ANNOTATIONS

TO

CODE OF IOWA

VOLUME II

COMPILED AND EDITED BY
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AND EDITOR OF THE CODE

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EDITOR'S INTRODUCTION

to Volume II of the Annotations to the Code of Iowa

Contents. The annotations contained in this volume are a continuation of the annotations in Volume I and cover all of the decisions of the Iowa Supreme Court from the September, 1925, term, reported in Volume 200 of the Iowa Reports, to the May, 1940, term of the court, reported in Volume 227 of the Iowa Reports, insofar as the opinions have been released to the Reporter by the Supreme Court, together with a few released opinions which, when published in the Iowa Reports, will appear in Volume 228. Certain earlier cases scattered herein dealing with criminal matters were furnished to the Code Editor several years ago by Professor Rollin M. Perkins of the State University.

There have been added brief notes showing Attorney General Opinions and Iowa Law Review citations. In order to save space these citations have been condensed, e.g., '38 AG Op 67, 72, 115. A citation such as this is an equivalent of three separate citations and the searcher should inspect *each* of the pages cited. This is likewise true of the Iowa Law Review and Negligence and Compensation Cases, Annotated, citations in many instances.

The ALR and NCCA citations have been added to the respective annotations instead of using a table at the back of the book as was done in Volume I. It is believed that the insertion of these citations following the respective annotations, together with the other citations, will facilitate the use of this volume and save the searcher time used in referring to a table at the back of the book.

Former system followed. As was stated in the preface to Volume I, "Judge McClain was quite liberal in the preparation of his annotations. In other words, many annotations were inserted by him, not because they constituted direct constructions of the section of law in question, but because they had some fair relation to the subject matter of the section. The bar is familiar with this system and it has not been deemed wise to depart from it." The plan as thus stated has been continued in this volume.

Catchwords. The catchwords inserted at the beginning of each annotation follow the plan inaugurated in Volume I.

Folio lines. Folio lines in heavy black type at the top of the pages appear in a manner similar to the folio lines in the Code.

Analyses. The analyses under the various sections in Volume I have been used as nearly verbatim as possible in Volume II, both to aid the searcher and to provide continuity of the annotations between the two volumes. Because of extensive material in certain places, a number of new analyses have been added. For example, in the motor vehicle law, an entirely new motor vehicle act and the extensive number of cases applicable to certain sections therein required new analyses. In a few instances an analysis has been placed at the end of a chapter under a note covering cases generally applicable to the subject matter of the chapter, e.g., **"Note 1 Contracts generally"** at the end of chapter 420. The purpose of all these analyses is to expedite the searcher's use of this volume. In instances where the annotations under a particular analysis extend over several pages, the analysis entry has been repeated at the top of each page in order that the searcher will not be required to return to the page where the analysis is printed, and then tediously follow through several pages in order to determine the location of subject matter under a desired portion of the analysis—as is now necessary in certain parts of Volume I. Clear, black, distinct type has been used in connection with the analysis entries distinguishing the code section catchwords and the analysis entries. In the larger analyses page numbers in parentheses have been added to indicate the beginning page of the annotations under that portion of the analysis.

Cross references. Under various sections and with many of the analyses, cross references have been added to indicate places in this volume where related matters may be found, and cross references also show many instances where the same or similar subjects may be found in Volume I of the Annotations, altho it is assumed the searcher will usually refer to the material in Volume I where the section numbers are identical.

Cases. The cases covered in Volume II of the Annotations are as follows:

Iowa Reports, Volumes 200 to 227, inclusive (some cases from Volume 228)
North Western Reporter, Volumes 204 to 291
American Law Reports, Annotated, Volumes 39 to 120

Negligence and Compensation Cases, Annotated, Volumes 25 to 39, inclusive
Negligence and Compensation Cases, Annotated, New Series, Volumes 1 to 5, inclusive
Federal Reporter 2d, Volumes 8 to 109, inclusive
United States Supreme Court Reports, Volumes 269 to 307, inclusive (covers only such cases as either directly or indirectly involve Iowa statutes)
Iowa Law Review, Volumes 1 to 25 (No. 1 and No. 2)
Attorney General Opinions, 1925 to 1940

Annotations to Supreme Court Rules. Since the Rules of the Supreme Court appear at the end of the Code, such annotations as apply to those rules have been added to this volume, beginning on page 2574.

Tables. At the back of this volume and just preceding the index are two tables inserted as a convenience to the users hereof. The first table is an abridged table of equivalent sections from the Code of 1935 to the Code of 1939 covering only those sections formerly carrying a combination figure-letter number and now carrying a decimal number. The other table is a corresponding section table from the Code of 1897 to the Code of 1939. Thus, if the searcher finds in the annotations either a section number referring to the Code of 1897 or a combination figure-letter number, he can immediately, by reference to one or the other of these tables, determine what is the equivalent section in the Code of 1939. The tables of corresponding sections covering the codes before 1897 are still available in the volume entitled "Tables of Corresponding Sections of Iowa Statutes", published in 1925.

Index. Due to the fact that many common-law subjects are covered by the cases in this volume, as well as in Volume I—such subjects being very difficult, if not impossible, to locate in the annotations through the code index—a short annotation index to general common-law subjects has been added at the end of this volume. Its use is explained by a note preceding the index.

Future annotations. It is planned to follow this volume with cumulative supplements which will keep these annotations up to date.

RICHARD REICHMANN,

Reporter of the Supreme Court and Code Editor

OFFICE OF THE REPORTER OF THE
SUPREME COURT AND CODE EDITOR
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List of Abbreviations

200-567	Iowa Reports
AG Op	Attorney General Opinions
ALR	American Law Reports, Annotated
F2d,	Federal Reporter, Second Series
ILB	Iowa Law Bulletin
ILR	Iowa Law Review
NCCA	Negligence and Compensation Cases, Annotated
NCCA(NS)	Negligence and Compensation Cases, Annotated, New Series
(NOR)	Not Officially Reported
NW	North Western Reporter
US	United States Supreme Court Reports

Annotations to Code of Iowa

Volume II

CONSTITUTION OF THE STATE OF IOWA

Preamble—Boundaries.

Jurisdiction in civil cases. See under §3
Jurisdiction in criminal cases. See under §13449

Ownership of lands—accretions. The owner of land along the bank of a navigable stream is entitled to accretions to the land even tho such accretions extend over the exact spot where another person formerly owned land eroded by the river.

Bone v May, 208-1094; 225 NW 367
See Meeker v Kautz, 213-370; 239 NW 27

Boundaries—Missouri river—accretion and avulsion—presumptions. In an action involving title to land affected by changes in course of Missouri river, court recognized principles that boundaries established in the middle of the main channels vary as channels change by accretion, but that boundaries are unaffected where change takes place suddenly by avulsion; that land on Iowa side of Missouri river is presumed to be in Iowa, and that land left by recession of the river is presumed to be the result of accretion rather than avulsion.

Arnd v Harrington, 227-43; 287 NW 292

Change in boundary. The boundary line between Iowa and Nebraska changes by gradual erosion or accretion, but not by avulsion.

Bigelow v Herrink, 200-830; 205 NW 531

Dams—new high-water mark—title of state. The state of Iowa by erecting a permanent dam in the bed of its navigable river, and by maintaining said dam peaceably and uninterruptedly for a period of ten years, legally extends its title to the new high-water mark resulting from the erection of the dam; and especially may a private deedholder not complain when his deed, executed after the dam was erected, simply calls for land "up to the river".

State v Sorenson, 222-1248; 271 NW 234

Lands under water—continuing ownership of land in place. The mere fact that land may disappear for a time, because river water enters a slough and spreads over it, will not destroy the ownership thereto as lands in place after the water recedes.

Sheldon v Chambers, 225-716; 281 NW 438

Sudden shifting of boundary river—effect. Principle applied that the sudden shiftings of boundary rivers do not change state boundary lines.

Dermit v School Dist., 220-344; 261 NW 636

ARTICLE I

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III FREEDOM OF CONTRACT
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I GUARANTY OF INDIVIDUAL OR PERSONAL RIGHTS

Appointment of nominated executor required unless disqualified. Altho a certain discretion lies with the probate court in the appointment of personal representatives, nevertheless an executor named in a will as the one in testator's judgment best fitted to administer his estate should be appointed by the court in the absence of disqualification, which must be more than the objections of collateral relatives.

In re Schneider, 224-598; 277 NW 567

I GUARANTY OF INDIVIDUAL OR PERSONAL RIGHTS—concluded

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State v Moore, 217-872; 251 NW 737

II LIMITING INDIVIDUAL RIGHTS

Individual rights subservient to public welfare. The sanctity of the home and the right of every free man to occupy and enjoy the same unmolested is subject, as are all other individual rights, to the higher and greater right known as the public welfare.

Stoner v Highway Com., 227-115; 287 NW 269

Private property—use subservient to ordinary incidents of city or village life. A person who lives in a city, town, or village must, of necessity, submit himself to the consequences and obligations of the occupations which may be carried on in his immediate neighborhood, which are necessary for trade and commerce, and also for the enjoyment of property and the benefits of the inhabitants of the place, and matters which, altho in themselves annoying, are in the nature of ordinary incidents of city or village life and cannot be complained of as nuisances.

Casteel v Afton (Town), 227-61; 287 NW 245

Regulation of business—price fixing. Legislative authority to municipalities to adopt ordinances which provide for "fair competition" in personal service trades—trades in which services are rendered upon the person of an individual without necessarily involving the sale of merchandise—cannot constitutionally embrace authority to include in such ordinances a provision fixing the minimum price which may be charged for said services, because neither the state nor the municipality has constitutional power to fix such charges in view of Amendment XIV, federal constitution and of Art. I, §9, Constitution of Iowa. So held as to the business of barbering. And this is true tho the trade in question be subject to the police power of the state.

Duncan v Des Moines, 222-218; 268 NW 547

Regulation of profession—limitation on advertising. The right of the state, under its police power to regulate, in the interest of the public health, morals, and welfare, a medical profession, e.g., the practice of dentistry, embraces the right to place stringent limitations on the form and style of advertisement which the practitioner may legally employ in carrying on his said profession, even the right to prohibit the use of advertisements which, in themselves, are truthful. But the state must not act arbitrarily.

Craven v Bierring, 222-613; 269 NW 801

Right to practice mere privilege. The right to practice law is not a constitutional right—not a vested right—but a mere privilege.

In re Cloud, 217-3; 250 NW 160

Police power—medicine and surgery. The practice of medicine and surgery is a proper exercise of the police power.

State v Hueser, 205-132; 215 NW 643

Cosmetology schools—charges for services of students. A statute defining cosmetologists as being persons who receive compensation for services and which provides that no person or corporation shall use any person as a practitioner of cosmetology unless the person is an apprentice or licensed cosmetologist, is an unconstitutional exercise of police power in requiring that students of cosmetology schools do gratuitous work while obtaining practical experience, as such requirement would be an arbitrary interference with private business and the right to contract and would impose unnecessary restrictions upon lawful occupations in violation of due process of law.

State v Thompson's School, 226-556; 285 NW 133

Police power—scientific difference as to efficiency of health measure. When it appears that there is a difference of scientific opinion as to the efficiency, desirability and reliability of a proposed public health measure, e.g., the tuberculin test for bovine tuberculosis, it necessarily follows that the door is open to the legislative department to adopt the theory to which it will apply its police power.

Pierre v Pierre, 210-1304; 232 NW 633
Loftus v Dept., 211-566; 232 NW 412
Panther v Dept., 211-868; 234 NW 560

Police power—due process as limitation. The due process clause of the federal constitution is no limitation on a legitimate and reasonable exercise by the state of its police powers. So held as to the statute requiring the testing of herds of breeding cattle and providing for the destruction of cattle found to be tubercular.

Peverill v Board, 208-94; 222 NW 535

Police power—regulation of curative agencies. The state may, under its police power, validly control the sale, distribution, and administration of an agency (e. g., tuberculin) which is the basis upon which rest the efforts of the state to eradicate bovine tuberculosis.

Fevold v Board, 202-1019; 210 NW 139

Police power—extending redemption period. Neither the federal nor state constitutional prohibitions against (a) the impairment of the obligations of contracts, or (b) the deprivation of vested property rights without due process of law, is violated by a statute (1) which is enacted during, and for the purpose of ameliorating, an existing public financial emer-

gency, (2) which grants to the owner of real estate during the existence of said emergency the right to possession and a time, very materially in excess of that otherwise granted by law, in which to redeem from mortgage foreclosure sale—even tho the sale precedes the passage of the emergency act—and (3) which sequesters the rents during said extended time and fairly and reasonably applies them to the protection of the mortgagee and his security. (45 GA, ch 179.)

Reason: Contract rights and vested interests must reasonably yield to the paramount right of the state, through the reservoir of its reserved police power, to protect, by appropriate legislation, its sovereignty, its government, its people and their general welfare, against exigencies arising out of a great emergency.

Des Moines JSL Bank v Nordholm, 217-1319; 253 NW 701

Moratorium acts of 47th GA—emergency must be temporary—judicial notice. An emergency, in order to justify legislation in contravention of the constitution on the theory of an exercise of the reserve police power, must be temporary or it cannot be called an emergency, but becomes an established status. In determining this question, the supreme court may take judicial notice of conditions existing at the time of enactment and whether or not they constitute an emergency.

First Tr. JSL Bank v Arp, 225-1331; 283 NW 441; 120 ALR 932

John Hancock Ins. v Eggland, 225-1073; 283 NW 444

Metropolitan v McDonald, 225-1075; 283 NW 445

Mortgage continuance—moratorium acts of 47th GA—unconstitutionality. Moratorium acts of the 47th GA extending foreclosure of mortgages, and extending time in which to redeem, are unconstitutional as an impairment of the obligation of contract, when such acts are not based on an actual existing emergency calling for an exercise of the reserve police power of the state.

First Tr. JSL Bank v Arp, 225-1331; 283 NW 441; 120 ALR 932

John Hancock Ins. v Eggland, 225-1073; 283 NW 444

Metropolitan v McDonald, 225-1075; 283 NW 445

Police power—restricted residence district—valid regulation. An ordinance, based upon a statute valid under the police power of the state, authorizing establishment of restricted residence districts is not a prohibition but a regulation and as such is a legitimate and reasonable exercise of the city's police power.

Scott v Waterloo, 223-1169; 274 NW 897

Police power—state monopoly over importation. In view of the Wilson Act, and of the Webb-Kenyon Act (27 USC, §§121, 122) and of the decisions of the federal supreme court thereunder, and especially in view of the 21st Amendment to the federal constitution (effective Dec. 5, 1933), it is futile to contend that the state, by investing the Iowa liquor control commission with the sole and exclusive right to import into the state alcoholic liquors, has transcended its police powers and thereby violated the due process, equal protection, and interstate commerce clauses of the federal constitution.

State v Arluno, 222-1; 268 NW 179

III FREEDOM OF CONTRACT

Cosmetology schools—charges for services of students. A statute defining cosmetologists as being persons who receive compensation for services and which provides that no person or corporation shall use any person as a practitioner of cosmetology unless the person is an apprentice or licensed cosmetologist, is an unconstitutional exercise of police power in requiring that students of cosmetology schools do gratuitous work while obtaining practical experience, as such requirement would be an arbitrary interference with private business and the right to contract and would impose unnecessary restrictions upon lawful occupations in violation of due process of law.

State v Thompson's School, 226-556; 285 NW 133

Motor fuel and fuel oil—price-posting statute—non-infringement on contract right—non-discriminatory. The statute providing that every seller of motor vehicle fuel or fuel oil shall post prices and sell at not less than such prices does not infringe on right of contract or unjustly discriminate against motor vehicle fuel dealers.

State v Woitha, 227-1; 287 NW 99

State v Hardy, 227-12; 287 NW 104

IV DISCRIMINATION

Corporations—tax discrimination. See under Art VIII, §2

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Discrimination against nonresident alien. The state, in the imposition of an inheritance tax, may validly discriminate in favor of a resident alien and against a nonresident alien.

In re Anderson, 205-324; 218 NW 140

Restricted residence districts—discrimination—exemption to existing business. An ordinance establishing a restricted residence district and prohibiting the subsequent erection and maintenance therein of gasoline filling stations without a permit is not unconstitutional because the ordinance exempts from its operation an already established and maintained gasoline filling station.

Marquis v Waterloo, 210-439; 228 NW 870

V CERTAIN ACTS HELD CONSTITUTIONAL

Cooperative agricultural marketing act.

Clear Lake Co-op. v Weir, 200-1293; 206 NW 297

Bovine tuberculosis eradication act.

Peverill v Board, 201-1050; 205 NW 543
Fevold v Board, 202-1019; 210 NW 139

Motor vehicle carriers taxation act.

Iowa Motor v Board, 207-461; 221 NW 364; 75 ALR 1

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Wissenburg v Bradley; 209-813; 229 NW 205; 67 ALR 1075

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State v Logsdon, 215-1297; 248 NW 4

Act creating park board.

State v Darling, 216-553; 246 NW 390; 88 ALR 218

Blue sky law.

State v Soeder, 216-815; 249 NW 412

Cigarette permit act.

Ford Hopkins v City, 216-1286; 248 NW 668

Local budget law—transfer of fund provisions.

State v Manning, 220-525; 259 NW 213

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Timmons v Bank, 221-102; 264 NW 708; 299 US 621

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Berg v Berg, 221-326; 264 NW 821

Chain store tax act of 1935—constitutional in part.

Tolerton v Board, 222-908; 270 NW 427

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Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

Income tax act.

Vilas v Board, 223-604; 273 NW 338

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State v Keturokis, 224-491; 276 NW 600

Motor vehicle fuel—price-posting law.

State v Woitha, 227-1; 287 NW 99
State v Hardy, 227-12; 287 NW 104

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Miller v Schuster, 227-1005; 289 NW 702

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State v Talerico, 227-1315; 290 NW 660

Motor vehicle fuel tax act.

Monamotor Oil Co. v Johnson, 292 US 86

VI PROPERTY RIGHTS

Discussion. See 7 ILB 232—Legal status of American Indian and his property

Owner's right of disposal. Under ordinary circumstances one has the absolute right to dispose of his property as he pleases.

O'Brien v Stoneman, 227-389; 288 NW 447

Reasonable use permitted. The owner of property may always put his property to reasonable use, dependent upon the locality and other conditions.

Casteel v Afton (Town), 227-61; 287 NW 245

Use not to injure others. The ownership of property carries with it the obligation to so use the property that injuries to others will not result therefrom.

Casteel v Afton (Town), 227-61; 287 NW 245

Building permit for dog hospital—not license—revocability. A duly issued building permit is more than a mere "license"; and after a building permit is issued under a city's zoning ordinance to a veterinary surgeon who made full disclosure to the city of his plans to build a "dog hospital", with his own living quarters on the second floor in a "hospital" zoned district, and after the building inspector consulted the city attorney, and after veterinary surgeon had spent considerable money toward constructing the building, an order revoking the permit was illegal and reviewable by certiorari.

Crow v Board, 227-324; 288 NW 145

Right to kill animals—limitation. The statutory authority to kill a dog for which a license is required, when such dog is not wearing a collar with license tag attached, does not embrace the right to invade the premises and residence of the owner of the dog in order to effect such killing.

Mendenhall v Struck, 207-1094; 224 NW 95

Temporary obstruction of access to property—damages. Conceding that a city in changing the course of a stream may, temporarily, substantially obstruct a property owner's access to his property, without liability in damages, yet the maintenance of such obstruction for two years is per se not a temporary obstruction, and evidence tending to exculpate the city is inadmissible.

Graham v Sioux City, 219-594; 258 NW 902

Citizens—challenging officers' official acts. Public welfare lodges in citizens of a community the right to challenge the validity of an electric plant construction contract and to enjoin a municipal corporation and its officers from violating their duties and abusing corporate powers, if such construction contract is consummated without competitive bidding, made mandatory by statute.

Miller v Milford, 224-753; 276 NW 826

Officers—salary—power to change. The general assembly has plenary power to reduce the salary of any public officer unless such reduction is prohibited by the constitution—a public office not being property.

Smith v Thompson, 219-888; 258 NW 190

Injunction against labor union—no denial of freedom of speech and assembly. An injunction against officers of a trade union was not void on its face as a denial of the right of freedom of speech and assembly because it prohibited unlawful interference with a company's business, mass picketing, intimidation and coercion, and going upon the company's premises without consent.

Carey v Dist. Court, 226-717; 285 NW 236

Political power. SEC. 2.

Additional citations. See under Art I, §25, Vol I; Art III, §1 (first)

Corporate governmental agencies—immunity from legal process and taxation. Immunity of corporate governmental agencies from suits and judicial process, and their incidents, is less readily implied than immunity from taxation.

First Tr. JSL Bank v Lehman, 225-1309; 283 NW 96

Nonviolation. A statute which requires a favorable vote equal to 60 percent of all the votes cast for and against a proposal to issue bonds in order to authorize them is not violative of the principle that political power is inherent in the people.

Waugh v Shirer, 216-468; 249 NW 246

Federal instrumentality—congress determines immunity from state laws. It is within discretion of congress to determine in what respects and to what extent its instrumentalities, for their proper functioning, shall be immune from legislation of state origin.

First Tr. JSL Bank v Lehman, 225-1309; 283 NW 96

Continuance under financial emergency. The legislative power of the state may, for the purpose of ameliorating an existing, public, financial emergency, constitutionally grant to a mortgagor, on equitable conditions, the right, in an action to foreclose the mortgage, to a continuance which is very materially in excess of that ordinarily permitted or sanctioned by law. (For fundamental reasons see Des Moines Bank v Nordholm, 217 Iowa 1319.)

Craig v Waggoner, 218-876; 256 NW 285
Tusha v Eberhart, 218-1065; 256 NW 740
Reed v Snow, 218-1165; 254 NW 800
Mudra v Brown, 219-867; 259 NW 773
First Tr. JSL Bank v Bridson, 221-1302; 268 NW 25
Fossler v Breniman, 222-124; 268 NW 521

Religion. SEC. 3.

Atty. Gen. Opinions. See '25-26 AG Op 417; '36 AG Op 629; AG Op May 17, '39

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Atty. Gen. Opinions. See AG Op Feb. 2, '39, March 22, '39

ANALYSIS

I EQUAL PROTECTION OF LAW—CLASSIFICATIONS
II UNIFORMITY OF OPERATION
III SPECIAL PRIVILEGES

I EQUAL PROTECTION OF LAW—CLASSIFICATIONS

Additional citations. See under Art III, §30

Equal protection—allowable classifications. The general assembly in the enactment of the chain store tax act (46 GA, ch 75; C., '35, ch 329-G1) did not go beyond its concededly broad power to classify:

1. By classifying chain stores, generally, as proper subjects for an occupational tax.
2. By classifying certain of said stores as not subject to said tax.
3. By classifying the tax-paying stores into groups of ten or multiples thereof and graduating the tax progressively on each group—it appearing that none of said classifications were arbitrary—that the reason for each was manifest or reasonably discernible—that all owners of chain stores similarly situated were treated alike.

Tolerton et al. v Board, 222-908; 270 NW 427

Classification based on population. The general assembly may constitutionally make a law applicable to cities having a certain population and not applicable to cities having a lesser population, provided the subject matter of the law suggests some reasonable necessity for said distinction. So held as to an act providing for the government and management of municipal parks by a park board of ten members.

State v Darling, 216-553; 246 NW 390; 88 ALR 218

Bank shares—taxing officers acting contrary to law. The taxation of state and national bank shares at a higher rate than the shares of competing domestic corporations is violative of the equal protection clause of the 14th Amendment and in excess of permission conferred by federal statute for the taxation of national bank stock.

Munn v D. M. Nat. Bank, 18 F 2d, 269
Knowles v First Nat. Bank, 58 F 2d, 232
First Nat. Bk. v Anderson, 269 US 341
Iowa Bank v Stewart, 214-1229; 232 NW 445; 284 US 239

Taxation of national banks—illegal change by auditor of assessment—effect. The act of a county auditor, on his own motion, and without the connivance of any other official charged with duties pertaining to taxation, in changing a duly made and approved assessment of corporate stock of concerns competing with national, state, and savings banks from its proper classification of "corporate stock" to the classification of "moneys and credits" and computing the tax thereon as provided for moneys

I EQUAL PROTECTION OF LAW—CLASSIFICATIONS—concluded

and credits is absolutely void, and furnishes no basis for the claim by national, state, and savings banks that they have been discriminated against, in that the consolidated levy has been applied to 20 percent of the value of their stock, while the favored concerns have been taxed on the basis of 5 mills on the dollar of the actual value of their stock. (Reversed by U. S. Sup. Ct.)

Iowa Bank v Stewart, 214-1229; 232 NW 445; 284 US 239

Cooperative selling associations. The provision of the nonprofit-sharing cooperative agricultural act (Ch 390, C., '24) (1) authorizing an association organized thereunder to require its members to sell all or a stipulated part of their produce through the association, (2) providing the form of the contract in such cases, and (3) empowering the collection of liquidated damages for a violation of the contract, is not violative of this section, no element of arbitrary or unreasonable classification or discrimination being discernible therein.

Clear Lake Co-op. v Weir, 200-1293; 206 NW 297

Due process of law—denial of permit. When the legislature enacts a regulatory measure requiring a permit to transact a business which it has the constitutional right, under its police power, to absolutely prohibit, a party who has been refused a permissible or optionable permit may not successfully contend that he has been (1) denied the equal protection of the law, or (2) deprived of his property and rights without due process and without compensation.

Ford Hopkins v City, 216-1286; 248 NW 668

Sales tax—shoe repairmen as consumers—taxation uniformity. Taxation uniformity, being an equal distribution of taxation burdens upon all persons of a given class, is impossible of perfect application, and a sales tax rule promulgated under valid legislative authority classifying shoe repairmen as consumers of materials used in shoe repairing, within the meaning of the sales tax act, is not arbitrary but uniform and consistent with the law imposing the tax and not a delegation of power.

Sandberg Co. v Board, 225-103; 278 NW 643; 281 NW 197

II UNIFORMITY OF OPERATION

Additional citations. See under Art III, §30

Arbitrary classification. An ordinance which provides safety regulations over tanks wherein inflammable oils are stored for sale, is null and void when in the same municipality there are large numbers of other tanks identical with those embraced in the ordinance and used for the same purpose except the stored oil is not for sale.

Edwards & B. v City, 213-1027; 240 NW 711

Class legislation—legalization of tax levies. The legalization of all taxes "heretofore assessed, levied and collected by any municipality" is not a local or special law without uniform operation throughout the state.

Chicago RI Ry. v Rosenbaum, 212-227; 231 NW 646

Class legislation—venue. The legislature may validly classify the subject of insurance into (1) life insurance and (2) nonlife insurance and validly enact that actions to recover assessments under nonlife insurance contracts shall be brought in the county of the defendant's residence, without applying the same statutory rule to life insurance companies.

Midwest Ins. v DeHoet, 208-49; 222 NW 548

Constitutional uniformity. A statute which applies equally to all of a specifically described class is constitutionally uniform.

Loftus v Department, 211-566; 232 NW 412

Governmental functions—nonliability in performance. The statutory-prescribed rules of the state governing aerial navigation (§8338-c7, C., '35 [§8338.20, C., '39]) have no application to the state in its sovereign capacity, nor to its governmental agencies, nor to the officials of said agencies when exclusively engaged in performing the duties of said agencies.

De Votie v Cameron, 221-354; 265 NW 637

Permissible classification for purpose of legislation. The legislative act (§11033-e1 et seq. C., '35 [§11033.1 et seq., C., '39]) which singles out four classes of judgments only, and markedly reduces the period of time theretofore granted by statute for their enforcement, does not constitute prohibited class legislation because the court will judicially take notice of the fact that the enumerated judgments and the claims out of which they arise are generally, if not uniformly, attended by such superior facilities and opportunities for collection as to justify a statute of limitation applicable to them alone.

Berg v Berg, 221-326; 264 NW 821

Uniform operation—arbitrary administration. An act will not be held unconstitutional because of the possibility that the administering officer will, by arbitrary administration, give the act a nonuniform operation.

State v Manning, 220-525; 259 NW 213

County testing units. This section is not violated by the bovine tuberculosis act because it operates through the medium of county testing units. (See Book of Anno., Vol. I, Const Art III, §30)

Fevold v Board, 202-1019; 210 NW 139

Income tax—discriminations—absence of evidence. The state income tax act (Ch. 329-F1, C., '35 [Ch. 329.3, C., '39]) will not be declared unconstitutionally discriminatory (1) because it exempts domestic corporations and not individuals, partnerships, and fiduciaries from paying a tax on that part of their income derived from activities carried on out-

side the state of Iowa, or (2) because the graduate rate of tax (§6943-f5, C., '35 [§6943.037, C., '39]) is not uniform between corporations, individuals, and partnerships. Courts will not assume in the absence of competent evidence that no state of facts could reasonably be conceived which could afford a rational basis for distinguishing, for purpose of taxation, between income of an individual and that of a domestic corporation derived from business carried on outside the state.

Vilas v Board, 223-604; 273NW 338

Itinerant drug vendor act. The statutes requiring a license of an itinerant vendor of drugs (§§3148, 3149, C., '31) are not discriminatory, do not effect double taxation, are not class legislation, were not enacted for any effect on trade or to remove competition, and are of uniform operation.

State v Logsdon, 215-1297; 248 NW 4

Motor fuel and fuel oil—price-posting statute—non-infringement on contract right—non-discriminatory. The statute, providing that every seller of motor vehicle fuel or fuel oil shall post prices and sell at not less than such prices, does not infringe on right of contract or unjustly discriminate against motor vehicle fuel dealers.

State v Woitha, 227-1; 287 NW 99
State v Hardy, 227-12; 287 NW 104

III SPECIAL PRIVILEGES

Class legislation. One who concedes that the bovine tuberculosis act is a general health measure may not contend for the unconstitutionality of the act because of the unwisdom of the legislature in limiting the realization of the benefits of the act to the initiative of a certain class, to wit, to the owners of breeding cattle.

Lausen v Board, 204-30; 214 NW 682

Class legislation—chain store act—equal protection—ruling of federal court—conclusiveness. The chain store tax act (46 GA, ch 75; C., '35, ch 329-G1 [C., '39, ch 329.5]) is in violation of the equal protection clause of the federal constitution insofar as it attempts to levy an annual tax solely on the basis of the gross receipts of said stores, such being the holding of the federal supreme court and such holding necessarily being conclusive on the courts of this state.

Tolerton et al. v Board, 222-908; 270 NW 427

Class legislation—municipal utilities—discrimination against privately owned plants. Statutory authority to municipalities to erect, in their proprietary capacity, electric light and power plants, and to pay the entire initial cost thereof from the net profits of said plants, and to this end to fix such rates as will effect such payment, is not void as an unconstitutional discrimination against privately owned plants of the same kind.

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

Permit to sell cigarettes. The cigarette permit act which provides that certain governmental bodies "may" grant permits for the sale of cigarettes (§1557, C., '31) arms said bodies with power to exercise at least a legal discretion to grant or refuse a permit.

Ford Hopkins v City, 216-1286; 248 NW 668

Class legislation—reduction of official salaries. An act readjusting or reducing the salaries of various public officers cannot be deemed unconstitutional class legislation.

Smith v Thompson, 219-888; 258 NW 190

Charitable institutions liable to strangers, invitees, or employees. Public policy has never demanded nor has the legislature adopted any immunity to charitable institutions from liability to strangers, invitees, or employees arising because of negligence of the servants of such institutions, and the court will not grant such immunity.

Andrews v Y.M.C.A., 226-374; 284 NW 186; 5 NCCA (NS) 335

Corporate governmental agencies—immunity from legal process and taxation. Immunity of corporate governmental agencies from suits and judicial process, and their incidents, is less readily implied than immunity from taxation.

First Tr. JSL Bank v Lehman, 225-1309; 283 NW 96

Liberty of speech and press. SEC. 7.

Slander and libel. See under §§12412, 13256

Libel not avoided because published as an opinion. A published attack on a person, otherwise libelous per se, is not rendered nonlibelous because it only stated what the publisher thought.

McCuddin v Dickinson, 225-304; 283 NW 886

Newspaper attack on attorney—requisites for libel per se. A newspaper attack upon attorneys stating, among other things, that they were attempting "to stall off" an appeal, tho ill-natured, vexatious, and untrue, yet is not libelous per se, since it lacks one essential element as such, to wit, malicious defamation, and unless special damages are pleaded, is not actionable.

Boardman et al. v Gazette Co., 225-533; 281 NW 118

Injunction against labor union—no denial of freedom of speech and assembly. An injunction against officers of a trade union was not void on its face as a denial of the right of freedom of speech and assembly because it prohibited unlawful interference with a company's business, mass picketing, intimidation and coercion, and going upon the company's premises without consent.

Carey v Dist. Court, 226-717; 285 NW 236

Injunction violation by labor union officials. There was no denial of the right of freedom of speech in holding officers of a trade union in contempt of court for violating an injunc-

tion, when they counseled, aided, abetted, and assisted in the violation of the injunction.

Carey v Dist. Court, 226-717; 285 NW 236

Personal security — searches and seizures. SEC. 8.

Atty. Gen. Opinion. See '25-26 AG Op 457

ANALYSIS

I LAWFUL SEARCHES AND SEIZURES

Presumption of legality. Search warrant proceedings, regular on their face, and shown to have been issued on a sworn information, and a separate oral examination of the informant, will, in the absence of any showing to the contrary, be presumed legal, even tho the facts or evidence showing probable cause do not actually appear in any of the proceedings leading up to the issuance of the warrant.

State v Bruns, 211-826; 232 NW 684

Determining probable cause—affidavit together with testimony. An affidavit for a search warrant, to comply with the Iowa Constitution, need not contain a recital of facts showing probable cause, as the magistrate may also examine witnesses in determining the existence of probable cause.

Krueger v Mun. Court, 223-1363; 275 NW 122

Probable cause for issuance of warrant—determination—sufficiency. The existence of "probable cause" for the issuance of a search warrant is to be determined by the magistrate issuing such warrant and does not have to be shown in the information itself but may be shown by affidavit attached thereto or by sworn testimony taken before the magistrate prior to the issuance of the warrant; hence, warrant to search for gambling devices was not issued without "probable cause" where state agent who signed and swore to information was also examined under oath.

State v Doe, 227-1215; 290 NW 518

Information—sufficiency. A sworn information which makes distinct allegations of facts showing illegal possession of intoxicating liquors may not be said to be an affidavit of belief only.

State v Friend, 206-615; 220 NW 59

Validity. A recital in a search warrant that "the court finds from the evidence that there is in fact sufficient ground and reason that a search warrant issue" conclusively shows that the warrant was not issued on mere belief.

State v Friend, 206-615; 220 NW 59

John Doe warrant—when valid. Unless a person is to be searched or is known to be in possession of the premises, a John Doe warrant sufficiently describing the premises is valid as basis to search for intoxicating liquor.

Krueger v Mun. Court, 223-1363; 275 NW 122

Unreasonable searches and seizures—what is not. The unreasonable search and seizure clause of the Iowa Constitution is not violated by the Iowa income tax act arming the state board with power to examine, under judicial procedure, the books and papers of the taxpayer in order to determine the correctness or fraudulent nature of the taxpayer's return of income.

Vilas v Board, 223-604; 273 NW 338

II SEARCH OF ARRESTED PERSONS

Compulsory examination of defendant's person. An examination of the defendant's person, while in jail, by a physician, cannot be said to have been compulsory, where the only evidence of compulsion was that the sheriff accompanied the physician, but it was not shown that he did or said anything in respect to the examination.

State v Struble, 71-11; 32 NW 1

III ILLEGAL OR UNAUTHORIZED SEARCHES

Unlawfully obtained evidence, admissibility. See under §13897 (I)

Evidence illegally obtained—admissibility. Evidence otherwise admissible is not rendered inadmissible because it was illegally obtained.

State v Rollinger, 208-1155; 225 NW 841

Forcible repossession of property. That part of a conditional sale contract which provides that the vendor, in case of default under the contract, may repossess himself of the property "forcibly and without process of law" is void because violative of public policy.

Girard v Anderson, 219-142; 257 NW 400; 4 NCCA(NS)203

IV DESCRIPTION OF PROPERTY OR PLACE OF SEARCH

John Doe warrant—when valid. Unless a person is to be searched or is known to be in possession of the premises, a John Doe warrant sufficiently describing the premises is valid as basis to search for intoxicating liquor.

Krueger v Mun. Court, 223-1363; 275 NW 122

Information—description of gambling devices—sufficiency. Description of gambling devices as "cards, dice, faro, roulette tables, and other devices" in information to obtain issuance of search warrant held sufficient.

State v Doe, 227-1215; 290 NW 518

Right of trial by jury—due process of law. SEC. 9.

Atty. Gen. Opinions. See '30 AG Op 59; AG Op Feb. 9, '39

ANALYSIS

Freedom of contract. See under Art I, §1
Legalizing acts as retroactive laws. See under Art I, §21
Moratorium acts generally. See under §12372 (VII)
Obligations of contracts impaired. See under Art I, §21
Personal rights guaranteed. See under Art I, §1
Right to jury. See under §11429
Rights of person accused. See under Art I, §10
Taking private property for public use—additional annotations. See under Art I, §18
Waiver of jury—additional annotations. See under §§11519, 11581

I NATURE OF RIGHT TO JURY TRIAL IN CIVIL CASES

Presence of party in court—important privilege. A party's privilege to be present in court at the trial of his cause should not be denied without weighty reasons therefor.

In re Rogers, 226-183; 283 NW 906

Equal protection—litigant's day in court. Every litigant is entitled to his day in court.

Lunt v Van Gorden, 225-1120; 281 NW 743

New trial—grounds sustained generally—effect on appeal. Even tho the overruling of a motion to strike an amendment to plaintiff's motion for new trial was error, there was no prejudice to defendant where motion for new trial was sustained generally, and where grounds of original motion, to wit: that verdict was not sustained by evidence and that plaintiff did not receive a fair and impartial trial, were good—in which case there can be no reversal.

Mitchell v Heaton, 227-1071; 290 NW 39

Directed verdicts. Principle reaffirmed that the constitutional right of trial by jury is not infringed by the action of the court in directing a verdict for defendant whenever the evidence is such that the court would not hesitate to set aside a verdict against defendant.

Cashman v Ry. Co., 217-469; 250 NW 111

Excessive verdict—unallowable reduction by court. The court has no power to reduce the verdict of a jury in an action for unliquidated damages, and to render judgment for a less amount, unless the party in whose favor the verdict was rendered consents to such reduction.

Crawford v Emerson Co., 222-378; 269 NW 334

Agent's authority — when jury question. Questions as to the nature or extent of an agent's authority, determinable or implied from the facts, are for the jury.

Wright v Iowa P. & L. Co., 223-1192; 274 NW 892

Attorneys for juveniles — compensation — jury question. An action by an attorney against a county for compensation for defending a juvenile delinquent is not demurrable but presents a jury question.

Ferguson v Pottawattamie Co., 224-516; 278 NW 223

Right to jury when reasonable men differ—injury from street defect. When a street defect is of such character that reasonable and prudent men may reasonably differ as to whether an accident could or should have been reasonably anticipated from its existence or not, the question of city's liability for injuries caused thereby is generally one for jury.

Thomas v Ft. Madison, 225-822; 281 NW 748

II JURY TRIALS IN INFERIOR COURTS

Jury of six. The trial of a nonindictable misdemeanor may legally be had in municipal court before a jury of six persons.

State v Porter, 206-1247; 220 NW 100

Jury of six. The municipal court act is not unconstitutional because, in the absence of a demand for a jury of twelve, it compels a defendant residing outside the city in which the court is established to submit to a trial by a jury of six which are drawn from the city and not from the county at large.

Kinsey v Clark, 215-765; 246 NW 840

III DENIAL OF TRIAL BY JURY

Deprivation of jury. An action by the receiver of an insolvent bank against stockholders for the purpose of determining the necessity for an assessment on stock holdings, and adjudicating the amount of such assessment, is not inherently a law action and, therefore, the legislature may provide that the action shall be brought in equity.

Broulik v Henderson, 218-640; 254 NW 63

Insanity appeal — noncriminal — nonjury — constitutionality. No constitutional rights are violated in trying an appeal from the insanity commission to the court without a jury, since this is not in any way a criminal proceeding.

In re Brewer, 224-773; 276 NW 766

III DENIAL OF TRIAL BY JURY—concluded

Municipal court jury trial. Where plaintiff requested jury trial and later withdrew such request, municipal court's refusal to allow defendant trial by jury was error.

Metier v Brewer, (NOR); 205 NW 734

IV WAIVER OF JURY TRIAL

Waiver by agreement of attorneys—validity. A written agreement or stipulation, duly signed and filed by opposing attorneys in a law action and approved of record by the court, agreeing to waive a jury and to try the action to the court is, in the absence of fraud or proof that an attorney had no authority so to agree, binding on the parties to the action for at least one trial to the court, even tho, after the stipulation was entered into, the pleadings be amended and the cause be continued to a later term.

Shores Co. v Chemical Co., 222-347; 268 NW 581; 106 ALR 198

Exemption from self-incrimination — nonwaiver. A witness who voluntarily appears before a grand jury, and, without duress or compulsion, testifies to matters which tend to render himself criminally liable for an offense as to which he is not given absolute immunity from prosecution (§11269, C., '35), does not thereby waive his natural, common law, statutory, and constitutional right to refuse to testify to said matters on the subsequent trial of another party under an indictment returned in whole or in part on the original testimony of said witness.

Duckworth v Dist. Court, 220-1350; 264 NW 715

V JURY TRIAL IN EQUITY CASES

Bank stock assessments. An action by the receiver of an insolvent bank against stockholders for the purpose of determining the necessity for an assessment on stock holdings, and adjudicating the amount of such assessment, is not inherently a law action and, therefore, the legislature may provide that the action shall be brought in equity.

Broulik v Henderson, 218-640; 254 NW 63

Law issues determined in equity. An action in equity by one school district to enjoin another school district and the county treasurer from transferring, to the defendant school, certain funds claimed to be due from the plaintiff school as tuition, remains in equity altho the defendant school files a cross-petition raising issues at law as to determination of the amount due, if any, and for judgment accordingly, since equity, acquiring jurisdiction, may determine all issues.

Lincoln Dist. v Redfield Dist., 226-298; 283 NW 881

VI DUE PROCESS OF LAW GENERALLY

Due process not limitation on police power.

Peverill v Board, 208-94; 222 NW 535

Appeal—no constitutional right.

Chic., Burl. Ry. v Board, 206-488; 221 NW 223

Van der Burg v Bailey, 207-797; 223 NW 515

Wissenburg v Bradley, 209-813; 229 NW 205; 67 ALR 1075

Donlan v Cooke, 212-771; 237 NW 496

Due process—test—equal operation on all. The test, with respect to requirements of due process of law, is simply whether the law operates equally upon all who come within class to be affected, embracing all persons who are, or may be, in like situation or circumstances.

State v Erickson, 225-1261; 282 NW 728

Trial on merits—litigant's day in court. It is the policy of the law that every cause of action should be tried upon its merits and that every party to an action shall have his day in court.

Western Grocer v Glenn, 226-1374; 286 NW 441

Judgment by default—day in court. Where a case is set for trial and counsel tho notified by letter is out of the state when the case is called for trial and a default is entered, the court erred in refusing to set aside the default since reputable counsel were employed, the parties themselves were not negligent and they should "have had their day in court".

Hatt v McCurdy, 223-974; 274 NW 72

New trial—court's inherent power to set aside verdict. Where a party has not received a fair and impartial trial, the trial court has inherent power to set aside the verdict.

Brunssen v Parker, 227-1364; 291 NW 535

Judgment—setting aside unaffected by failure to secure stay order. Fact that proceedings in district court could have been stayed pending appeal will not, on the ground that misfortune was avoidable, preclude setting aside a default judgment rendered pending appeal without customary notice between counsel.

Lunt v Van Gorden, 225-1120; 281 NW 743

Due process of law—short form indictment valid. A short form indictment is valid and the statute providing therefor is constitutional.

State v Keturokis, 224-491; 276 NW 600

Rape—amending indictment—form only—validity. In a prosecution for rape, adding the words, "a female, by force and against her will," as an amendment to an already valid indictment is an amendment affecting not substance but form only, and being merely surplusage, is not prejudicial and not error.

State v Keturokis, 224-491; 276 NW 600

Failure of accused to testify—allowable reference—due process not violated. County attorney, during the trial of a criminal case, may properly refer to the fact that the accused has not testified in his own behalf, and constitutional due process is not thereby violated.

State v Ferguson, 226-361; 283 NW 917

Inference from accused's failure to testify—due process unaffected. Any resulting inference or presumption of guilt arising from an accused's choice not to testify in his own behalf is not involved in the due process clause of the constitution.

State v Ferguson, 226-361; 283 NW 917

Sentence—right to revoke without notice. A defendant granted a suspension of sentence must take it with the statutory burden accompanying it, to wit: the right of the court to revoke the suspension at any time without notice or opportunity to be heard.

Pagano v Bechly, 211-1294; 232 NW 798

Venue—change on application of state. The legislature may constitutionally grant to the state the right to a change of venue in a criminal prosecution.

State v Dist. Court, 213-822; 238 NW 290

Power to punish. Contempt proceedings which are in accordance with that provided by Ch. 536, C., '35, are not violative of the due process clauses of the federal and state constitutions.

State v Baker, 222-903; 270 NW 359

"Notice" implied in context of statute. A statute is not unconstitutional because it does not expressly provide for notice to an interested party. A clear implication of notice, duly complied with, is sufficient.

Chehock v Sch. Dist., 210-258; 228 NW 585

Absence of notice. The fact that a stockholder in an insolvent bank was not made a party to proceedings which resulted in the issuance of receiver's certificates becomes immaterial when, in an action by the receiver to enforce an assessment to pay said certificates, the stockholder is afforded full opportunity to question the legality of such certificates.

Andrew v Bank, 206-869; 221 NW 668

Absence of notice. Notice to the beneficiary of a trust, of the hearing on an application by the trustee for an order of court confirming an investment already made by the trustee, is not necessary, such application not being an adversary proceeding, and the record revealing the perfect good faith of the trustee.

In re Lawson, 215-752; 244 NW 739; 88 ALR 316

Absence of notice. The statutes (§1989-a24, S., '13; 38 GA, ch 332 [§7563, C., '39]), authorizing certain improvements on the common outlet of two or more drainage districts, and an apportionment of the cost thereof among the several districts by means of assessments on the basis of water discharged by each district, are not unconstitutional because said statutes fail to provide for notice to interested parties prior to the making of said improvements, said improvements being analogous to repairs on ditches generally, subsequent to their construction.

Board v Board, 214-655; 241 NW 14

Absence of statutory provision for notice—power of court. When due process necessitates notice to a party and the statute makes no provision for such notice, the court may validly prescribe a notice which is reasonably calculated to give the interested party knowledge of the proceeding and opportunity to be heard.

McKinstry v Dewey, 192-753; 185 NW 565
Franklin v Bonner, 201-516; 207 NW 778
In re Barner, 201-525; 207 NW 613

Notice unnecessary. The enlargement of the boundaries of a municipality by a city council under an enabling statute, without any notice to the property owners within the territory annexed, and without any opportunity on the part of such owners to vote on the question, is not violative of this section.

Wertz v City, 201-947; 208 NW 511

Notice unnecessary. Due process does not require that notice to the owners of breeding cattle and hearing thereon be provided on an application to have a county enrolled under the county-accredited-area plan for the eradication of bovine tuberculosis.

Peverill v Board, 201-1050; 205 NW 543
Fevold v Board, 202-1019; 210 NW 139

Service outside state. Jurisdiction in personam of an Iowa corporation is constitutionally obtained by proper service of a proper original notice in a foreign state on one of the last known or acting officers of the corporation, as shown by the last statutory annual report of the corporation on file with the secretary of state of this state.

Bennett v Coal Co., 201-770; 208 NW 519

Substituted service on nonresident individual. The statute (§11079, C., '31) which provides, in effect, that when a corporation, company, or individual maintains in this state an agency "in any county" other than that in which said principal resides, service of original notice of any action growing out of or connected with said agency may be personally had on the principal in this state by serving in this state an agent employed in said agency, applies to a nonresident individual maintaining an agency in this state, and when so applied does not deny to said defendant (1) due process of law, (2) the equal protection of the law, (3) any privilege or immunity granted to citizens of this state, or (4) any privilege or immunity possessed by said defendant as a citizen of the United States.

Davidson v Doherty & Co., 214-739; 241 NW 700; 91 ALR 1308

VI DUE PROCESS OF LAW GENERALLY —continued

Adjudicating shortage without notice to surety. The sureties on the bond of an administrator are not entitled to notice of the proceedings wherein the probate court determines the amount the administrator is short in his accounts.

In re Kessler, 213-633; 239 NW 555

Due process of law—inapplicable to power of taxation. The due process clause of the federal constitution has no relation whatever to the lawful exercise of the sovereign power of taxation.

Carroll v Cedar Falls, 221-277; 261 NW 652

Assessments without notice. Whether statutes authorizing the cost of certain improvements on the common outlet of several districts to be apportioned by the board doing the work to each of said districts in the ratio of water discharged by each district, are unconstitutional because said statutes fail to provide interested parties in districts other than the district embracing the common outlet, with notice of and opportunity to contest said apportionment, quaere. But said interested parties may not complain of the absence of such notice and opportunity when they admit that the apportionment in question was correctly made in accordance with the said statutory ratio.

Board v Board, 214-655; 241 NW 14

Reduction in assessed valuation without notice. It is inferentially suggested that the statute which authorizes the state board of assessment and review to order a reduction in the assessed valuation of property, is not unconstitutional because the statute assumed to grant such power without notice.

State v Board, 211-1116; 235 NW 303

Decreeing lien without notice. An order establishing the heirship of persons to an estate and, without notice, decreeing a lien in favor of the attorney on the cash shares of certain heirs for whom the attorney has never appeared, is a nullity, insofar as the order establishing the lien and the amount thereof is concerned.

In re Lear, 204-346; 213 NW 240

Due process of law — removal from office without notice. There is, in a constitutional sense, no element of property in a public office. It follows that the statutory power conferred on the state executive council to investigate and remove appointive state officers, without making provision for notice and hearing, will not be held to violate the due process clause of the constitution as to an officer to whom the council has voluntarily given ample written notice and opportunity to be heard.

Clark v Herring, 221-1224; 260 NW 436

Regulation of business — price fixing. Legislative authority to municipalities to adopt ordinances which provide for "fair competition" in personal service trades—trades in which services are rendered upon the person of an individual without necessarily involving the sale of merchandise—cannot constitutionally embrace authority to include in such ordinances a provision fixing the minimum price which may be charged for said services, because neither the state nor the municipality has constitutional power to fix such charges in view of the federal constitution and of the Constitution of Iowa. So held as to the business of barbering. And this is true tho the trade in question be subject to the police power of the state.

Duncan v Des Moines, 222-218; 268 NW 547

Due process—ordinance requiring weighing of loads. A municipal ordinance requiring that merchandise sold in load lots by weight for delivery within the city be weighed by a public weighmaster whose certificate stating the gross, tare, and net weight must be delivered to the purchaser, such ordinance, altho it necessitates that a person trucking coal into the city unload and reload, is not so unreasonable as to violate the due process clause of the constitution.

Huss v Creston, 224-844; 278 NW 196; 116 ALR 242

Revocation of license. A physician is not denied his constitutional right to "due process" by being denied a jury trial in proceedings before the board of medical examiners to revoke his license.

State v Hanson, 201-579; 207 NW 769

Enjoining criminal acts — constitutionality. The statute authorizing the entry of a permanent injunction against a person practicing medicine without a license even tho said person may be prosecuted criminally for so practicing, is not unconstitutional on the theory that injunction proceeding is simply a method of punishing the defendant for a crime without the intervention of a trial jury, and consequently denies the defendant due process of law.

State v Fray, 214-53; 241 NW 663; 81 ALR 286

State v Howard, 214-60; 241 NW 682

Professions—deprivation of certificate. The holder of a duly issued certificate to practice a profession, e. g., dentistry, cannot be deprived of said certificate without due process, to wit: notice, hearing, and right to appeal to the courts. Statutes reviewed and held ample to protect such holder.

Craven v Bierring, 222-613; 269 NW 801

Denial of permit. When the legislature enacts a regulatory measure requiring a per-

mit to transact a business which it has the constitutional right, under its police power, to absolutely prohibit, a party who has been refused a permissible or optionable permit may not successfully contend that he has been (1) denied the equal protection of the law, or (2) deprived of his property and rights without due process and without compensation.

Ford Hopkins v City, 216-1286; 248 NW 668

Extending redemption period. Neither the federal nor state constitutional prohibitions against (a) the impairment of the obligations of contracts, or (b) the deprivation of vested property rights without due process of law, is violated by a statute (1) which is enacted during, and for the purpose of ameliorating, an existing public financial emergency, (2) which grants to the owner of real estate during the existence of said emergency the right to possession and a time, very materially in excess of that otherwise granted by law, in which to redeem from mortgage foreclosure sale—even tho the sale precedes the passage of the emergency act—and (3) which sequesters the rents during said extended time and fairly and reasonably applies them to the protection of the mortgagee and his security. (45 GA, ch 179.)

Reason: Contract rights and vested interests must reasonably yield to the paramount right of the state, through the reservoir of its reserved police power, to protect, by appropriate legislation, its sovereignty, its government, its people and their general welfare, against exigencies arising out of a great emergency.

Des M. JSL Bank v Nordholm, 217-1319; 253 NW 701

Moratorium acts of 47th GA—unconstitutionality. Moratorium acts of the 47th GA extending foreclosure of mortgages, and extending time in which to redeem, are unconstitutional as an impairment of the obligation of contract, when such acts are not based on an actual existing emergency calling for an exercise of the reserve police power of the state.

First Tr. JSL Bank v Arp, 225-1331; 283 NW 441; 120 ALR 932

John Hancock Ins. v Eggland, 225-1073; 283 NW 444

Metropolitan v McDonald, 225-1075; 283 NW 445

Moratorium acts of 47th GA—emergency must be temporary—judicial notice. An emergency, in order to justify legislation in contravention of the constitution on the theory of an exercise of the reserve police power, must be temporary or it cannot be called an emergency, but becomes an established status. In determining this question, the supreme court may take judicial notice of conditions existing at the time of enactment and whether or not they constitute an emergency.

First Tr. JSL Bank v Arp, 225-1331; 283 NW 441; 120 ALR 932

John Hancock Ins. v Eggland, 225-1073; 283 NW 444

Metropolitan v McDonald, 225-1075; 283 NW 445

Unborn child. A statute empowering the court in partition proceedings (1) to assume through a guardian ad litem, jurisdiction over the contingent interest of an unborn child as a possible co-tenant of the land, (2) to order a sale of the land, and (3) to exercise a continuing jurisdiction over the resulting fund insofar as such possible child may have an interest, is violative of neither the federal nor the state constitution relative to depriving persons of property without due process.

Mennig v Howard, 213-936; 240 NW 473

Juvenile delinquents. The juvenile court act (Chs. 179, 180, C., '27) is not violative of the due process clause of the federal and state constitutions because no provision is made for a jury trial of juvenile delinquents.

Wissenburg v Bradley, 209-813; 229 NW 205; 67 ALR 1075

Granting discretionary power to administrative officer. The statutory grant of discretionary power to the superintendent of banking in re reorganization of banks is not a violation of due process.

Priest v Whitney Co., 219-1281; 261 NW 374

Timmons v Sec. Bank, 221-102; 264 NW 708

Ascertainable standard of guilt or innocence. The statute which prohibits banks and bankers from receiving deposits when they know they are insolvent, and the interpretation by the courts and by the legislature of the term insolvency to mean "inability to pay, through their own agencies, all liabilities within a reasonable time, and in the ordinary course of business" presents no instance of prescribing or fixing an unascertainable standard of guilt or innocence, violative of the due process clauses of the federal and state constitutions.

State v Bevins, 210-1031; 230 NW 865

Liability of bailor of automobile. The statute which renders the bailor of an automobile liable to third persons for damages consequent on the negligent operation of the car by the bailee is not violative of the due process clause of the constitution.

Robinson v Bruce Co., 205-261; 215 NW 724; 61 ALR 851

Submission to foreign courts — insufficient showing. An Iowa accident insurance association which has not been licensed to transact its business in a foreign state (in which it has neither office, agent, nor property), and whose certificates of insurance are strictly Iowa contracts, cannot be deemed to have subjected itself to the jurisdiction of the courts of such foreign state (1) because a very large number of its certificate holders reside in said foreign state, or (2) because said association, from

VI DUE PROCESS OF LAW GENERALLY —concluded

time to time and by mail from its Iowa office, requests a physician in said foreign state to there examine claimants and to report as to accidental injuries received by claimants, it appearing that said physician was under no contract obligation to comply with said requests and to make such examinations tho he had done so for several years and had received a stated fee for each separate examination.

Held, the foreign court, in an action on a certificate, acquired no jurisdiction under process served on said physician.

Saunders v Trav. Assn., 222-969; 270 NW 407

Foreign employer— adjudication on registered mail service. The workmen's compensation act, in the absence of a statutory rejection thereof, becomes a part of a contract of employment which is performable by the employee wholly within this state, and entered into between a resident employee of this state and a foreign nonresident employer doing business in this state without a state permit; but in case the employee dies from an injury compensable under said act, the industrial commissioner acquires no jurisdiction to determine and adjudicate the compensation due on account of said death by simply sending, by registered mail, notices of said proceedings to said employer in said foreign state, tho, concededly, the addressee received said notices. An adjudication on such service does not constitute due process.

Elk River Co. v Funk, 222-1222; 271 NW 204; 110 ALR 1415

Destruction of property. The constitutional requirement of due process of law—notice and hearing—is fully met by the bovine tuberculosis act (1) in depriving the owner of all notice and hearing prior to the destruction of cattle actually infected with tuberculosis, and (2) in impliedly and necessarily giving to said owner a right of action for damages against persons destroying his cattle when they are not so infected.

Loftus v Dept., 211-566; 232 NW 412

Displacing liens. The right of a judgment creditor of an insolvent railway to due process on the issue whether the receiver shall continue the operation of the road and whether the operating expenses shall be given priority over existing judgments is not satisfied by giving the creditor a hearing on the issue whether such priority shall be ordered as to expenses already incurred without any authorizing order therefor.

Continental Bank v Railway, 202-579; 210 NW 787; 50 ALR 139

Reducing statute of limitation on judgments. A legislative act which reduces the existing statutory period of time in which existing judgments may be enforced, yet accords to the holders of such judgments a reasonable time in which to enforce said judgments before the reduced time becomes an absolute bar, is not violative of the due process clause of the federal constitution.

Berg v Berg, 221-326; 264 NW 821

Blue Sky Law. The "Blue Sky Law" (Ch. 393-C1, C., '31) is not subject to the constitutional objection that it (1) deprives citizens of their property without due process, (2) denies equal protection of the law, (3) takes property without just compensation, (4) grants special privileges and immunities, or (5) denies an accused the right to be advised of the nature of the charge preferred against him.

State v Soeder, 216-815; 249 NW 412

Compensation for finding lost property. The statutory provision that the finder of lost goods shall be paid a named compensation is not violative of the due process clause of the constitution.

Flood v Bank, 218-898; 253 NW 509; 95 ALR 1168

Discharge of school teacher. A written contract between a teacher and a school board is necessarily accompanied by all the statutory provisions which govern the original and appellate procedure for the discharge of such teacher. Having by the very act of contracting, legally consented to such procedure, the teacher may not assert that it does not afford him due process in a constitutional sense.

Chehock v Sch. Dist., 210-258; 228 NW 585

VII PERSONS AND PROPERTY ENTITLED TO PROTECTION

Contempt. A party charged with contempt is not entitled to a jury trial.

Hammer v Utterback, 202-50; 209 NW 522

Civil service—fair and impartial hearing. A city employee who has been removed from office cannot be said to have had a fair and impartial hearing before the civil service commission under a record disclosing that the commission, after investigation, unsuccessfully sought to have the employee indicted, that charges against the employee were filed by the commission itself, which then proceeded to "hear and determine" the case, and that a member of the commission stated "We had Paul Sandahl convicted before he ever went before us for trial."

Sandahl v Des Moines, 227-1310; 290 NW 697

Enlargement of boundaries—constitutional objections. The enlargement of the boundaries of a municipality by a city council, under an enabling statute, without any notice to the property owners within the territory annexed, and without any opportunity on the part of such owners to vote on the question, is not violative of the due process clause of the constitution.

Wertz v Ottumwa, 201-947; 208 NW 511

School not "person"—statutory tuition reimbursement without notice — due process. The statute providing for the collection of tuition fees by one school district from another is not unconstitutional under the due process clause because not requiring a notice and hearing, because a school district is not a person, as contemplated by the constitution. It is purely a creature of statute, having no power except that granted by the legislature, and so its funds are under legislative control.

Lincoln Dist. v Redfield Dist., 226-298; 283 NW 881

Cosmetology schools—charges for services of students. A statute defining cosmetologists as being persons who receive compensation for services and which provides that no person or corporation shall use any person as a practitioner of cosmetology unless the person is an apprentice or licensed cosmetologist, is an unconstitutional exercise of police power in requiring that students of cosmetology schools do gratuitous work while obtaining practical experience, as such requirement would be an arbitrary interference with private business and the right to contract and would impose unnecessary restrictions upon lawful occupations in violation of due process of law.

State v Thompson's School, 226-556; 285 NW 133

Trees in highway not property of adjoining owner. A property owner abutting and occupying a part of a highway has no rights in trees growing on such part of the highway, no matter how long his occupancy of the highway continued before public convenience and necessity required appropriation of the full highway width.

Rabiner v Humboldt Co., 224-1190; 278 NW 612; 116 ALR 89

VIII DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS

Compensation for finding lost property—constitutional. The statutory provision that the finder of lost goods shall be paid a named compensation is not violative of the due process clause of the constitution.

Flood v Bank, 218-898; 253 NW 509; 95 ALR 1168

Gasoline license revocation without hearing —valid. Provision in statute imposing tax on motor vehicle fuel, authorizing revocation of license, without hearing, on failure of distributor to make reports or pay license fees held not invalid as taking property of distributor without due process of law.

Monamotor Oil Co. v Johnson, 3 F Supp 189; 292 US 86

IX TAXATION AND DUE PROCESS OF LAW

Drains — assessments for after-accruing benefits. A statute authorizing certain improvements on the common outlet of several districts and the apportionment of the cost thereof among said several districts receiving the benefit of such improvements, is applicable to a district organized prior to the enactment of said statute, and is not unconstitutional in failing to provide for notice to the landowners of the latter district before said improvements are made.

Ward v Board, 214-1162; 241 NW 26

Income tax act. Iowa income tax act reviewed and held not subject to the vice of taking private property without due process of law.

Vilas v Board, 223-604; 273 NW 338

Rights of persons accused. SEC. 10.

Atty. Gen. Opinion. See AG Op Dec. 28, '39

ANALYSIS

I WHAT IS A CRIMINAL PROSECUTION

Short form of indictment. The plea that the short form indictment act does not provide for apprising the defendant of the offense with which he is charged, and is therefore unconstitutional, is untenable in view of the right of the defendant under said act to a bill of particulars.

State v Henderson, 215-276; 243 NW 289

Penal ordinance void for uncertainty. An ordinance which requires storage tanks for inflammable oils and the accessories of such tanks to "be kept and operated in compliance with law, the building code, and other city ordinances, and in a safe and proper manner, and the same shall not be permitted to become or remain defective, hazardous or dangerous" (sic), and penalizing violations, is void for uncertainty and unenforceability.

Edwards & B. v City, 213-1027; 240 NW 711
See State v Bevins, 210-1031; 230 NW 865

Regulatory ordinance—absence of specifications. An ordinance purporting to safeguard the public by regulating storage tanks for inflammable oils must, in order to be valid and enforceable, contain such rules and speci-

fications as will enable the property owner to know, definitely, just what is required of him in order to comply with the ordinance and thereby safeguard himself. It is quite insufficient to enact the dragnet command that said tanks and appurtenant accessories "must be kept and operated in compliance with law, the building code, and other city ordinances, and in a safe and proper manner, and the same shall not be permitted to become or remain defective, hazardous or dangerous."

Edwards & B. v City, 213-1027; 240 NW 711

II SPEEDY AND PUBLIC TRIAL BY IMPARTIAL JURY

Time of trial—mandatory discharge for delay. The court, on proper motion therefor, is under mandatory duty to dismiss an indictment which, during the first term of court following its return, was, on motion for change of venue, transferred to another county, and was not there tried during the term pending when the transfer was ordered, nor during the following term—lasting two months—because of the very large assignment of equity cases and matters local to said county.

And this is true tho the defendant during said delay made no demand for a trial.

Davison v Garfield, 221-424; 265 NW 645

Time of trial and continuance—when court loses jurisdiction. An indictment which has neither been continued on defendant's application, nor brought to trial at the first regular term of court following its return, is, on a motion to dismiss, subject to a showing explaining and excusing the delay in trial, but the continuance of such an indictment beyond the third term following the return of the indictment, ipso facto deprives the court, after the expiration of said third term, of all jurisdiction over said indictment except to formally dismiss it.

Davison v Garfield, 219-1258; 257 NW 432; 260 NW 667

Dismissal of indictment—right to speedy trial—waiver. An accused may not have an indictment dismissed because he was not tried at the first regular term succeeding the return of the indictment, when, at said succeeding term, the court in open session offered to summon a jury if any accused was insisting on trial, and defendant's counsel, who was present, made no request for trial at said term.

State v Ellington, 200-636; 204 NW 307

Speedy trial not denied—delay by defendant occasioned by appellate review. In a larceny prosecution, a defendant may not complain that he has been denied a speedy trial, where a procedendo was recalled because of a rehearing in the supreme court, and, after the second procedendo was issued, the trial was delayed by defendant's writ of certiorari. Delays complained of occurred at the instance of the defendant himself.

State v Ferguson, 226-361; 283 NW 917

Delay by defendant—certiorari to require dismissal denied. One convicted of larceny, who on appeal is granted a reversal, and who, then, each time thereafter as his case is assigned for retrial, delays trial on the merits by dilatory moves such as request for rehearing and change of venue, may not complain that he has been denied a speedy trial as provided by law, and certiorari will not lie to require dismissal of the indictment.

Ferguson v Bechly, 224-1049; 277 NW 755

Accused in state hospital—term for trial after release. An indictment not brought to trial because of accused's confinement in a state hospital as an inebriate is not subject to dismissal because accused was not immediately tried upon his release, when such was impossible because the release came at a time when the term was well under way and the assigned cases completely filled the court's time for that term.

Maher v Brown, 225-341; 280 NW 553

Inebriate in state hospital—delay in trial—no dismissal. Criminal courts have no right to force an inebriate inmate of a state hospital to stand trial on an indictment for driving while intoxicated, and such confinement is good cause for refusing to dismiss for delay in prosecution.

Maher v Brown, 225-341; 280 NW 553

Female jurors—house of ill fame case—no presumption of prejudice. Contention that a fair trial was not obtained on account of female jurors, a majority of which were on the jury, having an inborn prejudice against a woman accused of keeping a house of ill fame, denied because, in absence of a contrary showing, jurors regardless of sex are presumed to follow instructions and determine guilt upon the evidence.

State v Hathaway, 224-478; 276 NW 207

III RIGHT TO TRIAL BY JURY

Instructions in criminal cases. See under §13876

Jury trial on appeal in civil cases. See under Art I, §9

Waiver of jury trial in civil cases. See under Art I, §9; §§11519, 11581

Insane persons — inquisitions—appeal—special proceeding—no jury. An appeal to the district court from the finding of the county insanity commission is a special proceeding, and, since the legislature did not provide for a jury trial, the issue is triable to the court.

In re Brewer, 224-773; 276 NW 766

Insanity appeal — noncriminal — nonjury — constitutionality. No constitutional rights are violated in trying an appeal from the insanity

commission to the court without a jury, since this is not in any way a criminal proceeding.

In re Brewer, 224-773; 276 NW 766

IV RIGHT TO BE CONFRONTED WITH WITNESSES

Confronting witnesses—violation of constitutional right. The constitutional right of an accused in a criminal case to be confronted by the witnesses against him is violated, in a criminal case wherein the value of various items of property is material, by an instruction to the effect that the jurors "have the right to use their own knowledge of values * * * in connection with the testimony as to values which have been given by the different witnesses".

State v Henderson, 217-402; 251 NW 640

Successive offenses — proof by certified copies. Statutes which authorize proof of former convictions of crime to be made by duly authenticated copies of said judgments of convictions are constitutional.

State v Murray, 222-925; 270 NW 355

Testimony of accomplice at former trial. The transcript of the testimony of an accomplice given at a former trial of the defendant in a criminal prosecution, is admissible on a retrial when the accomplice is found by the court to be out of the state and therefore beyond the reach of a subpoena.

State v Clay, 222-1142; 271 NW 212

V RIGHT TO COPY OF INDICTMENT

Informing accused of accusation. The constitutional right of an accused "to be informed of the accusation against him"—formerly accorded to him through a technically and elaborately drawn indictment—is now, under the short form indictment act, fully accorded to him through a bill of particulars, to which he is arbitrarily entitled.

State v Engler, 217-138; 251 NW 88

Due process of law—short form indictment valid. A short form indictment is valid and the statute providing therefor is constitutional.

State v Keturokis, 224-491; 276 NW 600

VI RIGHT TO COMPULSORY ATTENDANCE OF WITNESSES

Accomplice out of state—testimony at former trial used. The transcript of the testimony of an accomplice given at a former trial of the defendant in a criminal prosecution, is admissible on a retrial when the accomplice is found by the court to be out of the state and therefore beyond the reach of a subpoena.

State v Clay, 222-1142; 271 NW 212

VII RIGHT TO ASSISTANCE OF COUNSEL

Neglect to procure counsel—no showing of prejudice. When the counsel for accused had withdrawn after a trial in which the jury disagreed, and the accused failed to secure new counsel until three days before retrial altho she had two months to do so, and the court denied her motion for continuance, on appeal she could not complain of the ruling in the absence of showing an injury resulting from the ruling.

State v Hathaway, 224-478; 276 NW 207

VIII WAIVER OF RIGHTS IN GENERAL

Bovine eradication—hearing and notice unnecessary. A statute for the eradication of bovine tuberculosis which provides (1) for the filing with the board of supervisors of a petition of "51 percent of the owners of breeding cattle within the county" as a basis for the designation of the county as a "county testing unit", and (2) for the forwarding by the board of said petition to the commission of animal health for action thereon, is not unconstitutional because it wholly fails to provide for any hearing and notice thereof before the board on the sufficiency of the said petition, when the statute demonstrates that no one can be affected except those who have signed the petition.

Peverill v Board, 201-1050; 205 NW 543

When indictment necessary. SEC. 11.

Atty. Gen. Opinion. See '34 AG Op 616

ANALYSIS

I NONINDICTABLE OFFENSES: TRIALS IN INFERIOR COURTS
II INDICTMENTS
III RIGHT OF APPEAL FROM INFERIOR COURTS

I NONINDICTABLE OFFENSES: TRIALS IN INFERIOR COURTS

Indictment for nonindictable offense. A prosecution may not be maintained under an indictment which simply charges a nonindictable offense, and such contention may be presented for the first time on appeal.

State v Wyatt, 207-319; 222 NW 866
State v Wyatt, 207-322; 222 NW 867

Nonindictable misdemeanor. A nonindictable misdemeanor may be prosecuted under an information filed and sworn to by a private individual.

State v Porter, 206-1247; 220 NW 100

I NONINDICTABLE OFFENSES: TRIALS IN INFERIOR COURTS—concluded

False check—amount of check determines grade of offense—jurisdiction. In a prosecution for false uttering of a bank check, it is the amount of the check that determines the grade of the offense and not the amount received, provided something of value is received for it. Where a check was $20 or more, but only $2 in cash was received, the district court was in error in directing a verdict for defendant on the ground that the offense should be prosecuted in the justice of peace court.

State v Dillard, 225-915; 281 NW 842

II INDICTMENTS

Federal amendments — applicability. Principle reaffirmed that the fifth amendment to the federal constitution, relating to criminal procedure, has no application to state courts and their proceedings.

State v Hawks, 213-698; 239 NW 553

Rape — amending indictment — form only — validity. In a prosecution for rape, adding the words "a female, by force and against her will" as an amendment to an already valid indictment, is an amendment affecting not substance but form only, and being merely surplusage, is not prejudicial and not error.

State v Keturokis, 224-491; 276 NW 600

III RIGHT OF APPEAL FROM INFERIOR COURTS

Discontinuance—death of defendant—effect. The death of a defendant in a criminal prosecution, even after trial, conviction, judgment and appeal, but before the final determination of the latter proceeding, works a complete abatement of the proceeding ab initio.

State v Kriechbaum, 219-457; 258 NW 110; 96 ALR 1317

Twice tried—bail. SEC. 12.

ANALYSIS

I LEGAL JEOPARDY

False pretense and conspiracy. A conviction on an indictment charging the obtaining, by an officer of a fraternal beneficiary society, of funds of the society, by means of false and fraudulent representations, is not a bar to an indictment for conspiracy based on the identical acts charged in the former indictment—the two charges not being sustainable by the same evidence.

State v Blackledge, 216-199; 243 NW 534

Former jeopardy—necessary identification of offense. Instructions that a defendant may be found guilty of maintaining a liquor nuisance if he committed the offense within three years prior to the return of the indictment will not be deemed to put the defendant on trial for an alleged liquor offense on which the defendant was acquitted within said three years when the specific nature of the latter offense is not made to appear.

State v Kelly, 217-1305; 253 NW 49

Former jeopardy—proof of several supporting transactions—election—effect. When, upon the trial of a public officer for embezzlement charged in one count and in a lump sum, the state supports the charge by evidence of several different transactions, any one of which was sufficient to support the charge, and, on order of the court, elects to rely on one certain transaction, the defendant, after being convicted and after being granted a new trial, may not successfully contend that he has been put in jeopardy on all the transactions except the transaction on which the state elected to rely on the first trial, it appearing that the nonelected transactions were allowed to remain in the record as evidentiary matter bearing on the issue of fraudulent intent.

State v Huff, 217-41; 250 NW 581

Former jeopardy—state's appeal from directed verdict—defendant unaffected by reversal. Where the state appeals from a ruling sustaining motion for directed verdict for defendant in a criminal case, defendant will not be affected by reversal on appeal.

State v Dillard, 225-915; 281 NW 842

II OFFENSES AGAINST TWO JURISDICTIONS

Conviction of nonindictable offense bar to indictable offense embraced in former. The conviction of an accused in the court of a justice of the peace of the nonindictable offense of transporting intoxicating liquors without properly labeling the same (§1936, C., '27), is a bar to a subsequent prosecution based on the same transaction for the indictable offense of transporting intoxicating liquors (§1945-a1 et seq., C., '27), the latter offense being necessarily embraced in the former.

State v Purdin, 206-1058; 221 NW 562

III EFFECT OF FORMER ACQUITTAL OR CONVICTION

Statutory guarantee against dual jeopardy. See under §13807

Acquittal of crime—nonconclusive as to payment in civil action. Where a contract for bailment of cattle provided for their purchase at a stipulated price and also provided for their surrender on demand if not paid for, and where defendant had been acquitted of a forgery charge based on a forged "Paid" stamp giving the appearance the contract

price had been paid, his acquittal, when interposed in a replevin action for the cattle, was not res judicata on the issue of payment and did not bar the replevin action.

Bates v Carter, 225-893; 281 NW 727

Acquittal of larceny—felonious receiving. An acquittal under an indictment charging larceny from a building in the nighttime constitutes no bar to a subsequent indictment charging the felonious receiving of the stolen property.

State v Smith, 219-168; 256 NW 651

Acquittal as bar to civil action—penalties—forfeitures. The general rule is that a defendant's acquittal in a criminal prosecution is neither a bar to a civil action against him, nor evidence in such action of his innocence; but, when the subsequent action, altho civil in form, is quasi-criminal in nature, as to recovering penalties or declaring forfeitures, the second action may be barred by the former.

Bates v Carter, 225-893; 281 NW 727

Former jeopardy—manslaughter by negligent act. The unintentional killing, by one act of negligence, of two or more persons cannot constitute more than one manslaughter. It follows that an acquittal under an indictment charging manslaughter in the killing of one deceased is a bar to a further prosecution for manslaughter for the killing of another deceased.

State v Wheelock, 216-1428; 250 NW 617

Criminal prosecution and contempt. A criminal prosecution for a violation of the intoxicating liquor statutes is not a bar to contempt proceedings based on the same act.

Touche v Bonner, 201-466; 205 NW 751

Criminal prosecution and injunction. A verdict of "not guilty" under an indictment charging the keeping of an intoxicating liquor nuisance on certain property is no bar to an action to enjoin the same defendant from maintaining a liquor nuisance on the same property, and based on the same transaction on which the indictment was based.

State v Osborne, 207-636; 223 NW 363

Different offenses in same act. An acquittal on an indictment which charges the maintenance of an intoxicating liquor nuisance does not constitute a bar to an indictment which charges the unlawful possession of such liquors, even tho the same liquors may appear as evidence in both cases.

State v Boever, 203-86; 210 NW 571

Conviction for assault and battery—effect on higher offense. A conviction in municipal court for assault and battery constitutes no bar to a subsequent prosecution under an indictment charging assault and battery, with intent to commit great bodily injury, based on the same act.

State v Smith, 217-825; 253 NW 130

Embezzlements by agent and bailee. An acquittal on an indictment which charges the defendant, as agent, with the embezzlement of the proceeds of grain delivered to him (§13031, C., '24) is no bar to an indictment which charges the defendant, as bailee, with the embezzlement of the same grain. (§13030, C., '24.)

State v Folger, 204-1296; 210 NW 580

Subsequent overlapping charge. When the state bases an indictment for nuisance on a series of acts occurring during a specified period of time, it thereby segregates such acts from all subsequent acts, and irrevocably identifies and stamps said acts as one complete offense; and if it suffers an acquittal, it may not thereafter maintain an indictment based (1) on said segregated acts and (2) on other acts subsequent thereto; and the exclusion of said segregated acts on the trial of the last indictment will not avoid the bar resulting from the first acquittal.

State v Reinhard, 202-168; 209 NW 419

Transporting intoxicating liquors. The conviction of an accused in the court of a justice of the peace of the nonindictable offense of transporting intoxicating liquors without properly labeling the same (§1936, C., '27), is a bar to a subsequent prosecution based on the same transaction for the indictable offense of transporting intoxicating liquors (§1945-a1 et seq., C., '27 [§1945.1 et seq., C., '39]) the latter offense being necessarily embraced in the former.

State v Purdin, 206-1058; 221 NW 562

IV RIGHT TO BAIL

No annotations in this volume

Habeas corpus. SEC. 13.

Defectively drawn indictment. The writ of habeas corpus will not lie to test the legality of imprisonment under an indictment or trial information of which the court has jurisdiction, even tho such indictment or information is defectively drawn.

Conkling v Hollowell, 203-1374; 214 NW 717

Appeal excludes habeas corpus. Habeas corpus will not lie to test the sufficiency of the evidence to sustain a judgment of conviction by a justice of the peace under an information which actually charges an offense the punishment for which does not exceed either a fine of $100 or imprisonment for 30 days.

Hallway v Byers, 205-936; 218 NW 905

Failure to determine degree of murder. A judgment of life imprisonment for murder rendered by the district court under a proper charge and on a plea of guilty of such crime, is not rendered void by the failure of the court, before imposing such judgment, to call witnesses and determine the degree of said crime, and enter said determination on the record. It follows that such failure, tho it be conceded to be error and reversible on appeal, furnishes no ground for release under a writ of habeas corpus.

McCormick v Hollowell, 215-638; 246 NW 612

Bail—punishments. SEC. 17.

Cruel and unusual punishment. An accused who has been fined $100 and ordered imprisoned in the county jail for 60 days may not question the constitutionality of the statute under which he was convicted, on the ground that the statute imposed cruel and unusual punishment.

State v Dowling, 204-977; 216 NW 271

Cruel and inhuman punishment. Sentence of six months at hard labor for maintaining liquor nuisance held not such "cruel and inhuman punishment" as to violate Amendment 8 of the United States Constitution, when the maximum punishment for the offense was one year at hard labor.

State v Gasparia, (NOR); 214 NW 550

Imprisonment for contempt as cruel and unusual punishment. Statutes providing for commitment to jail for contempt, upon default in payment of support money awarded in bastardy proceedings, without citation, charge, or hearing and without allowing defendant an opportunity to purge himself of any alleged contempt, contravene the constitutional prohibition against cruel and unusual punishment.

State v Devore, 225-815; 281 NW 740; 118 ALR 1104

Drastic and invalidating penalties. Drastic penalties may, in view of the nature of the acts punished, and in view of the circumstances attending the commission of such acts, nullify an entire ordinance. So held where each day's continuance of each of various acts was declared a separate offense and punished by fine or imprisonment.

Edwards & B. v City, 213-1027; 240 NW 711

Excessive fines. A fine of $1,000 and, in default of payment, commitment to the county jail for ten months for the second offense of violating an injunction against the sale of intoxicating liquors is not constitutionally excessive.

Touche v Bonner, 201-466; 205 NW 751

Excessive fines. A fine of $1,000 on the operator of an automobile for driving the same on the highway while intoxicated is not a "cruel and unusual punishment."

State v Rayburn, 213-396; 238 NW 908

Indeterminate sentence as excessive. The appellate court may not say that an indeterminate sentence is excessive when the record reveals justification for a penitentiary sentence.

State v Overbay, 201-758; 206 NW 634

Eminent domain. SEC. 18.

Atty. Gen. Opinion. See '30 AG Op 59

ANALYSIS

I NATURE OF POWER OF EMINENT DOMAIN

Municipal light and power lines—extra-territorial extension—constitutional taxation. Premise No. 1. The state may, inter alia, constitutionally authorize its governmental agencies to tax for any purpose which justifies the exercise of the power of eminent domain.

Premise No. 2. The power of eminent domain may be exercised only for public purposes.

Premise No. 3. The construction, operation, renewal and extension of electric light and power plants are for public purposes.

Premise No. 4. The power of eminent domain has, by statute, been conferred on cities and towns for all the purposes last above named.

Conclusion: Sections 6142, and 8310, C., '31, are constitutional insofar as they authorize cities and towns to levy taxes for extending, beyond their corporate limits, the transmission lines of their municipally owned electric light and power plants.

Carroll v Cedar Falls, 221-277; 261 NW 652

II WHAT IS A PUBLIC PURPOSE

Construction of wharf—paramount right of state. The construction by the state of a wharf below high-water mark on a navigable lake (to the bed of which the state has title), in aid of navigation, and without compensation to the riparian owner, is but the exercise of a right and the execution of a trust which is paramount to any right of ingress and egress of said riparian owner.

Peck v Const. Co., 216-519; 245 NW 131; 89 ALR 1132

Materially destroying access to property. A substantial interference by a city with access to property by means of a public street constitutes a taking of private property for public use, even tho no part of the physical property of the property owner is taken, and the city must respond in damages for such taking.

Nalon v City, 216-1041; 250 NW 166

Public property as private property. The public property of the state may, under proper circumstances, constitute private property within the meaning of the federal constitution prohibiting the taking of private property for public use without just compensation; and it does not matter that the taking is by one exclusively engaged in interstate commerce.

State v Pipe Line, 216-436; 249 NW 366

Railway right of way for private business site. The board of railroad commissioners has no constitutional power to order a railway company to furnish a private party with a site on its right of way, and to fix the rental for such site, in order to enable such party to erect and maintain on such site a coal shed in which he may store his coal and from which he may sell his coal for private gain, §8169, C., '24, to the contrary notwithstanding.

Ferguson v Railway, 202-508; 210 NW 604; 54 ALR 1

III COMPENSATION AND SECURITY

Drainage. For annotations on compensation and security in drainage improvements, see under Amendment of 1908, p. 69 of Vol. I; also under §7451, Vol. I

Discussion. See 12 ILR 286—Attorney fees as just compensation

Compensation — measure of. The recoverable measure of damages to a farm, consequent on the condemnation of a highway right of way therethrough, is the difference in value of the farm as a whole before condemnation and the value immediately thereafter. It follows that the trial court on appeal cannot limit the jury solely to a consideration of the items of damages specifically alleged by the landowner in the petition filed under §7841-c1, C., '35 [§7841.1, C., '39].

Maxwell v Highway Com., 223-159; 271 NW 883; 118 ALR 862

Measure of damages — general rules — disturbance of peace and quiet as element. In condemnation proceeding to acquire ground for highway purposes where trees taken from plaintiff were left standing along highway, testimony showing that peace and quiet of plaintiff's home was disturbed by passers-by who stopped under trees, was not incompetent on the ground that it was not a proper element of damage, it being a well-settled rule that the landowner may show all detrimental elements affecting value and that he may also show the condition the property would be in after the condemned strip had been appropriated and used for the purposes for which it was taken.

Stoner v Highway Com., 227-115; 287 NW 269

Measure of damages—advantage not considered. In condemnation proceeding where land was taken for highway purposes, under the principle that advantage resulting from improvement of property taken by condemnation may not be taken into consideration in determining amount of plaintiff's damage, the defendant had no right to plead and prove matters relating to the manner of construction of the improvement which would tend to ameliorate damages.

Stoner v Highway Com., 227-115; 287 NW 269

Evidence—driving stock across highway. In condemnation proceeding to acquire ground to widen highway which divided plaintiff's farm, a hypothetical question asked of one witness as to whether the additional trouble experienced by plaintiff in driving his stock across highway, since it had been widened, would affect the values of the farm—altho being a question of doubtful propriety—was related to a matter so simple and self-evident that the opinion of the witness could add no force or prejudicial effect thereto.

Stoner v Highway Com., 227-115; 287 NW 269

Verdict not excessive for ground and ornamental trees. In a condemnation proceeding to acquire a strip of ground for highway purposes 17 feet wide on each side of an existing highway which divided an 80 acre farm, where the land appropriated comprised 1.2 acres and included 19 trees in front of plaintiff's home, some of them being very large, hardwood, slow growing, ornamental trees, planted in connection with carefully planned landscaping, held, verdict of $2,000 was not excessive.

Stoner v Highway Com., 227-115; 287 NW 269

Inadequate or excessive verdicts — control power of court. The verdict of a common-law jury in eminent domain proceedings is subject to the same review by the court for inadequacy or excessiveness as other verdicts in other proceedings. Record in highway condemnation proceedings reviewed, and held verdict so grossly excessive as to evidence passion and prejudice.

Campbell v Highway Com., 222-544; 269 NW 20

Protection of right. Injunction will lie to enjoin the construction of a dam and the consequent overflow of private property for the public use until the damages are paid; and this is true even tho the taker is solvent.

Scott v Price Bros. Co., 207-191; 217 NW 75

IV METHOD OF ASSESSING DAMAGE

Assessment of damage—jury question. In a condemnation proceeding to acquire ground for highway purposes, the question of damages to be assessed for the land appropriated is peculiarly one for the jury.

Stoner v Highway Com., 227-115; 287 NW 269

Disputed fact questions as to value—when jury findings control. In a condemnation proceeding to acquire ground for highway purposes, the right of the jury to decide disputed fact questions as to value will not be interfered with by the supreme court, if there is evidence upon which the jury could reach the verdict it did reach.

Stoner v Highway Com., 227-115; 287 NW 269

Instructions in re benefits. In eminent domain proceedings, an instruction that the compensation allowed should not leave the landowner "poorer or worse off or better off" because of the taking, is not subject to the vice of leading the jury to understand that in computing compensation, benefits accruing to the landowner because of the taking should be deducted, when the jury is repeatedly and explicitly told elsewhere in the instructions that they should not consider benefits.

Witt v State, 223-156; 272 NW 419

Drains—trespass not taking. A landowner may not say that his land was taken for public use because in cleaning out a public ditch as a repair thereof, the contractor wrongfully distributed the dirt beyond the right of way line of the ditch as originally constructed.

Payne v Drain. Dist., 223-634; 272 NW 618

V EXTENT OF RIGHT ACQUIRED

Compensation—protection of right by injunction until damages paid. Injunction will lie to enjoin the construction of a dam and the consequent taking by overflow of private property for the public use until the damages are paid; and this is true even tho the taker is solvent.

Scott v Price Bros. Co., 207-191; 217 NW 75

VI ACTS WHICH DO NOT CONSTITUTE TAKING OF PROPERTY BY EMINENT DOMAIN

"Taking" defined. The enlargement of the boundaries of a municipality does not constitute a "taking" of private property for a public use, in a constitutional sense.

Wertz v City, 201-947; 208 NW 511

VII EMINENT DOMAIN AND TAXATION

No annotations in this volume

Imprisonment for debt. SEC. 19.

Imprisonment for criminal costs. See under §13964

Imprisonment for contempt. A defendant who is decreed to pay alimony and who willfully secretes his property for the purpose of avoiding compliance with said order, may be imprisoned as for a contempt of court, an award of alimony not being a "debt" in the sense of the constitutional prohibition against imprisonment for "debt".

Mason v Dist. Court, 209-774; 229 NW 168
Roberts v Fuller, 210-956; 229 NW 163
Roach v Oliver, 215-800; 244 NW 899

Imprisonment for costs. Imprisonment for nonpayment of costs in contempt proceedings is unauthorized.

Hammer v Utterback, 202-50; 209 NW 552

Jail sentence as imprisonment for debt—unconstitutional. Proceeding to establish paternity and to provide support money, being a civil proceeding, the statutory punishment by commitment to jail for nonpayment contravenes the constitutional prohibition against imprisonment for debt.

State v Devore, 225-815; 281 NW 740; 118 ALR 1104

Right of assemblage—petition. SEC. 20.

Injunction violation by labor union officials. There was no denial of the right of freedom of speech in holding officers of a trade union in contempt of court for violating an injunction, when they counseled, aided, abetted, and assisted in the violation of the injunction.

Carey v Dist. Court, 226-717; 285 NW 236

Injunction against labor union—no denial of freedom of speech and assembly. An injunction against officers of a trade union was not void on its face as a denial of the right of freedom of speech and assembly because it prohibited unlawful interference with a company's business, mass picketing, intimidation and coercion, and going upon the company's premises without consent.

Carey v Dist. Court, 226-717; 285 NW 236

Right of petition—construction. The constitutional right of the people to petition their legislature for a redress of grievances is no impediment in the way of a board of supervisors, acting for a public drainage district, in entering into a proper and unobjectionable contract with attorneys to secure legislation which will carry out a moral obligation on the part of the state.

Kemble v Weaver, 200-1333; 206 NW 83

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

Atty. Gen. Opinions. See '34 AG Op 616; '36 AG Op 90, 130, 499, 657

ANALYSIS

I EX POST FACTO LAWS
II RETROACTIVE LAWS IN GENERAL
III LEGALIZING ACTS AS RETROACTIVE LAWS
IV IMPAIRMENT OF CONTRACTS
V IMPAIRMENT OF VESTED RIGHTS

I EX POST FACTO LAWS

Aggravated punishment. A statute is not ex post facto because it attaches to a crime an increased punishment because of former convictions, even tho such former convictions were had prior to the enactment of the statute.

State v Norris, 203-327; 210 NW 922

Increasing punishment. A statute which increases the punishment for an existing offense is not applicable to a violation occurring prior to the enactment of the punishment-increasing act.

State v Marx, 200-884; 205 NW 518

Requisites and sufficiency — applicability of short form act. The sufficiency of the charging part of an indictment will be determined by the short form of indictment act, tho said act was enacted after the return of the indictment but before the sufficiency thereof was formally questioned; said act not being an ex post facto act.

State v Johnson, 212-1197; 237 NW 522

Redemption from tax sale — law governing. The time in which redemption may be made from tax sale is absolutely governed by the law in force at the time of the sale. It follows that a legislative amendment shortening the redemption period cannot apply to pre-existing sales.

Lockie v Hammerstrom, 222-451; 269 NW 507

II RETROACTIVE LAWS IN GENERAL

Foreclosure—continuance under emergency act. The emergency act for the continuance of mortgage foreclosure proceedings (45 GA, ch 182) was not designed to grant a continuance to a mortgagor of nonhomestead property who is so hopelessly insolvent that a continuance would, manifestly, work no benefit to him but would work material harm to the mortgagee.

Reed v Snow, 218-1165; 254 NW 800

Judicial functions outside legislative powers. A statute which provided that service in any action could be made on a nonresident criminal defendant while he was within the state, was unconstitutional in providing that the statute legalized such service where it had been made in cases pending, as after the commencement of an action, the question of determining jurisdiction is a judicial function which the legislature is without power to control.

Frink v Clark, 226-1012; 285 NW 681

Mechanics' liens. Chapter 452, C., '24, relative to labor and material on public improvements has no retroactive effect—applies only to claims arising after it took effect, to wit, October 28, 1924.

Francesconi v School Dist., 204-307; 214 NW 882

Shortening limitation on action—constitutional condition. Principle reaffirmed that the legislature may constitutionally shorten the time within which an existing cause of action may be barred if a reasonable time is given for the commencement of an action before the bar takes effect.

Johnson v Leese, 223-480; 273 NW 111

III LEGALIZING ACTS AS RETROACTIVE LAWS

Legalizing acts as special legislation. See under Art III, §30

Curative and legalizing acts. Principle recognized that the legislature may validate that which the judiciary has invalidated, especially in matters of public right.

Wilcox v Miner, 201-476; 205 NW 847
Peverill v Board, 201-1050; 205 NW 543

Legalization of invalid tax. The legislature may validly legalize a levy of taxes made under a supposedly legal statute but which was invalid because its title was constitutionally insufficient. (See also Const., Art. III, §30 (VI)

Chi. RI Ry. v Rosenbaum, 212-227; 231 NW 646

Legalization of illegal acts. When an act is done in a certain manner and under certain conditions, but in violation of an existing statute, the legislature may constitutionally validate the act, when it might constitutionally have originally ordered the act done in the manner and under the conditions in which it was done.

Peverill v Board, 201-1050; 205 NW 543

Legalizing tax levy after invalidating ruling by court. A legislative act which legalizes a tax levy after the appellate court has ruled (but before entry of judgment) that the taxpayer is entitled to a refund of the tax paid because the tax levy was void owing to the absence of an authorizing statute, neither disturbs any vested interest of the taxpayer, nor constitutes an unconstitutional interference with the judiciary.

Chi. RI Ry. v Streepy, 211-1334; 236 NW 24

III LEGALIZING ACTS AS RETROACTIVE LAWS—concluded

Permissible legalization. The legislature may validly legalize the act of the secretary of agriculture in enrolling a county under the accredited area plan for the eradication of bovine tuberculosis when the illegality of such enrollment is predicated on the doubt whether the petitions as a basis for such action contained the statutory number of signatures.

Peverill v Board, 208-94; 222 NW 535

Retroactive laws. The legalization of a tax levy made by a county under an optional and supposedly legal statute, but which was in fact originally invalid because of a fatal defect in the title, does not constitute a levying by the general assembly of a retroactive tax on the county.

Chi. RI Ry. v Rosenbaum, 212-227; 231 NW 646

Reducing time in which to appeal. The time allowed for an appeal cannot be reduced by legislative enactment after judgment.

Davis v Robinson, 200-840; 205 NW 520
Insell v McDaniels, 201-533; 207 NW 533

IV IMPAIRMENT OF CONTRACTS

Impairment — essential nature of clause. Principle recognized that the constitutional provision relative to impairment of contracts is not an absolute one and is not to be read with literal exactness like a mathematical formula.

Priest v Whitney Co., 219-1281; 261 NW 374

Existing statutes. An insurance company may not complain that its contracts are impaired by an unrepealed statute which was enacted prior to its incorporation and which provides that actions on assessments shall be brought in the county in which the defendant resides.

Midwest Ins. v DeHoet, 208-49; 222 NW 548

Valid statutes read into contracts. Principle affirmed that contracts are conclusively presumed to have been entered into in view of the valid statutes then existing and controlling the subject matter.

Priest v Whitney Co., 219-1281; 261 NW 374

Judgment not contract. A judgment is not a contract in the ordinary sense of said latter term.

Berg v Berg, 221-326; 264 NW 821

Repeal of statute. A party may not complain that a statute impairs his contract rights when the statute in question is repealed before his complaint is heard.

Peverill v Board, 208-94; 222 NW 535

Change in venue of action. A legislative change in the venue of an action may be validly applied to an existing contract.

Grain Belt Ins. v Gentry, 208-21; 222 NW 855

Assessment against stockholder—additional remedy to enforce. A statutory assessment against a holder of bank stock in order to restore the impaired capital of the bank creates a personal liability on the part of the stockholder, and the statutory remedy for enforcing such personal liability by a sale of the stockholder's stock may, after the stockholder acquires his stock, be constitutionally supplemented by an additional statutory remedy, to wit, an action at law to recover of the stockholder the balance due on said assessment after selling said stock. The granting of such additional remedy does not impair the stockholder's contract in a constitutional sense.

Woodbine Bk. v Shriver, 212-196; 236 NW 10

Certificate of deposit—permissible impairment. A bank depositor may not successfully claim that his certificate of deposit was unconstitutionally impaired by a later, state-approved, good-faith bank reorganization (in which he did not join) under which all claimants (claims over $10) were given equal but less favorable terms of payment than their contracts originally contemplated, when, at the time of his deposit, the statute law contemplated and substantially provided for such reorganization and change in terms of payment; and if the actual reorganization was effected under later statutes amplifying the said former ones, the answer is that he was dealing with a quasi-public corporation, and that his contract of deposit must reasonably yield to the police power in the interest of the public generally, especially in an emergency resulting from a great financial depression.

Priest v Whitney Co., 219-1281; 261 NW 374

Repeal of preferential deposit law. The repeal of a statute which gives the state a preferential right, as a depositor of state funds, to be first paid in full in those cases only where the bank is placed in the hands of a receiver, does not impair the contract obligation of an existing surety on a bond conditioned, in effect, to pay the state all loss on such deposit whether the bank was or was not placed in the hands of a receiver.

Leach v Bank, 205-1154; 213 NW 517

Income tax—interest on tax-exempt securities. Interest on tax-exempt municipal securities is not exempt from state income tax, tho the securities themselves are, by statute, exempt from general property tax. The statutory declaration that said securities "shall not be taxed" has reference solely to general property tax, and not to an excise tax—an income tax—on the interest collected on such securities.

Hale v Board, 223-321; 271 NW 168; 302 US 95

Reducing statute of limitation on judgments. A legislative act which reduces the existing statutory period of time in which existing judgments may be enforced, yet accords to the

holders of such judgments a reasonable time in which to enforce such judgments before the reduced time becomes an absolute bar, is not violative of the federal constitutional prohibition of the impairment of contracts by legislation.

Berg v Berg, 221-326; 264 NW 821

Foreclosure—economic conditions and fluctuations in values. Equity cannot refuse to foreclose a mortgage because of a depressed economic condition existing throughout the country, nor, in foreclosing, may it assume to adjust the judgment to the fluctuating value of the legal tender as declared by the federal government.

Federal Bank v Wilmarth, 218-339; 252 NW 507; 94 ALR 1338

Continuance under financial emergency. The legislative power of the state may, for the purpose of ameliorating an existing, public, financial emergency, constitutionally grant to a mortgagor, on equitable conditions, the right, in an action to foreclose the mortgage, to a continuance which is very materially in excess of that ordinarily permitted or sanctioned by law. (For fundamental reason see Des Moines Bank v Nordholm, 217 Iowa 1319.)

Craig v Waggoner, 218-876; 256 NW 285

Extending redemption period. Neither the federal nor state constitutional prohibitions against (a) the impairment of the obligations of contracts, or (b) the deprivation of vested property rights without due process of law, is violated by a statute (1) which is enacted during, and for the purpose of ameliorating, an existing public financial emergency, (2) which grants to the owner of real estate during the existence of said emergency the right to possession and a time, very materially in excess of that otherwise granted by law, in which to redeem from mortgage foreclosure sale—even tho the sale precedes the passage of the emergency act—and (3) which sequesters the rents during said extended time and fairly and reasonably applies them to the protection of the mortgagee and his security. (45 GA, ch 179.)

Reason: Contract rights and vested interests must reasonably yield to the paramount right of the state, through the reservoir of its reserved police power, to protect, by appropriate legislation, its sovereignty, its government, its people and their general welfare, against exigencies arising out of a great emergency.

Des M. JSL Bank v Nordholm, 217-1319; 253 NW 701

Tusha v Eberhart, 218-1065; 256 NW 740

Connecticut Ins. v Clingan, 218-1213; 257 NW 213

Moratorium act—unauthorized continuance. The mortgage moratorium act does not, and constitutionally could not, authorize a continuance thereunder to a mortgagor when the record affirmatively shows (1) that the mortgaged land is of a value substantially less than the mortgage debt, and (2) that, irrespective of the foregoing fact, the mortgagor-owner is in such financial condition as to exclude any possible redemption by him.

John Hancock Ins. v Schlosser, 222-447; 269 NW 435

Moratorium acts of 47th GA—emergency must be temporary—judicial notice. An emergency, in order to justify legislation in contravention of the constitution on the theory of an exercise of the reserve police power, must be temporary or it cannot be called an emergency, but becomes an established status. In determining this question, the supreme court may take judicial notice of conditions existing at the time of enactment and whether or not they constitute an emergency.

First Tr. JSL Bank v Arp, 225-1331; 283 NW 441; 120 ALR 932

John Hancock Ins. v Eggland, 225-1073; 283 NW 444

Metropolitan v McDonald, 225-1075; 283 NW 445

Police power—mortgage continuance—moratorium acts of 47th GA—unconstitutionality. Moratorium acts of the 47th GA extending foreclosure of mortgages, and extending time in which to redeem, are unconstitutional as an impairment of the obligation of contract, when such acts are not based on an actual existing emergency calling for an exercise of the reserve police power of the state.

First Tr. JSL Bank v Arp, 225-1331; 283 NW 441; 120 ALR 932

John Hancock Ins. v Eggland, 225-1073; 283 NW 444

Metropolitan v McDonald, 225-1075; 283 NW 445

V IMPAIRMENT OF VESTED RIGHTS

Abolition of common law. The legislature may, against a surety on a bond to secure state deposits in a bank, constitutionally abolish any preferential right in the state at common law to demand payment of its deposits in full—the existence of such right being assumed.

Leach v Bank, 205-1154; 213 NW 517

Attorney—right to practice mere privilege. The right to practice law is not a constitutional right—not a vested right—but a mere privilege.

In re Cloud, 217-3; 250 NW 160

Political rights — nonviolation. A statute which requires a favorable vote equal to 60 percent of all the votes cast for and against a proposal to issue bonds in order to authorize them is not violative of the principle that political power is inherent in the people.

Waugh v Shirer, 216-468; 249 NW 246

V IMPAIRMENT OF VESTED RIGHTS—continued

Noninjured complainant. A party may not question the constitutionality of a statute when he fails to show that he has been or will be injured by the statute. In other words, he may not borrow an objection from one who could complain, but does not complain. So held where a noninjured party predicated unconstitutionality upon the statute which reduced the public compensation for animals slaughtered by the state in the eradication of bovine tuberculosis.

Peverill v Board, 201-1050; 205 NW 543

Vested rights — not acquirable in remedy. Principle reasserted that, ordinarily, no one acquires, in a statutory remedy for the collection of a debt, such vested interest as can be properly denominated "property".

Berg v Berg, 221-326; 264 NW 821

Nonvested right in decree affecting public right. A plaintiff who (while furnishing electric light and power to a municipality and to the inhabitants thereof) obtains a judicial decree which adjudges invalid (for a statutory defect) certain proceedings for the erection by the municipality of an electric light and power plant, acquires by said decree no such right as will prevent the general assembly from constitutionally legalizing said proceeding, it appearing that when the legalizing act was enacted said plaintiff had, by final judicial decree, been wholly ousted, as a public utility, from said municipality.

Iowa E. L. & P. Co. v Grand Junction, 221-441; 264 NW 84

Decree—unauthorized modification. A decree in divorce proceedings to the effect that the wife should, until a named date, have the possession of certain property belonging to the husband, and that the husband, in the meantime, should pay off an existing mortgage and accruing taxes on the property, works a vested interest in the husband when he complies with the decree—an interest which the court has no jurisdiction to disturb by a subsequent order conferring the property absolutely on the wife.

Guisinger v Guisinger, 201-409; 205 NW 752

Interest on public deposits—power to divert. The general assembly has ample authority to divert from the county general fund to the state sinking fund for public deposits interest accruing on deposits of public funds in the hands of the county treasurer.

Scott Co. v Johnson, 209-213; 222 NW 378
See State v Bartlett, 207-208; 222 NW 529
See Boyd v Johnson, 212-1201; 238 NW 61

Repeal of preferential deposit law. A statute which gives to the state, when it has public funds on deposit in a bank, the preferential right to be paid in full if the bank passes into the hands of a receiver does not confer on a surety on a bond to secure said deposit any such vested right to be subrogated to the said right of the state as will constitutionally prevent the legislature from repealing the statute.

Andrew v U. S. Bank, 205-883; 213 NW 531
Leach v Bank, 205-1154; 213 NW 517

Priority in payment of deposits. The general assembly has constitutional power by legislative act to deprive a county or municipal corporation of an existing right of preference in a deposit of money belonging to the county in an insolvent bank.

Kuhl v Farmers Bank, 203-71; 212 NW 337

Priority in payment of deposits. A municipal corporation which, at the time an insolvent bank is placed under receivership, is entitled, under a statute as construed by the supreme court, to a priority in the payment of its municipal deposit, is not deprived of such priority by a subsequently enacted statute which denies such priority.

Murray v Bank, 202-281; 208 NW 212

Moratorium act — unallowable apportionment of rent. When the security for a debt is a combination (1) of a mortgage on the land, and (2) of a chattel mortgage on the rents and crops of the said land, the court, on granting under the moratorium act a continuation of foreclosure proceedings, has no authority under said act (nor could it constitutionally be given such authority) to apportion or set off to the mortgagor any portion of said rents.

Equitable v McNamara, 220-297; 259 NW 231; 262 NW 466

Right to rents in mortgage foreclosure. The statutory provision, which provides, in substance, that a pledge in a mortgage of the rents of the land shall carry the same priority of right over said rents as the mortgage carries over the land itself, cannot constitutionally apply to a mortgagee who, prior to the enactment of the statute, had fully acquired priority of right to the rents under the law then prevailing, to wit, the law which granted priority to the mortgagee who first filed petition for foreclosure and first prayed for a receiver.

First Tr. JSL Bank v Smith, 219-658; 259 NW 192

Curtailing right of mortgagee. Whether a mortgagee of unimproved land may constitutionally be deprived of a lien on future-erected and permanent improvements on the land, quaere.

Crawford-Fayram Co. v Mann, 203-748; 211 NW 225

Municipal bonds—accelerating maturity. The holder of a municipal bond which is, in effect, payable "on or before" a specified date, is deprived of no vested right by the enactment of a statute subsequent to the issuance of the bond, under which enactment the city is en-

abled to exercise its option to accelerate the date of payment.

Ballard-Hassett v City, 207-1351; 224 NW 793

Rights reserved. SEC. 25.

Legislative power. See under Art III, §1 (second)

ARTICLE II

RIGHT OF SUFFRAGE

Electors. SECTION 1.

Discussion. See 3 ILB 38—Where may a student vote

Atty. Gen. Opinions. See '32 AG Op 227; '34 AG Op 461, 722; '36 AG Op 633; '38 AG Op 749; AG Op Apr. 23, '40

Residence—evidence—sufficiency.

Willis v Sch. Dist., 210-391; 227 NW 532

Public improvements—qualifications of petitioners. The electors of a city or town who are such under the constitution of this state, even tho their names do not appear on the official books of registered voters of the city or town, are qualified to petition for the calling of an election to vote on the proposition whether the municipality shall erect an electric light and power plant.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

School teachers. Adult, unmarried school teachers become "residents" of the county in which they teach when the employment is entered upon with the good-faith intention of making the place of employment their permanent home or residence so long as the employment continues.

Dodd v Lorenz, 210-513; 231 NW 422

Military duty. SEC. 3.

Atty. Gen. Opinion. See '34 AG Op 547

Persons in military service. SEC. 4.

Atty. Gen. Opinions. See '34 AG Op 331, 722; '38 AG Op 749

Residence—effect of military service.

Harris v Harris, 205-108; 215 NW 661

Disqualified persons. SEC. 5.

Atty. Gen. Opinions. See '25-26 AG Op 462; '34 AG Op 722; '36 AG Op 417; '38 AG Op 94; AG Op Sept. 1, '39

ARTICLE III

OF THE DISTRIBUTION OF POWERS

Departments of government. SECTION 1.

Discussion. See 22 ILR 684—Administrative commissions

Atty. Gen. Opinions. See '28 AG Op 416; '34 AG Op 616

ANALYSIS

I THE TRIPARTITE SYSTEM

Legislature—sole power to legislate. The sole power of making laws resides in the legislative branch of government.

State v Woitha, 227-1; 287 NW 99

Legislature's power—felony for third conviction—liquor violation. Legislature possesses full authority to enact statute making third and subsequent offense of violating liquor law a felony.

State v Erickson, 225-1261; 282 NW 728

Statutes—duty of court to make effective. It is the duty of the court in construing statutes to seek the object and purpose of the law and then give it force and effect if not contrary to established legal precedents.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

Social welfare board. Social welfare board's determination of eligibility for old-age assistance is administrative duty. Judicial review is limited.

Schneberger v Board, 228- ; 291 NW 859

II DELEGATION AND USURPATION OF LEGISLATIVE AUTHORITY

Delegation of legislative powers. See under Art III, §1 (second)

Power to declare legislative acts unconstitutional. See under Art XII, §1

Discussion. See 17 ILR 239—Delegation to the people

Legislative authority—delegation. The statutory direction that the secretary of agriculture shall, in the administration of the bovine tuberculosis act, certify to the county auditor the facts which render unnecessary a tax levy in the county, constitutes no delegation to an individual of discretionary legislative power.

Fevold v Board, 202-1019; 210 NW 139

Nondelegation of authority. The statutory provision (§2930, C., '31) which requires the board of supervisors, under named conditions, to appropriate from the county general fund money to, and in aid of, a farm bureau organization, cannot be deemed a delegation to the

II DELEGATION AND USURPATION OF LEGISLATIVE AUTHORITY—concluded

said organization of the power to levy a tax on the public.

Blume v Crawford Co., 217-545; 250 NW 733

Delegation of powers—liberal interpretation. The constitutional prohibition against delegating legislative powers to administrative boards is given a liberal interpretation in favor of constitutionality of legislation.

Miller v Schuster, 227-1005; 289 NW 702

Delegation of legislative power. The legislature has no constitutional right to delegate to an administrative department, e. g., the conservation commission, the strictly and exclusively legislative power to formulate a policy and make regulations restricting angling. It may, however, make such declaration of policy, definitely describing the subject, the field, and the character of regulations intended to be imposed and leave to the department the manner in which that policy shall apply.

State v Van Trump, 224-504; 275 NW 569

See Goodlove v Logan, 217-98; 251 NW 39

Delegation of powers by legislature—Iowa securities act. Because the Iowa securities act covers such a broad field of transactions that it cannot cover each particular case in detail, it was proper for the legislature to delegate to an officer certain discretionary powers in administering the statute and in making such rules as were necessary to carry out the purposes of the law within the general policy set forth by the legislature.

Independence Fund v Miller, 226-1101; 285 NW 629

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

Sales tax—shoe repairmen as consumers—delegation of power. Taxation uniformity, being an equal distribution of taxation burdens upon all persons of a given class, is impossible of perfect application, and a sales tax rule promulgated under valid legislative authority classifying shoe repairmen as consumers of materials used in shoe repairing, within the meaning of the sales tax act, is not arbitrary but uniform and consistent with the law imposing the tax and not a delegation of power.

Sandberg Co. v Board, 225-103; 278 NW 643; 281 NW 197

Powers given to state commerce commission—limitation. The state commerce commission (board of railroad commissioners) has no powers except those expressly given and those incidental to or implied in the power given.

Huxley v Conway, 226-268; 284 NW 136

Combining administrative and judicial powers. The vesting of certain discretion and judgment in ministerial and administrative officers does not necessarily lead to unconstitutionality. So held as to the bovine tuberculosis act.

Loftus v Dept., 211-566; 232 NW 412

District court's power in soldiers preference appeals. A soldiers preference law provision giving the district court the power to review the evidence and find whether the applicant is qualified, and to direct the appointing board as to further action to be taken, is not an unconstitutional delegation of power, as the finding of facts is often a judicial function, and the power of appointment is not exclusively a legislative or executive right.

Maddy v City Council, 226-941; 285 NW 208

Supreme court—no encroachment on legislative function. Supreme court may not write into a statute words that are not there.

Mathewson v Board, 226-61; 283 NW 256

Usurpation of authority. The supreme court usurps no legislative function when it declares and determines the legislative intent of a statute.

Galvin v Citizens Bank, 217-494; 250 NW 729

III DELEGATION AND USURPATION OF EXECUTIVE AUTHORITY

Zoning ordinance—vesting permit power in council. An ordinance establishing a restricted residence district and prohibiting the erection and maintenance therein of gasoline filling stations without obtaining a permit therefor is not unconstitutional because the power to grant or refuse the permit is lodged in the city council—the same body which enacted the ordinance.

Marquis v Waterloo, 210-439; 228 NW 870

IV DELEGATION AND USURPATION OF JUDICIAL AUTHORITY

Usurpation of judicial authority. Principle recognized that the legislature cannot reverse, vacate, or overrule the judgment of a court.

Wilcox v Miner, 201-476; 205 NW 847

Legalizing act noninvasion of judiciary. The validation by the legislative department of a municipal contract which the judicial department has invalidated, because of noncompliance with statutory requirements, does not

constitute an unconstitutional invasion of the powers of the judiciary.

Iowa Elec. Co. v Grand Junction, 221-441; 264 NW 84

Nonjudicial review. A determination by the board of railroad commissioners, on supporting evidence, that the operation of a motor carrier line would promote the public convenience and necessity is constitutionally beyond review by the courts.

In re Beasley Bros., 206-229; 220 NW 306

Judicial functions outside legislative powers. A statute which provided that service in any action could be made on a nonresident criminal defendant while he was within the state, was unconstitutional in providing that the statute legalized such service where it had been made in cases pending, as after the commencement of an action, the question of determining jurisdiction is a judicial function which the legislature is without power to control.

Frink v Clark, 226-1012; 285 NW 681

Nonjudicial review of arbitrary act. The extension of the limits of a municipal corporation in strict compliance with a constitutional statute is conclusive on the courts, even tho the statute is, to a degree, arbitrary.

State v Altoona, 201-730; 207 NW 789

Legalizing tax levy after invalidating ruling by court. A legislative act which legalizes a tax levy after the appellate court has ruled (but before entry of judgment) that the taxpayer is entitled to a refund of the tax paid because the tax levy was void owing to the absence of an authorizing statute, neither disturbs any vested interest of the taxpayer, nor constitutes an unconstitutional interference with the judiciary.

Chi. RI Ry. v Streepy, 211-1334; 236 NW 24

LEGISLATIVE DEPARTMENT

General assembly. SECTION 1.

ANALYSIS

I GENERAL SCOPE OF POWER
II DELEGATION OF LEGISLATIVE POWER
III JUDICIAL REVIEW OF LEGISLATIVE ACTION

I GENERAL SCOPE OF POWER

Limitation on legislative power. See also under Art I, §25, Vol. I

Discussion. See 18 ILR 129—Administrative law symposium; 19 ILR 583—Recovery legislation.

Comprehensive power of general assembly. The general assembly has power to enact any legislation it sees fit, provided such legislation is not plainly in violation of the state or federal constitution.

Carroll v Cedar Falls, 221-277; 261 NW 652

Definition of terms — power of general assembly. The general assembly in exercising its constitutional power over an authorized subject matter, may be its own lexicographer—may use its own terms and declare what entities shall be embraced therein. So held where in the enactment of a statute (Motor Vehicle Fuel Tax Act, ch 251-F1, C., '35 [ch 251.3, C., '39]) it defined the term "person" and, in effect, declared such term to include a municipal corporation.

State v Des Moines, 221-642; 266 NW 41

Public policy of statute. The public policy of a valid statute is solely for the legislature to determine, not the courts.

Brutsche v Coon Rapids, 223-487; 272 NW 624

When criminal intent immaterial. Under the Iowa securities law, the provision that the making of a "false" statement before the secretary of state relative to the financial condition of a corporation is a felony, renders immaterial testimony that the accused did not know that the statement was false.

Reason: The legislature may declare an act criminal irrespective of the knowledge or intent of the doer.

State v Dobry, 217-858; 250 NW 702

Legislature's power—felony for third conviction—liquor violation. Legislature possesses full authority to enact statute making third and subsequent offense of violating liquor law a felony.

State v Erickson, 225-1261; 282 NW 728

Curative acts—omissions of levying officer. The failure of an officer to indorse on an execution the procedural matters required by statute may be legalized by an act of the legislature.

Francis v Todd & Kraft, 219-672; 259 NW 249

Nelson v Hayes, 222-701; 269 NW 861

Salary—power to change. The general assembly has plenary power to reduce the salary of any public officer unless such reduction is prohibited by the constitution—a public office not being property.

Smith v Thompson, 219-888; 258 NW 190

Police power—prohibition of sales of cigarettes. Power of legislature to prohibit sale of cigarettes reaffirmed.

Ford Hopkins Co. v Iowa City, 216-1286; 248 NW 668

I GENERAL SCOPE OF POWER—conclud'd

Unallowable irrevocable pledge. The general assembly has no power to render its enactment irrevocable and unrepealable by a future general assembly, even in an enactment which has been approved under the constitution by a direct vote of the people. So held where the act sought to irrevocably pledge certain indirect taxes to the payment of state bonds.

State v Council, 207-923; 223 NW 737

Interest on public deposits—power to divert. The general assembly has ample authority to divert from the county general fund to the state sinking fund for public deposits interest accruing on deposits of public funds in the hands of the county treasurer.

Scott Co. v Johnson, 209-213; 222 NW 378

Qualifications for office sufficiently set out in statute. The soldiers preference law is not unconstitutional for failure to provide standards of qualifications for office when it requires that the applicant be an honorably discharged soldier, that he be a citizen and a resident of the place of appointment, and that his qualifications be equal with those of the nonveteran applicant.

Maddy v City Council, 226-941; 285 NW 208

Legislative regulation—soldiers preference appointments. The soldiers preference law cannot be objected to on the grounds that it deprives the city of self-government when the powers of the municipality are derived solely from the legislature which has power under the constitution and under statute to prescribe rules governing municipalities.

Maddy v City Council, 226-941; 285 NW 208

II DELEGATION OF LEGISLATIVE POWER

Delegation and usurpation of legislative authority. See also §1 under "Of the Distribution of Powers" in this Article.

Discussion. See 22 ILR 684—Administrative commissions

Permissible agencies. The legislature may, generally speaking, choose any agency for the initiative and realization of the benefits of a public health measure.

Lausen v Board, 204-30; 214 NW 682

Legislative powers—no delegation to executive. Powers which can be exercised solely by the legislative branch of government may not be delegated to an administrative board which is a part of the executive branch of government.

Miller v Schuster, 227-1005; 289 NW 702

Nondelegation of authority. The statutory provision (§2930, C., '31) which requires the board of supervisors, under named conditions, to appropriate from the county general fund money to, and in aid of, a farm bureau organization, cannot be deemed a delegation to the said organization of the power to levy a tax on the public.

Blume v Crawford County, 217-545; 250 NW 733; 92 ALR 757

Budget act — nondelegation of legislative authority. The broad, sweeping, and apparently unguarded discretion granted by statute (§388, C., '31) to the director of the budget (now state comptroller) to grant or refuse permission to a municipality to make a transfer of its funds, does not constitute an unconstitutional grant of legislative power.

State v Manning, 220-525; 259 NW 213

Legislative power—nondelegation. The general assembly will not be deemed to delegate its legislative authority by authorizing its administrative body or board, in carrying out a law, to adopt rules and regulations which are not inconsistent with the law as the general assembly has enacted it.

Vilas v Board, 223-604; 273 NW 338

Criminal penalty in departmental rule. The mere fact that a rule or regulation of an administrative department, promulgated under valid legislative authority, imposes a criminal penalty for its violation will not invalidate it.

State v Van Trump, 224-504; 275 NW 569

Delegation of powers to executive. A statute, which delegates to the state banking board authority to determine and fix by regulation such maximum rate of interest or charges upon each class of small loans as will induce efficiently managed commercial capital to enter such business in sufficient amounts to make available adequate credit facilities to persons without the security usually required by commercial banks, is not an invalid delegation of legislative power because the standards fixed by the legislature are sufficiently definite and carefully defined to warrant conferring on such board the power to adopt rules and regulations and give effect to the legislative policy.

Miller v Schuster, 227-1005; 289 NW 702

Unallowable delegation. The general assembly cannot, for the protection of the highways or for the safety of the traffic thereon, constitutionally delegate to the state highway commission power to adopt rules and regulations which shall have the force and effect of law.

Goodlove v Logan, 217-98; 251 NW 39

Delegation of legislative power. The legislature has no constitutional right to delegate to an administrative department, e. g., the conservation commission, the strictly and exclusively legislative power to formulate a policy and make regulations restricting angling. It may, however, make such declaration of policy, definitely describing the subject, the field, and the character of regulations intended to be imposed and leave to the depart-

ment the manner in which that policy shall apply.

State v Van Trump, 224-504; 275 NW 569
See Goodlove v Logan, 217-98; 251 NW 39

Sales tax rule for undertakers—reasonableness. Rule 49 of the board of assessment and review, applying to sales tax collectible from undertakers, is clearly reasonable and valid, being promulgated under proper legislative authority and containing alternate methods of computing the tax to fit varying methods of conducting such business.

Kistner v Board, 225-404; 280 NW 587

III JUDICIAL REVIEW OF LEGISLATIVE ACTION

Constitutionality of laws. See also under Art XII, §1

Determination of constitutional question only when necessary. The supreme court will not pass upon the constitutionality of a statute unless it is necessary to do so in the determination of a given case.

State v Dunley, 227-1085; 290 NW 41

Ambiguous statute — conditions existing — occasion and necessity of statute considered. Where language of statute is ambiguous, it is proper to consider conditions with reference to subject matter that existed when statute was adopted, occasion and necessity for statute, and causes which induced its enactment.

Jones v Dunkelberg, (NOR); 260 NW 717

Statutes—duty of court to make effective. It is the duty of the court in construing statutes to seek the object and purpose of the law and then give it force and effect if not contrary to established legal precedents.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

Sessions. SEC. 2.

Powers at extra session. See under Art IV, §11, Vol I

Representatives. SEC. 3.

Atty. Gen. Opinions. See '25-26 AG Op 482; '36 AG Op 368

Senators—qualifications. SEC. 5.

Atty. Gen. Opinion. See '36 AG Op 368

Officers—elections determined. SEC. 7.

Atty. Gen. Opinions. See '28 AG Op 41; '34 AG Op 394, 616

Protest—record of vote. SEC. 10.

Atty. Gen. Opinion. See '36 AG Op 111

Vacancies. SEC. 12.

Atty. Gen. Opinions. See '25-26 AG Op 482; '34 AG Op 66, 121

Bills. SEC. 15.

Evidence of passage of bill. See under Art III, §17

Discussion. See 21 ILR 79, 538, 573—Judicial determination of due enactment

Atty. Gen. Opinion. See '36 AG Op 142

Enrollment of bill conclusive. The enrollment of a legislative bill and the due authentication of such enrollment by the signatures of the speaker of the house, president of the senate, and governor, constitute an unimpeachable attestation of what the legislative department has done.

Davidson v Mulock, 212-730; 235 NW 45

Presumption. An enrolled act which carries the signatures required by the constitution is presumed to have become a law, pursuant to the requirements of the constitution.

Dayton v Ins. Co., 202-753; 210 NW 945

Passage of bills. SEC. 17.

Atty. Gen. Opinions. See '30 AG Op 50, 52; '36 AG Op 38, 139; AG Op Aug. 4, '39

Fatally deficient journal entries. The mandatory constitutional requirement that a bill shall, in each house, be put on passage by a yea and nay vote, and such vote entered on the journal, is not shown to have been complied with by a journal which simply shows the adoption by a yea and nay vote of a conference report proposing certain amendments to the bill.

Smith v Thompson, 219-888; 258 NW 190

Readings and entry of vote. Legislative record reviewed and held to reveal full compliance with the constitutional requirements in re reading of the bill and the entry of the yeas and nays.

Witmer v Polk County, 222-1075; 270 NW 323

Adoption by house of senate amendments. The due passage of a bill by the house, and the amendment and due passage of the same bill by the senate, and the due concurrence of the house in said senate amendments, reveal a constitutional passage by the general assembly of the bill.

State v Woodbury Co., 222-488; 269 NW 449

Adoption of conference report—effect. When the general assembly is in deadlock over the final form and contents of a bill, the due adoption by both houses of the report of a joint conference committee and of the amendments therein proposed as an adjustment of existing differences, terminates all necessary legislative proceedings on said bill—other than enrollment and due signing. In other words, no necessity exists for a further or additional reading and passage of the bill as modified by said newly adopted amendments, when it is made to appear that, prior to the time said differences arose, each house had duly passed

the bill immediately following the last reading thereof in said houses.

[The conference report and amendments therein proposed were adopted by a yea and nay vote equal to that constitutionally required for the passage of a bill and said vote was duly entered on the journals of each house.]

Scott v Board, 221-1060; 267 NW 111
State v Arluno, 222-1; 268 NW 179
Brown v West, 222-331; 268 NW 525

Enrollment — when conclusive — when not conclusive. The text of the official enrollment of a legislative act will be treated by the courts as an absolute verity, but the courts will go behind such enrollment on the question whether the house or senate complied with the mandatory constitutional requirement that the bill be put on passage by a yea and nay vote and such vote be entered on the legislative journal.

Smith v Thompson, 219-888; 258 NW 190

Nonconclusiveness of enrollment. Principle reaffirmed that the enrollment of a bill is not conclusive that constitutional requirements have been complied with in its passage.

Scott v Board, 221-1060; 267 NW 111

Constitutional enactment—sufficiency. The statute regulating the small loan business is not invalid on ground that in its enactment the legislature failed to comply with mandatory provisions of the constitution.

Miller v Schuster, 227-1005; 289 NW 702

Impeachment. SEC. 19.

Atty. Gen. Opinion. See '32 AG Op 215

Officers subject to impeachment — judgment. SEC. 20.

Atty. Gen. Opinions. See '32 AG Op 215, '34 AG Op 616

Nonimpeachable officer. The commissioner of insurance, being only an appointive, ministerial agency of the executive department of the state is not an impeachable officer.

Clark v Herring, 221-1224; 260 NW 436

Members not appointed to office. SEC. 21.

Atty. Gen. Opinions. See '25-26 AG Op 40, 280, '28 AG Op 382; '34 AG Op 313, 490

Appropriations. SEC. 24.

State comptroller—money payable by appropriation only. State disbursing officer is bound by the constitutional provision that no money shall be drawn from the treasury but in consequence of appropriations made by law.

O'Connor v Murtagh, 225-782; 281 NW 455

Compensation of members. SEC. 25.

Atty. Gen. Opinions. See '34 AG Op 73, 102, 616; '36 AG Op 645

Constitutional basis. The compensation of the lieutenant governor and members of the general assembly cannot be constitutionally fixed on any basis except on the basis of "per diem and mileage".

Gallarno v Long, 214-805; 243 NW 719

Reimbursement for personal expenses. The legislature cannot constitutionally reimburse its members or the lieutenant governor for an expense incurred by said officers unless said expense is a governmental or legislative expense—an expense necessary to enable said officers to perform their duties.

Gallarno v Long, 214-805; 243 NW 719

Time laws to take effect. SEC. 26.

Atty. Gen. Opinions. See '36 AG Op 142, 479

Existing but noneffective statute—effect. A city, in acquiring jurisdiction to construct a public improvement, need only comply with existing effective statutes. In other words, it need not comply with a statute which then exists, but which has not yet taken effect.

Butters v City, 202-30; 209 NW 401

Acts of special session. Acts of a special session of the general assembly, in the absence of any contrary direction therein, take effect ninety days after final adjournment, the time being computed on the basis of excluding the day of adjournment and including the ninetieth day.

Clingingsmith v Dairy Co., 202-773; 211 NW 413
Danbury v Riedmiller, 208-879; 226 NW 159

Lotteries. SEC. 28.

Atty. Gen. Opinions. See '25-26 AG Op 226; '34 AG Op 741; '36 AG Op 19, 544; AG Op Jan. 9, '39

Consideration for chance—indispensable element. A scheme for the distribution, by lot or chance, of valuable prizes does not constitute a lottery when the recipient of the prize neither pays nor hazards anything of value for the chance to obtain said prize. And it is quite immaterial that the donor of such prizes expects such distribution of prizes will work a financial betterment of his business.

State v Hundling, 220-1369; 264 NW 608; 103 ALR 861

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

Atty. Gen. Opinions. See '25-26 AG Op 213, 215; '34 AG Op 649, 704; '36 AG Op 682

ANALYSIS

I SUBJECT MATTER OF ACTS
II TITLES OF ACTS

I SUBJECT MATTER OF ACTS

Presumption of constitutionality—strong case to invalidate. In passing upon constitutionality of acts of the legislature a presumption exists in favor of constitutionality, and an act will be invalidated only when it is clearly, plainly, and palpably unconstitutional, and it is the duty of the courts to give such a construction to an act that, if possible, this necessity is avoided and the act upheld.

State v Talerico, 227-1315; 290 NW 660

Unity of object. A statute which simply fixes the vote sufficient to authorize the issuance of bonds cannot be said to contain more than one subject.

Waugh v Shirer, 216-468; 249 NW 246

Multifarious provisions with unity of object. A legislative title which expresses a general and outstanding legislative object justifies the inclusion in the act itself of any number of provisions, howsoever multifarious, which have a unity of object in accord with that expressed in the title.

Davidson Co. v Mulock, 212-730; 235 NW 45

Nonduality in subject matter. Neither is the title of an act nor the act itself dual in subject matter in a constitutional sense:

1. When the title declares a purpose, (a) to amend a section of an existing statutory chapter governing the acquisition by cities and towns of named public utilities, (b) to provide additional methods of paying for said plants, and (c) outlines in a general way said proposed additional methods; and,
2. When the text of the act follows the title with congruous provisions.

Iowa-Neb. Co. v Villisca, 220-238; 261 NW 423

Joining germane matters. The constitutional requirement that a legislative act "shall embrace but one subject and matters properly connected therewith" is not violated by an act (1) authorizing different offenses to be charged in the same indictment, and (2) regulating peremptory challenges under such charge, the latter being germane to the former.

State v Miller, 217-1283; 252 NW 121

Amendment, revision, and codification. In the amendment, revision, and codification of the statutes which resulted in the Code of 1924, a reference in the code revision acts to a section number of the compiled code or of the supplements thereto effected the same result as tho the reference had been to the corresponding official section number of the statute as it existed when it was carried into the compiled code or supplements.

Rains v Bank, 201-140; 206 NW 821

Amendment, revision, and codification. The amendment, revision, and codification of a section of the Compiled Code of 1919 "to read as follows" worked an effectual repeal of the same section as it appeared in the Code of 1897.

Dayton v Ins. Co., 202-753; 210 NW 945

II TITLES OF ACTS

Construction. Legislative acts must be construed consistently with their titles. Nor can they be given any broader scope than their titles.

Siegel v Railway, 201-712; 208 NW 78

Liberal construction for constitutionality. The decisions involving the sufficiency of titles to legislative enactments lay down certain general rules. It is held the constitution should be liberally construed so as to embrace all matters reasonably connected with the title and which are not incongruous, unconnected, or unrelated thereto.

State v Talerico, 227-1315; 290 NW 660

Title embracing one subject—rules for determination. Constitutional provision that title to legislative acts shall embrace but one subject and matters connected therewith was designed to prevent surprise in legislation, but the title need not be an index or epitome of the act or its details. The subject of the bill need not be specifically or exactly expressed in the title, nor is it necessary that each thought or step toward the accomplishment of object be embodied in a separate act, nor is it important that it contains matters usually expressed in separate acts when they are germane to the general subject.

State v Talerico, 227-1315; 290 NW 660

Legislative intent expressed in enactments. The act of placing a section under a particular chapter of the code and the wording of the headings of the section, have little, if any, weight as official interpretations.

State v Oge, 227-1094; 290 NW 1

Amendment, revision, and codification. A bill for "an act to amend, revise, and codify" enumerated sections of law embracing the former law governing the requisites and sufficiency of indictments, furnishes a sufficient title to support what is now known as the short form indictment act.

State v Henderson, 215-276; 243 NW 289

Simmer law—bond statutes not included.

Weiss v Woodbine, 228- ; 289 NW 469

Short form indictment act. An act to amend, revise and codify specifically named sections of law "relating to the form, contents, and sufficiency of indictments, and to provide for bills of particulars in aid of indictments", is a perfectly good title to the act commonly known as the short form indictment act.

State v Engler, 217-138; 251 NW 88

II TITLES OF ACTS—continued

Title omnibus in form. A title which declares a purpose to amend a multitude of specifically named sections of the statutes which are described as "all relating to statutory salaries and compensation of state, county and city officers" complies with the constitutional requirement that an act shall embrace "but one subject".

Smith v Thompson, 219-888; 258 NW 190

Sufficiency of title. A title which recites that the act "creates a park board in cities having a population of 125,000 or more" sufficiently indicates that the act is designed to apply to cities subsequently acquiring the required population.

State v Darling, 216-553; 246 NW 390; 88 ALR 218

Different but related matters. This section is not violated by the title preceding §9253, C., '31, to wit: "Action by creditor", even tho said section does provide for action by three different parties, viz: action by an assignee, action by a receiver, and action by a creditor.

Andrew v Bank, 216-244; 249 NW 377

Title amendatory of existing section. A title to a legislative act which declares a purpose to amend a named section of existing school law "relating to attaching and detaching territory to and from adjoining corporations", justifies the inclusion in the act of provisions for a new and additional plan for attaching and detaching territory.

Rural Sch. Dist. v McCracken, 212-1114; 233 NW 147

Title—dual subject matter. A legislative act which is supported by a title which declares a purpose to amend a named section "relating to receivership of banks" is not subject to the vice of containing more than one subject matter because the said amendatory act impliedly works a repeal of another section of law which gave to the state, in case a receiver was appointed for a bank in which it was a depositor, the preferential right to be paid in full prior to other depositors.

Leach v Bank, 205-1154; 213 NW 517

Dual subjects. An act "relating to procedure in the supreme court and qualifications for admission to the bar" does not embrace two subjects, the latter enumeration being by statute embraced in the former.

Rains v Bank, 201-140; 206 NW 821
Dayton v Ins. Co., 202-753; 210 NW 945

Sufficiency—keeping liquor where beer is sold. Section 1921.126, C., '39, forbidding the keeping of intoxicating liquor where beer is sold, is not unconstitutional as violating constitutional provision requiring that the title of every legislative act embrace but one subject, since such subject is germane to an act relating to the sale of 4 percent beer.

State v Talerico, 227-1315; 290 NW 660

Noncompliance with title. The fact that the text of an act contains no repeal or amendments of certain statutory sections which the title declares a purpose to amend or repeal, does not invalidate the act.

Smith v Thompson, 219-888; 258 NW 190

Subject not embraced in title. When the general assembly sees fit specifically to enumerate in the title to an act the particular sections of the statutes which it proposes to repeal or amend, in order to effect a readjustment or reduction in the salaries of state, county and city officers, it may not constitutionally insert in the act a reduction in the salary of officers whose salaries are fixed by sections not so specifically enumerated in the title.

Smith v Thompson, 219-888; 258 NW 190

Act in excess of title—effect. A legislative act entitled "An act to provide a method whereby assessment life associations may be reincorporated as legal reserve life insurance companies", is void insofar as said act assumes to cover an additional subject matter not mentioned or referred to in the title, e. g., provisions prohibiting designated insurance companies or associations from writing life insurance on the assessment plan.

National Assn. v Murphy, 222-98; 269 NW 15

Co-operative selling agencies. An act "to provide for the organization of associations without capital stock and not for pecuniary profit" is broad enough to justify the inclusion of a provision (1) authorizing a co-operative selling association to require its members to sell all or a stipulated part of their products through the association, (2) providing for the form of the contract in such cases, and (3) empowering the association to provide for and collect liquidated damages for a violation of such contract.

Co-operative Assn. v Weir, 200-1293; 206 NW 297

Titles of acts—"to suppress" obscene literature—criminal penalty not intimated. The title, "An act to 'suppress' obscene literature," fails to intimate that a criminal penalty was provided for a violation.

State v Chenoweth, 226-217; 284 NW 110

Incongruous matter. A provision for the suspension of the license of a physician because of a conviction of a violation of the federal statutes relating to narcotics cannot be validly enacted under a title which professes "to amend, revise, and codify" certain statutes "relating to the sale and transportation of intoxicating liquors under permits".

In re Breen, 207-65; 222 NW 426

Incongruous matter. A title which gives notice of the creation of the office of state budget director and provides for a state and local budget, for the examination of public accounts, and for review of public contracts and bonds, is not broad enough to justify the inclusion of a provision creating a new fund and power in local municipalities to levy a tax for such fund.

Chi. RI Ry. v Streepy, 207-851; 224 NW 41

Legalization of invalid tax levy. A title, "An act to legalize any and all tax levies heretofore made and collected" supports the legalization of "All taxes heretofore assessed, levied or collected", when the intent of the legislature will be carried out by construing "made and collected" as "made or collected".

Chi. RI Ry. v Rosenbaum, 212-227; 231 NW 646

Legalization of invalid tax. The legislature may validly legalize a levy of taxes made under a supposedly legal statute which, however, was invalid because its title was constitutionally insufficient.

Chicago, RI Ry. v Rosenbaum, 212-227; 231 NW 646

Nonretroactive tax. The legalization of a tax levy made by a county under an optional and supposedly legal statute, which, however, was in fact originally invalid because of a fatal defect in the title, does not constitute a levying by the general assembly of a retroactive tax on the county.

Chicago, RI Ry. v Rosenbaum, 212-227; 231 NW 646

Nonreference to tax. A tax may validly be authorized by an act even tho no mention of a tax be made in the title, if the tax is fairly calculated to effect the object covered by the title.

Fevold v Board, 202-1019; 210 NW 139

Nonreference to chapter amended. The provisions of the so-called "Public Bidder Law" (46 GA, ch 83; §7255.1 et seq., §10260.1 et seq., C., '39) were properly classified in the title to the act as "relating to taxes and the collection thereof" without any reference in the title to Ch 449 of the Code, tho the act itself did make reference to and did effect some change in said chapter.

Witmer v Polk County, 222-1075; 270 NW 323

Local or special laws—general and uniform—boundaries of counties. SEC. 30.

Discussion. See 21 ILR 93—Classification for taxation; 21 ILR 147—Double taxation; 22 ILR 736—Legislation favoring economic groups

ANALYSIS

Uniform operation. See also under Art I, §6

I GENERAL AND SPECIAL LAWS DISTINGUISHED

Constitutional uniformity. A statute which applies equally to all of a specifically described class is constitutionally uniform.

Loftus v Dept., 211-566; 232 NW 412

Uniform operation. This section is not violated by the bovine tuberculosis act because it operates through the medium of county testing units.

Fevold v Board, 202-1019; 210 NW 139

Applicability to all under same conditions. A statute which provides the appellate procedure for all property owners who claim to be overassessed, is manifestly not lacking in constitutional uniformity.

Davidson v Mulock, 212-730; 235 NW 45

Bond election. A statute requiring a favorable vote equal to 60 percent of all the votes cast for and against a proposal to issue bonds, in lieu of former provisions requiring a majority vote only, is not violative of the constitutional prohibition against nonuniformity of operation.

Waugh v Shirer, 216-468; 249 NW 246

Class legislation—venue. The legislature may validly classify the subject of insurance into (1) life insurance and (2) nonlife insurance, and validly enact that actions to recover assessments under nonlife insurance contracts shall be brought in the county of the defendant's residence, without applying the same statutory rule to life insurance companies.

Midwest Ins. v DeHoet, 208-49; 222 NW 548

Municipal utilities—discrimination against privately owned plants. Statutory authority to municipalities to erect, in their proprietary capacity, electric light and power plants, and to pay the entire initial cost thereof from the net profits of said plants, and to this end to fix such rates as will effect such payment, is not void as an unconstitutional discrimination against privately owned plants of the same kind.

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

Discrimination as to defense to action. The statute (§8401, C., '27) prohibiting the defensive plea of want of legal incorporation to collateral actions by or against an acting corporation, is not unconstitutional on the ground that it is arbitrary and discriminatory.

First T&S Co. v U.S. Gyp. Co., 211-1019; 233 NW 137; 73 ALR 1196

I GENERAL AND SPECIAL LAWS DISTINGUISHED—concluded

Permit to sell cigarettes—discretion. The cigarette permit act which provides that certain governmental bodies "may" grant permits for the sale of cigarettes (§1557, C., '31) arms said bodies with power to exercise at least a legal discretion to grant or refuse a permit. For example, a city council may, in the interest of the public as it may view the matter, validly fix the maximum number of permits that will be issued, and may refuse to issue more, and in so refusing it may not be said that the council acts arbitrarily, capriciously, or discriminatively.

Ford Hopkins v City, 216-1286; 248 NW 668

Arbitrary classification. An ordinance which provides safety regulations over tanks wherein inflammable oils are stored for sale, is null and void when in the same municipality there are large numbers of other tanks identical with those embraced in the ordinance and used for the same purpose except the stored oil is not for sale.

Edwards & B. v City, 213-1027; 240 NW 711

Governmental functions—nonliability in performance. The statutory-prescribed rules of the state governing aerial navigation (§8338-c7, C., '35 [§8338.20, C., '39]) have no application to the state in its sovereign capacity, nor to its governmental agencies, nor to the officials of said agencies when exclusively engaged in performing the duties of said agencies.

De Votie v Cameron, 221-354; 265 NW 637

II INCORPORATION OF CITIES AND TOWNS

No annotations in this volume

III CLASSIFICATION OF CITIES AND TOWNS

No annotations in this volume

IV TAXATION

Assessment—discrimination. No unallowable discrimination is worked by a statute which, in the assessment of the stock of an incorporated bank, authorizes a deduction for certain liabilities and does not allow such deduction in the assessment of the bank assets of a private banker.

Mannings Bk. v Armstrong, 204-512; 211 NW 485

Collection—special method—when followed. A special statutory method for collecting a special tax must be followed, but in the absence of such method, the right which inheres in sovereignty to enforce collection of taxes would apply.

State v National Ins., 223-1301; 275 NW 26

Income tax—power to classify. The legislature had the power, in enacting the income tax act, to classify the residents of this state according to their income.

Vilas v Board, 223-604; 273 NW 338

Allowable classifications—not special. The general assembly in the enactment of the chain store tax act (46 GA, ch 75; C., '35, ch 329-G1 [C., '39, ch 329.5]) did not go beyond its concededly broad power to classify:

1. By classifying chain stores, generally, as proper subjects for an occupational tax.
2. By classifying certain of said stores as not subject to said tax.
3. By classifying the taxpaying stores into groups of ten or multiples thereof and graduating the tax progressively on each group—it appearing that none of said classifications were arbitrary—that the reason for each was manifest or reasonably discernible—that all owners of chain stores similarly situated were treated alike.

Tolerton et al v Board, 222-908; 270 NW 427

Permissible classification. The motor vehicle carrier taxation act is not clearly, plainly, and palpably arbitrary, unreasonable, and unlawfully discriminatory because it provides that those who shall pay the tax shall be those only who operate motor vehicles not upon fixed rails, and as common carriers of freight and passengers, over regular routes, on scheduled trips and between fixed termini.

Iowa Motor v Board, 207-461; 221 NW 364; 75 ALR 1

Ruling of federal court—conclusiveness. The chain store tax act (46 GA, ch 75; C., '35, ch 329-G1 [C., '39, ch 329.5]) is in violation of the equal protection clause of the federal constitution insofar as it attempts to levy an annual tax solely on the basis of the gross receipts of said stores, such being the holding of the federal supreme court and such holding necessarily being conclusive on the courts of this state.

Tolerton et al v Board, 222-908; 270 NW 427

Assessment at less than actual value—justification. Tho the statute directs property to be assessed at its actual value, it should not be so assessed if other property of a like or similar kind in the same assessment district is assessed at less than its actual value.

Talbott v Des Moines, 218-1397; 257 NW 393

V VALIDITY OF CERTAIN TAX LAWS

Itinerant drug vendor act. The statutes requiring a license of an itinerant vendor of drugs (§§3148, 3149, C., '31) are not discriminatory, do not effect double taxation, are not class legislation, were not enacted for any effect on trade or to remove competition, and are of uniform operation.

State v Logsdon, 215-1297; 248 NW 4

VI LEGALIZING ACTS

Legalizing acts as retrospective legislation. See under Art I, §21

Allowable "local and special" legalizing act. The general assembly has plenary constitutional power to validate, by a strictly local and special act, the proceedings under which a municipal electric light and power plant (payable from plant earnings) has been constructed and placed in operation—it appearing that the contract under which said proceedings were had, had been judicially declared void because said contract was not let on competitive bids as mandatorily required by statute—the constitution ex vi termini clearly recognizing the inapplicability of a general validating act to meet such a situation.

Iowa E. L. & P. Co. v Grand Junction, 221-441; 264 NW 84

Class legislation—legalization of tax levies. The legalization of all taxes "heretofore assessed, levied and collected by any municipality" is not a local or special law without uniform operation throughout the state.

Chicago RI Ry. v Rosenbaum, 212-227; 231 NW 646

Void municipal warrants. A legalizing act purporting to legalize specified void municipal warrants then in litigation, but which act was held in said litigation inapplicable to said warrants because of a proviso in said act that it should not affect pending litigation, is not subject to the construction in later litigation that the act is applicable to the extent of legalizing the contract under which said former warrants were issued even tho the warrants were not legalized.

Roland Co. v Carlisle (Town), 215-82; 244 NW 707

VII SPECIAL LAWS

Special act—what is not. A legislative act which first makes a permissible classification of those who must pay the tax (one not arbitrary, unreasonable, and unlawfully discriminatory) and then provides that the resulting tax shall, inter alia, be used for the maintenance and repair of certain public highways, is not a "special law for road purposes".

Iowa Motor v Board, 207-461; 221 NW 364; 75 ALR 1

General and local acts contrasted. Assuming that a supportable reason exists for classifying on the basis of population, a statute applicable to cities "now or hereafter having a population of" a named number, cannot be deemed "a local or special law" even tho when enacted it can apply to only one city, and even tho the creation of the official machinery for putting the act into effect in cities thereafter attaining said population is only implied.

State v Darling, 216-553; 246 NW 390; 88 ALR 218

Highway legislation. The constitutional provision that local or special laws for laying out, opening, and working highways shall not be passed, applies solely to ordinary legislation,—has no application to an act submitted to the electorate and designed to effect an improvement of specified state primary highways.

State v Council, 207-923; 223 NW 737

Extra compensation — payment of claims. SEC. 31.

Atty. Gen. Opinions. See '30 AG Op 52; '34 AG Op 734; '36 AG Op 139, 548; '38 AG Op 461

Additional compensation after performance of contract—prohibition. Section 31, Const., Art. III, is a limitation upon the general assembly and upon every city council, and the final clause thereof conditionally withdraws the said limitation only as to particular claims pending before the general assembly, but grants no authority to the general assembly to legislate generally on the subject matter of a bonus or its equivalent for services after the services are performed.

Love v Des Moines, 210-90; 230 NW 373

Illegal reimbursement of contractor for loss. A municipal corporation has no legal authority, and can be given no constitutional legal authority, to pay or contract to pay its contractor, after performance of a contract and after settlement therefor, an added sum to reimburse the contractor for loss sustained by him because the federal government commandeered him and his equipment as a war measure, and thereby delayed the performance of the contract in question.

Love v Des Moines, 210-90; 230 NW 373

Senators—number—method of apportionment. SEC. 34.

Atty. Gen. Opinion. See '30 AG Op 50

ARTICLE IV

EXECUTIVE DEPARTMENT

Governor. SECTION 1.

Delegation of power generally. See under Art III, §1 (first)

Atty. Gen. Opinion. See '36 AG Op 508

Constitutional power to remove officer.

Myers v United States, 272 US 52

Good cause for continuing tax sale—economic emergency—governor's proclamation. Good cause for continuing a tax sale is shown by the governor's proclamation of the existence of a great economic emergency also recognized by the legislative and judicial branches of the government.

Freemyer v Taylor Co., 224-401; 275 NW 718

Social welfare board—duties in re old-age benefits—executive functions. .

Schneberger v Board, 228- ; 291 NW 859

Duties of governor. SEC. 8.

Atty. Gen. Opinion. See '36 AG Op 508

Execution of laws. SEC. 9.

Atty. Gen. Opinion. See '36 AG Op 508

Vacancies. SEC. 10.

Atty. Gen. Opinions. See '34 AG Op 616; '38 AG Op 222, 616

Vacancy—when fillable by election. The statutory provision (§1157, C., '31) that if a vacancy occurs in an elective state office thirty days prior to a general election the vacancy shall be filled at said election, in legal effect prohibits the filling of such vacancy at said election when the vacancy occurs less than thirty days prior to said election.

State v Claussen, 216-1079; 250 NW 195

Term — compensation of lieutenant governor. SEC. 15.

Governmental powers — legislators — reimbursement for personal expenses. The legislature cannot constitutionally reimburse its members or the lieutenant governor for an expense incurred by said officers unless said expense is a governmental or legislative expense—an expense necessary to enable said officers to perform their duties.

Gallarno v Long, 214-805; 243 NW 719

Basis for compensation. The compensation of the lieutenant governor and members of the general assembly cannot be constitutionally fixed on any basis except on the basis of "per diem and mileage". It follows that one general assembly may not increase the compensation of future members by reimbursing them for their personal living expenses incurred while in attendance at a session of the legislature.

Gallarno v Long, 214-805; 243 NW 719

Pardons — reprieves — commutations. SEC. 16.

Atty. Gen. Opinions. See '28 AG Op 236; '34 AG Op 180, 372, 616; '36 AG Op 417; '38 AG Op 334

Unlawful suspension. The court has no power, in a criminal case, to enter a suspension of sentence during good behavior, and on payment of the costs.

State v Hamilton, 206-414; 220 NW 313

Lieutenant governor to act as governor. SEC. 17.

Atty. Gen. Opinion. See '38 AG Op 41

President of senate. SEC. 18.

Atty. Gen. Opinion. See '30 AG Op 50

Seal of state. SEC. 20.

Atty. Gen. Opinion. See '38 AG Op 470

Grants and commissions. SEC. 21.

Atty. Gen. Opinion. See '38 AG Op 146

Secretary—auditor—treasurer. SEC. 22.

Atty. Gen. Opinion. See '32 AG Op 216

ARTICLE V

JUDICIAL DEPARTMENT

Courts. SECTION 1.

Delegation of judicial authority. See under Art III, §1 (IV) (first)

Power of courts to pass on constitutionality. See under Art XII, §1

Discussion. See 16 ILR 337—Research in administration of justice

Atty. Gen. Opinion. See '36 AG Op 395

Attorney—disbarment by special court—constitutionality. The act of the supreme court in appointing three district court judges as a special court to hear and determine disbarment proceedings against an attorney is necessarily a holding that the statute providing for such appointment is constitutional.

In re Cloud, 217-3; 250 NW 160

Disbarment proceedings—special court. The legislature has ample constitutional power to create a special court to hear and determine disbarment proceedings against an attorney, and the fact that said special court is composed of three district court judges appointed by the supreme court does not constitute an attempt by the legislature to create a district court of three judges in violation of §5, Art. V, of the constitution.

In re Cloud, 217-3; 250 NW 160

Nonusurpation of authority. The supreme court usurps no legislative function when it declares and determines the legislative intent of a statute.

Galvin v Citizens Bank, 217-494; 250 NW 729

Supreme court—no encroachment on legislative function. Supreme court may not write into a statute words that are not there.

Mathewson v Board, 226-61; 283 NW 256

Legalizing act noninvasion of judiciary. The validation by the legislative department of a municipal contract which the judicial department has invalidated, because of noncompliance with statutory requirements, does not constitute an unconstitutional invasion of the powers of the judiciary.

Iowa E. L. & P. Co. v Grand Junction, 221-441; 264 NW 84

Jurisdiction of supreme court. SEC. 4.

ANALYSIS

I LAW AND EQUITY IN GENERAL
II EQUITY JURISDICTION
III LAW JURISDICTION
IV APPEAL IN GENERAL
V SUPERVISORY AND IMPLIED POWERS

I LAW AND EQUITY IN GENERAL

Methods of trial on appeal. See under §§11431, 11433

"Jurisdiction" defined. Jurisdiction means the power of a court to take cognizance of and to decide a case and carry its judgment and decree into execution.

Western Grocer v Glenn, 226-1374; 286 NW 441

Without original jurisdiction. The supreme court has no original jurisdiction.

School Dist. v Samuelson, 220-170; 262 NW 169

II EQUITY JURISDICTION

Equitable action — insufficient record. A quite manifest duty rests on appellant in an equitable action to present the record with such affirmative fullness as will enable the appellate court to intelligently try the cause de novo.

Northrup v Mikkleson, 222-1046; 270 NW 401

Treating improperly stricken plea as in record. Upon appeal in an equity cause, the court, upon discovering from the record that the cause of action is barred by the statute of limitation, will treat an improperly stricken plea of such statute as still in the record, and enter judgment accordingly.

Lawrence v Melvin, 202-866; 211 NW 410

Equitable proceedings—trial de novo. An action which plaintiff denominates when commenced as "In equity", and which is fully tried "In equity" without objection or effort to transfer to law, will, on appeal by defendant, be treated as "In equity" and tried de novo, without assignment of error.

Bates v Seeds, 223-70; 272 NW 515

Limited appeal in equity limits de novo hearing. The de novo hearing on appeal in an equitable action is necessarily limited to the particular part of the decree from which the appeal is taken; and, under such an appeal, appellee cannot have a de novo hearing on some other part of the decree unless he perfects a cross-appeal.

Brutsche v Coon Rapids, 220-1295; 264 NW 696

Trial de novo—custody of child. An appeal in habeas corpus proceedings involving the custody and best welfare of a child, necessarily and unavoidably gravitates to a review de novo; obviously such review is proper when distinctly equitable issues are involved.

Jensen v Sorenson, 211-354; 233 NW 717

De novo hearing regardless of decretal recitals of fact. A recital in a mortgage foreclosure decree that of two defensive pleas one had been established, and one had not been established, does not prevent the appellate court on review de novo from adjudging that both said defensive pleas have been established, even tho the prevailing party—the appellee—does not assume to appeal from the one adverse court finding of fact against him.

Northwest Ins. v Blohm, 212-89; 234 NW 268

Habeas corpus proceedings—custody of child. An appeal in habeas corpus proceedings—a law action—involving the custody and best welfare of a child necessarily and unavoidably gravitates to a review de novo.

Adair v Clure, 218-482; 255 NW 658

Taxation—levy and assessment—board of supervisors as objectors—trial de novo. The board of supervisors as objectors to the assessment of a stockyards company may properly appeal to the supreme court from an order sustaining a motion to dismiss their appeal to the district court, and the case in the supreme court is triable de novo.

Board v Sioux City Yards, 223-1066; 274 NW 17

III LAW JURISDICTION

Law (?) or equity (?)—mutual treatment of action. An action mutually treated as a law action, from its inception in the trial court to and including its presentation on appeal, must be treated on appeal as a law action.

Garden v Ins. Co., 218-1094; 254 NW 287

Law action tried by equity procedure—errors must be assigned. Where an essentially law action to recover a money judgment is brought and recognized as such by the parties and the court, it is not, without a record entry transferring it to equity, converted to an equity action because the parties with the consent of the court use an equity procedure, and appeal therefrom will be dismissed when no errors are assigned.

Petersen v New York Ins., 225-293; 280 NW 521

Transfer from equity to law—effect. A law action, e. g., quo warranto, commenced as an equitable action and properly transferred by the court to law, will, on appeal, be disposed of as a law action.

State v Murray, 219-108; 257 NW 553

Power to require assignments of error. The supreme court has both constitutional and statutory right and power to require such adequate assignments of error in appeals in law actions as will concisely inform the appellate court and appellee of the definite action of the trial court sought to be reviewed.

Siesseger v Puth, 211-775; 234 NW 540

III LAW JURISDICTION—concluded

Final report of administrator — hearing. Hearings on final reports of administrators are not reviewed de novo in the appellate court.

In re Manning, 215-746; 244 NW 860

Fact findings in probate not triable de novo on appeal. Findings of fact by the trial court in a probate proceeding involving objections to an executor's report and payment of certain claims cannot be reviewed on appeal, such not being triable de novo.

In re Scholbrock, 224-593; 277 NW 5

Statutory punishment excessive—legislature not controlled by court. Tho punishment is believed excessive, supreme court has no power to change punishment fixed by specific enactment of legislature for third and subsequent offense of violating liquor law.

State v Erickson, 225-1261; 282 NW 728

IV APPEAL IN GENERAL

Method of trial on appeal. See §§11431, 11433
Right of appeal as due process. See under Art I, §9

Right of review—statutes govern appeal. The right of appeal, being purely statutory, is controlled by the statutes in effect at the time the judgment appealed from was rendered.

Ontjes v McNider, 224-115; 275 NW 328

Consent to jurisdiction—effect. Parties to litigation cannot, by agreement, confer jurisdiction upon the supreme court.

Hampton v Railway, 216-640; 249 NW 436

Original judgment by supreme court. The supreme court has no constitutional, statutory, implied, or inherent jurisdiction to enter an original judgment on a stay bond given by an appellee in compliance with an order of a judge of said court pending an application by appellee to the supreme court of the United States for a writ of certiorari to review a decision of the supreme court of this state.

Hoskins v Hotel, 206-932; 221 NW 442

Findings by probate court—conclusiveness. Findings of fact by a probate court are conclusive on the appellate court when they are fairly supported by competent testimony.

In re Fish, 220-1247; 264 NW 123

Findings of fact in probate. A supported finding of fact by trustees that the beneficiary of a testamentary bequest had fulfilled the conditions imposed on the payment of said bequest is conclusive on the appellate court.

In re Sams' Est., 219-374; 258 NW 682

Hearings in probate. Where the issue whether a trustee should be credited with a loss of trust funds was heard by the probate court without a jury (as a continuation of the probate proceedings out of which the trust arose) the holding of the court, granting such credit, will be sustained if the evidence pro and con would have presented a jury question had the hearing been before a jury.

In re Moylan, 219-624; 258 NW 766

Accounting and settlement. Supported findings and orders of the probate court on the hearing on the final report of a guardian are conclusive on the appellate court, the proceedings being at law.

In re Jefferson, 219-429; 257 NW 783

Accounting and settlement. An order of the probate court granting an executor credit on his final report for the amount paid by him on his own motion, on a claim against the estate, is conclusive on the appellate court if the record reveals supporting testimony as to the genuineness of the claim.

In re Plendl, 218-103; 253 NW 819

Appeal in name of deceased party. Altho plaintiff died during pendency of action below, supreme court took jurisdiction of appeal taken in name of such decedent, because parties treated cause as one properly before the court and because it was a case where court's constitutional authority could be invoked.

Bingaman v Rosenbohm, 227-655; 288 NW 900

Appeal from unrecorded order — no complaint by appellant. After the unsuccessful termination of his appeal, an appellant may not later challenge the jurisdiction of the supreme court to entertain the appeal because the order appealed from was not spread upon the district court records.

Lincoln Bank v Brown, 224-1256; 278 NW 294

Procedendo—competency as evidence. The supreme court, by virtue of its constitutional powers to issue writs necessary to the exercise of its powers, has power to provide, without the aid of a statute, for the writ of procedendo, in order to furnish the trial court with competent evidence of its final decision and of its release of jurisdiction.

State v Banning, 205-826; 218 NW 572

Dual remedies—appeal or mandatory order. Where, after reversal and remand in an equity cause, the trial court, on procedendo, enters a judgment which it has no discretion to enter, the defendant may apply directly to the appellate court for a mandatory order to the trial court to obey the procedendo, even tho defendant might accomplish the same result by appealing from the entry of said judgment.

Ronna v Bank, 215-806; 246 NW 798

Unconstitutionality must be clearly shown. Courts are reluctant to declare legislation unconstitutional, and will do so only when the violation is clear, palpable, and practically free from doubt.

Maddy v City Council, 226-941; 285 NW 208

V SUPERVISORY AND IMPLIED POWERS

Certiorari—limited jurisdiction of supreme court. Neither a judge of the supreme court, nor the court itself, has jurisdiction to issue a writ of certiorari to other than an inferior judicial tribunal. So held where the writ was inadvertently issued to the superintendent of public instruction and to a county superintendent of schools.

School Dist. v Samuelson, 220-170; 262 NW 169

Writ of prohibition—state as plaintiff. An original action in the supreme court, for a writ of prohibition directed to a district court and prohibiting further action by said latter court in private actions pending therein, may be brought in the name of the state ex rel its attorney general; especially is this true when said private actions arose out of proceedings instituted by the state through the governor thereof.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

Writs of prohibition. The supreme court has original jurisdiction, under the constitution, to issue common-law writs of prohibition; but, when the application is for a writ directed to a district court and commanding it to discontinue further jurisdiction over named actions pending in said lower court, the supreme court must act solely on the established facts as revealed in the proceedings in said district court, and, if material disputed issues of fact arise, the writ will be refused, as the supreme court has no power to take testimony on disputed questions of fact dehors said district court records.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

District court and judge. SEC. 5.

Atty. Gen. Opinions. See '34 AG Op 616; '38 AG Op 739

Disbarment proceedings—special court. The legislature has ample constitutional power to create a special court to hear and determine disbarment proceedings against an attorney, and the fact that said special court is composed of three district court judges appointed by the supreme court does not constitute an attempt by the legislature to create a district court of three judges in violation of §5, Const., Art. V.

In re Cloud, 217-3; 250 NW 160

Nondisqualifying interest of judge. A judge of the district court does not, by signing a petition to a city council for an election to vote on the proposition whether the city shall erect a specified public utility plant, thereby disqualify himself from fully presiding over litigation questioning the legal sufficiency of said petition.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

Jurisdiction of district court. SEC. 6.

Delegation of judicial authority. See under Art III, §1 (first); §10761

Discussion. See 20 ILR 83—Jurisdiction—Federal receiverships

Jurisdiction defined. Jurisdiction means the power of a court to take cognizance of and to decide a case and carry its judgment and decree into execution.

Western Grocer v Glenn, 226-1374; 286 NW 441

Rules of procedure—power to prescribe by order. Under the recognized rule that courts have the inherent power to prescribe such rules of practice and rules to regulate their proceedings in order to expedite the trial of cases, to keep their dockets clear, and to facilitate the administration of justice, the judges of a judicial district could adopt and enforce a general order requiring parties to cause each case to be finally determined within two years from date of filing petition and providing upon failure to comply with such order the clerk should enter upon the record, "Dismissed without prejudice for want of prosecution".

Hammon v Gilson, 227-1366; 291 NW 448

Dismissal of cases for want of prosecution—validity of general order. The fact that an order of the judges of a judicial district, requiring the parties to cause each case to be finally determined within two years from date of filing petition, was a general order applicable to all cases or proceedings pending or to come before the courts of the district did not invalidate such order.

Hammon v Gilson, 227-1366; 291 NW 448

Prosecution and termination—retention of jurisdiction—effect. In a judicial proceedings to accomplish a certain purpose, e. g., the proper and legal protection of both life tenants and remaindermen in the matter of preserving the estate for all the parties, the record retention by the court of jurisdiction over the proceedings and parties thereto, will enable the court subsequently to make valid and supplementary orders in furtherance of the said purpose.

John Hancock Ins. v Dower, 222-1377; 271 NW 193

Contempt of court—legislative limitation on punishment. While the general assembly has no power to wholly deprive a constitutionally created court of its inherent power to inflict punishment for acts which are in contempt of such court, yet it may constitutionally impose a reasonable limitation on such courts as to the punishment which may be imposed.

Eicher v Tinley, 221-293; 264 NW 591

Correction—inherent power of court. The district court is but exercising its inherent power when, on motion, it corrects by nunc pro tunc order, and regardless of the one-year limitation imposed by §12791, C., '35, the unquestionably established error of its own clerk in entering a judgment against a judgment defendant for a less amount than theretofore ordered by the court, it appearing that the judgment plaintiff had not, by laches, forfeited the right to demand such correction against the judgment defendant.

Murnan v Schuldt, 221-242; 265 NW 369

Federal appointment—effect on state courts. The mere pendency of federal receivership proceedings over a party does not necessarily oust the jurisdiction of the state courts over the party and over his property.

Lippke v Milling Co., 215-134; 244 NW 845

Federal courts—probate claims—jurisdiction from diversity of citizenship. Tho proceedings for settlement of an estate may be pending in a state court, the federal courts may on account of diversity of citizenship assume jurisdiction to determine the validity of claims against the estate.

Reconstruction F. Corp. v Dingwell, 224-1172; 278 NW 281

State and federal courts—comity—certiorari coercing state court's release of jurisdiction. The necessity for comity between state and federal courts demands that controversies shall not arise concerning their respective jurisdictional powers on account of unsubstantial considerations, and certiorari from the supreme court of Iowa will lie to require a district court of the state to relinquish jurisdiction over a probate matter after the federal court, through diversity of citizenship, has assumed jurisdiction.

Reconstruction F. Corp. v Dingwell, 224-1172; 278 NW 281

Mortgagee suing receiver—decree fixing lien on other assets in different court. Court may authorize a mortgagee's foreclosure action against the receiver in a county where the property is located, tho different from county where receivership is pending and such court, after hearing the foreclosure proceeding, has the right, where such relief is proper, not only to foreclose but to impose a lien for a deficiency judgment on the other receivership assets in the other court.

Klages v Freier, 225-586; 281 NW 145

Injunction — constitutionality. The statute authorizing injunction to restrain the practice of medicine and surgery without a license is constitutional for the reason that such practice constitutes a nuisance under the general law of the state, and chancery has, from time *immemorial, possessed jurisdiction to enjoin* nuisances; and this is true irrespective of the question whether the district court may be constitutionally vested with an equitable jurisdiction not possessed by chancery courts when the state constitution was adopted.

State v Howard, 214-60; 241 NW 682

Salaries. SEC. 9.

Discussion. See 24 ILR 89—Diminution of judicial salaries

Atty. Gen. Opinions. See '34 AG Op 102, 216

Attorney general. SEC. 12.

Atty. Gen. Opinion. See '34 AG Op 53

System of court practice. SEC. 14.

Contempt of court—legislative limitation on punishment. While the general assembly has no power to wholly deprive a constitutionally created court of its inherent power to inflict punishment for acts which are in contempt of such court, yet it may constitutionally impose a reasonable limitation on such courts as to the punishment which may be imposed.

Eicher v Tinley, 221-293; 264 NW 591
State v Baker, 222-903; 270 NW 359

ARTICLE VII

STATE DEBTS

Credit not to be loaned. SECTION 1.

Atty. Gen. Opinion. See '38 AG Op 80

Assumption of county bonds. The state may validly assume the payment of road bonds issued by counties, a county not being a corporation, within the meaning of this section.

State v Council, 207-923; 223 NW 737

Limitation. SEC. 2.

Atty. Gen. Opinion. See '34 AG Op 230

Unallowable state debt.

Hubbell v Herring, 216-728; 249 NW 430

Losses to school funds. SEC. 3.

Atty. Gen. Opinions. See '38 AG Op 104; AG Op March 16, '39

School fund mortgage—state property—permanent school fund. A school fund mortgage is state property and the state has recognized its right to maintain a permanent school fund intact and inviolate for purpose to which dedicated.

Monona County v Waples, 226-1281; 286 NW 461

School fund mortgage foreclosure—defenses. In an action to foreclose a school fund mort-

gage, where the court decreed that plaintiff made no demand nor attempt to collect the mortgage until 11 years after it became due, held, that the defendant-holder of the certificate of tax sale was charged with knowledge of plaintiff's lien, and that it was unpaid, and he could not rely on lapse of time, laches or negligence, as against the state.

Monona County v Waples, 226-1281; 286 NW 461

Tax sale — school fund mortgage — paramount. The statutes providing that where real estate is incumbered to school fund, the interest of the person holding the fee shall alone be sold for taxes, and that lien of state shall not be affected by the tax sale will be construed as meaning that lien of mortgage given to the state for land bought on credit and lien of a real estate mortgage to school fund will be paramount to a tax lien.

Monona County v Waples, 226-1281; 286 NW 461

Tax sale—school, agricultural college, or university land—construing statute—catchwords. In construing statute which provides in substance that in the sale of school, agricultural college, or university land sold on credit, which is sold for taxes, the purchaser shall acquire only the interest of the person holding the fee and that the state's lien shall not be affected by such sale, the supreme court will not construe the catchwords for such statute to show legislative intent to omit school fund mortgages, as the catchwords are no part of the law enacted and are not to be considered in construing the statute.

Monona County v Waples, 226-1281; 286 NW 461

Tax sale—school fund mortgage unpaid—purchaser charged with knowledge. Where a mortgage securing the permanent school fund is on the realty purchased at tax sale, the purchaser is charged with knowledge of the rights of the county holding such mortgage and that the debt secured by the mortgage is unpaid.

Monona County v Waples, 226-1281; 286 NW 461

Contracting debt—submission to the people. SEC. 5.

Discussion. See 12 ILR 272—Amendment of acts approved by the people; 13 ILR 293—Banking clauses in Iowa Constitution

Unallowable state debt.

Hubbell v Herring, 216-728; 249 NW 430

Direct tax — nonpermissible substitution. The general assembly has no power to pledge or to substitute indirect taxes for the direct tax required by the constitution for the payment and discharge of a state bonded indebtedness approved by the people.

State v Council, 207-923; 223 NW 737

State debt—mandatory maturity. The constitutional requirement that a state debt be paid "within twenty years from the time of the contracting thereof" means, when the total debt is divided into installments, within twenty years from the contracting of the first installment of the debt.

State v Council, 207-923; 223 NW 737

Legislature may repeal. SEC. 6.

Atty. Gen. Opinion. See AG Op Aug. 4, '39

Tax imposed distinctly stated. SEC. 7.

Uniformity of taxation. See under Art III, §30

Atty. Gen. Opinion. See '38 AG Op 902

Nonapplicability. This section applies only to a legislative enactment which in and of itself "imposes, continues or revives a tax"—not to the legalization of a tax levy already made under an optional and supposedly legal statute which was, in fact, fatally defective in its title.

Chicago RI Ry. v Rosenbaum, 212-227; 231 NW 646

License fee as nonproperty tax. A substantial charge placed by the legislature on motor trucks operated on the public highways, graduated on the weight of the load carried, conceding the same to be a tax, tho termed a "license fee", is not a property tax but a tax imposed for the privilege of using the highways as a place of business, and therefore not within the meaning of this section.

Solberg v Davenport, 211-612; 232 NW 477

Reference to other law to fix tax. Section 7005, C., '31, which provides that "moneyed capital" within the meaning of §5219 of the federal statutes shall be assessed in a named manner and at the same rate as imposed on the stock of certain banks (§7003, C., '31), does not violate the constitutional requirement that in the imposition of a tax "it shall not be sufficient to refer to any other law to fix such tax".

Ballard-Hassett Co. v Board, 215-556; 246 NW 277

ARTICLE VIII

CORPORATIONS

How created. SECTION 1.

Municipal corporations. Local or special laws for incorporation of cities and towns prohibited, see Art III, §30, Anno Vol I, and annotations thereunder

Taxation of corporations. SEC. 2.

Uniformity of taxation. See annotations under Art III, §30

Income tax—corporation provision inapplicable. The constitutional provision that "the property of all corporations for pecuniary profit, shall be subject to taxation the same as that of individuals" has no application to the state income tax act—an excise tax.

Vilas v Board, 223-604; 273 NW 338

Corporate governmental agencies—immunity from legal process and taxation. Immunity of corporate governmental agencies from suits and judicial process, and their incidents, is less readily implied than immunity from taxation.

First Tr. JSL Bank v Lehman, 225-1309; 283 NW 96

Bank stock taxed in excess of other moneyed capital—illegal and void. A tax levy on bank stock in excess of that on other moneyed capital used in competition with bank capital, held, to be a denial of equal protection, illegal and void.

Munn v D. M. Nat. Bank, 18 F 2d, 269

Bank shares—discrimination—violating constitutional rights—taxing officers acting contrary to law. The taxation of state and national bank shares at a higher rate than the shares of competing domestic corporations is violative of the equal protection clause of the 14th amendment and in excess of permission conferred by federal statute for the taxation of national bank stock.

Iowa-D. M. Nat. Bk. v Bennett, 284 US 239

Banking associations. SEC. 5.

Discussion. See 13 ILR 293—Banking clauses in Iowa Constitution

General banking law. SEC. 8.

Banking affected with public interest. Principle affirmed that the business of banking is affected with a public interest.

Priest v Whitney Co., 219-1281; 261 NW 374

Moratorium act—no interference with federal land bank as governmental agency. There was no substantial or direct interference with accomplishment of purposes for which congress created joint stock land banks, by reason of the moratorium act of the 47th GA providing for continuance of foreclosure of real estate mortgage actions.

First Tr. JSL Bank v Lehman, 225-1309; 283 NW 96

Stockholders' responsibility. SEC. 9.

Applicability. Principle reaffirmed that the above section has reference solely to banks of issue.

Leach v Bank, 203-1052; 213 NW 772

Andrew v Bank, 204-243; 213 NW 925; 56 ALR 521

Andrew v Bank, 205-42; 217 NW 431; 57 ALR 767

Superadded double liability—improper plaintiff. An insolvent bank may not maintain an action against its stockholders to enforce and collect the superadded double liability imposed by §9251, C., '27.

Home Bank v Berggren, 211-697; 234 NW 573

Credit by amount of former assessment unallowable. One who purchases corporate bank stock by paying an existing assessment thereon (and but little in addition thereto) will not be permitted, after the bank has become insolvent, to assert that said assessment was coercive as to him, and that the amount of such assessment should be credited on his "double liability."

Andrew v Bank, 211-649; 234 NW 542

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

Statutory change — constitutionality. This section and §1090, C., '73 (§8376, C., '27), are constitutional and statutory authority for legislative act authorizing the board of directors of a mutual benefit life assessment company to transform said company into a legal reserve or level premium company, even tho such transformation results in leaving the old assessment certificate holders to carry their own assessments for death losses without further addition to their membership.

Wall v Life Co., 208-1053; 223 NW 257

Sale of stock for payment of assessment—common-law or statutory right of action. As to a stockholder who acquired his stock prior to the enactment of a statute permitting the sale of stock to enforce payment of a stockholder's assessment to reimburse an impairment of the bank capital, such statute does not necessarily exclude a common-law remedy by action when not so construed by the highest state court, and such statute declaring that the stockholder shall be liable for any deficiency after applying the proceeds of such sale, and providing for its collection by suit, is not a deprivation of property without due process by impairing a contract obligation.

Shriver v Woodbine Bk., 285 US 467

ARTICLE IX

EDUCATION AND SCHOOL LANDS

1st EDUCATION

State university. SEC. 11.

Atty. Gen. Opinion. See '36 AG Op 293

2nd SCHOOL FUNDS AND SCHOOL LANDS

Control—management. SECTION 1.

Atty. Gen. Opinion. See AG Op Feb. 2, '39

Permanent fund. SEC. 2.

Atty. Gen. Opinion. See '36 AG Op 416

Perpetual support fund. SEC. 3.

Atty. Gen. Opinion. See '38 AG Op 104

School fund mortgage — state property — permanent school fund. A school fund mortgage is state property and the state has recognized its right to maintain a permanent school fund intact and inviolate for purpose to which dedicated.

Monona County v Waples, 226-1281; 286 NW 461

Tax sale — school fund mortgage — paramount. The statutes providing that where real estate is incumbered to school fund, the interest of the person holding the fee shall alone be sold for taxes, and that lien of state shall not be affected by the tax sale, will be construed as meaning that lien of mortgage given to the state for land bought on credit and lien of a real estate mortgage to school fund will be paramount to a tax lien.

Monona County v Waples, 226-1281; 286 NW 461

Tax sale—school fund mortgage unpaid—purchaser charged with knowledge. Where a mortgage securing the permanent school fund is on the realty purchased at tax sale, the purchaser is charged with knowledge of the rights of the county holding such mortgage and that the debt secured by the mortgage is unpaid.

Monona County v Waples, 226-1281; 286 NW 461

School fund mortgage foreclosure—defenses. In an action to foreclose a school fund mortgage where the court decreed that plaintiff made no demand nor attempt to collect the mortgage until eleven years after it became due, held, that the defendant-holder of the certificate of tax sale was charged with knowledge of plaintiff's lien, and that it was unpaid, and he could not rely on lapse of time, laches or negligence, as against the state.

Monona County v Waples, 226-1281; 286 NW 461

Tax sale — school, agricultural college, or university land — construing statute — catchwords. In construing statute which provides in substance that in the sale of school, agricultural college, or university land sold on credit, which is sold for taxes, the purchaser shall acquire only the interest of the person holding the fee, and that the state's lien shall not be affected by such sale, the supreme court will not construe the catchwords for such statute to show legislative intent to omit school fund mortgages, as the catchwords are no part of the law enacted and are not to be considered in construing the statute.

Monona County v Waples, 226-1281; 286 NW 461

Fines—how appropriated. SEC. 4.

Atty. Gen. Opinion. See '38 AG Op 45

Proceeds of lands. SEC. 5.

Atty. Gen. Opinion. See '36 AG Op 224

Agents of school funds. SEC. 6.

Atty. Gen. Opinion. See '38 AG Op 905

ARTICLE X

AMENDMENTS TO THE CONSTITUTION

How proposed—submission. SECTION 1.

Authority of enrolled bill. For citations on the authority of the enrolled bill, see annotations to Art III, §15

Atty. Gen. Opinions. See '30 AG Op 50; '34 AG Op 99

More than one amendment. SEC. 2.

Unallowable combination of proposals. The combining into one proposal to amend the constitution, of two or more separate and distinct proposals each capable of separate submission to the people, is wholly unallowable even tho the combined proposals have but one object or purpose.

Mathews v Turner, 212-424; 236 NW 412

ARTICLE XI

MISCELLANEOUS

Justice of peace—jurisdiction. SECTION 1.

Atty. Gen. Opinion. See '34 AG Op 618

Indebtedness of political or municipal corporations. SEC. 3.

Discussion. See 18 ILR 269—Municipal indebtedness

Atty. Gen. Opinions. See '28 AG Op 120; '32 AG Op 18; AG Op Jan. 24, '39

ANALYSIS

I WHAT CONSTITUTES INDEBTEDNESS

(a) IN GENERAL

Debt—payment out of earnings. The expenditure which is necessary to establish a municipal electric light and power plant and which is to be paid solely from the earnings of the said plant, is not a "debt" within the constitutional and statutory limitation on indebtedness.

Wyatt v Town, 217-979; 250 NW 141

Electric plant payable out of earnings—contract not "debt" prohibited by constitution or statute. A contract for municipal electric plant payable out of earnings does not create a "debt" within meaning of constitutional inhibition where, altho plant was constructed on site owned by town, it was not shown that furnishing of site was part of consideration nor that site had a substantial value. In an action to enjoin the carrying out of such contract, the burden of proof to show that contract created a debt within the meaning of such constitutional inhibition was on the plaintiff-electric company.

Iowa So. Utilities v Cassill, 69 F 2d, 703

(b) PARTICULAR KINDS OF OBLIGATIONS

Contract with architect. A contract between an architect and a municipal corporation, which contract imposes a financial obligation on the corporation only in case the corporation enters into a further contract for the erection of the building which the architect has planned, is properly classified as a liability of the corporation's from the moment the building contract was entered into.

Holst v Sch. Dist., 203-288; 211 NW 398

(c) OBLIGATIONS MATURING BY INSTALLMENTS

Municipal light plant—payable out of earnings. In contract for construction of municipal electric plant, payable solely out of net earnings of plant, provision defining "net earnings" as balance of gross receipts after payment solely of necessary expenses of operation and maintenance, without provision for deduction of depreciation reserve, held not violative of statute providing that city should not be liable because of insufficiency of "net earnings".

Iowa So. Utilities v Cassill, 69 F 2d, 703

Waterworks extension—installment payments—future earnings. The trustees of a municipally owned and established waterworks plant may, without an authorizing election, validly contract for improving and extending said plant, and may obtain the funds therefor by issuing bonds payable solely out of the future net earnings of the plant and secured by a lien on said earnings and on said improvements and extensions.

Chitwood v Lanning, 218-1256; 257 NW 345

(d) OBLIGATIONS PAYABLE FROM EXISTING FUNDS OR ANTICIPATED REVENUES

Electric plant payable out of earnings—contract not "debt" prohibited by constitution or statute. A contract for municipal electric plant payable out of earnings does not create a "debt" within meaning of constitutional inhibition where, altho plant was constructed on site owned by town, it was not shown that furnishing of site was part of consideration nor that site had a substantial value. In an action to enjoin the carrying out of such contract, the burden of proof to show that contract created a debt within the meaning of such constitutional inhibition was on the plaintiff-electric company.

Iowa So. Utilities v Cassill, 69 F 2d, 703

Bonds payable from anticipated taxes.

Brunk v Des Moines, 228- ; 291 NW 395

(e) FUNDING BONDS

Exchanging bonds for valid indebtedness. Even tho a county, because of a sudden drop in the value of its taxable property, may find itself indebted beyond the constitutional limit, yet it may fund or refund its valid outstanding indebtedness by an issue of bonds in exchange for such indebtedness.

Hibbs v Fenton, 218-553; 255 NW 688

Funding bonds create no additional debt. A county whose valid bonded indebtedness is beyond the constitutional limitation (because of a drop in property valuations) may, under an

authorizing statute, validly refund said bonds, without creating any additional indebtedness in a constitutional sense, by issuing and selling at par and for cash, refunding bonds, and by irrevocably placing the proceeds of said sale in a separate and distinct trust fund which is also irrevocably pledged for the sole purpose of discharging the particularly designated bonds which are being refunded.

Banta v Clarke County, 219-1195; 260 NW 329

(f) TAXATION AS AN INDEBTEDNESS

No annotations in this volume

II COMPUTING INDEBTEDNESS

"Taxable property" defined. "Taxable property" embraces "moneys and credits", within the meaning of this section.

Mack v Sch. Dist., 200-1190; 206 NW 145

Tax list conclusive. On the issue whether the indebtedness of a municipal corporation exceeds the constitutional limitation, the court cannot add other property to the "last state and county tax list".

Trepp v Sch. Dist., 213-944; 240 NW 247

Tax as asset. In marshaling the assets and liabilities of a municipal corporation on the issue whether the debts of the corporation are in excess of the constitutional limitation, a duly levied and collectible tax must be deemed a municipal asset in the absence of proof showing the definite purpose of the tax and, if for current expenses, that legal obligations have been or necessarily will be created, sufficient to offset said tax fund.

Holst v Sch. Dist., 203-288; 211 NW 398

Computation of assets and liabilities. In the marshaling of the assets and liabilities of a municipal corporation on the issue whether the debts of the corporation are in excess of constitutional limitation, collected and uncollected taxes and tuition due the municipality cannot be deemed an asset when it is shown that the current expenses of the municipality will consume the entire amount of said taxes and tuition; otherwise as to municipal property available for sale.

Trepp v Sch. Dist., 213-944; 240 NW 247

Construction of contract. The specific amount for which a municipal corporation obligates itself in a written contract for the construction of a schoolhouse in return for the contractor's agreement to "provide all the material and perform all of the work," etc., is in no wise lessened by a contract clause that said price "includes five thousand dollar figure for millwork".

Holst v Sch. Dist., 203-288; 211 NW 398

III INVALIDITY OF PORTION OF INDEBTEDNESS

Unconstitutional municipal indebtedness not curable. The legislature has no constitutional power to authorize a tax levy or a bond issue to pay, in whole or in part, a constitutionally prohibited indebtedness. More concretely, if a municipality creates an indebtedness which is in part valid, and in part constitutionally invalid, the invalid part may not be cured (1) by the voting of a tax to pay or reduce the indebtedness, or (2) by the issuance of bonds, and the application of the proceeds thereof to the same purpose.

Trepp v Sch. Dist., 213-944; 240 NW 247

IV RIGHTS AND DUTIES OF HOLDERS OF MUNICIPAL OBLIGATIONS

Public debt—valid authorization. The legislature may authorize municipalities to incur, with or without an election, a debt when the debt does not exceed constitutional limitations.

Chitwood v Lanning, 218-1256; 257 NW 345

School warrants—validity. School warrants which are in form the general obligations of the district, and issued under a purported contract of the district providing for such unconditional issuance, are void if in excess of the constitutional limit of indebtedness, notwithstanding the fact that the said contract carries the inference that the warrants will be paid from a special fund arising from the sale of bonds.

Carstens Bros. v Sch. Dist., 218-812; 255 NW 702

Partly void warrants. There can be no recovery on municipal warrants given in payment of part of a total purported indebtedness, part of which is void because in excess of constitutional debt limitation. In other words, recovery, insofar as permissible, must be had in some proceedings other than on said warrants.

Trepp v Sch. Dist., 213-944; 240 NW 247

V ESTOPPEL

No annotations in this volume

VI CORPORATIONS INCLUDED

School districts—computation of assets and liabilities. In the marshaling of the assets and liabilities of a municipal corporation on the issue whether the debts of the corporation are in excess of constitutional limitation, collected and uncollected taxes and tuition due the municipality cannot be deemed an asset when it is shown that the current expenses of the municipality will consume the entire amount of said taxes and tuition; otherwise as to municipal property available for sale.

Trepp v School Dist., 213-944; 240 NW 247

Oath of office. SEC. 5.

Atty. Gen. Opinions. See AG Op Feb. 7, '39, April 3, '39, April 4, '39, April 5, '39, May 24, '39, July 6, '39, July 21, '39

Official acts—presumption of regularity. In the absence of contrary evidence, presumption obtains as to legality and regularity of official acts of sworn public officials.

Krueger v Mun. Court, 223-1363; 275 NW 122

Motives immaterial when following lawful procedure. The motives of public officials when proceeding according to law, to submit the question of municipal ownership of a public utility, are not fit subjects for judicial inquiry.

Interstate Co. v Forest City, 225-490; 281 NW 207

How vacancies filled. SEC. 6.

Statute supplementing constitution. The constitutional provision that appointees to fill vacancies in office shall hold until the next general election, is not self-executing, and therefore has been properly supplemented by §1157, C., '31.

State v Claussen, 216-1079; 250 NW 195

Election to fill vacancy. The statutory provision (§1155, C., '31) that an officer filling a vacancy in an elective office shall hold until the next regular election at which such vacancy can be filled, means the "next regular election" at which such vacancy can be legally filled.

State v Claussen, 216-1079; 250 NW 195

Vacancy—when fillable by election. The statutory provision (§1157, C., '31) that if a vacancy occurs in an elective state office thirty days prior to a general election the vacancy shall be filled at said election, in legal effect prohibits the filling of such vacancy at said election when the vacancy occurs less than thirty days prior to said election.

State v Claussen, 216-1079; 250 NW 195

Title to office—estoppel and waiver. Where, on the erroneous assumption that a vacancy existed in a public office, two persons are formally nominated, by different political parties, to fill the supposed vacancy and are voted on at the ensuing election, the failure of the candidate who is already serving under a valid appointment to withdraw his nomination and legally to question the nominations made, furnishes no basis for the claim that he thereby waived his right longer to hold the office, and estopped himself from objecting to the result of the election.

State v Claussen, 216-1079; 250 NW 195

District court clerk—vacancy filled by board. The district court has neither exclusive nor concurrent authority with the board of supervisors to fill a vacancy in the office of clerk of the court (a county office) by appointment; the court's power is confined to the appointment of a temporary clerk until the board fills the vacancy as provided by law.

State v Larson, 224-509; 275 NW 566

Seat of government established—state university. SEC. 8.

Atty. Gen. Opinions. See '36 AG Op 293, 694

ARTICLE XII

SCHEDULE

Supreme law — constitutionality of acts. SECTION 1.

Atty. Gen. Opinion. See '32 AG Op 4

ANALYSIS

Acts held constitutional. See under Art I, §1 (V)
Construction of statutes generally. See under §63
Contracts against public policy. See Ch 420, Note 1 (I)
General welfare, city ordinances. See under §5714 (III)
General welfare generally. See under Art I, §1
Mortgage moratorium act. See under §12372
Police power. See under Art I, §1
Repeal of acts. See under §63 (II, III)
Titles of acts. See under Art III, §29

I IN GENERAL

Valid statutes read into contracts. Principle affirmed that contracts are conclusively presumed to have been entered into in view of the valid statutes then existing and controlling the subject matter.

Priest v Whitney Co., 219-1281; 261 NW 374

Editorial arrangement of statutes changes no law. A mere rearrangement of statutes in code revision, or dividing one section into several sections, does not without legislative intention change the purpose, operation, and effect thereof.

Jones v Mills Co., 224-1375; 279 NW 96

Statutes — construction — unambiguous language. The word "or" in a statute cannot be judicially construed to mean "and" when the language of the section is too clear and unambiguous to admit of judicial construction.

State v Best, 225-338; 280 NW 551

Constitutionality of expired act — nonnecessity to determine. Courts will not, ordinarily at least, find any necessity to pass on the constitutionality of a statute which has expired ex vi termini.

Pittington v Herring, 220-1375; 264 NW 712

Trustee's liability for taxes—determined by state law as construed by courts. A trustee in bankruptcy takes title to all property of bankrupt by operation of law, and has the rights of an execution creditor, with legal or equitable lien, and whether or not the city and county treasurer's claim for taxes is a lien, or whether or not it is "due and owing", must be determined according to the laws of Iowa, as construed by its highest court.

In re Davenport Dry Goods Co., 9 F 2d, 477

Nonjudicial review. The extension of the limits of a municipal corporation in strict compliance with a constitutional statute is conclusive on the courts, even tho the statute is, to a degree, arbitrary.

State v Altoona, 201-730; 207 NW 789

Disbarment by special court. The act of the supreme court in appointing three district court judges as a special court to hear and determine disbarment proceedings against an attorney is necessarily a holding that the statute providing for such appointment is constitutional.

In re Cloud, 217-3; 250 NW 160

Assessments — unconstitutional basis—burden of proof. The court will not declare a drainage statute unconstitutional because it fixes a ratio of water discharged as the basis for computing assessments between districts, when the record reveals the legal fact that the district does receive a benefit because of the improvement in question and is assessable therefor, and when there is no proof by complainant that the said statutory basis is not the equivalent of benefits.

Board v Board, 214-655; 241 NW 14
Ward v Board, 214-1162; 241 NW 26

Class legislation—sale of drugs and medicines. Whether the statute (1) which defines "drugs and medicines" as including all substances and preparations for external or internal use recognized in the United States Pharmacopoeia or National Formulary, and (2) which prohibits the sale of "drugs and medicines" except by or under the supervision of a licensed pharmacist, is unconstitutional on the ground that said publications embrace many harmless substances that are of common and domestic use, quaere.

State v Jewett Co., 209-567; 228 NW 288

Nullity because of unworkableness. Whether the purchase of electrical energy by a city or town may be financed under §6134-d1, C., '31 [§6134.01, C., '39], or whether the provisions of §§6134-d5 and 6134-d6 of said code [§§6134.09, 6134.10, C., '39], relative to competitive bidding for furnishing electrical energy are a nullity because of indefiniteness, uncertainty, or unworkableness, quaere.

Brutsche v Coon Rapids, 218-1073; 256 NW 914

II POWER TO PASS UPON CONSTITUTIONALITY OF LAWS

Public policy of statute. The public policy of a valid statute is solely for the legislature to determine, not the courts.

Brutsche v Coon Rapids, 223-487; 272 NW 624

Determination of constitutional question only when necessary. The supreme court will not pass upon the constitutionality of a statute unless it is necessary to do so in the determination of a given case.

State v Dunley, 227-1085; 290 NW 41

Waiver of statutory right—public policy. A waiver by a corporate creditor of his statutory right to hold officers and directors personally responsible for prohibited excess corporate indebtedness is not violative of public policy.

Preston v Howell, 219-230; 257 NW 415; 97 ALR 1140

III CONSTRUCTION OF THE CONSTITUTION

Title embracing one subject—rules for determination. Constitutional provision that title to legislative acts shall embrace but one subject and matters connected therewith was designed to prevent surprise in legislation, but the title need not be an index or epitome of the act or its details. The subject of the bill need not be specifically or exactly expressed in the title, nor is it necessary that each thought or step toward the accomplishment of object be embodied in a separate act, nor is it important that it contains matters usually expressed in separate acts when they are germane to the general subject.

State v Talerico, 227-1315; 290 NW 660

Title of act—sufficiency—keeping liquor where beer is sold. Section 1921.126, C., '39, forbidding the keeping of intoxicating liquor where beer is sold, is not unconstitutional as violating constitutional provision requiring that the title of every legislative act embrace but one subject, since such subject is germane to an act relating to the sale of 4 percent beer.

State v Talerico, 227-1315; 290 NW 660

IV PLEADING OF CONSTITUTIONALITY OF ISSUES

Particularity required. A pleading assailing the constitutionality of a statute must (1) point out specifically the clause or section of the constitution which it is claimed is violated, and (2) designate the specific grounds upon which the asserted violation is based.

Peverill v Board, 201-1050; 205 NW 543

Particularity—criminal case. If procedure in a criminal case violates a constitutional provision, the complainant must specifically set forth wherein or in what manner said provision has been violated.

State v Hawks, 213-698; 239 NW 553

Presumption of constitutionality. Before the supreme court will declare an act of the legislature unconstitutional, the person assailing the statute must be able to point out the particular provision that he claims has been violated. In other words, there is a presumption in favor of the constitutionality of the statute.

State v Woitha, 227-1; 287 NW 99

Determination of question—necessity. The court will not at the instance of an amicus curiae search for or pass upon constitutional grounds of invalidity of a statute not presented by the parties.

State v Martin, 210-207; 230 NW 540

Constitutionality—necessity for determination. The court will not, on an order dissolving a temporary injunction pending the trial of the main action, pass upon the constitutionality of the statute under attack.

Iowa Mot. v Board, 202-85; 209 NW 511

Nonpresented constitutional questions. Constitutional questions not presented in the trial court will not be considered on appeal.

State v Johnson, 204-150; 214 NW 594
Talarico v City, 215-186; 244 NW 750
Andrew v Bank, 215-1150; 247 NW 797

Constitutional question first raised on appeal —no review. Constitutionality of statute requiring majority stockholders voting for franchise renewal to purchase stock of those voting against renewal, within three years from date of voting, will not be considered on appeal when such question has not been raised in the lower court.

Terrell v Tel. Co., 225-994; 282 NW 702

Unallowable amendment after remand. A party who attacks the constitutionality of a statute on specified grounds, and on appeal is defeated in his contentions, will not, after remand to the trial court, be permitted to file an amendment to his pleading attacking the constitutionality of the law on new and additional grounds.

Rural Dist. v McCracken, 215-55; 244 NW 711

V CONSTRUCTION IN FAVOR OF CONSTITUTIONALITY OF STATUTES

Construction favoring constitutionality. Principle reaffirmed that statutes are presumed to be constitutional, and will not be declared unconstitutional unless such unconstitutionality is apparent beyond reasonable doubt.

Gallarno v Long, 214-805; 243 NW 719
State v Darling, 216-553; 246 NW 390; 88 ALR 218
Priest v Whitney Co., 219-1281; 261 NW 374
State v Manning, 220-525; 259 NW 213
Berg v Berg, 221-326; 264 NW 821
Craven v Bierring, 222-613; 269 NW 801
Maddy v City Council, 226-941; 285 NW 208
Miller v Schuster, 227-1005; 289 NW 702

Burden to prove invalidity. One who attacks the constitutionality of a statute must show its invalidity beyond a reasonable doubt.

Miller v Schuster, 227-1005; 289 NW 702

Presumption of constitutionality. Before the supreme court will declare an act of the legislature unconstitutional, the person assailing the statute must be able to point out the particular provision that he claims has been violated. In other words, there is a presumption in favor of the constitutionality of the statute.

State v Woitha, 227-1; 287 NW 99

Presumption of constitutionality—strong case to invalidate. In passing upon constitutionality of acts of the legislature a presumption exists in favor of constitutionality, and an act will be invalidated only when it is clearly, plainly, and palpably unconstitutional, and it is the duty of the court to give such a construction to an act that, if possible, this necessity is avoided and the act upheld.

State v Talerico, 227-1315; 290 NW 660

Titles of acts—liberal construction for constitutionality. The decisions involving the sufficiency of titles to legislative enactments lay down certain general rules. It is held the constitution should be liberally construed so as to embrace all matters reasonably connected with the title and which are not incongruous, unconnected, or unrelated thereto.

State v Talerico, 227-1315; 290 NW 660

Doubtful constitutionality. Principle reaffirmed that when the court is in doubt as to the constitutionality of a statute, the statute must be declared constitutional.

Loftus v Dept., 211-566; 232 NW 412
Vilas v Board, 223-604; 273 NW 338

Doubt as to unconstitutionality — effect. Cities and towns need no statutory authority in order validly to sell the excess products of their municipally owned utility plants. It follows that the unconstitutionality of a statute

which authorizes a city having 7,500 people and owning its electric light plant, to furnish electricity to a town of 400 people is, at the least, very doubtful, and, being doubtful, the statute must be deemed constitutional.

Carroll v Cedar Falls, 221-277; 261 NW 652

Construction—necessity. The court will not, in order to save the constitutionality of a statute, declare a construction which, in effect, amends the statute.

New York Ins. v Burbank, 209-199; 216 NW 742

VI PART OF STATUTE UNCONSTITUTIONAL

Partial invalidity—effect. A legislative act which is constitutional in part and unconstitutional in part, and unaccompanied by any saving clause, must fall as a whole when the act reveals but a single object or purpose, which object or purpose will not be fully carried out by retaining the constitutional part only.

Smith v Thompson, 219-888; 258 NW 190

Unconstitutional in part. An unconstitutional amendment to a statute will not carry down the entire legislative structure on the subject in question unless it is very manifest that the legislature would have abrogated the entire statute, had it foreseen the unconstitutionality of its amendment.

Peverill v Board, 201-1050; 205 NW 543

Attacking particular part of act. A party contesting the validity of a legislative act may avail himself of the invalidity of a part of the act which does not directly affect himself, provided said part affects the validity of the entire act.

Smith v Thompson, 219-888; 258 NW 190

Invalid amendment — effect. An invalid amendment to a valid section of the statute leaves the section in the form in which it existed before the attempt to amend was made, unless a contrary intent on the part of the legislature is made to appear.

Talbott v Des Moines, 218-1397; 257 NW 393

Amendment—invalidity in whole (?) or part (?). When a statutory enactment for the taking of appeals in tax-adjustment proceedings turns out to be wholly invalid, such invalidity necessarily carries down all amendments which were an inseparable part of the enactment and which were designed to harmonize other statutes with the new enactment.

Talbott v Des Moines, 218-1397; 257 NW 393

Partial unconstitutionality—effect. That part of the state road bond act of 1928 which irrevocably pledged the primary road funds to the payment of the bonds, was necessarily such a persuasive inducement to the approval of the act by the people, as to invalidate the entire act upon its being adjudged that said pledge was invalid.

State v Council, 207-923; 223 NW 737
See State v Bevins, 210-1031; 230 NW 865

Auxiliary provisions. When sections of a statute seeking to control interstate commerce are unconstitutional because they impose unallowable burdens on such commerce, all auxiliary sections of the same statute which prescribe the procedure through which said unconstitutional control is sought to be attained, are likewise unconstitutional. (So held as to §§8338-d4–8338-d11, C., '31.)

State v Pipe Line, 216-436; 249 NW 366

Unconstitutional application of valid statute —banks and banking. The holding by the federal supreme court that the statute of this state (§§9279, 9280, C., '27) prohibiting receipt of deposits by insolvent banks and bankers generally was constitutionally inapplicable to national banks and bankers did not have the effect of carrying down the statute in toto—did not have the effect of thereafter rendering said statute inapplicable to state banks and bankers, even tho the state legislature did not, after said holding, re-enact said sections.

State v Bevins, 210-1031; 230 NW 865

Equal protection—ruling of federal court. The chain store tax act (46 GA, ch 75; C., '35, ch 329-G1 [C., '39, ch 329.5]) is in violation of the equal protection clause of the federal constitution insofar as it attempts to levy an annual tax solely on the basis of the gross receipts of said stores, such being the holding of the federal supreme court and such holding necessarily being conclusive on the courts of this state.

Tolerton & Co. v Board, 222-908; 270 NW 427

VII RIGHT TO CHALLENGE CONSTITUTIONALITY

Noninjured complainant. A party may not question the constitutionality of a statute when he fails to show that he has been or will be injured by the statute. In other words, he may not borrow an objection from one who could complain, but does not complain.

Peverill v Board, 201-1050; 205 NW 543
State v Terpstra, 206-408; 220 NW 357
State v Soeder, 216-815; 249 NW 412

Invalid part of act not affecting contestant —allowable attack. A party contesting the validity of a legislative act may avail himself of the invalidity of a part of the act which does not directly affect himself, provided said part affects the validity of the entire act.

Smith v Thompson, 219-888; 258 NW 190

Member of class favored by act. The claim that the bovine tuberculosis act is unconstitutional because it grants to the owners of breeding cattle the right to initiate or bring into existence the benefits of the act, may not be asserted by one who belongs to such favored class.

Lausen v Board, 204-30; 214 NW 682

VII RIGHT TO CHALLENGE CONSTITUTIONALITY—concluded

Statutory gratuity—unallowable complaint. A party may not complain as to the terms on which a mere gratuity is given to him.

Loftus v Department, 211-566; 232 NW 412

Public corporation. A county has no standing to question the constitutionality of a legislative act relative to its governmental powers.

Scott Co. v Johnson, 209-213; 222 NW 378

School district or taxpayer—diversion of school fund interest. Neither a school district nor a taxpayer thereof has any standing to question the constitutionality of the act which diverts the future-accruing interest on school funds to the state sinking fund for public deposits (Ch. 352-A1, C., '31) for the reason that they have no such thing as a vested right in said interest.

Boyd v Johnson, 212-1201; 238 NW 61

County supervisors—raising constitutionality of statutes not permitted. In an action in equity for mandamus to compel board of supervisors to remit taxes on capital stock of failed bank, held, board of supervisors could not raise issue of constitutionality of statute providing for such remission, either in that it contravened the state or the federal constitution, as counties and other municipal corporations are creatures of the legislature, existing by reason of statutes enacted within the power of the legislature, and the board may not question that power which brought it into existence and set the bounds of its capacities.

Brunner v Floyd Co., 226-583; 284 NW 814

Tax statute—no challenge by public official. A county auditor or a board of supervisors as ministerial officers or public officials may not challenge the constitutionality nor the competency of the legislature to pass a statute under which they act.

Hewitt & Sons v Keller, 223-1372; 275 NW 94

Fine and jail sentence not cruel punishment. An accused who has been fined $100 and ordered imprisoned in the county jail for 60 days may not question the constitutionality of the statute under which he was convicted, on the ground that the statute imposed cruel and unusual punishment.

State v Dowling, 204-977; 216 NW 271

VIII EMERGENCY LEGISLATION GENERALLY

Prohibited laws—emergency cannot justify. No legislative declaration or recital of the existence of an emergency can justify the enactment of a statute which is clearly prohibited by the constitution. So held as to an act fixing prices.

Duncan v Des Moines, 222-218; 268 NW 547

Extending redemption period. Neither the federal nor state constitutional prohibitions against (a) the impairment of the obligations of contracts, or (b) the deprivation of vested property rights without due process of law, is violated by a statute (1) which is enacted during, and for the purpose of ameliorating, an existing public financial emergency, (2) which grants to the owner of real estate during the existence of said emergency the right to possession and a time, very materially in excess of that otherwise granted by law, in which to redeem from mortgage foreclosure sale—even tho the sale precedes the passage of the emergency act—and (3) which sequesters the rents during said extended time and fairly and reasonably applies them to the protection of the mortgagee and his security. (45 GA, ch 179)

Reason: Contract rights and vested interests must reasonably yield to the paramount right of the state, through the reservoir of its reserved police power, to protect, by appropriate legislation, its sovereignty, its government, its people and their general welfare, against exigencies arising out of a great emergency.

Des Moines JSL Bank v Nordholm, 217-1319; 253 NW 701

Moratorium act of 47th General Assembly—extension of redemption period—unconstitutionality. Moratorium act of the 47th GA extending the period of redemption from foreclosure is unconstitutional as an impairment of the obligation of contract, when such act is not based on an actual existing emergency calling for an exercise of the reserve police power of the state.

John Hancock Ins. v Eggland, 225-1073; 283 NW 444

Moratorium act of 47th General Assembly—emergency must be temporary—judicial notice. An emergency, in order to justify legislation in contravention of the constitution on the theory of an exercise of the reserve police power, must be temporary or it cannot be called an emergency, but becomes an established status. In determining this question, the supreme court may take judicial notice of conditions existing at the time of enactment and whether or not they constitute an emergency.

First Tr. JSL Bank v Arp, 225-1331; 283 NW 441

IX ACTS DONE UNDER UNCONSTITUTIONAL STATUTES

Discussion. See 17 ILR 1—Government bonds—private promises

Fines inure to the state. SEC. 4.

Atty. Gen. Opinion. See '38 AG Op 45

AMENDMENTS TO THE CONSTITUTION

AMENDMENT 2 OF 1884
See annotations under Art V, §§5, 10, Vol I

AMENDMENT 3 OF 1884

Prosecution under trial information. The fifth amendment to the federal constitution (requiring infamous crimes to be presented by indictment) is no limitation upon the power of the state to provide for prosecution of infamous crimes without an indictment by a grand jury.

State v Ostby, 203-333; 210 NW 934; 212 NW 550

TITLE I

SOVEREIGNTY AND JURISDICTION OF THE STATE, AND THE LEGISLATIVE DEPARTMENT

CHAPTER 1

SOVEREIGNTY AND JURISDICTION OF THE STATE

1 State boundaries.

Sudden shifting of boundary river—effect. Principle applied that the sudden shiftings of boundary rivers do not change state boundary lines.

Dermit v School Dist., 220-344; 261 NW 636

2 Sovereignty.

ANALYSIS

I IN GENERAL

State fair board. The Iowa state fair board is an arm or agency of the state, and, therefore, not suable.

De Votie v Board, 216-281; 249 NW 429

II STATE SOVEREIGNTY

(a) IN GENERAL

Discussion. See 10 ILB 297—State rights

State—power and means of existence—policy not to limit. It is not the policy of this state or sovereign to place limitations upon the power and means of maintaining its own existence.

Teget v Lambach, 226-1346; 286 NW 522

Enjoining state highway commission. An action against the state highway commission to enjoin it from relocating a primary road, unaccompanied by any allegation of wrongful acts, is, in effect, an action against the state, and nonmaintainable.

Long v Highway Com., 204-376; 213 NW 532

(b) GOVERNMENTAL FUNCTIONS

Government nonliability for employee's tort—respondeat superior—exception. The exemption accorded counties and other governmental bodies and their officers from liability for torts growing out of the negligent acts of their agents or employees is a limitation or exception to the rule of respondeat superior, and in no way affects the fundamental principle of torts that one who wrongfully inflicts injury upon another is individually liable to the injured person.

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA (NS) 4

Governmental employees—personal liability for torts—no governmental immunity. A governmental employee committing a tortious act which causes injury to another in violation of a duty owed to the injured person becomes, as an individual, personally liable in damages therefor. (Hibbs v School Dist., 218 Iowa 841, overruled.)

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA (NS) 4

Futter v Hout, 225-723; 281 NW 286

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA (NS) 4

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Doherty v Edwards, 226-249; 284 NW 159

Nonliability in performance. The statutory-prescribed rules of the state governing aerial navigation (§8338-c7, C., '35 [§8338.20, C., '39]) have no application to the state in its sovereign capacity, nor to its governmental agencies, nor to the officials of said agencies

II STATE SOVEREIGNTY—concluded
(b) GOVERNMENTAL FUNCTIONS—concluded

when exclusively engaged in performing the duties of said agencies.

De Votie v Cameron, 221-354; 265 NW 637

Action against board of control. Allegations in a petition to quiet title to land and to obtain a writ of possession for said land, (1) that defendants constitute the entire membership of the state board of control, an agency of the state, and (2) that said defendants are wrongfully withholding said possession from plaintiff, furnish no sufficient basis for the holding that said action, in truth and fact, is against the state in its sovereign capacity.

Iowa Elec. Co. v Board, 221-1050; 266 NW 543

Employee—action against state or its agent. An employee of a state hospital for the insane may not maintain an action for salary against the executive officer thereof, as such action is, in effect, an action against the state.

Cross v Donohoe, 202-484; 210 NW 532

Enjoining state highway commission. An action against the state highway commission to enjoin it from relocating a primary road, unaccompanied by any allegation of wrongful acts, is, in effect, an action against the state, and nonmaintainable.

Long v Highway Com., 204-376; 213 NW 532

Employee performing governmental function—jurisdiction through original notice. A liquor commission enforcement officer as a state employee performing a governmental function is, nevertheless, subject to the jurisdiction of the courts by proper service of an original notice.

Anderson v Moon, 225-70; 279 NW 396

See also:

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA (NS) 4

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA (NS) 4

Futter v Hout, 225-723; 281 NW 286

Doherty v Edwards, 226-249; 284 NW 159

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Special appearance—nondeterminable matters. Whether an action is, in truth and fact, an action against the state in its sovereign capacity is a question which cannot be tried out on a special appearance—the petition not showing on its face that the action is such.

Iowa Elec. Co. v Board, 221-1050; 266 NW 543

Government employee's automobile collision—immunity as a defense. In a damage action for injuries arising out of a motor vehicle collision, defendant's claim that he was a state employee performing a governmental function is a matter of defense not properly raised by special appearance.

Groves v Webster City, 222-849; 270 NW 329

Anderson v Moon, 225-70; 279 NW 396

See also:

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA (NS) 4

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA (NS) 4

Futter v Hout, 225-723; 281 NW 286

Doherty v Edwards, 226-249; 284 NW 159

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Injuries from operation of municipally owned automobiles. The statutory declaration that the owner of a "car" is liable for damages done by it when it is operated with the consent of said owner, does not embrace the ownership of public property used solely for governmental purposes.

Bateson v Marshall County, 213-718; 239 NW 803

Sinking fund—actions—waiver. The state, after reimbursing a county for the loss of county deposits in an insolvent bank, may validly prohibit an action in its own favor on the depositary bond to which it was legally subrogated by the process of reimbursing the county.

State v Bartlett, 207-208; 222 NW 529

Deposits—payment on forged indorsement—negligence not imputable to state. Negligence and laches of public officers in the handling of state funds are not imputable to the state; for instance, in an action to recover from a drawee bank the amount paid by the bank on a forged indorsement of a check drawn by a county treasurer against state school funds on deposit with said drawee, it is no defense that the county treasurer was negligent in drawing or delivering the check, or that county officers generally were negligent in not making early discovery of the forged indorsement and notifying the drawee accordingly.

New Amsterdam Co. v Bank, 214-541; 239 NW 4; 242 NW 538

Proceedings against violators of labor union injunction—state as party.

Carey v Dist. Ct., 226-717; 285 NW 236

III FEDERAL SOVEREIGNTY

Discussion. See 22 ILR 39—State taxation and federal agencies

(a) IN GENERAL

Discussion. See 16 ILR 391, 504—Sovereignty and amending power

Foreign judgments—immunity from process—nonright to relitigate issue. A defendant who, when sued in a foreign state, litigates the

issue that he was immune from the service of process in said state because he was then temporarily and involuntarily therein as a military officer of the federal government, and on land owned and used exclusively by said government for military purposes, and who fails to appeal from a ruling denying his claimed immunity, may not relitigate said issue when sued in this state on the foreign judgment.

Northwestern Ins. v Conaway, 210-126; 230 NW 548; 68 ALR 1465

(b) FEDERAL INSTRUMENTALITIES

Federal instrumentality — congress determines immunity from state laws. It is within discretion of congress to determine in what respects and to what extent its instrumentalities, for their proper functioning, shall be immune from legislation of state origin.

First Tr. JSL Bank v Lehman, 225-1309; 283 NW 96

Moratorium act—no interference with federal land bank as governmental agency. There was no substantial or direct interference with accomplishment of purposes for which congress created joint stock land banks, by reason of the moratorium act of the 47th GA, providing for continuance of foreclosure of real estate mortgage actions.

First Tr. JSL Bank v Lehman, 225-1309; 283 NW 96

Foreclosure—state control over federal agencies. In proceedings instituted by a federal agency for the foreclosure of a mortgage, the state court, manifestly, cannot compel such agency to come to the relief of the debtor, even tho the federal government has advanced funds to the said agency for the primary purpose of relieving debtors.

Federal Bank v Wilmarth, 218-339; 252 NW 507; 94 ALR 1338

Corporate governmental agencies — immunity from legal process and taxation. Immunity of corporate governmental agencies from suits and judicial process and their incidents is less readily implied than immunity from taxation.

First Tr. JSL Bank v Lehman, 225-1309; 283 NW 96

Land banks as nonpreferential litigants in state courts. There is nothing to show that congress contemplated that land banks should occupy a preferential status as litigants in the state courts.

First Tr. JSL Bank v Lehman, 225-1309; 283 NW 96

Representative capacity. The conservator of a national bank may, in an action instituted by him, allege generally his official capacity and authority.

Ross v Long, 219-471; 258 NW 94

Statutory reward applicable to national banks. The statute which obligates the owner of lost goods, money, etc., to compensate the finder of such property, is applicable to a national bank as owner, even tho the federal statutes are silent on the subject, as said statute does not impair the efficiency of said bank as a federal, governmental agency.

Flood v Bank, 220-935; 263 NW 321

Federal conservator—authority. The federal statute that the conservator of a national bank shall act "under the direction" of the comptroller of the currency does not require the conservator to secure specific authority from the comptroller for the bringing of an attachment and the execution of a bond on behalf of the bank.

Ross v Long, 219-471; 258 NW 94

3 Concurrent jurisdiction.

Mississippi and Missouri rivers, concurrent jurisdiction in criminal cases. See under §13449 (III)

Discussion. See 1 ILB 107—Federal control of navigable rivers

Atty. Gen. Opinions. See '36 AG Op 458; '38 AG Op 748

Accretions—formation of sand bars. Land by accretions is not established by showing that sand bars formed in the bed of the stream beyond high watermark and became visible as the waters of the river receded.

McFerrin v Wiltse, 210-627; 231 NW 438

Accretion passes by ordinary deed. Accretion to land passes by a deed of the upland owner unless expressly excepted.

Haynie v May, 217-1233; 252 NW 749

Accretion — apportionment — estoppel. Riparian land owners interested in accretions to their lands may by agreement, acquiescence, or other conduct, apportion the accretion in a manner and way different than the law would apportion it, and thereby estop themselves, in an action to quiet title, from asserting that land did not pass under their deed because it was not accretion land.

Haynie v May, 217-1233; 252 NW 749

Dams—new high watermark—title of state. The state of Iowa by erecting a permanent dam in the bed of its navigable river, and by maintaining said dam peaceably and uninterruptedly for a period of ten years, legally extends its title to the new high watermark resulting from the erection of the dam; and especially may a private deedholder not complain when his deed, executed after the dam was erected, simply calls for land "up to the river".

State v Sorenson, 222-1248; 271 NW 234

Fishing regulations on boundary river — rights within territorial limits. The grant of concurrent jurisdiction to two states over a river, the middle of the channel of which is the boundary line between them, does not preclude one of them, without concurrence of the other, from regulating fishing by its own residents in that part of the river that is within its own territorial limits.

Miller v McLaughlin, 281 US 261

4 Acquisition of lands by United States.

Atty. Gen. Opinions. See '36 AG Op 404; '38 AG Op 748

4.2 Conditions.

Atty. Gen. Opinion. See '36 AG Op 404

4.5 National forests.

Atty. Gen. Opinion. See '36 AG Op 404

4.6 Offenses.

Atty. Gen. Opinion. See '36 AG Op 404

CHAPTER 2

GENERAL ASSEMBLY

10 Officers—tenure.

Atty. Gen. Opinions. See '30 AG Op 124; '34 AG Op 394

14 Compensation of full-time members.

Atty. Gen. Opinions. See '34 AG Op 73, 178; '36 AG Op 266; AG Op March 27, '39

15 Compensation of part-time members.

Atty. Gen. Opinion. See '36 AG Op 266

17-c1 (1935 Code) Expenses. [Section omitted from code after being held invalid]

Reimbursement for personal expenses. The legislature cannot constitutionally reimburse its members or the lieutenant governor for an expense incurred by said officers unless said expense is a governmental or legislative expense—an expense necessary to enable said officers to perform their duties. It follows that the monetary allowance to said officers under this section, as purported reimbursement for their personal living expenses incurred while in attendance at a session of the legislature, must be deemed added compensation.

Gallarno v Long, 214-805; 243 NW 719

Compensation of legislators — basis. The compensation of the lieutenant governor and members of the general assembly cannot be constitutionally fixed on any basis except on the basis of "per diem and mileage".

Gallarno v Long, 214-805; 243 NW 719

19 Compensation of officers and employees.

Atty. Gen. Opinion. See '30 AG Op 124

20 Issue of warrants.

Atty. Gen. Opinion. See '36 AG Op 645

23 Contempt.

Atty. Gen. Opinions. See '30 AG Op 90; '36 AG Op 111

24 Punishment for contempt.

Atty. Gen. Opinion. See '36 AG Op 111

25 Warrant—execution.

Atty. Gen. Opinion. See '36 AG Op 111

26 Fines—collection.

Atty. Gen. Opinion. See '36 AG Op 111

27 Punishment—effect.

Atty. Gen. Opinion. See '36 AG Op 111

28 Witness—attendance compulsory.

Atty. Gen. Opinion. See '30 AG Op 90

29 Witnesses—compensation.

Atty. Gen. Opinion. See '30 AG Op 90

38.1 Confirmation of appointments.

Constitutional power to remove officer.

Myers v United States, 272 US 52

39 Committee on retrenchment and reform.

Atty. Gen. Opinions. See '36 AG Op 624; '38 AG Op 616; AG Op Aug. 4, '39

40 Appointive members.

Atty. Gen. Opinion. See '36 AG Op 624

41 Organization—meetings.

Atty. Gen. Opinion. See '36 AG Op 624

42 Authority during recess.

Atty. Gen. Opinion. See '36 AG Op 624

43 Record.

Atty. Gen. Opinion. See '36 AG Op 624

44 Compensation and expenses.

Atty. Gen. Opinion. See '36 AG Op 624

45 Duties.

Atty. Gen. Opinions. See '36 AG Op 624; AG Op May 31, '39

46 May take evidence.

Atty. Gen. Opinion. See '36 AG Op 624

CHAPTER 3

STATUTES AND RELATED MATTERS

47 Form of bills.

Atty. Gen. Opinion. See '25-26 AG Op 44

Directory statute. This statute is directory only.

Solberg v Davenport, 211-612; 232 NW 477
Waugh v Shirer, 216-468; 249 NW 246

Noncompliance with title. The fact that the text of an act contains no repeal or amendments of certain statutory sections which the title declares a purpose to amend or repeal, does not invalidate the act.

Smith v Thompson, 219-888; 258 NW 190

Legislative reference to compiled code. In the amendment, revision, and codification of the statutes which resulted in the Code of 1924, a reference in the code revision acts to a section number of the compiled code or of the supplements thereto effected the same result as tho the reference had been to the corresponding official section number of the statute as it existed when it was carried into the compiled code or supplements.

Rains v First Nat. Bank, 201-140; 206 NW 821

Nonconclusiveness of enrollment. Principle reaffirmed that the enrollment of a bill is not conclusive that constitutional requirements have been complied with in its passage.

Scott v Board, 221-1060; 267 NW 111

Adoption of conference report—effect. When the general assembly is in deadlock over the final form and contents of a bill, the due adoption by both houses of the report of a joint conference committee and of the amendments therein proposed as an adjustment of existing differences terminates all necessary legislative proceedings on said bill—other than enrollment and due signing. In other words, no necessity exists for a further or additional reading and passage of the bill as modified by said newly adopted amendments when it is made to appear that, prior to the time said differences arose, each house had duly passed the bill immediately following the last reading thereof in said houses.

[The conference report and amendments therein proposed were adopted by a yea and nay vote equal to that constitutionally required for the passage of a bill and said vote was duly entered on the journals of each house.]

Scott v Board, 221-1060; 267 NW 111

49 Headnotes and historical references.

Code editor's catchwords—no part of law. Code section catchwords, prepared by code editor, are no part of the law.

State v Chenoweth, 226-217; 284 NW 110

Tax sale—school, agricultural college, or university land—construing statute. In construing statute which provides in substance that in the sale of school, agricultural college, or university land sold on credit, which is sold for taxes, the purchaser shall acquire only the interest of the person holding the fee, and that the state's lien shall not be affected by such sale, the supreme court will not construe the catchwords for such statute to show legislative intent to omit school fund mortgages, as the catchwords are no part of the law enacted and are not to be considered in construing the statute.

Monona County v Waples, 226-1281; 286 NW 461

51 Failure of governor to return bill.

Constitutional provision. See Const Art III, §16, Vol I

Atty. Gen. Opinion. See '32 AG Op 166

55 Designation of papers.

Atty. Gen. Opinion. See '36 AG Op 142

58 Appropriation acts—when effective.

Atty. Gen. Opinion. See '25-26 AG Op 288

59 Pro rata effect of appropriations.

Atty. Gen. Opinion. See '30 AG Op 75

CHAPTER 4

CONSTRUCTION OF STATUTES

63 Rules.

Atty. Gen. Opinions. See '25-26 AG Op 99, 137, 253, 354; '28 AG Op 355, 374; '32 AG Op 209, 219, 226; '34 AG Op 178, 381, 624; '36 AG Op 136, 360, 670; '38 AG Op 147, 549, 678

ANALYSIS

Joint and mutual wills. See under §11852
Wills construed, generally. See under §11846

I STATUTORY CONSTRUCTION IN GENERAL

Discussion. See 12 ILR 276—Genuine and spurious interpretation; 15 ILR 485—Substitution of words; 16 ILR 99—Severability of words; 24 ILR 744—Repeal of criminal statute; 25 ILR 736—Extrinsic aids in the federal court

Construction — canons of. Principles recognized that in the construction of statutes:

1. The province of construction lies wholly within the domain of ambiguity, and that prior acts may be resorted to, to solve, but not to create an ambiguity.

2. A thing is within a statute if it is within the intention, tho not within the letter; a thing which is within the letter of a statute is not within the statute unless it is within the intention of the makers.

3. All statutes in pari materia should be construed irrespective of the time of their enactment.

4. Statutes should be so construed that the intent and purpose thereof cannot be eluded.

Smith v Sioux City Yards, 219-1142; 260 NW 531

Fitzgerald v State, 220-547; 260 NW 681

General principles. Principles reaffirmed that:

1. A plain, unambiguous statute admits of no construction.

2. Legislative intent must be arrived at from the words used, construed in accordance with their context and ordinary meaning.

3. The particular procedure for acquiring a statutory right, not existing under the common law must be strictly pursued.

4. The term "shall" is generally construed as a command.

Jefferson v Sherman, 208-614; 226 NW 182

Unquestioned pronouncement of court. Scant consideration will be given to the claim that a pronouncement of the court was pure dictum when it has stood unchallenged and been acted on for half a century.

Schoenwetter v Oxley, 213-528; 239 NW 118

Statutes in pari materia. The rule that statutes in pari materia shall be construed together applies with peculiar force to statutes passed at the same legislative session or appearing in the same chapter.

Iowa Motor v Board, 207-461; 221 NW 364
Dikel v Mathers, 213-76; 238 NW 615

Statutes in pari materia — amendment to clear ambiguity. Statutes in pari materia being construed together, a later statute may be used to clear up an ambiguity, such as in the moratorium statutes where an amending act was passed at the same session of the legislature.

Prudential v Lowry, 225-60; 279 NW 132

Statutes construed together.

Durst v Board, 228- ; 292 NW 73

Elections—statutes in pari materia. The statutes relative (1) to vacancies in nominations, (2) to the placing of names of candidates on the official ballot, (3) to the sufficiency of a certificate of nomination, and (4) to the eligibility of candidates, all presuppose (and properly so) the existence of statutory authorization to hold an election, and therefore can have no controlling bearing on the construction of the statute which does authorize an election. Such former series of statutes are not strictly in pari materia with the latter statute.

State v Claussen, 216-1079; 250 NW 195

General and special statute on same subject —avoiding conflict. Principle recognized that where a general statute, if standing alone, would include the same matter as a special statute, and thus conflict with it, the special

act will be deemed an exception to the general statute.

Workman v Dist. Court, 222-364; 269 NW 27

Sentence—dual statutes. If there be two statutes defining an offense in such language that the accused may be sentenced under either, and one of them is general in its terms, and the other limited and particular, and imposing a lesser penalty, the particular should be construed as an exception to the general, and the lesser penalty prescribed thereby imposed. (So held under §§13140, 13144, C., '27.)

Drazich v Hollowell, 207-427; 223 NW 253

Guest statute—exceptions not to supplant general rule. Interpretation of automobile guest statute should be consistent with the intention of the legislature and its mandate in making a host not liable for injuries to guest except under exceptions of driver being reckless or intoxicated, and the statute should not be so interpreted as to supplant the general rule with the exceptions.

Crabb v Shanks, 226-589; 284 NW 446

General statutes—when applicable to governmental agencies. A general statute will not be construed to embrace a governmental agency in the absence of a definite legislative declaration that such agency is included.

Leckliter v City, 211-251; 233 NW 58

General statutes—when applicable to governmental agencies. General words of a statute will not be construed as applicable to the government or to its agencies unless such construction is clearly and indisputably required by the text of the act.

State v Des Moines, 221-642; 266 NW 41

Ambiguity as prerequisite to construction. A statute is not to be read as tho open to construction as a matter of course; but construction is invoked only when a statute contains such ambiguities or obscurities that reasonable minds may disagree as to their meaning.

Palmer v Board, 226-92; 283 NW 415

Plain meaning given in interpretation.

Green v Brinegar, 228- ; 292 NW 229

Plainness of meaning excluding construction. There can be no construction of a statute which is expressed in such plain and simple language that he who runs may read and understand it. So held as to that clause of the moratorium act which declares: "The provisions of this act shall not apply to any mortgage * * * executed subsequent to January 1, 1934 * * *."

Home Owners Corp. v District Court, 223-269; 272 NW 416

Ambiguous statute — conditions existing — occasion and necessity of statute considered. Where language of statute is ambiguous, it is proper to consider conditions with reference to subject matter that existed when statute was adopted, occasion and necessity for statute, and causes which induced its enactment.

Jones v Dunkelberg, (NOR); 260 NW 717

Income tax—rent received on the land in another state taxable. Income tax statutes held to be so plain and certain as to require no construction and to patently indicate a legislative intent to tax all personal income whether originating in the state or without the state, and to plainly include rent received in the state from property located in another state.

Palmer v Board, 226-92; 283 NW 415

Strict construction rule nonapplicable. Strict construction of statutes granting exemptions from taxation, altho being the rule, has no application to a plain, clear, and unambiguous statute affording no room for construction.

State v Griswold, 225-237; 280 NW 489

Judicial notice of conditions—effect. While the court should, in a proper case, in construing a statute, take judicial notice of the statewide condition surrounding the subject matter covered by the statute, yet such condition will not warrant the court in overthrowing the clear and concise language of the statute.

Andrew v Bank, 214-204; 242 NW 80

Division of sections—effect. The mere act of dividing an existing section of law and printing its parts in the code as separate sections works no change in the meaning of the law. So held as to §4840, C., '97.

State v Gardiner, 205-30; 215 NW 758

Statutes—editorial arrangement changes no law. A mere rearrangement of statutes in code revision, or dividing one section into several sections, does not without legislative intention change the purpose, operation, and effect thereof.

Jones v Mills Co., 224-1375; 279 NW 96

Placement of section in code—catchwords—effect on interpretation. The act of placing a section under a particular chapter of the code and the wording of the headings of the section, have little, if any, weight as official interpretations.

State v Oge, 227-1094; 290 NW 1

Legislative titles. Legislative acts must be construed consistently with their titles. Nor can they be given any broader scope than their titles.

Siegel v Railway, 201-712; 208 NW 78

Subjects and titles of acts—co-operative selling agencies. An act "to provide for the organization of associations without capital stock and not for pecuniary profit" is broad enough to justify the inclusion of a provision (1) authorizing a co-operative selling association to require its members to sell all or a stipulated part of their products through the association, (2) providing for the form of the contract in such cases, and (3) empowering the association to provide for and collect liquidated damages for a violation of such contract.

Co-operative Assn. v Weir, 200-1293; 206 NW 297

I STATUTORY CONSTRUCTION IN GENERAL—continued

Titles of acts—sufficiency—applicability of act. A title which recites that the act "creates a park board in cities having a population of 125,000 or more" sufficiently indicates that the act is designed to apply to cities subsequently acquiring the required population.

State v Darling, 216-553; 246 NW 390; 88 ALR 218

Titles of acts—section relating to different but related matters. The constitutional provision (Art. III, §29) which provides that "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title" is not violated by the title preceding §9253, C., '31, to wit, "Action by creditor", even tho said section does provide for action by three different parties, viz: action by an assignee, action by a receiver, and action by a creditor.

Andrew v Bank, 216-244; 249 NW 377

Construing statute—catchwords. In construing statute which provides in substance that in the sale of school, agricultural college, or university land sold on credit, which is sold for taxes, the purchaser shall acquire only the interest of the person holding the fee, and that the state's lien shall not be affected by such sale, the supreme court will not construe the catchwords for such statute to show legislative intent to omit school fund mortgages, as the catchwords are no part of the law enacted and are not to be considered in construing the statute.

Monona County v. Waples, 226-1281; 286 NW 461

Statutes—duty of court to make effective. It is the duty of the court in construing statutes to seek the object and purpose of the law and then give it force and effect if not contrary to established legal precedents.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

Giving effect to all provisions. Statutes must be so construed, if possible, as to give effect to every provision thereof.

Rhoades v Allyn, 220-474; 262 NW 788

Giving effect to entire statute. In the construction of a statute, words will never be treated as surplusage if a construction can be legitimately found which will give force to and preserve all the words of the statute.

Dorsey v Bentzinger, 209-883; 226 NW 52

Duty to harmonize statutes. On the claim that statutes are inconsistent, the court must preserve both statutes, if reasonably possible.

Ryerson v Ins. Co., 213-524; 239 NW 64

Legislative intent derived from entire act. In construing a particular statute to arrive at the legislative intention, the court should consider the entire act, and, so far as possible, construe its various provisions in the light of their relation to the whole.

Ahrweiler v Board, 226-229; 283 NW 889

Literal words limited by intent. Tho a thing is within the literal words of a statute, it will not be deemed in the statute when it is clearly not within the intention of the statute. Applied in the construction of the statute (§5026, C., '35) relative to the liability of the owner of an automobile who consents to its operation by another.

McGraw v Seigel, 221-127; 263 NW 553; 106 ALR 1035

Criminal law—soliciting for prostitution—soliciting for personal gratification not included. The statute providing a penalty for any person who solicits another to have carnal knowledge is intended to punish for the solicitation for purpose of prostitution and not to punish a defendant in soliciting by mail a female to have carnal knowledge with him for his personal gratification.

State v Oge, 227-1094; 290 NW 1

Gross premiums tax—when payable—legislative intent. Legislative intent being the cardinal rule of statutory construction, the plain intent of a statute taxing gross premiums of foreign corporations is a tax computed on and payable at the end of the year.

State v Ins. Co., 223-1301; 275 NW 26

Punctuation a fallible standard.

Seeger v Manifold, 210-683; 231 NW 479

Punctuation as evincing intention. A comma may be so employed in a will as to be the fair equivalent of the words "and also".

Buck v MacEachron, 209-1168; 229 NW 693

Codification of dual definition of same term. A legislative codification of two different statutory definitions of a term, e. g., "dog", into one definition, needless to say, is conclusive on the courts.

Bigelow v Saylor, 209-294; 228 NW 279

Legislative definition binding on court—"sale"—"retail sale". The legislature having defined certain terms, the court will follow that definition. So held as to "sale" and "retail sale" used in the sales tax act.

Kistner v Board, 225-404; 280 NW 587

Legislative construction—court's consideration. A legislative construction of a statute is entitled to consideration by the courts, but when it appears that an act may have been passed for the purpose of removing doubt from previous statutes, the court should so consider it.

Hansen v Kuhn, 226-794; 285 NW 249

Former statute revised—legislative construction. When the motor vehicle statutes were completely revised, and exempted the

vendor of a motor vehicle under a conditional sales contract from liability for negligent operation of the vehicle, such revision did not create a legislative construction that a former statute defining "owner" as the person with the use or control of a vehicle included such vendor within its definition, as a general revision of the law creates no presumption of an intent to change the law as is created when a particular section or a limited part of an act is re-enacted.

Hansen v Kuhn, 226-794; 285 NW 249

Amended statute. An amended statute will be interpreted as if it had read from the beginning as amended.

State v Local Board, 225-855; 283 NW 87

Amendment—presumption. The enactment of a statutory rule of procedure in lieu of one which the supreme court has held to be of doubtful meaning carries a presumption that the change was made in view of the criticism aimed at the old statute.

Dayton v Ins. Co., 202-753; 210 NW 945

Amendment—unallowable construction. The theory that an amended statute will be construed as tho the original act had been wholly repealed and re-enacted in its amended form, cannot, manifestly, be entertained when the amended statute, as a whole, reflects a contrary intent. So held where the amendment injected into the original statute a superfluous limiting date.

Metropolitan v Reeve, 222-255; 268 NW 531

Illogically placed amendment—effect. An act, additional to existing statutes on the same subject, is not invalid simply because it is declared to be an amendment to a section which, tho on the same subject, is not, perhaps, the most logical section to carry such amendment.

Iowa-Neb. Co. v Villisca, 220-238; 261 NW 423

Invalid amendment — effect. An invalid amendment to a valid section of the statute leaves the section in the form in which it existed before the attempt to amend was made, unless a contrary intent on the part of the legislature is made to appear.

Talbott v Des Moines, 218-1397; 257 NW 393

Amendment—invalidity in whole (?) or part (?). When a statutory enactment for the taking of appeals in tax-adjustment proceedings turns out to be wholly invalid, such invalidity necessarily carries down all amendments which were an inseparable part of the enactment and which were designed to harmonize other statutes with the new enactment.

Talbott v Des Moines, 218-1397; 257 NW 393

Amendment of tax sale statute—no implied amendment of special assessment sale statute. When a statute providing for tax sales was amended to prevent the sale of property against which the county held tax sale certificates, the amendment did not apply to other statutes requiring the county treasurer to sell property for delinquent special assessments, as an act amending a specified statute cannot be construed as amending an unmentioned statute, and repeal of statutes by implication is not favored.

Bennett v Greenwalt, 226-1113; 286 NW 722

Tax sale—redemption—liberal construction. The right of redemption from a sale will be liberally construed in favor of the taxpayer.

Murphy v Hatter, 227-1286; 290 NW 695

Tax sale—statutory notice to redeem—strict compliance mandatory. The requirements of §7279, C., '35, providing for steps necessary to cut off right of redemption from tax sale, are absolute, and the court is without power or authority to dispense with these positive requirements on the ground that they are unnecessary.

Murphy v Hatter, 227-1286; 290 NW 695

Application to things subsequently coming into existence. It is a rule of statutory construction that legislative enactments in general and comprehensive terms, prospective in operation, apply alike to all persons, subjects, and business within their general purview and scope coming into existence subsequent to their passage.

Bruce Transfer Co. v Johnston, 227-50; 287 NW 278

Public policy of statute. The public policy of a valid statute is solely for the legislature to determine, not the courts.

Brutsche v Coon Rapids, 223-487; 272 NW 624

Comprehensive power of general assembly. The general assembly has power to enact any legislation it sees fit, provided such legislation is not plainly in violation of the state or federal constitution.

Carroll v Cedar Falls, 221-277; 261 NW 652

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

Necessity for determination. The court will not, on an order dissolving a temporary injunction pending the trial of the main action, pass upon the constitutionality of the statute under attack.

Iowa Assn. v Board, 202-85; 209 NW 511

I STATUTORY CONSTRUCTION IN GENERAL—continued

Due process of law — "notice" implied in context of statute. A statute is not unconstitutional because it does not expressly provide for notice to an interested party. A clear implication of notice, duly complied with, is all-sufficient.

Chehock v School Dist., 210-258; 228 NW 585

Absence of statutory provision for notice—power of court to prescribe. When due process necessitates notice to a party and the statute makes no provision for such notice, the court may validly prescribe a notice which is reasonably calculated to give the interested party knowledge of the proceeding and opportunity to be heard.

Franklin v Bonner, 201-516; 207 NW 778

Temporary appointment of guardian—validity. The appointment of a temporary guardian on proper and sufficient notice to the person sought to be placed under guardianship is valid, even tho the statute authorizing such appointment is silent as to notice.

In re Barner, 201-525; 207 NW 613

Constitutionality — borrowed objection. A party may not have a portion of a legislative act, which does not affect him, declared unconstitutional.

State v Soeder, 216-815; 249 NW 412

Statutory gratuity—unallowable complaint. A party may not complain as to the statutory terms on which a mere gratuity is given to him.

Loftus v Department, 211-566; 232 NW 412

Burden to prove invalidity. One who attacks the constitutionality of a statute must show its invalidity beyond a reasonable doubt.

Miller v Schuster, 227-1005; 289 NW 702

Doubt as to unconstitutionality — effect. Cities and towns need no statutory authority in order validly to sell the excess products of their municipally owned utility plants. It follows that the unconstitutionality of a statute which authorizes a city, having 7,500 people and owning its electric light plant, to furnish electricity to a town of 400 people is, at the least, very doubtful, and, being doubtful, the statute must be deemed constitutional.

Carroll v Cedar Falls, 221-277; 261 NW 652

Amendment by construction nonpermissible. The court will not, in order to save the constitutionality of a statute, declare a construction which, in effect, amends the statute.

New York Ins. v Burbank, 209-199; 216 NW 742

Uncertainty of meaning — effect. A statute should not be held invalid because of uncertainty of meaning unless such holding is reasonably unavoidable.

Tolerton et al. v Board, 222-908; 270 NW 427

Partial invalidity — effect. The invalidity of a portion of a statute will not carry down the entire statute when the invalid portion is so severable from the valid part that the valid part remains as an effective statute.

State v Bevins, 210-1031; 230 NW 865
Davidson Co. v Mulock, 212-730; 235 NW 45
See State v Council, 207-923; 223 NW 737

Partial unconstitutionality. The holding by the federal supreme court that the statute of this state (§§9279, 9280, C., '27) prohibiting the receipt of deposits by insolvent banks and bankers generally, was constitutionally inapplicable to national banks and bankers did not have the effect of carrying down the statute in toto—did not have the effect of thereafter rendering said statute inapplicable to state banks and bankers, even tho the state legislature did not, after said holding, re-enact said sections.

State v Bevins, 210-1031; 230 NW 865
See State v Council, 207-923; 223 NW 737

Nonconclusiveness of enrollment. Principle reaffirmed that the enrollment of a bill is not conclusive that constitutional requirements have been complied with in its passage.

Scott v Board, 221-1060; 267 NW 111

Adoption of conference report—effect. When the general assembly is in deadlock over the final form and contents of a bill, the due adoption by both houses of the report of a joint conference committee and of the amendments therein proposed as an adjustment of existing differences, terminates all necessary legislative proceedings on said bill—other than enrollment and due signing. In other words, no necessity exists for a further or additional reading and passage of the bill as modified by said newly adopted amendments when it is made to appear that, prior to the time said differences arose, each house had duly passed the bill immediately following the last reading thereof in said houses.

[The conference report and amendments therein proposed were adopted by a yea and nay vote equal to that constitutionally required for the passage of a bill and said vote was duly entered on the journals of each house.]

Scott v Board, 221-1060; 267 NW 111

Liberal construction—workmen's compensation act. The workmen's compensation act is to be liberally construed.

Everts v Jorgensen, 227-818; 289 NW 11

Delegation of powers—liberal interpretation. The constitutional prohibition against delegating legislative powers to administrative boards

is given a liberal interpretation in favor of constitutionality of legislation.

Miller v Schuster, 227-1005; 289 NW 702

Form of bills. A statute providing the form of bills can have no force or effect other than as a directory provision.

Waugh v Shirer, 216-468; 249 NW 246

Statute invalid because unworkable. A statute may be invalid because the legislature has enacted it in such indefinite and uncertain form that it is unworkable. So held as to that part of chapter 205, Acts 43GA, relating to appeals from over-assessments of taxes.

Davidson Co. v Mulock, 212-730; 235 NW 45

Nullity because of unworkableness. Whether the purchase by a city or town of electrical energy may be financed under §6134-d1, C., '31 [§6134.01, C., '39], or whether the provisions of §§6134-d5, 6134-d6 [§§6134.09, 6134.10, C., '39] of said code relative to competitive bidding for furnishing electrical energy are a nullity because of indefiniteness, uncertainty, or unworkableness, quaere.

Brutsche v Town, 218-1073; 256 NW 914

Seeming contradiction—effect. The fact that the so-called Simmer law provides (§6134-d2, C., '35 [§6134.06, C., '39]) that no part of the cost of light and power plants erected thereunder (1) shall be payable by taxation, yet also provides, (2) that the city shall pay for current used by it—which payment necessarily must be made from funds derived from taxation—presents no such contradiction or unworkable condition as to invalidate the law.

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

Self-nullification. A legislative act which purports to legalize specified municipal warrants, the legality of which are then being litigated, is completely nullified, so far as said question of legality is concerned, by the insertion in the act of a proviso that "nothing in this act shall affect any pending litigation".

Mote v Town, 211-392; 233 NW 695

Reinsertion of stricken words. Principle reaffirmed that the courts will not read into a statute words which have long since been legislatively stricken from the act.

Gardner v Trustees, 217-1390; 250 NW 740

Executive construction. Principle recognized that great weight should be given to the construction placed upon statutes by those charged with their administration. But held principle not applicable under facts of present case.

State v Standard Oil, 222-1209; 271 NW 185

Administrative construction — effect. An administrative construction of a statute which has been fully acquiesced in for more than half a century by those vitally and continuously interested therein, will not be disturbed except for a very compelling reason.

New York Ins. v Burbank, 209-199; 216 NW 742

Executive construction. The long-continued and unquestioned construction placed upon a statute by the state executive department charged with its enforcement will be given great weight by the courts.

John Hancock Ins. v Lookingbill, 218-373; 253 NW 604

Executive construction—weight given. State departmental executive's construction of statutes to be given much weight.

State v Ind. Foresters, 226-1339; 286 NW 425

Construction by executive departments—legislative intent—presumption. The legislature is presumed to know the construction of its statutes by the executive departments, and when legislature indicates no dissatisfaction with such construction, the court may conclude such construction followed legislative intent.

State v Ind. Foresters, 226-1339; 286 NW 425

Carriage of livestock. The statutory provisions to the effect (1) that livestock shall be shipped at the highest practicable speed, etc., (2) that proof that the shipment was made according to timetables will not show prima facie compliance with the statute, and (3) that the railroad commissioners shall prescribe the speed of such shipment (§§8114 to 8118, inclusive, C., '24), do not justify an instruction which, in effect, submits to the jury the question of the reasonableness of a freight train schedule. These statutes contemplate the fixing of livestock shipping schedules by the railroad commission, with the attending presumption that such schedules will be reasonable.

Siegel v Railway, 201-712; 208 NW 78

Jurisdiction—existing but noneffective statute. A city, in acquiring jurisdiction to construct a public improvement, need only comply with existing effective statutes. In other words, it need not comply with a statute which then exists, but which has not yet taken effect.

Butters v Des Moines, 202-30; 209 NW 401

Retroactive effect. Statutes are not, ordinarily, given retroactive effect.

In re Culbertson, 204-473; 215 NW 761
Foster v Bellows, 204-1052; 216 NW 956

Retroactive application. A statute prohibiting the taxation of attorney fees in eminent domain proceedings instituted by the state applies to a proceeding pending but undetermined at the time of the enactment.

Welton v Highway Com., 211-625; 233 NW 876

I STATUTORY CONSTRUCTION IN GENERAL—continued

Nonretrospective statute. A statute which provides that "the superintendent of banking henceforth shall be the sole and only receiver" for state banks and trust companies in no manner displaces a then qualified and acting receiver.

Andrew v Bank, 206-869; 221 NW 668

Nonretroactive statute. The statute limiting the right of a guest riding in an automobile to recover damages consequent on the conduct of the operator has no application to an accident occurring prior to the passage of the statute.

Thomas v Disbrow, 208-873; 224 NW 36

Nonretroactive tax. The legalization of a tax levy made by a county under an optional and supposedly legal statute, which, however, was in fact originally invalid because of a fatal defect in the title, does not constitute a levying by the general assembly of a retroactive tax on the county.

Chicago, RI Ry. v Rosenbaum, 212-227; 231 NW 646

Retroactive operation—venue. A plaintiff may avail himself of a statute which regulates the venue of the action, and which is in force when the action is brought, irrespective of the fact that the statute was not in force when the cause of action accrued.

Goben v Akin, 208-1354; 227 NW 400

Payment of tuition—retroaction. Statute enacted in 1937 providing for payment of tuition of wards of charitable institution attending public schools held not retroactive in action involving liability for tuition incurred for years prior to that date.

School Twp. v Nicholson, 227-290; 288 NW 123

Legalization of invalid tax. The legislature may validly legalize a levy of taxes made under a supposedly legal statute which, however, was invalid because its title was constitutionally insufficient.

Chicago, RI Ry v Rosenbaum, 212-227; 231 NW 646

Statutes defining crime. Principle reaffirmed that statutes definitive of crime are strictly construed and all doubt resolved in favor of the accused.

State v Cooper, 221-658; 265 NW 915

Adding new element of criminal offense. The amendment of a criminal statute by adding a new and additional element of the offense does not, because of the saving clause in subsec. 1 of this section, have the effect of pardoning all unconvicted violators of the statute as it existed prior to the enactment of the additional element, unless the act which adds the new element evinces an intent to pardon.

State v Brown, 215-600; 246 NW 258

Indictment—fatal insufficiency. An indictment which alleges that a member of the Iowa liquor control commission knowingly and willingly permitted a named person unlawfully to possess intoxicating liquors (other than beer), charges no offense under §1921-f92, C., '35 [§1921.092, C., '39], in the absence of an allegation that said possessor was a member, or secretary, or officer, or employee of said commission. The term "such violation" in said section refers solely to violation by members, by the secretary, by officers, or by employees, of the commission.

State v Cooper, 221-658; 265 NW 915

Continuing appropriation statute—biennial appropriation paramount. A statute, altho in the code because of its general and permanent nature, which sets the salary of the attorney general, a state officer, is not a continuing appropriation for that officer, when the biennial appropriation act appropriates a different and smaller amount for such officer for the biennium and declares "all salaries provided for in this act are in lieu of all existing statutory salaries". Mandamus will not lie to require payment of the larger salary.

O'Connor v Murtagh, 225-782; 281 NW 455

Sale of bank stock for payment of assessment—common-law or statutory right of action. As to a stockholder who acquired his stock prior to the enactment of a statute permitting the sale of stock to enforce payment of a stockholder's assessment to reimburse an impairment of the bank capital, such statute does not necessarily exclude a common-law remedy by action when not so construed by the highest state court, and such statute declaring that the stockholder shall be liable for any deficiency after applying the proceeds of such sale, and providing for its collection by suit, is not a deprivation of property without due process by impairing a contract obligation.

Shriver v Woodbine Bk., 285 US 467

National bank directors—violation of duty—state statute invoked—construction. State statutes of limitation apply and may be invoked by directors of national bank in respect to liability for violation of duty, but two-year limitation in respect to personal reputation, held, inapplicable under such circumstances. The plain, obvious, and rational meaning of statute is always to be preferred to any curious, narrow, hidden sense, and, in case of substantial doubt, longer rather than shorter period of limitation is to be preferred.

Payne v Ostrus, 50 F 2d, 1039

Bastardy proceedings—repeal of statute—effect. The repeal of the former statutes relative to establishing the paternity of an illegitimate child and charging the father with the

support of such child (41 GA, ch 81) did not in any manner affect an existing right to institute such proceeding, even tho no proceedings were pending at the time of the appeal.

State v Shepherd, 202-437; 210 NW 476

Bovine tuberculosis law—nonrequired bond by examiner. In applying the bovine tuberculosis test, the examiner need not, nor may he be required to, post a bond to indemnify the owner against loss in case cattle are wrongfully destroyed, because the statute does not expressly or impliedly require such bond.

Peverill v Department, 216-534; 245 NW 334

De jure corporation. A statute which provides that "no corporation shall have legal existence until such [certified] articles be left for record" does not mean that a failure to strictly comply with the statute prevents a de facto corporation from coming into existence.

Wilkin Co. v Assn., 208-921; 223 NW 899

Restriction on corporations. A statute which limits the power of corporations which are organized under the laws of this state to take a testamentary devise will not be extended by the courts to include foreign corporations.

Ross v Seminary, 204-648; 215 NW 710

Foreign corporations—dissolution—effect on pending actions. A duly rendered decree of dissolution of a foreign corporation, at the instance of the state under the laws of which said corporation was organized, is, in effect, an executed sentence of death; being such, said decree ipso facto works an abatement (1) of an unadjudicated action in rem pending in this state against said dissolved corporation, and (2) of garnishment proceeding pending in connection with said action. Under such circumstances, the garnishee may properly move for and be granted an order of discharge.

Peoria Co. v Streator Co., 221-690; 266 NW 548

Foreign remedial statute—nonapplicability. The remedial statutes of a foreign state, authorizing an action in said state against a corporation which has been dissolved at the instance of said state, do not and cannot control the procedure when the action is sought to be maintained in this state; and especially is this true when said authorized foreign procedure is contrary to the procedural law of this state.

Peoria Co. v Streator Co., 221-690; 266 NW 548

Preferred labor claim act. The preferred labor claim act, providing that, when the property of a person is "seized upon by any process of any court," claims for labor shall be preferred over other claims, does not embrace a seizure under execution at the instance of the labor claimant. In other words, the labor claimant may not base a preference on an execution seizure instigated by himself.

Heessel v Bank, 205-508; 218 NW 298

Legalizing act re void warrants—construction. A legalizing act purporting to legalize specified void municipal warrants then in litigation, but which act was held in said litigation inapplicable to said warrants because of a proviso in said act that it should not affect pending litigation, is not subject to the construction in later litigation that the act is applicable to the extent of legalizing the contract under which said former warrants were issued even tho the warrants were not legalized.

Roland Co. v Town, 215-82; 244 NW 707

Mandatory procedure. The statutory requirement that the county treasurer shall pay collected municipal taxes to the city treasurer only on a written order signed by the mayor and city clerk or auditor is mandatory. (§6229, C., '27)

State v Hanson, 210-773; 231 NW 428

Nonmandatory procedure. The statutory command that the county auditor shall, after each assessment in his county, certify to the secretary of agriculture the number of owners of breeding cattle in his county for the purpose of enabling the said secretary to determine the numerical sufficiency of petitioners to agreements for the enrollment of the county under the accredited area plan for the eradication of bovine tuberculosis, is directory only.

Peverill v Board, 201-1050; 205 NW 543

Nonduty of supervisors to purchase certificate. The statutory provision, that the board of supervisors or the drainage trustees "may" purchase an outstanding certificate evidencing a sale of land for the nonpayment of drainage assessments, simply invests the board or trustees with discretion so to purchase. No mandatory duty so to purchase in order to protect the bondholder is imposed, even tho the bondholder must look solely to assessments for payment of his bond.

Bechtel v Board, 217-251; 251 NW 633

Nonresident with securities office in state—statute authorizing service on agent—constitutional. A state statute permitting the service of process on any agent or clerk employed in an office or agency maintained in the state by a nonresident in all actions growing out of, or connected with, the business of such office or agency does not abridge the privileges and immunities to which he is entitled by Art. IV, §2, of the federal constitution, or deprive him of the equal protection of the laws.

Doherty & Co. v Goodman, 294 US 623

Ordinances—construction as to employment of assistants. The superintendent of a department of municipal government under the so-called commission plan (Ch 326, C., '24) may

I STATUTORY CONSTRUCTION IN GENERAL—concluded

himself validly employ authorized and necessary employees to carry on the work of his department (1) when an existing ordinance in effect grants such power, and (2) when an existing ordinance makes an appropriation of funds for such department and fixes the number of employees and the separate salaries thereof; and this is true notwithstanding an additional existing ordinance which provides, in effect, that all contracts shall be entered into or approved by the council as a whole, it being held that the latter ordinance is not a limitation on the former.

Loran v Des Moines, 201-543; 207 NW 529

Personal earnings—salary of public officer. The salary—the "personal earnings"—of a public officer is exempt from liability on a judgment obtained against him and his surety, by the public body, because of the failure of the officer to account for public funds coming into his hands. The court cannot, on the plea of public policy, rule into the statute an exception which the legislature has not seen fit to declare. So held where the surety having paid the judgment, and thereby subrogated to the rights of the county, sought reimbursement from the officer's salary.

Ohio Ins. v Galvin, 222-670; 269 NW 254; 108 ALR 1036

Return of execution fees. An action to enforce the statutory liability of a county to return mortgage foreclosure execution fees to the certificate holder (when the debtor does not redeem) is barred from and after the expiration of five years from the enactment of the statute giving the right to such return.

Liljedahl v Montgomery Co., 212-951; 237 NW 523

Tax statute—construed against taxing body. A proviso or exemption in a taxing statute in derogation of its general enacting clause must be strictly construed. However, as to contention that an income tax statute does not include out-of-state rent, not because of an exception, but by its terms, if open to construction at all, must fall within the general rule that tax statutes are construed strictly against the taxing body.

Palmer v Board, 226-92; 283 NW 415

Trustee's liability for taxes—determined by state law as construed by courts. A trustee in bankruptcy takes title to all property of bankrupt by operation of law, and has the rights of an execution creditor, with legal or equitable lien, and whether or not the city and county treasurer's claim for taxes is a lien, or whether or not it is "due and owing", must be determined according to the laws of Iowa, as construed by its highest court.

In re Davenport Dry Goods Co., 9 F 2d, 477

Motor vehicle fuel tax—constitutional. The Iowa motor vehicle fuel tax was obviously not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it came to rest in Iowa, and the requirement that the distributor as shipper into Iowa shall, as agent of the state, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls, imposes no unconstitutional burden, either upon interstate commerce or upon the distributor.

Monamotor Oil Co. v Johnson, 292 US 86

Vacancy in office—statute supplementing constitution. The constitutional provision (Const. Art. XI, §6) that appointees to fill vacancies in office shall hold until the next general election, is not self-executing, and therefore has been properly supplemented by §1157, C., '31.

State v Claussen, 216-1079; 250 NW 195

II PAR. 1. REPEAL

Standing saving clause. The statutory provision that "the repeal of a statute does not * * * affect any right which has accrued, any duty imposed, any penalty incurred, or any proceeding commenced, under or by virtue of the statute repealed", constitutes a standing saving clause which, in effect, accompanies all repealing statutes.

State v Shepherd, 202-437; 210 NW 476

Repeals by implication. Repeals by implication are not favorites of the law.

Ogilvie v City, 212-117; 233 NW 526
Neessen v Armstrong, 213-378; 239 NW 56
Schoenwetter v Oxley, 213-528; 239 NW 118
Fowler v Board, 214-395; 238 NW 618
Towns v City, 214-76; 241 NW 658

Repeal by implication. Principle reaffirmed that in order to work the repeal by implication of an old statute by a new statute, there must be an absolute repugnancy between the two statutes.

Hahn v County, 218-543; 255 NW 695

Inferential repeal—when recognized. The court will not declare a statute repealed, or even modified, on the basis of a mere inference arising from the enactment of a later statute, unless such declaration is unavoidable.

McGraw v Seigel, 221-127; 263 NW 553; 106 ALR 1035

Repugnant statutes—implied repeal. When two statutes are repugnant and cannot be reconciled, the last in time of enactment must prevail.

Waugh v Shirer, 216-468; 249 NW 246

Implied repeal—statutes not in pari materia. A statute cannot be deemed impliedly repealed by other statutes which are not in pari materia. As an illustration, statutes dealing

merely with the procedure to be followed in making nominations for office, and in filling vacancies in such nominations, or in determining the eligibility of candidates, cannot be held to impliedly repeal a statute which authorizes the holding of an election.

State v Claussen, 216-1079; 250 NW 195

Municipal license of trucks—nonrepeal by state law. The legislature by the enactment of Ch 252-C1, C., '31 [Ch 252.3, C., '39], and thereby requiring of truck operators a privilege or occupation tax when not operating between fixed termini nor over a regular route, on any and all highways of the state, did not impliedly repeal that part of §5970, C., '31, which empowers cities and towns to license a truck operator whose business is limited to the municipality—there being no substantial conflict between said statutes.

Towns v Sioux City, 214-76; 241 NW 658

Holdership in due course—amount of recovery. The former statutory rule (§3070, C., '97) to the effect that when a note has its inception in fraud a holder in due course could recover only the amount which he paid for the note was impliedly repealed by the enactment of the negotiable instruments law, §9517, C., '24.

Sword v Spry, 205-266; 215 NW 737

Contiguous corporations combined by respective boards without submission to vote. In view of its legislative history and the apparent intention of the legislature, the enactment of §4191, C., '35, requiring that proposals to add territory to an existing district be approved separately by majority of voters in each territory affected, did not modify or repeal §4133, C., '35, providing that "* * * boundary lines of contiguous school corporations may be changed by the concurrent action of the respective boards of directors * * * so * * * that one corporation shall be included with the other as a single corporation" hence, respective boards of directors of contiguous school corporations had authority to combine such school corporations without approval of voters.

Peterson v Sch. Dist., 227-110; 287 NW 275

III PAR. 1. EFFECT OF REPEAL

"Right" and "privilege" contrasted. The statutory provision to the effect that "the repeal of a statute does not affect any right which has accrued" does not protect a mere privilege.

Welton v Highway Com., 211-625; 233 NW 876

Effect on existing action. The repeal of the former statutes relative to establishing the paternity of an illegitimate child and charging the father with the support of such child (41GA, ch 81 [§§12667-a1–12667-a54, C., '27]) did not in any manner affect an existing right to institute such proceedings, even tho no proceedings were pending at the time of repeal.

State v Shepherd, 202-437; 210 NW 476

Preservation of accrued right. An action to recover damages for negligently causing the death of a married woman survives the repeal of the statute authorizing such action, and the measure of recovery in such cases is governed by the repealed statute, not by the measure of recovery provided in a later and substituted statute on the same subject.

Azeltine v Lutterman, 218-675; 254 NW 854

Repeal of source of payment—effect. The repeal of a statute which provides the funds with which to retire duly authorized bonds as they are issued, without providing any new source of payment, necessarily precludes the further issuance of such bonds.

Dee v Tama Co., 209-1341; 230 NW 337

Mulct tax—void. A mulct tax certified and levied some two years after a violation of the intoxicating liquor statutes, and after the repeal of the statutes authorizing the levy of such tax, and after the property affected had passed into the hands of an innocent party, is void as to such latter party. (This on the assumption that the repeal of a statute does not affect any right which has accrued, any duty imposed, or any penalty incurred.)

Shriver v Polk County, 203-529; 212 NW 718

Violation of replaced statute.

State v McDowell, 228- ; 290 NW 65

Subrogation—repeal of preferential deposit law. Sureties on a bank depositary bond conditioned to hold the state harmless on deposit of state funds in said bank, and given at a time when the state possessed a statutory preferential right, in case the bank was thrown into receivership, to be paid in full prior to the payment of general depositors, are not entitled, upon the payment of a loss, in case of such receivership, to be subrogated to such right on the part of the state when, prior to such payment, the statute giving such right has been repealed. This is on the principle that a surety is entitled to subrogation only upon payment of the principal's debt, and only to the rights then possessed by the creditor.

Leach v Bank, 205-1154; 213 NW 517

Discharge of surety—repeal of preferential bank deposit law. The repeal of a statute which gives the state, when it is a depositor in a bank, a preferential right to be paid in full if the bank passes into the hands of a receiver does not constitute a release of security in such sense as to release a surety on a bond which secures said deposit.

Leach v Bank, 205-1154; 213 NW 517

IV PAR. 2. WORDS AND PHRASES

Motor vehicle words and phrases. See under §5000.01

Discussion. See 12 ILR 280—The constituents of "chastity"; 17 ILR 87—"Void" and "voidable" —statute of frauds; 17 ILR 254—Marriage consanguinity; 17 ILR 402—Usury; 17 ILR 524—Gambling; 20 ILR 483—"Domicile" and "residence"

General rules. In the construction of statutes words and phrases will, if possible, be given their ordinary and usual meaning, and that construction will be adopted, if possible, which will give force and effect to every part of the statute.

Des M. Ry. v City, 205-495; 216 NW 284

General and specific words. Principle "Expressio unius est exclusio alterius" applied.

In re Barnett, 217-187; 251 NW 59

"About November first." A contract to deliver a commercial product "about November first" requires a delivery substantially on said date or near approximation thereto.

North Am. Gin. Co. v Gilbertson, 200-1349; 206 NW 610

"Accidental means" defined. An injury caused by the intentional lifting of a log upon a wagon is one resulting from "accidental means" when such resulting injury was unexpected, undesigned, and not the usual or natural result of such an act.

Clarkson v Cas. Co., 201-1249; 207 NW 132

Acquiescence—elements. On the issue of acquiescence by both parties to a boundary line, the intention of the parties is important. Acquiescence is consent inferred from silence, involving notice or knowledge of the claim of the other party, and occurs where one who is entitled to impeach a transaction or enforce a right neglects to do so, from which the other party may infer that he has abandoned such right.

Patrick v Cheney, 226-853; 285 NW 184

Filing information—"actually in session" defined. The statutory right of the county attorney to file a trial information "at any time when the grand jury is not actually in session" does not mean that he is prohibited from filing such information at any time of any day on which the grand jury was in session. So held where the information was filed on the day on which the grand jury was duly convened, but at a time on said day when said jury was not "actually" in session.

Thrasher v Haynes, 221-1137; 264 NW 915

Adverse possession — requirements — intention. For adverse possession there must be occupancy taken with the intention to assert title beyond the true boundary line under a claim of right which must be as broad as the possession, whereas, occupancy taken by mistake beyond the true line with claim of right only up to the true line will not acquire title.

Patrick v Cheney, 226-853; 285 NW 184

"Advertisement for bids"—irregular compliance with mandatory duty. The irregularity of municipal authorities in advertising for, receiving, and opening, bids for the construction of a municipal light and power plant before instead of after the director of the budget had, on appeal, overruled objections to the plans, specifications, and proposed form of contract, (§357, C., '31) does not invalidate the contract entered into after said ruling and specifically approved by said director. But the duty to "advertise for bids" is mandatory in case an appeal is taken to the budget director.

Johnson v Town, 215-1033; 247 NW 552

"And" may be both conjunctive and disjunctive. The word "and", used in the homestead exemption act allowing an owner credit on his taxes "for the 1936 taxes payable in 1937 and for the 1937 taxes payable in 1938", construed to be used as a conjunctive with reference to a homestead eligible to benefits for both of said years; and when used with reference to a homestead not eligible in both years, to be used as a disjunctive, equivalent to the word "or".

Ahrweiler v Board, 226-229; 283 NW 889

"And" as "or". A title, "An act to legalize any and all tax levies heretofore made and collected" supports the legalization of "All taxes heretofore assessed, levied or collected," when the intent of the legislature will be carried out by construing "made and collected" as "made or collected".

Chicago, RI Ry. v Rosenbaum, 212-227; 231 NW 646

"And shall also." When interpreting the words "and shall also" consideration must be given to the harmony of the entire statute in which the words appear.

Brutsche v Town, 218-1073; 256 NW 914

"Apparent authority."

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Insurance—notice and proof of loss—"as soon as practicable". A policy requirement that written notice of an accident shall be given "as soon as practicable" means that said notice shall be given within a reasonable length of time under all the facts and circumstances. So held in a case where the insured inadvertently lost his policy and forgot the name of the insurer until some five months after liability accrued on the policy.

Gifford v Cas. Co., 216-23; 248 NW 235

"Between fixed termini." A truck operator who, under a permit duly granted under chapter 252-C1, C., '31 [Ch 252.3, C., '39], and by means of his motor truck, transports for hire freight from place to place, at irregular times, and on no schedule of service, and only when

he receives unsolicited and acceptable calls to do such transporting, is not operating "between fixed termini or over a regular route" within the meaning of chapters 252-A1, or 252-A2, C., '31 [Chs 252.1, or 252.2, C., '39], and, therefore, is under no obligation to obtain a certificate of necessity or convenience or to pay the tax required by said chapters.

State v Transfer, 213-1269; 239 NW 125

"Bi-monthly payments." A contract for services providing for payments each two weeks is obligatory, even tho the party rendering the service has not worked two full weeks.

Goben v Pav. Co., 218-829; 252 NW 262

"Building." A schoolhouse is a "building," within the definition of statutory burglary. (§13001, C., '27.)

State v Burzette, 208-818; 222 NW 394

"Buildings"—intent of parties. The word "building" as used in restrictive covenants in deeds of conveyance will be so construed as to give effect to the manifest intention and purposes of the parties. Held, inter alia, that structures for screening sand, and a derrick with hoisting machinery were "buildings" within the meaning of restrictive covenants against the erection of buildings which would cut off a view.

Curtis v Schmidt, 212-1279; 237 NW 463

"Bushel" construed. The admeasurement to a landlord by an agreed arbitrator of a certain number of bushels of corn as rent for a certain year will not be construed as calling for that number of bushels of "shelled" corn when the parties knew at all times that the admeasurement was on the basis of crib measurement; and when the landlord receives in shelled corn all that was set aside to him "on the cob," the rent must be deemed fully paid.

Salinger v Elev. Co., 210-668; 231 NW 366

"Car." A caterpillar road grader belonging to a county, and operated on the public highway, is not a "car" within the meaning of the statutory declaration that the owner of a "car" is liable for damages done by the car when it is operated with his consent.

Bateson v County, 213-718; 239 NW 803

"Chose or thing in action."

Brenton Bros. v Dorr, 213-725; 239 NW 808

"Car"—"line"—"stage" — common carrier venue statute. The terms, "line", "stage", "car" and "other line of coaches and cars" as defined at the time of the enactment of the statute specifying venue of actions against carriers are comprehensive enough to include the operations of a transfer company as a common carrier using motor vehicles, and a damage action against such motor vehicle carrier is properly brought in a county where an automobile collided with one of the carrier's trucks while traveling over its regular route, altho company had no office in such county.

Bruce Co. v Johnston, 227-50; 287 NW 278

"Church purposes." A broad and comprehensive meaning must be accorded to the term "church purposes" in a conveyance of land to trustees "so long as used for church purposes".

Presbyterian Church v Johnson, 213-49; 238 NW 456

"Commissioner" as agent for process.

Green v Brinegar, 228- ; 292 NW 229

Compensable "injury"—workmen's compensation.

Sachleben v Gjellefald, 228- ; 290 NW 48

"Compensation." Title 38, §454, USC, providing that federal funds granted to a World War veteran, "shall not be subject to the claims of creditors", does not prohibit the courts of this state from allowing the guardian of such veteran and from such funds, compensation not only for ordinary services but for extraordinary services rendered the ward—the guardian not being a "creditor" within the meaning of said statute.

Hines v McKenzie, 216-1388; 250 NW 687

"Confidential relations." The position of head bookkeeper in the office of the state treasurer involves "strictly confidential relations" with the head of said office, within the meaning of §1165, C., '31.

Allen v Wegman, 218-801; 254 NW 74

"Consolidated" defined. A "consolidated" school district is an "independent school district," within the meaning of §4230, C., '24, authorizing the school board to elect a superintendent for a period not exceeding three years.

Consolidated Dist. v Griffin, 201-63; 206 NW 86

"Construction" as imposing continuous duty. An ordinance which requires all rain spouts on buildings to be so "constructed" that water will not be cast upon sidewalks imposes a continuing duty upon the property owner—a duty not only to "construct" the spouting as required but to maintain the spouting in such required condition.

Updegraff v City, 210-382; 226 NW 928

Cigarettes—retailer not "consumer." The statute requiring packages of cigarettes sold to a "consumer" to have the tax stamps affixed thereto does not apply to a sale by a wholesaler to a retailer, the latter not being a consumer, within the meaning of §1570, C., '24.

State v Lagomarcino-Grupe Co., 207-621; 223 NW 512

Sales tax—shoe repairman as "consumer or user". A shoe repairman is a "consumer or user" of the material used in repairing shoes within the legislative definition of those terms in the sales tax act, and in charging for such repair he is not primarily reselling those materials, but selling his services; wherefore, the one from whom he buys those materials makes the retail sale subject to the tax.

Sandberg Co. v Board, 225-103; 278 NW 643; 281 NW 197

IV Par. 2. WORDS AND PHRASES—continued

"Conveyance." A valid prohibition against the "conveyance" of real property embraces a mortgage.

Iowa Corp. v Halligan, 214-903; 241 NW 475

Distinction between "court" and "judge". Statutes providing for the prosecution of injunction violators which do not prohibit the "court" from trying the defendant forthwith should be construed as consistent with statutes providing punishment for contempt, which allow the court to try the defendant forthwith, when both statutes recognize the distinction between the terms "judge" and "court", so that when acting in the capacity of "court" rather than as "judge", the court could try the defendants for an injunction violation during the same term in which the precept to punish them for contempt was issued.

Carey v Dist. Court, 226-717; 285 NW 236

"Debt." The meaning of the term "debt" is largely dependent on its context.

Smith v Andrew, 209-99; 227 NW 587

"Debt." A decree for alimony in fixed monthly payments does not create a debt in the sense of the garnishment statutes.

Malone v Moore, 212-58; 236 NW 100

"Debt." Schooley v Schooley, 184-835; 169 NW 56, overruled.

Malone v Moore, 212-58; 236 NW 100

Judgment as "debt". A judgment, whether based on contract or tort, is a "debt" within the meaning of the exemption statutes.

Ohio Ins. v Galvin, 222-670; 269 NW 254; 108 ALR 1036

"Indebtedness"—future taxes to pay bonds.

Brunk v Des Moines, 228- ; 291 NW 395

Mortgage redemption—"debtor" defined. The grantee of land who buys subject to an existing mortgage is a "debtor," within the meaning of the redemption statutes; and the original mortgagor is not entitled to the possession of the land or to the value of such possession during the redemption period following foreclosure, even tho such mortgagor is the only "debtor" who is personally liable for the mortgage debt.

Marx v Clark, 201-1219; 207 NW 357

"Donations" defined. Funds received by a court-appointed trustee "for the perpetual care" of a named cemetery are "donations" within the meaning of the statute requiring a bond securing such funds.

Belmond Assn. v Luick, 217-805; 253 NW 521

"Dues" and "subscription" defined. The terms "dues" and "subscriptions" are by no means necessarily synonymous.

Jefferson, etc. v Sherman, 208-614; 226 NW 182

"Dues and pledges." The statutory provision that a farm bureau organization shall be entitled to financial aid from the county when the "yearly membership dues and pledges" amount to a certain sum, authorizes such aid when the "dues" alone amount to the required sum.

Blume v Crawford Co., 217-545; 250 NW 733; 92 ALR 757

Easements and tenements—relation. An easement is a privilege or right without profit which the owner of one piece of realty may have in another, or conversely, it is a service which one tract of land owes to another. The land entitled to the easement is the dominant tenement, and the land burdened with the servitude is the servient tenement, neither the easement nor servitude being personal, but accessory, running with the land.

Dawson v McKinnon, 226-756; 285 NW 258

"Engaged in business." A person is "engaged in the business" of selling a drug when he has such drug for sale to any person who may apply for it for the seller's profit, irrespective of any other business carried on by the said seller.

State v Market Co., 209-567; 228 NW 288

"Fellow servant" and "vice-principal". Evidence held to warrant conclusion that owner of apparatus used to tear down silo, and who was actively engaged in such work, was a fellow servant; and, if he was a vice-principal, he was such only to the extent of being required to furnish plaintiff proper equipment and a safe place to work. The mere fact that one employee has authority over others does not make him a vice-principal or superior so as to charge the master with his negligence.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

"Filing." What constitutes.

Peterson v Barnett, 213-514; 239 NW 77

"Filing within twelve months". Conceding, arguendo, that in the settlement of an estate, the statute of limitation commences to run from the date of the last newspaper publication, yet, when the last publication was on April 16, 1931, a claim filed April 16, 1932, is not filed "within twelve months from the giving of the notice" as provided by §11972, C., '31.

First Tr. JSL Bk. v Terbell, 217-624; 252 NW 769

"Final decision." A statutory declaration that a decision of the court shall be "final" may carry the clear meaning that such decision is not an appealable decision.

State v Webster County, 209-143; 227 NW 595

"Forthwith." The term "forthwith" does not necessarily mean "immediately".

Ashpole v Delaney, 217-792; 253 NW 30

Franchise. A franchise is a privilege or authority vested in certain persons by grant of the sovereign to exercise powers or to do or perform acts which, without such grant, they could not legally do or perform.

Mapleton v Iowa Co., 206-9; 216 NW 683

Gambling devices—punch boards and slot machines. Legislature has specifically recognized punch boards and slot machines as gambling devices and they are subject to forfeiture when seized under a valid search warrant, unless the person named in the information or claiming an interest in the property shows cause why they should not be so forfeited.

State v Doe, 227-1215; 290 NW 518

Gifts causa mortis—essential elements. A gift causa mortis is a gift of personal property, intentionally made, even orally, by the mentally competent owner of said property, in expectation of his or her imminent death from an impending disorder or peril (tho not necessarily so imminent as to exclude the opportunity to execute a will), and made and delivered by the donor to the donee on the essential condition that, if the gift be not in the meantime revoked, the property shall belong to the donee in case the donor dies, as anticipated, of the disorder or peril, leaving said donee surviving.

Flint v Varney, 220-1241; 264 NW 277

"Guest." Under the rule that passenger is neither a guest nor a mere invitee when he is riding with driver for the mutual, tangible, and definite benefit of both parties, a passenger in an automobile driven by a representative of the Federal Resettlement Administration is not a "guest" when both parties are on their way to a bank to secure a temporary loan for passenger until such time as a loan could be completed with the Federal Resettlement Administration.

Doherty v Edwards, 227-1264; 290 NW 672

"Hear and determine". In certiorari to determine the legality of proceedings of civil service commission in removing a city employee, the commission's statutory duty to "hear and determine" is an essential ingredient of jurisdiction, and the quoted words refer to a judicial investigation and settlement of an issue of fact, which implies the weighing of testimony by both sides, from a consideration of which the relief sought by the moving party is either granted or denied.

Sandahl v Des Moines, 227-1310; 290 NW 697

"High watermark." The high watermark of a navigable river is that upper line which ordinary floods permanently mark along the course of the river.

Curtis v Schmidt, 212-1279; 237 NW 463

"Horse" as vehicle. A horse, saddled and bridled, and being used as a means of conveyance or transportation is not a "vehicle" within the meaning of a policy of insurance which provides indemnity "sustained by the wrecking or disablement of any vehicle or car * * * in which the insured is riding or by being accidentally thrown therefrom".

Riser v Ins. Co., 207-1101; 224 NW 67; 63 ALR 292

Illegal transportation. The word "transportation" in the intoxicating liquor statutes is employed in its ordinary sense: that is, to convey from one place to another—any real carrying about.

State v Canalle, 206-1169; 221 NW 847

"In." The preposition "in" may be used in the sense of "for" or "on behalf of".

Willis v Sch. Dist., 210-391; 227 NW 532

"In aerial conveyance"—parachute jump.

Richardson v Assn., 228- ; 291 NW 408

"Inebriacy" defined. Inebriacy is the state of drunkenness or habitual intoxication.

Maher v Brown, 225-341; 280 NW 553

"Interested person"—party to probate.

In re Duffy, 228- ; 292 NW 165

"Intersection" of highways—definition. In a damage action arising from a collision of motor vehicles at a highway intersection, where the question of negligence centered largely around the rights of the parties within the intersection, it was prejudicial error to instruct the jury that "intersection" is the area within the fence lines, if such fence lines were extended across the road, when a statute defines "intersection" as being the area within the lateral boundary lines of highways which join.

Hupp v Doolittle, 226-814; 285 NW 247

"Invitee"—"licensee". An invitee to a place of business is one who goes there, either at the express or implied invitation of the owner or occupant, on business of mutual interest to both, or in connection with the business of the owner or occupant. A licensee is one who goes upon the property of another, either at the invitation, or with the implied acquiescence, of the owner or occupant, for a purpose purely personal to himself.

Wilson v Goodrich, 218-462; 252 NW 142

"Judicial capacity". In adopting plans for pavement of alley intersection, the city was acting in a "judicial capacity" and was not liable for defects in engineer's plans unless as a matter of law the plans were obviously defective.

Russell v Sioux City, 227-1302; 290 NW 708

"Knowingly consenting." A statute (now repealed) placing personal liability on the officers and directors of a corporation for prohibited excess indebtedness of the corporation, "knowingly consented to" by them, necessarily excludes liability (1) on mere proof that the officers or directors were negligent in performing their duties, and (2) as to corporate debts contracted after the officer or director ceased to be such.

Preston v Howell, 219-230; 257 NW 415; 97 ALR 1140; 38 NCCA 133

IV PAR. 2. WORDS AND PHRASES—continued

"Legally bound" persons. Where a county has maintained in a state hospital an insane person who was a member of an incorporated religious and communistic society the county's statutory right (§3595, C., '31) to recover the resulting expense from any person "legally liable" for the support of such insane person does not entitle it to recover such expense from the said society simply on proof that the society had obligated itself by contract to support said member for life. "Legal" liability under the statute is confined strictly to "common-law" liability.

Iowa Co. v Amana Soc., 214-893; 243 NW 299

"Lost" goods defined. Money taken from the owner thereof by robbery, and the whereabouts of which money is thereafter unknown to said owner until it is returned to him by one who found it, where the robber had hidden it, constitutes "lost" money within the meaning of the statute which provides compensation to the finder of "lost" money and other property.

Flood v Bank, 218-898; 253 NW 509; 95 ALR 1168

Generating electricity as "manufacturing or mechanical business". The generation or production of electricity is a manufacturing or mechanical business within the scope of a statute permitting the formation of co-operative associations to conduct a manufacturing or mechanical business.

State v Hardin County Co-op., 226-896; 285 NW 219

"May." The primary meaning of the word "may" is permissive and discretionary.

Bernstein v City, 215-1168; 248 NW 26; 86 ALR 782

"May"—"must". "May" cannot, manifestly, be given the imperative meaning of "must", unless there be substantial warrant for such construction.

Brickson v Schwebach, 219-1368; 261 NW 518

Owner of auto salesroom—neither "mechanic" nor "other laborer". Proprietor of auto salesroom with separate department where repairing is done by employee held not a "mechanic", and therefore tools are not exempt from levy; nor is such proprietor an "other laborer" within vehicle exemption.

First N. Bank v Larson, 213-468; 239 NW 134

"Mistake" — mistake of law — statute not tolled. Where a sheriff collects fees under a mistake of law, the failure to discover the mistake of law will not toll the running of the statute of limitations. The word "mistake" in §11010, C., '35, means mistake of fact.

George v Webster County, 211-164; 233 NW 49

Morgan v Jasper County, 223-1044; 274 NW 310; 111 ALR 634

"Mortgagor" defined. A "mortgagor" is he who holds title to the premises mortgaged. A wife who joins in a mortgage of the husband's land for the purpose of releasing her distributive share is not a mortgagor.

Wood v Schwartz, 212-462; 236 NW 491

Municipal light rates. A reasonable rate for electric light, duly fixed by a municipality under §6143, C., '27, is both a maximum and a minimum rate. In other words, a public utility may not legally charge more nor less than the prescribed rate.

Mapleton v Iowa Co., 209-400; 223 NW 476; 68 ALR 993

"Net income" — what constitutes. "Net income" does not mean the general income of the estate without provision for the payment of just charges, taxes, and reasonable repair and upkeep. On the contrary, it means the income remaining, if any, after such charges and expenses are taken care of. (So held as to a testamentary trust which provided for the keeping of the trust estate intact and for the annual distribution of the net income.)

In re Whitman, 221-1114; 266 NW 28

"Newspaper." An agreement not to engage in the publication or circulation of a "newspaper" in a named locality is violated by the publication and circulation in said locality, without charge, of a so-called "Shopper's Guide" of eight pages arranged in the form of an ordinary newspaper, and containing much advertisement, some current news, serial stories, editorial comment, and newspaper clippings.

Henry & Sons v Rhinesmith, 219-1088; 260 NW 9

"Next regular election." The statutory provision (§1155, C., '31) that an officer filling a vacancy in an elective office shall hold until the next regular election at which such vacancy can be filled, means the "next regular election" at which such vacancy can be legally filled.

State v Claussen, 216-1079; 250 NW 195

"Operation upon public highway."

Des M. Co. v Johnson, 213-594; 239 NW 575

"On or about." The phrase "on or about" a specified date permits of some variation from the date specified, but no date in July is "on or about" the last of October of the same year.

Newcomer v Ament, 214-307; 242 NW 82

"Or"—"and". Statute construed and held, not permissible to substitute "and" for "or".

Ballard-Hassett Co. v Miller, 219-1066; 260 NW 65

Unambiguous language—"or" cannot mean "and". The word "or" in a statute cannot be judicially construed to mean "and" when the language of the section is too clear and unambiguous to admit of judicial construction.

State v Best, 225-338; 280 NW 551

Simmer law ballot showing "electric light or power"—"or" synonymous with "and". Since an electric plant produces energy which may be used for either light or power, a ballot which states the question as to whether a city should establish an "electric light or power plant" would be readily understood by the voters that the city was seeking to establish an "electric light and power plant".

Lahn v Primghar, 225-686; 281 NW 214

Conjunctive or disjunctive use of "or"—technical rules disregarded. Under a statute permitting the formation of associations to conduct a manufacturing business or to construct or operate electric transmission lines, the words "or to construct or operate * * * electric transmission lines" could be eliminated where the manufacturing business was the operation of an electric power plant, as the right to use such lines is implied as essential to the manufacture of electricity; so whether "or" was used in a conjunctive or disjunctive sense made no difference, as courts will disregard technical rules of grammar and punctuation to arrive at the intent of a statute.

State v Hardin County Co-op., 226-896; 285 NW 219

"Orchard" defined. A group of some 65 bearing fruit trees of different varieties, maintained by continued replanting, constitutes an "orchard", within the meaning of the statute which prohibits the laying out of highways through orchards without the owner's consent.

Junkin v Knapp, 205-184; 217 NW 834

"Order" as "final judgment". Where court entered an order reciting that the court "finds that said demurrer should be sustained and indictment dismissed", altho such order is not in the form of a judgment, it was in legal effect a "final judgment" from which an appeal can be taken by the state under §13995, C., '39. Every final adjudication of the rights of the parties is a judgment.

State v Talerico, 227-1315; 290 NW 660

"Orders." An "order" of court, speaking broadly, is any direction by the court in a proceeding, not including the judgment or decree.

Blunk v Walker, 206-1389; 222 NW 358

"Owner." The term "owner" may be used in a sense other than absolute and unconditional title.

Bare v Cole, 220-338; 260 NW 338

"Owner" defined. The legal titleholder of real estate and a prospective purchaser for whose benefit and use an improvement is erected upon the real estate, may both be considered "owners" of the property within the meaning of the mechanics lien law.

American Bank v West, 214-568; 243 NW 297

Moratorium act — receiver as "owner". The duly qualified and acting receiver of an insolvent private bank is the "owner" of the mortgaged real estate of said bank within the meaning of the moratorium statute (46 GA, ch 110) relative to extension of time in which to redeem from foreclosure sale.

Metropolitan v Van Alstine, 221-763; 266 NW 514

Moratorium act — "owner" defined. An "owner" within the meaning of the moratorium foreclosure act may be such tho his interest is less than a fee ownership.

Prudential v Kraschel, 222-128; 266 NW 550

"Paper" defined. A laboratory analysis, duly reduced to writing, of an organ of the human body and of the contents thereof is a "paper", within the meaning of the statute relative to the compulsory production of "papers or books" (§11316, C., '24), and the party to an action who has the exclusive possession thereof may be compelled to produce it for the inspection of the other party when such inspection is material to the issue whether the deceased died by accident or by suicide by means of poison; but the production of private correspondence or memoranda relative to the analysis may not be coerced.

Travelers Ins. v Jackson, 201-43; 206 NW 98

"Party" and "witness". The terms "party" to an action, and "witness" are not synonymous within the meaning of §11358, C., '31.

Bagley v Dist. Court, 218-34; 254 NW 26

"Person." The general assembly in exercising its constitutional power over an authorized subject matter, may be its own lexicographer —may use its own terms and declare what entities shall be embraced therein. So held where in the enactment of the motor vehicle fuel tax law, Ch 251-F1, C., '35 [Ch 251.3, C., '39], it defined the term "person" and, in effect, declared such term to include a municipal corporation.

State v Des Moines, 221-642; 266 NW 41

IV PAR. 2. WORDS AND PHRASES—continued

"Person in possession". In action to quiet title acquired under tax deed, statute requiring that notice of expiration of right to redeem from tax sale must be served on the "person in possession" of such real estate before tax deed can issue is not complied with by serving the husband only, where husband and wife are tenants, the evidence disclosing that wife was also working and that she paid the rent out of her separate wages.

Murphy v Hatter, 227-1286; 290 NW 695

"Person of same household" — scope of term. Where an insurance policy insured the assured against liability arising or resulting from automobile accidents, but excepted liability for injuries to "the assured or persons of the same household as the assured", held that a married woman who furnished the assured a room and board for a stated compensation could not be deemed a "person of the same household as the assured".

Umbarger v Ins. Co., 218-203; 254 NW 87; 36 NCCA 733

"Premium." The term "premium", tho used in connection with insurance contract, may embrace a consideration received by an insurance company in payment of an annuity contract, even tho the annuity contract in question is not an insurance contract.

Northwestern Ins. v Murphy, 223-333; 271 NW 899; 109 ALR 1054

Presumption (?) or assumption (?) of malice. The court may, under applicable evidence, instruct that the jury has a right, in the absence of evidence to the contrary, to presume the existence of malice from the use of a deadly weapon in a deadly manner; and in so instructing it is quite immaterial that the court employs the term "assume" instead of the term "presume".

State v Berlovich, 220-1288; 263 NW 853

Provisional remedy. A provisional remedy is one which is provided for present needs, or for the occasion; that is, one adapted to meet a particular exigency, e. g., the appointment of a receiver in mortgage foreclosure. It follows that an order granting such remedy is appealable.

Davenport v Thompson, 206-746; 221 NW 347

"Public place" includes bridge. The term "public place", as used in the statute relative to the obligation of streetcar companies to construct, reconstruct, and maintain paving between and outside the rails of their tracks, embraces a public bridge. (§6051-c1, C., '31 [§6051.1, C., '39]).

In re Walnut Bridge, 220-55; 261 NW 781

"Reasonably safe place" defined. The operator of a filling station was under a legal obligation to exercise reasonable and ordinary care to see that his place of business was reasonably safe for an invitee who was having a truck tire repaired. The phrase "reasonably safe" meaning safe according to the usage, habits, and ordinary risks of the business.

Reynolds v Skelly Co., 227-163; 287 NW 823

"Recklessness". Recklessness goes beyond mere negligence and means proceeding without concern for consequences, with a heedless disregard for the rights of others. Recklessness under the motor vehicle guest statute is not found from evidence that the driver of a car went to sleep, where there was little evidence that he was conscious of the approach of sleep.

Paulson v Hanson, 226-858; 285 NW 189

"Refund." Under a contract to pay an accountant a percentage of the amount "refunded" by the federal government as excess payment for certain years of income and war-profit taxes, the percentage must be computed on the actual amount returned by the government, even tho the government arrived at said amount by deducting from what would otherwise have been the refund the amount of tax inadequately paid in a certain year.

Gregerson v Cherry, 210-538; 231 NW 350

"Renew." The term "renew," as applied to a contract, means a re-establishment of an existing contract for another period of time.

State v Niehaus, 209-533; 228 NW 308

Repairs may incidentally benefit adjacent road. Work on a drainage ditch which prevented erosion and prevented an overflow on reclaimed lands was "repair" work within the statutory authority of the board of supervisors to repair drainage ditches even tho there was an incidental benefit to bridges and to a township road at the side of the ditch.

Baldozier v Mayberry, 226-693; 285 NW 140

"Resulting from." An injury to a passenger on a motor vehicle bus may not be said to "result from" the operation of the bus, when the proximate cause of such injury was the negligence of a third party.

Crozier v Stages, 209-313; 228 NW 320

Child on sled being towed not "riding" in vehicle. A person to be within the provisions of the Iowa guest statute must be "riding" in the motor vehicle, which excludes a child on a sled hooked to the rear of a moving automobile.

Samuelson v Sherrill, 225-421; 280 NW 596

"Rounding corner." The statutory provision that no ground shall be taken for a primary road "for the rounding of a corner" where certain named improvements are located, is violated by locating a primary road through a 40-acre tract on an arc which extends substantially from the southeast to the northwest corner of the tract, and which so bends

convexly to the northeast corner of the tract as to leave approximately 4 acres at said corner where the said improvements are located.

Butterworth v Com., 210-1231; 232 NW 760

"Shall." Under statute providing that county board of supervisors "shall" select three official newspapers, and there were only three applicants, the board had no discretionary power, and petitioner-applicant was entitled to maintain mandamus action to compel the selection of his newspaper.

Bredt v Franklin County, 227-1230; 290 NW 669

"Shall" as nonmandatory. Even tho the statute (§2668, C., '31) declares that "before being tested, such animals shall be appraised, etc.", nevertheless, an examination of the entire bovine tuberculosis act clearly demonstrates that "shall" is not used in a mandatory sense.

Peverill v Dept., 216-534; 245 NW 334

"Shall" and "may" used conversely. Rule reaffirmed that word "may" is construed to mean "shall" when the rights of the public or third person depend upon the exercise of the power or performance of the duty referred to, and conversely, the word "shall" is merely directory when no advantage is lost, right destroyed, or benefit sacrificed by giving it such construction.

School Twp. v Nicholson, 227-290; 288 NW 123

"Shall"—when synonymous with "may". Statute providing that person applying for admission to high school shall present affidavit of parent or guardian construed to be directory rather than mandatory, the rule being that the word "shall" is generally construed to be mandatory, but where no right or benefit depends on its imperative use it may be, and often is, treated as synonymous with "may".

School Twp. v Nicholson, 227-290; 288 NW 123

"Subject to liens of record." The expression "subject to liens of record" when embraced in the habendum clause of a deed of conveyance does not have the effect of continuing the lien of a judgment after the holder thereof had failed to exercise his right to redeem.

Paulsen v Jensen, 209-453; 228 NW 357

"Suspension" and "cancellation" compared. The suspension of a policy of insurance is not synonymous with cancellation of the policy.

Federal Bank v Ins. Assn., 217-1098; 253 NW 52

Taxes and special assessments. There is a distinction between taxes and special assessments—a tax being a general contribution imposed upon property, while a special assessment is a payment for special benefits conferred upon the property by an improvement.

Bennett v Greenwalt, 226-1113; 286 NW 722

"Thereon" and "thereof."

Brenton Bros. v Dorr, 213-725; 239 NW 808

"To take care of" claim. An agreement by one party to a compromise and settlement that he will "take care of" the claim of a named third party may not, in view of the circumstances attending the parties, be equivalent to an agreement to pay said claim.

Southern Sur. v Railway, 215-525; 245 NW 864

"Train wreck." The smashing in of a portion of one side of a passenger coach by swinging a loading bucket against the coach as it was passing, constitutes a "train wreck," within the meaning of a policy of accident insurance, even though the coach (the only one injured) was not derailed, and was not taken from the train for repairs until a division point on the line was reached.

Mochel v Iowa Assn., 203-623; 213 NW 259; 51 ALR 1327

"Unless." The term "unless" as employed in §8958, C., '27, is used in the sense of "if it be not a fact that."

Plunkett v Hopley, 208-1042; 226 NW 772

"Unliquidated." An "unliquidated claim" is one the amount of which has not been ascertained and agreed upon by the parties, or has not been fixed by law.

State v Naumann, 213-418; 239 NW 93; 81 ALR 483

"Vacation" of court. The term "vacation" as employed in the county attorney information act (§13667, C., '31) means the interim which commences immediately after the expiration of a term of court and ends at the commencement of the next term of court. The court is not in vacation while it is in a recess.

Dayton v Bechly, 213-1305; 241 NW 416

"Vibrolithic pavement". In action by pedestrian for injuries sustained in fall on paving, evidence that the paving was a "vibrolithic" type composed of granite and concrete chips, that the pavement was dry, that there had been no rain or mist, and that there was no foreign substance on the paving does not present a question for the jury on issue of city's negligence in construction, even tho the pavement was "pretty smooth", the smoothness being a quality inherent in the material.

Russell v Sioux City, 227-1302; 290 NW 708

"Volenti non fit injuria" defined. The maxim "volenti non fit injuria" means: "That to which a person assents is not esteemed in law an injury" or "He who consents cannot receive an injury".

Edwards v Kirk, 227-684; 288 NW 875

IV PAR. 2. WORDS AND PHRASES—concluded

"Wantonness" or "recklessness". Wantonness is something more than recklessness and recklessness is something more than negligence.

Sanburn v Rollins Mills, 217-218; 251 NW 144

"Warrant." A plain, unambiguous statutory declaration that a claim shall be filed "with the officer authorized by law to issue warrants in payment of such improvement" must be strictly construed in accordance with the usual and ordinary meaning of the word "warrant".

Missouri Gravel v Surety Co., 212-1322; 237 NW 635

"Warrant-issuing officer." Claims of laborers and materialmen, under a contract for the paving of a primary highway, entered into by the state highway commission must be filed with the state auditor and not with the said commission, the auditing and approving of claims by said commission not constituting the issuance of a "warrant" within the meaning of §10305, C., '27. (Statute now changed.)

Missouri Gravel v Surety Co., 212-1322; 237 NW 635

"Willful" defined. The term "willful" in the statute specifying grounds for removal from office, when applied to "neglect to perform the duties of his office," or to "misconduct or maladministration in office," means knowingly, intentionally, deliberately, "with a bad or evil purpose."

State v Naumann, 213-418; 239 NW 93; 81 ALR 483

Misleading terms. The expression "yielding to the embraces" is not synonymous with "sexual intercourse"; likewise, the expression "wrongful acts" is not synonymous with the term "seduction".

Gardner v Boland, 209-362; 227 NW 902

V PAR. 3. NUMBER AND GENDER

"Person"—political subdivisions not included. The statutory provision that in the construction of statutes "the word 'person' may be extended to bodies corporate" does not embrace political subdivisions of the state.

Julander v Reynolds, 206-1115; 221 NW 807

VI PAR. 5. HIGHWAY—ROAD

Highway traversing city street—highway law applicable. Where a statute requires pedestrians to walk on left side of a highway, the word "highway" is applicable to a through highway traversing a street within a city, especially in view of other sections in the motor vehicle act concerning highways.

Reynolds v Aller, 226-642; 284 NW 825; 5 NCCA(NS) 724

"Construction of highway." Subgrading a street preparatory to putting down curbing and guttering constitutes "construction of a highway improvement," within the meaning of §11042, C., '27, and the contractor is suable by the subcontractor in any county where the contract is made or performed, irrespective of the residence of the defendant.

Goben v Akin, 208-1354; 227 NW 400

VII PAR. 6. INSANE

Adjudication of insanity — nonretroactive presumption. An adjudication of insanity creates no presumption that the person in question was insane at any particular period of time prior to said adjudication.

Davidson v Piper, 221-171; 265 NW 107

VIII PAR. 7. ISSUE

Wills—construction—"heirs"—inaccurate use of term—intent controls. A testamentary provision that testator's "heirs" shall participate in a specified trust fund will be deemed to include a granddaughter, even tho under the then existing circumstances she is not, technically, an heir, it appearing that testator had in other parts of his will listed his heirs and had therein included his said granddaughter.

Slavens v Bailey, 222-1091; 270 NW 367

IX PAR. 8. LAND—REAL ESTATE

No annotations in this volume

X PAR. 9. PERSONAL PROPERTY

"Property" defined. The term "property" embraces both personal and real property unless the contrary is shown; similarly the term "property owners" embraces the owners of personal as well as real property.

Groenendyke v Fowler, 204-598; 215 NW 718

Real estate and personalty distinguished. Principle reaffirmed that upon the sale of land through the medium of a contract for a deed, the purchaser acquires "land" while the vendor acquires "personal property."

Wood v Schwartz, 212-462; 236 NW 491

Matured crops. Principle reaffirmed that matured corn, standing in the field, is personal property and therefore subject to conversion.

Durflinger v Heaton, 219-528; 258 NW 543

XI PAR. 10. PROPERTY

Municipal corporations—telephone franchise —"property owners" defined. The term "property owners" in the statute relative to calling elections for the purpose of voting on the granting of telephone and other franchises (§5905, C., '24), embraces owners of personal property, as well as owners of real property.

Groenendyke v Fowler, 204-598; 215 NW 718

Judgment as property. A judgment is "property" within the purview of this section, and gives jurisdiction to the district court of the county in which the judgment is entered to appoint an administrator of the deceased judgment creditor's estate.

Edwards v Popham, 206-149; 220 NW 16

XII PAR. 11. MONTH—YEAR—A.D.

Limitation of rent lien—computation of six-months period. In computing the six months during which a landlord's lien survives the expiration of the lease, the count must commence with the first day following the said expiration. The statutory rule to exclude the first day and to include the last day has no application.

Welch v Welch, 212-1245; 238 NW 81

Statutes—time of taking effect—act of special session. Acts of a special session of the general assembly, in the absence of any contrary direction therein, take effect 90 days after final adjournment, the time being computed on the basis of excluding the day of adjournment and including the 90th day.

Clingingsmith v Jackson Dairy, 202-773; 211 NW 413

XIII PAR. 13. PERSON

"Person"—municipality not included. The statutory provision that in the construction of statutes "the word person may be extended to bodies corporate" does not embrace political subdivisions of the state.

Julander v Reynolds, 206-1115; 221 NW 807

XIV PAR. 16. TOWN

Constitutional law—classification of municipalities by population. Assuming that a supportable reason exists for classifying on the basis of population, a statute applicable to cities "now or hereafter having a population of" a named number, cannot be deemed "a local or special law" even tho when enacted it can apply to only one city, and even tho the creation of the official machinery for putting the act into effect in cities thereafter attaining said population is only implied.

State v Darling, 216-553; 246 NW 390; 88 ALR 218

Constitutional law—privileges and immunities and class legislation. The general assembly may constitutionally make a law applicable to cities having a certain population and not applicable to cities having a lesser population, provided the subject matter of the law suggests some reasonable necessity for said distinction. So held in sustaining the constitutionality of an act providing for the government and management of municipal parks by a park board of 10 members.

State v Darling, 216-553; 246 NW 390; 88 ALR 218

XV PAR. 19. SHERIFF

Original notice—service—return by deputy. When service of an original notice is made by a deputy sheriff, the return is all-sufficient when made in the name of the sheriff by the deputy in his name.

Thompson Bros. v Phillips, 198-1064; 200 NW 727

XVI PAR. 20. DEED—BOND—INDENTURE—UNDERTAKING

Construction and operation of contract for deed. Principles reaffirmed that under a contract for a deed:

1. The purchaser acquires the full equitable title to the land, while the vendor continues to hold the legal title as security for the performance of the contract, and

2. That, for the purpose of foreclosure, the purchaser will be deemed a mortgagor and the vendor a mortgagee.

Junkin v McClain, 221-1084; 265 NW 362

Motor carrier's bond to pay taxes "incurred"—scope. A bond, (1) reciting that the principal therein had been licensed as a motor carrier under named statutes of the state, and (2) conditioned to pay "the taxes and penalties incurred" under said statutes—a positive liability—embraces liability to pay taxes and penalties incurred before, as well as after, the date of said bond.

Board v U.S.F. & G. Co., 221-880; 266 NW 501

XVII PAR. 21. EXECUTOR—ADMINISTRATOR

Special and general administrators. The fact that, in a will contest, verdict has been returned and judgment entered thereon to the effect that the alleged will in question is not a valid will, does not, in and of itself, legally justify the court in terminating an existing special administratorship and in appointing a general administrator. Said latter appointment would probably be void.

In re Whitehouse, 223-91; 272 NW 110

Executor and executor de son tort. A legatee of a strictly personal property, debt-free estate, who, with the approval of all other legatees, distributes the entire estate in strict accord with the will of the testator, is thereafter under no obligation to account to a subsequently appointed executor who does not question the correctness of her distribution. Especially is this true when such legatee offers to pay the cost of such unnecessary administration.

Davenport v Sandeman, 204-927; 216 NW 55

XVIII PAR. 22. NUMERALS—FIGURES

No annotations in this volume

XIX PAR. 23. COMPUTING TIME

Fractions of a day—when recognized. Principle recognized that the fiction, often encountered in the law, that a day is an individual period of time—that the law will not take cognizance of fractions of a day—is subject to many exceptions.

Thrasher v Haynes, 221-1137; 264 NW 915

Notice—insufficient publication. A notice of the hearing before the board of supervisors on a petition for the enrollment of a county under the county area eradication plan relating to bovine tuberculosis is a nullity when the last newspaper publication was on August 13th, and when the hearing was had on August 17th.

Phelps v Thornburg, 206-1150; 221 NW 835

Timely motion to set aside. Where judgment is entered in a municipal court on April 9th, a motion filed on April 19th following, to set aside the default, is timely.

Service System v Johns, 206-1164; 221 NW 777

Landlord's lien—computation of six months period. In computing the six months during which a landlord's lien survives the expiration of the lease, the count must commence with the first day following the said expiration. The statutory rule to exclude the first day and to include the last day has no application.

Welch v Welch, 212-1245; 238 NW 81

Acts of special session of legislature.

Clingingsmith v Dairy Co., 202-773; 211 NW 413

Danbury v Riedmiller, 208-879; 226 NW 159

Nugatory or ineffective amendments. The mortgage foreclosure redemption act (45 GA, ch 179), which became a law March 19, 1933, and which provided that "In any action * * * which has been commenced" for the foreclosure of a real estate mortgage, the court should, under named conditions, grant an extension of time in which to redeem from sale, manifestly, ex vi termini, had no application to mortgages executed on or after January 1, 1934. It follows that the later amendment (45 Ex. GA, ch 137) which specifically declared the inapplicability of said moratorium act to mortgages executed "on or after January 1, 1934" was nugatory—took naught from, and added naught to, said original moratorium act.

Metropolitan v Reeve, 222-255; 268 NW 531

Redemption from tax sale—law governing. The time in which redemption may be made from tax sale is absolutely governed by the law in force at the time of the sale. It follows that a legislative amendment shortening the redemption period cannot apply to pre-existing sales.

Lockie v Hammerstrom, 222-451; 269 NW 507

Verdict — scope of term — fatally delayed motion. A court-directed verdict (in a jury trial) is the verdict of the jury within the meaning of the statute limiting applications for new trial to five days "after the verdict is rendered" and the court has no jurisdiction to grant an application made after said time irrespective of the time when formal judgment was entered on the verdict. (Verdict rendered in 1916; judgment entered in 1930.)

Selby v McDonald, 219-823; 259 NW 485

Failure to file abstract—"second term" defined. The statutory provision that an appeal may be dismissed if the abstract is not filed "30 days before the second term" after the taking of the appeal, means "30 days before the second term at which the appeal can be submitted," in view of other provisions of the statute. (§§12847, 12848, C., '24.)

Mullenix v Bank, 201-137; 206 NW 670

XX PAR. 24. CONSANGUINITY AND AFFINITY

"Sister" contemplates "half-sister". The statute (§10445, C., '27) which declares void a marriage between a man and his sister's daughter, embraces a marriage between a man and his half-sister's daughter.

State v Lamb, 209-132; 227 NW 830

Status of children of adopted child. The legal status of children of an adopted child is, inter alia, that of grandchildren of their foster grandparents.

Shaw v Scott, 217-1259; 252 NW 237

Administrator—next of kin—no degrees of nearness. "Next of kin", within the meaning of the statute regulating the preferential right to apply for administration, embraces those persons who take the personal property of the deceased; and there are no degrees of nearness in said class. For instance, the sister of the deceased has no necessarily preferential right over the niece of the deceased.

In re Wright, 210-25; 230 NW 552

Inheritable existence—criterion. An infant acquires existence capable of taking an inheritance only when it acquires an independent circulation of its blood after being fully separated from the body of the mother.

Wehrman v Farmers & M. Bank, 221-249; 259 NW 564; 266 NW 290

XXI PAR. 25. CLERK—CLERK'S OFFICE

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XXII PAR. 26. POPULATION

Census—when effective. A state census becomes effective only from and after the date of the official certificate of the secretary of state as to its correctness.

Broyles v Mahaska County, 213-345; 239 NW 1

64 Common-law rule of construction.

Additional annotations. See under §§63, 10002

Common-law restrictions. The common-law rule that statutes in derogation of the common law must be strictly construed has no application in this state.

Peterson v Freeburn, 204-644; 215 NW 746
In re Van Vechten, 218-229; 251 NW 729
Sullivan v Harris, 224-345; 276 NW 88

Statutory remedies not necessarily exclusive. A statutory remedy will not be construed as abrogating an existing common-law remedy unless the statute affirmatively indicates an intention to make the statutory remedy exclusive.

Jones v Knutson, 212-268; 234 NW 548

Attachment. Principle reaffirmed that proceedings in attachment are of statutory origin only, and in derogation of the common law.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Quasi-mechanic's lien statute. The statutes relative to materialmen and laborers on public improvements have always been strictly construed.

Aetna Cas. Co. v Kimball, 206-1251; 222 NW 31

Missouri Gravel v Surety Co., 212-1322; 237 NW 635

Tax statute—construed against taxing body. A proviso or exemption in a taxing statute in derogation of its general enacting clause must be strictly construed. However, as to contention that an income tax statute does not include out-of-state rent, not because of an exception, but by its terms, if open to construction at all, must fall within the genèral rule that tax statutes are construed strictly against the taxing body.

Palmer v Board, 226-92; 283 NW 415

Premises and enjoyment and use thereof—injury to tenant. The housing law (Ch 323, C., '31) providing that "Every dwelling and all the parts thereof shall be kept in good repair by the owner" (§6392, C., '31) does not change the common-law rule of tort liability of the lessor to the lessee.

Johnson v Carter, 218-587; 255 NW 864; 93 ALR 774

Insurance—bylaws and statutes in conflict—statute prevails. In an action to recover damages for loss by hail, bylaws of mutual hail insurance association which are inconsistent with statute relating to notice of cancellation must give way to statute.

Sorensen v Ins. Assn., 226-1316; 286 NW 494

Insurance—cancellation—statutory and contract provisions—construction. In an action on an insurance policy to recover damages for loss by hail, held, that statutory provisions for benefit of insured cannot be contracted away and terms of contract are only binding upon the insured if not contrary to applicable statutes. A policy is construed to give the insured his indemnity in questions of cancellation or forfeiture.

Sorensen v Ins. Assn., 226-1316; 286 NW 494

Highway traversing city street—highway law applicable. Where a statute requires pedestrians to walk on left side of a highway, the word "highway" is applicable to a through highway traversing a street within a city, especially in view of other sections in the motor vehicle act concerning highways.

Reynolds v Aller, 226-642; 284 NW 825; 5 NCCA(NS) 724

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75 Proclamation.

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77.1 Action to test legality.

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Unallowable intervention. A taxpayer who is given the right to intervene in an action by joining (1) with the plaintiff, or (2) with the defendant, and in an attempted intervention does neither, has no standing in the action.

Mathews v Turner, 212-424; 236 NW 412

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State comptroller—money payable by appropriation only. State disbursing officer is bound by the constitutional provision that no money shall be drawn from the treasury but in consequence of appropriations made by law.

O'Connor v Murtagh, 225-782; 281 NW 455

Continuing appropriation statute—biennial appropriation paramount — mandamus. A statute, altho in the code because of its general and permanent nature, which sets the salary of the attorney general, a state officer, is not a continuing appropriation for that officer, when the biennial appropriation act appropriates a different and smaller amount for such officer for the biennium and declares "all salaries provided for in this act are in lieu of all existing statutory salaries". Mandamus will not lie to require payment of the larger salary.

O'Connor v Murtagh, 225-782; 281 NW 455

Limitation on claims for unpaid salary. Claims for back salary for the attorney general, a state officer, must be made within six months after said salary was due.

O'Connor v Murtagh, 225-782; 281 NW 455

Deposits—payment on forged indorsement—negligence not imputable to state. Negligence and laches of public officers in the handling of state funds are not imputable to the state; for instance, in an action to recover from a drawee bank the amount paid by the bank on a forged indorsement of a check drawn by a county treasurer against state school funds on deposit with said drawee, it is no defense that the county treasurer was negligent in drawing or delivering the check, or that county officers generally were negligent in not making early discovery of the forged indorsement, and notifying the drawee accordingly.

New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

84.13 Claims—limitations.

Atty. Gen. Opinions. See AG Op March 22, '39, April 20, '39

Limitation on claims for unpaid salary. Claims for back salary for the attorney general, a state officer, must be made within six months after said salary was due.

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Continuing appropriation statute—biennial appropriation paramount—mandamus. A statute, altho in the code because of its general and permanent nature, which sets the salary of a state officer is not a continuing appropriation for that officer, when the biennial appropriation act appropriates a different and smaller amount for such officer for the biennium and declares "all salaries provided for in this act are in lieu of all existing statutory salaries". Mandamus will not lie to require payment of the larger salary.

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94 When patents issued.

Patents—collateral attack. The issuance by the state of a patent to lands is an assertion of the existence of the property conveyed; and such patent is immune from attack in a collateral proceeding.

Meeker v Kautz, 213-370; 239 NW 27

96 Maps — field notes — records — papers.

Atty. Gen. Opinion. See '38 AG Op 143

99 Lists of federal granted lands.

Invalid reservation in land grant. Principle reaffirmed that the insertion in a patent issued by the federal government under a public improvement grant of a clause "excepting and reserving all mineral lands", is, in the absence of fraud, a nullity even tho the grant itself did except mineral lands.

Herman v Engstrom, 204-341; 214 NW 588

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113 Examination of counties.

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Atty. Gen. Opinion. See '25-26 AG Op 165

119 Refusal to testify.

Atty. Gen. Opinion. See '25-26 AG Op 165

120 Reports.

Atty. Gen. Opinions. See '25-26 AG Op 165; '38 AG Op 117

121 Report filed with county attorney.

Atty Gen. Opinion. See '25-26 AG Op 165

122 Duty of attorney general.

Atty. Gen. Opinion. See '25-26 AG Op 165

123 Disclosures prohibited.

Atty. Gen. Opinion. See '25-26 AG Op 165

124 Examination of cities, townships, and schools.

Atty. Gen. Opinions. See '25-26 AG Op 165; '30 AG Op 278; '38 AG Op 117

125 Bills—audit and payment.

Atty. Gen. Opinions. See '25-26 AG Op 165; '34 AG Op 507; '38 AG Op 727; AG Op Aug. 10, '39

126 Repayment—objections.

Atty. Gen. Opinions. See '25-26 AG Op 165; '30 AG Op 278; '34 AG Op 507; '38 AG Op 117, 727

130.1 Uniform system of accounting.

Blanks—requirements. The blank forms prescribed by the auditor must be consistent with the duties of the officer using the blanks.

Wallace v Gilmore, 216-1070; 250 NW 105

130.2 Duty to install.

Atty. Gen. Opinion. See '38 AG Op 117

130.3 Title of act.

Atty. Gen. Opinion. See '36 AG Op 6

130.9 Salary.

Continuing appropriation statute—biennial appropriation paramount—mandamus. A statute, altho in the code because of its general and permanent nature, which sets the salary of a state officer is not a continuing appropriation for that officer, when the biennial appropriation act appropriates a different and smaller amount for such officer for the biennium and declares "all salaries provided for in this act are in lieu of all existing statutory salaries". Mandamus will not lie to require payment of the larger salary.

O'Connor v Murtagh, 225-782; 281 NW 455

CHAPTER 11

TREASURER OF STATE

131 Office—accounts.

Deposits—payment on forged indorsement—negligence not imputable to state. Negligence and laches of public officers in the handling of state funds are not imputable to the state; for instance, in an action to recover from a drawee bank the amount paid by the bank on a forged indorsement of a check drawn by a county treasurer against state school funds on deposit with said drawee, it is no defense that the county treasurer was negligent in drawing or delivering the check, or that county officers generally were negligent in not making early discovery of the forged indorsement, and notifying the drawee accordingly.

New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

134 Receipts.

Atty. Gen. Opinion. See '38 AG Op 31

135 Payment.

Atty. Gen. Opinion. See '34 AG Op 426

142 Restoration of cash balance.

Atty. Gen. Opinion. See '34 AG Op 95

143 Deposits by state officers.

Atty. Gen. Opinion. See '36 AG Op 240

144 Statement itemized.

Atty. Gen. Opinion. See '38 AG Op 31

145 Comptroller and treasurer to keep account.

Atty. Gen. Opinion. See '38 AG Op 31

147.1 Salary.

Continuing appropriation statute—biennial appropriation paramount. A statute, altho in the code because of its general and permanent nature, which sets the salary of a state officer is not a continuing appropriation for that officer, when the biennial appropriation act appropriates a different and smaller amount for such officer for the biennium and declares "all salaries provided for in this act are in lieu of all existing statutory salaries". Mandamus will not lie to require payment of the larger salary.

O'Connor v Murtagh, 225-782; 281 NW 455

CHAPTER 12

ATTORNEY GENERAL

149 Duties.

Atty. Gen. Opinions. See '36 AG Op 508; '38 AG Op 300, 780

Appeal—attorney general as "adverse party". A liquidator (or receiver) was appointed in a foreign state to liquidate an insolvent insurance company chartered in said state, and doing business in Iowa. The attorney general of Iowa, in his official capacity, at once instituted ancillary receivership proceedings in Iowa, and, in time, certain claims were duly allowed, in said ancillary proceedings, in favor of creditors of the insolvent. The Iowa court later ruled, on intervention by the foreign liquidator, that funds in the hands of the ancillary receiver should be retained by him and distributed under the ancillary receivership.

Held, an appeal by the foreign liquidator from said latter ruling imperatively necessitated service of notice of appeal on the attorney general or on his successor in office.

State v Sur. Co., 223-558; 273 NW 129

Cy pres doctrine invoked by state in equity court. A public charity, created by trust, about to fail, is properly represented in court

of equity to invoke jurisdiction to apply cy pres doctrine by the state or some authorized agency thereof.

Schell v Leander Clark College, 10 F 2d, 542

Writ of prohibition—state as plaintiff. An original action in the supreme court, for a writ of prohibition directed to a district court and prohibiting further action by said latter court in private actions pending therein, may be brought in the name of the state ex rel its attorney general; especially is this true when said private actions arose out of proceedings instituted by the state through the governor thereof.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

Gross premiums tax—attorney general's opinion—not precedent. Attorney general's opinion that payment of gross premiums tax is "condition precedent to a foreign corporation's obtaining any recognition" is not precedent binding on supreme court.

State v Ins. Co., 223-1301; 275 NW 26

152 Special counsel.

Atty. Gen. Opinions. See '34 AG Op 478; '36 AG Op 393, 398; '38 AG Op 891

153.1 Salary.

Atty. Gen. Opinion. See '34 AG Op 54

Continuing appropriation statute—biennial appropriation paramount—mandamus. A statute, altho in the code because of its general and permanent nature, which sets the salary of the attorney general, a state officer, is not a continuing appropriation for that officer, when the biennial appropriation act appropriates a different and smaller amount for such officer for the biennium and declares "all salaries provided for in this act are in lieu of all existing statutory salaries". Mandamus will not lie to require payment of the larger salary.

O'Connor v Murtagh, 225-782; 281 NW 455

Limitation on claims for unpaid salary. Claims for back salary for the attorney general, a state officer, must be made within six months after said salary was due.

O'Connor v Murtagh, 225-782; 281 NW 455

CHAPTER 13

REPORTER OF THE SUPREME COURT AND CODE EDITOR

168 Style of code.

Legislative reference to compiled code—effect.

Rains v Bank, 201-140; 206 NW 821

See Dayton v Ins. Co., 202-753; 210 NW 945

Code editor's catchwords—no part of law. Code section catchwords, prepared by code editor, are no part of the law.

State v Chenoweth, 226-217; 284 NW 110

Catchwords — noneffect on interpretation. The act of placing a section under a particular chapter of the code and the wording of the headings of the section, have little, if any, weight as official interpretations.

State v Oge, 227-1094; 290 NW 1

169 Editorial work.

Atty. Gen. Opinion. See '38 AG Op 360

Division of sections—effect. The mere act of dividing an existing section of law and printing its parts in the code as separate sections works no change in the meaning of the law. So held as to §4840, C., '97.

State v Gardiner, 205-30; 215 NW 758

Editorial arrangement changes no law. A mere rearrangement of statutes in code revision, or dividing one section into several sections, does not without legislative intention change the purpose, operation, and effect thereof.

Jones v Mills Co., 224-1375; 279 NW 96

170 Future codes.

Atty. Gen. Opinions. See '36 AG Op 346; AG Op Feb. 28, '40

171 Preparation.

Sections—placement—noneffect on interpretation. The act of placing a section under a particular chapter of the code and the wording of the headings of the section, have little, if any, weight as official interpretations.

State v Oge, 227-1094; 290 NW 1

175 Official statutes.

Atty. Gen. Opinion. See '38 AG Op 360

CHAPTER 14

STATE PRINTING BOARD

180 Financial interest.

Atty. Gen. Opinions. See '36 AG Op 660; '38 AG Op 16

183 Duties.

Atty. Gen. Opinions. See '28 AG Op 376; '34 AG Op 649; '38 AG Op 16; AG Op April 3, '39

184 Printing defined.

Atty. Gen. Opinion. See '34 AG Op 594

205 Contracts by institutional heads.

Atty. Gen. Opinion. See '38 AG Op 16

CHAPTER 15

SUPERINTENDENT OF PRINTING

213 Appointment.

Atty. Gen. Opinion. See '38 AG Op 16

215 Duties.

Atty. Gen. Opinion. See '38 AG Op 16

236 Purchase by municipalities — accounting.

Atty. Gen. Opinion. See '28 AG Op 96

237 Old codes—free distribution.

Atty. Gen. Opinion. See '36 AG Op 368

238.1 Code—session laws.

Atty. Gen. Opinions. See '28 AG Op 156; '30 AG Op 129; '36 AG Op 368

CHAPTER 17

CUSTODIAN OF PUBLIC BUILDINGS

272 Appointment and tenure.

Atty. Gen. Opinion. See '25-26 AG Op 141

Yardman at state capitol. An honorably discharged veteran of the war with Germany, appointed for no stated time to the position of "yard man" on the statehouse grounds, is not removable by the executive council except on duly preferred charges of incompetency or misconduct, he not being a deputy of the state custodian of public grounds, tho working under the supervision of said latter officer, and his "term" not expiring on the legal removal of said custodian.

Statter v Herring, 217-410; 251 NW 715

273 Duties.

Employees—power to discharge. The custodian of public buildings and grounds (at the seat of government) must, in view of this section, be deemed vested with the sole authority legally to discharge the employees of said department, no statute to the contrary appearing; especially is this true when other legislation, tho it has expired ex vi termini, clearly demonstrates such to have been the intent of the general assembly.

Pittington v Herring, 220-1375; 264 NW 712

Certiorari to review discharge of state employee. The custodian of public buildings and grounds (at Des Moines) is the sole, proper defendant in an action of certiorari to review the legality, under the soldiers preference act, of the discharge of an employee of said department.

Pittington v Herring, 220-1375; 264 NW 712

Certiorari—dismissal re custodian—res judicata. In an action of certiorari against the state executive council, and the custodian of public buildings and grounds, to review the legality of the discharge of an employee of the latter department, an unappealed order of court dismissing said custodian as an improper party defendant, tho unqualifiedly erroneous, becomes the law of said particular action, and precludes said plaintiff from thereafter proceeding against said custodian for the relief sought.

Pittington v Herring, 220-1375; 264 NW 712

275 Interest in contracts.

Atty. Gen. Opinion. See '36 AG Op 660

CHAPTER 18

EXECUTIVE COUNCIL

276 Membership.

Certiorari—dismissing party defendant. In an action of certiorari against the state executive council, and the custodian of public buildings and grounds, to review the legality of the discharge of an employee of the latter department, an unappealed order of court dismissing said custodian as an improper party defendant, tho unqualifiedly erroneous, becomes the law of said particular action, and precludes said plaintiff from thereafter proceeding against said custodian for the relief sought.

Pittington v Herring, 220-1375; 264 NW 712

Certiorari—reinstatement of discharged employee—unallowable order. The court, in certiorari, is manifestly without authority to order the state executive council to reinstate, in a department of the state government, a discharged state employee, when said council has no legal authority to employ or discharge employees in said department.

Pittington v Herring, 220-1375; 264 NW 712

286 Contingent fund.

Atty. Gen. Opinions. See '34 AG Op 682, 704; '38 AG Op 38

287 Anticipation of revenues.

Atty. Gen. Opinions. See '34 AG Op 631; '36 AG Op 71

288 Compromise of claims.

Atty. Gen. Opinions. See '38 AG Op 558, 902; AG Op Oct. 11, '39; AG Op Apr. 23, '40

290 Report of unexpended balances.

Atty. Gen. Opinions. See '28 AG Op 162; '38 AG Op 130; AG Op Feb. 14, '40

291 Notice to transfer balance.

Atty. Gen. Opinions. See '28 AG Op 162; '38 AG Op 130; AG Op Feb. 14, '40

292 Order of transfer.

Atty. Gen. Opinions. See '38 AG Op 130; AG Op Feb. 14, '40

293 Duty to transfer.

Atty. Gen. Opinions. See '28 AG Op 162; '38 AG Op 130; AG Op Feb. 14, '40

294 Exception.

Atty. Gen. Opinions. See '28 AG Op 162, '30 AG Op 75; '38 AG Op 130; AG Op Feb. 14, '40

295 Assignment of rooms.

Atty. Gen. Opinions. See '30 AG Op 102; '36 AG Op 694

296 Repairs—supplies.

Atty. Gen. Opinions. See '36 AG Op 139, 399; AG Op Feb. 9, '39

297 Advertisement for bids.

Atty. Gen. Opinion. See '38 AG Op 38

300 Sale of state property.

Atty. Gen. Opinion. See '36 AG Op 139

302 Officers entitled to supplies.

Atty. Gen. Opinions. See '34 AG Op 615; '36 AG Op 220

303 Postage.

Atty. Gen. Opinions. See '34 AG Op 592, 713, 747; '36 AG Op 474; AG Op March 3, '39

306 Performance of duty—expense.

Atty. Gen. Opinions. See '30 AG Op 101, '34 AG Op 299; '36 AG Op 1, 694

307 Necessary record.

Atty. Gen. Opinions. See '34 AG Op 299; '36 AG Op 1, 694

CHAPTER 18.1

DISPATCHER OF STATE AUTOMOBILES

308.1 Authority in governor.

Atty. Gen. Opinion. See AG Op Sept. 11, '39

308.5 Private use—rate for state business.

Atty. Gen. Opinion. See AG Op Sept. 7, '39

CHAPTER 23

PUBLIC CONTRACTS AND BONDS

351 Terms defined.

Atty. Gen. Opinions. See '25-26 AG Op 61, 110; '28 AG Op 330, 378; '38 AG Op 838

School property—assessability. A school district having lots assessable under a city contract for paving and curbing cannot be deemed a "municipality" entering "into a contract" within the meaning of the state budget law (Ch 23, C., '31). In such circumstances, the district is simply a property owner.

Schumacher v City, 214-34; 239 NW 71

352 Notice of hearing.

Atty. Gen. Opinions. See '25-26 AG Op 61, 105, 119, 386; '28 AG Op 190, 330, 378; '34 AG Op 365; '38 AG Op 731

Inapplicability of budget act. This section has no application to a contract entered into by a city for street grading on a per diem basis and under a contract legally terminable by the council at any time, even tho the per diem compensation ultimately exceeds $5,000.

Carlson v City, 212-373; 236 NW 421

Public improvements — nonjurisdiction of budget director. A contract for street improvement, e. g., paving and curbing, to be paid for by special assessments, is entirely outside the purview and purpose of this section.

Schumacher v City, 214-34; 239 NW 71

School property — assessability. A school district having lots assessable under a city contract for paving and curbing cannot be deemed a "municipality" entering "into a contract" within the meaning of this section. In such circumstances, the district is simply a property owner.

Schumacher v City, 214-34; 239 NW 71

353 Objections—hearing—decision.

Atty. Gen. Opinions. See '25-26 AG Op 61, 119, 386; '28 AG Op 378

354 Appeal—limitation.

Atty. Gen. Opinions. See '25-26 AG Op 61, 119, 386; '28 AG Op 378

Fatally defective service. Appeal to the director of the budget from the action of the city council in overruling objections to a proposal for paving is not effected by simply delivering to the city clerk a notice which purports to be a copy of an unproduced original, but which was not such copy, in that only twenty-four of the twenty-seven signatures affixed to the original were affixed to the notice served; and this is true even tho the city appears, and moves to dismiss the appeal.

Casey (Town) v Hogue, 204-3; 214 NW 729

357 Hearing and decision.

Atty. Gen. Opinions. See '25-26 AG Op 61, 119, 480; '30 AG Op 69, 129; '38 AG Op 38

Advertisement for bids—irregular compliance with mandatory duty. The irregularity of municipal authorities in advertising for, receiving, and opening bids for the construction of a municipal light and power plant before instead of after the director of the budget had, on appeal, overruled objections to the plans, specifications, and proposed form of contract, does not invalidate the contract entered into after said ruling and specifically approved by said director. But the duty to "advertise for bids" is mandatory in case an appeal is taken to the budget director.

Johnson v Town, 215-1033; 247 NW 552

Competitive bidding—unallowable contract. When a contract for the construction of a proposed public improvement is required by statute to be let on competitive bids, such contract cannot be legally entered into on the basis and in accordance with a bid which fails in any material respect to respond to the proposal for bids. Held, contract illegal because based on, and in accordance with, a bid which failed to respond to the legal proposals:

1. In re time of commencing and completing the work, and
2. In re testing the improvement as a condition to acceptance.

Brutsche v Coon Rapids, 220-1295; 264 NW 696

358 Enforcement of performance.

Atty. Gen. Opinions. See '25-26 AG Op 61, 121, 400

359 Nonapproved contracts void.

Atty. Gen. Opinions. See '25-26 AG Op 61, 119

361 Witness fees—costs.

Atty. Gen. Opinions. See '25-26 AG Op 61, 119

363 Issuance of bonds—notice.

Atty. Gen. Opinions. See '25-26 AG Op 61, 386; '30 AG Op 353, 372; '34 AG Op 365; '38 AG Op 838

364 Objections.

Atty. Gen. Opinions. See '25-26 AG Op 61, 485; '38 AG Op 838

365 Notice of hearing.

Atty. Gen. Opinions. See '25-26 AG Op 61, 485; '38 AG Op 838

366 Decision.

Atty. Gen. Opinion. See '38 AG Op 838

CHAPTER 24

LOCAL BUDGET LAW

368 Short title.

Incongruous matter. A title which gives notice of the creation of the office of state budget director and provides for a state and local budget, for the examination of public accounts, and for review of public contracts and bonds, is not broad enough to justify the inclusion of a provision creating a new fund and power in local municipalities to levy a tax for such fund.

Chi. RI Ry. v Streepy, 207-851; 224 NW 41

369 Definition of terms.

Atty. Gen. Opinions. See '25-26 AG Op 49, 74, 386; '30 AG Op 320; '38 AG Op 96; AG Op April 12, '39

370 Requirements of local budget.

Atty. Gen. Opinions. See '25-26 AG Op 37; '36 AG Op 231; '38 AG Op 21

School district vs. state appeal board—action where school district located—propriety. An action against the state appeal board to review its rulings affecting a school district under the local budget law is properly brought in the county where the school district was located and where proceedings on the levy involved were held from which resulted the board's ruling.

Board v Dist. Court, 225-296; 280 NW 525

School fund estimates under local budget law omitting money on hand—taxes valid—no refund. School districts, in submitting their budgets for their fiscal year beginning July first, are not required to include money on hand derived from taxes levied and estimated two years before and collected a year later to be expended during the current school year, and taxes collected accordingly will not be refunded in a mandamus action.

Lowden v Woods, 226-425; 284 NW 155

Budget—inviolability. After the due adoption and entry by a city council of a financial budget for an ensuing year, on the basis of estimated receipts from (1) taxable sources, and (2) nontaxable sources, the council may not later, in its appropriating ordinance, legally increase the municipal expenditures for said year by the simple expedient of revising and increasing its former estimated receipts from nontaxable sources.

Clark v Des Moines, 222-317; 267 NW 97

372 Estimates itemized.

Atty. Gen. Opinion. See '25-26 AG Op 199

373 Emergency fund—levy.

Atty. Gen. Opinions. See '25-26 AG Op 37, 74, 89, 245, 247, 373, 444, 468; '28 AG Op 36, 134; '34 AG Op 242; '38 AG Op 21

Legalization of invalid tax. The legislature may validly legalize a levy of taxes made under a supposedly legal statute but which was invalid because its title was constitutionally insufficient. (See also Const., Art. I, §21; Art. III, §30)

Chicago, RI Ry. v Rosenbaum, 212-227; 231 NW 646

Legalizing tax levy after invalidating ruling by court. A legislative act which legalizes a tax levy after the appellate court has ruled (but before entry of judgment) that the taxpayer is entitled to a refund of the tax paid, because the tax levy was void, owing to the absence of an authorizing statute, neither disturbs any vested interest of the taxpayer's nor constitutes an unconstitutional interference with the judiciary.

Chi. RI Ry. v Streepy, 211-1334; 236 NW 24

373.1 Supplemental estimates.

Atty. Gen. Opinions. See '28 AG Op 134; '32 AG Op 33, 262

374 Estimated tax collections.

Atty. Gen. Opinions. See '28 AG Op 134; '36 AG Op 231

375 Filing estimates—notice of hearing.

Atty. Gen. Opinions. See '25-26 AG Op 119, 193; '28 AG Op 134; '32 AG Op 33, 115, 262; '38 AG Op 19, 21

377 Meeting for review.

Atty. Gen. Opinion. See '38 AG Op 21

378 Record by certifying board.

School fund estimates under local budget law omitting money on hand—taxes valid—no refund. School districts, in submitting their budgets for their fiscal year beginning July first, are not required to include money on hand derived from taxes levied and estimated two years before and collected a year later to be expended during the current school year, and taxes collected accordingly will not be refunded in a mandamus action.

Lowden v Woods, 226-425; 284 NW 155

380 Tax limited.

Atty. Gen. Opinions. See '25-26 AG Op 37, 72, 74, 247, 373, 468; '28 AG Op 336; '34 AG Op 59, 242; '36 AG Op 355; '38 AG Op 19, 21; AG Op May 19, '39, Sept. 25, '39, Oct. 25, '39

Taxation—source of power. The power of a city to tax is strictly statutory—never implied.

Clark v Des Moines, 222-317; 267 NW 97

Budget — inviolability of. After the due adoption and entry by a city council of a financial budget for an ensuing year, on the basis of estimated receipts from (1) taxable sources, and (2) nontaxable sources, the council may not later, in its appropriating ordinance, legally increase the municipal expenditures for said year by the simple expedient of revising and increasing its former estimated receipts from nontaxable sources.

Clark v Des Moines, 222-317; 267 NW 97

381 Further tax limitation.

Atty. Gen. Opinions. See '25-26 AG Op 37, 74, 112, 247, 373, 468; '28 AG Op 336; '32 AG Op 262; '34 AG Op 242; '38 AG Op 20

383 Budgets certified.

Atty. Gen. Opinions. See '25-26 AG Op 116, 193

387 Transfer of inactive funds.

Atty. Gen. Opinions. See '25-26 AG Op 64, 119, 173, 377, 471; '28 AG Op 210, 441; '38 AG Op 96

388 Transfer of active funds — poor fund.

Atty. Gen. Opinions. See '25-26 AG Op 64, 112, 173, 230, 377, 428, 471; '28 AG Op 106, 210, 336; '34 AG Op 708; '36 AG Op 654; '38 AG Op 721; AG Op Sept. 25,'39

Budget act—nondelegation of legislative authority. The broad, sweeping, and apparently unguarded discretion granted by statute to the director of the budget (now state comptroller) to grant or refuse permission to a municipality to make a transfer of its funds, does not constitute an unconstitutional grant of legislative power.

State v Manning, 220-525; 259 NW 213

Arbitrary administration. An act will not be held unconstitutional because of the possibility that the administering officer will, by arbitrary administration, give the act a nonuniform operation.

State v Manning, 220-525; 259 NW 213

Removal of officer—proof of evil design—when not required. In an action to remove a public official from office, the principle that a corrupt or evil design or purpose must be shown under a charge of "wilful misconduct or maladministration in office", does not apply when the official is charged with the violation of a statute which specifically declares that such violation shall be sufficient ground for removal from office.

State v Manning, 220-525; 259 NW 213

389 Supervisory power of state board.

Atty. Gen. Opinion. See '25-26 AG Op 471

Appeal from local budget—statute directory as to time. The statutory requirement, that the state appeal board in ruling on local budget matters shall render final disposition of all appeals by October 15th of each year, should be obeyed. However, being directory rather than mandatory in its nature, a mere delay of a few days will not invalidate the action of the board or defeat the purposes sought to be obtained.

Woodbury Conference v Carr, 226-204; 284 NW 122

Collateral attack on budget appeal board—illegality on face of petition necessary—certiorari proper remedy. A suit in mandamus, to compel the county auditor to ignore the decision of the state board of appeal in local budget matters on the ground that such decision was made after the board had ceased to exist, is a collateral attack on the board's action—certiorari being the method for a direct attack; and if the mandamus suit is dismissed by the lower court, the supreme court, on appeal, will determine, only, if the acts of the board show on their face by their dates alone that they were illegal acts because the board had ceased to exist as such.

Woodbury Conference v Carr, 226-204; 284 NW 122

Appeal board—decisions modified. The state appeal board has power to modify its decisions.

Woodbury Conference v Carr, 226-204; 284 NW 122

390 Violations.

Atty. Gen. Opinion. See '34 AG Op 277

Removal—proof of evil design. In an action to remove a public official from office, the principle that a corrupt or evil design or purpose must be shown under a charge of "wilful misconduct or maladministration in office" does not apply when the official is charged with the violation of a statute which specifically declares that such violation shall be sufficient ground for removal from office.

State v Manning, 220-525; 259 NW 213

390.1 State appeal board.

Suing state appeal board—ruling on venue—appeal sole remedy. Certiorari will not lie to review the action of the trial court in overruling a motion by the state appeal board for a change of venue of a trial questioning a decision of such board.

Board v Dist. Court, 225-296; 280 NW 525

390.7 Decision certified to county.

Appeal from local budget—statute directory as to time. The statutory requirement, that the state appeal board in ruling on local budget matters shall render final disposition of all appeals by October 15th of each year, should be obeyed. However, being directory rather than mandatory in its nature, a mere delay of a few days will not invalidate the action of the board or defeat the purposes sought to be obtained.

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Collateral attack on budget appeal board—illegality on face of petition necessary—certiorari proper remedy. A suit in mandamus, to compel the county auditor to ignore the decision of the state board of appeal in local budget matters on the ground that such decision was made after the board had ceased to exist, is a collateral attack on the board's action—certiorari being the method for a direct attack; and if the mandamus suit is dismissed by the lower court, the supreme court, on appeal, will determine, only, if the acts of the board show on their face by their dates alone that they were illegal acts because the board had ceased to exist as such.

Woodbury Conference v Carr, 226-204; 284 NW 122

Appeal board—decisions modified. The state appeal board has power to modify its decisions.

Woodbury Conference v Carr, 226-204; 284 NW 122

CHAPTER 26

CENSUS

425 Federal census.

Atty. Gen. Opinion. See AG Op Nov. 13, '39

426 Publication.

Atty. Gen. Opinion. See '25-26 AG Op 264

429 Population of counties, cities and towns.

Atty. Gen. Opinions. See '25-26 AG Op 83, 264

When effective. A state census becomes effective only from and after the date of the official certificate of the secretary of state as to its correctness.

Broyles v County, 213-345; 239 NW 1

CHAPTER 27

DEPUTIES OF STATE OFFICERS

431 Deputy to qualify.

Atty. Gen. Opinion. See '36 AG Op 612

TITLE III

MILITARY CODE AND RELATED MATTERS

CHAPTER 28.1

MILITARY CODE

467.01 Military forces.

Discussion. See 17 ILR 40—Martial law

467.17 Bonds of officers.

Atty. Gen. Opinions. See '25-26 AG Op 457; '36 AG Op 484

467.21 Compensation for services, death, and injury.

Atty. Gen. Opinions. See '25-26 AG Op 210; '36 AG Op 619

467.24 Exemptions.

Atty. Gen. Opinion. See '30 AG Op 274

467.25 State and municipal officers and employees not to lose pay while on duty.

Atty. Gen. Opinions. See '36 AG Op 292, 619; AG Op May 18, '39

467.28 Governor may order out troops.

Atty. Gen. Opinion. See '36 AG Op 619

Officers—civil liability. Civil liability of officers of the militia and their agents in putting down, under orders of the governor, an insurrection, discussed.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

467.29 Aid to civil authorities.

Atty. Gen. Opinion. See '36 AG Op 619

467.31 Compensation and expenses of national guard.

Atty. Gen. Opinion. See '36 AG Op 619

467.39 Not liable for acts performed under orders.

Civil liability. Civil liability of officers of the militia and their agents in putting down, under orders of the governor, an insurrection, discussed.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

467.50 Tax exemptions of armories—use of public utilities.

Atty. Gen. Opinion. See '38 AG Op 187

467.53 Training.

Atty. Gen. Opinion. See '36 AG Op 619

467.60 Call by president—term of service.

Discussion. See 4 ILB 122—Constitutionality of Conscription Act

Atty. Gen. Opinion. See '36 AG Op 619

CHAPTER 30

DESECRATION OF FLAG

Atty. Gen. Opinion. See '34 AG Op 272

CHAPTER 32

PENSIONS

Atty. Gen. Opinion. See '28 AG Op 294

CHAPTER 32.1

BONUS BOARD

482.02 Investment of bonus and disability fund.

Atty. Gen. Opinions. See '34 AG Op 410, 754

482.03 Choice of securities.

Atty. Gen. Opinion. See '34 AG Op 754

CHAPTER 33

MEMORIAL HALLS AND MONUMENTS FOR SOLDIERS, SAILORS, AND MARINES

Atty. Gen. Opinions. See '28 AG Op 263; '30 AG Op 231; '36 AG Op 434

TITLE IV

ELECTIONS AND OFFICERS

CHAPTER 35

TIME OF ELECTION AND TERM OF OFFICE

504 General election.

Right of suffrage. See under Const Art II
Time of holding election. See Amendments of 1904, No. 1

506 Proclamation concerning election.

Atty. Gen. Opinion. See '38 AG Op 87

507 Proclamation concerning revision of constitution.

Atty. Gen. Opinion. See '38 AG Op 87

509 Notice of special election.

Atty. Gen. Opinion. See '34 AG Op 68

511 Term of office.

Atty. Gen. Opinions. See '34 AG Op 54, 69; '38 AG Op 12, 896

Expiration of official term. An appeal in an action in which the county is the real party in interest will not be dismissed because the terms of office of the official party defendants have expired.

First N. Bank v Burke, 201-994; 196 NW 287

512 State officers—term.

Atty. Gen. Opinion. See '28 AG Op 43

518 State senators.

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520 County officers.

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521 Board of supervisors and township trustees.

Atty. Gen. Opinions. See '34 AG Op 69; '38 AG Op, 679, 777

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523 Justices and constables.

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523.1 Township trustees—manner of election.

Atty. Gen. Opinions. See '28 AG Op 299; '38 AG Op 498

525 Township assessor.

Atty. Gen. Opinions. See '25-26 AG Op 313; '38 AG Op 136

CHAPTER 35.1

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526.1 Districts designated.

Discussion. See 17 ILR 390—Re-apportionment of legislative districts

CHAPTER 36

NOMINATIONS BY PRIMARY ELECTION

527 "Primary election" defined.
Atty. Gen. Opinion. See '38 AG Op 804

528 "Political party" defined.
Atty. Gen. Opinions. See '34 AG Op 669; '38 AG Op 758, 804; AG Op March 27, '40

529 Offices affected by primary.
Atty. Gen. Opinion. See '25-26 AG Op 280

531 Applicable statutes.
Atty. Gen. Opinions. See '38 AG Op 659, 736, 823

537 Filing of nomination papers.
Atty. Gen. Opinions. See '30 AG Op 313; '34 AG Op 535

539 Failure to file nomination papers.
Atty. Gen. Opinion. See '30 AG Op 313

542 Withdrawals and additions not allowed.
Atty. Gen. Opinions. See '25-26 AG Op 346; '34 AG Op 534

543 Affidavit to nomination papers.
Atty. Gen. Opinions. See '30 AG Op 313; '32 AG Op 197

544 Affidavit by candidate.
Atty. Gen. Opinions. See '25-26 AG Op 346; '30 AG Op 313; '34 AG Op 535

545 Manner of filing affidavit.
Atty. Gen Opinion. See '34 AG Op 535

546 Signatures required.
Atty. Gen. Opinions. See '32 AG Op 181; '34 AG Op 505, 512

547 Township or precinct office.
Atty. Gen. Opinion. See '28 AG Op 357

548 Nominations certified.
Atty. Gen. Opinion. See '34 AG Op 534

550 Notice of election.
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551 Publication of notice.
Atty. Gen. Opinion. See '34 AG Op 552

553 Ballot—form.
Atty. Gen. Opinions. See '30 AG Op 165; '34 AG Op 718

556 Names of candidates—arrangement.
Atty. Gen. Opinion. See '30 AG Op 313

557 Township or district candidates.
Atty. Gen. Opinions. See '28 AG Op 417; '30 AG Op 313

559 Judges and clerks.
Atty. Gen. Opinion. See '38 AG Op 758

563 Designating party affiliation.
Atty. Gen. Opinion. See '30 AG Op 296

566 Voter confined to party ticket.
Atty. Gen. Opinion. See AG Op Apr. 23, '40

568 Records of party affiliation.
Atty. Gen. Opinions. See '34 AG Op 463; AG Op Apr. 23, '40

569 Change of party affiliation.
Atty. Gen. Opinion. See '34 AG Op 509

570 New voters.
Atty. Gen. Opinion. See AG Op Apr. 23, '40

572 Change of affiliation.
Atty. Gen. Opinions. See '34 AG Op 509; '38 AG Op 764

580 Who nominated for county office.
Atty. Gen. Opinion. See '36 AG Op 467

581 Who nominated for township office.
Atty. Gen. Opinions. See '30 AG Op 347, 363; '36 AG Op 467; AG Op May 2, '40

582 Right to place on ballot.
Atty. Gen. Opinion. See '36 AG Op 467

585 Showing must be specific.
Atty. Gen. Opinion. See '30 AG Op 319

586 Recount granted.
Atty. Gen. Opinion. See '30 AG Op 319

592 State canvass conclusive.

Effect of conclusiveness. The fact that the state canvass of primary election returns is final and conclusive has no relevancy to the question whether a convention had the right to make a nomination for an office for which concededly no nomination was made at the primary.

Zellmer v Smith, 206-725; 221 NW 220

593 Who nominated.
Atty. Gen. Opinion. See '32 AG Op 236

594 Minimum requirement for nomination.
Atty. Gen. Opinion. See '32 AG Op 236

Right of convention to nominate. The county convention of a political party may legally make a nomination for an office when no candidate of said party for said office had his name printed on the primary ballot of said party, and when the "written in" names at said primary election for said office did not effect a nomination because the candidate receiving a majority of the votes cast did not receive a vote equal to the 10 percent required by statute.

Zellmer v Smith, 206-725; 221 NW 220

598 Delivery of certificates.

Presumption. It will be presumed, in the absence of a showing to the contrary, that the state board of canvassers has duly performed its duty to certify the result of a primary election to the various chairmen of political parties.

Zellmer v Smith, 206-725; 221 NW 220

601 Secretary of state to certify nominees.

Mandamus. Mandamus will lie to compel the secretary of state to certify a legal nomination to the county auditor.

Zellmer v Smith, 206-725; 221 NW 220

604 Vacancies in nominations prior to convention.

Atty. Gen. Opinions. See '38 AG Op 804, 844

605 Failure of convention to fill.

Atty. Gen. Opinions. See '38 AG Op 804, 844

606 Vacancies in nominations subsequent to convention.

Atty. Gen. Opinions. See '28 AG Op 411; '38 AG Op 804

607 Vacancies in nomination of United States senator.

Atty. Gen. Opinions. See '25-26 AG Op 413; '38 AG Op 804

608 Vacancies in office prior to convention.

Atty. Gen. Opinion. See '38 AG Op 804

609 Vacancies in office subsequent to convention—United States senator.

Atty. Gen. Opinions. See '25-26 AG Op 413; '38 AG Op 804, 844

Statutes—construction and operation—elections—statutes in pari materia. The statutes relative (1) to vacancies in nominations, (2) to the placing of names of candidates on the official ballot, (3) to the sufficiency of a certificate of nomination, and (4) to the eligibility of candidates, all presuppose (and properly so) the existence of statutory authorization to hold an election, and therefore can have no controlling bearing on the construction of the statute which does authorize an election. Such former series of statutes are not strictly in pari materia with the latter statute.

State v Claussen, 216-1079; 250 NW 195

610 Vacancies in office of congressman or state senator.

Atty. Gen. Opinions. See '28 AG Op 55; '34 AG Op 68; '38 AG Op 804

611 Vacancies in office of state senator or representative.

Atty. Gen. Opinions. See '28 AG Op 55; '38 AG Op 804

612 County convention reconvened.

Atty. Gen. Opinions. See '34 AG Op 68; '38 AG Op 804

613 Committee may call convention.

Atty. Gen. Opinion. See '38 AG Op 804

614 Vacancies in nominations and in offices for subdivisions of county.

Atty. Gen. Opinions. See '30 AG Op 338, 347, 358, 363; '36 AG Op 482; '38 AG Op 804

615 Certification of nominations.

Statutes—construction and operation—elections—statutes in pari materia. The statutes relative (1) to vacancies in nominations, (2) to the placing of names of candidates on the official ballot, (3) to the sufficiency of a certificate of nomination, and (4) to the eligibility of candidates, all presuppose (and properly so) the existence of statutory authorization to hold an election, and therefore can have no controlling bearing on the construction of the statute which does authorize an election. Such former series of statutes are not strictly in pari materia with the latter statute.

State v Claussen, 216-1079; 250 NW 195

617 Delegates.

Atty. Gen. Opinion. See '38 AG Op 772

618 Election.

Atty. Gen. Opinion. See '30 AG Op 316

624 Duties performable by county convention.

Atty. Gen. Opinions. See '32 AG Op 23; '36 AG Op 489; '38 AG Op 772, 844

Primary elections—right of convention to nominate. The fact that the state canvass of primary election returns is final and conclusive (§592, C., '27), has no relevancy to the question whether a convention had the right to make a nomination for an office for which concededly no nomination was made at the primary.

Zellmer v Smith, 206-725; 221 NW 220

625 Nominations prohibited.

Atty. Gen. Opinions. See '32 AG Op 236; '36 AG Op 489; '38 AG Op 844

626 Party committeemen.

Atty. Gen. Opinion. See '34 AG Op 436

627 Central committee—vacancies.

Atty. Gen. Opinions. See '32 AG Op 234; '34 AG Op 436; '38 AG Op 772

629 Call for district convention.

Atty. Gen. Opinion. See '34 AG Op 68

630 Duty of county auditor.

Atty. Gen. Opinion. See '34 AG Op 68

631 Organization.

Atty. Gen. Opinion. See '34 AG Op 68

636 Nominations authorized.

Atty. Gen. Opinion. See '28 AG Op 411

638 State central committee — platform.

Atty. Gen. Opinion. See '38 AG Op 772

639 Nominations in certain cities and towns.

Atty. Gen. Opinions. See '25-26 AG Op 280; AG Op Jan. 24, '39

647 Bribery—illegal voting.

Conduct of election—municipal public utility ownership—candidates' statements. Statements made by candidates for municipal office as to what they intended to do in acquiring a public utility plant will not vitiate an election on the proposition of municipal control of said plant without a showing that the election was affected thereby.

Abbott v Iowa City, 224-698; 277 NW 437
Keokuk Co. v Keokuk, 224-718; 277 NW 291

648 Nominations by petition.

Atty. Gen. Opinion. See '38 AG Op 804

CHAPTER 37.1

NOMINATIONS BY NONPARTY POLITICAL ORGANIZATIONS

655.01 Political nonparty organizations.

Atty. Gen. Opinion. See '38 AG Op 804

655.04 Objections—time and place of filing.

Atty. Gen. Opinions. See '32 AG Op 278; '36 AG Op 633

Statutes—construction and operation—elections—statutes in pari materia. The statutes relative (1) to vacancies in nominations, (2) to the placing of names of candidates on the official ballot, (3) to the sufficiency of a certificate of nomination, and (4) to the eligibility of candidates, all presuppose (and properly so) the existence of statutory authorization to hold an election, and therefore can have no controlling bearing on the construction of the statute which does authorize an election. Such former series of statutes are not strictly in pari materia with the latter statute.

State v Claussen, 216-1079; 250 NW 195

655.05 Notice of objections.

Atty. Gen. Opinions. See '32 AG Op 278; '36 AG Op 633

655.06 Hearing before secretary of state.

Atty. Gen. Opinions. See '32 AG Op 278; '36 AG Op 633

655.07 Hearing before county auditor.

Atty. Gen. Opinion. See '32 AG Op 278

655.09 Withdrawals.

Atty. Gen. Opinions. See '30 AG Op 350; '38 AG Op 823

655.11 Vacancies filled.

Atty. Gen. Opinion. See '30 AG Op 71

655.12 Insufficient time for convention.

Atty. Gen. Opinion. See '30 AG Op 71

655.14 Filing of certificates.

Atty. Gen. Opinions. See '30 AG Op 71; AG Op Jan. 13, '39

CHAPTER 37.2

NOMINATIONS BY PETITION

Atty. Gen. Opinions. See '28 AG Op 319; '30 AG Op 363; '38 AG Op 777, 823

CHAPTER 38

NOMINATION AND ELECTION OF JUDGES

Atty. Gen. Opinion. See AG Op Nov. 1, '39

CHAPTER 39

REGISTRATION OF VOTERS

Atty. Gen. Opinion. See AG Op Apr. 23, '40

676 Registration required.

Petitioners for election—qualifications. The electors of a city or town who are such under the constitution of this state, even tho their names do not appear on the official books of registered voters of the city or town, are qualified to petition for the calling of an election to vote on the proposition whether the municipality shall erect an electric light and power plant.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

677 Registers.

Atty. Gen. Opinions. See '34 AG Op 715; AG Op Apr. 23, '40

678 Vacancies.
Atty. Gen. Opinion. See '34 AG Op 715

684 Term and compensation.
Atty. Gen. Opinion. See '30 AG Op 330

687 Form of registry books.
Atty. Gen. Opinion. See '28 AG Op 421

688 Expenses.
Atty. Gen. Opinion. See '28 AG Op 379

690 Place of meeting of registers.
Atty. Gen. Opinions. See '30 AG Op 263, 330

691 Time of meeting of registers.
Atty. Gen. Opinions. See '36 AG Op 639; AG Op Apr. 23, '40

707 Registration on election day.
Atty. Gen. Opinion. See '36 AG Op 639

713 New registry—how often.
Atty. Gen. Opinion. See '32 AG Op 18

714 Registration book in nonpresidential years.
Atty. Gen. Opinion. See '32 AG Op 18

CHAPTER 39.1

PERMANENT REGISTRATION

Atty. Gen. Opinion. See AG Op Apr. 23, '40

718.01 Commissioner of registration.
Atty. Gen. Opinion. See '28 AG Op 414

718.02 Definitions.
Atty. Gen. Opinion. See '28 AG Op 414

718.03 Registration required.
Atty. Gen. Opinions. See '28 AG Op 414; '36 AG Op 639, 640

Petitioners for election—qualifications. The electors of a city or town who are such under the constitution of this state, even tho their names do not appear on the official books of registered voters of the city or town, are qualified to petition for the calling of an election to vote on the proposition whether the municipality shall erect an electric light and power plant.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

718.04 Commissioner of registration—duties.
Atty. Gen. Opinions. See '28 AG Op 414; '30 AG Op 241; '36 AG Op 640

718.05 Registration lists.
Atty. Gen. Opinions. See '28 AG Op 414; '36 AG Op 640

718.06 Form of records.
Atty. Gen. Opinions. See '28 AG Op 414, 421; '36 AG Op 640

718.07 Change of residence.
Atty. Gen. Opinion. See '28 AG Op 414

718.08 Election register.
Atty. Gen. Opinions. See '28 AG Op 414; '34 AG Op 463; '36 AG Op 640

718.09 Correction of list.
Atty. Gen. Opinions. See '28 AG Op 414; '36 AG Op 640

718.10 Deceased persons—record.
Atty. Gen. Opinion. See '28 AG Op 414

718.11 Time and method of registration.
Atty. Gen. Opinions. See '28 AG Op 414; '36 AG Op 638, 639, 640

718.12 Disabled or absent voters.
Atty. Gen. Opinions. See '28 AG Op 414; '30 AG Op 302

718.13 Election registers.
Atty. Gen. Opinions. See '28 AG Op 414; '36 AG Op 638, 639, 640

718.14 Revision of lists.
Atty. Gen. Opinions. See '28 AG Op 414; '36 AG Op 640

718.15 Challenges.
Atty. Gen. Opinions. See '28 AG Op 414; '36 AG Op 640

718.16 Penalties.
Atty. Gen. Opinion. See '28 AG Op 414

718.17 Qualification of officers.
Atty. Gen. Opinion. See '28 AG Op 414

718.18 Expenses.
Atty. Gen. Opinions. See '28 AG Op 379, 414

718.19 Registration fund.
Atty. Gen. Opinions. See '28 AG Op 414; '36 AG Op 639

718.20 Nonapplicability of statutes.
Atty. Gen. Opinions. See '30 AG Op 303; '34 AG Op 463; '36 AG Op 640

718.21 Certificate of registration.
Atty. Gen. Opinion. See '36 AG Op 639

Percentage of voters required. The phrase "fifteen per cent of the qualified electors, as shown by the poll list" as employed in §10643, C., '31 must be deemed to refer to the "poll

books" in cities having no statutory system of permanent registration of voters, while in cities having such system of registration (where poll books are not employed) the phrase must be deemed to refer to the "certificates of registration" duly signed by voters just preceding their actual voting.

Gilman v City, 215-442; 245 NW 868

718.22 Permissive adoption.

Atty. Gen. Opinion. See '32 AG Op 22

718.24 Party affiliations.

Atty. Gen. Opinion. See '34 AG Op 463

718.25 Entries required.

Atty. Gen. Opinion. See '34 AG Op 463

CHAPTER 40

METHOD OF CONDUCTING ELECTIONS

719 Elections included.

Atty. Gen. Opinions. See '25-26 AG Op 253; '38 AG Op 248, 659

Call by unauthorized body. An election which is called by an unauthorized body is a nullity.

Leslie v Barnes, 201-1159; 208 NW 725

Irregularities — effect. A school election will not be held invalid (in the absence of any showing of prejudice) because all the members of the board acted as judges of election, instead of only the president, secretary, and one director, as provided by statute.

Mack v Sch. Dist., 200-1190; 206 NW 145

Failure to initial ballot. Ballots not initialed by the judges of election as required by statute must be counted if otherwise unobjectionable.

Donlan v Cooke, 212-771; 237 NW 496

Elections—public canvass in private room—incomplete election. Until legislative mandates are obeyed, an election is not complete.

Steeves v New Market, 225-618; 281 NW 162

Improper conduct of election—no validation by successors. Statutory requirements as to conducting elections, violated by one set of officials, cannot be validated by their successors in office a year later.

Steeves v New Market, 225-618; 281 NW 162

720 Terms defined.

Atty. Gen. Opinion. See '38 AG Op 248

723 City precincts.

Atty. Gen. Opinion. See '32 AG Op 228

725 Portions of townships combined.

Atty. Gen. Opinion. See '30 AG Op 320

727 Proper place of voting.

Right of suffrage. See Const Art II, §1

Atty. Gen. Opinions. See '32 AG Op 227; '38 AG Op 748, 832

Qualifications of voters — school teachers. Adult unmarried school teachers become "residents" of the county in which they teach, within the meaning of the constitutional provision governing suffrage, when the employment is entered upon with the good-faith intention of making the place of employment their permanent home or residence so long as the employment continues.

Dodd v Lorenz, 210-513; 231 NW 422

729 Notice of boundaries of precincts.

Atty. Gen. Opinion. See '32 AG Op 228

730 Election boards.

Atty. Gen. Opinions. See '30 AG Op 263, 357; '34 AG Op 505; '38 AG Op 758, 800, 856

731 Judges in cities and towns.

Atty. Gen. Opinions. See '30 AG Op 357; '34 AG Op 505; '38 AG Op 758, 856

732 Judges and clerk in township precincts.

Atty. Gen. Opinions. See '30 AG Op 357; '34 AG Op 505; '38 AG Op 758, 856

733 Supervisors to choose additional members.

Atty. Gen. Opinions. See '30 AG Op 241; '34 AG Op 505; '38 AG Op 758, 856

736 Vacancies occurring on election day.

Atty. Gen. Opinion. See '38 AG Op 856

737 Boards for special elections—duty of auditor.

Atty. Gen. Opinion. See '38 AG Op 800

748 All candidates on one ballot—exception.

Atty. Gen. Opinion. See '30 AG Op 347

749 Arrangement of party nominees.

Atty. Gen. Opinions. See '28 AG Op 417; '38 AG Op 804

753 Order of arranging names.

Atty. Gen. Opinion. See '28 AG Op 417

756 Candidate's name to appear but once.

Atty. Gen. Opinions. See '25-26 AG Op 376; '32 AG Op 179

759 Nominees for judge of district court.

Atty. Gen. Opinion. See '25-26 AG Op 376

760 Form of official ballot.

Atty. Gen. Opinions. See '25-26 AG Op 253; '34 AG Op 77, 108, 718

761 Constitutional amendment or other public measure.

Atty. Gen. Opinions. See '38 AG Op 659, 841

Granting franchise — when ordinance not necessary. The passage of an ordinance and the printing of the same on the ballots are not necessary in those cases where the proposal to grant a franchise to a private party for the erection and operation of an electric light and power franchise is not initiated by the city or town council, but is initiated by the voters, through a statutory petition addressed to the mayor. (See §6555, C., '27.)

Mapleton v Iowa Co., 206-9; 216 NW 683

Contents of ballot. At an election called by a city council on its own motion on the question whether the city shall erect an electric light and power plant and pay for the same out of the earnings of the plant, the ballot need only contain (1) the main proposition, and (2) a statement of the maximum amount to be expended. Manifestly, the law does not contemplate the setting forth of a contract which can only be entered into after the election grants the authority for such a contract.

Hogan v City, 217-504; 250 NW 134

Ballots — validity of form — Simmer law — municipal electric plant. In an election to establish a municipal electric plant under the Simmer law, the ballot held to comply with statute.

Interstate Co. v Forest City, 225-490; 281 NW 207

Substantial compliance with statutory ballot. Form of ballot used in election for establishment of a municipal electric light or power plant reviewed, and held to substantially comply with statute and to be unambiguous.

Lahn v Primghar, 225-686; 281 NW 214

Fatally defective ballot. A ballot is fatally defective when it fails to clearly indicate to the voter whether a proposed municipal electric light and power plant is to be financed, (1) by ordinary taxation or, (2) by pledging the plant and the net earnings thereof; and this is true tho the ballot states the maximum amount of money to be expended.

Pennington v Fairbanks, M. & Co., 217-1117; 253 NW 60

Light and power plant—form of ballot. This section has no application when the question submitted is whether a municipality shall erect an electric light and power plant and pay for the same solely from the earnings thereof.

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

Sufficient reference to statute in ballot.

Weiss v Woodbine, 228- ; 289 NW 469

Power to pledge plant. Due authorization to a municipality by the electors thereof to establish and erect an electric light and power plant at a stated maximum cost payable only out of the earnings of said newly acquired plant without the municipality itself incurring any indebtedness legally invests the council with power to pledge both the plant and its earnings as security for the payment of the resulting cost.

Greaves v City, 217-590; 251 NW 766

762 Form of ballot.

Unallowable impeachment. Evidence of voters, at an election to establish a consolidated school district, that they did not intend to include in said proposed district certain lands described in the petition for said district, and in the ballot used at said election, is wholly immaterial.

Dermit v School Dist., 220-344; 261 NW 636

763 General form of ballot.

Form of petition. A petition for the submission of a proposition to the electors must substantially contain every matter required by the statute in order that from the petition the ballot may be so framed that the entire proposition will be submitted to the electors.

O'Keefe v Hopp, 210-398; 230 NW 876

Substantial compliance with statutory ballot. Form of ballot used in election for establishment of a municipal electric light or power plant reviewed, and held to substantially comply with statute and to be unambiguous.

Lahn v Primghar, 225-686; 281 NW 214

766 Different measures on same ballot.

Atty. Gen. Opinion. See '38 AG Op 841

767 Printing of ballots on public measures.

Atty. Gen. Opinions. See '38 AG Op 659, 841

768 Indorsement and delivery of ballots.

Atty. Gen. Opinion. See '38 AG Op 659

769 County auditor to control printing.

Atty. Gen. Opinion. See '34 AG Op 77

770 Candidates for township offices—when omitted.

Atty. Gen. Opinion. See '30 AG Op 320

771 City or town clerk to control printing.

Atty. Gen. Opinion. See '34 AG Op 108

772 Publication of ballot.

Atty. Gen. Opinions. See '28 AG Op 430; '34 AG Op 552

774 Maximum cost of printing.

Atty. Gen. Opinion. See '38 AG Op 736

776 Vacancies certified before ballots are printed.

Atty. Gen. Opinion. See '30 AG Op 350

Elections—statutes in pari materia. The statutes relative (1) to vacancies in nominations, (2) to the placing of names of candidates on the official ballot, (3) to the sufficiency of a certificate of nomination, and (4) to the eligibility of candidates, all presuppose (and properly so) the existence of statutory authorization to hold an election, and therefore can have no controlling bearing on the construction of the statute which does authorize an election. Such former series of statutes are not strictly in pari materia with the latter statute.

State v Claussen, 216-1079; 250 NW 195

779 Furnishing judges name of vacancy nominee—pasters.

Statutes—construction and operation—elections—statutes in pari materia. The statutes relative (1) to vacancies in nominations, (2) to the placing of names of candidates on the official ballot, (3) to the sufficiency of a certificate of nomination, and (4) to the eligibility of candidates, all presuppose (and properly so) the existence of statutory authorization to hold an election, and therefore can have no controlling bearing on the construction of the statute which does authorize an election. Such former series of statutes are not strictly in pari materia with the latter statute.

State v Claussen, 216-1079; 250 NW 195

782 Number ballots delivered.

Atty. Gen. Opinion. See '36 AG Op 285

790 Publication of list of nominations.

Atty. Gen. Opinion. See '34 AG Op 552

791.1 Voters entitled to vote.

Atty. Gen. Opinion. See '38 AG Op 670

795 Voting under registration.

Atty. Gen. Opinion. See '36 AG Op 639

796 Challenges.

Atty. Gen. Opinions. See '28 AG Op 428; '36 AG Op 640; '38 AG Op 748

797 Examination on challenge.

Atty. Gen. Opinions. See '28 AG Op 428; '36 AG Op 640; '38 AG Op 400, 748

798 Oath in case of challenge.

Atty. Gen. Opinions. See '28 AG Op 428; '36 AG Op 640; '38 AG Op 748, 855; AG Op Apr. 23, '40

799 Voter to receive one ballot—indorsement by judge.

Ballots—failure to initial—effect.

Donlan v Cooke, 212-771; 237 NW 496

800 Names to be entered on poll book.

Atty. Gen. Opinions. See '25-26 AG Op 303; '30 AG Op 296, 303; '34 AG Op 463

Municipal court election—percentage of voters required. The phrase "fifteen percent of the qualified electors, as shown by the poll list" as employed in §10643, C., '31, must be deemed to refer to the "poll books" in cities having no statutory system of permanent registration of voters, while in cities having such system of registration (where poll books are not employed) the phrase must be deemed to refer to the "certificates of registration" duly signed by voters just preceding their actual voting.

Gilman v City, 215-442; 245 NW 868

801 Marking and return of ballot.

Marking with pencil or ink. A voter may very properly mark his ballot with a pencil of any color or with pen and ink.

Donlan v Cooke, 212-771; 237 NW 496

805 Limitation on time for voting.

Atty. Gen. Opinion. See '34 AG Op 720

808 Assistance indicated on poll book.

Atty. Gen. Opinions. See '30 AG Op 303; '34 AG Op 463

809 Voting mark.

Atty. Gen. Opinions. See '28 AG Op 374; '30 AG Op 319

Using check mark instead of cross—effect.

Donlan v Cooke, 212-771; 237 NW 496

School elections. This section is not applicable to the election of subdirectors in school townships. Any ballot voted at such latter election for subdirector must be counted if it plainly reveals the intent of the voter.

Thompson v Roberts, 220-854; 263 NW 491

810 But one vote for same office except in groups.

Atty. Gen. Opinions. See '28 AG Op 374; '30 AG Op 319

811 How to mark a straight ticket.

Atty. Gen. Opinions. See '25-26 AG Op 253; '28 AG Op 374; '30 AG Op 319

812 Voting part of ticket only.

Atty. Gen. Opinions. See '28 AG Op 374; '30 AG Op 319

813 Group candidates for offices of same class.

Atty. Gen. Opinions. See '28 AG Op 374; '30 AG Op 319

814 How to mark a mixed ticket.

Atty. Gen. Opinions. See '28 AG Op 374; '30 AG Op 319

815 Counting ballots.

Atty. Gen. Opinions. See '28 AG Op 374; '30 AG Op 319

Inadvertent identification. The impression of a notarial seal on an official ballot, caused by placing the ballot in the return envelope before the notary affixed his seal to the affidavit on the envelope, does not constitute an illegally identified ballot.

Willis v Sch. Dist., 210-391; 227 NW 532

Invalidating identification marks. Ballots which bear an indorsement of the name of the voter, or foreign writing such as "Let's have it wet", or numbers, or markings deliberately defacing the printed squares, must be classed as identified and void.

Donlan v Cooke, 212-771; 237 NW 496

816 Writing name on ballot.

Atty. Gen. Opinions. See '25-26 AG Op 253; '28 AG Op 374; '30 AG Op 165, 319

School elections. This section is not applicable to the election of subdirectors in school townships. Any ballot voted at such latter election for subdirector must be counted if it plainly reveals the intent of the voter.

Thompson v Roberts, 220-854; 263 NW 491

817 Spoiled ballots.

Atty. Gen. Opinion. See '30 AG Op 319

818 Defective ballot does not nullify vote.

Atty. Gen. Opinion. See '30 AG Op 319

Ballots—failure to initial—effect.

Donlan v Cooke, 212-771; 237 NW 496

819 Defective ballots.

Atty. Gen. Opinion. See '30 AG Op 319

820 Wrong ballots.

Atty. Gen. Opinion. See '30 AG Op 319

821 Persons permitted at polling places.

Atty. Gen. Opinion. See '34 AG Op 720

824 Prohibited acts on election day.

Atty. Gen. Opinions. See '34 AG Op 282, 720

Electioneering by judges—effect. A judge of election who, while conducting an election, electioneers for a particular candidate is guilty of such misconduct as to furnish basis for a contest as to the office involved.

Brooks v Fay, 206-845; 220 NW 30.

825 Penalty.

Atty. Gen. Opinion. See '34 AG Op 282

831 Special police.

Atty. Gen. Opinion. See '34 AG Op 282

Peace officers' qualifications. The public has a right to have, as peace officers, men of character, sobriety, judgment, and discretion.

Edwards v Civil Service, 227-74; 287 NW 285

838 Promise of influence.

Electric company offering rate reduction—not candidates' bribery—election valid. Evidence held insufficient to establish bribery and an illegal election in that candidates for municipal office acquiesced in or ratified an advertised plan by which the local electric company offered to reduce its rates, and pay back to its subscribers an accumulating sum as a rebate, in the event the voters would elect council members opposed to municipal ownership.

Van Der Zee v Means, 225-871; 281 NW 460

CHAPTER 41

CANVASS OF VOTES

Atty. Gen. Opinion. See '34 AG Op 552

840 Canvass by judges.

Atty. Gen. Opinion. See '28 AG Op 326

Elections—public canvass in private room. A canvass of an election required by statute to be made "publicly" cannot be made in a private room.

Steeves v New Market, 225-618; 281 NW 162

850 Proclamation of result.

Elections—public canvass in private room. A canvass of an election required by statute to be made "publicly" cannot be made in a private room.

Steeves v New Market, 225-618; 281 NW 162

851 Return and preservation of ballots.

Preserving and guarding ballots—burden of proof. Ballots cast at an election are not admissible as evidence in a subsequent contest unless the contestant first establishes the fact that the officer legally charged with the custody of said ballots has preserved, guarded, and protected them in such manner as to reasonably preclude the opportunity of unauthorized persons to tamper with them.

Matzdorff v Thompson, 217-961; 251 NW 867
Traeger v Meskel, 217-970; 252 NW 108
Tyler v Klaver, 220-1124; 264 NW 37
Stamos v Gray, 221-145; 264 NW 919

Ballots — preservation — showing required. While in an election contest it must be shown that the ballots have been preserved with meticulous care against tampering yet such showing need not go to the point of excluding all possibility of such tampering.

Donlan v Cooke, 212-771; 237 NW 496

Ballots — preservation—showing required—admissibility. Ballots must be "carefully preserved" after the election, and without such showing they are not admissible in evidence.

Steeves v New Market, 225-618; 281 NW 162

Count of votes — directory provisions. Principle reaffirmed that the statutory direction

relative to the folding and wiring of ballots which have been counted is not mandatory.

Tyler v Klaver, 220-1124; 264 NW 37
Stamos v Gray, 221-145; 264 NW 919

863 Canvass by board of supervisors.

Atty. Gen. Opinion. See '36 AG Op 662

864 Abstract of votes.

Atty. Gen. Opinion. See '36 AG Op 662

869 Abstracts forwarded to secretary of state.

Atty. Gen. Opinion. See '36 AG Op 662

877 Time of state canvass.

Atty. Gen. Opinion. See '36 AG Op 662

878 Abstract.

Atty. Gen. Opinion. See '36 AG Op 662

879 Record of canvass.

Atty. Gen. Opinion. See '36 AG Op 662

880 Certificate of election.

Atty. Gen. Opinion. See '36 AG Op 662

883 Tie vote.

Atty. Gen. Opinion. See '36 AG Op 544

CHAPTER 42

DOUBLE ELECTION BOARDS

Atty. Gen. Opinions. See '34 AG Op 505; '38 AG Op 800

CHAPTER 43

VOTING MACHINES

Atty. Gen. Opinion. See '28 AG Op 417

CHAPTER 44

ABSENT VOTERS LAW

Atty. Gen. Opinions. See '28 AG Op 414; '36 AG Op 640

927 Right to vote—conditions.

Atty. Gen. Opinions. See '25-26 AG Op 448; '28 AG Op 367, 428; '30 AG Op 79; '34 AG Op 533

Improper absent voting—inmates of county home—remedy not in equity. Absent voters' ballots, from Polk county home inmates who do not expect to be absent from the county or prevented by illness from going to the polls, should be challenged for cause, and, this being a plain, speedy and adequate remedy at law, equity will not enjoin the county auditor from doing his statutory duty in delivering the ballots to the judges of election.

Drennen v Olmstead, 224-85; 275 NW 884

928 Application for ballot.

Atty. Gen. Opinions. See '25-26 AG Op 448; '34 AG Op 533; AG Op Jan. 13, '39

929 School secretary.

Atty. Gen. Opinion. See '30 AG Op 79

Implied power. The county superintendent, under her statutory powers and duty to call elections in consolidated districts to vote on the question of dissolution of the district, has implied power to receive applications for ballots by, and to deliver ballots to, electors who wish to cast their ballots.

Willis v Sch. Dist., 210-391; 227 NW 532

930 Application blanks.

Atty. Gen. Opinion. See '28 AG Op 367

931 Form of blank application.

Atty. Gen. Opinion. See '34 AG Op 533

Improper absent voting—inmates of county home—remedy not in equity. Absent voters' ballots, from Polk county home inmates who do not expect to be absent from the county or prevented by illness from going to the polls, should be challenged for cause, and, this being a plain, speedy and adequate remedy at law, equity will not enjoin the county auditor from doing his statutory duty in delivering the ballots to the judges of election.

Drennen v Olmstead, 224-85; 275 NW 884

935 Ballot mailed.

Atty. Gen. Opinions. See '25-26 AG Op 448; '34 AG Op 533

936 Application mailed.

Atty. Gen. Opinions. See '25-26 AG Op 448; '28 AG Op 367; '34 AG Op 533

937 Personal delivery of ballot.

Atty. Gen. Opinion. See '34 AG Op 533

938 Duty of auditor.

Atty. Gen. Opinion. See '25-26 AG Op 448

939 Voter's affidavit on envelope.

Inadvertent identification. The impression of a notarial seal on an official ballot, caused by placing the ballot in the return envelope before the notary affixed his seal to the affidavit on the envelope, does not constitute an illegally identified ballot....

Willis v. Sch. Dist., 210-391; 227 NW 532

Improper absent voting—inmates of county home—remedy not in equity. Absent voters' ballots, from Polk county home inmates who do not expect to be absent from the county or prevented by illness from going to the polls, should be challenged for cause, and, this being a plain, speedy, and adequate remedy at law, equity will not enjoin the county auditor from doing his statutory duty in delivering the ballots to the judges of election.

Drennen v Olmstead, 224-85; 275 NW 884

943 Mailing or delivering ballot.

Atty. Gen. Opinion. See '34 AG Op 533

944 Manner of preserving ballot and application.

Atty. Gen. Opinion. See '28 AG Op 428

945 Delivery of ballot.

Atty. Gen. Opinion. See '25-26 AG Op 448

946 Auditor may mail or personally deliver.

Atty. Gen. Opinion. See '25-26 AG Op 448

954 Affidavit envelope constitutes registration.

Atty. Gen. Opinion. See '36 AG Op 640

957 Challenges.

Improper absent voting—inmates of county home—remedy not in equity. Absent voters' ballots, from Polk county home inmates who do not expect to be absent from the county or prevented by illness from going to the polls, should be challenged for cause, and, this being a plain, speedy, and adequate remedy at law, equity will not enjoin the county auditor from doing his statutory duty in delivering the ballots to the judges of election.

Drennen v Olmstead, 224-85; 275 NW 884

959 Laws made applicable.

Atty Gen. Opinion. See '28 AG Op 428

960 False affidavit.

Atty. Gen. Opinion. See '28 AG Op 428

Improper absent voting—inmates of county home—remedy not in equity. Absent voters' ballots, from Polk county home inmates who do not expect to be absent from the county or prevented by illness from going to the polls, should be challenged for cause, and, this being a plain, speedy, and adequate remedy at law, equity will not enjoin the county auditor from doing his statutory duty in delivering the ballots to the judges of election.

Drennen v Olmstead, 224-85; 275 NW 884

CHAPTER 45

PRESIDENTIAL ELECTORS

Atty. Gen. Opinions. See '25-26 AG Op 40; '28 AG Op 411

CHAPTER 45.1

AMENDMENTS TO FEDERAL CONSTITUTION

Atty. Gen. Opinion. See '34 AG Op 291

CHAPTER 46

STATEMENT OF EXPENSES

Atty. Gen. Opinions. See '38 AG Op 49, 93

CHAPTER 47

CONTESTING ELECTIONS—GENERAL PROVISIONS

Atty. Gen. Opinion. See '34 AG Op 129

981 Grounds of contest.

Electioneering by judges—effect. A judge of election who, while conducting an election, electioneers for a particular candidate is guilty of such misconduct as to furnish basis for a contest as to the office involved.

Brooks v Fay, 206-845; 220 NW 30

Election bribery by third person—disqualifying effect. A candidate having been elected to office is not disqualified, merely because some third person may have given or offered a bribe to the voters for the purpose of securing the election of said candidate, unless the candidate actually participated in and approved thereof.

Van Der Zee v Means, 225-871; 281 NW 460; 121 ALR 558

Electric company offering rate reduction—not candidates' bribery—election valid. Evi-

dence held insufficient to establish bribery and an illegal election in that candidates for municipal office acquiesced in or ratified an advertised plan by which the local electric company offered to reduce its rates, and pay back to its subscribers an accumulating sum as a rebate, in the event the voters would elect council members opposed to municipal ownership.

Van Der Zee v Means, 225-871; 281 NW 460; 121 ALR 558

Election bribery—electric rate reduction—fulfillment after trial immaterial. When the court, after hearing an election contest, finds that candidates to municipal office did not participate in an illegal bribe by a local electric company offering a rate reduction and a rebate of impounded charges if the municipal ownership opponents were elected, the fact that, after the trial, the council repeals the municipal ownership ordinance and the company does reduce rates and repay impounded funds to consumers, adds nothing new to the proof of participation and does not warrant a new trial.

Van Der Zee v Means, 225-871; 281 NW 460; 121 ALR 558

Improper absent voting—inmates of county home—remedy not in equity. Absent voters' ballots from Polk county home inmates who do not expect to be absent from the county or prevented by illness from going to the polls should be challenged for cause, and, this being a plain, speedy, and adequate remedy at law, equity will not enjoin the county auditor from doing his statutory duty in delivering the ballots to the judges of election.

Drennen v Olmstead, 224-85; 275 NW 884

Sufficient party contestee. When at an election in a judicial district several judges of the district court are to be elected for a full term, the candidate who, according to the official canvass of the returns, received the highest number of votes among those not officially declared elected, may legally institute a contest solely against him who, among those officially declared elected, received the lowest number of votes.

Haas v Contest Court, 221-150; 265 NW 373

Defect of party contestees—effect. Whether, in an election contest, a defect of party contestees is jurisdictional, quaere.

Haas v Contest Court, 221-150; 265 NW 373

Ballots — preservation — showing required. Ballots must be "carefully preserved" after the election, and without such showing they are not admissible in evidence.

Steeves v New Market, 225-618; 281 NW 162

983 Incumbent.

Sufficient party contestee. When at an election in a judicial district several judges of the district court are to be elected for a full term, the candidate who, according to the official canvass of the returns, received the highest number of votes among those not officially declared elected, may legally institute a contest solely against him who, among those officially declared elected, received the lowest number of votes.

Haas v Contest Court, 221-150; 265 NW 373

Defect of party contestees—effect. Whether, in an election contest, a defect of party contestees is jurisdictional, quaere.

Haas v Contest Court, 221-150; 265 NW 373

984 Change of result.

Misconduct—effect of. In an election contest over a county office, the entire vote of a precinct will not be thrown out because of the misconduct of the judges of election unless the contestant shows that the number of votes affected by such misconduct was such as to change the result in the county as to that office.

Brooks v Fay, 206-845; 220 NW 30

985 Recanvass in case of contest.

Atty. Gen. Opinion. See '36 AG Op 662

Preserving and guarding ballots—burden of proof. Ballots cast at an election are not admissible as evidence in a subsequent contest unless the contestant first establishes the fact that the officer legally charged with the custody of said ballots has preserved, guarded, and protected them in such manner as to reasonably preclude the opportunity of unauthorized persons to tamper with them.

Matzdorff v Thompson, 217-961; 251 NW 867
Traeger v Meskel, 217-970; 252 NW 108

CHAPTER 48

CONTESTING ELECTIONS OF GOVERNOR AND LIEUTENANT GOVERNOR

987 Notice—grounds.

Ballots — preservation — showing required. Ballots must be "carefully preserved" after the election, and without such showing they are not admissible in evidence.

Steeves v New Market, 225-618; 281 NW 162

CHAPTER 49

CONTESTING ELECTIONS FOR SEATS IN THE GENERAL ASSEMBLY

994 Statement served.

Ballots — preservation—showing required—admissibility. Ballots must be "carefully preserved" after the election, and without such showing they are not admissible in evidence.

Steeves v New Market, 225-618; 281 NW 162

CHAPTER 50

CONTESTING ELECTIONS OF PRESIDENTIAL ELECTORS

1000 Court of contest.

Ballots — preservation — showing required. Ballots must be "carefully preserved" after the election, and without such showing they are not admissible in evidence.

Steeves v New Market, 225-618; 281 NW 162

CHAPTER 51

CONTESTING ELECTIONS OF STATE OFFICERS

1006 Contest court.

Ballots — preservation — showing required. Ballots must be "carefully preserved" after the election, and without such showing they are not admissible in evidence.

Steeves v New Market, 225-618; 281 NW 162

1008 Statement filed.

Premature filing and subsequent refiling — effect. The filing of a "statement of contest" some ten days before the official declaration of election of the party whose election is sought to be contested, followed promptly, after such declaration of election, by the filing by contestant of a written assertion of refiling of said prematurely filed statement "and each and every allegation thereof", is not such irregularity as will deprive the subsequently selected court of contest of jurisdiction to proceed with said contest.

Haas v Contest Court, 221-150; 265 NW 373

1012 Contest relative to office of district judge.

Sufficient party contestee. When at an election in a judicial district several judges of the district court are to be elected for a full term, the candidate who, according to the official canvass of the returns, received the highest number of votes among those not officially declared elected, may legally institute a contest solely against him who, among those officially declared elected, received the lowest number of votes.

Haas v Contest Court, 221-150; 265 NW 373

Defect of party contestees—effect. Whether, in an election contest, a defect of party contestees is jurisdictional, quaere.

Haas v Contest Court, 221-150; 265 NW 373

1017 Judgment filed—execution.

Jurisdiction — certiorari to review. Certiorari will lie to review the alleged unauthorized exercise of jurisdiction by a contest court selected for the purpose of deciding who had been elected to a state office, even tho it be true that the decree of said contest court is final under the statute.

Haas v Contest Court, 221-150; 265 NW 373

CHAPTER 52

CONTESTING ELECTIONS OF COUNTY OFFICERS

Atty. Gen. Opinion. See '34 AG Op 129

1020 Contest court.

Atty. Gen. Opinion. See '34 AG Op 129

Ballots — preservation — showing required. Ballots must be "carefully preserved" after the election, and without such showing they are not admissible in evidence.

Steeves v New Market, 225-618; 281 NW 162

1024 Statement.

Atty. Gen. Opinion. See '25-26 AG Op 337

Premature filing and subsequent refiling — effect. The filing of a "statement of contest" some ten days before the official declaration of election of the party whose election is sought to be contested, followed promptly, after such

declaration of election, by the filing by contestant of a written assertion of refiling of said prematurely filed statement "and each and every allegation thereof", is not such irregularity as will deprive the subsequently selected court of contest of jurisdiction to proceed with said contest.

Haas v Contest Court, 221-150; 265 NW 373

City office—place of filing contest and bond. In an election contest over a city office, the written statement of intention to contest and bond are properly filed with the county auditor.

Jenkins v Furgeson, 212-640; 233 NW 741

1025 Bond.

Premature filing — effect. The fact that the statutory bond required in an election contest was prematurely filed with and accepted by the proper officer—prematurely because said filing and acceptance was had some ten days before the official declaration of the election of the party whose election is sought to be contested —constitutes no such irregularity as will deprive the subsequently selected court of contest of jurisdiction to proceed with such contest, it appearing that said bond was, within 30 days after said declaration of election, officially marked filed by the clerk of the contest court.

Haas v Contest Court, 221-150; 265 NW 373

Belated filing—effect. The statutory requirement, that the contestant in an election contest shall file a prescribed bond, is complied with if such bond is filed at any time within the time provided for the filing of the statement of contest, even tho said bond be filed subsequent to the filing of the statement of contest.

Haas v Contest Court, 221-150; 265 NW 373

City office—place of filing contest and bond. In an election contest over a city office, the written statement of intention to contest and bond are properly filed with the county auditor.

Jenkins v Furgeson, 212-640; 233 NW 741

1032 Procedure—powers of court.

Atty. Gen. Opinions. See '28 AG Op 218; '34 AG Op 129

1033 Sufficiency of statement.

As jurisdictional question. Sufficiency of statement of contest in case under review held to present no question of jurisdiction.

Haas v Contest Court, 221-150; 265 NW 373

1037 Judgment.

Judgment—effect. The judgment of a contest court holding the election in question illegal is valid and conclusive upon both parties to the contest, unless appealed from and reversed.

Leslie v Barnes, 201-1159; 208 NW 725

1039 Appeal.

Consent judgment—appeal. An election contestant may not appeal from the judgment of the contest board holding the election in question illegal and providing for the calling of a new election by said board, when he consented to the entry of such judgment.

Leslie v Barnes, 201-1159; 208 NW 725

Appeal by nonincumbent—bond not required. No appeal bond is required in an appeal to the district court from the judgment of an election contest court by a party who is not an incumbent of the office in question, §11440, C., '31, having no application to such a case.

Donlan v Cooke, 212-771; 237 NW 496

CHAPTER 53

TIME AND MANNER OF QUALIFYING

1045 Time.

Atty. Gen. Opinions. See '28 AG Op 43; '30 AG Op 322; '34 AG Op 511; AG Op June 14, '39

Officers—duties—motives. The motives of public officials when proceeding according to law to submit the question of municipal ownership of a public utility are not fit subjects for judicial inquiry.

Interstate Co. v Forest City, 225-490; 281 NW 207

1046 City and town officers.

Atty. Gen. Opinion. See '34 AG Op 94

1052 Vacancies—time to qualify.

Atty. Gen. Opinions. See '38 AG Op 679; AG Op Feb. 21, '39

1054 Other officers.

Atty. Gen. Opinion. See '34 AG Op 685

Official acts—presumption of regularity. In the absence of contrary evidence, presumption obtains as to legality and regularity of official acts of sworn public officials.

Krueger v Mun. Court, 223-1363; 275 NW 122

1057 Approval conditioned.

Requalification as own successor—presumption. The fact that a county treasurer who succeeds himself, requalifies, and gives a new bond for his second term, creates no conclusive presumption that the liability which attached to him during the first term has been carried over to his new bond.

Dallas County v Bank, 205-672; 216 NW 119

CHAPTER 54

OFFICIAL AND PRIVATE BONDS

Atty. Gen. Opinion. See '38 AG Op 475

1058 Bond not required.

Atty. Gen. Opinion. See '34 AG Op 382

1059 Conditions of bond of public officers.

Atty. Gen. Opinions. See '28 AG Op 53; '30 AG Op 40; '32 AG Op 174; '34 AG Op 100; '38 AG Op 475

Not insurer of official funds. The clerk of the district court is not liable for loss of official funds coming into his hands and lost because of the failure of the bank in which they were deposited, when, at the time of deposit, he in good faith justifiably believed the bank to be solvent.

Prudential v Hart, 205-801; 218 NW 529
Danbury v Riedmiller, 208-879; 226 NW 159
Andrew v Bank, 214-105; 241 NW 412

Liability on official bonds—misuse of funds. A county treasurer breaches his official bond by using county funds in paying drainage district bonds, and the county cannot be deemed estopped to insist on said breach, or be held to have waived said breach, because of the fact that the treasurer acted with the knowledge and consent of, or in obedience to the express direction of the board of supervisors.

Mitchell County v Odden, 219-793; 259 NW 774

Excessive bank deposits. A resolution of a city council to the effect that all city funds shall be deposited in a named bank is no authority to the city treasurer to make deposits in excess of the amount of the bond given by the bank to secure said deposits, and the treasurer and the surety on his official bond are liable for such excess, even tho the treasurer was not guilty of any negligence in depositing such excess.

State v Carney, 208-133; 217 NW 472

Deposits—liability of county treasurer. Even tho the county treasurer deposits public funds in a depositary bank in an amount authorized by a resolution of the board of supervisors, yet if the board later, by resolution, reduces the amount authorized to be deposited, the treasurer and his surety are liable for a loss resulting from the failure of the treasurer to exercise reasonable diligence to reduce his deposit to the amount authorized in the latter resolution.

State v Surety Co., 210-215; 230 NW 308

When conditions broken. It may not be said that a county treasurer who succeeds himself in office is not harmed by the nonpayment of bank deposits which were made during his first term, even tho he has requalified and given a new bond to cover his second term.

Dallas County v Bank, 205-672; 216 NW 119

Unallowable deposits.

Bookhart v Younglove, 207-800; 218 NW 533

Delivery of funds to successor—effect. An outgoing sheriff and his bondsmen are absolved from all liability as to funds held by the sheriff in unadjudicated condemnation proceedings by delivering said funds to his successor in office.

Northwestern Mfg. Co. v Bassett, 205-999; 218 NW 932

Time deposit works conversion. A sheriff is guilty of instant conversion and a breach of his bond when he deposits in a bank funds properly coming into his hands in unadjudicated condemnation proceedings and takes from the bank a certificate of deposit which is payable at a definite time in the future, and in such case the question of due care or negligence in making the deposit is quite immaterial.

Northwestern Mfg. Co. v Bassett, 205-999; 218 NW 932

Good-faith and nonnegligent deposit in bank —effect. Principle reaffirmed that, generally speaking, a public officer, for instance, a sheriff, is not liable for public funds properly coming into his hands and deposited by him in good faith and without negligence in a bank which subsequently fails, with resultant loss of said funds.

Northwestern Mfg. Co. v Bassett, 205-999; 218 NW 932

Nonentertainable defense. In an action on the bond of a school treasurer to recover a shortage in his accounts, it is no defense that the plaintiff district has a cause of action against a third party who is unlawfully in possession of the funds constituting the shortage.

School District v Sass, 220-1; 261 NW 30

Indemnification of one of two sureties — effect. In an action against a public officer and his bondsmen to recover a shortage in public funds, it is quite immaterial, as far as plaintiff is concerned, that one of the sureties has received property from the public officer as partial indemnity.

School District v Sass, 220-1; 261 NW 30

Rejected defensive plea. In an action on the bond of a school treasurer, the defensive plea (if it is a defense) that the treasurer was the innocent victim of another party's wrongdoing will be given no consideration when the wrongdoing of the treasurer is manifest.

School District v Sass, 220-1; 261 NW 30

Prima facie liability. Proof that a school treasurer drew a check upon the school district bank account in favor of another bank; that the check was duly cashed; that the payee bank did not credit the amount to any account of the school district; and that said treasurer, on demand, did not deliver said money to the district, constitutes prima facie evidence of the latter's default and of liability on his bond.

School District v Sass, 220-1; 261 NW 30

Unallowable limitation on liability. A statutory bond which is given for the express purpose of securing public deposits in a bank may not be limited in liability to less than the liability called for by the statute; and any such attempt will be deemed nugatory, even tho such bond is approved by the public governing board. (See also §10300; §10982, Anno. 20.)

Leach v Bank, 205-1154; 213 NW 517

Demand on surety. In an action on the bond of a public officer to recover funds unaccounted for, no demand on the surety is necessary before commencing the action, when proper demand has been made on the principal.

State v Carney, 208-133; 217 NW 472

Holding under former statutes. The general bond of a guardian of property must be deemed to embrace liability for the proceeds of a promissory note which is in the hands of the guardian when he gives such bond and which represents the sale price of real estate sold under order of court, but without a sale bond being given by the guardian.

Iowa Bank v Soppe, 215-1242; 247 NW 632

1060 Liability of surety.

Additional annotations. See under §7408, Vol I

Atty. Gen. Opinions. See '32 AG Op 174, 282; '38 AG Op 72

Holding under former statute. The surety on the bond of a public officer is not an insurer or guarantor of the funds coming into the hands of the principal.

Danbury v Riedmiller, 208-879; 226 NW 159

Scope of liability. The liability of the surety on the bond of a public officer is not limited solely to the failure of the official to make proper accounting for all public money and property officially coming into his possession, but embraces liability for the failure of said officer to "faithfully and impartially, without fear, favor, fraud, or oppression, discharge all duties * * * required of his office by law".

Brown v Cochran, 222-34; 268 NW 585

Continuing liability. The liability of a surety on a statutory depository bond conditioned "to hold the county treasurer harmless" because of authorized deposit of public funds in a bank continues for a reasonable time after the expiration of the authorized period as to the undrawn balance of all deposits made during said period.

Dallas County v Bank, 205-672; 216 NW 119

Requalification as own successor—presumption. The fact that a county treasurer who succeeds himself, requalifies, and gives a new bond for his second term, creates no conclusive presumption that the liability which attached to him during the first term has been carried over to his new bond.

Dallas County v Bank, 205-672; 216 NW 119

Unallowable deposits. The principle that an administrator is not liable for estate funds which have been lost because of the failure of a bank in which he has, in good faith, and without negligence, deposited them, has no application to deposits made by an administrator in his own private bank.

Bookhart v Younglove, 207-800; 218 NW 533

Parties plaintiff. An action on a statutory bond is properly brought by the entity to which the bond runs.

Belmond Assn. v Luick, 217-805; 253 NW 521

Unallowable defense. It is no defense on the part of one of two sureties on the bond of a public officer that said officer, while so acting, was also acting as cashier of a bank; that, as cashier, he was short in his account with the bank; that said other surety was also surety on the private bond of the cashier; and that said other surety and said cashier conspired to use and did use the public funds with which to make good the cashier's shortage to the bank.

School District v Sass, 220-1; 261 NW 30

Cross-complaint. In an action on the bonds of a public officer and his bondsmen to recover a shortage, one surety may not cross-petition against a party who he alleges wrongfully received the funds resulting in the shortage, said latter party not being a party to the bond sued on.

School District v Sass, 220-1; 261 NW 30

Taking assignment of claim. Where, because of the peculations of a county auditor, a depositary bank pays a forged check on school funds, the county, on effecting settlement with the surety on the auditor's official bond, may assign to the said surety its cause of action against the bank, and the assignee may enforce the said assigned action as the county might have enforced it.

New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

Contract limitations. Whether parties to a statutory bond will be permitted by contract to specify the time before which or after which an action can be maintained, quaere.

Page County v Fidelity Co., 205-798; 216 NW 957

Evidence—unsigned copy of fidelity bond—inadmissible. In action by a surety company against defendant, who was covered by a fidelity bond and who agreed to indemnify plaintiff against loss sustained by reason of its executing fidelity bond in his behalf, it was error to admit in evidence instrument purporting to be a certified copy of the bond, but containing no signatures and which was admittedly no true and genuine copy of original bond.

Fidelity Deposit Co. v Ryan, 225-1260; 282 NW 721

Authority of agent. A surety company will not, in an action on a bond issued in its name by its agent, be permitted to dispute the authority which it has specifically conferred on said agent in a written power of attorney filed with the clerk of the district court and relied on by said clerk in approving the bond, the obligee in the bond having no knowledge of any limitation on the authority of the agent.

State v Packing Co., 219-419; 258 NW 456

Reduction of widow's allowance — effect. Where the amount allowed a widow for her support for the year following the death of the husband is taken by her from the funds of the estate (she being executrix) and spent, a subsequent order, in an adversary proceeding, reducing said former amount is conclusive on the surety—and, of course, on the executrix—and in an action against the principal and surety the reduced amount is the limit of the allowable credit.

In re Durey, 215-257; 245 NW 236

Voluntarily augmented funds. A court-appointed, testamentary trustee and the surety on his official, statutory bond are liable not only for the money which comes into his hands as specifically required by the will, but for additional amounts of the testamentary funds which come into the hands of the trustee, as such, consequent on the generous action of the devisees, generally, in voluntarily augmenting said trust funds from the testamentary funds.

Whisler v Estes, 216-491; 249 NW 264

Salary of public officer. The salary—the "personal earnings"—of a public officer is exempt from liability on a judgment obtained against him and his surety, by the public body, because of the failure of the officer to account for public funds coming into his hands. The court cannot, on the plea of public policy, rule into the statute an exception which the legislature has not seen fit to declare. So held where the surety having paid the judgment, and thereby subrogated to the rights of the county, sought reimbursement from the officer's salary.

Ohio Ins. v Galvin, 222-670; 269 NW 254; 108 ALR 1036

Failure to file claim — when enforceable against heir. A claim arising under a bond wherein the surety binds "his heirs, devisees, and personal representatives", and arising after the death of said surety and the due settlement of his estate, is enforceable:

1. Against the property received by an heir, as such, from said ancestor-surety, and

2. Against the property passing from said ancestor and owned by said heir under conveyance for which he paid nothing, and

3. Against the heir, personally, for the value of the property so received if he has consumed it. And this is true even tho, necessarily, said claim was not filed against the estate of said surety.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

1061 Conditions of other bonds.

Necessary conditions. It seems that the official bonds of executors, administrators, court-appointed trustees, and similar officers are necessarily conditioned as the bonds of public officers are conditioned.

Whisler v Estes, 216-491; 249 NW 264

Fraud of trustee—affirmance or disaffirmance. It is of no concern to a surety on the bond of a trustee whether the beneficiary affirms or disaffirms the fraudulent conduct of the trustee.

Dodds v Cartwright, 209-835; 226 NW 918

Adjudication of liability—conclusiveness. An unappealed order of court adjudicating the amount of the liability of a trustee to the beneficiary is conclusive on the trustee and ipso facto on his surety.

Dodds v Cartwright, 209-835; 226 NW 918

Holding under prior statutes. The general bond of a guardian of property must be deemed to embrace liability for the proceeds of a promissory note which is in the hands of the guardian when he gives such bond and which represents the sale price of real estate sold under order of court, but without a sale bond being given by the guardian.

Iowa Bank v Soppe, 215-1242; 247 NW 632

When nonterminable by death—enforcement against heirs et al. The bond of a fiduciary, under the terms of which a surety purports to bind "his heirs, devisees, and personal representatives", is not revoked by the death of the surety, and binds the estate of the surety in the hands of his heirs, devisees, or personal representative.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

1062 Want of compliance—effect.

Omission of penalty—effect.

Ind. Dist. v Morris, 208-588; 226 NW 66

Attempt to limit liability.

Monona Co. v O'Connor, 205-1119; 215 NW 803

Andrew v Bank, 205-878; 219 NW 34

Statutory bonds—estoppel to deny. A bond given for the performance of a public building contract, and containing some of the conditions which the statute mandatorily prescribes for such a bond, anything in any contract to the contrary notwithstanding, will be deemed a statutory bond, with all the statutory conditions impliedly inserted therein.

Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495

Statutory bond—scope. Principle reaffirmed that a statutory bond always carries the obligations imposed by the statute, even tho said obligations are not written into said bond.

In re Durey, 215-257; 245 NW 236

Oral modification of bond.

Leach v Bank, 205-975; 213 NW 612

Surplusage in bond.

U. S. F. & G. v Tel. Co., 174-476; 156 NW 727
Schisel v Marvill, 198-725; 197 NW 662
Philip Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495
Dallas County v Bank, 205-672; 216 NW 119
State v Gregory, 205-707; 216 NW 17
Curtis v Michaelson, 206-111; 219 NW 49
Ottumwa Boiler v O'Meara, 206-577; 218 NW 920

Inclusion and exclusion. Statutory requirements will be read into a statutory bond, and nonstatutory requirements will be read out of such bond.

Chas. City v Rasmussen, 210-841; 232 NW 137; 72 ALR 638

Acts constituting breach. A statutory bond conditioned to secure the prompt paying over to the proper authorities of public funds on deposit in a bank is breached on the failure to promptly make such payment, and not from the time when the authorities suffer an actual loss.

Leach v Bank, 205-987; 213 NW 528

1063 State officers—amount of bonds.

Atty. Gen. Opinion. See '30 AG Op 40

1064 Amount of bond, when not fixed by law.

Atty. Gen. Opinion. See '38 AG Op 475

1065 County officers.

Atty. Gen. Opinions. See '25-26 AG Op 455; '28 AG Op 53; '36 AG Op 351

1066.1 Bond of county treasurer.

Atty. Gen. Opinion. See '32 AG Op 282

1067.1 Township clerk — expense of bond.

Atty. Gen. Opinions. See '28 AG Op 446; '38 AG Op 475

1068 Municipal officers.

Atty. Gen. Opinions. See '25-26 AG Op 456; '34 AG Op 382

1069 Bonds of deputy officers.

Atty. Gen. Opinion. See '32 AG Op 282

1070 Minimum number of sureties—qualifications.

Atty. Gen. Opinion. See '28 AG Op 446

1071 Surety company bonds.

Atty. Gen. Opinion. See '28 AG Op 446

1073 Approval of bonds.

Atty. Gen. Opinions. See '28 AG Op 446; '34 AG Op 94; '36 AG Op 351; '38 AG Op 475

1077 Custody of bond.

Atty. Gen. Opinion. See '36 AG Op 351

1078 Recording.

Atty. Gen. Opinion. See '36 AG Op 351

CHAPTER 55

ADDITIONAL SECURITY AND DISCHARGE OF SURETIES

1081 New bond.

Release—strict compliance with statute. The release and discharge of the surety on a guardian's bond under any judicial procedure other than that prescribed by statute is a nullity, and, in such case, a new bond cannot be deemed a "substitute bond", but must be deemed additional security.

Brooke v Bank, 207-668; 223 NW 500
Bookhart v Younglove, 207-800; 218 NW 533

1089 Sureties on other bonds.

Release—strict compliance with statute. The release and discharge of the surety on a guardian's bond under any judicial procedure other than that prescribed by statute are a nullity, and, in such case, a new bond cannot be deemed a "substitute bond", but must be deemed additional security.

Brooke v Bank, 207-668; 223 NW 500
Bookhart v Younglove, 207-800; 218 NW 533

CHAPTER 56

REMOVAL FROM OFFICE

Atty. Gen. Opinions. See '36 AG Op 381; '38 AG Op 300

1091 Removal by court.

Atty. Gen. Opinions. See '30 AG Op 336; '36 AG Op 381; '38 AG Op 290, 300

Pleadings. Allegations that a public officer drew statutory mileage on account of official journeys when the travel (1) was without cost to himself, or (2) was by means of a conveyance owned and supplied by the public, do not state facts constituting grounds for removal from office. (See §1225-d3, C., '31 [1225.03, C., '39].)

State v Naumann, 213-418; 239 NW 93; 81 ALR 483

Fundamentally required proof. In the absence of willful misconduct and corrupt motives on the part of a public officer, mere error of judgment either as to law or fact will not justify his removal from office.

State v Canning, 206-1349; 221 NW 923
State v Naumann, 213-418; 239 NW 93
State v Missildine, 215-663; 245 NW 303

Systematic disregard of law. The conduct of a member of the board of supervisors in systematically disregarding, or by subterfuges avoiding, the law which requires estimates by the county engineer and advertisement of public contracts for work and supplies evinces such "willfulness" as to render such acts ample ground for removal from office.

State v Garretson, 207-627; 223 NW 390

Using public funds for private use. The acts of a county treasurer in wrongfully and repeatedly taking and using, for his own private purposes, public funds in his possession, ipso facto constitutes "willful misconduct and maladministration in office", notwithstanding the fact (1) that prior to the commencement of an action to remove him from office, he returns to the public treasury the amount of his peculations, and (2) that his bondsmen are liable for his wrongdoing; a priori is this true when he also knowingly connives at and permits like conduct by his official employee.

State v Smith, 219-5; 257 NW 181

Proof of evil design—when not required. In an action to remove a public official from office, the principle that a corrupt or evil design or purpose must be shown under a charge of "willful misconduct or maladministration in office", does not apply when the official is charged with the violation of a statute which specifically declares that such violation shall be sufficient ground for removal from office.

State v Manning, 220-525; 259 NW 213

Constitutional power to remove officer.

Myers v United States, 272 US 52

1093 Who may file petition.

Atty. Gen. Opinion. See '38 AG Op 300

1100 Special prosecutor.

Atty. Gen. Opinion. See '32 AG Op 152

1101 Application for outside judge.

Atty. Gen. Opinion. See '38 AG Op 823

1111 Effect of dismissal.

Allowance of attorney fees—nullification on appeal. An allowance against the county of attorney fees in favor of a county officer unsuccessfully sought to be removed from office will, on reversal in the supreme court on appeal, be set aside.

State v Smith, 219-5; 257 NW 181

1112 Want of probable cause.

Dismissal of proceeding—costs. When citizens, with apparently good cause, and with reason to believe that the complaint is justified, initiate proceedings for the removal of a party from office, they should not be taxed with the costs in case the proceedings are dismissed by the court.

State v Canning, 206-1349; 221 NW 923

Unallowable taxation to relator. In a proceeding to remove a public officer, proof that the officer had drawn fees in a material amount to which he had no legal claim, precludes the court from taxing the costs to the relator, even tho the court, under the evidence, properly exonerates said officer from corrupt motive in drawing said fees.

State v Missildine, 215-663; 245 NW 303

1114 Appointive state officers.

Atty. Gen. Opinion. See '36 AG Op 381

Constitutional power to remove officer. The President of the United States is vested by the federal constitution with the right to remove, without the consent of the senate, any federal executive officer appointed by him, even tho said officer was appointed "by and with the advice and consent of the senate".

Myers v United States, 272 US 52

Due process of law—removal from office without notice. There is, in a constitutional sense, no element of property in a public office. It follows that the statutory power conferred on the state executive council to investigate and remove appointive state officers, without making provision for notice and hearing, will not be held to violate the due process clause of the constitution as to an officer to whom the council has voluntarily given ample written notice and opportunity to be heard.

Clark v Herring, 221-1224; 260 NW 436

CHAPTER 57

SUSPENSION OF STATE OFFICERS

Atty. Gen. Opinions. See '32 AG Op 216; '38 AG Op 223

CHAPTER 59

VACANCIES IN OFFICE

1145 Holding over.

Atty. Gen. Opinions. See '25-26 AG Op 503; 28 AG Op 43; '34 AG Op 67; '38 AG Op 701

Resignation—when effective. Three members of a board of school directors of five members constitute a legal quorum to elect a successor to one of said three members who had theretofore resigned with the intent (shared in by his fellow members) that the resignation would not take effect until his successor had been elected and had qualified.

Cowles v Sch. Dist., 204-689; 216 NW 83

County supervisor-elect—death before qualifying—vacancy. The death of a duly elected member to the board of supervisors, before qualifying, creates a vacancy in that office to be filled in the manner provided by subsec. 5, §1152, C., '35.

State v Best, 225-338; 280 NW 551

1146 What constitutes vacancy.

Atty. Gen. Opinions. See '25-26 AG Op 489, 502; '28 AG Op 89; '32 AG Op 1, 51; '34 AG Op 81, 383; '38 AG Op 1, 136, 415, 679, 701; AG Op Feb. 21, '39, April 4, '39, July 26, '39

County supervisor-elect—death before qualifying. The death of a duly elected member to the board of supervisors, before qualifying, creates a vacancy in that office to be filled in the manner provided by subsec. 5, §1152, C., '35.

State v Best, 225-338; 280 NW 551

Unambiguous language—"or" cannot mean "and". The word "or" in a statute cannot be judicially construed to mean "and" when the language of the section is too clear and unambiguous to admit of judicial construction.

State v Best, 225-338; 280 NW 551

Negotiation for other office—effect. A mayor may not be deemed to have vacated his office on a simple showing that he had requested an appointment as justice of the peace, and had executed a bond as such justice but was never appointed.

Meijerink v Lindsay, 203-1031; 213 NW 934

Incompatible offices. The office of constable is ipso facto vacated when the incumbent qualifies as marshal of a city which is coextensive with the township in which the constable was elected.

State v Bobst, 205-608; 218 NW 253

1147 Possession of office.

Atty. Gen. Opinion. See '38 AG Op 415

1148 Resignations.

Atty. Gen. Opinions. See '38 AG Op 1, 415

1151 Duty of officer receiving resignation.

Atty. Gen. Opinion. See '38 AG Op 415

1152 Vacancies—how filled.

Atty. Gen. Opinions. See '25-26 AG Op 413; '28 AG Op 347; '30 AG Op 48; '32 AG Op 1, 114; '36 AG Op 17, 609; '38 AG Op 124, 136, 415, 679, 701

Vacancy—when fillable by election. The statutory provision (§1157, C., '31) that if a vacancy occurs in an elective state office thirty days prior to a general election the vacancy shall be filled at said election, in legal effect prohibits the filling of such vacancy at said election when the vacancy occurs less than thirty days prior to said election.

State v Claussen, 216-1079; 250 NW 195

Power to fill—majority of quorum. Vacancies on an official board (which is empowered to fill vacancies) may be filled by a majority of a quorum, in the absence of a statute which requires a majority of the entire membership of the board.

Cowles v Sch. Dist., 204-689; 216 NW 83

De facto officers. Members of a school board who are, in supposed compliance with the law, and in good faith, elected to fill vacancies caused by resignations, and who in good faith act as such members, are at least directors de facto, and their official actions may not be collaterally assailed.

Cowles v Sch. Dist., 204-689; 216 NW 83

District court clerk—vacancy filled by board. The district court has neither exclusive nor concurrent authority with the board of supervisors to fill a vacancy in the office of clerk of the court (a county office) by appointment; the court's power is confined to the appointment of a temporary clerk until the board fills the vacancy as provided by law.

State v Larson, 224-509; 275 NW 566

County supervisor-elect—death before qualifying. The death of a duly elected member to the board of supervisors, before qualifying, creates a vacancy in that office to be filled in the manner provided by subsec. 5 of this section.

State v Best, 225-338; 280 NW 551

1154 Appointments.

Officers—qualification—failure to file commission—effect. The appointee to a vacancy in a public office derives his legal authority to act from the duly executed written appointment. Failure to file the appointment with the officer with whom the qualifying oath is required to be filed is but an irregularity.

State v Claussen, 216-1079; 250 NW 195

1155 Tenure of vacancy appointee.

Atty. Gen. Opinions. See '25-26 AG Op 414; '32 AG Op 1, 114; '38 AG Op 701

Election to fill vacancy. The statutory provision that an officer filling a vacancy in an elective office shall hold until the next regular election at which such vacancy can be filled, means the "next regular election" at which such vacancy can be legally filled.

State v Claussen, 216-1079; 250 NW 195

District court clerk—vacancy filled by board. The district court has neither exclusive nor concurrent authority with the board of supervisors to fill a vacancy in the office of clerk of the court (a county office) by appointment; the court's power is confined to the appointment of a temporary clerk until the board fills the vacancy as provided by law.

State v Larson, 224-509; 275 NW 566

1156 Officers elected to fill vacancies—tenure.

Atty. Gen. Opinion. See '25-26 AG Op 414

1157 Vacancies—when filled.

Atty. Gen. Opinions. See '36 AG Op 155; '38 AG Op 701

Statute supplementing constitution. The constitutional provision (Art. XI, §6) that appointees to fill vacancies in office shall hold until the next general election, is not self-executing, and therefore has been properly supplemented by this section.

State v Claussen, 216-1079; 250 NW 195

Estoppel and waiver. Where, on the erroneous assumption that a vacancy existed in a public office, two persons are formally nominated, by different political parties, to fill the supposed vacancy and are voted on at the ensuing election, the failure of the candidate who is already serving under a valid appointment to withdraw his nomination and legally to question the nominations made, furnishes no basis for the claim that he thereby waived his right longer to hold the office, and estopped himself from objecting to the result of the election.

State v Claussen, 216-1079; 250 NW 195

Implied repeal—statutes not in pari materia. A statute cannot be deemed impliedly repealed by other statutes which are not in pari materia. As an illustration, statutes dealing merely with the procedure to be followed in making nominations for office, and in filling vacancies in such nominations, or in determining the eligibility of candidates, cannot be held to impliedly repeal a statute which authorizes the holding of an election.

State v Claussen, 216-1079; 250 NW 195

Statutes in pari materia. The statutes relative (1) to vacancies in nominations, (2) to the placing of names of candidates on the official ballot, (3) to the sufficiency of a certificate of nomination, and (4) to the eligibility of candidates, all presuppose (and properly so) the existence of statutory authorization to hold an election, and therefore can have no controlling bearing on the construction of the statute which does authorize an election. Such former series of statutes are not strictly in pari materia with the latter statute.

State v Claussen, 216-1079; 250 NW 195

Vacancy—when fillable by election. The statutory provision that if a vacancy occurs in an elective state office 30 days prior to a general election the vacancy shall be filled at said election, in legal effect prohibits the filling of such vacancy at said election when the vacancy occurs less than thirty days prior to said election.

State v Claussen, 216-1079; 250 NW 195

1158 Special election to fill vacancies.

Atty. Gen. Opinions. See '25-26 AG Op 482; '34 AG Op 66, 67, 121

CHAPTER 60

SOLDIERS PREFERENCE LAW

Atty. Gen. Opinions. See '30 AG Op 157; '36 AG Op 538; '38 AG Op 190

1159 Appointments and promotions.

Discussion. See 21 ILR 135—General review of legislation

Atty. Gen. Opinions. See '36 AG Op 538; '38 AG Op 190

Qualifications for office sufficiently set out in statute. The soldiers preference law is not unconstitutional for failure to provide standards of qualifications for office when it requires that the applicant be an honorably discharged soldier, that he be a citizen and a resident of the place of appointment, and that his qualifications be equal with those of the nonveteran applicant.

Maddy v City Council, 226-941; 285 NW 208

Police judge appointment—no implied repeal by statute which merely limits. A statute providing that in certain cities the council shall appoint a police judge is not impliedly re-

pealed by the soldiers preference law, which merely places a limitation on the power of appointment.

Maddy v City Council, 226-941; 285 NW 208

Purpose of act. The intent of the soldiers preference law is to make veterans secure in their positions in public service and to prevent their removal except for misconduct, and it is not intended for the purpose of retaining in office one who violates his duty.

Edwards v Civil Service, 227-74; 287 NW 285

Justifiable discharge. An order of a city council to reduce the number of employees in a named department justifies the discharge of an ex-soldier employee whose duties are apparently inseparably connected with said department.

Rounds v City, 213-52; 238 NW 428

Good-faith abolishment of position—evidence sustaining. In an action by world war veteran, claiming to be within soldiers preference law, to compel reinstatement to position in city street cleaning department, finding of trial court that position had been abolished in good faith by city council held sustained by evidence.

Hamilton v MacVicar, (NOR); 269 NW 750

Legislative regulation—soldiers preference appointments. The soldiers preference law cannot be objected to on the grounds that it deprives the city of self-government when the powers of the municipality are derived solely from the legislature which has power under the constitution and under statute to prescribe rules governing municipalities.

Maddy v City Council, 226-941; 285 NW 208

Yardman at state capitol. An honorably discharged veteran of the war with Germany, appointed for no stated time to the position of "yardman" on the statehouse grounds, is not removable by the executive council except on duly preferred charges of incompetency or misconduct, he not being a deputy of the state custodian of public grounds, tho working under the supervision of said latter officer, and his "term" not expiring on the legal removal of said custodian.

Statter v Herring, 217-410; 251 NW 715

1161 Duty to investigate and appoint.

Atty. Gen. Opinion. See '38 AG Op 190

Investigation in re qualification. The general statutory requirement of the soldiers preference act that the appointing board or officer shall "make an investigation" relative to the qualifications of a soldier applicant, necessarily leaves to said board or officer the determination of the nature and kind of investigation to be made.

Miller v Hanna, 221-56; 265 NW 127

Soldiers preference law—findings on qualifications of applicants. In an action to compel the appointment of the plaintiff war veteran as city police judge, where it was shown that both the plaintiff and the nonveteran appointed by the city council were qualified for the position, a finding by the district court in favor of the veteran should not be disturbed.

Maddy v City Council, 226-941; 285 NW 208

Investigation of qualifications. An investigation of the comparative qualifications of applicants is a good faith investigation even tho there was no public hearing or formal taking of evidence, when record shows that supervisors made inquiries concerning and had personal knowledge of qualifications of applicants and were influenced by fact that petitioner had at one time been convicted of assault with intent to commit rape.

McLaughlin v Board, 227-267; 288 NW 74

Investigation—evidence—abuse of discretion. Evidence of past conduct and employment, coupled with appointing board's personal knowledge from having heard of and observed applicant's work held not to show a clear abuse of discretion warranting interference by the court.

McLaughlin v Board, 227-267; 288 NW 74

Grounds for refusing appointment—filing. Failure of appointing board to file the required statutory statement of grounds for refusing appointment does not invalidate another's appointment and under the circumstances of the case held not to be evidence that the board acted arbitrarily and unwarrantedly.

McLaughlin v Board, 227-267; 288 NW 74

Employees—power to discharge. The custodian of public buildings and grounds (at the seat of government) must, in view of §273, C., '35, be deemed vested with the sole authority legally to discharge the employees of said department, no statute to the contrary appearing; especially is this true when other legislation, tho it has expired ex vi termini, clearly demonstrates such to have been the intent of the general assembly.

Pittington v Herring, 220-1375; 264 NW 712

1162 Mandamus.

Nonreview of discretion. The legal freedom of the board of supervisors to determine according to its own judgment, in other words, its discretion to determine, that an applicant who is not an honorably discharged soldier has qualifications for the position of steward of the county home superior to the qualifications of an applicant who is such soldier, will not be reviewed in an action of mandamus unless the record is such as to clearly show that the board abused its discretion—acted in bad faith.

Miller v Hanna, 221-56; 265 NW 127

Refusal—narrow issue. On mandamus to right the alleged wrong in refusing to grant to an ex-soldier a preference in a public appointment or employment, the sole and only

issue before the court is whether the appointing officer or board was justified, within the range of fair discretion, in finding on the law-required investigation as to relative qualifications that the qualifications of the ex-soldier were not equal to the qualifications of the non-soldier appointee.

Bender v Iowa City, 222-739; 269 NW 779

Extent of court's power—soldiers preference. In mandamus action to compel county supervisors to employ war veteran as courthouse janitor and discharge incumbent nonveteran, court cannot control the appointment but can only direct and require the appointing body to make investigation of the comparative qualifications of the applicants, and when such investigation is made court cannot interfere unless it is plainly apparent from the testimony that the board acted arbitrarily and capriciously.

McLaughlin v Board, 227-267; 288 NW 74

1162.1 Appeals.

District court's power in soldiers preference appeals. A soldiers preference law provision giving the district court the power to review the evidence and find whether the applicant is qualified, and to direct the appointing board as to further action to be taken, is not an unconstitutional delegation of power, as the finding of facts is often a judicial function, and the power of appointment is not exclusively a legislative or executive right.

Maddy v City Council, 226-941; 285 NW 208

Soldiers preference law—findings on qualifications of applicants. In an action to compel the appointment of the plaintiff war veteran as city police judge, where it was shown that both the plaintiff and the nonveteran appointed by the city council were qualified for the position, a finding by the district court in favor of the veteran should not be disturbed.

Maddy v City Council, 226-941; 285 NW 208

Findings by district court. In an appeal under the soldiers preference law, the district court may direct a city council to appoint a war veteran to the position of police judge and to cancel all action taken in appointing a nonveteran with the same qualifications for the office, rather than remand the case for further consideration by the city council.

Maddy v City Council, 226-941; 285 NW 208

1163 Removal—certiorari to review.

Purpose of act. The intent of the soldiers preference law is to make veterans secure in their positions in public service and to prevent their removal except for misconduct, and it is not intended for the purpose of retaining in office one who violates his duty.

Edwards v Civil Service, 227-74; 287 NW 285

Civil service and soldiers preference laws—purpose. Civil service and soldiers preference laws were not intended as a cloak or shield to cover misconduct, incompetency, or failure to perform official duties, but to provide protection and safeguard against arbitrary action of superior officers in removing such employees for reasons other than those named in the statutes.

Anderson v Board, 227-1164; 290 NW 493

Employment for definite time—effect. An honorably discharged soldier who is employed by the board of supervisors, under a written contract for a definite period of time as janitor of the courthouse, does not, by serving said contract period of time, acquire a legal right, even tho his competency and conduct are unquestioned, to continue in said position in preference to another honorably discharged soldier of equal qualifications.

Sorenson v Andrews, 221-44; 264 NW 562

Reduction of employees. The city council has plenary power by appropriate resolution to order a good-faith reduction in the number of employees in a municipal department operating under civil service regulations, and may validly delegate to the chief officer of such department the administrative duty to designate, on the basis of efficiency, competency, and length of service, and without the preferring of charges the employees who shall be discharged; and this is true tho the employees be ex-soldiers.

Lyon v Com., 203-1203; 212 NW 579

Right to discharge. A municipality may, in good faith, validly discharge an ex-soldier employee when the emergency under which he was employed has ceased, and at any time when the city has no funds with which to pay such employee.

Douglas v City, 206-144; 220 NW 72

Discharge—conflicting statutes. A duly appointed county engineer, who is an honorably discharged soldier, may not be summarily discharged by the board of supervisors prior to the end of the term for which appointed, even tho the statute authorizing the appointment of such engineer provides that the "tenure of office may be terminated at any time by the board".

Hahn v County, 218-543; 255 NW 695

Hearing prior to discharge—waiver. Tho the soldiers preference act requires a hearing, prior to discharge, on charges of misconduct against a public employee as grounds for discharge, yet, where no such hearing is held, and the parties join issue on certiorari on the issue of misconduct, they must be held thereby to have presented the issue to the court.

Allen v Wegman, 218-801; 254 NW 74

Hearing before discharge—waiver. Tho the soldiers preference law requires, as grounds for and prior to discharge, a hearing on

charges of misconduct against a public employee, yet, when no such hearing is held and in a certiorari action the parties join issue on misconduct, they waive this hearing provided by the soldiers preference law. Evidence held to establish such misconduct.

Butler v Curran, 224-1339; 279 NW 89

Policeman assaulting prisoner—discharge justifiable. In an action in certiorari brought under soldiers preference law to review a ruling of civil service commission sustaining the discharge of a police officer for violation of civil service rules, providing for the dismissal of a policeman who clubs or mistreats a prisoner merely because such prisoner makes derogatory remarks concerning the officer, held, evidence sufficient to sustain findings of the commission.

Edwards v Civil Service, 227-74; 287 NW 285

Discharge of policeman for nonpayment of debts—nonpermissibility. Civil service commission's removal of police officer, an honorably discharged soldier, on sole ground that he failed to pay his creditors, held arbitrary and void despite fact that police department suffered inconvenience because of creditor's demands for assistance in collection, where such officer made good-faith efforts to meet his obligations which accrued as result of sickness in family.

Anderson v Board, 227-1164; 290 NW 493

Soldier employee—license fee retention. Retention of license fees collected for a state department is not "trivial and inconsequential" but is misconduct and incompetency sufficient to discharge a public employee having a soldier's preference.

Butler v Curran, 224-1339; 279 NW 89

When charges unnecessary. Charges against an ex-soldier employee as a condition precedent to his discharge are unnecessary when the office or position has been necessarily abolished.

Rounds v City, 213-52; 238 NW 428

Legislative abolishment of position—effect. The position known as "clerk of the state employment bureau" was, in legal effect, abolished by the act of the general assembly in accepting the provisions of the Wagner-Peyser Act (29 USC, §49 et seq.) and by the subsequent joint adoption by the federal and state governments of a system under which all employees of the state employment bureau were placed on a civil service basis after competitive examination administered by the federal employment service. It follows that he who was holding the said position of "clerk" at the time the position was legally abolished, tho an honorably discharged soldier, was not entitled to have charges preferred and a hearing had thereon.

Holmes v Reese, 221-52; 265 NW 384

Non-good-faith discharge. The summary discharge by a municipal department superintendent of an honorably-discharged soldier employee cannot be justified on the plea that the position occupied by said employee was in good faith abolished, when, immediately following said discharge, several other persons of no qualifications superior to that of the discharged employee were employed in the same department to do the same work which the discharged employee had done.

Dickey v King, 220-1322; 263 NW 823

Definite tenure of employment—removal.

Durst v Board, 228- ; 292 NW 73

Tenure—removal—yardman at state capitol. An honorably discharged veteran of the war with Germany, appointed for no stated time to the position of "yardman" on the statehouse grounds, is not removable by the executive council except on duly preferred charges of incompetency or misconduct, he not being a deputy of the state custodian of public grounds, tho working under the supervision of said latter officer, and his "term" not expiring on the legal removal of said custodian.

Statter v Herring, 217-410; 251 NW 715

Defendants. The custodian of public buildings and grounds (at Des Moines) is the sole, proper defendant in an action of certiorari to review the legality, under the soldiers preference act, of the discharge of an employee of said department.

Pittington v Herring, 220-1375; 264 NW 712

Certiorari — dismissal re custodian — res judicata. In an action of certiorari against the state executive council, and the custodian of public buildings and grounds, to review the legality of the discharge of an employee of the latter department, an unappealed order of court dismissing said custodian as an improper party defendant, tho unqualifiedly erroneous, becomes the law of said particular action, and precludes said plaintiff from thereafter proceeding against said custodian for the relief sought.

Pittington v Herring, 220-1375; 264 NW 712

Evidence in addition to return. On certiorari, to review the action of a municipality in declining longer to continue the employment of an employee, evidence in addition to the "return" may be received.

Douglas v City, 206-144; 220 NW 72

Failure of proof. Writ of certiorari, to review discharge of ex-soldier from a public appointive position, cannot be sustained when plaintiff predicates his right to relief solely on the unproven allegation that he was discharged by defendant.

Johnson v Herring, 222-1126; 271 NW 175

Reinstatement — unallowable order. The court, in certiorari, is manifestly without authority to order the state executive council to

reinstate, in a department of the state government, a discharged state employee, when said council has no legal authority to employ or discharge employees in said department.

Pittington v Herring, 220-1375; 264 NW 712

Certiorari to review veteran's discharge—scope. Under soldiers preference law affording veterans the right of hearing and review by certiorari, in the event of discharge from public employment, the scope of the review is not, as in ordinary cases of certiorari, limited to evidence on question of jurisdiction or other illegality, but is enlarged to allow a review of all proceedings had before a civil service commission.

Edwards v Civil Service, 227-74; 287 NW 285

Civil service commission findings—conclusiveness. The ruling of a civil service commission as to the discharge of a veteran under soldiers preference law, altho not conclusive, should not be lightly set aside, it being the general rule that where there is compliance in good faith with all requirements as to hearings, the courts will not usually interfere to direct or control the discretion of the commission.

Edwards v Civil Service, 227-74; 287 NW 285

Discharge by civil service commission—findings—reviewability. Supreme court will not review findings of civil service commission which are supported by competent evidence, where commission has jurisdiction and has otherwise acted legally; but, where evidence is entirely lacking to support the findings, the question becomes one of law and the action of the commission would not only be erroneous, but would amount to an illegality reviewable by certiorari.

Anderson v Board, 227-1164; 290 NW 493

No waiver by taking civil service examination. A war veteran holding a continuing position for a city does not waive his rights under the soldiers preference law by taking a civil service examination as to the position he holds. He is secure in the position so long as he is capable and efficient altho he may fail in the examination.

Jones v Des Moines, 225-1342; 283 NW 924

Soldiers preference law—not superseded by civil service law. Where a position occupied by a war veteran, such as license collector for a city, was treated by the council as a continuing one and not for a definite term, the fact that the city conducted a civil service examination (which the veteran failed to pass) will not permit the city to oust the veteran and appoint another without charges, notice, and hearing, as provided by the soldiers preference law.

Jones v Des Moines, 225-1342; 283 NW 924

1164 Burden of proof.

Civil service employee's discharge—burden of proof. Burden is on civil service commission to prove statutory grounds for removal of police officer who is entitled to soldiers preference.

Anderson v Board, 227-1164; 290 NW 493

1165 Exceptions.

Atty. Gen. Opinion. See '30 AG Op 157

Confidential employee. The position of head bookkeeper in the office of the state treasurer involves "strictly confidential relations" with the head of said office, within the meaning of this section.

Allen v Wegman, 218-801; 254 NW 74

CHAPTER 61

NEPOTISM

Atty. Gen. Opinions. See '34 AG Op 73, 445

1166 Employments prohibited.

Atty. Gen. Opinions. See '25-26 AG Op 369; '28 AG Op 58; '32 AG Op 175; '34 AG Op 137, 382, 445

Approval of appointment—effect. The appointment by a county superintendent of his wife as deputy superintendent cannot be legally questioned when the appointment was legally approved by the board of supervisors.

Kellogg v County, 218-224; 253 NW 915

1167 Payment prohibited.

Atty. Gen. Opinion. See '34 AG Op 382

CHAPTER 62

DUTIES RELATIVE TO PUBLIC CONTRACTS

Atty. Gen. Opinions. See '28 AG Op 163; '36 AG Op 10

CHAPTER 62.1

PREFERENCE FOR IOWA PRODUCTS AND LABOR

Atty. Gen. Opinions. See '34 AG Op 318, 371; '38 AG Op 457, 499, 506

1171.01 Preference authorized — conditions.

Atty. Gen. Opinions. See '34 AG Op 357, 371; '38 AG Op 499

Domestic products preference—not applicable to Simmer law. Sections 1171-b1 and 1171-b2, C., '35 [§§1171.01, 1171.02, C., '39], have no application to contracts let for construction of municipal public utility plants payable from the earnings.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

1171.02 Advertisements for bids — form.

Domestic products preference—not applicable to Simmer law. Sections 1171-b1 and 1171-b2, C., '35 [§§1171.01, 1171.02, C., '39], have no application to contracts let for construction of municipal public utility plants payable from the earnings.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

Simmer law—specifying trade named articles. A call for bids under the Simmer law may specify articles by trade name when followed by the words "or equal" and, if a few minor items omit these words, the entire contract is not vitiated when it appears that these particular items were available to all bidders.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

1171.03 Iowa labor.

Atty. Gen. Opinion. See '34 AG Op 357

1171.07 Bids and contracts.

Atty. Gen. Opinions. See '34 AG Op 318; '38 AG Op 457

CHAPTER 62.2

PUBLIC WARRANTS NOT PAID FOR WANT OF FUNDS

Atty. Gen. Opinions. See '38 AG Op 228, 437

CHAPTER 63

AUTHORIZATION AND SALE OF PUBLIC BONDS

Atty. Gen. Opinions. See '25-26 AG Op 425; '30 AG Op 372; '32 AG Op 269; '36 AG Op 423

1171.18 Bonds — election — vote required.

Atty. Gen. Opinions. See '34 AG Op 244; '38 AG Op 164, 841

Primary road bonds. Section 4753-a11, C., '31, [§4753.11, C., '39] insofar as it authorizes the issuance of primary road bonds on a majority vote was impliedly repealed by the subsequent enactment of this section, requiring a favorable vote equal to 60 percent of all the votes cast.

Waugh v Shirer, 216-468; 249 NW 246

Simmer law—nonapplicable statute. Elections to establish municipally owned public utilities payable from the earnings are controlled by chapter 312, C., '35, and not by this section.

Abbott v Iowa City, 224-698; 277 NW 437

Interstate Co. v Forest City, 225-490; 281 NW 207

1172 Notice of sale.

Atty. Gen. Opinions. See '25-26 AG Op 425; '32 AG Op 269; '34 AG Op 365; '36 AG Op 423

Bonds to contractor—noncompetitive bidding.

Simmer law—noninclusive title of act.

Weiss v Woodbine, 228- ; 289 NW 469

1173 Sealed and open bids.

Atty. Gen. Opinions. See '25-26 AG Op 425; '32 AG Op 269

1174 Rejection of bids.

Atty. Gen. Opinions. See '25-26 AG Op 425; '32 AG Op 269; '34 AG Op 365

1175 Selling price.

Atty. Gen. Opinions. See '25-26 AG Op 425; '34 AG Op 257

Value of government bonds. The face value of government bonds is prima facie evidence of their actual value.

Mulenix v Bank, 203-897; 209 NW 432

1176 Commission and expense.

Atty. Gen. Opinions. See '25-26 AG Op 425; '34 AG Op 257; AG Op Aug. 14, '39

1177 Penalty.

Atty. Gen. Opinions. See '25-26 AG Op 425; '34 AG Op 257

Presumption as to official conduct. Presumptively a public officer will perform his duties as prescribed by law.

Banta v Clarke County, 219-1195; 260 NW 329

1178 Sale of state bonds.

Atty. Gen. Opinion. See '25-26 AG Op 425

1179 Exchange of bonds.

Atty. Gen. Opinions. See '32 AG Op 269; '36 AG Op 423

CHAPTER 63.1

MATURITY AND PAYMENT OF BONDS

1179.1 Mandatory retirement.

Atty. Gen. Opinions. See '28 AG Op 418; '30 AG Op 119

Inadequate provision for payment. The court cannot assume that inadequate provision has been made for the payment of county primary road bonds and that, therefore, the bonds are void, in view of the fact that the state has underwritten every such bond through its primary road fund and has appropriated said fund to said purpose for the life of said bonds.

Harding v Board, 213-560; 237 NW 625

1179.2 Mandatory levy.

Atty. Gen. Opinions. See '28 AG Op 251, 418

1179.4 Permissive application of funds.

Atty. Gen. Opinion. See '30 AG Op 119

1179.6 Place of payment.

Atty. Gen. Opinion. See '36 AG Op 577

CHAPTER 64

COMMISSIONERS IN OTHER STATES

Atty. Gen. Opinion. See '38 AG Op 146

CHAPTER 65

NOTARIES PUBLIC

Atty. Gen. Opinions. See '38 AG Op 71, 146, 276, 650

1197 Appointment.

Atty. Gen. Opinions. See '38 AG Op 71, 276

1198 When appointments made.

Atty. Gen. Opinion. See '38 AG Op 650

Acting after expiration of commission. A notary public may not, after his term of appointment has expired, voluntarily or under order of court validly attach a new certificate of acknowledgment to a statutory agreement for arbitration executed during his expired term, even tho, at the time of attaching such new certificate, he was a notary public under a new appointment.

Koht v Towne, 201-538; 207 NW 596

1200 Conditions.

Atty. Gen. Opinions. See '38 AG Op 48, 71, 276, 650

Bond—action on. An action against a notary public and his sureties for damages consequent on a willfully false certificate of acknowledgment does not sound in tort.

Atlas Sec. Co. v O'Donnell, 210-810; 232 NW 121; 30 NCCA 273

1201 Certificate filed.

Atty. Gen. Opinion. See '38 AG Op 276

1203 Powers within county of appointment.

Atty. Gen. Opinions. See '28 AG Op 135; '38 AG Op 276

1204 Powers within adjoining county.

Atty. Gen. Opinions. See '28 AG Op 135; '38 AG Op 276

1206 Improperly acting as notary.

Disqualified notary—when inconsequential. The validity of a deed of conveyance is, as between the grantor and grantee, in no manner affected by the fact that the deed was acknowledged before a disqualified notary public.

Shanda v Clutier Bank, 220-290; 260 NW 841

False certificate—proximate cause. A willfully false certificate by a notary public as to the acknowledgment by the vendee of the execution of a forged conditional sale contract is not the proximate cause of the damage suffered by one who purchases the forged contract and the forged promissory note accompanying it.

Atlas Sec. Co. v O'Donnell, 210-810; 232 NW 121; 30 NCCA 273

Impeachment by notary of his own certificate. Very little weight will be given to the testimony of a notary public that the recitals of his certificate are false.

McDaniel v Bank, 210-1287; 232 NW 653

1207 Acting under maiden name.

Atty. Gen. Opinion. See '38 AG Op 48

1208 Record to be kept.

Lost certificate—allowable proof. Testimony tending to show the contents of a lost official notarial certificate of protest of a promissory note is inadmissible, but the facts constituting a legal protest of the note may, in such case, be established by any competent oral testimony.

Frank v Johnson, 212-807; 237 NW 488; 75 ALR 128

1212 Change of residence.

Atty. Gen. Opinion. See '38 AG Op 276

CHAPTER 66

ADMINISTRATION OF OATHS

1215 General authority.

Affidavits in general. See §11342

Atty. Gen. Opinion. See '34 AG Op 672

Affidavit lacking seal of court clerk. Affidavit of publication of notice of hearing on drainage assessment was sufficient altho court seal was not attached by court clerk before whom the affidavit was made. Moreover, statute did not require that proof of service be by affidavit.

Whisenand v Van Clark, 227-800; 288 NW 915

1216 Limited authority.

Atty. Gen. Opinions. See '28 AG Op 42; AG Op June 27, '39; AG Op March 25, '40

CHAPTER 67

SALARIES, FEES, MILEAGE, AND EXPENSES IN GENERAL

1218 Salaries paid monthly.

Atty. Gen. Opinions. See '28 AG Op 43; '34 AG Op 54, 69, 663; '36 AG Op 359; '38 AG Op 12, 799

Salary—power to change. The general assembly has plenary power to reduce the salary of any public officer unless such reduction is prohibited by the constitution—a public office not being property.

Smith v Thompson, 219-888; 258 NW 190

Compensation—acceptance in part—effect. An officer who accepts part of a statutory compensation does not thereby estop himself from enforcing payment of the balance.

Broyles v County, 213-345; 239 NW 1

Inequitable demand for legal salary. A city officer who has not, for a series of months, received his full salary as legally fixed by ordinance, may not, in an equitable action, compel the city to pay him the deficiency when during said time he has properly received an unknown amount of fees belonging to the city (or county) but has illegally retained them as salary and makes no offer to return said fees.

King v Eldora, 220-568; 261 NW 602

Personal earnings exempt. The salary—the "personal earnings"—of a public officer is exempt from liability on a judgment obtained against him and his surety, by the public body, because of the failure of the officer to account for public funds coming into his hands. The court cannot, on the plea of public policy, rule into the statute an exception which the legislature has not seen fit to declare. So held where the surety, having paid the judgment and thereby subrogated to the rights of the county, sought reimbursement from the officer's salary.

Ohio Ins. v Galvin, 222-670; 269 NW 254; 108 ALR 1036

1219 Appraisers of property.

Atty. Gen. Opinions. See '28 AG Op 181; '30 AG Op 149

1220 General fees.

Atty. Gen. Opinions. See '28 AG Op 360; '36 AG Op 400; AG Op July 17, '39, Nov. 13, '39

1225 State accounts—inspection.

Atty. Gen. Opinion. See '36 AG Op 508

1225.01 Charge for use of automobile.

Atty. Gen. Opinions. See '34 AG Op 53, 305; AG Op Sept. 7, '39

1225.02 Mileage and expenses—prohibition.

Atty. Gen. Opinion. See '34 AG Op 305

1225.03 Mileage and expenses — when unallowable.

Atty. Gen. Opinion. See '34 AG Op 305

Removal from office. Allegations that a public officer drew statutory mileage on account of official journeys when the travel (1) was without cost to himself, or (2) was by means of a conveyance owned and supplied by the public, does not state facts constituting grounds for removal from office.

State v Naumann, 213-418; 239 NW 93; 81 ALR 483

1225.04 Warrants prohibited.

Atty. Gen. Opinion. See '38 AG Op 87

TITLE V

POLICE POWER

CHAPTER 67.1

DEPARTMENT OF PUBLIC SAFETY

1225.09 Highway patrol.

Atty. Gen. Opinion. See AG Op Oct. 6, '39

1225.12 Patrolmen and employees—salaries.

Peace officers' qualifications. The public has a right to have, as peace officers, men of character, sobriety, judgment, and discretion.

Edwards v Civil Service, 227-74; 287 NW 285

1225.13 Duties of department.

Atty. Gen. Opinion. See '30 AG Op 331

1225.26 Prohibition on other departments.

Atty. Gen. Opinion. See '38 AG Op 170

CHAPTER 67.2

ITINERANT MERCHANTS

Atty. Gen. Opinion. See AG Op Aug. 16, '39

CHAPTER 68

COAL MINES AND MINING

Atty. Gen. Opinions. See '30 AG Op 57; '36 AG Op 282

1226 Board of examiners.

Discussion. See 9 ILB 145—Coal price regulation

1228 Mine inspectors—examinations.

Atty. Gen. Opinion. See '38 AG Op 638

1231 Examination—mine inspector.

Atty. Gen. Opinion. See '38 AG Op 638

1241 Duty of mine owner.

Atty. Gen. Opinion. See '36 AG Op 282

1242.1 Filling or sealing abandoned mine.

Strip mining coal—pipe line right of way easement—back-filling required—judgment. A holder of a strip mine coal lease who enters upon and strips coal from land, upon which land a pipe-line company holds an easement, knowing that by so mining violates his lease, must back-fill the land when the easement holder exercises his option to buy; and upon his failure to make the back-fill, a judgment against the coal lessee for the cost thereof is proper.

Penn v Pipe Line Co., 225-680; 281 NW 194

1272 Ventilation.

Atty. Gen. Opinion. See '38 AG Op 124

1276 Unhealthful conditions.

Operation of mines—gasoline engine—powers and duties of state mine inspector. Where a mine was being worked by its owners without "employees", and the state mine inspector (1) had never been in the mine, (2) had never made a test of air and health conditions therein, and (3) had not made inquiry as to whether air and health conditions were such as to endanger health of workers in the mine, the inspector exceeded his statutory authority in making an order, under §1308, C., '35, to "remove all mining machines operated with or by gasoline [or any other fuel oil whatsoever]"—portion in brackets not being contained in above code section.

State v Padavich, 223-991; 274 NW 51

1286 "Mine foreman" defined.

Atty. Gen. Opinion. See '38 AG Op 638

1292 Duties of foreman or pit boss.

Atty. Gen. Opinions. See '30 AG Op 97; '38 AG Op 638

1293 Duty of miners and other employees.

Atty. Gen. Opinion. See '30 AG Op 97

1308 Gasoline and engines—use and location.

Powers and duties of state mine inspector. Where a mine was being worked by its owners without "employees," and the state mine inspector (1) had never been in the mine, (2) had never made a test of air and health conditions therein, and (3) had not made inquiry

as to whether air and health conditions were such as to endanger health of workers in the mine, the inspector exceeded his statutory authority in making an order, under this section to "remove all mining machines operated with or by gasoline [or any other fuel oil whatsoever]"—portion in brackets not being contained in above code section.

State v Padavich, 223-991; 274 NW 51

1309 Temporary location of engine.

Atty. Gen. Opinion. See '34 AG Op 699

1332 Burden of proof.

Gasoline engine—powers and duties of state mine inspector. Where a mine was being worked by its owners without "employees", and the state mine inspector (1) had never been in the mine, (2) had never made a test of air and health conditions therein, and (3) had not made inquiry as to whether air and health conditions were such as to endanger health of workers in the mine, the inspector exceeded his statutory authority in making an order, under §1308, C., '35, to "remove all mining machines operated with or by gasoline [or any other fuel oil whatsoever]"—portion in brackets not being contained in above code section.

State v Padavich, 223-991; 274 NW 51

1334 Right of adjoining landowner.

Strip mining—coal lease subject to pipe-line easement—lateral support. Where a pipe-line company has an easement across land and an option to buy a designated strip of land along the pipe line if a strip coal mine should be opened on the land, a subsequent strip mine coal lease, subject to the pipe-line easement and option, gives the coal lessee no rights to strip mine coal on the land covered by the purchase option and thus destroy the lateral support of the pipe line, nor is such lessee entitled to any part of the purchase price for such strip of land.

Penn v Pipe Line Co., 225-680; 281 NW 194

Lease of mineable coal—breach—burden of proof. In an action to recover minimum royalties under a lease of coal lands because of defendant's breach of contract to mine all mineable, workable and merchantable coal underlying said lands, plaintiff has the burden to establish the existence of such coal, especially when plaintiff assumed such burden by his pleadings. Evidence exhaustively reviewed and held insufficient to generate a question for the jury.

Scovel v Norwood-White Co., 222-354; 269 NW 9

1336 Double damages.

Failure to quitclaim mineral rights—damages. The measure of damages for breach of contract to quitclaim to the surface owner of lands "the right to coal and minerals" under the lands is not the difference between the value of the land with and without the coal and mining rights existing against the land as an incumbrance, when the unit fee has theretofore been separated into (1) a fee to the surface, (2) a fee to the minerals, and (3) a fee to the right to vertical support, and the two latter fees have been conveyed to other parties and paid for.

Bremhorst v Coal Co., 202-1251; 211 NW 898

Measure of damages—wrongful act without profit to wrongdoer. The lessee of coal lands who seeks to recover damages consequent on the wrongful act of the owner of the land in taking coal from the land, need not show that the defendant-owner made any profit from his wrongful operations. Plaintiff need only show wherein and to what extent he was damaged.

Hartford Co. v Helsing, 220-1010; 263 NW 269

Opinion evidence—examination of experts—improper form. In an action against a mine owner for damages consequent on an injury to the surface of the soil which he did not own, hypothetical questions calling for values should not be framed on the erroneous theory that the mine owner had no right to use the surface of the soil to any extent.

Grell v Lumsden, 206-166; 220 NW 123

Torts—liability of mere employee. The mere employee of a tort-feasor is not necessarily liable for the damage resulting from the tort. So held in an action by the lessee of coal lands for damages consequent on the wrongful removal of coal by the owner of the leased land.

Hartford Co. v Helsing, 220-1010; 263 NW 269

Decree—broad power under general prayer for relief. A court of equity, in dealing with and adjusting involved and complicated matters of fact, has exceptionally broad power to effect equity and justice when both parties pray for general equitable relief. Illustrated where defendant, who was the owner of coal lands, and those working in conjunction with him, had wrongfully interfered with the rights of lessees, and were held liable in a reasonable amount for permanent improvements placed in the mine by lessees, even tho said improvements became worthless—it appearing that defendant's misconduct had materially contributed to said latter condition.

Hartford Co. v Helsing, 220-1010; 263 NW 269

CHAPTER 69

GYPSUM MINES

1349 Duties and powers of inspector.

Atty. Gen. Opinion. See '30 AG Op 57

1353 Separate maps.

Sale of gypsum lands—compensation—jury question. Evidence that defendant orally agreed to pay plaintiff a commission to assist in the sale of gypsum lands upon which plaintiff held drill plats, that agents of purchaser conferred with plaintiff and examined the plats, coupled with a denial by defendant that plaintiff accepted the offer or assisted in consummating the sale, presents a question precisely determinable by the jury.

Maher v Breen, 224-8; 276 NW 52

CHAPTER 70

WORKMEN'S COMPENSATION

Discussion. See 7 ILB 100—Workmen's compensation; 7 ILB 166—Conflict of laws; 17 ILR 181, 343—Commentary on workmen's compensation act

Atty. Gen. Opinions. See '28 AG Op 122; '34 AG Op 145, 648; '36 AG Op 259, 274; '38 AG Op 7, 611

1361 To whom not applicable.

Additional annotations. See under §1421
Interstate commerce. See under §§1417, 8042 (II)

Atty. Gen. Opinions. See '25-26 AG Op 251, 477; '34 AG Op 406, 648

Constitutionality.

Hawkins v Bleakly, 243 US 210

Liberal construction—workmen's compensation act. The workmen's compensation act is to be liberally construed.

Everts v Jorgensen, 227-818; 289 NW 11

Maintenance of residence not "trade or business". Testimony which simply shows that a home owner maintains on his residential grounds an additional residence which is occupied by his son, establishes no such "trade or business" as renders the home owner liable under the workmen's compensation act to an employee who is injured in the course of his employment while repairing the equipment of the house occupied by the son; and this is true even tho the employee was not a casual employee.

Tunnicliff v Bettendorf, 204-168; 214 NW 516

Casual employment—dual provision. The provision of the workmen's compensation act that "persons whose employment is of a casual nature" shall not be under the act (subsec. 2, this section), and the further provision that "A person whose employment is purely casual, and not for the purpose of the employer's trade or business," shall not be deemed an "employee" (§1421, subsec. 3a, C., '31), when construed together, have but one meaning, to wit, the full meaning of the last provision.

Gardner v Trustees, 217-1390; 250 NW 740

Employees within and without the act. If an employee is not engaged in work of a "purely casual nature" he is entitled to the benefits of the compensation act altho the employment was "not for the purpose of the employer's trade or business"; and vice versa, if his employment is "for the purpose of the employer's trade or business," he is entitled to the benefits of the act tho his employment is of a "purely casual nature". In other words, in order to put the employee outside the workmen's act it must appear that the employment was both "purely casual" and "not for the purpose of the employer's trade or business".

Gardner v Trustees, 217-1390; 250 NW 740

Casual employment "for the purpose of the employer's trade or business". An employment to wash the kitchen walls of a restaurant is "for the purpose of the employer's trade or business", even tho the employment is purely casual.

Dial v Coleman's Lunch, 217-945; 251 NW 33

Noncasual employment.

Eddington v Tel. Co., 201-67; 202 NW 374

Operator of sorghum mill not within act. The employee of a farmer is "engaged in an agricultural pursuit" while engaged in operating a sorghum mill on the farm, and therefore is not within the benefits of the workmen's compensation act.

Taverner v Anderson, 220-151; 261 NW 610

Employees within acts—excludes farm supervisors—agricultural pursuit. An employee whose duties consisted of repairing buildings and fences on some 20 farms and who occasionally advised as to crops was engaged in an agricultural pursuit within the meaning of §1361, C., '35, and when fatally injured on the highway while going from one farm to another, his estate is not entitled to workmen's compensation.

Criger v Mustaba Co., 224-1111; 276 NW 788

Scope of employment—jury question. The scope of a servant's duties is to be determined by what he was employed to perform, and by what, with knowledge and approval of his master, he actually did perform. Evidence

held to present a jury question whether a general farm hand was, at the time of his injury, within the scope of his employment.

Bell v Brown, 214-370; 239 NW 785

Nonagricultural pursuit. A workman who is employed by a county as a member of the county highway department, and is paid by the county an hourly wage for driving a heavy tractor road grader in the construction and maintenance of county roads—for which work said grader was exclusively designed—is not, as regards the county, the employer, deprived of the benefits of the workmen's compensation act because, when injured in the operation of said grader, he was, under the orders from the board of supervisors, engaged in the construction on a farm and for the benefit of the owner thereof, of a trench silo, such construction not being an engagement by said workman "in an agricultural pursuit or any operation immediately connected therewith" within the meaning of subsec. 5 of this section.

Trullinger v Fremont Co., 223-677; 273 NW 124

Civil Works Administration employee—status. Workmen who are (1) employed, (2) directed when and where to work, and (3) paid for their services, by the federal Civil Works Administration, are not, while engaged in redecorating a public school building, employees of the school corporation owning said building, within the meaning of the workmen's compensation act.

Hoover v Sch. Dist., 220-1364; 264 NW 611; 39 NCCA 271; 3 NCCA(NS) 741

Township not employer. A civil township is not an "employer" within the meaning of this chapter, such township being but an unincorporated district. It necessarily follows that a township road superintendent is not an "employee."

Hop v Brink, 205-74; 217 NW 551

Wife as employee of husband. A husband who is the sole owner of a printing plant may validly employ his wife as a linotype and press operator in said plant and the wife may legally accept such employment and collect therefor, because such services are wholly outside of, and foreign to, the usual and ordinary marital duties of a wife. It follows that the wife is entitled to compensation under the workmen's compensation act for injuries arising out of and in the course of said employment.

Reid v Reid, 216-882; 249 NW 387

Policemen not within act. The minor children of a deceased policeman who was a member of an organized police department and contributing to the statutory pension fund of said department, and who was killed while attempting to effect an arrest and at a time when he was not actually "pensioned", are not entitled to compensation under this chapter.

Ogilvie v Des Moines, 212-117; 233 NW 526

Iowa judgment for death damages—effect in foreign state. Where a judgment fixing the compensation for a railroad employee's death due to an accident in Iowa was rendered by an Iowa court under the Iowa compensation act, it may be pleaded by the railroad in an action brought against it for the same cause in Minnesota under the Federal Employers' Liability Act, since both courts had jurisdiction to decide whether deceased was engaged in intrastate or interstate commerce; and the Iowa judgment, being the earlier one rendered, was res judicata in the other action, altho the other action was brought first.

Chicago, RI Ry. v Schendel, 270 US 611

Policemen under coverage. Section 1422, C., '27, providing for coverage under the workmen's compensation act for policemen killed or injured in effecting an arrest, embraces, in view of §1361, subsec. 4, those policemen only who are not members of an organized police department.

Ogilvie v Des Moines, 212-117; 233 NW 526

1362 Compulsory when.

Atty. Gen. Opinions. See '25-26 AG Op 286, 477; '28 AG Op 122, 435; '34 AG Op 649; '36 AG Op 274; '38 AG Op 6

Nonemployee of city. One may not be said to be in the employ of a city, and therefore within the benefits of this chapter, when, at the time of his injury, he was performing work which he had donated, in furtherance of a plan of public-spirited citizens to beautify a plot of municipally owned land as a city park, which plan the city council had approved, provided it be carried out without expense to the city.

Norman v City, 206-790; 221 NW 481; 28 NCCA 831

Indigents on work-relief. An indigent who, through federal, state, and county unemployment relief agencies is given work on county roads and is injured while performing such work, must, in order to hold the county liable under the workmen's compensation act, show that the legal relation between him and the county was, at the time of injury, that of employer and employee.

Oswalt v Lucas Co., 222-1099; 270 NW 847; 3 NCCA(NS) 742

1363 Acceptance presumed.

Employer's failure to insure liability—employee's option—presumption. In workmen's compensation case where employer fails to insure his liability, as required under Iowa law, thereby giving employee election to proceed under the act or collect damages at common law, election to proceed under act will be presumed in absence of filing of his election within required time.

Severson v Hanford Air Lines, 105 F 2d, 622

Applicability of state and federal acts. Injuries received by an employee of a common carrier, engaged in the transportation of both intrastate and interstate freight, are compensable under the state workmen's compensation act, and not under the corresponding federal act, when the employment, in the course of which and out of which the injuries arose, consists solely of the duty to patrol the railroad yards of the employer against thieves, trespassers, and fires.

Califore v Railway, 220-676; 263 NW 29

Extra-territorial effect. The workmen's compensation act of this state, when not formally rejected, becomes a part of a contract of employment entered into in this state by a resident employer and a nonresident employee, tho the contract requires almost exclusive execution of the contract by the employee in the foreign state—where the employee was injured.

Cullamore v Groneweg & S., 219-200; 257 NW 561

Consent of owner-employer to operation of automobile—effect. An employer, whose automobile is being operated with his consent, is not liable, under §5026, C., '35, to his own employee for an injury suffered by said employee in consequence of the actionable negligence of said operator of the car, provided said injury is compensable under the workmen's compensation act.

McGraw v Seigel, 221-127; 263 NW 553; 106 ALR 1035

Injury not occurring from accident. A personal injury may be compensable even tho it did not arise out of an accident, or special incident or unusual occurrence. So held where a workman ruptured his stomach consequent on the physical strain of his ordinary work.

Almquist v Nurseries, 218-724; 254 NW 35; 94 ALR 573; 35 NCCA 432

Traumatic injury to diseased organ. A traumatic injury to an organ of the human body is not rendered noncompensable because the organ was already in a weakened condition because of a disease, and, therefore, more susceptible to an injury than a normal organ.

Almquist v Nurseries, 218-724; 254 NW 35; 94 ALR 573; 35 NCCA 432

Injury aggravating disease. In workmen's compensation case where the injury aggravates or accelerates a disease with which the workman is afflicted, it is compensable if death results from or is hastened by the injury.

West v Phillips, 227-612; 288 NW 625

Lead poisoning to auto mechanic—occupational disease—nonconclusive finding. As to lead poisoning suffered by an automobile mechanic from using a blowtorch negligently filled with tetraethyl lead gasoline, industrial commissioner's finding it to be an occupational disease was not conclusive on the courts.

Black v Creston Auto Co., 225-671; 281 NW 189

Garage mechanic—lead poisoning from blowtorch not occupational. An occupational disease is a usual or unavoidable incident or result of the particular employment. Lead poisoning suffered by a garage mechanic over a period of time resulting from using a blowtorch containing tetraethyl lead gasoline negligently furnished by the employer is a disease outside the ordinary diseases that follow the usual business of an automobile mechanic, and is compensable as an injury in the course of his employment.

Black v Creston Auto Co., 225-671; 281 NW 189

Fatal sunstroke—when noncompensable. A fatal sunstroke cannot be said to "arise out of" an employment and, therefore, be compensable, when the facts attending the injury fail to reveal any causal connection between the employment and the said injury.

Wax v Des M. Corp., 220-864; 263 NW 333; 38 NCCA 621

Death from lightning—noncompensable. The death of an employee from a fatal stroke of lightning, tho occurring "in the course of" his employment, cannot be deemed to "arise out of" said employment, and therefore be compensable under the workmen's compensation act, unless, by a preponderance of the evidence, a causal connection is established between (1) the circumstances and conditions attending said employment and (2) said death, i. e., that a person engaged in said employment is more susceptible to such an injury than other persons in the same locality. Evidence held insufficient.

Mincey v Dultmeier Co., 223-252; 272 NW 430

Heat exhaustion. In workmen's compensation action it is essential, in order to recover an award for death from heat exhaustion, that natural heat be intensified by artificial heat.

West v Phillips, 227-612; 288 NW 625

Exhaustion from artificial heat. Exhaustion from artificial heat in a bakeshop, which caused the death of a workman in the course of his employment, creates a compensable injury.

West v Phillips, 227-612; 288 NW 625

Excessive heat caused artificially. In workmen's compensation action to recover for death of workman caused by intensified or artificial heat, held, evidence sufficient to sustain finding that there was excessive heat in a bakeshop, caused artificially.

West v Phillips, 227-612; 288 NW 625

Causal connection between injury and death. In workmen's compensation action to recover for death of workman allegedly caused by intensified or artificial heat, wherein testimony of physician shows that some of the symptoms of heat exhaustion are that patient perspires freely, has an increased thirst, flushed face, increasing weakness and chills, and where workman manifested substantially all of the symptoms enumerated, such testimony supplied evidence that workman suffered heat exhaustion which hastened his death and thus provided the causal connection between his death and injury.

West v Phillips, 227-612; 288 NW 625

Act of courtesy resulting in injury. An injury to an employee may be said to "arise out of and in the course of his employment" when received at the employer's plant during working hours in extending, as a matter of courtesy, helpful assistance to a nonemployee who is rightfully on the premises for a purpose advantageous to the owner of the plant, provided the employee, from all the facts and circumstances attending his employment and work, believed and had reasonable grounds to believe that his employment embraced and contemplated the giving of such assistance under such circumstances.

Yates v Humphrey, 218-792; 255 NW 639; 35 NCCA 541

Hunting pheasants—course of employment—supported findings. The evidence leading up to and attending the injury of a salesman of steel culverts, while hunting pheasants with a son of a prospective customer, may be such as to support a finding of the industrial commissioner that the salesman was injured in the course of his employment and entitled to compensation accordingly.

Fintzel v Stoddard Co., 219-1263; 260 NW 725; 37 NCCA 799; 4 NCCA (NS) 694

1364 Rejection.

Failure to reject—effect. The neglect of an employer specifically to reject the workmen's compensation act in the manner provided automatically and conclusively places such employer under said act; and his neglect to insure his liability does not take him out from under said act.

Van Gorkom v O'Connell, 201-52; 206 NW 637

1367 Defenses when employee rejects.

Torts—fundamental laws govern liability. The fundamental and underlying law of torts is that he who does injury to the person or property of another is civilly liable in damages for the injuries inflicted.

Montanick v McMillin, 225-442; 280 NW 608

Safe place to work—no warranty by master—reasonable care only. In no event is a master held to warrant or insure the servant's safety, but he is held to the exercise of reasonable care to eliminate those elements of danger to the life and limb of the servant which are not the usual and natural incidents of the service when the master has exercised reasonable care.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

Negligence—reasonable care—test. If, in the performance of his duties, the master has exercised that degree of care ordinarily exercised by other reasonably prudent persons acting under the same or similar circumstances, he has met the standard of care the law requires and it cannot be said he is guilty of negligence.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

"Vice-principal" or "fellow servant"—master's liability. Evidence held to warrant conclusion that owner of apparatus used to tear down silo, and who was actively engaged in such work, was a fellow servant; and, if he was a vice-principal, he was such only to the extent of being required to furnish plaintiff proper equipment and a safe place to work. The mere fact that one employee has authority over others does not make him a vice-principal or superior so as to charge the master with his negligence.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

1368 Certain defenses not available.

Atty. Gen. Opinion. See '36 AG Op 395

Assumption of risk defined. It is an implied term of the servant's contract of employment that he assume the risk which naturally pertains to his work, but he is under no contract or legal obligation to assume any risk which is occasioned by a failure of duty on the part of his employer.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

Safe tools and place to work—reasonable care required. A master is required to exercise reasonable care to furnish reasonably safe tools, appliances, and instrumentalities for use in the work which the servant is expected to perform and the same degree of care in furnishing a reasonably safe place in which to work.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

1375 Defenses not available when employer rejects.

"Vice-principal" or "fellow servant"—master's liability. Evidence held to warrant conclusion that owner of apparatus used to tear down silo, and who was actively engaged in such work, was a fellow servant; and, if he was a vice-principal, he was such only to the extent

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Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

1376 Willful injury—intoxication.

Liberal construction—workmen's compensation act. The workmen's compensation act is to be liberally construed.

Everts v Jorgensen, 227-818; 289 NW 11

Willful injuries. A claim for workmen's compensation for injuries received by an employee who was attacked by another employee who had recently been discharged was sustainable as not within an exception to the workmen's compensation law providing that no compensation be allowed for injuries caused by an employee's willful intent to injure another, when the commissioner inferred from the evidence that the attack was "willful", meaning "governed by will but without yielding to reason", and was not the result of personal ill will, when the relations between the two men had always been friendly, but that any hostile feelings were against the former employer.

Everts v Jorgensen, 227-818; 289 NW 11

Fact of employment—claimant's burden of proof. The general rule that an employee is entitled to compensation for injuries arising in the course of his employment places upon him the burden of proving himself to be an employee within the meaning of the statute and proving that he received an injury which arose in the course of his employment.

Everts v Jorgensen, 227-818; 289 NW 11

Confession and avoidance. Under a claim for workmen's compensation, a defense alleging that the injuries sustained by the claimant were caused by the willful act of a third person is in the nature of a confession and avoidance and places the burden of proving it to be true upon the defendant.

Everts v Jorgensen, 227-818; 289 NW 11

Burden of proof on one asserting exception. One relying on an exception to the workmen's compensation act, providing that no compensation shall be allowed for an injury caused by the employee's willful intent to injure himself or to willfully injure another, has the burden of establishing the facts which bring the matter within the exception.

Everts v Jorgensen, 227-818; 289 NW 11

Burden of proof not sustained. The defendant in an action for workmen's compensation who relied on an exception to the law failed to sustain the burden of proving the exception when there was an entire lack of evidence tending to prove or disprove the exception.

Everts v Jorgensen, 227-818; 289 NW 11

Employee attacked by discharged employee —course of employment. When a hotel clerk, while on duty, was attacked by a recently discharged employee of the hotel, injuries received in the attack arose out of and in the course of the employment.

Everts v Jorgensen, 227-818; 289 NW 11

Supported findings of fact by commissioner on workmen's compensation claim. In an appeal from the commissioner's allowance of a claim for workmen's compensation, the order of the commissioner should be sustained when the record contains evidence to support his findings of fact.

Everts v Jorgensen, 227-818; 289 NW 11

1377 Implied acceptance.

Foreign employer—adjudication on registered mail service. The workmen's compensation act, in the absence of a statutory rejection thereof, becomes a part of a contract of employment which is performable by the employee wholly within this state, and entered into between a resident employee of this state and a foreign nonresident employer doing business in this state without a state permit; but in case the employee dies from an injury compensable under said act, the industrial commissioner acquires no jurisdiction to determine and adjudicate the compensation due on account of said death by simply sending, by registered mail, notices of said proceedings to

said employer in said foreign state, tho, concededly, the addressee received said notices. An adjudication on such service does not constitute due process.

Elk River Co. v Funk, 222-1222; 271 NW 204; 110 ALR 1415

1378 Contract to relieve not operative.

Contract in avoidance of liability—effect. A contract must be wholly rejected insofar as it appears to be a mere device resorted to by the employer in order to relieve himself of liability under the workmen's compensation act.

Mallinger v Oil Co., 211-847; 234 NW 254

Invalid agreement—approval by commissioner—effect. The approval by the industrial commissioner of an agreement between the employer and the dependent of a deceased employee, providing for a less compensation than that required by statute, is invalid, and therefore no obstacle to the later entry by the commissioner of a valid order.

Forbes v Sand Co., 216-292; 249 NW 399

Primary liability of employer. The employer is primarily liable for the payment of the compensation provided by the workmen's compensation act, irrespective of any agreement which the dependent may enter into with the employer's insurer.

Biggs v Bank, 218-48; 254 NW 331

1379 Negligence presumed.

Fact of employment—claimant's burden of proof. The general rule that an employee is entitled to compensation for injuries arising in the course of his employment places upon him the burden of proving himself to be an employee within the meaning of the statute and proving that he received an injury which arose in the course of his employment.

Everts v Jorgensen, 227-818; 289 NW 11

1380 Rights of employee exclusive.

Action for damages—jurisdiction. The district court has no jurisdiction to try and determine an original action against an employer for damages consequent on the alleged negligence of the employer resulting in the death of an employee, when both the employer and employee are under the terms and conditions of the workmen's compensation act.

Hlas v Quaker Co., 211-348; 233 NW 514

Compensation bars action for malpractice. A workman who, on receiving an injury which is compensable under the workmen's compensation act, demands and receives (or is receiving) compensation under said act for said injury, may not maintain an action against the attending physician for damages consequent on the aggravation of said injury by the unskillful treatment of said physician.

Paine v Wyatt, 217-1147; 251 NW 78; 39 NCCA 586

1382 Liability of others—subrogation.

Atty. Gen. Opinion. See '25-26 AG Op 388

Action against third party wrongdoer—foreign statute—effect. Under the workmen's compensation act of Illinois, when an employer pays his employee compensation for an injury, said employer is thereby subrogated to the employee's right to maintain an action against a third party wrongdoer who caused the injury, provided all three said parties are operating under said act. Said Illinois act will not be given, in this state, the effect of depriving an employee who renders services in Illinois for his Iowa employer, but who was injured in this state by a wrongdoer resident of this state, of the right to maintain in his own name in this state an action for damages against said wrongdoer, even tho said employer has paid, in Illinois, said employee the compensation called for by the Illinois act, and even tho wrongdoer's general business extended into the state of Illinois.

Henriksen v Stages, Inc., 216-643; 246 NW 913; 32 NCCA 602

Recovery by surety against third party. An insurer who pays compensation to an injured employee of an employer operating under the workmen's compensation act, but who neither (1) demands action by the employee against a third party out of whose operations the injury occurred, nor (2) serves on said third party any notice of his lien in an action voluntarily brought by the employee against said third party, may not, after the employee has settled with said third party and dismissed his action, maintain an action against said third party to recover the sums paid by said insurer to said employee; and especially when said insurer produces no showing that said third party was legally liable for the injury to said employee, or had ever admitted such liability.

Southern Sur. v Railway, 215-525; 245 NW 864

Compensation bars action for malpractice. A workman who, on receiving an injury which is compensable under the workmen's compensation act, demands and receives (or is receiving) compensation under said act for said injury, may not maintain an action against the attending physician for damages consequent on the aggravation of said injury by the unskillful treatment of said physician.

Paine v Wyatt, 217-1147; 251 NW 78; 39 NCCA 586

Discharge of employer's liability—effect on third party wrongdoer. Where an injury, which is mandatorily compensable under the workmen's compensation act, is received by an employee in consequence of the actionable negligence of the operator of an automobile owned by, and operated with the consent of, the employer, the fact that the employer fully discharges his statutory liability to the employee

does not ipso facto discharge the legal liability of the said negligent operator to said employee.

McGraw v Seigel, 221-127; 263 NW 553; 106 ALR 1035

1383 Notice of injury—failure to give.

Discussion. See 1 ILB 137—Procedure

Computation of period. The ninety-day period within which an employer must receive notice of an injury (in order to fix liability in any event) commences to run from the date of the accident, and not from the date when the causal relation between the accident and the resulting disability is revealed.

Mueller v. U. S. Gyp. Co., 203-1229; 212 NW 577

Proceedings—notice to employer—commissioner's finding conclusive. A conflict in the evidence in a workmen's compensation case as to whether the employer had notice of the injury within the statutory 90-day period, is a question whose determination by the industrial commissioner is conclusive on the courts.

Fritz v Rath Co., 224-1116; 278 NW 208

1386 Limitation of actions.

Atty. Gen. Opinions. See '25-26 AG Op 144; '36 AG Op 395

Nonretroactive effect. This section has no application to an injury received prior to the enactment of the section.

Hinricks v Locomotive Wks., 203-1395; 214 NW 585

Judgment on agreement—time limit. The two-year statute of limitation for instituting original proceedings for compensation under the workmen's compensation act has no application whatever to proceedings instituted in the district court to obtain judgment on a valid agreement as to compensation, even tho such proceedings were instituted more than two years after the agreement was executed and approved.

Biggs v Bank, 218-48; 254 NW 331

1387 Professional and hospital services.

Discussion. See 1 ILB 80—Rights of a physician

Atty. Gen. Opinions. See '28 AG Op 435; '34 AG Op 379

Medical services—condition to allowance. Upon reversing the order of the industrial commissioner that certain injuries were not compensable, the court may not make an allowance for medical services in the absence of a showing that a request was made to the commissioner or to the court for such services.

Almquist v Nurseries, 218-724; 254 NW 35; 94 ALR 573

Compromise—paying medical expense—no third party contract for physician. In a workmen's compensation case a stipulation of settlement including "all medical expense incurred" does not make a contract for the benefit of third persons so as to permit an action to be maintained by the physician who rendered medical services to the injured employee.

Casey v Creamery Co., 224-1094; 278 NW 214

1389 Liability in case of no dependents.

Atty. Gen. Opinions. See '30 AG Op 87, 271

Exemption from debts of testator. Workmen's compensation, already collected as the result of a commutation settlement and in the hands of testator's attorney, is subject to the debts of the employee's estate.

Long v Northup, 225-132; 279 NW 104; 116 ALR 1475

1390 Compensation schedule.

Atty. Gen. Opinions. See '25-26 AG Op 251; '38 AG Op 6

Deficient earnings—computation. When a fatally injured, adult employee earns less than 300 times the usual daily wage in the same line of industry in the locality, the yearly wage must be computed under §1397, subsec. 5, C., '31, and not under this section.

Shuttleworth v Power Co., 217-398; 251 NW 727

1391 Maturity date and interest.

Tender—effect. A tender by an employer of the proper amount of compensation payments, and for the proper compensation period, absolves the employer from all obligation to pay interest on such payments pending an unsuccessful attempt by the employee to secure an increase in the compensation period.

Pappas v Tile Co., 201-607; 206 NW 146

Nonallowable interest. Interest on a long delayed award of compensation will not be allowed when the delay was consequent on the applicant's neglect to perfect her petition for review of the decision of the board of arbitration.

Bushing v Light Co., 208-1010; 226 NW 719

1392 Death cases—dependents.

Atty. Gen. Opinions. See '25-26 AG Op 437; '28 AG Op 344; '30 AG Op 271

What causes of action survive. While the right of an injured employee to compensation under the workmen's compensation act is based on disability, and the right of his dependents to compensation in event of his death is based on loss of support, nevertheless the facts maturing each right are substantially the same, and therefore, in case the injured employee dies while his application for compensation is pending, the cause of action survives to his dependents, they being his "successors in interest" within the meaning of the statute.

Dille v Coal Co., 217-827; 250 NW 607

"Weekly compensation" defined. The "weekly compensation" provided by this section for injuries resulting in death is computed by taking 60 percent of the "average weekly earnings" referred to in §1390, C., '31.

Almquist v Nurseries, 218-724; 254 NW 35; 94 ALR 573

200 weeks payment—nonapplicability. Compensation for death under the workmen's compensation act is not limited to payments for 200 weeks simply because the workman happened to be working at the time of his death in a department which "shuts down and ceases operation during a season of each year", when the employer's business as a whole continues throughout the year in other departments, and the deceased employee is a general employee working in all departments.

Forbes v Sand Co., 216-292; 249 NW 399

Leg injury causing pneumonia—failure of proof—claimant's burden. A workmen's compensation claimant fails to maintain her burden to establish a compensable claim sustained in the course of employment when only hearsay evidence is offered to show that a leg injury to her husband occurred during his employment and when the producing cause of subsequent death from lobar pneumonia is under the conflicting medical testimony a matter of uncertainty.

Featherson v Continental-Keller Co., 225-119; 279 NW 432

1395 Permanent total disability.

"Disability" defined. An employee may be permanently and totally "disabled" within the meaning of the workmen's compensation act, and entitled to compensation accordingly, even tho a large percentage of his physical powers remain intact. In other words, the disability for which the law makes compensation is industrial disability—disability from carrying on a gainful occupation—inability to earn wages.

Diederich v Railway, 219-587; 258 NW 899

1396 Permanent partial disabilities.

Rule of computation. The legal formula, under the workmen's compensation act, for computing the weekly compensation due an employee consequent on a fractional, permanent disability not involving the loss of any physical part of the body is: Average weekly wage times 60 percent times the fraction representing the extent of the disability.

Oldham v Scofield et al., 222-764; 266 NW 480, 269 NW 925

"Disability" defined. An employee may be permanently and totally "disabled" within the meaning of the workmen's compensation law, and entitled to compensation accordingly, even tho a large percentage of his physical powers remain intact. In other words, the disability for which the law makes compensation is industrial disability—disability from carrying on a gainful occupation—inability to earn wages.

Diederich v Railway, 219-587; 258 NW 899

Conclusiveness of compensation schedule. An employee under the workmen's compensation act was, under an agreement, paid compensation for a supposedly temporary injury to the employee's foot. On review of said agreement, the deputy industrial commissioner found, on supporting evidence, that the foot had been permanently disabled to the extent of 50 percent of its normal functions, and ordered additional compensation paid according to the statute fixing compensation for permanent partial disabilities.

Held that the court, on appeal, should have treated the finding of the deputy as conclusive —that the court was in error in adjudging that the employee was, in an industrial sense, permanently disabled, and was entitled to compensation for the concededly permanent partial disability, not in accordance with the statutory schedule governing compensation for permanent partial disability, but on the basis of 400 weekly payments for total permanent disability.

Soukup v Shores Co., 222-272; 268 NW 598

Loss of less than arm—compensation period. Inasmuch as the workmen's compensation act does not definitely fix the compensation period for the loss of more than a hand but less than two-thirds of the arm, such period must, in case of dispute, be determined by arbitration, or by the industrial commissioner, in case arbitration is waived, and must, even tho the arm is the only arm possessed by the employee at the time of the injury, be determined by adding to the compensation period of 150 weeks for the loss of a hand, such period as will equitably adjust the compensation between the loss of a hand and the loss of an arm, such total period not to equal, however, 225 weeks—the statutory period for the loss of an arm.

Pappas v Tile Co., 201-607; 206 NW 146

Compensation—acceptance—effect. The acceptance by an employee of tendered compensation payments cannot prejudice him when the sole dispute between the employer and employee is as to the time the payments should continue.

Pappas v Tile Co., 201-607; 206 NW 146

Payment for former injury not deductible. A claimant for industrial compensation for loss of a member is entitled to full payment even tho previously he had been paid for permanent partial disability, if at the time of the last injury he was not receiving compensation under the act for the former injury.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

"Loss of more than one phalange." The provision that "the loss of more than one phalange shall equal the loss of the entire finger" is not subject to any qualifying terms as to the extent of the loss.

Starcevich v Fuel Co., 208-790; 226 NW 138

Loss of one eye. The compensation for the loss of an eye is limited to weekly compensation for one hundred weeks, even tho, at the time of such loss and prior thereto, the employee had lost three-fourths of the normal vision of his remaining eye.

Daugherty v Coal Co., 206-120; 219 NW 65

Loss of subnormal eye—useful industrial vision. The workmen's compensation act makes no requirement that an eye lost in an industrial accident must be a normal one. If there was useful industrial vision, as shown by the facts, and such vision is lost, there is a "loss of an eye" under the act.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

Vision—evidence refuting commissioner's decision. Evidence in a workmen's compensation case that the injured employee had from 33 to 50 percent vision in an eye before it was lost in a second industrial accident, leaves the decision of the industrial commissioner, that there was no loss, without support in the evidence, and the trial court was right in reversing the commissioner's decision.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

1397 Basis of computation.

Computation of award. Rule of Richards v Central Iowa Fuel Co., 184 Iowa, 1378, relative to the computation of awards, reaffirmed.

Clingingsmith v Dairy, 202-773; 211 NW 413

Degree of proof. A claimant must establish his right to compensation by a preponderance of the evidence.

Susich v Coal Co., 207-1129; 224 NW 86

Payment for former injury not deductible. A claimant for industrial compensation for loss of a member is entitled to full payment even tho previously he had been paid for permanent partial disability, if at the time of the last injury he was not receiving compensation under the act for the former injury.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

Compensation—when determined by earnings of fellow employee. When at the time an employee is fatally injured, he has not been in the employment and work in question for a full year, compensation may be properly computed on the basis of the annual earnings of a fellow employee who has been engaged in the same employment and in the same class of work for a full year. In such case the formula is as follows:

Average daily earnings of the fellow employee multiplied by 300 divided by 52 multiplied by 60 percent equals compensation per week.

Marley v Johnson & Co., 215-151; 244 NW 833; 85 ALR 969

Deficient earnings — computation. When a fatally injured, adult employee earns less than 300 times the usual daily wage in the same line of industry in the locality, the yearly wage must be computed under subsec. 5 of this section and not under §1390, C., '31.

Shuttleworth v Power Co., 217-398; 251 NW 727

200 weeks payment—nonapplicability. Compensation for death under the workmen's compensation act is not limited to payments for 200 weeks simply because the workman happened to be working at the time of his death in a department which "shuts down and ceases operation during a season of each year", when the employer's business as a whole continues throughout the year in other departments, and the deceased employee is a general employee working in all departments.

Forbes v Sand Co., 216-292; 249 NW 399

Seasonal employment—determination. Under a workmen's compensation statute, providing that the basis of computation for compensation for employees in a business or enterprise "which customarily shuts down and ceases operation during a season of each year" shall be the customary number of working days, with a minimum of 200 days, the nature of the business conducted by claimant's employer shall be determined without regard to the operations of other employers engaged in like activities, and it is not necessary to establish that the general industry or business of which the enterprise is a unit is recognized as a seasonal one.

Polich v Anderson-Robinson Coal Co., 227-553; 288 NW 650

"Operation" — seasonal business — construction. Under workmen's compensation statute, providing that the basis of computation for compensation for employees in a business or enterprise "which customarily shuts down and ceases operation during a season of the year" shall be the customary number of working days, with a minimum of 200 days, a corporation operating a wagon mine for production of coal, which ceased to produce coal between months of April and September of each year, but at one time during such period constructed an air shaft, and at other times pumped water from mine for the purpose of preservation of such mine, was not conducting "operation" of the mine within the statute because of such work to preserve the mine.

Polich v Anderson-Robinson Coal Co., 227-553; 288 NW 650

"Customarily"—seasonal employment—construction. Under workmen's compensation statute providing that the basis of computation for compensation for employees in a business or enterprise "which customarily shuts down and ceases operation during a season of the year" shall be the customary number of working days, with a minimum of 200 days, the word "customarily" was not intended to be a custom which takes the place of law. It is only necessary that the custom or habit exist for such a period that it can be said to be the custom or habit of the particular employer to operate on a seasonal basis. So, where coal mining corporation organized in 1936 ceased the production of coal each season between the months of April and September, the requirements of statute were met, and since the mine operated less than 200 days a year, the 200-day rule applied in computing compensation.

Polich v Anderson-Robinson Coal Co., 227-553; 288 NW 650

"Customarily" — seasonal employment — failure to establish. Under workmen's compensation statute providing that the basis of computation of compensation for employees in an enterprise "which customarily shuts down and ceases operation during a season of each year" shall be based on the customary number of working days, with a minimum of 200 days, the word "customarily" as used in statute applies only to the custom of the particular employer involved, and the custom of other employers engaged in like activity is immaterial. Where employer voluntarily assumes the burden of showing that claimant was engaged in a business which customarily shut down and ceased operation during a season of each year, and fails to sustain such burden, it is not error to calculate compensation on a basis of 300 days.

Schriver v McLaughlin, 227-580; 288 NW 657

Death of party—what causes of action survive. While the right of an injured employee to compensation under the workmen's compensation law is based on disability, and the right of his dependents to compensation in event of his death is based on loss of support, nevertheless the facts maturing each right are substantially the same, and therefore, in case the injured employee dies while his application for compensation is pending, the cause of action survives to his dependents, they being his "successors in interest" within the meaning of the statute.

Dille v Plainview Co., 217-827; 250 NW 607

1398 Contributions from employees.

Consent of owner-employer to operation of automobile — effect. An employer whose automobile is being operated with his consent, is not liable, under §5026, C., '35, to his own employee for an injury suffered by said employee in consequence of the actionable negligence of said operator of the car, provided said injury is compensable under the workmen's compensation act.

McGraw v Seigel, 221-127; 263 NW 553; 106 ALR 1035

1399 Examination of injured employees.

Refusal to submit to examination. Before an injured employee will be denied compensation because of his refusal to submit to a medical examination, it must appear that the proposed examining physician was authorized to practice, under the laws of this state.

Smith v Ice Co., 204-1348; 217 NW 264

Evidence — competency — confidential communications. The statutory rule of evidence (§11263, C., '35) that information obtained by a physician from his patient is inadmissible does not apply to workmen's compensation cases (§1441, C., '35).

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

1402 Conclusively presumed dependent.

Concubine not dependent.

Baldwin v Sullivan, 201-955; 204 NW 420; 208 NW 218

Conclusive dependency of stepchildren. The statutory conclusive presumption, that stepchildren of specified ages are wholly dependent upon the stepfather must prevail even tho, shortly prior to the death of the stepfather, the wife of the stepfather permanently deserted the latter, and took her children with her.

Robinson v Eaves, 203-902; 210 NW 578

Commutation—when allowable. Compensation is "definitely determinable", within the meaning of the statute (§1405, subsec. 1, C., '24), and is therefore commutable, when the compensation is for the death of an employee who leaves a widow and a stepchild under 16 years of age, even tho the widow remarries.

Reeves v Mfg. Co., 202-136; 209 NW 289

1403 Payment to spouse.

Instituting new action pending appeal—effect. An appeal by a surviving spouse, in workmen's compensation proceedings, from a judgment that she had no right as surviving spouse to be substituted as plaintiff in a proceeding for compensation commenced by her husband in his lifetime, cannot be deemed abandoned by the act of said appealing spouse in subsequently filing with the industrial commissioner her formal application for compensation as a dependent, when said latter filing was for the sole purpose of avoiding the running of the statute of limitation and preserving her rights as a dependent in the event she, on the merits, lost her pending appeal.

Dille v Plainview Co., 217-827; 250 NW 607

1405 Commutation.

Allowable commutation. Compensation is "definitely determinable", within the meaning of the statute and is therefore commutable, when the compensation is for the death of an employee who leaves a widow and a stepchild under 16 years of age, even tho the widow remarries.

Reeves v Mfg. Co., 202-136; 209 NW 289

Unapproved commutation. An agreement between an employer and one who was dependent upon a deceased employee, as to commutation of future payments, is not enforceable unless approved by the industrial commissioner.

Reeves v Mfg. Co., 202-136; 209 NW 289

1406 Proceedings for commutation.

Approval by commissioner. A petition for the commutation of compensation must carry the indorsement of the approval of the industrial commissioner; but this requirement is complied with by attaching to the petition a copy of the actual written approval of the commissioner.

Reeves v Mfg. Co., 202-136; 209 NW 289

1415 Waivers prohibited.

Invalid agreement—approval by commissioner—effect. The approval by the industrial commissioner of an agreement between the employer and the dependent of a deceased employee, providing for a less compensation than that required by statute, is invalid, and therefore no obstacle to the later entry by the commissioner of a valid order.

Forbes v Sand Co., 216-292; 249 NW 399

1417 Employees in interstate commerce.

Discussion. See 2 ILB 82—Third party rights—Federal Employers' Liability Act

Interstate commerce. A contract of employment for and on behalf of an interstate commerce carrier is consummated in this state when the conditional offer of employment is accepted in this state by a resident thereof, even tho the offer is made in a foreign state.

Chi. RI Ry. v Lundquist, 206-499; 221 NW 228

Interstate commerce. A railway employee who, upon the stopping of an interstate train, proceeds to remove intrastate freight therefrom is engaged in interstate commerce; and if he is injured he must resort to the federal employers' liability act for relief.

Johnston v Railway, 208-202; 225 NW 357; 30 NCCA 268

Interstate commerce. An employee is not engaged in interstate commerce while working for an interstate carrier in the construction of an entirely new, incomplete, and wholly unused telegraph line.

Chicago RI Ry. v Lundquist, 206-499; 221 NW 228; 30 NCCA 255

Iowa judgment for death damages—effect in foreign state. Where a judgment fixing the compensation for a railroad employee's death, due to an accident in Iowa, was rendered by an Iowa court under the Iowa compensation act, it may be pleaded by the railroad in an action brought against it for the same cause in Minnesota under the Federal Employers' Liability Act, since both courts had jurisdiction to decide whether deceased was engaged in intrastate or interstate commerce; and the Iowa judgment, being the earlier one rendered, was res judicata in the other action, altho the other action was brought first.

Chicago RI Ry. v Schendel, 270 US 611

1418 Employees of state.

Atty. Gen. Opinions. See '25-26 AG Op 260; '28 AG Op 203, 205; '34 AG Op 379

1419 Payment of state employees.

Atty. Gen. Opinions. See '28 AG Op 203, 205; '34 AG Op 379

1421 Definitions.

Atty. Gen. Opinions. See '28 AG Op 122; '34 AG Op 544; '36 AG Op 97; '38 AG Op 6

ANALYSIS

I EMPLOYER

Township not employer. A civil township is not an "employer", such township being but an unincorporated district.

Hop v Brink, 205-74; 217 NW 551

Church as employer. A voluntary church association may, in the work attending the erection of its church edifice, be an "employer" under the workmen's compensation act.

Reason: An "employer" need not, as formerly, be a person or concern engaged in a business "for the sake of pecuniary gain".

Gardner v Trustees, 217-1390; 250 NW 740

"Business" of church organization. A workman who is employed by a voluntary church association in work attending the erection of a church edifice is, within the meaning of subsec. 3a, of this section, employed "for the purpose of the employer's trade or business"—the business of erecting a church.

Gardner v Trustees, 217-1390; 250 NW 740

II WORKMAN OR EMPLOYEE

Discussion. See 18 ILR 525—Test of employee; 19 ILR 450—Public dependents

Employer-employee relation—test — control of work. The test of the relationship between employer and employee is the right of the employer to exercise control of the details and method of performing the work.

State v Ritholz, 226-70; 283 NW 268

Fact of employment—claimant's burden of proof. The general rule that an employee is entitled to compensation for injuries arising in the course of his employment places upon him the burden of proving himself to be an employee within the meaning of the statute and proving that he received an injury which arose in the course of his employment.

Everts v Jorgensen, 227-818; 289 NW 11

Employees within and without the act. If an employee is not engaged in work of a "purely casual nature" he is entitled to the benefits of the compensation act altho the employment was "not for the purpose of the employer's trade or business"; and vice versa, if his employment is "for the purpose of the employer's trade or business", he is entitled to the benefits of the act tho his employment is of a "purely casual nature". In other words, in order to put the employee outside the workmen's compensation act it must appear that the employment was both "purely casual" and "not for the purpose of the employer's trade or business".

Gardner v Trustees, 217-1390; 250 NW 740

Boy scout not an "employee". A boy scout while voluntarily attending a summer camp for recreation, pleasure, and self-development, without expense to himself, and while assisting other boy scouts in their activities as boy scouts in fulfillment of his voluntarily imposed duty as a boy scout, is not, within the meaning of the workmen's compensation act, an "employee" of the duly incorporated boy scout organization under whose auspices the camp is being held.

Stiles v Council, 209-1235; 229 NW 841

Indigents on work-relief. An indigent who, through federal, state and county unemployment relief agencies is given work on county roads and is injured while performing such work, must, in order to hold the county liable under the workmen's compensation act, show that the legal relation between him and the county was, at the time of injury, that of employer and employee.

Oswalt v Lucas County, 222-1099; 270 NW 847; 3 NCCA(NS) 742

Civil Works Administration employee — status. Workmen who are (1) employed, (2) directed when and where to work, and (3) paid for their services, by the federal Civil Works Administration, are not, while engaged in redecorating a public school building, employees of the school corporation owning said building, within the meaning of the workmen's compensation act.

Hoover v Sch. Dist., 220-1364; 264 NW 611; 39 NCCA 271; 3 NCCA(NS) 741

Nonemployee of city. One may not be said to be in the employ of a city, and therefore within the benefits of the workmen's compensation act, when, at the time of his injury, he was performing work which he had donated, in furtherance of a plan of public-spirited citizens to beautify a plot of municipally owned land as a city park, which plan the city council had approved, provided it be carried out without expense to the city.

Norman v City, 206-790; 221 NW 481; 28 NCCA 831

City fireman as "employee". This definition of the term "employee" is quite immaterial on the issue whether a fireman is an employee under §6519, C., '24.

Murphy v Gilman, 204-58; 214 NW 679

Contractor (?) or employee (?). A carpenter who, in repairing an ice house, is subject to the direction of the master as to the manner and means of doing the work may properly be found to be a "workman" or "employee," within the meaning of the workmen's compensation act, even tho the master, because of confidence in the employee, does not exercise such power.

Smith v Ice Co., 204-1348; 217 NW 264

Employee (?) or partner (?). One who has no control over the management of a business, and makes no contribution thereto except his personal services, and has no interest therein except to receive a portion of the profits thereof as compensation for his services, is an employee and not a partner.

Butz v Hahn Co., 220-995; 263 NW 257

Employee (?) or independent contractor (?) —test. One who is employed to do a certain work is a servant of the employer and not an independent contractor, when he—the one doing the work—is subject to the direction and control of the employer as to the details and method to be followed in the performance of the work. So held as to one operating an automobile oil truck, on commission.

Lembke v Fritz, 223-261; 272 NW 300

Road building contractor—truck driver—"employee" rather than "independent contractor". In workmen's compensation proceeding where it is shown that a road builder's contract provided that his own organization, with the assistance of workmen under his immediate superintendence, should perform not less than 80 percent of all work embraced in the contract, and that no portion of the contract should be sublet except with the written consent of contracting officer or his authorized representative, and where claimant, not being a

II WORKMAN OR EMPLOYEE—concluded

subcontractor, was injured while driving a truck which belonged to a person who was not a subcontractor, held, the claimant was an "employee" and not an "independent contractor" as respects the road building contractor's liability for compensation.

Schriver v McLaughlin, 227-580; 288 NW 657

Relation of parties — employee (?) or independent contractor (?). The relation of master and servant, and not of independent contractorship, exists:

1. When one party, as his sole business, enters into a bonded contract, mutually terminable on ten days' notice, with a dealer in oils, and therein agrees (a) to sell and deliver said dealer's oils to said dealer's rated customers and others, in a prescribed territory, at wholesale and retail, for cash or on credit, at said dealer's prices, and on a bi-monthly commission basis, (b) to protect and properly operate the mechanical outfit coming into his possession, (c) to handle said oils as provided by law, (d) to account for all property coming into his hands, and (e) to share in certain losses and expenses, and

2. When said dealer agrees (a) to furnish a mechanical outfit of substantial value and the motor fuel and lubricants to operate it, (b) to keep said outfit in repair in his own shops, and (c) to share with the other party in repair costs and certain losses on collections.

Mallinger v Oil Co., 211-847; 234 NW 254

Relation of parties—"employee" or "independent contractor"—recognized tests. Principle reaffirmed that, on the question whether a party is an "employee" or an "independent contractor," a material consideration is whether the party represents the employer as to the results or only as to the means; also, whether the right exists to terminate the contract instanter, without involving liability for the breach of the contract; also, the extent of the control which one party exercises over the methods and details of the work.

Arthur v School Dist., 209-280; 228 NW 70; 66 ALR 718

Oil company and filling station operator—evidence insufficiency—directing verdict. In an action to recover from an oil company for injuries allegedly caused by operator of company's filling station, evidence that operator conducted the station before approval of lease just as if it had been accepted, that he bought merchandise for cash from this company and others and kept the profits, that he received no remuneration from company, that although company suggested things to help him, it exercised no supervision, that he took out state permits in own name, and personally arranged for utility service, failed to establish relation of employer and employee. Hence company's motion for directed verdict should have been sustained.

Reynolds v Skelly Oil Co., 227-163; 287 NW 823

Wife as employee of husband. A husband who is the sole owner of a printing plant may validly employ his wife as a linotype and press operator in said plant and the wife may legally accept such employment and collect therefor, because such services are wholly outside of, and foreign to, the usual and ordinary marital duties of a wife. It follows that the wife is entitled to compensation under the workmen's compensation act for injuries arising out of and in the course of said employment.

Reid v Reid, 216-882; 249 NW 387

Termination of employment. An employee who gives the master notice of the termination of his employment, surrenders to his successor in employment the key to the work place, removes from the residence furnished to him as part of his employment, and leaves the master's premises, will not be heard to say that his employment continued during that part of the following day during which he, for the sole purpose of obtaining his tools, returned to the master's works, and during which he voluntarily proceeded to assist his successor in operating the said works.

Johnson v City, 203-1171; 212 NW 419

Maintenance of residence not "trade or business". Testimony which simply shows that a home owner maintains on his residential grounds an additional residence which is occupied by his son, establishes no such "trade or business" as renders the home owner liable under the workmen's compensation act to an employee who is injured in the course of his employment while repairing the equipment of the house occupied by the son; and this is true even tho the employee was not a casual employee.

Tunnicliff v Bettendorf, 204-168; 214 NW 516

County highway maintenance workman—no representative capacity. A county highway maintenance workman stands in no representative capacity for the employer-county when his duties are ministerial only and when he could possess no authority to act for nor bind the county as its representative, since board of supervisors and county engineer cannot delegate their powers and duties to maintain roads except as those duties are ministerial in character.

Schroyer v Jasper Co., 224-1391; 279 NW 118

III EXCLUDED PERSONS

(a) CASUAL EMPLOYMENT

Casual employment—dual provision—construction. The provision of the workmen's compensation act that "Persons whose em-

ployment is of a casual nature" shall not be under the act (§1361, subsec. 2, C., '31), and the further provision that "A person whose employment is purely casual, and not for the purpose of the employer's trade or business," shall not be deemed an "employee" (subsec. 3a, this section), when construed together, have but one meaning, to wit, the full meaning of the last provision.

Gardner v Trustees, 217-1390; 250 NW 740

Employees within and without the act. If an employee is not engaged in work of a "purely casual nature" he is entitled to the benefits of the compensation act altho the employment was "not for the purpose of the employer's trade or business"; and vice versa, if his employment is "for the purpose of the employer's trade or business", he is entitled to the benefits of the act tho his employment is of a "purely casual nature". In other words, in order to put the employee outside the workmen's compensation act it must appear that the employment was both "purely casual" and "not for the purpose of the employer's trade or business".

Gardner v Trustees, 217-1390; 250 NW 740

Employment in emergency. An employee who is employed by another employee under implied authority which arises under an emergency must be deemed a "casual" employee.

Johnson v City, 203-1171; 212 NW 419

Emergency noncasual employment.

Eddington v Tel. Co., 201-67; 202 NW 374

"Casual employment." An employment to wash the kitchen walls of a restaurant is "for the purpose of the employer's trade or business", even tho the employment is purely casual.

Dial v Lunch, 217-945; 251 NW 33

Noncasual employment—findings of commissioner. Evidence that a person was employed for the full term of two months which was the contemplated period for the performance of the work, and that he worked continuously for some eighteen days before being injured, supports the finding of the industrial commissioner that the employment was not "purely casual".

Gardner v Trustees, 217-1390; 250 NW 740

(b) CLERICAL WORK

"Clerical work only" defined. A stenographer and typist employed in the office of an insurance company in caring for and sending out supplies to agents, looking up information, making up lists of losses, and generally performing in the office other miscellaneous duties of a like or similar kind, is engaged in "clerical work only", and therefore not within the benefits of the workmen's compensation act, even tho she is, of course, subject to the hazards of her clerical position.

Crooke v Ins. Assn., 206-104; 218 NW 513; 62 ALR 342

Clerical employee. An injury to a strictly clerical employee is compensable when proximately caused by walking down an open stairway from his place of work and tripping over a scale which in part projected through the stairway and across his pathway.

Kent v Kent, 202-1044; 208 NW 709

(c) INDEPENDENT CONTRACTOR

"Independent contractor" defined. An independent contractor in fact under the common law is an independent contractor under the workmen's compensation act, and may be defined as one who carries on an independent business and contracts to do a piece of work according to his own methods, subject to the employer's control only as to results.

Arthur v School Dist., 209-280; 228 NW 70; 66 ALR 718

Mallinger v Oil Co., 211-847; 234 NW 254

Burns v Eno, 213-881; 240 NW 209

Relation of parties—"employee" or "independent contractor"—recognized tests. Principle reaffirmed that, on the question whether a party is an "employee" or an "independent contractor," a material consideration is whether the party represents the employer as to the results or only as to the means; also, whether the right exists to terminate the contract instanter, without involving liability for the breach of the contract; also, the extent of the control which one party exercises over the methods and details of the work.

Arthur v School Dist., 209-280; 228 NW 70; 66 ALR 718

Independent contractor—test. If, as to the result, and in the employment of the means, one acts entirely independent of the master, he must be regarded as an independent contractor, and not an employee.

Reynolds v Skelly Oil Co., 227-163; 287 NW 823

Trade-mark signs displayed—common knowledge—independent dealer's status not affected. In an action for injuries caused by alleged negligence of filling station operator, the fact that trade-mark signs of defendant oil company were displayed did not estop it from claiming that it was not the owner of filling station business and that operator was not employee of company, it being a matter of common knowledge that such signs are displayed throughout country by independent dealers.

Reynolds v Skelly Oil Co., 227-163; 287 NW 823

Contractor (?) or employee (?). A delivery man who is subject to no control by the person with whom he contracts, except to obey directions as to what and where to deliver, is a contractor, and not an employee.

In re Amond, 203-306; 210 NW 923

III EXCLUDED PERSONS—continued

(c) INDEPENDENT CONTRACTOR—concluded

Employee (?) or independent contractor (?). A party becomes an independent contractor and not an employee, under the workmen's compensation act, when he contracts with a consolidated school district, under a contract terminable instanter by the board, to transport school children to and from school for a stated time (a work which would consume each day but a small part of his time) and, to this end, agrees (1) to furnish at his own expense his own conveyance (except the body thereof) and full equipment for the protection of the children while on the road, and (2) to operate said conveyance at his own expense and personally or by a competent driver satisfactory to the board; and the relation of employer and independent contractor exists in such case even tho the operator is required to comply with certain rules of the board designed to protect the children in their moral and physical welfare.

Arthur v Sch. Dist., 209-280; 228 NW 70; 66 ALR 718

Employee (?) or independent contractor (?). One who equips himself with, and owns, complete oufits for hauling gravel, and for housing and maintaining himself and family while so working, becomes an independent contractor when he contracts to employ said outfits at his own expense and risk and at a fixed price per yard per mile, and on his own time, in hauling gravel from the gravel pit to such places on the highway as the public authorities may direct; and this is true tho the primary contractor with whom the independent contractor contracts is obligated to load the vehicles at the pit; likewise tho the primary contractor is obligated to the public authorities to furnish all employees necessary to carry out his contract.

Burns v Eno, 213-881; 240 NW 209

Employee (?) or independent contractor (?). A salesman who, under a contract with a dealer in goods, travels at his own expense, and when and where he pleases in a prescribed territory in quest for orders for goods to be filled by the dealer, and who receives his compensation solely in the form of commissions on sales effected by him through his own exclusive means and methods, is, within the meaning of the workmen's compensation act, an "independent contractor" and not an "employee" of the said dealer in the goods.

Arne v Silo Co., 214-511; 242 NW 539

Road building contractor—truck driver—"employee" rather than "independent contractor". In workmen's compensation proceeding where it is shown that a road builder's contract provided that his own organization, with the assistance of workmen under his immediate superintendence, should perform not less than 80 percent of all work embraced in the contract, and that no portion of the contract should be sublet except with the written consent of contracting officer or his authorized representative, and where claimant, not being a subcontractor, was injured while driving a truck which belonged to a person who was not a subcontractor, held, the claimant was an "employee" and not an "independent contractor" as respects the road building contractor's liability for compensation.

Schriver v McLaughlin, 227-580; 288 NW 657

Finding against independent contractorship—conclusiveness. A finding by the industrial commissioner, on conflicting but supporting testimony, that a workman when injured was the employee of a named employer, and not of an alleged independent contractor, is conclusive on the courts.

Niemann v Iowa Co., 218-127; 253 NW 815

Independent contractor as invitee—known danger revealed—otherwise reasonable care. Person employing an independent contractor to put steam pipes in downspouting owes only the duty to such invitee to use reasonable care for his safety, and to warn the contractor as to defects or dangers known to the employer and not apparent to the contractor. The employer is not responsible to the contractor for injuries from defects that the contractor knew of or, in the exercise of ordinary care, ought to have known of.

Gowing v Field, 225-729; 281 NW 281

(d) OFFICIALS

President of corporation not employee. The president of a corporation is not within the benefits of the workmen's compensation act, even tho, at the time of his injury, he is personally engaged in selling the products of his company by traveling about the country.

Kutil v Mfg. Co., 205-967; 218 NW 613

President excluded from coverage. A policy of insurance which simply agrees to pay the employees of the insured such sums as may become due them under the workmen's compensation act of this state does not embrace the corporate president of the insured or confer any right on him, even tho it provides, by way of a rider, that the salary of the president "shall be subject to a premium charge at the rate applicable to the hazard to which such officer is exposed".

Reason: No compensation for injuries can accrue, under said act, to the president of a corporation even tho he be deemed an "employee" under said rider.

Maryland Cas. v Dutch Mill, 220-646; 262 NW 776

General manager not "workman". An employer's alter ego, such for instance, as his general manager, is not entitled, if injured, to benefits under the workmen's compensation act.

Hamilton v Farmer Co., 220-25; 261 NW 506

Representative capacity—conclusiveness. A finding by the industrial commissioner, on supporting testimony, that a person, for whose death compensation is asked, stood, at the time of his death, in a representative capacity to his employer, is conclusive on the courts.

Pattee v Lumber Co., 220-1181; 263 NW 839; 38 NCCA 676

Public "official" not an "employee". Even tho it be conceded, arguendo, that the workmen's compensation act applies to the employees of a civil township, yet a township road superintendent would not be within the benefits of said act because he holds an "official" position.

Hop v Brink, 205-74; 217 NW 551

Officer (?) or employee (?) of city. A city marshal who is appointed by the mayor, and who qualifies by taking the usual oath, and by giving an official bond, all as required by a city ordinance, is a city officer and not a city employee within the scope of the workmen's compensation act.

Roberts v Colfax, 219-1136; 260 NW 57

Highway workman but not road patrolman —not excluded by "official position". A county highway maintenance workman is not necessarily a patrolman under §4774, C., '35, and not a person holding an "official position" such as denies him the benefits of the workmen's compensation act, when there was no record of an appointment, no approval of a bond, no oath as an official nor as a peace officer, and when no badge of office had ever been furnished.

Schroyer v Jasper Co., 224-1391; 279 NW 118

IV INJURY GENERALLY

"Personal injury" defined. A personal injury, within the meaning of the workmen's compensation act, is an injury to the body, the impairment of health, or a disease, not excluded by said legislative act, which comes about, not through natural causes, but because of a traumatic, or other, hurt or damage to the health or body of an employee.

Almquist v Nurseries, 218-724; 254 NW 35; 94 ALR 573

Acceleration of pre-existing disease. Compensation is payable where an apparently insignificant injury arising out of and in the course of an employment fans into life and accelerates a pre-existing dormant disease. The issue is simply one of causal connection.

Fraze v McClelland Co., 200-944; 205 NW 737; 25 NCCA 368

Traumatic injury to diseased organ. A traumatic injury to an organ of the human body is not rendered noncompensable because the organ was already in a weakened condition because of a disease, and, therefore, more susceptible to an injury than a normal organ.

Almquist v Nurseries, 218-724; 254 NW 35; 94 ALR 573; 35 NCCA 432

Injury aggravating disease. In workmen's compensation case where the injury aggravates or accelerates a disease with which the workman is afflicted, it is compensable if death results from or is hastened by the injury.

West v Phillips, 227-612; 288 NW 625

Injury not occurring from accident. A personal injury may be compensable under the workmen's compensation act, even tho it did not arise out of an accident, or special incident or unusual occurrence. So held where a workman ruptured his stomach consequent on the physical strain of his ordinary work.

Almquist v Nurseries, 218-724; 254 NW 35; 94 ALR 573; 35 NCCA 432

Finding by commissioner—conclusiveness. A supported finding by the industrial commissioner, as to hernia being the cause of death of an injured workman, is conclusive on the appellate court.

Emery v Service Stations, 220-885; 262 NW 786; 38 NCCA 644; 1 NCCA(NS) 605

"Heat exhaustion" as compensable injury.

Belcher v Elec. Lt. Co., 208-262; 225 NW 404; 30 NCCA 361

Causal connection between injury and death. In workmen's compensation action to recover for death of workman allegedly caused by intensified or artificial heat, wherein testimony of physician shows that some of the symptoms of heat exhaustion are that patient perspires freely, has an increased thirst, flushed face, increasing weakness and chills, and where workman manifested substantially all of the symptoms enumerated, such testimony supplied evidence that workman suffered heat exhaustion which hastened his death and thus provided the causal connection between his death and injury.

West v Phillips, 227-612; 288 NW 625

Excessive heat caused artificially. In workmen's compensation action to recover for death of workman caused by intensified or artificial heat, held, evidence sufficient to sustain finding that there was excessive heat in a bakeshop, caused artificially.

West v Phillips, 227-612; 288 NW 625

Heat exhaustion. In workmen's compensation action it is essential, in order to recover an award for death from heat exhaustion, that natural heat be intensified by artificial heat.

West v Phillips, 227-612; 288 NW 625

Exhaustion from artificial heat. Exhaustion from artificial heat in a bakeshop, which caused the death of a workman in the course of his employment, creates a compensable injury.

West v Phillips, 227-612; 288 NW 625

Lead poisoning to auto mechanic—occupational disease—nonconclusive finding. As to lead poisoning suffered by an automobile me-

IV INJURY GENERALLY—concluded

chanic from using a blowtorch negligently filled with tetraethyl lead gasoline, industrial commissioner's finding it to be an occupational disease was not conclusive on the courts.

Black v Creston Auto Co., 225-671; 281 NW 189

Occupational disease — supported finding. Record reviewed and held sufficient to support a finding by the industrial commissioner that an employee did not die from an occupational disease, but was injured by and died from the accumulation of deadly gases in a coal mine.

Dille v Plainview Co., 217-827; 250 NW 607; 34 NCCA 571

Willful injuries. A claim for workmen's compensation for injuries received by an employee who was attacked by another employee who had recently been discharged was sustainable as not within an exception to the workmen's compensation law providing that no compensation be allowed for injuries caused by an employee's willful intent to injure another, when the commissioner inferred from the evidence that the attack was "willful", meaning "governed by will but without yielding to reason", and was not the result of personal ill will, when the relations between the two men had always been friendly, but that any hostile feelings were against the former employer.

Everts v Jorgensen, 227-818; 289 NW 11

Absence of causal connection between injury and employment. An injury is not rendered compensable simply on a showing that an employee was on duty when he received the injury. Causal connection between the injury and the employment must be made to appear.

Smith v Hospital, 210-691; 231 NW 490; 30 NCCA 370; 1 NCCA(NS) 623

Accident and injury—causal connection necessary—claimant's burden. A workmen's compensation award cannot be predicated on speculation and conjecture, and the burden of proving a causal connection between the accident and its resulting injury is on claimant. So held as to infection in miner's leg and bruise not proven to have been sustained while working in mine.

Nash v Citizens Co., 224-1088; 277 NW 728

Struck by train away from place of work.

Sachleben v Gjellefald, 228- ; 290 NW 48

V PERSONAL INJURY ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT

Discussion. See 12 ILR 73—Employment obtained by fraud

Burden of proof. An injured employee has the burden of showing by a preponderance of the evidence that his injury arose out of and in the course of his employment.

Bushing v Lt. Co., 208-1010; 226 NW 719; 30 NCCA 449

Smith v Hospital, 210-691; 231 NW 490

Death—finding. Tho an employee is found dead on the employer's premises at a place where none of his duties were to be performed, and tho there is no direct testimony as to just when or just how he met his death, yet a finding by the industrial commissioner that the death "arose out of and in the course of" the employment is conclusive on the courts if such finding has support in the circumstances and facts surrounding and attending the death of the employee, so far as known, and in the inferences reasonably deducible from such facts and circumstances.

Bushing v Railway, 208-1010; 226 NW 719; 30 NCCA 449

Death of car salesman. A finding by the industrial commissioner, on supporting testimony, that death of car salesman "arose out of and in the course of" an employment is conclusive on the courts.

Heinen v Motor Corp., 202-67; 209 NW 415; 26 NCCA 53; 4 NCCA(NS) 676

Death from fall due to dizziness. A finding by the industrial commissioner, on supporting testimony, that death resulting from fall of person subject to nosebleed did not arise out of and in the course of an employment is conclusive on the courts.

Pattee v Fullerton Co., 220-1181; 263 NW 839

Night watchman—assault by trespasser. A finding by the industrial commissioner, that injuries to railroad night watchman assaulted by trespasser, "arose out of and in the course of" the employment, is conclusive on the court when the record reveals supporting evidence for the finding.

Califore v Railway, 220-676; 263 NW 29; 38 NCCA 683

Employee attacked by discharged employee —course of employment. When a hotel clerk, while on duty, was attacked by a recently discharged employee of the hotel, injuries received in the attack arose out of and in the course of the employment.

Everts v Jorgensen, 227-818; 289 NW 11

Findings re sportive contest. A finding by the industrial commissioner on conflicting, competent testimony that an injury to an employee arose out of a sportive contest voluntarily participated in by the injured employee and a co-employee is conclusive on the court.

Wittmer v Dexter Mfg. Co., 204-180; 214 NW 700; 27 NCCA 592; 2 NCCA(NS) 824

Chronic dermatitis—secondary infection—noncausal connection—mere possibility insufficient. Since an award of workmen's compensation must stand on something more than a mere possibility of causal connection between the accident and the injury, evidence that ag-

gravation or secondary infection of a chronic dermatitis or ringworm on employee's hand could "possibly" have been the result of housecleaning work done in employer's funeral home was not sufficient to support an award granted by industrial commissioner.

Boswell v Funeral Home, 227-344; 288 NW 402

Findings re aggravation of cancer. Evidence, expert and otherwise, carefully analyzed and reviewed, and held to be such that the industrial commissioner might justifiably find therefrom that a blow received by an employee, in the course of his employment, lit up and aggravated a cancer and caused the premature death of the employee, and inasmuch as the commissioner did so find, held that said finding was not reviewable by the courts.

Shepard v Carnation Co., 220-466; 262 NW 110; 37 NCCA 772

Leg injury causing pneumonia—failure of proof—claimant's burden. A workmen's compensation claimant fails to maintain her burden to establish a compensable claim sustained in the course of employment when only hearsay evidence is offered to show that a leg injury to her husband occurred during his employment and when the producing cause of subsequent death from lobar pneumonia is under the conflicting medical testimony a matter of uncertainty.

Featherson v Continental-Keller Co., 225-119; 279 NW 432

Garage mechanic—lead poisoning from blowtorch not occupational. An occupational disease is a usual or unavoidable incident or result of the particular employment. Lead poisoning suffered by a garage mechanic over a period of time resulting from using a blowtorch containing tetraethyl lead gasoline negligently furnished by the employer is a disease outside the ordinary diseases that follow the usual business of an automobile mechanic, and is compensable as an injury in the course of his employment.

Black v Creston Auto Co., 225-671; 281 NW 189

Hunting pheasants—course of employment—supported findings. The evidence leading up to and attending the injury of a salesman of steel culverts, while hunting pheasants with a son of a prospective customer, may be such as to support a finding of the industrial commissioner that the salesman was injured in the course of his employment, and entitled to compensation accordingly.

Fintzel v Stoddard Co., 219-1263; 260 NW 725; 37 NCCA 799; 4 NCCA(NS) 694

Act of courtesy resulting in injury. An injury to an employee may be said to "arise out of and in the course of his employment" when received, at the employer's plant during working hours, in extending, as a matter of courtesy, helpful assistance to a nonemployee who is rightfully on the premises for a purpose advantageous to the owner of the plant, provided the employee, from all the facts and circumstances attending his employment and work, believed and had reasonable grounds to believe that his employment embraced and contemplated the giving of such assistance under such circumstances.

Yates v Humphrey, 218-792; 255 NW 639; 35 NCCA 541

Finding re act of courtesy. A finding by the industrial commissioner on supporting testimony that an injury consisting of sliver in thumb while performing act of courtesy arose out of and in the course of an employment is conclusive on the courts in the absence of fraud.

Yates v Humphrey, 218-792; 255 NW 639

Heat exhaustion from and in the course of employment. In workmen's compensation case to recover for death of workman allegedly caused by intensified or artificial heat, commissioner, being the sole final judge of the facts, had, under the record, competent evidence to sustain his finding that deceased received an injury growing out of and in the course of his employment which contributed to and hastened his death.

West v Phillips, 227-612; 288 NW 625

Fatal sunstroke—when noncompensable. A fatal sunstroke cannot be said to "arise out of" an employment and, therefore, be compensable, when the facts attending the injury fail to reveal any causal connection between the employment and the said injury.

Wax v Des M. Corp., 220-864; 263 NW 333; 38 NCCA 621

Noncompensable injuries—death from lightning. The death of an employee from a fatal stroke of lightning, tho occurring "in the course of" his employment, cannot be deemed to "arise out of" said employment, and therefore be compensable under the workmen's compensation law, unless, by a preponderance of the evidence, a causal connection is established between (1) the circumstances and conditions attending said employment and (2) said death, i. e., that a person engaged in said employment is more susceptible to such an injury than other persons in the same locality. Evidence held insufficient.

Mincey v Dultmeier Co., 223-252; 272 NW 430

Emergency after working hours. An employee is in the course of his employment when, after returning home at the close of his work for the day, he starts to return to his place of work in order there to adjust an unexpected difficulty within the scope of his usual duties; and an injury received during such return trip by being run over by a passing vehicle arises out of his employment, and is compensable.

Kyle v High School, 208-1037; 226 NW 71; 28 NCCA 812; 30 NCCA 404

V PERSONAL INJURY ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT—continued

Working in prohibited place—effect. An employee who takes himself out of "the course of his employment" by deliberately and unjustifiably going into a place where he knows he is positively and invariably prohibited from being, may not say that his act was nothing more than an act of negligence.

Enfield v Products Co., 211-1004; 233 NW 141

Employee injured while in prohibited place. An employee is not injured "in the course of the employment" when he is injured in and at a place on the employer's premises where he knows he is positively and invariably prohibited from being, and when he is in and at said place without justifiable excuse or reason; and it is immaterial that at the time he is doing the master's work.

Enfield v Products Co., 211-1004; 233 NW 141; 30 NCCA 34

Violation of orders. The injuries to an employee must be deemed to "arise out of and in the course of" his employment when, at the time of his injuries, he was doing the identical thing, at the identical place, and with the identical instrumentalities required by his contract of employment, even tho at said time he was operating said instrumentality in a manner which he knew was contrary to the explicit command of his employer.

Wallace v Rex Co., 216-1239; 250 NW 589; 34 NCCA 647

Injury while using own vehicle. An injury to a workman must be deemed to "arise out of and in the course of" his employment when received by the workman as a result of cranking his own automobile, while it was standing on the side of a hill, in order to travel, in accordance with the orders of the employer, from one job of work to another job, it appearing that the employer knew the workman in question was using his own conveyance and made no objection thereto, tho he—the employer—had furnished a conveyance for the use of his workmen.

Marley v Johnson & Co., 215-151; 244 NW 833; 85 ALR 969; 32 NCCA 354

Employee injured during continuous employment. An injury "arises out of and in the course of an employment" when received by the employee on a Sunday while crossing a street on his way from his hotel to a nearby restaurant for his evening meal, it further appearing that the employee was a mechanic traveling about the country at the sole expense of the employer, and had arrived during the afternoon of said Sunday in the city where he was injured, solely because of orders from the employer so to report in order to perform at said place certain mechanical work for the employer on the following Monday.

Walker v Mach. Corp., 213-1134; 240 NW 725; 31 NCCA 610

Nondeparture from employment. An injury to an employee of a corporation "arises out of, and in the course of" his employment when the injury is received while the employee is performing work at the private residence of the general manager of the corporation, for the personal and individual benefit of said manager, and under orders from said manager, it appearing that the contract of employment between the corporation and the employee contemplated and required such occasional work for said manager.

Petersen v Corno Co., 216-894; 249 NW 408; 34 NCCA 633

Temporarily leaving place of work.

Sachleben v Gjellefald, 228- ; 290 NW 48

Violation of orders. The injuries to an employee must be deemed to "arise out of and in the course of" his employment when, at the time of his injuries, he was doing the identical thing, at the identical place, and with the identical instrumentalities required by his contract of employment, even tho at said time he was operating said instrumentality in a manner which he knew was contrary to the explicit command of his employer.

Wallace v Fuel Co., 216-1239; 250 NW 589; 34 NCCA 647

Consent of owner-employer to operation of automobile—effect. An employer, whose automobile is being operated with his consent, is not liable, under §5026, C., '35, to his own employee, for an injury suffered by said employee in consequence of the actionable negligence of said operator of the car, provided said injury is compensable under the workmen's compensation act.

McGraw v Seigel, 221-127; 263 NW 553; 106 ALR 1035

Iowa employment contract—action—place of business. Action for damages under oral contract of employment made in Iowa is not governed by the place where the contract was entered into, but may be maintained in state where employer's business was "localized".

Severson v Hanford Air Lines, 105 F 2d, 622

Extra territorial effect. The workmen's compensation law of this state, when not formally rejected, becomes a part of a contract of employment entered into in this state by a resident employer and a nonresident employee, tho the contract requires almost exclusive execution of the contract by the employee in the foreign state—where the employee was injured.

Cullamore v Groneweg Co., 219-200; 257 NW 561

Applicability of state and federal acts. Injuries received by an employee of a common carrier, engaged in the transportation of both intrastate and interstate freight, are compensable under the state workmen's compensation act, and not under the corresponding federal act, when the employment, in the course of which and out of which the injuries arose, consists solely of the duty to patrol the railroad yards of the employer against thieves, trespassers, and fires.

Califore v Railway, 220-676; 263 NW 29

Scope of employment—jury question. The scope of a servant's duties is to be determined by what he was employed to perform, and by what, with knowledge and approval of his master, he actually did perform. Evidence held to present a jury question whether a general farm hand was, at the time of his injury, within the scope of his employment.

Bell v Brown, 214-370; 239 NW 785

1422 Peace officers.

Atty. Gen. Opinions. See '25-26 AG Op 209, 235, 260; '28 AG Op 299, 368; '30 AG Op 137, 270, 317, 353; '34 AG Op 379

Policemen not within act. The minor children of a deceased policeman who was a member of an organized police department and contributing to the statutory pension fund of said department, and who was killed while attempting to effect an arrest and at a time when he was not actually "pensioned", are not entitled to compensation under the workmen's compensation act.

Ogilvie v Des Moines, 212-117; 233 NW 526

Policemen under coverage. Section 1422, C., '27, providing for coverage under the workmen's compensation act for policemen killed or injured in effecting an arrest, embraces, in view of §1361, subsec. 4, those policemen only who are not members of an organized police department.

Ogilvie v Des Moines, 212-117; 233 NW 526

Noncompensable injuries. The statutory provision (editorially classified as part of the workmen's compensation act, §1422, C., '31) which, inter alia, grants compensation to a city marshal when injured "while performing such official duties where there is peril or hazard peculiar to the work of his office", does not authorize compensation for an injury received by a marshal from the accidental discharge of his revolver as it dropped from his pocket while cleaning the floor of the city jail.

Roberts v Colfax, 219-1136; 260 NW 57; 37 NCCA 807

CHAPTER 71

INDUSTRIAL COMMISSIONER

1423 Industrial commissioner—term.

Atty. Gen. Opinion. See '30 AG Op 52

1425 Duties of the deputy.

Review—allowable appeal. The action of the deputy industrial commissioner (on the application of an injured employee) in opening up for further consideration an existing agreement for compensation, and the decision of said deputy on said further consideration, constitute an authorized "review" (§1457, C., '35) from which an appeal lies to the district court.

Soukup v Shores Co., 222-272; 268 NW 598

1427 Political activity and contributions.

Atty. Gen. Opinion. See '34 AG Op 668

1436 Compensation agreements.

Agreement as to compensation—limitation. An employer and the surviving dependent wife of a deceased employee have no legal right to agree that a stated lump sum shall be paid, in any and all events, by the employer for the death of the employee. Such agreement can legally go no further than to determine what sum shall be paid per week.

Comingore v Shenandoah Co., 208-430; 226 NW 124

Compensation agreement — sufficiency. A memorandum of agreement relative to compensation tho only signed by the dependent, is all-sufficient and binding when duly approved by the commissioner, and acquiesced in, recognized, and acted on, by the employer and insurer.

Biggs v Bank, 218-48; 254 NW 331

Jurisdiction to correct entry. If a memorandum of agreement as to what compensation shall be paid by an employer for the injury or death of an employee, and the approving entry indorsed thereon by the industrial commissioner, are susceptible of both a legal and an illegal construction, the commissioner has ample power, on due application, notice, and hearing, to make such supplemental entries as will show the legal construction.

Comingore v Shenandoah Co., 208-430; 226 NW 124

Application to correct entry—withdrawal of appearance. In an application by an insurance carrier to the industrial commissioner for the correction of an entry of approval on a memorandum of agreement relative to compensation, it is quite immaterial that the employer withdraws his appearance to the proceedings.

Comingore v Shenandoah Co., 208-430; 226 NW 124

Invalid agreement—approval by commissioner—effect. The approval by the industrial commissioner of an agreement between the employer and the dependent of a deceased employee, providing for a less compensation than that required by statute, is invalid, and therefore no obstacle to the later entry by the commissioner of a valid order.

Forbes v Sand Co., 216-292; 249 NW 399

1437 Board of arbitration.

Death of applicant—proper substitution. Where an injured employee files with the industrial commissioner, under the workmen's compensation act, his application for compensation, and dies before compensation has been adjudicated, the surviving wife, who is the sole surviving dependent, may be substituted as claimant.

Dille v Coal Co., 217-827; 250 NW 607

Belated objections. The objection that an insurance carrier was not a proper party defendant along with the employer in proceedings under the workmen's compensation act will not be considered when presented for the first time on appeal to the supreme court.

Walker v Mach. Corp., 213-1134; 240 NW 725

1438 Waiver of right.

Unallowable appeal. Appeal to the district court will not lie from the findings and award of the industrial commissioner sitting as arbitrator. In other words, appeal will lie only from the findings and award of the commissioner when sitting in review of arbitration already had.

Hampton v Railway, 217-108; 250 NW 881

1440 Powers of board—hearings.

Extra-territorial effect. The workmen's compensation act of this state, when not formally rejected, becomes a part of a contract of employment entered into in this state by a resident employer and a nonresident employee, tho the contract requires almost exclusive execution of the contract by the employee in the foreign state—where the employee was injured.

Cullamore v Groneweg & S., 219-200; 257 NW 561

1441 Liberal rules of evidence.

Discussion. See 24 ILR 576—Reception of evidence

Death of party and revival of action. While the right of an injured employee to compensation under the workmen's compensation act is based on disability, and the right of his dependents to compensation in event of his death is based on loss of support, nevertheless the facts maturing each right are substantially the same, and therefore, in case the injured employee dies while his application for compensation is pending, the cause of action survives to his dependents, they being his "successors in interest" within the meaning of the statute.

Dille v Coal Co., 217-827; 250 NW 607

Evidence—commissioner not bound by common law or statutory rules. In workmen's compensation case to recover for death of workman, where objection is raised as to expert witnesses testifying to an ultimate fact, held, assuming hypothetical questions called for an ultimate fact, the testimony was admissible under §1441, C., '39, which provides that the commissioner shall not be bound by common law or statutory rules of evidence, but shall make such investigation and inquiries as are best suited to ascertain and conserve the substantial rights of the parties.

West v Phillips, 227-612; 288 NW 625

Rules of evidence and procedure. The legislature did not contemplate that all ordinary rules of evidence and procedure might be disregarded by the industrial commissioner in hearings before him.

Baker v Roberts & Beier, 209-290; 228 NW 9

Right to compensation — degree of proof. Principle reaffirmed that a claimant under the workmen's compensation act must establish his right to compensation by a preponderance of the evidence.

Susich v Coal Co., 207-1129; 224 NW 86

Employee's burden of proof. In proceeding to recover workmen's compensation, burden of proof rests upon the employee to establish his case by a preponderance of the evidence.

Boswell v Funeral Home, 227-344; 288 NW 402

Exception to workmen's compensation—burden of proof on one asserting exception. One relying on an exception to the workmen's compensation act, providing that no compensation shall be allowed for an injury caused by the employee's willful intent to injure himself or to willfully injure another, has the burden of establishing the facts which bring the matter within the exception.

Everts v Jorgensen, 227-818; 289 NW 11

Exception to workmen's compensation—burden of proof not sustained. The defendant in an action for workmen's compensation who relied on an exception to the law failed to sustain the burden of proving the exception when there was an entire lack of evidence tending to prove or disprove the exception.

Everts v Jorgensen, 227-818; 289 NW 11

Unallowable impeachment of witness — effect. When the testimony of witnesses offered by an employer tends to show that an injury to an employee arose out of and in the course of his employment, it is wholly unallowable for the industrial commissioner to permit the employer to impeach his own witnesses by introducing their former ex parte

affidavits as to how the injury occurred, and equally unallowable for said commissioner to treat such affidavits as substantive evidence creating a conflict with the testimony of the injured employee unquestionably showing that his injuries were compensable.

Baker v Roberts & Beier, 209-290; 228 NW 9; 30 NCCA 433; 2 NCCA(NS) 841

Exhibit offered in part — commissioner's right to consider entirety. In a workmen's compensation case where an assignment of error is based upon the contention that the commissioner exceeded his powers in considering an instrument which had been identified and offered as an exhibit, as to which exhibit it was claimed that only a part had been offered, the commissioner considered other parts not offered in evidence, and where it appears that another exhibit was offered which referred to the entire exhibit complained of, the commissioner was authorized to consider such exhibit in its entirety under the statute providing for liberal rules of evidence in workmen's compensation cases, irrespective of what might be the rule under common law, under statutory rules of evidence, or under technical rules of procedure.

Schriver v McLaughlin, 227-580; 288 NW 657

Evidence—records of former compensation claim inadmissible. Records in the industrial commissioner's office as to a former compensation claim are inadmissible when they have no bearing on the merits of the claim at bar.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

Res gestae—declarations of injured party. The declarations of an injured party, made shortly after receiving the injury, as to the manner in which the injury was received, may be admissible as substantive evidence.

Califore v Railway, 220-676; 263 NW 29

Hearsay—statements to doctor regarding injuries. Hearsay evidence is not admissible nor competent to prove any of the basic facts in a compensation case. So held, as to statements made by deceased employee to doctor that injury was received in course of employment.

Schuler v Cudahy Co., 223-1323; 275 NW 39

Unobjected to, relevant hearsay evidence considered. In the absence of objection, relevant hearsay evidence may be given consideration.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

Hearsay evidence incompetent. A letter written by a physician to an insurer of an employer's industrial risk is incompetent to overthrow a prima facie showing of right of recovery on the part of the employee.

Swim v Fuel Co., 204-546; 215 NW 603

Examining injured employee—physician's opinion—hearsay. The inclusion in a physician's report to an insurance company, of his opinion, that an employee sustaining an eye injury had no vision in that eye previous to the accident, is hearsay evidence.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

Evidence—competency—physician—confidential communications—admissibility. The statutory rule of evidence (§11263, C., '35) that information obtained by a physician from his patient is inadmissible does not apply to workmen's compensation cases.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

Ex parte communications. Ex parte written communications are incompetent as evidence but the reception, in evidence, of a letter which expresses the opinion of a physician as to the cause of a disability does not constitute reversible error when the findings of the commissioner are otherwise supported by competent evidence, and no request for cross-examination is made.

Hinricks v Locomotive Works, 203-1395; 214 NW 585

Walker v Mach. Corp., 213-1134; 240 NW 725

Expert testimony—evidentiary (?) or ultimate (?) facts. In workmen's compensation action to recover for death of workman allegedly caused by intensified or artificial heat, wherein defendant asserts that expert witnesses testified to the ultimate fact that there was excessive heat, which fact was for the determination of the commissioner, held, the evidence given by the experts consisted of material, evidentiary facts, constituting a basis for one of the ultimate facts in the case, which was that decedent received an injury arising out of and in the course of his employment, and therefore was admissible, particularly so where defendant did not object to the testimony on the ground that it stated an ultimate fact.

West v Phillips, 227-612; 288 NW 625

Expert testimony—artificial heat. In workmen's compensation action in which objection is raised to the admission of expert testimony to show the heat situation in a bakeshop, where the death of a workman is allegedly caused by intensified or artificial heat, held, that insofar as the conditions, causes, and effects to which the experts testified required special study and experience to understand and explain, the admission of such expert testimony was proper.

West v Phillips, 227-612; 288 NW 625

Failure to set out objections. In workmen's compensation case, wherein defendants contend hypothetical questions propounded to expert witnesses included statements not supported by the record, and also omitted material

facts, and where objections to the questions failed to point out to the commissioner the particular defects, defendant is not in a position to present this proposition on appeal.

West v Phillips, 227-612; 288 NW 625

Deposition—when admissible. The deposition of an injured employee in support of his application for compensation under the workmen's compensation law, is admissible, after his death, on behalf of a dependent spouse who has been substituted as plaintiff, the proceeding by the employee during his lifetime and the proceeding by the dependent spouse as substituted plaintiff being in law one and the same cause of action.

Dille v Plainview Co., 217-827; 250 NW 607

Causal connection between injury and death. In workmen's compensation action to recover for death of workman allegedly caused by intensified or artificial heat, wherein testimony of physician shows that some of the symptoms of heat exhaustion are that patient perspires freely, has an increased thirst, flushed face, increasing weakness and chills, and where workman manifested substantially all of the symptoms enumerated, such testimony supplied evidence that workman suffered heat exhaustion which hastened his death and thus provided the causal connection between his death and injury.

West v Phillips, 227-612; 288 NW 625

Excessive heat caused artificially. In workmen's compensation action to recover for death of workman caused by intensified or artificial heat, held, evidence sufficient to sustain finding that there was excessive heat in a bakeshop, caused artificially.

West v Phillips, 227-612; 288 NW 625

"Customarily"—seasonal employment—failure to establish—effect. Under workmen's compensation statute providing that the basis of computation of compensation for employees in an enterprise "which customarily shuts down and ceases operation during a season of each year" shall be based on the customary number of working days, with a minimum of 200 days, the word "customarily" as used in statute applies only to the custom of the particular employer involved, and the custom of other employers engaged in like activity is immaterial. Where employer voluntarily assumes the burden of showing that claimant was engaged in a business which customarily shut down and ceased operation during a season of each year, and fails to sustain such burden, it is not error to calculate compensation on a basis of 300 days.

Schriver v McLaughlin, 227-580; 288 NW 657

Conflicting evidence—commissioner's duty. In workmen's compensation case to recover for death of workman, where there is a conflict in the evidence on the question of excessive heat allegedly causing death, it is the duty of the commissioner to determine which testimony is entitled to the greater weight and credibility.

West v Phillips, 227-612; 288 NW 625

Evidence supporting commissioner's finding. In workmen's compensation case to recover for death of workman allegedly caused by intensified or artificial heat, commissioner, being the sole final judge of the facts, had, under the record, competent evidence to sustain his finding that deceased received an injury growing out of and in the course of his employment which contributed to and hastened his death.

West v Phillips, 227-612; 288 NW 625

Undisputed evidence—contrary findings—conclusiveness. Industrial commissioner's finding contrary to undisputed evidence is not conclusive on the courts, but where workman's death from septicemia resulting from scratch on finger involves disputed testimony as to whether injury occurred in the course of the employment, the industrial commissioner's decision must stand.

Schuler v Cudahy Co., 223-1323; 275 NW 39

Commissioner's power—appeal from arbitrator's award. The industrial commissioner, on defendant's appeal from arbitrator's award of compensation, can increase the arbitration award in favor of the nonappealing claimant under the statute authorizing the commissioner to retry the issues de novo, hear the parties, consider the transcribed evidence, hear any additional evidence and affirm, modify, reverse, or remand the arbitrator's decision.

Jarman v Collins-Hill Co., 226-1247; 286 NW 526

1443 Transcript of evidence—compensation.

Atty. Gen. Opinion. See AG Op Aug. 15, '39

1444 Depositions.

When admissible. The deposition of an injured employee in support of his application for compensation under the workmen's compensation act is admissible, after his death, on behalf of a dependent spouse who has been substituted as plaintiff, the proceeding by the employee during his lifetime and the proceeding by the dependent spouse as substituted plaintiff being in law one and the same cause of action.

Dille v Coal Co., 217-827; 250 NW 607

1446 Findings of arbitration board filed.

Appeal to district court—only from award of commissioner. An appeal to the district court in compensation cases lies only from the industrial commissioner, and not from an arbitrator's award.

Jarman v Collins-Hill Co., 226-1247; 286 NW 526

Commissioner's power—appeal from arbitrator's award. The industrial commissioner, on defendant's appeal from arbitrator's award of compensation, can increase the arbitration award in favor of the nonappealing claimant under the statute authorizing the commissioner to retry the issues de novo, hear the parties, consider the transcribed evidence, hear any additional evidence and affirm, modify, reverse, or remand the arbitrator's decision.

Jarman v Collins-Hill Co., 226-1247; 286 NW 526

1447 Review.

Commissioner's power—appeal from arbitrator's award. The industrial commissioner, on defendant's appeal from arbitrator's award of compensation, can increase the arbitration award in favor of the nonappealing claimant under the statute authorizing the commissioner to retry the issues de novo, hear the parties, consider the transcribed evidence, hear any additional evidence and affirm, modify, reverse, or remand the arbitrator's decision.

Jarman v Collins-Hill Co., 226-1247; 286 NW 526

Appeal to district court—only from award of commissioner. An appeal to the district court in compensation cases lies only from the industrial commissioner, and not from an arbitrator's award.

Jarman v Collins-Hill Co., 226-1247; 286 NW 526

Commissioner's power to "modify" arbitration award. The statutory provision giving the industrial commissioner power to "modify" the decision of the arbitrator is the power to change, and to increase as well as reduce, the arbitration award.

Jarman v Collins-Hill Co., 226-1247; 286 NW 526

Failure to set out objections. In workmen's compensation case, wherein defendants contend hypothetical questions propounded to expert witnesses included statements not supported by the record, and also omitted material facts, and where objections to the questions failed to point out to the commissioner the particular defects, defendant is not in a position to present this proposition on appeal.

West v Phillips, 227-612; 288 NW 625

Award — nonadjudication. An award made by the deputy industrial commissioner of this state (acting under stipulation as a board of arbitration), based on a finding that the employee when injured was engaged in intrastate commerce, and pending on appeal to the industrial commissioner, constitutes no bar to the prosecution in a foreign state of an action by the employee under the Federal Employers' Liability Act on the theory that the employee, when injured, was engaged in interstate commerce.

Chicago, RI Ry. Co. v Schendel, 270 US 611

1448 Decision and findings of fact.

Conflicting evidence. In workmen's compensation case to recover for death of workman, where there is a conflict in the evidence on the question of excessive heat allegedly causing death, it is the duty of the commissioner to determine which testimony is entitled to the greater weight and credibility.

West v Phillips, 227-612; 288 NW 625

1449 Appeal.

Appeal to district court—only from award of commissioner. An appeal to the district court in compensation cases lies only from the industrial commissioner, and not from an arbitrator's award.

Jarman v Collins-Hill Co., 226-1247; 286 NW 526

Unallowable appeal. Appeal to the district court will not lie from the findings and award of the industrial commissioner sitting as arbitrator. In other words, appeal will only lie from the findings and award of the commissioner when sitting in review of arbitration already had.

Hampton v Railway, 217-108; 250 NW 881

Review — allowable appeal. The action of the deputy industrial commissioner (on the application of an injured employee) in opening up for further consideration an existing agreement for compensation, and the decision of said deputy on said further consideration, constitute an authorized "review" (§1457, C., '35) from which an appeal lies to the district court.

Soukup v Shores Co., 222-272; 268 NW 598

Trial not de novo. The trial of an appeal from decision of the industrial commissioner to the district court is not de novo, and where aggrieved party fails to appeal, the decision of the industrial commissioner is final and such party cannot obtain a review in either the district or supreme court.

Jarman v Collins-Hill Co., 226-1247; 286 NW 526

New action pending appeal — effect. An appeal by a surviving spouse, in workmen's compensation proceedings, from a judgment that she had no right as surviving spouse to be substituted as plaintiff in a proceeding for compensation commenced by her husband in his lifetime, cannot be deemed abandoned by the act of said appealing spouse in subsequently filing with the industrial commissioner her formal application for compensation as a dependent, when said latter filing was for the sole purpose of avoiding the running of the statute of limitation and preserving her rights as a dependent in the event she, on the merits, lost her pending appeal.

Dille v Coal Co., 217-827; 250 NW 607

Failure to appeal — effect. The ruling of the industrial commissioner that a party could not in the capacity of an administratrix maintain a proceeding to recover compensation arising out of an injury to a deceased employee, becomes a finality when not appealed from.

Dille v Coal Co., 217-827; 250 NW 607

Modification of award after appeal. The industrial commissioner has no jurisdiction to modify his award after an appeal has been taken therefrom.

Clingingsmith v Dairy, 202-773; 211 NW 413

Failure to set out objections. In workmen's compensation case, wherein defendants contend hypothetical questions propounded to expert witnesses included statements not supported by the record, and also omitted material facts, and where objections to the questions failed to point out to the commissioner the particular defects, defendant is not in a position to present this proposition on appeal.

West v Phillips, 227-612; 288 NW 625

1451 Trial on appeal.

Trial not de novo. The trial of an appeal from decision of the industrial commissioner to the district court is not de novo, and where aggrieved party fails to appeal, the decision of the industrial commissioner is final and such party cannot obtain a review in either the district or supreme court.

Jarman v Collins-Hill Co., 226-1247; 286 NW 526

1452 Record on appeal—findings of fact conclusive.

Discussion. See 11 ILR 381—Cases of undisputed facts

ANALYSIS

I CONCLUSIVE FINDINGS
II NONCONCLUSIVE FINDINGS

I CONCLUSIVE FINDINGS

Findings generally. Findings of fact by the industrial commissioner on substantial and supporting testimony are final.

Clingingsmith v Dairy, 202-773; 211 NW 413
McKinney v Fuel Co., 202-398; 210 NW 459
Mueller v U. S. Gyp. Co., 203-1229; 212 NW 577
Reid v Reid, 216-882; 249 NW 387
Gardner v Trustees, 217-1390; 250 NW 740
Wichers v McKee Co., 223-853; 273 NW 892
Nash v Citizens Co., 224-1088; 277 NW 728
Everts v Jorgensen, 227-818; 289 NW 11

Commissioner's findings — conclusiveness. The supreme court adheres to the residuum of legal evidence rule, and in workmen's compensation cases where there is competent evidence to sustain the decision of the industrial commissioner, the trial court cannot interfere with the award.

West v Phillips, 227-612; 288 NW 625

"Out of and in the course of." A finding by the industrial commissioner, on supporting testimony, that an injury "arose out of and in the course of" an employment is conclusive on the courts in the absence of fraud.

Heinen v Motor Inn, 202-67; 209 NW 415; 26 NCCA 53; 4 NCCA(NS) 676
Heissler v Hide Co., 212-848; 237 NW 843
Yates v Humphrey, 218-792; 255 NW 639
Fintzel v Stoddard Co., 219-1263; 260 NW 725
Califore v Railway, 220-676; 263 NW 29; 38 NCCA 683

"Out of and in the course of." A supported finding by the industrial commissioner, on conflicting testimony, that an employee had failed to show that an injury "arose out of and in the course of" his employment is conclusive on the courts.

Antonew v Cement Co., 204-1001; 216 NW 695
Smith v Hospital, 210-691; 231 NW 490; 30 NCCA 370; 1 NCCA(NS) 623

"Out of and in the course of." Tho an employee is found dead on the employer's premises at a place where none of his duties were to be performed, and tho there is no direct testimony as to just when or just how he met his death, yet a finding by the industrial commissioner that the death "arose out of and in the course of" the employment is conclusive on the courts if such finding has support in the circumstances and facts surrounding and attending the death of the employee, so far as known, and in the inferences reasonably deducible from such facts and circumstances.

Bushing v Iowa Co., 208-1010; 226 NW 719; 30 NCCA 449

Hunting pheasants — course of employment. The evidence leading up to and attending the injury of a salesman of steel culverts, while hunting pheasants with a son of a prospective customer, may be such as to support a finding of the industrial commissioner that the salesman was injured in the course of his employment, and entitled to compensation accordingly.

Fintzel v Stoddard Co., 219-1263; 260 NW 725; 37 NCCA 799; 4 NCCA(NS) 694

Sportive contest. A finding by the industrial commissioner on conflicting, competent testimony that an injury to an employee arose out of a sportive contest voluntarily participated in by the injured employee and a co-employee, is conclusive on the court.

Wittmer v Dexter, 204-180; 214 NW 700; 27 NCCA 592; 2 NCCA(NS) 824

Permanent partial disability. Where the industrial commissioner on a conflicting record found 25 percent permanent disability, the district court may not disregard this finding and award compensation on a total permanent disability basis.

Wichers v McKee Co., 223-853; 273 NW 892

Permanent partial disability — conclusiveness of compensation schedule. An employee under the workmen's compensation act was, under an agreement, paid compensation for a supposedly temporary injury to the employee's foot. On review of said agreement, the deputy industrial commissioner found, on supporting evidence, that the foot had been permanently disabled to the extent of 50 percent of its normal functions, and ordered additional compensation paid according to the statute fixing compensation for permanent partial disabilities.

Held that the court, on appeal, should have treated the finding of the deputy as conclusive —that the court was in error in adjudging that the employee was, in an industrial sense, permanently disabled, and was entitled to compensation for the concededly permanent partial disability, not in accordance with the statutory schedule governing compensation for permanent partial disability, but on the basis of 400 weekly payments for total permanent disability.

Soukup v Shores Co., 222-272; 268 NW 598

Compensation period. The determination by the industrial commissioner (arbitration being waived) of the compensation period for the loss of more than a hand and admittedly less than the arm, at a period between 150 weeks for the loss of a hand and less than 225 weeks for the loss of an arm, is conclusive on the courts.

Pappas v Tile Co., 201-607; 206 NW 146

Advisability of commutation. A supported finding by both the court and the industrial commissioner as to the advisability of commuting compensation is final on the appellate court.

Reeves v Mfg Co., 202-136; 209 NW 289

Length and nature of disability. When an employer agrees with the injured employee to pay the latter a stated compensation "during his disability", the court has no jurisdiction to determine such period of disability and to determine that said injuries are permanent and to enter judgment accordingly.

Sauter v Railway, 204-394; 214 NW 707

Who was employer. A finding by the industrial commissioner on competent, supporting, and conflicting testimony as to who was the employer of an injured servant is conclusive on the courts.

Murphy v Shipley, 200-857; 205 NW 497

Finding of representative capacity. A finding by the industrial commissioner, on supporting testimony, that a person, for whose death compensation is asked, stood, at the time of his death, in a representative capacity to his employer, is conclusive on the courts.

Pattee v Lumber Co., 220-1181; 263 NW 839; 38 NCCA 676

Finding against independent contractorship. A finding by the industrial commissioner, on conflicting but supporting testimony, that a workman when injured was the employee of a named employer, and not of an alleged independent contractor, is conclusive on the courts.

Niemann v Iowa Co., 218-127; 253 NW 815

Nonemployee. A finding by the industrial commissioner, on supporting testimony, that a claimant under the workmen's compensation act was not, at the time of his injury, an employee of the alleged employer is conclusive on the courts.

Norman v City, 206-790; 221 NW 481

Nonwillful neglect of injury. A finding by the industrial commissioner on conflicting and supporting testimony that an employee was not guilty of such willful misconduct in neglecting his injury as to bar recovery of compensation is not reviewable by the appellate courts.

Daugherty v Coal Co., 206-120; 219 NW 65

Notice to employer — finding conclusive. A conflict in the evidence, in a workmen's compensation case, as to whether the employer had notice of the injury within the statutory ninety-day period, is a question whose determination by the industrial commissioner is conclusive on the courts.

Fritz v Rath Co., 224-1116; 278 NW 208

Causal connection. A finding by the industrial commissioner, on competent, supporting, and conflicting testimony, that causal connection has been established between a slight injury and the subsequent condition of an injured workman is conclusive on the court.

Fraze v McClelland Co., 200-944; 205 NW 737

Hinricks v Locomotive Works, 203-1395; 214 NW 585

Noncausal connection — conclusiveness of finding. A finding by the industrial commissioner, on conflicting testimony that the physical condition of an employee was not caused by the heated condition of the atmosphere under which he formerly worked for the employer, is conclusive on the courts.

Brown v Packing Co., 219-9; 257 NW 411; 36 NCCA 540

Cause of death—artificial heat. A finding by the industrial commissioner, on supporting but conflicting testimony, that an employee died during the course of his employment from the effect of artificial heat attending and growing out of his employment is conclusive on the courts.

Belcher v Elec. Lt. Co., 208-262; 225 NW 404; 30 NCCA 361

I CONCLUSIVE FINDINGS—concluded

Cause of death—hernia. A supported finding by the industrial commissioner, as to hernia being the cause of death of an injured workman, is conclusive on the appellate court.

Emery v Ottumwa Service, 220-885; 262 NW 786; 38 NCCA 644; 1 NCCA(NS) 605

Pattee v Lumber Co., 220-1181; 263 NW 839

Employment, injury, and death unconnected. Industrial commissioner's finding that death from lobar pneumonia did not result from employment-connected injury is conclusive on the courts.

Featherson v Continental-Keller Co., 225-119; 279 NW 432

Blow lighting up cancer. Evidence, expert and otherwise, carefully analyzed and reviewed, and held to be such that the industrial commissioner might justifiably find therefrom that a blow received by an employee, in the course of his employment, lit up and aggravated a cancer and caused the premature death of the employee, and inasmuch as the commissioner did so find, held that said finding was not reviewable by the courts.

Shepard v Milk Co., 220-466; 262 NW 110; 37 NCCA 772

Loss of sight—cause. A finding by the industrial commissioner, on competent but conflicting testimony, that the loss of sight was caused by a certain injury, is conclusive on the courts.

Smith v Ice Co., 204-1348; 217 NW 264

Daugherty v Coal Co., 206-120; 219 NW 65

Impairment of vision—finding. A supported finding by the industrial commissioner that the vision of both eyes of an employee has been impaired to a named extent is conclusive on the courts.

Butz v Hahn Co., 220-995; 263 NW 257; 38 NCCA 647

Presence of gas in mine. A finding by the industrial commissioner, on conflicting evidence, as to the presence of carbon dioxide in a mine and as to its effect on a workman if it were present in the mine, is conclusive on the courts.

Susich v Coal Co., 207-1129; 224 NW 86

Cause of injury. A finding by the industrial commissioner, on conflicting, nonspeculative, competent, and supporting testimony, that the cause of death of an employee has been established by a preponderance of the testimony to have been a trauma arising out of the employment is necessarily conclusive on the courts.

Jones v Eppley Co., 208-1281; 227 NW 153; 30 NCCA 449

Septicemia — scratched finger. Industrial commissioner's finding contrary to undisputed evidence is not conclusive on the courts, but where workman's death from septicemia resulting from scratch on finger involves disputed testimony as to whether injury occurred in the course of the employment, the industrial commissioner's decision must stand.

Schuler v Cudahy Co., 223-1323; 275 NW 39

Cerebral hemorrhage—cause. A conflict in the evidence as to whether a workman's injury was, on the following day, the cause of a cerebral hemorrhage from which he died makes a fact question whose determination by the industrial commissioner is a finality on appeal.

Schroyer v Jasper Co., 224-1391; 279 NW 118

Chronic dermatitis—noncausal connection. Since an award of workmen's compensation must stand on something more than a mere possibility of causal connection between the accident and the injury, evidence that aggravation or secondary infection of a chronic dermatitis or ringworm on employee's hand could "possibly" have been the result of housecleaning work done in employer's funeral home was not sufficient to support an award granted by industrial commissioner.

Boswell v Funeral Home, 227-344; 288 NW 402

Riding on freight elevator—prohibition. A finding by the industrial commissioner, on competent, substantial, and supporting testimony, that an employee had full knowledge that all employees were invariably prohibited from riding upon a freight elevator, and that said employee arbitrarily and unjustifiably violated said prohibition, is conclusive on the courts—even tho there is no conflict in the testimony.

Enfield v Prod. Co., 211-1004; 233 NW 141; 30 NCCA 434

Appeal to district court—trial not de novo. The trial of an appeal from decision of the industrial commissioner to the district court is not de novo, and where aggrieved party fails to appeal, the decision of the industrial commissioner is final and such party cannot obtain a review in either the district or supreme court.

Jarman v Collins-Hill Co., 226-1247; 286 NW 526

II NONCONCLUSIVE FINDINGS

Law of admitted facts.

Baldwin v Sullivan, 201-955; 204 NW 420; 208 NW 218

Permissible review. A decision by the industrial commissioner is reviewable by the court on appeal (1) if the facts found by the commissioner do not support the decision, or (2) if there is not sufficient competent evidence in the record to justify the decree.

Stiles v Council, 209-1235; 229 NW 841

Findings on undisputed testimony. The findings and conclusions of the industrial commissioner on undisputed testimony are not con-

clusive on the courts when such findings and conclusions are not justified as a matter of law.

Tunnicliff v Bettendorf, 204-168; 214 NW 516
Petersen v Corno Co., 216-894; 249 NW 408

Findings of commissioner—scope of review. Where the facts are in dispute, the court will ordinarily refuse to disturb the findings of the industrial commissioner, but where they are not in dispute, the court may review the conclusions of the commissioner upon such undisputed facts for the purpose of determining whether or not there is sufficient competent evidence to support commissioner's decision.

Boswell v Funeral Home, 227-344; 288 NW 402

Undisputed evidence—contrary findings—conclusiveness. Industrial commissioner's finding contrary to undisputed evidence is not conclusive on the courts, but where workman's death from septicemia resulting from scratch on finger involves disputed testimony as to whether injury occurred in the course of the employment, the industrial commissioner's decision must stand.

Schuler v Cudahy Co., 223-1323; 275 NW 39

Undisputed facts—interstate commerce. A finding by the industrial commissioner on undisputed facts that an employee was not engaged in interstate commerce is reviewable by the courts.

Johnston v Railway, 208-202; 225 NW 357

Undisputed facts—course of employment. Undisputed facts bearing upon the question whether an injury arose out of and in the course of an employment present a question of law reviewable on appeal.

Marley v Johnson & Co., 215-151; 244 NW 833; 85 ALR 969

Insufficient competent evidence—independent contractor. A decision of the industrial commissioner (under a written contract and explanatory oral evidence) that a party was an independent contractor and not an employee is reversible by the court when the undisputed facts demonstrate that the party was, as a matter of law, an employee.

Mallinger v Oil Co., 211-847; 234 NW 254

Unsupported findings—clerical employee. The finding of the industrial commissioner, on nonsupportable or insufficient testimony, that an injury to a clerical employee was not the proximate result of a hazard of the employer's business, is reviewable by the appellate court.

Kent v Kent, 202-1044; 208 NW 709

Nonsupported finding—permanent partial disability. A finding by the industrial commissioner on nonconflicting testimony that the disabilities suffered by an employee were permanent and partial, is reviewable by the court.

Diederich v Railway, 219-587; 258 NW 899

Nonconclusive finding—noncompensable injury. A finding by the industrial commissioner on undisputed testimony that an injured employee was not entitled to compensation is not conclusive on the courts.

Almquist v Nurseries, 218-724; 254 NW 35; 94 ALR 573

Lead poisoning to auto mechanic—occupational disease—nonconclusive finding. As to lead poisoning suffered by an automobile mechanic from using a blowtorch negligently filled with tetraethyl lead gasoline, industrial commissioner's finding it to be an occupational disease was not conclusive on the courts.

Black v Creston Auto Co., 225-671; 281 NW 189

Unallowable impeachment of witness—effect. When the testimony of witnesses offered by an employer tends to show that an injury to an employee arose out of and in the course of his employment, it is wholly unallowable for the industrial commissioner to permit the employer to impeach his own witnesses by introducing their former ex parte affidavits as to how the injury occurred, and equally unallowable for said commissioner to treat such affidavits as substantive evidence creating a conflict with the testimony of the injured employee unquestionably showing that his injuries were compensable. In other words, the impeachment being wholly unallowable, the testimony of both the claimant and of the master's witnesses stands uncontradicted and the injury is legally compensable notwithstanding a contrary finding by the commissioner.

Baker v Roberts & Beier, 209-290; 228 NW 9; 30 NCCA 433; 2 NCCA(NS) 841

1453 Decision on appeal.

Permissible review. A decision by the industrial commissioner is reviewable by the court on appeal (1) if the facts found by the commissioner do not support the decision, or (2) if there is not sufficient competent evidence in the record to justify the decree.

Stiles v Council, 209-1235; 229 NW 841

Ruling of commissioner—when reviewable. The ruling of the industrial commissioner on a stipulation of fact is not conclusive on the courts if the facts so stipulated do not legally support said ruling.

Oswalt v Lucas Co., 222-1099; 270 NW 847

Construction of contract by commissioner. An erroneous legal construction placed on a contract by the industrial commissioner is reviewable by the courts.

Arthur v Sch. Dist., 209-280; 228 NW 70; 66 ALR 718

Conclusion of law on undisputed facts—reviewability. The finding of law by the industrial commissioner on undisputed questions of fact is not binding on the appellate court.

Hoover v Sch. Dist., 220-1364; 264 NW 611

Conclusive finding by commissioner. Principle reaffirmed that findings of industrial commissioner based upon conflict of evidence or sufficient competent evidence are effective as a verdict of the jury and conclusive on the courts.

Wichers v McKee Co., 223-853; 273 NW 892

Supported findings of fact—affirmance. In an appeal from the commissioner's allowance of a claim for workmen's compensation, the order of the commissioner should be sustained when the record contains evidence to support his findings of fact.

Everts v Jorgensen, 227-818; 289 NW 11

Finding as to cause of death—artificial heat. A finding by the industrial commissioner, on supporting but conflicting testimony, that an employee died during the course of his employment from the effect of artificial heat attending and growing out of his employment is conclusive on the courts.

Belcher v Light Co., 208-262; 225 NW 404; 30 NCCA 361

Occupational disease. Record reviewed and held sufficient to support a finding by the industrial commissioner that an employee did not die from an occupational disease, but was injured by and died from the accumulation of deadly gases in a coal mine.

Dille v Coal Co., 217-827; 250 NW 607; 34 NCCA 571

Undisputed evidence—contrary findings—conclusiveness. Industrial commissioner's finding contrary to undisputed evidence is not conclusive on the courts, but where workman's death from septicemia resulting from scratch on finger involves disputed testimony as to whether injury occurred in the course of the employment, the industrial commissioner's decision must stand.

Schuler v Cudahy Co., 223-1323; 275 NW 39

Commissioner's decision reversible when unsupported by evidence. In a workmen's compensation case, the decision of the industrial commissioner will be set aside if not supported by sufficient facts.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

Vision—evidence refuting commissioner's decision. Evidence in a workmen's compensation case that the injured employee had from 33 to 50 percent vision in an eye before it was lost in a second industrial accident, leaves the decision of the industrial commissioner, that there was no loss, without support in the evidence, and the trial court was right in reversing the commissioner's decision.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

Order based on incompetent evidence. An order of the industrial commissioner is subject to nullification by the court when the order is based solely on incompetent evidence.

Swim v Fuel Co., 204-546; 215 NW 603

Fact findings—permanent partial disability. Where the industrial commissioner on a conflicting record found 25 percent permanent disability, the district court may not disregard this finding and award compensation on a total permanent disability basis.

Wichers v McKee Co., 223-853; 273 NW 892

Road building contractor—truck driver—"employee" rather than "independent contractor". In workmen's compensation proceeding where it is shown that a road builder's contract provided that his own organization, with the assistance of workmen under his immediate superintendence, should perform not less than 80 percent of all work embraced in the contract, and that no portion of the contract should be sublet except with the written consent of contracting officer or his authorized representative, and where claimant, not being a subcontractor, was injured while driving a truck which belonged to a person who was not a subcontractor, held, the claimant was an "employee" and not an "independent contractor" as respects the road building contractor's liability for compensation.

Schriver v McLaughlin, 227-580; 288 NW 657

Conflicting adjudications. Where a judgment fixing the compensation for a railroad employee's death due to an accident in Iowa, was rendered by an Iowa court under the Iowa compensation act, it may be pleaded by the railroad in an action brought against it for the same cause in Minnesota under the Federal Employers' Liability Act, since both courts had jurisdiction to decide whether deceased was engaged in intrastate or interstate commerce; and the Iowa judgment, being the earlier one rendered, was res judicata in the other action, altho the other action was brought first.

Chicago, RI Ry. v Schendel, 270 US 611

Records of former compensation claim inadmissible. Records in the industrial commissioner's office as to a former compensation claim are inadmissible when they have no bearing on the merits of the claim at bar.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

Unobjected to, relevant hearsay evidence considered. In the absence of objection, relevant hearsay evidence may be given consideration.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

1454 Judgment or order remanding.

Final decree—modification. A final decree for compensation under the workmen's compensation act is not erroneous because it does not provide that compensation shall cease on the death of all claimants, as the decree may

be promptly modified to meet such a contingency whenever such contingency occurs.

Walker v Mach. Corp., 213-1134; 240 NW 725

1456 Appeal to supreme court.

What constitutes "final order". A ruling of the district court that a surviving wife, sole dependent of her husband, had no right, after the death of her husband, to be substituted as plaintiff in a proceeding for compensation commenced by the husband during his lifetime, and remanding the cause to the industrial commissioner for proceedings in harmony with such ruling, constitutes a final order or judgment from which an appeal will lie to the supreme court.

Dille v Coal Co., 217-827; 250 NW 607

Trial not de novo. Principle reaffirmed that appeals under the workmen's compensation act are not tried de novo.

Arne v Silo Co., 214-511; 242 NW 539

Jarman v Collins-Hill Co., 226-1247; 286 NW 526

Belated objections. The objection that an insurance carrier was not a proper party defendant along with the employer in proceedings under the workmen's compensation act will not be considered when presented for the first time on appeal to the supreme court.

Walker v Speeder Corp., 213-1134; 240 NW 725

1457 Review of award or settlement.

Atty. Gen. Opinion. See '34 AG Op 505

Review for additional compensation—burden of proof. An employee under the workmen's compensation act, allowed and paid compensation for an injury, has the burden of proof, on his application for review and compensation for additional consequences of said injury, to establish by a preponderance of evidence that said additional consequences are such as would naturally and proximately follow said original injury—were not the result of intervening accidents or other causes.

Oldham v Scofield, 222-764; 266 NW 480; 269 NW 925

Review—allowable appeal. The action of the deputy industrial commissioner (on the application of an injured employee) in opening up for further consideration an existing agreement for compensation, and the decision of said deputy on said further consideration, constitute an authorized "review" from which an appeal lies to the district court.

Soukup v Shores Co., 222-272; 268 NW 598

1459 Notice and service.

Jurisdiction—special appearance to question—effect. It seems that a special appearance before an administrative officer, e. g., the industrial commissioner, for the sole purpose of questioning the jurisdiction of the officer to act in a certain proceeding, is proper, and will not be deemed an appearance to the merits.

Elk River Co. v Funk, 222-1222; 271 NW 204; 110 ALR 1415

Foreign employer—adjudication on registered mail service—due process. The workmen's compensation act, in the absence of a statutory rejection thereof, becomes a part of a contract of employment which is performable by the employee wholly within this state, and entered into between a resident employee of this state and a foreign nonresident employer doing business in this state without a state permit; but in case the employee dies from an injury compensable under said act, the industrial commissioner acquires no jurisdiction to determine and adjudicate the compensation due on account of said death by simply sending, by registered mail, notices of said proceedings to said employer in said foreign state, tho, concededly, the addressee received said notices. An adjudication on such service does not constitute due process.

Elk River Co. v Funk, 222-1222; 271 NW 204; 110 ALR 1415

1465 Judgment by district court on award.

Discussion. See 11 ILR 182—Nature of award

Judgment on agreement—time limit. The two-year statute of limitation for instituting original proceedings for compensation under the workmen's compensation act has no application whatever to proceedings instituted in the district court to obtain judgment on a valid agreement as to compensation, even tho such proceedings were instituted more than two years after the agreement was executed and approved.

Biggs v Bank, 218-48; 254 NW 331

Lost memorandum of agreement—procedure. In a proceeding to obtain judgment on a lost memorandum of agreement relative to compensation the said memorandum, if found after the record is closed, may yet be made a part of the record, with the consent of the court, by proper amendment to the pleadings.

Biggs v Bank, 218-48; 254 NW 331

CHAPTER 72

COMPENSATION LIABILITY INSURANCE

1467 Insurance of liability required.

Atty. Gen. Opinion. See AG Op May 19, '39

Primary liability of employer. The employer is primarily liable for the payment of the compensation provided by the workmen's compensation act, irrespective of any agreement which the dependent may enter into with the employer's insurer.

Biggs v Bank, 218-48; 254 NW 331

1468 Notice of failure to insure.

Neglect to insure liability — effect. The neglect of an employer specifically to reject the workmen's compensation act in the manner provided, automatically and conclusively places such employer under said act; and his neglect to insure his liability does not take him out from under said act.

Van Gorkom v O'Connell, 201-52; 206 NW 637

1475 Policy clauses required.

President excluded from coverage. A policy of insurance which simply agrees to pay the employees of the insured such sums as may become due them under the workmen's compensation act of this state does not embrace the corporate president of the insured or confer any right on him, even tho it provides, by way of a rider, that the salary of the president "shall be subject to a premium charge at the rate applicable to the hazard to which such officer is exposed".

Reason: No compensation for injuries can accrue, under said act, to the president of a corporation even tho he be deemed an "employee" under said rider.

Maryland Cas. v Dutch Mill, 220-646; 262 NW 776

1479 Employer failing to insure.

Neglect to insure liability—effect. The neglect of an employer specifically to reject the workmen's compensation act automatically and conclusively places such employer under said act.

Van Gorkom v O'Connell, 201-52; 206 NW 637

Employer's failure to insure liability—employee's option—presumption. In workmen's compensation case where employer fails to insure his liability, as required under Iowa law, thereby giving employee election to proceed under the act or collect damages at common law, election to proceed under act will be presumed in absence of filing of his election within required time.

Severson v Hanford Air Lines, 105 F 2d, 622

1480 Manner of election—failure to elect.

Employer's failure to insure liability—employee's option—presumption. In workmen's compensation case where employer fails to insure his liability, as required under Iowa law, thereby giving employee election to proceed under the act or collect damages at common law, election to proceed under act will be presumed in absence of filing of his election within required time.

Severson v Hanford Air Lines, 105 F 2d, 622

CHAPTER 73

HEALTH AND SAFETY APPLIANCES

Atty. Gen. Opinion. See '38 AG Op 431

1487 Safety appliances.

Assumption of risk. See under §1495

1493 Report of accidents—evidence.

Atty. Gen. Opinion. See '38 AG Op 431

1495 Assumption of risks.

ANALYSIS

Automobile damage cases—assumption of risk. See under §§5037.09 (VI), 5037.10 (V)
Automobile damage cases—master's liability. See under §§5037.09 (IV), 5037.10 (II)
Employment contracts. See Ch 420, Note 1 (XI)
Federal Employers' Liability Act. See under §8156 (V)
Principal and agent. See under §10966
Railroad employees. See under §§8156–8161
Services and compensation of employees. See Ch 420, Note 1 (XI)
Workmen's compensation. See Chs 70 and 71

I MASTER AND SERVANT RELATION

The relationship—test. The test of the re-

lationship between employer and employee is the right of the employer to exercise control of the details and method of performing the work.

State v Ritholz, 226-70; 283 NW 268; 121 ALR 1450

The relation—servant (?) or independent contractor (?)—test. One who is employed to do a certain work is a servant of the employer and not an independent contractor, when he—the one doing the work—is subject to the direction and control of the employer as to the details and method to be followed in the performance of the work. So held as to one operating an automobile oil truck, on commission.

Lembke v Fritz, 223-261; 272 NW 300

Independent contractor—test. If, as to the result, and in the employment of the means, one acts entirely independent of the master, he must be regarded as an independent contractor, and not an employee.

Reynolds v Oil Co., 227-163; 287 NW 823

Independent contractor—burden of proof. One who claims that labor and services accepted by him were performed by an independent contractor has the burden to prove such claim.

Buescher v Schmidt, 209-300; 228 NW 26

Window washer as independent contractor. A party who is employed to clean windows at his own chosen time, and with his own means and appliances, is an independent contractor, and not a servant.

Alta v Beno Co., 206-1361; 222 NW 386; 61 ALR 351; 1 NCCA(NS) 257

The relation—when question of law. When the relationship of parties is fixed by a written contract, the question whether they occupy the relation of master and servant (employer and employee) is one of law to be determined by the court and not one of fact to be determined by the jury.

Page v Koss Con. Co., 215-1388; 245 NW 208

Breach by duty—failure to discharge—effect. Principle recognized that, tho an employer, by continuing the employment after knowledge of the breach of duty by the servant, is deemed thereby to waive his right to discharge, yet he is not thereby deemed to waive the breach of duty.

Durr v Clear Lake Park Co., 205-279; 218 NW 54

Private earnings of servant—right of master. Principle recognized that a master is not entitled to the earnings of his servant for work performed by the servant outside his employment hours and for parties other than the master.

Mayberry v Newell, 200-458; 204 NW 413

Casual employment—"extra" help—character of work. An employment in a labor-employing business, when the employment embraces the hazards incident to the business, is not rendered "casual" by the mere fact that the employment was for a few days only, and was occasioned by the taking on of "extra" help, owing to an unforeseen accumulation of work.

Eddington v Telephone Co., 201-67; 202 NW 374

Subrelationship—dual independent contractors. Where the primary contractor on a highway improvement sublets the hauling to a second party, and retains no substantial control over said second party except in case of the latter's default, and where said second party in turn sublets to a third party under contract terms substantially similar in effect, neither said third party nor his employees are employees either of said primary contractor, or of said second party.

Page v Koss Con. Co., 215-1388; 245 NW 208

Traveling salesman—employee (?) or independent contractor (?). A salesman who, under a contract with a dealer in goods, travels at his own expense, and when and where he pleases in a prescribed territory in quest for orders for goods to be filled by the dealer, and who receives his compensation solely in the form of commissions on sales effected by him through his own exclusive means and methods, is, within the meaning of the workmen's compensation act, an "independent contractor" and not an "employee" of the said dealer in the goods.

Arne v Western Silo Co., 214-511; 242 NW 539

Oil company and filling station operator—directing verdict. In an action to recover from an oil company for injuries allegedly caused by operator of company's filling station, evidence that operator conducted the station before approval of lease just as if it had been accepted, that he bought merchandise for cash from this company and others and kept the profits, that he received no remuneration from company, that altho company suggested things to help him, it exercised no supervision, that he took out state permits in own name, and personally arranged for utility service, failed to establish relation of employer and employee. Hence company's motion for directed verdict should have been sustained.

Reynolds v Oil Co., 227-163; 287 NW 823

Licenses—"employers' association". Articles of incorporation and the course of business carried on thereunder reviewed, and held to constitute an "employers' association", within the meaning of §1546-a1, C., '27 [§1546.1, C., '39], as amended.

Employment Bur. v State Emp. Agency Com., 209-1046; 229 NW 677

II INTERFERENCE WITH THE RELATION BY THIRD PARTIES

Third person procuring discharge. A person who voluntarily executes an assignment of his wages may not predicate damages against the assignee on the fact that, when the assignee brought the assignment to the attention of the employer, the employer discharged the assignor.

Hutchins v Jones Piano Co., 209-394; 228 NW 281

III MASTER'S LIABILITY FOR INJURIES TO SERVANT

(a) IN GENERAL

Negligence—reasonable care—test. If, in the performance of his duties, the master has exercised that degree of care ordinarily exercised by other reasonably prudent persons acting under the same or similar circumstances, he has met the standard of care the law requires and it cannot be said he is guilty of negligence.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

Workmen's compensation act—original action for damages—jurisdiction. The district court has no jurisdiction to try and determine an original action against an employer for damages consequent upon the alleged negligence of the employer, resulting in the death of an employee, when both the employer and the employee are under the terms and conditions of the workmen's compensation act.

Hlas v Quaker Oats Co., 211-348; 233 NW 514

Negligence—proximate cause of injury—when jury question. Whether certain negligence was the proximate cause of a certain injury is always a jury question when different minds might reasonably reach different conclusions.

Bell v Brown, 214-370; 239 NW 785

Injuries to servant—scope of employment—jury question. The scope of a servant's duties is to be determined by what he was employed to perform, and by what, with knowledge and approval of his master, he actually did perform. Evidence held to present a jury question whether a general farm hand was, at the time of his injury, within the scope of his employment.

Bell v Brown, 214-370; 239 NW 785

Duty to prevent injury. A farmer is under duty to exercise ordinary care to prevent injury to his servant. Evidence reviewed and held, the failure of the farmer to throw a harvesting machine out of gear under certain circumstances presented a jury question on the issue of negligence.

Bell v Brown, 214-370; 239 NW 785

Independent contractor as invitee — known danger revealed—reasonable care rule. Person employing an independent contractor to put steam pipes in downspouting owes only the duty to such invitee to use reasonable care for his safety, and to warn the contractor as to defects or dangers known to the employer and not apparent to the contractor. The employer is not responsible to the contractor for injuries from defects that the contractor knew of or, in the exercise of ordinary care, ought to have known of.

Gowing v Field Co., 225-729; 281 NW 281

Negligence—causal connection with injury necessary — no conjecture and speculation in verdict. There must be causal connection when an injury is caused by falling from a fire escape because of an alleged defect in the top step. When the allegation is not substantiated by the evidence any more than by the plaintiff's testimony stating that "something moved", that he "caught his heel on the step", it would be mere conjecture and speculation to base a verdict thereon, and verdicts must rest on something more substantial.

Gowing v Field Co., 225-729; 281 NW 281

Failure of duty by employer. It is an implied term of the servant's contract of employment that he assume the risk which naturally pertains to his work, but he is under no contract or legal obligation to assume any risk which is occasioned by a failure of duty on the part of his employer.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

Contract assumption by employer — effect. An agreement between an employer and an employee that the employer will assume all risk incident to the performance of a named piece of work is valid, yet it does not embrace an injury which results from the employee's own negligence; and especially is this true when the contract sprang from a contemplated danger which never in fact existed.

Rork v Klein, 206-809; 221 NW 460; 60 ALR 469

Charitable institution—nonliability to beneficiaries for employees' negligence. Tho as between benefactor and beneficiary, an institution conducted solely for doing charity may not be liable for the negligence of its employees to a person receiving the benefits of that charity, however, a WPA worker doing work on the premises of a Y.M.C.A. is not a beneficiary of the charitable work of the institution so as to be within this rule.

Andrews v Y.M.C.A., 226-374; 284 NW 186; 5 NCCA(NS) 335

Charitable institution liable to strangers, invitees, or employees. Public policy has never demanded nor has the legislature adopted any immunity to charitable institutions from liability to strangers, invitees, or employees arising because of negligence of the servants of such institutions, and the court will not grant such immunity.

Andrews v Y.M.C.A., 226-374; 284 NW 186; 5 NCCA(NS) 335

Employee injured by falling derrick—evidence—directed verdict. Evidence that employee engaged in tearing down silo was injured when derrick fell on him did not warrant submission of case to jury on issues of employer's negligence, negligence of fellow servant, and assumption of risk, where the employee was acting on the request of fellow servant or limited vice-principal in charge of the work, where steel pins which gave way were of harder steel than that blacksmiths ordinarily use and were of a type successfully used on derrick in the past, but were not scientifically tested for tensile strength or secured from a manufacturer.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

Painting schoolhouse as governmental act—scope of nonliability. A school district in causing its schoolhouse or the rooms thereof to be painted must be deemed as engaged in a governmental function with complete exemption from liability for negligence in so doing. So held where it was urged that the district had impliedly contracted to furnish the workman a "safe place" in which to work.

Ford v School Dist., 223-795; 273 NW 870

(b) PLACE OF WORK, TOOLS AND APPLIANCES

No warranty by master—reasonable care only. In no event is a master held to warrant or insure the servant's safety, but he is held to the exercise of reasonable care to eliminate those elements of danger to the life and limb of the servant which are not the usual and natural incidents of the service when the master has exercised reasonable care.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

Defective appliance—assumption of risk. Where a farmer and his employee both know that an appliance designed to throw a tractor out of gear is defective, and the employee is under no duty to repair the defect, the act of the employee in continuing to use the defective appliance does not constitute an assumption of the risk attending such use.

Bell v Brown, 214-370; 239 NW 785

Safe tools and place to work—reasonable care required. A master is required to exercise reasonable care to furnish reasonably safe tools, appliances, and instrumentalities for use in the work which the servant is expected to perform and the same degree of care in furnishing a reasonably safe place in which to work.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

Long use of defective machinery. A farm employee who bases his action for damages on the claim that his employer furnished him a machine with a defective shifting gear with which to perform his work, signally fails to sustain his action when the evidence shows, without question, that the machine and said device thereon had been long used by the employee, and had never, prior to the accident in question, disclosed to anyone any defect.

Degner v Anderson, 213-588; 239 NW 790; 39 NCCA 417

Promise to repair defective equipment—effect. The master's promise to repair a defective instrumentality authorizes the servant to continue its use for a reasonable time without assuming the risk attending such use unless the danger is so imminent that a reasonably prudent person would not continue such use.

Oestereich v Leslie, 212-105; 234 NW 229; 34 NCCA 67; 39 NCCA 424

Failure to warn employee. An employer is not negligent in failing to warn an experienced farm hand of the danger of going in front of a team of horses when the employee had full knowledge of the temperamental condition of the team.

Hansen v Jensen, 204-1063; 216 NW 677; 39 NCCA 431

Implied contract to furnish "safe place". A school district in causing its schoolhouse or the rooms thereof to be painted must be deemed as engaged in a governmental function with complete exemption from liability for negligence in so doing. So held where it was urged that the district had impliedly contracted to furnish the workman a "safe place" in which to work.

Ford v School Dist., 223-795; 273 NW 870

Insufficient instructions. Instructions to the effect that an employee may not recover damages sustained or resulting from the ordinary and inherent hazards and dangers of an employment, are wholly insufficient to submit the pleaded and supported defensive issue that plaintiff had knowledge of the defects in the instrumentalities used by him, and of the deficiencies and faults in the methods of using such instrumentalities, and that he fully appreciated the danger which might arise therefrom.

McClary v Railway, 209-67; 227 NW 646

Vice-principal's obligation. Evidence held to warrant conclusion that owner of apparatus used to tear down silo, and who was actively engaged in such work, was a fellow servant; and, if he were a vice-principal, he was such only to the extent of being required to furnish plaintiff proper equipment and a safe place to work. The mere fact that one employee has authority over others does not make him a vice-principal or superior so as to charge the master with his negligence.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

Vicious and runaway team. Evidence held insufficient to establish that a team of horses in question were vicious and addicted to running away.

Hansen v Jensen, 204-1063; 216 NW 677

III MASTER'S LIABILITY FOR INJURIES TO SERVANT—continued

(b) PLACE OF WORK, TOOLS, ETC.—concluded

Appliance on tractor. A farmer must furnish his employee with a reasonably safe machine with which to perform work. Whether an appliance on a tractor designed to throw the tractor out of gear was reasonably safe, held, under the evidence, a jury question.

Bell v Brown, 214-370; 239 NW 785; 39 NCCA 422

Injury from corn shredder—directing verdict. Directing a verdict is proper against a plaintiff, a farm machinery mechanic and salesman, seeking recovery for an injury sustained when his hand was caught in a corn shredder, which had been gratuitously loaned by defendant to a neighbor on whose farm plaintiff was operating the machine, the evidence showing plaintiff was an adult familiar with such machinery and in full possession of his faculties, and that there was no negligence attributable to defendant.

Davis v Sanderman, 225-1001; 282 NW 717

Loose rug on polished floor. The maintenance in the doorway between the dining room and hallway of an ordinary home, and on the polished hardwood floor thereof, of a 3 foot by 6 foot Persian rug with ribbed undersurface but without floor fastenings of any kind, cannot, as a matter of law, as to one who for years has been familiar with said home and the furnishings thereof, be deemed a violation by the householder of his duty to furnish his domestic servant a reasonably safe place in which to work.

Nelson v Smeltzer, 221-972; 265 NW 924

(c) METHOD OF WORK, RULES AND ORDERS

Scope of servant's duties. The scope of a servant's duties is to be determined by what he was employed to perform, and by what, with knowledge and approval of his master, he actually did perform. Evidence held to present a jury question whether a general farm hand was, at the time of his injury, within the scope of his employment.

Bell v Brown, 214-370; 239 NW 785

Failure to warn employee. An employer is not negligent in failing to warn an experienced farm hand of the danger of going in front of a team of horses when the employee had full knowledge of the temperamental condition of the team.

Hansen v Jensen, 204-1063; 216 NW 677; 39 NCCA 431

Elevator operator violating instructions. When, in order to make repairs, a WPA carpenter descended to the bottom of an elevator shaft in a Y.M.C.A. while the superintendent of the building assisted him, and when the superintendent had twice repeated an instruction to the elevator operator in the presence of the carpenter that the elevator was not to go below the first floor, the carpenter, who died because the elevator descended on him, was not required to anticipate that the elevator operator would negligently violate the instructions. Under these facts, contributory negligence was a jury question.

Andrews v Y.M.C.A., 226-374; 284 NW 186

Employee acting on request of fellow servant. Evidence that employee engaged in tearing down silo was injured when derrick fell on him did not warrant submission of case to jury on issues of employer's negligence, negligence of fellow servant, and assumption of risk, where the employee was acting on the request of fellow servant, or limited vice-principal in charge of the work, where steel pins which gave way were of harder steel than that blacksmiths ordinarily use and were of a type successfully used on derrick in the past, but were not scientifically tested for tensile strength or secured from a manufacturer.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

Operation of truck. Evidence reviewed and held quite insufficient to establish a "rule" as to where trucks should be operated in the course of paving operations.

Hedberg v Lester, 222-1025; 270 NW 447

(d) FELLOW SERVANTS

"Vice-principal" or "fellow servant"—master's liability. Evidence held to warrant conclusion that owner of apparatus used to tear down silo, and who was actively engaged in such work, was a fellow servant; and, if he were a vice-principal, he was such only to the extent of being required to furnish plaintiff proper equipment and a safe place to work. The mere fact that one employee has authority over others does not make him a vice-principal or superior so as to charge the master with his negligence.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

(e) ASSUMPTION OF RISK

Assumption of risk. Principle reaffirmed that an employee does not assume the risk of his employer's negligence.

Nelson v. Smeltzer, 221-972; 265 NW 924

Assumption of risk defined. It is an implied term of the servant's contract of employment that he assume the risk which naturally pertains to his work, but he is under no contract or legal obligation to assume any risk which is occasioned by a failure of duty on the part of his employer.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

"Volenti non fit injuria" defined. The maxim "volenti non fit injuria" means: "That to which a person assents is not esteemed in law an injury" or "He who consents cannot receive an injury."

Edwards v Kirk, 227-684; 288 NW 875

Lack of knowledge. An injured party may not be held to assume the risk of a defect of which he had no knowledge.

Dahna v Fun House, 204-922; 216 NW 262

Contract assumption by employer—effect. An agreement between an employer and an employee that the employer will assume all risk incident to the performance of a named piece of work is valid, yet it does not embrace an injury which results from the employee's own negligence; and especially is this true when the contract sprang from a contemplated danger which never in fact existed.

Rork v Klein, 206-809; 221 NW 460; 60 ALR 469

Long use by employee. A farm employee who bases his action for damages on the claim that his employer furnished him a machine with a defective shifting gear with which to perform his work, signally fails to sustain his action when the evidence shows, without question, that the machine and said device thereon had been long used by the employee, and had never, prior to the accident in question, disclosed to anyone any defect.

Degner v Anderson, 213-588; 239 NW 790; 39 NCCA 417

Promise of betterment — effect. The master's promise to repair a defective instrumentality authorizes the servant to continue its use for a reasonable time without assuming the risk attending such use, unless the danger is so imminent that a reasonably prudent person would not continue such use.

Oestereich v Leslie, 212-105; 234 NW 229; 34 NCCA 67; 39 NCCA 424

Appliance on tractor. Where a farmer and his employee both know that an appliance designed to throw a tractor out of gear is defective, and the employee is under no duty to repair the defect, the act of the employee in continuing to use the defective appliance does not constitute an assumption of the risk attending such use.

Bell v Brown, 214-370; 239 NW 785

Riding unshod horse. A farm employee assumes the danger of riding an unshod horse over frozen and slippery ground at the direction of the employer when he is experienced in farm work and knows of and fully appreciates the said danger.

Laws v Richards, 210-608; 231 NW 321; 39 NCCA 431

Injury from borrowed corn shredder. A person supplying a chattel for another's use, and who derives some beneficial interest therefrom, must use reasonable care to discover, and is liable for, unreasonable risks due to the condition or disrepair of the chattel or its unfitness or inadequacy for the purpose for which supplied. The user assumes only such risks as are not known and not discoverable by the supplier using ordinary care. Rule applied to corn shredder loaned to neighbor and in which shredder a person injured hand.

Davis v Sanderman, 225-1001; 282 NW 717

(f) CONTRIBUTORY NEGLIGENCE OF SERVANT

Departure of employee from zone of service—burden of proof. An employee who voluntarily steps outside the zone of his specific employment and voluntarily engages in a work in which the employer is engaged, and is injured, must, in an action for damages, prove his own freedom from contributory negligence. (§11210, C., '24.)

Tellier v Davenport, 203-1012; 213 NW 565

Mitigation of damages. In an action by an employee against his employer for damages consequent on the negligence of the employer, the contributory negligence of the employee may be pleaded by the employer in mitigation, only, of damages.

Bell v Brown, 214-370; 239 NW 785; 34 NCCA 68

Mitigation of damages. The court may very properly instruct the jury that a master must establish his plea of contributory negligence on the part of his servant by a preponderance of the evidence, and that such plea, if so established, is available to the master only in mitigation of damages.

Oestereich v Leslie, 212-105; 234 NW 229; 34 NCCA 67

Walking down fire escape carrying tools. A plumber, an independent contractor, who attempts the acrobatic feat of walking down a steep, but ordinarily safe, fire escape as if it were a stairway, with his hands full of wrenches and a length of pipe, or, while balancing on one heel, attempts to swing his body around while his hands were so employed, has assumed the risk arising from such conduct and must be held, as a matter of law, to have contributed to his injuries, if he falls.

Gowing v Field Co., 225-729; 281 NW 281

Failure to observe rear—negligence per se. The foreman of a paving outfit is guilty of negligence per se in walking along the unpaved portion of a rough road for a distance of some 200 feet without making any observations to his rear for trucks which he knew were being backed along said road and in his immediate direction at the rate of one truck each 90 seconds.

Hedberg v Lester, 222-1025; 270 NW 447

IV LIABILITY FOR INJURIES TO THIRD PERSONS

Liability basis—breach of duty not employment relationship. Every case which allows recovery against a servant can be based not upon any relationship growing out of the employment but upon the fundamental proposition that the servant violated some duty that he owed to the person injured. It may be an act of misfeasance, nonfeasance, or malfeasance.

Montanick v McMillin, 225-442; 280 NW 608

Exoneration of servant exonerates master. A master cannot be held liable for an injury solely on the ground of the negligence of his servant, when the jury wholly exonerates the servant from any negligence.

Hall v Miller, 212-835; 235 NW 298

Departure of servant from zone of service—effect. When the range or zone of service of an employee embraced the taking of a truck to a place of storage for the night, the act of the employee in temporarily using the truck for his own personal use will not per se absolve the employer from liability for a negligent act by the employee occurring after the employee had resumed his duty to take the truck to its storage place, and while he was pursuing a proper route in the immediate vicinity thereof.

Orris v Tolerton & Warfield Co., 201-1344; 207 NW 365; 25 NCCA 549; 34 NCCA 192, 213

Abandonment of employment—jury question. Evidence reviewed and held to present a jury question on the issue whether a servant had temporarily abandoned his employment and had not returned thereto at the time of the commission by him of an alleged negligent act.

Heintz v Iowa Packing Co., 222-517; 268 NW 607

Master and servant—loaning servant to another. A utility corporation, seeking to set its transmission poles along a public highway, is not responsible for the acts of its employees in assisting the county highway engineer, under his absolute direction and control, in finding a lost section corner which, when found, enables the engineer, first, to locate the lines of the highway, and second, the line of the poles.

Swartzwelter v Util. Corp., 216-1060; 250 NW 121; 34 NCCA 471

Mere employee of tort-feasor—nonliability. The mere employee of a tort-feasor is not necessarily liable for the damage resulting from the tort. So held in an action by the lessee of coal lands for damages consequent on the wrongful removal of coal by the owner of the leased land.

Hartford Coal Co. v Helsing, 220-1010; 263 NW 269

Municipal corporation employees personally liable for torts—governmental immunity denied. A governmental employee committing a tortious act which causes injury to another in violation of a duty owed to the injured person, becomes, as an individual, personally liable in damages therefor. (Hibbs v School Dist., 218-841, overruled.)

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA(NS) 4

Shirkey v Keokuk County, 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

Futter v Hout, 225-723; 281 NW 286

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Doherty v Edwards, 226-249; 284 NW 159

Municipal corporations—nonliability for employee's tort—respondeat superior—exception. The exemption accorded counties and other governmental bodies and their officers from liability for torts growing out of the negligent acts of their agents or employees is a limitation or exception to the rule of respondeat superior, and in no way affects the fundamental principle of torts that one who wrongfully inflicts injury upon another is individually liable to the injured person.

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA(NS) 4

County's nonliability. Neither a county, as a quasi corporation, nor its board of supervisors is liable for the negligence of its employee in operating after dark a road maintainer without lights on the left-hand side of a highway, and in an action by a motorist who sustained injuries on account of such negligence, demurrers to the petition by the county and its board of supervisors were properly sustained.

Shirkey v Keokuk County, 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

Admissions—by employee—competency. Admissions by an employee may be competent evidence against such employee while wholly incompetent against the employer.

Glass v Ice Cr. Co., 214-825; 243 NW 352

Oil company and filling station operator—liability. In an action to recover from an oil company for injuries allegedly caused by operator of company's filling station, evidence that operator conducted the station before approval of lease just as if it had been accepted, that he bought merchandise for cash from this company and others and kept the profits, that he received no remuneration from company, that altho company suggested things to help him, it exercised no supervision, that he took out state permits in own name, and personally arranged for utility service, failed to establish relation of employer and employee. Hence company's motion for directed verdict should have been sustained.

Reynolds v Oil Co., 227-163; 287 NW 823

Trademark signs displayed — independent dealer's status not affected. In an action for injuries caused by alleged negligence of filling station operator, the fact that trademark signs of defendant oil company were displayed did not estop it from claiming that it was not the owner of filling station business and that operator was not employee of company, it being a matter of common knowledge that such signs are displayed throughout country by independent dealers.

Reynolds v Oil Co., 227-163; 287 NW 823

Partnership—nonpermissible power of partner—burden of proof. A partnership is not bound by the act of one partner in consenting to, and acquiescing in, an act which is subversive of the very purpose of the partnership, unless he who seeks so to bind the partnership establishes the fact that all the partners consented to, and acquiesced in, said act.

Hartford Coal Co. v Helsing, 220-1010; 263 NW 269

Measure of damages—wrongful act without profit to wrongdoer—essential proof. The lessee of coal lands who seeks to recover damages consequent on the wrongful act of the owner of the land in taking coal from the land, need not show that the defendant-owner made any profit from his wrongful operations. Plaintiff need only show wherein and to what extent he was damaged.

Hartford Coal Co. v Helsing, 220-1010; 263 NW 269

Salesman employee (?) or independent contractor (?). A salesman who, when traveling from place to place about the country in behalf of the business of another party, employs his own automobile, and does so with the implied authority of said other party, cannot be deemed an independent contractor as to said matter of transportation when he is at all times subject to summary discharge by said other party, and also subject to the orders of said other party as to what he shall do, and when and where he shall do it.

Heintz v Iowa Packing Co., 222-517; 268 NW 607

Salesman—use of automobile—authority of servant. Evidence reviewed and held to present a jury question on the issue whether a master had impliedly authorized his salesman, in order to perform his duties, to travel about the country by means of the salesman's individually owned automobile.

Heintz v Iowa Packing Co., 222-517; 268 NW 607

Gravel hauler—employee (?) or independent contractor (?). One who equips himself with, and owns, complete outfits for hauling gravel, and for housing and maintaining himself and family while so working, becomes an independent contractor when he contracts to employ said outfits at his own expense and risk and at a fixed price per yard per mile, and on his own time, in hauling gravel from the gravel pit to such places on the highway as the public authorities may direct; and this is true tho the primary contractor with whom the independent contractor contracts is obligated to load the vehicles at the pit; likewise tho the primary contractor is obligated to the public authorities to furnish all employees necessary to carry out his contract.

Burns v Eno, 213-881; 240 NW 209

Independent contractorship—window washer. A party who is employed to clean windows at his own chosen time, and with his own means and appliances, is an independent contractor, and not a servant.

Aita v Beno Co., 206-1361; 222 NW 386; 61 ALR 351; 1 NCCA(NS) 257

Tripping over mop handle—negligence—jury question. A naked showing that a pedestrian, while walking along a public street, was tripped and caused to fall by a mop handle in the hands of a window cleaner, does not present a jury question on the issue of negligence.

Aita v Beno Co., 206-1361; 222 NW 386; 61 ALR 351; 34 NCCA 775

Borrowing automobile to deliver telegraph message. A telegraph company is not responsible for the act of its messenger in borrowing an automobile with which to make a delivery of a message when the usual and ordinary way of making delivery was by means of a bicycle, and when the borrowing aforesaid was wholly unauthorized by and unknown to the company.

Hughes v Western Union, 211-1391; 236 NW 8; 31 NCCA 423

CHAPTER 74

BOARDS OF ARBITRATION

Discussion. See 2 ILB 140—Discrimination in state employment; 8 ILB 162—Coronado Coal Case; 19 ILR 346—Labor union strike under NIRA; 24 ILR 411—Discharge under Wagner Act
Atty. Gen. Opinions. See '28 AG Op 341; '36 AG Op 670

1496 Petition for appointment.

Atty. Gen. Opinion. See '36 AG Op 670

1497 Notification by governor.

Atty. Gen. Opinion. See '36 AG Op 670

Note 1 Labor.

Employment contracts generally. See under Ch 420, Note 1 (XI)

Discussion. See 21 ILR 595—Legislative power to regulate punishment of contempt; 22 ILR 565—Minimum wages; 23 ILR 2—Injunctions—sit-down strikes

Employer-employee relation—test—control of work. The test of the relationship between employer and employee is the right of the employer to exercise control of the details and method of performing the work.

State v Ritholz, 226-70; 283 NW 268

Contracts—legality. A contract between a street railway company and a local labor union representing the employees will not be decreed illegal by a court of equity on the ground that the contract requires the company, against public policy, to maintain two employees on each car (1) when the city has not exercised its undoubted power over such subject matter, (2) when the city is not a party to the action, and (3) when the object of the action seems to be to obtain a declaratory decree only.

Des Moines Railway v Amalgamated Assn., 204-1195; 213 NW 264

Conflict with international union. Equity will not assume jurisdiction to declare illegal a contract between an employer and a local labor union on the ground that the contract is violative of the constitution of the international union to which the local union is subject, when the international union is not a party to the action and is making no complaint.

Des Moines Railway v Amalgamated Assn., 204-1195; 213 NW 264

Unionizing industry—legality. Equity will not assume to pass upon the public policy of a contract between an employer and a local union on the ground that the contract unionizes an entire industry, when no person is complaining that he is deprived of the right to freely dispose of his labor.

Des Moines Railway v Amalgamated Assn., 204-1195; 213 NW 264

Carriage of livestock—strike as defense. The plea that a carrier of livestock was prevented from making delivery because of a strike among stockyards employees must fall when the jury might well find that, if the carrier had exercised reasonable diligence, delivery would have been made notwithstanding the strike.

Riddle v Railway, 203-1232; 210 NW 770

Boycott—intimidation and coercion. Intimidation and coercion are essential elements of boycott. It must appear that the means used are threatening and intended to overcome the will of others and compel them to do or refrain from doing that which they would or would not otherwise have done.

Smythe Co. v Local Union, 226-191; 284 NW 126

Peaceful picketing not secondary boycott—no injunction. A threat to do something that a person has a right to do is not a threat in a legal sense. Held that union officials by lawfully placing a neon sign manufacturer on the unfair list, advertising to the public that he was unfair to electrical workers, and peacefully picketing his place of business, were not guilty of such conspiracy as to constitute a secondary boycott, and an injunction will not lie.

Smythe Co. v Local Union, 226-191; 284 NW 126

Secondary boycott—essential elements. A secondary boycott may be defined as a combination to cause a loss to one person by coercing others against their will to withdraw from their beneficial business intercourse, by threats that, unless they do so, the combination will cause similar loss to them, or by the use of means as the infliction of bodily harm on them, or such intimidation as will put them in fear of bodily harm.

Smythe Co. v Local Union, 226-191; 284 NW 126

Injunction against labor union—no denial of freedom of speech and assembly. An injunction against officers of a trade union was not void on its face as a denial of the right of freedom of speech and assembly because it prohibited unlawful interference with a company's business, mass picketing, intimidation and coercion, and going upon the company's premises without consent.

Carey v Dist. Court, 226-717; 285 NW 236

Injunction violation by labor union officials. There was no denial of the right of freedom of speech in holding officers of a trade union in contempt of court for violating an injunc-

tion, when they counseled, aided, abetted, and assisted in the violation of the injunction.

Carey v Dist. Court, 226-717; 285 NW 236

State as party to proceedings against violators of injunction against labor union. Where a grave situation existed in the locality at the time, the state had the right to be made a party to proceedings involving an injunction violation by labor union officials by filing a petition incorporating by reference the affidavits of the plaintiff's petition and the injunction upon which it was based, when the state did not seek different and distinct remedies from that asked by the plaintiff.

Carey v Dist. Court, 226-717; 285 NW 236

Proceedings against violators of injunction against labor union—state as party. A continuance requested on the ground that the state had been made a party to proceedings involving the violation of an injunction by labor union officers was properly refused when the petition of the state alleged the same matter and sought the same relief as the petition of the plaintiff.

Carey v Dist. Court, 226-717; 285 NW 236

Evidence of injunction violation—passion and prejudice negatived. There was no merit in a contention that a decision finding the defendants guilty of violating an injunction against a labor union was based on passion and prejudice, when evidence showed that they aided and abetted in mass picketing which was unlawful and which was restrained by the injunction.

Carey v Dist. Court, 226-717; 285 NW 236

Violators of injunction against labor union—maximum penalty excessive. Sentences of six months in jail and a $500 fine each, the maximum permitted by statute, when imposed against labor union officials for violating an injunction against the union, were excessive in view of the circumstances.

Carey v Dist. Court, 226-717; 285 NW 236

CHAPTER 75

BUREAU OF LABOR

Atty. Gen. Opinions. See '34 AG Op 622; '38 AG Op 431, 565

1511 Appointment.

Atty. Gen. Opinion. See '30 AG Op 52

1513 Industrial statistics and information.

Atty. Gen. Opinion. See '34 AG Op 622

1514 Other duties — jurisdiction in general.

Atty. Gen. Opinions. See '25-26 AG Op 122; AG Op March 16, '39

1518 Right to enter premises.

Atty. Gen. Opinion. See '34 AG Op 622

1519 Power to secure evidence.

Atty. Gen. Opinion. See '34 AG Op 622

1521 Reports to bureau.

Atty. Gen. Opinions. See '34 AG Op 622; '38 AG Op 431

1522 Persons furnishing information.

Atty. Gen. Opinions. See '34 AG Op 622; '38 AG Op 431

1524 Definition of terms.

Employer-employee relation—test—control of work. The test of the relationship between employer and employee is the right of the employer to exercise control of the details and method of performing the work.

State v Ritholz, 226-70; 283 NW 268

1525 Violations—penalties.

Atty. Gen. Opinions. See '34 AG Op 622; '38 AG Op 431

1525.1 Acceptance of federal act.

Legislative abolishment of position—effect. The position known as "clerk of the state employment bureau" was, in legal effect, abolished by the act of the general assembly in accepting the provisions of the Wagner-Peyser Act (29 USC, §49 et seq.) and by the subsequent joint adoption by the federal and state governments of a system under which all employees of the state employment bureau were placed on a civil service basis after competitive examination administered by the federal employment service. It follows that he who was holding the said position of "clerk" at the time the position was legally abolished, tho an honorably discharged soldier, was not entitled to have charges preferred and a hearing had thereon.

Holmes v Reese, 221-52; 265 NW 384

CHAPTER 76

CHILD LABOR

Atty. Gen. Opinion. See '34 AG Op 85

1526 Child labor — age limit — exception.

Atty. Gen. Opinions. See '28 AG Op 209, 391; '30 AG Op 169; '32 AG Op 243; '34 AG Op 85, 482; 38 AG Op 431, 852

Employer-employee relation—test—control of work. The test of the relationship between employer and employee is the right of the employer to exercise control of the details and method of performing the work.

State v Ritholz, 226-70; 283 NW 268

Right of mother to use child in her own occupation. A mother whose occupation is that of devising and furnishing theatrical entertainment for a compensation paid to her by the owner of the theater wherein the act of entertainment is performed, is not guilty of violating this section by causing her son, who is under fourteen years of age, to perform in such theater, under her direction and supervision, a part of said entertainment act.

State v Erle, 210-974; 232 NW 279; 72 ALR 137

1527 Hours of labor—noon intermission.

Atty. Gen. Opinions. See '32 AG Op 243; '34 AG Op 482

1530 Permit for child labor.

Atty. Gen. Opinion. See '38 AG Op 852

1536 Life, health, or morals endangered.

Atty. Gen. Opinions. See '30 AG Op 169; '38 AG Op 176

1537 Street occupations forbidden.

Atty. Gen. Opinion. See '28 AG Op 391

1540 Violations—penalties.

Atty. Gen. Opinions. See '28 AG Op 391; '38 AG Op 176

CHAPTER 77

STATE EMPLOYMENT BUREAU AND EMPLOYMENT AGENCIES

Atty. Gen. Opinions. See '34 AG Op 664; '38 AG Op 565

1544 Extension of service.

Atty. Gen. Opinion. See '34 AG Op 664

1546.1 Limitation of fee.

Atty. Gen. Opinions. See '28 AG Op 439; '32 AG Op 241; '34 AG Op 637

Holding under prior statute. Articles of incorporation and the course of business carried on thereunder reviewed, and held to constitute an "employers' association" within the meaning of this section as amended.

Employ. Bur. v Com., 209-1046; 229 NW 677

1550 Investigation by labor commissioner.

Atty. Gen. Opinions. See '28 AG Op 439; '38 AG Op 565

CHAPTER 77.1

LICENSE FOR EMPLOYMENT AGENCIES

Atty. Gen. Opinions. See '34 AG Op 637; '36 AG Op 445

CHAPTER 77.2

UNEMPLOYMENT COMPENSATION

1551.16 The commission, secretary and divisions.

Atty. Gen. Opinion. See '38 AG Op 222

1551.17 Powers, rules, and personnel.

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

1551.18 State service absorbed.

Atty. Gen. Opinion. See '38 AG Op 565

CHAPTER 78

CIGARETTES AND TOBACCO

Atty. Gen. Opinions. See '38 AG Op 579, 708

1553 Sale or gift to minor prohibited.

Atty. Gen. Opinions. See '32 AG Op 138; '38 AG Op 708

1554 Violation.

Atty. Gen. Opinion. See '32 AG Op 138

1556.03 Sale and exchange of stamps.

Atty. Gen. Opinions. See '32 AG Op 238; AG Op Sept. 21, '39

1556.05 Affixing of stamps by distributors.

Holding under former statute. The statute requiring packages of cigarettes sold to a "consumer" to have the tax stamps affixed thereto does not apply to a sale by a wholesaler to a retailer, the latter not being a "consumer."

State v Lagomarcino-Grupe Co., 207-621; 223 NW 512

1556.08 Distributor's, wholesaler's and retailer's permits.

Discussion. See 16 ILR 81—Denial of permits to chain stores

Atty. Gen. Opinions. See '28 AG Op 300; AG Op July 17,'39

Construing former statute. This section arms said bodies with power to exercise at least a legal discretion to grant or refuse a permit, e. g., a city council may legally refuse to grant a permit on the supported ground that the applicant is an unfit person to hold such permit.

Whether the statute assumes to grant an unlimited discretion to said governmental bodies, quaere.

Bernstein v City, 215-1168; 248 NW 26; 86 ALR 782

Ford Hopkins v City, 216-1286; 248 NW 668

Construing former statute. A party who has been refused a permissible or optional permit may not successfully contend that he has been (1) denied the equal protection of the law, or (2) deprived of his property and rights without due process and without compensation.

Ford Hopkins v City, 216-1286; 248 NW 668

Construing former statute. A city council may, in the interest of the public as it may view the matter, validly fix the maximum number of permits that will be issued, and may refuse to issue more, and in so refusing it may not be said that the council acts arbitrarily, capriciously, or discriminatively.

Ford Hopkins v City, 216-1286; 248 NW 668

1556.26 Civil penalty for certain violations.

Atty. Gen. Opinions. See '32 AG Op 16, 164

1585 Advertisement near public schools.

Atty. Gen. Opinion. See '34 AG Op 635

CHAPTER 79

HOUSES USED FOR PROSTITUTION, GAMBLING, OR POOL SELLING

Atty. Gen. Opinions. See '25-26 AG Op 319; '28 AG Op 121, 434; '30 AG Op 199; '38 AG Op 300

CHAPTER 80

STATE FIRE MARSHAL

Atty. Gen. Opinions. See '30 AG Op 268; '32 AG Op 82; '36 AG Op 55; '38 AG Op 192; AG Op May 11, '39

CHAPTER 81

FIRE COMPANIES

Atty. Gen. Opinion. See '30 AG Op 373

CHAPTER 83

PASSENGER AND FREIGHT ELEVATORS

1678 General equipment.

Atty. Gen. Opinion. See '25-26 AG Op 122

Personal injury action—bad-faith defense by vouchee. One who is vouched by a defendant into an action, and assumes exclusive charge of the defense, and in the trial pursues a course distinctly hostile to the defendant and distinctly favorable to himself, may thereby make himself, in legal effect, a co-defendant, and be conclusively bound by the judgment against the defendant. So held where the vouchee,

knowing that he was vouched into the action by the defendant on the theory that the negligence charged was primary as to the vouchee and secondary as to the defendant, actively attempted to establish that he (the vouchee) was not negligent and that the defendant was negligent.

Hoskins v Hotel, 203-1152; 211 NW 423; 65 ALR 1125

"Rapid" descent of elevator—testimony.

Dean v Koolish, 212-238; 234 NW 179

Passenger elevator falling—safety device—nonliability elevator manufacturer. The builder of a passenger elevator is neither liable for a personal injury caused by the falling of the car where the safety device, designed to prevent such falling and stop the car, was of an approved pattern in general use and was not shown to have ever before failed to work efficiently, nor where it is disclosed by the accident a device could have been made which would have obviated the particular defect which caused the particular accident, unless it is further shown that reasonable prudence would have discovered this defect and remedied it. Due care, in a legal sense, does not require an uncanny foresight.

Hoskins v Otis Elev. Co., 16 F 2d, 220

Place of danger—elevator operator violating instructions. When, in order to make repairs, a WPA carpenter descended to the bottom of an elevator shaft in a Y. M. C. A. while the superintendent of the building assisted him, and when the superintendent had twice repeated an instruction to the elevator operator in the presence of the carpenter that the elevator was not to go below the first floor, the carpenter, who died because the elevator descended on him, was not required to anticipate that the elevator operator would negligently violate the instructions. Under these facts, contributory negligence was a jury question.

Andrews v Y. M. C. A., 226-374; 284 NW 186

Fall in shaft—lights—guard rail.

Riggs v Pan-American, 225-1051; 283 NW 250

1679 Violations.

Atty. Gen. Opinions. See '25-26 AG Op 89; AG Op March 16, '39

1683 Ordinances.

Atty. Gen. Opinion. See '25-26 AG Op 123

1684.1 Door or gate interlock.

Contributory negligence. An invitee who enters a bakery in the nighttime, at a place other than a perfectly safe place where he had entered on a former occasion, and is unable to see anything owing to the darkness, and finds his progress blocked by an obstruction which, by sense of feeling, proves to be a movable, lattice gateway and who deliberately removes said gateway and, on advancing, falls into an elevator shaft, is, per se, guilty of negligence contributing to his resulting injury.

Hammer v Liberty Co., 220-229; 260 NW 720

CHAPTER 84

LIABILITY OF HOTELKEEPERS AND STEAMBOAT OWNERS

Discussion. See 1 ILB 38—Liability of elevator owners

CHAPTER 85

WATER NAVIGATION REGULATIONS

Atty. Gen. Opinions. See '30 AG Op 138; '34 AG Op. 237; '38 AG OP 467, 791

CHAPTER 85.1

STATE CONSERVATION COMMISSION

1703.33 Expenses generally.

Atty. Gen. Opinion. See '38 AG Op 25

1703.36 Offices.

Atty. Gen. Opinion. See '36 AG Op 349

1703.40 Officers and employees.

Atty. Gen. Opinions. See '36 AG Op 349, 404, 419

1703.44 Funds.

Atty. Gen. Opinions. See '25 AG Op 179; '30 AG Op 72, 243; '36 AG Op 35; '36 AG Op 615

1703.46 Expenditures.

Atty. Gen. Opinions. See '34 AG Op 350; '36 AG Op 615

1703.47 Divisions of department.

Atty. Gen. Opinions. See '36 AG Op 615; '38 AG Op 143

1703.49 General duties.

Atty. Gen. Opinion. See '38 AG Op 775

1703.50 Specific powers.

Atty. Gen. Opinions. See '30 AG Op 105; '34 AG Op 357, 379, 611, 621; '36 AG Op 193; '38 AG Op 25, 143, 775; AG Op Feb. 8, '39

Delegation of legislative power. The legislature has no constitutional right to delegate to an administrative department, e. g., the conservation commission, the strictly and exclusively legislative power to formulate a policy and make regulations restricting an-

gling. It may, however, make such declaration of policy, definitely describing the subject, the field, and the character of regulations intended to be imposed and leave to the department the manner in which that policy shall apply.

State v Van Trump, 224-504; 275 NW 569
See Goodlove v Logan, 217-98; 251 NW 39

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

Jurisdiction—on boundary waters. The state of Iowa has jurisdiction to try and determine the offense known, under our game laws, as the unlawful use of decoys (in the form of live ducks) tho said offense be committed on a temporary sandbar located in the Missouri river and west of the middle of the main channel thereof.

State v Rorris, 222-1348; 271 NW 515

CHAPTER 85.2

ACQUISITION OF LANDS BY CONSERVATION COMMISSION

Atty. Gen. Opinions. See '36 AG Op 404, 615; AG Op Jan. 26, '40

CHAPTER 86

FISH AND GAME CONSERVATION

1704 State ownership and title—exceptions.

Discussion. See 12 ILR 411—Right to fish in navigable waters

Atty. Gen. Opinions. See '28 AG Op 362; '34 AG Op 308, 503

1709 Fish hatcheries—game farms.

Atty. Gen. Opinions. See '28 AG Op 188; '34 AG Op 503

1709.1 State game refuges.

Atty. Gen. Opinions. See '34 AG Op 503; '38 AG Op 638

1709.2 Game management area.

Atty. Gen. Opinion. See '34 AG Op 503

1709.3 Hunting on game refuges.

Atty. Gen. Opinion. See '38 AG Op 638

1709.5 Spawning grounds.

Atty. Gen. Opinion. See '34 AG Op 503

1713 Arrests—assistance of peace officers.

Atty. Gen. Opinions. See '25-26 AG Op 179; '28 AG Op 440; '38 AG Op 798

1714 Seizure of unlawful game.

Atty. Gen. Opinion. See '30 AG Op 42

1741 Dams—fishways.

Atty. Gen. Opinion. See '34 AG Op 503

1742 Injury to dam.

Atty. Gen. Opinion. See '34 AG Op 503

1777 Parrots and canaries.

Atty. Gen. Opinions. See '28 AG Op 106, 362

1778 Birds as targets.

Atty. Gen. Opinion. See '36 AG Op 105

1780 Transportation for sale prohibited.

Atty. Gen. Opinions. See '28 AG Op 187; '38 AG Op 602

1788 Game brought into the state.

Atty. Gen. Opinions. See '32 AG Op 182; '34 AG Op 129

1789 Violation.

Atty. Gen. Opinions. See '28 AG Op 338; '30 AG Op 259; '38 AG Op 47

Delegation of legislative power. The legislature has no constitutional right to delegate to an administrative department, e. g., the conservation commission, the strictly and exclusively legislative power to formulate a policy and make regulations restricting angling. It may, however, make such declaration of policy, definitely describing the subject, the field, and the character of regulations intended to be imposed and leave to the department the manner in which that policy shall apply.

State v Van Trump, 224-504; 275 NW 569
See Goodlove v Logan, 217-98; 251 NW 39

1793 Information—venue.

Atty. Gen. Opinion. See '34 AG Op 246

1794 Presumptive evidence.

Atty. Gen. Opinions. See '25-26 AG Op 478; '32 AG Op 180

TERRITORIES, OPEN SEASONS, BAG AND POSSESSION LIMITS FOR GAME

1794.011 Restrictions.

Atty. Gen. Opinion. See '28 AG Op 106

1794.013 Selling birds.

Atty. Gen. Opinion. See '32 AG Op 182

SCIENTIFIC COLLECTING

1794.027 License.

Atty. Gen. Opinion. See '32 AG Op 239

ANGLING LAWS

1794.029 Seasons and limits.

Atty. Gen. Opinions. See '30 AG Op 128, 308

1794.034 Hooks.

Atty. Gen. Opinion. See '30 AG Op 153

1794.038 Unlawful means—exception.

Possession of seine. The possession of a seine is not a criminal offense irrespective of the intent and purpose attending such possession.

State v Zellmer, 202-638; 210 NW 774

TRAPPING OF FUR-BEARING ANIMALS

1794.049 Open seasons.

Atty. Gen. Opinions. See '25 AG Op 263; '28 AG Op 62, 187

1794.053 Shooting or spearing.

Atty. Gen. Opinion. See '30 AG Op 240

FUR DEALERS

1794.057 Agent's license.

Atty. Gen. Opinion. See AG Op Sept. 13, '39

1794.058 Possession by dealer.

Atty. Gen. Opinion. See '30 AG Op 79

COMMERCIAL FISHING

1794.068 Nets or seines.

Atty. Gen. Opinion. See '30 AG Op 363

Possession of seine. The possession of a seine is not a criminal offense irrespective of the intent and purpose attending such possession.

State v Zellmer, 202-638; 210 NW 774

1794.071 Nets permitted in boundary rivers—license.

Contradictory state policies. The state of Nebraska may validly prohibit the use of nets and seines in the taking of fish from that part of the Missouri river which lies within its boundary, notwithstanding the fact that the state of Iowa authorizes such use in that part of the river which lies within its boundary.

Miller v McLaughlin, 281 US 261

1794.074 Catching in boundary rivers.

Fishing regulations on boundary river—rights within territorial limits. The grant of concurrent jurisdiction to two states over a river, the middle of the channel of which is the boundary line between them, does not preclude one of them, without concurrence of the other, from regulating fishing by its own residents in that part of the river that is within its own territorial limits.

Miller v McLaughlin, 281 US 261

1794.077 Sale of fish.

Atty. Gen. Opinion. See '38 AG Op 343

1794.079 Wholesale license.

Atty. Gen. Opinions. See '25 AG Op 497; '38 AG Op 343

CHAPTER 86.1

FISH AND GAME LICENSES AND CONTRABAND ARTICLES AND GUNS

1794.082 Licenses.

Atty. Gen. Opinions. See '25 AG Op 97; '28 AG Op 158; '30 AG Op 164; AG Op Sept. 13, '39

Right to kill—absence of hunter's license—effect. On the issue whether a defendant had a legal right to kill an unlicensed dog, the fact that the defendant possessed no hunter's license is quite immaterial.

Mendenhall v Struck, 207-1094; 224 NW 95

1794.086 Fees.

Atty. Gen. Opinions. See '25 AG Op 93; '28 AG Op 381

1794.092 Form of license.

Atty. Gen. Opinion. See '30 AG Op 164

1794.098 License not required.

Atty. Gen. Opinions. See '28 AG Op 289; '32 AG Op 137; '36 AG Op 128

1794.099 Public nuisance.

Possession of seine. The possession of a seine is not a criminal offense irrespective of the intent and purpose attending such possession.

State v Zellmer, 202-638; 210 NW 774

1794.104 Manner of conveyance.

Atty. Gen. Opinions. See '28 AG Op 289; '32 AG Op 148

CHAPTER 87

CONSERVATION AND PUBLIC PARKS

1797 Secretary.

Atty. Gen. Opinion. See '36 AG Op 146

1799 Duties as to parks.

Atty. Gen. Opinions. See '32 AG Op 187; '36 AG Op 615

1799.1 Construction permit — regulations.

Atty. Gen. Opinions. See '28 AG Op 222, 272; '30 AG Op 109, 364; '32 AG Op 71; '34 AG Op 258, 499; AG Op Jan. 26, '40

1799.2 Obstruction removed.

Atty. Gen. Opinion. See AG Op Jan. 26, '40

1800 Eminent domain.

Atty. Gen. Opinions. See '34 AG Op 340, 350; '36 AG Op 193

1801 Highways.

Atty. Gen. Opinion. See '25-26 AG Op 138

1803 Title to lands.

Atty. Gen. Opinions. See '34 AG Op 306, 350, 357, 370

1804 Gifts.

Atty. Gen. Opinions. See '34 AG Op 357, 370; '38 AG Op 143

1805 Conditions—lands.

Atty. Gen. Opinions. See '34 AG Op 357, 370; '36 AG Op 55; '38 AG Op 143

1806 Conditions—personalty.

Atty. Gen. Opinions. See '34 AG Op 357; '36 AG Op 55

1807 Reversion of gift.

Atty. Gen. Opinion. See '36 AG Op 55

1812 Jurdisdiction.

Atty. Gen. Opinions. See '28 AG Op 118, 222, 272, 273, 320; '30 AG Op 300; '32 AG Op 159; '34 AG Op 251, 308; '38 AG Op 352, 784, 791, 897; AG Op Jan. 26,'40

Construction of wharf—paramount right of state. The construction by the state of a wharf below high watermark on a navigable lake (to the bed of which the state has title), in aid of navigation, and without compensation to the riparian owner, is but the exercise of a right and the execution of a trust which is paramount to any right of ingress and egress of said riparian owner.

Peck v Const. Co., 216-519; 245 NW 131; 89 ALR 1132

Wharf—what constitutes. The character of a public wharf in a navigable lake as an aid to navigation is not negatived by the fact that the wharf is in good faith so constructed in a circular form that vehicles going upon the wharf may conveniently turn and depart therefrom.

Peck v Const. Co., 216-519; 245 NW 131; 89 ALR 1132

Dams—new high watermark—title of state. The state of Iowa by erecting a permanent dam in the bed of its navigable river, and by maintaining said dam peaceably and uninterruptedly for a period of ten years, legally extends its title to the new high watermark resulting from the erection of the dam; and especially may a private deed holder not complain when his deed, executed after the dam was erected, simply calls for land "up to the river".

State v Sorenson, 222-1248; 271 NW 234

1818 Boundaries—adjustment.

Atty. Gen. Opinion. See '38 AG Op 352

1819 Leases.

Atty. Gen. Opinions. See '28 AG Op 118, 201; '36 AG Op 615; '38 AG Op 143, 352

1822 Management by municipalities.

Atty. Gen. Opinions. See '34 AG Op 306, 350

1822.1 Expenditure by cities.

Atty. Gen. Opinions. See '34 AG Op 306, 350, 414

1822.2 Limitation on expenditures.

Atty. Gen. Opinion. See '34 AG Op 306

1822.3 City funds available.

Atty. Gen. Opinion. See '34 AG Op 306

1823 Sale of islands.

Atty. Gen. Opinions. See '30 AG Op 300, 364; '36 AG Op 399; '38 AG Op 352

1824 Sale of park lands.

Atty. Gen. Opinions. See '34 AG Op 251; '36 AG Op 52; '38 AG Op 352, 897

1825 Form of conveyance.

Atty. Gen. Opinions. See '38 AG Op 352, 897

1827 Powers in municipalities.

Atty. Gen. Opinions. See '25-26 AG Op 415; '34 AG Op 306

CHAPTER 87.1

DAMS AND SPILLWAYS

Atty. Gen. Opinions. See '34 AG Op 480; AG Op Feb. 9, '39

CHAPTER 88

FENCES

Atty. Gen. Opinion See '34 AG Op 396

1829 Partition fences.

Estrays and trespassing animals. See under §§2979–3028

Discussion. See 7 ILB 176—Fencing laws

Injunction unallowable. In the absence of a division of a partition fence by agreement of the parties or by proper order of the fence viewers, either of the adjoining owners has the right to build and maintain all or any part of the fence; and an injunction which curtails such right is unallowable.

Sinnott v Dist. Court, 201-292; 207 NW 129

Maintenance—oral agreement. Principle reaffirmed that adjoining property owners may validly bind themselves by oral contract to maintain designated portions of partition fences.

Nichols v Fierce, 202-1358; 212 NW 151

Landowner's right to legal division. In a line fence controversy where the evidence shows there had never been any legal division of fences, the fact that the fences had been maintained by the respective owners of the real estate for many years does not bar the adjoining landowners from having a legal division made at any time they desire, and a finding that there had never been a legal division of fences, held sustained by evidence.

Morrison v Kipping, 227-1146; 290 NW 59

1831 Powers of fence viewers.

Atty. Gen. Opinion. See '34 AG Op 396

Admission in re jurisdiction — effect. An admission of record by a party, of the existence of a fact upon which jurisdiction of fence viewers depends, manifestly renders further testimony of such fact unnecessary.

Gavin v Linnane, 206-917; 221 NW 462

"Controversy" — jurisdiction. Written request by one landowner to an adjoining landowner to maintain his portion of a partition fence is essential, to create a "controversy" and to invest the fence viewers with jurisdiction to act.

Sinnott v Dist. Court, 201-292; 207 NW 129
Nichols v Fierce, 202-1358; 212 NW 151

Township trustees—right to divide fences not limited by property owner's notice. Where a property owner served notice on township trustees that adjoining owners had refused to maintain their share of division line fences, and the adjoining owners claimed no legal division of such fences had ever been made and asked that a division be made, trustees had authority under the statute to make a legal division and were not limited by the notice given by the complaining property owner.

Morrison v Kipping, 227-1146; 290 NW 59

Landowner's right to legal division. In a line fence controversy where the evidence shows there had never been any legal division of fences, the fact that the fences had been maintained by the respective owners of the real estate for many years does not bar the adjoining landowners from having a legal division made at any time they desire, and a finding that there had never been a legal division of fences, held sustained by evidence.

Morrison v Kipping, 227-1146; 290 NW 59

1832 Decision.

Township trustees—right to divide fences not limited by property owner's notice. Where a property owner served notice on township trustees that adjoining owners had refused to maintain their share of division line fences, and the adjoining owners claimed no legal division of such fences had ever been made and asked that a division be made, trustees had authority under the statute to make a legal division and were not limited by the notice given by the complaining property owner.

Morrison v Kipping, 227-1146; 290 NW 59

1834 Default—damages and fees collected as taxes.

Atty. Gen. Opinion. See '38 AG Op 473

1837 Notice.

Atty. Gen. Opinion. See '34 AG Op 396

1840 Division by agreement—record.

Landowner's right to legal division. In a line fence controversy where the evidence shows there had never been any legal division of fences, the fact that the fences had been maintained by the respective owners of the real estate for many years does not bar the adjoining landowners from having a legal division made at any time they desire, and a finding that there had never been a legal division of fences, held sustained by evidence.

Morrison v Kipping, 227-1146; 290 NW 59

Township trustees—right to divide fences not limited by property owner's notice. Where a property owner served notice on township trustees that adjoining owners had refused to maintain their share of division line fences, and the adjoining owners claimed no legal division of such fences had ever been made and asked that a division be made, trustees had authority under the statute to make a legal division and were not limited by the notice given by the complaining property owner.

Morrison v Kipping, 227-1146; 290 NW 59

1841 Orders and agreements—effect.

Enforceable oral agreement — statute of frauds. An oral agreement to change a long established boundary fence is enforceable when taken out of the statute of frauds (1) by the mutual taking of a new survey, (2) by the building of a new fence in accordance with the said survey, and (3) by taking possession of the lands inclosed by such new fence.

Cheshire v McCoy, 205-474; 218 NW 329

Unenforceable oral agreement. A naked oral agreement to change an established boundary line is unenforceable.

Stone v Richardson, 206-419; 218 NW 332

1851 Appeal.

Fence viewers — appeal from confirming order. Only questions of law will be considered on appeal from an order by the trial court which confirms the decision of fence viewers.

In re Fence Dispute, 204-1072; 216 NW 673

Triable at law—trial court's findings—conclusiveness. Since an appeal to district court from decision of fence viewers is triable as a law action to a jury, if demanded, the supreme court will not interfere with verdict if there is substantial evidence to sustain it. Hence, where parties waived jury on trial of such appeal, the trial court's decision, supported by sufficient evidence, was necessarily affirmed.

Moore v Short, 227-380; 288 NW 407

Belated presentation of error point. On appeal from an order by the district court in fence-viewing proceedings, the appellant may not, for the first time, present the claim that the orders of the fence viewers relative to a tight fence were erroneous, and that the district court should have corrected the error.

Gavin v Linnane, 206-917; 221 NW 462

Certiorari. Certiorari will lie to review the proceedings of township trustees in acting as fence viewers without jurisdiction of the subject matter, even tho an appeal is provided for in such proceedings.

Sinnott v Dist. Court, 201-292; 207 NW 129

CHAPTER 89

CIVIL ENGINEERS

Atty. Gen. Opinions. See '32 AG Op 58; '34 AG Op 133; '36 AG Op 451

1854 Registered engineers and surveyors.

Atty. Gen. Opinions. See '32 AG Op 58; '34 AG Op 133, 477

Municipal corporation—engineer's opinion on construction of approach to sidewalk. A municipality is not bound to construct an approach from street to sidewalk differently because some engineer other than its own thought some other method would be better, so where a pedestrian, who was familiar with such approach, who admitted that there was plenty of room for a pedestrian to pass on meeting two other pedestrians in broad daylight, and who without thought or attention stepped off approach and fell, such pedestrian was guilty of contributory negligence precluding recovery for personal injuries.

Hoffman v Sioux City, 227-1131; 290 NW 62

1855 Terms defined.

Atty. Gen. Opinions. See '34 AG Op 133, 477

Limitation of actions—amendments containing "thread" of original claim not barred. In an action for compensation for professional engineering services involved in construction of a sewage disposal plant, profuse substitutions and amendments to a petition which keep a thread of thought identifying them with the claim in the original notice, tho not filed within the allowable period of the statute of limitations, come within the rule that commencement of the action tolls the statute.

Slippy Co. v Grinnell, 224-212; 276 NW 58

1861 Compensation and expenses.

Atty. Gen. Opinions. See '32 AG Op 258; '36 AG Op 35

1862 Organization of the board—meetings—quorum.

Atty. Gen. Opinions. See '36 AG Op 35; AG Op April 19, '39, May 9, '39

1863 Annual report.

Atty. Gen. Opinions. See '32 AG Op 258; '36 AG Op 35

1864 Secretary—duties of.

Atty. Gen. Opinions. See '30 AG Op 375; '36 AG Op 35

1865 Engineering examiners fund.

Atty. Gen. Opinion. See '36 AG Op 35

1868 Seal—certificate evidence of registration.

Atty. Gen. Opinion. See '36 AG Op 421

1869 Certificate.

Atty. Gen. Opinions. See '30 AG Op 375; '32 AG Op 58

1869.1 Expirations and renewals.

Atty. Gen. Opinions. See '30 AG Op 296, 375

1870 Land surveyor's certificate.

Atty. Gen. Opinions. See '30 AG Op 296; '32 AG Op 58

1872 Revocation of certificate.

Atty. Gen. Opinion. See '32 AG Op 266

1873 Procedure.

Atty. Gen. Opinions. See '32 AG Op 266; AG Op April 19, '39

1874 Expenditures.
Atty. Gen. Opinion. See '34 AG Op 168

1875 Injunction.
Atty. Gen. Opinions. See '28 AG Op 354; '30 AG Op 151; '36 AG Op 451

1875.1 Violations.
Atty. Gen. Opinion. See AG Op April 19, '39

1876 Applicability of chapter.
Atty. Gen. Opinions. See '28 AG Op 354; '32 AG Op 58; '34 AG Op 133

CHAPTER 90

CERTIFIED SHORTHAND REPORTERS

Atty. Gen. Opinion. See '36 AG Op 35

CHAPTER 91.1

ACCOUNTANCY

Atty. Gen. Opinions. See '30 AG Op 108, 189, 210

1905.04 No compensation—expenses.
Atty. Gen. Opinion. See '36 AG Op 35

1905.06 Definitions.
Atty. Gen. Opinion. See AG Op April 6, '39

1905.07 Other terms defined.
Atty. Gen. Opinion. See '30 AG Op 210

1905.08 Examination.
Atty. Gen. Opinions. See '30 AG Op 63; AG Op April 6, '39

1905.09 Qualifications for examination.
Atty. Gen. Opinion. See '38 AG Op 153

1905.17 Unlawful practice.
Atty. Gen. Opinion. See AG Op April 6, '39

CHAPTER 91.2

REAL ESTATE BROKERS

Atty. Gen. Opinions. See '34 AG Op 274, 744; '36 AG Op 361, 428; '38 AG Op 45, 77, 345, 687

1905.20 License required.
Atty. Gen. Opinions. See '34 AG Op 743; '36 AG Op 85, 428, 457; '38 AG Op 687

1905.21 License to legal entity.
Atty. Gen. Opinions. See '34 AG Op 209, 743; '36 AG Op 457

1905.22 "Salesman" defined.
Atty. Gen. Opinions. See '34 AG Op 455, 476; '36 AG Op 428, 457; '38 AG Op 687

Principal and agent—secret limitation on authority—estoppel to assert. A land agent for an insurance company, when his conduct and that of the company lead the public to believe that he has authority to contract to sell the company's land and in many instances does write such contracts, will not be permitted to avoid an obligation through a secret limitation on the power not known by a prospective purchaser.

Hotz v Equitable, 224-552; 276 NW 413

1905.23 Nonapplicability of chapter.
Atty. Gen. Opinions. See '34 AG Op 455, 476, 744; '36 AG Op 85, 428; '38 AG Op 687

1905.24 Real estate commissioner.
Atty. Gen. Opinions. See '34 AG Op 274; '38 AG Op 345

1905.26 Fees and expenses.
Atty. Gen. Opinion. See '38 AG Op 77

1905.30 Rules and regulations.
Atty. Gen. Opinion. See '34 AG Op 135

1905.31 Hearing.
Atty. Gen. Opinion. See '34 AG Op 135

1905.36 Re-investigation.
Atty. Gen. Opinion. See '34 AG Op 135

1905.41 Action for commission.
Brokers and commission contracts generally. See under Ch 420, note 1(XI)

Discussion. See 1 ILB 188—Revocability of parol license

Status as licensee—failure to allege—effect. The failure of a broker in his petition for the recovery of commission to allege his status as a duly licensed broker, is quite harmless (1) when the petition is not attacked because of such omission, and (2) when the evidence, received without objection, clearly establishes such status.

Baehr-Shive Co. v Stoner-McCray, 221-1186; 268 NW 53

Prima facie right to a commission. A licensed real estate broker makes a prima facie showing for the recovery of a commission for effecting a sale of property on proof that he was employed by one of two owners of the property to find a purchaser at a stated price; that the other owner knew of such employment and assisted the broker in showing the property

to a prospect obtained by the broker; that the prospect offered to buy at said stated price; that thereupon one of the owners demanded an increased price to which the prospect finally acceded in part and actually bought the property.

Wareham v Atkinson, 215-1096; 247 NW 534

Employment—failure to show agency. A broker is not entitled to recover a commission on the ground that he procured a purchaser for property when he fails to show, expressly or impliedly, any agency to find such purchaser.

Reeve v Shoemaker, 200-983; 205 NW 742; 43 ALR 839

Dispute in evidence—jury question. Evidence that defendant orally agreed to pay plaintiff a commission to assist in the sale of gypsum lands upon which plaintiff held drill plats, that agents of purchaser conferred with plaintiff and examined the plats, coupled with a denial by defendant that plaintiff accepted the offer or assisted in consummating the sale, presents a question determinable by the jury.

Maher v Breen, 224-8; 276 NW 52

Powers of agent—apparent authority. An owner of land who authorizes his agent (1) to contract with a broker for sale of the land and (2) to pay the broker a specified and limited compensation is bound by the agreement of his agent to pay the broker a greater commission when the broker had no knowledge of such limited authority.

Boylan v Workman, 206-469; 220 NW 49

Authority—revocation by death of agent. The authority of a broker to find a purchaser for the owner of property is necessarily revoked by the death of the agent, and this is true when the broker is a partnership and a member thereof dies.

Reeve v Shoemaker, 200-983; 205 NW 742; 43 ALR 839

Agency revocation—nonpleaded issues—nonreview. In an action for real estate commission, contentions as to revocation of the agency arising from disposal of the subject matter of the agency and mental incapacity and death of one of the joint principals before the sale by the agent, will not be considered on appeal when the pleadings show no issue thereon but the action is on a contract allegedly personally made with the defendant.

Maher v Breen, 224-8; 276 NW 52

Broker as nonprocuring cause. A broker is not entitled to a commission when he was not the procuring cause of the sale.

Reeve v Shoemaker, 200-983; 205 NW 742; 43 ALR 839

Procuring cause—burden of proof. In an action by a real estate broker for commission he has burden to prove that he was the efficient and procuring cause of the sale.

Donahoe v Denman, 223-1273; 275 NW 154

Establishing "efficient and procuring cause"—presumption not jury question. In an action by a real estate broker for commission on the theory that he was the efficient and procuring cause for a sale, his showing that he was authorized to sell and had contacted a buyer who afterward purchased directly from the owner, raises no jury question but only a rebuttable presumption which defendant successfully rebuts by direct evidence to the contrary.

Donahoe v Denman, 223-1273; 275 NW 154

Finding sustained by evidence—intervening agent negotiating and consummating sale. In a law action by real estate agent to recover commission for negotiating sale of realty, which had been listed with several brokers, where another agent intervenes claiming such commission, and evidence shows both agents were empowered to dispose of land at reduced price, held, evidence sustained finding of trial court that intervening agent was entitled to commission where he had conducted the preliminary negotiations and also consummated the sale. Broker claiming commission must show he was the efficient and procuring cause of the sale.

Armstrong v Smith, 227-450; 288 NW 621

Listing property for sale—several brokers. In an action at law to recover a real estate commission, plaintiff, who was merely influential in bringing about a sale of land which had been listed with several brokers, was not entitled to commission where he never notified owner's agent of his activities and a sale was negotiated and consummated by another agent. The agent who first procured the consent of the purchaser to enter into the contract on terms satisfactory to the seller was entitled to the commission.

Armstrong v Smith, 227-450; 288 NW 621

Land purchaser obtained by real estate agent. Where the defendant had sent circular letters to real estate agents, listing farms for sale and stating the commission to be paid for any farm sold, and the plaintiff obtained a prospective buyer for a certain farm, but the sale was consummated by another real estate agent to whom the commission was paid, the defendant was entitled to a directed verdict in an action to collect the commission.

Santee v Lutheran Society, 226-1109; 285 NW 685

Procuring cause—jury question. Evidence held to present a jury question on the issue whether a plaintiff broker was the procuring cause of the leasing of premises when the lease was made, not to the individual produced by the broker, but to an unincorporated entity.

Baehr-Shive Co. v Stoner-McCray, 221-1186; 268 NW 53

Contract to find purchaser—tentative offer—effect. The issue whether a broker found a purchaser ready, able, and willing to buy the prop-

erty of his principal is not affirmatively established by proof that the broker found one who made a tentative proposition to purchase, which was specifically dependent on a further investigation as to the legality and probable security of the property—an issue of bonds—which investigation the person making the offer never made.

MacVicar v Paving Corp., 201-355; 207 NW 378

Compensation—when earned. A broker's right to his commission for finding a purchaser attaches when the owner of the property, his principal, enters into an executory contract of sale with the purchaser, even tho the principal sees fit not to enforce the contract, or sees fit to modify it. Evidence held to establish such contract.

Scott v Realty Co., 206-1158; 221 NW 785

Instructions—burden of proof—issues correctly submitted. In a suit for breach of oral commission contract, instructions plainly stating that burden was on plaintiff to establish by a preponderance of evidence (1) the terms of his contract, and (2) that through his efforts a sale was "effected, obtained, and procured", reviewed and held to correctly submit the issues under the pleadings.

Maher v Breen, 224-8; 276 NW 52

Ambiguous clauses in contracts—interpretation. In an action at law to recover real estate commission under a written contract, which provided that commission would be due upon the signing of the agreement to which was added the words, "The commission being due and payable upon the transfer of properties," held, that the added phrase cannot be disregarded as being repugnant to the original provision providing for time of payment, but is interpreted as limiting earlier provision, and the payment of commission is due upon the execution of the contract together with a transfer of the properties.

Mealey v Kanealy, 226-1266; 286 NW 500

Sale by owner. An owner of property may in good faith effect a sale of his own property without liability to a broker with whom the owner has expressly or impliedly listed it.

Reeve v Shoemaker, 200-983; 205 NW 742; 43 ALR 839

Sale by owner. Contract reviewed, and held to obligate the owner of property to pay a commission in case the owner himself sold the property during the period for which the property was listed with the broker.

Milligan Co. v Claiborne, 213-1088; 240 NW 694

Reformation of broker's contract. A court of equity abuses its discretion when it refuses to reform a written contract wherein the owner of property lists it with a broker for sale and binds himself to pay a commission in case a sale is made, even by himself, when it is shown, by clear, satisfactory, and convincing testimony, that the oral preliminary contract which the parties attempted to reduce to writing embraced the definite, mutual understanding that no commission would be payable if the owner made a sale to his then tenant, and that said understanding was inadvertently omitted from said writing. (In this case the owner made a sale to his tenant and was later sued by the broker for a commission.)

Milligan Co. v Lott, 220-1043; 263 NW 262

Compensation—subterfuge to defeat. An owner of property who has contracted to sell to a purchaser found by his broker cannot defeat the broker's right to commission by selling to a third party and having such third party complete the deal with the original purchaser.

Scott v Realty Co., 206-1158; 221 NW 785

Compensation of agent—nondual employment. The fact that different property owners employ the same rental agent to obtain the same tenant does not constitute such a dual employment as to deprive the agent of his compensation from the owner for whom a lease is obtained.

Foley v Mathias, 211-160; 233 NW 106; 71 ALR 696

Quantum meruit—irrelevant testimony. In an action by a broker to recover commission on a basis of quantum meruit, evidence is properly rejected as to the compensation generally received by brokers when they work by the day, the actual evidence received fairly showing that the customary method of employment of brokers was on a commission basis.

Baehr-Shive Co. v Stoner-McCray, 221-1186; 268 NW 53

Broker's claim against intervening broker—evidence warranting dismissal. In an action to recover real estate commission, the dismissal of one real estate broker's claim against an intervening real estate broker was proper under the evidence where no showing was made of any agreement for the payment of a definite amount.

Armstrong v Smith, 227-450; 288 NW 621

1905.42 Place of business.

Atty. Gen. Opinion. See AG Op Jan. 12, '39

1905.45 Revocation or suspension.

Atty. Gen. Opinion. See '36 AG Op 457

1905.46 Hearings.

Atty. Gen. Opinions. See '34 AG Op 135; '38 AG Op 38, 345

1905.47 Procedure.

Atty. Gen. Opinion. See '34 AG Op 274

1905.53 Findings of fact.

Atty. Gen. Opinions. See '38 AG Op 38, 345

1905.54 Nonresidents.

Atty. Gen. Opinions. See '36 AG Op 85; AG Op Jan. 12, '39

1905.56 Violations.

Atty. Gen. Opinions. See '36 AG Op 361; '38 AG Op 45

CHAPTER 91.3

REGISTERED ARCHITECTS

Atty. Gen. Opinions. See '28 AG Op 312; '36 AG Op 35

CHAPTER 93

ORGANIZATIONS SOLICITING PUBLIC DONATIONS

Atty. Gen. Opinions. See AG Op Jan 5, '39

TITLE VI

ALCOHOLIC BEVERAGES

Atty. Gen. Opinions. See '25-26 AG Op 201; '34 AG Op 418

CHAPTER 93.1

IOWA LIQUOR CONTROL ACT

Atty. Gen. Opinions. See '34 AG Op 577, 649, 682, 704, 707; '36 AG Op 5, 6, 76, 218, 349, 499, 566; '38 AG Op 117, 392

1921.001 Public policy declared.

Atty. Gen. Opinion. See AG Op Jan. 25, '39

History of Iowa beer law discussed.

State v Talerico, 227-1315; 290 NW 660

1921.003 General prohibition.

Atty. Gen. Opinions. See '34 AG Op 693; '36 AG Op 566; '38 AG Op 392

Illegal possession — containers without official seals. It is unlawful to possess in this state intoxicating liquors (except beer) in containers to which are not affixed the official seals or labels prescribed by the Iowa liquor control commission; and this is true irrespective whether said liquors were or were not bought or sold in Iowa.

State v Johnson, 222-1204; 271 NW 223

Intent to sell — possession as evidence. The possession of intoxicating liquors may be attended by such circumstances as to justify the jury in finding that such possession was with criminal intent on the part of the possessor to sell.

State v Arluno, 222-1; 268 NW 179

Self-incrimination. The statutory declaration that the finding of intoxicating liquors in the possession of a person under search warrant proceedings, when the liquors have been adjudged forfeited, shall be prima facie evidence that said person was maintaining a nuisance, does not violate the right of said person not to be a witness against himself.

State v Bruns, 211-826; 232 NW 684

Unlawful transportation—sufficiency of evidence. Examination of record on appeal from conviction for unlawful transportation of intoxicating liquor, as required by statute, disclosed sufficient evidence to sustain the conviction.

State v Korbel, 226-676; 284 NW 458

1921.005 Definitions.

Atty. Gen. Opinion. See '38 AG Op 392

Beer as intoxicating liquor. In prosecution for driving a motor vehicle while intoxicated, the refusal of accused's requested instruction that beer is not an intoxicating liquor held not error.

State v McGregor, (NOR); 266 NW 22

1921.015 Place of business.

Atty. Gen. Opinions. See '36 AG Op 349; '38 AG Op 277

1921.016 Powers.

Atty. Gen. Opinions. See '34 AG Op 649, 682; '36 AG Op 349; '38 AG Op 277

1921.017 Rules and regulations.

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

1921.024 Restrictions on sales—seals—labeling.

Illegal possession — containers without official seals. It is unlawful to possess in this state intoxicating liquors (except beer) in containers to which are not affixed the official seals or labels prescribed by the Iowa liquor control commission; and this is true irrespective whether said liquors were or were not bought or sold in Iowa.

State v Johnson, 222-1204; 271 NW 223

1921.036 Manufacturer's license.

Atty. Gen. Opinion. See '38 AG Op 392

1921.050 Fund.

Atty. Gen. Opinions. See '36 AG Op 349; '38 AG Op 117

1921.054 State monopoly.

State monopoly over importation. In view of the Wilson Act, and of the Webb-Kenyon Act (27 USC, §§121, 122) and of the decisions of the federal supreme court thereunder, and especially in view of the 21st Amendment to the federal constitution (effective Dec. 5, 1933), it is futile to contend that the state, by investing the Iowa liquor control commission with the sole and exclusive right to import into the state alcoholic liquors, has transcended its police powers and thereby violated the due process, equal protection, and interstate commerce clauses of the federal constitution.

State v Arluno, 222-1; 268 NW 179

1921.056 Native wines.

Atty. Gen. Opinion. See AG Op May 19, '39

1921.058 Auditing.

Atty. Gen. Opinion. See '38 AG Op 117

1921.060 Nuisances.

Evidence—sufficiency. Record reviewed, and held to sustain a verdict of guilty of maintaining an intoxicating liquor nuisance, especially against the claim that the accused was not the proprietor of the place.

State v Olson, 200-660; 204 NW 278

Facts attending search warrant proceedings. Disputed questions of fact upon the determination of which depends the right of the jury to consider search warrant proceedings on the issue of the defendant's guilt of maintaining a nuisance are properly submitted to the jury for determination.

State v Bruns, 211-826; 232 NW 684

Intent to sell — instructions. Instructions reviewed at length, and as a whole, and held fully to protect the accused against a conviction regardless of criminal intent.

State v Arluno, 222-1; 268 NW 179

Self-incrimination. The statutory declaration that the finding of intoxicating liquors in the possession of a person under search warrant proceedings, when the liquors have been adjudged forfeited, shall be prima facie evidence that said person was maintaining a nuisance does not violate the right of said person not to be a witness against himself.

State v Bruns, 211-826; 232 NW 684

1921.062 Injunction.

Bootleggers, injunction. See under §§1927, 2017, 2031

Nonright of private citizen. A private citizen has no right—since the enactment of the liquor control act, Ch. 93-F1, C., '35 [Ch 93.1, C., '39]—to institute an action to enjoin the maintenance of an intoxicating liquor nuisance which affects him only as one of the general body of citizens.

Doebler v Dodge, 223-218; 272 NW 144

No reinstatement of nol-prossed indictment. An indictment against a corporation for maintaining a liquor nuisance, nol-prossed without fraud at the sole instance of the county attorney, on the mistaken assumption that defendant was not a corporation and, therefore, could not be held to answer, may not later be reinstated when it is discovered that defendant is in fact a corporation. (Keokuk v Schultz, 188 Iowa 937, overruled in part.)

State v Veterans, 223-1146; 274 NW 916; 112 ALR 383

State v Moose, 223-1146; 274 NW 918

1921.071 Injunction against bootlegger.

Bootleggers, injunction. See under §§1927, 2017, 2031

1921.092 Violations by members and employees—acceptance of bribe.

Indictment—fatal insufficiency. An indictment which alleges that a member of the Iowa liquor control commission knowingly and willingly permitted a named person unlawfully to possess intoxicating liquors (other than beer), charges no offense under §1921-f92, C., '35, in the absence of an allegation that said possessor was a member, or secretary, or officer, or employee of said commission. The term "such violation" in said section refers solely to violation by members, by the secretary, by officers, or by employees, of the commission.

State v Cooper, 221-658; 265 NW 915

1921.093 Duty of county attorney and peace officers.

Atty. Gen. Opinion. See '36 AG Op 459

CHAPTER 93.2

BEER AND MALT LIQUORS

Atty. Gen. Opinions. See '34 AG Op 474, 479, 499, 558, 571, 606, 607, 621, 636, 695; '36 AG Op 54, 178, 458; '38 AG Op 35, 110, 210, 232, 371, 392, 447, 522

1921.095 Permit required.

History of Iowa beer law discussed.

State v Talerico, 227-1315; 290 NW 660

1921.096 Definitions.

Atty. Gen. Opinions. See '34 AG Op 474, 636; '36 AG Op 189; '38 AG Op 178, 392

1921.097 Permits — classes of — state permit board.

Atty. Gen. Opinion. See '38 AG Op 210

1921.099 Power to issue permits.

Atty. Gen. Opinions. See '34 AG Op 491; '38 AG Op 210, 390, 452, 463, 479, 529; AG Op Feb. 9, '39, Sept. 14, '39

Permit — refusal — mandamus. The good-faith exercise of the discretion vested in a town council to refuse an application for a class "B" permit to sell beer on the ground that the applicant is not "of good moral character and repute" is not controllable by mandamus.

Madsen v Oakland, 219-216; 257 NW 549

Proceedings of council — ordinance — arbitrary action. A mayor, exercising his power under an ordinance to direct the nonissuance of a license, may not be said to act "arbitrarily" when he, in accordance with the ordinance, notifies the applicant of the time and place of hearing on the application and when the applicant ignores the notice.

Talarico v Davenport, 215-186; 244 NW 750

1921.100 Tenure—character of permittee.

Atty. Gen. Opinions. See '36 AG Op 302; '38 AG Op 178, 202; AG Op Sept. 20, '39

1921.101 Tenure.

Atty. Gen. Opinion. See '36 AG Op 159

1921.102 Prohibited interest.

Atty. Gen. Opinion. See '38 AG Op 447

1921.103 Class "A" application.

Atty. Gen. Opinion. See '38 AG Op 463

1921.104 Class "B" application.

Atty. Gen. Opinions. See '36 AG Op 190; '38 AG Op 178, 232, 293, 371, 463; AG Op Jan. 18, '39, March 9, '39, May 11, '39

1921.105 Class "C" application.

Atty. Gen. Opinions. See '38 AG Op 293, 463

1921.106 Authority under class "A" permit.

Atty. Gen. Opinion. See '38 AG Op 392

1921.107 Authority under class "B" permit.

Atty. Gen. Opinions. See '34 AG Op 479, 499, 558; '38 AG Op 335

1921.108 Authority under class "C" permit.

Atty. Gen. Opinions. See '34 AG Op 499; '38 AG Op 480

1921.109 Sale on trains—bond.

Atty. Gen. Opinion. See '36 AG Op 7

1921.110 Permits to clubs.

Atty. Gen. Opinions. See '36 AG Op 151, 153; '38 AG Op 335, 529; AG Op Dec. 20, '39

1921.111 Class "B" permits.

Atty. Gen. Opinions. See '34 AG Op 603; '36 AG Op 151, 153; '38 AG Op 202, 335, 344, 452, 529; AG Op Jan. 20, '39, Dec. 20, '39

1921.112 Application.

Atty. Gen. Opinions. See '36 AG Op 151, 153, 159

1921.114 Sales by hotels.

Atty. Gen. Opinion. See '36 AG Op 190

1921.115 Prohibited sales and advertisements.

Atty. Gen. Opinions. See '36 AG Op 190; '38 AG Op 480, 662

1921.117 Brewers, etc.—prohibited interest.

Atty. Gen. Opinion. See '38 AG Op 447

1921.119 Fees.

Atty. Gen. Opinions. See '36 AG Op 153, 159, 190; '38 AG Op 335, 350; AG Op Aug. 19, '39, Sept. 20, '39

1921.120 Barrel tax.

Atty. Gen. Opinion. See AG Op Jan. 18, '39

1921.123 Separate locations—class "A"

Constitutionality—title of act—sufficiency. Section 1921.126, C., '39, forbidding the keeping of intoxicating liquor where beer is sold, is not unconstitutional as violating constitutional provision requiring that the title of every legislative act embrace but one subject, since such subject is germane to an act relating to the sale of 4 percent beer.

State v Talerico, 227-1315; 290 NW 660

1921.124 Separate locations — class "B" or "C".

Atty. Gen. Opinions. See '38 AG Op 232, 522

1921.125 Mandatory revocation.

Atty. Gen. Opinion. See '38 AG Op 447

History of Iowa beer law discussed.

State v Talerico, 227-1315; 290 NW 660

1921.126 Alcoholic content.

Atty. Gen. Opinion. See '38 AG Op 232

History of Iowa beer law discussed.

State v Talerico, 227-1315; 290 NW 660

Constitutionality—title of act—sufficiency. Section 1921.126, C., '39, forbidding the keeping of intoxicating liquor where beer is sold, is not unconstitutional as violating constitutional provision requiring that the title of every legislative act embrace but one subject, since such subject is germane to an act relating to the sale of 4 percent beer.

State v Talerico, 227-1315; 290 NW 660

1921.129 Power of municipalities.

Atty. Gen. Opinions. See '38 AG Op 35, 110, 350, 371, 480, 522, 549; AG Op May 11, '39; AG Op April 24, '40

Permit—refusal—mandamus as remedy. The good-faith exercise of the discretion vested in a town council to refuse an application for a class "B" permit to sell beer, on the ground that the applicant is not "of good moral character and repute", is not controllable by mandamus.

Madsen v Oakland, 219-216; 257 NW 549

Proceedings of council—ordinance—arbitrary action. A mayor, exercising his power under an ordinance to direct the nonissuance of a license, may not be said to act "arbitrarily" when he, in accordance with the ordinance, notifies the applicant of the time and place of hearing on the application and when the applicant ignores the notice.

Talarico v Davenport, 215-186; 244 NW 750

1921.130 Closing hours.

Atty. Gen. Opinion. See AG Op Jan. 20, '39

1921.131 Bottling beer.

Atty. Gen. Opinion. See '36 AG Op 197

1921.132 Violations.

Atty. Gen. Opinion. See '38 AG Op 447

1921.133 Labels on bottles, barrels, etc.—conclusive evidence.

Atty. Gen. Opinions. See '34 AG Op 474; '38 AG Op 337

CHAPTER 94

GENERAL PROHIBITIONS

1922 Interpretation.

Discussion. See 3 ILB 145—Webb-Kenyon Law; 3 ILB 221—State Power; 15 ILR 120—Jones-Stalker Act; 17 ILR 76—Moral turpitude; 18 ILR 22—Volstead Act

Atty. Gen. Opinion. See '25-26 AG Op 201

Instructions proper. It is not erroneous to instruct in a prosecution under the intoxicating liquor statutes, in the language of the statute, "that courts and juries shall construe the laws in regard to intoxicating liquors so as to prevent evasions." (State v Parsons, 206-390; 220 NW 328 overruled.)

State v Matthes, 210-178; 230 NW 522

Construction of law by jurors. The statutory provision to the effect that courts and jurors shall construe the intoxicating liquor statutes so as to prevent evasions furnishes no justification whatever for instructing the jury to that effect.

State v Parsons, 206-390; 220 NW 328

Requested instruction refused. Requested instructions relative to the duty of courts and jurors so to construe the intoxicating liquor statutes as to prevent evasions are properly refused.

State v Dunham, 206-354; 220 NW 77

1923 Definition.

Atty. Gen. Opinions. See '34 AG Op 129, 138, 156, 621, 695

Beer not intoxicating liquor. In prosecution for driving a motor vehicle while intoxicated, the refusal of accused's requested instruction that beer is not an intoxicating liquor held not error.

State v McGregor, (NOR); 266 NW 22

1924 General prohibition.

Atty. Gen. Opinions. See '25-26 AG Op 92, 201, '34 AG Op 129, 138; '36 AG Op 566

Scope of statute. The words, "for any of the purposes herein prohibited" as employed in §1930, C., '27, embrace all the prohibitions enumerated in this section.

State v Bruns, 211-826; 232 NW 684

Indictment — surplusage. Under an indictment charging the unlawful possession of intoxicating liquors, the allegation that the possession was for certain unlawful purposes is pure surplusage.

State v Healy, 217-1155; 251 NW 649

Articles seized on search. In a prosecution for willful and unlawful possession of intoxicating liquors, a still seized, together with liquors, during a search of defendant's premises, is admissible over the general objections of incompetency, immateriality and irrelevancy.

State v Matthes, 210-178; 230 NW 522

Search without warrant. One who is shown to be a violator of the law relative to the sale and possession of intoxicating liquors will be accorded no standing in a court of equity in an action by him to enjoin peace officers from picketing his place of business, interfering

with his business, or searching his customers without a search warrant.

Dietz v Cavender, 201-989; 208 NW 354

Excusable or justifiable homicide — defense of intoxicating liquors. A person may validly resist an attempt to steal from him intoxicating liquors which are unlawfully in his possession, even tho the said liquor has no value in a commercial sense.

State v Shannon, 214-1093; 243 NW 507

Evidence—sufficiency. Evidence held ample to present a jury question on the issue of possession of intoxicating liquors; also of a still.

State v Trumbauer, 207-772; 223 NW 491
State v Bamsey, 208-796; 223 NW 873
State v Bruns, 211-826; 232 NW 684

Evidence—fatal insufficiency. Evidence that intoxicating liquors were found in the home of the head of a family is insufficient, in and of itself, on which to base a finding that a son, as a member of the family, was in possession of the liquor.

State v Friend, 207-742; 223 NW 546

Opinion evidence. The opinion of a properly qualified witness is admissible on the issue whether a certain liquid is alcohol.

State v Healy, 217-1155; 251 NW 649

Liquor exhibits admissible. On a prosecution for bootlegging, intoxicating liquors and the cans containing the same, seized at a house on premises not occupied by the accused, but from which the jury could find he had obtained like liquors the day previous with which to make an unlawful sale, are admissible as circumstances tending to support the main charge.

State v Madison, 215-182; 244 NW 868

Identification of liquors. An exhibit in the form of alleged intoxicating liquors which were seized under a search warrant, when otherwise fully identified, is not rendered inadmissible because the liquors were left for a very brief time with the justice of the peace under circumstances which render very remote the possibility of tampering.

State v Barton, 202-530; 210 NW 551

Failure to identify liquors. Exhibits, e. g., bottles and the contents thereof seized by the officers at the time of making a search of defendant's premises, are not admissible on the trial of the defendant unless they are properly identified and their integrity established.

State v Reid, 200-892; 205 NW 517

Exhibits—excluding evidentiary statements. Properly identified bottles and their intoxicating contents are not rendered inadmissible because the labels thereon contain evidentiary statements when the jury is instructed to disregard such statements.

State v Christensen, 205-849; 216 NW 710

Evidence—empty bottles, etc. On a charge of unlawful possession of intoxicating liquors, empty bottles are admissible in evidence when they were seized at the same time and place where other bottles of liquor were seized; likewise, what the accused said to the officers at the time of such seizure.

State v Bryant, 208-816; 225 NW 854
State v Salisbury, 209-139; 227 NW 589

Unlawful "dispensing." Evidence that an accused made known to others the location of a cache of intoxicating liquors, assisted in actually locating it, and thereupon, jointly with the other parties, consumed the liquors, presents a jury question on the issue of "unlawful dispensing" of such liquors.

State v Meyer, 203-694; 213 NW 220

Self-incrimination. The statutory declaration that the finding of intoxicating liquors in the possession of a person under search warrant proceedings, when the liquors have been adjudged forfeited, shall be prima facie evidence that said person was maintaining a nuisance, does not violate the right of said person not to be a witness against himself.

State v Bruns, 211-826; 232 NW 684

Possession—election between acts. The court need not require the state to elect, on an indictment charging illegal possession of intoxicating liquors, whether it will rely on possession in the defendant's shop or in his nearby chicken coop, the indictment not distinguishing between the different liquors in respect to the time or place of their possession.

State v Christensen, 205-849; 216 NW 710

Possession—futile defense. Justification of possession of one certain bottle of intoxicating liquor will not be justification of the possession of another and different bottle of such liquor.

State v Healy, 217-1155; 251 NW 649

Possession of liquor—third conviction—proof of prior convictions unnecessary under guilty plea. Where an indictment charged the defendant with committing the crime of unlawful possession of alcoholic liquor, and that he had been convicted on two previous occasions of liquor law violations, and when defendant pleaded guilty, trial court was under no duty to require proof of former convictions.

State v Erickson, 225-1261; 282 NW 728

Possession of still—permissible inference. The finding of a still buried on defendant's premises justifies an inference that the possessor of the premises was in possession of the still, and the court may very properly so instruct the jury.

State v Trumbauer, 207-772; 223 NW 491

Unlawful "possession." The unlawful possession of intoxicating liquors is a misdemeanor.

State v Boever, 203-86; 210 NW 571
State v Wareham, 205-604; 218 NW 145
State v Bamsey, 208-796; 223 NW 873

Unlawful possession—corpus delicti. The corpus delicti is established and a jury question presented on the charge of unlawful possession of intoxicating liquors, by evidence that the accused, when approached, threw from an automobile in which he was sitting, a bottle of such liquors, but did not break it, even tho there was no evidence that he was operating the vehicle.

State v Kirkman, 206-364; 220 NW 57

Unlawful possession—control of premises—effect. In a prosecution for possessing liquors unlawfully, it is proper to instruct the jury to convict the accused if he willfully and unlawfully had such liquors in his possession, and that in law he had such liquors in his possession if he had possession and control of the building or place where they were kept.

State v Matthes, 210-178; 230 NW 522

Innocent possession—instructions. In a prosecution charging the unlawful possession of intoxicating liquors, the court must, without request, instruct on the supported issue whether defendant was consciously in possession of the liquors found on his person.

State v Wheeler, 216-433; 249 NW 162

Innocent possession—instructions. Instructions which, in effect, direct the jury not to convict unless the possession of intoxicating liquors was "willful and unlawful" on the part of defendant, adequately protect him from a conviction in case his possession was an innocent possession—in case he had no knowledge of the presence of such liquors.

State v Matthes, 210-178; 230 NW 522

Unusual quantity in residence. Instructions are unobjectionable when to the effect that the finding of intoxicating liquors in the residence of the accused in an unusual or unreasonable quantity might be sufficient, with all the other circumstances in the case, to justify a finding that such liquors were being kept for sale.

State v Burch, 202-348; 209 NW 474

Time of commission of offense. An instruction justifying a conviction for possessing intoxicating liquors at any time within three years prior to the return of the indictment is unobjectionable, when the indictment, proof, and trial were exclusively centered on one particular transaction occurring during said period.

State v Healy, 217-1155; 251 NW 649

Trial—misconduct of jurors. In a prosecution for illegal possession of intoxicating liquors, statements by jurors to other jurors during the deliberation of the jury that defendant "does nothing but bootleg," and "is the king of bootleggers," constitute such misconduct as to require a new trial.

State v Clark, 210-724; 231 NW 450

1927 "Bootlegger" defined.

Atty. Gen. Opinions. See '25-26 AG Op 92; '34 AG Op 156

"Carrying on person" defined. An indictment for unlawfully "carrying around liquor on the person" is not supported by evidence which simply shows that the accused, when solicited to sell intoxicating liquors, went to an oat bin, dug up a bottle of such liquor, and from such bottle filled another bottle which he sold to the prosecuting witness.

State v Kenne, 200-1239; 206 NW 247
State v Webb, 204-135; 214 NW 568

Purchaser not particeps criminis. Purchaser of liquor from bootlegger held not an accessory or accomplice.

State v McMahon, (NOR); 211 NW 409

Proper indictment. Under §13737, C., '39, an indictment charging the commission of the offense of bootlegging by any and all of the means denounced by §1927 is proper.

State v McMahon, (NOR); 211 NW 409

Indictment—nonessential allegation. An indictment charging the bootlegging of intoxicating liquors need not allege the place where defendant intended to sell the liquors.

State v Bamsey, 208-802; 226 NW 57

Bootlegging—surplusage allegation. In a prosecution for bootlegging by carrying around liquors on one's person, that portion of the information which charges an actual sale may be treated as surplusage.

State v Parsons, 209-540; 228 NW 307

Election between different sales. On a prosecution for strict bootlegging, viz: carrying around liquors with the intent to sell, the state may not be compelled to elect between actual sales shown by it.

State v Dillard, 205-430; 216 NW 610

Evidence—sufficiency. Evidence reviewed and held sufficient to establish the intoxicating character of liquors sold, and to identify the accused as the seller.

State v Cambridge, 216-1422; 250 NW 731

Evidence as to the delivery of bottles and money. Evidence tending to show the passing of bottles by the accused to others, and the passing of money from such others to the accused, is admissible on a charge of bootlegging even tho such testimony is somewhat equivocal.

State v Smalley, 211-109; 233 NW 55

Sales as evidence of intent. The element in a charge of bootlegging of intent to sell may

be established by showing sales of intoxicating liquors by the accused.

State v Bamsey, 208-802; 226 NW 57

Circumstantial evidence. An indictment for bootlegging may be sustained by circumstantial evidence.

State v Plew, 207-624; 223 NW 362

Evidence—taste or smell of liquor. A witness may be permitted to testify that certain liquor smelled or tasted like alcohol.

State v Eggleston, 201-1; 206 NW 281
State v Ferro, 211-910; 232 NW 127

Conflicting evidence. Conflicting evidence reviewed, and held to sustain a conviction for bootlegging.

State v Weber, 204-137; 214 NW 531

Possession not prima facie evidence of guilt. Under a specific charge of bootlegging, the fact that intoxicating liquors were found in the possession of the accused is not prima facie evidence of his guilt.

State v Bamsey, 208-802; 226 NW 57

Accomplice. A witness may not be deemed an accomplice in the crime of bootlegging from the mere fact that, while riding with the accused, he (the witness) directed the driver of the vehicle to stop at a point where the accused apparently obtained the liquor.

State v Brundage, 200-1394; 206 NW 607

Gifts — nonphysical delivery. The actual physical delivery of the vessel containing intoxicating liquors is not essential to constitute a "gift" of such liquors.

State v Wareham, 205-604; 218 NW 145

Bootlegging—submission of nuisance. On a simple charge of "bootlegging", it is reversible error to submit (along with said charge) the offense of maintaining a nuisance, even tho there be no evidence of the maintenance of a nuisance, and even tho the two offenses have common elements, and closely approach identity.

State v Moore, 210-743; 229 NW 701

Means and motives in effecting sale. It is proper to instruct that, if a sale of intoxicating liquors was in fact unlawful, then the means adopted by the buyer to effect the sale, and his motives, become quite immaterial.

State v Weber, 204-137; 214 NW 531

Limitation of prosecutions—instructions. In a prosecution for bootlegging, it is proper to instruct the jury that the exact date of guilt is not material provided it is shown that the offense was committed "at some time within three years" just prior to the filing of the trial information, even tho the evidence is such that if the defendant be guilty he is guilty as of a definite date.

State v Howard, 223-767; 273 NW 849

Instructions — presentation of particular theory. Comprehensive and correct instructions by the court render unnecessary, in the absence of a request, the submission of defendant's particular theory of the case.

State v Dillard, 205-430; 216 NW 610

Confusion of elements. An instruction which in defining the term "nuisance" (of the maintenance of which defendant is charged) makes elaborate and somewhat unnecessary recital of the statutes relative to "bootlegging" is not necessarily subject to the vice of confusing the jury as to the elements of the offense charged—nuisance.

State v Harrington, 220-1116; 264 NW 24

Submission of unsupported offense. When an offense may be committed in different ways, and there is no evidence of one of the ways, error results from copying the entire statute into the instructions and directing the jury to convict "if the accused did any one of the things as in these instructions explained."

State v Smalley, 211-109; 233 NW 55

Injunction—acts not constituting violation. An injunction solely against acts constituting bootlegging is not violated by the subsequent maintenance by the defendant of an intoxicating liquor nuisance.

Friend v Cummings, 207-1201; 224 NW 510

Nonexcessive judgment. Imprisonment for five months in the county jail and a fine of $600 for bootlegging will not be deemed excessive as to one who deliberately commits the offense with full knowledge of the law.

State v Weber, 204-137; 214 NW 531

Sentence—excessiveness. Sentences for violation of the intoxicating liquor statutes will not be disturbed in the absence of a substantial reason therefor.

State v Bamsey, 208-796; 223 NW 873

1928 Venue.

Offenses partly in county. See under §13451

1929 Nuisance.

Atty. Gen. Opinion. See '32 AG Op 160

Failure to question indictment. An accused who goes to trial without questioning the sufficiency of an indictment may not thereafter raise the question of sufficiency by objections to evidence.

State v Phillips, 212-1332; 236 NW 104

Former jeopardy—necessary identification of offense. Instructions that a defendant may be found guilty of maintaining a liquor nuisance if he committed the offense within three years prior to the return of the indictment will not be deemed to put the defendant on trial for an alleged liquor offense on which the defendant was acquitted within said three years when the specific nature of the latter offense is not made to appear.

State v Kelly, 217-1305; 253 NW 49

Self-incrimination. The statutory declaration that the finding of intoxicating liquors in the possession of a person under search warrant proceedings, when the liquors have been adjudged forfeited, shall be prima facie evidence that said person was maintaining a nuisance, does not violate the right of said person not to be a witness against himself.

State v Bruns, 211-826; 232 NW 684

Right to possess for own use. The court, in a prosecution for maintaining a liquor nuisance, is fully justified in failing to instruct as to the right of defendant to possess in his own home and for his own use, the liquors which were seized in his home, when defendant in his testimony positively asserted that he did not have said seized liquors in his possession for his own use.

State v Harrington, 220-1116; 264 NW 24

Nuisance—confusion of elements. An instruction which in defining the term "nuisance" (of the maintenance of which defendant is charged) makes elaborate and somewhat unnecessary recital of the statutes relative to "bootlegging" is not necessarily subject to the vice of confusing the jury as to the elements of the offense charged—nuisance.

State v Harrington, 220-1116; 264 NW 24

Jury question. Evidence held to present a jury question on the issue of maintaining a nuisance.

State v Phillips, 212-1332; 236 NW 104

Facts attending search warrant proceedings. Disputed questions of fact upon the determination of which depends the right of the jury to consider search warrant proceedings on the issue of the defendant's guilt of maintaining a nuisance are properly submitted to the jury for determination.

State v Bruns, 211-826; 232 NW 684

Evidence—sufficiency. Evidence held to support a verdict of guilty of maintaining a nuisance.

State v Heeren, 200-882; 205 NW 498
State v Burch, 202-348; 209 NW 474
State v Cahalan, 204-410; 214 NW 612
State v Tibbits, 207-1033; 222 NW 423
State v Salisbury, 209-139; 227 NW 589
State v Slycord, 210-1209; 232 NW 636
State v Kelly, 217-1305; 253 NW 49

Voir dire examination of juror—permissible range. The act of the county attorney, in a prosecution for maintaining a liquor nuisance, in asking a proposed juror (whose business was transporting beer) whether he would vote to convict the accused if the accused was proven guilty beyond all reasonable doubt, will not, in and of itself, be deemed prejudicial error.

State v Harrington, 220-1116; 264 NW 24

Cruel and inhuman punishment. Sentence of six months at hard labor for maintaining liquor nuisance held not such "cruel and inhuman punishment" as to violate Amendment 8 of the United States Constitution, when the maximum punishment for the offense was one year at hard labor.

State v Gasparia, (NOR); 214 NW 550

Mulct tax—knowledge of owner. The assessment of a mulct tax against property which the owner knows, or has reason to know, is being used as an intoxicating liquor nuisance is strictly in accordance with the statute.

State v Campbell, 204-147; 214 NW 550

1930 Penalty for nuisance.

Attorney's fee. See under §2023

Atty. Gen. Opinions. See '28 AG Op 259, 483; '32 AG Op 160, 231

Scope of statute. The words, "for any of the purposes herein prohibited" as employed in this section embrace all the prohibitions enumerated in §1924, C., '27.

State v Bruns, 211-826; 232 NW 684

"Place" defined. A "brush patch" is a place, within the meaning of the statute which prohibits the maintenance of a liquor nuisance in any place.

State v Cahalan, 204-410; 214 NW 612

Election as to "place". The state, upon making proof of an allegation of the maintenance of a liquor nuisance at a "dwelling house and brush patch", may not be required to elect as to which "place" it will rely on for a conviction, it appearing that both "places" were on the farm of the defendant and that the "brush patch" was only an additional hiding place.

State v Cahalan, 204-410; 214 NW 612

Location. The state need not, under a general charge of maintaining a nuisance, confine its proof of the keeping of liquors at any particular place.

State v Tibbits, 207-1033; 222 NW 423

Indictment—sufficiency. Information by county attorney for nuisance reviewed and held sufficient.

State v Japone, 202-450; 209 NW 468

Evidence—sufficiency. Evidence held sufficient to identify an accused as the keeper of an intoxicating liquor nuisance.

State v McGee, 207-334; 221 NW 556

Evidence—search warrant proceedings.

State v McGee, 207-334; 221 NW 556

Evidence—liquors seized. Duly identified liquors seized at the place of an alleged nuisance are admissible on the prosecution for maintaining such nuisance.

State v Salisbury, 209-139; 227 NW 589

Confessions—proof of corpus delicti. A naked confession made out of court will not sustain a conviction unless the corpus delicti is otherwise proven. So held as to a charge of maintaining an intoxicating liquor nuisance, there being no evidence that the accused had ever, directly or indirectly, been engaged in trafficking in such liquors.

State v Thomsen, 204-1160; 216 NW 616

Sale as element. An actual sale of intoxicating liquors is not a necessary element of the crime of maintaining an intoxicating liquor nuisance.

State v Friend, 206-615; 220 NW 59

Specifying acts constituting offense—effect. An indictment for nuisance which specifies the acts done by the accused limits the state to proof of the specific acts charged. In other words, the accused may rely on the specific acts charged as constituting the offense. So held where the state alleged the use of a building for the manufacture, sale, and keeping for sale of intoxicating liquors, and attempted to support the charge by proof of use of a building for repairing a still.

State v Schuling, 216-1425; 250 NW 588

Striking unnecessary allegation. A trial information by the county attorney for maintaining an intoxicating liquor nuisance in a named county "in the city of Cedar Rapids" may, after the jury is sworn, be amended by striking therefrom the clause "in the city of Cedar Rapids", it appearing that the said clause was a manifest error, and that the accused so knew, and requested no further time for trial.

State v Japone, 202-450; 209 NW 468

Nonnecessity to negative exception.

State v Japone, 202-450; 209 NW 468

Insufficient evidence. The maintenance of an intoxicating liquor nuisance at a certain place is not shown by evidence that the accused drove his conveyance containing the liquor up to, and stopped alongside of, the building in question with the unexecuted intent of making an unlawful delivery of liquor at said place.

State v Aliber, 204-144; 214 NW 610

Insufficient evidence. A conviction for maintaining a nuisance cannot be sustained on evidence which simply shows that the accused was on the premises of one who was engaged in the unlawful manufacture of intoxicating liquors, and was probably there for the purpose of buying liquors.

State v Marx, 200-884; 205 NW 518

Possession — evidence — fatal insufficiency. Evidence that intoxicating liquors were found in the home of the head of a family is insufficient, in and of itself, on which to base a finding that a son, as a member of the family, was in possession of the liquor.

State v Friend, 207-742; 223 NW 546

Instructions. An appellant may not complain of instructions which are in harmony with his contention that the accused was charged with maintaining an intoxicating liquor nuisance.

State v Bryant, 208-816; 225 NW 854

Essential instructions. Under an indictment for maintaining an intoxicating liquor nuisance, it is reversible error for the court in its instructions (1) to quote the statute which prohibits the mere "manufacture" of such liquors, (2) to tell the jury that the defendant was indicted thereunder, and (3) to fail to set out in some manner the elements of the statute prohibiting a nuisance.

State v Reid, 200-892; 205 NW 517

Character and use of utensils—instructions. In a prosecution for nuisance, a requested instruction by the defendant as to the effect of the possession, use, and character of utensils found in defendant's place of business may be so modified as to present both the theory of the defendant and of the state.

State v Barton, 202-530; 210 NW 551

Acquittal—nonbar to injunction. A verdict of "not guilty" under an indictment charging the keeping of an intoxicating liquor nuisance on certain property is no bar to an action to enjoin the same defendant from maintaining a liquor nuisance on the same property, and based on the same transaction on which the indictment was based.

State v Osborne, 207-636; 223 NW 363
See State v Boever, 203-86; 210 NW 571

Former jeopardy. An acquittal on an indictment which charges the maintenance of an intoxicating liquor nuisance does not constitute a bar to an indictment which charges the unlawful possession of such liquors, even tho the same liquors may appear as evidence in both cases.

State v Boever, 203-86; 210 NW 571
See Touche v Bonner, 201-466; 205 NW 751

Sealed verdict by agreement. Permitting the jury to return a sealed verdict and to separate and reassemble when the verdict is opened, is proper when the state and the defendant have agreed in writing to that effect; nor is it erroneous for the court to read such agreement to the jury.

State v Ferro, 211-910; 232 NW 127

Nonexcessive sentence. The maximum statutory penalty is not excessive under testimony showing the possession of a large quantity of liquor for immediate distribution.

State v Japone, 202-450; 209 NW 468

Reduction—record required. A sentence for violating the intoxicating liquor statutes will not, on appeal, be reduced in the absence of a record which shows a substantial reason for such reduction.

State v Nolta, 205-595; 218 NW 144

Sentence—impairment of defendant's right of appeal. After imposing, in a criminal case, a fine and imprisonment less than the maximum allowable limit, the court does not impair the defendant's right to appeal by embodying in the judgment a provision for the suspension of a portion of the sentence provided the defendant does not appeal.

State v Kelly, 217-1305; 253 NW 49

Punishment-increasing act. A county jail sentence under the latter part of this section for an offense committed prior to the enactment of such latter part is, of course, improper.

State v Marx, 200-884; 205 NW 518

1931 Intoxication punished.

Discussion. See 23 ILR 57—Scientific tests for intoxication

Atty. Gen. Opinion. See '34 AG Op 695

Opinion evidence. Opinion evidence is admissible on the issue of intoxication.

State v Jenkins, 203-251; 212 NW 475

Opinion evidence. A witness may testify whether a person was sober or intoxicated without first stating the facts on which the opinion is based.

State v Wheelock, 218-178; 254 NW 313

Instructions—nonexpert testimony. No instruction need be given in regard to nonexpert evidence in relation to intoxication.

State v Wheelock, 218-178; 254 NW 313

1932 Penalty remitted.

Atty. Gen. Opinion. See '34 AG Op 695

1934 False statements.

Atty. Gen. Opinion. See '25-26 AG Op 92

1936 Labeling shipments.

Atty. Gen. Opinion. See '25-26 AG Op 92

Scope of statute. The statute which punished the possession of intoxicating liquors which have been transported without being labeled as such liquor applies solely to a case where there is a consignor, a carrier, and a consignee.

State v Corey, 205-1042; 218 NW 957
State v Drain, 205-581; 218 NW 269
State v Wyatt, 207-319; 222 NW 866
State v Wyatt, 207-322; 222 NW 867

Information—essential elements. An information which charges the unlawful possession of intoxicating liquors which had theretofore been transported without being labeled, necessitates proof (1) of such prior unlawful transportation and (2) that the accused became party to such transportation by illegally receiving such liquors into his possession.

State v Edwards, 205-587; 218 NW 266
State v Drain, 205-581; 218 NW 269
State v Corey, 205-1042; 218 NW 957

Ignoring material allegations. The court may not, in the trial of a criminal case, ignore material allegations in the indictment or information and thereby place the accused on trial for a higher and more severely punishable offense than is charged in the indictment or information.

State v Wyatt, 207-322; 222 NW 867

Former jeopardy. The conviction of an accused in the court of a justice of the peace of the nonindictable offense of transporting intoxicating liquors without properly labeling the same is a bar to a subsequent prosecution based on the same transaction for the indictable offense of transporting intoxicating liquors (§1945-a1 et seq., C., '27 [§1945.2 et seq., C., '39]), the latter offense being necessarily embraced in the former.

State v Purdin, 206-1058; 221 NW 562

1939 Shipments unlawful—exception.

Insufficient evidence. A charge of illegal transportation of intoxicating liquors is not sustained by unquestioned testimony that the defendant was overtaken by the operator of an automobile and was invited to ride, accepted the invitation, and entered the car (in which he had no interest), where he later found a jug of whisky, in which he likewise had no interest, but which he threw out of the car when pursued by peace officers.

State v Duskin, 202-425; 210 NW 421

1945.2 Illegal transportation generally.

Atty. Gen. Opinion. See '34 AG Op 693

Scope of statute. The statutory prohibition against the illegal transportation of intoxicating liquors is not now limited to common carriers, as was the case under §2419, C., '97.

State v Casebolt, 201-574; 207 NW 566
State v Duskin, 202-425; 210 NW 421

Scope of statutes. Section 1936, C., '27, and this section discussed and differentiated.

State v Drain, 205-581; 218 NW 269

Illegal transportation—definition. The word "transportation" in the intoxicating liquor statutes is employed in its ordinary sense; that is, to convey from one place to another—any real carrying about.

State v Canalle, 206-1169; 221 NW 847
State v Near, 214-1083; 243 NW 519

Innocent possession—instructions. In a prosecution charging the unlawful possession of intoxicating liquors, the court must, without request, instruct on the supported issue whether defendant was consciously in possession of the liquors found on his person.

State v Wheeler, 216-433; 249 NW 162

Description of offense. An indictment for conspiracy to commit a crime need not set forth the various elements of said crime. Indictment held to charge properly a conspiracy

to engage in the unlawful transportation and sale of intoxicating liquors.

State v Terry, 207-916; 223 NW 870

Ignoring material allegations. The court may not, in the trial of a criminal case, ignore material allegations in the indictment or information and thereby place the accused on trial for a higher and more severely punishable offense than is charged in the indictment or information.

State v Wyatt, 207-322; 222 NW 867

Tracing movements of accused. On a charge of illegal transportation of intoxicating liquors, evidence relative to the actions and movements of the accused at the time of the transaction in question and to the subject matter of the charge is material and competent.

State v Canalle, 206-1169; 221 NW 847

Evidence—incriminating circumstance. On a charge of unlawful transportation of liquors, evidence is admissible that shortly before the accused was arrested with intoxicating liquors in his vehicle he was seen on a somewhat remote highway and near a cache containing such liquors.

State v Campbell, 209-519; 228 NW 22

Unlawful transportation—evidence. A jury is amply justified in finding that an accused was engaged in the unlawful transportation of intoxicating liquors when the evidence shows that he was found seated in the driver's seat of an automobile standing on a country road, with a loaded revolver by his side, and with 55 gallons of alcohol stored in the car.

State v Anderson, 216-887; 247 NW 306

See State v Canalle, 206-1169; 221 NW 847

Evidence—articles found in conveyance. The empty bottles, cartons, corks, and broken bottles taken from the automobile of a party who is accused of unlawful transportation of liquors, are admissible on the trial of said charge.

State v Campbell, 209-519; 228 NW 22

Inadvertent reception of immaterial testimony. On a charge of illegally transporting intoxicating liquors, the reception of evidence as to the search of an automobile of which the accused was not in possession, and as to the finding of such liquors therein, does not constitute reversible error when the evidence was first received because of a misunderstanding of the court as to which automobile was being referred to, and when the court pointedly directed the jury not to consider it.

State v Canalle, 206-1169; 221 NW 847

Former jeopardy. The conviction of an accused in the court of a justice of the peace of the nonindictable offense of transporting intoxicating liquors without properly labeling the same (§1936, C., '27), is a bar to a subsequent prosecution based on the same transaction for the indictable offense of transporting intoxicating liquors, the latter offense being necessarily embraced in the former.

State v Purdin, 206-1058; 221 NW 562

Aiding and abetting. Evidence held ample to justify the court in submitting to the jury the question whether the accused "aided and abetted" the illegal transportation of intoxicating liquors.

State v Canalle, 206-1169; 221 NW 847

Proof of corpus delicti. Proof relative to the alcoholic nature of certain liquors reviewed and held ample to show they could be used for beverage purposes.

State v Anderson, 216-887; 247 NW 306

Sentence—excessiveness. Sentence reviewed, and held not excessive, in view of the attending circumstances.

State v Van Klaveren, 208-867; 226 NW 81

Imprisonment for cost. There can be no legal imprisonment for the nonpayment of costs in a prosecution for the illegal transportation of intoxicating liquors.

State v Van Klaveren, 208-867; 226 NW 81

See Hammer v Utterback, 202-50; 209 NW 522

CHAPTER 95

INDICTMENT, EVIDENCE, AND PRACTICE

1952 Unnecessary allegations.

Indictment held sufficient.

State v Japone, 202-450; 209 NW 468

Negativing permit. An indictment or trial information for maintaining an intoxicating liquor nuisance need not negative the existence of a permit to the accused.

State v Japone, 202-450; 209 NW 468

Negativing exceptions. An indictment charging the unlawful possession of intoxicating liquors need not negative the exceptions which would render the possession legal. The accused must allege and prove the exonerating exceptions.

State v Healy, 217-1155; 251 NW 649

Criminal prosecutions—indictment—surplusage. Under an indictment charging the unlawful possession of intoxicating liquors, the allegation that the possession was for certain unlawful purposes is pure surplusage.

State v Healy, 217-1155; 251 NW 649

1954 Former conviction.

Sufficient particularity. A charge of former conviction is sufficient when it distinctly alleges the time and place of such conviction and the record and page thereof where it may be found.

State v Lambertti, 204-670; 215 NW 752

Method of trial. When the statute requires an allegation of former conviction to be inserted in the indictment, the resulting issue and the issue whether the present and former accused are one and the same person are properly submitted to the jury on supporting evidence, even tho the statute makes the record or a due authentication thereof prima facie evidence that a conviction has been had.

State v McGee, 207-334; 221 NW 556

Submission of unsupported issue—harmless error. The submission to the jury of the unsupported issue of former conviction and the unauthorized finding by the jury that the accused had been so convicted are quite harmless when the sentence imposed was less than the maximum provided for the substantive and proven offense charged in the indictment.

State v Lambertti, 204-670; 215 NW 752
See State v Bergman, 208-811; 225 NW 852

1956 Record of conviction.

Proof of identity of persons. Identity of names is not sufficient proof of identity of persons.

State v Logli, 204-116; 214 NW 490
State v Parsons, 206-390; 220 NW 328
State v Anderson, 216-887; 247 NW 306
See State v Franklin, 215-384; 245 NW 283

Evidence—judgment of former conviction. The record of a former conviction of an accused is admissible under an indictment which properly charges such conviction.

State v Lambertti, 204-670; 215 NW 752
State v McGee, 207-334; 221 NW 556

Permissible proof. Proof of former convictions of violations of the intoxicating liquor statutes, when pleaded in aggravation of a present like charge, is properly proven by the production and proper identification of the original charge, written plea of guilty, and judgment entry of sentence, together with proof that the person therein prosecuted and the defendant presently on trial are one and the same person.

State v Roberts, 222-117; 268 NW 27

1958 Purchaser as witness.

Taste or smell of liquor. A witness may be permitted to testify that certain liquor smelled or tasted like alcohol.

State v Eggleston, 201-1; 206 NW 281
State v Ferro, 211-910; 232 NW 127

1960 Judgment lien.

State as creditor. A plea of guilty in a criminal prosecution does not create the relation of creditor and debtor between the state and the accused, and a transfer of property by the accused after such plea and before the entry of judgment for a fine is not necessarily fraudulent as to the state.

State v Malecky, 202-307; 210 NW 121; 48 ALR 603

1961 Enforcement of lien.

Atty. Gen. Opinion. See '28 AG Op 433

1964 Second and subsequent conviction.

Atty. Gen. Opinion. See '32 AG Op 160

Ex post facto act.

State v Norris, 203-327; 210 NW 922

Successive offenses—scope of statute. The former convictions which this section authorizes the state to plead in aggravation of a subsequent offense must be convictions which have been had since said section became a law.

State v Kuhlman, 206-622; 220 NW 118

Guilty plea—proof of former convictions. After a plea of guilty to a third offense of unlawful possession of intoxicating liquor, to require proof of the prior convictions would be a useless act not contemplated by the legislature.

State v Erickson, 225-1261; 282 NW 728

Separate submission. On the trial of an indictment, the issue of former conviction should be separately submitted to the jury.

State v Parsons, 206-390; 220 NW 328

Nonpermissible amendment. An indictment which charges a first offense may not be so amended as to charge a second offense.

State v Herbert, 210-730; 231 NW 318

Former conviction—failure of proof—effect. An accused may very properly be convicted of the primary offense alleged in an indictment, even tho the allegation of a former conviction is unproven.

State v Parsons, 206-390; 220 NW 328

Unallowable former convictions—proper presentation. When an indictment charges a complete offense, and is, therefore, not demurrable, but pleads unallowable former convictions, the objections to such convictions may be raised for the first time by objections to the proof of such convictions.

State v Madson, 207-552; 223 NW 153

Allegations of former convictions—withdrawal from jury. In prosecution for illegal possession of intoxicating liquor, county attorney's action in seeking to place the federal convictions before the jury, such matters being entirely withdrawn from the considera-

tion of the jury, was not prejudicial to defendant and did not entitle him to a reversal when there was ample competent evidence to sustain the jury's verdict.

State v Caringello, 227-305; 288 NW 80

Unauthorized allegation of former conviction—effect. An unauthorized allegation in an indictment of a former conviction and the reception in evidence of proof thereof constitute reversible error, even tho, on conviction, the judgment imposed was within the limit provided for a first offense.

State v Bergman, 208-811; 225 NW 852
See State v Lambertti, 204-670; 215 NW 752

Review, scope of—waiver. An accused may not, for the first time on appeal, present the objection that the indictment pleads a former conviction which is legally unallowable.

State v McGee, 207-334; 221 NW 556

Sentence—excessiveness. Sentence reviewed, and held not excessive, in view of the attending circumstances.

State v Van Klaveren, 208-867; 226 NW 81

1965 Habitual violators.

Sufficiency—former conviction. A charge of former conviction is all-sufficient when it distinctly alleges the time and place of such conviction and the record and page thereof where it may be found.

State v Lambertti, 204-670; 215 NW 752

Judgment of former conviction. The record of a former conviction of an accused is admissible under an indictment which properly charges such conviction.

State v Lambertti, 204-670; 215 NW 752

Method of trial. When the statute requires an allegation of former conviction to be inserted in the indictment, the resulting issue and the issue whether the present and former accused are one and the same person, are properly submitted to the jury on supporting evidence, even tho the statute makes the record or a due authentication thereof prima facie evidence that a conviction has been had.

State v McGee, 207-334; 221 NW 556

1965.1 Duty of county attorney.

Allegations of former convictions — withdrawal from jury. In prosecution for illegal possession of intoxicating liquor, county attorney's action in seeking to place the federal convictions before the jury, such matter being entirely withdrawn from the consideration of the jury, was not prejudicial to defendant and did not entitle him to a reversal when there was ample competent evidence to sustain the jury's verdict.

State v Caringello, 227-305; 288 NW 80

1965.2 Duty of court.

Third conviction—proof of prior convictions under guilty plea. Where an indictment charged the defendant with committing the crime of unlawful possession of alcoholic liquor, and that he had been convicted on two previous occasions of liquor law violations, and when defendant pleaded guilty, trial court was under no duty to require proof of former convictions.

State v Erickson, 225-1261; 282 NW 728

1966.1 Prima facie evidence.

Nonforfeited liquors. An adjudication that liquors seized on a search warrant are intoxicating and have been forfeited is not a condition precedent to the introduction of such liquors against the accused.

State v Boever, 203-86; 210 NW 571
State v Phillips, 212-1332; 236 NW 104
State v Arluno, 222-1; 268 NW 179

Search warrant proceedings. Search warrant proceedings are admissible on a prosecution for nuisance, in order to lay the foundation for the reception in evidence of liquors seized under such proceedings.

State v McGee, 207-334; 221 NW 556

Possession of still and accompanying exhibits. On the issue whether defendant was in possession of a still which was buried on defendant's premises, a coat and letters and documents therein, addressed to the defendant, and buried with the still, are admissible, there being some evidence that the coat belonged to defendant.

State v Trumbauer, 207-772; 223 NW 491

Bootlegging—possession as prima facie evidence of guilt. Under a specific charge of bootlegging, the fact that intoxicating liquors were found in the possession of the accused is not prima facie evidence of his guilt.

State v Bamsey, 208-802; 226 NW 57

Possession—empty bottles, etc. On a charge of unlawful possession of intoxicating liquors, empty bottles are admissible in evidence when they were seized at the same time and place where other bottles of liquor were seized; likewise, what the accused said to the officers at the time of such seizure.

State v Bryant, 208-816; 225 NW 854

Intent to sell—possession as evidence. The possession of intoxicating liquors may be attended by such circumstances as to justify the jury in finding that such possession was with criminal intent on the part of the possessor to sell.

State v Arluno, 222-1; 268 NW 179

Bootlegging—liquor exhibits admissible. On a prosecution for bootlegging, intoxicating liquors and the cans containing the same, seized

at a house on premises not occupied by the accused, but from which the jury could find he had obtained like liquors the day previous with which to make an unlawful sale, are admissible as circumstances tending to support the main charge.

State v Madison, 215-182; 244 NW 868

Self-incrimination. The statutory declaration that the finding of intoxicating liquors in the possession of a person under search warrant proceedings, when the liquors have been adjudged forfeited, shall be prima facie evidence that said person was maintaining a nuisance, does not violate the right of said person not to be a witness against himself.

State v Bruns, 211-826; 232 NW 684

Indictment—unlawful possession. Evidence held ample to establish unlawful possession of intoxicating liquors.

State v Boever, 203-86; 210 NW 571

Injunction—insufficient evidence. The finding on defendant's premises of two partly filled half-pint bottles of alcohol, one in the actual possession of defendant's wife, and one in the actual possession of the defendant's adult son—the defendant not being at the time on the premises—is insufficient to justify the enjoining of the defendant from the maintenance of a liquor nuisance.

Doebler v Cherpakov, 217-86; 250 NW 894

Searches—presumption of legality. Search warrant proceedings, regular on their face and shown to have been issued on a sworn information, and a separate oral examination of the informant, will, in the absence of any showing to the contrary, be presumed legal, even tho the facts or evidence showing probable cause do not actually appear in any of the proceedings leading up to the issuance of the warrant.

State v Bruns, 211-826; 232 NW 684

Facts attending search warrant proceedings. Disputed questions of fact, upon the determination of which depends the right of the jury to consider search warrant proceedings on the issue of the defendant's guilt of maintaining a nuisance, are properly submitted to the jury for determination.

State v Bruns, 211-826; 232 NW 684

Unlawful transportation—evidence. A jury is amply justified in finding that an accused was engaged in the unlawful transportation of intoxicating liquors when the evidence shows that he was found seated in the driver's seat of an automobile standing on a country road, with a loaded revolver by his side, and with 55 gallons of alcohol stored in the car.

State v Anderson, 216-887; 247 NW 306

Trial—instructions—ignoring lack of evidence. An instruction which ignores the effect of "want of evidence," but directs the jury to determine guilt solely on the evidence "admitted" is not erroneous when it is manifest the instruction was given solely with reference to the effect to be given certain exhibits received in evidence, and without reference to the instruction on reasonable doubt which is not questioned.

State v Madison, 215-182; 244 NW 868

1966.2 Defense.

Atty. Gen. Opinion. See '36 AG Op 218

Indictment — negativing exceptions. An indictment charging the unlawful possession of intoxicating liquors need not negative the exceptions which would render the possession legal. The accused must allege and prove the exonerating exceptions.

State v Healy, 217-1155; 251 NW 649

Right to possess for own use—failure to instruct. The court, in a prosecution for maintaining a liquor nuisance, is fully justified in failing to instruct as to the right of defendant to possess in his own home and for his own use, the liquors which were seized in his home, when defendant in his testimony positively asserted that he did not have said seized liquors in his possession for his own use.

State v Harrington, 220-1116; 264 NW 24

Criminal prosecutions—possession — futile defense. Justification of possession of one certain bottle of intoxicating liquor will not be justification of the possession of another and different bottle of such liquor.

State v Healy, 217-1155; 251 NW 649

1966.3 Attempt to destroy.

Atty. Gen. Opinion. See '36 AG Op 218

Attempt to destroy. The attempt on the part of a person to destroy a liquid while the officers are searching his premises under a warrant constitutes prima facie proof that the liquid was intoxicating and intended for unlawful purposes.

State v Barton, 202-530; 210 NW 551

Bottle thrown from automobile. The corpus delicti is established and a jury question is presented on the charge of unlawful possession of intoxicating liquors by evidence that the accused, when approached, threw from an automobile, in which he was sitting a bottle of such liquors, but did not break it, even tho there was no evidence that he was operating the vehicle.

State v Kirkman, 206-364; 220 NW 57

Instructions. No necessity exists for instructing as to the presumption which arises from an attempt to destroy liquor which is the subject of a search, when the destruction, if any, was accomplished by the wife of an accused.

State v Dunham, 206-354; 220 NW 77

Nonreversible error — unsupported instruction. In a prosecution for illegal possession of

intoxicating liquors, an instruction as to the statutory presumption attending an attempt, in the presence of peace officers, to destroy such liquors—as to which there was no supporting evidence—does not constitute reversible error, it appearing from the record that the defendant was, beyond question, guilty of the offense charged and, in addition, was an habitual violator of said liquor statutes.

State v Roberts, 222-117; 268 NW 27

CHAPTER 97

SEIZURE AND SALE OF CONVEYANCES

2001 Seizure under transportation.

Self-incrimination. The statutory declaration (§1966-a1, C., '27 [§1966.1, C., '39]) that the finding of intoxicating liquors in the possession of a person under search warrant proceedings, when the liquors have been adjudged forfeited, shall be prima facie evidence that said person was maintaining a nuisance, does not violate the right of said person not to be a witness against himself.

State v Bruns, 211-826; 232 NW 684

Forfeiture when no liquor found. There may be a legal forfeiture of a conveyance which has been used in the unlawful transportation of intoxicating liquors, even tho no such liquors are found in the conveyance at the time of the seizure.

State v Coupe, 205-597; 218 NW 346

2004 Release.

Atty. Gen. Opinion. See '28 AG Op 204

Bond not required. No bond is required by one who intervenes and asks for the possession through an order of court after due hearing.

State v Automobile, 204-1155; 216 NW 611

2005 Information.

Nature of proceeding. A proceeding for the forfeiture of a conveyance because of its use in the unlawful transportation of liquors is a special action, and not triable de novo on appeal.

State v Coupe, 205-597; 218 NW 346

2006 Forfeiture.

Non de novo hearing on appeal. A proceeding for the condemnation of an automobile because employed in the unlawful transportation of intoxicating liquors will not be tried de novo on appeal. Whether the statutory presumption of knowledge of such use by the claimant has been negatived rests with the trial court.

State v Coupe, 205-597; 218 NW 346
State v Wilson, 212-1341; 237 NW 511
State v Coupe, 215-1308; 245 NW 243; 247 NW 639

2010 Procedure.

Discussion. See 12 ILR 283—Forfeiture of lienor's rights

Atty. Gen. Opinions. See '25-26 AG Op 141, 341

Knowledge of unlawful use—evidence. Knowledge, express or implied, that a conveyance was being used in the unlawful transportation of intoxicating liquors, may be shown (1) by statutory presumption, arising from the finding of liquors in the conveyance when it is seized, or (2) by any competent evidence, in the absence of the presumption.

State v Coupe, 205-597; 218 NW 346

Negativing knowledge of unlawful use. The fact that a corporate claimant of an automobile did not know that the car was being employed in the unlawful transportation of intoxicating liquors may be deemed established, under some circumstances, by testimony less than the negative testimony of all the principal officers of the corporation.

State v Sedan, 209-791; 229 NW 173

Overcoming presumption. In proceedings to condemn an automobile a claimant under a conditional sale contract does not overcome the statutory presumption that claimant knew of the unlawful use to which the car was being put, by evidence of one of the managing officers of claimant that he possessed no such knowledge, when it appears that other officers and employees of claimant, not called as witnesses, had knowledge of the original sale of the car, of payments made thereon, and of the purchaser.

State v Sedan, 210-714; 231 NW 385

Overcoming presumption. Proof that a claimant to an automobile had purchased for value an outstanding, unsatisfied, recorded, conditional sale contract covering the car, and that claimant had no knowledge of the unlawful use to which the car was being put, entitles claimant to some form of relief.

State v Sedan, 209-791; 229 NW 173
State v Automobile, 214-1088; 243 NW 303

Following trial court method of trial. An appeal will be heard de novo when the parties mutually and without controversy tried the cause in equity in the trial court.

State v Automobile, 214-1088; 243 NW 303

Condemnation of automobile—non de novo hearing. A proceeding for the condemnation of an automobile because employed in the unlawful transportation of intoxicating liquors will not be tried de novo on appeal. Whether the statutory presumption of knowledge of

such use, by the claimant, has been negatived rests with the trial court.

State v Chrysler Coupe, 215-1308; 247 NW 639; 245 NW 243

2012 Orders as to claims.

Atty. Gen. Opinions. See '28 AG Op 204; '30 AG Op 134

Unrecorded claim—effect. A claimant of the conveyance under an unrecorded sales contract may not have the conveyance returned to him, and it is quite immaterial that such contract was executed in a foreign state in which claimant's lien would be valid against subsequent purchasers without recordation.

State v Kelsey, 206-356; 220 NW 324
State v Jennings, 206-361; 220 NW 327
State v Automobile, 208-794; 226 NW 48

2013 Notice.

Atty. Gen. Opinion. See '25-26 AG Op 341

2014 Proceeds.

Atty. Gen. Opinion. See '25-26 AG Op 341

Return to owner—costs. The court may very properly order an automobile to be returned, without the payment of costs, to an intervening owner who had sold the same under a conditional sale contract, and who had no knowledge, directly or indirectly, of such unlawful use by such vendee. The law does not contemplate an order of forfeiture in every proceeding against such a conveyance.

State v Automobile, 204-1155; 216 NW 611

Improper taxation of costs. In a proceeding to forfeit an automobile because used in the unlawful transportation of intoxicating liquors, and in which proceeding an order of forfeiture is entered, costs may not be taxed to an intervenor claiming the property. Costs must be paid from the proceeds of the sale.

State v Coupe, 215-1308; 245 NW 243; 247 NW 639

2015 School fund.

Value of car—burden of proof. When an enforceable money claim has been established against an automobile which has been employed in the unlawful transportation of intoxicating liquors, the state, if it desires a forfeiture of the car to the school fund in excess of the amount due claimant, has the burden to show the existence of such excess.

State v Sedan, 209-791; 229 NW 173

CHAPTER 98

INJUNCTION AND ABATEMENT

2017 Action to enjoin.

ANALYSIS

I ACTION IN GENERAL

Nonright of private citizen. A private citizen has no right—since the enactment of the liquor control act, Ch. 93-F1, C., '35 [Ch 93.2, C., '39] —to institute an action to enjoin the maintenance of an intoxicating liquor nuisance which affects him only as one of the general body of citizens. (See also §§1921-f2, -f62, C., '35 [§§1921.002, 1921.062, C., '39].

Doebler v Dodge, 223-218; 272 NW 144

Non-good-faith abatement. A non-good-faith abatement of a nuisance prior to the trial of injunction proceedings will not shield the guilty party from an injunction and the consequences thereof.

State v Riley, 202-1213; 211 NW 731
State v Jones, 202-640; 210 NW 784

Involuntary abatement. The keeper of an intoxicating liquor nuisance may not escape an injunction and an order of abatement and the assessment of a mulct tax on the claim that the nuisance was fully abated prior to the institution of injunction proceedings by the act of the officers in seizing the liquors and paraphernalia and removing the same from the premises under a search warrant.

State v Seipes, 202-1199; 211 NW 719
State v Tillotta, 202-1217; 211 NW 721
See State v Deeney, 202-742; 210 NW 909

Acquittal—nonbar to injunction. A verdict of "not guilty" under an indictment charging the keeping of an intoxicating liquor nuisance on certain property is no bar to an action to enjoin the same defendant from maintaining a liquor nuisance on the same property, and based on the same transaction on which the indictment was based.

State v Osborne, 207-636; 223 NW 363

II PARTIES PLAINTIFF

Abatement by private citizen. A private citizen has no right—since the enactment of the liquor control act, Ch 93-F1, C., '35 [Ch 93.1, C., '39]—to institute an action to enjoin the maintenance of an intoxicating liquor nuisance which affects him only as one of the general

body of citizens. (§§1921-f2, -f62, C., '35 [§§1921.002, 1921.062, C., '39].)

Doebler v Dodge, 223-218; 272 NW 144

III PARTIES DEFENDANT

Owner of property—knowledge. Irrespective of the knowledge of the owner of property, an order of abatement of an intoxicating liquor nuisance is mandatory whenever the existence of the nuisance is established in a civil or criminal proceeding. (§2032, C., '24.)

State v Deeney, 202-742; 210 NW 909

Owner of property—lack of knowledge. An injunction is properly decreed against the owner of real property even tho such owner had no knowledge of the violation of the law by his tenant.

State v DeLeon, 204-843; 215 NW 973

Owner of property—imputed knowledge. An owner of property may not escape injunction and the assessment of a mulct tax when from the attending circumstances he must have known that his property was being used for the unlawful sale, etc., of intoxicating liquors.

State v Jones, 202-640; 210 NW 784

IV PETITION

Invalidating amendment. A petition to enjoin a defendant from maintaining a nuisance may not be so amended, before appearance and before answer, as to convert the petition into one to enjoin the defendant from operating as a bootlegger (§1927, C., '27), unless the defendant is given due notice of such amendment.

De Witt v Dist. Court, 206-139; 220 NW 70

V ANSWER

No annotations in this volume

VI EVIDENCE

Nuisance. Evidence reviewed, and held ample to sustain a conviction for nuisance.

State v Japone, 202-450; 209 NW 468

Insufficient evidence. Evidence held insufficient to justify an injunction against the maintenance of an intoxicating liquor nuisance and consequently insufficient to justify the levy of a mulct tax on the premises in question.

State v Straka, 209-572; 227 NW 909

Doebler v Cherpakov, 217-86; 250 NW 894

Evidence—analysis of liquors. Error may not be predicated on the fact that, in an action to abate a nuisance, a chemical analysis of the liquors was made at the instance of the court and unbeknown to the other parties to the action.

State v Marker, 208-1001; 224 NW 588

VII TRIAL

Trial at first term—permissive, not mandatory. The provision of the statute (§2021, C., '24) for trial of injunction proceedings at the first term after due service is permissive only—not mandatory.

State v Johnson, 204-150; 214 NW 594

Contempt—procedure—jury trial. A party charged with contempt is not entitled to a jury trial.

Hammer v Utterback, 202-50; 209 NW 522

Chemical analysis at instance of court. Error may not be predicated on the fact that, in an action to abate a nuisance, a chemical analysis of the liquors was made at the instance of the court and without the knowledge of the other parties to the action.

State v Marker, 208-1001; 224 NW 588

Identity of persons. In contempt proceedings, the plaintiff must establish that the person formerly enjoined and the defendant on trial for contempt are one and the same person, even tho the names are identical.

State v Franklin, 215-384; 245 NW 283

VIII DECREE

Knowledge of owner. An injunction is properly decreed against the owner of real property even tho such owner had no knowledge of the violation of the law by his tenant.

State v DeLeon, 204-843; 215 NW 973

Notice of decree. A defendant who has been duly noticed into court on an application against him for an injunction against the unlawful sale of intoxicating liquors must take notice of the resulting decree against him.

Labozetta v Dist. Court, 200-1339; 206 NW 139

Benscoter v Utterback, 202-762; 211 NW 403

Injunction as adjudication. A duly rendered decree of injunction against a party for the unlawful trafficking in intoxicating liquors is a bar to another action for the same relief against the same party when premises are the same in both cases.

State v Talarico, 202-744; 210 NW 968

IX APPEAL

Incompetent evidence in equity proceedings. It must be presumed on appeal in an equity proceeding that the court disregarded incompetent testimony which was received under proper objection.

State v Dietz, 202-1202; 211 NW 727

IX APPEAL—concluded

Voluntary abatement—effect. The granting of an injunction, notwithstanding the voluntary abatement of the nuisance prior to trial, will not be disturbed on appeal.

State v James, 202-1137; 211 NW 372
State v Johnson, 204-150; 214 NW 594
State v Campbell, 204-147; 214 NW 550
State v Marker, 208-1001; 224 NW 588

Review. A decree of injunction, abatement, and assessment of mulct tax will not be disturbed on a record revealing proof of the existence of the nuisance.

State v Dietz, 202-1202; 211 NW 727

2020 Scope of injunction.

Injunction limited to particular premises. A party who is proceeded against only as owner, and is so enjoined as to specified premises, may not be adjudged guilty of contempt on evidence showing the mere existence of intoxicating liquors on other and different premises of which the party is owner.

Leonetti v Utterback, 202-923; 211 NW 403

2021 Immediate trial.

Trial term permissive. This section is permissive only—not mandatory.

State v Johnson, 204-150; 214 NW 594

2022 General reputation.

Nuisance—abatement—costs. The circumstances attending the nuisance and the bad reputation of the place may amply justify the court in taxing the costs and attorney fees against the property.

State v James, 202-1137; 211 NW 372

2023 Attorney fee.

Atty. Gen. Opinions. See '25-26 AG Op 269; '28 AG Op 259; '30 AG Op 42

Mulct tax—knowledge of owner. Neither a mulct tax nor the attorney fees and costs attending the proceedings can be properly imposed upon real property and against the owner thereof when the owner did not know and did not have reason to know of the existence of the liquor nuisance on his premises.

State v DeLeon, 204-843; 215 NW 973

2023.1 Limitation.

Atty. Gen. Opinion. See '28 AG Op 259

2023.2 Conditions of taxation.

Atty. Gen. Opinions. See '28 AG Op 259; '30 AG Op 68

2027 Violation.

ANALYSIS

I PROCEEDINGS IN GENERAL
II INFORMATION AND WARRANT
III VIOLATIONS IN GENERAL
IV CERTIORARI

I PROCEEDINGS IN GENERAL

Evidence—sufficiency. The evidence in contempt proceedings must clearly and satisfactorily establish the guilt of the accused.

Tuttle v Peters, 206-435; 220 NW 22

Identity of names. In contempt proceedings, the plaintiff must establish that the person formerly enjoined and the defendant on trial for contempt are one and the same person, even tho the names are identical.

State v Parsons, 206-390; 220 NW 328
State v Franklin, 215-384; 245 NW 283
State v Anderson, 216-887; 247 NW 306
See State v Logli, 204-116; 214 NW 490

Criminal prosecution as bar. A criminal prosecution for a violation of the intoxicating liquor statutes is not a bar to contempt proceedings based on the same act.

Touche v Bonner, 201-466; 205 NW 751

Nonforfeited liquors as evidence. Intoxicating liquors which are seized upon the premises of a defendant in contempt proceedings are receivable in evidence even tho they have not been "finally adjudicated and declared forfeited."

Norris v Utterback, 202-686; 210 NW 933

Chemical examination of liquors. The results of a chemical examination of duly identified liquors are admissible on an issue of contempt.

Harding v Dist. Court, 202-675; 210 NW 900

Contempt—evidence—sufficiency. Evidence reviewed, and held to justify a conviction of contempt in violating an injunction against the sale of intoxicating liquors.

Harding v Dist. Court, 202-675; 210 NW 900

II INFORMATION AND WARRANT

No annotations in this volume

III VIOLATIONS IN GENERAL

Contempt—evidence. Evidence tending to show repeated possession of intoxicating liquors by an accused, and likewise repeated efforts by the accused to destroy such liquors when his place was searched, furnishes ample evidence on which to base a conviction for contempt.

Benscoter v Utterback, 202-762; 211 NW 403

Acts not constituting violation. An injunction solely against acts constituting bootlegging is not violated by the subsequent maintenance by the defendant of an intoxicating liquor nuisance.

Friend v Cummings, 207-1201; 224 NW 510

Insufficient evidence. A landlord is not shown to have violated an intoxicating liquor injunction by proof that a bottle of alcohol was found in his house in the effects of a mere roomer to whom it belonged.

Dykes v Dist. Court, 216-284; 249 NW 163

IV CERTIORARI

Belated presentation of objection. On certiorari to review a conviction for contempt in violating an intoxicating liquor injunction, the petitioner will not be permitted to present the objection that testimony taken in the trial court should not be considered because taken in his absence, and under a stipulation entered into by an unauthorized attorney, such objection not having been presented in the trial court.

Hammer v Utterback, 202-50; 209 NW 552

2028 Method of trial.

Use of affidavits. Affidavits are admissible on the trial of a contempt proceeding, in the absence of a demand for the cross-examination of the affiant.

Harding v Dist. Court, 202-675; 210 NW 900

Review—de novo hearing. Certiorari to review contempt proceedings is not triable de novo in the supreme court, and proof of guilt need not appear beyond a reasonable doubt.

Madalozzi v Anderson, 202-104; 209 NW 274

Review—extent of. A judgment of conviction of contempt in violating an intoxicating liquor injunction, even tho based on sharply conflicting testimony, will not be disturbed on certiorari if the testimony clearly sustains the action of the lower court.

Froah v Utterback, 202-610; 210 NW 791
Benscoter v Utterback, 202-762; 211 NW 403
Harding v Dist. Court, 202-675; 210 NW 900

Review—belated objection. On certiorari to review a conviction for contempt in violating an intoxicating liquor injunction, the petitioner will not be permitted to present the objection that testimony taken in the trial court should not be considered because taken in his absence, and under a stipulation entered into by an unauthorized attorney, such objection not having been presented in the trial court.

Hammer v Utterback, 202-50; 209 NW 522

2029 First conviction.

Imprisonment for costs. Imprisonment for nonpayment of costs in contempt proceedings is unauthorized.

Hammer v Utterback, 202-50; 209 NW 522
See State v Van Klaveren, 208-867; 226 NW 81

Fine satisfied by imprisonment. A judgment that an accused in a prosecution for contempt in violating an intoxicating liquor injunction "pay a fine of $300, or in lieu of payment * * * be committed to jail for three months" is satisfied in toto by serving the term of imprisonment.

State v Oliver, 203-458; 212 NW 572

Punishment — liquor injunction — imprisonment to satisfy fine. Section 13964, C., '39, authorizing imprisonment until fine is satisfied, is applicable to judgment imposing a fine as punishment for contempt of liquor injunction under §2029.

Scavo v Utterback, (NOR); 205 NW 858

Recovery of fine—satisfaction by serving sentence. Where judgment in prosecution for liquor injunction violation ordered defendant to pay a fine or in lieu thereof be committed for three months, held, in action on bond given on certiorari to recover the fine, that serving of sentence satisfied the fine.

State v Oliver, (NOR); 212 NW 572

2030 Subsequent convictions.

Excessive fines. A fine of $1,000 and, in default of payment, commitment to the county jail for ten months for the second offense of violating an injunction against the sale of intoxicating liquors is not constitutionally excessive.

Touche v Bonner, 201-466; 205 NW 751

2031 Bootleggers.

Venue. A bootlegger, irrespective of his legal residence, may be enjoined in any county in which it can be shown that he has been bootlegging.

State v Huntley, 210-732; 227 NW 337

Invalidating amendment. A petition to enjoin a defendant from maintaining a nuisance (§2017, C., '27), may not be so amended, before appearance and before answer, as to convert the petition into one to enjoin the defendant from operating as a bootlegger unless the defendant is given due notice of such amendment.

De Witt v Dist. Court, 206-139; 220 NW 70

Evidence to sustain violation of injunction. Evidence of finding in drawer in defendant's room numerous bottles, cans, and jugs containing certain form of liquor held to sustain conviction for contempt for violating bootlegger injunction.

Eden v Dist. Court, (NOR); 228 NW 14

Injunction. Tho the evidence fails to establish the keeping of a nuisance, yet the defendant is properly enjoined from trafficking in intoxicating liquors if the evidence shows that he is a bootlegger.

State v Aliber, 204-144; 214 NW 610

Acts not constituting violation. An injunction solely against acts constituting bootlegging is not violated by the subsequent maintenance by the defendant of an intoxicating liquor nuisance.

Friend v Cummings, 207-1201; 224 NW 510

Constitutionality of injunctional feature.

State v Fray, 214-53; 241 NW 663; 81 ALR 286
State v Howard, 214-60; 241 NW 682

Conflicting evidence. Conflicting evidence reviewed, and held to sustain a conviction for bootlegging.

State v Weber, 204-137; 214 NW 531

2032 Abatement.

Atty. Gen. Opinion. See '30 AG Op 68

Mandatory abatement. Irrespective of the knowledge of the owner of property, an order of abatement of an intoxicating liquor nuisance is mandatory whenever the existence of the nuisance is established in a civil or criminal proceeding.

State v Deeney, 202-742; 210 NW 909
State v Pickett, 202-1321; 210 NW 782
State v Riley, 202-1213; 211 NW 731

Abatement by decree. Even tho the owner of the property has abated the nuisance by excluding the offending tenant, yet the circumstances may be such as to justify the court in making assurance doubly sure by making the abatement a matter of decree.

State v James, 202-1137; 211 NW 372

Non-good-faith abatement. An owner of property may not escape injunction and the assessment of a mulct tax when from the attending circumstances he must have known that his property was being used for the unlawful sale, etc., of intoxicating liquors.

State v Jones, 202-640; 210 NW 784

Nonautomatic abatement. The fact that, when an action to abate an intoxicating liquor nuisance is brought, the building is closed and locked, under the levy of a landlord's attachment, does not constitute an ipso facto abatement of the nuisance.

State v Deeney, 202-742; 210 NW 909
State v Tillotta, 202-1217; 211 NW 721
See State v Seipes, 202-1199; 211 NW 719

Decree void in part—effect. An order of abatement based on a conviction on an indictment which charges an intoxicating liquor nuisance is void insofar as it directs the closing of premises which are wholly different from those specifically charged in the indictment, even tho they belong to the same party; and an abatement bond executed under threat to immediately close such other and different premises is likewise void.

Davidson v Bradford, 203-207; 212 NW 476

Jurisdiction to order destruction of liquors. The district court, in an action to abate an intoxicating liquor nuisance, has jurisdiction to order the destruction of liquors found upon the premises, even tho such liquors are being held under undetermined and untried search warrant proceedings in the office of a justice of the peace.

State v Marker, 208-1001; 224 NW 588

2050 Costs.

Atty. Gen. Opinion. See '32 AG Op 230

Improper taxation. Costs in contempt proceedings can be taxed to the individual petitioner only when the court finds that the proceedings were instituted maliciously and without probable cause.

State v Franklin, 215-384; 245 NW 283

2051 Mulct tax.

Atty. Gen. Opinions. See '25-26 AG Op 319; '28 AG Op 434

Nature of statute. The statute providing for the imposition of a mulct tax upon the entry of a permanent injunction against the maintenance of an intoxicating liquor nuisance is not a criminal statute.

State v Osborne, 207-636; 223 NW 363

Mandatory duty of court. The imposition of a mulct tax is mandatory on the court upon the ordering of a permanent injunction.

State v Marker, 208-1001; 224 NW 588

Evidence—sufficiency. Evidence held insufficient to justify an injunction against the maintenance of an intoxicating liquor nuisance and consequently insufficient to justify the levy of a mulct tax on the premises in question.

State v Straka, 209-572; 227 NW 909

Nonbasis for taxation. Failure to establish the alleged nuisance removes the basis for a mulct tax.

State v Aliber, 204-144; 214 NW 610

Unauthorized taxation. A mulct tax may be assessed only under the conditions expressly specified by statute.

State v Talarico, 202-744; 210 NW 968

Void tax. A mulct tax certified and levied some two years after a violation of the intoxicating liquor statutes, and after the repeal of the statutes authorizing the levy of such tax, and after the property affected had passed into the hands of an innocent party, is void as to such latter party.

Shriver v Polk County, 203-529; 212 NW 718

Justifiable assessment of mulct tax. Proof of the existence of a nuisance on the premises, plus evidence that such was the general reputation of the place, plus evidence of the renting to known bootleggers, and a suggestive reluctance on the part of the owner to make inquiries as to the business of his tenants, furnish ample justification for the imposition of a mulct tax.

State v Riley, 202-1213; 211 NW 731

Non-good-faith abatement. An owner of property may not escape injunction and the assessment of a mulct tax when from the attending circumstances he must have known

that his property was being used for the unlawful sale, etc., of intoxicating liquors.

State v Jones, 202-640; 210 NW 784

Knowledge of owner. The assessment of a mulct tax against property which the owner knows, or has reason to know, is being used as an intoxicating liquor nuisance, is strictly in accordance with the statute.

State v Campbell, 204-147; 214 NW 550

Knowledge of owner. Neither a mulct tax nor the attorney fees and costs attending the proceedings can be properly imposed upon real property and against the owner thereof when the owner did not know and did not have reason to know of the existence of the liquor nuisance on his premises.

State v DeLeon, 204-843; 215 NW 973

Presumption of coercion of wife. A wife and her property may not escape the assessment of a mulct tax consequent on the maintenance of a liquor nuisance on the premises, on the claim that the husband was maintaining the nuisance and that the wife was presumptively under the coercion of the husband, it appearing that the wife had done nothing to prevent the nuisance.

State v Tillotta, 202-1217; 211 NW 721

Review, scope of. A decree of injunction, abatement, and assessment of mulct tax will not be disturbed on a record revealing proof of the existence of the nuisance.

State v Dietz, 202-1202; 211 NW 727

2052 Amount.

Atty. Gen. Opinions. See '25-26 AG Op 319, '28 AG Op 434; '30 AG Op 199

2053 Evidence.

Evidence of knowledge. A mulct tax, attorney fees, and costs may not be assessed against property on testimony which simply tends to show (1) ownership of the property and (2) that, among a comparatively small class of people of the community, the place had the general reputation of being a place for the unlawful use and sale of intoxicating liquors.

State v Pickett, 202-1321; 210 NW 782

CHAPTER 99

CIVIL ACTIONS AND LIABILITY

2055 Civil action.

Torts—fundamental laws govern liability. The fundamental and underlying law of torts is that he who does injury to the person or property of another is civilly liable in damages for the injuries inflicted.

Montanick v McMillin, 225-442; 280 NW 608

CHAPTER 100

PERMITS TO LICENSED PHARMACISTS

Atty. Gen. Opinions. See '34 AG Op 405, 418

2072 Permits.

Right of pharmacist. A registered pharmacist may legally have government alcohol in his possession, and, in his business as a pharmacist, use the same in compounding nonbeverage drugs and medicines and in the filling of prescriptions, even tho he has neither a state permit to keep and sell such liquor nor a state permit to manufacture.

Reppert v Utterback, 206-314; 217 NW 545

2073 Petition.

Atty. Gen. Opinions. See '30 AG Op 186; '34 AG Op 233, 347

2074 Verification.

Atty. Gen. Opinion. See '30 AG Op 186

2082 Limitation.

Atty. Gen. Opinion. See '30 AG Op 186

2093 Limitation on sales.

Atty. Gen. Opinions. See '32 AG Op 17, 36; '34 AG Op 418

2094 Request.

Atty. Gen. Opinion. See '32 AG Op 36

2110 Conviction in federal courts.

Legislative title—incongruous matter. A provision for the suspension of the license of a physician because of a conviction of a violation of the federal statutes relating to narcotics cannot be validly enacted under a title which professes "to amend, revise, and codify" certain statutes "relating to the sale and transportation of intoxicating liquors under permits."

In re Breen, 207-65; 222 NW 420

2118 Evidence.

See annotations under §§2159, 2162, Vol I

CHAPTER 101

PERMITS TO WHOLESALE DRUGGISTS

Atty. Gen. Opinions. See '34 AG Op 405, 418

2136 Permit and authority.
Atty. Gen. Opinions. See '28 AG Op 234; '32 AG Op 246, 285

2138 Interpretative clause.
See annotations under §1923, Vol I

2141 Form.
Atty. Gen. Opinion. See '36 AG Op 418

CHAPTER 102

REPORTS BY PERMIT HOLDERS

Atty. Gen. Opinion. See '34 AG Op 418

2159 Reports required.
See annotations under §2118, Vol I
Atty. Gen. Opinion. See '30 AG Op 360

2162 Return of requests.
See annotations under §2118, Vol I

CHAPTER 103

PERMITS TO MANUFACTURERS

Atty. Gen. Opinions. See '32 AG Op 68; '34 AG Op 418

2164 Patent and proprietary medicines.
Atty. Gen. Opinion. See '28 AG Op 234

Right of pharmacist. A registered pharmacist may legally have government alcohol in his possession and in his business as a pharmacist, use the same in compounding nonbeverage drugs and medicines and in the filling of prescriptions, even tho he has neither a state permit to keep and sell such liquor nor a state permit to manufacture.

Reppert v Utterback, 206-314; 217 NW 545

CHAPTER 104

PERMITS TO CLERGYMEN

Atty. Gen. Opinion. See '34 AG Op 418

TITLE VII

PUBLIC HEALTH

Atty. Gen. Opinion. See '25-26 AG Op 153

CHAPTER 105

STATE DEPARTMENT OF HEALTH

Atty. Gen. Opinion. See '36 AG Op 429

2181 Definitions.

Atty. Gen. Opinions. See '25-26 AG Op 256; '28 AG Op 253, 336; '30 AG Op 250; '34 AG Op 473; '36 AG Op 46

2182 Appointment.

Atty. Gen. Opinion. See '30 AG Op 52

2191 Powers and duties.

Atty. Gen. Opinions. See '25-26 AG Op 153; '28 AG Op 296; '34 AG Op 751; '36 AG Op 307, 429

Right to institute prosecution. Prosecutions for the enforcement of the laws regulatory of the practice of medicine and surgery may be instituted without any authority from the state department of health.

State v Hueser, 205-132; 215 NW 643

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

2198 Pollution of water.

Atty. Gen. Opinion. See '28 AG Op 328

2199 Time and place of hearing.

Atty. Gen. Opinion. See '28 AG Op 328

2200 Notice.

Atty. Gen. Opinion. See '28 AG Op 328

2201 Order.

Atty. Gen. Opinion. See '28 AG Op 328

2201.1 Limitation on expense.

Atty. Gen. Opinion. See '28 AG Op 328

2204 Appeal.

Method of service. As to proper method of service when statute simply requires the notice to be "served," and specifies no method of service, see

Casey (Town) v Hogue, 204-3; 214 NW 729

2212 Refusal of board to enforce rules.

Atty. Gen. Opinions. See '28 AG Op 296; '34 AG Op 751; AG Op July 10, '39

2213 Expenses for enforcing rules.

Atty. Gen. Opinion. See '34 AG Op 751

2217.1 Federal aid.

Atty. Gen. Opinion. See '36 AG Op 429

CHAPTER 106

STATE BOARD OF HEALTH

Atty. Gen. Opinion. See '36 AG Op 429

2220 Duties.

Administrative rules. Rules and regulations which have been adopted by the state department of health, and which are advisory only, are quite unobjectionable.

Craven v Bierring, 222-613; 269 NW 801

2226 Compensation and expenses.

Atty. Gen. Opinion. See '25-26 AG Op 140

CHAPTER 107

LOCAL BOARD OF HEALTH

Atty. Gen. Opinion. See '34 AG Op 751

2231 Health officer.

Atty. Gen. Opinions. See '28 AG Op 253; '34 AG Op 137

2232 Sanitation and quarantine officer.

Tenure. An appointment under this section is not for life tenure.

Young v Huff, 209-874; 227 NW 122

Civil service—sanitary inspector—nonsupervisory position. In certiorari action to annul decision of civil service commission ordering the reinstatement of a discharged sanitary inspector, evidence that his general duty was to investigate and pass upon complaints with only occasional control over incidental employees, held to support and sustain findings below that such position was "nonsupervisory" under civil service statute allowing a preference to certain employees who had worked a certain length of time.

Des Moines v Board, 227-66; 287 NW 288

2237 Special duties.

Atty. Gen. Opinions. See '28 AG Op 369; '30 AG Op 81, 82

2238 Additional duties.

Atty. Gen. Opinion. See '28 AG Op 369

2239 Right to enter premises.

Atty. Gen. Opinion. See '28 AG Op 296

2240 Abatement of nuisance.

Atty. Gen. Opinions. See '28 AG Op 291, 296; '36 AG Op 307; AG Op July 10, '39

2241 Closing of premises.

Atty. Gen. Opinions. See '28 AG Op 296; '36 AG Op 562

2242 Refusal of admittance.

Atty. Gen. Opinion. See '28 AG Op 296

2243 Costs for abating nuisance.

Atty. Gen. Opinions. See '28 AG Op 291, 296

2244 Peace officers to enforce.

Atty. Gen. Opinion. See '28 AG Op 296

2245 Interference with officers.

Atty. Gen. Opinion. See '28 AG Op 296

2246 Penalty.

Atty. Gen. Opinion. See '28 AG Op 296

CHAPTER 107.1

COUNTY BOARD OF HEALTH

Atty. Gen. Opinion. See AG Op June 21, '39

CHAPTER 108

CONTAGIOUS AND INFECTIOUS DISEASES

Atty. Gen. Opinions. See '28 AG Op 182, 327; '30 AG Op 373

2252 Quarantine.

Atty. Gen. Opinion. See '25-26 AG Op 154

2254 Warning signs.

Atty. Gen. Opinion. See '28 AG Op 327

2270 Medical attendance and supplies.

Atty. Gen. Opinions. See '28 AG Op 406; '30 AG Op 107, 125

2271 County liability for supplies.

Atty. Gen. Opinion. See AG Op Feb. 27, '40

2273 Supplies and services.

Atty. Gen. Opinion. See '28 AG Op 327

2274 Filing of bills.

Atty. Gen. Opinions. See '28 AG Op 327, 369; '30 AG Op 81, 107

2275 Allowing claims.

Atty. Gen. Opinion. See '30 AG Op 107

2276 Approval and payment of claims.

Atty. Gen. Opinion. See '30 AG Op 246

2279 Penalty.

Atty. Gen. Opinion. See '30 AG Op 107

CHAPTER 109

VENEREAL DISEASES

Atty. Gen. Opinions. See '28 AG Op 56, 141; '30 AG Op 107, 246

CHAPTER 110

DISPOSAL OF DEAD BODIES

Atty. Gen. Opinion. See '32 AG Op 263

2321 Particulars.

Atty. Gen. Opinions. See '32 AG Op 40, 263; AG Op Jan. 17, '39

2322 Deaths without medical attendance.

Atty. Gen. Opinions. See '32 AG Op 95, 263

2337 Disinterment for reburial.

Controlling principle. Equity will order the disinterment of a dead body for reburial only in cases of extreme necessity.

King v Frame, 204-1074; 216 NW 630

2338 Disinterment for autopsy.

Privileged communication—nonapplicable to physician performing autopsy. In an action to recover on an accident policy for the death of insured, where the court excluded testimony of a physician, who performed a post mortem examination but did not treat the patient before death, on the ground of privileged communication between patient and physician, held, court improperly excluded such testimony, since the privilege is purely statutory and for the purpose of encouraging patients to make full disclosure to the physician of all facts to enable him to prescribe and administer the proper treatment. A deceased body is not a patient and the relation of physician and patient ends when the death of the patient ensues.

Travelers Ins. v Bergeron, 25 F 2d, 680

CHAPTER 111

DEAD BODIES FOR SCIENTIFIC PURPOSES

Atty. Gen. Opinions. See '28 AG Op 276; '32 AG Op 38

CHAPTER 114

REGISTRATION OF VITAL STATISTICS

Atty. Gen. Opinion. See '38 AG Op 425

2389 Local registrars.

Atty. Gen. Opinion. See '34 AG Op 277

2393 Duties of state registrar.

Atty. Gen. Opinions. See '38 AG Op 425; AG Op Feb 22, '39

2405 Stillborn children.

Certificate as to "stillborn" infant. A certified copy of a return by a physician showing the delivery, by a Caesarean operation, of a "stillborn" infant, while proper evidence, may have but little bearing on the issue whether said "stillborn" possessed an independent circulation after being fully separated from the mother.

Wehrman v Bank, 221-249; 259 NW 564; 266 NW 290

Collateral heirs—burden of proof. Collateral heirs, belonging as they do under the law of inheritance to a deferred class, must, in order to inherit, affirmatively negative by the greater weight of evidence, the existence, at the time the inheritance was cast, of any other heir belonging to a more favored class. Held that collateral heirs had failed to negative the independent existence of twins after they had been taken, by a Caesarean operation, from the womb of a dead mother.

Wehrman v Bank, 221-249; 259 NW 564; 266 NW 290

Inheritable existence—criterion. An infant acquires existence capable of taking an inheritance only when it acquires an independent circulation of its blood after being fully separated from the body of the mother.

Wehrman v Bank, 221-249; 259 NW 564; 266 NW 290

2426 Certified copies.

Atty. Gen. Opinions. See '38 AG Op 425; AG Op Feb. 22, '39

2427 Search of records—fee.

Atty. Gen. Opinion. See '38 AG Op 425

2428 Free certified copies.

Atty. Gen. Opinion. See '38 AG Op 425

2429 United States census bureau.

Atty. Gen. Opinions. See '25-26 AG Op 268, 393

2431 Copies of record as evidence.

Certificate of birth—evidentiary effect. That part of an official certificate of birth which states that the name of the father is unknown is not presumptive evidence of that fact in an action for damages for seduction, and does not contradict direct testimony as to the paternity of the child.

Gardner v Boland, 209-362; 227 NW 902

Official certificates of death—admissibility. A certificate of death not signed, executed, and certified in accordance with the laws governing the disposal of dead bodies is inadmissible as evidence in an action between private parties.

Morton v Ins. Co., 218-846; 254 NW 325; 96 ALR 315

Certificate of death—admissibility. In an action to recover on a policy of insurance, a certificate of death of the insured, tho duly and legally executed by a coroner, is inadmissible as evidence insofar as said certificate assumes to state the cause of death as "suicide by hanging", said stated cause of death being simply the opinion or conclusion of the coroner and not a statement of fact.

Morton v Ins. Co., 218-846; 254 NW 325; 96 ALR 315

See Wilkinson v Assn., 203-960; 211 NW 238

Certificate as to "stillborn" infant. A certified copy of a return by a physician showing the delivery, by a Caesarean operation, of a "stillborn" infant, while proper evidence, may have but little bearing on the issue whether said "stillborn" possessed an independent circulation after being fully separated from the mother.

Wehrman v Bank, 221-249; 259 NW 564; 266 NW 290

CHAPTER 114.1

STATE BOARD OF EUGENICS

2437.09 Order for sterilization.

Discussion. See 11 ILR 262—Sterilization statute; 15 ILR 238—New sterilization statute

2437.13 Consent to operation.

Atty. Gen. Opinion. See AG Op Jan. 16, '39

TITLE VIII

THE PRACTICE OF CERTAIN PROFESSIONS AFFECTING THE PUBLIC HEALTH

CHAPTER 114.2

BASIC SCIENCE LAW

Atty. Gen. Opinions. See '36 AG Op 173, 297, 400, 449, 680; '38 AG Op 361, 538

2437.29 Meetings—powers.

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

CHAPTER 115

GENERAL PROVISIONS

Atty. Gen. Opinion. See '32 AG Op 109

2438 Definitions.

Atty. Gen. Opinion. See '34 AG Op 732

2439 License required.

Atty. Gen. Opinions. See '25-26 AG Op 256, 473; '32 AG Op 248; '34 AG Op 64

License—constitutionality. Constitutionality of statutes requiring certain qualifications and the procurement of licenses by members of the learned professions reaffirmed.

State v Optical Co., 216-1157; 248 NW 332

Dentistry—practice by corporation. A corporation, being incapable of receiving a license to practice dentistry, cannot legally practice such profession, and is, therefore, subject to injunction if it attempts so to do.

State v Bailey Co., 211-781; 234 NW 260

Unauthorized practitioner. A medical practitioner who is not duly licensed as required by law may not recover for medical services.

Hoxsey v Baker, 216-85; 246 NW 653

Optometry—when not unlawful practice—physician and optical company—reciprocal deal. A reciprocal arrangement between an optical company and a physician, whereby the company sent customers to the physician for eye examination and the physician sent pa-

tients to the company to have their prescriptions filled, does not constitute said company as practicing optometry, in the complete absence of any proof that said doctor was an employee of the company and an injunction should not issue.

State v Ritholz, 226-70; 283 NW 268

2440 Qualifications.

Atty. Gen. Opinion. See '25-26 AG Op 473

2441 Grounds for refusing.

Atty. Gen. Opinions. See '25-26 AG Op 473; '34 AG Op 492

Applicability of statute. Statute relative to refusal to grant license to practice a profession, e. g., dentistry, reviewed and held applicable solely to the granting of a license in the first instance.

Craven v Bierring, 222-613; 269 NW 801

2442 Form.

Atty. Gen. Opinions. See '30 AG Op 58; '36 AG Op 140

2444 Display of license.

Atty. Gen. Opinion. See '36 AG Op 330

2447 Renewal.

Atty. Gen. Opinions. See '25-26 AG Op 98; '34 AG Op 492

2448 Reinstatement.

Atty. Gen. Opinions. See '30 AG Op 327; '34 AG Op 492

Procedure for new license. It seems that one who has suffered a revocation of his license to practice medicine should not move for a reinstatement of his license but should commence anew by making an original application for a license.

Hanson v Board, 220-357; 260 NW 68

2449 Examining boards.

Atty. Gen. Opinion. See '36 AG Op 173

2450 Designation of boards.

Atty. Gen. Opinion. See '36 AG Op 136

2451 Composition of boards.

Atty. Gen. Opinion. See '36 AG Op 140

2455 Disqualifications.

Atty. Gen. Opinion. See '36 AG Op 173

2462 Appropriation.

Atty. Gen. Opinions. See '28 AG Op 131; '36 AG Op 268

2463 Supplies.

Atty. Gen. Opinions. See '28 AG Op 131; '36 AG Op 268

2464 Quarters.

Atty. Gen. Opinion. See '36 AG Op 268

2465.1 National organization.

Atty. Gen. Opinions. See '28 AG Op 239, 313; '36 AG Op 268; AG Op Feb. 20, '39

2471 Time of examination.

Atty. Gen. Opinion. See '28 AG Op 169

2473 Rules.

Atty. Gen. Opinion. See '34 AG Op 286

2477 Certification of applicants.

Atty. Gen. Opinion. See '34 AG Op 286

2479 Rules relative to partial examinations.

Atty. Gen. Opinion. See '30 AG Op 58

2482 States entitled to reciprocal relations.

Atty. Gen. Opinion. See '36 AG Op 296

2485 Termination of agreements.

Atty. Gen. Opinion. See '36 AG Op 296

2492 Grounds.

Atty. Gen. Opinions. See '25-26 AG Op 186, 473; '30 AG Op 327; '34 AG Op 492, 732

Evidence. Evidence held ample to justify a decree which revoked the license of a physician.

State v Knight, 204-819; 216 NW 104

Proof—sufficiency. In proceedings to revoke the license of a physician, ample proof of some of the grounds for revocation renders quite immaterial the fact that other grounds were not proved.

State v Hanson, 201-579; 207 NW 769

2493 Unprofessional conduct.

Atty. Gen. Opinions. See '30 AG Op 142; '34 AG Op 732

Examination of witness—statutory privilege. A female upon whom it is alleged a criminal abortion has been committed by a physician may, when called to testify as to what transpired between her and the physician, legally refuse, not on the ground that her answer might render her criminally liable, but on the ground that her answer would expose her to public ignominy.

State v Brown, 218-166; 253 NW 836

Revocation of license—criminal abortion as grounds. An equitable action by the state to revoke a license to practice medicine on the ground that the defendant procured or aided in procuring a criminal abortion, manifestly requires proof that the female in question was pregnant.

State v Brown, 218-166; 253 NW 836

2495 Jurisdiction of revocation.

Atty. Gen. Opinion. See '34 AG Op 492

Nonjurisdiction to reinstate. The state board of medical examiners having, under statutory authority, properly revoked a license to practice medicine, has no jurisdiction thereafter to reinstate said license when, in the meantime, jurisdiction over the revocation of such licenses has been vested solely in the district court.

Hanson v Board, 220-357; 260 NW 68

Revocation of license—procedure for new license. It seems that one who has suffered a revocation of his license to practice medicine should not move for a reinstatement of his license but should commence anew by making an original application for a license.

Hanson v Board, 220-357; 260 NW 68

2496 Petition for revocation.

Holding under former statute. The right of the county attorney to initiate proceedings for the revocation of the license of a practicing physician is not dependent on any authorization from the state board of health.

State v Knight, 204-819; 216 NW 104

2499 Rules governing petition.

Atty. Gen. Opinion. See '34 AG Op 492

Charges. Definite charges, tho informal, are sufficient in a proceeding to revoke the license of a physician.

State v Hanson, 201-579; 207 NW 769

2500 Trial.

Arbitrary refusal of continuance. The refusal of the board of medical examiners (§2578-a, S., '13), in proceedings for the revocation of a license of a physician, to grant a continuance until the accused had finished serving a sentence in the penitentiary is not necessarily arbitrary.

State v Hanson, 201-579; 207 NW 769

2501 Notice.

Notice—proper service. A statute which distinctly provides that a notice shall be "served as an original notice", authorizes a service on the designated party by leaving a copy of said notice at the usual place of residence of said party with some member of his family over fourteen years of age—when said party is not present in the county at the time of said service.

In re Sioux City Yards, 222-323; 268 NW 18

Defective service cured by appearance. Any defect in the service of the notice of the filing of charges in proceedings to revoke the license of a physician is cured by the appearance of the accused.

State v Hanson, 201-579; 207 NW 769

Substituted service of notice. The requirement that, in proceedings to revoke the license of a physician, the notice of the filing of the charges shall be served "in the manner provided for the service of an original notice in a civil action," authorizes substituted service on a proper member of the defendant's family, in case he cannot be found in the county.

State v Hanson, 201-579; 207 NW 769

2502 Nature of action.

Due process. A physician is not denied his constitutional right to "due process" by being denied a jury trial in proceedings before the board of medical examiners to revoke his license. (§2578-a, S., '13.)

State v Hanson, 201-579; 207 NW 769

Incompetent evidence—effect. In an equitable proceeding for the revocation of the license of a physician, the reception of immaterial or incompetent evidence will be deemed harmless, because it will be presumed that all such testimony was rejected in arriving at the final decision.

State v Knight, 204-819; 216 NW 104

Self-debasement. In an equitable action by the state to revoke the license of a physician, the defendant may not base a claim of error in the fact that, over his objections, the court permitted witnesses for the state to expose themselves to public disgrace and ignominy by their testimony.

State v Knight, 204-819; 216 NW 104

Tampering with witness. Evidence is admissible, in an equitable action for the revocation of the license of a physician, which tends to show that the defendant had tampered with a witness in an effort to induce her to change her testimony.

State v Knight, 204-819; 216 NW 104

2507 Hearing on appeal.

Transcript at expense of county. The statutory requirement that, in criminal cases, an impecunious defendant may, on appeal, have a transcript of the record at the expense of the county, has no application to an appeal by a defendant in an equitable action to revoke his professional license.

State v Knight, 204-819; 216 NW 104

2509 Professional titles and abbreviations.

Atty. Gen. Opinion. See '34 AG Op 424

2510.1 False representation.

Atty. Gen. Opinion. See '36 AG Op 207

2511 Itinerant defined.

Atty. Gen. Opinions. See '30 AG Op 136, 188; '36 AG Op 330; AG Op Feb. 27, '39

2512 License required.

Atty. Gen. Opinion. See '36 AG Op 330

2514 Exception.

Atty. Gen. Opinions. See '30 AG Op 136; '36 AG Op 330

2516 License—examination—renewal fees.

Atty. Gen. Opinion. See '38 AG Op 220, 339

2519 Injunction.

"Engaged in business." A person is "engaged in the business" of selling a drug when he has such drug for sale to any person who may apply for it for the seller's profit, irrespective of any other business carried on by the said seller.

State v Market Co., 209-567; 228 NW 288
See State v Howard, 216-545; 245 NW 871

Contempt proceedings—scope of inquiry. In contempt proceedings for the violation of an injunction against the practice of medicine and surgery without a license, the testimony may very properly cover the entire time from the issuance of the writ to the date of hearing.

State v Baker, 222-903; 270 NW 359

Intent to continue violation. A petition which seeks to permanently enjoin the practice of medicine without a license, and which clearly alleges such present practice by the defendant, need not necessarily allege that the defendant intends to continue such practice in the future.

State v Fray, 214-53; 241 NW 663; 81 ALR 286
State v Howard, 214-60; 241 NW 682

Estoppel—evidence—sufficiency. It is futile for the defendant, in an action by the state to enjoin the defendant from practicing medicine without a license, to plead that the state and its officers are estopped to question his right to so practice and assume to support such plea by the fact that the state had not, for twenty years, questioned his right so to practice tho he had never offered to take the statutory examination for any recognized system of practice.

State v Howard, 216-545; 245 NW 871

Presumption of continuance of condition. Proof that enjoinable acts were being committed at the time of the commencement of an action carries the presumption that the condition complained of existed at the time of the trial.

State v Optical Co., 216-1157; 248 NW 332

Enjoining criminal acts — constitutionality. The statute authorizing the entry of a permanent injunction against a person practicing medicine without a license even tho said person may be prosecuted criminally for so practicing, is not unconstitutional on the theory that injunction proceedings are simply a method of punishing the defendant for a crime without the intervention of a trial jury, and consequently denies the defendant due process of law.

State v Fray, 214-53; 241 NW 663; 81 ALR 286
State v Howard, 214-60; 241 NW 682

Allowable injunction. The fact that the state duly issues a license to practice osteopathy does not limit it to a criminal prosecution against the licensee should the latter enter upon the practice of "medicine." Injunction will lie.

State v Stoddard, 215-534; 245 NW 273; 86 ALR 616

Injunction — constitutionality. The statute authorizing injunction to restrain the practice of medicine and surgery without a license is constitutional for the reason that such practice constitutes a nuisance under the general law of the state, and chancery has, from time immemorial, possessed jurisdiction to enjoin nuisances.

State v Howard, 214-60; 241 NW 682

Injunction — discontinuance of violations — effect. *In an action to enjoin violations of the* medical practice act, the all-important and material inquiry is whether the defendant was violating the law at the time the action was brought or during the pendency thereof, not whether the defendant had discontinued his violations at the time the decree was entered.

State v Stoddard, 215-534; 245 NW 273; 86 ALR 616

Practice by corporation. A corporation, being incapable of receiving a license to practice dentistry, cannot legally practice such profession, and is, therefore, subject to injunction if it attempts so to do.

State v Dental Co., 211-781; 234 NW 260

Practice by corporation. *A corporation* is practicing optometry when it equips, and publicly opens, carries on, manages, and controls, through its employee—a licensed optometrist—an office for the practice of said profession, even tho the name of the corporation does not publicly appear as such practitioner. And inasmuch as a corporation cannot legally practice optometry, such practice will be enjoined.

State v Optical Co., 216-1157; 248 NW 332
State v Ritholz, 226-70; 283 NW 268

Optometry—when not unlawful practice—physician and optical company — reciprocal deal. A reciprocal arrangement between an optical company and a physician, whereby the company sent customers to the physician for eye examination and the physician sent patients to the company to have their prescriptions filled, does not constitute said company as practicing optometry, in the complete absence of any proof that said doctor was an employee of the company and an injunction should not issue.

State v Ritholz, 226-70; 283 NW 268

Osteopath—injections. A person who, with the public profession on his part to cure and heal, treats hemorrhoids in the human body by hypodermic injections of a curative medicine—e. g., phenol—is "practicing medicine" and is subject to injunction against practicing

medicine, generally, without a license, even tho he is already a duly licensed osteopath.

State v McPheeters, 216-1359; 249 NW 349

Sale of aspirin. A corporation may be restrained by injunction from selling or offering or exposing for sale aspirin on proof that aspirin is a drug, and is not a proprietary medicine, and that the corporation is not conducting the business of selling said article under the supervision of a licensed pharmacist.

State v Market Co., 209-567; 228NW 288

2522 Penalties.

Atty. Gen. Opinions. See '25-26 AG Op 473; '30 AG Op 174

Professional conduct—violation—undue penalty. The practitioner of a profession, e. g., dentistry, may be validly denied a renewal of his license so to practice as a penalty for his violation of a valid statutory standard of professional conduct—this section, C., '35, having no application to such violation.

Craven v Bierring, 222-613; 269 NW 801

2523.1 Department inspector and assistant.

Atty. Gen. Opinion. See '38 AG Op 170

2528 Prima facie evidence.

Practicing without authority — evidence. Evidence reviewed, and held ample to present a jury question on the issue whether the accused was practicing medicine.

State v Hueser, 205-132; 215 NW 643

Practice of dentistry. A corporation is practicing dentistry when it publicly opens an office and equips it for such practice, employs dentists to carry on such practice, and advertises its business in its corporate name accordingly.

State v Dental Co., 211-781; 234 NW 260

"Practicing medicine." A person owning and operating a hospital for the treatment of diseases is practicing medicine when he furnishes and personally and systematically causes, both directly and indirectly, a carefully guarded secret medical formula possessed, and apparently compounded, by himself to be prescribed for and to be administered to patients as the sole remedy for their ills by attendants who are not licensed physicians; and this is true even tho licensed physicians are employed to diagnose the ailments of patients.

State v Baker, 212-571; 235 NW 313

2530 Enforcement.

Atty. Gen. Opinion. See '38 AG Op 170

2531 Pharmacy examiners.

Atty. Gen. Opinion. See '38 AG Op 170

2534.1 Association fee collected.

Atty. Gen. Opinion. See '38 AG Op 339

2537.2 Duties.

Atty. Gen. Opinion. See '36 AG Op 140

2537.3 Applications—reciprocal agreements—fees.

Atty. Gen. Opinions. See '36 AG Op 140, 268

2537.4 Assistants—payment.

Atty. Gen. Opinions. See '36 AG Op 140, 268

CHAPTER 116

PRACTICE OF MEDICINE AND SURGERY

2538 Persons engaged in.

Atty. Gen. Opinion. See '38 AG Op 321

Constitutionality. Principle reaffirmed that the statutes regulating the practice of medicine and surgery are a proper exercise of the police power.

State v Hueser, 205-132; 215 NW 643
State v Howard, 216-545; 245 NW 871

"Practicing medicine"—acts constituting. A person who, with the public profession on his part to cure and heal, treats hemorrhoids in the human body by hypodermic injections of a curative medicine—e. g., phenol—is "practicing medicine" and is subject to injunction against practicing medicine, generally, without a license, even tho he is already a duly licensed osteopath.

State v McPheeters, 216-1359; 249 NW 349

"Practicing medicine"—acts constituting. A person owning and operating a hospital for the treatment of diseases is practicing medicine when he furnishes and personally and systematically causes, both directly and indirectly, a carefully guarded secret medical formula possessed, and apparently compounded, by himself to be prescribed for and to be administered to patients as the sole remedy for their ills by attendants who are not licensed physicians; and this is true even tho licensed physicians are employed to diagnose the ailments of patients.

State v Baker, 212-571; 235 NW 313

Not unlawful practice—physician and optical company—reciprocal deal. A reciprocal arrangement between an optical company and a physician, whereby the company sent customers to the physician for eye examination and the

physician sent patients to the company to have their prescriptions filled, does not constitute said company as practicing optometry, in the complete absence of any proof that said doctor was an employee of the company and an injunction should not issue.

State v Ritholz, 226-70; 283 NW 268

Practicing without authority—evidence. Evidence reviewed, and held ample to present a jury question on the issue whether the accused was practicing medicine.

State v Hueser, 205-132; 215 NW 643

Practicing without authority. Instructions which defined "prescribe" reviewed, and held unobjectionable.

State v Hueser, 205-132; 215 NW 643

Offense defined. One "who publicly professes to assume the duties incident to the practice of medicine", i. e., diagnosing human ailments and prescribing the proper treatment for such ailments, is "practicing medicine" even tho the treatment prescribed or applied consists solely of laying the hands of the practitioner upon the body of the person treated.

State v Hughey, 208-842; 226 NW 371
State v Howard, 216-545; 245 NW 871

Parties acting jointly and in cooperation. Several persons engaged jointly and in cooperation in the unlawful furnishing, prescribing, and administering of medicine without a license may be properly joined in one action for injunction.

State v Baker, 212-571; 235 NW 313

Medical services—unauthorized practitioner. A medical practitioner who is not duly licensed as required by law may not recover for medical services.

Hoxsey v Baker, 216-85; 246 NW 653

Faith healer. A naked showing by the state that a so-called faith healer in treating people simply laid his hands upon them or, at most, slightly massaged the back of the neck and head, is wholly insufficient to establish the practice of medicine and surgery, within the meaning of the statute, nor is the lack of proof supplied by a showing that some years prior to such treatment the defendant's name in a telephone directory was preceded by the title "Dr."

State v Miller, 216-806; 249 NW 141

Estoppel of state—evidence—sufficiency. It is futile for the defendant, in an action by the state to enjoin the defendant from practicing medicine without a license, to plead that the state and its officers are estopped to question his right to so practice, and assume to support such plea by the fact that the state had not, for twenty years, questioned his right so to practice tho he had never offered to take the statutory examination for any recognized system of practice.

State v Howard, 216-545; 245 NW 871

Arbitrary refusal. The refusal of the board of medical examiners (§2578-a, S., '13), in proceedings for the revocation of the license of a physician, to grant a continuance until the accused had finished serving a sentence in the penitentiary is not necessarily arbitrary.

State v Hanson, 201-579; 207 NW 769

Right to institute prosecution. Prosecutions for the enforcement of the laws regulatory of the practice of medicine and surgery may be instituted without any authority from the state department of health.

State v Hueser, 205-132; 215 NW 643

Compensation—implied agreement. One who calls upon a physician and hospital authorities to attend an injured person to whom he is under no legal obligation may, by his acts and conduct, give rise to an implied promise to pay for the services rendered.

Valentine v Morgan, 207-232; 222 NW 412

Words actionable—intoxication in connection with profession. The defamation of a physician by accusing him of having been drunk, and because thereof unable to attend a professional call, is actionable per se. Pleadings held sufficient to state such cause of action.

Amick v Montross, 206-51; 220 NW 51; 58 ALR 1147

Taxation—charity and benevolence—nonexemption. Property consisting of town lots and the buildings situated thereon, owned by a corporation, and used in part for charitable and benevolent purposes, and in part for the private profit of one of the incorporators in the practice of his profession of medicine, is not exempt from taxation, to any extent, under §6944, subsec. 9, C., '35. And it is quite immaterial—under such state of facts—that the declared purposes of the corporation are solely charitable and benevolent.

Readlyn Hospital v Hoth, 223-341; 272 NW 90

Malpractice.

Hair v Sorensen, 215-1229; 247 NW 651

Dentist—tooth lodged in lung—malpractice.

Whetstine v Moravec, 228- ; 291 NW 425

Malpractice. In an action based on malpractice in sewing up in a wound a piece of gauze, instruction reviewed and held not subject to the objections (1) that it assumed the existence of an issuable fact and that such fact constituted negligence per se, and (2) that ordinary care was improperly defined.

Forrest v Abbott, 219-664; 259 NW 238

Evidence—usual and ordinary practice. The defendant in an action for damages for malpractice may always establish, even by his own testimony, the usual and ordinary practice of physicians and surgeons in treating, in the locality in question, the injury which is the subject matter of the action.

Wilcox v Crumpton, 219-389; 258 NW 704

Negligence—usual and ordinary treatment—competency of witness. A witness, his competency to testify being established, may testify as to what was the usual and ordinary practice at a named time and place among physicians and surgeons in the treatment of a specified injury.

Lemon v Kessel, 202-273; 209 NW 393; 26 NCCA 82; 28 NCCA 641

Negligence—usual and ordinary treatment—evidence. Evidence that certain medical treatment was not employed on a patient may very properly be met by evidence that such treatment was not the usual and ordinary method of practice at the time and place in question.

Lemon v Kessel, 202-273; 209 NW 393; 26 NCCA 82; 28 NCCA 641

Malpractice—res ipsa loquitur.

Whetstine v Moravec, 228- ; 291 NW 425

Negligence—evidence—sufficiency. Evidence held insufficient to present a jury question on the issue whether a physician was negligent in failing to discover and remove from the womb of plaintiff a portion of the placenta, and whether the retention of said placenta was the cause of septicemia.

McDaniels v Moth, 210-102; 230 NW 311

Malpractice—evidence. A physician does not impliedly guarantee that his treatment of a patient will be beneficial. He fully performs his duty when he, with due care, applies to his patient that treatment which is generally and ordinarily applied by physicians under like circumstances in the locality in question. Evidence held insufficient to show that the defendant had not performed his duty.

Nelson v Sandell, 202-109; 209 NW 440; 46 ALR 1447; 26 NCCA 99

Malpractice—nonjoint liability. The mere fact that a physician directs his patient to go to a named dentist for the extraction of a tooth, and agrees to and does administer the anesthetic, does not create such relation as will render the physician liable for the negligence of the dentist.

Nelson v Sandell, 202-109; 209 NW 440; 46 ALR 1447; 26 NCCA 99

Malpractice—recoverable and nonrecoverable damages—failure to differentiate. In an action for malpractice in that, after performing a successful operation except that the defendant negligently left a piece of gauze in the wound, which negligence necessitated a second operation, instructions relative to damages arising from (1) scars, (2) bodily and mental pain, and (3) expenses paid for household servants, must clearly differentiate, in view of the two operations, between such damages as are, under each heading, recoverable, and those that are not recoverable.

Forrest v Abbott, 219-664; 259 NW 238; 38 NCCA 315

Negligence—evidence. In an action for malpractice, evidence which is narrative of the physical condition of the patient at a time and place in controversy is necessarily admissible.

Lemon v Kessel, 202-273; 209 NW 393

Negligence—proximate cause. In an action for malpractice, proof that the physician negligently failed to apply the proper treatment avails nothing when the effect of proper treatment, had it been applied, is shown by the evidence to be purely speculative—just a guess.

Thompson v Anderson, 217-1186; 252 NW 117

Negligence—proximate cause. In an action for malpractice, plaintiff does not make a jury question by proof that the defendant was negligent in the treatment or in the lack of treatment of the patient, but must go forward with his proof and establish by a preponderance of the testimony that such negligence, and not the original injury, was the proximate cause of death.

Ramberg v Morgan, 209-474; 218 NW 492

Malpractice—proximate cause of damage. In an operation for conization of the cervix, evidence held to clearly place the negligence of the defendants, if any, in failing to keep the canal open while healing, as the proximate cause of plaintiff's injury.

Kirchner v Dorsey & Dorsey, 226-283; 284 NW 171

Negligence—new condition subsequent to discharge. If, after the discharge of a patient, new conditions arise which are not the natural result of the previously existing condition of the patient, the physician must have due notification of such condition and an opportunity to treat it; and the jury must be so instructed, if an instruction is requested.

Lemon v Kessel, 202-273; 209 NW 393

Aggravation of injury by unskillful treatment—liability of original wrongdoer. It is a principle of law that one who negligently inflicts a personal injury on another is liable in damages for the aggravation of said injury resulting from the unskillful treatment of said injury by his physicians and surgeons, provided the injured party exercised reasonable care in selecting said physicians and surgeons, but to permit the application of said principle there must be a proper showing of causal connection between said wrongfully inflicted injury and the said unskillful treatment.

Johnson v Selindh, 221-378; 265 NW 622

Negligence—amputation without X-ray picture. The issue whether a surgeon was negligent in failing to have an X-ray picture taken of a broken arm before amputating it, does not become a jury question on general descriptive testimony of the arm by laymen opposed by unanimous expert testimony that the extent of the broken, crushed, and mangled arm was

plainly apparent without an X-ray picture, the issue being whether amputation was necessary.

Jackovach v Yocom, 212-914; 237 NW 444; 76 ALR 551; 38 NCCA 346

X-ray pictures. An X-ray picture of an arm of the human body taken several days after amputation and when the arm is admittedly in a materially different condition than it was in when amputated cannot be received for any other purpose than to show the condition of the arm when the picture was taken, the very material issue being as to the condition of the arm at the time of amputation.

Jackovach v Yocom, 212-914; 237 NW 444; 76 ALR 551; 38 NCCA 346

Negligence—adverse result of X-ray treatment—jury question. While the adverse result attending X-ray treatment, e. g., a burn, is not in and of itself evidence of negligence, yet evidence that such result does not ordinarily follow reasonably skillful treatment, plus evidence that such result may result from too frequent treatment, or from treatment prolonged during a long period of time, and that plaintiff was so treated, may generate a jury question on the issue of negligence.

Berg v Willett, 212-1109; 232 NW 821; 38 NCCA 383

Hearsay—statement of stranger to action. The statement of a physician not a party to an action, relative to an X-ray picture exhibited to him, is hearsay and therefore incompetent.

Wilcox v Crumpton, 219-389; 258 NW 704

Negligence—evidence to rebut. On the issue why a reduced oblique fracture of a bone "slipped," evidence is admissible tending to show that in such fractures particles of flesh are liable to gather under the ends of the splintered bones and thus cause a slipping.

Lemon v Kessel, 202-273; 209 NW 393; 26 NCCA 82; 28 NCCA 641

Poor result of treatment—nonpresumption of negligence. The exclusion of testimony (in an action of malpractice growing out of the reduction of a fracture of a broken leg) tending to show that the bone was not, after a certain period of treatment, in the condition in which it ordinarily would be in after the usual and customary treatment had been applied does not constitute error when there is no other evidence of negligence or want of proper treatment of the patient. In other words, no presumption of negligence can be drawn from the naked fact that the result of treatment was unsatisfactory.

Hair v Sorensen, 215-1229; 247 NW 651

Negligence—evidence—competency. Principle reaffirmed that the issue whether the treatment accorded to a patient by a physician was proper must be determined by expert testimony.

Ramberg v Morgan, 209-474; 218 NW 492

Expert testimony—success of treatment. An expert medical witness may not testify as to the success he has had in treating a specified injury in a specified manner.

Wilcox v Crumpton, 219-389; 258 NW 704

Medical works — examination concerning. Prejudicial error results from permitting a physician, defendant in an action for malpractice, to be cross-examined as to the contents and teaching of scientific works on medicine, when the witness has not testified directly or indirectly as to such works.

Wilcox v Crumpton, 219-389; 258 NW 704

Negligence — pain and suffering — rebuttal. In an action for malpractice, evidence of pain and suffering on the part of the patient is, of course, rebuttable.

Lemon v Kessel, 202-273; 209 NW 393

Negligence—damages—pain incident to injury. No recovery may be had, in an action for malpractice, for pain (1) incident to an injury, or (2) incident to the usual and ordinary treatment of an injury; and, on request, the court must clearly differentiate, in its instructions, between such pain and pain caused by the negligence of the physician.

Lemon v Kessel, 202-273; 209 NW 393

Amputation without consent of patient or parents. It is the duty of a physician or surgeon, in an emergency which endangers the life or health of his patient, to do that which the occasion demands within the usual and customary practice among physicians and surgeons in the locality in question, even without the consent of the patient or of those who have the right to speak for him. And in so doing the physician or surgeon is not liable for an honest error in judgment.

Jackovach v Yocom, 212-914; 237 NW 444; 76 ALR 551; 38 NCCA 346

Negligence—undue shortening of limb—evidence. In an action for malpractice wherein it is shown that an injured limb, after treatment, was over three inches shorter than the uninjured limb, held that improperly formed questions tending to show that the ordinary results of such an injury would be a shortening of one or two inches were properly excluded.

Lemon v Kessel, 202-273; 209 NW 393; 26 NCCA 82; 28 NCCA 641

Necessity for amputation — jury question. The issue whether a necessity existed for the amputation of an arm does not become a jury question on general descriptive testimony of laymen, bearing on the appearance of the arm, and tending to show no necessity for amputation, and unanimous expert testimony to the effect that amputation was necessary in order to save the life of the patient.

Jackovach v Yocom, 212-914; 237 NW 444; 76 ALR 551; 38 NCCA 346

Negligence — jury question. Evidence reviewed, and held to present a jury question on the issue of negligence of a physician in failing to properly treat a traumatically injured patient.

Ramberg v Morgan, 209-474; 218 NW 492

Correct and incorrect instructions — effect. In an action for damages consequent on malpractice in sewing up a sponge in a wound, instructions which in part definitely confine the jury to the one ground of negligence alleged, and which in part fail so to confine them, constitute reversible error.

Forrest v Abbott, 219-664; 259 NW 238; 38 NCCA 315

Malpractice—damages—verdict. Verdict of $20,000 for personal injury consequent on the malpractice of a physician held nonexcessive.

Legler v Clinic, 207-720; 223 NW 405

Release—joint wrongdoers. A party who has been negligently injured and settles with and releases the original wrongdoer may not thereafter maintain an action against a physician for malpractice in treating the very injuries for which he has effected a settlement.

Phillips v Werndorff, 215-521; 243 NW 525

CHAPTER 117

PRACTICE OF PODIATRY

Atty. Gen. Opinions. See '38 AG Op 443, 665

2542 Persons engaged in practice.

Atty. Gen. Opinion. See '38 AG Op 443

2543 Persons not required to qualify.

Atty. Gen. Opinion. See '38 AG Op 443

2544 License.

Atty. Gen. Opinion. See '38 AG Op 320

2545 Approved school.

Atty. Gen. Opinions. See '38 AG Op 320; AG Op Oct. 6, '39

2546 Amputations—general anesthetics.

Atty. Gen. Opinions. See '32 AG Op 40; '38 AG Op 665

CHAPTER 118

PRACTICE OF OSTEOPATHY AND SURGERY

Atty. Gen. Opinions. See '25-26 AG Op 268; '36 AG Op 46, 264

2554.01 Definitions.

Atty. Gen. Opinion. See '36 AG Op 264

2554.05 Requirements—osteopathy and surgery.

Atty. Gen. Opinion. See '34 AG Op 286; '36 AG Op 46

2554.08 Internal curative medicines—surgery.

Atty. Gen. Opinions. See '36 AG Op 264; AG Op Oct. 7, '39

"Internal curative medicine"—scope of term. The statutory prohibition against a duly licensed and practicing osteopath prescribing for, or giving to, a patient "internal curative medicines" is as much violated by prescribing or giving for internal use a medicine designed simply to relieve a diseased conditon of the human body as tho he prescribed or gave to the patient for such use a specific—a known cure for said diseased condition.

State v Stoddard, 215-534; 245 NW 273; 86 ALR 616

2554.09 County physician.

Atty. Gen. Opinion. See '38 AG Op 321

CHAPTER 119

PRACTICE OF CHIROPRACTIC

2555 "Chiropractic" defined.

Atty. Gen. Opinion. See '38 AG Op 321

Chiropractors—prohibited practices—use of medical and surgical accessories. The statute limiting the practice of chiropractic and in specific terms prohibiting the use of surgery, osteopathy, or drugs must be construed as prohibiting chiropractors from practicing adjuncts to these practices, such as physiotherapy, electrotherapy, colonic irrigation, ultraviolet rays, traction tables, vitalizers, vibrators, and the like, and also construed as prohibiting chiropractors from prescribing diet in the treatment of the sick.

State v Boston, 226-429; 278 NW 291; 284 NW 143

2557 License.

Atty. Gen. Opinion. See '25-26 AG Op 406

2559 Operative surgery—drugs.

Atty. Gen. Opinions. See '34 AG Op 236; '38 AG Op 321

Chiropractors—prohibited practices—use of medical and surgical accessories. The statute limiting the practice of chiropractic and in specific terms prohibiting the use of surgery, osteopathy, or drugs must be construed as prohibiting chiropractors from practicing adjuncts to these practices, such as physiotherapy, electrotherapy, colonic irrigation, ultraviolet rays, traction tables, vitalizers, vibrators, and the like, and also construed as prohibiting chiropractors from prescribing diet in the treatment of the sick.

State v Boston, 226-429; 278 NW 291; 284 NW 143

CHAPTER 120

PRACTICE OF NURSING

Atty. Gen. Opinion. See '36 AG Op 535

CHAPTER 121

PRACTICE OF DENTISTRY

2565 "Practice of dentistry" defined.

Malpractice cases, see under §2532

Atty. Gen. Opinion. See '34 AG Op 424

Dentistry — practice of. A corporation is practicing dentistry when it publicly opens an office and equips it for such practice, employs dentists to carry on such practice, and advertises its business in its corporate name accordingly.

State v Dental Co., 211-781; 234 NW 260

Practice by corporation. A corporation, being incapable of receiving a license to practice dentistry, cannot legally practice such profession, and is, therefore, subject to injunction if it attempts so to do.

State v Dental Co., 211-781; 234 NW 260

2567 License.

Certificate to practice—denial. Statute relative to refusal to grant license to practice a profession, e. g., dentistry, reviewed and held applicable solely to the granting of a license in the first instance.

Craven v Bierring, 222-613; 269 NW 801

2568 Names of employed dentists to be posted.

Atty. Gen. Opinion. See '34 AG Op 424

2569 Employment of unlicensed dentist.

Atty. Gen. Opinion. See '34 AG Op 424

2570 Practice under own name.

Atty. Gen. Opinions. See '28 AG Op 52; '34 AG Op 424

Dentistry. A corporation is practicing dentistry when it publicly opens an office and equips it for such practice, employs dentists to carry on such practice, and advertises its business in its corporate name accordingly.

State v Dental Co., 211-781; 234 NW 260

2573.02 Renewal of licenses.

Deprivation of certificate. The holder of a duly issued certificate to practice a profession, e. g., dentistry, cannot be deprived of said certificate without due process, to wit: notice, hearing, and right to appeal to the courts. Statutes reviewed and held ample to protect such holder.

Craven v Bierring, 222-613; 269 NW 801

2573.04 Renewal and notice of expiration.

Atty. Gen. Opinion. See '36 AG Op 207

2573.05 Determining right to renewal.

Denial — applicability of statute. Statute relative to refusal to grant license to practice a profession, e. g., dentistry, reviewed and held applicable solely to the granting of a license in the first instance.

Craven v Bierring, 222-613; 269 NW 801

Professional conduct—violation. The practitioner of a profession, e. g., dentistry, may be validly denied a renewal of his license so to practice as a penalty for his violation of a valid statutory standard of professional conduct—§2522, C., '35, having no application to such violation.

Craven v Bierring, 222-613; 269 NW 801

2573.09 Grounds for rejecting application.

Professional conduct—violation—undue penalty. The practitioner of a profession, e. g., dentistry, may be validly denied a renewal of his license so to practice as a penalty for his violation of a valid statutory standard of professional conduct—§2522, C., '35, having no application to such violation.

Craven v Bierring, 222-613; 269 NW 801

2573.16 Unprofessional conduct.

Limitation on advertising. The right of the state under its police power to regulate in the interest of the public health, morals, and welfare a medical profession, e. g., the practice of dentistry, embraces the right to place stringent limitations on the form and style of advertisement which the practitioner may legally employ in carrying on his said profession, even the right to prohibit the use of advertisements which, in themselves, are truthful. But the state must not act arbitrarily.

Craven v Bierring, 222-613; 269 NW 801

Constitutionality of statute. Injunction will lie to enjoin the enforcement of an alleged unconstitutional statute which fixes a standard of conduct for a professional practitioner, e. g., a dentist.

Craven v Bierring, 222-613; 269 NW 801

CHAPTER 122

PRACTICE OF OPTOMETRY

2574 "Optometry" defined.

Atty. Gen. Opinion. See '25-26 AG Op 308

Practice by corporation. A corporation is practicing optometry when it equips, and publicly opens, carries on, manages, and controls, through its employee—a licensed optometrist—an office for the practice of said profession, even tho the name of the corporation does not publicly appear as such practitioner. And, inasmuch as a corporation cannot legally practice optometry, such practice will be enjoined.

State v Optical Co., 216-1157; 248 NW 332

Optometry—corporation practicing through employee-physician. A corporation is practicing optometry when it employs a physician—a licensed optometrist—to carry on his business under the company's control, and such practice may be enjoined.

State v Ritholz, 226-70; 283 NW 268

Optometry—when not unlawful practice—physician and optical company—reciprocal deal. A reciprocal arrangement between an optical company and a physician, whereby the company sent customers to the physician for eye examination and the physician sent patients to the company to have their prescriptions filled, does not constitute said company as practicing optometry, in the complete absence of any proof that said doctor was an employee of the company and an injunction should not issue.

State v Ritholz, 226-70; 283 NW 268

2575 Persons not engaged in.

Optometry—when not unlawful practice—physician and optical company—reciprocal deal. A reciprocal arrangement between an optical company and a physician, whereby the company sent customers to the physician for eye examination and the physician sent patients to the company to have their prescriptions filled, does not constitute said company as practicing optometry, in the complete absence of any proof that said doctor was an employee of the company and an injunction should not issue.

State v Ritholz, 226-70; 283 NW 268

CHAPTER 123

PRACTICE OF PHARMACY

Atty. Gen. Opinion. See '36 AG Op 664

2578 Persons engaged in.

Atty. Gen. Opinions. See '34 AG Op 618, 732; '36 AG Op 664

Right of pharmacist. A registered pharmacist may legally have government alcohol in his possession and, in his business as a pharmacist, use the same in compounding nonbeverage drugs and medicines and in the filling of prescriptions, even tho he has neither a state permit to keep and sell such liquor nor a state permit to manufacture.

Reppert v Utterback, 206-314; 217 NW 545

Sale of aspirin—injunction. A corporation may be restrained by injunction from selling or offering or exposing for sale aspirin on proof that aspirin is a drug and is not a proprietary medicine, and that the corporation is not conducting the business of selling said article under the supervision of a licensed pharmacist.

State v Market Co., 209-567; 228 NW 288

2579 Persons not engaged in.

Atty. Gen. Opinion. See '34 AG Op 618

2580 Definitions.

Atty. Gen. Opinion. See '36 AG Op 664

Class legislation—sale of drugs and medicines. Whether the statute (1) which defines "drugs and medicines" as including all substances and preparations for external or internal use recognized in the United States Pharmacopoeia or National Formulary, and (2) which prohibits the sale of "drugs and medicines" except by, or under the supervision

of, a licensed pharmacist, is unconstitutional on the ground that said publications embrace many harmless substances that are of common and domestic use, quaere.

State v Market Co., 209-567; 228 NW 288

Sale of aspirin—injunction. A corporation may be restrained by injunction from selling, or offering or exposing for sale, aspirin on proof that aspirin is a drug and is not a proprietary medicine, and that the corporation is not conducting the business of selling said article under the supervision of a licensed pharmacist.

State v Market Co., 209-567; 228 NW 288

2582.2 Use of terms.

Atty. Gen. Opinion. See '32 AG Op 67

CHAPTER 124.1

PRACTICE OF EMBALMING

Atty. Gen. Opinion. See '30 AG Op 142

2585.01 "Embalming" defined.

Atty. Gen. Opinion. See '36 AG Op 226

Practice by corporation. An incorporation which purports to be a cooperative association may not legally practice the profession of embalming by furnishing its so-called members with the services of a licensed embalmer when, under its organization, no restriction is placed on its membership except that said members must reside within 35 miles of the association's place of business. Whether the association could so practice were its membership reasonably restricted, quaere.

State v Fremont Assn., 222-949; 270 NW 320

Private nuisance—funeral home. The operating of an undertaking business or so-called funeral home in a strictly residential section of a municipality under circumstances which bring to the families in the immediate neighborhood a constant reminder of death, a resulting feeling of mental depression, an appreciable lessening of their happiness and disease-resisting powers, and an appreciable depreciation of the value of their properties, constitutes a nuisance and is enjoinable as such.

Bevington v Otte, 223-509; 273 NW 98

2585.03 License.

Atty. Gen. Opinion. See '34 AG Op 584

Private nuisance—undertaking establishment. The operation under formal municipal permit of an undertaking and embalming establishment in a city, in a territory designated by a duly enacted zoning ordinance as a commercial district, will not be enjoined on the sole ground that, being adjacent to a residence, said operation will have a depressing mental effect on the occupant and owner of said residence and on the members of his family.

Kirk v Mabis, 215-769; 246 NW 759; 87 ALR 1055

CHAPTER 124.2

COSMETOLOGY

Atty. Gen. Opinions. See '30 AG Op 170, 174

2585.10 Definitions.

Atty. Gen. Opinion. See '32 AG Op 41

Cosmetology schools — charges for services of students. A statute defining cosmetologists as being persons who receive compensation for services and which provides that no person or corporation shall use any person as a practitioner of cosmetology unless the person is an apprentice or licensed cosmetologist, is an unconstitutional exercise of police power in requiring that students of cosmetology schools do gratuitous work while obtaining practical experience, as such requirement would be an arbitrary interference with private business and the right to contract and would impose unnecessary restrictions upon lawful occupations in violation of due process of law.

State v Thompson's School, 226-556; 285 NW 133

Burns by operator—specific negligence—res ipsa loquitur — separate counts. Having received burns from a beauty parlor treatment, a plaintiff, after pleading specific acts of negligence in one count and the doctrine of res ipsa loquitur in another count, may at the conclusion of the evidence withdraw the first count and rely on the res ipsa loquitur doctrine which is always applicable in cases where all the instrumentalities are under the control of the operator and where, had ordinary care been used, the injuries would not ordinarily have occurred.

Pearson v Butts, 224-376; 276 NW 65

2585.11 Exceptions.

Atty. Gen. Opinion. See '30 AG Op 174

2585.12 License.

Atty. Gen. Opinions. See '30 AG Op 170; AG Op Nov. 8, '39

2585.15 Rules—practice in home.

Atty. Gen. Opinion. See '34 AG Op 320

2585.17 Assistants.

Atty. Gen. Opinion. See AG Op Jan. 31, '39

2585.20 Temporary permits.

Atty. Gen. Opinion. See '30 AG Op 174

2585.21 Managers—license required.

Atty. Gen. Opinion. See '32 AG Op 41

2585.22 Employment restricted.

Cosmetology schools—charges for services of students. A statute defining cosmetologists as being persons who receive compensation for services and which provides that no person or corporation shall use any person as a practitioner of cosmetology unless the person is an apprentice or licensed cosmetologist, is an unconstitutional exercise of police power in requiring that students of cosmetology schools do gratuitous work while obtaining practical experience, as such requirement would be an arbitrary interference with private business and the right to contract and would impose unnecessary restrictions upon lawful occupations in violation of due process of law.

State v Thompson's School, 226-556; 285 NW 133

CHAPTER 124.3

BARBERING

Atty. Gen. Opinion. See '38 AG Op 220

TITLE IX

AGRICULTURE, HORTICULTURE, AND ANIMAL INDUSTRY

CHAPTER 125

DEPARTMENT OF AGRICULTURE

2590 Powers and duties.

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

2596 Assessor.

Atty. Gen. Opinions. See '28 AG Op 74, 114

2597 Returns by assessor.

Atty. Gen. Opinions. See '28 AG Op 74, 114

CHAPTER 125.1

SOIL CONSERVATION

2603.04 Definitions.

Federal instrumentality — congress determines immunity from state laws. It is within discretion of congress to determine in what respects and to what extent its instrumentalities, for their proper functioning, shall be immune from legislation of state origin.

First Tr. JSL Bk. v Lehman, 225-1309; 283 NW 96

CHAPTER 126

FRUIT-TREE AND FOREST RESERVATIONS

Atty. Gen. Opinions. See '25-26 AG Op 371; '28 AG Op 125; '32 AG Op 21, 272; '38 AG Op 198

2605 Tax exemption.

Atty. Gen. Opinion. See '38 AG Op 738

2606 Reservations.

Atty. Gen. Opinions. See '28 AG Op 100; '30 AG Op 140, 306; '32 AG Op 198; '38 AG Op 738

2607 Forest reservation.

Atty. Gen. Opinion. See '30 AG Op 175

2611 Fruit-tree reservation.

Atty. Gen. Opinions. See '25-26 AG Op 282; '38 AG Op 738

2614 Restraint of livestock.

Atty. Gen. Opinion. See '38 AG Op 198

2615 Penalty.

Atty. Gen. Opinion. See '38 AG Op 198

2616 Assessor.

Atty. Gen. Opinion. See '38 AG Op 738

2617 County auditor.

Atty. Gen. Opinion. See '38 AG Op 738

CHAPTER 127

REGISTRATION OF ANIMALS

Atty. Gen. Opinion. See '34 AG Op 381

CHAPTER 128

INFECTIOUS AND CONTAGIOUS DISEASES AMONG ANIMALS

2643 Powers of department.

Atty. Gen. Opinion. See '25-26 AG Op 350

2652 Quarantining or killing animals.

Atty. Gen. Opinions. See '28 AG Op 218; '30 AG Op 312

Right to destroy if indemnifying funds ample. Tuberculosis-infected cattle may be destroyed without the consent of the owner even tho the county tuberculosis eradication fund is overdrawn, if the state allotment fund is ample to meet the resulting damage.

Peverill v Dept., 216-534; 245 NW 334

2661 Sale or exposure of infected animals.

Warranty — unallowable defense. The vendor of animals who actually warrants them to be "healthy and all right" may not avail himself of the claim that he had only recently purchased them, and that the vendee had equal knowledge with him as to their state of health.

Cavanaugh v Stock Co., 206-893; 221 NW 512

2663 Penalties.

Atty. Gen. Opinion. See '25-26 AG Op 350

CHAPTER 129

ERADICATION OF BOVINE TUBERCULOSIS

Atty. Gen. Opinion. See '30 AG Op 161

2665 Cooperation.

Discussion. See 15 ILR 509—Bovine tuberculosis statutes

Atty. Gen. Opinion. See '25-26 AG Op 298

Constitutionality reaffirmed. Constitutionality of bovine tuberculosis law reaffirmed.

Panther v Department, 211-868; 234 NW 560

Accredited area plan—enrollment—condition precedent. A county may not legally be enrolled under the accredited area plan for the eradication of bovine tuberculosis until the county has first been legally enrolled under the county area plan for such eradication.

Phelps v Thornburg, 206-1150; 221 NW 835

Enrollment of county—insufficient publication. A notice of the hearing before the board of supervisors on a petition for the enrollment of a county under the county area eradication plan relating to bovine tuberculosis is a nullity when the last newspaper publication was on August 13th and the hearing was had on August 17th.

Phelps v Thornburg, 206-1150; 221 NW 835

Accredited area plan—withdrawal of signatures—effect. Upon the filing with the secretary of agriculture of the required agreements for the enrollment of a county under the accredited area plan for the eradication of bovine tuberculosis, the jurisdiction in said secretary to act is not taken away by the subsequent withdrawal of signatures to such agreements.

Thede v Thornburg, 207-639; 223 NW 386

Permissible legalization. The legislature may validly legalize the act of the secretary of agriculture in enrolling a county under the accredited area plan for the eradication of bovine tuberculosis when the illegality of such enrollment is predicated on the doubt whether the petitions as a basis for such action contained the statutory number of signatures.

Peverill v Board, 208-94; 222 NW 535

Illegal enrollment of county—waiver and estoppel. Failure to properly publish a notice relative to the enrollment of a county for the eradication of bovine tuberculosis is not a mere irregularity, but is jurisdictional.

Phelps v Thornburg, 206-1150; 221 NW 835

Hearing—mandatory duty of secretary. The statutory requirement that the secretary of agriculture shall, on the basis of certain agreements filed with him, "hold a hearing" on the proposal to enroll a county under the accredited area plan for the eradication of bovine tuberculosis is mandatory, and the secretary has no power to substitute some other person to hold such hearing, even tho such hearing is reported in detail to the secretary, and later passed upon by him.

Thede v Thornburg, 207-639; 223 NW 386

Certification of petitions—sufficiency. Petitions for the enrollment of a county under the county-area-eradication plan for the control of bovine tuberculosis, after being passed upon by the board of supervisors, are properly transmitted by the county auditor to the secretary of agriculture by means of certified copies, such being the direction of the statute.

Thede v Thornburg, 207-639; 223 NW 386

2666 State as accredited area.

Class legislation—permissible agencies. The legislature may, generally speaking, choose any agency for the initiative and realization of the benefits of a public health measure.

Lausen v Board, 204-30; 214 NW 682

Due process as limitation on police power. The due process clause of the federal constitution is no limitation on a legitimate and reasonable exercise by the state of its police powers over bovine tuberculosis.

Peverill v Board, 208-94; 222 NW 535

Compulsory testing. An owner of breeding cattle who is validly required by statute to have them tested for tuberculosis or to submit to criminal prosecution may not complain that the law accords to him the right to enter into an agreement with the public authorities for his own protection.

Fevold v Board, 202-1019; 210 NW 139

Notice of time of testing unnecessary.

Peverill v Dept., 216-534; 245 NW 334

Justifiable and unjustifiable destruction. The constitutional requirement of due process of law—notice and hearing—is fully met by the bovine tuberculosis act (1) in depriving the owner of all notice and hearing prior to the destruction of cattle actually infected with tuberculosis, and (2) in impliedly and necessarily giving to said owner a right of action for damages against persons destroying his cattle when they are not so infected.

Loftus v Dept., 211-566; 232 NW 412

Scientific difference as to efficiency of health measure—effect. When it appears that there is a scientific difference of opinion as to the efficiency, desirability and reliability of a proposed public health measure, e. g., the tuberculin test for bovine tuberculosis, it necessarily follows that the door is open to the legislative department to adopt the theory to which it will apply its police power.

Loftus v Dept., 211-566; 232 NW 412
Panther v Dept., 211-868; 234 NW 560

Nonrequired bond by examiner. In applying the bovine tuberculosis test, the examiner need not, nor may he be required to, post a bond to indemnify the owner against loss in case cattle are wrongfully destroyed, because the statute does not expressly or impliedly require such bond.

Peverill v Dept., 216-534; 245 NW 334

2668 Appraisal.

Right to test prior to appraisement. Even tho the statute declares that "before being tested, such animals shall be appraised, etc.," nevertheless, an examination of the entire bovine tuberculosis act clearly demonstrates that "shall" is not used in a mandatory sense.

Peverill v Dept., 216-534; 245 NW 334

2669 Presence of tuberculosis.

Atty. Gen. Opinion. See '25-26 AG Op 350

Wrongful destruction by governmental agency. When animals are wrongfully destroyed by a governmental agency, the individual wrongdoer is liable in damages for such destruction.

Panther v Dept., 211-868; 234 NW 560

2670 Nonright to receive compensation.

Atty. Gen. Opinion. See '25-26 AG Op 327

2671 Amount of indemnity.

Atty. Gen. Opinions. See '25-26 AG Op 174, 315, 327, 359; '30 AG Op 92, 187

Noninjured complainant. A party may not question the constitutionality of this statute when he fails to show that he has been or will be injured by the statute. In other words, he may not borrow an objection from one who could complain, but does not complain.

Peverill v Board, 201-1050; 205 NW 543

2672 Pedigree.

Atty. Gen. Opinion. See '30 AG Op 92

2673 Right to receive pay.

Atty. Gen. Opinion. See '30 AG Op 312

2675 Examination by department.

Atty. Gen. Opinion. See '28 AG Op 218

2678 Tuberculin.

Atty. Gen. Opinion. See '25-26 AG Op 408

Regulation of curative agencies. The state may, under its police power, validly control the sale, distribution, and administration of an agency (e. g., tuberculin) which is the basis upon which rests the efforts of the state to eradicate bovine tuberculosis.

Fevold v Board, 202-1019; 210 NW 139

2679 Inspectors and assistants.

Atty. Gen. Opinion. See '25-26 AG Op 408

2680 Accredited veterinarian.

Atty. Gen. Opinion. See '25-26 AG Op 408

2683 Establishment by petition of breeders. (Repealed)

Due process.

Peverill v Board, 201-1050; 205 NW 543

Class legislation.

Lausen v Board, 204-30; 214 NW 682

Notice—insufficient publication.

Phelps v Thornburg, 206-1150; 221 NW 835

2684 Sufficiency of petition — enrollment. (Repealed)

Illegal enrollment of county.

Phelps v Thornburg, 206-1150; 221 NW 835

2685 Agreements filed with department. (Repealed)

Certification of petitions.
Thede v Thornburg, 207-639; 223 NW 386

2686 Eradication fund.
Atty. Gen. Opinion. See '30 AG Op 161

2689 Levy omitted.
Atty. Gen. Opinion. See '30 AG Op 161

2690 Availability of county fund.
Atty. Gen. Opinions. See '25-26 AG Op 327, 330

2693 Certification of claims.
Atty. Gen. Opinion. See '25-26 AG Op 330

2694 Accredited counties—notice—hearing. (Repealed)

Due process.
Fevold v Board, 202-1019; 210 NW 139

Enrollment—condition precedent.
Phelps v Thornburg, 206-1150; 221 NW 835

Fraud in enrollment of county.
Peverill v Board, 208-94; 222 NW 535

Hearing—mandatory personal duty of secretary.
Thede v Thornburg, 207-639; 223 NW 386

Legalization of illegal acts.
Peverill v Board, 201-1050; 205 NW 543

Substantial compliance with act.
Fevold v Board, 202-1019; 210 NW 139

Uniform operation.
Fevold v Board, 202-1019; 210 NW 139

Withdrawal of signatures—effect.
Thede v Thornburg, 207-639; 223 NW 386

2699 Permitting test.
Atty. Gen. Opinion. See '25-26 AG Op 271

2700 Penalty.
Atty. Gen. Opinion. See '25-26 AG Op 350

2701 Preventing test.
Atty. Gen. Opinion. See '25-26 AG Op 350

2702 Notice.
Atty. Gen. Opinion. See '25-26 AG Op 298

CHAPTER 130

HOG-CHOLERA VIRUS AND SERUM

2705 Definitions.
Atty. Gen. Opinion. See '34 AG Op 196

2710 Dealer's permit.
Atty. Gen. Opinions. See '34 AG Op 196; AG Op Feb. 28, '39

2713 Liability of manufacturer.

Loss or injury—evidence. Evidence tending to show that after a purported hog-cholera remedy was employed on hogs, they died of diseases which are prevalent and common among hogs, is not competent to prove that said remedy contained the germs of said diseases.

Howard v Serum Co., 202-822; 211 NW 419; 26 NCCA 921

Measure of care in manufacture. A manufacturer of hog-cholera virus and serum who, in a contract of sale, distinctly provides that he does not guarantee said product "further than that it will be manufactured strictly in accordance with the rules and regulations as laid down by the department of agriculture" of the federal government (which rules and regulations are distinctly comprehensive, in great detail, and mandatory on all manufacturers by fiat of the federal authorities) may not be held liable in damages resulting from the purchase and use of said product because he did not employ in the manufacture some additional precaution not required by said government regulations, e. g., a bacteriological testing laboratory.

Howard v Serum Co., 202-822; 211 NW 419; 26 NCCA 921

Proximate cause of death. Evidence held to present a jury question on the issue whether the feeding of a so-called hog remedy to hogs was the proximate cause of their death.

Crouch v Remedy Co., 205-51; 217 NW 557; 38 NCCA 80

CHAPTER 131

USE AND DISPOSAL OF DEAD ANIMALS

2745 Disposal of dead animals.
Atty. Gen. Opinions. See '36 AG Op 124; '38 AG Op 147

2746 "Disposing" defined.
Atty. Gen. Opinions. See '36 AG Op 124; '38 AG Op 147

2747 Application for license.
Atty. Gen. Opinion. See '38 AG Op 147

2748 Inspection of place.
Atty. Gen. Opinion. See '38 AG Op 147

2749 License.
Atty. Gen. Opinion. See '38 AG Op 147

2758 Transportation of dead animals.
Atty. Gen. Opinions. See '36 AG Op 124; '38 AG Op 147

2761 Duty to dispose of dead bodies.

Atty. Gen. Opinion. See '36 AG Op 124

Duplicity in indictment. The offense of permitting the carcass of a dead animal to lie about the premises of the owner or custodian undisposed of for more than 24 hours, is complete when the law is violated as to any one animal. It follows that an indictment charges more than one offense when it charges a violation as to more than one animal, dying "at sundry and various times".

State v Redlinger, 207-1114; 224 NW 83

CHAPTER 132

VETERINARY MEDICINE AND SURGERY

2764 Persons engaged in practice.

Atty. Gen. Opinions. See '25-26 AG Op 178; '30 AG Op 378; '36 AG Op 606

2765 Persons not engaged in practice.

Atty. Gen. Opinion. See '30 AG Op 378

2766 License.

Atty. Gen. Opinions. See '25-26 AG Op 178; '28 AG Op 84

2771 Unlawful use of degree.

Atty. Gen. Opinion. See '28 AG Op 84

CHAPTER 133

HOTELS, RESTAURANTS, AND FOOD ESTABLISHMENTS

2808 Definitions.

Atty. Gen. Opinions. See '34 AG Op 233, 347, 422, 474, 558; '36 AG Op 178; '38 AG Op 350

Public nuisance—nonapplicability of statute. Chapter 133, C., '31, has no application to a controversy wherein a private property owner seeks the abatement of a private nuisance.

Higgins v Prod. Co., 214-276; 242 NW 109; 81 ALR 1199

Documentary evidence—Coca-Cola advertisements—admissibility. In an action against a beverage bottler and wholesaler for damages caused by drinking unwholesome Coca-Cola, sold by the bottler to a retailer, the admission of Coca-Cola advertisements in evidence held nonprejudicial.

Anderson v Tyler, 223-1033; 274 NW 48

Sales on Sunday—unwholesome food—damages. Fact that beverage was sold on Sunday, in violation of §13227, C., '35, does not deprive plaintiff of right to recover proven damages.

Anderson v Tyler, 223-1033; 274 NW 48

2809 License required.

Atty. Gen. Opinions. See '28 AG Op 173; '30 AG Op 328

2824 Sanitary regulations.

Compensation act—casual employment. An employment to wash the kitchen walls of a restaurant is "for the purpose of the employer's trade or business", even tho the employment is purely casual.

Dial v Lunch, 217-945; 251 NW 33

2841 List of rooms and rates to be posted.

Atty. Gen. Opinion. See '25-26 AG Op 177

2842 Increase of rates.

Atty. Gen. Opinion. See '25-26 AG Op 177

2850 Elevator shafts.

Passenger elevator falling—safety device—nonliability elevator manufacturer. The builder of a passenger elevator is neither liable for a personal injury caused by the falling of the car where the safety device, designed to prevent such falling and stop the car, was of an approved pattern in general use and was not shown to have ever before failed to work efficiently, nor where it is disclosed by the accident a device could have been made which would have obviated the particular defect which caused the particular accident, unless it is further shown that reasonable prudence would have discovered this defect and remedied it. Due care, in a legal sense, does not require an uncanny foresight.

Hoskins v Otis Elev. Co., 16 F 2d, 220

2855 Injunction.

Constitutionality of injunctional feature.

State v Fray, 214-53; 241 NW 663; 81 ALR 286

State v Howard, 214-60; 241 NW 682

CHAPTER 135

STATE FAIR AND EXPOSITION

Atty. Gen. Opinions. See '34 AG Op 383, 725

2873 State fair board.
Atty. Gen. Opinions. See '34 AG Op 383, 725

2874 Convention.
Atty. Gen. Opinion. See '34 AG Op 383

2877 Elections to be made.
Atty. Gen. Opinion. See '34 AG Op 383

2883 Treasurer.
Atty. Gen. Opinion. See '32 AG Op 174

2886 Powers and duties of board.
Atty. Gen. Opinions. See '34 AG Op 329; AG Op June 19, '39

Peace officers' qualifications. The public has a right to have, as peace officers, men of character, sobriety, judgment, and discretion.

Edwards v Civil Service, 227-74; 287 NW 285

2888 Maintenance of state fair.
Atty. Gen. Opinion. See '28 AG Op 205

CHAPTER 136

COUNTY AND DISTRICT FAIRS

2894 Terms defined.
Atty. Gen. Opinions. See '30 AG Op 182; '36 AG Op 109; '38 AG Op 55, 813; AG Op July 19, '39

2895 Powers of society.
Atty. Gen. Opinion. See '38 AG Op 813

2896 Control of grounds.
Atty. Gen. Opinion. See '36 AG Op 339

Insurance—auto race—"no action clause"—effect. A policy of insurance indemnifying the insured from damages resulting from the holding of a hazardous automobile racing contest on a race track at a county fair, and which policy specifies that "No action shall be brought against the insurer * * * unless brought by and in the name of the insured for loss actually sustained and paid in money by the assured in satisfaction of a judgment after trial of the issues," is a contract of indemnity against loss, and not a contract of indemnity against liability, and gives no right of action on the policy to a person who was wrongfully injured as a result of holding said race; and this is true notwithstanding §8940, subsec. 5, par. "e", C., '24, '27, '31, giving, under certain conditions, an injured person a right of action on an automobile accident policy issued to the wrongdoer, said statute having application solely to policies on automobiles used on race tracks in racing contests.

Zieman v Fidelity Co., 214-468; 238 NW 100

Liability for negligence. Nonpecuniary incorporated county fair associations are not such governmental agencies as are exempt from liability for negligence.

Clark v Fair Assn., 203-1107; 212 NW 163; 33 NCCA 40

Negligence—reasonable care only required. It may not be said, as a matter of law, that a county fair association is under a legal duty to erect a fence along its race track sufficiently high to prevent a horse from jumping over such fence. The association is not an insurer. Reasonable care under varying circumstances is the full measure of its duty.

Clark v Fair Assn., 203-1107; 212 NW 163; 33 NCCA 40

2898 Appointment of police.
Atty. Gen. Opinion. See '36 AG Op 339

Peace officers' qualifications. The public has a right to have, as peace officers, men of character, sobriety, judgment, and discretion.

Edwards v Civil Service, 227-74; 287 NW 285

2901 Publication of financial statement.
Atty. Gen. Opinion. See '34 AG Op 727

2902 State aid.
Atty. Gen. Opinions. See '28 AG Op 145, 269, 285, 395; '34 AG Op 353, 727

2902.1 Appropriation—availability.
Atty. Gen. Opinion. See AG Op March 14, '39

2903 Amount allowed as state aid.
Atty. Gen. Opinions. See '28 AG Op 269; '34 AG Op 353

2904 Payment of state aid.
Atty. Gen. Opinion. See '34 AG Op 284

2905 County aid.
Atty. Gen. Opinions. See '25-26 AG Op 168; '28 AG Op 278, 285; '30 AG Op 182; '38 AG Op 55, 654; AG Op July 19, '39

2906 Additional county aid.
Atty. Gen. Opinion. See '38 AG Op 55

2907 Purchase and management.
Atty. Gen. Opinion. See '38 AG Op 55

2909 Tax aid.
Atty. Gen. Opinions. See '25-26 AG Op 168; '30 AG Op 369; '38 AG Op 55

2910 Expenditure of fund.

Atty. Gen. Opinions. See '25-26 AG Op 168; '30 AG Op 369

2911 Report to supervisors.

Atty. Gen. Opinions. See '25-26 AG Op 168; '30 AG Op 369

CHAPTER 138

FARM AID ASSOCIATIONS

Atty. Gen. Opinions. See '30 AG Op 152; '34 AG Op 71, 114, 225; '38 AG Op 314; AG Op March 27, '40

2926 Articles of incorporation.

Atty. Gen. Opinions. See '34 AG Op 62, 71, 115, 225; '38 AG Op 145

2926.1 Amendments to articles.

Inaccurate designation—effect. Amended articles of incorporation of a farm bureau association will be given the effect manifestly intended notwithstanding the fact that they are inaccurately designated.

Appanoose Co. Bureau v Board, 218-945; 256 NW 687

2930 Appropriation by board of supervisors.

Atty. Gen. Opinions. See '25-26 AG Op 132, 233, 252; '32 AG Op 217; '34 AG Op 62, 71, 93, 113, 177, 225; '38 AG Op 145, 314

Conclusiveness of certificate. The certificate of the proper officers of an incorporated farm bureau as to the number of bona fide members of the bureau, as a basis for an appropriation by the county, is conclusive on the board of supervisors.

Appanoose Co. Bureau v Board, 218-945; 256 NW 687

Certificate—sufficiency. The certificate filed by the proper officers of a farm bureau with the board of supervisors as a basis for county aid need not embrace statements of fact not required, expressly or impliedly, by the statute.

Appanoose Co. Bureau v Board, 218-945; 256 NW 687

When entitled to aid. The statutory provision that a farm bureau organization shall be entitled to financial aid from the county when the "yearly membership dues and pledges" amount to a certain sum, authorizes such aid when the "dues" alone amount to the required sum.

Blume v Crawford Co., 217-545; 250 NW 733; 92 ALR 757

When not entitled to public aid. An incorporated farm aid association which in its articles of incorporation fixes the annual dues at five dollars, instead of one dollar, as mandatorily required by statute, and which raises from its members no annual sum by way of subscription, as mandatorily required by statute, is not entitled to financial aid from the general fund of the county.

Jefferson etc. v Sherman, 208-614; 226 NW 182

Blume v Crawford Co., 217-545; 250 NW 733; 92ALR 757

Misappropriation — recovery — estoppel. Where, during a series of years, public funds have been appropriated by a county to a farm bureau organization under the good faith but mistaken belief that a statute authorized such appropriations, and where said funds have been expended in furtherance of the agricultural activities of said bureau, an action to recover such funds on behalf of the county will not lie by a taxpayer who has at all time had actual knowledge of the making of such appropriations and of the use to which they were being put, and took no action to question them.

Blume v Crawford Co., 217-545; 250 NW 733; 92 ALR 757

Public aid—conditions precedent. A farm bureau organization is not entitled to an appropriation of county funds (1) until the bureau treasurer has first given and filed the bond required by statute, and (2) until the president and secretary of the bureau have certified to the board of supervisors the definite amount, if any, advanced to the said bureau by the federal government for the ensuing year.

Taylor Bureau v Board, 218-937; 252 NW 498

Governmental powers—nondelegation of authority. The statutory provision which requires the board of supervisors, under named conditions, to appropriate from the county general fund money to, and in aid of, a farm bureau organization, cannot be deemed a delegation to the said organization of the power to levy a tax on the public.

Blume v Crawford Co., 217-545; 250 NW 733; 92 ALR 757

Matters specially pleaded. A plaintiff who seeks to enjoin the appropriation of county funds in aid of a farm bureau organization on the ground that the bureau was not organized to cooperate with stated governmental agencies, must specially plead and prove said fact.

Blume v Crawford Co., 217-545; 250 NW 733; 92 ALR 757

Mandamus. Mandamus is the proper remedy to compel the board of supervisors to make an appropriation of public funds to a farm bureau organization, even tho the board must, as a preliminary matter, determine whether the facts exist justifying the appropriation.

Taylor Bureau v Board, 218-937; 252 NW 498

2931 Limitation on aid.

When entitled to aid. While a farm bureau organization is not entitled to financial aid

from the county unless it is organized "to cooperate" with stated federal and state agricultural agencies, yet such cooperation need not be specifically provided for in the articles of incorporation.

Blume v Crawford Co., 217-545; 250 NW 733; 92 ALR 757

2932 Funds advanced by federal government.

Mandamus—sufficiency of petition. In mandamus to compel an appropriation by a board of supervisors to a farm bureau association, the failure of the petition to state the amount of aid furnished the bureau by the federal government is not fatal when the petition was not attacked in the trial court.

Appanoose Co. Bureau v Board, 218-945; 256 NW 687

Public aid—conditions precedent. A farm bureau organization is not entitled to an appropriation of county funds (1) until the bureau treasurer has first given and filed the bond required by statute, and (2) until the president and secretary of the bureau have certified to the board of supervisors the definite amount, if any, advanced to the said bureau by the federal government for the ensuing year.

Taylor Bureau v Board, 218-937, 252 NW 498

2934 Bond of treasurer.

Public aid—conditions precedent. A farm bureau organization is not entitled to an appropriation of county funds (1) until the bureau treasurer has first given and filed the bond required by statute, and (2) until the president and secretary of the bureau have certified to the board of supervisors the definite amount, if any, advanced to the said bureau by the federal government for the ensuing year.

Taylor Bureau v Board, 218-937, 252 NW 498

2938 Annual reports.

Atty. Gen. Opinions. See '32 AG Op 141; '34 AG Op 62, 71, 114, 177

CHAPTER 142

POULTRY ASSOCIATIONS

Atty. Gen. Opinions. See '25-26 AG Op 243; '34 AG Op 121

CHAPTER 146

ESTRAYS AND TRESPASSING ANIMALS

2980 Restraint of animals.

Damages—thoroughbred cow served by nonthoroughbred bull. Principle reaffirmed that the measure of damages resulting from the serving of a thoroughbred cow by a nonthoroughbred bull is the difference between the value of said cow for breeding purposes before and after such serving.

Madison v Hood, 207-495; 223 NW 178

Duty to restrain. There is no longer any difference between the obligation to restrain male and female animals.

Wheeler v Woods, 205-1240; 219 NW 407

Presumption as to ownership. Proof that stock was on the premises of a defendant and under his control, both before and after it was at large in the public highway (where it was alleged to have caused a damage), and that the defendant had inferentially admitted that the stock was his, creates a jury question on the issue of the defendant's ownership.

Stewart v Wild, 202-357; 208 NW 303

Violation of statute—effect. The unrestrained presence of a domestic animal upon the public highway generates a presumption that the owner of the animal has been negligent in not restraining the animal from running at large, as commanded by statute; but the owner may show that, in view of all the circumstances, he was not, in fact, negligent. The doctrine of negligence per se arising out of the violation of a statute does not here apply.

Hansen v Kemmish, 201-1008; 208 NW 277; 45 ALR 498; 39 NCCA 400

See Riepe v Elting, 89-82; 56 NW 285

McElhinney v Knittle, 199-278; 201 NW 586

2981 Trespass on lawfully fenced land.

Failure to maintain fence—effect. A party may neither (1) distrain an animal which comes upon his premises, nor (2) maintain an independent action for damages done by the animal, if the animal comes upon complainant's premises because of his neglect to maintain his part of the partition fence.

Wheeler v Woods, 205-1240; 219 NW 407; 39 NCCA 392

3004 Taking up estray.

Estrays defined. See under §2979, Vol I

3018 Penalty against finder.

Vesting title in taker-up. The taker-up of an estray is under mandatory duty not to take it out of the state until he has complied with the statutory procedure for vesting in himself title to the animal; and this is true irrespective of the state of facts constituting the animal an estray.

State v Berryhill, 223-168; 272 NW 107

TITLE X

REGULATION AND INSPECTION OF FOODS, DRUGS, AND OTHER ARTICLES

Atty. Gen. Opinions. See '34 AG Op 422, 474; '36 AG Op 385, 602

CHAPTER 147

GENERAL PROVISIONS

Atty. Gen. Opinions. See '28 AG Op 119; '34 AG Op 474, 636

3029 Definitions.

Atty. Gen. Opinions. See '34 AG Op 422, 474

3030 Duties.

Atty. Gen. Opinion. See '36 AG Op 385

3037 Labeling.

Atty. Gen. Opinions. See '25-26 AG Op 217; '36 AG Op 385

3039 Labeling of mixtures.

Atty. Gen. Opinion. See '36 AG Op 385

3041 False labels—defacement.

Atty. Gen. Opinion. See '34 AG Op 422

3042 Mislabeled articles.

Atty. Gen. Opinions. See '34 AG Op 474; '36 AG Op 385

3046 Injunction.

Constitutionality of injunctional feature.

State v Fray, 214-53; 241 NW 663; 81 ALR 286

State v Howard, 214-60; 241 NW 682

Itinerant vendors — agents and employees. The statute which defines an itinerant vendor of drugs as "any person who, by himself, agent or employee, goes from place to place or from house to house, and sells, offers or exposes for sale any drug" etc. (§3148, C., '31) renders a person an "itinerant vendor" who goes from place to place or from house to house and does the specified acts, even tho he does such acts solely as the employee of an employer who is concededly an itinerant vendor.

State v Logsdon, 215-1297; 248 NW 4

3054 Goods for sale in other states.

Atty. Gen. Opinion. See '36 AG Op 602

CHAPTER 148

ADULTERATION OF FOODS

Atty. Gen. Opinions. See AG Op July 5, '39

CHAPTER 149

LABELING FOODS

Atty. Gen. Opinion. See '36 AG Op 385

CHAPTER 150

PRODUCTION AND SALE OF DAIRY PRODUCTS

3077 Purity.

Contract — incurable breach. A dairyman who contracts to have his cows tested for tuberculosis, and to sell his milk to a retailer at a price substantially in excess of the market price for other milk of the same butter-fat test, fatally breaches his contract by failing, for 12 months, to have his cows so tested, even tho a test, subsequent to the retailer's rescission, shows that the cows are free from tuberculosis.

Niederhauser v Dairy, 213-285; 237 NW 222

CHAPTER 150.3

CREAM GRADING

Atty. Gen. Opinion. See '36 AG Op 602

CHAPTER 151

PRODUCTION AND SALE OF EGGS

Atty. Gen. Opinions. See '30 AG Op 115; AG Op March 12, '40

CHAPTER 152

COMMERCIAL FEEDS

3113 Definitions.

Atty. Gen. Opinion. See '30 AG Op 348

Contributory negligence—overdose of poison. In an action for damages consequent on the death of animals caused by an overdose of copper sulphate, in part contained in a stock food, it is manifest that plaintiff cannot recover if, by his own conduct, he has contributed to his said injury.

Jensen v Moorman Co., 213-922; 239 NW 917

3118 Inspection fee — report under oath.

Atty. Gen. Opinion. See '28 AG Op 119

3119 Fee for stock tonic.

Atty. Gen. Opinion. See '28 AG Op 119

CHAPTER 154.2

COUNTY LIMESTONE QUARRIES

Atty. Gen. Opinions. See '38 AG Op 356; AG Op Aug. 22, '39

CHAPTER 155

ADULTERATION AND LABELING OF DRUGS

3143 Defined.

Atty. Gen. Opinion. See '30 AG Op 348

Class legislation—sale of drugs and medicines. Whether the statute (1) which defines "drugs and medicines" as including all substances and preparations for external or internal use recognized in the United States Pharmacopoeia or National Formulary, and (2) which prohibits the sale of "drugs and medicines" except by, or under the supervision of a licensed pharmacist, is unconstitutional on the ground that said publications embrace many harmless substances that are of common and domestic use, quaere.

State v Jewett Co., 209-567; 228 NW 288

Sale of aspirin—injunction. A corporation may be restrained by injunction from selling or offering or exposing for sale aspirin, on proof that aspirin is a drug and is not a proprietary medicine, and that the corporation is not conducting the business of selling said article under the supervision of a licensed pharmacist.

State v Jewett Co., 209-567; 228 NW 288

3148 "Itinerant vendor of drugs" defined.

Atty. Gen. Opinions. See '30 AG Op 243, 348

Agents and employees. This section renders a person an "itinerant vendor" who goes from place to place or from house to house and does the specified acts, even tho he does such acts solely as the employee of an employer who is concededly an itinerant vendor.

State v Logsdon, 215-1297; 248 NW 4

3149 License required of itinerant — fee.

Atty. Gen. Opinion. See '30 AG Op 348

Constitutionality. The statutes requiring a license of an itinerant vendor of drugs are not discriminatory, do not effect double taxation, are not class legislation, were not enacted for any effect on trade or to remove competition, and are of uniform operation.

State v Logsdon, 215-1297; 248 NW 4

CHAPTER 155.1

UNIFORM NARCOTIC DRUG ACT

3169.01 Definitions.

Atty. Gen. Opinion. See '38 AG Op 665

3169.02 Acts prohibited.

Atty. Gen. Opinion. See '38 AG Op 665

Indictment—negativing exceptions. An indictment for the unlawful possession of narcotic drugs need not, in view of §3156, C., '35, negative the exception of the statute relative to possession under the prescription of named medical practitioners.

State v Bailey, 202-146; 209 NW 403

Indictment—sufficiency. An indictment alleging the illegal possession of morphine need not allege (1) the amount or quantity of the drug so possessed, (2) the form in which the morphine was found in the possession of the accused, nor (3) the time, place, and circumstances under which the offense was committed, other than an allegation of the county (and state) in which committed, and the year, month, and day of such commission.

State v Heeron, 208-1151; 226 NW 30

Negligent exposure of poisoned beverage. The act of a person in so negligently exposing a beverage which contains a narcotic in a deadly quantity as to be consumed by another may constitute involuntary manslaughter if the death of a human being results and the possession or use of such narcotic by the accused is unlawful. Evidence held insufficient to show that the accused placed the poison in the beverage in question, or knew of its presence therein.

State v Korth, 204-1360; 217 NW 236

3169.05 Sale on written orders.

Atty. Gen. Opinion. See '38 AG Op 665

3169.09 Record to be kept.

Atty. Gen. Opinion. See '38 AG Op 665

3169.11 Authorized possession of narcotic drugs by individuals.

Indictment—negativing exceptions. An indictment for the unlawful possession of narcotic drugs need not, in view of §3156, C., '24, negative the exception of the statute relative to possession under the prescription of named medical practitioners.

State v Bailey, 202-146; 209 NW 403

Indictment—sufficiency. An indictment alleging the illegal possession of morphine need not allege (1) the amount or quantity of the drug so possessed, (2) the form in which the morphine was found in the possession of the accused, nor (3) the time, place, and circumstances under which the offense was committed, other than an allegation of the county (and state) in which committed, and the year, month, and day of such commission.

State v Heeron, 208-1151; 226 NW 30

3169.21 Penalties.

Atty. Gen. Opinion. See '38 AG Op 334

Unlawful possession—sentence. A penitentiary sentence as punishment for the unlawful possession of narcotic drugs is not necessarily excessive.

State v Korth, 204-667; 215 NW 706

CHAPTER 160

MATTRESSES AND COMFORTS

Atty. Gen. Opinion. See AG Op March 10, '39

CHAPTER 161

STANDARD WEIGHTS AND MEASURES

3234 Sales of dry commodities.

Atty. Gen. Opinion. See '30 AG Op 201

3236 Bushel measure.

Atty. Gen. Opinion. See '30 AG Op 201

"Bushel" construed. The admeasurement to a landlord by an agreed arbitrator of a certain number of bushels of corn as rent for a certain year will not be construed as calling for that number of bushels of "shelled" corn when the parties knew at all times that the admeasurement was on the basis of crib measurement; and when the landlord receives in shelled corn all that was set aside to him "on the cob", the rent must be deemed fully paid.

Salinger v Elev. Co., 210-668; 231 NW 366

3244 Sales to be by standard weight or measure.

Atty. Gen. Opinion. See '25-26 AG Op 217

CHAPTER 163

STATE AND CITY SEALERS

3255 Sealer for cities and towns.

Atty. Gen. Opinion. See AG Op June 6, '39

Due process—ordinance requiring weighing of loads. A municipal ordinance requiring that merchandise sold in load lots by weight for delivery within the city be weighed by a public weighmaster whose certificate stating the gross, tare, and net weight must be delivered to the purchaser, such ordinance, although it necessitates that a person trucking coal into the city unload and reload, is not so unreasonable as to violate the due process clause of the constitution.

Huss v Creston, 224-844; 278 NW 196; 116 ALR 242

CHAPTER 164

PUBLIC SCALES AND GASOLINE PUMPS

3258 Definitions.

Atty. Gen. Opinion. See '38 AG Op 137

Filling station permit—ordinance amending restricted district. Under a restricted residence district ordinance, a city council may issue a permit for erection of a gasoline filling station on certain lots without a separate ordinance to remove the particular lots from the restricted district.

Scott v Waterloo, 223-1169; 274 NW 897

CHAPTER 165

INSPECTION OF WEIGHTS AND MEASURES

Atty. Gen. Opinions. See '34 AG Op 63; AG Op June 6, '39

CHAPTER 165.1

PRISON-MADE GOODS

Atty. Gen. Opinions. See '34 AG Op 336; '38 AG Op 259

3274.1 Branding, labeling, and marking.

Atty. Gen. Opinion. See '38 AG Op 259

3274.2 Penalty—effectiveness of act.

Atty. Gen. Opinion. See '38 AG Op 259

TITLE XI

SOCIAL WELFARE AND REHABILITATION

Atty. Gen. Opinion. See '38 AG Op 571

CHAPTER 166

BOARD OF CONTROL OF STATE INSTITUTIONS

Atty. Gen. Opinions. See '36 AG Op 107

3276 Appointment.

Atty. Gen. Opinion. See '30 AG Op 52

3279 Political activity.

Atty. Gen. Opinion. See '34 AG Op 668

3284 Trips to other states.

Atty. Gen. Opinion. See AG Op April 20, '39

CHAPTER 167

GOVERNMENT OF INSTITUTIONS

Atty. Gen. Opinions. See '28 AG Op 149; '36 AG Op 107, 455; '38 AG Op 559, 888

3287 Institutions controlled.

Atty. Gen. Opinions. See '25-26 AG Op 405; '28 AG Op 149; '36 AG Op 103, 107, 567, 573; '38 AG Op 106, 143, 373

3288 Powers of governor.

Atty. Gen. Opinions. See '36 AG Op 107; '38 AG Op 38

3290 Rules—fire—additional duties.

Atty. Gen. Opinion. See '36 AG Op 107

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

3292 Executive officers—tenure—removal.

Atty. Gen. Opinions. See '36 AG Op 381, 573

3293 Subordinate officers and employees.

Atty. Gen. Opinions. See '36 AG Op 103, 687; AG Op April 12, '38

Proper demand for accounting. Where the board of control of state institutions legally creates an official position, and charges the incumbent with the duty of collecting and accounting for certain state funds, a demand for an accounting, as a basis for a prosecution for embezzlement, is properly made by the treasurer of state, said latter official being the official ultimately entitled to the custody of said funds.

State v Conway, 219-1155; 260 NW 88

Informal creation of office — effect. The appointee to a public position who duly qualifies, gives bond and acts in the collection of public funds, is a public officer within the meaning of the statute prohibiting embezzlement by public officers even tho said position and the duties thereunder were very informally created at an unrecorded, impromptu meeting of a majority of the members of the official governing body.

State v Conway, 219-1155; 260 NW 88

Liability of officers. An employee of a state hospital for the insane may not recover of the executive officer of the institution the value of the use of the employee's automobile on behalf of the state, on the simple allegation that the said officer refused him the use of an automobile which belonged to the state, and that thereupon the employee used his own vehicle.

Cross v Donohoe, 202-484; 210 NW 532

3296 Salaries.

Atty. Gen. Opinion. See '36 AG Op 687

3297 Dwelling house and provisions.

Atty. Gen. Opinions. See '30 AG Op 173; '36 AG Op 103

3299 Vacations.

Atty. Gen. Opinion. See AG Op May 3, '39

Refusal to grant vacation. An employee of a state hospital for the insane may not maintain an action against the executive officer of the institution on the naked allegation that said officer deprived him of the annual vacation which is provided by law, especially when it appears that the employee has received his full annual salary and does not show wherein he was damaged.

Cross v Donohoe, 202-484; 210 NW 532

3317 State agents.
Atty. Gen. Opinion. See '38 AG Op 373

3319 Duties of agents.
Atty. Gen. Opinion. See '38 AG Op 373

3323 Services required.
Atty. Gen. Opinion. See '38 AG Op 106

3325 Wages of inmates.
Atty. Gen. Opinion. See '38 AG Op 94

3326 Deduction to pay court costs.
Atty. Gen. Opinion. See '38 AG Op 94

3330 Monthly report.
Atty. Gen. Opinion. See '36 AG Op 240

3345 State architect.
Atty. Gen. Opinion. See '38 AG Op 38

3346 Plans and specifications.
Atty. Gen. Opinion. See '38 AG Op 38

3347 Letting of contracts.
Atty. Gen. Opinion. See '38 AG Op 38

3348 Preliminary deposit.
Atty. Gen. Opinion. See '38 AG Op 38

3349 Improvements by day labor.
Atty. Gen. Opinion. See '38 AG Op 38

3350 Improvements at institutions.
Atty. Gen. Opinion. See '38 AG Op 38

3360 Industries.
Atty. Gen. Opinion. See '38 AG Op 259

CHAPTER 168.1

SOLDIERS HOME

Atty. Gen. Opinion. See '28 AG Op 323

CHAPTER 169

STATE SANATORIUM

Atty. Gen. Opinion. See '30 AG Op 274

3386 Object and purposes.
Atty. Gen. Opinions. See '30 AG Op 274, '38 AG Op 254

3390 Admission.
Atty. Gen. Opinions. See '25-26 AG Op 256; '38 AG Op 254

3391 Additional showing.
Atty. Gen. Opinion. See '38 AG Op 254

3395 Indigent patients.
Atty. Gen. Opinions. See '32 AG Op 165; '38 AG Op 97, 459

3396 Advancing transportation expense.
Atty. Gen. Opinions. See '38 AG Op 97, 459

3397 Certificates as to number of inmates.
Atty. Gen. Opinion. See '38 AG Op 97

3398 Certificate of monthly allowance.
Atty. Gen. Opinion. See '38 AG Op 97

3399 Liability of county.
Atty. Gen. Opinions. See '38 AG Op 97, 459; AG Op Feb. 13, '39

Tubercular patient's expense—county paying state—reimbursement. In an action by the county against a husband and wife for reimbursement for amount paid by county to the state for the wife's keep at state tubercular sanatorium, fact that wife was admitted to sanatorium through efforts of county soldiers and sailors relief commission would relieve neither her nor her husband from liability to the county for her expense at the sanatorium.

Woodbury County v Harbeck, 224-1142; 278 NW 918

3400 Liability of patients and others.
Atty. Gen. Opinion. See '38 AG Op 97

"Legally bound" person defined.

Iowa Co. v Amana Soc., 214-893; 243 NW 299

Tubercular patient's expense—county paying state—reimbursement. In an action by the county against a husband and wife for reimbursement for amount paid by county to the state for the wife's keep at state tubercular sanatorium, fact that wife was admitted to sanatorium through efforts of county soldiers and sailors relief commission would relieve neither her nor her husband from liability to the county for her expense at the sanatorium.

Woodbury County v Harbeck, 224-1142; 278 NW 918

3401 Patients and others liable.
Atty. Gen. Opinion. See '38 AG Op 97

Tubercular patient's expense—county paying state—reimbursement. In an action by the county against a husband and wife for reimbursement for amount paid by county to the state for the wife's keep at state tubercular sanatorium, fact that wife was admitted to sanatorium through efforts of county soldiers and sailors relief commission would relieve neither her nor her husband from liability to the county for her expense at the sanatorium.

Woodbury County v Harbeck, 224-1142; 278 NW 918

CHAPTER 170

GLENWOOD STATE SCHOOL

3405 Admission and discharge.
Atty. Gen. Opinion. See '30 AG Op 375

3406 Clothing.
Atty. Gen. Opinion. See '38 AG Op 97

3409 Liability of inmate.
Atty. Gen. Opinion. See '38 AG Op 97

"Legally bound" person defined.
Iowa Co. v Amana Soc., 214-893; 243 NW 299

3410 Release from liability.
Atty. Gen. Opinion. See '38 AG Op 97

CHAPTER 171

GUARDIANSHIP AND CUSTODY OF FEEBLE-MINDED

Atty. Gen. Opinion. See '30 AG Op 375

CHAPTER 172

HOSPITAL FOR EPILEPTICS AND SCHOOL FOR FEEBLE-MINDED

3466 Qualifications of superintendent —salary.
Atty. Gen. Opinion. See '34 AG Op 699

3471 Statutes applicable.
Atty. Gen. Opinion. See '38 AG Op 66

3477.1 Clothing.
Atty. Gen. Opinion. See '38 AG Op 97

CHAPTER 173

DRUG ADDICTS

Atty. Gen. Opinion. See '38 AG Op 93

3478 Commitment.

"Inebriacy" defined. Inebriacy is the state of drunkenness or habitual intoxication.
Maher v Brown, 225-341; 280 NW 553

Accused in state hospital—term for trial after release. An indictment not brought to trial because of accused's confinement in a state hospital as an inebriate is not subject to dismissal because accused was not immediately tried upon his release, when such was impossible because the release came at a time when the term was well under way and the assigned cases completely filled the court's time for that term.
Maher v Brown, 225-341; 280 NW 553

3479 Statutes applicable.
Atty. Gen. Opinion. See '38 AG Op. 93

Inebriate in state hospital—delay in trial—no dismissal. Criminal courts have no right to force an inebriate inmate of a state hospital to stand trial on an indictment for driving while intoxicated, and such confinement is good cause for refusing to dismiss for delay in prosecution.
Maher v Brown, 225-341; 280 NW 553

CHAPTER 173.1

PSYCHOPATHIC HOSPITAL

3482.02 Name—location.
Atty. Gen. Opinion. See '30 AG Op 219

3482.09 Voluntary private patients.
Atty. Gen. Opinion. See '28 AG Op 47

3482.33 Death of patient—disposal of body.
Atty. Gen. Opinion. See '32 AG Op 94

3482.34 Appropriation.
Atty. Gen. Opinion. See '32 AG Op 94

CHAPTER 174

STATE HOSPITALS FOR INSANE

3488 Duties of superintendent.

Atty. Gen. Opinion. See '38 AG Op 93

3500 Investigation as to sanity.

Funds to retry issue of sanity—discretion of court. Where a person is under guardianship and confined in a state hospital under an adjudication of insanity, an application in his behalf for an order directing the guardian to pay a substantial sum for the purpose of retrying the issue of insanity is properly denied on a showing by affidavit that two laymen consider the patient sane.

In re Ost, 211-1085; 235 NW 70

3501 Discharge—certificate.

Atty. Gen. Opinion. See '36 AG Op 573

Adjudication of insanity—evidentiary effect. One who has been duly and legally adjudged to be insane, and seeks to regain his liberty under a writ of habeas corpus, has the burden to establish his sanity.

Bettenga v Stewart, 214-1284; 244 NW 279

Presumption of sanity—jury question. Presumptively a person is sane from and after the time such person is discharged from an insane asylum to which he has been committed for treatment. Evidence, expert and nonexpert, reviewed and held to present a jury question on the issue whether an insured was sane at the time a policy of insurance was issued notwithstanding the conceded fact that said insured had, some four years prior to the issuance of the policy, been adjudged insane and committed to an asylum for the insane and had remained there some three years before being granted a discharge.

Foy v Ins. Co., 220-628; 263 NW 14

3505 Harmless incurables.

Atty. Gen. Opinion. See '36 AG Op 573

3506 Certificate covering subsequent recovery.

Atty. Gen. Opinion. See '36 AG Op 573

3507 Certificate and effect thereof.

Atty. Gen. Opinion. See '36 AG Op 573

3508 Dangerous incurables.

Atty. Gen. Opinion. See '36 AG Op 573

3509 Patient accused of crime.

Inebriate in state hospital—delay in trial—no dismissal. Criminal courts have no right to force an inebriate inmate of a state hospital to stand trial on an indictment for driving while intoxicated, and such confinement is good cause for refusing to dismiss for delay in prosecution.

Maher v Brown, 225-341; 280 NW 553

Term for trial after release. An indictment not brought to trial because of accused's confinement in a state hospital as an inebriate is not subject to dismissal because accused was not immediately tried upon his release, when such was impossible because the release came at a time when the term was well under way and the assigned cases completely filled the court's time for that term.

Maher v Brown, 225-341; 280 NW 553

CHAPTER 175

COUNTY AND PRIVATE HOSPITALS FOR INSANE

3527 Transfers from state hospitals.

Atty. Gen. Opinion. See '36 AG Op 573

CHAPTER 176

COMMISSION OF INSANITY

Atty. Gen. Opinions. See '25-26 AG Op 342; '36 AG Op 573

3536 Organization.

Court clerk as commissioner of insanity. The clerk of the district court may not, in addition to his regular salary, retain the fees collected by him for acting as a commissioner of insanity.

Baldwin v Stewart, 207-1135; 222 NW 348

3540 Jurisdiction — holding under criminal charge.

Atty. Gen. Opinion. See '25-26 AG Op 207

Exclusive jurisdiction of district court. The district court acquires exclusive jurisdiction to determine the sanity of an indicted person when he is taken into custody under an indictment, and, during the pendency of such indictment, such jurisdiction continues, and attaches under a subsequently returned indictment under which the person is taken into custody. It follows that an adjudication of insanity of such person by the commission of insanity subsequent to the first indictment and prior to the last indictment is a nullity.

State v Murphy, 205-1130; 217 NW 225

3541 Compensation and expenses.

Atty. Gen. Opinion. See '30 AG Op 177

3542 Costs—how paid.

Atty. Gen. Opinion. See '30 AG Op 177

CHAPTER 177

COMMITMENT AND DISCHARGE OF INSANE

Atty. Gen. Opinions. See '25-26 AG Op 207, 342; '36 AG Op 573

3544 Form of information.

Atty. Gen. Opinion. See '30 AG Op 178

Malicious prosecution — want of probable cause—discharge on insanity inquest. The discharge on an insanity inquest of the person alleged to be insane, does not furnish sufficient proof that the person signing the information did so without probable cause.

Dugan v Cap Co., 213-751; 239 NW 697

Want of probable cause—nonallowable presumption. Principle reaffirmed that while malice may be inferred from a total want of probable cause, yet a want of probable cause cannot be inferred from malice, however great.

Dugan v Cap Co., 213-751; 239 NW 697

3552 Findings and order.

Atty. Gen. Opinions. See '30 AG Op 178; '38 AG Op 365

Adjudication of insanity — nonretroactive presumption. An adjudication of insanity creates no presumption that the person in question was insane at any particular period of time prior to said adjudication.

Davidson v Piper, 221-171; 265 NW 107

Expert and lay opinions — which must yield. An expert opinion that a person was insane at a named time prior to the time when said person was judicially declared insane will not be permitted to outweigh overwhelming lay testimony which strongly tends to establish the contrary, when said expert opinion is based almost wholly on information obtained from said person after she was adjudged insane, and on information obtained from the relatives of said person. (Equity case)

Davidson v Piper, 221-171; 265 NW 107

Monomania — belief supported by evidence not illusion. Monomania is generally defined as a derangement of the mind on a single subject, but a belief ceases to be an illusion if there is any evidence to support it.

Mastain v Butschy, 224-68; 276 NW 79

Want of probable cause—discharge on insanity inquest—effect. The discharge on an insanity inquest of the person alleged to be insane, does not furnish sufficient proof that the person signing the information did so without probable cause.

Dugan v Cap Co., 213-751; 239 NW 697

3560 Appeal.

Inquisitions — appeal—special proceeding—no jury. An appeal to the district court from the finding of the county insanity commission is a special proceeding, and, since the legislature did not provide for a jury trial, the issue is triable to the court.

In re Brewer, 224-773; 276 NW 766

Insanity appeal — noncriminal — nonjury — constitutionality. No constitutional rights are violated in trying an appeal from the insanity commission to the court without a jury, since this is not in any way a criminal proceeding.

In re Brewer, 224-773; 276 NW 766

Nonexpert opinion as to insanity. Nonexpert opinion as to unsoundness of mind is inadmissible unless the nonexpert witness first details such facts as tend, in the judgment of the court, to show an abnormal state of mind of the person whose mentality is under investigation.

Campfield v Rutt, 211-1077; 235 NW 59

3562.1 Beneficiaries of the veterans bureau.

Atty. Gen. Opinion. See '32 AG Op 66

3564 Temporary custody in certain cases.

Atty. Gen. Opinion. See '36 AG Op 573

3567 Custody outside state hospitals.

Atty. Gen. Opinion. See '36 AG Op 573

3570 Discharge from custody.

Atty. Gen. Opinion. See '36 AG Op 573

3571 Commission of inquiry.

Atty. Gen. Opinion. See '25-26 AG Op 207

Funds to retry issue of sanity—discretion of court. Where a person is under guardianship and confined in a state hospital under an adjudication of insanity, an application in his behalf for an order directing the guardian to pay a substantial sum for the purpose of retrying the issue of insanity is properly denied on a showing by affidavit that two laymen consider the patient sane.

In re Ost, 211-1085; 235 NW 70

3577 Habeas corpus.

Insanity — presumption — burden of proof. One judicially held to be insane has the burden to overthrow the presumption that such insane condition continues.

Hazen v Donahoe, 208-582; 226 NW 33
Bettenga v Stewart, 214-1284; 244 NW 279

CHAPTER 178

SUPPORT OF INSANE

Atty. Gen. Opinions. See '25-26, AG Op 342; '28 AG Op 406; '38 AG Op 66

3581 Liability of county and state.

Atty. Gen. Opinions. See '26 AG Op 54; '38 AG Op 66

County paying support of insane person—laches of officials imputed to county. When a county was not liable for the support of a person committed to a state institution as insane, and through the negligence and laches of its officials paid such support for about 14 years before objecting, the negligence was imputed to the county, and the bar of laches prevented a recovery for such expenditures from the county which should have paid, but the burden of continuing payments was on the other county from the time payments ceased.

State v Clay County, 226-885; 285 NW 229

Continuing liability of county of legal settlement. A resident of a county who has no legal settlement therein continues, in case of his commitment to a state hospital for the insane, a legal charge upon that particular county of the state wherein he has such legal settlement, and such charge continues until, by the lapse of one year without notice to depart, his residence ripens into a legal settlement, after which he becomes a legal charge upon the county wherein he has both his residence and legal settlement.

State v Story County, 207-1117; 224 NW 232

Insane wife—acquiring legal settlement—county liable for support. Under a statute providing that "the residence of any person found insane who is an inmate of any state institution shall be that existing at the time of admission thereto", when the mother of a family was committed as insane within a few months after moving to another county, the residence at the time of commitment was in the county to which she had moved, and since no warning to depart was served on her, she acquired a legal settlement in the new county at the end of a year, regardless of the residence of her husband at the time, and that county was liable for her support in the institution after the end of the year.

State v Clay County, 226-885; 285 NW 229

Pauper—insanity commitment within year after moving to another county. When, within a few months after a family of paupers moved from Clay county to O'Brien county, the mother was committed as insane, but no finding of her legal settlement was made, the only effect of sending Clay county notice of the commitment and bills incurred was to notify Clay county of the amount expended for which it was liable, because the expenses were incurred within the year after the family moved from Clay county while legal settlement of the family had not been changed, but created no duty in Clay county to contest legal settlement.

State v Clay County, 226-885; 285 NW 229

Legal settlement of pauper — failure of county to determine—liability for care. When a pauper moved to another county, the failure of the county from which she had moved to take steps to have her legal settlement determined did not estop it from claiming that she acquired a legal settlement in the other county, when it was liable for the care of the pauper for a year after moving, and during that time had no reason to dispute the settlement and did not misrepresent or conceal any facts to cause the other county to fail to serve a warning to depart.

State v Clay County, 226-885; 285 NW 229

3582 Finding of legal settlement.

Atty. Gen. Opinion. See '38 AG Op 365

Insanity commitment within year after moving to another county. When, within a few months after a family of paupers moved from Clay county to O'Brien county, the mother was committed as insane, but no finding of her legal settlement was made, the only effect of sending Clay county notice of the commitment and bills incurred was to notify Clay county of the amount expended for which it was liable, because the expenses were incurred within the year after the family moved from Clay county while legal settlement of the family had not been changed, but created no duty in Clay county to contest legal settlement.

State v Clay County, 226-885; 285 NW 229

Legal settlement of pauper — failure of county to determine—liability for care. When a pauper moved to another county, the failure of the county from which she had moved to take steps to have her legal settlement determined did not estop it from claiming that she acquired a legal settlement in the other county, when it was liable for the care of the pauper for a year after moving, and during that time had no reason to dispute the settlement and did not misrepresent or conceal any facts to cause the other county to fail to serve a warning to depart.

State v Clay County, 226-885; 285 NW 229

Insane wife—acquiring legal settlement—county liable for support. Under a statute providing that "the residence of any person found insane who is an inmate of any state institution shall be that existing at the time of admission thereto", when the mother of a family was committed as insane within a few months after moving to another county, the residence at the time of commitment was in

the county to which she had moved, and since no warning to depart was served on her, she acquired a legal settlement in the new county at the end of a year, regardless of the residence of her husband at the time, and that county was liable for her support in the institution after the end of the year.

State v Clay County, 226-885; 285 NW 229

3583 Certification of settlement.

Atty. Gen. Opinions. See '30 AG Op 125, 275; '32 AG Op 49

Insanity commitment within year after moving to another county. When, within a few months after a family of paupers moved from Clay county to O'Brien county, the mother was committed as insane, but no finding of her legal settlement was made, the only effect of sending Clay county notice of the commitment and bills incurred was to notify Clay county of the amount expended for which it was liable, because the expenses were incurred within the year after the family moved from Clay county while legal settlement of the family had not been changed, but created no duty in Clay county to contest legal settlement.

State v Clay County, 226-885; 285 NW 229

3584 Certification to debtor county.

Atty. Gen. Opinion. See '30 AG Op 125

Insanity commitment within year after moving to another county. When, within a few months after a family of paupers moved from Clay county to O'Brien county, the mother was committed as insane, but no finding of her legal settlement was made, the only effect of sending Clay county notice of the commitment and bills incurred was to notify Clay county of the amount expended for which it was liable, because the expenses were incurred within the year after the family moved from Clay county while legal settlement of the family had not been changed, but created no duty in Clay county to contest legal settlement.

State v Clay County, 226-885; 285 NW 229

3586 Determination by board.

Atty. Gen. Opinion. See '25-26 AG Op 115

3587 Removal of nonresidents.

Atty. Gen. Opinion. See '38 AG Op 66

3589 Subsequent discovery of residence.

Atty. Gen. Opinion. See '28 AG Op 406

3590 Preliminary payment of costs.

Atty. Gen. Opinions. See '30 AG Op 275; '32 AG Op 66

3591 Recovery of costs from state.

Atty. Gen. Opinion. See '34 AG Op 92

3592 Action to determine legal settlement.

County paying support of insane person—laches of officials imputed to county. When a county was not liable for the support of a person committed to a state institution as insane, and through the negligence and laches of its officials paid such support for about 14 years before objecting, the negligence was imputed to the county, and the bar of laches prevented a recovery for such expenditures from the county which should have paid, but the burden of continuing payments was on the other county from the time payments ceased.

State v Clay County, 226-885; 285 NW 229

3593 Judgment when settlement found within state.

County paying support of insane person—laches of officials imputed to county. When a county was not liable for the support of a person committed to a state institution as insane, and through the negligence and laches of its officials paid such support for about 14 years before objecting, the negligence was imputed to the county, and the bar of laches prevented a recovery for such expenditures from the county which should have paid, but the burden of continuing payments was on the other county from the time payments ceased.

State v Clay County, 226-885; 285 NW 229

3594 Order when nonresidence or unknown settlement appears.

Appeal nonallowable. No appeal lies from a decision of the trial court on a duly joined issue as to the legal settlement of an insane inmate of a state hospital for the insane.

State v Webster County, 209-143; 227 NW 595

3595 Personal liability.

Atty. Gen. Opinions. See '30 AG Op 75, 356; '36 AG Op 383; '38 AG Op 785

Prior statute. Parents are not liable to a county for the support of their adult insane children in the state hospitals for the insane.

Wright Co. v Hagan, 210-795; 231 NW 298

Holding under former statute. Where a county has maintained in a state hospital an insane person who was a member of an incorporated religious and communistic society, the county's statutory right to recover the resulting expense from any person "legally liable" for the support of such insane person does not entitle it to recover such expense from the said society simply on proof that the society had obligated itself by contract to support said member for life. "Legal" liability under the statute is confined strictly to "common-law" liability.

Iowa Co. v Amana Soc., 214-893; 243 NW 299

County's claim for insane support—filing necessary. County's maintenance claim against estate of deceased who was inmate of state insane hospital is not a public rate or tax so as to make the filing of the claim against the estate unnecessary.

In re Wagner, 226-667; 284 NW 425

Compromise of claims by county — power of board. The board of supervisors, on a proper state of facts, has power to compromise the amount due on judgments obtained by the county for support rendered an incompetent in a state hospital for the insane, and to agree, in consideration of the payment of the compromised sum, that a specific tract of land standing in the name of the incompetent and the proceeds and accumulations of said proceeds, shall be exempt from all liability for the future support of said incompetent by the county in said hospital. So held where the land was encumbered (1) by judgment on mortgage foreclosure, (2) by a judgment other than those of the county, (3) by an outstanding tax sale certificate, and (4) by an apparently quite persuasive claim of both homestead rights and ownership in the wife of said incompetent.

Plymouth County v Koehler, 221-1022; 267 NW 106

Indigent's expense — county's reimbursement. In an action by the county against a husband and wife for reimbursement for amount paid by county to the state for the wife's keep at state tubercular sanatorium, fact that wife was admitted to sanatorium through efforts of county soldiers and sailors relief commission would relieve neither her nor her husband from liability to the county for her expense at the sanatorium.

Woodbury County v Harbeck, 224-1142; 278 NW 918

Unallowable attachment. An attachment cannot be legally issued in an action against a ward and his property guardian. Not being legally issuable, the writ cannot be legally levied on the property of the ward and must be discharged on proper motion.

Reason: The ward's property is in custodia legis.

Shumaker v Bohrofen, 217-34; 250 NW 683; 92 ALR 914

3597 Board may compromise lien.

Atty. Gen. Opinion. See '38 AG Op 785

3600 Expenses certified to counties.

Atty. Gen. Opinions. See '34 AG Op 526; '38 AG Op 421, 459

3603 Hospital support fund.

Atty. Gen. Opinion. See '34 AG Op 679

3604 County fund for insane.

Atty. Gen. Opinion. See '38 AG Op 97

3604.1 Lien of assistance.

Atty. Gen. Opinions. See AG Op July 11, '39, Sept. 23, '39

CHAPTER 179

JUVENILE COURT

Atty. Gen. Opinion. See '36 AG Op 345

3605 Jurisdiction.

Atty. Gen. Opinions. See '28 AG Op 309; '38 AG Op 464, 651

Jurisdiction over indictments. The juvenile court act has not deprived the district court of jurisdiction over indictments against persons under eighteen years of age.

State v Reed, 207-557; 218 NW 609

3606 How constituted.

Atty. Gen. Opinions. See '28 AG Op 309; '38 AG Op 464

Jurisdiction of judge. A judge of the district court is by statute ex officio judge of the juvenile court, even tho he has not been formally designated and assigned to such work by the district judges of the district.

Wissenburg v Bradley, 209-813; 229 NW 205; 67 ALR 1075

3607 Designation of judge.

Atty. Gen. Opinions. See '28 AG Op 309; '38 AG Op 464

3608 Effect.

Atty. Gen. Opinion. See '38 AG Op 464

3614 Powers and duties — office and supplies.

Irregular investigation. The fact that an investigation of a juvenile matter was, at the request of the judge, made by a person prior to the actual appointment of such person as probation officer, but presented to the court after appointment and on the final hearing of the matter, presents no element of illegality such as to disturb the jurisdiction of the court.

Wissenburg v Bradley, 209-813; 229 NW 205; 67 ALR 1075

Presence of probation officer. Proceedings in juvenile court are not rendered illegal because the duly appointed probation officer was not present in court to represent the child when the matter was first taken up and heard in part.

Wissenburg v Bradley, 209-813; 229 NW 205; 67 ALR 1075

3616 Salaries—expenses—how paid.

Atty. Gen. Opinion. See '32 AG Op 203

CHAPTER 180

CARE OF NEGLECTED, DEPENDENT, AND DELINQUENT CHILDREN

3617 Applicable to certain children.

Atty. Gen. Opinions. See '28 AG Op 142, 309; '34 AG Op 638; '36 AG Op 305; '38 AG Op 899

3618 "Dependent and neglected child" defined.

Atty. Gen. Opinions. See '25-26 AG Op 401; '34 AG Op 404

3620 "Child", "parent", and "institution" defined.

Atty. Gen. Opinion. See '36 AG Op 305

3621 Petitions—prior investigation.

Atty. Gen. Opinions. See '28 AG Op 309; '38 AG Op 899

3622 Petition may embrace several children.

Atty. Gen. Opinion. See '38 AG Op 899

3629 Hearing—continuance.

Trial by court. The juvenile court act is not violative of the due process clause of the federal and state constitution because no provision is made for a jury trial of juvenile delinquents.

Wissenburg v Bradley, 209-813; 229 NW 205; 67 ALR 1075

Appeal—absence of. The right of appeal is not a constitutional right, and it is wholly within the power of the legislature to grant, or deny it, in either civil or criminal cases. So held under the juvenile court act. (See also Const. Art. I, §9.)

Wissenburg v Bradley, 209-813; 229 NW 205; 67 ALR 1075

3631 Appointment to represent child.

Compensation—attorney appointed by juvenile court. The court by statute has power and authority to appoint attorneys to represent juvenile delinquents in municipal court, unable to employ counsel, and an obligation arises on the part of the county to pay a reasonable attorney fee, altho statute makes no provision therefor.

Ferguson v Pottawattamie Co., 224-516; 278 NW 223

3632 Information charging crime.

Atty. Gen. Opinions. See '28 AG Op 309; '34 AG Op 639

Jurisdiction of district court. The juvenile court act has not deprived the district court of jurisdiction over indictments against persons under eighteen years of age.

State v Reed, 207-557; 218 NW 609

3634 Prosecutions transferred.

Atty. Gen. Opinions. See '34 AG Op 639; AG Op March 31, '39

3636 Conviction of crime—alternative procedure.

Atty. Gen. Opinions. See '28 AG Op 309; AG Op March 15, '39

Jurisdiction of district court. The juvenile court act has not deprived the district court of jurisdiction over indictments against persons under eighteen years of age.

State v Reed, 207-557; 218 NW 609

3637 Alternative commitments.

Atty. Gen. Opinions. See '25-26 AG Op 336; '38 AG Op 421, 571, 899

3638 Guardianship and adoption.

Atty. Gen. Opinions. See '25-26 AG Op 336; '34 AG Op 404; '38 AG Op 421, 899; AG Op April 25, '39

3639 Conditions attending commitment.

Atty. Gen. Opinions. See '25-26 AG Op 336; '32 AG Op 39; '38 AG Op 421, 899

3641 Aid to widow in care of child.

Atty. Gen. Opinions. See '25-26 AG Op 139, 476; '28 AG Op 257, 261, 406; '30 AG Op 154, 216; '32 AG Op 144, 146, 205, 207, 255; '38 AG Op 436, 651, 869; AG Op Feb. 8, '39, May 9, '39, Aug. 4, '39, Feb. 15, '40

Residence only essential. The jurisdiction of the juvenile court to adjudicate and order the payment by the county of a "pension" to the mother of indigent, dependent minor children depends, inter alia, not on a finding of legal settlement of the mother in the county, within the meaning of §5311, C., '24 [§3828.088, C., '39], but on a finding of residence in the county by the mother for one year.

Adams Co. v Maxwell, 202-1327; 212 NW 152

3642 Duration of order.

Atty. Gen. Opinion. See '38 AG Op 436

3643 Who considered widow.

Atty. Gen. Opinions. See '28 AG Op 257, 261; '30 AG Op 225; '38 AG Op 436, 651

3646 Mandatory commitments.

Atty. Gen. Opinions. See '25-26 AG Op 401; '28 AG Op 166, 304; '36 AG Op 305; '38 AG Op 421, 559, 571, 899

Adjudication of neglect and dependency—effect. The due commitment of a child to a proper state institution on a legal adjudication that the child is "neglected and dependent" permanently deprives the parent of all right to the custody or control of said child.

Stephens v Treat, 202-1077; 209 NW 282

3648 Right to transfer.

Atty. Gen. Opinion. See '28 AG Op 304

3649 Term of commitment—warrant.

Atty. Gen. Opinions. See '25-26 AG Op 401; '30 AG Op 367; '32 AG Op 39; '38 AG Op 89, 421, 899

3653 Detention home and school in certain counties.

Atty. Gen. Opinions. See '25-26 AG Op 59; '28 AG Op 142; '38 AG Op 181

3654 Tax.

Atty. Gen. Opinions. See '25-26 AG Op 59; '38 AG Op 181

3655 Approval of institutions.

Atty. Gen. Opinions. See '25-26 AG Op 59; '38 AG Op 373, 571

3656 Reports by court and institutions.

Atty. Gen. Opinions. See '38 AG Op 373, 571

CHAPTER 181

CONTRIBUTING TO JUVENILE DELINQUENCY

Atty. Gen. Opinions. See '34 AG Op 359; '38 AG Op 464

CHAPTER 181.1

SOCIAL WELFARE DEPARTMENT

3661.007 Powers and duties of the state board.

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

3661.013 County board employees.

Atty. Gen. Opinions. See '38 AG Op 376; AG Op June 23, '39

3661.014 Compensation of county board employees.

Atty. Gen. Opinions. See '38 AG Op 376; AG Op Aug. 1, '39

CHAPTER 181.2

CHILD WELFARE

Atty. Gen. Opinions. See '34 AG Op 359, 647

CHAPTER 181.3

MATERNITY HOSPITALS

Atty. Gen. Opinions. See '38 AG Op 373, 477

CHAPTER 181.4

CHILDREN'S BOARDING HOMES

Atty. Gen. Opinions. See '38 AG Op 373, 477, 569, 571

CHAPTER 181.5

CHILD-PLACING AGENCIES

Atty. Gen. Opinions. See '25-26 AG Op 213; '34 AG Op 466; '38 AG Op 373, 571

3661.073 "Child-placing agency" defined.

Pupils of charitable institution. Statute providing that persons of school age who are residents of districts not having a four-year high school course shall be permitted to attend any public high school in the state, construed to extend to wards of a charitable institution—the legislature not intending to discriminate against private, denominational, or parochial schools, nor to bar them from the benefits of statutory provisions.

School Twp. v Nicholson, 227-290; 288 NW 123

School benefits applicable to charitable institutions. A charitable institution, concededly a home-finding agency under statutory authorization, which, however, did not engage in finding homes and did not comply with the law in accepting children and did not comply with

adoption law, was nevertheless properly held to be entitled to benefits of school law for the reason that violations of other statutes were immaterial issues.

School Twp. v Nicholson, 227-290; 288 NW 123

3661.074 Power to license.

Atty. Gen. Opinion. See '38 AG Op 477

3661.087 Rules and regulations.

Atty. Gen. Opinion. See '38 AG Op 477

3661.090 Inspection generally.

Atty. Gen. Opinion. See '38 AG Op 477

3661.094 Annual report.

Atty. Gen. Opinions. See '25-26 AG Op 214; '38 AG Op 477

3661.096 Assumption of care and custody.

Pseudo parent. On the issue of custody, the welfare of the child must control, especially when one of the contenders is a pseudo parent.

Tilton v Tilton, 206-998; 221 NW 552

3661.097 Relinquishment of rights and duties.

Atty. Gen. Opinion. See AG Op March 27, '40

3661.099 Relinquishment, parents not married.

Atty. Gen. Opinion. See AG Op March 27, '40

3661.103 Authority to agencies.

Atty. Gen. Opinions. See '38 AG Op 571; AG Op March 27, '40

3661.104 Importation of children.

Atty. Gen. Opinion. See '34 AG Op 143

CHAPTER 182

PRIVATE INSTITUTIONS FOR NEGLECTED, DEPENDENT, AND DELINQUENT CHILDREN

Atty. Gen. Opinions. See '38 AG Op 373, 464, 571

CHAPTER 182.1

AID FOR THE BLIND

3684.02 Eligibility for assistance to the needy blind.

Atty. Gen. Opinion. See '38 AG Op 139, 667; AG Op June 26, '39

Holding under prior statutes. The discretion of the board of supervisors to refuse public aid to a blind person may not be controlled by mandamus.

Addison v Loudon, 206-1358; 222 NW 406

3684.03 Amount of assistance.

Atty. Gen. Opinion. See '38 AG Op 408, 667

Decision under former statutes. Moneys appropriated by the board to a blind person, and not applied to the relief of such blind person, revert to the county upon the death of such person.

In re Hugus, 203-607; 213 NW 239

3684.06 Application for assistance.

Atty. Gen. Opinion. See '38 AG Op 139

3684.18 Reimbursement from estate.

Atty. Gen. Opinions. See '38 AG Op 609, 667

CHAPTER 183

TRAINING SCHOOLS

Atty. Gen. Opinion. See '38 AG Op 464

3685 Official designation.

Spur track to state institution—maintenance cost. After a contract placed the burden on the state to pay the cost of construction, maintenance, and operation of a spur track to the industrial school for boys at Eldora, a state institution, and in a later clause required the railway company to maintain the spur track, the contract as a whole was construed and the apparent ambiguity resolved in a finding that the railroad should do the maintenance work, but that the state should pay the cost.

State v Sprague, 225-766; 281 NW 349

3689 Procedure to commit.

Adjudication of neglect and dependency—effect. The due commitment of a child to a proper state institution on a legal adjudication that the child is "neglected and dependent" permanently deprives the parent of all right to the custody or control of said child.

Stephens v Treat, 202-1077; 209 NW 282

3696 Discharge or parole.

Atty. Gen. Opinion. See '38 AG Op 89

CHAPTER 184

IOWA JUVENILE HOME

Atty. Gen. Opinion. See '38 AG Op 464

3698 Objects.

Atty. Gen. Opinions. See '36 AG Op 567; '38 AG Op 421, 559

3699 Procedure for commitment.

Adjudication of neglect and dependency—effect. The due commitment of a child to a proper state institution on a legal adjudication that the child is "neglected and dependent" permanently deprives the parent of all right to the custody or control of said child.

Stephens v Treat, 202-1077; 209 NW 282

3702 Adoption or placing under contract.

Atty. Gen. Opinions. See '38 AG Op 421, 559

3703 Counties liable for support.

Atty. Gen. Opinions. See '28 AG Op 335; '36 AG Op 567; '38 AG Op 97

CHAPTER 185

IOWA SOLDIERS' ORPHANS HOME

Atty. Gen. Opinions. See '34 AG Op 359, 695; '38 AG Op 464

3706 Objects.

Atty. Gen. Opinions. See '28 AG Op 46; '34 AG Op 604

3708 Admissions.

Atty. Gen. Opinions. See '25-26 AG Op 162; '34 AG Op 695; '38 AG Op 421

Adjudication of neglect and dependency — effect. The due commitment of a child to a proper state institution on a legal adjudication that the child is "neglected and dependent" permanently deprives the parent of all right to the custody or control of said child.

Stephens v Treat, 202-1077; 209 NW 282

3709 Procedure.

Atty. Gen. Opinion. See '38 AG Op 421

3711 Profits and earnings.

Atty. Gen. Opinion. See '38 AG Op 166

3712 Regulations.

Atty. Gen. Opinions. See '30 AG Op 367; '38 AG Op 421, 559

3713 Enumeration of soldiers' orphans.

Atty. Gen. Opinions. See '25-26 AG Op 163; '38 AG Op 829

3715.1 Adoption.

Atty. Gen. Opinion. See '38 AG Op 421

3716 Placing child under contract.

Atty. Gen. Opinions. See '30 AG Op 367; '34 AG Op 359, 647; '38 AG Op 421, 458, 559

3717 Recovery of possession.

Atty. Gen. Opinions. See '25-26 AG Op 470; '30 AG Op 367

3720 Counties liable.

Atty. Gen. Opinions. See '25-26 AG Op 163, 401; '34 AG Op 695; '38 AG Op 97, 458

CHAPTER 186

WOMEN'S REFORMATORY

Atty. Gen. Opinions. See '36 AG Op 305; '38 AG Op 87, 888

CHAPTER 187

PENITENTIARY AND MEN'S REFORMATORY

3745 Household and domestic service.

Atty. Gen. Opinion. See '36 AG Op 103

3762 Purchase mandatory.

Atty. Gen. Opinion. See '28 AG Op 429

3763 Selling price.

Atty. Gen. Opinion. See '28 AG Op 429

3764.1 Industry revolving funds.

Atty. Gen. Opinion. See '28 AG Op 264

3764.2 Use of funds.

Atty. Gen. Opinion. See '28 AG Op 264

3764.3 Funds permanent.

Atty. Gen. Opinion. See '28 AG Op 264

3770 Escape of prisoner.

Atty. Gen. Opinions. See '30 AG Op 258; '34 AG Op 737; '38 AG Op 363, 888

3770.1 Payment of award—appropriation.

Reward. See under §13465

Atty. Gen. Opinions. See '34 AG Op 737; '38 AG Op 363

3772 Property of convict.

Atty. Gen. Opinion. See '38 AG Op 94

3773 Time to be served.

Atty. Gen. Opinions. See '25-26 AG Op 33; '38 AG Op 883; AG Op March 8, '39

Credit on federal sentence while in state reformatory—not commutation of sentence. A prisoner who is in the state reformatory serving a sentence imposed by the state court is to be considered a prisoner of the state, notwithstanding the fact that he may at the same time be obtaining credit on a sentence imposed by a federal court.

State v Thomason, 226-1057; 285 NW 636

3774 Reduction of sentence.

Atty. Gen. Opinions. See '25-26 AG Op 33; '38 AG Op 883

Indeterminate sentences not made concurrent—habeas corpus not available. That defendant's imprisonment, if he is compelled to serve full time for each offense, would cover 82 years affords no legal ground for discharge from custody under indeterminate sentences in habeas corpus proceedings, even tho defendant was only 18 years of age and had not been represented by counsel at time pleas of guilty were entered.

Randall v Hollowell, (NOR); 227 NW 139

3775 Records of prisoners.

Atty. Gen. Opinion. See '25-26 AG Op 33

3776 Forfeiture of reduction.

Atty. Gen. Opinion. See '25-26 AG Op 33

3777 Separate sentences.

Atty. Gen. Opinion. See '25-26 AG Op 33

3778 Special reduction.

Atty. Gen. Opinion. See '28 AG Op 268

3779 Discharge—transportation, clothing, and money.

Atty. Gen. Opinion. See '36 AG Op 113

CHAPTER 188

PAROLES

Atty. Gen. Opinions. See '34 AG Op 484; '38 AG Op 334

3783 Appointment—vacancies.

Atty. Gen. Opinion. See '30 AG Op 52

3784 Expenses.

Atty. Gen. Opinion. See '34 AG Op 484

3785 Trips to other states.

Atty. Gen. Opinion. See '25-26 AG Op 372

3786 Power to parole after commitment.

Atty. Gen. Opinions. See '28 AG Op 282; '32 AG Op 240; '34 AG Op 728, 751

3787 Rules.

Atty Gen. Opinion. See '34 AG Op 751

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

3788 Parole before commitment.

Atty. Gen. Opinions. See '32 AG Op 229; '34 AG Op 751

3790 Legal custody of paroled prisoners.

Atty. Gen. Opinion. See '30 AG Op 247

3800 Parole by board.

Atty. Gen. Opinions. See '28 AG Op 236, 433; '34 AG Op 241; AG Op Feb. 24, '39

Right to revoke without notice. A defendant who is granted a suspension of sentence must take it with the statutory burden accompanying it, to wit: the right of the court to revoke the suspension at any time without notice or opportunity to be heard.

Pagano v Bechly, 211-1294; 232 NW 798

Sentence—unlawful suspension. The court has no power in a criminal case to enter a suspension of sentence during good behavior and on payment of the costs.

State v Hamilton, 206-414; 220 NW 313

3801 Custody of court parolee.

Atty. Gen. Opinion. See '30 AG Op 258

3805 Revocation of parole.

Atty. Gen. Opinion. See AG Op June 5, '37

Right to revoke without notice. A defendant, granted a suspension of sentence, must take it with the statutory burden accompanying it, to wit: the right of the court to revoke the suspension at any time without notice or opportunity to be heard.

Pagano v Bechly, 211-1294; 232 NW 798

Suspended sentence—power to set aside. The suspension of a sentence by the court may be set aside by the court even after the lapse of the time covered by the sentence. In other words, the court may at any time reinstate a suspended sentence and order its enforcement.

Bennett v Bradley, 216-1267; 249 NW 651

CHAPTER 189

PARDONS, COMMUTATIONS, REMISSION OF FINES AND FORFEITURES, AND RESTORATION TO CITIZENSHIP

Atty. Gen. Opinions. See '34 AG Op 181; '38 AG Op 334

3812 Reprieves and pardons.

Annotations relative to pardons. See Const Art IV, §16, Vol I

Discussion. See 8 ILB 177—Judicial annulment of pardons

Atty. Gen. Opinions. See '28 AG Op 236; '34 AG Op 181; AG Op Feb. 9, '39

3813 Pardon.

Discussion. See 14 ILR 447—Pardons of contempts of court

Atty. Gen. Opinion. See '28 AG Op 236

3817 Conditions prerequisite to a pardon.

Atty. Gen. Opinions. See '34 AG Op 181, 372

3823 Restoration to citizenship

Atty. Gen. Opinions. See '36 AG Op 417, 461

3824 Fines and forfeitures

Annotations relative to fines and forfeitures. See Const Art IV, §16, Anno Vol I

Atty. Gen. Opinion. See '28 AG Op 236

CHAPTER 189.1

OLD-AGE ASSISTANCE

3828.001 Definitions.

Atty. Gen. Opinion. See '38 AG Op 389

3828.003 Powers and duties of the state board.

Atty. Gen. Opinion. See '38 AG Op 117

Social welfare board—executive functions—administrative duty in determining eligibility for relief—absence of fraud—appeal from findings.

Schneberger v Board, 228- ; 291 NW 859

3828.008 To whom granted.

Atty. Gen. Opinions. See '36 AG Op 461, 618, 676; '38 AG Op 157; AG Op June 26, '39

Voting as evidence of domicile. In determining domicile, fact that person voted in school election in Crawford county is not conclusive evidence that Crawford county was his residence.

Crawford County v Kock, 227-1235; 290 NW 682

3828.009 Amount of assistance.

Atty. Gen. Opinion. See AG Op Oct. 2, '39

3828.012 Property exclusions.

Atty. Gen. Opinions. See '36 AG Op 425; AG Op Jan. 29, '40

3828.015 Witnesses.

Atty. Gen. Opinion. See AG Op Sept. 12, '39

3828.016 Assistance certificate.

Atty. Gen. Opinion. See AG Op Mar. 23, '39

3828.021 Funeral expenses.

Atty. Gen. Opinions. See '38 AG Op 191, 424; AG Op Aug. 15, '39

3828.023 Transfer of property to the state.

Atty. Gen. Opinions. See '36 AG Op 425; '38 AG Op 400, 794; AG Op July 7, '39, July 10, '39, Aug. 15, '39, April 4, '40

3828.026 Assignment of insurance.

Atty. Gen. Opinions. See '36 AG Op 425; AG Op Jan. 29, '40

3828.029 When child's liability begins.

Atty. Gen. Opinion. See AG Op June 26, '39

3828.032 Recipient not to receive other assistance.

Atty. Gen. Opinions. See '36 AG Op 670; '38 AG Op 204; AG Op Aug. 23, '39, Oct. 2, '39

3828.035 Incapacity of applicant or recipient.

Atty. Gen. Opinions. See AG Op June 23, '39, Sept. 12, '39

3828.039 Assistance fund created.

Atty. Gen. Opinions. See '36 AG Op 403, 634; '38 AG Op 117, 157, 219, 434, 605; AG Op Mar. 18, '39, May 10, '39, Feb. 17, '40

Holding under prior statute. The actual and necessary expenses incurred by members of the old-age assistance board of a county are payable by the county but solely from the state old-age pension fund, such expenses being an "expenditure" within the meaning of §5296-f34, C., '35.

Jones v Dunkelberg, 221-1031; 265 NW 157

3828.042 Revolving fund created.

Atty. Gen. Opinion. See '36 AG Op 425

CHAPTER 189.2

RELIEF FOR SOLDIERS, SAILORS, AND MARINES

3828.051 Tax.

Atty. Gen. Opinions. See '30 AG Op 72, 234; '32 AG Op 163, 177, 201; '34 AG Op 708; '36 AG Op 105, 162; AG Op Jan. 31, '39, May 3, '39, May 10, '39, June 6, '39

3828.052 Control of fund.

Atty. Gen. Opinions. See '34 AG Op 708; AG Op June 14, '39

3828.053 Relief commission.

Discussion. See '28 AG Op 266; '36 AG Op 355

3828.056 Qualification—organization.

Atty. Gen. Opinions. See '28 AG Op 424; '34 AG Op 110

3828.057 Meetings—report—levy.

Atty. Gen. Opinions. See '30 AG Op 47; '36 AG Op 355

3828.059 Disbursements.

Atty. Gen. Opinions. See '34 AG Op 110, 242; '38 AG Op 5

3828.063 Expenses and audit thereof.

Atty. Gen. Opinion. See '30 AG Op 47

3828.065 Maintenance of graves.

Atty. Gen. Opinions. See '28 AG Op 380; '34 AG Op 510

3828.066 Payment—how made.

Atty. Gen. Opinion. See '28 AG Op 380

CHAPTER 189.3

EMERGENCY RELIEF ADMINISTRATION

3828.070 Duties of the county board of social welfare.

Atty. Gen. Opinion. See AG Op July 11, '39

CHAPTER 189.4

SUPPORT OF THE POOR

3828.073 "Poor person" defined.

Atty. Gen. Opinions. See '30 AG Op 356; '32 AG Op 192; '38 AG Op 204, 785

Applicability of statute. A person who is admittedly physically and financially unable to support himself is a "poor person" when it appears that he is sent to the county home by the township trustees in the exercise of a wise discretion, and especially is this true when the finding would be justified that the relatives had peremptorily refused longer to support such person.

Bremer Co. v Schroeder, 200-1285; 206 NW 303

Poor person—evidence. Evidence held to show that a person was a "poor" person within the meaning of the statute.

Cherokee County v Smith, 219-490; 258 NW 182

3828.074 Parents and children liable.

Atty. Gen. Opinions. See '28 AG Op 276; '38 AG Op 327, 785, 864

Liability of "legally bound" persons.

Iowa Co. v Amana Soc., 214-893; 243 NW 299

Application—sufficiency. It is not necessary that a poor person personally make application to the township trustees for support in order to render the son liable for support furnished by the county.

Bremer Co. v Schroeder, 200-1285; 206 NW 303

Recovery by county—condition. The county, in order to recover from the parents of a poor person who has been furnished poor relief, must establish that the said parents were able to support said child.

Cherokee County v Smith, 219-490; 258 NW 182

Holding under prior statutes. Parents are not liable for the support of their adult pauper children, unless such support is initiated by an application therefor by or to the township trustees. (§5328, C., '27, [§3828.105, C., '39]).

Wright County v Hagan, 210-795; 231 NW 298

3828.076 Who deemed trustee.

Atty. Gen. Opinion. See '34 AG Op 297

De facto trustees. The authority of de facto township trustees may not be questioned in a collateral proceeding.

Bremer Co. v Schroeder, 200-1285; 206 NW 303

3828.077 Remote relatives.

Atty. Gen. Opinions. See '28 AG Op 276; '36 AG Op 562; '38 AG Op 327, 785; AG Op June 26, '39

3828.078 Enforcement of liability.

Atty. Gen. Opinions. See '30 AG Op 356; '32 AG Op 87; '38 AG Op 327, 785

Conditions precedent. In order for a county to recover of a son for support rendered to the pauper father, it is not necessary, as a condition precedent, that the township trustees first make application to the district court and obtain an adjudication of the son's liability.

Bremer Co. v Schroeder, 200-1285; 206 NW 303

3828.079 Notice—hearing.

Necessaries for child—divorce—liability of parent. The father of a minor child is liable for necessary medical and hospital services rendered without his knowledge to the child in an emergency, even tho the mother has obtained a divorce and the custody of said child and has been paid the decreed alimony.

Stech v Holmes, 210-1136; 230 NW 326

Recovery by county — condition precedent. The county, in order to recover from the parents of a poor person who has been furnished poor relief, must establish that the said parents were able to support said child.

Cherokee County v Smith, 219-490; 258 NW 182

3828.084 Trial by jury.

Atty. Gen. Opinion. See '38 AG Op 785

3828.085 Recovery by county.

Atty. Gen. Opinions. See '32 AG Op 87; '38 AG Op 155, 327, 785

Limitation on recovery. This section limits the recovery to whatever amount has been actually paid during the two years immediately preceding the beginning of the action.

Bremer Co. v Schroeder, 200-1285; 206 NW 303

Recovery by county—condition. The county, in order to recover from the parents of a poor person who has been furnished poor relief, must establish that the said parents were able to support said child.

Cherokee County v Smith, 219-490; 258 NW 182

3828.086 Homestead—when liable.

Atty. Gen. Opinions. See '38 AG Op 327, 609

3828.088 Settlement—how acquired.

Atty. Gen. Opinions. See '28 AG Op 196, 257; '30 AG Op 72, 118, 286; '32 AG Op 165, 205, 224, 276; '34 AG Op 631, 693, 694, 725; '36 AG Op 87, 162, 262, 332, 347, 384, 562, 670; '38 AG Op 132, 139, 142, 160, 254, 365, 667, 857, 869; AG Op July 18, '39, Aug. 4, '39, Oct. 2, '39, Feb. 15, '40, May 3, '40

Continuing liability of county of legal settlement. A resident of a county who has no legal settlement therein continues, in case of his commitment to a state hospital for the insane, a legal charge upon that particular county of the state wherein he has such legal settlement, and such charge continues until, by the lapse of one year without notice to depart, his residence ripens into a legal settlement, after which he becomes a legal charge upon the county wherein he has both his residence and his legal settlement.

State v Story County, 207-1117; 224 NW 232

Insane wife—county liable for support. Under a statute providing that "the residence of any person found insane who is an inmate of any state institution shall be that existing at the time of admission thereto", when the mother of a family was committed as insane within a few months after moving to another county, the residence at the time of commitment was in the county to which she had moved, and since no warning to depart was served on her, she acquired a legal settlement in the new county at the end of a year, regardless of the residence of her husband at the time, and that county was liable for her support in the institution after the end of the year.

State v Clay County, 226-885; 285 NW 229

Intent to remain—county removal—support.

Audubon Co. v Vogessor, 228- ; 291 NW 135

Involuntary abandonment (?). The fact that an adult person having a legal settlement in one county is, on conviction in said county of a penitentiary offense, immediately paroled by the court on condition that he depart from said county and not return except on named condition, and the fact that he complies with said condition and removes with his family to another county, presents no obstacle to the acquisition by said person of a new legal settlement in the county to which he so removes. The assumption that the acceptance of the conditions of said parole was compulsory and deprived said party of all mental volition to acquire a new settlement is quite unjustified.

Cass Co. v Audubon Co., 221-1037; 266 NW 293

3828.089 Settlement continues.

Atty. Gen. Opinions. See '25-26 AG Op 476; '28 AG Op 257; '30 AG Op 283; '32 AG Op 224; '34 AG Op 631, 694; '36 AG Op 87; '38 AG Op 132, 142, 150, 160, 254, 869; AG Op Oct. 9, '39

3828.090 Foreign paupers.

Atty. Gen. Opinions. See '32 AG Op 146; '34 AG Op 631; '38 AG Op 132, 160; AG Op July 19, '39

3828.092 Notice to depart.

Atty. Gen. Opinions. See '25-26 AG Op 476; '28 AG Op 196, 257; '30 AG Op 283, 286; '32 AG Op 224, 253; '34 AG Op 406, 631; '36 AG Op 332; '38 AG Op 132, 139, 142, 160, 254, 685, 857, 869; AG Op Oct. 2, '39, Feb. 15, '40, May 13, '40

Notice not given to relief recipients.

Audubon Co. v Vogessor, 228- ; 291 NW 135

Continuing liability of county of legal settlement. A resident of a county who has no legal settlement therein continues, in case of his commitment to a state hospital for the insane, a legal charge upon that particular county of the state wherein he has such legal settlement, and such charge continues until, by the lapse of one year without notice to depart, his residence ripens into a legal settlement, after which he becomes a legal charge upon the county wherein he has both his residence and legal settlement.

State v Story County, 207-1117; 224 NW 232

Legal settlement of pauper — failure of county to determine—liability. When a pauper moved to another county, the failure of the county from which she had moved to take steps to have her legal settlement determined did not estop it from claiming that she acquired a legal settlement in the other county, when it was liable for the care of the pauper for a year after moving, and during that time had no reason to dispute the settlement and did not misrepresent or conceal any facts to cause the other county to fail to serve a warning to depart.

State v Clay County, 226-885; 285 NW 229

3828.093 Service of notice.

Atty. Gen. Opinions. See '28 AG Op 257; '34 AG Op 406; '38 AG Op 132, 685; AG Op May 13, '40

Notice to depart—invalidity. A notice to a nonresident poor person to depart from the county is a nullity unless officially authorized by the township trustees or board of supervisors. The mere fact that the members of the board individually discussed the matter in regular session and "told the chairman to sign the notice" does not constitute such official authorization.

Emmet County v Dally, 216-166; 248 NW 366

3828.094 Contest between counties.

Atty. Gen. Opinions. See '38 AG Op 862, 864, 869; AG Op July 19, '39

Insanity commitment within year after moving to another county. When, within a few months after a family of paupers moved from Clay county to O'Brien county, the mother was committed as insane, but no finding of her legal settlement was made, the only effect of sending Clay county notice of the commitment and bills incurred was to notify Clay county of the amount expended for which it was liable, because the expenses were incurred within the year after the family moved from Clay county while legal settlement of the family had not been changed, but created no duty in Clay county to contest legal settlement.

State v Clay County, 226-885; 285 NW 229

Removal by county—no notice—support.

Audubon Co. v Vogessor, 228- ; 291 NW 135

3828.095 Trial.

Atty. Gen. Opinions. See '38 AG Op 862, 864

3828.096 County of settlement liable.

Atty. Gen. Opinions. See '36 AG Op 670; '38 AG Op 139, 862

County paying support of insane person—laches of officials imputed to county. When a county was not liable for the support of a person committed to a state institution as insane, and through the negligence and laches of its officials paid such support for about 14 years before objecting, the negligence was imputed to the county, and the bar of laches prevented a recovery for such expenditures from the county which should have paid, but the burden of continuing payments was on the other county from the time payments ceased.

State v Clay County, 226-885; 285 NW 229

Insanity commitment within year after moving to another county. When, within a few months after a family of paupers moved from Clay county to O'Brien county, the mother was committed as insane, but no finding of her legal settlement was made, the only effect of sending Clay county notice of the commitment and bills incurred was to notify Clay county of the amount expended for which it was liable, because the expenses were incurred within the year after the family moved from Clay county while legal settlement of the family had not been changed, but created no duty in Clay county to contest legal settlement.

State v Clay County, 226-885; 285 NW 229

Insane wife—acquiring legal settlement. Under a statute providing that "the residence of any person found insane who is an inmate of any state institution shall be that existing at the time of admission thereto", when the mother of a family was committed as insane within a few months after moving to another county, the residence at the time of commitment was in the county to which she had moved, and since no warning to depart was served on her, she acquired a legal settlement in the new county at the end of a year, regardless of the residence of her husband at the time, and that county was liable for her support in the institution after the end of the year.

State v Clay County, 226-885; 285 NW 229

Legal settlement of pauper—failure of county to determine—liability. When a pauper moved to another county, the failure of the county from which she had moved to take steps to have her legal settlement determined did not estop it from claiming that she acquired a legal settlement in the other county, when it was liable for the care of the pauper for a year after moving, and during that time had no reason to dispute the settlement and did not misrepresent or conceal any facts to

cause the other county to fail to serve a warning to depart.

State v Clay County, 226-885; 285 NW 229

No notice—persons involuntarily in county.

Audubon Co. v Vogessor, 228- ; 291 NW 135

3828.097 Relief by trustees.

Atty. Gen. Opinions. See '32 AG Op 225; '34 AG Op 406; '38 AG Op 864; AG Op May 13, '40

Warrant on "poor" fund — liability. The liability of a county on a warrant properly drawn on the "poor" fund of the county is not limited to the funds in said fund.

Council Bl. Bk. v County, 216-1123; 250 NW 233

3828.098 Overseer of poor.

Atty. Gen. Opinions. See '30 AG Op 341; '34 AG Op 406; '36 AG Op 452; '38 AG Op 685; AG Op May 13, '40

Application to overseer—effect. An application to the overseer of the poor by or on behalf of a poor person, for poor relief, and acted on by said overseer, has the same legal effect as an application to the township trustees.

Cherokee County v Smith, 219-490; 258 NW 182

3828.099 Form of relief—condition.

Atty. Gen. Opinions. See '32 AG Op 177; '36 AG Op 344; '38 AG Op 155, 204, 321, 609, 868; AG Op Sept. 13, '39, Feb. 27, '40

3828.100 Medical services.

Atty. Gen. Opinions. See '36 AG Op 344; '38 AG Op 204, 864; AG Op Jan. 16, '39

3828.101 Interest prohibited.

Atty. Gen. Opinion. See '36 AG Op 660

3828.102 Special privileges to soldiers and others.

Atty. Gen. Opinions. See '32 AG Op 180; AG Op May 10, '39

3828.103 County expense.

Atty. Gen. Opinions. See '30 AG Op 341; '34 AG Op 297; '38 AG Op 204, 868

3828.104 Township trustees—duty.

Atty. Gen. Opinions. See '25-26 AG Op 469; '34 AG Op 406; '38 AG Op 50

3828.105 Application for relief.

Atty. Gen. Opinions. See '32 AG Op 225; '36 AG Op 344; '38 AG Op 785, 864

Application—sufficiency. It is not necessary that a poor person personally make application to the township trustees for support, in order to render the son liable for support furnished by the county.

Bremer Co. v Schroeder, 200-1285; 206 NW 303

Application to overseer—effect. An application to the overseer of the poor by or on behalf of a poor person, for poor relief, and acted on by said overseer, has the same legal effect as an application to the township trustees.

Cherokee County v Smith, 219-490; 258 NW 182

Holding under former statutes. A county furnishing relief to a poor person who has a settlement in another county cannot recover of such other county the value of such relief unless it is shown that the relief was initiated by an application to the township trustees of the township in which the poor person resided.

Cherokee Co. v County, 212-682; 237 NW 454

Holding under prior statutes. Parents are not liable for the support of their adult pauper children, unless such support is initiated by an application therefor by or to the township trustees, (§5298, C., '27 [§3828.074, C., '39]).

Wright County v Hagan, 210-795; 231 NW 298

3828.106 Allowance by board.

Atty. Gen. Opinions. See '32 AG Op 225; '38 AG Op 204, 864; AG Op Oct. 2, '39

3828.107 Payment of claims.

Atty. Gen. Opinion. See '38 AG Op 864

3828.109 Appeal to supervisors.

Atty. Gen. Opinions. See '32 AG Op 225; '38 AG Op 864

3828.110 Contracts for support.

Atty. Gen. Opinion. See '28 AG Op 215

3828.111 Medical and dental service.

Atty. Gen. Opinions. See '30 AG Op 310; '34 AG Op 189; '38 AG Op 50, 321

3828.114 Poor tax.

Atty. Gen. Opinions. See '36 AG Op 82; '38 AG Op 97, 327, 868; AG Op June 10, '39

Public debt—warrant on poor fund—liability. The liability of a county on a warrant properly drawn on the poor fund of the county is not limited to the funds in said fund.

Council Bl. Bk. v County, 216-1123; 250 NW 233

CHAPTER 189.5

COUNTY HOMES

3828.115 Establishment—submission to vote.

Atty. Gen. Opinion. See '34 AG Op 624

3828.116 Management.

Atty. Gen. Opinion. See AG Op Oct. 12, '39

3828.120 Order for admission.

Absence of formal order of commitment. The fact that a poor person was admitted to the county home without any formal written order, or without the making of any record

in relation thereto, does not relieve the son of such person from liability for the support furnished such poor person in such home.

Bremer Co. v Schroeder, 200-1285; 206 NW 303

3828.123 Education of children.

Atty. Gen. Opinions. See '34 AG Op 343, 416; '36 AG Op 197; '38 AG Op 181, 846

Tuition for poor children. Where county furnished two families small homes rent free, the homes being located on county-owned land, but did not furnish any additional aid and did not attempt to have supervision of such homes nor provide any rules or regulations, the children of such families were not "poor children * * * cared for at a county home" under statute providing that the county should reimburse school districts for the cost of providing schooling for such school children.

School Dist. v Ida County, 226-1237; 286 NW 407

CHAPTER 189.6

INDIGENT TUBERCULAR PATIENTS

Atty. Gen. Opinion. See '38 AG Op 155

CHAPTER 189.7

MEDICAL AND SURGICAL TREATMENT OF INDIGENT PERSONS

3828.132 Complaint.

Atty. Gen. Opinions. See '30 AG Op 77, 153, 218; '36 AG Op 344, 429; '38 AG Op 160

3828.133 Duty of public officers and others.

Atty. Gen. Opinion. See '36 AG Op 429

3828.135 Examination by physician.

Atty. Gen. Opinions. See '28 AG Op 386; '34 AG Op 473, 729

3828.136 Report by physician.

Atty. Gen. Opinions. See '28 AG Op 386; '34 AG Op 729

3828.139 Hearing—order—emergency cases—cancellation of commitments.

Atty. Gen. Opinions. See '36 AG Op 344, 429

3828.142 Order in case of emergency.

Atty. Gen. Opinion. See '30 AG Op 153

3828.144 Attendant—physician—compensation.

Atty. Gen. Opinions. See '32 AG Op 190; '36 AG Op 342

3828.145 Expenses—how paid.

Atty. Gen. Opinion. See '32 AG Op 190

3828.147 County quotas.

Atty. Gen. Opinions. See '36 AG Op 419, 429; '38 AG Op 160

3828.150 Treatment of other patients.

Atty. Gen. Opinion. See '36 AG Op 419

3828.152 Treatment outside hospital—attendant.

Atty. Gen. Opinion. See '36 AG Op 429

3828.155 Record and report of expenses.

Atty. Gen. Opinion. See '36 AG Op 429

3828.156 Audit of accounts of hospital.

Atty. Gen. Opinions. See '30 AG Op 218; '32 AG Op 261; '36 AG Op 429

3828.157 Expenses—how paid—action to reimburse county.

Atty. Gen. Opinion. See '30 AG Op 218

3828.158 Faculty to prepare blanks—printing.

Atty. Gen. Opinion. See '36 AG Op 429

3828.159 Transfer of patients from state institutions.

Atty. Gen. Opinions. See '28 AG Op 58; '30 AG Op 232

TITLE XII

EDUCATION

CHAPTER 190

SUPERINTENDENT OF PUBLIC INSTRUCTION

Atty. Gen. Opinions. See '34 AG Op 528; '36 AG Op 381

CHAPTER 191

VOCATIONAL EDUCATION

Atty. Gen. Opinion. See '38 AG Op 636

CHAPTER 192

VOCATIONAL REHABILITATION

Atty. Gen. Opinion. See '32 AG Op 200

CHAPTER 193

BOARD OF EDUCATIONAL EXAMINERS

Atty. Gen. Opinions. See '34 AG Op 202; '36 AG Op 462

3876 First grade uniform county certificate.

Atty. Gen. Opinion. See '30 AG Op 168

3879 First grade certificate—renewal.

Atty. Gen. Opinion. See '30 AG Op 168

3888 Registration of certificates and diplomas.

Atty. Gen. Opinions. See '28 AG Op 85; AG Op Oct. 9, '39

3890 Provisional certificates.

Atty. Gen. Opinion. See AG Op Sept. 9, '39

3892 Revocation by board.

Atty. Gen. Opinion. See '30 AG Op 208

3893 Revocation by county superintendent.

Atty. Gen. Opinion. See '30 AG Op 208

3895 Appeal.

Atty. Gen. Opinion. See '30 AG Op 208

3896 Expenditures.

Atty. Gen. Opinion. See '36 AG Op 85

CHAPTER 194

NORMAL TRAINING OF TEACHERS

Atty. Gen. Opinions. See '38 AG Op 201, 660

CHAPTER 195

STATE BOARD OF EDUCATION

Atty. Gen. Opinions. See '36 AG Op 379, 429

3914 Appointment.

Atty. Gen. Opinion. See '30 AG Op 52

3919 Institutions governed.

Atty. Gen. Opinions. See '36 AG Op 419, 429, 445

3921 Powers and duties.

Atty. Gen. Opinions. See '28 AG Op 49, 129; '32 AG Op 113; '34 AG Op 635; '36 AG Op 220, 224, 240, 293, 377, 389, 393, 398, 419, 429, 497; '38 AG Op 143, 385, 771

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

3922 Purchases—prohibitions.
Atty. Gen. Opinions. See '28 AG Op 129; '36 AG Op 647, 660; '38 AG Op 185

3923 Record.
Atty. Gen. Opinions. See '32 AG Op 113; '36 AG Op 647

3926 Loans—conditions.
Atty. Gen. Opinions. See '34 AG Op 522, 527; '36 AG Op 382, 416, 429; '38 AG Op 257

3928 Satisfaction of mortgages.
Atty. Gen. Opinion. See '34 AG Op 322

3931 Actions not barred.
Atty. Gen. Opinion. See '36 AG Op 189

3933 Expenses—official residences.
Atty. Gen. Opinions. See '25-26 AG Op 372; '32 AG Op 155

3935 Duties of treasurer.
Atty. Gen. Opinions. See '32 AG Op 124; '34 AG Op 426, 718; '36 AG Op 429; '38 AG Op 905

3937 Reports of secretarial officers.
Atty. Gen. Opinion. See '36 AG Op 429

3938 Report of board.
Atty. Gen. Opinion. See '36 AG Op 429

3940 Appropriations—monthly installments.
Atty. Gen. Opinion. See '34 AG Op 219, 426

3941 Expenses—filing and audit.
Atty. Gen. Opinion. See '25-26 AG Op 372

3942 Contracts for training teachers.
Atty. Gen. Opinions. See '32 AG Op 108; '34 AG Op 341, 541

3945 Improvements — advertisement for bids.
Atty. Gen. Opinions. See '25-26 AG Op 110; '36 AG Op 682

3945.1 Dormitories at state educational institutions.
Atty. Gen. Opinions. See '36 AG Op 224; '38 AG Op 385

3945.4 Borrowing money and mortgaging property.
Atty. Gen. Opinion. See '38 AG Op 385

3945.5 Nature of obligation — discharge.
Atty. Gen. Opinion. See '38 AG Op 385

CHAPTER 196

STATE UNIVERSITY

Atty. Gen. Opinions. See '30 AG Op 96; '36 AG Op 419

CHAPTER 198

FEDERAL MATERNITY AND INFANCY ACT

Atty. Gen. Opinion. See '36 AG Op 429

CHAPTER 200

STATE COLLEGE OF AGRICULTURE AND MECHANIC ARTS

Atty. Gen. Opinions. See '34 AG Op 530; '38 AG Op 257

CHAPTER 201.1

IOWA CROP PEST ACT

Atty. Gen. Opinion. See '32 AG Op 96

CHAPTER 204

SCHOOL FOR THE DEAF

Atty. Gen. Opinion. See '25-26 AG Op 72

CHAPTER 206

COUNTY SUPERINTENDENT

4096 Term of office.

Certiorari. Neither a judge of the supreme court, nor the court itself, has jurisdiction to issue a writ of certiorari to other than an inferior judicial tribunal. So held where the writ was inadvertently issued to the superintendent of public instruction and to a county superintendent of schools.

School District v Samuelson, 220-170; 262 NW 169

4097 Qualifications.

Atty. Gen. Opinions. See '28 AG Op 67, 97; '30 AG Op 168; '32 AG Op 252; '36 AG Op 421

4098 Election by convention.

Atty. Gen. Opinion. See '28 AG Op 123

4099 Representatives at convention.

Atty. Gen. Opinion. See '28 AG Op 284

4101 Convention—quorum.

Atty. Gen. Opinion. See '28 AG Op 99

4106 Duties.

Atty. Gen. Opinion. See '28 AG Op 284

Appeal from original order of county superintendent. No appeal lies to the superintendent of public instruction from an original order or action of a county superintendent. In other words, the right of appeal to the state superintendent is strictly confined to those decisions or orders that originate with a board of directors of a school corporation.

Field v Samuelson, 212-786; 233 NW 687

CHAPTER 207

COUNTY BOARD OF EDUCATION

4119 Membership—election.

Atty. Gen. Opinions. See '30 AG Op 377; '34 AG Op 551

4121 Meetings—chairman—records.

Atty. Gen. Opinion. See '30 AG Op 377

4122 Duties.

Atty. Gen. Opinions. See '30 AG Op 74, 180

County officials — raising constitutionality of statutes not permitted. Ministerial officers or public officials may not challenge the constitutionality nor competence of the legislature to pass a statute under which they act.

Hewitt & Sons v Keller, 223-1372; 275 NW 94

Brunner v Floyd County, 226-583; 284 NW 814

CHAPTER 208

SCHOOL DISTRICTS IN GENERAL

4123 Powers and jurisdiction.

Atty. Gen. Opinions. See '36 AG Op 280, 474, 670; '38 AG Op 90, 234, 746, 764; AG Op April 12, '39

Action by teacher for compensation—pleading—intervention by taxpayer. In a teacher's action to recover compensation against a school district, where a taxpayer files a defensive petition of intervention after a demurrer to the answer had been sustained, but before defendant had made any election to stand on its answer, before any demand to make such election had been made, before default or judgment had been entered, or any demand therefor—the petition of intervention being unquestioned and raising an issue on the additional defensive matter—the court erred in sustaining a motion to strike the petition of intervention and entering judgment against the school district.

Schwartz v Sch. Dist., 225-1272; 282 NW 754

School janitor—definite period of employment—removal without hearing—soldiers preference. An honorably discharged soldier employed as school janitor by a yearly contract had a definite tenure of appointment and could be removed by the school board at the end of the period of employment without the termination being effected in accordance with §1163 of the code.

Durst v Board, 228- ; 292 NW 73

Public officials—raising constitutionality of statutes not permitted. Ministerial officers or public officials may not challenge the constitutionality nor competence of the legislature to pass a statute under which they act.

Hewitt & Sons v Keller, 223-1372; 275 NW 94

Brunner v Floyd County, 226-583; 284 NW 814

District liabilities—torts. A school district, organized, existing, and acting under the laws of the state as a governmental agency, is not liable in damages consequent on the negligence of its employees, or in consequence of the maintenance by it, through its employees, of a nuisance.

Larsen v School Dist., 223-691; 272 NW 632

Division of township—effect. The division of a township by the board of supervisors, under §5531, C., '24, does not have the effect of dividing an existing school district.

Christensen v Board, 201-794; 208 NW 291

Equitable garnishment. A judgment plaintiff may not, as a matter of public policy, maintain against a school district an equitable proceeding to subject to the satisfaction of the judgment funds in the hands of such corporation and belonging to the judgment defendant.

Julander v Reynolds, 206-1115; 221 NW 807

School bus driver as independent contractor —nongovernmental function. A school bus driver, furnishing his own bus, under a contract embodying certain conditions to transport school children, but not under the supervision, control, and regulation of the board, is an independent contractor liable for his own negligence and not an employee exercising a governmental function.

Olson v Cushman, 224-974; 276 NW 777

Governmental employees—personal liability for torts—no governmental immunity. A governmental employee committing a tortious act which causes injury to another in violation of a duty owed to the injured person, becomes, as an individual, personally liable in damages therefor. (Hibbs v School Dist., 218 Iowa 841, overruled).

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA(NS) 4

Futter v Hout, 225-723; 281 NW 286

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Doherty v Edwards, 226-249; 284 NW 159

Governmental function — political corporations not suable for torts. Counties and school districts, being political or quasi corporations not clothed with full corporate powers as are cities and towns, cannot be sued for negligence, and the question of the exercise of a governmental function is immaterial.

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

Mandatory duty to transport pupils. A statute providing that a school board shall furnish transportation to children living two and one-half miles from the school creates a mandatory duty to transport pupils which is a governmental function, but whether the duty be considered as ministerial or governmental, the school district, being a quasi corporation, cannot be sued for failure to furnish such transportation when such right of action is not expressly given by statute.

Bruggeman v Sch. Dist., 227-661; 289 NW 5

Compelling transportation to be furnished to pupils. When a school district failed to provide transportation for a pupil as required by statute, the pupil's father, who had furnished such transportation after making a demand on the school district, could not recover for such services under quasi contract or contract implied in law, as the statute did not contemplate that the costs of transportation be paid except under an arrangement with the school board, as provided by statute. The proper remedy of the plaintiff was mandamus to compel the school district to perform its mandatory duty.

Bruggeman v Sch. Dist., 227-661; 289 NW 5

Painting schoolhouse as governmental act—nonliability. A school district in causing its schoolhouse or the rooms thereof to be painted must be deemed as engaged in a governmental function with complete exemption from liability for negligence in so doing. So held where it was urged that the district had impliedly contracted to furnish the workman a "safe place" in which to work.

Ford v School Dist., 223-795; 273 NW 870

Real property—power to acquire. A school district has general power to acquire and hold real property for its legitimate purposes.

Smith v Maresh, 226-552; 284 NW 390

School sites—contract—rescission and cancellation. The purchase by a school board of a schoolhouse site after bonds for such purchase had been duly voted, but prior to any bond levy, and the due issuance of a warrant in payment for such site, are not canceled or rescinded by the subsequent action of the electors in voting to rescind their former action authorizing the bonds.

Looney v School Dist., 201-436; 205 NW 328

School site—title valid as to part—no injunction. A school district's title to its site for a high school is not wholly invalid simply because the size may be greater than the statutory limitation on the amount that can be obtained by condemnation. When the size of the building is not so great as to cover more ground than the statute allows, and when the title, if defective at all, is defective only as to the excess land, an injunction will not lie on the theory that the district had no title.

Smith v Maresh, 226-552; 284 NW 390

School property—assessability. A school district having lots assessable under a city contract for paving and curbing cannot be deemed a "municipality" entering "into a contract" within the meaning of the state budget law (Ch 23, C., '31). In such circumstances, the district is simply a property owner.

Schumacher v Clear Lake, 214-34; 239 NW 71

4123.1 General applicability.

Atty. Gen. Opinion. See '28 AG Op 102

Extension of consolidated district. Section 4141, C., '27, is available to a consolidated school district which wishes to extend its boundaries by adding thereto part of the territory of an adjoining consolidated school district. In other words, §4133, C., '27, does not provide the exclusive procedure.

Chambers v Housel, 211-314; 233 NW 502

4124 Names.

"Independent district" defined. A "consolidated" school district is an "independent school district" within the meaning of §4230, C., '24, authorizing the school board to elect a superintendent for a period not exceeding three years.

Cons. Dist. v Griffin, 201-63; 206 NW 86

Indictment—immaterial misdescription. In an indictment for the larceny of coal from a school district it is not a fatal defect that the district is described as Grove Township School District instead of the Grove School District Township.

State v Philpott, 222-1334; 271 NW 617

4125 Directors.

Atty. Gen. Opinions. See '34 AG Op 605; '38 AG Op 234, 746

Employment of counsel. The board of directors has implied power in good faith to employ attorneys to defend against a proceeding for the dissolution of the district and to contract for a reasonable compensation for such services.

Rural Dist. v Daly, 201-286; 207 NW 124

4126 Division of school township—alterations.

Atty. Gen. Opinion. See '25-26 AG Op 109

4130 New township—election—notice.

Division of township—effect. The division of a township by the board of supervisors, under §5531, C., '24, does not have the effect of dividing an existing school district.

Christensen v Board, 201-794; 208 NW 291

4131 Attaching territory to adjoining corporation.

Atty. Gen. Opinions. See '25-26 AG Op 204; '30 AG Op 127; '32 AG Op 270; '34 AG Op 342

Detaching territory — remaining territory. The statutory authorization for the formation of new rural independent school districts by detaching, in certain instances, territory from an existing independent school district (not consolidated), is not limited by the provisions of the consolidated school district act (§4173, C., '27) providing that the territory remaining after the detaching shall not be less than four sections, said last statute having no application to independent districts not consolidated.

Rural Dist. v McCracken, 212-1114; 233 NW 147

Necessary parties—school district. In an action to determine which of two school districts embraces certain land, both districts are absolutely necessary parties.

Whitmer v School Dist., 210-239; 230 NW 413

Unallowable amendment after remand. A party who attacks the constitutionality of a statute on specified grounds, and on appeal is defeated in his contentions, will not, after remand to the trial court, be permitted to file an amendment to his pleading attacking the constitutionality of the law on new and additional grounds.

Rural Dist. v McCracken, 215-55; 244 NW 711

4132 Restoration.

Atty. Gen. Opinions. See '25-26 AG Op 44, 149, 283

4133 Boundary lines changed—consolidation.

Atty. Gen. Opinions. See '25-26 AG Op 282; '28 AG Op 102, 218, 329; '30 AG Op 127, 141; '36 AG Op 336, 679

Extension of consolidated district. Section 4141, C., '27, is available to a consolidated school district which wishes to extend its boundaries by adding thereto part of the territory of an adjoining consolidated school district. In other words, this section does not provide the exclusive procedure.

Chambers v Housel, 211-314; 233 NW 502

Contiguous corporations combined by respective boards without submission to vote. In view of its legislative history and the apparent intention of the legislature, the enactment of §4191, C., '35 [§4144.1, C., '39], requiring that proposals to add territory to an existing district be approved separately by majority of voters in each territory affected, did not modify or repeal §4133, C., '35, providing that "* * * boundary lines of contiguous school corporations may be changed by the concurrent action of the respective boards of directors * * * so * * * that one corporation shall be included with the other as a single corporation"; hence, respective boards of directors of contiguous school corporations had authority to combine such school corporations without approval of voters.

Peterson v Sch. Dist., 227-110; 287 NW 275

Limitation. When the boundary line between a school township and an independent school district is also the line between civil townships, the school boards have no power by concurrent action to change such boundary

line (§4135, C., '27), notwithstanding the broad and sweeping provisions of §4133 of said code.

Thomasson v Sch. Dist., 206-1183; 221 NW 776

4134 Board in new district—settlement.

Atty. Gen. Opinion. See 25-26 AG Op 282

4135 Corporation limits changed. (Repealed.)

Changes—limitation. When the boundary line between a school township and an independent school district is also the line between civil townships, the school boards have no power by concurrent action to change such boundary line notwithstanding the broad and sweeping provisions of §4133, C., '27.

Thomasson v Sch. Dist., 206-1183; 221 NW 776

4136 Board in new district—organization.

Atty. Gen. Opinions. See '28 AG Op 343; '34 AG Op 657

4137 Division of assets and distribution of liabilities.

Atty. Gen. Opinions. See '25-26 AG Op 282; '32 AG Op 107; '34 AG Op 342, 657

4138 Arbitration.

Atty. Gen. Opinions. See '25-26 AG Op 282; '32 AG Op 107; '34 AG Op 342

Method of service. As to proper method of service when statute simply requires the notice to be "served", and specifies no method of service, see

Casey (Town) v Hogue, 204-3; 214 NW 729

4140 Plats of school districts.

Atty. Gen. Opinion. See '32 AG Op 136

4141 Formation of independent district.

Extension of consolidated district. This section is available to a consolidated school district which wishes to extend its boundaries by adding thereto part of the territory of an adjoining consolidated school district. Section 4133, C., '27, does not provide the exclusive procedure.

Chambers v Housel, 211-314; 233 NW 502

Extension of consolidated district containing no town. Section 4141, C., '35, is not available to a rural consolidated school district wishing to annex part of territory of an adjoining district where such rural consolidated district contains no city, town, or village of over 100 inhabitants, and therefore cannot meet the requirements of such statute.

Independent Dist. v Consol. Dist., 227-707; 288 NW 920

4142 Vote by ballot—separate ballot boxes.

Majority vote in additional territory. An existing independent school district composed of the territory within a city or town and certain rural territory may not be formed into a new independent district composed of the existing territory and additional rural territory unless a majority of the voters in such additional territory vote in favor of such new district.

State v Van Peursem, 202-545; 210 NW 576

4143 Subdistrict into independent district.

Atty. Gen. Opinion. See '30 AG Op 184

4144 When district deemed formed.

Atty. Gen. Opinion. See '30 AG Op 184

4144.1 Additions and extensions—separate vote.

Discussion. See 25 ILR 832—Districts incorporated without vote

Atty. Gen. Opinions. See '28 AG Op 102; '30 AG Op 141, 340; '32 AG Op 136

Extension of consolidated district—procedure. Section 4141, C., '27, is available to a consolidated school district which wishes to extend its boundaries by adding thereto part of the territory of an adjoining consolidated school district. In other words, §4133 of the Code does not provide the exclusive procedure.

Chambers v Housel, 211-314; 233 NW 502

Extension of consolidated district containing no town. Section 4141, C., '35, is not available to a rural consolidated school district wishing to annex part of territory of an adjoining district where such rural consolidated district contains no city, town, or village of over 100 inhabitants, and therefore cannot meet the requirements of such statute.

Independent Dist. v Consol. Dist., 227-707; 288 NW 920

Contiguous corporations combined by respective boards without submission to vote. In view of its legislative history and the apparent intention of the legislature, the enactment of this section requiring that proposals to add territory to an existing district be approved separately by majority of voters in each territory affected, did not modify or repeal §4133, C., '35, providing that "* * * boundary lines of contiguous school corporations may be changed by the concurrent action of the respective boards of directors * * * so * * * that one corporation shall be included with the other as a single corporation"; hence, respective boards of directors of contiguous school corporations had authority to combine such school corporations without approval of voters.

Peterson v Sch. Dist., 227-110; 287 NW 275

Majority vote in additional territory. An existing independent school district composed of the territory within a city or town and cer-

tain rural territory may not be formed into a new independent district composed of the existing territory and additional rural territory unless a majority of the voters in such additional territory vote in favor of such new district.

State v Van Peursem, 202-545; 210 NW 576

4144.2 Ex officio officers.

Atty. Gen. Opinion. See 28 AG Op 343

4153 Uniting independent districts.

Atty. Gen. Opinion. See '28 AG Op 343

CHAPTER 209

CONSOLIDATED SCHOOL DISTRICTS

Atty. Gen. Opinions. See '28 AG Op 329; '32 AG Op 92

4154 Consolidated corporations.

"Independent" district. A "consolidated" school district is an "independent school district" within the meaning of §4230, C., '24, authorizing the school board to elect a superintendent for a period not exceeding three years.

Cons. Dist. v Griffin, 201-63; 206 NW 86

"Government section" defined. The statutory provisions that consolidated school corporations shall not be organized with less than, nor reduced below, "sixteen government sections" of contiguous territory, do not mean "sixteen square sections" of land, but mean an area equal to sixteen government sections of land.

Chambers v Housel, 211-314; 233 NW 502

4155 Petition.

Lands included in district—unallowable impeachment. Voters' testimony that at an election to establish a consolidated school district they did not intend to include in said proposed district certain lands described in the petition for said district and in the ballot used at said election is wholly immaterial.

Dermit v School District, 220-344; 261 NW 636

4157 Objections—time of filing—notice.

Atty. Gen. Opinion. See '28 AG Op 146

4163 Interested parties as judges.

Atty. Gen. Opinion. See 30 AG Op 377

4166 Separate vote in urban territory.

Atty. Gen. Opinion. See '30 AG Op 340

4167 Separate vote in large territory.

Atty. Gen. Opinion. See '30 AG Op 340

4169 Canvass and return.

Irregularities in elections. See under §719

4173 Minimum territory.

Atty. Gen. Opinion. See '25-26 AG Op 70

Detaching territory—size of remaining territory. The statutory authorization (§4131-c1, C., '31) for the formation of new rural independent school districts by detaching, in certain instances, territory from an existing independent school district (not consolidated), is not limited by this section.

Rural Dist. v McCracken, 212-1114; 233 NW 147

"Government section" defined. "Sixteen government sections" of contiguous territory does not mean "sixteen square sections" of land, but means an area equal to sixteen government sections of land.

Chambers v Housel, 211-314; 233 NW 502

4174 Organization of remaining territory.

Atty. Gen. Opinion. See '25-26 AG Op 70

4177 School buildings — tax levy — special fund.

Atty. Gen. Opinions. See '25-26 AG Op 403; '28 AG Op 249; AG Op April 8, '39

4178 Location of school building.

Atty. Gen. Opinion. See '32 AG Op 92

4179 Transportation.

Atty. Gen. Opinions. See '32 AG Op 92; '36 AG Op 512, 603; '38 AG Op 566, 663

Duty of district—refusal—right of parent. When a state boundary river renders a portion of a consolidated school district inaccessible to the consolidated school, and the school authorities agree with the parent of grade pupils residing on such inaccessible lands to pay the tuition of said pupils in a school in a foreign state, but later refuse to pay for transporting said pupils to said school (a distance of five miles), the parent may supply the transportation in the foreign state and the district will be liable for the reasonable value thereof.

Dermit v Sch. Dist. 220-344; 261 NW 636
See Riecks v Sch. Dist., 219-101; 257 NW 546

Mandatory duty to transport pupils — governmental function. A statute providing that a school board shall furnish transportation to children living two and one-half miles from the school creates a mandatory duty to transport pupils which is a governmental function, but whether the duty be considered as ministerial or governmental, the school district, being a quasi corporation, cannot be sued for

failure to furnish such transportation when such right of action is not expressly given by statute.

Bruggeman v Sch. Dist., 227-661; 289 NW 5

Transportation furnished pupils—no implied contract by board to pay for services. When a school district failed to provide transportation for a pupil as required by statute, the pupil's father, who had taken the child to school, could not recover for his services on a theory of contract implied in fact when there was no meeting of the minds or agreement that he should be compensated for such transportation, as no promise to pay can be inferred from the refusal of the school to furnish transportation upon demand and the subsequent transportation of the child by the father, as the school was in no position to reject such services.

Bruggeman v Sch. Dist., 227-661; 289 NW 5

Compelling transportation to be furnished to pupils. When a school district failed to provide transportation for a pupil as required by statute, the pupil's father, who had furnished such transportation after making a demand on the school district, could not recover for such services under quasi contract or contract implied in law, as the statute did not contemplate that the costs of transportation be paid except under an arrangement with the school board, as provided by statute. The proper remedy of the plaintiff was mandamus to compel the school district to perform its mandatory duty.

Bruggeman v Sch. Dist., 227-661; 289 NW 5

Mandamus—board's discretion—remedy by appeal. Mandamus will not lie to compel a consolidated school board to transport pupils when by statute it is also given a discretion to suspend service and to require a two mile transportation by the parent to the established bus route. A parent dissatisfied with the school board's procedure has an adequate law remedy by appeal to the county superintendent.

Lanphier v School Dist., 224-1035; 277 NW 740; 118 ALR 801

Suspending service—parent's duty. A consolidated school board in providing transportation for pupils has a discretion to suspend service when roads are impassable and to require parent to transport children not more than two miles to the established bus route.

Lanphier v School Dist., 224-1035; 277 NW 740; 118 ALR 801

Illegal use of busses. School busses of consolidated school districts may legally be employed, and funds for their operation may legally be expended, for the one purpose only of transporting to and from school, children of school age who live more than a mile from school.

Schmidt v Blair, 203-1016; 213 NW 593

Holding under prior statute. A consolidated school district, the former territory of which furnished no high school instruction, is liable for the reasonable cost of transporting children to the grade schools of another district pending the time during which the pupils are deprived of a grade school owing to delay in constructing the new central consolidated school building, but is not liable for the cost of transporting pupils similarly situated, but transported to the high school of another district.

Tow v Sch. Dist., 200-1254; 206 NW 94

4179.1 Extra curricular use.

Holding under prior statute. School busses of consolidated school districts may legally be employed, and funds for their operation may legally be expended, for the one purpose only of transporting to and from school, children of school age who live more than a mile from school.

Schmidt v Blair, 203-1016; 213 NW 593

4180 Transportation routes—suspension of service.

Atty. Gen. Opinion. See '38 AG Op 663

Mandamus—board's discretion—remedy by appeal. Mandamus will not lie to compel a consolidated school board to transport pupils when by statute it is also given a discretion to suspend service and to require a two mile transportation by the parent to the established bus route. A parent dissatisfied with the school board's procedure has an adequate law remedy by appeal to the county superintendent.

Lanphier v School Dist., 224-1035; 277 NW 740; 118 ALR 801

4181 By parent—instruction in another school.

Atty. Gen. Opinion. See '38 AG Op 663

Transportation — suspending service — parent's duty. A consolidated school board in providing transportation for pupils has a discretion to suspend service when roads are impassable and to require parent to transport children not more than two miles to the established bus route.

Lanphier v School Dist., 224-1035; 277 NW 740; 118 ALR 801

Mandamus—board's discretion—remedy by appeal. Mandamus will not lie to compel a consolidated school board to transport pupils when by statute it is also given a discretion to suspend service and to require a two mile transportation by the parent to the established bus route. A parent dissatisfied with the school board's procedure has an adequate law remedy by appeal to the county superintendent.

Lanphier v School Dist., 224-1035; 277 NW 740; 118 ALR 801

4182 Contracts for transportation—rules.

Atty. Gen. Opinion. See '36 AG Op 413

Contracts — termination without cause. A contract for the transportation of pupils for an entire school year, but containing a reservation by the board of right to terminate the contract at any time, enables the board to terminate the contract peremptorily at its pleasure, and without assigning any reason for such action.

Black v School Dist., 206-1386; 222 NW 350

Liability in re performance of governmental acts. The principle that when the officers, servants, or agents of a municipality are engaged in performing a governmental act for and on behalf of the municipality they are not liable in damages consequent on their negligence in doing the act, applies to a person who, with the knowledge and acquiescence of a school board, was operating for the school district a bus in the transportation of children to and from school, even tho the person so operating the bus was acting at the time in lieu of the person with whom the district had actually contracted for the transportation. [Overruled, see Montanick v McMillin, 225-442; 280 NW 608.]

Hibbs v School Dist., 218-841; 251 NW 606; 34 NCCA 468; 37 NCCA 711

School bus driver as independent contractor —nongovernmental function. A school bus driver, furnishing his own bus, under a contract embodying certain conditions to transport school children, but not under the supervision, control, and regulation of the board, is an independent contractor liable for his own negligence and not an employee exercising a governmental function.

Olson v Cushman, 224-974; 276 NW 777

4188 Dissolution of corporation.

Atty. Gen. Opinions. See '25-26 AG Op 41; '28 AG Op 126, 218

Powers of board—employment of counsel. The board of directors of a school corporation has implied power in good faith to employ attorneys to defend against a proceeding for the dissolution of the district and to contract for a reasonable compensation for such services.

Rural Dist. v Daly, 201-286; 207 NW 124

Outstanding bonds as basis for discretion. Refunding bonds issued by a consolidated school district for the purpose of paying off bonds originally issued by a district which was included in the consolidated district are bonds within the meaning of this section.

Sarby v Morey, 207-521; 221 NW 492

Absent voters law—implied power of superintendent. The county superintendent, under her statutory powers and duty to call elections in consolidated districts to vote on the question of dissolution of the district, has implied power to receive applications for ballots by, and to deliver ballots to, electors who wish to cast their ballots under the absent voters law.

Willis v Sch. Dist., 210-391; 227 NW 532

CHAPTER 211.1

SCHOOL ELECTIONS

4216.01 Regular election.

Atty. Gen. Opinions. See '38 AG Op 248; AG Op Sept. 21, '39

4216.02 Special election.

Atty. Gen. Opinions. See '30 AG Op 127, 304; '38 AG Op 248

4216.03 Notice of election.

Atty. Gen. Opinion. See '38 AG Op 670

4216.04 Nominations required.

Atty. Gen. Opinion. See '25-26 AG Op 303

4216.08 Printed ballots required.

Atty. Gen. Opinion. See '28 AG Op 93

4216.09 Opening polls.

Atty. Gen. Opinion. See '38 AG Op 670

4216.10 Judges of election.

Irregularities—effect. A school election will not be held invalid (in the absence of any showing of prejudice) because all of the members of the board acted as judges of election, instead of only the president, secretary, and one director, as provided by statute.

Mack v Sch. Dist., 200-1190; 206 NW 145

4216.12 Right to vote.

Elections and right to vote generally. See under chapter 39 et seq.

Residence—evidence—sufficiency.

Willis v Sch. Dist., 210-391; 227 NW 532

4216.17 Registrars appointed.

Atty. Gen. Opinion. See '25-26 AG Op 294

4216.19 Canvassing the votes.

Public canvass in private room. A canvass of an election required by statute to be made "publicly" cannot be made in a private room.

Steeves v New Market, 225-618; 281 NW 162

4216.22 Contested elections.

Atty. Gen. Opinion. See '34 AG Op 129

Appeal from consent judgment. An election contestant may not appeal from the judgment

of the contest board holding the election in question illegal and providing for the calling of a new election by said board, when he consented to the entry of such judgment; nor may an estoppel to question such appeal be based upon the fact that the official board of which appellees were members refused to recognize the validity of the new election called by the contest board.

Leslie v Barnes, 201-1159; 208 NW 725

4216.23 Directors—number.

Elections—when general election laws inapplicable. The mandatory statutory provisions as to the marking of ballots at general elections are not applicable to the election of subdirectors in school townships. Any ballot voted at such latter election for subdirector must be counted if it plainly reveals the intent of the voter.

Thompson v Roberts, 220-854; 263 NW 491

4216.24 Term of office.

Atty. Gen. Opinion. See '34 AG Op 605

4216.26 Treasurer.

Atty. Gen. Opinions. See '28 AG Op 89, 350

4216.27 Qualifications.

Atty. Gen. Opinions. See '28 AG Op 89, 350

4216.28 Oath required.

Atty. Gen. Opinion. See '36 AG Op 147

4216.29 Vacancies.

Atty. Gen. Opinions. See '34 AG Op 581, 685

4216.30 Vacancies filled by election.

Resignation—when effective. Three members of a board of school directors of five members constitute a legal quorum to elect a successor to one of said three members who had theretofore resigned, with the intent (shared in by his fellow members) that the resignation would not take effect until his successor had been elected and had qualified.

Cowles v Sch. Dist., 204-689; 216 NW 83

4216.32 Penalties.

Atty. Gen. Opinion. See '25-26 AG Op 73

4216.33 Application of general election laws.

Atty. Gen. Opinion. See '38 AG Op 670

When general election laws inapplicable. The mandatory statutory provisions as to the marking of ballots at general elections are not applicable to the election of subdirectors in school townships. Any ballot voted at such latter election for subdirector must be counted if it plainly reveals the intent of the voter.

Thompson v Roberts, 220-854; 263 NW 491

CHAPTER 212

POWERS OF ELECTORS

4217 Enumeration.

School elections. See under ch 211.1

Atty. Gen. Opinions. See '25-26 AG Op 403; '28 AG Op 79, 138, 159, 293, 394; '30 AG Op 54, 67, 127, 212, 244, 267, 269, 304; '32 AG Op 208; '34 AG Op 223; '36 AG Op 334; '38 AG Op 96, 167, 210, 676, 737, 746; AG Op March 21, '39

Course of study—discretion. The directors of a school district have a fair discretion as to the method to be employed in teaching a subject which the electors have directed to be taught—a discretion not controllable by mandamus.

Neilan v Board, 200-860; 205 NW 506

4218 Submission of proposition.

Irregularities in elections. See under §719

Atty. Gen. Opinions. See '30 AG Op 269; '34 AG Op 462

4219 Special subdistrict schoolhouse tax.

Atty. Gen. Opinion. See '25-26 AG Op 109

CHAPTER 213

DIRECTORS—POWERS AND DUTIES

Atty. Gen. Opinions. See '36 AG Op 464; '38 AG Op 167

4220 Organization.

Atty. Gen. Opinions. See '30 AG Op 140; '36 AG Op 147; '38 AG Op 362

Failure to notify director. The action of a school board at an annual meeting will not be invalidated because a member was not notified of the meeting because he was absent from the state and his whereabouts was not definitely known.

Cons. Dist. v Griffin, 201-63; 206 NW 86

4221 Special meetings.

Special meeting on oral notice. A special meeting of the board of directors of a school corporation is legally called on oral notice to the directors by the secretary, at the direction of the president.

Mershon v Sch. Dist., 204-221; 215 NW 235

4222 Appointment of secretary and treasurer.

Atty. Gen. Opinions. See '28 AG Op 164, 350

4223 Quorum.

Atty. Gen. Opinions. See '25-26 AG Op 502; '28 AG Op 89; '36 AG Op 173; '38 AG Op 362

Legal quorum. Three members of a board of school directors of five members constitute a legal quorum to elect a successor to one of said three members who had theretofore resigned, with the intent (shared in by his fellow members) that the resignation would not take effect until his successor had been elected and had qualified.

Cowles v Sch. Dist., 204-689; 216 NW 83

Majority of quorum. Vacancies on an official board (which is empowered to fill vacancies) may be filled by a majority of a quorum, in the absence of a statute which requires a majority of the entire membership of the board.

Cowles v Sch. Dist., 204-689; 216 NW 83

4223.2 Vacancies filled by board—qualification—tenure.

Atty. Gen. Opinion. See '36 AG Op 199

De facto officers—collateral attack. Members of a school board who are, in supposed compliance with the law and in good faith, elected to fill vacancies caused by resignations, and who in good faith act as such members, are at least directors de facto, and their official actions may not be collaterally assailed.

Cowles v Sch. Dist., 204-689; 216 NW 83

4224 General rules.

Atty. Gen. Opinions. See '28 AG Op 77, 112; '30 AG Op 337; '34 AG Op 657; '36 AG Op 373; 38 AG Op 230, 800; AG Op April 12, '39

4225 Use of tobacco.

Atty. Gen. Opinion. See '30 AG Op 337

4226 School year.

Atty. Gen. Opinion. See AG Op July 11, '39

4227 Number of schools—attendance—terms.

Atty. Gen. Opinion. See '28 AG Op 95

Compulsory attendance—power of board and duty of custodian. A school board may validly establish an ungraded school along with and as a part of the district's established system of graded schools, and may, so long as it does not act unreasonably, validly require the proper custodian of a child over 7 and under 16 years of age to cause said child to attend said ungraded school only, provided said child is continued in the public schools. So held as to a child who was in physical and mental condition to attend school but was unable to make the grades in the graded schools.

State v Ghrist, 222-1069; 270 NW 376

Directors — nonrevocation of official action. The official determination of school directors may not be deemed revoked because of the fact that the individual directors knew of a violation of such determination by one member of the board, and did not individually object to such violation.

Mulhall v Pfannkuch, 206-1139; 221 NW 833

4228 Contracts—election of teachers.

Atty. Gen. Opinions. See '30 AG Op 375; '34 AG Op 269; '36 AG Op 119, 392, 474; '38 AG Op 241

Contract for supplies—permissible duration. School boards may validly bind their school districts by reasonable contracts for ordinary school supplies, tho such contracts are not fully performable during the school year in which they were executed or during the school year following.

Dodds Co. v Sch. Dist., 220-812; 263 NW 522

Janitor—soldiers' preference—removal.

Durst v Board, 228- ; 292 NW 73

Illegal action—nonduty to appeal. The oral employment by a subdirector, under authority from the school board, of a teacher, and the formal, written, statutory contract evidencing such employment signed by the president of the board and by the teacher, are not subject to review by the school board, and the assumption of such power by the board may be ignored by the teacher without appeal to the county superintendent.

Shill v School Twp., 209-1020; 227 NW 412

School board's discretion not controllable by mandamus. Re-employment of a teacher is a matter wholly within the discretionary power vested in the school board and may not be controlled through the courts by mandamus.

Driver v School Dist., 224-393; 276 NW 37

Nondisqualifying interest. The adoption by a school board of a resolution is not rendered nugatory because of the affirmative vote of a particular member, by the fact that, subsequent to the adoption, the private corporation of which the particular member of the board was an officer entered into a contract with a third party for the carrying out of the purposes and objects of said resolution.

Security Bk. v Bagley, 202-701; 210 NW 947; 49 ALR 705

Pension — employment prerequisite — no relief outside issues. A public school teacher, after 30 years service and while lacking only six months more service to be entitled to a pension, cannot mandamus the school board to compel her re-employment, and, such re-employment being the relief sought, a court may not go outside the pleaded issues and grant such a pension as the school board may have given.

Driver v School Dist., 224-393; 276 NW 37

4229 Contracts with teachers.

Atty. Gen. Opinions. See '28 AG Op 345, 366; '30 AG Op 375; '32 AG Op 209; '34 AG Op 269, 341; '36 AG Op 119, 134, 392; '38 AG Op 241, 362

Oral extension. An oral extension of time for teaching under a teacher's contract (under

which no services were rendered) cannot be recognized.

Krutsinger v Sch. Twp., 219-291; 257 NW 797

Duty of president to sign contract. When a subdirector of a school township orally and under due authority from the school board employs a teacher, the president of the board has no discretion to refuse to sign the formal written contract required by statute.

Shill v School Twp., 209-1020; 227 NW 412

Employment — legality. The official action of a board of school directors in authorizing each subdirector to employ in his subdistrict the teacher of his choice necessarily constitutes no authority to a subdirector to hire a teacher in a district the school of which the board orders closed.

Mulhall v Pfannkuch, 206-1139; 221 NW 833

Employment. Principle reaffirmed that valid employment of a teacher must be made through the medium of a written contract duly signed by the teacher and the president.

Shackelford v Dist. Twp., 203-243; 212 NW 467

Issue as to terms of contract. Evidence held to present a jury question on the issue whether a contract had been entered into with a teacher.

Krutsinger v Township, 219-291; 257 NW 797

Modification by extrinsic matters. In an action at law by a teacher upon a written contract of employment, the rights of the parties are necessarily determinable by the actual terms of the contract, unmodified by extraneous matters or circumstances.

Miner v Sch. Dist., 212-973; 234 NW 817

Nonattendance of teacher at school—effect. A duly employed teacher, in order to recover on her contract of employment, need not show that she was in daily attendance at the schoolhouse, when no pupils attended the school, and when she, in compliance with the direction of the board, held herself in readiness to teach whenever notified that pupils would attend the school.

James v School Twp., 210-1059; 229 NW 750

Nonduty to seek employment elsewhere. A duly employed teacher, who, in compliance with the direction of the board, holds herself in readiness to teach but is furnished no pupils, need not, in an action on her contract, show that she made any effort to secure employment elsewhere as a teacher.

James v School Twp., 210-1059; 229 NW 750

See Shill v School Twp., 209-1020; 227 NW 412

Ratification of contract. A contract of employment of a teacher in a public school, signed by the teacher but not signed by the president of the board is ratified for the full term of the contract by the action of the board in accepting the services of the teacher, and paying her therefor, with knowledge of said contract.

Smith v School Dist., 216-1047; 250 NW 126

Termination on notice. A provision in a public school contract authorizing either party to the contract to terminate it by giving written notice of such termination for a named number of days, is not violative of, nor inconsistent with either this section or §4237, C., '27. (Holding by minority of court.)

Miner v Sch. Dist., 212-973; 234 NW 817

Termination on notice — validity. A provision in a public school contract which authorizes the school district to terminate the contract on stated notice at any time and for any reason is valid, and if a termination is effected under such contract authorization and not under statutory authorization (§4237, C., '35), no appeal will lie to the county superintendent or, in turn, to the state superintendent. In other words, neither superintendent has jurisdiction to review such a discharge.

Ind. Dist. v Samuelson, 222-1063; 270 NW 434

4230 Superintendent—term.

Atty. Gen. Opinions. See '32 AG Op 209; '36 AG Op 119

Power to employ. A "consolidated" school district is an "independent school district" within the meaning of this section.

Cons. Dist. v Griffin, 201-63; 206 NW 86

4231 Nonemployment of teacher—when.

Atty. Gen. Opinions. See '28 AG Op 95, 106, 185; '30 AG Op 222; '34 AG Op 155; '38 AG Op 308, 681

Insufficient attendance—duty to close school. A school is legally closeable whenever the average attendance in said school the last preceding term was less than five pupils irrespective of the pupils who reside within the district, but who attend school outside the district.

Kruse v Sch. Dist., 209-64; 227 NW 594

Insufficient attendance—duty to provide school facilities. Where a resident of a school district does not send his grade school children to his home-district school, and the school is legally closed because, during the preceding term, the attendance was less than five pupils (§4231, C., '27), he may not compel the district to pay the cost of tuition and transportation of his said children to a school outside his district. (§4232, C., '27.)

Kruse v School Dist., 209-64; 227 NW 594

Legality. The official action of a board of school directors in authorizing each subdirector to employ in his subdistrict the teacher of his choice necessarily constitutes no authority to a

subdirector to hire a teacher in a district the school of which the board orders closed.

Mulhall v Pfannkuch, 206-1139; 221 NW 833

Teachers—employment—mandamus. Principle reaffirmed that, in an action of mandamus against the president and secretary of a school board to compel the execution of a teacher's contract, the validity of the action of the directors in closing the school in question may not be inquired into.

Mulhall v Pfannkuch, 206-1139; 221 NW 833

4233.1 School privileges when school closed.

Atty. Gen. Opinions. See '28 AG Op 248; '34 AG Op 321, 668; '38 AG Op 583, 584, 681

Duty to provide school facilities. Where a resident of a school district does not send his grade school children to his home district school, and the school is legally closed because during the preceding term the attendance was less than five pupils (§4231, C., '27), he may not compel the district to pay the cost of tuition and transportation of his said children to a school outside his district.

Kruse v Sch. Dist., 209-64; 227 NW 594

4233.2 County superintendent—duties.

Atty. Gen. Opinions. See 34 AG Op 321, 668; '38 AG Op 584

4233.3 Tuition.

Atty. Gen. Opinions. See '34 AG Op 668; '38 AG Op 583, 674

4233.4 Transportation.

Atty. Gen. Opinions. See '30 AG Op 212; '34 AG Op 321, 668; '36 AG Op 603; '38 AG Op 17, 234, 524, 566, 584

Liability in performance of governmental acts. The principle that when the officers, servants, or agents of a municipality are engaged in performing a governmental act for and on behalf of the municipality they are not liable in damages consequent on their negligence in doing the act, applies to a person who, with the knowledge and acquiescence of a school board, was operating for the school district a bus in the transportation of children to and from school, even tho the person so operating the bus was acting at the time in lieu of the person with whom the district had actually contracted for the transportation. [Overruled, see Montanick v McMillin, 225-442; 280 NW 608.]

Hibbs v School Dist., 218-841; 251 NW 606; 34 NCCA 468; 37 NCCA 711

School bus driver as independent contractor—nongovernmental function. A school bus driver furnishing his own bus under a contract embodying certain conditions to transport school children, but not under the supervision, control, and regulation of the board, is an independent contractor liable for his own negligence and not an employee exercising a governmental function.

Olson v Cushman, 224-974; 276 NW 777

Power of board. The school board of a nonconsolidated school district has ample power to provide for the transportation to and from school of pupils living an unreasonable distance from the school. (Holding under §§4232, 4233, 4375, 4376, C., '31, now repealed.)

Hibbs v School Dist., 218-841; 251 NW 606; 4 NCCA (NS) 3

Refusal to furnish transportation. A school board which closes its school for want of the necessary five pupils is under a mandatory duty to provide transportation for its pupils, if any, to some other district as provided by statute, and in case of failure to perform such duty, the parent should seek relief in court, not by appeal to the county superintendent.

Riecks v School Dist., 219-101; 257 NW 546

Compelling transportation to be furnished to pupils. When a school district failed to provide transportation for a pupil as required by statute, the pupil's father, who had furnished such transportation after making a demand on the school district, could not recover for such services under quasi contract or contract implied in law, as the statute did not contemplate that the costs of transportation be paid except under an arrangement with the school board, as provided by statute. The proper remedy of the plaintiff was mandamus to compel the school district to perform its mandatory duty.

Bruggeman v Sch. Dist., 227-661; 289 NW 5

Mandatory duty to transport pupils—governmental function. A statute providing that a school board shall furnish transportation to children living two and one-half miles from the school creates a mandatory duty to transport pupils which is a governmental function, but whether the duty be considered as ministerial or governmental, the school district, being a quasi corporation, cannot be sued for failure to furnish such transportation when such right of action is not expressly given by statute.

Bruggeman v Sch. Dist., 227-661; 289 NW 5

Transportation furnished pupils—no implied contract by board to pay for services. When a school district failed to provide transportation for a pupil as required by statute, the pupil's father, who had taken the child to school, could not recover for his services on a theory of contract implied in fact when there was no meeting of the minds or agreement that he should be compensated for such transportation, as no promise to pay can be inferred from the refusal of the school to furnish transportation upon demand and the subsequent transportation of the child by the father, as the school was in no position to reject such services.

Bruggeman v Sch. Dist., 227-661; 289 NW 5

4233.5 Distance—how measured.

Atty. Gen. Opinions. See '34 AG Op 668; '38 AG Op 234

4236 Visiting schools.

Discussion. See 4 ILB 184—Authority of teachers over pupils outside of school

4237 Discharge of teacher.

Appeal as remedy. See under §4298

Atty. Gen. Opinions. See '28 AG Op 77; '30 AG Op 185

Discharge on notice—validity. A provision in a public school contract authorizing either party to the contract to terminate it by giving written notice of such termination for a named number of days, is not violative of, nor inconsistent with either §4229, C., '27, or this section. (Holding by minority of court.)

Miner v Sch. Dist., 212-973; 234 NW 817

Due process of law. A written contract between a teacher and a school board is necessarily accompanied by all statutory provisions which govern the original and appellate procedure for the discharge of such teacher. Having by the very act of contracting, legally consented to such procedure, the teacher may not assert that it does not afford him due process in a constitutional sense.

Chehock v Sch. Dist., 210-258; 228 NW 585

Jurisdiction of courts. A teacher who has been discharged by the board on charges of incompetency, after due notice to the teacher and hearing, may not maintain an action in the courts for damages consequent on such discharge.

Courtright v Sch. Dist., 203-26; 212 NW 368

Informal procedure—effect. A school board which has acquired jurisdiction in a proceeding for the discharge of a teacher, and over the teacher affected, does not lose such jurisdiction by conducting the hearing informally in the matter of evidence and procedure.

Chehock v Sch. Dist., 210-258; 228 NW 585

Informality of procedure—effect. The discharge of a teacher by the school board on supporting evidence will not be deemed illegal because of the marked informality of the proceedings, when the record reveals the presence of the elements of jurisdiction, to wit: charges before the board of incompetency on the part of the teacher, and a hearing on said charges at which the teacher was present and in which she participated.

Schrader v Sch. Dist., 221-799; 266 NW 473

Action for salary—insufficient defense. In an action by a teacher to recover salary accrued and unpaid at the time of her discharge by the board, it is no defense that the teacher did not make the report required of teachers at the close of the term (§4339, C., '35), said teacher having been discharged prior to the close of said term.

Schrader v Sch. Dist., 221-799; 266 NW 473

Contract—action on—demurrer. A petition which seeks recovery of the compensation arising under a contract for teaching, but which pleads a statutory discharge of plaintiff by the board of directors, is demurrable, even tho plaintiff also pleads that his appeal from the discharge to the superintendent of public instruction was dismissed for want of jurisdiction.

Streyffeler v Sch. Dist., 210-780; 231 NW 325

Contract of employment—termination on notice—validity. A provision in a public school contract which authorizes the school district to terminate the contract on stated notice at any time and for any reason, is valid, and if a termination is effected under such contract authorization and not under statutory authorization, no appeal will lie to the county superintendent or, in turn, to the state superintendent. In other words, neither superintendent has jurisdiction to review such a discharge.

Ind. Dist. v Samuelson, 222-1063; 270 NW 434

Illegal action—nonduty to appeal. The oral employment by a subdirector, under authority from the school board, of a teacher, and the formal, written, statutory contract evidencing such employment signed by the president of the board and by the school teacher are not subject to review by the school board; and the assumption of such power by the board may be ignored by the teacher without appeal to the county superintendent.

Shill v Sch. Twp., 209-1020; 227 NW 412

Wrongful discharge—duty to seek employment. A teacher wrongfully discharged is under obligation to exercise reasonable diligence to secure like employment in the same locality —not like employment at distant places, or similar employment of a lower or different grade.

Shill v Sch. Twp., 209-1020; 227 NW 412

See James v Sch. Twp., 210-1059; 229 NW 750

Appeal—dismissal—effect. Where a teacher appeals to the superintendent of public instruction from an order of the board of directors discharging the teacher, the dismissal of the appeal by said superintendent on the ground of want of jurisdiction cannot be given the legal effect of reversing the said order of discharge.

Streyffeler v Sch. Dist., 210-780; 231 NW 325

Appeal (?) or action in court (?). A teacher who is discharged by a school board, under proceedings over which it had jurisdiction, must seek relief by appeal to the county superintendent. On the other hand, if the board discharges a teacher under proceedings over which it had not acquired jurisdiction, the teacher may sue in the courts for breach of contract.

Schrader v Sch. Dist., 221-799; 266 NW 473

4238 Insurance—supplies—textbooks.

Atty. Gen. Opinions. See '28 AG Op 134; '34 AG Op 404, 462, 680; '36 AG Op 372

4239.3 Compensation of officers.

Atty. Gen. Opinions. See '30 AG Op 187; '34 AG Op 340, 344; AG Op Feb. 27, '39

4240 Annual settlements.

Atty. Gen. Opinions. See '38 AG Op 167, 210

4241 Transfer of funds.

Atty. Gen. Opinions. See '30 AG Op 54; '38 AG Op 167, 210; AG Op May 19, '39

4242 Financial statement — publication.

Atty. Gen. Opinions. See '30 AG Op 334, 336; '38 AG Op 154

4242.1 Other districts—filing statement.

Atty. Gen. Opinion. See '30 AG Op 336

4245 Employment of counsel.

Atty. Gen. Opinion. See AG Op Jan. 18, '39

Employment of counsel. A school board has legal authority to employ an attorney at the expense of the district to defend the action of the board in contracting with one teacher and in refusing to contract with another, even tho the actions in which the issue directly or indirectly arises are actions in form personally against the teacher and individual members of the board.

Cowles v Sch. Dist., 204-689; 216 NW 83

Powers of board. The board of directors of a school corporation has implied power in good faith to employ attorneys to defend against a proceeding for the dissolution of the district and to contract for a reasonable compensation for such services.

Rural Dist. v Daly, 201-286; 207 NW 124

Employment of county attorney. School boards are under no mandatory duty to secure the services of the county attorney in litigation affecting the corporate affairs of the school districts, even tho the statute (§5180, C., '24) does require such officers to give legal advice to such boards.

Rural Dist. v Daly, 201-286; 207 NW 124

Informal employment of attorney—ratification. An informal employment of attorneys by the directors of a school district in a matter as to which the district had a right to employ attorneys, is fully ratified by the good faith formal action of the board, with full knowledge of the facts, in allowing the claim of the attorneys.

Beers v Lasher, 209-1158; 229 NW 821

CHAPTER 214

COURSES OF STUDY

4250 Right to prescribe.

Atty. Gen. Opinions. See '28 AG Op 134, 213, 364, 413, 420; '32 AG Op 231; '36 AG Op 374, 375; '38 AG Op 230, 676, 737; AG Op May 22, '39, Oct. 9, '39

Course of study—discretion. The directors have a fair discretion as to the method to be employed in teaching a subject, which the electors have directed to be taught—a discretion not controllable by mandamus.

Neilan v Board, 200-860; 205 NW 506

Courses of study—discretion. The power of directors to prescribe courses of study embraces the discretion merely to authorize, without expense to the district or the pupils, the installation in the schools of a noncompulsory, copyrighted system of thrift instruction which necessarily contemplates the deposit of the child's savings in some bank or banks selected without dictation by the board.

Security Bk. v Bagley, 202-701; 210 NW 947; 49 ALR 705

4254 Medium of instruction.

Discussion. See 9 ILB 123—Foreign languages in private schools

Foreign language instruction. The right of a person to teach a foreign language in a private or parochial school, and the right of a parent to have his child so instructed in such schools, are constitutional rights guaranteed by the 14th amendment to the federal constitution. (191 Iowa 1060 reversed.)

Bartels v State of Iowa, 262 US 404

4256 Constitution of United States and state.

Atty. Gen. Opinion. See '30 AG Op 62

4257 American history and civics.

Atty. Gen. Opinion. See '30 AG Op 62

4258 Bible.

Atty. Gen. Opinions. See '28 AG Op 213; '36 AG Op 629

4259 Stimulants, narcotics, and poisons.

Atty. Gen. Opinion. See '28 AG Op 226

4262 Music.

Atty. Gen. Opinion. See '28 AG Op 413

4263 Physical education.

Atty. Gen. Opinions. See '28 AG Op 150, 243; '36 AG Op 375

4264 Length of course.

Atty. Gen. Opinions. See '28 AG Op 226, 243

4267 Higher and graded schools.

Atty. Gen. Opinions. See '28 AG Op 138, 165, 420; '32 AG Op 231; '36 AG Op 374, 375, 497; '38 AG Op 566, 676, 737; AG Op May 17, '39

Compulsory attendance — power of board and duty of custodian. A school board may validly establish an ungraded school along with and as a part of the district's established system of graded schools, and may, so long as

it does not act unreasonably, validly require the proper custodian of a child over 7 and under 16 years of age to cause said child to attend said ungraded school only, provided said child is continued in the public schools. So held as to a child who was in physical and mental condition to attend school but was unable to make the grades in the graded schools.

State v Ghrist, 222-1069; 270 NW 376

4267.1 Junior colleges.

Atty. Gen. Opinions. See '28 AG Op 138; '30 AG Op 67, 89

CHAPTER 215

SCHOOL ATTENDANCE AND TUITION

4268 School age—nonresidents.

Atty. Gen. Opinions. See '28 AG Op 186; '30 AG Op 377; AG Op Oct. 9, '39

4269 Offsetting tax.

Atty. Gen. Opinions. See '25-26 AG Op 491; '28 AG Op 210, 410; '30 AG Op 377; '32 AG Op 54; '34 AG Op 341, 466, 627; '36 AG Op 374, 422

4270 Right to exclude pupil.

Dismissal of appeal when question moot. An appeal from an order refusing to compel the public authorities to admit a child into the public schools (owing to certain health regulations) will be dismissed on a showing that the child has, prior to the taking of the appeal, been admitted to the school.

Saner v Sch. Bd., 211-1201; 235 NW 291

Unvaccinated school children. The appellate court will be slow to interfere with an order by the trial court refusing a temporary injunction against the enforcement by a school board of its order which temporarily excluded unvaccinated pupils from the public school; and especially will the appellate court decline to disturb such refusal when it affirmatively appears that the order of the board has expired ex vi termini.

Baehne v Sch. Dist., 201-625; 207 NW 755

4271 Majority vote—suspension.

Rules and violations thereof. See under §4224, Vol. I

4273 Tuition.

Atty. Gen. Opinions. See '25-26 AG Op 239; '28 AG Op 232, 238, 265, 376; '30 AG Op 67, 147, 377; '34 AG Op 627; '36 AG Op 567, 677; '38 AG Op 69, 95, 230, 846

Payment for tuition. Record reviewed and held that minor children moving into plaintiff school district and actually residing there with their parents had acquired a residence for school purposes, and that said district could not recover of the county tuition for said children.

Carbon Dist. v Adams Co., 221-1047; 267 NW 690

4274 Attending in another corporation—payment.

Atty. Gen. Opinions. See '25-26 AG Op 68, 189, 418; '28 AG Op 167, 387; '30 AG Op 377; '32 AG Op 73, 74, 271; '36 AG Op 250; '38 AG Op 122

Consent of superintendent—discretion. The county superintendent has discretion to refuse to consent that a pupil residing more than two miles from its home school may (at the expense of the pupil's home district) attend a much nearer school in an adjoining but different school corporation.

Moles v Daland, 220-1170; 264 NW 74

Nonconsent of superintendent—certiorari to review. Certiorari will lie to review the discretion of the county superintendent of schools in refusing to consent that a pupil, residing in one school corporation, may (at the expense of the pupil's district) attend school in an adjoining but different school corporation.

Moles v Daland, 220-1170; 264 NW 74

4274.01 Attending school outside state.

Atty. Gen. Opinion. See '38 AG Op 380

4274.03 Contract for school privileges.

Atty. Gen. Opinions. See '38 AG Op 566, 674

4274.04 Terms of contract.

Atty. Gen. Opinion. See '38 AG Op 674

4274.05 Transportation—two-mile limit.

Atty. Gen. Opinion. See '34 AG Op 321

4274.06 Transportation generally.

Atty. Gen. Opinions. See '34 AG Op 321; '38 AG Op 566

4274.09 Effect of contract.

Atty. Gen. Opinion. See '38 AG Op 674

4275 High school outside home district.

Atty. Gen. Opinions. See '25-26 AG Op 491; '28 AG Op 232, 357, 376; '30 AG Op 204; '32 AG Op 128; '34 AG Op 255, 541; '36 AG Op 146, 567, 604; '38 AG Op 69, 380, 516, 524, 674

No high school in district—attendance in other district—pupils of charitable institution. Statute providing that persons of school age who are residents of districts not having a four-year high school course shall be permitted to attend any public high school in the state construed to extend to wards of a charitable institution—the legislature not intending to discriminate against private, denominational, or parochial schools, nor to bar them from the benefits of statutory provisions.

Sch. Twp. v Nicholson, 227-290; 288 NW 123

Residence for high school purposes. Children of school age who are so apprenticed to a charitable institution that such institution is

their only home until they reach the age of 21 years become residents of the school district in which such charitable institution is located; and if such district does not maintain a high school, such children may attend high school in some other district which does maintain such school and the tuition for such schooling shall be paid by the district of which the child is a resident, as aforesaid.

Salem Dist. v Kiel, 206-967; 221 NW 519

Pupils—duty of district to transport. When a state boundary river renders a portion of a consolidated school district inaccessible to the consolidated school, and the school authorities agree with the parent of grade pupils, residing on such inaccessible lands, to pay the tuition of said pupils in a school in a foreign state, but later refuse to pay for transporting said pupils to said school (a distance of five miles), the parent may supply the transportation in the foreign state and the district will be liable for the reasonable value thereof.

Dermit v Sch. Dist., 220-344; 261 NW 636

Wards of charitable institution from different district—tuition. In dispute over school district's liability for tuition of high school pupils who were wards of a charitable institution located in a school district which had no high school, and who attended high school in the district seeking to collect the tuition, the court properly held, under statute making the district of residence liable, that the children were residents of the school district in which the institution was located. (New statute, see '39 Code, section 4275.1)

Sch. Twp. v Nicholson, 227-290; 288 NW 123

4275.1 Children from charitable institution.

Holding under prior statute. In dispute over school district's liability for tuition of high school pupils who were wards of a charitable institution located in a school district which had no high school, and who attended high school in the district seeking to collect the tuition, the court properly held, under statute making the district of residence liable, that the children were residents of the school district in which the institution was located.

Sch. Twp. v Nicholson, 227-290; 288 NW 123

4276 Requirements for admission.

Atty. Gen. Opinions. See '25-26 AG Op 424; '32 AG Op 56; '36 AG Op 145, 146, 188; '38 AG Op 632, 674; AG Op Jan. 27, '39

Statutes — construction — "shall" — when synonymous with "may". Statute providing that person applying for admission to high school shall present affidavit of parent or guardian construed to be directory rather than mandatory, the rule being that the word "shall" is generally construed to be mandatory, but where no right or benefit depends on its imperative use it may be, and often is, treated as synonymous with "may".

Sch. Twp. v Nicholson, 227-290; 288 NW 123

Liability for tuition — affidavit — failure to file. Where statute required person applying for admission to high school in another district to present affidavit that applicant is a resident of a school district of the state, and such affidavit was not filed, court properly held that such affidavit was not mandatory, and that school officials could waive such affidavit—the legislature not intending to allow a school district to escape liability for tuition because of failure to require such affidavit, particularly where statute was fully complied with in respect to filing certificate of proficiency.

Sch. Twp. v Nicholson, 227-290; 288 NW 123

4277 Tuition fees—payment.

Atty. Gen. Opinions. See '25-26 AG Op 217, 238; '28 AG Op 112, 210, 232; '30 AG Op 336; '32 AG Op 128, 172; '34 AG Op 255, 575, 668; '36 AG Op 146, 188, 604; '38 AG Op 69, 95, 516, 524, 566, 825, 828; AG Op Aug. 16, '39

Wards of charitable institution from different district. In dispute over school district's liability for tuition of high school pupils who were wards of a charitable institution located in a school district which had no high school, and who attended high school in the district seeking to collect the tuition, the court properly held, under statute making the district of residence liable, that the children were residents of the school district in which the institution was located. (New statute, see '39 Code, section 4275.1)

Sch. Twp. v Nicholson, 227-290; 288 NW 123

4278 Collection of tuition fees.

Atty. Gen. Opinions. See '28 AG Op 429; '34 AG Op 600, 668; '36 AG Op 146, 567

Statutory tuition reimbursement without notice—due process. The statute providing for the collection of tuition fees by one school district from another is not unconstitutional under the due process clause because not requiring a notice and hearing, because a school district is not a person, as contemplated by the constitution. It is purely a creature of statute, having no power except that granted by the legislature, and so its funds are under legislative control.

Lincoln Dist. v Redfield Dist., 226-298; 283 NW 881

Action — equity retaining jurisdiction on counterclaim—law issues. An action in equity by one school district to enjoin another school district and the county treasurer from transferring to the defendant school certain funds claimed to be due from the plaintiff school as tuition, remains in equity altho the defendant school files a cross-petition raising issues at law as to determination of the amount due, if any, and for judgment accordingly, since

equity, acquiring jurisdiction, may determine all issues.

Lincoln Dist. v Redfield Dist., 226-298; 283 NW 881

Tuition transfer—county treasurer—joinder on cross-petition unnecessary. In an equitable action between school districts to prevent a statutory transfer by a county treasurer of funds in payment of tuition, a cross-petition of the defendant school district, not joined in by the county treasurer, may not be stricken therefrom, inasmuch as the county treasurer has no investment therein and is not a necessary party thereto.

Lincoln Dist. v Redfield Dist., 226-298; 283 NW 881

Wards of charitable institution from different district. In dispute over school district's liability for tuition of high school pupils who were wards of a charitable institution located in a school district which had no high school, and who attended high school in the district seeking to collect the tuition, the court properly held, under statute making the district of residence liable, that the children were residents of the school district in which the institution was located. (New statute, see '39 Code, section 4275.1)

Sch. Twp. v Nicholson, 227-290; 288 NW 123

4283 Tuition in charitable institutions.

Atty. Gen. Opinions. See '36 AG Op 567; '38 AG Op 569

Residence for high school purposes. Children of school age who are so apprenticed to a charitable institution that such institution is their only home until they reach the age of 21 years become residents of the school district in which such charitable institution is located; and if such district does not maintain a high school, such children may attend high school in some other district which does maintain such school (§4275, C., '27), and the tuition for such schooling shall be paid by the district of which the child is a resident, as aforesaid.

Salem Dist. v Kiel, 206-967; 221 NW 519

4283.01 Tuition when in boarding home.

Atty. Gen. Opinion. See '38 AG Op 569

Children in private charitable institution—not public charges. Statute providing that state shall pay tuition of public charges living in a children's boarding home is not available as a defense in school district's action for tuition when children were supported by Lutheran Society and neither the state nor any political subdivision contributed to their support.

Sch. Twp. v Nicholson, 227-290; 288 NW 123

Payment of tuition—retroaction—intention of legislature. Statute enacted in 1937 providing for payment of tuition of wards of charitable institution attending public schools held not retroactive in action involving liability for tuition incurred for years prior to that date.

Sch. Twp. v Nicholson, 227-290; 288 NW 123

CHAPTER 215.2

REIMBURSEMENT OF SCHOOL DISTRICTS FOR LOSS OF TAXES

Atty. Gen. Opinions. See '34 AG Op 395, 575; '36 AG Op 199

CHAPTER 217

EVENING SCHOOLS

4288 Evening schools authorized.

Atty. Gen. Opinions. See '25-26 AG Op 258; AG Op Oct. 9, '39

4289 When establishment mandatory.

Atty. Gen. Opinion. See '25-26 AG Op 258

4290 Supervision—who admitted.

Atty. Gen. Opinion. See '25-26 AG Op 258

CHAPTER 218

PART-TIME SCHOOLS

Atty. Gen. Opinion. See '30 AG Op 266

CHAPTER 219

APPEAL FROM DECISIONS OF BOARDS OF DIRECTORS

Atty. Gen. Opinions. See '34 AG Op 452; '38 AG Op 506

4298 Appeal to county superintendent.

Atty. Gen. Opinions. See '28 AG Op 249, 302; '30 AG Op 208; '32 AG Op 57

ANALYSIS

I APPEAL IN GENERAL
II APPEAL TO SUPERINTENDENT AS SOLE REMEDY
III PERMISSIBLE COURT ACTION

I APPEAL IN GENERAL

Jurisdiction—strict construction. The jurisdiction of the superintendent of public instruction over appeals from decisions and orders of a county superintendent cannot, by the conduct of a party to the appeal, be enlarged beyond the jurisdiction actually conferred by law.

Ind. Dist. v Samuelson, 222-1063; 270 NW 434

Illegal action—nonduty to appeal. The oral employment by a subdirector, under authority from the school board, of a teacher, and the formal, written, statutory contract evidencing such employment, signed by the president of the board and by the teacher, are not subject to review by the school board; and the assumption of such power by the board may be ignored by the teacher without appeal to the county superintendent.

Shill v School Twp., 209-1020; 227 NW 412

Location of school—no injunctive relief. The determination of the location of site of a new high school is within the power of the school board and its decision cannot be controlled by injunction.

Smith v Maresh, 226-552; 284 NW 390

Teachers — contract of employment — termination on notice — validity. A provision in a public school contract which authorizes the school district to terminate the contract on stated notice at any time and for any reason is valid, and if a termination is effected under such contract authorization and not under statutory authorization (§4237, C., '35), no appeal will lie to the county superintendent or in turn to the state superintendent. In other words, neither superintendent has jurisdiction to review such a discharge.

Ind. Dist. v Samuelson, 222-1063; 270 NW 434

II APPEAL TO SUPERINTENDENT AS SOLE REMEDY

Appeal — affidavit — sufficiency. The "affidavit" as the basis of an appeal to the county superintendent is sufficient even tho made by one who is a nonappellant and a nonresident of the subdistrict where the controversy exists, when he is a resident of the school district and a taxpayer in the subdistrict and a patron of the school therein and when the affidavit is filed with the county superintendent by the actual appellants.

Sanderson v Board, 211-768; 234 NW 216

Jurisdiction of courts. A teacher who has been discharged by the board of directors on charges of incompetency, after due notice to the teacher and hearing, may not maintain an action in the courts for damages consequent on such discharge.

Courtright v Sch. Dist., 203-26; 212 NW 368

Proper review of board action. When school directors are invested by statute with control over a named subject matter, their action with reference to such subject matter must be reviewed through an appeal to the county superintendent, and not through a resort to the courts; and this is true howsoever inexpedient, improper, and ill-advised the action may appear to be.

Security Bk. v Bagley, 202-701; 210 NW 947; 49 ALR 705

Transporting consolidated school pupils—board's discretion—remedy by appeal. Mandamus will not lie to compel a consolidated school board to transport pupils when by statute it is also given a discretion to suspend service and to require a two mile transportation by the parent to the established bus route. A parent dissatisfied with the school board's procedure has an adequate law remedy by appeal to the county superintendent.

Lanphier v School Dist., 224-1035; 277 NW 740; 118 ALR 801

III PERMISSIBLE COURT ACTION

Teachers—discharge—appeal (?) or action in court (?). A teacher who is discharged by a school board under proceedings over which it had jurisdiction must seek relief by appeal to the county superintendent. On the other hand, if the board discharges a teacher under proceedings over which it had not acquired jurisdiction, the teacher may sue in the courts for breach of contract.

Schrader v School Dist., 221-799; 266 NW 473

Transportation—refusal to furnish—remedy. A school board which closes its school for want of the necessary five pupils is under a mandatory duty to provide transportation for its pupils, if any, to some other district as provided by statute, and in case of failure to perform such duty, the parent should seek relief in

court, not by appeal to the county superintendent.

Riecks v School Dist., 219-101; 257 NW 546
See Dermit v School Dist., 220-344; 261 NW 636

4299 Notice—transcript—hearing.

Appearance in lieu of notice. Failure of the county superintendent to fully comply with the statute relative to notifying adversely interested parties of an appeal is cured by the voluntary appearance of said parties.

Sanderson v Board, 211-768; 234 NW 216

4300 Hearing—shorthand reporter—decision.

Atty. Gen. Opinion. See '32 AG Op 57

4301 Witnesses—fees—collection.

Atty. Gen. Opinion. See '34 AG Op 452

4302 Appeal to state superintendent.

Atty. Gen. Opinions. See '25-26 AG Op 149; '30 AG Op 208; '32 AG Op 57

Jurisdiction—strict construction. The state superintendent's power over appeals cannot be enlarged beyond jurisdiction actually conferred by law.

Ind. Dist. v Samuelson, 222-1063; 270 NW 434

Appeal from original order. No appeal lies to the superintendent of public instruction from an original order or action of a county superintendent. In other words, the right of appeal to the state superintendent is strictly confined to those decisions or orders that originate with a board of directors of a school corporation.

Field v Samuelson, 212-786; 233 NW 687

Appeal—dismissal—effect. Where a teacher appeals to the superintendent of public instruction from an order of the board of directors discharging the teacher, the dismissal of the appeal by said superintendent on the ground of want of jurisdiction cannot be given the legal right of reversing the said order of discharge.

Streyffeler v Sch. Dist., 210-780; 231 NW 325

Sites—appeal—jurisdiction of state superintendent. The superintendent of public instruction on an appeal involving an order of a school board locating a schoolhouse site has no jurisdiction, after affirming the order of the board, to enter an order directing the school board to provide transportation for certain pupils, the matter of transportation not being mentioned in the order locating the site.

Reason: The jurisdiction of said officers on appeal is strictly appellate.

Albrecht v School Dist., 216-968; 250 NW 129

CHAPTER 220

PRESIDENT, SECRETARY, AND TREASURER

4304 President—duties.

Delegation of authority. A school board may very properly delegate to its president the authority to receive a deed to property purchased by the board and to deliver the warrant in payment for such property.

Looney v Sch. Dist., 201-436; 205 NW 328

4305 Bonds of secretary and treasurer.

Bonds—prima facie liability. Proof that a school treasurer drew a check upon the school district bank account in favor of another bank; that the check was duly cashed; that the payee bank did not credit the amount to any account of the school district; and that said treasurer on demand did not deliver said money to the district, constitutes prima facie evidence of the latter's default and of liability on his bond.

School District v Sass, 220-1; 261 NW 30

Indemnification of one of two sureties—effect. In an action against a public officer and his bondsmen to recover a shortage in public funds, it is quite immaterial as far as plaintiff is concerned that one of the sureties has received property from the public officer as partial indemnity.

School District v Sass, 220-1; 261 NW 30

Nonentertainable defense. In an action on the bond of a school treasurer to recover a shortage in his accounts, it is no defense that the plaintiff district has a cause of action against a third party who is unlawfully in possession of the funds constituting the shortage.

School District v Sass, 220-1; 261 NW 30

Rejected defensive plea. In an action on the bond of a school treasurer, the defensive plea (if it is a defense) that the treasurer was the innocent victim of another party's wrongdoing will be given no consideration when the wrongdoing of the treasurer is manifest.

School District v Sass, 220-1; 261 NW 30

4308 Duties of secretary.

Atty. Gen. Opinions. See '28 AG Op 164; '38 AG Op 800

4310 Warrants.

District debts—unavailable defense. In an action on a school warrant duly drawn on the schoolhouse fund, it is no defense that the warrant is, in effect, payable out of such fund as may be on deposit in a named bank.

Looney v School Dist., 201-436; 205 NW 328

4316 Duties of treasurer—payment of warrants.

Atty. Gen. Opinion. See '28 AG Op 152

4317 General and schoolhouse funds.

Atty. Gen. Opinions. See '28 AG Op 394; '34 AG Op 223; '38 AG Op 210

Trust property for educational purposes. Property transferred to a county in trust for the establishment of a prescribed seminary of learning, and duly accepted by the board of supervisors on behalf of the county, becomes a special part of the school fund of the county, and remains such, tho the legal title be transferred to court-appointed trustees for managerial purposes. It follows that, being county property and devoted to public use and not held for pecuniary profit, said property is exempt from taxation (§6944, par. 2, C., '35), even tho no action has been taken to actually execute the trust.

McColl v Dallas County, 220-434; 262 NW 824

Unavailable defense. In an action on a school warrant duly drawn on the schoolhouse fund, it is no defense that the warrant is in effect payable out of such fund as may be on deposit in a named bank.

Looney v Sch. Dist., 201-436; 205 NW 328

CHAPTER 221

COMMON SCHOOL LIBRARIES

Atty. Gen. Opinions. See '28 AG Op 157; '30 AG Op 186; '34 AG Op 404; AG Op Feb. 2. '39

CHAPTER 222

STANDARDIZATION AND STATE AID

Atty. Gen. Opinions. See '25-26 AG Op 126; '28 AG Op 165; '34 AG Op 247; '36 AG Op 195

CHAPTER 223

TEACHERS

4336 Qualifications — compensation prohibited.

Atty. Gen. Opinion. See AG Op Oct. 9, '39

Action by teacher for compensation—pleading—intervention by taxpayer. In a teacher's action to recover compensation against a school district, where a taxpayer files a defensive petition of intervention after a demurrer to the answer had been sustained, but before defendant had made any election to stand on its answer, before any demand to make such election had been made, before default or judgment had been entered, or any demand therefor—the petition of intervention being unquestioned and raising an issue on the additional defensive matter—the court erred in sustaining a motion to strike the petition of intervention and entering judgment against the school district.

Schwartz v Sch. Dist., 225-1272; 282 NW 754

4339 Daily register.

Action for salary — insufficient defense. In an action by a teacher to recover salary accrued and unpaid at the time of her discharge by the board, it is no defense that the teacher did not make the report required of teachers at the close of the term, said teacher having been discharged prior to the close of said term.

Schrader v School Dist., 221-799; 266 NW 473

4341 Minimum teachers' wage.

Atty. Gen. Opinions. See '28 AG Op 85, 198; '32 AG Op 192; '36 AG Op 134

4345 Pension system.

Atty. Gen. Opinions. See '30 AG Op 86, 312, 334; '36 AG Op 599; '38 AG Op 248

4346 Fund.

Atty. Gen. Opinions. See '36 AG Op 599; '38 AG Op 248

4347 Management.

Atty. Gen. Opinions. See '36 AG Op 599; '38 AG Op 248; AG Op Jan. 19, '39

CHAPTER 224

INSTRUCTION OF DEAF

Atty. Gen. Opinions. See '25-26 AG Op 36, 37

CHAPTER 225

INDEBTEDNESS OF SCHOOL DISTRICTS

Atty. Gen. Opinions. See '36 AG Op 196; '38 AG Op 187

4353 Indebtedness authorized.

Atty. Gen. Opinions. See '28 AG Op 79, 249, 293

General obligations — trust fund. School warrants which are in form the general obligations of the district, and issued under a purported contract of the district providing for such unconditional issuance, are void if in excess of the constitutional limit of indebtedness, notwithstanding the fact that the said contract carries the inference that the warrants will be paid from a special fund arising from the sale of bonds.

Carstens Bros. v Sch. Dist., 218-812; 255 NW 702

4354 Petition for election.

Atty. Gen. Opinions. See '28 AG Op 79, 93, 249; '36 AG Op 196; '38 AG Op 167, 210

Legal sufficiency of petition. The determination by the board of directors of the legal sufficiency of a petition as regards the signatures thereon is sufficient, even tho the statute does not require the board to keep on file a record of the electors of the district.

Mershon v Sch. Dist., 204-221; 215 NW 235

4355 Election called.

Atty. Gen. Opinion. See '36 AG Op 196

Special meeting on oral notice. A special meeting of the board of directors of a school corporation is legally called on oral notice to the directors by the secretary, at the direction of the president.

Mershon v Sch. Dist., 204-221; 215 NW 235

CHAPTER 226

SCHOOLHOUSES AND SCHOOLHOUSE SITES

4359 Location.

Appeal to county superintendent. See under §4298

Atty. Gen. Opinion. See '34 AG Op 657

Nonprejudicial order of court. An order of court commanding the school board forthwith to erect a schoolhouse on a specified site is unobjectionable when such site had been already legally selected by the board.

Sanderson v Board, 211-768; 234 NW 216

Decision of school board—no injunctive relief. The determination of the location of site of a new high school is within the power of the school board and its decision cannot be controlled by injunction.

Smith v Maresh, 226-552; 284 NW 390

Order—sufficiency. An order fixing a schoolhouse site of at least one-half acre in the southeast corner of a named quarter section is not fatally indefinite on the theory that such order would require the location to be made in part in the contiguous public highway.

Sanderson v Board, 211-768; 234 NW 216

Purchase—rescission and cancellation. The purchase by a board of a schoolhouse site after bonds for such purchase had been duly voted, but prior to any bond levy, and the due issuance of a warrant in payment for such site, are not canceled or rescinded by the subsequent action of the electors in voting to rescind their former action authorizing the bonds.

Looney v Sch. Dist., 201-436; 205 NW 328

Relocation—record—sufficiency. School record reviewed, and, while quite informal, held to clearly show the official action of the board in relocating a schoolhouse site.

Sanderson v Board, 211-768; 234 NW 216

Appeal—jurisdiction of state superintendent. The superintendent of public instruction on an appeal involving an order of a school board locating a schoolhouse site has no jurisdiction, after affirming the order of the board, to enter an order directing the school board to provide transportation for certain pupils, the matter of transportation not being mentioned in the order locating the site.

Reason: The jurisdiction of said officers on appeal is strictly appellate.

Albrecht v School Dist., 216-968; 250 NW 129

District property — conveyance — review by courts. The courts will not, at the suit of a taxpayer, overturn and nullify the action of a school board in executing and receiving, on behalf of the district, deeds in order to adjust the boundaries of a schoolhouse site, and in finally conveying the site when no longer needed, when the transactions have stood unquestioned for many years, and when there is no allegation or proof that the directors refused to perform their duty, or acted illegally or fraudulently.

Beck v School Dist., 213-1282; 241 NW 427

4361 Five-acre limitation.

Atty. Gen. Opinions. See '34 AG Op 223; '38 AG Op 210

School site—title valid as to part—no injunction. A school district's title to its site for a high school is not wholly invalid simply because the size may be greater than the statutory

limitation on the amount that can be obtained by condemnation. When the size of the building is not so great as to cover more ground than the statute allows, and when the title, if defective at all, is defective only as to the excess land, an injunction will not lie on the theory that the district had no title.

Smith v Maresh, 226-552; 284 NW 390

Real property—power to acquire. A school district has general power to acquire and hold real property for its legitimate purposes.

Smith v Maresh, 226-552; 284 NW 390

4363 Tax.

Atty. Gen. Opinions. See '34 AG Op 223; '38 AG Op 210

4364 Condemnation.

Atty. Gen. Opinion. See '30 AG Op 146

4371 Uses for other than school purposes.

Discussion. See 1 ILB 85—Uses of school property

Atty. Gen. Opinions. See '25-26 AG Op 203; '28 AG Op 146, '32 AG Op 208; '36 AG Op 196; AG Op May 15, '39

4372 Compensation.

Atty. Gen. Opinion. See '36 AG Op 196

4373 Use forbidden.

Atty. Gen. Opinion. See '36 AG Op 196

4374 Renting schoolroom.

Atty. Gen. Opinions. See '28 AG Op 293, 413; '32 AG Op 231

4379 Reversion of schoolhouse site.

Atty. Gen. Opinions. See '34 AG Op 657; AG Op March 21, '39

4385 Sale of unnecessary schoolhouse sites.

Atty. Gen. Opinions. See '34 AG Op 657; AG Op March 21, '39

Conveyance—review by courts. The courts will not, at the suit of a taxpayer, overturn and nullify the action of a school board in executing and receiving, on behalf of the district, deeds in order to adjust the boundaries of a schoolhouse site and in finally conveying the site when no longer needed when the transactions have stood unquestioned for many years and when there is no allegation or proof that the directors refused to perform their duty or acted illegally or fraudulently.

Beck v Sch. Dist., 213-1282; 241 NW 427

CHAPTER 227

SCHOOL TAXES AND BONDS

4386 School taxes.

Atty. Gen. Opinions. See '28 AG Op 116; '30 AG Op 67, 89, 204

Venue—action where school district located—propriety. An action against the state appeal board to review its rulings affecting a school district under the local budget law is properly brought in the county where the school district was located and where proceedings on the levy involved were held from which resulted the board's ruling.

Board v Dist. Court, 225-296; 280 NW 525

4387 Additional taxes.

Atty. Gen. Opinions. See '28 AG Op 116; '30 AG Op 204

4388 Transportation fund—tax for free textbooks.

Atty. Gen. Opinion. See '28 AG Op 116

4391 Contract for use of library.

Atty. Gen. Opinion. See '28 AG Op 220

4393 Levy by board of supervisors.

Atty. Gen. Opinion. See '34 AG Op 661

4394 Special levies.

Atty. Gen. Opinion. See '34 AG Op 661

4395 General school levy.

Atty. Gen. Opinions. See '34 AG Op 342, 661; '36 AG Op 567

Venue—action where school district located—propriety. An action against the state appeal board to review its rulings affecting a school district under the local budget law is properly brought in the county where the school district was located and where proceedings on the levy involved were held from which resulted the board's ruling.

Board v Dist. Court, 225-296; 280 NW 525

4396 Apportionment of school funds.

Atty. Gen. Opinions. See '28 AG Op 157; '36 AG Op 567

***Deposits*—payment on forged indorsement—negligence not imputable to state.** Negligence and laches of public officers in the handling of state funds are not imputable to the state; for instance, in an action to recover from a drawee bank the amount paid by the bank on a forged indorsement of a check drawn by a county treasurer against state school funds on deposit with said drawee, it is no defense that the county treasurer was negligent in drawing or delivering the check, or that county officers generally were negligent in not making early discovery of the forged indorsement, and notifying the drawee accordingly.

New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

4402 Judgment levy.

Limitation on schoolhouse levy. See under §4217, Vol. I

4403 Bond tax.

Atty. Gen. Opinions. See '25-26 AG Op 283; '28 AG Op 394; '36 AG Op 678

4405 Funding or refunding bonds.

Atty. Gen. Opinions. See '36 AG Op 121, 423

4406 School bonds.

Atty. Gen. Opinions. See '28 AG Op 394; '38 AG Op 234

General obligations — trust fund. School warrants which are in form the general obligations of the district and issued under a purported contract of the district providing for such unconditional issuance are void if in excess of the constitutional limit of indebtedness, notwithstanding the fact that the said contract carries the inference that the warrants will be paid from a special fund arising from the sale of bonds.

Carstens Bros. v Sch. Dist., 218-812; 255 NW 702

4407 Form—rate of interest—where registered.

Atty. Gen. Opinion. See '38 AG Op 200

4408 Redemption.

Atty. Gen. Opinions. See '38 AG Op 187, 200

CHAPTER 228

COMPULSORY EDUCATION

4410 Attendance requirement.

Atty. Gen. Opinions. See '28 AG Op 92, 186; '34 AG Op 627; '36 AG Op 512

Pupils — compulsory attendance — power of board and duty of custodian. A school board may validly establish an ungraded school along with and as a part of the district's established system of graded schools, and may, so long as it does not act unreasonably, validly require the proper custodian of a child over 7 and under 16 years of age to cause said child to attend said ungraded school only, provided said child is continued in the public schools. So held as to a child who was in physical and mental condition to attend school but was unable to make the grades in the graded schools.

State v Ghrist, 222-1069; 270 NW 376

4413 Reports as to private instruction.

Atty. Gen. Opinion. See '28 AG Op 293

4415 Violations.

Atty. Gen. Opinion. See '30 AG Op 329

CHAPTER 229

PUBLIC RECREATION AND PLAYGROUNDS

Atty. Gen. Opinion. See '30 AG Op 335

CHAPTER 231

TEXTBOOKS

4446 Adoption—purchase and sale.

Atty. Gen. Opinions. See '32 AG Op 78; '34 AG Op 462; '36 AG Op 280; '38 AG Op 601

4447 Custodian—bond.

Atty. Gen. Opinions. See '36 AG Op 280; '38 AG Op 601

4448 Payment—additional tax.

Atty. Gen. Opinions. See '28 AG Op 116; '36 AG Op 280

4452 Awarding contract.

Contract for supplies—permissible duration. School boards may validly bind their school districts by reasonable contracts for ordinary school supplies, tho such contracts are not fully performable during the school year in which they were executed or during the school year following.

Dodds Co. v School Dist., 220-812; 263 NW 522

4453 Change—election.

Atty. Gen. Opinion. See '32 AG Op 173

4461 Custody and accounting.

Atty. Gen. Opinion. See '28 AG Op 215

4464 Petition—election.

Atty. Gen. Opinions. See '32 AG Op 77, 128; '34 AG Op 461, 462

4468 Officers as agents.

Atty. Gen. Opinions. See '28 AG Op 74, 399; '30 AG Op 93, 336; '32 AG Op 110, 189; '36 AG Op 237, 660; '38 AG Op 185; AG Op Feb. 27, '39

CHAPTER 232
SCHOOL FUNDS

Atty. Gen. Opinions. See '34 AG Op 290; '38 AG Op 149

4469 Permanent fund.

School fund mortgage—state property—permanent school fund. A school fund mortgage is state property and the state has recognized its right to maintain a permanent school fund intact and inviolate for purpose to which dedicated.

Monona County v Waples, 226-1281; 286 NW 461

Trust property for educational purposes. Property transferred to a county in trust for the establishment of a prescribed seminary of learning, and duly accepted by the board of supervisors on behalf of the county, becomes a special part of the school fund of the county, and remains such, tho the legal title be transferred to court-appointed trustees for managerial purposes. It follows that, being county property and devoted to public use and not held for pecuniary profit, said property is exempt from taxation (§6944, par. 2, C., '35), even tho no action has been taken to actually execute the trust.

McColl v Dallas County, 220-434; 262 NW 824

4472 Division and appraisement.
Atty. Gen. Opinion. See '28 AG Op 181

4473 Notice—sale.
Atty. Gen. Opinion. See '25-26 AG Op 68

4476 Sale of lands bid in.
Atty. Gen. Opinions. See '25-26 AG Op 68; '38 AG Op 149

4483 Management.
Atty. Gen. Opinions. See '38 AG Op 396, 733

4484 Actions.
Atty. Gen. Opinion. See '38 AG Op 396

4485 Liability of county.
Atty. Gen. Opinions. See '38 AG Op 396; AG Op March 16, '39

4487 Loans—officers may not borrow.
Atty. Gen. Opinions. See '28 AG Op 431; '34 AG Op 645

4488 Terms—appraisement—fee.
Atty. Gen. Opinions. See '28 AG Op 294; '34 AG Op 536; '38 AG Op 418, 723

4489 Application for loan.
Atty. Gen. Opinion. See '38 AG Op 827

4494 Renewal.
Atty. Gen. Opinion. See '28 AG Op 294

4495 Statute of limitation.
Atty. Gen. Opinion. See '34 AG Op 59

School fund mortgage foreclosure—defenses. In an action to foreclose a school fund mortgage, where the court decreed that plaintiff made no demand nor attempt to collect the mortgage until eleven years after it became due, held, that the defendant-holder of the certificate of tax sale was charged with knowledge of plaintiff's lien and that it was unpaid, and he could not rely on lapse of time, laches or negligence as against the state.

Monona County v Waples, 226-1281; 286 NW 461

4498 School fund account—settlement.
Atty. Gen. Opinion. See '34 AG Op 104

4499 Notice of default.
Atty. Gen. Opinion. See '34 AG Op 104

4500 Suit—attorney fee.
Atty. Gen. Opinions. See '25-26 AG Op 68; '34 AG Op 104

4501 Bid at execution sale.
Atty. Gen. Opinion. See '38 AG Op 396

4502 Sheriff's deed to state.
Atty. Gen. Opinion. See '34 AG Op 140

4503 Resale by state.
Atty. Gen. Opinions. See '38 AG Op 149; AG Op Feb. 9, '39

4505 Excess—loss borne by county.
Atty. Gen. Opinions. See '38 AG Op 104; AG Op March 16, '39

4506 Report as to sales—interest.
Atty. Gen. Opinion. See '38 AG Op 608

4507 Interest charged to counties.
Atty. Gen. Opinion. See '38 AG Op 418

CHAPTER 234.1
LAW, MEDICAL, AND TRAVELING LIBRARIES AND HISTORICAL DEPARTMENT

4541.02 Board of trustees.
Atty. Gen. Opinion. See '38 AG Op 146

4541.03 Powers and duties of the board.
Atty. Gen. Opinion. See '38 AG Op 146

4541.06 Duties of the curator of the department of history and archives.
Atty. Gen. Opinion. See '38 AG Op 669

4541.09 Archives.
Atty. Gen. Opinion. See AG Op Feb. 22, '39

4541.12 Certified copies—fees.
Atty. Gen. Opinions. See '38 AG Op 425; AG Op Feb. 22, '39; AG Op Nov. 13, '39

TITLE XIII

HIGHWAYS

CHAPTER 237

ESTABLISHMENT, ALTERATION, AND VACATION OF HIGHWAYS

Atty. Gen. Opinions. See '25-26 AG Op 125; '28 AG Op 435; '32 AG Op 100; '36 AG Op 215, 235; '38 AG Op 677

GENERAL PROVISIONS

4560 Jurisdiction.

Atty. Gen. Opinions. See '28 AG Op 246; '38 AG Op 677, 808

ANALYSIS

Adverse possession, prescriptive rights, abandonment, and estoppel in re highways. See under §§10175, 11007(VI, XXVIII)

I HIGHWAYS IN GENERAL

Unallowable alteration. A highway which was established substantially on a designated line, but which was actually opened and maintained by the public authorities and fenced by the various abutting property owners for more than a half century on a line variant from the established line, may not be summarily changed back to the established line and thereby made to embrace lands which were theretofore undisturbed.

Clarken v Lennon, 203-359; 212 NW 686

Bequest for paving roads—acceptance by county not enjoined. In an action by a taxpayer to obtain an injunction restraining a county from accepting a bequest to be used for paving roads, the injunction was refused where a will and two codicils provided for the bequest, as when all papers were construed together a valid gift to the county was found to have been created which the county had the authority to accept.

Anderson v Board, 226-1177; 286 NW 735

Codicil creating charitable trust to county for paving roads—improper delegation of duties to executor. A first codicil devising an estate to trustees to be administered under county supervision in building roads and a second codicil appointing one executor to aid the county in building roads created a lawful charitable trust with the county as trustee and taxpayers as beneficiaries which was not necessarily invalid because the executor was given administrative duties in the road construction in violation of statute.

Blackford v Anderson, 226-1138; 286 NW 735

Abandonment of highway. Evidence reviewed and held insufficient to establish the claimed intentional abandonment by the public of a duly established highway.

Robinson v Board, 222-663; 269 NW 921

II JURISDICTION

Power lodged with supervisors under Revision 1860. Under the statutes in force on January 9, 1868, the time at which a highway, the boundaries of which are in question, was established, the county board of supervisors had general supervision and power to establish highways.

Davelaar v Marion Co., 224-669; 277 NW 744

Jurisdictional recital as prima facie showing. A recital made in 1868 by a board of supervisors when ordering the establishment of a highway to the effect, "The board being fully advised in the premises", states a prima facie presumption that they had jurisdiction and had complied with all statutory requirements.

Davelaar v Marion Co., 224-669; 277 NW 744

Dual procedure—effect. It is not fatal to the establishment of a highway that, owing to a change in the statutes, the procedure was in part before the court and in part before the board of supervisors.

Harbacheck v Tel. Co., 208-552; 226 NW 171

Alteration—power to make. The power to make changes in the location of highways in the interest of safety, economy, and utility rests:

1. As to primary roads, in the state highway commission on its own motion.
2. As to secondary roads, in the board of supervisors on its own motion. (§§4607, 4755-b36, C., '27 [§§4607, 4755.33, C., '39]).

And a cut-off of 3 miles which will eliminate 4 miles of a 350-mile primary road will not be deemed other than a change—will not be deemed an establishment of a road—the power to establish roads being a power not possessed by the state commission.

Jenkins v Highway Com., 205-523; 218 NW 258

Discontinuance—disregard of statute—effect on right to damages. A board of supervisors cannot deprive a property owner of a

valid claim for damages consequent on the vacation or abandonment of a county road by wholly disregarding the statutory procedure governing such vacation or abandonment. The property owner may recognize the irregular procedure of the board by filing his claim with it and the board thereby acquires jurisdiction over the claim, a jurisdiction which it must exercise.

Furgason v County, 212-814; 237 NW 214

III DEDICATION

Implied dedication. An implied dedication of land for a public way and an implied acceptance thereof by the public will not be decreed on evidence tending to show a very perfunctory assumption of jurisdiction over the land by the public authorities, plus a use which is as consistent with the theory of mere permission by the owner as with the theory of rightful public use.

Dugan v Zurmuehlen, 203-1114; 211 NW 986

Prescription. A public way by prescription will not be decreed on evidence which is just as consistent with the theory of the owner that whatever use was made of the land as a road was purely permissive as with the theory that the use was hostile, adverse, and under a claim of right.

Dugan v Zurmuehlen, 203-1114; 211 NW 986

Evidence—old road records—use alone insufficient. In an action to establish a road by prescription, evidence in the form of a page from an old road record made in 1850, which was a copy of the surveyor's notes, and introduced as evidence of an adverse claim, is not sufficient when it does not show that such road as shown on the old record was the same as the road now in use. Without this, the road could not be established on the sole evidence of long continued use.

Slack v Herrick, 226-336; 283 NW 904

Right of way—deed—abandonment—effect. A deed to a strip of land for highway purposes is ipso facto annulled and rendered ineffective by the definite abandonment of the proposal to establish the highway. In other words, the municipality may not, years after definitely abandoning the project, establish the highway and claim anything under the deed.

Beim v Carlson, 209-1001; 227 NW 421

4561 Width.

Width of bridges. See §4667, Vol I

Atty. Gen. Opinions. See '25-26 AG Op 335; '30 AG Op 120

Ipso facto width. Principle reaffirmed that if, in the establishment of a highway, no width is designated, then the statutory width prevails.

Dickson v Davis County, 201-741; 205 NW 456

Presumption as to width of old road duly established. When the records of the establishment of a highway made many years ago are silent as to the width thereof, it must be presumed to be the statutory width, to wit, 66 feet.

Richardson v Derry, 226-178; 284 NW 82

"Statutory" width—definition. The "statutory" width of a road is the width (1) expressly fixed by the board of supervisors when the road is established, or (2) implied by statute if the board fixes no width, in no case less than 40 feet.

Carstens v Keating, 210-1326; 230 NW 432
McKinley v County, 215-46; 244 NW 663

Territorial road. The establishment of a highway by the legislature and the designation of it as a "territorial" highway are conclusive as to its width—70 feet.

Dickson v Davis Co., 201-741; 205 NW 456

Alteration — effect as to width. A material alteration in the location of a road constitutes the establishment of a new road, and the width thereof will be controlled by the then existing statutes.

Dickson v Davis Co., 201-741; 205 NW 456

Adjoining landowner—no title accrues from encroachment on highway. Encroachment by an adjoining landowner on an established public highway will not ripen into a title through any statute of limitations, doctrine of acquiescence, adverse possession, or estoppel—the establishment and maintenance of public highways being a governmental function.

Richardson v Derry, 226-178; 284 NW 82

4562 Petition.

Atty. Gen. Opinions. See '34 AG Op 125; '36 AG Op 214, 235

Optional procedure to make changes. The board of supervisors may proceed on its own motion under §4607 et seq., C., '27, to widen an established statutory road. It need not wait for the filing of a petition as in case of the original establishment of a road.

Carstens v Keating, 210-1326; 230 NW 432

"Petition presented" construed as "writing". The words "petition * * * and agreement were presented" appearing on the record of a highway established in 1868 can only mean the writing required by statute.

Davelaar v Marion Co., 224-669; 277 NW 744

Petition—location of road. Under the Code, '51, and R., '60, the petition for the establishment of a highway is sufficient as to the location of the highway if the township is indicated by the correct governmental description.

Harbacheck v Tel. Co., 208-552; 226 NW 171

Prohibition relative to "orchards". The statutory prohibition against establishing a high-

way through an orchard without the owner's consent (§4566, C., '24) applies whether the establishment is by the board of supervisors on petition or by such board on its own motion (§4607 et seq., C., '24).

Junkin v Knapp, 205-184; 217 NW 834

Unallowable plea to avoid damages. A county which through its board of supervisors takes out the bridges and culverts on a long established county road and permits the road to be plowed and cultivated, and thereby rendered impassable, may not avoid a claim for damages resulting to a property owner because of the vacation by the plea that it did not comply with the statute relative to vacation.

Furgason v County, 212-814; 237 NW 214

4563 Bond.

Atty. Gen. Opinions. See '36 AG Op 214, 235

Security—proof. Proof that security was given for the expense attending an application for the establishment of a highway may be established by a record recital to that effect, aided by the legal presumption that the officers acted regularly.

Harbacheck v Tel. Co., 208-552; 226 NW 171

4566 Property exempt.

Discussion. See 16 ILR 271—Construction of statute

Condemnation by state highway commission. The state highway commission has no authority to condemn for primary road purposes the ornamental grounds or orchard of an owner without his consent; and this is true notwithstanding §§4755-b27, 7803, C., '27 [§§4755.23, 7803, C., '39].

Hoover v Highway Com., 207-56; 222 NW 438

Prohibition relative to "orchards". The statutory prohibition against establishing a highway through an orchard without the owner's consent, applies whether the establishment is by the board of supervisors on petition (§4562 et seq., C., '24) or by such board on its own motion (§4607 et seq., C., '24).

Junkin v Knapp, 205-184; 217 NW 834

"Orchard" defined. A group of some 65 bearing fruit trees of different varieties, and maintained by continued replanting, constitutes an "orchard".

Junkin v Knapp, 205-184; 217 NW 834

Removal of building. A "small" privy is not a "substantial, permanent, and valuable building", within the meaning of this section.

Junkin v Knapp, 205-184; 217 NW 834

4568 Survey made — commissioner sworn.

Absence of survey. The absence of a survey is not fatal to the establishment of a highway when the record reveals the fact that the road was located equally on each side of a given section line.

Harbacheck v Tel. Co., 208-552; 226 NW 171

Burden to show government line. A landowner who concedes that a long existing highway was by agreement to be located equally upon both sides of the government line between adjoining tracts, but who disputes the accuracy of the location, has the burden to show the actual location of the government line.

Sedore v Turner, 202-1373; 212 NW 61

Location—evidence. Record reviewed, and held that the highway in question was legally established on a certain section line, but that, because of insufficient evidence, cause should be remanded for the purpose of taking evidence on the exact location of said line.

Harbacheck v Tel. Co., 208-552; 226 NW 171

4571 Plat and field notes.

Disregard of nonsubstantial defects. The fact that a commissioner in recommending the establishment of a highway "as petitioned for", files a plat which does not show a slight variant in the line as petitioned for, does not invalidate the proceeding and thereby deprive the board of supervisors of jurisdiction to establish said highway; and especially is this true when said slight defect was obviated by a detailed plat which was of record prior to the final order establishing the road.

Wheeler v Riggs, 222-1373; 271 NW 509

4575 Notice served.

Atty. Gen. Opinions. See '36 AG Op 214; '38 AG Op 808

Presumption of regularity—when jurisdiction must appear. The statutory presumption that the proceedings of inferior tribunals, e. g., the county board of supervisors, are presumed to be regular, does not extend to the acquisition of jurisdiction of the board—this must be shown.

Davelaar v Marion Co., 224-669; 277 NW 744

Notice—recital of record. Proof that the required preliminary notice of hearing on the petition for the establishment of a highway was given, may be established by the record recitals to that effect, aided by the legal presumption that the officers acted regularly.

Harbacheck v Tel. Co., 208-552; 226 NW 171

Notice as condition precedent. Notice of hearing, on the establishment of a highway and the service of such notice as required by statute (or the waiver of such notice), is an imperative condition precedent to the legal establishment of the road. And the fact that the highway records reveal a paper establishment will not justify the presumption that said notice was given.

McKinley v County, 215-46; 244 NW 663

Notice—waiver. A landowner who files a claim for damages to his land, in proceedings to establish a highway along said land, thereby waives his right to formal statutory notice of said proceedings.

McKinley v County, 215-46; 244 NW 663

4576 Form of notice.

Atty. Gen. Opinion. See '36 AG Op 214

Timely claim under fatally defective notice. A landowner who in eminent domain proceeding for a public road is entitled to a specified time after notice in which to file his claim for damages, and who appears in said proceeding in response to a fatally defective notice, is entitled to said specified time after he so appears, in which to file his claim for damages.

Witham v Union Co., 202-557; 210 NW 535

4577 Auditor may establish, alter, or vacate.

Atty. Gen. Opinion. See '34 AG Op 125

4580 Objections or claims.

Atty. Gen. Opinions. See '28 AG Op 435; '38 AG Op 808

4581 Appraisers appointed—vacancies—qualification.

Joinder—mandamus and damages. An action of mandamus to compel the board of supervisors to proceed to the assessment of damages consequent on the taking of land in order to effect a change in a highway is properly stricken on motion when joined with an action against the county for damages for the taking of said land.

Valentine v Board, 206-840; 221 NW 517

4586 Damages—conditional order.

Vacation—damages recoverable. A property owner who, by the vacation of a county highway, is deprived of reasonable access to his property may recover from the county the resulting damages.

Furgason v County, 212-814; 237 NW 214

Unallowable action. Pending eminent domain proceedings by and on behalf of a county relative to land for highway purposes preclude an independent action by the landowner for his damages.

Gibson v Union Co., 208-314; 223 NW 111

Damages do not embrace cost of fence. Evidence is admissible, in proceedings to condemn land for highway purposes, to show the general fact that the condemnation may impose on the remainder of the farm an added burden in the form of extra fencing and the repair, maintenance, and replacement thereof; but evidence of the cost of fencing the land along the new highway is wholly unallowable, and equally unallowable are instructions which substantially direct the jury to consider such costs as an element of damages.

Dean v State, 211-143; 233 NW 36

Noncontiguous tracts as one farm. In the condemnation of land for highway purposes, the record may be such as to present a jury question whether noncontiguous tracts are being used as one farm so that the damages resulted to it as an entirety, or whether the land was in such separate tracts that the damages should be assessed to each tract separately.

Paulson v Highway Com., 210-651; 231 NW 296

Conditional establishment—effect. A highway which is ordered established on the condition that petitioners "pay the damages assessed within ninety days" is not legally established until the damages are so paid; and the court cannot presume that payment was so made even tho the way has been used as a public highway for a half century.

McKinley v County, 215-46; 244 NW 663

Notice—waiver. A landowner who files a claim for damages to his land, in proceedings to establish a highway along said land, thereby waives his right to formal statutory notice of said proceedings.

McKinley v County, 215-46; 244 NW 663

Compromise settlement. The acceptance by a property owner, after condemnation and assessment, and while the amount of damages was in controversy, and before the public authorities had taken possession of the land, of an amount less than had been assessed, and the execution of a deed to the right of way, in which deed the amount received is itemized as to (1) right of way, (2) fences, and (3) damages, constitute a full settlement, and preclude recovery of the difference between the assessment and the amount so accepted.

Burrow v County, 200-787; 205 NW 460

4591 Fences—crops.

Removal—nonimplication for compensation. The removal by an owner of land of fences across a public highway on the land, in compliance with a demand of the public authorities, gives rise to no implied contract on the part of the municipality to pay the value of the work and materials necessary in effecting such removal.

Hall v Union Co., 206-512; 219 NW 929

Damages do not embrace cost of fence. Evidence is admissible in proceedings to condemn land for highway purposes to show the general fact that the condemnation may impose on the remainder of the farm an added burden in the form of extra fencing and the repair, maintenance, and replacement thereof; but evidence of the cost of fencing the land along the new highway is wholly unallowable, and

equally unallowable are instructions which substantially direct the jury to consider such costs as an element of damages.

Dean v State, 211-143; 233 NW 36

4596 Consent highways.

Atty. Gen. Opinion. See '38 AG Op 808

Foreclosure certificate holder as "owner". A certificate holder under mortgage foreclosure is an "owner" of the land within the meaning of this statute. Establishment in such case without such consent is a nullity.

Vien v County, 209-580; 228 NW 19

Easements—records—different location in use—use alone insufficient. In an action to establish a road by prescription, evidence in the form of a page from an old road record made in 1850, which was a copy of the surveyor's notes, and introduced as evidence of an adverse claim, is not sufficient when it does not show that such road as shown on the old record was the same as the road now in use. Without this, the road could not be established on the sole evidence of long continued use.

Slack v Herrick, 226-336; 283 NW 904

4597 Appeal by damage claimant.

Unallowable appeal. The owner of land sought to be condemned for highway purposes who has never been made a party to the proceedings cannot appeal from the award of damages.

Gibson v Union Co., 208-314; 223 NW 111

4600 Trial on appeal.

Appeal—proper docket. An alleged owner of land who appeals to the district court from an award of damages may not complain of an order which transfers to the equity side of the calendar so much of said appeal as involves the issue whether the condemnor or the appellant owns part of the land sought to be condemned.

Montgomery Co. v Case, 204-1104; 216 NW 633

Condemnation award—separate tracts—joint award—transfer to equity. In a condemnation proceeding where two separate tracts of land under separate ownerships were treated as being jointly owned, and where, on appeal from a lump sum award covering both tracts, the owners in one count of their petition sought dismissal of the condemnation proceeding, and where issues of waiver and estoppel as to such irregularity were joined, it was proper to transfer said count to equity so that such issues could be determined in advance of the trial to a jury on question of damages.

Newby v Des Moines, 227-382; 288 NW 399

Public agency to be treated as individual. A governmental agency has a right, in eminent domain proceedings, to have the jury instructed that such agency is entitled to have the cause tried and determined precisely as tho said agency were an individual.

Welton v Highway Com., 211-625; 233 NW 876

Damages do not embrace cost of fence. Evidence is admissible in proceedings to condemn land for highway purposes to show the general fact that the condemnation may impose on the remainder of the farm an added burden in the form of extra fencing and the repair, maintenance, and replacement thereof; but evidence of the cost of fencing the land along the new highway is wholly unallowable, and equally unallowable are instructions which substantially direct the jury to consider such costs as an element of damages.

Dean v State, 211-143; 233 NW 36

4601 Costs.

Attorney fees. A statutory provision for the taxation in eminent domain proceedings of attorney fees in favor of a successful party is no authority for such taxation in another like proceeding under a separate and different statute which makes no provision for such taxation.

Nichol v Neighbour, 202-406; 210 NW 281

CHANGES IN ROADS, STREAMS, OR DRY RUNS

4607 Changes for safety, economy, and utility.

Atty. Gen. Opinions. See '32 AG Op 140; '34 AG Op 125; '36 AG Op 235; '38 AG Op 677, 808

Optional procedure to make changes. The board of supervisors may proceed on its own motion under this section to widen an established statutory road. It need not wait for the filing of a petition as in case of the original establishment of a road.

Carstens v Keating, 210-1326; 230 NW 432

"Statutory" width—definition. The "statutory" width of a road is the width (1) expressly fixed by the board of supervisors when the road is established, or (2) implied by statute if the board fixes no width, in no case less than 40 feet.

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Alteration—power to make. The power to make changes in the location of highways in the interest of safety, economy, and utility rests:

1. As to primary roads, in the state highway commission on its own motion.
2. As to secondary roads, in the board of supervisors on its own motion.

And a cut-off of 3 miles which will eliminate 4 miles of a 350-mile primary road will not be deemed other than a change—will not be deemed an establishment of a road—the power

to establish roads being a power not possessed by the state commission.

Jenkins v Highway Com., 205-523; 218 NW 258

Drainage of surface waters. Road authorities will not be held estopped from carrying surface waters across a public highway in the course of natural drainage because of the fact that for more than ten years they have unsuccessfully attempted to divert such waters from said natural course of drainage, the landowner affected not having changed his position because of such unsuccessful efforts.

Schwartz v County, 208-1229; 227 NW 91

Percolating waters—damage to adjoining land—causal connection necessary. A city excavating a new creek channel and which thereby collects water on its own land, from which it percolates to adjoining land resulting in damage, is liable therefor, but there must be probative evidence to establish percolation as the cause of the damage.

Covell v Sioux City, 224-1060; 277 NW 447

4608 Costs.

Atty. Gen. Opinion. See '36 AG Op 235

4609 Report and survey.

Atty. Gen. Opinions. See '36 AG Op 235; '38 AG Op 808

4610 Appraisers.

Atty. Gen. Opinions. See '28 AG Op 42; '36 AG Op 214

Procedure—exclusiveness. Pending eminent domain proceedings by and on behalf of a county relative to land for highway purposes preclude an independent action by the landowner for his damages.

Gibson v Union Co., 208-314; 223 NW 111

4611 Notice.

Atty. Gen. Opinion. See '36 AG Op 214

Timely claim under fatally defective notice. A landowner who, in eminent domain proceeding for a public road, is entitled to a specified time after notice in which to file his claim for damages, and who appears in said proceeding in response to a fatally defective notice, is entitled to said specified time after he so appears, in which to file his claim for damages.

Witham v Union Co., 202-557; 210 NW 535

4612 Service of notice.

Atty. Gen. Opinion. See '36 AG Op 214

4614 Hearing—adjournment.

Jurisdiction—nonvoluntary appearance. An owner of land sought to be condemned for highway purposes cannot be said to submit himself to the jurisdiction of the condemnatory body by addressing to such body a signed communication denying the existence of any such jurisdiction.

Gibson v Union Co., 208-314; 223 NW 111

4616 Hearing on claims for damages.

Compromise settlement. The acceptance by a property owner, after condemnation and assessment, and while the amount of damages was in controversy, and before the public authorities had taken possession of the land, of an amount less than had been assessed, and the execution of a deed to the right of way, in which deed the amount received is itemized as to (1) right of way, (2) fences, and (3) damages, constitute a full settlement and preclude recovery of the difference between the assessment and the amount so accepted.

Burrow v County, 200-787; 205 NW 460

Noncontiguous tracts as one farm. In the condemnation of land for highway purposes, the record may be such as to present a jury question whether noncontiguous tracts are being used as one farm so that the damages resulted to it as an entirety, or whether the land was in such separate tracts that the damages should be assessed to each tract separately.

Paulson v Highway Com., 210-651; 231 NW 296

4617 Appeals.

Unallowable appeal. The owner of land sought to be condemned for highway purposes who has never been made a party to the proceedings cannot appeal from the award of damages.

Gibson v Union Co., 208-314; 223 NW 111

4618 Damages on appeal—rescission of order.

Damages do not embrace cost of fence. Evidence is admissible, in proceedings to condemn land for highway purposes, to show the general fact that the condemnation may impose on the remainder of the farm an added burden in the form of extra fencing and the repair, maintenance, and replacement thereof; but evidence of the cost of fencing the land along the new highway is wholly unallowable, and equally unallowable are instructions which substantially direct the jury to consider such costs as an element of damages.

Dean v State, 211-143; 233 NW 36

4621 Abandonment of highway—notice to owner affected.

Atty. Gen. Opinions. See '32 AG Op 100; '36 AG Op 235; '38 AG Op 677, 808

4621.1 Duty to close and protect.

Atty. Gen. Opinion. See '38 AG Op 808

Abandonment of highway. Evidence reviewed and held insufficient to establish the claimed intentional abandonment by the public of a duly established highway.

Robinson v Board, 222-663; 269 NW 921

CHAPTER 238

STATE HIGHWAY COMMISSION

Atty. Gen. Opinions. See '38 AG Op 143

4622 Members—qualifications — term —location.

Atty. Gen. Opinion. See '36 AG Op 272

4623 Appointments.

Atty. Gen. Opinion. See '30 AG Op 52

4624 Vacancies.

Atty. Gen. Opinion. See '28 AG Op 49

4625 Compensation.

Atty. Gen. Opinion. See '25-26 AG Op 479

4626 Duties.

Atty. Gen. Opinions. See '25-26 AG Op 479, 480; '34 AG Op 168; '38 AG Op 143, 624, 814

Actions against. An action against the commission to enjoin it from relocating a primary road, unaccompanied by any allegation of wrongful acts, is in effect an action against the state and nonmaintainable.

Long v Highway Com., 204-376; 213 NW 532

Legal discretion uncontrollable. The court cannot compel the state highway commission to expend county primary road funds in the improvement of the primary roads of the county; nor can the court control said commission in the legal expenditure of other funds under the control of the commission.

Scharnberg v Highway Com., 214-1041; 243 NW 334

Unallowable delegation of power. The general assembly cannot, for the protection of the highways or for the safety of the traffic thereon, constitutionally delegate to the state highway commission power to adopt rules and regulations which shall have the force and effect of law.

Goodlove v Logan, 217-98; 251 NW 39

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

Alteration—power to make. The power to make changes in the location of highways in the interest of safety, economy, and utility rests:

1. As to primary roads, in the state highway commission on its own motion.

2. As to secondary roads, in the board of supervisors on its own motion (§§4607, 4755-b36, C., '27 [§4755.33, C., '39]).

And a cut-off of 3 miles which will eliminate 4 miles of a 350-mile primary road will not be deemed other than a change—will not be deemed an establishment of a road—the power to establish roads being a power not possessed by the state commission.

Jenkins v Highway Com., 205-523; 218 NW 258

Governmental employee — personal liability for torts—governmental immunity denied. An employee of the state highway commission, in going from place to place to inspect bridges, and in doing so commits a tortious act which causes injury to another, in violation of a duty owed to the injured person, becomes, as an individual, personally liable for damages therefor.

Futter v Hout, 225-723; 281 NW 286

4626.2 Federal appropriations.

Atty. Gen. Opinions. See '38 AG Op 624, 769

4630.1 Special counsel.

Atty. Gen. Opinions. See '38 AG Op 814, AG Op Feb. 28, '40

CHAPTER 239

ROADS ON STATE LANDS

Atty. Gen. Opinion. See '36 AG Op 78

4631 Separate districts.

Atty. Gen. Opinions. See '32 AG Op 210; '34 AG Op 611

4632 Supervisor.

Atty. Gen. Opinion. See '34 AG Op 169

4633 Maintenance and improvement.

Atty. Gen. Opinions. See '25-26 AG Op 111; '34 AG Op 169; '36 AG Op 272; AG Op June 27, '39

4634 Improvement by city or county.

Atty. Gen. Opinions. See '25-26 AG Op 195, 318, 499; '28 AG Op 373; '32 AG Op 126; '36 AG Op 78; '38 AG Op 794

CHAPTER 240

SECONDARY ROADS

Atty. Gen. Opinions. See '30 AG Op 193, 215, 221, 257; '32 AG Op 26; '38 AG Op 49, 86, 188, 624, 711, 793, 794, 814, 838

SECONDARY ROAD AND BRIDGE SYSTEMS IN GENERAL

4644.01 Construction, repair, and maintenance.

Atty. Gen. Opinions. See '38 AG Op 27, 184, 445, 624, 640, 793, 814; AG Op Feb. 20, '39

Independent contractor—liability for negligence. One who as an independent contractor installs a culvert in a public highway is liable to a traveler in damages consequent on the negligence of said contractor in leaving the highway at the point in question in a condition unsafe for public travel, and without barriers.

Kehm v Dilts, 222-826; 270 NW 388; 3 NCCA (NS) 39

County highway maintenance workman—no representative capacity. A county highway maintenance workman stands in no representative capacity for the employer-county when his duties are ministerial only and when he could possess no authority to act for nor bind the county as its representative, since board of supervisors and county engineer cannot delegate their powers and duties to maintain roads except as those duties are ministerial in character.

Schroyer v Jasper Co., 224-1391; 279 NW 118

Injuries from street defects—plans by competent engineer—nonliability. Where a person is thrown against the top of an automobile while crossing a certain type of open gutters in a street, constructed according to plans, even tho faulty, of a competent engineer, there is no liability on the municipality because in adopting such plans it is exercising its discretion and acting in a governmental capacity, unless it can be said, as a matter of law, that the plans adopted were obviously defective. Evidence held to establish that certain open gutters in street were reasonably safe for traffic at lawful speeds.

Dodds v West Liberty, 225-506; 281 NW 476

Bequest for paving roads — acceptance by county not enjoined. In an action by a taxpayer to obtain an injunction restraining a county from accepting a bequest to be used for paving roads, the injunction was refused where a will and two codicils provided for the bequest, as when all papers were construed together a valid gift to the county was found to have been created which the county had the authority to accept.

Anderson v Board, 226-1177; 285 NW 735

Codicil creating charitable trust to county for paving roads — improper delegation of duties to executor. A first codicil devising an estate to trustees to be administered under county supervision in building roads and a second codicil appointing one executor to aid the county in building roads created a lawful charitable trust with the county as trustee and taxpayers as beneficiaries which was not necessarily invalid because the executor was given administrative duties in the road construction in violation of statute.

Blackford v Anderson, 226-1138; 286 NW 735

4644.02 Secondary road system.

Atty. Gen. Opinions. See '34 AG Op 169; '38 AG Op 27, 445

4644.03 Secondary bridge system.

Atty. Gen. Opinions. See '32 AG Op 134; '34 AG Op 169; '36 AG Op 278; '38 AG Op 445

Highway drainage easement — discretion. The authority to erect a bridge at a specified place in a public highway without limitation as to size of such bridge necessarily invests the public officials with a fair discretion as to such size.

Ehler v Stier, 205-678; 216 NW 637

Negligence — nonliability of county. The statutory duty of a town to keep its streets free from nuisances is not interrupted or suspended during the time when the county under an arrangement with the town is engaged in constructing a culvert in a street which is a continuation of a county road outside the town; and the county is under no legal obligation to reimburse the town for any sum voluntarily paid by it in settlement of suits jointly against the town and county for damages consequent on persons driving into an unguarded excavation made by the county authorities while constructing the culvert.

Norwalk v County, 210-1262; 232 NW 682

4644.04 Designation of roads.

Atty. Gen. Opinion. See '38 AG Op 793

Road as county trunk highway—stop signs.

Davis v Hoskinson, 228- ; 290 NW 497

4644.05 Modification of trunk roads.

Atty. Gen. Opinion. See '38 AG Op 793

4644.08 Secondary road construction fund.

Atty. Gen. Opinions. See '36 AG Op 230; '38 AG Op 27

4644.09 Pledge to local roads.

Atty. Gen. Opinions. See '30 AG Op 264; '36 AG Op 212, 483; '38 AG Op 27, 141, 445, 793; AG Op Sept. 25, '39

4644.10 General pledge.

Atty. Gen. Opinions. See '30 AG Op 200, 237, 251; '36 AG Op 212, 483; '38 AG Op 27, 445, 793

4644.11 Optional maintenance levies.

Atty. Gen. Opinion. See '34 AG Op 373

4644.12 Secondary road maintenance fund.

Atty. Gen. Opinions. See '30 AG Op 116; '36 AG Op 212

4644.13 Pledge of maintenance fund.

Atty. Gen. Opinions. See '30 AG Op 200, 237; '36 AG Op 212; '38 AG Op 640, 837

4644.15 Transfers generally.

Atty. Gen. Opinions. See '36 AG Op 275; AG Op Sept. 25, '39

COUNTY ENGINEER

4644.17 Engineer—term.

Atty. Gen. Opinion. See '34 AG Op 58

Discharge of engineer—conflicting statutes. A duly appointed county engineer who is an honorably discharged soldier may not be summarily discharged by the board of supervisors prior to the end of the term for which appointed, even tho the statute authorizing the appointment of such engineer provides that the "tenure of office may be terminated at any time by the board".

Hahn v County, 218-543; 255 NW 695

Employment binding on new board. Inasmuch as the board of supervisors has statutory authority to employ a county engineer for a period as long as three years, an employment of such engineer at the December meeting of the board for the ensuing calendar year is valid, even tho the personnel of the board changes in January following the meeting.

Hahn v County, 218-543; 255 NW 695

4644.18 Compensation.

Atty. Gen. Opinion. See AG Op May 17, '39

4644.19 Duties—bonds.

Damages—nonliability of highway engineer. A county highway engineer is not liable in damages consequent on his act in making an excavation in a public highway of his county, for a proper and lawful purpose, and in leaving the work in a condition which becomes dangerous, even tho, by leaving the work in said condition, he creates a public nuisance for which he may be punished.

Swartzwelter v Util. Corp., 216-1060; 250 NW 121; 34 NCCA 471

4644.21 Supervision of construction and maintenance work.

Atty. Gen. Opinion. See '38 AG Op 624

Nonliability of highway engineer. A county highway engineer is not liable in damages consequent on his act in making an excavation in a public highway of his county for a proper and lawful purpose, and in leaving the work in a condition which becomes dangerous, even tho, by leaving the work in said condition, he creates a public nuisance for which he may be punished. (§4841, C., '31.)

Swartzwelter v Utilities Corp., 216-1060; 250 NW 121; 34 NCCA 471

Right of way—county engineer—signs. In the absence of signs indicating a different right of way rule, erected by authority not of county engineer but of the board of supervisors, the law giving right of way to traffic from the right applies to an intersection of county trunk roads.

Smithson v Mommsen, 224-307; 276 NW 47

CONSTRUCTION PROGRAM

4644.22 Construction program or project.

Atty. Gen. Opinions. See '34 AG Op 337; '36 AG Op 465, 483, 519, 529; '38 AG Op 42, 141, 445, 759, 793, 838

4644.23 Scope of program.

Atty. Gen. Opinions. See '34 AG Op 337; '38 AG Op 793; AG Op Jan. 19, '39

4644.32 Board's action final.

Atty. Gen. Opinions. See '32 AG Op 179; '38 AG Op 49, 86, 141, 600, 640, 793

Bridges—mandamus to compel. The statutory duty of the board of supervisors to construct bridges over public ditches at points where such ditches intersect secondary roads is enforceable by action of mandamus, such duty being in no manner limited or controlled by the statutory powers granted the county board of approval in adopting secondary road programs.

Robinson v Board, 222-663; 269 NW 921

4644.33 County trunk roads.

Atty. Gen. Opinion. See '34 AG Op 337

4644.35 Surveys required.

Atty. Gen. Opinions. See '38 AG Op 711, 768

4644.36 Nature of survey.

Atty. Gen. Opinion. See '38 AG Op 768

4644.37 Details of survey.

See annotations under §4644.44

Atty. Gen. Opinions. See '38 AG Op 711, 768

4644.39 Contracts and specifications.

Atty. Gen. Opinions. See '38 AG Op 184, 761

4644.40 Advertisement and letting.

Atty. Gen. Opinions. See '32 AG Op 67; '34 AG Op 81; '36 AG Op 45, 216; '38 AG Op 29, 115, 188, 711, 731; AG Op Jan. 30, '39

Avoiding estimates and public letting—effect. This statute cannot be avoided by the subterfuge of buying, in disregard of the statute, material in quantities much exceeding said amount, on the plea that the amount used on each subsequent individual work of repair will be much less than $1,000 in value.

State v Garretson, 207-627; 223 NW 390

Systematic disregard of law. The conduct of a member of the board of supervisors in

systematically disregarding, or by subterfuges avoiding this section evinces such "willfulness" as to render such acts ample ground for removal from office.

State v Garretson, 207-627; 223 NW 390

Competitive bids—void provision. A clause inserted in a public improvement contract, to the effect that if rock or quicksand is encountered, the contractor shall be paid on the basis of cost plus a named percentage, is void when both the specifications and the advertisement for bids are silent as to such contingency.

Gjellefald v Hunt, 202-212; 210 NW 122

Public improvements—estimated quantities as basis for contract—variation with specifications not fatal. In awarding a contract, the function of plans and estimated quantities is to permit a uniform comparison of bids, and the requirement of "unit prices", as a means of payment for variations from the estimated quantities, indicates their variable character, so certain variations between the plans and specifications will not result in a failure of competitive bidding invalidating a contract based thereon.

Interstate Co. v Forest City, 225-490; 281 NW 207

4644.41 Optional advertisement and letting.

Atty. Gen. Opinion. See '38 AG Op 115

4644.42 Approval of road contracts.

Atty. Gen. Opinions. See '38 AG Op 27, 29, 838

4644.43 Record of bids.

Atty. Gen. Opinion. See '38 AG Op 179

4644.44 Trees—ingress or egress—drainage.

Atty. Gen. Opinion. See '38 AG Op 184

Trees in highway not property of adjoining owner. A property owner abutting and occupying a part of a highway has no rights in trees growing on such part of the highway, no matter how long his occupancy of the highway continued before public convenience and necessity required appropriation of the full highway width.

Rabiner v Humboldt Co., 224-1190; 278 NW 612; 116 ALR 89

Improvement of highway—malice immaterial in performance of legal act. Removal of trees from a highway by county authorities for improvement, being a legal act, the question as to whether or not they were acting maliciously as alleged by an abutting property owner is immaterial.

Rabiner v Humboldt Co., 224-1190; 278 NW 612; 116 ALR 89

Finding by county highway authorities of necessity for tree removal—conclusiveness. Conclusion by county authorities that a secondary road could not be improved without removing certain trees, when substantiated by the record, is conclusive on appeal.

Rabiner v Humboldt Co., 224-1190; 278 NW 612; 116 ALR 89

Highways—tree removal—valid exercise of power—no injunction. Injunction will not lie to restrain county authorities from removing trees along a highway when they are acting strictly within their statutory powers.

Rabiner v Humboldt Co., 224-1190; 278 NW 612; 116 ALR 89

Trees—removal for drainage—no injunction. In landowner's action to restrain county from cutting down seven trees in the construction of a highway, where evidence showed that trees were too far apart to constitute a windbreak, that trees were on the highway right of way, and that their destruction was necessary to provide a drainage ditch, lower court properly refused to enjoin destruction under statute prohibiting such destruction unless "materially interfering with improvement of the road".

Harrison v Hamilton County, (NOR); 284 NW 456

Special restrictive statutes not controlling general law. Statutes relating to hedges and drainage, which for such purposes restrict authorities as to molesting ornamental trees and windbreaks, have no application to the general law on improvements of secondary roads.

Rabiner v Humboldt Co., 224-1190; 278 NW 612; 116 ALR 89

Interference with ingress and egress. A highway improvement which compels a property owner to travel slightly farther in going to and from his farm may not be said to interfere substantially with his right of ingress and egress.

Lingo v Page County, 201-906; 208 NW 327

Unnecessary diversion of drainage. Injunction will lie to restrain highway officers from so improving a highway as to unnecessarily divert natural drainage to the substantial injury of a property owner.

Estes v Anderson, 204-288; 213 NW 566

Drainage of surface waters. Road authorities will not be held estopped from carrying surface waters across a public highway in the course of natural drainage because of the fact that for more than ten years they have unsuccessfully attempted to divert such waters from said natural course of drainage, the landowner affected not having changed his position because of such unsuccessful efforts.

Schwartz v County, 208-1229; 227 NW 91

Perpetuation of unlawful drainage by bridge. The board of supervisors may not, by the construction and maintenance of a culvert in the public highway, supplement, continue and per-

petuate an unlawful and material diversion of surface waters by a dominant estate holder, all to the substantial damage of the servient estate holder.

Anton v Stanke, 217-166; 251 NW 153

Prohibited obstruction. Principle reaffirmed that a property owner may not legally place obstructions within a public highway and thereby interfere with the drainage of surface waters across such highway.

Adams County v Rider, 205-137; 218 NW 60

Highway drainage easement — discretion. The authority to erect a bridge at a specified place in a public highway without limitation as to the size of such bridge, necessarily invests the public officials with a fair discretion as to such size.

Ehler v Stier, 205-678; 216 NW 637

4644.45 County trunk roads in cities and towns.

Atty. Gen. Opinions. See '38 AG Op 27, 346

Presumptions. When a board of supervisors proceeds to improve a town street which is a continuation of a county road, it will be presumed, nothing being shown to the contrary, that the board and the town council first entered into a written agreement covering the work as provided by statute.

Norwalk v County, 210-1262; 232 NW 682

Negligence in constructing culvert. The statutory duty of a town to keep its streets free from nuisances is not interrupted or suspended during the time when the county under an arrangement with the town is engaged in constructing a culvert in a street which is a continuation of a county road outside the town; and the county is under no legal obligation to reimburse the town for any sum voluntarily paid by it in settlement of suits, jointly against the town and county, for damages consequent on persons driving into an unguarded excavation made by the county authorities while constructing the culvert.

Norwalk v County, 210-1262; 232 NW 682

ANTICIPATION OF FUNDS

4644.46 Construction fund anticipated.

Atty. Gen. Opinions. See '32 AG Op 252; '38 AG Op 838; AG Op March 2, '39

4644.47 Anticipatory resolution.

Atty. Gen. Opinion. See '32 AG Op 252

4644.48 Recitals.

Atty. Gen. Opinion. See '32 AG Op 252

MISCELLANEOUS PROVISIONS

4645 Surveys and reports.

Atty. Gen. Opinion. See '25-26 AG Op 311

4653 Itemized and certified bills.

Atty. Gen. Opinion. See '36 AG Op 214

4655 Advance payment of pay rolls.

Atty. Gen. Opinion. See '28 AG Op 319

4657 Gravel beds.

Atty. Gen. Opinions. See '25-26 AG Op 199, 394, 420; '28 AG Op 370; '36 AG Op 214

Taking gravel—injury to mortgage security —measure of damages. A mortgagee, being a lienholder, may not maintain trespass against third persons but must sue for injury to his security, and in taking gravel from mortgaged premises the measure of damages is not the value of the gravel taken but the difference in the value of the premises before and after the taking.

Bates v Humboldt County, 224-841; 277 NW 715

4658 Procedure.

Atty. Gen. Opinions. See '28 AG Op 370; '36 AG Op 214

4658.1 Right to prospect.

Atty. Gen. Opinion. See '36 AG Op 214

4659 Use of gravel beds.

Atty. Gen. Opinions. See '25-26 AG Op 394; '32 AG Op 53; '38 AG Op 189, 837

4661 Intercounty highways.

Atty. Gen. Opinions. See '25-26 AG Op 106; '28 AG Op 375; '38 AG Op 346

4662 Enforcement of duty.

Atty. Gen. Opinions. See '25-26 AG Op 106; '38 AG Op 624, 769

4662.1 Construction by commission.

Atty. Gen. Opinions. See '28 AG Op 375; '38 AG Op 624, 769

4662.2 Payment.

Atty. Gen. Opinions. See '28 AG Op 375; '38 AG Op 624, 769

4663 Interstate highways.

Atty. Gen. Opinion. See '25-26 AG Op 76

4666 Bridges and culverts on city boundary line.

Atty. Gen. Opinion. See '38 AG Op 346

4667 Width of bridges and culverts.

Atty. Gen. Opinion. See '38 AG Op 115

4668 Definitions.

Atty. Gen. Opinion. See '28 AG Op 137

Perpetuation of unlawful drainage by bridge. The board of supervisors may not, by the construction and maintenance of a culvert in the public highway, supplement, continue and perpetuate an unlawful and material diversion of surface waters by a dominant estate holder, all to the substantial damage of the servient estate holder.

Anton v Stanke, 217-166; 251 NW 153

4671 Bridge specifications.

Atty. Gen. Opinions. See '25-26 AG Op 311, 480

4672 Approval of contract.

Atty. Gen. Opinions. See '25-26 AG Op 311, 480; '30 AG Op 285

4673 Record of plans.

Atty. Gen. Opinion. See '38 AG Op 711

Estimated quantities as basis for contract—variation with specifications not fatal. In awarding a construction contract, the function of plans and estimated quantities is to permit a uniform comparison of bids, and the requirement of "unit prices" as a means of payment for variations from the estimated quantities indicates their variable character, so certain variations between the plans and specifications will not result in a failure of competitive bidding invalidating a contract based thereon.

Interstate Co. v Forest City, 225-490; 281 NW 207

4674 Record of final cost.

Atty. Gen. Opinion. See '38 AG Op 711

4678 Bridges over state boundary line streams.

Atty. Gen. Opinion. See '28 AG Op 418

Election for establishment—form of ballot. A petition for the submission of a proposition to the electors must substantially contain every matter required by the statute, in order that from the petition the ballot may be so framed that the entire proposition will be submitted to the electors.

O'Keefe v Hopp, 210-398; 228 NW 625

Petition—fatal omission. A statute which authorizes the submission to the electors of a proposition for the partial construction and maintenance by the county of a bridge across a boundary line river, on a petition clearly contemplating a statement of the cost of both construction and maintenance, is not substantially complied with by the filing of a petition:

1. Which fails to state the cost of maintenance, either in a definite lump sum, or in terms of an annual maximum tax rate, or

2. Which fails definitely to state that the sister state or one of its municipalities has or will legally obligate itself for the remaining construction costs.

O'Keefe v Hopp, 210-398; 228 NW 625

4679 Submission of question.

Atty. Gen. Opinion. See '28 AG Op 418

4682 Levy—bond.

Atty. Gen. Opinion. See '28 AG Op 418

4685 Interest in contracts.

Atty. Gen. Opinions. See '28 AG Op 296, 372; '36 AG Op 660; '38 AG Op 185

CHAPTER 240.1

FARM-TO-MARKET ROADS

4686.14 Bids—awards to officials prohibited.

Public improvements—estimated quantities as basis for contract—variation with specifications not fatal. In awarding a contract, the function of plans and estimated quantities is to permit a uniform comparison of bids, and the requirement of "unit prices", as a means of payment for variations from the estimated quantities, indicates their variable character, so certain variations between the plans and specifications will not result in a failure of competitive bidding invalidating a contract based thereon.

Interstate Co. v Forest City, 225-490; 281 NW 207

4686.20 Supervisors resolution to state treasurer.

Atty. Gen. Opinion. See AG Op Oct. 6, '39

4686.22 Right of way—how acquired.

Atty. Gen. Opinion. See AG Op July 24, '39

4686.23 Eminent domain applicable.

Procedure—exclusiveness. Pending eminent domain proceedings by and on behalf of a county relative to land for highway purposes preclude an independent action by the landowner for his damages.

Gibson v Union Co., 208-314; 223 NW 111

CHAPTER 241

FINANCING PRIMARY AND SECONDARY ROADS

Atty. Gen. Opinions. See '25-26 AG Op 299, 331; '28 AG Op 240, 281, 375; '30 AG Op 145; '32 AG Op 116; '36 AG Op 490, 580; '38 AG Op 794

4745 "Secondary road system" defined.

Atty. Gen. Opinion. See '25-26 AG Op 290

4745.1 Streets as extensions of secondary roads.

Municipal discharge of statutory liability. A contract between a county and a city wherein the city, in discharge of its statutory liability relative to one-half of the cost of paving a city boundary line road, agrees to issue to the county road certificates in anticipation of the collection of special assessments on benefited property, cannot be construed as an unconditional promise on the part of the city to pay said statutory liability.

Polk County v Des Moines, 210-342; 226 NW 718

4746 Assessment districts—survey and report—notice—hearing.

Atty. Gen. Opinions. See '25-26 AG Op 81, 88; '28 AG Op 136; '30 AG Op 220, 238; '32 AG Op 50, 87; '38 AG Op 54

Appearance in assessment proceedings. The voluntary appearance by a property owner in proceedings to assess his property as part of a road assessment district does not cure the fatal defect arising from want of jurisdiction to establish the district.

Johnson v Board, 213-988; 238 NW 66

Jurisdiction—estoppel. The fact that a property owner lived adjacent to a highway and knew that it was being improved does not estop him from questioning the jurisdiction of the public authorities to establish the district embracing his land.

Johnson v Board, 213-988; 238 NW 66

Fatally defective notice. The board of supervisors acquires no jurisdiction to establish a secondary road assessment district by the service of a notice which fails to state the "year" in which the hearing will be held.

Johnson v Board, 213-988; 238 NW 66

Assessment of tenants in common. Jurisdiction to establish an assessment district as to only one of two tenants in common does not embrace jurisdiction to levy an assessment against the farm as a whole.

Johnson v Board, 213-988; 238 NW 66

4748 Plans—bids.

Atty. Gen. Opinions. See '30 AG Op 220; '38 AG Op 731

4749 Inspection of work.

Atty. Gen. Opinions. See '30 AG Op 52, 123

4750 Payment for county road improvements.

Atty. Gen. Opinions. See '25-26 AG Op 88, 394; '30 AG Op 220

4751 Payment for township secondary roads—maintenance.

Atty. Gen. Opinions. See '25-26 AG Op 88, 394

4752 Advancing costs and reimbursement of funds.

Atty. Gen. Opinion. See '25-26 AG Op 81

4753.03 Hearing—levy of assessments—payment.

Atty. Gen. Opinions. See '28 AG Op 400; '38 AG Op 794

Appearance in assessment proceedings. The voluntary appearance by a property owner in proceedings to assess his property as part of a road assessment district does not cure the fatal defect arising from want of jurisdiction to establish the district.

Johnson v Board, 213-988; 238 NW 66

Assessment—tenants in common. Jurisdiction to establish an assessment district as to only one of two tenants in common does not embrace jurisdiction to levy an assessment against the farm as a whole.

Johnson v Board, 213-988; 238 NW 66

4753.05 Appeals—power of court—duty of clerk.

Abortive appeal. An appeal from an order levying an assessment within a secondary road district is not perfected (1) by the timely giving of notice of appeal, and (2) by the timely filing of a purported appeal bond which is not signed by the surety; nor is the defect cured by the filing, after the statutory time for appeal has expired, of an affidavit of qualification by a party who states "that I am surety in the above bond".

Johnson v Board, 213-988; 238 NW 66

4753.10 Election in re bonds—notice—form of proposition—canvass—procedure to test legality.

Discussion. See 15 ILR 235—State highway bonds

Atty. Gen. Opinions. See '30 AG Op 86; '36 AG Op 600

Primary road bonds—unlawful diversion. County primary road bonds voted for the purpose of improving "the primary roads of the county" cannot be legally issued except to improve those roads which were primary roads in the county on the date when the bonds were

authorized by the voters. For instance, where the state highway commission, after the election, abandoned a 12-mile strip, part of a pre-existing primary road, and substituted therefor a substantially equal mileage two miles distant, held, the bonds could not be legally issued for the purpose of paving the substitute.

Harding v Board, 213-560; 237 NW 625

Scharnberg v Highway Com., 214-1041; 243 NW 334

Plaintiffs—taxpayers. A taxpayer may maintain an action to enjoin the board of supervisors from issuing county bonds for a purpose not authorized by law.

Harding v Board, 213-560; 237 NW 625

4753.11 Bonds—form — denomination —interest—payment.

Atty. Gen. Opinion. See '30 AG Op 282

Vote required. This section insofar as it authorizes the issuance of primary road bonds on a majority vote was impliedly repealed by the subsequent enactment of §1171-d4, C., '31, [§1171.18, C., '39] requiring a favorable vote equal to 60 percent of all the votes cast.

Waugh v Shirer, 216-468; 249 NW 246

Primary road bonds—unlawful diversion. Roads and streets within cities and towns are not part of the primary road system, even tho such roads and streets are continuations of primary roads which are outside cities and towns. It follows that county bonds voted for the purpose of improving the primary roads of the county may not be legally issued nor may the proceeds thereof be legally employed for the improvement of roads and streets within cities and towns.

Wallace v Foster, 213-1151; 241 NW 9

Inadequate provision for payment. The court cannot assume that inadequate provision has been made for the payment of county primary road bonds and that, therefore, the bonds are void, in view of the fact that the state has underwritten every such bond through its primary road fund and has appropriated said fund to said purpose for the life of said bonds.

Harding v Board, 213-560; 237 NW 625

4753.12 Bond levy.

Atty. Gen. Opinions. See '28 AG Op 317; '36 AG Op 515

4753.13 Bonds—issuance — sale — retirement — terminating interest — exemption from taxation.

Atty. Gen. Opinions. See '28 AG Op 316; '36 AG Op 362

Taxation of interest on tax-exempt securities. Interest on tax-exempt municipal securities is not exempt from state income tax, tho the securities themselves are, by statute, exempt from general property tax. The statutory declaration that said securities "shall not be taxed" has reference solely to general property tax, and not to an excise tax—an income tax—on the interest collected on such securities.

Hale v Board, 223-321; 271 NW 168; 302 US 95

4753.14 Nature of bonds—refunding.

Atty. Gen. Opinions. See '30 AG Op 193, 353.

4753.17 Limitation on indebtedness.

Atty. Gen. Opinions. See '30 AG Op 123; '32 AG Op 226

4753.18 Penalty for violations.

Atty. Gen. Opinion. See '28 AG Op 316

4753.19 Refunding bonds—proceeds—management.

Atty. Gen. Opinions. See '36 AG Op 515, 577

CHAPTER 241.1

IMPROVEMENT OF PRIMARY ROADS

Atty. Gen. Opinions. See '28 AG Op 128, 281; '36 AG Op 491, 589, 600

4755.01 Federal and state cooperation.

Atty. Gen. Opinions. See '36 AG Op 548; '38 AG Op 518; AG Op May 17, '39

4755.02 "Road systems" defined.

Atty. Gen. Opinions. See '28 AG Op 240, 246; '32 AG Op 98, 116

Primary road bonds — unlawful diversion. County primary road bonds voted for the purpose of improving "the primary roads of the county" cannot be legally issued except to improve those roads which were primary roads in the county on the date when the bonds were authorized by the voters. For instance, where the state highway commission, after the election, abandoned a 12-mile strip, part of a pre-existing primary road, and substituted therefor a substantially equal mileage two miles distant, held, the bonds could not be legally issued for the purpose of paving the substitute.

Harding v Board, 213-560; 237 NW 625

Scharnberg v Highway Com., 214-1041; 243 NW 334

Improvement—primary road bonds—unlawful diversion. Roads and streets within cities and towns are not part of the primary road system, even tho such roads and streets are continuations of primary roads which are outside cities and towns. It follows that county bonds voted for the purpose of improving the primary roads of the county may not be legally issued nor may the proceeds thereof be

legally employed for the improvement of roads and streets within cities and towns.

Wallace v Foster, 213-1151; 241 NW 9

State commerce commission abandoning overhead crossing—street change resulting. The state commerce commission has no power to order the abandonment of an overpass or overhead crossing over a railroad in a city or town, which results in altering the streets thereof. Jurisdiction of its streets is a city function which may not be invaded by the state commerce commission, regardless of its good faith motives, and certiorari will lie to prevent such invasion.

Huxley (Town) v Conway, 226-268; 284 NW 136

4755.03 Primary road fund.

Atty. Gen. Opinions. See '34 AG Op 151; '36 AG Op 258; '38 AG Op 624

4755.04 Disbursement of fund.

Atty. Gen. Opinions. See '28 AG Op 316; '30 AG Op 78; '36 AG Op 258, 515, 577, 580, 600; '38 AG Op 624; AG Op Feb. 28, '40

Crossings—safe condition controlled by transportation needs. It is the duty of railways and municipalities to keep pace with the changes in transportation methods and to keep highways and railroad crossings in a reasonably safe condition, inasmuch as a type of crossing construction considered safe when built might be unsafe for a later changed method of use by the public.

Harris v Railway, 224-1319; 278 NW 338

4755.08 Improvement of primary system.

Primary road bonds—unlawful diversion. County primary road bonds voted for the purpose of improving "the primary roads of the county," cannot be legally issued except to improve those roads which were primary roads in the county on the date when the bonds were authorized by the voters. For instance where the state highway commission, after the election, abandoned a 12-mile strip, part of a pre-existing primary road, and substituted therefor a substantially equal mileage 2 miles distant, held, the bonds could not be legally issued for the purpose of paving the substitute.

Harding v Board, 213-560; 237 NW 625

Legal discretion uncontrollable. The court cannot compel the state highway commission to expend county primary road funds in the improvement of the primary roads of the county; nor can the court control said commission in the legal expenditure of other funds under the control of the commission.

Scharnberg v Highway Com., 214-1041; 243 NW 334

4755.09 Surveys, plans, and specifications.

Interference with ingress and egress. A highway improvement which compels a property owner to travel slightly farther in going to and from his farm may not be said to interfere substantially with his right of ingress and egress.

Lingo v Page County, 201-906; 208 NW 327

Unnecessary diversion of drainage. Injunction will lie to restrain highway officers from so improving a highway as to unnecessarily divert natural drainage to the substantial injury of a property owner.

Estes v Anderson, 204-288; 213 NW 566

Nonestoppel to drain surface waters in natural course.

Schwartz v County, 208-1229; 227 NW 91

Prohibited obstruction. Principle reaffirmed that a property owner may not legally place obstructions within a public highway and thereby interfere with the drainage of surface waters across such highway.

Adams Co. v Rider, 205-137; 218 NW 60

Highway drainage easement — discretion. The authority to erect a bridge at a specified place in a public highway without limitation as to the size of such bridge necessarily invests the public officials with a fair discretion as to such size.

Ehler v Stier, 205-678; 216 NW 637

Injuries from street defects—plans by competent engineer—nonliability. Where a person is thrown against the top of an automobile while crossing a certain type of open gutters in a street, constructed according to plans, even tho faulty, of a competent engineer, there is no liability on the municipality because in adopting such plans it is exercising its discretion and acting in a governmental capacity, unless it can be said, as a matter of law, that the plans adopted were obviously defective. Evidence held to establish that certain open gutters in street were reasonably safe for traffic at lawful speeds.

Dodds v West Liberty, 225-506; 281 NW 476

Engineer's plans accepted by city—no obvious defects — no imputation of negligence. Where engineer's plans for paving alley were not obviously defective in failing to show grade of alley, and the work was done in accordance with the plans, no negligence in adopting the plans can be imputed to the city, since engineering expertness is not within the province of the council members, and a lack of such expertness is the reason for employing a competent engineer and relying on his ability and plans for the construction of the improvement.

Russell v Sioux City, 227-1302; 290 NW 708

4755.10 Bids—contracts prohibited.

Atty. Gen. Opinions. See '34 AG Op 390; '38 AG Op 185; AG Op June 29, '39

4755.11 Award of contracts—bond.

Public improvements—estimated quantities as basis for contract—variation with specifications not fatal. In awarding a contract, the function of plans and estimated quantities is to permit a uniform comparison of bids, and the requirement of "unit prices", as a means of payment for variations from the estimated quantities, indicates their variable character, so certain variations between the plans and specifications will not result in a failure of competitive bidding invalidating a contract based thereon.

Interstate Co. v Forest City, 225-490; 281 NW 207

4755.20 Auditor—appointment—bond—duties.

Atty. Gen. Opinion. See '38 AG Op 814

4755.21 Improvements in cities and towns.

Atty. Gen. Opinions. See '38 AG Op 199, 518

4755.23 Jurisdiction to establish.

Alteration—power to make. The power to make changes in the location of highways in the interest of safety, economy, and utility rests:

1. As to primary roads, in the state highway commission on its own motion.

2. As to secondary roads, in the board of supervisors on its own motion. (§§4607, 4755-b36, [§4755.33, C., '39], C., '27.)

And a cut-off of 3 miles which will eliminate 4 miles of a 350-mile primary road will not be deemed other than a change—will not be deemed an establishment of a road, the power to establish roads being a power not possessed by the state commission.

Jenkins v Highway Com., 205-523; 218 NW 258

Enjoining state highway commission. An action against the state highway commission to enjoin it from relocating a primary road, unaccompanied by any allegation of wrongful acts, is, in effect, an action against the state, and nonmaintainable.

Long v Highway Com., 204-376; 213 NW 532

Condemnation of orchard, etc. The state highway commission has no authority to condemn for primary road purposes the ornamental grounds or orchard of an owner without his consent.

Hoover v Highway Com., 207-56; 222 NW 438

"Rounding corner." The statutory provision that, in condemning land for road purposes, no ground shall be taken "for the rounding of a corner" when the dwelling house, lawn, and ornamental trees connected therewith are located at such corner necessarily has no application when the condemnation is of land extending in a straight line.

Hoover v Highway Com., 210-1; 230 NW 561

"Rounding corner." The statutory provision that no ground shall be taken for a primary road "for the rounding of a corner" where certain named improvements are located, is violated by locating a primary road through a 40-acre tract on an arc which extends substantially from the southeast to the northwest corner of the tract, and which so bends convexly to the northeast corner of the tract as to leave approximately 4 acres at said corner where the said improvements are located.

Butterworth v Highway Com., 210-1231; 232 NW 760

"Rounding corner." The statutory provision, that in the establishment, relocation, and improvement of primary roads, no ground shall, without the consent of the owner, be taken "for the rounding of a corner where the dwelling house, * * * connected therewith are located", is violated by locating such road through a 14½-acre and substantially square tract of land, and on an arc which extends from the southeast corner to the northwest corner of said tract, and which arc so bends to the northeast corner of said tract as to cut off a segment of land of 5.22 acres in said latter corner, on which said improvements are located. This is true tho the public authorities propose to condemn for road purposes said entire segment of 5.22 acres in addition to said curved roadway.

Reed v Highway Com., 221-500; 266 NW 47
Hicks v Highway Com., 221-509; 266 NW 51

Review of condemnation proceedings. Certiorari will lie to review condemnation proceedings by the state highway commission.

Jenkins v Highway Com., 205-523; 218 NW 258

Easements—evidence—old road records. In an action to establish a road by prescription, evidence in the form of a page from an old road record made in 1850, which was a copy of the surveyor's notes, and introduced as evidence of an adverse claim, is not sufficient when it does not show that such road as shown on the old record was the same as the road now in use. Without this, the road could not be established on the sole evidence of long continued use.

Slack v Herrick, 226-336; 283 NW 904

Highway construction — interference with easement. When a highway was established through a city, taking the larger part of land over which the plaintiff had been granted an easement, a property right belonging to the plaintiff was thereby destroyed, and when she was compelled to sell the property at a loss because of its impaired value, she was entitled to a writ of mandamus against the high-

way commission to compel the assessment of the damages sustained.

Dawson v McKinnon, 226-756; 285 NW 258

Noncontiguous tracts as one farm. In the condemnation of land for highway purposes, the record may be such as to present a jury question whether noncontiguous tracts are being used as one farm so that the damages resulted to it as an entirety, or whether the land was in such separate tracts that the damages should be assessed to each tract separately.

Paulson v Highway Com., 210-651; 231 NW 296

Governmental agency to be treated as individual. A governmental agency has a right, in eminent domain proceedings, to have the jury instructed that such agency is entitled to have the cause tried and determined precisely as tho said agency was an individual.

Welton v Highway Com., 211-625; 233 NW 876

Damages do not embrace cost of fence. Evidence is admissible in proceedings to condemn land for highway purposes to show the general fact that the condemnation may impose on the remainder of the farm an added burden in the form of extra fencing and the repair, maintenance, and replacement thereof; but evidence of the cost of fencing the land along the new highway is wholly unallowable, and equally unallowable are instructions which substantially direct the jury to consider such costs as an element of damages.

Dean v State, 211-143; 233 NW 36

Procedure—exclusiveness. Pending eminent domain proceedings by and on behalf of a county relative to land for highway purposes preclude an independent action by the landowner for his damages.

Gibson v Union Co., 208-314; 223 NW 111

4755.25 Bridges, viaducts, etc., on municipal primary extensions.

Atty. Gen. Opinion. See '38 AG Op 518

Crossings — safe condition controlled by transportation needs. It is the duty of railways and municipalities to keep pace with the changes in transportation methods and to keep highways and railroad crossings in a reasonably safe condition, inasmuch as a type of crossing construction considered safe when built might be unsafe for a later changed method of use by the public.

Harris v Railway, 224-1319; 278 NW 338

4755.27 Maintenance.

Atty. Gen. Opinion. See '30 AG Op 175

4755.29 Completing improvement programs.

Atty. Gen. Opinions. See '28 AG Op 128; '34 AG Op 151; '36 AG Op 258, 515, 580, 600

Improvements—primary road bonds—unlawful diversion. Roads and streets within cities and towns are not part of the primary road system, even tho such roads and streets are continuations of primary roads which are outside cities and towns. It follows that county bonds voted for the purpose of improving the primary roads of the county may not be legally issued nor may the proceeds thereof be legally employed for the improvement of roads and streets within cities and towns.

Wallace v Foster, 213-1151; 241 NW 9

4755.33 Transfer of powers and duties.

Atty. Gen. Opinion. See '28 AG Op 361

Alteration—power to make. The power to make changes in the location of highways in the interest of safety, economy, and utility rests:

1. As to primary roads, in the state highway commission on its own motion.
2. As to secondary roads, in the board of supervisors on its own motion.

And a cut-off of 3 miles which will eliminate 4 miles of a 350-mile primary road will not be deemed other than a change, will not be deemed an establishment of a road, the power to establish roads being a power not possessed by the state commission. (Power to "establish" see §§4755-b27, 4755-c1, C., '31 [§§4755.23, 4755.24, C., '39]).

Jenkins v Highway Com., 205-523; 218 NW 258

Eminent domain—excessive award—farm already bisected. A $6,000 verdict, being one-fourth the value of a 212-acre farm, for taking 9.63 acres of land for highway purposes, at least part of which was permanently pasture land, from a farm already bisected by a railroad is so grossly excessive as to indicate passion and prejudice, and when so appearing will, in condemnation proceedings as in negligence cases, be set aside.

Luthi v Highway Com., 224-678; 276 NW 586

MARKINGS FOR MUNICIPALITIES

4755.34 Lateral or detour routes in cities and towns.

State commerce commission abandoning overhead crossing—street change resulting. The state commerce commission has no power to order the abandonment of an overpass or overhead crossing over a railroad in a city or town, which results in altering the streets thereof. Jurisdiction of its streets is a city function which may not be invaded by the state commerce commission, regardless of its

good-faith motives, and certiorari will lie to prevent such invasion.

Huxley (Town) v Conway, 226-268; 284 NW 136

VACATION OF PRIMARY ROADS

4755.37 Power to vacate.

Atty. Gen. Opinion. See '34 AG Op 611

4755.39 Notice—service.

Atty. Gen. Opinion. See '34 AG Op 611

4755.43 Damages—payment—appeal.

Atty. Gen. Opinion. See '34 AG Op 611

CHAPTER 241.2

FINANCING PRIMARY ROAD BONDS

Atty. Gen. Opinions. See '36 AG Op 258, 490, 515, 577, 580, 600

CHAPTER 242

IMPROVEMENT OF COUNTY AND PRIMARY ROADS

Atty. Gen. Opinions. See '25-26 AG Op 291, 299, 311; '30 AG Op 53; '36 AG Op 490

4756 Bonds and taxes.

Atty. Gen. Opinions. See '25-26 AG Op 293; '30 AG Op 353

4761 Form of submission.

Atty. Gen. Opinions. See '25-26 AG Op 309; '28 AG Op 334; '30 AG Op 53

Repeal of source of payment—effect. The repeal of a statute which provides the funds with which to retire duly authorized bonds as they are issued, without providing any new source of payment, necessarily precludes the further issuance of such bonds.

Dee v Tama Co., 209-1341; 230 NW 337

4762 Combining or separating proposition.

Atty. Gen. Opinion. See '25-26 AG Op 293

4763 Bonds—maturity—interest.

Atty. Gen. Opinion. See '30 AG Op 282

4767 Budget required.

Atty. Gen. Opinion. See '25-26 AG Op 309

4771 Statutes applicable.

Atty. Gen. Opinions. See '25-26 AG Op 299, 311; '30 AG Op 353

4773 Optional procedure.

Atty. Gen. Opinion. See '25-26 AG Op 293

CHAPTER 243

ROAD MAINTENANCE PATROL

4774 Road patrolmen.

Highway workman not "road patrolman"—not excluded from workmen's compensation by "official position". A county highway maintenance workman is not necessarily a patrolman under §4774, C., '35, and not a person holding an "official position" such as denies him the benefits of the workmen's compensation act, when there was no record of an appointment, no approval of a bond, no oath as an official nor as a peace officer, and when no badge of office had ever been furnished.

Schroyer v Jasper Co., 224-1391; 279 NW 118

4776 Bonds.

Liability. The statutory bond required of road patrolmen for the performance of their statutory duties in caring for the roads assigned to them, does not embrace liability to a traveler in damages consequent on the negligent handling of road machinery.

Bateson v County, 213-718; 239 NW 803

4778 Duties.

Atty. Gen. Opinions. See '25-26 AG Op 90, 413, 486; '30 AG Op 46

4779 Additional authority—badge—oath.

Atty. Gen. Opinions. See '25-26 AG Op 90, 383, '30 AG Op 46, 144

CHAPTER 246.1

WEEDS

Atty. Gen. Opinions. See '38 AG Op 408, 497

4829.01 Noxious weeds.

Atty. Gen. Opinion. See '28 AG Op 218

4829.03 Weed commissioner.

Atty. Gen. Opinion. See '30 AG Op 161

4829.05 Entering land—limitation.

Atty. Gen. Opinion. See AG Op April 26, '39

4829.06 Notice to owner.

Atty. Gen. Opinion. See AG Op April 22, '39

4829.09 Duty of board to enforce.

Atty. Gen. Opinion. See AG Op June 29, '39

4829.10 Duty of owner or tenant.

Atty. Gen. Opinions. See '28 AG Op 172; '30 AG Op 152, 179; '32 AG Op 56, 93

4829.13 Program of control.

Atty. Gen. Opinions. See '28 AG Op 172; AG Op Apr. 3, '39, Oct. 2, '39

4829.18 Order for destruction on roads.

Atty. Gen. Opinion. See AG Op Sept. 5, '39

4829.19 Cost of such destruction.

Atty. Gen. Opinions. See '30 AG Op 179; '38 AG Op 408

4829.20 Duty of highway maintenance men.

Atty. Gen. Opinion. See '38 AG Op 408

4829.22 Punishment of officer.

Atty. Gen. Opinions. See '38 AG Op 408, 762

CHAPTER 247

HEDGES ALONG HIGHWAYS

Atty. Gen. Opinions. See '25-26 AG Op 352; '34 AG Op 78

4830 Hedges and windbreaks—trimming.

Trees, secondary road construction. See under §4644.44

Special restrictive statutes not controlling general law. Statutes relating to hedges and drainage, which for such purposes restrict authorities as to molesting ornamental trees and windbreaks, have no application to the general law on improvements of secondary roads.

Rabiner v Humboldt Co., 224-1190; 278 NW 612; 116 ALR 89

4831 Destruction by supervisors—tax.

Special restrictive statutes not controlling general law. Statutes relating to hedges and drainage, which for such purposes restrict authorities as to molesting ornamental trees and windbreaks, have no application to the general law on improvements of secondary roads.

Rabiner v Humboldt Co., 224-1190; 278 NW 612; 116 ALR 89

4833 Exceptions.

Atty. Gen. Opinion. See '38 AG Op 181

Tree limb over electric wire—nonremoval.

Porter v Elec. Co., 228- ; 292 NW 231

CHAPTER 248

OBSTRUCTIONS IN HIGHWAYS

Atty. Gen. Opinions. See '28 AG Op 184; '30 AG Op 346; '36 AG Op 525

4834 Removal.

Obstructions as criminal offense. See under §13120, Vol I

Atty. Gen. Opinions. See '28 AG Op 297; '30 AG Op 332

Long-continued obstructions furnish no basis for legal right.

Dickson v Davis County, 201-741; 205 NW 456

Malice immaterial in performance of legal act. Removal of trees from a highway by county authorities for improvement being a legal act, the question as to whether or not they were acting maliciously as alleged by an abutting property owner is immaterial.

Rabiner v Humboldt County, 224-1190; 278 NW 612; 116 ALR 89

Duty to remove stalled vehicle from highway. Where a motor vehicle is stalled in a snowdrift and obstructs half of the highway, a motorist must use reasonable expedience to remove such vehicle.

Youngman v Sloan, 225-558; 281 NW 130

Damages—nonliability of highway engineer. A county highway engineer is not liable in damages consequent on his act in making an excavation in a public highway of his county, for a proper and lawful purpose, and in leaving the work in a condition which becomes dangerous, even tho, by leaving the work in said condition, he creates a public nuisance for which he may be punished.

Swartzwelter v Util. Corp., 216-1060; 250 NW 121; 34 NCCA 471

4835 Fences and electric transmission poles.

Road fenced less than established width. Injunction will not lie on behalf of a landowner to prevent a county from removing fences as obstructions in the highway—the fences having been built more than fifty years ago on a 40-foot width—when the road record shows not only a 66-foot road but all the mandatory prerequisites for establishment.

Davelaar v Marion County, 224-669; 277 NW 744

Encroachment on highway—supervisors removing landowner's fences. Injunction by landowner will not lie to prevent county supervisors from removing landowner's fences encroaching on highway even tho such fences have existed for seventy years.

Richardson v Derry, 226-178; 284 NW 82

Adjoining landowner—no title accrues from encroachment on highway. Encroachment by an adjoining landowner on an established public highway will not ripen into a title through any statute of limitations, doctrine of acquiescence, adverse possession, or estoppel—the establishment and maintenance of public highways being a governmental function.

Richardson v Derry, 226-178; 284 NW 82

4836 Notice.

Removal—injunction. Highway officials are properly enjoined from removing a fence from the highway and to the line of the highway (1) when the landowner has not had the full statutory 60-day notice to make the removal, and (2) when the said notice to the landowner was served by registered mail, instead of being served as an original notice of suit is required to be served.

Harbacheck v Tel. Co., 208-552; 226 NW 171

4838 New lines.

Atty. Gen. Opinions. See '30 AG Op 224; '36 AG Op 525; '38 AG Op 318; AG Op May 17, '39, Sept. 8, '39

Power of county engineer. A franchise issued by the board of railroad commissioners to operate an electric transmission line "over, along, and across" a specified highway, under specifications calling for a crossarm at the top of the poles, carries the right and power in the grantee so to erect its line that all parts thereof, including the superstructure, will be wholly within the lines of said highway. It follows that the general power of the county engineer under this section to locate such lines does not embrace the power so to locate the line that part of the superstructure will overhang land outside the highway. (Overruling Central States Elec. Co. v Pocahontas Co., 223 NW 236.)

Iowa Corp. v Lindsey, 211-544; 231 NW 461

Location of transmission poles—jurisdiction. A written application to the highway engineer for the location of transmission poles along a highway is not jurisdictional. In other words, a proper location may be made on an oral application.

Swartzwelter v Utilities Corp., 216-1060; 250 NW 121

Lawfulness of action. In the absence of any evidence or showing to the contrary, it will not be presumed that a public service corporation is seeking the location of its lines along a highway without having procured a franchise or that the highway engineer is proceeding to mark such location without a written application therefor.

Swartzwelter v Utilities Corp., 216-1060; 250 NW 121

Loaning servant to another. A utility corporation, seeking to set its transmission poles along a public highway, is not responsible for the acts of its employees in assisting the county highway engineer, under his absolute direction and control, in finding a lost section corner which, when found, enables the engineer, first, to locate the lines of the highway, and second, the line of the poles.

Reason: The utility employees in the search for the lost corner become the special employees of the highway engineer.

Swartzwelter v Utilities Corp., 216-1060; 250 NW 121; 34 NCCA 471

4839 Cost of removal—liability.

Atty. Gen. Opinions. See '38 AG Op 318; AG Op Aug. 29, '39

Nonimplication for compensation. The removal by an owner of land of fences across a public highway on the land, in compliance with a demand of the public authorities, gives rise to no implied contract on the part of the municipality to pay the value of the work and materials necessary in effecting such removal.

Hall v Union Co., 206-512; 219 NW 929

4840 Duty of road officers.

Atty. Gen. Opinion. See '38 AG Op 318

4841 Nuisance.

Atty. Gen. Opinion. See '38 AG Op 318

Nonliability of highway engineer. A county highway engineer is not liable in damages consequent on his act in making an excavation in a public highway of his county for a proper and lawful purpose and in leaving the work in a condition which becomes dangerous, even tho by leaving the work in said condition he creates a public nuisance for which he may be punished.

Swartzwelter v Utilities Corp., 216-1060; 250 NW 121; 34 NCCA 471

Aerial obstructions—justifiable assumption. The operator of a truck along a public street

has a right, in the absence of actual knowledge to the contrary, to assume that the street is free from aerial obstructions which may strike the top of his vehicle, e. g., a guy wire stretched across the street from a nearby building in process of construction. And especially is this true when the surface of the street along which the driver is moving is badly cluttered up with building material.

Hatfield v White Line, 223-7; 272 NW 99

4842 Injunction to restrain obstructions.

Obstructions—drainage. Principle reaffirmed that a property owner may not legally place obstructions within a public highway and thereby interfere with the drainage of surface waters across such highway.

Adams County v Rider, 205-137; 218 NW 60
Herman v Drew, 216-315; 249 NW 277

Trees—removal for drainage—no injunction. In landowner's action to restrain county from cutting down seven trees in the construction of a highway, where evidence showed that trees were too far apart to constitute a windbreak, that trees were on the highway right of way, and that their destruction was necessary to provide a drainage ditch, lower court properly refused to enjoin destruction under statute prohibiting such destruction unless "materially interfering with improvement of the road".

Harrison v Hamilton County, (NOR); 284 NW 456

4845 Enforcement.

Atty. Gen. Opinion. See AG Op April 14, '39

4846 Billboards and signs prohibited.

Atty. Gen. Opinion. See AG Op April 14, '39

CHAPTER 249

REGISTRATION OF HIGHWAY ROUTES

Atty. Gen. Opinion. See '30 AG Op 289

CHAPTER 250

USE OF HIGHWAYS

Atty. Gen. Opinion. See '30 AG Op 364

CHAPTER 251.1

MOTOR VEHICLES AND LAW OF ROAD

Atty. Gen. Opinions. See '34 AG Op 252, 258, 310; '36 AG Op 209, 444; '38 AG Op 703, 718

DEPARTMENT OF MOTOR VEHICLES

5000.01 Definitions of words and phrases.

Assured clear distance. See under §5023.01
Consent. See under §5037.09
Control. See under §5023.04
Guest. See under §5037.10
Intoxication, penal provision. See under §5022.02
Lookout. See under §5023.01
Negligence. See under §5037.09
Person. See also under §5038.02
Reckless driving, penal provision. See under §5022.04
Recklessness, guest statute. See under §5037.10
Words and phrases generally. See under §63 (IV)

Atty. Gen. Opinion. See AG Op July 11, '39

Horse as vehicle. A horse, saddled and bridled, and being used as a means of conveyance or transportation, is not a "vehicle," within the meaning of a policy of insurance which provides indemnity "sustained by the wrecking or disablement of any vehicle or car * * * in which the insured is riding, or by being accidentally thrown therefrom."

Riser v Ins. Co., 207-1101; 224 NW 67; 63 ALR 292

Former statute revised — legislative construction. When the motor vehicle statutes were completely revised, and exempted the vendor of a motor vehicle under a conditional sales contract from liability for negligent operation of the vehicle, such revision did not create a legislative construction that a former statute defining "owner" as the person with the use or control of a vehicle included such vendor within its definition, as a general revision of the laws creates no presumption of an intent to change the law, as is created when a particular section or a limited part of an act is re-enacted.

Hansen v Kuhn, 226-794; 285 NW 249

Conditional sales—ownership in vendee. When a motor vehicle is sold under a conditional sales contract, altho the seller retains legal title for the purpose of security, the ownership of the car passes to the buyer.

Hansen v Kuhn, 226-794; 285 NW 249

Assignee from conditional sale vendor not the owner of motor vehicle. The assignee from the vendor of a truck under a conditional

sales contract did not have either the "lawful ownership, use or control" or "the right to the use or control" of the truck, and could not be considered as "owner" under a former statute which said that any person coming within those specifications should be included in the term "owner".

Hansen v Kuhn, 226-794; 285 NW 249

"Commissioner" as agent for process.

Green v Brinegar, 228- ; 292 NW 229

Conditional seller not "owner"—nonliability. Statute making owner of automobile liable for damage caused by its operation when being driven with owner's consent, held not to extend to seller of automobile under conditional sales contract even when, under the contract of sale, seller retained title, for the buyer is the beneficial, equitable, and substantial owner, and the seller retains only naked title subject to complete divestation upon payment of the final installment of the purchase price.

Craddock v Bickelhaupt, 227-202; 288 NW 109

Ownership of automobile. Evidence that the head of a family bought an automobile, paid for it, used it for the purpose of making a living, and has never parted with the possession, is sufficient to prove his ownership on the question of exemption.

Shepard v Findley, 204-107; 214 NW 676

"Owner" defined. When an automobile actually belongs to an employee, the employer is not also to be deemed an "owner" because in the contract of employment the employee contracts to hold the employer harmless in the operation of the car.

McLain v Armour & Co., 205-343; 218 NW 69

Ownership of car—futile evidence. Evidence that an automobile of a certain make was, at the time of a collision, occupied by a husband and wife, that it carried a registration plate of the county of which said parties were residents, and that said car was being operated by the husband, furnishes no prima facie proof of the wife's ownership of the car.

Putnam v Bussing, 221-871; 266 NW 559

Transfer—prima facie effect. An insurer against the theft of an automobile, defending on the ground that the insured was not the "unconditional and sole" owner, may not complain that the jury is instructed that a transfer of the certificate of registration is only prima facie evidence of change of title.

Abraham v Ins. Co., 215-1; 244 NW 675

Carrying pistol—operator — motor vehicle definition not controlling. The definition of an "operator" of a motor vehicle applicable to and contained in the motor vehicle law is not controlling in construing a criminal statute found in another, distinct part of the code.

State v Thomason, 224-499; 276 NW 619

"Chauffeur" defined. An employee of a business who is not known as a chauffeur, and who is solely employed and paid for services wholly distinct from the operation of a delivery truck, does not become a "chauffeur" within the meaning of §4943, C., '27, [§5013.01, C., '39] by operating the truck during the time the regular chauffeur operator is temporarily absent.

Des M. Rug Co. v Underwriters, 215-246; 245 NW 215

Highway traversing city street — highway law applicable. Where a statute requires pedestrians to walk on left side of a highway, the word "highway" is applicable to a through highway traversing a street within a city, especially in view of other sections in the motor vehicle act concerning highways.

Reynolds v Aller, 226-642; 284 NW 825; 5 NCCA (NS) 724

Intersection—what constitutes—instructions. Where a north and south highway splits into two curves near an east and west highway, and connects with the latter at two points some 900 feet apart, it is not erroneous for the court to instruct that the intersection embraces the entire distance of 900 feet, (1) when the evidence tends to show that the authorized public authorities have treated said distance as the intersection, and (2) when the instruction is manifestly given for the sole purpose of guiding the jury in applying the statutory command that motorists shall reduce their speed to a reasonable and proper rate when approaching and traversing intersections of public highways.

Enfield v Butler, 221-615; 264 NW 546

Improper definition of "intersection" in motor vehicle case. There was no error nor abuse of discretion by the court in granting a new trial in a motor vehicle damage case on the ground that an incorrect definition of "intersection" was given to the jury, when the correct definition was a matter of statute, even tho both parties to the action during the trial used the wrong interpretation of the term as it was given by the court.

Hupp v Doolittle, 226-814; 285 NW 247

"Intersection" of highways—definition. In a damage action arising from a collision of motor vehicles at a highway intersection, where the question of negligence centered largely around the rights of the parties within the intersection, it was prejudicial error to instruct the jury that "intersection" is the area within the fence lines, if such fence lines were extended across the road, when a statute defines "intersection" as being the area within the lateral boundary lines of highways which join.

Hupp v Doolittle, 226-814; 285 NW 247

Automobile not "baggage". An automobile kept by the occupant of an apartment

house in a garage adjacent to the apartment is not "baggage" within the meaning of the hotelkeepers lien act.

Cedar Rapids Co. v Commodore Hotel, 205-736; 218 NW 510

"Dangerous instrumentality." The vendor of a motor vehicle under a conditional sales contract and his assignee are not to be held responsible for the negligent operation of the vehicle by the vendee on the ground that they have a duty to see if the vendee is responsible before turning him loose on the highway with a dangerous instrumentality.

Hansen v Kuhn, 226-794; 285 NW 249

"Emergency" defined. An emergency is (1) an unforeseen combination of circumstances which calls for immediate action; (2) a perplexing contingency or complication of circumstances; (3) a sudden or unexpected occasion for action; exigency; pressing necessity.

Young v Hendricks, 226-211; 283 NW 895

Change in classification of police patrol—effect. While the motor vehicle act in the Code of 1924, classified a "police patrol" as a "nonmotor vehicle", the later legislative classification of "police patrols" as "motor vehicles" was not intended to deprive a municipality of its exemption from liability for damages consequent on the negligent operation of a city-owned police patrol as a governmental agency.

Leckliter v City, 211-251; 233 NW 58

Registration—"special mobile equipment" includes portable mill. Statute exempting "special mobile equipment" from motor vehicle registration fees includes a portable grinding mill so mounted on the vehicle with such permanency that the vehicle and the equipment constitute an integral unit operated on the highways as a subordinate or subsidiary, tho necessary, feature in moving to locations where its primary use in grinding feed is to be performed.

State v Griswold, 225-237; 280 NW 489

Through highway—county trunk road.

Davis v Hoskinson, 228- ; 290 NW 497

Yielding half of "traveled way"—beaten path (?) or entire roadway (?). When the plaintiff's truck turned left at a blind corner, keeping to the right of the beaten path, but not to the right side of the graveled highway, and collided with the defendant's car which was approaching the corner on the right side of the road, it was not improper to instruct the jury that a car must yield half the traveled or graveled part of the road when meeting another car, and, that for the plaintiff to recover, it must be found that the truck was hit while on the right side of the road; or, for a recovery to be had by the defendant on a counterclaim, that the plaintiff was negligent in not yielding half the road.

Kiesau v Vangen, 226-824; 285 NW 181

5000.04 Rules and regulations.

Atty. Gen. Opinion. See '36 AG Op 444

Statutes—construction and operation — in pari materia. Statutes in pari materia are to be construed together, and harmonized, if possible, and especially when such statutes appear in the same chapter. So held as to different statutes relating to the right of way of travelers at highway intersections.

Dikel v Mathers, 213-76; 238 NW 615

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

Unallowable delegation. The general assembly cannot, for the protection of the highways or for the safety of the traffic thereon, constitutionally delegate to the state highway commission power to adopt rules and regulations which shall have the force and effect of law.

Goodlove v Logan, 217-98; 251 NW 39

5000.10 Certified copies of records.

Ownership—incompetent evidence. On the issue of ownership of a motor vehicle (arising on the allegation that said vehicle was being operated with the consent of the owner), neither of the following is admissible:

1. A certified copy of a purported application for registration of said vehicle when said purported application is neither signed by nor sworn to by any person. For an added reason is this true when said certification fails to identify said application as a record of any public office.

2. An unauthenticated copy of a purported duplicate certificate of registration of said vehicle, especially when said certificate fails to carry the signature of the purported owner of said vehicle.

Putnam v Bussing, 221-871; 266 NW 559

ORIGINAL AND RENEWAL OF REGISTRATION

5001.01 Misdemeanor to violate registration provisions.

Atty. Gen. Opinion. See AG Op Jan. 17, '40

5001.02 Vehicles subject to registration—exception.

Unambiguous tax exemption statute—strict construction rule nonapplicable. Strict construction of statutes granting exemptions from taxation, altho being the rule, has no application to a plain, clear, and unambiguous statute affording no room for construction.

State v Griswold, 225-237; 280 NW 489

Registration—"special mobile equipment" includes portable mill. Statute exempting "special mobile equipment" from motor vehicle registration fees includes a portable grinding mill so mounted on the vehicle with such permanency that the vehicle and the equipment constitute an integral unit operated on the highways as a subordinate or subsidiary, tho necessary, feature in moving to locations where its primary use in grinding feed is to be performed.

State v Griswold, 225-237; 280 NW 489

5001.03 General exemptions.

Atty. Gen. Opinions. See '30 AG Op 42; '34 AG Op 257, 329, 595, 691

5001.05 Registration by treasurer.

Atty. Gen. Opinion. See '34 AG Op 160

5001.11 Cards furnished.

Atty. Gen. Opinion. See '34 AG Op 737

5001.18 Plates furnished.

Atty. Gen. Opinion. See '34 AG Op 160

Registration plate — judicial notice of the county of issuance. The court cannot, from the figures alone, take judicial notice that a registration number plate on an automobile was issued by the county treasurer of a certain county.

Putnam v Bussing, 221-871; 266 NW 559

TRANSFERS OF TITLE OR INTEREST

5002.01 Notice.

Atty. Gen. Opinion. See '36 AG Op 209

Implied warranty of title. The seller of an automobile impliedly warrants that he has a right to sell it.

Espe v McClelland, 208-512; 226 NW 130

Issue of ownership—instructions. On the issue of actual ownership, as between the vendor and vendee of an automobile, reversible error does not result from instructing, in effect, that the nonregistration of the vehicle with the county treasurer in the name of a prospective purchaser might be considered by the jury as a mere side light of the transaction.

Tigue Sales v Motor Co., 207-567; 221 NW 514

Transfer—right to contradict. On the issue whether plaintiff, in an action on a policy of insurance covering the theft of an automobile, was the "unconditional and sole" owner of the vehicle, plaintiff may testify to facts attending a written transfer of the certificate of registration tending to show that he, in fact, remained the owner of the vehicle notwithstanding said transfer.

Abraham v Ins. Co., 215-1; 244 NW 675

5002.02 Duty of purchaser.

Atty. Gen. Opinions. See '34 AG Op 257; '36 AG Op 209

Scope of statute. Section 4964, C., '35, simply means that no delivery or passing of title is valid against the public tax-collecting authorities until the required registration is consummated. It has no reference to a contract delivery and passing of title between the private parties to a sale.

Cerex Co. v Peterson, 203-355; 212 NW 890

5002.03 Registration and fee.

Atty. Gen. Opinions. See '28 AG Op 135; '34 AG Op 257; '36 AG Op 209

Failure to register auto transfer—passing title. Inference, from their failure to complete registration, that parties did not intend to pass ownership of an automobile sold under conditional sale is not sufficient to make a jury question when the parties at the time of the transaction clearly manifested an intent to immediately transfer ownership.

Craddock v Bickelhaupt, 227-202; 288 NW 109

5002.06 Penalty.

Atty. Gen. Opinion. See '34 AG Op 309

5002.07 Owner after transfer not liable for negligent operation.

Atty. Gen. Opinions. See '34 AG Op 309; '36 AG Op 209

Conditional sale vendor not liable for negligence of vendee. The vendor of a motor vehicle under a conditional sales contract and his assignee are not to be held responsible for the negligent operation of the vehicle by the vendee on the ground that they have a duty to see if the vendee is responsible before turning him loose on the highway with a dangerous instrumentality.

Hansen v Kuhn, 226-794; 285 NW 249

Delivery and title—scope of statutory requirement. The provision of the motor vehicle act that delivery of a vehicle shall not be deemed made, nor title to a vehicle be deemed to pass, until the transferee shall receive and sign the certificate of registration, simply means that no delivery or passing of title is valid against the public tax-collecting authorities until the required registration is consummated. The provision has no reference to a contract delivery and passing of title between the private parties to a sale.

Cerex Co. v Peterson, 203-355; 212 NW 890

Conditional sales—motor vehicles—ownership. An instruction was erroneous in stating that a conditional sales contract, containing a clause that title remained in seller, left the ownership of an automobile in the seller. The buyer became the substantial and beneficial owner under the contract, and §4964, C., '35,

stating that title to motor vehicle shall not be deemed to pass until transferee has received and written his name on the registration certificate, is not construed to make seller liable as owner of the vehicle.

Craddock v Bickelhaupt, 227-202; 288 NW 109

Registration statutes—contract rights unrestricted between parties. Purpose of §4964, C., '35, in the motor vehicle laws, providing that title does not pass until the registration provisions have been completed, is to enable officials to perform their duty, collect tax, and prevent fraud on state, and does not restrict the contract rights of parties as between themselves, which they would have had in the absence of such statute.

Craddock v Bickelhaupt, 227-202; 288 NW 109

Issue of ownership—instructions. On the issue of actual ownership, as between the vendor and vendee of an automobile, reversible error does not result from instructing, in effect, that the nonregistration of the vehicle with the county treasurer in the name of a prospective purchaser might be considered by the jury, as a mere sidelight of the transaction.

Tigue Co. v Motor Co., 207-567; 221 NW 514

5002.08 Surrender of plates.

Atty. Gen. Opinion. See '36 AG Op 209

PERMITS TO NONRESIDENT OWNERS

5003.01 Nonresident owners exempt.

Atty. Gen. Opinions. See '28 AG Op 76, 389; '34 AG Op 583; '36 AG Op 626; AG Op Sept. 13, '39; AG Op Jan. 11, '40

5003.02 Nonresident carriers.

Atty. Gen. Opinion. See AG Op July 19, '39

5003.03 Nonresidents employed in state.

Atty. Gen. Opinions. See '32 AG Op 15; '34 AG Op 583, 595

5003.04 Scope of exemption.

Atty. Gen. Opinions. See '28 AG Op 76; '36 AG Op 628; AG Op Nov. 6, '39; AG Op Jan. 11, '40

SPECIAL PLATES TO MANUFACTURERS, TRANSPORTERS, AND DEALERS

5004.01 Operation under special plates.

Atty. Gen. Opinion. See AG Op Jan. 17, '40

5004.02 Application.

Atty. Gen. Opinions. See '30 AG Op 265; '34 AG Op 514

5004.04 Issuance of plates.

Atty. Gen. Opinion. See '30 AG Op 265

USED MOTOR VEHICLES

5005.03 Right to operate.

Atty. Gen. Opinion. See '34 AG Op 514

SPECIAL ANTITHEFT LAW

5006.05 Operating without consent.

Atty. Gen. Opinions. See '34 AG Op 415; '36 AG Op 690

5006.09 Vehicles without manufacturers' numbers.

Holding under prior statute. The possession of a motor vehicle the engine number of which has been altered is an offense, irrespective of the knowledge of the person possessing it.

State v Dunn, 202-1188; 211 NW 850

Prior statute. In an action to recover the money paid for an automobile the engine number of which had been changed, it is quite immaterial that there is no evidence that such change was wrongful or illegal.

Espe v McClelland, 208-512; 226 NW 130

Sale—total failure of consideration. The sale of an automobile the engine number of which has been defaced, altered, or tampered with, without an official certificate showing good and sufficient reasons for such change, presents a case of total failure of consideration, and no formal rescission of contract is necessary in order to recover the price paid.

Espe v McClelland, 208-512; 226 NW 130

Latent defects and equal opportunity to inspect. The rules of law pertaining to latent defects and equal opportunity to inspect do not apply to the sale of an article the possession of which the law unconditionally prohibits.

Espe v McClelland, 208-512; 226 NW 130

5006.11 Larceny of motor vehicle.

Unauthorized taking of motor vehicle—presumption of theft. When an owner of a motor vehicle establishes that his car was taken without his knowledge or consent from the place he left it, he has made a prima facie case of theft. The law raises a rebuttable presumption that the taking was with intent to steal the same.

Whisler v Ins. Co., 224-201; 276 NW 606

Intoxication subsequent to automobile theft —inadmissibility. Exclusion of evidence offered by an insurance company in an effort to escape liability on a theft policy, as to a thief's intoxicated condition an hour after the alleged theft of motor vehicles, as bearing on his condition at the time of the taking, held not prejudicial.

Whisler v Ins. Co., 224-201; 276 NW 606

Intoxication—defense to automobile theft insurance. Conflicting evidence as to whether one who took motor vehicles without owner's consent was intoxicated presents a jury question.

Whisler v Ins. Co., 224-201; 276 NW 606

Recent possession—justifiable inference. Unexplained possession of recently stolen property may justify the conviction of the possessor of the larceny in question; and especially when said possession is reinforced by proof of other incriminating circumstances with which the accused is connected.

State v Kenny, 222-279; 268 NW 505

5006.21 Altering or changing numbers.

Atty. Gen. Opinion. See '34 AG Op 415

5006.22 Defense.

Unpleaded defense. Reversible error results from submitting to the jury and requiring it to make a finding on a possible defense not presented by the defendant.

State v Dunn, 202-1188; 211 NW 850

OFFENSES AGAINST REGISTRATION LAWS AND SUSPENSION OR REVOCATION OF REGISTRATION

5007.01 Fraudulent applications.

Atty. Gen. Opinion. See '28 AG Op 59

5007.02 Operation without registration.

Discussion. See 17 ILR 94—Consequences of nonregistration

REGISTRATION FEES

5008.01 Annual fee required.

Atty. Gen. Opinions. See '34 AG Op 108, 183; AG Op Jan. 17, '40

License fee as nonproperty tax. A substantial charge placed by the legislature on motor trucks operated on the public highways, graduated on the weight of the load carried, conceding the same to be a tax, tho termed a "license fee", is not a property tax but a tax imposed for the privilege of using the highways as a place of business, and therefore not within the meaning of Art VII, §7, of the constitution.

Solberg v Davenport, 211-612; 232 NW 477
Towns v City, 214-76; 241 NW 658

5008.05 Motor vehicle fee.

Atty. Gen. Opinions. See '30 AG Op 265; '34 AG Op 464

5008.09 Automatic reduction.

Atty. Gen. Opinion. See '34 AG Op 595

5008.13 Motorcycle and hearse fees.

Atty. Gen. Opinion. See '34 AG Op 464

5008.14 Cornshellers and feed grinders.

Unambiguous tax exemption statute—strict construction rule nonapplicable. Strict construction of statutes granting exemptions from taxation, altho being the rule, has no application to a plain, clear, and unambiguous statute affording no room for construction.

State v Griswold, 225-237; 280 NW 489

Registration — "special mobile equipment" includes portable mill. Statute exempting "special mobile equipment" from motor vehicle registration fees includes a portable grinding mill so mounted on the vehicle with such permanency that the vehicle and the equipment constitute an integral unit operated on the highways as a subordinate or subsidiary, tho necessary, feature in moving to locations where its primary use in grinding feed is to be performed.

State v Griswold, 225-237; 280 NW 489

5008.15 Trucks with pneumatic tires.

Atty. Gen. Opinion. See '34 AG Op 464

License fee as nonproperty tax. A substantial charge placed by the legislature on motor trucks operated on the public highways, graduated on the weight of the load carried, if the same be conceded to be a tax, though termed a "license fee," is not a property tax, but a tax imposed for the privilege of using the highways as a place of business, and therefore is not within the meaning of Const. Art. VII, §7.

Solberg v Davenport, 211-612; 232 NW 477

5008.19 Trailers.

Atty. Gen. Opinion. See '34 AG Op 691

5008.24 Payment authorized.

Atty. Gen. Opinions. See '30 AG Op 251; '34 AG Op 275; '36 AG Op 133, 209

5008.26 Fees in lieu of taxes.

Atty. Gen. Opinions. See '30 AG Op 265; '34 AG Op 515; '38 AG Op 703

PENALTIES, COSTS, AND COLLECTIONS

5009.01 Methods of collection.

Atty. Gen. Opinion. See '25-26 AG Op 383

5009.03 When fees delinquent.

Atty. Gen. Opinion. See '25-26 AG Op 377

5009.06 Collection by sheriff.

Atty. Gen. Opinion. See '28 AG Op 59

FUNDS

5010.01 Disposition.

Atty. Gen. Opinions. See '34 AG Op 108, 369; AG Op Feb. 28, '40

5010.02 Unexpended balances.

Atty. Gen. Opinion. See AG Op Feb. 28, '40

5010.03 Cash balance.

Atty. Gen. Opinions. See '34 AG Op 108, 369

5010.04 Monthly estimate.

Atty. Gen. Opinion. See '34 AG Op 369

5010.07 Duty and liability of treasurer.

Atty. Gen. Opinions. See '34 AG Op 160, 183, 369

5010.08 Fee for county.

Atty. Gen. Opinion. See '28 AG Op 274

5010.09 Treasurer's report to department.

Atty. Gen. Opinion. See '34 AG Op 369

OPERATORS' AND CHAUFFEURS' LICENSES

ISSUANCE OF LICENSES, EXPIRATION, AND RENEWAL

5013.01 Operators and chauffeurs licensed.

Driving without driver's license—effect. The fact that the driver of an automobile had no driver's license at the time of an accident becomes inconsequential when the action is by a passenger and when there is no causal relation between the driver's violation of law and plaintiff's injuries.

Schuster v Gillispie, 217-386; 251 NW 735

"Chauffeur" defined. An employee of a business who is not known as a chauffeur, and who is solely employed and paid for services wholly distinct from the operation of a delivery truck, does not become a "chauffeur" within the meaning of §4943, C., '27, by operating the truck during the time the regular chauffeur operator is temporarily absent.

Des M. Rug Co. v Underwriters, 215-246; 245 NW 215

5013.03 Persons exempt.

Atty. Gen. Opinion. See AG Op Aug. 16, '39

5013.17 Disposal of fees.

Atty. Gen. Opinion. See '36 AG Op 576

CANCELLATION, SUSPENSION, OR REVOCATION OF LICENSES

5014.01 Authority to cancel license.

Atty. Gen. Opinions. See '34 AG Op 267; '36 AG Op 690; '38 AG Op 189

5014.06 Surrender of license—duty of court.

Atty. Gen. Opinion. See '34 AG Op 608

5014.10 Authority to suspend.

Atty. Gen. Opinion. See '36 AG Op 668

5014.11 Notice and hearing.

Atty. Gen. Opinion. See '36 AG Op 668

5014.12 Period of suspension or revocation.

Atty. Gen. Opinion. See '36 AG Op 668

VIOLATION OF LICENSE PROVISIONS

5015.07 Renting motor vehicle to another.

Liability of bailor. The bailor of an automobile is personally liable to a third person for damages consequent on the negligent operation of the car by the bailee.

Robinson v Bruce, 205-261; 215 NW 724; 61 ALR 851; 28 NCCA 626; 30 NCCA 90

Guest injured in rented car—burden of proof. In action by guest against lender of rented car and driven by borrower, for injuries sustained when car because of defective wheels goes into ditch, he must show, not only that car was defective at time of accident, but that it was defective at time of its delivery to borrower. Held burden of proof not sustained.

Gianopulos v Saunders System, (NOR) 242 NW 53; 32 NCCA 18

LAW OF THE ROAD

OBEDIENCE TO AND EFFECT OF TRAFFIC LAWS

5017.03 Public officers not exempt.

Public officers and agents—personal liability. A public officer while traveling upon the public highway in the performance of a governmental function, in the sense that he is attempting to reach a point where he can actually perform and consummate such function, is under the same duty to exercise care and subject to the same liability for want of such care as any other citizen.

Rowley v City, 203-1245; 212 NW 158; 53 ALR 375; 34 NCCA 464

Governmental employees—personally liable for torts—governmental immunity denied. A governmental employee committing a tortious act which causes injury to another in violation of a duty owed to the injured person becomes, as an individual, personally liable in damages therefor. (Hibbs v School Dist., 218 Iowa 841, overruled.)

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA(NS) 4

Futter v Hout, 225-723; 281 NW 286

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Doherty v Edwards, 226-249; 284 NW 159

Governmental immunity — law question raised in reply—recognizing issue. The defense of "governmental immunity" of an employee, in a personal injury action, should properly be assailed by motion or demurrer. However, if the law question of sufficiency of this defense is raised in the reply and not challenged by the defendant, and the case tried on that theory, then the court is correct in recognizing the issue and instructing on the inadequacy of that defense.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Government employee's automobile collision —immunity as a defense. In a damage action for injuries arising out of a motor vehicle collision, defendant's claim that he was a state employee performing a governmental function is a matter of defense not properly raised by special appearance.

Anderson v Moon, 225-70; 279 NW 396

Government nonliability for employee's tort —respondeat superior—exception. The exemption accorded counties and other governmental

bodies and their officers from liability for torts growing out of the negligent acts of their agents or employees is a limitation or exception to the rule of respondeat superior and in no way affects the fundamental principle of torts that one who wrongfully inflicts injury upon another is individually liable to the injured person.

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA(NS) 4

Governmental function—negligent operation of road maintainer—nonliability. Neither a county as a quasi corporation nor its board of supervisors is liable for the negligence of its employee in operating after dark a road maintainer without lights on the left-hand side of a highway, and in an action by a motorist who sustained injuries on account of such negligence demurrers to the petition by the county and its board of supervisors were properly sustained.

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

Statute requiring lights on road machinery—violation—nonliability of county. Mandatory statutes requiring danger lights on road machinery and providing punishment for their violation do not create any liability on a county for negligent observance thereof.

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

Maintenance patrolmen — bonds — liability. The statutory bond required of road patrolmen for the performance of their statutory duties in caring for the roads assigned to them, does not embrace liability to a traveler, in damages consequent on the negligent handling of road machinery.

Bateson v Marshall County, 213-718; 239 NW 803

School bus driver as independent contractor — nongovernmental function. A school bus driver furnishing his own bus under a contract embodying certain conditions to transport school children, but not under the supervision, control, and regulation of the board, is an independent contractor liable for his own negligence and not an employee exercising a governmental function.

Olson v Cushman, 224-974; 276 NW 777

Legislative change in classification of police patrol — effect on governmental exemption. While the motor vehicle act, C., '24, classified a "police patrol" as a "nonmotor vehicle," the later legislative classification of "police patrols" as "motor vehicles" was not intended to deprive a municipality of its exemption from liability for damages consequent on the negligent operation of a city-owned police patrol as a governmental agency.

Leckliter v Des Moines, 211-251; 233 NW 58

Operation of police patrol a governmental function. The operation of a plainly marked police patrol by a policeman in uniform, in conveying policemen in uniform from the police station to their patrol beats, all under orders from the chief of police, is a governmental function. It follows that the city is not liable for damages consequent on the negligent operation of the car by the driver.

Leckliter v Des Moines, 211-251; 233 NW 58; 38 NCCA 493

5017.06 Road workers exempted.

Person injured on highway construction work. In laborer's personal injury action arising because of truck backing into him while both were engaged in highway construction work, an instruction, that it is the duty of driver in moving a truck to exercise care and caution of ordinarily prudent person and to bring truck under proper control if he discovers, or in exercise of reasonable care should discover, a person in the path of truck, was neither erroneous as submitting to the jury a previously withdrawn issue as to whether defendant driver has truck under control, nor as permitting jury to speculate on defendant's negligence generally.

Rebmann v Heesch, 227-566; 288 NW 695

Co-worker—truck driver's duty. In a laborer's personal injury action against a truck driver for backing truck into laborer while both were engaged in highway construction, §5017.06, C., '39, exempting persons and motor vehicles actually engaged in work upon the highway from the motor vehicle law requirements, does not exempt a truck driver from using his horn if necessary in the exercise of ordinary care when backing from an intersection onto highway under construction. Question of defendant's negligence in not sounding horn nor observing plaintiff's presence when backing truck where men were working, and question of plaintiff's contributory negligence while working under foreman's instruction at outside edge of road were questions properly submitted to jury.

Rebmann v Heesch, 227-566; 288 NW 695

5017.07 Bicycles or animal-drawn vehicles.

Driving blind horse. It is not negligent per se to drive a blind horse in a narrow highway on a dark night, with the horse hitched to an unlighted buggy.

Lange v Bedell, 203-1194; 212 NW 354

Collision resulting in collision. The act of the driver of an automobile in negligently running into a wagon and team on the highway and causing the team to run away, may be the proximate cause of a later collision between said runaway team and another automobile, provided said latter collision was the natural or likely result of the first collision; and this

is true tho the first driver did not foresee or apprehend said second collision.

Dennis v Merrill, 218-1259; 257 NW 322; 1 NCCA(NS) 175

Res ipsa loquitur—ambiguous but not erroneous phrase. In an action against a motorist for colliding with the rear of a horse-drawn vehicle, tried on the theory of res ipsa loquitur, an instruction containing the phrase, "within her exclusive control, or the exclusive control of her authorized driver", as applied to the automobile or instrumentality, held not erroneous as meaning control to the exclusion of each other, but rather control to the exclusion of third persons.

Mein v Reed, 224-1274; 278 NW 307

Unnatural appearance and unnecessary noise as negligence. It is actionable negligence to operate a motor vehicle upon the public highway when said vehicle is so equipped as to take on such a strange and unnatural appearance and to emit such unusual and unnecessary noise as may reasonably result in fright to animals properly driven on such highway.

Buchanan v Cream Co., 215-415; 246 NW 41

Striking boy on bicycle—dispute as to lookout. Where a defendant county employee-trucker ran over a boy on a bicycle, an allegation of defendant's lack of proper lookout is clearly for the jury, when from the evidence, indicating the trucker may have struck the boy from the rear and should have seen him, the jury may well have found that defendant did not, in fact, keep such lookout.

Montanick v McMillin, 225-442; 280 NW 608

Contributory negligence as jury question—boy on bicycle warming ear with hand. Plaintiff riding a bicycle on the sidewalk, a place of comparative safety, observing the traffic ahead of him, cannot, as a matter of law, be said to be guilty of contributory negligence in not watching where he was going simply because he put a hand over his ear to warm it, when there is a sharp conflict in the evidence as to whether the truck which struck the boy turned sharply in ahead of him, or turned gradually and struck him from the rear.

Montanick v McMillin, 225-442; 280 NW 608

Bicycle lights — contributory negligence — jury question. In a damage action against a motorist for death of a bicycle rider, the jury, under the record, could properly find that cyclist was not traveling with bicycle lights required by statute and was not free from contributory negligence, despite fact that evidence showed a recent purchase of red reflector and lamp by an unidentified person on morning of accident; and the finding of a broken lamp, reflector, etc., by the sheriff at the scene of and some time after the accident does not compel a finding that the bicycle was properly equipped.

Reardon v Hermansen, 223-1207; 275 NW 6

Collision with bicycle — instructions — jury question. Where a motorist driving east 40 to 50 miles per hour at night on a paved highway, the lights on vehicle properly working (no rain, fog, or snow), his attention being momentarily diverted by an oncoming car, and, simultaneously with its passing, he collided with and fatally injured a bicycle rider also traveling east, instructions covering diverting circumstances relative to speed (§5029, C., '35) and failing to turn to left when passing vehicle (§5022, C., '35) reviewed and held to present correctly questions for jury.

Reardon v Hermansen, 223-1207; 275 NW 6; 3 NCCA(NS) 184

POWERS OF LOCAL AUTHORITIES

5018.01 Powers of local authorities.

Annotations in Vol I, see under §4992

Violation of ordinance — presumption — instructions. While the violation of a city ordinance relative to the operation of an automobile is only prima facie evidence of negligence, yet, where the sole issue is whether the operator did violate such ordinance—when the operator makes no effort to excuse a violation —it is not erroneous for the court to instruct that if there was such violation the jury "would be warranted in finding the operator guilty of negligence".

McDougal v Bormann, 211-950; 234 NW 807; 32 NCCA 405

Negligence under ordinance embodying statute. It is not error to submit to the jury the question of negligence based on the violation of a city ordinance with reference to control and speed of a motor vehicle when the ordinance merely embodies the provisions of a statute.

Womochil v Peters, 226-924; 285 NW 151

Unlawful parking — negligence. The parking of a motor vehicle at a place where parking is prohibited by a valid city ordinance constitutes negligence and, in case a collision occurs with the parked vehicle, the said negligence must be deemed to have contributed to the resulting damage.

Riley v Guthrie, 218-422; 255 NW 502; 35 NCCA 818

Parking on left side without tail light. Section 5056, C., '35, requiring parking on right side of city street, was in effect in city which had not adopted any ordinance to the contrary under authority of §4997, and §5045, in view of its legislative history, required red tail light upon automobile parked at night upon city street. The purpose of these statutes was protection and warning of traffic, and violation thereof without legal excuse was negligence, but whether such negligence was proximate cause of a bicyclist's collision with an automobile so parked was question for jury.

Trailer v Schelm, 227-780; 288 NW 865

Right of way at boulevard intersections. The mere legal designation by a city or town of a street as a boulevard or arterial highway, and the erection of stop signs on intersecting streets, does not impliedly give to the traveler on the boulevard or arterial highway the right of way over traffic on intersecting streets. In the absence of a statute giving such right of way, the traveler on the intersecting highway is first controlled by the boulevard stop sign, and thereafter by the statute regulating right of way at intersections generally.

Dikel v Mathers, 213-76; 238 NW 615

"Stop and go" signals—change after entering intersection—nonnegligence per se. A pedestrian who, in obedience to a municipally operated "go" signal, starts across the street on the pathway provided for pedestrians, and suddenly discovers that said "go" signal has changed to "stop", is not guilty of negligence per se in failing to look for, see, and avoid a vehicle which, under said change in signals, passes entirely across the intersection and hits and injures said pedestrian within less than two seconds after said change in signals occurs; especially is this true, (1) when said pedestrian has, by ordinance, the right of way over said vehicle because he was first properly to enter said intersection, and (2) when said pedestrian, at the very instant of said change in signals, was immediately approaching other stationary vehicles known to be awaiting release from a "stop" signal.

Dougherty v McFee, 221-391; 265 NW 176

Excluding travel from street. A city has no legal right to exclude ordinary travel from a public street in order that the street may be used exclusively for coasting.

Dennier v Johnson, 214-770; 240 NW 745

"Coasting" defined—sled hitched to vehicle excluded. A city ordinance prohibiting "coasting" in the streets applies only to vehicles or sleds moving by the force of gravity and not to sleds hitched to the rear of motor vehicles.

Samuelson v Sherrill, 225-421; 280 NW 596

Ordinance—violation—jury question. Whether the driver of a slowly moving vehicle was violating an ordinance which required him to keep as close as possible to the right-hand curb becomes a jury question on evidence that he was driving three feet from said curb, with adequate space for another vehicle to pass to his left.

Ege v Born, 212-1138; 236 NW 75

TRAFFIC SIGNS, SIGNALS, AND MARKINGS

5019.01 Highway commission to adopt sign manual.

Official highway markers presumed regular. A motorist has a right to assume that highway signs having the appearance of regularity have been erected by proper authority.

King v Gold, 224-890; 276 NW 774; 4 NCCA (NS) 333

Unallowable delegation. The general assembly cannot, for the protection of the highways or for the safety of the traffic thereon, constitutionally delegate to the state highway commission power to adopt rules and regulations which shall have the force and effect of law.

Goodlove v Logan, 217-98; 251 NW 39

5019.08 Unauthorized signs, signals, or markings.

Highway signs—authorized erection. It may be presumed, in the absence of evidence to the contrary, that the ordinary "Stop" and "Slow" signs, as they are found upon the public highways, were erected by and under authority of the proper public officials.

Rogers v Jefferson, 223-718; 272 NW 532; 277 NW 570; 4 NCCA (NS) 318

Official highway markers presumed regular. A motorist has a right to assume that highway signs having the appearance of regularity have been erected by proper authority.

King v Gold, 224-890; 276 NW 774; 4 NCCA (NS) 333

ACCIDENTS

5020.06 Reporting accidents.

Failure to report accident—negligence of injured person no defense. The fact that a person injured in an automobile accident was negligent does not excuse the operator from making a report.

State v Schenk, 220-511; 262 NW 129

Failure immediately to report accident. All accidents involving injury to a person must be reported "immediately", irrespective of the place of the accident.

State v Schenk, 220-511; 262 NW 129

5020.11 Reports confidential—without prejudice.

Patrolman's testimony—law inapplicable.

State v Weltha, 228- ; 292 NW 148

Remarks overheard—privileged communication. Evidence of witness who overheard statement of defendant in reporting accident, the witness being neither a peace officer nor an official, was properly excluded under statute requiring such report to be made and further providing that the report shall be confidential and not used as evidence in any trial, civil or criminal, arising out of the accident.

McBride v Stewart, 227-1273; 290 NW 700

ACCIDENT LIABILITY

5021.01 Suspension of licenses.

Discussion. See 16 ILR 267—Revocation—failure to pay judgment

Atty. Gen. Opinions. See '34 AG Op 309; '36 AG Op 352, 692; '38 AG Op 272, 718, 819; AG Op March 9, '39

DRIVING WHILE INTOXICATED AND RECKLESS DRIVING

5022.01 Assaults and homicide.

Manslaughter—nonapplicable statute. Section 5026-b1, C., '31 [§5037.10, C., '39], fixes civil liability in the operation of automobiles and has nothing to do with automobile operations resulting in manslaughter.

State v Richardson, 216-809; 249 NW 211

Manslaughter—wanton and reckless conduct. Instructions to the effect that, in order to constitute manslaughter, the operation of an automobile must be in such a wanton and reckless manner as to show utter disregard for the "safety" of others, are not erroneous because the court did not employ the phrase "safety and lives of others".

State v Richardson, 216-809; 249 NW 211

Manslaughter — unavoidable accident—failure to submit issue. Instructions, under a charge of manslaughter, which distinctly place on the state the burden to show beyond a reasonable doubt that the defendant was operating his automobile in a careless, reckless, and negligent manner in willful or wanton disregard of the safety of others, clearly protect the defendant from a conviction if the death was the result of unavoidable accident.

State v Richardson, 216-809; 249 NW 211

5022.02 Operating while intoxicated.

Annotations in Vol I, see under §5027

Discussion. See 23 ILR 57—Scientific tests for intoxication; 24 ILR 191—Medico-legal aspects

Constitutionality—cruel and unusual punishment.

State v Dowling, 204-977; 216 NW 271
State v Rayburn, 213-396; 238 NW 908

Statutory penalty replaced.

State v McDowell, 228- ; 290 NW 65

Indictment. An indictment for operating an automobile while the driver thereof is intoxicated need not allege that the operation was "on a public highway".

State v Dowling, 204-977; 216 NW 271; 29 NCCA 580

"Operation" defined. An intoxicated person is "operating" an automobile, when, preparatory to actually moving the car along the highway, he puts the engine in motion.

State v Webb, 202-633; 210 NW 751; 49 ALR 1389; 29 NCCA 560

"Operation" defined. The driving-while-intoxicated statute is violated by so operating a car while attempting to get it out of a ditch along the side of the road, into which ditch the car had inadvertently slid.

State v Overbay, 201-758; 206 NW 634; 29 NCCA 560

Accomplice. The owner of an automobile who causes another person to operate the car while such other person is intoxicated, because such other person is less drunk than the owner, becomes an accomplice in the offense of operating an automobile while intoxicated.

State v Myers, 207-555; 223 NW 166

Aggravation per se. On the plea that the punishment for operating an automobile on the public highways while the driver was intoxicated is excessive, it must be kept in mind that aggravation necessarily inheres in such an act.

State v Giles, 200-1232; 206 NW 133; 42 ALR 1496; 29 NCCA 578
State v Dillard, 207-831; 221 NW 817

Use of liquor—criminal negligence.

State v Weltha, 228- ; 292 NW 148

Burden of proof. In a prosecution for driving while intoxicated the state must prove beyond a reasonable doubt that (1) defendant was operating the motor vehicle and (2) defendant was intoxicated.

State v Hamer, 223-1129; 274 NW 885

Opinion evidence. Opinion evidence is admissible on the issue of intoxication.

State v Jenkins, 203-251; 212 NW 475

Opinion evidence. A witness may testify whether a person was sober or intoxicated without first stating the facts on which the opinion is based.

State v Wheelock, 218-178; 254 NW 313

Nonexpert testimony. No instruction need be given in regard to nonexpert evidence in relation to intoxication.

State v Wheelock, 218-178; 254 NW 313

Fatally remote evidence. Evidence that a party accused of operating an automobile while intoxicated was free from the odor of alcohol some sixteen hours after the occurrence in question is properly excluded.

State v Jenkins, 203-251; 212 NW 475

Insufficient evidence. Evidence which is not conclusive that an accused was intoxicated when arrested some three or four hours after he had operated an automobile, together with evidence that the accident which resulted from such operation might easily have happened to a sober man, is wholly insufficient to sustain a verdict of guilt of operating an automobile while intoxicated.

State v Liechti, 209-1119; 229 NW 743

Driving while intoxicated not presumed from later intoxication. The fact as established by the state's evidence that defendant was intoxicated some time after a motor vehicle accident

carries no presumption that he was intoxicated at the time of the accident, especially when considered with the testimony of another state witness that the defendant was not intoxicated at the time of the accident.

State v Hamer, 223-1129; 274 NW 885

Insufficient evidence. A verdict of guilty of operating an automobile while intoxicated is not sustainable on testimony all of which tends to show that the accused was sober while operating the car in question, and part of which tends to show that he was intoxicated shortly after the operation in question.

State v McKenzie, 204-833; 216 NW 29

No conviction on state's contradictory evidence. In a prosecution for operating a motor vehicle while intoxicated, a conviction based solely on the self-contradictory statements of the state's witnesses as to whether defendant was actually driving the vehicle cannot be sustained.

State v Hamer, 223-1129; 274 NW 885

Bias of witness. Fact that a doctor, the real instigator of the prosecution, as a witness in a criminal case showed considerable feeling and interest was a matter for the jury—not for the court.

State v Carlson, 224-1262; 276 NW 770

Fact cases.

State v Gillman, 202-428; 210 NW 435

State v Jenkins, 203-251; 212 NW 475; 29 NCCA 557

State v Sharpshair, 215-399; 245 NW 350

Acts and declarations of officer. Acts and declarations of an officer after searching the vehicle of an accused, which are not related to the issue on trial, are properly excluded.

State v Jenkins, 203-251; 212 NW 475

Demonstrative evidence. On the issue of intoxication, articles and things found at the scene of an automobile wreck may be relevant and admissible.

State v Jenkins, 203-251; 212 NW 475

Dazed condition from injury—opinion.

State v McDowell, 228- ; 290 NW 65

Second offense—unallowable evidence. On the issue of former conviction of driving an automobile while intoxicated, it is highly prejudicial to receive in evidence on the trial to the jury, the files of said former case. So held where said files consisted of (1) the information of the county attorney with minutes of testimony attached, (2) the indictment with the minutes of some 13 witnesses attached, (3) the bench warrant, and (4) mittimus.

State v De Bont, 223-721; 273 NW 873

Good character witness—cross-examination. A good character witness, who testifies that the general reputation of an accused (charged with operating an automobile while intoxicated) for moral character is good, may, on cross-examination, be asked whether he has heard within a stated recent time that the defendant, while operating a motor vehicle and while in an intoxicated condition, had been involved in certain specified accidents.

State v Wheelock, 218-178; 254 NW 313

Circumstantial evidence — weight and sufficiency. Principle reaffirmed that circumstantial evidence when exclusively relied on to support a verdict of guilt in a criminal cause must point to the guilt of the defendant beyond all reasonable doubt and be inconsistent with any reasonable theory of the defendant's innocence. So held as to a charge of operating an automobile while intoxicated.

State v Hooper, 222-481; 269 NW 431

Prosecutor's misconduct — admonition — court's discretion. In a prosecution for operating a motor vehicle while intoxicated, where misconduct was alleged because of prosecutor's argument to jury that defendant had admitted his intoxication, and, if other statements of prosecutor were not true, defendant's counsel would not jump up and squeal like a pig under a gate, and when timely admonitions to the jury are given, coupled with the discretion of the trial court in controlling arguments, no reversal should follow as supreme court will not interfere unless such misconduct results in prejudice and deprives a defendant of a fair trial.

State v Dale, 225-1254; 282 NW 715

Evidentiary conflict—jury question. A sharp conflict in the testimony as to whether a motor vehicle driver was intoxicated generates a question of the credibility of the witnesses, which is a matter peculiarly for the jury.

State v Carlson, 224-1262; 276 NW 770

Physical facts considered by jury. Physical facts that a motorist drove over a sidewalk, into the front yard of a house, striking a child, together with certain remarks he made immediately after the accident which were inconsistent with sobriety, warrants the jury, trying to reconcile conflicting testimony, in finding the driver was intoxicated.

State v Carlson, 224-1262; 276 NW 770

Intoxication — degree. In a prosecution for operating an automobile while in an intoxicated condition, an instruction that a person is intoxicated when he is so far under the influence of intoxicating liquor that his passions are visibly excited, or his judgment is impaired by the liquor, is sufficient without any additional requirement that defendant's judgment must be "visibly impaired", or that his ability to drive must be affected by the liquor.

State v Wheelock, 218-178; 254 NW 313

Intoxication — evidence — sufficiency. In a prosecution for operating an automobile while in an intoxicated condition, the court need not instruct the jury that the presence of the odor

of liquor on defendant's breath after an accident would not of itself constitute proof of intoxication — the court having already adequately, but in a general way, apprised the jury of what constituted intoxication.

State v Wheelock, 218-178; 254 NW 313

Cross-examination of accused—use of liquor. Even tho an accused on trial for driving an automobile while intoxicated is not asked on direct examination whether he had used intoxicating liquors on the day in question or was then sober or drunk, yet on cross-examination the state may make inquiry of defendant concerning his use of intoxicating liquors on the occasion in question, for the purpose of enabling the jury to properly weigh the defendant's testimony.

State v Wheelock, 218-178; 254 NW 313

Evidence—sufficiency. Evidence held to present a jury question on the issue as to the operation of an automobile while the operator was intoxicated.

State v Kendall, 200-483; 203 NW 806

Evidence—sufficiency. Evidence held to sustain a verdict of guilty of operating a motor vehicle while intoxicated.

State v Fahey, 201-575; 207 NW 608

Intoxication—instructions. In a prosecution for driving an automobile while intoxicated, an instruction that intoxication was not established by evidence that defendant was at fault in the occurrence of a collision or that he drove negligently or recklessly, but that such matters should be given due consideration, neither needs nor requires elaboration as to what constitutes fault or negligence.

State v Wheelock, 218-178; 254 NW 313

Instructions—intoxication element of recklessness.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Instructions—"upon a public highway". An allegation of the driving of an automobile "upon a public highway" while the driver was intoxicated is properly submitted to the jury by instructions which set forth the indictment and direct the jury to acquit unless, inter alia, the jury finds that the accused operated the automobile "at the place alleged."

State v Conklin, 204-1131; 216 NW 704; 29 NCCA 563

Instruction allowing recommendation of clemency — juror's affidavit of explanation. Where during its deliberations jury inquired of judge as to whether a verdict of guilty with recommendation of clemency would have any weight on sentence and judge instructed that any recommendations desired could be made on separate sheet of paper, signed and returned with verdict, held, instruction did not constitute error, and that jurors' affidavits stating that they were influenced by the instruction could not be considered by court in ruling on motion for new trial.

State v Cook, 227-1212; 290 NW 550

Defendant's theory of case—no requested instruction—no reviewable error. Where defendant, charged with operating a motor vehicle while intoxicated, requests no instruction on his theory of how he happened to lose control of his car because his trousers caught fire, the court did not err in failing to submit his theory to the jury.

State v Dale, 225-1254; 282 NW 715

Requested instruction—beer not intoxicating liquor—refusal not error. In prosecution for driving a motor vehicle while intoxicated, the refusal of accused's requested instruction that beer is not an intoxicating liquor held not error.

State v McGregor, (NOR); 266 NW 22

Inebriate in state hospital—delay in trial—no dismissal. Criminal courts have no right to force an inebriate inmate of a state hospital to stand trial on an indictment for driving while intoxicated, and such confinement is good cause for refusing to dismiss for delay in prosecution.

Maher v Brown, 225-341; 280 NW 553

Excessive proof of fact. In a prosecution for driving an automobile while intoxicated, the fact that the gruesome details of a collision were oft detailed by a large number of witnesses furnishes no reason why the defendant should be given a new trial.

State v Wheelock, 218-178; 254 NW 313

Sentence—imprisonment for nonpayment of costs. One convicted for operating an automobile while intoxicated and sentenced to pay a fine and costs may not be imprisoned for the nonpayment of the costs.

State v Gillman, 202-428; 210 NW 435

5022.04 Reckless driving.

Annotations in Vol I, see under §5028

Atty. Gen. Opinions. See '30 AG Op 167; '36 AG Op 692

Recklessness—civil liability—definition not deducible from criminal statute. The enumeration in this section of certain acts and the denomination of said acts as "reckless driving", and imposing a criminal punishment for doing said acts, cannot be deemed as furnishing a definition as to what conduct constitutes "reckless operation" under §5026-b1, C., '31 [§5037.10, C., '39], which simply states a rule of civil liability.

Shenkle v Mains, 216-1324; 247 NW 635

Recklessness—civil definition.

State v Graff, 228- ; 282 NW 745; 290 NW 97

"Reckless operation" — plural definitions. Section 5028, C., '31, which, in effect, provides that the operation of a motor vehicle in specified ways shall be deemed "reckless driving", was not intended to define "reckless operation" as provided in the so-called "guest" statute—§5026-b1 [§5037.10, C., '39] of said code.

Fleming v Thornton, 217-183; 251 NW 158

Involuntary manslaughter—evidence—sufficiency. Testimony held to generate a jury question on the issue of manslaughter, arising from reckless driving.

State v Thomlinson, 209-555; 228 NW 80

SPEED RESTRICTIONS

5023.01 Speed restrictions.

Atty. Gen. Opinion. See 30 AG Op 167

ANALYSIS

Annotations in Vol I, see under §§5029, 5030
Control of vehicle. See under §5023.04
Evidence of speed. See under §5037.09
Excessive speed as negligence per se. See under §5037.09
General application of motor vehicle law. See under §5037.09
Guest statute. See under §5037.10
Instructions—trial. See under §5037.09
Negligence in general. See under §5037.09

I ASSURED CLEAR DISTANCE AHEAD

Discussion. See 19 ILR 580—Speed standard; 24 ILR 128—Assured clear distance

Definition. Assured clear distance ahead means the distance ahead that discernible objects may be seen.

Mueller v Ins. Assn., 223-888; 274 NW 106; 113 ALR 1256

Proper paraphrase. The statutory command so to drive as to be able to stop "within the assured clear distance ahead" is properly paraphrased in instructions as ability to stop "within the distance that discernible objects may be seen ahead".

Engle v Nelson, 220-771; 263 NW 505

Improper definition. Reversible error results from instructing that "assured clear distance ahead" as used in our statute means "the distance ahead within which the driver of an automobile is sure and certain that the highway is not occupied by other vehicles or persons".

Groshens v Lund, 222-49; 268 NW 496

Vehicle within town limits—no speed sign.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Requirements of rule. The assured clear distance ahead rule requires the driver of an automobile to drive at all times at a rate of speed that will enable him to stop his car within the distance that discernible objects ahead of it may be seen.

Monen v Jewel Tea Co., 227-547; 288 NW 637

Operation after visibility ceases. The statutory command so to drive a vehicle on the highway as to be able to stop within the assured clear distance ahead requires an immediate stop when, for any reason, there is no visibility ahead.

Townsend v Armstrong, 220-396; 260 NW 17

Visibility as affecting speed. As visibility is reduced speed must be reduced accordingly, and when visibility is lost an automobile should be stopped.

Mueller v Ins. Assn., 223-888; 274 NW 106; 113 ALR 1256

Pleading negligence—sufficiency.

Janes v Roach, 228- ; 290 NW 87

Careful and prudent speed not a test. Circumstances indicating a violation of that part of this section requiring a motor vehicle to be driven at a careful and prudent speed would not necessarily also involve a violation of the other part of the section pertaining to the assured clear distance ahead.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Prohibited speed negligence per se. A violation of the statute that no person shall drive any vehicle on a highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead permits of no escape from the imputation of negligence per se, except on plea and proof of a recognized legal excuse for so driving.

Swan v Auto Co., 221-842; 265 NW 143

Inability to stop as negligence. The driver of an automobile who pays no attention to objects ahead of him or who operates his car, without legal excuse for so doing, at a speed which will not enable him to stop within the assured clear distance ahead, is necessarily guilty of negligence.

Peckinpaugh v Engelke, 215-1248; 247 NW 822

Rebuttable presumption of negligence. The driving of a vehicle upon a highway at a speed greater than will permit the driver to stop within the assured clear distance ahead creates a rebuttable presumption of negligence only.

Sergeant v Challis, 213-57; 238 NW 442

Physical facts—no object ahead—error to submit. It is error to submit the issue of assured clear distance when the physical facts and plaintiff's testimony show that there was no discernible object ahead of defendant's car.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Jury question. Evidence held to present a jury question on the issues whether the operator of an automobile was guilty of negligence in failing (1) to maintain a proper outlook for pedestrians, (2) to warn pedestrians, and (3) to keep his car under control.

Sexauer v Dunlap, 207-1018; 222 NW 420
Altfilisch v Wessel, 208-361; 225 NW 862
Robertson v Carlgren, 211-963; 234 NW 824
Lorimer v Ice Cream Co., 216-384; 249 NW 220

I ASSURED CLEAR DISTANCE AHEAD —continued

Pedestrian accident — legal excuse — jury question. Where a pedestrian crossing the street is struck by a motorist after first being seen 180 feet away on the opposite curb, and could have been seen by the motorist at all times prior to the collision, motorist's showing that pedestrian "popped up" ahead of him as legal excuse for not stopping within the assured clear distance is evidence raising a jury question.

Swan v Dailey-Luce Co., 225-89; 277 NW 580; 281 NW 504

Jury question—sufficient evidence.

Janes v Roach, 228- ; 290 NW 87

Negligence — emergency as legal excuse. Evidence that a pedestrian walking along a shoulder of a highway suddenly stepped in front of an automobile, where he was struck, raises a jury question as to such emergency and as to legal excuse for failing to stop within the assured clear distance ahead.

Edwards v Perley, 223-1119; 274 NW 910

Approaching vehicles. The statutory duty of the driver of a vehicle to so drive as to be able to stop within the assured clear distance ahead applies to drivers approaching each other from opposite directions.

Hoegh v See, 215-733; 246 NW 787

Approaching vehicle turning to left. The statutory duty so to drive as to be able to stop within the assured clear distance ahead has no application to a situation where the driver has no reason to suppose, until practically instantaneous with the collision, that an approaching vehicle would be driven into his proper pathway of travel.

Howk v Anderson, 218-358; 253 NW 32

Young v Jacobsen Bros., 219-483; 258 NW 104

Vehicle on wrong side of road. The statutory duty of the driver of an automobile so to drive that he can stop within the assured clear distance ahead applies to a driver who is on the wrong side of the road when meeting another vehicle.

Albert v Maher Bros., 215-197; 243 NW 561

Stopping when meeting vehicle. The duty so to operate an automobile as to be able to stop it within the assured clear distance ahead does not necessarily require the operator to stop his car on approaching an oncoming vehicle which is under duty to yield one-half of the traveled way.

Schuster v Gillispie, 217-386; 251 NW 735

Wrong side of highway—violation. The fact that a motorist traveling on the right-hand side of the highway comes into collision with an approaching car traveling on the left-hand side of the highway (in other words, both cars traveling in the same pathway) does not, in and of itself, establish or even tend to establish a violation of the statutory command so to drive as to be able to stop within the assured clear distance ahead.

Jordan v Schantz, 220-1251; 264 NW 259

Plural assignment—justifiable submission. Record reviewed in an action for damages consequent on a collision during the nighttime between trucks and held to justify the court in submitting to the jury not only the issue (1) of defendant's failure to turn to the right and yield one-half of the right of way, but also the issues (2) of defendant's failure to maintain a proper lookout for other vehicles, and (3) of defendant's alleged excessive speed.

Pazen v Des Moines Co., 223-23; 272 NW 126

Overtaking and passing—inapplicability. In action to recover for personal injuries resulting from an automobile collision occurring when the driver of an automobile attempted to pass a truck while the vehicles were traveling side by side, and the truck driver attempted a left turn into driveway of a farm, held, that the assured clear distance ahead rule was inapplicable.

Monen v Jewel Tea Co., 227-547; 288 NW 637

Negligence per se — double passing. The operator of a motor vehicle, who, at a speed of forty miles per hour and in the nighttime, attempts to pass another vehicle which he is closely following, at the very time when the operator of such other vehicle is attempting to pass a vehicle which he has overtaken, is guilty of negligence per se; both because he (1) is manifestly driving at an imprudent rate of speed under the circumstances, and (2) is driving at a rate of speed which will not enable him to stop within the assured clear distance ahead.

Harvey v Knowles Co., 215-35; 244 NW 660

Parked truck—failure to slow down. The driver of a vehicle who, on a clear and unobstructed road, and at a distance of 250 feet, sees a substantial object on the right-hand side of the road ahead, and at a distance of 150 feet discovers that the object is a truck, and at a distance of 25 feet discovers that the truck is stationary, and thereupon, because of unslackened speed, is unable to avoid hitting the truck by turning to the left into the unobstructed part of the road, is guilty of a negligence which is the proximate cause of the resulting collision.

Albrecht v Constr. Co., 218-1205; 257 NW 183

Continuing travel after loss of visibility. When the driver of an automobile, on a dark and misty night, continues his course on a public street after the street lights and his car lights fail to reveal objects ahead, the proximate cause of running head-on into an invisible street curb must be deemed to be the loss of visibility and the driver's venture into the darkness.

Greenland v Des Moines, 206-1298; 221 NW 953

Failure to see obstruction — contributory negligence per se. The driver of an automobile who, in the nighttime, with his headlights burning, and while on the proper side of a straight, 20-foot-wide, paved highway, drives at the rate of 35 or 40 miles per hour, and under no materially diverting circumstances, squarely into the rear of a stationary, wholly unlighted truck which is directly in his pathway and which, from its build, color, and load, is reasonably discernible, must be deemed to have failed to maintain a proper lookout or to have been so driving as to be unable to stop within the assured clear distance ahead—in either event, negligent. (For some measurable period of time before the collision, said stationary truck was being simultaneously approached from the north by the lights of the colliding car and from the south by the lights of a car traveling northward, which latter car passed said stationary car almost at the instant of the collision.)

Shannahan v Produce Co., 220-702; 263 NW 39

Stalled vehicle—absence of signals—proximate cause. The fact that, upon the stalling of a vehicle in the public highway, no lights or signals were erected to show the presence and position of said vehicle cannot be deemed the proximate cause of a collision with the stalled vehicle when the driver of the colliding vehicle discovered the presence and position of the stalled car in ample time to stop had he been so driving as to be able to stop within the assured clear distance ahead.

Albrecht v Const. Co., 218-1205; 257 NW 183

Visibility of parked car at night.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Inability to stop—blinded by lights. The driver of an automobile is guilty of negligence per se in driving at such a rate of speed that he cannot stop within the distance that a discernible obstruction may be seen ahead of the car. So held as to a driver who, blinded by the lights of a stationary car by the roadside, nevertheless continued his speed for some material distance, and when too late to stop, discovered an unlighted truck in the highway.

Lindquist v Thierman, 216-170; 248 NW 504; 87 ALR 893

Stopping within radius of lights. The driver of an automobile, in the nighttime and on a public highway, when faced by no emergency or diverting circumstance, is guilty of negligence per se in so driving that he cannot stop within the radius of his lights.

Ellis v Bruce, 217-258; 252 NW 101; 36 NCCA 136; 1 NCCA(NS) 10

Driving into unlighted truck. The operator of an automobile is guilty of contributory negligence in colliding in the nighttime with a truck parked in the highway directly ahead of him, when his lights revealed objects ahead for a distance of from 75 to 100 feet; and he cannot avoid such imputation of negligence by the claim that just preceding the collision his attention was diverted by a light remote from the highway on which he was traveling.

Dearinger v Keller, 219-1; 257 NW 206; 36 NCCA 709

Meeting car without lights. An operator of an automobile does not necessarily violate the assured clear distance ahead statute when he has no reason to anticipate that he will meet another rapidly approaching car without lights, and therefore so drives on a foggy night that he cannot stop instantly when confronted by such nonanticipated event.

Caudle v Zenor, 217-77; 251 NW 69; 34 NCCA 122; 1 NCCA(NS) 44

Inability to stop within range of visibility. The driving of an automobile on the public highway in the nighttime at a speed which will not permit the operator to stop within the range of visibility constitutes, in the absence of plea and proof of a legal excuse for so doing, negligence per se.

Hart v Stence, 219-55; 257 NW 434; 97 ALR 535; 36 NCCA 716; 1 NCCA(NS) 23

Absence of excuse—negligence per se. The failure of the driver of an automobile to drive at such speed as will permit him to bring the car to a stop within the assured clear distance ahead constitutes, in the absence of some legal excuse, negligence per se. And such excuse is not made to appear by evidence that the driver met a car and was temporarily blinded by the lights shining in his face but did not slacken his speed.

Wosoba v Kenyon, 215-226; 243 NW 569; 1 NCCA(NS) 63, 747

Willemsen v Reedy, 215-193; 244 NW 691

Failure to see obstruction in fog. On a foggy evening when visibility was poor, where the plaintiff, with the headlamps on his automobile lighted and the windshield wiper working, drove his car into another car which was parked on the highway, in the absence of any proof of an emergency to excuse his failure to see the other car, he was not free from contributory negligence and the defendant was entitled to a directed verdict.

Newman v Hotz, 226-831; 285 NW 289

Fog—careful and prudent operation—jury question. Evidence held to present a jury question whether the operator of an automobile was, on a foggy night, proceeding in a careful and prudent manner, and whether he had such control over the car that he could avoid obstacles appearing within the range of his vision.

Caudle v Zenor, 217-77; 251 NW 69; 34 NCCA 122; 1 NCCA(NS) 44

Accident at crossing—warnings additional to statutory warnings—duty to furnish. Conceded, arguendo, that a public railway crossing may be attended by such danger as to impose

I ASSURED CLEAR DISTANCE AHEAD —continued

on the railway company, in the exercise of reasonable care, the duty to furnish to the highway traveler warnings in addition to those required by statute, but such duty does not arise when the danger is avoidable by the exercise of ordinary care on the part of the traveler. So held, inter alia, as to a fog-shrouded crossing, the danger attending which could be avoided by the traveler so driving as to be able to stop within the range of his vision.

Dolan v Bremner, 220-1143; 263 NW 798

Inability to stop — slippery highway. The fact that the driver of an automobile in the nighttime suddenly comes to an unexpected, slippery spot in the highway without fault or negligence on his part may render inapplicable the statutory command so to drive as to be able to stop within the assured clear distance ahead.

Schwind v Gibson, 220-377; 260 NW 853

Range of visibility—instructions. Altho the driver of a truck which was following another truck on an icy street on which two cars were parked, could see past the truck and the cars and could have stopped within the distance he could see, when he ran into the truck ahead after it had skidded and turned around, there was a jury question as to whether he had been complying with the assured clear distance ahead rule, and it was proper to give an instruction imposing on him the duty to refrain from driving at a speed greater than would permit him to stop within the assured clear distance ahead.

Remer v Takin Bros., 227-903; 289 NW 477

Intersection—failure to reduce speed. Record reviewed and held to establish contributory negligence on the part of a motorist in driving into a highway intersection and turning to the left (1) without first observing whether he had sufficient space in which safely to make said turn, (2) without first reducing his speed to a reasonable rate, a rate which would permit a stop within the assured clear distance ahead, and (3) without first driving to the right of, and beyond the center of, said intersection, before turning to the left.

Wimer v Bottling Co., 221-120; 264 NW 262

Driving at reasonable speed—reduction unnecessary. A motorist driving at a reasonable and proper speed need not reduce his speed when traversing an open intersection, and a speed of 30 or 35 miles per hour on a clear day and on a good road is not, as a matter of law, such a speed as violates the assured clear distance statute.

Rogers v Jefferson, 224-324; 275 NW 874

Predicating error solely on one's own evidence — impropriety. Predication of error based solely on defendant's own evidence and his own theory of the case is ineffective when other conflicting evidence clearly makes a jury question on contributory negligence regarding plaintiff's failure to have adequate brakes on his automobile, his failure to stop within the assured clear distance ahead, and his failure to slow down before crossing a bridge.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Vehicle emerging from behind truck. Whether a vehicle suddenly emerged from behind a stalled truck and moved into the pathway of an oncoming car, necessarily has a material bearing on the issue whether the driver of the oncoming car violated the assured clear distance statute. Evidence held to present a jury question.

McWilliams v Beck, 220-906; 262 NW 781

Jury question. Evidence reviewed at length and held to present a jury question on the issue whether a motorist so operated his car that he could not stop within the assured clear distance ahead.

Lukin v Marvel, 219-773; 259 NW 782; 1 NCCA(NS) 16

Failure to stop, look, or control speed. Unreconcilable evidence reviewed at length in an action for damages consequent on alleged negligence, and in view of the hopeless conflict therein and the permissible inferences to be drawn therefrom, held to justify the submission of the issue of failure (1) to stop, (2) to maintain a proper lookout, and (3) so to drive as to be able to stop within the assured clear distance ahead.

Bauer v Reavell, 219-1212; 260 NW 39

Negligence — jury question. Evidence held to present jury questions on the issues whether defendant (1) drove at a dangerous rate of speed, (2) did not have his car under control, and (3) failed to maintain a proper lookout.

Parrack v McGaffey, 217-368; 251 NW 871

Minks v Stenberg, 217-119; 250 NW 883; 1 NCCA(NS) 57

Right-side driving—peremptory instruction. Instructions that a party is in duty bound to drive on the right-hand side of a highway, or that he must so drive as to be able to stop within the assured clear distance ahead, without any qualification relative to the driver's right to show legal excuse for driving otherwise, are not erroneous when the driver offers no excuse.

Winter v Davis, 217-424; 251 NW 770

Instructions—"legal excuse" — unsupported issue. Instruction submitting "legal excuse" for violation of the assured clear distance statute is reversible error when neither party raises nor gives evidence upon this issue.

Keller v Dodds, 224-935; 277 NW 467

Instructions—ability to stop under all conditions. Instruction reviewed and held not to impose on defendant the absolute duty to oper-

ate his automobile at such a speed as to be able to bring it to a stop under any and all conditions.

Shutes v Weeks, 220-616; 262 NW 518

Erroneous instructions. Instructions relative to the statutory duties of the operator of an automobile (1) to have the vehicle under control, and (2) to so drive as to be able to stop within the assured clear distance ahead, reviewed and held prejudicially misleading and erroneous.

Swan v Auto Co., 221-842; 265 NW 143

Instruction—reducing speed at intersection.

Davis v Hoskinson, 228- ; 290 NW 497

Instructions — unsupported theory. Principle reaffirmed that instructions on a theory not supported by the evidence are erroneous. So held as to instructions relative to the duty of the driver of a vehicle so to drive as to be able to stop within the assured clear distance ahead.

Dougherty v McFee, 221-391; 265 NW 176

Travel in fog—oncoming vehicles. Since as to oncoming vehicles, assured clear distance statute applies only to motorist not traveling on his right-hand side of the road, in an action involving a collision between oncoming vehicles on a foggy night, when vehicle in which plaintiff was riding was traveling on the right-hand side of the road, a requested instruction applying the assured clear distance statute to the plaintiff was properly refused.

Gregory v Suhr, 224-954; 277 NW 721

Right to assume compliance with law. Reversible error results from refusing to instruct that the operator of an automobile has a right to assume (until he knows or should know to the contrary) that other operators of automobiles, (1) will keep their cars under control, (2) will maintain a speed which will enable them to stop within the assured clear distance ahead, and (3) will yield one-half of the traveled way by turning to the right,—all such enumerated subject matters being distinctly in issue.

Fry v Smith, 217-1295; 253 NW 147

II CONDITION OF HIGHWAY—OBSTRUCTIONS

Railroad crossings—safe condition controlled by transportation needs. It is the duty of railways and municipalities to keep pace with the changes in transportation methods and to keep highways and railroad crossings in a reasonably safe condition, inasmuch as a type of crossing construction, considered safe when built, might be unsafe for a later changed method of use by the public.

Harris v Railway, 224-1319; 278 NW 338

Unsupported issue. The submission of the issue of speed of a vehicle in excess of that fixed by statute when the view is obstructed, is necessarily erroneous when there is no evidence that the view was obstructed.

Stoner v Hutzell, 212-1061; 237 NW 487

Speed limit—construction of statute. A statute which in effect provides that when the view along a highway is obstructed the speed of a vehicle shall not exceed a named rate, has no reference to obstruction of view by a car ahead of a rear driver.

Stoner v Hutzell, 212-1061; 237 NW 487

Failure to see unlighted truck—legal excuse. The failure of the driver of an automobile to see, in time to stop, an unlighted truck standing ahead of him in the highway and within the radius of his lights, may be legally excused by plea and proof that the truck was not reasonably discernible sooner (1) because of its color, (2) because of shadows cast over it by nearby trees, and (3) because his attention was momentarily diverted by a car and the lights thereon which he was about to meet and pass at a lawful rate of speed.

Kadlec v Const. Co., 217-299; 252 NW 103; 35 NCCA 764; 1 NCCA(NS) 3

Failure to see obstruction — contributory negligence per se. The driver of an automobile who, in the nighttime, with his headlights burning, and while on the proper side of a straight, 20 foot wide, paved highway, drives at the rate of 35 or 40 miles per hour, and under no materially diverting circumstances, squarely into the rear of a stationary, wholly unlighted truck which is directly in his pathway and which, from its build, color, and load, is reasonably discernible, must be deemed to have failed to maintain a proper lookout or to have been so driving as to be unable to stop within the assured clear distance ahead—in either event, negligent. (For some measurable period of time before the collision, said stationary truck was being simultaneously approached from the north by the lights of the colliding car, and from the south by the lights of a car traveling northward, which latter car passed said stationary car almost at the instant of collision.)

Shannahan v Produce Co., 220-702; 263 NW 39; 1 NCCA(NS) 16

Parked truck — nondiverting circumstance. The operator of an automobile is guilty of contributory negligence in colliding in the nighttime with a truck parked in the highway directly ahead of him when his lights revealed objects ahead for a distance of from 75 to 100 feet, and he cannot avoid such imputation of negligence by the claim that just preceding the collision his attention was diverted by a light remote from the highway on which he was traveling.

Dearinger v Keller, 219-1; 257 NW 206; 36 NCCA 709

Unlighted truck — blinding lights. The driver of an automobile is guilty of negligence per se in driving at such a rate of speed that

II CONDITION OF HIGHWAY—OBSTRUCTIONS—continued

he cannot stop within the distance that a discernible obstruction may be seen ahead of the car. So held as to a driver who, blinded by the lights of a stationary car by the roadside, nevertheless continued his speed for some material distance, and when too late to stop, discovered an unlighted truck in the highway.

Lindquist v Thierman, 216-170; 248 NW 504; 87 ALR 893; 1 NCCA(NS) 38

Taillight of parked car obscured.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Driving into side of train—proximate cause. Evidence which is solely to the effect that on a misty and foggy night a freight train was standing across a public railway crossing without any visible warning whatever of its presence, except the train itself, reveals no negligence (if it be deemed negligence) on the part of the railway company or its employees which can be deemed the proximate cause of an accident to a motorist who drove his car along the public highway and into the side of said train.

Dolan v Bremner, 220-1143; 263 NW 798

Fog and mist-obscured track. An occupant of an automobile is not necessarily guilty of negligence per se in not seeing a railroad track which intersected the highway until the automobile was entering upon the track, when the presence of the tracks was unknown to him, and when the windshield was covered with fog and mist, even tho he testifies to the opinion that objects could be seen for a distance of from 50 to 75 feet in front of the automobile.

Gilliam v Railway, 206-1291; 222 NW 12

Crossing accident—"physical facts" rule—inapplicability. The so-called "physical facts" rule which is often applied in negligence cases —the rule that when the operator of a vehicle at a known railroad crossing possesses ordinary sense of sight he is conclusively presumed, in the absence of diverting circumstances, to have seen an approaching train which was in plain view — necessarily has no application when the train is not in plain view, owing to a temporary obstruction which the railroad company has interposed to his view, e. g., freight cars on a side track.

Bush v Railway, 216-788; 247 NW 645

Traveling highway in fog—keeping lookout —instructions. Where defendant alleges failure to keep a lookout and contributory negligence on account of plaintiff's travel on the highway in a fog, instructions correctly but generally charging as to negligence and contributory negligence and requiring consideration of all conditions and circumstances are, in the absence of requested instructions thereon, sufficient to require the jury to consider the circumstance of the fog.

Gregory v Suhr, 224-954; 277 NW 721

Operating during fog. The operation of an automobile on the highway in the nighttime at a speed of 25 miles per hour and in a fog with ability to see from 25 to 75 feet ahead is not necessarily negligence.

Caudle v Zenor, 217-77; 251 NW 69; 34 NCCA 122; 1 NCCA(NS) 44

Failure to see obstruction in fog. On a foggy evening when visibility was poor, where the plaintiff, with the headlamps on his automobile lighted and the windshield wiper working, drove his car into another car which was parked on the highway, in the absence of any proof of an emergency to excuse his failure to see the other car, he was not free from contributory negligence and the defendant was entitled to a directed verdict.

Newman v Hotz, 226-831; 285 NW 289

Failure to see obstruction in fog—proximate cause. When, on a foggy night, a car ran into another car which was parked on the highway, and the proof did not show that the stalled car was plainly visible, it was error for the court on motion to rule that the negligence of the driver of the car which ran into the other car was the sole proximate cause of injuries sustained by an occupant of the moving car.

Newman v Hotz, 226-834; 285 NW 287

Fog—stopping automobile not necessary for due care. The driver of an automobile, encountering a fog, is not bound as a matter of law to stop and wait for the fog to lift in order to escape the charge of negligence. He must, however, exercise a degree of care consistent with the existing conditions.

Rabenold v Hutt, 226-321; 283 NW 865

Contributory negligence—matter of law—stalled motorist—poor visibility in snowstorm. A plaintiff motorist who during a snowstorm becomes stalled in a snowdrift is not, as a matter of law, guilty of contributory negligence because in attempting to extricate his car he must at times place himself with his back to oncoming traffic alongside his vehicle, tho meanwhile making occasional attempts to observe traffic in that direction, especially when before the vehicle struck him he observed it when it was about 50 feet away, such distance under the undisputed evidence being the extreme extent of visibility.

Youngman v Sloan, 225-558; 281 NW 130

Yielding one-half of road—assuming compliance with law—snowstorm. Where two motorists approach each other in a snowstorm—one driving into the face of the storm which has obliterated the pavement outlines and the dividing mark thereon—the other motorist has a right to assume that he will be accorded one-half the traveled way until he sees or until, in view of the storm conditions and added driving difficulties, he should, in using ordinary care, realize that half the highway was not being yielded, under which facts a jury question is presented as to whether his continued reliance

on the assumption excused him from the charge of negligence.

Futter v Hout, 225-723; 281 NW 286

Passenger suing both drivers—concurring negligence—jury question. In an action by a passenger against the drivers of both automobiles involved in a collision, where the vehicle in which he was riding was being driven 50 to 60 miles per hour in a snowstorm, with an oncoming automobile crowding toward the wrong side of the road, a jury question is created as to whether the conduct of the driver with whom the plaintiff was riding was a concurring proximate cause of the passenger's injuries.

Futter v Hout, 225-723; 281 NW 286

Frost on train—visibility—when jury question on plaintiff's care. Plaintiff's contention that a snowy landscape and frost on a train so camouflaged it that the question of his negligence in driving upon an unobstructed crossing in front of the train was for the jury is not substantiated by a record devoid of any evidence of frost on the front of the engine or that he was in any way blinded by the sun or glare of the sun on the snow.

Russell v Scandrett, 225-1129; 281 NW 782

Railroad crossing accident—snow glare affecting visibility. Where a passenger riding in a truck was killed in a crossing collision between truck and train, a contention that sun shining on snow and reflecting into truck constituted such obstruction to view of oncoming train that it raised a jury question on issue of deceased's contributory negligence in failing to see approaching train, held not established by his evidence.

Russell v Scandrett, 225-1129; 281 NW 782

Limb of tree as street obstruction. One who, in broad daylight and without diverting circumstances, drives along a public street with which he is familiar, and permits his vehicle to come in contact with a perfectly visible limb of a tree overhanging the traveled part of the street is guilty of negligence per se.

Abraham v Sioux City, 218-1068; 250 NW 461

Telephone pole in parking. The presence of an unused telephone pole in the parking bordering a traveled street may not be said to be the proximate cause of an accident caused by the driving of an automobile, on a dark and misty night, head-on into a street curb, because the driver did not know that the street on which he was traveling materially jogged at the place in question to one side of a straight line of travel; and this is true tho the pole did enhance the damages suffered.

Greenland v Des Moines, 206-1298; 221 NW 953

Aerial obstructions — justifiable assumption. The operator of a truck along a public street has a right, in the absence of actual knowledge to the contrary, to assume that the street is free from aerial obstructions which may strike the top of his vehicle, e. g., a guy wire stretched across the street from a nearby building in process of construction. And especially is this true when the surface of the street along which the driver is moving is badly cluttered up with building material.

Hatfield v White Line, 223-7; 272 NW 99

Negligence per se in colliding with traffic signal. An experienced driver of an automobile is guilty of negligence per se when, near midnight, while traveling in the center of a 26-foot wide, brilliantly lighted, paved street with which he was familiar, he drives squarely head-on in the center of the street against a railroad traffic signal consisting of a concrete base 4 feet wide, 2 feet high, and 5 feet long, surmounted by an iron pole several feet high and noticeably painted with black and white diagonal stripes, on which pole at the time were crossarms bearing in large letters the words "railroad crossing" and two burning lights.

Van Gorden v City, 216-209; 245 NW 736; 4 NCCA(NS) 291

Slippery pavement. The fact that the driver of an automobile in the nighttime suddenly comes to an unexpected, slippery spot in the highway, without fault or negligence on his part, may render inapplicable the statutory command so to drive as to be able to stop within the assured clear distance ahead.

Schwind v Gibson, 220-377; 260 NW 853

Use of ice-covered street. An ice-covered, sloping street may be in such an extreme condition of slipperiness as to render its use negligent by one who knows its condition, and especially when other streets are safe and convenient.

McDowell v Oil Co., 212-1314; 237 NW 456; 31 NCCA 305; 38 NCCA 383

Acts constituting negligence—use of street. Whether the driver of a conveyance is negligent in even attempting to use a street necessarily depends on the peculiar conditions facing him. Evidence held insufficient to show negligence.

McDowell v Interstate Co., 208-641; 224 NW 58; 31 NCCA 282

Collision because of skidding—icy street not legal excuse per se. Where one of two motor vehicles which are approaching each other skids across the street and collides with the other vehicle which had almost stopped at the curb, the existence of ice on a city street, tho a condition over which a motorist has no control, yet is a condition whose presence is not legal excuse to relieve him from his duty to use care commensurate with the existing conditions when he is responsible for the control of his car.

Young v Hendricks, 226-211; 283 NW 895

II CONDITION OF HIGHWAY—OBSTRUCTIONS—concluded

Striking car ahead on icy street. Instructions involving the negligence of the defendant in failing to drive around another truck and in failing to stop when he could see, or should have seen, that he was about to collide with the other truck, properly presented the question of keeping a proper lookout and were justified by evidence that the defendant ran into another truck which had skidded and turned around on the icy pavement at a time when the defendant's truck was 150 or 200 feet away.

Remer v Takin Bros., 227-903; 289 NW 477

Truck skidding on icy pavement. A defendant truck driver's explanation in argument that icy pavement and locked brakes made his truck slide and should excuse his presence on the wrong side of the road, where his truck collided with plaintiff's automobile, will not sustain a directed verdict in his favor since question of plaintiff's contributory negligence, defendant's violation of statute, the sufficiency of his excuse, and whether his negligence, if any, was the proximate cause of plaintiff's injuries, being questions on which reasonable minds might differ, are for the jury.

McIntyre v West Co., 225-739; 281 NW 353

Stalled truck—imputed negligence. Where a car collided with a stalled tractor-trailer, jackknifed on an icy hill at night, the question of plaintiff's contributory negligence was properly submitted to the jury, wherein it is shown the tractor, with lighted headlamps, standing on the right side of the highway, diverted plaintiff's and husband-driver's attention, and, there being no reasonable apparent cause to suspect that trailer blocked the left side of highway, and, where jury could find that car in which plaintiff was riding was proceeding at less than twenty miles per hour, and, that plaintiff and husband-driver were looking straight ahead, there is no warrant for saying plaintiff was contributorily negligent as a matter of law; however, under the record, the negligence of the husband-driver, if any, could not be imputed to plaintiff.

Johnson v Transp. Co., 227-487; 288 NW 601

Animals on highway—violation of statute. The unrestrained presence of a domestic animal upon the public highway generates a presumption that the owner of the animal has been negligent in not restraining the animal from running at large, as commanded by statute; but the owner may show that, in view of all the circumstances, he was not, in fact, negligent. The doctrine of negligence per se arising out of the violation of a statute does not here apply.

Hansen v Kemmish, 201-1008; 208 NW 277; 45 ALR 498; 29 NCCA 326; 33 NCCA 100; 39 NCCA 400

III LOOKOUT NOT MAINTAINED

Absolute duty to see what is manifest. The driver of an automobile on a much traveled street is properly held to actually see vehicles immediately ahead of him, and traveling in the same direction, when there is no impediment to vision and no diverting circumstance except one created by the driver himself; especially so when the driver offers no allowable explanation for not seeing.

Ege v Born, 212-1138; 236 NW 75

Negligence—jury question. Evidence held to present jury questions on the issues whether defendant (1) drove at a dangerous rate of speed, (2) did not have his car under control, and (3) failed to maintain a proper lookout.

Minks v Stenberg, 217-119; 250 NW 883; 1 NCCA(NS) 57
Parrack v McGaffey, 217-368; 251 NW 871
Bauer v Reavell, 219-1212; 260 NW 39
McWilliams v Beck, 220-906; 262 NW 781

Failure to watch road. The driver of an automobile who pays no attention to objects ahead of him or who operates his car without legal excuse for so doing, at a speed which will not enable him to stop within the assured clear distance ahead, is necessarily guilty of negligence.

Peckinpaugh v Engelke, 215-1248; 247 NW 822; 33 NCCA 103; 35 NCCA 765; 1 NCCA (NS) 41

Watching road—jury question. In action for damages resulting from automobile collision, where the only pertinent evidence on the question was that of the plaintiff and his witnesses that plaintiff was at all times watching the road, court properly refused to direct the jury, as a matter of law, to find plaintiff negligent in respect to keeping a lookout.

Simmering v Hutt, 226-648; 284 NW 459

Striking boy on bicycle — jury question. Where a defendant county employee-trucker ran over a boy on a bicycle, an allegation of defendant's lack of proper lookout is clearly for the jury, when from the evidence, indicating the trucker may have struck the boy from the rear and should have seen him, the jury may well have found that defendant did not, in fact, keep such lookout.

Montanick v McMillin, 225-442; 280 NW 608

Car running in reverse—failure to discover. One who, on a fairly clear day, and with no obstruction to vision, and with nothing to distract attention is operating an automobile at the rate of some 25 miles per hour, on the proper side of a straight and level, paved highway, is not guilty of contributory negligence per se in failing to discover, until too late to avoid a collision, that another automobile directly ahead of him (and some 40 rods distant

when first seen) was slowly running backward, it appearing that said latter car carried no sign or signal, other than its movement, that it was running in reverse.

Baldwin v Rusbult, 220-725; 263 NW 279; 39 NCCA 339

Failure to see unlighted truck—contributory negligence per se. The driver of an automobile who, in the nighttime, with his headlights burning, and while on the proper side of a straight, 20 foot wide, paved highway, drives at the rate of 35 or 40 miles per hour, and under no materially diverting circumstances, squarely into the rear of a stationary, wholly unlighted truck which is directly in his pathway and which, from its build, color, and load, is reasonably discernible, must be deemed to have failed to maintain a proper lookout or to have been so driving as to be unable to stop within the assured clear distance ahead—in either event, negligent. (For some measurable period of time before the collision, said stationary truck was being simultaneously approached from the north by the lights of the colliding car and from the south by the lights of a car traveling northward, which latter car passed said stationary car almost at the instant of collision.)

Shannahan v Produce Co., 220-702; 263 NW 39; 1 NCCA(NS) 16

Jury question—plaintiff's car rammed from rear. The issues, whether defendant failed (1) to maintain a proper lookout, or (2) to have his car under control, are properly submitted to the jury on evidence that plaintiff, on a clear day, while immediately approaching an intersecting crossroad and while other cars were closely approaching from the opposite direction, was slowly driving his car in the immediate rear of several other forward-moving cars on the right-hand side of an 18 foot dry, paved road with level shoulders and no accompanying ditches and was suddenly and very unexpectedly rammed from the rear by defendant's truck.

Luther v Jones, 220-95; 261 NW 817; 39 NCCA 139

Plural assignment — justifiable submission. Record reviewed in an action for damages consequent on a collision during the nighttime between trucks, and held to justify the court in submitting to the jury not only the issue (1) of defendant's failure to turn to the right and yield one-half of the traveled way, but also the issues (2) of defendant's failure to maintain a proper lookout for other vehicles, and (3) of defendant's alleged excessive speed.

Pazen v Des Moines Co., 223-23; 272 NW 126

Proof of facts not alleged. Evidence that lights were not burning on defendant's truck should have been admitted, even tho not alleged as a ground of negligence in plaintiff's petition, in order to enable plaintiff to show he was maintaining a proper lookout and was therefore free from contributory negligence.

Haines v Mahaska Works, 227-228; 288 NW 70

Unobserved person. The driver of an automobile is not, broadly speaking, under a duty, before putting the vehicle in motion, to look around or under it, in order to discover the possible presence of persons in a position of danger. A plaintiff seeking personal damages consequent upon a person's being run over is under an imperative necessity to show the location of the injured person just preceding the injury, or such a state of facts with reference thereto as will justify a finding that the driver (1) saw the person, or (2) ought, in the exercise of ordinary care, to have seen him.

Williams v Cohn, 201-1121; 206 NW 823

Child running in front of car. Evidence reviewed and held insufficient to present a jury question on the issue whether the operator of an automobile maintained a proper lookout preceding the time when a small child suddenly emerged from behind an obstruction and ran into the pathway of the approaching car.

Howk v Anderson, 218-358; 253 NW 32

Child on sled—view obstructed by snowbank —negligence—directed verdict. In an action for death of seven-year-old child, where defendant-motorist could not see child because of snowbank, and child, lying on sled, coasted into intersection at 20 or more miles per hour and struck rear wheel of defendant's automobile, the court properly directed verdict for defendant, the evidence being insufficient to establish that defendant was driving at excessive speed, lacked control of his car, failed to maintain proper lookout, or failed to give warning of approach to intersection.

McBride v Stewart, 227-1273; 290 NW 700

Pedestrian crossing street — contributory negligence—jury question. A pedestrian crossing a street need not anticipate another's negligence, nor keep a constant lookout in both directions at the same time, nor wait for all approaching vehicles from both directions, and, moreover, he is not as a matter of law contributorily negligent merely in running while crossing a street altho not seeing an approaching motor vehicle 180 feet away, but in any case whether he could rightly assume he could cross in safety is a question of contributory negligence for the jury.

Swan v Dailey-Luce Co., 225-89; 277 NW 580; 281 NW 504

Negligence — pedestrians at intersection. Evidence reviewed, and held to present a jury question as to the negligence of a motorist in operating his car in the business district of a city (1) by maintaining a speed in excess of 15 miles per hour, or (2) by failing to maintain proper lookout, or (3) by increasing in-

III LOOKOUT NOT MAINTAINED — continued

stead of reducing his speed on approaching an intersection and pedestrians walking across one side thereof, or by so doing without giving warning of his approach.

Huffman v King, 222-150; 268 NW 144

Jury question—pedestrians. Evidence held to present a jury question on the issues whether the operator of an automobile was guilty of negligence in failing (1) to maintain a proper lookout for pedestrians, (2) to warn pedestrians, and (3) to keep his car under control.

Sexauer v Dunlap, 207-1018; 222 NW 420

Altfilisch v Wessel, 208-361; 225 NW 862; 32 NCCA 482; 34 NCCA 150

Robertson v Carlgren, 211-963; 234 NW 824

Lorimer v Ice Cream Co., 216-384; 249 NW 220; 1 NCCA(NS) 57

Pedestrian on highway. Record reviewed, in an action for damages for death of a pedestrian who was killed by being hit by an automobile on the public highway, and held to justify the court in refusing, for want of evidence, to submit to the jury the issue of the defendant's alleged failure to maintain proper lookout. (Concededly a close case.)

Hartman v Lee, 223-32; 272 NW 140

Proper lookout for pedestrian—jury question. After motorist had seen pedestrian 180 feet away standing on the curb and when pedestrian has almost reached the opposite side of the street before being struck by the motor vehicle, which meanwhile had traveled the 180 feet, during which time pedestrian was plainly visible, and when motorist claims he did not again see pedestrian until just before striking him, the evidence raises a jury question as to whether motorist kept proper lookout, and directing a verdict is improper.

Swan v Dailey-Luce Co., 225-89; 277 NW 580; 281 NW 504

Failure to keep lookout alleged—substituting last clear chance—not permitted. In a law action for damages wherein the petition alleges that defendant motorist was negligent in failing to keep a proper lookout and such allegation was not withdrawn, and it is shown deceased pedestrian was contributorily negligent, it was proper to refuse to submit the case under last clear chance doctrine on the theory that motorist, being under duty to keep a lookout, presumably performed such duty; but after seeing deceased, failed to exercise due care in avoiding the injury.

Reynolds v Aller, 226-642; 284 NW 825

Unsupported issues—stepping from car on highway. Unsupported issues are very properly and necessarily excluded from the jury. So held as to the issues (1) whether the operator of an automobile failed to maintain a proper lookout, (2) whether he was negligent in stepping out of the car and upon the running board preparatory to cleaning the sleet from the windshield, and (3) whether the snowy and icy condition of the pavement was the proximate cause of an accident.

Winter v Davis, 217-424; 251 NW 770; 39 NCCA 308

Contributory negligence per se—intersection. Record reviewed and held to establish contributory negligence on the part of a motorist in driving into a highway intersection and turning to the left, (1) without first observing whether he had sufficient space in which safely to make said turn, (2) without first reducing his speed to a reasonable rate, a rate which would permit a stop within the assured clear distance ahead, and (3) without first driving to the right of, and beyond the center of, said intersection, before turning to the left.

Wimer v Bottling Co., 221-120; 264 NW 262

Obscured view of travel at intersection—failure to look or signal. The operator of an automobile in approaching and entering an intersecting country highway, when the view of travel approaching from his right is obstructed, is guilty of negligence (1) if he fails to signal his approach and entry, and also (2) if he fails to look for such travel at a point from which he can see such travel.

Smith v Lamb, 220-835; 263 NW 311

Failure to look to left on entering intersection—not contributory negligence as a matter of law. Principle reaffirmed that vehicle driver's failure to look to the left when entering highway intersection does not constitute contributory negligence as a matter of law.

Rogers v Jefferson, 226-1047; 285 NW 701

Contributory negligence when not determined as matter of law. In action for personal injuries and damage to automobile resulting from collision with defendant's automobile, plaintiff is not guilty of contributory negligence as a matter of law for failure to maintain lookout, yield right of way, and make proper stop before entering arterial highway, when evidence discloses that as plaintiff was about to cross an arterial highway, he looked to the right and saw defendant's automobile at a distance of 150 feet and then proceeded across intersection at speed of between 5 and 10 miles per hour until defendant's automobile collided with right rear wheel of plaintiff's automobile—more than half of plaintiff's automobile being out of the intersection.

Cowles v Joelson, 226-1202; 286 NW 419

Streetcar operator—failure to stop—excuse. Negligence on the part of the operator of a streetcar cannot be predicated on his failure (1) to maintain a lookout for an injured party, or (2) to stop or slacken the speed of the car, when both parties were aware of the presence of each other long prior to any suggestion of a collision, and when, after the danger of a

collision arose, stopping or slackening of speed was not only out of the question but would have been futile.

Bowers v Railway, 219-944; 259 NW 244

Collision with streetcar—negligence per se. The operator of an automobile who, without diverting circumstances, approaches and drives upon streetcar tracks and looks for an approaching streetcar at a place where he knows his view is very limited because of an intervening embankment and fails to look at a point where he would still be within a zone of safety and where his view would be unobstructed, is guilty of negligence per se.

Pender v Railway, 217-1152; 251 NW 55

Negligence per se in driving upon car tracks. The driver of a conveyance is guilty of negligence per se when, upon reaching a street intersection on a clear day, he has positive knowledge that a nearby streetcar is rapidly approaching the same intersection from a side street, and when he, without again looking at the approaching streetcar and confronted by no emergency, continues his journey into the intersection at a speed which would enable him to stop his conveyance instantly and turns and enters upon the streetcar tracks in the direction in which the streetcar is moving.

Middleton v Railway, 209-1278; 227 NW 915

Contributory negligence—guest's lookout at railroad crossing—jury question. A guest in a motor vehicle is not, as a reasonably prudent person, under the same obligation as the driver to keep a lookout, but whether or not, under the circumstances, a guest was lacking in ordinary care in committing his safety to the motor vehicle driver while crossing a railroad is a question for the jury.

Finley v Lowden, 224-999; 277 NW 487

Accident at crossing. A traveler in approaching a railway crossing with which he is familiar, and while he is beset by no diverting circumstance, is guilty of negligence in failing to look at some place from where he knows he can see approaching trains and thus avoid injury.

Glessner v Railway, 216-850; 249 NW 138

Nondiverting circumstance—railway crossing. The fact that a party in crossing railway tracks was compelled, owing to the coldness of the weather, to manipulate the choke on the automobile cannot be deemed a diverting circumstance such as to excuse him from exercising his senses of sight and hearing.

Rosenberg v Railway, 213-152; 238 NW 703

"Physical facts" rule — diverting circumstance. A requested instruction should be given, when the testimony is supporting, to the effect that, if the view of a railway track is unobstructed for a long distance while a traveler is knowingly approaching it, he will be held to have seen the train approaching thereon, there being no diverting circumstance.

Langham v Railway, 201-897; 208 NW 356; 27 NCCA 68; 27 NCCA 69

Accident at railway crossing — negligence per se. The driver of a vehicle who, while approaching a railway crossing, knows that his view along the track is obscured by an intervening embankment, and enters upon said crossing, is guilty of contributory negligence per se when, without dispute, his unobstructed view along the track from a point 25 feet distant from the crossing and up to a point 10 feet distant from the crossing enlarged from 360 feet to 954 feet. Under such circumstances the testimony of the driver that he was constantly looking and listening and saw and heard nothing, must be wholly rejected.

Darden v Railway, 213-583; 239 NW 531

Contributory negligence as matter of law—railroad crossing — motorist not looking. A motorist who approaches a railroad crossing on a clear day over a good road, with no obstructions and no diverting circumstances, and who drives upon the tracks where he is struck by a train and killed, when, had he looked, he must have seen the approaching train, which from a point 141 feet from the crossing was visible 2500 feet down the track, is guilty of contributory negligence as a matter of law, and the defendant-railroad is entitled to a directed verdict.

Meier v Railway, 224-295; 275 NW 139

Crossing railroad in front of oncoming train —directed verdict. It is error to overrule a motion for a directed verdict when, after considering all the evidence in the light most favorable to the plaintiff, there is no doubt but what he drove in front of a train with the view entirely unobstructed and with the train plainly to be seen had he looked, or, if he looked, he did so negligently.

Russell v Scandrett, 225-1129; 281 NW 782

Unsustained issue—negligence of engineer. Reversible error results from submitting the issue whether the engineer of a railway train was negligent in not maintaining a proper lookout for automobiles approaching a public crossing, when the evidence shows to the contrary and that the approaching automobile was discovered at the earliest reasonable opportunity, which was too late to prevent the accident.

Simmons v Railway, 217-1277; 252 NW 516

Speed—lookout—turning to right—presumption. If there be applicable evidence the court must instruct (at least on request), (1) as to the duty of drivers of cars, on meeting, to obey the laws of the road, such as turning to the right, and maintaining a proper lookout and proper speed, and (2) as to the right of the driver of each car to presume that such duties will be performed by the other driver.

Hoover v Haggard, 219-1232; 260 NW 540

III LOOKOUT NOT MAINTAINED — concluded

Traveling highway in fog—contributory negligence—instructions. Where defendant alleges failure to keep a lookout and contributory negligence on account of plaintiff's travel on the highway in a fog, instructions correctly but generally charging as to negligence and contributory negligence and requiring consideration of all conditions and circumstances are, in the absence of requested instructions thereon, suffieient to require the jury to consider the circumstance of the fog.

Gregory v Suhr, 224-954; 277 NW 721

Running into truck—instructions. Instructions involving the negligence of the defendant in failing to drive around another truck and in failing to stop when he could see, or should have seen, that he was about to collide with the other truck, properly presented the question of keeping a proper lookout and were justified by evidence that the defendant ran into another truck which had skidded and turned around on the icy pavement at a time when the defendant's truck was 150 or 200 feet away.

Remer v Takin Bros., 227-903; 289 NW 477

Intersecting highways—imposing undue care. An instruction which, after directing the jury that the operator of a vehicle on approaching intersecting highways must keep a lookout for approaching vehicles, imposes on the operator, if there be danger of a collision, the duty to "reduce his speed" or to "bring his vehicle to a stop", is erroneous.

Reason: Such instruction imposes on the operator a greater duty than to exercise reasonable or ordinary care.

Knutson v Lurie, 217-192; 251 NW 147; 37 NCCA 62

Compelling jury to draw certain inference. Where plaintiff and defendant were, under conditions which rendered visibility poor, approaching the same intersection approximately at the same time, the court cannot properly instruct the jury that if plaintiff could see several hundred feet in the direction from which defendant was approaching, then the jury must conclude either (1) that plaintiff did not look for defendant as was his duty, or (2) that plaintiff did see the defendant.

Appleby v Cass, 211-1145; 234 NW 477

IV OBSERVANCE OF LAWS BY OTHER PERSONS

Reliance on assumption limited. Assumption that others using the highways will obey the law may be relied on only until the contrary is known, or until in the exercise of ordinary care it should be known.

Futter v Hout, 225-723; 281 NW 286

Precautions for safety must be taken. While the operator of an automobile has a legal right to act on the assumption that other operators will obey the law, yet this does not necessarily mean that he need take no other precaution for his own safety.

Jeck v Const. Co., 216-516; 246 NW 595; 1 NCCA (NS) 71

Exercising right of way—other motorist's ignorance thereof—no negligence. A motorist approaching an intersection from the west, knowing he has statutory right of way over traffic from the north, and knowing a stop sign is erected on the highway intersecting from the north, may not be charged with negligence because a motorist on his left approaching from the north has no knowledge of the intersection and therefore drives past the stop sign into such intersection, resulting in a collision.

King v Gold, 224-890; 276 NW 774; 4 NCCA (NS) 333

Farfetched construction on use of words. An instruction that each of two operators of automobiles had the right "to assume" that the other would comply with the laws of the road (as correctly stated by the court) is not subject to the farfetched and hypercritical construction that thereby an operator was authorized to assume such compliance when he knew there had been a violation.

Shutes v Weeks, 220-616; 262 NW 518

Right to assume care and nonviolation of law of road. After correctly instructing as to the law of the road, it is not erroneous to instruct that each of the operators of the two automobiles in question had the right to assume that the other would not violate such laws, and would exercise ordinary care for the safety of himself and others.

Shutes v Weeks, 220-616; 262 NW 518

Refusal of instruction as error. Reversible error results from refusing to instruct that the operator of an automobile has a right to assume (until he knows or should know to the contrary) that other operators of automobiles (1) will keep their cars under control, (2) will maintain a speed which will enable them to stop within the assured clear distance ahead, and (3) will yield one-half of the traveled way by turning to the right—all such enumerated subject matters being distinctly in issue.

Fry v Smith, 217-1295; 253 NW 147

Speed — lookout — turning to right — presumption. If there be applicable evidence the court must instruct (at least on request) (1) as to the duty of drivers of cars, on meeting, to obey the laws of the road, such as turning to the right, and maintaining a proper lookout and proper speed, and (2) as to the right of the driver of each car to presume that such duties will be performed by the other driver.

Hoover v Haggard, 219-1232; 260 NW 540

Obeying statute — presumption. Principle reaffirmed that a motor vehicle driver in attempting to make a left-hand turn into an intersecting road has a right to proceed on the assumption (unless he has knowledge to the contrary) that another driver, approaching from his right, will obey the law (§5031, C., '35) by reducing his speed to a reasonable and proper rate when approaching and traversing said intersection.

Enfield v Butler, 221-615; 264 NW 546

Intersection — danger obvious — jury question. Where plaintiff, riding with his son, approaches an intersection of county trunk roads and on his left observes defendant also approaching the intersection, altho plaintiff may assume that defendant will obey the right of way law, he must not place himself in a position of obvious danger avoidable by the exercise of ordinary care, and whether or not he did so place himself is a jury question.

Rogers v Jefferson, 224-324; 275 NW 874

Yielding roadway — requested instruction. The operators of automobiles have the right to assume, when they meet on the highway, that the other will yield one-half of the traveled way by turning to the right; and it is erroneous to refuse a request for such instruction.

Muirhead v Challis, 213-1108; 240 NW 912

Yielding one-half of road—assuming compliance with law—reasonable care rule. Where two motorists approach each other in a snowstorm—one driving into the face of the storm which has obliterated the pavement outlines and the dividing mark thereon—the other motorist has a right to assume that he will be accorded one-half the traveled way until he sees or until, in view of the storm conditions and added driving difficulties, he should, in using ordinary care, realize that half the highway was not being yielded, under which facts a jury question is presented as to whether his continued reliance on the assumption excused him from the charge of negligence.

Futter v Hout, 225-723; 281 NW 286

Knowledge that law is not complied with. The right of a motorist to assume that others using the highway will obey the law ceases when he knows that another motorist is not obeying the law. When such motorist testifies that he saw an approaching car skidding and then drove on the wrong side of a city street to avoid that car, he is not entitled to the embodiment of such rule of assumption in instructions to the jury.

Young v Hendricks, 226-211; 283 NW 895

Instructions—following statute enacted after accident. Where an automobile collides at night with a truck displaying no lights, it is error to instruct in the language of this section that plaintiff had a right to assume that others using the highway would obey the law, when such collision causing the injuries complained of occurred before this right of assumption was added by the legislature, and the statute had previously been construed that a driver had no such right.

Gookin v Baker & Son, 224-967; 276 NW 418

Correct but inapplicable instructions refused. Requested instructions that a motorist had a right to assume that a taxi driver would obey the law as to speed and lookout, altho correct as abstract propositions of law, are properly refused when not supported by the evidence.

Reed v Pape, 226-170; 284 NW 106

New trial—conflicting instructions. Doubt and uncertainty consequent on conflicting instructions relative to the right of the operator of an automobile to assume that another operator would not use the highway unlawfully present ample justification for granting the prejudiced party a new trial.

Jelsma v English, 210-1065; 231 NW 304

V SPEED

(a) IN GENERAL

Discussion. See 16 ILR 548—Effect of statute

Pleading under common law (?) or statute (?). An allegation that a defendant "was driving at an excessive, illegal, and negligent rate of speed" must be deemed, in the absence of an attack by motion, as an allegation not at common law, but under the statute regulating speed.

Danner v Cooper, 215-1354; 246 NW 223

Witnesses—competency—speed. One may be a competent witness as to the speed of a motor vehicle on a showing that he has observed such vehicles while in operation with a view of determining their speed.

Becvar v Batesole, 218-858; 256 NW 297

Circumstantial evidence. Circumstances are oftentimes more persuasive on the issue of speed than direct testimony is.

Starry v Hanold, 202-1180; 211 NW 696

Careful and prudent speed not a test of assured clear distance. Circumstances indicating a violation of that part of this section requiring a motor vehicle to be driven at a careful and prudent speed would not necessarily also involve a violation of the other part of the section pertaining to the assured clear distance ahead.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Speed determined from skid marks. A witness in an automobile accident case may describe skid marks, but may not base an opinion of the speed of an automobile on them, as it is solely within the province of the jury to draw an inference of speed from skid marks.

Ward v Zerzanek, 227-918; 289 NW 443

V SPEED—continued
(a) IN GENERAL—continued

Speed remote from accident—admissibility. Where a motorcycle coming over a viaduct at high speed collides with an automobile leaving and making a left-hand turn at the foot of the viaduct, speed of the motorcycle at the instant of or immediately before the collision is admissible, but with nothing to indicate to the trial court the materiality of speed some distance away, the exclusion of such evidence will not be disturbed.

Thomas v Charter, 224-1278; 278 NW 920

Stepping into path of vehicle. A rate of speed which is not negligence per se cannot be deemed the proximate cause of an accident when the act of the injured party in stepping into the pathway of the car was so sudden and unexpected as to render impossible the stopping of the car.

Howk v Anderson, 218-358; 253 NW 32; 35 NCCA 1

Stepping into path of automobile—rate of speed immaterial. The negligence of a pedestrian, who left a position of safety on a curb and walked directly into the path of an automobile which struck him, was the proximate cause of the accident, and under the circumstances the rate of speed of the car was not material.

Ward v Zerzanek, 227-918; 289 NW 443

Unlawful but inconsequential speed. Operating an automobile on the public highway at a speed prohibited by statute becomes quite immaterial when such speed is not the proximate cause of the injury in question.

McDowell v Oil Co., 208-641; 224 NW 58; 35 NCCA 21

Crutchley v Bruce, 214-731; 240 NW 238; 35 NCCA 25

Negligence per se. Operating an automobile upon the public highway at a speed prohibited by law constitutes negligence per se, and error results from instructing that such operation creates a presumption of negligence.

Codner v Stowe, 201-800; 208 NW 330; 26 NCCA 207

Driving beside streetcar—hitting pedestrian. The operation of an automobile, even at an excessive speed, alongside a moving streetcar and in the direction in which the streetcar is moving, is not the proximate cause of an injury to a pedestrian who suddenly darts across the streetcar track ahead of the moving streetcar and into the line of automobile travel, and is hit by the automobile.

Pettijohn v Weede, 209-902; 227 NW 824; 35 NCCA 5

Speed at intersection—jury question. A motor vehicle operator who materially and intentionally increases the speed of his vehicle "when approaching and traversing a highway intersection", seemingly in violation of §5031, C., '35, is not necessarily guilty of negligence per se.

Carpenter v Wolfe, 223-417; 272 NW 169

Collision with left-turning vehicle—contributory negligence. The driver of a rear-moving vehicle is not necessarily guilty of contributory negligence because, at high speed, he collides with another vehicle while it is making an abrupt left turn.

McManus v Co-op. Creamery, 219-860; 259 NW 921

Passing vehicle—subsequent accident. The act of passing a vehicle at an illegal rate of speed may not be declared negligence per se as to a collision which occurred after the passing had been completely effected.

Berridge v Pray, 202-663; 210 NW 916

Being struck by faster-moving vehicle. It may not be said that the unlawful speed of a vehicle constitutes contributory negligence per se as to a collision which results from such vehicle being overtaken by a faster-moving vehicle.

Berridge v Pray, 202-663; 210 NW 916

Icy street—jury question. Jury was warranted in finding from conflicting testimony that the defendant's truck was traveling at a speed of 20 to 25 miles an hour and that the speed was excessive and dangerous in view of the icy condition of the street.

Remer v Takin Bros., 227-903; 289 NW 477

Intersection collision—complex facts—jury question. An intersection collision involving disputed facts, fractional seconds, speeds of 40 to 50 miles an hour, and failure to see an approaching automobile presents, not a matter of law for the courts, but a question for the jury to determine blame.

Eby v Sanford, 223-805; 273 NW 918

Speed as element of recklessness—other factors—jury question. Altho speed alone will not be considered recklessness, yet, when combined with such evidence as the car's swerving from side to side, the wetness of the street, the late hour (two o'clock in the morning), the presence of cross streets, and the lack of defendant's effort to check his speed when the view was obstructed, a jury question on the issue of recklessness is created.

Reed v Pape, 226-170; 284 NW 106

Evidence of recklessness—sufficiency—jury question. In an action by a guest against the driver and owner of a motor vehicle for injuries sustained as a result of a collision with an oncoming vehicle, where it is shown that the collision occurred on the left side of the road while automobile, with defective brakes, was being driven at an excessive rate of speed through a well-traveled intersection in a town

over a slope or hill which limited visibility, and on the left side of the highway in face of visible oncoming traffic, such evidence, on the issue of whether or not collision was caused by driver's recklessness, presented a jury question.

Allbaugh v Ashby, 226-574; 284 NW 816

Approaching intersection—instruction—jury question. In an action for personal injuries sustained by driver of a motor vehicle in collision with another vehicle which entered intersection from the left, an instruction stating that the statute requires any person operating a motor vehicle to have the same under control and reduce the speed to a reasonable and proper rate when approaching and traversing a crossing or intersection of public highways was correct. Since the jury in most cases must determine from the circumstances whether there had been a compliance with such statute, question was properly submitted.

Rogers v Jefferson, 226-1047; 285 NW 701

Plural assignment — justifiable submission. Record reviewed in an action for damages consequent on a collision during the nighttime between trucks, and held to justify the court in submitting to the jury not only the issue (1) of defendant's failure to turn to the right and yield one-half of the traveled way, but also the issues (2) of defendant's failure to maintain a proper lookout for other vehicles, and (3) of defendant's alleged excessive speed.

Pazen v Des Moines Co., 223-23; 272 NW 126

Collision with bicycle — instructions — jury question. Where a motorist driving east 40 to 50 miles per hour at night on a paved highway, the lights on vehicle properly working (no rain, fog, or snow), his attention being momentarily diverted by an oncoming car, and, simultaneously with its passing, he collided with and fatally injured a bicycle rider, also traveling east, instructions covering diverting circumstances relative to speed (§5029, C., '35 [§5023.01, C., '39]) and failing to turn to left when passing vehicle (§5022, C., '35 [§5024.03, C., '39]) reviewed and held to present correctly questions for jury.

Reardon v Hermansen, 223-1207; 275 NW 6; 3 NCCA(NS) 184

Submission of issues. Instructions reviewed and held adequately to present the issue of excessive speed and lack of control in the operation of an automobile.

Schuster v Gillispie, 217-386; 251 NW 735

Instructions — ability to stop under all conditions. Instruction reviewed and held not to impose on defendant the absolute duty to operate his automobile at such a speed as to be able to bring it to a stop under any and all conditions.

Shutes v Weeks, 220-616; 262 NW 518

Speed as negligence irrespective of conditions. Instruction reviewed and held not to submit to the jury the question whether speed, in and of itself, was the proximate cause of an accident, irrespective of the attending conditions and circumstances.

Jarvis v Stone, 216-27; 247 NW 393

Careful and prudent operation — granting jury undue license. The court is—to say the least—perilously close to committing reversible error when it instructs the jury, even in the literal words of the statute (§5029, C., '35 [§5023.01, C., '39]) that it should determine whether an automobile was driven "at a careful and prudent speed * * *, having due regard to the traffic, the surface and width of the highway, and of any other conditions then existing". The vice of the instruction is its failure affirmatively to limit the jury to a consideration of conditions as shown by the evidence.

Groshens v Lund, 222-49; 268 NW 496

Turning to right—instructions. If there be applicable evidence the court must instruct (at least on request), (1) as to the duty of drivers of cars, on meeting, to obey the laws of the road, such as turning to the right, and maintaining a proper lookout and proper speed, and (2) as to the right of the driver of each car to presume that such duties will be performed by the other driver.

Hoover v Haggard, 219-1232; 260 NW 540

Negligence per se—instruction. It is correct to instruct the jury that a driver of an automobile is guilty of negligence if he drives "at a high and dangerous rate", such being the allegation of the petition and the evidence tending to show a speed materially in excess of the maximum speed allowed by statute.

Albert v Maher Bros., 215-197; 243 NW 561

Collision with overtaking and passing vehicle—instruction on speed not necessary. In a personal injury action arising out of an automobile-truck collision occurring when the automobile in which plaintiff was riding with husband-driver was passing a truck which attempted to make a left turn into driveway of a farm just as the automobile came alongside, and when the automobile driver, attempting to avoid an accident by speeding ahead of truck, collided therewith, held, that statute relating to speed, which requires reasonable speed with due regard to existing conditions, the truck being the only "existing condition" at the time and place of accident, was inapplicable, and the court properly instructed jury only on the statute governing passing vehicles as affecting automobile driver's contributory negligence, which would be imputed to plaintiff by court's former instruction.

Monen v Jewel Tea Co., 227-547; 288 NW 637

Speed—distance. In intersection collision, evidence of speeds and distances raises jury question and directed verdict was error.

Short v Powell, 228- ; 291 NW 406

V SPEED—concluded

(b) SPEED RESTRICTIONS

Speeding—unsworn information—no basis to support conviction. An unsworn municipal court information charging defendant with speeding will not support a conviction.

State v Weston, 225-1377; 282 NW 774

Unsworn information first challenged on appeal—no waiver. Where a municipal court information charging speeding was not sworn to, defendant did not waive his right to challenge its sufficiency to sustain a conviction nor lose his right to raise such objection on appeal in supreme court by failure to question the sufficiency of information before the trial.

State v Weston, 225-1377; 282 NW 774

Speed in suburban district. It is not negligent to operate an automobile in a "suburban district" in a city or town at 40 miles per hour on the proper side of a level, paved street and at a place remote from a street intersection and when the street is apparently free of vehicles and persons except a nearby mail truck traveling in the opposite direction on the proper side of the street.

Howk v Anderson, 218-358; 253 NW 32; 35 NCCA 1

Vehicle within town limits—no speed sign.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Statute violation—per se negligence must contribute to bar recovery. As involved in a motor vehicle collision, the act of driving a motor vehicle at a speed of more than 25 miles an hour in a residence district, being in violation of statute, is negligence as a matter of law, but unless such negligence contributes to the injuries, it will not defeat recovery.

McIntyre v West Co., 225-739; 281 NW 353

Speeding in residence district—sufficiency of evidence—jury question. Evidence that accident occurred on main street of town about four or five blocks from the business district, that defendant was driving 50 miles per hour, that there were a number of dwellings on both sides of the street, and that defendant had passed a sign which read, "Slow down, speed limit 25 miles per hour", was sufficient to raise jury question on issue of whether car was being driven in a residence district in excess of 25 miles per hour.

Doherty v Edwards, 227-1264; 290 NW 672

Business district intersection—jury question. Evidence reviewed, and held to present a jury question as to the negligence of a motorist in operating his car in the business district of a city (1) by maintaining a speed in excess of 15 miles per hour, or (2) by failing to maintain proper lookout, or (3) by increasing instead of reducing his speed on approaching an intersection and pedestrians walking across one side thereof, or by so doing without giving warning of his approach.

Huffman v King, 222-150; 268 NW 144

Reckless operation—jury question. A jury question on the issue of reckless operation of an automobile is made by evidence that the car was being operated (1) over a wide, well-settled, graveled highway with which the operator was wholly unfamiliar, (2) at a speed of some 65 miles per hour, (3) during the nighttime when visibility was materially limited, and (4) at a turn in the road so belatedly anticipated and discovered that the driver was unable to negotiate it and was compelled to turn his car into the side ditch.

Mescher v Brogan, 223-573; 272 NW 645

Absence of evidence to support. Instructions which submit to the jury the questions whether a defendant has shown legal excuses (1) for exceeding a statutory speed limit, or (2) for not having yielded one-half of the traveled way are erroneous when there is no evidence supporting an affirmative finding on either proposition.

Deweese v Tr. Lines, 218-1327; 256 NW 428

5023.02 Truck speed limits.

Noncausal negligence. Excessive or negligent speed of motor vehicle becomes immaterial when it is not the proximate cause of the injury in question.

McDowell v Oil Co., 208-641; 224 NW 58

Speed statute — instructions. Instruction relative to the speed of a truck reviewed, and held not subject to the vice of being indefinite as to the particular statute violated.

Rogers v Lagomarcino-Grupe Co., 215-1270; 248 NW 1

Collision — jury questions. Evidence reviewed in an action for damages consequent on a collision in the nighttime between a truck and an automobile, and held to present jury questions on the issues:

1. Whether deceased was guilty of contributory negligence.
2. Whether defendant was driving his truck without lights.
3. Whether defendant was driving on the wrong side of the road.
4. Whether defendant was operating his truck (weighing three tons) at an unlawful rate of speed.
5. Whether defendant had opportunity to avoid the collision and failed to do so.

Carlson v Decker, 218-54; 253 NW 923; 36 NCCA 93

Plural assignment — justifiable submission. Record reviewed in an action for damages consequent on a collision during the nighttime between trucks, and held to justify the court in submitting to the jury not only the issue (1) of defendant's failure to turn to the right and yield one-half of the traveled way, but also the

issues (2) of defendant's failure to maintain a proper lookout for other vehicles, and (3) of defendant's alleged excessive speed.

Pazen v Des Moines Co., 223-23; 272 NW 126

5023.03 Bus speed limits.

Atty. Gen. Opinion. See '30 AG Op 167

ANALYSIS

I SCOPE OF SECTION IN GENERAL
II TAXICABS GENERALLY

General application of motor vehicle law. See under §5037.09
Negligence generally. See under §5037.09
Rented cars. See under §5015.07
Taxicabs, municipal regulation, authority. See under §5970

I SCOPE OF SECTION IN GENERAL

No annotations in this volume

II TAXICABS GENERALLY

Negligence—taxicab door striking eye—res ipsa loquitur. An action for loss of an eye caused by the sudden opening of a taxicab door as plaintiff stopped on the sidewalk to engage the cab, and when plaintiff made no move toward opening the door, the exclusive control of which was lodged in the driver inside the cab, presents a case to which the doctrine of res ipsa loquitur applies. In such case defendants' motion for a verdict is properly overruled.

Peterson v De Luxe Co., 225-809; 281 NW 737

Responsibility between defendants—jury question. In an action for injuries sustained by a passenger riding in a taxicab, the question of responsibility for the accident between the owner of the cab, the driver, and a party to an agreement under which the cab was operated, was a jury question.

Womochil v Peters, 226-924; 285 NW 151

Intersection collision—jury question. In a damage case resulting from a collision between a taxicab and an automobile at an intersection, when the record does not conclusively show negligence, that question and how the accident occurred are for the jury.

Womochil v Peters, 226-924; 285 NW 151

Taxicab — carrier's liability — instructions. In an action for injuries sustained in an accident at an intersection while riding in a taxicab, an instruction which held the defendant to the liability of a common carrier of passengers for hire was not error in view of other instructions defining a common carrier and making a high degree of care dependent on a finding that the taxi was a common carrier.

Womochil v Peters, 226-924; 285 NW 151

Assuming other motorist will obey law. Requested instructions that a motorist had a right to assume that a taxi driver would obey the law as to speed and lookout, altho correct as abstract propositions of law, are properly refused when not supported by the evidence.

Reed v Pape, 226-98; 284 NW 106

Excessive verdict—$3,500 for broken collarbone. For injuries sustained by a passenger in a taxicab accident, when a verdict of $3,500 was nearly $3,000 over the damages subject to calculation for a broken collarbone, pain and suffering, hospitalization, and loss of about three months work, the amount should be reduced to $2,500.

Womochil v Peters, 226-924; 285 NW 151

5023.04 Control of vehicle.

ANALYSIS

I SCOPE OF SECTION IN GENERAL
II CONTROL OF VEHICLES
III REDUCING SPEED
IV MOTORCYCLES

Annotations in Vol I, see under §5031
Animal-drawn vehicles. See under §5017.07
Assured clear distance ahead. See under §5023.01
Bridges. See under §5023.11
Curves and hills. See under §5031.03
Horns, signaling. See under §5031.03
Intersections. See under §§5026.01–5026.04
Pedestrians generally. See under §5027.05
Speed generally. See under §5023.01(V)

I SCOPE OF SECTION IN GENERAL

Negligence per se—noncompliance with statutes. Where the automobile of plaintiff's intestate collided with defendant's truck at a highway intersection and the physical facts showed that plaintiff's intestate had violated statutes in not keeping his car under control and not yielding the right of way to the truck, which had entered the intersection first, plaintiff's intestate was therefore guilty of negligence per se which contributed directly to his death and which entitled the truck owner to a directed verdict.

Young v Clark, 226-1066; 285 NW 633

Anticipating child coasting—barricades removed—negligence. Where defendant knew that for many years a certain street was barricaded while children were coasting, and that there had been coasting there recently, but where the snow had melted somewhat so that the middle portion of the paving on the hill was bare of snow, and the barricades had been taken down the day before the accident, the defendant was not bound to anticipate and prepare for some child coasting on the hill.

McBride v Stewart, 227-1273; 290 NW 700

II CONTROL OF VEHICLES

Definition. Principle recognized that a car is "under control" when the driver has the mechanism and power thereof under such control that, in view of the rate at which the car is moving, it can be brought to a reasonably quick stop.

Hanson v Manning, 213-625; 239 NW 793

II CONTROL OF VEHICLES—continued

Excessive requirement. The driver of an automobile is not under a duty to maintain such control over the vehicle as will avoid a collision.

Looney v Parker, 210-85; 230 NW 570

Imputed negligence—fundamental basis of doctrine. The negligence of a husband in the operation of an automobile cannot be deemed the contributory negligence of his wife who rides with him—cannot be imputed to the wife—simply because the husband and wife at the time of the negligence in question are engaged in a common enterprise, unless the wife has the right in some manner at the time in question to control the operation of said car.

Carpenter v Wolfe, 223-417; 272 NW 169

Joint enterprise between driver and passenger—giving directions to reach destination insufficient. A joint enterprise is not shown between a driver of an automobile and his passenger when the passenger neither drove the car at any time nor exercised any control over its operation, but merely directed the driver which way to go so that the driver might view a team of mules which he was interested in buying.

Churchill v Briggs, 225-1187; 282 NW 280

Passing children—care required. A motorist in approaching and passing, on the highway, children of apparently immature age who are in plain sight, is under duty, even tho the children are in a place of apparent safety near the margin of the traveled way, to bring and keep his vehicle under such control that he will be able, by ordinary care, to prevent injury to a child should the child suddenly, and without warning, leave its place of safety and place itself in a place of danger in the pathway of the oncoming car. Pre-eminently is this true when the motorist knows, or ought to know, from the time he first sees the children that they are preparing to cross said highway in front of his car.

Darr v Porte, 220-751; 263 NW 240

Passing children—nonright to assume care. Testimony in an action against a motorist for striking and killing a 10-year-old child on the highway, supported by the physical facts, from which the jury could find that the child's position on the shoulder could have been seen by defendant when more than 300 feet away, justifies an instruction on the nonright of a motorist to assume that a child under 14, in a place of apparent safety, will remain there, and on his duty to so control his machine as to avoid hitting her if she does not.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Child on sled—view obstructed by snowbank—negligence. In an action for death of a seven-year-old child, where defendant-motorist could not see child because of snowbank, and child, lying on sled, coasted into intersection at 20 or more miles per hour and struck rear wheel of defendant's automobile, the court properly directed verdict for defendant, the evidence being insufficient to establish that defendant was driving at excessive speed, lacked control of his car, failed to maintain proper lookout, or failed to give warning of approach to intersection.

McBride v Stewart, 227-1273; 290 NW 700

Jury question—care toward pedestrians. Evidence held to present a jury question on the issues whether the operator of an automobile was guilty of negligence in failing (1) to maintain a proper lookout for pedestrians, (2) to warn pedestrians, and (3) to keep his car under control.

Sexauer v Dunlap, 207-1018; 222 NW 420

Altfilisch v Wessel, 208-361; 225 NW 862; 32 NCCA 482; 34 NCCA 150

Robertson v Carlgren, 211-963; 234 NW 824

Lorimer v Ice Cream Co., 216-384; 249 NW 220

Negligence at intersection—jury question. Evidence reviewed and held to present a jury question on the issues whether the operator of an automobile (1) had his car under proper control in approaching and entering a busy street intersection, (2) kept a proper lookout ahead, (3) operated his car at an excessive rate of speed, or (4) so operated the car that he could stop it within the assured clear distance ahead.

Minks v Stenberg, 217-119; 250 NW 883; 1 NCCA(NS) 57

Approaching intersection—instruction—jury question. In an action for personal injuries sustained by driver of a motor vehicle in collision with another vehicle which entered intersection from the left, an instruction stating that the statute requires any person operating a motor vehicle to have the same under control and reduce the speed to a reasonable and proper rate when approaching and traversing a crossing or intersection of public highways was correct. Since the jury in most cases must determine from the circumstances whether there had been a compliance with such statute, question was properly submitted.

Rogers v Jefferson, 226-1047; 285 NW 701

Plaintiff's car struck from behind. The issues whether defendant failed (1) to maintain a proper lookout, or (2) to have his car under control, are properly submitted to the jury on evidence that plaintiff, on a clear day, while immediately approaching an intersecting crossroad, and while other cars were closely approaching from the opposite direction, was slowly driving his car in the immediate rear of several other forward-moving cars on the right-hand side of an 18-foot dry, paved road with level shoulders and no accompanying ditches, and was suddenly and very unexpect-

edly rammed from the rear by defendant's truck.

Luther v Jones, 220-95; 261 NW 817

Fog—careful and prudent operation—jury question. Evidence held to present a jury question whether the operator of an automobile was, on a foggy night, proceeding in a careful and prudent manner, and whether he had such control over the car that he could avoid obstacles appearing within the range of his vision.

Caudle v Zenor, 217-77; 251 NW 69; 34 NCCA 122; 1 NCCA(NS) 44

Negligence—jury question. Evidence held to present jury questions on the issues whether defendant (1) drove at a dangerous rate of speed, (2) did not have his car under control, and (3) failed to maintain a proper lookout.

Parrack v McGaffey, 217-368; 251 NW 871

Passing vehicle—jury question. Manifestly the court cannot find that a motorist did not have his car under control while attempting to pass another car, and was therefore guilty of negligence per se, when the position and speed of the cars at the time of the collision are in sharp dispute.

Jordan v Schantz, 220-1251; 264 NW 259

Truck crossing bridge—care as jury question. The question of a trucker's speed and control while crossing a bridge is properly one to be considered by the jury as bearing on his negligence, when the truck was wide and the bridge was narrow and somehow the truck collided with an oncoming vehicle.

Hawkins v Burton, 225-707; 281 NW 342

Striking jackknifed truck on icy hill. Where a car collided with a truck-trailer which had stalled on an icy hill at night on a country highway and had jackknifed across the left side of the highway on which plaintiff's husband was driving, the question of the husband's negligence in braking his car to such extent that it slid on the ice and collided with the side of the trailer, in the absence of any other evidence that car went out of control, held, that question of negligence of the husband as the sole proximate cause of the collision was properly submitted to the jury, and even tho it may be conceded that husband was negligent, it cannot be said, as a matter of law, that such negligence was the sole proximate cause of the injury.

Johnson v Transp. Co., 227-487; 288 NW 601

Instructions—"control" construed in its practical sense. Common words in instructions must generally be understood by the jury in their ordinary and practical sense, and, if a more specific definition is desired, it must be requested. So held as to the word "control" in connection with operating a motor vehicle.

Johnston v Johnson, 225-77; 279 NW 139; 118 ALR 233

Definition not requested. Failure of the court to define the term "under control" does not constitute error in the absence of a request for such defining.

Altfilisch v Wessel, 208-361; 225 NW 862; 29 NCCA 95

Instruction—definition. Ordinarily, it is not erroneous for the court to instruct the jury that the driver of an automobile has it under control when he has the ability to guide and direct its course of movement, to fix its speed, and bring it to a stop within a reasonable time.

Duncan v Rhomberg, 212-389; 236 NW 638

Instructions justified. Evidence held to justify instructions relative to the speed of an automobile and to the control which the driver had over the car.

Altfilisch v Wessel, 208-361; 225 NW 862; 29 NCCA 95

Submission of issues. Instructions reviewed and held adequately to present the issue of excessive speed and lack of control in the operation of an automobile.

Schuster v Gillispie, 217-386; 251 NW 735

Instructions — negligence under ordinance embodying statute. It was not error to submit to the jury the question of negligence based on the violation of a city ordinance with reference to control and speed of a motor vehicle when the ordinance merely embodied the provisions of a statute.

Womochil v Peters, 226-924; 285 NW 151

Dragnet instructions under dragnet allegations. A dragnet allegation that defendant drove his automobile in a "careless, negligent and reckless manner without due regard of the safety of others in excess of 25 miles an hour" and "not under proper control", does not justify or permit dragnet instructions which largely cover the statutory law respecting the operation of automobiles, and which thereby places before the jury the duty to determine whether said statutes or some of them have been violated.

Holub v Fitzgerald, 214-857; 243 NW 575

Paraphrasing allegation of negligence. It is quite proper for the court to paraphrase an allegation charging negligence in that defendant "lost control of his car", and to submit the charge in the paraphrased form.

Danner v Cooper, 215-1354; 246 NW 223

Res ipsa loquitur—ambiguous but not erroneous phrase. In an action against a motorist for colliding with the rear of a horse-drawn vehicle, tried on the theory of res ipsa loquitur, an instruction containing the phrase, "within her exclusive control, or the exclusive control of her authorized driver", as applied to the automobile or instrumentality, held not erroneous as meaning control to the exclusion of

II CONTROL OF VEHICLES—concluded

each other, but rather control to the exclusion of third persons.

Mein v Reed, 224-1274; 278 NW 307

Instructions—speed considered on issue of control. On the issue whether the operator of a motor vehicle had it under control, the court may very properly instruct the jury that it may consider the rate of speed and the attendant circumstances, even tho there is no dispute in the testimony as to the rate of speed.

Comparet v Coal Co., 200-922; 205 NW 779

Blowing out tire—legal excuse instruction. An instruction, stating " * * * The blowing out of a tire is a legal excuse to a driver for losing control of his or her automobile * * *", and also stating conditions for recovering control of the car, was not erroneous in that the grounds of negligence alleged and submitted to the jury were referable to the conduct of the driver, not at the time of the blowout, but thereafter—bearing in mind that instructions must be read as a whole and that it is unfair to pick out parts of instructions and give them a forced or strained construction.

Band v Reinke, 227-458; 288 NW 629

Right to assume compliance with law. Reversible error results from refusing to instruct that the operator of an automobile has a right to assume (until he knows or should know to the contrary) that other operators of automobiles, (1) will keep their cars under control, (2) will maintain a speed which will enable them to stop within the assured clear distance ahead, and (3) will yield one-half of the traveled way by turning to the right—all such enumerated subject matters being distinctly in issue.

Fry v Smith, 217-1295; 253 NW 147

Erroneous instructions. Instructions relative to the statutory duties of the operator of an automobile (1) to have the vehicle under control, and (2) to so drive as to be able to stop within the assured clear distance ahead, reviewed and held prejudicially misleading and erroneous.

Swan v Auto Co., 221-842; 265 NW 143; 1 NCCA(NS) 58

Undue degree of care. An instruction which in effect imposes upon the operator of an automobile an absolute duty to have his car under such control as to avoid injury to others under all circumstances is fundamentally erroneous because imposing an undue degree of care, and necessarily justifies an order for new trial.

Gregory v Suhr, 221-1283; 268 NW 14

Undue burden of care—incurable error. An instruction which places on the operator of an automobile the absolute duty to maintain a constant lookout and to use all his senses to avoid the danger of a collision is erroneous as imposing an undue burden, and the error is not necessarily cured by subsequent statements limiting the operator's duty to reasonable care and diligence.

Fry v Smith, 217-1295; 253 NW 147

III REDUCING SPEED

Arterial highway — negligence per se. The operator of an automobile on a county trunk arterial highway (on which no "stop" or "slow" signs had been erected at points intersected by county local roads) is guilty of negligence per se in knowingly approaching an obscured intersection without either (1) slacking his speed (of some 25 or 30 miles per hour) as required by this section, or (2) giving some warning signal of his approach as required by §5043, C., '31 [§5031.03, C., '39]. (But see Dikel v Mathers, 213 Iowa 76.)

Lang v Kollasch, 218-391; 255 NW 493; 37 NCCA 74

Contributory negligence per se. Record reviewed and held to establish contributory negligence on the part of a motorist in driving into a highway intersection and turning to the left (1) without first observing whether he had sufficient space in which safely to make said turn, (2) without first reducing his speed to a reasonable rate, a rate which would permit a stop within the assured clear distance ahead, and (3) without first driving to the right of, and beyond the center of (statute since revised), said intersection, before turning to the left.

Wimer v Bottling Co., 221-120; 264 NW 262

Intersection—what constitutes—instructions. Where a north and south highway splits into two curves near an east and west highway, and connects with the latter at two points some 900 feet apart, it is not erroneous for the court to instruct that the intersection embraces the entire distance of 900 feet (1) when the evidence tends to show that the authorized public authorities have treated said distance as the intersection, and (2) when the instruction is manifestly given for the sole purpose of guiding the jury in applying the statutory command that motorists shall reduce their speed to a reasonable and proper rate when approaching and traversing intersections of public highways.

Enfield v Butler, 221-615; 264 NW 546

Approaching intersection—instruction—jury question. In an action for personal injuries sustained by driver of a motor vehicle in collision with another vehicle which entered intersection from the left, an instruction stating that the statute requires any person operating a motor vehicle to have the same under control and reduce the speed to a reasonable and proper rate when approaching and traversing a crossing or intersection of public highways was correct. Since the jury in most cases must determine from the circumstances whether there had been a compliance with such statute, question was properly submitted.

Rogers v Jefferson, 226-1047; 285 NW 701

IV MOTORCYCLES

Motorcycle-automobile collision — speed remote from accident—admissibility in evidence. Where a motorcycle coming over a viaduct at high speed collides with an automobile leaving and making a left-hand turn at the foot of the viaduct, speed of the motorcycle at the instant of or immediately before the collision is admissible, but, with nothing to indicate to the trial court the materiality of speed some distance away, the exclusion of such evidence will not be disturbed.

Thomas v Charter, 224-1278; 278 NW 920

Two vehicles approaching on same side—assumption. Where a motorcycle traveling east and an automobile traveling west approach each other, both driving on the south half of the highway, held, that as long as the automobile driver had sufficient time to return to his right, the north, side of the highway, he had a right to assume that the motorcyclist would not attempt to drive to the north half of the highway for the purpose of passing on the north, the wrong side, of the automobile.

Jakeway v Allen, 226-13; 282 NW 374

Motorcycle passenger riding behind driver—care required. A girl riding on a motorcycle directly behind the driver, and unable to see the road ahead without standing up, thereby endangering the operation of the vehicle, cannot as a matter of law be under duty to warn the driver of impending danger in order to avoid the driver's negligence being imputed to her.

Williams v Kearney, 224-1006; 278 NW 180

Motorcycle passenger vs automobile owner—nonassumption of risk—sudden danger. In action to recover for death of 13-year-old boy resulting from collision between motorcycle, on which he was riding as a passenger, and defendant's automobile, allegation in defendant's answer that decedent assumed risk of motorcycle driver's negligence was properly stricken where pleaded facts and common knowledge justified conclusion that danger of the collision could not have been apparent more than a few seconds of time so that there was no time for deliberation and voluntary assumption of such risk.

Edwards v Kirk, 227-684; 288 NW 875

Order striking defense of assumption of risk. In an action to recover for death of motorcycle passenger resulting from motorcycle collision with automobile, an order striking allegation of defendant-car owner that decedent assumed risk of motorcycle driver's negligence was appealable because the matter stricken was of such character as to involve the merits of the case.

Edwards v Kirk, 227-684; 288 NW 875

Defendant driving on wrong side—no sudden emergency instruction for defendant. In an action for injuries sustained in a collision between a motorcycle driven east by plaintiff on his right, the south, side of the road and an approaching automobile operated by the defendant, allegedly on the left, or south, side of road, there was no occasion for court giving instruction to effect that defendant was faced with an emergency, when defendant maintained that he was at all times on his own right side of the road, because, if he were on the left, or south, side of highway, the emergency was of his own making.

Jakeway v Allen, 226-13; 282 NW 374

5023.05 Speed signs—duty to install.

Absence of signs—effect. The statutory limitation on speed within "residence districts" as provided in §5030, C., '31 [§5023.01, C., '39], applies even tho the speed limit signs provided by this section have not been erected within said district.

Waldman v Motor Co., 214-1139; 243 NW 555

Vehicle within town limits—no speed sign.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Presumption of officer's performance of duty. In the absence of proof to the contrary, it will be presumed that town officers properly performed the mandatory duty imposed on them by statute in the erection and maintenance of speed limit signs.

Doherty v Edwards, 227-1264; 290 NW 672

5023.06 Special restrictions.

Atty. Gen. Opinion. See AG Op July 12, '39

5023.11 Limitation on elevated structures.

Speed remote from accident—admissibility. Where a motorcycle coming over a viaduct at high speed collides with an automobile leaving and making a left-hand turn at the foot of the viaduct, speed of the motorcycle at the instant of or immediately before the collision is admissible, but, with nothing to indicate to the trial court the materiality of speed some distance away, the exclusion of such evidence will not be disturbed.

Thomas v Charter, 224-1278; 278 NW 920

Control and speed of truck crossing bridge—care as jury question. The question of a trucker's speed and control while crossing a bridge is properly one to be considered by the jury as bearing on his negligence, when the truck was wide and the bridge was narrow, and somehow the truck collided with an oncoming vehicle.

Hawkins v Burton, 225-707; 281 NW 342

Contributory negligence—inadequate brakes—jury question. Evidence that a plaintiff motorist approached a bridge at 15 miles per hour and proceeded to cross, keeping his car within 6 inches of the right-hand side, before defendant came on the bridge, and that plain-

tiff was two-thirds across before defendant swung across the center line and struck him, makes a jury question as to whether the fact of plaintiff's negligence in not having adequate brakes contributed to the collision.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Predicating error solely on one's own evidence—impropriety. Predication of error based solely on defendant's own evidence and his own theory of the case is ineffective when other conflicting evidence clearly makes a jury question on contributory negligence regarding plaintiff's failure to have adequate brakes on his automobile, his failure to stop within the assured clear distance ahead, and his failure to slow down before crossing a bridge.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Reckless operation—insufficient proof. The reckless operation of an automobile, within the meaning of §5026-b1, C., '35, is not shown by proof that a motorist, in the daytime and without obstruction to view ahead, and while approaching a bridge on a country highway, was traveling at the rate of some forty-odd miles per hour, and a-straddle the black lines in the center of an 18-foot wide, level, 10-degree curve; that, while so traveling, he confined his view solely to said black lines as they came into view immediately ahead of the fender or hood of his car; that he did not "look up" and see an approaching truck on the bridge until 75 feet therefrom; and that thereupon he swerved his car to the right but not quite far enough to avoid side-swiping the rear part of the truck while the two vehicles were passing on the bridge.

Wilson v Oxborrow, 220-1135; 264 NW 1

DRIVING ON RIGHT SIDE OF ROADWAY—OVERTAKING AND PASSING, ETC.

5024.01 Traveling on right-hand side.

Annotations in Vol I, see under §5019

Atty. Gen. Opinion. See '25-26 AG Op 32

Failure to keep to right in city—statute controlling. In an action for negligence on account of an automobile collision occurring in a suburban district of a city, the statute requiring travel on the right-hand side of the street (this section) rather than the statute giving one-half of the traveled way (§5020, Code, 35 [§5024.02, C., '39]) is controlling.

Rusch v Hoffman, 223-895; 274 NW 96

Left-side driving—negligence per se. The operator of a motor vehicle in cities and towns is guilty of negligence per se in driving on the left-hand side of a street without legal excuse.

Winter v Davis, 217-424; 251 NW 770

Justifiable travel beyond center of street. A traveler, in order to avoid an obstruction in the line of his travel, may, if he exercises due care, encroach upon that part of the street which is beyond the center line thereof; and the mere fact that the approaching vehicle is, at the same time, on that half of the highway which the statute has assigned to him does not necessarily show that he is not guilty of actionable negligence.

Cuthbertson v Hoffa, 205-666; 216 NW 733

Operating automobile outside vehicular roadway. The statute which requires the operator of a motor vehicle in cities and towns to travel at all times on the right-hand side of the center of the street has no application to the operation of such vehicle on a driveway which is a part of the street, but which is outside of the vehicular part thereof.

Dickeson v Lzicar, 208-275; 225 NW 406

Nonapplicability of statute—action against city. This section has no application to a controversy between the municipality as a defendant and a plaintiff who was the sole traveler upon the street at the time in question.

Smith v Town, 202-300; 207 NW 340

Facts surrounding automobile accident—right-hand travel. In an action arising out of an automobile collision an allegation as to negligence in failing to travel the right-hand side of the street may be supported by both testimony of witnesses and all the surrounding circumstances.

Rusch v Hoffman, 223-895; 274 NW 96

Evidence of automobile tracks—undue limitation. The action of the trial court in unduly limiting litigants in the introduction of testimony having direct bearing on a vital and material issue constitutes reversible error. So held as to evidence relative to the tracks of colliding automobiles.

Harness v Tehel, 221-403; 263 NW 843

Icy street—skidding not unforeseen. A motorist driving on icy pavement cannot excuse his presence on the wrong side of a city street, in violation of law, on the ground that he thought an approaching vehicle might skid into him, when the approaching vehicle remained at all times on its proper side of the street. Skidding on an icy street could neither be an unforeseen circumstance nor unexpected happening.

Young v Hendricks, 226-211; 283 NW 895

Collision because of skidding—icy street not legal excuse per se. Where one of two motor vehicles, which are approaching each other, skids across the street and collides with the other vehicle which had almost stopped at the curb, and while the existence of ice on a city street is a condition over which a motorist has no control, yet its presence is not legal excuse to relieve him from his duty to use care commensurate with the existing conditions when he is responsible for the control of his car.

Young v Hendricks, 226-211; 283 NW 895

Icy pavement and locked brakes as excuse—jury question. A defendant truck driver's explanation in argument that icy pavement and locked brakes made his truck slide and should excuse his presence on the wrong side of the road, where his truck collided with plaintiff's automobile, will not sustain a directed verdict in his favor, since question of plaintiff's contributory negligence, defendant's violation of statute, the sufficiency of his excuse, and whether his negligence, if any, was the proximate cause of plaintiff's injuries, being questions on which reasonable minds might differ, are for the jury.

McIntyre v West Co., 225-739; 281 NW 353

Evidence of recklessness—sufficiency—jury question. In an action by a guest against the driver and owner of a motor vehicle for injuries sustained as a result of a collision with an oncoming vehicle, where it is shown that the collision occurred on the left side of the road while automobile, with defective brakes, was being driven at an excessive rate of speed through a well-traveled intersection in a town over a slope or hill which limited visibility, and on the left side of the highway in face of visible oncoming traffic, such evidence, on the issue of whether or not collision was caused by driver's recklessness, presented a jury question.

Allbaugh v Ashby, 226-574; 284 NW 816

Equal use of street—instruction. An instruction that drivers of different vehicles are entitled to an "equal use of the street", with elucidating qualifications relative to the duty of one of the drivers under a valid regulatory city ordinance, is quite unobjectionable.

Ege v Born, 212-1138; 236 NW 75

Instructions neutralizing effect—rejection. Instructions which wholly neutralize the effect of driving on the left-hand side of a street are properly rejected when the jury might find that such driving contributed to the injury in question.

Waldman v Motor Co., 214-1139; 243 NW 555

Others' compliance with law assumed—when presumption fails—no instruction. The right of a motorist to assume that others using the highway will obey the law ceases when he knows that another motorist is not obeying the law. When such motorist testifies that he saw an approaching car skidding and then drove on the wrong side of a city street to avoid that car, he is not entitled to the embodiment of such rule of assumption in instructions to the jury.

Young v Hendricks, 226-211; 283 NW 895

Place of accident—nonapplicability of circumstantial evidence instruction. In a death claim action for negligence arising from an automobile collision occurring in a suburban district of a city where the negligence alleged was in failing to travel on the right-hand side of the street, and where along with the physical facts there was direct evidence by the driver of the car wherein decedent was riding as to decedent's travel on the right-hand side of the street, it was error to give an instruction, applicable only to cases based entirely on circumstantial evidence, when such instruction prevented the jury from properly considering the direct evidence as to where the accident occurred.

Rusch v Hoffman, 223-895; 274 NW 96

Compliance with law assumed—when presumption fails. The right of a motorist to assume that others using the highway will obey the law ceases when he knows that another motorist is not obeying the law. When such motorist testifies that he saw an approaching car skidding and he then drove on the wrong side of a city street to avoid that car, he is not entitled to the embodiment of such rule of assumption in instructions to the jury.

Young v Hendricks, 226-211; 283 NW 895

5024.02 Meeting and turning to right.

Annotations in Vol I, see under §5020

Atty. Gen. Opinion. See '25-26 AG Op 32

"Traveled way" defined. A single track made by vehicles in the snow on an 18-foot pavement is properly treated as the "traveled way", within the meaning of the statute, especially when the parties mutually try their case on such theory.

Rudd v Jackson, 203-661; 213 NW 428

Controlling statute. In an action for negligence on account of an automobile collision occurring in a suburban district of a city, the statute requiring travel on the right-hand side of the street (§5019, Code, 35 [§5024.01, C., '39]) rather than the statute giving one-half of the traveled way (this section) is controlling.

Rusch v Hoffman, 223-895; 274 NW 96

Right to use any part of highway. Principle reaffirmed that a traveler has the right to travel upon the left-hand side of the highway so long as he has no reason to apprehend meeting another conveyance.

Sergeant v Challis, 213-57; 238 NW 442

Stopping when meeting car not required. The duty so to operate an automobile as to be able to stop it within the assured clear distance ahead does not necessarily require the operator to stop his car on approaching an oncoming vehicle which is under duty to yield one-half of the traveled way.

Schuster v Gillispie, 217-386; 251 NW 735

Stationary vehicle—inapplicability of statute. The statute relative to the duty of the driver of a vehicle on the public highway, on meeting another vehicle, to yield one-half of the traveled way may, manifestly, have no

application to the driver of a vehicle which, to the timely knowledge of an oncoming driver, is standing stationary in such highway.

Engle v Nelson, 220-771; 263 NW 505

Preference at intersections—statutes inapplicable. Statutory requirements relative (1) to drivers turning "to the right" when meeting, and (2) to preference accorded drivers at highway intersections (§5035, C., '35 [§5026.01, C., '39]) can, from the very nature of the transaction, have no application to an occurrence where the driver of a westbound car in making, or instantly after making, a left-hand turn into an intersecting road came into collision with an eastbound car traveling on or near the highway from which the left-hand turn was made.

Enfield v Butler, 221-615; 264 NW 546

Pleading—using wrong side of road. An allegation that defendant's car at the time of a collision was "over the center of the pavement, and over on plaintiff's side of the pavement" may be very material and not subject to a motion to strike.

Harriman v Roberts, 211-1372; 235 NW 751

Sufficient allegation of negligence. An allegation (1) that defendant drove his vehicle to the left of the center of the traveled way, or (what is practically the same thing) (2) that defendant drove his vehicle upon the wrong or left side of the public highway, tenders a sufficiently definite issue of fact, at least in the absence of any pleaded attack thereon.

Muirhead v Challis, 213-1108; 240 NW 912

Equivalent allegation. Plaintiff's allegation that defendant, on meeting plaintiff's car on the highway, negligently usurped plaintiff's side of the highway, is, in effect, an allegation that defendant failed, on meeting plaintiff, to yield one-half of the traveled way by turning to the right, and under supporting evidence justifies an instruction accordingly.

Foster v Flaugh, 223-40; 271 NW 503

Sufficient allegation—interpretation by court. An allegation, that "defendant negligently drove his car in a northerly direction and allowed it to travel to the west of the center of the highway and encroached upon the line of travel of the plaintiff" (who was traveling in a southerly direction), is properly interpreted by the court as simply charging that defendant failed to yield one-half of the traveled way to plaintiff.

Keller v Gartin, 220-78; 261 NW 776

Negligence—prima facie (?) or per se (?). Where an accident happens upon a public highway outside a city or town, the fact that the vehicle is on the wrong side of the road is only prima facie evidence of negligence. On the other hand, subject to the above, the violation without legal excuse of a standard of care for the operation or equipment of vehicles, whether fixed by statute or ordinance, constitutes negligence per se.

Codner v Stowe, 201-800; 208 NW 330; 26 NCCA 207

Lange v Bedell, 203-1194; 212 NW 354

McDougal v Bormann, 211-950; 234 NW 807; 32 NCCA 405

Sergeant v Challis, 213-57; 238 NW 442

Lane v Varlamos, 213-795; 239 NW 689

Muirhead v Challis, 213-1108; 240 NW 912

Hollingsworth v Hall, 214-285; 242 NW 39

Holub v Fitzgerald, 214-857; 243 NW 575

Kisling v Thierman, 214-911; 243 NW 552; 36 NCCA 90; 37 NCCA 494

Waldman v Motor Co., 214-1139; 243 NW 555

Harvey v Knowles Co., 215-35; 244 NW 660; 1 NCCA(NS) 50

Wood v Banning, 215-59; 244 NW 658; 32 NCCA 255

Willemsen v Reedy, 215-193; 244 NW 691

Albert v Maher Bros., 215-197; 243 NW 561

Wosoba v Kenyon, 215-226; 243 NW 569; 1 NCCA(NS) 63, 747

Dillon v Diamond Co., 215-440; 245 NW 725

Peckinpaugh v Engelke, 215-1248; 247 NW 822; 33 NCCA 103; 35 NCCA 765; 1 NCCA (NS) 41

Danner v Cooper, 215-1354; 246 NW 223

Hogan v Nesbit, 216-75; 246 NW 270

Grover v Neibauer, 216-631; 247 NW 298

See Masonholder v O'Toole, 203-884; 210 NW 778; 31 NCCA 44; Voiles v Hunt, 213-1234; 240 NW 703; 31 NCCA 59; 32 NCCA 458

Negligence—prima facie evidence. Driving on the wrong side of a country highway, or failing to give one-half of such road by turning to the right, constitutes prima facie evidence of negligence—not negligence per se.

Cooley v Killingsworth, 209-646; 228 NW 880

Lang v Siddall, 218-263; 254 NW 783

Despain v Ballard, 218-863; 256 NW 426

Hobbs v Traut, 218-1265; 257 NW 320

Rainey v Riese, 219-164; 257 NW 346

McManus v Creamery Co., 219-860; 259 NW 921

Hoover v Haggard, 219-1232; 260 NW 540

Bobst v Hoxie Line, 221-823; 267 NW 673

Collision not proof of statute violation. The fact that a motorist traveling on the right-hand side of the highway comes into collision with an approaching car traveling on the left-hand side of the highway (in other words, both cars traveling in the same pathway) does not, in and of itself, establish or even tend to establish a violation of the statutory command so to drive as to be able to stop "within the assured clear distance ahead".

Jordan v Schantz, 220-1251; 264 NW 259; 1 NCCA(NS) 51

Evidence—colloquy following accident. In an action for damages consequent on a collision of automobiles, prejudicial error results from receiving against defendant evidence of a

heated colloquy between defendant and the other driver, occurring within a very few minutes after the collision, and wherein each driver asserted that he was on the right side of the highway, and wherein the defendant refused to examine certain tracks as bearing on the dispute and applied scandalously opprobrius epithets to the other driver; this because said testimony is neither a part of the res gestae nor does it reveal any admission on the part of the defendant.

Muirhead v Challis, 213-1108; 240 NW 912

Surrounding circumstances—jury question. Circumstances surrounding an accident, viz: the condition of the vehicles, the location of dead bodies and debris, the blood and brains splattered on one side of a bridge, are circumstances for the jury to consider in determining whether a truck driver gave one half of the traveled way by turning to the right.

Hawkins v Burton, 225-707; 281 NW 342

Instructions—failure to yield one half traveled way—other circumstances mentioned. In action by automobile passenger, arising out of collision between a bus and approaching automobile wherein the only ground of negligence submitted was bus driver's failure to yield one half of traveled way, instructions relating to speed and control of bus and to rights and duties of bus driver in general relating to fact pavement was wet, relating to a car parked in path of bus, and other circumstances, when read with other instructions, that failure to yield one half of highway was only prima facie negligence and could be justified, explained, or excused, and that parked car on highway might be an emergency creating an excuse, were not erroneous as submitting additional grounds of negligence.

Staggs v Bartovsky, 228- ; 291 NW 443

Assumption that half the roadway will be yielded. Where vehicles are approaching each other on a highway, they each have a right to assume that the other will give one-half the traveled way by turning to the right, until, in the exercise of ordinary care, it becomes apparent that this assumption can no longer be indulged in.

Jakeway v Allen, 226-13; 282 NW 374

Justifiable assumption—instruction. The operators of automobiles have the right to assume, when they meet on the highway, that the other will yield one-half of the traveled way by turning to the right; and it is erroneous to refuse a request for such instruction.

Muirhead v Challis, 213-1108; 240 NW 912

Motorcycle approaching on left side—assumption. Where a motorcycle traveling east and an automobile traveling west approach each other, both driving on the south half of the highway, held, that as long as the automobile driver had sufficient time to return to his right, the north, side of the highway, he had a right to assume that the motorcyclist would not attempt to drive to the north half of the highway for the purpose of passing on the north, the wrong side, of the automobile.

Jakeway v Allen, 226-13; 282 NW 374

Instructions—emergencies—jury question. Instruction that emergency rule would apply in a case "where it reasonably seemed to him, acting as an ordinarily careful and prudent person would act under like circumstances, that he could not safely turn to the right", properly presents question for jury's determination and is not open to objection that it gauges the excuse of emergency by driver's own judgment or impulse.

Jakeway v Allen, 227-1182; 290 NW 507

Turning to left in emergency. The driver of a conveyance is not necessarily guilty of negligence when, faced by a sudden and dangerous emergency, he turns to the left of an approaching vehicle in an effort to avoid a collision.

Lein v Morrell & Co., 207-1271; 224 NW 576; 31 NCCA 165

Emergency—failure to turn to right—effect. Failure of the operator of an automobile to turn to the right in an emergency is not necessarily negligent, and especially when the complaining party was the author of the emergency.

Caudle v Zenor, 217-77; 251 NW 69; 34 NCCA 122; 1 NCCA(NS) 44

Legal excuse—jury question. The act of the operator of a vehicle in turning to the left-hand side of a country highway when meeting another vehicle is presumptively negligent, but testimony that the immediately approaching vehicle was weaving from side to side of the road, and that the turn to the left was made in order to avoid a collision, presents a jury question whether he was, in turning to the left, exercising reasonable care.

Babendure v Baker, 218-31; 253 NW 834; 2 NCCA(NS) 650

Emergency instruction — conflict of testimony. In an action for injuries sustained in a collision between a motorcycle driven east by plaintiff on his right, the south, side of the road and an approaching automobile operated by the defendant allegedly on the left, or south, side of road, there was no occasion for court giving instruction to effect that defendant was faced with an emergency, when defendant maintained that he was at all times on his own right side of the road, because if he were on the left, or south, side of highway, the emergency was of his own making.

Jakeway v Allen, 226-13; 282 NW 374

Confusion resulting from accident not negligence. A motorist who, while operating his car easterly on the south or right-hand side

of a paved road at 50 miles per hour (tho the night is misty and visibility is poor), is unexpectedly, violently, and negligently so hit by the car of another motorist as to be deflected to the north or left-hand side of the road and into collision with an oncoming, westbound car, cannot, as to said latter collision, be deemed negligent because instantly when so deflected his hand involuntarily dropped from his steering wheel and his foot unintentionally reached the accelerator of his car instead of the brake.

Rich v Herny, 222-465; 269 NW 489

Legal excuse—instruction on statute. An instruction, tho in the language of the statute, e. g., that "motor vehicles, meeting each other on the public highway, shall give one-half of the traveled way thereof by turning to the right", may constitute reversible error when unaccompanied by any reference to a sudden emergency which is presented as an excuse for a car actually being on the wrong side of the road at the time of a collision.

Christenson v Tel. Co., 222-808; 270 NW 394

Occupying right side of highway—jury question. A specification of negligence that defendant did not keep his truck on the right-hand side of the highway when struck from the rear could not be withdrawn and was properly submitted to the jury when there was evidence to sustain the specification. Evidence did not show that collision would have occurred even tho truck had been wholly on right-hand side of the highway.

Gookin v Baker & Son, 224-967; 276 NW 418

Passing parked truck—excuse—jury question. The length of a vehicle (34 feet), its load (7 tons), and the space required in which to make a turn (20 to 30 feet) may, especially on a dark night, have a very material bearing on the issue whether the driver, by proof of an attempt to pass around a stalled truck, had legally excused his presumptive negligence in being on the left-hand side of the traveled way at the time of a collision with an oncoming vehicle. Evidence held to present jury question.

McWilliams v Beck, 220-906; 262 NW 781

Yielding right of way—jury question. Evidence held to present a jury question on the issue whether the operator of an automobile yielded, to an oncoming vehicle, one-half of a traveled way.

Ryan v Amodeo, 216-752; 249 NW 656
Schuster v Gillispie, 217-386; 251 NW 735
Lukin v Marvel, 219-773; 259 NW 782

Proximate cause—jury question. Evidence held to present jury question whether defendant's failure to give half of the traveled highway was the proximate cause of an accident.

Henriksen v Stages, 216-643; 246 NW 913

Crossing black line to pass automobile—jury question. Eyewitness testimony, that a defendant motorist crossed the black line to the left side of the pavement preparatory to passing an automobile, then, observing an approaching vehicle, swung back in again, and in so doing struck this latter vehicle, deflecting his own automobile so as to collide with a second approaching vehicle in which plaintiff was riding, makes a jury question as to defendant's acts being negligence.

Echternacht v Herny, 224-317; 275 NW 576

Collision—jury questions. Evidence reviewed in an action for damages consequent on a collision in the nighttime between a truck and an automobile, and held to present jury questions on the issues:

1. Whether deceased was guilty of contributory negligence.
2. Whether defendant was driving his truck without lights.
3. Whether defendant was driving on the wrong side of the road.
4. Whether defendant was operating his truck (weighing three tons) at an unlawful rate of speed.
5. Whether defendant had opportunity to avoid the collision and failed to do so.

Carlson v Decker, 218-54; 253 NW 923; 36 NCCA 93

Collision on bridge—inadequate brakes—jury question. Evidence that a plaintiff motorist approached a bridge at 15 miles per hour, proceeded to cross, keeping his car within 6 inches of the right-hand side, before defendant came on the bridge, and that plaintiff was two-thirds across before defendant swung across the center line and struck him, makes a jury question as to whether the fact of plaintiff's negligence in not having adequate brakes contributed to the collision.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Passenger suing both drivers — concurring negligence—jury question. In an action by a passenger against the drivers of both automobiles involved in a collision, where the vehicle in which he was riding was being driven 50 to 60 miles per hour in a snowstorm, with an oncoming automobile crowding toward the wrong side of the road, a jury question is created as to whether the conduct of the driver with whom the plaintiff was riding was a concurring proximate cause of the passenger's injuries.

Futter v Hout, 225-723; 281 NW 286

Plural assignment — justifiable submission. Record reviewed in an action for damages consequent on a collision during the nighttime between trucks, and held to justify the court in submitting to the jury not only the issue (1) of defendant's failure to turn to the right and yield one-half of the traveled way, but also the issues (2) of defendant's failure to maintain

a proper lookout for other vehicles, and (3) of defendant's alleged excessive speed.

Pazen v Des Moines Co., 223-23; 272 NW 126

Collision with bicycle—negligence—instructions—jury question. Where a motorist driving east 40 to 50 miles per hour at night on a paved highway, the lights on his vehicle working properly (no rain, fog, or snow), his attention being momentarily diverted by an oncoming car, and, simultaneously with its passing, he collided with and fatally injured a bicycle rider, also traveling east, instructions covering diverting circumstances relative to speed (§5029, C., '35 [§5023.01, C., '39]) and failing to turn to left when passing vehicle (§5022, C., '35 [§5024.03, C., '39]) reviewed and held to correctly present questions for jury.

Reardon v Hermansen, 223-1207; 275 NW 6; 3 NCCA(NS) 184

Directed verdict—defendant's excuse for negligence—jury question. In argument, a defendant truck driver's explanation that icy pavement and locked brakes made his truck slide and should excuse his presence on the wrong side of the road where his truck collided with plaintiff's automobile will not sustain a directed verdict in his favor, since question of plaintiff's contributory negligence, defendant's violation of statute, the sufficiency of his excuse, and whether his negligence, if any, was the proximate cause of plaintiff's injuries, being questions on which reasonable minds might differ, are for the jury.

McIntyre v West Co., 225-739; 281 NW 353

Directed verdict—improper unless per se negligence also contributory—jury question. A plaintiff motorist, against whom a directed verdict was rendered because in violating a speed statute he was negligent per se, still should have had the benefit of the best possible view of the evidence, and, moreover, a record showing that he remained at all times on his own side of the road, but that a truck driver, for no apparent reason, drove across the pavement center line, resulting in a head-on collision, makes a jury question as to whether or not plaintiff's per se negligence contributed to his injury.

McIntyre v West Co., 225-739; 281 NW 353

Reckless operation—insufficient proof. The reckless operation of an automobile, within the meaning of section 5026-b1, C., '35, is not shown by proof that a motorist, in the daytime and without obstruction to view ahead, and while approaching a bridge on a country highway, was traveling at the rate of some forty-odd miles per hour, and a-straddle the black lines in the center of an 18-foot wide, level, 10-degree curve; that, while so traveling, he confined his view solely to said black lines as they came into view immediately ahead of the fender or hood of his car; that he did not "look up" and see an approaching truck on the bridge until 75 feet therefrom; and that thereupon he swerved his car to the right but not quite far enough to avoid side-swiping the rear part of the truck while the two vehicles were passing on the bridge.

Wilson v Oxborrow, 220-1135; 264 NW 1

Instruction justified by allegation. Instructions relative to the duty of vehicle drivers to turn to the right, on meeting, are justified by an allegation of negligence in driving on the wrong side of the road at the time of meeting.

Lange v Bedell, 203-1194; 212 NW 354

Instructions—acts of negligence set out. In submitting to the jury the alleged negligence of driving to the left of the center of a traveled way, or driving upon the wrong or left side of the highway, the court must specifically define to the jury what acts would constitute negligence under said allegations.

Muirhead v Challis, 213-1108; 240 NW 912
Jakeway v Allen, 226-13; 282 NW 374

No presumption of fault when on wrong side of highway. It is erroneous to instruct that where a collision occurs between two vehicles, at a time when one of the vehicles is on the wrong side of the road, the presumption is that the collision was caused by the negligence of the driver who was on the wrong side of the road.

Fry v Smith, 217-1295; 253 NW 147

Instruction—violation as presumption of negligence. An instruction that negligence may consist in the failure to do that which the law commands, in connection with an instruction that the statute requires drivers of vehicles to turn to the right when meeting, in effect directs the jury that the failure to turn to the right constitutes negligence in and of itself, and is erroneous because the failure to obey said statute creates a presumption, only, of negligence.

Ryan v Rendering Wks., 215-363; 245 NW 301

Excuse not presented—peremptory instruction. Instructions that a party is in duty bound to drive on the right-hand side of a highway or that he must so drive as to be able to stop within the assured clear distance ahead, without any qualification relative to the driver's right to show legal excuse for driving otherwise, are not erroneous when the driver offers no excuse.

Winter v Davis, 217-424; 251 NW 770

Nonprejudicial instructions—excuse. An instruction to the effect that if the defendant failed to yield to another motorist one-half of the traveled way, the jury, "in the absence of justifiable excuse", might find the defendant negligent, cannot be deemed prejudicial to a defendant who established no excuse whatever.

Lukin v Marvel, 219-773; 259 NW 782

Instructions—failure to yield half of traveled way—justification. Instruction as to defendant's duty to yield one half of traveled highway and that violation of such duty would be presumptive evidence of negligence and would warrant finding of negligence unless it was shown by "the greater weight or preponderance of the evidence" that under the circumstances defendant's failure was justified and in exercise of ordinary care, held not prejudicial since no evidence of justification was adduced, altho use of quoted words is not to be approved. Instruction as to plaintiff's duty to yield one half of traveled way also reviewed and held sufficient.

Jakeway v Allen, 227-1182; 290 NW 507

Improper burden of proof—excuse presented under general denial. Reversible error results from an instruction that defendant's failure, on meeting plaintiff, to yield half of the traveled way would be prima facie evidence of negligence unless defendant has established by a preponderance of the evidence his excuse for not so yielding, when defendant did not plead said excuse as an affirmative defense, but, under a general denial, presented it in his evidence.

Rich v Herny, 222-465; 269 NW 489

Assumption that laws will be obeyed—instruction. If there be applicable evidence the court must instruct (at least on request), (1) as to the duty of drivers of cars, on meeting, to obey the laws of the road, such as turning to the right, and maintaining a proper lookout and proper speed, and (2) as to the right of the driver of each car to presume that such duties will be performed by the other driver.

Hoover v Haggard, 219-1232; 260 NW 540

Snowstorm—assuming compliance with law—reasonable care rule. Where two motorists approach each other in a snowstorm—one driving into the face of the storm which has obliterated the pavement outlines and the dividing mark thereon—the other motorist has a right to assume that he will be accorded one-half the traveled way until he sees or until, in view of the storm conditions and added driving difficulties, he should, in using ordinary care, realize that half the highway was not being yielded, under which facts a jury question is presented as to whether his continued reliance on the assumption excused him from the charge of negligence.

Futter v Hout, 225-723; 281 NW 286

Instructions—absence of evidence to support. Instructions which submit to the jury the questions whether a defendant has shown legal excuses, (1) for exceeding a statutory speed limit, or (2) for not having yielded one-half of the traveled way, are erroneous when there is no evidence supporting an affirmative finding on either proposition.

Deweese v Transit Lines, 218-1327; 256 NW 428

Requested instructions—refusal when otherwise favorably covered—nonerroneous. In action arising out of injuries sustained in collision between a bus and approaching automobile, a refusal to give bus owner's requested instruction concerning the discovery of parked car on paved highway in the path of bus as a circumstance bearing on question of bus driver's negligence in failing to yield one half of traveled way, was not prejudicial error where other instructions given at bus owner's request were at least as favorable to bus owner as refused instruction.

Staggs v Bartovsky, 228- ; 291 NW 443

Absence of rear reflectors—nonproximate cause—instruction without issue. A "sideswipe" collision between two head-on approaching automobiles could not proximately result from the absence of red reflectors on the rear of the body and no instruction involving this negligence should be given.

Keller v Dodds, 224-935; 277 NW 467

Instructions—noncompliance — unsupported issue. Instruction dealing with contributory negligence and presenting to the jury a situation involving plaintiff's duty to yield one-half of traveled roadway and turning to the right unless impossible to do so is reversibly erroneous when neither allegations nor evidence raise this question.

Keller v Dodds, 224-935; 277 NW 467

Unsupported issues not submitted. In a damage action for an automobile collision occurring on a north and south paved road south of an intersection, it is not error to submit the case on the one negligence ground that defendant crossed the center line of the pavement when the record as to other negligence allegations shows a proper speed and lookout, control of the car, and that defendant driving north could not make a left turn before reaching the intersection.

Tharp v Rees, 224-962; 277 NW 758

Failure to turn to right as negligence—nonprejudicial error. An instruction to the effect that the failure of the operator of an automobile on a country road to turn to the right on meeting another vehicle constitutes negligence, if erroneous, is error without prejudice when the record reveals beyond question that said operator was guilty of proximate negligence in other respects.

Scott v Hinman, 216-1126; 249 NW 249

Travel in fog—assured clear distance—oncoming vehicles. Since as to oncoming vehicles, "assured clear distance" statute applies only to motorist not traveling on his right-hand side of the road, in an action involving a collision between oncoming vehicles on a foggy night when vehicle in which plaintiff was riding was traveling on the right-hand side of the road, a requested instruction applying the

"assured clear distance" statute to the plaintiff was properly refused.

Gregory v Suhr, 224-954; 277 NW 721

Unbalanced instruction — unallowable limitation on materiality of evidence. Reversible error results to an unsuccessful plaintiff (in an action pivoted on the issue whether defendant traveling northward yielded half of the traveled way to plaintiff traveling southward) from instructions to the effect that "evidence that defendant just preceding the collision swerved his car to the west is material on the issue whether plaintiff was guilty of contributory negligence, even tho plaintiff had not alleged such swerving as a specific act of negligence on the part of defendant". The vice is not in what the court does say but in what the court does not say, to wit: that said evidence is material on the issue of defendant's negligence.

Keller v Gartin, 220-78; 261 NW 776

Fatally confusing instruction. The presentation to the jury of an assignment of negligence to the specific effect that the two automobiles in question, moving in opposite directions on the highway and immediately before they collided, were each on the left-hand side of the highway, is so confusing as to constitute reversible error.

Balik v Flacker, 212-1381; 238 NW 467

Erroneously refused instruction—right to assume compliance with law. Reversible error results from refusing to instruct that the operator of an automobile has a right to assume (until he knows or should know to the contrary) that other operators of automobiles, (1) will keep their cars under control, (2) will maintain a speed which will enable them to stop within the assured clear distance ahead, and (3) will yield one-half of the traveled way by turning to the right—all such enumerated subject matters being distinctly in issue.

Fry v Smith, 217-1295; 253 NW 147

Yielding half of traveled way—beaten path (?) or entire roadway (?). When the plaintiff's truck turned left at a blind corner, keeping to the right of the beaten path, but not to the right side of the graveled highway, and collided with the defendant's car which was approaching the corner on the right side of the road, it was not improper to instruct the jury that a car must yield half the traveled or graveled part of the road when meeting another car, and, that for the plaintiff to recover, it must be found that the truck was hit while on the right side of the road; or, for a recovery to be had by the defendant on a counterclaim, that the plaintiff was negligent in not yielding half the road.

Kiesau v Vangen, 226-824; 285 NW 181

Ruts in snow on highway—collision—explanatory instruction omitting contributory negligence. Where, on a snow-covered highway containing a single pair of ruts, two automobiles approaching each other collide on a hill, in a damage action by a passenger injured thereby, an instruction further explaining negligence, but not mentioning contributory negligence, is not erroneous when contributory negligence was covered in other instructions and when the jury could not have been misled by the explanatory purpose of the instruction.

Tallmon v Larson, 226-564; 284 NW 367

5024.03 Overtaking a vehicle.

Atty. Gen. Opinion. See '30 AG Op 167

Nonright to assume compliance with law. The operator of an automobile while attempting to pass another car going in the same direction has no right to assume that the car sought to be passed will keep to the right of the center of the highway when the highway is so occupied at the time by another car that the car sought to be passed cannot turn to the right.

Gehlbach v McCann, 216-296; 249 NW 144; 33 NCCA 476

Left turn by car ahead—"assured clear distance ahead" rule—inapplicability. In action to recover for personal injuries resulting from an automobile collision occurring when the driver of an automobile attempted to pass a truck while the vehicles were traveling side by side, and the truck driver attempted a left turn into driveway of a farm, held, that the "assured clear distance ahead" rule was inapplicable.

Monen v Jewel Tea Co., 227-547; 288 NW 637

Racing as proximate cause—evidence. On the issue whether two automobiles were racing and whether such race was the proximate cause of an injury to a third party, the court may, in its discretion, refuse to receive evidence of racing remote in point of time unless evidence of racing immediately before the accident is first introduced.

Glass v Hutchinson Co., 214-825; 243 NW 352

Use of entire pavement—permissible until signal received. The driver of a truck proceeding down the highway had the right to make use of the entire pavement when there was no vehicle approaching from in front, until he received some signal or in some way acquired knowledge that a truck in the rear desired to pass.

Glover v Vernon, 226-1089; 285 NW 652

Driving past stationary vehicle. Driving past and within four feet of a stationary vehicle in the public highway, at a rate of 35 miles per hour and without giving any warning signal, when much more than said four feet was afforded by the highway, may constitute negligence.

Jarvis v Stone, 216-27; 247 NW 393

Turning to right when overtaking vehicle. Turning to the right on approaching from the rear a stationary vehicle in the highway may not, in an emergency, constitute negligence.

Jeck v Const. Co., 216-516; 246 NW 595; 35 NCCA 766

Passing pedestrian—contributory negligence—jury question. When a truck slowed down and turned out to the left to avoid a pedestrian walking along the traveled portion of the highway, and was struck by another truck proceeding from the rear, the court properly submitted the question of contributory negligence to the jury.

Glover v Vernon, 226-1089; 285 NW 652

Conflicting evidence re control. Manifestly the court cannot find that a motorist did not have his car under control while attempting to pass another car, and was therefore guilty of negligence per se, when the position and speed of the cars at the time of the collision are in sharp dispute.

Jordan v Schantz, 220-1251; 264 NW 259

Jury question — contributory negligence. Record reviewed and held to present a jury question on the issue of the contributory negligence of plaintiff in attempting to pass another car traveling in the same direction.

McCoy v Cole, 216-1320; 249 NW 213

Failure to yield right of way. Record reviewed and held to justify the submission to the jury of the assignment of negligence to the effect that the operator of an automobile failed to yield the right of way to a passing car.

McCoy v Cole, 216-1320; 249 NW 213; 33 NCCA 347

Negligence per se—double passing. The operator of a motor vehicle, who, at a speed of forty miles per hour and in the nighttime, attempts to pass another vehicle which he is closely following, at the very time when the operator of such other vehicle is attempting to pass a vehicle which he has overtaken, is guilty of negligence per se; both because he (1) is manifestly driving at an imprudent rate of speed under the circumstances, and (2) is driving at a rate of speed which will not enable him to stop within the assured clear distance ahead.

Harvey v Knowles Co., 215-35; 244 NW 660

"Double passing." Evidence relative to the facts attending a "double passing" reviewed and held to present a jury question on the issue of contributory negligence.

Gehlbach v McCann, 216-296; 249 NW 144; 33 NCCA 476

Repealed statute. Requested instruction in re repealed statute, previously governing overtaking automobiles, properly refused.

Jones v Krambeck, 228- ; 290 NW 56

Negligence—truck struck from the rear—jury question. A specification of negligence that defendant did not keep his truck on the right-hand side of the highway when struck from the rear could not be withdrawn and was properly submitted to the jury when there was evidence to sustain the specification. Evidence did not show that collision would have occurred, even tho truck had been wholly on right-hand side of the highway.

Gookin v Baker & Son, 224-967; 276 NW 418

Negligence—jury question. Evidence reviewed, and held to present a jury question on the issue whether the driver of a vehicle was negligent in attempting to pass on the left of a forward-moving vehicle.

Starry v Hanold, 202-1180; 211 NW 696; 33 NCCA 506

Anticipated negligence—repairing car on highway. Prejudicial error results from instructing, in effect, that a person who has stopped his car at a proper place in the highway in order to repair it must anticipate and guard himself against the possibility that the operator of some passing car may be negligent by passing the stationary car on the wrong side.

Hanson v Manning, 213-625; 239 NW 793

Left turn into passing vehicle—instruction on speed not necessary. In a personal injury action arising out of an automobile-truck collision occurring when the automobile, in which plaintiff was riding with husband-driver, was passing a truck which attempted to make a left turn into driveway of a farm just as the automobile came alongside, and when the automobile driver, attempting to avoid an accident by speeding ahead of truck, collided therewith, held, that statute relating to speed, which requires reasonable speed with due regard to existing conditions, the truck being the only "existing condition" at the time and place of accident, was inapplicable, and the court properly instructed jury only on the statute governing passing vehicles as affecting automobile driver's contributory negligence, which would be imputed to plaintiff by court's former instruction.

Monen v Jewel Tea Co., 227-547; 288 NW 637

Care by driver being overtaken—instructions. Instructions relative to the care required by the driver of a car which is overtaken by another car are proper when such care is in issue under conflicting evidence.

Kuhn v Kjose, 216-36; 248 NW 230

Duty to reduce speed. An allegation that defendant drove his vehicle past a stationary vehicle at an excessive and dangerous rate of speed renders proper, on supporting proof, an instruction as to the duty of the defendant to reduce his speed to a reasonable rate when approaching and passing the stationary vehicle.

Jarvis v Stone, 216-27; 247 NW 393

Failure to signal. Instructions relative to the duty of the driver of an automobile, in attempting to pass a slower moving vehicle, to sound his horn, may be justified even tho the driver of the slower moving vehicle had knowledge that the other party was attempting to pass.

Johnson v McVicker, 216-654; 247 NW 488

Negligence—improper submission. Only supported grounds of negligence should be submitted to the jury. So held where the court submitted the negligence of the driver of an automobile (1) in failing to turn to the right when signaled by an overtaking car, and (2) in increasing his speed when so signaled, when on the record the only possible proximate negligence was the act of the said driver in overtaking the passing car, after it had passed, and then bringing about a collision.

Berridge v Pray, 202-663; 210 NW 916

5024.06 Overtaking on the right.

Turning to right when overtaking vehicle—effect. Turning to the right on approaching from the rear a stationary vehicle in the highway may not, in an emergency, constitute negligence.

Jeck v Const. Co., 216-516; 246 NW 595; 35 NCCA 766

Failure to lessen speed or signal approach. A jury question on the issue of negligence of the operator of an automobile is generated by evidence tending to show that said operator was driving easterly on a straight road at 50 miles per hour; that he plainly could have seen, while at a distance of 80 rods, two well-lighted cars, and that they were standing together on the south side of the highway, one headed west and one headed east, with all headlights burning; and that, without slacking his speed or giving signal of his approach, he passed to the south of said stationary cars and so close thereto as to strike and break an open door on one of said cars.

Hanson v Manning, 213-625; 239 NW 793; 2 NCCA(NS) 446

5024.07 Limitations on overtaking on the left.

Precautions before passing vehicle. The operator of a vehicle is under duty, before attempting to pass to the left of and around another vehicle moving in the same direction, to make reasonable observation as to the presence, in front, of other vehicles moving in the opposite direction on the highway, and to attempt such passage only when, in the exercise of reasonable care, it appears that he can (1) effect such passage in safety to the vehicle which is to be passed, and (2) properly return to the right-hand side of the road before meeting oncoming vehicles. A violation of this duty may be the proximate cause of a third vehicle being deflected into the vehicle which had been passed.

Bobst v Hoxie Line, 221-823; 267 NW 673

Proximate cause. The act of passing a vehicle at an illegal rate of speed may not be declared negligence per se as to a collision which occurred after the passing had been completely effected.

Berridge v Pray, 202-663; 210 NW 916

Last clear chance—jury question. When a truck driven by plaintiff's intestate slowed down and turned to the left to avoid a crippled pedestrian who was walking along the highway, whether the defendant's truck, coming from the rear at a greater speed, after discovering the peril of the truck in front in having turned out into his path, should have pulled further to the left on the shoulder of the road to avoid a collision, was a question of last clear chance for the jury.

Glover v Vernon, 226-1089; 285 NW 652

Collision with bicycle—instructions — jury question. Where a motorist driving east 40 to 50 miles per hour at night on a paved highway, the lights on vehicle working properly (no rain, fog, or snow), his attention being momentarily diverted by an oncoming car, and, simultaneously with its passing, he collided with and fatally injured a bicycle rider also traveling east, instructions covering diverting circumstances relative to speed (§5029, C., '35) and failing to turn to left when passing vehicle (§5022, C., '35) reviewed and held to present correctly questions for jury.

Reardon v Hermansen, 223-1207; 275 NW 6; 3 NCCA(NS) 184

Verdict contrary to evidence—setting aside—nonabuse of discretion. In an action for personal injuries sustained by plaintiff in a head-on automobile collision occurring at night near a crest of a hill on a narrow paved country highway, where the vehicle in which plaintiff was riding was then on the left-hand side of the highway attempting to pass another car traveling in the same direction, the setting aside of the verdict for plaintiff on the ground that verdict was contrary to the evidence, and granting a new trial, was not an abuse of discretion.

Brunssen v Parker, 227-1364; 291 NW 535

Negligence per se. The operator of a motor vehicle, who, at a speed of 40 miles per hour and in the nighttime, attempts to pass another

vehicle which he is closely following, at the very time when the operator of such other vehicle is attempting to pass a vehicle which he has overtaken, is guilty of negligence per se; both because he (1) is manifestly driving at an imprudent rate of speed under the circumstances, and (2) is driving at a rate of speed which will not enable him to stop within the assured clear distance ahead.

Harvey v Knowles Co., 215-35; 244 NW 660; 1 NCCA(NS) 50

Holding under former statute. The operator of a vehicle is guilty of negligence per se when, after passing another vehicle moving in the same direction, he returns to the right-hand side of the highway and in front of the vehicle just passed, within a shorter distance than that provided by law—30 feet.

Bobst v Hoxie Line, 221-823; 267 NW 673

Passing on curve—negligence—jury question. Evidence held to present a jury question on the issue of negligence of the operator of an automobile in passing another vehicle on a curve and returning to the right side of the traveled way within 30 feet of the car which had been passed.

Andersen v Christensen, 222-177; 268 NW 527

5024.08 Prohibited passing.

Passing on curve—negligence—jury question. Evidence held to present a jury question on the issue of negligence of the operator of an automobile in passing another vehicle on a curve, and returning to the right side of the traveled way within 30 feet of the car which had been passed.

Andersen v Christensen, 222-177; 268 NW 527

Verdict contrary to evidence—setting aside—nonabuse of discretion. In an action for personal injuries sustained by plaintiff in a head-on automobile collision occurring at night near a crest of a hill on a narrow paved country highway, where the vehicle in which plaintiff was riding was then on the left-hand side of the highway attempting to pass another car traveling in the same direction, the setting aside of the verdict for plaintiff on the ground that verdict was contrary to the evidence, and granting a new trial, was not an abuse of discretion.

Brunssen v Parker, 227-1364; 291 NW 535

5024.11 Following too closely.

Last clear chance—jury question. When a truck driven by plaintiff's intestate slowed down and turned to the left to avoid a crippled pedestrian who was walking along the highway, whether the defendant's truck, coming from the rear at a greater speed, after discovering the peril of the truck in front in having turned out into his path, should have pulled further to the left on the shoulder of the road to avoid a collision, was a question of last clear chance for the jury.

Glover v Vernon, 226-1089; 285 NW 652

TURNING AND STARTING AND SIGNALS ON STOPPING AND TURNING

5025.01 Turning at intersections.

Annotations in Vol I, see under §5033
Intersection collisions generally. See under §§5026.01–5026.05

Atty. Gen. Opinion. See '30 AG Op 355

Cutting corners—inapplicability of statute. The statutory prohibition against "cutting corners" in making left-hand turns is not applicable when no one is approaching on the road into which such turn is made.

Enfield v Butler, 221-615; 264 NW 546

Cutting corner. A left-hand "cutting of the corner" while passing from one street into another is ipso facto negligent.

Lein v Morrell & Co., 207-1271; 224 NW 576; 32 NCCA 417

Cutting corner—jury question. Evidence held to present a jury question on the issue whether an automobile driver's failure to pass to the right of and beyond the center of a highway intersection was the proximate cause of an injury.

Sexauer v Dunlap, 207-1018; 222 NW 420

Turning or changing course—conditions precedent. The operator of a motor vehicle cannot be deemed guilty of negligence in attempting to turn to the right and into an intersecting road, if he believed and as a reasonably prudent person had a right to believe, in view of all the circumstances, that he could make said turn in safety.

Harmon v Gilligan, 221-605; 266 NW 288

Justifiably attempted left turn. A motor vehicle driver cannot be deemed negligent in attempting a left-hand turn into an intersecting highway when, acting as a reasonably cautious and prudent person, he believes and has a right to believe that vehicles approaching from his right during the turn are at such distance that he can safely make the turn.

Enfield v Butler, 221-615; 264 NW 546

Obeying statute—presumption. Principle reaffirmed that a motor vehicle driver in attempting to make a left-hand turn into an intersecting road has a right to proceed on the assumption (unless he has knowledge to the contrary) that another driver, approaching from his right, will obey the law (§5031, C., '35) by reducing his speed to a reasonable and proper rate when approaching and traversing said intersection.

Enfield v Butler, 221-615; 264 NW 546

Holding under former statute. In making a left-hand turn into an intersecting road, negligence on the part of a westbound driver (1) in failing to drive to the right and beyond the center before turning, or (2) in failing to note whether he could make the turn in safety, is not the proximate cause of injuries received by him by being hit by an eastbound car after he had completed the turn and was wholly on the intersecting road.

Enfield v Butler, 221-615; 264 NW 546

Prior statute. The failure of the owner of a truck, before making a left turn into an intersecting highway, to drive to the right of and beyond the center of the intersection, constitutes negligence per se and if such owner is injured his negligence will be classified as contributory negligence per se if such conclusion is the only one to which reasonable minds could arrive.

Mansfield v Summers, 222-837; 270 NW 417

Holding under prior statute. Record reviewed and held to establish contributory negligence on the part of a motorist in driving into a highway intersection and turning to the left (1) without first observing whether he had sufficient space in which safely to make said turn, (2) without first reducing his speed to a reasonable rate, a rate which would permit a stop within the assured clear distance ahead, and (3) without first driving to the right of, and beyond the center of, said intersection before turning to the left.

Wimer v Bottling Co., 221-120; 264 NW 262

Negligence per se—improper left-hand turn. A left-hand turn from one highway into another highway contrary to the direction of the statute constitutes negligence per se in the absence of plea and proof of a valid excuse.

Wilson v Long, 221-668; 266 NW 482

Turn at intersection—negligence per se. The operator of a westbound automobile, who makes a left-hand turn at an intersecting street and thereupon increases his speed in order to escape a collision with an eastbound car which he knows is but some forty feet west of the intersection and approaching it at a speed twice his own speed, is guilty of negligence per se.

Parrack v McGaffey, 217-368; 251 NW 871

Collision with left-turning vehicle—contributory negligence. The driver of a rear-moving vehicle is not necessarily guilty of contributory negligence because, at high speed, he collides with a forward-moving vehicle while it is making an abrupt left turn.

McManus v Creamery Co., 219-860; 259 NW 921

Negligence per se—prejudicial submission. Prejudicial error results from submitting to the jury whether a motorist was negligent in so making a left-hand turn as to run into the side of another motorist properly operating his car on the road from which the turn was made, because such a turn with such result is negligence per se in the absence of proof of legal excuse.

Rich v Herny, 222-465; 269 NW 489

Overtaking and passing—car ahead turning to left. In action to recover for personal injuries resulting from an automobile collision occurring when the driver of an automobile attempted to pass a truck while the vehicles were traveling side by side, and the truck driver attempted a left turn into driveway of a farm, held, that the "assured clear distance ahead" rule was inapplicable.

Monen v Jewel Tea Co., 227-547; 288 NW 637

Turning or changing course—negligence. Evidence reviewed, and held to present a jury question on the issue whether a motorist was negligent in suddenly turning from the right side to the left side of a paved, rural highway (in order to enter a private driveway on the latter side of said road), and whether, if negligent, said negligence was the proximate cause of a collision with another vehicle which he knew he was about to meet.

McKinnon v Guthrie, 221-400; 265 NW 620

Turning to right into intersecting road—contributory negligence—jury question. Record reviewed and held to present a jury question on the issue whether plaintiff, traveling on the right-hand side of the highway, with knowledge that she was being closely followed by a truck, was guilty of contributory negligence in changing her course by turning to the right and entering an intersecting highway—the collision occurring between said turning car and said truck.

Harmon v Gilligan, 221-605; 266 NW 288

Collision with overtaking and passing vehicle—instruction on speed not necessary. In a personal injury action arising out of an automobile-truck collision occurring when the automobile in which plaintiff was riding with husband-driver was passing a truck which attempted to make a left turn into driveway of a farm just as the automobile came alongside, and when the automobile driver, attempting to avoid an accident by speeding ahead of truck, collided therewith, held, that statute relating to speed, which requires reasonable speed with due regard to existing conditions, the truck being the only "existing condition" at the time and place of accident, was inapplicable, and the court properly instructed jury only on the statute governing passing vehicles as affecting automobile driver's contributory negligence, which would be imputed to plaintiff by court's former instruction.

Monen v Jewel Tea Co., 227-547; 288 NW 637

Intersecting highways—jury question. The intersection formed by the junction of two

highways may be such that the center thereof may be a question for the jury.

Wambeam v Hayes, 205-1394; 219 NW 813; 31 NCCA 71; 32 NCCA 437

Actions—unsupported issues not submitted. In a damage action for an automobile collision occurring on a north and south paved road south of an intersection, it is not error to submit the case on the one negligence ground that defendant crossed the center line of the pavement when the record as to other negligence allegations shows a proper speed and lookout, control of the car, and that defendant driving north could not make a left turn before reaching the intersection.

Tharp v Rees, 224-962; 277 NW 758

5025.03 Starting parked vehicle.

Motorist anticipating dangerous position of one aiding—jury question. Where a stalled motorist heard one of several bystanders say, "Let's give him a push", whereupon they arranged themselves in positions to push the automobile, and one called, "Let's go ahead", a directed verdict is properly denied, and a jury question is presented as to whether or not the motorist might have known that a person was directly behind the automobile and would be injured if the car moved backward.

Huston v Lindsay, 224-281; 276 NW 201

Instructions—moving automobile backward—warning person in perilous position. Instructions covering motorist's right to move his car backward and his duty to give warning of his intention to so move the automobile when people are pushing and trying to extricate it from stalled position on icy street, and whether he knew or ought to have known of one in a position of peril at the rear of the automobile, reviewed, and held to correctly present the issues.

Huston v Lindsay, 224-281; 276 NW 201

Truck in reverse gear—negligent starting. Evidence reviewed and held to present jury questions on the issues:

1. Whether the operator of a truck which he had left in reverse gear was negligent in starting the engine when he had reason to know that another person was in the near vicinity of the rear of the truck, and,
2. Whether the deceased was injured by being crushed between the rear of said truck and a building.

Laudner v James, 221-863; 266 NW 15

Nonduty to apprehend remote danger. The driver of a loaded truck, which is standing with the rear end against a building, is under no duty, when starting the truck, to apprehend that a person then standing beside the truck and some four feet from it and in a position of perfect safety, will, after the truck is started, suddenly run in behind the truck and be caught in a dangerous position provided the engine should unexpectedly stall and the truck "back up" against the building.

Nelson v Mitten, 218-914; 255 NW 662; 39 NCCA 353

Unobserved person. The driver of an automobile is not, broadly speaking, under a duty, before putting the vehicle in motion, to look around or under it in order to discover the possible presence of persons in a position of danger. A plaintiff seeking personal damages consequent upon a person's being run over is under an imperative necessity to show the location of the injured person just preceding the injury, or such a state of facts with reference thereto as will justify a finding that the driver (1) saw the person, or (2) ought, in the exercise of ordinary care, to have seen him.

Williams v Cohn, 201-1121; 206 NW 823

Caterpillar tractor started while man standing on track. Where a gasoline tank-wagon operator, engaged in filling the gas tank on a caterpillar tractor owned by a road construction company, and, while standing on the tractor's endless track, is thrown, by a sudden movement of the tractor, in front of another such tractor, company cannot say that first tractor operator may be negligent but second operator was not and so accident was unavoidable.

O'Meara v Green Const. Co., 225-1365; 283 NW 735

5025.04 When signal required.

Signals—when unnecessary. One may not complain of the absence of a signal of intention to turn at an intersection when he already has all the knowledge that a signal would have given him.

Ryan v Trenkle, 203-443; 212 NW 888; 30 NCCA 113; 31 NCCA 389; 35 NCCA 59; 3 NCCA(NS) 103

Knowledge by other driver. A charge that an operator of an automobile failed, prior to making a turn, to see that there was sufficient space in which to turn becomes inconsequential when the record reveals the fact that plaintiff and defendant were the only persons present at the intersection and that each was aware of the actions of the other.

Ryan v Trenkle, 203-443; 212 NW 888

Holding under prior statute—effect of signal. The operator of a motor vehicle who "raises and extends his hand" in effect warns the operator of a vehicle immediately following that there is to be a change in the condition then existing, that the signaling driver intends to stop, turn, or change the course of his vehicle, and said operator to the rear must note said warning and exercise ordinary care to safely meet said change in condition.

Harmon v Gilligan, 221-605; 266 NW 288

Signaling turns—evidence in re custom—effect. Testimony relative to the custom of automobile drivers of this state and surrounding territory, in signaling turns, reviewed, and held too inconsequential to justify a reversal, even tho the inadmissibility of such testimony be conceded.

Harmon v Gilligan, 221-605; 266 NW 288

Dual negligence in turning into side road. The operator of an automobile who turns into a side road (1) without first noting whether there is sufficient space in which to make the turn with reasonable safety to himself and to all other persons on the highway, and (2) without first signaling such proposed turn, is guilty of dual statutory negligence.

Miller v Lowe, 220-105; 261 NW 822

Turning into side road—failure to signal—effect. The driver of an automobile who turns abruptly into a side road without first seeing that there is sufficient space in which to make such turn in safety, and without making some proper signal to indicate his intention to make such turn is guilty of negligence—not prima facie evidence of negligence.

Kisling v Thierman, 214-911; 243 NW 552
Dillon v Diamond Co., 215-440; 245 NW 725
See Voiles v Hunt, 213-1234; 240 NW 703; 31 NCCA 59; 32 NCCA 458

Left turn—negligence of truck driver. A jury question on the issue of negligence is made by testimony from which the jury might have found that a truck driver made an abrupt left turn when he could not, from his seat, see to the rear because of the manner in which the truck was loaded, and did not otherwise look to the rear, and that, owing to the wide rack on the truck, his signal (if he made one) by extending his arm could not be seen from the rear.

McManus v Creamery Co., 219-860; 259 NW 921

5025.06 Stopping.

Holding under prior statute—effect of signal. The operator of a motor vehicle who "raises and extends his hand" in effect warns the operator of a vehicle immediately following that there is to be a change in the condition then existing—that the signaling driver intends to stop, turn, or change the course of his vehicle, and said operator to the rear must note said warning and exercise ordinary care to safely meet said change in condition.

Harmon v Gilligan, 221-605; 266 NW 288

"Sudden" stop — legitimate suggestion by counsel. When the word "suddenly" was never used by witnesses to describe how a truck slowed down and turned out to the left to avoid a pedestrian before it was hit by another truck proceeding from the rear, but the word was put into their mouths by legitimate suggestion of counsel, the weight and credibility to be given the word is for the jury.

Glover v Vernon, 226-1089; 285 NW 652

Failure to signal "stop" — nonproximate cause. Failure of the driver of a truck to give a visible signal of his intention to stop is not the proximate cause of a collision with an automobile approaching from the rear when the driver of the oncoming rear car did not see the truck until an instant before the collision, and, therefore, had not regulated or gauged his speed with the speed of the truck ahead.

Isaacs v Bruce, 218-759; 254 NW 57

Signaling passing cars—no duty to anticipate negligence. A motorist stalled on the highway has a right to assume that the driver of a passing automobile to whom he signals to stop will use ordinary care in so doing.

McDaniel v Stitsworth, 224-289; 275 NW 572

Disabled vehicle—daytime stopping on highway—signaling. Stopping a disabled motor truck in the daytime upon the right-hand side of a 26-foot graveled road, within 4 feet of a guard rail, where it was visible for 225 feet, and signaling to passing cars do not constitute negligence.

McDaniel v Stitsworth, 224-289; 275 NW 572

Failure to signal "stop"—unsupported submission of issue. The submission to the jury of the issue whether the driver of a truck failed to give a signal of his intention to stop cannot be justified on the naked statement of a witness who was riding with the driver that he did not "see or hear" the driver give any such signal.

Isaacs v Bruce, 218-759; 254 NW 57

Slowing down for pedestrian—jury question. When a truck slowed down and turned out to the left to avoid a pedestrian walking along the traveled portion of the highway, and was struck by another truck proceeding from the rear, the court properly submitted to the jury the question of contributory negligence.

Glover v Vernon, 226-1089; 285 NW 652

5025.07 Signals by hand and arm or signal device.

Holding under former statute—effect of signal. The operator of a motor vehicle who "raises and extends his hand" in effect warns the operator of a vehicle immediately following that there is to be a change in the condition then existing, that the signaling driver intends to stop, turn, or change the course of his vehicle, and said operator to the rear must note said warning and exercise ordinary care to safely meet said change in condition.

Harmon v Gilligan, 221-605; 266 NW 288

Left turn—signal hidden by truck box. A jury question on the issue of negligence is made by testimony from which the jury might

have found that a truck driver made an abrupt left turn when he could not, from his seat, see to the rear because of the manner in which the truck was loaded, and did not otherwise look to the rear, and that, owing to the wide rack on the truck, his signal (if he made one) by extending his arm could not be seen from the rear.

McManus v Creamery Co., 219-860; 259 NW 921

RIGHT OF WAY

5026.01 Approaching or entering intersections.

Annotations in Vol. I. See under §5035

Statutes in pari materia—construction. Statutes in pari materia are to be construed together, and harmonized, if possible, and especially when such statutes appear in the same chapter. So held as to different statutes relating to the right of way of travelers at highway intersections.

Dikel v Mathers, 213-76; 238 NW 615

Cutting corners not permitted. This section does not authorize the vehicle having the right of way to "cut the corner" or otherwise unlawfully use the highway.

Lein v Morrell & Co., 207-1271; 224 NW 576; 32 NCCA 417

Pleading—sufficiency. A pleader is entitled to claim as many grounds of actionable negligence as flow from his pleaded statements of facts. Pleadings as to the facts attending a collision at an intersection of highways reviewed, and held to warrant the instructions given.

Sutton v Moreland, 214-337; 242 NW 75

Yielding right of way—what constitutes. The statutory duty of the operator of a vehicle to yield the right of way, at intersecting streets or highways, to the vehicle approaching from the right, is not performed by yielding one-half of said street or highway in favor of the vehicle which has the right of way.

Reason: The yielding must be at the point where the paths of the two vehicles intersect.

Newland v McClelland, 217-568; 250 NW 229

Boulevard intersections. The mere legal designation by a city or town of a street as a boulevard or arterial highway, and the erection of stop signs on intersecting streets (§4995, C., '31 [§5018.01, C., '39]), does not impliedly give to the traveler on the boulevard or arterial highway the right of way over traffic on intersecting streets. In the absence of a statute giving such right of way, the traveler on the intersecting highway is first controlled by the boulevard stop sign, and thereafter by the statute regulating right of way at intersections generally.

Dikel v Mathers, 213-76; 238 NW 615

Entering intersection at same time. The naked fact that an eastbound car and a northbound car approach an intersection at substantially the same time and in such manner that their paths will ultimately intersect does not necessarily mean that the latter car has the statutory right of way over the intersection. The statute only applies when, under all the facts and circumstances, danger of a collision may reasonably be apprehended.

Becvar v Batesole, 218-858; 256 NW 297

Crossing intersection before oncoming vehicle.

Davis v Hoskinson, 228- ; 290 NW 497

Failure to grant right of way—justification. The driver of a vehicle upon reaching a street intersection is under no legal duty to stop and wait or yield the right of way to another vehicle which is approaching his right-hand side when such approaching vehicle is so far away that, in view of all attending circumstances, and assuming legal and proper speed on the part of the approaching vehicle, no danger of collision reasonably appears.

Shuck v Keefe, 205-365; 218 NW 31; 30 NCCA 134; 33 NCCA 405; 4 NCCA(NS) 383, 397

Wolfson v Lumber Co., 210-244; 227 NW 608

Turning to right—preference at intersections—statutes inapplicable. Statutory requirements relative (1) to drivers turning "to the right" when meeting (§5020, C., '35 [§5024.02, C., '39]) and (2) to preference accorded drivers at highway intersections can, from the very nature of the transaction, have no application to an occurrence where the driver of a westbound car in making, or instantly after making, a left-hand turn into an intersecting road came into collision with an eastbound car traveling on or near the highway from which the left-hand turn was made.

Enfield v Butler, 221-615; 264 NW 546

Collision on icy intersection—facts sufficient to sustain verdict. In an action for damages to plaintiff's automobile, evidence held sufficient to warrant recovery from truck owner where it is shown that the collision occurred on a winter day at an icy intersection which plaintiff entered first.

Schenk v Moore, 226-1313; 286 NW 445

Failure to yield right of way—hidden crossroad. The driver of an automobile may not be said to be negligent per se for failure to yield the right of way to a car approaching him from the right on an unknown and absolutely hidden road.

Sexauer v Dunlap, 207-1018; 222 NW 420

Exercising right of way—other motorist's ignorance of stop sign. A motorist approaching an intersection from the west, knowing he has statutory right of way over traffic from the north, and knowing a stop sign is erected on the highway intersecting from the north, may not be charged with negligence because a motorist on his left, approaching from the

north, has no knowledge of the intersection and therefore drives past the stop sign into such intersection, resulting in a collision.

King v Gold, 224-890; 276 NW 774; 4 NCCA (NS) 333

County trunk road intersections—applicability. In the absence of signs indicating a different right-of-way rule, erected by authority not of county engineer but of the board of supervisors, the law giving right of way to traffic from the right applies to an intersection of county trunk roads.

Smithson v Mommsen, 224-307; 276 NW 47
Rogers v Jefferson, 224-324; 275 NW 874; 4 NCCA (NS) 318

Primary and trunk road intersection—preference in re right of way. A northbound motorist on a primary road cannot be deemed guilty of negligence proximately causing a collision with an eastbound car traveling on an intersecting county trunk road:

1. When each car as it approached the intersection was in plain view of the driver of the other car for several hundred feet,
2. When the driver on the trunk road ignored the "stop" sign on said road, and by his rate of speed justified the belief that he intended to turn to the right on entering the primary road,
3. When the motorist on the primary road was, prior to, and at the time of, entering the intersection, traveling on the right-hand side of the road and at the uniform rate of some 30 miles per hour, and
4. When the motorist on the primary road discovered for the first time when near the center of the intersection that the driver on the trunk road was driving straight through the intersection.

May v Hall, 221-609; 266 NW 297

Turning or changing course — conditions precedent. The operator of a motor vehicle cannot be deemed guilty of negligence in attempting to turn to the right and into an intersecting road if he believed and as a reasonably prudent person had a right to believe, in view of all the circumstances, that he could make said turn in safety.

Harmon v Gilligan, 221-605; 266 NW 288

Failure to look to left. The mere fact that the operator of an automobile in approaching on a rainy day, and at a moderate rate of speed, an intersection which afforded a clear view to all travelers, fails to look to his left for approaching vehicles, does not constitute negligence per se.

Roe v Kurtz, 203-906; 210 NW 550; 33 NCCA 409
Rogers v Jefferson, 224-324; 275 NW 874
Rogers v Jefferson, 226-1047; 285 NW 701

Obscured view of travel at intersection—failure to look or signal. The operator of an automobile in approaching and entering an intersecting country highway, when the view of travel approaching from his right is obstructed, is guilty of negligence (1) if he fails to signal his approach and entry, and also (2) if he fails to look for such travel at a point from which he can see such travel.

Smith v Lamb, 220-835; 263 NW 311; 4 NCCA (NS) 368

Negligence per se in approaching crossing. Negligence per se is revealed in the act of the driver of an automobile in approaching and entering an obscured public crossing (with which he was familiar) with knowledge that another vehicle was also rapidly and immediately approaching said intersection from his right, and failing either (1) to sound his horn or (2) to yield the right of way. (See Vol. I, §5028 et seq.)

Masonholder v O'Toole, 203-884; 210 NW 778; 31 NCCA 44

Street intersection—stopping in front of other vehicle. The driver of an automobile who drives into a known, much traveled street intersection and stops in the pathway of an oncoming car which has the right of way, and which he has ample opportunity to see and does see before entering the intersection, and who is not misled by any fact or circumstance attending the entire transaction, is guilty of negligence per se.

Hollingsworth v Hall, 214-285; 242 NW 39

Negligence per se—physical facts. Where the automobile of plaintiff's intestate collided with defendant's truck at a highway intersection and the physical facts showed that plaintiff's intestate had violated statutes in not keeping his car under control and not yielding the right of way to the truck, which had entered the intersection first, plaintiff's intestate was therefore guilty of negligence per se which contributed directly to his death, and which entitled the truck owner to a directed verdict.

Young v Clark, 226-1066; 285 NW 633

Failure to see car on side road. The operator of an automobile on a county trunk road (an arterial highway), having the right of way over traffic on an intersecting local county road, is not guilty of negligence per se in entering such an intersection with his car under apparent control and without seeing a car approaching from his right at a high and dangerous rate of speed.

Arends v DeBruyn, 217-529; 252 NW 249; 37 NCCA 78

Driving at reasonable speed—reduction unnecessary. A motorist driving at a reasonable and proper speed need not reduce his speed when traversing an open intersection, and a speed of 30 or 35 miles per hour on a clear day and on a good road is not, as a matter of law, such a speed as violates the assured clear distance statute.

Rogers v Jefferson, 224-324; 275 NW 874

Other car not near to intersection. The court cannot say that the operator of a northbound car is guilty of contributory negligence per se in entering an intersection when a westbound car was three-quarters of a block distant.

Leckliter v City, 211-251; 233 NW 58; 38 NCCA 493

Right turn when followed by truck—contributory negligence—jury question. Record reviewed and held to present a jury question on the issue whether plaintiff, traveling on the right-hand side of the highway, with knowledge that she was being closely followed by a truck, was guilty of contributory negligence in changing her course by turning to the right and entering an intersecting highway—the collision occurring between said turning car and said truck.

Harmon v Gilligan, 221-605; 266 NW 288

Contributory negligence—passenger. Record reviewed relative to the facts and circumstances attending the unobscured and simultaneous approach, on a clear day, of northbound and of eastbound automobiles, to an intersection of arterial highways (where a collision occurred), and held insufficient to establish contributory negligence per se on the part of a passenger who was traveling in the northbound car and who was injured in said collision.

Rogers v Jefferson, 223-718; 272 NW 532; 277 NW 570

Contributory negligence per se—street intersection. The occupants of an eastbound automobile were guilty of contributory negligence per se under testimony that upon arriving at an intersecting north and south street, on a clear day, they looked to the south without obstruction for a distance of at least 225 feet, and saw no approaching car, and thereupon entered the intersection and moved across the same at ten miles per hour, but before they had fully cleared the intersection were hit by a northbound car traveling at the rate of 40 or 50 miles per hour.

Hewitt v Ogle, 219-46; 256 NW 755

Contributory negligence—looking to left and right. The driver of an automobile, moving easterly at the rate of 20 miles per hour, who, when some 140 feet from an intersection, looks and sees no vehicle approaching from the north within a distance of 290 feet, is not guilty of negligence per se in not again looking to the north until after he had satisfied himself, as soon as possible, when near the intersection that no one was approaching from the south.

Liddle v Hyde, 216-1311; 247 NW 827; 33 NCCA 433

Failure to look to left on entering intersection—not contributory negligence as matter of law. Principle reaffirmed that vehicle driver's failure to look to the left when entering highway intersection does not constitute contributory negligence as a matter of law.

Rogers v Jefferson, 226-1047; 285 NW 701

Contributory negligence when not determined as matter of law. In action for personal injuries and damage to automobile resulting from collision with defendant's automobile, plaintiff is not guilty of contributory negligence as a matter of law for failure to maintain lookout, yield right of way, and make proper stop before entering arterial highway when evidence discloses that as plaintiff was about to cross an arterial highway he looked to the right and saw defendant's automobile at a distance of 150 feet and then proceeded across intersection at speed of between 5 and 10 miles per hour until defendant's automobile collided with right rear wheel of plaintiff's automobile—more than half of plaintiff's automobile being out of the intersection.

Cowles v Joelson, 226-1202; 286 NW 419

Jury question. Evidence held to present jury question on the issue of negligence at a street intersection.

Hartman v Red Ball, 211-64; 233 NW 23
Appleby v Cass, 211-1145; 234 NW 477
Wheeler v Peterson, 213-1239; 240 NW 683; 33 NCCA 451
Branch v Railway, 214-689; 243 NW 379

Negligence—jury question — pedestrians in business district. Evidence reviewed, and held to present a jury question as to the negligence of a motorist in operating his car in the business district of a city (1) by maintaining a speed in excess of 15 miles per hour, or (2) by failing to maintain proper lookout, or (3) by increasing instead of reducing his speed on approaching an intersection and pedestrians walking across one side thereof, or by so doing without giving warning of his approach.

Huffman v King, 222-150; 268 NW 144

Intersection collision—complex facts—jury question. An intersection collision involving disputed facts, fractional seconds, speeds of 40 to 50 miles an hour, and failure to see an approaching automobile presents, not a matter of law for the courts, but a question for the jury to determine blame.

Eby v Sanford, 223-805; 273 NW 918

Negligence—jury question of fact and negligence. In a damage case resulting from a collision between a taxicab and an automobile at an intersection, when the record does not conclusively show negligence, that question and how the accident occurred is for the jury.

Womochil v Peters, 226-924; 285 NW 151

Speed—distance. In intersection collision, evidence of speeds and distances raises jury question and directed verdict was error.

Short v Powell, 228- ; 291 NW 406

Increasing speed at intersection—jury question. A motor vehicle operator who materially and intentionally increases the speed of his vehicle "when approaching and traversing a highway intersection", seemingly in violation of §5031, C., '35, is not necessarily guilty of negligence per se.

Carpenter v Wolfe, 223-417; 272 NW 169

Assuming compliance with law when danger obvious—jury question. Where plaintiff, riding with his son, approaches an intersection of county trunk roads and on his left observes defendant also approaching the intersection, altho plaintiff may assume that defendant will obey the right of way law, he must not place himself in a position of obvious danger avoidable by the exercise of ordinary care, and whether or not he did so place himself is a jury question.

Rogers v Jefferson, 224-324; 275 NW 874

Prior statute—failure to yield right of way—directing verdict improper. The right-of-way law imposes on a person approaching an intersection from the left the duty to yield the way, a violation of which, under ordinary circumstances, constitutes negligence, and in such a case the defendant is not entitled to a directed verdict.

Bletzer v Wilson, 224-884; 276 NW 836

Unsupported issues not submitted. In a damage action for an automobile collision occurring on a north and south paved road south of an intersection, it is not error to submit the case on the one negligence ground that defendant crossed the center line of the pavement when the record as to other negligence allegations shows a proper speed and lookout, control of the car, and that defendant driving north could not make a left turn before reaching the intersection.

Tharp v Rees, 224-962; 277 NW 758

Intersection—what constitutes—instructions. Where a north and south highway splits into two curves near an east and west highway, and connects with the latter at two points some 900 feet apart, it is not erroneous for the court to instruct that the intersection embraces the entire distance of 900 feet (1) when the evidence tends to show that the authorized public authorities have treated said distance as the intersection, and (2) when the instruction is manifestly given for the sole purpose of guiding the jury in applying the statutory command that motorists shall reduce their speed to a reasonable and proper rate when approaching and traversing intersections of public highways.

Enfield v Butler, 221-615; 264 NW 546

"Intersection" of highways—definition. In a damage action arising from a collision of motor vehicles at a highway intersection, where the question of negligence centered largely around the rights of the parties within the intersection, it was prejudicial error to instruct the jury that "intersection" is the area within the fence lines if such fence lines were extended across the road, when a statute defines "intersection" as being the area within the lateral boundary lines of highways which join.

Hupp v Doolittle, 226-814; 285 NW 247

Instructions considered as a whole. In an action for injuries sustained by driver of a motor vehicle in collision with an automobile approaching an intersection from the left, an instruction which in part states, "If a traveler comes to an intersection and finds no one approaching from the right upon the other highway within such distance and approaching at such a rate of speed as to reasonably indicate danger of a collision, he may proceed as a matter of right to use the intersection, unless from his observation he is apprised to the contrary", when considered with remainder of instruction, was not prejudicial. Instructions must be taken together, and especially must all parts of one instruction be considered as a whole.

Rogers v Jefferson, 226-1047; 285 NW 701

Rights and duties at intersection—instructions. Instructions relative to the rights and duties of operators of automobiles at an intersection reviewed and held authorized under the pleadings.

Melsha v Dillon, 214-1324; 243 NW 295

Compelling jury to draw certain inference. Where plaintiff and defendant were, under conditions which rendered visibility poor, approaching the same intersection approximately at the same time, the court cannot properly instruct the jury that if plaintiff could see several hundred feet in the direction from which defendant was approaching, then the jury must conclude either (1) that plaintiff did not look for defendant as was his duty, or (2) that plaintiff did see the defendant.

Appleby v Cass, 211-1145; 234 NW 477

Instruction similar to request—yielding right of way—justifiable assumption. The court may refuse a requested instruction and give the fair equivalent thereof in its own language. So held as to an instruction relative to the duty of the operator of an automobile to yield the right of way at an intersection.

Appleby v Cass, 211-1145; 234 NW 477

Assumption of issuable fact. Instructions are properly refused when they assume that one of the parties to an accident had the superior right to enter a street intersection, such right being a matter of dispute.

Waldman v Motor Co., 214-1139; 243 NW 555

Instructions—assumption of fact. Instruction relative to a collision between automobiles at a street intersection reviewed, and held not to assume that one of the cars first entered the intersection.

Becvar v Batesole, 218-858; 256 NW 297

Instruction—reducing speed at intersection.
Davis v Hoskinson, 228- ; 290 NW 497

Presentation of conflicting theories—non-assumption of fact issue. Instructions presenting the conflicting theories of the plaintiff and defendant as to a collision between motor vehicles reviewed, and held, when viewed as a whole, not to assume that the collision occurred in the center of an intersection, said point of collision being in issue.

Ballain v Brazelton, 221-806; 266 NW 522

Instruction—imposing undue care. An instruction which, after directing the jury that the operator of a vehicle on approaching intersecting highways must keep a lookout for approaching vehicles, imposes on the operator, if there be danger of a collision, the duty to "reduce his speed" or to "bring his vehicle to a stop", is erroneous.

Reason: Such instruction imposes on the operator a greater duty than to exercise reasonable or ordinary care.

Knutson v Lurie, 217-192; 251 NW 147; 37 NCCA 62

5026.02 Turning left at intersection.

Obeying statute — presumption. Principle reaffirmed that a motor vehicle driver in attempting to make a left-hand turn into an intersecting road has a right to proceed on the assumption (unless he has knowledge to the contrary) that another driver, approaching from his right, will obey the law (§5031, C., '35) by reducing his speed to a reasonable and proper rate when approaching and traversing said intersection.

Enfield v Butler, 221-615; 264 NW 546

Justifiably attempted left turn. A motor vehicle driver cannot be deemed negligent in attempting a left-hand turn into an intersecting highway when, acting as a reasonably cautious and prudent person, he believes and has a right to believe that vehicles approaching from his right during the turn are at such distance that he can safely make the turn.

Enfield v Butler, 221-615; 264 NW 546

Turning to right—preference at intersections—statutes inapplicable. Statutory requirements relative (1) to drivers turning "to the right" when meeting (§5020, C., '35 [§5024.02, C., '39]), and (2) to preference accorded drivers at highway intersections (§5035, C., '35 [§5026.01, C., '39]), can, from the very nature of the transaction, have no application to an occurrence where the driver of a westbound car in making, or instantly after making, a left-hand turn into an intersecting road came into collision with an eastbound car traveling on or near the highway from which the left-hand turn was made.

Enfield v Butler, 221-615; 264 NW 546

Turn at intersection—increasing speed—negligence per se. The operator of a westbound automobile, who makes a left-hand turn at an intersecting street, and thereupon increases his speed, in order to escape a collision with an eastbound car which he knows is but some forty feet west of the intersection and approaching it at a speed twice his own speed, is guilty of negligence per se.

Parrack v McGaffey, 217-368; 251 NW 871

Contributory negligence per se. Record reviewed and held to establish contributory negligence on the part of a motorist in driving into a highway intersection and turning to the left (1) without first observing whether he had sufficient space in which safely to make said turn, (2) without first reducing his speed to a reasonable rate, a rate which would permit a stop within the assured clear distance ahead, and (3) without first driving to the right of, and beyond the center of, said intersection before turning to the left.

Wimer v Bottling Co., 221-120; 264 NW 262

Left-hand turn—conflicting testimony. Evidence reviewed in detail in an action involving a left-hand turn, during the nighttime, of a westbound car, and its collision with an eastbound car near the point of intersection, and held, because of the conflict in testimony, to present a jury question on the issue whether plaintiff had established his freedom from contributory negligence.

Enfield v Butler, 221-615; 264 NW 546

Holding under former statute. In making a left-hand turn into an intersecting road, negligence on the part of a westbound driver, (1) in failing to drive to the right and beyond the center before turning, or (2) in failing to note whether he could make the turn in safety, is not the proximate cause of injuries received by him by being hit by an eastbound car after he had completed the turn and was wholly on the intersecting road.

Enfield v Butler, 221-615; 264 NW 546

Instructions—yielding half of traveled way—beaten path (?) or entire roadway (?). When the plaintiff's truck turned left at a blind corner, keeping to the right of the beaten path, but not to the right side of the graveled highway, and collided with the defendant's car which was approaching the corner on the right side of the road, it was not improper to instruct the jury that a car must yield half the traveled or graveled part of the road when meeting another car, and, that for the plaintiff to recover, it must be found that the truck was hit while on the right side of the road; or, for a recovery to be had by the defendant on a counterclaim, that the plaintiff was negligent in not yielding half the road.

Kiesau v Vangen, 226-824; 285 NW 181

Unsupported issues not submitted. In a damage action for an automobile collision occurring on a north and south paved road south of an intersection, it is not error to submit the case on the one negligence ground that defendant crossed the center line of the pave-

ment when the record as to other negligence allegations shows a proper speed and lookout, control of the car, and that defendant driving north could not make a left turn before reaching the intersection.

Tharp v Rees, 224-962; 277 NW 758

5026.03 Entering through highways.

Discussion. See 25 ILR 834—Failure to stop at arterial highway when no stop sign

Right of way—county trunk roads. The right-of-way law (§5035, C., '35) applies to an intersection of county trunk roads unless traffic is regulated by signs erected by the supervisors under authority of law indicating a different rule.

Rogers v Jefferson, 224-324; 275 NW 874; 4 NCCA(NS) 318

Right of way—county engineer—signs. In the absence of signs, indicating a different right-of-way rule, erected by authority not of county engineer but of the board of supervisors, the law giving right of way to traffic from the right applies to an intersection of county trunk roads.

Smithson v Mommsen, 224-307; 276 NW 47

Intersecting county roads—negligence per se. The operator of an automobile on a county trunk road (an arterial highway), having the right of way over traffic on an intersecting local county road, is not guilty of negligence per se in entering such an intersection with his car under apparent control and without seeing a car approaching from his right at a high and dangerous rate of speed.

Arends v DeBruyn, 217-529; 252 NW 249; 37 NCCA 78

Primary roads—right of way. Inasmuch as vehicles traveling on a primary road have right of way at intersections with nonprimary roads, the operator of a vehicle on a nonprimary road is guilty of negligence per se when he attempts to cross an intersection with a primary road, at a speed of 10 miles per hour, when he knows or ought to know that another vehicle on the primary road is, at a distance of 80 or 90 feet, approaching the intersection at a speed very greatly in excess of 10 miles per hour.

Hittle v Jones, 217-598; 250 NW 689; 37 NCCA 67

County trunk road without stop signs.

Davis v Hoskinson, 228- ; 290 NW 497

Arterial highway—negligence per se. The operator of an automobile on a county trunk arterial highway (on which no "stop" or "slow" signs had been erected at points intersected by county local roads) is guilty of negligence per se in knowingly approaching an obscured intersection without either (1) slacking his speed (of some 25 or 30 miles per hour) as required by §5031, C., '31 [§5023.04, C., '39], or (2) giving some warning signal of his approach as required by §5043, C., '31 [§5031.03, C., '39]. (But see Dikel v Mathers, 213 Iowa 76.)

Lang v Kollasch, 218-391; 255 NW 493; 37 NCCA 74

Contributory negligence — jury question. Evidence reviewed, in detail, relative to the stoppage of an automobile before entering a curving boulevard (on which traffic had the right of way) and held to present a jury question on the issue of the contributory negligence of the operator, and not a case of contributory negligence per se.

Shutes v Weeks, 220-616; 262 NW 518

Contributory negligence when not determined as matter of law. In action for personal injuries and damage to automobile resulting from collision with defendant's automobile, plaintiff is not guilty of contributory negligence as a matter of law for failure to maintain lookout, yield right of way, and make proper stop before entering arterial highway, when evidence discloses that as plaintiff was about to cross an arterial highway, he looked to the right and saw defendant's automobile at a distance of 150 feet and then proceeded across intersection at speed of between 5 and 10 miles per hour until defendant's automobile collided with right rear wheel of plaintiff's automobile—more than half of plaintiff's automobile being out of the intersection.

Cowles v Joelson, 226-1202; 286 NW 419

5026.04 Entering stop intersection.

Disregarding "stop" sign — elements of offense. Defendant in a criminal prosecution for failure to stop his automobile at intersecting roads in obedience to a duly and lawfully erected "stop" sign may be properly convicted tho there is no evidence of careless driving, intent, willfulness, or wantonness except such as may be deduced from the failure to stop, the defendant at the time acting under no compulsion.

State v Wilson, 222-572; 269 NW 205

Highway signs—authorized erection. It may be presumed, in the absence of evidence to the contrary, that the ordinary "stop" and "slow" signs, as they are found upon the public highways, were erected by and under authority of the proper public officials.

Rogers v Jefferson, 223-718; 272 NW 532; 277 NW 570; 4 NCCA(NS) 318

Ignoring statutory "stop" sign—effect. Failure of the operator of an automobile on a highway outside a city or town to comply, before entering an arterial highway, with a duly erected, statutory "stop" sign, constitutes negligence.

Willemsen v Reedy, 215-193; 244 NW 691
Hogan v Nesbit, 216-75; 246 NW 270

Right of way on primary roads. A traveler on a nonprimary road in approaching an intersection with a primary road does not fulfill his full duty of care by stopping at the

statutory "stop" sign erected outside the primary road. He must not only so stop and observe the travel on the primary road, but must continue so to observe until he reaches the intersection and until he has passed the point where danger may reasonably be apprehended.

Hittle v Jones, 217-598; 250 NW 689; 37 NCCA 67

Obeying law—right to assume. The operator of a motor vehicle on an arterial (primary) highway in approaching an intersection with a side road has the legal right to act on the assumption that a driver who is immediately approaching on a side road, will stop at and before entering the intersection in obedience to a statutory "stop" sign there erected.

Hogan v Nesbit, 216-75; 246 NW 270

Exercising right of way—other motorist's ignorance of stop sign. A motorist approaching an intersection from the west, knowing he has statutory right of way over traffic from the north and knowing a stop sign is erected on the highway intersecting from the north, may not be charged with negligence because a motorist on his left, approaching from the north, has no knowledge of the intersection and therefore drives past the stop sign into such intersection, resulting in a collision.

King v Gold, 224-890; 276 NW 774; 4 NCCA (NS) 333

Primary and trunk road intersection—preference in re right of way. A northbound motorist on a primary road cannot be deemed guilty of negligence proximately causing a collision with an eastbound car traveling on an intersecting county trunk road:

1. When each car as it approached the intersection was in plain view of the driver of the other car for several hundred feet,
2. When the driver on the trunk road ignored the "stop" sign on said road, and, by his rate of speed, justified the belief that he intended to turn to the right on entering the primary road,
3. When the motorist on the primary road was, prior to, and at the time of, entering the intersection, traveling on the right-hand side of the road and at the uniform rate of some 30 miles per hour, and
4. When the motorist on the primary road discovered for the first time when near the center of the intersection that the driver on the trunk road was driving straight through the intersection.

May v Hall, 221-609; 266 NW 297

Parking—view of stop sign obstructed—others' imputed knowledge of stop sign no defense. Where defendant's truck was parked so as to obscure the view of a stop sign at an intersection, and where motorist proceeded into intersection without stopping and collided with an automobile on intersecting street, defendant will not be exempt from liability on ground that knowledge would be imputed to motorist that intersecting street was an arterial highway, because of statute as to posting signs.

Blessing v Welding, 226-1178; 286 NW 436

Recklessness. The act of a motorist in the nighttime in driving into a highway intersection without stopping in obedience to a statutory "stop" sign, when shortly theretofore he had seen an automobile approaching said intersection on the intersecting highway, manifestly does not necessarily constitute "recklessness" within the meaning of the guest statute (§5026-b1, C., '35 [§5037.10, C., '39]). Evidence exhaustively analyzed (in a light as favorable to plaintiff as is reasonably possible), and held per se insufficient to support an allegation of recklessness in the operation of an automobile.

Hansen v Dall, 220-817; 263 NW 530

5026.05 Entering from private driveway.

Failure to yield right of way—hidden road. The driver of an automobile may not be said to be negligent per se for failure to yield the right of way to a car approaching him from the right on an unknown and absolutely hidden road.

Sexauer v Dunlap, 207-1018; 222 NW 420

Contributory negligence—jury question. Evidence relative to the act of driving from a private driveway into a public highway in front of an approaching car reviewed, and held to present a jury question on the issue of contributory negligence.

Tinley v Implement Co., 216-458; 249 NW 390

View unobstructed. The statute which requires the driver of a vehicle on a private driveway to stop before entering a public highway does not apply when the view of the driver in the direction of vehicles approaching on the public highway is unobstructed for a distance of a thousand feet.

Tinley v Implement Co., 216-458; 249 NW 390

Backing out of private driveway. Tho the driver of a motor vehicle in driving or backing from a private driveway into a public highway where the view along the public highway is not obstructed, is not by statute required to stop before entering the public highway, yet he is required as a matter of ordinary care and prudence to look for vehicles approaching on the public highway and to act with ordinary care in view of what he sees or should see.

Carstensen v Thomsen, 215-427; 245 NW 734

Emerging from private drive—failure to stop. The issue of negligence on the part of the operator of an automobile in driving out of a private driveway and upon a main traveled road without stopping and looking for

approaching vehicles is properly submitted to the jury on supporting testimony.

Olson v Shafer, 207-1001; 221 NW 949; 32 NCCA 252

Tinley v Implement Co., 216-458; 249 NW 390

View obstructed—duty to stop. Driving from a private driveway into a public highway without stopping immediately before entering said highway constitutes negligence when, from the private driveway, the view of nearby and approaching travel on the public highway is obstructed.

Wood v Branning, 215-59; 244 NW 658

Hunter v Irwin, 220-693; 263 NW 34

Physical facts—negligence. Where a car approaching a public highway from a private driveway, traveling in neutral at only 3 miles per hour, and while still 12 feet from such highway, driver saw defendant's truck approaching at a rapid rate, the fact that car was out in the highway when collision occurred would either show that brakes were inadequate or that driver was negligent in the operation of car.

Hermon v Egy, (NOR); 207 NW 116; 31 NCCA 409

Backing vehicle out of private driveway. The driver of a truck who is nonnegligently traveling on the north side of a straight and level public highway in plain and unobstructed view of an automobile standing outside the public highway and in a private driveway on the same side of the highway, has the right to assume that the automobile will not without warning be suddenly backed out of the private driveway and immediately in front of his oncoming truck, and if said automobile is so backed out and in his immediate front, he cannot be deemed negligent because, in such sudden emergency, he turns to his left and unintentionally strikes a person whom he theretofore knew was on the south side of the highway.

Carstensen v Thomsen, 215-427; 245 NW 734; 32 NCCA 300; 34 NCCA 326; 39 NCCA 369

Knowledge of party's predicament. The fact that a defendant drove his automobile from his private driveway upon the public highway with knowledge that plaintiff was rapidly approaching, and had to some extent lost control of his car because of the icy condition of the highway, may have a bearing on the issue of defendant's due care.

Stilson v Ellis, 208-1157; 225 NW 346; 32 NCCA 258; 35 NCCA 111

Turning or changing course. Evidence reviewed, and held to present a jury question on the issue whether a motorist was negligent in suddenly turning from the right side to the left side of a paved rural highway (in order to enter a private driveway on the latter side of said road), and whether, if negligent, said negligence was the proximate cause of a collision with another vehicle which he knew he was about to meet.

McKinnon v Guthrie, 221-400; 265 NW 620

PEDESTRIANS' RIGHTS AND DUTIES

5027.01 Pedestrians subject to signals.

"Stop and go" signals—change after entering intersection—nonnegligence per se. A pedestrian who, in obedience to a municipally operated "go" signal, starts across the street on the pathway provided for pedestrians and suddenly discovers that said "go" signal has changed to "stop", is not guilty of negligence per se in failing to look for, see, and avoid a vehicle which, under said change in signals, passes entirely across the intersection and hits and injures said pedestrian within less than two seconds after said change in signals occurs; especially is this true (1) when said pedestrian has, by ordinance, the right of way over said vehicle because he was first properly to enter said intersection, and (2) when said pedestrian, at the very instant of said change in signals, was immediately approaching other stationary vehicles known to be awaiting release from a "stop" signal.

Dougherty v McFee, 221-391; 265 NW 176

5027.02 Pedestrians on left.

Highway traversing city street—highway law applicable. Where a statute requires pedestrians to walk on left side of a highway, the word "highway" is applicable to a through highway traversing a street within a city, especially in view of other sections in the motor vehicle act concerning highways.

Reynolds v Aller, 226-642; 284 NW 825; 5 NCCA(NS) 724

Minor walking on wrong side of highway—contributory negligence as matter of law. In a law action for damages where it is shown that plaintiff's decedent, a 15-year-old boy, was violating statute requiring pedestrians to walk on the left side of a highway by walking along right side, about 4 or 5 feet from west side of highway, and failing to make observations to oncoming traffic from the rear, while walking after dark on a street traversed by a through highway, held, he was guilty of contributory negligence as a matter of law.

Reynolds v Aller, 226-642; 284 NW 825

Negligence per se—walking in center of highway. A pedestrian who, with normal sight and hearing, travels on a clear night in a space which is substantially two feet wide and which is marked by parallel black lines drawn along the center of a straight, 18-foot, paved highway, with an unobstructed view both to his front and rear of more than a quarter of a mile, with full opportunity to walk on the smooth, 6-foot-wide dirt shoulders bordering the pavement, is guilty of negligence per se.

Lindloff v Duecker, 217-326; 251 NW 698; 34 NCCA 234; 35 NCCA 819; 39 NCCA 308

Pedestrian—duty to leave highway when danger impending—contributory negligence. A pedestrian wearing dark clothes and walking at night along a heavily traveled arterial street should, in the exercise of reasonable care and prudence, ascertain his immediate danger when two automobiles—one from in front and one from behind—are approaching at the same time, and when he fails to remove himself as speedily as possible from the place of danger, he is contributorily negligent.

Armbruster v Gray, 225-1226; 282 NW 342

Ordinary care—undue limitation on jury. Reversible error results from instructing the jury that a pedestrian on the highway need not, in the exercise of due and ordinary care, continuously look backward and forward.

(The injured party, on a dark night, had ascended a hill and passed the crest thereof and was, when injured by a car approaching from his rear, walking down the sharply descending slope, either near the middle line of the 18-foot pavement or near the right-hand side thereof. The car which did the injury met and passed another car momentarily before the pedestrian was hit.)

Taylor v Wistey, 218-785; 254 NW 50

Vehicles approaching from rear—pedestrian's duty. An instruction relative to the duty of a pedestrian traveling in the public highway to keep a reasonable lookout for vehicles approaching from the rear as well as from the front need not necessarily be modified on request to the effect that such duty does not require him to turn about "constantly and repeatedly" to observe the possible approach of vehicles from his rear.

Kessel v Hunt, 215-117; 244 NW 714; 34 NCCA 247

Failure to keep lookout. The foreman of a paving outfit is guilty of negligence per se in walking along the unpaved portion of a rough road for a distance of some 200 feet without making any observations to his rear for trucks which he knew were being backed along said road and in his immediate direction at the rate of one truck each 90 seconds.

Hedberg v Lester, 222-1025; 270 NW 447

5027.03 Pedestrians' right of way.

Negligence—dual view of evidence. A jury question on the issue of negligence arises (1) when the evidence is conflicting as to what the injured party did or did not do, and (2) when there may be a fair difference of opinion whether that which the injured party admittedly did do or omitted to do constituted negligence. Evidence as to what an elderly lady did in crossing a public street after nightfall presented a jury question on the issue of contributory negligence.

Robertson v Carlgren, 211-963; 234 NW 824

Contributory negligence as jury or law question. The court has no right to rule that a pedestrian—injured while attempting to cross a public street at the place provided for such crossing and by coming into collision with a moving vehicle—is guilty of negligence contributing to his own injury unless the facts and circumstances, after viewing them in the light most favorable to the pedestrian, are such that all reasonable minds must arrive at the same conclusion, to wit, negligence upon the part of the pedestrian. Evidence held to present jury, not law, question.

Huffman v King, 222-150; 268 NW 144

Attempting to dodge car. The act of a pedestrian, while crossing a street, in attempting to dodge an oncoming car, may constitute the proximate cause of the injuries suffered by him. So held where the pedestrian evidently stepped or turned back directly in front of said car.

Kortright v Strater, 222-603; 269 NW 745

Duty to pedestrians at intersection. Evidence reviewed, and held to present a jury question as to the negligence of a motorist in operating his car in the business district of a city (1) by maintaining a speed in excess of 15 miles per hour, or (2) by failing to maintain proper lookout, or (3) by increasing instead of reducing his speed on approaching an intersection and pedestrians walking across one side thereof, or by so doing without giving warning of his approach.

Huffman v King, 222-150; 268 NW 144

Instructions — unsupported assumption of fact. A requested instruction which erroneously assumes that there is a marked place on a street pavement for the crossing by pedestrians is properly refused.

Minks v Stenberg, 217-119; 250 NW 883

5027.04 Crossing at other than crosswalk.

Negligence per se in crossing street. A pedestrian who attempts to cross a street in the middle of a block without looking for a plainly approaching vehicle or who sees said oncoming vehicle when it is only a few feet distant and attempts to pass in front of it is guilty of contributory negligence per se.

Whitman v Pilmer, 214-461; 239 NW 686; 35 NCCA 693

Orth v Gregg, 217-516; 250 NW 113; 35 NCCA 612

Crossing traffic-congested street—negligence per se. A pedestrian who, while crossing a traffic-congested street at a place other than the place specifically provided for such crossing, fails to look for approaching vehicles, or voluntarily steps in front of an immediately approaching vehicle which he does see, is guilty of negligence per se.

Spaulding v Miller, 216-948; 249 NW 642; 35 NCCA 676

Crossing highway without looking. An adult person, after alighting from an automobile which had been stopped substantially astraddle the north edge of an 18-foot pavement on a heavily traveled country highway, is guilty of negligence per se in attempting to walk to the south and across said pavement without making any observations to his unobstructed right for eastbound vehicles.

Zuck v Larson, 222-842; 270 NW 384

Diagonal crossing of street—contributory negligence. It cannot be said that a pedestrian is guilty of negligence per se when he looks both at the street curb and in the middle of the street for approaching vehicles and sees a vehicle at a distance of some 150 feet; and this is true tho he was proceeding diagonally across a street intersection of peculiar shape, in order to board an approaching streetcar, there being, apparently, nothing in the movements of the approaching vehicle to fairly suggest danger.

Minks v Stenberg, 217-119; 250 NW 883; 35 NCCA 589

Instructions—right of way—precautions—crosswalks defined—custom.

Scott v McKelvey, 228- ; 290 NW 729

5027.05 Duty of driver.

ANALYSIS

I PEDESTRIANS GENERALLY
II CHILDREN
III INCAPACITATED PERSONS

Children, contributory negligence generally. See under §5037.09(III)
General application of motor vehicle law. See under §5037.09
Imputed negligence generally. See under §5037.09(IV)

I PEDESTRIANS GENERALLY

Opinion evidence — allowable conclusion. When the actions and conduct of a witness at a certain time are material and there is no other adequate way of placing the matter before the jury, then the witness should be permitted to describe what he saw, even tho his description consists of a mixed statement of fact and conclusion. So held as to the statement "It seemed as tho the man jumped right in front of the car, and we hit him."

Wieneke v Steinke, 211-477; 233 NW 535

Evidence—harmless error. Evidence concerning a path leading from a sidewalk to a curb line, and traveled by an injured person just before he stepped into a street and was injured by an automobile, is quite harmless when the driver of the automobile admittedly saw the injured party at all times while he was crossing the street.

O'Hara v Chaplin, 211-404; 233 NW 516

Evidence—most favorable view—plaintiff's contention rebutted. Even when the most favorable view of the evidence is taken, plaintiff's contention, that he was struck by defendant's automobile at a street intersection after the automobile had approached the intersection from a side street, was not established when the testimony of the witness on whom the plaintiff relied was inherently inconsistent and was disproved by skid marks and other testimony showing that the automobile had not been on the side street.

Ward v Zerzanek, 227-918; 289 NW 443

"No eyewitness" rule—nonapplicability. In a pedestrian-automobile accident, where a motorist testifies that he saw deceased just prior to striking and killing him, the rule that in the absence of eyewitnesses the deceased is presumed to have exercised due care has no application.

Edwards v Perley, 223-1119; 274 NW 910

Res ipsa loquitur—negligence inferred by jury from circumstances. Pleading specific acts of negligence precludes recovery under the doctrine of res ipsa loquitur, and as no inference of negligence arises from the mere fact of a collision, a pedestrian's action to recover damages from a motorist may not be submitted to the jury on the theory that the jury might reasonably infer negligence from the circumstances. A case may be submitted on this theory only when there may be drawn from the circumstances no other reasonable conclusion than the existence of negligence.

Armbruster v Gray, 225-1226; 282 NW 342

Negligence—emergency as legal excuse. Evidence that a pedestrian walking along a shoulder of a highway suddenly stepped in front of an automobile, where he was struck, raises a jury question as to such emergency and as to legal excuse for failing to stop within the assured clear distance ahead.

Edwards v Perley, 223-1119; 274 NW 910

Assured clear distance—legal excuse—jury question. Where a pedestrian crossing the street is struck by a motorist after having first been seen 180 feet away on the opposite curb and could have been seen by the motorist at all times prior to the collision, motorist's showing that pedestrian "popped up" ahead of him as legal excuse for not stopping within the assured clear distance is evidence raising a jury question.

Swan v Dailey-Luce Co., 225-89; 277 NW 580; 281 NW 504

Stopping within assured clear distance—scope of duty. Principle reaffirmed that the duty so to operate an automobile as to be able to stop within the assured clear distance ahead does not embrace a duty to so operate as to be able to stop immediately should a person unexpectedly and without warning step into the path of the car.

Howk v Anderson, 218-358; 253 NW 32; 35 NCCA 1

I PEDESTRIANS GENERALLY—continued

Failure to sound horn—nonproximate cause. Failure to sound the horn on an automobile is quite inconsequential when there was no occasion to give such signal until the injured party, suddenly and without previous warning, ran into the immediate pathway of the car at a time when it was impossible to stop the car and avoid the accident.

Howk v Anderson, 218-358; 253 NW 32; 35 NCCA 1

Attempting to dodge car. The act of a pedestrian, while crossing a street, in attempting to dodge an oncoming car, may constitute the proximate cause of the injuries suffered by him. So held where the pedestrian evidently stepped or turned back directly in front of said car.

Kortright v Strater, 222-603; 269 NW 745

Last clear chance. The physical facts and circumstances attending an accident may present a jury question on the issue whether defendant actually discovered plaintiff's negligently assumed position of peril in such time that defendant, by the exercise of reasonable care, might have avoided said accident.

Groves v Webster City, 222-849; 270 NW 329

"Last clear chance"—erroneous submission. The submission to the jury of the issue of "last clear chance" is improper on undisputed testimony that, while an automobile was moving along a traffic-congested street at a speed of from five to ten miles an hour, a pedestrian negligently placed himself in a position of danger in front of said car, but that the operator of said car did not discover said position of danger until his car was only seven feet from said pedestrian, and that thereupon said operator applied or attempted to apply his brakes but not in time to avoid injuring said pedestrian.

Spaulding v Miller, 220-1107; 264 NW 8

Last clear chance doctrine. A plaintiff, who stepped directly into the path of the defendant's automobile from a position of safety on a curb, could not rely on the last clear chance doctrine when there was no evidence that the defendant could have avoided the accident by exercising reasonable care after discovering that the plaintiff was in a perilous position.

Ward v Zerzanek, 227-918; 289 NW 443

Speed as nonproximate cause. A rate of speed which is not negligence per se cannot be deemed the proximate cause of an accident when the act of the injured party in stepping into the pathway of the car was so sudden and unexpected as to render impossible the stopping of the car.

Howk v Anderson, 218-358; 253 NW 32; 35 NCCA 1

Stepping into path of automobile—rate of speed immaterial. The negligence of a pedestrian, who left a position of safety on a curb and walked directly into the path of an automobile which struck him, was the proximate cause of the accident, and under the circumstances the rate of speed of the car was not material.

Ward v Zerzanek, 227-918; 289 NW 443

Speed—when nonproximate cause. The operation of an automobile, even at an excessive speed, alongside a moving streetcar and in the direction in which the streetcar is moving, is not the proximate cause of an injury to a pedestrian who suddenly darts across the streetcar track ahead of the moving streetcar, and into the line of automobile travel and is hit by the automobile.

Pettijohn v Weede, 209-902; 227 NW 824; 35 NCCA 5

Failure to stop for streetcar—proximate cause. Evidence reviewed, and held that the act of a motorist in turning to the left on meeting a streetcar, instead of stopping, was the proximate cause of an injury to a pedestrian in the street, rather than the act of the streetcar operator in allowing the streetcar to turn to the left on a curve before stopping.

Moss v Railway, 217-354; 251 NW 627

Truck thrown against plaintiff. Conflicting testimony as to the speed of the defendant's truck while following pick-up truck on an icy street, and as to the distance between the trucks when the one in front skidded and turned around, presented a jury question as to whether the driver of the defendant's truck was guilty of negligence in colliding with the pick-up truck, forcing it over a curb where it struck the plaintiff, and whether such negligence, if any, was the proximate cause of the plaintiff's injuries.

Remer v Takin Bros., 227-903; 289 NW 477

Collision—trucker struck while retrieving goods scattered on highway. A defendant-motorist's negligence in striking a truck stopped on the highway is not the proximate cause of a later injury to the trucker by another motorist, who struck him while he was attempting to remove his merchandise spilled on the highway. The latter intervening cause was the proximate cause of his injury.

McClure v Richard, 225-949; 282 NW 312

Aiding stalled motorist—automobile moving backward—no duty to anticipate negligence. A bystander, offering to help extricate a motorist's car from an icy parking place, who steps behind the car, other people being on each side, in order to push, and who calls to the motorist, "Let's go ahead," cannot as a matter of law be held to anticipate that the automobile was in reverse gear and would move backward instead of forward, causing him injury.

Huston v Lindsay, 224-281; 276 NW 201

Acts constituting negligence—backing up truck—losing control. It cannot be held as a matter of law that plaintiff failed to establish any negligence on the part of the defendant when the record shows that truck driver, after backing an intended 2 or 3 feet and almost stopping, suddenly moved back an additional 12 feet, crushing plaintiff against a pile of bricks

Johnston v Johnson, 225-77; 279 NW 139; 118 ALR 233

Person in comparative safety—no duty to anticipate negligence. Plaintiff, standing between a truck and a pile of brick 15 feet away, who, after requesting the truck driver to back up 2 or 3 feet, is crushed against the pile of brick by the truck suddenly backing over the entire distance, is not contributorily negligent as a matter of law, but question is for jury as to plaintiff's right to rely on presumption that truck driver would use due care in backing up and would not suddenly back over the entire distance.

Johnston v Johnson, 225-77; 279 NW 139; 118 ALR 233

Negligence—assumption that law will be obeyed. Principle reaffirmed that just what acts of care must be taken by a pedestrian on the highway in order to save himself from the imputation of negligence may be very materially influenced and controlled by his right to assume that others using the highway will obey the law of the road.

Orth v Gregg, 217-516; 250 NW 113; 35 NCCA 612

Driving outside traveled roadway. An allegation that a motorist, without warning, ran his car outside the traveled part of the highway, and injured plaintiff, constitutes an adequate charge of negligence, and must, if supported by evidence, be submitted to the jury.

Townsend v Armstrong, 220-396; 260 NW 17

Lack of precaution for safety—plaintiff's own proof. A person riding with a trucker and struck by an automobile while helping put on tire chains after dark, having placed himself in a perilous position on the traffic side of the truck stopped astraddle the center of the highway, fails to prove his freedom from contributory negligence where there is no evidence that he kept any lookout or took any precautions for his own safety.

Denny v Augustine, 223-1202; 275 NW 117

Contributory negligence—stalled motorist—poor visibility in snowstorm. A plaintiff motorist who during a snowstorm becomes stalled in a snowdrift is not, as a matter of law, guilty of contributory negligence because, in attempting to extricate his car, he must at times place himself with his back to oncoming traffic alongside his vehicle, tho meanwhile making occasional attempts to observe traffic in that direction, especially when before the vehicle struck him he observed it when it was about 50 feet away, such distance under the undisputed evidence being the extreme extent of visibility.

Youngman v Sloan, 225-558; 281 NW 130

Standing on shoulder—standard of care.

Janes v Roach, 228- ; 290 NW 87

Failure to signal approach to stationary truck. The operator of an automobile, driving in broad daylight on the proper side of a country highway where the view is wholly unobstructed, is not guilty of negligence in failing to signal his approach to an open, stationary milk truck with a person standing beside it (which is also on the proper side of the highway) when said operator has no reason to suppose or apprehend that someone may be in or about said truck and may suddenly emerge therefrom and into the pathway of said oncoming automobile.

Crutchley v Bruce, 214-731; 240 NW 238; 31 NCCA 376

Person standing behind tail light of car.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Standing in path of truck. One who is standing substantially on the very edge of a passageway through which an approaching truck on a downgrade had to pass and knows that the truck operator is having difficulty to control the truck owing to the slippery condition of the road and does not step out of the way tho he has ample opportunity to do so, is guilty of contributory negligence.

Norris v Lough, 217-362; 251 NW 646

Walking in middle of highway. A pedestrian who, with normal sight and hearing, travels, on a clear night, in a space which is substantially two feet wide and which is marked by parallel black lines drawn along the center of a straight, 18-foot, paved highway, with an unobstructed view both to his front and rear of more than a quarter of a mile, with full opportunity to walk on the smooth, six-foot-wide dirt shoulders bordering the pavement, is guilty of negligence per se.

Lindloff v Duecker, 217-326; 251 NW 698; 34 NCCA 234

Pedestrian on highway. The rule that a pedestrian and an automobile have equal rights upon the highway does not authorize a highway employee to stand on the edge of the pavement watching an oncoming automobile travel a distance of 200 feet on the same side of the pavement, knowing the pavement is in an icy condition, knowing that the driver of the oncoming automobile is having difficulty controlling it, from which facts it is, or to a reasonably prudent man it would have been, apparent that he was occupying a position of danger, and consequently, in remaining there, he was guilty of contributory negligence. De-

I PEDESTRIANS GENERALLY—continued

fendant's motion for a directed verdict was properly sustained.

Cumming v Dosland, 227-470; 288 NW 647

Pedestrian crossing street — contributory negligence—jury question. A pedestrian crossing a street need not anticipate another's negligence, nor keep a constant lookout in both directions at the same time, nor wait for all approaching vehicles from both directions, and, moreover, he is not as a matter of law contributorily negligent merely in running while crossing a street altho not seeing an approaching motor vehicle 180 feet away; but in any case whether he could rightly assume he could cross in safety is a question of contributory negligence for the jury.

Swan v Dailey-Luce Co., 225-89; 277 NW 580; 281 NW 504

Contributory negligence—failure to look for cars in street. A pedestrian who, while crossing a public street, stops because of a car approaching from his immediate right, is guilty of contributory negligence when, observing that said car had also stopped, he at once moves forward without looking to his left or right, and is instantly hit by another car coming from said latter direction.

Stawsky v Wheaton, 220-981; 263 NW 313

Stepping into street in path of automobile. Plaintiff was guilty of contributory negligence as a matter of law in stepping from a curb into the path of an oncoming automobile which was in plain sight where it would have been seen by the plaintiff if he had looked.

Ward v Zerzanek, 227-918; 289 NW 443

Duty to pedestrians at intersection. Evidence reviewed and held to present a jury question as to the negligence of a motorist in operating his car in the business district of a city (1) by maintaining a speed in excess of 15 miles per hour, or (2) by failing to maintain proper lookout, or (3) by increasing instead of reducing his speed on approaching an intersection and pedestrians walking across one side thereof, or by so doing without giving warning of his approach.

Huffman v King, 222-150; 268 NW 144

Jury question. Evidence held to present a jury question on the issues whether the operator of an automobile was guilty of negligence in failing (1) to maintain a proper lookout for pedestrians, (2) to warn pedestrians, and (3) to keep his car under control.

Sexauer v Dunlap, 207-1018; 222 NW 420

Altfilisch v Wessel, 208-361; 225 NW 862; 32 NCCA 482; 34 NCCA 150

Robertson v Carlgren, 211-963; 234 NW 824

Lorimer v Ice Cream Co., 216-384; 249 NW 220; 1 NCCA(NS) 57

Proper lookout for pedestrian—jury question. After motorist had seen pedestrian 180 feet away standing on the curb, and when pedestrian had almost reached the opposite side of the street before being struck by the motor vehicle, which meanwhile had traveled the 180 feet, during which time pedestrian was plainly visible, and when motorist claims he did not again see pedestrian until just before striking him, the evidence raises a jury question as to whether motorist kept proper lookout, and directing a verdict is improper.

Swan v Dailey-Luce Co., 225-89; 277 NW 580; 281 NW 504

Knowledge dispensing with signals. Whether the operator of an automobile failed to give proper signal on approaching a crossing should not be submitted to the jury when admittedly the complaining pedestrian had full and explicit knowledge of the immediate presence and approach of said car.

Wilkinson v Lbr. Co., 203-476; 212 NW 682; 31 NCCA 345

Irregular crossing of street — negligence. Record held to present a jury question on the issue whether a pedestrian was guilty of contributory negligence in crossing a street in the middle of a block; likewise whether the driver of an automobile was guilty of proximate negligence in injuring said pedestrian.

Orth v Gregg, 217-516; 250 NW 113; 35 NCCA 612

Right of way instruction—crossing highway.

Scott v McKelvey, 228- ; 290 NW 729

Driving outside traveled roadway. An allegation that a motorist, without warning, ran his car outside the traveled part of the highway and injured plaintiff, constitutes an adequate charge of negligence, and must, of course, if supported by evidence, be submitted to the jury.

Townsend v Armstrong, 220-396; 260 NW 17

Hitting pedestrian on shoulder of highway. Direct evidence of negligence which is insufficient, in and of itself, to generate a jury question may be sufficient when aided by such fair and reasonable inferences as are legally permissible for the jury to draw from such direct evidence and the attending circumstances. So held on the issue whether the driver of an automobile, in pursuance of a concerted plan between himself and others riding with him, negligently drove the car so close to a woman walking on the shoulder of the pavement that when the door of the car was opened she was hit thereby.

Tissue v Durin, 216-709; 246 NW 806; 2 NCCA(NS) 447

Withdrawal of issue supported by evidence —pedestrian off pavement. Under a record in a motor vehicle pedestrian accident case showing that the jury could have found from the evidence that decedent was more off the pavement than on it, it is error to withdraw from the jury plaintiff's allegation that his intestate had reached a place of comparative safety on the shoulder of the highway and that defendant left the highway without warning the pedestrian.

McCormick v Kennedy, 224-983; 277 NW 576

Failure to maintain lookout—proper failure to submit. Record reviewed in an action for damages for death of a pedestrian who was killed by being hit by an automobile on the public highway, and held to justify the court in refusing, for want of evidence, to submit to the jury the issue of the defendant's alleged failure to maintain proper lookout.

Hartman v Lee, 223-32; 272 NW 140

Failure to keep lookout alleged—substituting last clear chance—not permitted. In a law action for damages wherein the petition alleges that defendant motorist was negligent in failing to keep a proper lookout, and such allegation was not withdrawn, and it is shown deceased pedestrian was contributorily negligent, it was proper to refuse to submit the case under last clear chance doctrine on the theory that motorist, being under duty to keep a lookout, presumably performed such duty, but, after seeing deceased, failed to exercise due care in avoiding the injury.

Reynolds v Aller, 226-642; 284 NW 825; 5 NCCA(NS) 140

Departure from pleaded theory. A plaintiff who predicates negligence in the operation of an automobile solely on the fact that defendant failed to give a warning signal after discovering plaintiff's position of danger may not complain that the court failed to instruct on the statutory duty to give a warning signal "on approaching tops of hills and intersecting highways."

Ryan v Shirk, 207-1327; 224 NW 824

Negativing defendant's plea. In an action for damages consequent on plaintiff being negligently struck and injured by defendant's automobile [in which action defendant pleads (1) a denial that his car struck plaintiff, and (2) that plaintiff was struck and injured by some other vehicle], the court commits reversible error by instructing that plaintiff cannot recover unless plaintiff establishes by a preponderance of the evidence not only (1) that defendant's car struck and injured plaintiff, but (2) that no other car struck and injured plaintiff.

Griffin v Stuart, 222-815; 270 NW 442

Stalled motorist—freedom from negligence—requested instruction—jury question. In a damage action for personal injuries arising out of a motor vehicle collision, the burden is on plaintiff to establish (1) the defendant's negligence, (2) such negligence as the proximate cause of the injury, and (3) plaintiff's freedom from contributory negligence. Hence a motorist who stands in the center of the road near the rear of her automobile stalled on the highway, attempting to stop a following motorist, and who, having the opportunity, fails to seek a place of safety when she sees the approaching motorist apparently will crash into her stalled automobile, is not entitled to an instruction establishing her freedom from contributory negligence as a matter of law, nor to a directed verdict against the defendant.

Murchland v Jones, 225-149; 279 NW 382

Person injured on highway construction work. In laborer's personal injury action arising because of truck backing into him while both were engaged in highway construction work, an instruction, that it is the duty of driver in moving a truck to exercise care and caution of ordinarily prudent person and to bring truck under proper control if he discovers, or in exercise of reasonable care should discover, a person in the path of truck, was neither erroneous as submitting to the jury a previously withdrawn issue as to whether defendant driver has truck under control, nor as permitting jury to speculate on defendant's negligence generally.

Rebmann v Heesch, 227-566; 288 NW 695

Reliance on another's duty—knowledge of breach no excuse for negligence. A plaintiff, injured by a passing automobile while helping defendant's employee-driver put on tire chains, may not excuse his own lack of due care by testifying that he relied on the driver to place out flares, when as a fact he knew both that the driver had no such intention and that no flares were so placed.

Denny v Augustine, 223-1202; 275 NW 117

Sudden and unexpected appearance of person. The operator of an automobile on a straight, open, and unobstructed public highway cannot be held to anticipate that some one will, without warning, suddenly emerge from behind a stationary object and place himself in the immediate pathway of the vehicle.

Watson v Ins. Assn., 215-670; 246 NW 655; 3 NCCA(NS) 333

Backing vehicle out of private driveway. The driver of a truck who is nonnegligently traveling on the north side of a straight and level public highway in plain and unobstructed view of an automobile standing outside the public highway and in a private driveway on the same side of the highway, has the right to assume that the automobile will not, without warning, be suddenly backed out of the private driveway and immediately in front of his oncoming truck, and if said automobile is so backed out and in his immediate front, he cannot be deemed negligent because, in such sudden emergency, he turns to his left and unintentionally strikes a person whom he theretofore knew was on the south side of the highway.

Carstensen v Thomsen, 215-427; 245 NW 734; 32 NCCA 300; 34 NCCA 326; 39 NCCA 369

II CHILDREN

Discussion. See 21 ILR 803—Anticipating conduct of children.

Passing children—care required. A motorist, in approaching and passing on the highway children who are in plain sight and apparently under 14 years of age, must, even tho said children are in a place of apparent safety along the margin of the traveled way, bring and keep his vehicle under such control that he will be able by ordinary care to prevent injury to a child should the child suddenly, unexpectedly, and without warning leave its place of apparent safety and place itself in a place of danger in front of the oncoming car.

Webster v Luckow, 219-1048; 258 NW 685
Darr v Porte, 220-751; 263 NW 240

Passing children—nonright to assume care. Testimony in an action against a motorist for striking and killing a 10-year-old child on the highway supported by the physical facts, from which the jury could find that the child's position on the shoulder could have been seen by defendant when more than 300 feet away, justifies an instruction on the nonright of a motorist to assume that a child under 14, in a place of apparent safety, will remain there, and on his duty to so control his machine as to avoid hitting her if she does not.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Proper lookout—evidence—sufficiency. Evidence reviewed and held insufficient to present a jury question on the issue whether the operator of an automobile maintained a proper lookout preceding the time when a small child suddenly emerged from behind an obstruction and ran into the pathway of the approaching car.

Howk v Anderson, 218-358; 253 NW 32

Anticipating child coasting—barricades removed—negligence. Where defendant knew that for many years a certain street was barricaded while children were coasting, and that there had been coasting there recently, but where the snow had melted somewhat so that the middle portion of the paving on the hill was bare of snow, and the barricades had been taken down the day before the accident, the defendant was not bound to anticipate and prepare for some child coasting on the hill.

McBride v Stewart, 227-1273; 290 NW 700

Unavoidable accident. Evidence reviewed and held to reveal per se no act of negligence on the part of a motorist in coming into collision with a child who, suddenly and unexpectedly darted from a hidden cover into the pathway of the car.

Chipokas v Peterson, 219-1072; 260 NW 37; 113 ALR 524; 3 NCCA(NS) 761

Inevitable accident. No actionable negligence is shown on a record which reveals that a small child suddenly ran from a place of safety directly and immediately into the path of an approaching automobile while the vehicle was proceeding at a lawful rate of speed, and when the driver did not know and had no reason to know, until almost the instant of impact, that the child was even present on or near the highway.

Klink v Bany, 207-1241; 224 NW 540; 65 ALR 187; 31 NCCA 112; 3 NCCA(NS) 332

Emergency—turning to right to avoid pedestrian. The driver of an automobile who is driving south on the right-hand side of a north and south highway is not guilty of negligence per se because, in order to avoid hitting a child running across the highway from the east side, he turns still farther to the right, even tho it later appears that had he kept his course or had turned to the left he might have avoided hitting the child.

Garmoe v Colthurst, 215-729; 246 NW 767

Nonnegligence per se. Evidence reviewed and held affirmatively to show no negligence on the part of the driver of an automobile, the injured party being an infant incapable of contributory negligence.

Kessler v Robbins, 215-327; 245 NW 284

Proximate cause — noncausal negligence. Failure of the driver of a conveyance to keep a proper lookout for other persons using the highway, or to keep his windshield clean, is quite inconsequential when the proximate cause of an injury to a boy on a sled was the icy condition of the street.

McDowell v Interstate Oil Co., 208-641; 224 NW 58; 31 NCCA 282; 32 NCCA 486

Contributory negligence—child under 14—burden to overthrow presumption. The presumption is that children under 14 are incapable of contributory negligence. A motorist striking a child of 10 must prove from all the facts and circumstances that the child did not exercise the degree of care ordinarily exercised by a child of like age. Held that the question of whether he had sustained his burden was clearly for the jury.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Minor walking on wrong side of highway—contributory negligence as matter of law. In a law action for damages where it is shown that plaintiff's decedent, a 15-year-old boy, was violating statute requiring pedestrians to walk on the left side of a highway by walking along right side, about 4 or 5 feet from west side of highway, and failing to make observations to oncoming traffic from the rear, while walking after dark on a street traversed by a thru highway, held, he was guilty of contributory negligence as a matter of law.

Reynolds v Aller, 226-642; 284 NW 825

Improper submission of issue. The issue of the alleged negligence of a truck driver in running over and killing a person cannot be properly submitted to the jury on evidence which fails to reveal the facts and circumstances immediately attending the accident itself—which leaves to mere conjecture the manner in which the fatal accident occurred. So held as to a fatal injury to a child.

Westenburg v Johnson, 221-134; 264 NW 18

Requested instruction on absent issue properly refused. A defendant-motorist's requested instruction, which deals with the question of sudden emergency arising because, as he alleges, a child suddenly darted from hiding and ran across the path of his car, is properly refused when the issue of error in judgment after the emergency arose was not in the case, and the theory of how and when the child got in his path was otherwise covered by instructions.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

III INCAPACITATED PERSONS

Last clear chance—jury question. When a truck driven by plaintiff's intestate slowed down and turned to the left to avoid a crippled pedestrian who was walking along the highway, whether the defendant's truck, coming from the rear at a greater speed, after discovering the peril of the truck in front in having turned out into his path, should have pulled further to the left on the shoulder of the road to avoid a collision, was a question of last clear chance for the jury.

Glover v Vernon, 226-1089; 285 NW 652

STREETCARS AND SAFETY ZONES

5028.03 Stopping at streetcar.

Negligence—concurrent or intervening cause. Record reviewed, relative to a passenger's alighting from a moving streetcar and being almost immediately hit or touched by a passing automobile, and held to present a jury question on the issues whether the injury was caused (1) solely by the operation of the streetcar, or (2) solely by the operation of the automobile, or (3) by the concurrent movement of both the streetcar and the automobile.

Fitzgerald v Railway, 201-1302; 207 NW 602

Negligence—proximate cause. Evidence reviewed, and held that the act of a motorist in turning to the left on meeting a streetcar, instead of stopping, was the proximate cause of an injury to a pedestrian in the street, rather than the act of the streetcar operator in allowing the streetcar to turn to the left on a curve before stopping.

Moss v Railway, 217-354; 251 NW 627

Stopping streetcar in intersection and failure to warn. The operator of a streetcar is not negligent (1) in stopping, on signal, the car in the middle of a smoothly paved street intersection rather than at the near side thereof, and (2) in failing to warn a passenger that he might encounter peril in the street from passing vehicles.

MacLearn v Utilities Co., 212-555; 234 NW 851; 2 NCCA (NS) 551

5028.04 Driving on streetcar tracks.

Negligence per se in driving upon car tracks. The driver of an automobile is guilty of negligence per se when, upon entering during the daytime a private crossing over much-used interurban railway tracks located on a curve, he knows when some 25 feet from the track in question that his view of an apprehended approaching car is limited to 300 feet, and when he avails himself of such view and sees no approaching car, and thereupon proceeds to attempt, under no diverting circumstances, to cross the tracks at a rate of three miles per hour without looking or listening for the apprehended car, tho his view of the track materially enlarged as he proceeded.

Rosenberg v Railway, 213-152; 238 NW 703

Negligence per se in crossing street. A pedestrian who, from a place of perfect safety, suddenly hastens across a streetcar track in front of an immediately approaching streetcar, with full knowledge that as soon as he had passed the said track he would be directly in line with the automobile travel moving with the streetcar, is guilty of contributory negligence per se, even tho the automobile which hit him was being operated at an excessive speed.

Pettijohn v Weede, 209-902; 227 NW 824

Driving into streetcar. The driver of a truck is guilty of negligence per se when, without any apparent necessity for so doing, he attempts to steer his vehicle out of a groove or rut in the street, with the result that the vehicle suddenly responded to his efforts, bounded out of the rut, and darted diagonally across the street for a distance of twenty feet, and into an oncoming streetcar, of the prior presence and actions of which he had the fullest knowledge.

Bowers v Railway, 219-944; 259 NW 244

Avoiding contributory negligence. A streetcar motorman who plainly sees that the driver of another conveyance is negligently placing himself in a position of danger on the tracks, or is about to do so, and by ordinary care can avoid an accident and fails to do so, must be deemed guilty of negligence which is the proximate cause of the accident, irrespective of the negligence of the injured party.

Lynch v Railway, 215-1119; 245 NW 219

"Last clear chance"—unallowable submission. Evidence relative to collision between a streetcar and an automobile reviewed and held wholly insufficient to justify the submission

to the jury of the "last clear chance" doctrine.

Elliott v Railway, 223-46; 271 NW 507; 5 NCCA(NS) 169

Streetcar operator — failure to maintain lookout—failure to stop—excuse. Negligence on the part of the operator of a streetcar cannot be predicated on his failure (1) to maintain a lookout for an injured party, or (2) to stop or slacken the speed of the car, when both parties were aware of the presence of each other long prior to any suggestion of a collision, and when, after the danger of a collision arose, stopping or slackening of speed was not only out of the question but would have been futile.

Bowers v Railway, 219-944; 259 NW 244

Instructions relative to nonpleaded negligence. Instructions that the jury should not consider the failure to ring a bell on a streetcar as a ground of negligence are properly refused (1) when plaintiff pleads no such ground of negligence, (2) when no such ground was submitted to the jury, and (3) when the testimony relative to such failure was received without objection.

Watson v Railway, 217-1194; 251 NW 31

Instructions — undue burden. No undue burden is imposed on a defending street railway company by requiring it to keep its car "under proper control and to use ordinary care," to operate its car "in a careful manner and not at a dangerous rate of speed," and to give notice of its approach "by ringing the gong or bell or otherwise," when the pleaded assignment of negligence embraces (1) excessive speed, (2) want of proper control of the car, and (3) failure to give warning of the approach of the car.

Johnson v Railway, 201-1044; 207 NW 984

5028.05 Driving in front of streetcar.

Precedence to streetcar. Principle reaffirmed that a streetcar at a street intersection may have precedence over an approaching motorist.

Moss v Railway, 217-354; 251 NW 627

Negligence—proximate cause. Evidence reviewed, and held that the act of a motorist in turning to the left on meeting a streetcar, instead of stopping, was the proximate cause of an injury to a pedestrian in the street, rather than the act of the streetcar operator in allowing the streetcar to turn to the left on a curve before stopping.

Moss v Railway, 217-354; 251 NW 627

Negligence per se — driving in front of streetcar. The operator of an automobile is guilty of negligence per se when, in the nighttime, and without diverting circumstances, and at a speed such that he could have stopped within two feet, he drives upon a streetcar track and immediately in front of an approaching and lighted streetcar which was at all material time in unobstructed view.

Crull v Railway, 217-83; 250 NW 905

Streetcar intersection — negligence per se. The operator of an automobile cannot be said to be negligent per se in driving into an intersection on a dark night in front of a rapidly oncoming streetcar with no headlight and with the entire front end of the streetcar unlighted, when, immediately before entering the intersection, he stops and listens and looks both ways for streetcars, and sees none (so he testifies) because of the glare of oil station lights immediately to his left, from which side the streetcar was approaching, and especially when there is evidence that the streetcar was approaching without audible signals.

Deiling v Railway, 217-687; 251 NW 622

Negligence per se in driving upon car tracks. The driver of a conveyance is guilty of negligence per se when, upon reaching a street intersection on a clear day, he has positive knowledge that a nearby streetcar is rapidly approaching the same intersection from a side street, and when he, without again looking at the approaching streetcar, and confronted by no emergency, continues his journey into the intersection at a speed which would enable him to stop his conveyance instantly and turns and enters upon the streetcar tracks in the direction in which the streetcar is moving.

Middleton v Railway, 209-1278; 227 NW 915

Collision with streetcar—obstructed view. The operator of an automobile who, without diverting circumstances, approaches and drives upon streetcar tracks and looks for an approaching streetcar at a place where he knows his view is very limited because of an intervening embankment, and fails to look at a point where he would still be within a zone of safety and where his view would be unobstructed, is guilty of negligence per se.

Pender v Railway, 217-1152; 251 NW 55

Negligence per se in crossing tracks. A party will not be permitted to excuse his contributory negligence, consequent on his attempt to cross streetcar tracks without using his senses of sight and hearing, by the simple assumption that the streetcars will not be negligently operated.

Rosenberg v Railway, 213-152; 238 NW 703

SPECIAL STOPS REQUIRED

5029.01 Obedience to signal of train.

Accidents at railroad crossings. See under §§8011, 8018

5029.05 Stop at through highways.

Entering stop intersections. See under §5026.04

Highway signs—authorized erection. It may be presumed, in the absence of evidence to the contrary, that the ordinary "Stop" and "Slow" signs, as they are found upon the public

highways, were erected by and under authority of the proper public officials.

Rogers v Jefferson, 223-718; 272 NW 532; 277 NW 570; 4 NCCA(NS) 318

Presumption—signs erected by county. On appeal the appellate court will, in the absence of proof to the contrary, assume that the board of supervisors has performed its mandatory duty to erect and maintain proper signs on local county roads where they intersect with county trunk roads.

Arends v DeBruyn, 217-529; 252 NW 249

Ignoring statutory "Stop" sign—effect. Failure of the operator of an automobile on a highway outside a city or town to comply, before entering an arterial highway, with a duly erected, statutory "Stop" sign constitutes negligence.

Willemsen v Reedy, 215-193; 244 NW 691

Disregarding "Stop" sign. Defendant, in a criminal prosecution for failure to stop his automobile at intersecting roads in obedience to a duly and lawfully erected "Stop" sign, may be properly convicted tho there is no evidence of careless driving, intent, willfulness or wantonness except such as may be deduced from the failure to stop, the defendant at the time acting under no compulsion.

State v Wilson, 222-572; 269 NW 205

No stop sign at county trunk highway.
Davis v Hoskinson, 228- ; 290 NW 497

Right of way on primary roads—duty of side traveler. A traveler on a nonprimary road in approaching an intersection with a primary road does not fulfill his full duty of care by stopping at the statutory "Stop" sign erected outside the primary road. He must not only so stop, and observe the travel on the primary road, but must continue so to observe until he reaches the intersection, and until he has passed the point where danger may reasonably be apprehended.

Hittle v Jones, 217-598; 250 NW 689; 37 NCCA 67

5029.10 Primary roads as through highways.

Primary roads—right of way—contributory negligence per se. Inasmuch as vehicles traveling on a primary road have right of way at intersections with nonprimary roads, the operator of a vehicle on a nonprimary road is guilty of negligence per se when he attempts to cross an intersection with a primary road, at a speed of 10 miles per hour, when he knows or ought to know that another vehicle on the primary road is, at a distance of 80 or 90 feet, approaching the intersection at a speed very greatly in excess of 10 miles per hour.

Hittle v Jones, 217-598; 250 NW 689; 37 NCCA 67

Right of way on primary roads—duty of side traveler. A traveler on a nonprimary road in approaching an intersection with a primary road does not fulfill his full duty of care by stopping at the statutory "Stop" sign erected outside the primary road. He must not only so stop, and observe the travel on the primary road, but must continue so to observe until he reaches the intersection, and until he has passed the point where danger may reasonably be apprehended.

Hittle v Jones, 217-598; 250 NW 689; 37 NCCA 67

Highway traversing city street—highway law applicable. Where a statute requires pedestrians to walk on left side of a highway, the word "highway" is applicable to a through highway traversing a street within a city, especially in view of other sections in the motor vehicle act concerning highways.

Reynolds v Aller, 226-642; 284 NW 825; 5 NCCA(NS) 724

5029.11 County trunk roads as through highways.

Intersecting county roads—negligence per se. The operator of an automobile on a county trunk road (an arterial highway), having the right of way over traffic on an intersecting local county road, is not guilty of negligence per se in entering such an intersection, with his car under apparent control, and without seeing a car approaching from his right at a high and dangerous rate of speed.

Arends v DeBruyn, 217-529; 252 NW 249; 37 NCCA 78

Evidence—instructions—county trunk road.
Davis v Hoskinson, 228- ; 290 NW 497

5029.12 Additional signs—cost.

Highway signs—authorized erection. It may be presumed, in the absence of evidence to the contrary, that the ordinary "Stop" and "Slow" signs, as they are found upon the public highways, were erected by and under authority of the proper public officials.

Rogers v Jefferson, 223-718; 272 NW 532; 277 NW 570; 4 NCCA(NS) 318

STOPPING, STANDING, AND PARKING

5030.01 Stopping on traveled way.

Stopping on highway. Stopping a vehicle on the public highway is not, ordinarily at least, an act of negligence.

Albrecht v Const. Co., 218-1205; 257 NW 183; 36 NCCA 713

Duty to stop and make repairs. It is not only the right but the duty of the operator of an automobile temporarily to stop on the proper side of a highway for the purpose of making necessary repairs, when a failure so to stop would be negligence.

Winter v Davis, 217-424; 251 NW 770

Highway as place of repair. Principle recognized that the driver of an automobile has the

right to stop in a public highway, even during the nighttime, and there repair his car, provided he exercises reasonable care in view of all the circumstances.

Hanson v Manning, 213-625; 239 NW 793

Stalled truck—place where stopped. Evidence reviewed and held to present a jury question on the issue whether the driver of a truck, who suddenly and without warning discovered that his engine had stalled, was negligent in failing to turn his truck farther to the right of the pavement and onto the shoulder of the road before stopping it.

Peckinpaugh v Engelke, 215-1248; 247 NW 822

Stopping on highway rather than muddy shoulder. It is not negligence per se for a motorist, on a moonlit, foggy night, with his rear lights burning and discernible for a distance of 30 rods, to stop for a period of from 2 to 5 minutes on the extreme right-hand side of a long, straight, level stretch of an 18-foot wide paved road, for the purpose of removing the loose or broken chains on his tires, even tho he might have stopped on a 6-foot wide slippery and muddy dirt shoulder.

Goodlove v Logan, 219-1380; 261 NW 496

Stopping on highway rather than soft shoulder. Stopping a motor vehicle directly on a public highway at night, because of the soft condition of the shoulder of the highway, in order to make unavoidable repairs on the vehicle necessitated by the unexpected blowing out of tires, does not, in and of itself, constitute negligence at common law.

Harvey v Knowles Co., 215-35; 244 NW 660; 36 NCCA 102

Stepping into highway from vehicle. It is not negligence per se for a motorist traveling on a dark, misty, and foggy night, on the proper side of a dark, 28-foot wide roadway, to stop, with his lights in full operation, and immediately to step from the car and into the traveled way.

Lukin v Marvel, 219-773; 259 NW 782; 1 NCCA 157

Stepping from vehicle in order to clean windshield. The driver of an automobile cannot be deemed negligent per se (1) in stopping his car on the right-hand side of the road with the major part of the car on the dirt shoulder bordering the pavement for the purpose of restoring visibility by cleaning the sleet from his windshield nor (2) in stepping out of the car and upon the running board—he, up to the time of said act, not having seen an approaching car.

Winter v Davis, 217-424; 251 NW 770; 35 NCCA 819; 39 NCCA 308

Collision—trucker struck while retrieving goods scattered on highway. A defendant motorist's negligence in striking a truck stopped on the highway is not the proximate cause of a later injury to the trucker by another motorist, who struck him while he was attempting to remove his merchandise spilled on the highway. The latter intervening cause was the proximate cause of his injury.

McClure v Richard, 225-949; 282 NW 312

Stalled motorist—freedom from negligence—requested instruction—jury question. In a damage action for personal injuries arising out of a motor vehicle collision, the burden is on plaintiff to establish (1) the defendant's negligence, (2) such negligence as the proximate cause of the injury, and (3) plaintiff's freedom from contributory negligence. Hence, a motorist who stands in the center of the road near the rear of her automobile stalled on the highway, attempting to stop a following motorist, and, tho having the opportunity, fails to seek a place of safety when she sees the approaching motorist apparently will crash into her stalled automobile, is neither entitled to an instruction establishing her freedom from contributory negligence as a matter of law, nor to a directed verdict against the defendant.

Murchland v Jones, 225-149; 279 NW 382

Failure to lessen speed or signal approach. A jury question on the issue of negligence of the operator of an automobile is generated by evidence tending to show that said operator was driving easterly on a straight road at 50 miles per hour; that he plainly could have seen, while at a distance of 80 rods, two well-lighted cars, and that they were standing together on the south side of the highway, one headed west and one headed east, with all headlights burning; and that, without slacking his speed, or giving signal of his approach, he passed to the south of said stationary cars, and so close thereto as to strike and break an open door on one of said cars.

Hanson v Manning, 213-625; 239 NW 793; 2 NCCA(NS) 446

Anticipated negligence—passing on wrong side. Prejudicial error results from instructing, in effect, that a person who has stopped his car at a proper place in the highway in order to repair it must anticipate and guard himself against the possibility that the operator of some passing car may be negligent by passing the stationary car on the wrong side.

Hanson v Manning, 213-625; 239 NW 793

Driving past stationary vehicle. Driving past and within four feet of a stationary vehicle in the public highway, at a rate of 35 miles per hour and without giving any warning signal, when much more than said four feet was afforded by the highway, may constitute negligence.

Jarvis v Stone, 216-27; 247 NW 393

Duty to reduce speed while passing vehicle. An allegation that defendant drove his vehicle

past a stationary vehicle at an excessive and dangerous rate of speed renders proper, on supporting proof, an instruction as to the duty of the defendant to reduce his speed to a reasonable rate when approaching and passing the stationary vehicle.

Jarvis v Stone, 216-27; 247 NW 393

Parked cars—accident between other vehicles. Evidence held affirmatively to show that the stopping of three cars on the highway was not the proximate cause of a collision between a fourth car and a car traveling in the opposite direction from the three stationary cars.

Foster v Flaugh, 223-40; 271 NW 503

Knowledge of parked car—nonproximate cause. A general allegation of negligence in leaving a stalled automobile in the highway unattended is not available to a traveler who had the fullest knowledge of the presence of the automobile long before he reached and collided with it; especially when the leaving of said car in the highway was not the proximate cause of the injury that was suffered.

Scoville v Bakery, 213-534; 239 NW 110; 35 NCCA 719; 36 NCCA 94

Contributory negligence—failure of lights—as jury question. Where a truck is being operated in a fog with 35 feet visibility ahead, under speed and road conditions permitting a stop within 25 feet, and after meeting and passing another automobile, there is a failure of the lights on the truck, the truck driver is confronted with an emergency not of his own making, and if he tries the lights again before applying his brakes and turning on his emergency light, after which he discovers another truck stopped on the road within the visibility range so that it would have been seen and avoided had the lights not failed, he is not as a matter of law contributorily negligent in being unable to stop without a collision, but the question is for the jury.

Mueller v Ins. Assn., 223-888; 274 NW 106; 113 ALR 1256

Failure to see parked car in fog. On a foggy evening when visibility was poor, where the plaintiff, with the headlamps on his automobile lighted and the windshield wiper working, drove his car into another car which was parked on the highway, in the absence of any proof of an emergency to excuse his failure to see the other car, he was not free from contributory negligence and the defendant was entitled to a directed verdict.

Newman v Hotz, 226-831; 285 NW 289

Tail light of car concealed by person's body.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Yielding half of traveled way—inapplicability. The statute relative to the duty of the driver of a vehicle on the public highway, on meeting another vehicle, to yield one-half of the traveled way, may, manifestly, have no application to the driver of a vehicle which, to the timely knowledge of an oncoming driver, is standing stationary in such highway.

Engle v Nelson, 220-771; 263 NW 505

Passing stalled truck. The length of a vehicle (34 feet), its load (7 tons), and the space required in which to make a turn (20 to 30 feet) may, especially on a dark night, have a very material bearing on the issue whether the driver, by proof of an attempt to pass around a stalled truck, had legally excused his presumptive negligence in being on the left-hand side of the traveled way at the time of a collision with an oncoming vehicle. Evidence held to present jury question.

McWilliams v Beck, 220-906; 262 NW 781

Parking in highway—absence of lights. Negligence, alleged to have been the proximate cause of a collision, and asserted in the plea that defendant's truck (1) was parked, in the nighttime, diagonally across the entire right-hand side of a paved highway, and (2) without lights, with substantial evidence pro and con, both as to the position of the truck and as to the lights, necessarily presents a jury question.

Schwind v Gibson, 220-377; 260 NW 853; 37 NCCA 496, 640

5030.02 Disabled vehicle.

Signaling passing cars—no duty to anticipate negligence. A motorist stalled on the highway has a right to assume that the driver of a passing automobile to whom he signals to stop will use ordinary care in so doing.

McDaniel v Stitsworth, 224-289; 275 NW 572

Place of stopping truck—negligence. Evidence reviewed and held to present a jury question on the issue whether the driver of a truck who suddenly and without warning discovered that his engine had stalled was negligent in failing to turn his truck farther to the right of the pavement and onto the shoulder of the road before stopping it.

Peckinpaugh v Engelke, 215-1248; 247 NW 822

Disabled vehicle—daytime stopping on highway—signaling. Stopping a disabled motor truck in the daytime upon the right-hand side of a 26-foot graveled road within 4 feet of a guardrail, where it was visible for 225 feet, and signaling to passing cars does not constitute negligence.

McDaniel v Stitsworth, 224-289; 275 NW 572

Stopping on highway when shoulder soft. Stopping a motor vehicle directly on a public highway because of the soft condition of the shoulder of the highway in order to make unavoidable repairs on the vehicle necessitated by the unexpected blowing out of tires does not, in and of itself, constitute negligence at common law.

Harvey v Knowles Co., 215-35; 244 NW 660; 36 NCCA 102

Contributory negligence—matter of law—stalled motorist—poor visibility in snowstorm. A plaintiff motorist who during a snowstorm becomes stalled in a snowdrift is not, as a matter of law, guilty of contributory negligence because, in attempting to extricate his car, he must at times place himself with his back to oncoming traffic alongside his vehicle, tho meanwhile making occasional attempts to observe traffic in that direction, especially when before the vehicle struck him he observed it when it was about 50 feet away, such distance under the undisputed evidence being the extreme extent of visibility.

Youngman v Sloan, 225-558; 281 NW 130

Duty to remove stalled vehicle from highway. Where a motor vehicle is stalled in a snowdrift and obstructs half of the highway, a motorist must use reasonable efforts to remove such vehicle.

Youngman v Sloan, 225-558; 281 NW 130

Failure to see parked vehicle in fog—jury question. In an action for damages resulting from injuries sustained when the car in which the plaintiff and her husband were riding on a foggy evening ran into a car which the defendant had left standing on the highway after an unsuccessful attempt to tow it away, it was error for the lower court to direct a verdict for the defendant, as the question of liability should have gone to the jury.

Newman v Hotz, 226-834; 285 NW 287

Stalled truck — contributory negligence. Where a car collided with a stalled tractor-trailer, jackknifed on an icy hill at night, the question of plaintiff's contributory negligence was properly submitted to the jury, where it is shown the tractor, with lighted headlamps, standing on the right side of the highway, diverted plaintiff's and husband-driver's attention, and, there being no reasonable apparent cause to suspect that trailer blocked the left side of highway, and, where jury could find that car in which the plaintiff was riding was proceeding at less than 20 miles per hour, and that plaintiff and husband-driver were looking straight ahead, there is no warrant for saying plaintiff was contributorily negligent as a matter of law; however, under the record, the negligence of the husband-driver, if any, could not be imputed to plaintiff.

Johnson v Transp. Co., 227-487; 288 NW 601

5030.05 Stopping, standing, or parking.

Discussion. See 22 ILR 713—Parking meters

Petition stating cause of action as against demurrer—stop sign—obstructed view. Where petition alleges defendants' truck was parked on curbing or sidewalk so as to obstruct view of stop sign for a motorist who proceeded into intersection and collided with another car, petition held to state a cause of action as against demurrer.

Blessing v Welding, 226-1178; 286 NW 436

Pleading ordinance and statute violations—assumed for purpose of demurrer. In an action for injuries resulting from a motor vehicle collision at an intersection, where defendants' truck is alleged to have been parked so as to obscure the view of a stop sign, and where the violations of both city ordinance and state law are pleaded, the supreme court will assume, for the purpose of demurrer, that truck was parked within prohibited distance and did obscure the sign.

Blessing v Welding, 226-1178; 286 NW 436

Unlawful parking—negligence. The parking of a motor vehicle at a place where parking is prohibited by a valid city ordinance constitutes negligence and, in case a collision occurs with the parked vehicle, the said negligence must be deemed to have contributed to the resulting damage.

Riley v Guthrie, 218-422; 255 NW 502; 35 NCCA 818

Parking—view of stop sign obstructed—others' imputed knowledge of stop sign no defense. Where defendants' truck was parked so as to obscure the view of a stop sign at an intersection, and where motorist proceeded into intersection without stopping and collided with an automobile on intersecting street, defendant will not be exempt from liability on ground that knowledge would be imputed to motorist that intersecting street was an arterial highway because of statute as to posting signs.

Blessing v Welding, 226-1178; 286 NW 436

5030.08 Parking at right-hand curb.

Municipal corporations — torts — proximate cause. A truck which is legally parked alongside the curb of a public street is not the proximate cause of an injury to a child whose sled was deflected into the truck by a bump in the street.

Dennier v Johnson, 214-770; 240 NW 745; 35 NCCA 717

Parking on left side without tail light. Section 5056, C., '35, requiring parking on right side of city street, was in effect in city which had not adopted any ordinance to the contrary under authority of §4997, and §5045, in view of its legislative history, required red tail light upon automobile parked at night upon city street. The purpose of these statutes was protection and warning of traffic, and violation thereof without legal excuse was negligence, but whether such negligence was proximate cause of a bicyclist's collision with an automobile so parked was question for jury.

Trailer v Schelm, 227-780; 288 NW 865

MISCELLANEOUS RULES

5031.03 Control of vehicle—signals.

ANALYSIS

I WARNING SIGNALS GENERALLY
II CURVES
III HILLS

Annotations Vol I, see under §§5040, 5043
Control of vehicle generally. See under §5023.04

I WARNING SIGNALS GENERALLY

Failure to signal approach to stationary truck. The operator of an automobile, driving in broad daylight on the proper side of a country highway where the view is wholly unobstructed, is not guilty of negligence in failing to signal his approach to an open, stationary milk truck with a person standing beside it (which is also on the proper side of the highway) when said operator has no reason to suppose or apprehend that some one may be in or about said truck and may suddenly emerge therefrom and into the pathway of said oncoming automobile.

Crutchley v Bruce, 214-731; 240 NW 238; 31 NCCA 376

Negligence per se—entering obscured crossing. Negligence per se is revealed in the act of the driver of an automobile in approaching and entering an obscured public crossing (with which he was familiar) with knowledge that another vehicle was also rapidly and immediately approaching said intersection from his right, and failing either (1) to sound his horn or (2) to yield the right of way. (See Vol. I, §5028 et seq.)

Masonholder v O'Toole, 203-884; 210 NW 778; 31 NCCA 44

Arterial highway—negligence per se. The operator of an automobile on a county trunk arterial highway (on which no "stop" or "slow" signs had been erected at points intersected by county local roads) is guilty of negligence per se in knowingly approaching an obscured intersection without either (1) slacking his speed (of some 25 or 30 miles per hour) as required by §5031, C., '31 [§5023.04, C., '39] or (2) giving some warning signal of his approach. (But see Dikel v Mathers, 213 Iowa 76.)

Lang v Kollasch, 218-391; 255 NW 493; 37 NCCA 74

Child on sled—view obstructed by snowbank—negligence—directed verdict. In an action for death of 7-year-old child, where defendant-motorist could not see child because of snowbank, and child, lying on sled, coasted into intersection at 20 or more miles per hour and struck rear wheel of defendant's automobile, the court properly directed verdict for defendant, the evidence being insufficient to establish that defendant was driving at excessive speed, lacked control of his car, failed to maintain proper lookout, or failed to give warning of approach to intersection.

McBride v Stewart, 227-1273; 290 NW 700

Obscured view of travel at intersection—failure to look or signal. The operator of an automobile in approaching and entering an intersecting country highway, when the view of travel approaching from his right is obstructed, is guilty of negligence (1) if he fails to signal his approach and entry, and also (2) if he fails to look for such travel at a point from which he can see such travel.

Smith v Lamb, 220-835; 263 NW 311; 4 NCCA(NS) 368

Plaintiff's negligence per se not necessarily contributory. A plaintiff riding in his automobile driven by his son who enters an obscured intersection without sounding his horn, (§5043, C., '35), is guilty of negligence per se, imputable from his son, but a jury question arises as to whether or not this contributed to the injury, when from the evidence it is questionable whether defendant could have heard such signal had it been given.

In re Green, 224-1268; 278 NW 285

Contributory negligence—failure to sound horn. In action involving collision between car and motorcycle, plaintiff was not guilty of contributory negligence as a matter of law for failure to sound horn where vehicles were in plain view of each other for more than 200 feet and there was no apparent danger of any collision.

Jakeway v Allen, 227-1182; 290 NW 507

Failure to signal at intersection—jury question. Evidence reviewed on the issues whether the driver of an automobile (1) was driving on the wrong side of the street, (2) "cut the corner" of an intersection, and (3) gave no signal of his approach, and held to present a jury question.

Handlon v Henshaw, 206-771; 221 NW 489; 32 NCCA 433; 35 NCCA 649

Failure to signal—knowledge of approach. The submission to a jury of the issue of negligence on the part of the operator of an automobile in not sounding a warning of his approach to an intersection of streets is reversible error when the undisputed evidence shows that the injured party saw the approaching automobile when it was more than a block from said intersection.

Lauxman v Tisher, 213-654; 239 NW 675

Failure to signal at unknown intersection. The driver of an automobile may not be said to be negligent per se for failure to sound a signaling device upon approaching an intersecting and completely hidden highway, of the existence of which he had no knowledge in fact or reason.

Sexauer v Dunlap, 207-1018; 222 NW 420

I WARNING SIGNALS GENERALLY—concluded

Construction as a whole. An instruction which properly directs the jury that the defendant would be guilty of negligence if, under named circumstances, he failed to signal his approach to the scene of an accident is not rendered erroneous because the court does not, in said instruction, make any reference to the law of direct and proximate cause—said latter subject matter being properly covered elsewhere in the instructions.

Engle v Nelson, 220-771; 263 NW 505

Failure to sound horn—pedestrian ran in front of car. Failure to sound the horn on an automobile is quite inconsequential when there was no occasion to give such signal until the injured party, suddenly and without previous warning, ran into the immediate pathway of the car at a time when it was impossible to stop the car and avoid the accident.

Howk v Anderson, 218-358; 253 NW 32; 35 NCCA 1

Persons working on highway—truck driver's duty. In a laborer's personal injury action against a truck driver for backing truck into laborer while both were engaged in highway construction, §5017.06, C., '39, exempting persons and motor vehicles actually engaged in work upon the highway from the motor vehicle law requirements, does not exempt a truck driver from using his horn if necessary in the exercise of ordinary care when backing from an intersection onto highway under construction. Question of defendant's negligence in not sounding horn or observing plaintiff's presence when backing truck where men were working, and question of plaintiff's contributory negligence while working under foreman's instruction at outside edge of road were questions properly submitted to jury.

Rebmann v Heesch, 227-566; 288 NW 695

II CURVES

Negligence—sudden stopping of car on curve. The driver of an automobile who is on the right-hand side of the road at a curve and driving at a proper speed is not guilty of negligence in suddenly applying the brakes in order to avoid hitting an overtaking and passing car which unexpectedly swerved in front of him, and in order to prevent his own car going into a ditch, tho by so doing the wheels of his car locked and the momentum skidded the car across the road and into another car.

Klaaren v Shadley, 215-1043; 247 NW 301

Passing on curve—negligence—jury question. Evidence held to present a jury question on the issue of negligence of the operator of an automobile in passing another vehicle on a curve, and returning to the right side of the traveled way within 30 feet of the car which had been passed.

Andersen v Christensen, 222-177; 268 NW 527

Guest statute—speed as recklessness. Where an automobile, traveling 40 miles an hour around a curve that was neither a sharp turn nor a long sweeping curve, ran off the pavement and turned over, injuring plaintiff guest, this evidence did not raise a jury question on whether defendant was reckless within scope of guest statute.

Crabb v Shanks, 226-589; 284 NW 446

Reckless operation—jury question. A jury question on the issue of reckless operation of an automobile is made by evidence that the car was being operated (1) over a wide, well-settled graveled highway with which the operator was wholly unfamiliar, (2) at a speed of some 65 miles per hour, (3) during the nighttime when visibility was materially limited, and (4) at a sharp turn in the road so belatedly anticipated and discovered that the driver was unable to negotiate it and was compelled to turn his car into the side ditch.

Mescher v Brogan, 223-573; 272 NW 645

III HILLS

Failure to signal approach—effect. Failure to sound some signaling device when an automobile is approaching the top of a hill may constitute no more than presumptive negligence.

Lane v Varlamos, 213-795; 239 NW 689

Ruts in snow on highway—collision—explanatory instruction omitting contributory negligence. Where, on a snow-covered highway containing a single pair of ruts, two automobiles approaching each other collide on a hill, in a damage action by a passenger injured thereby, an instruction further explaining negligence, but not mentioning contributory negligence, is not erroneous when contributory negligence was covered in other instructions and when the jury could not have been misled by the explanatory purpose of the instruction.

Tallmon v Larson, 226-564; 284 NW 367

Signaling on approaching hilltop—statute inapplicable. The statutory requirement that an adequate signaling device be sounded when a motor vehicle approaches the top of a hill has no application to an accident which happened on a level road, and at a point over 250 feet beyond the top of the hill in question.

Heacock v Baule, 216-311; 249 NW 437; 93 ALR 151

Departure from pleaded theory. A plaintiff who predicates negligence in the operation of an automobile solely on the fact that defendant failed to give a warning signal after dis-

covering plaintiff's position of danger may not complain that the court failed to instruct on the statutory duty to give a warning signal "on approaching tops of hills and intersecting highways."

Ryan v Shirk, 207-1327; 224 NW 824

SCHOOL BUSSES

5032.04 Drivers.

School bus driver as independent contractor—nongovernmental function. A school bus driver furnishing his own bus under a contract embodying certain conditions to transport school children, but not under the supervision, control, and regulation of the board, is an independent contractor liable for his own negligence and not an employee exercising a governmental function.

Olson v Cushman, 224-974; 276 NW 777

EQUIPMENT

5033.01 Scope and effect of regulations.

Use of known dangerous vehicle. One who continues to ride in an automobile after he knows it is dangerous to do so, and without availing himself of the opportunity to have the vehicle repaired, is guilty of negligence; especially may he not complain when he happens to occupy such relation to the vehicle as renders it his duty to have repairs made.

Helming v Bank, 206-1213; 220 NW 45

Circumstantial evidence — defectively attached wheel. Circumstantial evidence is wholly insufficient, in and of itself, to generate a jury question on the issue whether a defendant in repairing an automobile so negligently replaced a wheel on the car that thereby it became detached while in operation (with resulting damage to plaintiff) when said evidence is also consistent with the additional theory that said wheel became detached because of defects and weaknesses in the car arising from its age and great use.

Tyrrell v Skelly Co., 222-1257; 270 NW 857

Res ipsa loquitur—nonapplicability. In an automobile damage action the doctrine of res ipsa loquitur is not applicable when the automobile was not under the exclusive control of the defendant nor when the jury must speculate from the evidence whether the injury was caused by a defect in the automobile or by the negligence of the driver.

Sproll v Burkett Co., 223-902; 274 NW 63

Guest injured in rented car—burden of proof. In action by guest against lender of rented car and driven by borrower, for injuries sustained when car, because of defective wheels, goes into ditch, he must show, not only that car was defective at time of accident, but that it was defective at time of its delivery to borrower. Held burden of proof not sustained.

Gianopulos v Saunders System, (NOR); 242 NW 53; 32 NCCA 18

5033.04 When lighted lamps required.

Atty. Gen. Opinion. See '36 AG Op 51

Absence of lights—inferential evidence to support issue. Testimony by a plaintiff to the effect that as he entered an intersection he looked along the intersecting highway to his right (which was the proper direction) and saw no approaching automobile or automobile lights, may be sufficient to justify the court in submitting to the jury the question whether the defendant was operating his car without lights.

Appleby v Cass, 211-1145; 234 NW 477

Striking admissible testimony. Excluding evidence that lights on defendant's truck were not burning, plaintiff having failed to allege such fact in petition, held, prejudicial error when such fact had direct bearing on question of plaintiff's contributory negligence.

Haines v Mahaska Works, 227-228; 288 NW 70

Nonproximate cause. The operation of an automobile with lights which do not measure up to statutory requirements becomes quite immaterial in a civil action if such shortcoming in no manner contributes to the damage.

Hansen v Kemmish, 201-1008; 208 NW 277; 45 ALR 498; 29 NCCA 326; 33 NCCA 100

Violation of statute—avoidance by contributory negligence. Failure of defendant, the driver of an automobile, to have the headlights on his car displayed at a time required by statute, becomes inconsequential when the contributory negligence of the plaintiff was the proximate cause of the injury resulting from the collision.

Sheridan v Limbrecht, 205-573; 218 NW 278; 29 NCCA 300; 35 NCCA 661; 2 NCCA (NS) 417

Contributory negligence—insufficient showing. Evidence held insufficient to show contributory negligence per se in not seeing, in the nighttime, an unlighted approaching vehicle.

Carlson v Decker & Sons, 216-581; 247 NW 296; 36 NCCA 91

Driving without lights. The act of driving an automobile without lights on the wrong side of highway on a dark night is per se not careful and prudent.

Lange v Bedell, 203-1194; 212 NW 354

Driving blind horse—buggy without lights. It is not negligent per se to drive a blind horse in a narrow highway on a dark night, with the horse hitched to an unlighted buggy.

Lange v Bedell, 203-1194; 212 NW 354

Absence of lights—negligence per se. The operator of an automobile who, on a dark and foggy night, operates his car without lights because he believes he can see better without them, is guilty of negligence per se.

Caudle v Zenor, 217-77; 251 NW 69; 34 NCCA 122; 1 NCCA(NS) 44

Jury question. Evidence held to present a jury question whether an automobile was negligently operated (1) without lights, (2) at a dangerous rate of speed, and (3) on the wrong side of the highway.

Carlson v Decker & Sons, 216-581; 247 NW 296; 36 NCCA 91

Collision — jury questions. Evidence reviewed in an action for damages consequent on a collision in the nighttime between a truck and an automobile, and held to present jury questions on the issues:

1. Whether deceased was guilty of contributory negligence.
2. Whether defendant was driving his truck without lights.
3. Whether defendant was driving on the wrong side of the road.
4. Whether defendant was operating his truck (weighing three tons) at an unlawful rate of speed.
5. Whether defendant had opportunity to avoid the collision and failed to do so.

Carlson v Decker, 218-54; 253 NW 923; 36 NCCA 91

Contributory negligence—failure of lights —jury question. Where a truck is being operated in a fog with 35 feet visibility ahead under speed and road conditions permitting a stop within 25 feet, and after meeting and passing another automobile, there is a failure of the lights on the truck, the truck driver is confronted with an emergency not of his own making, and if he tries the lights again before applying his brakes and turning on his emergency light, after which he discovers another truck stopped on the road within the visibility range so that it would have been seen and avoided had the lights not failed, he is not as a matter of law contributorily negligent in being unable to stop without a collision, but the question is for the jury.

Mueller v Ins. Assn., 223-888; 274 NW 106; 113 ALR 1256

Absence of lights—instructions—sufficiency. An instruction that plaintiff would be guilty of contributory negligence if his automobile was not equipped with two white lights on the front is all-sufficient on that particular subject matter.

Winter v Davis, 217-424; 251 NW 770

Insufficient headlights—erroneous submission of issue. The submission to the jury of the issue whether an automobile was being operated with lights which were insufficient to reveal a person or object 75 feet ahead of the lights, without any evidence that the lights did not meet the statutory requirements, constitutes reversible error.

Grover v Neibauer, 216-631; 247 NW 298; 36 NCCA 133

Failure of lights—right to proceed—instructions. The court should, on supporting testimony, instruct as to the right of a traveler to proceed cautiously toward his destination in case of the failure of his lights to operate.

Sergeant v Challis, 213-57; 238 NW 442

Necessary instructions. The operation of an automobile during the nighttime without the required number of lights is not necessarily negligent; and in submitting such issue the court must clearly state to the jury the circumstances under which the operator would, under the statute, be negligent and the circumstances under which he would not, under the statute, be negligent.

Muirhead v Challis, 213-1108; 240 NW 912

Taking obviously dangerous position on highway. A motorist is guilty of negligence per se when, with darkness rapidly falling, and with his unlighted car stalled on a substantial up-grade, and substantially across the right-hand side of a known heavily-traveled, ice-covered street, he deliberately places himself on that side of his car toward which traffic would be directly moving, and, with his back to such oncoming traffic, attempts to back his car into a private driveway, knowing at the time that the view of an approaching driver would be seriously impaired by the lights of a car which at that moment had passed him, and which was moving toward said approaching driver.

Fortman v McBride, 220-1003; 263 NW 345; 39 NCCA 330

Lights on road machinery—statute violation —nonliability of county. Mandatory statutes requiring danger lights on road machinery and providing punishment for their violation do not create any liability on a county for negligent observance thereof.

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 827; 4 NCCA(NS) 4

5033.05 Head lamps on motor vehicles.

Absence of lights—instructions—sufficiency. An instruction that plaintiff would be guilty of contributory negligence if his automobile was not equipped with two white lights on the front is all-sufficient on that particular subject matter.

Winter v Davis, 217-424; 251 NW 770

Holding under former statute. The operation of an automobile during the nighttime without the required number of lights is not necessarily negligent; and in submitting such

issue the court must (especially when requested) clearly state to the jury the circumstances under which the operator would under the statute be negligent and the circumstances under which he would not under the statute be negligent.

Muirhead v Challis, 213-1108; 240 NW 912

5033.07 Rear lamps and reflectors.

Tail lights—when not required. (Holding under prior statute.)

Leete v Hays, 211-379; 233 NW 481

Improper argument. An argument to the effect that plaintiff could not have known at the time of an accident of the existence of an ordinance relative to rear signal lights on vehicles, because defendant's counsel did not know such fact until long after the accident, is improper.

DeMoss v Cab Co., 218-77; 254 NW 17

Absence of tail lights and reflectors—jury question. Testimony reviewed and held that the court could not say as a matter of law that the truck in question was not, at the time of a collision, equipped with tail lights and reflectors.

Isaacs v Bruce, 218-759; 254 NW 57; 36 NCCA 93

Parking on left side without tail light. Section 5056, C., '35, requiring parking on right side of city street, was in effect in city which had not adopted any ordinance to the contrary under authority of §4997, and §5045, in view of its legislative history, required red tail light upon automobile parked at night upon city street. The purpose of these statutes was protection and warning of traffic, and violation thereof without legal excuse was negligence, but whether such negligence was proximate cause of a bicyclist's collision with an automobile so parked was question for jury.

Trailer v Schelm, 227-780; 288 NW 865

5033.09 Reflectors additional.

Absence of rear reflectors—nonproximate cause—instruction without issue. A "sideswipe" collision between two head-on approaching automobiles could not proximately result from the absence of red reflectors on the rear of the body, and no instruction involving this negligence should be given.

Keller v Dodds, 224-935; 277 NW 467

CLEARANCE AND IDENTIFICATION LIGHTS

5034.01 Kinds and placement of lights.

Atty. Gen. Opinion. See '36 AG Op 262

Absence of tail lights and reflectors—jury question. Testimony reviewed and held that the court could not say as a matter of law that the truck in question was not, at the time of a collision, equipped with tail lights and reflectors.

Isaacs v Bruce, 218-759; 254 NW 57; 36 NCCA 93

Lack of proper lamps on trucks or trailers. In an action at law to recover damages for personal injuries sustained by plaintiff when car in which she was riding collided with a tractor-trailer which had stalled on an icy hill on a country highway at night and had jackknifed across the highway, the question of owners' and operators' negligence in failing to comply with statutes prescribing number and place of lamps required on truck or trailer, and whether such negligence, if any, had proximate causal connection with injury sustained by plaintiff, held, under the evidence, properly submitted to the jury.

Johnson v Transp. Co., 227-487; 288 NW 601

Failure to submit supported issue. Error results from the failure of the court, in a personal damage action, to submit to the jury a supported issue of negligence as to the absence of sidelights on a truck.

Jordan v Schantz, 220-1251; 264 NW 259

5034.04 Lamps on parked vehicles.

Truck flares. See under §5034.57

Absence of tail light—effect. The parking, during the nighttime, of a motor vehicle upon a paved highway outside a city or town, with the tail lights extinguished, constitutes negligence per se, in the absence of a showing of legal excuse.

Harvey v Knowles Co., 215-35; 244 NW 660

Evidence—positive vs. negative. Positive evidence of the existence of lights in full operation on a parked automobile is in no degree detracted from by evidence of a witness that he did not see any lights at a material time when his view was obstructed by an intervening object.

Harvey v Knowles Co., 215-35; 244 NW 660

Truck trailer jackknifed across road—sufficiency of time to set out flares. In an action at law to recover damages for personal injuries received when car in which plaintiff was riding collided with the trailer of a tractor-trailer unit which had stalled on an icy hill at night on a country highway, and had jackknifed across highway, and where it is claimed the operators of the trailer unit failed to comply with statute requiring such standing vehicles to set out flares, and where operators claimed a warning was given by waving an ordinary flash light from inside or just outside cab of tractor, the question as to whether operators of trailer unit had sufficient time to set out warning signals, and whether the warning by waving an ordinary flash light was sufficient to afford a warning of presence of truck and trailer blocking motorists' pass-

age, were proper questions of fact for the jury.

Johnson v Transp. Co., 227-487; 288 NW 601

Unlighted truck in highway. Evidence which would justify a finding that the driver of a truck left it where it obstructed one-half of the highway and with the rear end unlighted presents a jury question on the issue of such assigned negligence.

Kimmel v Mitchell, 216-366; 249 NW 151; 35 NCCA 790; 36 NCCA 106

Stalled vehicle—absence of signals—proximate cause. The fact that, upon the stalling of a vehicle in the public highway, no lights or signals were erected to show the presence and position of said vehicle cannot be deemed the proximate cause of a collision with the stalled vehicle when the driver of the colliding vehicle discovered the presence and position of the stalled car in ample time to stop had he been so driving as to be able to stop within the assured clear distance ahead.

Albrecht v Const. Co., 218-1205; 257 NW 183; 36 NCCA 713

Collision with stationary truck—negligence. The position of an unlighted truck parked in the highway and the diverting circumstances occurring just preceding a collision with the truck may have a very material bearing on the issue of plaintiff's contributory negligence and the assured clear distance rule.

Kimmel v Mitchell, 216-366; 249 NW 151; 1 NCCA(NS) 42

Failure to see unlighted truck. The driver of an automobile who, in the nighttime, with his headlights burning, and while on the proper side of a straight, 20-foot-wide, paved highway, drives at the rate of 35 or 40 miles per hour, and under no materially diverting circumstances, squarely into the rear of a stationary, wholly unlighted truck which is directly in his pathway and which, from its build, color, and load, is reasonably discernible, must be deemed to have failed to maintain a proper lookout, or to have been so driving as to be unable to stop within the assured clear distance ahead—in either event, negligent.

Shannahan v Borden Co., 220-702; 263 NW 69; 1 NCCA(NS) 16

Failure to see unlighted truck—legal excuse. The failure of the driver of an automobile to see, in time to stop, an unlighted truck standing ahead of him in the highway and within the radius of his lights, may be legally excused by plea and proof that the truck was not reasonably discernible sooner (1) because of its color, (2) because of shadows cast over it by nearby trees, and (3) because his attention was momentarily diverted by a car and the lights thereon which he was about to meet and pass at a lawful rate of speed.

Kadlec v Const. Co., 217-299; 252 NW 103; 35 NCCA 764; 1 NCCA(NS) 3

Parking in highway — absence of lights. Negligence alleged to have been the proximate cause of a collision and asserted in the plea that defendant's truck (1) was parked in the nighttime, diagonally across the entire right-hand side of a paved highway, and (2) without lights, with substantial evidence pro and con, both as to the position of the truck and as to the lights, necessarily presents a jury question.

Schwind v Gibson, 220-377; 260 NW 853

Lack of proper lamps on trucks or trailers. In an action to recover damages for personal injuries sustained by plaintiff when car in which she was riding collided with a tractor-trailer which had stalled on an icy hill on a country highway at night and had jackknifed across the highway, the question of owners' and operators' negligence in failing to comply with statutes prescribing number and place of lamps required on truck or trailer, and whether such negligence, if any, had proximate causal connection with injury sustained by plaintiff, held, under the evidence, properly submitted to the jury.

Johnson v Transp. Co., 227-487; 288 NW 601

Tail light concealed by body of person.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Instructions — following statute enacted after accident. Where an automobile collides at night with a truck displaying no lights, it is error to instruct in the language of §5029, C., '35, that plaintiff had a right to assume that others using the highway would obey the law, when such collision causing the injuries complained of occurred before this right of assumption was added by the legislature and the statute had previously been construed that a driver had no such right.

Gookin v Baker & Son, 224-967; 276 NW 418

5034.06 Lamps on bicycles.

Bicycle lights—contributory negligence—jury question. In a damage action against a motorist for death of a bicycle rider, the jury, under the record, could properly find that cyclist was not traveling with bicycle lights required by statute and was not free from contributory negligence, despite fact that evidence showed a recent purchase of red reflector and lamp by an unidentified person on morning of accident; and the finding of a broken lamp, reflector, etc., by the sheriff at the scene of and sometime after the accident does not compel a finding that the bicycle was properly equipped.

Reardon v Hermansen, 223-1207; 275 NW 6

5034.07 Lamps on other vehicles and equipment.

Driving blind horse—unlighted buggy. It is not negligent per se to drive a blind horse in a narrow highway on a dark night, with the horse hitched to an unlighted buggy.

Lange v Bedell, 203-1194; 212 NW 354

Safety precautions — violation — negligence per se. The operation of a horse-drawn vehicle on the highway during the nighttime without displaying on said vehicle one or more white or tinted lights or red reflector or reflectors constitutes negligence per se, notwithstanding the substitution at the time by the operator of an ordinary flashlight which lay in the lap of the operator and was pointed rearward.

Kneppe v Huismann, 223-569; 272 NW 602

5034.08 Road machinery—lights required.

Atty. Gen. Opinion. See '36 AG Op 51

5034.09 Number of lights—duty to maintain.

Atty. Gen. Opinion. See '36 AG Op 51

5034.10 Duty to enforce.

Atty. Gen. Opinion. See '36 AG Op 51

Road grader—failure to carry signals—effect. The naked fact that a road patrolman fails to carry on a road grader operated by him on the highway the statutory red danger lights does not ipso facto constitute a breach of statutory duty by the board of supervisors to enforce the law requiring the carrying of such lights.

Bateson v County, 213-718; 239 NW 803

5034.39 Brake equipment.

Driver of injured vehicle held negligent. Where a car approaching a public highway from a private driveway, traveling in neutral at only 3 miles per hour, and while still 12 feet from such highway, driver saw defendant's truck approaching at a rapid rate, the fact that car was out in the highway when collision occurred would either show that brakes were inadequate or that driver was negligent in the operation of car.

Hermon v Egy, (NOR); 207 NW 116; 31 NCCA 76

Negligence — sudden stopping of car on curve. The driver of an automobile who is on the right-hand side of the road at a curve and driving at a proper speed is not guilty of negligence in suddenly applying the brakes in order to avoid hitting an overtaking and passing car which unexpectedly swerved in front of him and in order to prevent his own car going into a ditch, tho by so doing the wheels of his car locked and the momentum skidded the car across the road and into another car.

Klaaren v Shadley, 215-1043; 247 NW 301

Operation without brakes—proximate cause. Record reviewed and held that the proximate cause of an accident was not the condition in which a railway crossing was maintained, but was the speed at which an overloaded truck was operated without brakes.

Gable v Kriege, 221-852; 267 NW 86; 105 ALR 539

Directing verdict—inadequate brakes must contribute to injuries. Before a plaintiff motorist can be held guilty of contributory negligence as a matter of law it must conclusively appear, from a consideration of the evidence in the light most favorable to him, that his negligence in having inadequate brakes contributed in some way or in some degree to the accident and injuries for which he seeks a recovery.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Conflict as to use of brakes—jury question. A conflict in the evidence in a motor vehicle accident case as to whether defendant did or did not apply his brakes is properly a matter for the jury.

Reed v Pape, 226-170; 284 NW 106

Predicating error solely on one's own evidence—impropriety. Predication of error based solely on defendant's own evidence and his own theory of the case is ineffective when other conflicting evidence clearly makes a jury question on contributory negligence regarding plaintiff's failure to have adequate brakes on his automobile, his failure to stop within the assured clear distance ahead, and his failure to slow down before crossing a bridge.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Contributory negligence—inadequate brakes —jury question. Evidence that a plaintiff motorist approached a bridge at 15 miles per hour and proceeded to cross, keeping his car within 6 inches of the right-hand side, before defendant came on the bridge, and that plaintiff was two-thirds across before defendant swung across the center line and struck him, makes a jury question as to whether the fact of plaintiff's negligence in not having adequate brakes contributed to the collision.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Car sliding into stalled truck. Where a car collided with a truck-trailer which had stalled on an icy hill at night on a country highway and had jackknifed across the left side of the highway on which plaintiff's husband was driving, the question of the husband's negligence in braking his car to such extent that it slid on the ice and collided with the side of the trailer, in the absence of any other evidence that car went out of control, held, that question of negligence of the husband as the sole proximate cause of the collision was properly submitted to the jury, and even tho it may be conceded that husband was negligent, it cannot be said, as a matter of law, that such negligence was the sole proximate cause of the injury.

Johnson v Transp. Co., 227-487; 288 NW 601

Inadequate brakes immaterial unless negligence contributory. An exception to an in-

struction because the fact question of plaintiff's contributory negligence was erroneously submitted is not an exception to the submission of the sole fact of his negligence, and even if plaintiff's negligence in not having brakes is established beyond question, the fact question of its contributory nature is still for the jury.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

5034.41 Horns and warning devices.

Sounding horn—driver's discretion—jury question. In an automobile damage action, a driver of an automobile is not guilty of negligence as a matter of law for failure to sound horn as he approaches an intersection, since the statute does not require the sounding of the horn under any and all conditions. The propriety of using the horn is left to the reasonable discretion of the driver, and is a fact rather than a law question. The jury determines whether the sounding of a horn would have avoided the accident.

Short v Powell, 228- ; 291 NW 406

5034.47 Windshields unobstructed.

Accident at crossing. The operator of a vehicle is guilty of negligence in driving upon a railway crossing in front of an approaching train (1) when he knows the train is approaching the crossing, (2) when the train is in plain sight for a material distance from the crossing, and (3) when his failure to see the train, at best, was because of a known obstruction on his own vehicle.

Sodemann v Railway, 215-827; 244 NW 865

Parking vehicle in order to clean windshield. The driver of an automobile cannot be deemed negligent per se (1) in stopping his car on the right-hand side of the road with the major part of the car on the dirt shoulder bordering the pavement for the purpose of restoring visibility by cleaning the sleet from his windshield nor (2) in stepping out of the car and upon the running board—he, up to the time of said act, not having seen an approaching car.

Winter v Davis, 217-424; 251 NW 770; 35 NCCA 819; 39 NCCA 308

5034.49 Restrictions as to tire equipment.

Stopping on highway. Stopping a motor vehicle directly on a public highway because of the soft condition of the shoulder of the highway, in order to make unavoidable repairs on the vehicle necessitated by the unexpected blowing out of tires, does not, in and of itself, constitute negligence at common law.

Harvey v Knowles Co., 215-35; 244 NW 660; 36 NCCA 102

Tire blowout as sole and only cause of injury—proper instruction. In a personal injury action against an automobile owner, where plaintiff complained of instruction denying a recovery if the blowing out of the tire was the sole and only cause of the damage for the alleged reason that the instruction was not warranted by evidence showing that the car, after swerving to the left, veered back and forth, eventually going into the ditch on right side of the road, as this evidence refuted the driver's testimony that she was excited and did nothing to gain control of the car, held, the question of driver's negligence was before the jury, and the instruction was proper.

Band v Reinke, 227-458; 288 NW 629

5034.56 Trucks to carry flares.

"Motor trucks and combinations thereof"—scope of term. A service car consisting of an ordinary touring automobile with the rear part of the body removed, and a wrecking crane substituted therefor, is not a "truck or combination thereof" within the meaning of §5067-e1, C., '35, which, under named conditions, requires "motor trucks or combinations thereof" to carry and display portable flares.

Engle v Nelson, 220-771; 263 NW 505; 39 NCCA 302

5034.57 Display of flares.

Lamps on parked vehicles. See under §5034.04

Violation of statute—when inconsequential. The violation by a motorist of the statute relative to setting out a "flare" beside a truck standing on the highway constitutes inconsequential negligence as to another motorist who, without the flare, had timely knowledge of every fact that a flare would have furnished.

Engle v Nelson, 220-771; 263 NW 505; 39 NCCA 326

Truck trailer jackknifed across road—sufficiency of time to set out flares. In an action at law to recover damages for personal injuries received when car in which plaintiff was riding collided with the trailer of a tractor-trailer unit which had stalled on an icy hill at night on a country highway, and had jackknifed across highway, and where it is claimed the operators of the trailer unit failed to com-

ply with statute requiring such standing vehicles to set out flares, and where operators claimed a warning was given by waving an ordinary flashlight from inside or just outside cab of tractor, the question as to whether operators of trailer unit had sufficient time to set out warning signals, and whether the warning by waving an ordinary flashlight was sufficient to afford a warning of presence of truck and trailer blocking motorists' passage, were proper questions of fact for the jury.

Johnson v Transp. Co., 227-487; 288 NW 601

Reliance on another's duty—knowledge of breach no excuse for negligence. A plaintiff, injured by a passing automobile while helping defendant's employee-driver put on tire chains, may not excuse his own lack of due care by testifying that he relied on the driver to place out flares, when as a fact he knew both that the driver had no such intention and that no flares were so placed.

Denny v Augustine, 223-1202; 275 NW 117

SIZE, WEIGHT, AND LOAD

5035.02 Exceptions.

Atty. Gen. Opinions. See AG Op July 11, '39, July 13, '39

5035.06 Maximum length.

Atty. Gen. Opinion. See '32 AG Op 239

Injuries from operation, or use of highway. The length of a vehicle (34 feet), its load (7 tons), and the space required in which to make a turn (20 to 30 feet) may, especially on a dark night, have a very material bearing on the issue whether the driver, by proof of an attempt to pass around a stalled truck, had legally excused his presumptive negligence in being on the left-hand side of the traveled way at the time of a collision with an oncoming vehicle. Evidence held to present jury question.

McWilliams v Beck, 220-906; 262 NW 781

5035.15 Loading capacity.

Atty. Gen. Opinions. See '30 AG Op 165; '34 AG Op 691

License fee as nonproperty tax. A substantial charge placed by the legislature on motor trucks operated on the public highways, graduated on the weight of the load carried, conceding the same to be a tax, tho termed a "license fee", is not a property tax but a tax imposed for the privilege of using the highways as a place of business, and therefore not within the meaning of Const. Art. VII, §7.

Solberg v Davenport, 211-612; 232 NW 477
Towns v City, 214-76; 241 NW 658

5035.16 Permits for excess size and weight.

Atty. Gen. Opinions. See '32 AG Op 186; AG Op July 11, '39, July 13, '39

5035.20 Local authorities may restrict.

Excluding travel from street. A city has no legal right to exclude ordinary travel from a public street in order that the street may be used exclusively for coasting.

Dennier v Johnson, 214-770; 240 NW 745

Unguarded street set aside for coasting. A city which temporarily sets aside a public street for coasting purposes is not liable in damages for an injury resulting to a person so using the street, from his coming in contact with an automobile which the city had failed to exclude from the street.

Harris v Des Moines, 202-53; 209 NW 454; 46 ALR 1429; 26 NCCA 753

5035.23 Highway commission may restrict.

Unallowable delegation. The general assembly cannot, for the protection of the highways or for the safety of the traffic thereon, constitutionally delegate to the state highway commission power to adopt rules and regulations which shall have the force and effect of law.

Goodlove v Logan, 217-98; 251 NW 39

See State v Van Trump, 224-504; 275 NW 569

Predicating negligence on unlawful rule. Negligence in the operation of a motor vehicle on the public highway may not be predicated on the violation of a rule adopted without legal authority by the state highway commission.

Albrecht v Const. Co., 218-1205; 257 NW 183; 36 NCCA 713

PENALTIES

5036.01 Penalties for misdemeanor.

Atty. Gen. Opinion. See '36 AG Op 626

Disregarding "stop" sign—elements of offense. Defendant in a criminal prosecution for failure to stop his automobile at intersecting roads in obedience to a duly and lawfully erected "stop" sign may be properly convicted tho there is no evidence of careless driving, intent, willfulness, or wantonness except such as may be deduced from the failure to stop, the defendant at the time acting under no compulsion.

State v Wilson, 222-572; 269 NW 205

PARTIES, PROCEDURE UPON ARREST, AND REPORTS IN CRIMINAL CASES

5037.05 Procedure not exclusive.

Speeding charge—unsworn information first challenged on appeal—no waiver. Where a municipal court information charging speeding was not sworn to, defendant did not waive his right to challenge its sufficiency to sustain a

conviction, or lose his right to raise such objection on appeal in supreme court by failure to question the sufficiency of information before the trial.

State v Weston, 225-1377; 282 NW 774

Verdict set aside—criminal more readily than civil. Where the verdict is clearly against the weight of evidence, a new trial should be granted, and the appellate court will interfere more readily in a criminal case than in a civil one.

State v Carlson, 224-1262; 276 NW 770

No request for elaboration of instructions. The instructions must be considered as a whole, and if a criminal defendant asks for no elaboration, he is in no position to complain.

State v Carlson, 224-1262; 276 NW 770

5037.08 Convictions to be reported.

Atty. Gen. Opinions. See '25-26 AG Op 296; '34 AG Op 696

5037.09 Liability for damages.

Atty. Gen. Opinion. See '38 AG Op 620

ANALYSIS

Annotations in Vol I, see under §5026
Accidents generally. See under §§5020.06–5021.01
Assumption of risk by guest. See under §5037.10
Assured clear distance. See under §5023.01
Bicycles or animal-drawn vehicles. See under §5017.07
Bridges or elevated structures. See under §5023.11
Control of vehicle. See under §5023.04
Curves. See under §5031.03
Damages generally. See under §11515
Driver's duty toward pedestrians. See under §5027.05
Evidence generally. See under §11254
Exceptions. See under §11548
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Hills and defiles. See under §5031.03
Horns, signaling. See under §5031.03
Instructions generally. See under §§11491, 11493, 11495
Insurance generally. See under §8940
Insurer's liability—unsatisfied judgments. See under §9024.1
Intersections. See under §§5026.01–5026.04
Judgment. See under §11567
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Lights and equipment. See under §§5033.01–5034.57
Lookout not maintained. See under §5023.01
Meeting vehicles. See under §5024.02
Motorcycles. See under §5023.04
Parking. See under §§5030.01–5030.08
Passing vehicles. See under §§5024.03–5024.08
Pedestrians. See under §§5027.01–5027.05
Public officer's personal liability from motor vehicle operation. See under §5017.03
Railroad crossing accidents. See under §§8011, 8018, 8156
Recklessness. See under §5022.04
Rented cars. See under §5015.07
Right of way. See under §§5026.01–5026.05
Speed. See under §§5023.01–5023.11
Stopping vehicle—special requirements. See under §§5029.05, 5029.10
Streetcars, vehicle regulations. See under §§5028.03–5028.05
Taxicabs. See under §5023.03
Tires. See under §5034.49
Turning, starting, stopping—signals. See under §§5025.01–5025.07

I NEGLIGENCE IN GENERAL

(a) ACTS CONSTITUTING

1. In General

Torts—fundamental laws govern liability. The fundamental and underlying law of torts is that he who does injury to the person or property of another is civilly liable in damages for the injuries inflicted.

Montanick v McMillin, 225-442; 280 NW 608

Ordinary care—definition reaffirmed. The standard definition of ordinary care need not be augmented by adding an extra word "ordinarily" to the phrases "would do" or "would not do under the circumstances".

Schalk v Smith, 224-904; 277 NW 303

Johnston v Johnson, 225-77; 279 NW 139; 118 ALR 233

Imprudent operation—essential proof. The operator of an automobile cannot be deemed to have operated his car "in a careless and imprudent manner" unless it is shown that he operated it in a manner different from the manner in which an ordinarily prudent person would have operated it under the circumstances.

Crutchley v Bruce, 214-731; 240 NW 238; 3 NCCA(NS) 332

Predicating negligence on unlawful rule. Negligence in the operation of a motor vehicle on the public highway may not be predicated on the violation of a rule adopted, without legal authority, by the state highway commission.

Albrecht v Const. Co., 218-1205; 257 NW 183; 36 NCCA 713

Definition of negligence approved. Instruction defining "negligence" and otherwise correct is not rendered erroneous because it includes the statement that "such care is proportionate to the apparent danger involved; where the apparent danger is great, a greater care is required than where such apparent danger is slight". So held against the contention that degrees of negligence are not recognized in this state.

Wolfe v Decker, 221-600; 266 NW 4

Use of known dangerous vehicle. One who continues to ride in an automobile after he knows it is dangerous to do so and without availing himself of the opportunity to have the vehicle repaired is guilty of negligence; especially may he not complain when he happens to occupy such relation to the vehicle as renders it his duty to have repairs made.

Helming v Bank, 206-1213; 220 NW 45

Negligent speed—evidence—sufficiency. Evidence held wholly insufficient to show that a truck on the running board of which a boy was riding was operated at a dangerous rate of speed, or that the roadway was rough and uneven.

Nicolino v Const. Co., 211-1190; 235 NW 297

Driving on wrong side of road—effect. Proof that the driver of a motor vehicle was, at the time of meeting and passing another vehicle on a country road, operating his vehicle on the left-hand, or wrong side of the road, establishes, not that the driver was actually negligent, but that he was presumptively negligent.

Despain v Ballard, 218-863; 256 NW 426

Failure to yield right of way—directing verdict improper. The right-of-way law imposes on a person approaching an intersection from the left the duty to yield the way, a violation of which, under ordinary circumstances, constitutes negligence, and in such a case the defendant is not entitled to a directed verdict.

Bletzer v Wilson, 224-884; 276 NW 836

Child on sled—view obstructed by snowbank—negligence. In an action for death of 7-year-old child, where defendant-motorist could not see child because of snowbank, and child, lying on sled, coasted into intersection at 20 or more miles per hour and struck rear wheel of defendant's automobile, the court properly directed verdict for defendant, the evidence being insufficient to establish that defendant was driving at excessive speed, lacked control of his car, failed to maintain proper lookout, or failed to give warning of approach to intersection.

McBride v Stewart, 227-1273; 290 NW 700

Dual negligence in turning into side road. The operator of an automobile who turns into a side road (1) without first noting whether there is sufficient space in which to make the turn with reasonable safety to himself and to all other persons on the highway, and (2) without first signaling such proposed turn, is guilty of dual statutory negligence.

Miller v Lowe, 220-105; 261 NW 822

Unlawful parking. The parking of a motor vehicle at a place where parking is prohibited by a valid city ordinance constitutes negligence and in case a collision occurs with the parked vehicle the said negligence must be deemed to have contributed to the resulting damage.

Riley v Guthrie, 218-422; 255 NW 502; 35 NCCA 818

Violation of statute—when inconsequential. The violation by a motorist of the statute relative to setting out a "flare" beside a truck standing on the highway constitutes inconsequential negligence as to another motorist who, without the flare, had timely knowledge of every fact that a flare would have furnished.

Engle v Nelson, 220-771; 263 NW 505; 39 NCCA 326; 1 NCCA(NS) 163

Driving without driver's license. The fact that the driver of an automobile had no driv-

I NEGLIGENCE IN GENERAL—concluded
(a) ACTS CONSTITUTING—concluded
1. In General—concluded

er's license at the time of an accident becomes inconsequential when the action is by a passenger and when there is no causal relation between the driver's violation of law and plaintiff's injuries.

Schuster v Gillispie, 217-386; 251 NW 735

Predicating negligence on unlawful rule. Negligence in the operation of a motor vehicle on the public highway may not be predicated on the violation of a rule adopted without legal authority by the state highway commission.

Albrecht v Const. Co., 218-1205; 257 NW 183; 36 NCCA 713

Law of road—excuse for violation. Failure to instruct that defendant may excuse his apparent violation of a law of the road is proper when such instruction, if given, would have no support in the evidence.

Jarvis v Stone, 216-27; 247 NW 393

Instructions regarding open car door—proper evidence necessary. Submission to jury of a ground of negligence not supported by the evidence is erroneous. So held where trial court submitted specification of negligence that left rear door of defendant's car was open at time of collision with approaching motorcycle, whereas only testimony on this question came from witnesses who were not present until after accident occurred.

Jakeway v Allen, 227-1182; 290 NW 507

Anticipating child coasting—barricades removed—negligence. Where defendant knew that for many years a certain street was barricaded while children were coasting, and that there had been coasting there recently, but where the snow had melted somewhat so that the middle portion of the paving on the hill was bare of snow, and the barricades had been taken down the day before the accident, the defendant was not bound to anticipate and prepare for some child coasting on the hill.

McBride v Stewart, 227-1273; 290 NW 700

2. Driver's Physical Condition

Discussion. See 22 ILR 525—Sleeping at the wheel

(b) RECKLESSNESS DISTINGUISHED

"Reckless operation" defined. To constitute "reckless operation" of a motor vehicle, the plea and proof must be such as to justify a finding that the operator was "proceeding without heed of, or concern for, consequences". Plea and proof of negligent operation only is wholly insufficient.

Siesseger v Puth, 213-164; 239 NW 46; 31 NCCA 84; 34 NCCA 495

Neessen v Armstrong, 213-378; 239 NW 56; 31 NCCA 104

McQuillen v Meyers, 213-1366; 241 NW 442; 34 NCCA 348

Passenger as mere guest (?) or otherwise (?). A passenger riding in an automobile is neither a "guest" nor a mere "invitee" when he is riding therein:

1. For the purpose of performing and in order to perform his duty as a servant of the owner or operator of the car; or
2. For the definite and tangible benefit of the owner or operator; or
3. For the mutual, definite, and tangible benefit of the owner or operator on the one hand, and of the passenger on the other hand.

Knutson v Lurie, 217-192; 251 NW 157; 36 NCCA 275; 37 NCCA 62

Passenger as mere guest (?) or otherwise (?). A passenger in an automobile operated by the owner thereof may be a mere guest or invitee with right to recover for damages consequent on the reckless operation, only, of the car; but he may be a passenger (1) for hire, or (2) for the benefit of said operator, or (3) for the mutual benefit of both operator and himself, with right to recover for damages consequent on mere negligent operation by the driver.

Clendenning v Simerman, 220-739; 263 NW 248

II NEGLIGENCE PER SE

(a) IN GENERAL

Negligence—prima facie (?) or per se (?). Where an accident happens upon a public highway outside a city or town, the fact that the vehicle is on the wrong side of the road is only prima facie evidence of negligence. On the other hand, subject to the above, the violation without legal excuse of a standard of care for the operation or equipment of vehicles, whether fixed by statute or ordinance, constitutes negligence per se.

Codner v Stowe, 201-800; 208 NW 330; 26 NCCA 207

Lange v Bedell, 203-1194; 212 NW 354

McDougal v Borman, 211-950; 234 NW 807; 32 NCCA 405

Sergeant v Challis, 213-57; 238 NW 442

Lane v Varlamos, 213-795; 239 NW 689

Muirhead v Challis, 213-1108; 240 NW 912

Hollingsworth v Hall, 214-285; 242 NW 39

Holub v Fitzgerald, 214-857; 243 NW 575

Kisling v Thierman, 214-911; 243 NW 552; 36 NCCA 90; 37 NCCA 494

Waldman v Motor Co., 214-1139; 243 NW 555

Harvey v Knowles Co., 215-35; 244 NW 660; 1 NCCA(NS) 50

Wood v Banning, 215-59; 244 NW 658; 32 NCCA 255

Willemsen v Reedy, 215-193; 244 NW 691

Albert v Maher Bros., 215-197; 243 NW 561

Wosoba v Kenyon, 215-226; 243 NW 569; 1 NCCA(NS) 63, 747

Dillon v Diamond Co., 215-440; 245 NW 725

Peckinpaugh v Engelke, 215-1248; 247 NW 822; 33 NCCA 103; 35 NCCA 765; 1 NCCA (NS) 41

Danner v Cooper, 215-1354; 246 NW 223

Hogan v Nesbit, 216-75; 246 NW 270
Grover v Neibauer, 216-631; 247 NW 298
See Masonholder v O'Toole, 203-884; 210 NW 778; 31 NCCA 44; Voiles v Hunt, 213-1234; 240 NW 703; 31 NCCA 59; 32 NCCA 458

Traveling on wrong side of road. Failure of the driver of an automobile on meeting another vehicle on the highway outside cities and towns, to yield one-half of the traveled way by turning to the right does not constitute negligence per se, but prima facie evidence of negligence only.

Cooley v Killingsworth, 209-646; 228 NW 880
Lang v Siddall, 218-263; 254 NW 783
Despain v Ballard, 218-863; 256 NW 426
Hobbs v Traut, 218-1265; 257 NW 320
Rainey v Riese, 219-164; 257 NW 346
McManus v Creamery Co., 219-860; 259 NW 921
Hoover v Haggard, 219-1232; 260 NW 540
Bobst v Hoxie Line, 221-823; 267 NW 673

Negligence per se (?) or prima facie (?). An instruction that negligence may consist in the failure to do that which the law commands, in connection with an instruction that the statute requires drivers of vehicles to turn to the right when meeting, in effect directs the jury that the failure to turn to the right constitutes negligence in and of itself, and such instruction is erroneous because the failure to obey said statute creates a presumption, only, of negligence.

Ryan v Perry Works, 215-363; 245 NW 301

Left-side driving in municipalities. The operator of a motor vehicle in cities and towns is guilty of negligence per se in driving on the left-hand side of a street without legal excuse.

Winter v Davis, 217-424; 251 NW 770

Control of car. Manifestly the court cannot find that a motorist did not have his car under control while attempting to pass another car, and was therefore guilty of negligence per se, when the position and speed of the cars at the time of the collision are in sharp dispute.

Jordan v Schantz, 220-1251; 264 NW 259

Passing vehicle—premature return to traveled path. The operator of a vehicle is guilty of negligence per se when, after passing another vehicle moving in the same direction, he returns to the right-hand side of the highway and in front of the vehicle just passed, within a shorter distance than that provided by law.

Bobst v Hoxie Line, 221-823; 267 NW 673

Turn at intersection. The operator of a westbound automobile, who makes a left-hand turn at an intersecting street, and thereupon increases his speed, in order to escape a collision with an eastbound car which he knows is but some 40 feet west of the intersection and approaching it at a speed twice his own speed, is guilty of negligence per se.

Parrack v McGaffey, 217-368; 251 NW 871

Improper left-hand turn. A left-hand turn from one highway into another highway contrary to the direction of the statute (§5033, C., '35 [§5025.01, C., '39]) constitutes negligence per se in the absence of plea and proof of a valid excuse.

Wilson v Long, 221-668; 266 NW 482

Prior statute. The failure of the owner of a truck, before making a left turn into an intersecting highway, to drive to the right of and beyond the center of the intersection, constitutes negligence per se and if such owner is injured his negligence will be classified as contributory negligence per se if such conclusion is the only one to which reasonable minds could arrive.

Mansfield v Summers, 222-837; 270 NW 417

Failure to signal at unknown intersection—effect. The driver of an automobile may not be said to be negligent per se for failure to sound a signaling device upon approaching an intersecting and completely hidden highway, of the existence of which he had no knowledge, in fact or reason.

Sexauer v Dunlap, 207-1018; 222 NW 420

Plaintiff's negligence per se not necessarily contributory. A plaintiff riding in his automobile driven by his son who enters an obscured intersection without sounding his horn, (§5043, C., '35 [§5031.03, C., '39]), is guilty of negligence per se, imputable from his son, but a jury question arises as to whether or not this contributed to the injury when from the evidence it is questionable whether defendant could have heard such signal had it been given.

In re Green, 224-1268; 278 NW 285

Negligence per se in approaching crossing. Negligence per se is revealed in the act of the driver of an automobile in approaching and entering an obscured public crossing (with which he was familiar) with knowledge that another vehicle was also rapidly and immediately approaching said intersection from his right, and failing either (1) to sound his horn or (2) to yield the right of way. (See Vol. I, §5028 et seq.)

Masonholder v O'Toole, 203-884; 210 NW 778; 31 NCCA 44

Approaching arterial highway. The operator of an automobile on a county trunk arterial highway (on which no "stop" or "slow" signs had been erected at points intersected by county local roads) is guilty of negligence per se in knowingly approaching an obscured intersection without either (1) slacking his speed (of some 25 or 30 miles per hour), or (2) giving some warning signal of his approach as required by §5043, C., '31 [§5031.03, C., '39]. (But see Dikel v Mathers, 213 Iowa 76.)

Lang v Kollasch, 218-391; 255 NW 493; 37 NCCA 74

II NEGLIGENCE PER SE—continued
(a) IN GENERAL—continued

Approaching intersection—failure to look to left. The mere fact that the operator of an automobile in approaching, on a rainy day, and at a moderate rate of speed, an intersection which afforded a clear view to all travelers, fails to look to his left for approaching vehicles, does not constitute negligence per se.

Roe v Kurtz, 203-906; 210 NW 550; 33 NCCA 409

Rogers v Jefferson, 224-324; 275 NW 874
Rogers v Jefferson, 226-1047; 285 NW 701

Intersecting county roads. The operator of an automobile on a county trunk road (an arterial highway), having the right of way over traffic on an intersecting local county road, is not guilty of negligence per se in entering such an intersection, with his car under apparent control, and without seeing a car approaching from his right at a high and dangerous rate of speed.

Arends v DeBruyn, 217-529; 252 NW 249; 37 NCCA 78

Primary roads—right of way—contributory negligence per se. Inasmuch as vehicles traveling on a primary road have right of way at intersections with nonprimary roads, the operator of a vehicle on a nonprimary road is guilty of negligence per se when he attempts to cross an intersection with a primary road, at a speed of 10 miles per hour, when he knows or ought to know that another vehicle on the primary road is, at a distance of 80 or 90 feet, approaching the intersection at a speed very greatly in excess of 10 miles per hour.

Hittle v Jones, 217-598; 250 NW 689; 37 NCCA 67

Failure to yield right of way—directed verdict. Where the automobile of plaintiff's intestate collided with defendant's truck at a highway intersection, and the physical facts showed that plaintiff's intestate had violated statutes in not keeping his car under control and not yielding the right of way to the truck, which had entered the intersection first, plaintiff's intestate was therefore guilty of negligence per se which contributed directly to his death, and which entitled the truck owner to a directed verdict.

Young v Clark, 226-1066; 285 NW 633

Accidents at crossings. The driver of a conveyance is guilty of negligence per se when, in approaching an unobscured railway crossing with which he is perfectly familiar, in full possession of his faculties, and with no distracting circumstance or emergency facing him, he, when 20 feet from the crossing, sees an engine approaching at a distance of 175 feet, and knows that the bell is not ringing, and thereafter drives upon the crossing without in any manner observing or judging of the speed of the engine; and this is true even tho the engine is in fact running in violation of an ordinance relative to the speed of trains and to the ringing of the engine bell.

Erlich v Davis, 202-317; 208 NW 515; 27 NCCA 164

Driving upon car tracks. The driver of a conveyance is guilty of negligence per se when, upon reaching a street intersection on a clear day, he has positive knowledge that a nearby streetcar is rapidly approaching the same intersection from a side street, and when he, without again looking at the approaching streetcar and confronted by no emergency, continues his journey into the intersection at a speed which would enable him to stop his conveyance instantly, and turns and enters upon the streetcar tracks in the direction in which the streetcar is moving.

Middleton v Railway, 209-1278; 227 NW 915

Negligence per se in driving upon car tracks. The driver of an automobile is guilty of negligence per se when, upon entering during the daytime a private crossing over much-used interurban railway tracks located on a curve, he knows when some 25 feet from the track in question that his view of an apprehended approaching car is limited to 300 feet, and when he avails himself of such view and sees no approaching car, and thereupon proceeds to attempt, under no diverting circumstances, to cross the tracks at a rate of three miles per hour without looking or listening for the apprehended car, tho his view of the track materially enlarged as he proceeded.

Rosenberg v Railway, 213-152; 238 NW 703

Driving upon unobstructed streetcar tracks. The operator of an automobile is guilty of negligence per se when, in the nighttime, and without diverting circumstances, and at a speed such that he could have stopped within 2 feet, he drives upon a streetcar track and immediately in front of an approaching and lighted streetcar which was at all material time in unobstructed view.

Crull v Railway, 217-83; 250 NW 905

Streetcar intersection—negligence per se. The operator of an automobile cannot be said to be negligent per se in driving into an intersection on a dark night in front of a rapidly oncoming streetcar with no headlight and with the entire front end of the streetcar unlighted, when, immediately before entering the intersection, he stops and listens, and looks both ways for streetcars, and sees none (so he testifies) because of the glare of oil station lights immediately to his left from which side the streetcar was approaching, and especially when there is evidence that the streetcar was approaching without audible signals.

Deiling v Railway, 217-687; 251 NW 622

Collision with streetcar. The operator of an automobile who, without diverting circum-

stances, approaches and drives upon streetcar tracks, and looks for an approaching streetcar at a place where he knows his view is very limited because of an intervening embankment, and fails to look at a point where he would still be within a zone of safety and where his view would be unobstructed, is guilty of negligence per se.

Pender v Railway, 217-1152; 251 NW 55

Driving into streetcar. The driver of a truck is guilty of negligence per se when, without any apparent necessity for so doing, he attempts to steer his vehicle out of a groove or rut in the street, with the result that the vehicle suddenly responded to his efforts, bounded out of the rut, and darted diagonally across the street for a distance of 20 feet, and into an oncoming streetcar, of the prior presence and actions of which he had the fullest knowledge.

Bowers v Railway, 219-944; 259 NW 244

Colliding with traffic signal. An experienced driver of an automobile is guilty of negligence per se when, near midnight, while traveling in the center of a 26-foot wide, brilliantly lighted, paved street with which he was familiar, he drives squarely head-on in the center of the street against a railroad traffic signal consisting of a concrete base 4 feet wide, 2 feet high, and 5 feet long, surmounted by an iron pole several feet high and noticeably painted with black and white diagonal stripes, on which pole at the time were crossarms bearing in large letters the words "railroad crossing" and two burning lights.

Van Gorden v City, 216-209; 245 NW 736; 4 NCCA(NS) 291

Limb of tree as street obstruction. One who, in broad daylight and without diverting circumstances, drives along a public street with which he is familiar, and permits his vehicle to come in contact with a perfectly visible limb of a tree overhanging the traveled part of the street is guilty of negligence per se.

Abraham v Sioux City, 218-1068; 250 NW 461

Riding in exposed position. The act of a person in riding on the rear, rounded surface of a coupe, and in such a position that he cannot see what is happening ahead of the car, does not constitute negligence per se when the injury to such person arose out of a collision with another car.

Hamilton v Boyd, 218-885; 256 NW 290; 37 NCCA 664

Arm out of window. The driver of an automobile is not necessarily guilty of negligence per se in driving with his left arm slightly protruding through the left window of his car.

Olson v Tyner, 219-251; 257 NW 538

Taking obviously dangerous position on highway. A motorist is guilty of negligence per se when, with darkness rapidly falling, and with his unlighted car stalled on a substantial upgrade, and substantially across the right-hand side of a known heavily-traveled, ice-covered street, he deliberately places himself on that side of his car toward which traffic would be directly moving, and, with his back to such oncoming traffic, attempts to back his car into a private driveway, knowing at the time that the view of an approaching driver would be seriously impaired by the lights of a car which at that moment had passed him, and which was moving toward said approaching driver.

Fortman v McBride, 220-1003; 263 NW 345; 39 NCCA 330

Place of stopping on highway. It is not negligence per se for a motorist, on a moonlit, foggy night, with his rear lights burning and discernible for a distance of 30 rods, to stop, for a period of from 2 to 5 minutes on the extreme right-hand side of a long, straight, level stretch of an 18-foot wide paved road, for the purpose of removing the loose or broken chains on his tires, even tho he might have stopped on a 6-foot wide slippery and muddy dirt shoulder.

Goodlove v Logan, 219-1380; 261 NW 496

Stopping on highway to clean windshield. The driver of an automobile cannot be deemed negligent per se (1) in stopping his car on the right-hand side of the road with the major part of the car on the dirt shoulder bordering the pavement for the purpose of restoring visibility by cleaning the sleet from his windshield, nor (2) in stepping out of the car and upon the running board—he, up to the time of said act, not having seen an approaching car.

Winter v Davis, 217-424; 251 NW 770; 35 NCCA 819; 39 NCCA 308

Stopping on highway at night. It is not negligence per se for a motorist, traveling on a dark, misty, and foggy night, on the proper side of a dark, 28-foot wide roadway, to stop, with his lights in full operation, and immediately to step from the car and into the traveled way.

Lukin v Marvel, 219-773; 259 NW 782; 1 NCCA(NS) 157

Emergency—turning to right to avoid pedestrian. The driver of an automobile who is driving south on the right-hand side of a north and south highway is not guilty of negligence per se because, in order to avoid hitting a child running across the highway from the east side, he turns still farther to the right, even tho it later appears that had he kept his course or had turned to the left he might have avoided hitting the child.

Garmoe v Colthurst, 215-729; 246 NW 767

Unavoidable accident. Evidence reviewed and held to reveal per se no act of negligence

II NEGLIGENCE PER SE—continued
(a) IN GENERAL—continued

on the part of a motorist in coming into collision with a child who suddenly and unexpectedly darted from a hidden cover into the pathway of the car.

Chipokas v Peterson, 219-1072; 260 NW 37; 113 ALR 524; 3 NCCA(NS) 334

Pedestrian in center of highway. A pedestrian who, with normal sight and hearing, travels on a clear night in a space which is substantially 2 feet wide and which is marked by parallel black lines drawn along the center of a straight, 18-foot, paved highway, with an unobstructed view both to his front and rear of more than a quarter of a mile, with full opportunity to walk on the smooth, 6-foot-wide dirt shoulders bordering the pavement, is guilty of negligence per se.

Lindloff v Duecker, 217-326; 251 NW 698; 34 NCCA 234

Pedestrian—failure to keep lookout to rear. The foreman of a paving outfit is guilty of negligence per se in walking along the unpaved portion of a rough road for a distance of some 200 feet without making any observations to his rear for trucks which he knew were being backed along said road and in his immediate direction at the rate of one truck each 90 seconds.

Hedberg v Lester, 222-1025; 270 NW 447

Crossing highway without looking. An adult person, after alighting from an automobile which had been stopped substantially astraddle the north edge of an 18-foot pavement on a heavily traveled country highway, is guilty of negligence per se in attempting to walk to the south and across said pavement without making any observations to his unobstructed right for eastbound vehicles.

Zuck v Larson, 222-842; 270 NW 384

Minor walking on wrong side of highway—contributory negligence as matter of law. In a law action for damages where it is shown that plaintiff's decedent, a 15-year-old boy, was violating statute requiring pedestrians to walk on the left side of a highway, by walking along right side about 4 or 5 feet from west side of highway, and failing to make observations as to oncoming traffic from the rear while walking after dark on a street traversed by a through highway, held, he was guilty of contributory negligence as a matter of law.

Reynolds v Aller, 226-642; 284 NW 825

"Stop and go" signals—change after entering intersection. A pedestrian who, in obedience to a municipally operated "go" signal, starts across the street on the pathway provided for pedestrians, and suddenly discovers that said "go" signal has changed to "stop", is not guilty of negligence per se in failing to look for, see, and avoid a vehicle which, under said change in signals, passes entirely across the intersection and hits and injures said pedestrian within less than two seconds after said change in signals occurs; especially is this true (1) when said pedestrian has, by ordinance, the right of way over said vehicle because he was first properly to enter said intersection, and (2) when said pedestrian, at the very instant of said change in signals, was immediately approaching other stationary vehicles known to be awaiting release from a "stop" signal.

Dougherty v McFee, 221-391; 265 NW 176

Crossing traffic-congested street. A pedestrian who, while crossing a traffic-congested street at a place other than the place specifically provided for such crossing, fails to look for approaching vehicles, or voluntarily steps in front of an immediately approaching vehicle which he does see, is guilty of negligence per se.

Spaulding v Miller, 216-948; 249 NW 642; 35 NCCA 676

Legal avoidance. The operator of a vehicle who has failed to comply with a statutory or ordinance standard of care governing the operation or equipment of his vehicle may excuse such failure, and thereby avoid the legal imputation of negligence per se, by establishing (1) any excuse specifically provided by statute, or (2) that, without his fault, circumstances rendered compliance with the law impossible.

Kisling v Thierman, 214-911; 243 NW 552; 36 NCCA 90; 37 NCCA 494

Legal excuse—what constitutes. The operator of a vehicle who has failed to comply with a statutory standard of care may avoid the consequences thereof by establishing as legal excuse (1) anything making it impossible to comply, (2) anything over which he has no control which places his vehicle in a position contrary to the law, (3) that he was confronted with an emergency not of his own making, or (4) any excuse specifically provided by statute.

Young v Hendricks, 226-211; 283 NW 895

Violating statute without legal excuse—burden of proof. An instruction stating that if a defendant motorist failed to comply with the requirements of a statute "without legal excuse", then the verdict should be for the plaintiff, does not shift plaintiff's burden of proof on the defendant.

Schalk v Smith, 224-913; 277 NW 303

Assured clear distance ahead. The driver of an automobile, in the nighttime and on a public highway, when faced by no emergency or diverting circumstance, is guilty of negligence per se in so driving that he cannot stop within the radius of his lights.

Ellis v Bruce, 217-258; 252 NW 101; 36 NCCA 136; 1 NCCA(NS) 10

Absence of lights. The operator of an automobile who, on a dark and foggy night, operates his car without lights, because he believes he can see better without them, is guilty of negligence per se.

Caudle v Zenor, 217-77; 251 NW 69; 34 NCCA 122; 1 NCCA(NS) 44

Absence of tail light. The parking, during the nighttime, of a motor vehicle upon a paved highway outside a city or town, with the tail lights extinguished, constitutes negligence per se, in the absence of a showing of legal excuse.

Harvey v Knowles Co., 215-35; 244 NW 660

(b) EXCESSIVE SPEED

Instruction—presumption of negligence—error. Operating an automobile upon the public highway at a speed prohibited by law constitutes negligence per se, and error results from instructing that such operation creates a presumption of negligence.

Codner v Stowe, 201-800; 208 NW 330; 26 NCCA 207
Holub v Fitzgerald, 214-857; 243 NW 575
Waldman v Motor Co., 214-1139; 243 NW 555
Harvey v Knowles Co., 215-35; 244 NW 660; 1 NCCA(NS) 50
Albert v Maher Bros., 215-197; 243 NW 561
Danner v Cooper, 215-1354; 246 NW 223
Grover v Neibauer, 216-631; 247 NW 298

Prohibited speed negligence per se. A violation of the statute that no person shall drive any vehicle on a highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead permits of no escape from the imputation of negligence per se, except on plea and proof of a recognized legal excuse for so driving.

Ellis v Bruce, 217-258; 252 NW 101; 36 NCCA 136; 1 NCCA(NS) 10
Hart v Stence, 219-55; 257 NW 434; 97 ALR 535; 36 NCCA 716; 1 NCCA(NS) 23
Swan v Auto Co., 221-842; 265 NW 143; 1 NCCA(NS) 58

Inability to stop within assured clear distance. The driver of an automobile is guilty of negligence per se in driving at such a rate of speed that he cannot stop within the distance that a discernible obstruction may be seen ahead of the car. So held as to a driver who, blinded by the lights of a stationary car by the roadside, nevertheless continued his speed for some material distance, and, when too late to stop, discovered an unlighted truck in the highway.

Lindquist v Thierman, 216-170; 248 NW 504; 87 ALR 893; 1 NCCA(NS) 38

Assured clear distance—negligence. The failure of the driver of an automobile to drive at such speed as will permit him to bring the car to a stop within the assured clear distance ahead constitutes, in the absence of some legal excuse, negligence per se. And such excuse is not made to appear by evidence that the driver met a car and was temporarily blinded by the lights shining in his face but did not slacken his speed.

Wosoba v Kenyon, 215-226; 243 NW 569; 1 NCCA(NS) 63, 747
Willemsen v Reedy, 215-193; 244 NW 691

Overtaking and passing—circumstances controlling. The operator of a motor vehicle, who, at a speed of 40 miles per hour and in the nighttime, attempts to pass another vehicle which he is closely following, at the very time when the operator of such other vehicle is attempting to pass a vehicle which he has overtaken, is guilty of negligence per se, both because he (1) is manifestly driving at an imprudent rate of speed under the circumstances, and (2) is driving at a rate of speed which will not enable him to stop within the assured clear distance ahead.

Harvey v Knowles Co., 215-35; 244 NW 660; 1 NCCA(NS) 50

Proximate cause. The act of passing a vehicle at an illegal rate of speed may not be declared negligence per se as to a collision which occurred after the passing had been completely effected.

Berridge v Pray, 202-663; 210 NW 916; 29 NCCA 560

Proximate cause—noncausal negligence. Excessive or negligent speed of an automobile becomes immaterial when it is not the proximate cause of the injury in question.

McDowell v Interstate Co., 208-641; 224 NW 58; 35 NCCA 21

Speed as nonproximate cause. A rate of speed which is not negligence per se cannot be deemed the proximate cause of an accident when the act of the injured party in stepping into the pathway of the car was so sudden and unexpected as to render impossible the stopping of the car.

Howk v Anderson, 218-358; 253 NW 32; 35 NCCA 1

Directed verdict—improper unless per se negligence also contributory. A plaintiff motorist, against whom a directed verdict was rendered because in violating a speed statute he was negligent per se, still should have had the benefit of the best possible view of the evidence, and, moreover, a record showing that he remained at all times on his own side of the road, but that a truck driver, for no apparent reason, drove across the pavement center line, resulting in a head-on collision, makes a jury question as to whether or not plaintiff's per se negligence contributed to his injury.

McIntyre v West Co., 225-739; 281 NW 353

Speed statute violation—per se negligence must contribute to bar recovery. As involved

II NEGLIGENCE PER SE—concluded
(b) EXCESSIVE SPEED—concluded

in a motor vehicle collision, the act of driving a motor vehicle at a speed of more than 25 miles an hour in a residence district, being in violation of statute, is negligence as a matter of law, but unless such negligence contributes to the injuries, it will not defeat recovery.

McIntyre v West Co., 225-739; 281 NW 353

Speed at intersection—jury question. A motor vehicle operator who materially and intentionally increases the speed of his vehicle "when approaching and traversing a highway intersection"—seemingly in violation of §5031, C., '35 [5023.04, C., '39], is not necessarily guilty of negligence per se.

Carpenter v Wolfe, 223-417; 272 NW 169

Insufficient evidence. Evidence held wholly insufficient to show that a truck, on the running board of which a boy was riding, was operated at a dangerous rate of speed, or that the roadway was rough and uneven.

Nicolino v Const. Co., 211-1190; 235 NW 297

Excess of statutory rate. It is correct to instruct the jury that a driver of an automobile is guilty of negligence if he drives "at a high and dangerous rate", such being the allegation of the petition and the evidence tending to show a speed materially in excess of the maximum speed allowed by statute.

Albert v Maher Bros., 215-197; 243 NW 561

III CONTRIBUTORY NEGLIGENCE

(a) IN GENERAL

Plaintiff's conduct—conflict in evidence. The presence or absence of contributory negligence is generally a jury question, and two elements are involved, (1) what plaintiff did, and (2) the effect of his action; if either or both of said propositions present uncertainty, there is a jury question.

Riggs v Pan-American Co., 225-1051; 283 NW 250

Model instruction. Courts, in instructing as to contributory negligence which will bar recovery, should employ the model instruction approved by the appellate court, viz: "If the injured party contributed in any way or in any degree directly to the injury complained of there can be no recovery", but it is not erroneous to substitute "cooperated" or an equivalent term for "contributed".

Hoegh v See, 215-733; 246 NW 787

Correct definition. Preferably, the court should instruct that contributory negligence which will defeat a recovery by plaintiff is that negligence which "directly contributes to the damage in any degree or in anyway", but, of course, the court may employ any other clearly equivalent expression.

Rogers v Lagomarcino-Grupe Co., 215-1270; 248 NW 1

Degree or extent barring recovery—model instruction. It is strictly accurate to instruct, in an action for damages for negligently inflicted injuries, that before plaintiff can recover, he must establish as a fact that he, himself, "was not guilty of any negligence that contributed in any manner or degree directly to his own injury".

Engle v Nelson, 220-771; 263 NW 505; 1 NCCA(NS) 166

Adequate definition. An instruction which defines "contributory negligence" as such negligence as "helps" to produce the injury complained of is not erroneous when accompanied by a correct definition of negligence generally.

Swan v Dailey Co., 221-842; 265 NW 143

"Cause of injury"—language approved. A contributory negligence instruction in a motor vehicle collision case stating that if such negligence "became or constituted * * * a cause of the injury" reviewed and held correct.

Smithson v Mommsen, 224-307; 276 NW 47

Negligence must "directly" contribute. Instruction reaffirmed requiring plaintiff's negligence to contribute "directly" to the injuries before it will defeat recovery.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Sole cause of injury. An instruction that "where a party is injured and such injury is due to his own negligence he cannot recover", tho incorporated in a paragraph defining contributory negligence, does not have the effect of declaring that the contributory negligence which will bar an injured party from recovering must be a negligence which is the sole cause of the injury.

Ryan v Rendering Wks., 215-363; 245 NW 301

Need not be proximate cause of injury. Contributory negligence in order to defeat recovery need not be the proximate cause of the injury in question. It is only necessary that such negligence contributes to the injury in some degree or in some manner.

Hogan v Nesbit, 216-75; 246 NW 270
Schuster v Gillispie, 217-386; 251 NW 735

Proximate cause. The contributory negligence which will defeat a plaintiff is such negligence as contributes to the injury in any way or in any degree. Error results from instructing that such negligence must contribute proximately to the injury.

Hamilton v Boyd, 218-885; 256 NW 290

Instructions — proximate cause — incurable error. An instruction that, before plaintiff can recover for alleged negligently inflicted injuries, he must establish that he "was free from contributory negligence that contributed to, or was the proximate cause of such injuries", is entirely erroneous insofar as refer-

ence is made to "proximate cause", and the error is not cured by another instruction to the effect that the instructions should be construed "as a whole".

Bobst v Hoxie Line, 221-823; 267 NW 673

Freedom from contributory negligence—failure to instruct. An instruction which summarizes all the elements that plaintiff must prove to make a case, and directs the jury that if these elements and conditions existed, the plaintiff is entitled to recover, is fatally defective when no reference whatever is made to plaintiff's freedom from contributory negligence. And, in such case, the error is not cured by the fact that in other instructions the jury is instructed that plaintiff must be free from contributory negligence.

Bobst v Hoxie Line, 221-823; 267 NW 673

Contributory negligence—fatally inconsistent instructions. After properly instructing that plaintiff, before she could recover, must establish her entire freedom from contributory negligence, the court commits a fatal inconsistency by instructing that plaintiff could not be charged with negligence in not choosing some other highway than the one in question on which to travel, unless defendant has proven that plaintiff knew or ought to have known that the highway on which she was traveling was in a dangerous condition.

Kehm v Dilts, 222-826; 270 NW 388

Instructions—error in quoting statute only. In submitting specifications of alleged contributory negligence, the court commits error in simply quoting the statute relating to these grounds without defining just what acts of plaintiff, under the evidence, would constitute contributory negligence, and without applying the law to the facts.

Jakeway v Allen, 226-13; 282 NW 374

Lack of evidence—effect. An instruction which properly directs the jury, in determining the issue of contributory negligence of an injured party, to take into consideration certain enumerated matters as shown by the evidence is not necessarily erroneous because it makes no reference to the effect of a lack of evidence on the subject.

Engle v Nelson, 220-771; 263 NW 505

Nonduty to anticipate negligence. An instruction on the subject of contributory negligence is erroneous when it, in effect, requires the person in question to anticipate negligence on the part of the driver of an approaching vehicle.

Townsend v Armstrong, 220-396; 260 NW 17

Requests—right to assume care by plaintiff. A requested instruction in a personal injury action, to the effect that defendant had a right to assume that plaintiff would commit no act of negligence contributing to his own injury, is properly refused (1) when defendant in driving as he did was not influenced by plaintiff's actions, and (2) when the record shows that the jury found that plaintiff was not guilty of any act of contributory negligence.

Orr v Hart, 219-408; 258 NW 84

Most favorable view rule. On motion for directed verdict in determining whether plaintiff was guilty of contributory negligence as a matter of law, the evidence must be considered in the light most favorable to him.

Trailer v Schelm, 227-780; 288 NW 865

Defendant's negligence also considered—directing verdict. In a personal injury action on account of the negligent operation of a motor vehicle, the court, on a motion for directed verdict, should, before considering contributory negligence of the plaintiff, consider the evidence as to negligence on the part of the defendant being a proximate cause of the injury.

Youngman v Sloan, 225-558; 281 NW 130

Law of case. A holding on appeal, that plaintiff in a personal injury action based on alleged negligence was himself guilty of contributory negligence, is the absolute law of the case on retrial on the same state of facts.

Spaulding v Miller, 220-1107; 264 NW 8

Driving from private driveway. Evidence relative to the act of driving from a private driveway into a public highway in front of an approaching car reviewed, and held to present a jury question on the issue of contributory negligence.

Tinley v Implement Co., 216-458; 249 NW 390

Failure to see or hear. Principle reaffirmed that he who failed either to see what was plainly visible or to hear what was clearly audible must be deemed not to have looked or listened at all.

Sodemann v Railway, 215-827; 244 NW 865

Entering highway without looking. The occupants of an eastbound automobile were guilty of contributory negligence per se under testimony that upon arriving at an intersecting north and south street, on a clear day, they looked to the south without obstruction for a distance of at least 225 feet, and saw no approaching car, and thereupon entered the intersection and moved across the same at 10 miles per hour, but before they had fully cleared the intersection were hit by a northbound car traveling at the rate of 40 or 50 miles per hour.

Hewitt v Ogle, 219-46; 256 NW 755

Contributory negligence per se. Record reviewed and held to establish contributory negligence on the part of a motorist in driving into a highway intersection and turning to the left (1) without first observing whether he had

III CONTRIBUTORY NEGLIGENCE—continued

(a) IN GENERAL—continued

sufficient space in which safely to make said turn, (2) without first reducing his speed to a reasonable rate, a rate which would permit a stop within the assured clear distance ahead, and (3) without first driving to the right of, and beyond the center of, said intersection, before turning to the left.

Wimer v Bottling Co., 221-120; 264 NW 262

When not determined as matter of law. In action for personal injuries and damage to automobile resulting from collision with defendant's automobile, plaintiff is not guilty of contributory negligence as a matter of law for failure to maintain lookout, yield right of way, and make proper stop before entering arterial highway, when evidence discloses that as plaintiff was about to cross an arterial highway, he looked to the right and saw defendant's automobile at a distance of 150 feet and then proceeded across intersection at speed of between 5 and 10 miles per hour until defendant's automobile collided with right rear wheel of plaintiff's automobile—more than half of plaintiff's automobile being out of the intersection.

Cowles v Joelson, 226-1202; 286 NW 419

Diverting circumstances. The operator of an automobile when entering upon a known railway crossing is held to know that he is entering a zone of danger; yet (1) the absence of statutory signals, (2) the obscured nature of the crossing, and (3) the distracting influence of other passing vehicles and of nearby objects may save the operator from the imputation of contributory negligence per se.

Nederhiser v Railway, 202-285; 208 NW 856; 27 NCCA 86

"Double passing." Evidence relative to the facts attending a "double passing" reviewed and held to present a jury question on the issue of contributory negligence.

Gehlbach v McCann, 216-296; 249 NW 144; 33 NCCA 476

Standing on endless track of tractor to fill gas tank. Where defendant, engaged in road construction work, was using caterpillar tractor-pulled dump wagons, and while plaintiff, a gasoline tank-wagon operator, was standing on the caterpillar's endless track filling the gasoline tank, the tractor suddenly started moving, throwing plaintiff in path of another oncoming tractor-towed dirt wagon which ran over and injured him, and altho defendant claims that plaintiff was on the tractor at his own peril, even when the peril was created by defendant, the question as to whether plaintiff acted as ordinarily prudent person or was guilty of contributory negligence was for jury.

O'Meara v Green Const. Co., 225-1365; 282 NW 735

Insufficient showing. Evidence held insufficient to show contributory negligence per se in not seeing, in the nighttime, an unlighted approaching vehicle.

Carlson v Decker, 216-581; 247 NW 296; 36 NCCA 91

Collision with stationary truck. The position of an unlighted truck parked in the highway, and the diverting circumstances occurring just preceding a collision with the truck, may have a very material bearing on the issue of plaintiff's contributory negligence, and the assured clear distance rule.

Kimmel v Mitchell, 216-366; 249 NW 151; 1 NCCA(NS) 42

Persons working on highway. In a laborer's personal injury action against a truck driver for backing truck into laborer while both were engaged in highway construction, §5017.06, C., '39, exempting persons and motor vehicles actually engaged in work upon the highway from the motor vehicle law requirements, does not exempt a truck driver from using his horn if necessary in the exercise of ordinary care when backing from an intersection onto highway under construction. Question of defendant's negligence in not sounding horn nor observing plaintiff's presence when backing truck where men were working, and question of plaintiff's contributory negligence while working under foreman's instruction at outside edge of road were questions properly submitted to jury.

Rebmann v Heesch, 227-566; 288 NW 695

Injuries to child—improper direction of verdict. Record reviewed relative to the facts attending the alleged negligent infliction of injuries on a child, and held to be such as to render improper the direction of a verdict for defendant, especially as said child was of such tender years as to be, presumptively, incapable of negligence.

Johnson v Selindh, 221-378; 265 NW 622; 39 NCCA 289, 565

Bicyclist's observation of parked car in time to avoid collision. Where a minor bicyclist collided with a car unlawfully parked on left side of city street without tail light, when he pulled over to his right to avoid an approaching car, the question of his contributory negligence, which depended on whether or not he should have observed the parked car in time to avoid the collision, was for the jury.

Trailer v Schelm, 227-780; 288 NW 865

Foreign statutes—right to plead. In an action in this state to recover damages sustained in a foreign state in consequence of the alleged actionable negligence of defendant in operating an automobile in said foreign state, plaintiff may plead those statutes and rules of law of said foreign state from which actionable negligence, under the facts of the case, are deducible, e. g., those (1) which declare the

degree of care required of defendant in such operation in said foreign state, and (2) the nature and degree of plaintiff's contributory negligence which will bar his action, said pleaded statutes and laws being of the very essence of plaintiff's cause of action, and not contrary to the public policy of this state, even tho they exact a greater degree of care than would be exacted by the law of this state had the injury occurred in this state.

Kingery v Donnell, 222-241; 268 NW 617; 1 NCCA(NS) 292

Evidence sufficiency. Evidence held to establish contributory negligence per se in the operation of an automobile.

Plummer v Wright, 214-318; 242 NW 28

Insufficient evidence. Evidence held insufficient to establish contributory negligence per se.

Wambeam v Hayes, 205-1394; 219 NW 813
Riddle v Frankl, 215-1083; 247 NW 493

Sudden emergency. Evidence reviewed and held insufficient to establish contributory negligence per se on the part of a motorist, especially in view of the fact that he was faced by a sudden, almost instantaneous emergency which was not of his making.

McKinnon v Guthrie, 221-400; 265 NW 620

Jury question. Record reviewed relative to a fatal accident at a highway intersection, and held that plaintiff had not shown that the deceased was free from contributory negligence.

Nyswander v Gonser, 218-136; 253 NW 829

(b) DEFINITION

Instruction. No particular or fixed phraseology is required in conveying to a jury, in a case founded on negligence, the idea that plaintiff cannot recover if he has, by his own negligence, contributed in any degree to his own injury.

Bauer v Reavell, 219-1212; 260 NW 39

Contributory negligence — degree barring recovery. In an action for damages based on actionable negligence of the defendant, the quantum of contributory negligence on the part of plaintiff which will absolutely bar recovery is any negligence which directly contributes to said injury "in any way or in any degree". Any material departure in the instructions from this statement of the law must be deemed reversible error.

Albert v Maher Bros., 215-197; 243 NW 561
Rogers v Lagomarcino Co., 215-1270; 248 NW 1
Hellberg v Lund, 217-1; 250 NW 192
Becvar v Batesole, 218-858; 256 NW 297
Hamilton v Boyd, 218-885; 256 NW 290
Bauer v Reavell, 219-1212; 260 NW 39
Meggers v Kinley, 221-383; 265 NW 614
Swan v Auto Co., 221-842; 265 NW 143
Clark v Berry Seed Co., 225-262; 280 NW 505

Contributory negligence defined. It is not reversible error to define contributory negligence as negligence which proximately causes an injury or which in some degree contributes to the bringing about of such injury.

Stilson v Ellis, 208-1157; 225 NW 346
O'Hara v Chaplin, 211-404; 233 NW 516
McDougal v Bormann, 211-950; 234 NW 807

Adequate definition. Instructions defining contributory negligence as negligence which contributes to cause the injury and stating that before plaintiff could recover he must establish by a preponderance of the evidence that he was not guilty of any negligence that in any degree contributed to cause of collision were not erroneous and did not tell jury such negligence must be a proximate cause before it would prevent recovery.

Jakeway v Allen, 227-1182; 290 NW 507

Degree—fundamental error. An unobjectionable definition of contributory negligence is converted into fundamental error by the addition of the clause "and but for such negligence on the part of the person injured the injury would not have occurred."

Ryan v Rendering Wks., 215-363; 245 NW 301

Direct contribution to injury. Principle reasserted that negligence is not contributory unless it contributes directly to plaintiff's injury.

Engle v Ungles, 223-780; 273 NW 879

(c) DRIVER

Speed statute violation—per se negligence must contribute to bar recovery. As involved in a motor vehicle collision, the act of driving a motor vehicle at a speed of more than 25 miles an hour in a residence district, being in violation of statute, is negligence as a matter of law, but unless such negligence contributes to the injuries, it will not defeat recovery.

McIntyre v West Co., 225-739; 281 NW 353

Absence of lights—instructions—sufficiency. An instruction that plaintiff would be guilty of contributory negligence if his automobile was not equipped with two white lights on the front is all-sufficient on that particular subject matter.

Winter v Davis, 217-424; 251 NW 770

Striking admissible testimony. Excluding evidence that lights on defendant's truck were not burning, plaintiff having failed to allege such fact in petition, held prejudicial error when such fact had direct bearing on question of plaintiff's contributory negligence.

Haines v Mahaska Works, 227-228; 288 NW 70

Proof of facts not alleged. Evidence that lights were not burning on defendant's truck should have been admitted, even tho not alleged

III CONTRIBUTORY NEGLIGENCE—continued

(c) DRIVER—continued

as a ground of negligence in plaintiff's petition, in order to enable plaintiff to show he was maintaining a proper lookout and was therefore free from contributory negligence.

Haines v Mahaska Works, 227-228; 288 NW 70

Assured clear distance ahead—nondiverting circumstances. The operator of an automobile is guilty of contributory negligence in colliding, in the nighttime, with a truck parked in the highway directly ahead of him, when his lights revealed objects ahead for a distance of from 75 to 100 feet; and he cannot avoid such imputation of negligence by the claim that just preceding the collision, his attention was diverted by a light remote from the highway on which he was traveling.

Dearinger v Keller, 219-1; 257 NW 206; 36 NCCA 709

Sounding horn — driver's discretion — jury question. In an automobile damage action, a driver of an automobile is not guilty of negligence as a matter of law for failure to sound horn as he approaches an intersection, since the statute does not require the sounding of the horn under any and all conditions. The propriety of using the horn is left to the reasonable discretion of the driver, and is a fact rather than a law question. The jury determines whether the sounding of a horn would have avoided the accident.

Short v Powell, 228- ; 291 NW 406

Entering highway from private driveway. Where a car, traveling in neutral at only 3 miles per hour, approaches a public highway from a private driveway, and when the driver, while the car is still 12 feet from such highway, sees defendant's truck approaching at a rapid rate, then the fact that the car was out in the highway when the collision occurred would show either that the brakes were inadequate or that the driver was negligent in the operation of his car.

Hermon v Egy, (NOR); 207 NW 116; 26 NCCA 270

Failure to stop at stop sign—jury question. The alleged failure of plaintiff to stop before entering a paved primary highway, in view of evidence that defendant's truck was several hundred feet away from the intersection and traveling on the left side of pavement at a time when plaintiff's automobile was entirely across the black line and on his right-hand side of the road, cannot, where the evidence conflicts and reasonable men might differ, be, as a matter of law, negligence contributing to the collision.

Russell v Leschensky, 224-334; 276 NW 608

Physical facts—statute violation. Where the automobile of plaintiff's intestate collided with defendant's truck at a highway intersection, and the physical facts showed that plaintiff's intestate had violated statutes in not keeping his car under control and not yielding the right of way to the truck, which had entered the intersection first, plaintiff's intestate was therefore guilty of negligence per se which contributed directly to his death, and which entitled the truck owner to a directed verdict.

Young v Clark, 226-1066; 285 NW 633

Failure to look to left on entering intersection. Principle reaffirmed that vehicle driver's failure to look to the left when entering highway intersection does not constitute contributory negligence as a matter of law.

Roe v Kurtz, 203-906; 210 NW 550; 33 NCCA 409

Rogers v Jefferson, 224-324; 275 NW 874

Rogers v Jefferson, 226-1047; 285 NW 701

Left turn—prior statute. The failure of the owner of a truck, before making a left turn into an intersecting highway, to drive to the right of and beyond the center of the intersection, constitutes negligence per se and if such owner is injured his negligence will be classified as contributory negligence per se if such conclusion is the only one to which reasonable minds could arrive.

Mansfield v Summers, 222-837; 270 NW 417

Crossing intersection before oncoming car.

Davis v Hoskinson, 228- ; 290 NW 497

Contributory negligence per se. Record reviewed and held to establish contributory negligence on the part of a motorist in driving into a highway intersection and turning to the left (1) without first observing whether he had sufficient space in which safely to make said turn, (2) without first reducing his speed to a reasonable rate,—a rate which would permit a stop within the assured clear distance ahead, and (3) without first driving to the right of, and beyond the center of, said intersection, before turning to the left.

Wimer v. Bottling Co., 221-120; 264 NW 262

Maintaining lookout — jury question. In action for damages resulting from automobile collision, where the only pertinent evidence on the question was that of the plaintiff and his witnesses that plaintiff was at all times watching the road, court properly refused to direct the jury, as a matter of law, to find plaintiff negligent in respect to keeping a lookout.

Simmering v Hutt, 226-648; 284 NW 459

Failure to see parked car in fog. On a foggy evening when visibility was poor, where the plaintiff, with the headlamps on his automobile lighted and the windshield wiper working, drove his car into another car which was parked on the highway, in the absence of any proof of an emergency to excuse his failure to see the other car, he was not free from con-

tributory negligence and the defendant was entitled to a directed verdict.

Newman v Hotz, 226-831; 285 NW 289

Instructions compelling jury to draw certain inference. Where plaintiff and defendant were, under conditions which rendered visibility poor, approaching the same intersection approximately at the same time, the court cannot properly instruct the jury that, if plaintiff could see several hundred feet in the direction from which defendant was approaching, then the jury must conclude, either (1) that plaintiff did not look for defendant, as was his duty, or (2) that plaintiff did see the defendant.

Appleby v Cass, 211-1145; 234 NW 477

Nonnegligent lookout. The driver of an automobile, moving easterly at the rate of 20 miles per hour, who, when some 140 feet from an intersection, looks and sees no vehicle approaching from the north within a distance of 290 feet, is not guilty of negligence per se in not again looking to the north until after he had satisfied himself, as soon as possible, when near the intersection that no one was approaching from the south.

Liddle v Hyde, 216-1311; 247 NW 827; 33 NCCA 433

Car running in reverse—failure to discover. One who, on a fairly clear day, and with no obstruction to vision, and with nothing to distract attention, is operating an automobile at the rate of some 25 miles per hour on the proper side of a straight and level, paved highway, is not guilty of contributory negligence per se in failing to discover, until too late to avoid a collision, that another automobile directly ahead of him (and some 40 rods distant when first seen) was slowly runing backward, it appearing that said latter car carried no sign or signal, other than its movement, that it was running in reverse.

Baldwin v Rusbult, 220-725; 263 NW 279

Passing car traveling in same direction. Record reviewed and held to present a jury question on the issue of the contributory negligence of plaintiff in attempting to pass another car traveling in the same direction.

McCoy v Cole, 216-1320; 249 NW 213

Proximate cause. It may not be said that the unlawful speed of a vehicle constitutes contributory negligence per se as to a collision which results from such vehicle being overtaken by a faster-moving vehicle.

Berridge v Pray, 202-663; 210 NW 916

Unbalanced instruction — unallowable limitation on materiality of evidence. Reversible error results to an unsuccessful plaintiff (in an action pivoted on the issue whether defendant traveling northward yielded half of the traveled way to plaintiff traveling southward) from instructions to the effect that "evidence that defendant just preceding the collision swerved his car to the west is material on the issue whether plaintiff was guilty of contributory negligence, even tho plaintiff had not alleged such swerving as a specific act of negligence on the part of the defendant". The vice is not in what the court does say but in what the court does not say, to wit: that said evidence is material on the issue of defendant's negligence.

Keller v Gartin, 220-78; 261 NW 776

Crossing streetcar tracks. A party will not be permitted to excuse his contributory negligence, consequent on his attempt to cross streetcar tracks without using his senses of sight and hearing, by the simple assumption that the streetcars will not be negligently operated.

Rosenberg v Railway, 213-152; 238 NW 703

Accident at railway crossing—negligence per se. The driver of a vehicle who, while approaching a railway crossing, knows that his view along the track is obscured by an intervening embankment, and enters upon said crossing, is guilty of contributory negligence per se when, without dispute, his unobstructed view along the track from a point 25 feet distant from the crossing and up to a point 10 feet distant from the crossing enlarged from 360 feet to 954 feet. Under such circumstances the testimony of the driver that he was constantly looking and listening and saw and heard nothing, must be wholly rejected.

Darden v Railway, 213-583; 239 NW 531

Accident at crossing. The operator of a vehicle is guilty of negligence in driving upon a railway crossing in front of an approaching train (1) when he knows the train is approaching the crossing, (2) when the train is in plain sight for a material distance from the crossing, and (3) when his failure to see the train, at best, was because of a known obstruction on his own vehicle.

Sodemann v Railway, 215-827; 244 NW 865

Accident at crossing. A traveler in approaching a railway crossing with which he is familiar, and while he is beset by no diverting circumstance, is guilty of negligence in failing to look at some place from where he knows he can see approaching trains and thus avoid injury.

Glessner v Railway, 216-850; 249 NW 138

Failure to see approaching train. A traveler who, when some 15 feet from a railway crossing, looks for but fails to see a train which is in plain sight on a straight track and rapidly approaching the crossing from a point some 230 feet distant, and thereupon drives upon the crossing, is guilty of contributory negligence.

Cashman v Railway, 217-469; 250 NW 111

Railroad crossing—motorist not looking. A motorist who approaches a railroad crossing

III CONTRIBUTORY NEGLIGENCE—continued

(c) DRIVER—concluded

on a clear day, over a good road, with no obstructions and no diverting circumstances, and who drives upon the tracks where he is struck by a train and killed, when, had he looked, he must have seen the approaching train which from a point 141 feet from the crossing was visible 2500 feet down the track, is guilty of contributory negligence as a matter of law, and the defendant-railroad is entitled to a directed verdict.

Meier v Railway, 224-295; 275 NW 139

Absence of signs and signals at railroad—nonproximate cause. The failure of a railway company to erect statutory warning signs on both sides of a railway crossing (assuming such duty to exist) or the failure of its engineer, when approaching a crossing, to give the statutory signals, becomes quite inconsequential where the operator of an automobile and his guest saw the crossing and the immediately approaching train when they were 100 feet from said crossing, and while they were traveling at a speed not exceeding 25 miles per hour.

Wright v Railway, 222-583; 268 NW 915

Sudden emergency. Evidence reviewed and held insufficient to establish contributory negligence per se on the part of a motorist, especially in view of the fact that he was faced by a sudden, almost instantaneous emergency which was not of his making.

McKinnon v Guthrie, 221-400; 265 NW 620

Common enterprise. The negligence of the driver of an automobile cannot be deemed the contributory negligence of a passenger, on the claim that the driver and passenger were engaged in a common enterprise, unless the passenger has the right in some manner to control the operation of the automobile.

Stingley v Crawford, 219-509; 258 NW 316

Assignment of claim of passenger—effect. The driver of an automobile involved in an accident may take from his passenger an assignment of the passenger's cause of action and recover thereon even tho he—the driver—was guilty of contributory negligence, provided the passenger was not guilty of such negligence. The driver's contributory negligence simply defeats his own individual claim for damages.

Albert v Maher Bros., 215-197; 243 NW 561

(d) PERSONS OTHER THAN DRIVER

Inferential allegation of nonnegligence. An allegation by plaintiff, that a collision between automobiles was caused solely by the negligence of the defendant, inferentially charges that a passenger riding with plaintiff at the time was not guilty of contributory negligence—at least when the sufficiency of the petition is not attacked and when the parties treat the negligence of the passenger as at issue.

Keller v Gartin, 220-78; 261 NW 776

Passenger's duty. A passenger in the front seat of an automobile, with opportunity equal to that of the driver to see what is to be seen, and free from any diverting circumstances, cannot surrender himself to the care of the driver, and then successfully contend that he (the passenger) was in the exercise of ordinary care.

Hutchinson v Service Co., 210-9; 230 NW 387; 33 NCCA 170

Holding prior to guest statute. The court must not instruct that a mere passenger in an automobile (under duty, of course, to exercise reasonable and ordinary care) will be guilty of negligence if he fails to do some particular thing, e. g., attempt in some manner to check the speed of the car.

Codner v Stowe, 201-800; 208 NW 330; 26 NCCA 207

Instruction—care required of passenger. An instruction that a passenger in an automobile must be deemed negligent if he fails to warn the driver of "any situation" that may be dangerous, does not correctly state the law, because requiring more than ordinary care.

Muirhead v Challis, 213-1108; 240 NW 912

Failure to warn driver. The court cannot say that an aged woman passenger riding in the rear seat of an automobile on a dark night with the auto lights turned on was guilty of contributory negligence in not seeing an approaching truck and warning her driver thereof when the said driver saw said truck as soon as the passenger could have seen it, and when the jury found that the driver was not negligent.

Albert v Maher Bros., 215-197; 243 NW 561

Instructions—care required of passenger. It is correct to say that a passenger on a vehicle may be found free of contributory negligence if he acted as a person of ordinary prudence would act under like circumstances. Requested instructions reviewed and held properly refused.

Newland v McClelland, 217-568; 250 NW 229

Passenger's duty. A passenger in an automobile is under no duty to exercise care for his own safety except to exercise ordinary care in view of the circumstances. Manifestly, this duty does not require that the passenger maintain a constant attitude of watchfulness and warning and protests to the driver of possible dangers.

Stingley v Crawford, 219-509; 258 NW 316; 37 NCCA 652

Wife riding with husband—nonduty to warn. A wife while riding in an automobile owned and operated by her husband, and over the

movements of which automobile she neither has nor attempts to have control, is under duty to exercise, for her own safety, ordinary care in view of the circumstances, but this duty does not require the wife, in order to escape the imputation of contributory negligence, to maintain an attitude of watchfulness and warning and protest to the husband of possible dangers.

Carpenter v Wolfe, 223-417; 272 NW 169

Motorcycle passenger—care required. A girl riding on a motorcycle directly behind the driver, and being unable to see the road ahead without standing up, thereby endangering the operation of the vehicle, cannot as a matter of law be under duty to warn the driver of impending danger in order to avoid the driver's negligence being imputed to her.

Williams v Kearney, 224-1006; 278 NW 180

Negligence of driver not imputable to passenger. The negligence of the driver of a car is not imputable to a passenger who has no right to control the operation of the car.

Schwind v Gibson, 220-377; 260 NW 853; 37 NCCA 640

Driver's negligence not imputed to passenger. The negligence of a motor vehicle driver is not ordinarily imputed to a passenger; however, such passenger must show the exercise of ordinary care.

Williams v Kearney, 224-1006; 278 NW 180

Assignment of claim of passenger—effect. The driver of an automobile involved in an accident may take from his passenger an assignment of the passenger's cause of action and recover thereon even tho he—the driver—was guilty of contributory negligence, provided the passenger was not guilty of such negligence. The driver's contributory negligence simply defeats his own individual claim for damages.

Albert v Maher Bros., 215-197; 243 NW 561

Host's action on assignment of passenger's claim. The passenger in an automobile who is injured in a collision with another car may, notwithstanding the contributory negligence of the driver-host, recover his damages from the owner and operator of said other car on proof (1) that said owner and operator were proximately negligent, (2) that he—the passenger—had no control over his driver-host, and (3) that he—the passenger—was free from contributory negligence; and the assignee of such damages, even tho he be the driver-host, may recover on such assignment on the same conditions, and the court must so instruct, even tho said driver-host could not, because of his contributory negligence, recover damages personal to himself.

Keller v Gartin, 220-78; 261 NW 776

Contributory negligence of passenger—jury question. Whether a passenger who had no control over the operation of a car was guilty of contributory negligence must almost inevitably be a jury question.

Schwind v Gibson, 220-377; 260 NW 853

Passenger's negligence per se not necessarily contributory. A plaintiff riding in his automobile driven by his son who enters an obscured intersection without sounding his horn (§5043, C., '35 [§5031.03, C., '39]), is guilty of negligence per se, imputable from his son, but a jury question arises as to whether or not this contributed to the injury, when from the evidence it is questionable whether defendant could have heard such signal had it been given.

In re Green, 224-1268; 278 NW 285

Negligence of borrower imputable to lender. One who borrows an automobile becomes, by force of our statute, the agent of the lender, in the operation of the car. It necessarily follows that the negligence of the borrower is imputable to the lender, and is a bar to the recovery of damages by the lender in an action against a third party, if such negligence contributed to the injury and resulting damages.

Secured Fin. Co. v Railway, 207-1105; 224 NW 88; 30 NCCA 90

Declarations of passenger. Testimony by a passenger in an automobile to the effect that shortly before an accident he called the attention of the driver to the approaching car is admissible on the issue of the contributory negligence of the passenger.

Waldman v Motor Co., 214-1139; 243 NW 555

Contributory negligence of passenger as jury question. Evidence that a passenger riding in an automobile, when 100 feet from a railway crossing, observed and called the attention of the operator to an approaching train, and that thereupon the operator of the car commenced to reduce and continued to reduce the speed of the car until it was hit by the oncoming locomotive, precludes the court from saying that the passenger was guilty of contributory negligence per se.

Wright v Railway, 222-583; 268 NW 915

Negligence of passenger—insufficient evidence. Record reviewed relative to the facts and circumstances attending the unobscured and simultaneous approach, on a clear day, of northbound and of eastbound automobiles to an intersection of arterial highways (where a collision occurred), and held insufficient to establish contributory negligence per se on the part of a passenger who was traveling in the northbound car and who was injured in said collision.

Rogers v Jefferson, 223-718; 272 NW 532; 277 NW 570

Passenger — instructions — reversible error. Reversible error results from instructing that

III CONTRIBUTORY NEGLIGENCE—continued

the jury may find that a passenger in an automobile was free of contributory negligence from the fact that the passenger neither exercised nor had the right to exercise control over the car in question.

Waldman v Motor Co., 214-1139; 243 NW 555

(e) CHILDREN

Discussion. See 21 ILR 803—Duty to anticipate conduct of children

Child incapable of contributory negligence. Evidence reviewed and held affirmatively to show no negligence on the part of the driver of an automobile, the injured party being an infant incapable of contributory negligence.

Kessler v Robbins, 215-327; 245 NW 284

Negligent infliction of injuries on child—improper direction of verdict. Record reviewed relative to the facts attending the alleged negligent infliction of injuries on a child, and held to be such as to render improper the direction of a verdict for defendant, especially as said child was of such tender years as to be, presumptively, incapable of negligence.

Johnson v Selindh, 221-378; 265 NW 622; 39 NCCA 289, 565

Child of 10—presumption. Plaintiff, in an action for damages for negligently inflicted injuries, establishes prima facie freedom from contributory negligence by proof that when he suffered the injuries in question he was only 10 years of age, thereby availing himself of the common-law presumption arising from such proof. And the case would be quite rare where defendant's rebutting testimony would be so convincing and overwhelming as per se to overthrow said prima facie showing.

Flickinger v Phillips, 221-837; 267 NW 101

Child of 10—overthrowing presumption. In an action for damages for the alleged negligent killing of a child, prima facie absence of contributory negligence on the part of the child is established by simply proving that the child was only 10 years of age; but evidence that said child, apparently without reason for so doing, suddenly and without warning ran from a place of safety into a place of danger in front of an oncoming vehicle, creates a jury question on the issue whether said child exercised that degree of care ordinarily exercised by children of a like age.

Webster v Luckow, 219-1048; 258 NW 685

Child under 14—burden to overthrow presumption. The presumption is that children under 14 are incapable of contributory negligence. A motorist striking a child of 10 must prove from all the facts and circumstances that the child did not exercise the degree of care ordinarily exercised by a child of like age. Held that the question of whether he had sustained his burden was clearly for the jury.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Contributory negligence—12-year-old child—presumption. A child between the ages of 7 and 14 is presumed to be free from contributory negligence, and where a plaintiff is between those ages a prima facie case of nonnegligence on his part is established.

Samuelson v Sherrill, 225-421; 280 NW 596

Minor walking on wrong side of highway—contributory negligence as matter of law. In a law action for damages where it is shown that plaintiff's decedent, a 15-year-old boy, was violating statute requiring pedestrians to walk on the left side of a highway by walking along right side, about 4 or 5 feet from west side of highway, and failing to make observations as to oncoming traffic from the rear while walking after dark on a street traversed by a through highway, held, he was guilty of contributory negligence as a matter of law.

Reynolds v Aller, 226-642; 284 NW 825

Bicyclist's observation of parked car in time to avoid collision. Where a minor bicyclist collided with a car unlawfully parked on left side of city street without tail light when he pulled over to his right to avoid an approaching car, the question of his contributory negligence, which depended on whether or not he should have observed the parked car in time to avoid the collision, was for the jury.

Trailer v Schelm, 227-780; 288 NW 865

Children on sleds hooked to vehicle—ordinary care a jury question. A jury must determine whether a motorist has used ordinary care commensurate with the surrounding circumstances when he drives his automobile over icy streets at a speed of 25 miles per hour, knowing that children of a tender age are in a hazardous position on sleds hooked to the rear of his vehicle.

Samuelson v Sherrill, 225-421; 280 NW 596

Children on sleds hooked to vehicle—speed as proximate cause of injury. Where children on sleds hooked to the rear of a moving automobile became frightened at the speed of the car, released their sleds, and in so doing turned aside into the path of an oncoming vehicle, whereby they were injured, such turning aside by the children did not prevent the motor vehicle operator's negligence from being the proximate cause of their injury.

Samuelson v Sherrill, 225-421; 280 NW 596

Employee's unauthorized use. In a damage action arising out of a collision between the defendant's truck and a motorcycle upon which plaintiff was riding as a guest, in which action it was alleged that the corporation-defendant's truck was being driven by a person "in the

course of his employment for * * * his employer"—the employer denying both this allegation and his consent to use of truck—and when the evidence showed that the corporation employed the truck driver for making deliveries during the week, excluding Sunday, on which day the collision occurred while the truck driver was assisting a personal friend tow a stalled car, held, after plaintiff alleged liability under the master and servant theory rather than under the statute making the owner of the motor vehicle liable, a directed verdict for the corporation was proper when plaintiff's evidence failed to support his theory.

Alcock v Kearney, 227-650; 288 NW 785

(f) PEDESTRIANS

Crossing street in middle of block. A pedestrian who attempts to cross a street in the middle of a block without looking for a plainly approaching vehicle, or who sees said oncoming vehicle when it is only a few feet distant, and attempts to pass in front of it is guilty of contributory negligence per se.

Whitman v Pilmer, 214-461; 239 NW 686; 35 NCCA 693

Orth v Gregg, 217-516; 250 NW 113; 35 NCCA 612

Crossing traffic-congested street. A pedestrian who, while crossing a traffic-congested street at a place other than the place specifically provided for such crossing, fails to look for approaching vehicles or voluntarily steps in front of an immediately approaching vehicle which he does see, is guilty of negligence per se.

Spaulding v Miller, 216-948; 249 NW 642; 35 NCCA 676

Stepping in front of vehicle. Instructions to the effect that a pedestrian is guilty of negligence per se if he suddenly steps in front of an automobile reviewed, and held proper, under the circumstances.

Ryan v Shirk, 207-1327; 224 NW 824

Stepping into street in path of automobile. Plaintiff was guilty of contributory negligence as a matter of law in stepping from a curb into the path of an oncoming automobile which was in plain sight where it would have been seen by the plaintiff if he had looked.

Ward v Zerzanek, 227-918; 289 NW 443

Attempting to dodge car. The act of a pedestrian, while crossing a street, in attempting to dodge an oncoming car, may constitute the proximate cause of the injuries suffered by him. So held where the pedestrian evidently stepped or turned back directly in front of said car.

Kortright v Strater, 222-603; 269 NW 745

Failure to look for cars. A pedestrian who, while crossing a public street, stops because of a car approaching from his immediate right, is guilty of contributory negligence when, observing that said car had also stopped, he at once moves forward without looking to his left or right, and is instantly hit by another car coming from said latter direction.

Stawsky v Wheaton, 220-981; 263 NW 313

"Stop and go" signals—change after entering intersection. A pedestrian who, in obedience to a municipally operated "go" signal, starts across the street on the pathway provided for pedestrians and suddenly discovers that said "go" signal has changed to "stop", is not guilty of negligence per se in failing to look for, see, and avoid a vehicle which, under said change in signals, passes entirely across the intersection and hits and injures said pedestrian within less than two seconds after said change in signals occurs; especially is this true (1) when said pedestrian has by ordinance the right of way over said vehicle because he was first properly to enter said intersection, and (2) when said pedestrian, at the very instant of said change in signals, was immediately approaching other stationary vehicles known to be waiting release from a "stop" signal.

Dougherty v McFee, 221-391; 265 NW 176

Pedestrian crossing street—duties. A pedestrian crossing a street need not anticipate another's negligence, nor keep a constant lookout in both directions at the same time, nor wait for all approaching vehicles from both directions, and, moreover, he is not as a matter of law contributorily negligent merely in running while crossing a street altho not seeing an approaching motor vehicle 180 feet away, but in any case whether he could rightly assume he could cross in safety is a question of contributory negligence for the jury.

Swan v Dailey-Luce Co., 225-89; 277 NW 580; 281 NW 504

Assumption that law will be obeyed. Principle reaffirmed that just what acts of care must be taken by a pedestrian on the highway in order to save himself from the imputation of negligence, may be very materially influenced and controlled by his right to assume that others using the highway will obey the law of the road.

Orth v Gregg, 217-516; 250 NW 113; 35 NCCA 612

Crossing streetcar track. A pedestrian who, from a place of perfect safety, suddenly hastens across a streetcar track in front of an immediately approaching streetcar, with full knowledge that as soon as he had passed the said track he would be directly in line with the automobile travel moving with the streetcar, is guilty of contributory negligence per se, even tho the automobile which hit him was being operated at an excessive speed.

Pettijohn v Weede, 209-902; 227 NW 824

Crossing near intersection—jury question.

Scott v McKelvey, 228- ; 290 NW 729

Diagonal crossing of street. It cannot be said that a pedestrian is guilty of negligence per se when he looks both at the street curb

III CONTRIBUTORY NEGLIGENCE—continued

(f) PEDESTRIANS—continued

and in the middle of the street for approaching vehicles and sees a vehicle at a distance of some 150 feet; and this is true tho he was proceeding diagonally across a street intersection of peculiar shape, in order to board an approaching streetcar, there being, apparently, nothing in the movements of the approaching vehicle to fairly suggest danger.

Minks v Stenberg, 217-119; 250 NW 883; 35 NCCA 589

Reason for not looking for danger. The reason why a pedestrian while crossing a street did not look in the direction of an oncoming vehicle which injured him is relevant and material, and the injured party may testify as to such reason.

Orr v Hart, 219-408; 258 NW 84

Walking in highway. One who walks around the end of a stationary vehicle in the public highway and thereupon turns and walks along the side of the car in the direction of, and directly in line with, an oncoming vehicle which is wholly unobstructed is guilty of negligence per se.

Jarvis v Stone, 216-27; 247 NW 393; 39 NCCA 309

Duty to leave highway when danger impending. A pedestrian wearing dark clothes and walking at night along a heavily traveled arterial street should, in the exercise of reasonable care and prudence, ascertain his immediate danger when two automobiles—one from in front and one from behind—are approaching at the same time, and when he fails to remove himself as speedily as possible from the place of danger, he is contributorily negligent.

Armbruster v Gray, 225-1226; 282 NW 342

Minor walking on wrong side of highway—violating statute—contributory negligence as matter of law. In a law action for damages where it is shown that plaintiff's decedent, a 15-year-old boy, was violating statute requiring pedestrians to walk on the left side of a highway by walking along right side, about 4 or 5 feet from west side of highway, and failing to make observations as to oncoming traffic from the rear, while walking after dark on a street traversed by a through highway, held, he was guilty of contributory negligence as a matter of law.

Reynolds v Aller, 226-642; 284 NW 825

Crossing highway without looking. An adult person, after alighting from an automobile which had been stopped substantially astraddle the north edge of an 18-foot pavement on a heavily traveled country highway, is guilty of negligence per se in attempting to walk to the south and across said pavement without making any observations to his unobstructed right for eastbound vehicles.

Zuck v Larson, 222-842; 270 NW 384

Failure to keep lookout to rear. The foreman of a paving outfit is guilty of negligence per se in walking along the unpaved portion of a rough road for a distance of some 200 feet without making any observations to his rear for trucks which he knew were being backed along said road and in his immediate direction at the rate of one truck each 90 seconds.

Hedberg v Lester, 222-1025; 270 NW 447

Standing on shoulder of pavement—care.

Janes v Roach, 228- ; 290 NW 87

Standing in path of truck. One who is standing substantially on the very edge of a passageway through which an approaching truck on a downgrade had to pass and knows that the truck operator is having difficulty to control the truck owing to the slippery condition of the road and does not step out of the way tho he has ample opportunity to do so, is guilty of contributory negligence.

Norris v Lough, 217-362; 251 NW 646

Disregarding apparent danger. The rule that a pedestrian and an automobile have equal rights upon the highway does not authorize a highway employee to stand on the edge of the pavement watching an oncoming automobile travel a distance of 200 feet on the same side of the pavement, knowing the pavement is in an icy condition, knowing that the driver of the oncoming automobile is having difficulty controlling it, from which facts it is, or to a reasonably prudent man it would have been, apparent that he was occupying a position of danger, and consequently, in remaining there, he was guilty of contributory negligence. Defendant's motion for a directed verdict was properly sustained.

Cumming v Dosland, 227-470; 288 NW 647

Stalled motorist—freedom from negligence—requested instruction. In a damage action for personal injuries arising out of a motor vehicle collision, the burden is on plaintiff to establish (1) the defendant's negligence, (2) such negligence as the proximate cause of the injury, and (3) plaintiff's freedom from contributory negligence. Hence, a motorist who stands in the center of the road near the rear of her automobile stalled on the highway, attempting to stop a following motorist, and, tho having the opportunity, fails to seek a place of safety when she sees the approaching motorist apparently will crash into her stalled automobile, is not entitled to an instruction establishing her freedom from contributory negligence as a matter of law, nor to a directed verdict against the defendant.

Murchland v Jones, 225-149; 279 NW 382

Lack of precaution for safety—plaintiff's own proof. A person riding with a trucker and struck by an automobile while helping

put on tire chains after dark, having placed himself in a perilous position on the traffic side of the truck stopped astraddle the center of the highway, fails to prove his freedom from contributory negligence where there is no evidence that he kept any lookout or took any precautions for his own safety.

Denny v Augustine, 223-1202; 275 NW 117

Reliance on another's duty—knowledge of breach no excuse for negligence. A plaintiff, injured by a passing automobile while helping defendant's employee-driver put on tire chains, may not excuse his own lack of due care by testifying that he relied on the driver to place out flares, when as a fact he knew both that the driver had no such intention and that no flares were so placed.

Denny v Augustine, 223-1202; 275 NW 117

Proximate cause—violation of statute. Failure of a defendant, the driver of an automobile, to have the headlights on his car displayed at a time required by statute becomes inconsequential when the contributory negligence of the plaintiff-pedestrian was the proximate cause of the injury resulting from the collision.

Sheridan v Limbrecht, 205-573; 218 NW 278; 29 NCCA 300; 35 NCCA 661; 2 NCCA(NS) 417

Eyewitness testimony—custom of injured party immaterial. Evidence tending to show the usual custom of a person in approaching a highway intersection—where he was killed in a collision—is inadmissible on the issue of negligence—it appearing that there were eyewitnesses to the entire transaction resulting in the collision.

Nyswander v Gonser, 218-136; 253 NW 829; 36 NCCA 1

No-eyewitness rule—nonapplicability. In a pedestrian-automobile accident, where a motorist testifies that he saw deceased just prior to striking and killing him, the rule that in the absence of eyewitnesses the deceased is presumed to have exercised due care has no application.

Edwards v Perley, 223-1119; 274 NW 910

"No-eyewitness rule" inapplicable. Where pedestrian crossing highway is killed by automobile, and in action for death where plaintiff's witness clearly observed decedent's conduct for some time immediately prior to accident and did not see him look for approaching car, the "no-eyewitness rule" establishing presumption of freedom from contributory negligence was inapplicable.

Spooner v Wisecup, 227-768; 288 NW 894

Jury or law question. The court has no right to rule that a pedestrian—injured while attempting to cross a public street at the place provided for such crossing and by coming into collision with a moving vehicle—is guilty of negligence contributing to his own injury, unless the facts and circumstances, after viewing them in the light most favorable to the pedestrian, are such that all reasonable minds must arrive at the same conclusion, to wit, negligence upon the part of the pedestrian. Evidence held to present jury, not law, question.

Huffman v King, 222-150; 268 NW 144

Elderly lady crossing street at night. A jury question on the issue of negligence arises (1) when the evidence is conflicting as to what the injured party did or did not do, and (2) when there may be a fair difference of opinion whether that which the injured party admittedly did do or omitted to do, constituted negligence. Evidence as to what an elderly lady did in crossing a public street after nightfall presented a jury question on the issue of contributory negligence.

Robertson v Carlgren, 211-963; 234 NW 824
Hittle v Jones, 217-598; 250 NW 689; 37 NCCA 67

Sudden fright—trial theory. The abstract proposition that a pedestrian who steps suddenly in front of a moving vehicle is guilty of negligence per se need not be limited by the effect of sudden fright or surprise on the part of the pedestrian when no such claim is made in the pleadings or evidence.

Ryan v Shirk, 207-1327; 224 NW 824

Position of danger—last clear chance. The submission to the jury of the issue of "last clear chance" is improper on undisputed testimony that, while an automobile was moving along a traffic-congested street at a speed of from five to ten miles an hour, a pedestrian negligently placed himself in a position of danger in front of said car, but that the operator of said car did not discover said position of danger until his car was only seven feet from said pedestrian, and that thereupon said operator applied or attempted to apply his brakes but not in time to avoid injuring said pedestrian.

Spaulding v Miller, 220-1107; 264 NW 8

Pedestrian in voluntary position of appreciable danger—instruction. In action for death of pedestrian struck by automobile, instruction that decedent's contributory negligence barred recovery unless last clear chance doctrine could be invoked, was not erroneous on theory that such contributory negligence must be proximate cause of accident in order to defeat recovery. Moreover, such instruction was justified under the record showing that decedent voluntarily placed himself in a position of evident danger.

Spooner v Wisecup, 227-768; 288 NW 894

Failure to keep lookout alleged—no submission of last clear chance. In a law action for damages wherein the petition alleges that defendant motorist was negligent in failing to

III CONTRIBUTORY NEGLIGENCE—continued

keep a proper lookout and such allegation was not withdrawn, and it is shown deceased pedestrian was contributorily negligent, it was proper to refuse to submit the case under last clear chance doctrine, on the theory that motorist, being under duty to keep a lookout, presumably performed such duty, but, after seeing deceased, failed to exercise due care in avoiding the injury.

Reynolds v Aller, 226-642; 284 NW 825

(g) WHEN LAW OR JURY QUESTION

Jury question unless all minds concur. Contributory negligence is for the jury, and a directed verdict should be denied except in cases where the facts are clear and undisputed and the cause and effect so apparent to every candid mind that but one conclusion may be fairly drawn.

In re Green, 224-1268; 278 NW 285

As jury question. The presence or absence of contributory negligence is, as a general rule, a question for the jury.

Wheeler v Peterson, 213-1239; 240 NW 683; 33 NCCA 451

Grounds for new trial—court mistakenly directing verdict. Ordinarily the question of contributory negligence is peculiarly for the jury, and where the trial court mistakenly directs a verdict for defendant on the ground of plaintiff's negligence, the court does not err in later granting a new trial.

Williams v Kearney, 224-1006; 278 NW 180

Inadequate submission. Defendant's specific allegations as to contributory negligence on the part of plaintiff should be specifically submitted to the jury when they have adequate support in the evidence.

Lang v Siddall, 218-263; 254 NW 783

Instructions—error in quoting statute only. In submitting specifications of alleged contributory negligence, the court commits error in simply quoting the statute relating to these grounds without defining just what acts of plaintiff, under the evidence, would constitute contributory negligence, and without applying the law to the facts.

Jakeway v Allen, 226-13; 282 NW 374

Jury question. Evidence held to present a jury question on the issue whether there was negligence in the operation of automobiles by the drivers thereof; likewise, whether there was contributory negligence on the part of an injured party.

Shuck v Keefe, 205-365; 218 NW 31
Dickeson v Lzicar, 208-275; 225 NW 406
Stilson v Ellis, 208-1157; 225 NW 346
Vass v Martin, 209-870; 226 NW 920; 39 NCCA 325; 1 NCCA(NS) 162
O'Hara v Chaplin, 211-404; 233 NW 516; 35 NCCA 573
Rogers v Lagomarcino Co., 215-1270; 248 NW 1
Orr v Hart, 219-408; 258 NW 84

Directed verdict—improper unless per se negligence also contributory. A plaintiff motorist, against whom a directed verdict was rendered because in violating a speed statute he was negligent per se, still should have had the benefit of the best possible view of the evidence, and, moreover, under a record showing that he remained at all times on his own side of the road, but that a truck driver, for no apparent reason, drove across the pavement center line resulting in a head-on collision, makes a jury question as to whether or not plaintiff's per se negligence contributed to his injury.

McIntyre v West Co., 225-739; 281 NW 353

Failure to sound horn. In action involving collision between car and motorcycle, plaintiff was not guilty of contributory negligence as a matter of law for failure to sound horn where vehicles were in plain view of each other for more than 200 feet and there was no apparent danger of any collision.

Jakeway v Allen, 227-1182; 290 NW 507

Sounding horn — driver's discretion — jury question. In an automobile damage action, a driver of an automobile is not guilty of negligence as a matter of law for failure to sound horn as he approaches an intersection, since the statute does not require the sounding of the horn under any and all conditions. The propriety of using the horn is left to the reasonable discretion of the driver, and is a fact rather than a law question. The jury determines whether the sounding of a horn would have avoided the accident.

Short v Powell, 228- ; 291 NW 406

Pedestrian at crossing. The court has no right to rule that a pedestrian—injured while attempting to cross a public street at the place provided for such crossing and by coming into collision with a moving vehicle—is guilty of negligence contributing to his own injury, unless the facts and circumstances, after viewing them in the light most favorable to the pedestrian, are such that all reasonable minds must arrive at the same conclusion, to wit, negligence upon the part of the pedestrian. Evidence held to present jury, not law, question.

Huffman v King, 222-150; 268 NW 144

Pedestrian on shoulder of highway—care.
Janes v Roach, 228- ; 290 NW 87

Elderly lady crossing street at night. A jury question on the issue of negligence arises (1) when the evidence is conflicting as to what the injured party did or did not do, and (2) when there may be a fair difference of opinion whether that which the injured party admittedly did do or omitted to do, constituted negligence. Evidence as to what an elderly lady

did in crossing a public street after nightfall presented a jury question on the issue of contributory negligence.

Robertson v Carlgren, 211-963; 234 NW 824
Hittle v Jones, 217-598; 250 NW 689

Truck turning to left to avoid pedestrian. When a truck slowed down and turned out to the left to avoid a pedestrian walking along the traveled portion of the highway, and was struck by another truck proceeding from the rear, the court properly submitted to the jury the question of contributory negligence.

Glover v Vernon, 226-1089; 285 NW 652

Car striking person standing on street—jury question. In personal injury action for being struck by automobile while plaintiff was standing at night on city street discussing question of blame for another collision, plaintiff's contributory negligence was question for jury.

Yale v Hanson, 227-813; 288 NW 905

Accident at intersection. Evidence held to present a jury question on the issue whether the driver of an eastbound car was guilty of contributory negligence in entering and attempting to cross the intersection while a northbound car was approaching said intersection.

Hartman v Trans. Co., 211-64; 233 NW 23

Preference at intersecting points. The court cannot say that the operator of a northbound car is guilty of contributory negligence per se in entering an intersection when a westbound car was three-quarters of a block distant.

Leckliter v Des Moines, 211-251; 233 NW 58; 38 NCCA 493

For jury. In damage suit arising from a motor vehicle accident at a highway intersection, the question of contributory negligence was for the jury.

Hupp v Doolittle, 226-814; 285 NW 247

Approaching intersection—instruction. In an action for personal injuries sustained by driver of a motor vehicle in collision with another vehicle which entered intersection from the left, an instruction stating that the statute requires any person operating a motor vehicle to have the same under control and reduce the speed to a reasonable and proper rate when approaching and traversing a crossing or intersection of public highways was correct. Since the jury in most cases must determine from the circumstances whether there had been a compliance with such statute, question was properly submitted.

Rogers v Jefferson, 226-1047; 285 NW 701

Stopping before entering boulevard. Evidence reviewed in detail relative to the stoppage of an automobile before entering a curving boulevard (on which traffic had the right of way) and held to present a jury question on the issue of the contributory negligence of the operator and not a case of contributory negligence per se.

Shutes v Weeks, 220-616; 262 NW 518

Driving from private driveway. Evidence relative to the act of driving from a private driveway into a public highway in front of an approaching car reviewed, and held to present a jury question on the issue of contributory negligence.

Tinley v Implement Co., 216-458; 249 NW 390

Left-hand turn—conflicting testimony. Evidence reviewed in detail in an action involving a left-hand turn, during the nighttime, of a westbound car, and its collision with an eastbound car near the point of intersection, and held, because of the conflict in testimony, to present a jury question on the issue whether plaintiff had established his freedom from contributory negligence.

Enfield v Butler, 221-615; 264 NW 546

Turning to right into intersecting road. Record reviewed and held to present a jury question on the issue whether plaintiff, traveling on the right-hand side of the highway, with knowledge that she was being closely followed by a truck, was guilty of contributory negligence in changing her course by turning to the right and entering an intersecting highway, the collision occurring between said turning car and said truck.

Harmon v Gilligan, 221-605; 266 NW 288

Contributory negligence of passenger—jury question. What a decedent, a passenger in a vehicle, did do, or could have done, for his own safety during the very few seconds during which danger arose, is for the jury to decide.

Newland v McClelland, 217-568; 250 NW 229

Passenger. Evidence which discloses, on the part of a passenger in an automobile, no act or omission to act which contributed in any manner to an accident, justifies the submission to the jury of the issue of contributory negligence of said passenger.

Schuster v Gillispie, 217-386; 251 NW 735

Contributory negligence of passenger as jury question. Evidence which discloses on the part of plaintiff, riding as a passenger in an automobile, no act or omission to act which contributed in any manner to an accident, justifies the submission to the jury of plaintiff's contributory negligence.

Miller v Lowe, 220-105; 261 NW 822

Contributory negligence of passenger as jury question. Whether a passenger who had no control over the operation of a car was guilty of contributory negligence must almost inevitably be a jury question.

Schwind v Gibson, 220-377; 260 NW 853

III CONTRIBUTORY NEGLIGENCE—continued

(g) WHEN LAW OR JURY QUESTION—continued

Contributory negligence of passenger as jury question. Whether an invited passenger in an automobile, over which the passenger has no control, is guilty of contributory negligence can rarely, if ever, be a question of law.

Kehm v Dilts, 222-826; 270 NW 388; 3 NCCA(NS) 39

Instructions—ignoring supported issue. In an action for damages based on the alleged negligence of the defendant in operating an automobile which collided with an automobile in which plaintiff was riding, the court commits reversible error by wholly ignoring in its instructions the duly joined issue as to the contributory negligence of the plaintiff, the evidence being such as to present a jury question on said issue.

Schelldorf v Cherry, 220-1101; 264 NW 54

Passenger's lookout at railroad crossing. A passenger in a motor vehicle is not, as a reasonably prudent person, under the same obligation as the driver to keep a lookout, but whether or not, under the circumstances, a passenger was lacking in ordinary care in committing his safety to the motor vehicle driver while crossing a railroad is a question for the jury.

Finley v Lowden, 224-999; 277 NW 487

Railroad crossing accident—snow glare affecting visibility. Where a passenger riding in a truck was killed in a crossing collision between truck and train, a contention that sun shining on snow and reflecting into truck constituted such obstruction to view of oncoming train that it raised a jury question on issue of deceased's contributory negligence in failing to see approaching train held not established by his evidence.

Russell v Scandrett, 225-1129; 281 NW 782

Tracks creating hidden danger. A jury question as to the negligent operation of a streetcar and as to the contributory negligence of the driver of an automobile is presented by evidence (1) that the streetcar tracks were so laid that, as they approached a turn at a street intersection, they imperceptibly approached the street curb until, near the intersection, insufficient space remained for the passage of an automobile between a passing streetcar and the curb, and (2) that the driver of the automobile, without knowledge of such condition of the tracks, and without warning from the streetcar employee who was present, was caught at said point of danger, and was not only "wedged in" between the streetcar and curb by the front end of the streetcar, but was crushed by the oversweep of the rear end of the car as it turned away from the auto at the intersection.

Knudson v Railway, 209-429; 228 NW 470

Crossing accident—boxcars hiding view. Evidence tending to show that the driver of a vehicle stopped some twelve feet from a railroad crossing, and reconnoitered for an approaching train, and saw none, owing to a string of cars on a side track, and heard no warning signals of an approaching train, and thereupon drove upon the crossing, presents a jury question on the issue of his negligence.

Bush v Railway, 216-788; 247 NW 645

Crossing—lookout—failure to see train. Evidence tending to show that the driver of a vehicle stopped some 10 or 15 feet from a railroad crossing and reconnoitered for an approaching train and saw none because of dirt elevations and weeds along the side of the track, and heard no warning signals of an approaching train, and thereupon drove upon the crossing, presents a jury question on the issue of his negligence, even tho, had he stopped some few feet nearer the track he would have seen the approaching train.

Markle v Railway, 219-301; 257 NW 771

"Double passing". Evidence relative to the facts attending a "double passing" reviewed and held to present a jury question on the issue of contributory negligence.

Gehlbach v McCann, 216-296; 249 NW 144; 33 NCCA 476

Failure of lights. Where a truck is being operated in a fog with 35 feet visibility ahead under speed and road conditions permitting a stop within 25 feet and after meeting and passing another automobile, there is a failure of the lights on the truck, the truck driver is confronted with an emergency not of his own making, and if he tries the lights again before applying his brakes and turning on his emergency light, after which he discovers another truck stopped on the road within the visibility range such that it would have been seen and avoided had the lights not failed, he is not as a matter of law contributorily negligent in being unable to stop without a collision but the question is for the jury.

Mueller v State Assn., 223-888; 274 NW 106; 113 ALR 1256

Collision—jury questions. Evidence reviewed in an action for damages consequent on a collision in the nighttime between a truck and an automobile, and held to present jury questions on the issues:

1. Whether deceased was guilty of contributory negligence.
2. Whether defendant was driving his truck without lights.
3. Whether defendant was driving on the wrong side of the road.
4. Whether defendant was operating his truck (weighing three tons) at an unlawful rate of speed.
5. Whether defendant had opportunity to avoid the collision and failed to do so.

Carlson v Decker, 218-54; 253 NW 923; 36 NCCA 93

Boy on bicycle warming ear with hand. Plaintiff riding a bicycle on the sidewalk, a place of comparative safety, observing the traffic ahead of him, cannot, as a matter of law, be said to be guilty of contributory negligence in not watching where he was going simply because he put a hand over his ear to warm it, when there is a sharp conflict in the evidence as to whether the truck which struck the boy turned sharply in ahead of him, or turned gradually and struck him from the rear.

Montanick v McMillin, 225-442; 280 NW 608

Directing verdict—inadequate brakes must contribute to injuries. Before a plaintiff motorist can be held guilty of contributory negligence as a matter of law it must conclusively appear, from a consideration of the evidence in the light most favorable to him, that his negligence in having inadequate brakes contributed in some way or in some degree to the accident and injuries for which he seeks a recovery.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Inadequate brakes immaterial unless negligence contributory. An exception to an instruction because the fact question of plaintiff's contributory negligence was erroneously submitted is not an exception to the submission of the sole fact of his negligence, and even if plaintiff's negligence in not having brakes is established beyond question, the fact question of its contributory nature is still for the jury.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Predicating error solely on one's own evidence—impropriety. Predication of error based solely on defendant's own evidence and his own theory of the case is ineffective when other conflicting evidence clearly makes a jury question on contributory negligence regarding plaintiff's failure to have adequate brakes on his automobile, his failure to stop within the assured clear distance ahead, and his failure to slow down before crossing a bridge.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

New trial to plaintiff—propriety. In a case involving a truck and passenger car collision on a bridge, when the defendant contended that he was entitled to a directed verdict and that therefore it was error to grant a new trial after a verdict had been returned in his favor, his contention was without merit when the evidence was such that the jury could have found the defendant negligent, that his negligence was the proximate cause of the accident, and that neither plaintiff nor plaintiff's driver was contributorily negligent.

Hawkins v Burton, 225-1138; 281 NW 790

Racing car at fair. Evidence held to present a jury question on the issue of the contributory negligence of a party injured by a racing automobile at a county fair.

Zieman v Amusement Assn., 209-1298; 228 NW 48

(h) AVOIDANCE—LAST CLEAR CHANCE

Doctrine must be pleaded. The doctrine of the last clear chance is not available unless distinctly pleaded.

Steele v Brada, 213-708; 239 NW 538

Nyswander v Gonser, 218-136; 253 NW 829; 36 NCCA 1

Doctrine inherent in pleading. The elements of the doctrine of last clear chance may be deemed as inherently attending an allegation which, in effect, charges defendant with proximate negligence up to the very time of the infliction of the injury, even tho said allegation carries no reference to the last clear chance or to the doctrine thereof. It follows that after trial and reversal thereof, such allegation may be amended and amplified by alleging facts which, if proven, will specifically present the issue of the last clear chance.

Spaulding v Miller, 220-1107; 264 NW 8

Burden of proof. A plaintiff who contends for the applicability of the doctrine of the last clear chance has the burden of proof to show that the defendant discovered plaintiff's negligence in such time that defendant, by the exercise of reasonable care, might have avoided injuring plaintiff.

Hogan v Nesbit, 216-75; 246 NW 270

Applicability of doctrine. The doctrine of last clear chance applies only where defendant had actual knowledge of plaintiff's peril, and after acquiring such knowledge, could have avoided the injury by the exercise of due care, but failed to do so.

Steele v Brada, 213-708; 239 NW 538

Reynolds v Aller, 226-642; 284 NW 825; 5 NCCA(NS) 335

Inapplicability of doctrine. The doctrine of the last clear chance has no application to a record which shows (1) that the plaintiff was confessedly negligent, and (2) that the accident of which plaintiff complains occurred instantly and inevitably after plaintiff's negligence was discovered.

Albrecht v Berry, 202-250; 208 NW 205; 32 NCCA 108

Discovery of danger—inapplicability of doctrine. The doctrine of the last clear chance can have no application when the nonnegligent driver of a conveyance, after he discovers the danger, does everything in his power to prevent an accident.

Middleton v Railway, 209-1278; 227 NW 915

Discovery of danger—erroneous submission. The submission of the last clear chance doctrine under a record which unquestionably

III CONTRIBUTORY NEGLIGENCE—concluded

(h) AVOIDANCE—LAST CLEAR CHANCE—concl'd

shows that the accident of which plaintiff complains occurred instantly and inevitably after plaintiff's position of danger was discovered by defendant, constitutes reversible error.

Rutherford v Gilchrist, 218-1169; 255 NW 516

Highway blocked—jury question. When a truck driven by plaintiff's intestate slowed down and turned to the left to avoid a crippled pedestrian who was walking along the highway, whether the defendant's truck, coming from the rear at a greater speed, after discovering the peril of the truck in front in having turned out into his path, should have pulled further to the left on the shoulder of the road to avoid a collision, was a question of last clear chance for the jury.

Glover v Vernon, 226-1089; 285 NW 652

Railroad crossing accident. The doctrine of last clear chance is not applicable unless peril of injured party is actually discovered and appreciated in time to prevent his injury by the exercise of ordinary care. So where plaintiff drives his truck at a speed of 4 or 5 miles per hour onto a railroad track and is struck by a train going 4 or 5 miles per hour, and it is shown engineer of train felt a jar and, looking out of cab, saw some object in front of locomotive and immediately applied brakes and placed locomotive in reverse, held, evidence insufficient to submit to jury, and a motion for directed verdict was rightfully sustained.

Kinney v Railway, 17 F 2d, 708

Streetcar collision. Evidence relative to collision between a streetcar and an automobile reviewed, and held wholly insufficient to justify the submission to the jury of the last clear chance doctrine.

Elliott v Railway, 223-46; 271 NW 507; 5 NCCA(NS) 169

Stepping into path of automobile. A plaintiff, who stepped directly into the path of the defendant's automobile from a position of safety on a curb, could not rely on the last clear chance doctrine when there was no evidence that the defendant could have avoided the accident by exercising reasonable care after discovering that the plaintiff was in a perilous position.

Ward v Zerzanek, 227-918; 289 NW 443

Pedestrian in voluntary position of appreciable danger—instruction. In action for death of pedestrian struck by automobile, instruction that decedent's contributory negligence barred recovery unless last clear chance doctrine could be invoked, was not erroneous on theory that such contributory negligence must be proximate cause of accident in order to defeat recovery. Moreover, such instruction was justified under the record showing that decedent voluntarily placed himself in a position of evident danger.

Spooner v Wisecup, 227-768; 288 NW 894

Evidence—erroneous submission. The submission to the jury of the issue of last clear chance is improper on undisputed testimony that, while an automobile was moving along a traffic-congested street at a speed of from 5 to 10 miles an hour, a pedestrian negligently placed himself in a position of danger in front of said car, but that the operator of said car did not discover said position of danger until his car was only seven feet from said pedestrian, and that thereupon said operator applied or attempted to apply his brakes but not in time to avoid injuring said pedestrian.

Spaulding v Miller, 220-1107; 264 NW 8

Evidence—time element. The application of the principle of the last clear chance necessitates some adequate evidence that the party against whom the doctrine is sought to be applied discovered the negligence in question in such time as enabled him to avoid it by the exercise of reasonable care.

Reid v Brooke, 221-808; 266 NW 477

Last clear chance—jury question. Jury must consider all the evidence, and where it tends to show that defendant, after discovering plaintiff's perilous position, might by the exercise of ordinary care have avoided a collision, it is not error to submit the doctrine of last clear chance.

Pettijohn v Weede, 219-465; 258 NW 72
Groves v Webster City, 222-849; 270 NW 329
Russell v Leschensky, 224-334; 276 NW 608

Erroneous and confusing instructions. An instruction, in effect, that if defendant, after he discovered plaintiff's peril, was negligent in the doing of certain acts which resulted in the striking of plaintiff, then "defendant would still be liable even tho plaintiff was negligent", is prejudicially erroneous; also prejudicially confusing and inconsistent in view of repeated instructions that plaintiff could not recover if he was guilty of contributory negligence.

Steele v Brada, 213-708; 239 NW 538

Avoiding contributory negligence. A streetcar motorman who plainly sees that the driver of another conveyance is negligently placing himself in a position of danger on the tracks, or is about to do so, and by ordinary care can avoid an accident and fails to do so, must be deemed guilty of negligence which is the proximate cause of the accident, irrespective of the negligence of the injured party.

Lynch v Railway, 215-1119; 245 NW 219

IV IMPUTED NEGLIGENCE

(a) IN GENERAL

Harmless error. Instruction on the subject of imputed negligence held nonprejudicial.

Sutton v Moreland, 214-337; 242 NW 75

(b) DEFINITION

Fundamental basis of doctrine. If two or more persons unite in the joint prosecution of a common purpose, under such circumstances that each has authority, express or implied, to act for all in respect to the conduct or the means of agency employed to execute such common purpose, the negligence of any one of them in the management thereof will be imputed to all of the others.

This doctrine is based on the relation of agency existing between the parties engaged in the common enterprise.

Carpenter v Wolfe, 223-417; 273 NW 169

(c) TO OWNER-PASSENGER

Common purpose. The negligence of the driver of an automobile who, because of his skill as a driver, is selected by the owners to operate the car on a pleasure trip, is imputable to such owners, even tho such driver was the guest of such owners. (See Vol. I, §5028, Anno. 13)

Wiley v Dobbins, 204-174; 214 NW 529; 62 ALR 432; 28 NCCA 593

Harmless assumption of fact. The assumption in instructions of the fact that an automobile was being operated with the consent of the owner does not constitute reversible error when the evidence bearing on the element of consent was the one persuasive and unquestioned fact that the owner was riding in the car with the driver thereof at the time of the accident.

Hoover v Haggard, 219-1232; 260 NW 540

Son's negligence imputed to father-owner. The negligence of a son driving an automobile in which the father-owner is riding is imputed to the father.

Rogers v Jefferson, 224-324; 275 NW 874

Plaintiff's negligence per se not necessarily contributory. A plaintiff riding in his automobile driven by his son, who enters an obscured intersection without sounding his horn, is guilty of negligence per se, imputable from his son, but a jury question arises as to whether or not this contributed to the injury when from the evidence it is questionable whether defendant could have heard such signal had it been given.

In re Green, 224-1268; 278 NW 285

(d) OWNER'S CONSENT TO OPERATION

Discussion. See 13 ILR 336—Liability of owner; 21 ILR 804—Wife's recovery against owner of car operated by husband

Literal words limited by intent. Tho a thing is within the literal words of a statute, it will not be deemed in the statute when it is clearly not within the intention of the statute. Applied in the construction of the statute relative to the liability of the owner of an automobile who consents to its operation by another.

McGraw v Seigel, 221-127; 263 NW 553; 106 ALR 1035

Stating cause of action. A cause of action is stated by allegations (1) that the driver of an automobile was negligent in operating it, (2) that plaintiff suffered damages thereby, and (3) that the car was then being operated with the consent of the owner.

Seleine v Wisner, 200-1389; 206 NW 130; 25 NCCA 714

Pleading — nonallowable amendment. A timely brought action based solely on the common-law plea of defendant's liability consequent on the negligent operation of an automobile by defendant's employee in due course of employment may not, after the action would be barred by the statute of limitation, be so amended as to wholly abandon said pleaded basis and to substitute an entirely new basis for recovery, to wit, an allegation that defendant was liable because the automobile in question belonged to defendant and was operated at the time in question with defendant's consent.

Page v Constr. Co., 219-1017; 257 NW 426

Cross complaint—when allowable. In an action by an administrator for damages consequent on the alleged negligent killing by defendant of the intestate in a collision between automobiles, the defendant may cross-petition for damages against the administrator personally under the allegation that the deceased at the time of said collision was negligently operating an automobile which was personally owned by said administrator and was so doing with the consent of said owner. And this is true irrespective of the personal residence of the administrator.

Ryan v Amodeo, 216-752; 249 NW 656

Conditional sales—ownership in vendee. When a motor vehicle is sold under a conditional sales contract, altho the seller retains legal title for the purpose of security, the ownership of the car passes to the buyer.

Hansen v Kuhn, 226-794; 285 NW 249

Conditional sales—motor vehicles—ownership. An instruction was erroneous in stating that a conditional sales contract, containing a clause that title remained in seller, left the ownership of an automobile in the seller. The buyer became the substantial and beneficial owner under the contract, and §4964, C., '35 [§5002.07, C., '39], stating that title to motor vehicle shall not be deemed to pass until transferee has received and written his name on the registration certificate, is not construed to make seller liable as owner of the vehicle.

Craddock v Bickelhaupt, 227-202; 288 NW 109

IV IMPUTED NEGLIGENCE—continued
(d) OWNER'S CONSENT TO OPERATION—continu'd

Former statute revised—legislative construction. When the motor vehicle statutes were completely revised and exempted the vendor of a motor vehicle, under a conditional sales contract, from liability for negligent operation of the vehicle, such revision did not create a legislative construction that a former statute defining "owner" as the person with the use or control of a vehicle included such vendor within its definition, as a general revision of the laws creates no presumption of an intent to change the law, as is created when a particular section or a limited part of an act is re-enacted.

Hansen v Kuhn, 226-794; 285 NW 249

Assignee from conditional sale vendor not the owner of motor vehicle. The assignee from the vendor of a truck under a conditional sales contract did not have either the "lawful ownership, use or control" or "the right to the use or control" of the truck, and could not be considered as "owner" under a former statute which said that any person coming within those specifications should be included in the term "owner".

Hansen v Kuhn, 226-794; 285 NW 249

Conditional seller not "owner"—nonliability. Statute making owner of automobile liable for damage caused by its operation when being driven with owner's consent, held not to extend to seller of automobile under conditional sales contract even when, under the contract of sale, seller retained title, for the buyer is the beneficial, equitable, and substantial owner, and the seller retains only naked title subject to complete divestation upon payment of the final installment of the purchase price.

Craddock v Bickelhaupt, 227-202; 288 NW 109

Conditional sale vendor not liable for negligence of vendee. The vendor of a motor vehicle under a conditional sales contract and his assignee are not to be held responsible for the negligent operation of the vehicle by the vendee on the ground that they have a duty to see if the vendee is responsible before turning him loose on the highway with a dangerous instrumentality.

Hansen v Kuhn, 226-794; 285 NW 249

Ownership—relevant proof. On the issue of the ownership of an automobile, the contract of sale to the alleged owner is relevant and material.

Kimmel v Mitchell, 216-366; 249 NW 151

Ownership of car—futile evidence. Evidence that an automobile of a certain make was, at the time of a collision, occupied by a husband and wife, that it carried a registration plate of the county of which said parties were residents, and that said car was being operated by the husband, furnishes no prima facie proof of the wife's ownership of the car.

Putnam v Bussing, 221-871; 266 NW 559

Ownership—incompetent evidence. On the issue of ownership of a motor vehicle (arising on the allegation that said vehicle was being operated with the consent of the owner), neither of the following is admissible:

1. A certified copy of a purported application for registration of said vehicle when said purported application is neither signed by nor sworn to by any person. For an added reason is this true when said certification fails to identify said application as a record of any public office; nor

2. An unauthenticated copy of a purported duplicate certificate of registration of said vehicle, especially when said certificate fails to carry the signature of the purported owner of said vehicle.

Putnam v Bussing, 221-871; 266 NW 559

Ownership—Missouri certificate of ownership—conclusiveness. A duly issued and outstanding certificate of ownership of a motor vehicle, issued by the secretary of state of the state of Missouri under the statute law thereof (§3, Art. 16, Public Acts of 1923), is absolutely conclusive in said state as to such ownership, and will be recognized and accorded the same force and effect in this state, said statutes not being violative of the public policy of this state.

Enfield v Butler, 221-615; 264 NW 546

Indispensable element. The consent of such owner to such operation is an indispensable element of the owner's liability.

McLain v Armour & Co., 205-343; 218 NW 69

Presumption from ownership—evidence to refute. Admission of ownership of a motor vehicle involved in a collision establishes, prima facie, that the vehicle was being operated with the consent of the owner and to avoid such finding there must be some showing to the contrary.

Wolfson v Lumber Co., 210-244; 227 NW 608
Enfield v Butler, 221-615; 264 NW 546
Mitchell v Underwriters, 225-906; 281 NW 832

Consent of owner—harmless assumption. The assumption in instructions of the fact that an automobile was being operated with the consent of the owner does not constitute reversible error when the evidence bearing on the element of consent was the one persuasive and unquestioned fact that the owner was riding in the car with the driver thereof at the time of the accident.

Hoover v Haggard, 219-1232; 260 NW 540

Presumption. Presumptively, the owner of an automobile is in control of his own car, but he may rebut the presumption and show that

the car was being operated without his consent.

Waldman v Motor Co., 214-1139; 243 NW 555

Inference—burden of proof. An inference arises from the ownership of an automobile that it was operated with the owner's consent, or under his direction, and the owner has the burden of establishing that such was not the case.

McCann v Downey, 227-1277; 290 NW 690

Custom of driver—jury question. A jury question is created on the issue whether an automobile was being operated with the consent of the owner by testimony that the driver had habitually used the car for business and pleasure both before and after the accident, even tho the counter testimony of the owner that he had expressly forbidden the use of the car on the occasion in question was not directly contradicted.

Lange v Bedell, 203-1194; 212 NW 354; 27 NCCA 531; 29 NCCA 323

See Tigue Sales v Motor Co., 207-567; 221 NW 514

Presumption from ownership—force and effect. Proof by plaintiff, in an action for damages consequent on the negligent operation of an automobile, that said vehicle, on the occasion in question, was driven by one of the defendants and was owned by the other defendant, generates a presumption that said driving was "by consent" of said owner; but said presumption, while all-sufficient in the first instance, cannot prevail against positive, unimpeached evidence to the contrary unless plaintiff reinforces it with additional evidence sufficient to make a jury question.

Hunter v Irwin, 220-693; 263 NW 34

Brother allowed to keep car—consent presumed. Where the owner of a car allowed his brother to keep the car much of the time and use it and the brother allowed a third person to use the car and the third party had an accident, the proof of ownership established, prima facie, that the car was being operated for the owner, and this inference could not be overcome by vague testimony.

Olinger v Tiefenthaler, 226-847; 285 NW 137

Overcoming inference of consent. The inference that an automobile operated by one person and owned by another person was operated with the consent of the owner is wholly overcome by uncontradicted evidence that the car was being operated against the positive command of said owner, and compels the court, in such a case, to direct a verdict against the plaintiff.

Robinson v Shell Corp., 217-1252; 251 NW 613

Consent to operation—jury question. Proof that an automobile at the time of a collision (1) was operated by one defendant, (2) was owned by another defendant, and (3) was under lease exceeding ten days to yet another defendant generates a jury question on the issue whether the car was operated with the consent of the owner, and also with the consent of the lessee; and such jury question survives as to the owner and as to the lessee until each, for himself, negatives such consent by undisputed and uncontroverted testimony. And the most positive denials of consent cannot be deemed "undisputed and uncontroverted" when the facts and circumstances attending the operation of the car tend to prove that the owner and lessee did consent.

Greene v Lagerquist, 217-718; 252 NW 94

"Family-car" doctrine inapplicable to foster son. The naked fact that the driver of an automobile is the foster son of the owner of the car, affords no basis, in and of itself, for an inference or presumption that said driving was "by consent" of said owner, when the foster son has attained his majority and is dependent on himself for support.

Hunter v Irwin, 220-693; 263 NW 34

Evidence—jury question. Evidence that 15-year-old son, who often drove family car, had permission to drive the car to choir practice and also to a high school pep meeting, raised a jury question as to whether or not the son was driving with his father's consent at the time of the accident which occurred after the pep meeting.

McCann v Downey, 227-1277; 290 NW 690

Erroneous instructions. In a joint action against the owner of an automobile and against the driver thereof based on the alleged negligent operation of the car, it is erroneous to require the jury to find for both defendants, or against both defendants, when the consent of the owner to the operation in question is distinctly in issue.

Jarvis v Stone, 216-27; 247 NW 393

Joint action against owner and operator—erroneous instructions. In a joint action against the owner and operator of an automobile the evidence, manifestly, may be such as to justify a verdict against the operator and in favor of the owner, and in such cases instructions holding the owner liable in case the jury finds the operator liable are fundamentally erroneous.

Gehlbach v McCann, 216-296; 249 NW 144

Unallowable verdicts. In a joint action for damages against the driver and owner of an automobile, based, as to the driver, on his negligence, and as to the owner, on his consent to the driving (as to which consent the proof is substantially conclusive), there cannot legally be separate verdicts, one holding the driver liable, and one holding the owner nonliable.

Hoover v Haggard, 219-1232; 260 NW 540

IV IMPUTED NEGLIGENCE—continued
(d) OWNER'S CONSENT TO OPERATION—conclud'd

Responsibility between defendants — jury question. In an action for injuries sustained by a passenger riding in a taxicab, the question of responsibility for the accident between the owner of the cab, the driver, and a party to an agreement under which the cab was operated, was a jury question.

Womochil v Peters, 226-924; 285 NW 151

Liability of bailor. The bailor of an automobile is personally liable to a third person for damages consequent on the negligent operation of the car by the bailee. (§5026, C., '24.)

Robinson v Bruce Co., 205-261; 215 NW 724; 61 ALR 851; 28 NCCA 626; 30 NCCA 90

Due process—liability of bailor. The statute which renders the bailor of an automobile liable to third persons for damages consequent on the negligent operation of the car by the bailee is not violative of the due process clause of the constitution.

Robinson v Bruce Co., 205-261; 215 NW 724; 61 ALR 851; 28 NCCA 626; 30 NCCA 90

Liability of owner. The owner of an automobile by consenting to its operation by another renders himself liable in damages consequent on either a negligent or reckless operation by such other person.

White v Center, 218-1027; 254 NW 90

Joint negligence. The owner of an automobile who permits another person to drive it is liable for the joint negligence of the driver and a third party riding with said driver.

Tissue v Durin, 216-709; 246 NW 806

Negligence of borrower imputable to lender. One who borrows an automobile becomes, by force of our statute, the agent of the lender in the operation of the car. It necessarily follows that the negligence of the borrower is imputable to the lender and is a bar to the recovery of damages by the lender in an action against a third party, if such negligence contributed to the injury and resulting damages.

Secured Fin. Co. v Railway, 207-1105; 224 NW 88; 61 ALR 855; 30 NCCA 90

Loan for specific purpose. Unquestioned evidence that an automobile was loaned by the owner to a party for a specific purpose, and that said party wrongfully used said car for a specifically different purpose, and that the injury in question occurred in the operation of the car while it was being so wrongfully used, establishes the nonliability of the owner as a matter of law.

Heavilin v Wendell, 214-844; 241 NW 654; 83 ALR 872

Nonliability of owner. The owner of an automobile is not liable for damages done by his car consequent on the negligent operation of the car by the proprietor of a garage who, without the knowledge of said owner, and as an independent contractor, was towing said car to his place of business in order to repair it; nor is a nonowner of the car, who directed the garageman to take the car and repair it, liable for said damages.

Johnson v Selindh, 221-378; 265 NW 622; 39 NCCA 289, 565

Operation by nonowner—unnecessary proof. In an action for damages consequent on the operation of an automobile by nonowner thereof, plaintiff need not show that such nonowner was in the employ of the owner, or was the agent of the owner or was transacting the business of the owner.

Tigue Sales v Motor Co., 207-567; 221 NW 514

Owner liability—negligence of driver—truck operated by wife. An owner permitting and directing his wife, in driving a truck, to back up the truck 2 or 3 feet is liable in damages if she does so negligently.

Johnston v Johnson, 225-77; 279 NW 139; 118 ALR 233

Municipally owned automobiles. This section does not embrace the ownership of public property used solely for governmental purposes.

Bateson v County, 213-718; 239 NW 803

Road grader not a "car". A caterpillar road grader belonging to a county and operated on the public highway is not a "car" within the meaning of the statutory declaration that the owner of a "car" is liable for damages done by the car when it is operated with his consent.

Bateson v County, 213-718; 239 NW 803

(e) COMMON ENTERPRISE

Fundamental basis of doctrine. If two or more persons unite in the joint prosecution of a common purpose, under such circumstances that each has authority, express or implied, to act for all in respect to the conduct or the means of agency employed to execute such common purpose, the negligence of any one of them in the management thereof will be imputed to all of the others.

This doctrine is based on the relation of agency existing between the parties engaged in the common enterprise.

Carpenter v Wolfe, 223-417; 273 NW 169

Common enterprise. The contributory negligence of a husband will be imputed to his wife when they are engaged in a joint or common enterprise.

Lindquist v Thierman, 216-170; 248 NW 504; 87 ALR 893; 34 NCCA 309

Negligence of husband imputable to wife. Proof that a husband and wife, riding together

in an automobile on the highway, were engaged in a common enterprise is insufficient to justify the imputation of the husband's negligence to the wife. The proof should further show that the wife had some control over the car and the driver thereof.

Fry v Smith, 217-1295; 253 NW 147
Hough v Freight Service, 222-548; 269 NW 1
Carpenter v Wolfe, 223-417; 273 NW 169

Passenger—common enterprise—limitation. The negligence of the driver of an automobile cannot be deemed the contributory negligence of a passenger, on the claim that the driver and passenger were engaged in a common enterprise, unless the passenger has the right, in some manner, to control the operation of the automobile.

Stingley v Crawford, 219-509; 258 NW 316

Joint adventure or common enterprise. The doctrine that when parties are engaged in a joint adventure or common enterprise each is the agent of the other for the purpose of executing the adventure or enterprise, and that the negligence of one is the negligence of all other co-adventurers, has no application to an action by one joint adventurer against another joint adventurer based on the negligence of the latter.

White v McVicker, 216-90; 246 NW 385; 34 NCCA 416
White v McVicker, 219-834; 259 NW 465

Joint enterprise between driver and passenger—giving directions to reach destination insufficient. A joint enterprise is not shown between a driver of an automobile and his passenger when the passenger neither drove the car at any time nor exercised any control over its operation, but merely directed the driver which way to go so that the driver might view a team of mules which he was interested in buying.

Churchill v Briggs, 225-1187; 282 NW 280

Erroneous direction of verdict. An order for a new trial is, of course, proper when the judgment entered was ordered by the court on an erroneous theory of the law on a material point. So held where the court treated both plaintiff and defendant as joint adventurers and directed a verdict against plaintiff on the erroneous theory that defendant's negligence was imputable to the plaintiff.

Thompson v Farrand, 217-160; 251 NW 44; 34 NCCA 398

(f) TO PASSENGER IN ACTION AGAINST THIRD PARTY

Driver's negligence not imputed to passenger. The negligence of a motor vehicle driver is not ordinarily imputed to a passenger; however, such passenger must show the exercise of ordinary care.

Williams v Kearney, 224-1006; 278 NW 180

Common enterprise. The negligence of the driver of an automobile cannot be deemed the contributory negligence of a passenger, on the claim that the driver and passenger were engaged in a common enterprise, unless the passenger has the right in some manner to control the operation of the automobile.

Stingley v Crawford, 219-509; 258 NW 316

Negligence of driver not imputed to passenger. The negligence of the driver of an automobile—he having full management, control, and supervision of it—is not imputable to his passenger.

Meggers v Kinley, 221-383; 265 NW 614
Kehm v Dilts, 222-826; 270 NW 388

Contributory negligence of driver-host not imputed to passenger. The passenger in an automobile who is injured in a collision with another car may, notwithstanding the contributory negligence of the driver-host, recover his damages from the owner and operator of said other car on proof, (1) that said owner and operator were proximately negligent, (2) that he—the passenger—had no control over his driver-host, and (3) that he—the passenger—was free from contributory negligence; and the assignee of such damages, even tho he be the driver-host, may recover on such assignment on the same conditions, and the court must so instruct, even tho said driver-host could not, because of his contributory negligence, recover damages personal to himself.

Keller v Gartin, 220-78; 261 NW 776
Schwind v Gibson, 220-377; 260 NW 853; 37 NCCA 640

Passenger. The negligence of the driver of an automobile is not imputable to his passenger, they not being engaged in a joint or common enterprise. And the court should not instruct that such negligence is imputable simply because defendant pleads that the driver's negligence was the sole cause of the injury sued for.

Albert v Maher Bros., 215-197; 243 NW 561

Child passenger. The negligence of the driver of a conveyance in which a child is riding is, in an action by the child against a third party for damages, wholly immaterial as far as said child is concerned unless said negligence is the sole cause of the damages. (See Vol. I, §5028, Anno. 13.)

Armstrong v Waffle, 212-335; 236 NW 507; 5 NCCA(NS) 763

Collision with overtaking and passing vehicle. In a personal injury action arising out of a collision occurring when the automobile in which plaintiff was riding with husband-driver was passing a truck which attempted to make a left turn into driveway of a farm just as the automobile came alongside, held, that statute relating to speed, which requires reasonable speed with due regard to existing

IV IMPUTED NEGLIGENCE—continued
(f) TO PASSENGER IN ACTION AGAINST THIRD PARTY—continued

conditions, the truck being the only "existing condition" at the time and place of accident, was inapplicable, and the court properly instructed jury only on the statute governing passing vehicles as affecting automobile driver's contributory negligence, which would be imputed to plaintiff by court's former instruction.

Monen v Jewel Tea Co., 227-547; 288 NW 637

Wife riding with husband—nonduty to warn. A wife, while riding in an automobile owned and operated by her husband, and over the movements of which automobile she neither has nor attempts to have control, is under duty to exercise, for her own safety, ordinary care in view of the circumstances, but this duty does not require the wife, in order to escape the imputation of contributory negligence, to maintain an attitude of watchfulness and warning and protest to the husband of possible dangers.

Carpenter v Wolfe, 223-417; 272 NW 169

Imputing husband's negligence to wife. A wife who was riding in the front seat of a car driven by her husband did not have such control or right to direct the movements of the car that the negligence of the husband should be imputed to her, even tho she may have suggested that he should not drive faster than 35 miles an hour.

Newman v Hotz, 226-834; 285 NW 287

Husband and wife. The negligence, if any, of a husband in the operation of an automobile owned by him and used on the occasion of a funeral of one of his relatives is not imputable to his wife who was riding with him. (See Vol. I, §5028.)

Stilson v Ellis, 208-1157; 225 NW 346

Negligence of husband not imputable to wife. Proof that a husband and wife, riding together in an automobile on the highway, were engaged in a common enterprise is insufficient to justify the imputation of the husband's negligence to the wife. The proof should further show that the wife had some control over the car and the driver thereof.

Fry v Smith, 217-1295; 253 NW 147
Hough v Freight Service, 222-548; 269 NW 1

Occupant injured — imputed negligence of driver. Where a car collided with a stalled tractor-trailer, jackknifed on an icy hill at night, the question of plaintiff's contributory negligence was properly submitted to the jury, where it is shown the tractor, with lighted head lamps, standing on the right side of the highway, diverted plaintiff's and husband-driver's attention, and, there being no reasonable apparent cause to suspect that trailer blocked the left side of highway, and, where jury could find that car in which plaintiff was riding was proceeding at less than 20 miles per hour, and, that plaintiff and husband-driver were looking straight ahead, there is no warrant for saying plaintiff was contributorily negligent as a matter of law; however, under the record, the negligence of the husband-driver, if any, could not be imputed to plaintiff.

Johnson v Transp. Co., 227-487; 288 NW 601

Collision with stalled truck. Where a car collided with a truck-trailer which had stalled on an icy hill at night on a country highway and had jackknifed across the left side of the highway on which plaintiff's husband was driving, the question of the husband's negligence in braking his car to such extent that it slid on the ice and collided with the side of the trailer, in the absence of any other evidence that car went out of control, held, that question of negligence of the husband as the sole proximate cause of the collision was properly submitted to the jury, and even tho it may be conceded that husband was negligent, it cannot be said, as a matter of law, that such negligence was the sole proximate cause of the injury.

Johnson v Transp. Co., 227-487; 288 NW 601

Fundamental basis of doctrine. The negligence of a husband in the operation of an automobile cannot be deemed the contributory negligence of his wife who rides with him—cannot be imputed to the wife—simply because the husband and wife at the time of the negligence in question are engaged in a common enterprise, unless the wife has the right in some manner at the time in question to control the operation of said car.

Carpenter v Wolfe, 223-417; 272 NW 169

Motorcycle passenger riding behind driver—care required. A girl riding on a motorcycle directly behind the driver, and unable to see the road ahead without standing up, thereby endangering the operation of the vehicle, cannot as a matter of law be under duty to warn the driver of impending danger in order to avoid the driver's negligence being imputed to her.

Williams v Kearney, 224-1006; 278 NW 180

Negligence of host—proximate cause. The submission to the jury of interrogatories bearing on the negligence of the driver of a conveyance (in an action by a passenger against a third party for damages) is not erroneous when the negligence of the driver was material on, and strictly confined to, the issue of proximate cause.

Schlinkert v Skaalia, 203-672; 213 NW 219

Imputed negligence—instructions construed. In an unsuccessful action against a railway company for negligently causing the death of a passenger riding in a truck, an instruction as to what acts of the said driver would constitute negligence cannot be deemed to impute

the negligence, if any, of said driver to the passenger when other instructions specifically state, in effect, that the negligence of the driver would be no defense if the negligence of the defendant was found to be the sole proximate cause of said death.

Reidy v Railway, 220-1386; 258 NW 675

Injuries actionable tho driver negligent. An occupant of a car is not deprived of the right to recover for injuries sustained in an accident even tho the driver of the car in which she was riding and also the defendant, who left another car on the highway where it was run into, were both guilty of proximate negligence.

Newman v Hotz, 226-834; 285 NW 287

Unsupported instructions. In a damage action where a truck traversing the crest of a hill on a snow-drifted highway, sideswipes a passenger automobile, the question of contributory negligence of a plaintiff motorist riding in the back seat should not be submitted to the jury in the absence of any claim that plaintiff's driver's negligence, if any, was imputable to the plaintiff or was the sole proximate cause of the accident.

Schalk v Smith, 224-904; 277 NW 303

Consideration of nonimputable negligence. An instruction to the effect that even tho the negligence of a husband with whom the wife was riding could not be imputed to the wife, nevertheless the negligence of the husband could be considered by the jury on the issue whether the negligence of the defendant—the driver of another car—was the proximate cause of plaintiff's injuries, is a correct statement of law, and if plaintiff wishes such instruction modified by a statement as to the law governing the concurrent negligence of different parties, she must request such instruction.

Kuhn v Kjose, 216-36; 248 NW 230

Passenger going to sleep. The fact that a passenger is asleep in an automobile at the time of an accident does not prevent a recovery of damages by him unless there exists some causal connection between the fact of sleep and the accident.

Fry v Smith, 217-1295; 253 NW 147; 36 NCCA 316

Injuries from defects or obstructions in highways and other public places. A passenger in the front seat of an automobile, with opportunity equal to that of the driver to see what is to be seen, and free from any diverting circumstances, cannot surrender himself to the care of the driver and then successfully contend that he (the passenger) was in the exercise of ordinary care.

Hutchinson v Service Co., 210-9; 230 NW 387; 33 NCCA 170

Passenger nonapprehensive of danger. A passenger in an automobile is not guilty of negligence per se, nor is the negligence of the driver imputable to such passenger simply from the fact that the passenger implicitly trusts the driver, when the passenger had no occasion to apprehend any danger until the very instant of the accident. (See Vol. I, §5028, Anno. 13.)

Johnson v Railway, 201-1044; 207 NW 984

Motorcycle passenger vs automobile owner —nonassumption of risk—sudden danger. In action to recover for death of 13-year-old boy resulting from collision between motorcycle, on which he was riding as a passenger, and defendant's automobile, allegation in defendant's answer that decedent assumed risk of motorcycle driver's negligence was properly stricken where pleaded facts and common knowledge justified conclusion that danger of the collision could not have been apparent more than a few seconds of time so that there was no time for deliberation and voluntary assumption of such risk.

Edwards v Kirk, 227-684; 288 NW 875

Passenger—nonassumption of risk. A passenger in an automobile cannot be held to assume the risks arising out of the incompetency, inexperience, or recklessness of the driver unless knowledge on the part of the passenger of such condition or conditions is adequately shown.

Stingley v Crawford, 219-509; 258 NW 316

(g) EMPLOYER AND EMPLOYEE

"Owner" defined. When an automobile actually belongs to an employee, the employer is not also to be deemed an "owner" because in the contract of employment the employee contracts to hold the employer harmless in the operation of the car.

McLain v Armour & Co., 205-343; 218 NW 69

Operation by nonowner—unnecessary proof. In an action for damages consequent on the operation of an automobile by nonowner thereof, plaintiff need not show that such nonowner was in the employ of the owner, or was the agent of the owner, or was transacting the business of the owner.

Tigue Sales v Motor Co., 207-567; 221 NW 514

Negligence of garageman—nonliability of owner. The owner of an automobile is not liable for damages done by his car consequent on the negligent operation of the car by the proprietor of a garage who, without the knowledge of said owner, and as an independent contractor, was towing said car to his place of business in order to repair it; nor is a nonowner of the car, who directed the garageman to take the car and repair it, liable for said damages.

Johnson v Selindh, 221-378; 265 NW 622; 39 NCCA 289, 565

IV IMPUTED NEGLIGENCE—continued
(g) EMPLOYER AND EMPLOYEE—continued

Pleading—nonallowable amendment. A timely brought action based solely on the common-law plea of defendant's liability consequent on the negligent operation of an automobile by defendant's employee, in due course of employment, may not, after the action would be barred by the statute of limitation, be so amended as to wholly abandon said pleaded basis and to substitute an entirely new basis for recovery, to wit, an allegation that defendant was liable because the automobile in question belonged to defendant and was operated at the time in question with defendant's consent.

Page v Constr. Co., 219-1017; 257 NW 426

Consent of owner-employer—effect. An employer, whose automobile is being operated with his consent, is not liable, under this section, to his own employee, for an injury suffered by said employee in consequence of the actionable negligence of said operator of the car, provided said injury is compensable under the workmen's compensation act.

McGraw v Seigel, 221-127; 263 NW 553; 106 ALR 1035

Discharge of employer's liability—effect on third party wrongdoer. Where an injury which is mandatorily compensable under the workmen's compensation act is received by an employee in consequence of the actionable negligence of the operator of an automobile owned by, and operated with the consent of, the employer, the fact that the employer fully discharges his statutory liability to the employee does not ipso facto discharge the legal liability of the said negligent operator to said employee.

McGraw v Seigel, 221-127; 263 NW 553; 106 ALR 1035

Scope of employment. In an action against the owner of an automobile on the theory that the car was being operated by the owner's agent and with the owner's consent, the court may very properly instruct that there could not be a recovery unless the driver was, at the time in question, driving within the scope of his employment—such instruction being directly applicable to the supported claim of said owner.

Ege v Born, 212-1138; 236 NW 75

Abandonment of employment—jury question. Evidence reviewed and held to present a jury question on the issue whether a servant had temporarily abandoned his employment and had not returned thereto at the time of the commission by him of an alleged negligent act.

Heintz v Packing Co., 222-517; 268 NW 607

Employee exceeding authority. Where an employee, contrary to general and specific instructions, drove gas company's truck five miles outside city to take a co-employee home, instead of driving directly to company's shop, there was no such "consent" to use the truck as would make the company liable for its employee's negligence when a collision occurred during the trip.

Usher v Stafford, 227-443; 288 NW 432

Departure of servant from zone of service. When the range or zone of service of an employee embraced the taking of a truck to a place of storage for the night, the act of the employee in temporarily using the truck for his own personal use will not per se absolve the employer from liability for a negligent act by the employee occurring after the employee had resumed his duty to take the truck to its storage place, and while he was pursuing a proper route in the immediate vicinity thereof.

Orris v Tolerton, 201-1344; 207 NW 365; 25 NCCA 549; 34 NCCA 192, 213

Agent borrowing automobile. A telegraph company is not responsible for the act of its messenger in borrowing an automobile with which to make a delivery of a message, when the usual and ordinary way of making delivery was by means of a bicycle, and when the borrowing aforesaid was wholly unauthorized by, and unknown to, the company.

Hughes v Tel. Co., 211-1391; 236 NW 8; 31 NCCA 423

Use of automobile—authority of servant. Evidence reviewed and held to present a jury question on the issue whether a master had impliedly authorized his salesman, in order to perform his duties, to travel about the country by means of the salesman's individually owned automobile.

Heintz v Packing Co., 222-517; 268 NW 607

Employee (?) or independent contractor (?). A salesman who, when traveling from place to place about the country in behalf of the business of another party, employs his own automobile, and does so with the implied authority of said other party, cannot be deemed an independent contractor as to said matter of transportation when he is at all times subject to summary discharge by said other party, and also subject to the orders of said other party as to what he shall do, and when and where he shall do it.

Heintz v Packing Co., 222-517; 268 NW 607

Servant (?) or independent contractor (?) —test. One who is employed to do a certain work is a servant of the employer and not an independent contractor, when he—the one doing the work—is subject to the direction and control of the employer as to the details and method to be followed in the performance of the work. So held as to one operating an automobile oil truck on commission.

Lembke v Fritz, 223-261; 272 NW 300

Dual independent contractors. Where the primary contractor on a highway improvement

sublets the hauling to a second party, and retains no substantial control over said second party except in case of the latter's default, and where said second party in turn sublets to a third party under contract terms substantially similar in effect, neither said third party nor his employees are employees either of said primary contractor or of said second party.

Page v Const. Co., 215-1388; 245 NW 208

Government nonliability for employee's tort —respondeat superior—exception. The exemption accorded counties and other governmental bodies and their officers from liability for torts growing out of the negligent acts of their agents or employees is a limitation or exception to the rule of respondeat superior and in no way affects the fundamental principle of torts that one who wrongfully inflicts injury upon another is individually liable to the injured person.

Montanick v. McMillin, 225-442; 280 NW 608; 4 NCCA(NS) 4

School bus driver as independent contractor —nongovernmental function. A school bus driver furnishing his own bus under a contract embodying certain conditions to transport school children, but not under the supervision, control, and regulation of the board, is an independent contractor liable for his own negligence and not an employee exercising a governmental function.

Olson v Cushman, 224-974; 276 NW 777

Injuries to third persons—liability basis. Every case which allows recovery against a servant can be based not upon any relationship growing out of the employment but upon the fundamental proposition that the servant violated some duty that he owed to the person injured. It may be an act of misfeasance, nonfeasance, or malfeasance.

Montanick v McMillin, 225-442; 280 NW 608

Declarations inadmissible against master. In a joint action against a master and his servant for damages consequent on the negligent operation of the car by the servant, declarations or statements by the servant made several days after the accident and tending to show the negligence of the servant are, while admissible against the servant, not admissible against the master; and the court must by proper instruction, if requested, limit the testimony accordingly.

Droullard v Rudolph, 207-367; 223 NW 100
Wilkinson v Lbr. Co., 208-933; 226 NW 43
Looney v Parker, 210-85; 230 NW 570
Glass v Hutchinson Co., 214-825; 243 NW 352

Subagency—essentials. A subagency cannot arise without the knowledge or consent of either the principal or his agent.

McLain v Armour & Co., 205-343; 218 NW 69

Acting without permit—connivance at violation—effect. A shipper of goods will be deemed as participating in the doing of an illegal act when he enters into a contract with a motor vehicle freight operator for the transportation of freight over the highways of this state by said operator as an independent contractor, and knows, at the time of so contracting, that said operator has no right to carry on his said business because of the failure of said operator (1) to obtain from the board of railroad commissioners (now commerce commission) the legally required official permit to carry on said business, and (2) to file with said board the legally required bond. It follows that said operator will not be deemed an independent contractor but simply the agent of said shipper.

Hough v Freight Service, 222-548; 269 NW 1

V PROXIMATE CAUSE

(a) IN GENERAL

Question of fact—general rules applicable. The question of proximate cause, as a general rule, is a question of fact, and the same rules apply as in other questions of fact.

Blessing v Welding, 226-1178; 286 NW 436

No evidence of other cause. The question whether a certain negligent act was the moving or producing cause—the proximate cause—of an injury is properly submitted to the jury when the record contains evidence which establishes an act which could fairly be such proximate cause and contains no evidence tending to establish any other cause.

Buchanan v Cream Co., 215-415; 246 NW 41

Proximate cause tho not sole cause—instructions. Instructions involving the thought that negligence in the operation of an automobile might be the proximate cause of an injury even tho it was not the sole cause, reviewed, and held not to permit a recovery for negligence which was not the proximate cause of the injury.

Duncan v Rhomberg, 212-389; 236 NW 638

Instructions—"a proximate cause"—nonprejudicial error. In an automobile collision negligence case where plaintiff's son was driving automobile in which plaintiff was riding, an instruction that plaintiff need only prove defendant's negligence to be "a proximate cause" is not prejudicial error when court also instructed that negligence of plaintiff or plaintiff's son barred recovery and the instructions were to be read as a whole.

Rogers v Jefferson, 224-324; 275 NW 874

Proximate cause. The contributory negligence which will defeat a plaintiff is such negligence as contributes to the injury in any way or in any degree. Error results from instructing that such negligence must contribute proximately to the injury.

Hamilton v Boyd, 218-885; 256 NW 290

V PROXIMATE CAUSE—continued
(a) IN GENERAL—continued

Need not be proximate cause of injury. Contributory negligence in order to defeat recovery need not be the proximate cause of the injury in question. It is only necessary that such negligence contributes to the injury in some degree or in some manner.

Hogan v Nesbit, 216-75; 246 NW 270

Negligence of host—proximate cause. The submission to the jury of interrogatories bearing on the negligence of the driver of a conveyance (in an action by a passenger against a third party for damages) is not erroneous when the negligence of the driver was material on, and strictly confined to, the issue of proximate cause.

Schlinkert v Skaalia, 203-672; 213 NW 219

Proximate negligence of different co-defendants. On separate trials of an action for damages against the operators of different vehicles on one of which plaintiff was a passenger at the time she was injured by a collision, defendant is properly denied an instruction to the effect that he cannot be held liable if his co-defendant might be proximately negligent.

Newland v McClelland & Son, 217-568; 250 NW 229

Negligence of outsider as proximate cause. The court must submit to the jury the supported plea that the proximate cause of an accident was the negligence of an outsider—a person not a party to the action.

Hoover v Haggard, 219-1232; 260 NW 540

Third person's negligence. Under instructions properly stating that a plaintiff cannot recover unless defendant's negligence was the proximate cause of his injuries, and in the absence of a requested instruction, there is no error in failing to instruct that if the sole proximate cause of the injury was the negligence of a third person, plaintiff could not recover.

Gregory v Suhr, 224-954; 277 NW 721

Icy highway. The icy condition of a highway may not be said to be the proximate cause of an accident unless it can be said that such icy condition would have brought about the accident irrespective of the negligence assigned in the pleadings and supported by the proofs.

Stilson v Ellis, 208-1157; 225 NW 346

Noncausal negligence. Failure of the driver of a conveyance to keep a proper lookout for other persons using the highway or to keep his windshield clean is quite inconsequential when the proximate cause of the injury in question was the icy condition of the street.

McDowell v Interstate Co., 208-641; 224 NW 58; 31 NCCA 282; 32 NCCA 486

Negligence — unsupported issues. Unsupported issues are very properly and necessarily excluded from the jury. So held as to the issues (1) whether the operator of an automobile failed to maintain a proper lookout, (2) whether he was negligent in stepping out of the car and upon the running board preparatory to cleaning the sleet from the windshield, and (3) whether the snowy and icy condition of the pavement was the proximate cause of an accident.

Winter v Davis, 217-424; 251 NW 770; 39 NCCA 308

Operation without brakes. Record reviewed and held that the proximate cause of an accident was not the condition in which a railway crossing was maintained, but the speed at which an overloaded truck was operated without brakes.

Gable v Kriege, 221-852; 267 NW 86; 105 ALR 539

Insufficient lighting—effect. The operation of an automobile with lights which do not measure up to statutory requirements becomes quite immaterial, in a civil action, if such shortcoming in no manner contributes to the damage.

Hansen v Kemmish, 201-1008; 208 NW 277; 45 ALR 498; 29 NCCA 326; 33 NCCA 100

Violation of statute—avoidance by contributory negligence. Failure of a defendant, the driver of an automobile, to have the headlights on his car displayed at a time required by statute becomes inconsequential when the contributory negligence of the plaintiff was the proximate cause of the injury resulting from the collision.

Sheridan v Limbrecht, 205-573; 218 NW 278; 29 NCCA 300; 35 NCCA 661; 2 NCCA(NS) 417

Lack of proper lamps on trucks or trailers. In an action at law to recover damages for personal injuries sustained by plaintiff when car in which she was riding collided with a tractor-trailer which had stalled on an icy hill on a country highway at night and had jackknifed across the highway, the question of owners' and operators' negligence in failing to comply with statutes prescribing number and place of lamps required on truck or trailer, and whether such negligence, if any, had proximate causal connection with injury sustained by plaintiff, held, under the evidence, properly submitted to the jury.

Johnson v Transp. Co., 227-487; 288 NW 601

Stalled vehicle—absence of signals. The fact that, upon the stalling of a vehicle in the public highway, no lights or signals were erected to show the presence and position of said vehicle cannot be deemed the proximate cause of a collision with the stalled vehicle when the driver of the colliding vehicle discovered the presence and position of the stalled car in ample time

to stop had he been so driving as to be able to stop within the assured clear distance ahead.

Albrecht v Const. Co., 218-1205; 257 NW 183; 36 NCCA 713

Parking in highway—absence of lights. Negligence alleged to have been the proximate cause of a collision and asserted in the plea that defendant's truck (1) was parked, in the nighttime, diagonally across the entire right-hand side of a paved highway, and (2) without lights, with substantial evidence pro and con, both as to the position of the truck and as to the lights, necessarily presents a jury question.

Schwind v Gibson, 220-377; 260 NW 853; 37 NCCA 496

Parking on left side without tail light—bicyclist colliding. Section 5056, C., '35 [§5030.08, C., '39], requiring parking on right side of city street, was in effect in city which had not adopted any ordinance to the contrary under authority of §4997, C., '35 [§5018.01, C., '39], and §5045, C., '35 [§§5033.07, 5033.08, C., '39], in view of its legislative history, required red tail light upon automobile parked at night upon city street. The purpose of these statutes was protection and warning of traffic, and violation thereof without legal excuse was negligence, but whether such negligence was proximate cause of a bicyclist's collision with an automobile so parked was question for jury.

Trailer v Schelm, 227-780; 288 NW 865

Unavailable negligence. A general allegation of negligence in leaving a stalled automobile in the highway unattended is not available to a traveler who had the fullest knowledge of the presence of the automobile long before he reached and collided with it; and especially when the leaving of said car in the highway was not the proximate cause of the injury that was suffered.

Scoville v Bakery, 213-534; 239 NW 110; 35 NCCA 719; 36 NCCA 94

Stalled motorist—freedom from negligence—requested instruction—jury question. In a damage action for personal injuries arising out of a motor vehicle collision, the burden is on plaintiff to establish (1) the defendant's negligence, (2) such negligence as the proximate cause of the injury, and (3) plaintiff's freedom from contributory negligence. Hence, a motorist who stands in the center of the road near the rear of her automobile stalled on the highway, attempting to stop a following motorist, and, tho having the opportunity, fails to seek a place of safety when she sees the approaching motorist apparently will crash into her stalled automobile, is neither entitled to an instruction establishing her freedom from contributory negligence as a matter of law, nor to a directed verdict against the defendant.

Murchland v Jones, 225-149; 279 NW 382

Collision with stalled truck. Where a car collided with a truck-trailer which had stalled on an icy hill at night on a country highway and had jackknifed across the left side of the highway on which plaintiff's husband was driving, the question of the husband's negligence in braking his car to such extent that it slid on the ice and collided with the side of the trailer, in the absence of any other evidence that car went out of control, held, that question of negligence of the husband as the sole proximate cause of the collision was properly submitted to the jury; and even tho it may be conceded that husband was negligent, it cannot be said, as a matter of law, that such negligence was the sole proximate cause of the injury.

Johnson v Transp. Co., 227-487; 288 NW 601

Child on sled—parked truck. A truck which is legally parked alongside the curb of a public street is not the proximate cause of an injury to a child whose sled was deflected into the truck by a bump in the street.

Dennier v Johnson, 214-770; 240 NW 745; 35 NCCA 717

Avoiding contributory negligence. A streetcar motorman who plainly sees that the driver of another conveyance is negligently placing himself in a position of danger on the tracks, or is about to do so, and by ordinary care can avoid an accident and fails to do so, must be deemed guilty of negligence which is the proximate cause of the accident, irrespective of the negligence of the injured party.

Lynch v Railway, 215-1119; 245 NW 219

Turning to left—streetcar. Evidence reviewed, and held that the act of a motorist in turning to the left on meeting a streetcar, instead of stopping, was the proximate cause of an injury to a pedestrian in the street, rather than the act of the streetcar operator in allowing the streetcar to turn to the left on a curve before stopping.

Moss v Railway, 217-354; 251 NW 627

Speed—when nonproximate cause. The operation of an automobile, even at an excessive speed, alongside a moving streetcar and in the direction in which the streetcar is moving, is not the proximate cause of an injury to a pedestrian who suddenly darts across the streetcar track ahead of the moving streetcar, and into the line of automobile travel, and is hit by the automobile.

Pettijohn v Weede, 209-902; 227 NW 824; 35 NCCA 5

Speed as nonproximate cause. A rate of speed which is not negligence per se cannot be deemed the proximate cause of an accident when the act of the injured party in stepping into the pathway of the car was so sudden and unexpected as to render impossible the stopping of the car.

Howk v Anderson, 218-358; 253 NW 32; 35 NCCA 1

V PROXIMATE CAUSE—continued
(a) IN GENERAL—concluded

Stepping into path of automobile. The negligence of a pedestrian, who left a position of safety on a curb and walked directly into the path of an automobile which struck him, was the proximate cause of the accident, and under the circumstances the rate of speed of the car was not material.

Ward v Zerzanek, 227-918; 289 NW 443

Noncausal negligence. Excessive or negligent speed of an automobile becomes immaterial when it is not the proximate cause of the injury in question.

McDowell v Interstate Co., 208-641; 224 NW 58; 35 NCCA 21

Crutchley v Bruce, 214-731; 240 NW 238; 35 NCCA 25

Attempting to dodge car. The act of a pedestrian, while crossing a street, in attempting to dodge an oncoming car, may constitute the proximate cause of the injuries suffered by him. So held where the pedestrian evidently stepped or turned back directly in front of said car.

Kortright v Strater, 222-603; 269 NW 745

Jury question on proximate cause. Conflicting testimony as to the speed of the defendant's truck while following pick-up truck on an icy street, and as to the distance between the trucks when the one in front skidded and turned around, presented a jury question as to whether the driver of the defendant's truck was guilty of negligence in colliding with the pick-up truck, forcing it over a curb where it struck the plaintiff, and whether such negligence, if any, was the proximate cause of the plaintiff's injuries.

Remer v Takin Bros., 227-903; 289 NW 477

Racing as proximate cause—evidence. On the issue whether two automobiles were racing and whether such race was the proximate cause of an injury to a third party, the court may, in its discretion, refuse to receive evidence of racing remote in point of time unless evidence of racing immediately before the accident is first introduced.

Glass v Hutchinson Co., 214-825; 243 NW 352

Sudden stopping of cars—proximate cause. Evidence held affirmatively to show that the stopping of three cars on the highway was not the proximate cause of a collision between a fourth car and a car traveling in the opposite direction from the three stationary cars.

Foster v Flaugh, 223-40; 271 NW 503

Failure to signal "stop" — nonproximate cause. Failure of the driver of a truck to give a visible signal of his intention to stop is not the proximate cause of a collision with an automobile approaching from the rear when the driver of the oncoming rear car did not see the truck until an instant before the collision, and, therefore, had not regulated or gauged his speed with the speed of the truck ahead.

Isaacs v Bruce, 218-759; 254 NW 57

Assured clear distance ahead—proximate negligence. The driver of a vehicle who, on a clear and unobstructed road, and at a distance of 250 feet, sees a substantial object on the right-hand side of the road ahead, and at a distance of 150 feet discovers that the object is a truck, and at a distance of 25 feet discovers that the truck is stationary, and thereupon, because of unslackened speed, is unable to avoid hitting the truck by turning to the left into the unobstructed part of the road, is guilty of a negligence which is the proximate cause of the resulting collision.

Albrecht v Const. Co., 218-1205; 257 NW 183; 36 NCCA 713; 1 NCCA(NS) 15

Failure to see stalled car in fog. When, on a foggy night, a car ran into another car which was parked on the highway, and the proof did not show that the stalled car was plainly visible, it was error for the court on motion to rule that the negligence of the driver of the car which ran into the other car was the sole proximate cause of injuries sustained by an occupant of the moving car.

Newman v Hotz, 226-834; 285 NW 287

Driving into side of train. Evidence which is solely to the effect that, on a misty and foggy night, a freight train was standing across a public railway crossing without any visible warning whatever of its presence, except the train itself, reveals no negligence (if it be deemed negligence) on the part of the railway company or its employees which can be deemed the proximate cause of an accident to a motorist who drove his car along the public highway and into the side of said train.

Dolan v Bremner, 220-1143; 263 NW 798

(b) DEFINITION

Proximate cause defined. Negligence is the proximate cause of an injury which follows such negligent act, if it can be fairly said that in the absence of such negligence the injury or damage complained of would not have occurred.

Buchanan v Creamery Co., 215-415; 246 NW 41

Dennis v Merrill, 218-1259; 257 NW 322

Gray v Des Moines, 221-596; 265 NW 612

(c) INTERVENING CAUSE

Negligence—intervention of second force—determining liability. Where an injury results through the operation of a second force, ordinarily liability depends upon whether or not that second force may be anticipated to be

the natural and probable consequence of the negligent act of the first party.

Blessing v Welding, 226-1178; 286 NW 436

Negligence—intervening third party's act. Where the act of a third party, even if it is negligent, intervenes between the original negligence of defendant and the injury, there is "proximate cause" if, under the circumstances, an ordinarily prudent man could or should have anticipated that such intervening act, or a similar intervening act, would occur.

Blessing v Welding, 226-1178; 286 NW 436

Negligence—"superseding cause"—liability—effect. The fact that an intervening act of a third party is negligent in itself, or is done in a negligent manner, does not make it a "superseding cause" of harm to another if the actor should have realized that a third person might so act, or a reasonable man knowing the situation would not regard it as highly extraordinary that the third person had so acted, or the intervening act is a normal response to the situation created by actor's conduct and manner in which it is done is not extraordinarily negligent.

Blessing v Welding, 226-1178; 286 NW 436

Third person's hazardous acts—liability of first person. If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes a person negligent, such act whether innocent, negligent, intentionally tortious, or criminal does not prevent the first person from being liable for injury caused thereby.

Blessing v Welding, 226-1178; 286 NW 436

Speed of train—driving upon crossing. If the jury might properly find that the concurrent negligence of defendant and of a third party caused the injury or death of a nonnegligent person, the court cannot properly direct a verdict for defendant on the theory that the negligence of said third party was an intervening negligence which wholly supplanted and superseded the negligence of the said defendant. So held where the concurring negligence was (1) that of defendant in operating its train over a crossing at an unlawful rate of speed, and (2) that of the operator of an automobile in driving upon said crossing.

Wright v Railway, 222-583; 268 NW 915

Streetcar turning to left. Evidence reviewed, and held that the act of a motorist in turning to the left on meeting a streetcar, instead of stopping, was the proximate cause of an injury to a pedestrian in the street, rather than the act of the streetcar operator in allowing the streetcar to turn to the left on a curve before stopping.

Moss v Railway, 217-354; 251 NW 627

Negligence—proximate cause (?)—intervening cause (?). In making a left-hand turn into an intersecting road, negligence on the part of a westbound driver, (1) in failing to drive to the right and beyond the center before turning, or (2) in failing to note whether he could make the turn in safety, is not the proximate cause of injuries received by him by being hit by an eastbound car after he had completed the turn and was wholly on the intersecting road.

Enfield v Butler, 221-615; 264 NW 546

Street defect as cause of collision. The proximate cause of a collision between motor vehicles on a public street may be the defective condition which the city has long permitted to exist in a portion of its street, provided said condition, in view of all the relevant facts, was such as to reasonably charge the city with knowledge that some accident would probably result therefrom to motor vehicles and to the occupants thereof traveling over said defect. Phrased otherwise, where a city has long maintained in and on one side of its street a defect of such nature that an automobile passing over the defect was thereby swerved out of its course and onto the opposite side of the street where it collided with another vehicle properly moving in the opposite direction, the city cannot properly contend that said collision was an independent, intervening, and efficient cause which prevented the negligence of the city from being the proximate cause of the resulting injuries, when the jury might justly find that said defect, in view of all the relevant facts, was such as to reasonably charge the city with knowledge that some accident would probably result therefrom to motor vehicles and to the occupants thereof traveling over said defect.

Gray v Des Moines, 221-596; 265 NW 612; 104 ALR 1228

Accident causing injury—death following—jury question. Where a healthy, normal boy of 17 dies from an ear infection and mastoid involvement, the symptoms of which began shortly after the upsetting of a school bus in which he was riding, a jury question is created as to whether such accident was the moving or producing—the proximate—cause of the injury and death.

Olson v Cushman, 224-974; 276 NW 777

Children on sleds hooked to vehicle—speed as proximate cause of injury. Where children on sleds hooked to the rear of a moving automobile became frightened at the speed of the car, released their sleds, and in so doing turned aside into the path of an oncoming vehicle, whereby they were injured, such turning aside by the children did not prevent the motor vehicle operator's negligence from being the proximate cause of their injury.

Samuelson v Sherrill, 225-421; 280 NW 596

Collision—trucker struck while retrieving goods scattered on highway. A defendant-motorist's negligence in striking a truck stop-

V PROXIMATE CAUSE—continued
(c) INTERVENING CAUSE—concluded

ped on the highway is not the proximate cause of a later injury to the trucker by another motorist, who struck him while he was attempting to remove his merchandise spilled on the highway. The latter intervening cause was the proximate cause of his injury.

McClure v Richard, 225-949; 282 NW 312

Sudden emergency — nonnegligence. A motorist who, while operating his car easterly on the south or right-hand side of a paved road at 50 miles per hour (tho the night is misty and visibility is poor), is unexpectedly, violently, and negligently so hit by the car of another motorist as to be deflected to the north or left-hand side of the road and into collision with an oncoming westbound car, cannot, as to said latter collision, be deemed negligent because instantly when so deflected his hand involuntarily dropped from his steering wheel and his foot unintentionally reached the accelerator of his car instead of the brake.

Rich v Herny, 222-465; 269 NW 489

(d) CONCURRENT AGENCIES

Negligence liability. Principle reaffirmed that when two parties by their concurrent negligence injure a nonnegligent third party, both of said two parties are liable for the resulting damages suffered by said third party.

Andersen v Christensen, 222-177; 268 NW 527

Concurring negligence—no directed verdict. A defendant whose negligence operates proximately to produce an injury to a passenger in another car is not entitled to a directed verdict because the host of such injured party was guilty of negligence which also operated proximately to produce said injury.

Wolfson v Lumber Co., 210-244; 227 NW 608

Proximate cause not sole cause. Principle reaffirmed that certain negligent acts on the part of one party may be the proximate cause of an injury even tho they concurred with certain negligent acts of another party.

Duncan v Rhomberg, 212-389; 236 NW 638

Proximate and concurring cause. If the negligence of the operator of an automobile proximately operates to produce a damage, he is liable therefor, even tho another concurring cause operates at the same time to bring about said damages; and in such case it is quite immaterial whether the concurring cause was or was not negligently put into operation.

Judd v Rudolph, 207-113; 222 NW 416; 62 ALR 1174; 1 NCCA(NS) 184

Proximate negligence of different co-defendants. On separate trials of an action for damages against the operators of different vehicles on one of which plaintiff was a passenger at the time she was injured by a collision, defendant is properly denied an instruction to the effect that he cannot be held liable if his co-defendant was proximately negligent.

Reason: Both defendants might be proximately negligent.

Newland v McClelland, 217-568; 250 NW 229

Collision resulting in collision. The act of the driver of an automobile in negligently running into a wagon and team on the highway and causing the team to run away may be the proximate cause of a later collision between said runaway team and another automobile, provided said latter collision was the natural or likely result of the first collision; and this is true tho the first driver did not foresee or apprehend said second collision.

Dennis v Merrill, 218-1259; 257 NW 322; 1 NCCA(NS) 175

Consideration of nonimputable negligence. An instruction to the effect that even tho the negligence of a husband with whom the wife was riding could not be imputed to the wife, nevertheless the negligence of the husband could be considered by the jury on the issue whether the negligence of the defendant—the driver of another car—was the proximate cause of plaintiff's injuries, is a correct statement of law, and if plaintiff wishes such instruction modified by a statement as to the law governing the concurrent negligence of different parties, she must request such instruction.

Kuhn v Kjose, 216-36; 248 NW 230

Negligence of different agencies—jury question. Where the evidence demonstrates that an injury resulted from the negligence of two agencies, the question of proximate cause is peculiarly one for the jury.

Schwind v Gibson, 220-377; 260 NW 853

Passenger—injuries actionable tho driver negligent. An occupant of a car is not deprived of the right to recover for injuries sustained in an accident even tho the driver of the car in which she was riding and also the defendant who left another car on the highway where it was run into were both guilty of proximate negligence.

Newman v Hotz, 226-834; 285 NW 287

Sudden stopping of car on curve. The driver of an automobile who is on the right-hand side of the road at a curve and driving at a proper speed is not guilty of negligence in suddenly applying the brakes in order to avoid hitting an overtaking and passing car which unexpectedly swerved in front of him, and in order to prevent his own car going into a ditch, tho by so doing the wheels of his car locked and the momentum skidded the car across the road and into another car.

Klaaren v Shadley, 215-1043; 247 NW 301

Concurrent negligence—erroneous instruction. If the jury might properly find that the concurrent negligence of defendant and of a third party caused the injury or death of a nonnegligent person, the court cannot properly direct a verdict for defendant on the theory that the negligence of said third party was an intervening negligence which wholly supplanted and superseded the negligence of the said defendant. So held where the concurring negligence was (1) that of defendant in operating its train over a crossing at an unlawful rate of speed, and (2) that of the operator of an automobile in driving upon said crossing.

Wright v Railway, 222-583; 268 NW 915

(e) INEVITABLE ACCIDENT

Absence of evidence. An instruction on the subject of "inevitable" accident is wholly improper when there is no evidence whatever supporting such a theory.

Orr v Hart, 219-408; 258 NW 84

Confusing and unsupported instructions. Instructions with reference to an "inevitable" accident and defendant's nonliability therefor are wholly out of place when there is no applicable evidence in the record.

Keller v Gartin, 220-78; 261 NW 776

Supplanting issue of negligence with inevitable accident. When the record testimony shows that a collision between automobiles and the resulting damage was caused (1) by the negligence of the plaintiff, or (2) by the negligence of the defendant, or (3) by the negligence of both parties, the court must not in its instructions depart from the issues of negligence and inject into the instructions the theory of inevitable accident.

Christenson v Tel. Co., 222-808; 270 NW 394

Jury question. When the evidence presents a jury question on the issue of defendant's negligence and plaintiff's contributory negligence, the court cannot, of course, sustain defendant's motion to dismiss on his claim of unavoidable accident.

Lorimer v Ice Cream Co., 216-384; 249 NW 220

Person thrown from one tractor under another. Where plaintiff fell from one tractor and was injured by another tractor, whether the accident was unavoidable on the part of the construction company operating the tractors was a jury question.

O'Meara v Green Const. Co., 225-1365; 283 NW 735

VI DEFENSES

(a) IN GENERAL

Collision with stationary truck—diverting circumstances. The position of an unlighted truck parked in the highway, and the diverting circumstances occurring just preceding a collision with the truck, may have a very material bearing on the issue of plaintiff's contributory negligence, and the assured clear distance rule.

Kimmel v Mitchell, 216-366; 249 NW 151; 1 NCCA(NS) 42

Conversation as diverting circumstance—insufficiency. A brief and apparently inconsequential conversation between an employer and an employee relative to the work of the employee, and occurring very shortly before the employee placed himself in a position of peril, cannot be deemed a diverting circumstance within the meaning of the law of negligence.

Zuck v Larson, 222-842; 270 NW 384

Light remote from highway—nondiverting circumstance. The operator of an automobile is guilty of contributory negligence in colliding, in the nighttime, with a truck parked in the highway directly ahead of him, when his lights revealed objects ahead for a distance of from 75 to 100 feet; and he cannot avoid such imputation of negligence by the claim that, just preceding the collision, his attention was diverted by a light remote from the highway on which he was traveling.

Dearinger v Keller, 219-1; 257 NW 206; 36 NCCA 709

Government employee's automobile collision—immunity. In a damage action for injuries arising out of a motor vehicle collision, defendant's claim that he was a state employee performing a governmental function is a matter of defense not properly raised by special appearance.

Anderson v Moon, 225-70; 279 NW 396

Negativing defendant's plea. In an action for damages consequent on plaintiff being negligently struck and injured by defendant's automobile [in which action defendant pleads (1) a denial that his car struck plaintiff, and (2) that plaintiff was struck and injured by some other vehicle], the court commits reversible error by instructing that plaintiff cannot recover unless plaintiff establishes by a preponderance of the evidence not only (1) that defendant's car struck and injured plaintiff, but (2) that no other car struck and injured plaintiff.

Griffin v Stuart, 222-815; 270 NW 442

View of stop sign obstructed—others' imputed knowledge of stop sign no defense. Where defendant's truck was parked so as to obscure the view of a stop sign at an intersection, and where motorist proceeded into intersection without stopping and collided with an automobile on intersecting street, defendant will not be exempt from liability on ground that knowledge would be imputed to motorist that intersecting street was an arterial highway, because of statute as to posting signs.

Blessing v Welding, 226-1178; 286 NW 436

Anticipating child coasting—barricades removed—negligence. Where defendant knew

VI DEFENSES—continued

(a) IN GENERAL—concluded

that for many years a certain street was barricaded while children were coasting, and that there had been coasting there recently, but where the snow had melted somewhat so that the middle portion of the paving on the hill was bare of snow, and the barricades had been taken down the day before the accident, the defendant was not bound to anticipate and prepare for some child coasting on the hill.

McBride v Stewart, 227-1273; 290 NW 700

Employer paying doctor bills — negligent person still liable. Payment of an injured truck driver's doctor bills by his employer, whether the motive be philanthropy or contract, constitutes a bounty from which a negligent defendant-motorist can derive no benefit in reduction of his liability, inasmuch as he owes compensation for all damages as to which his negligence was the proximate cause.

Clark v Berry Seed Co., 225-262; 280 NW 505

(b) LEGAL EXCUSE

Legal excuse defined. The operator of a vehicle who has failed to comply with a statutory standard of care may avoid the consequences thereof by establishing as legal excuse (1) anything making it impossible to comply, (2) anything over which he has no control which places his vehicle in a position contrary to the law, (3) that he was confronted with an emergency not of his own making, or (4) any excuse specifically provided by statute.

Young v Hendricks, 226-211; 283 NW 895

Negligence—legal avoidance. The operator of a vehicle who has failed to comply with a statutory or ordinance standard of care governing the operation or equipment of his vehicle may excuse such failure, and thereby avoid the legal imputation of negligence per se, by establishing (1) any excuse specifically provided by statute, or (2) that, without his fault, circumstances rendered compliance with the law impossible.

Kisling v Thierman, 214-911; 243 NW 552; 36 NCCA 90; 37 NCCA 494

Statutory noncompliance without legal excuse—burden of proof. An instruction stating that if a defendant motorist failed to comply with the requirements of a statute "without legal excuse", then the verdict should be for the plaintiff, does not shift plaintiff's burden of proof on the defendant.

Schalk v Smith, 224-913; 277 NW 303

Excuse—proof under general denial. Proof of legal excuse for failure to comply with a statutory standard of care in operating or equipping an automobile is admissible under a general denial of negligence.

Townsend v Armstrong, 220-396; 260 NW 17

Instructions—unsupported issue. Instruction submitting "legal excuse" for violation of the assured clear distance statute is reversible error when neither party raises, nor gives evidence, upon this issue.

Keller v Dodds, 224-935; 277 NW 467

Instructions—paraphrasing "legal excuse." The phrase, "explained or justified by the evidence", used as a substitute in instructions for the term "legal excuse" should be avoided as possibly permitting the jury to consider evidence which would not constitute a legal excuse as defined in another instruction, but under the evidence and considered with other instruction, held no reversible error.

Edwards v Perley, 223-1119; 274 NW 910

Nonprejudicial instructions. An instruction to the effect that if the defendant failed to yield to another motorist one-half of the traveled way, the jury, "in the absence of justifiable excuse", might find the defendant negligent, cannot be deemed prejudicial to a defendant who established no excuse whatever.

Lukin v Marvel, 219-773; 259 NW 782

Instructions—failure to yield half of traveled way—justification. Instruction as to defendant's duty to yield one half of traveled highway and that violation of such duty would be presumptive evidence of negligence and would warrant finding of negligence unless it was shown by "the greater weight or preponderance of the evidence" that under the circumstances defendant's failure was justified and in exercise of ordinary care, held not prejudicial since no evidence of justification was adduced, altho use of quoted words is not to be approved. Instruction as to plaintiff's duty to yield one half of traveled way also reviewed and held sufficient.

Jakeway v Allen, 227-1182; 290 NW 507

Instructions—emergency as legal excuse—evidentiary support. Question of emergency as being legal excuse should not be submitted to the jury without competent evidence to support it. Held, instruction amply supported in instant case.

Edwards v Perley, 223-1119; 274 NW 910

Excusing violation of statute—absence of evidence. While a motorist may plead and establish any recognized legal excuse for having violated a statutory standard of care for the operation of an automobile, yet he is manifestly not entitled to any instruction to the jury on the subject of "excuse" when he wholly fails to establish any excusatory fact.

Lukin v Marvel, 219-773; 259 NW 782

Violation of statute—excuse—required instruction. When the violation of a particular law of the road is pleaded by plaintiff as a ground for recovery of damages and such violation is treated as in issue (tho the applicability of the statute be quite doubtful), the court commits error in failing to instruct as to the effect of defendant's evidence tending to legally excuse such alleged violation.

Rich v Herny, 222-465; 269 NW 489

Blowing out tire—losing control of car. An instruction, stating "* * * The blowing out of a tire is a legal excuse to a driver for losing control of his or her automobile * * *", and also stating conditions for recovering control of the car was not erroneous in that the grounds of negligence alleged and submitted to the jury were referable to the conduct of the driver, not at the time of the blowout, but thereafter—bearing in mind that instructions must be read as a whole and that it is unfair to pick out parts of instructions and give them a forced or strained construction.

Band v Reinke, 227-458; 288 NW 629

Collision because of skidding—icy street not legal excuse per se. Where one of two motor vehicles which are approaching each other skids across the street and collides with the other vehicle which had almost stopped at the curb, the existence of ice on a city street, tho a condition over which a motorist has no control, yet is a condition whose presence is not legal excuse to relieve him from his duty to use care commensurate with the existing conditions when he is responsible for the control of his car.

Young v Hendricks, 226-211; 283 NW 895

Icy street—skidding not unforeseen. A motorist driving on icy pavement cannot excuse his presence on the wrong side of a city street, in violation of law, on the ground that he thought an approaching vehicle might skid into him, when the approaching vehicle remained at all times on its proper side of the street. Skidding on an icy street could neither be an unforeseen circumstance nor an unexpected happening.

Young v Hendricks, 226-211; 283 NW 895

Meeting car without lights—assured clear distance. An operator of an automobile does not necessarily violate the assured clear distance ahead statute when he has no reason to anticipate that he will meet another rapidly approaching car without lights, and, therefore, so drives on a foggy night that he cannot stop instantly when confronted by such nonanticipated event.

Caudle v Zenor, 217-77; 251 NW 69; 34 NCCA 122; 1 NCCA(NS) 44

Blinded by lights—assured clear distance. The failure of the driver of an automobile to drive at such speed as will permit him to bring the car to a stop "within the assured clear distance ahead" constitutes, in the absence of some legal excuse, negligence per se. And such excuse is not made to appear by evidence that the driver met a car and was temporarily blinded by the lights shining in his face, but did not slacken his speed.

Wosoba v Kenyon, 215-226; 243 NW 569; 1 NCCA(NS) 63, 747

Failure to see unlighted truck. The failure of the driver of an automobile to see, in time to stop, an unlighted truck standing ahead of him in the highway and within the radius of his lights, may be legally excused by plea and proof that the truck was not reasonably discernible sooner (1) because of its color, (2) because of shadows cast over it by nearby trees, and (3) because his attention was momentarily diverted by a car and the lights thereon which he was about to meet and pass at a lawful rate of speed.

Kadlec v Const. Co., 217-299; 252 NW 103; 35 NCCA 764, 1 NCCA(NS) 3

Pedestrians—assured clear distance—jury question. Where a pedestrian crossing the street is struck by a motorist after first being seen 180 feet away on the opposite curb and could have been seen by the motorist at all times prior to the collision, motorist's showing that pedestrian "popped up" ahead of him as legal excuse for not stopping within the assured clear distance is evidence raising a jury question.

Swan v Dailey-Luce Co., 225-89; 277 NW 580; 281 NW 504

Person injured on highway construction work. In laborer's personal injury action arising because of truck backing into him while both were engaged in highway construction work, an instruction, that it is the duty of driver in moving a truck to exercise care and caution of ordinarily prudent person and to bring truck under proper control if he discovers, or in exercise of reasonable care should discover, a person in the path of truck, was neither erroneous as submitting to the jury a previously withdrawn issue as to whether defendant driver has truck under control, nor as permitting jury to speculate on defendant's negligence generally.

Rebmann v Heesch, 227-566; 288 NW 695

Prohibited speed negligence per se. A violation of the statute that no person shall drive any vehicle on a highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead permits of no escape from the imputation of negligence per se, except on plea and proof of a recognized legal excuse for so driving.

Swan v Auto Co., 221-842; 265 NW 143; 1 NCCA(NS) 58

(c) SUDDEN EMERGENCY

"Emergency" defined. An emergency is (1) an unforeseen combination of circumstances which calls for immediate action; (2) a perplexing contingency or complication of circumstances; (3) a sudden or unexpected occasion for action; exigency; pressing necessity.

Young v Hendricks, 226-211; 283 NW 895

VI DEFENSES—continued
(c) SUDDEN EMERGENCY—continued

Element of legal excuse. The operator of a vehicle who has failed to comply with a statutory standard of care may avoid the consequences thereof by establishing as legal excuse (1) anything making it impossible to comply, (2) anything over which he has no control which places his vehicle in a position contrary to the law, (3) that he was confronted with an emergency not of his own making, or (4) any excuse specifically provided by statute.

Young v Hendricks, 226-211; 283 NW 895

Conduct under impulse of the moment. In a personal injury action arising from an automobile accident, an instruction is correct which states that a person in a position of peril in an emergency is not required imperatively to do that which, after the emergency is ended, would seem could have been done to avoid the injury.

Band v Reinke, 227-458; 288 NW 629

Instructions—emergencies — jury question. Instruction that emergency rule would apply in a case "where it reasonably seemed to him, acting as an ordinarily careful and prudent person would act under like circumstances, that he could not safely turn to the right", properly presents question for jury's determination and is not open to objection that it gauges the excuse of emergency by driver's own judgment or impulse.

Jakeway v Allen, 227-1182; 290 NW 507

Burden of proof. The fact that the evidence in an action for damages reveals a claim by defendant that the accident happened under the circumstances of an unexpected emergency furnishes no justification for an instruction that defendant has the burden to establish the existence of such emergency.

McKeever v Batcheler, 219-93; 257 NW 567

Erroneous instruction on burden of proof. Defendant's contention that he acted as he did because faced with a sudden emergency will not place the burden on the plaintiff to prove there was no such emergency when, if it did exist, it was created by the defendant himself, and an instruction placing on plaintiff the burden of proving nonexistence of the emergency is erroneous.

Bletzer v Wilson, 224-884; 276 NW 836

Sudden and unexpected appearance of person. The operator of an automobile on a straight, open, and unobstructed public highway cannot be held to anticipate that some one will, without warning, suddenly emerge from behind a stationary object and place himself in the immediate pathway of the vehicle.

Watson v Ins. Assn., 215-670; 246 NW 655; 3 NCCA(NS) 333

Pedestrian stepping in front of car. Evidence that a pedestrian walking along a shoulder of a highway suddenly stepped in front of an automobile, where he was struck, raises a jury question as to such emergency and as to legal excuse for failing to stop within the assured clear distance ahead.

Edwards v Perley, 223-1119; 274 NW 910

Turning to right to avoid pedestrian. The driver of an automobile who is driving south on the right-hand side of a north and south highway is not guilty of negligence per se because, in order to avoid hitting a child running across the highway from the east side, he turns still farther to the right, even tho it later appears that had he kept his course or had turned to the left he might have avoided hitting the child.

Garmoe v Colthurst, 215-729; 246 NW 767

Inevitable accident. No actionable negligence is shown on a record which reveals that a small child suddenly ran from a place of safety directly and immediately into the path of an approaching automobile while the vehicle was proceeding at a lawful rate of speed, and when the driver did not know and had no reason to know, until almost the instant of impact, that the child was even present on or near the highway.

Klink v Bany, 207-1241; 224 NW 540; 65 ALR 187; 31 NCCA 112; 3 NCCA(NS) 332

Backing vehicle out of private driveway. The driver of a truck who is nonnegligently traveling on the north side of a straight and level public highway in plain and unobstructed view of an automobile standing outside the public highway and in a private driveway on the same side of the highway has the right to assume that the automobile will not, without warning, be suddenly backed out of the private driveway and immediately in front of his oncoming truck, and if said automobile is so backed out and in his immediate front, he cannot be deemed negligent because, in such sudden emergency, he turns to his left and unintentionally strikes a person whom he theretofore knew was on the south side of the highway.

Carstensen v Thomsen, 215-427; 245 NW 734; 32 NCCA 300; 34 NCCA 326; 39 NCCA 369

Double collision—nonnegligence. A motorist who, while operating his car easterly on the south or right-hand side of a paved road at 50 miles per hour (tho the night is misty and visibility is poor), is unexpectedly, violently, and negligently so hit by the car of another motorist as to be deflected to the north or left-hand side of the road and into collision with an oncoming, westbound car, cannot, as to said latter collision, be deemed negligent because instantly when so deflected his hand involuntarily dropped from his steering wheel and his foot unintentionally reached the accelerator of his car instead of the brake.

Rich v Herny, 222-465; 269 NW 489

Sudden stopping of car on curve. The driver of an automobile who is on the right-hand side of the road at a curve and driving at a proper speed is not guilty of negligence in suddenly applying the brakes in order to avoid hitting an overtaking and passing car which unexpectedly swerved in front of him, and in order to prevent his own car going into a ditch, tho by so doing the wheels of his car locked and the momentum skidded the car across the road and into another car.

Klaaren v Shadley, 215-1043; 247 NW 301

Failure of lights. Where a truck is being operated in a fog with 35 feet visibility ahead, under speed and road conditions permitting a stop within 25 feet, and after meeting and passing another automobile, there is a failure of the lights on the truck, the truck driver is confronted with an emergency not of his own making, and if he tries the lights again before applying his brakes and turning on his emergency light, after which he discovers another truck stopped on the road within the visibility range so that it would have been seen and avoided had the lights not failed, he is not as a matter of law contributorily negligent in being unable to stop without a collision, but the question is for the jury.

Mueller v Ins. Assn., 223-888; 274 NW 106; 113 ALR 1256

Failure to see parked car in fog. On a foggy evening when visibility was poor, where the plaintiff, with the headlamps on his automobile lighted and the windshield wiper working, drove his car into another car which was parked on the highway, in the absence of any proof of an emergency to excuse his failure to see the other car, he was not free from contributory negligence and the defendant was entitled to a directed verdict.

Newman v Hotz, 226-831; 285 NW 289

Yielding half of highway. An instruction, tho in the language of the statute, e. g., that "motor vehicles, meeting each other on the public highway, shall give one-half of the traveled way thereof by turning to the right", may constitute reversible error when unaccompanied by any reference to a sudden emergency which is presented as an excuse for a car actually being on the wrong side of the road at the time of a collision.

Christenson v Tel. Co., 222-808; 270 NW 394

Failure to turn to right—effect. Failure of the operator of an automobile to turn to the right in an emergency is not necessarily negligent, and especially when the complaining party was the author of the emergency.

Caudle v Zenor, 217-77; 251 NW 69

Defendant driving on wrong side—no sudden emergency instruction for defendant. In an action for injuries sustained in a collision between a motorcycle driven east by plaintiff on his right, the south, side of the road and an approaching automobile operated by the defendant, allegedly on the left, or south, side of road, there was no occasion for court giving instruction to effect that defendant was faced with an emergency, when defendant maintained that he was at all times on his own right side of the road, because, if he were on the left, or south, side of highway, the emergency was of his own making.

Jakeway v Allen, 226-13; 282 NW 374

Requested instruction on absent issue properly refused. A defendant motorist's requested instruction, which deals with the question of sudden emergency arising because, as he alleges, a child suddenly darted from hiding and ran across the path of his car, is properly refused when the issue of error in judgment after the emergency arose was not in the case, and the theory of how and when the child got in his path was otherwise covered by instructions.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Requested instruction. In the absence of a request therefor, defendant may not complain that the jury was not instructed on the question of sudden emergency, especially where, if it did exist, it was of the defendant's own making.

Schalk v Smith, 224-904; 277 NW 303

(d) ASSUMPTION OF RISK

"Volenti non fit injuria" defined. The maxim "Volenti non fit injuria" means: "That to which a person assents is not esteemed in law an injury" or "He who consents cannot receive an injury."

Edwards v Kirk, 227-684; 288 NW 875

Special defense. The defense of "assumption of risk" must be specially pleaded in order to justify the submission of the issue to the jury.

Johnson v McVicker, 216-654; 247 NW 4£

Order striking defense of assumption of risk. In an action to recover for death of motorcycle passenger resulting from motorcycle collision with automobile, an order striking allegation of defendant car owner that decedent assumed risk of motorcycle driver's negligence was appealable because the matter stricken was of such character as to involve the merits of the case.

Edwards v Kirk, 227-684; 288 NW 875

Fog on highway—driver using due care—inapplicability. A passenger in a motor vehicle is not negligent on the theory of assumption of risk, simply because he failed to advise the driver or protest the continuation of the trip on a foggy highway, when no other apparent dangers existed and there was evidence that the driver was using care commensurate with the conditions existing.

Rabenold v Hutt, 226-321; 283 NW 865

VI DEFENSES—concluded

(d) ASSUMPTION OF RISK—concluded

Jury question — directed verdict improper. Motion for directed verdict based on contributory negligence and assumption of risk because of travel on highway under foggy atmospheric conditions properly denied as being jury question.

Gregory v Suhr, 224-954; 277 NW 721

Passenger's assumption of risk of riding with aged driver. While riding in the rear seat of an automobile being demonstrated to her employer as a prospective purchaser, an aged lady who protests against the salesman permitting her employer, also an aged person, to drive the automobile and who, altho she cannot get out of the automobile, is assured of safety by the salesman, does not as a matter of law assume the risk incident to her employer's driving, since reasonable minds could differ, and a jury must determine if it was unreasonable for her to rely on the salesman's assurances of safety.

Wittrock v Newcom, 224-925; 277 NW 286

Incompetency—knowledge of passenger. A passenger in an automobile cannot be held to assume the risks arising out of the incompetency, inexperience, or recklessness of the driver unless knowledge on the part of the passenger of such condition or conditions is adequately shown.

Stingley v Crawford, 219-509; 258 NW 316

Motorcycle passenger — sudden danger. In action to recover for death of 13-year-old boy resulting from collision between motorcycle on which he was riding as a passenger and defendant's automobile, allegation in defendant's answer that decedent assumed risk of motorcycle driver's negligence was properly stricken where pleaded facts and common knowledge justified conclusion that danger of the collision could not have been apparent more than a few seconds of time so that there was no time for deliberation and voluntary assumption of such risk.

Edwards v Kirk, 227-684; 288 NW 875

(e) RELEASE

Covenant not to sue—joint wrongdoers. The driver of an oil truck sued for damages consequent on his negligent operation of the truck is not released from liability because another party who owned the oil tank and grease rack carried on the truck obtained from the injured party a covenant wherein the injured party agreed not to sue such other party—the record failing to show that the truck driver and the owner of the tank were joint wrongdoers.

Lang v Siddall, 218-263; 254 NW 783

Release of joint tort-feasor. An injured party, who voluntarily, and without being imposed on by fraud, accepts and receives from one alleged joint tort-feasor a legal consideration in the form of property in settlement of his injuries, may not thereafter maintain an action against another joint tort-feasor for damages for the same injury.

Barden v Hurd, 217-798; 253 NW 127

Joint wrongdoers. A party who has been negligently injured and settles with and releases the original wrongdoer may not thereafter maintain an action against a physician for malpractice in treating the very injuries for which he has effected a settlement.

Phillips v Werndorff, 215-521; 243 NW 525; 39 NCCA 574

Avoidance—mutual mistake. A general release of a claim for personal injuries may, under proper circumstances, be avoided on the ground of mutual mistake as to the nature or seriousness of the injury.

Jordan v Brady Co., 226-137; 284 NW 73

Doctor's belief in recovery—mutual mistake —rescission. A contract for settlement of damages for personal injury in a motor vehicle accident and for release of further liability will be set aside when it is shown that both the injured party and the agent of the defendant relied on the physician's good faith statement that the injury was healing and the patient would soon recover, tho it later developed that the doctor was mistaken—such mistake is a mutual mistake of fact by both parties to the contract.

Jordan v Brady Co., 226-137; 284 NW 73

Signing a release without reading. A signed release and settlement of a claim for damages is conclusive on the signer, even tho he signed it, because of a false statement of its contents, when he had ample time and ability to read, and was in no manner prevented from reading.

Crum v McCollum, 211-319; 233 NW 678; 4 NCCA(NS) 142

Fraud in settlement—burden. A plaintiff, injured when the automobile in which she is riding in a snowstorm is struck from the rear by another automobile, and who, in the presence of her husband and sister, makes a written settlement with the insurance company for such injuries, and who delays two years thereafter before attacking as fraudulent the validity of such settlement, does not meet her burden to overcome the written instruments by giving her own self-contradictory testimony with no proof of actual fraud or misrepresentations.

Mosher v Snyder, 224-896; 276 NW 582; 4 NCCA(NS) 132

VII TRIAL

(a) IN GENERAL

Reinstating excluded ground of negligence —waiver. If the court, at the close of plaintiff's testimony, withdraws one of plaintiff's alleged grounds of negligence, but reinstates

it after the close of defendant's testimony, defendant waives the error, if any, by failing to move to reopen the case for additional testimony.

Deiling v Railway, 217-687; 251 NW 622

Striking allegation (?) or withdrawal of issue (?). It is not proper practice, at the close of all the evidence, to move to strike from the petition unsupported or legally insufficient allegations of negligence. The proper practice is to move to withdraw such issues from the jury.

Townsend v Armstrong, 220-396; 260 NW 17

Curing error. Error in striking, at the close of all the evidence, an adequate and supported allegation of negligence, is cured by adequately submitting the issue notwithstanding the striking order.

Townsend v Armstrong, 220-396; 260 NW 17

View of object by jurors — instructions. Principle reaffirmed that when jurors are permitted to view an object which is the subject of the action, they must be instructed that they must base their verdict solely on the evidence received judged in the light of their observation of the object.

Gehlbach v McCann, 216-296; 249 NW 144

Inconsistent findings by jury. Findings by the jury, in response to special interrogatories, (1) that the negligence of the operator of an automobile was the proximate cause of an accident, and (2) that the recklessness of said operator was the proximate cause of the accident, are fatally inconsistent.

Stanbery v Johnson, 218-160; 254 NW 303

Counterclaim — instruction to disregard. Where plaintiff sued (1) for damages to his car, and (2) on an assignment of the claim of his injured guest, and defendant counterclaimed for damages to his car, no error occurs in instructing the jury to disregard defendant's claim if a finding is returned for plaintiff, and such finding is so returned.

Albert v Maher Bros., 215-197; 243 NW 561

Remote speed—materiality first presented on appeal. Defendant's claim that plaintiff's speed remote from the collision was material as showing that at the time defendant looked back, before making a left turn, plaintiff was too far distant to be seen over a viaduct may not, when such evidence is excluded, be urged first on appeal as ground for reversal when such purpose for introducing such evidence was not stated to the trial court.

Thomas v Charter, 224-1278; 278 NW 920

(b) INJECTING INSURANCE

Discussion. See 17 ILR 501—Voir dire

Voir dire—interest in insurance companies. The wide discretion of the trial court to permit counsel to ask jurors on their voir dire whether they are stockholders, officers, or directors in any insurance company writing automobile liability insurance will not be interfered with in the absence of an abuse of such discretion. But the purpose of such questions must be solely to guide counsel in exercising his peremptory challenges.

Kaufman v Borg, 214-293; 242 NW 104
Holub v Fitzgerald, 214-857; 243 NW 575
Tissue v Durin, 216-709; 246 NW 806

Voir dire examination. In an action for damages arising out of a collision between automobiles, plaintiff, in the selection of the jury, has the right, in a proper manner, to ask each prospective juror whether he is in any manner interested in any liability insurance company.

Olson v Tyner, 219-251; 257 NW 538

Questioning prospective jurors as insurance stockholders. Counsel, when actuated by good faith and the sole purpose of acquiring information which will control the exercise of his peremptory challenges, may very properly be permitted, in a personal injury action, to ask a juror on his voir dire whether he or any member of his family is a stockholder in any insurance company.

Montanick v McMillin, 225-442; 280 NW 608

Voir dire examination as to insurance. In examining jurors for an automobile accident case, where counsel asked two or three jurors if they had insurance in a certain company, and the court then learned that the plaintiff was not insured in a mutual company and so informed the counsel, such allowance of questions was not an abuse of discretion of the trial court, when no improper motive or bad faith was shown, and no other mention of insurance was made.

Kiesau v Vangen, 226-824; 285 NW 181

Injecting insurance on voir dire—discretion of court. Control of voir dire examination on the subject of liability insurance is largely within the discretion of the trial court and will not be interfered with without a showing of prejudicial abuse.

Hawkins v Burton, 225-707; 281 NW 342

Appellant's jury examination inducing insurance discussion. Jury-room discussion of liability insurance suggested by plaintiff's examination of the jurors is not misconduct of which plaintiff can complain.

Tharp v Rees, 224-962; 277 NW 758

Trucker's statutory insurance requirement—jurors' discussion not misconduct. Jurors' discussion of statutory requirement that certain truckers carry liability insurance—being a discussion of law that all were presumed to know—is neither misconduct nor justification for a new trial.

Keller v Dodds, 224-935; 277 NW 467

VII TRIAL—continued
(b) INJECTING INSURANCE—continued

Reference to insured liability. The rule of law, in actions for personal injuries, that reversible error results from the willful injection, by plaintiff, into the record and before the jury, of the fact that defendant is carrying insurance against the liability sued on, is not violated:

1. By asking in good faith a juror on voir dire whether he is interested in any such insurance company; or

2. By asking a witness, in good faith, for legitimate testimony, and receiving an answer which, inter alia, reveals the fact of such insurance. (And especially when defendant's cross-examination accentuates the objectionable answer.)

Bauer v Reavell, 219-1212; 260 NW 39

Cross-examination of witness. The fact that during a material cross-examination by plaintiff, in a personal injury action arising out of a collision between automobiles, the witness unexpectedly injects an indefinite remark relative to "insurance" from which the jury might conjecture that defendant was protected by liability insurance, is wholly insufficient to reveal prejudicial error.

Albert v Maher Bros., 215-197; 243 NW 561

Withdrawal of incompetent testimony—effect. The incidental reception in evidence of testimony tending to show that defendant in an action for damages growing out of a collision of vehicles carried indemnity insurance, when the same is withdrawn by the court, will not constitute reversible error.

Stilson v Ellis, 208-1157; 225 NW 346

Improper reference to insured liability. In an action for damages consequent on a collision between vehicles, error does not result when, on the proper examination of witnesses, and without design on the part of plaintiff, the fact is revealed that the defendant is, by insurance, indemnified against loss.

Wolfe v Decker, 221-600; 266 NW 4

Injecting into trial fact of insurance. The unintentional or inadvertent injection into the trial of an action for damages of the fact that one of the parties had insured his loss or liability does not necessarily require the granting of a new trial.

Priest v Hogan, 218-1371; 257 NW 403

Incidental reference to indemnity insurance. Plaintiff in an action for damages consequent on an automobile collision has a clear right to show that defendant admitted his negligence and liability therefor, even tho said admission incidentally discloses that defendant was protected by indemnity insurance; and especially no error occurs when the reference to insurance is innocently brought out and was at once withdrawn by the court from the jury.

Liddle v Hyde, 216-1311; 247 NW 827

Cross-examination as to indemnity insurance. Reversible error results, in a personal damage action, from purposely carrying a cross-examination to the extent of revealing the fact that the defendant is protected by insurance from ultimate liability.

Rudd v Jackson, 203-661; 213 NW 428

Admissions—separation of relevant and irrelevant matter. When a conversation relates to two distinct and easily separated subject matters, one relevant and one irrelevant, the latter cannot be deemed admissible simply because it is a part of the conversation as a whole. So held where the conversation related (1) to the manner in which an accident happened and (2) to the insurance carried by the defendant.

Kuhn v Kjose, 216-36; 248 NW 230

Liability insurance—cross-examination. In an automobile accident case where plaintiff's witness was asked to relate a particular conversation with one of the defendants, objection that it was incompetent, irrelevant, and immaterial was properly overruled. However, when answer to such question revealed that conversation concerned insurance, motion to strike as immaterial should have been sustained. Likewise, on cross-examination of same defendant, testimony elicited concerning payments of insurance premium, which subject had not been brought out in examination in chief, was immaterial and not proper cross-examination, and refusal to sustain objection on that ground was prejudicial error.

Floy v Hibbard, 227-149; 287 NW 829

Showing insurance against liability. The fact that in the trial of an action for damages the information is brought out that the defendant is carrying indemnity or other insurance against said damages does not constitute reversible error in the absence of some showing or appearance of bad faith on the part of counsel.

McCoy v Cole, 216-1320; 249 NW 213

Liability insurance—improper reference to as grounds for new trial.

Ryan v Trenkle, 199-636; 200 NW 318
Stilson v Ellis, 208-1157; 225 NW 346
Ryan v Simeons, 209-1090; 229 NW 667
Raines v Wilson, 213-1251; 239 NW 36
Holub v Fitzgerald, 214-857; 243 NW 575
Albert v Maher Bros., 215-197; 243 NW 561
Bauer v Reavell, 219-1212; 260 NW 39

Asserting damages insured against. In an action for damages resulting from a collision of vehicles, prejudicial misconduct may result from asserting, in effect, before the jury, that the damages sued for have been insured against.

Berridge v Pray, 202-663; 210 NW 916

Insured claim. The act of counsel in persistently keeping before the jury the fact that the defendant carried casualty insurance

against the claim sued on constitutes reversible error—an error which is not cured by an instruction to disregard such fact of insurance.

Miller v Kooker, 208-687; 224 NW 46

Liability insurance. The reception of evidence, that the defendant in an action for damages consequent on a collision between automobiles carried liability insurance, constitutes reversible error.

Rutherford v Gilchrist, 218-1169; 255 NW 516

Attorney injecting insurance by innuendo—error. It is reversible error for an attorney in an action for personal injuries to remark to the jury in argument that the defendant will not have to pay if they bring in a verdict for the plaintiff and to state, "You people know exactly who will pay that verdict."

McCornack v Pickerell, 225-1076; 283 NW 899

Misconduct of counsel—injecting "liability insurance". In an automobile accident case where, in argument to jury, plaintiff's counsel developed an idea that the only party interested in preventing a verdict was the insurance company, the court recognized such tactics as being misconduct on the part of counsel.

Floy v Hibbard, 227-149; 287 NW 829

Failure to strike evidence not cured by instructions. Evidence that the owner of an automobile had stated that he did not go out to the scene of the accident after a collision in which the automobile was involved because the car was insured and he would let the insurance company take care of it, improperly injected the question of insurance in an action for damages resulting from the collision. The failure to strike such evidence was error which was not cured by the court's direction to the jury to disregard it.

Floy v Hibbard, 227-154; 289 NW 905

(c) FOREIGN STATUTES GOVERNING LIABILITY

Foreign statutes — right to plead. In an action in this state to recover damages sustained in a foreign state in consequence of the alleged actionable negligence of defendant in operating an automobile in said foreign state, plaintiff may plead those statutes and rules of law of said foreign state from which actionable negligence, under the facts of the case, are deducible, e. g., those (1) which declare the degree of care required of defendant in such operation in said foreign state, and (2) the nature and degree of plaintiff's contributory negligence which will bar his action, said pleaded statutes and laws being of the very essence of plaintiff's cause of action and not contrary to the public policy of this state, even tho they exact a greater degree of care than would be exacted by the law of this state had the injury occurred in this state.

Kingery v Donnell, 222-241; 268 NW 617; 1 NCCA(NS) 292

Foreign procedural statutes — nonright to plead. In an action in this state to recover damages sustained in a foreign state in consequence of the alleged actionable negligence of the defendant in operating an automobile in said foreign state, plaintiff has no right to plead the procedural statutes and rules of law of said foreign state. For example, those pertaining:

1. To what matters would be presumptive evidence of negligence;
2. To the burden of proof in the trial of the action; or
3. To the right of plaintiff to submit his action on different theories of the evidence.

Reason: All said matters are purely procedural.

Kingery v Donnell, 222-241; 268 NW 617; 1 NCCA(NS) 292

Lex fori procedure. While, as a matter of comity, the courts of this state will, under proper pleading, recognize and enforce the civil rights and liabilities of parties to a tort committed in a foreign state—if not contrary to the public policy of this state—yet in determining all issues of fact on which such rights and liabilities depend, the judicial procedure of the courts of this state must be followed.

Kingery v Donnell, 222-241; 268 NW 617; 1 NCCA(NS) 292

Separate specifications submitted—joined by "and"—harmless error. In an action under the Illinois guest statute for damages arising out of injuries received in a motor vehicle collision in Illinois, separate specifications of negligence, based on one charge of excessive speed, but, nevertheless, submitted in the language of the petition, are not rendered prejudicially erroneous because joined together with the word "and".

Moran v Kean, 225-329; 280 NW 543

Ownership — Missouri certificate of ownership—conclusiveness. A duly issued and outstanding certificate of ownership of a motor vehicle, issued by the secretary of state of the state of Missouri under the statute law thereof (§3, Art. 16, Public Acts of 1923), is absolutely conclusive in said state as to such ownership, and will be recognized and accorded the same force and effect in this state, said statutes not being violative of the public policy of this state.

Enfield v Butler, 221-615; 264 NW 546

(d) IMPROPER CONDUCT AT TRIAL

Offer of false testimony. The fact that a party to an action has made a statement out

VII TRIAL—continued

(d) IMPROPER CONDUCT AT TRIAL—concluded

of court inconsistent with his statements in court does not, manifestly, justify the conclusion that his statements in court are false and perjured.

Danner v Cooper, 215-1354; 246 NW 223

Counsel — belittling injuries — retaliatory statements. Counsel who, in argument, belittles the personal injuries of the opposing party, may not complain if opposing counsel in reply figuratively magnifies said injuries.

Hoegh v See, 215-733; 246 NW 787

Misconduct of counsel in argument to jury. In an automobile accident case where, in argument to jury, plaintiff's counsel developed an idea that the only party interested in preventing a verdict was the insurance company, the court recognized such tactics as being misconduct on the part of counsel.

Floy v Hibbard, 227-149; 287 NW 829

Order striking defense of assumption of risk. In an action to recover for death of passenger resulting from motorcycle collision with automobile, an order striking allegation of defendant car owner that decedent assumed risk of motorcycle driver's negligence was appealable because the matter stricken was of such character as to involve the merits of the case.

Edwards v Kirk, 227-684; 288 NW 875

New trial — grounds — misconduct of jury. The rule of law (206 Iowa 1263) that the trial court should not set aside the verdict of the jury and grant a new trial, when such verdict is the verdict which the court erroneously refused to direct at the close of the evidence, is not applicable when the grounds for new trial are predicated solely on the grounds of (1) misconduct of the jury, and (2) exceptions to the instructions.

Jordan v Schantz, 220-1251; 264 NW 259

(e) DIRECTING VERDICT

Most favorable view of evidence. On a motion for a directed verdict, the court must view the evidence in the light which is most favorable to the party against whom the motion is aimed.

Robertson v Carlgren, 211-963; 234 NW 824; 35 NCCA 555
Harvey v Knowles Co., 215-35; 244 NW 660
Lynch v Railway, 215-1119; 245 NW 219
Schwind v Gibson, 220-377; 260 NW 853
McWilliams v Beck, 220-906; 262 NW 781
Youngman v Sloan, 225-558; 281 NW 130

Most favorable view rule. On motion for directed verdict in determining whether plaintiff was guilty of contributory negligence as a matter of law, the evidence must be considered in the light most favorable to him.

Trailer v Schelm, 227-780; 288 NW 865

Defendant's negligence as proximate cause. In a personal injury action on account of the negligent operation of a motor vehicle, the court, on a motion for directed verdict, should, before considering contributory negligence of the plaintiff, consider the evidence as to negligence on the part of the defendant being a proximate cause of the injury.

Youngman v Sloan, 225-558; 281 NW 130

Force accorded testimony. Principle reaffirmed that the court in ruling on defendant's motion for a directed verdict must treat plaintiff's evidence exactly as the jury would have the right to treat it, viz: that said evidence and all reasonable deductions therefrom are true.

Heintz v Packing Co., 222-517; 268 NW 607

Absence of jurors—effect. When the court sustains a motion for a directed verdict, it is quite immaterial that all the jurors were not present.

Nyswander v Gonser, 218-136; 253 NW 829; 36 NCCA 1

Reasonable minds differing as to conclusions. If reasonable men may differ as to conclusions drawn from the evidence, the question is one for the jury.

Yale v Hanson, 227-813; 288 NW 905

Taking case from jury—plaintiff's burden. A plaintiff's failure to carry the burden of proving at least some of his allegations of negligence properly results in a directed verdict against him.

King v Gold, 224-890; 276 NW 774

Directed verdict at close of defendant's evidence. If there is sufficient evidence to take a case to a jury at the close of the plaintiff's testimony, a defendant cannot claim at the close of his evidence that there is nothing for the jury to determine, except when the testimony by the party having the burden of proof is in conflict with undisputed facts, or is such that under the circumstances it cannot be true, or shows that the witnesses must have been mistaken.

Ward v Zerzanek, 227-918; 289 NW 443

Overcoming inference of consent. The inference that an automobile operated by one person and owned by another person was operated with the consent of the owner is wholly overcome by uncontradicted evidence that the car was being operated against the positive command of said owner, and compels the court, in such case, to direct a verdict against the plaintiff.

Robinson v Shell Corp., 217-1252; 251 NW 613

Taxicab door striking eye—res ipsa loquitur. An action for loss of an eye caused by the sudden opening of a taxicab door as plaintiff stopped on the sidewalk to engage the cab,

and when plaintiff made no move toward opening the door, the exclusive control of which was lodged in the driver inside the cab, presents a case to which the doctrine of res ipsa loquitur applies. In such case defendants' motion for a verdict is properly overruled.

Peterson v De Luxe Co., 225-809; 281 NW 737

Violating right-of-way law—jury question. The right-of-way law imposes on a person approaching an intersection from the left the duty to yield the way, a violation of which, under ordinary circumstances, constitutes negligence, and in such a case the defendant is not entitled to a directed verdict.

Bletzer v Wilson, 224-884; 276 NW 836

Negligence per se. Where the automobile of plaintiff's intestate collided with defendant's truck at a highway intersection, and the physical facts showed that plaintiff's intestate had violated statutes in not keeping his car under control and not yielding the right of way to the truck, which had entered the intersection first, plaintiff's intestate was therefore guilty of negligence per se which contributed directly to his death, and which entitled the truck owner to a directed verdict.

Young v Clark, 226-1066; 285 NW 633

Failure to stop at stop sign—jury question. The alleged failure of plaintiff to stop before entering a paved primary highway, in view of evidence that defendant's truck was several hundred feet away from the intersection and traveling on the left side of pavement at a time when plaintiff's automobile was entirely across the black line and on his own right-hand side of the road, cannot, where the evidence conflicts and reasonable men might differ, be, as a matter of law, negligence contributing to the collision.

Russell v Leschensky, 224-334; 276 NW 608

Injuries to child—improper direction of verdict. Record reviewed relative to the facts attending the alleged negligent infliction of injuries on a child, and held to be such as to render improper the direction of a verdict for defendant, especially as said child was of such tender years as to be, presumptively, incapable of negligence.

Johnson v Selindh, 221-378; 265 NW 622; 39 NCCA 289, 565

Motorist anticipating dangerous position of one aiding—jury question. Where a stalled motorist heard one of several bystanders say, "Let's give him a push," whereupon they arranged themselves in positions to push the automobile and one called, "Let's go ahead," a directed verdict is properly denied and a jury question is presented as to whether or not the motorist might have known that a person was directly behind the automobile and would be injured if the car moved backward.

Huston v Lindsay, 224-281; 276 NW 201

Motorist keeping proper lookout for pedestrian—jury question. After motorist had seen pedestrian 180 feet away standing on the curb and when pedestrian had almost reached the opposite side of the street before being struck by the motor vehicle, which meanwhile had traveled the 180 feet, during which time pedestrian was plainly visible, and when motorist claims he did not again see pedestrian until just before striking him, the evidence raises a jury question as to whether motorist kept proper lookout, and directing a verdict is improper.

Swan v Dailey-Luce Co., 225-89; 277 NW 580; 281 NW 504

Child on sled—view obstructed by snowbank—negligence. In an action for death of seven-year-old child, where defendant-motorist could not see child because of snowbank, and child, lying on sled, coasted into intersection at 20 or more miles per hour and struck rear wheel of defendant's automobile, the court properly directed verdict for defendant, the evidence being insufficient to establish that defendant was driving at excessive speed, lacked control of his car, failed to maintain proper lookout, or failed to give warning of approach to intersection.

McBride v Stewart, 227-1273; 290 NW 700

Pedestrian on highway—disregarding apparent danger. The rule that a pedestrian and an automobile have equal rights upon the highway does not authorize a highway employee to stand on the edge of the pavement watching an oncoming automobile travel a distance of 200 feet on the same side of the pavement, knowing the pavement is in an icy condition, knowing that the driver of the oncoming automobile is having difficulty controlling it, from which facts it is, or to a reasonably prudent man it would have been, apparent that he was occupying a position of danger, and consequently, in remaining there, he was guilty of contributory negligence. Defendant's motion for a directed verdict was properly sustained.

Cumming v Dosland, 227-470; 288 NW 647

Stalled motorist—freedom from negligence—jury question. In a damage action for personal injuries arising out of a motor vehicle collision, the burden is on plaintiff to establish (1) the defendant's negligence, (2) such negligence as the proximate cause of the injury, and (3) plaintiff's freedom from contributory negligence; hence, a motorist who stands in the center of the road near the rear of her automobile stalled on the highway, attempting to stop a following motorist, and, tho having the opportunity, fails to seek a place of safety when she sees the approaching motorist apparently will crash into her stalled automobile, is not entitled to an instruction establishing her freedom from contributory negligence as a matter of law, nor to a directed verdict against the defendant.

Murchland v Jones, 225-149; 279 NW 382

VII TRIAL—continued

(e) DIRECTING VERDICT—continued

Failure to see parked car in fog. On a foggy evening when visibility was poor, where the plaintiff, with the headlamps on his automobile lighted and the windshield wiper working, drove his car into another car which was parked on the highway, in the absence of any proof of an emergency to excuse his failure to see the other car, he was not free from contributory negligence and the defendant was entitled to a directed verdict.

Newman v Hotz, 226-831; 285 NW 289

Failure to see obstruction in fog—jury question. In an action for damages resulting from injuries sustained when the car in which the plaintiff and her husband were riding on a foggy evening ran into a car which the defendant had left standing on the highway after an unsuccessful attempt to tow it away, it was error for the lower court to direct a verdict for the defendant, as the question of liability should have gone to the jury.

Newman v Hotz, 226-834; 285 NW 287

Contributory negligence — assumption of risk—jury question. Motion for directed verdict based on contributory negligence and assumption of risk because of travel on highway under foggy atmospheric conditions properly denied as being jury question.

Gregory v Suhr, 224-954; 277 NW 721

Contributory negligence per se—conclusiveness. Before a plaintiff motorist can be held guilty of contributory negligence as a matter of law it must conclusively appear, from a consideration of the evidence in the light most favorable to him, that his negligence in having inadequate brakes contributed in some way or in some degree to the accident and injuries for which he seeks a recovery.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Head-on collision—plaintiff's per se negligence contributing to injury. A plaintiff motorist, against whom a directed verdict was rendered because in violating a speed statute he was negligent per se, still should have had the benefit of the best possible view of the evidence, and, moreover, a record showing that he remained at all times on his own side of the road, but that a truck driver, for no apparent reason, drove across the pavement center line, resulting in a head-on collision, makes a jury question as to whether or not plaintiff's per se negligence contributed to his injury.

McIntyre v West Co., 225-739; 281 NW 353

Concurring negligence. A defendant whose negligence operates proximately to produce an injury to a passenger in another car is not entitled to a directed verdict because the host of such injured party was guilty of negligence which also operated proximately to produce said injury.

Wolfson v Lumber Co., 210-244; 227 NW 608

Concurrent negligence — effect. If the jury might properly find that the concurrent negligence of defendant and of a third party caused the injury or death of a nonnegligent person, the court cannot properly direct a verdict for defendant on the theory that the negligence of said third party was an intervening negligence which wholly supplanted and superseded the negligence of the said defendant. So held where the concurring negligence was (1) that of defendant in operating its train over a crossing at an unlawful rate of speed, and (2) that of the operator of an automobile in driving upon said crossing.

Wright v Railway, 222-583; 268 NW 915

Crossing railroad in front of oncoming train. It is error to overrule a motion for a directed verdict when, after considering all the evidence in the light most favorable to the plaintiff, there is no doubt but what he drove in front of a train with the view entirely unobstructed and with the train plainly to be seen had he looked, or, if he looked, he did so negligently.

Russell v Scandrett, 225-1129; 281 NW 782

Crossing highway in front of oncoming car.

Davis v Hoskinson, 228- ; 290 NW 497

Place of collision uncertain—physical facts—rule inapplicable. Under the physical facts rule, a conclusion cannot be established as a matter of law unless the physical facts and circumstances lead to but one conclusion to the exclusion of all others, and so certain indecisive physical facts will not conclusively rebut direct testimony, indicating the position on the pavement of a motor vehicle collision, so as to sustain a directed verdict thereon.

Clark v Berry Seed Co., 225-262; 280 NW 505

Failure to direct verdict—new trial to plaintiff allowable. A defendant truck driver's contention, in a case involving a truck and passenger automobile collision on a bridge, that under the evidence a verdict should have been directed for him and that therefore when a verdict was returned in his favor, the granting of a new trial was error, is a contention without merit, when the evidence was such that the jury could have found the defendant negligent, that his negligence was the proximate cause of the accident, and that neither plaintiff nor plaintiff's driver was contributorily negligent.

Hawkins v Burton, 225-1138; 281 NW 790

New trial—court mistakenly directing verdict. Ordinarily the question of contributory negligence is peculiarly for the jury, and, where the trial court mistakenly directs a verdict for defendant on the ground of plaintiff's negligence, the court does not err in later granting a new trial.

Williams v Kearney, 224-1006; 278 NW 180

Erroneous direction of verdict. An order for a new trial is, of course, proper when the judgment entered was ordered by the court on an erroneous theory of the law on a material point. So held where the court treated both plaintiff and defendant as joint adventurers and directed a verdict against plaintiff on the erroneous theory that defendant's negligence was imputable to the plaintiff.

Thompson v Farrand, 217-160; 251 NW 44; 34 NCCA 398

Erroneous instructions cured where directed verdict proper. Errors in instructions made by the trial court are not prejudicial to the appellant when appellee is entitled to a directed verdict.

Young v Clark, 226-1066; 285 NW 633

Unduly comprehensive request. Instructions which are so comprehensive as to authorize and direct a verdict in favor of all defendants are properly rejected when one of the defendants would be liable in any event.

Waldman v Motor Co., 214-1139; 243 NW 555

(f) RETRIAL

Witnesses—credibility—contradictory previous testimony. Inconsistent testimony by a witness at one trial as to certain facts in an automobile accident cannot as a matter of law negative his testimony in a later trial, inasmuch as the jury is the sole judge of the credibility of a witness and the weight of his testimony.

Echternacht v Herny, 224-317; 275 NW 576

New trial to plaintiff—propriety. In a case involving a truck and passenger car collision on a bridge, when the defendant contended that he was entitled to a directed verdict and that therefore it was error to grant a new trial after a verdict had been returned in his favor, his contention was without merit when the evidence was such that the jury could have found the defendant negligent, that his negligence was the proximate cause of the accident, and that neither plaintiff nor plaintiff's driver was contributorily negligent.

Hawkins v Burton, 225-1138; 281 NW 790

(g) PLEADINGS

Petition in two counts—(1) guest and (2) not a guest. A passenger in an automobile receiving injuries in a collision may not be required to elect between counts when his petition contains (1) a count alleging recklessness based on theory he was a guest and (2) a count alleging negligence based on theory he was not a guest where plaintiff's cause of action is for a single wrong and he seeks in each count damages for the same injuries arising out of the same act of deceased defendant-driver.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Petition—allegations in one count not admissions as to another count. Different theories of recovery contained in separate counts of a petition are not admissions by which the plaintiff is bound under the rule that he may not controvert his own pleading.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Stating cause of action. A cause of action is stated by allegations (1) that the driver of an automobile was negligent in operating it, (2) that plaintiff suffered damages thereby, and (3) that the car was then being operated with the consent of the owner.

Seleine v Wisner, 200-1389; 206 NW 130; 25 NCCA 714

Pleading—sufficiency. A pleader is entitled to claim as many grounds of actionable negligence as flow from his pleaded statements of facts. Pleadings as to the facts attending a collision at an intersection of highways reviewed, and held to warrant the instructions given.

Sutton v Moreland, 214-337; 242 NW 75

General and specific allegations. The refusal to strike a count confined to general allegations of negligence is of no consequence when the specific allegations of the remaining count simply elaborated the general allegations.

Tissue v Durin, 216-709; 246 NW 806

General and specific allegation of negligence. A general allegation of negligence on the part of a named party is not supplanted by a later specific allegation of negligence on the part of the same party when there is evidence supporting both the general and specific allegations and when it is manifest that the sole purpose of the specific allegation was to obtain the benefit of a particular rule of statute law.

Newland v McClelland, 217-568; 250 NW 229

General and specific allegations—belated attack. Except in res ipsa loquitur cases a specific allegation will not waive a general allegation of negligence, which general allegation must be assailed by motion, if timely, before answer and without such motion is properly submitted to the jury if sustained by the evidence.

Gookin v Baker & Son, 224-967; 276 NW 418

General or dragnet assignment. A general or dragnet allegation of negligence is properly submitted to the jury in accordance with the supporting evidence when such allegation is neither attacked (1) by motion for more specific allegation, nor (2) by motion to strike or withdraw.

Watson v Railway, 217-1194; 251 NW 31

Allowable conclusion. An allegation of fact which is sufficient, if proven, to constitute negligence, is none the less sufficient because the pleader adds thereto his conclusion of negligence.

Townsend v Armstrong, 220-396; 260 NW 17

VII TRIAL—continued
(g) PLEADINGS—continued

Sufficient allegation of negligence. An allegation (1) that defendant drove his vehicle to the left of the center of the traveled way, or (what is practically the same thing) (2) that defendant drove his vehicle upon the wrong or left side of the public highway, tenders a sufficiently definite issue of fact—at least in the absence of any pleaded attack thereon.

Muirhead v Challis, 213-1108; 240 NW 912

Pleading under common law (?) or statute (?). An allegation that a defendant "was driving at an excessive, illegal, and negligent rate of speed" must be deemed, in the absence of an attack by motion, as an allegation not at common law, but under the statute regulating speed.

Danner v Cooper, 215-1354; 246 NW 223

Predicating negligence solely on speed. An allegation predicating negligence in the operation of an automobile solely on speed is wholly insufficient.

Townsend v Armstrong, 220-396; 260 NW 17

Assured clear distance allegation.

Janes v Roach, 228- ; 290 NW 87

Statements of facts—sufficiency. Assignments of negligence reviewed and held to constitute sufficient statements of ultimate facts pertaining to a collision between vehicles.

Ege v Born, 212-1138; 236 NW 75

Negligence in re yielding half of highway—interpretation by court of allegation. An allegation, that "defendant negligently drove his car in a northerly direction and allowed it to travel to the west of the center of the highway and encroached upon the line of travel of the plaintiff" (who was traveling in a southerly direction), is properly interpreted by the court as simply charging that defendant failed to yield one-half of the traveled way to plaintiff.

Keller v Gartin, 220-78; 261 NW 776

Driving outside traveled roadway. An allegation that a motorist, without warning, ran his car outside the traveled part of the highway, and injured plaintiff, constitutes an adequate charge of negligence, and must, of course, if supported by evidence, be submitted to the jury.

Townsend v Armstrong, 220-396; 260 NW 17

Governmental function—negligent operation of road maintainer. Neither a county, as a quasi corporation, nor its board of supervisors is liable for the negligence of its employee in operating after dark a road maintainer without lights on the left-hand side of a highway, and in an action by a motorist who sustained injuries on account of such negligence, demurrers to the petition by the county and its board of supervisors were properly sustained.

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

Inferential allegation of nonnegligence. An allegation by plaintiff that a collision between automobiles was caused solely by the negligence of the defendant, inferentially charges that a passenger riding with plaintiff at the time was not guilty of contributory negligence —at least when the sufficiency of the petition is not attacked, and when the parties treat the negligence of the passenger as at issue.

Keller v Gartin, 220-78; 261 NW 776

Indirect admission. An answer may, by indirection, clearly admit the truth of an allegation contained in the petition.

Arends v DeBruyn, 217-529; 252 NW 249

Petition stating cause of action as against demurrer—stop sign—obstructed view. Where petition alleges defendant's truck was parked on curbing or sidewalk so as to obstruct view of stop sign for a motorist who proceeded into intersection and collided with another car, petition held to state a cause of action as against demurrer.

Blessing v Welding, 226-1178; 286 NW 436

Pleading ordinance and statute violations—assumed for purpose of demurrer. In an action for injuries resulting from a motor vehicle collision at an intersection, where defendant's truck is alleged to have been parked so as to obscure the view of a stop sign, and where the violations of both city ordinance and state law are pleaded, the supreme court will assume, for the purpose of demurrer, that truck was parked within prohibited distance and did obscure the sign.

Blessing v Welding, 226-1178; 286 NW 436

Motion to correct improper joinder. Where causes of action against different defendants are unallowably joined in the same action, a defendant wishing to correct the error should move to strike from the petition the cause of action not affecting himself.

Ellis v Bruce, 215-308; 245 NW 320

Specific reliance on res ipsa loquitur. A plaintiff who sues in tort and alleges generally (1) that defendant was guilty of negligence which was the proximate cause of her injuries, and (2) that she relies on the doctrine of res ipsa loquitur, cannot be compelled, by motion for more specific statement, to state the particular acts of negligence of which she complains.

Harvey v Borg, 218-1228; 257 NW 190; 39 NCCA 139

Motion to dismiss—unavoidable accident. When the evidence presents a jury question on the issue of defendant's negligence and plaintiff's contributory negligence, the court cannot, of course, sustain defendant's motion to dismiss on his claim of unavoidable accident.

Lorimer v Ice Cream Co., 216-384; 249 NW 220

Amending pleadings—substituting specific negligence for general negligence. A plaintiff who, on one trial, rests on a general allegation of negligence, does not plead a new cause of action within the meaning of the statute of limitation, when on retrial he, by amendment, withdraws his general allegation and substitutes a specific allegation of negligence which, if proven, will furnish basis for the doctrine of the last clear chance.

Reason: The latter allegation was always embraced within the former general allegation.

Pettijohn v Weede, 219-465; 258 NW 72
Spaulding v Miller, 220-1107; 264 NW 8

Pleading — nonallowable amendment. A timely brought action based solely on the common-law plea of defendant's liability consequent on the negligent operation of an automobile by defendant's employee, in due course of employment, may not, after the action would be barred by the statute of limitation, be so amended as to wholly abandon said pleaded basis and to substitute an entirely new basis for recovery, to wit, an allegation that defendant was liable because the automobile in question belonged to defendant and was operated at the time in question with defendant's consent.

Page v Const. Co., 219-1017; 257 NW 426

Belated and unsupported amendment. It is doubly erroneous for the court, after argument has closed, (1) to permit an amendment assigning a new ground of negligence which is without support in the evidence, and (2) to submit such alleged negligence to the jury.

Peckinpaugh v Engelke, 215-1248; 247 NW 822

Counterclaim—damages growing out of transaction. Joint defendants in an action for damages consequent on a collision of two automobiles may each separately plead as a counterclaim any damages suffered by them in the collision in question.

Harriman v Roberts, 211-1372; 235 NW 751

Counterclaim—malicious prosecution. Defendant in an action for damages consequent on a collision between automobiles may not plead as a counterclaim damages consequent on a malicious prosecution instituted by the plaintiff against defendant for reckless driving at the time of the collision.

Harriman v Roberts, 211-1372; 235 NW 751

Counterclaim as admission. Where corporation, within its agency for an insurance association, insured its own automobile, and when sued along with the driver thereof on account of a collision involving the automobile, and when the corporation counterclaims therein, alleging that it and driver were free from negligence, which counterclaim was subsequently dismissed, then in a later action against corporation to recover on the policy, the corporation was bound by such allegation as an admission of its consent to use the vehicle, and the pleading was admissible in evidence therefor.

Mitchell v Underwriters, 225-906; 281 NW 832

(h) JOINT DEFENDANTS

Release of joint tort-feasor. An injured party who voluntarily, and without being imposed on by fraud, accepts and receives from one alleged joint tort-feasor a legal consideration in the form of property in settlement of his injuries, may not thereafter maintain an action against another joint tort-feasor for damages for the same injury.

Barden v Hurd, 217-798; 253 NW 127

Covenant not to sue—joint wrongdoers. The driver of an oil truck sued for damages consequent on his negligent operation of the truck is not released from liability because another party who owned the oil tank and grease rack carried on the truck obtained from the injured party a covenant wherein the injured party agreed not to sue such other party—the record failing to show that the truck driver and the owner of the tank were joint wrongdoers.

Lang v Siddall, 218-263; 254 NW 783

Requiring defendant to prove allegations of co-defendant. In damage action, by one riding in an automobile, against a truck driver and his employer where defense was conducted jointly and where, in respect to negligence, the question was whether negligence of the automobile driver or the negligence of the truck driver was the sole proximate cause of the accident, it was not prejudicial error to instruct jury that burden was upon both defendants to prove negligence of automobile driver, affirmatively alleged by the employer alone.

Usher v Stafford, 227-443; 288 NW 432

Proximate negligence of different co-defendants. On separate trials of an action for damages against the operators of different vehicles on one of which plaintiff was a passenger at the time she was injured by a collision, defendant is properly denied an instruction to the effect that he cannot be held liable if his co-defendant was proximately negligent.

Reason: Both defendants might be proximately negligent.

Newland v McClelland, 217-568; 250 NW 229

Separate forms of verdicts. In a joint action against the driver of an automobile and the owner of the vehicle, wherein necessity arises so to instruct as to limit the effect of the driver's admissions to the question of his liability, and the effect of the owner's admissions to the question of his liability, separate forms of verdict must be submitted, if requested.

Broderick v Barry, 212-672; 237 NW 481

Verdicts—submission of separate forms. In an action against the driver and owner of a

VII TRIAL—concluded
(h) JOINT DEFENDANTS—concluded

truck, held, the omission to submit separate forms of verdict for each defendant was not prejudicial error—the court having specifically and correctly instructed the jury as to separate liability of each defendant.

Carlson v Decker & Sons, 218-54; 253 NW 923

Res gestae—admissibility. The declaration of the driver of an automobile almost immediately after a collision had occurred and before or while an injured person was being removed from one of the cars, to the effect that "I know I was driving fast", is part of the res gestae, and admissible against both defendants, to wit, the driver of the car and the owner thereof.

Duncan v Rhomberg, 212-389; 236 NW 638

Non res gestae statements of driver. Non res gestae statements of the driver of an automobile tending to show his negligence are not competent against the owner of the vehicle, nor are such statements of the owner competent evidence against the driver, and the court must clearly and definitely so instruct. In addition the court must submit separate forms of verdict if requested.

Broderick v Barry, 212-672; 237 NW 481

Non res gestae statements. When a plaintiff seeks to recover damages from the owner of an automobile because of the negligence of the driver, he must prove such negligence by evidence other and different than the non res gestae statements and declarations of the driver, and where the owner and the driver are co-defendants the court must exercise meticulous care to instruct the jury accordingly.

Cooley v Killingsworth, 209-646; 228 NW 880
Wieneke v Steinke, 211-477; 233 NW 535
Ege v Born, 212-1138; 236 NW 75

Erroneous instructions. In a joint action against the owner of an automobile and against the driver thereof based on the alleged negligent operation of the car, it is erroneous to require the jury to find for both defendants, or against both defendants, when the consent of the owner to the operation in question is distinctly in issue.

Jarvis v Stone, 216-27; 247 NW 393

Joint action against owner and operator—erroneous instruction. In a joint action against the owner and operator of an automobile the evidence, manifestly, may be such as to justify a verdict against the operator and in favor of the owner, and in such cases instructions holding the owner liable in case the jury finds the operator liable are fundamentally erroneous.

Gehlbach v McCann, 216-296; 249 NW 144

Unallowable verdicts. In a joint action for damages against the driver and owner of an automobile, based, as to the driver, on his negligence, and as to the owner, on his consent to the driving (as to which consent the proof is substantially conclusive), there cannot legally be separate verdicts, one holding the driver liable, and one holding the owner nonliable.

Hoover v Haggard, 219-1232; 260 NW 540

Granting separate trial. Reversible error results from refusing a separate trial to a defendant who is sued jointly with another for damages consequent on his alleged negligence, and on the alleged recklessness of his co-defendant, the defensive issues of the two defendants being wholly hostile to each other, and the opportunity existing for collusion between the plaintiff and such other defendant.

Manley v Paysen, 215-146; 244 NW 863; 84 ALR 1330

Tort of one and contract of another. A joint action (1) against a wrongdoer upon his tort consequent on the negligent operation of a motor vehicle, and (2) against a surety company upon its policy to indemnify the wrongdoer from loss because of said tort, even tho but one recovery is sought, presents two different causes of action, and the joinder thereof is wholly unallowable. And this is true whether the policy is simply a private, optional contract between the insured and insurer, or a policy mandatorily required by statute to be filed with and approved by the railroad commission as a condition precedent to the obtaining of a permit to operate said vehicle.

Ellis v Bruce, 215-308; 245 NW 320

VIII PRESUMPTIONS, EVIDENCE, AND PROOF

(a) IN GENERAL

Plaintiff's burden—proving negligence allegations. A plaintiff's failure to carry the burden of proving at least some of his allegations of negligence properly results in a directed verdict against him.

King v Gold, 224-890; 276 NW 774

Verdict contrary to evidence—setting aside—nonabuse of discretion. In an action for personal injuries sustained by plaintiff in a head-on automobile collision occurring at night near a crest of a hill on a narrow paved country highway, where the vehicle in which plaintiff was riding was then on the left-hand side of the highway attempting to pass another car traveling in the same direction, the setting aside of the verdict for plaintiff on the ground that verdict was contrary to the evidence, and granting a new trial, was not an abuse of discretion.

Brunssen v Parker, 227-1364; 291 NW 535

Circumstantial evidence—sufficiency to establish theory. A theory cannot be established by circumstantial evidence, even in a civil action, unless the facts relied upon are

of such a nature and so related to each other that it is the only conclusion that can fairly or reasonably be drawn from them, and it is not sufficient that they be consistent merely with that theory.

Jakeway v Allen, 227-1182; 290 NW 507

Witnesses—impeachment—shorthand notes. The shorthand notes taken upon the trial of an action may be used for impeaching purposes.

Judd v Rudolph, 207-113; 222 NW 416; 62 ALR 1174

Presumptions act prospectively only. Principle recognized that presumptions do not travel backward. They look forward only.

State v Liechti, 209-1119; 229 NW 743

Speed signs—presumption of officer's performance of duty. In the absence of proof to the contrary, it will be presumed that town officers properly performed the mandatory duty imposed on them by statute in the erection and maintenance of speed limit signs.

Doherty v Edwards, 227-1264; 290 NW 672

Right to assume care by plaintiff. A requested instruction in a personal injury action, to the effect that defendant had a right to assume that plaintiff would commit no act of negligence contributing to his own injury, is properly refused (1) when defendant in driving as he did was not influenced by plaintiff's actions, and (2) when the record shows that the jury found that plaintiff was not guilty of any act of contributory negligence.

Orr v Hart, 219-408; 258 NW 84

Remote speed—materiality of evidence. Defendant's claim that plaintiff's speed remote from the collision was material as showing that at the time defendant looked back, before making a left turn, plaintiff was too far distant to be seen over a viaduct may not, when such evidence is excluded, be urged first on appeal as ground for reversal when such purpose for introducing such evidence was not stated to the trial court.

Thomas v Charter, 224-1278; 278 NW 920

Violation of ordinance—presumption—instructions. While the violation of a city ordinance relative to the operation of an automobile is only prima facie evidence of negligence, yet, where the sole issue is whether the operator did violate such ordinance—when the operator makes no effort to excuse a violation —it is not erroneous for the court to instruct that if there was such violation the jury "would be warranted in finding the operator guilty of negligence".

McDougal v Bormann, 211-950; 234 NW 807; 32 NCCA 405

See Kisling v Thierman, 214-911; 243 NW 552

Negligence—prima facie (?) or per se (?). Where an accident happens upon a public highway outside a city or town, the fact that the vehicle is on the wrong side of the road is only prima facie evidence of negligence.

On the other hand, subject to the above, the violation, without legal excuse, of a standard of care for the operation or equipment of vehicles, whether fixed by statute or ordinance, constitutes negligence per se.

Codner v Stowe, 201-800; 208 NW 330; 26 NCCA 207

Lange v Bedell, 203-1194; 212 NW 354

McDougal v Bormann, 211-950; 234 NW 807; 32 NCCA 405

Sergeant v Challis, 213-57; 238 NW 442

Lane v Varlamos, 213-795; 239 NW 689

Muirhead v Challis, 213-1108; 240 NW 912

Hollingsworth v Hall, 214-285; 242 NW 39

Holub v Fitzgerald, 214-857; 243 NW 575

Kisling v Thierman, 214-911; 243 NW 552; 36 NCCA 90; 37 NCCA 494

Waldman v Motor Co., 214-1139; 243 NW 555

Harvey v Knowles Co., 215-35; 244 NW 660; 1 NCCA(NS) 50

Wood v Banning, 215-59; 244 NW 658; 32 NCCA 255

Willemsen v Reedy, 215-193; 244 NW 691

Albert v Maher Bros., 215-197; 243 NW 561

Wosoba v Kenyon, 215-226; 243 NW 569; 1 NCCA(NS) 63, 747

Dillon v Diamond Co., 215-440; 245 NW 725

Peckinpaugh v Engelke, 215-1248; 247 NW 822; 33 NCCA 103; 35 NCCA 765; 1 NCCA (NS) 41

Danner v Cooper, 215-1354; 246 NW 223

Hogan v Nesbit, 216-75; 246 NW 270

Grover v Neibauer, 216-631; 247 NW 298

See Masonholder v O'Toole, 203-884; 210 NW 778; Voiles v Hunt, 213-1234; 240 NW 703; 31 NCCA 59; 32 NCCA 458

Presumption that lookout was maintained. In a law action for damages wherein the petition alleges that defendant motorist was negligent in failing to keep a proper lookout, and such allegation was not withdrawn, and it is shown deceased pedestrian was contributorily negligent, it was proper to refuse to submit the case under last clear chance doctrine, on the theory that motorist, being under duty to keep a lookout, presumably performed such duty, but, after seeing deceased, failed to exercise due care in avoiding the injury.

Reynolds v Aller, 226-642; 284 NW 825; 5 NCCA(NS) 140

Declarations of passenger—issue of contributory negligence. Testimony by a passenger in an automobile to the effect that shortly before an accident he called the attention of the driver to the approaching car is admissible on the issue of the contributory negligence of the passenger.

Waldman v Motor Co., 214-1139; 243 NW 555

Report of accident—remarks overheard—privileged communication. Evidence of wit-

VIII PRESUMPTIONS, EVIDENCE, AND PROOF—continued

(a) IN GENERAL—continued

ness who overheard statement of defendant in reporting accident, the witness being neither a peace officer nor an official, was properly excluded under statute requiring such report to be made and further providing that the report shall be confidential and not used as evidence in any trial, civil or criminal, arising out of the accident.

McBride v Stewart, 227-1273; 290 NW 700

Animals at large—presumption of negligence.

Hansen v Kemmish, 201-1008; 208 NW 277; 39 NCCA 400

Appointment of guardian—irrelevant testimony. In an action for damages consequent on the alleged negligent operation by defendant of an automobile, evidence of the appointment and discharge of a temporary guardian for plaintiff and of the various orders granted to said guardian are wholly irrelevant.

Jarvis v Stone, 216-27; 247 NW 393

Absence of bicycle lights. In a damage action against a motorist for death of a bicycle rider, the jury, under the record, could properly find that cyclist was not traveling with bicycle lights required by statute and was not free from contributory negligence, despite fact that evidence showed a recent purchase of red reflector and lamp by an unidentified person on morning of accident; and the finding of a broken lamp, reflector, etc., by the sheriff at the scene of and some time after the accident does not compel a finding that the bicycle was properly equipped.

Reardon v Hermansen, 223-1207; 275 NW 6

Careless habits. The carelessness and incompetency of a person as the operator of an automobile may neither be shown by his reputation, nor by specific instances of carelessness and incompetency having no similarity with the occasion in question.

In re Hill, 202-1038; 208 NW 334; 210 NW 241

Wheel coming off—circumstantial evidence. Circumstantial evidence is wholly insufficient, in and of itself, to generate a jury question on the issue whether a defendant in repairing an automobile so negligently replaced a wheel on the car that thereby it became detached while in operation (with resulting damage to plaintiff) when said evidence is also consistent with the additional theory that said wheel became detached because of defects and weaknesses in the car arising from its age and great use.

Tyrrell v Skelly Co., 222-1257; 270 NW 857

Lights not burning—failure to allege—admissibility. Evidence that lights were not burning on defendant's truck should have been admitted, even tho not alleged as a ground of negligence in plaintiff's petition, in order to enable plaintiff to show he was maintaining a proper lookout and was therefore free from contributory negligence.

Haines v Mahaska Works, 227-228; 288 NW 70

Lights not burning—exclusion of evidence. Excluding evidence that lights on defendant's truck were not burning, plaintiff having failed to allege such fact in petition, held prejudicial error when such fact had direct bearing on question of plaintiff's contributory negligence.

Haines v Mahaska Works, 227-228; 288 NW 70

Visibility of parked car at night.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Contributory negligence of child — duty to negative. Plaintiff, in an action for damages for negligently inflicted injuries, establishes prima facie freedom from contributory negligence by proof that when he suffered the injuries in question he was only 10 years of age, thereby availing himself of the common-law presumption arising from such proof. And the case would be quite rare where defendant's rebutting testimony would be so convincing and overwhelming as per se to overthrow said prima facie showing.

Flickinger v Phillips, 221-837; 267 NW 101

Inconsistent testimony at previous trial. Inconsistent testimony by a witness at one trial as to certain facts in an automobile accident cannot as a matter of law negative his testimony in a later trial, inasmuch as the jury is the sole judge of the credibility of a witness and the weight of his testimony.

Echternacht v Herny, 224-317; 275 NW 576

Hospital expenses—evidence of reasonableness. In an action for personal injury no recovery can be had for hospital expenses when there is no evidence of any kind bearing on the reasonableness of the charge—not even in the form of an itemized bill or that the bill had been paid.

Ege v Born, 212-1138; 236 NW 75

Failure to yield half of road. Reversible error results from an instruction that defendant's failure, on meeting plaintiff, to yield half of the traveled way would be prima facie evidence of negligence unless defendant has established by a preponderance of the evidence his excuse for not so yielding, when defendant did not plead said excuse as an affirmative defense, but, under a general denial, presented it in his evidence.

Rich v Herny, 222-465; 269 NW 489

Identification of defendant. In a personal injury action arising out of a collision of vehicles, a conversation between plaintiff and defendant relative to the collision may be admissible for the purpose of identifying the defendant as the wrongdoer.

Harvey v Borg, 218-1228; 257 NW 190

Incompetency of driver. Evidence held insufficient to present a jury question on the issue of the incompetency of the driver of an automobile.

Helming v Bank, 206-1213; 220 NW 45

Judicial notice — ability to stop car. The court will take judicial notice of the fact that an automobile in good mechanical condition, with good brakes, and traveling at a speed not greater than 25 miles per hour on a highway which is in good condition, can be stopped in a less distance than 100 feet.

Wright v Railway, 222-583; 268 NW 915

Skid marks as rebutting testimony. Even when the most favorable view of the evidence is taken, plaintiff's contention, that he was struck by defendant's automobile at a street intersection after the automobile had approached the intersection from a side street, was not established when the testimony of the witness on whom the plaintiff relied was inherently inconsistent and was disproved by skid marks and other testimony showing that the automobile had not been on the side street.

Ward v Zerzanek, 227-918; 289 NW 443

Consent presumed from fact or ownership. Where the owner of a car allowed his brother to keep the car much of the time and use it, and the brother allowed a third person to use the car and the third party had an accident, the proof of ownership established, prima facie, that the car was being operated for the owner, and this inference could not be overcome by vague testimony.

Olinger v Tiefenthaler, 226-847; 285 NW 137

Operation by nonowner—unnecessary proof. In an action for damages consequent on the operation of an automobile by a nonowner thereof, plaintiff need not show that such nonowner was in the employ of the owner or was the agent of the owner or was transacting the business of the owner.

Tigue Co. v Motor Co., 207-567; 221 NW 514

Owner's consent—burden of proof. The inference which arises from ownership places upon the owner of an automobile the burden of proof to show that it was not used with his knowledge or consent, express or implied.

Wolfson v Lumber Co., 210-244; 227 NW 608
Waldman v Motor Co., 214-1139; 243 NW 555
Hunter v Irwin, 220-693; 263 NW 34
Enfield v Butler, 221-615; 264 NW 546

Ownership of car — futile evidence. Evidence that an automobile of a certain make was, at the time of a collision, occupied by a husband and wife; that it carried a registration plate of the county of which said parties were residents, and that said car was being operated by the husband, furnishes no prima facie proof of the wife's ownership of the car.

Putnam v Bussing, 221-871; 266 NW 559

Ownership — incompetent evidence. On the issue of ownership of a motor vehicle (arising on the allegation that said vehicle was being operated with the consent of the owner), neither of the following is admissible:

1. A certified copy of a purported application for registration of said vehicle when said purported application is neither signed by nor sworn to by any person. For an added reason is this true when said certification fails to identify said application as a record of any public office; nor

2. An unauthenticated copy of a purported duplicate certificate of registration of said vehicle, especially when said certificate fails to carry the signature of the purported owner of said vehicle.

Putnam v Bussing, 221-871; 266 NW 559

Ownership—contract of sale. On the issue of the ownership of an automobile, the contract of sale to the alleged owner is relevant and material.

Kimmel v Mitchell, 216-366; 249 NW 151

Missouri certificate of ownership — conclusiveness. A duly issued and outstanding certificate of ownership of a motor vehicle, issued by the secretary of state of the state of Missouri under the statute law thereof (§3, Art. 16, Public Acts of 1923), is absolutely conclusive in said state as to such ownership, and will be recognized and accorded the same force and effect in this state, said statutes not being violative of the public policy of this state.

Enfield v Butler, 221-615; 264 NW 546

Registration plate — judicial notice of the county of issuance. The court cannot, from the figures alone, take judicial notice that a registration number plate on an automobile was issued by the county treasurer of a certain county.

Putnam v Bussing, 221-871; 266 NW 559

Control of car—obeying statute—presumption. Principle reaffirmed that a motor vehicle driver in attempting to make a left-hand turn into an intersecting road has a right to proceed on the assumption (unless he has knowledge to the contrary) that another driver, approaching from his right, will obey the law (§5031, C., '35 [§5023.04, C., '39]) by reducing his speed to a reasonable and proper rate when approaching and traversing said intersection.

Enfield v Butler, 221-615; 264 NW 546

Customary place of crossing street.

Scott v McKelvey, 228- ; 290 NW 729

Reason for not looking for danger. The reason why a pedestrian while crossing a street did not look in the direction of an oncoming vehicle which injured him is relevant and material, and the injured party may testify as to such reason.

Orr v Hart, 219-408; 258 NW 84

Signaling turns—evidence in re custom—effect. Testimony relative to the custom of automobile drivers of this state and surround-

VIII PRESUMPTIONS, EVIDENCE, AND PROOF—continued

(a) IN GENERAL—concluded

ing territory, in signaling turns, reviewed, and held too inconsequential to justify a reversal, even tho the inadmissibility of such testimony be conceded.

Harmon v Gilligan, 221-605; 266 NW 288

Tracks of colliding vehicles. The action of the trial court in unduly limiting litigants in the introduction of testimony having direct bearing on a vital and material issue constitutes reversible error. So held as to evidence relative to the tracks of colliding automobiles.

Harness v Tehel, 221-403; 263 NW 843

Damages for death—evidence. In an action for damages for wrongful death, evidence is admissible of the recent purchase, solely on credit, by decedent, of a business, and of the marked reduction by decedent of his indebtedness subsequent to such purchase, together with evidence of his ability, health, and other kindred matters.

Scott v Hinman, 216-1126; 249 NW 249

Intemperate habits bearing on damages. In an action for damages consequent on wrongful death, evidence is admissible tending to show the intemperate habits of the deceased.

Townsend v Armstrong, 220-396; 260 NW 17

Occupation and earnings of parent. The occupation and earnings of the father of a minor child may be shown, in an action for the wrongful death of the child, as an element to be considered by the jury on the issue of damages to the child's estate.

McDowell v Oil Co., 212-1314; 237 NW 456

(b) NO-EYEWITNESS RULE

Positive testimony vs. presumption. In a pedestrian-automobile accident the presumption attending the no-eyewitness rule will not overcome actual testimony of eyewitnesses.

Edwards v Perley, 223-1119; 274 NW 910

Presence of eyewitnesses. The no-eyewitness rule has no application when there is evidence of what the deceased was doing immediately prior and up to the very time of the accident.

Lindloff v Duecker, 217-326; 251 NW 698

Eyewitness testimony — custom of injured party immaterial. Evidence tending to show the usual custom of a person in approaching a highway intersection—where he was killed in a collision—is inadmissible on the issue of negligence—it appearing that there were eyewitnesses to the entire transaction resulting in the collision.

Nyswander v Gonser, 218-136; 253 NW 829; 36 NCCA 1

Nonapplicability. In a pedestrian-automobile accident, where a motorist testifies that he saw deceased just prior to striking and killing him, the rule that in the absence of eyewitnesses the deceased is presumed to have exercised due care has no application.

Edwards v Perley, 223-1119; 274 NW 910

Direct evidence of decedent's conduct. Where pedestrian crossing highway is killed by automobile, and in action for death where plaintiff's witness clearly observed decedent's conduct for some time immediately prior to accident and did not see him look for approaching car, the "no-eyewitness rule" establishing presumption of freedom from contributory negligence was inapplicable.

Spooner v Wisecup, 227-768; 288 NW 894

Presumption of care in absence of witnesses —nonapplicability. The presumption that a deceased was, at the time of a fatal accident, exercising reasonable and ordinary care for his own safety, cannot be indulged when there are eyewitnesses who fully testify as to the conduct of the deceased at the time in question, nor when the physical facts of a transaction negative such presumption.

Shannahan v Produce Co., 220-702; 263 NW 39

Applicability. The no-eyewitness rule—the presumption or inference that a fatally injured person was, at the time of being so injured, exercising reasonable care—may be applicable even tho there be a witness as to the actions of said party except during a very short but material period of time during which he received the fatal injuries.

Laudner v James, 221-863; 266 NW 15

Jury question. Principle reaffirmed that when there is no witness to a fatal injury, or when there is no witness as to just what the decedent did or did not do just immediately preceding the injury, a jury question may be presented on the issue of the negligence of the deceased because of the jury's right to infer due care under such state of the record; otherwise when the physical facts and surrounding circumstances negative due care.

Hittle v Jones, 217-598; 250 NW 689

Death — no-eyewitness rule—nonapplicability. When there are no eyewitnesses to a fatal accident, no presumption can be indulged that the deceased was, at the time, exercising due care when the mute facts attending the accident negative such presumption.

Van Gorden v City, 216-209; 245 NW 736

Allowable and unallowable scope. The right of a jury, under the no-eyewitness principle, to draw the inference that a fatally injured party exercised due care in approaching an intersection of highways, may justify the jury in presuming that the party at the time made due observations as to the existing travel on the intersecting highways; otherwise as to

presuming the truth of affirmative excuses offered for the negligence of the deceased.

Hittle v Jones, 217-598; 250 NW 689; 37 NCCA 67

Existence of eyewitnesses—not jury question. In a pedestrian-automobile accident involving the no-eyewitness rule, it is not for the jury to decide whether or not there were eyewitnesses.

Edwards v Perley, 223-1119; 274 NW 910

Contributory negligence for jury. Evidence, in connection with the presumption of due care in the absence of eyewitnesses, reviewed and held to present a jury question on the issue of contributory negligence.

Lorimer v Ice Cream Co., 216-384; 249 NW 220; 35 NCCA 709

Railway accidents at crossings—obstructions. On the issue whether the view of a railway track was so obstructed at the time of an accident that an approaching train could not be seen, testimony by an eyewitness is manifestly admissible to the effect that he immediately stationed himself at the point of accident and could plainly see the entire track over which a train would approach.

Langham v Railway, 201-897; 208 NW 356

(c) OPINION EVIDENCE

Allowable conclusion. When the actions and conduct of a witness at a certain time are material and there is no other adequate way of placing the matter before the jury, then the witness should be permitted to describe what he saw, even tho his description consists of a mixed statement of fact and conclusion. So held as to the statement "It seemed as tho the man jumped right in front of the car, and we hit him."

Wieneke v Steinke, 211-477; 233 NW 535

Careful driver. A person riding on an automobile and injured in a collision with another car may not properly testify that the driver with whom he was riding "was a careful driver".

Hamilton v Boyd, 218-885; 256 NW 290

Habits of person—conclusion. An opinion, as to "what kind of a driver" the operator of an automobile was, is an unallowable conclusion.

In re Hill, 202-1038; 208 NW 334; 210 NW 241; 26 NCCA 193

General custom—immateriality. Evidence of the manner in which a party usually or customarily drove from a private driveway upon a public highway is quite immaterial.

Stilson v Ellis, 208-1157; 225 NW 346; 32 NCCA 258

Competency of witness. A witness is competent to testify to the value of an automobile before and after an accident when it appears that he has seen cars of that make sold, and also second-hand cars bought and sold.

Anderson v U. S. Ry. Adm., 203-715; 211 NW 872

Distance in which car can be stopped. A properly qualified witness may testify as to the distance in which an automobile may be stopped under given conditions.

Judd v Rudolph, 207-113; 222 NW 416; 62 ALR 1174

Form of hypothetical question. Record reviewed and held that a hypothetical question was not subject to the vice of assuming the existence of a fact not shown by the evidence.

Peckinpaugh v Engelke, 215-1248; 247 NW 822

Identity of automobile tracks. A witness should not be permitted to testify that certain tracks seen by him at the scene of an accident were the identical tracks which he has heard described by other witnesses at the trial.

McKeever v Batcheler, 219-93; 257 NW 567

Physical ability. A nonexpert witness who first recites what he observed about the physical condition of an injured party may testify whether the injured party was able to get out of bed.

Stilson v Ellis, 208-1157; 225 NW 346

Radiograph (X-ray)—oral explanation. A radiograph may be explained or interpreted to a jury by an expert, insofar as the radiograph does not interpret itself to the mere observation of a nonexpert.

Appleby v Cass, 211-1145; 234 NW 477

Res gestae—proper exclusion. The exclusion of declarations of unidentified bystanders, made shortly after an accident, to the effect that, "the boys ran between the cars", does not constitute reversible error when ample evidence bearing on the same point was received in evidence, and when the said declarations were, in view of the entire record, quite inconsequential.

Riddle v Frankl, 215-1083; 247 NW 493

Rate of speed. A witness may, under proper circumstances, testify in effect that a vehicle "sounded like it was traveling fast".

Lane v Varlamos, 213-795; 239 NW 689

Speed—competency. The driver of an automobile seeing another car approaching him around a curve at a distance of 80 feet is competent to estimate the speed of the approaching car.

Albert v Maher Bros., 215-197; 243 NW 561

VIII PRESUMPTIONS, EVIDENCE, AND PROOF—continued

(c) OPINION EVIDENCE—concluded

Direct evidence of speed—surrounding circumstances considered—jury question. A truck driver's direct testimony as to speed will not be taken as a verity, but will generate a jury question when considered with the other facts and circumstances of the accident tending to overcome the direct evidence as to speed.

Hawkins v Burton, 225-707; 281 NW 342

Eyewitnesses' estimate of speed, location, distance. The testimony of eyewitnesses to an automobile accident as to speed, location, and distance is only their judgment and estimation, which the jury must consider with other evidence in order to arrive at the truth.

Glover v Vernon, 226-1089; 285 NW 652

Inadmissible opinion evidence. Tho a witness may be competent to give his opinion, generally, of the rate of speed of a vehicle, yet the circumstances of a transaction may be such, and the position of the offered witness may be such as to render the opinion valueless and, therefore, wholly inadmissible.

Klaaren v Shadley, 215-1043; 247 NW 301

Rate of speed—striking testimony. The refusal to strike testimony to the effect that "the car sounded like it was going fast" constitutes no prejudicial error, when the witness (1) actually saw the car in question, and (2) elsewhere gave similar testimony without objection.

Lane v Varlamos, 213-795; 239 NW 689

Speed of automobile. A witness who has operated an automobile for several years and whose business necessitates extensive travel by him over the country, mostly by automobile, is competent to give an opinion as to speed at which an automobile was being operated on a certain occasion.

State v Thomlinson, 209-555; 228 NW 80

Speed determined from skid marks. A witness in an automobile accident case may describe skid marks, but may not base an opinion of the speed of an automobile on them, as it is solely within the province of the jury to draw an inference of speed from skid marks.

Ward v Zerzanek, 227-918; 289 NW 443

Witnesses—competency—speed. One may be a competent witness as to the speed of a motor vehicle on a showing that he has observed such vehicles while in operation with a view of determining their speed.

Becvar v Batesole, 218-858; 256 NW 297

(d) PHYSICAL FACTS

Cause and effect—jury question or matter of law. So many elements enter into the physical results produced by motor vehicle collisions that when fact questions are presented, the supreme court cannot substitute its judgment for that of the jury and say, as a matter of law, that a particular result was produced because certain factors constituted the cause.

Echternacht v Herny, 224-317; 275 NW 576
Rabenold v Hutt, 226-321; 283 NW 865

"Physical facts" rule—inapplicability. The so-called "physical facts" rule which is often applied in negligence cases—the rule that when the operator of a vehicle at a known railroad crossing possesses ordinary sense of sight he is conclusively presumed, in the absence of diverting circumstances, to have seen an approaching train which was in plain view—necessarily has no application when the train is not in plain view, owing to a temporary obstruction which the railroad company has interposed to his view, e. g., freight cars on a side track.

Bush v Railway, 216-788; 247 NW 645

Exception to most favorable evidence rule. On appeal from an order overruling defendant's motion for directed verdict, the supreme court need not follow the most favorable evidence rule, as urged by plaintiff, to the exclusion of the physical facts and other uncontradicted matters which plaintiff not only conceded, but affirmatively and intentionally established.

Scott v Hansen, 228- ; 289 NW 710

Assured clear distance—error to submit. It is error to submit the issue of assured clear distance when the physical facts and plaintiff's testimony show that there was no discernible object ahead of defendant's car.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Assured clear distance.

Janes v Roach, 228- ; 290 NW 87

Circumstantial evidence as sole proof. Negligence cannot be deemed established by circumstantial evidence alone unless the facts constituting such circumstances are of such a nature and so related that the conclusion of negligence is the only conclusion to which the mind can fairly and reasonably arrive. So held where the location and condition of wrecked automobiles and marks on the pavement were relied on to show negligence.

Reimer v Musel, 217-377; 251 NW 863

Contributory negligence per se. The occupants of an eastbound automobile were guilty of contributory negligence per se under testimony that upon arriving at an intersecting north and south street, on a clear day, they looked to the south without obstruction for a distance of at least 225 feet, and saw no approaching car, and thereupon entered the intersection and moved across the same at 10 miles per hour, but before they had fully cleared the intersection were hit by a northbound car traveling at the rate of 40 or 50 miles per hour.

Hewitt v Ogle, 219-46; 256 NW 755

Place of collision uncertain—physical facts rule inapplicable. Under the physical facts rule, a conclusion cannot be established as a matter of law unless the physical facts and circumstances lead to but one conclusion, to the exclusion of all others, and so certain indecisive physical facts will not conclusively rebut direct testimony, indicating the place on the pavement of a motor vehicle collision, so as to sustain a directed verdict thereon.

Clark v Berry Seed Co., 225-262; 280 NW 505

Excessive speed. Circumstances are oftentimes more persuasive on the issue of speed than direct testimony is.

Starry v Hanold, 202-1180; 211 NW 696

Last clear chance—jury question. The physical facts and circumstances attending an accident may present a jury question on the issue whether defendant actually discovered plaintiff's negligently assumed position of peril in such time that defendant, by the exercise of reasonable care, might have avoided said accident.

Groves v Webster City, 222-849; 270 NW 329

Law of case—location of tracks. A holding on appeal that a jury question on the issue of negligence in operating an automobile was not generated by record evidence relative to the location and condition of wrecked automobiles, and as to marks and broken glass on the highway, is necessarily conclusive on the court on retrial on substantially the same evidence.

Reimer v Musel, 220-1095; 264 NW 47

Intersection collision. Where the automobile of plaintiff's intestate collided with defendant's truck at a highway intersection, and the physical facts showed that plaintiff's intestate had violated statutes in not keeping his car under control and not yielding the right of way to the truck, which had entered the intersection first, plaintiff's intestate was therefore guilty of negligence per se which contributed directly to his death, and which entitled the truck owner to a directed verdict.

Young v Clark, 226-1066; 285 NW 633

No-eyewitness rule — when nonapplicable. Principle reaffirmed that when there is no witness to a fatal injury, or when there is no witness as to just what the decedent did or did not do just immediately preceding the injury, a jury question may be presented on the issue of the negligence of the deceased because of the jury's right to infer due care under such state of the record; otherwise when the physical facts and surrounding circumstances negative due care.

Hittle v Jones, 217-598; 250 NW 689

Presumption of care in absence of witnesses —nonapplicability. The presumption that a deceased was, at the time of a fatal accident, exercising reasonable and ordinary care for his own safety, cannot be indulged when there are eyewitnesses who fully testify as to the conduct of the deceased at the time in question, nor when the physical facts of a transaction negative such presumption.

Shannahan v Produce Co., 220-702; 263 NW 39

Direct evidence—nonapplicability of circumstantial evidence instruction. In a death claim action for negligence arising from an automobile collision occurring in a suburban district of a city where the negligence alleged was in failing to travel on the right-hand side of the street and where along with the physical facts there was direct evidence by the driver of the car wherein decedent was riding as to decedent's travel on the right-hand side of the street, it was error to give an instruction, applicable only to cases based entirely on circumstantial evidence, when such instruction prevented the jury from considering the direct evidence as to where the accident occurred.

Rusch v Hoffman, 223-895; 274 NW 96

Skid marks—intersection collision. Even when the most favorable view of the evidence is taken, plaintiff's contention, that he was struck by defendant's automobile at a street intersection after the automobile had approached the intersection from a side street, was not established when the testimony of the witness on whom the plaintiff relied was inherently inconsistent and was disproved by skid marks and other testimony showing that the automobile had not been on the side street.

Ward v Zerzanek, 227-918; 289 NW 443

Yielding one-half of road—surrounding circumstances — jury question. Circumstances surrounding an accident, viz: the condition of the vehicles, the location of dead bodies and debris, the blood and brains splattered on one side of a bridge, are circumstances for the jury to consider in determining whether a truck driver gave one-half of the traveled way by turning to the right.

Hawkins v Burton, 225-707; 281 NW 342

(e) RES IPSA LOQUITUR

Res ipsa loquitur as rule of evidence. The doctrine of res ipsa loquitur is a rule of evidence not applicable where specific allegations of negligence are pleaded but only where general allegations of negligence are wholly relied upon.

Olson v Cushman, 224-974; 276 NW 777

Passenger injured in motorbus accident. Plaintiff, under a general allegation of negligence on the part of a common carrier of passengers, to wit, a motorbus company, generates, under the doctrine of res ipsa loquitur, a jury question on the issue of the negligence of such carrier by proof (1) that he was a passenger on said bus; (2) that a collision

VIII PRESUMPTIONS, EVIDENCE, AND PROOF—continued

(e) RES IPSA LOQUITUR—concluded

occurred between said bus and an automobile; (3) that in said collision said bus was overturned; and (4) that plaintiff was injured.

Crozier v Stages, 209-313; 228 NW 320; 29 NCCA 20

Car run into from rear. The doctrine of res ipsa loquitur is applicable to an occurrence wherein plaintiff in the daytime is driving a vehicle at a moderate rate of speed, and looking ahead, on the right-hand side of a wide and wholly unobstructed highway and is suddenly and unexpectedly run into from the rear by another vehicle.

Harvey v Borg, 218-1228; 257 NW 190; 39 NCCA 139

Collision with rear of horse-drawn vehicle. In an action against a motorist for colliding with the rear of a horse-drawn vehicle, tried on the theory of res ipsa loquitur, an instruction containing the phrase, "within her exclusive control, or the exclusive control of her authorized driver", as applied to the automobile or instrumentality, held not erroneous as meaning control to the exclusion of each other, but rather control to the exclusion of third persons.

Mein v Reed, 224-1274; 278 NW 307

Inconclusive evidence. In an automobile damage action the doctrine of res ipsa loquitur is not applicable when the automobile was not under the exclusive control of the defendant or when the jury must speculate from the evidence whether the injury was caused by a defect in the automobile or by the negligence of the driver.

Sproll v Burkett Co., 223-902; 274 NW 63; 2 NCCA(NS) 424

Waiver. One who pleads specific acts of negligence on the part of defendant thereby waives the right to rely on the doctrine of res ipsa loquitur.

Harvey v Borg, 218-1228; 257 NW 190; 39 NCCA 139

Luther v Jones, 220-95; 261 NW 817; 39 NCCA 139

Negligence pleaded specifically. The doctrine of res ipsa loquitur may be applicable under one unquestioned count of a petition which alleges negligence generally, notwithstanding the fact that the same cause of action is pleaded in another count under specific allegations of negligence.

Crozier v Stages, 209-313; 228 NW 320; 32 NCCA 46; 34 NCCA 678

Specific reliance on res ipsa loquitur. A plaintiff who sues in tort and alleges generally (1) that defendant was guilty of negligence which was the proximate cause of her injuries, and (2) that she relies on the doctrine of res ipsa loquitur, cannot be compelled by motion for more specific statement to state the particular acts of negligence of which she complains.

Harvey v Borg, 218-1228; 257 NW 190; 39 NCCA 139

Negligence inferred by jury from circumstances. Pleading specific acts of negligence precludes recovery under the doctrine of res ipsa loquitur, and as no inference of negligence arises from the mere fact of a collision, a pedestrian's action to recover damages from a motorist may not be submitted to the jury on the theory that the jury might reasonably infer negligence from the circumstances. A case may be submitted on this theory only when there may be drawn from the circumstances no other reasonable conclusion than the existence of negligence.

Armbruster v Gray, 225-1226; 282 NW 342

Passenger injured in rented car. In an action by passenger against a lender of car for injuries sustained when car driven by borrower went into ditch, res ipsa loquitur doctrine held inapplicable.

Gianopulos v Saunders System, (NOR); 242 NW 53; 32 NCCA 18

(f) JURY QUESTIONS

Conflicting evidence. On conflicting testimony, the jury is to determine the credibility of the witnesses and to ascertain the facts, and on appeal the supreme court is to determine not what the facts were, but solely what the jury was warranted in finding them to be, reviewing the evidence in the light most favorable to the party in whose favor the verdict was returned.

Remer v Takin Bros., 227-903; 289 NW 477

Contributory negligence—reasonable minds differing. Principle reaffirmed that a jury question exists on the issue of negligence whenever on the record reasonable minds might reasonably differ as to the effect of what was done or not done under the circumstances.

Rosenberg v Railway, 213-152; 238 NW 703

Reasonable minds reaching different conclusions. Where reasonable minds may reach different conclusions from the facts presented, the case is one for the jury.

Short v Powell, 228- ; 291 NW 406

Physical facts—cause and effect. So many elements enter into the physical results produced by motor vehicle collisions that when fact questions are presented, the supreme court cannot substitute its judgment for that of the jury and say, as a matter of law, that a particular result was produced because certain factors constituted the cause.

Rabenold v Hutt, 226-321; 283 NW 865

Jury question (?) or law question (?). Principle reaffirmed that no jury question arises on the issue of the negligence of an injured party when all reasonable minds would agree that the injured party was negligent in what he did or did not do just immediately preceding and at the time when he was injured.

Hittle v Jones, 217-598; 250 NW 689

Abandonment of employment. Evidence reviewed and held to present a jury question on the issue whether a servant had temporarily abandoned his employment and had not returned thereto at the time of the commission by him of an alleged negligent act.

Heintz v Packing Co., 222-517; 268 NW 607

Accident on driveway. Evidence held to present a jury question on the issue of negligence of both parties to an accident on a driveway contiguous to the vehicular roadway of a street.

Dickeson v Lzicar, 208-275; 225 NW 406

Unavoidable accident. When the evidence presents a jury question on the issue of defendant's negligence and plaintiff's contributory negligence, the court cannot, of course, sustain defendant's motion to dismiss on his claim of unavoidable accident.

Lorimer v Ice Cream Co., 216-384; 249 NW 220

Authority of servant. Evidence reviewed and held to present a jury question on the issue whether a master had impliedly authorized his salesman, in order to perform his duties, to travel about the country by means of the salesman's individually owned automobile.

Heintz v Packing Co., 222-517; 268 NW 607

Assured clear distance statute—jury question. Whether a vehicle suddenly emerged from behind a stalled truck and moved into the pathway of an oncoming car, necessarily has a material bearing on the issue whether the driver of the oncoming car violated the "assured clear distance" statute. Evidence held to present a jury question.

McWilliams v Beck, 220-906; 262 NW 781

Assured clear distance—error to submit. It is error to submit the issue of assured clear distance when the physical facts and plaintiff's testimony show that there was no discernible object ahead of defendant's car.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Speed—clear distance ahead statute. Evidence reviewed at length and held to present a jury question on the issue whether a motorist so operated his car that he could not stop within the assured clear distance ahead.

Lukin v Marvel, 219-773; 259 NW 782; 1 NCCA(NS) 16

Range of visibility. Altho the driver of a truck, which was following another truck on an icy street on which two cars were parked, could see past the truck and the cars and could have stopped within the distance he could see, when he ran into the truck ahead after it had skidded and turned around, there was a jury question as to whether he had been complying with the assured clear distance ahead rule, and it was proper to give an instruction imposing on him the duty to refrain from driving at a speed greater than would permit him to stop within the assured clear distance ahead.

Remer v Takin Bros., 227-903; 289 NW 477

Pedestrian—assured clear distance—legal excuse. Where a pedestrian crossing the street is struck by a motorist after first being seen 180 feet away on the opposite curb, and could have been seen by the motorist at all times prior to the collision, motorist's showing that pedestrian "popped up" ahead of him as legal excuse for not stopping within the assured clear distance is evidence raising a jury question.

Swan v Dailey-Luce Co., 225-89; 277 NW 580; 281 NW 504

Pedestrian crossing near intersection.

Scott v McKelvey, 228- ; 290 NW 729

Careful operation. Evidence held to present a jury question on the issue whether an automobile was operated with due care.

Sexauer v Dunlap, 207-1018; 222 NW 420

Wheel becoming detached — circumstantial evidence. Circumstantial evidence is wholly insufficient, in and of itself, to generate a jury question on the issue whether a defendant in repairing an automobile so negligently replaced a wheel on the car that thereby it became detached while in operation (with resulting damage to plaintiff) when said evidence is also consistent with the additional theory that said wheel became detached because of defects and weaknesses in the car arising from its age and great use.

Tyrrell v Skelly Co., 222-1257; 270 NW 857

Collision. Evidence reviewed in an action for damages consequent on a collision in the nighttime between a truck and an automobile, and held to present jury questions on the issues:

1. Whether deceased was guilty of contributory negligence;
2. Whether defendant was driving his truck without lights;
3. Whether defendant was driving on the wrong side of the road;
4. Whether defendant was operating his truck (weighing three tons) at an unlawful rate of speed; or
5. Whether defendant had opportunity to avoid the collision and failed to do so.

Carlson v Decker, 218-54; 253 NW 923; 36 NCCA 93

Collision with bicycle. Where a motorist driving east 40 to 50 miles per hour at night

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on a paved highway, the lights on vehicle working properly (no rain, fog, or snow), his attention being momentarily diverted by an oncoming car, and, simultaneously with its passing, he collided with and fatally injured a bicycle rider, also traveling east, instructions covering diverting circumstances relative to speed (§5029, C., '35) and failing to turn to left when passing vehicle (§5022, C., '35) reviewed and held to correctly present questions for jury.

Reardon v Hermansen, 223-1207; 275 NW 6; 3 NCCA(NS) 184

Conflict as to use of brakes. A conflict in the evidence in a motor vehicle accident case as to whether defendant did or did not apply his brakes is properly a matter for the jury.

Reed v Pape, 226-170; 284 NW 106

Icy pavement as excuse for negligence. In argument, a defendant truck driver's explanation that icy pavement and locked brakes made his truck slide and should excuse his presence on the wrong side of the road where his truck collided with plaintiff's automobile will not sustain a directed verdict in his favor, since question of plaintiff's contributory negligence, defendant's violation of statute, the sufficiency of his excuse, and whether his negligence, if any, was the proximate cause of plaintiff's injuries, being questions on which reasonable minds might differ, are for the jury.

McIntyre v West Co., 225-739; 281 NW 353

Emergency as legal excuse — evidentiary support. Question of emergency as being legal excuse should not be submitted to the jury without competent evidence to support it. Held, instruction amply supported in instant case.

Edwards v Perley, 223-1119; 274 NW 910

Evidence—legitimate suggestion by counsel. When the word "suddenly" was never used by witnesses to describe how a truck slowed down and turned out to the left to avoid a pedestrian before it was hit by another truck proceeding from the rear, but the word was put into their mouths by legitimate suggestion of counsel, the weight and credibility to be given the word is for the jury.

Glover v Vernon, 226-1089; 285 NW 652

Consent to operation. Proof that an automobile at the time of a collision (1) was operated by one defendant, (2) was owned by another defendant, and (3) was under lease exceeding ten days to yet another defendant, generates a jury question on the issue whether the car was operated with the consent of the owner, and also with the consent of the lessee; and such jury question survives as to the owner and as to the lessee until each, for himself, negatives such consent by undisputed and uncontroverted testimony. And the most positive denials of consent cannot be deemed "undisputed and uncontroverted" when the facts and circumstances attending the operation of the car tend to prove that the owner and lessee did consent.

Greene v Lagerquist, 217-718; 252 NW 94

Contributory negligence of passenger. Whether a passenger who had no control over the operation of a car was guilty of contributory negligence must almost inevitably be a jury question.

Schwind v Gibson, 220-377; 260 NW 853

Plaintiff's negligence per se not necessarily contributory. A plaintiff riding in his automobile driven by his son, who enters an obscured intersection without sounding his horn (§5043, C., '35), is guilty of negligence per se, imputable from his son, but a jury question arises as to whether or not this contributed to the injury, when from the evidence it is questionable whether defendant could have heard such signal had it been given.

In re Green, 224-1268; 278 NW 285

Negligence—contributory negligence. Evidence held to present a jury question on the issue whether there was negligence in the operation of automobiles by the drivers thereof; likewise, whether there was contributory negligence on the part of an injured party.

Shuck v Keefe, 205-365; 218 NW 31

Stilson v Ellis, 208-1157; 225 NW 346

Dickeson v Lzicar, 208-275; 225 NW 406

Vass v Martin, 209-870; 226 NW 920; 39 NCCA 325; 1 NCCA(NS) 162

O'Hara v Chaplin, 211-404; 233 NW 516; 35 NCCA 573

Rogers v Lagomarcino Co., 215-1270; 248 NW 1

Car striking person standing on street. In personal injury action for being struck by automobile while plaintiff was standing at night on city street discussing question of blame for another collision, plaintiff's contributory negligence was question for jury.

Yale v Hanson, 227-813; 288 NW 905

Standing on endless track of tractor to fill gas tank — contributory negligence. Where defendant, engaged in road construction work, was using caterpillar tractor-pulled dump wagons, and while plaintiff, a gasoline tank wagon operator, was standing on the caterpillar's endless track filling the gasoline tank, the tractor suddenly started moving, throwing plaintiff in path of another oncoming tractor-towed dirt wagon which ran over and injured him, and altho defendant claims that plaintiff was on the tractor at his own peril, even when the peril was created by defendant, the question, as to whether plaintiff acted as ordinarily prudent person or was guilty of contributory negligence, was for jury.

O'Meara v Green Const. Co., 225-1365; 282 NW 735

Bicyclist colliding with unlighted car. Where a minor bicyclist collided with a car unlawfully parked on left side of city street without tail light, when he pulled over to his right to avoid an approaching car the question of his contributory negligence, which depended on whether or not he should have observed the parked car in time to avoid the collision, was for the jury.

Trailer v Schelm, 227-780; 288 NW 865

Contributory negligence—child under 14—burden to overthrow presumption. The presumption is that children under 14 are incapable of contributory negligence. A motorist striking a child of 10 must prove from all the facts and circumstances that the child did not exercise the degree of care ordinarily exercised by a child of like age. Held that the question of whether he had sustained his burden was clearly for the jury.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

"Double passing"—contributory negligence. Evidence relative to the facts attending a "double passing" reviewed and held to present a jury question on the issue of contributory negligence.

Gehlbach v McCann, 216-296; 249 NW 144; 33 NCCA 476

Contributory negligence—failure of lights. Where a truck is being operated in a fog with 35 feet visibility ahead, under speed and road conditions permitting a stop within 25 feet, and after meeting and passing another automobile, there is a failure of the lights on the truck, the truck driver is confronted with an emergency not of his own making, and if he tries the lights again before applying his brakes and turning on his emergency light, after which he discovers another truck stopped on the road within the visibility range so that it would have been seen and avoided had the lights not failed, he is not as a matter of law contributorily negligent in being unable to stop without a collision, but the question is for the jury.

Mueller v State Assn., 223-888; 274 NW 106; 113 ALR 1256

Care—pedestrian on shoulder of highway.

Janes v Roach, 228- . ; 290 NW 87

Dual view of evidence. A jury question on the issue of negligence arises (1) when the evidence is conflicting as to what the injured party did or did not do, and (2) when there may be a fair difference of opinion whether that which the injured party admittedly did do or omitted to do constituted negligence. Evidence as to what an elderly lady did in crossing a public street after nightfall presented a jury question on the issue of contributory negligence.

Robertson v Carlgren, 211-963; 234 NW 824

Plaintiff's conduct—conflict in evidence. The presence or absence of contributory negligence is generally a jury question, and two elements are involved, (1) what plaintiff did, and (2) the effect of his action; if either or both of said propositions present uncertainty, there is a jury question.

Riggs v Pan-American Co., 225-1051; 283 NW 250

Contributory negligence—inadequate brakes. Evidence that a plaintiff motorist approached a bridge at 15 miles per hour and proceeded to cross, keeping his car within 6 inches of the right-hand side, before defendant came on the bridge, and that plaintiff was two-thirds across before defendant swung across the center line and struck him, makes a jury question as to whether the fact of plaintiff's negligence in not having adequate brakes contributed to the collision.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Contributory negligence—jury question unless all minds concur. Contributory negligence is for the jury, and a directed verdict should be denied except in cases where the facts are clear and undisputed and the cause and effect so apparent to every candid mind that but one conclusion may be fairly drawn.

In re Green, 224-1268; 278 NW 285

Person in comparative safety—no duty to anticipate negligence. Plaintiff, standing between a truck and a pile of brick 15 feet away, who, after requesting the truck driver to back up 2 or 3 feet, is crushed against the pile of brick by the truck suddenly backing over the entire distance, is not contributorily negligent as a matter of law, but question is for jury as to plaintiff's right to rely on presumption that truck driver would use due care in backing up and would not suddenly back over the entire distance.

Johnston v Johnson, 225-77; 279 NW 139; 118 ALR 233

Failure of proof — incompetent witness. Where plaintiff, a motor vehicle passenger, predicates his action on two theories, viz: (1) he was not a guest, and (2) he was a guest, and as to the first his proof fails because of witness's incompetency under dead man statute, and as to the second he offers no evidence, there is nothing to be submitted to the jury.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Intoxication of motorist—evidentiary conflict. A sharp conflict in the testimony, as to whether a motor vehicle driver was intoxicated, generates a question of the credibility of the witnesses, which is a matter peculiarly for the jury.

State v Carlson, 224-1262; 276 NW 770

Last clear chance doctrine—nonapplicability. The submission of the last clear chance doctrine, under a record which unquestionably shows that the accident of which plaintiff com-

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plains occurred instantly and inevitably after plaintiff's position of danger was discovered by defendant, constitutes reversible error.

Rutherford v Gilchrist, 218-1169; 255 NW 516

Last clear chance. Jury must consider all the evidence and where it tends to show that defendant, after discovering plaintiff's perilous position, might by the exercise of ordinary care have avoided a collision, it is not error to submit the doctrine of last clear chance.

Pettijohn v Weede, 219-465; 258 NW 72

Groves v Webster City, 222-849; 270 NW 329

Russell v Leschensky, 224-334; 276 NW 608

Lookout for pedestrians. Evidence held to present a jury question on the issues whether the operator of an automobile was guilty of negligence in failing (1) to maintain a proper lookout for pedestrians, (2) to warn pedestrians, and (3) to keep his car under control.

Sexauer v Dunlap, 207-1018; 222 NW 420

Altfilisch v Wessel, 208-361; 225 NW 862; 32 NCCA 482; 34 NCCA 150

Robertson v Carlgren, 211-963; 234 NW 824; 35 NCCA 555

Lorimer v Ice Cream Co., 216-384; 249 NW 220; 1 NCCA(NS) 57

Hitting pedestrian on shoulder of highway. Direct evidence of negligence which is insufficient, in and of itself, to generate a jury question may be sufficient when aided by such fair and reasonable inferences as are legally permissible for the jury to draw from such direct evidence and the attending circumstances. So held on the issue whether the driver of an automobile, in pursuance of a concerted plan between himself and others riding with him, negligently drove the car so close to a woman walking on the shoulder of the pavement that when the door of the car was opened she was hit thereby.

Tissue v Durin, 216-709; 246 NW 806; 2 NCCA(NS) 447

Proper lookout for pedestrian. After motorist had seen pedestrian 180 feet away standing on the curb, and when pedestrian had almost reached the opposite side of the street before being struck by the motor vehicle, which meanwhile had traveled the 180 feet, during which time pedestrian was plainly visible, and when motorist claims he did not again see pedestrian until just before striking him, the evidence raises a jury question as to whether motorist kept proper lookout, and directing a verdict is improper.

Swan v Dailey-Luce Co., 225-89; 277 NW 580; 281 NW 504

Failure to maintain lookout—proper failure to submit. Record reviewed, in an action for damages for death of a pedestrian who was killed by being hit by an automobile on the public highway, and held to justify the court in refusing, for want of evidence, to submit to the jury the issue of the defendant's alleged failure to maintain proper lookout.

Hartman v Lee, 223-32; 272 NW 140

Taillight of parked car concealed by body.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Control—lookout—speed. Evidence reviewed and held to present a jury question on the issues whether the operator of an automobile (1) had his car under proper control in approaching and entering a busy street intersection, (2) kept a proper lookout ahead, (3) operated his car at an excessive rate of speed, or (4) so operated the car that he could stop it within the assured clear distance ahead.

Minks v Stenberg, 217-119; 250 NW 883; 1 NCCA (NS) 57

Parrack v McGaffey, 217-368; 251 NW 871

Failure to stop, look, or control speed. Unreconcilable evidence reviewed at length in an action for damages consequent on alleged negligence, and, in view of the hopeless conflict therein, and the permissible inferences to be drawn therefrom, held to justify the submission of the issue of failure (1) to stop, (2) to maintain a proper lookout, and (3) so to drive as to be able to stop within the assured clear distance ahead.

Bauer v Reavell, 219-1212; 260 NW 39

Lookout—control—car rammed from rear. The issues whether defendant failed (1) to maintain a proper lookout, or (2) to have his car under control, are properly submitted to the jury on evidence that plaintiff, on a clear day, while immediately approaching an intersecting crossroad, and while other cars were closely approaching from the opposite direction, was slowly driving his car in the immediate rear of several other forward-moving cars on the right-hand side of an 18-foot dry, paved road with level shoulders and no accompanying ditches and was suddenly and very unexpectedly rammed from the rear by defendant's truck.

Luther v Jones, 220-95; 261 NW 817

Maintaining lookout. Evidence reviewed and held to present jury question on issue whether a motorist had maintained a proper lookout preceding a collision.

McWilliams v Beck, 220-906; 262 NW 781

Negligence—speed. Evidence held to present jury questions on the issues whether defendant (1) drove at a dangerous rate of speed, (2) did not have his car under control, and (3) failed to maintain a proper lookout.

Parrack v McGaffey, 217-368; 251 NW 871

Proper lookout—evidence—sufficiency. Evidence reviewed and held insufficient to present a jury question on the issue whether the operator of an automobile maintained a proper look-

out preceding the time when a small child suddenly emerged from behind an obstruction and ran into the pathway of the approaching car.

Howk v Anderson, 218-358; 253 NW 32

Striking boy on bicycle—dispute as to lookout. Where a defendant county-employee-trucker ran over a boy on a bicycle, an allegation of defendant's lack of proper lookout is clearly for the jury, when from the evidence, indicating the trucker may have struck the boy from the rear and should have seen him, the jury may well have found that defendant did not, in fact, keep such lookout.

Montanick v McMillin, 225-442; 280 NW 608

Motorist anticipating dangerous position of one aiding. Where a stalled motorist heard one of several bystanders say, "Let's give him a push", whereupon they arranged themselves in positions to push the automobile, and one called, "Let's go ahead", a directed verdict is properly denied, and a jury question is presented as to whether or not the motorist might have known that a person was directly behind the automobile and would be injured if the car moved backward.

Huston v Lindsay, 224-281; 276 NW 201

Truck in reverse gear—negligent starting. Evidence reviewed and held to present jury questions on the issues:

1. Whether the operator of a truck which he had left in reverse gear was negligent in starting the engine when he had reason to know that another person was in the near vicinity of the rear of the truck; and
2. Whether the deceased was injured by being crushed between the rear of said truck and a building.

Laudner v James, 221-863; 266 NW 15

Backing up truck—control. It cannot be held as a matter of law that plaintiff failed to establish any negligence on the part of the defendant when the record shows that truck driver, after backing an intended 2 or 3 feet and almost stopping, suddenly moved back an additional 12 feet, crushing plaintiff against a pile of bricks.

Johnston v Johnson, 225-77; 279 NW 139; 118 ALR 233

Supported assignments of negligence. Pleaded and supported assignments of negligence, which the jury might find was the proximate cause of the accident and resulting injury, must necessarily be submitted to the jury.

Muirhead v Challis, 213-1108; 240 NW 912

General and specific allegations—belated attack. Except in res ipsa loquitur cases a specific allegation will not waive a general allegation of negligence, which general allegation must be assailed by motion, if timely, before answer and without such motion is properly submitted to the jury if sustained by the evidence.

Gookin v Baker & Son, 224-967; 276 NW 418

Driving on wrong side of highway—evidence. Evidence on the issue whether the operator of an automobile was driving on the wrong side of the highway reviewed, and held to present a jury question.

Ryan v Amodeo, 216-752; 249 NW 656

Henriksen v Stages, 216-643; 246 NW 913

McCoy v Cole, 216-1320; 249 NW 213; 33 NCCA 524

Schuster v Gillispie, 217-386; 251 NW 735

Statutory negligence—evidence. Evidence reviewed, on the issues whether the driver of an automobile (1) was driving on the wrong side of the street, (2) "cut the corner" of an intersection, and (3) gave no signal of his approach, and held to present a jury question.

Handlon v Henshaw, 206-771; 221 NW 489; 32 NCCA 433; 35 NCCA 649

Crossing black line on pavement. Eyewitness testimony that a defendant-motorist crossed the black line to the left side of the pavement preparatory to passing an automobile, then, observing an approaching vehicle, swung back in again, and in so doing struck this latter vehicle, deflecting his own automobile so as to collide with a second approaching vehicle in which plaintiff was riding, makes a jury question as to defendant's acts being negligence.

Echternacht v Herny, 224-317; 275 NW 576

Operation on wrong side of road—legal excuse. The act of the operator of a vehicle in turning to the left-hand side of a country highway when meeting another vehicle is presumptively negligent, but testimony that the immediately approaching vehicle was weaving from side to side of the road, and that the turn to the left was made in order to avoid a collision, presents a jury question whether he was, in turning to the left, exercising reasonable care.

Babendure v Baker, 218-31; 253 NW 834; 2 NCCA(NS) 650

Driving outside traveled roadway. An allegation that a motorist, without warning, ran his car outside the traveled part of the highway and injured plaintiff, constitutes an adequate charge of negligence, and must, of course, if supported by evidence, be submitted to the jury.

Townsend v Armstrong, 220-396; 260 NW 17

Negligence—occupying right side of highway. A specification of negligence that defendant did not keep his truck on the right-hand side of the highway when struck from the rear could not be withdrawn and was properly submitted to the jury when there was evidence to sustain the specification. Evidence did not show that collision would have oc-

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curred, even tho truck had been wholly on right-hand side of the highway.

Gookin v Baker & Son, 224-967; 276 NW 418

Emergency as legal excuse. Evidence that a pedestrian walking along a shoulder of a highway suddenly stepped in front of an automobile, where he was struck, raises a jury question as to such emergency and as to legal excuse for failing to stop within the assured clear distance ahead.

Edwards v Perley, 223-1119; 274 NW 910

Fog—careful and prudent operation. Evidence held to present a jury question whether the operator of an automobile was, on a foggy night, proceeding in a careful and prudent manner, and whether he had such control over the car that he could avoid obstacles appearing within the range of his vision.

Caudle v Zenor, 217-77; 251 NW 69; 34 NCCA 122; 1 NCCA(NS) 44

Failure to see obstruction in fog. In an action for damages resulting from injuries sustained when the car, in which the plaintiff and her husband were riding on a foggy evening, ran into a car which the defendant had left standing on the highway after an unsuccessful attempt to tow it away, it was error for the lower court to direct a verdict for the defendant, as the question of liability should have gone to the jury.

Newman v Hotz, 226-834; 285 NW 287

Negligence—intersection collision. In a damage case resulting from a collision between a taxicab and an automobile at an intersection, when the record does not conclusively show negligence, that question and how the accident occurred are for the jury.

Womochil v Peters, 226-924; 285 NW 151

Negligence of both plaintiff and defendant—jury question. Evidence held to present a jury question on the issue of the negligence of both plaintiff and defendant in a collision at a street intersection.

Branch v Railway, 214-689; 243 NW 379

Negligence at intersection. Evidence held to present jury question on the issue of negligence at a street intersection.

Appleby v Cass, 211-1145; 234 NW 477

Approaching intersection—instruction. In an action for personal injuries sustained by driver of a motor vehicle in collision with another vehicle which entered intersection from the left, an instruction stating that the statute requires any person operating a motor vehicle to have the same under control and reduce the speed to a reasonable and proper rate when approaching and traversing a crossing or intersection of public highways was correct. Since the jury in most cases must determine from the circumstances whether there had been a compliance with such statute, question was properly submitted.

Rogers v Jefferson, 226-1047; 285 NW 701

Intersection collision—complex facts. An intersection collision involving disputed facts, fractional seconds, speeds of 40 to 50 miles an hour, and failure to see an approaching automobile presents, not a matter of law for the courts, but a question for the jury to determine blame.

Eby v Sanford, 223-805; 273 NW 918

Assuming compliance with law when danger obvious. Where plaintiff, riding with his son, approaches an intersection of county trunk roads and on his left observes defendant also approaching the intersection, altho plaintiff may assume that defendant will obey the right-of-way law, he must not place himself in a position of obvious danger avoidable by the exercise of ordinary care, and whether or not he did so place himself is a jury question.

Rogers v Jefferson, 224-324; 275 NW 874

Yielding one-half of road—assuming compliance with law limited. Where two motorists approach each other in a snowstorm, one driving into the face of the storm, which has obliterated the pavement outlines and the dividing mark thereon, the other motorist has a right to assume that he will be accorded one-half the traveled way, until he sees, or until, in view of the storm conditions and added driving difficulties, he should, in using ordinary care, realize that half the highway was not being yielded, under which facts a jury question is presented as to whether his continued reliance on the assumption excused him from the charge of negligence.

Futter v Hout, 225-723; 281 NW 286

Justifiable ignoring of issues. Grounds of negligence which, if proven, would not establish a cause of action, are properly withheld from the jury.

Fleming v Thornton, 217-183; 251 NW 158

Law of case—location of tracks. A holding on appeal that a jury question on the issue of negligence in operating an automobile was not generated by record evidence relative to the location and condition of wrecked automobiles, and as to marks and broken glass on the highway is necessarily conclusive on the court on retrial on substantially the same evidence.

Reimer v Musel, 220-1095; 264 NW 47

Absence of tail lights and reflectors—statement by court. Testimony reviewed and held that the court could not say, as a matter of law, that the truck in question was not, at the time of a collision, equipped with tail lights and reflectors.

Isaacs v Bruce, 218-759; 254 NW 57; 36 NCCA 93

No lights—high speed—wrong side. Evidence held to present a jury question whether an automobile was negligently operated (1) without lights, (2) at a dangerous rate of speed, and (3) on the wrong side of the highway.

Carlson v Decker, 216-581; 247 NW 296; 36 NCCA 91

Unlighted truck in highway. Evidence which would justify a finding that the driver of a truck left it where it obstructed one-half of the highway and with the rear end unlighted, presents a jury question on the issue of such assigned negligence.

Kimmel v Mitchell, 216-366; 249 NW 151; 35 NCCA 790; 36 NCCA 106

Parking in highway — absence of lights. Negligence alleged to have been the proximate cause of a collision and asserted in the plea that defendant's truck (1) was parked, in the nighttime, diagonally across the entire right-hand side of a paved highway, and (2) without lights, with substantial evidence pro and con, both as to the position of the truck and as to the lights, necessarily presents a jury question.

Schwind v Gibson, 220-377; 260 NW 853; 37 NCCA 496

Proximate cause—question of fact—general rules applicable. The question of proximate cause, as a general rule, is a question of fact, and the same rules apply as in other questions of fact.

Blessing v Welding, 226-1178; 286 NW 436

Proximate cause of injury. The question whether a certain negligent act was the moving or producing cause—the proximate cause—of an injury is properly submitted to the jury when the record contains evidence which establishes an act which could fairly be such proximate cause and contains no evidence tending to establish any other cause.

Buchanan v Cream Co., 215-415; 246 NW 41

Negligence of different agencies—proximate cause. Where the evidence demonstrates that an injury resulted from the negligence of two agencies, the question of proximate cause is peculiarly one for the jury.

Schwind v Gibson, 220-377; 260 NW 853

Proximate cause. Section 5056, C., '35, [§5030.08, C., '39], requiring parking on right side of city street, was in effect in city which had not adopted any ordinance to the contrary under authority of §4997, C., '35 [§5018.01, C., '39], and §5045, C., '35 [§§5033.07, 5033.08, C., '39], in view of its legislative history, required red tail light upon automobile parked at night upon city street. The purpose of these statutes was protection and warning of traffic, and violation thereof without legal excuse was negligence, but whether such negligence was proximate cause of a bicyclist's collision with ar automobile so parked was question for jury.

Trailer v Schelm, 227-780; 288 NW 865

Lack of proper lamps on trucks or trailers—proximate cause. In an action at law to recover damages for personal injuries sustained by plaintiff when car in which she was riding collided with a tractor-trailer which had stalled on an icy hill on a country highway at night and had jackknifed across the highway, the question of owners' and operators' negligence in failing to comply with statutes prescribing number and place of lamps required on truck or trailer, and whether such negligence, if any, had proximate causal connection with injury sustained by plaintiff, held, under the evidence, properly submitted to the jury.

Johnson v Transp. Co., 227-487; 288 NW 601

Turning or changing course — proximate cause. Evidence reviewed, and held to present a jury question on the issue whether a motorist was negligent in suddenly turning from the right side to the left side of a paved rural highway (in order to enter a private driveway on the latter side of said road), and whether, if negligent, said negligence was the proximate cause of a collision with another vehicle which he knew he was about to meet.

McKinnon v Guthrie, 221-400; 265 NW 620

Proximate cause. Conflicting testimony as to the speed of the defendant's truck while following pick-up truck on an icy street, and as to the distance between the trucks when the one in front skidded and turned around, presented a jury question as to whether the driver of the defendant's truck was guilty of negligence in colliding with the pick-up truck, forcing it over a curb where it struck the plaintiff, and whether such negligence, if any, was the proximate cause of the plaintiff's injuries.

Remer v Takin Bros., 227-903; 289 NW 477

Proximate cause—accident causing injury—death following. Where a healthy, normal boy of 17 dies from an ear infection and mastoid involvement, the symptoms of which began shortly after the upsetting of a school bus in which he was riding, a jury question is created as to whether such accident was the moving or producing—the proximate—cause of the injury and death.

Olson v Cushman, 224-974; 276 NW 777

Negligence of outsider as proximate cause. The court must submit to the jury the supported plea that the proximate cause of an accident was the negligence of an outsider—a person not a party to the action.

Hoover v Haggard, 219-1232; 260 NW 540

Occupant injured—imputed negligence of driver. Where a car collided with a stalled tractor-trailer, jackknifed on an icy hill at night, the question of plaintiff's contributory negligence was properly submitted to the jury.

VIII PRESUMPTIONS, EVIDENCE, AND PROOF—continued

(f) JURY QUESTIONS—continued

wherein it is shown the tractor, with lighted headlamps, standing on the right side of the highway, diverted plaintiff's and husband-driver's attention, and, there being no reasonable apparent cause to suspect that trailer blocked the left side of highway, and, where jury could find that car in which plaintiff was riding was proceeding at less than 20 miles per hour, and, that plaintiff and husband-driver were looking straight ahead, there is no warrant for saying plaintiff was contributorily negligent as a matter of law; however, under the record, the negligence of the husband-driver, if any, could not be imputed to plaintiff.

Johnson v Transp. Co., 227-487; 288 NW 601

Passing on curve — negligence. Evidence held to present a jury question on the issue of negligence of the operator of an automobile in passing another vehicle on a curve, and returning to the right side of the traveled way within 30 feet of the car which had been passed.

Andersen v Christensen, 222-177; 268 NW 527

Persons working on highway—truck driver's duty. In a laborer's personal injury action against a truck driver for backing truck into laborer while both were engaged in highway construction, §5017.06, C., '39, exempting persons and motor vehicles actually engaged in work upon the highway from the motor vehicle law requirements, does not exempt a truck driver from using his horn if necessary in the exercise of ordinary care when backing from an intersection onto highway under construction. Question of defendant's negligence in not sounding horn nor observing plaintiff's presence when backing truck where men were working, and question of plaintiff's contributory negligence while working under foreman's instruction at outside edge of road were questions properly submitted to jury.

Rebmann v Heesch, 227-566; 288 NW 695

Specification of negligence—evidentiary support. Evidence held to support the specifications of negligence submitted to the jury.

O'Hara v Chaplin, 211-404; 233 NW 516

Assured clear distance.

Janes v Roach, 228- ; 290 NW 87

Negligence — speed in city. Evidence reviewed, and held to present a jury question as to the negligence of a motorist in operating his car in the business district of a city (1) by maintaining a speed in excess of 15 miles per hour, or (2) by failing to maintain proper lookout, or (3) by increasing instead of reducing his speed on approaching an intersection and pedestrians walking across one side thereof, or by so doing without giving warning of his approach.

Huffman v King, 222-150; 268 NW 144

Speeding in residence district—sufficiency of evidence—jury question. Evidence that accident occurred on main street of town about four or five blocks from the business district, that defendant was driving 50 miles per hour, that there were a number of dwellings on both sides of the street, and that defendant had passed a sign which read, "Slow down, speed limit 25 miles per hour", was sufficient to raise jury question on issue of whether car was being driven in a residence district in excess of 25 miles per hour.

Doherty v Edwards, 227-1264; 290 NW 672

Speed determined by jury. Jury was warranted in finding from conflicting testimony that the defendant's truck was traveling at a speed of 20 to 25 miles an hour and that the speed was excessive and dangerous in view of the icy condition of the street.

Remer v Takin Bros., 227-903; 289 NW 477

Speed and distance as jury questions. In automobile damage action, where collision occurred about 8:30 a. m. at the intersection of two country highways, and where plaintiff, driving west, allegedly entered the intersection first at about 20 miles per hour and had the right of way, and defendant, driving south about 40 miles per hour in a truck loaded with seven head of cattle, collided with plaintiff's automobile about six or seven feet west of the center of (statutory) intersection, the trial court, deciding the issues as a matter of law by directing a verdict for defendant, was in error, since the question of speeds and distances, being estimates rather than certainties, raises a jury question on evidence submitted.

Short v Powell, 228- ; 291 NW 406

Speed determined from skid marks. A witness in an automobile accident case may describe skid marks, but may not base an opinion of the speed of an automobile on them, as it is solely within the province of the jury to draw an inference of speed from skid marks.

Ward v Zerzanek, 227-918; 289 NW 443

Control and speed of truck crossing bridge. The question of a trucker's speed and control while crossing a bridge is properly one to be considered by the jury as bearing on his negligence, when the truck was wide and the bridge was narrow, and somehow the truck collided with an oncoming vehicle.

Hawkins v Burton, 225-707; 281 NW 342

Direct evidence of speed—surrounding circumstances considered. A truck driver's direct testimony as to speed will not be taken as a verity, but will generate a jury question when considered with the other facts and circumstances of the accident tending to overcome the direct evidence as to speed.

Hawkins v Burton, 225-707; 281 NW 342

Failure to lessen speed or signal approach. A jury question on the issue of negligence of the operator of an automobile is generated by evidence tending to show that said operator was driving easterly on a straight road at 50 miles per hour; that he plainly could have seen, while at a distance of 80 rods, two well-lighted cars, and that they were standing together on the south side of the highway, one headed west and one headed east with all headlights burning; and that, without slacking his speed, or giving signal of his approach, he passed to the south of said stationary cars, and so close thereto as to strike and break an open door on one of said cars.

Hanson v Manning, 213-625; 239 NW 793; 2 NCCA(NS) 446

Passenger's assumption of risk of riding with aged driver. While riding in the rear seat of an automobile being demonstrated to her employer as a prospective purchaser, an aged lady who protests against the salesman permitting her employer, also an aged person, to drive the automobile and who, altho she cannot get out of the automobile, is assured of safety by the salesman, does not as a matter of law assume the risk incident to her employer's driving, since reasonable minds could differ, and a jury must determine if it was unreasonable for her to rely on the salesman's assurances of safety.

Wittrock v Newcom, 224-925; 277 NW 286

Submitting both negligence and recklessness. Both questions of negligence and of recklessness may in a proper case be submitted together to the jury.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

General or dragnet assignment. A general or dragnet allegation of negligence is properly submitted to the jury in accordance with the supporting evidence when such allegation is neither attacked (1) by motion for more specific allegation, nor (2) by motion to strike or withdraw.

Watson v Railway, 217-1194; 251 NW 31

Unallowable dragnet assignment. It is erroneous to submit to a jury, over proper objection, a pleaded assignment of negligence to the effect that a defendant operated his automobile "without regard for the rights and safety of the lives and property of others rightfully upon and using said highway, and of plaintiff in particular."

Cooley v Killingsworth, 209-646; 228 NW 880

Improper submission of issue. The issue of the alleged negligence of a truck driver in running over and killing a person cannot be properly submitted to the jury on evidence which fails to reveal the facts and circumstances immediately attending the accident itself—which leaves to mere conjecture the manner in which the fatal accident occurred. So held as to a fatal injury to a child.

Westenburg v Johnson, 221-134; 264 NW 18

Operation—improper submission. Only supported grounds of negligence should be submitted to the jury. So held where the court submitted the negligence of the driver of an automobile (1) in failing to turn to the right, when signaled by an overtaking car, and (2) in increasing his speed when so signaled, when, on the record, the only possible proximate negligence was the act of the said driver in overtaking the passing car, after it had passed, and then bringing about a collision.

Berridge v Pray, 202-663; 210 NW 916

Plural assignment — justifiable submission. Record reviewed in an action for damages consequent on a collision during the nighttime between trucks, and held to justify the court in submitting to the jury not only the issue (1) of defendant's failure to turn to the right and yield one-half of the traveled way, but also the issues (2) of defendant's failure to maintain a proper lookout for other vehicles, and (3) of defendant's alleged excessive speed.

Pazen v Des Moines Co., 223-23; 272 NW 126

Withdrawal of issue supported by evidence —pedestrian off pavement. Under a record in a motor vehicle-pedestrian accident case showing that the jury could have found from the evidence that decedent was more off the pavement than on it, it is error to withdraw from the jury plaintiff's allegation that his intestate had reached a place of comparative safety on the shoulder of the highway and that defendant left the highway without warning the pedestrian.

McCormick v Kennedy, 224-983; 277 NW 576

Truck trailer jackknifed across road—sufficiency of time to set out flares. In an action at law to recover damages for personal injuries received when car in which plaintiff was riding collided with the trailer of a tractor-trailer unit which had stalled on an icy hill at night on a country highway, and had jackknifed across highway, and where it is claimed the operators of the trailer unit failed to comply with statute requiring such standing vehicles to set out flares, and where operators claimed a warning was given by waving an ordinary flash light from inside or just outside cab of tractor, the question as to whether operators of trailer unit had sufficient time to set out warning signals, and whether the warning by waving an ordinary flash light was sufficient to afford a warning of presence of truck and trailer blocking motorists' passage, were proper questions of fact for the jury.

Johnson v Transp. Co., 227-487; 288 NW 601

Violation of ordinance. Whether the driver of a slowly moving vehicle was violating an ordinance which required him to keep as close

VIII PRESUMPTIONS, EVIDENCE, AND PROOF—continued

(f) JURY QUESTIONS—concluded

as possible to the right-hand curb becomes a jury question on evidence that he was driving three feet from said curb, with adequate space for another vehicle to pass to his left.

Ege v Born, 212-1138; 236 NW 75

Eyewitnesses' estimate of speed, location, distance. The testimony of eyewitnesses to an automobile accident as to speed, location, and distance is only their judgment and estimation, which the jury must consider with other evidence in order to arrive at the truth.

Glover v Vernon, 226-1089; 285 NW 652

No-eyewitness rule. Evidence in connection with the presumption of due care in the absence of eyewitnesses reviewed and held to present a jury question on the issue of contributory negligence.

Lorimer v Ice Cream Co., 216-384; 249 NW 220; 35 NCCA 709

Existence of eyewitnesses—not jury question. In a pedestrian-automobile accident involving the no-eyewitness rule, it is not for the jury to decide whether or not there were eyewitnesses.

Edwards v Perley, 223-1119; 274 NW 910

Personal injuries. Evidence held to present a jury question on the issue whether injuries were permanent and whether they were the proximate result of an accident or resulted from a former diseased condition of the injured party.

Dickeson v Lzicar, 208-275; 225 NW 406

Pain and suffering—instruction. In an action to recover for personal injuries sustained in an automobile collision where plaintiff testified that headaches causing much suffering affected him since the accident, and when an expert witness testified that plaintiff's injury might have caused headaches and that the injury might be permanent, an instruction permitting recovery for future pain and suffering from headaches was not erroneous and properly submitted the question to the jury.

Rogers v Jefferson, 226-1047; 285 NW 701

Damages—future pain as incident to permanent injury. Even without a claim for damages for future pain and suffering, allegations and proof of permanent injuries from which future pain and suffering are reasonably certain to follow warrant the submission to the jury of this question.

Keller v Dodds, 224-935; 277 NW 467

Res ipsa loquitur—negligence inferred from circumstances. Pleading specific acts of negligence precludes recovery under the doctrine of res ipsa loquitur, and as no inference of negligence arises from the mere fact of a collision, a pedestrian's action to recover damages from a motorist may not be submitted to the jury on the theory that the jury might reasonably infer negligence from the circumstances. A case may be submitted on this theory only when there may be drawn from the circumstances no other reasonable conclusion than the existence of negligence.

Armbruster v Gray, 225-1226; 282 NW 342

Weight of evidence—credibility of witnesses. In action for damages to plaintiff's automobile wherein there is a dispute in the testimony, the weight of evidence and credibility of witnesses are for the jury.

Schenk v Moore, 226-1313; 286 NW 445

Credibility — contradictory previous testimony. Inconsistent testimony by a witness at one trial as to certain facts in an automobile accident cannot as a matter of law negative his testimony in a later trial, inasmuch as the jury is the sole judge of the credibility of a witness and the weight of his testimony.

Echternacht v Herny, 224-317; 275 NW 576

Responsibility between defendants. In an action for injuries sustained by a passenger riding in a taxicab, the question of responsibility for the accident between the owner of the cab, the driver, and a party to an agreement under which the cab was operated was a jury question.

Womochil v Peters, 226-924; 285 NW 151

(g) DECLARATIONS AND ADMISSIONS

Petition—allegations in one count not admissions as to another count. Different theories of recovery contained in separate counts of a petition are not admissions by which the plaintiff is bound under the rule that he may not controvert his own pleading.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Caution—weight to be given admission. A cautionary instruction pertaining to the weight to be given an alleged oral admission of defendant to plaintiff, following a motor vehicle accident, should include a counterbalancing statement that, if the admission were deliberately made or often repeated, it might be the most satisfactory evidence.

White v Zell, 224-359; 276 NW 76

Contributory negligence — declarations of passenger. Testimony by a passenger in an automobile to the effect that shortly before an accident he called the attention of the driver to the approaching car is admissible on the issue of the contributory negligence of the passenger.

Waldman v Motor Co., 214-1139; 243 NW 555

Damaging statements—failure to deny as admission. Evidence of the failure of a person to reply to material statements made in his presence and hearing, concerning facts affecting his rights, is competent if the statements are of such character and are made under such conditions that a denial would have been

natural had the statements been untrue and incorrect.

Doherty v Edwards, 227-1264; 290 NW 672

Declarations inadmissible against master. In a joint action against a master and his servant for damages consequent on the negligent operation of the car by the servant, declarations or statements by the servant made several days after the accident tending to show the negligence of the servant are, while admissible against the servant, not admissible against the master; and the court must by proper instruction, if requested, limit the testimony accordingly.

Droullard v Rudolph, 207-367; 223 NW 100
Wilkinson v Lbr. Co., 208-933; 226 NW 43
Glass v Hutchinson Co., 214-825; 243 NW 352

Non res gestae statements. When a plaintiff seeks to recover damages from the owner of an automobile because of the negligence of the driver, he must prove such negligence by evidence other and different than the non res gestae statements and declarations of the driver, and where the owner and the driver are co-defendants the court must exercise meticulous care to instruct the jury accordingly.

Cooley v Killingsworth, 209-646; 228 NW 880
Ege v Born, 212-1138; 236 NW 75

Non res gestae statements by agent. Non res gestae statements by the driver of an automobile, tending to show the negligence of the driver, are not admissible against the owner of the car; and if the owner and the driver are co-defendants, the court should receive the statements only as to the driver, and must clearly instruct the jury that such statements must not be considered in determining the liability of the owner. Whether failure of the owner to ask any instructions would obviate the error in failing so to instruct, quaere.

Wieneke v Steinke, 211-477; 233 NW 535

Non res gestae statements of driver. Non res gestae statements of the driver of an automobile tending to show his negligence are not competent against the owner of the vehicle, nor are such statements of the owner competent evidence against the driver, and the court must clearly and definitely so instruct. In addition the court must submit separate forms of verdict if requested.

Broderick v Barry, 212-672; 237 NW 481; 75 ALR 1530

Statement made at scene of accident.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Opinion evidence—allowable conclusion. The statement of a witness to the effect that, when his vehicle was hit, "he was headed right into" another vehicle, is an allowable conclusion.

Judd v Rudolph, 207-113; 222 NW 416; 62 ALR 1174

Owner and operator as joint defendants—instructions. In a joint action against the owner and the operator of an automobile for damages consequent on the negligent operation of the automobile, wherein there is evidence of declarations and statements by the driver immediately following the accident (but not part of the res gestae), tending to establish the operator's negligence, instructions which permit or require the jury to consider such declarations and statements in determining the liability of said owner are prejudicially erroneous.

Looney v Parker, 210-85; 230 NW 570

Separate forms of verdicts. In a joint action against the driver of an automobile and the owner of the vehicle, wherein necessity arises so to instruct as to limit the effect of the driver's admissions to the question of his liability, and the effect of the owner's admissions to the question of his liability, separate forms of verdict must be submitted, if requested.

Broderick v Barry, 212-672; 237 NW 481; 75 ALR 1530

Incidental reference to indemnity insurance. Plaintiff in an action for damages consequent on an automobile collision has a clear right to show that defendant admitted his negligence and liability therefor, even tho said admission incidentally discloses that defendant was protected by indemnity insurance; and especially no error occurs when the reference to insurance is innocently brought out and was at once withdrawn by the court from the jury.

Liddle v Hyde, 216-1311; 247 NW 827

Separation of relevant and irrelevant matter. When a conversation relates to two distinct and easily separated subject matters, one relevant and one irrelevant, the latter cannot be deemed admissible simply because it is a part of the conversation as a whole. So held where the conversation related (1) to the manner in which an accident happened and (2) to the insurance carried by the defendant.

Kuhn v Kjose, 216-36; 248 NW 230

(h) RES GESTAE

Evidence—gruesome recital. The res gestae of an accident are admissible even tho the recital is gruesome.

Judd v Rudolph, 207-113; 222 NW 416; 62 ALR 1174

Nonconsequential statements—reception discretionary with court. The admissibility of res gestae statements rests in the sound discretion of the trial court. So held as to nonconsequential statements attending an accident.

Fortman v McBride, 220-1003; 263 NW 345

Evidence—colloquy following accident. In an action for damages consequent on a colli-

VIII PRESUMPTIONS, EVIDENCE, AND PROOF—concluded

(h) RES GESTAE—concluded

sion of automobiles, prejudicial error results from receiving against defendant evidence of a heated colloquy between defendant and the other driver, occurring within a very few minutes after the collision, and wherein each driver asserted that he was on the right side of the highway, and wherein the defendant refused to examine certain tracks as bearing on the dispute and applied scandalously opprobrious epithets to the other driver; this because said testimony is neither a part of the res gestae nor does it reveal any admission on the part of the defendant.

Muirhead v Challis, 213-1108; 240 NW 912

Admissibility of declaration. The declaration of the driver of an automobile almost immediately after a collision had occurred and before or while an injured person was being removed from one of the cars, to the effect that "I know I was driving fast", is part of the res gestae, and admissible against both defendants, to wit, the driver of the car and the owner thereof.

Duncan v Rhomberg, 212-389; 236 NW 638

Declarations by bystanders—proper exclusion. The exclusion of declarations of unidentified bystanders, made shortly after an accident, to the effect that "the boys ran between the cars" does not constitute reversible error when ample evidence bearing on the same point was received in evidence, and when the said declarations were, in view of the entire record, quite inconsequential.

Riddle v Frankl, 215-1083; 247 NW 493

Non res gestae statements of driver. In a joint action against the driver and owner of an automobile, evidence of the non res gestae statements of the driver tending to show his negligence is receivable provided the court properly protects the owner of the automobile from the effect of such statements.

Ege v Born, 212-1138; 236 NW 75

Non res gestae statements. When a plaintiff seeks to recover damages from the owner of an automobile because of the negligence of the driver, he must prove such negligence by evidence other and different than the non res gestae statements and declarations of the driver, and where the owner and the driver are co-defendants the court must exercise meticulous care to instruct the jury accordingly.

Cooley v Killingsworth, 209-646; 228 NW 880
Wieneke v Steinke, 211-477; 233 NW 535
Ege v Born, 212-1138; 236 NW 75

Non res gestae statements of driver. Non res gestae statements of the driver of an automobile tending to show his negligence are not competent against the owner of the vehicle, nor are such statements of the owner competent evidence against the driver, and the court must clearly and definitely so instruct. In addition the court must submit separate forms of verdict if requested.

Broderick v Barry, 212-672; 237 NW 481

(i) DEMONSTRATIVE EVIDENCE

Appearance of automobile lights. Demonstrations in court as to the appearance of automobile lights on the occasion of a collision in the public highway are properly rejected when the time and conditions of the demonstration are not shown to be the same as at the collision in question.

State v Fahey, 201-575; 207 NW 608

Exhibiting wounds to jury. During the final arguments in a personal injury case, the court may permit the plaintiff to seat himself alongside the jury in order that the jury may have a close-up view of wounds which, during the taking of testimony, have been fully described and exhibited to the jurors while some of them were 20 feet from the witnesses.

Mizner v Lohr, 213-1182; 238 NW 584

Contract of sale. On the issue of the ownership of an automobile, the contract of sale to the alleged owner is relevant and material.

Kimmel v Mitchell, 216-366; 249 NW 151

X-ray sciagraphs—sufficient foundation. Proof that certain X-ray sciagraphs were taken, for the use of the attending physician, by an expert in that science, and other circumstantial evidence tending to show the correctness of such sciagraphs, furnish sufficient basis for their introduction as evidence, even tho no witness specifically asserts that they "correctly portray the condition of the body affected."

Wosoba v Kenyon, 215-226; 243 NW 569; 1 NCCA(NS) 63, 747

IX INSTRUCTIONS

(a) IN GENERAL

Incomplete record. Alleged errors in instructions will not be considered on appeal when the record contains only part of the instructions and when those contained in the record announce correct abstract propositions of law.

McDowell v Oil Co., 212-1314; 237 NW 456
Reardon v Hermansen, 223-1207; 275 NW 6

Questions not raised in trial court—no review. Assignments of error relating to instructions not raised or passed upon by the lower court will not be considered on appeal.

Simmering v Hutt, 226-648; 284 NW 459

Proper assumption of fact. An instruction may properly assume as true a fact which the record unquestionably reveals.

Engle v Nelson, 220-771; 263 NW 505

Invading province of jury. An instruction which deprives the jury of the right to pass on a jury question is, of course, unthinkable.

Stingley v Crawford, 219-509; 258 NW 316

Impeachment—effect. The ordinary instructions as to the credibility of witnesses are all-sufficient in the absence of a request for a specific instruction as to the effect of impeaching testimony.

Altfilisch v Wessel, 208-361; 225 NW 862

Undenied statement as admission—cautionary instruction—failure to request. Court did not err in failing to give a cautionary instruction concerning evidence of damaging statements against defendant, made in his presence, to which he failed to reply or deny, when no such instruction was requested, nor when such claimed error was not raised in the trial court.

Doherty v Edwards, 227-1264; 290 NW 672

Erroneous instructions cured where directed verdict proper. Errors in instructions made by the trial court are not prejudicial to the appellant when appellee is entitled to a directed verdict.

Young v Clark, 226-1066; 285 NW 633

Harmless error—error in favor of complainant. A litigant may not complain of instructions which gave him an unjustifiable chance for a verdict in his own favor.

Judd v Rudolph, 207-113; 222 NW 416; 62 ALR 1174

Correct and incorrect instruction on same subject matter. A correct and an incorrect instruction on the same subject matter presents a hopeless contradiction to the jury.

Hoover v Haggard, 219-1232; 260 NW 540

View of object by jurors. Principle reaffirmed that when jurors are permitted to view an object which is the subject of the action, they must be instructed that they must base their verdict solely on the evidence received judged in the light of their observation of the object.

Gehlbach v McCann, 216-296; 249 NW 144

Equal degree of care. Any basis in the instructions for claiming that a greater degree of care was required of one party than of the other is fully effaced when the court otherwise instructs definitely to the contrary.

Stilson v Ellis, 208-1157; 225 NW 346

Equal right to use. The abstract statement that "all persons have an equal right to use the highways in an equal manner", without qualification as to the right of way in specific instances, is manifestly incorrect.

Judd v Rudolph, 207-113; 222 NW 416; 62 ALR 1174

Droullard v Rudolph, 207-367; 223 NW 100

Equal use of highway—right qualified by ordinance. An instruction that drivers of different vehicles are entitled to an "equal use of the street," with elucidating qualifications relative to the duty of one of the drivers under a valid regulatory city ordinance, is quite unobjectionable.

Ege v Born, 212-1138; 236 NW 75

Limiting issues. Issues of negligence submitted to the jury should be specifically limited to those supported acts of commission or omission alleged in the petition.

Parrack v McGaffey, 217-368; 251 NW 871

Pleading—sufficiency. A pleader is entitled to claim as many grounds of actionable negligence as flow from his pleaded statements of facts. Pleadings as to the facts attending a collision at an intersection of highways reviewed, and held to warrant the instructions given.

Sutton v Moreland, 214-337; 242 NW 75

Intermingling general and specific allegations. Instructions which refer the jury to the general allegations of negligence and not to the specific allegations are of harmless consequence when the latter are simply an elaboration of the former.

Tissue v Durin, 216-709; 246 NW 806

Instructions—conformity to general allegation—nonerror. An assignment of error that a general allegation of negligence specifying, "In not operating and driving said truck in a careful and prudent manner on a public highway", should not have been submitted to the jury, because such phraseology implied a moving vehicle, is without merit when there is substantial evidentiary conflict as to whether the truck was moving or stopped.

Gookin v Baker & Son, 224-967; 276 NW 418

Care required. Instructions reviewed, and held correctly to state the degree of care which is incumbent on a person using the highway.

Ryan v Shirk, 207-1327; 224 NW 824

Failure to exercise undue care. Error results from instructing that the driver of an automobile is negligent if he fails "to adopt such means as are within his power to avoid a collision". He performs his full duty if he exercises "ordinary care" to avoid the collision.

Jarvis v Stone, 216-27; 247 NW 393

Control of car—undue degree of care. An instruction, which, in effect, imposes upon the operator of an automobile an absolute duty to have his car under such control as to avoid injury to others, under all circumstances, is fundamentally erroneous because imposing an undue degree of care, and necessarily justifies an order for new trial.

Gregory v Suhr, 221-1283; 268 NW 14

IX INSTRUCTIONS—continued
(a) IN GENERAL—continued

Duty to use ordinary care. The court may very properly tell the jury that the driver of an automobile must exercise ordinary care even tho, at the time in question, a motorcycle officer was assisting the driver in testing the speedometer.

Ege v Born, 212-1138; 236 NW 75

Undue burden of care—incurable error. An instruction which places on the operator of an automobile the absolute duty to maintain a constant lookout and to use all his senses to avoid the danger of a collision is erroneous as imposing an undue burden, and the error is not necessarily cured by subsequent statements limiting the operator's duty to reasonable care and diligence.

Fry v Smith, 217-1295; 253 NW 147

Imposing undue care. An instruction which, after directing the jury that the operator of a vehicle on approaching intersecting highways must keep a lookout for approaching vehicles, imposes on the operator, if there be danger of a collision, the duty to "reduce his speed" or to "bring his vehicle to a stop", is erroneous.

Reason: Such instruction imposes on the operator a greater duty than to exercise reasonable or ordinary care.

Knutson v Lurie, 217-192; 251 NW 147; 37 NCCA 62

Instructions—ability to stop under all conditions. Instruction reviewed and held not to impose on defendant the absolute duty to operate his automobile at such a speed as to be able to bring it to a stop under any and all conditions.

Shutes v Weeks, 220-616; 262 NW 518

Avoiding injury by ordinary care. An instruction that a motorman on a streetcar must keep a "constant" lookout for drivers of vehicles on the street, is not subject to the exception that it requires an undue degree of care, when the sole issue on trial is whether the motorman, being fully aware of the dangerous position of the vehicle in question, could have avoided the injury by ordinary care.

Lynch v Railway, 215-1119; 245 NW 219

Conflicting instructions. Doubt and uncertainty consequent on conflicting instructions relative to the right of the operator of an automobile to assume that another operator would not use the highway unlawfully present ample justification for granting the prejudiced party a new trial.

Jelsma v English, 210-1065; 231 NW 304

Right to assume care and nonviolation of law of road. After correctly instructing as to the law of the road, it is not erroneous to instruct that each of the operators of the two automobiles in question had the right to assume that the other would not violate such laws, and would exercise ordinary care for the safety of himself and others.

Shutes v Weeks, 220-616; 262 NW 518

Right to assume compliance with law. Reversible error results from refusing to instruct that the operator of an automobile has a right to assume (until he knows or should know to the contrary) that other operators of automobiles, (1) will keep their cars under control, (2) will maintain a speed which will enable them to stop within the assured clear distance ahead, and (3) will yield one-half of the traveled way by turning to the right—all such enumerated subject matters being distinctly in issue.

Fry v Smith, 217-1295; 253 NW 147

Violation of ordinance — presumption — instructions. While the violation of a city ordinance relative to the operation of an automobile is only prima facie evidence of negligence, yet, where the sole issue is whether the operator did violate such ordinance—when the operator makes no effort to excuse a violation —it is not erroneous for the court to instruct that if there was such violation the jury "would be warranted in finding the operator guilty of negligence".

McDougal v Bormann, 211-950; 234 NW 807; 32 NCCA 405

See Kisling v Thierman, 214-911; 243 NW 552

Passenger—care required. An instruction that a passenger in an automobile must be deemed negligent if he fails to warn the driver of "any situation" that may be dangerous, does not correctly state the law, because requiring more than ordinary care.

Muirhead v Challis, 213-1108; 240 NW 912

Passenger—control over car. Reversible error results from instructing that the jury may find that a passenger in an automobile was free of contributory negligence from the fact that the passenger neither exercised nor had the right to exercise control over the car in question.

Waldman v Motor Co., 214-1139; 243 NW 555

Invading province of jury. The court must not instruct that a mere passenger in an automobile (under duty, of course, to exercise reasonable and ordinary care) will be guilty of negligence if he fails to do some particular thing, e. g., attempt in some manner to check the speed of the car.

Codner v Stowe, 201-800; 208 NW 330; 26 NCCA 207

Contributory negligence—instructions — ignoring supported issue. In an action for damages based on the alleged negligence of the defendant in operating an automobile which collided with an automobile in which plaintiff was riding, the court commits reversible error

by wholly ignoring in its instructions the duly joined issue as to the contributory negligence of the plaintiff, the evidence being such as to present a jury question on said issue.

Schelldorf v Cherry, 220-1101; 264 NW 54

Contributory negligence—fatally inconsistent instructions. After properly instructing that plaintiff, before she could recover, must establish her entire freedom from contributory negligence, the court commits a fatal inconsistency by instructing that plaintiff could not be charged with negligence in not choosing some other highway than the one in question on which to travel, unless defendant has proven that plaintiff knew or ought to have known that the highway on which she was traveling was in a dangerous condition.

Kehm v Dilts, 222-826; 270 NW 388

Contributory negligence—"cause of injury" —language approved. A contributory negligence instruction in a motor vehicle collision case stating that if such negligence "became or constituted, * * * a cause of the injury" reviewed and held correct.

Smithson v Mommsen, 224-307; 276 NW 47

Contributory negligence—contributing "directly" to injuries—instruction correct. In a motor vehicle collision case, a contributory negligence instruction stating, "If the injured party by any negligence on his part contributed in any way or in any degree directly to the injuries of which he complains;" follows the form approved by the supreme court and is correct.

Clark v Berry Seed Co., 225-262; 280 NW 505

Contributory negligence—degree or extent barring recovery—model instruction. It is strictly accurate to instruct, in an action for damages for negligently inflicted injuries, that, before plaintiff can recover, he must establish as a fact that he, himself, "was not guilty of any negligence that contributed in any manner or degree directly to his own injury".

Engle v Nelson, 220-771; 263 NW 505; 1 NCCA(NS) 166

Instructions—sufficiency. Instructions reviewed and held properly to present the issue of contributory negligence.

Becvar v Batesole, 218-858; 256 NW 297

Stalled motorist—freedom from negligence —requested instruction. In a damage action for personal injuries arising out of a motor vehicle collision, the burden is on plaintiff to establish (1) the defendant's negligence, (2) such negligence as the proximate cause of the injury, and (3) plaintiff's freedom from contributory negligence.

Hence, a motorist who stands in the center of the road near the rear of her automobile stalled on the highway, attempting to stop a following motorist, and, tho having the opportunity, fails to seek a place of safety, when she sees the approaching motorist apparently will crash into her stalled automobile, is not entitled to an instruction establishing her freedom from contributory negligence as a matter of law, nor to a directed verdict against the defendant.

Murchland v Jones, 225-149; 279 NW 382

Proximate cause. The contributory negligence which will defeat a plaintiff is such negligence as contributes to the injury in any way or in any degree. Error results from instructing that such negligence must contribute proximately to the injury.

Hamilton v Boyd, 218-885; 256 NW 290

Submitting nonproximate cause. The submission to a jury of the issue of negligence on the part of the operator of an automobile in not sounding a warning of his approach to an intersection of streets is reversible error when the undisputed evidence shows that the injured party saw the approaching automobile when it was more than a block from said intersection. Nonproximate causes of an injury should not be submitted.

Lauxman v Tisher, 213-654; 239 NW 675

Proximate cause tho not sole cause. Instruction involving the thought that negligence in the operation of an automobile might be the proximate cause of an injury even tho it was not the sole cause, reviewed, and held not to permit a recovery for negligence which was not the proximate cause of the injury.

Duncan v Rhomberg, 212-389; 236 NW 638

Proximate cause—requiring excessive proof. Instructions reviewed and held not subject to the objections that plaintiff was required to prove (1) not only that the negligence of defendant was the proximate cause of plaintiff's injuries, but (2) that said negligence was the sole cause of said injuries.

Rainey v Riese, 219-164; 257 NW 346

Unnecessary amplification. Instructions which fully and correctly instruct the jury as to negligence and proximate cause need not (especially in the absence of a request) be amplified by the specific submission of defendant's plea that some certain act or failure to act on the part of plaintiff was the proximate cause of the injury, said latter matters having been otherwise adequately presented to the jury.

Lang v Siddall, 218-263; 254 NW 783

Imputed negligence—instructions construed. In an unsuccessful action against a railway company for negligently causing the death of a passenger riding in a truck, an instruction as to what acts of the said driver would constitute negligence cannot be deemed to impute the negligence, if any, of said driver to the passenger when other instructions specifically state, in effect, that the negligence of the driver would be no defense if the negligence of

IX INSTRUCTIONS—continued
(a) IN GENERAL—continued
the defendant was found to be the sole proximate cause of said death.

Reidy v Railway, 220-1386; 258 NW 675

"Independent proximate cause". In a motor vehicle collision case, an instruction stating that defendant claimed the negligence of plaintiff's driver was the "independent, proximate cause of the collision", together with other instructions covering plaintiff's burden of proof held to properly submit to the jury defenses specially pleaded as to "sole proximate cause" being the negligence of plaintiff's driver.

Smithson v Mommsen, 224-307; 276 NW 47

Personal injuries—proximate negligence of different co-defendants. On separate trials of an action for damages against the operators of different vehicles on one of which plaintiff was a passenger at the time she was injured by a collision, defendant is properly denied an instruction to the effect that he cannot be held liable if his co-defendant might be proximately negligent.

Newland v McClelland & Son, 217-568; 250 NW 229

Proximate cause—third person's negligence. Under instructions properly stating that a plaintiff cannot recover unless defendant's negligence was the proximate cause of his injuries, and in the absence of a requested instruction, there is no error in failing to instruct that if the sole proximate cause of the injury was the negligence of a third person, plaintiff could not recover.

Gregory v Suhr, 224-954; 277 NW 721

Third party nondefendant — instructions. Where, under the pleadings and evidence, the jury might find that plaintiff's injuries were caused (1) by defendant's negligence, or (2) solely by the negligence of a third party nondefendant, the court must, on proper request, fully instruct as to the negligence of said third party.

Dennis v Merrill, 218-1259; 257 NW 322

Dual proximate liability—instructions. The court, manifestly, cannot properly instruct in a personal injury action based on negligence, that defendant would not be liable if the injuries were caused by the negligence of a third party, when, under the pleadings and evidence, the jury could find that both defendant and said third party were proximately liable.

Dennis v Merrill, 218-1259; 257 NW 322; 1 NCCA(NS) 175

Negativing defendant's plea. In an action for damages consequent on plaintiff being negligently struck and injured by defendant's automobile [in which action defendant pleads (1) a denial that his car struck plaintiff, and (2) that plaintiff was struck and injured by some other vehicle], the court commits reversible error by instructing that plaintiff cannot recover unless plaintiff establishes by a preponderance of the evidence not only (1) that defendant's car struck and injured plaintiff, but (2) that no other car struck and injured plaintiff.

Griffin v Stuart, 222-815; 270 NW 442

Contributory negligence—consideration of nonimputable negligence. An instruction to the effect that even tho the negligence of a husband with whom the wife was riding could not be imputed to the wife, nevertheless the negligence of the husband could be considered by the jury on the issue whether the negligence of the defendant—the driver of another car—was the proximate cause of plaintiff's injuries, is a correct statement of law, and if plaintiff wishes such instruction modified by a statement as to the law governing the concurrent negligence of different parties, she must request such instruction.

Kuhn v Kjose, 216-36; 248 NW 230

Subsequent elaboration curing former omission. Any error by the court in one instruction in omitting to tell the jury that the mere happening of an accident or the mere failure of defendant to stop his vehicle on a certain occasion would not constitute negligence per se may be effaced by subsequent elaboration on the general subject of negligence.

Comparet v Coal Co., 200-922; 205 NW 779

Negligence per se—prejudicial submission. Prejudicial error results from submitting to the jury whether a motorist was negligent in so making a left-hand turn as to run into the side of another motorist properly operating his car on the road from which the turn was made, because such a turn with such result is negligence per se in the absence of proof of legal excuse.

Rich v Herny, 222-465; 269 NW 489

Instructions—"last clear chance"—erroneous and confusing. An instruction, in effect, that if defendant, after he discovered plaintiff's peril, was negligent in the doing of certain acts which resulted in the striking of plaintiff, then "defendant would still be liable even tho plaintiff was negligent", is prejudicially erroneous; also prejudicially confusing and inconsistent in view of repeated instructions that plaintiff could not recover if he was guilty of contributory negligence.

Steele v Brada, 213-708; 239 NW 538

Pedestrian in voluntary position of appreciable danger. In action for death of pedestrian struck by automobile, instruction that decedent's contributory negligence barred recovery unless last clear chance doctrine could be invoked, was not erroneous on theory that such contributory negligence must be proximate cause of accident in order to defeat re-

covery. Moreover, such instruction was justified under the record showing that decedent voluntarily placed himself in a position of evident danger.

Spooner v Wisecup, 227-768; 288 NW 894

Ordinary care—undue limitation on jury. Reversible error results from instructing the jury that a pedestrian on the highway need not, in the exercise of due and ordinary care, continuously look backward and forward.

(The injured party, on a dark night, had ascended a hill and passed the crest thereof and was, when injured by a car approaching from his rear, walking down the sharply descending slope, either near the middle line of the 18-foot pavement or near the right-hand side thereof. The car which did the injury met and passed another car momentarily before the pedestrian was hit.)

Taylor v Wistey, 218-785; 254 NW 50

Pedestrian at crosswalk—right of way—precautions.

Scott v McKelvey, 228- ; 290 NW 729

Pedestrian—vehicle approaching from rear. An instruction relative to the duty of a pedestrian traveling in the public highway to keep a reasonable lookout for vehicles approaching from the rear as well as from the front need not necessarily be modified on request to the effect that such duty does not require him to turn about "constantly and repeatedly" to observe the possible approach of vehicles from his rear.

Kessel v Hunt, 215-117; 244 NW 714; 34 NCCA 247

Sudden fright—trial theory. The abstract proposition that a pedestrian who steps suddenly in front of a moving vehicle is guilty of negligence per se need not be limited by the effect of sudden fright or surprise on the part of the pedestrian when no such claim is made in the pleadings or evidence.

Ryan v Shirk, 207-1327; 224 NW 824

Moving automobile backward—warning person in perilous position. Instructions covering motorist's right to move his car backward and his duty to give warning of his intention to so move the automobile when people are pushing and trying to extricate it from stalled position on icy street, and whether he knew or ought to have known of one in a position of peril at the rear of the automobile, reviewed, and held to correctly present the issues.

Huston v Lindsay, 224-281; 276 NW 201

Person injured on highway construction work. In laborer's personal injury action arising because of truck backing into him while both were engaged in highway construction work, an instruction, that it is the duty of driver in moving a truck to exercise care and caution of ordinarily prudent person and to bring truck under proper control if he discovers, or in exercise of reasonable care should discover, a person in the path of truck, was neither erroneous as submitting to the jury a previously withdrawn issue as to whether defendant driver has truck under control, nor as permitting jury to speculate on defendant's negligence generally.

Rebmann v Heesch, 227-566; 288 NW 695

Passing children—nonright to assume care. Testimony in an action against a motorist for striking and killing a 10-year-old child on the highway supported by the physical facts, from which the jury could find that the child's position on the shoulder could have been seen by defendant when more than 300 feet away, justifies an instruction on the nonright of a motorist to assume that a child under 14, in a place of apparent safety, will remain there, and on his duty to control his machine so as to avoid hitting her if she does not.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Speed as negligence irrespective of conditions. Instruction reviewed and held not to submit to the jury the question whether speed, in and of itself, was the proximate cause of an accident, irrespective of the attending conditions and circumstances.

Jarvis v Stone, 216-27; 247 NW 393

Requiring excessive proof of alleged negligence. An instruction is erroneous when it requires negligence to be established "in the respects charged in the petition," and the negligence so charged is (1) excessive speed, (2) excessive speed after warning, and (3) excessive speed while traveling on loose gravel.

Codner v Stowe, 201-800; 208 NW 330

Ignoring grounds of negligence. The trial court is within its legal discretion in granting a new trial to plaintiff because the instructions, in fact, ignored a material allegation by the plaintiff as to the speed of defendant's car.

Lewellen v Haynes, 215-132; 244 NW 701

Reference to speed—granting new trial. A reference in an instruction to a motor vehicle speed of 60 miles per hour when the allegation in the petition of such speed was coerced by a ruling of the court, while not in itself sufficient to warrant a reversal, still justifies the trial court in granting a new trial when considered along with other alleged errors.

White v Zell, 224-359; 276 NW 76

Collision with bicycle — negligence — jury question. Where a motorist driving east 40 to 50 miles per hour at night on a paved highway, the lights on vehicle working properly (no rain, fog, or snow), his attention being momentarily diverted by an oncoming car, and, simultaneously with its passing, he collided with and fatally injured a bicycle rider, also traveling east, instructions covering diverting circumstances relative to speed (§5029, C., '35 [§5023.01, C., '39]) and failing to turn to left when passing vehicle (§5022, C., '35 [§5024.03,

IX INSTRUCTIONS—continued
(a) IN GENERAL—continued

C., '39]) reviewed and held to correctly present questions for jury.

Reardon v Hermansen, 223-1207; 275 NW 6; 3 NCCA(NS) 184

Driving on wrong side—unsupported issues not submitted. In a damage action for an automobile collision occurring on a north and south paved road south of an intersection, it is not error to submit the case on the one negligence ground that defendant crossed the center line of the pavement when the record as to other negligence allegations shows a proper speed and lookout, control of the car, and that defendant driving north could not make a left turn before reaching the intersection.

Tharp v Rees, 224-962; 277 NW 758

Collision at intersection. Instructions relative to the rights and duties of operators of automobiles at an intersection reviewed and held authorized under the pleadings.

Melsha v Dillon, 214-1324; 243 NW 295

Rights at through highway intersection.

Davis v Hoskinson, 228- ; 290 NW 497

Assumption of fact. Instruction relative to a collision between automobiles at a street intersection reviewed, and held not to assume that one of the cars first entered the intersection.

Becvar v Batesole, 218-858; 256 NW 297

Instructions compelling jury to draw certain inference. Where plaintiff and defendant were, under conditions which rendered visibility poor, approaching the same intersection approximately at the same time, the court cannot properly instruct the jury that if plaintiff could see several hundred feet in the direction from which defendant was approaching, then the jury must conclude either (1) that plaintiff did not look for defendant as was his duty, or (2) that plaintiff did see the defendant.

Appleby v Cass, 211-1145; 234 NW 477

Driving on left-hand side—instruction. Instructions which wholly neutralize the effect of driving on the left-hand side of a street are properly rejected when the jury might find that such driving contributed to the injury in question.

Waldman v Motor Co., 214-1139; 243 NW 555

Failure to yield half of traveled way—prima facie negligence only. Failure of the driver of a vehicle on highways outside cities and towns to yield one-half of the traveled way to a vehicle traveling in the opposite direction is only prima facie evidence of negligence. Instruction reviewed and held, when read as a whole, violative of this rule of law.

Bobst v Hoxie Line, 221-823; 267 NW 673

Failure to turn to right as negligence—nonprejudicial error. An instruction to the effect that the failure of the operator of an automobile on a country road to turn to the right on meeting another vehicle constitutes negligence, if erroneous, is error without prejudice when the record reveals beyond question that said operator was guilty of proximate negligence in other respects.

Scott v Hinman, 216-1126; 249 NW 249

Driver on wrong side of highway—collision—presumption. It is erroneous to instruct that where a collision occurs between two vehicles, at a time when one of the vehicles is on the wrong side of the road, the presumption is that the collision was caused by the negligence of the driver who was on the wrong side of the road.

Fry v Smith, 217-1295; 253 NW 147

Occupying right side of highway—jury question. A specification of negligence that defendant did not keep his truck on the right-hand side of the highway when struck from the rear could not be withdrawn and was properly submitted to the jury when there was evidence to sustain the specification. Evidence did not show that collision would have occurred even tho truck had been wholly on right-hand side of the highway.

Gookin v Baker & Son, 224-967; 276 NW 418

Nonprejudicial instructions. An instruction to the effect that if the defendant failed to yield to another motorist one-half of the traveled way, the jury, "in the absence of justifiable excuse", might find the defendant negligent, cannot be deemed prejudicial to a defendant who established no excuse whatever.

Lukin v Marvel, 219-773; 259 NW 782

Fatally confusing instruction. The presentation to the jury of an assignment of negligence to the specific effect that the two automobiles in question, moving in opposite directions on the highway and immediately before they collided, were each on the left-hand side of the highway, is so confusing as to constitute reversible error.

Balik v Flacker, 212-1381; 238 NW 467

Passing slower moving vehicle—failure to signal. Instructions relative to the duty of the driver of an automobile, in attempting to pass a slower moving vehicle, to sound his horn, may be justified even tho the driver of the slower moving vehicle had knowledge that the other party was attempting to pass.

Johnson v McVicker, 216-654; 247 NW 488

Nonduty to anticipate negligence. An instruction on the subject of contributory negligence is erroneous when it, in effect, requires the person in question to anticipate negligence on the part of the driver of an approaching vehicle.

Townsend v Armstrong, 220-396; 260 NW 17

Anticipated negligence. Prejudicial error results from instructing, in effect, that a person

who has stopped his car at a proper place in the highway in order to repair it must anticipate and guard himself against the possibility that the operator of some passing car may be negligent by passing the stationary car on the wrong side.

Hanson v Manning, 213-625; 239 NW 793

Harmless error. Instruction on the subject of imputed negligence held nonprejudicial.

Sutton v Moreland, 214-337; 242 NW 75

Violation of statute—excuse—required instruction. When the violation of a particular law of the road is pleaded by plaintiff as a ground for recovery of damages and such violation is treated as in issue (tho the applicability of the statute be quite doubtful), the court commits error in failing to instruct as to the effect of defendant's evidence tending to legally excuse such alleged violation.

Rich v Herny, 222-465; 269 NW 489

Emergency—conduct under impulse of the moment. In a personal injury action arising from an automobile accident, an instruction is correct which states that a person in a position of peril in an emergency is not required imperatively to do that which, after the emergency is ended, it would appear could have been done to avoid the injury.

Band v Reinke, 227-458; 288 NW 629

Inappropriate term as error. The use in an instruction of a wholly inappropriate and confusing term may constitute error. So held in an action for damages growing out of a collision between automobiles, in which action the court instructed that "defendant is liable to plaintiffs for any liability if any, of the driver of said truck".

Christenson v Tel. Co., 222-808; 270 NW 394

Ignoring supported issue. Error results from the failure of the court, in a personal damage action, to submit to the jury a supported issue of negligence as to the absence of sidelights on a truck.

Jordan v Schantz, 220-1251; 264 NW 259

Absence of lights—instructions—sufficiency. An instruction that plaintiff would be guilty of contributory negligence if his automobile was not equipped with two white lights on the front is all-sufficient on that particular subject matter.

Winter v Davis, 217-424; 251 NW 770

Defining terms. Where an accident occurred on a street but outside the vehicular part thereof, it is not important that the court failed to designate the scene of the accident either as a "street" or as a "sidewalk".

Dickeson v Lzicar, 208-275; 225 NW 406

Res ipsa loquitur—ambiguous but not erroneous phrase. In an action against a motorist, for colliding with the rear of a horse-drawn vehicle, tried on the theory of res ipsa loquitur, an instruction containing the phrase, "within her exclusive control, or the exclusive control of her authorized driver", as applied to the automobile or instrumentality, held not erroneous as meaning control to the exclusion of each other but rather control to the exclusion of third persons.

Mein v Reed, 224-1274; 278 NW 307

Joint action against owner and operator—erroneous instruction. In a joint action against the owner and operator of an automobile the evidence, manifestly, may be such as to justify a verdict against the operator and in favor of the owner, and in such cases instructions holding the owner liable in case the jury finds the operator liable are fundamentally erroneous.

Gehlbach v McCann, 216-296; 249 NW 144

Declarations inadmissible against master. In a joint action against a master and his servant for damages consequent on the negligent operation of the car by the servant, declarations or statements by the servant made several days after the accident and tending to show the negligence of the servant are, while admissible against the servant, not admissible against the master; and the court must by proper instruction, if requested, limit the testimony accordingly.

Droullard v Rudolph, 207-367; 223 NW 100
Wilkinson v Lbr. Co., 208-933; 226 NW 43
Looney v Parker, 210-85; 230 NW 570
Glass v Hutchinson Co., 214-825; 243 NW 352

Non res gestae statements. When a plaintiff seeks to recover damages from the owner of an automobile because of the negligence of the driver, he must prove such negligence by evidence other and different than the non res gestae statements and declarations of the driver, and where the owner and the driver are co-defendants the court must exercise meticulous care to instruct the jury accordingly.

Cooley v Killingsworth, 209-646; 228 NW 880
Wieneke v Steinke, 211-477; 233 NW 535
Ege v Born, 212-1138; 236 NW 75

Non res gestae statements of drivers. Non res gestae statements of the driver of an automobile tending to show his negligence are not competent against the owner of the vehicle, nor are such statements of the owner competent evidence against the driver, and the court must clearly and definitely so instruct. In addition the court must submit separate forms of verdict if requested.

Broderick v Barry, 212-672; 237 NW 481; 75 ALR 1530

Verdicts—submission of separate forms. In an action against the driver and owner of a truck, held, the omission to submit separate forms of verdict for each defendant was not prejudicial error—the court having specifically

IX INSTRUCTIONS—continued
(a) IN GENERAL—continued
and correctly instructed the jury as to separate liability of each defendant.

Carlson v Decker & Sons, 218-54; 253 NW 923

Separate forms of verdicts. In a joint action against the driver of an automobile and the owner of the vehicle, wherein necessity arises so to instruct as to limit the effect of the driver's admissions to the question of his liability, and the effect of the owner's admissions to the question of his liability, separate forms of verdict must be submitted, if requested.

Broderick v Barry, 212-672; 237 NW 481; 75 ALR 1530

Counterclaim — instruction to disregard. Where plaintiff sued (1) for damages to his car, and (2) on an assignment of the claim of his injured passenger, and defendant counterclaimed for damages to his car, no error occurs in instructing the jury to disregard defendant's claim if a finding is returned for plaintiff, and such finding is so returned.

Albert v Maher Bros., 215-197; 243 NW 561

Operation with consent of owner—scope of employment. In an action against the owner of an automobile on the theory that the car was being operated by the owner's agent and with the owner's consent, the court may very properly instruct that there could not be a recovery unless the driver was, at the time in question, driving within the scope of his employment—such instruction being directly applicable to the supported claim of said owner.

Ege v Born, 212-1138; 236 NW 75

Harmless assumption of fact. The assumption in instructions of the fact that an automobile was being operated with the consent of the owner does not constitute reversible error when the evidence bearing on the element of consent was the one persuasive and unquestioned fact that the owner was riding in the car with the driver thereof at the time of the accident.

Hoover v Haggard, 219-1232; 260 NW 540

Insured claim. The act of plaintiff in persistently keeping before the jury the fact that the defendant carried casualty insurance against the claim sued on constitutes reversible error—an error which is not cured by an instruction to disregard such fact of insurance.

Miller v Kooker, 208-687; 224 NW 46

Evidence of insurance—failure to strike not cured by instructions. Evidence that the owner of an automobile had stated that he did not go out to the scene of the accident after a collision in which the automobile was involved because the car was insured and he would let the insurance company take care of it, improperly injected the question of insurance in an action for damages resulting from the collision. The failure to strike such evidence was error which was not cured by the court's direction to the jury to disregard it.

Floy v Hibbard, 227-154; 289 NW 905

Incompetent testimony incidentally received —withdrawal. The incidental reception in evidence of testimony tending to show that defendant in an action for damages growing out of a collision of vehicles carried indemnity insurance, when the same is withdrawn by the court, will not constitute reversible error.

Stilson v Ellis, 208-1157; 225 NW 346

Double recovery. The submission to the jury of duplicate counts—counts praying recovery on the same elements of damages—and permitting recovery on both such counts is clearly erroneous.

Gehlbach v McCann, 216-296; 249 NW 144

Loss and injury—failure to limit. Instructions which direct the jury to allow damages for such loss and injuries as necessarily resulted from the accident complained of are too broad because not limited to the loss and injuries properly set out in the petition, and sustained by the evidence.

Balik v Flacker, 212-1381; 238 NW 467

Instruction—sufficiency. Instructions to the effect that the jury should determine from the evidence the amount due plaintiff for injuries to person and property, and allow him such sum as would fairly compensate him, reviewed and held to reveal no error.

Winter v Davis, 217-424; 251 NW 770

Future pain—instructions — adequacy. An instruction to the effect that a recovery would be limited to "the fair and reasonable compensation for personal injury, pain and suffering, past and future * * * as shown by the evidence", is sufficient on the subject of future pain and suffering in the absence of a request for elaboration.

Duncan v Rhomberg, 212-389; 236 NW 638

Permanent cripple—future pain—correct instruction. In a personal injury action arising from a motor vehicle collision, an allegation that plaintiff has been crippled for life, sustained by some evidence, justifies an instruction that the jury may allow such sum as in their judgment will fairly compensate plaintiff for future pain and for being crippled.

Clark v Berry Seed Co., 225-262; 280 NW 505

Instructions limiting damages. An instruction in a personal injury action limiting recovery to medical, hospital, nursing, and ambulance service, permanent disfigurement, and for pain and suffering, cannot be deemed in

any sense to submit the question of damages for loss of time.

Carlson v Decker, 216-581; 247 NW 296

Headaches—pain and suffering—instruction. In an action to recover for personal injuries sustained in an automobile collision where plaintiff testified that headaches causing much suffering affected him since the accident, and when an expert witness testified that plaintiff's injury might have caused headaches and that the injury might be permanent, an instruction permitting recovery for future pain and suffering from headaches was not erroneous and properly submitted the question to the jury.

Rogers v Jefferson, 226-1047; 285 NW 701

Instruction on future and anticipatory damages. In an action to recover damages for personal injuries resulting from an automobile collision where petition alleged damages for future medical expenses and the evidence showed plaintiff received severe permanent injuries to his back and spine, suffered intense pain, and received two hernias, together with other injuries, an instruction on future and anticipatory expenses was held proper and supported by the evidence.

Kramer v Henely, 227-504; 288 NW 610

Separating personal injury damage claims. Instructions limiting the amount of total recovery which could be allowed the plaintiff, but not advising how much was claimed for pain and suffering and for permanent disability, were erroneous, and, being erroneous, prejudice is presumed unless the record is such as to overcome the presumption.

Remer v Takin Bros., 227-903; 289 NW 477

Damages—ten percent permanent injury to arm. Where a petition alleges ten percent injury to an arm and asks $1,000 damages therefor, it is not error to permit the jury to return a verdict for the full amount when the evidence shows some permanent injury to the arm and the court in another instruction limited the recovery to the damages sustained.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

(b) DEFINING TERMS

Confused use of word "accident". The use in instruction of the word "accident", both (1) in the sense of an occurrence that was inevitable, and (2) in the sense of an occurrence happening because of negligence, is not necessarily confusing.

Keller v Gartin, 220-78; 261 NW 776

Inevitable accident—failure to define. Failure to define the term "inevitable accident" does not result in error when the instruction is correct as far as it goes and when a request for a definition is not made.

Hamilton v Boyd, 218-885; 256 NW 290

"Assured clear distance ahead"—improper definition. Reversible error results from instructing that "assured clear distance ahead" as used in our statute "means the distance ahead within which the driver of an automobile is sure and certain that the highway is not occupied by other vehicles or persons".

Groshens v Lund, 222-49; 268 NW 496

Crosswalks.

Scott v McKelvey, 228- ; 290 NW 729

Contributory negligence—sole cause of injury. An instruction that "where a party is injured and such injury is due to his own negligence he cannot recover," tho incorporated in a paragraph defining contributory negligence, does not have the effect of declaring that the contributory negligence which will bar an injured party from recovering must be a negligence which is the sole cause of the injury.

Ryan v Rendering Works, 215-363; 245 NW 301

Instruction. No particular or fixed phraseology is required in conveying to a jury, in a case founded on negligence, the idea that plaintiff cannot recover if he has, by his own negligence, contributed in any degree to his own injury.

Bauer v Reavell, 219-1212; 260 NW 39

Model instruction. Courts, in instructing as to contributory negligence which will bar recovery, should employ the model instruction approved by the appellate court, viz.: "If the injured party contributed in any way or in any degree directly to the injury complained of there can be no recovery," but it is not erroneous to substitute "cooperated" or an equivalent term for "contributed".

Hoegh v See, 215-733; 246 NW 787

Contributory negligence—degree barring recovery. In an action for damages based on actionable negligence of the defendant, the quantum of contributory negligence on the part of plaintiff which will absolutely bar recovery is any negligence which directly contributes to said injury "in any way or in any degree". Any material departure in the instructions from this statement of the law must be deemed reversible error.

Albert v Maher Bros., 215-197; 243 NW 561
Rogers v Lagomarcino Co., 215-1270; 248 NW 1
Hellberg v Lund, 217-1; 250 NW 192
Becvar v Batesole, 218-858; 256 NW 297
Hamilton v Boyd, 218-885; 256 NW 290
Bauer v Reavell, 219-1212; 260 NW 39
Meggers v Kinley, 221-383; 265 NW 614
Swan v Auto Co., 221-842; 265 NW 143
Clark v Seed Co., 225-262; 280 NW 505

Contributory negligence—adequate definition. An instruction which defines "contributory negligence" as such negligence as "helps" to produce the injury complained of is not

IX INSTRUCTIONS—continued
(b) DEFINING TERMS—continued

erroneous when accompanied by a correct definition of negligence generally.

Swan v Auto Co., 221-842; 265 NW 143

Contributory negligence — negligence must "directly" contribute. Instruction reaffirmed requiring plaintiff's negligence to contribute "directly" to the injuries before it will defeat recovery.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Contributory negligence. Instructions relative to contributory negligence reviewed, and held sufficient.

McDougal v Bormann, 211-950; 234 NW 807

Contributory negligence—definition—fundamental error. An unobjectionable definition of contributory negligence is converted into fundamental error by the addition of the clause "and but for such negligence on the part of the person injured the injury would not have occurred."

Ryan v Perry Works, 215-363; 245 NW 301

"Control" of car—definition. Ordinarily, it is not erroneous for the court to instruct the jury that the driver of an automobile has it under control when he has the ability to guide and direct its course of movement, to fix its speed, and bring it to a stop within a reasonable time.

Duncan v Rhomberg, 212-389; 236 NW 638

Control of car. Failure of the court to define the term "under control" (as employed in the statutory duty of the operator of an automobile to have his car "under control") does not constitute error, in the absence of a request for such defining.

Altfilisch v Wessel, 208-361; 225 NW 862; 29 NCCA 95

Failure to define "prima facie". An instruction characterizing certain acts of omission and commission, if found by the jury, as prima facie evidence of negligence, is not necessarily rendered erroneous because the court failed to define said term "prima facie".

Wolfe v Decker, 221-600; 266 NW 4

Intersection of highway — instructions. Where a north and south highway splits into two curves near an east and west highway, and connects with the latter at two points some 900 feet apart, it is not erroneous for the court to instruct that the intersection embraces the entire distance of 900 feet (1) when the evidence tends to show that the authorized public authorities have treated said distance as the intersection, and (2) when the instruction is manifestly given for the sole purpose of guiding the jury in applying the statutory command (§5031, C., '35) that motorists shall reduce their speed to a reasonable and proper rate when approaching and traversing intersections of public highways.

Enfield v Butler, 221-615; 264 NW 546

Improper definition of "intersection". There was no error nor abuse of discretion by the court in granting a new trial in a motor vehicle damage case on the ground that an incorrect definition of "intersection" was given to the jury, when the correct definition was a matter of statute, even tho both parties to the action during the trial used the wrong interpretation of the term as it was given by the court.

Hupp v Doolittle, 226-814; 285 NW 247

"Intersection" of highways—definition. In a damage action arising from a collision of motor vehicles at a highway intersection, where the question of negligence centered largely around the rights of the parties within the intersection, it was prejudicial error to instruct the jury that "intersection" is the area within the fence lines, if such fence lines were extended across the road, when a statute defines "intersection" as being the area within the lateral boundary lines of highways which join.

Hupp v Doolittle, 226-814; 285 NW 247

Instructions—paraphrasing "legal excuse". The phrase, "explained or justified by the evidence", used as a substitute in instructions for the term "legal excuse", should be avoided as possibly permitting the jury to consider evidence which would not constitute a legal excuse as defined in another instruction, but under the evidence and considered with other instructions held no reversible error.

Edwards v Perley, 223-1119; 274 NW 910

Definition of negligence approved. Instruction defining "negligence" and otherwise correct is not rendered erroneous because it includes the statement that "such care is proportionate to the apparent danger involved; where the apparent danger is great, a greater care is required than where such apparent danger is slight." So held against the contention that degrees of negligence are not recognized in this state.

Wolfe v Decker, 221-600; 266 NW 4

Negligence — correct definition. Instruction reviewed and held to constitute a correct definition of actionable negligence.

Engle v Nelson, 220-771; 263 NW 505

Negligence—erroneous definition. A definition of "negligence" which is so broad as to permit the jury to predicate a finding of negligence on the violation of a statute law of the road when the facts rendering such statute applicable are neither pleaded nor proven is necessarily erroneous and prejudicial.

Gross v Bakery, 209-40; 227 NW 620

Negligence—explanatory instruction omitting contributory negligence. Where, on a snow-covered highway containing a single pair of ruts, two automobiles approaching each other, collide on a hill, in a damage action by a passenger injured thereby, an instruction further explaining negligence, but not mentioning contributory negligence, is not erroneous when contributory negligence was covered in other instructions, and when the jury could not have been misled by the explanatory purpose of the instruction.

Tallmon v Larson, 226-564; 284 NW 367

Obscure definition of "ordinary care". An instruction which, somewhat obscurely, defines ordinary care as such care as is commensurate with the danger to be apprehended from the circumstances surrounding or facing the actor may nevertheless be adequate.

Orr v Hart, 219-408; 258 NW 84

Ordinary care—definition reaffirmed. The standard definition of ordinary care need not be augmented by adding an extra word "ordinarily" to the phrases "would do" or "would not do under the circumstances".

Schalk v Smith, 224-904; 277 NW 303

Johnston v Johnson, 225-77; 279 NW 139; 118 ALR 233

Use of highway—care. Instructions reviewed and held correctly to state the degree of care which is incumbent on a person using a highway.

Ryan v Shirk, 207-1327; 224 NW 824

Preponderance of evidence. In defining "preponderance of evidence" as evidence which is "more convincing as to its truth", the court does not, in effect, say that evidence cannot constitute a preponderance unless the jury is satisfied that it is true.

Priest v Hogan, 218-1371; 257 NW 403

Preponderance of evidence erroneously defined. It is error to define "preponderance of the credible evidence" as the testimony which best satisfies the juror's mind "that it is true", because it implies that the jury must be fully convinced of the truth of the testimony which controls the decision on an issue.

Heacock v Baule, 216-311; 249 NW 437; 93 ALR 151; 36 NCCA 25

Res ipsa loquitur. In an action against a motorist for colliding with the rear of a horse-drawn vehicle, tried on the theory of res ipsa loquitur, an instruction containing the phrase, "within her exclusive control, or the exclusive control of her authorized driver", as applied to the automobile or instrumentality, held not erroneous as meaning control to the exclusion of each other, but rather control to the exclusion of third persons.

Mein v Reed, 224-1274; 278 NW 307

"Street" or "sidewalk". Where an accident occurred on a street, but outside the vehicular part thereof, it is not important that the court failed to designate the scene of the accident either as a "street" or as a "sidewalk."

Dickeson v Lzicar, 208-275; 225 NW 406

Yielding half of traveled way—beaten path (?) or entire roadway (?). When the plaintiff's truck turned left at a blind corner, keeping to the right of the beaten path, but not to the right side of the graveled highway, and collided with the defendant's car which was approaching the corner on the right side of the road, it was not improper to instruct the jury that a car must yield half the traveled or graveled part of the road when meeting another car, and that for the plaintiff to recover, it must be found that the truck was hit while on the right side of the road; or, for a recovery to be had by the defendant on a counterclaim, that the plaintiff was negligent in not yielding half the road.

Kiesau v Vangen, 226-824; 285 NW 181

(c) BALANCING INSTRUCTIONS

Fact of collision—negligence. A general allegation that defendant was negligent "in driving his truck against plaintiff's automobile" should not be submitted to the jury unless the jury is properly guarded against finding negligence from the naked fact that defendant's truck came into collision with plaintiff's automobile.

Lang v Siddall, 218-263; 254 NW 783

Unallowable limitation on materiality of evidence. Reversible error results to an unsuccessful plaintiff (in an action pivoted on the issue whether defendant traveling northward yielded half of the traveled way to plaintiff traveling southward) from instructions to the effect that "evidence that defendant just preceding the collision swerved his car to the west is material on the issue whether plaintiff was guilty of contributory negligence, even tho plaintiff had not alleged such swerving as a specific act of negligence on the part of defendant". The vice is not in what the court does say but in what the court does not say, to wit: that said evidence is material on the issue of defendant's negligence.

Keller v Gartin, 220-78; 261 NW 776

Explanatory instruction omitting contributory negligence. Where, on a snow-covered highway containing a single pair of ruts, two automobiles approaching each other, collide on a hill, in a damage action by a passenger injured thereby, an instruction further explaining negligence, but not mentioning contributory negligence, is not erroneous when contributory negligence was covered in other instructions, and when the jury could not have been misled by the explanatory purpose of the instruction.

Tallmon v Larson, 226-564; 284 NW 367

IX INSTRUCTIONS—continued

(c) BALANCING INSTRUCTIONS—concluded

Weight to be given admission. A cautionary instruction pertaining to the weight to be given an alleged oral admission of defendant to plaintiff following a motor vehicle accident should include a counterbalancing statement that if the admission were deliberately made or often repeated, it might be the most satisfactory evidence.

White v Zell, 224-359; 276 NW 76

(d) PARAPHRASING PLEADINGS, STATUTES

Copying pleadings. Literally copying portions of the pleadings into the instructions is unobjectionable if the issues are thereby fairly and concisely stated.

Hoegh v See, 215-733; 246 NW 787

Copying pleadings. The appellate court again, quite pointedly, expresses its surprise that occasionally some trial courts, in attempting to state the issues to the jury, do not recognize the impropriety of copying verbose pleadings into the instructions.

But error and the resulting confusion in copying pleadings will be deemed cured by the later action of the court in the instructions, in clearly and definitely confining the jury to the proper issues.

Young v Jacobsen Bros., 219-483; 258 NW 104

Copying pleadings — when nonprejudicial. Practice of stating case in language of pleadings, except where pleadings concisely and clearly state the substance of the controversy, condemned by court.

Jakeway v Allen, 227-1182; 290 NW 507

Fact of collision—negligence. A general allegation that defendant was negligent "in driving his truck against plaintiff's automobile" should not be submitted to the jury unless the jury is properly guarded against finding negligence from the naked fact that defendant's truck came into collision with plaintiff's automobile.

Lang v Siddall, 218-263; 254 NW 783

Repealed statute — requested instruction properly refused. In automobile guest's personal injury action resulting in jury verdict for defendant, plaintiff's request for new trial because of refusal to give an instruction to the effect that it was the duty of a driver of an overtaken automobile, upon signal, to drive to the "right center of the traveled way" and remain there until overtaking automobile shall have "safely passed" was properly refused, since such statute was repealed at time plaintiff was injured, and new statute only required such driver to "give way to the right" until overtaking vehicle had "completely passed".

Jones v Krambeck, 228- ; 290 NW 56

Following statute enacted after accident. Where an automobile collides at night with a truck displaying no lights, it is error to instruct in the language of §5029, C., '35 [§§5023.01, 5023.02, C., '39], that plaintiff had a right to assume that others using the highway would obey the law, when such collision causing the injuries complained of occurred before this right of assumption was added by the legislature, and the statute had previously been construed that a driver had no such right.

Gookin v Baker & Son, 224-967; 276 NW 418

Others' compliance with law assumed—when presumption fails. The right of a motorist to assume that others using the highway will obey the law ceases when he knows that another motorist is not obeying the law. When such motorist testifies that he saw an approaching car skidding and he then drove on the wrong side of a city street to avoid that car, he is not entitled to the embodiment of such rule of assumption in instructions to the jury.

Young v Hendricks, 226-211; 283 NW 895

Undue paraphrasing of pleadings. The paraphrasing by the court in the instructions of pleaded negligence must not go to the extent of wholly omitting a material assignment of negligence. So held where the omitted assignment charged "reckless driving on a wet and slippery road".

Rainey v Riese, 219-164; 257 NW 346

Inadequate submission of grounds of negligence. Prejudicial error results from failure to submit to the jury all well-pleaded, separate specifications of negligence which have been established as jury questions and as the alleged compound negligence attending a given transaction, it appearing that the plaintiff has been defeated on an inadequate submission.

Hanson v Manning, 213-625; 239 NW 793

Negligence — justifiable paraphrase of grounds. Both of two grounds of negligence are properly submitted to the jury (1) when the pleadings fairly justify such action, (2) when the court so paraphrased the pleadings, and (3) when the cause was tried on the theory that both grounds were involved.

Buchanan v Cream. Co., 215-415; 246 NW 41

Dragnet instructions under dragnet allegations. A dragnet allegation that defendant drove his automobile in a "careless, negligent and reckless manner without due regard of the safety of others in excess of 25 miles an hour" and "not under proper control", does not justify or permit dragnet instructions which largely cover the statutory law respecting the operation of automobiles, and which thereby places before the jury the duty to determine whether said statutes or some of them have been violated.

Holub v Fitzgerald, 214-857; 243 NW 575

Contributory negligence—error in quoting statute only. In submitting specifications of alleged contributory negligence, the court commits error in simply quoting the statute relating to these grounds without defining just what acts of plaintiff, under the evidence, would constitute contributory negligence, and without applying the law to the facts.

Jakeway v Allen, 226-13; 282 NW 374

Law of road—justifiable assumption. The operators of automobiles have the right to assume, when they meet on the highway, that the other will yield one-half of the traveled way by turning to the right; and it is erroneous to refuse a request for such instruction.

Muirhead v Challis, 213-1108; 240 NW 912

Right-side driving—peremptory instruction. Instructions that a party is in duty bound to drive on the right-hand side of a highway, or that he must so drive as to be able to stop within the assured clear distance ahead, without any qualification relative to the driver's right to show legal excuse for driving otherwise, are not erroneous when the driver offers no excuse.

Winter v Davis, 217-424; 251 NW 770

Yielding half of highway—abstract instruction as reversible error. An instruction, tho in the language of the statute, e. g., that "motor vehicles, meeting each other on the public highway, shall give one-half of the traveled way thereof by turning to the right", may constitute reversible error when unaccompanied by any reference to a sudden emergency which is presented as an excuse for a car actually being on the wrong side of the road at the time of a collision.

Christenson v Tel. Co., 222-808; 270 NW 394

Violation of statute—excuse—required instruction. When the violation of a particular law of the road is pleaded by plaintiff as a ground for recovery of damages and such violation is treated as in issue (tho the applicability of the statute be quite doubtful), the court commits error in failing to instruct as to the effect of defendant's evidence tending to legally excuse such alleged violation.

Rich v Herny, 222-465; 269 NW 489

Negligence in re yielding half of highway—interpretation by court of allegation. An allegation, that "defendant negligently drove his car in a northerly direction and allowed it to travel to the west of the center of the highway and encroached upon the line of travel of the plaintiff" (who was traveling in a southerly direction), is properly interpreted by the court as simply charging that defendant failed to yield one-half of the traveled way to plaintiff.

Keller v Gartin, 220-78; 261 NW 776

Failure to yield half of way—equivalent allegation. Plaintiff's allegation that defendant, on meeting plaintiff's car on the highway, negligently usurped plaintiff's side of the highway is, in effect, an allegation that defendant failed, on meeting plaintiff, to yield one-half of the traveled way by turning to the right, and, under supporting evidence justifies an instruction accordingly.

Foster v Flaugh, 223-40; 271 NW 503

Driving on wrong side—necessary instructions. In submitting to the jury the alleged negligence of driving to the left of the center of a traveled way, or driving upon the wrong or left side of the highway, the court must specifically define to the jury what acts would constitute negligence under said allegations.

Muirhead v Challis, 213-1108; 240 NW 912

Driving on wrong side—quoting statute insufficient. In submitting to the jury the alleged negligence of driving to the left of the center of the traveled way, or driving upon the wrong side of the highway, the court must specifically define what acts would constitute negligence under such allegations, and this may not be done by simply quoting the statute

Jakeway v Allen, 226-13; 282 NW 374

Paraphrasing allegation of negligence. An allegation that defendant drove his vehicle past a stationary vehicle at an excessive and dangerous rate of speed renders proper, on supporting proof, an instruction as to the duty of the defendant to reduce his speed to a reasonable rate when approaching and passing the stationary vehicle.

Jarvis v Stone, 216-27; 247 NW 393

Collision with bicycle—failure to turn to left when passing. Where a motorist driving east 40 to 50 miles per hour at night on a paved highway, the lights on vehicle working properly (no rain, fog, or snow), his attention being momentarily diverted by an oncoming car, and, simultaneously with its passing, he collided with and fatally injured a bicycle rider, also traveling east, instructions covering diverting circumstances relative to speed (§5029, C., '35) and failing to turn to left when passing vehicle (§5022, C., '35) reviewed and held to present correctly questions for jury.

Reardon v Hermansen, 223-1207; 275 NW 6; 3 NCCA(NS) 184

Instructions—granting jury undue license, The court is, to say the least, perilously close to committing reversible error when it instructs the jury, even in the literal words of the statute that it should determine whether an automobile was driven "at a careful and prudent speed * * *, having due regard to the traffic, the surface and width of the highway, and of any other conditions then existing". The vice of the instruction is its failure affirm-

IX INSTRUCTIONS—continued
(d) PARAPHRASING PLEADINGS, STATUTES—continued

atively to limit the jury to a consideration of conditions as shown by the evidence.

Groshens v Lund, 222-49; 268 NW 496

Left turn—collision with overtaking and passing vehicle. In a personal injury action arising out of an automobile-truck collision occurring when the automobile in which plaintiff was riding with husband-driver was passing a truck which attempted to make a left turn into driveway of a farm just as the automobile came alongside, and when the automobile driver, attempting to avoid an accident by speeding ahead of truck, collided therewith, held, that statute relating to speed, which requires reasonable speed with due regard to existing conditions, the truck being the only "existing condition" at the time and place of accident, was inapplicable, and the court properly instructed jury only on the statute governing passing vehicles as affecting automobile driver's contributory negligence, which would be imputed to plaintiff by court's former instruction.

Monen v Jewel Tea Co., 227-547; 288 NW 637

Paraphrasing allegation of control. It is quite proper for the court to paraphrase an allegation charging negligence in that defendant "lost control of his car", and to submit the charge in the paraphrased form.

Danner v Cooper, 215-1354; 246 NW 223

Negligence under control and speed ordinance. It was not error to submit to the jury the question of negligence based on the violation of a city ordinance with reference to control and speed of a motor vehicle when the ordinance merely embodied the provisions of a statute.

Womochil v Peters, 226-924; 285 NW 151

Undue burden. No undue burden is imposed on a defending street railway company by requiring it to keep its car "under proper control and to use ordinary care", to operate its car "in a careful manner and not at a dangerous rate of speed", and to give notice of its approach "by ringing the gong or bell or otherwise", when the pleaded assignment of negligence embraces (1) excessive speed, (2) want of proper control of the car, and (3) failure to give warning of the approach of the car.

Johnson v Railway, 201-1044; 207 NW 984

Approaching intersection — reducing speed. In an action for personal injuries sustained by driver of a motor vehicle in collision with another vehicle which entered intersection from the left, an instruction stating that the statute requires any person operating a motor vehicle to have the same under control and reduce the speed to a reasonable and proper rate when approaching and traversing a crossing or intersection of public highways was correct. Since the jury in most cases must determine from the circumstances whether there had been a compliance with such statute, question was properly submitted.

Rogers v Jefferson, 226-1047; 285 NW 701

Requiring excessive proof of speed. An instruction is erroneous when it requires negligence to be established "in the respects charged in the petition", and the negligence so charged is (1) excessive speed, (2) excessive speed after warning, and (3) excessive speed while traveling on loose gravel.

Codner v Stowe, 201-800; 208 NW 330

Departure from pleaded theory. A plaintiff who predicates negligence in the operation of an automobile solely on the fact that defendant failed to give a warning signal after discovering plaintiff's position of danger, may not complain that the court failed to instruct on the statutory duty to give a warning signal "on approaching tops of hills and intersecting highways".

Ryan v Shirk, 207-1327; 224 NW 824

Assured clear distance—erroneous instructions. Instructions relative to the statutory duties of the operator of an automobile, (1) to have the vehicle under control, and (2) to so drive as to be able to stop within the assured clear distance ahead, reviewed and held prejudicially misleading and erroneous.

Swan v Auto Co., 221-842; 265 NW 143; 1 NCCA(NS) 58

Assured clear distance ahead—proper paraphrase. The statutory command so to drive as to be able to stop "within the assured clear distance ahead" is properly paraphrased in instructions as ability to stop "within the distance that discernible objects may be seen ahead".

Engle v Nelson, 220-771; 263 NW 505; 1 NCCA(NS) 63, 80

Assured clear distance ahead. Altho the driver of a truck which was following another truck on an icy street on which two cars were parked, could see past the truck and the cars and could have stopped within the distance he could see, when he ran into the truck ahead after it had skidded and turned around, there was a jury question as to whether he had been complying with the assured clear distance ahead rule, and it was proper to give an instruction imposing on him the duty to refrain from driving at a speed greater than would permit him to stop within the assured clear distance ahead.

Remer v Takin Bros., 227-903; 289 NW 477

Assured clear distance.

Janes v Roach, 228- ; 290 NW 87

Failure of lights — necessary instructions. The operation of an automobile during the nighttime without the required number of lights is not necessarily negligent; and in sub-

mitting such issue the court must (especially when requested) clearly state to the jury the circumstances under which the operator would under the statute be negligent and the circumstances under which he would not under the statute be negligent.

Muirhead v Challis, 213-1108; 240 NW 912

Paraphrasing allegations of injuries. The court, in stating the issues to the jury, may very properly paraphrase an allegation as to the injuries which plaintiff claims to have suffered.

McCoy v Cole, 216-1320; 249 NW 213

(e) BURDEN OF PROOF

Statutory noncompliance without legal excuse. An instruction stating that if a defendant motorist failed to comply with the requirements of a statute "without legal excuse", then the verdict should be for the plaintiff, does not shift the plaintiff's burden of proof on the defendant.

Schalk v Smith, 224-904; 277 NW 303

Excuse—improper burden of proof. Reversible error results from an instruction that defendant's failure, on meeting plaintiff, to yield half of the traveled way would be prima facie evidence of negligence unless defendant has established by a preponderance of the evidence his excuse for not so yielding, when defendant did not plead said excuse as an affirmative defense, but, under a general denial, presented it in his evidence.

Rich v Herny, 222-465; 269 NW 489

Emergency—burden of proof. The fact that the evidence in an action for damages reveals a claim by defendant that the accident happened under the circumstances of an unexpected emergency furnishes no justification for an instruction that defendant has the burden to establish the existence of such emergency.

McKeever v Batcheler, 219-93; 257 NW 567

Person creating sudden emergency—negligence not excused. Defendant's contention that he acted as he did because faced with a sudden emergency will not place the burden on the plaintiff to prove there was no such emergency when, if it did exist, it was created by the defendant himself, and an instruction placing on plaintiff the burden of proving nonexistence of the emergency is erroneous.

Bletzer v Wilson, 224-884; 276 NW 836

Driver on wrong side of highway—presumption. It is erroneous to instruct that where a collision occurs between two vehicles at a time when one of the vehicles is on the wrong side of the road, the presumption is that the collision was caused by the negligence of the driver who was on the wrong side of the road.

Fry v Smith, 217-1295; 253 NW 147

Negligence per se. Operating an automobile upon the public highway at a speed prohibited by law constitutes negligence per se, and error results from instructing that such operation creates a presumption of negligence.

Codner v Stowe, 201-800; 208 NW 330; 26 NCCA 207

Holub v Fitzgerald, 214-857; 243 NW 575

Waldman v Motor Co., 214-1139; 243 NW 555

Harvey v Knowles Co., 215-35; 244 NW 660; 1 NCCA(NS) 50

Albert v Maher Bros., 215-197; 243 NW 561

Danner v Cooper, 215-1354; 246 NW 223

Grover v Neibauer, 216-631; 247 NW 298

No-eyewitness rule — inapplicability under direct evidence. Where a motorist and other eyewitnesses testify as to deceased's conduct just prior to his driving into the side of a moving train, it is error to instruct on the presumption that defendant's natural instinct of self-preservation would prompt him not to run into a moving train, when direct evidence as to his conduct is obtainable.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

Negligence directly contributing to one's injury. Instructions are correct which, as a whole, direct the jury that plaintiff must show that he did not, by any negligence on his part, directly contribute in any degree to his injury, even tho one of the instructions does not carry the limiting clause "in any degree."

O'Hara v Chaplin, 211-404; 233 NW 516

Contributory negligence. It is strictly accurate to instruct, in an action for damages for negligently inflicted injuries, that, before plaintiff can recover, he must establish as a fact that he, himself, "was not guilty of any negligence that contributed in any manner or degree directly to his own injury".

Engle v Nelson, 220-771; 263 NW 505; 1 NCCA(NS) 166

Requiring defendant to prove allegations of co-defendant. In damage action, by one riding in an automobile, against a truck driver and his employer where defense was conducted jointly and where, in respect to negligence, the question was whether negligence of the automobile driver or the negligence of the truck driver was the sole proximate cause of the accident, it was not prejudicial error to instruct jury that burden was upon both defendants to prove negligence of automobile driver, affirmatively alleged by the employer alone.

Usher v Stafford, 227-443; 288 NW 432

Third party negligence as defense. A defendant who pleads that the sole and proximate cause of an injury was the negligence of a third party cannot complain that the court instructs that the negligence of said third person is immaterial unless defendant establishes that such negligence was the sole and proximate cause of said injury.

Johnson v McVicker, 216-654; 247 NW 488

IX INSTRUCTIONS—continued
(e) BURDEN OF PROOF—concluded

Negativing defendant's plea. In an action for damages consequent on plaintiff being negligently struck and injured by defendant's automobile [in which action defendant pleads (1) a denial that his car struck plaintiff, and (2) that plaintiff was struck and injured by some other vehicle], the court commits reversible error by instructing that the plaintiff cannot recover unless plaintiff establishes by a preponderance of the evidence not only (1) that defendant's car struck and injured plaintiff, but (2) that no other car struck and injured plaintiff.

Griffin v Stuart, 222-815; 270 NW 442

(f) UNSUPPORTED ISSUES

Plea and proof as basis. Instructions without plea or proof as a basis thereof are erroneous.

Dickeson v Lzicar, 208-275; 225 NW 406
Townsend v Armstrong, 220-396; 260 NW 17
Engle v Nelson, 220-771; 263 NW 505
Enfield v Butler, 221-615; 264 NW 546

Unsupported charge of negligence. Unsupported charges of negligence should not be submitted to the jury.

Wilkinson v Lumber Co., 203-476; 212 NW 682

Instructions regarding open car door—proper evidence necessary. Submission to jury of a ground of negligence not supported by the evidence is erroneous. So held where trial court submitted specification of negligence that left rear door of defendant's car was open at time of collision with approaching motorcycle, whereas only testimony on this question came from witnesses who were not present until after accident occurred.

Jakeway v Allen, 227-1182; 290 NW 507

Unsupported issues. Presumptively, prejudicial error results from submitting unsupported issues to the jury; but record reviewed and held to support the submission of all assignments of negligence in an automobile accident case.

Sergeant v Challis, 213-57; 238 NW 442

Unsupported issue of general negligence. Instruction injecting unpleaded and unproved specification of general negligence is reversible error.

Keller v Dodds, 224-935; 277 NW 467

Conformity to general allegation—nonerror. An assignment of error that a general allegation of negligence specifying "In not operating and driving said truck in a careful and prudent manner on a public highway" should not have been submitted to the jury, because such phraseology implied a moving vehicle, is without merit when there is substantial evidentiary conflict as to whether the truck was moving or stopped.

Gookin v Baker & Son, 224-967; 276 NW 418

Assuming other motorist will obey law—inapplicable instructions refused. Requested instructions that a motorist had a right to assume that taxi driver would obey the law as to speed and lookout, altho correct as abstract propositions of law, are properly refused when not supported by the evidence.

Reed v Pape, 226-170; 284 NW 106

Others' compliance with law assumed—when presumption fails. The right of a motorist to assume that others using the highway will obey the law ceases when he knows that another motorist is not obeying the law. When such motorist testifies that he saw an approaching car skidding and then drove on the wrong side of a city street to avoid that car, he is not entitled to the embodiment of such rule of assumption in instructions to the jury.

Young v Hendricks, 226-211; 283 NW 895

Lookout—negligence—proximate cause. Unsupported issues are very properly and necessarily excluded from the jury. So held as to the issues (1) whether the operator of an automobile failed to maintain a proper lookout, (2) whether he was negligent in stepping out of the car and upon the running board preparatory to cleaning the sleet from the windshield, and (3) whether the snowy and icy condition of the pavement was the proximate cause of an accident.

Winter v Davis, 217-424; 251 NW 770; 39 NCCA 308

Passenger's contributory negligence—imputing from driver. In a damage action where a truck, traversing the crest of a hill on a snow-drifted highway, sideswipes a passenger automobile, the question of contributory negligence of a plaintiff motorist riding in the back seat should not be submitted to the jury in the absence of any claim that plaintiff's driver's negligence, if any, was imputable to the plaintiff or was the sole proximate cause of the accident.

Schalk v Smith, 224-904; 277 NW 303

Absence of rear reflectors—nonproximate cause. A "sideswipe" collision between two head-on approaching automobiles could not proximately result from the absence of red reflectors on the rear of the body, and no instruction involving this negligence should be given.

Keller v Dodds, 224-935; 277 NW 467

Tire blowout as sole and only cause of injury. In a personal injury action against an automobile owner, where plaintiff complained of instruction denying a recovery if the blowing out of the tire was the sole and only cause of

the damage, for the alleged reason that the instruction was not warranted by evidence showing that the car, after swerving to the left, veered back and forth, eventually going into the ditch on right side of the road, as this evidence refuted the driver's testimony that she was excited and did nothing to gain control of the car, held, the question of driver's negligence was before the jury, and the instruction was proper.

Band v Reinke, 227-458; 288 NW 629

Nonpleaded negligence. Instructions that the jury should not consider the failure to ring a bell on a streetcar as a ground of negligence are properly refused (1) when plaintiff pleads no such ground of negligence, (2) when no such ground was submitted to the jury, and (3) when the testimony relative to such failure was received without objection.

Watson v Railway, 217-1194; 251 NW 31

Undue care—instructions harmless. An instruction that a motorman on a streetcar must keep a "constant" lookout for drivers of vehicles on the street is not subject to the exception that it requires an undue degree of care, when the sole issue on trial is whether the motorman, being fully aware of the dangerous position of the vehicle in question, could have avoided the injury by ordinary care.

Lynch v Railway, 215-1119; 245 NW 219

Unsupported negligence. An instruction authorizing a finding of negligence on the part of a railroad company if an employee thereof discovered the danger of an approaching vehicle and did not in the exercise of ordinary care report such danger to the engineer is wholly inapplicable to a record which clearly reveals the fact that when the employee aforesaid discovered the danger no ordinary care could have prevented the accident.

Gilliam v Railway, 206-1291; 222 NW 12

Unavoidable accident. Reversible error results from submitting the issue whether the engineer of a railway train was negligent in not maintaining a proper lookout for automobiles approaching a public crossing, when the evidence shows to the contrary and that the approaching automobile was discovered at the earliest reasonable opportunity, which was too late to prevent the accident.

Simmons v Railway, 217-1277; 252 NW 516

Supplanting issue of negligence with inevitable accident. When the record testimony shows that a collision between automobiles and the resulting damage was caused (1) by the negligence of the plaintiff, or (2) by the negligence of the defendant, or (3) by the negligence of both parties, the court must not in its instructions depart from the issues of negligence and inject into the instructions the theory of inevitable accident.

Christenson v Tel. Co., 222-808; 270 NW 394

"Inevitable" accident—absence of evidence. An instruction on the subject of "inevitable" accident is wholly improper when there is no evidence whatever supporting such a theory.

Orr v Hart, 219-408; 258 NW 84

Confusing and unsupported instructions in re "inevitable accident". Instructions with reference to an "inevitable" accident and defendant's nonliability therefor are wholly out of place when there is no applicable evidence in the record.

Keller v Gartin, 220-78; 261 NW 776

Last clear chance—erroneous submission. The submission to the jury of the issue of last clear chance is improper on undisputed testimony that, while an automobile was moving along a traffic-congested street at a speed of from five to ten miles an hour, a pedestrian negligently placed himself in a position of danger in front of said car, but that the operator of said car did not discover said position of danger until his car was only seven feet from said pedestrian, and that thereupon said operator applied or attempted to apply his brakes but not in time to avoid injuring said pedestrian.

Spaulding v Miller, 220-1107; 264 NW 8

Excessive speed—view obstructed. The submission of the issue of speed of a vehicle, in excess of that fixed by statute when the view is obstructed, is necessarily erroneous when there is no evidence that the view was obstructed.

Stoner v Hutzell, 212-1061; 237 NW 487

Unpleaded and unsupported qualification. The abstract proposition that a pedestrian who steps suddenly in front of a moving vehicle is guilty of negligence per se need not be limited by the effect of sudden fright or surprise on the part of the pedestrian when no such claim is made in the pleadings or evidence.

Ryan v Shirk, 207-1327; 224 NW 824

Failure to signal. Whether the operator of an automobile failed to give proper signal on approaching a crossing should not be submitted to the jury when admittedly the complaining pedestrian had full and explicit knowledge of the immediate presence and approach of said car.

Wilkinson v Lbr. Co., 203-476; 212 NW 682; 31 NCCA 345

Failure to signal "stop". The submission to the jury of the issue whether the driver of a truck failed to give a signal of his intention to stop cannot be justified on the naked statement of a witness who was riding with the driver that he did not "see or hear" the driver give any such signal.

Isaacs v Bruce, 218-759; 254 NW 57

Negligence—absence of evidence re accident. The issue of the alleged negligence of a truck

IX INSTRUCTIONS—continued
(f) UNSUPPORTED ISSUES—continued

driver in running over and killing a person cannot be properly submitted to the jury on evidence which fails to reveal the facts and circumstances immediately attending the accident itself—which leaves to mere conjecture the manner in which the fatal accident occurred. So held as to a fatal injury to a child.

Westenburg v Johnson, 221-134; 264 NW 18

Unsupported assumption of fact. A requested instruction which erroneously assumes that there is a marked place on a street pavement for the crossing by pedestrians is properly refused.

Minks v Stenberg, 217-119; 250 NW 883

Turning to left of overtaken vehicle. The court manifestly commits no error in failing to instruct that a vehicle approaching another vehicle from the rear should pass to the left of the overtaken vehicle, when such was not the theory upon which the trial was had.

Olson v Shafer, 207-1001; 221 NW 949

Law of road—excuse for violation. Failure to instruct that defendant may excuse his apparent violation of a law of the road is proper when such instruction, if given, would have no support in the evidence.

Jarvis v Stone, 216-27; 247 NW 393

Legal excuse. Instruction submitting "legal excuse" for violation of the assured clear distance statute is reversible error when neither party raises nor gives evidence upon this issue.

Keller v Dodds, 224-935; 277 NW 437

Excusing violation of statute—absence of evidence. While a motorist may plead and establish any recognized legal excuse for having violated a statutory standard of care for the operation of an automobile, yet he is manifestly not entitled to any instruction to the jury on the subject of "excuse" when he wholly fails to establish any excusatory fact.

Lukin v Marvel, 219-773; 259 NW 782

Emergency as legal excuse—evidentiary support. Question of emergency as being legal excuse should not be submitted to the jury without competent evidence to support it. Held, instruction amply supported in instant case.

Edwards v Perley, 223-1119; 274 NW 910

Sudden emergency—requested instruction. In the absence of a request therefor, defendant may not complain that the jury was not instructed on the question of sudden emergency, especially where, if it did exist, it was of the defendant's own making.

Schalk v Smith, 224-904; 277 NW 303

Defendant driving on wrong side—no sudden emergency instruction for defendant. In an action for injuries sustained in a collision between a motorcycle driven east by plaintiff on his right, the south, side of the road and an approaching automobile operated by the defendant allegedly on the left, or south, side of road, there was no occasion for court giving instruction to effect that defendant was faced with an emergency, when defendant maintained that he was at all times on his own right side of the road, because if he was on the left, or south, side of highway, the emergency was of his own making.

Jakeway v Allen, 226-13; 282 NW 374

Insufficient headlights—erroneous submission of issue. The submission to the jury of the issue whether an automobile was being operated with lights which were insufficient to reveal a person or object 75 feet ahead of the lights, without any evidence that the lights did not meet the statutory requirements, constitutes reversible error.

Grover v Neibauer, 216-631; 247 NW 298; 36 NCCA 133

Alleged absence of lights. Testimony by a plaintiff to the effect that, as he entered an intersection, he looked along the intersecting highway to his right (which was the proper direction), and saw no approaching automobile or automobile lights, may be sufficient to justify the court in submitting to the jury the question whether the defendant was operating his car without lights.

Appleby v Cass, 211-1145; 234 NW 477

Reducing speed at intersection.

Davis v Hoskinson, 228- ; 290 NW 497

Assured clear distance instructions. Principle reaffirmed that instructions on a theory not supported by the evidence are erroneous. So held as to instructions relative to the duty of the driver of a vehicle so to drive as to be able to stop within the assured clear distance ahead.

Dougherty v McFee, 221-391; 265 NW 176

Assured clear distance—oncoming vehicles. Since as to oncoming vehicles, assured clear distance statute applies only to motorist not traveling on his right-hand side of the road, in an action involving a collision between oncoming vehicles on a foggy night when vehicle in which plaintiff was riding was traveling on the right-hand side of the road, a requested instruction applying the assured clear distance statute to the plaintiff was properly refused.

Gregory v Suhr, 224-954; 277 NW 721

Circumstantial evidence instruction. In a death claim action for negligence arising from an automobile collision occurring in a suburban district of a city where the negligence alleged was in failing to travel on the right-hand side of the street and where along with the physical facts there was direct evidence by the driver of the car wherein decedent was riding, as to decedent's travel on the right-hand side of the street, it was error to give an instruction, applicable only to cases based entirely on circumstantial evidence, when such instruc-

tion prevented the jury from properly considering the direct evidence as to where the accident occurred.

Rusch v Hoffman, 223-895; 274 NW 96

Half of traveled way. Instruction dealing with contributory negligence and presenting to the jury a situation involving plaintiff's duty to yield one-half of traveled roadway and to turn to the right unless impossible to do so is reversibly erroneous when neither allegations nor evidence raise this question.

Keller v Dodds, 224-935; 277 NW 467

Yielding half of traveled way. Instructions which submit to the jury the questions whether a defendant has shown legal excuses (1) for exceeding a statutory speed limit, or (2) for not having yielded one-half of the traveled way are erroneous when there is no evidence supporting an affirmative finding on either proposition.

Deweese v Transit Lines, 218-1327; 256 NW 428

Intoxication. The inclusion, in the court's recital of the issues, of the defendant's wholly unsupported allegation that the deceased was intoxicated at the time of the collision in question, without any withdrawal of said issue, justifies the court in granting plaintiff, against whom verdict was rendered, a new trial.

Fort v Ferguson, 218-756; 255 NW 501

Failure to limit. Instructions which direct the jury to allow damages for such loss and injuries as necessarily resulted from the accident complained of are too broad because not limited to the loss and injuries properly set out in the petition and sustained by the evidence.

Balik v Flacker, 212-1381; 238 NW 467

Failure to limit damages—fatal error. An instruction which fails to limit the jury in its return of damages (1) to the amount claimed for each item of damages, and (2) to such amount only as shown by the evidence, is prejudicially erroneous.

Andersen v Christensen, 222-177; 268 NW 527

Permanent injuries. Instructions relative to damages for permanent injuries are improper where there is no testimony tending to show permanent injuries.

Wilkinson v Lbr. Co., 203-476; 212 NW 682

Unsupported issue of permanent injuries. In an action for physical injuries sustained by the plaintiff when he was struck by the defendant's automobile, it was reversible error to submit to the jury the question of permanent injuries as a measure of damages when there was no evidence of permanent injuries to support such submission.

Street v Stewart, 226-960; 285 NW 204

Permanent injury. Instructions reviewed, and held not subject to the vice of submitting an unsupported issue of permanent injury.

Groshens v Lund, 222-49; 268 NW 496

Earning capacity of child. Elements of damage not sustained by evidence should not be submitted, which applies to the earning capacity of a 10-year-old school girl in the absence of supporting evidence, but in the instant case the error was harmless, as the jury's possibility of considering such element was very remote.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Unduly comprehensive request. Instructions which are so comprehensive as to authorize and direct a verdict in favor of all defendants are properly rejected when one of the defendants would be liable in any event.

Waldman v Motor Co., 214-1139; 243 NW 555

Failure to except. Failure to except to an instruction which submits an unsupported issue is fatal to the right of review on appeal.

Lange v Bedell, 203-1194; 212 NW 354

(g) CONSTRUCTION AS A WHOLE

Principle stated. Principle reaffirmed that instructions must be construed as a whole.

Starry v Hanold, 202-1180; 211 NW 696
Raines v Wilson, 213-1251; 239 NW 36
Tallmon v Larson, 226-564; 284 NW 367

Cautionary instruction not necessary. A cautionary instruction to the jury that court did not attempt to embody all applicable law in any one instruction, but in considering any one instruction jury should consider each in light of and in harmony with all other given instructions and apply them as a whole to the evidence would be proper; however, a failure to do so would not be reversible error.

Churchill v Briggs, 225-1187; 282 NW 280

Presentation of conflicting theories—non-assumption of fact issue. Instructions presenting the conflicting theories of the plaintiff and defendant as to a collision between motor vehicles, reviewed, and held, when viewed as a whole, not to assume that the collision occurred in the center of an intersection, said point of collision being in issue.

Ballain v Brazelton, 221-806; 266 NW 522

Approaching or entering intersections—right to proceed. In an action for injuries sustained by driver of a motor vehicle in collision with an automobile approaching an intersection from the left, an instruction which in part states, "If a traveler comes to an intersection and finds no one approaching from the right upon the other highway within such distance and approaching at such a rate of speed as to reasonably indicate danger of a collision, he may proceed as a matter of right to use the intersection, unless from his observation he is

IX INSTRUCTIONS—continued
(g) CONSTRUCTION AS A WHOLE—continued

apprised to the contrary", when considered with remainder of instruction, was not prejudicial. Instructions must be taken together, and especially must all parts of one instruction be considered as a whole.

Rogers v Jefferson, 226-1047; 285 NW 701

Farfetched construction on use of words. An instruction that each of two operators of automobiles had the right "to assume" that the other would comply with the laws of the road (as correctly stated by the court) is not subject to the farfetched and hypercritical construction that thereby an operator was authorized to assume such compliance when he knew there had been a violation.

Shutes v Weeks, 220-616; 262 NW 518

Sole cause of injury. An instruction that "where a party is injured and such injury is due to his own negligence he cannot recover", tho incorporated in a paragraph defining contributory negligence, does not have the effect of declaring that the contributory negligence which will bar an injured party from recovering must be a negligence which is the sole cause of the injury.

Ryan v Rendering Wks., 215-363; 245 NW 301

Contributory negligence—lack of evidence—effect. An instruction which properly directs the jury, in determining the issue of contributory negligence of an injured party, to take into consideration certain enumerated matters as shown by the evidence, is not necessarily erroneous because it makes no reference to the effect of a lack of evidence on the subject.

Engle v Nelson, 220-771; 263 NW 505

Contributory negligence — fatally inconsistent instructions. After properly instructing that plaintiff, before she could recover, must establish her entire freedom from contributory negligence, the court commits a fatal inconsistency by instructing that plaintiff could not be charged with negligence in not choosing some other highway than the one in question on which to travel, unless defendant has proven that plaintiff knew or ought to have known that the highway on which she was traveling was in a dangerous condition.

Kehm v Dilts, 222-826; 270 NW 388

Contributory negligence — incurable error. An instruction which summarizes all the elements that plaintiff must prove to make a case, and directs the jury that if these elements and conditions existed, the plaintiff is entitled to recover, is fatally defective when no reference whatever is made to plaintiff's freedom from contributory negligence. And, in such case, the error is not cured by the fact that in other instructions the jury is instructed that plaintiff must be free from contributory negligence.

Bobst v Hoxie Line, 221-823; 267 NW 673

Traveling highway in fog—keeping lookout—instructions. Where a defendant alleges failure to keep a lookout and contributory negligence on account of plaintiff's travel on the highway in a fog, instructions correctly but generally charging as to negligence and contributory negligence and requiring consideration of all conditions and circumstances are, in the absence of requested instructions thereon, sufficient to require the jury to consider the circumstance of the fog.

Gregory v Suhr, 224-954; 277 NW 721

Negligence—instruction omitting contributory negligence. Where, on a snow-covered highway containing a single pair of ruts, two automobiles approaching each other collide on a hill, in a damage action by a passenger injured thereby, an instruction further explaining negligence, but not mentioning contributory negligence, is not erroneous when contributory negligence was covered in other instructions, and when the jury could not have been misled by the explanatory purpose of the instruction.

Tallmon v Larson, 226-564; 284 NW 367

Lookout—instructions. Instructions involving the negligence of the defendant in failing to drive around another truck and in failing to stop when he could see, or should have seen, that he was about to collide with the other truck, properly presented the question of keeping a proper lookout and were justified by evidence that the defendant ran into another truck which had skidded and turned around on the icy pavement at a time when the defendant's truck was 150 or 200 feet away.

Remer v Takin Bros., 227-903; 289 NW 477

Unallowable limitation on materiality of evidence. Reversible error results to an unsuccessful plaintiff (in an action pivoted on the issue whether defendant traveling northward yielded half of the traveled way to plaintiff traveling southward) from instructions to the effect that "evidence that defendant just preceding the collision swerved his car to the west is material on the issue whether plaintiff was guilty of contributory negligence, even tho plaintiff had not alleged such swerving as a specific act of negligence on the part of the defendant". The vice is not in what the court does say but in what the court does not say, to wit: that said evidence is material on the issue of defendant's negligence.

Keller v Gartin, 220-78; 261 NW 776

Instructions — "a proximate cause" — nonprejudicial error. In an automobile collision negligence case where plaintiff's son was driving automobile in which plaintiff was riding, an instruction that plaintiff need only prove

defendant's negligence to be "a proximate cause" is not prejudicial error when court also instructed that negligence of plaintiff or plaintiff's son barred recovery and the instructions were to be read as a whole.

Rogers v Jefferson, 224-324; 275 NW 874

Contributory negligence—reference to proximate cause—error. An instruction that before plaintiff can recover for alleged negligently inflicted injuries, he must establish that he "was free from contributory negligence, that contributed to, or was the proximate cause of such injuries", is entirely erroneous insofar as reference is made to "proximate cause", and the error is not cured by another instruction to the effect that the instructions should be construed "as a whole".

Bobst v Hoxie Line, 221-823; 267 NW 673

Failure to signal approach. An instruction, which properly directs the jury that the defendant would be guilty of negligence if, under named circumstances, he failed to signal his approach to the scene of an accident, is not rendered erroneous because the court does not, in said instruction, make any reference to the law of direct and proximate cause—said latter subject matter being properly covered elsewhere in the instructions.

Engle v Nelson, 220-771; 263 NW 505

Proximate negligence not superseded by concurrent negligence. If the jury might justifiably find that the defendant railway company operated its train over one of its crossings at an excessive and unlawful rate of speed and that said speed was the proximate cause of the collision of the train with an automobile and of the injury to an occupant of the automobile, the court must not so instruct as to permit the jury to find that the negligence of the driver of the automobile in approaching and driving upon the crossing was an intervening cause which wholly superseded the said negligence of the defendant railway company.

Dedina v Railway, 220-1336; 264 NW 566

Duty to look and listen—instructions. An instruction to the effect that, in determining the care exercised by a traveler at a railroad crossing, the jury should consider whether obstructions to one's view were such as to require the traveler to look and listen, is quite harmless when the jury was elsewhere correctly instructed as to the duty to look and listen.

Love v Railway, 207-1278; 224 NW 815

Blowing out tire—losing control of car. Where an instruction stating, "* * * the blowing out of a tire is a legal excuse to a driver for losing control of his or her automobile * * *", and also stating conditions for recovering control of the car, is challenged because this quoted part withdrew from the jury the question of whether driver was negligent in losing control of car and decided the issue erroneously as a matter of law, such instruction was not erroneous in that the grounds of negligence alleged and submitted to the jury were referable to the conduct of the driver, not at the time of the blowout, but thereafter—bearing in mind that instructions must be read as a whole and that it is unfair to pick out parts of instructions and give them a forced or strained construction.

Band v Reinke, 227-458; 288 NW 629

Carrier's liability. In an action for injuries sustained in an accident at an intersection while riding in a taxicab, an instruction which held the defendant to the liability of a common carrier of passengers for hire was not error in view of other instructions defining a common carrier and making a high degree of care dependent on a finding that the taxi was a common carrier.

Womochil v Peters, 226-924; 285 NW 151

Omitting reference to defendant's omission to act. An instruction that the jury, in determining an issue of negligence, should take into consideration "what the defendant did", need not be accompanied by any instruction for the jury to consider what the defendant omitted to do, when the jury is fully instructed to consider all the facts and circumstances bearing on the issue.

Leete v Hays, 211-379; 233 NW 481

Grouping distinct grounds. Reversible error results from grouping separate and distinct grounds of negligence and so instructing as to lead the jury to understand that plaintiff, before he can recover, must establish the truth of an entire group.

Leete v Hays, 211-379; 233 NW 481

Failure to yield one-half traveled way—other circumstances mentioned. In action by automobile passenger, arising out of collision between a bus and approaching automobile, wherein the only ground of negligence submitted was bus driver's failure to yield one-half of traveled way, instructions relating to speed and control of bus and to rights and duties of bus driver in general relating to fact pavement was wet, relating to a car parked in path of bus, and other circumstances, when read with other instructions, that failure to yield one-half of highway was only prima facie negligence and could be justified, explained, or excused, and that parked car on highway might be an emergency creating an excuse, were not erroneous as submitting additional grounds of negligence.

Staggs v Bartovsky, 228- ; 291 NW 443

Damages—submission of pleaded but unsupported amount. No error results from instructing that no recovery can be allowed plaintiff in excess of the pleaded amount for a named element of damages (the evidence concededly showing that plaintiff had not suffered said maximum amount) when other in-

IX INSTRUCTIONS—continued

structions definitely charged the jury to base damages solely on the evidence.

Danner v Cooper, 215-1354; 246 NW 223

(h) REQUESTING INSTRUCTIONS

Refusal not error when subject matter covered. Refusal to give requested instructions is not error when the subject matter is covered by instructions given on the court's own motion.

Womochil v Peters, 226-924; 285 NW 151

Refusal nonerroneous when otherwise favorably covered. In action arising out of injuries sustained in collision between a bus and approaching automobile, a refusal to give bus owner's requested instruction concerning the discovery of parked car on paved highway in the path of bus as a circumstance bearing on question of bus driver's negligence in failing to yield one-half the traveled way, was not prejudicial error where other instructions given at bus owner's request were at least as favorable to bus owner as refused instruction.

Staggs v Bartovsky, 228- ; 291 NW 443

Covering requested instructions. When three similar instructions were requested, it was not error to refuse to give two of them, and give but one embodying the propositions of the other two.

Remer v Takin Bros., 227-903; 289 NW 477

Contributory negligence of passenger. It is correct to say that a passenger on a vehicle may be found free of contributory negligence if he acted as a person of ordinary prudence would act under like circumstances. Requested instructions reviewed and held properly refused.

Newland v McClelland & Son, 217-568; 250 NW 229

Instructions in conformity with requests—estoppel to urge error. Defendant in an automobile case could not complain of an instruction on speed, lookout, and control given in conformity with instruction requested.

Usher v Stafford, 227-443; 288 NW 432

Requests—right to assume care by plaintiff. A requested instruction in a personal injury action, to the effect that defendant had a right to assume that plaintiff would commit no act of negligence contributing to his own injury, is properly refused (1) when defendant in driving as he did was not influenced by plaintiff's actions, and (2) when the record shows that the jury found that plaintiff was not guilty of any act of contributory negligence.

Orr v Hart, 219-408; 258 NW 84

Speed—lookout—turning to right—presumption. If there be applicable evidence the court must instruct (at least on request) (1) as to the duty of drivers of cars on meeting to obey the laws of the road, such as turning to the right, and maintaining a proper lookout and proper speed, and (2) as to the right of the driver of each car to presume that such duties will be performed by the other driver.

Hoover v Haggard, 219-1232; 260 NW 540

Right to assume compliance with law. Reversible error results from refusing to instruct that the operator of an automobile has a right to assume (until he knows or should know to the contrary) that other operators of automobiles (1) will keep their cars under control, (2) will maintain a speed which will enable them to stop within the assured clear distance ahead, and (3) will yield one-half of the traveled way by turning to the right—all such enumerated subject matters being distinctly in issue.

Fry v Smith, 217-1295; 253 NW 147

"Control" construed in its practical sense. Common words in instructions must generally be understood by the jury in their ordinary and practical sense, and, if a more specific definition is desired, it must be requested. So held as to the word "control" in connection with operating a motor vehicle.

Johnston v Johnson, 225-77; 279 NW 139; 118 ALR 233

Submitting issue notwithstanding negligence per se. It is not necessarily reversible error for the court to fail to instruct the jury that the defendant was negligent as a matter of law, even tho had the court so instructed, the appellate court would not reverse because of such instruction.

Townsend v Armstrong, 220-396; 260 NW 17

Assured clear distance—oncoming vehicles. Since, as to oncoming vehicles, assured clear distance statute applies only to motorist not traveling on his right-hand side of the road, in an action involving a collision between oncoming vehicles on a foggy night, when vehicle in which plaintiff was riding was traveling on the right-hand side of the road, a requested instruction applying the assured clear distance statute to the plaintiff was properly refused.

Gregory v Suhr, 224-954; 277 NW 721

Assuming issuable facts—refusal. When it assumes disputed questions of fact as established, a requested instruction may be properly refused, even tho the request embodies a correct statement of law.

Usher v Stafford, 227-443; 288 NW 432

Assuming right to enter intersection. Instructions are properly refused when they assume that one of the parties to an accident had the superior right to enter a street intersection—such right being a matter of dispute.

Waldman v Motor Co., 214-1139; 243 NW 555

Yielding right of way—justifiable assumption. The court may refuse a requested instruction and give the fair equivalent thereof in its own language. So held as to an instruction relative to the duty of the operator of an automobile to yield the right of way at an intersection.

Appleby v Cass, 211-1145; 234 NW 477

Vehicles approaching from rear—pedestrian's duty. An instruction relative to the duty of a pedestrian traveling in the public highway, to keep a reasonable lookout for vehicles approaching from the rear as well as from the front, need not necessarily be modified on request to the effect that such duty does not require him to turn about "constantly and repeatedly" to observe the possible approach of vehicles from his rear.

Kessel v Hunt, 215-117; 244 NW 714; 34 NCCA 247

Consideration of nonimputable negligence. An instruction to the effect that even tho the negligence of a husband with whom the wife was riding could not be imputed to the wife, nevertheless the negligence of the husband could be considered by the jury on the issue whether the negligence of the defendant—the driver of another car—was the proximate cause of plaintiff's injuries, is a correct statement of law, and if plaintiff wishes such instruction modified by a statement as to the law governing the concurrent negligence of different parties, she must request such instruction.

Kuhn v Kjose, 216-36; 248 NW 230

Proximate negligence of different co-defendants. On separate trials of an action for damages against the operators of different vehicles on one of which plaintiff was a passenger at the time she was injured by a collision, defendant is properly denied an instruction to the effect that he cannot be held liable if his co-defendant was proximately negligent.

Reason: Both defendants might be proximately negligent.

Newland v McClelland, 217-568; 250 NW 229

Sudden emergency instruction properly refused. A defendant-motorist's requested instruction, which deals with the question of sudden emergency arising because, as he alleges, a child suddenly darted from hiding and ran across the path of his car, is properly refused when the issue of error in judgment after the emergency arose was not in the case, and the theory of how and when the child got in his path was otherwise covered by instructions.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Stalled motorist—freedom from negligence. In a damage action for personal injuries arising out of a motor vehicle collision, the burden is on plaintiff to establish (1) the defendant's negligence, (2) such negligence as the proximate cause of the injury, and (3) plaintiff's freedom from contributory negligence. Hence, a motorist who stands in the center of the road near the rear of her automobile stalled on the highway, attempting to stop a following motorist, and, tho having the opportunity, fails to seek a place of safety when she sees the approaching motorist apparently will crash into her stalled automobile, is neither entitled to an instruction establishing her freedom from contributory negligence as a matter of law, nor to a directed verdict against the defendant.

Murchland v Jones, 225-149; 279 NW 382

"Physical facts" rule. A requested instruction should be given, when the testimony is supporting, to the effect that, if the view of a railway track is unobstructed for a long distance while a traveler is knowingly approaching it, he will be held to have seen the train approaching thereon, there being no diverting circumstances.

Langham v Railway, 201-897; 208 NW 356; 27 NCCA 68; 27 NCCA 69

Separate forms of verdicts. In a joint action against the driver of an automobile and the owner of the vehicle, wherein necessity arises so to instruct as to limit the effect of the driver's admissions to the question of his liability, and the effect of the owner's admissions to the question of his liability, separate forms of verdict must be submitted if requested.

Broderick v Barry, 212-672; 237 NW 481; 75 ALR 1530

Error not waived by requesting instruction. Where a motion for a directed verdict is erroneously overruled, the defeated party does not waive said error by asking instructions which correctly state the law of the case as fixed by the ruling of the court on the motion.

(Overruling Martens v Martens, 181-350, and McDermott v Ida County, 186-736)

Heavilin v Wendell, 214-844; 241 NW 654; 83 ALR 872

X DAMAGES

(a) IN GENERAL

Assessment—double recovery. The submission to the jury of duplicate counts—counts praying recovery on the same elements of damages—and permitting recovery on both such counts is clearly erroneous.

Gehlbach v McCann, 216-296; 249 NW 144

Failure to limit damages. Instructions which direct the jury to allow damages for such loss and injuries as necessarily resulted from the accident complained of are too broad because not limited to the loss and injuries properly set out in the petition and sustained by the evidence.

Balik v Flacker, 212-1381; 238 NW 467

X DAMAGES—continued
(a) IN GENERAL—continued

Failure to limit damages—fatal error. An instruction which fails to limit the jury in its return of damages (1) to the amount claimed for each item of damages, and (2) to such amount only as shown by the evidence, is prejudicially erroneous.

Andersen v Christensen, 222-177; 268 NW 527

Direct damages only recoverable. It is mandatory on the court to instruct that damages recoverable because of a defendant's negligence are limited to those damages which the evidence shows directly resulted from such negligence.

Schelldorf v Cherry, 220-1101; 264 NW 54

Instruction as to allowable damages. Instruction, specifying that damages should be such as were rendered necessary by the injuries as disclosed by the evidence and which the evidence shows that plaintiff sustained and endured, sufficiently informed the jury that only such damages could be allowed as were caused by, and the direct result of, injuries sustained because of defendant's negligence.

Jakeway v Allen, 227-1182; 290 NW 507

Erroneous limitation on verdict. A general instruction, in a personal injury case, to the effect that the jury must not return a verdict in excess of the sum total of all the damages claimed by plaintiff is prejudicially erroneous when the plaintiff has alleged a particular amount of damages for each element of damages.

Sergeant v Challis, 213-57; 238 NW 442

Death—measure of damages. The measure of damages for death is the reasonable present value of the life of the deceased to his estate.

Droullard v Rudolph, 207-367; 223 NW 100

Occupation and earnings of parent. The occupation and earnings of the father of a minor child may be shown, in an action for the wrongful death of the child, as an element to be considered by the jury on the issue of damages to the child's estate.

McDowell v Oil Co., 212-1314; 237 NW 456

Harmless error—submitting earning capacity of child. Elements of damage not sustained by evidence should not be submitted, which applies to the earning capacity of a 10-year-old schoolgirl in the absence of supporting evidence, but in the instant case the error was harmless, as the jury's possibility of considering such element was very remote.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Wrongful death—purchase of business. In an action for damages for wrongful death, evidence is admissible of the recent purchase, solely on credit, by decedent, of a business, and of the marked reduction by decedent of his indebtedness subsequent to such purchase, together with evidence of his ability, health, and other kindred matters.

Scott v Hinman, 216-1126; 249 NW 249

Medical services. It is error to permit the recovery of expense for medical services necessitated by a personal injury when there is no evidence of the reasonable value of such services and no showing that the amount in question has been paid.

Melsha v Dillon, 214-1324; 243 NW 295

Earnings in discarded business. Evidence by an injured party as to the amount of his earnings in a business which he had, at the time of his injury, abandoned, is incompetent, when the amount of his future earnings in such business, were he to re-engage in it, is conjectural and speculative.

Dickeson v Lzicar, 208-275; 225 NW 406

Hospital expenses—absence of evidence. In an action for personal injury, no recovery can be had for hospital expenses when there is no evidence of any kind bearing on the reasonableness of the charge—not even in the form of an itemized bill or that the bill had been paid.

Ege v Born, 212-1138; 236 NW 75

Hospital expense—board and lodging—when allowable. In personal injury action, allowance of board and lodging in hospital is not error where such items are inseparably tied up with treatment.

Jakeway v Allen, 227-1182; 290 NW 507

Employer paying doctor bills—negligent person still liable. Payment of an injured truck driver's doctor bills by his employer, whether the motive be philanthropy or contract, constitutes a bounty from which a negligent defendant-motorist can derive no benefit in reduction of his liability, inasmuch as he owes compensation for all damages as to which his negligence was the proximate cause.

Clark v Berry Seed Co., 225-262; 280 NW 505

Release—fraud. A jury question as to the validity of a release of personal injury damages is made by proof that the releasee represented that the doctor's charges would be "about" $10, and that the representation was materially false and was made to the releasor and acted on by him when he was alone and practically helpless from his injuries.

Robinson v Meek, 203-185; 210 NW 762; 5 NCCA(NS) 434

Release of joint tort-feasor. An injured party who voluntarily, and without being imposed on by fraud, accepts and receives from one alleged joint tort-feasor a legal consideration in the form of property in settlement of his injuries, may not thereafter maintain an

action against another joint tort-feasor for damages for the same injury.

Barden v Hurd, 217-798; 253 NW 127

Covenant not to sue—joint wrongdoers. The driver of an oil truck sued for damages consequent on his negligent operation of the truck is not released from liability because another party who owned the oil tank and grease rack carried on the truck obtained from the injured party a covenant wherein the injured party agreed not to sue such other party—the record failing to show that the truck driver and the owner of the tank were joint wrongdoers.

Lang v Siddall, 218-263; 254 NW 783

(b) PHYSICAL DAMAGES—TO PERSON OR PROPERTY

Reparable and irreparable injury. The measure of damages for injury to an article is: (1) for total destruction, the reasonable value at the time of destruction; (2) for a fully reparable injury, the reasonable cost of the repairs, plus the reasonable value of the use of the article during a reasonable time for repair; (3) for a partially reparable injury, the difference in the reasonable value of the article before and after the injury.

Langham v Railway, 201-897; 208 NW 356; 26 NCCA 938

Measure of damages—fully reparable injury. If the injury to an article is fully reparable, then the measure of damages is the reasonable cost of the repairs, not the difference between the reasonable value of the article before and after the injury.

Looney v Parker, 210-85; 230 NW 570

Reparable injury to article. The measure of damages for negligent injury to an article is the reasonable cost of restoring the article to the condition it was in immediately before the injury, not exceeding in any case the reasonable value of the article at the time of injury.

Laizure v Railway, 214-918; 241 NW 480

Measure of damages—total destruction. The measure of damages for the total destruction of an article is the reasonable market value of the article immediately before its destruction.

Bush v Railway, 216-788; 247 NW 645

Failure to limit damages—fatal error. An instruction which fails to limit the jury in its return of damages (1) to the amount claimed for each item of damages, and (2) to such amount only as shown by the evidence, is prejudicially erroneous.

Andersen v Christensen, 222-177; 268 NW 527

Direct damages only recoverable. It is mandatory on the court to instruct that damages recoverable because of a defendant's negligence are limited to those damages which the evidence shows directly resulted from such negligence.

Schelldorf v Cherry, 220-1101; 264 NW 54

Failure to limit findings. An instruction which directs the jury, in determining the damages to an article, "to consider" its value before the injury and its value after injury is erroneous because it fails to confine the jury in its findings of damages.

Langham v Railway, 201-897; 208 NW 356; 26 NCCA 938

Instruction—sufficiency. Instructions to the effect that the jury should determine from the evidence the amount due plaintiff for injuries to person and property, and allow him such sum as would fairly compensate him, reviewed and held to reveal no error.

Winter v Davis, 217-424; 251 NW 770

Hospital expenses. In an action for personal injury no recovery can be had for hospital expenses when there is no evidence of any kind bearing on the reasonableness of the charge—not even in the form of an itemized bill or that the bill had been paid.

Ege v Born, 212-1138; 236 NW 75

Nervous injury—evidence—sufficiency. There may be recovery of damages consequent upon nervous injury even tho there is no medical testimony showing the connection between the injury and the nervous disturbance.

McDougal v Bormann, 211-950; 234 NW 807

Nonpermanent recovery—submission. Record reviewed and held that the issue of nonpermanent recovery from a personal injury was properly submitted on supporting expert testimony.

Albert v Trans. Co., 215-197; 243 NW 561

Permanent injuries—evidence. Evidence held sufficient to justify the submission to the jury of the issue whether certain personal injuries were permanent.

Stilson v Ellis, 208-1157; 225 NW 346

Personal injuries—evidence. Evidence held to present a jury question on the issue whether injuries were permanent and whether they were the proximate result of an accident or resulted from a former diseased condition of the injured party.

Dickeson v Lzicar, 208-275; 225 NW 406

Damages—permanent cripple—future pain—correct instruction. In a personal injury action arising from a motor vehicle collision, an allegation that plaintiff has been crippled for life, sustained by some evidence, justifies an instruction that the jury may allow such sum as in their judgment will fairly compensate plaintiff for future pain and for being crippled.

Clark v Berry Seed Co., 225-262; 280 NW 505

X DAMAGES—continued

(b) PHYSICAL DAMAGES—TO PERSON OR PROPERTY—concluded

Permanent injury to back and spine—$6,500 not excessive. In an action for damages as a result of automobile collision, a verdict of $6,500 was held not to be excessive where plaintiff received severe permanent injuries to his back and spine and could not work or sleep on account of intense pain, and where, prior to the accident, plaintiff's earnings were around $5 per day, but after the accident not over fifty cents per day, and where plaintiff, prior to the trial, lost two years earnings amounting to $2,500.

Kramer v Henely, 227-504; 288 NW 610

Ten percent permanent injury to arm—non-speculative verdict. Where a petition alleges ten percent injury to an arm and asks $1,000 damages therefor, it is not error to permit the jury to return a verdict for the full amount when the evidence shows some permanent injury to the arm and the court in another instruction limited the recovery to the damages sustained.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Unsupported issue of permanent injury. Instructions reviewed, and held not subject to the vice of submitting an unsupported issue of permanent injury.

Groshens v Lund, 222-49; 268 NW 496

Unsupported issue of permanent injuries—submission to jury improper. In an action for physical injuries sustained by the plaintiff when he was struck by the defendant's automobile, it was reversible error to submit to the jury the question of permanent injuries as a measure of damages when there was no evidence of permanent injuries to support such submission.

Street v Stewart, 226-960; 285 NW 204

Interest on funeral expenses. The measure of damages for wrongful death, while not including reasonable funeral expenses, does include simple interest at a legal rate on such expenses for the time intervening between the premature death and the time when, in the ordinary course of events, the deceased would have died.

Lukin v Marvel, 219-773; 259 NW 782

(c) PAIN AND SUFFERING

Future pain — instructions—adequacy. An instruction to the effect that a recovery would be limited to "the fair and reasonable compensation for personal injury, pain and suffering, past and future * * * as shown by the evidence", is sufficient on the subject of future pain and suffering in the absence of a request for elaboration.

Duncan v Rhomberg, 212-389; 236 NW 638

Limiting recovery to sum of separate claims. Limiting a recovery of damages to the sum of one amount claimed for present and future physical pain and one amount claimed for mental pain will not be deemed erroneous when the verdict demonstrates that less was allowed than claimed.

Danner v Cooper, 215-1354; 246 NW 223

Mental pain and anguish. An injured plaintiff may recover for mental pain resulting from personal physical injury, even tho no special claim for such recovery is made in the petition; especially may he so recover when the petition fairly presents such claim.

Lang v Siddall, 218-263; 254 NW 783

Future pain—justifiable assumption. Where there is evidence of a permanent injury, and of present pain produced thereby, the jury may very properly conclude that future pain may be suffered even tho no witness specifically so testifies.

Danner v Cooper, 215-1354; 246 NW 223

Permanent cripple—future pain. In a personal injury action arising from a motor vehicle collision, an allegation that plaintiff has been crippled for life, sustained by some evidence, justifies an instruction that the jury may allow such sum as in their judgment will fairly compensate plaintiff for future pain and for being crippled.

Clark v Berry Seed Co., 225-262; 280 NW 505

Future pain as incident to permanent injury. Even without a claim for damages for future pain and suffering, allegations and proof of permanent injuries from which future pain and suffering are reasonably certain to follow warrant the submission to the jury of this question.

Keller v Dodds, 224-935; 277 NW 467

Headaches—pain and suffering. In an action to recover for personal injuries sustained in an automobile collision where plaintiff testified that headaches causing much suffering affected him since the accident, and when an expert witness testified that plaintiff's injury might have caused headaches and that the injury might be permanent, an instruction permitting recovery for future pain and suffering from headaches was not erroneous and properly submitted the question to the jury.

Rogers v Jefferson, 226-1047; 285 NW 701

Instructions — separating personal injury claims. Instructions limiting the amount of total recovery which could be allowed the plaintiff, but not advising how much was claimed for pain and suffering and for permanent disability, were erroneous, and, being erroneous, prejudice is presumed unless the record is such as to overcome the presumption.

Remer v Takin Bros., 227-903; 289 NW 477

Expressions of pain. The reception of evidence tending to show pain and suffering on the part of a deceased for whose death the action has been brought is not erroneous.

Droullard v Rudolph, 207-367; 223 NW 100

(d) AGGRAVATION OF INJURY

Aggravation of disease—liability in general. One who is predisposed to disease which is aggravated or accelerated by motorist's negligence is entitled to recover damages necessarily and proximately resulting from such aggravation or acceleration.

Hackley v Robinson, (NOR); 219 NW 398

Aggravation of injury by unskillful treatment — liability of original wrongdoer. It is a principle of law that one who negligently inflicts a personal injury on another is liable in damages for the aggravation of said injury resulting from the unskillful treatment of said injury by his physicians and surgeons, provided the injured party exercised reasonable care in selecting said physicians and surgeons, but to permit the application of said principle there must be a proper showing of causal connection between said wrongfully inflicted injury and the said unskillful treatment.

Johnson v Selindh, 221-378; 265 NW 622

Release—joint wrongdoers. A party who has been negligently injured and settles with and releases the original wrongdoer may not thereafter maintain an action against a physician for malpractice in treating the very injuries for which he has effected a settlement.

Phillips v Werndorff, 215-521; 243 NW 525; 39 NCCA 574

(e) INADEQUATE OR EXCESSIVE

When court will interfere. It is not the province of a court to interfere with the amount of a verdict in a personal injury action unless it is clearly made to appear that the verdict is the result of passion or prejudice or of a palpable disregard of the evidence. Verdict of $10,000 held nonreviewable.

Engle v Nelson, 220-771; 263 NW 505

Option to remit excessive part of verdict. It is proper for the court to give plaintiff the option to remit that portion of a verdict which the court deems excessive, and refuse a new trial (on that ground) if the remittitur is filed.

Bobst v Hoxie Line, 221-823; 267 NW 673

Excessive verdicts.

$2,130 for personal injuries.

Kimmel v Mitchell, 216-366; 249 NW 151

$7,500 for wrongful death.

Lorimer v Hutchinson Co., 216-384; 249 NW 220

$2,500 for personal injury.

Tissue v Durin, 216-709; 246 NW 806

$17,000 for wrongful death.

Scott v Hinman, 216-1126; 249 NW 249

$30,000 for wrongful death.

Shutes v Weeks, 220-616; 262 NW 518

$6,000 for death of child.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

$3,500 for broken collarbone. For injuries sustained by a passenger in a taxicab accident, when a verdict of $3,500 was nearly $3,000 over the damages subject to calculation for a broken collarbone, pain and suffering, hospitalization, and loss of about three months work, the amount should be reduced to $2,500.

Womochil v Peters, 226-924; 285 NW 151

Slightly excessive recovery. The reception in evidence in a personal injury action of a hospital bill which includes a charge for "board" for the patient, is not reversible error when the amount of the nonrecoverable item is not shown, and when, apparently, the matter was not called to the attention of the trial court.

Sutton v Moreland, 214-337; 242 NW 75

Nonexcessive verdicts.

$2,800 for personal injuries.

O'Hara v Chaplin, 211-404; 233 NW 516

$5,950 for personal injuries.

Mizner v Lohr, 213-1182; 238 NW 584

$3,500 for personal injury.

Raines v Wilson, 213-1251; 239 NW 36

$1,000 for personal injury.

Hoegh v See, 215-733; 246 NW 787

$1,825 for personal injury.

Danner v Cooper, 215-1354; 246 NW 223

$12,000 for personal injury.

Henriksen v Stages, 216-643; 246 NW 913

$8,000 for personal injuries.

McCoy v Cole, 216-1320; 249 NW 213

$5,170 for personal injury and property damage.

Winter v Davis, 217-424; 251 NW 770

$1,328 for personal injury and property loss.

Wolfe v Decker, 221-600; 266 NW 4

$5,091.26 for personal injury.

Janes v Roach, 228- ; 290 NW 87

$3,750 for personal injury—new trial. Damages are generally within the province of the jury and an appellate court hesitates to interfere with the amount unless it is so grossly excessive as to indicate passion or prejudice, or some other reason appears, and ordinarily the trial court's granting or refusing a new trial on the ground of excessiveness of a verdict will not be disturbed on appeal unless an abuse of discretion is shown. Held, a $3,750

X DAMAGES—concluded
(e) INADEQUATE OR EXCESSIVE—concluded

personal injury verdict was not excessive when based on a fracture of the skull, broken left shoulder, four broken ribs, eye and ear injuries, unconsciousness for five days, and severe headaches.

Rogers v Jefferson, 226-1047; 285 NW 701

$2,500 increase on retrial of personal injury case—nonexcessiveness. A verdict of $10,000 on second trial of automobile accident case, altho $2,500 larger than first verdict, did not under the circumstances indicate passion or prejudice and was not excessive.

Jakeway v Allen, 227-1182; 290 NW 507

$600 for injuries resulting in loss of eight weeks work. When an automobile accident resulted in damages amounting to $90 to the car and bodily injuries including broken ribs which kept the injured person from work for eight weeks and with continued pain, a verdict of $600 was not excessive.

Kiesau v Vangen, 226-824; 285 NW 181

5037.10 Guest statute.

Discussion. See 18 ILR 78—Legislation

ANALYSIS

General application of motor vehicle law. See under §5037.09

I SCOPE OF SECTION IN GENERAL

Nonretroactive statute.

Thomas v Disbrow, 208-873; 224 NW 36; 30 NCCA 195

Nonapplicable to manslaughter. This section fixes civil liability in the operation of automobiles and has nothing to do with automobile operations resulting in manslaughter.

State v Richardson, 216-809; 249 NW 211

Nonrevival of right to recover for negligence. The right of a guest in an automobile to recover damages consequent on the negligence of the operator, having been supplanted by the statute permitting a recovery only in case of "reckless operation", has not been restored by the enactment of §5028, C., '31 [§5022.04, C., '39], wherein, inter alia, the driving of a motor vehicle "without due caution and circumspection" is characterized as "reckless driving", and made punishable as a crime.

Neessen v Armstrong, 213-378; 239 NW 56; 31 NCCA 104

Negligence—liability—exception to rule. The motor vehicle guest statute precluding recovery by a passenger for injuries received while riding in a vehicle, unless the damage is caused by the intoxication or recklessness of the operator, is an exception to the rule as to liability for negligence.

Paulson v Hanson, 226-858; 285 NW 189

Exceptions not to supplant general rule. Interpretation of automobile guest statute should be consistent with the intention of the legislature and its mandate in making a host not liable for injuries to guest, except under exceptions of driver being reckless or intoxicated, and the statute should not be so interpreted as to supplant the general rule with the exceptions.

Crabb v Shanks, 226-589; 284 NW 446

Who is not guest. A person while attempting to enter an unoccupied automobile, for the purpose of commencing a journey as a guest, and on the invitation of the owner of the car, is not a "passenger or person riding in said motor vehicle", within the meaning of this section.

Puckett v Pailthorpe, 207-613; 223 NW 254; 30 NCCA 194; 36 NCCA 255

Child on sled being towed not "riding" in vehicle. A person, to be within the provisions of the Iowa guest statute, must be "riding" in the motor vehicle, which excludes a child on a sled hooked to the rear of a moving automobile.

Samuelson v Sherrill, 225-421; 280 NW 596

Exclusive liability of owner. The liability of the owner of an automobile to a guest when the owner is operating the vehicle himself is identical with his liability to a guest when the vehicle is being operated by someone else with his—the owner's—consent.

Stanbery v Johnson, 218-160; 254 NW 303

Consent to use of vehicle denied by defendant —nonconclusiveness. In an action for injuries resulting from a motor vehicle collision, the positive testimony of a defendant that no consent was given to use the automobile is not conclusive and can be rebutted by circumstances, together with the reasonable or unreasonable character of the testimony.

Allbaugh v Ashby, 226-574; 284 NW 816

Question of father's consent to son's use of vehicle. Where a guest, injured in an automobile collision, seeks damages from a son and father, as driver and owner, respectively, of a motor vehicle, question of father's consent to son's use of automobile, procured especially for and used exclusively by the son, so as to render the father liable for guest's injuries resulting from son's reckless operation, is a jury question.

Allbaugh v Ashby, 226-574; 284 NW 816

Ethical objection to recovery. In an action by a guest to recover of her host damages for injuries inflicted by the reckless operation of an automobile, it is not reversible error to instruct: "Nor is she bound by any ethical rule to the effect that one who is a guest of another should not seek recovery in a proper case", it appearing that the full burden of proving a legal right to recover was plainly imposed on plaintiff.

McQuillen v Meyers, 213-1366; 241 NW 442

Injury in foreign state—"guest statute" not applicable. The statutory declaration that the guest of the owner or operator of a motor vehicle is entitled to recover damages only when the damages are the proximate result of the intoxication or reckless operation of the driver is declaratory of the substantive rights of the guest; therefore, said statute has no application to an action in this state to recover damages consequent on an accident occurring in a foreign state in which the common-law rule of liability for negligence exists.

Redfern v Redfern, 212-454; 236 NW 399; 1 NCCA(NS) 291

Federal governmental employee—personal liability for tort. A governmental employee, committing a tortious act which causes injury to another in violation of a duty owed to the injured person, becomes, as an individual, personally liable in damages therefor. So held as to recklessness resulting in death of a guest riding in an automobile with agent of Federal Resettlement Administration.

Doherty v Edwards, 226-249; 284 NW 159

II GUEST OR INVITEE AND EXCEPTIONS

(a) IN GENERAL

Discussion. See 18 ILR 358—Persons included

"Guest" defined. A person is a guest while riding gratuitously in an automobile owned, managed, controlled, and directed by the driver.

Kaplan v Kaplan, 213-646; 239 NW 682

Pleading—sufficiency. An allegation that plaintiff was invited by defendant to accompany defendant in the latter's automobile and that plaintiff accepted the invitation and did accompany defendant, is a sufficient allegation that plaintiff was the guest of defendant.

White v McVicker, 219-834; 259 NW 465

"Guest" — evidence — sufficiency. Evidence held insufficient to show that a plaintiff in an action for damages was a "guest" in an automobile.

Thompson v Farrand, 217-160; 251 NW 44

Guest (?) or otherwise—jury question. Evidence reviewed and held to present a jury question on the issue whether plaintiff, at the time he was injured in a collision, was riding in an automobile as a "guest" or as an employee.

Porter v Decker, 222-1109; 270 NW 897

Guest (?) or otherwise. Issues which are without support in the evidence must not be submitted. So held where on the question whether plaintiff when he was injured was a guest in an automobile, the court submitted the unsupported issues whether plaintiff accompanied defendant (1) for the definite benefit of defendant, or (2) for the mutual benefit of plaintiff and defendant.

Porter v Decker, 222-1109; 270 NW 897

"Guest" or mere "invitee"—negativing relation. A passenger riding in an automobile is neither a "guest" nor a mere "invitee" when he is riding therein:

1. For the purpose of performing and in order to perform his duty as a servant of the owner or operator of the car; or
2. For the definite and tangible benefit of the owner or operator; or
3. For the mutual, definite, and tangible benefit of the owner or operator on the one hand, and of the passenger on the other hand.

Necessarily, a jury question is generated by a substantial conflict of testimony.

Knutson v Lurie, 217-192; 251 NW 147; 36 NCCA 275

Guest (?) or for hire, etc. (?)—evidence. A passenger in an automobile operated by the owner thereof may be a mere guest or invitee with right to recover for damages consequent on the reckless operation, only, of the car; but he may be a passenger (1) for hire, or (2) for the benefit of said operator, or (3) for the mutual benefit of both operator and himself,

II GUEST OR INVITEE AND EXCEPTIONS—continued

(a) IN GENERAL—concluded

with right to recover for damages consequent on mere negligent operation by the driver. Evidence held wholly insufficient to establish the status of the passenger to be other than a mere guest.

Clendenning v Simerman, 220-739; 263 NW 248

Witness riding to motorist's wedding. Where a person is invited by the groom to be witness at his wedding, and when such person is injured in an automobile collision while riding with the groom to the wedding, such person is a guest, even tho she took her own lunch for the trip and offered to pay part of the travel expense. Agreeing to become a witness and furnishing some incidentals do not constitute such consideration for the ride as to render the witness a passenger for hire.

McCornack v Pickerell, 225-1076; 283 NW 899

Passenger receiving expenses nevertheless a guest. A situation where a motorist making a trip offers to take a friend, who objects to the expense but is reassured that the motorist will pay expenses, and which friend is desired, but not required, to relieve the motorist of driving part of the way, is not a transaction amounting to the dignity of a contract nor making the friend a passenger for hire instead of a guest.

Sullivan v Harris, 224-345; 276 NW 88

Companionship and society—contributing to expenses—helping drive. Under guest statute where the only benefits conferred upon the person extending the invitation are those incidental to hospitality, companionship, or society, the passenger is ordinarily held to be a guest. This is also true even if the guest contributes something toward the expenses of the journey and is expected to help drive.

Doherty v Edwards, 227-1264; 290 NW 672

Who is not guest. A person while attempting to enter an unoccupied automobile, for the purpose of commencing a journey as a guest, and on the invitation of the owner of the car, is not a "passenger or person riding in said motor vehicle", within the meaning of this section.

Puckett v Pailthorpe, 207-613; 223 NW 254; 30 NCCA 194; 36 NCCA 255

Who is not guest. A person who contemplates the purchase of an automobile, and, on the invitation of the salesman, enters the car in order to observe the operation of the car by the salesman, is neither a guest nor is he a gratuitous passenger within the meaning of the so-called guest statute.

(Modified, Knutson v Lurie, 217-192; 251 NW 147; 36 NCCA 275)

Bookhart v Motor Co., 215-8; 244 NW 721; 82 ALR 1359; 32 NCCA 587; 34 NCCA 279; 36 NCCA 264; 2 NCCA(NS) 301, 599

Prospective purchaser's passenger—guest (?) or passenger for hire (?). Where a prospective purchaser driving a used automobile belonging to an automobile dealer takes as a passenger a person familiar with automobiles to advise as to its value, and while so driving has an accident wherein the passenger is injured, such passenger is not a passenger for hire, but only a guest, insofar as the automobile dealer's liability for the passenger's injury is concerned.

Sproll v Burkett Co., 223-902; 274 NW 63; 2 NCCA(NS) 424

Transporting passenger for hire. The owner of an automobile who uses it in transporting, from place to place, an orchestra of which he is a member, and who on each trip, by mutual agreement of the members, receives from the earnings of the common enterprise four and one-half cents for each mile traveled, cannot be deemed as transporting his associates as passengers for hire or for a consideration, it appearing that said payment was made for the sole and only purpose of reimbursing said car owner for the actual cost of operating said car, and that said payment did not exceed said actual cost.

Park v Casualty Co., 222-861; 270 NW 23

Burden of proof. Whether the burden of proof is upon a plaintiff administrator seeking to recover damages for death consequent on the reckless operation of an automobile by the defendant, to prove that the deceased was riding in the car by invitation and not for hire, quaere.

Neessen v Armstrong, 213-378; 239 NW 56

Failure of proof—incompetent witness—dead man statute. Where plaintiff, a motor vehicle passenger, predicates his action on two theories, viz: (1) he was not a guest, and (2) he was a guest, and as to the first his proof fails because of witness' incompetency under dead man statute, and as to the second he offers no evidence, there is nothing to be submitted to the jury.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Unpleaded issues—"unwilling guest" interpretation unwarranted. Instruction reviewed and held not open to the vice of injecting an issue not in the pleadings, to wit, that plaintiff was an unwilling guest in defendant's automobile.

Reed v Pape, 226-170; 284 NW 106

(b) EMPLOYEES

Guest (?) or otherwise—jury question. Evidence reviewed and held to present a jury question on the issue whether plaintiff, at the time he was injured in a collision, was riding

in an automobile as a "guest" or as an employee.

Porter v Decker, 222-1109; 270 NW 897

Guest or employee as pivotal question—duty of court. When, under the pleading and evidence, the pivotal question is whether plaintiff when injured in defendant's car was a guest or an employee of defendant, the court should not refuse instructions which require the jury to determine such question.

Porter v Decker, 222-1109; 270 NW 897

"Guest" or mere "invitee"—negativing relation. A passenger riding in an automobile is neither a "guest" nor a mere "invitee" when he is riding therein:

1. For the purpose of performing and in order to perform his duty as a servant of the owner or operator of the car, or
2. For the definite and tangible benefit of the owner or operator, or
3. For the mutual, definite, and tangible benefit of the owner or operator on the one hand, and of the passenger on the other hand. Necessarily, a jury question is generated by a substantial conflict of testimony.

Knutson v Lurie, 217-192; 251 NW 147; 36 NCCA 275

(c) MEMBERS OF FAMILY

Adult daughter—statute applicability. The guest statute is applicable to an adult, emancipated daughter living in the home of her father, but paying for her board and room, when injured while riding in an automobile driven, managed, and controlled by her father.

Kaplan v Kaplan, 213-646; 239 NW 682

(d) JOINT ENTERPRISE

"Guest" or mere "invitee"—negativing relation. A passenger riding in an automobile is neither a "guest" nor a mere "invitee" when he is riding therein:

1. For the purpose of performing and in order to perform his duty as a servant of the owner or operator of the car, or
2. For the definite and tangible benefit of the owner or operator, or
3. For the mutual, definite, and tangible benefit of the owner or operator on the one hand, and of the passenger on the other hand. Necessarily, a jury question is generated by a substantial conflict of testimony.

Knutson v Lurie, 217-192; 251 NW 147; 36 NCCA 275

Passenger riding with loan agent—mutual benefit. Under the rule that passenger is neither a guest nor a mere invitee when he is riding with driver for the mutual, tangible, and definite benefit of both parties, a passenger in an automobile driven by a representative of the Federal Resettlement Administration is not a "guest" when both parties are on their way to a bank to secure a temporary loan for passenger until such time as a loan could be completed with the Federal Resettlement Administration.

Doherty v Edwards, 227-1264; 290 NW 672

Guest (?) or for hire, etc. (?)—evidence. A passenger in an automobile operated by the owner thereof may be a mere guest or invitee with right to recover for damages consequent on the reckless operation, only, of the car; but he may be a passenger (1) for hire, or (2) for the benefit of said operator, or (3) for the mutual benefit of both operator and himself, with right to recover for damages consequent on mere negligent operation by the driver. Evidence held wholly insufficient to establish the status of the passenger to be other than a mere guest.

Clendenning v Simerman, 220-739; 268 NW 248

Guest (?) or otherwise. Issues which are without support in the evidence must not be submitted. So held where on the question whether plaintiff when he was injured was a guest in an automobile, the court submitted the unsupported issues whether plaintiff accompanied defendant (1) for the definite benefit of defendant, or (2) for the mutual benefit of plaintiff and defendant.

Porter v Decker, 222-1109; 270 NW 897

Passenger in automobile demonstrator—mutual benefits. Where an automobile salesman, demonstrating a car to a prospective purchaser, and at the same time, among other things, to further his chances of making a sale, transports an employee of the prospective purchaser to her place of employment, such employee, being transported for the mutual benefit of all concerned, is not a guest.

Wittrock v Newcom, 224-925; 277 NW 286

(e) PASSENGERS FOR HIRE

Passenger for hire—division of expenses. The mere division of expenses among members of a party riding in an automobile does not render the person so contributing a passenger for hire.

McCornack v Pickerell, 225-1076; 283 NW 899

Transporting orchestra members. The owner of an automobile who uses it in transporting, from place to place, an orchestra of which he is a member, and who on each trip, by mutual agreement of the members, receives from the earnings of the common enterprise four and one-half cents for each mile traveled, cannot be deemed as transporting his associates as passengers for hire or for a consideration, it appearing that said payment was made for the sole and only purpose of reimbursing said car owner for the actual cost of operating said car, and that said payment did not exceed said actual cost.

Park v Casualty Co., 222-861; 270 NW 23

II GUEST OR INVITEE AND EXCEPTIONS—concluded

(e) PASSENGERS FOR HIRE—concluded

Witness riding to motorist's wedding. Where a person is invited by the groom to be witness at his wedding, and when such person is injured in an automobile collision while riding with the groom to the wedding, such person is a guest, even tho she took her own lunch for the trip and offered to pay part of the travel expense. Agreeing to become a witness and furnishing some incidentals do not constitute such consideration for the ride as to render the witness a passenger for hire.

McCornack v Pickerell, 225-1076; 283 NW 899

III INTOXICATION

Assumption of risk—jury question. Where motorist and guest had been drinking, and automobile was driven off road, wrecked, and guest was killed, the question of assumption of risk was for the jury.

White v Zell, 224-359; 276 NW 76

Intoxication as jury question. In a guest case where the evidence shows all the occupants of the motor vehicle had been drinking whisky, the issue of intoxication should not be withdrawn from the jury.

White v Zell, 224-359; 276 NW 76

IV RECKLESSNESS

(a) IN GENERAL

Discussion. See 16 ILR 265—Meaning of "reckless"

Exception to negligence liability rule. The motor vehicle guest statute precluding recovery by a passenger for injuries received while riding in a vehicle, unless the damage is caused by the intoxication or recklessness of the operator, is an exception to the rule as to liability for negligence.

Paulson v Hanson, 226-858; 285 NW 189

Nonrevival of right to recover for negligence. The right of a guest in an automobile to recover damages consequent on the negligence of the operator, having been supplanted by the statute permitting a recovery only in case of "reckless operation", has not been restored by the enactment of §5028, C., '31 [§5022.04, C., '39], wherein, inter alia, the driving of a motor vehicle "without due caution and circumspection" is characterized as "reckless driving", and made punishable as a crime.

Neessen v Armstrong, 213-378; 239 NW 56; 31 NCCA 104

Civil liability—definition not deducible from criminal statute. The enumeration in §5028, C., '31 [§5022.04, C., '39] of certain acts, and the denomination of said acts as "reckless driving", and imposing a criminal punishment for doing said acts, cannot be deemed as furnishing a definition as to what conduct constitutes "reckless operation" under §5026-b1, C., '31 [§5037.10, C., '39], which simply states a rule of civil liability.

Shenkle v Mains, 216-1324; 247 NW 635; 34 NCCA 347

"Reckless operation" — plural definitions. Section 5028, C., '31 [§5022.04, C., '39], which, in effect, provides that the operation of a motor vehicle in specified ways shall be deemed "reckless driving", was not intended to define "reckless operation" as provided in the so-called "guest" statute.

Fleming v Thornton, 217-183; 251 NW 158

Recklessness—manslaughter case.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Improper definition. The approved definition of "recklessness" as "implying no care—a proceeding without heed of or concern for consequences"—is rendered erroneous by the addition thereto of the elements of "desperation" and "foolishly heedless of danger".

White v McVicker, 216-90; 246 NW 385

Instructions defining recklessness but not negligence—no error. Definition of recklessness stating that "recklessness is more than negligence" is not erroneous because of failure to also define negligence.

Claussen v Johnson's Est., 224-990; 278 NW 297

Recklessness instruction — construing instructions as a whole. An instruction, stating that if defendant's recklessness caused plaintiff's injury the defendant would be liable, is not error when accompanied by other instructions which limit recovery to proof of specific grounds of recklessness.

Reed v Pape, 226-170; 284 NW 106

Recklessness—instructions as a whole. Instructions clearly and accurately defining "recklessness" in the operation of an automobile and definitely placing on plaintiff the burden to establish such "recklessness", neutralize the evil effect of a particular instruction which might, in and of itself, possibly lead the jury to understand that recklessness might consist of the doing of certain acts irrespective of the conditions or circumstances under which they might be done.

Siesseger v Puth, 216-916; 248 NW 352; 34 NCCA 361

Balancing instructions. Instructions to a jury that a motorist is not at his peril required to comply with the protests and warnings of his guest should, if requested by the plaintiff and shown by the evidence, be followed with the converse of this proposition, that if the jury finds the driver was warned some distance from a railroad crossing of imminent danger and, then, if the driver made no attempt to stop or reduce his speed, he is guilty of recklessness as a matter of law.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

Sleeping driver. Recklessness goes beyond mere negligence and means proceeding without concern for consequences, with a heedless disregard for the rights of others. Recklessness under the motor vehicle guest statute is not found from evidence that the driver of a car went to sleep, where there was little evidence that he was conscious of the approach of sleep.

Kaplan v Kaplan, 213-646; 239 NW 682; 31 NCCA 105; 34 NCCA 113; 38 NCCA 696

Paulson v Hanson, 226-858; 285 NW 189

Falling asleep not recklessness. In an action based on the motor vehicle guest statute, evidence showing that the defendant driver of the car fell asleep and the car ran into a bridge causing the death of the plaintiff's intestate, failed to establish recklessness, and a directed verdict for the defendant would have been justified.

Paulson v Hanson, 226-858; 285 NW 189

Insufficient plea. In an action for damages consequent on the operation of an automobile instructions which predicate recovery on proof of "reckless" operation cannot be sustained when the pleadings neither allege reckless driving nor facts from which recklessness is a necessary deduction.

Redfern v Redfern, 212-454; 236 NW 399

Res ipsa loquitur. The doctrine of res ipsa loquitur is never applicable to establish a presumption of recklessness.

Phillips v Briggs, 215-461; 245 NW 720; 34 NCCA 364; 39 NCCA 126

Admission of fault. On the issue of reckless operation of an automobile evidence that shortly after a collision the driver being asked what was the matter with him replied, "Just a little reckless", is admissible against the driver as tending to show his admitted fault for the collision.

White v Center, 218-1027; 254 NW 90

Signed statement by plaintiff—legal effect. Plaintiff who seeks to establish the reckless operation of an automobile, at a time when he was riding therein as a guest, is not legally precluded by a written statement theretofore signed by him, and introduced as part of his cross-examination, and which statement tended, perhaps conclusively, to disprove said alleged reckless operation, plaintiff not admitting that the statements contained in said signed writing were true for the purposes of said trial.

Wright v Mahaffa, 222-872; 270 NW 402

Defense—third party negligence. A defendant-host who pleads that the sole and proximate cause of an injury was the negligence of a third party cannot complain that the court instructs that the negligence of said third person is immaterial unless defendant-host establishes that such negligence, and not his own recklessness, was the sole and proximate cause of said injury.

Johnson v McVicker, 216-654; 247 NW 488

Concurring cause—effect. The reckless operation of an automobile need not be the sole and only cause of an accident and resulting damage in order to justify a recovery. In other words, the mere fact that some other cause operated with defendant's recklessness to produce the injury does not relieve the defendant.

Johnson v McVicker, 216-654; 247 NW 488

Concurrent acts of negligence showing recklessness. In an action by a guest in an automobile against the driver of the car, for damages consequent on the operation of the car, evidence reviewed at length relative to several alleged concurrent acts of negligence on the part of said driver, and held insufficient, when viewed collectively, to establish prima facie evidence of recklessness.

Wion v Hayes, 220-156; 261 NW 531

Reckless operation—negativing possibilities. In order to make a jury question on the issue of reckless operation of an automobile, plaintiff need not negative every possibility which might exculpate the defendant.

White v Center, 218-1027; 254 NW 90

Insufficient evidence. In an action for damages consequent on the alleged reckless operation of the car in which plaintiff was riding as a guest, evidence reviewed and held per se insufficient to establish reckless operation within the repeated holdings of this court.

Popham v Case, 223-52; 271 NW 226

Evidence—insufficiency. Evidence reviewed and held insufficient to justify submission to the jury of the issue of recklessness in the operation of an automobile.

Wright v What Cheer Co., 221-1292; 267 NW 92

Evidence—sufficiency—jury question. In an action by a guest against the driver and owner of a motor vehicle for injuries sustained as a result of a collision with an oncoming vehicle, where it is shown that the collision occurred on the left side of the road while automobile, with defective brakes, was being driven at an excessive rate of speed through a well-traveled intersection in a town over a slope or hill which limited visibility, and on the left side of the highway in face of visible oncoming traffic, such evidence, on the issue of whether or not collision was caused by driver's recklessness, presented a jury question.

Allbaugh v Ashby, 226-574; 284 NW 816

Unsustainable verdict. A verdict finding, in effect, that defendant (with whom a guest was riding) was operating his automobile in a reckless manner cannot be sustained when the testimony tending to establish recklessness, when

IV RECKLESSNESS—continued
(a) IN GENERAL—concluded

tested in the light of the admitted physical facts and verities revealed in the record, cannot be true; and this is true notwithstanding plaintiff's conceded right to the benefit of the most favorable view of evidence rule.

Bowermaster v Universal Co., 221-831; 266 NW 503

Physical facts—warranting directed verdict for defendant. Where a guest in defendant's automobile sustains injuries resulting from defendant's alleged recklessness in traveling at a high rate of speed and striking a cow on a paved highway, and where guest recovers judgment in a damage action wherein defendant appeals from an order overruling his motion for directed verdict, evidence reviewed showing that plaintiff's own uncontradicted factual situation, developed on direct examination, failed to sustain his specifications of recklessness in that defendant failed to reduce the speed of the car as he approached the cattle, and held the court erred in not sustaining the motion for a directed verdict.

Scott v Hansen, 228- ; 289 NW 710

(b) RECKLESS AND NONRECKLESS ACTS

Discussion. See 22 ILR 525—Sleeping at the wheel

Recklessness. Recklessness goes beyond mere negligence and means proceeding without concern for consequences, with a heedless disregard for the rights of others. Recklessness under the motor vehicle guest statute is not found from evidence that the driver of a car went to sleep, where there was little evidence that he was conscious of the approach of sleep.

Paulson v Hanson, 226-858; 285 NW 189

Driving while asleep. An automobile may not be said to be operated "recklessly" within the meaning of the guest statute when the operator involuntarily falls asleep during said operation, even tho the sleep results in a grave accident.

Kaplan v Kaplan, 213-646; 239 NW 682; 31 NCCA 105; 34 NCCA 113; 38 NCCA 696
Paulson v Hanson, 226-858; 285 NW 189

Falling asleep not reckless. In an action based on the motor vehicle guest statute, evidence showing that the defendant driver of the car fell asleep and the car ran into a bridge, causing the death of the plaintiff's intestate, failed to establish recklessness, and a directed verdict for the defendant would have been justified.

Paulson v Hanson, 226-858; 285 NW 189

Evidence—insufficiency. A jury question on the issue whether an automobile was recklessly operated is not made by proof that the car was being operated on a straight, level, and unobstructed paved road at a speed of some 50 miles per hour by a person who was somewhat weary from loss of sleep, and somewhat unnerved by an accident happening earlier in the day, and that suddenly and without warning the car swerved and went into a ditch and overturned, notwithstanding the evident good-faith efforts of the driver to control the car.

Duncan v Lowe, 221-1278; 268 NW 10

Speed at danger point. The driver of an automobile may be guilty of statutory "recklessness" by operating his vehicle over a graveled highway, in the nighttime, at a high rate of speed, and at a point where he knows he must make abrupt and successive changes in direction of travel.

Hart v Hinkley, 215-915; 247 NW 258; 34 NCCA 359

Speed as recklessness. Where an automobile, traveling 40 miles an hour around a curve that was neither a sharp turn nor a long sweeping curve, ran off the pavement and turned over, injuring plaintiff guest, this evidence did not raise a jury question on whether defendant was reckless within scope of guest statute.

Crabb v Shanks, 226-589; 284 NW 446

Speed at sharp turn. A jury question on the issue of reckless operation of an automobile is made by evidence that the car was being operated (1) over a wide, well-settled graveled highway with which the operator was wholly unfamiliar, (2) at a speed of some 65 miles per hour, (3) during the nighttime when visibility was materially limited, and (4) at a sharp turn in the road so belatedly anticipated and discovered that the driver was unable to negotiate it and was compelled to turn his car into the side ditch.

Mescher v Brogan, 223-573; 272 NW 645

Speed plus surrounding circumstances—jury question. High speed, while not alone decisive of recklessness, yet when coupled with surrounding circumstances such as approaching darkness, difficult visibility, heavy primary road traffic, and a double collision with the rear of an unlighted trailer and an oncoming truck, presents a question on which reasonable minds would differ, and should be submitted to the jury.

Claussen v Johnson's Est., 224-990; 278 NW 297

Speed as element of recklessness — other factors. Altho speed alone will not be considered recklessness, yet, when combined with such evidence as the car's swerving from side to side, the wetness of the street, the late hour (two o'clock in the morning), the presence of cross streets, and the lack of defendant's effort to check his speed when the view was obstructed, a jury question on the issue of recklessness is created.

Reed v Pape, 226-170; 284 NW 106

Speed—car out of control. Evidence tending to show that an inexperienced driver operated his automobile for a half mile on a downgrade on a perfectly good, broad, graveled highway at a speed of 55 miles per hour in violation of the statutory speed standard, with the car out of control and swaying from side to side, and that thereupon he inadvertently stepped on the gas instead of the brake and went into a ditch on the wrong side of the road, justifies the submission to the jury of the issue of recklessness.

Siesseger v Puth, 216-916; 248 NW 352; 34 NCCA 361

Speed on downgrade. A jury question on the issue whether an automobile was operated recklessly, that is, in heedless disregard of consequences, is made by testimony that the driver, faced by no emergency, operated the car on the downgrade of a straight, well-conditioned, 18-foot wide, graveled road, for a distance of over 1500 feet, and at a speed of 75 miles per hour (110 feet per second), and in the direction of a somewhat elevated railway grade crossing, and that in the near vicinity of said crossing, the car, after repeatedly weaving from one side of the roadway to the other, left said roadway, plunged into a ditch and overturned two or three times.

Wright v Mahaffa, 222-872; 270 NW 402

Car running into rear of wagon. A jury question on the issue of reckless operation of an automobile may be made by testimony that the driver, on a straight, level stretch of paved road, and on the right-hand side thereof, and at a time when he could see substantial objects on the road at least one-quarter mile ahead and easily pass them, operated his car at 70 miles per hour and crashed into the rear of and substantially annihilated a wagon and team on the extreme right-hand side of the road and moving in the same direction as the automobile.

White v Center, 218-1027; 254 NW 90; 36 NCCA 339

Warning of danger—no reduction of speed. Instructions to a jury that a motorist is not at his peril required to comply with the protests and warnings of his guest should, if requested by the plaintiff and shown by the evidence, be followed with the converse of this proposition, that if the jury finds the driver was warned some distance from a railroad crossing of imminent danger and, then, if the driver made no attempt to stop or reduce his speed, he is guilty of recklessness as a matter of law.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

Condition of highway—evidence insufficiency. Evidence reviewed in detail relative (1) to the operation of an automobile upon a paved road, and upon a straightaway graveled road connecting therewith, (2) to the warning signs upon said paved road, (3) to the condition of said graveled road and to the visibility of the somewhat rough and rutted condition thereof, and (4) to the twice overturning of said automobile almost immediately after it entered upon said graveled road, and held insufficient per se to establish recklessness in the operation of said automobile.

Brown v Martin, 216-1272; 248 NW 368; 34 NCCA 354

Car sliding into ditch. Evidence that the driver of an automobile on a straight, smooth, graveled road was traveling 45 miles per hour in an attempt to pass other automobiles does not, in and of itself, furnish a jury question on the issue of reckless operation; otherwise as to evidence that after the car slipped and entered a ditch along the roadside the speed materially increased for a distance of 160 feet at which latter point the car collided with an intersecting grade, turned over twice, and came to a stop some 105 feet farther on.

White v McVicker, 216-90; 246 NW 385; 34 NCCA 371

See Cerny v Secor, 211-1232; 234 NW 193

Failure to keep lookout. The reckless operation of an automobile, within the meaning of the "guest" statute is not shown by proof that a motorist, in the daytime and without obstruction to view ahead, and while approaching a bridge on a country highway, was traveling at the rate of some forty-odd miles per hour, and astraddle the black lines in the center of an 18-foot wide, level, 10-degree curve; that, while so traveling, he confined his view solely to said black lines as they came into view immediately ahead of the fender or hood of his car; that he did not "look up" and see an approaching truck on the bridge until 75 feet therefrom; and that thereupon he swerved his car to the right but not quite far enough to avoid sideswiping the rear part of the truck while the two vehicles were passing on the bridge.

Wilson v Oxborrow, 220-1135; 264 NW 1

Car running into ditch. Evidence that an automobile was driven over a straight pavement at from 30 to 35 miles per hour; that the wheels on one side ran off the pavement and upon an unfinished dirt shoulder; that in the effort to stop the car, the operator's foot slipped from the brake pedal to the gas pedal and that the car ran into a side ditch for a distance of 100 feet, reveals no basis for a finding of "reckless" operation.

Thompson v Farrand, 217-160; 251 NW 44; 34 NCCA 369

Speed—unsafe inner tube. Evidence that the operator of an automobile ran it at the rate of 55 miles per hour on a paved highway, with a spare tire which inclosed a patched inner tube, is insufficient on which to base a finding that the car was operated recklessly—there being no evidence that he knew the inner

IV RECKLESSNESS—continued

(b) RECKLESS AND NONRECKLESS ACTS—concluded

tube was unsafe when he placed the same on the car.

Newville v Weller, 217-1144; 251 NW 21; 34 NCCA 379; 39 NCCA 529

Defective steering gear. "Reckless" operation of an automobile is not established as a jury question by proof that it was operated at a time when the operator knew the steering mechanism was in such condition that when the brakes were applied the vehicle would turn to one side.

Stanbery v Johnson, 218-160; 254 NW 303

Inadequate brakes. The court cannot say as a matter of law that an operator of an automobile is guilty of recklessness in attempting to ascend an 18½ percent grade with knowledge that his brakes were not efficient.

Fleming v Thornton, 217-183; 251 NW 158; 34 NCCA 379; 36 NCCA 175

Tire blowout—emergency. A host sued by his guest for damages consequent on the alleged reckless operation of an automobile may very properly plead that at the time of the accident in question he was overtaken by an emergency, e. g., the blowing out of a tire, and that said emergency was the sole cause of the injury, and that after he became aware of said emergency he did not act recklessly.

Kaufman v Borg, 214-293; 242 NW 104; 34 NCCA 377

Failure to stop at sign. The act of a motorist in the nighttime in driving into a highway intersection without stopping in obedience to a statutory "stop" sign, when shortly theretofore he had seen an automobile approaching said intersection on the intersecting highway, manifestly does not necessarily constitute "recklessness" within the meaning of the guest statute. Evidence exhaustively analyzed (in a light as favorable to plaintiff as is reasonably possible), and held per se insufficient to support an allegation of recklessness in the operation of an automobile.

Hansen v Dall, 220-817; 263 NW 530

(c) NEGLIGENCE DISTINGUISHED

"Reckless operation" defined. To constitute "reckless operation" of a motor vehicle, the plea and proof must be such as to justify a finding that the operator was "proceeding without heed of, or concern for, consequences". Plea and proof of negligent operation only is wholly insufficient.

Siesseger v Puth, 213-164; 239 NW 46; 31 NCCA 84; 34 NCCA 495

Neessen v Armstrong, 213-378; 239 NW 56; 31 NCCA 104

McQuillen v Meyers, 213-1366; 241 NW 442

Negligence insufficient to show "recklessness". Testimony which, at the best, only shows that the operator of an automobile was negligent in the operation of the car, is per se wholly insufficient to support a plea of "reckless operation" within the meaning of the "guest" statute.

Neessen v Armstrong, 213-378; 239 NW 56; 31 NCCA 104

Wilde v Griffel, 214-1177; 243 NW 159; 31 NCCA 78; 34 NCCA 496

Levinson v Hagerman, 214-1296; 244 NW 307; 34 NCCA 367

Koch v Roehrig, 215-43; 244 NW 677; 34 NCCA 374

Phillips v Briggs, 215-461; 245 NW 720

Whether jury case is made. In an action for damages based on the plea of reckless operation of the vehicle, the court must determine whether substantially uncontradicted testimony presents, when judged in the light most favorable to plaintiff, no more, at the best, than a case of simple negligence on the part of the operator, or whether said testimony presents a jury question on the issue of recklessness.

Welch v Minkel, 215-848; 246 NW 775; 34 NCCA 384

Shenkle v Mains, 216-1324; 247 NW 635

Reckless operation — degree of proof. Principle reaffirmed that proof of the negligent operation of an automobile will not support an allegation that the automobile was operated recklessly.

Petersen v Detwiller, 218-418; 255 NW 529; 36 NCCA 358

Concurrent acts of negligence showing recklessness. In an action by a guest in an automobile against the driver of the car for damages consequent on the operation of the car, evidence reviewed at length relative to several alleged concurrent acts of negligence on the part of said driver, and held insufficient, when viewed collectively, to establish prima facie evidence of recklessness.

Wion v Hayes, 220-156; 261 NW 531

Avoiding reference to negligent acts. In an action based solely on "reckless" operation of an automobile, the failure of the court to explain and define various acts of negligence covered by the motor vehicle statutes, is eminently proper.

McQuillen v Meyers, 213-1366; 241 NW 442

Improper reference to negligence. In an action based solely on the reckless operation of an automobile, the court must not confuse the jury by reciting in its instructions the law governing liability for negligence.

Kaufman v Borg, 214-293; 242 NW 104

Pleadings—"reckless and negligent"—more specific statement required. Where two motor vehicles collide and plaintiff, riding in the back seat of one of the vehicles, sues both drivers, alleging "concurrent, reckless, and negligent

conduct", the petition is subject to motion for more specific statement as to whether or not plaintiff was a guest and whether both defendants were charged with both reckless and negligent acts.

Fay v Dorow, 224-275; 276 NW 31

Joint tort-feasors with different defenses—separate trials. Altho joint tort-feasors may be joined in one action, a petition charging two colliding motorists generally with negligence and recklessness and only alleging that plaintiff was riding in one of the vehicles, with no averment as to his status as a guest or otherwise, presents to the jury such complex and confusing issues as to entitle defendants to separate trials.

Fay v Dorow, 224-275; 276 NW 31

Instructions defining recklessness but not negligence—no error. Definition of recklessness stating that "recklessness is more than negligence" is not erroneous because of failure to also define negligence.

Claussen v Johnson's Est., 224-990; 278 NW 297

Instructions—duty of court. In an action under the guest statute, it is the court's duty to plainly point out to the jury the distinction between negligence and recklessness, and the court, in so doing, by saying "that recklessness means more than negligence", does not unduly emphasize matters in defense or confuse the jury.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

(d) CONTRIBUTORY NEGLIGENCE OF GUEST

Contributory negligence. In an action based on "reckless operation" of a motor vehicle contributory negligence is not an element to be considered or dealt with, either by pleading, proof or instructions.

Siesseger v Puth, 213-164; 239 NW 46; 31 NCCA 84; 34 NCCA 495

Neessen v Armstrong, 213-378; 239 NW 56; 31 NCCA 104

Kaplan v Kaplan, 213-646; 239 NW 682; 31 NCCA 105

McQuillen v Meyers, 213-1366; 241 NW 442

Holding under prior statute. The court must not instruct that a mere guest in an automobile (under duty, of course, to exercise reasonable and ordinary care) will be guilty of negligence if he fails to do some particular thing, e. g., attempt in some manner to check the speed of the car.

Codner v Stowe, 201-800; 208 NW 330; 26 NCCA 207

Contributory negligence. The refusal of the court to instruct as to just what a guest in an automobile must do in order to escape the imputation of contributory negligence is proper, especially in view of the fact that contributory negligence is not an element to be considered in an action for reckless driving.

McQuillen v Meyers, 213-1366; 241 NW 442

V DEFENSES

(a) IN GENERAL

Tire blowout—emergency. A host sued by his guest for damages consequent on the alleged reckless operation of an automobile may very properly plead that at the time of the accident in question he was overtaken by an emergency, e. g., the blowing out of a tire, and that said emergency was the sole cause of the injury, and that after he became aware of said emergency he did not act recklessly.

Kaufman v Borg, 214-293; 242 NW 104; 34 NCCA 377

Consent denied by defendant—nonconclusiveness. In an action for injuries resulting from a motor vehicle collision, the positive testimony of a defendant that no consent was given to use the automobile is not conclusive and can be rebutted by circumstances, together with the reasonable or unreasonable character of the testimony.

Allbaugh v Ashby, 226-574; 284 NW 816

Father's consent to son's use of vehicle—jury question. Where a guest, injured in an automobile collision, seeks damages from a son and father, as driver and owner, respectively, of a motor vehicle, question of father's consent to son's use of automobile, procured especially for and used exclusively by the son, so as to render the father liable for guest's injuries resulting from son's reckless operation, is a jury question.

Allbaugh v Ashby, 226-574; 284 NW 816

Instructions—father's consent to son's use of vehicle. In a guest's action against a father and son on account of son's reckless operation of automobile, instructions to the jury setting out elements required for recovery against both father and son should have included element that proof of father's consent to son's use of automobile was required to justify a verdict against the father, and any instruction which was intended to refer to son only should have been so stated.

Allbaugh v Ashby, 226-574; 284 NW 816

Interrogatory seeking "knowledge and consent" of owner—proper refusal. In a guest's personal injury action against a father and son, owner and driver, respectively, of the motor vehicle, where the petition alleges the son was driving with the "knowledge and consent" of the father, court's refusal to submit to the jury defendant-appellant's special interrogatory as to finding that son was driving car with "knowledge and consent" of father was not error, as it required an element not contained in the statute—proof under the statute need go no further than to show "con-

V DEFENSES—concluded
(a) IN GENERAL—concluded

sent", even tho allegation of knowledge was in the petition.

Allbaugh v Ashby, 226-574; 284 NW 816

Vehicle driven without owner's consent—burden of proof. Where jury is instructed that the law implies that a car being driven by one other than its owner is being driven with the owner's consent, "and this places the burden upon the owner to prove, by a preponderance of the evidence, that the car was not being driven with his consent", this quoted portion of instruction is reversible error as it places undue burden on owner; the inference from ownership does not change the burden of proof which continues on the complaining party throughout the trial.

Allbaugh v Ashby, 226-574; 284 NW 816

(b) ASSUMPTION OF RISK

Knowledge of danger. One who voluntarily becomes a guest in an automobile when he knows the driver is incompetent, inexperienced, reckless, or intoxicated, or who later acquires such knowledge, and thereupon, with knowledge of the nature and extent of the danger, aids, encourages, cooperates or acquiesces in the operation of the car in a reckless manner, must be held to assume the risk of a resulting accident.

White v McVicker, 216-90; 246 NW 385

Absence of knowledge. A guest in an automobile cannot be deemed to have assumed the risk incident to the reckless operation of the automobile unless there is evidence that he had knowledge of the acts constituting recklessness on the part of the driver and acquiesced in such acts.

White v Center, 218-1027; 254 NW 90

Knowledge of mechanical faults. A guest in an automobile cannot be held to assume the risk attending a defective condition of the vehicle when he had no knowledge of such condition.

Stanbery v Johnson, 218-160; 254 NW 303

Drinking driver—jury question. Where motorist and guest had been drinking, and automobile was driven off road, wrecked, and guest was killed, the question of assumption of risk was for the jury.

White v Zell, 224-359; 276 NW 76; 36 NCCA 359

Risk of riding with aged driver—jury question. While riding in the rear seat of an automobile being demonstrated to her employer as a prospective purchaser, an aged lady, who protests against the salesman permitting her employer, also an aged person, to drive the automobile, and who, altho she cannot get out of the automobile, is assured of safety by the salesman, does not as a matter of law assume the risk incident to her employer's driving, since reasonable minds could differ, and a jury must determine if it was unreasonable for her to rely on the salesman's assurances of safety.

Wittrock v Newcom, 224-925; 277 NW 286

Assignment of error — fatal indefiniteness. Assignments of error to the effect (1) that "the jury was informed of liability insurance," and (2) that the appellee "knew of defendant's inexperience in driving, and that the court permitted evidence thereof to go to the jury," are fatally indefinite.

Siesseger v Puth, 211-775; 234 NW 540

Order striking defense of assumption of risk. In an action to recover for death of guest resulting from motorcycle collision with automobile, an order striking allegation of defendant car owner that decedent assumed risk of motorcycle driver's negligence was appealable because the matter stricken was of such character as to involve the merits of the case.

Edwards v Kirk, 227-684; 288 NW 875

Affirmative defense—burden on pleader. The jury in a personal injury or death claim action where the defendant pleads "assumption of risk" should be plainly instructed that one pleading an affirmative defense must assume the burden of proving it.

White v Zell, 224-359; 276 NW 76

VI TRIAL

(a) IN GENERAL

Instructions — recklessness particulars unchallenged before answer—submitting as alleged. Error may not be predicated on the submission of certain particulars alleging recklessness when their sufficiency is not raised before answer filed and when evidence exists to sustain them.

Claussen v Johnson's Est., 224-990; 278 NW 297

Injury in foreign state—"guest" statute not applicable. The statutory declaration that the guest of the owner or operator of a motor vehicle is entitled to recover damages only when the damages are the proximate result of the intoxication or reckless operation of the driver is declaratory of the substantive rights of the guest; therefore, said statute has no application to an action in this state to recover damages consequent on an accident occurring in a foreign state in which the common-law rule of liability for negligence exists.

Redfern v Redfern, 212-454; 236 NW 399; 1 NCCA(NS) 291

(b) DIRECTING VERDICT

Recklessness—jury (?) or court (?) question. A jury question and not a court question arises (1) when one or more of a series of undisputed facts tend to establish recklessness in the operation of an automobile, and (2)

when different minds might reasonably differ on the question whether recklessness was, in fact, established.

Siesseger v Puth, 216-916; 248 NW 352; 34 NCCA 361

Speed as recklessness. Where an automobile, traveling 40 miles an hour around a curve that was neither a sharp turn nor a long sweeping curve, ran off the pavement and turned over, injuring plaintiff guest, this evidence did not raise a jury question on whether defendant was reckless within scope of guest statute.

Crabb v Shanks, 226-589; 284 NW 446

Falling asleep not recklessness. In an action based on the motor vehicle guest statute, evidence showing that the defendant driver of the car fell asleep and the car ran into a bridge, causing the death of the plaintiff's intestate, failed to establish recklessness, and a directed verdict for the defendant would have been justified.

Paulson v Hanson, 226-858; 285 NW 189

Sustainable and unsustainable grounds. Principle reaffirmed that the sustaining of a motion to direct a verdict must be upheld if one of the grounds is legally good tho other grounds may be legally unsustainable.

Phillips v Briggs, 215-461; 245 NW 720

Refusal to direct verdict—nullifying error. The act of the court in wholly withdrawing the issue of "reckless" operation of an automobile nullifies any former error of the court in refusing to direct a verdict on the ground of absence of evidence of reckless operation.

Thompson v Farrand, 217-160; 251 NW 44

Law of case. A holding on appeal that the record created a jury question, on the issue of reckless operation of an automobile, is absolutely binding on the trial court on retrial on substantially the same evidence.

White v McVicker, 219-834; 259 NW 465

Physical facts — unsustainable verdict. A verdict finding, in effect, that defendant (with whom a guest was riding) was operating his automobile in a reckless manner cannot be sustained when the testimony tending to establish recklessness, when tested in the light of the admitted physical facts and verities revealed in the record, cannot be true; and this is true notwithstanding plaintiff's conceded right to the benefit of the most favorable view of evidence rule.

Bowermaster v Universal Co., 221-831; 266 NW 503

(c) PLEADINGS

Petition in two counts—(1) guest and (2) not a guest. A passenger in an automobile receiving injuries in a collision may not be required to elect between counts when his petition contains (1) a count alleging recklessness based on theory he was a guest and (2) a count alleging negligence based on theory he was not a guest where plaintiff's cause of action is for a single wrong and he seeks in each count damages for the same injuries arising out of the same act of deceased defendant-driver.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Pleading — sufficiency. An allegation that plaintiff was invited by defendant to accompany defendant in the latter's automobile and that plaintiff accepted the invitation, and did accompany defendant, is a sufficient allegation that plaintiff was the guest of defendant.

White v McVicker, 219-834; 259 NW 465

"Reckless and negligent"—single allegation —more specific statement required. Where two motor vehicles collide, and plaintiff, riding in the back seat of one of the vehicles, sues both drivers, alleging "concurrent, reckless, and negligent conduct", the petition is subject to motion for more specific statement as to whether or not plaintiff was a guest and whether both defendants were charged with both reckless and negligent acts.

Fay v Dorow, 224-275; 276 NW 31

"Reckless operation" defined. To constitute "reckless operation" of a motor vehicle, the plea and proof must be such as to justify a finding that the operator was "proceeding without heed of, or concern for, consequences". Plea and proof of negligent operation only is wholly insufficient.

Siesseger v Puth, 213-164; 239 NW 46; 31 NCCA 84; 34 NCCA 495

Neessen v Armstrong, 213-378; 239 NW 56; 31 NCCA 104

McQuillen v Meyers, 213-1366; 241 NW 442

Petersen v Detwiller, 218-418; 255 NW 529; 36 NCCA 358

Insufficient plea. In an action for damages consequent on the operation of an automobile instructions which predicate recovery on proof of "reckless" operation cannot be sustained when the pleadings neither allege reckless driving nor facts from which recklessness is a necessary deduction.

Redfern v Redfern, 212-454; 236 NW 399

Defense — emergency. A host sued by his guest for damages consequent on the alleged reckless operation of an automobile may very properly plead that at the time of the accident in question he was overtaken by an emergency, e. g., the blowing out of a tire, and that said emergency was the sole cause of the injury, and that after he became aware of said emergency he did not act recklessly.

Kaufman v Borg, 214-293; 242 NW 104; 34 NCCA 377

VI TRIAL—concluded
(c) PLEADINGS—concluded

Physical facts—warranting directed verdict for defendant. Where a guest in defendant's automobile sustains injuries resulting from defendant's alleged recklessness in traveling at a high rate of speed and striking a cow on a paved highway, and where guest recovers judgment in a damage action wherein defendant appeals from an order overruling his motion for directed verdict, evidence reviewed showing that plaintiff's own uncontradicted factual situation, developed on direct examination, failed to sustain his specifications of recklessness in that defendant failed to reduce the speed of the car as he approached the cattle, and held the court erred in not sustaining the motion for a directed verdict.

Scott v Hansen, 228- ; 289 NW 710

Physical facts—exception to most favorable evidence rule. On appeal from an order overruling defendant's motion for directed verdict, the supreme court need not follow the most favorable evidence rule, as urged by plaintiff, to the exclusion of the physical facts and other uncontradicted matters which plaintiff not only conceded, but affirmatively and intentionally established.

Scott v Hansen, 228- ; 289 NW 710

Separate trial—right to. Reversible error results from refusing a separate trial to a defendant who is sued jointly with another for damages consequent on his alleged negligence, and on the alleged recklessness of his co-defendant, the defensive issues of the two defendants being wholly hostile to each other, and the opportunity existing for collusion between the plaintiff and such other defendant.

Manley v Paysen, 215-146; 244 NW 863; 84 ALR 1330

Joint tort-feasors with different defenses—separate trials. Altho joint tort-feasors may be joined in one action, a petition charging two colliding motorists generally with negligence and recklessness and only alleging that plaintiff was riding in one of the vehicles, with no averment as to his status as a guest or otherwise, presents to the jury such complex and confusing issues as to entitle defendants to separate trials.

Fay v Dorow, 224-275; 276 NW 31

Defense—third party negligence. A defendant-host who pleads that the sole and proximate cause of an injury was the negligence of a third party cannot complain that the court instructs that the negligence of said third person is immaterial unless defendant-host establishes that such negligence, and not his own recklessness, was the sole and proximate cause of said injury.

Johnson v McVicker, 216-654; 247 NW 488

Separate specifications submitted—joined by "and"—harmless error. In an action under the Illinois guest statute for damages arising out of injuries received in a motor vehicle collision in Illinois, separate specifications of negligence, based on one charge of excessive speed, but, nevertheless, submitted in the language of the petition, are not rendered prejudicially erroneous because joined together with the word "and".

Moran v Kean, 225-329; 280 NW 543

Admissions of fact—conclusiveness. Specific admissions of fact made in the pleadings which join the issues which are being tried are binding on the party making them, and as to such admissions there can be no issue.

Wilson v Oxborrow, 220-1135; 264 NW 1

Instructions—reference to speed—granting new trial. A reference in an instruction to a motor vehicle speed of 60 miles per hour when the allegation in the petition of such speed was coerced by a ruling of the court, while not in itself sufficient to warrant a reversal, still justifies the trial court in granting a new trial when considered along with other alleged errors.

White v Zell, 224-359; 276 NW 76

VII PRESUMPTIONS, EVIDENCE, AND PROOF

(a) IN GENERAL

Speed signs—presumption of officer's performance of duty. In the absence of proof to the contrary, it will be presumed that town officers properly performed the mandatory duty imposed on them by statute in the erection and maintenance of speed limit signs.

Doherty v Edwards, 227-1264; 290 NW 672

"Reckless operation" defined. To constitute "reckless operation" of a motor vehicle, the plea and proof must be such as to justify a finding that the operator was "proceeding without heed of, or concern for, consequences". Plea and proof of negligent operation only is wholly insufficient.

Siesseger v Puth, 213-164; 239 NW 46; 31 NCCA 84; 34 NCCA 495

Neessen v Armstrong, 213-378; 239 NW 56; 31 NCCA 104

McQuillen v Meyers, 213-1366; 241 NW 442

Petersen v Detwiller, 218-418; 255 NW 529; 36 NCCA 358

Burden of proof. Whether the burden of proof is upon a plaintiff-administrator seeking to recover damages for death consequent on the reckless operation of an automobile by the defendant, to prove that the deceased was riding in the car by invitation and not for hire, quaere.

Neessen v Armstrong, 213-378; 239 NW 56

Concurrent acts of negligence showing recklessness. In an action by a guest in an automobile against the driver of the car for damages consequent on the operation of the car,

evidence reviewed at length relative to several alleged concurrent acts of negligence on the part of said driver, and held insufficient, when viewed collectively, to establish prima facie evidence of recklessness.

Wion v Hayes, 220-156; 261 NW 531

Contributory negligence. In an action based on "reckless operation" of a motor vehicle contributory negligence is not an element to be considered or dealt with, either by pleading, proof or instructions.

Siesseger v Puth; 213-164; 239 NW 46; 31 NCCA 84; 34 NCCA 495

Neessen v Armstrong, 213-378; 239 NW 56; 31 NCCA 104

Kaplan v Kaplan, 213-646; 239 NW 682; 31 NCCA 105

Recklessness — evidence insufficiency. Evidence reviewed in detail relative (1) to the operation of an automobile upon a paved road, and upon a straightaway graveled road connecting therewith, (2) to the warning signs upon said paved road, (3) to the condition of said graveled road and to the visibility of the somewhat rough and rutted condition thereof, and (4) to the twice overturning of said automobile almost immediately after it entered upon said graveled road, and held insufficient per se to establish recklessness in the operation of said automobile.

Brown v Martin, 216-1272; 248 NW 368; 34 NCCA 354

Physical facts — unsustainable verdict. A verdict finding, in effect, that defendant (with whom a guest was riding) was operating his automobile in a reckless manner cannot be sustained when the testimony tending to establish recklessness, when tested in the light of the admitted physical facts and verities revealed in the record, cannot be true; and this is true notwithstanding plaintiff's conceded right to the benefit of the most favorable view of evidence rule.

Bowermaster v Universal Co., 221-831; 266 NW 503

Issue whether owner driving—circumstantial evidence. On the issue supported by circumstantial evidence as to whether a car owner was driving at the time of an accident, a mere showing that another person was in the front seat creates only a possibility that he was driving, when opposed by facts supporting the probability and more plausible presumption that the owner was driving, arising from evidence that also being in the front seat, seated behind the wheel, the owner was driving the automobile a short time before the accident.

Claussen v Johnson's Est., 224-990; 278 NW 297

Impeachment of witness—allowable contradiction. A party may not impeach his own witness but he may offer testimony of other witnesses in contradiction thereof.

White v Zell, 224-359; 276 NW 76

Dead man statute—circumventing by indirection. A witness is not permitted to do by indirection that which the law forbids. So held where a passenger in a motor vehicle attempted to circumvent the dead man statute by testifying that he was hired by someone to make the trip, who was no other person than the deceased driver.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

(b) NO-EYEWITNESS RULE

Inapplicability of rule under direct evidence. Where a motorist and other eyewitnesses testify as to defendant's conduct just prior to his driving into the side of a moving train, it is error to instruct on the presumption that defendant's natural instinct of self-preservation would prompt him not to run into a moving train, when direct evidence as to his conduct is obtainable.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

(c) OPINION EVIDENCE

Qualified mechanic's testimony as to brakes and lights. It is not error to permit testimony of expert witnesses when there is a sufficient showing of their qualifications to give such testimony. So held as to a mechanic's testimony regarding brakes and lights.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

(d) PHYSICAL FACTS

Determining cause from effect—rarely matter of law. So many elements enter into the physical results produced by motor vehicle collisions that it is very seldom that a court can say as a matter of law that a particular result was produced because certain factors constituted the cause.

Echternacht v Herny, 224-317; 275 NW 576

Unsustainable verdict. A verdict finding, in effect, that defendant (with whom a guest was riding) was operating his automobile in a reckless manner cannot be sustained when the testimony tending to establish recklessness, when tested in the light of the admitted physical facts and verities revealed in the record, cannot be true; and this is true notwithstanding plaintiff's conceded right to the benefit of the most favorable view of evidence rule.

Bowermaster v Universal Co., 221-831; 266 NW 503

Physical facts—warranting directed verdict for defendant. Where a guest in defendant's automobile sustains injuries resulting from defendant's alleged recklessness in traveling at a high rate of speed and striking a cow on a paved highway, and where guest recovers judgment in a damage action wherein defendant appeals from an order overruling his motion for directed verdict, evidence reviewed

VII PRESUMPTIONS, EVIDENCE, AND PROOF—continued

(d) PHYSICAL FACTS—concluded

showing that plaintiff's own uncontradicted factual situation, developed on direct examination, failed to sustain his specifications of recklessness in that defendant failed to reduce the speed of the car as he approached the cattle, and held the court erred in not sustaining the motion for a directed verdict.

Scott v Hansen, 228- ; 289 NW 710

Physical facts—exception to most favorable evidence rule. On appeal from an order overruling defendant's motion for directed verdict, the supreme court need not follow the most favorable evidence rule, as urged by plaintiff, to the exclusion of the physical facts and other uncontradicted matters which plaintiff not only conceded, but affirmatively and intentionally established.

Scott v Hansen, 228- ; 289 NW 710

(e) RES IPSA LOQUITUR

Doctrine never applicable. The doctrine of res ipsa loquitur is never applicable to establish a presumption of recklessness.

Phillips v Briggs, 215-461; 245 NW 720; 34 NCCA 364; 39 NCCA 126

(f) JURY QUESTIONS

Submitting both negligence and recklessness. Both questions of negligence and of recklessness may in a proper case be submitted together to the jury.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Reckless operation—negativing possibilities. In order to make a jury question on the issue of reckless operation of an automobile, plaintiff need not negative every possibility which might exculpate the defendant.

White v Center, 218-1027; 254 NW 90

Whether jury case is made. In an action for damages based on the plea of reckless operation of the vehicle, the court must determine whether substantially uncontradicted testimony presents, when judged in the light most favorable to plaintiff, no more, at the best, than a case of simple negligence on the part of the operator, or whether said testimony presents a jury question on the issue of recklessness.

Welch v Minkel, 215-848; 246 NW 775; 34 NCCA 384

Shenkle v Mains, 216-1324; 247 NW 635

Recklessness—jury (?) or court (?) question. A jury question and not a court question arises (1) when one or more of a series of undisputed facts tend to establish recklessness in the operation of an automobile, and (2) when different minds might reasonably differ on the question whether recklessness was, in fact, established.

Siesseger v Puth, 216-916; 248 NW 352; 34 NCCA 361

Evidence — insufficiency. Evidence reviewed and held insufficient to justify submission to the jury of the issue of recklessness in the operation of an automobile.

Wright v What Cheer Co., 221-1292; 267 NW 92

Recklessness particulars unchallenged before answer—submitting as alleged. Error may not be predicated on the submission of certain particulars alleging recklessness when their sufficiency is not raised before answer filed and when evidence exists to sustain them.

Claussen v Johnson's Est., 224-990; 278 NW 297

Defective steering gear — recklessness. "Reckless" operation of an automobile is not established as a jury question by proof that it was operated at a time when the operator knew the steering mechanism was in such condition that when the brakes were applied the vehicle would turn to one side.

Stanbery v Johnson, 218-160; 254 NW 303

Reckless operation—car swerving into ditch. A jury question on the issue whether an automobile was recklessly operated is not made by proof that the car was being operated on a straight, level, and unobstructed paved road at a speed of some 50 miles per hour by a person who was somewhat weary from loss of sleep, and somewhat unnerved by an accident happening earlier in the day, and that suddenly and without warning the car swerved and went into a ditch and overturned, notwithstanding the evident good-faith efforts of the driver to control the car.

Duncan v Lowe, 221-1278; 268 NW 10

Car slipping into ditch. Evidence that the driver of an automobile on a straight, smooth, graveled road was traveling 45 miles per hour in an attempt to pass other automobiles does not, in and of itself, furnish a jury question on the issue of reckless operation; otherwise as to evidence that after the car slipped and entered a ditch along the roadside the speed materially increased for a distance of 160 feet at which latter point the car collided with an intersecting grade, turned over twice, and came to a stop some 105 feet farther on.

White v McVicker, 216-90; 246 NW 385; 34 NCCA 371; 37 NCCA 126

See Cerny v Secor, 211-1232; 234 NW 193

Reckless operation — driving in middle of road at high speed. In an action under the guest statute, evidence that the car was being driven down the middle of a graveled road at a high speed, when it collided with an oncoming car on a hill, held insufficient to present a

jury question on the issue of reckless operation.

Mayer v Sheetz, 223-582; 273 NW 138

Speed—car out of control. Evidence tending to show that an inexperienced driver operated his automobile for a half mile on a downgrade on a perfectly good, broad, graveled highway at a speed of 55 miles per hour in violation of the statutory speed standard, with the car out of control and swaying from side to side, and that thereupon he inadvertently stepped on the gas instead of the brake and went into a ditch on the wrong side of the road, justifies the submission to the jury of the issue of recklessness.

Siesseger v Puth, 216-916; 248 NW 352; 34 NCCA 361

Speed on downgrade. A jury question on the issue whether an automobile was operated recklessly, that is, in heedless disregard of consequences, is made by testimony that the driver, faced by no emergency, operated the car on the downgrade of a straight, good-conditioned, 18-foot wide, graveled road, for a distance of over 1500 feet, and at a speed of 75 miles per hour (110 feet per second), and in the direction of a somewhat elevated railway grade crossing, and that in the near vicinity of said crossing, the car, after repeatedly weaving from one side of the roadway to the other, left said roadway, plunged into a ditch, and overturned two or three times.

Wright v Mahaffa, 222-872; 270 NW 402

Speed. A jury question on the issue of reckless operation of an automobile may be made by testimony that the driver, on a straight, level stretch of paved road, and on the right-hand side thereof, and at a time when he could see substantial objects on the road at least one-quarter mile ahead and easily pass them, operated his car at 70 miles per hour and crashed into the rear of and substantially annihilated a wagon and team on the extreme right-hand side of the road and moving in the same direction as the automobile.

White v Center, 218-1027; 254 NW 90; 36 NCCA 339

Recklessness—speed plus surrounding circumstances. High speed, while not alone decisive of recklessness, yet when coupled with surrounding circumstances such as approaching darkness, difficult visibility, heavy primary road traffic, and a double collision with the rear of an unlighted trailer and an oncoming truck, presents a question on which reasonable minds would differ and should be submitted to the jury.

Claussen v Johnson's Est., 224-990; 278 NW 297

Speed on unfamiliar road. A jury question on the issue of reckless operation of an automobile is made by evidence that the car was being operated (1) over a wide, well-settled, graveled highway with which the operator was wholly unfamiliar, (2) at a speed of some 65 miles per hour, (3) during the nighttime when visibility was materially limited, and (4) at a turn in the road so belatedly anticipated and discovered that the driver was unable to negotiate it and was compelled to turn his car into the side ditch.

Mescher v Brogan, 223-573; 272 NW 645

Excessive speed at intersection. In an action by a guest against the driver and owner of a motor vehicle for injuries sustained as a result of a collision with an oncoming vehicle, where it is shown that the collision occurred on the left side of the road while automobile, with defective brakes, was being driven at an excessive rate of speed through a well-traveled intersection in a town over a slope or hill which limited visibility, and on the left side of the highway in face of visible oncoming traffic, such evidence, on the issue of whether or not collision was caused by driver's recklessness, presented a jury question.

Allbaugh v Ashby, 226-574; 284 NW 816

Speeding in residence district—sufficiency of evidence. Evidence that accident occurred on main street of town about four or five blocks from the business district, that defendant was driving 50 miles per hour, that there were a number of dwellings on both sides of the street, and that defendant had passed a sign which read, "Slow down, speed limit 25 miles per hour", was sufficient to raise jury question on issue of whether car was being driven in a residence district in excess of 25 miles per hour.

Doherty v Edwards, 227-1264; 290 NW 672

"Guest" or mere "invitee"—negativing relation. A passenger in an automobile is neither a "guest" nor a mere "invitee" when he is riding therein:

1. For the purpose of performing and in order to perform his duty as a servant of the owner or operator; or
2. For the definite and tangible benefit of the owner or operator; or
3. For the mutual, definite, and tangible benefit of the owner or operator on the one hand, and of the passenger on the other hand.

Necessarily, a jury question is generated by a substantial conflict of testimony.

Knutson v Lurie, 217-192; 251 NW 157; 36 NCCA 275

Guest or employee as pivotal question—duty of court. When, under the pleading and evidence, the pivotal question is whether plaintiff when injured in defendant's car was a guest or an employee of defendant, the court should not refuse instructions which require the jury to determine such question.

Porter v Decker, 222-1109; 270 NW 897

VII PRESUMPTIONS, EVIDENCE, AND PROOF—continued

(f) JURY QUESTIONS—concluded

Guest (?) or otherwise—jury question. Evidence reviewed and held to present a jury question on the issue whether plaintiff, at the time he was injured in a collision, was riding in an automobile as a "guest" or as an employee.

Porter v Decker, 222-1109; 270 NW 897

Failure to support one theory of case. Where plaintiff, a motor vehicle passenger, predicates his action on two theories, viz: (1) he was not a guest, and (2) he was a guest, and as to the first his proof fails because of witness' incompetency under dead man statute, and as to the second he offers no evidence, there is nothing to be submitted to the jury.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Pleading as controlling applicability of guest statute. Even when there is evidence indicating that deceased may not have been a guest, yet when an action is based and tried on the theory of "recklessness", the court may on its own motion properly instruct that deceased was a guest.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

Assumption of risk. Where motorist and guest had been drinking and automobile was driven off road, wrecked, and guest was killed, the question of assumption of risk was for the jury.

White v Zell, 224-359; 276 NW 76

Intoxication. In a guest case where the evidence shows all the occupants of the motor vehicle had been drinking whisky, the issue of intoxication should not be withdrawn from the jury.

White v Zell, 224-359; 276 NW 76

Conflict as to use of brakes. A conflict in the evidence in a motor vehicle accident case as to whether defendant did or did not apply his brakes is properly a matter for the jury.

Reed v Pape, 226-170; 284 NW 106

Father's consent to son's use of vehicle. Where a guest, injured in an automobile collision, seeks damages from a son and father, as driver and owner, respectively, of a motor vehicle, question of father's consent to son's use of automobile, procured especially for and used exclusively by the son, so as to render the father liable for guest's injuries resulting from son's reckless operation, is a jury question.

Allbaugh v Ashby, 226-574; 284 NW 816

Interrogatory seeking "knowledge and consent"—proper refusal. In a guest's personal injury action against a father and son, owner and driver, respectively, of the motor vehicle, where the petition alleges the son was driving with the "knowledge and consent" of the father, court's refusal to submit to the jury defendant-appellant's special interrogatory as to finding that son was driving car with "knowledge and consent" of father was not error, as it required an element not contained in the statute—proof under the statute need go no further than to show "consent", even tho allegation of knowledge was in the petition.

Allbaugh v Ashby, 226-574; 284 NW 816

Passenger suing both drivers—concurring negligence. In an action by a passenger against the drivers of both automobiles involved in a collision, where the vehicle in which he was riding was being driven 50 to 60 miles per hour in a snowstorm, with an oncoming automobile crowding toward the wrong side of the road, a jury question is created as to whether the conduct of the driver with whom the plaintiff was riding was a concurring proximate cause of the passenger's injuries.

Futter v Hout, 225-723; 281 NW 286

(g) DECLARATIONS AND ADMISSIONS

Admissions of fact—conclusiveness. Specific admissions of fact made in the pleadings which join the issues which are being tried are binding on the party making them, and as to such admissions there can be no issue.

Wilson v Oxborrow, 220-1135; 264 NW 1

Weight to be given admission. A cautionary instruction pertaining to the weight to be given an alleged oral admission of defendant to plaintiff following a motor vehicle accident should include a counterbalancing statement that if the admission were deliberately made or often repeated, it might be the most satisfactory evidence.

White v Zell, 224-359; 276 NW 76

Admission of fault. On the issue of reckless operation of an automobile evidence that shortly after a collision the driver being asked what was the matter with him replied, "Just a little reckless", is admissible against the driver as tending to show his admitted fault for the collision.

White v Center, 218-1027; 254 NW 90

Damaging statements—failure to deny as admission. Evidence of the failure of a person to reply to material statements made in his presence and hearing, concerning facts affecting his rights, is competent if the statements are of such character and are made under such conditions that a denial would have been natural had the statements been untrue and incorrect.

Doherty v Edwards, 227-1264; 290 NW 672

Whole of writing offered—must be on same subject as part offered. In automobile damage action for injuries sustained by plaintiff while riding as a guest of defendant's deceased husband, where, on cross-examination of plaintiff,

he was interrogated for impeachment purposes concerning statements made by him as witness in coroner's investigation, and admitted making certain statements, but claimed he was mistaken as to facts, and defendant offered such statements found in coroner's transcript as admission against interest, whereupon plaintiff offered the transcript in its entirety under statute providing the whole of a writing on the same subject may be inquired into, exclusion of transcript by the court was rightful since transcript contained statements made by plaintiff that were not on the same subject as were the answers offered by defendant, as well as being self-serving in character.

Jones v Krambeck, 228- ; 290 NW 56

(h) RES GESTAE

Reckless operation—admission of fault. On the issue of reckless operation of an automobile evidence that shortly after a collision the driver being asked what was the matter with him replied, "Just a little reckless", is admissible against the driver as tending to show his admitted fault for the collision.

White v Center, 218-1027; 254 NW 90

(i) DEMONSTRATIVE EVIDENCE

Signed statement by plaintiff—legal effect. Plaintiff who seeks to establish the reckless operation of an automobile at a time when he was riding therein as a guest is not legally precluded by a written statement theretofore signed by him, and introduced as part of his cross-examination, and which statement tended, perhaps conclusively, to disprove said alleged reckless operation, plaintiff not admitting that the statements contained in said signed writing were true for the purposes of said trial.

Wright v Mahaffa, 222-872; 270 NW 402

VIII INSTRUCTIONS

(a) IN GENERAL

Pleading as controlling applicability of guest statute. Even when there is evidence indicating that deceased may not have been a guest, yet when an action is based and tried on the theory of "recklessness", the court may on its own motion properly instruct that deceased was a guest.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

Guest or employee as pivotal question—duty of court. When, under the pleading and evidence, the pivotal question is whether plaintiff when injured in defendant's car was a guest or an employee of defendant, the court should not refuse instructions which require the jury to determine such question.

Porter v Decker, 222-1109; 270 NW 897

Ethical objection to recovery. In an action by a guest to recover of her host damages for injuries inflicted by the reckless operation of an automobile, it is not reversible error to instruct: "Nor is she bound by any ethical rule to the effect that one who is a guest of another should not seek recovery in a proper case", it appearing that the full burden of proving a legal right to recover was plainly imposed on plaintiff.

McQuillen v Meyers, 213-1366; 241 NW 442

Law of case—guest — evidence sufficiency. An instruction to the effect that claimant under the "guest" statute, in order to recover, must prove by a preponderance of the evidence that his decedent was a guest, when unobjected to and not appealed from, remains the law of the case, and evidence that automobile trip, like similar prior trips, with operator as host to friends for purpose of attending a school function, was sufficient to sustain jury finding that passenger was a "guest".

Claussen v Johnson's Est., 224-990; 278 NW 297

Contributory negligence. In an action based on "reckless operation" of a motor vehicle contributory negligence is not an element to be considered or dealt with, either by pleading, proof or instructions.

Siesseger v Puth, 213-164; 239 NW 46; 31 NCCA 84; 34 NCCA 495

Neessen v Armstrong, 213-378; 239 NW 56; 31 NCCA 104

Kaplan v Kaplan, 213-646; 239 NW 682; 31 NCCA 105

Contributory negligence. The refusal of the court to instruct as to just what a guest in an automobile must do in order to escape the imputation of contributory negligence is proper, especially in view of the fact that contributory negligence is not an element to be considered in an action for reckless driving.

McQuillen v Meyers, 213-1366; 241 NW 442

Holding under prior statute. The court must not instruct that a mere guest in an automobile (under duty, of course, to exercise reasonable and ordinary care) will be guilty of negligence if he fails to do some particular thing, e. g., attempt in some manner to check the speed of the car.

Codner v Stowe, 201-800; 208 NW 330; 26 NCCA 207

Improper reference to negligence. In an action based solely on the reckless operation of an automobile, the court must not confuse the jury by reciting in its instructions the law governing liability for negligence.

Kaufman v Borg, 214-293; 242 NW 104

Avoiding reference to negligent acts. In an action based solely on "reckless" operation of an automobile, the failure of the court to explain and define various acts of negligence covered by the motor vehicle statutes, is eminently proper.

McQuillen v Meyers, 213-1366; 241 NW 442

VIII INSTRUCTIONS—continued
(a) IN GENERAL—concluded

Reference to speed—granting new trial. A reference in an instruction to a motor vehicle speed of 60 miles per hour when the allegation in the petition of such speed was coerced by a ruling of the court, while not in itself sufficient to warrant a reversal, still justifies the trial court in granting a new trial when considered along with other alleged errors.

White v Zell, 224-359; 276 NW 76

(b) DEFINING TERMS

Recklessness—instructions as a whole. Instructions clearly and accurately defining "recklessness" in the operation of an automobile and definitely placing on plaintiff the burden to establish such "recklessness", neutralize the evil effect of a particular instruction which might, in and of itself, possibly lead the jury to understand that recklessness might consist of the doing of certain acts irrespective of the conditions or circumstances under which they might be done.

Siesseger v Puth, 216-916; 248 NW 352; 34 NCCA 361

Statute distinctions—duty of court. In an action under the guest statute, it is the court's duty to plainly point out to the jury the distinction between negligence and recklessness, and the court, in so doing, by saying "that recklessness means more than negligence", does not unduly emphasize matters in defense or confuse the jury.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

Defining recklessness but not negligence—no error. Definition of recklessness stating that "recklessness is more than negligence" is not erroneous because of failure to also define negligence.

Claussen v Johnson's Est., 224-990; 278 NW 297

Improper definition of recklessness. The approved definition of "recklessness" as "implying no care—a proceeding without heed or concern for consequences"—is rendered erroneous by the addition thereto of the elements of "desperation" and "foolishly heedless of danger".

White v McVicker, 216-90; 246 NW 385

Correct but not explicit. Instructions which are correct statements of applicable law, but which are not accompanied by definitions of quite commonplace terms, e. g. "express or implied consent," are nevertheless all-sufficient in the absence of a request for such definitions.

McQuillen v Meyers, 213-1366; 241 NW 442

Failure to define "issue". It is not erroneous for the court to fail to define the term "issue".

McQuillen v Meyers, 213-1366; 241 NW 442

(c) BALANCING INSTRUCTIONS

Protests and warnings by guest. Instructions to a jury that a motorist is not at his peril required to comply with the protests and warnings of his guest should, if requested by the plaintiff and shown by the evidence, be followed with the converse of this proposition, that if the jury finds the driver was warned, some distance from a railroad crossing, of imminent danger and, then, if the driver made no attempt to stop or reduce his speed, he is guilty of recklessness as a matter of law.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

Weight to be given admission. A cautionary instruction pertaining to the weight to be given an alleged oral admission of defendant to plaintiff following a motor vehicle accident should include a counterbalancing statement that if the admission were deliberately made or often repeated, it might be the most satisfactory evidence.

White v Zell, 224-359; 276 NW 76

(d) PARAPHRASING PLEADINGS, STATUTES

Paraphrasing grounds of recklessness. An accurate paraphrase of various grounds of recovery is all-sufficient for submission to the jury.

Fleming v Thornton, 217-183; 251 NW 158

Repealed statute — requested instruction properly refused. In automobile guest's personal injury action resulting in jury verdict for defendant, plaintiff's request for new trial because of refusal to give an instruction to the effect that it was the duty of a driver of an overtaken automobile, upon signal, to drive to the "right center of the traveled way" and remain there until overtaking automobile shall have "safely passed" was properly refused, since such statute was repealed at time plaintiff was injured, and new statute only required such driver to "give way to the right" until overtaking vehicle had "completely passed".

Jones v Krambeck, 228- ; 290 NW 56

Separate specifications of wanton misconduct submitted—joined by "and"—harmless error. In an action under the Illinois guest statute, for damages arising out of injuries received in a motor vehicle collision in Illinois, separate specifications of wanton misconduct, based on one charge of excessive speed, but, nevertheless, submitted in the language of the petition, are not rendered prejudicially erroneous because joined together with the word "and".

Moran v Kean, 225-329; 280 NW 543

(e) BURDEN OF PROOF

Affirmative defense—burden on pleader. The jury in a personal injury or death claim action where the defendant pleads "assumption of risk" should be plainly instructed that one

pleading an affirmative defense must assume the burden of proving it.

White v Zell, 224-359; 276 NW 76

Ethical objection to recovery. In an action by a guest to recover of her host damages for injuries inflicted by the reckless operation of an automobile, it is not reversible error to instruct: "Nor is she bound by any ethical rule to the effect that one who is a guest of another should not seek recovery in a proper case," it appearing that the full burden of proving a legal right to recover was plainly imposed on plaintiff.

McQuillen v Meyers, 213-1366; 241 NW 442

Guest—evidence sufficiency. An instruction to the effect that claimant under the guest statute, in order to recover, must prove by a preponderance of the evidence that his decedent was a guest, when unobjected to and not appealed from, remains the law of the case, and evidence that automobile trip, like similar prior trips, with operator as host to friends for purpose of attending a school function, was sufficient to sustain jury finding that passenger was a "guest".

Claussen v Johnson's Est., 224-990; 278 NW 297

Father's consent to son's use of vehicle. In a guest's action against a father and son on account of son's reckless operation of automobile, instructions to the jury setting out elements required for recovery against both father and son should have included element that proof of father's consent to son's use of automobile was required to justify a verdict against the father, and any instruction which was intended to refer to son only should have been so stated.

Allbaugh v Ashby, 226-574; 284 NW 816

Vehicle driven without owner's consent. Where jury is instructed that the law implies that a car being driven by one other than its owner is being driven with the owner's consent "and this places the burden upon the owner to prove, by a preponderance of the evidence, that the car was not being driven with his consent", this quoted portion of instruction is reversible error as it places undue burden on owner; the inference from ownership does not change the burden of proof which continues on the complaining party throughout the trial.

Allbaugh v Ashby, 226-574; 284 NW 816

(f) UNSUPPORTED ISSUES

Submission of evidentiary issue. Issues having no basis in the pleadings need not be submitted to the jury.

Hart v Hinkley, 215-915; 247 NW 258

Insufficient plea. In an action for damages consequent on the operation of an automobile instructions which predicate recovery on proof of "reckless" operation cannot be sustained when the pleadings neither allege reckless driving nor facts from which recklessness is a necessary deduction.

Redfern v Redfern, 212-454; 236 NW 399

Guest (?) or otherwise. Issues which are without support in the evidence must not be submitted. So held where on the question whether plaintiff when he was injured was a guest in an automobile, the court submitted the unsupported issues whether plaintiff accompanied defendant (1) for the definite benefit of defendant, or (2) for the mutual benefit of plaintiff and defendant.

Porter v Decker, 222-1109; 270 NW 897

"Unwilling guest" interpretation unwarranted. Instruction reviewed and held not open to the vice of injecting an issue not in the pleadings, to wit, that plaintiff was an unwilling guest in defendant's automobile.

Reed v Pape, 226-170; 284 NW 106

Assuming other motorist will obey law. Requested instructions that a motorist had a right to assume that a taxi driver would obey the law as to speed and lookout, altho correct as abstract propositions of law, are properly refused when not supported by the evidence.

Reed v Pape, 226-170; 284 NW 106

"No-eyewitness" rule. Where a motorist and other eyewitnesses testify as to deceased's conduct just prior to his driving into the side of a moving train, it is error to instruct on the presumption that defendant's natural instinct of self-preservation would prompt him not to run into a moving train, when direct evidence as to his conduct is obtainable.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

Defense—third party negligence. A defendant-host who pleads that the sole and proximate cause of an injury was the negligence of a third party cannot complain that the court instructs that the negligence of said third person is immaterial unless defendant-host establishes that such negligence, and not his own recklessness, was the sole and proximate cause of said injury.

Johnson v McVicker, 216-654; 247 NW 488

(g) CONSTRUCTION AS A WHOLE

Limiting recovery to proof. An instruction stating that if defendant's recklessness caused plaintiff's injury the defendant would be liable, is not error when accompanied by other instructions which limit recovery to proof of specific grounds of recklessness.

Reed v Pape, 226-170; 284 NW 106

Neutralizing evil of one instruction. Instructions clearly and accurately defining "recklessness" in the operation of an automobile and definitely placing on plaintiff the burden to establish such "recklessness", neutral-

VIII INSTRUCTIONS—concluded

(g) CONSTRUCTION AS A WHOLE—concluded

ize the evil effect of a particular instruction which might, in and of itself, possibly lead the jury to understand that recklessness might consist of the doing of certain acts irrespective of the conditions or circumstances under which they might be done.

Siesseger v Puth, 216-916; 248 NW 352; 34 NCCA 361

Bad effect of one instruction neutralized by repeating good instruction. Repeated instructions, to the effect that plaintiff must, in order to recover, establish that defendant recklessly operated the automobile in question, neutralize the evil effects of a particular instruction which inferentially told the jury that defendant admitted such recklessness.

Siesseger v Puth, 216-916; 248 NW 352

Ethical objection to recovery. In an action by a guest to recover of her host damages for injuries inflicted by the reckless operation of an automobile, it is not reversible error to instruct: "Nor is she bound by any ethical rule to the effect that one who is a guest of another should not seek recovery in a proper case", it appearing that the full burden of proving a legal right to recover was plainly imposed on plaintiff.

McQuillen v Meyers, 213-1366; 241 NW 442

(h) REQUESTING INSTRUCTIONS

Guest or employee as pivotal question — duty of court. When, under the pleading and evidence, the pivotal question is whether plaintiff when injured in defendant's car was a guest or an employee of defendant, the court should not refuse instructions which require the jury to determine such question.

Porter v Decker, 222-1109; 270 NW 897

Protests and warnings by guest—balancing instructions. Instructions to a jury that a motorist is not at his peril required to comply with the protests and warnings of his guest should, if requested by the plaintiff and shown by the evidence, be followed with the converse of this proposition, that if the jury finds the driver was warned some distance from a railroad crossing of imminent danger and, then, if the driver made no attempt to stop or reduce his speed, he is guilty of recklessness as a matter of law.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

Interrogatory seeking more than statutory requirements—proper refusal. In a guest's personal injury action against a father and son, owner and driver, respectively, of the motor vehicle, where the petition alleges the son was driving with the "knowledge and consent" of the father, court's refusal to submit to the jury defendant-appellant's special interrogatory as to finding that son was driving car with "knowledge and consent" of father was not error, as it required an element not contained in the statute—proof under the statute need go no further than to show "consent", even tho allegation of knowledge was in the petition.

Allbaugh v Ashby, 226-574; 284 NW 816

IX DAMAGES

Submission of excess recovery. The submission to the jury of a possible amount of recovery slightly in excess of what is legally recoverable does not constitute error when the final result is not affected thereby.

McQuillen v Meyers, 213-1366; 241 NW 442

Harmless error—instructions inviting excess recovery. Instructions allowing the jury to return damages in excess of statutory limitation are harmless when the jury returns a verdict for less than the statutory limit.

Siesseger v Puth, 211-775; 234 NW 540

Present worth of estate—inadequate instructions. In an action for damages to the estate of 17-year-old minor consequent on his wrongful death, the court should instruct that the present worth of said estate must be based on the minor's expectancy at the time of his majority. But a substantial reduction of the verdict may cure the error.

Hart v Hinkley, 215-915; 247 NW 258

Verdicts—unallowable impeachment. In a personal injury action, a verdict may not be impeached by the affidavits of jurors to the effect that a certain allowance was made for an element of damages as to which there was no evidence.

McQuillen v Meyers, 213-1366; 241 NW 442

Visible disfigurement. A visible and lifelong personal disfigurement is necessarily a very persuasive element of damages. Verdict of $5,000 held nonexcessive.

Siesseger v Puth, 216-916; 248 NW 352

Verdict due to passion and prejudice. Verdict of $17,000 for wrongfully caused death held to show passion and prejudice, and optionally reduced to $7,000.

Cerny v Secor, 211-1232; 234 NW 193

Fatal personal injury—$15,000—excessiveness. Verdict for $15,000 for death of a 17-year-old boy, reduced by trial court to $10,000, held subject to a further reduction to $7,500.

Hart v Hinkley, 215-915; 247 NW 258

ACTIONS AGAINST NONRESIDENTS

5038.01 Legal effect of use and operation.

Discussion. See 20 ILR 654—Nonresident motorists; 25 ILR 810—Nonresident plaintiff

Foreign decisions.

Horvath v Brettschneider, 227 N. Y. S. 109
Hendrick v State, 235 US 610
Kane v State, 242 US 160
Hess v Pawloski, 274 US 352
Wuchter v Pizzutti, 276 US 13
State v Belden, 193 Wis., 145
Pawloski v Hess, 250 Mass., 22
Harvard Law Review, Vol. 39 p. 563

Substituted service statute—strict adherence. Statutes providing for substituted service of original notice present a method of procedure that is extraordinary in character and allowed only because specially authorized. Because such statutes are the only authority for the procedure, the facts required in the statute must appear.

Jermaine v Graf, 225-1063; 283 NW 428

Substituted service on nonresident defendants in automobile cases—availability to nonresident plaintiffs. The provisions of the Iowa motor vehicle law relative to substituted service upon nonresident defendants are available to nonresident plaintiffs.

Welsh v Ruopp, 228- ; 289 NW 760

Original notice—service on nonresidents—showing nonresidence at time of accident. Where an attack by special appearance and motion to quash is made upon use of special method of securing service on nonresidents provided for in motor vehicle law, a showing is required of facts essential to jurisdiction, and one of such basic facts is nonresidence of defendant at the time of the use and operation of the vehicle allegedly causing the damage upon which suit is brought. Accordingly, proof of nonresidence at the time suit is started would not be sufficient where accident in question occurred one and one-half years earlier.

Welsh v Ruopp, 228- ; 289 NW 760

Substituted service on nonresident corporation—plaintiff's burden. In a motor vehicle accident action wherein plaintiff obtained service of notice upon a nonresident corporation by serving the commissioner of motor vehicles and wherein the defendant attacked such service by special appearance on the ground that it was not a person within the purview of the statute, the burden was on the plaintiff to make such showing that defendant was a person under the statute. Held, burden not met.

Jermaine v Graf, 225-1063; 283 NW 428

5038.03 Original notice—form.

Substituted service on nonresidents—contents of notice. Provision in motor vehicle law invoking special method of service on nonresidents does not require that the original notice set out facts which warrant use of such method and which might be necessary to sustain jurisdiction. Notice which complies with this section and §11055, C., '39, is sufficient.

Welsh v Ruopp, 228- ; 289 NW 760

5038.04 Manner of service.

Substituted service on nonresidents. Statutes relative to securing substituted service on nonresidents in motor vehicle accident cases do not require that motor vehicle commissioner or his deputy make affidavit proving filing of original notice with the commissioner and proving mailing of notification to nonresidents. Such proof may be made by plaintiff, his attorney, or someone acting in his behalf.

Welsh v Ruopp, 228- ; 289 NW 760

"Commissioner" as process agent.

Green v Brinegar, 228- ; 292 NW 229

5038.08 Proof of service.

Original notice—service on nonresidents—showing nonresidence at time of accident. Where an attack by special appearance and motion to quash is made upon use of special method of securing service on nonresidents provided for in motor vehicle law, a showing is required of facts essential to jurisdiction, and one of such basic facts is nonresidence of defendant at the time of the use and operation of the vehicle allegedly causing the damage upon which suit is brought. Accordingly, proof of nonresidence at time suit is started would not be sufficient where accident in question occurred one and one-half years earlier.

Welsh v Ruopp, 228- ; 289 NW 760

Substituted service on nonresidents. Statutes relative to securing substituted service on nonresidents in motor vehicle accident cases do not require that motor vehicle commissioner or his deputy make affidavit proving filing of original notice with the commissioner and proving mailing of notification to nonresidents. Such proof may be made by plaintiff, his attorney, or someone acting in his behalf.

Welsh v Ruopp, 228- ; 289 NW 760

5038.10 Venue of actions.

Substituted service on nonresident defendants—availability to nonresident plaintiffs. The provisions of the Iowa motor vehicle law relative to substituted service upon nonresident defendants are available to nonresident plaintiffs.

Welsh v Ruopp, 228- ; 289 NW 760

5038.12 Duty of commissioner.

Substituted service on nonresidents—proof of service. Statutes relative to securing substituted service on nonresidents in motor vehicle accident cases do not require that motor vehicle commissioner or his deputy make affidavit proving filing of original notice with the commissioner and proving mailing of notification to nonresidents. Such proof may be made by plaintiff, his attorney, or someone acting in his behalf.

Welsh v Ruopp, 228- ; 289 NW 760

CHAPTER 251.2

MOTOR VEHICLE DEALERS

5039.02 Definitions.

Conditional sale vendor not liable for negligence of vendee. The vendor of a motor vehicle under a conditional sales contract and his assignee are not to be held responsible for the negligent operation of the vehicle by the vendee on the ground that they have a duty to see if the vendee is responsible before turning him loose on the highway with a dangerous instrumentality.

Hansen v Kuhn, 226-794; 285 NW 249

5048 Failure of lights. (Repealed.)

Right to proceed—instructions. The court should, on supporting testimony, instruct as to the right of a traveler to proceed cautiously toward his destination in case of the failure of his lights to operate.

Sergeant v Challis, 213-57; 238 NW 442

Necessary instructions. The operation of an automobile during the nighttime without the required number of lights is not necessarily negligent; and in submitting such issue the court must clearly state to the jury the circumstances under which the operator would, under the statute, be negligent and the circumstances under which he would not, under the statute, be negligent.

Muirhead v Challis, 213-1108; 240 NW 912

CHAPTER 251.3

MOTOR VEHICLE FUEL TAX

Atty. Gen. Opinions. See '36 AG Op 450, 539, 541, 543; '38 AG Op 294

5093.01 Purpose.

Atty. Gen. Opinion. See '36 AG Op 613

5093.02 Definition of terms.

Discussion. See 17 ILR 272—Gasoline for interstate airplanes

Atty. Gen. Opinions. See '38 AG Op 294, 551

"Gasoline" does not embrace "benzol" or "naphtha".

State v Oil Co., 209-980; 229 NW 214
Lineberger v Johnson, 213-800; 239 NW 679

Liability of county. A county becomes, within the scope and meaning of chapter 251-F1, C., '35, [Ch 251,3, C., '39] a distributor of motor vehicle fuel when it imports the same from without the state solely for the purpose of operating its power maintainers and trucks in the construction and maintenance of its highways and is under obligation to obtain a license as such distributor and to pay the state the statutory excise charge (without penalty) on such importations.

State v Woodbury County, 222-488; 269 NW 449

Liability of municipality. A municipal corporation becomes, within the scope and meaning of chapter 251-F1, C., '35, [Ch 251.3, C., '39] a "distributor" of motor vehicle fuel when it imports the same from without the state for its own use and is under obligation to obtain a license as such distributor and to pay to the state the statutory excise charge on such importations.

State v Des Moines, 221-642; 266 NW 41

Definition of terms—power of general assembly. The general assembly in exercising its constitutional power over an authorized subject matter may be its own lexicographer—may use its own terms and declare what entities shall be embraced therein. So held where in the enactment of this chapter it defined the term "person" and, in effect, declared such term to include a municipal corporation.

State v Des Moines, 221-642; 266 NW 41

5093.03 Tax imposed.

Atty. Gen. Opinions. See '38 AG Op 72, 438, 548, 551, 555

"Gasoline" does not embrace "benzol" or "naphtha".

State v Oil Co., 209-980; 229 NW 214
Lineberger v Johnson, 213-800; 239 NW 679

Nonburden on interstate commerce. Principle reaffirmed that the so-called motor vehicle fuel tax is not a direct tax on said fuel imported, but is an excise on the use of the fuel for the propulsion of vehicles on the highways of the state, and is in no sense a burden on interstate commerce.

State v Standard Oil, 222-1209; 271 NW 185

Motor vehicle fuel tax—constitutional. The Iowa motor vehicle fuel tax was obviously not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it came to rest in Iowa, and the requirement that the distributor as shipper into Iowa shall, as agent of the state, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls, imposes no unconstitutional burden, either upon interstate commerce or upon the distributor.

Monamotor Oil Co. v Johnson, 292 US 86

5093.04 Tax payable by whom.

Atty. Gen. Opinions. See '38 AG Op 438, 453, 548, AG Op July 15, '39

Price-posting statute. The statute providing that every seller of motor vehicle fuel or fuel oil shall post prices and sell at not less than such prices does not infringe on right of contract or unjustly discriminate against motor vehicle fuel dealers.

State v Woitha, 227-1; 287 NW 99
State v Hardy, 227-12; 287 NW 104

Motor vehicle fuel tax—constitutional. The Iowa motor vehicle fuel tax was obviously not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it came to rest in Iowa, and the requirement that the distributor as shipper into Iowa shall, as agent of the state, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls, imposes no unconstitutional burden, either upon interstate commerce or upon the distributor.

Monamotor Oil Co. v Johnson, 292 US 86

5093.09 Monthly reports of distributors.

Atty. Gen. Opinions. See '36 AG Op 450; '38 AG Op 294, 502

Unallowable refunds. A distributor of motor vehicle fuel imported into the state who under this statute pays the tax on the "invoiced gallonage"—the number of gallons placed in the car at the refinery—less the statutory gallonage allowed by statute for "loss and evaporation" (3%), is not entitled to a refund of the tax on the difference in gallonage between said invoiced gallonage and the actual unloaded gallonage—a difference arising from the fact that the fuel was loaded when it was at a much higher temperature than at the time it was unloaded.

State v Standard Oil, 222-1209; 271 NW 185

5093.10 Cancellation of distributor's license.

Atty. Gen. Opinion. See '38 AG Op 294

5093.11 Treasurer may assess amount of license fees due.

Atty. Gen. Opinion. See '36 AG Op 450

5093.14 Permits to sell fuel oil tax-free.

Atty. Gen. Opinions. See '36 AG Op 539, 543; AG Op May 18, '39

5093.26 Records open to inspection of treasurer.

Atty. Gen. Opinion. See '36 AG Op 613

5093.29 Refund.

Atty. Gen. Opinions. See '38 AG Op 72, 438, 551; AG Op March 23, '39

When tax or license refundable. Where the general public is by proper authority excluded from a public highway during its construction, the operation thereon by the contractor of his motor vehicle road construction machinery in carrying out his contract for the construction of said highway is not an "operation upon the public highway" within the meaning of the statute which denies a refund of tax on gasoline used for said latter purpose. Gasoline used in operating said machinery under said circumstances is used for a "commercial" purpose and the tax paid thereon must be refunded.

D. M. Co. v Johnson, 213-594; 239 NW 575

Unallowable refunds. A distributor of motor vehicle fuel imported into the state who under this statute pays the tax on the "invoiced gallonage"—the number of gallons placed in the car at the refinery—less the statutory gallonage allowed by statute for "loss and evaporation" (3%), is not entitled to a refund of the tax on the difference in gallonage between said invoiced gallonage and the actual unloaded gallonage—a difference arising from the fact that the fuel was loaded when it was at a much higher temperature than at the time it was unloaded.

State v Standard Oil, 222-1209; 271 NW 185

Mistaken refunds—recovery of interest. The state treasurer who, under a mistaken interpretation of the law, refunds to a distributor of motor vehicle fuel a portion of the excise properly paid on account of said fuel, may, on behalf of the state, legally recover the amount of said mistaken refund, but with interest only from the date of the judgment.

State v Oil Co., 222-1209; 271 NW 185

5093.31 Certain acts made unlawful.

Atty. Gen. Opinion. See AG Op May 25, '39

Indictment—short form — erroneous designation of section. A "short-form" indictment for obtaining money by false pretenses, even tho it specifically purports to be found under §13045, C., '31, but which, by the bill of particulars, is manifestly based on false pretenses on obtaining a refund of tax paid on motor vehicle fuel as provided by §5093-a8, C., '31, is sufficient to support a conviction under the latter section and a sentence solely thereunder.

State v Wall, 218-171; 254 NW 71

CHAPTER 251.4

MOTOR VEHICLE FUEL

Atty. Gen. Opinion. See '34 AG Op 190

5095.01 Definitions.

Atty. Gen. Opinion. See '34 AG Op 190

5095.02 Tests and standards.

Atty. Gen. Opinions. See '32 AG Op 250; '34 AG Op 190

5095.05 Sales slip on demand.

Atty. Gen. Opinions. See '32 AG Op 45; '38 AG Op 502

5095.08 Prohibition.

Atty. Gen. Opinions. See '28 AG Op 264; '32 AG Op 284; '34 AG Op 63

5095.09 Poster showing analysis.

Atty. Gen. Opinion. See '32 AG Op 115

5095.11 Violations.

Atty. Gen. Opinion. See '32 AG Op 259

CHAPTER 252.1

MOTOR VEHICLE CERTIFICATED CARRIERS

Atty. Gen. Opinion. See '34 AG Op 305

5100.01 Definitions.

Atty. Gen. Opinions. See '25-26 AG Op 192, 314; '34 AG Op 190

Common carrier—acts constituting. The contention of a trucker that he is a private carrier solely of a particular line of goods and exclusively for the members of an unincorporated association cannot be sustained when he operates his truck (1) between fixed termini, (2) over a regular route, (3) at stated, regular times, and (4) for compensation with the purpose of offering his services to all persons within said territory having need for the same particular line of carriage, the so-called "association" being a mere subterfuge to hide his real character as a carrier.

State v Rosenstein, 217-985; 252 NW 251

Constitutionality of act. Chapters 252-A1 and 252-A2, C., '31, providing for the regulation and taxation of motor vehicle carriers held constitutional by the federal court.

Grolbert v Bd. of R. R. Com., 60 F 2d, 321

"Operation between fixed termini." A trucker cannot be said to operate "between fixed termini, or over a regular route" when, during the time he is not engaged in his regular business of carrying the government mail, he does odd jobs of trucking and of manual labor, and at irregular times and over irregular routes carries goods from a wholesale center to merchants of his own and of nearby towns, provided he can arrange his time so to do.

State v Thompson, 217-994; 252 NW 256

Nonfixed termini — change in business — effect. A duly issued permit under chapter 252-C1, C., '31 [Ch 252.3, C., 39], authorizing a "truck operator" to transport freight for compensation between nonfixed termini and over nonregular routes ceases to afford protection to the holder of the permit whenever his business concentrates upon a regular route and two fixed termini within the meaning of chapters 252-A1 and 252-A2, C., '31 [Chs 252.1, 252.2, C., '39].

State v Mercer, 215-611; 246 NW 406

Status—voluntary change. A "truck operator" within the meaning of chapter 252-C1, C., '35 [Ch 252.3, C., '39] (one not operating between fixed termini nor over a regular route), immediately becomes a "motor vehicle carrier" (one operating between fixed termini, or over a regular route), and governed accordingly, whenever he so changes the course of his business as to take on the status of the latter and leave off the status of the former.

State v Lischer Bros., 223-588; 272 NW 604

Property damaged while in storage—liability. When motor vehicle carriers utilized the terminal facilities of a third party, who provided pickup and delivery service from the terminal, and had individual spaces rented to each trucker for the storage of that trucker's shipments, it was held that control and possession of the shipments of goods was in the truck carriers during the storage period, and when a fire destroyed the terminal, the terminal owner was acting as agent for the truckers, who were liable to the owners of the property in transit for the losses occasioned by the fire.

Crouse v Cadwell, 226-1083; 285 NW 623

Motor freight terminal operator's liability to carrier. When motor carrier operators stored goods belonging to third parties in a motor freight terminal and were held liable when the goods were destroyed in a fire through no negligence on the part of the terminal operator, the carriers were not entitled to recoupment from the terminal operator who acted as their agent in storing the goods, in the absence of an agreement that he be liable for losses not caused by his own negligence.

Crouse v Cadwell, 226-1083; 285 NW 623

5100.02 Special powers of commission.

Discussion. See 9 ILB 268—Motorbus competition; 9 ILB 26—Motorbus regulation; 14 ILR 201—Constitutionality of motorbus tax

5100.03 General powers.

Discussion. See 19 ILR 453—Truck classification

5100.04 Statutes applicable.

Injunction. Injunction will lie by the state on the relation of the board of railroad commissioners to enjoin the operation of a motor carrier over the public highways contrary to the orders of said board.

State v Holdcroft, 207-564; 221 NW 191

Injunction—burden of proof. In an action by the board to enjoin a trucker from operating upon the public highway "between fixed termini or over a regular route" without the legally required certificate and payment of the statutory tax, the board has the burden of proof to establish that the defendant is so operating.

State v Ooten, 215-543; 243 NW 329

5100.06 Certificate of convenience and necessity.

Injunction—burden of proof. In an action by the board of railroad commissioners to enjoin a trucker from operating upon the public highway "between fixed termini or over a regular route" without the legally required certificate and payment of the statutory tax, the board has the burden of proof to establish that the defendant is so operating. Evidence held insufficient.

State v Ooten, 215-543; 243 NW 329

Applicability of statutes. A truck operator who, under a permit duly granted under chapter 252-C1, C., '31 [Ch 252.3, C., '39], and by means of his motor truck, transports for hire freight from place to place at irregular times and on no schedule of service, and only when he receives unsolicited and acceptable calls to do such transporting, is not operating "between fixed termini or over a regular route" within the meaning of chapters 252-A1, or 252-A2, C., '31, '[Chs 252.1, 252.2, C., '39] and, therefore, is under no obligation to obtain a certificate of necessity or convenience or to pay the tax required by said chapters.

State v Transfer, 213-1269; 239 NW 125
State v Lischer, 215-607; 246 NW 264
State v Lischer, (NOR); 261 NW 634

5100.15 Objections to application.

Authorized objectors. The legal owner by assignment of a certificate of necessity and convenience for the operation of a motor carrier line is a party authorized to enter objections to the granting of a certificate for a competing line.

Campbell v Eldridge, 206-224; 220 NW 304

5100.21 Appeal.

Appearance by commerce counsel. The commerce counsel has a right to appear for and on behalf of the board of railroad commissioners on an appeal from orders granting or refusing an application for the operation of a motor carrier line.

Campbell v Eldridge, 206-224; 220 NW 304

5100.23 Trial on appeal.

Granting of certificate—review. A determination by the board of railroad commissioners, on supporting evidence, that the operation of a motor carrier line would promote the public convenience and necessity is constitutionally beyond review by the courts.

In re Beasley Bros., 206-229; 220 NW 306

Orders of railroad commissioners—judicial review. The authority of the court to review the finding and order of the board of railroad commissioners in granting or refusing a certificate of convenience and necessity for the operation of a motor carrier is strictly limited to questions of law.

In re Waterloo Railway, 206-238; 220 NW 310

Conclusiveness of orders. The board of railroad commissioners has legal authority, on supporting testimony, to grant in part only an application for authority to operate a motor carrier line, and in such case the orders of the board are conclusive on the courts.

Campbell v Eldridge, 206-224; 220 NW 304

5100.24 Appeal to supreme court.

Atty. Gen. Opinion. See '30 AG Op 165

5100.26 Liability bond.

Scope of bond. A liability insurance bond under this section imposes no liability on the surety for injuries to persons except for injuries for which the motor vehicle carrier would be legally liable.

Crozier v Stages, 209-313; 228 NW 320

Action against surety on bond. A party injured in person and property by the operation of a motor vehicle carrier may bring his action directly against the carrier and the statutory surety on the bond filed with the board of railroad commissioners, even tho no service is had on the carrier and even tho the bond provides, in effect, for an action against the surety in event the injured party first obtains a judgment against the carrier and fails to collect thereon.

Curtis v Michaelson, 206-111; 219 NW 49; 1 NCCA (NS) 336

Regulation—construction and application of statute. An interstate motor vehicle carrier will not be permitted to justify a total disre-

gard of the motor vehicle carrier acts of this state on the plea that said acts (applicable in a general way to both interstate and intrastate carriers) if literally construed, would require him to execute to the state a bond which would be violative of the interstate commerce clause of the federal constitution, because said acts vest the board of railroad commissioners with ample power and duty so to construe and apply said acts that, when applied to an interstate carrier, they will not violate said interstate commerce clause.

State v Martin, 210-207; 230 NW 540

Right of injured party. When the owner or operator of a motor vehicle has insured his liability for damages consequent on the operation of his vehicle, an injured party may not sue directly on the policy which indemnifies the wrongdoer—the insured—until he has obtained a judgment against the wrongdoer—the insured—and until an execution on the judgment has been returned unsatisfied (§8940, C., '31). There is one exception to this statutory rule, to wit: When the policy is one obtained by a motor vehicle carrier as a mandatory statutory condition precedent to obtaining a certificate to operate as such carrier, an injured party may maintain an action on the policy when service of notice of suit cannot be had on the carrier within this state.

Ellis v Bruce, 215-308; 245 NW 320

Joinder—tort of one and contract of another. A joint action (1) against a wrongdoer upon his tort consequent on the negligent operation of a motor vehicle, and (2) against a surety company upon its policy to indemnify the wrongdoer from loss because of said tort, even tho but one recovery is sought, presents two different causes of action, and the joinder thereof is wholly unallowable. And this is true whether the policy is simply a private, optional contract between the insured and insurer, or a policy mandatorily required by statute to be filed with and approved by the railroad commission as a condition precedent to the obtaining of a permit to operate said vehicle.

Ellis v Bruce, 215-308; 245 NW 320

"Resulting from." An injury to a passenger on a motor vehicle bus may not be said to "result from" the operation of the bus when the proximate cause of such injury was the negligence of a third party.

Crozier v Stages, 209-313; 228 NW 320

Res ipsa loquitur—applicability of doctrine. Plaintiff, under a general allegation of negligence on the part of a common carrier of passengers, to wit, a motor bus company, generates, under the doctrine of res ipsa loquitur, a jury question on the issue of the negligence of such carrier by proof (1) that he was a passenger on said bus; (2) that a collision occurred between said bus and an automobile; (3) that in said collision said bus was overturned; and (4) that plaintiff was injured.

Crozier v Stages, 209-313; 228 NW 320; 29 NCCA 20

Res ipsa loquitur—applicability. Principle recognized that the doctrine of res ipsa loquitur is, under appropriate facts, applicable to common carriers.

Preston v Railway, 214-156; 241 NW 648

Hand baggage—condition to liability. A carrier of passengers is not liable as an insurer for the loss of hand baggage of the passenger unless said baggage is definitely surrendered into the exclusive possession and control of the carrier. If liability is predicated on negligence, such ground must be pleaded and, of course, proven. Evidence held to show no such surrender of custody.

Jensen v Transit Lines, 221-513; 266 NW 9

Injuries to livestock—directed verdict—sufficiency of evidence. Evidence that injury to cow was caused by negligence of alleged common carrier was insufficient to make a jury question when the injury was not discovered until 3 hours after the cow was delivered and there was no showing of any injury at the time the cow was unloaded.

Mountain v Albaugh, 227-1282; 290 NW 693

Property damaged while in storage—liability. When motor vehicle carriers utilized the terminal facilities of a third party, who provided pickup and delivery service from the terminal, and had individual spaces rented to each trucker for the storage of that trucker's shipments, it was held that control and possession of the shipments of goods was in the truck carriers during the storage period, and when a fire destroyed the terminal, the terminal owner was acting as agent for the truckers, who were liable to the owners of the property in transit for the losses occasioned by the fire.

Crouse v Cadwell Co., 226-1083; 285 NW 623

Motor freight terminal operator's liability to carrier. When motor carrier operators stored goods belonging to third parties in a motor freight terminal, and were held liable when the goods were destroyed in a fire through no negligence on the part of the terminal operator, the carriers were not entitled to recoupment from the terminal operator who acted as their agent in storing the goods, in the absence of an agreement that he be liable for losses not caused by his own negligence.

Crouse v Cadwell Co., 226-1083; 285 NW 623

Destruction of property—evidence of value—pleading. In motor carrier's action on liability insurance policy for loss of property destroyed by fire in freight terminal, plaintiff has burden of proof as to its "custody and control" of goods within policy provisions, also as to value thereof, and stipulation as to value

of certain goods on which claims had been paid by insured does not admit value of other goods in absence of competent proof thereof.

Amer. Alliance Ins. v Brady Co., 101 F 2d, 144

New trial—trucker's statutory insurance requirement—jurors' discussion not misconduct. Jurors' discussion of statutory requirement that certain truckers carry liability insurance —being a discussion of law that all were presumed to know—is neither misconduct nor justification for a new trial.

Keller v Dodds, 224-935; 277 NW 467

5100.34 Misdemeanor—penalty.

Atty. Gen. Opinion. See '34 AG Op 305

CHAPTER 252.2

TAXATION OF MOTOR VEHICLE CERTIFICATED CARRIERS

Atty. Gen. Opinion. See '34 AG Op 89

5103.01 Definitions.

Atty. Gen. Opinion. See '25-26 AG Op 192

Constitutionality of act. Chapters 252-A1 and 252-A2, C., '31, providing for the regulation and taxation of motor vehicle carriers held constitutional by the federal court.

Grolbert v Bd. of R. R. Com., 60 F 2d, 321

Permissible classification. The motor vehicle carrier taxation act is not clearly, plainly, and palpably arbitrary, unreasonable, and unlawfully discriminatory because it provides that those who shall pay the tax shall be those only who operate motor vehicles not upon fixed rails, and as common carriers of freight and passengers, over regular routes, on scheduled trips, and between fixed termini.

Iowa Motor v Board, 207-461; 221 NW 364; 75 ALR 1

Status—voluntary change. A "truck operator" within the meaning of Ch 252-C1, C., '35 [Ch 252.3, C., '39] (one not operating between fixed termini nor over a regular route), immediately becomes a "motor vehicle carrier" (one operating between fixed termini, or over a regular route), and governed accordingly, whenever he so changes the course of his business as to take on the status of the latter and leave off the status of the former.

State v Lischer Bros., 223-588; 272 NW 604

Truck operator between nonfixed termini—change in business—effect. A duly issued permit under chapter 252-C1, C., '31, authorizing a "truck operator" to transport freight for compensation between nonfixed termini and over nonregular routes ceases to afford protection to the holder of the permit whenever his business concentrates upon a regular route and two fixed termini within the meaning of chapters 252-A1 and 252-A2, C., '31. Evidence held to show such concentration.

State v Mercer, 215-611; 246 NW 406

Common carrier—acts constituting. The contention of a trucker that he is a private carrier solely of a particular line of goods and exclusively for the members of an unincorporated association cannot be sustained when he operates his truck (1) between fixed termini, (2) over a regular route, (3) at stated, regular times, and (4) for compensation—with the purpose of offering his services to all persons within said territory having need for the same particular line of carriage, the so-called "association" being a mere subterfuge to hide his real character as a carrier.

State v Rosenstein, 217-985; 252 NW 251

"Operation between fixed termini"—scope. A trucker cannot be said to operate "between fixed termini nor over a regular route" when, during the time he is not engaged in his regular business of carrying the government mail, he does odd jobs of trucking and of manual labor, and, at irregular times and over irregular routes carries goods from a wholesale center to merchants of his own and of nearby towns, provided he can arrange his time so to do.

State v Thompson, 217-994; 252 NW 256

Injunction—burden of proof. In an action by the board of railroad commissioners to enjoin a trucker from operating upon the public highway "between fixed termini or over a regular route" without the legally required certificate and payment of the statutory tax, the board has the burden of proof to establish that the defendant is so operating. Evidence held insufficient.

State v Ooten, 215-543; 243 NW 329

5103.02 Compensation tax.

Atty. Gen. Opinion. See AG Op Jan. 11, '40

Applicability of statutes. A truck operator who, under a permit duly granted under chapter 252-C1, C., '31 [Ch 252.3, C., '39], and by means of his motor truck, transports for hire freight from place to place, at irregular times, and on no schedule of service, and only when he receives unsolicited and acceptable calls to do such transporting, is not operating "between fixed termini or over a regular route" within the meaning of chapters 252-A1, or 252-A2, C., '31 [Chs 252.1, 252.2, C., '39], and, therefore, is under no obligation to obtain a

certificate of necessity or convenience or to pay the tax required by said chapters.

State v Transfer, 213-1269; 239 NW 125
State v Lischer, 215-607; 246 NW 264
State v Lischer, (NQR); 261 NW 634

Bond to pay taxes "incurred"—scope. A bond (1) reciting that the principal therein had been licensed as a motor carrier under named statutes of the state, and (2) conditioned to pay "the taxes and penalties incurred" under said statutes—a positive liability—embraces liability to pay taxes and penalties incurred before, as well as after, the date of said bond.

State v U. S. F. & G. Co., 221-880; 266 NW 501

5103.08 Sale of property.

Tax—nonliability of vehicle. An automobile truck purchased under an ordinary conditional sale contract and operated by a motor vehicle carrier as such under a certificate of authority issued by the board of railroad commissioners is not subject to levy for the payment of the statutory motor vehicle carrier tax under a tax warrant issued by the commissioners after the vendor had repossessed himself of said truck for default in payment of the purchase price.

Universal Credit v Mamminga, 214-1135; 243 NW 513

5103.12 Distribution of proceeds.

Atty. Gen. Opinions. See '34 AG Op 88; '36 AG Op 35

Special act—what is not. A legislative act which first makes a permissible classification of those who must pay the tax (one not arbitrary, unreasonable, and unlawfully discriminatory), and then provides that the resulting tax shall, inter alia, be used for the maintenance and repair of certain public highways, is not a "special law for road purposes", within the meaning of Art. III, §30, of the state constitution.

Iowa Motor v Board, 207-461; 221 NW 364; 75 ALR 1

CHAPTER 252.3

MOTOR VEHICLE TRUCK OPERATORS

Atty. Gen. Opinion. See '34 AG Op 88

5105.01 Definitions.

Applicability of statutes. A truck operator who, under a permit duly granted under chapter 252-C1, C., '31 [Ch 252.3, C., '39], and by means of his motor truck, transports for hire freight from place to place, at irregular times, and on no schedule of service, and only when he receives unsolicited and acceptable calls to do such transporting, is not operating "between fixed termini or over a regular route" within the meaning of chapters 252-A1, or 252-A2, C., '31 [Chs 252.1, 252.2, C., '39], and, therefore, is under no obligation to obtain a certificate of necessity or convenience or to pay the tax required by said chapters.

State v Transfer, 213-1269; 239 NW 125
State v Lischer, 215-607; 246 NW 264
State v Lischer, (NOR); 261 NW 634

"Operation between fixed termini." A trucker cannot be said to operate "between fixed termini, or over a regular route" when, during the time he is not engaged in his regular business of carrying the government mail, he does odd jobs of trucking and of manual labor, and at irregular times and over irregular routes carries goods from a wholesale center to merchants of his own and of nearby towns, provided he can arrange his time so to do.

State v Thompson, 217-994; 252 NW 256

Nonfixed termini — change in business — effect. A duly issued permit under chapter 252-C1, C., '31 [Ch 252.3, C., '39], authorizing a "truck operator" to transport freight for compensation between nonfixed termini and over nonregular routes ceases to afford protection to the holder of the permit whenever his business concentrates upon a regular route and two fixed termini within the meaning of chapters 252-A1 and 252-A2, C., '31 [Chs 252.1, 252.2, C., '39].

State v Mercer, 215-611; 246 NW 406

Status—voluntary change. A "truck operator" within the meaning of chapter 252-C1, C., '35 [Ch 252.3, C., '39] (one not operating between fixed termini nor over a regular route), immediately becomes a "motor vehicle carrier" (one operating between fixed termini, or over a regular route), and governed accordingly, whenever he so changes the course of his business as to take on the status of the latter and leave off the status of the former.

State v Lischer Bros., 223-588; 272 NW 604

"Public transportation"—insufficient proof. A deliveryman who, in a city and for compensation, makes deliveries of goods by motor vehicle truck, but only for merchants with whom he chooses to contract—who has never held himself out as a common carrier—is not engaged in the "public transportation" of freight within the meaning of this chapter.

State v Carlson, 217-854; 251 NW 160

Property damaged while in storage—liability. When motor vehicle carriers utilized the terminal facilities of a third party, who provided pickup and delivery service from the terminal, and had individual spaces rented to

each trucker for the storage of that trucker's shipments, it was held that control and possession of the shipments of goods was in the truck carriers during the storage period, and when a fire destroyed the terminal, the terminal owner was acting as agent for the truckers, who were liable to the owners of the property in transit for the losses occasioned by the fire.

Crouse v Cadwell, 226-1083; 285 NW 623

Motor freight terminal operator's liability to carrier. When motor carrier operators stored goods belonging to third parties in a motor freight terminal and were held liable when the goods were destroyed in a fire through no negligence on the part of the terminal operator, the carriers were not entitled to recoupment from the terminal operator who acted as their agent in storing the goods, in the absence of an agreement that he be liable for losses not caused by his own negligence.

Crouse v Cadwell, 226-1083; 285 NW 623

Injunction—burden of proof. In an action by the board of railroad commissioners to enjoin a trucker from operating upon the public highway "between fixed termini or over a regular route" without the legally required certificate and payment of the statutory tax, the board has the burden of proof to establish that the defendant is so operating. Evidence held insufficient.

State v Ooten, 215-543; 243 NW 329

Road construction—method of work. Evidence reviewed and held quite insufficient to establish a "rule" as to where trucks should be operated in the course of paving operations.

Hedberg v Lester, 222-1025; 270 NW 447

5105.02 Jurisdiction.

Discussion. See 15 ILR 379—Truck operator statute

Atty. Gen. Opinion. See '30 AG Op 285

5105.04 Powers.

Discussion. See 19 ILR 453—Truck classification

5105.06 Permit.

Applicability of statutes. A truck operator who, under a permit duly granted under chapter 252-C1, C., '31, [Ch 252.3, C., '39] and by means of his motor truck, transports for hire freight from place to place, at irregular times, and on no schedule of service, and only when he receives unsolicited and acceptable calls to do such transporting, is not operating "between fixed termini or over a regular route" within the meaning of chapters 252-A1, or 252-A2, C., '31, [Chs 252.1, 252.2, C., '39] and, therefore, is under no obligation to obtain a certificate of necessity or convenience or to pay the tax required by said chapters.

State v Blecha, 213-1269; 239 NW 125
State v Lischer, 215-607; 246 NW 264
State v Lischer, (NOR); 261 NW 634

Acting without permit—connivance at violation—effect. A shipper of goods will be deemed as participating in the doing of an illegal act when he enters into a contract with a motor vehicle freight operator for the transportation of freight over the highways of this state by said operator as an independent contractor and knows, at the time of so contracting, that said operator has no right to carry on his said business because of the failure of said operator (1) to obtain from the board of railroad commissioners the legally required official permit to carry on said business, and (2) to file with said board the legally required bond. It follows that said operator will not be deemed an independent contractor but simply the agent of said shipper.

Hough v Freight Service, 222-548; 269 NW 1

5105.09 Fee.

Atty. Gen. Opinion. See AG Op Nov. 6, '39

License fee as occupation tax. The permit fee required of a truck operator under chapter 252-C1, C., '31 [Ch 252.3, C., '39] constitutes an occupation or privilege tax.

Towns v City, 214-76; 241 NW 658
See Solberg v Davenport, 211-612; 232 NW 477

Municipal license of trucks—nonrepeal by state law. The legislature by the enactment of chapter 252-C1, C., '31 [Ch 252.3, C., '39], and thereby requiring of truck operators a privilege or occupation tax when not operating between fixed termini nor over a regular route, on any and all highways of the state, did not impliedly repeal that part of §5970, C., '31, which empowers cities and towns to license a truck operator whose business is limited to the municipality—there being no substantial conflict between said statutes.

Towns v City, 214-76; 241 NW 658

5105.13 Expenditure of funds.

Atty. Gen. Opinions. See '34 AG Op 88; '36 AG Op 35

5105.15 Insurance or bond.

New trial—trucker's statutory insurance requirement—jurors' discussion not misconduct. Jurors' discussion of statutory requirement that certain truckers carry liability insurance —being a discussion of law that all were presumed to know—is neither misconduct nor justification for a new trial.

Keller v Dodds, 224-935; 277 NW 467

Acting without permit—connivance at violation. A shipper of goods will be deemed as participating in the doing of an illegal act when he enters into a contract with a motor vehicle freight operator for the transportation of freight over the highways of this state by said operator as an independent contractor, and knows, at the time of so contracting, that said operator has no right to carry on his said business because of the failure of said operator (1) to obtain from the board of railroad commissioners the legally required official permit to carry on said business, and (2) to file with said board the legally required bond. It follows that said operator will not be deemed an independent contractor but simply the agent of said shipper.

Hough v Freight Service, 222-548; 269 NW 1

Injuries to livestock—sufficiency of evidence. Evidence that injury to cow was caused by negligence of alleged common carrier was insufficient to make a jury question when the injury was not discovered until three hours after the cow was delivered and there was no showing of any injury at the time the cow was unloaded.

Mountain v Albaugh, 227-1282; 290 NW 693

TITLE XIV

COUNTY AND TOWNSHIP GOVERNMENT

CHAPTER 253

BOARD OF SUPERVISORS

5106 Number of members.

Atty. Gen. Opinion. See '30 AG Op 140

5107 Number increased by vote.

Atty. Gen. Opinions. See '32 AG Op 271; '34 AG Op 690

5108 Number reduced by vote.

Atty. Gen. Opinions. See '32 AG Op 194; '34 AG Op 691; AG Op May 17, '39

5110 Election of new members.

Atty. Gen. Opinion. See '32 AG Op 194

5111 Supervisor districts.

Atty. Gen. Opinion. See '38 AG Op 777

5112 How formed.

Atty. Gen. Opinion. See '38 AG Op 777

5118 Meetings.

Atty. Gen. Opinion. See '38 AG Op 134

5119 Special sessions.

Atty. Gen. Opinions. See '34 AG Op 136; '38 AG Op 134

5120 Notice.

Atty. Gen. Opinion. See '38 AG Op 134

5121 Acts requiring majority.

Atty. Gen. Opinion. See '32 AG OP 132

Sale—contract without official action. Proof that a writing purporting to be a contract for the sale by the board of supervisors of county-owned land, signed by the purported purchaser and by one member of the board as "acting chairman", together with proof that the board never took any official action in regard to the said matter, is quite insufficient to show a valid and enforceable contract.

Smith v Standard Oil, 218-709; 255 NW 674

5122 Books to be kept.

Failure to record proceedings—effect.

State v Pierson, 204-837; 216 NW43

5123 Claims generally.

Atty. Gen. Opinion. See '30 AG Op 257

5124 Unliquidated claims.

Allowance of claims. See under §5130

Atty. Gen. Opinion. See '32 AG Op 158

"Unliquidated". An "unliquidated claim" is one the amount of which has not been ascertained and agreed upon by the parties, or has not been fixed by law.

State v Naumann, 213-418; 239 NW 93; 81 ALR 483

Action on warrants. The liability of a county on a warrant issued by it on its poor fund may be determined and established in an action at law against the county.

Council Bluffs Bk. v County, 216-1123; 250 NW 233

Claims—rescission of allowance—effect. The action of a board of supervisors in formally rescinding its former allowance of an unquestionably legal claim, long after the commencement of an action to compel the issuance of a warrant on the allowed claim, is futile.

Miller Tractor v Hope, 218-1235; 257 NW 312

County hospital claims—ministerial duty of supervisors. The act of the board of trustees of a county-owned public hospital in certifying to the correctness of claims arising out of their legal management and operation of the hospital is conclusive on the board of supervisors and leaves said latter board with no power or

duty except to direct the auditor to issue the necessary warrants.

Phinney v Montgomery, 218-1240; 257 NW 208

Accord and satisfaction. The allowance by the board of supervisors of a lump sum on a claim consisting of several unliquidated items, and the taking and cashing by claimant of a warrant for said allowed amount, constitute a final accord and satisfaction.

Smith v Cherokee Co., 219-475; 257 NW 788

Allowing unverified unliquidated claims—effect. Grounds for ousting a public official may not be predicated on the fact that he, apparently in perfectly good faith, allowed unliquidated but bona fide claims when such claims were not verified as provided by statute; at any rate, the state must clearly show that the claims were unliquidated.

State v Naumann, 213-418; 239 NW 93; 81 ALR 483

5125 Compensation of supervisors.

Atty. Gen. Opinions. See '28 AG Op 306; '32 AG Op 10, 197; 34 AG Op 136

Removal from office — grounds — mileage charge. Allegations that a public officer drew statutory mileage on account of official journeys when the travel (1) was without cost to himself, or (2) was by means of a conveyance owned and supplied by the public, do not state facts constituting grounds for removal from office. (See §1225-d3, C., '31 [§1225.03, C., '39])

State v Naumann, 213-418; 239 NW 93; 81 ALR 483

Conniving for unlawful mileage. Evidence in ouster proceedings relative to a charge that a member of the board of supervisors connived at so separating a continuous session of the board as to make one day appear as committee work, and thereby permit the drawing of unallowable mileage, reviewed and held the state had failed to carry its burden to show that the conduct of the member was willful.

State v Naumann, 213-418; 239 NW 93; 81 ALR 483

Good-faith but erroneous construction of statute. A good-faith construction by the members of the board of supervisors of the statute relative to allowable mileage, even tho erroneous, does not constitute grounds for ouster of such officers.

State v Naumann, 213-418; 239 NW 93; 81 ALR 483

CHAPTER 254

POWERS AND DUTIES OF BOARD OF SUPERVISORS

Atty. Gen. Opinions. See '36 AG Op 217; '38 AG Op 586

5128 Body corporate.

Discussion. See 10 ILB 16—Liability of counties

Atty. Gen. Opinion. See '28 AG Op 305

Vested interest. A county has no standing to question the constitutionality of a legislative act relative to its governmental powers.

Scott County v Johnson, 209-213; 222 NW 378

Tax statute—constitutionality—no challenge by public official. A county auditor or a board of supervisors as ministerial officers or public officials may not challenge the constitutionality nor competence of the legislature to pass a statute under which they act.

Hewitt & Sons v Keller, 223-1372; 275 NW 94

County supervisors—raising constitutionality of statutes not permitted. In an action in equity for mandamus to compel board of supervisors to remit taxes on capital stock of failed bank, held, board of supervisors could not raise issue of constitutionality of statute providing for such remission, either in that it contravened the state or the federal constitution, as counties and other municipal corporations are creatures of the legislature, existing by reason of statutes enacted within the power of the legislature, and the board may not question that power which brought it into existence and set the bounds of its capacities.

Brunner v Floyd County, 226-583; 284 NW 814

Equitable estoppel—against governmental agency. A county which accepts and for some 30 years retains the financial benefits arising from a particular action of its governing body, will not be permitted, as to said transaction, to question the legal authority of its governing body to act as it did act.

Plymouth County v Koehler, 221-1022; 267 NW 106

Equitable estoppel—when inapplicable to public. A county is not estopped to recover unlawful excess mileage paid a grand juror, even tho the payment was made under an ex parte order of court.

Park v Polk County, 220-120; 261 NW 508

Action on warrants. The liability of a county on a warrant issued by it on its poor fund may be determined and established in an action at law against the county.

Council Bl. Bk. v County, 216-1123; 250 NW 233

Negligence—unauthorized contract. A county is not liable for negligence in executing its duly granted governmental powers; a fortiori it is not liable for negligence in executing a wholly unauthorized contract. (See Vol. I, §4635)

Hilgers v County, 200-1318; 206 NW 660

Governmental function — political corporations not suable for torts. Counties and school districts, being political or quasi corporations not clothed with full corporate powers as are cities and towns, cannot be sued for negligence, and the question of the exercise of a governmental function is immaterial.

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

Statute violation—nonliability. Mandatory statutes requiring danger lights on road machinery and providing punishment for their violation do not create any liability on a county for negligent observance thereof.

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

Negligent operation of road maintainer—nonliability—demurrer. Neither a county, as a quasi corporation, nor its board of supervisors is liable for the negligence of its employee in operating after dark a road maintainer without lights on the left-hand side of a highway, and in an action by a motorist who sustained injuries on account of such negligence demurrers to the petition by the county and its board of supervisors were properly sustained.

Shirkey v Keokuk County, 225-1159; 275 NW 706; 281 NW 837

Motor vehicle fuel license — liability of county. A county becomes, within the scope and meaning of chapter 251-F1, Code, '35 [Ch 251.3, C., '39], a distributor of motor vehicle fuel when it imports the same from without the state solely for the purpose of operating its power maintainers and trucks in the construction and maintenance of its highways, and is under obligation to obtain a license as such distributor and to pay the state the statutory excise charge (without penalty) on such importations.

State v Woodbury County, 222-488; 269 NW 449

Governmental employees—personal liability for torts—no governmental immunity. A governmental employee committing a tortious act which causes injury to another in violation of a duty owed to the injured person, becomes, as an individual, personally liable in damages therefor. (Hibbs v School Dist., 218-841, overruled.)

Futter v Hout, 225-723; 281 NW 286

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA(NS) 4

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Doherty v Edwards, 226-249; 284 NW 159

Nonliability for negligence in constructing culvert. The statutory duty of a town to keep its streets free from nuisances is not interrupted or suspended during the time when the county under an arrangement with the town is engaged in constructing a culvert in a street which is a continuation of a county road outside the town; and the county is under no legal obligation to reimburse the town for any sum voluntarily paid by it in settlement of suits, jointly against the town and county, for damages consequent on persons driving into an unguarded excavation made by the county authorities while constructing the culvert.

Norwalk v County, 210-1262; 232 NW 682

Nonliability of highway engineer in damages. A county highway engineer is not liable in damages consequent on his act in making an excavation in a public highway of his county, for a proper and lawful purpose, and in leaving the work in a condition which becomes dangerous, even tho, by leaving the work in said condition, he creates a public nuisance for which he may be punished. (§4841, C., '31)

Swartzwelter v Utilities Corp., 216-1060; 250 NW 121

Highway improvement—malice immaterial in performance of legal act. Removal of trees from a highway by county authorities for improvement being a legal act, the question as to whether or not they were acting maliciously as alleged by an abutting property owner is immaterial.

Rabiner v Humboldt County, 224-1190; 278 NW 612; 116 ALR 89

Drains — assessments — nonliability of county. A county, as a body corporate, is not liable in damages consequent on the failure of the board of supervisors to levy an adequate assessment against a drainage district to pay the bonds of the district. It follows that the county treasurer and his surety, when sued by the county for damages consequent on the act of said treasurer in using county funds in paying said bonds, cannot be subrogated to any right of the bondholder to proceed against the county—because the bondholder has no such right.

Mitchell County v Odden, 219-793; 259 NW 774

Nonsuperiority over state. When the state, under a given condition of law and fact, is not entitled to a certain right, it necessarily follows that a county, under the same conditions, is not entitled to such right. So held under the preferential bank deposit law.

Leach v Bank, 205-987; 213 NW 528

5130 General powers.

Atty. Gen. Opinions. See '25-26 AG Op 181, 182, 188; '28 AG Op 109, 203, 304, 305, 348, 424, 442; '30 AG Op 317; '32 AG Op 42, 112, 132, 231; '34 AG Op 241, 306, 421, 592, 645, 713, 735, 747; '36 AG Op 252, 474, 521; '38 AG Op 2, 90, 181, 314, 328, 338, 714, 780; AG Op Jan. 17, '39; Jan. 27, '39; Feb. 9, '39; Feb. 20, '39; June 20, '39; June 29, '39; Sept. 13, '39; Oct. 9, '39; Nov. 1, '39; AG Op Feb. 2, '40

ANALYSIS

Employment of counsel. See under §5243
Indebtedness, limitation and computation. See under Art XI, §3
Nonliability for negligence. See under §5128
Presentation of claims. See under §5124

I POWERS IN GENERAL

When jurisdiction must appear. The statutory presumption that the proceedings of inferior tribunals, e. g., the county board of supervisors, are presumed to be regular, does not extend to the acquisition of jurisdiction of the board—this must be shown.

Davelaar v Marion County, 224-669; 277 NW 744

Limited power of individual member. A single member of a board of supervisors has no power to bind the board or to bind the county, unless specifically authorized by the board to act for the whole board, or unless an agreement made by him for the county is approved or ratified by the board.

Greusel v O'Brien County, 223-747; 273 NW 853

County supervisor-elect—death before qualifying—vacancy. The death of a duly elected member to the board of supervisors, before qualifying, creates a vacancy in that office, to be filled in the manner provided by §1152, subsec. 5, C., '35.

State v Best, 225-338; 280 NW 551

Nonsuperiority over state. When the state, under a given condition of law and fact, is not entitled to a certain right, it necessarily follows that a county, under the same conditions, is not entitled to such right. So held under the preferential bank deposit law.

Leach v Bank, 205-987; 213 NW 528

County supervisors—raising constitutionality of statutes not permitted. In an action in equity for mandamus to compel board of supervisors to remit taxes on capital stock of failed bank, held, board of supervisors could not raise issue of constitutionality of statute providing for such remission, either in that it contravened the state or the federal constitution, as counties and other municipal corporations are creatures of the legislature, existing by reason of statutes enacted within the power of the legislature, and the board may not question that power which brought it into existence and set the bounds of its capacities.

Brunner v Floyd County, 226-583; 284 NW 814

Tax statute—constitutionality—no challenge by public official. A county auditor or a board of supervisors as ministerial officers or public officials may not challenge the constitutional authority nor competence of the legislature to pass a statute under which they act.

Hewitt & Sons v Keller, 223-1372; 275 NW 94

County supervisors—duties imposed by law—effect. A statute requiring the board of supervisors to remit unpaid taxes on the capital stock of a bank which fails, imposes a positive duty on board of supervisors to comply with statute irrespective of any demand or notice, and the fact that the stockholders petitioned for a refund of taxes already paid, which is not contemplated by such statute, in addition to remission of unpaid taxes, does not excuse the failure of the board to remit such taxes as come within the purview of the statute, since the performance of this duty is imposed upon the board by law.

Brunner v Floyd County, 226-583; 284 NW 814

Official newspapers — number — nondiscretionary power of supervisors. Under statute providing that county board of supervisors "shall" select three official newspapers, and there were only three applicants, the board had no discretionary power, and petitioner-applicant was entitled to maintain mandamus action to compel the selection of his newspaper.

Bredt v Franklin County, 227-1230; 290 NW 669

County highway maintenance workman—no representative capacity. A county highway maintenance workman stands in no representative capacity for the employer-county when his duties are ministerial only and when he could possess no authority to act for nor bind the county as its representative, since board of supervisors and county engineer cannot delegate their powers and duties to maintain roads except as those duties are ministerial in character.

Schroyer v Jasper County, 224-1391; 279 NW 118

Drains—assessments—nonliability of county. A county, as a body corporate, is not

I POWERS IN GENERAL—concluded

liable in damages consequent on the failure of the board of supervisors to levy an adequate assessment against a drainage district to pay the bonds of the district. It follows that the county treasurer and his surety, when sued by the county for damages consequent on the act of said treasurer in using county funds in paying said bonds, cannot be subrogated to any right of the bondholder to proceed against the county—because the bondholder has no such right.

Mitchell County v Odden, 219-793; 259 NW 774

Employment of counsel to defend assessment. County supervisors in their statutory capacity as representatives of a drainage district had right to employ attorneys and issue drainage warrants to them for services to be rendered in the trial and appeal of an action brought by property owners to enjoin collection of assessments levied to meet cost of work done for the district, and fact that elected drainage trustees took over management of the district before services were fully performed in supreme court did not render void the warrant previously issued for such service.

Kilpatrick v Mills County, 227-721; 288 NW 871.

Malice immaterial in performance of legal act. Removal of trees from a highway by county authorities for improvement, being a legal act, the question as to whether or not they were acting maliciously as alleged by an abutting property owner is immaterial.

Rabiner v Humboldt County, 224-1190; 278 NW 612

Motives immaterial when following lawful procedure. The motives of public officials when proceeding according to law to submit the question of municipal ownership of a public utility are not fit subjects for judicial inquiry.

Interstate Co. v Forest City, 225-490; 281 NW 207

II ACCOUNTS AND CLAIMS

Claims—rescission of allowance—effect. The action of a board of supervisors in formally rescinding its former allowance of an unquestionably legal claim, long after the commencement of an action to compel the issuance of a warrant on the allowed claim, is futile.

Miller Tractor v Hope, 218-1235; 257 NW 312

Compromise of claims—power of board. The board of supervisors on a proper state of facts has power to compromise the amount due on judgments obtained by the county for support rendered an incompetent in a state hospital for the insane, and to agree, in consideration of the payment of the compromised sum, that a specific tract of land standing in the name of the incompetent and the proceeds and accumulations of said proceeds shall be exempt from all liability for the future support of said incompetent by the county in said hospital. So held where the land was encumbered (1) by judgment on mortgage foreclosure, (2) by a judgment other than those of the county, (3) by an outstanding tax sale certificate, and (4) by an apparently quite persuasive claim of both homestead rights, and ownership in the wife of said incompetent.

Plymouth County v Koehler, 221-1022; 267 NW 106

County old-age assistance board—expenses—how paid. The actual and necessary expenses incurred by members of the old-age assistance board of a county are payable by the county but solely from the state old-age pension fund, such expenses being an "expenditure" within the meaning of §5296-f34, C., '35 [§3828.039, C., '39].

Jones v Dunkelberg, 221-1031; 265 NW 157

Compensation—attorney appointed by juvenile court. The court by statute has power and authority to appoint attorneys to represent juvenile delinquents in municipal court, unable to employ counsel, and an obligation arises on the part of the county to pay a reasonable attorney fee, altho statute makes no provision therefor.

Ferguson v Pottawattamie Co., 224-516; 278 NW 223

III BUILDINGS AND MAINTENANCE

Lease for private use. The board of supervisors may not lease portions of the courthouse to private parties.

Hilgers v County, 200-1318; 206 NW 660

IV REAL ESTATE—PURCHASE AND SALE—SITES

Contract without official action. Proof that a writing purporting to be a contract for the sale by the board of supervisors of county-owned land, signed by the purported purchaser and by one member of the board as "acting chairman", together with proof that the board never took any official action in regard to the said matter, is quite insufficient to show a valid and enforceable contract.

Smith v Oil Co., 218-709; 255 NW 674

V GENERAL COUNTY MANAGEMENT

(a) IN GENERAL

Right to secure deposits. The officers of a savings bank which is a duly selected and acting depository of county funds under a statutory depository bond, may, in addition to the security afforded by said previously executed bond, validly transfer to the county, and the county through its fiscal officers may validly accept, notes and mortgages of the bank

as additional collateral security for said deposits.

Andrew v Bank, 203-1335; 214 NW 559

Agreements in re county deposits—right of taxpayer. The statutory discretion of the board of supervisors to enter into an agreement with legally reorganized and approved banks, with reference to the county's deposits in said banks, cannot be questioned by a taxpayer except on proof of fraud or arbitrary abuse of said discretion.

Pugh v Polk County, 220-794; 263 NW 315

Publishing supervisors' proceedings—homestead exemption—application numbers sufficient. Statute requiring publication of proceedings of board of supervisors is substantially complied with, insofar as the action taken on homestead exemption applications is concerned, by publishing the numbers of the applications as allowed or disallowed.

Choate Co. v Schade, 225-324; 280 NW 540

(b) OFFICERS APPOINTED AND REMOVED

Employment binding on new board. Inasmuch as the board of supervisors has statutory authority to employ a county engineer for a period as long as three years (§4644-c19, C., '31 [§4644.17, C., '39]), an employment of such engineer at the December meeting of the board for the ensuing calendar year is valid, even tho the personnel of the board changes in January following the meeting.

Hahn v Clayton County, 218-543; 255 NW 695

District court clerk—vacancy filled by board. The district court has neither exclusive nor concurrent authority with the board of supervisors to fill a vacancy in the office of clerk of the court (a county office) by appointment; the court's power is confined to the appointment of a temporary clerk until the board fills the vacancy as provided by law.

State v Larson, 224-509; 275 NW 566

Abolishing office of deputy. The board of supervisors, after approving the appointment and bond of a deputy county officer, and after the appointee has qualified and entered upon his duties, has no power to abolish the office of such deputy.

Kellogg v Story County, 218-224; 253 NW 915

(c) OFFICERS' AND EMPLOYEES' COMPENSATION

Employees—discretion to limit term of appointment. The board of supervisors, in appointing a janitor of the courthouse, cannot be said to abuse its discretion by limiting the appointment to a term of one year.

Sorenson v Andrews, 221-44; 264 NW 562

Salary—conclusive fixing of. The board of supervisors having once officially fixed the salary of a public office may not, later and during the term of office in question, reduce said salary.

Kellogg v Story County, 219-399; 257 NW 778

(d) OWNING AND OPERATING MOTOR VEHICLES

Road grader not a "car". A caterpillar road grader belonging to a county, and operated on the public highway, is not a "car" within the meaning of the statutory declaration that the owner of a "car" is liable for damages done by the car when it is operated with his consent.

Bateson v County, 213-718; 239 NW 803

Governmental function—negligent operation of road maintainer—nonliability—demurrer. Neither a county, as a quasi corporation, nor its board of supervisors is liable for the negligence of its employee in operating after dark a road maintainer without lights on the left-hand side of a highway, and in an action by a motorist who sustained injuries on account of such negligence demurrers to the petition by the county and its board of supervisors were properly sustained.

Shirkey v Keokuk County, 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

Governmental employees—personal liability for torts—no governmental immunity. A governmental employee committing a tortious act which causes injury to another in violation of a duty owed to the injured person becomes, as an individual, personally liable in damages therefor. (Hibbs v School Dist., 218 Iowa 841, overruled.)

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA(NS) 4

Futter v Hout, 225-723; 281 NW 286

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Doherty v Edwards, 226-249; 284 NW 159

Government nonliability for employee's tort—respondeat superior—exception. The exemption accorded counties and other governmental bodies and their officers from liability for torts growing out of the negligent acts of their agents or employees is a limitation or exception to the rule of respondeat superior and in no way affects the fundamental principle of torts that one who wrongfully inflicts injury upon another is individually liable to the injured person.

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA(NS) 4

Road grader — workmen's compensation — nonagricultural pursuit. A workman who is employed by a county as a member of the county highway department, and is paid by the county an hourly wage for driving a heavy tractor road grader in the construction and maintenance of county roads—for which work said grader was exclusively designed—is not,

as regards the county, the employer, deprived of the benefits of the workmen's compensation law because, when injured in the operation of said grader, he was, under the orders from the board of supervisors, engaged in the construction on a farm and for the benefit of the owner thereof, of a trench silo, such construction not being an engagement by said workman "in an agricultural pursuit or any operation immediately connected therewith" within the meaning of §1361, subsec. 5, C., '35.

Trullinger v Fremont County, 223-677; 273 NW 124

VI SCHOOL FUND

No annotations in this volume

VII RULES AND REGULATIONS

No annotations in this volume

5131 Contracts and bids required.

Atty. Gen. Opinions. See '28 AG Op 304; '32 AG Op 132; '38 AG Op 38, 731

Estimated quantities as basis for contract—variation with specifications not fatal. In awarding a contract to build an electric plant, the function of plans and estimated quantities is to permit a uniform comparison of bids, and the requirement of "unit prices" as a means of payment for variations from the estimated quantities, indicates their variable character, so certain variations between the plans and specifications will not result in a failure of competitive bidding invalidating a contract based thereon.

Interstate Co. v Forest City, 225-490; 281 NW 207

Systematic disregard of law by officer. The conduct of a member of the board of supervisors in systematically disregarding, or by subterfuges avoiding, the law which requires estimates by the county engineer and advertisement of public contracts for work and supplies evinces such "willfulness" as to render such acts ample ground for removal from office.

State v Garretson, 207-627; 223 NW 390

5133 Offices furnished.

Atty. Gen. Opinions. See '28 AG Op 307, 342; '38 AG Op 714; AG Op Jan. 24, '39, Feb. 9, '39; AG Op Sept. 13, '39

5134 Supplies.

Atty. Gen. Opinions. See '28 AG Op 307; '34 AG Op 551; '38 AG Op 338, 714; AG Op Feb. 7, '39

5136 Compromise authorized.

Atty. Gen. Opinion. See '32 AG Op 132

5140 Neglect of duty.

Public official personally liable for negligence. See under §§2, 5738

CHAPTER 255

COUNTY AUDITOR

5141 Duties.

Atty. Gen. Opinion. See '25-26 AG Op 181

Costs—persons acting officially. Costs should not be taxed against a county auditor in a matter in which he acts officially, in good faith, and on the advice of counsel.

Northwestern Bank v Van Roekel, 202-237; 207 NW 345

Paupers—notice to depart—invalidity. A notice to a nonresident poor person to depart from the county is a nullity unless officially authorized by the township trustees or board of supervisors. The mere fact that the members of the board individually discussed the matter in regular session and "told the chairman to sign the notice" does not constitute such official authorization.

Emmet County v Dally, 216-166; 248 NW 366

Warrant—mandamus—issuance of county warrant. Mandamus is the proper remedy to compel the county auditor to issue a warrant in payment of legal claims against the county.

Miller Tractor v Hope, 218-1235; 257 NW 312

Tax statute—constitutionality—no challenge by public official. A county auditor or a board of supervisors as ministerial officers or public officials may not challenge the constitutional authority nor competence of the legislature to pass a statute under which they act.

Hewitt & Sons v Keller, 223-1372; 275 NW 94

Redemption from tax sale—subsequent taxes—filing of receipts. The act of a tax-sale purchaser in personally delivering to the county auditor at the auditor's office, a duplicate tax receipt for subsequent accruing taxes, constitutes a legal filing in said office, even tho the auditor did not indorse any filing mark on the receipt, and even tho the auditor later returned said receipt to the said purchaser. (§7266, C., '31.)

Peterson v Barnett, 213-514; 239 NW 77

Correcting assessment of private banker. The county auditor may, on proper notice and hearing, and before a tax is paid, correct the erroneous action of the assessor in deducting the debts of a private banker from the value of the banker's taxable property. (§1321, S., '13.)

Mannings Bank v Armstrong, 204-512; 211 NW 485

5142 Issuance of warrants.

Action on warrants. The liability of a county on a warrant issued by it on its poor

fund may be determined and established in an action at law against the county.

Council Bl. Bk. v County, 216-1123; 250 NW 233

Duty to issue warrants. The county auditor is under duty to issue and to continue to issue during the calendar year, on the proper fund or funds, warrants in payment of all claims allowed by the board of supervisors on said fund or funds so long as the total of said warrants does not exceed the collectible and available revenues in said fund or funds for said year.

Miller Tractor v Hope, 218-1235; 257 NW 312

Equitable set-off against insolvent county treasurer — unliquidated demand — pleading. Where an insolvent county treasurer brought mandamus action to secure salary warrant, and another suit was pending against the treasurer and his surety wherein county sought to recover for shortage in treasurer's office, the fact that county's claim was unliquidated would not prevent pleading the same as an equitable set-off, in view of the fact that the treasurer was insolvent.

Briley v Board, 227-55; 287 NW 242

Issuance of treasurer's salary warrant—equitable relief. In mandamus suit by county treasurer to obtain warrant for salary, defendant's answer alleging, in effect, that treasurer owed county money for which a right of set-off existed, that treasurer was insolvent, and that he was not the head of a family and had not offered to do equity, raised issue as to treasurer's right to equitable relief.

Briley v Board, 227-55; 287 NW 242

5143 Issuance of warrants without audit.

Atty. Gen. Opinions. See '38 AG Op 577; AG Op Feb. 27, '40

5146 Form of warrants.

Atty. Gen. Opinion. See '36 AG Op 521

5149 Collection of moneys.

Liability for funds. See under §1059

5151 Financial report.

Atty. Gen. Opinions. See '25-26 AG Op 208; '38 AG Op 166

5155 Fees to be collected.

Atty. Gen. Opinions. See '25-26 AG Op 153, 241; AG Op Sept. 12, '39

CHAPTER 256

COUNTY TREASURER

5156 Duties.

Liability for funds. See under §1059

Atty. Gen. Opinions. See '25-26 AG Op 176; '38 AG Op 354; AG Op Aug. 1, '39

Illegal handling of public funds—election of remedies. The fact that a city institutes an action against its treasurer to recover its public funds is not an election of remedies such as will preclude the city from maintaining an action against a county treasurer to recover its funds illegally paid to the city treasurer.

State v Hanson, 210-773; 231 NW 428

Using public funds for private use. The acts of a county treasurer in wrongfully and repeatedly taking and using, for his own private purposes, public funds in his possession, ipso facto constitutes "willful misconduct and maladministration in office", notwithstanding the fact (1) that, prior to the commencement of an action to remove him from office, he returns, to the public treasury, the amount of his peculations, and (2) that his bondsmen are liable for his wrongdoing; a priori is this true when he also knowingly connives at and permits like conduct by his official employee.

State v Smith, 219-5; 257 NW 181

Right to secure deposits. The officers of a savings bank which is a duly selected and acting depository of county funds under a statutory depository bond may, in addition to the security afforded by said previously executed bond, validly transfer to the county, and the county through its fiscal officers may validly accept, notes and mortgages of the bank as additional collateral security for said deposits.

Andrew v Bank, 203-1335; 214 NW 559

Liability on official bonds—estoppel—waiver. A county treasurer breaches his official bond by using county funds in paying drainage district bonds, and the county cannot be deemed estopped to insist on said breach, or be held to have waived said breach, because of the fact that the treasurer acted with the knowledge and consent of, or in obedience to the express direction of the board of supervisors.

Mitchell County v Odden, 219-793; 259 NW 774

Drainage levies as ordinary taxes—treasurer as drainage district officer. A county treasurer is not an ex officio officer of a drainage district, so individuals paying drainage levies to him are classed as ordinary taxpayers, and as such cannot be compelled to pay such taxes twice.

Western Assn. v Barrett, 223-932; 274 NW 55

Treasurer—statutory duty—possession and control of county funds. Under the Iowa

statutes the county treasurer is the only person who has the possession and control of the money of the county.

U. S. v Brechtel, 90 F 2d, 516

5157 Official seal.

Atty. Gen. Opinion. See '38 AG Op 431

5158 Warrants—indorsement.

Atty. Gen. Opinion. See '32 AG Op 232

5162 Warrants partially paid.

Atty. Gen. Opinion. See '32 AG Op 232

5165 Funds—separate account.

Treasurer—statutory duty—possession and control of county funds. Under the Iowa statutes the county treasurer is the only person who has the possession and control of the money of the county.

U. S. v Brechtel, 90 F 2d, 516

5167 Payment to state treasurer.

Atty. Gen. Opinions. See '25-26 AG Op 220; '34 AG Op 95

5169 Unclaimed money.

Atty. Gen. Opinion. See '25-26 AG Op 177

REPLACEMENT OF LOSSES

5169.01 Losses.

Atty. Gen. Opinions. See '30 AG Op 86; '34 AG Op 100

5169.10 Limitation.

Atty. Gen. Opinions. See '30 AG Op 86; '34 AG Op 100

CHAPTER 257

COUNTY RECORDER

5171 General duties.

Atty. Gen. Opinions. See '28 AG Op 218; '38 AG Op 129

Mandamus. A mortgage (1) on chattels on certain described real estate and (2) on all crops "sown, planted, raised, growing, or grown" on said real estate for two specified years following the execution of said instrument, being an instrument which "relates to real estate", is recordable as a real estate mortgage, and such recording may be enforced by mandamus.

Weyrauch v Johnson, 201-1197; 208 NW 706

Reservation of homestead right—evidence. Where a form book used for the recordation of warranty deeds in the office of the recorder of deeds contained a printed relinquishment by a spouse of "dower and homestead", the fact that in a certain instance the word "homestead" has been erased furnishes no evidence that the grantors had orally reserved a homestead right in the conveyed property.

Clark v Chapman, 213-737; 239 NW 797

5173 Military discharge.

Atty. Gen. Opinion. See '36 AG Op 424

5175 Free copies.

Atty. Gen. Opinion. See '34 AG Op 161

5177 Fees.

Atty. Gen. Opinions. See '25-26 AG Op 98; '32 AG Op 176, 225; '34 AG Op 57, 98, 588; AG Op May 24, '39, Aug. 25, '39, Sept. 12, '39, May 3, '40

CHAPTER 258

COUNTY ATTORNEY

5179 Qualifications.

Atty. Gen. Opinion. See '34 AG Op 511

5180 Duties.

Atty. Gen. Opinions. See '28 AG Op 342, 442; '34 AG Op 53, 86; '36 AG Op 521; '38 AG Op 50, 203, 586, 621, 827; AG Op Jan. 6, '39, March 2, '39, May 2, '39, May 4, '40

School board—employment of county attorney. School boards are under no mandatory duty to secure the services of the county attorney in litigation affecting the corporate affairs of the school districts, even tho the statute does require such officers to give legal advice to such boards.

Rural Dist. v Daly, 201-286; 207 NW 124

Powers—reinstatement of action. A county attorney who, in his official capacity, brings an action in behalf of the state, and later, by amendment, changes said action to a personal action by himself and others, may not, after he ceases to be such officer, reinstate said action as one on behalf of the state. Nor may the court reinstate said action as an official action in the name of said ex-county attorney. Especially is this true when the official county attorney objects to such procedure.

State v Power Co., 214-1109; 243 NW 149

Improper presence of county attorney before grand jury. The presence of the county attorney before the grand jury during its investigation of certain charges of criminality, when he is confessedly disqualified from so appearing, necessitates the quashing of all indictments returned by said jury as a result of said investigation.

Maley v Dist. Court, 221-732; 266 NW 815

5180.1 Absence of county attorney—substitute—compensation.

Atty. Gen. Opinion. See '32 AG Op 14

5180.2 Substitute—notice before appointment.

Atty. Gen. Opinion. See '32 AG Op 14

5180.3 County attorney—prohibitions—disqualified assistants.

Improper appearance before grand jury. An assistant county attorney (in this instance a special prosecutor) by accepting from a private person compensation for services rendered and to be rendered before the grand jury, in its investigation of certain pending charges of criminality, thereby ipso facto disqualifies himself henceforth from being present before said jury during said investigation. And his further presence before said jury during said investigation, in disregard of said disqualification, mandatorily necessitates the quashing, on proper motion, of all indictments returned by said jury on said investigation.

Maley v Dist. Court, 221-732; 266 NW 815

Private assistant. A privately employed attorney may assist the county attorney in the trial of a criminal action, even tho, at a time prior to his connection with such criminal action, such assisting attorney had been interested in a civil action which involved the matters and things involved in the criminal action, but had severed all connection with such civil action prior to any connection with the criminal action. It is a present interest which disqualifies.

State v Lounsbury, 178-555; 159 NW 998

CHAPTER 259

SHERIFF

5182 Authority to summon aid.

Atty. Gen. Opinion. See '36 AG Op 116

5184 Investigation on order of county attorney.

Atty. Gen. Opinions. See '28 AG Op 377; '32 AG Op 117, 254; '36 AG Op 521; AG Op April 26, '39

5187 Bailiffs—appointment—duties.

Peace officers' qualifications. The public has a right to have, as peace officers, men of character, sobriety, judgment, and discretion.

Edwards v Civil Service, 227-74; 287 NW 285

5191 Fees.

Atty. Gen. Opinions. See '25-26 AG Op 207, 456; '28 AG Op 36, 194, 270, 287; '30 AG Op 196; '32 AG Op 117, 188, 197; '34 AG Op 103, 296, 747; '36 AG Op 165, 372; '38 AG Op 87, 139, 207, 240, 326, 491, 558, 734; AG Op Feb. 9, '39, Feb. 20, '39, Oct. 12, '39; AG Op March 22, '40, May 3, '40

Recovery of payments—rule—exception as to officer. Where a sheriff not knowing that a statute has been repealed collects fees thereunder, he acts not under a mistake of fact but under a mistake of law, and such fees when paid to an officer of court, even tho voluntarily, are recoverable, this being an exception to the general rule that voluntary payments under a mistake of law are not recoverable.

Morgan v Jasper County, 223-1044; 274 NW 310; 111 ALR 634

5191.1 Costs—when payable by county.

Atty. Gen. Opinion. See '32 AG Op 230

Discontinuance—death of defendant—effect. The death of a defendant in a criminal prosecution, even after trial, conviction, judgment and appeal, but before the final determination of the latter proceeding, works a complete abatement of the proceeding ab initio.

State v Kriechbaum, 219-457; 258 NW 110; 96 ALR 1317

5192 Fees in addition to salary.

Atty. Gen. Opinions. See '28 AG Op 287; '36 AG Op 165; '38 AG Op 558, 734; AG Op May 3, '40

5194 Unadjudicated condemnation funds.

Delivery of funds to successor—effect. An outgoing sheriff and his bondsmen are absolved from all liability as to funds held by the sheriff in unadjudicated condemnation proceedings by delivering said funds to his successor in office.

Northwestern Mfg. Co. v Bassett, 205-999; 218 NW 932

5196 Record of funds.

Time deposit works conversion. A sheriff is guilty of instant conversion and a breach of his bond when he deposits in a bank funds properly coming into his hands in unadjudicated condemnation proceedings and takes from the bank a certificate of deposit which is payable at a definite time in the future, because he thereby fails so to "hold" said funds as commanded by statute as to enable himself to account for such funds whenever the proceedings are finally determined; and in such case the question of due care or negligence in making the deposit is quite immaterial.

Northwestern Mfg. Co. v Bassett, 205-999; 218 NW 932

5197 Liability of sheriff.

Atty. Gen. Opinion. See '38 AG Op 734

CHAPTER 259.1

CARE OF PRISONERS IN CERTAIN COUNTIES

Atty. Gen. Opinions. See '38 AG Op 207, 734

CHAPTER 260

CORONER

Atty. Gen. Opinions. See '28 AG Op 62; '36 AG Op 336; '38 AG Op 683

5200 Inquest—jury.

Atty. Gen. Opinions. See '32 AG Op 263; '36 AG Op 336; '38 AG Op 196, 218, 252; AG Op Jan. 17, '39

5201 Person killed in mine.

Atty. Gen. Opinions. See '38 AG Op 196, 218, 252

5205 Witnesses and jurors.

Evidence—before coroner's jury—best evidence rule. Oral proof of the testimony given by a witness at a coroner's inquest is not properly subject to the objection that it is not the best evidence.

State v Johnston, 221-933; 267 NW 698

5206 Shorthand reporter.

Transcript of coroner's investigation. In automobile damage action for injuries sustained by plaintiff while riding as a guest of defendant's deceased husband, where, on cross-examination of plaintiff, he was interrogated for impeachment purposes concerning statements made by him as witness in coroner's investigation, and admitted making certain statements, but claimed he was mistaken as to facts, and defendant offered such statements found in coroner's transcript as admission against interest, whereupon plaintiff offered the transcript in its entirety under statute providing the whole of a writing on the same subject may be inquired into, exclusion of transcript by the court was rightful since transcript contained statements made by plaintiff that were not on the same subject as were the answers offered by defendant, as well as being self-serving in character.

Jones v Krambeck, 228- ; 290 NW 56

5208 Verdict.

Atty. Gen. Opinion. See '38 AG Op 252

Certificate of death—admissibility. In an action to recover on a policy of insurance, a certificate of death of the insured, tho duly and legally executed by a coroner, is inadmissible as evidence insofar as said certificate assumes to state the cause of death.

Morton v Ins. Co., 218-846; 254 NW 325; 96 ALR 315

See Wilkinson v Life Assn., 203-960; 211 NW 238

5214 Reports.

Atty. Gen. Opinions. See '32 AG Op 263; '38 AG Op 196, 683

5214.1 Violent deaths.

Atty. Gen. Opinions. See '32 AG Op 263; '38 AG Op 196, 683

5218 Physician employed—fees.

Atty. Gen. Opinions. See '28 AG Op 197, 300, 305; '34 AG Op 119; '36 AG Op 336; '38 AG Op 196, 218

Blood test by coroner from another county.

State v Weltha, 228- ; 292 NW 148

Privileged communication—nonapplicable to physician performing autopsy. In an action to recover on an accident policy for the death of insured, where the court excluded testimony of a physician, who performed a post mortem examination but did not treat the patient before death, on the ground of privileged communication between patient and physician, held, court improperly excluded such testimony, since the privilege is purely statutory and for the purpose of encouraging patients to make full disclosure to the physician of all facts to enable him to prescribe and administer the proper treatment. A deceased body is not a patient and the relation of physician and patient ends when the death of the patient ensues.

Travelers Ins. v Bergeron, 25 F 2d, 680

CHAPTER 261

COMPENSATION OF COUNTY OFFICERS, DEPUTIES, AND CLERKS

Atty. Gen. Opinions. See '25-26 AG Op 83; '32 AG Op 162, 171; '36 AG Op 162; '38 AG Op 121

5220 County auditor.

Atty. Gen. Opinions. See '34 AG Op 662; '36 AG Op 161; AG Op Aug. 9, '39

5221 Deputy auditor and clerks.

Atty. Gen. Opinions. See '34 AG Op 115; '36 AG Op 161; AG Op Feb. 2, '40

5222 County treasurer.

Atty. Gen. Opinions. See AG Op Aug. 1, '39, Aug. 9, '39

Mandamus—issuance of treasurer's salary warrant. In mandamus suit by county treasurer to obtain warrant for salary, defendant's

answer alleging, in effect, that treasurer owed county money for which a right of set-off existed, that treasurer was insolvent, and that he was not the head of a family and had not offered to do equity, raised issue as to treasurer's right to equitable relief.

Briley v Board, 227-55; 287 NW 242

Set-off against insolvent county treasurer. Where an insolvent county treasurer brought mandamus action to secure salary warrant, and another suit was pending against the treasurer and his surety wherein county sought to recover for shortage in treasurer's office, the fact that county's claim was unliquidated would not prevent pleading the same as an equitable set-off, in view of the fact that the treasurer was insolvent.

Briley v Board, 227-55; 287 NW 242

5223 Deputy treasurer and clerks.

Atty. Gen. Opinions. See '36 AG Op 149; AG Op Feb. 2, '40

5225 Deputy recorder and clerks.

Atty. Gen. Opinions. See '38 AG Op 6; AG Op Feb. 2, '40

5226 Sheriff.

Atty. Gen. Opinions. See '25-26 AG Op 460; '30 AG Op 380; '36 AG Op 165; '38 AG Op 12, 240, 338; AG Op Jan. 27, '39

5227 Deputy sheriff.

Atty. Gen. Opinions. See '25-26 AG Op 300; '38 AG Op 12; AG Op Jan. 27, '39, Aug. 9, '39; AG Op Feb. 2, '40

5228 County attorney.

Atty. Gen. Opinions. See '25-26 AG Op 117, 176, 197, 207; '28 AG Op 45, 342; '30 AG Op 54, 192, 198; '36 AG Op 160, 359; '38 AG Op 55, 203, 780; AG Op Jan. 6, '39, Feb. 6, '39, Feb. 8, '39, April 14, 39, May 5, '39, Aug. 1, '39, Sept. 12, '39; AG Op Dec. 27, '39

Percentage on fines. A statute which provides that a county attorney shall receive "attorney fees allowed in criminal cases" may not be construed as meaning the same as a former statute which provided that he should receive a percentage on "all fines collected where he appears for the state, and not otherwise".

Gabrielson v County, 202-673; 210 NW 912

5229 Assistant county attorney.

Atty. Gen. Opinion. See '34 AG Op 53

5230 Clerk of district court.

Atty. Gen. Opinion. See '34 AG Op 283

Clerk as commissioner of insanity. The clerk of the district court may not, in addition to his regular salary, retain the fees collected by him for acting as a commissioner of insanity.

Baldwin v Stewart, 207-1135; 222 NW 348

5231 Deputy clerk.

Atty. Gen. Opinions. See '30 AG Op 205; AG Op Jan. 11, '39, June 26, '39; AG Op Feb. 2, '40

5232 County superintendent.

Atty. Gen. Opinions. See '32 AG Op 178; '34 AG Op 66; '36 AG Op 252; AG Op April 5, '39

Salary—conclusive fixing of. The board of supervisors having once officially fixed the salary of a public office (§5130, subsec. 10, C., '31) may not, later and during the term of office in question, reduce said salary.

Kellogg v Story County, 219-399; 257 NW 778

5233 Expenses of county superintendent.

Atty. Gen. Opinions. See '30 AG Op 148; '32 AG Op 91; '38 AG Op 13; AG Op April 5, '39

5234 Deputy county superintendent.

Atty. Gen. Opinion. See '34 AG Op 296

5236 Dual county seats.

Atty. Gen. Opinions. See '30 AG Op 205; '38 AG Op 6; AG Op June 26, '39

5237 Coroner—fees.

Atty. Gen. Opinions. See '28 AG Op 197; '32 AG Op 132, 162, 263; '38 AG Op 138, 218, 683; AG Op Jan. 17, '39

CHAPTER 262

DEPUTY OFFICERS, ASSISTANTS, AND CLERKS

Atty. Gen. Opinion. See '38 AG Op 714

5238 Appointment.

Atty. Gen. Opinions. See '28 AG Op 58, 209, 274, 342; '30 AG Op 379; '32 AG Op 1, 162, 222; '34 AG Op 53, 65, 100, 115, 445; '36 AG Op 149; '38 AG Op 208, 714; AG Op Jan. 10, '39; AG Op Feb. 2, 6, '40

Nepotism—approval of appointment—effect. The appointment by a county superintendent of his wife as deputy superintendent cannot be legally questioned when the appointment was legally approved by the board of supervisors.

Kellogg v County, 218-224; 253 NW 915

Appointment—approval — want of — effect. The failure of the board of supervisors to approve, by formal resolution, the appointment of a deputy county officer is inconsequential when it appears that the deputy duly qualified, that the board approved his bond, and that he thereafter acted as such deputy.

Kellogg v County, 218-224; 253 NW 915

Peace officers' qualifications. The public has a right to have, as peace officers, men of character, sobriety, judgment, and discretion.

Edwards v Civil Service, 227-74; 287 NW 285

5239 Certificate of appointment.

Atty. Gen. Opinions. See '28 AG Op 58; '32 AG Op 1; '34 AG Op 445; '38 AG Op 714; AG Op Feb. 2, '40

Failure to file certificate—effect. The appointment of a deputy county officer is not invalidated by the failure of the appointing officer to issue and file with the auditor a formal certificate of appointment when the deputy, after approval by the board, duly qualified and acted as such deputy.

Kellogg v County, 218-224; 253 NW 915

5240 Revocation of appointment.

Atty. Gen. Opinions. See '28 AG Op 246; '34 AG Op 445; AG Op Feb. 2, '40

Abolishing office of deputy. The board of supervisors, after approving the appointment and bond of a deputy county officer, and after the appointee has qualified and entered upon his duties, has no power to abolish the office of such deputy.

Kellogg v County, 218-224; 253 NW 915

5241 Qualifications.

Atty. Gen. Opinions. See '32 AG Op 282; '36 AG Op 149; AG Op Feb. 6, '40

5242 Powers and duties.

Atty. Gen. Opinions. See '30 AG Op 84; '32 AG Op 252; '34 AG Op 672; '36 AG Op 149; '38 AG Op 714; AG Op Feb. 6, '40

5243 Temporary assistance for county attorney.

Atty. Gen. Opinions. See '34 AG Op 651; '36 AG Op 383; '38 AG Op 50

Disqualification of attorney—improper appearance before grand jury—quashing indictments. An assistant county attorney (in this instance a special prosecutor) by accepting from a private person compensation for services rendered and to be rendered before the grand jury, in its investigation of certain pending charges of criminality, thereby ipso facto disqualifies himself henceforth from being present before said jury during said investigation. And his further presence before said jury during said investigation, in disregard of said disqualification, mandatorily necessitates the quashing, on proper motion, of all indictments returned by said jury on said investigation.

Maley v Dist. Court, 221-732; 266 NW 815

Presence of assistant county attorney. The presence of a duly appointed assistant county attorney in the grand jury room while the question of indictment was being considered did not render the indictment defective.

State v Coleman, 226-968; 285 NW 269

CHAPTER 263

COLLECTION AND ACCOUNTING OF FEES

5245 Fees belong to county.

Atty. Gen. Opinions. See '28 AG Op 252; '38 AG Op 208, 558, 734; AG Op Jan. 10, '39, Jan. 24, '39, Sept. 13, '39

Clerk as commissioner of insanity. The clerk of the district court may not, in addition to his regular salary, retain the fees collected by him for acting as a commissioner of insanity.

Baldwin v Stewart, 207-1135; 222 NW 348

5247 Quarterly reports and payments.

Atty. Gen. Opinions. See '28 AG Op 252; '30 AG Op 191

CHAPTER 264

GENERAL DUTIES OF COUNTY OFFICERS

5256 Money for sectarian purposes.

Atty. Gen. Opinions. See '25-26 AG Op 59, 417; '28 AG Op 104, 146, 174, 286, 410; '34 AG Op 680; '36 AG Op 512, 629

5257 Violations.

Atty. Gen. Opinions. See '25-26 AG Op 59; '34 AG Op 680; '36 AG Op 512

5258 Expenditures confined to receipts.

Atty. Gen. Opinions. See '25-26 AG Op 67, 85, 136, 200, 221, 373; '28 AG Op 187, 247, 359; '30 AG Op 74, 253, 292; '32 AG Op 237, 252; '34 AG Op 59, 92, 300, 679; '36 AG Op 230, 532; '38 AG Op 77, AG Op Feb. 8, '39

Excessive expenditures—effect. The validity of obligations incurred by a county, at a time during a calendar year when the collectible and available revenue in the proper fund or funds for said year is sufficient to pay said obligations, is not affected by the subsequent attempt of the county to incur further obligations which, when added to the former obligations, would exceed said collectible and available revenues.

Miller Tractor v Hope, 218-1235; 257 NW 312

Duty to issue warrants. The county auditor is under duty to issue and to continue to issue, during the calendar year, on the proper fund or funds, warrants in payment of all claims allowed by the board of supervisors on said fund or funds so long as the total of said warrants does not exceed the collectible and avail-

able revenues in said fund or funds for said year.

Miller Tractor v Hope, 218-1235; 257 NW 312

Misuse of funds — estoppel — waiver. A county treasurer breaches his official bond by using county funds in paying drainage district bonds, and the county cannot be deemed estopped to insist on said breach, or be held to have waived said breach, because of the fact that the treasurer acted with the knowledge and consent of, or in obedience to the express direction of the board of supervisors.

Mitchell County v Odden, 219-793; 259 NW 774

5259 Exceptions.

Atty. Gen. Opinions. See '25-26 AG Op 67, 88, 136, 200, 221, 373; '28 AG Op 247, 359; '30 AG Op 74, 253; '32 AG Op 237; '34 AG Op 59, 92, 242, 300, 679; '36 AG Op 230, 278, 355, 532; '38 AG Op 21; AG Op Feb. 8, '39, Aug. 25, '39, Oct. 25, '39

Warrant on poor fund—liability. The liability of a county on a warrant properly drawn on the poor fund of the county is not limited to the funds in said fund.

Council Bl. Bk. v County, 216-1123; 250 NW 233

5260 Unallowable claims.

Atty. Gen. Opinions. See '34 AG Op 158; '38 AG Op 44, 112; AG Op Sept. 29, '39

CHAPTER 264.1.

COUNTY BUDGET

Atty. Gen. Opinions. See '36 AG Op 532; '38 AG Op 19, 21, 77

5260.01 Annual itemized estimates.

Atty. Gen. Opinion. See '32 AG Op 184

5260.02 Appropriation.

Misappropriation — recovery — estoppel. Where, during a series of years, public funds have been appropriated by a county to a farm bureau organization under the good faith but mistaken belief that a statute authorized such appropriations, and where said funds have been expended in furtherance of the agricultural activities of said bureau, an action to recover such funds on behalf of the county will not lie by a taxpayer who has at all times had actual knowledge of the making of such appropriations and of the use to which they were being put, and took no action to question them.

Blume v Crawford County, 217-545; 250 NW 733; 92 ALR 757

5260.03 Contingent fund.

Atty. Gen. Opinion. See '34 AG Op 302

5260.06 Supplemental appropriation.

Atty. Gen. Opinion. See '34 AG Op 302

5260.10 Expenditures exceeding appropriation.

Atty. Gen. Opinion. See '38 AG Op 77

CHAPTER 265

SUBMISSION OF QUESTIONS TO VOTERS

Atty. Gen. Opinion. See '36 AG Op 490

5261 Expenditures—when vote necessary.

Atty. Gen. Opinions. See '25-26 AG Op 216; '28 AG Op 187; '30 AG Op 181; '32 AG Op 52, 169; '34 AG Op 326; '38 AG Op 11, 164, 181, 841

5263 Questions submitted to voters.

Atty. Gen. Opinion. See '38 AG Op 841

5265 Manner of submitting questions.

Atty. Gen. Opinions. See '28 AG Op 418; '32 AG Op 271; '34 AG Op 125; '36 AG Op 490

5266 Voting of tax—when required.

Atty. Gen. Opinions. See '28 AG Op 319; '36 AG Op 490

5272 Board must submit questions.

Atty. Gen. Opinions. See '36 AG Op 490; '38 AG Op 841

Establishment of bridge—election—form of ballot. A petition for the submission of a proposition to the electors must substantially contain every matter required by the statute, in order that from the petition the ballot may be so framed that the entire proposition will be submitted to the electors.

O'Keefe v Hopp, 210-398; 228 NW 625

CHAPTER 266

COUNTY BONDS

Atty. Gen. Opinions. See '32 AG Op 269; AG Op March 8, '40

5275 Funding and refunding bonds.

Atty. Gen. Opinions. See '30 AG Op 353; '32 AG Op 23; '34 AG Op 639; AG Op March 8, '40

Exchanging bonds for valid indebtedness—effect. Even tho a county, because of a sudden drop in the value of its taxable property, may find itself indebted beyond the constitutional limit, yet it may fund or refund its valid outstanding indebtedness by an issue of bonds in exchange for such indebtedness. So held as to outstanding unpaid warrants on the poor fund.

Hibbs v Fenton, 218-553; 255 NW 688

5276 Refunding bridge bonds.

Atty. Gen. Opinions. See '25-26 AG Op 136; '30 AG Op 193

5277 Rate of interest—form of bond.

Unauthorized pledge. A pledge of "the faith and resources of the county" for the payment of a drainage bond, issued by the board of supervisors on behalf of a drainage district, is without force or effect because wholly unauthorized.

Mitchell County v Odden, 219-793; 259 NW 774

5278 Provisions applicable.

Atty. Gen. Opinion. See '32 AG Op 269

5279 Bonds—negotiation of—duties of treasurer.

Atty. Gen. Opinion. See '34 AG Op 640

Exchanging bonds for valid indebtedness—effect. Even tho a county, because of a sudden drop in the value of its taxable property, may find itself indebted beyond the constitutional limit, yet it may fund or refund its valid outstanding indebtedness by an issue of bonds in exchange for such indebtedness.

Hibbs v Fenton, 218-553; 255 NW 688

5283 Unconstitutional issue.

Nonapplicability of statute. The statute imposing personal liability on a member of the board of supervisors when voting for the issuance of bonds in excess of the constitutional limit has no application to the voting of bonds in exchange of valid outstanding indebtedness, even tho at the time of so voting the county was indebted beyond the said allowable limit.

Hibbs v Fenton, 218-553; 255 NW 688

5284 Tax for bonded indebtedness.

Atty. Gen. Opinion. See AG Op March 8, '40

5286 Bond fund—separate account.

Atty. Gen. Opinion. See AG Op June 2, '39

5289 Balance to general fund.

Atty. Gen. Opinions. See '28 AG Op 316; '30 AG Op 78

CHAPTER 269

COUNTY PUBLIC HOSPITALS

Atty. Gen. Opinions. See '25-26 AG Op 181; '28 AG Op 132, 210, 215; '30 AG Op 274; '34 AG Op 387; '38 AG Op 181

5353 Tax levy.

Atty. Gen. Opinions. See '28 AG Op 132, 210, 215; '30 AG Op 320; '38 AG Op 251

5354 Sale of bonds.

Atty. Gen. Opinion. See '32 AG Op 257

5358 County treasurer.

Atty. Gen. Opinions. See '28 AG Op 132; '30 AG Op 96, 320; '32 AG Op 103, 201; '34 AG Op 387

County hospital claims—ministerial duty of supervisors. The act of the board of trustees of a county-owned public hospital in certifying to the correctness of claims arising out of their legal management and operation of the hospital is conclusive on the board of supervisors and leaves said latter board with no power or duty except to direct the auditor to issue the necessary warrants.

Phinney v Montgomery, 218-1240; 257 NW 208

5359 Powers and duties.

Atty. Gen. Opinions. See '28 AG Op 132, 210; '32 AG Op 257; '34 AG Op 387; '38 AG Op 321; AG Op Feb. 24, '39

5360 Optional powers and duties.

Atty. Gen. Opinions. See '30 AG Op 274; '38 AG Op 321

5361 Pecuniary interest prohibited.

Atty. Gen. Opinion. See '34 AG Op 357

5362 Hospital benefits—terms.

Atty. Gen. Opinions. See '28 AG Op 215; '32 AG Op 257; '38 AG Op 251

5364 Discrimination.

Atty. Gen. Opinions. See '30 AG Op 250; '38 AG Op 321

5367 County wards in public or private hospitals—levy.

Atty. Gen. Opinion. See '28 AG Op 215

5368 Occupancy of county wards.

Atty. Gen. Opinions. See '28 AG Op 210, 215

CHAPTER 274

OFFICIAL NEWSPAPERS

Atty. Gen. Opinions. See '34 AG Op 76, 437; '38 AG Op 448

5397 Time of selection.

Atty. Gen. Opinions. See '34 AG Op 283, 437; '38 AG Op 448

Number—nondiscretionary power of supervisors—mandamus. Under statute providing that county board of supervisors "shall" select three official newspapers, and there were only three applicants, the board had no discretionary power, and petitioner-applicant was entitled to maintain mandamus action to compel the selection of his newspaper.

Bredt v Franklin County, 227-1230; 290 NW 669

Mandamus—proprietor as proper party to compel selection. The rule is now well established that the proprietor of a newspaper has such interest in the selection of official newspapers that he can maintain an action of mandamus in his own name to compel the selection by the county supervisors.

Bredt v Franklin County, 227-1230; 290 NW 669

5398 Source of selection.

Atty. Gen. Opinions. See '34 AG Op 76, 437; '38 AG Op 448; AG Op Jan. 5, '39, June 20, '39

5399 Number.

Atty. Gen. Opinions. See '34 AG Op 283, 437; '38 AG Op 448

Number—nondiscretionary power of supervisors. Under statute providing that county board of supervisors "shall" select three official newspapers, and there were only three applicants, the board had no discretionary power, and petitioner-applicant was entitled to maintain mandamus action to compel the selection of his newspaper.

Bredt v Franklin County, 227-1230; 290 NW 669

5400 Application—contest.

Atty. Gen. Opinion. See '34 AG Op 437

Form and sufficiency of application for appointment. Under statute requiring that application shall be made to county supervisors for appointment as an official newspaper, an application which avers the qualifications of the newspaper in the words of the statute is sufficient. The application need not be in any particular form, and any written application by the publisher which apprises the board of the desire of the newspaper to be selected is sufficient to require the board to take cognizance of it.

Bredt v Franklin County, 227-1230; 290 NW 669

Mandamus—speedy and adequate remedy—jurisdiction. Mandamus to compel county supervisors to select petitioner's newspaper as one of three official newspapers was a proper procedure where petitioner was one of three applicants and had no plain, speedy, and adequate remedy at law, since there was no contest in the selection from which an appeal would lie under §5406, C., '39.

Bredt v Franklin County, 227-1230; 290 NW 669

Mandamus—proprietor as proper party to compel selection. The rule is now well established that the proprietor of a newspaper has such interest in the selection of official newspapers that he can maintain an action of mandamus in his own name to compel the selection by the county supervisors.

Bredt v Franklin County, 227-1230; 290 NW 669

5401 Contest—verified statements.

Atty. Gen. Opinion. See '34 AG Op 437

Sealed envelopes for subscription list. The depositing with the county auditor of a sealed pasteboard box of cards containing the names of the subscribers of a newspaper which is sought to be selected as a county official newspaper is a sufficient compliance with the statute.

Bloomfield Messenger v Democrat, 201-196; 205 NW 345

Who are subscribers. Two publishers who in good faith consolidate their newspaper plants and subscription lists into one establishment and one subscription list, and issue their respective newspapers separately and mail them to each subscriber on the combined list, without objection by the subscribers, may each, in a contest for selection as county official newspapers, appropriate to himself and against other contestants the entire list of subscribers appearing on the combined list.

Bloomfield Messenger v Democrat, 201-196; 205 NW 345

"Bona fide yearly subscribers" defined. On the question whether a newspaper is entitled to be selected as an "official newspaper" of the county for a certain year, the following persons cannot be deemed "bona fide yearly subscribers", tho the newspaper is being sent to and received by them, in the county, viz:

1. Those whose subscriptions have expired prior to the year in question.
2. Those who have not subscribed for the newspaper for several years prior to the year in question.
3. Those who have never subscribed for the newspaper.

Van der Burg v Bailey, 209-991; 229 NW 253

5402.1 Subscribers—how determined.

"General circulation"—general test. A "newspaper of general circulation" is determined not by the number of its subscribers, but by the diversity of its subscribers, and is such newspaper if it contains news, tho of limited amount, of a general nature, even tho it makes a specialty of news of a particular kind.

Burak v Ditson, 209-926; 229 NW 227; 68 ALR 538

Official newspapers—"bona fide yearly subscribers" defined. On the question whether a newspaper is entitled to be selected as an "official newspaper" of the county for a certain year, the following persons cannot be deemed "bona fide yearly subscribers," tho the newspaper is being sent to and received by them in the county, viz.:

1. Those whose subscriptions have expired prior to the year in question.
2. Those who have not subscribed for the newspaper for several years prior to the year in question.
3. Those who have never subscribed for the newspaper.

Van der Burg v Bailey, 209-991; 229 NW 253

Official newspapers—division of compensation. A newspaper which is entitled to be selected as an official newspaper for a county may agree with a newspaper which is not entitled to be so selected for a division of the compensation for official publications, and in such case both newspapers will be designated as official publications, but for one compensation only.

Van der Burg v Bailey, 209-991; 229 NW 253

5404 Fraudulent lists.

Insufficient showing. No inference of fraud is necessarily deducible in a contest for selection of county official newspapers because a contestant fails to indicate on his filed list of subscribers the times when the various subscriptions expire.

Bloomfield Messenger v Democrat, 201-196; 205 NW 345

Nonwillful subscription list. A publisher who makes application to have his newspaper selected as a county official newspaper is not deprived of standing in the contest because of the nonwillful insertion in his list of subscribers of names of persons who are not bona fide subscribers.

Bloomfield Messenger v Democrat, 201-196; 205 NW 345

5406 Appeal.

Mandamus—speedy and adequate remedy—jurisdiction. Mandamus to compel county supervisors to select petitioner's newspaper as one of three official newspapers was a proper procedure where petitioner was one of three applicants and had no plain, speedy, and adequate remedy at law, since there was no contest in the selection from which an appeal would lie under §5406, C., '39.

Bredt v Franklin County, 227-1230; 290 NW 669

Unallowable service of notice. Notice of appeal from the decision of the board of supervisors in selecting official newspapers must be served on the applicant whose selection appellant desires to contest. Service on the attorneys who appeared for said applicant in the hearing before the board is a nullity.

Van der Burg v Bailey, 207-797; 223 NW 515

5410 Division of compensation.

Atty. Gen. Opinion. See '38 AG Op 34

Permissible division. A newspaper which is entitled to be selected as an official newspaper for a county may agree with a newspaper which is not entitled to be so selected, for a division of the compensation for official publications, and in such case both newspapers will be designated as official publications but for one compensation only.

Van der Burg v Bailey, 209-991; 229 NW 253

5411 What published.

Atty. Gen. Opinions. See '25-26 AG Op 394; '32 AG Op 261; '34 AG Op 437; '38 AG Op 413, 448, 472, 731

Officers—publishing supervisors' proceedings—homestead exemption—application numbers sufficient. Statute requiring publication of proceedings of the board of supervisors is substantially complied with, insofar as the action taken on homestead exemption applications is concerned, by publishing the numbers of the applications as allowed or disallowed.

Choate Co. v Schade, 225-324; 280 NW 540

5412.1 Supervisors' proceedings—each payee listed—publication.

Atty. Gen. Opinions. See '38 AG Op 448, 472; AG Op Aug. 25, '39

CHAPTER 275

BOUNTIES ON WILD ANIMALS

Atty. Gen. Opinions. See '25-26 AG Op 343; '38 AG Op 104; AG Op Jan. 27, '39

CHAPTER 276

DOGS AND LICENSING THEREOF

Atty. Gen. Opinions. See '25-26 AG Op 320; '34 AG Op 589

5420 Annual license.

Atty. Gen. Opinions. See '25-26 AG Op 320; '34 AG Op 589

5421 "Owner" defined.

"Owner" defined. A person who "keeps or harbors" a dog is an "owner", whether the subject matter is the taxation of the dog or damages done by the dog.

Bigelow v Saylor, 209-294; 228 NW 279

5422 Application by owner.

Atty. Gen. Opinion. See '34 AG Op 154

5434 Assessors to list dogs—fees.

Atty. Gen. Opinion. See '34 AG Op 154

5435 Delinquency.

Atty. Gen. Opinion. See '32 AG Op 244

5441 Entry of tax.

Atty. Gen. Opinion. See '34 AG Op 589

5446 Taxation of dogs—municipal license.

Atty. Gen. Opinion. See '34 AG Op 72

5448 Right and duty to kill unlicensed dog.

Limitation. The statutory authority to kill a dog, when such dog is not wearing a collar with license tag attached, does not embrace the right to invade the premises and residence of the owner of the dog, in order to effect such killing.

Mendenhall v Struck, 207-1094; 224 NW 95

Absence of hunter's license—effect. On the issue whether a defendant had a legal right to kill an unlicensed dog, the fact that the defendant possessed no hunter's license is quite immaterial.

Mendenhall v Struck, 207-1094; 224 NW 95

5449 Right to kill licensed dog.

"Worrying animal" defined. Evidence that a dog barked at and ran after a horse, even tho for only a short time, and that the reaction of the horse indicated that he was frightened, may present a jury question on the issue whether the dog was "worrying" the animal.

Luick v Sondrol, 200-728; 205 NW 331

5450 Liability for damages.

Optional remedies. See under §5452, Vol I

Vicious character. In an action at common law for damages caused by a dog, the vicious character of the dog is an indispensable element. Not so when the action is based on the statute.

Luick v Sondrol, 200-728; 205 NW 331

Common-law and statutory liability distinguished. Principle reaffirmed that, while one who harbors a dog may be liable at common law, statutory liability rests only on the owner.

Luick v Sondrol, 200-728; 205 NW 331

Personal injury by dog—"owner" defined. A person who "keeps or harbors" a dog is an "owner", whether the subject matter is the taxation of the dog or damages done by the dog.

Bigelow v Saylor, 209-294; 228 NW 279

Confining jury to evidence. Instructions should expressly or in effect confine the jury to the evidence. When the sole charge against a dog was that he was worrying an animal, it is error to instruct that the dog had a right to be on the highway "if he behaved properly."

Luick v Sondrol, 200-728; 205 NW 331

CHAPTER 277

DOMESTIC ANIMAL FUND

Atty. Gen. Opinions. See '28 AG Op 306; '32 AG Op 147, 283; '34 AG Op 72, 589

5452 Claims.

Atty. Gen. Opinions. See '28 AG Op 253, 281, 288, 306; '32 AG Op 13, 283; '34 AG Op 72, 75; AG Op Jan. 25, '39

5454 Allowance of claims.

Atty. Gen. Opinion. See '32 AG Op 13

5457 Transfer of funds.

Atty. Gen. Opinions. See '25-26 AG Op 320; '34 AG Op 589

CHAPTER 278

RELOCATION OF COUNTY SEATS

Atty. Gen. Opinion. See '32 AG Op 147

CHAPTER 280

LAND SURVEYS

5482 County surveyor—appointment and duties.

Atty. Gen. Opinion. See '38 AG Op 318

5483 Field notes of original survey.

Federal survey conclusive. A section corner established by a government survey is conclusive.

Fair v Ida County, 204-1046; 216 NW 952

CHAPTER 281

JAILS

5497 How used.

Atty. Gen. Opinions. See '30 AG Op 327; '36 AG Op 411

5499 Minors separately confined.

Atty. Gen. Opinion. See '28 AG Op 142

5501 Keeper's duty.

Atty. Gen. Opinions. See '36 AG Op 411; AG Op Nov. 1, '39

5505 Ex officio inspectors.

Atty. Gen. Opinion. See '28 AG Op 235

5506 Visitation.

Atty. Gen. Opinion. See '28 AG Op 235

5507 Report.

Atty. Gen. Opinion. See '28 AG Op 235

5508 Right to inspect.

Atty. Gen. Opinion. See '28 AG Op 235

5509 Officers examined.

Atty. Gen. Opinion. See '28 AG Op 235

5511 Expenses.

Atty. Gen. Opinions. See '36 AG Op 411; '38 AG Op 491, 734; AG Op Jan. 23, '39, Feb. 20, '39

5513 Labor on public works.

Atty. Gen. Opinion. See '28 AG Op 427

CHAPTER 282.1

BENEFITED WATER DISTRICTS

5526.01 Petition.

Water district 1/3 larger than petition—not "approximate". A proposal to establish a benefited water district, almost one-third larger than that petitioned for, is not a substantial compliance with a statute that requires that the petition shall state the "approximate" district to be served.

Fiesel v Bennett, 225-98; 280 NW 482

Amendment to petition not signed by original petitioners—invalidity. A statute, requiring the signatures of 25 percent of the property owners to establish a benefited water district, is not complied with where the original petition describing the district was so signed, and an amendment adding new territory was subscribed by 25 percent of the owners of the added territory, but the signers of the original petition did not subscribe to the enlarged district.

Fiesel v Bennett, 225-98; 280 NW 482

Amendment not complying with statute. The requisite statutory statements in the original petition for a benefited water district as to (1) the need of the water supply, (2) the approximate district to be served, (3) the approximate number of families in the district, (4) the source of supply, and (5) the type of service, will not serve to cover a subsequent amendment adding about 30 percent more territory and in which such statements were omitted.

Fiesel v Bennett, 225-98; 280 NW 482

5526.14 Bids for construction.

Public improvements—estimated quantities as basis for contract—variation with specifications not fatal. In awarding a contract, the function of plans and estimated quantities is to permit a uniform comparison of bids, and the requirement of "unit prices", as a means of payment for variations from the estimated quantities, indicates their variable character, so certain variations between the plans and specifications will not result in a failure of competitive bidding invalidating a contract based thereon.

Interstate Co. v Forest City, 225-490; 281 NW 207

CHAPTER 283

TOWNSHIPS AND TOWNSHIP OFFICERS

DIVISION, BOUNDARIES, AND CHANGE OF NAMES

5527 Division authorized.

Workmen's compensation act—township not employer. A civil township is not an "employer," within the meaning of the workmen's compensation act, such township being but an unincorporated district. It necessarily follows that a township road superintendent is not an "employee," within the meaning of said act.

Hop v Brink, 205-74; 217 NW 551

5529 Boundaries conterminous with city.

Atty. Gen. Opinion. See '25-26 AG Op 166

5531 Divisions where city included.

Atty. Gen. Opinion. See '28 AG Op 208

Division of township—effect. The division of a township does not have the effect of dividing an existing school district.

Christensen v Board, 201-794; 208 NW 291

Board of supervisors—division of township—mandatory duty. The board of supervisors has no discretion to refuse to divide a township which contains a city of 1,500, upon the proper presentation of the required statutory petition.

Christensen v Board, 201-794; 208 NW 291

5534 Division—effect.

Mandatory duty. The board of supervisors has no discretion to refuse to divide a township which contains a city of 1,500, upon the proper presentation of the required statutory petition. (§5531, C., '24.)

Christensen v Board, 201-794; 208 NW 291

5542 Petition dismissed.

Atty. Gen. Opinions. See '28 AG Op 382; '34 AG Op 72

TRUSTEES

5543 Trustees—duties—meetings.

Atty. Gen. Opinions. See '28 AG Op 208, 382

De facto trustees. The authority of de facto township trustees may not be questioned in a collateral proceeding.

Bremer County v Schroeder, 200-1285; 206 NW 303

Fences—right to divide not limited by property owner's notice. Where a property owner served notice on township trustees that adjoining owners had refused to maintain their share of division line fences, and the adjoining owners claimed no legal division of such fences had ever been made and asked that a division be made, trustees had authority under the statute to make a legal division and were not limited by the notice given by the complaining property owner.

Morrison v Kipping, 227-1146; 290 NW 59

5544 County attorney as counsel.

Atty. Gen. Opinions. See '32 AG Op 14; AG Op July 31, '39

5545 Employment of counsel.

Atty. Gen. Opinions. See '32 AG Op 14; AG Op Nov. 1, '39

CLERK

5546 Clerk to keep record.

Paupers—notice to depart—invalidity. A notice to a nonresident poor person to depart from the county is a nullity unless officially authorized by the township trustees or board of supervisors. The mere fact that the members of the board individually discussed the matter in regular session and "told the chairman to sign the notice" does not constitute such official authorization.

Emmet County v Dally, 216-166; 248 NW 366

5547 Custody of funds.

Atty. Gen. Opinion. See '30 AG Op 247

OFFICES ABOLISHED

5553 Clerk and trustees abolished.

Atty. Gen. Opinion. See '28 AG Op 208

5554 Clerk and council to act.

Atty. Gen. Opinion. See '28 AG Op 208

CEMETERIES

5558 Cemeteries—condemnation.

City and town cemeteries. See under §5750, Vol I

Atty. Gen. Opinions. See '28 AG Op 378; AG Op April 10, '40

Conveyances in lieu of condemnation. A deed given to a railroad for a strip of land to be used as a right of way, and deeds of a like kind, given by the landowner when condemnation may be imminent if he refuses to convey, should be given such liberal construction as will effectuate the intention of the parties and fully protect the rights of the grantor and his assigns.

Keokuk County v Reinier, 227-499; 288 NW 676

5559 Gifts and donations.

Atty. Gen. Opinions. See '30 AG Op 76; '38 AG Op 814; AG Op April 11, '40

5560 Cemetery and park tax.

Atty. Gen. Opinions. See '28 AG Op 378; AG Op April 10, '40

5562 Tax for nonowned cemetery.

Atty. Gen. Opinions. See '30 AG Op 76; AG Op Sept. 1, '39, April 10, '40

5563 Scope of levy.

Atty. Gen. Opinions. See '30 AG Op 247; AG Op April 26, '39

5564 Cemetery funds—use.

Atty. Gen. Opinion. See '30 AG Op 232

5565 Joint boards.

Atty. Gen. Opinions. See '28 AG Op 378; '30 AG Op 233

5566 Regulations.

Atty. Gen. Opinion. See '30 AG Op 232

5570 Conveyance of lots.

Atty. Gen. Opinion. See AG Op June 7, '39

Conflicting purchases—priority. One who in good faith, purchases a vacant and wholly unoccupied lot in a township-controlled cemetery, and proceeds to bury his dead thereon, without actual or constructive notice that the lot had been previously sold to another, acquires rights superior to such prior purchaser. And this is true whether the deed to such prior purchaser was or was not recorded, because the statute fails to declare that the legal effect of recording such a deed is to impart constructive notice to subsequent purchasers.

King v Frame, 204-1074; 216 NW 630

FIRE EQUIPMENT

5570.1 Authorization.

Atty. Gen. Opinion. See AG Op Aug. 4, '39

5570.3 Election.

Atty. Gen. Opinion. See AG Op Sept. 29, '39

COMPENSATION

5571 Compensation of trustees.

Atty. Gen. Opinions. See '28 AG Op 280; '30 AG Op 103; '38 AG Op 473

5573 Compensation of assessor.

Atty. Gen. Opinions. See '25-26 AG Op 345; '30 AG Op 115; '32 AG Op 184; '38 AG Op 123, 461

CHAPTER 284

TOWNSHIP HALLS

Atty. Gen. Opinions. See '28 AG Op 98; '30 AG Op 257; '38 AG Op 498

CHAPTER 285

TOWNSHIP LICENSES

Atty. Gen. Opinion. See '34 AG Op 292

5582 License required.

Atty. Gen. Opinions. See '32 AG Op 130; '34 AG Op 111, 292; '36 AG Op 279; AG Op Jan. 17, '40

"Fun house"—concealed amusement device. The maintenance and operation of an amusement device may constitute actionable negligence as to one from whom the maintenance and operation were concealed, even though it might be otherwise as to one who had full knowledge.

Dahna v Fun House Co., 204-922; 216 NW 262

5582.1 "Roadhouse" defined.

Atty. Gen. Opinions. See '30 AG Op 157; '34 AG Op 111, 292; '36 AG Op 279; AG Op Jan. 30, '39, Feb. 9, '39; AG Op Jan. 17, '40

5583 Limitations and conditions.

Atty. Gen. Opinion. See AG Op Feb. 9, '39

5584 Record.

Atty. Gen. Opinion. See '32 AG Op 130

TITLE XV

CITY AND TOWN GOVERNMENT

CHAPTER 286

INCORPORATION

GENERAL PROVISIONS

5588 How effected.

Municipal utility—power to make profits. Municipal corporations owe their origin to, and derive their powers from, the legislature and can exercise only such powers as are granted in express words or fairly implied from, or incident to, the powers expressly granted, or such powers as are essential to purposes of corporation, and, under the Simmer law, permitting cities to pay for public utilities from future earnings, a municipal corporation has statutory power to make profits in excess of statutory demands.

Corning v Iowa-Nebr. Co., 225-1380; 282 NW 791

Tax statute—constitutionality—no challenge by public official. A county auditor or a board of supervisors as ministerial officers or public officials may not challenge the constitutionality nor competence of the legislature to pass a statute under which they act.

Hewitt & Sons v Keller, 223-1372; 275 NW 94

Raising constitutionality of statutes not permitted. In an action in equity for mandamus to compel board of supervisors to remit taxes on capital stock of failed bank, held, board of supervisors could not raise issue of constitutionality of statute providing for such remission, either in that it contravened the state or the federal constitution, as counties and other municipal corporations are creatures of the legislature, existing by reason of statutes enacted within the power of the legislature, and the board may not question that power which brought it into existence and set the bounds of its capacities.

Brunner v Floyd County, 226-583; 284 NW 814

CONSOLIDATION

5605 How effected.

Discussion. See 21 ILR 128—Annexation of territory

ANNEXATION OR SEVERANCE

5612 Platted territory.

Discussion. See 21 ILR 128—Annexation of territory

Atty. Gen. Opinion. See '25-26 AG Op 353

5613 Unplatted territory.

Enlargement of boundaries not a "taking" for public use.

Wertz v City, 201-947; 208 NW 511

Nonjudicial review. The extension of the limits of a municipal corporation in strict compliance with a constitutional statute is conclusive on the courts, even tho the statute is, to a degree, arbitrary.

State v Altoona, 201-730; 207 NW 789

5614 Annexation by resolution.

Constitutionality.

Wertz v City, 201-947; 208 NW 511

Enlargement of boundaries—constitutional objections. The enlargement of the boundaries of a municipality, under an enabling statute, without any notice to property owners within the territory annexed, is not violative of the "due-process" clause of the constitution on the theory that such property owners will assuredly be subject to increased taxation in the future.

Wertz v City, 201-947; 208 NW 511

5617 Severance of territory.

Material considerations. Territory is properly detached from a municipality when such territory is very severely isolated from the main body of the city, when the inhabitants on such territory never have derived, and probably never will derive, any material benefit from the municipal government, when the municipality does not need, and never will need, such territory for any legitimate purpose, and, finally, when the municipality has never made any substantial use of the territory except to levy taxes thereon.

McKeon v City, 206-556; 221 NW 351; 62 ALR 1006

Unallowable defense. The fact that territory has remained within a municipality for some half century without the institution of proceedings to have it detached, furnishes no basis, when such proceedings are instituted, for the defensive plea of laches, equitable estoppel or acquiescence.

McKeon v City, 206-556; 221 NW 351; 62 ALR 1006

Unallowable severance. Built-up, residential territory of a city will not be severed or detached therefrom when reasonably needed for sanitary purposes, and for police and fire protection and regulation, especially when such severance would reduce the area of the city by substantially one-half.

Creery v Okoboji, 217-1312; 253 NW 810

Method of trial. Proceedings for the severance and detaching of territory from a municipality, being now purely equitable, are triable de novo on appeal.

McKeon v City, 206-556; 221 NW 351; 62 ALR 1006

CHAPTER 287

ORGANIZATION AND OFFICERS

5623 Classes of cities — towns — villages.

Atty. Gen. Opinions. See '25-26 AG Op 59; '34 AG Op 111, 492, 520, 575; '38 AG Op 346; AG Op Sept. 14, '39

Tax statute—constitutionality—no challenge by public official. A county auditor or a board of supervisors as ministerial officers or public officials may not challenge the constitutionality nor competence of the legislature to pass a statute under which they act.

Hewitt & Sons v Keller, 223-1372; 275 NW 94

Raising constitutionality of statutes not permitted. In an action in equity for mandamus to compel board of supervisors to remit taxes on capital stock of failed bank, held, board of supervisors could not raise issue of constitutionality of statute providing for such remission, either in that it contravened the state or the federal constitution, as counties and other municipal corporations are creatures of the legislature, existing by reason of statutes enacted within the power of the legislature, and the board may not question that power which brought it into existence and set the bounds of its capacities.

Brunner v Floyd County, 226-583; 284 NW 814

5624 Change of class—loss of population.

Atty. Gen. Opinion. See '25-26 AG Op 266

5628 Residence in precinct—exception.

Discussion. See 4 ILB 3—Residence and domicile

Atty. Gen. Opinions. See '32 AG Op 227; '38 AG Op 748, 832; AG Op Apr. 23, '40

5629 Tie votes—contesting elections.

Place of filing contest and bond. In an election contest over a city office, the written statement of intention to contest and bond are properly filed with a county auditor. (§1024, C., '27.)

Jenkins v Furgeson, 212-640; 233 NW 741

Ballots—preservation—showing required—admissibility. Ballots must be "carefully preserved" after the election, and without such showing they are not admissible in evidence.

Steeves v New Market, 225-618; 281 NW 162

5631 Council — how composed — election.

Atty. Gen. Opinion. See '25-26 AG Op 161

5632 Officers elected at large.

Atty. Gen. Opinions. See '30 AG Op 299; '34 AG Op 94; '36 AG Op 351; '38 AG Op 319

5633 Officers appointed by council.

Atty. Gen. Opinions. See '30 AG Op 299; '38 AG Op 265

5633.1 Optional election or appointment.

Atty. Gen. Opinion. See '38 AG Op 319

5634 Officers appointed by the mayor.

Watchman—nonauthority to appoint. A mayor of a town has no authority, in the absence of an ordinance so empowering him, to contract for and appoint a night watchman for the municipality—a limitation on the authority of the mayor of which all persons must take notice.

Peterson v Panora, 222-1236; 271 NW 317

Peace officers' qualifications. The public has a right to have, as peace officers, men of character, sobriety, judgment, and discretion.

Edwards v Civil Service, 227-74; 287 NW 285

Peace officer as agent of public—nonliability of town for tort. A law-enforcing officer, whose office is created by statute and whose duties are prescribed therein, is an agent of the public in general and not the agent of the municipality which employs him, therefore the municipality is not liable in damages for his unlawful or negligent acts, and a petition alleging cause of action thereon against the municipality is demurrable.

Hagedorn v Schrum, 226-128; 283 NW 876

Tear gas gun—town not liable for negligent use. A city or town is not liable for the negligent acts of its peace officer employee merely because it furnished him with a tear gas gun.

Hagedorn v Schrum, 226-128; 283 NW 876

5636 Other officers.

Atty. Gen. Opinion. See '30 AG Op 299

5638 Removal of officers.

Atty. Gen. Opinion. See '38 AG Op 290

Civil service—right to abolish office. A city may in good faith—without fraud, sham, subterfuge or arbitrariness—abolish an office or official position which it has theretofore duly placed under municipal civil service, and peremptorily dismiss the occupant of such office.

Kern v Des Moines, 213-510; 239 NW 104

5639 Mayor—powers and duties.

Atty. Gen. Opinions. See '25-26 AG Op 113, 161, 489; '32 AG Op 36; '36 AG Op 68, 311

Council—mayor not member—no vote on contract. Where the four members of a city council vote two in favor of and two against employing a superintendent of the municipal power plant, under a statute requiring a majority vote of the members elected to the council, a contract employing such superintendent entered into after the mayor votes "yes" by virtue of a statute giving him the right to vote in case of a tie, is not a binding contract on the city, the mayor not being a member of the council.

Doonan v Winterset, 224-365; 275 NW 640

5640 Clerk—duties.

Atty. Gen. Opinions. See '25-26 AG Op 207; '30 AG Op 299

Burden of proof—public official's receipt of money as issue—plea of full accounting—not affirmative defense. A city seeking to recover from its clerk water rents, allegedly received and unaccounted for, must go forward with the evidence and prove by a preponderance thereof, the receipt of such funds by the clerk, the clerk's answer, denying receipt of such funds, and asserting that all money received was accounted for. Such answer is not an affirmative defense requiring defendant to prove payment, but raises the receipt of funds as a controverted fact or issue submissible to a jury.

Carroll v Arts, 225-487; 280 NW 869

5641 Warrants—how drawn.

Atty. Gen. Opinion. See '30 AG Op 299

5644 Treasurer—general duties.

Illegal handling of public funds—election of remedies. The fact that a city institutes an action against its treasurer to recover its public funds is not an election of remedies such as will preclude the city from maintaining an action against a county treasurer to recover its funds illegally paid to the city treasurer.

State v Hanson, 210-773; 231 NW 428

Public debt—recovery—partly void warrants. There can be no recovery on municipal warrants given in payment of part of a total purported indebtedness, part of which is void because in excess of constitutional debt limitation. In other words, recovery, insofar as permissible, must be had in some proceedings other than on said warrants.

Trepp v School Dist., 213-944; 240 NW 247

5654.1 Bond—amount.

Atty. Gen. Opinion. See '36 AG Op 172

5655 Expense of bond.

Atty. Gen. Opinion. See '36 AG Op 172

5656 Assessor—duties—deputies—returns.

Atty. Gen. Opinion. See '36 AG Op 68

5657 Marshal—duties.

Atty. Gen. Opinions. See '36 AG Op 537; AG Op Jan. 16, '39

Peace officers' qualifications. The public has a right to have, as peace officers, men of character, sobriety, judgment, and discretion.

Edwards v Civil Service, 227-74; 287 NW 285

Workmen's compensation act—city marshal—noncompensable injuries. The statutory provision (editorially classified as part of the workmen's compensation act, §1422, C., '31) which, inter alia, grants compensation to a city marshal when injured "while performing such official duties where there is peril or hazard peculiar to the work of his office", does not authorize compensation for an injury received by a marshal from the accidental discharge of his revolver as it dropped from his pocket while cleaning the floor of the city jail.

Roberts v City, 219-1136; 260 NW 57; 37 NCCA 807

Workmen's compensation act—officer (?) or employee (?) of city. A city marshal who is appointed by the mayor, and who qualifies by taking the usual oath, and by giving an official bond, all as required by a city ordinance, is a city officer and not a city employee within the scope of the workmen's compensation act.

Roberts v City, 219-1136; 260 NW 57

Tear gas gun—town not liable for negligent use. A city or town is not liable for the negligent acts of its peace officer employee merely because it furnished him with a tear gas gun.

Hagedorn v Schrum, 226-128; 283 NW 876

Peace officer as agent of public—nonliability of town for tort. A law-enforcing officer, whose office is created by statute and whose duties are prescribed therein, is an agent of the public in general and not the agent of the municipality which employs him, therefore the municipality is not liable in damages for his unlawful or negligent acts, and a petition alleging cause of action thereon against the municipality is demurrable.

Hagedorn v Schrum, 226-128; 283 NW 876

False imprisonment — justification — jury question. In an action for wrongful arrest

and false imprisonment, where defendants, Polk county sheriff and deputies acquired information that one "Gene or Eugene Drake, alias J. O. Drake", 40 to 45 years of age, weighing 150 pounds or more, with light hair and complexion, had committed a felony, and by telegraphic request to Omaha, Nebr., police caused arrest and imprisonment of plaintiff, Eugene Drake, 29 years old, weighing 240 pounds, with dark hair, the question as to whether defendants were justified in causing plaintiff's arrest was one for jury, hence court erred in sustaining motion for directed verdict.

Drake v Keeling, (NOR); 287 NW 596

Consent to extradition—no waiver of illegal arrest and detention. In an action for wrongful arrest and false imprisonment of plaintiff by Omaha, Nebr., police upon request of defendants, Polk county, Iowa, sheriff and deputies, where plaintiff waived extradition and was taken to Polk county, altho protesting he did not commit alleged offense, and where imprisonment continued in Iowa even after one of the defendant deputies stated that he was satisfied they had the wrong man, the waiver of extradition did not as a matter of law constitute a relinquishment of plaintiff's right to claim such arrest and detention to be unlawful.

Drake v Keeling, (NOR); 287 NW 596

5658 Policemen—powers and duties.

Operation of police patrol a governmental function. The operation of a plainly marked police patrol by a policeman in uniform, in conveying policemen in uniform from the police station to their patrol beats, all under orders from the chief of police, is a governmental function. It follows that the city is not liable for damages consequent on the negligent operation of the car by the driver.

Leckliter v City, 211-251; 233 NW 58; 38 NCCA 493

Peace officer as agent of public—nonliability of town for tort. A law-enforcing officer, whose office is created by statute and whose duties are prescribed therein, is an agent of the public in general and not the agent of the municipality which employs him, therefore the municipality is not liable in damages for his unlawful or negligent acts, and a petition alleging cause of action thereon against the municipality is demurrable.

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False imprisonment — justification — jury question. In an action for wrongful arrest and false imprisonment, where defendants, Polk county sheriff and deputies acquired information that one "Gene or Eugene Drake, alias J. O. Drake", 40 to 45 years of age, weighing 150 pounds or more, with light hair and complexion, had committed a felony, and by telegraphic request to Omaha, Nebr., police caused arrest and imprisonment of plaintiff, Eugene Drake, 29 years old, weighing 240 pounds, with dark hair, the question as to whether defendants were justified in causing plaintiff's arrest was one for jury, hence court erred in sustaining motion for directed verdict.

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Drake v Keeling, (NOR); 287 NW 596

5659 Police matrons.

Atty. Gen. Opinion. See '25-26 AG Op 147

5662 Executive and legislative functions.

Atty. Gen. Opinion. See '28 AG Op 349

5663 City and town councils.

Atty. Gen. Opinions. See '25-26 AG Op 384; '28 AG Op 262; '30 AG Op 48; '32 AG Op 119; '34 AG Op 94, 360; '36 AG Op 446

Rules—power to waive. A city or town council may waive a rule adopted by it for its own guidance, e. g., a rule that a member shall not incur an indebtedness against the city in excess of a named sum.

Carlson v City, 212-373; 236 NW 421

Employment of assistants. The superintendent of a department of municipal government under the so-called commission plan may himself validly employ authorized and necessary employees to carry on the work of his department (1) when an existing ordinance in effect grants such power, and (2) when an existing ordinance makes an appropriation of funds for such department and fixes the number of employees and the separate salaries thereof; and this is true notwithstanding an additional existing ordinance which provides, in effect, that all contracts shall be entered into or approved by the council as a whole, it being held that the latter ordinance is not a limitation on the former.

Loran v City, 201-543; 207 NW 529

Officers—limitation on power to contract—dealing at peril. One contracting with a municipal corporation is bound to take notice of

limitations on the power of the particular officers to make such contract.

Doonan v Winterset, 224-365; 275 NW 640

Contract—absence of funds—evidence. Record reviewed on the contention that a contract for grading was invalid because no funds existed from which to pay the contractor, and held the contention was untenable in view of the pleadings in the case and the fact findings of the court.

Carlson v City, 212-373; 236 NW 421

5664 Compensation of councilmen.

Atty. Gen. Opinions. See '25-26 AG Op 161, 207; '28 AG Op 405

5665 Fees of mayor.

Atty. Gen. Opinions. See '25-26 AG Op 252; '32 AG Op 255; '34 AG Op 363; '36 AG Op 311; '38 AG Op 342

5666 Fees of police judge.

Atty. Gen. Opinions. See '25-26 AG Op 252; '28 AG Op 445

5668 Fees of marshal and deputy.

Atty. Gen. Opinion. See '38 AG Op 342

Ordinance fixing monthly salaries excludes fees. A city ordinance, which, under section 5670, C., '31, fixes the salary of the city marshal at a stated sum per month, necessarily fixes said salary "in lieu of all other compensation" (such as fees) even tho said ordinance does not specifically so declare.

King v Eldora, 220-568; 261 NW 602

Salary deficiency—payment by overdraft on different fund. A town marshal employed at a sum fixed by ordinance, but paid each month only a part of that sum from the general fund, may not recover the difference between this sum and the rate fixed by ordinance when he had in fact been paid this difference by an overdraft on the waterworks fund. No supplemental contract of any validity may be inferred from the town so acting contrary to statute.

Clark v Goldfield, 224-1012; 278 NW 341

5669 Compensation of assessors and deputies.

Atty. Gen. Opinions. See '30 AG Op 56; '32 AG Op 136; '36 AG Op 166; '38 AG Op 123, 534, 829

Per diem compensation of assessor. When the compensation of an assessor is fixed on a per diem basis, the board of supervisors has power to fix the maximum time for which the per diem will be allowed.

Alderdice v County, 202-759; 210 NW 242

5670 Salaries in lieu of fees.

Atty. Gen. Opinions. See '25-26 AG Op 252, 431; '28 AG Op 445, '34 AG Op 78, 363; '36 AG Op 311; '38 AG Op 342

Ordinance fixing monthly salaries excludes fees. A city ordinance, which, under this section fixes the salary of the city marshal at a stated sum per month, necessarily fixes said salary "in lieu of all other compensation" (such as fees) even tho said ordinance does not specifically so declare.

King v Eldora, 220-568; 261 NW 602

Inequitable demand for legal salary. A city officer, who has not, for a series of months, received his full salary as legally fixed by ordinance, may not, in an equitable action, compel the city to pay him the deficiency when, during said time, he has properly received an unknown amount of fees belonging to the city (or county) but has illegally retained them as salary and makes no offer to return said fees.

King v Eldora, 220-568; 261 NW 602

5671 Compensation of other officers.

Atty. Gen. Opinions. See '25-26 AG Op 150, 252; '34 AG Op 78; '36 AG Op 68, 311; '38 AG Op 28, 342

Employment of assistants. The superintendent of a department of municipal government under the so-called commission plan may himself validly employ authorized and necessary employees to carry on the work of his department (1) when an existing ordinance in effect grants such power, and (2) when an existing ordinance makes an appropriation of funds for such department and fixes the number of employees and the separate salaries thereof; and this is true notwithstanding an additional existing ordinance which provides, in effect, that all contracts shall be entered into or approved by the council as a whole, it being held that the latter ordinance is not a limitation on the former.

Loran v City, 201-543; 207 NW 529

5672 Ineligibility—change of compensation.

Atty. Gen. Opinions. See '25-26 AG Op 150; '28 AG Op 398; '32 AG Op 110; '38 AG Op 28, 151, 265

Salary deficiency—payment by overdraft on different fund. A town marshal employed at a sum fixed by ordinance, but paid each month only a part of that sum from the general fund, may not recover the difference between this sum and the rate fixed by ordinance when he had in fact been paid this difference by an overdraft on the waterworks fund. No supplemental contract of any validity may be inferred from the town so acting contrary to statute.

Clark v Goldfield, 224-1012; 278 NW 341

5673 Interest in contracts.

Atty. Gen. Opinions. See '28 AG Op 399; '30 AG Op 196; '32 AG Op 198; '34 AG Op 323; '36 AG Op 660; '38 AG Op 185; AG Op May 9, '39

Nondisqualifying interest. The adoption of a resolution is not rendered nugatory because of the affirmative vote of a particular member, by the fact that, subsequent to the adoption, the private corporation of which the particular member of the board was an officer

entered into a contract with a third party for the carrying out of the purposes and objects of said resolution.

Security Bk. v Bagley, 202-701; 210 NW 947; 49 ALR 705

Interest of councilman. The mere fact that a member of a city council has leased cement mixers to a contractor under an agreement that the rental shall be paid out of the profits arising from the use of such machinery creates no such interest in the councilman in a contract between the city and said contractor as invalidates the contract, even tho the contract contemplated the use of said machinery in the execution of the contract.

Wayman v City, 204-675; 215 NW 655

Fatally delayed objection. A property owner may not, after a permanent sidewalk has been fully completed, enjoin the collection of a special assessment on his property on the ground that the sidewalk was constructed by an officer of the city.

Perrott v Balkema, 211-764; 234 NW 240

Officers—election bribery by third person—disqualifying effect. A candidate having been elected to office is not disqualified, merely because some third person may have given or offered a bribe to the voters for the purpose of securing the election of said candidate, unless the candidate actually participated in and approved thereof.

Van Der Zee v Means, 225-871; 281 NW 460

5677 Annual report.

Atty. Gen. Opinion. See '30 AG Op 262

5677.1 Enforcement of duty.

Atty. Gen. Opinion. See '30 AG Op 262

5679 Publication.

Atty. Gen. Opinion. See '30 AG Op 262

5683 League of municipalities.

Atty. Gen. Opinion. See '38 AG Op 33

CHAPTER 288

DEPARTMENT OF PUBLICITY, DEVELOPMENT, AND GENERAL WELFARE

Atty. Gen. Opinion. See '34 AG Op 664

CHAPTER 289

CIVIL SERVICE

Atty. Gen. Opinions. See '36 AG Op 537, 538; '38 AG Op 190, 313

5689 Appointment of commission.

Nature of commission. The civil service commission is a special tribunal of wide discretion within the jurisdictional field confided to it, and entitled to pursue a procedure unshackled by mere formality and technicality.

Substantial compliance with the statute governing it is all-sufficient.

Jenney v Com., 200-1042; 205 NW 958
Dickey v Com., 201-1135; 205 NW 961

5690 Qualifications.

Atty. Gen. Opinion. See AG Op Feb. 7, '39

5694 Applicability—exceptions.

Atty. Gen. Opinions. See '32 AG Op 202; '38 AG Op 112, 264, 290, 347

Illegal order—when nonparty may question. An appointee to a public position who has been deprived of said position by the action of the civil service commission may maintain in the district court certiorari to review said action, even tho he was not a party to the proceedings which resulted in said action.

Ash v Board, 215-908; 247 NW 264

Janitors not under civil service. A municipal employee who performs the ordinary and usual manual labor of a janitor must be classified as a "laborer whose occupation requires no special skill or fitness" and, therefore, not within the purview of the civil service law.

Ash v Board, 215-908; 247 NW 264

5695 Preference by service.

Atty. Gen. Opinions. See '36 AG Op 537; '38 AG Op 290, 728

Holding under former statute. A municipal civil service commission has no jurisdiction over the discharge of a municipal employee who has never taken the civil service examination provided by the commission.

Walling v Commission, 214-1156; 243 NW 178

Holding under former statute. The statutory provision in the civil service act to the effect that persons "who have rendered long and efficient service shall retain their positions without further examination" does not embrace any officer or appointee who is specifically excepted from the benefits of said act.

Ash v Board, 215-908; 247 NW 264

Holding under prior statute. On mandamus to compel a city to comply with an order of

the civil service commission, plaintiff must, of course, establish jurisdiction in said commission to enter said order. So held where the order was entered for the reinstatement of an employee who had never taken an examination and had no civil service rights.

Larson v Des Moines, 216-42; 247 NW 38

Employees—who may appeal. Principle reaffirmed that "long and efficient service" by a discharged city employee does not give said employee the right of appeal to the civil service commission.

Larson v Des Moines, 216-42; 247 NW 38

Civil service—sanitary inspector—nonsupervisory position. In certiorari action to annul decision of civil service commission ordering the reinstatement of a discharged sanitary inspector, evidence, that his general duty was to investigate and pass upon complaints with only occasional control over incidental employees, held to support and sustain findings below that such position was "nonsupervisory" under civil service statute allowing a preference to certain employees who had worked a certain length of time.

Des Moines v Board, 227-66; 287 NW 288

Civil service — preference by service — five year provision construed—taking examination not admission of necessity. A Sioux City policeman who served as a patrolman for about 14 years and was then promoted to rank of detective, in which capacity he served for about 4 years until demoted to former position of patrolman, came within purview of statute enacted during his service as a detective providing that any person having "* * * five years of service in a position or positions, shall retain his position and have full civil service rights * * *" without examination. Hence his demotion without cause was improper, and the fact that he had taken examinations for position of detective did not amount to an admission that an examination was necessary in his case.

Brown v Sturgeon, 227-136; 287 NW 834

Civil service — only original appointments probationary. Section 5696, C., '35, providing for examinations by civil service commission and making appointments probationary for a period of not to exceed six months, refers to original appointments and not to old appointees who have later qualified for their position by examination, in view of §5695, C., '35, concerning preference by service.

Des Moines v Board, 227-66; 287 NW 288

5696 Original entrance examination—appointments.

Soldiers preference law—not superseded by civil service law. Where a position occupied by a war veteran, such as license collector for a city, was treated by the council as a continuing one and not for a definite term, the fact that the city conducted a civil service examination (which the veteran failed to pass) will not permit the city to oust the veteran and appoint another without charges, notice, and hearing, as provided by the soldiers preference law.

Jones v Des Moines, 225-1342; 283 NW 924

No waiver by taking civil service examination. A war veteran holding a continuing position for a city does not waive his rights under the soldiers preference law, by taking a civil service examination as to the position he holds. He is secure in the position so long as he is capable and efficient altho he may fail in the examination.

Jones v Des Moines, 225-1342; 283 NW 924

Civil service — only original appointments probationary. This section providing for examinations by civil service commission and making appointments probationary for a period of not to exceed six months, refers to original appointments and not to old appointees who have later qualified for their position by examination, in view of §5695, C., '35, concerning preference by service.

Des Moines v Board, 227-66; 287 NW 288

5697 Preferences.

Atty. Gen. Opinions. See '36 AG Op 538; '38 AG Op 190

Soldiers preference law — purpose of act. The intent of the soldiers preference law is to make veterans secure in their positions in public service and to prevent their removal except for misconduct, and it is not intended for the purpose of retaining in office one who violates his duty.

Edwards v Civil Service, 227-74; 287 NW 285

Soldiers preference law—no waiver by taking civil service examination. A war veteran holding a continuing position for a city does not waive his rights under the soldiers preference law, by taking a civil service examination as to the position he holds. He is secure in the position so long as he is capable and efficient altho he may fail in the examination.

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Jones v Des Moines, 225-1342; 283 NW 924

5698 Names certified—temporary appointment.

Atty. Gen. Opinion. See '38 AG Op 290

5698.1 Seniority.

Atty. Gen. Opinions. See '38 AG Op 292, 728

Civil service commission—power to determine seniority rights. Where a sanitary inspector, upon being discharged by a city council, took an appeal to civil service commission, it had jurisdiction to determine his seniority rights.

Des Moines v Board, 227-66; 287 NW 288

5699 Chief of police and chief of fire department.

Atty. Gen. Opinion. See '38 AG Op 290

Peace officer as agent of public—nonliability of town for tort. A law-enforcing officer, whose office is created by statute and whose duties are prescribed therein, is an agent of the public in general and not the agent of the municipality which employs him, therefore the municipality is not liable in damages for his unlawful or negligent acts, and a petition alleging cause of action thereon against the municipality is demurrable.

Hagedorn v Schrum, 226-128; 283 NW 876

Tear gas gun—town not liable for negligent use. A city or town is not liable for the negligent acts of its peace officer employee merely because it furnished him with a tear gas gun.

Hagedorn v Schrum, 226-128; 283 NW 876

5700 Qualifications.

Peace officers' qualifications. The public has a right to have, as peace officers, men of character, sobriety, judgment, and discretion.

Edwards v Civil Service, 227-74; 287 NW 285

5701 Employees under civil service—qualifications.

Atty. Gen. Opinion. See '36 AG Op 537

5702 Removal, demotion, or suspension.

Civil service and soldiers preference laws—purpose. Civil service and soldiers preference laws were not intended as a cloak or shield to cover misconduct, incompetency, or failure to perform official duties, but to provide protection and safeguard against arbitrary action of superior officers in removing such employees for reasons other than those named in the statutes.

Anderson v Board, 227-1164; 290 NW 493

Discharge by commission—findings—reviewability. Supreme court will not review findings of civil service commission which are supported by competent evidence, where commission has jurisdiction and has otherwise acted legally; but, where evidence is entirely lacking to support the findings, the question becomes one of law and the action of the commission would not only be erroneous, but would amount to an illegality reviewable by certiorari.

Anderson v Board, 227-1164; 290 NW 493

Jurisdiction to discharge. Informal charges against a policeman of misconduct, recited in and recognized tentatively by the city council by resolution filed with the civil service commission, furnish jurisdictional basis for the commission, on proper notice to the accused of the charges, to proceed to a hearing and, in a proper case, to enter an order of discharge.

Dickey v Com., 201-1135; 205 NW 961

Discharge by commission—jurisdiction on appeal. The municipal civil service commission has jurisdiction, on appeal to it by an "indefinitely suspended" policeman as per order of the chief of police, (1) to receive formal written charges of misconduct on the part of appellant, (2) to hold legal hearing thereon, and, on proper proof, (3) to enter an order peremptorily discharging appellant; and such action is, in effect, legally accomplished by an order of the commission "dismissing the appeal and affirming the discharge" by the chief of police.

Fetters v Guth, 221-359; 265 NW 625

Discharge—burden of proof. Burden is on civil service commission to prove statutory grounds for removal of police officer who is entitled to soldiers preference.

Anderson v Board, 227-1164; 290 NW 493

Discharge—nonjurisdiction of civil service commission. A municipal civil service commission has no jurisdiction over the discharge of a municipal employee who has never taken the civil service examination provided by the commission.

Walling v Civil Service, 214-1156; 243 NW 178

Right to abolish office. A city may in good faith—without fraud, sham, subterfuge or arbitrariness—abolish an office or official position which it has theretofore duly placed under municipal civil service, and peremptorily dismiss the occupant of such office.

Kern v Council, 213-510; 239 NW 104

"Hearing and determination"—what constitutes. In certiorari to determine the legality of proceedings of civil service commission in removing a city employee, the commission's statutory duty to "hear and determine" is an essential ingredient of jurisdiction, and the quoted words refer to a judicial investigation and settlement of an issue of fact, which implies the weighing of testimony by both sides, from a consideration of which the relief

sought by the moving party is either granted or denied.

Sandahl v Des Moines, 227-1310; 290 NW 697

Fair and impartial hearing. A city employee who has been removed from office cannot be said to have had a fair and impartial hearing before the civil service commission under a record disclosing that the commission, after investigation, unsuccessfully sought to have the employee indicted, that charges against the employee were filed by the commission itself, which then proceeded to "hear and determine" the case, and that a member of the commission stated "We had Paul Sandahl convicted before he ever went before us for trial."

Sandahl v Des Moines, 227-1310; 290 NW 697

Review—scope and extent. A writ of certiorari presents only a question of law, and does not entitle the petitioner to have a review of the facts, unless the return reveals such an absence of facts as to present a law question of arbitrary action.

Dickey v Com., 201-1135; 205 NW 961

Discharge of policeman for nonpayment of debts—nonpermissibility. Civil service commission's removal of police officer, an honorably discharged soldier, on sole ground that he failed to pay his creditors, held arbitrary and void despite fact that police department suffered inconvenience because of creditor's demands for assistance in collection, where such officer made good-faith efforts to meet his obligations which accrued as result of sickness in family.

Anderson v Board, 227-1164; 290 NW 493

Policeman assaulting prisoner—discharge justifiable. In an action in certiorari brought under soldiers preference law to review a ruling of civil service commission sustaining the discharge of a police officer for violation of civil service rules, providing for the dismissal of a policeman who clubs or mistreats a prisoner merely because such prisoner makes derogatory remarks concerning the officer, held, evidence sufficient to sustain findings of the commission.

Edwards v Civil Service, 227-74; 287 NW 285

Peace officers' qualifications. The public has a right to have, as peace officers, men of character, sobriety, judgment, and discretion.

Edwards v Civil Service, 227-74; 287 NW 285

5703 Removal or discharge of subordinates.

Policeman assaulting prisoner—discharge justifiable. In an action in certiorari brought under soldiers preference law to review a ruling of civil service commission sustaining the discharge of a police officer for violation of civil service rules, providing for the dismissal of a policeman who clubs or mistreats a prisoner merely because such prisoner makes derogatory remarks concerning the officer, held, evidence sufficient to sustain findings of the commission.

Edwards v Civil Service, 227-74; 287 NW 285

5704 Appeal.

Jurisdiction of commission. The civil service commission has jurisdiction, on appeal by an officer of the police department from an order of discharge, to determine, on an appropriate record, (1) whether said officer is simply a special or temporary officer, and dischargeable at pleasure, or (2) whether said officer has acquired the civil service rights of a regular policeman, and, on the latter finding, to order his reinstatement—no charges being filed against him.

Jenney v Com., 200-1042; 205 NW 958

Nonjurisdiction of commission. A municipal civil service commission has no jurisdiction over the discharge of a municipal employee who has never taken the civil service examination provided by the commission.

Walling v Commission, 214-1156; 243 NW 178

Larson v Des Moines, 216-42; 247 NW 38

Employees—who may appeal. Principle reaffirmed that "long and efficient service" by a discharged city employee (under §5695, C., '31) does not give said employee the right of appeal to the civil service commission.

Larson v Des Moines, 216-42; 247 NW 38

Certiorari—competent sustaining evidence necessary—hearsay ignored on review. Where, in a proceeding before the civil service commission, incompetent hearsay evidence, in the form of minutes of testimony before a grand jury, is considered on the question of whether suspended police officers should be reinstated, the supreme court on review in certiorari must examine the record to ascertain if there is other competent evidence to support the commission's ruling.

Luke v Civil Service, 225-189; 279 NW 443

5711 Jurisdiction—attorney—decision.

Certiorari—civil service commission ruling—remedy. No appeal being allowed from a ruling of the civil service commission, and there being no other plain, speedy, and adequate remedy if the commission exceeded its proper jurisdiction, or otherwise acted illegally, a writ of certiorari will lie.

Luke v Civil Service, 225-189; 279 NW 443

Fair and impartial hearing. A city employee who has been removed from office cannot be said to have had a fair and impartial

hearing before the civil service commission under a record disclosing that the commission, after investigation, unsuccessfully sought to have the employee indicted, that charges against the employee were filed by the commission itself, which then proceeded to "hear and determine" the case, and that a member of the commission stated "We had Paul Sandahl convicted before he ever went before us for trial."

Sandahl v Des Moines, 227-1310; 290 NW 697

"Hearing and determination"—what constitutes. In certiorari to determine the legality of proceedings of civil service commission in removing a city employee, the commission's statutory duty to "hear and determine" is an essential ingredient of jurisdiction, and the quoted words refer to a judicial investigation and settlement of an issue of fact, which implies the weighing of testimony by both sides, from a consideration of which the relief sought by the moving party is either granted or denied.

Sandahl v Des Moines, 227-1310; 290 NW 697

Civil service commission findings—conclusiveness. The ruling of a civil service commission as to the discharge of a veteran under soldiers preference law, altho not conclusive, should not be lightly set aside, it being the general rule that where there is compliance in good faith with all requirements as to hearings, the courts will not usually interfere to direct or control the discretion of the commission.

Edwards v Civil Service, 227-74; 287 NW 285

Findings of fact—when reviewed. In certiorari action by city to annul decision of civil service commission, it is not the court's duty to review findings of fact if sustained by any competent and substantial evidence, unless such lower tribunal otherwise acted illegally and there is no other plain, speedy and adequate remedy at law. However, a lack of such evidence constitutes such illegality as would warrant a review of the findings below.

Des Moines v Board, 227-66; 287 NW 288

Certiorari to review veteran's discharge. Under soldiers preference law affording veterans the right of hearing and review by certiorari, in the event of discharge from public employment, the scope of the review is not, as in ordinary cases of certiorari, limited to evidence on question of jurisdiction or other illegality, but is enlarged to allow a review of all proceedings had before a civil service commission.

Edwards v Civil Service, 227-74; 287 NW 285

Policeman assaulting prisoner — discharge justifiable. In an action in certiorari brought under soldiers preference law to review a ruling of civil service commission sustaining the discharge of a police officer for violation of civil service rules, providing for the dismissal of a policeman who clubs or mistreats a prisoner merely because such prisoner makes derogatory remarks concerning the officer, held, evidence sufficient to sustain findings of the commission.

Edwards v Civil Service, 227-74; 287 NW 285

Civil service commission fixing penalty—record of employee considered. It is the right and duty of a commission or magistrate to take into consideration the record of a guilty person in fixing a penalty.

Edwards v Civil Service, 227-74; 287 NW 285

Jurisdiction to discharge. Informal charges against a policeman of misconduct, recited in and recognized tentatively by the city council by resolution filed with the civil service commission, furnish jurisdictional basis for the commission, on proper notice to the accused of the charges, to proceed to a hearing and, in a proper case, to enter an order of discharge.

Dickey v Com., 201-1135; 205 NW 961

Power to determine seniority rights. Where a sanitary inspector, upon being discharged by a city council, took an appeal to civil service commission, it had jurisdiction to determine his seniority rights.

Des Moines v Board, 227-66; 287 NW 288

Allowance of compensation to employee during discharge. On an appeal by a discharged employee to civil service commission, the allowance of compensation during period of discharge is within discretion of commission.

Des Moines v Board, 227-66; 287 NW 288

Reinstating suspended policeman—back salary denied. A suspended police officer, upon being reinstated by the civil service commission, may be denied his compensation for the time of his suspension, the matter being entirely discretionary with the commission.

Luke v Civil Service, 225-189; 279 NW 443

5712 Employees—number diminished.

Atty. Gen. Opinions. See '38 AG Op 264, 728

Discharge. The city council has plenary power by appropriate resolution to order a good-faith reduction in the number of employees in a municipal department operating under civil service regulations, and may validly delegate to the chief officer of such department the administrative duty to designate, on the basis of efficiency, competency, and length of service, and without the preferring of charges, the employees who shall be discharged; and this is true tho the employees be ex-soldiers, as the soldiers preference act has no application to a case where an office is abolished.

Lyon v Com., 203-1203; 212 NW 579

Right to abolish office. A city may in good faith—without fraud, sham, subterfuge or arbitrariness—abolish an office or official position which it has theretofore duly placed under municipal civil service, and peremptorily dismiss the occupant of such office.

Kern v Council, 213-510; 239 NW 104

How abolished—effect of transfer. The abolishment of a position under civil service can be accomplished only by compliance with statutory requirements relating to the diminution of employees, and the mere transfer of the duties of a position to another department will not amount to an abolishment.

Des Moines v Board, 227-66; 287 NW 288

Transfer of position—evidence incompetent to prove. In certiorari action to annul decision of civil service commission ordering reinstatement of a discharged sanitary inspector, where it was claimed that this position had been transferred from one department to another, evidence to that effect, consisting of (1) only a reference in the certification to a report of the commission, and (2) an appointment made by the city council, was incompetent.

Des Moines v Board, 227-66; 287 NW 288

Power to determine seniority rights. Where a sanitary inspector, upon being discharged by a city council, took an appeal to civil service commission, it had jurisdiction to determine his seniority rights.

Des Moines v Board, 227-66; 287 NW 288

CHAPTER 290

ORDINANCES

Atty. Gen. Opinions. See '34 AG Op 230, 231

5714 Power to pass.

Discussion. See 22 ILR 713—Parking meters
Atty. Gen. Opinions. See '34 AG Op 229, 664; '38 AG Op 309, 371; AG Op May 18, '39.

ANALYSIS

I ORDINANCES IN GENERAL

Nonfraudulent exercise of granted power not reviewable by courts.

Lytle Co. v Gilman, 201-603; 206 NW 108

Approval by voters does not create franchise. The approval, by a majority vote of the electors of a city or town, of a proposed franchise for the use of the streets by a private public utility, does not create a franchise. Such franchise comes into existence only when the city or town council sees fit, after the favorable vote, to enact, and does enact, such franchise in the form of an ordinance.

Schnieders v Town, 213-807; 234 NW 207

Construction. An ordinance must be construed as a whole.

Talarico v City, 215-186; 244 NW 750

Construction—franchise (?) or regulation (?). Ordinance construed in the light of its terms and of the facts attending its enactment, and held, to constitute a franchise to the grantee therein named to operate a telephone exchange, and not to constitute a mere regulatory ordinance imposing a license fee on said business.

Pella v Fowler, 215-90; 244 NW 734

"Coasting" defined—sled hitched to vehicle excluded. A city ordinance, prohibiting "coasting" in the streets, applies only to vehicles or sleds moving by the force of gravity and not to sleds hitched to the rear of motor vehicles.

Samuelson v Sherrill, 225-421; 280 NW 596

Simmer law—filing contract but not resolution—ordinance unnecessary. In establishing municipal ownership of a waterworks plant, it is the contract and not the resolutions calling an election that must be on file with the city clerk for one week before adoption, and an ordinance establishing the municipal waterworks plant is unnecessary.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

Employees—compensation. The determination of the salary of a fireman is the exercise of an administrative power and need not be made by ordinance. (§6519, C., '24.)

Murphy v Gilman, 204-58; 214 NW 679

Transmission line—construction—negligence. The owner of a high-voltage electric transmission line may not be said to be negligent in failing to cover the wires with an insulating material when its said line is constructed in full compliance with the law and is guarded from doing injury by every practical device and expedient known and recognized by those who are expert in such construction and use; and one who unwittingly and wrongfully places himself in contact with such a line must be held to be the sole author of the resulting injury.

Dilley v Iowa Co., 210-1332; 227 NW 173

Election bribery—electric rate reduction—fulfillment after trial immaterial. Where the court, after hearing an election contest, finds that candidates to municipal office did not par-

I ORDINANCES IN GENERAL—concluded

ticipate in an illegal bribe by a local electric company offering a rate reduction and a rebate of impounded charges if the municipal ownership opponents were elected, the fact that, after the trial, the council repeals the municipal ownership ordinance, and the company does reduce rates and repay impounded funds to consumers, adds nothing new to the proof of participation and does not warrant a new trial.

Van Der Zee v Means, 225-871; 281 NW 460

Citizens—challenging officers' official acts. Public welfare lodges in citizens of a community the right to challenge the validity of an electric plant construction contract and to enjoin a municipal corporation and its officers from violating their duties and abusing corporate powers, if such construction contract is consummated without competitive bidding, made mandatory by statute.

Miller v Milford, 224-753; 276 NW 826

II VALIDITY IN GENERAL

Ordinance—effect of obsolete or repealed provisions. An ordinance may be perfectly valid as to a distinct subject matter therein, even tho the provisions relative to other subject matters have been repealed or have become obsolete.

Towns v City, 214-76; 241 NW 658

Drastic and invalidating penalties. Drastic penalties may, in view of the nature of the acts punished, and in view of the circumstances attending the commission of such acts, nullify an entire ordinance. So held where each day's continuance of each of various acts was declared a separate offense and punished by fine or imprisonment.

Edwards v City, 213-1027; 240 NW 711

Discretionary power. Discretionary power may, in proper cases, be conferred upon the mayor of a city.

Talarico v City, 215-186; 244 NW 750

Delegation of power. Ordinance held not to confer power on the mayor to issue a license.

Talarico v City, 215-186; 244 NW 750

License fees presumptively reasonable. License fees duly fixed by an authorized ordinance will be deemed reasonable unless the contrary appears on the face of the ordinance or on proper evidence.

Towns v City, 214-76; 241 NW 658

Unreasonableness per se. Under statutory authority "to regulate and license" sales by transient merchants, an ordinance which empowers the mayor not only to fix the license fee at any sum from $5 to $100 per day, but also the tenure of the license, is per se arbitrary, unreasonable, and void.

Creston v Mezvinsky, 213-1212; 240 NW 676

Taxation under power to regulate or license. Statutory power in a city to regulate or license a business does not embrace the power to tax the business; and the court will be quick to note whether the revenue derivable is out of proportion to the expense entailed by the regulations; also whether the language of the ordinance purporting to be a police measure is but a subterfuge to hide an actual purpose to tax.

Edwards v City, 213-1027; 240 NW 711

Police powers—consent of property owners—effect. General principle recognized that an ordinance which requires the consent of abutting and adjacent property owners for the erection of a building is invalid on constitutional grounds.

Downey v City, 208-1273; 227 NW 125

Due process—ordinance requiring weighing of loads. A municipal ordinance requiring that merchandise sold in load lots by weight for delivery within the city be weighed by a public weighmaster whose certificate stating the gross, tare, and net weight must be delivered to the purchaser, such ordinance, altho it necessitates that a person trucking coal into the city unload and reload, is not so unreasonable as to violate the due process clause of the constitution.

Huss v Creston, 224-844; 278 NW 196

Fireproof construction—unallowable restriction. Statutory authority to municipalities to prohibit the erection of buildings unless the outer walls be made of "brick, iron, stone, mortar, or other noncombustible materials," will not authorize an ordinance which prohibits the erection of outer walls unless made of "brick and mortar or of iron and stone and mortar"—in other words, an ordinance which excludes the right to use "other noncombustible materials."

Boehner v Williams, 213-578; 239 NW 545

Alley—vacating by ordinance—invalidity for nondescription. An ordinance to vacate an alley is invalid insofar as it affects a certain block in the city plat not mentioned nor described in the ordinance.

Pederson v Radcliffe, 226-166; 284 NW 145

Penal ordinance void for uncertainty. An ordinance which requires storage tanks for inflammable oils and the accessories of such tanks to "be kept and operated in compliance with law, the building code, and other city ordinances, and in a safe and proper manner, and the same shall not be permitted to become or remain defective, hazardous or dangerous" (sic), and penalizing violations, is void for uncertainty and unenforceability.

Edwards v City, 213-1027; 240 NW 711

Regulatory ordinance—absence of specifications—effect. An ordinance purporting to safeguard the public by regulating storage tanks for inflammable oils must, in order to

be valid and enforceable, contain such rules and specifications as will enable the property owner to know, definitely, just what is required of him in order to comply with the ordinance and thereby safeguard himself. It is quite insufficient to enact the dragnet command that said tanks and appurtenant accessories "must be kept and operated in compliance with law, the building code, and other city ordinances, and in a safe and proper manner, and the same shall not be permitted to become or remain defective, hazardous or dangerous".

Edwards v City, 213-1027; 240 NW 711

Storage of gasoline—vested right. A person who has the right, under an ordinance, to store gasoline in a certain quantity without a permit from the city, and the right to store gasoline in excess of said quantity only with such permit, and who is refused a permit for such excess storage, does not, by thereafter erecting his storage tanks, acquire a vested right to store gasoline in said lesser quantity without a permit. In other words, the ordinance may validly be amended by reducing the quantity which may be stored without a permit.

Clinton v Donnelly, 203-576; 213 NW 262

Inflammable oils—regulations—permit required. An ordinance regulatory of inflammable oils may validly prohibit the erection and maintenance within the city of gasoline filling stations unless the city council, in the exercise of its legal discretion, first grants a permit for such erection and maintenance. (§5764, C., '27.)

Cecil v Toenjes, 210-407; 228 NW 874

Equal protection of laws—ordinance—arbitrary classification. An ordinance which provides safety regulations over tanks wherein inflammable oils are stored for sale is null and void when in the same municipality there are large numbers of other tanks identical with those embraced in the ordinance and used for the same purpose except the stored oil is not for sale. Especially is this an arbitrary classification when it is made to appear that a material number of the exempted tanks are more dangerous than the tanks to which the ordinance is made applicable.

Edwards v City, 213-1027; 240 NW 711

City ordinance—burden to show inadmissibility. The burden of pointing out wherein city ordinance regulating train's speed is defective, either in substance or method of adoption, is on the party objecting to its admissibility.

Meier v Railway, 224-295; 275 NW 139

III GENERAL WELFARE CLAUSE

"Construction" as imposing continuous duty. An ordinance which requires all rain spouts on buildings to be so "constructed that water will not be cast upon the sidewalks" imposes a continuing duty upon the property owner—a duty not only to "construct" the spouting as required but to maintain the spouting in such required condition.

Updegraff v City, 210-382; 226 NW 928

Regulatory ordinance—absence of specifications—effect. An ordinance purporting to safeguard the public by regulating storage tanks for inflammable oils must, in order to be valid and enforceable, contain such rules and specifications as will enable the property owner to know, definitely, just what is required of him in order to comply with the ordinance and thereby safeguard himself. It is quite insufficient to enact the dragnet command that said tanks and appurtenant accessories "must be kept and operated in compliance with law, the building code, and other city ordinances, and in a safe and proper manner, and the same shall not be permitted to become or remain defective, hazardous or dangerous".

Edwards v City, 213-1027; 240 NW 711

IV ENFORCEMENT

Arbitrary action. A mayor, exercising his power under an ordinance to direct the nonissuance of a license, may not be said to act "arbitrarily" when he, in accordance with the ordinance, notifies the applicant of the time and place of hearing on the application and when the applicant ignores the notice.

Talarico v City, 215-186; 244 NW 750

Enforcement of ordinance. A permanent injunction against a mayor and his successor to enjoin the enforcement, against plaintiff's nonresident employees, of a penal ordinance, on the theory that such employees are transient peddlers, will not be entered at a time when it does not appear that said transient employees are in the city in question, or that plaintiff's property rights will be invaded, or that plaintiff will be irreparably injured by enforcement.

Cook v Davis, 218-335; 252 NW 754

5715 General requirements.

Atty. Gen. Opinion. See '36 AG Op 132

5716 Reading.

Atty. Gen. Opinion. See '38 AG Op 151

5717 Majority vote.

Atty. Gen. Opinion. See '30 AG Op 288

Council — mayor not member — no vote on contract. Where the four members of a city council vote two in favor of and two against employing a superintendent of the municipal power plant, under a statute requiring a majority vote of the members elected to the council, a contract employing such superintendent entered into after the mayor votes "yes" by virtue of a statute giving him the right to vote in case of a tie, is not a binding contract on the city, the mayor not being a member of the council.

Doonan v Winterset, 224-365; 275 NW 640

Permanent sidewalk—sufficient showing of jurisdiction. Jurisdiction to construct a permanent sidewalk and to assess property therefor is made to appear by unquestioned proof (1) that the city or town council by resolution ordered such construction, and (2) that the mayor later signed the record of such meeting and the resolution, even tho the record fails to show a three-fourths affirmative vote of all members and fails to show that the yeas and nays were called on the resolution.

Perrott v Balkema, 211-764; 234 NW 240

5720 Publication.

Atty. Gen. Opinions. See '28 AG Op 262, 398; '36 AG Op 177; '38 AG Op 151, 265, 536; AG Op Jan. 26, '39

City ordinance—burden to show inadmissibility. The burden of pointing out wherein city ordinance regulating train's speed is defective, either in substance or method of adoption, is on the party objecting to its admissibility.

Meier v Railway, 224-295; 275 NW 139

5721 Book form.

Atty. Gen. Opinion. See '38 AG Op 536

Ordinance as evidence. A book purporting to be the ordinances of a municipality and duly certified as such by the city clerk is admissible, so far as material, without further showing.

Hollingsworth v Hall, 214-285; 242 NW 39

City ordinance — sufficient "offer". A book purporting to have been issued by a city or town and to contain the ordinances thereof, as of a certain date, need not be formally offered as such. Counsel need only produce or bring the volume into court for the inspection of the court and thereupon formally offer such portions thereof as he may see fit.

Orr v Hart, 219-408; 258 NW 84

Insufficient publication "in pamphlet form". The publication "in pamphlet form", by a city, of the proceedings of the city council for the preceding month (§6581, C., '31), in which pamphlet appears a duly enacted ordinance, does not constitute the publication "in pamphlet form" of said ordinance as contemplated by this section.

Des Moines v Miller, 219-632; 259 NW 205

5722 Proceedings published or posted.

Atty. Gen. Opinions. See '28 AG Op 108, 262; '30 AG Op 262

5723 Cost of publishing.

Atty. Gen. Opinions. See '28 AG Op 262; AG Op Jan. 25, '39, Oct. 11, '39

CHAPTER 291

MAYORS' AND POLICE COURTS

5728 Police court.

Atty. Gen. Opinion. See '36 AG Op 313

5732 Jurisdiction of mayor.

Discussion. See 12 ILR 393—Mayor's court and due process

Atty. Gen. Opinions. See '32 AG Op 253; AG Op March 31, '39

In re recovery of license fee.

Scranton v Henderson, 163-457; 144 NW 1024

5735 Procedure—appeal—judicial notice.

Certiorari. The refusal of a mayor to grant defendant a change of venue, in a prosecution for assault and battery, on the ground "that the mayor was prejudiced against him", constitutes an illegality reviewable on certiorari, an appeal from the judgment of the mayor on the merits not being a plain, speedy, and adequate remedy.

Shearer v Sayre, 207-203; 222 NW 445

Nonpermissible appeal. A city, in a criminal prosecution for the violation of its own ordinance, may not appeal from a judgment of conviction in the district court.

Creston v Kessler, 202-372; 210 NW 464

CHAPTER 292

GENERAL POWERS

Atty. Gen. Opinion. See '36 AG Op 427

5738 Bodies corporate — name — authority.

Discussion. See 22 ILR 713—Parking meters; 23 ILR 392—Municipal tort liability

Atty. Gen. Opinions. See '25-26 AG Op 165, 387; '28 AG Op 109, 208; '34 AG Op 664; '36 AG Op 474, 652; '38 AG Op 90, 408

ANALYSIS

Airports, city's liability. See under §5903.11
County—governmental functions. See under §5128
Liability in re streets. See under §5945
School district—governmental functions. See under §4123
State — sovereignty and governmental functions. See under §2
Township—governmental functions. See under §5527

I GOVERNMENTAL POWERS AND FUNCTIONS

(a) IN GENERAL

Powers conferred by legislature. A municipal corporation possesses only such powers as are conferred upon it by the legislature—that is, such powers as are granted in express words, or those necessarily or fairly implied in or incident to the powers expressly conferred, or those necessarily essential to the identical objects and purposes of the corporation as by statute provided, and not those which are simply convenient.

Iowa Electric v Cascade, 227-480; 288 NW 633

Express or implied power. Principle reaffirmed that no city may exercise any police power unless such police power is expressly or impliedly granted to it by the general assembly.

Downey v City, 208-1273; 227 NW 125

Governmental powers. Principle reaffirmed that what a city does within the zone of its granted powers is not subject to review by the courts, in the absence of plea and proof of fraud.

Lytle Co. v Gilman, 201-603; 206 NW 108

Sale of milk—incidental powers. The statutory power of cities and towns (§5747, C., '31) "to establish and enforce sanitary requirements for the production, handling, and distribution of milk" (and certain milk products) necessarily embraces the power to create, by ordinance, all reasonable administrative machinery for specifically exercising said general power. For example, the ordinance may validly make the legal sale of said products dependent on the seller obtaining a municipal permit, provided the refusal of the permit be not arbitrary.

Des Moines v Fowler, 218-504; 255 NW 880

Power to fix rates. The legislature having graciously granted cities and towns the power to fix public utility rates may, at its pleasure, curtail or limit the power.

Iowa-Neb. Co. v Villisca, 220-238; 261 NW 423

Taxation — source of power. The power of a city to tax is strictly statutory—never implied.

Clark v Des Moines, 222-317; 267 NW 97

Taxpayer—right to maintain action.

Collins v Davis, 57-256; 10 NW 643
Ind. Dist. v Gookin, 72-387; 34 NW 174
Brockman v Creston, 79-587; 44 NW 822
Goetzman v Whitaker, 81-527; 46 NW 1058

Police powers—emergency measure. The attempt of a city to exercise by ordinance an ungranted police power cannot be justified on the plea of emergency.

Downey v City, 208-1273; 227 NW 125

Police powers—consent of property owners —effect. General principle recognized that an ordinance which requires the consent of abutting and adjacent property owners for the erection of a building is invalid on constitutional grounds.

Downey v City, 208-1273; 227 NW 125

Gasoline service station. Principle reaffirmed that the location and regulation of gasoline service stations are clearly within the police powers of municipal corporations.

Yeanos v Oil Co., 220-1317; 263 NW 834

Construction as to employment of assistants. The superintendent of a department of municipal government under the so-called commission plan may himself validly employ authorized and necessary employees to carry on the work of his department (1) when an existing ordinance in effect grants such power, and (2) when an existing ordinance makes an appropriation of funds for such department and fixes the number of employees and the separate salaries thereof.

Loran v City, 201-543; 207 NW 529

Water company in which city owns stock—not "governmental agency"—exempt from federal tax. A private corporation furnishing water to city under arrangement whereby dividends and financial expenditures were limited, and city owned one-third of voting stock with

I GOVERNMENTAL POWERS AND FUNCTIONS—continued

(a) IN GENERAL—concluded

right of representation on board of directors, right of purchase, and right to compel retirement of preferred stock from surplus earnings, held not immune from federal taxation as "governmental agency", since surplus earnings from water tax did not become property of city.

Citizens Water Co. v Com. of Int. Rev., 87 F 2d, 874

Authority to erect public utility—insufficient funds—effect. A city or town which has been authorized by popular election to establish and erect a system of waterworks by issuing bonds to a specified amount, and which discovers, after said funds have been applied, that the system is so incomplete as to be unusable, has no authority, in the absence of a reauthorization by the electorate, to issue additional warrants to complete the system.

Mote v Carlisle, 211-392; 233 NW 695

Municipal utilities—discrimination against privately owned plants. Statutory authority to municipalities to erect, in their proprietary capacity, electric light and power plants, and to pay the entire initial cost thereof from the net profits of said plants, and to this end to fix such rates as will effect such payment, is not void as an unconstitutional discrimination against privately owned plants of the same kind.

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

City election favoring utility—no implied obligation to construct utility. Under the Simmer law an action by an engineering company for a general judgment against a city for engineering services cannot be maintained, based on an implied obligation of the city to erect light and power plant, even after repeal of the enabling ordinance, and altho the special election therefor had carried. Such would be unlawful and contrary to public policy and beyond powers of city council. Persons dealing with a municipality are bound to take notice of legislative restrictions upon its authority.

Burns & McDonnell Co. v Iowa City, 225-1241; 282 NW 708

Wrongful exercise of judicial function. A city is not liable for damages consequent on the wrongful attempt of the city council to revoke a permit granted by it for the erection of a store building; nor are the individual members of the council liable for such damages, it appearing that they acted in good faith but under a misapprehension of their legal power.

Rehmann v City, 204-798; 215 NW 957; 55 ALR 430; 34 NCCA 480

Ratification of illegal acts. Assuming that it is legally possible for a city to ratify an illegal payment of city funds to the city treasurer, yet such ratification cannot be based on acts of the city done on inadequate information as to the relevant and material facts.

State v Hanson, 210-773; 231 NW 428

Unjust enrichment as basis for recovery. No basis for recovery against a city, on the theory that the city has been unjustly enriched and must pay therefor, is established by proof of the reasonable value of that which the city has received.

Roland Co. v Town, 215-82; 244 NW 707

Torts—dedicating part of street to travel—effect. A city or town has the right to divide a street and to set apart a certain part thereof for vehicular traffic, and when it does so, the part thus dedicated to that purpose is the part which falls within the provisions of the statute that the city or town must use reasonable diligence to keep the same free from obstructions and pitfalls.

Morse v Castana, 213-1225; 241 NW 304

Statutes of limitations—nonapplicability to nonaccepted street. In a quiet title action where land was dedicated but never accepted as street in unincorporated village, the rule that statute of limitations will not run against a municipality exercising a governmental function does not apply.

Brewer v Claypool, 223-1235; 275 NW 34

(b) GOVERNMENTAL FUNCTIONS

Strict construction of power. On the question whether a municipal corporation possesses a certain power, all reasonable doubts must be resolved against the existence of such power.

Van Eaton v Town, 211-986; 231 NW 475; 71 ALR 820

Dual functions of government. The functions of a municipality are two-fold: one is governmental, and the other, proprietary and quasi private. Lighting its streets is governmental, and selling electricity to individual users is proprietary.

Miller v Milford, 224-753; 276 NW 826

Operation of police patrol a governmental function. The operation of a plainly marked police patrol by a policeman in uniform, in conveying policemen in uniform from the police station to their patrol beats, all under orders from the chief of police, is a governmental function. It follows that the city is not liable for damages consequent on the negligent operation of the car by the driver.

Leckliter v City, 211-251; 233 NW 58; 38 NCCA 493

Lauxman v Tisher, 213-654; 239 NW 675

Peace officer as agent of public—nonliability of town for tort. A law-enforcing officer, whose office is created by statute and whose duties are prescribed therein, is an agent of the public in general and not the agent of the municipality which employs him; therefore, the municipality is not liable in damages for his unlawful or negligent acts, and a petition alleging cause of action thereon against the municipality is demurrable.

Hagedorn v Schrum, 226-128; 283 NW 876

Governmental function — negligence. The maintenance by a municipality of a bathing beach or a city park constitutes the exercise of a governmental function, with consequent nonliability of the municipality for injuries connected with such maintenance.

Norman v City, 201-279; 207 NW 134; 25 NCCA 675

Hensley v Town, 203-388; 212 NW 714; 34 NCCA 559

Mocha v City, 204-51; 214 NW 587; 34 NCCA 542; 3 NCCA(NS) 459

Injuries from defects—plans by competent engineer—nonliability. When municipal improvements are constructed according to plans, even tho faulty, of a competent engineer, there is no liability on the municipality because in adopting such plans it is exercising its discretion and acting in a governmental capacity, unless it can be said, as a matter of law, that the plans adopted were obviously defective.

Dodds v West Liberty, 225-506; 281 NW 476

School bus driver as independent contractor —nongovernmental function. A school bus driver, furnishing his own bus, under a contract embodying certain conditions to transport school children, but not under the supervision, control, and regulation of the board, is an independent contractor liable for his own negligence and not an employee exercising a governmental function.

Olson v Cushman, 224-974; 276 NW 777

School districts—mandatory duty to transport pupils. A statute providing that a school board shall furnish transportation to children living two and one-half miles from the school creates a mandatory duty to transport pupils which is a governmental function, but whether the duty be considered as ministerial or governmental, the school district, being a quasi corporation, cannot be sued for failure to furnish such transportation when such right of action is not expressly given by statute.

Bruggeman v School Dist., 227-661; 289 NW 5

Special plea in re governmental function. The nonliability of a municipality, for the negligence of an employee in the performance of a governmental function, is a special defense and must be pleaded as such.

Groves v Webster City, 222-849; 270 NW 329

Anderson v Moon, 225-70; 279 NW 396

Slander—governmental capacity. A demurrer to a petition in an action for slander will not lie solely on the ground that the petition shows on its face that defendant, at the time of speaking the words in question, was acting in a governmental capacity, because defendant's right to assert the privileged character of the spoken words is not an absolute right but a qualified right only. The demurrer—if employed under such circumstances—must point out wherein said petition fails to state a cause of action against defendant.

Brown v Cochran, 222-34; 268 NW 585

Torts — government nonliability for employee's tort—respondeat superior—exception. The exemption accorded counties and other governmental bodies and their officers from liability for torts growing out of the negligent acts of their agents or employees is a limitation or exception to the rule of respondeat superior, and in no way affects the fundamental principle of torts that one who wrongfully inflicts injury upon another is individually liable to the injured person.

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA(NS) 4

Governmental employees—personal liability for torts. A governmental employee committing a tortious act which causes injury to another in violation of a duty owed to the injured person, becomes, as an individual, personally liable in damages therefor. (Overruling Hibbs v School Dist., 218 Iowa 841; 34 NCCA 468; 37 NCCA 711).

Montanick v McMillin, 225-442; 280 NW 608

Futter v Hout, 225-723; 281 NW 286

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837

Doherty v Edwards, 226-249; 284 NW 159

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

See Anderson v Moon, 225-70; 279 NW 396

Special assessments — collection — county treasurer as agent. The county treasurer is a statutory agent of a city in the collection of special assessments for street improvements and sewers.

Hauge v Des Moines, 207-1209; 224 NW 520

(c) MINISTERIAL FUNCTIONS

Pleading ministerial character of acts. A petition for damages against a municipality because of the wrongful acts of municipal agents and employees is demurrable unless the petition alleges such facts as show that the acts complained of were corporate or ministerial (the only acts for which the municipality would be liable), and not governmental.

Rowley v City, 203-1245; 212 NW 158; 53 ALR 375; 34 NCCA 464

Judicial supervision—council's judgment—filling station permit. The wisdom, judgment, or lack thereof, on the part of a city council

I GOVERNMENTAL POWERS AND FUNCTIONS—concluded

(c) MINISTERIAL FUNCTIONS—concluded

in issuing a permit to erect a "filling station" is not reviewable by the courts unless the action taken was arbitrary, oppressive, or capricious. Evidence reviewed and permit held valid.

Scott v Waterloo, 223-1169; 274 NW 897

Soldiers preference appointments. The soldiers preference law cannot be objected to on the grounds that it deprives the city of self-government when the powers of the municipality are derived solely from the legislature which has power under the constitution and under statute to prescribe rules governing municipalities.

Maddy v City Council, 226-941; 285 NW 208

Police power—restricted residence district—valid regulation. An ordinance, based upon a statute valid under the police power of the state, authorizing establishment of restricted residence districts is not a prohibition but a regulation and as such is a legitimate and reasonable exercise of the city's police power.

Scott v Waterloo, 223-1169; 274 NW 897

Rights, powers, duties, and liabilities—motives immaterial when following lawful procedure. The motives of public officials when proceeding according to law, to submit the question of municipal ownership of a public utility, are not fit subjects for judicial inquiry.

Interstate Co. v Forest City, 225-490; 281 NW 207

Tax statute—constitutionality—no challenge by public official. A county auditor or a board of supervisors as ministerial officers or public officials may not challenge the constitutional authority nor competence of the legislature to pass a statute under which they act.

Hewitt & Sons v Keller, 223-1372; 275 NW 94

Failure to maintain pension fund—proper remedy. An action at law against a city for judgment consequent upon the failure of the council to perform its mandatory duty to levy a tax sufficient to meet and pay pensions for firemen and policemen will not lie either on the theory of contract or damages. Mandamus is the proper remedy.

Lage v Marshalltown, 212-53; 235 NW 761

Raising constitutionality of statutes not permitted. In an action in equity for mandamus to compel board of supervisors to remit taxes on capital stock of failed bank, held, board of supervisors could not raise issue of constitutionality of statute providing for such remission, either in that it contravened the state or the federal constitution, as counties and other municipal corporations are creatures of the legislature, existing by reason of statutes enacted within the power of the legislature, and the board may not question that power which brought it into existence and set the bounds of its capacities.

Brunner v Floyd County, 226-583; 284 NW 814

II CONTRACTS IN GENERAL

Contracts generally. See under Ch 420, Note 1

Legislative control—capacity. The contention that a city or town may not be limited by the state in contracting in its private or municipal capacity is quite unallowable.

Johnson Bk. v City, 212-929; 231 NW 705; 237 NW 507; 84 ALR 926

Consideration in nature of public benefit. Principle recognized that the contract of a municipal corporation must be supported by a consideration in the nature of a public benefit.

Love v City, 210-90; 230 NW 373

Invalid contracts—liability of city. Principle reaffirmed that a city may be held liable for public benefits received and retained pursuant to a purported contract which the city had power to enter into, but which failed in validity because of defective procedure by the city.

Love v City, 210-90; 230 NW 373

Compromise of illegal claim—effect. A compromise in the amount of a claim which a municipal corporation has no legal authority to pay in any amount affords no consideration for the agreement to pay the lesser sum.

Love v City, 210-90; 230 NW 373

Prohibited express contract excludes implied. Absolute lack of authority in a municipality to enter into an express contract relative to a given subject matter necessarily excludes the possibility of an implied contract on the same subject matter.

Roland Co. v Town, 215-82; 244 NW 707

Implied contracts. A city may, in the absence of a prohibiting statute, validly enter into an implied contract for the grading of its streets preparatory to the construction of permanent sidewalks.

Carlson v City, 212-373; 236 NW 421

Unallowable implied contract. Inasmuch as a city has no statutory authority to expressly contract for a rental for the use of its streets, there can be no implied contract that a telephone company will pay reasonable rental for the space occupied by its equipment in such streets.

Pella v Fowler, 215-90; 244 NW 734

Void contract—nonliability of city as on implied contract. A municipal contract for the repair of a street improvement is void when entered into in disregard of the statute requiring competitive bidding. And after it is decreed that special assessments on benefited property may not be levied, the contractor or his assignee may not, on the theory of an im-

plied contract, recover against the city in its corporate capacity, either at law or in equity (1) for the contract price, or (2) for the reasonable value of the materials and labor furnished under the void contract and retained by the city.

Johnson Bk. v City, 212-929; 231 NW 705; 237 NW 507; 84 ALR 926

Paving contract—contractor's duty to investigate statutory prerequisites. Sound public policy requires a contractor proposing performance of construction work for a city, to ascertain whether the council has sufficiently complied with statutory prerequisites so as to possess power to execute the proposed contract.

Lytle v Ames, 225-199; 279 NW 453

Illegal reimbursement of contractor for loss. A municipal corporation can be given by the general assembly no constitutional legal authority to pay or contract to pay its contractor, after performance of a contract and after settlement therefor, an added sum to reimburse the contractor for loss sustained by him because the federal government commandeered him and his equipment as a war measure, and thereby delayed the performance of the contract in question.

Love v City, 210-90; 230 NW 373

Modification of contract without competitive bidding. A city which has so breached a valid paving contract that the contractor is under no duty to perform, may, without submitting the matter to competitive bidding, validly contract in good faith with the contractor for reasonably enlarged compensation (to be paid from the general fund) as a consideration for the performance of the contract notwithstanding the breach, and the execution of the contract on such basis is beyond attack.

Des Moines v Horrabin, 204-683; 215 NW 967

Public improvements—void contract—sweeping deprivation of rights. A contract for the repair or reconstruction of a street pavement, entered into in total disregard of the mandatory statute requiring competitive bidding (§6004, C., '31), is void ab initio, and, if performed it follows as a matter of public policy and irrespective of the motives of the parties:

1. That special assessments may not be legally levied to defray the cost of such performance, and

2. That the contractor may not, either, (1) on the theory of a contract implied in fact, or (2) on the theory of quasi contract or contract implied in law (unjust enrichment), recover against the city for the expenditures made by him even tho all profit be excluded therefrom.

Especially is the foregoing true when the record reveals a contract manipulation which emits an unmistakable odor of fraud and evasion.

Horrabin Co. v Creston, 221-1237; 262 NW 480

Public improvements—assessments—failure to substantially perform contract—effect. The appellate court will not invalidate an entire assessment for paving because of the nonfraudulent failure of the contractor to substantially comply with the construction of some minor part of the work, i. e., a 6- or 8-inch longitudinal expansion joint along the curb; nor will the court attempt to readjust the assessment because of such default when the record contains no data from which such readjustment can be intelligently arrived at.

Cardell v Perry, 201-628; 207 NW 775

Public improvements — unauthorized contracts. A judicial holding that municipal warrants issued for the erection of a municipal waterworks are void because the erection had not been authorized by the voters is necessarily a holding that the contract under which the warrants are issued is also void.

Roland Co. v Carlisle, 215-82; 244 NW 707

Public improvements—void warrants—legalizing act—construction. A legalizing act purporting to legalize specified void municipal warrants then in litigation, but which act was held in said litigation inapplicable to said warrants because of a proviso in said act that it should not affect pending litigation, is not subject to the construction in later litigation that the act is applicable to the extent of legalizing the contract under which said former warrants were issued even tho the warrants were not legalized.

Roland Co. v Carlisle, 215-82; 244 NW 707

Paving—suing city on express contract—other theories excluded. Where a holder of invalid paving assessment certificates elects to base his recovery solely on an express written contract, no question of estoppel, waiver, ratification, or accord and satisfaction is involved.

Lytle v Ames, 225-199; 279 NW 453

Contracts in general—officers—limitation on power—dealing at peril. One contracting with a municipal corporation is bound to take notice of limitations on the power of the particular officers to make such contract.

Doonan v Winterset, 224-365; 275 NW 640

Watchman — nonauthority to appoint. A mayor of a town has no authority, in the absence of an ordinance so empowering him, to contract for and appoint a night watchman for the municipality—a limitation on the authority of the mayor of which all persons must take notice. (§5634, C., '35.)

Peterson v Panora, 222-1236; 271 NW 317

Employees—salary deficiency—payment by overdraft on different fund. A town marshal employed at a sum fixed by ordinance, but paid each month only a part of that sum from the general fund, may not recover the difference between this sum and the rate fixed by ordi-

II CONTRACTS IN GENERAL—conclud'd

nance when he had in fact been paid this difference by an overdraft on the waterworks fund. No supplemental contract of any validity may be inferred from the town so acting contrary to statute.

Clark v Goldfield, 224-1012; 278 NW 341

Council—mayor not member—no vote on contract. Where the four members of a city council vote two in favor of and two against employing a superintendent of the municipal power plant, under a statute requiring a majority vote of the members elected to the council, a contract employing such superintendent entered into after the mayor votes "yes" by virtue of a statute giving him the right to vote in case of a tie, is not a binding contract on the city, the mayor not being a member of the council.

Doonan v Winterset, 224-365; 275 NW 640

Power to bind future councils. A city council, under legislative authority, may validly enter into a contract which will be binding on future city councils.

Iowa-Neb. Co. v Villisca, 220-238; 261 NW 423

Fiscal management — unauthorized debt — curing illegality in contract. Any invalidity in a contract for the construction of a street improvement arising from the fact that the contract contains a clause which might be construed as imposing on the city an absolute indebtedness beyond its legal power to contract is cured by the act of the city council and its contractor in mutually agreeing, before any part of the contract has been performed, that said clause should be deemed wholly eliminated, and by the subsequent execution of said contract in strict accord with said agreement and the statute.

Waller v Pritchard, 201-1364; 202 NW 770

Right of taxpayer to question municipal action. A plaintiff has no standing to enjoin a city from entering into a contract for the construction of an electric lighting system to be paid for by special assessments, unless he alleges and proves that, in some specified way, he will be adversely affected by such proposed contract, e. g., (1) that he owns property which will be specially assessed, or (2) that he is a taxpayer and must contribute to the improvement fund from which payment of a deficit must be made.

Donovan Co. v City, 211-506; 231 NW 499

Power to acquire property—burden of proof. A municipality as defendant in an action for specific performance of its alleged contract for the purchase of land, has the burden to establish its plea that its attempted purchase of said land was for a purpose not authorized by law. Record reviewed and held said burden had not been met.

Golf View Co. v City, 222-433; 269 NW 451

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Officers and agents—personal liability for misfeasance. A public officer, while traveling upon the public highway in the performance of a governmental function, in the sense that he is attempting to reach a point where he can actually perform and consummate such function, is under the same duty to exercise care, and subject to the same liability for want of such care, as any other citizen.

Rowley v Cedar Rapids, 203-1245; 212 NW 158; 53 ALR 375; 34 NCCA 464

Officers and agents — pleading ministerial character of acts. A petition for damages against a municipality because of the wrongful acts of municipal agents and employees is demurrable unless the petition alleges such facts as show that the acts complained of were corporate or ministerial (the only acts for which the municipality would be liable), and not governmental.

Rowley v Cedar Rapids, 203-1245; 212 NW 158; 53 ALR 375; 34 NCCA 464

Attractive nuisance—basis of theory. In this state, the doctrine of attractive nuisance has its foundation in an implied invitation of the landlord on the theory that the temptation of an attractive plaything to a child of tender years is equivalent to an express invitation to an adult.

Harriman v Afton, 225-659; 281 NW 183

Attractive nuisance—limited applicability. The attractive nuisance doctrine applies only to children at an age where they are incapable of appreciating the dangers incidental to the instrumentality in question, and while not necessarily inapplicable to a boy of 13, yet cannot be extended to a situation where a boy 13 years old is drowned after jumping into the water from a raft on a city reservoir, and the evidence shows he was aware of the dangers involved.

Harriman v Afton, 225-659; 281 NW 183

Park instrumentality—attractive nuisance. A combined "teeter-totter and merry-go-round" erected and maintained in a city park by the city through its park board, for the sole purpose of amusing children, cannot be deemed an attractive nuisance, even tho said instrumentality is not kept in repair.

Smith v Iowa City, 213-391; 239 NW 29; 34 NCCA 468; 34 NCCA 553; 3 NCCA(NS) 432

Pool of water not "attractive nuisance". A small, but deep and unguarded, pond or pool of water, permitted to form at the outlet of a municipal storm-water sewer, will not be

deemed an "attractive nuisance", within the law of negligence.

Raeside v Sioux City, 209-975; 229 NW 216; 30 NCCA 299; 2 NCCA(NS) 734

Requirements for attractive nuisance. To come within the doctrine of attractive nuisance, an instrumentality must be both attractive and dangerous. A raft maintained by a city on its reservoir for the purpose of measuring the depth of water cannot be deemed a dangerous instrumentality per se.

Harriman v Afton, 225-659; 281 NW 183

Torts—city reservoir and raft thereon—attractive nuisance doctrine not applicable. Neither a reservoir maintained by a city on private ground isolated from any public place or playground nor a raft thereon, capable of supporting a man, used to measure the water depth, being inherently an attractive nuisance, a combination of the two will not invoke a different rule.

Harriman v Afton, 225-659; 281 NW 183

Legislative change in classification of police patrol—effect on governmental exemption. While the motor vehicle act, C., '24, classified a "police patrol" as a "nonmotor vehicle," the later legislative classification of "police patrols" as "motor vehicles" was not intended to deprive a municipality of its exemption from liability for damages consequent on the negligent operation of a city-owned police patrol as a governmental agency.

Leckliter v Des Moines, 211-251; 233 NW 58

Condition of building—trespasser. A municipality is not liable in damages to a person who is injured in a municipal market place by falling through an open manhole while he is on an errand distinctly personal to himself, and not as a customer of the market, and when the manhole is located at a place where he is neither expected nor invited to be.

Knote v Des Moines, 204-948; 216 NW 52

Negligent maintenance of public park. A city in exercising its governmental power through a park board to acquire and maintain public parks is not liable in damages consequent on the negligent failure to keep the instrumentalities in said parks in repair; nor are the members of the park board individually liable for such nonfeasance on their part.

Smith v Iowa City, 213-391; 239 NW 29; 34 NCCA 468; 34 NCCA 553; 3 NCCA(NS) 432

Sidewalks and intersections—different degree of care. The standard of care that a city owes to a pedestrian in respect to a sidewalk differs from the degree owed where an intersection is involved.

Russell v Sioux City, 227-1302; 290 NW 708

Defects in streets—notice—evidence. A city sued for alleged neglect to maintain its streets may show the date when notice of the injury was served upon it.

Smith v Sioux City, 200-1100; 205 NW 956

Law of case—defect in street. A holding on appeal that a certain defect in a public street was not of such nature as to charge the municipality with negligence is the law of the case on retrial on substantially the same evidence. (See Annos. under §12871.)

Norman v Sioux City, 200-1343; 206 NW 112

Ice on sloping portion of sidewalk—recovery refused on evidence and trial theory. In an action by a pedestrian against a city to recover for personal injuries received from fall on sidewalk where it is shown that pedestrian slipped on smooth, slippery ice, unaffected by artificial causes, on sloping portion of a sidewalk which was lifted by the roots of a tree, the refusal to permit a recovery on either of the following grounds of alleged negligence, to wit, (1) in failing to remove ice, or (2) in failing to repair slope in sidewalk, without the concurrence of the other, was not error under the evidence and the trial theory of plaintiff, consequently, the court could not properly submit such propositions to the jury as independent grounds of negligence.

Leonard v Muscatine, 227-1381; 291 NW 446

Instructions on trial theory—nonduty of court on other theories and necessity of requests. In an action by pedestrian who fell on ice which had formed on a sloping portion of sidewalk, an instruction to jury requiring, as prerequisite to recovery, a finding of knowledge or constructive notice by city of icy condition of sidewalk, was not erroneous where plaintiff failed to request an instruction that such notice was unnecessary, where action was tried on theory expressed in the instruction. A trial court is not required to instruct on theory not in the case as tried, and appellant, who invited instruction given and failed to request different instruction, could not, on appeal, complain of such instruction.

Leonard v Muscatine, 227-1381; 291 NW 446

Torts—cause of loss of rentals—construction work (?) or business depression (?). Question as to whether rentals from property are lost because of construction of a bridge and new creek channel by a city, which construction occasioned some inconvenience to tenants in egress or ingress to the property, or because of depression in business conditions, is a question for the jury.

Edmond v Sioux City, 225-1058; 283 NW 260

Torts—storm waters into sanitary sewer—negligence—jury question. A city has the duty to maintain its sanitary sewer with ordinary care and prudence and, where the city diverts storm waters into a sanitary sewer designed for a certain capacity, a jury might find the

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city negligent, and that such negligence was the proximate cause of damage from overflow due to the inability of the sewer to handle the increased flowage.

Wilkinson v Indianola, 224-1285; 278 NW 326

Surface waters — increased flowage consequent on nonnegligent execution of expert plans. Damages to a property owner from an increased flowage of water consequent on the nonnegligent execution of concededly expert plans for paving and surface-water intakes therein, and for curbing, is damnum absque injuria, especially when the damage occurs at the converging point of natural watercourses.

Cole v City, 212-1270; 232 NW 800

Temporary obstruction of access to property —damages. Conceding that a city in changing the course of a stream may, temporarily, substantially obstruct a property owner's access to his property, without liability in damages, yet the maintenance of such obstruction for two years is per se not a temporary obstruction, and evidence tending to exculpate the city is inadmissible.

Graham v Sioux City, 219-594; 258 NW 902

5739 Nuisances—action to abate.

Atty. Gen. Opinions. See '36 AG Op 307; '38 AG Op 408

Obstruction of street. An obstruction of a street or highway is a nuisance.

Pederson v Radcliffe, 226-166; 284 NW 145

Alley — vacating by ordinance — invalidity for nondescription. An ordinance to vacate an alley is invalid insofar as it affects a certain block in the city plat not mentioned nor described in the ordinance.

Pederson v Radcliffe, 226-166; 284 NW 145

Gasoline service station. Principle reaffirmed that the location and regulation of gasoline service stations are clearly within the police powers of municipal corporations.

Yeanos v Oil Co., 220-1317; 263 NW 834

Filling stations—nuisance per se—no presumption on appeal. A court will not assume that a gasoline filling station is a nuisance per se nor that it will be installed in such a manner as to be a nuisance in fact.

Scott v Waterloo, 223-1169; 274 NW 897

Gasoline service station—evidence. A gasoline service station located in a city is not a nuisance per se. Evidence reviewed and held the station in question was not a nuisance in fact.

Yeanos v Oil Co., 220-1317; 263 NW 834

Storage of gasoline—vested right. A person who has the right, under an ordinance, to store gasoline in a certain quantity without a permit from the city, and the right to store gasoline in excess of said quantity only with such permit, and who is refused a permit for such excess storage, does not, by thereafter erecting his storage tanks, acquire a vested right to store gasoline in said lesser quantity without a permit. In other words, the ordinance may validly be amended by reducing the quantity which may be stored without a permit.

Clinton v Donnelly, 203-576; 213 NW 262

5741 Smoke.

Federal constitution. So far as the federal constitution is concerned, the state may, by itself or through authorized municipalities, declare the emission of dense smoke in cities a nuisance and subject to restraint as such; and the harshness of such legislation, or its effect upon business interests, short of a merely arbitrary enactment, are not valid constitutional objections.

Northwestern Laundry v City, 239 US 486

5743 Power to regulate and license.

Reasonableness of ordinances. See under §5714

Atty. Gen. Opinions. See '28 AG Op 64; '38 AG Op 238

Unreasonableness per se. Under statutory authority "to regulate and license" sales by transient merchants, an ordinance which empowers the mayor not only to fix the license fee at any sum from $5.00 to $100.00 per day, but also the tenure of the license, is per se arbitrary, unreasonable, and void.

Creston v Mezvinsky, 213-1212; 240 NW 676

5744 Power to restrain and prohibit.

Reasonableness of ordinances. See under §5714

Atty. Gen. Opinion. See '34 AG Op 396

5745 Power to regulate, license, or prohibit.

Dogs and licensing thereof. See chapter 276
Reasonableness of ordinances. See under §5714

Atty. Gen. Opinions. See '30 AG Op 61; '34 AG Op 72, 187; '36 AG Op 311, 493

Taxation under power to regulate or license. Statutory power in a city to regulate or license a business does not embrace the power to tax the business; and the court will be quick to note whether the revenue derivable is out of proportion to the expense entailed by the regulations; also whether the language of the ordinance purporting to be a police measure is but a subterfuge to hide an actual purpose to tax.

Edwards v Sioux City, 213-1027; 240 NW 711

Restricted residence districts — discrimination—exemption to existing business. An ordinance establishing a restricted residence district and prohibiting the subsequent erec-

tion and maintenance therein of gasoline filling stations without a permit is not unconstitutional because the ordinance exempts from its operation an already established and maintained gasoline filling station.

Marquis v Waterloo, 210-439; 228 NW 870

Filling station permit—ordinance amending restricted district. Under a restricted residence district ordinance, a city council may issue a permit for erection of a gasoline filling station on certain lots without a separate ordinance to remove the particular lots from the restricted district.

Scott v Waterloo, 223-1169; 274 NW 897

Necessity for ordinance. The statutory power granted cities and towns "to limit the number of, regulate, license, or prohibit" gasoline curb pumps in streets, must be exercised under a duly enacted ordinance.

Lamoni v Smith, 217-264; 251 NW 706

Enjoining maintenance of nuisance. A gasoline pump erected in the parking of a public street is not only an "incumbrance" on the street, but, when erected without legal authority, is ipso facto a nuisance and, because of the mandatory duty of the municipality to keep its streets free from nuisances, is enjoinable by the city or town.

Lamoni v Smith, 217-264; 251 NW 706

Filling stations—nuisance per se—no presumption on appeal. A court will not assume that a gasoline filling station is a nuisance per se nor that it will be installed in such a manner as to be a nuisance in fact.

Scott v Waterloo, 223-1169; 274 NW 897

5746 Power to establish and regulate.

Atty. Gen. Opinions. See '34 AG Op 644; '38 AG Op 63; AG Op Feb. 8, '39

Negligence—depositing refuse on city dump. A person who deposits, on dump grounds provided by a city, discarded materials containing acid or capable of generating acid by a process of decomposition, becomes, henceforth, a stranger to such materials. In other words, he cannot be deemed negligent, toward persons frequenting said grounds, either in making the original deposit or in leaving it unguarded on the grounds.

Cabrnosh v Penick & F., 218-972; 252 NW 88

Boy drowning in swimming pool at boys' camp—owners of pool—liability. In an action to recover damages for the drowning of an 11-year-old boy who was attending an outing camp, where the camp director had arranged with the Red Cross to provide two swimming instructors and life guards to be on duty at a specified time to protect about 100 boys at the camp, and when the corporation operating the swimming pool took no part in arranging for life guards, it was not, under the circumstances, negligent in presumably admitting the decedent to the pool a few moments in advance of the time fixed for the entire group and in advance of supervision by the Red Cross instructors and life guards.

Hecht v D. M. Assn., 227-81; 287 NW 259

Drowning in swimming pool—failure to advise as to depth—signs. A corporation, operating a swimming pool in which an 11-year-old boy drowned, was not negligent in not personally informing the deceased of the depth of the water in the pool and in failing to inquire of him as to whether he could swim, where there were many signs, plainly visible about the pool indicating the various depths, and the age, intelligence, and experience of the deceased were sufficient to advise him of the inherent dangers of entering a body of water deeper than his height, especially when he was under the supervision of adults who had more direct and complete control over him than the agents and employees operating the pool.

Hecht v D. M. Assn., 227-81; 287 NW 259

Swimming pool not an "attractive nuisance". A swimming pool, either natural or artificial, is not an attractive nuisance.

Hecht v D. M. Assn., 227-81; 287 NW 259

Drowning in swimming pool—life guards—sufficiency. Negligence of a corporation operating a swimming pool in which an 11-year-old boy drowned, could not be grounded upon lack of sufficient attentive life guards, where it had one competent guard who never left his post at the deep water end and no showing was made as to need for more guards and none of the many bathers saw the drowning; and where most of the bathers, including the deceased, were in special groups which had competent life guards and other adult attendants for their own special protection.

Hecht v D. M. Assn., 227-81; 287 NW 259

Swimming pool—drowning—res ipsa loquitur—nonapplicability. The mere fact a person drowns in a swimming pool does not of itself establish negligence on the part of the proprietor under the doctrine of res ipsa loquitur.

Hecht v D. M. Assn., 227-81; 287 NW 259

Swimming pool proprietors—degree of care required. The general rule that the proprietor of a bathhouse or swimming pool for profit is bound to use ordinary care to guard against injury to his patrons held applicable to nonprofit corporation operating a swimming pool.

Hecht v D. M. Assn., 227-81; 287 NW 259

5747 Dairy herds and milk.

Atty. Gen. Opinions. See '25-26 AG Op 407; '34 AG Op 460

Sale of milk—incidental powers. The statutory power of cities and towns "to establish and enforce sanitary requirements for the pro-

duction, handling, and distribution of milk" (and certain milk products) necessarily embraces the power to create, by ordinance, all reasonable administrative machinery for specifically exercising said general power. For example, the ordinance may validly make the legal sale of said products dependent on the seller obtaining a municipal permit, provided the refusal of the permit be not arbitrary.

Des Moines v Fowler, 218-504; 255 NW 880

5750 Burials — cemeteries — crematories.

Atty. Gen. Opinion. •See AG Op April 26, '39 Township cemeteries. See under §§5558–5570

5752 Drainage preserved.

Increased flowage consequent on nonnegligent execution of expert plans. Damages to a property owner from an increased flowage of water consequent on the nonnegligent execution of concededly expert plans for paving and surface-water intakes therein, and for curbing, is damnum absque injuria; especially when the damage occurs at the converging point of natural watercourses.

Cole v City, 212-1270; 232 NW 800

5756 Building code.

Wrongful exercise of judicial function. A city is not liable for damages consequent on the wrongful attempt of the city council to revoke a permit granted by it for the erection of a store building; nor are the individual members of the council liable for such damages, it appearing that they acted in good faith but under a misapprehension of their legal power. (See Annos. under §5738.)

Rehmann v City, 204-798; 215 NW 957; 55 ALR 430; 34 NCCA 480

"Construction" as imposing continuous duty. An ordinance which requires all rain spouts on buildings to be so "constructed" that water will not be cast upon sidewalks imposes a continuing duty upon the property owner—a duty not only to "construct" the spouting as required but to maintain the spouting in such required condition.

Updegraff v City, 210-382; 226 NW 928

Prohibiting erection of building. The legislative grant of power to regulate the erection of buildings does not embrace the power to prohibit the erection of buildings, and the power to prohibit will not be deemed supplied because of the existence of the power in other statutes (Chs 324, 325, C., '27), of which the city has never availed itself.

Downey v City, 208-1273; 227 NW 125

Illegal building permit—nonestoppel to question. The holder of an illegal building permit may not, in an action by injured property owners to restrain operations under the permit, successfully contend that his permit is beyond judicial cancellation because he has already expended a substantial sum in reliance on said permit.

Zimmerman v O'Meara, 215-1140; 245 NW 715

Building permit for dog hospital—revocability. A duly issued building permit is more than a mere "license", and after a building permit is issued under a city's zoning ordinance to a veterinary surgeon who made full disclosure to the city of his plans to build a "dog hospital", with his own living quarters on the second floor, in a "hospital" zoned district, and after the building inspector consulted the city attorney, and after veterinary surgeon had spent considerable money toward constructing the building, an order revoking the permit was illegal and reviewable by certiorari.

Crow v Board, 227-324; 288 NW 145

Unpermitted furnace installation — lawful and unlawful acts—performance—effect. A contract to install an oil burner, being a lawful act, is not rendered void on account of a failure to first secure an installation permit required by a city ordinance, inasmuch as this wrongful omission, not inhering in the contract, does not make an otherwise valid contract void. A distinction exists between doing a per se unlawful and prohibited thing, and doing a lawful thing in a prohibited manner.

Keith Co. v Mac Vicar, 225-246; 280 NW 496

Performance of illegal contract—recovery thereunder barred. A contract to do an illegal act, which cannot be performed without violating the constitution, a constitutional statute or ordinance, is illegal and void, even in some cases when no penalty is provided for the violation.

Keith Co. v Mac Vicar, 225-246; 280 NW 496

5760 Fires — electric apparatus — fire limits.

Fire proof construction — unallowable restriction. Statutory authority to municipalities to prohibit the erection of buildings unless the outer walls be made of "brick, iron, stone, mortar, or other noncombustible materials", will not authorize an ordinance which prohibits the erection of outer walls unless made of "brick and mortar or of iron and stone and mortar"—in other words, an ordinance which excludes the right to use "other noncombustible materials".

Boehner v Williams, 213-578; 239 NW 545

Parties—municipal property owner. A property owner who owns property adjacent to a building being erected in violation of a town ordinance relating to constructions within the fire limits of the town, has such interest as will entitle him to an injunction against the erection and maintenance of such building.

Boehner v Williams, 213-578; 239 NW 545

5761 Electric installation.

Trespassers and "attractive nuisances". An owner of property may so negligently use it as to become liable in damages for a resulting injury to a trespasser. A jury question, both as to negligence and contributory negligence, is presented by testimony tending to show that an owner, without full compliance with city ordinance requirements, erected and maintained, on his own uninclosed, populously surrounded, and promiscuously frequented premises, which abutted upon an uninclosed and much frequented public park and fishing resort, a pole with a ladder thereon in the form of spikes driven therein, and with a crossarm on the pole, some 25 feet from the ground, carrying wires heavily charged with electricity, and that a trespassing boy of 14 years of age, and of ordinary intelligence, climbed the pole and, upon reaching the crossarm, was killed by an electric shock.

McKiddy v Elec. Co., 202-225; 206 NW 815; 29 NCCA 886

5762 Fire protection.

Permitting discharge of fireworks. A city or town is not liable for damages to a pedestrian consequent on the discharge on the public streets of explosives attending a Fourth of July celebration.

Reinart v Manning, 210-664; 231 NW 326

5763 Steam boilers and magazines.

Atty. Gen. Opinions. See '28 AG Op 88; '34 AG Op 61

5764 Gunpowder—combustibles.

Atty. Gen. Opinions. See '30 AG Op 371; '34 AG Op 61

Taxation under power to regulate or license. Statutory power in a city to regulate or license a business does not embrace the power to tax the business; and the court will be quick to note whether the revenue derivable is out of proportion to the expense entailed by the regulations; also whether the language of the ordinance purporting to be a police measure is but a subterfuge to hide an actual purpose to tax.

Edwards v City, 213-1027; 240 NW 711

Gasoline service station. Principle reaffirmed that the location and regulation of gasoline service stations are clearly within the police powers of municipal corporations.

Yeanos v Oil Co., 220-1317; 263 NW 834

Gasoline service station—evidence. A gasoline service station located in a city is not a nuisance per se. Evidence reviewed and held the station in question was not a nuisance in fact.

Yeanos v Oil Co., 220-1317; 263 NW 834

Penal ordinance void for uncertainty. An ordinance which requires storage tanks for inflammable oils and the accessories of such tanks to "be kept and operated in compliance with law, the building code, and other city ordinances, and in a safe and proper manner, and the same shall not be permitted to become or remain defective, hazardous or dangerous" (sic), and penalizing violations, is void for uncertainty and unenforceability.

Edwards v City, 213-1027; 240 NW 711

Absence of specifications—effect. An ordinance purporting to safeguard the public by regulating storage tanks for inflammable oils must, in order to be valid and enforceable, contain such rules and specifications as will enable the property owner to know, definitely, just what is required of him in order to comply with the ordinance and thereby safeguard himself. It is quite insufficient to enact the dragnet command that said tanks and appurtenant accessories "must be kept and operated in compliance with law, the building code, and other city ordinances, and in a safe and proper manner, and the same shall not be permitted to become or remain defective, hazardous or dangerous".

Edwards v City, 213-1027; 240 NW 711

Arbitrary classification. An ordinance which provides safety regulations over tanks wherein inflammable oils are stored for sale, is null and void when in the same municipality there are large numbers of other tanks identical with those embraced in the ordinance and used for the same purpose except the stored oil is not for sale; especially is this an arbitrary classification when it is made to appear that a material number of the exempted tanks are more dangerous than the tanks to which the ordinance is made applicable.

Edwards v City, 213-1027; 240 NW 711

Regulations—permit required. An ordinance regulatory of inflammable oils may validly prohibit the erection and maintenance within the city of gasoline filling stations unless the city council, in the exercise of its legal discretion, first grants a permit for such erection and maintenance. (§5714, C., '27.)

Cecil v Toenjes, 210-407; 228 NW 874

Permits—failure to specify rules. An ordinance, regulatory of inflammable oils, which prohibits the erection and maintenance of gasoline filling stations without a permit therefor will not be deemed unreasonable, uncertain, and arbitrary because the ordinance fails to contain rules and regulations or any specified plan under which such permit can be obtained.

Cecil v Toenjes, 210-407; 228 NW 874

Storage of gasoline—vested right. A person who has the right, under an ordinance, to store gasoline in a certain quantity without a permit from the city, and the right to store gasoline in excess of said quantity only with such permit, and who is refused a per-

mit for such excess storage, does not, by thereafter erecting his storage tanks, acquire a vested right to store gasoline in said lesser quantity without a permit. In other words, the ordinance may validly be amended by reducing the quantity which may be stored without a permit.

Clinton v Donnelly, 203-576; 213 NW 262

Regulation—nonarbitrary action. Record reviewed and held affirmatively to show that the action of a city council in refusing a permit for a gasoline filling station was not arbitrary.

Cecil v Toenjes, 210-407; 228 NW 874
Marquis v City, 210-439; 228 NW 870

Mandamus—nonavailability of writ. Mandamus will not lie to compel a city council to grant a permit for the erection and maintenance of a gasoline filling station when the council, in the exercise of its legal discretion, has refused such permit.

Cecil v Toenjes, 210-407; 228 NW 874

5766 Fire department.

Atty. Gen. Opinions. See '28 AG Op 426; '32 AG Op 51

5767 Levy—percentage—maturity.

Atty. Gen. Opinions. See '28 AG Op 202; '32 AG Op 33, 51

5768 Markets.

Atty. Gen. Opinion. See AG Op June 6, '39

Due process—ordinance requiring weighing of loads. A municipal ordinance requiring that merchandise sold in load lots by weight for delivery within the city be weighed by a public weighmaster whose certificate stating the gross, tare, and net weight must be delivered to the purchaser, such ordinance, altho it necessitates that a person trucking coal into the city unload and reload, is not so unreasonable as to violate the due process clause of the constitution.

Huss v Creston, 224-844; 278 NW 196; 116 ALR 242

5769 Wharves, docks, and piers.

Paramount right of state. The construction by the state of a wharf below high watermark on a navigable lake (to the bed of which the state has title), in aid of navigation, and without compensation to the riparian owner, is but the exercise of a right and the execution of a trust which is paramount to any right of ingress and egress of said riparian owner.

Peck v Const. Co., 216-519; 245 NW 131; 89 ALR 1132

Wharf—what constitutes. The character of a public wharf in a navigable lake as an aid to navigation is not negatived by the fact that the wharf is in good faith so constructed in a circular form that vehicles going upon the wharf may conveniently turn and depart therefrom.

Peck v Const. Co., 216-519; 245 NW 131; 89 ALR 1132

5771 Infirmary—outdoor relief.

Atty. Gen. Opinion. See '34 AG Op 297

5772 Jail—station house.

Atty. Gen. Opinions. See '30 AG Op 217, 327; AG Op Jan. 23, '39, Feb. 20, '39

5773 City hall.

Atty. Gen. Opinions. See '25-26 AG Op 368; '38 AG Op 498

5775 Plumbing—inspector.

Atty. Gen. Opinion. See '25-26 AG Op 398

5776 License—board of examiners.

Atty. Gen. Opinion. See '25-26 AG Op 398

5777 Regulations.

Atty. Gen. Opinion. See '25-26 AG Op 398

5784 Sanitary toilets.

Atty. Gen. Opinion. See AG Op April 2, '40

5785 Action by local board of health.

Atty. Gen. Opinion. See AG Op April 2, '40

5786 Special assessment.

Atty. Gen. Opinion. See '28 AG Op 109

CHAPTER 292.1

PERSONAL SERVICE TRADES

5786.1 Emergency and purpose declared.

Prohibited laws — emergency — effect. No legislative declaration or recital of the existence of an emergency can justify the enactment of a statute which is clearly prohibited by the constitution. So held as to an act fixing prices.

Duncan v Des Moines, 222-218; 268 NW 547

5786.3 Application for ordinance.

Regulation of business — price fixing. Legislative authority to municipalities to adopt ordinances which provide for "fair competition" in personal service trades—trades in which services are rendered upon the person of an individual without necessarily involving the sale of merchandise—cannot constitutionally embrace authority to include in such ordi-

nances a provision fixing the minimum price which may be charged for said services, because neither the state nor the municipality has constitutional power to fix such charges in view of amendment 14, federal constitution and of Art. I, §9, Constitution of Iowa. So held as to the business of barbering. And this is true tho the trade in question be subject to the police power of the state.

Duncan v Des Moines, 222-218; 268 NW 547

CHAPTER 293

PARK COMMISSIONERS

5787 Election—appointment.

Atty. Gen. Opinion. See AG Op Jan. 24, '39

5792 Tax levy.

Atty. Gen. Opinions. See '28 AG Op 364; '30 AG Op 196

5793 Additional tax levy.

Atty. Gen. Opinion. See '28 AG Op 364

5794 Certification and collection.

Atty. Gen. Opinion. See '30 AG Op 196

5795 Anticipation of taxes.

Atty. Gen. Opinions. See '28 AG Op 364; '30 AG Op 196

5796 Park fund—how expended.

Governmental function — negligence. The construction and maintenance by a municipal corporation of a public park constitute the exercise of a governmental function, and therefore the municipality is not liable for damages consequent on the negligence of its employees employed on such construction and maintenance. (See Annos. under §5738.)

Norman v City, 201-279; 207 NW 134; 25 NCCA 675

Hensley v Town, 203-388; 212 NW 714; 34 NCCA 559

Mocha v City, 204-51; 214 NW 587; 34 NCCA 542; 3 NCCA(NS) 459

Negligent maintenance of public park. A city in exercising its governmental power thru a park board to acquire and maintain public parks is not liable in damages consequent on the negligent failure to keep the instrumentalities in said parks in repair; nor are the members of the park board individually liable for such nonfeasance on their part.

Smith v City, 213-391; 239 NW 29; 34 NCCA 468; 34 NCCA 553; 3 NCCA(NS) 432

Park instrumentality as nuisance. A combined "teeter-totter and merry-go-round" erected and maintained in a city park by the city through its park board, for the sole purpose of amusing children, cannot be deemed an attractive nuisance, even tho said instrumentality is not kept in repair.

Smith v City, 213-391; 239 NW 29; 34 NCCA 468; 34 NCCA 553; 3 NCCA(NS) 432

5797 Acquisition of real estate.

Atty. Gen. Opinions. See '34 AG Op 306, 414

Powers not subject of contract. A municipal arm of the government may not deprive itself by contract,—even on a valid consideration,—of the right of eminent domain duly vested in it.

Herman v Board, 200-1116; 206 NW 35

5798 General powers.

Atty. Gen. Opinions. See '34 AG Op 414; '36 AG Op 348

5800 Bonds.

Atty. Gen. Opinions. See '28 AG Op 364; '34 AG Op 306, 414

5805 Jurisdiction.

Atty. Gen. Opinion. See '36 AG Op 348

5807 Rules and regulations.

Atty. Gen. Opinion. See AG Op Feb. 8, '39

5810 Appropriation.

Atty. Gen. Opinion. See '28 AG Op 287

5811 How expended.

Atty. Gen. Opinion. See '28 AG Op 287

CHAPTER 293.1

PERMANENT PARK BOARDS

5813.1 Applicability of chapter.

Applicability of act. A title which recites that the act "creates a park board in cities having a population of 125,000 or more" sufficiently indicates that the act is designed to apply to cities subsequently acquiring the required population.

State v Darling, 216-553; 246 NW 390; 88 ALR 218

Class legislation — classification based on population. The general assembly may constitutionally make a law applicable to cities having a certain population and not applicable to cities having a lesser population, provided the subject matter of the law suggests some reasonable necessity for said distinction. So held in sustaining the constitutionality of an act providing for the government and management of municipal parks by a park board of ten members.

State v Darling, 216-553; 246 NW 390; 88 ALR 218

Class legislation—general and local acts contrasted. Assuming that a supportable reason exists for classifying on the basis of population, a statute applicable to cities "now or hereafter having a population of" a named number, cannot be deemed "a local or special law" even tho when enacted it can apply to only one city, and even tho the creation of the official machinery for putting the act into effect in cities thereafter attaining said population is only implied.

State v Darling, 216-553; 246 NW 390; 88 ALR 218

Illegal interference with management and control. An act creating an appointive board and empowering it to manage and govern the numerous public parks of a city does not constitute an invalid interference with the right of the city to manage and control its own proprietary interests, it appearing that all of said parks, with three exceptions, were open to the public without charge, while, as to said three parks, a charge was made for the use of certain particular conveniences.

State v Darling, 216-553; 246 NW 390; 88 ALR 218

5813.6 Powers and duties.

Right of self-government. A statute which creates an appointive board and invests it with power to manage and govern the parks of certain cities, and to this end to expend the public revenues appropriated therefor, but with no power to levy or collect such revenues, is not violative of any right of municipal self-government.

State v Darling, 216-553; 246 NW 390; 88 ALR 218

CHAPTER 294

RIVER-FRONT IMPROVEMENT COMMISSION

Atty. Gen. Opinion. See '28 AG Op 161

5814 Cities affected.

Atty. Gen. Opinion. See '25-26 AG Op 466

5821 Profiles and specifications — approval.

Atty. Gen. Opinion. See '32 AG Op 121

5822 Additional powers — annual report—tax.

Instructions—right of governmental agency to be treated as individual. A governmental agency has a right, in eminent domain proceedings, to have the jury instructed that such agency is entitled to have the cause tried and determined precisely as tho said agency was an individual.

Welton v Highway Com., 211-625; 233 NW 876

5824 Cities may aid.

Atty. Gen Opinion. See '34 AG Op 297

5827 Wharves—landing places.

Governmental functions. The construction and operation by a city of public facilities is the exercise of a governmental function, and the city is not liable in damages for negligence in such construction and operation, and the charging of a nominal fee for their use does not change the rule.

Hensley v Town, 203-388; 212 NW 714; 34 NCCA 559

Mocha v City, 204-51; 214 NW 587; 34 NCCA 542; 3 NCCA(NS) 459

See Norman v City, 201-279; 207 NW 134; 25 NCCA 675

Paramount right of state. The construction by the state of a wharf below high-water mark on a navigable lake (to the bed of which the state has title), in aid of navigation, and without compensation to the riparian owner, is but the exercise of a right and the execution

of a trust which is paramount to any right of ingress and egress of said riparian owner.

Peck v Const. Co., 216-519; 245 NW 131; 89 ALR 1132

Wharf—what constitutes. The character of a public wharf in a navigable lake as an aid to navigation is not negatived by the fact that the wharf is in good faith so constructed in a circular form that vehicles going upon the wharf may conveniently turn and depart therefrom.

Peck v Const. Co., 216-519; 245 NW 131; 89 ALR 1132

5828 What prohibited.

Atty. Gen. Opinions. See '36 AG Op 660; '38 AG Op 185

CHAPTER 294.1

CITY PLAN COMMISSION

Atty. Gen. Opinion. See '34 AG Op 699

CHAPTER 296

MUNICIPAL BANDS

Atty. Gen. Opinions. See '25-26 AG Op 366, 367; '32 AG Op 89, 105, 134; '34 AG Op 112, 125, 264, 624, '36 AG Op 60; '38 AG Op 289, 429

CHAPTER 298

JUVENILE PLAYGROUNDS

5844 Authorization.

Bathing beaches. The construction and operation by a city of a bathing beach is the exercise of a governmental function, and the city is not liable in damages for negligence in such construction and operation; and the charging of a nominal fee for the use of the beach does not change the rule.

Mocha v Cedar Rapids, 204-51; 214 NW 587; 34 NCCA 542; 3 NCCA(NS) 459

Torts — park instrumentality as nuisance. A combined "teeter-totter and merry-go-round" erected and maintained in a city park by the city through its park board, for the sole purpose of amusing children, cannot be deemed an attractive nuisance, even tho said instrumentality is not kept in repair.

Smith v Iowa City, 213-391; 239 NW 29; 34 NCCA 468; 34 NCCA 553; 3 NCCA(NS) 432

CHAPTER 299

PUBLIC LIBRARIES

Atty. Gen. Opinions. See '32 AG Op 148; '38 AG Op 264, 443, 721

5849 Formation—maintenance.

Atty. Gen. Opinions. See '36 AG Op 174, 274

5850 Donations.

Atty. Gen. Opinion. See '38 AG Op 443

Devise for charity—power of municipality to take. Devises and bequests for charitable purposes are such favorites of the law that "they will not be construed void if, by law, they can be made good." Will construed, and held that the conditions attending a devise and bequest to a municipality of a charitable trust in the form of a free public library, were conditions subsequent and not conditions precedent, to the vesting of said trust, and that said conditions were within the legal power of the municipality to accept—under prescribed statutory procedure—and perform.

In re Nugen, 223-428; 272 NW 638

5851 Library trustees.

Atty. Gen. Opinion. See '38 AG Op 721

5858 Powers.

Atty. Gen. Opinions. See '25-26 AG Op 49, 392; '30 AG Op 65; '36 AG Op 174, 274; '38 AG Op 264, 443, 721

5859 Power to contract.

Atty. Gen. Opinions. See '25-26 AG Op 48, 392; '32 AG Op 105

5861 Rate of tax.

Atty. Gen. Opinion. See '25-26 AG Op 392

5865 Fund—treasurer.

Atty. Gen. Opinions. See '38 AG Op 443, 721

"Public funds" defined. Funds raised by general taxation for the maintenance of public libraries are public funds, and within the protection of the state sinking fund act. (§1090-a2, C., '27 [§7420.10, C., '39])

Andrew v Bank, 203-349; 212 NW 742

CHAPTER 300

MUNICIPAL HOSPITALS

Atty. Gen. Opinions. See '36 AG Op 331, 427; '38 AG Op 321; AG Op Feb. 16, '39; May 10, '39; May 18, '39

CHAPTER 301

BRIDGES

5874 Construction and repair.

Atty. Gen. Opinion. See '25-26 AG Op 265

Operation—crossings—safe condition controlled by transportation needs. It is the duty of railways and municipalities to keep pace with the changes in transportation methods and to keep highways and railroad crossings in a reasonably safe condition, inasmuch as a type of crossing construction, considered safe when built, might be unsafe for a later changed method of use by the public.

Harris v Railway, 224-1319; 278 NW 338

5875 Cities controlling bridge fund.

Liability of city for improper construction and maintenance. See notes under §5945

Atty. Gen. Opinion. See '30 AG Op 236

CHAPTER 302

INTERSTATE BRIDGES

Atty. Gen. Opinion. See '30 AG Op 372

CHAPTER 302.1

INTERSTATE BRIDGES (ADDITIONAL ACT)

5899.07 Existing bridge—condemnation.

Conveyances in lieu of condemnation. A deed given to a railroad for a strip of land to be used as a right of way, and deeds of a like kind, given by the landowner when condemnation may be imminent if he refuses to convey, should be given such liberal construction as will effectuate the intention of the parties and fully protect the rights of the grantor and his assigns.

Keokuk County v Reinier, 227-499; 288 NW 676

5899.18 Condemnation of property by commission.

Conveyances in lieu of condemnation. A deed given to a railroad for a strip of land to be used as a right of way, and deeds of a like kind, given by the landowner when condemnation may be imminent if he refuses to convey, should be given such liberal construction as will effectuate the intention of the parties and fully protect the rights of the grantor and his assigns.

Keokuk County v Reinier, 227-499; 288 NW 676

CHAPTER 303

DOCKS

5902 Powers and duties.

Atty. Gen. Opinion. See '30 AG Op 109

Powers not subject of contract. A municipal arm of the government may not deprive itself by contract,—even on a valid consideration,—of the right of eminent domain duly vested in it.

Herman v Board, 200-1116; 206 NW 35

CHAPTER 303.1

AIRPORTS

5903.05 Expenditures—levy of tax.

Atty. Gen. Opinion. See '32 AG Op 3

5903.11 Deemed as public use.

City's liability, governmental function. See under §5738

CHAPTER 303.2

ARMORIES

Atty. Gen. Opinion. See '38 AG Op 888

CHAPTER 304

ELECTRIC UTILITIES AND MOTORBUS LINES

5904 Regulations.

Rates in special charter cities. See under §6817, Vol I

Ordinance—construction—franchise (?) or regulation (?). Ordinance construed in the light of its terms and of the facts attending its enactment, and held, to constitute a franchise to the grantee therein named to operate a telephone exchange, and not to constitute a mere regulatory ordinance imposing a license fee on said business.

Pella v Fowler, 215-90; 244 NW 734

Perpetual franchise—grantees. A telephone company which, prior to October 1, 1897 (when the Code of 1897 took effect), had constructed a toll line and local telephone system in a city or town, thereby acquired a perpetual legislative franchise subject to the reserved power of the state, and said franchise necessarily passes to the holder's grantee.

Osceola v Utilities, 219-192; 257 NW 340

Unallowable implied contract. Inasmuch as a city has no statutory authority to expressly contract for a rental for the use of its streets, there can be no implied contract that a telephone company will pay reasonable rental for the space occupied by its equipment in such streets.

Pella v Fowler, 215-90; 244 NW 734

Enjoining unauthorized maintenance of wires. The maintenance of electric transmission lines across the streets and alleys of a city or town without a franchise right so to do, constitutes not only a nuisance, but a trespass upon the property of the municipality, and may be enjoined by the municipality, irrespective of the fact whether it has been damaged by such maintenance.

Ackley v Elec. Co., 204-1246; 214 NW 879; 54 ALR 474

5905 Franchise—election.

Franchise—definition. A franchise is a privilege or authority vested in certain persons by grant of the sovereign, to exercise powers or to do or perform acts which, without such grant, they could not legally do or perform.

Mapleton v Iowa Co., 206-9; 216 NW 683

Franchise ordinance—submission to electors. A proposition to grant a franchise to a private party to operate a telephone exchange, initiated by a city council, necessitates the submission to the voters of the franchise ordinance in literal fullness; otherwise, when the proposition is initiated by the private party through petition of votors.

Pella v Fowler, 215-90; 244 NW 734

Approval by voters of proposed utility franchise does not create franchise. The approval, by a majority vote of the electors of a city or town, of a proposed franchise for the use of the streets by a private public utility, does not create a franchise. Such franchise comes into existence only when the city or town council sees fit, after the favorable vote, to enact, and does enact, such franchise in the form of an ordinance.

Schneiders v Town, 213-807; 234 NW 207

Franchise—intentional abandonment. Evidence held quite insufficient to establish an intention to abandon a legislative-acquired franchise.

Osceola v Utilities, 219-192; 257 NW 340

Incomplete franchise — power of council. Where a proposition relative to the granting of a telephone franchise (initiated by petitions to the council), as submitted to the electors, contained no time limitation on the franchise, the council may validly fix and determine said limitation in the subsequently adopted ordinance.

Pella v Fowler, 215-90; 244 NW 734

Adjudication—mandamus to compel calling of election. A judicial holding to the effect that a petition for the calling of an election to vote on the question of granting an electric light and power franchise was in due form

and substance, and that mandamus should issue to compel the calling of such election, is res judicata of a subsequent petition by the same petitioner for the same relief.

Iowa Co. v Tourgee, 208-198; 225 NW 372

When ordinance not necessary. The passage of an ordinance and the printing of the same on the ballots are not necessary in those cases where the proposal to grant a franchise to a private party for the erection and operation of an electric light and power franchise is not initiated by the city or town council, but is initiated by the voters, through a statutory petition addressed to the mayor. (See §6555, C., '27, for law governing certain cities.)

Mapleton v Iowa Co., 206-9; 216 NW 683

"Property owners" defined.

Groenendyke v Fowler, 204-598; 215 NW 718

Rates—nonpower to contract for. A city or town which has not been granted the power to fix rates has no power to contract for rates.

Osceola v Utilities, 219-192; 257 NW 340

CHAPTER 305

VIADUCTS

5910 Authorization.

Crossings — safe condition controlled by transportation needs. It is the duty of railways and municipalities to keep pace with the changes in transportation methods and to keep highways and railroad crossings in a reasonably safe condition, inasmuch as a type of crossing construction, considered safe when built, might be unsafe for a later changed method of use by the public.

Harris v Railway, 224-1319; 278 NW 338

State commerce commission abandoning overhead crossing—street change resulting—excess of jurisdiction. The state commerce commission has no power to order the abandonment of an overpass or overhead crossing over a railroad in a city or town, which results in altering the streets thereof. Jurisdiction of its streets is a city function which may not be invaded by the state commerce commission, regardless of its good-faith motives, and certiorari will lie to prevent such invasion.

Huxley v Conway, 226-268; 284 NW 136

5913 Procedure.

Powers not subject of contract. A municipal arm of the government may not deprive itself by contract—even on a valid consideration—of the right of eminent domain duly vested in it.

Herman v Board, 200-1116; 206 NW 35

5916 Specifications.

Crossings — safe condition controlled by transportation needs. It is the duty of railways and municipalities to keep pace with the changes in transportation methods and to keep highways and railroad crossings in a reasonably safe condition, inasmuch as a type of crossing construction, considered safe when built, might be unsafe for a later changed method of use by the public.

Harris v Railway, 224-1319; 278 NW 338

CHAPTER 306

JITNEY BUSSES

Atty. Gen. Opinions. See '30 AG Op 145; '34 Ag Op 229

CHAPTER 307

STREETS AND PUBLIC GROUNDS

Atty. Gen. Opinions. See '30 AG Op 145; '34 AG Op 229

GENERAL POWERS

5938 Establishment—improvement.

Atty. Gen. Opinions. See '28 AG Op 400; '32 AG Op 97

ANALYSIS

Adverse possession, estoppel. See under §11007
City's liability generally. See under §§5738, 5945
Proprietary interest of city in streets. See under §6277
Proprietary interest of property owner in streets. See under §6277
Vacation of street by vacation of plat. See under §§6282–6286

I WHARVES

Wharf—what constitutes. The character of a public wharf in a navigable lake as an aid

to navigation is not negatived by the fact that the wharf is in good faith so constructed in a circular form that vehicles going upon the wharf may conveniently turn and depart therefrom.

Peck v Const. Co., 216-519; 245 NW 131; 89 ALR 1132

Construction of wharf—paramount right of state. The construction by the state of a wharf below high-water mark on a navigable lake (to the bed of which the state has title), in aid of navigation, and without compensation to the riparian owner, is but the exercise of a right and the execution of a trust which is paramount to any right of ingress and egress of said riparian owner.

Peck v Const. Co., 216-519; 245 NW 131; 89 ALR 1132

II ESTABLISHMENT OF STREETS

Implied contracts. A city may, in the absence of a prohibiting statute, validly enter into an implied contract for the grading of its streets preparatory to the construction of permanent sidewalks.

Carlson v City, 212-373; 236 NW 421

Change of grade—validity of ordinance. The court cannot say that an ordinance is so arbitrary and unreasonable as to be void per se when it provides for the widening of a street and for a 4-foot change of grade thereon for a distance of some 400 feet, even tho it be conceded that the present grade is far less than other heavily traveled streets on which no change is proposed.

Des M. Ry. v City, 205-495; 216 NW 284

Slope of alley—city not insurer of pedestrian's safety. In action by pedestrian injured by a fall in alley intersection, where city was charged with negligence in paving alley with too steep a slope, the degree of safety to pedestrian is concededly lessened, but pedestrian still owes to himself the duty of exercising ordinary care, and the city's duty is of like character, i.e., such care as characterizes an ordinarily prudent person. In no instance is the city an insurer of the pedestrian's safety.

Russell v Sioux City, 227-1302; 290 NW 708

Increased flowage consequent on nonnegligent execution of expert plans. Damages to a property owner from an increased flowage of water consequent on the nonnegligent execution of concededly expert plans for paving and surface-water intakes therein, and for curbing, is damnum absque injuria; especially when the damage occurs at the converging point of natural watercourses.

Cole v City, 212-1270; 232 NW 800

Vibrolithic pavement—smoothness inherent in construction—nonliability of city. In action by pedestrian for injuries sustained in fall on paving, evidence that the paving was a "vibrolithic" type composed of granite and concrete chips, that the pavement was dry, that there had been no rain or mist, and that there was no foreign substance on the paving does not present a question for the jury on issue of city's negligence in construction, even tho the pavement was "pretty smooth", the smoothness being a quality inherent in the material.

Russell v Sioux City, 227-1302; 290 NW 708

Construction of alley—slope—negligence of city. In determining negligence of city in constructing alley intersection with a steep grade, evidence that the paving sloped 7½ inches in the first 3 feet, 2 inches in the next foot, and 1½ inches in the remaining 4 feet to the center of the intersection, held, not to constitute jury question when the drop and slope were necessary to provide a sufficient means of escape for the surface water.

Russell v Sioux City, 227-1302; 290 NW 708

Power to contract for paving — statutory compliance mandatory. A city council has power to enter into a contract to pave streets and pay the cost either entirely from the general fund, or partly therefrom and partly by levy of special assessments, but, before it may lawfully so contract, it must comply with the necessary statutory provisions.

Lytle v Ames, 225-199; 279 NW 453

Paving contract—contractor's duty to investigate statutory prerequisites. Sound public policy requires a contractor, proposing performance of construction work for a city, to ascertain whether the council has sufficiently complied with statutory prerequisites so as to possess power to execute the proposed contract.

Lytle v Ames, 225-199; 279 NW 453

Street improvements—railroad crossing construction—council's power to require—findings—conclusiveness. Since character and extent of street improvements are within responsible discretion of city authorities and because city council's determination of question of desirability of proposed improvements is conclusive except for want of authority or fraud, and where ordinance granting franchise to railroad gave city council authority to require construction of crossing, damage claim for refusal to construct crossing could not be maintained by owner seeking access to property, when owner instead of requesting council to direct railroad to build crossing merely made such request by personal letter to railroad official.

Call Bd. & Mtg. v Railway, 227-142; 287 NW 832

Torts—injuries from street defects—plans by competent engineer—nonliability. Where a person is thrown against the top of an automobile while crossing a certain type of open

II ESTABLISHMENT OF STREETS—concluded

gutter in a street, constructed according to plans, even tho faulty, of a competent engineer, there is no liability on the municipality because in adopting such plans it is exercising its discretion and acting in a governmental capacity, unless it can be said, as a matter of law, that the plans adopted were obviously defective. Evidence held to establish that certain open gutters in street were reasonably safe for traffic at lawful speeds.

Dodds v West Liberty, 225-506; 281 NW 476

Adoption of engineer's plans—nonliability for tort unless obviously defective. In adopting plans for pavement of alley intersection, the city was acting in a "judicial capacity" and was not liable for defects in engineer's plans unless as a matter of law the plans were obviously defective.

Russell v Sioux City, 227-1302; 290 NW 708

Engineer's plans accepted by city—no obvious defects—no imputation of negligence. Where engineer's plans for paving alley were not obviously defective in failing to show grade of alley, and the work was done in accordance with the plans, no negligence in adopting the plans can be imputed to the city, since engineering expertness is not within the province of the council members, and a lack of such expertness is the reason for employing a competent engineer and relying on his ability and plans for the construction of the improvement.

Russell v Sioux City, 227-1302; 290 NW 708

State commerce commission abandoning overhead crossing—street change resulting—excess of jurisdiction. The state commerce commission has no power to order the abandonment of an overpass or overhead crossing over a railroad in a city or town, which results in altering the streets thereof. Jurisdiction of its streets is a city function which may not be invaded by the state commerce commission, regardless of its good-faith motives, and certiorari will lie to prevent such invasion.

Huxley v Conway, 226-268; 284 NW 136

Conveyance of title after acceptance and vacation. In an action involving the title to a strip of land which had once been part of a street between town lots, it made no difference whether such street had ever been accepted by the town and opened for public use and later vacated and conveyances of the land made by the town, so long as a question of acquiescence and adverse possession was the decisive issue between the claimants.

Patrick v Cheney, 226-853; 285 NW 184

III SALE AND DISPOSAL OF STREETS

See annotations under §6206

IV VACATION

Discussion. See 2 ILB 32—Abutter's right in a street

Vacating alley — adjoining owner's rights. Action by city in vacating alley and conveying it to grantee, who closed the alley by fencing it as a part of his adjoining land, which still gave adjoining property owner ingress and egress to his property at both front and rear, and where only interference with public right was use of alley by children going to and from school, was not an abuse of city's discretion, and such action did not deprive such adjoining property owner of convenient and reasonable access to and from his property or its use.

Stoessel v Ottumwa, 227-1021; 289 NW 718

Streets—conveyance of title after acceptance and vacation. In an action involving the title to a strip of land which had once been part of a street between town lots, it made no difference whether such street had ever been accepted by the town and opened for public use and later vacated and conveyances of the land made by the town, so long as a question of acquiescence and adverse possession was the decisive issue between the claimants.

Patrick v Cheney, 226-853; 285 NW 184

Arbitrarily vacating street to make defense to injunction. In an action to enjoin a town from maintaining a nuisance in a street or alley by allowing an adjoining owner to fence and use the street or alley, the action of the town council in arbitrarily vacating the street and the alley, without regard to the interests of the public, for the obvious purpose of creating a defense to the injunction suit, will be declared invalid.

Pederson v Radcliffe, 226-166; 284 NW 145

Temporary obstruction of access to property —damages. Conceding that a city in changing the course of a stream may, temporarily, substantially obstruct a property owner's access to his property, without liability in damages, yet the maintenance of such obstruction for two years is per se not a temporary obstruction, and evidence tending to exculpate the city is inadmissible.

Graham v Sioux City, 219-594; 258 NW 902

Judicial review—extent. Cities and towns possess a wide, tho not unlimited, discretion in opening, controlling and vacating streets and alleys, and courts will not interfere except in a clear case of arbitrary and unjust exercise of such power.

Stoessel v Ottumwa, 227-1021; 289 NW 718

5939 Acceptance of dedication.

Dedication and acceptance. See under §6277

Streets—conveyance of title after acceptance and vacation. In an action involving the title

to a strip of land which had once been part of a street between town lots, it made no difference whether such street had ever been accepted by the town and opened for public use and later vacated and conveyances of the land made by the town, so long as a question of acquiescence and adverse possession was the decisive issue between the claimants.

Patrick v Cheney, 226-853; 285 NW 184

Torts—unsafe place in partially opened street—instructions. Reversible error results from submitting whether a city was negligent in not filling depressions and tamping soft places in a street (1) when, owing to an unusual unfitness of the street for travel, the city had opened it only to the extent of a narrow roadway and there is no evidence that the failure to fill and tamp said opened roadway was the cause of the injury, and (2) when, under the evidence, the injury may have occurred at a place in the street where the city was under no duty to fill and tamp—at a place which the city had never assumed to put in condition for use.

McKeehan v Des Moines, 213-1351; 242 NW 43

5940 Optional payments.

Power to contract for paving—statutory compliance mandatory. A city council has power to enter into a contract to pave streets and pay the cost either entirely from the general fund, or partly therefrom and partly by levy of special assessments, but, before it may lawfully so contract, it must comply with the necessary statutory provisions.

Lytle v Ames, 225-199; 279 NW 453

Modification of contract without competitive bidding. A city which has so breached a valid paving contract that the contractor is under no duty to perform, may, without submitting the matter to competitive bidding, validly contract in good faith with the contractor for reasonably enlarged compensation (to be paid from the general fund) as a consideration for the performance of the contract notwithstanding the breach; and the execution of the contract on such basis is beyond attack.

Des Moines v Horrabin, 204-683; 215 NW 967

5942.1 Acquisition of lands.

Materially destroying access to property. A substantial interference by a city with access to property by means of a public street constitutes a taking of private property for public use, even tho no part of the physical property of the property owner is taken, and the city must respond in damages for such taking.

Nalon v Sioux City, 216-1041; 250 NW 166

5942.2 Plat and schedule—resolution of necessity.

Justifiable inclusion of "adjacent" property. In designating an improvement district for the purpose of defraying the cost of establishing and opening a municipal street, the council may legally include as "adjacent" land property which will receive special benefits by reason of the improvement, e. g., greater convenience of access to the property and a centralization and stabilization of business in the immediate locality where the property is situated; and it is immaterial in such case that the property is situated a substantial distance from the street in question, to wit, some 2,000 feet.

In re Hume, 202-969; 208 NW 285

5942.3 Levy—certificates or bonds.

Pro rata payment nonpermissible. Where a special assessment fund was insufficient to pay in full all outstanding street improvement bonds which had been issued so that each series would mature successively over a period of years, such insufficiency did not affect the order of payment, and therefore the bondholders were not entitled to payment from the fund on a pro rata basis, but only in the order each series matured.

Shaw v Danbury, 227-415; 288 NW 435

5942.5 Applicable provisions.

Atty. Gen. Opinion. See '28 AG Op 400

5945 Duty to supervise.

Atty. Gen. Opinions. See '32 AG Op 97; AG Op April 14, '39

ANALYSIS

Acceptance of streets. See under §6277
Actions against special charter cities. See also under §6734
Bathing beaches, city's liability. See under §§5738 (I), 6606
Bondholder's rights. See under Art XI, §3 (IV)
Change of grade of streets. See under §§5951 (II), 5953 (II)
Cities, contracts generally. See under §5738
Cities, torts generally. See under §5738
City's governmental functions generally. See under §5738
Negligence generally. See under Ch 484, Note 1
Ordinances. See under §5714
Torts generally. See under Ch 484, Note 2

I CONTROL IN GENERAL

Rights, powers, duties, and liabilities—motives immaterial when following lawful procedure. The motives of public officials when proceeding according to law, to submit the question of municipal ownership of a public utility, are not fit subjects for judicial inquiry.

Interstate Co. v Forest City, 225-490; 281 NW 207

Dual functions of government. The functions of a municipality are two-fold: one is governmental, and the other, proprietary and quasi private. Lighting its streets is governmental, and selling electricity to individual users is proprietary.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Contract to light streets not subject to vote. Cities and towns may contract for lighting streets and alleys under section 5949, C., '35, without submitting the contract to a vote of the people for approval.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Franchise not prerequisite to street lighting contract. The fact that a power company had a franchise and had established poles and lines in the streets to transmit electricity does not preclude the company from maintaining such poles and wires, after the franchise has expired, in order to fulfill its contract to furnish street lights to the city because a franchise is not a prerequisite to a city or town contracting to light its streets.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Use of public places—expired franchise—unexpired street light contract—poles in streets lawful. Electric company's occupancy of town streets to supply street lighting under a valid contract is not a trespass nor a nuisance merely because its franchise has expired.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Expired franchise—service furnished and suit maintained thereafter. A privately owned public utility must after expiration of its franchise continue under contract or otherwise supplying electricity to a city until some other source is available, but its use of the city streets may be discontinued after reasonable notice, and the expiration of the franchise will not prevent it from maintaining an action to enjoin the establishment of a municipal light plant, nor need special personal damages be shown as a condition therefor.

Abbott v Iowa City, 224-698; 277 NW 437

Unallowable implied contract. Inasmuch as a city has no statutory authority to expressly contract for a rental for the use of its streets, there can be no implied contract that a telephone company will pay reasonable rental for the space occupied by its equipment in such streets.

Pella v Fowler, 215-90; 244 NW 734

"Construction" as imposing continuous duty. An ordinance which requires all rain spouts on buildings to be so "constructed" that water will not be cast upon sidewalks imposes a continuing duty upon the property owner—a duty not only to "construct" the spouting as required but to maintain the spouting in such required condition.

Updegraff v City, 210-382; 226 NW 928

Village streets. All highways appearing on a village plat become streets and belong to the municipality as soon as legal incorporation is effected.

Ackley v Elec. Co., 206-533; 220 NW 315

Dedicating part of street to travel—effect. A city or town has the right to divide a street and to set apart a certain part thereof for vehicular traffic, and when it does so, the part thus dedicated to that purpose is the part which falls within the provisions of the statute that the city or town must use reasonable diligence to keep the same free from obstructions and pitfalls.

Morse v Town, 213-1225; 241 NW 304

Excluding travel from street. A city has no legal right to exclude ordinary travel from a public street in order that the street may be used exclusively for coasting.

Dennier v Johnson, 214-770; 240 NW 745

Arbitrarily vacating street to make defense to injunction. In an action to enjoin a town from maintaining a nuisance in a street or alley by allowing an adjoining owner to fence and use the street or alley, the action of the town council in arbitrarily vacating the street and the alley, without regard to the interests of the public, for the obvious purpose of creating a defense to the injunction suit, will be declared invalid.

Pederson v Radcliffe, 226-166; 284 NW 145

***Deed*—effect as to subsequently laid out streets.** An ordinary railroad right of way deed simply grants to the railroad an easement, and works no impediment to the vesting in a municipality, subject to such easement, of streets subsequently laid out across such right of way; and especially so when the railroad company acquiesces in and recognizes the statutory dedication to the public.

Ackley v Elec. Co., 206-533; 220 NW 315

II LIABILITY IN GENERAL

Liability to pedestrians—precedents of little value. Principle reaffirmed that in determining municipality's liability for injuries to pedestrian, precedents are of little value, each

case must be determined upon its own peculiar facts.

Hoffman v Sioux City, 227-1131; 290 NW 62

Rule of care. Principle reaffirmed that the obligation of a city or town to exercise reasonable diligence to maintain its streets in a reasonably safe condition extends, not merely to the surface of the walk, but to those things within its control which endanger the safety of people properly using the walk.

Krska v Town, 200-594; 203 NW 39; 37 NCCA 440

City's liability—degree of care required. Liability of a municipal corporation for injuries arising from defects or obstructions in the streets is for negligence only, and the city is not liable for consequences which could not have been foreseen, but is required to exercise ordinary or reasonable care to maintain its streets and sidewalks in a reasonably safe condition.

Bird v Keokuk, 226-456; 284 NW 438

Slope of alley—city not insurer of pedestrian's safety. In action by pedestrian injured by a fall in alley intersection, where city was charged with negligence in paving alley with too steep a slope, the degree of safety to pedestrian is concededly lessened, but pedestrian still owes to himself the duty of exercising ordinary care, and the city's duty is of like character, i.e., such care as characterizes an ordinarily prudent person. In no instance is the city an insurer of the pedestrian's safety.

Russell v Sioux City, 227-1302; 290 NW 708

Defects in streets or highway—liability—jury (?) or law (?) question. In determining municipality's liability for injuries from defective streets or highways, if reasonable or prudent men could reasonably differ as to whether accident could and should have been reasonably anticipated from the existence of the defect, then the case is generally one for the jury, but if careful or prudent men would not reasonably anticipate any danger from the existence of the defect, but still an accident happens which could have been guarded against, the question of liability is one of law.

Bird v Keokuk, 226-456; 284 NW 438

Torts—street defects—actual or constructive notice—reasonable care duty. City streets need not be kept in a condition of absolute safety so as to insure the safety of travelers, but it must use ordinary care, and as a prerequisite to liability it must have actual notice of a dangerous defect, or the condition must have existed a sufficient time to enable the city, using ordinary care, to discover and repair the same.

Thomas v Fort Madison, 225-822; 281 NW 748

Torts—injuries from street defects—plans by competent engineer—nonliability. Where a person is thrown against the top of an automobile while crossing a certain type of open gutter in a street, constructed according to plans, even tho faulty, of a competent engineer, there is no liability on the municipality because in adopting such plans it is exercising its discretion and acting in a governmental capacity, unless it can be said, as a matter of law, that the plans adopted were obviously defective. Evidence held to establish that certain open gutters in street were reasonably safe for traffic at lawful speeds.

Dodds v West Liberty, 225-506; 281 NW 476

Engineer's opinion on construction of approach to sidewalk. A municipality is not bound to construct an approach from street to sidewalk differently because some engineer other than its own thought some other method would be better, so where a pedestrian, who was familiar with such approach, who admitted that there was plenty of room for a pedestrian to pass on meeting two other pedestrians in broad daylight, and who without thought or attention stepped off approach and fell, such pedestrian was guilty of contributory negligence precluding recovery for personal injuries.

Hoffman v Sioux City, 227-1131; 290 NW 62

Unallowable defense. The dangerous condition of the streets of a city cannot be excused on the plea that the street funds are overdrawn.

Thompson v City, 212-1348; 237 NW 366

Private road—nonliability of city. A city is not legally responsible for the condition of a road located by private parties for their own convenience diagonally and haphazardly across unoccupied platted lots, and connecting with two public streets, even tho at one time the city, by a small amount of labor, smoothed down said road at its junction with one of the public streets, and even tho the city, in improving its public street, removed dirt in a material amount from said road at said junction point and failed to barricade said private way.

Archip v City, 213-1198; 241 NW 300

Duty to repair sidewalk. A city is under a duty to repair its defective sidewalk, and the claim in such case that the city was originally under no obligation to build the walk is quite immaterial.

Thompson v City, 212-1348; 237 NW 366

Vibrolithic pavement—smoothness inherent in construction—nonliability. In action by pedestrian for injuries sustained in fall on paving, evidence that the paving was a "vibrolithic" type composed of granite and concrete chips, that the pavement was dry, that there had been no rain or mist, and that there was no foreign substance on the paving does not present a question for the jury on issue of

II LIABILITY IN GENERAL—concluded

city's negligence in construction, even tho the pavement was "pretty smooth", the smoothness being a quality inherent in the material.

Russell v Sioux City, 227-1302; 290 NW 708

Condition of title irrelevant. In an action for damages consequent on the defective condition of a sidewalk where it crosses an alley, it is wholly irrelevant that the title of the city to the alley was defective.

Thompson v City, 212-1348; 237 NW 366

Nonliability for negligence in constructing culvert in town street. The statutory duty of a town to keep its streets free from nuisances is not interrupted or suspended during the time when the county under an arrangement with the town is engaged in constructing a culvert in a street which is a continuation of a county road outside the town; and the county is under no legal obligation to reimburse the town for any sum voluntarily paid by it in settlement of suits, jointly against the town and county, for damages consequent on persons driving into an unguarded excavation made by the county authorities while constructing the culvert.

Norwalk v County, 210-1262; 232 NW 682

Unguarded street set aside for coasting. A city which temporarily sets aside a public street for coasting purposes is not liable in damages for an injury resulting to a person so using the street, from his coming in contact with an automobile which the city had failed to exclude from the street.

Harris v City, 202-53; 209 NW 454; 46 ALR 1429; 26 NCCA 753

Permitting discharge of fireworks, etc. A city or town is not liable for damages to a pedestrian consequent on the discharge on the public streets of explosives attending a Fourth of July celebration.

Reinart v Town, 210-664; 231 NW 326

Felling tree into street. A city is not liable in damages consequent on the act of a property owner or his contractor in felling into a street a tree standing in the parking; in other words, the city is not liable because of its failure to exercise its governmental power to police the street at the place and time when the tree was felled,—it knowing that the property owner intended to cut and fell said tree.

Armstrong v Waffle, 212-335; 236 NW 507

Claim of undue submission of issues. A preliminary recital in the language of an unquestioned pleading, of an issue of negligence in maintaining a sidewalk, which embraces statements of the method by which and the source from which the alleged nuisance was created on the walk, reveals no error when the definite legal issue was alone actually submitted to the jury.

Fosselman v City, 211-1213; 233 NW 491

Instructions—hopeless conflict. An instruction from which the jury would be wholly unable to determine whether a city was bound to maintain a reasonably safe traveled way to the full width of the street, or to the full width of the graded portion of the street, is prejudicially erroneous.

Morse v Town, 213-1225; 241 NW 304

Instructions — nonapplicability. Reversible error results from instructing a jury that plaintiff, in an action against a city for damages consequent on a defect in a sidewalk, need not show that the city had actual knowledge of the defect if the defect resulted from the original defective construction of the walk, when neither pleading nor evidence presented such issue.

Ritter v City, 212-564; 234 NW 814

III NUISANCES IN GENERAL

Nuisance—essential elements. In order that a construction or erection may properly be classified as a nuisance, there must be something in its nature and in its relation to its surroundings and to the use of such surroundings which foreshadows dangerous possibilities. So held as to a fountain in a public park.

Hensley v Town, 203-388; 212 NW 714; 34 NCCA 559; 3 NCCA(NS) 438

Attractive nuisance. A small, but deep and unguarded pond or pool of water, permitted to form at the outlet of a municipal storm water sewer, will not be deemed an "attractive nuisance" within the law of negligence.

Raeside v City, 209-975; 229 NW 216

See Cox v Elec. Co., 209-931; 229 NW 244; 36 NCCA 160

Torts — park instrumentality as nuisance. A combined "teeter-totter and merry-go-round" erected and maintained in a city park by the city through its park board, for the sole purpose of amusing children, cannot be deemed an attractive nuisance, even tho said instrumentality is not kept in repair.

Smith v Iowa City, 213-391; 239 NW 29; 34 NCCA 468, 553; 3 NCCA(NS) 432

Attractive nuisance — basis of theory. In this state, the doctrine of attractive nuisance has its foundation in an implied invitation of the landlord on the theory that the temptation of an attractive plaything to a child of tender years is equivalent to an express invitation to an adult.

Harriman v Afton, 225-659; 281 NW 183

Cornice on building as nuisance. Evidence that a building built flush with the street line was surmounted by a cornice which overhung the street for a material distance and which

for several years, through some defect, cast water upon the sidewalk, and at times caused a dangerous accumulation of ice on the sidewalk, furnishes ample basis for a jury finding that the city had not and was not keeping its street free from nuisance.

Wright v A. & P. Tea Co., 216-565; 246 NW 846; 32 NCCA 509

Nuisances—obstruction of street. An obstruction of a street or highway is a nuisance.

Pederson v Radcliffe, 226-166; 284 NW 145

Enjoining maintenance of nuisance. A gasoline pump erected in the parking of a public street is not only an "incumbrance" on the street, but, when erected without legal authority, is ipso facto a nuisance and, because of the mandatory duty of the municipality to keep its streets free from nuisances, is enjoinable by the city or town.

Lamoni v Smith, 217-264; 251 NW 706

IV NEGLIGENCE OF CITY IN GENERAL

Sidewalks and intersections—different degree of care. The standard of care that a city owes to a pedestrian in respect to a sidewalk differs from the degree owed where an intersection is involved.

Russell v Sioux City, 227-1302; 290 NW 708

Negligence—degree of care required. Liability of a municipal corporation for injuries arising from defects or obstructions in the streets is for negligence only, and the city is not liable for consequences which could not have been foreseen, but is required to exercise ordinary or reasonable care to maintain its streets and sidewalks in a reasonably safe condition.

Bird v Keokuk, 226-456; 284 NW 438

Adoption of engineer's plans — nonliability unless obviously defective. In adopting plans for pavement of alley intersection, the city was acting in a "judicial capacity" and was not liable for defects in engineer's plans unless as a matter of law the plans were obviously defective.

Russell v Sioux City, 227-1302; 290 NW 708

Slant in pavement. The fact that a street pavement, as it approached a manhole, was on a slant of four inches in three feet affords, in itself, no basis for a charge of negligence against the city.

Corbin v City, 207-1168; 224 NW 828

Tolerating nondangerous condition. An injured person who establishes that the hole or depression in which she fell, and over which she had repeatedly passed, during many months, was not dangerous, is in no position to claim that the city was negligent in knowingly permitting the nondangerous defect to exist.

Geringer v Town, 203-41; 212 NW 365

Trespasser. A municipality is not liable in damages to a person who is injured in a municipal market place by falling through an open manhole while he is on an errand distinctly personal to himself, and not as a customer of the market, and when the manhole is located at a place where he is neither expected nor invited to be.

Knote v City, 204-948; 216 NW 52

Streets—danger in close proximity to sidewalk—guard rails. Where six year old child had to climb over a solid steel girder 34 inches high, located between the sidewalk and the opening in the bridge through which she fell, and the opening being only 3 or 3½ inches at its top and 10 inches at the bottom, there was no dangerous place in such "close proximity" to sidewalk as to imperil use and require guard rails, and no reasonably prudent man would have anticipated that even a child would have climbed over the guard rail and fallen through the opening.

Bird v Keokuk, 226-456; 284 NW 438

City's negligence — guarding against accidents. In action by next friend to recover for child's injuries in falling through opening in bridge when opening was so narrow that it was seemingly impossible for child to fall through it, the city could not be charged with negligence for failure to guard against such a rare, unexpected, and unforeseeable accident.

Bird v Keokuk, 226-456; 284 NW 438

Sidewalk defect—city's negligence—jury question—evidence sufficiency. Where a woman sustains injuries by falling on pavement at intersection, when her heel caught in crevice, between the sidewalk and curb, as she stepped off sidewalk, a jury question on the liability of the city was created under evidence showing the injuries were sustained in nighttime while plaintiff was slowly and carefully walking in a strange part of city, and when this condition of the street had been created by the city ten years before and never remedied, altho considered so unsafe by pedestrians in neighborhood that beaten paths were formed on either side in avoiding it.

Thomas v Fort Madison, 225-822; 281 NW 748

Construction of alley—slope—negligence of city. In determining negligence of city in constructing alley intersection with a steep grade, evidence that the paving sloped 7½ inches in the first 3 feet, 2 inches in the next foot, and 1½ inches in the remaining 4 feet to the center of the intersection, held, not to constitute jury question when the drop and slope were necessary to provide a sufficient means of escape for the surface water.

Russell v Sioux City, 227-1302; 290 NW 708

Ice on sloping portion of sidewalk—recovery refused on evidence and trial theory. In an action by a pedestrian against a city to re-

IV NEGLIGENCE OF CITY IN GENERAL —concluded

cover for personal injuries received from fall on sidewalk where it is shown that pedestrian slipped on smooth, slippery ice, unaffected by artificial causes, on sloping portion of a sidewalk which was lifted by the roots of a tree, the refusal to permit a recovery on either of the following grounds of alleged negligence, to wit, (1) in failing to remove ice, or (2) in failing to repair slope in sidewalk, without the concurrence of the other, was not error under the evidence and the trial theory of plaintiff, consequently, the court could not properly submit such propositions to the jury as independent grounds of negligence.

Leonard v Muscatine, 227-1381; 291 NW 446

V OBSTRUCTIONS, ELEVATIONS, DEPRESSIONS, AND EXCAVATIONS

Liability to pedestrians—precedents of little value. Principle reaffirmed that in determining municipality's liability for injuries to pedestrian, precedents are of little value. Each case must be determined upon its own peculiar facts.

Hoffman v Sioux City, 227-1131; 290 NW 62

Depression in sidewalk with ice therein. It is reversible error to grant a new trial because the court had omitted to submit to the jury the question whether the city was negligent in permitting an alley crossing to remain in a slightly sunken, saucer-shaped condition, and in permitting water to accumulate in the depression and to freeze in a smooth condition, such acts, if done, not being such as to render the city liable in case of an accident.

Turner v City, 210-458; 229 NW 229; 37 NCCA 524

Stepping into depressed street. A pedestrian on a public street who steps from a sidewalk into the street proper at a place other than at a crossing, without in any manner giving heed to the distance from the top of the sidewalk to the level of the street pavement, is guilty of negligence.

Corbin v City, 207-1168; 224 NW 828

Engineer's opinion on construction of approach to sidewalk. A municipality is not bound to construct an approach from street to sidewalk differently because some engineer other than its own thought some other method would be better, so where a pedestrian, who was familiar with such approach, who admitted that there was plenty of room for a pedestrian to pass on meeting two other pedestrians in broad daylight, and who without thought or attention stepped off approach and fell, such pedestrian was guilty of contributory negligence precluding recovery for personal injuries.

Hoffman v Sioux City, 227-1131; 290 NW 62

Engineer's plans accepted by city—no obvious defects—no imputation of negligence. Where engineer's plans for paving alley were not obviously defective in failing to show grade of alley, and the work was done in accordance with the plans, no negligence in adopting the plans can be imputed to the city, since engineering expertness is not within the province of the council members, and a lack of such expertness is the reason for employing a competent engineer and relying on his ability and plans for the construction of the improvement.

Russell v Sioux City, 227-1302; 290 NW 708

Dangerous depression in walk. A jury question on the issue of actionable negligence is presented by evidence tending to show that a city had for some two years allowed a portion of a block of cement on a sidewalk to remain in a sunken condition of from 1¾ to 2¼ inches below the level of the abutting blocks, and that, on the edge of this sunken condition, but on a level with the abutting blocks, there existed a rough, protruding, and overhanging slab of cement under which the toe of a foot might be caught.

Howard v City, 206-1109; 221 NW 812

Unseen depression. A pedestrian who, in an ordinary way, walks along a cement sidewalk over which he had not passed for about two years prior thereto, is not guilty of negligence per se because he did not see a depression of some two inches in the walk and other conditions which rendered the depression possibly dangerous.

Howard v City, 206-1109; 221 NW 812

Defective sidewalk—duty to see defect. A person is not exercising reasonable care, as a matter of law, when, immediately after emerging from a store, she walks directly across an 8-foot cement sidewalk, of which she had a general knowledge, and fails to see that the extreme inner edge of the walk, elevated some 8 inches above the vehicular part of the street, has been broken away for a distance of some 30 inches, and to an irregular depth not exceeding 8 inches, when the unobscured opening is directly in front of her, and when she is walking under perfect conditions of weather, light, and sight, and attended by no mental abstraction except a voluntary conversation with her companion.

Seiser v Redfield, 211-1035; 232 NW 129

Negligence—jury question. Evidence relative to an unguarded and unlighted excavation in a public street reviewed, and held to present jury questions on the issues of negligence of both plaintiff and defendant.

Smith v Town, 202-300; 207 NW 340

Unsafe place in partially opened street. Reversible error results from submitting whether a city was negligent in not filling depressions and tamping soft places in a street (1) when, owing to an unusual unfitness of the street for travel, the city had opened it only to the

extent of a narrow roadway and there is no evidence that the failure to fill and tamp said opened roadway was the cause of the injury, and (2) when, under the evidence, the injury may have occurred at a place in the street where the city was under no duty to fill and tamp—at a place which the city had never assumed to put in condition for use.

McKeehan v City, 213-1351; 242 NW 42

Proximate cause of injury — intervening cause—legal measure of. The proximate cause of a collision between motor vehicles on a public street may be the defective condition which the city has long permitted to exist in a portion of its street, provided said condition, in view of all the relevant facts, was such as to reasonably charge the city with knowledge that some accident would probably result therefrom to motor vehicles and to the occupants thereof traveling over said defect. Phrased otherwise, where a city has long maintained in and on one side of its street a defect of such nature that an automobile passing over the defect was thereby swerved out of its course and onto the opposite side of the street where it collided with another vehicle properly moving in the opposite direction, the city cannot properly contend that said collision was an independent, intervening and efficient cause which prevented the negligence of the city from being the proximate cause of the resulting injuries, when the jury might justly find that said defect, in view of all the relevant facts, was such as to reasonably charge the city with knowledge that some accident would probably result therefrom to motor vehicles and to the occupants thereof traveling over said defect.

Gray v Des Moines, 221-596; 265 NW 612; 104 ALR 1228

Instructions on trial theory—nonduty of court on other theories and necessity of requests. In an action by pedestrian who fell on ice which had formed on a sloping portion of sidewalk, an instruction to jury requiring, as prerequisite to recovery, a finding of knowledge or constructive notice by city of icy condition of sidewalk, was not erroneous where plaintiff failed to request an instruction that such notice was unnecessary, where action was tried on theory expressed in the instruction. A trial court is not required to instruct on theory not in the case as tried, and appellant, who invited instruction given and failed to request different instruction, could not, on appeal, complain of such instruction.

Leonard v Muscatine, 227-1381; 291 NW 446

Aerial obstructions—justifiable assumption. The operator of a truck along a public street has a right, in the absence of actual knowledge to the contrary, to assume that the street is free from aerial obstructions which may strike the top of his vehicle, e. g., a guy wire stretched across the street from a nearby building in process of construction. And especially is this true when the surface of the street along which the driver is moving is badly cluttered up with building material.

Hatfield v Freight Co., 223-7; 272 NW 99

Enjoining unauthorized maintenance of wires. The maintenance of electric transmission lines across the streets and alleys of a city or town without a franchise right so to do, constitutes not only a nuisance, but a trespass upon the property of the municipality, and may be enjoined by the municipality, irrespective of the fact whether it has been damaged by such maintenance.

Ackley v Elec. Co., 204-1246; 214 NW 879; 54 ALR 474

Ackley v Elec. Co., 206-533; 220 NW 315

Limb of tree as street obstruction. One who in broad daylight, and without diverting circumstances, drives along a public street with which he is familiar, and permits his vehicle to come in contact with a perfectly visible limb of a tree overhanging the traveled part of the street, is guilty of negligence per se.

Abraham v City, 218-1068; 250 NW 461

Proximate cause. A truck which is legally parked alongside the curb of a public street is not the proximate cause of an injury to a child whose sled was deflected into the truck by a bump in the street.

Dennier v Johnson, 214-770; 240 NW 745; 35 NCCA 717

Temporary obstruction of access to property —damages. Conceding that a city in changing the course of a stream may, temporarily, substantially obstruct a property owner's access to his property, without liability in damages, yet the maintenance of such obstruction for two years is per se not a temporary obstruction, and evidence tending to exculpate the city is inadmissible.

Graham v Sioux City, 219-594; 258 NW 902

VI SNOW AND ICE

Negligence. The act of a city in leaving snow upon its streets for a period of four days after it had first melted and then frozen into a rough and irregular condition constitutes negligence.

Tollackson v City, 203-696; 213 NW 222; 37 NCCA 527

Care of vehicular part of street. A city is not negligent in failing to remove snow and ice naturally accumulating on that part of a public street designed for ordinary vehicular travel. If the accumulation is consequent on some defect in the construction of the street at the point of injury, the injured plaintiff must so show.

Workman v Sioux City, 218-217; 253 NW 909

Dangerous condition of ice between curb lines. No actionable negligence is shown by

VI SNOW AND ICE—concluded

proof that an entire city had for several weeks been covered by successive snow falls which had become packed and congealed into a blanket of ice between the curb lines, and that during said times vehicular travel had worn abrupt and dangerous ruts into such ice to a depth of from 7 to 10 inches, and that a person alighting from a street car fell into one of said ruts and was severely injured.

Ritchie v Des Moines, 211-1026; 233 NW 43

Burden of proof. An injured person suing for damages consequent upon the dangerous condition of ice and snow on a public street between the curb lines has the burden of proof to show what reasonable action the city might have taken to avoid the said dangerous condition.

Ritchie v Des Moines, 211-1026; 233 NW 43

Ice on sloping portion of sidewalk—recovery refused on evidence and trial theory. In an action by a pedestrian against a city to recover for personal injuries received from fall on sidewalk where it is shown that pedestrian slipped on smooth, slippery ice, unaffected by artificial causes, on sloping portion of a sidewalk which was lifted by the roots of a tree, the refusal to permit a recovery on either of the following grounds of alleged negligence, to wit, (1) in failing to remove ice, or (2) in failing to repair slope in sidewalk, without the concurrence of the other, was not error under the evidence and the trial theory of plaintiff, consequently, the court could not properly submit such propositions to the jury as independent grounds of negligence.

Leonard v Muscatine, 227-1381; 291 NW 446

Unknown recent formation. A city may not be held liable for injury consequent on a fall on an icy sidewalk covered with snow when the ice had formed so recently prior to the accident that no one knew of its existence, —not even plaintiff until he fell.

Wilson v City, 204-1183; 216 NW 698; 37 NCCA 515

Change of temperature — effect. Principle recognized that, when cold weather follows the depositing of moisture on a walk, causing a film of ice to form, which is practically impossible to remove, the city may wait for a change of temperature to remedy the condition, without being subject to the charge of negligence.

Burke v Town, 207-585; 223 NW 397

Defects or obstructions in streets. When negligence is predicated on the unsafe condition of a path made by the town authorities through the snow on a crosswalk, evidence tending to show that said path never was safe necessarily presents a jury question.

Beardmore v New Albin, 203-721; 211 NW 430; 37 NCCA 528

Icy condition of walk—negligence per se. Evidence that a person, on emerging from a building, stepped carefully upon the sidewalk because he knew of the icy and slippery condition of the walk, and that he fell, upon taking the first step, does not per se disclose contributory negligence.

Fosselman v Dubuque, 211-1213; 233 NW 491

Ice-incrusted walk. A pedestrian may, by his testimony as to the manner in which he walked along a rough, ice-incrusted, and dangerous walk, create a jury question on the issue of his contributory negligence.

Burke v Town, 207-585; 223 NW 397; 37 NCCA 522

Rough and uneven ice—instructions. Instructions held to confine the jury strictly to the proposition that plaintiff could recover for an injury only in case he established that the ice in question on the public street had become rough and uneven.

Casper v City, 213-69; 238 NW 591

Instructions on trial theory—nonduty of court on other theories and necessity of requests. In an action by pedestrian who fell on ice which had formed on a sloping portion of sidewalk, an instruction to jury requiring, as prerequisite to recovery, a finding of knowledge or constructive notice by city of icy condition of sidewalk, was not erroneous where plaintiff failed to request an instruction that such notice was unnecessary, where action was tried on theory expressed in the instruction. A trial court is not required to instruct on theory not in the case as tried, and appellant, who invited instruction given and failed to request different instruction, could not, on appeal, complain of such instruction.

Leonard v Muscatine, 227-1381; 291 NW 446

Instructions. Instructions reviewed, and held to state correctly the liability of the city for the accumulation of snow and ice upon the public streets.

Smith v City, 200-1100; 205 NW 956; 37 NCCA 511

Torts—failure to sand and gravel. It is a jury question whether a city was negligent in not spreading sand and gravel over a street crossing which, for several days, by the falling and melting and freezing of snow thereon, and by the travel thereover, had become rough and uneven and corrugated with ice, when the city had, at the time, provided itself with said materials for said purpose and with employees to do and perform the work.

Staples v Spencer, 222-1241; 271 NW 200

VII NOTICE OR KNOWLEDGE OF DEFECT

(a) IN GENERAL

Defect in street—knowledge by city all-essential to liability. In an action against a

city for damages for personal injury consequent on a defect in wooden steps maintained by the city in a public street, failure to prove that the city had either actual or constructive knowledge of the defect is fatal to plaintiff's right to recover.

Jeffers v Sioux City, 221-236; 265 NW 521

Notice of defect — inadequate instruction. Instructions which might lead the jury to understand that a plaintiff had a right to recover without proof of knowledge, on the part of the city, of the defect in question, constitute reversible error.

Jensen v Magnolia, 219-209; 257 NW 584

Constructive notice. A city must be held, as a matter of law, to have at least constructive notice of a defect in a public street when such defect had openly and visibly existed for a period of two years.

Howard v City, 206-1109; 221 NW 812

Notice — jury question. Record reviewed and held to present a jury question on the issue whether the city had actual notice of the rough and uneven condition of snow and ice on a public street for some four days prior to an accident; likewise whether the city had constructive notice of such condition for a somewhat longer period.

Casper v City, 213-69; 238 NW 591

(b) EVIDENCE

City's liability for nuisance continued over period of years. Evidence that a building built flush with the street line was surmounted by a cornice which overhung the street for a material distance and which for several years, through some defect, cast water upon the sidewalk, and at times caused a dangerous accumulation of ice on the sidewalk, furnishes ample basis for a jury finding that the city had not and was not keeping its street free from nuisance.

Wright v A. & P. Tea Co., 216-565; 246 NW 846; 32 NCCA 509

VIII CONTRIBUTORY NEGLIGENCE

(a) IN GENERAL

Knowledge generally. The court cannot say that an injured party was negligent per se because she had, generally speaking, been long familiar with all the streets of the municipality, when she was aged, did not know of the particular defect in the street which caused her injury, and when, just prior to the accident, her mind was excusably diverted from the walk in question.

Greenlee v City, 204-1055; 216 NW 774

Choosing imprudent way—effect. The doctrine that a pedestrian may, under some circumstances, be deemed negligent in traveling a path which it is imprudent to travel, necessarily can have no application when the traveler had no knowledge of any defect in the way traveled by him.

Greenlee v City, 204-1055; 216 NW 774

Torts—obstructions in street. Evidence reviewed relative to the act of plaintiff (injured by coming in contact with a wire stretched across a public street) in running, in semi-darkness, along the street and outside a crowded sidewalk, in order to reach shelter from a sudden and rapidly gathering thunderstorm, and held to present a jury question on the issue of contributory negligence on the part of plaintiff.

Cuvelier v Dumont, 221-1016; 266 NW 517

(b) KNOWLEDGE OF DANGER

Knowledge of danger. Use of a walk by a pedestrian, with knowledge that it is in an unsafe condition, is not, in and of itself, sufficient to constitute contributory negligence.

Tollackson v City, 203-696; 213 NW 222

Knowledge of danger. A pedestrian who attempts to pass over an abrupt decline, known to be dangerous, in a public street, in the belief that he can do so in safety, will be deemed guilty of negligence per se, in the absence of any showing of acts of care on his part.

Lundy v City, 202-100; 209 NW 427

Knowledge of obstructions. A pedestrian who, on a dark and rainy night, passes over a parking in a public street in close proximity to a pile of broken cement, with full knowledge of the presence of such obstruction and of its dangerous character, and is injured by stumbling over a detached piece of the cement, is guilty of contributory negligence per se when it appears that a very slight deviation in his course would have placed him in a zone of perfect safety.

Roppel v City, 208-117; 224 NW 579

Duty to see defect. A person is not exercising reasonable care as a matter of law when, immediately after emerging from a store, she walks directly across an eight foot cement sidewalk, of which she had a general knowledge, and fails to see that the extreme inner edge of the walk, elevated, some eight inches above the vehicular part of the street, had been broken away for a distance of some thirty inches and to an irregular depth not exceeding eight inches, when the unobscured opening is directly in front of her, and when she is walking under perfect conditions of weather, light, and sight, and attended by no mental abstraction except a voluntary conversation with her companion.

Seiser v Town, 211-1035; 232 NW 129

Nondiverting circumstance. The fact that an injured pedestrian forgot that an obstruction was in his pathway is not a diverting circumstance which will relieve him from re-

VIII CONTRIBUTORY NEGLIGENCE—concluded

(b) KNOWLEDGE OF DANGER—concluded

sponsibility for the knowledge which he did have.

Davis v City, 209-1324; 230 NW 421

Attempt to use known defective walk. Mere knowledge of a pedestrian that a walk was defective does not establish negligence in attempting to use it, especially when the walk had undergone severe usage since he last saw it.

Thompson v City, 212-1348; 237 NW 366

Icy condition of walk—negligence per se. Evidence that a person on emerging from a building stepped carefully upon the sidewalk because he knew of the icy and slippery condition of the walk, and that he fell upon taking the first step, does not per se disclose contributory negligence.

Fosselman v City, 211-1213; 233 NW 491

Passing along known slippery sidewalk. A pedestrian is not guilty of negligence per se in attempting to walk along a freshly snow-covered sidewalk bounded by a foot or two of snow, even tho he knows that the walk is rough, uneven, and slippery from an accumulation of ice, when he had prepared his feet with rubbers in order to avoid slipping, and, upon reaching the walk, thoughtfully slackened his speed, and was proceeding cautiously in order to avoid a fall.

Smith v City, 212-1022; 237 NW 330

Negligence per se. A pedestrian who discovers in his pathway on a public sidewalk a substantial obstruction of frozen straw and other refuse and unnecessarily attempts to walk over the same is guilty of negligence per se.

Wells v City, 212-1095; 235 NW 322

IX EVIDENCE

Negligence—noncompetent evidence to excuse. In an action based on alleged negligence in maintaining a sidewalk in front of privately owned property, testimony to the effect that the janitor of the building was under a duty to keep the walk clean is incompetent.

Smith v City, 200-1100; 205 NW 956

X PLEADING AND PROOF

Pleading ministerial character of acts. A petition for damages against a municipality because of the wrongful acts of municipal agents and employees is demurrable unless the petition alleges such facts as show that the acts complained of were corporate or ministerial (the only acts for which the municipality would be liable), and not governmental.

Rowley v City, 203-1245; 212 NW 158; 53 ALR 375; 34 NCCA 464

Defect in street—notice—pleading. In an action in tort against a municipality, a plea that the city had notice of the defect in the street may be adequate tho such plea be subject to a motion for more specific statement.

Jensen v Magnolia, 219-209; 257 NW 584

More specific statement—waiver of error. Error of the trial court in overruling a motion for a more specific statement as to where an accident happened is waived by answering over.

McKeehan v Des Moines, 213-1351; 242 NW 43

Allowable amendment to pleading. Plaintiff in an action for damages consequent on the dangerous condition of a sidewalk pleads no new cause of action by so amending his petition as to amplify the facts which brought about said dangerous condition.

Casper v Sioux City, 213-69; 238 NW 591

Burden of proof. An injured person suing for damages consequent on the dangerous condition of ice and snow on a public street between the curb lines has the burden of proof to show what reasonable action the city might have taken to avoid the said dangerous condition.

Ritchie v City, 211-1026; 233 NW 43

XI LIABILITY OF PROPERTY OWNER OR OTHER WRONGDOER

Property owner. Principle recognized that a property owner may be liable in damages for creating or permitting to exist a nuisance upon a public sidewalk even tho the municipality rests by statute under substantially the same liability.

Updegraff v City, 210-382; 226 NW 928

Tenant. The tenant of a building which abuts upon a public street is not liable for personal injuries resulting to a pedestrian from falling on account of stepping into a one-and-one-half-inch curved depression in the sidewalk adjacent to said building, when said depression was not occasioned by any affirmative act of the tenant, but had, from ordinary travel, been gradually forming through a series of years, it not appearing that the tenant was under any statutory or ordinance duty to repair.

Atkinson v Motor Co., 203-195; 212 NW 484

Governmental employees—personally liable for torts—governmental immunity denied. A governmental employee committing a tortious act which causes injury to another in viola-

tion of a duty owed to the injured person, becomes, as an individual, personally liable in damages therefor. (Hibbs v School Dist., 218 Iowa 841, overruled).

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA(NS) 4

Shirkey v Keokuk County, 225-1159; 275 NW 706; 281 NW 837

Lenth v Schug, 226-1; 281 NW 150; 287 NW 596

XII PUBLIC GROUNDS IN GENERAL

Negligence—unsupported issue. An unsupported issue of negligence must not be submitted to the jury. So held on the issue whether a city had negligently maintained its dump grounds.

Nichols Co. v Des Moines, 215-894; 245 NW 358

Depositing refuse on city dump. A person who deposits, on dump grounds provided by a city, discarded materials containing acid or capable of generating acid by a process of decomposition, becomes, henceforth, a stranger to such materials. In other words, he cannot be deemed negligent, toward persons frequenting said grounds, either in making the original deposit or in leaving it unguarded on the grounds. But evidence reviewed and held insufficient to sustain plaintiff's action even on a contrary theory.

Cabrnosh v Penick, 218-972; 252 NW 88

5949 Lighting.

Dual functions of government. The functions of a municipality are two-fold: one is governmental, and the other, proprietary and quasi private. Lighting its streets is governmental, and selling electricity to individual users is proprietary.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Contract to light streets not subject to vote. Cities and towns may contract for lighting streets and alleys under this section without submitting the contract to a vote of the people for approval.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Use of public places—expired franchise—unexpired street light contract — poles in streets lawful. Electric company's occupancy of town streets to supply street lighting under a valid contract is not a trespass nor a nuisance merely because its franchise has expired.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Electricity—franchise not prerequisite to street lighting contract. The fact that a power company had a franchise and had established poles and lines in the streets to transmit electricity does not preclude the company from maintaining such poles and wires, after the franchise has expired, in order to fulfill its contract to furnish street lights to the city because a franchise is not a prerequisite to a city or town contracting to light its streets.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

GRADE OF STREETS

5951 Grades and grading.

Atty. Gen. Opinion. See '38 AG Op 746

ANALYSIS

I GRADES IN GENERAL
II LIABILITY OF CITY

I GRADES IN GENERAL

Validity of ordinance. The court cannot say that an ordinance is so arbitrary and unreasonable as to be void per se when it provides for the widening of a street and for a 4-foot change of grade thereon for a distance of some 400 feet, even tho it be conceded that the present grade is far less than other heavily traveled streets on which no change is proposed.

Des M. Ry. v City, 205-495; 216 NW 284

Construction of alley—slope—negligence of city. In determining negligence of city in constructing alley intersection with a steep grade, evidence that the paving sloped 7½ inches in the first 3 feet, 2 inches in the next foot, and 1½ inches in the remaining 4 feet to the center of the intersection, held, not to constitute jury question when the drop and slope were necessary to provide a sufficient means of escape for the surface water.

Russell v Sioux City, 227-1302; 290 NW 708

II LIABILITY OF CITY

Sidewalks and intersections—different degree of care. The standard of care that a city owes to a pedestrian in respect to a sidewalk differs from the degree owed where an intersection is involved.

Russell v Sioux City, 227-1302; 290 NW 708

Slope of alley—city not insurer of pedestrian's safety. In action by pedestrian injured by a fall in alley intersection, where city was charged with negligence in paving alley with too steep a slope, the degree of safety to pedestrian is concededly lessened, but pedestrian still owes to himself the duty of exercising ordinary care, and the city's duty is of like character, i.e., such care as characterizes an ordinarily prudent person. In no instance is the city an insurer of the pedestrian's safety.

Russell v Sioux City, 227-1302; 290 NW 708

Torts—injuries from street defects—plans by competent engineer—nonliability. Where a person is thrown against the top of an automobile while crossing a certain type of open gutter in a street, constructed according to

II LIABILITY OF CITY—concluded

plans, even tho faulty, of a competent engineer, there is no liability on the municipality because in adopting such plans it is exercising its discretion and acting in a governmental capacity, unless it can be said, as a matter of law, that the plans adopted were obviously defective. Evidence held to establish that certain open gutters in street were reasonably safe for traffic at lawful speeds.

Dodds v West Liberty, 225-506; 281 NW 476

Engineer's plans accepted by city—no obvious defects—no imputation of negligence. Where engineer's plans for paving alley were not obviously defective in failing to show grade of alley, and the work was done in accordance with the plans, no negligence in adopting the plans can be imputed to the city, since engineering expertness is not within the province of the council members, and a lack of such expertness is the reason for employing a competent engineer and relying on his ability and plans for the construction of the improvement.

Russell v Sioux City, 227-1302; 290 NW 708

Vibrolithic pavement—smoothness inherent in construction—nonliability of city. In action by pedestrian for injuries sustained in fall on paving, evidence that the paving was a "vibrolithic" type composed of granite and concrete chips, that the pavement was dry, that there had been no rain or mist, and that there was no foreign substance on the paving does not present a question for the jury on issue of city's negligence in construction, even tho the pavement was "pretty smooth", the smoothness being a quality inherent in the material.

Russell v Sioux City, 227-1302; 290 NW 708

5953 Change.

Atty. Gen. Opinions. See '28 AG Op 430; '38 AG Op 746

ANALYSIS

I CHANGE OF GRADE IN GENERAL
II DAMAGES

I CHANGE OF GRADE IN GENERAL

Street railway not "improvement". A street railway is not an "improvement" on the streets of cities and towns, within the meaning of this statute.

Des M. Ry. v City, 205-495; 216 NW 284

II DAMAGES

Accrual of action. An action by a property owner against a city for damages consequent on a long delayed but finally completed street improvement which, while somewhat various in its operations, is one project, and which substantially destroys the owner's means of passing to and from his property, does not accrue until the improvement is completed.

Ashman v City, 209-1247; 228 NW 316; 229 NW 907

Unallowable evidence of damage. In an action for damages consequent on a change of grade in a street, evidence of the cost of entirely rebuilding a building on the property and of the cost of new pavement and new sidewalks is inadmissible.

Corcoran v City, 205-405; 215 NW 948

5954 Appraisers.

Atty. Gen. Opinion. See '38 AG Op 746

5959 Appeal.

Method of service. As to proper method of service when statute simply requires the notice to be "served", and specifies no method of service, see

Casey v Hogue, 204-3; 214 NW 729

SIDEWALKS

5962 Permanent sidewalks.

Implied contracts. A city may, in the absence of a prohibiting statute, validly enter into an implied contract for the grading of its streets preparatory to the construction of permanent sidewalks.

Carlson v City, 212-373; 236 NW 421

Sufficient showing of jurisdiction. Jurisdiction to construct a permanent sidewalk, and to assess property therefor is made to appear by unquestioned proof (1) that the city or town council by resolution ordered such construction, and (2) that the mayor later signed the record of such meeting and the resolution, even tho the record fails to show a three-fourths affirmative vote of all members, and fails to show that the yeas and nays were called on the resolution.

Perrott v Balkema, 211-764; 234 NW 240

Necessity—review. Courts may not, in the absence of a plea of fraud or oppression, review the municipal determination that an improvement is necessary.

Brush v Town, 202-1155; 211 NW 856

5963 Objections.

Fatally delayed objection. A property owner may not, after a permanent sidewalk has been fully completed, enjoin the collection of a special assessment on his property on the ground that the sidewalk was constructed by an officer of the city. (§5673, C., '27.)

Perrott v Balkema, 211-764; 234 NW 240

When injunction unallowable. Injunction will not lie to enjoin the collection of a special assessment for a permanent sidewalk when the city or town council had acquired juris-

diction over such construction and assessment, even tho the procedure leading up to such jurisdiction was somewhat indefinite.

Perrott v Balkema, 211-764; 234 NW 240

5964 Payment under waiver.

Atty. Gen. Opinion. See '28 AG Op 400

5966 Certificates of levy—lien.

Tax sales enjoined—error as to non-parties. An injunction restraining tax sales of all property against which special assessment certificate holders had liens was erroneous insofar as it deprived certificate holders, who were not parties to the action and over whom the court had no jurisdiction, of their right to have the property sold to pay the special assessments.

Bennett v Greenwalt, 226-1113; 286 NW 722

USE OF STREETS

5970 Conveyances—transportation.

Atty. Gen. Opinion. See '36 AG Op 493

License fees presumptively reasonable. License fees duly fixed by an authorized ordinance will be deemed reasonable unless the contrary appears on the face of the ordinance or on proper evidence.

Towns v City, 214-76; 241 NW 658

Exclusive grant of cab stand privileges. A railway company may grant exclusive rights to a cab stand on its own premises when such grant is not arbitrary or unreasonable.

Red Top Cab Co. v McGlashing, 204-791; 213 NW 791

Municipal license of trucks—nonrepeal by state law. The legislature by the enactment of chapter 252-C1, C., '31 [ch 252.3, C., '39], and thereby requiring of truck operators a privilege or occupation tax when not operating between fixed termini nor over a regular route, on any and all highways of the state, did not impliedly repeal that part of this section which empowers cities and towns to license a truck operator whose business is limited to the municipality—there being no substantial conflict between said statutes.

Towns v City, 214-76; 241 NW 658

5972 Flagmen and gates.

City ordinance—lack of relevancy. A city ordinance which requires a railway company, during certain hours, to maintain a flagman at one of its street crossings, is neither relevant nor material when the accident did not occur during said hours, but at a time substantially thereafter.

Miller v Railway, 223-316; 272 NW 96

Absence of flagmen, gates, etc.—effect. The failure of a railway company to maintain flagmen, gates, or warning devices at crossings does not constitute negligence in the absence of proof that the crossing is unusually dangerous and hazardous.

O'Brien v Railway, 203-1301; 214 NW 608

Absence of flagman or signal device—effect. The submission to the jury of the issue of negligence, based on the absence at a railway crossing of a flagman or signaling device, tho not required by ordinance, is justified when the crossing is more than ordinarily dangerous.

Williams v Railway, 205-446; 214 NW 692

Private crossing—nonduty to maintain flagmen. A railroad company is under no obligation to maintain a flagman at a private farm crossing.

Graves v Railway, 207-30; 222 NW 344

Accident at crossing—failure to ring bell. Tho a traveler on a public street has timely knowledge that an engine and a couple of cars are standing immediately outside the curb line of said street, and on a track which crosses said street, yet the failure to ring the bell on said engine may be the proximate cause of an injury to said traveler should the train be suddenly backed into the street without ringing said bell.

Hanrahan v Sprague, 220-867; 263 NW 514

5973 Speed of trains.

Speed—statute or reasonable care controls. No amount of speed of a railroad train is in and of itself negligence unless in violation of statute or ordinance; likewise, any speed may be negligence if, under the circumstances, a slower rate is called for in the exercise of reasonable care.

Finley v Lowden, 224-999; 277 NW 487

Inapplicability of speed ordinance. A city ordinance which limits the speed of railway trains under given conditions is properly excluded, in the absence of any evidence that the ordinance was violated.

Newman v Railway, 202-1059; 206 NW 831

Negligence per se. The driver of a conveyance is guilty of negligence per se when, in approaching an unobscured railway crossing, with which he is perfectly familiar, in full possession of his faculties, and with no distracting circumstances or emergency facing him, he, when 20 feet from the crossing, sees an engine approaching at a distance of 175 feet, and knows that the bell is not ringing, and thereafter drives upon the crossing, without in any manner observing or judging of the speed of the engine; and this is true even though the engine is in fact running in violation of an ordinance relative to the speed of trains and to the ringing of the engine bell.

Erlich v Davis, 202-317; 208 NW 515; 27 NCCA 164

City ordinance—burden to show inadmissibility. The burden of pointing out wherein city ordinance regulating train's speed is defective, either in substance or method of adoption, is on the party objecting to its admissibility.

Meier v Railway, 224-295; 275 NW 139

CHAPTER 308

STREET IMPROVEMENTS, SEWERS, AND SPECIAL ASSESSMENTS

Atty. Gen. Opinions. See '28 AG Op 400; '30 AG Op 145; '34 AG Op 399, 412; '38 AG Op 333, 794

5975 Street improvements.

Atty. Gen. Opinions. See '25-26 AG Op 331; '32 AG Op 195

ANALYSIS

I IMPROVEMENTS IN GENERAL
II IMPROVEMENTS SPECIALLY ASSESSABLE
III PRIVATE CONTRACTS RELATIVE TO PAYMENT OF ASSESSMENTS

I IMPROVEMENTS IN GENERAL

"Oiling"—what constitutes. The resurfacing to a substantially level condition of an uneven, cracked, and rutted pavement by the application of an oleaginous substance in combination with sand, and of a thickness varying from a quarter to a half inch, does not constitute the improvement of a street "by oiling".

Jackson v City, 206-244; 220 NW 92

Paving contract—contractor's duty to investigate statutory prerequisites. Sound public policy requires a contractor, proposing performance of construction work for a city, to ascertain whether the council has sufficiently complied with statutory prerequisites so as to possess power to execute the proposed contract.

Lytle v Ames, 225-199; 279 NW 453

Railroad crossing construction. Since character and extent of street improvements are within responsible discretion of city authorities and because city council's determination of question of desirability of proposed improvements is conclusive except for want of authority or fraud, and where ordinance granting franchise to railroad gave city council authority to require construction of crossing, damage claim for refusal to construct crossing could not be maintained by owner seeking access to property, when owner instead of requesting council to direct railroad to build crossing, merely made such request by personal letter to railroad official.

Call Bond Co. v Railway, 227-142; 287 NW 832

Temporary obstruction of access to property—damages. Conceding that a city in changing the course of a stream may, temporarily, substantially obstruct a property owner's access to his property, without liability in damages, yet the maintenance of such obstruction for two years is per se not a temporary obstruction, and evidence tending to exculpate the city is inadmissible.

Graham v Sioux City, 219-594; 258 NW 902

II IMPROVEMENTS SPECIALLY ASSESSABLE

Paving cost deficiency from general fund—invalid assessment not "deficiency". A city's paving contract providing payment to the contractor in assessment certificates, and any resulting deficiency from the general fund, does not obligate the city to pay the amount represented by the certificates from the general fund when such certificates are declared void. "Deficiency" in such case refers solely to that portion of the cost not lawfully assessable against property.

Lytle v Ames, 225-199; 279 NW 453

III PRIVATE CONTRACTS RELATIVE TO PAYMENT OF ASSESSMENTS

Invalid resolution of necessity—procedural requisites to paving contract—demurrer. After the supreme court has adjudged certain paving assessments and the procedural requisites to a paving contract invalid because the resolution of necessity lacked the necessary three-fourths vote of the city council, an assignee of the paving assessment certificates may not rely on said contract as an express written agreement to pay for the paving from the general fund on account of a clause in the contract requiring deficiencies to be so paid, hence a cause of action thereon is subject to demurrer.

Lytle v Ames, 225-199; 279 NW 453

5976 Grading required.

Failure to establish grade—effect. A city council has no jurisdiction to assess property for the paving of an alley unless it has, by ordinance, established the grade of the alley.

Walter v City, 203-1068; 213 NW 935

Absence of grade nonjurisdictional. The due establishment of a permanent grade on a street is not a jurisdictional condition precedent to graveling said street, and assessing the cost thereof to abutting and adjacent property. It follows that the property owner, when duly notified of the proposed assessment, must present to the city council the objection that no

permanent grade has been established, or said objection will be irrevocably waived.

Peoples Inv. v City, 213-1378; 241 NW 464; 79 ALR 1310

5979 Use of old material.

Atty. Gen. Opinion. See '38 AG Op 199

5980 Sale of salvage.

Atty. Gen. Opinion. See '38 AG Op 199

5981 Gas, water, and other connections.

Sewer and water connections—illegal assessment. When a city, on default of the property owner, installs water and sewer connections, no assessment can be legally made therefor when the city gives to the property owner no rules or directions whatever as to the location and manner of construction of such connections by the owner; especially is this true when the number of connections made by the city is apparently excessive.

Seymour v Ames, 218-615; 255 NW 874

5984 Sewers.

Avoidance of peremptory abatement by city. A sewer system which is being maintained by a municipality for sanitary purposes, but which is a nuisance, should not be peremptorily and finally abated, but the court should (while retaining jurisdiction) enter an interlocutory order of abatement and give the municipality a reasonable time in which to effect the abatement.

Stovern v Town, 204-983; 216 NW 112

Torts—storm waters into sanitary sewer—negligence—jury question. A city has the duty to maintain its sanitary sewer with ordinary care and prudence and, where the city diverts storm waters into a sanitary sewer designed for a certain capacity, a jury might find the city negligent, and that such negligence was the proximate cause of damage from overflow due to the inability of the sewer to handle the increased flowage.

Wilkinson v Indianola, 224-1285; 278 NW 326

5985 Outlets and purifying plants.

Atty. Gen. Opinion. See '38 AG Op 333

5988 State building.

Atty. Gen. Opinion. See '38 AG Op 794

5991 Resolution of necessity — contents.

Atty. Gen. Opinion. See '38 AG Op 769

ANALYSIS

I RESOLUTION IN GENERAL

Existing but noneffective statute—effect. A city, in acquiring jurisdiction to construct a public improvement, need only comply with existing effective statutes. In other words, it need not comply with a statute which then exists, but which has not yet taken effect.

Butters v City, 202-30; 209 NW 401

Width of paving. A resolution of necessity is not rendered invalid because it fixes the width of the proposed paving at a figure which is in excess of the then ordinance-fixed distance between the curb lines, it appearing that, subsequent to the resolution, the curb lines were so adjusted by ordinance as to correspond with the width of the proposed paving.

Turley v Town, 202-1221; 211 NW 723

Railroad crossing construction. Since character and extent of street improvements are within responsible discretion of city authorities and because city council's determination of question of desirability of proposed improvements is conclusive except for want of authority or fraud, and where ordinance granting franchise to railroad gave city council authority to require construction of crossing, damage claim for refusal to construct crossing could not be maintained by owner seeking access to property, when owner instead of requesting council to direct railroad to build crossing, merely made such request by personal letter to railroad official.

Call Bond Co. v Railway, 227-142; 287 NW 832

Invalid resolution of necessity—procedural requisites to paving contract—demurrer. After the supreme court has adjudged certain paving assessments and the procedural requisites to a paving contract invalid because the resolution of necessity lacked the necessary three-fourths vote of the city council, an assignee of the paving assessment certificates may not rely on said contract as an express written agreement to pay for the paving from the general fund on account of a clause in the contract requiring deficiencies to be so paid, hence a cause of action thereon is subject to demurrer.

Lytle v Ames, 225-199; 279 NW 453

Necessity—review. Courts may not, in the absence of a plea of fraud or oppression, review the municipal determination that an improvement is necessary.

Brush v Town, 202-1155; 211 NW 856

II MATERIALS AND METHOD OF CONSTRUCTION

Details in re materials. A statement of the kinds of materials to be used in a paving project is sufficient if the public is so apprised of the general character of the materials that

it may intelligently investigate and intelligently object if found necessary.

Cardell v City, 201-628; 207 NW 775

III PROPERTY ASSESSABLE

Assessments—belated objections. The objection that a resolution of necessity did not state whether "abutting or adjacent" property would be assessed for a sewer may not be made for the first time on appeal (1) when the entire municipality had been formed into a sewer district, and (2) when the resolution of necessity specified alternate modes of payment, among which was a special assessment against "all the property in said town."

Chicago, RI Ry. v Dysart, 208-422; 223 NW 371

IV LOCATION AND TERMINI

Width of paving—validity of resolution of necessity. A resolution of necessity is not rendered invalid because it fixes the width of the proposed paving at a figure which is in excess of the then ordinance-fixed distance between the curb lines, it appearing that, subsequent to the resolution, the curb lines were so adjusted by ordinance as to correspond with the width of the proposed paving.

Turley v Dyersville, 202-1221; 211 NW 723

5992 Additional contents.

Failure to object to estimated assessment. The right of a property owner to object to an assessment for paving on the ground that said assessment is in excess of 25 percent of the value of the lot at the time of the levy is not waived by failure to interpose said objection before the resolution of necessity is adopted, even tho the said resolution and the plat and schedule filed in connection therewith show (1) the valuation fixed by the council on the lot, (2) the estimated assessment on the lot, and (3) a notification that objection to the amount of the estimated assessment shall be deemed waived unless interposed before the resolution was adopted.

Smith Co. v City, 210-700; 231 NW 370

5993 Plat and schedule.

Atty. Gen. Opinion. See '25-26 AG Op 61

Unallowable exemption. A tract of ground which abuts upon an improvement may not be exempted from assessment simply because the owner contemplates a possible future donation of the tract to the city for a street.

Johnson v City, 202-617; 210 NW 755

5994 Cost of schedule.

Atty. Gen. Opinion. See '25-26 AG Op 61

5995 Time of hearing—objections permitted.

Adjournment without date—effect. Jurisdiction over a resolution of necessity for paving and curbing of streets is not lost because the city council, after full hearing on the resolution, adjourned without date, to wit: "to the call of the mayor".

Schumacher v City, 214-34; 239 NW 71

5996 Remonstrance—vote required—amendment.

Atty. Gen. Opinion. See '25-26 AG Op 61

5997 Notice.

Atty. Gen. Opinions. See '28 AG Op 190, 262

Assessments—how made lienable. A filing by the city clerk with a county auditor of a copy of the published notice of the resolution of necessity covering a sewer improvement is sufficient (under §816, S., '13), if accompanied by proof of publication in one of the required newspapers. (Note change in §6007, C., '24.)

Anderson-Deering Co. v Boone, 201-1129; 205 NW 984

5999 Record—vote required.

Initiation by council—vote required. An assessment for paving cannot be legally made against property when the improvement was initiated by the council by a vote of less than three-fourths of its membership and when the property owner has not estopped himself from objecting to the proceedings.

Seymour v Ames, 218-615; 255 NW 874

Excessive assessment—nonestoppel. A property owner is not estopped to assert that his property has been assessed in excess of 25 percent of its value, because he (along with a majority of the property owners) had petitioned for the improvement and in the petition had waived the 25 percent limitation, when the record made by the city council shows that the petition was ignored, and that the improvement was ordered solely on the motion of the council.

Nelson v City, 208-709; 226 NW 41

Invalid resolution of necessity—procedural requisites to paving contract—demurrer. After the supreme court has adjudged certain paving assessments and the procedural requisites to a paving contract invalid because the resolution of necessity lacked the necessary three-fourths vote of the city council, an assignee of the paving assessment certificates may not rely on said contract as an express written agreement to pay for the paving from the general fund on account of a clause in the contract requiring deficiencies to be so paid, hence a cause of action thereon is subject to demurrer.

Lytle v Ames, 225-199; 279 NW 453

6001 Contract.

Atty. Gen. Opinions. See '28 AG Op 46; '32 AG Op 44

Curing invalidity in contract.

Waller v Pritchard, 201-1364; 202 NW 770

Prohibited express contract excludes implied. Absolute lack of authority in a municipality to enter into an express contract relative to a given subject matter necessarily excludes the possibility of an implied contract on the same subject matter.

Roland Co. v Town, 215-82; 244 NW 707

Negligence of contractor — unanticipated event. A contractor who, while constructing a sewer under the direction of and in accordance with the plans prescribed by the city, is unexpectedly interrupted in his work by the failure of the city to acquire a continuous right of way for the sewer, is under no legal obligation to a property owner to leave his uncompleted work in such condition as will avoid damages which no reasonable foresight would anticipate.

Newton Auto v Herrick, 203-424; 212 NW 680

Illegal reimbursement of contractor for loss. A municipal corporation has no legal authority, and can be given by the general assembly no constitutional legal authority, to pay or contract to pay its contractor, after performance of a contract and after settlement therefor, an added sum to reimburse the contractor for loss sustained by him because the federal government commandeered him and his equipment as a war measure, and thereby delayed the performance of the contract in question.

Love v City, 210-90; 230 NW 373

Acceptance—avoidance by proof of fraud. A nonfraudulently induced acceptance by a city council of a street pavement estops the city thereafter to plead nonperformance of the contract, but not so when the city pleads and proves that, at the time of said acceptance, the contractor, unbeknown to the council and in collusion with city employees, had constructed said pavement of a thickness substantially less than the thickness required by the contract.

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

Bond — breach — allowable and unallowable action by city. A city, tho named as obligee in a bond for the construction of a street pavement, may not—assuming fraud-induced acceptance by the city of the work—maintain in its own right and for its sole benefit an action at law on the bond for damages consequent on the failure of the contractor to construct the pavement of the thickness required by contract.

But the city may maintain such action in its own name as representative of the assessed property owners, and to recover for itself its own proper outlay (§10968, C., '35).

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

Pavement—insufficient thickness — quantity of material purchased. On the issue whether a pavement was constructed of the thickness required by the contract, evidence of the quantity of material sold and delivered to the contractor is quite immaterial, he making no effort to show the quantity of material that actually went into the structure.

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

Pavement — noncontract tolerance in re thickness. Contract and accompanying specifications reviewed and held not to authorize a tolerance in the thickness of a concrete pavement applicable to the type of paving contracted for.

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

Substantial failure to perform—nonallowable recovery. Principle reaffirmed that a contractor who, in the construction of a street pavement, substantially fails to comply with the contract specifications, and is thereby barred from recovering the contract price, may not recover on quantum meruit, either from the city or from the property owners—and especially is this true when the contractor is guilty of fraud in the construction work.

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

Decree—nullification of contract and enjoining payment thereunder—scope. A decree to the effect that a contract between a contractor and a city was void, and enjoining the city from in any manner making any further payment under the contract, is not an adjudication of another action then pending at law wherein the contractor was seeking to recover on the same subject matter, irrespective of the contract; especially is this true when the decree shows that the court excluded such pending action from the scope of its decree.

Hargrave v City, 208-559; 223 NW 274

Nonjurisdiction of budget director. A contract for street improvements, e. g., paving and curbing, to be paid for by special assessments, is entirely outside the purview and purpose of that part of the Budget Act (Ch 23, C., '31) giving the director of the budget jurisdiction on appeal over proposed contracts for the construction of municipal improvements payable in whole or in part from the funds of the municipality; and this is true tho, in the final adjustment, a portion of the costs is paid from general municipal funds.

Schumacher v City, 214-34; 239 NW 71

6003 Agreement to repair—exception.

Bond to repair—construction. A statutory bond "to keep in good repair" a pavement covers repairs necessitated by defective workmanship and defective materials, not repairs necessitated by ordinary wear and tear.

Charles City v Rasmussen, 210-841; 232 NW 137; 72 ALR 638

Breach—right to maintain immediate action. An action on a contractor's bond to repair a street may be maintained without allegation and proof that the city has made the repairs.

Charles City v Rasmussen, 210-841; 232 NW 137; 72 ALR 638

6004 Bids—notice.

Atty. Gen. Opinions. See '28 AG Op 262; '30 AG Op 102

ANALYSIS

I LETTING CONTRACT
II PROPOSALS FOR BIDS AND NOTICE
III BIDS

I LETTING CONTRACT

Statute mandatory. The statute requiring contracts for the repair of a street improvement to be let on competitive bids is mandatory even tho special assessments on benefited property are not within the contemplation of the contract.

Johnson Bk. v City, 212-929; 231 NW 705; 237 NW 507; 84 ALR 926

Modification of contract without competitive bidding. A city which has so breached a valid paving contract that the contractor is under no duty to perform, may, without submitting the matter to competitive bidding, validly contract in good faith with the contractor for reasonably enlarged compensation (to be paid from the general fund) as a consideration for the performance of the contract notwithstanding the breach; and the execution of the contract on such basis is beyond attack.

Des Moines v Horrabin, 204-683; 215 NW 967

Competitive bidding—unallowable contract. Competitive bidding on municipal public works is mandatory, but is not obtained when bids under specifications prescribed by the city are rejected, and the contract is awarded to a bidder who bids under his own specifications which are materially and substantially different than the specifications prescribed by the city.

Iowa Co. v Town, 216-1301; 250 NW 136

Public improvements—estimated quantities as basis for contract—variation with specifications not fatal. In awarding a contract the function of plans and estimated quantities is to permit a uniform comparison of bids, and the requirement of "unit prices", as a means of payment for variations from the estimated quantities, indicates their variable character, so certain variations between the plans and specifications will not result in a failure of competitive bidding invalidating a contract based thereon.

Interstate Co. v Forest City, 225-490; 281 NW 207

Belated objection. Failure to present in the trial court the proposition that a contract for grading was invalid because not let to the lowest bidder, cannot be presented for the first time on appeal.

Carlson v City, 212-373; 236 NW 421

Void contract—nonliability of city as on implied contract. A municipal contract for the repair of a street pavement is void when entered into in disregard of the statute requiring competitive bidding. And after it is decreed that special assessments on benefited property may not be levied, the contractor or his assignee may not, on the theory of an implied contract, recover against the city in its corporate capacity, either at law or in equity (1) for the contract price, or (2) for the reasonable value of the materials and labor furnished under the void contract and retained by the city.

Johnson Bk. v City, 212-929; 231 NW 705; 237 NW 507; 84 ALR 926

Void contract—sweeping deprivation of rights. A contract for the repair or reconstruction of a street pavement, entered into in total disregard of the mandatory statute requiring competitive bidding, is void ab initio, and, if performed, it follows as a matter of public policy and irrespective of the motives of the parties:

1. That special assessments may not be legally levied to defray the cost of such performance, and
2. That the contractor may not, either, (1) on the theory of a contract implied in fact, or (2) on the theory of quasi-contract or contract implied in law (unjust enrichment) recover against the city for the expenditures made by him even tho all profit be excluded therefrom.

Especially is the foregoing true when the record reveals a contract manipulation which emits an unmistakable odor of fraud and evasion.

Horrabin Co. v Creston, 221-1237; 262 NW 480

Contract—assignment as releasing surety—inadequate proof. A surety on a bond for the construction of a city pavement who claims release from liability because the city consented to an assignment of the contract to a third party, must, at the least, establish such consent by evidence of some action on the part of the city council. Proof of consent by the city auditor, alone, to such assignment, is not sufficient. Especially is this true when the record otherwise shows that the original contractor was the only contractor recognized by the city.

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

II PROPOSALS FOR BIDS AND NOTICE

Failure to submit to bids. Failure to submit a contract for a street improvement (other than for oiling or chloriding) to competitive bids renders the entire proceedings invalid,

and, of course, precludes the right to assess property for the cost thereof.

Jackson v City, 206-244; 220 NW 92

Competitive bids—void provision. A clause inserted in a public improvement contract, to the effect that, if rock or quicksand is encountered, the contractor shall be paid on the basis of cost plus a named percentage, is void when both the specifications and the advertisement for bids are silent as to such contingency. (See annos. under §7463.)

Gjellefald v Hunt, 202-212; 210 NW 122

Paving contract—contractor's duty to investigate statutory prerequisites. Sound public policy requires a contractor, proposing performance of construction work for a city, to ascertain whether the council has sufficiently complied with statutory prerequisites so as to possess power to execute the proposed contract.

Lytle v Ames, 225-199; 279 NW 453

III BIDS

Competitive bidding—patentee as bidder—legality of bid. When the city calls for competitive bids on four different kinds of paving mixtures, all of substantially the same utility, desirability, and cost of commercial materials, three of which mixtures are unpatented and one of which is patented, the bid of the patentee, tho the only bid on the patented article, to furnish and lay the patented mixture for one cent per square yard above the price (not shown to be exorbitant) at which he had agreed simply to furnish it to all other bidders, is not fraudulent and void as stifling competition, tho the cost of laying the mixture is some twenty-eight cents per square yard.

Hoffman v City, 212-867; 232 NW 430; 77 ALR 680

6006 Bond.

Hidden fraud—nonestoppel by use. A city, by using a pavement for some three and a half years, does not estop itself from legally moving against the contractor because of a hidden-from-view, fraudulent defect in the work for which the contractor was responsible.

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

6007 Certification to county auditor—record book.

Atty. Gen. Opinion. See '32 AG Op 65

Special assessments—when lien or incumbrance. A special assessment for a street improvement which has been undertaken by the city without the letting of a contract does not become a lien or incumbrance on the land from the point of time when the assessment is finally approved by the council.

Frankel v Blank, 205-1; 213 NW 597

How made lienable. A filing by the city clerk with a county auditor of a copy of the published notice of the resolution of necessity covering a sewer improvement is sufficient (under §816, S., '13 [§6007, C., '39]), if accompanied by proof of publication in one of the required newspapers.

Anderson-Deering Co. v Boone, 201-1129; 205 NW 984

Certificates—special procedure for collection exclusive. A municipal, improvement certificate may not be foreclosed by an action in court, because, (1) the statutes confer no such authority, and (2) the statutes provide a special procedure for collection along with the collection of ordinary taxes. See §7193-d1, C., '31 [§7193.01, C., '39].

Hawkeye Ins. v Valley-Des Moines Co., 220-556; 260 NW 669; 105 ALR 1018

6008 Lien generally.

Atty. Gen. Opinions. See '32 AG Op 265, 267

Applicability of statute. Principle reaffirmed that §7202 et seq., C., '24, relative to the lien of taxes, have applicability only to general taxes, not to special assessments for street improvements.

Frankel v Blank, 205-1; 213 NW 597

Special assessments—when lien or incumbrance. A special assessment for a street improvement which has been undertaken by the city without the letting of a contract does not become a lien or incumbrance on the land from the point of time when the assessment is finally approved by the council.

Frankel v Blank, 205-1; 213 NW 597

When lien or incumbrance. A covenant against "liens and incumbrances" is not broken by the naked fact that at the time thereof the records of the city show that the city council had finally approved a special assessment on the land for a street improvement which the city had undertaken without the letting of a contract therefor; and this is true even tho the covenantor had appeared in said assessment proceedings and waived irregularities therein.

Frankel v Blank, 205-1; 213 NW 597

Priority. The fully perfected lien of a special assessment for sewer is prior in right to the lien of a subsequent special assessment by the board of supervisors for a public drainage improvement, even tho the latter improvement was initiated prior to the sewer proceedings.

Anderson-Deering Co. v Boone, 201-1129; 205 NW 984

Equal equities—which shall prevail. Principle reaffirmed that as between equal equities, the first in time shall prevail—that the first in time shall be first in right. Applied as between special assessment certificates issued at

different times against the same lots or land for different improvements.

Inter-Ocean Co. v Dickey, 222-995; 270 NW 29

Loss of lien. The lien of delinquent special assessments for street improvements is irrevocably lost by the failure of the county treasurer to enter such assessments on the current general tax list. And this is true even tho the property owner has formally waived all illegalities in the assessments, and has agreed to pay them, and even tho the county treasurer has kept his books on forms prescribed by the state auditor.

Wallace v Gilmore, 216-1070; 250 NW 105

Tax deed destroys lien of special assessment. A tax sale for general or ordinary taxes and a tax deed issued thereon displaces unmatured special assessment liens which attached prior to said sale.

Iowa Co. v Barrett, 210-53; 230 NW 528
Western Sec. Co. v Bank, 211-1304; 231 NW 317

Tax deed nullifies special assessments. A tax deed issued on a sale for ordinary regular taxes nullifies the lien of all special assessments levied on the land by a city after the sale and before the execution of the deed.

Means v City, 214-948; 241 NW 671

Special assessment liens ended by resale.
Tesdell v Greenwalt, 228- ; 290 NW 676

When deed extinguishes drainage taxes. The lien on land of unmatured installments of duly levied district-drainage taxes is extinguished by a tax deed which is issued on a sale of said land for general (ordinary) taxes levied subsequent to the levy of the drainage taxes.

Fergason v Aitken, 220-1154; 263 NW 850

Certificates—paramount right of holder. The holder of special paving assessment certificates who obtains an assignment of a tax sale certificate, issued on a sale of the lots or land for general taxes, may be compelled by mandamus to reassign said tax sale certificate (on proper payment) to the holder of special sewer assessment certificates which affect the same lots or land and which latter certificates are legally prior in point of time and right to said paving certificates.

Inter-Ocean Co. v Dickey, 222-995; 270 NW 29

Judgment—persons not parties or privies. A party who purchases a municipal, improvement certificate, lienable on certain property, is not privy to (and therefore not bound by) a subsequently instituted action to quiet title, and the decree entered therein, when he is not made a party to said action.

Hawkeye Ins. v Valley-Des Moines Co., 220-556; 260 NW 669; 105 ALR 1018

6012 Cost of improvements.

Special assessments—discrepancies—effect. Relatively small discrepancies in assessments on different sides of the street improved, and on nonabutting properties having the same relative location, will not invalidate an entire assessment, no relief in such special instances being asked.

In re Fourth St., 203-298; 211 NW 375

Void assessment. A street improvement assessment under the nondistrict method, on property separated by a parallel street from the street improved, is void.

Bates v City, 201-1233; 207 NW 793

6014 Cost of paved roadway.

Atty. Gen. Opinion. See '34 AG Op 399

6015 Cost of sewers.

Atty. Gen. Opinion. See '38 AG Op 333

Payment from sewer fund—effect. When public storm sewers are constructed by a city and paid for out of the city sewer fund, no compliance need be had with the law (Ch 308, C., '27) which controls such construction when the cost is assessed to adjacent property.

Dunn v City, 206-908; 221 NW 571

6017 Deficiencies—nonassessable property.

Paving cost deficiency from general fund—invalid assessment not "deficiency". A city's paving contract providing payment to the contractor in assessment certificates, and any resulting deficiency from the general fund, does not obligate the city to pay the amount represented by the certificates from the general fund when such certificates are declared void. "Deficiency" in such case refers solely to that portion of the cost not lawfully assessable against property.

Lytle v Ames, 225-199; 279 NW 453

6018 Assessment.

ANALYSIS

I PERFORMANCE OF CONTRACT
II ACCEPTANCE OR REJECTION OF WORK
III ASCERTAINMENTS OF COSTS, AMOUNTS ASSESSABLE, ETC.

I PERFORMANCE OF CONTRACT

School property—assessability. A school district having lots assessable under a city contract for paving and curbing cannot be deemed a "municipality" entering "into a contract" within the meaning of the state budget act (Ch 23, C., '31). In such circumstances, the district is simply a property owner.

Schumacher v City, 214-34; 239 NW 71

Corporate liability of city. When a paving contract has, in fact, been performed and the work has, in fact, been accepted by the city and assessments made on private property, the conduct of the city in fraudulently conniving, on appeal by property owners, in the

entry of a decree that the contract had not been substantially performed, renders the city personally responsible for the loss suffered by the contractor or his assignee.

Western Corp. v City, 203-1324; 214 NW 687

Failure to substantially perform contract. The appellate court will not invalidate an entire assessment for paving, because of the nonfraudulent failure of the contractor to substantially comply with the construction of some minor part of the work, i. e., a six or eight-inch longitudinal expansion joint along the curb; nor will the court attempt to readjust the assessment because of such default when the record contains no data from which such readjustment can be intelligently arrived at.

Cardell v City, 201-628; 207 NW 775

II ACCEPTANCE OR REJECTION OF WORK

Acceptance of completed construction work —undiscoverable defects—recovery. In the absence of fraud or mistake, the acceptance of construction work by a city bars recovery on the contractor's bond, except as to defects undiscoverable or unknown at the time of acceptance; however, the fraud or mistake necessary to overcome the acceptance must be alleged and proven.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Contractor's bond—implied condition — no acceptance of hidden defects. A bond filed by a contractor, assuming the sole responsibility of constructing a water-tight dam for a city reservoir, contains the implied condition that acceptance by the city of the work will not bar recovery by the city on account of defects unknown and undiscovered at the time of acceptance.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Special assessments—fraudulent failure of city to defend assessments—effect. When a paving contract has in fact been performed, and the work has in fact been accepted by the city and assessments made on private property, the conduct of the city in fraudulently conniving, on appeal by property owners, in the entry of a decree that the contract had not been substantially performed, renders the city personally responsible for the loss suffered by the contractor or his assignee.

Western Pav. Corp. v Marshalltown, 203-1324; 214 NW 687

III ASCERTAINMENTS OF COSTS, AMOUNTS ASSESSABLE, ETC.

Cost of sewer embraced in cost of paving. The cost of a storm sewer, rendered necessary in connection with a paving project, may be included in the assessable cost of said paving; but not a charge for attorney fees.

Turley v Town, 202-1221; 211 NW 723

Bonds—corporate liability. A city which legally issues bonds in the form provided by statute, and on the basis of special assessments for street improvements or sewers, must not only make and maintain valid special assessments on the benefited property sufficient to pay the principal of the bonds and all interest accruing thereon, but must, by the due exercise of its own statutory powers relative to the collection of special assessments, supplement, if necessary, the efforts of the county treasurer to collect and realize on such assessments; and for any deficiency which is traceable to the neglect of the city to perform either of such duties, the city is liable in its corporate capacity.

Hauge v City, 207-1209; 224 NW 520
First N. Bk. v Town, 211-341; 233 NW 712

Assessment certificates create no trust relationship. A city or town in issuing valid special assessment certificates for street improvements and in levying valid assessments for the payment of the certificates, does not constitute itself a trustee for said certificate holders.

Stockholders Inv. v Town, 216-693; 246 NW 826

Certificates—nonliability of city. A city or town which issues a valid special assessment certificate against specific property, for paving, and legally levies an adequate assessment against the property to pay the certificate, does not thereby obligate itself to pay the certificate in case the property owner does not pay it, and in case the property in question remains unsold at tax sale.

Morrison v Culver Est., 216-676; 248 NW 237

Special assessments—nonduty to collect and apply. Neither the statutes relative to special assessments nor the certificates issued in connection with such assessments impose on the city or town any right or duty to collect the assessments and to apply the proceeds thereof.

Stockholders Inv. v Town, 216-693; 246 NW 826

Nonduty to create special fund for payment. A city or town is under no obligation to provide or create a special fund for the payment of special assessment certificates other than the fund resulting from valid assessments on the property involved.

Stockholders Inv. v Town, 216-693; 246 NW 826

Limitation of actions — special assessment certificates. A cause of action accrues against a city or town on special assessment certificates issued and delivered by it for street improvements, at the point of time when it fails

to levy valid assessments for the payment of said certificates, and such cause of action is barred in ten years after said accrual.

Stockholders Inv. v Town, 216-693; 246 NW 826

6019 "Privately owned property" defined.

Atty. Gen. Opinion. See '38 AG Op 794

6021 Assessment—rate.

Atty. Gen. Opinion. See '25-26 AG Op 323

ANALYSIS

I LIMITATION IN GENERAL
II VALUE OF PROPERTY
III BENEFITS

I LIMITATION IN GENERAL

Ordinance—failure to include statute. An ordinance which provides for an authorized public improvement and for the assessment of the cost thereof on specified property is not invalid because it does not embrace or repeat therein the statutory limitations on such assessment.

Brush v Town, 202-1155; 211 NW 856

Dual systems of improvements. Two paving contracts initiated and carried on in good faith under separate resolutions do not constitute one system of improvement, even tho they in part affect the same property.

Curtis v Town, 202-588; 210 NW 800

Inequitable assessment—insufficient basis. Evidence of the relative values of different properties is not, in itself, sufficient basis on which to determine whether an assessment is inequitable.

Walter v City, 203-1068; 213 NW 935

Fatally inadequate record on appeal.

Cardell v City, 201-628; 207 NW 775

II VALUE OF PROPERTY

Value of property—elements. In determining the value of real property as the basis for a special assessment, due consideration should be given to its location and adaptability for residence or business purposes, its assessed value, offers made for it, if any, at a public auction, along with the past, present, and future prospects of the city or town.

Turley v Town, 202-1221; 211 NW 723

Valuing agricultural lands. The value of agricultural lands within a municipality must not be determined for special assessment purposes on the basis that the lands will be abandoned for agricultural purposes, and will be platted into blocks and lots; but reasonable future prospects may be given due consideration. Evidence reviewed and values held excessive.

Gronbech v Town, 213-358; 239 NW 26

Selling price as evidence of value. The actual selling price of specially assessed property is not necessarily conclusive on the owner as to its actual value. The terms of the sale are a very material consideration.

Johnson v City, 202-617; 210 NW 755

Improvement—value at time of levy. On a special assessment levied against property for curb and gutter, future prospects of property must be considered only in determining its value, with improvement, at the time of levy.

Nash v Ames, (NOR); 282 NW 340

Personal property not assessable. Only real estate is assessable for a municipal pavement. In other words, in determining the value of a tract of land in order to fix an assessment as high as one-fourth of the actual value, the value of buildings and other improvements belonging solely to lessees must be excluded.

Chi. RI Ry. v Reinbeck, 201-126; 206 NW 664

Presumption. Special assessments for street improvements are presumptively just and correct.

Curtis v Town, 202-588; 210 NW 800
In re Hume, 202-969; 208 NW 285

Assessment in excess of statutory permission. A special assessment in excess of 25 percent of the value of the property is perfectly valid when the property owner fails to enter any objections thereto, as provided by statute. (See annos. under §6029.)

Anderson-Deering Co. v Boone, 201-1129; 205 NW 984

Paving assessments over 25 percent—reduction. In an appeal by a city from a ruling by the trial court that an assessment for paving was more than 25 percent of the value of the adjoining lot and from the resulting order reducing the assessment, evidence reviewed and held that the court's finding was sustained by the weight of the evidence.

Lee v Ames, 225-1061; 283 NW 427

Excessive assessment—nonestoppel. A property owner is not estopped to assert that his property has been assessed in excess of 25 percent of its value, because he (along with a majority of the property owners) had petitioned for the improvement and in the petition had waived the 25 percent limitation, when the record made by the city council shows that the petition was ignored, and that the improvement was ordered solely on the motion of the council.

Nelson v City, 208-709; 226 NW 41

Failure to object to estimated assessment. The right of a property owner to object to an assessment for paving on the ground that said assessment is in excess of 25 percent of the value of the lot at the time of the levy is not waived by failure to interpose said objection before the resolution of necessity is

adopted, even tho the said resolution and the plat and schedule filed in connection therewith show (1) the valuation fixed by the council on the lot, (2) the estimated assessment on the lot, and (3) a notification that objection to the amount of the estimated assessment shall be deemed waived unless interposed before the resolution was adopted.

Smith, etc. Co. v City, 210-700; 231 NW 370

Assessments exceeding statutory limitation —city council's nonfraudulent judgment final. Altho refunding bonds contain a certification that the city has done all things as required by law, such certification is not a misrepresentation, and a city incurs no liability by reason of a claim that certain properties were assessed in excess of the 25 percent statutory limitation, for the reason that having been set up by the legislature to make such determination, the city council's discretion and judgment respecting property values, in the absence of fraud or other sufficient grounds, are not subject to this attack in the courts.

Bankers Life v Emmetsburg, 224-1287; 278 NW 311

Excessive assessment—when evidence admissible. In an action against a city in its corporate capacity to recover a deficiency on a street improvement or sewer bond, it may be shown that the special assessment for the purpose of paying the bond was in excess of 25 percent of the value of the property, and that such fact resulted in the property's selling at tax sale for a less sum than the assessment.

Hauge v City, 207-1209; 224 NW 520

Excessive assessments—inadequate proof. The failure of property to sell at tax sale for the amount of the special assessment levied against it for paving does not establish the contention that the property was assessed in excess of 25 percent of its value.

Morrison v Culver Est., 216-676; 248 NW 237

Excessiveness—evidence. Evidence held to justify a materially higher assessment for paving than the assessment fixed by the trial court.

Nelson v City, 208-709; 226 NW 41
Verlinden v City, 208-892; 226 NW 42

Good faith excessive assessments. A city or town which levies special assessments for street improvements in an amount sufficient to pay the various certificates issued, and obtains waivers, by the various property owners, of illegalities and irregularities in the proceedings and the promises of the said property owners to pay the assessments, is not liable in damages consequent on the fact that the funds actually collected on the assessments were insufficient to retire the certificates; and this is true tho the assessments, without fraud or collusion, exceeded 25 percent of the value of each of the various properties.

Stockholders Inv. v Town, 216-693; 246 NW 826

Intentionally excessive assessment—liability of city. A city or town which levies special assessments for street improvements in an amount sufficient to pay the various certificates issued, and obtains waivers by property owners of illegalities and irregularities in the proceedings, and the written promise of the said property owners to pay the assessments, is not liable in damages consequent on the fact that the funds actually collected on the assessments were insufficient to retire the certificates; and this is true tho the council knowingly and intentionally levied the assessments in excess of 25 percent of the value of each of the various properties.

Inter-Ocean Co. v Sioux City, 219-998; 258 NW 907

III BENEFITS

Computation—method employed. The manner in which the amount of a special assessment is arrived at is quite immaterial if such amount is just and equitable and is in proportion to and not in excess of the benefits conferred.

In re Fourth St., 203-298; 211 NW 375

Future prospects—evidence. Future prospects of property and reasonable anticipations concerning it may be given consideration (1) in fixing the benefits which result to the property by reason of the construction of a public improvement, and (2) in determining the actual value. Evidence reviewed, and held both to sustain and not to sustain the ruling of the trial court as to different tracts.

Finkle v City, 205-918; 218 NW 618

Present use of property. The fact that the owner of real estate is, at the time of a public improvement, using it for such a particular purpose that the land derives little or no benefit from the improvement presents no legal obstacle to allowing the public authorities to view the land in its general relations and apart from its particular use and justly and equitably assess it accordingly.

In re Fourth St., 203-298; 211 NW 375

Presumption—failure to overcome. An assessment for sewer must stand when appellant fails to establish his objections: to wit, that the assessment exceeds benefits and exceeds 25 percent of the value of the property.

Chi. RI Ry. v Town, 208-422; 223 NW 371

Excessive assessments — burden to overthrow. When the record reveals both by presumption and by actual proof that property has been benefited by the construction of a sewer improvement, the complaining property owner must, with reasonable definiteness, es-

III BENEFITS—concluded

tablish the extent that the assessments exceed the amount of said benefits.

Brenton v Des Moines, 219-267; 257 NW 794

Assessment—evidence. Evidence relative to the location, topography, and surroundings of municipal acreage, and the extent to which it was supplied with municipal facilities and advantages reviewed; and held that a street paving assessment against it of $900 was approximately correct, in view of the statutory prohibition against assessing property in excess of 25 percent of its value.

Adams v Town, 205-456; 218 NW 468

6025 City engineer—duties.

Adoption of engineer's plans—nonliability for tort unless obviously defective. In adopting plans for pavement of alley intersection, the city was acting in a "judicial capacity" and was not liable for defects in engineer's plans unless as a matter of law the plans were obviously defective.

Russell v Sioux City, 227-1302; 290 NW 708

6026 Notice of assessment.

Atty. Gen. Opinion. See '28 AG Op 262

Special assessments—timely objections. Objections to a proposed special assessment by a city council for paving are timely when filed by the property owner prior to the date for filing such objections, as specified in the published notice of the proposed assessment, even tho such filing was more than 20 days after the first publication.

Western Corp. v City, 203-1324; 214 NW 687

6028 Hearing and decision.

Special assessments—discrepancies — effect. Relatively small discrepancies in assessments on different sides of the street improved, and on nonabutting properties having the same relative location, will not invalidate an entire assessment, no relief in such special instances being asked.

In re Fourth St., 203-298; 211 NW 375

6029 Objections waived.

ANALYSIS

I REMEDIES IN GENERAL
II OBJECTIONS
III ESTOPPEL TO OBJECT

I REMEDIES IN GENERAL

Void assessment—remedies available. A void assessment for a street improvement may be annulled either (1) on appeal or (2) by an independent action in equity, even tho no objections to the assessment are filed with the city council.

Bates v City, 201-1233; 207 NW 793

Objections as exclusive remedy. Property owners who unsuccessfully file objections before the city council as to an assessment may not thereafter maintain an action in equity, when the proceedings leading up to and culminating in the assessment are prima facie regular, tho long drawn out and delayed and perhaps irregular.

Franquemont v Munn, 208-528; 224 NW 39

Jurisdictional objections. The objection that an assessment for sewer is void because the work was let on a cost-plus contract when the specifications and notice to bidders were silent as to any such contract goes to the jurisdiction of the council to make the assessment, and may be raised for the first time on appeal.

Chi. RI Ry. v Town, 208-422; 223 NW 371

When sufficiency immaterial. The question whether objections filed before a city council against the confirmation of a special assessment are sufficiently specific becomes quite immaterial when it is made to appear that the council was wholly without jurisdiction to make the assessment.

Rivers v City, 202-940; 211 NW 415

Void assessment. The act of a city in taking possession of a strip of ground and paving it as a street, and assessing the cost thereof on the abutting land, without having in any manner acquired the paved land for street purposes, is absolutely void.

Beim v Carlson, 209-1001; 227 NW 421

Nonvoid assessment. The inclusion in an assessment for a street improvement of unallowable items of expense does not render the assessment fraudulent and void; and consequently an independent action in equity to cancel the assessment will not lie, objection before the council and appeal being the proper remedy.

Meijerink v Lindsay, 203-1031; 213 NW 934
Walter v City, 203-1068; 213 NW 935

II OBJECTIONS

Timely objections. Objections to a proposed special assessment by a city council for paving are timely when filed by the property owner prior to the date for filing such objections, as specified in the published notice of the proposed assessment, even tho such filing was more than 20 days after the first publication. (§6026, C., '24.)

Western Corp. v City, 203-1324; 214 NW 687

Inadequate objection. An objection before a city council that a sewer assessment was excessive cannot possibly be construed as an attack on the jurisdiction of the council to make the assessment.

Chi. RI Ry. v Town, 208-422; 223 NW 371

Fatally indefinite objection. An objection to a special assessment must be explicit

enough to fairly call to the attention of the city council the nature of the property owner's complaint and to enable the council to investigate. "I object" is quite insufficient.

Downing v City, 203-216; 212 NW 549

Noncomprehensive objection. An objection on appeal that a special assessment was not "ratably and proportionately distributed over all the property in the district" is not embraced within an objection filed with the council to the effect that the assessment "is in excess of benefits, confiscatory, oppressive."

Walter v Ida Grove, 203-1068; 213 NW 935

III ESTOPPEL TO OBJECT

Failure to object—effect. A special assessment in excess of 25 percent of the value of the property is perfectly valid when the property owner fails to enter any objections thereto, as provided by statute. (See annos. under §6021.)

Anderson-Deering Co. v Boone, 201-1129; 205 NW 984

Schumacher v City, 214-34; 239 NW 71

Failure to object—waiver. The right of a property owner to object to an assessment for paving on the ground that said assessment is in excess of 25 percent of the value of the lot at the time of the levy, is not waived by failure to interpose said objection before the resolution of necessity is adopted, even tho the said resolution and the plat and schedule filed in connection therewith show (1) the valuation fixed by the council on the lot, (2) the estimated assessment on the lot, and (3) a notification that objection to the amount of the estimated assessment shall be deemed waived unless interposed before the resolution was adopted. (§§5992, 5993, 5995, 6021, 6023, 6026, C., '27.)

Smith v City, 210-700; 231 NW 370

Belated objections. The objection that a resolution of necessity did not state whether "abutting or adjacent" property would be assessed for a sewer may not be made for the first time on appeal (1) when the entire municipality had been formed into a sewer district, and (2) when the resolution of necessity specified alternate modes of payment, among which was a special assessment against "all the property in said town".

Chi. RI Ry. v Town, 208-422; 223 NW 371

Fatally delayed objection. A property owner may not, after a permanent sidewalk has been fully completed, enjoin the collection of a special assessment on his property on the ground that the sidewalk was constructed by an officer of the city. (§5673, C., '27.)

Perrott v Balkema, 211-764; 234 NW 240

Absence of grade nonjurisdictional. The due establishment of a permanent grade on a street is not a jurisdictional condition precedent to graveling said street, and assessing the cost thereof to abutting and adjacent property. It follows that the property owner, when duly notified of the proposed assessment, must present to the city council the objection that no permanent grade has been established, or said objection will be irrevocably waived.

Peoples Inv. v City, 213-1378; 241 NW 464; 79 ALR 1310

6030 Levy.

Atty. Gen. Opinion. See '28 AG Op 400

6031 Maturity when no waiver made.

Atty. Gen. Opinions. See '25-26 AG Op 27; '32 AG Op 65

6032 Maturity under implied waiver.

Atty. Gen. Opinions. See '25-26 AG Op 27, 295; '28 AG Op 400; '30 AG Op 145; '34 AG Op 412

Graveling street—absence of grade nonjurisdictional. The due establishment of a permanent grade on a street is not a jurisdictional condition precedent to graveling said street, and assessing the cost thereof to abutting and adjacent property. It follows that the property owner, when duly notified of the proposed assessment, must present to the city council the objection that no permanent grade has been established, or said objections will be irrevocably waived.

Peoples Co. v Des Moines, 213-1378; 241 NW 464; 79 ALR 1310

6033 Installments — payment — delinquency.

Atty. Gen. Opinions. See '25-26 AG Op 27, 222, 295; '28 AG Op 400; '30 AG Op 50, 145; '32 AG Op 65; '34 AG Op 399, 412, 554; '36 AG Op 96; '38 AG Op 851

County treasurer as agent. The county treasurer is a statutory agent of a city in the collection of special assessments for street improvements and sewers.

Hauge v City, 207-1209; 224 NW 520

Duty to discharge assessments. As between life tenants and remaindermen, the former, during their tenancy, should pay the interest on special assessments, and the latter should pay the principal; and refunds on such assessments should be distributed in the same proportions.

Cooper v Barton, 208-447; 226 NW 70

6034 Certification of levy.

Atty. Gen. Opinion. See '30 AG Op 369

6035 Right of payment.

Atty. Gen. Opinions. See '25-26 AG Op 222; '30 AG Op 262

6036 Division of property.

Atty. Gen. Opinion. See '30 AG Op 369

6037 Tax sale.

Atty. Gen. Opinions. See '28 AG Op 226, 425

Inadequate payment. It is idle for one to assert that he has paid all taxes due against

real estate when he concededly has not paid matured special assessments on the land.

Wren v Berry, 214-1191; 243 NW 375

Public improvements—excessive assessments—inadequate proof. The failure of property to sell at tax sale for the amount of the special assessment levied against it for paving does not establish the contention that the property was assessed in excess of 25 percent of its value.

Morrison v Culver Est., 216-676; 248 NW 237

Statutes part of certificate holder's contract. The right of a special assessment certificate holder to take advantage of statutes providing that special assessments be collected in the same manner as ordinary taxes, and to have the property sold to pay assessments, was a part of his contract when he purchased the certificates, and was not defeated when another statute providing for tax sales was amended to prevent the tax sale of property against which the county holds a tax sale certificate.

Bennett v Greenwalt, 226-1113; 286 NW 722

Amendment of tax sale statute. When a statute providing for tax sales was amended to prevent the sale of property against which the county held tax sale certificates, the amendment did not apply to other statutes requiring the county treasurer to sell property for delinquent special assessments, as an act amending a specified statute cannot be construed as amending an unmentioned statute, and repeal of statutes by implication is not favored.

Bennett v Greenwalt, 226-1113; 286 NW 722

Tax sale certificate assignment—installment redemption act. An assignment of a tax sale certificate of purchase by county to city was not premature under chapter 191 of the 47th GA authorizing redemption in installments from public bidder where owner of property failed to take advantage of such act within the 6 months period prescribed therein, and the city was entitled to such assignment because of special assessment due and unpaid on the property.

Fleck v Duro, 227-356; 288 NW 426

Specials included in tax sale. The inclusion in tax sale of an installment on a special assessment bond was permissible under this section and did not render sale void where county bid only the amount of the general taxes, interest, penalty and costs pursuant to §7255.1, C., '39, authorizing purchase by county.

Fleck v Duro, 227-356; 288 NW 426

Tax sale—error in name of owner. A tax sale is not void because the real estate was advertised and sold as belonging to one who owned only a minor part thereof.

Wren v Berry, 214-1191; 243 NW 375

Tax sales enjoined—error as to nonparties. An injunction restraining tax sales of all property against which special assessment certificate holders had liens was erroneous insofar as it deprived certificate holders, who were not parties to the action and over whom the court had no jurisdiction, of their right to have the property sold to pay the special assessments.

Bennett v Greenwalt, 226-1113; 286 NW 722

Resale to correct previous error.

Tesdell v Greenwalt, 228- ; 290 NW 676

Taxes suspended by appeal—effect. There cannot be a valid sale of real estate for taxes, a part of which consists of special assessments for paving, and which part has been suspended by an appeal to the district court.

Fidelity Inv. v White, 208-519; 223 NW 884

Mandamus to cancel sale. Mandamus (assuming the propriety of the remedy) will not lie to wholly cancel a tax sale which is only partially void.

Wren v Berry, 214-1191; 243 NW 375

6039 City as purchaser.

Atty. Gen. Opinion. See '34 AG Op 144

Deficiency—corporate liability. A city which legally issues bonds in the form provided by statute, and on the basis of special assessments for street improvements or sewers, must not only make and maintain valid special assessments on the benefited property sufficient to pay the principal of the bonds and all interest accruing thereon, but must, by the due exercise of its own statutory powers relative to the collection of special assessments, supplement, if necessary, the efforts of the county treasurer to collect and realize on such assessments; and for any deficiency which is traceable to the neglect of the city to perform either of such duties, the city is liable in its corporate capacity.

Hauge v City, 207-1209; 224 NW 520
First N. Bk. v Town, 211-341; 233 NW 712

Redemption — nonright in town. A town which had no title to real estate when it was sold for nonpayment of special assessments levied by the town, and has acquired no title since said sale, may not redeem after the issuance of tax deed to the tax sale purchaser; and if equitable circumstances are relied on as a basis for redemption, the proof of such circumstances must be substantial.

Story City v Hadley, 214-132; 241 NW 649

Public improvements — assessment certificates—nonliability of city. A city or town which issues a valid special assessment certificate against specific property, for paving, and legally levies an adequate assessment against the property to pay the certificate, does not thereby obligate itself to pay the certificate in case the property owner does not pay it, and in case the property in question remains unsold at tax sale.

Morrison v Culver Est., 216-676; 248 NW 237

6041 Assignment of certificate.

Atty. Gen. Opinions. See '30 AG Op 280; '32 AG Op 265, 267; '34 AG Op 165; '36 AG Op 56, 341; '38 AG Op 2, 266

Certificate as chattel—transferableness. A tax sale certificate of purchase is a mere chattel subject to sale by assignment and indorsement and delivery, and the owner of such certificate who presents the same at the expiration of redemption period is entitled to a deed.

Fleck v Duro, 227-356; 288 NW 426

Paramount right of holder. The holder of special paving assessment certificates who obtains an assignment of a tax sale certificate, issued on a sale of the lots or land for general taxes, may be compelled by mandamus to reassign said tax sale certificate (on proper payment) to the holder of special sewer assessment certificates which affect the same lots or land and which latter certificates are legally prior in point of time and right to said paving certificates.

Inter-Ocean Co. v Dickey, 222-995; 270 NW 29

Duty enjoined from "station". Mandamus is a proper remedy to compel the holder of a tax sale certificate to assign the same to a party who has a prior, paramount, legal right to such certificate. This is true because of the "station" which said obligated party has legally taken upon himself. (§12440, C., '35.)

Inter-Ocean Co. v Dickey, 222-995; 270|NW 29

Tax deed nullifies special assessments. A tax deed issued on a sale for ordinary regular taxes nullifies the lien of all special assessments levied on the land by a city after the sale and before the execution of the deed.

Means v City, 214-948; 241 NW 671

Specials included in tax sale. The inclusion in tax sale of an installment on a special assessment bond was permissible under §6037, C., '39, and did not render sale void where county bid only the amount of the general taxes, interest, penalty and costs pursuant to §7255.1, C., '39, authorizing purchase by county.

Fleck v Duro, 227-356; 288 NW 426

Certificate assignment—failure to enter on tax sale register. In the statute providing that tax sale certificate of purchase shall be assignable by indorsement and by entry in tax sale register, and that "when such assignment is so entered" it shall vest in assignee all right of assignor, the legislature did not intend by the use of such quoted words to bar other means of proving ownership of such a certificate. Hence assignments of certificate made by indorsement alone without entry upon tax sale register were not void.

Fleck v Duro, 227-356; 288 NW 426

Tax sale certificate assignment. An assignment of a tax sale certificate of purchase by county to city was not premature under chapter 191 of the 47th GA authorizing redemption in installments from public bidder where owner of property failed to take advantage of such act within the 6 months period prescribed therein, and the city was entitled to such assignment because of special assessment due and unpaid on the property.

Fleck v Duro, 227-356; 288 NW 426

Redemption from tax sale. A town which had no title to real estate when it was sold for nonpayment of special assessments levied by the town, and has acquired no title since said sale, may not redeem after the issuance of tax deed to the tax sale purchaser; and if equitable circumstances are relied on as a basis for redemption, the proof of such circumstances must be substantial.

Story City v Hadley, 214-132; 241 NW 649

Redemption from sale—notice. Where notice of expiration of right of redemption from tax sale was filed with, attached to, and made a part of affidavit of proof of service, and where treasurer made an entry which read, "Notice for deed filed Nov. 10, 1937", opposite the record entry of the sale on his sale register, and the auditor, upon written communication from treasurer, made a similar entry in sale book in his office, there was substantial and sufficient compliance with statutory requirements relating thereto.

Fleck v Duro, 227-356; 288 NW 426

Notice by assignor of certificate. Where the assignor of a tax sale certificate of purchase has given notice of expiration of redemption right, assignee is not required to give another such notice.

Fleck v Duro, 227-356; 288 NW 426

Notice—affidavit of service. Under statute prescribing method of making affidavit to prove service of notice of expiration of right of redemption from tax sale, it is not necessary for affiant to state method and manner in which the holder of certificate of purchase authorized and directed him to serve the notice. Hence an affidavit stating that agent made service on behalf of and "under the direction of Polk county, Iowa" was sufficient.

Fleck v Duro, 227-356; 288 NW 426

Affidavit of service—holder's duty to make. The holder of a tax sale certificate of purchase must give the notice of expiration of right of redemption, and either he or his agent or attorney must make the affidavit of service of such notice.

Fleck v Duro, 227-356; 288 NW 426

6042 Improvement fund.

Atty. Gen. Opinion. See '25-26 AG Op 444

6043 Roadway district fund.

Atty. Gen. Opinion. See '25-26 AG Op 444

Agricultural lands—conflicting statutes. The general statutory declaration that designated

agricultural lands within the limits of a city or town shall not be taxed "for any city or town purpose" (§6210, C., '27), must be deemed modified by a contemporaneous specific statute to the effect that a tax may be levied "upon all the taxable property in such city" for the purpose of paying the cost of paving arterial highways into and out of the city.

McKinney v McClure, 206-285; 220 NW 354

6044 Payment from primary road fund.

Atty. Gen. Opinion. See '32 AG Op 194

6051.1 Improvements by street railways.

Street railways—fundamental purpose of statute. The fundamental purpose of the statute relative to the assessment of street railways for paving in connection with their tracks (§6051-c1, C., '31 [§6051.1, C., '39]) is to cover the entire subject and declare a basic rule for the government of the same.

In re Walnut Bridge, 220-55; 261 NW 781

Assessments—"public place" includes bridge. The term "public place", as used in the statute relative to the obligation of street car companies to construct, reconstruct and maintain paving between and outside the rails of their tracks, embraces a public bridge.

In re Walnut Bridge, 220-55; 261 NW 781

Assessments — when franchise ordinance must yield to statute. A street railway franchise ordinance which specifies, in effect, that, until the state statutes otherwise provide, the obligation of the company to construct and reconstruct paving between and outside the rails of its tracks shall be thus and so, manifestly must yield to such later enacted state statute.

In re Walnut Bridge, 220-55; 261 NW 781

6052 Improvements by railways.

Atty. Gen. Opinion. See '34 AG Op 362

Railroad crossing construction. Since character and extent of street improvements are within responsible discretion of city authorities and because city council's determination of question of desirability of proposed improvements is conclusive except for want of authority or fraud, and where ordinance granting franchise to railroad gave city council authority to require construction of crossing, damage claim for refusal to construct crossing could not be maintained by owner seeking access to property, when owner instead of requesting council to direct railroad to build crossing, merely made such request by personal letter to railroad official.

Call Bond Co. v Railway, 227-142; 287 NW 832

6059 Relevy.

Reassessment—basis. A city or town cannot be held to be under obligation to reassess property, which is subject to assessment for the cost of an improvement, in the absence of some showing of inadequacy in the assessment already made.

Morrison v Culver Est., 216-676; 248 NW 237

6061 Correction of assessments.

Deficiency—corporate liability. A city which legally issues bonds in the form provided by statute, and on the basis of special assessments for street improvements or sewers, must not only make and maintain valid special assessments on the benefited property sufficient to pay the principal of the bonds and all interest accruing thereon, but must, by the due exercise of its own statutory powers relative to the collection of special assessments, supplement, if necessary, the efforts of the county treasurer to collect and realize on such assessments; and for any deficiency which is traceable to the neglect of the city to perform either of such duties, the city is liable in its corporate capacity.

Hauge v City, 207-1209; 224 NW 520
First N. Bk. v Town, 211-341; 233 NW 712

6063 Appeal on assessment.

Appeal as sole remedy. The objection that the board of supervisors levied an assessment for a highway improvement against an entire 40-acre tract, instead of that part only which was at right angles to the improvement, must be presented on appeal from the assessment, and not by an independent action in equity.

Paul v Marshall County, 204-1114; 216 NW 736

Equitable action treated as appeal. An apparently independent action in equity to correct nonjurisdictional defects in a special assessment may be treated as an appeal from the adverse action of the council when so mutually treated by the litigants.

Walter v City, 203-1068; 213 NW 935

Unauthorized appeal. One who has no interest in the title to property may not appeal from a special assessment levied thereon.

Wright Const. v City, 202-661; 210 NW 809

Taxes suspended by appeal—effect. There cannot be a valid sale of real estate for taxes, a part of which consists of special assessments for paving, which part has been suspended by an appeal to the district court.

Fidelity Inv. v White, 208-519; 223 NW 884

Objections—sufficiency. An objection on appeal that a special assessment was not "ratably and proportionately distributed over all

the property in the district", is not embraced within an objection filed with the council to the effect that the assessment "is in excess of benefits, confiscatory, oppressive". (See under §6029.)

Walter v City, 203-1068; 213 NW 935

Special assessments—inclusion of improper expense—effect. The inclusion in an assessment for a street improvement of unallowable items of expense does not render the assessment fraudulent and void; and consequently an independent action in equity to cancel the assessment will not lie, objection before the council and appeal being the proper remedy.

Meijerink Estate v Lindsay, 203-1031; 213 NW 934

Appeal—effect on assignee of prematurely issued certificates. The assignee of paving assessment certificates who takes his assignment during the pendency of an appeal by the property owners (the certificates being prematurely issued) is bound, so far as the property owners are concerned, by the final decree on appeal, even tho said assignee was not a party to such appeal.

Western Corp. v City, 203-1324; 214 NW 687

6064 Perfecting appeal.

See §12759.1

Fatally defective notice. Where statute required notice of appeal on assessment to be directed to the city or town as defendant, and notice was directed to the "Clerk of the incorporated town", a special appearance was properly sustained—the district court having no jurisdiction to hear the appeal because of the defective notice.

Fuller v Town, 226-604; 284 NW 455

Proper addressee. A notice of appeal to the supreme court addressed to a municipal corporation by name as the sole adverse party is all-sufficient, and service of such notice on the mayor of the city is likewise all-sufficient, even tho the notice is in no manner addressed to the mayor. (See under §12837.)

Lundy v City, 201-186; 206 NW 954
Western Corp. v City, 203-1324; 214 NW 687

Informal approval of bond. In an appeal from a special assessment for a street improvement, an appeal bond otherwise proper, which has been in fact approved by the clerk of the district court, is not rendered insufficient because of the failure of the said clerk to formally enter his approval on the bond.

Bates v City, 201-1233; 207 NW 793
Dickinson v City, 202-782; 211 NW 417
Rivers v City, 202-940; 211 NW 415

Inadequate bond nonamendable. The filing of an appeal bond in the full amount required by statute, and within 15 days from the date of a special assessment for paving being jurisdictional, it follows that a bond inadequate in amount cannot be rectified by an amendment after the lapse of said 15 days.

Woodard v City, 212-326; 232 NW 806

6065 Trial, judgment, and costs.

Failure to substantially perform contract—effect. The appellate court will not invalidate an entire assessment for paving because of the nonfraudulent failure of the contractor to substantially comply with the construction of some minor part of the work, i. e., a six or eight-inch longitudinal expansion joint along the curb; nor will the court attempt to readjust the assessment because of such default when the record contains no data from which such readjustment can be intelligently arrived at. (See under §6018.)

Cardell v City, 201-628; 207 NW 775

Decree as to special assessment not adjudication of damages. A decree fixing the amount of special assessment on property consequent on a street improvement cannot be deemed an adjudication of the damages suffered by the property owner consequent on the improvement's cutting off the owner's ingress to and egress from the property, even tho the decree markedly reduced the assessment made by the city council.

Ashman v City, 209-1247; 228 NW 316; 229 NW 907

CHAPTER 308.1

JOINT USE OF MUNICIPAL SEWERS

Atty. Gen. Opinion. See '28 AG Op 400

CHAPTER 308.2

SEWER RENTALS

Atty. Gen. Opinions. See '32 AG Op 89; '38 AG Op 340

CHAPTER 308.3

SELF-LIQUIDATING IMPROVEMENTS

Atty. Gen. Opinions. See '34 AG Op 294, 644; '36 AG Op 233

6066.24 Sewage treatment plants—acquisition—bonds.

Swimming pool proprietors—degree of care required. The general rule that the proprietor of a bathhouse or swimming pool for profit is bound to use ordinary care to guard against injury to his patrons held applicable to nonprofit corporation operating a swimming pool.

Hecht v Playground Assn., 227-81; 287 NW 259

Drowning in swimming pool—liability. In an action to recover damages for the drowning of an eleven year old boy who was attending an outing camp, where the camp director had arranged with the Red Cross to provide two swimming instructors and life guards to be on duty at a specified time to protect about one hundred boys at the camp, and when the corporation operating the swimming pool took no part in arranging for life guards, it was not, under the circumstances, negligent in presumably admitting the decedent to the pool a few moments in advance of the time fixed for the entire group and in advance of supervision by the Red Cross instructors and life guards.

Hecht v Playground Assn., 227-81; 287 NW 259

Swimming pool—drowning—res ipso loquitur—nonapplicable. The mere fact a person drowns in a swimming pool does not of itself establish negligence on the part of the proprietor under the doctrine of res ipsa loquitur.

Hecht v Playground Assn., 227-81; 287 NW 259

Swimming pool not an "attractive nuisance". A swimming pool, either natural or artificial, is not an attractive nuisance.

Hecht v Playground Assn., 227-81; 287 NW 259

Drowning in swimming pool—failure to advise as to depth. A corporation, operating a swimming pool in which an eleven year old boy drowned, was not negligent in not personally informing the deceased of the depth of the water in the pool and in failing to inquire of him as to whether he could swim, where there were many signs, plainly visible about the pool indicating the various depths, and the age, intelligence, and experience of the deceased were sufficient to advise him of the inherent dangers of entering a body of water deeper than his height, especially when he was under the supervision of adults, who had more direct and complete control over him than the agents and employees operating the pool.

Hecht v Playground Assn., 227-81; 287 NW 259

Drowning in swimming pool—life guards—sufficiency. Negligence of a corporation operating a swimming pool in which an eleven-year-old boy drowned, could not be grounded upon lack of sufficient attentive life guards, where it had one competent guard who never left his post at the deep water end and no showing was made as to need for more guards and none of the many bathers saw the drowning; and where most of the bathers, including the deceased, were in special groups which had competent life guards and other adult attendants for their own special protection.

Hecht v Playground Assn., 227-81; 287 NW 259

Parks—scope of power. Statutory power to acquire land for parks embraces the power to acquire land for golf courses.

Golf View Co. v Sioux City, 222-433; 269 NW 451

CHAPTER 309

JOINT MUNICIPAL IMPROVEMENT OF HIGHWAYS

Atty. Gen. Opinion. See '28 AG Op 400

CHAPTER 310

PROTECTION FROM FLOODS

Atty. Gen. Opinion. See '25-26 AG Op 245

6080 Authorization.

Atty. Gen. Opinion. See '25-26 AG Op 246

Temporary obstruction of access to property—damages. Conceding that a city in changing the course of a stream may, temporarily, substantially obstruct a property owner's access to his property, without liability in damages, yet the maintenance of such obstruction for two years is per se not a temporary obstruction, and evidence tending to exculpate the city is inadmissible.

Graham v Sioux City, 219-594; 258 NW 902

Torts—storm waters into sanitary sewer—negligence—jury question. A city has the duty to maintain its sanitary sewer with ordinary care and prudence and, where the city diverts storm waters into a sanitary sewer designed for a certain capacity, a jury might find the city negligent, and that such negligence was the proximate cause of damage from overflow due to the inability of the sewer to handle the increased flowage.

Wilkinson v Indianola, 224-1285; 278 NW 326

6089 Assessment.

Intentionally excessive assessment—liability of city. A city or town which levies special assessments for street improvements in an amount sufficient to pay the various certificates issued, and obtains waivers by property owners of illegalities and irregularities in the proceedings, and the written promise of the said property owners to pay the assessments, is not liable in damages consequent on the fact that the funds actually collected on the assessments were insufficient to retire the certificates; and this is true tho the council knowingly and intentionally levied the assessments in excess of 25 percent of the value of each of the various properties.

Inter-Ocean Co. v Sioux City, 219-998; 258 NW 907

6090 Statutes governing.

Statutes part of special assessment certificate holder's contract. The right of a special assessment certificate holder to take advantage of statutes providing that special assessments be collected in the same manner as ordinary taxes, and to have the property sold to pay assessments, was a part of his contract when he purchased the certificates, and was not defeated when another statute providing for tax sales was amended to prevent the tax sale of property against which the county holds a tax sale certificate.

Bennett v Greenwalt, 226-1113; 286 NW 722

Amendment of tax sale statute. When a statute providing for tax sales was amended to prevent the sale of property against which the county held tax sale certificates, the amendment did not apply to other statutes requiring the county treasurer to sell property for delinquent special assessments, as an act amending a specified statute cannot be construed as amending an unmentioned statute, and repeal of statutes by implication is not favored.

Bennett v Greenwalt, 226-1113; 286 NW 722

6094 Duty to construct.

Atty. Gen. Opinion. See '25-26 AG Op 246

6096 Condemnation.

Atty. Gen. Opinion. See '25-26 AG Op 246

CHAPTER 311

BONDS AND CERTIFICATES FOR STREET IMPROVEMENTS AND SEWERS

Atty. Gen. Opinions. See '34 AG Op 399; '38 AG Op 333

6104 Certificates authorized.

Certificates—special procedure for collection exclusive. A municipal improvement certificate may not be foreclosed by an action in court, because, (1) the statutes confer no such authority, and (2) the statutes provide a special procedure for collection along with the collection of ordinary taxes. See §6007 et seq., §7193-d1, C., '31 [§7193.01, C., '39].

Hawkeye Ins. v Valley-Des Moines Co., 220-556; 260 NW 669; 105 ALR 1018

Paving—suing city on express contract—other theories excluded. Where a holder of invalid paving assessment certificates elects to base his recovery solely on an express written contract, no question of estoppel, waiver, ratification, or accord and satisfaction is involved.

Lytle v Ames, 225-199; 279 NW 453

Certificates — assignment — nonnecessity to record. Conceding arguendo, that municipal improvement certificates and assignments thereof are instruments which require filing and recordation under §10105, C., '31, yet the failure to so file and record is quite inconsequential as to parties who had full knowledge that the certificates were outstanding.

Hawkeye Ins. v Valley-Des Moines Co., 220-556; 260 NW 669; 105 ALR 1018

Judgment — persons not parties or privies. A party who purchases a municipal improvement certificate, lienable on certain property, is not privy to (and therefore not bound by) a subsequently instituted action to quiet title, and the decree entered therein, when he is not made a party to said action.

Hawkeye Ins. v Valley-Des Moines Co., 220-556; 260 NW 669; 105 ALR 1018

Primary road bonds — unlawful diversion. Roads and streets within cities and towns are not part of the primary road system, even tho such roads and streets are continuations of primary roads which are outside cities and towns. It follows that county bonds voted for the purpose of improving the primary roads of the county may not be legally issued nor may the proceeds thereof be legally employed for

the improvement of roads and streets within cities and towns.

Wallace v Foster, 213-1151; 241 NW 9

Statutes part of special assessment certificate holder's contract. The right of a special assessment certificate holder to take advantage of statutes providing that special assessments be collected in the same manner as ordinary taxes, and to have the property sold to pay assessments, was a part of his contract when he purchased the certificates, and was not defeated when another statute providing for tax sales was amended to prevent the tax sale of property against which the county holds a tax sale certificate.

Bennett v Greenwalt, 226-1113; 286 NW 722

6105 Requirements.

Personal liability of property owner. Special assessment certificates for paving held to impose no personal obligation on the property owner to pay the assessment.

Morrison v Culver Est., 216-676; 248 NW 237

Certificate — lien — noninvalidating defects. Record reviewed, and held that a municipal special assessment certificate for paving was not invalidated because the name of the owner of the land assessed did not appear therein; nor was the lien of certain installments of said assessment lost because of the failure of the proper county officials to bring forward on the tax books, at the time of tax sale, said unpaid installments (§7193, C., '35).

Hawkeye Ins. v Munn, 223-302; 272 NW 85

6106 Payment.

Atty. Gen. Opinion. See '34 AG Op 198

Special assessments — collection — county treasurer as agent. The county treasurer is a statutory agent of a city in the collection of special assessments for street improvements and sewers.

Hauge v Des Moines, 207-1209; 224 NW 520

Liability of property owner. Special assessment certificates for paving held to impose no personal obligation on the property owner to pay the assessment.

Morrison v Culver Est., 216-676; 248 NW 237

6107 Rights of bearer.

Atty. Gen. Opinion. See '34 AG Op 399

Appeal — effect on assignee of prematurely issued certificates. The assignee of paving assessment certificates who takes his assignment during the pendency of an appeal by the property owners (the certificates being prematurely issued) is bound, so far as the property owners are concerned, by the final decree on appeal, even tho said assignee was not a party to such appeal.

Western Corp. v City, 203-1324; 214 NW 687

6109 Bonds authorized.

Atty. Gen. Opinion. See '38 AG Op 333

6112 Bonds—series.

Pro rata payment nonpermissible. Where a special assessment fund was insufficient to pay in full all outstanding street improvement bonds which had been issued so that each series would mature successively over a period of years, such insufficiency did not affect the order of payment, and therefore the bondholders were not entitled to payment from the fund on a pro rata basis, but only in the order each series matured.

Shaw v Danbury, 227-415; 288 NW 435

6113 Maturity—name of street—interest.

Successively due special assessment bonds—payment. Where a special assessment fund was insufficient to pay in full all outstanding street improvement bonds which had been issued so that each series would mature successively over a period of years, such insufficiency did not affect the order of payment, and therefore the bondholders were not entitled to payment from the fund on a pro rata basis, but only in the order each series matured.

Shaw v Danbury, 227-415; 288 NW 435

6114 Form.

Right to modify. A statute which, in prescribing the form of a street improvement bond, provides for a promise to pay on a specified date, but also provides that the bond shall be "subject to changes that will conform them to the ordinances or resolution of the council", fairly authorizes the insertion in the bond of an option to pay on or before said specified date.

Ballard-Hassett v City, 207-1351; 224 NW 793

Legal acceleration of payment. A municipal improvement bond which provides for payment (1) on a specified date "or prior thereto at the option of the city", and (2) solely from the proceeds of special property assessments, is, nevertheless, legally payable, at the option of the city, prior to said specified maturity date, from the proceeds of a refund of the bond, even tho such refunding was authorized by a statute enacted subsequent to the issuance of the bond in question.

Ballard-Hassett v City, 207-1351; 224 NW 793

Special improvement bonds not general obligations. Refunding bonds for improvements payable from special assessments are not general obligations of the city.

Bankers Life v Emmetsburg, 224-1287; 278 NW 311

Successively due special assessment bonds —payment. Where a special assessment fund was insufficient to pay in full all outstanding street improvement bonds which had been issued so that each series would mature successively over a period of years, such insufficiency did not affect the order of payment, and therefore the bondholders were not entitled to payment from the fund on a pro rata basis, but only in the order each series matured.

Shaw v Danbury, 227-415; 288 NW 435

Statutes part of special assessment certificate holder's contract. The right of a special assessment certificate holder to take advantage of statutes providing that special assessments be collected in the same manner as ordinary taxes, and to have the property sold to pay assessments, was a part of his contract when he purchased the certificates, and was not defeated when another statute providing for tax sales was amended to prevent the tax sale of property against which the county holds a tax sale certificate.

Bennett v Greenwalt, 226-1113; 286 NW 722

6121 Payment from special fund.

Atty. Gen. Opinion. See '28 AG Op 301

Special improvement bonds not general obligations. Refunding bonds for improvements payable from special assessments are not general obligations of the city.

Bankers Life v Emmetsburg, 224-1287; 278 NW 311

Nonduty to create special fund for payment. A city or town is under no obligation to provide or create a special fund for the payment of special assessment certificates other than the fund resulting from valid assessments on the property involved.

Stockholders Inv. Co. v Brooklyn, 216-693; 246 NW 826

Deficiency in special taxes—statutory noncontemplation—city's nonliability. Fact that amount realized from special taxes is insufficient to pay all bonds for certain improvements will not establish liability on the part of the city, since the statutes provide and limit to the cost of the improvement the amount of the special assessments which the city may levy, since the deficiency in the special taxes resulted in part from a nation-wide depression, and since there was a defect inherent in the statute which made no provision for any shortage.

Bankers Life v Emmetsburg, 224-1287; 278 NW 311

Fund insufficient—pro rata payment. Where a special assessment fund was insufficient to pay in full all outstanding street improvement bonds which had been issued so that each series would mature successively over a period of years, such insufficiency did not affect the order of payment, and therefore the bondholders were not entitled to payment from the fund on a pro rata basis, but only in the order each series matured.

Shaw v Danbury, 227-415; 288 NW 435

6122 Limitation on issue.

Successively due special assessment bonds—fund insufficient. Where a special assessment fund was insufficient to pay in full all outstanding street improvement bonds which had been issued so that each series would mature successively over a period of years, such insufficiency did not affect the order of payment, and therefore the bondholders were not entitled to payment from the fund on a pro rata basis, but only in the order each series matured.

Shaw v Danbury, 227-415; 288 NW 435

6123 Liability of city.

Atty. Gen. Opinion. See '28 AG Op 301

Bonds — corporate liability. A city which legally issues bonds in the form provided by statute, and on the basis of special assessments for street improvements or sewers, must not only make and maintain valid special assessments on the benefited property sufficient to pay the principal of the bonds and all interest accruing thereon, but must, by the due exercise of its own statutory powers relative to the collection of special assessments, supplement, if necessary, the efforts of the county treasurer to collect and realize on such assessments; and for any deficiency which is traceable to the neglect of the city to perform either of such duties the city is liable in its corporate capacity.

Hauge v City, 207-1209; 224 NW 520
First N. Bk. v Town, 211-341; 233 NW 712

Certificates—nonliability of city. A city or town which issues a valid special assessment certificate against specific property, for paving, and legally levies an adequate assessment against the property to pay the certificate, does not thereby obligate itself to pay the certificate in case the property owner does not pay it, and in case the property in question remains unsold at tax sale.

Morrison v Culver Est., 216-676; 248 NW 237

Certificates create no trust relationship. A city or town in issuing valid special assessment certificates for street improvements and in levying valid assessments for the payment of the certificates, does not constitute itself a trustee for said certificate holders.

Stockholders Inv. v Town, 216-693; 246 NW 826

Nonduty to create special fund for payment. A city or town is under no obligation to provide or create a special fund for the payment of special assessment certificates other than the fund resulting from valid assessments on the property involved.

Stockholders Inv. v Town, 216-693; 246 NW 826

Assessments—nonduty to collect and apply. Neither the statutes relative to special assessments nor the certificates issued in connection with such assessments impose on the city or town any right or duty to collect the assessments and to apply the proceeds thereof.

Stockholders Inv. v Town, 216-693; 246 NW 826

Intentionally excessive assessment—liability of city. A city or town which levies special assessments for street improvements in an amount sufficient to pay the various certificates issued, and obtains waivers by property owners of illegalities and irregularities in the proceedings, and the written promise of the said property owners to pay the assessments, is not liable in damages consequent on the fact that the funds actually collected on the assessments were insufficient to retire the certificates; and this is true tho the council knowingly and intentionally levied the assessments in excess of 25 percent of the value of each of the various properties.

Inter-Ocean Co. v Sioux City, 219-998; 258 NW 907

Good faith excessive assessments—liability of city. A city or town which levies special assessments for street improvements in an amount sufficient to pay the various certificates issued, and obtains waivers, by the various property owners, of illegalities and irregularities in the proceedings and the promises of the said property owners to pay the assessments, is not liable in damages consequent on the fact that the funds actually collected on the assessments were insufficient to retire the certificates; and this is true tho the assessments, without fraud or collusion, exceeded 25 percent of the value of each of the various properties.

Stockholders Inv. v Town, 216-693; 246 NW 826

Void contract—nonliability of city as on implied contract. A municipal contract for the repair of a public street is void when entered into in disregard of the statute requiring competitive bidding. And after it is decreed that special assessments on benefited property may not be levied, the contractor or his assignee may not, on the theory of an implied contract, recover against the city in its corporate capacity, either at law or in equity (1) for the contract price, or (2) for the reasonable value of the materials and labor furnished under the void contract and retained by the city.

Johnson Bk. v City, 212-929; 231 NW 705; 237 NW 507; 84 ALR 926

Prohibited express contract excludes implied. Absolute lack of authority in a municipality to enter into an express contract relative to a given subject matter necessarily excludes the possibility of an implied contract on the same subject matter.

Roland Co. v Town, 215-82; 244 NW 707

Void contract — unjust enrichment as basis for recovery. No basis for recovery against a city, on the theory that the city has been unjustly enriched and must pay therefor, is established by proof of the reasonable value of that which the city has received.

Roland Co. v Town, 215-82; 244 NW 707

Limitation of action. A cause of action accrues against a city or town on special assessment certificates issued and delivered by it for street improvements, at the point of time when it fails to levy valid assessments for the payment of said certificates, and such cause of action is barred in ten years after said accrual.

Stockholders Inv. v Town, 216-693; 246 NW 826

Fund insufficient—pro rata payment nonpermissible. Where a special assessment fund was insufficient to pay in full all outstanding street improvement bonds which had been issued so that each series would mature successively over a period of years, such insufficiency did not affect the order of payment, and therefore the bondholders were not entitled to payment from the fund on a pro rata basis, but only in the order each series matured.

Shaw v Danbury, 227-415; 288 NW 435

6124 Interest—temporary loan.

Fund insufficient—pro rata payment. Where a special assessment fund was insufficient to pay in full all outstanding street improvement bonds which had been issued so that each series would mature successively over a period of years, such insufficiency did not affect the order of payment, and therefore the bondholders were not entitled to payment from the fund on a pro rata basis, but only in the order each series matured.

Shaw v Danbury, 227-415; 288 NW 435

6125 Sewer bonds authorized—form.

Atty. Gen. Opinion. See AG Op Sept. 21, '39

REFUNDING BONDS

6126.1 Issuance—interest.

Legal acceleration of payment. A municipal improvement bond which provides for payment (1) on a specified date "or prior thereto at the option of the city", and (2) solely from the proceeds of special property assessments, is, nevertheless, legally payable, at the option of the city, prior to said specified maturity date, from the proceeds of a refund of the bond, even tho such refunding was authorized by a statute enacted subsequent to the issuance of the bond in question.

Ballard-Hassett v City, 207-1351; 224 NW 793

6126.2 Form and amount.

Special improvement refunding bonds—issuance in excess of statutory limit—liability. Where a city issues refunding bonds for certain special improvements without limiting them to the amount of the unpaid special assessments, a liability to the bondholders arises for the amount of the deficiency plus interest carried by the special assessment from the date bonds were issued, plus interest on each unpaid annual interest installment on the bond at the rate carried by the bond from the date each interest installment became due.

Bankers Life v Spirit Lake, 224-1304; 278 NW 320

Refunding bonds for assessments not carried forward—city nonliable. Where a city issues refunding bonds for street and sewer improvements in an amount equal to "unpaid special assessments" including therein "unpaid special assessments" which the county treasurer failed to carry forward on his tax lists, a theory that "unpaid special assessments" meant only those supported by a valid lien, and therefore such bonds exceeded the statutory limit to the extent of those assessments not carried forward, will not make a city liable to the bondholders, inasmuch as those assessments not carried forward are not void but only voidable at the option of the property holder.

Bankers Life v Spirit Lake, 224-1304; 278 NW 320

Delinquent taxes not brought forward—effect on bonds retired by special assessments. County treasurer's failure to bring forward delinquent special assessments, an irregularity rendering the assessments only voidable and not void, will not create a cause of action against the city on refunding bonds based on the claim that such special assessments, not brought forward, may not be included in determining the amount of the "unpaid special assessments."

Bankers Life v Emmetsburg, 224-1287; 278 NW 311

6126.5 Retirement.

Securities—special improvement bonds not general obligations. Refunding bonds for improvements payable from special assessments are not general obligations of the city.

Bankers Life v Emmetsburg, 224-1287; 278 NW 311

6126.6 Liability of city or town.

Securities and taxation—diligence in collection of assessments—acquired property tendered to bondholders. Lack of due diligence in the collection of special assessments to retire refunding bonds is not shown where the record discloses, among other things, the city's acquisition of property by tax deeds, and in one instance by deed from the owner, using general funds therefor, and thereafter tendering these acquisitions to the bondholders.

Bankers Life v Emmetsburg, 224-1287; 278 NW 311

Deficiency in special taxes—statutory noncontemplation—city's nonliability. Fact that amount realized from special taxes is insufficient to pay all bonds for certain improvements will not establish liability on the part of the city, since the statutes provide and limit to the cost of the improvement the amount of the special assessments which the city may levy, since the deficiency in the special taxes resulted in part from a nation-wide depression, and since there was a defect inherent in the statute which made no provision for any shortage.

Bankers Life v Emmetsburg, 224-1287; 278 NW 311

CHAPTER 312

HEATING PLANTS, WATER OR GAS WORKS, AND ELECTRIC PLANTS

Atty. Gen. Opinions. See '25-26 AG Op 289, 490; '34 AG Op 345; '36 AG Op 652; '38 AG Op 63

6127 Cities and towns may purchase.

Reservoir not attractive nuisance. See under §5738 (III)

Atty. Gen. Opinions. See '25-26 AG Op 211, 438; '36 AG Op 470

Dual functions of government. The functions of a municipality are two-fold: one is governmental, and the other, proprietary and quasi private. Lighting its streets is governmental, and selling electricity to individual users is proprietary.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Contract to light streets not subject to vote. Cities and towns may contract for lighting streets and alleys under §5949, C., '35, without submitting the contract to a vote of the people for approval.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Powers conferred by legislature. A municipal corporation possesses only such powers as are conferred upon it by the legislature—that is, such powers as are granted in express words, or those necessarily or fairly implied in or incident to the powers expressly con-

ferred, or those necessarily essential to the identical objects and purposes of the corporation as by statute provided, and not those which are simply convenient.

Iowa Electric v Cascade, 227-480; 288 NW 633

Pledge of income of electric light plant. The specific statutory power of a city or town to establish an electric light plant and to pay for the same by issuing bonds, does not embrace the implied power to contract to pay for said plant by pledging the income from said plant for an indefinite period of time; and this is true tho it may be convenient or advantageous for the municipality to make payment in said latter way.

Van Eaton v Town, 211-986; 231 NW 475; 71 ALR 820

Christensen v Town, 212-384; 236 NW 406

Unallowable implied contract. Inasmuch as a city has no statutory authority to expressly contract for a rental for the use of its streets, there can be no implied contract that a telephone company will pay reasonable rental for the space occupied by its equipment in such streets.

Pella v Fowler, 215-90; 244 NW 734

Franchise (?) or regulation (?). Ordinance construed in the light of its terms and of the facts attending its enactment, and held, to constitute a franchise to the grantee therein named to operate a telephone exchange, and not to constitute a mere regulatory ordinance imposing a license fee on said business.

Pella v Fowler, 215-90; 244 NW 734

Competitive bidding — object. Under the Simmer law a contract for the construction of improvements by a municipality, such as a municipal electric light and power plant, should be let by competitive bidding, the purpose being to enable the municipal corporation to secure the best bargain for the least money.

Iowa Electric v Cascade, 227-480; 288 NW 633

Advertisements for bids—irregular compliance with mandatory duty. The irregularity of municipal authorities in advertising for, receiving, and opening, bids for the construction of a municipal light and power plant before instead of after the director of the budget had, on appeal, overruled objections to the plans, specifications, and proposed form of contract, (§357, C., '31) does not invalidate the contract entered into after said ruling and specifically approved by said director. But the duty to "advertise for bids" is mandatory in case an appeal is taken to the budget director.

Johnson v Town, 215-1033; 247 NW 552

Rejection of bids—subsequent contract with rejected bidder. After advertising for bids for the construction of a municipal electric light and power plant, and after the rejection of all bids because excessive, the council may, subsequently, in the absence of fraud or bad faith, and without re-advertisement, validly enter into a contract with one of the rejected bidders at a figure substantially less than any of the former bids.

Johnson v Town, 215-1033; 247 NW 552

Damages — superior replacement construction — contractor nonliable. A contractor should not be required to pay in damages for a quality and quantity of replacement construction superior to what he originally contracted to do.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Subjects of damages—municipal light plant earnings—anticipated profits neither nominal nor speculative. In a city's action on a public utility's injunction bond indemnifying city's loss on account of delayed construction of a municipal light plant, even tho plant had not been in operation, loss of profits and loss of use of the plant not in being, are not too speculative nor nominal, and anticipated profits, if established with reasonable certainty, may be recovered as damages.

Corning v Iowa-Nebr. Co., 225-1380; 282 NW 791

Real estate without rental value — "use value" as measure of damages. When real property has no rental value, upon dissolution of a wrongful injunction restraining erection of a municipal light plant thereon, the measure of damages is the use value, including net profits.

Corning v Iowa-Nebr. Co., 225-1380; 282 NW 791

City engineer supervising construction—no abrogation of contract duty. The fact that a city had an engineer directing the construction of a dam does not relieve the contractor of his specified duty to make a water-tight dam when contractor practically concedes that, had he followed the specifications, the dam would hold water.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Acceptance of completed construction work — undiscoverable defects — recovery. In the absence of fraud or mistake, the acceptance of construction work by a city bars recovery on the contractor's bond, except as to defects undiscoverable or unknown at the time of acceptance; however, the fraud or mistake necessary to overcome the acceptance must be alleged and proven.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Eminent domain—compensation—allowable elements. In the condemnation of a portion of a farm in order to create a reservoir on a natural stream for waterworks purposes, the

following elements may be taken into consideration in fixing the value of the remaining portion of the farm immediately after the condemnation, to wit:

1. The extent to which the uncondemned land will be detrimentally affected by the percolation of water;

2. The detrimental effect on livestock of hunting and shooting on the condemned land, it appearing that the municipality had authorized such acts;

3. The limitation which will to a reasonable certainty be placed upon the landowner's former right to cast drainage from feed lots directly into said stream.

Wheatley v Fairfield, 213-1187; 240 NW 628

Federal grant for constructing municipal plant. Under §10188, C., '39, authorizing municipal corporations to accept gifts and providing that "conditions attached to such gifts or bequests become binding upon the corporation * * * upon acceptance thereof", a city may accept a federal grant of money to construct a municipal electric light and power plant, tho the grant is conditioned upon the payment of a minimum wage for labor, notwithstanding the Simmer law requiring such contracts be let by competitive bidding, where the wages provided did not in any manner increase the cost of construction.

Iowa Electric v Cascade, 227-480; 288 NW 633

Simmer law — federal money grants. The words "maximum amount to be expended" in the so-called "Simmer law" refer not to the size of the plant but to the amount to be paid from the earnings. It follows that the construction fund may be enlarged by other funds that do not have to be repaid from taxes or from earnings.

Keokuk Co. v Keokuk, 224-718; 277 NW 291
Abbott v Iowa City, 224-698; 277 NW 437

Right of taxpayer to question municipal action. A plaintiff has no standing to enjoin a city from entering into a contract for the construction of an electric lighting system, to be paid for by special assessments, unless he alleges and proves that, in some specified way, he will be adversely affected by such proposed contract: e. g. (1) that he owns property which will be specially assessed; or (2) that he is a taxpayer, and must contribute to the improvement fund from which payment of a deficit must be made.

Donovan Co. v Waterloo, 211-506; 231 NW 499

Stockholder's action to establish interest in city waterworks. A stockholder in a waterworks company, who advocated purchase of its waterworks by city and assisted in carrying an election authorizing the same, and who did not disclose to the city his claim to an interest in or lien upon the property, was estopped to assert as against the city, which purchased the property and made improvements, that city's grantors did not have good title and were trustees ex maleficio, or that the city took property burdened with a trust for his benefit.

Shaver v Des Moines, 227-411; 288 NW 412

6128 Franchise may be granted.

Franchise ordinance—submission to electors. A proposition to grant a franchise to a private party to operate a telephone exchange, initiated by a city council, necessitates the submission to the voters of the franchise ordinance in literal fullness; otherwise, when the proposition is initiated by the private party through petition of voters.

Pella v Fowler, 215-90; 244 NW 734

When ordinance not necessary. The passage of an ordinance and the printing of the same on the ballots is not necessary in those cases where the proposal to grant a franchise to a private party for the erection and operation of an electric light and power plant is not initiated by the city or town council, but is initiated by the voters through a statutory petition addressed to the mayor. (See §6555, C., '27, for law governing certain cities.)

Mapleton v Iowa Co., 206-9; 216 NW 683

Approval by voters of proposed utility franchise does not create franchise. The approval, by a majority vote of the electors of a city or town, of a proposed franchise for the use of the streets by a private public utility, does not create a franchise. Such franchise comes into existence only when the city or town council sees fit, after the favorable vote, to enact, and does enact, such franchise in the form of an ordinance.

Schnieders v Pocahontas, 213-807; 237 NW 207

Contract termination — right of franchise holder. A city which terminates a franchise under a power reserved in the franchise ordinance may maintain an action to enjoin the franchise holder from operating under the franchise and to oust such holder; but if the city has agreed in said ordinance to purchase the property of the franchise holder in case of ouster, no writ of removal should issue until the purchase price of such property is determined.

Sac City v Iowa Co., 203-1364; 214 NW 571

Franchise — construction. The terms and provisions of an ordinance together with the mutual construction which the city and grantee have placed upon it, may reveal the fact that the grantee has the right to maintain within the city a transmission line of high electrical voltage as distinguished from an ordinary lighting system, even tho the ordinance does not expressly permit such high voltage line.

Dilley v Service Co., 210-1332; 227 NW 173

Waiver of franchise provision — effect. A valid franchise to establish and operate an electric light, heat, and power plant is not rendered invalid by the fact that the city council waived that part of the original ordinance which pertained (1) to the place of manufacture within the municipality and (2) to the assignability of the franchise right.

Mapleton v Iowa Co., 206-9; 216 NW 683

Incomplete franchise — power of council. Where a proposition relative to the granting of a telephone franchise (initiated by petitions to the council), as submitted to the electors, contained no time limitation on the franchise, the council may validly fix and determine said limitation in the subsequently adopted ordinance.

Pella v Fowler, 215-90; 244 NW 734

Limitations — public not barred by. An action to oust an alleged franchise holder from public streets because of the invalidity of the alleged franchise, tho brought by the county attorney in quo warranto, cannot be barred by the lapse of time.

State v Munn, 216-1232; 250 NW 471

Illegal franchise — nonestoppel on public. The fact that an alleged franchise holder has, with the knowledge of a municipality, expended large sums of money under said franchise, does not bar or estop the municipality from questioning the legality of said franchise and from legally excluding the alleged franchise holder from the public streets.

State v Munn, 216-1232; 250 NW 471

Foreclosure — title acquired. The purchaser of a municipal electric light and power plant, under a foreclosure of a pledge thereof, does not automatically acquire a franchise to operate the plant.

Greaves v City, 217-590; 251 NW 766

Expired franchise — service furnished and suit maintained thereafter. A privately owned public utility must after expiration of its franchise continue under contract or otherwise supplying electricity to a city until some other source is available, but its use of the city streets may be discontinued after reasonable notice, and the expiration of the franchise will not prevent it from maintaining an action to enjoin the establishment of a municipal light plant, nor need special personal damages be shown as a condition therefor.

Abbott v Iowa City, 224-698; 277 NW 437

Leaky gas pipes—res ipsa loquitur. Basis for the application of the doctrine of res ipsa loquitur is established by proof that pipes and appliances for conducting inflammable gas into a place of business were under the full control of the party furnishing the gas; that gas leaked from said pipes and appliances before it entered the meter; and that a violent explosion resulted from such leakage.

Sutcliffe v Fort Dodge Co., 218-1386; 257 NW 406

Duty as to unowned pipes and fixtures. A gas company engaged in furnishing inflammable gas for domestic or for other like or similar purposes, is under legal obligation to exercise a degree of care, commensurate with the danger, to maintain in a safe condition the pipes and fixtures over which it has full control, and through which its gas passes into the meter, even tho the company does not own said pipes or fixtures and did not originally install them.

Sutcliffe v Fort Dodge Co., 218-1386; 257 NW 406

Judgment—on trial of issues—reservation of unpleaded issue. In an action to enjoin a public utility company from maintaining an electric light and power plant within a city, the reservation in the final decree of the question of the right of the company to maintain a similar plant running through the city and supplying points outside the city—a plant distinct from the company's city plant—is proper when the pleadings do not fairly embrace said latter plant.

Iowa Light Co. v Grand Junction, 217-291; 251 NW 609

6130 Purchase of utility products.

Atty. Gen. Opinions. See '25-26 AG Op 211; '32 AG Op 18, 81; '36 AG Op 652

Dual functions of government. The functions of a municipality are two-fold: one is governmental, and the other, proprietary and quasi private. Lighting its streets is governmental, and selling electricity to individual users is proprietary.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Contract to light streets not subject to vote. Cities and towns may contract for lighting streets and alleys under §5949, C., '35, without submitting the contract to a vote of the people for approval.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Use of public places—expired franchise—unexpired street light contract — poles in streets lawful. Electric company's occupancy of town streets to supply street lighting under a valid contract is not a trespass nor a nuisance merely because its franchise has expired.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Franchise not prerequisite to street lighting contract. The fact that a power company had a franchise and had established poles and lines in the streets to transmit electricity does not preclude the company from maintaining such

poles and wires, after the franchise has expired, in order to fulfill its contract to furnish street lights to the city because a franchise is not a prerequisite to a city or town contracting to light its streets.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

6131 Election required.

Atty. Gen. Opinion. See '25-26 AG Op 211

Ballots—substantial compliance with statutory ballot. Form of ballot used in election for establishment of a municipal electric light or power plant reviewed, and held to substantially comply with statute and to be unambiguous.

Lahn v Primghar, 225-686; 281 NW 214

Fatally defective ballot. A ballot is fatally defective when it fails to clearly indicate to the voter whether a proposed municipal electric light and power plant is to be financed, (1) by ordinary taxation or, (2) by pledging the plant and the net earnings thereof; and this is true tho the ballot states the maximum amount of money to be expended.

Pennington v Fairbanks, M. & Co., 217-1117; 253 NW 60

Ballots—validity of form—Simmer law—municipal electric plant. In an election to establish a municipal electric plant under the Simmer law, the ballot held to comply with statute.

Interstate Co. v Forest City, 225-490; 281 NW 207

Simmer law ballot showing "electric light or power"—"or" synonymous with "and". Since an electric plant produces energy which may be used for either light or power, a ballot, which states the question as to whether a city should establish an "electric light or power plant", would be readily understood by the voters that the city was seeking to establish an "electric light and power plant".

Lahn v Primghar, 225-686; 281 NW 214

Simmer law—expenditure shown on ballot, not on petition for election. The petition authorized by statute (§6132, C., '35) requesting submission to the voters the question of municipal ownership of an electric plant to be paid for from earnings need not state the maximum amount to be expended, but this amount must be stated on the ballot. (§6134-d3, C., '35 [§6134.07, C., '39]).

Abbott v Iowa City, 224-698; 277 NW 437

Contract to light streets not subject to vote. Cities and towns may contract for lighting streets and alleys under §5949, C., '35, without submitting the contract to a vote of the people for approval.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Power to pledge plant. Due authorization to a municipality by the electors thereof to establish and erect an electric light and power plant at a stated maximum cost payable only out of the earnings of said newly acquired plant without the municipality itself incurring any indebtedness legally invests the council with power to pledge both the plant and its earnings as security for the payment of the resulting cost.

Greaves v City, 217-590; 251 NW 766

City election favoring utility—no implied obligation to construct utility. Under the Simmer law an action by an engineering company for a general judgment against a city for engineering services cannot be maintained, based on an implied obligation of the city to erect light and power plant, even after repeal of the enabling ordinance, and altho the special election therefor had carried. Such would be unlawful and contrary to public policy and beyond powers of city council. Persons dealing with a municipality are bound to take notice of legislative restrictions upon its authority.

Burns & McDonnell v Iowa City, 225-1241; 282 NW 708

Citizen's right to challenge council's official acts. A citizen of a community has the right to challenge the validity of the actions of his city council in proceeding to establish a municipal electric plant and to apply for injunctive relief where by no other proceedings can public or private interests be fully protected.

Abbott v Iowa City, 224-698; 277 NW 437

Election—statements, public and private, of public officials—effect. Statements by public municipal authorities, made during the pendency of an election contest relative to the authorization of the construction of a public improvement, reviewed and held insufficient to invalidate said election.

Johnson v Town, 215-1033; 247 NW 552

Conduct of election—candidates' statements. Statements made by candidates for municipal office as to what they intended to do in acquiring a public utility plant will not vitiate an election on the proposition of municipal control of said plant without a showing that the election was affected thereby.

Keokuk Co. v Keokuk, 224-718; 277 NW 291
Abbott v Iowa City, 224-698; 277 NW 437

Election—surplusage in stating proposition. When no electric light and power plant exists in a municipality in which an election is held to authorize the municipality to "establish and erect" such plant, the stating of the proposition on the ballot as one "to extend" as well as to "establish and erect" is harmless surplusage.

Johnson v Town, 215-1033; 247 NW 552

Dual methods to acquire utility ownership—single purpose. A proposition submitted to

the voters to establish a municipal utility plant "by purchase * * * or by construction" is not dual but relates only to the single purpose of acquiring municipal ownership of a public utility.

Keokuk Co. v Keokuk, 224-718; 277 NW 291
Abbott v Iowa City, 224-698; 277 NW 437

Expiration of franchise—effect. An electric light and power company which permits its franchise in a city to expire without securing a new franchise, or a renewal of the old one, must be deemed to occupy the streets and public places of the city without color of right or authority, and to rest under a legal obligation to remove its property from the streets within a reasonable time.

Iowa Co. v Town, 216-1301; 250 NW 136

Authority to erect public utility—insufficient funds—effect. A city or town which has been authorized, by popular election, to establish and erect a system of waterworks by issuing bonds to a specified amount, and which discovers, after said funds have been applied, that the system is so incomplete as to be unusable, has no authority, in the absence of a reauthorization by the electorate, to issue additional warrants to complete the system.

Mote v Town, 211-392; 233 NW 695

Unauthorized contracts. A judicial holding that municipal warrants issued for the erection of a municipal waterworks are void because the erection had not been authorized by the voters, is necessarily a holding that the contract under which the warrants are issued is also void.

Roland Co. v Town, 215-82; 244 NW 707

Prohibited express contract excludes implied. Absolute lack of authority in a municipality to enter into an express contract relative to a given subject matter necessarily excludes the possibility of an implied contract on the same subject matter.

Roland Co. v Town, 215-82; 244 NW 707

Legality—immaterial questions. On the narrow question of the legality of a called election to vote on the erection of a municipal light and power plant, the question whether the plant if authorized and erected would create an unlawful indebtedness is quite immaterial.

Hogan v Corning, 217-504; 250 NW 134

6132 Question submitted.

Atty. Gen. Opinions. See '25-26 AG Op 212; '32 AG Op 18, 81

Different methods of calling. This section and §6242, C., '31, provide optional methods for submitting to the people the question whether a municipal light and power plant shall be erected and paid for out of the earnings of the plant.

Hogan v Corning, 217-504; 250 NW 134

Election called by council on own motion. An election to vote on the question whether a city shall erect an electric light and power plant and pay for the same out of the earnings of said plant, may be validly called by the city council on its own motion, in accordance with this section.

Hogan v Corning, 217-504; 250 NW 134
Wyatt v Manning, 217-929; 250 NW 141

Petition for election — verification not required. A petition for the calling of an election in a city or town, to vote on the proposition whether the municipality shall construct an electric light and power plant, need not be accompanied by an affidavit as to the electorial qualifications of the signers. The statute (ch 319, C., '31) contains no such requirement.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

Petition for election—insufficiency—burden of proof. He who alleges the insufficiency of a duly filed petition for the calling of a municipal election, to vote on the proposition whether the municipality shall erect an electric light and power plant, has the burden to sustain his allegation when the petition is apparently sufficient and apparently in conformity with the statute.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

Petition—noninvalidating matter. A petition to the mayor of a city for the submission to the people of the question of granting a public utility franchise is not rendered invalid because a proposed or suggested ordinance is included in the petition.

Iowa Co. v Tourgee, 208-36; 222 NW 882

Petition for election—forged signatures. The fact that a petition to a city council for an election to vote on the proposition whether the city shall construct a specified public utility plant contains both forged signatures of electors and signatures of nonresidents of the city will not invalidate the petition if it be otherwise sufficient after the objectionable signatures are excluded.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

Nondiscretionary duty of mayor. Upon the filing with the mayor of a legally sufficient petition for the calling of an election and after the lapse of a reasonable time for a canvass of the legal sufficiency of the petition, a mandatory and nondiscretionary duty, enforceable by mandamus, devolves on the mayor to call the election and make the submission.

Iowa Co. v Tourgee, 208-36; 222 NW 882

Nondisqualifying interest of judge. A judge of the district court does not, by signing a petition to a city council for an election to vote on the proposition whether the city shall erect a specified public utility plant, thereby

disqualify himself from fully presiding over litigation questioning the legal sufficiency of said petition.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

Simmer law—expenditure shown on ballot, not on petition for election. The petition authorized by statute requesting submission to the voters the question of municipal ownership of an electric plant to be paid for from earnings need not state the maximum amount to be expended, but this amount must be stated on the ballot. (§6134-d3, C., '35 [§6134.07, C., '39]).

Abbott v Iowa City, 224-698; 277 NW 437

Ballot — sufficiency. A ballot which sets forth whether the city or town shall "establish, erect, maintain, and operate" an electric light and power plant, and pay for the same solely from the earnings of said plant, and definitely limits the expenditures for establishment, is all-sufficient without any reference (1) to the maximum rate to be charged consumers, or (2) to the interest rate to be paid on the expenditure, or (3) whether past or future earnings are to be so employed, or (4) whether the plant is to be pledged.

Wyatt v Town, 217-929; 250 NW 141

Contents of ballot. At an election called by a city council on its own motion on the question whether the city shall erect an electric light and power plant and pay for the same out of the earnings of the plant, the ballot need only contain (1) the main proposition, and (2) a statement of the maximum amount to be expended. Manifestly, the law does not contemplate the setting forth of a contract which can only be entered into after the election grants the authority for such a contract.

Hogan v Corning, 217-504; 250 NW 134

Sufficient reference to statute in ballot.

Weiss v Woodbine, 228- ; 289 NW 469

Ballots — preservation—showing required—admissibility. Ballots must be "carefully preserved" after the election, and without such showing they are not admissible in evidence.

Steeves v New Market, 225-618; 281 NW 162

6134 General powers granted.

Atty. Gen. Opinions. See '25-26 AG Op 438; '32 AG Op 18

Bonds—express authority required. Power "to borrow" money does not embrace the power to issue negotiable bonds.

Muscatine Co. v City, 205-82; 217 NW 468

Bonds—extension of existing plant. A city has no power to issue bonds to provide for the cost of extensions and enlargement of an existing municipally constructed electric light and power plant.

Muscatine Co. v City, 205-82; 217 NW 468

Bonds—validity. Bonds issued under a procedure which is, on its face, apparently authorized by law, are, nevertheless, invalid if the record shows that such procedure was simply a subterfuge for the purpose of evading the law and to accomplish an illegal purpose.

Muscatine Co. v City, 205-82; 217 NW 468

Compensation—allowable elements. In the condemnation of a portion of a farm in order to create a reservoir on a natural stream for waterworks purposes, the following elements may be taken into consideration in fixing the value of the remaining portion of the farm immediately after the condemnation, to wit:

1. The extent to which the uncondemned land will be detrimentally affected by the percolation of water.

2. The detrimental effect on livestock of hunting and shooting on the condemned land, it appearing that the municipality had authorized such acts.

3. The limitation which will to a reasonable certainty be placed upon the landowner's former right to cast drainage from feed lots directly into said stream.

Wheatley v City, 213-1187; 240 NW 628

PAYMENT FROM EARNINGS

6134.01 Contract authorized.

Discussion. See 17 ILR 397—Utilities purchased from income; 20 ILR 493—"Simmer law"—electric utilities; 25 ILR 828—Restrictions on bidding

Atty. Gen. Opinions. See '32 AG Op 133, '34 AG Op 345, 385, 429; '36 AG Op 82

ANALYSIS

I GENERAL SCOPE OF SIMMER LAW
II POWER OF COUNCIL GENERALLY
III PLEDGE OF PROPERTY AND EARNINGS
IV INJUNCTIONS—OBJECTIONS

I GENERAL SCOPE OF SIMMER LAW

Holding prior to statute.

Van Eaton v Town, 211-986; 231 NW 475; 71 ALR 820

Christensen v Town, 212-384; 236 NW 406

Nonduality in subject matter. Neither the title of an act nor the act itself is dual in subject matter in a constitutional sense:

1. When the title declares a purpose, (a) to amend a section of an existing statutory chapter governing the acquisition by cities and towns of named public utilities, (b) to provide additional methods of paying for said plants, and (c) outlines in a general way said proposed additional methods, and;

2. When the text of the act follows the title with congruous provisions.

Iowa-Neb. Co. v Villisca, 220-238; 261 NW 423

Illogically placed amendment—effect. An act, additional to existing statutes on the same subject, is not invalid simply because it is declared to be an amendment to a section which, tho

I GENERAL SCOPE OF SIMMER LAW—concluded

on the same subject, is not, perhaps, the most logical section to carry such amendment.

Iowa-Neb. Co. v Villisca, 220-238; 261 NW 423

Nullity because of unworkableness. Whether the purchase by a city or town of electrical energy may be financed under this section [§6134-d1], C., '31, or whether the provisions of sections 6134-d5 and 6134-d6 of said code [§§6134.09, 6134.10, C., '39] relative to competitive bidding for furnishing electrical energy are a nullity because of indefiniteness, uncertainty or unworkableness, quaere.

Brutsche v Town, 218-1073; 256 NW 914

Discrimination against privately owned plants. Statutory authority to municipalities to erect, in their proprietary capacity, electric light and power plants, and to pay the entire initial cost thereof from the net profits of said plants, and to this end to fix such rates as will effect such payment, is not void as an unconstitutional discrimination against privately owned plants of the same kind.

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

Waterworks — extension without election. The trustees of a municipally owned and established waterworks plant may, without an authorizing election, validly contract for improving and extending said plant, and may obtain the funds therefor by issuing bonds payable solely out of the future net earnings of the plant and secured by a lien on said earnings and on said improvements and extensions.

Chitwood v Lanning, 218-1256; 257 NW 345

Allowable "local and special" legalizing act. The general assembly has plenary constitutional power to validate, by a strictly local and special act, the proceedings under which a municipal electric light and power plant (payable from plant earnings) has been constructed and placed in operation,—it appearing that the contract under which said proceedings were had, had been judicially declared void because said contract was not let on competitive bids as mandatorily required by statute,—the constitution ex vi termini (Art. III, §30) clearly recognizing the inapplicability of a general validating act to meet such a situation.

Iowa E. L. & P. Co. v Grand Junction, 221-441; 264 NW 84

Construction of statutes—duty of court to make effective. It is the duty of the court, in construing statutes, to seek the object and purpose of the law and then give it force and effect if not contrary to established legal precedents.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

Bond statute not included in title of act. Sufficient reference to statutes in ballot.

Weiss v Woodbine, 228- ; 289 NW 469

Grants of power to cities—manner of exercising—nonstrict construction. Since there is no inherent power vested in a municipality, statutes purporting to grant such power are to be strictly construed; however, this rule does not apply in construing statutes relating to the manner of exercising expressly granted power.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

Rights, powers, duties, and liabilities—motives immaterial when following lawful procedure. The motives of public officials when proceeding according to law, to submit the question of municipal ownership of a public utility, are not fit subjects for judicial inquiry.

Interstate Co. v Forest City, 225-490; 281 NW 207

Electric plant under Simmer law—"net earnings"—reserve not necessary. No fraud or misrepresentation is shown where it is proven that a proposed municipally owned public utility is amply adequate and can be built within the amount proposed, altho no sum is included as a reserve for depreciation, etc. The term "net earnings" in the statute does not include such reserve.

Interstate Co. v Forest City, 225-490; 281 NW 207

Not a "debt". The expenditure which is necessary to establish a municipal electric light and power plant and which is to be paid solely from the earnings of the said plant, is not a "debt" within the constitutional and statutory limitation on indebtedness.

Wyatt v Manning, 217-929; 250 NW 141

Competitive bidding required. Under the Simmer law a contract for the construction of improvements by a municipality, such as a municipal electric light and power plant, should be let by competitive bidding, the purpose being to enable the municipal corporation to secure the best bargain for the least money.

Iowa Electric v Cascade, 227-480; 288 NW 633

Federal grant for constructing municipal plant. Under §10188, C., '39, authorizing municipal corporations to accept gifts and providing that "conditions attached to such gifts or bequests become binding upon the corporation * * * upon acceptance thereof", a city may accept a federal grant of money to construct a municipal electric light and power plant, tho the grant is conditioned upon the payment of a minimum wage for labor, notwithstanding the Simmer law requiring such contracts be let by competitive bidding, where the wages provided did not in any manner increase the cost of construction.

Iowa Electric v Cascade, 227-480; 288 NW 633

II POWER OF COUNCIL GENERALLY

Powers conferred by legislature. A municipal corporation possesses only such powers as are conferred upon it by the legislature—

that is, such powers as are granted in express words, or those necessarily or fairly implied in or incident to the powers expressly conferred, or those necessarily essential to the identical objects and purposes of the corporation as by statute provided, and not those which are simply convenient.

Iowa Electric v Cascade, 227-480; 288 NW 633

Grants of power to cities—manner of exercising—nonstrict construction. Since there is no inherent power vested in a municipality, statutes purporting to grant such power are to be strictly construed; however, this rule does not apply in construing statutes relating to the manner of exercising expressly granted power.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

Power to bind future councils. A city council, under legislative authority, may validly enter into a contract which will be binding on future city councils.

Iowa-Neb. Co. v Villisca, 220-238; 261 NW 423

Simmer law—municipal utility—power to make profits. Municipal corporations owe their origin to, and derive their powers from, the legislature and can exercise only such powers as are granted in express words or fairly implied from, or incident to, the powers expressly granted, or such powers as are essential to purposes of corporation, and, under the Simmer law, permitting cities to pay for public utilities from future earnings, a municipal corporation has statutory power to make profits in excess of statutory demands.

Corning v Iowa-Nebr. Co., 225-1380; 282 NW 791

City election favoring utility—no implied obligation to construct utility. Under the Simmer law an action by an engineering company for a general judgment against a city for engineering services cannot be maintained, based on an implied obligation of the city to erect light and power plant, even after repeal of the enabling ordinance, and altho the special election therefor had carried. Such would be unlawful and contrary to public policy and beyond powers of city council. Persons dealing with a municipality are bound to take notice of legislative restrictions upon its authority.

Burns & McDonnell v Iowa City, 225-1241; 282 NW 708

Plants payable out of earnings—bids—sufficiency. After the electors of a city or town have duly authorized the construction of an electric light and power plant to be paid for out of the future earnings of the plant, the call for bids need only be for the carrying out of that which the electors have authorized, to wit: The erection of a complete electric generating and distributing system. Sections 6134-d5 and 6134-d6, C., '31 [§§6134.09, 6134.10, C., '39], in providing for competitive bidding for "furnishing" electrical energy do not have the effect of requiring, in addition to bids on the specific authorization, bids on various other constructions and outlays in order to enable the city council to enter into a contract for electrical energy without erecting a complete plant as authorized by the electors.

Brutsche v Coon Rapids, 218-1073; 256 NW 914

III PLEDGE OF PROPERTY AND EARNINGS

Power to pledge plant. Due authorization to a municipality by the electors thereof to establish and erect an electric light and power plant at a stated maximum cost payable only out of the earnings of said newly acquired plant without the municipality itself incurring any indebtedness legally invests the council with power to pledge both the plant and its earnings as security for the payment of the resulting cost.

Greaves v City, 217-590; 251 NW 766

Foreclosure—title acquired. The purchaser of a municipal electric light and power plant, under a foreclosure of a pledge thereof, does not automatically acquire a franchise to operate the plant.

Greaves v City, 217-590; 251 NW 766

IV INJUNCTIONS—OBJECTIONS

Electric plant under Simmer law—attack by taxpayer—nonright. An action, by a taxpayer, to enjoin the operation of a municipal electric plant, payable from the earnings, does not lie because such plants do not impose any additional burden on the taxpayers.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Citizens—challenging officers' official acts. Public welfare lodges in citizens of a community the right to challenge the validity of an electric plant construction contract and to enjoin a municipal corporation and its officers from violating their duties and abusing corporate powers if such construction contract is consummated without competitive bidding made mandatory by statute.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Enjoining electric plant operation—taxpayer or citizen—moot question. Altho the federal court on application of a taxpayer holds that it will not enjoin an act already done, to wit, to enjoin the construction of a municipal electric plant already built, such holding will not bar a citizen from bringing action to enjoin the operation of the plant.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

IV INJUNCTIONS — OBJECTIONS—concluded

Completely constructed electric plant—operation enjoined—nonmoot question. Fact that a municipal electric plant has been built does not preclude, as a moot question, citizens from bringing action to restrain its operation if the contract is void, since question is not moot if there remains anything on which a decision of the court can operate.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Taxpayer must show adverse interest to enjoin city erecting light plant. One suing to enjoin town's contract for purchase of machinery for electric lighting plant must show interest adversely affected.

Christensen v Kimballton, (NOR); 231 NW 502

Plaintiffs—uninjured taxpayer. A public utility corporation, operating in a city under a duly granted franchise, may not, solely as a taxpayer, maintain injunction to test the legality of an ordinance granting a franchise to a competitor, on the grounds (1) that the ordinance rates for private consumers are unreasonable, and (2) that the city has an option, under the ordinance, to take over the ownership of the plant after it has paid for itself out of its own earnings, when it appears that such possible "taking over" will be without the creation of any debt on the part of the city and without resort to any taxation,—in other words, when it appears that there is no present or threatened danger to the plaintiff, except the danger of competition.

Iowa Co. v Emmetsburg, 210-300; 227 NW 514

Injunction—city officers exceeding authority. To warrant an injunction against the officers of a city or town, there must be some present, tangible, existent infraction or threatened infraction of legal power and authority, with resultant injury and damage to the petitioners.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

Electric plant payable out of earnings—contract not "debt" prohibited by constitution or statute. A contract for municipal electric plant payable out of earnings does not create a "debt" within meaning of constitutional inhibition where, although plant was constructed on site owned by town, it was not shown that furnishing of site was part of consideration nor that site had a substantial value. In an action to enjoin the carrying out of such contract, the burden of proof to show that contract created a debt within the meaning of such constitutional inhibition was on the plaintiff electric company.

Iowa So. Utilities v Cassill, 69 F 2d, 703

Contract invalidated by procedure. A contract for the construction of an improvement to a municipally owned waterworks (expenditures thereunder payable from the earnings of the plant) is invalid and therefore enjoinable, (1) when the city council first advertises for bids on plans and specifications (prepared by the ultimately successful bidder) which were so lacking in details as to furnish no common standard for competitive bids, and (2) when, on the day for letting the contract, the council caps the climax of its efforts by letting the contract to one of the bidders on his newly proposed and then-filed plans and specifications which contained many variations from those on which bids had been invited.

Northwestern Co. v Grundy Center, 220-108; 261 NW 604

Noncompetitive bidding on contract.

Weiss v Woodbine, 228- ; 289 NW 469

Seeming illegality—explanatory amendment. In an action by private citizens to enjoin a municipality and its contractor from carrying out an alleged, illegal, written contract for the construction of a light and power plant, the defendants may be permitted by the court so to amend their answer as to plead, tho belatedly, that a provision in said contract relative to the manner of testing said plant when completed, and which provision was in material variance with the plans and specifications on which bids were received, was inadvertently inserted in said contract—that the actual agreed test was identical with that called for by said specifications, and that, since the commencement of the suit, the said defendants had entered into a supplemental contract in accordance with said plea.

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

Res judicata plea—inapplicability—stricken on motion. In an action by citizens against the town council to enjoin the operation of a municipal electric plant, the trial court is correct in striking, on motion, that portion of defendant's answer which pleads res judicata, when it appears that a former action in the United States district court for the same purpose was by a private electric company in its individual capacity to enjoin the construction of the plant and that no judgment on the merits was rendered.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Electric plant earnings—fact findings in trial to court—conclusive on appeal. Where an injunction wrongfully restrained and delayed, for 11 months, construction of a municipal light plant and in an action on the injunction bonds, tried without a jury, where the trial court had evidence to determine the plant's net earnings for first year of operation and there was sufficient evidence to support his findings that earnings during 11 months lost by delay would have been substantially same, damages in that amount for such period are not too speculative, remote, and uncertain, and such findings are conclusive on appeal.

Corning v Iowa-Nebr. Co., 225-1380; 282 NW 791

6134.02 Bonds.

Bonds—extension of existing plant. A city has no power to issue bonds to provide for the cost of extensions and enlargement of an existing municipally constructed electric light and power plant.

Muscatine Co. v Muscatine, 205-82; 217 NW 468

Exemption from registration. Securities issued by cities or towns, even tho not constituting general obligations of the city or town, e. g., "pledge orders" payable solely from the net income of a municipally owned utility, are exempt from registration or qualification under the Iowa securities law.

Ballard-Hassett Co. v Miller, 219-1066; 260 NW 65

Simmer law — rates in contract — unnecessary when cash is paid. A contractor who is paid in cash for building a municipal public utility plant is not interested in the electric rates the city proposes to charge nor in the rate of interest on the bonds sold to provide the cash, nor does the statute contemplate that these items be inserted in the construction contract when such contractor is to be paid in cash.

Interstate Co. v Forest City, 225-490; 281 NW 207

Simmer law — payment — dual methods — interest rate. In letting contracts for public utilities under the Simmer law the council determines the method of payment, and, if payment is made as earnings accumulate, the interest rate must be specified in the contract, but not when payment is made at once by negotiable revenue bonds.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

6134.03 Refunding bonds.

Simmer law—duration of maximum electric rates—bonds and refunding bonds retired. A contract for a municipal electric plant is not invalid on the ground that it limits the operation of the maximum electric rate therein to the life of the original bonds, for maximum rates need not be in effect after the cost of the plant has been fully paid; but refunding bonds being merely substitutes for the original bonds the original indebtedness would remain, and maximum rates would apply until such obligation was paid.

Lahn v Primghar, 225-686; 281 NW 214

6134.06 Nature and requirements of contract.

Atty. Gen. Opinion. See '36 AG Op 82

Grant of power to fix rates — discretion to modify. The legislature having graciously granted cities and towns the power to fix public utility rates may, at its pleasure, curtail or limit the power.

Iowa-Neb. Co. v Villisca, 220-238; 261 NW 423

Utility plants maintained by taxation—Simmer law not applicable. The statutory provisions for taxation to maintain and operate utility plants, contained in sections 6142 and 6211, C., '35, have no application to plants established under the Simmer law which are paid for from net earnings.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

Seeming contradiction—effect. The fact that the so-called Simmer law provides that no part of the cost of light and power plants erected thereunder (1) shall be payable by taxation, yet also provides, (2) that the city shall pay for current used by it—which payment necessarily must be made from funds derived from taxation—presents no such contradiction or unworkable condition as to invalidate the law.

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

Domestic products preference—not applicable to Simmer law. Sections 1171-b1 and 1171-b2, C., '35 [§§1171.01, 1171.02, C., '39], have no application to contracts let for construction of municipal public utility plants payable from the earnings.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

Simmer law—payment—dual methods—interest rate. In letting contracts for public utilities under the Simmer law the council determines the method of payment, and, if payment is made as earnings accumulate, the interest rate must be specified in the contract, but not when payment is made at once by negotiable revenue bonds.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

Simmer law—rates in contract—unnecessary when cash is paid. A contractor who is paid in cash for building a municipal public utility plant is not interested in the electric rates the city proposes to charge nor in the rate of interest on the bonds sold to provide the cash, nor does the statute contemplate that these items be inserted in the construction contract when such contractor is to be paid in cash.

Interstate Co. v Forest City, 225-490; 281 NW 207

Simmer law—duration of maximum electric rates—bonds and refunding bonds retired. A contract for a municipal electric plant is not invalid on the ground that it limits the operation of the maximum electric rate therein to the life of the original bonds, for maximum rates need not be in effect after the cost of the plant has been fully paid; but refunding bonds being merely substitutes for the original bonds the original indebtedness would remain,

and maximum rates would apply until such obligation was paid.

Lahn v Primghar, 225-686; 281 NW 214

Public contracts—engineering cost of public utility under Simmer law—no general judgment—directing verdict. Simmer law prohibits payment of construction cost of a municipal electric plant from taxation, and precludes rendering a general judgment for such cost, including a judgment for cost of engineering services in preparing plans and specifications for construction of such public utility, when such services were performed under contract subsequent to the election and passage of the ordinance providing for construction payment from future earnings. Consequently, in an action by the engineers against a city to recover compensation for their services, a directed verdict for the city was proper.

Burns & McDonnell v Iowa City, 225-1241; 282 NW 708

"Net earnings" in statute — public utility plants. In a contract for construction of municipal electric plant payable solely out of earnings, contract provision defining "net earnings" as balance of gross receipts after payment solely of necessary expenses of operation and maintenance, and making no provision for reduction of depreciation reserve, does not violate statute providing that city should not be liable because of insufficiency of "net earnings".

Iowa So. Utilities v Cassill, 69 F 2d, 703

Electric plant payable out of earnings — contract not "debt" prohibited by constitution or statute. A contract for municipal electric plant payable out of earnings does not create a "debt" within meaning of constitutional inhibition where, altho plant was constructed on site owned by town, it was not shown that furnishing of site was part of consideration nor that site had a substantial value. In an action to enjoin the carrying out of such contract, the burden of proof to show that contract created a debt within the meaning of such constitutional inhibition was on the plaintiff electric company.

Iowa So. Utilities v Cassill, 69 F 2d, 703

6134.07 Interpretative clause — election requirement.

ANALYSIS

I Elections in General
II Ballots

I ELECTIONS IN GENERAL

Election — validity. An election to vote on the question whether the city shall erect an electric light and power plant and pay for the same out of the earnings of said plant may be validly called by the city council on its own motion, in accordance with §6132, C., '31.

Hogan v City, 217-504; 250 NW 134
Wyatt v Town, 217-929; 250 NW 141

Extension without election. The trustees of a municipally owned and established waterworks plant may, without an authorizing election, validly contract for improving and extending said plant, and may obtain the funds therefor by issuing bonds payable solely out of the future net earnings of the plant and secured by a lien on said earnings and on said improvements and extensions.

Chitwood v Lanning, 218-1256; 257 NW 345

Simmer law—nonapplicable statutes. Elections to establish municipally owned public utilities payable from the earnings are controlled by chapter 312, C., '35, and sections 1171-d4 [§1171.18, C., '39] and 6246, C., '35, have no application.

Abbott v Iowa City, 224-698; 277 NW 437
Keokuk Co. v Keokuk, 224-718; 277 NW 291
Interstate Co. v Forest City, 225-490; 281 NW 207

Power to pledge plant. Due authorization to a municipality by the electors thereof to establish and erect an electric light and power plant at a stated maximum cost payable only out of the earnings of said newly acquired plant without the municipality itself incurring any indebtedness legally invests the council with power to pledge both the plant and its earnings as security for the payment of the resulting cost.

Greaves v Villisca, 217-590; 251 NW 766

Election laws applicable. Statutory requirements as to canvass of votes, preservation of ballots, and care of poll books apply to elections for establishment of a municipal electric plant payable from earnings.

Steeves v New Market, 225-618; 281 NW 162

Simmer law — federal money grants. The words "maximum amount to be expended" in the so-called "Simmer law" refer not to the size of the plant but to the amount to be paid from the earnings. It follows that the construction fund may be enlarged by other funds that do not have to be repaid from taxes or from earnings.

Keokuk Co. v Keokuk, 224-718; 277 NW 291
Abbott v Iowa City, 224-698; 277 NW 437

Simmer law—substituting for adequate present service—immateriality. The people of a city or town have a right, under the statute, to vote on the question of establishing a municipally owned public utility, to be paid for from the earnings, which right is unaffected by fact that such a plant would substitute its services for a privately owned plant that has been furnishing adequate and satisfactory service.

Interstate Co. v Forest City, 225-490; 281 NW 207

Conduct of election—"municipal ownership issue" — candidates' statements. Statements made by candidates for municipal office as to what they intended to do in acquiring a public utility plant will not vitiate an election on the proposition of municipal control of said plant without a showing that the election was affected thereby.

Keokuk Co. v Keokuk, 224-718; 277 NW 291
Abbott v Iowa City, 224-698; 277 NW 437

II BALLOTS

Ballot—contents of. At an election called by a city council on its own motion on the question whether the city shall erect an electric light and power plant and pay for the same out of the earnings of the plant, the ballot need only contain (1) the main proposition, and (2) a statement of the maximum amount to be expended. Manifestly, the law does not contemplate the setting forth of a contract which can only be entered into after the election grants the authority for such a contract.

Hogan v City, 217-504; 250 NW 134

Substantial compliance with statutory ballot. Form of ballot used in election for establishment of a municipal electric light or power plant reviewed, and held to substantially comply with statute and to be unambiguous.

Lahn v Primghar, 225-686; 281 NW 214

Authority—form of ballot. On the question whether a municipality shall erect a light and power plant and pay for the plant from the earnings thereof, the ballot is not fatally defective because it describes the proposed plant as a "municipal light and power plant" instead of a "municipal electric light and power plant".

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

Statement of proposal—completeness required. Section 761, C., '35, (requiring certain proposed public measures, when submitted to the people for adoption or rejection, to be printed in full on the ballot) has no application when the question submitted is whether a municipality shall erect an electric light and power plant and pay for the same solely from the earnings thereof.

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

Ballot—duality. A ballot which definitely limits the expenditure for establishing an electric plant is not subject to the objection that said amount embraces both (1) establishment, and (2) maintenance and operation.

Wyatt v Town, 217-929; 250 NW 141

Dual methods to acquire utility ownership—single purpose. A proposition submitted to the voters to establish a municipal utility plant "by purchase * * * or by construction" is not dual but relates only to the single purpose of acquiring municipal ownership of a public utility.

Keokuk Co. v Keokuk, 224-718; 277 NW 291
Abbott v Iowa City, 224-698; 277 NW 437

Ballot—sufficiency. A ballot which sets forth whether the city or town shall "establish, erect, maintain, and operate" an electric light and power plant, and pay for the same solely from the earnings of said plant, and definitely limits the expenditures for establishment, is all-sufficient without any reference (1) to the maximum rate to be charged consumers, or (2) to the interest rate to be paid on the expenditure, or (3) whether past or future earnings are to be so employed, or (4) whether the plant is to be pledged.

Wyatt v Town, 217-929; 250 NW 141

Fatally defective ballot. A ballot is fatally defective when it fails to clearly indicate to the voter whether a proposed municipal electric light and power plant is to be financed, (1) by ordinary taxation or, (2) by pledging the plant and the net earnings thereof; and this is true tho the ballot states the maximum amount of money to be expended.

Pennington v Fairbanks & Co., 217-1117; 253 NW 60

Expenditure shown on ballot, not on petition for election. The petition authorized by statute (§6132, C., '35) requesting submission to the voters the question of municipal ownership of an electric plant to be paid for from earnings need not state the maximum amount to be expended, but this amount must be stated on the ballot.

Abbott v Iowa City, 224-698; 277 NW 437

"Maximum expenditure" requirement defined. At an election to determine whether a city shall erect a light and power plant and pay therefor from the earnings of said plant, the statutory requirement that the ballot "shall state the maximum amount which may be expended" has reference to the initial cost of the completed plant and not to the total of all payments of principal and interest to be made from future earnings.

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

Ballot showing "electric light or power"—"or" synonymous with "and". Since an electric plant produces energy which may be used for either light or power, a ballot, which states the question as to whether a city should establish an "electric light or power plant", would be readily understood by the voters that the city was seeking to establish an "electric light and power plant".

Lahn v Primghar, 225-686; 281 NW 214

6134.08 Notice of proposed contract—publication.

Contract invalidated by procedure in re competitive bids. A contract for the construction of an improvement to a municipally-owned waterworks (expenditures thereunder payable from the earnings of the plant) is invalid and therefore enjoinable, (1) when the city council first advertises for bids on plans and specifications (prepared by the ultimately successful bidder) which were so lacking in details as to furnish no common standard for competitive bids, and (2) when, on the day for letting the contract, the council caps the climax of its efforts by letting the contract to one of the bidders on his newly proposed and then filed plans and specifications which contained many variations from those on which bids had been invited.

Northwestern Co. v Grundy Center, 220-108; 261 NW 604

6134.09 Contents of notice.

Citizens' right to challenge validity. Public welfare lodges in citizens of a community the right to challenge the validity of an electric plant construction contract and to enjoin a municipal corporation and its officers from violating their duties and abusing corporate powers if such construction contract is consummated without competitive bidding, made mandatory by statute.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Plants payable out of earnings—bids—sufficiency. After the electors of a city or town have duly authorized the construction of an electric light and power plant to be paid for out of the future earnings of the plant, the call for bids need only be for the carrying out of that which the electors have authorized, to wit: the erection of a complete electric generating and distributing system. This section [§6134-d5] and section 6134-d6, C., '31 [§§6134.09, 6134.10, C., '39], in providing for competitive bidding for "furnishing" electrical energy do not have the effect of requiring, in addition to bids on the specific authorization, bids on various other constructions and outlays in order to enable the city council to enter into a contract for electrical energy without erecting a complete plant as authorized by the electors.

Brutsche v Town, 218-1073; 256 NW 914

Competitive bidding required—object. Under the Simmer law a contract for the construction of improvements by a municipality, such as a municipal electric light and power plant, should be let by competitive bidding, the purpose being to enable the municipal corporation to secure the best bargain for the least money.

Iowa Electric v Cascade, 227-480; 288 NW 633

Avoidance of competitive bidding. To sustain contracts for the construction of municipal utility plants and for payment therefor from plant earnings, when said contracts substantially fail to comply with the requirements of the plans and specifications on which bids are invited, would work a complete avoidance of that part of the statute which mandatorily requires competitive bidding. (Specifications called for a 375 hp engine of a type which had been in a specified use sufficiently long to prove its ability to generate said power without overcrowding. The contract called for a type of engine rated at 375 hp, but which, until shortly prior to the contract, had been rated at 350 hp. The evidence affirmatively showed that said engine had not had the actual service test required by the specifications.) Held, contract illegal.

Greaves v Villisca, 221-776; 266 NW 805

Noncompetitive bidding—injunction.

Weiss v Woodbine, 228- ; 289 NW 469

Call for bids—reference to plans—extension of time—validity. A call for construction bids which states that the work must be completed by a certain date, but refers to the plans and specifications on file, giving to all bidders the same privileges as given to the successful bidder, who had an extension of time clause in his contract, the inclusion of which, in many public contracts, the court will take judicial notice, is not a restriction on competitive bidding, and the bid and contract containing the extension clause was responsive to the call for bids.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Unresponsive bidding — unallowable contract. When a contract for the construction of a proposed public improvement is required by statute to be let on competitive bids, such contract cannot be legally entered into on the basis and in accordance with a bid which fails in any material respect to respond to the proposal for bids. Held, contract illegal because based on, and in accordance with, a bid which failed to respond to the legal proposals:

1. In re time of commencing and completing the work, and

2. In re testing the improvement as a condition to acceptance.

Brutsche v Coon Rapids, 220-1295; 264 NW 696

Bidder making own specifications—unallowable contract. Competitive bidding on municipal public works is mandatory, but is not obtained when bids under specifications prescribed by the city are rejected, and the contract is awarded to a bidder who bids under his own specifications which are materially and substantially different than the specifications prescribed by the city.

Iowa Co. v Town, 216-1301; 250 NW 136

Bids — illegal contract on modified plans. When competitive bids for the construction of a municipal electric light plant are manda-

torily required, and all bids duly advertised for and received are in excess of the authorized expenditure, no legal contract can be let by the simple expedient of substantially reducing the requirements of the plans and specifications, and, without re-advertising, letting the contract to one of the former bidders at a price within the authorized expenditure.

Iowa-Neb. Co. v Villisca, 220-238; 261 NW 423

Specifications—controlling location. Specifications for the construction of an electric plant —payable from plant earnings only—may specify the particular lot on which the plant shall be erected and what shall be paid therefor, the municipality having an option thereon for a reasonable price.

Brutsche v Coon Rapids, 223-487; 272 NW 624

Estimated quantities as basis for contract—variation with specifications not fatal. In awarding a contract to build an electric plant, the function of plans and estimated quantities is to permit a uniform comparison of bids, and the requirement of "unit prices", as a means of payment for variations from the estimated quantities, indicates their variable character, so certain variations between the plans and specifications will not result in a failure of competitive bidding invalidating a contract based thereon.

Interstate Co. v Forest City, 225-490; 281 NW 207

Specifying trade named articles. A call for bids under the Simmer law may specify articles by trade name when followed by the words "or equal" and, if a few minor items omit these words, the entire contract is not vitiated when it appears that these particular items were available to all bidders.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

Plans and specifications—undue particularity. Specifications for a contemplated municipal electric light and power plant (payable from plant earnings only) should, manifestly, not be in such minute detail as will practically defeat competitive bidding.

Brutsche v Coon Rapids, 223-487; 272 NW 624

Nullity because of unworkableness. Whether the purchase by a city or town of electrical energy may be financed under section 6134-d1, C., '31 [§6134.01, C., '39], or whether the provisions of this section [§6134-d5] and section 6134-d6 of said code [§§6134.09, 6134.10, C., '39] relative to competitive bidding for furnishing electrical energy are a nullity because of indefiniteness, uncertainty or unworkableness, quaere.

Brutsche v Town, 218-1073; 256 NW 914

Federal grant for constructing municipal plant. Under §10188, C., '39, authorizing municipal corporations to accept gifts and providing that "conditions attached to such gifts or bequests become binding upon the corporation * * * upon acceptance thereof", a city may accept a federal grant of money to construct a municipal electric light and power plant, tho the grant is conditioned upon the payment of a minimum wage for labor, notwithstanding the Simmer law requiring such contracts be let by competitive bidding, where the wages provided did not in any manner increase the cost of construction.

Iowa Electric v Cascade, 227-480; 288 NW 633

6134.10 Execution of contract.

Form of contract — sufficiency. In proceedings by a municipality preliminary to the letting of a contract for the construction of a light and power plant, an important feature of the "form of contract" which the city is required to prepare and have on file is a definite statement that the plant is to be paid for solely from the earnings of the plant, but the law does not contemplate that said "form of contract" be complete in and of itself.

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

Objections—public hearing—scope of. The statutory public hearing on objections to a municipality entering into a contract for the erection of an electric plant—payable from plant earnings only—does not contemplate or authorize the introduction of evidence and a trial in re said objections.

Brutsche v Coon Rapids, 223-487; 272 NW 624

Utility plant—contract and specifications variation first alleged on appeal. A contended variation between the contract for a municipal public utility plant and the specifications, in that the contract omitted the right to call bonds at a certain time, will not be considered on appeal, when such variation, if any, was not an issue in the lower court.

Lahn v Primghar, 225-686; 281 NW 214

Specifications—allowable general provisions. Specifications for the construction of a municipal improvement (e. g., the construction of an electric light plant) may very properly contain a provision requiring the bidders to specify the amount that would be deducted from or added to the bid for supplying specified things by way of substitution, omission, or addition.

Brutsche v Coon Rapids, 223-487; 272 NW 624

Call for bids on alternate engines—proposals offering several makes of engines—validity. A call for bids on engines to conform to specification sizes designated by "A" and "B" is responded to by a bidder who submits five sizes and makes of engines designated as proposals "A" to "E", inclusive, when all five

makes of engines fit the specification classes of "A" or "B".

Lahn v Primghar, 225-686; 281 NW 214

Ordinance repealed and federal application withdrawn—no estoppel to deny general liability for engineering services. Where a city contracted for engineering services necessary to construct a municipal electric light and power plant to be paid for, under the Simmer law, out of plant's future earnings, and then later repealed the ordinance authorizing its construction and adopted a resolution withdrawing the application for the federal loan therefor, yet the city was not estopped to deny a general liability for the engineering services performed, when it was known to the engineering company, when the services were commenced, that no money derived from taxation was payable for any services it might render, and there was no showing of reliance by the plaintiff company on alleged implied obligation to erect the plant.

Burns & McDonnell v Iowa City, 225-1241; 282 NW 708

Federal grant for constructing municipal plant. Under §10188, C., '39, authorizing municipal corporations to accept gifts and providing that "conditions attached to such gifts or bequests become binding upon the corporation * * * upon acceptance thereof", a city may accept a federal grant of money to construct a municipal electric light and power plant, tho the grant is conditioned upon the payment of a minimum wage for labor, notwithstanding the Simmer law requiring such contracts be let by competitive bidding, where the wages provided did not in any manner increase the cost of construction.

Iowa Electric v Cascade, 227-480; 288 NW 633

Completely constructed plant—operation enjoined—nonmoot question. Fact that a municipal electric plant has been built does not preclude, as a moot question, citizens from bringing action to restrain its operation if the contract is void, since question is not moot if there remains anything on which a decision of the court can operate.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

CONDEMNATION OF EXISTING PLANTS

6135 Special condemnation proceedings —limitation.

Power not subject of contract. A municipal arm of the government may not deprive itself by contract,—even on a valid consideration,—of the right of eminent domain duly vested in it.

Herman v Board, 200-1116; 206 NW 35

JURISDICTION, SALE OF PRODUCTS, AND RATES

6141 Jurisdiction of city.

Atty. Gen. Opinions. See '30 AG Op 300; '36 AG Op 307

Natural watercourses—pollution—limitation on right. The right of a riparian owner to cast refuse into a natural stream may be quite materially limited after a portion of his land has been condemned for a public purpose.

Wheatley v City, 213-1187; 240 NW 628

Eminent domain—compensation—allowable elements. In the condemnation of a portion of a farm in order to create a reservoir on a natural stream for waterworks purposes, the following elements may be taken into consideration in fixing the value of the remaining portion of the farm immediately after the condemnation, to wit:

1. The extent to which the uncondemned land will be detrimentally affected by the percolation of water;
2. The detrimental effect on livestock of hunting and shooting on the condemned land, it appearing that the municipality had authorized such acts;
3. The limitation which will to a reasonable certainty be placed upon the landowner's former right to cast drainage from feed lots directly into said stream.

Wheatley v Fairfield, 213-1187; 240 NW 628

6142 Sale of products—rates—taxes—equipment.

Atty. Gen. Opinion. See '25-26 AG Op 490

Personal liability of property owner. Statutory power in a city or town to "assess reasonable rates upon each tenement" supplied by the municipality with electric light or power does not authorize an ordinance which renders the owner of premises personally liable for electric light or power furnished by the municipality to the owner's tenant.

Onawa v Oil Co., 217-1042; 252 NW 544

Extra-territorial extension of municipal light and power lines—constitutional taxation. Sections 6142 and 8310, C., '31, are constitutional insofar as they authorize cities and towns to levy taxes for extending, beyond their corporate limits, the transmission lines of their municipally owned electric light and power plants.

Carroll v Cedar Falls, 221-277; 261 NW 652

Power to sell excess products. Cities and towns need no statutory authority in order validly to sell the excess products of their municipally owned utility plants. It follows that the unconstitutionality of a statute which authorizes a city, having 7500 people, and owning its electric light plant, to furnish electricity to a town of 400 people is, at the least, very doubtful, and, being doubtful, the statute must be deemed constitutional.

Carroll v Cedar Falls, 221-277; 261 NW 652

Grant of power to fix rates—discretion to modify. The legislature having graciously granted cities and towns the power to fix public utility rates may, at its pleasure, curtail or limit the power.

Iowa-Neb. L. & P. Co. v Villisca, 220-238; 261 NW 423

Allowable discrimination. In fixing rates for a municipally owned water plant, the classification of apartment houses as residences will not be deemed an unlawful discrimination simply on a showing that such classification deprives a complainant of the benefit of a rate granted to department stores, office buildings, and similarly conditioned businesses.

Knotts v Nollen, 206-261; 218 NW 563

Utility plants maintained by taxation—Simmer law not applicable. The statutory provisions for taxation to maintain and operate utility plants, contained in this section and section 6211, have no application to plants established under the Simmer law which are paid for from net earnings.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

6143 Regulation of rates and service.

Discussion. See 9 ILB 49—Rate making; 12 ILR 249—Public utility rates; 13 ILR 145—Regulation and management; 13 ILR 369—Federal regulation; 18 ILR 354—Municipal unit as base for rates; 20 ILR 128—Federal court jurisdiction; 25 ILR 801—Temporary statutes in expediting rate litigation

Atty. Gen. Opinions. See '34 AG Op 65; '36 AG Op 470

Municipal rates—effect. A reasonable rate for electricity, duly fixed by a municipality is both a maximum and a minimum rate. In other words, a public utility may not legally charge more or less than the prescribed rate.

Mapleton v Serv. Co., 209-400; 223 NW 476; 68 ALR 993

Reserved power over rates. An ordinance drawn in form of a contract, to be accepted by the franchisee, becomes a contract when accepted and is subject to the reserved power specified in this section. 144 Iowa 426 affirmed.

Cedar Rapids Gas Lt. Co. v City, 223 US 655

Inadequate contract rate. An inadequate rate for public-utility services under this section cannot be enforced even tho cloaked in the garb of a franchise contract. 256 Fed. Rep. 929 reversed.

Southern Ia. El. Co. v City, 255 US 539

Rates—ordinance construed. An ordinance which definitely fixes the rate per kilowatt hour which may be charged for electricity must be deemed to fix a rate above which and below which the utility company cannot legally charge, and not a mere fixing of a maximum rate below which legal charges may be made, even tho the ordinance assumes to declare that the rate shall not be exceeded.

In re Ransom, 219-284; 258 NW 78

Rates—violation—recovery denied. Recovery cannot be had for electricity furnished under an oral contract providing a flat rate per month, irrespective of the amount of electricity used, when a municipal ordinance under which the claimant is operating definitely fixes the legal rate at a stated sum per kilowatt hour; nor may recovery be had on quantum meruit when the quantity used is unknown and therefore there is nothing to which to apply the ordinance rate.

In re Ransom, 219-284; 258 NW 78

Minimum monthly ordinance charge—recovery. Recovery on contract for electricity furnished having been denied a utility company, because of a violation of the rate-fixing ordinance, nevertheless recovery may be possible under a minimum monthly charge clause of the ordinance.

In re Ransom, 219-284; 258 NW 78

Contract to light streets not subject to vote. Cities and towns may contract for lighting streets and alleys under §5949, C., '35, without submitting the contract to a vote of the people for approval.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Justifiable refusal to furnish product. A public utility company is within its rights in refusing to furnish its product—electric energy—to one who fails to pay his current bill for such product, and it is not sufficient that the customer tenders payment for future service.

Bailey v Power Co., 209-631; 228 NW 644

MANAGEMENT BY TRUSTEES

6144 Management by board of trustees.

Atty. Gen. Opinions. See '32 AG Op 275; '36 AG Op 446

6149 Powers of trustees.

Atty. Gen. Opinion. See '36 AG Op 446

6149.1 Bonds.

Issuance of bonds without authorizing vote. A legislative act authorizing boards of trustees of municipally owned waterworks in cities conditioned in a specified way to issue bonds for the purpose of extending or improving said waterworks does not authorize the trustees to issue said bonds without an authorizing vote of the electors of the municipality when, without such act, an authorizing vote of the electors would be necessary under other statutes which were in no manner repealed.

Fowler v Board, 214-395; 238 NW 618

SURPLUS EARNINGS

6151.1 Transfer of surplus earnings.

Atty. Gen. Opinions. See '34 AG Op 643; '38 AG Op 63

Simmer law—municipal utility—power to make profits. Municipal corporations owe

their origin to, and derive their powers from, the legislature and can exercise only such powers as are granted in express words or fairly implied from, or incident to, the powers expressly granted, or such powers as are essential to purposes of corporation, and, under the Simmer law, permitting cities to pay for public utilities from future earnings, a municipal corporation has statutory power to make profits in excess of statutory demands.

Corning v Iowa-Nebr. Co., 225-1380; 282 NW 791

6151.2 General transfer.

Atty. Gen. Opinions. See '34 AG Op 643; '38 AG Op 63

6151.3 Exceptions.

Atty. Gen. Opinion. See '34 AG Op 643

6151.5 Acquiring property and building thereon.

"Surplus earned" defined. A municipally owned water plant may not be said to have "a surplus earned from the operation" of the said plant within the meaning of this section, unless in the operation of said plant the income from water rentals and the like, other than taxation, exceeds the cost of operation.

Saltzman v City, 214-1033; 243 NW 161

CHAPTER 313

PURCHASE AND CONSTRUCTION OF WATERWORKS IN CERTAIN CITIES

Atty. Gen. Opinion. See '25-26 AG Op 289

6155 Contracts—bonds—purchase of waterworks.

Breach of contract to build. In an action for damages based on alleged breach of a written contract for the erection, under written specifications, of a structure (especially when it is of magnitude and complexity), general conclusion allegations by plaintiff of the use by defendant of defective materials and workmanship must, on proper motion, be accompanied and supported by fact allegations showing with reasonable certainty, (1) wherein said material and workmanship were defective, (2) the location of the several alleged defects, and (under some circumstances) when each of said defects became manifest, and (3) the particular specification which was violated by using such material and workmanship.

Osceola v Gjellefald Co., 220-685; 263 NW 1

Stockholder's action to establish interest in city waterworks. A stockholder in a waterworks company, who advocated purchase of its waterworks by city and assisted in carrying an election authorizing the same, and who did not disclose to the city his claim to an interest in or lien upon the property, was estopped to assert as against the city, which purchased the property and made improvements, that city's grantors did not have good title and were trustees ex maleficio, or that the city took property burdened with a trust for his benefit.

Shaver v Des Moines, 227-411; 288 NW 412

6158 Powers—waterworks fund—how disbursed.

Atty. Gen. Opinion. See '36 AG Op 446

6159 Fixing rates.

Allowable discrimination. In fixing rates for a municipally owned water plant, the classification of apartment houses as residences will not be deemed an unlawful discrimination simply on a showing that such classification deprives a complainant of the benefit of a rate granted to department stores, office buildings, and similarly conditioned businesses.

Knotts v Nollen, 206-261; 218 NW 563

CHAPTER 314

PURCHASE OF WATERWORKS BY CITIES OF FIFTY THOUSAND OR OVER

6162 Purchase—condemnation.

Conveyances in lieu of condemnation. A deed given to a railroad for a strip of land to be used as a right of way, and deeds of a like kind, given by the landowner when condemnation may be imminent if he refuses to convey, should be given such liberal construction as will effectuate the intention of the parties and fully protect the rights of the grantor and his assigns.

Keokuk County v Reinier, 227-499; 288 NW 676

Stockholder's action to establish interest in city waterworks. A stockholder in a waterworks company, who advocated purchase of its waterworks by city and assisted in carrying an election authorizing the same, and who did not disclose to the city his claim to an interest in or lien upon the property, was estopped to assert as against the city, which purchased the property and made improvements, that city's grantors did not have good title and were trustees ex maleficio, or that the city took property burdened with a trust for his benefit.

Shaver v Des Moines, 227-411; 288 NW 412

6175 Bond.

Atty. Gen. Opinion. See '25-26 AG Op 281

6177 Rules — records — accounts — financial statement.

Atty. Gen. Opinions. See '28 AG Op 178; '36 AG Op 415

6177.1 Audit of accounts.

Atty. Gen. Opinion. See '36 AG Op 415

6180 Rates generally.

Allowable discrimination. In fixing rates for a municipally owned water plant, the classification of apartment houses as residences will not be deemed an unlawful discrimination simply on a showing that such classification deprives a complainant of the benefit of a rate granted to department stores, office buildings, and similarly conditioned businesses.

Knotts v Nollen, 206-261; 218 NW 563

CHAPTER 314.1

EXTENSION OF WATER MAINS

Atty. Gen. Opinions. See '25-26 AG Op 114; '34 AG Op 165

CHAPTER 315

STREET RAILWAY REGULATIONS

6191 General powers.

Collisions with motor vehicles. See under §8156 (III)

Contracts—legality. A contract between a street railway company and a local labor union representing the employees will not be decreed illegal by a court of equity on the ground that the contract requires the company, against public policy, to maintain two employees on each car (1) when the city has not exercised its undoubted power over such subject matter, (2) when the city is not a party to the action, and (3) when the object of the action seems to be to obtain a declaratory decree only.

D. M. Railway v Assn., 204-1195; 213 NW 264

6193 Vestibules—brakes—transparent shields.

Res ipsa loquitur—applicability. Principle recognized that the doctrine of res ipsa loquitur is, under appropriate facts, applicable to common carriers.

Preston v Railway, 214-156; 241 NW 648

CHAPTER 316

CONDEMNATION, PURCHASE, AND DISPOSAL OF LANDS

CONDEMNATION

6195 Purposes.

Atty. Gen. Opinion. See '28 AG Op 255

Power not subject of contract. A municipal arm of the government may not deprive itself by contract,—even on a valid consideration,—of the right of eminent domain duly vested in it.

Herman v Board, 200-1116; 206 NW 35

Governmental agency to be treated as individual. A governmental agency has a right, in eminent domain proceedings, to have the jury instructed that such agency is entitled to have the cause tried and determined precisely as tho said agency were an individual.

Welton v Highway Com., 211-625; 233 NW 876

Construction of wharf—paramount right of state. The construction by the state of a wharf below high watermark on a navigable lake (to the bed of which the state has title), in aid of navigation, and without compensation to the riparian owner, is but the exercise of a right and the execution of a trust which is paramount to any right of ingress and egress of said riparian owner.

Peck v Const. Co., 216-519; 245 NW 131; 89 ALR 1132

Wharf—what constitutes. The character of a public wharf in a navigable lake as an aid to navigation is not negatived by the fact that the wharf is in good faith so constructed in a circular form that vehicles going upon the wharf may conveniently turn and depart therefrom.

Peck v Const. Co., 216-519; 245 NW 131; 89 ALR 1132

Acquisition for parks—scope of power. Statutory power to acquire land for parks embraces the power to acquire land for golf courses.

Golf View Co. v City, 222-433; 269 NW 451

Presumptive power to acquire—burden of proof. A municipality as defendant in an ac-

tion for specific performance of its alleged contract for the purchase of land, has the burden to establish its plea that its attempted purchase of said land was for a purpose not authorized by law. Record reviewed and held said burden had not been met.

Golf View Co. v City, 222-433; 269 NW 451

6201 Streets—conditions prescribed.

Streets—conveyance of title after acceptance and vacation. In an action involving the title to a strip of land which had once been part of a street between town lots, it made no difference whether such street had ever been accepted by the town and opened for public use and later vacated and conveyances of the land made by the town, so long as a question of acquiescence and adverse possession was the decisive issue between the claimants.

Patrick v Cheney, 226-853; 285 NW 184

PURCHASE AND DISPOSAL

6205 Disposal of unsuitable lands.

Atty. Gen. Opinion. See '30 AG Op 151

6206 Disposal of lands and streets.

Atty. Gen. Opinion. See '30 AG Op 151

City's supervision. Cities and towns possess a wide, tho not unlimited, discretion in opening, controlling and vacating streets and alleys, and courts will not interfere except in a clear case of arbitrary and unjust exercise of such power.

Stoessel v Ottumwa, 227-1021; 289 NW 718

Streets—conveyance of title after acceptance and vacation. In an action involving the title to a strip of land which had once been part of a street between town lots, it made no difference whether such street had ever been accepted by the town and opened for public use and later vacated and conveyances of the land made by the town, so long as a question of acquiescence and adverse possession was the decisive issue between the claimants.

Patrick v Cheney, 226-853; 285 NW 184

Vacation and conveyance—effect. A city has no property rights in a cab stand established on land vacated by the city and conveyed to a railway company.

Red Top v McGlashing, 204-791; 213 NW 791

Vacating alley—adjoining owner's rights. Action by city in vacating alley and conveying it to grantee, who closed the alley by fencing it as a part of his adjoining land, which still gave adjoining property owner ingress and egress to his property at both front and rear, and where only interference with public right was use of alley by children going to and from school, was not an abuse of city's discretion, and such action did not deprive such adjoining property owner of convenient and reasonable access to and from his property or its use.

Stoessel v Ottumwa, 227-1021; 289 NW 718

CHAPTER 317

TAXATION

6207 General fund.

Discussion. See 18 ILR 342—Tariffs—occupation taxes

Atty. Gen. Opinions. See '25-26 AG Op 83; '28 AG Op 60

Source of power. The power of a city to tax is strictly statutory—never implied.

Clark v Des Moines, 222-317; 267 NW 97

6209 City bridge fund.

Atty. Gen. Opinion. See '30 AG Op 236

6210 Agricultural lands.

Atty. Gen. Opinions. See '25-26 AG Op 127, 340, 496; '28 AG Op 65, 189, 331, 427; '30 AG Op 236; '32 AG Op 59; '38 AG Op 127, 305

Taxation and assessment—conflicting statutes. The general statutory declaration that designated agricultural lands within the limits of a city or town shall not be taxed "for any city or town purpose" must be deemed modified by a contemporaneous specific statute to the effect that a tax may be levied "upon all the taxable property in such city" for the purpose of paying the cost of paving arterial highways into and out of the city. (Ch. 308, C., '27.)

McKinney v McClure, 206-285; 220 NW 354

6211 Taxes for particular purposes.

Atty. Gen. Opinions. See '25-26 AG Op 83, 256, 339, 392, 432, 438, 442; '28 AG Op 48, 60, 202, 207, 250, 287; '30 AG Op 214, 297; '32 AG Op 18; '34 AG Op 362; '36 AG Op 328, 331, 424; '38 AG Op 427, 696, 721; AG Op April 26, '39

Utility plants maintained by taxation—Simmer law not applicable. The statutory provisions for taxation to maintain and operate utility plants, contained in this section and section 6142, C., '35, have no application to plants established under the Simmer law which are paid for from net earnings.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

6212 Limitation of certain taxes.

Atty. Gen. Opinion. See '25-26 AG Op 442

6215 Transfer of funds.

Atty. Gen. Opinions. See '25-26 AG Op 377, 410

6216 Notice of hearing—limitation.

Atty. Gen. Opinion. See '25-26 AG Op 411

6217 Consolidated tax levy.

Atty. Gen. Opinions. See '25-26 AG Op 193; '30 AG Op 288, 352; '32 AG Op 119, 256

6218 Budget—publication—objections.

Atty. Gen. Opinions. See '25-26 AG Op 119, 193; '32 AG Op 119

6223 Anticipation of revenue.

Atty. Gen. Opinions. See '25-26 AG Op 182, 439; '28 AG Op 127

6224 Aiding outside highway.

Atty. Gen. Opinion. See '28 AG Op 155

6225 Question submitted.

Atty. Gen. Opinions. See '28 AG Op 155; '38 AG Op 346

6226 Limit on aid.

Atty. Gen. Opinion. See '28 AG Op 155

6227 Certification of taxes and assessments—collection.

Atty. Gen. Opinions. See '28 AG Op 251; '36 AG Op 303, 486; '38 AG Op 266

6228 Tax sales.

Atty. Gen. Opinions. See '36 AG Op 303; '38 AG Op 266

Statutes part of special assessment certificate holder's contract. The right of a special assessment certificate holder to take advantage of statutes providing that special assessments be collected in the same manner as ordinary taxes, and to have the property sold to pay assessments, was a part of his contract when he purchased the certificates, and was not defeated when another statute providing for tax sales was amended to prevent the tax sale of property against which the county holds a tax sale certificate.

Bennett v Greenwalt, 226-1113; 286 NW 722

Amendment of tax sale statute. When a statute providing for tax sales was amended to prevent the sale of property against which the county held tax sale certificates, the amendment did not apply to other statutes requiring the county treasurer to sell property for delinquent special assessments, as an act amending a specified statute cannot be construed as amending an unmentioned statute, and repeal of statutes by implication is not favored.

Bennett v Greenwalt, 226-1113; 286 NW 722

6229 Taxes paid over.

Atty. Gen. Opinions. See '28 AG Op 241; '36 AG Op 303

Paying over city taxes—mandatory procedure. The statutory requirement that the county treasurer shall pay collected municipal taxes to the city treasurer only on a written order signed by the mayor and city clerk or auditor is mandatory.

State v Hanson, 210-773; 231 NW 428

Illegal payment of funds to city with resulting loss. The act of a county treasurer in illegally paying collected municipal taxes to the city treasurer is the proximate cause of the loss of said funds consequent on the deposit of said funds in an insolvent bank by the city treasurer,—it being assumed that the question of negligence and proximate cause is a material inquiry in such a case.

State v Hanson, 210-773; 231 NW 428

6230 Diversion of funds.

Atty. Gen. Opinions. See '25-26 AG Op 377; '38 AG Op 427

CHAPTER 318

ROAD POLL TAX

Atty. Gen. Opinion. See '30 AG Op 150

6231 Tax authorized.

Atty. Gen. Opinions. See '25-26 AG Op 224; '30 AG Op 150; '32 AG Op 69; '34 AG Op 331

6233 Action to recover.

Atty. Gen. Opinions. See '30 AG Op 150; AG Op Sept. 1, '39

6236 Certification of unpaid tax.

Atty. Gen. Opinion. See AG Op Feb. 7, '39

6237 Action.

Atty. Gen. Opinion. See AG Op Sept. 1, '39

CHAPTER 319

INDEBTEDNESS

Atty. Gen. Opinions. See '25-26 AG Op 438; '32 AG Op 3; '38 AG Op 63, 498

6238 Limitation.

Atty. Gen. Opinions. See '25-26 AG Op 438; '28 AG Op 120; '30 AG Op 181; '36 AG Op 82; '38 AG Op 77; AG Op Jan. 24, '39

"Taxable property" defined. "Taxable property" embraces "moneys and credits", within the meaning of the constitutional provision which limits municipal indebtedness. (Const., Art. XI, §3.)

Mack v Sch. Dist., 200-1190; 206 NW 145

General obligations exceeding limit—invalidity—trust fund. School warrants which are in form the general obligations of the district, and issued under a purported contract of the district providing for such unconditional issuance, are void if in excess of the constitutional limit of indebtedness, notwithstanding the fact that the said contract carries the inference that the warrants will be paid from a special fund arising from the sale of bonds.

Carstens v Sch. Dist., 218-812; 255 NW 702

Obligation of contracts—tax as asset. In the marshaling of the assets and liabilities of a municipal corporation on the issue whether the debts of the corporation are in excess of constitutional limitation, a duly levied and collectible tax must be deemed a municipal asset, in the absence of proof showing the definite purpose of the tax, and, if for current expenses, that legal obligations have been or necessarily will be created, sufficient to offset said tax fund.

Holst v Sch. Dist., 203-288; 211 NW 398

Obligation of contracts—what constitutes a debt. A contract between an architect and a municipal corporation, which contract imposes a financial obligation on the corporation only in case the corporation enters into a further contract for the erection of the building which the architect has planned, is properly classified as a liability of the corporation's from the moment the building contract is entered into. So held on the issue whether the municipal debt was in excess of constitutional limitation.

Holst v Sch. Dist., 203-288; 211 NW 398

Construction of contract. The specific amount for which a municipal corporation obligates itself in a written contract for the construction of a schoolhouse in return for the contractor's agreement to "provide all the material and perform all of the work," etc., is in no wise lessened by a contract clause that said price "includes five thousand dollar figure for millwork".

Holst v Sch. Dist., 203-288; 211 NW 398

Computation of assets and liabilities. In the marshaling of the assets and liabilities of a municipal corporation on the issue whether the debts of the corporation are in excess of constitutional limitation, collected and uncollected taxes and tuition due the municipality cannot be deemed an asset when it is shown that the current expenses of the municipality will consume the entire amount of said taxes and tuition; otherwise as to municipal property available for sale.

Trepp v Sch. Dist., 213-944; 240 NW 247

Obligation of contracts—unconstitutional indebtedness not curable. The legislature has no constitutional power to authorize a tax levy or a bond issue to pay, in whole or in part, a constitutionally prohibited indebtedness. More concretely, if a municipality creates an indebtedness which is in part valid, and in part constitutionally invalid, the invalid part may not be cured (1) by the voting of a tax to pay or reduce the indebtedness, or (2) by the issuance of bonds, and the application of the proceeds thereof to the same purpose.

Trepp v Sch. Dist., 213-944; 240 NW 247

Funding bonds create no additional debt. A county whose valid bonded indebtedness is beyond the constitutional limitation (because of a drop in property valuations) may, under an authorizing statute, validly refund said bonds, without creating any additional indebtedness in a constitutional sense, by issuing and selling at par and for cash, refunding bonds, and by irrevocably placing the proceeds of said sale in a separate and distinct trust fund which is also irrevocably pledged for the sole purpose of discharging the particularly designated bonds which are being refunded.

Banta v Clarke County, 219-1195; 260 NW 329

Obligations payable out of earnings. The expenditure which is necessary to establish a municipal electric light and power plant and which is to be paid solely from the earnings of the said plant, is not a "debt" within the constitutional and statutory limitation on indebtedness.

Wyatt v Town, 217-929; 250 NW 141

Electric plant payable out of earnings—contract not "debt" prohibited by constitution or statute. A contract for municipal electric plant payable out of earnings does not create a "debt" within meaning of constitutional inhibition where, altho plant was constructed on site owned by town, it was not shown that furnishing of site was part of consideration nor that site had a substantial value. In an action to enjoin the carrying out of such contract, the burden of proof to show that contract created a debt within the meaning of such constitutional inhibition was on the plaintiff electric company.

Iowa So. Utilities v Cassill, 69 F 2d, 703

Simmer law—federal money grants. The words "maximum amount to be expended" in the so-called "Simmer law" refer not to the size of the plant but to the amount to be paid from the earnings. It follows that the construction fund may be enlarged by other funds that do not have to be repaid from taxes or from earnings.

Keokuk Co. v Keokuk, 224-718; 277 NW 291
Abbott v Iowa City, 224-698; 277 NW 437

Election — legality — immaterial questions. On the narrow question of the legality of a called election to vote on the erection of a municipal light and power plant, the question whether the plant if authorized and erected would create an unlawful indebtedness is quite immaterial.

Hogan v City, 217-504; 250 NW 134

Prior indebtedness—supported findings—conclusiveness. On the issue whether the indebtedness of a municipal corporation exceeded the constitutional limit, the supported finding of the trial court that a certain indebtedness was created prior to the indebtedness in question, or that the indebtedness in question "did not precede" said other indebtedness, is not reviewable by the appellate court.

Trepp v Sch. Dist., 213-944; 240 NW 247

Tax list conclusive. On the issue whether the indebtedness of a municipal corporation exceeds the constitutional limitation, the court cannot add other property to the "last state and county tax list."

Trepp v Sch. Dist., 213-944; 240 NW 247

6239 Purposes.

Cities, attractive nuisance liability. See under §5738 (III)
City's exercise of governmental function. See under §5738 (I)

Atty. Gen. Opinions. See '28 AG Op 250; '36 AG Op 82, 331; '38 AG Op 63, 721

6240 Application of limitation.

Atty. Gen. Opinion. See '36 AG Op 82

Valid authorization. The legislature may authorize municipalities to incur, with or without an election, a debt when the debt does not exceed constitutional limitations.

Chitwood v Lanning, 218-1256; 257 NW 345

6241 Election required.

Atty. Gen. Opinions. See '28 AG Op 250; '38 AG Op 63

Issuance of bonds without authorizing vote. A legislative act authorizing boards of trustees of municipally owned waterworks in cities conditioned in a specified way to issue bonds for the purpose of extending or improving said waterworks does not authorize the trustees to issue said bonds without an authorizing vote of the electors of the municipality when, without such act, an authorizing vote of the electors would be necessary under other statutes which were in no manner repealed; especially is this true in view of the legislative history of the state.

Fowler v Board, 214-395; 238 NW 618

6242 Initiation of proceedings.

Atty. Gen. Opinion. See '28 AG Op 250

Election—different methods of calling. Section 6132 and this section, C., '31, provide optional methods for submitting to the people the question whether a municipal light and power plant shall be erected and paid for out of the earnings of the plant.

Hogan v City, 217-504; 250 NW 134

Petition—sufficiency. A statutory provision that a petition for an election to vote authorization for a public utility shall state that such plant cannot be "purchased, erected, built, or furnished" within the limits of a certain percentage on the property valuation is complied with by stating that such plant cannot be "established" within the limits of such percentage, it appearing that no such plant then existed within the municipality.

Iowa Service v City, 203-610; 213 NW 401

Petitioners for election—qualifications. The electors of a city or town who are such under the constitution of this state, even tho their names do not appear on the official books of registered voters of the city or town, are qualified to petition for the calling of an election to vote on the proposition whether the municipality shall erect an electric light and power plant.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

Petition — forged signatures — effect. The fact that a petition to a city council for an election to vote on the proposition whether the city shall construct a specified public utility plant contains both forged signatures of electors and signatures of nonresidents of the city will not invalidate the petition if it be otherwise sufficient after the objectionable signatures are excluded.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

Petition—verification not required. A petition for the calling of an election in a city or town to vote on the proposition whether the municipality shall construct an electric light and power plant, need not be accompanied by an affidavit as to the electoral qualifications of the signers. This chapter contains no such requirement.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

Petition for election—insufficiency—burden of proof. He who alleges the insufficiency of a duly filed petition for the calling of a municipal election to vote on the proposition whether the municipality shall erect an electric light and power plant, has the burden to sustain his allegation when the petition is apparently sufficient and apparently in conformity with the statute.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

Nondisqualifying interest of judge. A judge of the district court does not, by signing a petition to a city council for an election to vote on the proposition whether the city shall erect a specified public utility plant, thereby disqualify himself from fully presiding over litigation questioning the legal sufficiency of said petition.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

6245 Questions submitted—manner of submission.

Election—ballot—sufficiency. A ballot which sets forth whether the city or town shall "establish, erect, maintain, and operate" an electric light and power plant, and pay for the same solely from the earnings of said plant, and definitely limits the expenditures for establishment, is all-sufficient without any reference (1) to the maximum rate to be charged consumers, or (2) to the interest rate to be paid on the expenditure, or (3) whether past

or future earnings are to be so employed, or (4) whether the plant is to be pledged.

Wyatt v Town, 217-929; 250 NW 141

6246 Majorities required.

Atty. Gen. Opinion. See '34 AG Op 244

Public improvements—Simmer law—nonapplicable statute. Elections to establish municipally owned public utilities payable from the earnings are controlled by chapter 312, C., '35, and this section has no application.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

CHAPTER 320

BONDS

6252 Funding.

Bonds—evasive procedure—validity. Bonds issued under a procedure which is, on its face, apparently authorized by law, are nevertheless invalid if the record shows that such procedure was simply a subterfuge for the purpose of evading the law and to accomplish an illegal purpose.

Muscatine County v City, 205-82; 217 NW 468

6258 Sale or exchange.

Application without sale. A city which offers for sale bonds voted for the erection of a public utility and receives no bids may not thereupon enter into a contract which provides that the contractor shall receive the bonds at par in payment of the contract price.

Iowa Service v City, 203-610; 213 NW 401

"Indebtedness"—payment from future taxes.

Brunk v Des Moines, 228- ; 291 NW 395

6261 Anticipation of special taxes.

Atty. Gen. Opinions. See '25-26 AG Op 31, 365; '28 AG Op 202, 206; '32 AG Op 89; AG Op Sept. 21, '39

Bonds to contractor—noncompetitive bidding.

Weiss v Woodbine, 228- ; 289 NW 469

6262 How denominated.

Discussion. See 13 ILR 81—*Liability of city upon paving certificates*

6263 Assessments and levies pledged.

Atty. Gen. Opinions. See '25-26 AG Op 31; '28 AG Op 206; '36 AG Op 327

Special procedure for collection exclusive. A municipal improvement certificate may not be foreclosed by an action in court, because, (1) the statutes confer no such authority, and (2) the statutes provide a special procedure for collection along with the collection of ordinary taxes. See §6007 et seq., §7193-d1, C., '31 [§7193.01, C., '39].

Hawkeye Ins. v Valley-D. M. Co., 220-556; 260 NW 669; 105 ALR 1018

6264 Limitation of action.

Time limit to question legality of bonds.

Waller v Pritchard, 201-1364; 202 NW 770

CHAPTER 321

PLATS

6266 Subdivisions or additions.

Parol as affecting writings — ambiguous plat. A town plat which is ambiguous in its descriptions and recitals is subject to parol explanation.

Shuler v Sand Co., 203-134; 209 NW 731

6269 Streets and blocks.

Plat — nonconformity with statutes — proof. In an action to quiet title against paving assessment certificate holders, an unsworn petition supported by unsworn written statements showing, as contention for invalidity of assessments the nonconformity of plat to statutory requirements, is not the sufficient evidence as in equity will support a judgment by default and the burden of proof thereof being on the plaintiff, the petition was properly dismissed.

Neilan v Lytle Co., 223-987; 274 NW 103

6277 Record—filing.

Atty. Gen. Opinion. See '25-26 AG Op 240

ANALYSIS

I COMMON-LAW DEDICATION

Fundamental requirements. The mere use of a roadway, howsoever long continued, will not ripen into an irrevocable private easement in favor of the private user, nor into a dedicated public highway in favor of the public generally, unless, in the case of a claim of private easement, the fact is established, independent of the evidence of use, that the private user has, for at least ten years, and to the knowledge of the landowner, asserted or claimed a hostile right to use such way, and

unless, in the case of a claimed public dedication, the fact is established that the land owner has, by deliberate, unequivocal, and decisive acts and declarations, manifested a positive intention permanently to abandon the land in question to the public for highway purposes.

Culver v Converse, 207-1173; 224 NW 834

Implied dedication. An implied dedication of land for a public way and an implied acceptance thereof by the public will not be decreed on evidence tending to show a very perfunctory assumption of jurisdiction over the land by the public authorities, plus a use which is as consistent with the theory of mere permission by the owner as with the theory of rightful public use.

Dugan v Zurmuehlen, 203-1114; 211 NW 986

Establishment of highway—prescription. A public way by prescription will not be decreed on evidence which is just as consistent with the theory of the owner that whatever use was made of the land as a road was purely permissive as with the theory that the use was hostile, adverse, and under a claim of right.

Dugan v Zurmuehlen, 203-1114; 211 NW 986

Evidence — sufficiency. Evidence that the public highway authorities had, on at least one occasion, worked a roadway, coupled with evidence of use of the roadway by the public for many years, may furnish sufficient evidence of a dedication and the acceptance thereof.

Dillon v Fehd, 207-351; 222 NW 881

II STATUTORY DEDICATION

(a) IN GENERAL

Fatally indefinite deed. A deed to a strip of land is insufficient, in and of itself, to constitute a dedication of land for highway purposes when the deed is void for uncertainty in the description.

Beim v Carlson, 209-1001; 227 NW 421

Deed — effect as to subsequently laid out streets. An ordinary railroad right of way deed simply grants to the railroad an easement, and works no impediment to the vesting in a municipality, subject to such easement, of streets subsequently laid out across such right of way; and especially so when the railroad company acquiesces in and recognizes the statutory dedication to the public.

Ackley v Elec. Co., 206-533; 220 NW 315

(b) CONSTRUCTION OF DEDICATION

Evidence—sufficiency. Plat of a municipal addition reviewed, in the light of explanatory testimony, and held insufficient to show that an irregular tract therein had been dedicated as a public street.

Shuler v Sand Co., 203-134; 209 NW 731

(c) INTENTION TO DEDICATE

Conclusiveness. The recorded plat of an addition must be held to control boundary lines, in the absence of evidence sufficient to establish the acquiescence of the interested parties in other boundary lines. (See under §12306.)

Jackson v Snyder, 202-262; 208 NW 321

(d) REVOCATION OF DEDICATION

Streets—conveyance of title after acceptance and vacation. In an action involving the title to a strip of land which had once been part of a street between town lots, it made no difference whether such street had ever been accepted by the town and opened for public use and later vacated and conveyances of the land made by the town, so long as a question of acquiescence and adverse possession was the decisive issue between the claimants.

Patrick v Cheney, 226-853; 285 NW 184

III ACCEPTANCE OF DEDICATION

Adverse possession — unaccepted platted street applicability. Where parties claim land dedicated in plat as a street, but not being accepted, never became a street, the public has no interest therein and the doctrine of adverse possession is applicable.

Brewer v Claypool, 223-1235; 275 NW 34

Use of part of street—access to properties —no vacation of street. Where plaintiffs and defendants, as property owners, abutting on a dedicated but unaccepted street, have for years used a part of the street in entering and leaving their respective properties, thereby acquiring an easement in such part of the street, and where defendants acquired title to the other part of the street by adverse possession and acquiescence, the plaintiffs are not entitled to vacate such street.

Brewer v Claypool, 223-1235; 275 NW 34

Platted streets—nonacceptance—effect. Acceptance of dedication being essential to establishment of a street, where a municipality never accepted a certain plat, the streets remain private property. Purchasers of lots may acquire an easement thereon for access to their premises.

Brewer v Claypool, 223-1235; 275 NW 34

Statutes of limitations—nonapplicability to nonaccepted street. In a quiet title action where land was dedicated but never accepted as street in unincorporated village, the rule that statute of limitations will not run against a municipality exercising a governmental function, does not apply.

Brewer v Claypool, 223-1235; 275 NW 34

IV PROPRIETARY INTEREST OF CITY OR TOWN

Village streets — ownership. All highways appearing on a village plat become streets and belong to the municipality as soon as legal incorporation is effected.

Ackley v Elec. Co., 206-533; 220 NW 315

Right of way deed—abandonment—effect. A deed to a strip of land for highway purposes is ipso facto annulled and rendered ineffective by the definite abandonment of the proposal to establish the highway. In other words, the municipality may not, years after definitely abandoning the project, establish the highway and claim anything under the deed.

Beim v Carlson, 209-1001; 227 NW 421

Streets—conveyance of title after acceptance and vacation. In an action involving the title to a strip of land which had once been part of a street between town lots, it made no difference whether such street had ever been accepted by the town and opened for public use and later vacated and conveyances of the land made by the town, so long as a question of acquiescence and adverse possession was the decisive issue between the claimants.

Patrick v Cheney, 226-853; 285 NW 184

V PROPRIETARY INTEREST OF PROPERTY OWNER

Performance of contract—partial failure of title—alley as nonincumbrance. A vendor who seeks to recover the entire contract price of land which he had contracted to convey, even tho a portion thereof proves to be a public alley, cannot support his claim on the theory that the public alley was a benefit to that portion of the land to which he had good title, and was not an incumbrance.

Van Duzer v Engeldinger, 209-150; 227 NW 591

6282 Streets, alleys, and public grounds.

Streets — nonuser — adverse possession — estoppel. Tho a street be legally established, yet where (1) the municipality does not open up the street, or there is nonuser for the statutory period, and (2) private rights have been acquired by adverse possession, then abandonment may be presumed, the public estopped from asserting any rights therein, and public rights in street extinguished.

Brewer v Claypool, 223-1235; 275 NW 34

Use of part of street—access to properties—no vacation of street. Where plaintiffs and defendants, as property owners, abutting on a dedicated but unaccepted street, have for years used a part of the street in entering and leaving their respective properties, thereby acquiring an easement in such part of the street, and where defendants acquired title to the other part of the street by adverse possession and acquiescence, the plaintiffs are not entitled to vacate such street.

Brewer v Claypool, 223-1235; 275 NW 34

6284 Vacation by lot owners—petition—notice.

Action to vacate municipal plat. In an action for the vacation of a county auditor's plat of land within a city or town, the county auditor is not a necessary party.

Schemmel v Town, 214-321; 242 NW 89

Vacation of plat by court. A county auditor's plat may be vacated by a court of equity at the instance of a plaintiff who, since the plat was duly executed, has become the owner of all the various tracts embraced in said plat.

Schemmel v Town, 214-321; 242 NW 89

Vacation of plat—when city may not object. A city or town may not justly complain of the vacation of an auditor's plat of land within the municipality when no public property of any kind is located on the land, and when legitimate and authorized municipal taxation is in no manner limited.

Schemmel v Town, 214-321; 242 NW 89

Use of part of street—access to properties—no vacation of street. Where plaintiffs and defendants, as property owners, abutting on a dedicated but unaccepted street, have for years used a part of the street in entering and leaving their respective properties, thereby acquiring an easement in such part of the street, and where defendants acquired title to the other part of the street by adverse possession and acquiescence, the plaintiffs are not entitled to vacate such street.

Brewer v Claypool, 223-1235; 275 NW 34

6286 Decree.

Use of part of street—access to properties—no vacation of street. Where plaintiffs and defendants, as property owners, abutting on a dedicated but unaccepted street, have for years used a part of the street in entering and leaving their respective properties, thereby acquiring an easement in such part of the street, and where defendants acquired title to the other part of the street by adverse possession and acquiescence, the plaintiffs are not entitled to vacate such street.

Brewer v Claypool, 223-1235; 275 NW 34

Streets—conveyance of title after acceptance and vacation. In an action involving the title to a strip of land which had once been part of a street between town lots, it made no difference whether such street had ever been accepted by the town and opened for public use and later vacated and conveyances of the land made by the town, so long as a question of acquiescence and adverse possession was the decisive issue between the claimants.

Patrick v Cheney, 226-853; 285 NW 184

6293 Platting for assessment and taxation.

Atty. Gen. Opinion. See '34 AG Op 520

CHAPTER 322

DISABLED AND RETIRED FIREMEN AND POLICEMEN

6310 Pension funds.

Atty. Gen. Opinions. See '25-26 AG Op 232; '32 AG Op 120; 153; '34 AG Op 613

Failure to maintain pension fund—proper remedy. An action at law against a city for judgment consequent on the failure of the council to perform its mandatory duty to levy a tax sufficient to meet and pay pensions for firemen and policemen, will not lie either on the theory of contract or damages. Mandamus is the proper remedy.

Lage v City, 212-53; 235 NW 761

Fireman—pension—service prior to adoption of pension plan. Any city or town having an organized fire department must pay to a retired fireman, who was on a monthly salary, his statutory pension when he becomes eligible, if it has become a pension-paying department prior thereto, altho it may not have been such a department for all of the 22 years that the pensioner was in service.

Mathewson v Board, 226-61; 283 NW 256

Deposit of funds—nonpreference. The trustees of a municipal fireman's pension fund may validly make a bank deposit of its funds in an amount sufficient to meet current pension demands. It follows that if the bank becomes insolvent the trustees are simply depositors and no preference over other depositors exists.

Andrew v Bank, 214-105; 241 NW 412

Wrongful deposit defined—preference. A deposit in a bank of municipal firemen's pension funds under conditions which deprive the trustees of the power to immediately withdraw said funds, is wrongful and being wrongful the trustees do not lose title to said funds. It follows that in case the bank becomes insolvent the deposit is entitled to preferential payment from the cash on hand at the time of insolvency; and it matters not that the trustees and bank are in pari delicto.

Andrew v Bank, 214-105; 241 NW 412
Andrew v Union Bank, 222-881; 270 NW 465

6311 Boards of trustees—officers.

Atty. Gen. Opinions. See '28 AG Op 227; '32 AG Op 153

6312 Investment of surplus.

Atty. Gen. Opinion. See '28 AG Op 227

6313 Gifts, devises, or bequests.

Atty. Gen. Opinion. See '25-26 AG Op 431

6314 Membership fee—assessments.

Atty. Gen. Opinion. See '32 AG Op 120

6315 Who entitled to pension—conditions.

Atty. Gen. Opinion. See '32 AG Op 153

Nature of right. The right to a pension becomes a vested and enforceable right, upon the happening of the statutory facts which mature the right.

Gaffney v Young, 200-1030; 205 NW 865

Nonbar by lapse of time. The right to make application for and to enforce the allowance of a pension which has actually accrued is barred by no lapse of time.

Gaffney v Young, 200-1030; 205 NW 865

Sanitation officer. The sanitation and quarantine officer appointed by the mayor from the police force of a city (§2232, C., '27) is within the benefits of the statutory policemen's pension fund.

Dempsey v Alber, 212-1134; 236 NW 86; 238 NW 33

Fireman serving prior to adoption of pension plan. Any city or town having an organized fire department must pay to a retired fireman, who was on a monthly salary, his statutory pension when he becomes eligible, if it has become a pension-paying department prior thereto, altho it may not have been such a department for all of the 22 years that the pensioner was in service.

Mathewson v Board, 226-61; 283 NW 256

6318 Pensions—widow—children—dependents.

Atty. Gen. Opinion. See '28 AG Op 373

Workmen's compensation—when denied. The minor children of a deceased policeman who was a member of an organized police department and contributing to the statutory pension fund of said department, and who was killed while attempting to effect an arrest and at a time when he was not actually "pensioned", are not entitled to compensation under the workmen's compensation act, notwithstanding section 1422, Code, 1927. (§1361, par. 4, C., '27.)

Ogilvie v City, 212-117; 233 NW 526

6320 Volunteer or call firemen.

Atty. Gen. Opinion. See '32 AG Op 120

6322 Decision of board.

Certiorari (?) or mandamus (?). Certiorari and not mandamus is the proper remedy to test the legality of the action of the trustees in denying a pension to an applicant.

Gaffney v Young, 200-1030; 205 NW 865
Riley v City, 203-1240; 212 NW 716

Review on question of facts. Certiorari will lie to review the action of the trustees of a statutory pension fund in denying relief to an applicant when the conceded or proven

facts mandatorily require the granting of such relief.

Dempsey v Alber, 212-1134; 236 NW 86; 238 NW 33

Findings and orders—conclusiveness. An unquestioned, nonfraudulent order or finding by the board of trustees of the policemen's pension fund, on a due application for retirement on a pension, that the applicant was not entitled to such pension, constitutes a conclusive adjudication of the right to such pension, even tho the board did not act on the advice of a physician as required by statute, and even tho the board otherwise acted irregularly.

Riley v Board, 210-449; 228 NW 578

Conclusiveness. The official decision of the board of trustees of the firemen's pension fund that an applicant was not entitled to a pension on account of an alleged injury, is final and conclusive in the absence of fraud, and fraud will not be presumed in the absence of proof thereof. So held as to a claimed injury which had, apparently, been concealed for some nine years before being presented as a ground for pension.

Fehrman v Sioux City, 223-308; 271 NW 500

CHAPTER 322.1

RETIREMENT SYSTEMS FOR POLICEMEN AND FIREMEN

6326.03 Definitions controlling.

Atty. Gen. Opinion. See AG Op Feb. 23, '39

6326.05 Membership.

Atty. Gen. Opinion. See '36 AG Op 634

CHAPTER 323

HOUSING LAW

GENERAL PROVISIONS

6329 Definitions.

Atty Gen. Opinions. See '30 AG Op 56; '36 AG Op 178

Nuisance—repair shop in connection with garage—injunction. A repair shop in connection with a garage, situated in what is in fact a residential district, may be attended with such noise, smoke, gases, and odors as to constitute an abatable private nuisance, provided such shop cannot be so operated as to avoid such objectionable conditions.

Pauly v Montgomery, 209-699; 228 NW 648

LIGHT AND VENTILATION

6339 Rear yards.

Atty. Gen. Opinion. See '30 AG Op 56

MAINTENANCE

6392 Repair of dwelling.

Injury to tenant—common law rules. The housing law (ch 323, C., '31) providing that "Every dwelling and all the parts thereof shall be kept in good repair by the owner", does not change the common law rule of tort liability of the lessor to the lessee.

Johnson v Carter, 218-587; 255 NW 864; 93 ALR 774

Negligence of tenant—liability of landlord. Principle recognized that a property owner who has parted with full possession and control of his premises by lease is not liable to third persons for injuries caused by the negligence of the tenant.

Updegraff v City, 210-382; 226 NW 928

Leased premises—liability—res ipsa loquitur. With respect to trapdoor in coliseum leased by one defendant to another for circus conducted by a third party, doctrine of res ipsa loquitur held not to apply to injury to one falling into opening, especially where the trapdoor was not wholly under the control of defendants.

Work v Coliseum Co., (NOR); 207 NW 679

Causal connection with injury necessary—no conjecture and speculation in verdict. There must be causal connection between an injury caused by falling from a fire escape because of an alleged defect in the top step. When the allegation is not substantiated by the evidence, any more than by the plaintiff's testimony, stating that "something moved", that he "caught his heel on the step", it would be mere conjecture and speculation to base a verdict thereon, and verdicts must rest on something more substantial.

Gowing v Field, 225-729; 281 NW 281

Negligence—trespassing children. The owner or occupier of real property is under no legal obligation to make or keep the premises safe for trespassers or bare licensees. So held where a child fell through an opening in the floor of a building which was undergoing reconstruction after a fire.

Battin v Cornwall, 218-42; 253 NW 842

Independent contractor as invitee—known danger revealed—otherwise reasonable care. Person, employing an independent contractor to put steam pipes in downspouting, owes only the duty to such invitee to use reasonable care for his safety, and to warn the contractor as to defects or dangers known to the employer and not apparent to the contractor. The employer is not responsible to the contractor for injuries from defects that the contractor knew of or, in the exercise of ordinary care, ought to have known of.

Gowing v Field, 225-729; 281 NW 281

REQUIREMENTS AND REMEDIES

6440 Injunction.

Proper party plaintiff. The proper officer charged with the enforcement of the "Housing Law" may maintain an action to enjoin the storage of gasoline on residence property without a permit.

Clinton v Donnelly, 203-576; 213 NW 262

CHAPTER 324

MUNICIPAL ZONING

6452 Building restrictions — powers granted.

Discussion. See 13 ILR 78—Zoning—police power; 25 ILR 830—Residential property surrounded by business properties

ANALYSIS

I IN GENERAL
II RESTRICTIONS IN DEEDS

I IN GENERAL

Discussion. See 11 ILR 152—Zoning ordinances

Prohibiting erection of building. The legislative grant of power in §5756, C., '27, to regulate the erection of buildings, does not embrace the power to prohibit the erection of buildings, and the power to prohibit will not be deemed supplied because of the existence of the power in other statutes (chs 324, 325, C., '27), of which the city has never availed itself.

Downey v City, 208-1273; 227 NW 125

Building restrictions—abrogation by ordinance. Building restrictions which constitute covenants running with the land are not abrogated by a subsequently enacted municipal zoning ordinance which is contrary to such building restrictions but which distinctly disclaims any intent to abrogate any existing contract restrictions.

Burgess v Magarian, 214-694; 243 NW 356

Building restrictions—enforcement. Building restrictions prohibiting the erection of a gasoline filling station within a certain addition should be enforced on a proper showing even tho immediately outside said addition a gaso line filling station has been erected.

Burgess v Magarian, 214-694; 243 NW 356

Illegal building permit—nonestoppel to question. The holder of an illegal building permit may not, in an action by injured property owners to restrain operations under the permit, successfully contend that his permit is beyond judicial cancellation because he has already expended a substantial sum in reliance on said permit.

Zimmerman v O'Meara, 215-1140; 245 NW 715

Building permit for dog hospital—revocability. A duly issued building permit is more than a mere "license", and after a building permit is issued under a city's zoning ordinance to a veterinary surgeon who made full disclosure to the city of his plans to build a "dog hospital", with his own living quarters on the second floor, in a "hospital" zoned district, and after the building inspector consulted the city attorney, and after veterinary surgeon had spent considerable money toward constructing the building, an order revoking the permit was illegal and reviewable by certiorari.

Crow v Board, 227-324; 288 NW 145

Undertaking establishment. The operation, under formal municipal permit, of an undertaking and embalming establishment in a city, in a territory designated by a duly enacted zoning ordinance as a commercial district, will not be enjoined on the sole ground that, being adjacent to a residence, said operation will have a depressing mental effect on the occupant and owner of said residence and on the members of his family.

Kirk v Mabis, 215-769; 246 NW 759; 87 ALR 1055

Wrongful exercise of judicial function. A city is not liable for damages consequent on the wrongful attempt of the city council to revoke a permit granted by it for the erection of a store building; nor are the individual members of the council liable for such damages, it appearing that they acted in good faith, but under a misapprehension of their legal power. (See under §5738.)

Rehmann v City, 204-798; 215 NW 957; 55 ALR 430; 34 NCCA 480

II RESTRICTIONS IN DEEDS

Covenants—construction—"buildings"—intent of parties. The word "building" as used in restrictive covenants in deeds of conveyance will be so construed as to give effect to the manifest intention and purposes of the parties. Held, inter alia, that structures for screening sand, and a derrick with hoisting machinery were "buildings" within the meaning of restrictive covenants against the erection of buildings which would cut off a view.

Curtis v Schmidt, 212-1279; 237 NW 463

Building restrictions—knowledge of. A grantee of land who, at the time of purchasing knows, generally, that there are building restrictions running with the land, is bound by such restrictions even tho they are omitted from the deed taken by him.

Burgess v Magarian, 214-694; 243 NW 356

Tax deed destroys prior chain. A valid tax deed issued on a sale for nonpayment of general taxes extinguishes all restrictive covenants in the chain of title of previous owners. So held as to a restriction against erecting or placing a business or store building on the lot in question.

Nedderman v Des Moines, 221-1352; 268 NW 36

6458 Board of adjustment.

Building permit for dog hospital—revocability. A duly issued building permit is more than a mere "license", and after a building permit is issued under a city's zoning ordinance to a veterinary surgeon who made full disclosure to the city of his plans to build a "dog hospital", with his own living quarters on the second floor, in a "hospital" zoned district, and after the building inspector consulted the city attorney, and after veterinary surgeon had spent considerable money toward constructing the building, an order revoking the permit was illegal and reviewable by certiorari.

Crow v Board, 227-324; 288 NW 145

6461 Appeals.

Revocation—exclusive remedy. When a building permit has been nonarbitrarily revoked by the city building inspector who issued it, the sole and exclusive remedy of the permittee is to appeal to the board of adjustment which is specifically provided for that and other related purposes.

Call Co. v City, 219-572; 259 NW 33

6463 Powers.

Arbitrary exercise of power. A board of adjustment, whose powers under a zoning ordinance are substantially identical with the powers granted such boards by this statute, acts wholly without legal authority when it grants to one of many property owners, similarly or identically situated as regards their property, the right to so structurally alter his residence as to convert said residence into a duplex in admitted disregard of the ordinance requirement as to area of lot per family, and to the damage of all property owners within the district.

Zimmerman v O'Meara, 215-1140; 245 NW 715

Nonarbitrary revocation. The revocation by a building inspector of a building permit issued by him, on the ground of illegality of the original issuance, cannot be deemed an arbitrary revocation when it is made to appear that the legality of the original issuance is very questionable.

Call Co. v City, 219-572; 259 NW 33

Permissible revocation. A building permit issued by a city building inspector is revocable by the nonarbitrary action of the inspector when the permittee has not materially and detrimentally altered his position in reliance on the permit.

Call Co. v City, 219-572; 259 NW 33

Building permit for dog hospital—revocability. A duly issued building permit is more than a mere "license", and after a building permit is issued under a city's zoning ordinance to a veterinary surgeon who made full disclosure to the city of his plans to build a "dog hospital", with his own living quarters on the second floor, in a "hospital" zoned district, and after the building inspector consulted the city attorney, and after veterinary surgeon had spent considerable money toward constructing the building, an order revoking the permit was illegal and reviewable by certiorari.

Crow v Board, 227-324; 288 NW 145

6464 Decision on appeal.

Building permit for dog hospital—revocability. A duly issued building permit is more than a mere "license", and after a building permit is issued under a city's zoning ordinance to a veterinary surgeon who made full disclosure to the city of his plans to build a "dog hospital", with his own living quarters on the second floor, in a "hospital" zoned district, and after the building inspector consulted the city attorney, and after veterinary surgeon had spent considerable money toward constructing the building, an order revoking the permit was illegal and reviewable by certiorari.

Crow v Board, 227-324; 288 NW 145

6466 Petition for certiorari.

Illegal modification in zoning ordinance. A detrimentally affected property owner may maintain injunction to restrain the carrying out of a wholly illegal modification of a zoning ordinance when he had no notice of such modi-

fication until after the expiration of the thirty days provided by statute for certiorari.

Zimmerman v O'Meara, 215-1140; 245 NW 715

Building permit for dog hospital—revocability. A duly issued building permit is more than a mere "license", and after a building permit is issued under a city's zoning ordinance to a veterinary surgeon who made full disclosure to the city of his plans to build a "dog hospital", with his own living quarters on the second floor, in a "hospital" zoned district, and after the building inspector consulted the city attorney, and after veterinary surgeon had spent considerable money toward constructing the building, an order revoking the permit was illegal and reviewable by certiorari.

Crow v Board, 227-324; 288 NW 145

6469 Trial—judgment—costs.

Certiorari—procedure. Certiorari to review an order by the board of adjustment in re municipal zoning is not necessarily triable de novo on the return to the writ. Plaintiff, on proper allegation, has the legal right to introduce testimony (when it is not already in the return, or when the facts are in dispute) to show that the order of the board is (1) clearly arbitrary and unreasonable, or (2) is contrary to the public interest and to the spirit of the zoning ordinance. (See under §12464.)

Anderson v Jester, 206-452; 221 NW 354

CHAPTER 325

RESTRICTED RESIDENCE DISTRICTS

6475 Ordinance—scope.

Police power and regulations — restricted residence district—valid regulation. An ordinance, based upon a statute valid under the police power of the state, authorizing establishment of restricted residence districts is not a prohibition but a regulation and as such is a legitimate and reasonable exercise of the city's police power.

Scott v Waterloo, 223-1169; 274 NW 897

Prohibiting erection of building. The legislative grant of power in section 5756, C., '27, to regulate the erection of buildings does not embrace the power to prohibit the erection of buildings, and the power to prohibit will not be deemed supplied because of the existence of the power in other statutes (chs 324, 325, C., '27), of which the city has never availed itself.

Downey v City, 208-1273; 227 NW 125

Vesting permit power in council. An ordinance establishing a restricted residence district and prohibiting the erection and maintenance therein of gasoline filling stations without obtaining a permit therefor is not unconstitutional because the power to grant or refuse the permit is lodged in the city council —the same body which enacted the ordinance.

Marquis v City, 210-439; 228 NW 870
Cecil v Toenjes, 210-407; 228 NW 874

Failure to specify rules. An ordinance establishing a restricted residence district and prohibiting the erection and maintenance therein of gasoline filling stations without obtaining from the city council a permit therefor, is not unconstitutional because the ordinance fails to specify the rules and regulations governing the granting or refusal of such permit.

Marquis v City, 210-439; 228 NW 870
Cecil v Toenjes, 210-407; 228 NW 874

Discrimination—exemption to existing business. An ordinance establishing a restricted residence district, and prohibiting the subsequent erection and maintenance therein of gasoline filling stations without a permit, is not unconstitutional because the ordinance exempts from its operation an already established and maintained gasoline filling station.

Marquis v City, 210-439; 228 NW 870

Filling station permit—ordinance amending restricted district. Under a restricted residence district ordinance, a city council may issue a permit for erection of a gasoline filling station on certain lots without a separate ordinance to remove the particular lots from the restricted district.

Scott v Waterloo, 223-1169; 274 NW 897

Judicial supervision—council's judgment—filling station permit. The wisdom, judgment, or lack thereof, on the part of a city council in issuing a permit to erect a "filling station" is not reviewable by the courts unless the action taken was arbitrary, oppressive, or capricious. Evidence reviewed and permit held valid.

Scott v Waterloo, 223-1169; 274 NW 897

Building permit—permissible revocation. A building permit issued by a city building inspector is revocable by the nonarbitrary action of the inspector when the permittee has not materially and detrimentally altered his position in reliance on the permit.

Call Co. v City, 219-572; 259 NW 33

Permit—nonarbitrary revocation. The revocation by a building inspector of a building permit issued by him, on the ground of illegality of the original issuance, cannot be deemed an arbitrary revocation when it is made to

appear that the legality of the original issuance is very questionable.

Call Co. v City, 219-572; 259 NW 33

Building restrictions — abrogation by ordinance. Building restrictions which constitute covenants running with the land are not abrogated by a subsequently enacted municipal zoning ordinance which is contrary to such building restrictions but which distinctly disclaims any intent to abrogate any existing contract restrictions.

Burgess v Magarian, 214-694; 243 NW 356

CHAPTER 326

GOVERNMENT OF CITIES BY COMMISSION

THE COUNCIL

6495 Affidavit of candidacy.

Atty. Gen. Opinion. See AG Op Jan. 24, '39

6516 Bribery and illegal voting.

Conduct of election—municipal public utility ownership — candidates' statements. Statements made by candidates for municipal office as to their intentions respecting the acquisition of a public utility will not vitiate the election deciding the question of municipal ownership without a showing that the election was affected thereby.

Abbott v Iowa City, 224-698; 277 NW 437
Keokuk Co. v Keokuk, 224-718; 277 NW 291

Contests—electric company offering rate reduction — not candidates' bribery — election valid. Evidence held insufficient to establish bribery and an illegal election in that candidates for municipal office acquiesced in or ratified an advertised plan by which the local electric company offered to reduce its rates, and pay back to its subscribers an accumulating sum as a rebate, in the event the voters would elect council members opposed to municipal ownership.

Van Der Zee v Means, 225-871; 281 NW 460

Officers—election bribery by third person—disqualifying effect. A candidate having been elected to office is not disqualified, merely because some third person may have given or offered a bribe to the voters for the purpose of securing the election of said candidate, unless the candidate actually participated in and approved thereof.

Van Der Zee v Means, 225-871; 281 NW 460

6517 Salaries.

Atty. Gen. Opinion. See '25-26 AG Op 241

6519 Salaries of minor officers.

Fireman as "employee". The definition of the term "employee", as embodied in §1421, C., '24, is quite immaterial on the issue whether a fireman is an employee under this section.

Murphy v Gilman, 204-58; 214 NW 679

Ordinance not required. The determination of the salary of a fireman is the exercise of an administrative power and need not be made by ordinance.

Murphy v Gilman, 204-58; 214 NW 679

6528 Minor officers and assistants.

Peace officer as agent of public—nonliability of town for tort. A law-enforcing officer, whose office is created by statute and whose duties are prescribed therein, is an agent of the public in general and not the agent of the municipality which employs him, therefore the municipality is not liable in damages for his unlawful or negligent acts, and a petition alleging cause of action thereon against the municipality is demurrable.

Hagedorn v Schrum, 226-128; 283 NW 876

Tear gas gun—town not liable for negligent use. A city or town is not liable for the negligent acts of its peace officer employee merely because it furnished him with a tear gas gun.

Hagedorn v Schrum, 226-128; 283 NW 876

6530 Police judge.

Atty. Gen. Opinion. See '38 AG Op 319

Appointment—no implied repeal. A statute providing that in certain cities the council shall appoint a police judge is not impliedly repealed by the soldiers preference law, which merely places a limitation on the power of appointment.

Maddy v City Council, 226-941; 285 NW 208

Soldiers preference case—findings by district court. In an appeal under the soldiers preference law, the district court may direct a city council to appoint a war veteran to the position of police judge and to cancel all action taken in appointing a nonveteran with the same qualifications for the office, rather than remand the case for further consideration by the city council.

Maddy v City Council, 226-941; 285 NW 208

Soldiers preference law. In an action to compel the appointment of the plaintiff war veteran as city police judge, where it was shown that both the plaintiff and the nonveteran appointed by the city council were qualified for the position, a finding by the district court in favor of the veteran should not be disturbed.

Maddy v City Council, 226-941; 285 NW 208

6532 Removal of officers.

Atty. Gen. Opinion. See '38 AG Op 290

6533 Create and discontinue offices.

Atty. Gen. Opinion. See '38 AG Op 290

Employees—soldiers preference act—justifiable discharge. An order of a city council to reduce the number of employees in a named department justifies the discharge of an ex-soldier employee whose duties are apparently inseparably connected with said department.

Rounds v Des Moines, 213-52; 238 NW 428

6534 Interest in contracts.

Atty. Gen. Opinion. See '36 AG Op 660

ORDINANCES AND RESOLUTIONS

6553 Time limit on enactment.

Contracts—Simmer law—filing contract but not resolution—ordinance unnecessary. In establishing municipal ownership of a waterworks plant, it is the contract and not the resolutions calling an election that must be on file with the city clerk for one week before adoption, and an ordinance establishing the municipal waterworks plant is unnecessary.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

6556 Petitions for ordinances.

Initiative and referendum—scope. The initiative and referendum applies only to such acts as are legislative in character, as distinguished from those that are of an administrative or executive character. Held that submission of an ordinance which fixed the compensation of firemen was nugatory, even tho the submission was in the form of an amendment to an existing ordinance which fixed such salaries.

Murphy v Gilman, 204-58; 214 NW 679

6557 Ordinance passed or election called.

Atty. Gen. Opinion. See '28 AG Op 422

GENERAL POWERS AND DUTIES

6566 Department superintendents.

Employment of assistants. The superintendent of a department of municipal government under the so-called commission plan may himself validly employ authorized and necessary employees to carry on the work of his department (1) when an existing ordinance in effect grants such power, and (2) when an existing ordinance makes an appropriation of funds for such department and fixes the number of employees and the separate salaries thereof; and this is true notwithstanding an additional existing ordinance which provides, in effect, that all contracts shall be entered into or approved by the council as a whole, it being held that the latter ordinance is not a limitation on the former.

Loran v City, 201-543; 207 NW 529

6567 Statutes applicable.

Atty. Gen. Opinion. See '30 AG Op 92

6569 Existing limits, rights, property.

Statute governing action for damages. In a city which has abandoned its special charter and become organized under the commission form of municipal government, actions for damages consequent on defective streets are governed by §11007, par. 1, C., '27, and not by §6734, C., '27, such reorganized city having no "vested right" in said latter section within the meaning of this section.

Wilson v City, 210-790; 231 NW 495

6571 Discretionary powers.

Civil service employees—discharge. The city council has plenary power by appropriate resolution to order a good-faith reduction in the number of employees in a municipal department operating under civil service regulations, and may validly delegate to the chief officer of such department the administrative duty to designate, on the basis of efficiency, competency, and length of service, and without the preferring of charges, the employees who shall be discharged; and this is true tho the employees be ex-soldiers, as the soldier preference act has no application to a case where an office is abolished.

Lyon v Com., 203-1203; 212 NW 579

6574 Flood protection—division of work—levy.

Torts—storm waters into sanitary sewer—negligence—jury question. A city has the duty to maintain its sanitary sewer with ordinary care and prudence and, where the city diverts storm waters into a sanitary sewer designed for a certain capacity, a jury might find the city negligent, and that such negligence was the proximate cause of damage from overflow due to the inability of the sewer to handle the increased flowage.

Wilkinson v Indianola, 224-1285; 278 NW 326

6575 Special assessments.

Graveling street—absence of grade nonjurisdictional. The due establishment of a permanent grade on a street is not a jurisdictional condition precedent to graveling said street, and assessing the cost thereof to abutting and adjacent property. It follows that the property owner, when duly notified of the proposed assessment, must present to the city council the objection that no permanent grade has been established, or said objection will be irrevocably waived.

Peoples Inv. Co. v Des Moines, 213-1378; 241 NW 464; 79 ALR 1310

6577 Repairs by street railway companies.

Assessment of street railways—fundamental purpose of statute. The fundamental purpose of the statute relative to the assessment of street railways for paving in connection with their tracks (§6051-c1, C., '31 [§6051.1, C., '39]) is to cover the entire subject and declare a basic rule for the government of the same.

In re Walnut Bridge, 220-55; 261 NW 781

Assessments — when franchise ordinance must yield to statute. A street railway franchise ordinance which specifies, in effect, that, until the state statutes otherwise provide, the obligation of the company to construct and reconstruct paving between and outside the rails of its tracks shall be thus and so, manifestly must yield to such later enacted state statute.

In re Walnut Bridge, 220-55; 261 NW 781

6579 Fund for cemeteries.

Atty. Gen. Opinions. See '32 AG Op 126; '34 AG Op 683

6581 Itemized statements.

Atty. Gen. Opinion. See '30 AG Op 262

Ordinance—insufficient publication "in pamphlet form". The publication "in pamphlet form", by a city, of the proceedings of the city council for the preceding month in which pamphlet appears a duly enacted ordinance, does not constitute the publication "in pamphlet form" of said ordinance as contemplated by §5721, C., '31.

Des Moines v Miller, 219-632; 259 NW 205

6582 Annual examination.

Atty. Gen. Opinion. See '30 AG Op 92

POLICE EQUIPMENT IN CERTAIN CITIES

6588 Equipment authorized.

Operation of police patrol a governmental function. The operation of a plainly marked police patrol by a policeman in uniform, in conveying policemen in uniform from the police station to their patrol beats, all under orders from the chief of police, is a governmental function. It follows that the city is not liable for damages consequent on the negligent operation of the car by the driver.

Leckliter v City, 211-251; 233 NW 58; 38 NCCA 493

RIVER FRONT COMMISSION AND FIRE DEPARTMENT IN CERTAIN CITIES

6596 Transfer of powers.

Atty. Gen. Opinions. See '25-26 AG Op 156; '38 AG Op 791

6597 Meandered streams.

Atty. Gen. Opinions. See '30 AG Op 300; '38 AG Op 791

Dams—new high watermark—title of state. The state of Iowa by erecting a permanent dam in the bed of its navigable river, and by maintaining said dam peaceably and uninterruptedly for a period of ten years, legally extends its title to the new high watermark resulting from the erection of the dam; and especially may a private deed holder not complain when his deed, executed after the dam was erected, simply calls for land "up to the river".

State v Sorenson, 222-1248; 271 NW 234

6598 Tax sales—redemptions.

Tax titles—mother paying on contract while daughter gets tax deed—invalidity. A tax deed will be set aside when a mother buying property on contract, allows it to go to tax sale, then contracts with the certificate purchaser to buy the certificate while continuing payments to the landowner, assuring said landowner that she is redeeming, yet, when the certificate is acquired, a daughter's name is inserted and treasurer's deed issued thereto, the mother must be held to have conspired with the daughter to defraud the landowner and to have accomplished no more than a redemption for herself.

Blotcky v Silberman, 225-519; 281 NW 496

6600 Tax for fire department.

Atty. Gen. Opinion. See '25-26 AG Op 156

PARKS, SWIMMING POOLS, ETC., IN CERTAIN CITIES

6606 Powers granted.

Governmental functions. The construction and operation by a city of a bathing beach or water fountain is the exercise of a governmental function, and the city is not liable in damages for negligence in such construction and operation; and the charging of a nominal fee for the use of the beach does not change the rule.

Hensley v Towne, 203-388; 212 NW 714; 34 NCCA 559

Mocha v City, 204-51; 214 NW 587; 34 NCCA 542; 3 NCCA(NS) 459

See Norman v City, 201-279; 207 NW 134; 25 NCCA 675

Drowning in swimming pool—liability. In an action to recover damages for the drowning of an eleven-year-old boy who was attending an outing camp, where the camp director had arranged with the Red Cross to provide two swimming instructors and life guards to be on duty at a specified time to protect about one hundred boys at the camp, and when the corporation operating the swimming pool took no part in arranging for life guards, it was not, under the circumstances, negligent in presumably admitting the decedent to the pool a few moments in advance of the time fixed for the entire group and in advance of supervision by the Red Cross instructors and life guards.

Hecht v Playground Assn., 227-81; 287 NW 259

Swimming pool not an "attractive nuisance". A swimming pool, either natural or artificial, is not an attractive nuisance.

Hecht v Playground Assn., 227-81; 287 NW 259

Swimming pool—drowning—res ipsa loquitur nonapplicable. The mere fact a person drowns in a swimming pool does not of itself establish negligence on the part of the proprietor under the doctrine of res ipsa loquitur.

Hecht v Playground Assn., 227-81; 287 NW 259

Swimming pool proprietors—degree of care required. The general rule that the proprietor of a bathhouse or swimming pool for profit is bound to use ordinary care to guard against injury to his patrons held applicable to nonprofit corporation operating a swimming pool.

Hecht v Playground Assn., 227-81; 287 NW 259

Drowning in swimming pool—failure to advise as to depth. A corporation, operating a swimming pool in which an eleven-year-old boy drowned, was not negligent in not personally informing the deceased of the depth of the water in the pool and in failing to inquire of him as to whether he could swim, where there were many signs, plainly visible about the pool indicating the various depths, and the age, intelligence, and experience of the deceased were sufficient to advise him of the inherent dangers of entering a body of water deeper than his height, especially when he was under the supervision of adults, who had more direct and complete control over him than the agents and employees operating the pool.

Hecht v Playground Assn., 227-81; 287 NW 259

Drowning in swimming pool—life guards—sufficiency. Negligence of a corporation operating a swimming pool in which an eleven-year-old boy drowned, could not be grounded upon lack of sufficient attentive life guards, where it had one competent guard who never left his post at the deep water end and no showing was made as to need for more guards and none of the many bathers saw the drowning; and where most of the bathers, including the deceased, were in special groups which had competent life guards and other adult attendants for their own special protection.

Hecht v Playground Assn., 227-81; 287 NW 259

CHAPTER 326.1

STREET IMPROVEMENTS AND SEWERS IN CITIES UNDER COMMISSION FORM OF GOVERNMENT

6610.04 Proceedings—plans.

Railroad crossing construction — council's power to require. Since character and extent of street improvements are within responsible discretion of city authorities and because city council's determination of question of desirability of proposed improvements is conclusive except for want of authority or fraud, and where ordinance granting franchise to railroad gave city council authority to require construction of crossing, damage claim for refusal to construct crossing could not be maintained by owner seeking access to property, when owner instead of requesting council to direct railroad to build crossing, merely made such request by personal letter to railroad official.

Call Co. v Railway, 227-142; 287 NW 832

6610.13 Private initiation of improvement plan.

Railroad crossing construction. Since character and extent of street improvements are within responsible discretion of city authorities and because city council's determination of question of desirability of proposed improvements is conclusive except for want of authority or fraud, and where ordinance granting franchise to railroad gave city council authority to require construction of crossing, damage claim for refusal to construct crossing could not be maintained by owner seeking access to property, when owner instead of requesting council to direct railroad to build crossing, merely made such request by personal letter to railroad official.

Call Co. v Railway, 227-142; 287 NW 832

6610.28 Final determination.

Railroad crossing construction — council's findings—conclusiveness. Since character and extent of street improvements are within responsible discretion of city authorities and because city council's determination of question of desirability of proposed improvements is conclusive except for want of authority or fraud, and where ordinance granting franchise to railroad gave city council authority to require construction of crossing, damage claim for refusal to construct crossing could not be maintained by owner seeking access to property, when owner instead of requesting council to direct railroad to build crossing, merely made such request by personal letter to railroad official.

Call Co. v Railway, 227-142; 287 NW 832

6610.49 Bids—advertisement—letting of contract.

Public improvements—estimated quantities as basis for contract—variation with specifications not fatal. In awarding a contract, the function of plans and estimated quantities is to permit a uniform comparison of bids, and the requirement of "unit prices", as a means of payment for variations from the estimated quantities, indicates their variable character, so certain variations between the plans and specifications will not result in a failure of competitive bidding invalidating a contract based thereon.

Interstate Co. v Forest City, 225-490; 281 NW 207

6610.57 Railways and street railways.

Railroad crossing construction — council's power to require. Since character and extent of street improvements are within responsible discretion of city authorities and because city council's determination of question of desirability of proposed improvements is conclusive except for want of authority or fraud, and where ordinance granting franchise to railroad gave city council authority to require construction of crossing, damage claim for refusal to construct crossing could not be maintained by owner seeking access to property, when owner instead of requesting council to direct railroad to build crossing, merely made such request by personal letter to railroad official.

Call Co. v Railway, 227-142; 287 NW 832

CHAPTER 328

CITY MANAGER PLAN BY POPULAR ELECTION

6630 Tenure by council.

Atty. Gen. Opinion. See '38 AG Op 290

6631 Tenure by manager.

Atty. Gen. Opinion. See '38 AG Op 290

6651 Appointments by council.

Atty. Gen. Opinion. See 38 AG Op 319

6678 General powers conferred.

Drowning in swimming pool—liability. In an action to recover damages for the drowning of an eleven-year-old boy who was attending an outing camp, where the camp director had arranged with the Red Cross to provide two swimming instructors and life guards to be on duty at a specified time to protect about one hundred boys at the camp, and when the corporation operating the swimming pool took no part in arranging for life guards, it was not, under the circumstances, negligent in presumably admitting the decedent to the pool a few moments in advance of the time fixed for the entire group and in advance of supervision by the Red Cross instructors and life guards.

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Drowning in swimming pool—life guards—sufficiency. Negligence of a corporation operating a swimming pool in which an eleven-year-old boy drowned, could not be grounded

upon lack of sufficient attentive life guards, where it had one competent guard who never left his post at the deep water end and no showing was made as to need for more guards and none of the many bathers saw the drowning; and where most of the bathers, including the deceased, were in special groups which had competent life guards and other adult attendants for their own special protection.

Hecht v Playground Assn., 227-81; 287 NW 259

6687 Procedure—petition—election.

Atty. Gen. Opinion. See '34 AG Op 294

CHAPTER 329

CITIES UNDER SPECIAL CHARTER

OFFICERS AND EMPLOYEES

6700 Marshal—policemen.

Peace officers' qualifications. The public has a right to have, as peace officers, men of character, sobriety, judgment, and discretion.

Edwards v Civil Service, 227-74; 287 NW 285

Peace officer as agent of public—nonliability of town for tort. A law-enforcing officer, whose office is created by statute and whose duties are prescribed therein, is an agent of the public in general and not the agent of the municipality which employs him, therefore the municipality is not liable in damages for his unlawful or negligent acts, and a petition alleging cause of action thereon against the municipality is demurrable.

Hagedorn v Schrum, 226-128; 283 NW 876

Tear gas gun—town not liable for negligent use. A city or town is not liable for the negligent acts of its peace officer employee merely because it furnished him with a tear gas gun.

Hagedorn v Schrum, 226-128; 283 NW 876

Policeman assaulting prisoner — discharge justifiable. In an action in certiorari brought under soldiers preference law to review a ruling of civil service commission sustaining the discharge of a police officer for violation of civil service rules, providing for the dismissal of a policeman who clubs or mistreats a prisoner merely because such prisoner makes derogatory remarks concerning the officer, held, evidence sufficient to sustain findings of the commission.

Edwards v Civil Service, 227-74; 287 NW 285

6706 Compensation of other officers—report.

Atty. Gen. Opinion. See '36 AG Op 313

6707 Change of compensation.

Atty. Gen. Opinion. See '34 AG Op 215

6710 Interest in contract.

Atty. Gen. Opinion. See '36 AG Op 660

MISCELLANEOUS OFFICIAL DUTIES

6718 Annual financial report.

Atty. Gen. Opinion. See '30 AG Op 262

ORDINANCES

6720 Ordinances—fines.

Atty. Gen. Opinions. See '34 AG Op 229; '38 AG Op 309

GENERAL PROVISIONS AND POWERS

6730 Applicability of provisions.

Atty. Gen. Opinions. See '38 AG Op 112, 313, 732

6731 Definition.

Atty. Gen. Opinion. See '34 AG Op 277

6732 Application of certain terms.

Atty. Gen. Opinion. See '36 AG Op 303

6734 Claims for personal injury—limitation.

Actions against cities generally. See under §5738

Actions against cities—streets—defects—notice. See under §5945

Condition precedent. This section prescribes a condition precedent to the right to maintain an action.

Luke v City, 202-1123; 211 NW 583

Notice—fatal inaccuracy. A statutory notice designed to avoid the three months statute of limitation on an action against a city for damages consequent on a defective street (§11007, C., '31) is fatally defective when it designates the place of injury at a point on a street some 3000 feet distant from the place or point on said street where the injury was actually received.

Tredwell v Waterloo, 218-243; 251 NW 37

Failure to state time. A statement that the injury occurred on "March 22d" is a nullity.

Luke v City, 202-1123; 211 NW 583

Notice—proof of service. Evidence of service of notice of injury in consequence of defective street, in order to prevent the attaching of the "three month" statute of limitation, held sufficient to justify submission to jury of the issue of such service.

Cuvelier v Dumont, 221-1016; 266 NW 517

Reorganization—statute governing action for damages. In a city which has abandoned its special charter and become organized under the commission form of government, actions

for damages consequent on defective streets are governed by §11007, par. 1, C., '27, and not by this section, such reorganized city having no "vested right" in said latter section within the meaning of §6569, C., '27.

Wilson v City, 210-790; 231 NW 495

6743 Smoke nuisance.

Repair shop in connection with garage—injunction. A repair shop in connection with a garage, situated in what is in fact a residential district, may be attended with such noise, smoke, gases, and odors as to constitute an abatable private nuisance, provided such shop cannot be so operated as to avoid such objectionable conditions.

Pauly v Montgomery, 209-699; 228 NW 648

6748 Changing watercourses—condemnation.

Percolating waters—damage to adjoining land—causal connection necessary. A city excavating a new creek channel and which thereby collects water on its own land, from which it percolates to adjoining land resulting in damage, is liable therefor, but there must be probative evidence to establish percolation as the cause of the damage.

Covell v Sioux City, 224-1060; 277 NW 447

GENERAL STATUTES MADE APPLICABLE

6758 Civil service.

Atty. Gen. Opinions. See '38 AG Op 112, 313

6759 General powers.

Atty. Gen. Opinion. See '25-26 AG Op 387

6772 Outside highways—aid.

Atty. Gen. Opinion. See '38 AG Op 346

6779 Limitation of action.

Time limit to question legality of bonds.

Waller v Pritchard, 201-1364; 202 NW 770

PUBLIC UTILITIES

6789 Establishment of utilities.

Bonds—express authority required. Power "to borrow" money does not embrace the power to issue negotiable bonds.

Muscatine Co. v City, 205-82; 217 NW 468

Bonds—extension of existing plant. A city has no power to issue bonds to provide for the cost of extensions and enlargement of an existing municipally constructed electric light and power plant.

Muscatine Co. v City, 205-82; 217 NW 468

Bonds—validity. Bonds issued under a procedure which is, on its face, apparently authorized by law, are, nevertheless, invalid if the record shows that such procedure was simply a subterfuge for the purpose of evading the law and to accomplish an illegal purpose.

Muscatine Co. v City, 205-82; 217 NW 468

6817 Regulation of electric wires.

Similar provision. See §5904

RIVER-FRONT AND LEVEE IMPROVEMENTS

6823 Water-front improvement—fund.

Atty. Gen. Opinion. See '30 AG Op 300

BOARD OF HEALTH

6834 Officers appointed—quorum.

Sanitary inspector—nonsupervisory position. In certiorari action to annul decision of civil service commission ordering the reinstatement of a discharged sanitary inspector, evidence, that his general duty was to investigate and pass upon complaints with only occasional control over incidental employees, held to support and sustain findings below that such position was "nonsupervisory" under civil service statute allowing a preference to certain employees who had worked a certain length of time.

Des Moines v Board, 227-66; 287 NW 288

6846 Contagious diseases.

Unvaccinated school children. The appellate court will be slow to interfere with an order by the trial court refusing a temporary injunction against the enforcement by a school board of its order which temporarily excluded unvaccinated pupils from the public school; and especially will the appellate court decline to disturb such refusal when it affirmatively appears that the order of the board has expired ex vi termini.

Baehne v Sch. Dist., 201-625; 207 NW 755

GENERAL TAXATION

6856 Special levies.

Atty. Gen. Opinion. See '25-26 AG Op 387

Extra-territorial extension of municipal light and power lines—constitutional taxation. Sections 6142 and 8310, C., '31, are constitutional insofar as they authorize cities and towns to levy taxes for extending, beyond their corporate limits, the transmission lines of their municipally owned electric light and power plants.

Carroll v Cedar Falls, 221-277; 261 NW 652

6863 Anticipating revenue.

Similar statute. See §6223, Vol I

6867.1 Taxation in general.

Atty. Gen. Opinion. See '36 AG Op 303

6871 Collection through county.

Atty. Gen. Opinion. See '36 AG Op 303

6880 Lien on real estate.

Similar statute. See §§7202-7205

STREET IMPROVEMENTS AND SEWERS

6901 Notice and levy of assessments.

Similar provisions. See §6026, Vol I

6907 When delinquent.

Atty. Gen. Opinion. See '28 AG Op 400

6912 Street improvements.

Railroad crossing construction — council's power to require. Since character and extent of street improvements are within responsible discretion of city authorities and because city council's determination of question of desirability of proposed improvements is conclusive except for want of authority or fraud, and where ordinance granting franchise to railroad gave city council authority to require construction of crossing, damage claim for refusal to construct crossing could not be maintained by owner seeking access to property, when owner instead of requesting council to direct railroad to build crossing, merely made such request by personal letter to railroad official.

Call Co. v Railway, 227-142; 287 NW 832

6913 Plat and estimate.

Similar provision. See §5993

6914 Publication of notice.

Analogous procedure. See §§5991, 5997

6915 Passage of resolution.

Analogous provision. See §5995

6920 Relevy.

Analogous provision. See §6060, Vol I

6921 Correction.

Analogous provision. See §6061

6923 Interest—delinquency.

Atty. Gen. Opinion. See '28 AG Op 400

6927 Requirements of bonds.

Successively due special assessment bonds—pro rata payment nonpermissible. Where a special assessment fund was insufficient to pay in full all outstanding street improvement bonds which had been issued so that each series would mature successively over a period of years, such insufficiency did not affect the order of payment, and therefore the bondholders were not entitled to payment from the fund on a pro rata basis, but only in the order each series matured.

Shaw v Danbury, 227-415; 288 NW 435

TITLE XVI

TAXATION

CHAPTER 329.2

STATE TAX COMMISSION

6943.023 Rules and regulations.

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

6943.026 Powers.

Atty. Gen. Opinions. See '32 AG Op 158; '34 AG Op 446; '38 AG Op 109, 558; AG Op Jan. 10, '39

Assessment irregularities—remedy—review by board. If a tax assessment is otherwise valid and legal, a property owner's remedy for an irregularity, such as indefinite description or overlapping assessment, is to appear before the board of review.

Jones v Mills County, 224-1375; 279 NW 96

Appeal — county treasurer not "aggrieved party". The county treasurer may not appeal to the district court from an order of the state board of assessment and review nullifying an assessment made by the said treasurer against alleged omitted property of a taxpayer, said treasurer not being a "party aggrieved" within the meaning of the statute. (§6943-c27, par. 9a, C., '31 [§6943.026, C., '39, (par. 9a repealed by 47 GA, ch 188, §7)]).

In re Lytle Inv. Co., 219-1099; 260 NW 538

Assessment—wrongful classification—statutory remedy must be pursued. A taxpayer, who fails timely to interpose, before the local board of review, or before the state board of assessment and review, his objection that his property (in this case, the capital stock of a bank) was wrongfully classified as personal property and subjected to a consolidated levy instead of being classified as moneys and credits and subject to a six-mill levy, may not proceed in equity to enjoin the collection of the tax.

Security Bk. v Mitts, 220-271; 261 NW 625

Duties—supervision. The state board of assessment and review must as one of its duties exercise supervision over the administration of

the tax list, advise with taxing officials, and aid in securing equitable and just enforcement of the tax list.

Trustees v Board, 226-1353; 286 NW 483

Taxation supervision—"cubical content" and "zone" assessments. The state board of assessment and review, under §6943-c27, C., '35 [§6943.026, C., '39], still has authority to control, regulate, and supervise the administration of the assessments and the tax laws of the state and to correct assessments made under the "cubical content" and "zone" method of assessing, notwithstanding a repeal of part of said section allowing it other revisory powers over local boards.

State v Local Board, 225-855; 283 NW 87

Arbitrary "zone" reductions—correcting local board. The state board of assessment and review has "supervision" over, and power to direct, the local board and the city assessor of Des Moines, Iowa, to correct an arbitrary and discriminatory practice as to "cubical content" and "zone" of assessments, and in a mandamus action may enforce its order for the correction of such discrimination as may already have resulted. Such an order is not a reassessment nor a revision of individual assessments of individual owners, since it dealt with aggregate valuation in several zones.

State v Local Board, 225-855; 283 NW 87

Levy and assessment—nullification—jurisdiction of state board. Assuming the legal right of the county treasurer to enter an assessment against the alleged omitted property of a taxpayer (§7155 et seq., C., '31), yet the state board of assessment and review has, on proper hearing and order, plenary jurisdiction, subject to appeal to the district court, wholly to nullify such assessment. (§6943-c27, par. 9a, C., '31 [§6943.026, C., '39, (par. 9a repealed by 47 GA, ch 188, §7)]).

Smith v Sioux City Yards, 219-1142; 260 NW 531

Reduction in assessment—power of board. The state board of assessment and review has power, in an even numbered year, and for the purpose of attaining a new basis for the computation of taxes in and for said year, to order the county board of equalization with notice to lower the assessed valuation of the real property in a township, tho it be true, of course, that said assessed valuation was made and legally confirmed in the preceding odd numbered year.

State v Board, 211-1116; 235 NW 303

Order for reduction—discretion. A valid order by the state board of assessment and review to a board of supervisors to reduce certain assessed valuations, leaves said board of supervisors with no discretion as to compliance with the order.

State v Board, 211-1116; 235 NW 303

Valuation—order of reduction. Where the taxable value to be placed on property in 1931 was fixed by the court, and was acquiesced in by all parties and neither appealed, it is considered a fair assessable value where the evidence does not indicate that property was to any considerable degree different in value in 1931 and 1933, and the state board of assessment and review recommends a 20% reduction of the 1931 tax assessment as an equalization of tax assessments for the year 1933, held, the taxpayer is entitled to the full 20% reduction rather than 10.08% reduction allowed by the assessor.

Trustees v Board, 226-1353; 286 NW 483

Statute authorizing reduction in assessed valuation without notice. It is inferentially suggested that the statute which authorizes the state board of assessment and review to order a reduction in the assessed valuation of property is not unconstitutional because the statute assumed to grant such power without notice.

State v Board, 211-1116; 235 NW 303

Voluntary payment on excessive assessment—later reduction by state board—effect. A taxpayer who makes no objection to the local board of review as to the valuation which has been duly placed on his real estate by the assessor for assessment purposes, and voluntarily pays the taxes duly levied during the two following years on said valuation, may not later, and after obtaining an order from the state board of assessment and review reducing said assessed valuation, successfully contend that any part of said voluntarily paid taxes was "erroneously or illegally exacted or paid" within the meaning of the refund statute, §7235, C., '35.

Cedar Rapids Co. v Stirm, 222-206; 268 NW 562

Mandamus proper remedy to secure tax refund. A taxpayer may properly bring a mandamus action to compel a refund of taxes overpaid because of county auditor's failure to comply with budget deduction requirements of section 7164, C., '35. The state board of assessment and review has no power to correct this failure.

Hewitt v Keller, 223-1372; 275 NW 94

CHAPTER 329.3

INCOME, CORPORATION, AND SALES TAX

DIVISION I

INTRODUCTORY PROVISIONS

6943.035 Definitions controlling chapter.

Atty. Gen. Opinions. See '38 AG Op 56, 655

DIVISION II

PERSONAL NET INCOME TAX

6943.037 Tax imposed—applicable to federal employees.

Discussion. See 20 ILR 825—Personal net income tax; 22 ILR 292—Jurisdiction to tax income; 22 ILR 390—Constructive receipt of income; 22 ILR 430—Employees of federal agencies

6943.038 Income from estates or trusts.

Discussion. See 22 ILR 268—Tax on trust income

6943.040 "Gross income" defined—exceptions.

Discussion. See 18 ILR 320—Exemptions and deductions; 22 ILR 246—Progressive tax on gross income; 22 ILR 268—Tax on trust income; 22 ILR 411—Income from tax-exempt securities; 22 ILR 430—Employees of federal agencies; 24 ILR 343—Iowa and Federal law

Atty. Gen. Opinions. See '38 AG Op 46, 56, 723

Construction—ambiguity as prerequisite. A statute is not to be read as tho open to construction as a matter of course; but construction is invoked only when a statute contains such ambiguities or obscurities that reasonable minds may disagree as to their meaning.

Palmer v Board, 226-92; 283 NW 415

Tax statute—construed against taxing body. A proviso or exemption in a taxing statute in derogation of its general enacting clause must be strictly construed. However, as to contention that an income tax statute does not include out-of-state rent, not because of an exception, but by its terms, if open to construction at all, must fall within the general rule that tax statutes are construed strictly against the taxing body.

Palmer v Board, 226-92; 283 NW 415

Rent received on the land in another state taxable. Income tax statutes held to be so plain and certain as to require no construction and to patently indicate a legislative intent to tax all personal income whether originating in the state or without the state, and to plainly include rent received in the state from property located in another state.

Palmer v Board, 226-92; 283 NW 415

Interest on tax-exempt securities. Interest on tax-exempt municipal securities is not exempt from state income tax, tho the securities themselves are, by statute, exempt from general property tax. The statutory declaration that said securities "shall not be taxed" has reference solely to general property tax, and not to an excise tax—an income tax—on the interest collected on such securities.

Hale v Board, 223-321; 271 NW 168; 302 US 95

Income tax on dividends—time of payment controlling—when earned immaterial. Since income tax is not a tax on property but a tax on the individual, income received as dividends paid during the tax year constitutes taxable income for the year, where the return of the taxpayer is made on a cash receipt and disbursement basis for the calendar year, notwithstanding such dividends were accumulated by the corporation before the income tax law became effective.

Martin v Board, 225-1319; 283 NW 418; 120 ALR 1273

Stock market profits as capital investment. Transactions involving the sale of stocks and grain may be in the nature of a capital investment rather than stock in trade and, in the absence of a proper showing that they constituted the latter, the profits would not be taxable under the state income tax statutes.

Martin v Board, 225-1319; 283 NW 418; 120 ALR 1273

Stock market profits—when not taxable—refunds—stipulated record. In an action to cancel and secure a refund of income taxes submitted on a stipulated record, stock market transactions involved therein would be illegal and void as based on a gaming transaction if the buyer neither intended nor contemplated taking actual delivery but intended that the profits or losses should be settled on the market quotations; however, illegality is not presumed, and without illegality appearing in the record, profits accruing from such transactions must be held to be profits from the sale of capital assets, and not taxable as income, hence taxes paid thereon must be refunded.

Martin v Board, 225-1319; 283 NW 418; 120 ALR 1273

6943.041 Allowable deductions on gross income.

Federal income tax from receiver—burden of sustaining deductions. In an action involving a claim for federal income tax from an insolvent corporation, the assessment by the internal revenue collector must be treated as prima facie evidence of the amount due, and the state statutes do not control the matter of deduction for attorney fees, referee fees, court costs, and other expenses, but the burden is on the receiver to establish these deductions.

State v American Co., 225-638; 281 NW 172

6943.045 Return by individual.

Federal income tax—statute of limitations not started by insufficient tax return. The mere filing of a federal income tax blank containing, not the required information, but only a notation across the face that the corporation was "hopelessly insolvent" and in the hands of a receiver, does not constitute a legal return, as will start the statute of limitations operating against the income tax assessment.

State v American Co., 225-638; 281 NW 172

6943.046 Return by fiduciary.

Federal income tax—statute of limitations not started by insufficient tax return. The mere filing of a federal income tax blank containing, not the required information, but only a notation across the face that the corporation was "hopelessly insolvent" and in the hands of a receiver, does not constitute a legal return, as will start the statute of limitations operating against the income tax assessment.

State v American Co., 225-638; 281 NW 172

6943.057 Computation of tax, interest and penalties.

Atty. Gen. Opinion. See '38 AG Op 558

6943.058 Lien of tax—collection—action authorized.

Atty. Gen. Opinions. See '38 AG Op 164; AG Op Dec. 20, '39, May 3, '40

Income tax paid by surety. A surety whose bond was held for a compromise of corporate federal income taxes holds no lien upon the corporate assets, but has merely a right to be paid from assets held by receiver before payment to other claimants, and a receiver authorized to continue a business is not personally liable to such surety for diminishment of assets during receivership, tho such assets at the time of receiver's appointment would have been sufficient to pay the surety.

Miller Co. v Silvers Co., 227-1000; 289 NW 699

6943.060 Revision of tax.

Defect of notice of commencement of action —noninterruption of running of limitations. In action to recover erroneous refund of income tax, summons addressed to marshal only and commanding him to summon named defendants to appear on specific date "to answer to a complaint filed by the United States of America" was defective as not addressed to defendants, not stating cause of action, and not describing consequences of failure to defend, and hence did not interrupt running of limitations as of date of service.

U. S. v French, 95 F 2d, 922

DIVISION III

BUSINESS TAX ON CORPORATIONS

6943.065 Corporate tax imposed.

Discussion. See 10 ILR 44—Federal income tax on municipal utilities

Income tax — discriminations — absence of evidence. The state income tax act (Ch 329-F1, C., '35 [Ch 329.3, C., '39]) will not be declared unconstitutionally discriminatory (1) because it exempts domestic corporations, and not individuals, partnerships and fiduciaries, from paying a tax on that part of their income derived from activities carried on outside the state of Iowa, or (2) because the graduate rate of tax (§6943-f5, C., '35 [§6943.037, C., '39]) is not uniform between corporations, individuals and partnerships.

Courts will not assume, in the absence of competent evidence, that no state of facts could reasonably be conceived which could afford a rational basis for distinguishing, for purpose of taxation, between income of an individual and that of a domestic corporation derived from business carried on outside the state.

Vilas v Board, 223-604; 273 NW 338

6943.068 Returns.

Federal income tax—statute of limitations not started by insufficient tax return. The mere filing of a federal income tax blank containing, not the required information, but only a notation across the face that the corporation was "hopelessly insolvent" and in the hands of a receiver, does not constitute a legal return, as will start the statute of limitations operating against the income tax assessment.

State v American Co., 225-638; 281 NW 172

DIVISION IV

RETAIL SALES TAX

6943.074 Definitions.

Atty. Gen. Opinion. See AG Op Aug. 16, '39

Legislative definition binding on court—"sale"—"retail sale". The legislature having defined certain terms, the court will follow that definition. So held as to "sale" and "retail sale" used in the sales tax act.

Kistner v Board, 225-404; 280 NW 587

Shoe repair materials—shoe repairman is "consumer or user". A shoe repairman is a "consumer or user" of the material used in repairing shoes, within the legislative definition of those terms in the sales tax act, and in charging for such repair he is not primarily reselling those materials, but selling his services, wherefore, the one from whom he buys

those materials makes the retail sale subject to the tax.

Sandberg Co. v Board, 225-103; 278 NW 643; 281 NW 197

Shoe repairmen as consumers—taxation uniformity—delegation of power—constitutionality. Taxation uniformity, being an equal distribution of taxation burdens upon all persons of a given class, is impossible of perfect application, and a sales tax rule promulgated under valid legislative authority classifying shoe repairmen as consumers of materials used in shoe repairing, within the meaning of the sales tax act, is not arbitrary but uniform and consistent with the law imposing the tax and not a delegation of power.

Sandberg Co. v Board, 225-103; 278 NW 643; 281 NW 197

Undertaker's services—fee including casket—"sale" of casket. The fact that an undertaker makes a contract, wherein he furnishes a casket and a vault, tho called a contract for services, does not change the legal character of the transaction nor preclude it from being a sale of personal property nor prevent a transfer of title of said property to the purchaser.

Kistner v Board, 225-404; 280 NW 587

Undertaker as retailer. A funeral director becomes a retailer when he transfers title to personal property, the casket, vault, etc., to relatives of the deceased, by contract for his services in which such articles are used, and as such is liable for the retail sales tax on such articles.

Kistner v Board, 225-404; 280 NW 587

Fertilizer—processing exemption not applicable. The exemption from taxation in the sales tax statute of materials used in processing does not, in the absence of a declaration of legislative intent, include fertilizer used in growing vegetables. (Holding prior to amendment.)

Kennedy v Board, 224-405; 276 NW 205

Fertilizer—nonretroactive exemption. Taxation being the rule rather than the exception, it cannot be said that a later amendment to the sales tax statute, exempting fertilizers, is retroactive and explanatory of the exemption in the original statute of materials used in processing.

Kennedy v Board, 224-405; 276 NW 205

6943.075 Tax imposed.

Atty. Gen. Opinion. See '38 AG Op 72

Board's rule for undertakers — reasonableness. Rule 49 of the Board of Assessment and Review, applying to sales tax collectible from undertakers, is clearly reasonable and valid, being promulgated under proper legislative authority and containing alternate methods of computing the tax to fit varying methods of conducting such business.

Kistner v Board, 225-404; 280 NW 587

6943.076 Exemptions.

Atty. Gen. Opinions. See '38 AG Op 72, 629; AG Op Feb. 2, '39

6943.082 Return of gross receipts.

Federal income tax—statute of limitations not started by insufficient tax return. The mere filing of a federal income tax blank containing, not the required information, but only a notation across the face that the corporation was "hopelessly insolvent" and in the hands of a receiver, does not constitute a legal return, as will start the statute of limitations operating against the income tax assessment.

State v American Co., 225-638; 281 NW 172

6943.083 Payment of tax—bond.

Atty. Gen. Opinion. See '38 AG Op 72

6943.087 Statute applicable to sales tax.

Atty. Gen. Opinion. See '38 AG Op 164

DIVISION V

ADMINISTRATION

6943.091 Generally—bond—approval.

Atty. Gen. Opinion. See '38 AG Op 558

6943.092 Powers and duties.

Sales tax rule for undertakers—reasonableness. Rule 49 of the Board of Assessment and Review, applying to sales tax collectible from undertakers, is clearly reasonable and valid, being promulgated under proper legislative authority and containing alternate methods of computing the tax to fit varying methods of conducting such business.

Kistner v Board, 225-404; 280 NW 587

6943.093 Funds.

Atty. Gen. Opinion. See '38 AG Op 235

6943.094 General powers—hearings.

Unreasonable searches and seizures—what is not. The unreasonable search and seizure clause of the Iowa Constitution (Art I, §8) is not violated by the Iowa income tax act arming the state board with power to examine, under judicial procedure, the books and papers of the taxpayer in order to determine the correctness or fraudulent nature of the taxpayer's return of income.

Vilas v Board, 223-604; 273 NW 338

False tax returns—corporation books admissible evidence. In a prosecution of corporate officers for conspiracy to defraud government by filing false income tax return of corporation, the books of the corporation, together

with summaries obtained by expert accountants, are admissible as tending to show what the taxable income of the corporation was represented to be, where such books were present and available for cross-examination.

Cooper v United States, 9 F 2d, 216

DIVISION VI

ALLOCATION OF REVENUES

6943.100 Generally.

Atty. Gen. Opinions. See '38 AG Op 434, 456, 540

CHAPTER 329.4

USE TAX

6943.104 Exemptions.

Atty. Gen. Opinion. See AG Op March 13, '40

CHAPTER 329.5

CHAIN STORE TAX

6943.126 Title.

Discussion. See 16 ILR 427—Constitutionality of statutes; 17 ILR 72—Validity of tax

6943.127 Definitions.

Atty. Gen. Opinion. See '36 AG Op 435

6943.128 Exemptions.

Atty. Gen. Opinion. See '36 AG Op 435

6943.129 Tax imposed.

Discussion. See 22 ILR 246—Progressive tax on gross income

Atty. Gen. Opinion. See '36 AG Op 435

Constitutionality—allowable classifications. The general assembly in the enactment of the chain store tax act did not go beyond its concededly broad power to classify:

1. By classifying chain stores, generally, as proper subjects for an occupational tax.
2. By classifying certain of said stores as not subject to said tax.
3. By classifying the tax-paying stores into groups of ten or multiples thereof and graduating the tax progressively on each group—it appearing that none of said classifications were arbitrary—that the reason for each was manifest or reasonably discernible—that all owners of chain stores similarly situated were treated alike.

Tolerton v Board, 222-908; 270 NW 427

Ruling of federal court—conclusiveness. The chain store tax act is in violation of the equal protection clause of the federal constitution insofar as it attempts to levy an annual tax solely on the basis of the gross receipts of said stores, such being the holding of the federal supreme court and such holding necessarily being conclusive on the courts of this state.

Tolerton v Board, 222-908; 270 NW 427

Chain store tax based on receipts on graduated scale—unconstitutional. Iowa chain store tax of 1935, section 4 (b), held unconstitutional, as imposing a tax on gross receipts from sales according to an accumulative graduated scale, and invalid under equal protection clause of the 14th amendment to federal constitution, as creating an arbitrary discrimination.

Valentine v A. & P. Tea Co., 299 US 32

6943.130 Failure to file return—incorrect return.

Atty. Gen. Opinion. See '36 AG Op 435

CHAPTER 329.6

HOMESTEAD TAX CREDIT

6943.142 Ratio and manner of distribution.

Discussion. See 22 ILR 633—Homestead tax reduction; 23 ILR 67—Homestead tax relief

Atty. Gen. Opinions. See '38 AG Op 540; AG Op Jan. 10, '39

Publishing supervisors' proceedings—homestead exemption—application numbers sufficient. Statute requiring publication of proceedings of the board of supervisors is substantially complied with, insofar as the action taken on homestead exemption applications is concerned, by publishing the numbers of the applications as allowed or disallowed.

Choate Co. v Schade, 225-324; 280 NW 540

6943.143 Qualifying for credit.

Atty. Gen. Opinions. See '38 AG Op 193, 242, 247, 272, 288, 305, 311, 428

Homestead exemption strictly construed. Ambiguities and obscurities in the homestead tax exemption statutes should be strictly construed since taxation is the rule and the exemption therefrom the exception.

Ahrweiler v Board, 226-229; 283 NW 889

Construction—resorting to entire act. In construing a particular statute to arrive at the legislative intention the court should consider the entire act, and, so far as possible,

construe its various provisions in the light of their relation to the whole.

Ahrweiler v Board, 226-229; 283 NW 889

Homestead credit to property not to owner—theory of law. The homestead tax exemption law was adopted on the premise of benefit to the people as a whole through the encouragement of home ownership and not as a gift or bonus to the owner. The tax credit is not a credit to the owner, but to the homestead.

Ahrweiler v Board, 226-229; 283 NW 889

6943.144 Verification by board.

Atty. Gen. Opinions. See '38 AG Op 312, 413

Publishing supervisors' proceedings—homestead exemption—application numbers sufficient. Statute requiring publication of proceedings of the board of supervisors is substantially complied with, insofar as the action taken on homestead exemption applications is concerned, by publishing the numbers of the applications as allowed or disallowed.

Choate Co. v Schade, 225-324; 280 NW 540

6943.152 Definitions.

Homestead credit to property not to owner—theory of law. The homestead tax exemption law was adopted on the premise of benefit to the people as a whole through the encouragement of home ownership and not as a gift or bonus to the owner. The tax credit is not a credit to the owner, but to the homestead.

Ahrweiler v Board, 226-229; 283 NW 889

Homestead exemption strictly construed. Ambiguities and obscurities in the homestead tax exemption statutes should be strictly construed since taxation is the rule and the exemption therefrom the exception.

Ahrweiler v Board, 226-229; 283 NW 889

Homestead exemption—waiver of residence relates to year of homestead acquisition. The provision in the homestead tax exemption statute waiving the six months requirement for residence, for the first year of a newly acquired homestead, is not sufficient to extend the exemption back to taxes levied a year previous to the year in which it was acquired.

Ahrweiler v Board, 226-229; 283 NW 889

Homestead exemption—"and" may be both conjunctive and disjunctive. The word "and", used in the homestead exemption act allowing an owner credit on his taxes "for the 1936 taxes payable in 1937 and for the 1937 taxes payable in 1938", construed to be used as a conjunctive with reference to a homestead eligible to benefits for both of said years, and when used with reference to a homestead not eligible in both years to be used as a disjunctive, equivalent to the word "or".

Ahrweiler v Board, 226-229; 283 NW 889

CHAPTER 330

PROPERTY EXEMPT AND TAXABLE

6944 Exemptions.

Atty. Gen. Opinions. See '25-26 AG Op 349, 353, 446, 493; '28 AG Op 61, 79, 98, 279, 295, 338; '30 AG Op 45, 83, 117, 373; '32 AG Op 12, 53, 69, 204, 235; '34 AG Op 110, 116, 602, 750; '36 AG Op 48, 114, 362, 404, 439; '38 AG Op 176, 329, 400, 692; AG Op Jan. 18, '39, Jan. 19, '39, Jan. 26, '39; AG Op March 27, '40

ANALYSIS

I EXEMPTIONS IN GENERAL

Unambiguous tax exemption statute—strict construction rule nonapplicable. Strict construction of statutes granting exemptions from taxation, altho being the rule, has no application to a plain, clear, and unambiguous statute affording no room for construction.

State v Griswold, 225-237; 280 NW 489

I EXEMPTIONS IN GENERAL—concluded

Homestead exemption strictly construed. Ambiguities and obscurities in the homestead tax exemption statutes should be strictly construed since taxation is the rule and the exemption therefrom the exception.

Ahrweiler v Board, 226-229; 283 NW 889

"Accumulations and funds" of beneficiary association. The statutory exemption from taxation of the "accumulations and funds" of a fraternal beneficiary association does not embrace an exemption from taxation of lands acquired by such association through a mortgage foreclosure deed, even tho loan in question was made from the "funds" of the association.

Grand Lodge v Madigan, 207-24; 222 NW 545

Reservation of grounds of review. When the sole question before the trial court was whether a certain section of the statute (consisting of many separately numbered paragraphs) exempts certain property from taxation, the appellate court in its review will consider and construe all relevant paragraphs of the section, even tho it appears probable that one of said paragraphs was not called to the attention of the trial court.

McColl v Dallas County, 220-434; 262 NW 824

II PAR. 2 MUNICIPAL AND MILITARY PROPERTY

Property of municipality—excise charge. The statutory exemption from taxation of city property is not violated by the imposition of an excise charge.

State v Des Moines, 221-642; 266 NW 41

Trust property for educational purposes. Property transferred to a county in trust for the establishment of a prescribed seminary of learning, and duly accepted by the board of supervisors on behalf of the county, becomes a special part of the school fund of the county, and remains such tho the legal title be transferred to court-appointed trustees for managerial purposes. It follows that, being county property and devoted to public use and not held for pecuniary profit, said property is exempt from taxation (subsec. 2 this section, C., '35), even tho no action has been taken to actually execute the trust.

McColl v Dallas Co., 220-434; 262 NW 824

Interest on tax-exempt securities. Interest on tax-exempt municipal securities is not exempt from state income tax, tho the securities themselves are, by statute, exempt from general property tax. The statutory declaration that said securities "shall not be taxed" has reference solely to general property tax, and not to an excise tax—an income tax—on the interest collected on such securities.

Hale v Board, 223-321; 271 NW 168; 302 US 95

III PAR. 3 PUBLIC GROUNDS AND CEMETERIES

Atty. Gen. Opinions. See '32 AG Op 69; '38 AG Op 329

IV PAR. 8 LIBRARIES AND ART GALLERIES

Lands devised to library—essential proof. Where a will provides that the residue of the estate shall pass to a public library, exemption from taxation on the lands devised will not be granted until there is a judicial showing that (1) the estate is settled, and (2) that the devised lands constitute part of the residue and belong, legally or equitably, to the institution.

Wapello Bank v Keokuk County, 209-1127; 229 NW 721

V PAR. 9 PROPERTY OF RELIGIOUS, LITERARY, AND CHARITABLE SOCIETIES

Funds devoted to charity. Funds in the hands of a personal trustee, tho the income of such funds is, under a testamentary bequest, devoted solely to charitable purposes, are subject to taxation, said trustee not being an "institution" within the meaning of subsec. 9 of this section, and taxation being the rule and exemption from taxation the exception.

Samuelson v Horn, 221-208; 265 NW 168

Charity and benevolence—nonexemption. Property consisting of town lots and the buildings situated thereon, owned by a corporation, and used in part for charitable and benevolent purposes, and in part for the private profit of one of the incorporators in the practice of his profession of medicine, is not exempt from taxation, to any extent, under subsec. 9 of this section, C, '35. And it is quite immaterial—under such state of facts—that the declared purposes of the corporation are solely charitable and benevolent.

Readlyn Hosp. v Hoth, 223-341; 272 NW 90

Benevolent societies contrasted. The exemption from taxation accorded to certain insurance associations by §7025, C., '35, is determined by the kind or character of the association, whereas the exemption provided by this section, subsec. 9, is determined by the use made of the property by the institutions within its provisions.

Lutheran Soc. v Murphy, 223-1151; 274 NW 907

Homesteaders Life v Murphy, 224-173; 275 NW 146

Fraternity house nonexempt. The property of a college fraternity is not exempt from taxation when the dominant use during the college year, to which the property is put is that of a dormitory, boarding house, home and place of social and fraternal intercourse for

its members and when the use of the property for literary or scientific purposes is merely incidental.

Theta Xi v Board, 217-1181; 251 NW 76

VI PAR. 11 PROPERTY OF EDUCATIONAL INSTITUTIONS

Discussion. See 19 ILR 71—Federal tax on private business of state educational institutions

Educational institution—acquisition prior to levy. The act of assessing land to the individual owner thereof does not deprive an educational institution of its statutory exemption from taxation when the title subsequently passed to the educational institution prior to the levy of any tax on the land.

Iowa College v Knight, 207-1238; 224 NW 502

Educational institution—essential proof. Where a will provides that the residue of the estate shall pass to an educational institution of this state as a part of its endowment fund, exemption from taxation on lands will not be granted except on the production in evidence of the probate records showing judicially (1) that the estate has been fully settled, and (2) that the lands in question constitute part of the residue of said estate, and, as a consequence, belong, legally or equitably, to said institution.

Wapello Bk. v County, 209-1127; 229 NW 721

County school system as "educational institution"—exemption. The school system of a county is "an educational institution" within the meaning of subsec. 11 of this section. It follows that lands held by a county in trust for a specified educational purpose, and not exceeding 160 acres in a township, are exempt from taxation.

McColl v Dallas Co., 220-434; 262 NW 824

VII PAR. 17 FARM EQUIPMENT—DRAYS—TOOLS

No annotations in this volume

VIII PAR. 18 GOVERNMENT LANDS

Atty. Gen. Opinion. See AG Op April 23, '40

6945 Roads and drainage rights of way.

Atty. Gen. Opinions. See '28 AG Op 200; '34 AG Op 299; '38 AG Op 860

6946 Military service—exemptions.

Atty. Gen. Opinions. See '25-26 AG Op 310, 395; '28 AG Op 50, 69, 80, 86, 244, 303, 307, 318, 322, 338, 340; '30 AG Op 81, 135, 274; '32 AG Op 69, 133, 199, 200, 241, 242, 247, 272; '34 AG Op 66, 112, 161, 510, 703, 728; '36 AG Op 116, 281; '38 AG Op 126, 130, 180, 195, 221, 391, 394, 418, 531, 550; AG Op March 25, '40

Claim for exemption—yearly filing.

Lewis v Vanier, 228- ; 290 NW 684

6947 Reduction—noted by assessor—limitation.

Atty. Gen. Opinions. See '28 AG Op 244, 420; '30 AG Op 321; '36 AG Op 116; '38 AG Op 126, 130, 180, 221, 394, 418, 531

6948 Listing by assessors.

Atty. Gen. Opinions. See '28 AG Op 244, 267, 420; '30 AG Op 374; '38 AG Op 43, 394

6949 Exemption by board of supervisors.

Atty. Gen. Opinions. See '25-26 AG Op 338; '28 AG Op 244, 267, 321, 420; '30 AG Op 374; '38 AG Op 43, 394

6950 Petition for exemption.

Atty. Gen. Opinions. See '28 AG Op 244, 407; '30 AG Op 231, 350; '32 AG Op 119, 183; '34 AG Op 398, 642; '36 AG Op 303; '38 AG Op 43, 227, 288, 400, 437

6950.1 Suspension of taxes.

Atty. Gen. Opinions. See '38 AG Op 227, 288, 400; AG Op June 5, '39, Oct. 10, '39, April 4, '40

6951 Additional order.

Atty. Gen. Opinions. See '28 AG Op 407; '30 AG Op 231, 350; '32 AG Op 221; '36 AG Op 303; '38 AG Op 437

6952 Grantee or devisee to pay tax.

Atty. Gen. Opinions. See '28 AG Op 407; '30 AG Op 350; '34 AG Op 398; '38 AG Op 14, 227, 288; AG Op June 5, '39

6953 What taxable.

"Credits" defined. See also Vol I under §6984

Atty. Gen. Opinions. See '28 AG Op 68, 278; '32 AG Op 22; '36 AG Op 439; '38 AG Op 400; AG Op Feb. 6, '39

Merchandise accounts belonging to nonresident. Book accounts which belong to a nonresident corporation, but which grow out of a business in this state and are held in this state by the agent of the nonresident owner, may acquire such a "business situs" in this state as to be legally taxable in this state; but a statute (§6958, C., '27) which authorizes the taxation of credits which are in the hands of an agent "with a view to investing or loaning or in any other manner using or holding the same for pecuniary profit" does not authorize the taxation of ordinary current merchandise sale accounts held by the agent of a nonresident owner for collection and use in the merchandise business of such owner.

Crane Co. v Council, 208-164; 225 NW 344; 76 ALR 801

Property temporarily absent from state. The temporary absence from this state of tangible personal property belonging to a corporation of this state, presents no obstacle to the taxation in this state of said property.

Capital Co. v City, 211-1228; 235 NW 476

6955 Interest of lessee.

Atty. Gen. Opinion. See '28 AG Op 190

CHAPTER 331

LISTING IN GENERAL

6956 Listing—by whom.

Atty. Gen. Opinions. See '25-26 AG Op 233, 250, 422; '28 AG Op 177, 190, 225; '30 AG Op 104; '34 AG Op 602; '36 AG Op 439; '38 AG Op 114, 400, 781; AG Op Dec. 21, '39, April 11, '40, April 26, '40

Life tenant—duty to pay taxes. It is the duty of a life tenant to pay taxes.

Rich v Allen, 226-1304; 286 NW 434

6957 Listing property of another.

See annotations under §6963

Atty. Gen. Opinions. See '25-26 AG Op 422; '28 AG Op 177, 190; '30 AG Op 104; '38 AG Op 781; AG Op Dec. 21, '39, April 11, '40

6958 Agent personally liable.

Atty. Gen. Opinions. See 25-26 AG Op 422; '28 AG Op 185; '30 AG Op 283

Merchandise accounts belonging to nonresident. This section does not authorize the taxation of ordinary current merchandise sale accounts held by an agent of a nonresident owner for collection and use in the merchandise business of such owner.

Crane Co. v City, 208-164; 225 NW 344; 76 ALR 801

6959 Personal property—real estate—buildings.

Discussion. See 17 ILR 512—Situs of intangibles

Atty. Gen. Opinions. See '25-26 AG Op 137, 152; '30 AG Op 110; '34 AG Op 749; '38 AG Op 114, 135, 509, 738; AG Op April 26, '40, May 8, '40

Equalization—evidence—recitals of consideration. The recitals of consideration in deeds of conveyances are not admissible to prove the value of real estate for the purpose of taxation.

Iowa Corp. v Board, 209-687; 228 NW 623

6962 Description of tracts—manner.

Atty. Gen. Opinion. See '38 AG Op 509

Forty-acre assessment requirement — sole applicability—unknown owners. The statute which provides that assessment of land shall be made by forty-acre tracts applies only to cases where the ownership is unknown.

Jones v Mills County, 224-1375; 279 NW 96

Actual value—limitation on board. The board of review, in readjusting the value of land for assessment purposes, must not go beyond the actual, independent value of the 40-acre tract in question. It may not add to such value on the ground that the owner owns other improved contiguous lands.

Davison v Board, 209-1332; 230 NW 304

6963 Place of listing.

Additional annotations. See under §6957, Vol I

Atty. Gen. Opinions. See '25-26 AG Op 262, 422; AG Op Dec. 21, '39, April 11, '40

Legal situs of tangible personal property. Tangible personal property belonging to a corporation is assessable in the taxing district in which the principal place of business of the corporation is located, even tho said property has never been in such taxing district, unless the owner shows that said property has been kept in another assessment district during the major part of the year preceding January first.

Capital Co. v City, 211-1228; 235 NW 476

6964 "Owner" defined.

Atty. Gen. Opinion. See AG Op Dec. 21, '39

6965 Grain, ice, and coal dealers.

Atty. Gen. Opinion. See '30 AG Op 63

6966 Business in different districts.

Atty. Gen. Opinions. See '30 AG Op 63; '38 AG Op 135

Place of taxation—business in different districts. A corporation is not "doing business in more than one assessment district" simply because it keeps some of its corporate records, books and accounts in a taxing district other than the one which embraces its corporate principal place of business.

Iowa Co. v Cook, 211-534; 233 NW 682

6970 Partners.

Atty. Gen. Opinion. See '25-26 AG Op 199

6971 "Merchant" defined.

Atty. Gen. Opinions. See '25-26 AG Op 40; '30 AG Op 83; '36 AG Op 370, 439

6972 Stocks of merchandise.

Atty. Gen. Opinions. See '25-26 AG Op 40, 134; '28 AG Op 65, 324, 335; '36 AG Op 439; AG Op Jan. 18, '39

6973 Warehouseman to file list.

Atty. Gen. Opinion. See '30 AG Op 63

6974 Warehouseman deemed owner.

Atty. Gen. Opinion. See '30 AG Op 63

6975 "Manufacturer" defined—duty to list.

Atty. Gen. Opinions. See '25-26 AG Op 40, 259; '28 AG Op 63, 65, 324; '30 AG Op 83

Blaster and crusher of stone. One who blasts stone from a quarry and breaks it into merchantable size and sells such resulting product, is not a manufacturer within the taxation statute.

Iowa Co. v Cook, 211-534; 233 NW 682

Constructing paving not "manufacturing". One who combines different materials and spreads the resulting product upon public highways as permanent paving is not a "manufacturer" within the meaning of the taxation statute, said statute not embracing constructions which become a permanent part of the realty.

In re Koss, 214-125; 241 NW 495

6976 Assessment—how made.

Atty. Gen. Opinions. See '25-26 AG Op 40, 259; '28 AG Op 63, 65, 324

6977 Machinery deemed real estate.

Atty. Gen. Opinions. See '25-26 AG Op 259; '28 AG Op 65

6978 Manufacturer to list.

Atty. Gen. Opinions. See '25-26 AG Op 259; '28 AG Op 65

6979 Public utility plants.

Discussion. See 9 ILB 36—Valuing public utility properties; 15 ILR 198—Reproduction cost and original prudent investment; 15 ILR 401—Ascertainment of value

Atty. Gen. Opinions. See '28 AG Op 129, 388; '34 AG Op 174

6980 Property in different districts.

Atty. Gen. Opinions. See '28 AG Op 129, 388

6981 Personal property.

Atty. Gen. Opinion. See '34 AG Op 174

6983 Real estate of corporations.

Atty. Gen. Opinions. See '25-26 AG Op 469; '28 AG Op 439; '36 AG Op 439

CHAPTER 332

MONEYS AND CREDITS

6984 "Credits" defined.

See annotations under §6953

Atty. Gen. Opinions. See '25-26 AG Op 445; '28 AG Op 68, 338, 375; '36 AG Op 114

6985 Moneys — credits — annuities — bank notes—stock.

Atty. Gen. Opinions. See '25-26 AG Op 272, 445; '28 AG Op 394; '30 AG Op 336; '32 AG Op 76; '34 AG Op 385; '36 AG Op 370, 439; AG Op April 11, '40

Merchandise accounts belonging to nonresident. Book accounts which belong to a nonresident corporation, but which grow out of a business in this state and are held in this state by the agent of the nonresident owner, may acquire such a "business situs" in this state as to be legally taxable in this state; but a statute (§6958, C., '27) which authorizes the taxation of credits which are in the hands of an agent "with a view to investing or loaning or in any other manner using or holding the same for pecuniary profit" does not authorize the taxation of ordinary current merchandise sale accounts held by the agent of a nonresident owner for collection and use in the merchandise business of such owner.

Crane Co. v Council, 208-164; 225 NW 344; 76 ALR 801

"Loading" charge of mutual insurance company. A surplus, known as a "loading" charge, accumulated by a mutual legal reserve life insurance company by crediting thereto, annually, a portion of the gross premiums, even tho such surplus is not required by law, is not assessable as moneys and credits when such surplus is used to defray the expense of carrying and fulfilling policies during the various life expectancies, and when such surplus cannot be legally used for any other purpose.

Central Life v City, 212-1254; 238 NW 535; 78 ALR 551

Mistaken classification—waiver. An insurance company which lists its corporate stock to itself as personal property, and at an inadequate value which it induces the assessor to accept,—all on the assumption that it was subject to the consolidated levy,—and thereafter interposes no counter objection, may neither obtain a refund for taxes paid nor enjoin the collection of taxes unpaid, on the theory that the property was in fact only subject to a five-mill levy, as moneys and credits.

Farmers Ins. v County, 202-444; 208 NW 929

Unauthorized classification. Whether certain securities shall be assessed as moneys and credits or as moneyed capital, within the meaning of the federal statutes, must, in the first instance, be determined by the judgment of the assessor and lastly by the judgment of the board of review; and the county auditor has no power to change such determination.

Ft. Madison Sec. v Maxwell, 202-1346; 212 NW 131

Assessment — wrongful classification. A taxpayer, who fails timely to interpose, before the local board of review, or before the state board of assessment and review, his objection that his property (in this case, the capital stock of a bank) was wrongfully classified as personal property and subjected to a consolidated levy instead of being classified as moneys and credits and subject to a six-mill levy, may not proceed in equity to enjoin the collection of the tax.

Security Bank v Mitts, 220-271; 261 NW 625

Moneyed capital used in small loan business. Moneyed capital employed, under §9410 et seq., C., '24 [§9438.01, C., '39], in the making of small loans of $300 or less on personal or chattel security is taxable as moneys and

credits, and not at the rate at which national bank stock is taxable, when the evidence shows that such moneyed capital does not come into competition with the business of national banks.

Welfare Loan v City, 205-1400; 219 NW 534
Universal Loan v Board, 205-1391; 219 NW 536

Taxation of national banks—illegal change by auditor of assessment—effect. The act of a county auditor, on his own motion, and without the connivance of any other official charged with duties pertaining to taxation, in changing a duly made and approved assessment of corporate stock of concerns competing with national, state, and savings banks from its proper classification of "corporate stock" to the classification of "moneys and credits" and computing the tax thereon as provided for moneys and credits is absolutely void, and furnishes no basis for the claim by national, state, and savings banks that they have been discriminated against, in that the consolidated levy has been applied to 20 percent of the value of their stock, while the favored concerns have been taxed on the basis of 5 mills on the dollar of the actual value of their stock. (Reversed by U. S. Sup. Ct.)

Iowa Bank v Stewart, 214-1229; 232 NW 445; 284 US 239

Bank shares—discrimination—violating constitutional rights—taxing officers acting contrary to law. The taxation of state and national bank shares at a higher rate than the shares of competing domestic corporations is violative of the equal protection clause of the 14th amendment and in excess of permission conferred by federal statute for the taxation of national bank stock.

Munn v Bank, 18 F 2d, 269
Knowles v Bank, 58 F 2d, 232
First N. Bk. v Anderson, 269 US 341
Iowa Bank v Stewart, 214-1229; 232 NW 445; 284 US 239

Articles of incorporation may control place of taxation. The personal property and moneys and credits of a corporation engaged in blasting and crushing stone are taxable in the taxing district which embraces the place where its principal business is transacted, as declared in its articles of incorporation.

Iowa Co. v Cook, 211-534; 233 NW 682

Failure to return notes for assessment. Failure of the alleged grantee in a conveyance to list for assessment the notes which he claims were satisfied by the conveyance is material on the issue of fraud.

Oelke v Howey, 210-1296; 232 NW 666

Failure to list gift for taxation—effect. The naked fact that a donee fails to list the gift (a substantial sum in cash) for taxation cannot have such evidentiary force as to overthrow other evidence which persuasively shows that the gift was actually made and executed.

Humphrey v Norwood, 213-912; 240 NW 232

Wrongful assessment—administrative remedy to be exhausted before appeal to court. All adequate administrative remedies in matters of taxation must be exhausted before resort can be had to court, so when administrative stage of action is completed, judicial power of court may begin, and the parties may resort to any tribunal having jurisdiction. Hence, where national banks bring an action to restrain collection of alleged illegal taxes on capital stock, basing alleged illegality on fact that other competitive "moneyed capital" was taxed intentionally and consistently at lower rate in violation of federal statutes, held, banks failed to exhaust remedy provided by statutes providing appeal from assessor to board of review.

Nelson v Bank, 42 F 2d, 30
Crawford Bk. v Crawford County, 66 F 2d, 971

6986 Levy — division of money collected.

Atty. Gen. Opinion. See '32 AG Op 226

6987 Bonus bond levy.

Atty. Gen. Opinion. See '36 AG Op 439

6988 Deduction of debts.

Atty. Gen. Opinions. See '25-26 AG Op 382; '30 AG Op 113; '32 AG Op 64; '38 AG Op 405

Mutual insurance—surplus fund—nonassessable. Mutual life insurance company's surplus fund, known as loading charge, held nonassessable for taxation.

Central Life v Des Moines, (NOR); 236 NW 426

6989 Good-faith debt required.

Atty. Gen. Opinion. See AG Op Jan. 18, '39

Burden of proof. The property owner must establish the validity and good faith of the indebtedness which he seeks to set off.

Vanderpluijm v Morris, 200-776; 205 NW 341

6994 Loan corporations.

Atty. Gen. Opinions. See '28 AG Op 252; '32 AG Op 64

State auditor's action affecting stockholder's contractual rights. Fact that auditor of state approved building and loan association's refusal to honor applications for withdrawal of funds does not affect stockholder's contractual rights with the association for such withdrawal.

O'Connor v Home Assn., 224-1127; 278 NW 636

6995 Examinations—expense.

Atty. Gen. Opinion. See '28 AG Op 252

6996 Millage tax.

Atty. Gen. Opinion. See '28 AG Op 252

CHAPTER 333

BANKS

6997 Private banks.

Atty. Gen. Opinion. See '28 AG Op 41

Assessment correct but violative of statute. An assessment of bank stock which correctly arrives at the value of the bank credits is unassailable even tho the statute is not strictly complied with—is, in fact, violated. So held where the listing of the credits was excessive, in that it showed the entire face value of the credits, from which was deducted a specific sum for debts owed by the bank (for which deduction there was no authority), instead of reducing the face value of the credits by the amount for which certain credits had been hypothecated.

In re Stacyville Bank, 202-221; 210 NW 126

Allowable correction of void act without notice.

First N. Bk. v Burke, 201-994; 196 NW 287

Unallowable correction. The county auditor may not, under the guise of correcting the assessment of a private banker, impose an assessment on bills receivable which the banker had rediscounted for full value to his correspondent bank, even tho the rediscounts were, in a sense, held by the correspondent as collateral, because of the mutual contemplation of the banker and the correspondent that the banker would in time redeem said discounts.

Northwestern Bk. v Van Roekel, 202-237; 207 NW 345

Correcting assessment of private banker. The county auditor may, on proper notice and hearing, and before a tax is paid, correct the erroneous action of the assessor in deducting the debts of a private banker from the value of the banker's taxable property. (§1321, S., '13.)

Mannings Bank v Armstrong, 204-512; 211 NW 485

Irregularities not invalidating assessment of capital stock of bank. It cannot be said that no valid assessment of the capital stock and surplus and undivided profits of a bank is effected because of irregularities in that:

1. The bank officials in furnishing the law-required statement, filled out that part of the official blank which the law contemplates will be filled out by the assessor, to wit, the "valuation" sheet showing the actual figures on which the several assessments should be computed,
2. The assessor failed either to sign or verify said valuation sheet as so made out, and
3. The assessor's books, when delivered to the county auditor contained no formal entry of assessments of said items of taxable property,—

when the evidence shows that said "valuation" sheet, as so made out, (1) was examined and approved by the assessor, (2) was duly placed before the review board, (3) was by said board examined and left without change, (4) was later, with other assessment records, duly filed with the county auditor, and (5) when no error is claimed in any record figures.

Security Bank v Mitts, 220-271; 261 NW 625

6998 National and state bank stock—place of assessment.

Valuation of bank stock. For purposes of taxation the value of each different issue, class, or denomination of national bank stock must be determined according to the rights vested in it with reference to the assets of the bank and its relationship to the other outstanding stock. Therefore, where there were sufficient assets to pay preferred stock, which had priority over common stock, in full at its par value, it was city assessor's duty to deduct value of the preferred stock at par from bank's assets in computing value of the common stock, and the fact that the preferred stock was nontaxable did not avoid the necessity of such procedure.

Iowa-D. M. Bank v Des Moines, 227-372; 288 NW 408

Permissible change. When the shares of stock of a bank are assessed to the bank, the county auditor may, at any time before the tax is paid, and without notice, change the assessment to the individual stockholders.

Ludeman v County, 204-1100; 216 NW 712

7001 Statement furnished.

Atty. Gen. Opinion. See '34 AG Op 654

Constitutionality of statute.

First N. Bk. v Burke, 201-994; 196 NW 287

7002 Deductions on account of real estate.

Atty. Gen. Opinions. See '25-26 AG Op 292; '28 AG Op 41, 153; '30 AG Op 351, 240; '32 AG Op 62; '34 AG Op 654

Unauthorized deduction of federal securities not adjudication.

First N. Bk. v Burke, 201-994; 196 NW 287

7003 Rule of actual and taxable value.

Atty. Gen. Opinions. See '28 AG Op 41; '30 AG Op 110; '32 AG Op 62; '34 AG Op 654; '36 AG Op 213, 276

Discrimination as to deductions. No unallowable discrimination is worked by a statute which, in the assessment of the stock of an incorporated bank, authorizes a deduction for certain liabilities, and does not allow such

deduction in the assessment of the bank assets of a private banker.

Mannings Bk. v Armstrong, 204-512; 211 NW 485

Tax-exempt securities. Shares of stock of national banks may be valued and taxed to the stockholders on the basis of the sum total of the capital, surplus and undivided profits of the bank without deducting the amount of tax-exempt securities owned by the bank, even tho in the assessment of a private banker his tax-exempt securities would not be included in the sum total of his property. 191 Iowa 1240 affirmed.

Des M. Nat. Bk. v Fairweather, 263 US 103

Federal question. The claim that an assessment of national bank stock is in excess of the value of the stock, exorbitant, unjust, and not in proportion with other like property, presents no federal question for review on writ of error from the federal court. 136 Iowa 203, in effect, affirmed.

First N. Bk. v Council, 215 US 341

Valuation of bank stock. For purposes of taxation the value of each different issue, class, or denomination of national bank stock must be determined according to the rights vested in it with reference to the assets of the bank and its relationship to the other outstanding stock. Therefore, where there were sufficient assets to pay preferred stock, which had priority over common stock, in full at its par value, it was city assessor's duty to deduct value of the preferred stock at par from bank's assets in computing value of the common stock, and the fact that the preferred stock was nontaxable did not avoid the necessity of such procedure.

Iowa-D. M. Bank v Des Moines, 227-372; 288 NW 408

7004 Refusal to furnish information.

Atty. Gen. Opinion. See 25-26 AG Op 416

7004.1 Stock of insolvent bank—remission.

Atty. Gen. Opinions. See '36 AG Op 669; '38 AG Op 9, 14, 102; AG Op Feb. 16, '39

County supervisors—duties imposed by law—effect. A statute, requiring the board of supervisors to remit unpaid taxes on the capital stock of a bank which fails, imposes a positive duty on board of supervisors to comply with statute irrespective of any demand or notice, and the fact that the stockholders petitioned for a refund of taxes already paid, which is not contemplated by such statute, in addition to remission of unpaid taxes, does not excuse the failure of the board to remit such taxes as come within the purview of the statute, since the performance of this duty is imposed upon the board by law.

Brunner v County, 226-583; 284 NW 814

County supervisors—raising constitutionality of statutes not permitted. In an action in equity for mandamus to compel board of supervisors to remit taxes on capital stock of failed bank, held, board of supervisors could not raise issue of constitutionality of statute providing for such remission, either in that it contravened the state or the federal constitution, as counties and other municipal corporations are creatures of the legislature, existing by reason of statutes enacted within the power of the legislature, and the board may not question that power which brought it into existence and set the bounds of its capacities.

Brunner v Floyd County, 226-583; 284 NW 814

7005 Moneyed capital.

Atty. Gen. Opinion. See '32 AG Op 62

Reference to other law to fix tax. This section does not violate the constitutional requirement that in the imposition of a tax "it shall not be sufficient to refer to any other law to fix such tax".

Ballard-Hassett v Board, 215-556; 246 NW 277

Applicable statute. Section 1322-1a, S., '13, (now repealed) was not applicable to the assessment of the banking assets of a private banker.

Mannings Bk. v Armstrong, 204-512; 211 NW 485

Unauthorized classification. Whether certain securities shall be assessed as moneys and credits or as moneyed capital, within the meaning of the federal statutes, must, in the first instance, be determined by the judgment of the assessor, and lastly by the judgment of the board of review; and the county auditor has no power to change such determination.

Ft. Madison Sec. v Maxwell, 202-1346; 212 NW 131

Illegal change of assessment by auditor—effect. The act of the county auditor, on his own motion, and without the connivance of any other official charged with duties pertaining to taxation, in changing a duly made and approved assessment of corporate stock of concerns competing with national, state and savings banks, from its proper classification of "corporate stock" to the classification of "moneys and credits" and computing the tax thereon as provided for moneys and credits, is absolutely void, and furnishes no basis for the claim by national, state and savings banks that they have been discriminated against, in that the consolidated levy has been applied to 20 percent of the value of their stock while the favored concerns have been taxed on the basis of 5 mills on the dollar of the actual value of their stock.

Iowa N. Bk. v Stewart, 214-1229; 232 NW 445
Reversed, 284 US 239

Bank shares—taxing officers acting contrary to law. The taxation of state and national bank shares at a higher rate than the shares of competing domestic corporations is violative of the equal protection clause of the 14th amendment and in excess of permission conferred by federal statute for the taxation of national bank stock.

Munn v Bank, 18 F 2d, 269
Knowles v Bank, 58 F 2d, 232
First N. Bk. v Anderson, 269 US 341
Iowa N. Bk. v Stewart, 214-1229; 232 NW 445; 284 US 239

Statutory remedy must be pursued. A taxpayer, who fails timely to interpose, before the local board of review, or before the state board of assessment and review, his objection that his property (in this case, the capital stock of a bank) was wrongfully classified as personal property and subjected to a consolidated levy instead of being classified as moneys and credits and subject to a six-mill levy, may not proceed in equity to enjoin the collection of the tax.

Security Bk. v Mitts, 220-271; 261 NW 625

7007.1 Liability of corporation for tax.

Nonliability of insolvent corporation. The statutory liability of a corporation to pay taxes assessed and levied on its corporate shares of stock and against the individual owners thereof, does not apply to taxes assessed and levied in a year during which, and before the taxes become payable, the corporation becomes insolvent and passes into the hands of a receiver.

Wilcoxen v Munn, 206-1194; 221 NW 823

Lien—corporate bank stock. Taxes on corporate bank stock and against the individual owners thereof are not a lien on the real estate holdings of the corporation in the hands of a receiver, notwithstanding the fact that the statute assumes to make the corporation personally liable therefor.

Andrew v Munn, 205-723; 218 NW 526

Jurisdictional amount—bank combining several protested illegal assessments. Under the statute imposing taxes upon bank stockholders, which makes the bank liable therefor, the bank can maintain an equity action in federal court for taxes paid under protest by several stockholders, where jurisdictional amount was involved, notwithstanding amount paid for any one stockholder would not give the federal court jurisdiction.

Crawford Bank v Crawford County, 63 F 2d, 342

CHAPTER 334

CORPORATION STOCK

7008 Shares of stock.

Atty. Gen. Opinions. See '25-26 AG Op 39, 445, 453; '36 AG Op 370, 439

Articles of incorporation may control place of taxation. The personal property and moneys and credits of a corporation engaged in blasting and crushing stone are taxable in the taxing district which embraces the place where its principal business is transacted as declared in its articles of incorporation.

Iowa Co. v Cook, 211-534; 233 NW 682

Unallowable computation. An assessor, in computing the value of the shares of stock of a corporation for the purpose of assessing them to the stockholder, has no right to include an item of cash accumulated by the corporation for the good-faith and actual purpose of paying the taxes of the corporation.

Equitable Life v City, 207-879; 223 NW 744

Mistaken classification—waiver. An insurance company which lists its corporate stock to itself as personal property, and at an inadequate value which it induces the assessor to accept,—all on the assumption that it was subject to the consolidated levy,—and thereafter interposes no counter objection, may neither obtain a refund for taxes paid nor enjoin the collection of taxes unpaid, on the theory that the property was in fact only subject to a five-mill levy, as moneys and credits.

Farmers Ins. v County, 202-444; 208 NW 929

Valuation of bank stock. For purposes of taxation the value of each different issue, class, or denomination of national bank stock must be determined according to the rights vested in it with reference to the assets of the bank and its relationship to the other outstanding stock. Therefore, where there were sufficient assets to pay preferred stock, which had priority over common stock, in full at its par value, it was city assessor's duty to deduct value of the preferred stock at par from bank's assets in computing value of the common stock, and the fact that the preferred stock was nontaxable did not avoid the necessity of such procedure.

Iowa-D. M. Bank v Des Moines, 227-372; 288 NW 408

Abstract books and equipment of corporation. The abstract books and office equipment of a corporation engaged in making abstracts of title to real estate are so assessable as to come under and be subject to the general tax levy. In other words, such property is not to

be included in the value of the corporate shares of stock and assessed as moneys and credits.

Mills Abstract v Board, 216-398; 249 NW 235

Levy and assessment—board of supervisors as objectors—trial de novo. The board of supervisors as objectors to the assessment of a stockyards company may properly appeal to the supreme court from an order sustaining a motion to dismiss their appeal to the district court, and the case in the supreme court is triable de novo.

Board v Sioux City Yards, 223-1066; 274 NW 17

7010 Valuation of stock.

Atty. Gen. Opinions. See '25-26 AG Op 453; '36 AG Op 439

Valuation of bank stock—method. For purposes of taxation the value of each different issue, class, or denomination of national bank stock must be determined according to the rights vested in it with reference to the assets of the bank and its relationship to the other outstanding stock. Therefore, where there were sufficient assets to pay preferred stock, which had priority over common stock, in full at its par value, it was city assessor's duty to deduct value of the preferred stock at par from bank's assets in computing value of the common stock, and the fact that the preferred stock was nontaxable did not avoid the necessity of such procedure.

Iowa-D. M. Bank v Des Moines, 227-372; 288 NW 408

7013 Corporations liable to pay tax.

Nonliability of insolvent corporation. The statutory liability of a corporation to pay taxes assessed and levied on its corporate shares of stock and against the individual owners thereof does not apply to taxes assessed and levied in a year during which, and before the taxes become payable, the corporation becomes insolvent and passes into the hands of a receiver.

Wilcoxen v Munn, 206-1194; 221 NW 823

BUILDING, SAVINGS AND LOAN ASSOCIATIONS

7017.01 Shares assessed against association.

Atty. Gen. Opinion. See '32 AG Op 126

7017.02 Sworn statement required.

Atty. Gen. Opinion. See '32 AG Op 126

7017.04 Determination of value.

Atty. Gen. Opinions. See '32 AG Op 126; AG Op March 11, '40

Valuation of bank stock—method. For purposes of taxation the value of each different issue, class, or denomination of national bank stock must be determined according to the rights vested in it with reference to the assets of the bank and its relationship to the other outstanding stock. Therefore, where there were sufficient assets to pay preferred stock, which had priority over common stock, in full at its par value, it was city assessor's duty to deduct value of the preferred stock at par from bank's assets in computing value of the common stock, and the fact that the preferred stock was nontaxable did not avoid the necessity of such procedure.

Iowa-D. M. Bank v Des Moines, 227-372; 288 NW 408

CHAPTER 335

INSURANCE COMPANIES

7022 Foreign companies—tax on gross premiums.

Atty. Gen. Opinions. See '25-26 AG Op 459; '36 AG Op 204

Unallowable deductions. The statutory provision which requires a foreign insurance company to pay a stated tax on "the gross amount of premiums received by it for business done in this state", permits of no deductions for "dividends" which the company may declare, or for so-called "deferred dividends", or for surrender values of policies, on its Iowa business. Especially is this true in view of the fact that such has been the unquestioned administrative construction of the law for over half a century.

New Y. Life v Burbank, 209-199; 216 NW 742

When payable—legislative intent. Legislative intent being the cardinal rule of statutory construction, the plain intent of statute taxing gross premiums of foreign corporations is a tax computed on and payable at the end of the year.

State v Ins. Co., 223-1301; 275 NW 26

Excise tax. The gross premiums tax on foreign corporations is an excise tax in the nature of a franchise or privilege tax.

State v Ins. Co., 223-1301; 275 NW 26

Revenue measure — withholding certificate immaterial. A tax on gross premiums of a foreign insurance corporation is neither dependent on, nor satisfied by, the withholding of an annual certificate to do business, but is a revenue measure and a statutory tax owed to and collectible by the state on business done prior to dissolution.

State v Ins. Co., 223-1301; 275 NW 26

Annuity contracts. This section requires payment of a tax on sums of money received by an insurance company during the year in payment of annuity contracts, even tho said contracts are not insurance contracts.

Northwestern Ins. v Murphy, 223-333; 271 NW 899; 109 ALR 1054

Fraternal benefit societies—gross premium tax inapplicable. Fraternal benefit societies doing business in this state including one organized under foreign nation are not subject to gross premium tax levied on foreign insurance companies, in view of executive and departmental construction of taxing statute and acquiesced in by legislature.

State v Ind. Foresters, 226-1339; 286 NW 425

Receiverships—gross premiums tax as preferred claim. In estate and receivership proceedings, taxes have preference over other claims. Held, foreign corporations gross premiums tax allowable in receivership as preferred claim without interest.

State v Ins. Co., 223-1301; 275 NW 26

Illinois receiver—Iowa insurance assets removed—Iowa laws controlling. Where an Illinois receiver was permitted as a matter of comity to take charge of an insurance company's assets held under ancillary receivership in Iowa and remove them, it does not follow that Illinois laws are controlling on question of gross premium taxes due from foreign corporation to the State of Iowa.

State v Ins. Co., 223-1301; 275 NW 26

Attorney general's opinion—not precedent. Attorney general's opinion that payment of gross premiums tax is "condition precedent to a foreign corporation's obtaining any recognition" is not precedent binding on Supreme Court.

State v Ins. Co., 223-1301; 275 NW 26

7023 Receipts—certificate of authority.

Gross premiums tax as privilege tax—annual certificate. A statute (§7025, C., '35) requiring proof of payment by foreign corporation of gross premiums tax when annual certificate is issued refers to the tax levy on the premiums at the close of a year's business and not for the ensuing year. Tax imposed not for privilege of continuing, but for the privilege of engaging in business for the year at the end of which the tax is collected.

State v Ins. Co., 223-1301; 275 NW 26

As revenue measure—withholding certificate immaterial. A tax on gross premiums of a foreign insurance corporation is neither dependent on, nor satisfied by, the withholding of an annual certificate to do business, but is a revenue measure and a statutory tax owed to and collectible by the state on business done prior to dissolution.

State v Ins. Co., 223-1301; 275 NW 26

Withholding certificate—penalty. A statute allowing annual certificate to be withheld for nonpayment of gross premiums tax on foreign corporations is not a method of collecting but a penalty imposed.

State v Ins. Co., 223-1301; 275 NW 26

7025 Domestic companies — tax on gross premiums.

Atty. Gen. Opinions. See '25-26 AG Op 459; '32 AG Op 86

Liability of property—exemptions—benevolent societies contrasted. The exemption from taxation accorded to certain insurance associations by this section is determined by the kind or character of the association, whereas the exemption provided by section 6944, subsec. 9, is determined by the use made of the property by the institutions within its provisions.

Lutheran Soc. v Murphy, 223-1151; 274 NW 907

Homesteaders Life v Murphy, 224-173; 275 NW 146

Mutual benefit insurance — nontaxation of undivided profits — purpose of organization controls. A fraternal beneficiary association organized under chapter 402 of the Code, 1935, "not for profit" is not subject to a tax on gross premiums under this section, and even tho such association does accumulate a surplus and a profit. Violations of chapter 402 by any such association are punishable as provided but such offenses do not change its organizational character.

Lutheran Soc. v Murphy, 223-1151; 274 NW 907

Homesteaders Life v Murphy, 224-173; 275 NW 146

Fraternal beneficiary certificates—not taxable after reorganization. A fraternal beneficiary association may reorganize into an old line company, but the amounts the new organization collects under the original certificates, which it has assumed, are not taxable under the gross premium tax provision of this section.

Yeomen Ins. v Murphy, 223-1315; 275 NW 127

Commissioner—power of suspension not lodged. The commissioner of insurance is not empowered to suspend the business of a fraternal beneficiary association for failure to comply with commissioner's order to pay a gross premium tax, such order being based on his interpretation of a statute.

Homesteaders Life v Murphy, 224-173; 275 NW 146

7026 Domestic companies—shares of stock.

Unallowable computation. An assessor, in computing the value of the shares of stock of

a corporation for the purpose of assessing them to the stockholder, has no right to include an item of cash accumulated by the corporation for the good faith and actual purpose of paying the taxes of the corporation.

Equitable v City, 207-879; 223 NW 744

Mistaken classification—waiver. An insurance company which lists its corporate stock to itself as personal property, and at an inadequate value which it induces the assessor to accept,—all on the assumption that it was subject to the consolidated levy,—and thereafter interposes no counter objection, may neither obtain a refund for taxes paid nor enjoin the collection of taxes unpaid on the theory that the property was in fact only subject to a five-mill levy, as moneys and credits.

Farmers Ins. v County, 202-444; 208 NW 929

7029 Moneys and credits.

Mutual insurance—surplus fund—nonassessable. Mutual life insurance company's surplus fund, known as loading charge, held nonassessable for taxation.

Central Life v Des Moines, (NOR); 236 NW 426

7030 Debts deductible.

"Loading" charge of mutual insurance company. A surplus, known as a "loading" charge, accumulated by a mutual legal reserve life insurance company by crediting thereto, annually, a portion of the gross premiums, even tho such surplus is not required by law, is not assessable as moneys and credits when such surplus is used to defray the expense of carrying and fulfilling policies during the various life expectancies, and when such surplus cannot be legally used for any other purpose.

Central Life v City, 212-1254; 238 NW 535; 78 ALR 551

Mutual insurance—surplus fund—nonassessable. Mutual life insurance company's surplus fund, known as loading charge, held nonassessable for taxation.

Central Life v Des Moines, (NOR); 236 NW 426

CHAPTER 336

TELEGRAPH AND TELEPHONE COMPANIES

7031 Statement required.

Atty. Gen. Opinions. See '28 AG Op 180; '30 AG Op 83; '38 AG Op 690

7034 Assessment.

Atty. Gen. Opinions. See '30 AG Op 83; '38 AG Op 433, 690

7035 Actual value per mile.

Atty. Gen. Opinions. See '38 AG Op 433, 690

7038 Assessment in each county—how certified.

Atty. Gen. Opinion. See '38 AG Op 690

7042 "Company" defined.

Borrowing automobile to deliver telegraph message. A telegraph company is not responsible for the act of its messenger in borrowing an automobile with which to make a delivery of a message when the usual and ordinary way of making delivery was by means of a bicycle, and when the borrowing aforesaid was wholly unauthorized by and unknown to the company.

Hughes v Western Union, 211-1391; 236 NW 8; 31 NCCA 423

7044 Maps required.

Atty. Gen. Opinion. See '38 AG Op 690

CHAPTER 337

RAILWAY COMPANIES

7046 When assessed — statement required.

Taxation of interstate bridges. See §7065, Vol I
Atty. Gen. Opinion. See AG Op May 8, '40

7047 Real estate holdings—statement required.

Atty. Gen. Opinion. See '28 AG Op 230

7060 Assessment of railways.

Atty. Gen. Opinion. See '28 AG Op 230

Federal interference. The charge, as a basis for federal injunctional interference, that the executive council (now state tax commission) has discriminated against a nonresident railway company in valuing its property for assessment purposes, as compared with other dissimilar properties, must be supported by a clear and affirmative showing that the discrimination does in fact exist, has been adopted as a practice, and is necessarily intentional.

Chicago, GW Ry. v Kendall, 266 US 94

7065 Property assessed by local authorities.

Atty. Gen. Opinion. See '30 AG Op 93

Invalid sale of railway property. A sale of property for nonpayment of taxes assessed by the local authorities is a nullity when the property is used exclusively in the operation of a railway and has been assessed by the state executive council.

Minn. St. L. Ry. v Pugh, 201-208; 205 NW 758

CHAPTER 340

ELECTRIC TRANSMISSION LINES

7089 "Company" defined.

Atty. Gen. Opinion. See '28 AG Op 180

7090 Statement required.

Atty. Gen. Opinion. See '28 AG Op 129

7101 Local assessment.

Atty. Gen. Opinion. See '28 AG Op 388

7102 Interest of cooperative members.

Atty. Gen. Opinions. See '25-26 AG Op 29, 39, 453; '36 AG Op 370

CHAPTER 340.1

PIPE-LINE COMPANIES

7103.13 Basis of valuation and assessment.

Atty. Gen. Opinion. See AG Op May 8, '40

CHAPTER 342

LOCAL ASSESSOR

7106 Listing and valuation.

Atty. Gen. Opinion. See '32 AG Op 196

ANALYSIS

I ASSESSMENTS IN GENERAL
II DESCRIPTION OF PROPERTY

I ASSESSMENTS IN GENERAL

Statutory requirements—approximate compliance. In determining assessments where the formula used by the assessor allows depreciation upon the same annual basis for all buildings, and does not take into account all the elements mentioned in the statutes, but does achieve approximate uniformity, and reasonable equality of assessment, and where assessed value is conceded to be less than actual value, assessment is proper.

Crary v Board, 226-1197; 286 NW 428

Assessor's statutory duty—noncompliance—reduction allowed. In a proceeding for reduction of a city tax assessment, where evidence shows that an old frame house, assessed separately from lots, was out of date and not adaptable to use as a residence, was located in a zoning district which limits the property to residential purposes, where petitioner's witnesses agree that on account of such factors the only value that can be fairly attributed to the improvements is a salvage value fixed at $3,000 and where assessor admits that he had no idea what the market value was, nor what the rental or income value would be, and further admits he gave no consideration to rental or income value and that assessment was made on the basis of cubic content or cubic foot replacement, somewhere between 16 and 50 cents per foot, which is not disclosed by the record, and that he allowed only a 25 percent depreciation on 45- or 50-year-old residence, held, assessor did not perform the duties imposed by statute, and assessment reduced to $3,000.

Call v Board, 227-1116; 290 NW 109

Valuation—factors considered. The valuation of property for tax purposes cannot be determined by mathematical formulae alone. While the statute requires that the productive and earning capacity, past, present, and prospective, must be taken into consideration, it is also necessary that the element of the assessor's judgment properly estimating the influence of the various relevant factors must enter in the assessment.

Trustees v Board, 226-1353; 286 NW 483

Valuation—equitableness—assessor's duty. In determining values it is the duty of the assessor to fix such values equitably in comparison with other like property.

Trustees v Board, 226-1353; 286 NW 483

Assessment—disproportionate and discriminatory—evidence insufficient. On complaint of inequality of assessment and contention that assessment is disproportionate and discriminatory, the trial court properly found, "com-

I ASSESSMENTS IN GENERAL—concluded

parison with but one other property in a city the size of Boone, is insufficient to afford relief".

Crary v Board, 226-1197; 286 NW 428

Assessor's valuation—presumptions—burden of proof. The presumption is that the valuation placed by the assessor upon any particular property is correct, and the burden of proof is upon the person challenging that estimate to prove otherwise, as provided by statute, yet the opinion of the assessor is not conclusive, but when properly based and apparently not erroneous, excessive, or out of proportion, it is to be held as the true value of the property.

Trustees v Board, 226-1353; 286 NW 483

Presumption in favor of assessor's valuation—burden of proving assessment inequitable. There is a strong presumption in favor of the valuation fixed by the assessor which will not be disturbed on appeal, unless the presumption is overcome by proof, and altho the assessment is less than the value of the property, if it is inequitable when compared with assessments on similar property, it will be reduced to an equitable basis; so, where petition for reduction of city tax assessment on petitioner's lots did not allege that it was inequitable, where evidence showed lots were assessed pursuant to uniform system and reason for petitioner's witnesses' disagreement with assessor as to value did not appear, and, where assessments on similar lots in same amount were not challenged, the presumption in favor of assessment was not overcome and petitioner failed to sustain statutory burden of proving that assessor's valuation was inequitable.

Call v Board, 227-1116; 290 NW 109

Assessment—presumption of correctness. The strong presumption of correctness which attends an official assessment of property (especially after it has been confirmed by the official board of review) cannot be overcome except by very definite and persuasive testimony to the contrary.

Butler v Des Moines, 219-956; 258 NW 755

Assessor's valuation—conclusiveness. It is the judgment of the assessor which the statute requires in making assessments. So long as his action is not arbitrary or capricious or so inconsistent with the actual values as to give rise to the inference that for some reason he has not properly discharged his duty, the assessments made by him and confirmed by the local board of review should not be disturbed by the court.

Crary v Board, 226-1197; 286 NW 428

Void assessment voids tax. Under a void tax assessment no valid tax is due.

Jones v Mills County, 224-1375; 279 NW 96

Irregularities in assessment of capital stock of bank. It cannot be said that no valid assessment of the capital stock and surplus and undivided profits of a bank is effected because of irregularities in that:

1. The bank officials, in furnishing the law-required statement, correctly filled out that part of the official blank which the law contemplates will be filled out by the assessor, to wit, the "valuation" sheet showing the actual figures on which the several assessments should be computed,

2. The assessor failed either to sign or verify said valuation sheet as so made out, and

3. The assessor's books, when delivered to the county auditor contained no formal entry of assessments of said items of taxable property,—

when the evidence shows that said "valuation" sheet, as so made out, (1) was examined and approved by the assessor, (2) was duly placed before the review board, (3) was by said board examined and left without change, and (4) was later, with other assessment records, duly filed with the county auditor.

Security Bank v Mitts, 220-271; 261 NW 625

Bar of causes of action—decisions involving former assessments not res judicata. Taxes do not arise out of contract and each year's taxes constitute a separate cause of action. Therefore, a decision or judgment involving assessments on the same property in former years cannot be res judicata as to future assessments.

Board v Sioux City Yards, 223-1066; 274 NW 17

II DESCRIPTION OF PROPERTY

Indefinite description or overlapping assessment—remedy. If a tax assessment is otherwise valid and legal, a property owner's remedy for an irregularity, such as indefinite description or overlapping assessment, is to appear before the board of review.

Jones v Mills County, 224-1375; 279 NW 96

Forty-acre assessment requirement—limited applicability. The statute (§6962, C., '35) which provides that assessment of land shall be made by 40-acre tracts applies only to cases where the ownership is unknown.

Jones v Mills County, 224-1375; 279 NW 96

7108 Oath.

Sworn assessment roll competent for impeaching purposes. The defendant in eminent domain proceedings has the right, on the cross-examination of the plaintiff and for the purpose of contradicting and impeaching him, to show the sworn statement made by the plaintiff to the assessor as to the value of the farm in question and as to the number and value of the livestock kept on said farm.

Welton v Highway Com., 211-625; 233 NW 876

7109 Actual, assessed, and taxable value.

Atty. Gen. Opinion. See '38 AG Op 509

ANALYSIS

I VALUATION IN GENERAL
II TAXABLE VALUE

I VALUATION IN GENERAL

"Actual" and "market" value. The terms "actual" and "market" value, as employed in the law of taxation, ordinarily mean the same thing.

Hawkeye Co. v Board, 205-161; 217 NW 837

"Value" and "market value"—interchangeable and equivalent to "actual value". By "value", in common parlance, is meant "market value", which is no other than the fair value of property as between one who wants to purchase and another who desires to sell—both terms being used interchangeably and being the equivalent of "actual value" at which the statute requires assessment of property for taxation.

Lincoln JSL Bank v Board, 227-1136; 290 NW 94

Actual value—evidence. On the issue of the actual value of property for purposes of general taxation for a certain year, the prior tax records of the court are inadmissible.

Board v Board, 215-876; 244 NW 855

Assessment at less than actual value—justification. Tho the statute directs property to be assessed at its actual value, it should not be so assessed if other property of a like or similar kind in the same assessment district is assessed at less than its actual value.

Talbott v Des Moines, 218-1397; 257 NW 393

Actual value—limitation on board. The board of review, in readjusting the value of land for assessment purposes must not go beyond the actual, independent value of the 40-acre tract in question. It may not add to such value on the ground that the owner owns other improved contiguous lands.

Davison v Board, 209-1332; 230 NW 304

Assessors—statutory requirements. In determining assessments where the formula used by the assessor allows depreciation upon the same annual basis for all buildings, and does not take into account all the elements mentioned in the statutes, but does achieve approximate uniformity, and reasonable equality of assessment, and where assessed value is conceded to be less than actual value, assessment is proper.

Crary v Board, 226-1197; 286 NW 428

Valuation— equitableness— assessor's duty. In determining values it is the duty of the assessor to fix such values equitably in comparison with other like property.

Trustees v Board, 226-1353; 286 NW 483

Levy and assessment—when discriminatory. An assessment is not discriminatory unless it stands out above the general levy.

Crary v Board, 226-1197; 286 NW 428

Discrimination between similar properties—reduction. Tho property is not assessed at its actual value as required by law, nevertheless, if it is assessed for more in proportion to its actual value than other similar properties in the same assessment district, the property owner is entitled to an equalizing reduction.

Chapman Bros. v Board, 209-304; 228 NW 28

Assessment—disproportionate and discriminatory. On complaint of inequality of assessment and contention that assessment is disproportionate and discriminatory, the trial court properly found, "comparison with but one other property in a city the size of Boone, is insufficient to afford relief."

Crary v Board, 226-1197; 286 NW 428

State board of review—supervision. The state board of assessment and review must as one of its duties exercise supervision over the administration of the tax list, advise with taxing officials, and aid in securing equitable and just enforcement of the tax list.

Trustees v Board, 226-1353; 286 NW 483

Presumption as to actual value. The court must presume, until the contrary is made to appear, that an assessment of property for general taxation purposes has been made and equalized on the sole basis of actual value as commanded by this section.

Board v Board, 215-876; 244 NW 855

Assessments — presumption of correctness. Evidence held insufficient to overcome presumption of correctness of tax assessments, where two properties, similar in construction and producing about the same income, are claimed to be disproportionate to respective values.

Crary v Board, 226-1197; 286 NW 428

Assessor's valuation — presumption. The presumption is that the valuation placed by the assessor upon any particular property is correct, and the burden of proof is upon the person challenging that estimate to prove otherwise, as provided by statute, yet the opinion of the assessor is not conclusive, but when properly based and apparently not erroneous, excessive, or out of proportion, it is to be held as the true value of the property.

Trustees v Board, 226-1353; 286 NW 483

Presumption in favor of assessor's valuation —burden of proving assessment inequitable. There is a strong presumption in favor of the

I VALUATION IN GENERAL—concluded

valuation fixed by the assessor which will not be disturbed on appeal, unless the presumption is overcome by proof, and altho the assessment is less than the value of the property, if it is inequitable when compared with assessments on similar property, it will be reduced to an equitable basis; so, where petition for reduction of city tax assessment on petitioner's lots did not allege that it was inequitable, where evidence showed lots were assessed pursuant to uniform system and reason for petitioner's witnesses' disagreement with assessor as to value did not appear, and, where assessments on similar lots in same amount were not challenged, the presumption in favor of assessment was not overcome and petitioner failed to sustain statutory burden of proving that assessor's valuation was inequitable.

Call v Board, 227-1116; 290 NW 109

Assessor's valuation—conclusiveness. It is the judgment of the assessor which the statute requires in making assessments. So long as his action is not arbitrary or capricious or so inconsistent with the actual values as to give rise to the inference that for some reason he has not properly discharged his duty, the assessments made by him and confirmed by the local board of review should not be disturbed by the court.

Crary v Board, 226-1197; 286 NW 428

Presumptions—correctness of assessment—complainant's burden of proof. One who complains of a tax assessment has burden of proof of overcoming the presumption of correctness of assessments.

Crary v Board, 226-1197; 286 NW 428

Assessment — correction — burden of proof. A property owner who attacks an assessment which has been confirmed by the board of review must overthrow the presumption that such assessment is equitable, just, and nondiscriminatory when compared with other like property within the taxing district.

Hawkeye Co. v Board, 205-161; 217 NW 837

Burden of proof. A property owner has the burden of proof to show that the valuation placed upon his property by the board of review, for taxation purposes, is excessive or inequitable.

Appeal of Blank, 214-863; 243 NW 173

Farm land within city—evidence warranting reduction in actual value. Where a 371.51-acre farm within the corporate limits of a city was very rough, the top soil washed off, the fertility gone, a third of the land infested with weeds rendering it impossible to raise even grass crops, and where the taxes exceeded the income, and qualified witnesses fixed its value at between $10 and $15 per acre, as against the tax assessor's value fixed at $65.58 per acre, on same basis as adjoining lands, tho there was no other similar land in the district, the supreme court fixed the actual value thereof for taxation at $30 per acre.

Lincoln JSL Bank v Board, 227-1136; 290 NW 94

Federal interference. The charge, as a basis for a federal injunctional interference, that the executive council (now state tax commission) has discriminated against a nonresident railway company in valuing its property for assessment purposes, as compared with other dissimilar properties, must be supported by a clear and affirmative showing that the discrimination does in fact exist, has been adopted as a practice, and is necessarily intentional.

Chicago, GW Ry. v Kendall, 266 US 94

State statute providing review on tax assessments—federal equity jurisdiction. The statutes offering a remedy to banks for review of excessive assessments, held, not sufficiently adequate to preclude federal jurisdiction in equity.

Munn v Bank, 18 F 2d, 269

II TAXABLE VALUE

Taxable value—determined—60 percent rule. The assessor having determined the actual value and the equitable valuation of the property proportionately with other properties of the district, the value for tax purposes is determined by the 60 percent rule.

Trustees v Board, 226-1353; 286 NW 483

Assessors—statutory requirements—approximate compliance. In determining assessments where the formula used by the assessor allows depreciation upon the same annual basis for all buildings, and does not take into account all the elements mentioned in the statutes, but does achieve approximate uniformity, and reasonable equality of assessment, and where assessed value is conceded to be less than actual value, assessment is proper.

Crary v Board, 226-1197; 286 NW 428

Assessor's statutory duty—noncompliance—reduction allowed. In a proceeding for reduction of a city tax assessment, where evidence shows that an old frame house, assessed separately from lots, was out of date and not adaptable to use as a residence, was located in a zoning district which limits the property to residential purposes, where petitioner's witnesses agree that on account of such factors the only value that can be fairly attributed to the improvements is a salvage value fixed at $3,000 and where assessor admits that he had no idea what the market value was, nor what the rental or income value would be, and further admits he gave no consideration to rental or income value and that assessment was made on the basis of cubic content or

cubic foot replacement, somewhere between 16 and 50 cents per foot, which is not disclosed by the record, and that he allowed only a 25 percent depreciation on 45- or 50-year-old residence, held, assessor did not perform the duties imposed by statute, and assessment reduced to $3,000.

Call v Board, 227-1116; 290 NW 109

Valuation—factors considered. The valuation of property for tax purposes cannot be determined by mathematical formulae alone. While the statute requires that the productive and earning capacity, past, present, and prospective, must be taken into consideration, it is also necessary that the element of the assessor's judgment properly estimating the influence of the various relevant factors must enter in the assessment.

Trustees v Board, 226-1353; 286 NW 483

Valuation—key property reduction—other property—effect. In an action for reduction in valuation of a taxpayer's business property where it is based in part on the valuation of key property selected in the district, upon which the board of assessment and review allows a reduction of valuation of street frontage on one street adjoining key property, held, a corresponding percentage reduction in front foot valuations of taxpayer's property located on another street is not required in absence of any showing that valuation of street frontage of taxpayer's property is fixed solely on account of proximity of key property.

Trustees v Board, 226-1353; 286 NW 483

Valuation—order of reduction. Where the taxable value to be placed on property in 1931 was fixed by the court, and was acquiesced in by all parties and neither appealed, it is considered a fair assessable value where the evidence does not indicate that property was to any considerable degree different in value in 1931 and 1933, and the state board of assessment and review recommends a 20 percent reduction of the 1931 tax assessment as an equalization of tax assessments for the year 1933, held, the taxpayer is entitled to the full 20 percent reduction rather than 10.08 percent reduction allowed by the assessor.

Trustees v Board, 226-1353; 286 NW 483

Decisions involving former assessments not res judicata. The assessment of property for taxation is separate for each year, being based on a separate valuation, and an adjudication for one year cannot definitely fix the value for succeeding years.

Trustees v Board, 226-1353; 286 NW 483

Special legislative act—reduction—nonapplicable. Chapter 244 Special Acts of the Forty-fourth General Assembly, providing for reduction in tax rates for years 1931 and 1932, is not applicable as a basis for reduction in a tax valuation for the year 1933.

Trustees v Board, 226-1353; 286 NW 483

7110 Forest and fruit-tree reservations.

Atty. Gen. Opinions. See '28 AG Op 125; '30 AG Op 217; '32 AG Op 21; '38 AG Op 198, 738

7111 Notice of valuation.

Atty. Gen. Opinion. See AG Op Feb. 16, '39

7112 Refusal to furnish statement.

Atty. Gen. Opinion. See '30 AG Op 281

7114 Meeting of assessors.

Atty. Gen. Opinion. See '38 AG Op 583

7115 Assessment rolls and books.

Atty. Gen. Opinions. See AG Op April 26, '40, May 8, '40

Contradictory statements. Assessment rolls covering personal property of the taxpayer and the total value thereof, and introduced for purpose of impeachment, are not also receivable for the purpose of showing the value placed on a particular article when the owner demonstrates that the article was not given in for taxation.

Hall v Ins. Co., 217-1005; 252 NW 763

Eminent domain—assessment rolls as evidence. In eminent domain proceedings, the duly signed assessment roll of the property in question is admissible for the purpose of showing the assessed value.

Duggan v State, 214-230; 242 NW 98

7119 Uniform assessment rolls.

Atty. Gen. Opinions. See '38 AG Op 509, 558

7120 Plat book.

Atty. Gen. Opinion. See AG Op May 8, '40

7121 Completion of assessment—oath.

Atty. Gen. Opinions. See '25-26 AG Op 415; '38 AG Op 509

Failure to attach oath—effect. Whether a tax is invalidated because the assessor failed to attach to the assessment rolls the affidavit required by law, quaere.

Fidelity Inv. v White, 208-519; 223 NW 884

Incomplete affidavit by assessor. An assessment, accompanied by the affidavit of the owner of the property, and acquiesced in by him, and duly presented to, passed upon, and approved by, the local board of review and certified by its clerk, is not rendered invalid because the signature of the assessor to the affidavit attached to the assessment roll is not attested by an officer qualified to administer oaths.

Johnson v Miller, 217-295; 251 NW 747

7122 Rolls returned to local board.

Atty. Gen. Opinions. See '30 AG Op 110; '38 AG Op 509

7123 Assessment book — preparation and return.

Atty. Gen. Opinion. See '30 AG Op 110

Loss of rolls—effect. A tax is not invalidated because the assessment rolls were belatedly turned over by the assessor to the county auditor and later lost.

Fidelity Inv. v White, 208-519; 223 NW 884

Irregularities in assessment of capital stock of bank. It cannot be said that no valid assessment of the capital stock and surplus and undivided profits of a bank is effected because of irregularities in that:

1. The bank officials, in furnishing the law-required statement, correctly filled out that part of the official blank which the law contemplates will be filled out by the assessor, to wit, the "valuation" sheet showing the actual figures on which the several assessments should be computed,

2. The assessor failed either to sign or verify said valuation sheet as so made out, and

3. The assessor's books, when delivered to the county auditor contained no formal entry of assessments of said items of taxable property,—

when the evidence shows that said "valuation" sheet, as so made out, (1) was examined and approved by the assessor, (2) was duly placed before the review board, (3) was by said board examined and left without change, and (4) was later, with other assessment records, duly filed with the county auditor.

Security Bank v Mitts, 220-271; 261 NW 625

CHAPTER 343

BOARDS OF REVIEW

7129 Local board of review.

Atty. Gen. Opinions. See '25-26 AG Op 161, 207, 226; '30 AG Op 110; '38 AG Op 509, 561, 730

Levy and assessment—unauthorized review—effect. The unauthorized act of the county board of review in assuming to offset against an assessment of bank stock the amount of federal tax-exempt securities held by the bank does not constitute an adjudication against the proper county officials to correct the error.

First N. Bank v Burke, 201-994; 196 NW 287

State statute providing review on tax assessments—federal equity jurisdiction. The statutes offering a remedy to banks for review of excessive assessments, held, not sufficiently adequate to preclude federal jurisdiction in equity.

Munn v Bank, 18 F 2d, 269

Wrongful assessment—administrative remedy to be exhausted before appeal to court. All adequate administrative remedies in matters of taxation must be exhausted before resort can be had to court, so when administrative stage of action is completed, judicial power of court may begin, and the parties may resort to any tribunal having jurisdiction. Hence, where national banks bring an action to restrain collection of alleged illegal taxes on capital stock, basing alleged illegality on fact that other competitive "moneyed capital" was taxed intentionally and consistently at lower rate in violation of federal statutes, held, banks failed to exhaust remedy provided by statutes providing appeal from assessor to board of review.

Nelson v Bank, 42 F 2d, 30

Crawford Bk. v Crawford County, 66 F 2d, 971

7129.1 Revaluation and reassessment of real estate.

Atty. Gen. Opinions. See '38 AG Op 702, 730

7131 Notice of assessments raised.

Atty. Gen. Opinions. See '30 AG Op 195, 325; '38 AG Op 730

7132 Complaint to board of review.

Atty. Gen. Opinions. See '30 AG Op 110, 308, 325; '32 AG Op 196; '38 AG Op 509, 561

Discrimination—exclusive remedy. The exclusive remedy of a taxpayer who claims that he has been discriminated against in an assessment of his property is to point out, even informally, to the board of review the facts showing such discrimination, and to appeal in case he feels aggrieved by the ruling of the board.

Iowa N. Bk. v Stewart, 214-1229; 232 NW 445

See 284 US 239

Assessment — irregularities — remedy—review by board. If a tax assessment is otherwise valid and legal, a property owner's remedy for an irregularity, such as indefinite description or overlapping assessment, is to appear before the board of review.

Jones v Mills County, 224-1375; 279 NW 96

Wrongful assessment—administrative remedy to be exhausted before appeal to court. All adequate administrative remedies in matters of taxation must be exhausted before resort can be had to court, so when administrative stage of action is completed, judicial power of court may begin, and the parties may resort to any tribunal having jurisdiction. Hence, where national banks bring an action to restrain collection of alleged illegal taxes on capital stock, basing alleged illegality on fact that other competitive "moneyed capital" was taxed intentionally and consistently at lower rate in violation of federal statutes, held, banks failed to exhaust remedy provided by statutes providing appeal from assessor to board of review.

Nelson v First N. Bk., 42 F 2d, 30

Crawford Bk. v Crawford County, 66 F 2d, 971

Right of lessee. A lessee of real estate who has contracted to pay, as part of the rent, all taxes on the land, and who has the right under the lease to contest the validity of any assessment on the land, may institute and maintain such contest in his own name, even tho he might under the lease make such contest in the name of the landlord.

Chapman Bros. v Board, 209-304; 228 NW 28

Assessment at less than actual value—justification. Tho the statute directs property to be assessed at its actual value, it should not be so assessed if other property of a like or similar kind in the same assessment district is assessed at less than its actual value.

Talbott v Des Moines, 218-1397; 257 NW 393

Assessment—wrongful classification—statutory remedy must be pursued. A taxpayer, who fails timely to interpose, before the local board of review, or before the state board of assessment and review, his objection that his property (in this case, the capital stock of a bank) was wrongfully classified as personal property and subjected to a consolidated levy instead of being classified as moneys and credits and subject to a six-mill levy, may not proceed in equity to enjoin the collection of the tax.

Security Bk. v Mitts, 220-271; 261 NW 625

National bank stock taxed in excess of other moneyed capital—discrimination. The action of taxing officials in classifying a national bank's shares of stock as "moneyed capital" under the state laws, while placing competing capital of individuals in class of "moneys and credits", resulting in higher tax rates on banks, held, prohibited discrimination against national bank, and entitled bank to an injunction against the county treasurer restraining collection of discriminatory tax, notwithstanding bank's alleged failure to seek a hearing before state board of review.

Knowles v Bank, 58 F 2d, 232

Voluntary payment on excessive assessment —later reduction by state board—effect. A taxpayer who makes no objection to the local board of review as to the valuation which has been duly placed on his real estate by the assessor for assessment purposes, and voluntarily pays the taxes duly levied during the two following years on said valuation, may not later, and after obtaining an order from the state board of assessment and review reducing said assessed valuation, successfully contend that any part of said voluntarily paid taxes was "erroneously or illegally exacted or paid" within the meaning of the refund statute, §7235, C., '35.

Cedar Rapids Co. v Stirm, 222-206; 268 NW 562

Limitation on relief. A property owner may not, in the adjustment of his assessment, be granted greater relief than that prayed for by him.

Talbott v Des Moines, 218-1397; 257 NW 393

Burden of proof. A property owner has the burden of proof to show that the valuation placed upon his property by the board of review, for taxation purposes, is excessive or inequitable.

Appeal of Blank, 214-863; 243 NW 173

State statute providing review on tax assessments—federal equity jurisdiction. The statutes offering a remedy to banks for review of excessive assessments, held, not sufficiently adequate to preclude federal jurisdiction in equity.

Munn v Bank, 18 F 2d, 269

Petition to board of review on excessive tax assessment—not exclusion of federal court. Bank's petition to board of review, held, not to constitute a selection of statutory remedy for adjudication of alleged excessive assessment to exclusion of remedy in federal court of equity.

Munn v Bank, 18 F 2d, 269

7133 Appeal.

Atty. Gen. Opinions. See '32 AG Op 196; '38 AG Op 509, 561; AG Op April 24, '39

Invalid amendment. Amendment changing "board" (C., '27) to "county board of review" (43 GA, Ch 205) invalid.

Davidson Co. v Mulock, 212-730; 235 NW 45

Notice of—proper service. A statute which distinctly provides that a notice, e.g., a notice of appeal, shall be "served as an original notice", authorizes a service on the designated party by leaving a copy of said notice at the usual place of residence of said party with some member of his family over fourteen years of age—when said party is not present in the county at the time of said service. So held as to the service of a notice of appeal under this section.

In re Sioux City Yards, 222-323; 268 NW 18

Defective notice — appearance — effect. A notice of appeal from a refusal of the board of review to lower an assessment, and the form, contents, and service of such notice become quite immaterial when the board enters a general appearance and contests the appeal.

Chapman Bros. v Board, 209-304; 228 NW 28

Fatally defective notice. A notice of appeal to the district court from the action of the local board of review, addressed "To the Honorable Mayor and the City Council of Des Moines sitting as a board of review", is wholly insufficient to confer jurisdiction on the district court.

Midwest. Realty v City, 210-942; 231 NW 459

Fatally defective notice—appearance — effect. A fatal defect in a notice of appeal to the district court from the action of the board of review in a city, is not cured by the entry in the district court of a general appearance by the city through its attorney.

Midwest. Realty v City, 210-942; 231 NW 459

Discrimination—exclusive remedy. The exclusive remedy of a taxpayer who claims that he has been discriminated against in an assessment of his property is to point out, even informally, to the board of review the facts showing such discrimination, and to appeal in case he feels aggrieved by the ruling of the board.

Iowa Bank v Stewart, 214-1229; 232 NW 445
See 284 US 239

Decisions involving former assessments not res judicata. Taxes do not arise out of contract and each year's taxes constitute a separate cause of action. Therefore, a decision or judgment involving assessments on the same property in former years cannot be res judicata as to future assessments.

Board v Sioux City Yards, 223-1066; 274 NW 17

Review—transcript defined. For a tax appeal, the transcript from the board of review consists of the assessment, the objections thereto, and the board's ruling on the objections.

Board v Sioux City Yards, 223-1066; 274 NW 17

Appeal to supreme court—limited to questions before board of review. Where taxpayer appealed from board of review complaining of two items of assessment, city and board of review on further appeal to supreme court could not have other controverted items reviewed.

Central Life v Des Moines, (NOR); 236 NW 426

State statute providing review on tax assessments—federal equity jurisdiction. The statutes offering a remedy to banks for review of excessive assessments, held, not sufficiently adequate to preclude federal jurisdiction in equity.

Munn v Bank, 18 F 2d, 269

7134 Trial on appeal.

Atty. Gen. Opinions. See '32 AG Op 158; '38 AG Op 509; AG Op July 31, '39

Appeal—scope. The public may complain, on an appeal from the district court to the supreme court, because the court below decreased the valuation approved by the local board of review.

Appeal of Blank, 214-863; 243 NW 173

Decisions involving former assessments not res judicata. Taxes do not arise out of contract and each year's taxes constitute a separate cause of action. Therefore, a decision or judgment involving assessments on the same property in former years cannot be res judicata as to future assessments.

Board v Sioux City Yards, 223-1066; 274 NW 17

Actual value—evidence. On the issue of the actual value of property for purposes of general taxation for a certain year, the prior tax records are inadmissible.

Board v Board, 215-876; 244 NW 855

Presumption of correctness. The strong presumption of correctness which attends an official assessment of property (especially after it has been confirmed by the official board of review) cannot be overcome except by very definite and persuasive testimony to the contrary. Evidence held insufficient to overcome presumption.

Butler v Des Moines, 219-956; 258 NW 755

Assessment—correction — burden of proof. A property owner who attacks an assessment which has been confirmed by the board of review must overthrow the presumption that such assessment is equitable, just, and nondiscriminatory when compared with other like property within the taxing district. Evidence held ample to overthrow such presumption and to justify a reduction by the court.

Hawkeye Co. v Board, 205-161; 217 NW 837

Board of supervisors as objectors—trial de novo. The board of supervisors as objectors to the assessment of a stock yards company may properly appeal to the supreme court from an order sustaining a motion to dismiss their appeal to the district court, and the case in the supreme court is triable de novo.

Board v Sioux City Yards, 223-1066; 274 NW 17

Appeal to supreme court—limited to questions before board of review. Where taxpayer appealed from board of review complaining of two items of assessment, city and board of review on further appeal to supreme court could not have other controverted items reviewed.

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State statute providing review on tax assessments—federal equity jurisdiction. The statutes offering a remedy to banks for review of excessive assessments, held, not sufficiently adequate to preclude federal jurisdiction in equity.

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7135 Appeal on behalf of public.

Board of supervisors as objectors—trial de novo. The board of supervisors as objectors to the assessment of a stock yards company may properly appeal to the supreme court

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Munn v Bank, 18 F 2d, 269

7136 Power of court.

Discrimination between similar properties—reduction. Tho property is not assessed at its actual value as required by law, nevertheless, if it is assessed for more in proportion to its actual value than other similar properties in the same assessment district, the property owner is entitled to an equalizing reduction.

Chapman Bros. v Board, 209-304; 228 NW 28

Nonpower of court to increase assessment. On appeal by a taxpayer from an assessment against him, the court cannot increase the assessment. The court has power to increase an assessment only in those cases where the appeal is taken by an officer of an interested county, city, town, township or school district. So held where the local board of review based its assessment against an insurance company solely on two items of moneys and credits, thereby conceding the nonassessability of all other items of moneys and credits of the company as shown by its report to the assessor, and where on appeal by the taxpayer it was sought to increase the assessment by other and additional items of moneys and credits as shown by said report.

Central Life v City, 212-1254; 238 NW 535; 78 ALR 551

Appeal by taxpayer—district court cannot increase assessment. Statute authorizing district court on appeal from board of review to increase assessments does not apply to taxpayer's appeal.

Central Life v Des Moines, (NOR); 236 NW 426

Appeal to supreme court—limited to questions before board of review. Where taxpayer appealed from board of review complaining of two items of assessment, city and board of review on further appeal to supreme court could not have other controverted items reviewed.

Central Life v Des Moines, (NOR); 236 NW 426

State statute providing review on tax assessments—federal equity jurisdiction. The statutes offering a remedy to banks for review of excessive assessments, held, not sufficiently adequate to preclude federal jurisdiction in equity.

Munn v Bank, 18 F 2d, 269

7137 County board of review.

Atty. Gen. Opinions. See '25-26 AG Op 82, 467; '28 AG Op 358; '38 AG Op 509

Presumption as to actual value. The court must presume, until the contrary is made to appear, that an assessment of property for general taxation purposes has been made and equalized on the sole basis of actual value as commanded by section 7109, C., '31.

Board v Board, 215-876; 244 NW 855

7138 Appeals.

Atty. Gen. Opinion. See '38 AG Op 509

7139 Abstract to state commission.

Atty. Gen. Opinions. See '25-26 AG Op 152; '38 AG Op 509

7140 State board of review.

Atty. Gen. Opinions. See '25-26 AG Op 152; '38 AG Op 558

7141 Adjusting county valuations.

Atty. Gen. Opinion. See '25-26 AG Op 82

7142 Notice of increase.

Atty. Gen. Opinion. See '25-26 AG Op 82

CHAPTER 344

TAX LIST

7144 Consolidated tax.

Intermingled legal and illegal taxes—procedure. When a taxpayer claims that a separable part of his consolidated tax is illegal, he has the legal right to pay the concededly legal part in whole, or by statutory installments, and to test the legality of the untendered part by proper proceedings. It follows that if he is unsuccessful in his test suit he is liable for interest or penalty on the untendered tax only.

Chicago, RI Ry. v Slate, 213-1294; 241 NW 393

7145 Tax list.

Atty. Gen. Opinions. See '28 AG Op 115; '36 AG Op 486

Approval of assessment—necessarily resulting levy. A duly made and approved assessment on specific property necessarily takes that rate of tax which the law has provided for such property, and the duty of the auditor to compute the tax on such basis is purely ministerial.

Iowa N. Bk. v Stewart, 214-1229; 232 NW 445

See 284 US 239

Tax sale register as evidence. In an action to enjoin a county treasurer from selling at tax sale land on which the county held either certificates of tax sale or tax deeds, books designated as "tax sale registers" containing the county record of tax sales were competent evidence of the issuance of tax certificates to the county, although not evidence of the county's alleged tax deeds.

Bennett v Greenwalt, 226-1113; 286 NW 722

7146 Correction—tax apportioned.

Atty. Gen. Opinion. See '28 AG Op 115

7147 Tax list delivered — informality and delay.

Delinquent and unpaid taxes—bringing forward—time limit. The duty of the county treasurer to bring forward and enter on a tax list all delinquent and unpaid taxes against each tract of land (in order to preserve the lien of said taxes) is legally discharged if said bringing forward and entry is done as rapidly as is possible within a reasonable time after said list is received from the county auditor.

Murphy v Smith, 222-780; 269 NW 748

7149 Corrections by auditor.

Atty. Gen. Opinions. See '25-26 AG Op 134, 453; '28 AG Op 244; '30 AG Op 85; '34 AG Op 446; '36 AG Op 486; AG Op Nov. 6, '39, April 26, '39, May 24, '39

Delegation of authority. The authority of the county auditor to correct errors in assessments cannot be delegated to the county treasurer.

Muscatine Co. v Pitchforth, 214-952; 243 NW 292

Correction—time limit. The error of the assessor in deducting from the assessment of a private bank the amount of money borrowed by the banker may be corrected by the county auditor after the payment of the first installment and before the payment of the last installment of taxes.

Elliott v Rhoads, 203-218; 212 NW 468

No current year limitation. The auditor's power to assess omitted property is not limited to the so-called current year.

Blondel v County, 203-1099; 212 NW 335

Assessment after nullification of tax. The county auditor has power to assess real estate as "omitted" property when the ordinary tax thereon has been decreed void because of an omission by the regular assessor, even tho the county treasurer possibly had the same power.

Blondel v County, 203-1099; 212 NW 335

Correcting assessment of private banker. The county auditor may, on proper notice and hearing, and before a tax is paid, correct the erroneous action of the assessor in deducting the debts of a private banker from the value of the banker's taxable property. (§1321, S., '13 [§6997, C., '39]).

Mannings Bk. v Armstrong, 204-512; 211 NW 485

Bank shares—taxing officers acting contrary to law. The taxation of state and national bank shares at a higher rate than the shares of competing domestic corporations is violative of the equal protection clause of the 14th amendment and in excess of permission conferred by federal statute for the taxation of national bank stock.

Munn v Bank, 18 F 2d, 269
Knowles v Bank, 58 F 2d, 232
First N. Bk. v Anderson, 269 US 341
Iowa N. Bk. v Stewart, 214-1229; 232 NW 445; 284 US 239

Levy and assessment—bank stock—correction of error without notice. The act of the county board of review in setting off against an assessment of bank stock the amount of federal tax-exempt securities held by the bank, and thereby wholly canceling the assessment, is not only an error, but is a nullity; and the county auditor may, without notice to the bank, correct the error by entering the proper assessment on the tax books on the basis of the conceded capital, surplus, and undivided profits, less the real estate, of the bank. (See §§1322, 1385-b, S., '13.)

First N. Bank v Burke, 201-994; 196 NW 287

Unallowable corrrection. The county auditor may not, under the guise of correcting the assessment of a private banker, impose an assessment on bills receivable which the banker had rediscounted for full value to his correspondent bank, even tho the rediscounts were, in a sense, held by the correspondent as collateral, because of the mutual contemplation of the banker and the correspondent that the banker would in time redeem said discounts.

Northwestern Bk. v Van Roekel, 202-237; 207 NW 345

Illegal change by auditor of assessment — effect. The act of a county auditor, on his own motion, and without the connivance of any other official charged with duties pertaining to taxation, in changing a duly made and approved assessment of corporate stock of concerns competing with national, state and savings banks, from its proper classification of "corporate stock" to the classification of "moneys and credits" and computing the tax thereon as provided for moneys and credits, is absolutely void, and furnishes no basis for the claim by national, state and savings banks that they have been discriminated against, in that the consolidated levy has been applied to 20 percent of the value of their stock while the favored concerns have been taxed on the basis

of 5 mills on the dollar of the actual value of their stock.

Iowa N. Bk. v Stewart, 214-1229; 232 NW 445 Reversed, 284 US 239

Unauthorized classification. Whether certain securities shall be assessed as moneys and credits or as moneyed capital, within the meaning of the federal statutes, must, in the first instance, be determined by the judgment of the assessor, and lastly by the judgment of the board of review; and the county auditor has no power to change such determination.

Ft. Madison Sec. v Maxwell, 202-1346; 212 NW 131

7150 Notice.

Allowable correction without notice.

First N. Bk. v Burke, 201-994; 196 NW 287

Permissible change without notice. When the shares of stock of a bank are assessed to the bank, the county auditor may, at any time before the tax is paid, and without notice, change the assessment to the individual stockholders.

Ludeman v County, 204-1100; 216 NW 712

7152 Adjustment of accounts.

Atty. Gen. Opinion. See '25-26 AG Op 134

7154 Procedure on appeal.

Decisions involving former assessments not res judicata. Taxes do not arise out of contract and each year's taxes constitute a separate cause of action. Therefore, a decision or judgment involving assessments on the same property in former years cannot be res judicata as to future assessments.

Board v Sioux City Yards, 223-1066; 274 NW 17

7155 Corrections by treasurer.

Atty. Gen. Opinions. See '25-26 AG Op 226, 453; '28 AG Op 196, 332, 414; '34 AG Op 653; '38 AG Op 603; AG Op May 24, '39

Corrections by auditor—delegation of authority. The authority of the county auditor to correct errors in assessments cannot be delegated to the county treasurer.

Muscatine Co. v Pitchforth, 214-952; 243 NW 292

Unauthorized change. The county treasurer is wholly without authority to change the amount of a duly made assessment which appears on the tax books in the amount as fixed by the assessor and as modified and approved by the various equalization boards. The property so assessed cannot be deemed omitted property within the meaning of this section.

Muscatine Co. v Pitchforth, 214-952; 243 NW 292

Appeal—county treasurer not "aggrieved party". The county treasurer may not appeal to the district court from an order of the state board of assessment and review nullifying an assessment made by the said treasurer against alleged omitted property of a taxpayer, said treasurer not being a "party aggrieved" within the meaning of the statute. (§6943-c27, par. 9a, C., '31 [§6943.026, C., '39 (par. 9a repealed by 47 GA, Ch 188, §7)]).

In re Lytle Inv. Co., 219-1099; 260 NW 538

7156 Action by treasurer—apportionment.

Atty. Gen. Opinions. See '28 AG Op 414; '38 AG Op 603

Nullification—jurisdiction of state board. Assuming the legal right of the county treasurer to enter an assessment against the alleged omitted property of a taxpayer (§7155 et seq., C., '31), yet the state board of assessment and review has, on proper hearing and order, plenary jurisdiction, subject to appeal to the district court, wholly to nullify such assessment. (§6943-c27, par. 9a, C., '31 [§6943.026, C., '39 (par. 9a repealed by 47 GA, Ch 188, §7)]).

Smith v City Yards, 219-1142; 260 NW 531

7157 Duty of treasurer.

Atty. Gen. Opinion. See '38 AG Op 603

7158 Time limit.

Atty. Gen. Opinion. See '28 AG Op 332

7161 Discovery of property not listed.

Atty. Gen. Opinions. See '28 AG Op 170; '36 AG Op 167; '38 AG Op 586; AG Op Feb. 17, '40

CHAPTER 345

TAX LEVIES

CERTIFICATION OF TAXES

7162 Basis for amount of tax.

Discussion. See 17 ILR 374—Taxation for public buildings

Atty. Gen. Opinions. See '25-26 AG Op 415; '32 AG Op 51; '38 AG Op 77

7163 Amounts certified in dollars.

Atty. Gen. Opinion. See '30 AG Op 86

7164 Computation of rate.

Atty. Gen. Opinion. See '30 AG Op 86

Recovery of tax paid—mandamus as remedy—voluntary payment—effect. Taxes illegally exacted through county auditor's failure to comply with statute requiring budget deduction of moneys and credits tax may be recovered in a mandamus action against the

board of supervisors, even tho paid voluntarily and without protest.

Hewitt v Keller, 223-1372; 275 NW 94

Mandamus proper remedy to secure tax refund. A taxpayer may properly bring a mandamus action to compel a refund of taxes overpaid because of county auditor's failure to comply with budget deduction requirements of this section. The state board of assessment and review has no power to correct this failure.

Hewitt v Keller, 223-1372; 275 NW 94

7169 Excessive tax prohibited.

Atty. Gen. Opinion. See '32 AG Op 105

COUNTY LEVIES

7171 Annual levies.

Atty. Gen. Opinions. See '28 AG Op 86; '32 AG Op 69; '36 AG Op 202; AG Op June 10, '39, July 10, '39

7172 Court expense.

Atty. Gen. Opinions. See '25-26 AG Op 58, 207; '28 AG Op 404; '32 AG Op 81; '38 AG Op 166

PEDDLERS

7174 Peddlers.

Atty. Gen. Opinions. See '38 AG Op 238, 661

7176 "Peddlers" defined.

Atty. Gen. Opinions. See '36 AG Op 271; '38 AG Op 239, 661

7177 Exceptions.

Atty. Gen. Opinions. See '25-26 AG Op 497; '32 AG Op 94, 144; '34 AG Op 301; '36 AG Op 271; '38 AG Op 256, 661; AG Op Feb. 2, '39

LEVIES BY STATE TAX COMMISSION

7182 Annual levy.

Atty. Gen. Opinion. See '34 AG Op 676

7183 Rate certified to county auditor.

Atty. Gen. Opinion. See '34 AG Op 676

CHAPTER 346

COLLECTION OF TAXES

7184 Duty of treasurer.

Atty. Gen. Opinion. See '34 AG Op 324

Special method—when followed. A special statutory method for collecting a special tax must be followed, but in the absence of such method, the right which inheres in sovereignty to enforce collection of taxes would apply.

State v Ins. Co., 223-1301; 275 NW 26

Failure to pay legally assessed tax—presumption. On the naked showing that a party has not paid in full a tax legally assessed against him, the presumption must be indulged that the public authorities not only have the right to collect in full but will collect in full.

Iowa N. Bk. v Stewart, 214-1229; 232 NW 445

See 284 US 239

Collection—court lending aid. The supreme court will, within the limits of the power conferred by the legislature, lend its aid to the collection of the revenues upon which the state must depend.

Bittle v Cain, 224-1332; 278 NW 608

7186 Actions authorized.

Atty. Gen. Opinions. See '25-26 AG Op 77; '28 AG Op 221; '30 AG Op 101

Personal liability of stockholder who appropriates corporate assets. A stockholder who appropriates to his own personal use substantially all the assets of the corporation becomes personally liable for the taxes theretofore levied against the corporation, the appropriation being in excess of said taxes.

Manning v Auto Co., 210-1182; 232 NW 501

7187 Statutes applicable—attachment—damages.

Atty. Gen. Opinion. See '30 AG Op 101

7188 Receipt.

Intermingled legal and illegal taxes—procedure. When a taxpayer claims that a separable part of his consolidated tax is illegal, he has the legal right to pay the concededly legal part in whole, or by statutory installments, and to test the legality of the untendered part by proper proceedings. It follows that if he is unsuccessful in his test suit he is liable for interest or penalty on the untendered tax only.

Chi. RI Ry. v Slate, 213-1294; 241 NW 398

7189 Distress and sale.

Atty. Gen. Opinions. See '25-26 AG Op 115; '28 AG Op 221; '30 AG Op 132; '34 AG Op 158, 568; '38 AG Op 164; AG Op Feb. 8, '39, Dec. 20, '39, May 3, '40

Special method—when followed. A special statutory method for collecting a special tax must be followed, but in the absence of such method, the right which inheres in sovereignty to enforce collection of taxes would apply.

State v Ins. Co., 223-1301; 275 NW 26

7189.1 Distress warrant—form.

Atty. Gen. Opinions. See '38 AG Op 164; AG Op Dec. 20, '39, May 3, '40

7190 Delinquent personal tax list.

Atty. Gen. Opinions. See '25-26 AG Op 434; '28 AG Op 88, 275, 434

Lienability. The entry of taxes on personal property in the delinquent personal tax book

as such taxes accrue from year to year constitutes such taxes a lien on the real estate of the delinquent taxpayer.

Hayes v Kemp, 207-53; 222 NW 392

Sale for tax for one year discharges lien of tax for prior years. A sale of land for taxes thereon for a certain year discharges the lien of personal taxes levied against the owner for prior years.

In re Hager, 212-851; 235 NW 563

Personal property tax lien on homestead. A tax on bank stock duly entered on the delinquent personal tax list is a lien on the homestead of the owner of the stock.

Hampe v Philipp, 210-1243; 232 NW 648

7191 Record—contents.

Atty. Gen. Opinion. See '28 AG Op 275

7193 Former delinquent real estate taxes.

Atty. Gen. Opinions. See '25-26 AG Op 80; '28 AG Op 221; '30 AG Op 87, 231; '38 AG Op 553

Lien and priority—sale for tax for one year discharges lien of tax for prior years. A sale of land for taxes thereon for a certain year discharges the lien of personal taxes levied against the owner for prior years.

In re Hager, 212-851; 235 NW 563

Special assessments—loss of lien. The lien of delinquent special assessments for street improvements is irrevocably lost by the failure of the county treasurer to enter such assessments on the current general tax list. And this is true even tho the property owner has formally waived all illegalities in the assessments and has agreed to pay them, and even tho the county treasurer has kept his books on forms prescribed by the state auditor.

Wallace v Gilmore, 216-1070; 250 NW 105

Sale for current tax and tax not brought forward. A tax sale for a special assessment maturing during the year of sale is not rendered wholly void because the sale is also made for delinquent special assessments for prior years, not brought forward by the treasurer on the tax books.

Wren v Berry, 214-1191; 243 NW 375

Bringing forward on tax list—time limit. The duty of the county treasurer to bring forward and enter on a tax list all delinquent and unpaid taxes against each tract of land (in order to preserve the lien of said taxes) is legally discharged if said bringing forward and entry is done as rapidly as is possible within a reasonable time after said list is received from the county auditor.

Murphy v Smith, 222-780; 269 NW 748

Sale for delinquent taxes not carried forward—setting aside — insufficient tender. A tax sale for delinquent taxes not carried forward will not be set aside in equity nor the deed issuance restrained when the titleholder's offer to do equity by tendering such taxes as "constitute a valid lien" and "actually paid" by the purchaser is a disingenuous tender.

McClelland v Polk County, 225-177; 279 NW 423

Sale for delinquent taxes not brought forward—deed invalidity. A tax deed is invalid as a basis for a quiet title action against the legal titleholder who asks no relief except undisturbed possession where, prior to the sale, the delinquent taxes supporting such deed have not been brought forward by the treasurer and entered on the current tax list opposite the property on which it is a lien.

Bittle v Cain, 224-1332; 278 NW 608

Delinquent taxes not brought forward—effect on bonds retired by special assessments. County treasurer's failure to bring forward delinquent special assessments, an irregularity rendering the assessments only voidable and not void, will not create a cause of action against the city on refunding bonds based on the claim that such special assessments, not brought forward, may not be included in determining the amount of the "unpaid special assessments."

Bankers Life v Emmetsburg, 224-1287; 278 NW 311

Lien—refunding bonds for assessments not carried forward—city nonliable. Where a city issues refunding bonds for street and sewer improvements in an amount equal to "unpaid special assessments" including therein "unpaid special assessments" which the county treasurer failed to carry forward on his tax lists, a theory that "unpaid special assessments" meant only those supported by a valid lien, and therefore such bonds exceeded the statutory limit to the extent of those assessments not carried forward, will not make a city liable to the bondholders, inasmuch as those assessments not carried forward are not void but only voidable at the option of the property holder.

Bankers Life v Spirit Lake, 224-1304; 278 NW 320

Bringing forward special taxes—omission—county treasurer not city's agent. A county treasurer's failure to bring forward special assessments on his tax list does not constitute a delinqency on part of the city, and he is no agent for that purpose.

Bankers Life v Emmetsburg, 224-1287; 278 NW 311

Delinquent personal tax—failure to enter on list—effect. A sale of real estate for a delinquent personal tax not entered on the delinquent personal tax list is void because of the provisions of §7192, C., '27, even tho §7203, C., '27, '31, declares, generally, that personal

taxes are a lien on the taxpayer's real estate for a period of ten years after December 31 of the year of levy. (Section 7192, C., '27, now repealed.)

Schoenwetter v Oxley, 213-528; 239 NW 118

Mortgagee as subsequent titleholder denying tax deed validity—delinquent tax tender unnecessary. A mortgagee, being required only to pay the taxes levied on his mortgage, not being the realty titleholder when certain delinquent real estate taxes were levied, and being under no legal obligation to pay such delinquent taxes, is not, after having acquired the land by deed from the mortgagor subsequent to an invalid tax sale, required to tender such delinquent taxes as a condition to defending and denying in a quiet title action the validity of the tax deed issued for such taxes.

Bittle v Cain, 224-1332; 278 NW 608

Tax sale register as evidence. In an action to enjoin a county treasurer from selling at tax sale land on which the county held either certificates of tax sale or tax deeds, books designated as "tax sale registers" containing the county record of tax sales were competent evidence of the issuance of tax certificates to the county, altho not evidence of the county's alleged tax deeds.

Bennett v Greenwalt, 226-1113; 286 NW 722

Certificate — lien — noninvalidating defects. Record reviewed, and held that a municipal special assessment certificate for paving was not invalidated because the name of the owner of the land assessed did not appear therein (§6105, C., '35); nor was the lien of certain installments of said assessment lost because of the failure of the proper county officials to bring forward on the tax books, at the time of tax sale, said unpaid installments.

Hawkeye Ins. v Munn, 223-302; 272 NW 85

7193.04 Entries on general tax list.

Special assessments—loss of lien. The lien of delinquent special assessments for street improvements is irrevocably lost by the failure of the county treasurer to enter such assessments on the current general tax list. And this is true even tho the property owner has formally waived all illegalities in the assessments and has agreed to pay them, and even tho the county treasurer has kept his books on forms prescribed by the state auditor.

Wallace v Gilmore, 216-1070; 250 NW 105

Special procedure for collection exclusive. A municipal improvement certificate may not be foreclosed by an action in court, because (1) the statutes confer no such authority, and (2) the statutes provide a special procedure for collection along with the collection of ordinary taxes. See §6007 et seq., §7193-d1 [§7193.01, C., '39], C., '31.

Hawkeye Ins. v Valley-Des M. Co., 220-556; 260 NW 669; 105 ALR 1018

7193.05 Limitations.

Whether this and the four preceding sections change the rule in Fitzgerald v City, 125-396; 101 NW 268, quaere.

7193.06 Compromising tax.

Atty. Gen. Opinions. See '28 AG Op 226, 275, 308; '32 AG Op 183; '36 AG Op 164, 255, 319; '38 AG Op 699

7193.09 Compromising tax on personal property.

Atty. Gen. Opinions. See '28 AG Op 275, 308, 320; '32 AG Op 183; '38 AG Op 123

7194 Penalty and interest limited—unavailable taxes.

Atty. Gen. Opinions. See '25-26 AG Op 172, 342, 347; '36 AG Op 530; '38 AG Op 14, 851

7195 County credited.

Atty. Gen. Opinion. See '25-26 AG Op 322

7196 Subsequent collection.

Atty. Gen. Opinions. See '25-26 AG Op 322; '36 AG Op 530

7202 Lien of taxes on real estate.

Similar provision. See under §6880

Atty. Gen. Opinions. See '32 AG Op 204; '36 AG Op 202; '38 AG Op 692

Applicability of statute. Principle reaffirmed that this section relative to the lien of taxes has applicability only to general taxes, not to special assessments for street improvements.

Frankel v Blank, 205-1; 213 NW 597

Special assessments—lien and priority. A tax sale for general taxes and a tax deed duly issued thereon extinguishes the lien of all existing special assessments for paving or sewer.

Iowa Co. v Barrett, 210-53; 230 NW 528

Western Sec. v Bank, 211-1304; 231 NW 317

Priority between different special assessments. The fully perfected lien of a special assessment for sewer is prior in right to the lien of a subsequent special assessment by the board of supervisors for a public drainage improvement, even tho the latter improvement was initiated prior to the sewer proceedings.

Anderson-Deering Co. v Boone, 201-1129; 205 NW 984

Statute declares lien—priority. Unless so expressed by statute, taxes are neither a lien on property assessed nor on taxpayer's other property and this cannot be enlarged by judicial construction, but whether such a lien is paramount to other liens depends on legislative intent ascertained or implied from the statute, which need not contain specific words indicating a "first lien" in order to create priority.

Linn County v Steele, 223-864; 273 NW 920; 110 ALR 1492

Tax deed nullifies special assessments. A tax deed issued on a sale for ordinary regular taxes nullifies the lien of all special assess-

ments levied on the land by a city after the sale and before the execution of the deed.

Means v City, 214-948; 241 NW 671

Tax sale—school fund mortgage. Where a mortgage securing the permanent school fund is on the realty purchased at tax sale, the purchaser is charged with knowledge of the rights of the county holding such mortgage and that the debt secured by the mortgage is unpaid.

Monona County v Waples, 226-1281; 286 NW 461

School fund mortgage foreclosure. In an action to foreclose a school fund mortgage, where the court decreed that plaintiff made no demand nor attempt to collect the mortgage until eleven years after it became due, held, that the defendant-holder of the certificate of tax sale was charged with knowledge of plaintiff's lien, and that it was unpaid, and he could not rely on lapse of time, laches or negligence, as against the state.

Monona County v Waples, 226-1281; 286 NW 461

School fund mortgage paramount—treasurer exceeding authority. In an action to foreclose a duly recorded mortgage to secure a loan from the permanent school fund, the priority of lien granted by statute can neither be defeated by a tax sale purchaser of such realty on ground of mutual mistake of purchaser and county treasurer in connection with tax sale, nor that the county treasurer exceeded his authority and sold more than the interest of person holding fee in such realty, as the taxes on the realty mortgaged to secure loan from permanent school fund are not a lien against the state and the purchaser at such sale acquired only the right to redeem from mortgage and does not acquire a lien superior to lien of mortgage.

Monona County v Waples, 226-1281; 286 NW 461

School fund mortgage paramount. The statutes providing, that where real estate is incumbered to school fund the interest of the person holding the fee shall alone be sold for taxes and that lien of state shall not be affected by the tax sale, will be construed as meaning that lien of mortgage given to the state for land bought on credit and lien of a real estate mortgage to school fund will be paramount to a tax lien.

Monona County v Waples, 226-1281; 286 NW 461

Duration of lien. Tax sale of land for nonpayment of drainage assessments is not an action barred by statute of limitations, and the duration of a lien for such assessment or the time within which payment may be enforced is not limited by statute.

Whisenand v Van Clark, 227-800; 288 NW 915

Tax sale—school, agricultural college, or university land. In construing statute which provides in substance, that in the sale of school, agricultural college or university land sold on credit which is sold for taxes, the purchaser shall acquire only the interest of the person holding the fee and that the state's lien shall not be affected by such sale, the supreme court will not construe the catchwords for such statute to show legislative intent to omit school fund mortgages, as the catchwords are no part of the law enacted and are not to be considered in construing the statute.

Monona County v Waples, 226-1281; 286 NW 461

7203 Lien of personal taxes.

Atty. Gen. Opinions. See '25-26 AG Op 188, 233, 320; '28 AG Op 384; '32 AG Op 204; '34 AG Op 722; '38 AG Op 15, 65, 595, 697

Delinquent taxes—entry. The entry of taxes on personal property in the delinquent personal tax book as such taxes accrue from year to year constitutes such taxes a lien on the real estate of the delinquent taxpayer.

Hayes v Kemp, 207-53; 222 NW 392

Delinquent personal tax—failure to enter on list—effect. A sale of real estate for a delinquent personal tax not entered on the delinquent personal tax list is void because of the provisions of §7192, C., '27, even tho §7203, C., '27, '31, declares, generally, that personal taxes are a lien on the taxpayer's real estate for a period of 10 years after December 31 of the year of levy. (§7192, C., '27, now repealed.)

Schoenwetter v Oxley, 213-528; 239 NW 118

Sale for tax for one year discharges lien of tax for prior years. A sale of land for taxes thereon for a certain year discharges the lien of personal taxes levied against the owner for prior years.

In re Hager, 212-851; 235 NW 563

Corporate bank stock. Taxes on corporate bank stock and against the individual owners thereof are not a lien on the real estate holdings of the corporation in the hands of a receiver, notwithstanding the fact that the statute assumes to make the corporation personally liable therefor.

Andrew v Munn, 205-723; 218 NW 526

Personal property tax lien on homestead. A tax on bank stock, duly entered on the delinquent personal tax list, is a lien on the homestead of the owner of the stock.

Hampe v Philipp, 210-1243; 232 NW 648

7204 Lien between vendor and purchaser.

Atty. Gen. Opinions. See '32 AG Op 204; '36 AG Op 202; '38 AG Op 692; AG Op April 26, '40

Taxes maturing December 31—obligation to pay. A vendor who, prior to December 31,

sells real estate "free of all incumbrances to date of sale" must, as between himself and the vendee, pay the taxes falling due on December 31 of said year.

Moore v Trust Co., 210-1020; 229 NW 666

7205 Lien follows certain personal property.

Atty. Gen. Opinions. See '28 AG Op 295; '30 AG Op 64; '32 AG Op 170, 276; '38 AG Op 35; AG Op Aug. 23, '39

Statutory declaration of lien—effect. A statutory declaration that taxes are a lien does not necessarily mean that they are a first lien.

In re Cutler & Horgen, 213-983; 234 NW 238; 238 NW 80

Statute declares lien—priority. Unless so expressed by statute, taxes are neither a lien on property assessed nor on taxpayer's other property and this cannot be enlarged by judicial construction, but whether such a lien is paramount to other liens depends on legislative intent ascertained or implied from the statute, which need not contain specific words indicating a "first lien" in order to create priority.

Linn County v Steele, 223-864; 273 NW 920; 110 ALR 1492

Lien and priority—conditional sale lien—superiority of tax lien. Taxes assessed (§§7205, 7206, C., '35) after execution of a conditional sale contract on a stock of goods and other personalty are superior to the lien of such contract inasmuch as (1) historically these sections were contained in a single section; (2) one section already carries a construction creating a lien paramount to all other liens; (3) necessarily security of the revenue is an incident of sovereignty; and (4) the above sections contain language which by necessarily implied legislative intent creates liens continuing and paramount to all other liens.

Linn County v Steele, 223-864; 273 NW 920; 110 ALR 1492

7206 Lien follows building assessed as personalty.

Statute declares lien—priority. Unless so expressed by statute, taxes are neither a lien on property assessed nor on taxpayer's other property and this cannot be enlarged by judicial construction, but whether such a lien is paramount to other liens depends on legislative intent ascertained or implied from the statute, which need not contain specific words indicating a "first lien" in order to create priority.

Linn County v Steele, 223-864; 273 NW 920; 110 ALR 1492

Lien and priority—conditional sale lien—superiority of tax lien. Taxes assessed (§§7205, 7206, C., '35) after execution of a conditional sale contract on a stock of goods and other personalty are superior to the lien of such contract inasmuch as (1) historically these sections were contained in a single section; (2) one section already carries a construction creating a lien paramount to all other liens; (3) necessarily security of the revenue is an incident of sovereignty; and (4) the above sections contain language which by necessarily implied legislative intent creates liens continuing and paramount to all other liens.

Linn County v Steele, 223-864; 273 NW 920; 110 ALR 1492

7207 Payment—what receivable.

Atty. Gen. Opinion. See '34 AG Op 324

What constitutes legal payment. The act of a county treasurer in forwarding to a banker officially signed tax receipts, with implied authority to the banker to deliver the receipts to the various taxpayers on payment to the banker of the amount called for by the respective receipts, and the act of the taxpayer in paying the amount and receiving his receipt, constitute a legal payment of the taxes, even tho, because of the insolvency of the bank, the county treasurer never actually received the money.

Rundell v Boone Co., 204-965; 216 NW 122

Uncashed check. The uncashed check of a taxpayer to the county treasurer in payment of taxes does not constitute such payment, even tho said check would have been paid had it been properly presented, and even tho the treasurer, as a matter of bookkeeping, treated said check as cash and prepared receipts accordingly.

Morgan v Gilbert, 207-725; 223 NW 483

7208 Certain warrants receivable.

Atty. Gen. Opinions. See '32 AG Op 258; '34 AG Op 324

7209 Warrants not receivable.

Atty. Gen. Opinion. See '34 AG Op 324

7210 Payment—installments.

Atty. Gen. Opinions. See '34 AG Op 324; AG Op Nov. 6, '39, March 13, '40

ANALYSIS

I PAYMENT IN GENERAL
II RIGHT OR DUTY OF PARTICULAR PARTIES TO PAY
III CONTRACT TO PAY
IV PAYMENT BY NONOWNER AND REIMBURSEMENT THEREFOR

I PAYMENT IN GENERAL

Inadequate payment. It is idle for one to assert that he has paid all taxes due against real estate when he concededly has not paid matured special assessments on the land.

Wren v Berry, 214-1191; 243 NW 375

Uncashed check. The uncashed check of a taxpayer to the county treasurer in payment of taxes does not constitute such payment, even tho said check would have been paid, had

it been properly presented, and even tho the treasurer, as a matter of bookkeeping, treated said check as cash, and prepared receipts accordingly.

Morgan v Gilbert, 207-725; 223 NW 483

Recovery of tax paid—mandamus as remedy—voluntary payment—effect. Taxes illegally exacted through county auditor's failure to comply with statute requiring budget deduction of moneys and credits tax may be recovered in a mandamus action against the board of supervisors, even tho paid voluntarily and without protest.

Hewitt v Keller, 223-1372; 275 NW 94

Intermingled legal and illegal taxes—procedure. When a taxpayer claims that a separable part of his consolidated tax is illegal, he has the legal right to pay the concededly legal part in whole, or by statutory installments, and to test the legality of the untendered part by proper proceedings. It follows that if he is unsuccessful in his test suit he is liable for interest or penalty on the untendered tax only.

Chi. RI Ry. v Slate, 213-1294; 241 NW 398

II RIGHT OR DUTY OF PARTICULAR PARTIES TO PAY

Discussion. See 22 ILR 39—State taxation and federal agencies

General taxes—life tenant to pay. Principle recognized that a life tenant is under primary duty to pay general taxes.

Kinnett v Ritchie, 223-543; 273 NW 175

When taxes "due". An obligation on the part of a receiver to pay taxes on mortgaged property "as they become due" embraces taxes which are owing on and after the first Monday in January following the levy, even tho they are not delinquent. In other words, nondelinquent taxes are due in the sense that they are owing.

Hawkeye Ins. v Inv. Co., 217-644; 251 NW 874

Foreclosure sale—protection of mortgagee against taxes. A mortgagee who bids in the property under a deficiency bid at foreclosure sale without at any time protecting himself against delinquent taxes as he might have done under the mortgage and foreclosure decree, and later takes a sheriff's deed to the property, may not have the rents collected during the redemption period applied to the discharge of said taxes.

Hartford Ins. v Alexander, 215-573; 246 NW 204

Redemption—law remedy to remove tax sale cloud—equity unavailing. A property owner, presumed to have been informed of his tax assessments, knowing that they will become due and payable without demand, yet allowing the taxes to become delinquent and the property to go to tax sale, may not resort to equity to remove the cloud on his title when he has by redemption a plain, speedy, and adequate remedy at law.

Jones v Mills County, 224-1375; 279 NW 96

Paying taxes before attacking tax deed—valid tender sufficient. Statute requiring payment of taxes as a prerequisite to attacking a tax deed, §7290, C., '35, does not preclude questioning the title by a person who repeatedly offers to do equity by tendering the whole of the taxes legally and rightfully due together with interest and penalties thereon.

Jordan v Beeson, 225-460; 280 NW 625

III CONTRACT TO PAY

Recovery of taxes paid for another. Instruction requiring proof of defendant's oral request that plaintiff pay taxes, promise to repay and payment by plaintiff in reliance thereon was proper under the pleading and proof.

Nelson v Hemminger, (NOR); 224 NW 49

IV PAYMENT BY NONOWNER AND REIMBURSEMENT THEREFOR

Assignment pending action—right of grantee. One who becomes an assignee of a real estate mortgage after the commencement of a successful action to set aside the mortgage as fraudulent (the action being legally lis pendens by proper index) and who, during the trial of said action, to which he had been made a party, redeems the land from tax sale, must be deemed a mere volunteer payer of taxes with no right to have the amount paid by him made a lien on the land.

Clarkson v McCoy, 215-1008; 247 NW 270

7211 When delinquent.

Atty. Gen. Opinions. See '28 AG Op 315; AG Op March 13, '40

Conditional limitation — obligation to pay taxes. A testamentary proviso which provides that if the life tenant "neglects to pay the taxes on said real estate within six months after they become delinquent", the life estate shall automatically terminate, must be deemed to refer to all the taxes payable during a given year and not to an installment thereof. It follows that a six months delinquency on the first yearly installment of taxes works no forfeiture.

Churchill v Bank, 211-1168; 235 NW 480

Payment — intermingled legal and illegal taxes—procedure. When a taxpayer claims that a separable part of his consolidated tax is illegal, he has the legal right to pay the concededly legal part in whole, or by statutory installments, and to test the legality of the untendered part by proper proceedings. It follows that if he is unsuccessful in his test

suit he is liable for interest or penalty on the untendered tax only.

Chicago, RI Ry. v Slate, 213-1294; 241 NW 393

7214 Interest as penalty.

Atty. Gen. Opinions. See '25-26 AG Op 27, 115; '28 AG Op 355, 400; '34 AG Op 79, 180; '38 AG Op 568; AG Op Sept. 1, '39, March 13, '40

Intermingled legal and illegal taxes—procedure. When a taxpayer claims that a separable part of his consolidated tax is illegal, he has the legal right to pay the concededly legal part in whole, or by statutory installments, and to test the legality of the untendered part by proper proceedings. It follows that if he is unsuccessful in his test suit he is liable for interest or penalty on the untendered tax only.

Chicago, RI Ry. v Slate, 213-1294; 241 NW 393

When taxes "due". An obligation on the part of a receiver to pay taxes on mortgaged property "as they become due" embraces taxes which are owing on and after the first Monday in January following the levy, even tho they are not delinquent. In other words, nondelinquent taxes are due in the sense that they are owing.

Hawkeye Ins. v Inv. Co., 217-644; 251 NW 874

7215 Penalty on personal taxes.

Atty. Gen. Opinions. See '28 AG Op 230, 400; '34 AG Op 106, 711; AG Op Jan. 18, '39, March 27, '40

Penalties accruing during unsuccessful litigation to defeat tax. A taxpayer is chargeable with the statutory penalties accruing during the pendency of his unsuccessful litigation to defeat the tax.

Iowa N. Bk. v Stewart, 214-1229; 232 NW 445

See 284 US 239

7217 Assessment of migratory property of nonresident.

Atty. Gen. Opinion. See '30 AG Op 101

7222 Collectors—appointment.

Atty. Gen. Opinions. See '25-26 AG Op 77; '34 AG Op 711; '36 AG Op 167; AG Op March 27, '40

7223 Compensation and accounting.

Atty. Gen. Opinions. See '28 AG Op 220; '30 AG Op 324; '34 AG Op 711; '36 AG Op 167; '38 AG Op 164, 558; AG Op Jan. 18, '39

7224 Sheriff or constable as collector.

Atty. Gen. Opinions. See '38 AG Op 164; AG Op Dec. 20, '39, March 27, '40, May 3, '40

7225 Personal property tax collectors.

Atty. Gen. Opinions. See '28 AG Op 314; '32 AG Op 51; '34 AG Op 711; '36 AG Op 164; '38 AG Op 586; AG Op Aug. 1, '39; AG Op March 27, '40

7226 Current taxes—when delivered for collection.

Atty. Gen. Opinions. See '28 AG Op 314; '30 AG Op 324; '38 AG Op 586

7227 Interest and penalties — apportionment—compensation of collectors.

Atty. Gen. Opinions. See '25-26 AG Op 118; '28 AG Op 170

7232 Monthly apportionment.

Atty. Gen. Opinions. See '25-26 AG Op 118; '36 AG Op 530

7233 Misapplied interest or penalty.

Atty. Gen. Opinions. See '25-26 AG Op 118, 126

7235 Refunding erroneous tax.

Atty. Gen. Opinions. See '28 AG Op 50, 177, 331; '30 AG Op 51, 87, 171, 206, 321; '32 AG Op 196; '34 AG Op 275, 580, 589; '38 AG Op 14, 109, 174, 405, 414, 697; AG Op Feb. 1, '39, Feb. 16, '39, Nov. 6, '39

ANALYSIS

I REFUND IN GENERAL
II RIGHT TO REFUND
III NONRIGHT TO REFUND
IV SOURCE OF REFUND

Purchaser indemnified for wrongful sale. See under §7293

I REFUND IN GENERAL

Discussion. See 16 ILR 381—Restraint and recovery of taxes

Refunding erroneous tax — administrative remedies must be exhausted before resorting to court. Under the statute providing for refunding erroneous tax, stockholders of a national bank are not entitled to money judgment in alternative of statute. All adequate administrative remedies must be exhausted to recover tax illegally collected before resorting to the courts.

First Nat. Bk. v Harrison County, 57 F 2d, 56
Hammerstrom v Bank, 81 F 2d, 628

New action after failure of former action. An action in equity to mandamus the board of supervisors to order the refund of a tax which has been illegally exacted from plaintiff may not be deemed a continuation of a former action at law by the same plaintiff against the county and its treasurer for a personal judgment for the amount of said illegally exacted tax.

Murphy v Board, 205-256; 215 NW 744

Intermingled legal and illegal taxes—procedure. When a taxpayer claims that a separable part of his consolidated tax is illegal, he has the legal right to pay the concededly legal part in whole, or by statutory installments, and to test the legality of the untendered part by proper proceedings. It follows that if he is unsuccessful in his test suit he is liable for interest or penalty on the untendered tax only.

Chi. RI Ry. v Slate, 213-1294; 241 NW 398

Legalizing tax levy after invalidating ruling by court. A legislative act which legalizes a tax levy after the appellate court has ruled (but before entry of judgment) that the taxpayer is entitled to a refund of the tax paid, because the tax levy was void, owing to the absence of an authorizing statute, neither disturbs any vested interest of the taxpayer's nor constitutes an unconstitutional interference with the judiciary.

Chi. RI Ry. v Streepy, 211-1334; 236 NW 24

II RIGHT TO REFUND

Recovery of tax paid—mandamus as remedy —voluntary payment—effect. Taxes illegally exacted through county auditor's failure to comply with statute requiring budget deduction of moneys and credits tax may be recovered in a mandamus action against the board of supervisors, even tho paid voluntarily and without protest.

Hewitt v Keller, 223-1372; 275 NW 94

Mandamus as exclusive remedy. A taxpayer may not maintain an action for a general money judgment against a county, arising out of the fact that he has paid in the same year and on the same property an illegal bridge tax levied by a city and a legal bridge tax levied by the board of supervisors. Whatever remedy he has against the county, if any, must be worked out through mandamus to compel a refund.

Murphy v Berry, 200-974; 205 NW 777
Schoenwetter v Oxley, 213-528; 239 NW 118

Unallowable joinder of law and mandamus. An action at law against a county for judgment for taxes illegally exacted may not be joined with an equitable action of mandamus for an order on the board of supervisors directing the county treasurer to refund such taxes.

First N. Bk. v Board, 217-702; 247 NW 617; 250 NW 887

Holder of illegal certificate. The holder of a tax sale certificate issued at an illegal sale of real estate for personal taxes not entered on the delinquent personal tax list, is a "taxpayer" within the statute giving a taxpayer the right to a refund of the money paid.

Schoenwetter v Oxley, 213-528; 239 NW 118

III NONRIGHT TO REFUND

Refund — waiver. An insurance company which lists its corporate stock to itself as personal property, and at an inadequate value which it induces the assessor to accept, all on the assumption that it was subject to the consolidated levy, and thereafter interposes no counter objection, may neither obtain a refund for taxes paid nor enjoin the collection of taxes unpaid, on the theory that the property was in fact only subject to a five-mill levy as moneys and credits.

Farmers Ins. v County, 202-444; 208 NW 929

Voluntary payment on excessive assessment —later reduction by state board—effect. A taxpayer who makes no objection to the local board of review as to the valuation which has been duly placed on his real estate by the assessor for assessment purposes, and voluntarily pays the taxes duly levied during the two following years on said valuation, may not later, and after obtaining an order from the state board of assessment and review reducing said assessed valuation, successfully contend that any part of said voluntarily paid taxes was "erroneously or illegally exacted or paid" within the meaning of this section.

Cedar Rapids Co. v Stirm, 222-206; 268 NW 562

School fund estimates under local budget law omitting money on hand—taxes valid—no refund. School districts, in submitting their budgets for their fiscal year beginning July 1, are not required to include money on hand derived from taxes levied and estimated two years before and collected a year later to be expended during the current school year, and taxes collected accordingly will not be refunded in a mandamus action.

Lowden v Woods, 226-425; 284 NW 155

IV SOURCE OF REFUND

No annotations in this volume

7236 Sale for erroneous tax.

Atty. Gen. Opinions. See '32 AG Op 29; '38 AG Op 65, 109

7237 Remission in case of loss.

Atty. Gen. Opinions. See '25-26 AG Op 333; '28 AG Op 244; '30 AG Op 101, 136, 290, 352; '34 AG Op 555; '36 AG Op 48; '38 AG Op 9, 14

CHAPTER 347

TAX SALE

7242 Time of sale—adjournment.

Atty. Gen. Opinion. See '32 AG Op 147

7244 Annual tax sale.

Atty. Gen. Opinions. See '28 AG Op 48, 268, 434; '32 AG Op 147, 267, 278; '34 AG Op 79, 465; '36 AG Op 319; '38 AG Op 227, 697, 699; AG Op Nov. 6, '39

ANALYSIS

I SALES UNDER PRIOR STATUTES
II SALES GENERALLY
III PUBLIC SALE
IV IRREGULAR OR VOID SALES

I SALES UNDER PRIOR STATUTES

Statutes part of special assessment certificate holder's contract—no effect by amending tax sale statute. The right of a special assessment certificate holder to take advantage of statutes providing that special assessments be collected in the same manner as ordinary taxes, and to have the property sold to pay assessments, was a part of his contract when he purchased the certificates, and was not defeated when another statute providing for tax sales was amended to prevent the tax sale of property against which the county holds a tax sale certificate.

Bennett v Greenwalt, 226-1113; 286 NW 722

II SALES GENERALLY

Sale for tax for one year discharges lien of tax for prior years. A sale of land for taxes thereon for a certain year discharges the lien of personal taxes levied against the owner for prior years.

In re Hager, 212-851; 235 NW 563

Continuing tax sale under statute. A county treasurer may, under the statute, without setting a specific date, continue a tax sale for cause from the date first advertised and the later sale will be valid.

Freemyer v Taylor County, 224-401; 275 NW 718

Good cause for continuing—economic emergency—governor's proclamation. Good cause for continuing a tax sale is shown by the governor's proclamation of the existence of a great economic emergency also recognized by the legislative and judicial branches of the government.

Freemyer v Taylor County, 224-401; 275 NW 718

Judgment—substitution of county treasurer as defendant without notice—effect. A default judgment entered against a county treasurer who had been substituted as defendant in lieu of a former treasurer, in an action to enjoin the sale of land for taxes, must be set aside when the substitution is made without the service of original notice upon him and without knowledge on his part, even tho the former treasurer had been negligent in not entering an appearance; and especially is this true when the application to set aside is timely and accompanied by an affidavit of merit and an apparently good answer.

Dewell v Suddick, 211-1352; 232 NW 118

Tax sale register as evidence of tax certificates—not evidence of tax deeds. In an action to enjoin a county treasurer from selling at tax sale land on which the county held either certificates of tax sale or tax deeds, books designated as "tax sale registers" containing the county record of tax sales were competent evidence of the issuance of tax certificates to the county, altho not evidence of the county's alleged tax deeds.

Bennett v Greenwalt, 226-1113; 286 NW 722

Special assessment tax sales—injunction decree not justified by pleadings. When the petition asked for an injunction restraining the county treasurer from selling at tax sale lands upon which Polk county holds tax deeds, it was error to grant an injunction restraining tax sales for special assessments regardless of who the owner of the tax deed might be, even tho other general relief was asked by the petition, the petitions of intervention, and the answer, as the court should not render a judgment which has no foundation in the pleading and is not justified by the evidence, issues, or theory upon which the case was tried.

Bennett v Greenwalt, 226-1113; 286 NW 722

Amendment of tax sale statute—no implied amendment of special assessment sale statute. When a statute providing for tax sales was amended to prevent the sale of property against which the county held tax sale certificates, the amendment did not apply to other statutes requiring the county treasurer to sell property for delinquent special assessments, as an act amending a specified statute cannot be construed as amending an unmentioned statute, and repeal of statutes by implication is not favored.

Bennett v Greenwalt, 226-1113; 286 NW 722

Drainage assessments—tax sale for nonpayment. Tax sale of land for nonpayment of drainage assessments is not an action barred by statute of limitations, and the duration of a lien for such assessment or the time within which payment may be enforced is not limited by statute.

Whisenand v Van Clark, 227-800; 288 NW 915

III PUBLIC SALE

No annotations in this volume

IV IRREGULAR OR VOID SALES

Partially void tax sale. Mandamus (assuming the propriety of the remedy) will not lie to wholly cancel a tax sale which is only partially void.

Wren v Berry, 214-1191; 243 NW 375

Voidable sale—terms on which set aside. A tax sale, tho legally voidable, will not be set aside in equity at the instance of the property owner unless he pays, or binds himself to pay, the taxes legally assessed against the property.

Witmer v Polk Co., 222-1075; 270 NW 323

Sale for delinquent taxes not carried forward—setting aside—insufficient tender. A tax sale for delinquent taxes not carried forward will not be set aside in equity nor the deed issuance restrained when the titleholder's offer to do equity by tendering such taxes as "constitute a valid lien" and "actually paid" by the purchaser is a disingenuous tender.

McClelland v Polk County, 225-177; 279 NW 423

Mortgagee as subsequent titleholder denying tax deed validity—delinquent tax tender unnecessary. A mortgagee, being required only to pay the taxes levied on his mortgage, not being the realty titleholder when certain delinquent real estate taxes were levied, and being under no legal obligation to pay such delinquent taxes, is not, after having acquired the land by deed from the mortgagor subsequent to an invalid tax sale, required to tender such delinquent taxes as a condition to defending and denying in a quiet title action the validity of the tax deed issued for such taxes.

Bittle v Cain, 224-1332; 278 NW 608

Tax sales enjoined—error as to persons not parties to action. An injunction restraining tax sales of all property against which special assessment certificate holders had liens was erroneous insofar as it deprived certificate holders, who were not parties to the action and over whom the court had no jurisdiction, of their right to have the property sold to pay the special assessments.

Bennett v Greenwalt, 226-1113; 286 NW 722

Sale for delinquent taxes not brought forward—deed invalidity. A tax deed is invalid as a basis for a quiet title action against the legal titleholder who asks no relief except undisturbed possession where, prior to the sale, the delinquent taxes supporting such deed have not been brought forward by the treasurer and entered on the current tax list opposite the property on which it is a lien.

Bittle v Cain, 224-1332; 278 NW 608

7246 Notice of sale—service.

Atty. Gen. Opinions. See '25-26 AG Op 213; '32 AG Op 185; AG Op Sept. 1, '39, Oct. 10, '39

Error in name of owner. A tax sale is not void because the real estate was advertised and sold as belonging to one who owned only a minor part thereof.

Wren v Berry, 214-1191; 243 NW 375

Tax sale—general and special taxes—single sale—en masse sale rule not applicable. An en masse sale of different tracts of land for taxes is void, but land in one tract is not divided into separate tracts for tax sale purposes by virtue of separate assessments of general and special taxes, altho the specials covered only part of the tract.

White v Hammerstrom, 224-1041; 277 NW 483

Correction by resale at adjourned sale.

Tesdell v Greenwalt, 228- ; 290 NW 676

Sale—tax tender as doing equity before enjoining deed issuance. One who allows his property to go to tax sale and later seeks to enjoin the county from issuing a tax deed claiming a void sale must, if seeking equity, do equity by tendering the amount of the taxes due and attempt to make redemption as by statute provided.

Jones v Mills County, 224-1375; 279 NW 96

Amendment of tax sale statute. When a statute providing for tax sales was amended to prevent the sale of property against which the county held tax sale certificates, the amendment did not apply to other statutes requiring the county treasurer to sell property for delinquent special assessments, as an act amending a specified statute cannot be construed as amending an unmentioned statute, and repeal of statutes by implication is not favored.

Bennett v Greenwalt, 226-1113; 286 NW 722

Statutes part of special assessment certificate holder's contract. The right of a special assessment certificate holder to take advantage of statutes providing that special assessments be collected in the same manner as ordinary taxes, and to have the property sold to pay assessments, was a part of his contract when he purchased the certificates, and was not defeated when another statute providing for tax sales was amended to prevent the tax sale of property against which the county holds a tax sale certificate.

Bennett v Greenwalt, 226-1113; 286 NW 722

7247 Costs.

Atty. Gen. Opinion. See '32 AG Op 185

7250 Method of describing lands, etc.

Additional annotations. See under §7106, Vol I

Fatally indefinite description of land. Principle reaffirmed that a tax deed is void when the land is so defectively described as not to identify the land.

Geil v Babb, 214-263; 242 NW 34

7251 Irregularities in advertisement.

Error in name of owner—effect. A tax sale is not void because the real estate was advertised and sold as belonging to one who owned only a minor part thereof.

Wren v Berry, 214-1191; 243 NW 375

7252 Offer for sale.

Atty. Gen. Opinions. See '28 AG Op 295; AG Op May 4, '39

Taxes suspended by appeal—effect. There cannot be a valid sale of real estate for taxes a part of which consists of special assessments for paving, and which part has been suspended by an appeal to the district court.

Fidelity Inv. v White, 208-519; 223 NW 884

Tax sale—general and special taxes—single sale—en masse sale rule not applicable. An en masse sale of different tracts of land for taxes is void, but land in one tract is not divided into separate tracts for tax sale purposes by virtue of separate assessments of general and special taxes, altho the specials covered only part of the tract.

White v Hammerstrom, 224-1041; 277 NW 483

Tax sale—en masse sale of separate tracts—deed recitals conclusive. The sale of more than one tract or parcel of real estate en masse, for the gross sum of taxes thereon, being contrary to the mandatory provisions of statute, voids the entire sale and deeds based thereon. Tax deed recitals relating to whether the sale was separately or en masse are conclusive evidence thereof.

Jordan v Beeson, 225-460; 280 NW 625

Tax titles—separate tracts—lots with street between used as single unit. A tax deed, issued pursuant to an en masse sale of land, describes two separate tracts of land, when it lists land on two sides of a dedicated street, and the separateness of the tracts is neither affected by fact that the entire tract, including the street, has been used as a pasture for 37 years, nor by the circumstance that the street may never have been accepted, or, if so, had been abandoned, because the tax deed did not convey the land occupied by the street.

Jordan v Beeson, 225-460; 280 NW 625

Tax sale—mandatory sale method governs public bidder law. The mandatory directions as to the manner of offering and selling real estate for taxes, control the public bidder law, §7255, C., '35, where the treasurer is likewise directed to offer and sell.

Jordan v Beeson, 225-460; 280 NW 625

Amendment of tax sale statute. When a statute providing for tax sales was amended to prevent the sale of property against which the county held tax sale certificates, the amendment did not apply to other statutes requiring the county treasurer to sell property for delinquent special assessments, as an act amending a specified statute cannot be construed as amending an unmentioned statute, and repeal of statutes by implication is not favored.

Bennett v Greenwalt, 226-1113; 286 NW 722

Statutes part of special assessment certificate holder's contract. The right of a special assessment certificate holder to take advantage of statutes providing that special assessments be collected in the same manner as ordinary taxes, and to have the property sold to pay assessments, was a part of his contract when he purchased the certificates, and was not defeated when another statute providing for tax sales was amended to prevent the tax sale of property against which the county holds a tax sale certificate.

Bennett v Greenwalt, 226-1113; 286 NW 722

7253 Bid—purchaser.

Atty. Gen. Opinions. See '32 AG Op 142; '36 AG Op 319; '38 AG Op 10; AG Op Feb. 8, '39

Collusive deed—effect. A landowner who permits his land to be sold at tax sale, pursuant to an understanding with the purchaser that the latter will, after obtaining a tax deed, quitclaim to said landowner, neither acquires by the carrying out of said understanding, a new title, nor any betterment of his old title. By such transaction the landowner has simply paid his taxes.

Harrington v Foster, 220-1066; 264 NW 51

Invalid tax sale and deed in interest of mortgagee. A mortgagor and mortgagee who enter into and execute a scheme to have one of their employees bid in the property at tax sale and secure a tax deed and assign it to the mortgagee in the effort to cut out other lienholders, will be held to have accomplished no more than a payment of the taxes. A tax certificate and a deed issued under such circumstances are void.

Hawkeye Ins. v Valley-Des M. Co., 220-556; 260 NW 669; 105 ALR 1018

Tax sales—who may purchase. Under the statutes of this state any person may become a purchaser at tax sale, and the only statutory exception is found in §7261, C., '39.

Teget v Lambach, 226-1346; 286 NW 522

Tax sales—who may not purchase. Persons who by reason of their interest in the premises and their relationship to others interested therein, that may not for equitable reasons become purchasers at a tax sale, include persons whose duty it is to pay the taxes or who have such an interest in the property that they might redeem the same from tax sale and save themselves from loss or injury, or those lienholders who may pay the taxes and are given a preferred lien over other lienholders and the titleholder for the amount of taxes paid, and persons occupying fiduciary relation-

ships, such as agents, attorneys, guardians, trustees, etc., who may not violate their trust by becoming purchasers at tax sale of the trust property.

Teget v Lambach, 226-1346; 286 NW 522

Drainage district bondholder — permissible purchaser at tax sale. Bondholders of a drainage district, by virtue of their ownership of such bonds, do not have an interest in such drainage district land sold for taxes which will disqualify them from becoming purchasers at tax sale.

Teget v Lambach, 226-1346; 286 NW 522

7255 "Scavenger sale"—notice.

Atty. Gen. Opinions. See '25-26 AG Op 231, 474; '28 AG Op 270, 425; '32 AG Op 185; '36 AG Op 319; '38 AG Op 103, 542, 575, 699; AG Op Feb. 8, '39

Presumption of regularity. When a county treasurer sells lands to the highest bidder at "scavenger" tax sale it will be presumed, in the absence of any showing to the contrary, that said lands were duly and unsuccessfully offered for sale at prior tax sales as required by statute.

Board v Stone, 212-660; 237 NW 478

Notice—sufficiency. A general notice by a county treasurer, duly published as provided by statute, to the effect that he will, at a named regular tax sale, "sell all real estate which shall have been previously advertised and unsuccessfully offered for sale for two years or more" is all-sufficient.

Board v Stone, 212-660; 237 NW 478

Inadequacy of bid. A bona fide sale of land at "scavenger" sale for delinquent tax will not be deemed void as against public policy because of inadequacy of the bid, in view of the fact (1) that the public authorities have a legal right to bid at said sale, and (2) that the treasurer is under a mandatory duty to sell.

Board v Stone, 212-660; 237 NW 478

Drains—nonduty of supervisors to purchase certificate. The statutory provision, that the board of supervisors or the drainage trustees "may" purchase an outstanding certificate evidencing a sale of land for the nonpayment of drainage assessments, simply invests the board or trustees with discretion so to purchase. No mandatory duty so to purchase in order to protect the bondholder is imposed, even tho the bondholder must look solely to assessments for payment of his bond.

Bechtel v Board, 217-251; 251 NW 633

Tax sale—mandatory sale method governs public bidder law. The mandatory directions of §7252, C., '35, as to the manner of offering and selling real estate for taxes, control the public bidder law, §7255, C., '35, where the treasurer is likewise directed to offer and sell.

Jordan v Beeson, 225-460; 280 NW 625

Tax titles—prerequisite to defeat deed—nonapplicability without valid sale. Statute specifying prerequisites to defeat tax title, §7289, subsec. 4, will not bar recovery by one claiming title adverse to the treasurer's deed, when there has been no valid tax sale.

Jordan v Beeson, 225-460; 280 NW 625

Tax titles—paying taxes before attacking tax deed—valid tender sufficient. Statute requiring payment of taxes as a prerequisite to attacking a tax deed, §7290, does not preclude questioning the title by a person who repeatedly offers to do equity by tendering the whole of the taxes legally and rightfully due together with interest and penalties thereon.

Jordan v Beeson, 225-460; 280 NW 625

7255.1 County as purchaser.

Atty. Gen. Opinions. See '32 AG Op 32; '36 AG Op 260; '38 AG Op 10, 97, 111, 153, 203, 266, 287, 354, 396, 417, 489, 534, 542, 575, 621, 699; AG Op May 24, '39

Title of act. The provisions of the so-called "public bidder law" (46 GA, ch 83) were properly classified in the title to the act as "relating to taxes and the collection thereof" without any reference in the title to chapter 449 of the Code, tho the act itself did make reference to and did effect some change in said chapter.

Witmer v Polk County, 222-1075; 270 NW 323

Tax sale—mandatory sale method governs public bidder law. The mandatory directions of §7252, C., '35, as to the manner of offering and selling real estate for taxes, control the public bidder law, §7255, C., '35, where the treasurer is likewise directed to offer and sell.

Jordan v Beeson, 225-460; 280 NW 625

Tax sale—en masse sale of separate tracts—deed recitals conclusive. The sale of more than one tract or parcel of real estate en masse, for the gross sum of taxes thereon, being contrary to the mandatory provisions of statute, voids the entire sale and deeds based thereon. Tax deed recitals relating to whether the sale was separately or en masse are conclusive evidence thereof.

Jordan v Beeson, 225-460; 280 NW 625

Tax titles—separate tracts—lots with street between used as single unit. A tax deed, issued pursuant to an en masse sale of land, describes two separate tracts of land, when it lists land on two sides of a dedicated street, and the separateness of the tracts is neither affected by fact that the entire tract, including the street, has been used as a pasture for 37 years, nor by the circumstance that the street may never have been accepted, or, if so, had been abandoned, because the tax deed did not convey the land occupied by the street.

Jordan v Beeson, 225-460; 280 NW 625

Purchase by county—amount of bid. The inclusion in tax sale of an installment on a special assessment bond was permissible under §6037, C., '39, and did not render sale void where county bid only the amount of the general taxes, interest, penalty and costs pursuant to §7255.1, C., '39, authorizing purchase by county.

Fleck v Duro, 227-356; 288 NW 426

7255.2 In special charter cities.

City as assignee for specials. An assignment of a tax sale certificate of purchase by county to city was not premature under chapter 191 of the 47th GA authorizing redemption in installments from public bidder where owner of property failed to take advantage of such act within the 6-months period prescribed therein, and the city was entitled to such assignment because of special assessment due and unpaid on the property.

Fleck v Duro, 227-356; 288 NW 426

7255.3 Applicable statute.

Tax sale certificate assignment—city as assignee. An assignment of a tax sale certificate of purchase by county to city was not premature under chapter 191 of the 47th GA authorizing redemption in installments from public bidder where owner of property failed to take advantage of such act within the 6-months period prescribed therein, and the city was entitled to such assignment because of special assessment due and unpaid on the property.

Fleck v Duro, 227-356; 288 NW 426

7256 Unavailable tax—credit given.

Atty. Gen. Opinions. See '28 AG Op 290; '30 AG Op 255; '36 AG Op 530

7257 Resale.

Atty. Gen. Opinion. See '34 AG Op 98

Resale to correct previous error.

Tesdell v Greenwalt, 228- ; 290 NW 676

Timely payment of bid. The statutory requirement that the successful bidder at tax sale shall "forthwith" pay the amount of his bid is complied with by making payment when the treasurer issues the certificate of purchase.

Board v Stone, 212-660; 237 NW 478

7258 Record of sales.

Atty. Gen. Opinion. See '38 AG Op 111

Unlawful record invalidates deed. Tax-sale entries required by law to be made by the county auditor in the "sales book" must be made in ink (§7276-c1, C., '31 [§7276.1, C., '39]) and if not so made the right to redeem continues. It follows that tax deeds issued at a time when the right to redeem exists are void.

Huiskamp v Breen, 220-29; 260 NW 70

7261 Fraud of officers.

Tax sales—who may purchase. Under the statutes of this state any person may become a purchaser at tax sale, and the only statutory exception is found in this section.

Teget v Lambach, 226-1346; 286 NW 522

Tax sales—who may not purchase. Persons who by reason of their interest in the premises and their relationship to others interested therein, that may not for equitable reasons become purchasers at a tax sale, include persons whose duty it is to pay the taxes or who have such an interest in the property that they might redeem the same from tax sale and save themselves from loss or injury, or those lienholders who may pay the taxes and are given a preferred lien over other lienholders and the titleholder for the amount of taxes paid, and persons occupying fiduciary relationships, such as agents, attorneys, guardians, trustees, etc., who may not violate their trust by becoming purchasers at tax sale of the trust property.

Teget v Lambach, 226-1346; 286 NW 522

Drainage district bondholder—permissible purchaser at tax sale. Bondholders of a drainage district, by virtue of their ownership of such bonds, do not have an interest in such drainage district land sold for taxes which will disqualify them from becoming purchasers at tax sale.

Teget v Lambach, 226-1346; 286 NW 522

7262 Subsequent sale.

Atty. Gen. Opinions. See '32 AG Op 278; '34 AG Op 465; '38 AG Op 890; AG Op Nov. 6, '39

Continuing under statute. A county treasurer may, under the statute, without setting a specific date, continue a tax sale for cause from the date first advertised and the later sale will be valid.

Freemyer v Taylor County, 224-401; 275 NW 718

Good cause for continuing—economic emergency—governor's proclamation. Good cause for continuing a tax sale is shown by the governor's proclamation of the existence of a great economic emergency also recognized by the legislative and judicial branches of the government.

Freemyer v Taylor County, 224-401; 275 NW 718

7263 Certificate of purchase.

Certificate holder protected against waste. See §12410, Vol I

Atty. Gen. Opinions. See '36 AG Op 319; AG Op May 4, '39

Setting aside—inadequate ground. The purchaser of real estate at execution sale may not have certificates of tax sale of the property set aside, and the issuance of tax deed enjoined on allegation and proof that the owner of the

property conspired with another to permit the property to go to tax sale and ultimate deed, because such conspiracy was quite harmless in view of the right of the execution purchaser to redeem from the tax sale.

Hanby v Snyder, 212-845; 237 NW 339

Certificate not merged by quitclaim deed. A tax sale certificate is not merged in a subsequently acquired quitclaim deed from the owner of the property.

Hanby v Snyder, 212-845; 237 NW 339

Right to impeach action of trustee. The act of a trustee in individually buying in property at tax sale and receiving a tax sale certificate when a mortgage on the property constituted part of the trust fund, is unimpeachable except by the cestui que trust; in other words, the subsequent purchaser of said property at foreclosure sale may not impeach such act, especially when such purchaser had both actual and constructive knowledge when he purchased that the taxes had not been paid.

Eyres v Koehler, 212-1290; 237 NW 351

Invalid tax sale and deed in interest of mortgagee. A mortgagor and mortgagee who enter into and execute a scheme to have one of their employees bid in the property at tax sale and secure a tax deed and assign it to the mortgagee in the effort to cut out other lienholders, will be held to have accomplished no more than a payment of the taxes. A tax certificate and a deed issued under such circumstances are void.

Hawkeye Ins. v Valley-Des Moines Co., 220-556; 260 NW 669; 105 ALR 1018

Tax certificate priority waived—extension of time of payment of mortgage—sufficient consideration. Extension of the time of payment on bonds secured by mortgage held sufficient consideration to support waiver of priority of tax certificate owned by mortgagor's daughter.

Beal v Milliron, (NOR); 267 NW 83

Collusive deed—effect. A landowner who permits his land to be sold at tax sale, pursuant to an understanding with the purchaser that the latter will, after obtaining a tax deed, quitclaim to said landowner, neither acquires by the carrying out of said understanding, a new title, nor any betterment of his old title. By such transaction the landowner has simply paid his taxes.

Harrington v Foster, 220-1066; 264 NW 51

Mandamus—defect of parties—effect. In mandamus to obtain an order canceling a tax sale and the certificate issued thereunder (assuming the propriety of such action) the court manifestly cannot disturb the certificate holder when he is not a party to the action.

Wren v Berry, 214-1191; 243 NW 375

7265 Assignment—presumption from deed recitals.

Paramount right of holder. The holder of special paving assessment certificates who obtains an assignment of a tax sale certificate, issued on a sale of the lots or land for general taxes, may be compelled by mandamus to reassign said tax sale certificate (on proper payment) to the holder of special sewer assessment certificates which affect the same lots or land and which latter certificates are legally prior in point of time and right to said paving certificates.

Inter-Ocean Co. v Dickey, 222-995; 270 NW 29

Tax titles—mother paying on contract while daughter gets tax deed—invalidity. A tax deed will be set aside when a mother buying property on contract, allows it to go to tax sale, then contracts with the certificate purchaser to buy the certificate while continuing payments to the landowner, assuring said landowner that she is redeeming, yet, when the certificate is acquired, a daughter's name is inserted and treasurer's deed issued thereto, the mother must be held to have conspired with the daughter to defraud the landowner and to have accomplished no more than a redemption for herself.

Blotcky v Silberman, 225-519; 281 NW 496

Certificate assignment — validity. In the statute providing that tax sale certificate of purchase shall be assignable by indorsement and by entry in tax sale register, and that "when such assignment is so entered" it shall vest in assignee all right of assignor, the legislature did not intend by the use of such quoted words to bar other means of proving ownership of such a certificate. Hence assignments of certificate made by indorsement alone without entry upon tax sale register were not void.

Fleck v Duro, 227-356; 288 NW 426

Certificate as chattel—transferableness. A tax sale certificate of purchase is a mere chattel subject to sale by assignment and indorsement and delivery, and the owner of such certificate who presents the same at the expiration of redemption period is entitled to a deed.

Fleck v Duro, 227-356; 288 NW 426

Notice by assignor of certificate. Where the assignor of a tax sale certificate of purchase has given notice of expiration of redemption right, assignee is not required to give another such notice.

Fleck v Duro, 227-356; 288 NW 426

7266 Payment of subsequent taxes by purchaser.

Atty. Gen. Opinions. See '30 AG Op 43; '34 AG Op 398; '38 AG Op 697; AG Op Nov. 6, '39

Subsequent taxes—filing of receipts. The act of a tax-sale purchaser in personally delivering

to the county auditor at the auditor's office, a duplicate tax receipt for subsequent accruing taxes, constitutes a legal filing in said office, even tho the auditor did not indorse any filing mark on the receipt, and even tho the auditor later returned said receipt to the said purchaser.

Peterson v Barnett, 213-514; 239 NW 77

7267 Failure to file duplicate receipt.

Atty. Gen. Opinion. See '30 AG Op 43

7268 School, agricultural college, or university land.

Atty. Gen. Opinions. See '34 AG Op 59, 602; '38 AG Op 109, 396, 400, 692

Tax sale—school, agricultural college, or university land. In construing statute which provides in substance, that in the sale of school, agricultural college or university land sold on credit which is sold for taxes, the purchaser shall acquire only the interest of the person holding the fee and that the state's lien shall not be affected by such sale, the supreme court will not construe the catchwords for such statute to show legislative intent to omit school fund mortgages, as the catchwords are no part of the law enacted and are not to be considered in construing the statute.

Monona County v Waples, 226-1281; 286 NW 461

School fund mortgage. A school fund mortgage is state property and the state has recognized its right to maintain a permanent school fund intact and inviolate for purpose to which dedicated.

Monona County v Waples, 226-1281; 286 NW 461

Tax sale—school fund mortgage paramount. The statutes providing, that where real estate is incumbered to school fund the interest of the person holding the fee shall alone be sold for taxes and that lien of state shall not be affected by the tax sale, will be construed as meaning that lien of mortgage given to the state for land bought on credit and lien of a real estate mortgage to school fund will be paramount to a tax lien.

Monona County v Waples, 226-1281; 286 NW 461

Tax sale—school fund mortgage paramount. In an action to foreclose a duly recorded mortgage to secure a loan from the permanent school fund the priority of lien granted by statute can neither be defeated by a tax sale purchaser of such realty on ground of mutual mistake of purchaser and county treasurer in connection with tax sale, especially where purchaser relies upon legality of tax sale to sustain his claim of priority, nor that the county treasurer exceeds his authority and sells more than the interest of person holding fee in such realty, as the taxes on the realty mortgaged to secure loan from permanent school fund are not a lien against the state and the purchaser at such sale acquired only the right to redeem from mortgage and does not acquire a lien superior to lien of mortgage.

Monona County v Waples, 226-1281; 286 NW 461

School fund mortgage foreclosure. In an action to foreclose a school fund mortgage, where the court decreed that plaintiff made no demand nor attempt to collect the mortgage until 11 years after it became due, held, that the defendant-holder of the certificate of tax sale was charged with knowledge of plaintiff's lien, and that it was unpaid, and he could not rely on lapse of time, laches or negligence, as against the state.

Monona County v Waples, 226-1281; 286 NW 461

Tax sale—school fund mortgage unpaid. Where a mortgage securing the permanent school fund is on the realty purchased at tax sale, the purchaser is charged with knowledge of the rights of the county holding such mortgage and that the debt secured by the mortgage is unpaid.

Monona County v Waples, 226-1281; 286 NW 461

7271 Failure to obtain deed—cancellation of sale.

Atty. Gen. Opinions. See '25-26 AG Op 487; '30 AG Op 187; '36 AG Op 273

CHAPTER 348

TAX REDEMPTION

7272 Redemption—terms.

Atty. Gen. Opinions. See '28 AG Op 37; '34 AG Op 157, 180; '36 AG Op 118; '38 AG Op 697

ANALYSIS

I REDEMPTION IN GENERAL

Setting aside—inadequate ground. The purchaser of real estate at execution sale may not have certificates of tax sale of the property set aside, and the issuance of tax deed enjoined on allegation and proof that the owner of the property conspired with another to permit the property to go to tax sale and ultimate deed, because such conspiracy was quite harm-

less in view of the right of the execution purchaser to redeem from the tax sale.

Hanby v Snyder, 212-845; 237 NW 339

Amount necessary to effect tax redemption. A holding on appeal as to the amount which the owner of land must pay in order to effect redemption from tax sale is necessarily conclusive on the parties.

Fidelity Inv. v White, 212-782; 237 NW 518

Redemption—law remedy to remove tax sale cloud—equity unavailing. A property owner, presumed to have been informed of his tax assessments, knowing that they will become due and payable without demand, yet allowing the taxes to become delinquent and the property to go to tax sale, may not resort to equity to remove the cloud on his title when he has by redemption a plain, speedy, and adequate remedy at law.

Jones v Mills County, 224-1375; 279 NW 96

Sale—tax tender as doing equity before enjoining deed issuance. One who allows his property to go to tax sale and later seeks to enjoin the county from issuing a tax deed claiming a void sale must, if seeking equity, do equity by tendering the amount of the taxes due and attempt to make redemption as by statute provided.

Jones v Mills County, 224-1375; 279 NW 96

Sale for delinquent taxes not carried forward —setting aside—insufficient tender. A tax sale for delinquent taxes not carried forward will not be set aside in equity nor the deed issuance restrained when the titleholder's offer to do equity by tendering such taxes as "constitute a valid lien" and "actually paid" by the purchaser is a disingenuous tender.

McClelland v Polk County, 225-177; 279 NW 423

II WHO MAY REDEEM

Mortgagee as redemptioner. The holder of a mortgage on land has a legal right to redeem from tax sale; and if tax deed be improperly issued, he may maintain the equitable action to redeem provided by §7278.

Bates v Pabst, 223-534; 273 NW 151

Redemption from tax sale—tax deed terminates prior certificate holder's rights. Tax deed being new and independent grant from the state barring all prior liens, a holder of a tax sale certificate issued prior to the certificate sustaining the deed had the right only to redeem from such and subsequent sales and only before the deed was issued.

White v Hammerstrom, 224-1041; 277 NW 483

III WHO MAY NOT REDEEM

Tax title—voidable only by person holding title at time of sale. Under statute requiring challenger of tax deed to have been titleholder at time of sale and to have paid all taxes, where two persons hold tax sale certificates for different years and the later holder takes a deed, it may not be questioned by the holder of the earlier certificate.

White v Hammerstrom, 224-1041; 277 NW 483

IV MANNER OF REDEMPTION

Terms. Redemption from tax sale necessitates a repayment of the legal taxes due at the time of sale, plus all subsequent legal taxes and proper interest and penalties thereon.

Fidelity Inv. v White, 208-519; 223 NW 884; 225 NW 868

Acts not constituting. The act of a testamentary trustee in individually buying in property at tax sale and receiving a tax sale certificate when a mortgage on the property constituted a part of the trust funds cannot be deemed a redemption of the property from the taxes for the benefit of a subsequent purchaser of the property at mortgage foreclosure sale.

Eyres v Koehler, 212-1290; 237 NW 351

V EFFECT OF REDEMPTION

Acquisition by owner—effect. An owner of land who takes a tax deed to his own land simply effects a redemption from the tax sale. He acquires no better title than he before possessed.

Taylor v Olmstead, 201-760; 206 NW 88

Redemption by volunteer. One who becomes the assignee of a mortgage on land during the pendency of a lis pendens action to invalidate the mortgage as fraudulent, and who during the trial of the action (to which he had been made a party) redeems from a tax sale of the premises, will not, upon the entry of a decree invalidating the mortgage, be entitled to a lien on the land for the amount expended in effecting said redemption.

Clarkson v McCoy, 215-1008; 247 NW 270

Redemption from tax sales. One who redeemed land from tax sale for nonpayment of drainage assessment installments and who acquiesced in drainage proceedings during years in which her land received benefits of the improvement is estopped from questioning establishment of the drainage district.

Whisenand v Van Clark, 227-800; 288 NW 915

7273 Nonallowable penalties.

Atty. Gen. Opinions. See '34 AG Op 157, 180; '36 AG Op 118

7275 Redemption from sale for part of tax.

Atty. Gen. Opinions. See '25-26 AG Op 472, 474; '36 AG Op 56, 341; '38 AG Op 75; AG Op May 24,, '39

7276.1 Erasures prohibited.

Atty. Gen. Opinion. See '38 AG Op 2

Unlawful record invalidates deed. Tax-sale entries required by law to be made by the county auditor in the "sales book" must be made in ink and if not so made the right to redeem continues. It follows that tax deeds issued at a time when the right to redeem exists are void.

Huiskamp v Breen, 220-29; 260 NW 70

7278 Redemption after delivery of deed.

Action to redeem—noninterested party. A noninterested party may not maintain an action to redeem from a tax deed.

M. & St. L. Ry. v Pugh, 201-208; 205 NW 758

Mortgagee as redemptioner. The holder of a mortgage on land has a legal right to redeem from tax sale; and if tax deed be improperly issued, he may maintain the equitable action to redeem provided by this section.

Bates v Pabst, 223-534; 273 NW 151

Violation of trust in re tax deed. A director of a bank may not, for his own personal enrichment, take assignment of a tax sale certificate covering land on which the bank of which he is director holds a first mortgage lien, and take tax deed under such certificate. Such deed will, on timely action and proper proof, be set aside and the bank, or its legal representative in case of insolvency, accorded the right to redeem from the tax sale.

Bates v Pabst, 223-534; 273 NW 151

Action to redeem—showing of payment excused. In an action to redeem from a void tax deed, plaintiff need not show that he has paid all taxes due on the property.

M. & St. L. Ry. v Pugh, 201-208; 205 NW 758

Invalid deed—redemption—form of decree. The decree in an action to redeem from an invalid tax sale and deed may very properly require the titleholder, as a condition precedent to his right to redeem, to pay into court for the benefit of the tax deed holder a sum equal to that which the deed holder has paid in the way of taxes, interest, and penalties under the tax sale certificate. No authority exists for a decree which simply makes said reimbursement sum a lien on the land.

Grandy v Adams, 219-51; 256 NW 684

Invalid deed—reimbursement of deed holder—evidence. Record held to sustain a finding of the court in an action to redeem from an invalid tax sale and deed as to the amount necessary to be paid by the titleholder in order to reimburse the tax sale purchaser.

Grandy v Adams, 219-51; 256 NW 684

Redemption notice to residents—personal service mandatory—deed on publication void. A tax deed issued after service of notice of redemption upon residents by publication instead of by personal service contrary to the statutory method provided in §§7279-7282, C., '35, is void as to persons having the right to redeem.

Smith v Huber, 224-817; 277 NW 557; 115 ALR 131

Redemption after tax deed—defective notice—reimbursing tax deed holder. Purchaser and holder of a deed from the receiver of an insolvent bank, for property quitclaimed to the bank by the owners after the property had gone to tax sale, may redeem even after tax deed has issued, tho on defective affidavit of service of the ninety-day notice of expiration of redemption, if then he offers to do equity by completely reimbursing tax deed holder; and a claim that he purchased only for speculation held ineffective.

Weideman v Pocahontas, 225-141; 279 NW 146

Review on appeal—de novo. The appellate court may review all legal propositions presented by the record in an equitable action even tho the trial court considered only one proposition which it deemed controlling.

Geil v Babb, 214-263; 242 NW 34

Payment of taxes not shown—objection. The objection that plaintiff in an action to redeem from a tax deed has not shown that all taxes on the property have been paid will not be considered when raised for the first time on appeal.

M. & St. L. Ry. v Pugh, 201-208; 205 NW 758

7279 Notice of expiration of right of redemption.

Atty. Gen. Opinions. See '34 AG Op 105; '36 AG Op 360; '38 AG Op 68, 172, 575, 621; AG Op Nov. 7, '39

ANALYSIS

Proof of service. See under §7282

I REDEMPTION IN GENERAL

Liberal construction. The right of redemption from a sale will be liberally construed in favor of the taxpayer.

Murphy v Hatter, 227-1286; 290 NW 695

Strict statutory compliance mandatory. The requirements of this section, providing for steps necessary to cut off right of redemption from tax sale, are absolute, and the court is without power or authority to dispense with these positive requirements on the ground that they are unnecessary.

Murphy v Hatter, 227-1286; 290 NW 695

Law governing at time of sale. The time in which redemption may be made from tax sale is absolutely governed by the law in force at the time of the sale. It follows that a legislative amendment shortening the redemption period cannot apply to pre-existing sales.

Lockie v Hammerstrom, 222-451; 269 NW 507

II TIME FOR REDEMPTION

Redemption from tax sale—notice of expiration of period—refusal to file. The county treasurer is under no obligation to receive and file notices of expiration of period for redemption from a tax sale when the fact is manifest that said notices have been prematurely served.

Lockie v Hammerstrom, 222-451; 269 NW 507

III PARTIES ENTITLED TO OR REQUIRED TO GIVE NOTICE

Redemption from sale—notice—affidavit of service—holder's duty to make. The holder of a tax sale certificate of purchase must give the notice of expiration of right of redemption, and either he or his agent or attorney must make the affidavit of service of such notice.

Fleck v Duro, 227-356; 288 NW 426

Notice by assignor of certificate. Where the assignor of a tax sale certificate of purchase has given notice of expiration of redemption right, assignee is not required to give another such notice.

Fleck v Duro, 227-356; 288 NW 426

IV NOTICE IN GENERAL

Redemption from tax sale—notice of expiration of period—refusal to file. The county treasurer is under no obligation to receive and file notices of expiration of period for redemption from tax sale when the fact is manifest that said notices have been prematurely served.

Lockie v Hammerstrom, 222-451; 269 NW 507

Tax deed on invalid redemption notice—abstract insufficient. The test as to whether an abstract shows a good, merchantable title depends upon whether or not a reasonably prudent person, familiar with the facts and apprised of the question of law involved, would accept such title in the ordinary course of business; and a tax title upon an invalid redemption notice is not such a title.

Smith v Huber, 224-817; 277 NW 557; 115 ALR 131

Title to real estate—nonparties not bound by judgment. In an action between parties to a contract for the conveyance of real estate, a judgment determining the question as to whether the seller, whose title was based upon a tax deed, had a good and merchantable title when the validity of the statutory notice of redemption is attacked, would not be binding on the former titleholders not parties to the action.

Smith v Huber, 224-817; 277 NW 557; 115 ALR 131

Supplemental petition after answer—pleading valid second tax deed—first deed defective. Even after answer, a plaintiff relying on tax deeds in a quiet title action, may, after discovering the deeds are invalid, obtain and plead second tax deeds without reserving notice of expiration of redemption, especially when the answer contained, at most, only a conditional offer to pay the taxes and redeem.

Inter-Ocean Co. v Morrison, 225-1336; 283 NW 909

V NOTICE TO PERSON IN POSSESSION

Mandatory service. The requirement that notice shall be personally served on the party in possession, if he is a resident, is mandatory.

M. & St. L. Ry. v Pugh, 201-208; 205 NW 758

Necessity of service on wife of tenant. In action to quiet title acquired under tax deed, statute requiring that notice of expiration of right to redeem from tax sale must be served on the "person in possession" of such real estate before tax deed can issue is not complied with by serving the husband only, where husband and wife are tenants, the evidence disclosing that wife was also working and that she paid the rent out of her separate wages.

Murphy v Hatter, 227-1286; 290 NW 695

Deed—redemption not terminated without proper service of notice. The holder of a tax certificate has no right to a deed until he has served the statutory notices on the person in possession and the person in whose name the land is taxed.

White v Hammerstrom, 224-1041; 277 NW 483

VI NOTICE TO PERSON TAXED AS OWNER

Mandatory service. The requirement that notice be personally served on the person in whose name the property is taxed, is absolute, and it is quite immaterial that the name of such person is indicated on the tax books by letter abbreviations, when the tax certificate

VI NOTICE TO PERSON TAXED AS OWNER—concluded

holder knows exactly who was intended by the abbreviations.

M. & St. L. Ry. v Pugh, 201-208; 205 NW 758

Notice—service on owner unnecessary. Notice of redemption from a tax sale need not be served on the owner of the property when he is not the person (1) in possession, or (2) in whose name the property is taxed.

Gray v Morin, 218-540; 255 NW 631

Deed—redemption not terminated without proper service of notice. The holder of a tax certificate has no right to a deed until he has served the statutory notices on the person in possession and the person in whose name the land is taxed.

White v Hammerstrom, 224-1041; 277 NW 483

VII SUFFICIENCY AND REQUIREMENTS OF NOTICE

Sale—notice of deed—mandatory requirement. The failure to state, in an affidavit of the service of the notice of the expiration of the right of redemption from tax sale, "under whose direction" the service was made, is fatal to the validity of the subsequently executed tax deed, even tho the affiant states that he is the "agent" of the certificate holder.

Fidelity Inv. Co. v White, 208-519; 223 NW 884; 225 NW 868

VIII MANNER OF SERVICE

Affidavit of service—sufficiency. An affidavit showing the manner of making service of notice of expiration of right to redeem from tax sale is not rendered invalid because said affidavit fails to state that said notice was read to the parties named in the notice in their presence and hearing.

Johnson v Miller, 217-295; 251 NW 747

Affidavit of service—requirements. Under statute prescribing method of making affidavit to prove service of notice of expiration of right of redemption from tax sale, it is not necessary for affiant to state method and manner in which the holder of certificate of purchase authorized and directed him to serve the notice. Hence an affidavit stating that agent made service on behalf of and "under the direction of Polk county, Iowa" was sufficient.

Fleck v Duro, 227-356; 288 NW 426

Tax titles—redemption notice to residents—personal service mandatory—deed on publication void. A tax deed issued after service of notice of redemption upon residents by publication instead of by personal service contrary to the statutory method provided in §§7279-7282, C., '35, is void as to persons having the right to redeem.

Smith v Huber, 224-817; 277 NW 557; 115 ALR 131

7280 Service on nonresidents except mortgagees.

Atty. Gen. Opinions. See '38 AG Op 122; AG Op Nov. 7, '39

Unallowable publication. Service by publication of notice of expiration of the right of redemption from tax sale is wholly nugatory when the domestic corporation in whose name the property is taxed has a resident secretary capable of receiving personal notice.

M. & St. L. Ry. v Pugh, 201-208; 205 NW 758

Tax titles—redemption notice to residents—personal service mandatory—deed on publication void. A tax deed issued after service of notice of redemption upon residents by publication instead of by personal service contrary to the statutory method provided in §§7279-7282, C., '35, is void as to persons having the right to redeem.

Smith v Huber, 224-817; 277 NW 557; 115 ALR 131

7282 When service deemed complete—presumption.

ANALYSIS

I AFFIDAVIT AND PROOF OF SERVICE
II EXPIRATION OF TIME OF REDEMPTION

I AFFIDAVIT AND PROOF OF SERVICE

Mandatory requirement. The failure to state, in an affidavit of the service of the notice of the expiration of the right of redemption from tax sale, "under whose direction" the service was made, is fatal to the validity of the subsequently executed tax deed, even tho the affiant states that he is the "agent" of the certificate holder.

Fidelity Inv. v White, 208-519; 223 NW 884

Fatally defective affidavit of service. When the actual service of a notice of expiration of redemption from tax sale is made by some one other than the holder of the certificate of purchase, the affidavit designed to fully complete the service must show that the party actually making the service was the agent or attorney of the certificate holder; and a tax deed issued on an affidavit not so showing is void.

Geil v Babb, 214-263; 242 NW 34
Galleger v Duhigg, 218-521; 255 NW 867

Notice—affidavit of service—sufficiency. An affidavit showing the manner of making service of notice of expiration of right to redeem from tax sale is not rendered invalid because said affidavit fails to state that said notice was read to the parties named in the notice in their presence and hearing.

Johnson v Miller, 217-295; 251 NW 747

Redemption—90-day notice—sheriff serving for certificate holder's attorney—defective return of service. An affidavit of service of the

90-day notice to redeem from tax sale is insufficient when served by a sheriff at the instance of the certificate holder's attorney, thereby failing to show that the person who made the service was the certificate holder's agent or attorney, and, consequently, the period of redemption was not terminated.

Weideman v Pocahontas, 225-141; 279 NW 146

Affidavit of service—sufficiency. Where notice of expiration of right of redemption from tax sale was filed with, attached to, and made a part of affidavit of proof of service, and where treasurer made an entry which read, "Notice for deed filed Nov. 10, 1937", opposite the record entry of the sale on his sale register, and the auditor, upon written communication from treasurer, made a similar entry in sale book in his office, there was substantial and sufficient compliance with statutory requirements relating thereto.

Fleck v Duro, 227-356; 288 NW 426

Affidavit of service—holder's duty to make. The holder of a tax sale certificate of purchase must give the notice of expiration of right of redemption, and either he or his agent or attorney must make the affidavit of service of such notice.

Fleck v Duro, 227-356; 288 NW 426

Affidavit of service—requirements. Under statute prescribing method of making affidavit to prove service of notice of expiration of right of redemption from tax sale, it is not necessary for affiant to state method and manner in which the holder of certificate of purchase authorized and directed him to serve the notice. Hence an affidavit stating that agent made service on behalf of and "under the direction of Polk county, Iowa" was sufficient.

Fleck v Duro, 227-356; 288 NW 426

Refusal to file premature notice. The county treasurer is under no obligation to receive and file notices of expiration of period for redemption from tax sale when the fact is manifest that said notices have been prematurely served.

Lockie v Hammerstrom, 222-451; 269 NW 507

II EXPIRATION OF TIME OF REDEMPTION

Estoppel to dispute landlord's title—exception. One who mistakenly supposes that he has lost his property by the issuance of a tax deed (which in fact is void) and, under the influence of legal duress, becomes the tenant of the deed holder, is not estopped to dispute the latter's title.

Galleger v Duhigg, 218-521; 255 NW 867

Deed—redemption not terminated without proper service of notice. The holder of a tax certificate has no right to a deed until he has served the statutory notices on the person in possession and the person in whose name the land is taxed.

White v Hammerstrom, 224-1041; 277 NW 483

Tax titles—redemption after tax deed—defective 90-day redemption expiration notice—reimbursing tax deed holder. Purchaser and holder of a deed from the receiver of an insolvent bank, for property quitclaimed to the bank by the owners after the property had gone to tax sale, may redeem even after tax deed has issued, tho on defective affidavit of service of the 90-day notice of expiration of redemption, if then he offers to do equity by completely reimbursing tax deed holder; and a claim that he purchased only for speculation held ineffective.

Weideman v Pocahontas, 225-141; 279 NW 146

7283 Cost—fee—report.

Atty. Gen. Opinions. See '38 AG Op 621; AG Op July 17, '39

Failure to report proofs of service. The county treasurer, upon receiving proof of service of notice of expiration of redemption from tax sale and the accompanying statement of cost, must report such fact to the county auditor, who, in turn, must enter such report on the sale book against the proper tract of land, and a tax deed issued without said preliminaries does not terminate the right to redeem.

Geil v Babb, 214-263; 242 NW 34

CHAPTER 349

TAX DEED

7284 Deed executed.

Method of describing land. See under §7250

Redemption—liberal construction. The right of redemption from a sale will be liberally construed in favor of the taxpayer.

Murphy v Hatter, 227-1286; 290 NW 695

Statutory notice to redeem—strict compliance mandatory. The requirements of §7279, C., '35, providing for steps necessary to cut off right of redemption from tax sale, are absolute, and the court is without power or authority to dispense with these positive requirements on the ground that they are unnecessary.

Murphy v Hatter, 227-1286; 290 NW 695

Deed—redemption not terminated without proper service of notice. The holder of a tax certificate has no right to a deed until he has

served the statutory notices on the person in possession and the person in whose name the land is taxed.

White v Hammerstrom, 224-1041; 277 NW 483

Tax titles—mother paying on contract while daughter gets tax deed—invalidity. A tax deed will be set aside when a mother buying property on contract, allows it to go to tax sale, then contracts with the certificate purchaser to buy the certificate while continuing payments to the landowner, assuring said landowner that she is redeeming, yet, when the certificate is acquired, a daughter's name is inserted and treasurer's deed issued thereto, the mother must be held to have conspired with the daughter to defraud the landowner and to have accomplished no more than a redemption for herself.

Blotcky v Silberman, 225-519; 281 NW 496

Notice to redeem—necessity of service on wife of tenant. In action to quiet title acquired under tax deed, statute requiring that notice of expiration of right to redeem from tax sale must be served on the "person in possession" of such real estate before tax deed can issue is not complied with by serving the husband only, where husband and wife are tenants, the evidence disclosing that wife was also working and that she paid the rent out of her separate wages.

Murphy v Hatter, 227-1286; 290 NW 695

Tax titles—second tax deed by treasurer—when proper. When the county treasurer has executed a valid deed in accordance with the sale, his power is exhausted and he cannot, by the execution of a second deed, divest, nor in any manner affect, the title thus conveyed, but if the first deed was an insufficient execution, the treasurer does not lose power to execute a valid and sufficient deed.

Inter-Ocean Co. v Morrison, 225-1336; 283 NW 909

Injunction—inadequate ground. The purchaser of real estate at execution sale may not have certificates of tax sale of the property set aside, and the issuance of tax deed enjoined on allegation and proof that the owner of the property conspired with another to permit the property to go to tax sale and ultimate deed, because such conspiracy was quite harmless in view of the right of the execution purchaser to redeem from the tax sale.

Hanby v Snyder, 212-845; 237 NW 339

Special assessment tax sales—injunction. When the petition asked for an injunction restraining the county treasurer from selling at tax sale lands upon which Polk county holds tax deeds, it was error to grant an injunction restraining tax sales for special assessments regardless of who the owner of the tax deed might be, even tho other general relief was asked by the petition, the petitions of intervention, and the answer, as the court should not render a judgment which has no foundation in the pleading and is not justified by the evidence, issues, or theory upon which the case was tried.

Bennett v Greenwalt, 226-1113; 286 NW 722

Doing equity before enjoining deed. One who allows his property to go to tax sale and later seeks to enjoin the county from issuing a tax deed claiming a void sale must, if seeking equity, do equity by tendering the amount of taxes due and attempt to make redemption as by statute provided.

Jones v Mills County, 224-1375; 279 NW 96

Issuance of tax deed enjoined and tax sale certificates cancelled.

Means v Boone, 214-948; 241 NW 671

7285 Form.

Deed—substantial conformance to statute. A tax deed needs only to substantially follow the form set out in the statute.

White v Hammerstrom, 224-1041; 277 NW 483

Tax titles—second tax deed by treasurer—when proper. When the county treasurer has executed a valid deed in accordance with the sale, his power is exhausted and he cannot, by the execution of a second deed, divest, nor in any manner affect, the title thus conveyed, but if the first deed was an insufficient execution, the treasurer does not lose power to execute a valid and sufficient deed.

Inter-Ocean Co. v Morrison, 225-1336; 283 NW 909

7286 Execution and effect of deed.

Discussion. See 25 ILR 135 — Disqualified claimants

ANALYSIS

I ACKNOWLEDGMENT AND RECORDATION
II NATURE OF TITLE
III RIGHTS ACQUIRED

I ACKNOWLEDGMENT AND RECORDATION

Unlawful record invalidates deed. Tax sale entries required by law to be made by the county auditor in the "sales book" must be made in ink (§7276-c1, C., '31 [§7276.1, C., '39]) and if not so made the right to redeem continues. It follows that tax deeds issued at a time when the right to redeem exists are void.

Huiskamp v Breen, 220-29; 260 NW 70

II NATURE OF TITLE

Color of title—deed from tax title holder. One who is in possession of real property under deed from a tax deed holder has color of title.

Mann v Nies, 213-121; 238 NW 601

Tax deed—new and independent grant from sovereign—rights of former owner vest in grantee. A tax title is not a derivative title, but is a new and independent grant from the sovereign, and upon the execution and recording of the tax deed, all the right, title, interest, and estate of the former owner becomes vested in the grantee named in the tax deed.

Teget v Lambach, 226-1346; 286 NW 522

Recording of tax deed vests title in purchaser. When a statute provides that the proper execution and recording of a tax deed shall vest title to the property in the purchaser at a tax sale, it follows, as a corollary, that until title is so vested in the purchaser no interest adverse to him will be divested.

Bennett v Greenwalt, 226-1113; 286 NW 722

Tax deed as evidence—construction in favor of holder. Statutes, providing that a tax deed shall be presumptive evidence of certain things and conclusive evidence of others, are construed to mean that unless the tax deed is received in evidence there is no evidence of the tax deed before the court, and when a tax deed is introduced in evidence a prima facie case is established of the regularity of all proceedings prior to its execution. Such statutory provisions with a tendency adverse to the owner of the title under a tax deed are construed most strictly in his favor.

Bennett v Greenwalt, 226-1113; 286 NW 722

Recovery of real property—abstract of title. The holder of a tax deed need not, in an action to recover the property, attach to his petition an abstract of title showing the chain of title which antedated the tax deed.

Shaffer v Marshall, 206-336; 218 NW 292

III RIGHTS ACQUIRED

Tax deed—independent grant from sovereign. A tax title is not a derivative title, but is a new and independent grant from the sovereign, and upon the execution and recording of the tax deed, all the right, title, interest, and estate of the former owner becomes vested in the grantee named in the tax deed.

Teget v Lambach, 226-1346; 286 NW 522

Tax title—acquisition by owner—effect. An owner of land who takes a tax deed to his own land simply effects a redemption from the tax sale. He acquires no better title than he before possessed.

Taylor v Olmstead, 201-760; 206 NW 88

Tax deed destroys prior chain. A valid tax deed issued on a sale for nonpayment of general taxes extinguishes all restrictive covenants in the chain of title of previous owners. So held as to a restriction against erecting or placing a business or store building on the lot in question. (But see 47 GA, ch 192)

Nedderman v Des Moines, 221-1352; 268 NW 36

See Iowa Co. v Barrett, 210-53; 230 NW 528

Tax deed nullifies special assessments. A tax deed issued on a sale for ordinary regular taxes nullifies the lien of all special assessments levied on the land by a city after the sale and before the execution of the deed.

Means v City, 214-948; 241 NW 671

Special assessments—lien and priority. A tax sale for general taxes and a tax deed duly issued thereon extinguish the lien of all existing special assessments for paving or sewer.

Western Sec. v Bank, 211-1304; 231 NW 317

When deed extinguishes drainage taxes. The lien on land of unmatured installments of duly levied district-drainage taxes is extinguished by a tax deed which is issued on a sale of said land for general (ordinary) taxes levied subsequent to the levy of the drainage taxes.

Fergason v Aitken, 220-1154; 263 NW 850

Injunction against tax sales—tax deed extinguishing special assessment lien. An injunction restraining a county treasurer from selling real estate at tax sale for special assessments could not be sustained on the ground that tax deeds issued at a sale for general taxes extinguished the lien of the special assessments when the tax deeds were never introduced in evidence to enable the court to rule on whether the statutory requirements had been properly performed to make the tax deed valid.

Bennett v Greenwalt, 226-1113; 286 NW 722

Tax deed terminates prior certificate holder's rights. Tax deed being new and independent grant from the state barring all prior liens, a holder of a tax sale certificate issued prior to the certificate sustaining the deed had the right only to redeem from such and subsequent sales and only before the deed was issued.

White v Hammerstrom, 224-1041; 277 NW 483

Tax sale—school fund mortgage unpaid. Where a mortgage securing the permanent school fund is on the realty purchased at tax sale, the purchaser is charged with knowledge of the rights of the county holding such mortgage and that the debt secured by the mortgage is unpaid.

Monona County v Waples, 226-1281; 286 NW 461

Invalid tax sale and deed in interest of mortgagee. A mortgagor and mortgagee who enter into and execute a scheme to have one of their employees bid in the property at tax sale and secure a tax deed and assign it to the mortgagee, in the effort to cut out other lienholders, will be held to have accomplished no more than a payment of the taxes. A tax certificate and a deed issued under such circumstances are void.

Hawkeye Ins. v Valley-D. M. Co., 220-556; 260 NW 669; 105 ALR 1018

III RIGHTS ACQUIRED—concluded

Collusive deed—effect. A landowner who permits his land to be sold at tax sale, pursuant to an understanding with the purchaser that the latter will, after obtaining a tax deed, quitclaim to said landowner, neither acquires by the carrying out of said understanding, a new title, nor any betterment of his old title. By such transaction the landowner has simply paid his taxes.

Harrington v Foster, 220-1066; 264 NW 51

Error corrected by resale at adjourned sale.

Tesdell v Greenwalt, 228- ; 290 NW 676

Subsequent tax deed—purchase by wife who joined in mortgage—effect. A wife who joins with her husband in a mortgage on the husband's land, but who assumes no obligation, contractual or otherwise, to pay subsequently accruing taxes on the land, may, after the land has gone to tax deed to a stranger without collusion with her and while she was not in possession, purchase the land of the tax deed holder and acquire his title, viz, a fee simple indefeasible title—a title free from the lien of said mortgage.

Wood v Schwartz, 212-462; 236 NW 491

Homestead possession—effect. An heir cannot successfully claim that he is the owner of premises because his father continuously occupied said premises for some 35 years and until his death, as a homestead, when it appears that during said time the premises went to tax deed, and that thereupon the mother reacquired title from the tax deed holder and thereunder adversely occupied said premises under said newly acquired deed for more than 10 years.

Mann v Nies, 213-121; 238 NW 601

Tax title on invalid redemption notice not merchantable — contract unenforceable. The supreme court will not compel a land purchaser under contract to accept, as good and merchantable, a title based on a tax deed where the record shows the former titleholders have not been notified in the statutory manner of the expiration of their right of redemption.

Smith v Huber, 224-817; 277 NW 557; 115 ALR 131

Tax deed on invalid redemption notice—abstract insufficient. The test as to whether an abstract shows a good, merchantable title depends upon whether or not a reasonably prudent person, familiar with the facts and apprised of the question of law involved, would accept such title in the ordinary course of business; and a tax title upon an invalid redemption notice is not such a title.

Smith v Huber, 224-817; 277 NW 557; 115 ALR 131

7287 Presumptive evidence.

ANALYSIS

I PRESUMPTIONS IN GENERAL
II PRIMA FACIE EVIDENCE

I PRESUMPTIONS IN GENERAL

Deed—presumption. A tax teed is presumptively unassailable.

Fidelity Inv. v White, 208-519; 223 NW 884

Tax deed as evidence under statute—construction in favor of holder. Statutes, providing that a tax deed shall be presumptive evidence of certain things and conclusive evidence of others, are construed to mean that unless the tax deed is received in evidence there is no evidence of the tax deed before the court, and when a tax deed is introduced in evidence a prima facie case is established of the regularity of all proceedings prior to its execution. Such statutory provisions with a tendency adverse to the owner of the title under a tax deed are construed most strictly in his favor.

Bennett v Greenwalt, 226-1113; 286 NW 722

Statutory presumption of validity to tax deeds—no abandonment by pleading later corrective deeds. A defendant in a quiet title action may not claim that the plaintiff by first pleading title by invalid tax deeds, and then amending by pleading second corrective tax deeds, had abandoned the statutory presumption of their validity, nor must he, therefore, resort to the common law to prove his title.

Inter-Ocean Co. v Morrison, 225-1336; 283 NW 909

Presumption in favor of tax deed holder. When land belonging to a daughter was sold for taxes and the tax deed was issued to her mother under an agreement between them, there was a presumption that the continuing possession of the land by the daughter was subordinate to the mother's tax deed, and to defeat the tax title, the presumption had to be overcome and the daughter's possession proven to be adverse. Adverse possession was not established by the continued possession of the daughter under a lease to a tenant, from whom the daughter collected rents and paid taxes, when she made no open claim that the land was her own and that she was asserting her title in hostility to the title under the tax deed.

McCormick v Anderson, 227-888; 289 NW 440

Recognizing invalid tax deed—effect. An owner of land who, for his own advantage, recognizes the validity of a tax deed to his land, and thereby causes another to change his position, may not thereafter plead invalidating irregularities in the deed.

First N. Bk. v Barthell, 201-857; 208 NW 286

II PRIMA FACIE EVIDENCE

Tax sale—issuance of deeds prima facie evidence of regularity. The issuance by the county treasurer of tax deeds is prima facie evi-

dence that proper notice of tax sale had been given.

Inter-Ocean Co. v Morrison, 225-1336; 283 NW 909

Supplemental petition after answer—pleading valid second tax deed—first deed defective. Even after answer, a plaintiff relying on tax deeds in a quiet title action, may, after discovering the deeds are invalid, obtain and plead second tax deeds without re-serving notice of expiration of redemption, especially when the answer contained, at most, only a conditional offer to pay the taxes and redeem.

Inter-Ocean Co. v Morrison, 225-1336; 283 NW 909

The deed as evidence under statute—construction in favor of holder. Statutes, providing that a tax deed shall be presumptive evidence of certain things and conclusive evidence of others, are construed to mean that unless the tax deed is received in evidence there is no evidence of the tax deed before the court, and when a tax deed is introduced in evidence a prima facie case is established of the regularity of all proceedings prior to its execution. Such statutory provisions with a tendency adverse to the owner of the title under a tax deed are construed most strictly in his favor.

Bennett v Greenwalt, 226-1113; 286 NW 722

Quieting title—tax deed as evidence.

Tesdell v Greenwalt, 228- ; 290 NW 676

7288 Conclusive evidence.

Estoppel to dispute landlord's title—exception. One who mistakenly supposes that he has lost his property by the issuance of a tax deed (which in fact is void) and, under the influence of legal duress, becomes the tenant of the deedholder, is not estopped to dispute the latter's title.

Galleger v Duhigg, 218-521; 255 NW 867

Tax sale—en masse sale of separate tracts—deed recitals conclusive. The sale of more than one tract or parcel of real estate en masse, for the gross sum of taxes thereon, being contrary to the mandatory provisions of statute, voids the entire sale and deeds based thereon. Tax deed recitals relating to whether the sale was separately or en masse are conclusive evidence thereof.

Jordan v Beeson, 225-460; 280 NW 625

Tax titles—separate tracts—lots with street between used as single unit. A tax deed, issued pursuant to an en masse sale of land, describes two separate tracts of land, when it lists land on two sides of a dedicated street, and the separateness of the tracts is neither affected by fact that the entire tract, including the street, has been used as a pasture for 37 years, nor by the circumstances that the street may never have been accepted, or, if so, had been abandoned, because the tax deed did not convey the land occupied by the street.

Jordan v Beeson, 225-460; 280 NW 625

Statutory presumption of validity of tax deeds—no abandonment by pleading later corrective deeds. A defendant in a quiet title action may not claim that the plaintiff by first pleading title by invalid tax deeds, and then amending by pleading second corrective tax deeds, had abandoned the statutory presumption of their validity, nor must he, therefore, resort to the common law to prove his title.

Inter-Ocean Co. v Morrison, 225-1336; 283 NW 909

Tax deed as evidence—construction in favor of holder. Statutes, providing that a tax deed shall be presumptive evidence of certain things and conclusive evidence of others, are construed to mean that unless the tax deed is received in evidence there is no evidence of the tax deed before the court, and when a tax deed is introduced in evidence a prima facie case is established of the regularity of all proceedings prior to its execution. Such statutory provisions with a tendency adverse to the owner of the title under a tax deed are construed most strictly in his favor.

Bennett v Greenwalt, 226-1113; 286 NW 722

Tax titles—second tax deed by treasurer—when proper. When the county treasurer has executed a valid deed in accordance with the sale, his power is exhausted and he cannot, by the execution of a second deed, divest, nor in any manner affect, the title thus conveyed, but if the first deed was an insufficient execution, the treasurer does not lose power to execute a valid and sufficient deed.

Inter-Ocean Co. v Morrison, 225-1336; 283 NW 909

7289 Facts necessary to defeat deed.

Redemption—liberal construction. The right of redemption from a sale will be liberally construed in favor of the taxpayer.

Murphy v Hatter, 227-1286; 290 NW 695

Statutory notice to redeem—strict compliance mandatory. The requirements of §7279, C., '35, providing for steps necessary to cut off right of redemption from tax sale, are absolute, and the court is without power or authority to dispense with these positive requirements on the ground that they are unnecessary.

Murphy v Hatter, 227-1286; 290 NW 695

Tax titles—prerequisite to defeat deed—nonapplicability without valid sale. Statute specifying prerequisites to defeat tax title will not bar recovery by one claiming title adverse to the treasurer's deed, when there has been no valid tax sale.

Jordan v Beeson, 225-460; 280 NW 625

Redemption notice to residents—personal service mandatory—deed on publication void. A tax deed issued after service of notice of redemption upon residents by publication in-

stead of by personal service contrary to the statutory method provided in §§7279–7282, C., '35, is void as to persons having the right to redeem.

Smith v Huber, 224-817; 277 NW 557; 115 ALR 131

Notice to redeem—necessity of service on wife of tenant. In action to quiet title acquired under tax deed, statute requiring that notice of expiration of right to redeem from tax sale must be served on the "person in possession" of such real estate before tax deed can issue is not complied with by serving the husband only, where husband and wife are tenants, the evidence disclosing that wife was also working and that she paid the rent out of her separate wages.

Murphy v Hatter, 227-1286; 290 NW 695

Unlawful record invalidates deed. Tax-sale entries required by law to be made by the county auditor in the "sales book" must be made in ink (§7276-c1, C., '31 [§7276.1, C., '39]), and if not so made the right to redeem continues. It follows that tax deeds issued at a time when the right to redeem exists are void.

Huiskamp v Breen, 220-29; 260 NW 70

Estoppel to dispute landlord's title—exception. One who mistakenly supposes that he has lost his property by the issuance of a tax deed (which in fact is void) and, under the influence of legal duress, becomes the tenant of the deedholder, is not estopped to dispute the latter's title.

Galleger v Duhigg, 218-521; 255 NW 867

Purchase by drainage district bondholder—validity—tender of tax necessary. The statute relating to fraudulent tax sales does not entitle the owner of the property to quiet title against holders of tax deeds on the grounds that tax deeds are void because purchasers are owners and holders of drainage bonds issued by drainage district in which land is situated without tender of taxes paid, when no claim is asserted that there is any fraud or collusion or conspiracy to defraud, and the question submitted is purely a legal question as to whether bondholders are under a legal disability to acquire title.

Teget v Lambach, 226-1346; 286 NW 522

Tax titles—mother paying on contract while daughter gets tax deed—invalidity. A tax deed will be set aside when a mother buying property on contract, allows it to go to tax sale, then contracts with the certificate purchaser to buy the certificate while continuing payments to the landowner, assuring said landowner that she is redeeming, yet, when the certificate is acquired, a daughter's name is inserted and treasurer's deed issued thereto, the mother must be held to have conspired with the daughter to defraud the landowner and to have accomplished no more than a redemption for herself.

Blotcky v Silberman, 225-519; 281 NW 496

Cancellation—evidence. Evidence held insufficient to show that a mortgagee had, in taking his mortgage, agreed inter alia to pay a tax sale certificate under which he subsequently took a tax deed.

Proctor v Williamson, 205-127; 215 NW 593

Statute of limitations—owner's possession—effect. When the owner of the fee title continued in possession with rights subservient to the rights of the tax title owner after land was sold for nonpayment of taxes, and the owner's right to bring an action for recovery of the real estate was barred by a statute of limitations, one who claimed title under the owner was not entitled to succeed in an action to quiet title against the tax title owner.

McCormick v Anderson, 227-888; 289 NW 440

7290 Additional facts necessary.

ANALYSIS

I TITLE REQUIRED
II PAYMENT OF TAXES

I TITLE REQUIRED

Noninterested party. A noninterested party may not maintain an action to redeem from a tax deed.

M. & St. L. Ry. v Pugh, 201-208; 205 NW 758

Who may question. The holder of a special assessment certificate against property may not question the title conveyed by a tax deed to said property.

Gray v Morin, 218-540; 255 NW 631

Void deed. The statutory provision that no person shall be permitted to question a tax deed unless he first makes a prescribed showing as to title in himself, has no application when the tax deed which is questioned is wholly void.

Hawkeye Ins. v Valley-Des Moines Co., 220-556; 260 NW 669; 105 ALR 1018

Redemption from tax sale—nonright in town. A town which had no title to real estate when it was sold for nonpayment of special assessments levied by the town, and has acquired no title since said sale, may not redeem after the issuance of tax deed to the tax sale purchaser; and if equitable circumstances are relied on as a basis for redemption, the proof of such circumstances must be substantial.

Story City v Hadley, 214-132; 241 NW 649

Tax title—voidable only by person holding title at time of sale. Under statute requiring challenger of tax deed to have been titleholder at time of sale and to have paid all taxes,

where two persons hold tax sale certificates for different years and the later holder takes a deed, it may not be questioned by the holder of the earlier certificate.

White v Hammerstrom, 224-1041; 277 NW 483

Deed to ancestor—previous and subsequent chain of title lacking—title not established as against tax deed. In a quiet title action, stipulated evidence that an ancestor of defendant received and recorded a deed to the land from another is insufficient to overthrow plaintiff's tax deed without a further showing of the previous and subsequent chain of title.

Inter-Ocean v Morrison, 225-1336; 283 NW 909

Adverse possession of land by owner. When land belonging to a daughter was sold for taxes and the tax deed was issued to her mother under an agreement between them, there was a presumption that the continuing possession of the land by the daughter was subordinate to the mother's tax deed, and to defeat the tax title, the presumption had to be overcome and the daughter's possession proven to be adverse. Adverse possession was not established by the continued possession of the daughter under a lease to a tenant, from whom the daughter collected rents and paid taxes, when she made no open claim that the land was her own and that she was asserting her title in hostility to the title under the tax deed.

McCormick v Anderson, 227-888; 289 NW 440

Tax titles—second tax deed by treasurer—when proper. When the county treasurer has executed a valid deed in accordance with the sale, his power is exhausted and he cannot, by the execution of a second deed, divest, nor in any manner affect, the title thus conveyed, but if the first deed was an insufficient execution, the treasurer does not lose power to execute a valid and sufficient deed.

Inter-Ocean Co. v Morrison, 225-1336; 283 NW 909

Injunction against tax sales—tax deed extinguishing special assesment lien. An injunction restraining a county treasurer from selling real estate at tax sale for special assessments could not be sustained on the ground that tax deeds issued at a sale for general taxes extinguished the lien of the special assessments when the tax deeds were never introduced in evidence to enable the court to rule on whether the statutory requirements had been properly performed to make the tax deed valid.

Bennett v Greenwalt, 226-1113; 286 NW 722

II PAYMENT OF TAXES

Tender and offer to pay taxes. Tender and offer by plaintiff to pay all taxes found due is equivalent to payment within the meaning of this section.

M. & St. L. Ry. v Pugh, 201-208; 205 NW 758
Jordan v Beeson, 225-460; 280 NW 625

Sufficiency—offer in pleadings. An offer by a litigant in an equitable pleading to pay whatever sums are legally necessary to effect a redemption constitutes a sufficient tender.

Fidelity Inv. Co. v White, 208-519; 223 NW 884; 225 NW 868

Showing of payment excused. In an action to redeem from a void tax deed, plaintiff need not show that he has paid all taxes due on the property.

M. & St. L. Ry. v Pugh, 201-208; 205 NW 758

Redemption—form of decree. The decree in an action to redeem from an invalid tax sale and deed may very properly require the title holder, as a condition precedent to his right to redeem, to pay into court, for the benefit of the tax deed holder, a sum equal to that which the deed holder has paid in the way of taxes, interest, and penalties under the tax sale certificate. No authority exists for a decree which simply makes said reimbursement sum a lien on the land.

Grandy v Adams, 219-51; 256 NW 684

Invalid deed—reimbursement of deed holder—evidence. Record held to sustain a finding of the court, in an action to redeem from an invalid tax sale and deed, as to the amount necessary to be paid by the title holder in order to reimburse the tax sale purchaser.

Grandy v Adams, 219-51; 256 NW 684

7292 Fraudulent sale.

ANALYSIS

I FRAUD IN GENERAL
II INNOCENT PURCHASERS

I FRAUD IN GENERAL

Collusive deed—effect. A landowner who permits his land to be sold at tax sale, pursuant to an understanding with the purchaser that the latter will, after obtaining a tax deed, quitclaim to said landowner, neither acquires by the carrying out of said understanding, a new title, nor any betterment of his old title. By such transaction the landowner has simply paid his taxes.

Harrington v Foster, 220-1066; 264 NW 51

Invalid tax sale and deed in interest of mortgagee. A mortgagor and mortgagee who enter into and execute a scheme to have one of their employees bid in the property at tax sale and secure a tax deed and assign it to the mortgagee in the effort to cut out other lien holders, will be held to have accomplished no more than a payment of the taxes. A tax cer-

I FRAUD IN GENERAL—concluded

tificate and a deed issued under such circumstances are void.

Hawkeye Ins. v Valley-Des Moines Co., 220-556; 260 NW 669; 105 ALR 1018

Purchase by drainage district bondholder. The statute relating to fraudulent tax sales does not entitle the owner of the property to quiet title against holders of tax deeds on the grounds that tax deeds are void because purchasers are owners and holders of drainage bonds issued by drainage district in which land is situated without tender of taxes paid, when no claim is asserted that there is any fraud or collusion or conspiracy to defraud, and the question submitted is purely a legal question as to whether bondholders are under a legal disability to acquire title.

Teget v Lambach, 226-1346; 286 NW 522

II INNOCENT PURCHASERS

No annotations in this volume

7293 Wrongful sales—purchaser indemnified.

Refunding erroneous tax. See under §7235

Ineffective sale—who entitled to money. The holder of an avoided tax deed is the proper party to receive from the owner of the land the legal taxes paid by the deed holder subsequent to the ineffective sale.

Fidelity Inv. v White, 208-519; 223 NW 884

Delinquent personal tax—failure to enter on list—effect. A sale of real estate for a delinquent personal tax not entered on the delinquent personal tax list is void because of the provisions of §7192, C., '27, even tho §7203, C., '27, '31, declares, generally, that personal taxes are a lien on the taxpayer's real estate for a period of ten years after December 31 of the year of levy. (Section 7192, C., '27, now repealed.)

Schoenwetter v Oxley, 213-528; 239 NW 118

Refund of erroneously exacted tax. Mandamus is the proper remedy to compel the board of supervisors to refund to a tax certificate holder the amount paid on an illegal sale of real estate for personal taxes not entered on delinquent personal tax list.

Schoenwetter v Oxley, 213-528; 239 NW 118

Holder of illegal certificate. The holder of a tax sale certificate issued at an illegal sale of real estate for personal taxes not entered on the delinquent personal tax list, is a "taxpayer" within the statute (§7235, C., '31) giving a taxpayer the right to a refund of the money paid.

Schoenwetter v Oxley, 213-528; 239 NW 118

7294 Correcting wrongful sale.

Atty. Gen. Opinion. See '30 AG Op 307

7295 Limitation of actions.

ANALYSIS

I LIMITATION IN GENERAL
II APPLICABILITY OF SECTION
III NONAPPLICABILITY OF SECTION
IV WHEN PERIOD COMMENCES TO RUN
V QUIETING TITLE

I LIMITATION IN GENERAL

Title to real estate—nonparties not bound by judgment. In an action between parties to a contract for the conveyance of real estate, a judgment determining the question as to whether the seller, whose title was based upon a tax deed, had a good and merchantable title when the validity of the statutory notice of redemption is attacked, would not be binding on the former titleholders not parties to the action.

Smith v Huber, 224-817; 277 NW 557; 115 ALR 131

II APPLICABILITY OF SECTION

Void and voidable tax deeds—how statute applied. The statutory five-year limitation on actions for recovery of real estate held by tax deed applies not to void but only to voidable deeds and also applies to the holder as well as the one attacking the deed.

Smith v Huber, 224-817; 277 NW 557; 115 ALR 131

III NONAPPLICABILITY OF SECTION

Limitation of action—failure to plead—no question of laches presented. In action to quiet title by owner of land against a tax deed which had been issued on an insufficient affidavit of service of notice of expiration of redemption from tax sale, where the right to redeem had not expired, and no claim of statute of limitations was made, no question of laches was presented.

Weideman v Pocahontas, 225-141; 279 NW 146

IV WHEN PERIOD COMMENCES TO RUN

Action for possession barred. A tax deed holder is barred from maintaining an action for the possession of the land after the lapse of five years from the execution and recordation of the deed.

Wallis v Clinkenbeard, 214-343; 242 NW 86

V QUIETING TITLE

Owner's possession—effect. When the owner of the fee title continued in possession with rights subservient to the rights of the tax title owner after land was sold for nonpayment of taxes, and the owner's right to bring an action for recovery of the real estate was barred by a statute of limitations, one who claimed title under the owner was not en-

titled to succeed in an action to quiet title against the tax title owner.

McCormick v Anderson, 227-888; 289 NW 440

Adverse possession of land by owner. When land belonging to a daughter was sold for taxes and the tax deed was issued to her mother under an agreement between them, there was a presumption that the continuing possession of the land by the daughter was subordinate to the mother's tax deed, and to defeat the tax title, the presumption had to be overcome and the daughter's possession proven to be adverse. Adverse possession was not established by the continued possession of the daughter under a lease to a tenant, from whom the daughter collected rents and paid taxes, when she made no open claim that the land was her own and that she was asserting her title in hostility to the title under the tax deed.

McCormick v Anderson, 227-888; 289 NW 440

Possession which will bar action. Under a statute limiting the time in which an action may be brought for the recovery of real estate sold for taxes, the possession by the owner necessary to bar an action by the tax title holder is ordinarily not the possession required under the general statute of limitations and need not be adverse, but need be only such possession as would entitle the tax title holder to maintain an action against the owner.

McCormick v Anderson, 227-888; 289 NW 440

CHAPTER 350

APPORTIONMENT OF TAXES

Atty. Gen. Opinion. See AG Op Feb. 1, '40

CHAPTER 351

INHERITANCE TAX

7306 Estates taxable.

Discussion. See 12 ILR 14—Progress in inheritance tax law; 17 ILR 258—Amendments

Double succession tax on intangibles. A state may not enforce a succession tax on intangible personal property, consisting of mortgages on lands within such state, when a like tax has been enforced on the same property by the foreign state in which the deceased had his domicile.

In re Smith, 209-685; 228 NW 638

Unconstitutional levy. Remaindermen are not subject to a succession tax when, prior to the enactment of the succession-tax law, the property in question was irrevocably trusteed by the trustor for his own personal benefit for life, with remainder to designated persons. Such tax would be violative of the clauses of the federal constitution, relative (1) to the impairment of contracts, and (2) to due process.

Coolidge v Long, 282 US 582

Inheritance tax—proceeds of realty sale in foreign state. When testator's realty is sold pursuant to will in probate proceedings in foreign state where property is located, and inheritance tax paid by executor in said state, the same cannot be included in computing Iowa inheritance tax.

In re Marx, 226-1260; 286 NW 422

Foreign realty sold pursuant to will—proceeds remain tangible property. When testator's realty in a foreign state is sold pursuant to will, the proceeds will not be subject to Iowa inheritance tax under doctrine of equitable conversion, since even tho the realty takes the form of cash it remains tangible property.

In re Marx, 226-1260; 286 NW 422

Proceeds from sale of realty in foreign state by probate—inheritance tax inapplicable on theory of support of government for protection. When testator's realty located in foreign state is sold pursuant to will in probate proceedings in such state and inheritance tax on legacies there paid, proceeds will not be subject to Iowa inheritance tax under the theory that property is obligated to contribute to the support of government giving it protection.

In re Marx, 226-1260; 286 NW 422

7307 Property included.

Discussion. See 22 ILR 268—Tax on trust income

"Transfers in contemplation of death" defined. A transfer of property "in contemplation of death", within the meaning of the inheritance tax law, is a transfer, the impelling cause of which is the thought of death, but not necessarily of immediate or impending death.

In re Mann, 219-597; 258 NW 904

Transfers in contemplation of death—presumption. Transfers of property made within two years prior to the death of the grantor are presumptively made "in contemplation of death". Evidence held insufficient to overcome the presumption attending a transfer some three months prior to death.

In re Mann, 219-597; 258 NW 904

Findings in probate. The finding by the trial court, on supporting testimony, that a transfer of real property was made "in contemplation of death" will not be disturbed on appeal.

In re Mann, 219-597; 258 NW 904

Life reservation, by grantor, of income—effect. This section embraces property which passes by a conveyance in trust in which the grantor or donor reserves unto himself, during his lifetime, the net annual income of the conveyed property; and this is true even tho said section is later so amended as to specifically declare the above to be the effect of such a reservation.

In re Toy, 220-825; 263 NW 501

Approval of executor's report not construction of will. The fact that the court had approved an executor's report, wherein he had attempted to relieve an estate of inheritance tax on the ground that all devises in the will were contingent, does not mean that such holding is a construction of the will, since the construction of the will was not in issue.

Flanagan v Spalti, 225-1231; 282 NW 347

7308 Exemptions.

Public charities. A trust for the purpose of aiding young men and women of the Protestant faith in obtaining an education in the colleges or universities of this state is a public charity, within the meaning of this statute.

Heald v Johnson, 204-1067; 216 NW 772

7312 Transfers in contemplation of death.

Additional annotations. See under §7307
Gifts causa mortis. See Ch 445, note 1

Transfer without consideration. A bona fide transfer of property for a fair consideration, sufficient to render the property nontaxable under the inheritance tax law, is not established by evidence that the instruments of transfer—concededly executed in contemplation of death and to take effect after death—were, at the most, supported only by a past and wholly executed consideration.

McEvoy v Wegman, 216-395; 249 NW 263

"Transfers in contemplation of death" defined. A transfer of property "in contemplation of death", within the meaning of the inheritance tax act, is a transfer, the impelling cause of which is the thought of death, but not necessarily of immediate or impending death.

In re Mann, 219-597; 258 NW 904

7315 Alien beneficiaries.

Discrimination against nonresident alien. The state, in the imposition of an inheritance tax, may validly discriminate in favor of a resident alien and against a nonresident alien.

In re Anderson, 205-324; 218 NW 140

Treaty in re droit de detraction. The clause of a treaty prohibiting discrimination in taxes and charges on the removal of property from the countries of the contracting parties has no reference to inheritance taxes.

In re Anderson, 205-324; 218 NW 140
(Reversed. Nielson v Johnson, 279 US 47.)

Droit de detraction. That paragraph of the treaty between this country and Denmark dealing with droit de detraction does not apply to or govern the imposition of an inheritance tax on property situated in this state and owned by a resident, naturalized citizen. 166 Iowa 617 affirmed.

Petersen v State, 245 US 170

Alien beneficiaries—inheritance tax prohibited by treaty with Denmark. A state inheritance tax as to property of a Denmark citizen residing in Iowa, imposed upon alien beneficiaries before it can pass to his heirs in Denmark, when no such tax is imposed on citizens of this state by Denmark under like circumstances, is prohibited by virtue of a reciprocity treaty between the United States and Denmark.

Nielsen v Johnson, 279 US 47

7317 Deductions of debts.

Dual tax within two-year period.

In re Nilson, 201-1033; 204 NW 244

7332 Notice of appraisement.

Atty. Gen. Opinion. See AG Op Aug. 17, '39

7334 Property in different counties.

Atty. Gen. Opinion. See '30 AG Op 275

7335 Objections.

Time limit for objections. The duty to file objections to an appraisement of property for inheritance tax purposes within twenty days from the filing of the appraisement with the clerk is mandatory, and failure to file objections within said time ipso facto works an approval of the appraisement.

Insel v Wright County, 208-295; 225 NW 378

7336 Hearing—order.

Evidence—sufficiency. Evidence held on de novo hearing, insufficient to support an appraisement of land for inheritance tax purposes.

In re Seibel, 207-100; 222 NW 361

7339 Cancellation of lien.

Time limit for objections. The duty to file objections to an appraisement of property for inheritance tax purposes within 20 days from the filing of the appraisement with the clerk is mandatory, and failure to file objections within said time ipso facto works an approval of the appraisement.

Insel v Wright County, 208-295; 225 NW 378

7358 Duty of executor to pay tax.

Failure of executor to pay tax—effect. When the state allows an estate to be fully settled and the executor to be duly and finally discharged without the payment of an inheritance tax, and makes no application to open up the accounts of the executor, it may not thereafter enforce the statutory personal liability of the executor to pay said tax. This is true on two fundamental propositions, to wit: (1) that the court, being prohibited by statute from discharging the executor until the tax is paid, must be presumed, in entering such discharge, to have found that no tax was due, and (2) that the state, by designating the court as its special statutory representative, will not be permitted to deny such presumption.

In re Meinert, 204-355; 213 NW 938

Right of testator to pay on bequest. A testator may validly provide that the inheritance tax on a specific devise or bequest made by him in his will shall be paid from the residuary part of his estate, provided he clearly expresses his intention to that effect. Will construed and held clearly so to provide.

In re Johnson, 220-424; 262 NW 811

7392 Foreign estates—deduction of debts.

Discussion. See 10 ILB 66—Inheritance tax on nonresident's stock

7393.1 Foreign estates—reciprocity—personal property.

Discussion. See 16 ILR 415—Double taxation of intangibles; 17 ILR 512—Single taxable situs

Atty. Gen. Opinion. See AG Op Nov. 7, '39

7394 Compromise settlement.

Atty. Gen. Opinion. See AG Op Oct. 11, '39

7396 Refund of tax improperly paid.

Timely action to recover. It is not necessary that an action against the treasurer of state to recover inheritance taxes illegally exacted be both brought and adjudicated within the five years following the payment. It is only necessary that the action be brought within said period—the ambiguity in this section to the contrary notwithstanding.

In re Van Vechten, 218-229; 251 NW 729

CHAPTER 352

SECURITY OF THE REVENUE

7398 County responsible to state.

Atty. Gen. Opinions. See '34 AG Op 95, 183

7402 Loans by county treasurer.

Liability on official bond. See under §1059

Using public funds for private use. The acts of a county treasurer in wrongfully and repeatedly taking and using, for his own private purposes, public funds in his possession, ipso facto constitutes "willful misconduct and maladministration in office", notwithstanding the fact (1) that, prior to the commencement of an action to remove him from office, he returns, to the public treasury, the amount of his peculations, and (2) that his bondsmen are liable for his wrongdoing; a priori is this true when he also knowingly connives at and permits like conduct by his official employee.

State v Smith, 219-5; 257 NW 181

7405 Bond required. (Repealed)

Contract limitations — statutory bonds. Whether parties to a statutory bond will be permitted by contract to specify the time before which or after which an action can be maintained, quaere.

Page County v Fidelity Co., 205-798; 216 NW 957

7408 Settlement with treasurer.

Bonds of officials. See under §§1057, 1060

7412 Custody of public funds.

Atty. Gen. Opinions. See '34 AG Op 67; '36 AG Op 409

7417 Official delinquency.

Deposits—payment on forged indorsement—negligence not imputable to state. Negligence and laches of public officers in the handling of state funds are not imputable to the state; for instance, in an action to recover from a drawee bank the amount paid by the bank on a forged indorsement of a check drawn by a county treasurer against state school funds on deposit with said drawee, it is no defense that the county treasurer was negligent in drawing or delivering the check, or that county officers generally were negligent in not making early discovery of the forged indorsement, and notifying the drawee accordingly.

New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

Taking assignment of claim. Where, because of the peculations of a county auditor, a depositary bank pays a forged check on school funds, the county, on effecting settlement with the surety on the auditor's official bond, may assign to the said surety its cause of action against the bank, and the assignee may enforce the said assigned action as the county might have enforced it.

New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

7420 Delivery to treasurer.

Atty. Gen. Opinion. See '36 AG Op 474

CHAPTER 352.1

DEPOSIT OF PUBLIC FUNDS

7420.01 Deposits in general.

Atty. Gen. Opinions. See '25-26 AG Op 363; '32 AG Op 147, 244; '34 AG Op 67, 431, 523, 601, 735; '36 AG Op 50, 220, 240, 257, 409, 423, 497, 515; '38 AG Op 354

Wrongful deposits—effect.

New Hampton v Leach, 201-316; 207 NW 348

Leach v Bank, 204-1083; 216 NW 748; 65 ALR 679

Leach v Bank, 205-1345; 219 NW 483

Leach v Bank, 207-478; 223 NW 171

Wrongful deposit of public funds. A deposit in a bank of municipal pension funds (police and firemen) under conditions which deprive the trustees of the power to immediately withdraw said funds is wrongful, and being wrongful the trustees do not lose title to said funds. It follows that in case the bank becomes insolvent, the deposit is entitled to preferential payment from the cash on hand at the time of insolvency.

Andrew v Bank, 214-105; 241 NW 412

Andrew v Bank, 222-881; 270 NW 465

Right to secure deposits.

Andrew v Bank, 203-1335; 214 NW 559

Bonds and sureties under prior statutes.

Andrew v Bank, 205-878; 219 NW 34

Dallas Co. v Bank, 205-672; 216 NW 119

Ind. Dist. v Morris, 208-588; 226 NW 66

Excessive bank deposits—effect.

State v Carney, 208-133; 217 NW 472

Bank as depositor. A bank may lawfully become a depositor in another bank. So held where a bank was the sole depositary of the funds of a municipality, and upon receipt of such funds, deposited a part thereof with other banks, under a so-called "gentlemen's agreement" with reference thereto.

Leach v Bank, 206-265; 217 NW 865

Bank dissolution—nonpreference in deposits. Principle reaffirmed that, in the settlement of the affairs of an insolvent state bank, the deposit of a municipal corporation has no preference over other deposits. (§9239, C., '24.)

Leach v Bank, 201-346; 207 NW 331

Subrogation—preferential deposit law. Principle reaffirmed (1) that a surety on a public depositary bond is not, on payment of the bond, entitled to be subrogated to the preferential rights of the municipality existing when the bond was given, when, at the time of such payment, the statute granting such payment had been repealed; and (2) that the repeal of such statute impaired no contract obligation and violated no vested right of such surety.

Andrew v Bank, 205-883; 213 NW 531

Nonpreference to firemen's funds. The trustees of a municipal firemen's pension fund may validly make a bank deposit of its funds in an amount sufficient to meet current pension demands. It follows that if the bank becomes insolvent the trustees are simply depositors and no preference over other depositors exists.

Andrew v Bank, 214-105; 241 NW 412

Statutory bond—acts constituting breach. A statutory bond conditioned to secure the prompt paying over to the proper authorities of public funds on deposit in a bank is breached on the failure to promptly make such payment, and not from the time when the authorities suffer an actual loss.

Leach v Bank, 205-987; 213 NW 528

Statutory bonds—unallowable limitation on liability. A statutory bond which is given for the express purpose of securing public deposits in a bank may not be limited in liability to less than the liability called for by the statute; and any such attempt will be deemed nugatory, even tho such bond is approved by the public governing board. (See §§10300, 10982.)

Leach v Bank, 205-1154; 213 NW 517

Statutory bonds—unauthorized substitution—release—effect. Public officers who are authorized to deposit in banks public funds only on the due execution of an indemnifying bond have no authority to accept collateral security in lieu of a statutory bond; and, if taken, the same may be released and the sureties on the statutory bonds may not complain.

Leach v Bank, 205-975; 213 NW 612

Statutory bonds—oral modification—legality. An agreement between the state treasurer and the accommodation sureties on a statutory bank deposit guaranty bond, to the effect that such bond shall be deemed automatically canceled when the deposit of state funds in the bank drops below the amount of existing nonaccommodation surety bonds, is invalid both as to the state and as to nonaccommodation sureties who are seeking contribution. (See §12751.)

Leach v Bank, 205-975; 213 NW 612

Payment on forged indorsement—negligence not imputable to state. Negligence and laches of public officers in the handling of state funds are not imputable to the state; for instance, in an action to recover from a drawee bank the amount paid by the bank on a forged indorsement of a check drawn by a county treasurer against state school funds on deposit with said drawee, it is no defense that the county treasurer was negligent in drawing or delivering the check, or that county officers generally were negligent in not making early discovery of the forged indorsement, and notifying the drawee accordingly.

New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

School district as depositor. A school district is the depositor of school funds which are placed by the school treasurer in a legally selected depositary.

Runyan v Bank, 210-147; 230 NW 418

Bonds—prima facie liability. Proof that a school treasurer drew a check upon the school district bank account in favor of another bank; that the check was duly cashed; that the payee-bank did not credit the amount to any account of the school district; and that said treasurer, on demand, did not deliver said money to the district, constitutes prima facie evidence of the latter's default and of liability on his bond.

School District v Sass, 220-1; 261 NW 30

Burden of proof. Proof that a municipality had deposited public funds to a named amount in an authorized public depositary casts the burden on the depositary, or on the receiver therefor, to show what payments were made from such deposits and the legality of such payments. And such burden is not met by the introduction of unexplained ledger entries.

Winnebago County v Horton, 204-1186; 216 NW 769

Rescinding authority. The action of the governing board (1) in rescinding its former action authorizing its treasurer to deposit public funds in a named depositary to a named amount, and (2) in authorizing such deposits in said depositary in a lesser amount, renders all existing deposits in said depositary in excess of the latter authorization, after the lapse of a reasonable time, unlawful and unauthorized, and to that extent deprives the municipality of the right to reimbursement from the state sinking fund for public deposits.

Andrew v Bank, 203-1089; 213 NW 232

Rescinding authority. The act of a city council in rescinding its authority to the city treasurer to deposit municipal funds in a named bank to a named amount, and in authorizing deposits in a lesser amount, does not render an existing deposit unlawful and unauthorized to the extent that it exceeds the latter authorization, when the treasurer is wholly unable to withdraw said excess from said bank because of the distressed financial condition of the bank.

Andrew v Bank, 206-464; 221 NW 342

Rescinding authority. Even tho the county treasurer deposits public funds in a depositary bank in an amount authorized by a resolution of the board of supervisors, yet if the board later, by resolution, reduces the amount authorized to be deposited, the treasurer and his surety are liable for a loss resulting from the failure of the treasurer to exercise reasonable diligence to reduce his deposit to the amount authorized in the latter resolution. So held where the treasurer might have withdrawn the excess in the ordinary course of business but failed to do so.

State v Surety Co., 210-215; 230 NW 308

Bond—nonapproval by board of supervisors—effect. A bond given by a bank and by sureties interested in the bank, and given for the purpose of inducing the county treasurer to make deposit of public funds in said bank, and which did induce such deposits, is enforceable even tho the board of supervisors did not formally approve it.

Floyd County v Ramsay, 210-1161; 230 NW 404

Agreements in re county deposits—right of taxpayer. The statutory discretion of the board of supervisors to enter into an agreement with legally and approved reorganized banks, with reference to the county's deposits in said banks, cannot be questioned by a taxpayer except on proof of fraud or arbitrary abuse of said discretion.

Pugh v Polk County, 220-794; 263 NW 315

7420.02 Approval—requirements.

Atty. Gen. Opinions. See '32 AG Op 244; '34 AG Op 235, 431; '36 AG Op 409

7420.03 Increase conditionally prohibited.

Atty. Gen. Opinion. See '36 AG Op 409

7420.04 Location of depositories.

Atty. Gen. Opinions. See '32 AG Op 152; '34 AG Op 304; '36 AG Op 423

7420.05 Refusal of deposits—procedure.

Atty. Gen. Opinions. See '34 AG Op 218, 523; '36 AG Op 497

7420.06 Passbook entry.

Atty. Gen. Opinions. See '32 AG Op 244; '34 AG Op 218, 235, 244, 523; '36 AG Op 157, 220, 240, 423, 497; '38 AG Op 771

7420.07 Interest prohibited to public officer.

Atty. Gen. Opinions. See '36 AG Op 220, 240; '38 AG Op 771

7420.08 Liability of public officers.

Atty. Gen. Opinions. See '34 AG Op 198; '38 AG Op 354

Official liability for funds.

Prudential v Hart, 205-801; 218 NW 529

Northwestern etc. v Bassett, 205-999; 218 NW 932

Andrew v Bank, 214-105; 241 NW 412

CHAPTER 352.2

STATE SINKING FUND FOR PUBLIC DEPOSITS

7420-a6 Interest diverted. (Repealed by 47 GA, ch 194, §4)

Power to divert. The general assembly has ample authority to divert from the county general fund to the state sinking fund for public deposits interest accruing on deposits of public funds in the hands of the county treasurer.

Scott County v Johnson, 209-213; 222 NW 378

Trust funds—diversion of interest. This section has no application to interest on a trust fund which the school district does not own but is administering.

Boyd v Johnson, 212-1201; 238 NW 61

Right to question constitutionality. Neither a school district nor a taxpayer thereof has any standing to question the constitutionality of the act which diverts the future-accruing interest on school funds to the state sinking fund for public deposits (Ch 352-A1, C., '31 [Ch 352.2, C., '39]), for the reason that they have no such thing as a vested right in said interest.

Boyd v Johnson, 212-1201; 238 NW 61

7420.09 State sinking fund.

Atty. Gen. Opinions. See '25-26 AG Op 430; '34 AG Op 600; '36 AG Op 474; '38 AG Op 354; AG Op March 22, '39

7420.10 Purpose of fund.

See annotations under chapter 352.1

"Public funds" defined. Funds raised by general taxation for the maintenance of public libraries are public funds, and within the protection of this chapter.

Andrew v Bank, 203-349; 212 NW 742

Illegal deposit. A deposit in a bank of the public funds of a school district is not a legally authorized deposit, within the meaning of this chapter, when made simply on the individual and nonofficial written direction of the several members of the board of directors to the school treasurer to make such deposit, nor will such deposit be rendered legal by the fact (1) that the board of directors, after the deposit was made, had knowledge thereof, or (2) that interest was paid on said deposit.

Andrew v Bank, 204-570; 215 NW 807

Embezzlement by depository. School funds duly deposited in a bank under legal authorization of the directors, and embezzled by an officer of the bank, are a legal charge against the state sinking fund for public deposits, in case the bank becomes insolvent.

Runyan v Bank, 210-147; 230 NW 418

7420.15 Certification of deposits.

Atty. Gen. Opinions. See '34 AG Op 97, 210, 235; '36 AG Op 474

7420.17 Assessment rate.

Atty. Gen. Opinion. See '32 AG Op 244

7420.20 Liability of depository.

Atty. Gen. Opinions. See '32 AG Op 244; '34 AG Op 523

7420.21 Liability of public officers.

Atty. Gen. Opinions. See '32 AG Op 244; '34 AG Op 523

7420.22 Amount of deposit — determination—effect—objections.

Atty. Gen. Opinions. See '34 AG Op 97, 431

Rescinding authority—effect. The action of the governing board of a municipality (1) in rescinding its former action authorizing its treasurer to deposit public funds in a named depositary to a named amount, and (2) in authorizing such deposits in said depositary in a lesser amount, renders all existing deposits in said depositary in excess of the latter authorization, after the lapse of a reasonable time, unlawful and unauthorized, and to that extent deprives the municipality of the right to reimbursement from the state sinking fund for public deposits.

Andrew v Bank, 203-1089; 213 NW 232

Judgments appealable. An appeal lies from an order of court which adjudges the amount of public funds on deposit in an insolvent bank for the purpose of payment out of the state sinking fund.

Winnebago County v Horton, 204-1186; 216 NW 769

7420.25 Warrant — payment — subrogation.

Atty. Gen. Opinion. See '34 AG Op 735

7420.26 Bonds—subrogation.

Waiver of subrogation. The state, after reimbursing a county for the loss of county deposits in an insolvent bank, may validly prohibit an action in its own favor on the depositary bond to which it was legally subrogated by the process of reimbursing the county.

State v Bartlett, 207-208; 222 NW 529

Improper parties. A county and its treasurer are not proper parties to an action by the treasurer of state to recover on a depositary bond in which the county and its treasurer no longer have any interest.

State v Bartlett, 207-208; 222 NW 529

7420.27 Anticipatory warrants.

Atty. Gen. Opinions. See '34 AG Op 727; '36 AG Op 10, 71; '38 AG Op 70

7420.30 Public sale—interest.

Atty. Gen. Opinion. See '36 AG Op 71

7420.41 Termination of interest.

Atty. Gen. Opinion. See '36 AG Op 10

7420.43 Investment of sinking fund.

Atty. Gen. Opinions. See '28 AG Op 441; '30 AG Op 229; '38 AG Op 70, 209, 443

TITLE XVII

CERTAIN INTERNAL IMPROVEMENTS

CHAPTER 353

LEVEE AND DRAINAGE DISTRICTS AND IMPROVEMENTS ON PETITION OR BY MUTUAL AGREEMENT

7421 Jurisdiction to establish.

Atty. Gen. Opinion. See '28 AG Op 365

Interested but nondeciding vote. Drainage proceedings are not rendered illegal by the nondeciding vote of a supervisor who is financially interested in the proposed improvement.

Monona County v Gray, 200-1133; 206 NW 26

Abuse of discretion. It is beyond the discretionary power of the board to establish a drainage improvement which (1) is of no substantial present value, (2) is admittedly incomplete, (3) will entail a heavy financial burden on the taxpayers, and possible confiscation, and (4) furnishes no assurance that benefits will equal assessments.

Dean v District, 200-1162; 206 NW 245

Anderson v Board, 203-1023; 213 NW 623

Failure to obtain jurisdiction. Failure in drainage proceedings to serve any valid notice on a property owner (1) of the proposed establishment of a drainage district, or (2) of the later proposed assessment, renders the entire proceedings void as to such property owner; and the collection of the assessment will be enjoined, even tho the property owner did voluntarily and generally appear at the hearing on the confirmation of the assessment and filed objections thereto and did not appeal from the adverse ruling thereon.

Chicago, NW Ry. v Sedgwick, 203-726; 213 NW 435

Protection from erosion—delegation of authority. In the establishment of a district for the protection of the banks of a stream from erosion, the board of supervisors may validly delegate to the engineer in charge the duty to determine, in good faith, the number, size, and location of the various retards, when, at the time of the filing of the petition for the district, and up to the time the construction is inaugurated, the condition of the river is such that the exact number, size, and location of the said retards cannot be determined.

Dashner v Const. Co., 205-64; 217 NW 464

Injunction as remedy. Injunction is the proper remedy to restrain the board of supervisors from proceeding with a drainage improvement over which it has no jurisdiction.

Maasdam v Kirkpatrick, 214-1388; 243 NW 145

Mandamus as remedy. Mandamus will not lie to compel the board of supervisors to proceed with the construction of a drainage improvement which, in effect, the board has never established.

Eller v Board, 208-285; 225 NW 375

Supervisors nonrepresentative of county. The board of supervisors of a county in establishing a drainage district, and in maintaining the improvement therein, acts as a special tribunal in an official or governmental capacity, and does not in any way represent the county as a body corporate.

Mitchell County v Odden, 219-793; 259 NW 774

7423 "Levee" defined — bank protection.

Delegation of authority. In the establishment of a district for the protection of the banks of a stream from erosion, the board of supervisors may validly delegate to the engineer in charge the duty to determine, in good faith, the number, size, and location of the various retards, when, at the time of the filing of the petition for the district, and up to the time the construction is inaugurated, the condition of the river is such that the exact number, size, and location of the said retards cannot be determined.

Dashner v Const. Co., 205-64; 217 NW 464

7428 Straightening creek or river.

Repairs (?) or original construction (?). Drainage work which consists in the abandonment of a material portion of an existing drain in order to straighten a river, and the substitution therefor of a new channel at a substantial expense and which work, in fact, is a

change in the plan under which the ditch was first constructed, must be deemed an original construction, and not a repair. Especially is this true when the said expense exceeds ten per cent of original cost of construction. It follows that the comprehensive procedure for an original construction must be followed, and not the limited procedure governing repairs.

Maasdam v Kirkpatrick, 214-1388; 243 NW 145

7430 Bond.

Conditional signing. Knowledge on the part of a member of a board (1) of the conditions on which sureties signed a drainage improvement bond, and (2) of the violation of such conditions, will not be imputed to the county in accepting the bond, when said member of the board was a landowner within the proposed district, and therefore wholly disqualified, under the statutes, to act in the proceedings.

Monona County v Gray, 200-1133; 206 NW 26

Unallowable defense. In an action on a drainage bond conditioned to pay all expenses incurred by the county in case the district be not established, the plea that the survey departed from the plan proposed in the petition will be disregarded (1) when the petition was unusually comprehensive in its proposal, and assumed to and did invest the board with full statutory jurisdiction over the proposal, and (2) when the survey was not beyond the call of the statute.

Monona County v Gray, 200-1133; 206 NW 26

Estoppel. Sureties on a drainage improvement bond are estopped to plead nonliability on the bond because the conditions on which they signed had been violated, when they filed the bond, or caused it to be filed, with knowledge, or with ready means of knowing, that said conditions had been violated, and stood by in silence while the county, at large expense, acted thereon.

Monona County v Gray, 200-1133; 206 NW 26

Sufficiency of proof. In an action by a county to recover, on bond given in an abortive drainage proceeding, for items paid by the county, proof of the due audit and payment of the claims by the county authorities is conclusive, in the absence of proof of fraud.

Monona County v Gray, 200-1133; 206 NW 26

Evidence—immateriality. In an action on a drainage bond conditioned to pay all expenses incurred by the county in case the district be not established, testimony to the effect that the engineer, after his employment, estimated the cost of the contemplated survey at a certain amount, is immaterial.

Monona County v Gray, 200-1133; 206 NW 26

7438 Report.

Subsequent exclusion of lands—effect. The board of supervisors has no power or jurisdiction to exclude lands from a drainage district subsequent to the final establishment thereof.

Estes v Board, 204-1043; 217 NW 81

7440 Notice of hearing.

Award by board. See under §7451, Vol I

Foreclosure certificate holder as necessary party.

Vien v Harrison County, 209-580; 228 NW 19

Drainage record book admissible—nonjurisdictional defect. In action to cancel tax sale certificate for an unpaid drainage assessment, to enjoin issuance of treasurer's deed therefor and to further enjoin the collection of remaining assessments on ground that drainage district was not legally established because of defective notice and failure to file proof of service, the drainage record book kept by auditor showing compliance with statutory requirements was admissible, and failure to give correct name of mortgagee in proceeding to establish the district was not a jurisdictional defect where proposed ditch did not extend through or abut upon land covered by the mortgage. (§1989-a3, S., '13.)

Whisenand v Van Clark, 227-800; 288 NW 915

7442 Service on agent.

Failure to serve designated agent. Failure to serve notice of a proposed drainage assessment on a railway company by serving its agent as designated by it under the statute deprives the board of all jurisdiction to levy such assessment against the company; and no estoppel to plead such failure of service arises from the fact that the company was served (1) by publication and (2) by service on a nondesignated agent of the company, and that the company interposed no objection to the proceedings.

Chi. NW Ry. v Sedgwick, 202-33; 209 NW 456

Failure to serve notice. Failure in drainage proceedings to serve any valid notice on a property owner (1) of the proposed establishment of a drainage district, or (2) of the later proposed assessment, renders the entire proceedings void as to such property owner; and the collection of the assessment will be enjoined, even tho the property owner did voluntarily and generally appear at the hearing on the confirmation of the assessment and filed objections thereto and did not appeal from the adverse ruling thereon.

Chi. NW Ry. v Sedgwick, 203-726; 213 NW 435

7444 Waiver of notice.

Failure to obtain jurisdiction—enjoining assessment. Failure in drainage proceedings to serve any valid notice on a property owner (1) of the proposed establishment of a drainage district, or (2) of the later proposed assessment, renders the entire proceedings void as to such property owner; and the collection of the assessment will be enjoined, even tho the property owner did voluntarily and generally appear at the hearing on the confirmation of the assessment and filed objections thereto, and did not appeal from the adverse ruling thereon.

Chi. NW Ry. v Sedgwick, 203-726; 213 NW 435

7445 Waiver of objections and damages.

Assessments—estoppel. Principle reaffirmed that, when property owners stand by and see a drainage improvement made, and take no steps of legal interference, they are estopped to raise the question of validity when called upon to pay their assessments.

Dashner v Woods Co., 205-64; 217 NW 464

Establishment—estoppel to question validity. One who redeemed land from tax sale for nonpayment of drainage assessment installments and who acquiesced in drainage proceedings during years in which her land received benefits of the improvement is estopped from questioning establishment of the drainage district.

Whisenand v Van Clark, 227-800; 288 NW 915

7447 Hearing of petition—dismissal.

Refusal to establish—nonpermissible appeal. An appeal will not lie to the district court from the refusal of the board of supervisors to establish a proposed drainage ditch when such refusal is based on a finding by the board (1) that another and existing ditch is sufficient, and (2) that the public benefit, utility, health, convenience, and welfare would not be promoted by establishing said proposed improvement.

Christensen v Agan, 209-1315; 230 NW 800

7448 Establishment—further investigation.

"Public benefit, utility, health, etc."—effect of former finding. A finding that the establishing of a drainage improvement covering certain lands would be conducive to public benefit, utility, health, convenience, and welfare does not constitute a finding that another and subsequently proposed drainage improvement entirely or partially embracing the same land would be conducive to public benefit, utility, health, convenience, and welfare.

Christensen v Agan, 209-1315; 230 NW 800

7454 Dissolution.

Atty. Gen. Opinion. See '30 AG Op 306

7459 Advertisement for bids.

Atty. Gen. Opinion. See '38 AG Op 731

7460 Bids—letting of work.

Public improvements — estimated quantities as basis for contract—variation with specifications not fatal. In awarding a contract the function of plans and estimated quantities is to permit a uniform comparison of bids, and the requirement of "unit prices", as a means of payment for variations from the estimated quantities, indicates their variable character, so certain variations between the plans and specifications will not result in a failure of competitive bidding invalidating a contract based thereon.

Interstate Co. v City, 225-490; 281 NW 207

7462 Performance bond — return of check.

Performance by surety — proper charges. Evidence reviewed relative to certain charges debited against the contract price of a drainage improvement by a surety who had taken over the work of the defaulting contractor, and held proper, and in some instances improper.

Ottumwa Boiler v O'Meara, 206-577; 218 NW 920

Subrogation—priority. A surety who takes over the work of a defaulting public drainage contractor and proceeds to pay off claims which are statutorily lienable against the funds due under the contract acquires a right of subrogation superior to that of a prior assignee of said funds.

Ottumwa Boiler v O'Meara, 206-577; 218 NW 920

Nonlienable claims. Claims for labor and materials furnished to a contractor on a public drainage improvement in repairing the machinery which the contractor employed on the work are not lienable on the drainage funds. (§1989-a57, S., '13; Ch 347, 38 GA, now repealed. See Ch 452, C., '24.)

Ottumwa Boiler v O'Meara, 206-577; 218 NW 920

7463 Contracts.

Reformation of contract. A written contract between a drainage contractor and the board which inadvertently departs from the terms of the bid and the acceptance by the board will be reformed on an application in equity.

Gjellefald v District, 203-1144; 212 NW 691

Extra contract work. While a contractor may not recover for cleaning out a ditch, consequent on his own fault, yet he may recover

for extra contract excavation after so cleaning out, on order of the proper authorities.

Gjellefald v District, 203-1144; 212 NW 691

Construction aside contract. A public drainage contractor may not recover for construction work which is neither provided for in his contract nor ordered nor approved by the board, even tho it was ordered by the engineer in charge.

Gjellefald v District, 203-1144; 212 NW 691

Void provision. A clause inserted in a public improvement contract, to the effect that, if rock or quicksand is encountered the contractor shall be paid on the basis of cost plus a named percentage, is void when both the specifications and the advertisement for bids are silent as to such contingency.

Gjellefald v Hunt, 202-212; 210 NW 122

7465 Duties—time for performance—scale of benefits.

Assessments—evidentiary showing sufficient to overcome. A landowner, who claims that his lands have been inequitably assessed, must demonstrate the truth of his claim by presenting to the court such an evidentiary picture of every separate tract of land within the district, or of a determining portion thereof, distinctly reflecting every material fact and element bearing on a legal and proper classification, as will enable the court intelligently to weigh relative benefits, and to weigh them in complainant's favor. If the picture be uncertain or indistinct in material parts or if it fails to show important facts, such, for instance, as pre-existing public drainage improvements and the consideration due such improvements, then it must be held insufficient to overcome the presumed correctness of the assessment.

Fulton v Sherman, 212-1218; 238 NW 88

Employment of counsel to defend assessment. County supervisors in their statutory capacity as representatives of a drainage district had right to employ attorneys and issue drainage warrants to them for services to be rendered in the trial and appeal of an action brought by property owners to enjoin collection of assessments levied to meet cost of work done for the district, and fact that elected drainage trustees took over management of the district before services were fully performed in supreme court did not render void the warrant previously issued for such service.

Kilpatrick v Mills County, 227-721; 288 NW 871

Good faith presumption. Acts of county supervisors concerning work done by them in their statutory capacity as representatives of a drainage district to maintain the efficiency and durability of a drainage system was presumed to have been done in good faith, and they had an absolute right on behalf of the district to stand behind the contract under which the work was done in the interest of the district.

Kilpatrick v Mills County, 227-721; 288 NW 871

7466 Classification as basis for future assessments. (Repealed.)

Duty to follow existing classification. An assessment for the cost of repairing a lateral drain must be levied solely on the lands benefited by the lateral, as shown by the unchanged classification adopted when the lateral was originally constructed, even tho it be a fact that in making the assessment for the original construction, the classification in question was unlawfully disregarded.

Seabury v Adams, 208-1332; 225 NW 264

7468 Assessment for lateral ditches.

Duty to follow existing classification. An assessment for the cost of repairing a lateral drain must be levied solely on the lands benefited by the lateral, as shown by the unchanged classification adopted when the lateral was originally constructed, even tho it be a fact that, in making the assessment for the original construction, the classification in question was unlawfully disregarded.

Seabury v Adams, 208-1332; 225 NW 264

7470 Public highways.

Atty. Gen. Opinions. See '25-26 AG Op 278, 492; '30 AG Op 240

7471 Report of commissioners.

Statute governing. The assessment procedure to cover the cost of remodeling a public drainage improvement is controlled by the statute in effect when the contract is let.

Mayne v Board, 208-987; 223 NW 904; 225 NW 953

Accretions. When the high-water mark or line of a river is a boundary line of a drainage district, accretions to the land are not assessable for drainage improvements.

Mayne v Board, 208-987; 223 NW 904; 225 NW 953

Existing improvements as credit. In arriving at the amount of a drainage assessment, due credit should be given for existing drainage improvements on the land. Assessment reviewed, and held excessive.

Petersen v Board, 208-748; 226 NW 1

7472 Notice of hearing.

Assessments—estoppel. Principle reaffirmed that, when property owners stand by and see a drainage improvement made, and take no steps of legal interference, they are estopped to raise the question of validity when called upon to pay their assessments.

Dashner v Woods Co., 205-64; 217 NW 464

Notice of hearing—affidavit lacking seal of court clerk. Affidavit of publication of notice of hearing on drainage assessment was sufficient altho court seal was not attached by court clerk before whom the affidavit was made. Moreover, statute did not require that proof of service be by affidavit.

Whisenand v Van Clark, 227-800; 288 NW 915

7473 Hearing and determination.

Existing improvements as credit. In arriving at the amount of a drainage assessment, due credit should be given for existing drainage improvements on the land. Assessment reviewed, and held excessive.

Petersen v Board, 208-748; 226 NW 1

Objections—technical formality unnecessary. Technical formality in presenting to the board of supervisors matters bearing on a drainage assessment is not required. So held where the matter in question was presented through the medium of a so-called "petition", instead of through the medium of formal objections.

Mayne v Board, 208-987; 223 NW 904; 225 NW 953

Assessments—errors in acreage—computation. Where board has jurisdiction to make drainage assessment, errors in (1) acreage of benefited land, (2) method of computing amount of assessment, and (3) using a non-statutory installment plan of payment do not render the assessment void, but are only irregularities not reviewable in a collateral proceeding.

Whisenand v Van Clark, 227-800; 288 NW 915

7474 Evidence — conclusive presumption.

Validity—estoppel. A property owner cannot be deemed estopped to question the illegality of a drainage improvement because of the action of a former owner of the land on which no one relied; nor because the property owner, after he discovered that the work had been substantially completed, entered a formal complaint as to certain defects in the work.

Kelleher v Drainage Dist., 216-348; 249 NW 401

7476 Classification as basis for future assessments.

Duty to follow existing classification. An assessment for the cost of repairing a lateral drain must be levied solely on the lands benefited by the lateral as shown by the unchanged classification adopted when the lateral was originally constructed, even tho it be a fact that, in making the assessment for the original construction, the classification in question was unlawfully disregarded.

Seabury v Adams, 208-1332; 225 NW 264

Reclassification—proper basis. A reclassification of lands within a drainage district for an improvement made subsequent to the construction of other improvements within the district should be made on the basis of the condition of the land as it existed just prior to and at the time of the construction of the improvement for which the assessment is made.

Mayne v Board, 208-987; 223 NW 904; 225 NW 953

7477 Levy—interest.

Atty. Gen. Opinion. See '30 AG Op 113

Assessments—nonliability of county. A county, as a body corporate, is not liable in damages consequent on the failure of the board of supervisors to levy an adequate assessment against a drainage district to pay the bonds of the district. It follows that the county treasurer and his surety, when sued by the county for damages consequent on the act of said treasurer in using county funds in paying said bonds, cannot be subrogated to any right of the bondholder to proceed against the county, —because the bondholder has no such right.

Mitchell County v Odden, 219-793; 259 NW 774

Drainage levies as ordinary taxes—treasurer as drainage district officer. A county treasurer is not an ex officio officer of a drainage district, so individuals paying drainage levies to him are classed as ordinary taxpayers, and as such cannot be compelled to pay such taxes twice.

Western Assn. v Barrett, 223-932; 274 NW 55

Tax assessment constitutes lien on land—bond not lien. Under statute providing for issuance of drainage district bonds the tax assessments levied by the district, and not the bond, constitute the lien against the land.

Teget v Lambach, 226-1346; 286 NW 522

Bond—lien on entire proceeds of special assessment—exclusive remedy. Bond issued by drainage district under statute is a lien upon the entire proceeds of the special assessment and not on any particular tract of land. The whole process being statutory, is exclusive of all other remedies.

Teget v Lambach, 226-1346; 286 NW 522

Purchase by drainage district bondholder. The statute relating to fraudulent tax sales does not entitle the owner of the property to quiet title against holders of tax deeds on the grounds that tax deeds are void because purchasers are owners and holders of drainage bonds issued by drainage district in which land is situated without tender of taxes paid, when no claim is asserted that there is any fraud or collusion or conspiracy to defraud, and the question submitted is purely a legal

question as to whether bondholders are under a legal disability to acquire title.

Teget v Lambach, 226-1346; 286 NW 522

Drainage district bondholder—permissible purchaser at tax sale. Bondholders of a drainage district, by virtue of their ownership of such bonds, do not have an interest in such drainage district land sold for taxes which will disqualify them from becoming purchasers at tax sale.

Teget v Lambach, 226-1346; 286 NW 522

7478 Lien of tax.

Atty. Gen. Opinion. See '30 AG Op 113
Additional annotations. See under §6008

Priority between different special assessments. The fully perfected lien of a special assessment for a city sewer is prior in right to the lien of a subsequent special assessment by the board of supervisors for a public drainage improvement, even tho the latter improvement was initiated prior to the sewer proceedings.

Anderson-Deering Co. v Boone, 201-1129; 205 NW 984

When deed extinguishes drainage taxes. The lien on land of unmatured installments of duly levied district-drainage taxes is extinguished by a tax deed which is issued on a sale of said land for general (ordinary) taxes levied subsequent to the levy of the drainage taxes.

Fergason v Aitken, 220-1154; 263 NW 850

Tax assessment constitutes lien on land—bond not lien. Under statute providing for issuance of drainage district bonds the tax assessments levied by the district, and not the bond, constitute the lien against the land.

Teget v Lambach, 226-1346; 286 NW 522

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Teget v Lambach, 226-1346; 286 NW 522

Drainage levies as ordinary taxes—treasurer as drainage district officer. A county treasurer is not an ex officio officer of a drainage district, so individuals paying drainage levies to him are classed as ordinary taxpayers, and as such cannot be compelled to pay such taxes twice.

Western Assn. v Barrett, 223-932; 274 NW 55

Purchase by drainage district bondholder. The statute relating to fraudulent tax sales does not entitle the owner of the property to quiet title against holders of tax deeds on the grounds that tax deeds are void because purchasers are owners and holders of drainage bonds issued by drainage district in which land is situated without tender of taxes paid, when no claim is asserted that there is any fraud or collusion or conspiracy to defraud, and the question submitted is purely a legal question as to whether bondholders are under a legal disability to acquire title.

Teget v Lambach, 226-1346; 286 NW 522

Tax sale for nonpayment—duration of lien. Tax sale of land for nonpayment of drainage assessments is not an action barred by statute of limitations, and the duration of a lien for such assessment or the time within which payment may be enforced is not limited by statute.

Whisenand v Van Clark, 227-800; 288 NW 915

7479 Levy for deficiency.

Unallowable item of expense. The boards of supervisors in charge of an intercounty drainage improvement are wholly without jurisdiction to include in a deficiency assessment on all the lands within the district an item of expense which had been contracted in one county by the board of supervisors thereof in the employment of a fiscal agent to sell the bonds which had been issued in such particular county.

Haferman v District, 204-936; 216 NW 257

Limitation of actions. The statute of limitation commences to run against an action of mandamus to compel the board of supervisors to levy an additional assessment to pay drainage warrants even tho the board had not levied or otherwise provided for the additional assessment to complete the fund from which the warrants are to be paid.

Lenehan v Drainage Dist., 219-294; 258 NW 91

Assessments—inability to meet bonds—mandamus not remedy. Where a drainage district was created and a sufficient assessment to pay all bonds was levied and collected but not at all times carried in a separate account by the county treasurer, with the result that on maturity date of the bonds no sufficient balance was available to retire them, a mandamus action on the theory of an insufficient assessment (§7509, C., '35) brought by the bondholders to require the drainage district trustees to make an additional levy was properly denied.

Western Assn. v Barrett, 223-932; 274 NW 55

7480 Record of drainage taxes.

Atty. Gen. Opinion. See '30 AG Op 113

7481 Funds—disbursement—interest.

Atty. Gen. Opinions. See '25-26 AG Op 428; '28 AG Op 195

Contract for lobbying. The action of a board on behalf of a public drainage district in employing attorneys to induce the state legislature to make an appropriation with which to pay the assessment on state-owned lands within the district is not violative of public policy, and the allowance of a claim for such services is proper, it appearing that the contract was carried out without the employment of any improper influence whatever.

Kemble v Weaver, 200-1333; 206 NW 83

Failure to file brief and argument—estoppel to assert claim. In action by subcontractor against principal and drainage district jointly to establish claim as a lien on the district's fund, where drainage district filed no brief or argument, court need give no attention to its plea that subcontractor was estopped from asserting claim by his action in accepting auditor's warrant for a lesser amount than that to which he was entitled.

Graettinger Works v Gjellefald, (NOR); 214 NW 579

7482 Assessments—maturity and collection.

Atty. Gen. Opinions. See '30 AG Op 113; '34 AG Op 412

Correction of description. Mandamus will lie, by one landowner within a drainage district, to compel the board to so correct the description of other assessed lands that the latter may be sold under the assessment against them.

Plumer v Board, 203-643; 213 NW 257

Drainage levies as ordinary taxes—treasurer as drainage district officer. A county treasurer is not an ex officio officer of a drainage district, so individuals paying drainage levies to him are classed as ordinary taxpayers, and as such cannot be compelled to pay such taxes twice.

Western Assn. v Barrett, 223-932; 274 NW 55

Drainage district bondholder — permissible purchaser at tax sale. Bondholders of a drainage district, by virtue of their ownership of such bonds, do not have an interest in such drainage district land sold for taxes which will disqualify them from becoming purchasers at tax sale.

Teget v Lambach, 226-1346; 286 NW 522

Estoppel to question validity—redemption from tax sales. One who redeemed land from tax sale for nonpayment of drainage assessment installments and who acquiesced in drainage proceedings during years in which her land received benefits of the improvement is estopped from questioning establishment of the drainage district.

Whisenand v Van Clark, 227-800; 288 NW 915

Assessments—tax sale for nonpayment. Tax sale of land for nonpayment of drainage assessments is not an action barred by statute of limitations, and the duration of a lien for such assessment or the time within which payment may be enforced is not limited by statute.

Whisenand v Van Clark, 227-800; 288 NW 915

7483 Payment before bonds or certificates issued.

Atty. Gen. Opinion. See '32 AG Op 104

7484 Installment payments—waiver.

Atty. Gen. Opinion. See '32 AG Op 104

Implication to pay in certain county—effect. A mere implication arising from a writing that payments maturing under the writing will be made at a certain place in a certain county furnishes no legal basis for bringing action in said county when defendant is an actual resident of some other county. Basis for such action in a county other than that of defendant's residence must be found in the express terms of the writing. So held in an action by a holder of drainage bonds to recover assessments on land to pay the bonds.

Bechtel v Dist. Court, 215-295; 245 NW 299

Assessments — nonstatutory plan of payment. Where board has jurisdiction to make drainage assessment, errors in (1) acreage of benefited land, (2) method of computing amount of assessment, and (3) using a nonstatutory installment plan of payment do not render the assessment void, but are only irregularities not reviewable in a collateral proceeding.

Whisenand v Van Clark, 227-800; 288 NW 915

7488 Lien of deferred installments.

Warranty and incumbrance. A covenant against incumbrance is not broken by the existence of a public drainage improvement on the land, nor is a general covenant of warranty breached by the fact that subsequent to the deed an additional assessment is levied on the land for such improvement.

Kleinmeyer v Willenbrock, 202-1049; 210 NW 447

Duty to discharge. As between life tenants and remaindermen, the former, during their tenancy, should pay the interest on special assessments and the latter should pay the principal; and refunds on such assessments should be distributed in the same proportions.

Cooper v Barton, 208-447; 226 NW 70

Statute of limitations—duration of lien. Tax sale of land for nonpayment of drainage assessments is not an action barred by statute of limitations, and the duration of a lien for such assessment or the time within which payment may be enforced is not limited by statute.

Whisenand v Van Clark, 227-800; 288 NW 915

7492 Reclassification.

Proper basis. A reclassification of lands within a drainage district for an improvement made subsequent to the construction of other improvements within the district should be made on the basis of the condition of the land as it existed just prior to and at the time of the construction of the improvement for which the assessment is made.

Mayne v Board, 208-987; 223 NW 904; 225 NW 953

Duty to follow existing classification. An assessment for the cost of repairing a lateral drain must be levied solely on the lands benefited by the lateral, as shown by the unchanged classification adopted when the lateral was originally constructed, even tho it be a fact that, in making the assessment for the original construction, the classification in question was unlawfully disregarded.

Seabury v Adams, 208-1332; 225 NW 264

7495 Drainage warrants received for assessments.

Assignment — absolute (?) or conditional (?). Record reviewed and held that a written assignment of a drainage warrant must be deemed to have deprived the assignor of all interest therein.

Simmons v Tatham, 219-1407; 261 NW 434

7495.1 Bonds received for assessments.

Atty. Gen. Opinion. See AG Op May 18, '39

7499 Improvement certificates.

Atty. Gen. Opinion. See '30 AG Op 106

Implication to pay in certain county—effect. A mere implication arising from a writing that payments maturing under the writing will be made at a certain place in a certain county furnishes no legal basis for bringing action in said county when defendant is an actual resident of some other county. Basis for such action in a county other than that of defendant's residence must be found in the express terms of the writing. So held in an action by a holder of drainage bonds to recover assessments on land to pay the bonds.

Bechtel v Dist. Court, 215-295; 245 NW 299

7500 Form, negotiability, and effect.

Atty. Gen. Opinion. See '30 AG Op 106

7502 Sale at par—right to pay.

Atty. Gen. Opinion. See '30 AG Op 106

7503 Drainage bonds.

Atty. Gen. Opinions. See '30 AG Op 73, 108

Violation of conditions—good faith of board. The fact that not all signers of a petition for a drainage improvement signed the bond, in accordance with an agreement between the parties who initiated the proceedings, will not affect the enforceability of the bond, when the bond was received and accepted by the county in good faith and without knowledge of said agreement and of the violation thereof.

Monona County v Gray, 200-1133; 206 NW 26

7504 Form.

Nonallowable judgment at law. The holder of a drainage bond issued by a county is not entitled to a personal judgment at law against the county, its board of supervisors, or the drainage district, for the amount due on the bond, the drainage district not being a legal entity, and the county and its supervisors acting only in an official or representative capacity.

Board v Dist. Court, 209-1030; 229 NW 711

Assessments—proper application to bonds. The holder of a matured drainage bond is entitled to have said bond paid in full if funds to that extent are available in the hands of the county treasurer, irrespective of the time when said funds were paid to the treasurer. In other words, the treasurer is not compelled to apply tax collections of a given year solely on bonds maturing in that year.

Bechtel v Mostrom, 214-623; 243 NW 361

Bonds—unauthorized pledge. A pledge of "the faith and resources of the county" for the payment of a drainage bond, issued by the board of supervisors on behalf of a drainage district, is without force or effect because wholly unauthorized.

Mitchell County v Odden, 219-793; 259 NW 774

Misuse of funds — estoppel — waiver. A county treasurer breaches his official bond by using county funds in paying drainage district bonds, and the county cannot be deemed estopped to insist on said breach, or be held to have waived said breach, because of the fact that the treasurer acted with the knowledge and consent of, or in obedience to the express direction of the board of supervisors.

Mitchell County v Odden, 219-793; 259 NW 774

Nonliability of county. A county, as a body corporate, is not liable in damages consequent on the failure of the board of supervisors to levy an adequate assessment against a drainage district to pay the bonds of the district. It follows that the county treasurer and his surety, when sued by the county for damages consequent on the act of said treasurer in using county funds in paying said bonds, cannot be

subrogated to any right of the bondholder to proceed against the county,—because the bondholder has no such right.

Mitchell County v Odden, 219-793; 259 NW 774

Bond—lien on entire proceeds of special assessment. Bond issued by drainage district under statute is a lien upon the entire proceeds of the special assessment and not on any particular tract of land. The whole process being statutory, is exclusive of all other remedies.

Teget v Lambach, 226-1346; 286 NW 522

Drainage district bondholder — permissible purchaser at tax sale. Bondholders of a drainage district, by virtue of their ownership of such bonds, do not have an interest in such drainage district land sold for taxes which will disqualify them from becoming purchasers at tax sale.

Teget v Lambach, 226-1346; 286 NW 522

Purchase by drainage district bondholder. The statute relating to fraudulent tax sales does not entitle the owner of the property to quiet title against holders of tax deeds on the grounds that tax deeds are void because purchasers are owners and holders of drainage bonds issued by drainage district in which land is situated without tender of taxes paid, when no claim is asserted that there is any fraud or collusion or conspiracy to defraud, and the question submitted is purely a legal question as to whether bondholders are under a legal disability to acquire title.

Teget v Lambach, 226-1346; 286 NW 522

Tax assessment constitutes lien on land—bond not lien. Under statute providing for issuance of drainage district bonds the tax assessments levied by the district, and not the bond, constitute the lien against the land.

Teget v Lambach, 226-1346; 286 NW 522

7509 Deficiency levy—additional bonds.

Atty. Gen. Opinions. See '30 AG Op 131; '32 AG Op 104, 232

Unallowable item of expense. The boards of supervisors in charge of an intercounty drainage improvement are wholly without jurisdiction to include in a deficiency assessment on all the lands within the district an item of expense which had been contracted in one county by the board of supervisors thereof in the employment of a fiscal agent to sell the bonds which had been issued in such particular county.

Haferman v District, 204-936; 216 NW 257

See Kemble v Weaver, 200-1333; 206 NW 83

Assessments—inability to meet bonds—mandamus not remedy. Where a drainage district was created and a sufficient assessment to pay all bonds was levied and collected but not at all times carried in a separate account by the county treasurer, with the result that on maturity date of the bonds no sufficient balance was available to retire them, a mandamus action on the theory of an insufficient assessment brought by the bondholders to require the drainage district trustees to make an additional levy was properly denied.

Western Assn. v Barrett, 223-932; 274 NW 55

7509.1 Funding or refunding indebtedness.

Atty. Gen. Opinions. See '28 AG Op 346; '32 AG Op 140; '38 AG Op 67

7512 Payment before bonds issued.

Atty. Gen. Opinion. See '30 AG Op 73

7513 Appeals.

Atty. Gen. Opinion. See '30 AG Op 289

Appeal as sole remedy. The objection that the board of supervisors levied an assessment for a highway improvement against an entire 40-acre tract, instead of that part only which was at right angles to the improvement, must be presented on appeal from the assessment, and not by an independent action in equity.

Paul v Marshall County, 204-1114; 216 NW 736

Appeal as non-exclusive remedy. Either certiorari or appeal will lie to review the action of the board of supervisors in attempting to exclude lands from a drainage district after its establishment and construction, such attempted action being wholly beyond the jurisdiction of the board.

Estes v Board, 204-1043; 217 NW 81

Nonpermissible appeal. An appeal will not lie to the district court from the refusal of the board of supervisors to establish a proposed drainage ditch when such refusal is based on a finding by the board (1) that another and existing ditch is sufficient, and (2) that the public benefit, utility, health, convenience, and welfare would not be promoted by establishing said proposed improvement.

Christensen v Agan, 209-1315; 230 NW 800

Appeal by petitioners for district. Petitioners for the establishment of a drainage district may not maintain an appeal from an order by the district court setting aside the establishment by the board of supervisors of a drainage district, when, up to the time of the entry of the said order of the district court, the board of supervisors and the drainage district were the sole defendants in the proceedings.

Chi., Burl. Ry. v Board, 206-488; 221 NW 223

Assessments—errors nonreviewable in collateral action. Where board has jurisdiction to make drainage assessment, errors in (1) acreage of benefited land, (2) method of com-

puting amount of assessment, and (3) using a nonstatutory installment plan of payment do not render the assessment void, but are only irregularities not reviewable in a collateral proceeding.

Whisenand v Van Clark, 227-800; 288 NW 915

7515 Time and manner.

Appeal notice—proper filing notwithstanding auditor's failure to mark "filed". The statutory requirement of "filing with the auditor" a notice of appeal from the action of the county board of supervisors, with respect to classification and assessment of land in a drainage district, was satisfied when attorney for owner delivered notice of appeal and appeal bond to auditor with instructions to file them, notwithstanding auditor failed to mark papers "filed". A paper is said to be "filed" when it is delivered to the proper officer and by him received to be kept on file.

Mills v Board, 227-1141; 290 NW 50

Appeal bond—filing—statutory presumption of approval. Where, on appeal from action of county board of supervisors with respect to classification and assessment of land in drainage district, the board urges that failure of the auditor to approve the appeal bond constituted a fatal defect and it is shown attorney for property owner delivered the notice of appeal and appeal bond to county auditor with instructions to file them, the delivery to and receipt by the auditor of the tendered appeal bond constituted a "filing" and generated statutory presumption that auditor approved the bond, sufficient to uphold appeal, in absence of evidence to overcome presumption.

Mills v Board, 227-1141; 290 NW 50

7517 Petition—docket fee—waiver—dismissal.

Substantial compliance with statute—sufficiency. On appeal from action of county board of supervisors with respect to classification and assessment of land in drainage district, a motion to dismiss the appeal for alleged failure to fully set out in petition everything required by statute was properly overruled where petition substantially complied with statute.

Mills v Board, 227-1141; 290 NW 50

7519 Proper parties — employment of counsel.

Atty. Gen. Opinion. See AG Op March 2, '39

Legal representative. The board of supervisors is the proper legal representative of all parties interested in public drainage proceedings except adversary parties.

Chi., Burl. Ry. v Board, 206-488; 221 NW 223

Decree on appeal—conclusiveness. A decree which sustains objections of property owners to a proposed drainage assessment on the assigned ground that certain specified contracts are illegal and void is conclusive on the contractor and his assignees, even tho they are not in fact represented at such hearing; because in law the board of supervisors is, in such proceeding, made the representative, not only of the district, but of every interested party except the adversary parties.

First N. Bk. v County, 204-720; 216 NW 8

Employment of counsel to defend assessment. County supervisors in their statutory capacity as representatives of a drainage district had right to employ attorneys and issue drainage warrants to them for services to be rendered in the trial and appeal of an action brought by property owners to enjoin collection of assessments levied to meet cost of work done for the district, and fact that elected drainage trustees took over management of the district before services were fully performed in supreme court did not render void the warrant previously issued for such service.

Kilpatrick v Mills County, 227-721; 288 NW 871

Supervisors representing drainage district. Acts of county supervisors concerning work done by them in their statutory capacity as representatives of a drainage district to maintain the efficiency and durability of a drainage system was presumed to have been done in good faith, and they had an absolute right on behalf of the district to stand behind the contract under which the work was done in the interest of the district.

Kilpatrick v Mills County, 227-721; 288 NW 871

7521 Right of board and district to sue.

District not legal entity.

Board v Dist. Court, 209-1030; 229 NW 711

Houghton v Bonnicksen, 212-902; 237 NW 313

Nonallowable judgment at law. The holder of a drainage bond issued by a county is not entitled to a personal judgment at law against the county, its board of supervisors, or the drainage district, for the amount due on the bond, the drainage district not being a legal entity, and the county and its supervisors acting only in an official or representative capacity.

Board v Dist. Court, 209-1030; 229 NW 711

7522 Trial on appeal—consolidation.

Excessive assessment—evidence sustaining reduction. On appeal from action of county board of supervisors with respect to assessment of land in drainage district, it may be shown that the amount of assessment as recommended by second report of county commissioners was greatly in excess of amount

recommended in first report, as a circumstance entitled to consideration in determining whether second report was excessive. Evidence sustained finding that assessments on certain land were excessive and inequitable and should be reduced by 30 percent.

Mills v Board, 227-1141; 290 NW 50

Petition—substantial compliance with statute—sufficiency. On appeal from action of county board of supervisors with respect to classification and assessment of land in drainage district, a motion to dismiss the appeal for alleged failure to fully set out in petition everything required by statute was properly overruled where petition substantially complied with statute.

Mills v Board, 227-1141; 290 NW 50

Excessive assessment — findings of trial court—effect on appeal. Where the trial court, which saw and heard the witnesses, makes a finding that classification and assessment of certain lands in drainage district were excessive and inequitable and should be reduced by 30 percent, such finding is entitled to some weight on appeal to the supreme court.

Mills v Board, 227-1141; 290 NW 50

7523 Conclusive presumption on appeal.

See annotations under §7474

7526 Decree as to establishing district or including lands.

Annexing additional lands. An order by joint boards of supervisors, annexing additional lands to an already established intercounty drainage district, is appealable to the district court for the purpose of trying anew the quasi judicial issue whether such additional lands will be benefited by the proposed improvement; and on such appeal the court has power to exclude such lands from the district, in case it is clearly shown that they cannot be benefited in any degree by the proposed improvement.

Thompson v Board, 201-1099; 206 NW 624

Impossible project. The setting aside by the district court of an order by the board of supervisors establishing a drainage district is proper when it is made to appear that the project is impossible,—when the sum total of the plan would be to redeem certain lands and unavoidably submerge other lands.

Dean v District, 200-1162; 206 NW 245

Anderson v Board, 203-1023; 213 NW 623

7527 Appeal as exclusive remedy—nonappellants.

Enjoining assessment. Failure in drainage proceedings to serve any valid notice on a property owner (1) of the proposed establishment of a drainage district, or (2) of the later proposed assessment, renders the entire proceedings void as to such property owner; and the collection of the assessment will be enjoined, even tho the property owner did voluntarily and generally appear at the hearing on the confirmation of the assessment and filed objections thereto and did not appeal from the adverse ruling thereon.

Chi. NW Ry. v Sedgwick, 202-33; 209 NW 456

Chi. NW Ry. v Sedgwick, 203-726; 213 NW 435

Estoppel. Principle reaffirmed that, when property owners stand by and see a drainage improvement made, and take no steps of legal interference, they are estopped to raise the question of validity when called upon to pay their assessments.

Dashner v Const. Co., 205-64; 217 NW 464

Injunction to restrain irregularities. Injunction will not lie to restrain a mere irregularity in the levying of a drainage assessment.

Seabury v Adams, 208-1332; 225 NW 264

Injunction—absence of jurisdiction. Principle reaffirmed that injunction is the proper remedy to restrain the board of supervisors from proceeding with a drainage improvement over which it has no jurisdiction.

Maasdam v Kirkpatrick, 214-1388; 243 NW 145

Objection to assessments—remedy. When the board of supervisors exercises discretion in repairing a drainage ditch and their action in levying an assessment is not absolutely void for lack of jurisdiction, the proper remedy for one aggrieved by such action is by appeal to the district court, and not by injunction against the assessment levy.

Baldozier v Mayberry, 226-693; 285 NW 140

Establishment—nonjurisdictional defect. In action to cancel tax sale certificate for an unpaid drainage assessment, to enjoin issuance of treasurer's deed therefor, and to further enjoin the collection of remaining assessments on ground that drainage district was not legally established because of defective notice and failure to file proof of service, the drainage record book kept by auditor showing compliance with statutory requirements was admissible, and failure to give correct name of mortgagee in proceeding to establish the district was not a jurisdictional defect where proposed ditch did not extend thru or abut upon land covered by the mortgage. (§1989-a3, S., '13.)

Whisenand v Van Clark, 227-800; 288 NW 915

Errors nonreviewable in collateral action. Where board has jurisdiction to make drainage assessment, errors in (1) acreage of bene-

fited land, (2) method of computing amount of assessment, and (3) using a nonstatutory installment plan of payment do not render the assessment void, but are only irregularities not reviewable in a collateral proceeding.

Whisenand v Van Clark, 227-800; 288 NW 915

7531 Monthly estimate—payment.

Interest on deferred payment. Interest on long deferred payments due to a contractor may properly be ordered.

Gjellefald v District, 203-1144; 212 NW 691

Dual conflicting contracts—procedure in re warrants. An action in equity praying for the adjudication of the amount due on certain drainage warrants will not be entertained when the petition reveals the fact that the warrants were issued under one of two materially different contracts covering the same subject matter, and that as a consequence the warrants in question were wholly valid or wholly invalid.

Houghton v Bonnicksen, 212-902; 237 NW 313

7534 Final settlement.

Acceptance of work—effect. The good-faith final acceptance by the duly constituted authorities of the work performed under a drainage improvement is final.

Dashner v Const. Co., 205-64; 217 NW 464

Failure to file brief and argument—estoppel to assert claim. In action by subcontractor against principal and drainage district jointly to establish claim as a lien on the district's fund, where drainage district filed no brief or argument, court need give no attention to its plea that subcontractor was estopped from asserting claim by his action in accepting auditor's warrant for a lesser amount than that to which he was entitled.

Graettinger Works v Gjellefald, (NOR); 214 NW 579

7537 Construction on or along highway.

Nonappropriation for new purpose. The fact that a public drainage ditch is so laid out and constructed that in places it encroaches, to some extent, upon a public highway, does not per se justify the conclusion that thereby the highway has been legally appropriated for a new public purpose, to wit: drainage.

Robinson v Board, 222-663; 269 NW 921

7539 Bridges.

Atty. Gen. Opinion. See '38 AG Op 445

Nonperformance. Mandamus to compel the board to erect a bridge on an established and existing highway at the point where the highway is crossed by a public drainage improvement is not barred by the lapse of time.

Perley v Heath, 201-1163; 208 NW 721

Mandamus—construction over ditches. The statutory duty of the board of supervisors to construct bridges over public ditches at points where such ditches intersect secondary roads is enforceable by action of mandamus, such duty being in no manner limited or controlled by the statutory powers granted the county board of approval in adopting secondary road programs.

Robinson v Board, 222-663; 269 NW 921

Nonappropriation for new purpose. The fact that a public drainage ditch is so laid out and constructed that in places it encroaches, to some extent, upon a public highway, does not per se justify the conclusion that thereby the highway has been legally appropriated for a new public purpose, to wit: drainage.

Robinson v Board, 222-663; 269 NW 921

7540 Construction across railroad.

Atty. Gen. Opinion. See '28 AG Op 191

Notice from maintenance of bridge. The existence, on a minor fractional part of a government 40-acre tract, of permanent improvements in the form of a railway bridge spanning a public drainage ditch constitutes implied notice to the purchaser of the remaining part of the said 40-acre tract of the unrecorded written contract right of the railway company to maintain said bridge in its then length and elevation without liability in damages to the owner of the abutting land.

Johnson v Railway, 202-1282; 211 NW 842

Overflow damage. In landowner's action against railroad for damage to crops, resulting from overflow, where record showed plans and specifications for drainage ditch did not require railroad to lengthen bridge span, railroad's full compliance with requirements barred recovery.

Kellogg v Railway, (NOR); 239 NW 557

7541 Duty to construct.

Inadequate opening — compulsory construction—effect. Negligence may not be predicated on the insufficient length or height of a railroad bridge within a public drainage district when the bridge was constructed strictly in accordance with the plans and specifications prescribed by the public drainage authorities.

Hunter v Railway, 206-655; 221 NW 360

7549 Annexation of additional lands.

Additional lands in foreign county. A board of supervisors has no jurisdiction to annex to an intracounty drainage improvement lands situated in a foreign county.

Glenn v County, 201-1003; 206 NW 802

Subsequent exclusion of lands. The board of supervisors has no power or jurisdiction to exclude lands from a drainage district subsequent to the final establishment thereof.

Estes v Board, 204-1043; 217 NW 81

Nonpermissible annexation. The power of joint boards of supervisors to annex lands to an existing intercounty drainage district does not extend to lands which are embraced in an existing intracounty drainage district.

Farley Dist. v Drainage Dist., 207-970; 221 NW 589

7550 Proceedings on report.

Annexing additional lands—appeal. An order by joint boards of supervisors, annexing additional lands to an already established intercounty drainage district, is appealable to the district court for the purpose of trying anew the quasi judicial issue whether such additional lands will be benefited by the proposed improvement; and on such appeal the court has power to exclude such lands from the district, in case it is clearly shown that they cannot be benefited in any degree by the proposed improvement.

Thompson v Board, 201-1099; 206 NW 624

7554 New district including old district.

"New construction" (?) or "repair" (?). In the effort to correct the inadequacy of an established public drainage improvement, the construction of an entirely different and substituted system of drainage—one costing several times the cost of the inadequate drain, of materially increased capacity, differently located, affecting additional lands, and one which, in fact, is the result of an entirely new plan—must be deemed a "new construction" and not a "repair". It follows that such "new construction" must be preceded by the establishment of an entirely new district.

Kelleher v Drainage Dist., 216-348; 249 NW 401

7556 Repair.

Atty Gen. Opinions. See '30 AG Op 45, 194; '32 AG Op 235, 274; '38 AG Op 482; AG Op Jan. 11, '39

"Constructed" drain defined. A drainage improvement is "constructed", within the meaning of this section, whenever the physical work is completed and the governing body has accepted the same, even tho a supplemental improvement governed by a different contract remains unfinished.

Board v Paine, 203-263; 210 NW 929

"Remodeling" not "repair". The remodeling of a public drain or ditch in order to care for and obviate an undue burden of waters cast into it by other like ditches may not be deemed a repair.

Mayne v Board, 208-987; 223 NW 904; 225 NW 953

Repair (?) or original construction (?). Drainage work which consists in the abandonment of a material portion of an existing drain in order to straighten a river, and the substitution therefor of a new channel at a substantial expense and which work, in fact, is a change in the plan under which the ditch was first constructed, must be deemed an original construction, and not a repair. Especially is this true when the said expense exceeds ten per cent of original cost of construction. It follows that the comprehensive procedure for an original construction must be followed, and not the limited procedure governing repairs.

Maasdam v Kirkpatrick, 214-1388; 243 NW 145

"New construction" (?) or "repair" (?). In the effort to correct the inadequacy of an established public drainage improvement, the construction of an entirely different and substituted system of drainage—one costing several times the cost of the inadequate drain, of materially increased capacity, differently located, affecting additional lands, and one which, in fact, is the result of an entirely new plan—must be deemed a "new construction" and not a "repair". It follows that such "new construction" must be preceded by the establishment of an entirely new district.

Kelleher v Drainage Dist., 216-348; 249 NW 401

Erosion of banks and depositing of silt. The authority of the board of supervisors to keep a constructed drainage improvement "in repair" embraced the authority to contract for the placing of pipes through the waste banks, in order to prevent erosion of the banks and the depositing of silt in the ditch.

Board v Paine, 203-263; 210 NW 929

New settling basin as repair. The repair of a drainage system may include, inter alia, the providing of an entirely new settling basin in lieu of an old one which has become so silted as to cease to function.

Payne v Drainage Dist., 223-634; 272 NW 618

Changing course of water—effect. The fact that, in repairing a public ditch or drain, certain waters are passed to their final outlet differently than under the condition formerly existing, does not necessarily show an unallowable change in the plan of the improvement.

Payne v Drainage Dist., 223-634; 272 NW 618

Repairs may incidentally benefit adjacent road. Work on a drainage ditch which prevented erosion and prevented an overflow on

reclaimed lands was "repair" work within the statutory authority of the board of supervisors to repair drainage ditches even tho there was an incidental benefit to bridges and to a township road at the side of the ditch.

Baldozier v Mayberry, 226-693; 285 NW 140

Evidence that purpose of repairs was to benefit ditch. Evidence of claims filed against a drainage district for labor and materials was a sufficient record of the board of supervisors' proceedings to show that the work was considered from the beginning as being repair work on the ditch.

Baldozier v Mayberry, 226-693; 285 NW 140

Assessments for repairs—levy without notice. If the cost of repairs to drainage ditches amounts to less than 10 percent of the original cost, the county board of supervisors may levy assessments for such repairs without giving notice.

Baldozier v Mayberry, 226-693; 285 NW 140

Notice and hearing not necessary.

Breiholtz v Board, 257 US 118

Taking of land—who entitled to notice. If, in the repair of a public ditch or drain, new land be taken for use by the public, the owners thereof only need be served with notice of eminent domain proceedings.

Payne v Drainage Dist., 223-634; 272 NW 618

Trespass not a "taking". A landowner may not say that his land was taken for public use because in cleaning out a public ditch as a repair thereof, the contractor wrongfully distributed the dirt beyond the right of way line of the ditch as originally constructed.

Payne v Drainage Dist., 223-634; 272 NW 618

Employment of counsel to defend assessment. County supervisors in their statutory capacity as representatives of a drainage district had right to employ attorneys and issue drainage warrants to them for services to be rendered in the trial and appeal of an action brought by property owners to enjoin collection of assessments levied to meet cost of work done for the district, and fact that elected drainage trustees took over management of the district before services were fully performed in supreme court did not render void the warrant previously issued for such service.

Kilpatrick v Mills County, 227-721; 288 NW 871

Supervisors representing drainage district. Acts of county supervisors concerning work done by them in their statutory capacity as representatives of a drainage district to maintain the efficiency and durability of a drainage system was presumed to have been done in good faith, and they had an absolute right on behalf of the district to stand behind the contract under which the work was done in the interest of the district.

Kilpatrick v Mills County, 227-721; 288 NW 871

7558 Assessment without notice.

Atty. Gen. Opinion. See '32 AG Op 235

Repairing without notice. A statute is valid which authorizes the governing board of a duly established and constructed drainage improvement to clean out and repair the improvement, when necessary, and without notice to the property owners, to assess the cost of such repairs in the proportion in which the original cost was apportioned, as provided by said statute. 186 Iowa 1147 affirmed.

Breiholtz v Board, 257 US 118

Assessments for repairs — levy without notice. If the cost of repairs to drainage ditches amounts to less than 10 percent of the original cost, the county board of supervisors may levy assessments for such repairs without giving notice.

Baldozier v Mayberry, 226-693; 285 NW 140

7559 Assessment with notice.

Atty. Gen. Opinions. See '32 AG Op 235; '38 AG Op 483

7560 Additional land.

Who entitled to notice. If in the repair of a public ditch or drain, new land be taken for use by the public, the owners thereof only need to be served with notice of condemnation proceedings.

Payne v Drainage Dist., 223-634; 272 NW 618

Trespass not taking. A landowner may not say that his land was taken for public use because in cleaning out a public ditch as a repair thereof, the contractor wrongfully distributed the dirt beyond the right of way line of the ditch as originally constructed.

Payne v Drainage Dist., 223-634; 272 NW 618

7561 Separate assessments for main ditch and laterals.

Atty. Gen. Opinions. See '30 AG Op 45, 194, 283; '32 AG Op 274

Duty to follow existing classification. An assessment for the cost of repairing a lateral drain must be levied solely on the lands benefited by the lateral, as shown by the unchanged classification adopted when the lateral was originally constructed, even tho it be a fact that, in making the assessment for the original construction, the classification in question was unlawfully disregarded.

Seabury v Adams, 208-1332; 225 NW 264

7562 Reclassification required.

Atty. Gen. Opinion. See '30 AG Op 283

7563 Improvement of common outlet.

Common outlet—what constitutes. A natural watercourse, through the sinuous course of which several adjoining drainage districts separately run their main ditch, must be considered the common outlet of all of said districts notwithstanding the fact that said watercourse remains in its natural condition for a considerable distance between two of the upper districts.

Board v Board, 214-655; 241 NW 14

Common outlet costs—mandatory duty. Principle reaffirmed that when the cost of cleaning out or enlarging the common outlet of two or more drainage districts has been properly apportioned among the several districts, a mandatory duty rests on the governing bodies of the several districts to make the proper levies in their respective counties.

Board v Board, 214-655; 241 NW 14

Mandamus—remand in equity. Where, on appeal in an equitable action of mandamus to compel the levy of assessments to defray the cost of maintaining the common outlet of several drainage districts, it appears that the trial court erroneously denied relief as to one of two expenditures, and the record so blends and combines the allowable and unallowable expenditures that the appellate court is unable to determine the matter, a reversal and remand may be entered with order to the trial court to receive additional testimony and determine the amount of the allowable expenditure.

Board v Board, 214-655; 241 NW 14

Common outlet—new right of way—notice. Statutory power "to enlarge, deepen or widen" a public drain in order to carry the combined waters of several districts using said drain as a common outlet, includes the power by necessary implication to acquire a new right of way for the purpose of effecting such enlargement, deepening or widening, and no one is entitled to notice of such acquisition or taking except the owner of the land taken, such taking being analogous to the taking of new right of way in case of repairs generally on constructed ditches.

Board v Board, 214-655; 241 NW 14

Assessments—improvement of common outlet—absence of notice—effect. The statutes (§1989-a24, S., '13; 38 GA, ch. 332), authorizing certain improvements on the common outlet of two or more drainage districts, and an apportionment of the cost thereof among the several districts by means of assessments on the basis of water discharged by each district, are not unconstitutional because said statutes fail to provide for notice to interested parties prior to the making of said improvements, said improvements being analogous to repairs on ditches generally, subsequent to their construction.

Board v Board, 214-655; 241 NW 14

Assessments—unconstitutional basis—burden of proof. The court will not declare a drainage statute unconstitutional because it fixes a ratio of water discharged as the basis for computing assessments between districts, when the record reveals the legal fact that the district does receive a benefit because of the improvement in question and is assessable therefor, and when there is no proof by complainant that the said statutory basis is not the equivalent of benefits.

Board v Board, 214-655; 241 NW 14
Ward v Board, 214-1162; 241 NW 26

Assessment under repealed statute. An apportionment or assessment of drainage improvement costs under a statute which fixed "volume-of-water-discharged" as a basis, but which, before the improvement in question had been initiated, had been repealed and supplanted by a statute which fixed "benefits" as a basis, is prejudicially erroneous unless the prejudice is obviated by a showing that an apportionment or assessment on either basis would be the same.

Board v Board, 214-655; 241 NW 14

Assessment—remodeling common outlet. The cost consequent on the cleaning out, enlarging, deepening, or widening of a public drain or ditch which receives the combined waters from two or more such districts must be assessed against the lands in all of said districts in the ratio provided by statute. (Holding under 38th GA, ch. 332.)

Mayne v Board, 208-987; 223 NW 904; 225 NW 953

Assessments—for common outlet—constitutionality. Whether statutes authorizing the cost of certain improvements on the common outlet of several districts to be apportioned by the board doing the work to each of said districts in the ratio of water discharged by each district, are unconstitutional because said statutes fail to provide interested parties, in districts other than the district embracing the common outlet, with notice of and opportunity to contest said apportionment, quaere. But said interested parties may not complain of the absence of such notice and opportunity when they admit that the apportionment in question was correctly made in accordance with the said statutory ratio.

Board v Board, 214-655; 241 NW 14

Assessments for common outlet—basis of benefits. Ample basis for assessing lands within a public drainage district for benefits in order to defray the cost of maintaining or enlarging an outlet which is the common outlet of said district and of other districts, is found in the fact that, by the statutory establishment

of said district, the landowners within the district acquire an extraordinary right which they could not acquire under any other statute or have under the common law, to wit: The right to gather together the surface waters on said lands, and to cast them, through a materially shortened and straightened ditch, and in abnormally increased volume, and with abnormally increased velocity, upon the servient lands of lower districts; to the substantial damage of said latter lands.

Board v Board, 214-655; 241 NW 14
Ward v Board, 214-1162; 241 NW 26

Assessments for after-accruing benefits. A statute authorizing certain improvements on the common outlet of several districts and the apportionment of the cost thereof among said several districts receiving the benefit of such improvements, is applicable to a district organized prior to the enactment of said statute, and is not unconstitutional in failing to provide for notice to the landowners of the latter district before said improvements are made.

Ward v Board, 214-1162; 241 NW 26

Judgment—nonparty and nonprivy. A judgment to the effect that drainage improvement costs (designed ultimately to be apportioned among several separate districts) must be assessed in accordance with a specified statute, is not conclusive in a subsequent proceeding against a district which was not a party to the first proceedings and which was not privy to any party to said first proceeding.

Board v Board, 214-655; 241 NW 14
Ward v Board, 214-1162; 241 NW 26

Nonpresumption of benefits. There is no presumption that improvements within a drainage district confer any benefit on the lands within an adjoining district, even tho said improvements are made in the vicinity of the common outlet of both districts. It follows that no assessment, on account of such an improvement, can be legally made against another district in the absence of proof of benefit to such other district.

Mayne v Board, 215-221; 241 NW 29

Contribution—statute of limitation. The legal right of the governing body of a drainage district located in one county to compel a drainage district located in another county, thru its governing body, to contribute to the cost of cleaning out, deepening, enlarging, extending or straightening of the outlet which is common to both of said districts, accrues when the actual cost of said work is legally apportionable to the different districts; and action to enforce said right, unless instituted within five years after said accrual, is barred by the statute of limitation. And the making of an erroneous apportionment will not toll said statute.

Board v Board, 221-337; 264 NW 702

7567 Levy under original classification.

Common outlet costs — mandatory duty. Principle reaffirmed that when the cost of cleaning out or enlarging the common outlet of two or more drainage districts has been properly apportioned among the several districts, a mandatory duty rests on the governing bodies of the several districts to make the proper levies in their respective counties.

Board v Board, 214-655; 241 NW 14

7568 Levy under reclassification.

Atty. Gen. Opinion. See '38 AG Op 483

7569 Removal of obstructions.

Atty. Gen. Opinion. See '28 AG Op 365

7571 Outlet for lateral drains—specifications.

Statutory right to use. A landowner who has been assessed for the cost of a drainage improvement may construct, wholly upon his own land, ditches for the purpose of carrying his surface waters into a lateral which has been located upon his land, even tho said lateral may be overtaxed by said surface waters, to the damage of lower landowners.

Dullard v Phelan, 204-716; 215 NW 965

7576 Procedure.

Public improvements—estimated quantities as basis for contract—variation with specifications not fatal. In awarding a contract, the function of plans and estimated quantities is to permit a uniform comparison of bids, and the requirement of "unit prices", as a means of payment for variations from the estimated quantities, indicates their variable character, so certain variations between the plans and specifications will not result in a failure of competitive bidding invalidating a contract based thereon.

Interstate Co. v City, 225-490; 281 NW 207

7585 Employment of counsel.

Implied power. Boards acting on behalf of public drainage districts have implied power to contract with attorneys to appear before the legislature and by proper means seek to induce the legislature to so legislate that a moral obligation on the part of the state with reference to the district will be fulfilled.

Kemble v Weaver, 200-1333; 206 NW 83

Illegal employment of attorneys, etc. The board of supervisors after refusing to establish a proposed drainage improvement because such establishment would not be conducive to public benefit, utility, health, convenience, and welfare, has no power to employ attorneys and an engineer to defend on appeal the action of the board. Such employment being a nul-

lity, the resulting expense may not be taxed to the petitioners.

Christensen v Agan, 209-1315; 230 NW 800

7589 Purchase at tax sale.

Inadequacy of bid. A bona fide sale of land at "scavenger" sale for delinquent tax will not be deemed void as against public policy because of inadequacy of the bid, in view of the fact (1) that the public authorities have a legal right to bid at said sale, and (2) that the treasurer is under a mandatory duty to sell.

Board v Stone, 212-660; 237 NW 478

7590 Tax deed—sale or lease.

Drainage district bondholder—permissible purchaser at tax sale. Bondholders of a drainage district, by virtue of their ownership of such bonds, do not have an interest in such drainage district land sold for taxes which will disqualify them from becoming purchasers at tax sale.

Teget v Lambach, 226-1346; 286 NW 522

7590.1 Purchase of tax certificate.

Atty. Gen. Opinion. See '36 AG Op 256

Tax sale—nonduty of supervisors to purchase certificate. The statutory provision, that the board of supervisors or the drainage trustees "may" purchase an outstanding certificate evidencing a sale of land for the nonpayment of drainage assessments, simply invests the board or trustees with discretion so to purchase. No mandatory duty so to purchase in order to protect the bondholder is imposed, even tho the bondholder must look solely to assessments for payment of his bond.

Bechtel v Board, 217-251; 251 NW 633

7590.2 Terms of redemption.

Atty. Gen. Opinions. See '36 AG Op 256; AG Op May 18, '39, May 19, '39

7590.7 Purchase by bondholder.

Tax sales—who may purchase. Under the statutes of this state any person may become a purchaser at tax sale, and the only statutory exception is found in §7261, C., '39.

Teget v Lambach, 226-1346; 286 NW 522

Drainage district bondholder — permissible purchaser at tax sale. Bondholders of a drainage district, by virtue of their ownership of such bonds, do not have an interest in such drainage district land sold for taxes which will disqualify them from becoming purchasers at tax sale.

Teget v Lambach, 226-1346; 286 NW 522

7597 Drainage record.

Drainage record book admissible. In action to cancel tax sale certificate for an unpaid drainage assessment, to enjoin issuance of treasurer's deed therefor, and to further enjoin the collection of remaining assessments on ground that drainage district was not legally established because of defective notice and failure to file proof of service, the drainage record book kept by auditor showing compliance with statutory requirements was admissible, and failure to give correct name of mortgagee in proceeding to establish the district was not a jurisdictional defect where proposed ditch did not extend through or abut upon land covered by the mortgage. (§1989-a3, S., '13.)

Whisenand v Van Clark, 227-800; 288 NW 915

Purchase by drainage district bondholder. The statute relating to fraudulent tax sales does not entitle the owner of the property to quiet title against holders of tax deeds on the grounds that tax deeds are void because purchasers are owners and holders of drainage bonds issued by drainage district in which land is situated without tender of taxes paid, when no claim is asserted that there is any fraud or collusion or conspiracy to defraud, and the question submitted is purely a legal question as to whether bondholders are under a legal disability to acquire title.

Teget v Lambach, 226-1346; 286 NW 522

CHAPTER 354

INTERCOUNTY LEVEE OR DRAINAGE DISTRICTS

7599 Petition and bond.

Jurisdictional facts. The filing of a petition and bond with the county auditor of each county is mandatory, in order to confer jurisdiction to establish an intercounty drainage improvement.

Glenn v County, 201-1033; 206 NW 802

7614 Levies—certificates and bonds.

Unallowable item of expense. The boards of supervisors in charge of an intercounty drainage improvement are wholly without jurisdiction to include in a deficiency assessment on all the lands within the district an item of expense which had been contracted in one county by the board of supervisors thereof in the employment of a fiscal agent to sell the bonds which had been issued in such particular county.

Haferman v District, 204-936; 216 NW 257

Impressing unpaid warrant on excess assessment—necessary parties. Where two counties, by contract between both boards of

supervisors and the contractors, issued warrants for construction of an intercounty drain and one county had a balance remaining from its assessments after paying all its drainage warrants but the other county after exhausting all funds from its assessments still owed outstanding unpaid warrants, an action in equity by an assignee of one of the unpaid warrants of the latter county to impress a trust for the amount of his warrant on the excess balance of the assessment in the former county, cannot be maintained against the former county alone because the other unpaid warrant holders and the landowners who paid the excess assessment are necessary parties.

Straub v Board, 223-1099; 274 NW 84

7623 Transfer to district court.

Applicability of statute. This section has no application to an intracounty drain.

Glenn v County, 201-1033; 206 NW 802

7626 Law applicable.

Nonpermissible annexation. The power of joint boards of supervisors to annex lands to an existing intercounty drainage district does not extend to lands which are embraced in an existing intracounty drainage district.

Farley Dist. v Drainage Dist., 207-970; 221 NW 589

CHAPTER 354.1

CONVERTING INTRACOUNTY DISTRICTS INTO INTERCOUNTY DISTRICT

7626.1 Intracounty districts converted into intercounty district.

Annexation of lands—when nonpermissible. The power of joint boards of supervisors to annex lands to an existing intercounty drainage district does not extend to lands which are embraced in an existing intracounty drainage district.

Farley Dist. v Drain. Dist., 207-970; 221 NW 589

CHAPTER 355

DRAINAGE DISTRICTS EMBRACING PART OR WHOLE OF CITY OR TOWN

Atty. Gen. Opinion. See '32 AG Op 273

CHAPTER 356

HIGHWAY DRAINAGE DISTRICTS

7639 Powers.

Atty. Gen. Opinion. See '38 AG Op 445

7643 Assessment—report.

Reduction of assessment. Record reviewed in detail, and held that a thirty-three and one-third percent reduction by the trial court of an assessment on agricultural lands, to defray the cost of a highway drainage improvement was justified.

Held v Board, 201-418; 205 NW 529

7649 Removal of trees from highway.

Improvement — special restrictive statutes not controlling general law. Statutes relating to hedges and drainage, which for such purposes restrict authorities as to molesting ornamental trees and windbreaks, have no application to the general law on improvements of secondary roads.

Rabiner v Humboldt County, 224-1190; 278 NW 612; 116 ALR 89

7650 Trees outside of highways.

Improvement — special restrictive statutes not controlling general law. Statutes relating to hedges and drainage, which for such purposes restrict authorities as to molesting ornamental trees and windbreaks, have no application to the general law on improvements of secondary roads.

Rabiner v Humboldt County, 224-1190; 278 NW 612; 116 ALR 89

CHAPTER 357

DRAINAGE AND LEVEE DISTRICTS WITH PUMPING STATIONS

7663 Funding bonds.

Atty. Gen. Opinion. See '28 AG Op 346

7673 Limitation of actions.

Time limit to question legality of bonds.

Waller v Pritchard, 201-1364; 202 NW 770

CHAPTER 358

MANAGEMENT OF DRAINAGE OR LEVEE DISTRICTS BY TRUSTEES

Atty. Gen. Opinion. See AG Op Feb. 28, '40

7674 Trustees authorized.

Drainage levies as ordinary taxes—treasurer as drainage district officer. A county treasurer is not an ex officio officer of a drainage district, so individuals paying drainage levies to him are classed as ordinary taxpayers, and as such cannot be compelled to pay such taxes twice.

Western Assn. v Barrett, 223-932; 274 NW 55

Trustees taking control of district. County supervisors in their statutory capacity as representatives of a drainage district had right to employ attorneys and issue drainage warrants to them for services to be rendered in the trial and appeal of an action brought by property owners to enjoin collection of assessments levied to meet cost of work done for the district, and fact that elected drainage trustees took over management of the district before services were fully performed in supreme court did not render void the warrant previously issued for such service.

Kilpatrick v Mills County, 227-721; 288 NW 871

7699 Organization.

Atty. Gen. Opinion. See AG Op Feb. 28, '40

7700 Power and duties of trustees.

Good faith presumption. Acts of county supervisors concerning work done by them in their statutory capacity as representatives of a drainage district to maintain the efficiency and durability of a drainage system was presumed to have been done in good faith, and they had an absolute right on behalf of the district to stand behind the contract under which the work was done in the interest of the district.

Kilpatrick v Mills County, 227-721; 288 NW 871

Trustees taking control of district—effect. County supervisors in their statutory capacity as representatives of a drainage district had right to employ attorneys and issue drainage warrants to them for services to be rendered in the trial and appeal of an action brought by property owners to enjoin collection of assessments levied to meet cost of work done for the district, and fact that elected drainage trustees took over management of the district before services were fully performed in supreme court did not render void the warrant previously issued for such service.

Kilpatrick v Mills County, 227-721; 288 NW 871

CHAPTER 358.1

DRAINAGE REFUNDING BONDS

7714.23 Limitation of action.

Time limit to question legality of bonds.

Waller v Pritchard, 201-1364; 202 NW 770

7714.25 Interpretative clause.

Atty. Gen. Opinion. See '28 AG Op 346

CHAPTER 359

INDIVIDUAL DRAINAGE RIGHTS

7723 Appeal—notice.

Proper service. A statute which distinctly provides that a notice, e. g., a notice of appeal, shall be "served as an original notice", authorizes a service on the designated party by leaving a copy of said notice at the usual place of residence of said party with some member of his family over fourteen years of age—when said party is not present in the county at the time of said service. So held as to the service of a notice of appeal under §7133.

In re Sioux City Yards, 222-323; 268 NW 18

7736 Drainage in course of natural drainage.

Surface waters, city's power to regulate. See under §5752

Scope of section. This section has no reference to, nor does it purport to limit, the right of contract for private drainage.

Salinger v Winthouser, 200-755; 205 NW 309

Right of discharge. Principle asserted that a landowner may freely avail himself of the topography of his land, and may discharge his surface waters wherever gravitation naturally carries them, without further concern or obligation on his part.

Thompson v Board, 201-1099; 206 NW 624

Private drainage—pleadings. On the issue whether a dominant estate holder may maintain a tile drainage system on his land, and by means thereof discharge waters on the land of

a servient estate holder, a plea should not be stricken which asserts, in substance, that the tile system in question was constructed at large cost, under an agreement with a former owner of the servient estate, and was open, visible, and notorious to all subsequent purchasers of the latter estate.

Salinger v Winthouser, 200-755; 205 NW 309

Relative rights of dominant and servient landowners. Principle reaffirmed that the owner of servient lands may not substantially interfere with the natural passage of water from dominant lands, but that, after such water has passed upon the servient lands, the owner of such latter lands may handle the water as he pleases, so long as no damage results to the dominant land.

Miller v Perkins, 204-782; 216 NW 27

Natural watercourses—duty to maintain. It is the duty of the owner of a servient estate to maintain free from obstruction the natural watercourses even tho they have no well defined banks.

Heinse v Thorborg, 210-435; 230 NW 881

Unlawful diversion on one's own land. The owner of a dominant estate may not legally divert material quantities of surface waters from one natural watercourse on his land to another natural watercourse on his land, and thereby ultimately cast such diverted waters upon a public highway at a point where they would not naturally flow, nor may the board of supervisors, in order to dispose of said diverted waters, legally construct and maintain a culvert in said highway at said point of diversion, and thereby cause said diverted waters to pass through the highway and upon the land of the servient estate (to its substantial damage), at places where it would not naturally flow.

Anton v Stanke, 217-166; 251 NW 153

Damages by surface waters—flowage increased by tile. Surface water collected by one landowner and drained by tile to the land of another's servient estate, where it is there conveyed by the latter's tile to the lands of a second servient estate, all through the natural course of drainage, is not such subject of damages as to entitle the third estate owner to equitable relief; especially when it is not shown that he was substantially damaged thereby.

Johannsen v Otto, 225-976; 282 NW 334

Artificial channel—maintenance on own land. A landowner cannot be enjoined from maintaining a ditch constructed wholly upon his own land and which expedites flow of water and discharges it at practically the same point where the water was discharged under its natural course.

Fennema v Nolin, (NOR); 212 NW 702

Diverting surface water—injunction. In equity action to enjoin defendant from diverting surface water from its alleged natural course onto lands of plaintiff, evidence held to show that plaintiff failed to sustain burden of establishing case by preponderance of evidence, in that he failed to establish that water from defendant's land, judged from the natural topography of said land, would flow onto the land of plaintiff.

Schemmel v Kramer, (NOR); 228 NW 561

Surface waters—dominant and servient estates—artificial ditch—injunction. The owner of the dominant estate has the right to have the surface waters accumulating thereon flow unobstructed in the usual and natural course of drainage upon the adjoining lower or subservient estate, but he may not create an artificial ditch on the servient estate, nor enjoin the servient owner from filling such artificial ditch.

Clark v Pierce, 224-1068; 277 NW 711

Obstruction of tile—damages. Evidence held insufficient to establish a claim for damages consequent on the obstruction of a drainage tile.

Besler v Greenwood, 202-1330; 212 NW 120

Enjoining obstructed tile. A landowner who lays his tile in the general course of natural drainage and discharges the same at his boundary line into a natural watercourse, may enjoin the adjoining landowner from so obstructing said natural watercourse as to impede the flow of water from the tile.

Besler v Greenwood, 202-1330; 212 NW 120

Obstructions—mandatory removal—limitations. A mandatory injunction requiring the removal of obstructions from a watercourse should be limited to removal of what the enjoined party placed therein.

Fennema v Nolin, (NOR); 212 NW 702

Obstructions—effect. Principle recognized that the appreciable raising of the water level of streams by dams constitutes an invasion of the rights of an injured landowner.

Whittington v City, 202-442; 210 NW 460

Indemnity for operation of dam. A contract which provides that one joint owner of a dam to whom it is turned over for joint mutual use shall hold the other joint owner harmless from any damages arising from the "operation" thereof imposes upon the operator of the dam, as between said joint owners, liability for damages to overflowed property owners, consequent on the general maintenance of the dam above the authorized level, even tho the other joint owner does reserve some control over the movable parts of said dam in order to avoid such damages.

Ellis Co. v Iowa Co., 204-1325; 217 NW 262

Injunction. Highway authorities may cause a property owner to be enjoined from main-

taining on his premises a dam which obstructs the free flow of surface waters in their natural course across the highway.

Herman v Drew, 216-315; 249 NW 277

Levee construction—injunction denied—evidence. Evidence justified denying to landowner a decree for injunction against construction and maintenance by private persons of levee on adjoining property when landowner's claims were that levee would result in essential interference with flood waters or appreciably increase their volume or height along owner's property or, that levee would prevent any flood water overflowing the dike protecting landowner's property, from running back to river when flood waters receded.

Kellogg v Hottman, 226-1256; 286 NW 415

Repair of dike—estoppel. In an action to enjoin the repair of a dike originally constructed in connection with drainage system created jointly by adjoining landowners, including plaintiff's predecessor in title, and used with knowledge of plaintiff for over 20 years without objection, principles reaffirmed (1) that where there is proof of more than mere user, the statute providing that an easement cannot be established by proof of mere user alone does not apply, and (2) that the owner of a dominant estate may by consent, express or implied, estop himself from insisting upon adherence to the principle that the owner of a servient estate has no right to interfere with the natural flow of water in a well-defined course so as to cast it back upon the dominant estate.

Dodd v Aitken, 227-679; 288 NW 898

Interference with surface drainage. The maintenance of a dike along lands for the purpose of warding off backwater from a river may not be enjoined by an adjoining landowner unless he shows (1) that his lands constitute the dominant estate and the diked lands the servient estate, and (2) that the dike materially and substantially interferes with surface drainage; and high lands which are last covered by backwater from the river are not servient to adjoining low lands which are first covered by such backwater.

Downey v Phelps, 201-826; 208 NW 499

Perpetuation of unlawful drainage by bridge. The board of supervisors may not, by the construction and maintenance of a culvert in the public highway, supplement, continue and perpetuate an unlawful and material diversion of surface waters by a dominant estate holder, all to the substantial damage of the servient estate holder.

Anton v Stanke, 217-166; 251 NW 153

Drainage of surface waters. Road authorities will not be held estopped from carrying surface waters across a public highway in the course of natural drainage because of the fact that for more than ten years they have unsuccessfully attempted to divert such waters from said natural course of drainage, the landowner affected not having changed his position because of such unsuccessful efforts.

Schwartz v County, 208-1229; 227 NW 91

Damages—original or continuing. Where a bridge which spanned a natural watercourse or drain across a public highway was removed and replaced by the public authorities with a solid and permanent earth embankment, the injury or hurt to nearby lands, from flood water consequent on said change in the highway, must be deemed original damages which mature upon completion of the embankment—or at least on the occurrence of substantial damages consequent on the change. It follows that the maintenance of said embankment may not be legally questioned by action commenced after the lapse of five years from the maturity of said damages.

Thomas v Cedar Falls, 223-229; 272 NW 79

Nonestoppel to abandon artificial course of drainage. A railway company which, for a great number of years, has unsuccessfully attempted to drain surface waters along the line of its right of way (which was slightly counter to the natural course of drainage) is under no legal obligation to continue to maintain such unsuccessful drain, but may abandon it, and conduct such waters under its tracks in the natural course of drainage.

Hinkle v Railway, 208-1366; 227 NW 419

Overflow damage. In landowner's action against railroad for damage to crops, resulting from overflow, where record showed plans and specifications for drainage ditch did not require railroad to lengthen bridge span, railroad's full compliance with requirements barred recovery.

Kellogg v Railway, (NOR); 239 NW 557

Natural flow—contract to change. Adjoining landowners, as between themselves, may validly contract for ditches and dikes which will free the servient estate from the burden of natural drainage, and the right, if not abandoned, to have such ditches and dikes maintained will pass to subsequent owners of the land. But he who alleges such contract must establish the same by clear and satisfactory evidence.

Young v Scott, 216-1253; 250 NW 484

Increased flowage consequent on nonnegligent execution of expert plans. Damages to a property owner from an increased flowage of water consequent on the nonnegligent execution of concededly expert plans for paving and surface-water intakes therein, and for curbing, is damnum absque injuria; especially when the damage occurs at the converging point of natural watercourses.

Cole v City, 212-1270; 232 NW 800

Eminent domain—compensation—allowable elements. In the condemnation of a portion of a farm in order to create a reservoir on a natural stream for waterworks purposes, the following elements may be taken into consideration in fixing the value of the remaining portion of the farm immediately after the condemnation, to wit:

1. The extent to which the uncondemned land will be detrimentally affected by the percolation of water;
2. The detrimental effect on livestock of hunting and shooting on the condemned land, it appearing that the municipality had authorized such acts;
3. The limitation which will to a reasonable certainty be placed upon the landowner's former right to cast drainage from feed lots directly into said stream.

Wheatley v Fairfield, 213-1187; 240 NW 628

Assessments for common outlet—basis of benefits. Ample basis for assessing lands within a public drainage district for benefits in order to defray the cost of maintaining or enlarging an outlet which is the common outlet of said district and of other districts, is found in the fact that, by the statutory establishment of said district, the landowners within the district acquired an extraordinary right which they could not acquire under any other statute or have under the common law, to wit: The right to gather together the surface waters on said lands, and to cast them, through a materially shortened and straightened ditch, and in abnormally increased volume, and with abnormally increased velocity, upon the servient lands of lower districts, to the substantial damage of said latter lands.

Ward v Board, 214-1162; 241 NW 26

Laterals—statutory right to use. A landowner who has been assessed for the cost of a drainage improvement may construct, wholly upon his own land, ditches for the purpose of carrying his surface waters into a lateral which has been located upon his land, even tho said lateral may be overtaxed by said surface waters to the damage of lower landowners.

Dullard v Phelan, 204-716; 215 NW 965

Creation by ancient grantors—effect. An owner of land may not, except with the consent of all interested parties, question a visible and permanent drainage easement imposed upon the land by his ancient grantors.

Ehler v Stier, 205-678; 216 NW 637

Pollution—limitation on right. Principle recognized that the right of a riparian owner to cast refuse into a natural stream may be quite materially limited after a portion of his land has been condemned for a public purpose.

Wheatley v City, 213-1187; 240 NW 628

Surface waters—damages—evidence. Evidence held to justify the court in submitting to the jury the question of damages resulting from the seepage of surface waters into the wall of a building.

Dravis v Sawyer, 218-742; 254 NW 920

7737 Drainage connection with highway.

Obstructions. Principle reaffirmed that a property owner may not legally place obstructions within a public highway and thereby interfere with the drainage of surface waters across such highway.

Adams County v Rider, 205-137; 218 NW 60

CHAPTER 363

MILLDAMS AND RACES

7767 Prohibition—permit.

Atty. Gen. Opinions. See '28 AG Op 272, 333; '32 AG Op 121; '34 AG Op 489; '36 AG Op 109

7768 Application for permit.

Atty. Gen. Opinion. See '25-26 AG Op 466

7769 Notice of hearing.

Atty. Gen. Opinion. See '32 AG Op 121

7775 Permit fee—annual license.

Atty. Gen. Opinions. See '28 AG Op 415; '30 AG Op 284; '34 AG Op 489

7776 Construction and operation.

Atty. Gen. Opinion. See '36 AG Op 109

7780 Action to collect fees.

Atty. Gen. Opinion. See '30 AG Op 284

7782 Nuisance.

Atty. Gen. Opinion. See '36 AG Op 109

7783 Condemnation—petition.

Atty. Gen. Opinion. See '25-26 AG Op 466

Compensation—protection of right. Injunction will lie to enjoin the construction of a dam and the consequent taking by overflow of private property for the public use, until the damages are paid; and this is true even tho the taker is solvent.

Scott v Price Bros. Co., 207-191; 217 NW 75

7787 Oath—assessment of damages—costs.

Indemnity for operation of dam. A contract which provides that one joint owner of a dam to whom it is turned over for joint mutual use, shall hold the other joint owner harmless from any damages arising from the "operation" thereof, imposes upon the operator of the dam, as between said joint owners,

liability for damages to overflowed property owners consequent on the general maintenance of the dam above the authorized level, even tho the other joint owner does reserve some control over the movable parts of said dam, in order to avoid such damages.

Ellis Park v Iowa Co., 204-1325; 217 NW 262

7792 Revocation or forfeiture of permit.

Atty. Gen. Opinions. See '30 AG Op 77; '36 AG Op 109

7793 Legislative control.

Atty. Gen. Opinion. See '36 AG Op 109

CHAPTER 364

WATER-POWER IMPROVEMENTS

7797 Eminent domain.

Conveyance in lieu of condemnation. A deed given to a railroad for a strip of land to be used as a right of way, and deeds of a like kind, given by the landowner when condemnation may be imminent if he refuses to convey, should be given such liberal construction as will effectuate the intention of the parties and fully protect the rights of the grantor and his assigns.

Keokuk County v Reinier, 227-499; 288 NW 676

CHAPTER 365

EMINENT DOMAIN

7803 Exercise of power by state.

Discussion. See 17 ILR 374—Public building construction

Atty. Gen. Opinion. See '34 AG Op 667

Condemnation by state highway commission. The state highway commission has no authority to condemn for primary road purposes the ornamental grounds or orchard of an owner, without his consent.

Hoover v Highway Com., 207-56; 222 NW 438

Construction of wharf—paramount right of state. The construction by the state of a wharf below high watermark on a navigable lake (to the bed of which the state has title), in aid of navigation, and without compensation to the riparian owner, is but the exercise of a right and the execution of a trust which is paramount to any right of ingress and egress of said riparian owner.

Peck v Const. Co., 216-519; 245 NW 131; 89 ALR 1132

Compensation — abutting tract — connected farming operation—instruction. In a condemnation action where an 80-acre tract abutting and farmed in connection with, but only partly owned by the owner of the farm involved in condemnation, an instruction that no damage to the abutting 80 acres could be assessed, but that the jury could consider the farming control advantage of the two tracts, while not approved, held not prejudicial.

Cutler v State, 224-686; 278 NW 327

Liberal condemnation verdict — supporting evidence—finality on appeal. A verdict of $4,000, in condemnation of a small tract of land, including the buildings, improvements, and shade trees, for purpose of rounding a highway corner, while perhaps liberal, will not, when evidence exists to support it, be interfered with on appeal as excessive.

Cutler v State, 224-686; 278 NW 327

Compensation—instructions— jurors' experience. An instruction in eminent domain proceedings that jurors have the right to weigh the testimony of experts as to values in the light of their own experience is not subject to the vice that they were told to substitute their own knowledge of values.

Cutler v State, 224-686; 278 NW 327

Instructions—condemnation—highway used for lawful purpose—unsupported issue. A requested instruction to the effect that in arriving at compensation the law presumes that the highway to be built would be used for a lawful purpose is properly refused when there is no claim that the highway would be unlawfully used.

Cutler v State, 224-686; 278 NW 327

Necessity for condemnation — instructions. In the absence of an issue thereon, there is no occasion whatever for the court, in eminent domain proceedings, to instruct on the subject of the necessity for such condemnation.

Hoeft v State, 221-694; 266 NW 571; 104 ALR 1008

Highway construction — interference with easement. When a highway was established through a city, taking the larger part of land over which the plaintiff had been granted an easement, a property right belonging to the plaintiff was thereby destroyed, and when she was compelled to sell the property at a loss because of its impaired value, she was entitled

to a writ of mandamus against the highway commission to compel the assessment of the damages sustained.

Dawson v McKinnon, 226-756; 285 NW 258

Conveyances in lieu of condemnation. A deed given to a railroad for a strip of land to be used as a right of way, and deeds of a like kind, given by the landowner when condemnation may be imminent if he refuses to convey, should be given such liberal construction as will effectuate the intention of the parties and fully protect the rights of the grantor and his assigns.

Keokuk County v Reinier, 227-499; 288 NW 676

7804 On behalf of federal government.

Atty. Gen. Opinion. See '34 AG Op 667

7806 Right conferred.

Atty. Gen. Opinion. See '32 AG Op 100

Public property taken for public use. The public property of the state may, under proper circumstances, constitute private property within the meaning of the federal constitution prohibiting the taking of private property for public use without just compensation; and it does not matter that the taking is by one exclusively engaged in interstate commerce. Whether the mere "use" of such public property is "a taking", quaere.

State v Pipe Line, 216-436; 249 NW 366

Highway construction — interference with easement. When a highway was established through a city, taking the larger part of land over which the plaintiff had been granted an easement, a property right belonging to the plaintiff was thereby destroyed, and when she was compelled to sell the property at a loss because of its impaired value, she was entitled to a writ of mandamus against the highway commission to compel the assessment of the damages sustained.

Dawson v McKinnon, 226-756; 285 NW 258

Conveyances in lieu of condemnation. A deed given to a railroad for a strip of land to be used as a right of way, and deeds of a like kind, given by the landowner when condemnation may be imminent if he refuses to convey, should be given such liberal construction as will effectuate the intention of the parties and fully protect the rights of the grantor and his assigns.

Keokuk County v Reinier, 227-499; 288 NW 676

7807 Right to purchase.

Compromise settlement. The acceptance by a property owner, after condemnation and assessment, and while the amount of damages was in controversy, and before the public authorities had taken possession of the land, of an amount less than had been assessed, and the execution of a deed to the right of way, in which deed the amount received is itemized as to (1) right of way, (2) fences, and (3) damages, constitute a full settlement, and preclude recovery of the difference between the assessment and the amount so accepted.

Burrow v County, 200-787; 205 NW 460

7808 Railways.

ANALYSIS

I CONDEMNATION OR ACQUISITION IN GENERAL

II RIGHTS ACQUIRED AND NATURE THEREOF

I CONDEMNATION OR ACQUISITION IN GENERAL

Deed—effect as to subsequently laid out streets. An ordinary railroad right of way deed simply grants to the railroad an easement, and works no impediment to the vesting in a municipality, subject to such easement, of streets subsequently laid out across such right of way; and especially so when the railroad company acquiesces in and recognizes the statutory dedication to the public.

Ackley v Elec. Co., 206-533; 220 NW 315

II RIGHTS ACQUIRED AND NATURE THEREOF

Nonreversion of right of way obtained by deed. A railway right of way obtained from the owner by full warranty deed and not by condemnation does not, by nonuser for the statutory eight years, revert to the owner of the tract from which such right of way was taken.

Montgomery County v Case, 212-73; 232 NW 150

Conveyances in lieu of condemnation. A deed given to a railroad for a strip of land to be used as a right of way, and deeds of a like kind, given by the landowner when condemnation may be imminent if he refuses to convey, should be given such liberal construction as will effectuate the intention of the parties and fully protect the rights of the grantor and his assigns.

Keokuk County v Reinier, 227-499; 288 NW 676

7810 Limitation on right of way.

Conveyances in lieu of condemnation. A deed given to a railroad for a strip of land to be used as a right of way, and deeds of a like kind, given by the landowner when condemnation may be imminent if he refuses to convey, should be given such liberal construction as will effectuate the intention of the parties and fully protect the rights of the grantor and his assigns.

Keokuk County v Reinier, 227-499; 288 NW 676

CHAPTER 366

PROCEDURE UNDER POWER OF EMINENT DOMAIN

7822 Procedure provided.

ANALYSIS

I CONDEMNATION IN GENERAL
II PROPERTY SUBJECT TO CONDEMNATION
III PROCEDURE IN GENERAL

I CONDEMNATION IN GENERAL

Power not subject of contract. A municipal arm of the government may not deprive itself by contract,—even on a valid consideration,—of the right of eminent domain duly vested in it.

Herman v Board, 200-1116; 206 NW 35

Inadvertent but harmless misdescription of land. Inadvertently omitting from instructions, in eminent domain proceedings, a minor portion of the land involved, does not constitute reversible error when otherwise the entire integral tract was consistently and persistently treated throughout the trial as the land in controversy, and when it is obvious that the jury never discovered the inadvertent error of the court.

Sherwood v Reynolds, 213-539; 239 NW 137

Materially destroying access to property. A substantial interference by a city with access to property by means of a public street constitutes a taking of private property for public use, even tho no part of the physical property of the property owner is taken, and the city must respond in damages for such taking.

Nalon v City, 216-1041; 250 NW 166

Trespass not a "taking". A landowner may not say that his land was taken for public use because in cleaning out a public ditch as a repair thereof, the contractor wrongfully distributed the dirt beyond the right of way line of the ditch as originally constructed.

Payne v Drainage Dist., 223-634; 272 NW 618

II PROPERTY SUBJECT TO CONDEMNATION

Highway establishment—removal of building. A "small" privy is not a "substantial, permanent, and valuable building" such as to render property exempt from condemnation.

Junkin v Knapp, 205-184; 217 NW 834

III PROCEDURE IN GENERAL

Appeal—transfer to equity. In a condemnation proceeding where two separate tracts of land under separate ownerships were treated as being jointly owned, and where, on appeal from a lump sum award covering both tracts, the owners in one count of their petition sought dismissal of the condemnation proceeding, and, where issues of waiver and estoppel as to such irregularity were joined, it was proper to transfer said count to equity so that such issues could be determined in advance of the trial to a jury on question of damages.

Newby v City, 227-382; 288 NW 399

7824 Application for condemnation.

Joint application. A joint application by different owners is allowable when the municipality seeking to condemn does not object to such joinder on appeal. (Under §1999, C., '97.)

Longstreet v Town, 200-723; 205 NW 343

"Owner" defined. The purchaser of land under an executory contract is an "owner".

Millard v Mfg. Co., 200-1063; 205 NW 979

Person entitled to compensation—burden to show title. A party who claims title to land and consequently the right to compensation for its appropriation to a public use, must establish good title in himself irrespective of the weakness of the title of the appropriating municipality which also claims title to the land.

Montgomery County v Case, 212-73; 232 NW 150

7825 Commission to assess damages.

Atty. Gen. Opinion. See '30 AG Op 184

Protection of right—injunction. Injunction will lie to enjoin the construction of a dam and the consequent taking by overflow of private property for the public use, until the damages are paid; and this is true even tho the taker is solvent.

Scott v Price Bros., 207-191; 217 NW 75

Compensation—excessive verdict. Evidence held to reveal a grossly excessive verdict on a condemnation for highway purposes.

Jenkins v Highway Com., 208-620; 224 NW 66

7829 Notice of assessment.

Taking of new land—who entitled to notice. If in the repair of a public ditch or drain, new land be taken for use by the public, the owners thereof only need to be served with notice of condemnation proceedings.

Payne v Drainage Dist., 223-634; 272 NW 618

7830 Form of notice.

Timely claim. A landowner who, in eminent domain proceeding for a public road, is entitled to a specified time after notice in which to file his claim for damages, and who appears in said proceeding in response to a fatally de-

fective notice, is entitled to said specified time after he so appears, in which to file his claim for damages.

Witham v Union Co., 202-557; 210 NW 535

7835 Appraisement—report.

ANALYSIS

I ASSESSMENTS IN GENERAL

Governmental agency to be treated as individual.

Welton v Highway Com., 211-625; 233 NW 876

Assessment rolls as evidence. In eminent domain proceedings, the duly signed assessment roll of the property in question is admissible for the purpose of showing the assessed value.

Duggan v State, 214-230; 242 NW 98

Presumptively lawful use — instructions. Damages in eminent domain proceedings for a public road must be assessed on the presumption that the highway will be lawfully used, and the court should, on request, so instruct.

Duggan v State, 214-230; 242 NW 98

Sworn assessment roll competent for impeaching purposes.

Welton v Highway Com., 211-625; 233 NW 876

Duggan v State, 214-230; 242 NW 98

II DAMAGES IN GENERAL

Location of crossing. Whether an underground crossing placed in a grade was placed at the only feasible point is quite immaterial on the issue of damages in condemnation proceedings.

Kemmerer v Highway Com., 214-136; 241 NW 693

Inadequacy of crossing. In eminent domain proceedings for a public highway, the inadequacy of an underground cattleway placed in the grade, by the condemnor, may be shown.

Kemmerer v Highway Com., 214-136; 241 NW 693

Instructions in re speculative damages. Instructions in eminent domain proceedings held not subject to the vice that they emphasized evidence tending to prove speculative damages.

Kemmerer v Highway Com., 214-136; 241 NW 693

Finality of award. An award of damages in condemnation proceedings is conclusively presumed to include all damages, present and future, which may be sustained by reason of the proper use of the condemned land.

Wheatley v City, 213-1187; 240 NW 628

Improper addition of interest. It is improper for the court in the trial of an appeal in eminent domain proceedings to direct the jury to add to their verdict interest from the date of the taking, such direction being an assumption by the court that the jury would return a verdict for damages in excess of the damages awarded by the condemnation jury.

Welton v Highway Com., 211-625; 233 NW 876

Compensation—dual methods to determine. Damages (or compensation) for land condemned under eminent domain, and belonging to the same person, are determinable:

1. When the condemnation is from one distinct tract, on the basis of the difference between the reasonable market value of said entire tract immediately before and after the condemnation.

2. When the condemnation is from two (tho contiguous) tracts, each of which is used independently of the other and for a purpose not common to both, on the same basis except that the damage to each independent tract is determined separately.

Hoeft v State, 221-694; 266 NW 571; 104 ALR 1008

Nonexcessive verdict. Verdict of $5,733 in eminent domain proceedings held nonexcessive.

Sherwood v Reynolds, 213-539; 239 NW 137

Compensation—nonexcessive verdict. In a condemnation proceeding where the evidence shows a strip of land containing 8.12 acres lying parallel and adjacent to a railroad running diagonally across a quarter section of land is taken for highway right of way and which strip includes a well, part of a feed lot, and other improvements, a verdict for damages in the sum of $4,750 cannot be held excessive by the supreme court without substituting its judgment for that of the jury.

Moran v Highway Com., 223-936; 274 NW 59

Taking gravel—injury to mortgage security —measure of damages. A mortgagee, being a lienholder, may not maintain trespass against third persons but must sue for injury to his security, and in taking gravel from mortgaged premises the measure of damages is not the value of the gravel taken but the difference in the value of the premises before and after the taking.

Bates v Humboldt County, 224-841; 277 NW 715

Assessment of damage. In a condemnation proceeding to acquire ground for highway purposes, the question of damages to be assessed

for the land appropriated is peculiarly one for the jury.

Stoner v Highway Com., 227-115; 287 NW 269

Verdict not excessive for ground and ornamental trees. In a condemnation proceeding to acquire a strip of ground for highway purposes 17 feet wide on each side of an existing highway which divided an 80-acre farm, where the land appropriated comprised 1.2 acres and included 19 trees in front of plaintiff's home, some of them being very large, hardwood, slow growing, ornamental trees, planted in connection with carefully planned landscaping, held, verdict of $2,000 was not excessive.

Stoner v Highway Com., 227-115; 287 NW 269

Proceedings to take property—power of court. The verdict of a common-law jury in eminent domain proceedings is subject to the same review by the court for inadequacy or excessiveness as other verdicts in other proceedings. Record in highway condemnation proceedings reviewed, and held verdict so grossly excessive as to evidence passion and prejudice.

Campbell v Highway Com., 222-544; 269 NW 20

Highway construction—interference with easement. When a highway was established through a city, taking the larger part of land over which the plaintiff had been granted an easement, a property right belonging to the plaintiff was thereby destroyed, and when she was compelled to sell the property at a loss because of its impaired value, she was entitled to a writ of mandamus against the highway commission to compel the assessment of the damages sustained.

Dawson v McKinnon, 226-756; 285 NW 258

III RECOVERABLE ELEMENTS OF DAMAGES

Discussion. See 12 ILR 286—Attorney fees as just compensation

Compensation—allowable elements. In the condemnation of a portion of a farm in order to create a reservoir on a natural stream for waterworks purposes, the following elements may be taken into consideration in fixing the value of the remaining portion of the farm immediately after the condemnation, to wit:

1. The extent to which the uncondemned land will be detrimentally affected by the percolation of water.

2. The detrimental effect on livestock of hunting and shooting on the condemned land, it appearing that the municipality had authorized such acts.

3. The limitation which will to a reasonable certainty be placed upon the landowner's former right to cast drainage from feed lots directly into said stream.

Wheatley v City, 213-1187; 240 NW 628

"Inconvenience" as element. The inconvenience of driving stock across a highway, consequent of the condemnation of said highway through the farm, is an element which should be given due consideration in determining the market value of the farm as a whole immediately following the condemnation.

Cory v State, 214-222; 242 NW 100

Disturbance of peace and quiet as element. In condemnation proceeding to acquire ground for highway purposes where trees taken from plaintiff were left standing along highway, testimony showing that peace and quiet of plaintiff's home was disturbed by passers-by who stopped under trees, was not incompetent on the ground that it was not a proper element of damage, it being a well-settled rule that the landowner may show all detrimental elements affecting value and that he may also show the condition the property would be in after the condemned strip had been appropriated and used for the purposes for which it was taken.

Stoner v Highway Com., 227-115; 287 NW 269

Cost of driving stock across highway. While a claimant for damages in eminent domain proceedings for the widening of an existing highway may show the fact, if it be a fact, that an additional burden will be cast on the land in the difficulty of driving stock across the highway, yet he may not show a definite sum which this additional burden will annually entail as cost in the future.

Randell v Highway Com., 214-1; 241 NW 685

Cost of removing weeds from highway. While a claimant for damages in eminent domain proceedings for the condemnation of a highway may show the fact that there will be an additional burden on the land arising from the statutory duty to destroy the weeds on the highway, yet he may not show, without any foundation therefor, a definite sum which in his opinion represents the cost of removing such weeds from the highway in the future.

Randell v Highway Com., 214-1; 241 NW 685

Verdict not excessive for ground and ornamental trees. In a condemnation proceeding to acquire a strip of ground for highway purposes 17 feet wide on each side of an existing highway which divided an 80-acre farm, where the land appropriated comprised 1.2 acres and included 19 trees in front of plaintiff's home, some of them being very large, hardwood, slow growing, ornamental trees, planted in connection with carefully planned landscaping, held, verdict of $2,000 was not excessive.

Stoner v Highway Com., 227-115; 287 NW 269

IV NONRECOVERABLE ELEMENTS OF DAMAGES

Noncontiguous tracts as one farm. In the condemnation of land for highway purposes, the record may be such as to present a jury question whether noncontiguous tracts are being used as one farm, so that the damages resulted to it as an entirety, or whether the land was in such separate tracts that the damages should be assessed to each tract separately.

Paulson v Highway Com., 210-651; 231 NW 296

Diversely owned tracts. In condemnation of land for a right of way solely through land owned by two parties jointly, the damages must not be computed on the basis of treating as one farm said jointly owned tract and another adjoining tract owned by one of the parties, individually, even tho both of said tracts are then, and for a number of years have been, leased and used as one farm.

Duggan v State, 214-230; 242 NW 98

Evidence of amount and cost of fencing incompetent. In establishing the damages for the taking of part of a farm for highway purposes, evidence of the amount of fencing which the landowner claims will be necessary because of the taking and the original and maintenance cost of such fencing is incompetent.

Dean v State, 211-143; 233 NW 36

Welton v Highway Com., 211-625; 233 NW 876

Randell v Highway Com., 214-1; 241 NW 685

Cost of removing and rebuilding existing fence. A claimant for damages in eminent domain proceedings for a public highway may show the reasonable cost of removing and rebuilding a definitely described existing fence when such removal and rebuilding is made necessary by the condemnation; but the jury must be distinctly told that the evidence of such costs is in the case solely (1) to indicate, if it does, that the damages to the land are substantial, and (2) to assist, if it will, in explaining, supporting, or denying the estimates made of the value of the property, and not to be added to the damages otherwise found by the jury as the difference between the value of the farm as a whole before and after the condemnation.

Randell v Highway Com., 214-1; 241 NW 685

Destruction of, or necessity to build, fences. Instructions to the effect that the destruction of fences, and the necessity to build new fences consequent on eminent domain proceedings are proper elements to be considered in determining the market value of the remaining farm, are not subject to the construction that the jury is thereby given the right to add to the otherwise determined market value some sum as compensation for the destruction of fences and for the necessity to build new fences.

Cory v State, 214-222; 242 NW 100

Inconvenience resulting from taking—unallowable damages. The jury must be instructed, on request, in eminent domain proceedings for highway purposes, that damages must not be allowed on the theory that the highway through the landowner's farm will be used illegally, with resulting inconvenience to the landowner; likewise an instruction to the effect that the jury must assess the damages on the presumption that the use would be lawful.

Welton v Highway Com., 211-625; 233 NW 876

V MEASURE OF DAMAGES

Excessive award. An award of damages in condemnation proceedings will not be disturbed on appeal from the trial court unless such award is so extravagant as to be wholly unfair and unreasonable.

Longstreet v Town, 200-723; 205 NW 343

Wheatley v City, 213-1187; 240 NW 628

Excessive allowance — evidence. Evidence held insufficient to justify a holding that an allowance of $11,755 as damages for land taken for highway purposes was the result of passion and prejudice.

Shimerda v Highway Com., 210-154; 230 NW 335

Compromise settlement. The acceptance by a property owner, after condemnation and assessment, and while the amount of damages was in controversy, and before the public authorities had taken possession of the land, of an amount less than had been assessed, and the execution of a deed to the right of way, in which deed the amount received is itemized as to (1) right of way, (2) fences, and (3) damages, constitute a full settlement, and preclude recovery of the difference between the assessment and the amount so accepted.

Burrow v County, 200-787; 205 NW 460

Verdict—conclusiveness. In condemnation proceedings, a verdict for damages which is fairly within the range of the legitimate testimony is ordinarily conclusive on the appellate court, even tho the amount is concededly larger than a court itself would have granted, and even tho it appears that the jury substantially split the difference between the witnesses in their estimate of damages.

Cory v State, 214-222; 242 NW 100

Measure of damages. The measure of damages for injury resulting from the exercise of the right of eminent domain is the difference in value of the land as a whole immediately before and immediately after the injury occurs.

Millard v Mfg. Co., 200-1063; 205 NW 979

Welton v Highway Com., 211-625; 233 NW 876

Wheatley v City, 213-1187; 240 NW 628

Condemnation—measure of damages. Principle reaffirmed that the measure of damages for land condemned for right of way for an electric power line is the difference in the market value of the tract from which the land is taken, before and after the condemnation.

Evans v Iowa Co., 205-283; 218 NW 66

Compensation—measure of. The recoverable measure of damages to a farm, consequent on the condemnation of a highway right of way therethrough, is the difference in value of the farm as a whole before condemnation and the value immediately thereafter. It follows that the trial court on appeal cannot limit the jury solely to a consideration of the items of damages specifically alleged by the landowner in the petition filed under §7841-c1, C., '35 [§7841.1, C., '39].

Maxwell v Highway Com., 223-159; 271 NW 883; 118 ALR 862

Taking gravel—injury to mortgage security—measure of damages. A mortgagee, being a lienholder, may not maintain trespass against third persons but must sue for injury to his security, and in taking gravel from mortgaged premises the measure of damages is not the value of the gravel taken but the difference in the value of the premises before and after the taking.

Bates v Humboldt Co., 224-841; 277 NW 715

Excessive condemnation award—jury verdict—reviewability. Generally the question of compensation in an eminent domain case is for the jury, but the supreme court will not hesitate to reverse where the record clearly shows excessive damages.

Luthi v Highway Com., 224-678; 276 NW 586

Liberal condemnation verdict — supporting evidence—finality on appeal. A verdict of $4,000, in condemnation of a small tract of land, including the buildings, improvements, and shade trees, for purpose of rounding a highway corner, while perhaps liberal, will not, when evidence exists to support it, be interfered with on appeal as excessive.

Cutler v State, 224-686; 278 NW 327

Disturbance of peace and quiet as element. In condemnation proceedings to acquire ground for highway purposes where trees taken from plaintiff were left standing along highway, testimony showing that peace and quiet of plaintiff's home was disturbed by passers-by who stopped under trees, was not incompetent on the ground that it was not a proper element of damage, it being a well settled rule that the landowner may show all detrimental elements affecting value and that he may also show the condition the property would be in after the condemned strip had been appropriated and used for the purposes for which it was taken.

Stoner v Highway Com., 227-115; 287 NW 269

Advantage not considered. In condemnation proceeding where land was taken for highway purposes, under the principle that advantage resulting from improvement of property taken by condemnation may not be taken into consideration in determining amount of plaintiff's damage, the defendant had no right to plead and prove matters relating to the manner of construction of the improvement which would tend to ameliorate damages.

Stoner v Highway Com., 227-115; 287 NW 269

Jury considering cost of bridges. Instruction on measure of damages for constructing drainage ditch, which instruction permitted jury to consider cost of bridges where such ditch bisects claimant's land, was not erroneous, and an allowance of $1,050 damages from construction of such ditch to a farm of 55 acres held not excessive.

Kerr v Tysseling, (NOR); 239 NW 233

Highway construction — interference with easement. When a highway was established through a city, taking the larger part of land over which the plaintiff had been granted an easement, a property right belonging to the plaintiff was thereby destroyed, and when she was compelled to sell the property at a loss because of its impaired value, she was entitled to a writ of mandamus against the highway commission to compel the assessment of the damages sustained.

Dawson v McKinnon, 226-756; 285 NW 258

VI EVIDENCE AND WITNESSES IN GENERAL

Conflicting evidence. The depreciation in the value of a farm as a whole because of the condemnation of a right of way thereover is necessarily a matter of estimation, and a verdict on supporting and conflicting testimony will not be disturbed. The amount of land taken is by no means the sole criterion.

Besco v Mahaska County, 200-684; 205 NW 459

Jurisdiction—insufficient showing of estoppel. Record reviewed, in eminent domain proceedings, and held insufficient to show that the county, through its board of supervisors, was estopped to assert that it had jurisdiction over an objector.

Witham v Union County, 202-557; 210 NW 535

Accessibility of farm to market. The defendant in eminent domain proceedings has the legal right, on the cross-examination of plaintiff's witnesses as to value, to show the distance of plaintiff's farm from the market and the kind of roads leading to such market.

Welton v Highway Com., 211-625; 233 NW 876

VI EVIDENCE AND WITNESSES IN GENERAL—concluded

Evidence—distance to markets. In a condemnation action, evidence as to distance from market centers and condition of old roads not admissible in determining damages.

Moran v Highway Com., 223-936; 274 NW 59

Evidence of value of separate parcels of single farm incompetent. A landowner will not be permitted, when part of his farm is being taken for highway purposes, to prove the value of different parcels of his farm before and after the taking.

Welton v Highway Com., 211-625; 233 NW 876

Evidence—benefits to mitigate damages. Where a strip of land lying parallel and adjacent to a railroad diagonally across a quarter section of land was condemned for highway right of way purposes, it was not error to exclude evidence of the beneficial final condition of the construction with reference to culverts, drains and water pipes from a well, offered for the purpose of mitigating damages, especially when such evidence proves only a favor of uncertain tenure granted to the landowner rather than a matter of absolute right.

Moran v Highway Com., 223-936; 274 NW 59

Examination of witness—form of question—valuation without benefits. In a condemnation proceeding, question propounded by landowner as to valuation immediately after condemnation, without referring in the question to benefits, is not prejudicial to condemnor and not erroneous, especially when court states correct measure of damages.

Moran v Highway Com., 223-936; 274 NW 59

Evidence—similar land sale prices. In a condemnation action, excluding evidence from one witness as to similar land sale prices but admitting the like evidence from another witness held not reversible error where both had testified as to values generally.

Moran v Highway Com., 223-936; 274 NW 59

Evidence—driving stock across highway. In condemnation proceeding to acquire ground to widen highway which divided plaintiff's farm, a hypothetical question asked of one witness as to whether the additional trouble experienced by plaintiff in driving his stock across highway, since it had been widened, would affect the values of the farm—although being a question of doubtful propriety, was related to a matter so simple and self-evident that the opinion of the witness could add no force or prejudicial effect thereto.

Stoner v Highway Com., 227-115; 287 NW 269

Witnesses—need for fence. In a condemnation action, denial of cross-examination of landowner by condemnor as to necessity of fencing held not reversible error when plat of property already in evidence settled question.

Moran v Highway Com., 223-936; 274 NW 59

Assessment as commissioner's personal judgment—cross-examination. In a condemnation action, permitting landowner to cross-examine a condemnation commissioner regarding the sworn assessment of damages as expressing his personal judgment held not error. (Distinguishing Winkelmans v Des Moines N.W. Ry. Co., 62 Iowa 11.)

Moran v Highway Com., 223-936; 274 NW 59

7839 Appeal.

ANALYSIS

I APPEAL IN GENERAL
II PARTIES TO APPEAL
III NOTICE

I APPEAL IN GENERAL

Consolidation of appeals. Separate appeals to the district court in eminent domain proceedings relative to the same award are properly consolidated.

Cenco v Northwestern Co., 203-1390; 214 NW 545

Appeal—transfer to equity. In a condemnation proceeding where two separate tracts of land under separate ownerships were treated as being jointly owned, and where, on appeal from a lump sum award covering both tracts, the owners in one count of their petition sought dismissal of the condemnation proceeding, and, where issues of waiver and estoppel as to such irregularity were joined, it was proper to transfer said count to equity so that such issues could be determined in advance of the trial to a jury on question of damages.

Newby v City, 227-382; 288 NW 399

II PARTIES TO APPEAL

Defendants—eminent domain—bringing in necessary parties. In eminent domain proceedings on appeal from the award of the sheriff's jury, the court may permit the appellant landowner to amend, and bring in, and join equitable issue of ownership as to a portion of the property involved, with a stranger to the proceedings, and to try out such issue prior to trying out the issue of damages.

McCall v Highway Com., 217-1054; 252 NW 546

III NOTICE

Sufficiency of notice. A written notice of appeal from an award in eminent domain proceedings is sufficient, under this section, if it is addressed to the condemnor and to the sheriff and simply states that the landowner has taken an appeal to the district court of the county

in question from the award of the appraisers. The particularity required in an original notice of suit is by no means required.

O'Neal v State, 214-977; 243 NW 601

7841 Appeals—how docketed and tried.

Filing petition not jurisdictional. On appeal from an award in condemnation proceedings, the filing of a petition in the appellate court, at the time required by statute, is not jurisdictional.

Wilcox & Sons v Omaha, 220-1131; 264 NW 5

Erroneous docketing—effect. An applicant for condemnation of realty who erroneously causes its appeal from the award of the sheriff's jury to be docketed in the name of itself as plaintiff, and in the name of the landowner as defendant, and files petition, and thereby induces the landowner to file answer thereto, is in no position, after causing its own error to be corrected by a proper redocketing, either to demand the entry of judgment in accordance with its own offer to confess judgment, or to object to the action of the court in granting to the landowner (the proper plaintiff) a continuance over the term in which to file a proper petition.

Wilcox & Sons v Omaha, 220-1131; 264 NW 5

Appeal—transfer to equity. In a condemnation proceeding where two separate tracts of land under separate ownerships were treated as being jointly owned, and where, on appeal from a lump sum award covering both tracts, the owners in one count of their petition sought dismissal of the condemnation proceeding, and, where issues of waiver and estoppel as to such irregularity were joined, it was proper to transfer said count to equity so that such issues could be determined in advance of the trial to a jury on question of damages.

Newby v City, 227-382; 288 NW 399

Burden of proof. A claimant for damages in eminent domain proceedings, who appeals to the district court from the award of the appraisers, has the burden of proof to establish his damages, and reversible error results from a failure so to instruct.

Randell v Highway Com., 214-1; 241 NW 685

Proceedings to take property — instructions in re benefits. In eminent domain proceedings, an instruction that the compensation allowed should not leave the landowner "poorer off or worse off or better off" because of the taking, is not subject to the vice of leading the jury to understand that in computing compensation, benefits accruing to the landowner because of the taking should be deducted, when the jury is repeatedly and explicitly told elsewhere in the instructions that they should not consider benefits.

Witt v State, 223-156; 272 NW 419

Assessment of damage—jury question. In a condemnation proceeding to acquire ground for highway purposes, the question of damages to be assessed for the land appropriated is peculiarly one for the jury.

Stoner v Highway Com., 227-115; 287 NW 269

Disputed fact questions as to value. In a condemnation proceeding to acquire ground for highway purposes, the right of the jury to decide disputed fact questions as to value will not be interfered with by the supreme court, if there is evidence upon which the jury could reach the verdict it did reach.

Stoner v Highway Com., 227-115; 287 NW 269

7841.1 Pleadings on appeal.

Requirements. The petition need not state, on the subject of damages, anything more than the total amount of damages claimed.

Maxwell v Highway Com., 223-159; 271 NW 883; 118 ALR 862

Filing petition not jurisdictional. The filing by an appellant in eminent domain proceedings "on or before the first day of the term to which the appeal is taken" of a petition specifying the items of damages claimed and the amount thereof is purely procedural and, therefore, not jurisdictional.

O'Neal v State, 214-977; 243 NW 601

Filing petition not jurisdictional. On appeal from an award in condemnation proceedings, the filing of a petition in the appellate court, at the time required by statute, is not jurisdictional.

Wilcox & Sons v Omaha, 220-1131; 264 NW 5

Appeal to district court—damages pleaded specifically. In an appeal to district court from award of condemnation jury, the plaintiff must state specifically the items of damage and the amount thereof.

Stoner v Highway Com., 227-115; 287 NW 269

Right to amend pleading. A claimant for damages in condemnation proceedings may amend his pleadings and increase his demand for damages as in other actions.

Kemmerer v Highway Com., 214-136; 241 NW 693

Erroneous docketing — effect. An applicant for condemnation of realty who erroneously causes its appeal from the award of the sheriff's jury to be docketed in the name of itself as plaintiff, and in the name of the landowner as defendant, and files petition, and thereby induces the landowner to file answer thereto, is in no position, after causing its own error to be corrected by a proper redocketing, either to demand the entry of judgment in accordance with its own offer to confess judgment, or to object to the action of the court in granting to the landowner (the proper plaintiff) a con-

tinuance over the term in which to file a proper petition.

Wilcox & Sons v Omaha, 220-1131; 264 NW 5

Compensation — measure of. The recoverable measure of damages to a farm, consequent on the condemnation of a highway right of way therethrough, is the difference in value of the farm as a whole before condemnation and the value immediately thereafter. It follows that the trial court on appeal cannot limit the jury solely to a consideration of the items of damages specifically alleged by the landowner in the petition.

Maxwell v Highway Com., 223-159; 271 NW 883; 118 ALR 862

7842 Question determined.

Verdict—passion and prejudice. A verdict in eminent domain proceedings will not be disturbed, even tho the amount suggests excessiveness, if it is well within the supporting evidence.

Kemmerer v Highway Com., 214-136; 241 NW 693

Judgment — insufficiency. Record entry in proceedings relative to eminent domain proceedings reviewed, and held, notwithstanding its recitals, not to constitute a judgment for damages, but to specify the conditions under which the plaintiff property owner would be entitled to a provisional injunction.

Wheatley v Fairfield, 221-66; 264 NW 906

Matters actually and potentially in issue. Two proceedings were consolidated for trial only, viz:

1. An action for injunction, general equitable relief, and specifically enumerated damages consequent on a trespass by a city in overflowing plaintiff's land, and

2. An appeal from an award in proceedings by the city to condemn said land. On the trial, plaintiff was awarded no judgment for the damages claimed by him in his equitable action because he made no attempt to establish them —probably on the assumption that he would be made whole by the payment of the final award in the condemnation proceedings.

But the city refused to pay the final award in the condemnation proceeding and abandoned said proceeding.

Plaintiff then commenced a new action for damages, including, inter alia, the identical damages formerly claimed in said equitable action. Held, all damages which plaintiff had suffered prior to the trial of said equitable action, whether they were then in issue or not, were res judicata.

Wheatley v Fairfield, 221-66; 264 NW 906

Value of land—selling price as evidence. The value of farm land, through which a highway right of way is sought to be condemned, cannot be competently shown by evidence of the recent sale price of similar land in a nearby community.

Maxwell v Highway Com., 223-159; 271 NW 883; 118 ALR 862

Value of land — amount of insurance. The amount of insurance carried on farm improvements, situated on a farm through which a highway right of way is sought to be condemned, does not constitute substantive evidence of the value of said farm, and is quite inadmissible for such purpose.

Maxwell v Highway Com., 223-159; 271 NW 883; 118 ALR 862

Disputed fact questions as to value. In a condemnation proceeding to acquire ground for highway purposes, the right of the jury to decide disputed fact questions as to value will not be interfered with by the supreme court, if there is evidence upon which the jury could reach the verdict it did reach.

Stoner v Highway Com., 227-115; 287 NW 269

Instruction—inadvisable but harmless. An instruction in eminent domain proceedings that the real right of which the property owner is deprived, and for which he is entitled to compensation, is the right to remain in undisturbed possession of his property, while ill-advised, may be quite harmless.

Maxwell v Highway Com., 223-159; 271 NW 883; 118 ALR 862

Condemnation — highway used for lawful purpose—unsupported issue. A requested instruction to the effect that in arriving at compensation the law presumes that the highway to be built would be used for a lawful purpose is properly refused when there is no claim that the highway would be unlawfully used.

Cutler v State, 224-686; 278 NW 327

Assessment of damage. In a condemnation proceeding to acquire ground for highway purposes, the question of damages to be assessed for the land appropriated is peculiarly one for the jury.

Stoner v Highway Com., 227-115; 287 NW 269

Excessive condemnation award—jury verdict—reviewability. Generally the question of compensation in an eminent domain case is for the jury, but the supreme court will not hesitate to reverse where the record clearly shows excessive damages.

Luthi v Highway Com., 224-678; 276 NW 586

Compensation — abutting tract — connected farming operation—instruction. In a condemnation action where an 80-acre tract abutting and farmed in connection with, but only partly owned by the owner of the farm involved in condemnation, an instruction that no damage

to the abutting 80 acres could be assessed, but that the jury could consider the farming control advantage of the two tracts, while not approved, held not prejudicial.

Cutler v State, 224-686; 278 NW 327

Excessive award—farm already bisected. A $6,000 verdict, being one-fourth the value of a 212-acre farm, for taking 9.63 acres of land for highway purposes, at least part of which was permanently pasture land, from a farm already bisected by a railroad, is so grossly excessive as to indicate passion and prejudice, and when so appearing will, in condemnation proceedings, as in negligence cases, be set aside.

Luthi v Highway Com., 224-678; 276 NW 586

Liberal condemnation verdict — supporting evidence — finality on appeal. A verdict of $4,000, in condemnation of a small tract of land, including the buildings, improvements, and shade trees, for purpose of rounding a highway corner, while perhaps liberal, will not, when evidence exists to support it, be interfered with on appeal as excessive.

Cutler v State, 224-686; 278 NW 327

Compensation—instructions—jurors' experience. An instruction in eminent domain proceedings that jurors have the right to weigh the testimony of experts as to values in the light of their own experience is not subject to the vice that they were told to substitute their own knowledge of values.

Cutler v State, 224-686; 278 NW 327

Appeal—transfer to equity. In a condemnation proceeding where two separate tracts of land under separate ownerships were treated as being jointly owned, and where, on appeal from a lump sum award covering both tracts, the owners in one count of their petition sought dismissal of the condemnation proceeding, and, where issues of waiver and estoppel as to such irregularity were joined, it was proper to transfer said count to equity so that such issues could be determined in advance of the trial to a jury on question of damages.

Newby v City, 227-382; 288 NW 399

7844 Right to take possession of lands.

Right to interest. In eminent domain proceedings where the property owner recovers on appeal more than was awarded by the sheriff's jury, interest should be allowed on the verdict from the date when the condemnor takes possession of the land.

Beal v Highway Com., 209-1308; 230 NW 302; 36 NCCA 196

7847 Deposit pending appeal.

Time deposit works conversion. A sheriff is guilty of instant conversion and a breach of his bond when he deposits in a bank funds properly coming into his hands in unadjudicated condemnation proceedings and takes from the bank a certificate of deposit which is payable at a definite time in the future, because he thereby fails so to "hold" said funds as commanded by statute as to enable himself to account for such funds whenever the proceedings are finally determined; and in such case the question of due care or negligence in making the deposit is quite immaterial.

Northwestern Mfg. Co. v Bassett, 205-999; 218 NW 932

7851 Removal of condemnor.

Injunction — conditional order for — compliance—effect. When a decree provides (1) that defendant shall pay an award in condemnation proceedings, or (2) that in event defendant appeals from said award he shall give a supersedeas bond, and (3) that in event he fails to pay or appeal, injunction shall issue enjoining defendant's use of the condemned land, then the taking of an appeal and the giving of the supersedeas bond by defendant nullifies the authority under the decree to issue an injunction. In other words, after the decree is affirmed on appeal without any provision relative to injunction, the trial court has no jurisdiction on motion to enter an injunction on the basis of the affirmed decree. (The reasoning is that the decree constituted a final decree and that the decree as drawn authorized an injunction only on condition that defendant failed to appeal and give the supersedeas bond.)

Fairfield v Dashiell, 217-474; 249 NW 236

7852 Costs and attorney fees.

Atty. Gen. Opinion. See '36 AG Op 240

ANALYSIS

I COSTS IN GENERAL
II ATTORNEY FEES

I COSTS IN GENERAL

No annotations in this volume

II ATTORNEY FEES

Attorney fees. A statutory provision for the taxation, in eminent domain proceedings, of attorney fees in favor of a successful party, is no authority for such taxation in another like proceeding under a separate and different statute which makes no provision for such taxation.

Nichol v Neighbour, 202-406; 210 NW 281

Prejudicial error—affirmative showing. Affirmative prejudicial error appears from a record which shows that the trial court, acting without a jury, in a law action involving the allowance of attorney fees, received evidence of both allowable and unallowable services.

Iowa Co. v Scott, 206-1217; 220 NW 333

II ATTORNEY FEES—concluded

Prohibition of taxation of attorney fees—retroactive application. A statute prohibiting the taxation of attorney fees in eminent domain proceedings instituted by the state applies to a proceeding pending but undetermined at the time of the enactment.

Welton v Highway Com., 211-625; 233 NW 876

Condemnation by state — attorney fees unallowable. Attorney fees are unallowable in eminent domain proceedings instituted by the state.

Welton v Highway Com., 211-625; 233 NW 876

Attorney fees not allowable against state. Attorney fees cannot be taxed against the state in any eminent domain proceedings wherein the state is an applicant.

Fitzgerald v State, 220-547; 260 NW 681

7853 Refusal to pay final award.

Atty. Gen. Opinion. See '36 AG Op 240

Attorney fees—limitation. One who seeks to condemn private property for a public use, but who, after appeals are taken from the award of the sheriff's jury, and before trial thereof, dismisses his condemnation proceedings and abandons all claim to the property, remains liable to a taxation of reasonable attorney's fees in favor of property owners; but such fees must be based solely on services rendered on the appeal.

Iowa Elec. v Scott, 206-1217; 220 NW 333

Injunction—conditional order for—compliance—effect. When a decree provides (1) that defendant shall pay an award in condemnation proceedings, or (2) that in event defendant appeals from said award he shall give a supersedeas bond, and (3) that in event he fails to pay or appeal, injunction shall issue enjoining defendant's use of the condemned land, then the taking of an appeal and the giving of the supersedeas bond by defendant nullifies the authority under the decree to issue an injunction. In other words, after the decree is affirmed on appeal without any provision relative to injunction, the trial court has no jurisdiction on motion to enter an injunction on the basis of the affirmed decree. (The reasoning is that the decree constituted a final decree and that the decree as drawn authorized an injunction only on condition that defendant failed to appeal and give the supersedeas bond.)

Fairfield v Dashiell, 217-474; 249 NW 236

Abandonment of proceedings—attorney fees as damages—recovery. A condemnor who appeals from the district court award, and, on affirmance, refuses to pay the award and take the property, may very properly be held liable to the property owner for the latter's reasonable attorney fees in the supreme court as a part of the actual damages suffered by the landowner because of the futile procedure.

Wheatley v Fairfield, 221-66; 264 NW 906

Abandonment of proceedings—acts constituting. Proceedings by a city for the condemnation of privately owned lands, which the city had overflowed by the erection of a dam on its own property, must be deemed wholly abandoned by the acts of the city, (1) in refusing to pay the adjudged damages, (2) in passing a resolution of abandonment, and (3) in ordering the water drained from said land.

Wheatley v Fairfield, 221-66; 264 NW 906

CHAPTER 367

REVERSION

7861 Relocation of railway.

Statutory reversion. Where a deed conveyed a strip of land to a railroad company "to have and to hold for all purposes incident and necessary to the construction and operation of a railroad * * * thereon", and where the statute provides that if a railway right of way is abandoned for railway purposes by relocation of the line of railway, it shall revert to the persons who, at the time of the abandonment, are owners of the tract from which such abandoned right of way was taken, and tho a railway under such circumstances deeded the property to an individual, such conveyance by the railway company conveyed nothing to the grantee and the fee title reverted to the owners of the land from which right of way was originally taken, and such owners may quiet title in themselves.

Keokuk County v Reinier, 227-499; 288 NW 676

Conveyances in lieu of condemnation. A deed given to a railroad for a strip of land to be used as a right of way, and deeds of a like kind, given by the land owner when condemnation may be imminent if he refuses to convey, should be given such liberal construction as will effectuate the intention of the parties and fully protect the rights of the grantor and his assigns.

Keokuk County v Reinier, 227-499; 288 NW 676

7862 Failure to operate or construct railway.

Nonreversion of right of way obtained by deed. A railway right of way obtained from the owner by full warranty deed and not by condemnation does not, by nonuser for the statutory eight years, revert to the owner of the tract from which such right of way was taken.

Montgomery Co. v Case, 212-73; 232 NW 150

Conveyances in lieu of condemnation. A deed given to a railroad for a strip of land to be used as a right of way, and deeds of a like kind, given by the landowner when condemnation may be imminent if he refuses to convey, should be given such liberal construction as will effectuate the intention of the parties and fully protect the rights of the grantor and his assigns.

Keokuk County v Reinier, 227-499; 288 NW 676

7863 Quasi-public roads and rights of way.

Conveyances in lieu of condemnation. A deed given to a railroad for a strip of land to be used as a right of way, and deeds of a like kind, given by the landowner when condemnation may be imminent if he refuses to convey, should be given such liberal construction as will effectuate the intention of the parties and fully protect the rights of the grantor and his assigns.

Keokuk County v Reinier, 227-499; 288 NW 676

7864 Lands for highway improvement.

Atty. Gen. Opinion. See '32 AG Op 67

Conveyances in lieu of condemnation. A deed given to a railroad for a strip of land to be used as a right of way, and deeds of a like kind, given by the landowner when condemnation may be imminent if he refuses to convey, should be given such liberal construction as will effectuate the intention of the parties and fully protect the rights of the grantor and his assigns.

Keokuk County v Reinier, 227-499; 288 NW 676

TITLE XVIII

PUBLIC UTILITIES

CHAPTER 368

IOWA STATE COMMERCE COMMISSION

7869 Rules, forms, and service.

Delegating powers to nonlegislative board. While the legislature may not delegate its power to make laws, yet when it had declared a policy which is definite in describing the subject to which it relates and the character of the regulation intended to be imposed, it may delegate to nonlegislative board the power to make rules and regulations for effectuating such policy.

Miller v Schuster, 227-1005; 289 NW 702

7873 Free transportation.

Atty. Gen. Opinion. See '36 AG Op 148

7874 General jurisdiction.

Discussion. See 8 ILB 12—A study of the railroad commission in the state of Iowa

Powers given to state commerce commission —limitation. The state commerce commission (board of railroad commissioners) has no powers except those expressly given and those incidental to or implied in the power given.

Huxley v Conway, 226-268; 284 NW 136

Injunction. Injunction will lie by the state on the relation of the board of railroad commissioners to enjoin the operation of a motor carrier over the public highways, contrary to the orders of said board.

State v Holdcroft, 207-564; 221 NW 191

Continuing shipment. An order requiring a railway to accept in this state loaded cars which have arrived from another state through a terminated interstate shipment, and to transport said cars without reloading, is valid and enforceable. 152 Iowa 317 affirmed.

Chicago, Mil. Ry. Co. v State, 233 US 334

State commerce commission abandoning overhead crossing—street change resulting—excess of jurisdiction. The state commerce commission has no power to order the abandonment of an overpass or overhead crossing over a railroad in a city or town, which results in altering the streets thereof. Jurisdiction of its streets is a city function which may not be invaded by the state commerce commission, regardless of its good-faith motives, and certiorari will lie to prevent such invasion.

Huxley v Conway, 226-268; 284 NW 136

7875 Inspection—notice to repair.

Powers given to state commerce commission —limitation. The state commerce commission (board of railroad commissioners) has no powers except those expressly given and those incidental to or implied in the power given.

Huxley v Conway, 226-268; 284 NW 136

State commerce commission abandoning overhead crossing—street change resulting—excess of jurisdiction. The state commerce commission has no power to order the abandonment of an overpass or overhead crossing over a railroad in a city or town, which results in alter-

ing the streets thereof. Jurisdiction of its streets is a city function which may not be invaded by the state commerce commission, regardless of its good-faith motives, and certiorari will lie to prevent such invasion.

Huxley v Conway, 226-268; 284 NW 136

7877 Changes in operation and improvements.

State commerce commission abandoning overhead crossing—street change resulting—excess of jurisdiction. The state commerce commission has no power to order the abandonment of an overpass or overhead crossing over a railroad in a city or town, which results in altering the streets thereof. Jurisdiction of its streets is a city function which may not be invaded by the state commerce commission, regardless of its good-faith motives, and certiorari will lie to prevent such invasion.

Huxley v Conway, 226-268; 284 NW 136

7883 Jurisdiction of courts to enforce order.

Constitutionality of injunctional feature.

State v Fray, 214-53; 241 NW 663; 81 ALR 286

State v Howard, 214-60; 241 NW 682

Injunction. Injunction will lie by the state on the relation of the board of railroad commissioners to enjoin the operation of a motor carrier over the public highways, contrary to the orders of said board.

State v Holdcroft, 207-564; 221 NW 191

7888 Remitting penalty.

Powers given to commerce commission—limitation. The commerce commission (board of railroad commissioners) has no powers except those expressly given and those incidental to or implied in the power given.

Huxley v Conway, 226-268; 284 NW 136

7890 Interstate freight rates.

Discussion. See 20 ILR 128—Federal court jurisdiction

7904 Rights and remedies not exclusive.

Pleading carrier's degree of care and res ipsa loquitur. A general allegation of negligence in a petition followed by a further allegation of negligence, dealing with the degree of care required of carriers, did not prevent application of the doctrine of res ipsa loquitur.

Peterson v De Luxe Co., 225-809; 281 NW 737

CHAPTER 369

COMMERCE COUNSEL

7913 Appointment—term.

Atty. Gen. Opinion. See '34 AG Op 478

7916 Political activity.

Atty. Gen. Opinion. See '34 AG Op 669

7919 Duties.

Appeal—appearance. The commerce counsel has a right to appear for and on behalf of the board of railroad commissioners on an appeal from orders granting or refusing an application for the operation of a motor carrier line.

Campbell v Eldridge, 206-224; 220 NW 304

CHAPTER 370

GENERAL POWERS OF RAILWAY CORPORATIONS

7928 Duties and liabilities of lessees.

Liability to fence. See under §8001, Vol I
Liability for negligence. See under §8156

CHAPTER 371

CONSTRUCTION AND OPERATION OF RAILWAYS

7947 Maintenance of bridges — damages.

Inadequate opening—compulsory construction—effect. Negligence may not be predicated on the insufficient length or height of a railroad bridge within a public drainage district when the bridge was constructed strictly in accordance with the plans and specifications prescribed by the public drainage authorities.

Hunter v Ry. Co., 206-655; 221 NW 360

Trestle as licensed place. It will not be lightly inferred that a railway company knowingly consented to the use of its trestle as a footway for pedestrians when such use, under

the peculiar circumstances existing, was not only perilous but literally foolhardy.

Brimeyer v Railway, 213-1289; 241 NW 409

7948 Rights of riparian owners.

Discussion. See 9 ILB 236—Navigability of streams meandered by government survey

7961 Nonassumption of risk.

Assumption of risk defined. It is an implied term of the servant's contract of employment that he assume the risk which naturally pertains to his work, but he is under no contract or legal obligation to assume any risk which is occasioned by a failure of duty on the part of his employer.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

CHAPTER 372

CATTLE GUARDS, FENCES, CROSSINGS, AND INTERLOCKING SWITCHES

8000 Cattle guards—crossings—signs.

Atty. Gen. Opinion. See '28 AG Op 191

ANALYSIS

Accidents at private crossings. See also under §8011
Accidents at public crossings. See also under §8018
Liability for negligence generally. See also under §8156

I STATUTE IN GENERAL

Negligence per se in failing to stop. A traveler who knows that a railway crossing is so badly obstructed that he will not be able, by looking and listening, to know of the approach of a train until he is substantially on the tracks, is guilty of negligence per se if he does not stop.

Dean v Ry. Co., 211-1347; 229 NW 223

Driving into side of train—proximate cause. Evidence which is solely to the effect that, on a misty and foggy night, a freight train was standing across a public railway crossing without any visible warning whatever of its presence, except the train itself, reveals no negligence (if it be deemed negligence) on the part of the railway company or its employees which can be deemed the proximate cause of an accident to a motorist who drove his car along the public highway and into the side of said train.

Dolan v Bremner, 220-1143; 263 NW 798

Guest in automobile—contributory negligence—jury question. Evidence that a guest riding in an automobile, when 100 feet from a railway crossing, observed, and called the attention of the operator to, an approaching train, and that thereupon the operator of the car commenced to reduce and continued to reduce the speed of the car until it was hit by the oncoming locomotive, precludes the court from saying that the guest was guilty of contributory negligence per se.

Wright v Railway, 222-583; 268 NW 915

Driving upon crossing negligence per se. The operator of an automobile is guilty of negligence per se when he drives upon an open, city, railway crossing, with which he is familiar, and with timely knowledge that a moving train is in the immediate vicinity and that the said crossing may at any moment be occupied by said train or another train.

Miller v Railway, 223-316; 272 NW 96

Contributory negligence as matter of law—motorist not looking. A motorist, who approaches a railroad crossing on a clear day, over a good road, with no obstructions and no diverting circumstances, and who, had he looked, must have seen but nevertheless is struck and killed by an approaching train which from a point 141 feet from the crossing was visible 2500 feet down the track, is guilty of contributory negligence as a matter of law, and the defendant railroad is entitled to a directed verdict.

Meier v Railway, 224-295; 275 NW 139

Crossing railroad in front of oncoming train—contributory negligence—directed verdict. It is error to overrule a motion for a directed verdict when, after considering all the evidence in the light most favorable to the plaintiff, there is no doubt but what he drove in front of a train with the view entirely unobstructed and with the train plainly to be seen had he looked, or if he looked, he did so negligently.

Russell v Scandrett, 225-1129; 281 NW 782

Operation—frost on train—visibility—when jury question on plaintiff's care. Plaintiff's contention, that a snowy landscape and frost on a train so camouflaged it that the question of his negligence in driving upon an unobstructed crossing in front of the train was for the jury, is not substantiated by a record devoid of any evidence of frost on the front of the engine or that he was in any way blinded by the sun or glare of the sun on the snow.

Russell v Scandrett, 225-1129; 281 NW 782

Judicial notice—change in mode of transportation. Court will take judicial notice of the changes in the mode of transportation occur-

ring during the last preceding twenty-five years.

Harris v Railway, 224-1319; 278 NW 338

II CATTLE GUARDS

Maintenance of dangerous cattle guard—negligence. A railway company is not negligent in maintaining at a private crossing on its track a cattle guard which is actually dangerous to the feet of stock which persist in going upon it. Evidence held quite insufficient to show that the guard in question was unnecessarily dangerous.

Harsch v Railway, 211-1377; 232 NW 144; 75 ALR 927

Open gates—negligence. Evidence (1) that a railway company maintained a gate in its right-of-way fence with attachments suitable for securely keeping the gate closed, (2) that late in the afternoon the gate was closed after being used, (3) that on the following morning the gate was found open, and (4) that certain animals from the adjoining field were then found dead on the railway right of way, having evidently been killed by a passing train, is insufficient to establish any negligence on the part of the railway company.

Hughes v Ry. Co., 215-741; 246 NW 769

III CROSSINGS

Accidents at crossings — negligence — evidence. Evidence reviewed in law action for damages tried to the court alone, and held to support a finding of negligence in the maintenance of a railway crossing; that said negligence was the proximate cause of an injury; and that plaintiff's negligence, if any, did not contribute to said injury.

Warren v Railway, 219-723; 259 NW 115

Accidents at crossings—"cupped out" depression as negligence. Proof that a three or four inch "cupped out" depression existed in a railway crossing over a public road, does not, in and of itself, present a jury question on the issue of the negligent maintenance of said railway crossing.

Gable v Kriege, 221-852; 267 NW 86; 105 ALR 539

Accident at crossing—proximate negligence not superseded by concurrent negligence. If the jury might justifiably find that the defendant railway company operated its train over one of its crossings at an excessive and unlawful rate of speed and that said speed was the proximate cause of the collision of the train with an automobile and of the injury to an occupant of the automobile, the court must not so instruct as to permit the jury to find that the negligence of the driver of the automobile in approaching and driving upon the crossing was an intervening cause which wholly superseded the said negligence of the defendant railway company.

Dedina v Railway, 220-1336; 264 NW 566

Operation of automobile without brakes—proximate cause. Record reviewed and held that the proximate cause of an accident was not the condition in which a railway crossing was maintained, but was the speed at which an overloaded truck was operated without brakes.

Gable v Kriege, 221-852; 267 NW 86; 105 ALR 539

Accidents at crossings—duty to construct crossing—scope. The statutory duty of a railway company to construct and maintain a "good, sufficient and safe crossing" at all points where its tracks cross public roads, is fully complied with when, in crossing a level public road, the railway ties and rails and the proper planking between said rails and on the ends of the ties immediately outside said rails, are so placed that the level of the public road is maintained.

Gable v Kriege, 221-852; 267 NW 86; 105 ALR 539

Crossings—safe condition controlled by transportation needs. It is the duty of railways and municipalities to keep pace with the changes in transportation methods and to keep highways and railroad crossings in a reasonably safe condition, inasmuch as a type of crossing construction, considered safe when built, might be unsafe for a later changed method of use by the public.

Harris v Railway, 224-1319; 278 NW 338

Railway crossing—injuries from jolting—causal negligence necessary. Plaintiff has the burden to show wherein a railway was negligent in maintaining a viaduct crossing, since jury's verdict may not rest upon surmise, speculation, or guess, and this burden is not met when plaintiff fails to show that injuries received from being thrown against top of car while going over viaduct were caused by a condition of the viaduct resulting from negligence.

Harris v Railway, 224-1319; 278 NW 338

Railroad crossing construction. Since character and extent of street improvements are within responsible discretion of city authorities and because city council's determination of question of desirability of proposed improvements is conclusive except for want of authority or fraud, and where ordinance granting franchise to railroad gave city council authority to require construction of crossing, damage claim for refusal to construct crossing could not be maintained by owner seeking access to property, when owner instead of requesting council to direct railroad to build crossing, merely made such request by personal letter to railroad official.

Call Bond Co. v Railway, 227-142; 287 NW 832

IV WARNING SIGNS

Warnings additional to statutory warnings—duty to furnish. Conceded, arguendo, that a public railway crossing may be attended by such danger as to impose on the railway company, in the exercise of reasonable care, the duty to furnish to the highway traveler warnings in addition to those required by statute, but such duty does not arise when the danger is avoidable by the exercise of ordinary care on the part of the traveler. So held, inter alia, as to a fog-shrouded crossing, the danger attending which could be avoided by the traveler so driving as to be able to stop within the range of his vision.

Dolan v Bremner, 220-1143; 263 NW 798

Accident at crossing—absence of signs and signals—nonproximate cause. The failure of a railway company to erect statutory warning signs on both sides of a railway crossing (assuming such duty to exist) or the failure of its engineer, when approaching a crossing, to give the statutory signals, becomes quite inconsequential where the operator of an automobile and his guest saw the crossing and the immediately approaching train when they were 100 feet from said crossing, and while they were traveling at a speed not exceeding 25 miles per hour.

Wright v Railway, 222-583; 268 NW 915

8005 Failure to fence.

Absence of cattle guard—scope of statute. This section contemplates injuries caused by the operation of trains, not injuries caused by the manner in which a cattle guard may be constructed and maintained.

Harsch v Ry. Co., 211-1377; 232 NW 144; 75 ALR 927

Injuries to animals—open gate—negligence. Evidence (1) that a railway company maintained a gate in its right-of-way fence with attachments suitable for securely keeping the gate closed, (2) that late in the afternoon the gate was closed after being used, (3) that on the following morning the gate was found open, and (4) that certain animals from the adjoining field were then found dead on the railway right of way, having evidently been killed by a passing train, is insufficient to establish any negligence on the part of the railway company.

Hughes v Railway, 215-741; 246 NW 769

Cow killed by interurban—entry where fence down—evidence sufficiency. Railroads being required by statute to fence right of way against livestock, where judgment was rendered for loss of cow killed by an interurban, evidence, that cow was kept in pasture along right of way and that right-of-way fence was down near place where cow was killed, justified a finding that cow entered right of way at such place.

McSweyn v Railway, (NOR); 288 NW 398

8008 Depot grounds—speed limit.

Proximate negligence not superseded by concurrent negligence. If the jury might justifiably find that the defendant railway company operated its train over one of its crossings at an excessive and unlawful rate of speed and that said speed was the proximate cause of the collision of the train with an automobile and of the injury to an occupant of the automobile, the court must not so instruct as to permit the jury to find that the negligence of the driver of the automobile in approaching and driving upon the crossing was an intervening cause which wholly superseded the said negligence of the defendant railway company.

Dedina v Railway, 220-1336; 264 NW 566

8011 Private crossings.

ANALYSIS

Accidents at public crossings. See under §8018

I PRIVATE CROSSINGS IN GENERAL

Flag protection—instructions. Error does not result from instructing that plaintiff, in moving machinery across a private crossing, would not be negligent in failing to request flag protection unless he knew that a rule of the company required the section foreman to furnish such protection when requested.

Graves v Railway, 207-30; 222 NW 344

Speed as basis for negligence. Reversible error results from so instructing as to permit the jury to base negligence on the speed of a train at a private farm crossing, irrespective of the safe or dangerous condition of such crossing.

Graves v Railway, 207-30; 222 NW 344

Nonduty to maintain flagmen. A railroad company is under no obligation to maintain a flagman at a private farm crossing.

Graves v Railway, 207-30; 222 NW 344

Adequacy—jury question. Evidence held to create a jury question on the issue whether a railroad company had constructed and was maintaining a safe and adequate private farm crossing.

Graves v Railway, 207-30; 222 NW 344

Private crossings—nonduty to maintain. A railway company is under no legal duty to construct and maintain in a city or town a crossing or roadway over its right of way, or under its tracks in order to afford to a landowner access from his nonfarm land abutting one side of the right of way to his nonfarm land of trifling quantity and value abutting the other side of the right of way.

Chicago, Mil. Ry. v Cross, 212-218; 234 NW 569

I PRIVATE CROSSINGS IN GENERAL—concluded

State commerce commission abandoning overhead crossing—street change resulting—excess of jurisdiction. The state commerce commission has no power to order the abandonment of an overpass or overhead crossing over a railroad in a city or town, which results in altering the streets thereof. Jurisdiction of its streets is a city function which may not be invaded by the state commerce commission, regardless of its good-faith motives, and certiorari will lie to prevent such invasion.

Huxley v Conway, 226-268; 284 NW 136

II GATES AT PRIVATE CROSSINGS

Maintenance of dangerous cattle guard—negligence. A railway company is not negligent in maintaining at a private crossing on its track a cattle guard which is actually dangerous to the feet of stock which persist in going upon it. Evidence held quite insufficient to show that the guard in question was unnecessarily dangerous.

Harsch v Railway, 211-1377; 232 NW 144; 75 ALR 927

III ACCIDENTS AT CROSSINGS

Contributory negligence per se. The driver of an automobile is guilty of negligence per se when, upon entering during the daytime a private crossing over much-used interurban railway tracks located on a curve, he knows when some 25 feet from the track in question that his view of an apprehended approaching car is limited to 300 feet, and when he avails himself of such view and sees no approaching car, and thereupon proceeds to attempt, under no diverting circumstances, to cross the tracks at a rate of three miles per hour without looking or listening for the apprehended car, tho his view of the track materially enlarged as he proceeded.

Rosenberg v Railway, 213-152; 238 NW 703

Inapplicability of speed ordinance. A city ordinance which limits the speed of railway trains under given conditions is properly excluded, in the absence of any evidence that the ordinance was violated.

Newman v Railway, 202-1059; 206 NW 831

Negligence—nondiverting circumstance. The fact that a party in crossing railway tracks was compelled, owing to the coldness of the weather, to manipulate the choke on the automobile cannot be deemed a diverting circumstance such as to excuse him from exercising his senses of sight and hearing.

Rosenberg v Railway, 213-152; 238 NW 703

Contributory negligence—nonexcuse. A party will not be permitted to excuse his contributory negligence consequent on his attempt to cross streetcar tracks without using his senses of sight and hearing, by the simple assumption that the streetcars will not be negligently operated.

Rosenberg v Railway, 213-152; 238 NW 703

8015 Stopping of trains.

Sleeping passenger—duty to awaken—jury question. Where trainmen know that a passenger is asleep as the train is closely approaching the passenger's destination, the question whether, under all the circumstances, the carrier owes the sleeping passenger the duty to awaken him in time to enable him to leave the train at the station is for the jury.

Vanderbeck v Railway, 210-230; 230 NW 390

Trespasser—failure to leave train—effect. A passenger does not become a trespasser and subject to rightful expulsion from the train from the naked fact that he failed to leave the train at his destination.

Vanderbeck v Railway, 210-230; 230 NW 390

Failure to leave train—tender of fare—judicial notice. A passenger failing to leave the train at his destination does not render himself subject to immediate ejection from the train because he fails to tender the fare to another destination. Judicial notice is taken of the fact that it is the duty of the conductor to demand the fare.

Vanderbeck v Railway, 210-230; 230 NW 390

8018 Signals at road crossings.

ANALYSIS

Accidents at private crossings. See under §8011

I STATUTE IN GENERAL

Absence of flagmen, gates, etc. The failure of a railway company to maintain flagmen, gates, or warning devices at crossings does not constitute negligence, in the absence of proof that the crossing is unusually dangerous and hazardous.

O'Brien v Railway, 203-1301; 214 NW 608

No warning signal at crossing—statute violations—negligence. The failure of compliance with a statutory standard of care is negligence. In an action for personal injuries sustained by an automobile passenger in collision in Illinois between an automobile and railway motorcar, where petition alleged that railway employees failed to ring bell or sound whistle of motorcar while approaching a crossing, as required by Illinois statute, such allegations were sufficient to state a cause of action based on negligence of employees of defendant railroad.

Smith v Railway, 227-1404; 291 NW 417

View obstructed—duty to give timely warning. Where a railroad motorcar, which had been standing still, obscured from view of motorist by shrubbery at the side of a crossing, gave no warning that it was about to cross the intersection, resulting in the motorist's automobile colliding with front end of motorcar, the presence of motorcar near the crossing was not sufficient warning to motorist that crossing was occupied. There must not only be a warning, but it must be timely.

Smith v Railway, 227-1404; 291 NW 417

Damages—total destruction. The measure of damages for the total destruction of an article is the reasonable market value of the article immediately before its destruction.

Bush v Railway, 216-788; 247 NW 645

"Flying switch." Principle recognized that the act of making a "flying switch" does not necessarily constitute negligence.

Love v Railway, 207-1278; 224 NW 815

Insufficient assignment of negligence. A general plea that a railway was negligent in surveying, building, maintaining and operating its railway at the place of an accident, without pleading or proving any standard by which to determine negligence, is quite insufficient.

Lenning v Railway, 209-890; 227 NW 828

Recklessness of railway employees—insufficient pleading to establish. In action for personal injuries sustained by automobile passenger in collision between automobile and railway motorcar, where petition alleged that railway motorcar had been standing a short distance from crossing, obscured from view of motorist by shrubbery along railway right of way, and was driven onto crossing and into the course of oncoming automobile without warning, and that railway motorcar could have been stopped by applying brakes, such allegations were insufficient to state a cause of action based upon recklessness of employees of defendant railroad.

Smith v Railway, 227-1404; 291 NW 417

No-eyewitness rule—nonapplicability. The presumption of care which may be indulged in case of an accident of which there is no eyewitness has no application when the record affirmatively shows that the accident would not have happened, had the injured party exercised reasonable care.

Tegtmeyer v Byram, 204-1169; 216 NW 613
Lenning v Railway, 209-890; 227 NW 828

"Physical fact" rule—inapplicability. The so-called "physical fact" rule which is often applied in negligence cases—the rule that when the operator of a vehicle at a known railroad crossing possesses ordinary sense of sight he is conclusively presumed, in the absence of diverting circumstances, to have seen an approaching train which was in plain view—necessarily has no application when the train is not in plain view, owing to a temporary obstruction which the railroad company has interposed to his view, e. g., freight cars on a side track.

Bush v Railway, 216-788; 247NW 645

Positive and negative testimony. Witnesses may testify, on the issue whether a train in approaching a crossing gave the statutory signals, that they could have heard such signals, had such signals been given, and that none were given, it appearing that the witnesses were in a mental attitude to hear such signals.

Anderson v Railway, 203-715; 211 NW 872

Standing railroad motorcar obscured from view—motorist rightfully entering crossing. Where railroad motorcar was standing still, obscured from view of motorist by shrubbery along railroad right of way, motorist was within his rights in attempting to pass over the crossing.

Smith v Railway, 227-1404; 291 NW 417

Presumption arising from human instinct. The presumption that the instinct of self-preservation caused a traveler who was killed by a train at a crossing to look for a train before he went upon the crossing has no application when it affirmatively appears that, had he looked at any time while he was in the zone of danger, he must have seen the train.

Wasson v Railway, 203-705; 213 NW 388

Ringing of bell—limit of duty. The statutory requirement that after the whistle on a railway engine is sounded and approaching a crossing, the bell shall be rung "continuously until the crossing is passed," imposes no duty after the engine has passed over the crossing to continue the ringing of the bell until the entire train has passed the crossing.

Butters v Railway, 214-700; 243 NW 597

Signals irrespective of statute. The failure of train operators in nearing a public crossing to signal the approach of the train may constitute negligence, irrespective of any statute so requiring.

Anderson v Railway, 203-715; 211 NW 872

Trestle as licensed place. It will not be lightly inferred that a railway company knowingly consented to the use of its trestle as a footway for pedestrians when such use, under the peculiar circumstances existing, was not only perilous but literally foolhardy.

Brimeyer v Railway, 213-1289; 241 NW 409

II PROXIMATE CAUSE

Avoiding contributory negligence. A street car motorman who plainly sees that the driver of another conveyance is negligently placing himself in a position of danger on the tracks, or is about to do so, and by ordinary care can avoid an accident and fails to do so, must be deemed guilty of negligence which is the prox-

II PROXIMATE CAUSE—concluded

imate cause of the accident, irrespective of the negligence of the injured party.

Lynch v Railway, 215-1119; 245 NW 219

Concurrent negligence—effect. If the jury might properly find that the concurrent negligence of defendant and of a third party caused the injury or death of a nonnegligent person, the court cannot properly direct a verdict for defendant on the theory that the negligence of said third party was an intervening negligence which wholly supplanted and superseded the negligence of the said defendant. So held where the concurring negligence was (1) that of defendant in operating its train over a crossing at an unlawful rate of speed, and (2) that of the operator of an automobile in driving upon said crossing.

Wright v Railway, 222-583; 268 NW 915

Driving into side of train—proximate cause. Evidence which is solely to the effect that, on a misty and foggy night, a freight train was standing across a public railway crossing without any visible warning whatever of its presence, except the train itself, reveals no negligence (if it be deemed negligence) on the part of the railway company or its employees which can be deemed the proximate cause of an accident to a motorist who drove his car along the public highway and into the side of said train.

Dolan v Bremner, 220-1143; 263 NW 798

Failure to ring bell—proximate cause. Tho a traveler on a public street has timely knowledge that an engine and a couple of cars are standing immediately outside the curb line of said street, and on a track which crosses said street, yet the failure to ring the bell on said engine may be the proximate cause of an injury to said traveler should the train be suddenly backed into the street without ringing said bell.

Hanrahan v Sprague, 220-867; 263 NW 514

Absence of nonproximate cause. The failure of a railway company to erect statutory warning signs on both sides of a railway crossing (assuming such duty to exist) or the failure of its engineer, when approaching a crossing, to give the statutory signals, becomes quite inconsequential where the operator of an automobile and his guest saw the crossing and the immediately approaching train when they were 100 feet from said crossing, and while they were traveling at a speed not exceeding 25 miles per hour.

Wright v Railway, 222-583; 268 NW 915

Pleading negligence of employees operating railway motorcar—sufficiency. In action for personal injuries sustained by an automobile passenger in collision between automobile and railroad motorcar, where petition alleged that motorcar had been standing at crossing obscured from view of motorist by shrubbery along railroad right of way, and was driven into course of the oncoming automobile without any warning and that it could have been stopped by applying the brakes, such allegations were sufficient to state a cause of action based upon negligence of railroad employees.

Smith v Railway, 227-1404; 291 NW 417

Failure to give signals as nonproximate cause. Failure of a train crew to give the statutory signals on approaching a public crossing is manifestly not the proximate cause of an accident (1) when the driver on the public highway intended, regardless of the absence of signals, to stop before entering upon the crossing and reconnoiter for approaching trains, and (2) when he discovered the approaching train in ample time to make an ordinary stop, but was unable to do so because his brakes, tho successfully applied, did not sufficiently retard the momentum of his car in the loose gravel on the highway.

Pifer v Railway, 215-1258; 247 NW 625

Non-working signal device—effect. The presence and silence, at a railway crossing, of an automatic railway signaling device may be quite influential in saving a traveler from the imputation of negligence per se in approaching and going upon the crossing, when he is faced by two closely adjacent parallel tracks, and when the immediate possible danger is on the first track, tho he was actually injured on the second track.

Crowley v Railway, 204-1385; 213 NW 403; 53 ALR 964; 27 NCCA 618

Proximate negligence not superseded by concurrent negligence. If the jury might justifiably find that the defendant railway company operated its train over one of its crossings at an excessive and unlawful rate of speed and that said speed was the proximate cause of the collision of the train with an automobile and of the injury to an occupant of the automobile, the court must not so instruct as to permit the jury to find that the negligence of the driver of the automobile in approaching and driving upon the crossing was an intervening cause which wholly superseded the said negligence of the defendant railway company.

Dedina v Railway, 220-1336; 264 NW 566

III CONTRIBUTORY NEGLIGENCE

Absence of signals—effect. The failure of trainmen to give the required statutory signals when approaching and passing over a public highway crossing may have material bearing on the issue whether the plaintiff was guilty of contributory negligence.

Rastede v Railway, 203-430; 212 NW 751

Accident at crossing. The operator of a vehicle is guilty of negligence in driving upon a railway crossing in front of an approaching train (1) when he knows the train is approaching the crossing, (2) when the train is in plain sight for a material distance from the

crossing, and (3) when his failure to see the train, at best, was because of a known obstruction on his own vehicle.

Sodemann v Railway, 215-827; 244 NW 865

Nonrequired precautions. Principle recognized that a traveler is not, as a matter of law, required to stop and alight from his conveyance at a railroad crossing and make observations as to possible danger.

Love v Railway, 207-1278; 224 NW 815

Erroneous definition. Defining contributory negligence as including only acts of omission does not necessarily constitute reversible error, especially when such definition is in harmony with the trial theory.

Williams v Railway, 205-446; 214 NW 692

Contributory negligence — jury question. Record relative to conduct, conditions, and circumstances attending an injured party at a railroad crossing reviewed, and held, in view of obstructions and distracting circumstances, to present a jury question on the issue of contributory negligence.

Williams v Railway, 205-446; 214 NW 692

Jury question. Evidence tending to show that the driver of a vehicle stopped some twelve feet from a railroad crossing, and reconnoitered for an approaching train, and saw none, owing to a string of cars on a side track, and heard no warning signals of an approaching train, and thereupon drove upon the crossing, presents a jury question on the issue of his negligence.

Bush v Railway, 216-788; 247 NW 645

Jury question. Evidence tending to show that the driver of a vehicle stopped some ten or fifteen feet from a railroad crossing and reconnoitered for an approaching train and saw none because of dirt elevations and weeds along the side of the track, and heard no warning signals of an approaching train, and thereupon drove upon the crossing, presents a jury question on the issue of his negligence, even tho, had he stopped some few feet nearer the track he would have seen the approaching train.

Markle v Railway, 219-301; 257 NW 771

Contributory negligence per se (fact cases).

Albright v Ry. Co., 200-678; 205 NW 462

Erlich v Davis, 202-317; 208 NW 515; 27 NCCA 164

Wasson v Ry. Co., 203-705; 213 NW 388

Tegtmeyer v Byram, 204-1169; 216 NW 613; 27 NCCA 67; 34 NCCA 424

Russell v Ry. Co., 204-810; 216 NW 47; 27 NCCA 11

Darden v Ry. Co., 213-583; 239 NW 531

Sodemann v Ry. Co., 215-827; 244 NW 865

Railroads—negligence per se—fog and mist-obscured track. An occupant of an automobile is not necessarily guilty of negligence per se in not seeing a railroad track which intersected the highway until the automobile was entering upon the track, when the presence of the tracks was unknown to him, and when the windshield was covered with fog and mist, even tho he testifies to the opinion that objects could be seen for a distance of from 50 to 75 feet in front of the automobile.

Gilliam v Railway, 206-1291; 222 NW 12

Contributory negligence per se. A traveler in approaching a railway crossing with which he is familiar, and while he is beset by no diverting circumstance, is guilty of negligence in failing to look at some place from where he knows he can see approaching trains and thus avoid injury. It will avail him nothing to look when at places where he knows his view will be largely obstructed.

Glessner v Railway, 216-850; 249 NW 138

Negligence per se in colliding with traffic signal. An experienced driver of an automobile is guilty of negligence per se when, near midnight, while traveling in the center of a 26-foot wide, brilliantly lighted, paved street, with which he was familiar, he drives squarely head-on in the center of the street against a railroad traffic signal consisting of a concrete base 4 feet wide, 2 feet high, and 5 feet long, surmounted by an iron pole several feet high and noticeably painted with black and white diagonal stripes, on which pole at the time were crossarms bearing in large letters the words "railroad crossing" and two burning lights.

Van Gorden v City, 216-209; 245 NW 736; 4 NCCA(NS) 291

Driving upon crossing negligence per se. The operator of an automobile is guilty of contributory negligence as a matter of law when he drives upon an open, city, railway crossing, with which he is familiar, and with timely knowledge that a moving train is in the immediate vicinity and that the said crossing may at any moment be occupied by said train or another train.

Miller v Railway, 223-316; 272 NW 96

Contributory negligence per se. A traveler who, when some fifteen feet from a railway crossing, looks but fails to see a train which is in plain sight on a straight track, and rapidly approaching the crossing from a point some 230 feet distant, and thereupon drives upon the crossing, is guilty of contributory negligence.

Cashman v Railway, 217-469; 250 NW 111

Crossing railroad in front of oncoming train — contributory negligence — directed verdict. It is error to overrule a motion for a directed verdict when, after considering all the evidence in the light most favorable to the plaintiff, there is no doubt but what he drove in front of a train with the view entirely unobstructed

III CONTRIBUTORY NEGLIGENCE—continued

and with the train plainly to be seen had he looked, or, if he looked, he did so negligently.

Russell v Scandrett, 225-1129; 281 NW 782

Failure to stop. A traveler who knows that a railway crossing is so badly obstructed that he will not be able, by looking and listening, to know of the approach of a train until he is substantially on the tracks is guilty of negligence per se if he does not stop.

Dean v Railway, 211-1347; 229 NW 223

Failure to see or hear. Principle reaffirmed that he who failed either to see what was plainly visible or to hear what was clearly audible must be deemed not to have looked or listened at all.

Sodemann v Railway, 215-827; 244 NW 865

Contributory negligence—crossing railroad with train in view. A motorist approaching a railroad crossing has a duty to look for trains and to see a train if it is in plain sight, and, if he goes upon a crossing in front of a train that was in plain view as he approached and is struck thereby, he is guilty of contributory negligence as a matter of law.

Russell v Scandrett, 225-1129; 281 NW 782

Contributory negligence as matter of law—motorist not looking. A motorist, who approaches a railroad crossing on a clear day, over a good road, with no obstructions and no diverting circumstances, and who, had he looked, must have seen but nevertheless is struck and killed by an approaching train which from a point 141 feet from the crossing was visible 2500 feet down the track, is guilty of contributory negligence as a matter of law, and the defendant railroad is entitled to a directed verdict.

Meier v Railway, 224-295; 275 NW 139

Contributory negligence of guest as jury question. Evidence that a guest riding in an automobile, when 100 feet from a railway crossing, observed and called the attention of the operator to an approaching train, and that thereupon the operator of the car commenced to reduce and continued to reduce the speed of the car until it was hit by the oncoming locomotive, precludes the court from saying that the guest was guilty of contributory negligence per se.

Wright v Railway, 222-583; 268 NW 915

Contributory negligence—guest's lookout at railroad crossing—jury question. A guest in a motor vehicle is not, as a reasonably prudent person, under the same obligation as the driver to keep a lookout, but whether or not, under the circumstances, a guest was lacking in ordinary care in committing his safety to the motor vehicle driver while crossing a railroad is a question for the jury.

Finley v Lowden, 224-999; 277 NW 487

Imputed negligence—instructions construed. In an unsuccessful action against a railway company for negligently causing the death of a guest riding in a truck, an instruction, as to what acts of the said driver would constitute negligence, cannot be deemed to impute the negligence, if any, of said driver to the guest when other instructions specifically state, in effect, that the negligence of the driver would be no defense if the negligence of the defendant was found to be the sole proximate cause of said death.

Reidy v Railway, 220-1386; 258 NW 675

Diverting circumstances. The operator of an automobile when entering upon a known railway crossing is held to know that he is entering a zone of danger; yet (1) the absence of statutory signals, (2) the obscured nature of the crossing, and (3) the distracting influence of other passing vehicles and of nearby objects, may save the operator from the imputation of contributory negligence per se.

Nederhiser v Railway, 202-285; 208 NW 856; 27 NCCA 86

Nondiverting circumstance. The fact that a party in crossing railway tracks was compelled, owing to the coldness of the weather, to manipulate the choke on the automobile cannot be deemed a diverting circumstance such as to excuse him from exercising his senses of sight and hearing.

Rosenberg v Railway, 213-152; 238 NW 703

Driving into side of train. Evidence which is solely to the effect that, on a misty and foggy night, a freight train was standing across a public railway crossing without any visible warning whatever of its presence, except the train itself, reveals no negligence (if it be deemed negligence) on the part of the railway company or its employees which can be deemed the proximate cause of an accident to a motorist who drove his car along the public highway and into the side of said train.

Dolan v Bremner, 220-1143; 263 NW 798

Emergency — attempt to avoid train. The driver of a conveyance who, in an emergency, attempts to pass in front of an immediately approaching railway train is not necessarily guilty of contributory negligence.

Anderson v Railway, 203-715; 211 NW 872; 27 NCCA 155; 27 NCCA 304; 31 NCCA 221

Failure to slow down or stop train. When a railway train and a traveler on the public highway are approaching a railway crossing in the country at the same time, and the train is within the unobstructed view of the traveler for a distance of several hundred feet before he reaches the crossing, the engineer of the train may not be said to be negligent in failing to slow down or stop the train when he has no reason to suppose that the traveler is unaware of the approaching train.

Lenning v Railway, 209-890; 227 NW 828

Red light on tender. The fact that an engine was, in the nighttime, and at the time of an accident, running backwards, and across a public crossing, with a red light on the tender may quite persuasively demonstrate that the injured party was not guilty of contributory negligence per se.

Rastede v Railway, 203-430; 212 NW 751

Snow glare affecting visibility. Where a passenger riding in a truck was killed in a crossing collision between truck and train, a contention that sun shining on snow and reflecting into truck constituted such obstruction to view of oncoming train that it raised a jury question on issue of deceased's contributory negligence in failing to see approaching train held not established by his evidence.

Russell v Scandrett, 225-1129; 281 NW 782

Warnings additional to statutory warnings. Conceded, arguendo, that a public railway crossing may be attended by such danger as to impose on the railway company, in the exercise of reasonable care, the duty to furnish to the highway traveler warnings in addition to those required by statute, but such duty does not arise when the danger is avoidable by the exercise of ordinary care on the part of the traveler. So held, inter alia, as to a fog-shrouded crossing, the danger attending which could be avoided by the traveler so driving as to be able to stop within the range of his vision.

Dolan v Bremner, 220-1143; 263 NW 798

IV EVIDENCE AND INSTRUCTIONS

Accidents at crossings—inapplicability of speed ordinance. A city ordinance which limits the speed of railway trains under given conditions is properly excluded, in the absence of any evidence that the ordinance was violated.

Newman v Railway, 202-1059; 206 NW 831

Habitual negligence of engineer. On the issue of the negligence of an engineer in operating his train on a certain occasion, evidence of his conduct on prior and similar occasions, is inadmissible.

Darden v Railway, 213-583; 239 NW 531

Frost on train—visibility—when jury question on plaintiff's care. Plaintiff's contention that a snowy landscape and frost on a train so camouflaged it that the question of his negligence in driving upon an unobstructed crossing in front of the train was for the jury is not substantiated by a record devoid of any evidence of frost on the front of the engine or that he was in any way blinded by the sun or glare of the sun on the snow.

Russell v Scandrett, 225-1129; 281 NW 782

Jury question. Evidence reviewed and held that a traveler whose view was somewhat obstructed was not guilty of negligence per se in driving upon railway tracks after the passage of a train and after the crossing watchman had lowered his "stop" sign and started in the direction of his station abode.

Love v Railway, 207-1278; 224 NW 815

Last clear chance—justifiable submission. The mere fact that a train operator on the rear of a backing train saw a party approaching a public crossing, at a time when the party was 100 or more feet distant, affords no basis for submitting to the jury the issue of the "last clear chance"; but such basis is furnished by testimony tending to show (1) that, to the knowledge of the operator, the party continued to approach said crossing and was in a position of peril when 30 feet therefrom, and (2) that the train could have been stopped within 20 feet.

Williams v Railway, 205-446; 214 NW 692; 27 NCCA 666

Negative testimony. Testimony that certain witnesses "did not hear" any warning signals from an approaching train is intrinsically without probative value when unaccompanied by any proof that such witnesses were in a position and mental attitude to have heard such signals, had they been given.

Chilcote v Railway, 206-1093; 221 NW 771

Negligence — evidence. Evidence reviewed in law action for damages tried to the court alone, and held to support a finding of negligence in the maintenance of a railway crossing; that said negligence was the proximate cause of an injury; and that plaintiff's negligence, if any, did not contribute to said injury.

Warren v Railway, 219-723; 259 NW 115

"No-eyewitness" rule—inapplicability under direct evidence. Where a motorist and other eyewitnesses testify as to deceased's conduct just prior to his driving into the side of a moving train, it is error to instruct on the presumption that defendant's natural instinct of self-preservation would prompt him not to run into a moving train, when direct evidence as to his conduct is obtainable.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

Obstructions—evidence pro and con. On the issue whether the view of a railway track was so obstructed at the time of an accident that an approaching train could not be seen, testimony by an eyewitness is manifestly admissible, to the effect that he immediately stationed himself at the point of accident and could plainly see the entire track over which a train would approach.

Langham v Railway, 201-897; 208 NW 356

Positive and negative evidence. Testimony of witnesses to the effect that they did not hear or notice any signals, when the witnesses were in no mental attitude to hear or notice such signals, creates no conflict with positive testimony that such signals were given.

Lenning v Railway, 209-890; 227 NW 828

IV EVIDENCE AND INSTRUCTIONS — concluded

Precautions in addition to statute. A railway crossing may be so unusually dangerous as to justify a jury in finding that the railway company was negligent in not providing warnings and safeguards in addition to those required by statute. But record reviewed and held wholly insufficient to justify the submission of such issue to the jury.

Butters v Railway, 214-700; 243 NW 597

Warning unheard — negative evidence not valueless as matter of law. In an action involving an automobile railroad crossing accident, statements of witnesses as to not hearing a bell nor whistle warning were not as a matter of law of such negative character as to lack all probative force.

Finley v Lowden, 224-999; 277 NW 487

Instruction without basis in evidence. An instruction authorizing a finding of negligence on the part of a railroad company if an employee thereof discovered the danger of an approaching vehicle and did not, in the exercise of ordinary care, report such danger to the engineer is wholly inapplicable to a record which clearly reveals the fact that, when the employee aforesaid discovered the danger, no ordinary care could have prevented the accident.

Gilliam v Railway, 206-1291; 222 NW 12

Absence of flagman or signal device. The submission to the jury of the issue of negligence, based on the absence at a railway crossing of a flagman or signaling device, tho not required by ordinance, is justified when the crossing is more than ordinarily dangerous.

Williams v Railway, 205-446; 214 NW 692

Duty to look and listen. An instruction to the effect that, in determining the care exercised by a traveler at a railroad crossing, the jury should consider whether obstructions to one's view were such as to require the traveler to look and listen, is quite harmless when the jury was elsewhere correctly instructed as to the duty to look and listen.

Love v Railway, 207-1278; 224 NW 815

Failure to stop and look. Instructions are properly refused when they impute contributory negligence to the driver of a vehicle in approaching and going upon a materially obstructed railway crossing without stopping and looking, when it is conceded that the obstructions were such that no stopping and looking would have discovered the approaching train except substantially at the point of collision.

Anderson v Railway, 203-715; 211 NW 872

Absence of lookout. Instructions held properly to authorize the jury to consider the absence of a lookout and other lack of warning on the question of negligence.

Love v Railway, 207-1278; 224 NW 815

Accident at crossing—maintaining lookout—unsustained issue. Reversible error results from submitting the issue whether the engineer of a railway train was negligent in not maintaining a proper lookout for automobiles approaching a public crossing, when the evidence shows to the contrary and that the approaching automobile was discovered at the earliest reasonable opportunity, which was too late to prevent the accident.

Simmons v Railway, 217-1277; 252 NW 516

"Physical fact" rule. A requested instruction should be given, when the testimony is supporting, to the effect that, if the view of a railway track is unobstructed for a long distance while a traveler is knowingly approaching it, he will be held to have seen the train approaching thereon, there being no diverting circumstance.

Langham v Railway, 201-897; 208 NW 356; 27 NCCA 68; 27 NCCA 69

Sodemann v Railway, 215-827; 244 NW 865

8020 Railway and highway crossing at grade.

Atty. Gen. Opinion. See '25-26 AG Op 369

State commerce commission abandoning overhead crossing—street change resulting—excess of jurisdiction. The state commerce commission has no power to order the abandonment of an overpass or overhead crossing over a railroad in a city or town, which results in altering the streets thereof. Jurisdiction of its streets is a city function which may not be invaded by the state commerce commission, regardless of its good-faith motives, and certiorari will lie to prevent such invasion.

Huxley v Conway, 226-268; 284NW 136

8021 Disagreement—application—notice.

Atty. Gen. Opinion. See '25-26 AG Op 369

8022 Hearing—order.

Atty. Gen. Opinion. See '25-26 AG Op 369

8024 Repairs—aid by court.

Crossings—safe condition controlled by transportation needs. It is the duty of railways and municipalities to keep pace with the changes in transportation methods and to keep highways and railroad crossings in a reasonably safe condition, inasmuch as a type of crossing construction, considered safe when built, might be unsafe for a later changed method of use by the public.

Harris v Railway, 224-1319; 289 NW 338

CHAPTER 373

REGULATION OF CARRIERS

GENERAL PROVISIONS

8038 Duty to furnish cars and transport freight.

Noninsurer of perishable goods. A carrier is not, under the common law, an insurer against the freezing of articles which are subject to being frozen.

Dye Co. v Davis, 202-1008; 209 NW 744

Ignoring specific allegations of negligence and relying on breach of contract. In an action against a common carrier for damages to a shipment of stock, plaintiff may ignore his specific allegations of negligence, and rely on his general allegation of breach of contract to carry safely.

McCoy v Railway, 210-1075; 231 NW 353

Cause of death as question of law. Evidence reviewed, and held that the court could not say as a matter of law that the expert theory that hogs died of hog cholera after the termination of a shipment was more reasonable than the theory that they died because of the negligence of the carrier during shipment.

Brower v Railway, 218-317; 252 NW 755

Overloading cars. The court is in error in holding as a matter of law that a carrier of livestock knew or ought to have known that the cars were overloaded, when the testimony shows that the agent of the carrier was necessarily compelled to inspect the cars after dark, and with a flash light, and when he could not clearly see the animals.

Wiersma v Railway, 213-223; 238 NW 579

Presumption from good and bad delivery. A showing that goods were in good condition when received by a carrier and in bad condition when delivered, presumptively establishes, in and of itself, the carrier's negligence. Error necessarily results from instructing that the shipper must show specific acts of negligence on the part of the carrier.

Dye Co. v Davis, 202-1008; 209 NW 744

Delivery in good condition—presumption—jury question. Evidence that animals were in good condition when delivered to a carrier; that an unusual number died during the shipment; that the surviving hogs were in good condition at the end of the shipment; coupled with uncertain testimony as to the amount of water furnished by the carrier to the animals for drinking purposes in very hot weather, presents a jury question on the issue whether the said deaths were the result of human agency.

McCoy v Railway, 210-1075; 231 NW 353

Prima facie case for recovery. Evidence tending to show that stock (1) was delivered to a carrier in good, healthy condition, (2) was turned over to the consignee in a damaged condition, (3) was insufficiently fed and watered during the shipment, and (4) was unaccompanied by a caretaker, makes a jury question on the issue of the carrier's liability for the damage.

Brower v Railway, 218-317; 252 NW 755
See Hall v Ins. Co., 217-1005; 252 NW 763

Unfrozen condition—jury question. A jury question is made on the issue whether goods were unfrozen when delivered to the carrier by testimony tending to show (1) that no freezing temperature had existed at the place of initial shipment at and for some substantial time prior to the delivery, and (2) that the goods near the doorway, along the sides, and at the ends of the car were frozen when delivered.

Dye Co. v Davis, 202-1008; 209 NW 744

Rule requiring written orders for cars. The rule of a carrier requiring orders by a shipper for cars to be in writing, and being a part of its freight-rate schedules on file with the board of railroad commissioners, is mandatory, and compliance therewith is not shown by evidence that the station agent, upon receiving an oral order, made a written memorandum thereof for his own convenience. Such rule is manifestly admissible as evidence in a proper case.

Jackson v Railway, 213-365; 238 NW 912

Continuing shipment. An order requiring a railway to accept in this state loaded cars which have arrived from another state through a terminated interstate shipment, and to transport said cars without reloading, is valid and enforceable. 152 Iowa 317 affirmed.

Chicago, Mil. Ry. Co. v State, 233 US 334

Special damages. A carrier is not liable for special damages consequent on its negligent delay in delivering a shipment unless, at or before the time of shipment, the carrier is notified of the special purpose for which the shipment is intended and of the necessity for prompt shipment. So held as to a shipment of cans by the consignor to itself, followed by damages to corn which the ultimate consignee was unable to can, owing to negligent delay in delivering shipment.

Percy v Railway, 207-889; 223 NW 879; 28 NCCA 717

When mistaken delivery absolves carrier. A carrier is not responsible for a loss which results from delivering a shipment to a person who is not the agent of the consignee for the purpose of such shipment, when the carrier justifiably believed such person to be such agent, and when such person was the very person to whom the consignor intended delivery

to be made, because of a like belief on his part as to such agency.

Malvern Storage v Ry. Exp. Co., 206-292; 220 NW 322

8039 Cars of connecting roads.

Liability of initial and connecting carriers. See under §10980

8042 Limitation on liability.

ANALYSIS

I LIMITATIONS IN GENERAL
II INTERSTATE COMMERCE

I LIMITATIONS IN GENERAL

Carrier's "burden of proof"—instruction—nonprejudicial error. In an action for damages against a railroad for the value of a stallion which died in transit, where the court clearly defined those matters and facts as to which the burden of proof was on plaintiff, and in substance charged the jury that, upon plaintiff having successfully carried this burden, the "burden of proof" would be on defendant to show, by a preponderance of the evidence, the excepted cause, held, the use of the phrase "burden of proof" as quoted in second instruction was not error.

Vander Beek v Railway, 226-1363; 286 NW 452

Damages—condition of livestock at end of route—no determination of recovery. In an action against railroad ex contractu for value of livestock shipped, whether animal's condition at the end of the route would lead a reasonable man to believe that such condition was caused by railroad's act was not determinative of recovery.

Vander Beek v Railway, 226-1363; 286 NW 452

Delay of shipment—special damages. A carrier is not liable for special damages consequent on its negligent delay in delivering a shipment unless at or before the time of shipment the carrier is notified of the special purpose for which the shipment is intended and of the necessity for prompt shipment. So held as to a shipment of cans by the consignor to itself, followed by damages to corn which the ultimate consignee was unable to can, owing to negligent delay in delivering shipment.

Percy v Railway, 207-889; 223 NW 879; 28 NCCA 717

Instruction—"act or omission"—not erroneous. In an action for damages against a railroad for value of stallion which died in transit, an instruction placing on the railroad the burden of proving that its failure to transport stallion to destination "was not due to any act or omission upon the part of the railway company" will not be erroneous because of failure to use the words "negligent act or omission".

Vander Beek v Railway, 226-1363; 286 NW 452

Liability as insurer. In an action for damages against a carrier for loss of livestock, the liability of carrier is not only that of bailee, but as insurer against all risks incident to the transportation, save such losses as might result from the act of God or some other excepted cause.

Vander Beek v Railway, 226-1363; 286 NW 452

Newsboys as passengers. Newsboys on railway passenger trains are, in a legal sense, passengers, even tho they travel on free transportation furnished by the railway company for a consideration under a contract between their employer and the said company, which contract, unbeknown to them, stipulates that they shall not be considered passengers.

Shadduck v Railway, 218-281; 252 NW 772

When person not "passenger". A person while walking in the street toward a street car for the purpose of entering the car for passage thereon cannot be deemed a "passenger", and the carrier operating the car owes such person that degree of care only, which it owes to all people in the street, to wit, ordinary care.

Moss v Railway, 217-354; 251 NW 627

Pleading affirmative defense—instruction on preponderance of evidence. In an action to recover damages from a railroad for value of stallion which died during transportation, wherein an excepted cause of death is pleaded and relied on as an affirmative defense, railroad will be entitled only to instruction that verdict must be for railroad if such cause should appear from a preponderance of the evidence.

Vander Beek v Railway, 226-1363; 286 NW 452

Injuries to livestock—directed verdict—sufficiency of evidence. Evidence that injury to cow was caused by negligence of alleged common carrier was insufficient to make a jury question when the injury was not discovered until 3 hours after the cow was delivered and there was no showing of any injury at the time the cow was unloaded.

Mountain v Albaugh, 227-1282; 290 NW 693

Shipment unaccompanied — action ex contractu—affirmatively showing negligence unnecessary. In an action against a railroad for damages, where plaintiff does not accompany shipment, he will not be bound to support his action, brought ex contractu, by affirmative showing of negligence by the carrier, nor will he be bound by a showing that a human agency

caused the loss since this would merely establish negligence.

Vander Beek v Railway, 226-1363; 286 NW 452

II INTERSTATE COMMERCE

Discussion. See 2 ILB 194—Sale and delivery as interstate commerce; 12 ILR 30—The "local transaction" in interstate commerce

Applicability. This section is not applicable to interstate commerce. 153 Iowa 103 reversed.

Chicago, RI Ry. Co. v Cramer, 232 US 490

Interstate commerce — unallowable burden on. A foreign corporation seeking to operate in this state an exclusive interstate pipe-line system may not be constitutionally required by a state statute, as a condition precedent to the construction of its line and to the transacting of its said business, even on its own private right of way:

1. To apply for, obtain, and pay for a permit to carry on said business, and pay all expenses attending the hearing on said application; or

2. To consent to any and all statutes then or thereafter in force regulatory of said business; or

3. To consent that the state may levy on it such general property taxes and/or taxes on gross receipts, and/or taxes on net income as the general assembly may thereafter prescribe; or

4. To consent to and pay an annual license fee.

Reason: Each of said requirements imposes an unallowable burden on interstate commerce.

State v Stanolind Co., 216-436; 249 NW 366

8044 Preference prohibited — exception.

Exclusive grant of cab stand privileges. A railway company may grant exclusive rights to a cab stand on its own premises when such grant is not arbitrary or unreasonable.

Red Top v McGlashing, 204-791; 213 NW 791

8046 Unjust discrimination — exceptions.

Discussion. See 1 ILB 33—Preferential passenger rates; 2 ILB 71—Damages at common law; 2 ILB 202—Damages as rebate

8048 Charges to be reasonable.

Discussion. See 17 ILR 394—Interstate commerce commission authority

8049 Long and short haul—fair rate.

Shipping over long route—recovery of excess charge. Where a carrier on his own motion and without proffering any reason therefor carries an interstate shipment over the longer of two routes and collects the published rate for said longer route, the shipper may, without resort to the interstate commerce commission, recover of the carrier the freight rates paid by him in excess of the published rate for the shorter route.

Miller v Davis, 213-1091; 240 NW 743; 78 ALR 1541

JOINT RATES

8069.1 Routing intrastate shipments.

Shipping over long route—recovery of excess charge. Where a carrier on his own motion and without proffering any reason therefor carries an interstate shipment over the longer of two routes and collects the published rate for said longer route, the shipper may, without resort to the interstate commerce commission, recover of the carrier the freight rates paid by him in excess of the published rate for the shorter route.

Miller v Davis, 213-1091; 240 NW 743; 78 ALR 1541

RATE SCHEDULES

8082 Definitions.

Discussion. See 11 ILR 354—Rate-making, ownership and financing

8084 Detailed requirements.

Rule requiring written orders for cars. The rule of a carrier requiring orders by a shipper for cars to be in writing, and being a part of its freight-rate schedules on file with the board of railroad commissioners, is mandatory, and compliance therewith is not shown by evidence that the station agent, upon receiving an oral order, made a written memorandum thereof for his own convenience. Such rule is manifestly admissible as evidence in a proper case.

Jackson v Railway, 213-365; 238 NW 912

LIVESTOCK

8109 Shipment—free transportation.

Negligence—burden of proof. Shipper of livestock who accompanies shipment as caretaker has burden to establish the negligence alleged to have injured the stock.

Wiederin v Railway, 212-1103; 237 NW 344

8114 Movement of livestock—burden of proof.

ANALYSIS

I LIABILITY IN GENERAL
II DELAY IN SHIPMENT

Liability of initial and connecting carriers. See under §10980

I LIABILITY IN GENERAL

Action ex contractu—affirmatively showing negligence unnecessary. In an action against a railroad for damages, where plaintiff does not accompany shipment, he will not be bound to support his action, brought ex contractu, by

I LIABILITY IN GENERAL—continued

affirmative showing of negligence by the carrier, nor will he be bound by a showing that a human agency caused the loss since this would merely establish negligence.

Vander Beek v Railway, 226-1363; 286 NW 452

Carrier's "burden of proof." In an action for damages against a railroad for the value of a stallion which died in transit, where the court clearly defined those matters and facts as to which the burden of proof was on plaintiff, and in substance charged the jury that, upon plaintiff having successfully carried this burden, the "burden of proof" would be on defendant to show, by a preponderance of the evidence, the excepted cause, held, the use of the phrase "burden of proof" as quoted in second instruction was not error.

Vander Beek v Railway, 226-1363; 286 NW 452

Cause of death as question of law. Evidence reviewed, and held that the court could not say as a matter of law that the expert theory that hogs died of hog cholera after the termination of a shipment was more reasonable than the theory that they died because of the negligence of the carrier during shipment.

Brower v Railway, 218-317; 252 NW 755

Construction of statute. This section does not justify an instruction which, in effect, submits to the jury the question of the reasonableness of a freight train schedule. These statutes contemplate the fixing of livestock-shipping schedules by the railroad commission, with the attending presumption that such schedules will be reasonable.

Siegel v Railway, 201-712; 208 NW 78

Damages—condition of livestock. In an action against railroad ex contractu for value of livestock shipped, whether animal's condition at the end of the route would lead a reasonable man to believe that such condition was caused by railroad's act was not determinative of recovery.

Vander Beek v Railway, 226-1363; 286 NW 452

Injuries—directed verdict—sufficiency of evidence. Evidence that injury to cow was caused by negligence of alleged common carrier was insufficient to make a jury question when the injury was not discovered until 3 hours after the cow was delivered and there was no showing of any injury at the time the cow was unloaded.

Mountain v Albaugh, 227-1282; 290 NW 693

Speculative verdict for damages. A verdict for damages consequent on the death from congestion of the lungs of stock during shipment will not be permitted to stand when, on the record, the cause of said congestion can be equally attributed either (1) to the act of the shipper in unduly exerting the hogs prior to the complete loading of the stock, or (2) to the rough handling of the train while the stock was being transported.

Wiederin v Railway, 212-1103; 237 NW 344

Delivery in good condition—presumption—jury question. Evidence that animals were in good condition when delivered to a carrier; that an unusual number died during the shipment; that the surviving hogs were in good condition at the end of the shipment; coupled with uncertain testimony as to the amount of water furnished by the carrier to the animals for drinking purposes in very hot weather, presents a jury question on the issue whether the said deaths were the result of human agency.

McCoy v Railway, 210-1075; 231 NW 353

Ignoring specific allegations of negligence and relying on breach of contract. In an action against a common carrier for damages to a shipment of stock, plaintiff may ignore his specific allegations of negligence, and rely on his general allegation of breach of contract to carry safely.

McCoy v Railway, 210-1075; 231NW 353

Instruction—"act or omission." In an action for damages against a railroad for value of stallion which died in transit, an instruction placing on the railroad the burden of proving that its failure to transport stallion to destination "was not due to any act or omission upon the part of the railway company" will not be erroneous because of failure to use the words "negligent act or omission".

Vander Beek v Railway, 226-1363; 286 NW 452

Liability as insurer. In an action for damages against a carrier for loss of livestock, the liability of carrier is not only that of bailee, but as insurer against all risks incident to the transportation, save such losses as might result from the act of God or some other excepted cause.

Vander Beek v Railway, 226-1363; 286 NW 452

Negligence—burden of proof. Shipper of livestock who accompanies shipment as caretaker has burden to establish the negligence alleged to have injured the stock.

Wiederin v Railway, 212-1103; 237 NW 344

Overloading cars—jury question. The court is in error in holding as a matter of law that a carrier of livestock knew or ought to have known that the cars were overloaded, when the testimony shows that the agent of the carrier was necessarily compelled to inspect the cars after dark, and with a flashlight, and when he could not clearly see the animals.

Wiersma v Railway, 213-223; 238 NW 579

Pleading affirmative defense. In an action to recover damages from railroad for value of stallion which died during transportation, wherein an excepted cause of death is pleaded and relied on as an affirmative defense, railroad will be entitled only to instruction that verdict must be for railroad if such cause should appear from a preponderance of the evidence.

Vander Beek v Railway, 226-1363; 286 NW 452

Prima facie case for recovery. Evidence tending to show that stock (1) was delivered to a carrier in good, healthy condition, (2) was turned over to the consignee in a damaged condition, (3) was insufficiently fed and watered during the shipment, and (4) was unaccompanied by a caretaker, makes a jury question on the issue of the carrier's liability for the damage.

Brower v Railway, 218-317; 252 NW 755
See Hall v Ins. Co., 217-1005; 252 NW 763

II DELAY IN SHIPMENT

Damages—double measure. A shipper may be entitled to recover of a carrier for a delayed shipment damages measured by the difference in value of the shipment immediately after the transportation, and such value as it would have been if the transportation had been without negligence; but he is not entitled, in addition, to any amount for care, feed, or medical services expended in order to render the shipment fit for the market.

Siegel v Railway, 201-712; 208 NW 78

Nonrecoverable damages. In an action against a common carrier for damages to livestock, based solely on the claim that the carrier had been guilty of negligent delay in the shipment and that the delay had resulted in sickness of the stock, recovery may not be had for damages to other stock, strangers to the shipment, because such other stock contracted the same sickness by intermingling with the stock which had been shipped.

Siegel v Railway, 201-712; 208 NW 78

Assumed burden of proof. A carrier which pleads that, as to a shipment of livestock, it was under the necessity to keep, hold, and feed the stock under the shipper's direction, and that it made every effort to discharge that duty, may not, on appeal, contend that the shipper should be held to the burden of showing that the injury did not result from his negligence.

Riddle v Railway, 203-1232; 210 NW 770

Instructions—correct but inexplicit. A correct instruction as to the responsibility of a carrier for the acts of its different agencies employed in transporting and delivering a shipment is sufficient, in the absence of a request for particular limitations thereon.

Riddle v Railway, 203-1232; 210 NW 770

Negligence in unloading. A carrier is not negligent in unloading and caring for stock at a station specially equipped for such service, even tho it might have carried the stock to a more distant point on the line of its destination before unloading, and thereby have avoided a washout on its line and a resulting delay, when to have so done would have been likely to involve the carrier in a violation of the federal stock-shipping law.

Canady v Railway, 203-12; 212 NW 322

Strike as defense. The plea that a carrier of livestock was prevented from making delivery because of a strike among stockyards employees must fail when the jury might well find that, if the carrier had exercised reasonable diligence, delivery would have been made notwithstanding the strike.

Riddle v Railway, 203-1232; 210 NW 770

Value of livestock. Competent oral testimony of the value of livestock is admissible even tho a recognized market journal is in evidence showing such values.

Riddle v Railway, 203-1232; 210 NW 770

CLASSIFICATION AND PASSENGER RATES

8126 Passenger rates—limitation.

Limitation on interstate ticket. A passenger in the use of an interstate excursion ticket, issued under a schedule filed with and approved by the interstate commerce commission, is conclusively held to know that he has no right to travel on any train except on the train specified in said schedule, even tho he has been otherwise informed by the carrier's agent, has never seen the schedule, and even the ticket itself shows no limitation to any particular train. It follows that damages consequent on being ejected from the train on which the passenger has no right to ride are nonrecoverable, whether the action sound in contract or tort.

Foley v Railway, 205-72; 217 NW 563

8128 Exceptions.

Atty. Gen. Opinion. See '32 AG Op 20

WEIGHING OF COAL

8137 Coal in car lots.

Loss by evaporation. In an action against a carrier for a shortage in the shipment of coal, the trial court may very properly refuse to deduct from the apparent weight any percentage or amount for evaporation, when the testimony relative thereto simply consists of federal bulletins of the department of mines, tending to show that in such shipments there is, at times, and under different conditions, a variable loss of weight by evaporation.

Smith v Railway, 202-292; 209 NW 465

8138 Where weighed—bills of lading.

Bills of lading—identification. A bill of lading is amply identified as issued by the initial carrier by a showing that it was in the hands of the consignee and was by him delivered to and accepted by the delivering carrier when the consignee received the goods.

Smith v Railway, 202-292; 209 NW 465

8141 Prima facie evidence.

Measure of damages. In an action against a carrier for a shortage in the delivery of a shipment of coal, the value of the shortage at the point of shipment is not an improper measure of damages.

Smith v Railway, 202-292; 209 NW 465

Value at distant market. A coal dealer who has for a long time purchased coal at points in a foreign state is competent to testify to the value of such commodity at said foreign points.

Smith v Railway, 202-292; 209 NW 465

Variation in scale weights. In an action against a carrier for a shortage in the shipment of coal, the weights at the point of shipment and destination are presumptively correct, and the trial court may very properly disregard testimony tending to show, in substance, that scales frequently disagree as to the weight of such commodity.

Smith v Railway, 202-292; 209 NW 465

APPROPRIATION OF FUEL

8143 Fuel in transit.

Atty. Gen. Opinion. See '32 AG Op 171

NEGLIGENCE OF EMPLOYEES

8156 Liability for negligence of employees.

Discussion. See 3 ILB 195—Judicial relaxation of carrier's liability; 3 ILB 197—In England; 4 ILB 21—United States; 4 ILB 86—Statutes

ANALYSIS

I STATUTE IN GENERAL
II LIABILITY IN GENERAL
III NEGLIGENCE IN GENERAL
IV EMPLOYEES PROTECTED
V FEDERAL EMPLOYERS' LIABILITY ACT

I STATUTE IN GENERAL

Carrier—state (?) or interstate (?). An employee is not engaged in interstate commerce while working for an interstate carrier in the construction of an entirely new, incomplete, and wholly unused telegraph line.

Chi. RI Ry. v Lundquist, 206-499; 221 NW 228; 30 NCCA 255

Interstate carrier — lex loci contractus. A contract of employment for and on behalf of an interstate commerce carrier is consummated in this state when the conditional offer of employment is accepted in this state by a resident thereof, even tho the offer is made in a foreign state.

Chi. RI Ry. v Lundquist, 206-499; 221 NW 228

"Last clear chance." The doctrine of "last clear chance" can have no possible application when the danger of the injured person was discovered at a time when manifestly nothing could be done to prevent the injury.

Albright v Railway, 200-678; 205 NW 462; 27 NCCA 176; 27 NCCA 651

Recklessness of railway employees—insufficient pleading to establish. In action for personal injuries sustained by automobile passenger in collision between automobile and railway motorcar, where petition alleged that railway motorcar had been standing a short distance from crossing, obscured from view of motorist by shrubbery along railway right of way, and was driven onto crossing and into the course of oncoming automobile without warning, and that railway motorcar could have been stopped by applying brakes, such allegations were insufficient to state a cause of action based upon recklessness of employees of defendant railroad.

Smith v Railway, 227-1404; 291 NW 417

II LIABILITY IN GENERAL

Discussion. See 9 ILB 291—Clauses giving carrier the benefit of shipper's insurance; 10 ILB 322—Liability of carrier for delay

License—revocation. An implied license to pedestrians on a railway right of way to use a path alongside a railway track is impliedly repealed by the act of the railway in substantially obstructing such path.

Radenhausen v Railway, 205-547; 218 NW 316

Damage to privately owned car. An action by a shipper to recover of an initial carrier damages to the shipper's own car which had been delivered to the said carrier, fully loaded, for transportation to a connecting carrier, and injured by the connecting carrier while returning the car to the initial carrier, cannot be maintained in the absence of some showing as to the contract or arrangement governing the return of the car.

Bott Co. v Railway, 215-16; 244 NW 679

Injury not reasonably to be anticipated. A carrier is not liable in damages to a passenger for failure to guard against an injury or occurrence which human foresight would not reasonably anticipate. So held where a passenger fainted in the toilet room of a coach and was severely burned by falling on uncovered steam pipes near the wall.

Hauser v Railway, 205-940; 219 NW 60; 58 ALR 687

Limitation on interstate ticket. A passenger, in the use of an interstate excursion ticket issued under a schedule filed with and approved

by the interstate commerce commission, is conclusively held to know that he has no right to travel on any train except on the train specified in said schedule, even tho he has been otherwise informed by the carrier's agent, has never seen the schedule, and even tho the ticket itself shows no limitation to any particular train. It follows that damages consequent on being ejected from the train on which the passenger has no right to ride are nonrecoverable, whether the action sound in contract or tort.

Foley v Railway, 205-72; 217 NW 563

Starting streetcar. Question whether conductor started streetcar when passenger, who was injured by being thrown to the floor of car, was in position of peril and such fact was apparent to the conductor, held for jury determination.

Havens v Railway, (NOR); 207 NW 677; 32 NCCA 680

Carriage of passengers—termination of relation. Principle reaffirmed that a passenger on a streetcar ceases to be such the moment he completes his step from the car into the street.

MacLearn v Utilities Co., 212-555; 234 NW 851; 2 NCCA(NS) 551

Trestle as licensed place. It will not be lightly inferred that a railway company knowingly consented to the use of its trestle as a footway for pedestrians when such use, under the peculiar circumstances existing, was not only perilous but literally foolhardy.

Brimeyer v Railway, 213-1289; 241 NW 409

Failure to maintain lookout. Failure of the operatives of a train to keep a lookout for pedestrians near the tracks does not constitute negligence when such failure had nothing whatever to do with the resulting accident.

Radenhausen v Railway, 205-547; 218 NW 316

III NEGLIGENCE IN GENERAL

Safe tools and place to work—reasonable care required. A master is required to exercise reasonable care to furnish reasonably safe tools, appliances, and instrumentalities for use in the work which the servant is expected to perform and the same degree of care in furnishing a reasonably safe place in which to work.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

Attractive nuisance. Evidence that cinders were piled along a railroad track, and that a 7-year-old boy was suffered to walk thereon in going on an errand for his mother, furnishes no possible application for the doctrine of "attractive nuisances".

Radenhausen v Railway, 205-547; 218 NW 316; 37 NCCA 15

Railroad turntable. A turntable, owned by the defendant, which was situated within four or five hundred feet of its depot, near a public highway, and in the vicinity of a ball ground, and a stream of water to which boys were accustomed to resort for fishing and skating, was fastened by a pair of iron clamps, connecting the ends of the rails on the table, by means of a loop and pin, with the corresponding ends of the rails on the embankment adjacent thereto. After a number of boys, under 12 years of age, had removed said fastenings, and had set the table in motion by pushing, they were joined by the plaintiff, a lad of 13 years, who jumped upon the table while in motion, lay down thereon with his head toward the center, and his legs projecting over the end, and was immediately injured by having his legs caught between the table and the embankment. In an action to recover for such injury, the plaintiff admitted that he knew that the space between the ends of the table and the embankment was but one and one-half inches, and that if his leg was caught between them it would be crushed, and that if he had thought of the danger he could and would have avoided it, but that he did not think of it because he was having fun. Held, that the plaintiff was guilty of negligence contributing to the injury, and the evidence being uncontroverted, the court properly instructed the jury to find for the defendant.

Merryman v Railway, 85-634; 52 NW 545

Contributory negligence. A boy 12 years old, of good ability and usually well informed, who is injured by catching his foot between the end of a moving turntable and the side of the pit while attempting to step from it on a dark night, is guilty of contributory negligence as a matter of law.

Carson v Railway Co., 96-583; 65 NW 831

Turntable in neighborhood of street—negligence. A railroad company maintaining a turntable on an unfenced lot, near a public alley, and which was from 80 to 300 feet from the street, is liable for injuries received by a seven-year-old child while playing thereon, caused by the company's failure to use reasonable care to so guard and fasten the turntable as to prevent injuries to children tempted to play on it.

Edgington v Railway Co., 116-410; 90 NW 95

Sufficiency of fastening turntable. Where, in an action against a railroad company for injuries received by a child while playing on defendant's turntable, it was shown that the turntable was unfastened by one of the children with plaintiff, the question of the sufficiency of the fastening used was one of fact for the jury.

Edgington v Railway Co., 116-410; 90 NW 95

Capacity to appreciate danger. A child seven years and eight months old cannot be considered, as a matter of law, of sufficient age and

III NEGLIGENCE IN GENERAL—continued

intelligence to appreciate the danger to which she exposed herself in playing on a railroad turntable, and such question was properly left to the jury in determining the question of contributory negligence.

Edgington v Railway Co., 116-410; 90 NW 95

Contribution of playmates to injury. The fact that injuries received by a child while playing on a railroad turntable were immediately caused by the child's playmates unfastening and operating the turntable, does not relieve the company from liability, the gist of the action being the keeping of a dangerous machine in a place where children might reasonably be expected to resort and to play thereon.

Edgington v Railway Co., 116-410; 90 NW 95

Trespassing boy—jumping from freight car to building. There are cases where the owner of premises will be held liable for injury to a child too young to understand the fact or meaning of trespass, or to care for his own safety when attracted to the premises by some act or omission of the owner which he knows, or as a reasonably prudent person ought to apprehend, would render the premises dangerous. But where, as in this case, a boy 13 years of age climbed upon a freight car standing at defendant's railway station and from there jumped to the roof of a storage building for electric cars, and when about to jump back to the car was injured by contact with an uninsulated power wire passing above the roof of the building, and it appeared that plaintiff knew he was a trespasser, that the railway was operated by electricity and that electric wires were dangerous; that the roof could only be reached by climbing the cars; that this was the first incident of the kind and no necessity for guards or signs had been indicated to the owner, the plaintiff was guilty of such negligence as to preclude recovery for the injury.

Anderson v Railway, 150-465; 130 NW 391

Railroad wreck—not attractive nuisance. An owner or occupant of premises owes no duty to an infant who, without the knowledge or invitation, express or implied, of such owner or occupant, goes, out of idle curiosity, upon such premises, and is injured by some dangerous agency. And the existence of a railway wreck, consisting of two overturned box cars and promiscuously interwoven trackage, does not constitute such a known, attractive and dangerous agency as to amount to an implied invitation to children to come upon the premises, out of idle curiosity, to view it, and thus bring the child within the "law of attractive agencies".

Wilmes v Railway, 175-101; 156 NW 877

Artificial pond—nonattractive nuisance. An ordinary pond of water, unguarded and unfenced, within the corporate limits of a city, and entirely within a railway right of way, and formed by natural drainage from surrounding land, which settled into a borrow pit, and around which children habitually played, is not an attractive nuisance, in such sense as to render the railway company liable in damages because an immature child met death by falling therein.

Blough v Railway, 189-1256; 179 NW 840

Plank shelf along cofferdam—not attractive nuisance. A plank shelf along the side of a cofferdam, adjacent to a bridge abutment which was securely inclosed by a substantial barbed wire fence, located in the open country and fairly removed from habitation, is not an "attractive nuisance" in such sense as to render the owner responsible for the death of an immature child, who, as a mere licensee, at the best, went upon the shelf and fell therefrom into the water.

Massingham v Railway, 189-1288; 179 NW 832

Accident at crossing—habitual negligence of engineer. On the issue of negligence of an engineer in operating his train on a certain occasion, evidence of his conduct on prior and similar occasions, is inadmissible.

Darden v Railway, 213-583; 239 NW 531

Action ex contractu—affirmatively showing negligence unnecessary. In an action against a railroad for damages, where plaintiff does not accompany shipment, he will not be bound to support his action, brought ex contractu, by affirmative showing of negligence by the carrier, nor will he be bound by a showing that a human agency caused the loss since this would merely establish negligence.

Vander Beek v Railway, 226-1363; 286 NW 452

Alighting from moving train. Negligence may be found in the act of a brakeman of a train in advising a passenger to alight from a moving train, and it is not necessarily negligence for the passenger to follow the advice.

Bersie v Railway, 202-1090; 211 NW 250

Baggage in aisle—negligence. Negligence on the part of a carrier may not be predicated on the presence of baggage in the aisle of a passenger coach when there is no evidence that the carrier knew, or ought in reason to have known, of the presence of such baggage.

Costello v Railway, 205-1077; 217 NW 434; 28 NCCA 82

Carriage of livestock—overloading cars—jury question. The court is in error in holding as a matter of law that a carrier of livestock knew or ought to have known that the cars were overloaded, when the testimony shows that the agent of the carrier was necessarily compelled to inspect the cars after dark, and with a flash light, and when he could not clearly see the animals.

Wiersma v Railway, 213-223; 238 NW 579

Injuries to livestock—directed verdict—sufficiency of evidence. Evidence that injury to cow was caused by negligence of alleged common carrier was insufficient to make a jury question when the injury was not discovered until 3 hours after the cow was delivered and there was no showing of any injury at the time the cow was unloaded.

Mountain v Albaugh, 227-1282; 290 NW 693

Exoneration of servant—effect on master's liability. When a master is liable, if at all, because of the negligence of his servant, a verdict exonerating the servant from the alleged negligence, and a judgment of dismissal entered thereon, from which no appeal is taken, necessarily exonerates the master.

Lahr v Railway, 212-544; 234 NW 223
Hall v Miller, 212-835; 235 NW 298

Pleading negligence of employees operating railway motorcar—sufficiency. In action for personal injuries sustained by an automobile passenger in collision between automobile and railroad motorcar, where petition alleged that motorcar had been standing at crossing obscured from view of motorist by shrubbery along railroad right of way, and was driven into course of the oncoming automobile without any warning and that it could have been stopped by applying the brakes, such allegations were sufficient to state a cause of action based upon negligence of railroad employees.

Smith v Railway, 227-1404; 291 NW 417

Instruction without basis in evidence. An instruction authorizing a finding of negligence on the part of a railroad company if an employee thereof discovered the danger of an approaching vehicle and did not, in the exercise of ordinary care, report such danger to the engineer is wholly inapplicable to a record which clearly reveals the fact that, when the employee aforesaid discovered the danger, no ordinary care could have prevented the accident.

Gilliam v Railway, 206-1291; 222 NW 12

Injuries to persons on tracks—no-eyewitness rule. In an action against a railway company for damages for negligently running over and killing, during the nighttime, and within its switching yard, a pedestrian, the all-important and indispensable fact that said pedestrian was, when hit, on a nearby public sidewalk—where he had a right to be—will not be presumed from the fact that there was no eyewitness to the fatal accident, the "no-eyewitness rule" having no such function.

Young v Railway, 223-773; 273 NW 885

"Last clear chance" doctrine—applicability. The "last clear chance" doctrine has no application except in those cases only where defendant actually discovers plaintiff's position of peril in time to prevent injury by the exercise of ordinary care, and fails to exercise such care.

Graves v Railway, 207-30; 222 NW 344

"Last clear chance" doctrine—applicability. The "last clear chance" doctrine can have no application unless it be found that defendant discovered the negligence of the plaintiff at a time such that, by the exercise of reasonable care, defendant might have avoided injuring plaintiff.

Steele v Brada, 213-708; 239 NW 538

"Last clear chance"—evidence—insufficiency. The doctrine of "last clear chance" is not applicable unless peril of injured party is actually discovered and appreciated in time to prevent his injury by the exercise of ordinary care. So where plaintiff drives his truck at a speed of 4 or 5 miles per hour onto a railroad track, and is struck by a train going 4 or 5 miles per hour, and it is shown engineer of train felt a jar and, looking out of cab, saw some object in front of locomotive and immediately applied brakes and placed locomotive in reverse, held, evidence insufficient to submit to jury, and a motion for directed verdict was rightfully sustained.

Kinney v Railway, 17 F 2d, 708

"Last clear chance"—justifiable submission. The mere fact that a train operator on the rear of a backing train saw a party approaching a public crossing, at a time when the party was 100 or more feet distant, affords no basis for submitting to the jury the issue of the "last clear chance"; but such basis is furnished by testimony tending to show (1) that, to the knowledge of the operator, the party continued to approach said crossing and was in a position of peril when 30 feet therefrom, and (2) that the train could have been stopped within 20 feet.

Williams v Railway, 205-446; 214 NW 692; 27 NCCA 666

See Brimeyer v Railway, 213-1289; 241 NW 409

Licensor and licensee. A railway company may not be said to be guilty of actionable negligence because it habitually permits or suffers pedestrians on its right of way to use a path alongside, but well removed from the rails of its track.

Radenhausen v Railway, 205-547; 218 NW 316; 39 NCCA 36

Negligence—failure of coemployee to do his share of lifting. A coemployee is not shown to have been negligent by proof that while loading heavy rails upon a flat car he lifted less at times than at other times.

Kempe v Railway, 211-812; 232 NW 657; 74 ALR 148

Nonapprehended danger. Negligence may not be predicated on the failure of the operatives of a train to stop and remove a 7-year-old

III NEGLIGENCE IN GENERAL—continued

child from a pile of cinders near the track when there is no occasion to apprehend danger to the child.

Radenhausen v Railway, 205-547; 218 NW 316

Person under car—contributory negligence. A person who seeks shelter from a rain by going under a stationary railroad car, with full knowledge that the car might be moved at any time, is guilty of negligence; and it is no answer that he relied on a train crew sounding the engine whistle and ringing the engine bell before moving the car, the train crew having no reason to anticipate that anyone was under the car.

Anderson v Railway, 216-230; 249 NW 256

Private crossing—speed as basis for negligence. Reversible error results from so instructing as to permit the jury to base negligence on the speed of a train at a private farm crossing, irrespective of the safe or dangerous condition of such crossing.

Graves v Railway, 207-30; 222 NW 344

Proximate cause of injury—noncausal relation. Principle reaffirmed that negligence becomes quite inconsequential when it has no causal relation to the accident in question.

Simmons v Railway, 217-1277; 252 NW 516

Remand—right to amend. A plaintiff manifestly does not set up a new and different cause of action when, after remand on appeal in a law action based on negligence, he, by allowable pleadings, rephrases and elaborates an unadjudicated ground of negligence which was embraced in his pleadings at the time of the original trial.

Lahr v Railway, 218-1155; 252 NW 525

Remand—utilizing unadjudicated ground of negligence. Plaintiff, in an action based on negligence, who fails on appeal to sustain a verdict in his favor against an employer based solely on the doctrine of respondeat superior, may, on remand and retrial, avail himself of a ground of negligence which was alleged by him on the original trial, but which was unadjudicated, and which, if established, would render the defendant liable irrespective of the doctrine of respondeat superior.

Lahr v Railway, 218-1155; 252 NW 525

Res ipsa loquitur—applicability. Principle recognized that the doctrine of res ipsa loquitur is, under appropriate facts, applicable to common carriers.

Preston v Railway, 214-156; 241 NW 648

Res ipsa loquitur—scope. The full limit of the doctrine of res ipsa loquitur is that the peculiar facts of the occurrence warrant or permit the jury to draw the inference of negligence, not that such facts compel the jury to draw such inference in the absence of explanatory evidence. The doctrine does not in the slightest degree change the burden of proof on the issue of negligence.

Anderson v Railway, 208-369; 226 NW 151; 3 NCCA(NS) 547

Preston v Railway, 214-156; 241 NW 648

Street railway — contributory negligence — alighting from moving streetcar. Alighting from a slowly moving streetcar is not necessarily negligence per se.

Fitzgerald v Railway, 201-1302; 207 NW 602; 2 NCCA(NS) 540

Concurrent or intervening cause. Record reviewed, relative to a passenger's alighting from a moving streetcar and being almost immediately hit or touched by a passing automobile, and held to present a jury question on the issues whether the injury was caused (1) solely by the operation of the streetcar, or (2) solely by the operation of the automobile, or (3) by the concurrent movement of both the streetcar and the automobile.

Fitzgerald v Railway, 201-1302; 207 NW 602

Excessive speed—lack of control—jury question. Evidence held to present jury questions on the issues whether a motorman was, in view of the presence of children in the street, operating his streetcar at an excessive rate of speed; also whether he had his car under proper control.

Allen v Railway, 218-286; 253 NW 143

Failure to give warning—jury question. Evidence held to present a jury question on the issue whether a motorman in the operation of a streetcar failed to give warning of the approach of the car.

Allen v Railway, 218-286; 253 NW 143

Failure to maintain lookout—jury question. Evidence held to present a jury question on the issue whether a motorman in the operation of a streetcar maintained a proper lookout for pedestrians.

Allen v Railway, 218-286; 253 NW 143

***No warning signal at crossing*—statute violations—negligence.** The failure of compliance with a statutory standard of care is negligence. In an action for personal injuries sustained by an automobile passenger in collision in Illinois between an automobile and railway motorcar, where petition alleged that railway employees failed to ring bell or sound whistle of motorcar while approaching a crossing, as required by Illinois statute, such allegations were sufficient to state a cause of action based on negligence of employees of defendant railroad.

Smith v Railway, 227-1404; 291 NW 417

Injury to person near tracks—"oversweep" of car turning corner. The operator of a streetcar may not assume that a pedestrian who is intercepted by a streetcar at inter-

secting streets will avoid being hit by the "oversweep" of the car as it passes around the corner, when such operator has reason to know that the pedestrian is unaware of the impending danger.

Mangan v Railway, 200-597; 203 NW 705; 41 ALR 368

Injury from "oversweep" of streetcar turning corner. A jury question on the issue of negligence of a streetcar company and the contributory negligence of an injured plaintiff-pedestrian is presented by evidence tending to show that the plaintiff, in crossing a streetcar track at a point where streets intersected, and where the general traffic was congested, was intercepted by a passing streetcar, and, not knowing that the car was going to turn at said intersection, took up a position for his own safety within the limits of a safety zone marked out by the company on the street pavement immediately adjacent to the tracks, and used exclusively for taking on and discharging passengers; and that the motorman, knowing the position of plaintiff, and without any warning of danger to him, turned the car into the intersecting street, with resulting injury to plaintiff by being hit by the "oversweep" of the rear end of the car.

Mangan v Railway, 200-597; 203 NW 705; 41 ALR 368; 28 NCCA 622

Streetcar intersection—negligence per se. The operator of an automobile cannot be said to be negligent per se in driving into an intersection on a dark night in front of a rapidly oncoming streetcar with no headlight and with the entire front end of the streetcar unlighted, when, immediately before entering the intersection, he stops and listens, and looks both ways for streetcars, and sees none (so he testifies) because of the glare of oil station lights immediately to his left from which side the streetcar was approaching, and especially when there is evidence that the streetcar was approaching without audible signals.

Deiling v Railway, 217-687; 251 NW 622

Opening streetcar door as invitation to alight. Evidence that the conductor of a streetcar called the street, and, at a point very close to the customary place for discharging passengers, opened the exit door, after a stop signal had been given, and after he saw the passenger standing in front of the closed door, presents a jury question on the issue whether the opening of the door was an invitation to the passenger forthwith to alight, even tho unknown to the passenger, the car had not fully stopped.

Fitzgerald v Railway, 201-1302; 207 NW 602; 2 NCCA(NS) 540

Opinion evidence — unallowable questions. Whether a motorman could have done anything which would have stopped his streetcar sooner than it was stopped is properly excluded because the question calls for an unallowable conclusion, and also invades the province of the jury.

Allen v Railway, 218-286; 253 NW 143

Stopping streetcar in intersection and failure to warn. The operator of a streetcar is not negligent (1) in stopping, on signal, the car in the middle of a smoothly paved street intersection rather than at the near side thereof, and (2) in failing to warn a passenger that he might encounter peril in the street from passing vehicles.

MacLearn v Utilities Co., 212-555; 234 NW 851; 2 NCCA(NS) 551

Sudden stopping of streetcar. Evidence that a street railway car was put in motion in order to carry it around a corner at two intersecting streets, and was momentarily thereafter brought to a sudden stop because of the unexpected act of an automobile driver in attempting to pass the streetcar and in being caught by the overswing of the rear end of the streetcar, presents no jury question on the issue of negligence in operating the streetcar.

Wheeler v Railway, 205-439; 215 NW 950; 55 ALR 473

Tracks creating hidden danger. A jury question as to the negligent operation of a streetcar and as to the contributory negligence of the driver of an automobile is presented by evidence (1) that the streetcar tracks were so laid that, as they approached a turn at a street intersection, they imperceptibly approached the street curb until, near the intersection, insufficient space remained for the passage of an automobile between a passing streetcar and the curb, and (2) that the driver of the automobile, without knowledge of such condition of the tracks, and without warning from the streetcar employee who was present, was caught at said point of danger, and was not only "wedged in" between the streetcar and curb by the front end of the streetcar, but was crushed by the oversweep of the rear end of the car as it turned away from the auto at the intersection.

Knudson v Railway, 209-429; 228 NW 470

IV EMPLOYEES PROTECTED

Assumption of risk—failure of co-employee to do his share of lifting. An experienced railway employee who knows or learns during the work of loading heavy railway rails upon a flat car that a co-employee was in the habit of lifting less at times than at other times, and who understood and appreciated that in working under such conditions he might be compelled at any time to carry or lift an increased load with danger of injury to himself, must quit the work, or he will be deemed to have assumed the appreciated and understood danger.

Kempe v Railway, 211-812; 232 NW 657; 74 ALR 148; 31 NCCA 758

IV EMPLOYEES PROTECTED—concluded

Assumption of risk—overtaxing oneself. An employee assumes the risk of overtaxing himself by lifting.

Kempe v Railway, 211-812; 232 NW 657; 74 ALR 148

Fraudulent release. A written release of all damages suffered by an injured party is fraudulent and void when it was in fact mutually intended as a receipt for wages only, and was signed by the injured party without negligence on his part; and the failure of the injured person, who was himself unable to read, to have such instrument read to him does not necessarily constitute negligence per se.

Farwark v Railway, 202-1229; 211 NW 875

Inadvertent self-inflicted injury. One may not recover damages for an injury arising out of his own act, and under circumstances under his exclusive control. So held where the party in removing a prop under a loading chute was injured by the prop falling against his face.

Rogers v Railway, 214-1018; 243 NW 351

V FEDERAL EMPLOYERS' LIABILITY ACT

Applicability of state and federal acts. Injuries received by an employee of a common carrier, engaged in the transportation of both intrastate and interstate freight, are compensable under the state workmen's compensation act, and not under the corresponding federal act, when the employment, in the course of which and out of which the injuries arose, consists solely of the duty to patrol the railroad yards of the employer against thieves, trespassers, and fires.

Califore v Railway, 220-676; 263 NW 29

Assumption of risk incident to nature of work. Under the Federal Employers' Liability Act, a sectionman while inspecting a railway track assumes the risk of danger from passing trains.

Hamilton v Railway, 211-924; 234 NW 810; 31 NCCA 762

Fellow servants—nonassumption of risk. Under the Federal Employers' Liability Act, an employee does not assume the risk of an injury due to the negligence of a fellow servant.

Farwark v Railway, 202-1229; 211 NW 875; 26 NCCA 231; 31 NCCA 759

Contributory negligence by violating rule. The deliberate violation by a section foreman of a rule that, while inspecting his track on a motor car, he should cause one of his men to face to the rear and look for trains constitutes negligence.

Hamilton v Railway, 211-924; 234 NW 810

Injuries to servant—assumption of risk and negligence. In an action under the Federal Employers' Liability Act for damages for the death of a sectionman run down by a fast mail train, the plaintiff must affirmatively show (1) that the defendant was proximately negligent, and (2) that the plaintiff's decedent was not guilty of contributory negligence. Evidence held to show that plaintiff had failed on both fundamental requirements.

Hamilton v Railway, 211-924; 234 NW 810; 31 NCCA 762

Negligence—loading rails by hand. Record held to show that a railway company was not negligent, under the Federal Employers' Liability Act, in causing rails to be loaded by hand rather than by a hoisting machine or derrick.

Kempe v Railway, 211-812; 232 NW 657; 74 ALR 148

Negligence of fellow servant — evidence — sufficiency. Evidence reviewed, and held insufficient to establish negligence on the part of a fellow servant.

Baird v Railway, 209-1026; 229 NW 759

Rapid speed in open country. In an action for the death of a section foreman while inspecting a railway track in the open country, the rapid speed of the train may not be assigned as negligence upon the part of the railway company.

Hamilton v Railway, 211-924; 234 NW 810

8159 Unallowable pleas.

Assumption of risk defined. It is an implied term of the servant's contract of employment that he assume the risk which naturally pertains to his work, but he is under no contract or legal obligation to assume any risk which is occasioned by a failure of duty on the part of his employer.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

"Vice-principal" or "fellow servant"—master's liability. Evidence held to warrant conclusion that owner of apparatus used to tear down silo, and who was actively engaged in such work, was a fellow servant; and, if he was a vice-principal, he was such only to the extent of being required to furnish plaintiff proper equipment and a safe place to work. The mere fact that one employee has authority over others does not make him a vice-principal or superior so as to charge the master with his negligence.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

8160 Damages by fire.

ANALYSIS

I STATUTE IN GENERAL
II EVIDENCE
III DAMAGES AND MEASURE THEREOF

I STATUTE IN GENERAL

Presumption of negligence. To instruct that a railroad company must overcome a presumption of negligence in setting out a fire "by negativing every fact that would justify a finding of negligence on defendant's part" is not misleading when defendant is, by the instructions, fully exempted from liability on proof that its engine was properly equipped and properly operated.

Stickling v Railway, 215-1312; 247 NW 642

II EVIDENCE

Burden of proof. Evidence reviewed and held quite insufficient to show that the fire which destroyed plaintiff's property was set out by a railway company.

Beck v Railway, 214-628; 243 NW 154

See Stickling v Railway, 215-1312; 247 NW 642

Evidence of other fires set by other engines. In an action to recover damages consequent on a fire alleged to have been set out by a certain passing engine, evidence of other fires set out by other engines on other occasions near the place in question may be admissible, not on the issue of negligence, but on the issue as to how far an engine would throw burning embers.

Stickling v Railway, 212-149; 232 NW 677

Fire damage—evidence sufficiency. In an action against a railroad for loss of property by fire, the state court's construction of statute, respecting presumption against railroad causing fire damage, is binding on federal courts. So where a prima facie case is established by plaintiff and no rebuttal thereto is offered, evidence held sufficient to make case for jury.

Turner v Bremner, 40 F 2d, 368

III DAMAGES AND MEASURE THEREOF

Damages—unallowable evidence. On the issue as to the general damage to meadow land consequent on a fire set out by a passing railroad engine, evidence of the amount of grass seed which would have been realized had the grass been threshed instead of being used as hay, is wholly inadmissible,—the measure of damages in such case being the difference in value of the affected land before and after the fire.

Baird v Railway, 214-611; 243 NW 515

Other fires at time in question. Plaintiff in an action for damages consequent on a fire alleged to have been set by a passing engine, may show that the engine in question emitted sparks and burning embers which set fire to other combustible materials immediately preceding the fire in question.

Stickling v Railway, 212-149; 232 NW 677

8161 Baggage—liability.

Discussion. See 2 ILB 34—Liability for baggage

CHAPTER 374

RELOCATION OF LINE

8164 Conditions.

Abandonment and dismantlement—claims of donors. In proceedings for the abandonment and dismantlement of a railway, the measure of recovery by those who have made donations for the construction of the road cannot be less than the value of the railway when dismantlement was begun, if said claims equal such value.

State v Beaton, 209-1291; 228NW 111

Appointment of receiver. The fact that a party purchases property at a receiver's sale does not exhaust the power of the court to appoint a second receiver of the property so purchased, in order to protect rights relative to said property which accrued after said sale and by reason of the wrongful acts of said purchaser.

State v Beaton, 205-1139; 217 NW 255

8165 Order of court.

Abandonment and dismantlement—claims—judgment defendants. In the determination of claims against the owner of a railroad preliminary to the dismantlement of the road, judgment should be rendered against both the original purchaser and against his vendee when the original purchase was made with the purpose in view of immediate dismantlement and when said original purchaser and his vendee have, during the entire proceedings, treated themselves as owners.

State v Beaton, 209-1291; 228 NW 111

CHAPTER 375

PRIVATE BUILDINGS AND SPUR TRACKS

8169 Buildings on railroad lands.

Right of way for private business site. The board of railroad commissioners has no constitutional power to order a railway company to furnish a private party with a site on its right of way, and to fix the rental for such site, in order to enable such party to erect and maintain on such site a coal shed in which he may store his coal and from which he may sell his coal for private gain.

Ferguson v Railway, 202-508; 210 NW 604; 54 ALR 1

8170 Destruction of buildings.

Entire or severable contract. A contract provision which is valid when standing alone is not necessarily rendered invalid by the fact that in the contract in question it is interwoven with other contract provisions which may be violative of a statute. So held where a lease sought to exempt the lessor, a railroad company, from liability to the lessee for negligence, but provided that, if such exemption legally failed, "the lessor shall have full benefit of any insurance effected by the lessee on structures erected on the premises".

Queen Ins. v Railway, 201-1072; 206 NW 804

8171 Spur tracks.

Spur track to state institution—maintenance cost. After a contract placed the burden on the state to pay the cost of construction, maintenance, and operation of a spur track to the industrial school for boys at Eldora, a state institution, and in a later clause required the railway company to maintain the spur track, the contract as a whole was construed and the apparent ambiguity resolved in a finding that the railroad should do the maintenance work, but that the state should pay the cost.

State v Sprague, 225-766; 281 NW 349

CHAPTER 378

INTERURBAN RAILWAYS

8201 Definition.

Discussion. See 1 ILB 40—Status of interurban railways

8211 Franchises.

Valuation for rate-making purposes.

United Railways v West, 280 US 234

When franchise must yield to statute. A street-railway franchise ordinance which specifies, in effect, that, until the state statutes otherwise provide, the obligation of the company to construct and reconstruct paving between and outside the rails of its tracks shall be thus and so, manifestly must yield to such later enacted state statute.

In re Walnut St. Bridge, 220-55; 261 NW 781

Street railway granted relief—city's confiscatory rates. Under the statute, §767, C., '97 [§§6191, 6192, C., '39], granting cities and towns the power to authorize street railways where it is shown that under ordinance a contract was entered into providing maximum rates to be charged for carrying passengers, which limited the city to change of rates not oftener than once in 15 years, a sufficient showing was made in the court of original jurisdiction to warrant the granting of a temporary injunction against the city preventing a confiscation of property on account of low rate, and such temporary injunction will not be disturbed by appellate court until after the matter has been fully heard and determined in the lower court, unless an abuse of discretion is shown. The fact the railroad operated on the same rate for 20 years did not amount to an estoppel to secure relief from confiscatory rates by reason of long acquiescence.

City v Railway, 9 F 2d, 246

8212 Contracts and rates.

Street railway granted relief—city's confiscatory rates. Under the statute, §767, C., '97, [§§6191, 6192, C., '39], granting cities and towns the power to authorize street railways where it is shown that under ordinance a contract was entered into providing maximum rates to be charged for carrying passengers, which limited the city to change of rates not oftener than once in 15 years, a sufficient showing was made in the court of original jurisdiction to warrant the granting of a temporary injunction against the city preventing a confiscation of property on account of low rate, and such temporary injunction will not be disturbed by appellate court until after the matter has been fully heard and determined in the lower court, unless an abuse of discretion is shown. The fact the railroad operated on the same rate for 20 years did not amount to an estoppel to secure relief from confiscatory rates by reason of long acquiescence.

City v Railway, 9 F 2d, 246

CHAPTER 381

UNIFORM BILLS OF LADING LAW

PART II

OBLIGATIONS AND RIGHTS OF CARRIERS UPON THEIR BILLS OF LADING

8268[§24] Attachment or levy upon goods for which a negotiable bill has been issued.

Discussion. See 2 ILB 200—Garnishment of goods under bill of lading

CHAPTER 382

TELEGRAPH AND TELEPHONE LINES AND COMPANIES

8300 Right of way.

Atty. Gen. Opinion. See '30 AG Op 364

Franchise—intentional abandonment. Evidence held quite insufficient to establish an intention to abandon a legislative-acquired franchise.

Osceola v Utilities, 219-192; 257 NW 340

Perpetual franchise—grantees. A telephone company which, prior to October 1, 1897 (when the Code of 1897 took effect), had constructed a toll line and local telephone system in a city or town, thereby acquired a perpetual legislative franchise subject to the reserved power of the state, and said franchise necessarily passes to the holder's grantee.

Osceola v Utilities, 219-192; 257 NW 340

8304 Equal facilities—delay.

Physical connection. This section does not require a telephone company to permit another like company to physically connect the lines of the two companies.

State v Tel. Co., 214-1100; 240 NW 252

Physical connection. A telephone company that has contracted for and is maintaining physical connection with the lines of another telephone company is under no common law obligation to contract on the same terms, or on any terms, with another telephone company for physical connection with the lines of the latter. (The doctrine that a public utility is under a common law obligation to furnish equal facilities to the public contemplates no one except those who see fit to become the subscribers or patrons of the company.)

State v Tel. Co., 214-1100; 240 NW 252

RECIPROCAL SERVICE

8308.2 Facilities to local exchange.

Duty to furnish service—physical connection. A telephone company that has contracted for and is maintaining physical connection with the lines of another telephone company is under no common law obligation to contract on the same terms, or on any terms, with another telephone company for physical connection with the lines of the latter. (The doctrine that a public utility is under a common law obligation to furnish equal facilities to the public contemplates no one except those who see fit to become the subscribers or patrons of the company.)

State v Tel. Co., 214-1100; 240 NW 252

Physical connection between lines. A telephone company is not under statutory obligation to permit its lines to be physically connected with the lines of another company, by a statute (§8304, C., '31) which withdraws from the company certain legal rights if it "refuses to furnish equal facilities to the public and to all connecting lines for the transmission of communications * * *."

State v Tel. Co., 214-1100; 240 NW 252

CHAPTER 383

ELECTRIC TRANSMISSION LINES

8309 Franchise.

Scope of statute. This chapter applies solely to electric transmission lines outside cities and towns.

Anderson v Railway, 208-369; 226 NW 151

Location of line—power of county engineer. A franchise issued by the board of railroad commissioners to operate an electric transmission line "over, along, and across" a specified highway, under specifications calling for cross arms at the top of the poles, carries the right and power in the grantee so to erect its line that all parts thereof, including the superstructure, will be wholly within the lines of said highway. It follows that the general power of the county engineer, under §4838, C., '27, to

locate such lines does not embrace the power so to locate the line that part of the superstructure will overhang land outside the highway.

Iowa Corp. v. Lindsey, 211-544; 231 NW 461

8310 Petition for franchise.

Extra-territorial extension of municipal light and power lines—constitutional taxation. Sections 6142 and 8310, C., '31, are constitutional insofar as they authorize cities and towns to levy taxes for extending, beyond their corporate limits, the transmission lines of their municipally owned electric light and power plants.

Carroll v Cedar Falls, 221-277; 261 NW 652

8313 Objections—hearing.

Atty. Gen. Opinion. See '30 AG Op 122

8315 Valuation of franchise.

Valuation for rate-making purposes.

United Railways v West, 280 US 234

8319 Acceptance of franchise.

Location of line—power of county engineer. A franchise issued by the board of railroad commissioners to operate an electric transmission line "over, along, and across" a specified highway, under specifications calling for a cross-arm at the top of the poles, carries the right and power in the grantee so to erect its line that all parts thereof, including the superstructure, will be wholly within the lines of said highway. It follows that the general power of the county engineer, under section 4838, C., '27, to locate such lines does not embrace the power so to locate the line that part of the superstructure will overhang land outside the highway.

Iowa Corp. v Lindsey, 211-544; 231 NW 461

8322 Eminent domain—procedure.

Elements bearing on market value. The fact that the condemnor of an electric power line in maintaining the line would be compelled to go upon the land, and might cause damages to crops, etc., may have proper bearing on the issue of market value of the tract of land, even tho the statutes give the landowner a right of action for damages to crops and the like.

Evans v Utilities Co., 205-283; 218 NW 66

Measure of damages. Principle reaffirmed that the measure of damages for land condemned for right of way for an electric power line is the difference in the market value of the tract from which the land is taken, before and after the condemnation.

Evans v Utilities Co., 205-283; 218 NW 66

Trial theory as to right of way. The condemnor of land for an electric power line may not complain that witnesses on the issue of damages assumed that the right of way would be 100 feet in width, when such assumption was in harmony with the condemnor's petition for such right of way.

Evans v Utilities Co., 205-283; 218 NW 66

Value on condemnation proceedings. A landowner who knows the value of land sought to be condemned for an electric power line is competent to testify to the amount of damages caused to the tract by such condemnation, even tho he does not qualify as an electrical expert.

Evans v Utilities Co., 205-283; 218 NW 66

8323 Injury to person or property.

Electricity generally, liability. See under Ch 484, note 2 (VIII)

Admissibility of contract in action sounding in tort. In an action sounding in tort only, against alleged joint tort-feasors, a contract entered into by one of the defendants with a third party and conversations between said parties relative to matters arising under said contract, may be material, not for the purpose of permitting plaintiff to recover on the contract, but for the purpose of showing the defendant's relation to a certain subject matter, and thereby establishing a basis for the applicable law of tort.

Hanna v Electric Co., 210-864; 232 NW 421

Instructions—correct but not elaborate.

Hanna v Elec. Co., 210-864; 232 NW 421

Negligence—evidence—sufficiency. Evidence held insufficient to show negligence in the installation of electrical fixtures.

Anderson v Railway, 208-369; 226 NW 151

Contributory negligence per se. A person is guilty of contributory negligence per se when, knowing that a wire at the top of a pole carries a very dangerous voltage of electricity, and faced by no emergency requiring or excusing a relaxation of due care, he attempts to get another wire out of his way by swinging it upward in the form of a rainbow, in order to hook it over a spike which had been driven into the pole some two feet below the dangerously charged wire.

Murphy v Electric Co., 206-567; 220 NW 360

See Russell v Gas & Elec. Co., 215-1405; 245 NW 705

Contributory negligence of 11-year-old boy—jury question. In an action for personal injuries sustained by an 11-year-old boy, who, while playing in a tree in a public street fell into wires of public utility company, sustaining severe burns, the question of contributory negligence of the boy together with question of whether defendant company had knowledge of the use of the tree by the boys in the neighborhood in playing, and the question of proximate cause of the injury should have been submitted to the jury.

Reynolds v Iowa Utilities Co., 21 F 2d, 958

Person knowing of danger—handling broken wire—contributory negligence. It is well set-

tled as a general rule that where a person with knowledge of the dangerous character of an electric wire purposely comes in contact with it, he is guilty of contributory negligence and cannot recover for the resulting injury. So where plaintiff, with knowledge of the danger and using a table napkin as insulator, picks up an electric wire lying in the street where there is no imminent danger to others, a finding that he was contributorily negligent as a matter of law was not erroneous.

Barnett v D. M. Elec. Co., 10 F 2d, 111

Contributory negligence nullifies statutory presumption—transmission line injuries. When a person is injured by transmission line, the statutory presumption of defendant's negligence need not be rebutted when plaintiff fails to establish freedom from contributory negligence.

Aller v Iowa Elec. Co., 227-185; 288 NW 66

Drawing wire cable against power line. Farmer attempting to connect wire cable from hay carrier on barn to pole 50 or 55 feet distant is contributorily negligent in drawing cable against power line when he saw or should have seen the power line and knew that it was not insulated.

Aller v Iowa Elec. Co., 227-185; 288 NW 66

Limb hanging over wire—failure to remove.

Porter v Elec. Co., 228- ; 292 NW 231

Electric poles and wires—not inherently attractive nuisance. An electric power pole and wires and a fence of ten strands of barbed wire around the same are not agencies or instrumentalities reasonably calculated or likely to attract small children, and are not attractive agencies, such as to make the owner of the premises liable for the death of a child who climbed on the fence and reached over and touched one of the electric wires.

Davis v Malvern L. & P. Co., 186-884; 173 NW 252

Sagging wires on highway after storm—knowledge. In a case where a woman is burned by contacting a high tension electric line, sagging over a highway after a storm, and who testifies she had no knowledge it was there, newly discovered evidence to show that she was seen stepping over the broken poles prior to the accident, is not cumulative but tends directly to establish a material fact affecting the result of the case on retrial.

Wilbur v Iowa P. & L. Co., 223-1349; 275 NW 43

Noninsulated wires. Evidence held to present a jury question on the issue of the negligence of a utility company in maintaining noninsulated electric wiring in close proximity to machinery.

Beman v Electric Co., 205-730; 218 NW 343

Noninsulated wires—trespassers. The owner of a high voltage electric transmission line may not be said to be negligent in failing to cover the wires with an insulating material when its said line is constructed in full compliance with the law, and is guarded from injury therefrom by every practical device and expedient known and recognized by those who are expert in such construction and use; and one who unwittingly and wrongfully places himself in contact with such a line must be held to be the sole author of the resulting injury.

Dilley v Service Co., 210-1332; 227 NW 173

Presumption. An allegation of negligent construction or maintenance of an electrical transmission line is unnecessary, and if made, need not be proved, in an action for damages caused by fire set out by such line. Proof that fire was communicated to property by said line, and proof of the amount of damages resulting, plus the statutory presumption of negligence on the part of the operator of the line, make a prima facie case for recovery.

Walters v Elec. Co., 203-471; 212 NW 884; 38 NCCA 551

Proximate cause — evidence — sufficiency. Evidence held insufficient to show that certain acts of omission and commission were the proximate cause of an excess voltage of electricity reaching and entering a building.

Anderson v Railway, 208-369; 226 NW 151; 3 NCCA(NS) 547

Res ipsa loquitur—scope. The full limit of the doctrine of res ipsa loquitur is that the peculiar facts of the occurrence warrant or permit the jury to draw the inference of negligence; not that such facts compel the jury to draw such inference. The doctrine does not in the slightest degree change the burden of proof on the issue of negligence.

Anderson v Railway, 208-369; 226 NW 151; 3 NCCA(NS) 547

Preston v Railway, 214-156; 241 NW 648

Res ipsa loquitur. Evidence tending to show that decedent came to his death from an electric shock consequent on handling an ordinary electric lighting fixture, charged with electricity by the defendant, and that the ordinary lighting voltage was harmless, even tho there is evidence to the contrary as to the last proposition, furnishes basis for the application of the doctrine of res ipsa loquitur, and creates a jury question on the issue of the defendant's negligence.

Orr v Elec. Co., 213-127; 238 NW 604

Trespassers and "attractive nuisances". An owner of property may so negligently use it as to become liable in damages for a resulting injury to a trespasser. A jury question, both as to negligence and contributory negligence, is presented by testimony tending to show that an owner, without full compliance with city ordinance requirements, erected and maintained, on his own uninclosed, populously surrounded, and promiscuously frequented premises, which abutted upon an uninclosed

and much frequented public park and fishing resort, a pole with a ladder thereon in the form of spikes driven therein, and with a cross-arm on the pole, some 25 feet from the ground, carrying wires heavily charged with electricity, and that a trespassing boy of 14 years of age, and of ordinary intelligence, climbed the pole and, upon reaching the cross-arm, was killed by an electric shock.

McKiddy v Elec. Co., 202-225; 206 NW 815; 29 NCCA 886

Trespassing as defense. The fact that a person injured by coming in contact with a high-voltage wire was a trespasser on the land of a third party upon whose land the wire was erected, is no defense to an action for damages for said injury.

Lipovac v Iowa Co., 202-517; 210 NW 573

Cox v Elec. Co., 209-931; 229 NW 244; 36 NCCA 160

Waiver of presumption. A litigant who in the trial court relies solely on specific acts of negligence as a basis for his cause of action, may not be heard on appeal to assert that he has a right to rely on a statutory presumption of negligence.

Dilley v Service Co., 210-1332; 227 NW 173

Waiver of presumption. Failure to instruct on the statutory presumption of negligence in an action for wrongful injury from electricity, is not erroneous (1) when plaintiff has seemingly ignored such presumption by alleging and attempting to prove specific acts of negligence, and (2) when plaintiff requests no such instruction.

Hanna v Electric Co., 210-864; 232 NW 421

8325 Supervision of construction—location.

Atty. Gen. Opinion. See AG Op Aug. 29, '39

Location of line—power of county engineer. A franchise issued by the board of railroad commissioners to operate an electric transmission line "over, along, and across" a specified highway, under specifications calling for cross arms at the top of the poles, carries the right and power in the grantee so to erect its line that all parts thereof, including the superstructure, will be wholly within the lines of said highway. It follows that the general power of the county engineer, under §4838, C., '27, to locate such lines does not embrace the power so to locate the line that part of the superstructure will overhang land outside the highway.

Iowa Corp. v Lindsey, 211-544; 231 NW 461

8326 Manner of construction.

Manner of construction of lines—pleading violation of statute or ordinance—insufficiency. In an action against an electric company whose transmission line was so close to plaintiff's building that firemen could not throw water on a fire until current was turned off, which delay caused destruction of building and contents, a complaint alleging violation of town ordinance and a state statute respecting construction of transmission lines held insufficient to state a cause of action.

Bowen v Iowa Public Service, 35 F 2d, 616

8327 Distance from buildings.

Agreement. Statute requiring transmission lines to be 100 feet from building except by agreement held not to be violated when line was constructed 17 feet above ground and 18 or 19 feet from barn by agreement with the farm owner and former tenant.

Aller v Iowa Elec. Co., 227-185; 288 NW 66

8328 Lines along or crossing highway—danger label.

Danger signs—posting—sufficient evidence. Evidence sufficient to justify finding that electric company had complied with statute requiring danger signs to be posted on poles or towers along highway.

Aller v Iowa Elec. Co., 227-185; 288 NW 66

8329 Nonuser.

Atty. Gen. Opinion. See '36 AG Op 648

8330 Forfeiture for violations.

Atty. Gen. Opinions. See '25-26 AG Op 150; '36 AG Op 648

8338 Crossing highway.

Atty. Gen. Opinion. See '36 AG Op 525

CHAPTER 383.2

AERIAL TRANSPORTATION

8338.20 Rules.

Discussion. See 16 ILR 169—Ownership of air above land

Atty. Gen. Opinion. See '34 AG Op 521

Governmental functions—nonliability in performance. The statutory-prescribed rules of the state governing aerial navigation have no application to the state in its sovereign capacity, nor to its governmental agencies, nor to the officials of said agencies when exclusively engaged in performing the duties of said agencies.

De Votie v Cameron, 221-354; 265 NW 637

State fair board as defendant. The Iowa state fair board is an arm or agency of the state, and, therefore, not suable.

De Votie v Board, 216-281; 249 NW 429

CHAPTER 383.3

PIPE LINES

8338.24 Conditions attending operation.

Interstate commerce — unallowable burden on. A foreign corporation seeking to operate in this state an exclusive interstate pipe line system may not be constitutionally required by a state statute, as a condition precedent to the construction of its line and to the transacting of its said business, even on its own private right of way,

1. To apply for, obtain, and pay for a permit to carry on said business, and pay all expenses attending the hearing on said application, or

2. To consent to any and all statutes then or thereafter in force regulatory of said business, or

3. To consent that the state may levy on it such general property taxes and/or taxes on gross receipts, and/or taxes on net income as the general assembly may thereafter prescribe, or

4. To consent to and pay an annual license fee.

Reason: Each of said requirements imposes an unallowable burden on interstate commerce.

State v Pipe Line, 216-436; 249 NW 366

Interstate commerce—unconstitutional control—auxiliary provisions. When sections of a statute seeking to control interstate commerce are unconstitutional because imposing unallowable burdens on such commerce, all auxiliary sections of the same statute which prescribe the procedure thru which said unconstitutional control is sought to be attained, are likewise unconstitutional. (So held as to §§8338-d4 to 8338-d11, inclusive, C., '31 [§§8338.27-8338.34, C., '39].)

State v Pipe Line, 216-436; 249 NW 366

8338.41 Limitation on grant.

Strip mining—coal lease subject to pipe-line easement—lateral support. Where a pipe-line company has an easement across land and an option to buy a designated strip of land along the pipe line if a strip coal mine should be opened on the land, a subsequent strip mine coal lease, subject to the pipe-line easement and option, gives the coal lessee no rights to strip mine coal on the land covered by the purchase option and thus destroy the lateral support of the pipe line, nor is such lessee entitled to any part of the purchase price for such strip of land.

Penn v Pipe Line Co., 225-680; 281 NW 194

8338.46 Eminent domain.

Compensation—fixtures on mortgaged premises—res judicata. In a proceeding to condemn right of way for a gas pipe line, the fact that the pipe was already installed under an easement which was held in a foreclosure action to be inferior to a prior mortgage, did not thereby give the mortgagee through his foreclosure decree title and ownership of the pipe and fixtures installed on the mortgaged premises, nor is such foreclosure decree res judicata as to title to such pipe and fixtures without trying the issue thereon.

Titus Co. v Natural Gas, 223-944; 274 NW 68

8338.47 Damages.

Liability of principal and independent contractors. A contract granting the right of way over land for an underground pipe line, on payment of a certain sum per rod, and on payment of "damages to growing crops, fences, or improvements occasioned in laying, repairing, or removing lines", does not constitute an agreement by grantee that he will pay damages consequent on the negligent act—tort—of an independent contractor in injuring grantor's private bridge which was located wholly outside said right of way.

Asher v Construction Co., 216-977; 250 NW 179

Compensation rate—conflicting contracts.

Vorthmann v Pipe Line, 228- ; 289 NW 746

TITLE XIX

CORPORATIONS

CHAPTER 384

CORPORATIONS FOR PECUNIARY PROFIT

8339 Who may incorporate.

De facto corporations. See under §8401
Atty. Gen. Opinion. See '32 AG Op 4

Belated presentation of illegal incorporation. The objection or point that an alleged incorporation never became such in fact may not be presented for the first time on appeal.

State v Packing Co., 206-405; 220 NW 6

Collateral attack as unallowable defense to action. A foreign de facto corporation cannot be defeated in its action to prevent an injury to its property by the plea that it has no valid corporate existence, in that it has attempted in its incorporation to effect a combination of powers prohibited by the laws of the state of its attempted incorporation.

First T. & S. Co. v Gypsum Co., 211-1019; 233 NW 137; 73 ALR 1196

Corporate entity—unallowable disregard of. Where collaterally secured bonds, owned by a corporation, were depreciated in value by the wrongful act of the collateral-holding trustee in permitting worthless collaterals to be substituted for valuable collaterals, the resulting damages belong solely to the corporation. In other words, a stockholder may not maintain an action against the trustee for alleged special damages suffered by said stockholder consequent on the fact that said depreciation so impaired the capital of the corporation that an assessment on the corporate shares became necessary, and that the stockholder was unable to pay said assessment and thereby lost his said stock.

Grimes v Brammer, 214-405; 239 NW 550

Corporate governmental agencies—immunity from legal process and taxation. Immunity of corporate governmental agencies from suits and judicial process, and their incidents, is less readily implied than immunity from taxation.

First Tr. JSL Bank v Lehman, 225-1309; 283 NW 96

Incorporation denied by state—partnership formed—agreement to furnish stock not excused. Promoters of a corporation are liable to an investor for money received as the agreed purchase price for stock in a corporation, even tho the failure to deliver stock occurred because the state denied the right to incorporate, and they are not relieved by a partnership agreement, signed by the investor, who nowhere waives nor abandons the agreement for delivery of the corporate stock.

Smith v Secor, 225-650; 281 NW 178

De facto corporation defined. Principle reaffirmed that a de facto corporation is one formed and acting as such under an authorizing statute, tho its incorporation may be defective.

First T. & S. Co. v Gypsum Co., 211-1019; 233 NW 137; 73 ALR 1196

Dentistry—practice by corporation. A corporation, being incapable of receiving a license to practice dentistry, cannot legally practice such profession, and is, therefore, subject to injunction if it attempts so to do.

State v Bailey Co., 211-781; 234 NW 260

Proof of incorporation. A copy of the articles of incorporation of a banking corporation, duly certified by the secretary of state, is sufficient proof of such incorporation.

State v Niehaus, 209-533; 228 NW 308

Unpaid stock subscription—nonliability. A subscriber for corporate stock who is not a promoter of the purported corporation is not liable on his fraud-induced, unpaid stock subscription contract in an action by the receiver of the corporation when the charter of the corporation has been judicially annulled, subsequent to the subscription contract, by the state, for fraud perpetrated on the state in obtaining the charter; in other words, the so-called English "Equitable Trust Fund Doctrine" does not apply to such a condition.

Fundamental reason. Such purported corporation, having been conceived, born, and nurtured in fraud, was never, in truth or in fact, a corporation de jure or de facto, in a business sense.

State v Packing Co., 216-1344; 249 NW 761; 90 ALR 1339

Water company in which city owns stock—not "governmental agency"—exempt from federal tax. A private corporation furnishing water to city under arrangement whereby dividends and financial expenditures were limited, and city owned one-third of voting stock with right of representation on board of directors, right of purchase, and right to compel retirement of preferred stock from surplus earnings, held not immune from federal taxation as "governmental agency", since surplus earnings from water tax did not become property of city.

Citizens Water Co. v Com. of Int. Rev., 87 F 2d, 874

8341 Powers.

Atty. Gen. Opinion. See '32 AG Op 219

ANALYSIS

I Powers in General
II Particular Powers and Obligations
III Right to Sue and Be Sued
IV Exemption of Private Property
V Bylaws

I POWERS IN GENERAL

Discussion. See 17 ILR 83—Practice of law

Articles—statutes as part of. The statutes and constitutional provisions of a state relative to corporations must be deemed a part of the articles of incorporation of a corporation tho not physically copied therein.

Ontjes v Bagley, 217-1200; 250 NW 17

Statutes and articles as part of contracts. The corporation charter and the statutes of the state of domicile of the corporation become a part of any contract between the corporation and a purchaser of its stock.

Bishop v Middle States Co., 225-941; 282 NW 305

Acting through agent—apparent authority. A corporation must act through an agent and as to third parties is bound by acts within the apparent scope of the agent's authority.

Wright v Iowa P. & L. Co., 223-1192; 274 NW 892

Action on insurance policy—real party in interest — authority to make admission in pleading. A defendant corporation, formed to underwrite reciprocal insurance contracts of its unincorporated group of subscribers, is the real party in interest in an action to enforce a judgment against the corporation. The group of subscribers is not a legal entity, and when the corporation is the only legal entity of the two, an admission of an important fact by the corporation made in a counterclaim in the action in which judgment was obtained is binding on it in the later action.

Mitchell v Underwriters, 225-906; 281 NW 832

Assignment of rents by dummy corporation. On the issue, in mortgage foreclosure, whether an assignment of the rents of the mortgaged premises placed the rents beyond the power of the receiver, if one were appointed, evidence reviewed and held insufficient, in the absence of any showing of fraud, to justify the court in holding that the assignor corporation and the assignee corporation were in fact one corporation,—that the assignor corporation was a mere dummy.

First Tr. JSL Bk. v Galagan, 220-173; 261 NW 920

Corporation judgment compromised — former stockholder—no authority. Stockholders who had sold their stock after the corporation had recovered a judgment no longer had an interest in the judgment which remained the property of the corporation even when its name was changed, so a compromise settlement of the judgment had no validity when made by attorneys with consent given by one former stockholder, as only the corporation could authorize such settlement.

Glenwood Lbr. Co. v Hammers, 226-788; 285 NW 277

Discretion in re managerial expenses. An insurance company which is conducting the business of assessment and level premium life insurance will not be controlled by the courts in its allotment between the two classes of insurance, of the managerial expenses, so long as such allotment is not violative of law, is reasonable, and is not arbitrary.

Wall v Bankers Life, 208-1053; 223 NW 257

Injunction — "balance-of-convenience" rule. The consummation of a perfectly legal reorganization of a corporation will not be held up by injunction pending the determination of the value of the interest of a dissenting stockholder when said stockholder can be amply protected by a deposit of money or bond by the corporation.

Ontjes v Bagley, 217-1200; 250 NW 17

Life insurance—insurable interest—corporation as beneficiary of policy on officer. A corporation which, for its own general benefit, is the beneficiary in a policy of life insurance on the life of one of its officers, is unconditionally entitled to the proceeds of the policy, even tho the insured had, at the time of his death, severed his official relation with the corporation.

Reilly v Ins. Co., 201-555; 207 NW 583

Reorganization—authorized method. The stockholders of a corporation, or a part thereof, may, in good faith, reorganize it (1) by causing its entire assets and liabilities to be transferred to a newly formed corporation, and (2) by surrendering their old stock and in lieu thereof receiving stock of the new corporation—provided the laws of the states under which the corporations are organized sanction and authorize such reorganization.

Ontjes v Bagley, 217-1200; 250 NW 17

Reorganization—dissenting stockholder—arbitrary determination of value of stock. The plans for the reorganization of a corporation may not arbitrarily fix the value of the stock of a dissenting stockholder.

Ontjes v Bagley, 217-1200; 250 NW 17

Sale of assets (?) or consolidation (?). Record relative to the transfer of corporate assets reviewed, and held legally to constitute but a sale of the assets of certain existing

I POWERS IN GENERAL—concluded

corporations to a newly formed corporation, and not a consolidation at common law.

Graeser v Finance Co., 218-1112; 254 NW 859

Sale of entire assets—effect. A sale of the entire assets of different corporations to a newly formed corporation, and consummated in good faith and in conformity with the articles of incorporation of said corporations, and with the laws of the state under which said incorporations were effected, is binding and conclusive on the selling and buying corporations and on the stockholders thereof.

Graeser v Finance Co., 218-1112; 254 NW 859

Seal—duty to affix—scope of requirement. A writing granting to a party a mere option to repurchase land from a corporation within a named time and at a named price, is not an instrument such as is contemplated by the statute which requires the corporate seal to be affixed to instruments "conveying, incumbering or affecting real estate", nor as is contemplated by substantially similar requirements in articles of incorporation.

Shanda v Clutier Bank, 220-290; 260 NW 841

Stock—wrongful issuance—cancellation in equity. Where a corporation which succeeds to the business of two partners agrees to pay all outstanding debts of the partnership, a hypothecation of corporate stock of one of the two stockholders as security for one of said debts, manifestly works no transfer of title to said stock to the corporation, and where the debt is paid with corporate funds, and the stock certificate is returned, the wrongful act of the nonhypothecating stockholder in causing a new stock certificate to be issued to himself for one-half of the returned shares will be canceled by proper action in equity.

Petersen v Heywood, 212-1174; 236 NW 63

Ultra vires acts. Where corporation directors borrowed money from bank to purchase stock in manufacturing corporation, taking over of such indebtedness by corporation was ultra vires, and where bank participated therein with knowledge, corporation indebtedness to bank and directors' notes to corporation should be canceled, and new notes delivered to bank by directors.

Waters v Disbrow & Co., 70 F 2d, 572

Ultra vires acts. Borrowing of money from manufacturing corporation by directors to purchase stock from others, and switching of indebtedness from corporation to bank and from bank to corporation with knowledge of bank, held ultra vires for which directors were liable to corporation for advancements with interest made within period of limitation for money received, but increase of corporation indebtedness to bank should stand where money obtained from bank was used by corporation.

Waters v Disbrow & Co., 70 F 2d, 572

II PARTICULAR POWERS AND OBLIGATIONS

Action on behalf of corporation—when demand unnecessary. Demand on an incorporated fraternal order to institute an action against a former officer of the order to recover money belonging to the order and unlawfully expended by such officer, is not a condition precedent to the commencement of such action by a member of the order, when the record reveals the fact that such demand if made would have been met by a peremptory refusal.

Outing v Plum, 212-1169; 235 NW 559

Agreement as to dividends—want of consideration—effect. An agreement that one of two stockholders shall draw all dividends up to a certain time, unsupported by any consideration, is properly canceled in an action in equity.

Petersen v Heywood, 212-1174; 236 NW 63

Consolidation, merger, and sale of assets distinguished. Consolidation of corporations, merger of corporations, and sale of assets of one corporation to another defined and distinguished.

Graeser v Finance Co., 218-1112; 254 NW 859

Disposal of assets. Principle recognized that, at common law, neither the board of directors of a corporation nor a majority of the stockholders thereof, can, against the dissent of a single stockholder, dispose of all the assets of the corporation when the corporation is conducting a prosperous business.

Graeser v Finance Co., 218-1112; 254 NW 859

Sale of entire assets. The board of directors of an insolvent banking corporation which is on the verge of a complete financial collapse has power to sell en masse the assets of the corporation without the consent of the stockholders, especially when the directors own a majority of the stock.

Oskaloosa Bk. v Bank, 205-1351; 219 NW 530; 60 ALR 1204

Equitable estoppel—ultra vires in re corporate accommodation note. A corporation is not estopped to plead ultra vires in becoming the maker of an accommodation promissory note, from the fact that its officers knew that the payee (who was not the accommodated party) was making advances to the party actually accommodated, when the payee knew (1) that the note was an accommodation solely to the party receiving the advances, and (2) that the note was not executed in conformity with the authority which the corporation had granted to its officers.

Black Hawk Bk. v Monarch Co., 201-240; 207 NW 121

Partnership—mutual rights, duties and liabilities of partners. The members of a partnership (or the stockholders of a corporation) may validly authorize a partner (or an officer of the corporation as the case may be) to privately engage in the same business for the transaction of which the partnership (or corporation) was formed, and in such cases no partner (or stockholder) will be permitted to lay claim, on behalf of the partnership (or corporation), to any profits accruing under such private contracts,—no rights of third parties being involved.

Anderson v Dunnegan, 217-672; 250 NW 115

Officers — resolution deferring delinquent salary—contractual validity. Where a father and son, the sole owners of a corporation, as officers, and having delinquent salary due them, pass a resolution deferring payment until after death of both, such resolution became a contract, supported by a consideration and accepted by and binding upon both the corporation and the executing officers, who having personally conducted the transaction are bound thereby and estopped from denying its validity.

Bankers Trust v Economy Coal, 224-36; 276 NW 16

Stock—limitation on transfer. A provision in the duly recorded articles of incorporation of a corporation for profit to the effect that the corporate shares of stock shall not be transferred to persons who are not then owners of stock, unless the proposed new stockholder is recommended by two directors, is neither violative of statute nor of public policy.

Mason v Tel. Co., 213-1076; 240 NW 671

Issuance of unpaid stock—pledge to innocent party—estoppel. A corporation which issues and delivers its corporate shares of stock, without receiving payment therefor, estops itself to question such issuance and delivery after the stock has been pledged by the holder thereof to a good-faith pledgee for value and without notice of the fact of nonpayment.

Bankers Tr. Co. v Rood, 211-289; 233 NW 794; 73 ALR 1421

Stock—rights of equitable owner. The legal rights of an equitable owner of corporate shares of stock (stock not duly transferred to him on the books of the corporation) are, in many respects, very limited, but, among such rights, is the right to maintain an action against the corporation to establish and protect the interest of such equitable owner in the corporate property.

Graeser v Finance Co., 218-1112; 254 NW 859

Stock—restricting sale—corporation having first option to buy. Provisions in articles of incorporation requiring stockholders to give the corporation opportunity to purchase, before selling to outsiders, are generally held to be valid and apply to investment stock as well as voting stock.

McDonald v Farley et al. Co., 226-53; 283 NW 261

Stock—corporation having first option to buy—no restriction on judicial sale—mandamus to transfer. Sale of assets of insolvent national bank made in obedience to an order of court is not a voluntary but a judicial sale; therefore, a corporation whose stock was sold thereunder is not entitled to notice thereof, even tho its articles of incorporation required notice of proposed sale of stock, and mandamus will lie to compel the transfer of said stock on its records.

McDonald v Farley et al. Co., 226-53; 283 NW 261

Water company in which city owns stock—not "governmental agency"—exempt from federal tax. A private corporation furnishing water to city under arrangement whereby dividends and financial expenditures were limited, and city owned one-third of voting stock with right of representation on board of directors, right of purchase, and right to compel retirement of preferred stock from surplus earnings, held not immune from federal taxation as "governmental agency", since surplus earnings from water tax did not become property of city.

Citizens Water Co. v Com. of Int. Rev., 87 F 2d, 874

III RIGHT TO SUE AND BE SUED

Contract to repurchase stock—equitable issues not presented—no review. On appeal from a ruling sustaining plaintiff's demurrer to answer of a foreign corporation, in suit for breach of contract to repurchase from plaintiff its own stock, setting up defense that such purchase would impair its capital, which was prohibited under the statute of the state of its domicile, the supreme court could not exercise its inherent equitable power or give consideration to estoppel, ratification, implied contract, or theory that contract was loan, when proper pleading or proof relating thereto was lacking.

Bishop v Middle States Co., 225-941; 282 NW 305

Libel—corporation as plaintiff. A corporation may maintain an action for libel.

Shaw Cleaners v Dress Club, 215-1130; 245 NW 231; 86 ALR 839

Corporate entity—unallowable disregard of. Where collaterally secured bonds, owned by a corporation, were depreciated in value by the wrongful act of the collateral-holding trustee in permitting worthless collaterals to be substituted for valuable collaterals, the resulting damages belong solely to the corporation. In other words, a stockholder may not

III RIGHT TO SUE AND BE SUED—continued

maintain an action against the trustee for alleged special damages suffered by said stockholder consequent on the fact that said depreciation so impaired the capital of the corporation that an assessment on the corporate shares became necessary, and that the stockholder was unable to pay said assessment and thereby lost his said stock.

Grimes v Brammer, 214-405; 239 NW 550

Court control in lieu of corporate control. Where the officers and directors of a corporation settle and compromise a dispute in which the corporation is involved, and the settlement is intra vires, minority stockholders will not be permitted to displace corporate authority and control by substituting court control, except in plain cases of fraud or maladministration.

Independent Order v Scott, 223-105; 272NW 68

Decisions reviewable—misjoinder of corporate parties—ruling on motion to strike—nonreviewable fact question. On appeal from an order overruling a motion to strike on ground that there was misjoinder of a principal corporation and its subsidiary, where question to be determined was whether the corporate entity of the subsidiary could be disregarded because it was so organized, controlled, and conducted as to make it a mere instrumentality of the principal corporation, which question being one of fact determinable only after a hearing of the evidence, the supreme court would not decide the matter on basis of the pleadings.

Wade v Central Co., 227-427; 288 NW 441

Foreign corporation—interference with internal affairs. Where a foreign corporation receives, as a consideration for the legal sale of its entire assets, a certain amount in money and the balance in the bonds, and in the preferred and participating stock of the purchaser, the courts of this state will not, in an action against the corporation, adjudicate the question whether a dissenting stockholder should be paid in cash the value of his stock, as such adjudication would be an unallowable interference with the internal affairs of said foreign corporation.

Graeser v Finance Co., 218-1112; 254 NW 859

Foreign corporation without business permit — action on contract barred. A foreign stock corporation which, through its president while personally present in Iowa, sells on contract, accepts payment, part in cash and part in notes, and makes delivery of a machine, is doing business in the state, and not having first secured a permit to do business may not maintain an action on such contract.

Actino Lab. v Lamb, 224-573; 278 NW 234

Fraud—joinder of corporations and officers. Two corporations, each organized by the same promoters, for identically the same purpose, and officered by the same officers, may be joined with the common president, in an action based upon a single joint transaction wherein the said president in the sale of corporate stock of both corporations made false representations in the interest of and for the benefit of both corporations.

McCarthy v Dixon, 219-15; 257 NW 327

Joint stock land banks—legal status. Joint stock land banks, tho organized under federal statutes, are privately owned corporations, organized for profit to their stockholders through the business of making loans on farm mortgages, are not governmental instrumentalities, and are suable in the proper state courts.

Higdon v Lincoln JSL Bk., 223-57; 272 NW 93

Judgment—fatal inadequacy of proof. The court has no legal right to enter judgment against a corporation on promissory notes purporting to be signed by the corporation by its president (1) when there is no proof as to the actual or apparent authority of the president, and (2) no evidentiary explanation as to the nature of the transaction.

Schooler v Avon Lakes Corp., 216-1419; 250 NW 629

Optometry—corporation practicing through employee-physician. A corporation is practicing optometry when it employs a physician —a licensed optometrist—to carry on his business under the company's control, and such practice may be enjoined.

State v Ritholz, 226-70; 283 NW 268

Restraint of vexatious suits. Restraint by injunction of one claiming to have cause of action against another should be granted only when the purpose of it is shown clearly to have been in bad faith and for the purpose of vexation and annoyance. Rule applied where successive actions were brought by stockholders against corporation.

Strasburger v Witousek, (NOR); 211 NW 713

Ultra vires and lack of authority—ratification. A corporation is estopped to plead that the contract of its vice president on behalf of the corporation to repurchase a note and mortgage, at face value, was neither expressly nor impliedly authorized and was ultra vires, when the corporation with full knowledge of all the facts elects to retain the consideration paid it for the paper.

Hawkeye Ins. v Tr. Co., 210-284; 227 NW 637

Unauthorized expenditures—ratification. A member of a fraternal order may not maintain an action against a former officer of the order

to recover, on behalf of the order, money belonging to the order and expended by said officer for unauthorized purposes, when the governing body of the order has formally and explicitly ratified such expenditures.

Outing v Plum, 212-1169; 235 NW 559

IV EXEMPTION OF PRIVATE PROPERTY

Authorization of corporate indebtedness—effect. The stockholders of a legal incorporation do not, by authorizing their board of directors to incur corporate obligations, render themselves personally liable to contribute to the loss suffered by the directors who incurred personal liability by executing their personal notes.

Fulton v Farmers Exch., 207-371; 222 NW 889

V BYLAWS

Authority of president—insufficient showing. A contract is not binding on a corporation, tho entered into in its name by its president, to the effect that the corporation shall be and remain liable on promissory notes negotiated by it without recourse, when authority to the president to enter into such contract cannot be found in the articles of incorporation, in the bylaws, in the proceedings of the directors in any act of corporate ratification, or in the customs and practices of the corporation.

First N. Bk. v Prod. Co., 209-358; 227 NW 908

Employment under delegated authority. The board of directors of a corporation, when not prohibited from so doing by the articles of incorporation or bylaws, may delegate in good faith to the corporate manager power to hire employees and to fix and pay salaries; and under such delegation, the manager may, in good faith, legally employ a director to perform duties which are separate and distinct from those of a director.

Schulte v Ideal Co., 208-767; 226 NW 174

8342 Index book.

Landlord's contractual lien—recording articles and assignments—constructive notice to trustee. Where a lease provided for lien in favor of lessors for taxes and other money paid by lessors under provisions of lease, and when assignments of lease to corporations, articles of incorporation of bankrupt lessee under its original name, and amendment changing its name to that of bankrupt had all been recorded, that record gave constructive notice to trustee in bankruptcy and all subsequent lienors of lessor's prior lien.

Ginsberg v Lindel, 107 F 2d, 721

8343 Articles adopted and recorded.

De facto corporations. See under §8401

Articles—statutes as part of. The statutes and constitutional provisions of a state relative to corporations must be deemed a part of the articles of incorporation of a corporation tho not physically copied therein.

Ontjes v Bagley, 217-1200; 250 NW 17

Statutes and articles as part of contracts. The corporation charter and the statutes of the state of domicile of the corporation become a part of any contract between the corporation and a purchaser of its stock.

Bishop v Middle States Co., 225-941; 282 NW 305

Mutual rights. The members of a partnership (or the stockholders of a corporation) may validly authorize a partner (or an officer of the corporation as the case may be) to privately engage in the same business for the transaction of which the partnership (or corporation) was formed, and in such cases no partner (nor a stockholder) will be permitted to lay claim, on behalf of the partnership (or corporation), to any profits accruing under such private contracts,—no rights of third parties being involved.

Anderson v Dunnegan, 217-672; 250 NW 115

Brokers compensation—insufficient proof. It is a far-fetched proposition that a broker employed to effect a sale of all the capital stock of a corporation has established his right to a commission by proof that he contacted a party in the effort to effect such sale but was unsuccessful, and that some two years later, without any further effort on his part, the party so contacted and said corporation effected a reorganization of the corporation on the basis of a stock issue entirely different than that formerly existing.

Jackley-Wiedman Co. v Washer Co., 220-486; 262 NW 97; 101 ALR 1216

Preferred stockholders' rights—subject to general creditors' claims. Rights of preferred stockholders in a bankrupt corporation's assets are subject to all debts of the corporation, including general creditors, and instruments having attributes commonly attached to preferred stock are construed as stock unless contrary intention clearly appears, in which respect the articles of incorporation are held competent to prove meaning and legal effect of certificates purporting to be issued under such articles.

In re Hicks-Fuller Co., 9 F 2d, 492

8344 Filing or refusal to file.

Atty. Gen. Opinions. See '30 AG Op 304; '32 AG Op 130

8345 Question of legality submitted.

Stock—limitation on transfer. A provision in the duly recorded articles of incorporation of a corporation for profit to the effect that the corporate shares of stock shall not be transferred to persons who are not then owners of stock unless the proposed new stockholder

is recommended by two directors, is neither violative of statute nor of public policy.

Mason v Mallard Co., 213-1076; 240 NW 671

8347 Submission to executive council.

Atty. Gen. Opinion. See '36 AG Op 528

8348 Interpretative clause.

Atty. Gen. Opinion. See '36 AG Op 528

8351 Limit of indebtedness. (Repealed)

Debts beyond lawful limit—status. A debt contracted by a corporation in excess of the maximum limitation prescribed by law is not void.

German Bk. v Bank, 203-276; 211 NW 386

Noncreation of debt. A corporation which sells its holdings and receives in payment a transfer of junior mortgages on other property, without agreement to pay the senior mortgages, necessarily creates no indebtedness against itself.

Boyd v Bank, 205-465; 218 NW 321

Authorization of corporate indebtedness—effect. The stockholders of a legal incorporation do not, by authorizing their board of directors to incur corporate obligations, render themselves personally liable to contribute to the loss suffered by the directors who incurred personal liability by executing their personal notes.

Fulton v Exchange, 207-371; 222 NW 889

8357 Notice of incorporation.

ANALYSIS

I NOTICE
II OFFICERS IN GENERAL
III CORPORATE STOCK IN GENERAL

I NOTICE

Notice—sufficiency. A notice of incorporation sufficiently states the time of the commencement and termination of the corporation, and the amount of capital stock authorized, and the time and conditions in which it is to be paid in, (1) by a recital that the business should begin on the date of the issuance of the official certificate of incorporation and continue for a named time, and (2) by a recital of the amount of capital stock, and that it should be fully paid before the corporation began business.

Comstock v Wood, 204-1027; 216 NW 640

Landlord's contractual lien—recording articles and assignments—constructive notice to trustee. Where a lease provided for lien in favor of lessors for taxes and other money paid by lessors under provisions of lease, and when assignments of lease to corporations, articles of incorporation of bankrupt lessee under its original name, and amendment changing its name to that of bankrupt had all been recorded, that record gave constructive notice to trustee in bankruptcy and all subsequent lienors of lessor's prior lien.

Ginsberg v Lindel, 107 F 2d, 721

II OFFICERS IN GENERAL

Identity of partnership and corporation. A bona fide corporation which is engaged in one business, and a bona fide partnership which is engaged in a different business may not, even in equity, be deemed identical—one and the same entity—even tho the corporate stock of the corporation is owned entirely by the partnership entity and by the individual partners, and even tho the individual partners of the partnership constitute the board of directors of the corporation. So held on the plea that a contract of the corporation worked a change in a former contract of the partnership, and thereby released the surety.

Weitz v Guar. Co., 206-1025; 219 NW 411

Partner's (or stockholder's) right to compete with partnership (or corporation). The members of a partnership (or the stockholders of a corporation) may validly authorize a partner (or an officer of the corporation as the case may be) to privately engage in the same business for the transaction of which the partnership (or corporation) was formed, and in such cases no partner (or stockholder) will be permitted to lay claim, on behalf of the partnership (or corporation), to any profits accruing under such private contracts,—no rights of third parties being involved.

Anderson v Dunnegan, 217-672; 250 NW 115

Apparent authority of manager sufficient to bind corporation to tenancy. Corporation held liable for rent as tenant at will, based on correspondence and telephone conversations with corporation's manager, as against contention that manager was not authorized to enter into arrangement made—principal being bound by apparent authority of its agent.

Daly Co. v Brunswick Co., (NOR); 263 NW 234

Directors—nonimputed knowledge. Actual knowledge of the business transactions of a corporation is not imputable to a director simply because of such directorship.

Commercial Bank v Kietges, 206-90; 219 NW 44

Knowledge of insolvency of bank—not imputable to nonactive director. Knowledge that a bank is insolvent is not imputed to one who is a director and minor stockholder of the bank, when he takes no active part in its management and has no actual knowledge of the insolvency.

In re Smith, 228- ; 289 NW 694

Liability of officer for corporate tort. The managing officer of a corporation who causes the corporation of which he is such officer

wrongfully to withhold personal property from a person who is entitled to the immediate possession of said property, is guilty of a tort, and is personally liable for said tort along with his said corporation.

Luther v Investment Co., 222-305; 268 NW 589

Nonpermissible joinder. An action against a corporation on its obligation and an action against the directors to enforce a statutory liability relative to such obligation may not be joined.

McPherson v Commercial Co., 206-562; 218 NW 306

Sales contract—offer or order—insufficient acceptance by corporation. A contract for the purchase of an article from a corporation is not established by the simple, naked showing that the purported buyer signed an order addressed to the corporation for the article, and that said order carries an acceptance signed individually by a person who was, in fact, the vice president and general manager of the corporation.

Birum-Olson Co. v Johnson, 213-439; 239 NW 123

Check—indorsement by corporate payee. An indorsement on a negotiable check payable to the "order of" a corporate payee, tho consisting simply of the name of said corporation, effects a prima facie transfer of absolute ownership of the check to the bank to which the check is delivered by the said corporation as a deposit; and especially so when it appears that said indorsement is in the handwriting of a general, managerial officer of the corporation.

Bureau Service v Lewis, 220-662; 263 NW 7

Corporate president's authority to write checks—burden of proof. In action by payee of check drawn by president of corporation for interest on officer's note, it was held that payee had burden to prove check was executed by the corporation, that president had no implied authority to give check for interest on officer's personal debt, that president's check on corporation for officer's debt was without consideration as to the corporation, and that payee could not recover on the check as a matter of law without proof of president's authority or benefit received by the corporation.

Smoltz v Meat Co., (NOR); 224 NW 536

Good faith holdership of note—calling officers. The corporate holder of a promissory note sufficiently establishes its holdership in good faith and for value by calling those of its officers only who participated in the purchase of said note.

Grimes Bank v McHarg, 213-969; 236 NW 418

Payment of mortgage—authority of president. Principle reaffirmed that the president of an investment corporation has no implied authority to agree on behalf of the company that a real estate mortgage held by the company shall be considered as an absolute deed, and that the company will accept the equity of redemption of the mortgagors as full payment of the mortgage debt.

Central Co. v Estes, 206-83; 218 NW 480

Release or subordination of mortgage—authority of president. A corporation is bound by the act of its president in subordinating its mortgage to another mortgage (1) when the president is expressly authorized by the articles of incorporation to release and satisfy such mortgages, (2) when the president first executed, on adequate consideration, a written release and subordination without the corporate seal being attached, and later confirmed said act by a new release and subordination with said seal attached, and (3) when the corporation at all times intended so to subordinate its mortgage.

Homesteaders Life v Salinger, 212-251; 235 NW 485

Right as bondholder. An officer of a corporation who, as surety, signs a corporate note for borrowed money which the corporation employs in its business, and in good faith receives bonds of the corporation to indemnify him in case he is compelled to pay the note, will, upon payment of the note, be accorded the same rights under a trust deed or mortgage executed to secure the payment of said bonds as will be accorded to good-faith purchasers of other portions of said bonds.

Gunn v Gould Co., 206-172; 218 NW 895; 220 NW 127

III CORPORATE STOCK IN GENERAL

Discussion. See 17 ILR 313—Minority stockholder

Authority of depositary—assessment on corporate stock. The holder in escrow of corporate stock has no implied authority to pay an assessment on said stock.

Harris v Bills, 203-1034; 213 NW 929

Divorced stockholders—disposition of property—nonallowable subsequent modification. Where parties to a divorce proceeding owned the entire capital stock of a corporation, and said stock was decreed to the parties in equal shares, a subsequent modification of the decree will not be entered because of the doing of acts in the course of the corporate management in which each acquiesced, nor because one of the parties now apprehends that said equal division of stock will ultimately result in a deadlock in corporate management.

Parker v Parker, 214-1327; 241 NW 497

Issuance of unpaid stock—pledge to innocent party—estoppel. A corporation which issues and delivers its corporate shares of stock without receiving payment therefor, estops itself to question such issuance and deliv-

III CORPORATE STOCK IN GENERAL—concluded

ery after the stock has been pledged by the holder thereof to a good-faith pledgee for value and without notice of the fact of nonpayment.

Bankers Tr. Co. v Rood, 211-289; 233 NW 794; 73 ALR 1421

Oral contract to repurchase. An oral contract by one who effects a sale of corporate shares of stock as agent of the owner thereof, that he will repurchase the shares on demand of the purchaser, is within the statute of frauds.

Thomas v Elec. Co., 220-850; 263 NW 499

Preferred stock—lien—nature of. Where articles of an incorporation for the purchase and sale of real estate grant to the holders of preferred stock a first lien on all the assets of the incorporation, the lien is a blanket lien upon all the assets, whatever their form, and not a lien upon particular items of property.

Boyd v Bank, 205-465; 218 NW 321

8360 Amendments—fees.

Amendment to articles—inaccurate designation—effect. Amended articles of incorporation of a farm bureau association will be given the effect manifestly intended notwithstanding the fact that they are inaccurately designated.

Appanoose Co. Bureau v Board, 218-945; 256 NW 687

Collateral attack on corporate existence after change of name. When a corporation changed its name by amending its articles of incorporation, and published notice of the amendment only one week instead of four, as required by statute, it continued to exist as either a de jure or de facto corporation, and its corporate existence could be attacked only by direct action, and not collaterally.

Glenwood Lbr. Co. v Hammers, 226-788; 285 NW 277

Landlord's contractual lien—recording articles and assignments—constructive notice to trustee. Where a lease provided for lien in favor of lessors for taxes and other money paid by lessors under provisions of lease, and when assignments of lease to corporations, articles of incorporation of bankrupt lessee under its original name, and amendment changing its name to that of bankrupt had all been recorded, that record gave constructive notice to trustee in bankruptcy and all subsequent lienors of lessor's prior lien.

Ginsberg v Lindel, 107 F 2d, 721

8362 Individual property liable.

ANALYSIS

I PERSONAL LIABILITY IN GENERAL
II WHEN PERSONAL LIABILITY ATTACHES
III WHEN PERSONAL LIABILITY DOES NOT ATTACH

I PERSONAL LIABILITY IN GENERAL

Burden of proof. Persons who are in good faith contracted with and extended credit as partners are personally liable for the resulting debt, in the absence of evidence by them that they are stockholders in a corporation which is at least a de facto corporation.

Wilkin Co. v Co-op., 208-921; 223 NW 899

Substantial failure to effect incorporation. This section has no application to a case where no steps whatever are taken to effect an incorporation beyond securing subscriptions for stock in the contemplated incorporation and assuming to issue such stock, there being no holding out of an incorporation.

Kinney v Bank, 213-267; 236 NW 31

Waiver of statutory right—public policy. A waiver by a corporate creditor of his statutory right (now repealed) to hold officers and directors personally responsible for prohibited excess corporate indebtedness is not violative of public policy.

Preston v Howell, 219-230; 257 NW 415; 97 ALR 1140

II WHEN PERSONAL LIABILITY ATTACHES

Liability of stockholders—burden of proof. Persons who are in good faith contracted with and extended credit as partners are personally liable for the resulting debt, in the absence of evidence by them that they are stockholders in a corporation which is at least a de facto corporation.

Wilkin Co. v Co-op., 208-921; 223 NW 899

Personal liability of stockholder who appropriates corporate assets. A stockholder who appropriates to his own personal use substantially all the assets of the corporation becomes personally liable for the taxes theretofore levied against the corporation, the appropriation being in excess of said taxes.

Manning v Ottumwa Auto Co., 210-1182; 232 NW 501

Corporate resolution deferring delinquent salary—contractual validity. Where a father and son, the sole owners of a corporation, as officers, and having delinquent salary due them, pass a resolution deferring payment until after death of both, such resolution became a contract, supported by a consideration and accepted by and binding upon both the corporation and the executing officers, who having personally conducted the transaction are bound thereby and estopped from denying its validity.

Bankers Trust v Economy Coal, 224-36; 276 NW 16

III WHEN PERSONAL LIABILITY DOES NOT ATTACH

Authorization of corporate indebtedness—effect. The stockholders of a legal incorporation do not, by authorizing their board of directors to incur corporate obligations, render themselves personally liable to contribute to the loss suffered by the directors who incurred personal liability by executing their personal notes.

Fulton v Exch., 207-371; 222 NW 889

Liability for excess corporate debts—waiver. The purchaser of a corporate bond effectively waives his statutory right (now repealed) to hold the officers and directors personally liable for a prohibited excess indebtedness of the corporation, when he accepts the bond with an agreement therein consenting to all the terms of an indenture of trust securing said bond, and when he had full opportunity to discover that said indenture specifically embraced such waiver.

Preston v Howell, 219-230; 257 NW 415; 97 ALR 1140

Liability for excess indebtedness—waiver—consideration. Ample consideration for a contract waiver by the purchaser of corporate bonds, of his statutory right (now repealed) to hold the officers and directors personally liable for a prohibited excess indebtedness of the corporation, may be found in the fact that the corporation has withdrawn a large amount of its assets and specifically pledged them with a trustee for the purpose of paying said bonds.

Preston v Howell, 219-230; 257 NW 415; 97 ALR 1140

Liability of stockholders—de facto corporation. A creditor who knowingly contracts with, and extends credit to, a corporation as such tho it is only a de facto corporation, may not, in the absence of a statute to the contrary, hold the stockholders personally liable for the resulting debt.

Wilkin Co. v Co-op., 208-921; 223 NW 899

Nonpersonal liability under defective notice. The fact that a published notice of amendment to the articles of incorporation of a validly organized corporation does not state the terms and conditions upon which an issue of increased capital stock is to be paid, does not render a stockholder personally liable for the corporate debts, as regards a creditor who, at the time of extending credit, had explicit knowledge of such terms and conditions.

Comstock v Wood, 204-1027; 216 NW 640

8363 Dissolution—notice of.

Atty. Gen. Opinions. See '28 AG Op 368, 371

When preferred stockholder may not complain. A preferred stockholder whose stock has fully matured has no legal interest in the continuation of the corporation, provided his right of priority to the assets be protected.

Boyd v Bank, 205-465; 218 NW 321

8364 Duration.

Discussion. See 2 ILB 84—Repeal of corporation franchise

Atty. Gen. Opinions. See '25-26 AG Op 43; '30 AG Op 95, 141

8365 Renewal—conditions.

Atty. Gen. Opinions. See '28 AG Op 130, 368; '30 AG Op 141, 190, 238; '32 AG Op 122; '34 AG Op 620

Arbitrary determination of value of stock. The plans for the reorganization of a corporation may not arbitrarily fix the value of the stock of a dissenting stockholder.

Ontjes v Bagley, 217-1200; 250 NW 17

Collateral holder of stock—nonpermissible contract. A national bank which holds as collateral to an individual loan a majority of the corporate stock of a manufacturing corporation has no power to enter into a contract with minority stockholders to the effect that said minority stockholders shall, under the renewal of said corporation, hold certain lucrative positions with the said renewed corporation.

Clark v Bank, 219-637; 259 NW 211

Contracts—waiver by inconsistent conduct. When minority and majority stockholders agree that the former will withdraw their objections to the renewal of the corporation and the latter will vote for such directors as will employ the minority in certain corporate positions, the minority waives all rights under the contract by subsequently joining with all the other stockholders in the adoption of renewal articles which wholly ignore the said contract.

Clark v Bank, 219-637; 259 NW 211

Franchise renewal — purchase of objecting stockholders' stock — no corporate obligation nor lien. Statute requiring majority stockholders, voting for renewal of corporate franchise, to purchase objecting stockholders' stock creates no liability against the corporation nor lien on its assets.

Terrell v Ringgold Tel. Co., 225-994; 282 NW 702

Franchise renewal statute—objecting stockholders selling to majority—action within 3 years premature—dismissal. At the termination of a mutual telephone company franchise, stockholders voting against renewal of franchise may not maintain an action against the majority stockholders to require purchase of their stock by such stockholders voting in favor thereof, until after 3 years from date of voting, under this section, permitting such franchise renewal, if the majority stockhold-

ers voting renewal purchase the stock of those voting against renewal within 3 years from date of voting, and an action commenced within such 3-year period, being premature, will be dismissed on motion.

Terrell v Ringgold Tel. Co., 225-994; 282 NW 702

Constitutional question—first raised on appeal—no review. Constitutionality of statute requiring majority stockholders voting for franchise renewal to purchase stock of those voting against renewal, within three years from date of voting, will not be considered on appeal when such question has not been raised in the lower court.

Terrell v Ringgold Tel. Co., 225-994; 282 NW 702

Reorganization — authorized method. The stockholders of a corporation, or a part thereof, may, in good faith, reorganize it (1) by causing its entire assets and liabilities to be transferred to a newly formed corporation, and (2) by surrendering their old stock and in lieu thereof receiving stock of the new corporation—provided the laws of the states under which the corporations are organized sanction and authorize such reorganization.

Ontjes v Bagley, 217-1200; 250 NW 17

8366 Computation and duration.

Atty. Gen. Opinion. See '28 AG Op 160

8367 Execution of renewal—record required.

Atty. Gen. Opinions. See '30 AG Op 95; '38 AG Op 250

8368 Filing with secretary of state—fees—certificate of renewal.

Atty. Gen. Opinions. See '25-26 AG Op 195, 202; '30 AG Op 95

8369 Exemption from fee.

Atty. Gen. Opinions. See '25-26 AG Op 195, 202

8371 Renewal of banks—conditions.

Atty. Gen. Opinions. See '25-26 AG Op 325; '30 AG Op 141; '32 AG Op 122; '36 AG Op 128

8372 Meeting and notice thereof.

Atty. Gen. Opinions. See '28 AG Op 130; '32 AG Op 122; '36 AG Op 128

8374 Amendments to articles.

Collateral attack on corporate existence after change of name. When a corporation changed its name by amending its articles of incorporation, and published notice of the amendment only one week instead of four, as required by statute, it continued to exist as either a de jure or de facto corporation, and its corporate existence could be attacked only by direct action, and not collaterally.

Glenwood Lbr. Co. v Hammers, 226-788; 285 NW 277

8376 Legislative control.

Atty. Gen. Opinion. See '36 AG Op 64

Mutual assessment company — statutory change—constitutionality. Article VIII, §12, Constitution of Iowa, and this section are constitutional and statutory authority for a legislative act authorizing the board of directors of a mutual benefit life assessment company to transform said company into a legal reserve or level premium company, even tho such transformation results in leaving the old assessment certificate holders to carry their own assessments for death losses without further addition to their membership.

Wall v Bankers Life, 208-1053; 223 NW 257

8377 Fraud—penalty for.

Discussion. See 20 ILR 808—Director as fiduciary

Compensation — unallowable determination. A corporate director may not have his salary fixed by his own deciding vote.

Bennett v Klipto Co., 201-236; 207 NW 228

Contracting against one's own wrong. Corporate officers will not be permitted to write into a trust deed provisions which will shield them from personal responsibility for their illegal conversion of corporate property in their charge, or for any other willful wrong.

Walker v Howell, 209-823; 226 NW 85

Dissolution by state—corporate officer's lien denied—mining property. In an action by the state for dissolution of a mining corporation, a chattel mortgage and conditional sale contract covering the mine property are fraudulently invalid and may not be established as first liens when held and asserted by a defendant who, among other things, as an incorporator, director, president, and general manager of the corporation, secured such instruments while acting in his fiduciary capacity for the purpose of insuring payment to himself of debts previously created, thus serving his personal interests, rather than as fiduciary, preserving the assets for the creditors and stockholders.

State v Exline Co., 224-466; 276 NW 41

Dissipation of assets—liability. The act of the directors of a financially embarrassed corporation in selling their individually owned corporate shares of stock to a third party, and in receiving pay therefor out of the partly frozen bank deposits of the corporation under an understanding that said third party would replace said dissipated deposits with securities of equal value, is per se fraudulent, and necessarily violative of the law-imposed trust relationship of the directors to existing and future contemplated corporate creditors; and this

is true irrespective of the plea that the directors in good faith believed that said third party would carry out the said understanding. It follows that the receiver of the corporation may repudiate such transaction and recover the dissipated assets from the directors.

Hoyt v Hampe, 206-206; 214 NW 718; 220 NW 45

Employment under delegated authority. The board of directors of a corporation, when not prohibited from so doing by the articles of incorporation or bylaws, may delegate in good faith to the corporate manager power to hire employees and to fix and pay salaries; and under such delegation the manager may, in good faith, legally employ a director to perform duties which are separate and distinct from those of a director.

Schulte v Ideal Co., 208-767; 226 NW 174

Evidence—sufficiency. Evidence held ample to sustain a charge of conspiracy on the part of the officers of a corporation in the sale of the shares of stock.

Pullan v Struthers, 201-1179; 207 NW 235

Fraudulent stock issue. The consent of stockholders to fraudulent issuance of bonds by corporation, which consent is obtained without disclosure of circumstances, does not excuse or ratify the fraud.

First Tr. Bank v Bridge Co., 98 F 2d, 416

Nonliability for naked nonfeasance. The director of a corporation is not liable, to a person dealing with the corporation, for mere nonfeasance—naked inaction as a director. So held where the director of a bank took no action with reference to the practice of the bank in commingling trust funds with the general funds of the corporation.

Proksch v Bettendorf, 218-1376; 257 NW 383; 38 NCCA 292

Purchase of corporate stock by officers—fiduciary relation. Principle recognized that an officer or director of a corporation occupies a fiduciary relation towards a fellow stockholder in the purchase of the latter's corporate stock, and is under duty to disclose to the selling stockholder evidence which has bearing on the value of the stock and which has come to him as such officer or director. Held, principle not applicable under certain facts.

Humphrey v Baron, 223-735; 273 NW 856

Responsibility for worthless loans. The president of a bank is personally liable to the bank for loaning the funds of the bank to persons known by him to be financially irresponsible, and especially so when he secures the approval of the directors as to such loans on the repeated assurance that he is back of said loans and will see that they are paid.

Farmers Bk. v Kaufmann, 201-651; 207 NW 764

Unauthorized transfer of collateral—conversion. The act of a trustee, holding collateral as security for a particular bond issue, in transferring, without authority, the collateral so held to another and different series of bonds, in order that the said latter bonds may be better secured, or the transfer of such collateral to any other foreign purpose, constitutes a conversion, and renders the trustee and the corporate officers who connive thereat personally responsible to the bondholders for the loss suffered by them.

Walker v Howell, 209-823; 226 NW 85

8378 Diversion of funds — unlawful dividends.

Discussion. See 18 ILR 516—Recovery of dividends

Corporate president's authority to write checks—burden of proof. In action by payee of check drawn by president of corporation for interest on officer's note it was held that payee had burden to prove check was executed by the corporation, that president had no implied authority to give check for interest on officer's personal debt, that president's check on corporation for officer's debt was without consideration as to the corporation, and that payee could not recover on the check as a matter of law without proof of president's authority or benefit received by the corporation.

Smoltz v Meat Co., (NOR); 224 NW 536

Dissolution by state—corporate officer's lien denied—mining property. In an action by the state for dissolution of a mining corporation, a chattel mortgage and conditional sale contract covering the mine property are fraudulently invalid and may not be established as first liens when held and asserted by a defendant who, among other things, as an incorporator, director, president, and general manager of the corporation, secured such instruments while acting in his fiduciary capacity for the purpose of insuring payment to himself of debts previously created, thus serving his personal interests, rather than as fiduciary, preserving the assets for the creditors and stockholders.

State v Exline Fuel Co., 224-466; 276 NW 41

General manager—power to deposit and withdraw funds. The general manager of an incorporated, cooperative, dairy company who, for years, and to the general knowledge of the banking and business interest of the locality in question, is in unrestricted management of the entire business of the company, must be deemed to have both actual and ostensible authority to select banks of deposit for the corporate funds, and like authority to withdraw said funds—an authority as to which, both as to the making of deposits and as to the withdrawal thereof, the bank need ask no questions, assuming, of course, it acts at all times in perfect good faith.

Fidelity Co. v Bank, 223-446; 273 NW 141

Liability of capital stock not considered—lawful payment of dividends—presumption. Under the statute providing for the remedy of a creditor who is damaged by the wrongful diversion of funds of a corporation, it is held, the word "liability", as used in the statute, of a corporation on its capital stock is not an indebtedness to be considered in determining whether or not a corporation may lawfully pay dividends. In the absence of a showing to the contrary the presumption is that the payment of dividends is lawful.

Majestic Co. v Orpheum Circuit, 21 F 2d, 720

Nonobligation of stockholder to return. Stockholders who, while their corporation is solvent and so remains, in good faith receive dividends which, unbeknown to them, are paid from corporate capital and not from corporate profits or surplus, are not, in case the corporation subsequently becomes insolvent, liable, in an action at law, to corporate creditors for the amount of such dividends. And it is quite immaterial whether the claimed liability is predicated on the statutes (§§8377, 8378, C., '35) or on and under the so-called corporate "trust fund" doctrine of the common law.

Bates v Brooks, 222-1128; 270 NW 867; 109 ALR 1371

Policyholder as creditor.

Hoyt v Hampe, 206-206; 214 NW 718; 220 NW 45

Trust fund doctrine. The transfer by an insolvent bank, while in the hands of a receiver, of all or of a part of its assets to another bank which pays nothing therefor, but assumes the payment of certain liabilities of the insolvent's, does not deprive a judgment creditor of the insolvent's of the right to follow said assets into the hands of the transferee and to impress a lien thereon on the basis of the pro-rata value of the assets transferred; and this is true tho the transferee bank had no knowledge of the creditor's claim when it accepted the transfer.

German Bk. v Bank, 203-276; 211 NW 386

8380 Liability on excessive indebtedness. (Repealed.)

Excess indebtedness—basis of liability. A statute (now repealed) placing personal liability on the officers and directors of a corporation for prohibited excess indebtedness of the corporation, "knowingly consented to" by them, necessarily excludes liability (1) on mere proof that the officers or directors were negligent in performing their duties, and (2) as to corporate debts contracted after the officer or director ceased to be such.

Preston v Howell, 219-230; 257 NW 415; 97 ALR 1140; 38 NCCA 133

Liability for excess corporate debts—waiver. The purchaser of a corporate bond effectively waives his statutory right (now repealed) to hold the officers and directors personally liable for a prohibited excess indebtedness of the corporation, when he accepts the bond with an agreement therein consenting to all the terms of an indenture of trust securing said bond, and when he had full opportunity to discover that said indenture specifically embraced such waiver.

Preston v Howell, 219-230; 257 NW 415; 97 ALR 1140

Liability for excess indebtedness—waiver—consideration. Ample consideration for a contract waiver by the purchaser of corporate bonds, of his statutory right (now repealed) to hold the officers and directors personally liable for a prohibited excess indebtedness of the corporation, may be found in the fact that the corporation has withdrawn a large amount of its assets and specifically pledged them with a trustee for the purpose of paying said bonds.

Preston v Howell, 219-230; 257 NW 415; 97 ALR 1140

Procedure against officers and directors. The personal and individual liability imposed by this statute is a liability which is enforceable, not by action at law by each creditor in piecemeal, and against one or more or all offending officers and directors, but by an action in equity for and on behalf of all creditors, wherein may be adjudicated, once for all, the extent of liability of each defendant and the extent of right of each creditor.

Platner v Hughes, 200-1363; 206 NW 268; 43 ALR 1141

Recovery on excess corporate indebtedness—proper party plaintiff. A trustee in bankruptcy of a corporate bankrupt cannot maintain an action against the directors and officers of the corporation to enforce the statutory individual liability attaching to such directors and officers consequent on their act in knowingly consenting to a corporate indebtedness in excess of that permitted by law; such right of action never, in any sense, belongs to the corporation, but on the contrary is a right extended to the corporate creditors, and is enforceable solely by such creditors, if necessary, irrespective of the bankruptcy proceedings.

Hicklin v Cummings, 211-687; 234 NW 530; 72 ALR 822

Statute of limitation—statutory liability. A cause of action to enforce the statutory-declared personal liability of corporate officers and directors for prohibited, excess corporate indebtedness (now repealed) is barred after the lapse of five years from the creation of the indebtedness.

Preston v Howell, 219-230; 257 NW 415; 97 ALR 1140

Stock—rights of equitable owner. The legal rights of an equitable owner of corporate

shares of stock (stock not duly transferred to him on the books of the corporation) are, in many respects, very limited, but, among such rights, is the right to maintain an action against the corporation to establish and protect the interest of such equitable owner in the corporate property.

Graeser v Finance Co., 218-1112; 254 NW 859

Waiver of statutory right—public policy. A waiver by a corporate creditor of his statutory right (now repealed) to hold officers and directors personally responsible for prohibited excess corporate indebtedness is not violative of public policy.

Preston v Howell, 219-230; 257 NW 415; 97 ALR 1140

8382 Bylaws posted.

Bylaws—insufficient proof. A bylaw may not be deemed established by the mere introduction in evidence of the minute book of the corporation which reveals the presence of the alleged bylaw on pages of the book prior to the commencement of the official minutes of the corporation, which minutes contain no reference to bylaws.

Home Bk. v Ratcliffe, 206-201; 220 NW 36

8384 Stockholders entitled to names of stockholders.

Issuance of unpaid stock—pledge to innocent party—estoppel. A corporation which issues and delivers its corporate shares of stock, without receiving payment therefor, estops itself to question such issuance and delivery after the stock has been pledged by the holder thereof to a good-faith pledgee for value and without notice of the fact of nonpayment.

Bankers Tr. Co. v Rood, 211-289; 233 NW 794; 73 ALR 1421

Right to examine books and records. An administrator and the heirs at law of a deceased stockholder in a corporation, when refused an examination by the corporation, have the right, without any plea of good faith, to an order of court, in an appropriate proceeding, permitting them and their necessary assistants to examine the books and records of the corporation in order to determine the financial condition of the corporation and the value of its stock.

Becker v Trust Co., 217-17; 250 NW 644

Right to examine records. A stockholder of a corporation has a right, solely on the basis of his stockholdership, in good faith to inspect, examine, and copy the corporate stock records and records pertaining to the financial condition of the corporation, and if his application for such purpose is not in good faith, the corporation must so allege and prove.

Ontjes v Harrer, 208-1217; 227 NW 101

8385 Stock book and transfers.

Discussion. See 16 ILR 430—Mandamus to inspect books

Arbitrary determination of value of stock. The plans for the reorganization of a corporation may not arbitrarily fix the value of the stock of a dissenting stockholder.

Ontjes v Bagley, 217-1200; 250 NW 17

Banks—surrender of management to superintendent—scope of act. The right of a stockholder in a bank, or his representative, to have or make an examination of the books and records of the bank in order to determine its financial condition and the value of its corporate stock, is not negatived or suspended by an emergency act of the legislature providing for the taking over of the bank and of its management by the superintendent of banking on application of the bank directors and suspending legal and equitable remedies during the time of such management.

Becker v Trust Co., 217-17; 250 NW 644

Dissolution—receiver's general sale power in decree without further order—validity—stock transfer compelled. A receiver in a partnership dissolution, while having no inherent powers but only those conferred by the appointing decree and subsequent orders, may, nevertheless, under a decree definitely granting general power to sell property without prior application to the court, make a sale of stock at an adequate price involving no bad faith, which sale, being by an officer of the court requiring court approval, is, when set out in and approved as part of an annual report, a completed valid sale entitling purchaser to a stock transfer on the proper corporation records.

Van Alstine v Bank, 224-1311; 278 NW 604

Evidence—competency. The duly identified stock book and stubs thereof of a corporation are admissible on the issue whether the person to whom the stock was issued was, in fact, a stockholder.

Gruetzmacher v Quevli, 208-537; 226 NW 5

Failure to transfer bank stock—estoppel to deny ownership. The appearance on the corporate stock record of a person's name as owner will not of itself estop such person to deny ownership of stock to escape a "double liability" assessment.

Bates v Bank, 223-1215; 275 NW 91

Genuineness of corporate records. In an action against the secretary of a corporation individually, the record proceedings of the corporation are admissible against him, when material, upon an admission by such secretary that he believed them to be such records, even tho he states such belief as a conclusion, or bases his belief on hearsay, and even tho he states that he does not know that they were correctly kept.

Helberg v Zuck, 201-860; 208 NW 209

Knowledge of falsity—opportunity to learn truth. The purchaser of corporate shares of stock will not be permitted to say that he relied to his damage on false representations as to the assets of the corporation and the value thereof, and as to amount originally paid in on the stock and the dividends declared, when, at the time the representations were made, he personally knew that some of the representations were false, and when, at said time, he had equal opportunity with the seller to know and learn the actual truth of the remaining representations but did not avail himself of said opportunity.

Wead v Ganzhorn, 216-478; 249 NW 271

Right to examine. Principle reaffirmed that a person has no right to examine the stock books and transfer records of a corporation in furtherance of a purpose which is inimical to the corporation.

Drennan v Ins. Co., 200-931; 205 NW 735

Mandamus—proper party plaintiff. One who, as an attorney in fact (tho not an attorney at law), is in good faith interested on behalf of his principal in a transfer of corporate stock, and who will become entitled to a compensation if he succeeds in collecting his client's claim, has such interest as will enable him to maintain mandamus to compel the corporation to permit an examination of the stock books and transfer records of the corporation.

Drennan v Ins. Co., 200-931; 205 NW 735

Right to examine records. A stockholder of a corporation has a right, solely on the basis of his stockholdership, in good faith to inspect, examine, and copy the corporate stock records and records pertaining to the financial condition of the corporation, and if his application for such purpose is not in good faith, the corporation must so allege and prove.

Ontjes v Harrer, 208-1217; 227 NW 101

Order for examination. An order by the trial court commanding a corporation to permit an examination of its "stock books and records" will be modified on appeal by expunging the reference to the "records".

Drennan v Ins. Co., 200-931; 205 NW 735

Partnership—corporation as part of assets. Where a corporation is the exclusive property of a partnership, its affairs are subject, in an accounting between the surviving partners and the representatives of a deceased partner, to investigation, correction, and review.

Fleming v Fleming, 211-1251; 230 NW 359

Stock—wrongful issuance — cancellation in equity. Where a corporation which succeeds to the business of two partners agrees to pay all outstanding debts of the partnership, a hypothecation of corporate stock of one of the two stockholders as security for one of said debts manifestly works no transfer of title to said stock to the corporation, and where the debt is paid with corporate funds and the stock certificate is returned, the wrongful act of the nonhypothecating stockholder in causing a new stock certificate to be issued to himself for one-half of the returned shares will be cancelled by proper action in equity.

Petersen v Heywood, 212-1174; 236 NW 63

Subscriptions—burden of proof. In an action by a corporation on a stock subscription contract for stock in an unorganized but contemplated corporation, plaintiff has the burden to establish every nonadmitted fact entitling it to recover, even tho defendant, in addition to a limited general denial, pleads in great detail that plaintiff's corporate organization was wholly beyond the contemplation of his subscription contract.

Cedar R. Amu. Assn. v Wymer, 213-1012; 240 NW 644

8386 Transfer of shares.

Effect on other stockholders. Transaction reviewed wherein the majority stockholder of a bank in good faith purchased certain frozen assets of the bank in the form of preferred and common corporate stock, and wherein the remaining stockholders of the bank likewise purchased the bank stock of the majority stockholder, and held in no manner to prejudice the rights of other holders of like preferred stock or to furnish any grounds for judgment either against the bank or against the majority stockholder in favor of such other preferred stockholders.

Boyd v Bank, 205-465; 218 NW 321

Assessment—when estate beneficiary liable. One who, in the final settlement of an estate, receives the corporate bank stock of the deceased intestate as his or her share of the estate, becomes a "stockholder", and is subject to assessment like other stockholders, even tho the stock has not been transferred on the stock books of the bank.

Bates v Bank, 218-1320; 256 NW 286

Bank official's wife—stock transfer to husband. Where a wife transfers her bank stock to her husband, a bank officer, who informed other bank officials thereof, who contributed to the insolvent bank on a basis including this stock and who personally, instead of by proxy as previously, voted this stock, he was in fact the actual owner of bank stock, even tho it had not been transferred to him on the bank's books, and the double liability assessment is not recoverable from the wife.

Bates v Bank, 223-1215; 275 NW 91

Contract for equality in stock holdings—violation—injunction. Equity will, by injunction and other proper orders, protect a stockholder of a corporation from a violation of his contract with another stockholder under which

equality of stockholdings of the two stockholders was clearly intended.

Holsinger v Herring, 207-1218; 224 NW 766

Disposal of assets. Principle recognized that, at common law, neither the board of directors of a corporation nor a majority of the stockholders thereof, can, against the dissent of a single stockholder, dispose of all the assets of the corporation when the corporation is conducting a prosperous business.

Graeser v Finance Co., 218-1112; 254 NW 859

Failure to transfer bank stock—estoppel to deny ownership. The appearance on the corporate stock record of a person's name as owner will not of itself estop such person to deny ownership of stock to escape a "double liability" assessment.

Bates v Bank, 223-1215; 275 NW 91

Former stockholder—no authority. Stockholders who had sold their stock after the corporation had recovered a judgment no longer had an interest in the judgment which remained the property of the corporation even when its name was changed, so a compromise settlement of the judgment had no validity when made by attorneys with consent given by one former stockholder, as only the corporation could authorize such settlement.

Glenwood Lbr. Co. v Hammers, 226-788; 285 NW 277

Limitation on transfer. A provision in the duly recorded articles of incorporation of a corporation for profit to the effect that the corporate shares of stock shall not be transferred to persons who are not then owners of stock, unless the proposed new stockholder is recommended by two directors, is neither violative of statute nor of public policy.

Mason v Tel. Co., 213-1076; 240 NW 671

Notice to agent—effect. The fact that an officer of a bank, during the administration of an estate, acted as an appraiser of corporation shares of stock standing in the name of the deceased is no notice to him or to the bank that corporate stock of the same kind hypothecated to the bank several years later belonged to the estate, and not to the corporate record owner thereof.

Klatt v Bank, 206-252; 220 NW 318

Officers—purchase of corporate stock by officers—fiduciary relation. Principle recognized that an officer or director of a corporation occupies a fiduciary relation towards a fellow stockholder in the purchase of the latter's corporate stock, and is under duty to disclose to the selling stockholder evidence which has bearing on the value of the stock and which has come to him as such officer or director. Held, principle not applicable under certain facts.

Humphrey v Baron, 223-735; 273 NW 856

Pledgee of stock and foreclosure purchaser entitled to record transfer. A good-faith pledgee of corporate shares of stock, for value and without notice that the pledgor has not paid the corporation for the stock, and the purchaser of said stock on foreclosure of the pledge, are both entitled to have said stock transferred on the records of the corporation in order to show their respective ownership.

Bankers Tr. Co. v Rood, 211-289; 233 NW 794; 73 ALR 1421

Right to corporate transfer of stock — laches—effect. Delay of some seven years, by a pledgee of corporate shares of stock, to enforce his right to have the stock transferred on the corporate stock records, will not bar the enforcement of said right when there are no unprotected rights of third parties intervening, and when the corporation has not been harmed by the delay.

Bankers Tr. Co. v Rood, 211-289; 233 NW 794; 73 ALR 1421

Right to corporate transfer of stock—when barred. The right of the pledgee of corporate shares of stock to have said stock transferred on the corporate stock records is based on a written contract arising out of the articles of incorporation, bylaws, certificates of stock, and statute, and consequently such right may be enforced at any time within the ten-year period following a written demand for such transfer, unless the enforcement of such right is barred by laches.

Bankers Tr. Co. v Rood, 211-289; 233 NW 794; 73 ALR 1421

Statutes and articles as part of contracts. The corporation charter and the statutes of the state of domicile of the corporation become a part of any contract between the corporation and a purchaser of its stock.

Bishop v Middle States Co., 225-941; 282 NW 305

Stock—assignment without delivery of certificate. A written assignment by the owner of corporate shares of stock of all his right, title and interest therein conveys good title, (1) even tho the owner places the assignment in escrow and causes it, together with the stock certificate, to be delivered to the assignee after his death, and (2) even tho the assignor, prior to his death, pledges the said stock certificate as security for a personal loan, which his estate later paid.

Leedham v Leedham, 218-767; 254 NW 61

Stock — corporation having first option to buy—no restriction on judicial sale—mandamus to transfer. Sale of assets of insolvent national bank made in obedience to an order of court is not a voluntary but a judicial sale; therefore, a corporation whose stock was sold thereunder is not entitled to notice thereof, even tho its articles of incorporation required notice of proposed sale of stock, and manda-

mus will lie to compel the transfer of said stock on its records.

McDonald v Farley, 226-53; 283 NW 261

Stock—restraint on transfer—strictly construed. Restraints on powers to transfer corporate stock, or to assign leases, must be strictly construed.

McDonald v Farley, 226-53; 283 NW 261

Stockholder — who is — wholly inadequate evidence. In an equitable action to enforce, against an estate, "double" liability on bank stock, a finding and decree (based almost exclusively on the testimony of the record owner of said stock), that the deceased had actually owned said stock for some thirty years and was such owner at the time of his death, will (notwithstanding the deference accorded to the trial court in judging of the credibility of witnesses) be annulled on appeal as without adequate support in the evidence when the actions and conduct of said record owner during substantially all of said time in asserting exclusive ownership in himself, even after the death of the deceased, is wholly at war with his present testimony that he had never owned said stock and that the deceased had always owned it.

Andrew v Citizens Bank, 220-219; 261 NW 810

Transfer of shares — bona fide purchaser pending litigation. A purchaser in good faith and for value of corporate shares of stock will be protected in his ownership even tho the purchase was made pending litigation over the stock, when at the time of purchase there was no lien on or against the stock, and when the purchaser had no knowledge of said pending litigation.

Hewitt v Cas. Co., 212-316; 232 NW 835

Transfer of stock after expiration of charter —effect. When the charter of a bank expires, the legal existence of the corporation terminates; likewise terminates the legal right to transfer the stock in such sense that the transferer ceases to be a stockholder.

Andrew v Bank, 211-649; 234 NW 542

8387 Transfer of shares as collateral.

Belated notice. A levy on corporate shares of stock is not affected by the fact that, shortly after the levy was made, an officer of the corporation orally informed the levying officer that the stock had been transferred as collateral security.

Reimers v Tonne, 207-1011; 221 NW 574

Collateral holder of stock—nonpermissible contract. A national bank which holds as collateral to an individual loan a majority of the corporate stock of a manufacturing corporation has no power to enter into a contract with minority stockholders to the effect that said minority stockholders shall, under the renewal of said corporation, hold certain lucrative positions with the said renewed corporation.

Clark v Bank, 219-637; 259 NW 211

Failure to give notice. One who holds corporate shares of stock as collateral must, in order to preserve his lien on the stock, give to the secretary of the corporation whose stock is so held the statutory written notice of the fact that he holds said stock as collateral security; and it is quite immaterial that the secretary has acquired knowledge of such collateral holding from sources other than from the collateral holder.

Maloney v Storjohann, 206-721; 221 NW 208
Reimers v Tonne, 207-1011; 221 NW 574

Improper payments—assessment on bank stock. An executor will not be given credit for estate funds voluntarily used by him in discharging an assessment on bank stock which is held by the estate solely as collateral security.

In re Moe, 213-95; 237 NW 228; 238 NW 718

Ineffectual notice. Writing reviewed, and held wholly insufficient to constitute written notice to the secretary of a corporation that certain of its corporate stock had been collaterally hypothecated.

Reimers v Tonne, 207-1011; 221 NW 574

Pledge of stock—practical construction of parties. A pledge of corporate shares of stock as collateral security will not be deemed novated into subsequently taken security and by an agreement in connection therewith, when such novation was never discussed between the parties, when the collateral holder never intended such novation, when pledgor's claim of novation was very belated, and when the parties had by their practical conduct negatived such novation.

Winfield Bk. v Snell, 208-1086; 226 NW 774

Sale of pledge—legality. A good faith sale by a pledgee to his son of corporate stock pledged as collateral security for a debt is valid, no relation of principal and agent existing.

Williams v Herman, 216-499; 249 NW 215

8390 Liability of collateral holder.

Authority of depositary — assessment on corporate stock. The holder in escrow of corporate stock has no implied authority to pay an assessment on said stock.

Harris v Bills, 203-1034; 213 NW 929

8392 Expiration and closing of business.

Atty. Gen. Opinion. See '28 AG Op 368

Receivership. The court has a discretion as to the appointment of a receiver to close up the affairs of the corporation.

McCarthy Co. v Dist. Ct., 201-912; 208 NW 505

8394 Liability of stockholders.

Discussion. See 2 ILB 1—Stockholder's liability; 3 ILB 130—Issuance of corporate stock for property; 19 ILR 101—Rescission by subscriber

ANALYSIS

I LIABILITY IN GENERAL
II LIABILITY TO CREDITORS

I LIABILITY IN GENERAL

Discussion. See 11 ILR 369—Liability of subscribers to corporate stock

Accommodation and interested guarantors distinguished. Principle reaffirmed that guarantors, who become such solely as an accommodation, occupy a very materially different position in the law than guarantors who become such in order to protect matters in which they have a financial interest. Stockholders, for instance, in guaranteeing payment of the debts of the corporation are not favorites of the law.

West Branch Bank v Farmers Exc., 221-1382; 268 NW 155

Assessment—nonpower of superintendent. The superintendent of banking has no power to order an assessment on the stockholders of an insolvent bank.

Home Bank v Berggren, 211-697; 234 NW 573

Assessment on stockholders—allowance of claims—conclusiveness. On appeal from an order of assessment on stockholders who have not paid for their stock, the court will not, on the plea of the nonappealing receiver, determine whether the allowance of a claim against the corporation is conclusive on the said stockholders.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Assessment on unpaid stock subscriptions—"incorporation" as basis for order. An incorporation apparently effected by legal and regular steps, but actually permeated from its very inception by gross fraud, nevertheless creates a "corporation" in the sense that an assessment by the court on unpaid stock subscription contracts will not be set aside on the ground that there never was a corporation de jure or de facto.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Authorization of corporate indebtedness—effect. The stockholders of a legal incorporation do not, by authorizing their board of directors to incur corporate obligations, render themselves personally liable to contribute to the loss suffered by the directors who incurred personal liability by executing their personal notes.

Fulton v Farmers Exch., 207-371; 222 NW 889

Double liability—credit by amount of former assessment unallowable. One who purchases corporate bank stock by paying an existing assessment thereon (and but little in addition thereto) will not be permitted, after the bank has become insolvent, to assert that said assessment was coercive as to him, and that the amount of such assessment should be credited on his "double liability."

Andrew v Bank, 211-649; 234 NW 542

Payment in property other than money. Where due authorization is obtained to pay for corporate stock with personal property other than money, the unquestioned assumption by the corporation, upon the issuance of stock, of full ownership of such personal property is equivalent to a formal bill of sale of such property.

Comstock v Wood, 204-1027; 216 NW 640

Personal liability of stockholder who appropriates corporate assets. A stockholder who appropriates to his own personal use substantially all the assets of the corporation becomes personally liable for the taxes theretofore levied against the corporation, the appropriation being in excess of said taxes.

Manning v Auto Co., 210-1182; 232 NW 501

Knowledge of insolvency of bank—not imputable to nonactive director. Knowledge that a bank is insolvent is not imputed to one who is a director and minor stockholder of the bank, when he takes no active part in its management and has no actual knowledge of the insolvency.

In re Smith, 228- ; 289 NW 694

Stockholders—acts constituting. One who buys corporate bank stock necessarily becomes a stockholder even tho the bank officials in good faith, but mistakenly, represented that such purchase would rehabilitate the impaired capital of the bank.

Andrew v Bank, 211-649; 234 NW 542

Subscriptions—burden of proof. In an action by a corporation on a stock subscription contract for stock in an unorganized but contemplated corporation, plaintiff has the burden to establish every nonadmitted fact entitling it to recover, even tho defendant, in addition to a limited general denial, pleads in great detail that plaintiff's corporate organization was wholly beyond the contemplation of his subscription contract.

Cedar Rapids Co. v Wymer, 213-1012; 240 NW 644

Subscription — liability. A subscriber for corporate stock on specified terms of payment is liable on his contract of subscription (except in those cases where the defensive plea of fraud is available), even tho no certificate of stock has been or can be legally issued to him until payment has been made in full,

I LIABILITY IN GENERAL—concluded

and even tho he is not deemed a "stockholder" until he has paid in full; and this is true irrespective of the statute which declares the stockholder's liability for unpaid installments on stock "owned by him".

Lex v Selway Corp., 203-792; 206 NW 586

Subscriptions—unexecuted rescission. A subscriber for corporate shares of stock who, while the corporation is a going concern, enters into a bona fide agreement with the corporation for the complete rescission of the stock-subscription contract, will be entitled to judgment against a subsequently appointed receiver for the amount of the stock-subscription notes executed by him and transferred by the corporation and not returned to him as provided in the contract of rescission.

Lex v Selway Corp., 203-792; 206 NW 586

Unallowable plea of satisfaction. A subscriber for corporate shares of stock may not avoid a judgment for the amount due on his subscription by a showing that he had indorsed to the corporation the note of a third party under an agreement that the corporation would collect the note and pay to the subscriber the balance remaining after satisfying the stock-subscription contract.

Lex v Selway Corp., 203-792; 206 NW 586

II LIABILITY TO CREDITORS

Determination of corporate debts—conclusiveness. For the purpose of determining the probable debts of an insolvent corporation as a basis for an assessment on unpaid stock subscriptions, the allowance of a claim is conclusive on the receiver of the corporation.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Foreign receiver—comity. A foreign receiver may maintain in this state an action to recover of a corporate stockholder a statutory liability on stockholdings.

Gruetzmacher v Quevli, 208-537; 226 NW 5

Fraud in incorporation—effect on title of receiver. Even tho the court in proceedings for the dissolution of a so-called corporation found and decreed, in effect, that the concern was conceived, born, and nurtured in fraud, nevertheless, in receivership proceedings for the ordering of an assessment on those who had contracted for stock in the concern and had not paid therefor, the receiver will be deemed to have prima facie title to such contracts of subscriptions.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Fraud pleadable against corporate creditors. One who is fraudulently induced to subscribe for corporate stock and to execute his negotiable promissory note in payment therefor may plead said fraud against a creditor of the corporation who, by indorsement, became a collateral security holder of the note, with full knowledge that it was given in payment for stock, (1) whether the creditor sues on the note or (2) whether the creditor sues on the theory (conceding, arguendo, its legal permissibility) that the indorsement of the note worked an assignment to him of the corporation's right of action against the subscriber for unpaid installments of stock.

Arnd v Grell, 200-1272; 206 NW 613

Fraudulent subscriptions — belated rescission. A party who has been fraudulently induced to subscribe for corporate shares of stock may not, after the corporation has been dissolved, and after a receiver has been appointed to close up its affairs, have his contract of subscription cancelled and rescinded and the status quo restored by the court in the receivership proceedings.

Lex v Selway Corp., 203-792; 206 NW 586
State v Packing Co., 206-405; 220 NW 6

Subscriptions—fraud in avoidance. A subscriber for corporate shares of stock whose contract of subscription has been fraudulently induced by the corporation or by its agents may avail himself of such fraud and avoid all liability on such contract:

1. By properly and with due diligence rescinding such contract while the corporation is a going concern, tho insolvent, or
2. By pleading said fraud (assuming due diligence) as a complete defense to an action by the receiver of the insolvent corporation to recover on such contract for the benefit of corporate creditors, unless the receiver avoids the plea by proof of the existence of unpaid corporate debts contracted subsequent to the said contract of subscription.

Lex v Selway Corp., 203-792; 206 NW 586
State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Issuance of stock—estoppel to question. One, who has explicit knowledge of the facts under which corporate shares of stock were issued to him and later accepts and retains a dividend paid on the stock, will not, at least as against creditors of the corporation, be heard to say that the stock was improperly issued to him.

Andrew v Bank & Trust, 219-939; 258 NW 925

Merger and bar of defenses—nonbar or estoppel. A decree that a subscriber for corporate stock could not recover of the corporate receiver the amount already paid to the corporation on his subscription contract—such being the sole issue—does not estop the subscriber, when sued by the receiver for the unpaid amount of said contract, from pleading in de-

fense that the purported corporation never had any corporate existence.

State v Packing Co., 216-1344; 249 NW 761; 90 ALR 1339

Order for assessment—limitation of action. The power of the court to enter an order of assessment on unpaid written contracts of subscription for corporate stock in a corporation which has become insolvent and is under receivership, is not barred from and after the lapse of five years from the time the attorney general brought the action for dissolution and alleged the insolvency of the corporation, nor from and after the lapse of five years from the time when the insolvency of the corporation was definitely determined.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Subscription contract—when rescission unallowable. Principle reaffirmed that a contract of subscription for corporate shares of stock cannot be rescinded after the insolvency of the corporation, there being corporate creditors who became such after the subscription was executed.

Andrew v Bank & Trust Co., 219-921; 258 NW 911

"Trust fund doctrine"—applicability to dissolved corporation. The "Trust Fund Doctrine" —the equitable rule that the entire property of a corporation, including unpaid subscriptions to its capital stock, becomes a trust fund in the hands of the receiver for the payment of the claims of innocent creditors, applies to cases or instances where the corporation has been dissolved because of fraud, as well as to cases or instances where the corporation has simply become insolvent.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Unpaid stock subscription—nonliability. A subscriber for corporate stock who is not a promoter of the purported corporation is not liable on his fraud-induced unpaid stock subscription contract in an action by the receiver of the corporation when the charter of the corporation has been judicially annulled, subsequent to the subscription contract, by the state, for fraud perpetrated on the state in obtaining the charter; in other words, the so-called English "Equitable Trust Fund Doctrine" does not apply to such a condition.

Fundamental reason: Such purported corporation, having been conceived, born, and nurtured in fraud, was never, in truth or fact, a corporation de jure or de facto, in a business sense.

State v Packing Co., 216-1344; 249 NW 761; 90 ALR 1339

Unpaid subscriptions—enforcement by receiver. The statutory liability of a corporate stockholder on the unpaid installments of his stock is not enforceable, after the corporation has passed into the hands of a trustee in bankruptcy, by an individual corporate creditor for his own sole benefit, but by an appropriate action for the benefit of all creditors.

Arnd v Grell, 200-1272; 206 NW 613

Unpaid subscriptions—law (?) or equity (?). An action by a receiver of a dissolved corporation to collect on the unpaid stock subscriptions of various parties must be by separate, ordinary proceedings at law, and not jointly in equity, when the demand is solely for a money judgment; and this is true even tho in equity a multiplicity of suits would be avoided.

Kosman v Thompson, 204-1254; 211 NW 878; 215 NW 261

Unpaid stock subscriptions—duty of receiver. A receiver who has so far acted in behalf of all creditors and against all parties adversely interested to the creditors, may proceed, and will be permitted to proceed, under an order of court, against stockholders who have not paid for their stock, notwithstanding the possibility that at some time in the future it may become necessary for the court to adjust the conflicting rights and equities between creditors or between creditors and stockholders.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Voidable subscription contract. A stock-subscription contract to the effect that the corporation will accept, in payment for its stock, future services of undetermined value to be rendered by the subscriber is voidable by the corporate receiver who is seeking to recover for the benefit of creditors the amount due on the stock subscription.

Lex v Selway Corp., 203-792; 206 NW 586

Wrongful payment of dividends—nonobligation to return. Stockholders who, while their corporation is solvent and so remains, in good faith receive dividends which, unbeknown to them, are paid from corporate capital and not from corporate profits or surplus, are not, in case the corporation subsequently becomes insolvent, liable, in an action at law, to corporate creditors for the amount of such dividends. And it is quite immaterial whether the claimed liability is predicated on the statutes (§§8377, 8378, C., '35) or on and under the so-called corporate "trust fund" doctrine of the common law.

Bates v Brooks, 222-1128; 270 NW 867; 109 ALR 1371

8398 Indemnity—contribution.

Right to contribution. Corporate stockholders who have fully paid for their stock may, upon the insolvency of the corporation, maintain an action for contribution against stockholders who have not fully paid for their stock, in order that, in the final settlement of the corporate affairs, the burden of discharging

corporate obligations may rest upon all stockholders in proportion to their respective stock holdings or obligations; and it is immaterial that all the stockholders were fraudulently induced by the corporation to subscribe for the stock.

Lex v Selway Corp., 203-792; 206 NW 586

8400 Production of books.

See annotations under §11316 et seq.

Essential purposes of writ of certiorari. On certiorari to review an order of the district court relative to the production of books and papers, the sole inquiry is whether the lower court had jurisdiction to enter the order in question, not whether the lower court made errors in exercising its jurisdiction which were correctible on appeal.

Independent Order v Scott, 223-105; 272 NW 68

Foreign corporations—visitatorial power of state. A foreign corporation transacting business within this state is subject to all the remedies available against a domestic corporation. So held under an application for an order for the production of papers and documents.

Independent Order v Scott, 223-105; 272 NW 68

Insufficient authentication. A purported financial statement of a corporation is manifestly inadmissible, in the absence of testimony as to its authenticity or as to the author thereof and the circumstances of its preparation.

Helberg v Zuck, 201-860; 208 NW 209

Minority stockholders — right to inspect books. The minority stockholders of a dissolved corporation have the right, (in an action for an accounting against another corporation which has succeeded to the business, assets, books, and papers of the dissolved corporation) on a proper petition therefor, to an order for the production and inspection of the material books, records, and papers of the dissolved corporation and of the succeeding corporation.

National Co. v Dist. Court, 214-960; 243 NW 727

Order on strangers to action. The jurisdiction of the court, on a proper petition, to order a party to an action to produce books, papers, etc., does not embrace the jurisdiction to enter such order against one who is not a party to the litigation. And an amendment to the petition for such order which does no more than to insert in the caption the names of various parties as defendants does not make such parties defendants in the statutory sense.

National Co. v Dist. Court, 214-960; 243 NW 727

Order for production—inability to enforce —effect. That a foreign corporation doing business in this state may not comply with an order for the production of documents and papers and that the court may be unable to enforce its order, is no adequate reason for refusing the order or for annulling such order when made.

Independent Order v Scott, 223-105; 272 NW 68

Place of inspection—balance of convenience. A foreign corporation, doing business in this state, has no absolute right to demand that its documents and papers be inspected at its home office in the foreign state. So held as to documents and papers which did not pertain to the daily operations of a foreign insurance company.

Independent Order v Scott, 223-105; 272 NW 68

Place of inspection of books. One ordered to produce books for inspection may have the right to insist that said inspection be made at his principal place of business, and not at a place where said books will pass, temporarily, entirely out of his possession.

National Co. v Dist. Court, 214-960; 243 NW 727

Protection of private papers. A party defendant may not be required to expose to his adversary or the public, his private business affairs which have no relation to the matters in litigation. If his books contain matters relevant to the litigation, and also purely nonrelevant personal matters, the order for the production and inspection of the books must, by some proper provision, protect the latter.

National Co. v Dist. Court, 214-960; 243 NW 727

Relevancy—determination of issue. The affidavit of one against whom an order for the production of books is sought, to the effect that said books are wholly irrelevant to the matter in litigation, will be deemed presumptively true.

National Co. v Dist. Court, 214-960; 243 NW 727

Subpoena duces tecum—office. The remedy of a party to an action who desires the production of books, papers, etc., in the possession of a stranger to the action is to cause to be issued and served a subpoena duces tecum.

National Co. v Dist. Court, 214-960; 243 NW 727

8401 Estoppel.

Assessment on unpaid stock subscriptions— "incorporation" as basis for order. An incorporation apparently effected by legal and regular steps, but actually permeated from its very inception by gross fraud, nevertheless creates a "corporation" in the sense that an

assessment by the court on unpaid stock subscription contracts will not be set aside on the ground that there never was a corporation de jure or de facto.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Burden of proof. Persons who are in good faith contracted with and extended credit as partners are personally liable for the resulting debt, in the absence of evidence by them that they are stockholders in a corporation which is at least a de facto corporation.

Wilkin Co. v Co-op. Assn., 208-921; 223 NW 899

Cancellation of deed—statements to attorney subsequent to execution—incompetency. In an action by a grantor to set aside deed, testimony as to the contents of statements made by grantor to his attorneys eight days after execution of deed, was incompetent and inadmissible.

Lawson v Boo, 227-100; 287 NW 282

Collateral attack as unallowable defense to action. A foreign de facto corporation cannot be defeated in its action to prevent an injury to its property by the plea that it has no valid corporate existence in that it has attempted in its incorporation to effect a combination of powers prohibited by the laws of the state of its attempted incorporation.

First T. & S. Co. v U. S. Gypsum, 211-1019; 233 NW 137; 73 ALR 1196

Collateral attack on corporate existence after change of name. When a corporation changed its name by amending its articles of incorporation, and published notice of the amendment only one week instead of four, as required by statute, it continued to exist as either a de jure or de facto corporation, and its corporate existence could be attacked only by direct action, and not collaterally.

Glenwood Lbr. Co. v Hammers, 226-788; 285 NW 277

De facto corporation defined. A de facto corporation is one formed and acting as such under an authorizing statute, tho its incorporation may be defective.

First T. & S. Co. v U. S. Gypsum, 211-1019; 233 NW 137; 73 ALR 1196

De facto corporation. A de facto corporation results from (1) the good-faith execution of articles of incorporation under an authorizing statute, (2) the filing of said articles with the officer designated by the statute, (3) the imperfect certification of said articles by the secretary of state to the recording officer, (4) the due recording of said articles, (5) the due issuance of a permit to transact business as a corporation, and (6) the actual transaction of such business.

Wilkin Co. v Co-op. Assn., 208-921; 223 NW 899

De jure corporation. A statute which provides that "no corporation shall have legal existence until such [certified] articles be left for record", does not mean that a failure to strictly comply with the statute prevents a de facto corporation from coming into existence.

Wilkin Co. v Co-op. Assn., 208-921; 223 NW 899

Liability of stockholders—de facto corporation. A creditor who knowingly contracts with and extends credit to a corporation as such, tho it is only a de facto corporation, may not, in the absence of a statute to the contrary, hold the stockholders personally liable for the resulting debt.

Wilkin Co. v Co-op. Assn., 208-921; 223 NW 899

Discrimination as to permissible defense to action. The statute prohibiting the defensive plea of want of legal incorporation to collateral actions by or against an acting corporation is not unconstitutional on the ground that it is arbitrary and discriminatory.

First T. & S. Co. v U. S. Gypsum Co., 211-1019; 233 NW 137; 73 ALR 1196

Estoppel to plead invalidity—scope of statute. This statute applies to all corporations, domestic or foreign.

First T. & S. Co. v U. S. Gypsum Co., 211-1019; 233 NW 137; 73 ALR 1196

Joint stock land banks—legal status. Joint stock land banks, tho organized under federal statutes, are privately owned corporations, organized for profit to their stockholders through the business of making loans on farm mortgages, are not governmental instrumentalities, and are suable in the proper state courts.

Higdon v Lincoln JSL Bk., 223-57; 272 NW 93

Unincorporated association—validity of contracts—estoppel. One who contracts with an association as a legal entity capable of transacting business, and receives money or other valuable consideration therefrom, may not deny the validity of the contract on the ground that the association has no legal existence.

Lamm v Stoen, 226-622; 284 NW 465

Unpaid stock subscription—nonliability. A subscriber for corporate stock who is not a promoter of the purported corporation is not liable on his fraud-induced unpaid stock subscription contract in an action by the receiver of the corporation when the charter of the corporation has been judicially annulled, subsequent to the subscription contract, by the state, for fraud perpetrated on the state in obtaining the charter; in other words, the so-called English "Equitable Trust Fund Doctrine" does not apply to such a condition.

Fundamental reason: Such purported corporation, having been conceived, born, and nur-

tured in fraud, was never, in truth or fact, a corporation de jure or de facto, in a business sense.

State v Packing Co., 216-1344; 249 NW 761; 90 ALR 1339

8402 Dissolution—receivership.

Discussion. See 19 ILR 95—Power of equity; 20 ILR 113—Foreign assets; 22 ILR 60—Tort claims in receiverships

"Corporation" defined. The filing of articles of incorporation and the due issuance by the secretary of state of a certificate of incorporation, constitutes a "corporation" within the meaning of this section.

Kosman v Thompson, 204-1254; 211 NW 878; 215 NW 261

Attorney general as "adverse party". A liquidator (or receiver) was appointed in a foreign state to liquidate an insolvent insurance company chartered in said state, and doing business in Iowa. The attorney general of Iowa, in his official capacity, at once instituted ancillary receivership proceedings in Iowa, and, in time, certain claims were duly allowed, in said ancillary proceedings, in favor of creditors of the insolvent. The Iowa court later ruled, on intervention by the foreign liquidator, that funds in the hands of the ancillary receiver should be retained by him and distributed under the ancillary receivership.

Held, an appeal by the foreign liquidator from said latter ruling imperatively necessitated service of notice of appeal on the attorney general or on his successor in office.

State v Southern Surety, 223-558; 273 NW 129

Claims—lapsed time for hearing—reopening discretionary. Trial court administering receiverships has a discretion dependent upon equitable circumstances and not a mandatory duty to permit a claim to be presented and heard after the time fixed therefor.

Headford Co. v Associated Co., 224-1364; 278 NW 624

Claims—order approving disallowance construed. An order of court in an insolvent corporation receivership proceedings in the language, "The claims filed * * * be and the same are hereby allowed as classified by the receiver herein * * *", construed to mean an approval of the disallowance of a claim by the receiver.

Headford Co. v Associated Co., 224-1364; 278 NW 624

Cross-petition defense—state as proper party—belated objections. In an action to dissolve a mining corporation, question whether state, not being stockholder or creditor of the mining corporation, was proper party to make defense to a cross petition, which question not having been raised in the trial court, may not be raised for the first time and reviewed on appeal.

State v Exline Co., 224-466; 276 NW 41

Dissolution and annulment of incorporation—effect. Even tho a so-called incorporation is dissolved and its life wholly annulled, nevertheless, the receiver appointed for the purpose of winding up its affairs must be deemed to represent the corporation for said purpose.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Dissolution by state—corporate officer's lien denied—mining property. In an action by the state for dissolution of a mining corporation, a chattel mortgage and conditional sale contract covering the mine property are fraudulently invalid and may not be established as first liens when held and asserted by a defendant who, among other things, as an incorporator, director, president, and general manager of the corporation, secured such instruments while acting in his fiduciary capacity for the purpose of insuring payment to himself of debts previously created, thus serving his personal interests, rather than as fiduciary, preserving the assets for the creditors and stockholders.

State v Exline Co., 224-466; 276 NW 41

Effect on pending actions. A duly rendered decree of dissolution of a foreign corporation, at the instance of the state under the laws of which said corporation was organized, is, in effect, an executed sentence of death; being such, said decree ipso facto works an abatement, (1) of an unadjudicated action in rem pending in this state against said dissolved corporation, and (2) of garnishment proceeding pending in connection with said action. Under such circumstances, the garnishee may properly move for and be granted an order of discharge.

Peoria Co. v Streator Co., 221-690; 266 NW 548

Existing garnishment—priority over receivership. The receiver of a defunct corporation takes the property of the corporation subject to the prior positive rights acquired by a creditor under a duly perfected garnishment of the admitted debtors of the corporation.

Watts v Surety Co., 216-150; 248 NW 347

Federal income tax on operating receiverships—nature of business. The federal statute requiring operating receiverships to pay income tax applies to a receiver, where a substantial part of business both before and after the appointment was the investment of corporation funds in securities and the collection of rents and profits, even tho the receiver was appointed to liquidate the business.

State v American B. & C. Co., 225-638; 281 NW 172

Foreign corporations—dissolution and receivership—effect. A foreign decree of disso-

lution of a corporation, and an order appointing a receiver to wind up its affairs, do not abate an action aided by attachment in this state, because the claim of the receiver of a foreign corporation to its property in this state will not be recognized as against the valid claims of resident attaching creditors.

Watts v Surety Co., 216-150; 248 NW 347

Fraud-induced subscriptions for stock—liability of subscribers. Principle reaffirmed that, under the "Trust Fund Doctrine," the receiver of an insolvent corporation may recover on an unpaid contract of subscription for stock of the corporation fraudulently obtained from the subscriber, provided that the receiver shows the existence of unpaid corporate debts which were contracted subsequent to the said contract of subscription.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Good cause. "Good cause" for total ouster may consist of any grounds which would support quo warranto.

Kosman v Thompson, 204-1254; 211 NW 878; 215 NW 261

Material considerations. On the issue whether a temporary receiver should be appointed, in an action by minority stockholders to liquidate the affairs of a corporation whose charter had expired, the court, always proceeding cautiously, will, inter alia, give due consideration to the following matters: (1) The fact that ordinarily such liquidation is effected through the corporate organization; (2) the relative financial holdings of the contending parties; (3) the fact that the parties agree that the inherent nature of the business requires a temporary continuation of the business as a part of the liquidation; (4) whether, from the nature of the business, the court would be practically compelled to choose a receiver from the management which is under attack; (5) the integrity of the past and present corporate management; (6) whether liquidation has been unduly delayed, in view of general economic conditions; (7) the probability of loss or impairment of assets under the present corporate management; (8) the solvency or insolvency of the corporation.

McCarthy Co. v Coal Co., 204-207; 215 NW 250; 54 ALR 1116

Optional remedies. When the state demands the complete ouster of a corporation, it may proceed in equity under this section, or at law in the form of quo warranto under §12417.

Kosman v Thompson, 204-1254; 211 NW 878; 215 NW 261

Order of payment. Serial bonds of different maturity dates must, in case of insolvency of the issuing company, be paid pro rata, and not pro tanto, when they are issued under a trust agreement under which the issuing company is obligated to keep on deposit with the trustee collateral securities to the full amount and value of the entire issue of that particular series.

Central Bank v Commercial Co., 206-75; 218 NW 622

Permissible defendants. All stockholders of a corporation are proper parties to an action by the state to dissolve the corporation.

Lex v Selway Corp., 203-792; 206 NW 586

Preferred stockholder may not complain. A preferred stockholder whose stock has fully matured has no legal interest in the continuation of the corporation, provided his right of priority to the assets be protected.

Boyd v Bank, 205-465; 218 NW 321

Receivers—dissolution of corporation—federal income tax liability. The state, not owning the property, has no such interest in a corporation under receivership as to prevent the federal government from collecting income tax therefrom, even tho the receivership arose out of the state's action in its governmental capacity for a dissolution of the corporation.

State v American B. & C. Co., 225-638; 281 NW 172

Right of minority stockholders. A receiver may, in an action by minority stockholders, very properly be appointed for a solvent corporation which is no longer a going concern, and is in process of liquidation, on a showing that the management is inefficient, negligent, and fraudulent, to the manifest detriment of the plaintiffs.

Crow v Bond & M. Co., 202-38; 209 NW 410

Right to question corporate management. The corporate management of a corporation may not be questioned by stockholders who became such subsequent to the acts in question.

Pomeroy v Bank, 203-524; 211 NW 219

"Trust Fund Doctrine"—applicability. The "Trust Fund Doctrine"—the equitable rule that the entire property of a corporation, including unpaid subscriptions to its capital stock, becomes a trust fund in the hands of the receiver, for the payment of the claims of innocent creditors—applies to cases or instances where the corporation has been dissolved because of fraud, as well as to cases or instances where the corporation has simply become insolvent.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Unpaid stock subscriptions — liability determined in receivership proceedings. An ancillary bill by a receiver of insolvent corporation to enforce collection upon unpaid stock subscriptions cannot be maintained in equity in the same court where receivership proceedings are pending, since the stockholders are not necessary parties to the receivership ac-

tion as they are represented by the corporation, itself, which is a party to the action, and the liability of such stockholders can be determined in the receivership action after which the receiver may proceed by action at law against the various subscribers for the unpaid stock subscriptions.

Britton v Andrews, 8 F 2d, 950

8404 False statements or pretenses.

Fidelity insurance—construction. The conduct of an officer of a bank in intentionally and deceitfully omitting to make any entry on the books of the bank of payments made on the bills receivable of the bank (other than a memorandum slip, hung on a spindle), with resulting loss to the bank, is covered by a bond or policy of insurance which guarantees indemnity against "dishonest or criminal acts or omissions" of said officers.

Andrew v Ind. Co., 207-652; 223 NW 529

Opinion evidence—assets of bank. A qualified expert accountant is competent to testify that certain proven payments of money to a bank "did not come into the assets of the bank as shown by the books and records of the bank".

Andrew v Ind. Co., 207-652; 223 NW 529

CHAPTER 385

CAPITAL STOCK

8408 Indorsement of amount paid.

Capital stock—money paid for stock—hemp production—effect of joint promotion. Tho only one of two persons jointly interested in processing hemp holds from a foreign corporation a contract for certain hemp production rights in Iowa and they induce another person to invest money for stock in an Iowa hemp corporation to be formed, the money will be considered as paid to both.

Smith v Secor, 225-650; 281 NW 178

Certificate reciting absolute ownership of stock—effect. A certificate of corporate stock which certifies that the holder "is the owner" of said stock cannot be deemed to give the transferee notice that the holder has not paid the corporation for the stock, even tho the certificate carries no indorsement as to "what amount or portion of the par value has been paid to the corporation issuing the same, and whether such payment has been in money or property".

Bankers Tr. Co. v Rood, 211-289; 233 NW 794; 73 ALR 1421

Money advanced on joint representations—suing jointly. Where money is invested with several persons representing themselves to be jointly interested in a hemp production scheme, such joint promoters may be sued jointly, notwithstanding one of them asserts that he was not in fact so interested,—he is estopped from denying his interest.

Smith v Secor, 225-650; 281 NW 178

Payment—trust relation. One who subscribes for corporate shares of stock, pays therefor, and receives a valid receipt evidencing such payment may not claim that he continued to retain title to the money because no certificate of stock was issued to him.

Andrew v Bk. & Tr. Co., 219-921; 258 NW 911

Rescission by stockholder unallowable. A stockholder may not rescind a contract entered into by the corporation of which he is a stockholder and another corporation.

Andrew v Bk. & Tr. Co., 219-921; 258 NW 911

Unpaid stock subscription—nonliability. A subscriber for corporate stock who is not a promoter of the purported corporation is not liable on his fraud-induced unpaid stock subscription contract in an action by the receiver of the corporation when the charter of the corporation has been judicially annulled, subsequent to the subscription contract, by the state, for fraud perpetrated on the state in obtaining the charter; in other words, the so-called English "Equitable Trust Fund Doctrine" does not apply to such a condition.

Fundamental reason: Such purported corporation, having been conceived, born, and nurtured in fraud, was never, in truth or fact, a corporation de jure or de facto, in a business sense.

State v Packing Co., 216-1344; 249 NW 761; 90 ALR 1339

Voidable subscription contract. A stock-subscription contract to the effect that the corporation will accept, in payment for its stock, future services of undetermined value to be rendered by the subscriber is voidable by the corporate receiver who is seeking to recover for the benefit of creditors the amount due on the stock subscription.

Lex v Selway Corp., 203-792; 206 NW 586

8409 Effect of violation.

Issuance of unpaid stock—pledge to innocent party—estoppel. A corporation which issues and delivers its corporate shares of stock without receiving payment therefor estops itself to question such issuance and delivery after the stock has been pledged by the holder

thereof to a good-faith pledgee for value and without notice of the fact of nonpayment.

Bankers Tr. v Rood, 211-289; 233 NW 794; 73 ALR 1421

8412 Par value required.

Additional annotations. See under §8394

Atty. Gen. Opinions. See '25-26, AG Op 289; '30 AG Op 119; '32 AG Op 25; '34 AG Op 334; '36 AG Op 572, 622; '38 AG Op 641

Liability on unpaid installments. A subscriber for corporate shares of stock who executes to the corporation his negotiable promissory note therefor may not be said to owe an "unpaid installment" on his stock after the corporation has negotiated the note to a holder in due course.

Arnd v Grell, 200-1272; 206 NW 613

Subscription to stock—liability. A subscriber for corporate stock on specified terms of payment is liable on his contract of subscription (except in those cases where the defensive plea of fraud is available), even tho no certificate of stock has been or can be legally issued to him until payment has been made in full, and even tho he is not deemed a "stockholder" until he has paid in full; and this is true irrespective of the statute (§8394, C., '24) which declares the stockholder's liability for unpaid installments on stock "owned by him".

Lex v Selway Corp., 203-792; 206 NW 586

8413 Payment in property other than cash.

Atty. Gen. Opinions. See '25-26 AG Op 289; '28 AG Op 108; '30 AG Op 149, 298; '32 AG Op 25, 254; '36 AG Op 113, 236, 572, 622; '38 AG Op 641; AG Op June 8, '39

Payment in property other than money. Where due authorization is obtained to pay for corporate stock with personal property other than money, the unquestioned assumption by the corporation, upon the issuance of stock, of full ownership of such personal property is equivalent to a formal bill of sale of such property.

Comstock v Wood, 204-1027; 216 NW 640

8414 Executive council to fix amount.

Atty. Gen. Opinions. See '25-26 AG Op 332; '28 AG Op 108; '32 AG Op 25, 254; '34 AG Op 334; '36 AG Op 113, 236, 572, 622; '38 AG Op 641

8415 Elements considered in fixing amount.

Atty. Gen. Opinion. See '34 AG Op 334

8417 Cancellation of stock—reimbursement.

Stock issued without payment is voidable only. Corporate stock issued in return for the subscriber's promissory note which was never paid is not void but voidable.

Bankers Tr. Co. v Rood, 211-289; 233 NW 794; 73 ALR 1421

CHAPTER 385.1

CORPORATION STOCK WITHOUT PAR VALUE

Atty. Gen. Opinion. See '34 AG Op 710

8419.01 Authorization.

Atty. Gen. Opinion. See '34 AG Op 710

8419.10 Convertibility.

Atty. Gen. Opinion. See '36 AG Op 622

CHAPTER 386

PERMITS TO FOREIGN CORPORATIONS

8420 Application for permit.

Atty. Gen. Opinions. See '25-26 AG Op 404; '34 AG Op 209, 334

Certificate of authority. A foreign life insurance company which holds an annual certificate from the commissioner of insurance authorizing it to transact its business in this state (§8657, C., '31) is not subject to the provision of chapter 386, C., '31, requiring foreign corporations generally to obtain a permit from the secretary of state in order to transact business in this state. It is not the intent to require two permits.

John Hancock Ins. v Lookingbill, 218-373; 253 NW 604

Doing business in state—no absolute right. A foreign insurance company has no absolute right to come into the state and do business.

State v Ins. Co., 223-1301; 275 NW 26

Foreign corporation doing business without permit — actions barred — presumptions from nature of business. A necessary statutory prerequisite, to the right of a foreign corporation for pecuniary profit to sue on an Iowa contract, is that it first have a permit to transact business in Iowa, and the very nature of its business may raise the presumption that such corporation is one for pecuniary profit.

Johnson Co. v Hamilton, 225-551; 281 NW 127

Testamentary power. A statute which limits the power of corporations which are organized under the laws of this state to take a testamentary devise will not be extended by the courts to include foreign corporations.

Ross v Seminary, 204-648; 215 NW 710

8421 Details of application—secretary of state as process agent.

Atty. Gen. Opinion. See '25-26 AG Op 384

Discharged employee. Service of an original notice on a foreign corporation which has wholly withdrawn from the state may not be legally made on one who was never an officer or acting officer of the corporation, and who, at the time of service, was simply a discharged former employee.

Reliance Co. v Craig, 206-804; 221 NW 499

Implied process agent. Whether a foreign corporation which enters the state and transacts business therein without obtaining a permit so to do is subject to service of an original notice on the secretary of state, quaere.

Reliance Co. v Craig, 206-804; 221 NW 499

Nonpermissible personal judgment on foreign service. A corporation organized under federal law, with its principal place of business or domicile in a foreign state, does not become a "resident" of this state by doing business in this state. It follows that service outside this state of an original notice on the corporation, it having no officer or agent in this state, does not authorize the entry in this state of a personal judgment against the corporation.

Van Gilder v Bank, 210-531; 231 NW 671; 69 ALR 1340

Service on soliciting agent. A foreign corporation which has no permit from this state to transact business in this state, and which maintains no office in this state, is not subjected to the jurisdiction of the courts of this state by service in this state of process on the corporation's traveling agent whose authority begins and ends in soliciting and receiving at his own expense in this state orders for goods, and in forwarding said orders to the corporation in the foreign state for approval or disapproval.

Burnham Co. v Stove Works, 214-112; 241 NW 405

Foreign corporations—doing business—original notice—quashing service. A foreign corporation that has no office, no representative, and at most only one transaction in Iowa is not "doing business" in the state so as to give Iowa courts jurisdiction thereof by service of original notice on the secretary of state and a motion to quash the service was properly sustained.

Keokuk Bridge v Curtin-Howe Corp., 223-915; 274 NW 78

8422 Secretary of state to determine values.

Atty. Gen. Opinion. See '34 AG Op 209

8423 Fees.

Atty. Gen. Opinions. See '25-26 AG Op 404; '34 AG Op 209

8424 Increase of capital—blanks.

Atty. Gen. Opinions. See '25-26 AG Op 404; '34 AG Op 237; AG Op Sept. 28, '39

8425 Exemption.

Atty. Gen. Opinion. See '25-26 AG Op 404

8426 Issuance of permit—effect.

Foreign corporation's contract to install pipe organ—interstate commerce. In an action on contract by a Connecticut corporation doing business in New Jersey to build, deliver, and install a pipe organ in a theater in Iowa, held, the transaction was in "interstate commerce", and therefore local statutes governing foreign corporations doing business within this state were inapplicable.

Palmer v Aeolian Co., 46 F 2d, 746

Foreign corporation doing business without permit — actions barred — presumptions from nature of business. A necessary statutory prerequisite, to the right of a foreign corporation for pecuniary profit to sue on an Iowa contract, is that it first have a permit to transact business in Iowa, and the very nature of its business may raise the presumption that such corporation is one for pecuniary profit.

Johnson Co. v Hamilton, 225-551; 281 NW 127

8427 Denial of right to sue.

Discussion. See 14 ILR 372—Actions by foreign corporations

Atty. Gen. Opinions. See '32 AG Op 130; '34 AG Op 209, 390

Absence of permit—individual liability. Individuals are personally liable on contracts entered into by them in the name of a foreign corporation which they know has not been authorized by the state to transact business in this state.

Peacock Co. v Coal Co., 206-1228; 219 NW 24

Answer—foreign corporation—right to sue raised by general denial. A general denial will put in issue a foreign corporation's right to sue in Iowa when so alleged, dependent upon securing the statutory permit therefor.

Johnson Co. v Hamilton, 225-551; 281 NW 127

Foreign corporation doing business without permit — actions barred — presumptions from nature of business. A necessary statutory prerequisite, to the right of a foreign corporation for pecuniary profit to sue on an Iowa contract, is that it first have a permit to transact business in Iowa, and the very nature of its business may raise the presumption that such corporation is one for pecuniary profit.

Johnson Co. v Hamilton, 225-551; 281 NW 127

Foreign corporation's permit to do business —burden of proof—directing verdict. A for-

eign corporation for pecuniary profit, suing on an Iowa contract, has the burden to plead and prove its compliance with the statutes requiring permit to do business herein, without which a directed verdict in its favor is error.

Johnson Co. v Hamilton, 225-551; 281 NW 127

Foreign corporation without business permit —action on contract barred. A foreign stock corporation which, through its president while personally present in Iowa, sells on contract, accepts payment, part in cash and part in notes, and makes delivery of a machine, is doing business in the state, and not having first secured a permit to do business may not maintain an action on such contract.

Actino Lab. v Lamb, 224-573; 278 NW 234

Nonretroactive effect.

Foster v Bellows, 204-1052; 216 NW 956

Order in this state and acceptance in foreign state. The execution in this state by a proposed vendee of a naked order for goods, and the oral acceptance of such order by the vendor at his place of business in a foreign state, does not constitute the making of a contract in this state.

Anderson Bros. v Monument Co., 210-1226; 232 NW 689

Parol evidence to show acceptance. Parol evidence is admissible to show that a naked order for goods was accepted and, when material, that such acceptance was at a certain place.

Anderson Bros. v Monument Co., 210-1226; 232 NW 689

Right to sue. A foreign corporation which has not complied with the laws of this state and obtained a permit to transact business herein, may nevertheless maintain an action in this state on a contract which was consummated in a foreign state.

Service Sys. v Johns, 206-1164; 221 NW 777

Standard Co. v Detroit, F. & S. Co., 207-619; 223 NW 365

Ryerson v Schraag, 211-558; 229 NW 733

Shipment by foreign corporation to its officer—interstate character lost. A machine sold by a foreign corporation to an Iowa resident, when shipped to the corporation president, temporarily in Iowa, to be delivered to the purchaser, loses its interstate character upon delivery in Iowa to such president.

Actino Lab. v Lamb, 224-573; 278 NW 234

"Transacting business" defined. A foreign corporation, even tho it has no permit to do business in this state, and even tho neither it nor its agents maintain an office in this state, is, nevertheless, "transacting business" within this state, and subject to service of notice of suit on its resident agent, when, as a continuous and systematic course of business, it, in part at its own expense, maintains in this state an agent with powers limited strictly to the solicitation of orders which the corporation approves or disapproves, and on which, in case of approval, it makes its own collections.

American Corp. v Shankland, 205-862; 219 NW 28; 60 ALR 986

When "doing business" in this state. A foreign corporation which, by mail, enters into a contract in this state with a party, and performs the contract wholly outside this state, may not be said, because of said acts, to be "doing business" in this state.

Internat. Transp. v Morris Plan, 215-268; 245 NW 244

When offer becomes contract. An unconditional offer by mail to enter into a specified contract becomes a contract in fact at the time and place at which a duly stamped and addressed acceptance is mailed.

Internat. Transp. v Morris Plan, 215-268; 245 NW 244

8429 Powers denied.

Atty. Gen. Opinion. See '34 AG Op 390

Foreign corporation's contract to install pipe organ—interstate commerce. In an action on contract by a Connecticut corporation doing business in New Jersey to build, deliver, and install a pipe organ in a theater in Iowa, held, the transaction was in "interstate commerce", and therefore local statutes governing foreign corporations doing business within this state were inapplicable.

Palmer v Aeolian Co., 46 F 2d, 746

8430 Violations by corporation.

Atty. Gen. Opinion. See '34 AG Op 209

8431 Violations by officers.

Absence of permit—individual liability. Individuals are personally liable on contracts entered into by them in the name of a foreign corporation which they know has not been authorized by the state to transact business in this state.

Peacock Co. v Coal Co., 206-1228; 219 NW 24

8432 Status of corporation and officers.

Discussion. See 15 ILR 285—Liability of individuals—unauthorized corporation

Atty. Gen. Opinions. See '28 AG Op 148; '34 AG Op 620

Foreign corporations—visitatorial power of state. A foreign corporation transacting business within this state is subject to all the remedies available against a domestic corporation. So held under an application for an order for the production of papers and documents.

Independent Order v Scott, 223-105; 272 NW 68

CHAPTER 387

FOREIGN PUBLIC UTILITY CORPORATIONS

Atty. Gen. Opinions. See '34 AG Op 334; '36 AG Op 622

CHAPTER 388

ANNUAL REPORTS OF CORPORATIONS

Atty. Gen. Opinion. See '25-26 AG Op 486

CHAPTER 389

COOPERATIVE ASSOCIATIONS

8459 Plan authorized.

Atty. Gen. Opinion. See '36 AG Op 226

8461 Filing—certificate of incorporation.

De jure corporation. A statute which provides that "no corporation shall have legal existence until such [certified] articles be left for record", does not mean that a failure to strictly comply with the statute prevents a de facto corporation from coming into existence.

Wilkin Co. v Co-op. Assn., 208-921; 223 NW 899

Liability of stockholders—de facto corporation. A creditor who knowingly contracts with and extends credit to a corporation as such, tho it is only a de facto corporation, may not, in the absence of a statute to the contrary, hold the stockholders personally liable for the resulting debt.

Wilkin Co. v Co-op. Assn., 208-921; 223 NW 899

8463 Board of directors.

General manager—power to deposit and withdraw funds. The general manager of an incorporated, cooperative, dairy company who, for years, and to the general knowledge of the banking and business interest of the locality in question, is in unrestricted management of the entire business of the company, must be deemed to have both actual and ostensible authority to select banks of deposit for the corporate funds, and like authority to withdraw said funds—an authority as to which, both as to the making of deposits and as to the withdrawal thereof, the bank need ask no questions, assuming, of course, it acts at all times in perfect good faith.

Fidelity Co. v Merchants Bk., 223-446; 273 NW 141

8470 Stockholding.

Atty. Gen. Opinion. See '28 AG Op 182

8475 Reserve fund.

Atty. Gen. Opinion. See '25-26 AG Op 375

8480 Annual report—penalty.

Atty. Gen. Opinion. See '25-26 AG Op 486

8481 Chapter extended to former companies.

Atty. Gen. Opinion. See '36 AG Op 205

8482 Use of term "cooperative" restricted.

Atty. Gen. Opinion. See '36 AG Op 226

CHAPTER 390

NONPROFIT-SHARING COOPERATIVE ASSOCIATIONS

8486 Organization.

Atty. Gen. Opinions. See '28 AG Op 81, 383; '36 AG Op 226

Corporate powers—practice of profession. An incorporation which purports to be a cooperative association may not legally practice the profession of embalming by furnishing its so-called members with the services of a licensed embalmer when, under its organization, no restriction is placed on its membership except that said members must reside within 35 miles of the association's place of business. Whether the association could so practice were its membership reasonably restricted, quaere.

State v Fremont Assn., 222-949; 270 NW 320

8487 Terms defined—products of nonmember.

Atty. Gen. Opinion. See '28 AG Op 383

8499 Combinations of local associations.

Atty. Gen. Opinion. See '28 AG Op 182

8503 Power to compel sales and purchases—liquidated damages.

Class legislation. This section is not violative of Art. I, §6, of the Constitution, no ele-

ment of arbitrary or unreasonable classification or discrimination being discernible therein.

Clear Lake Co-op. v Weir, 200-1293; 206 NW 297

Ambiguous contract—mutual interpretation. A cooperative marketing association, which, by written contract separately binds each member of the association to sell and deliver exclusively to the association the milk produced by the member—impliedly from day to day—or "pay as liquidated damages $25 for each and every such failure and breach of contract", will not be permitted to recover from a member said amount for each and every day there is a failure so to deliver, when such interpretation is absolutely contrary to the uniform, mutual interpretation theretofore placed on the contract during a long series of years. Especially is this true because otherwise the court would be compelled to construe the said damage clause as a penalty.

Fort Dodge Assn. v Ainsworth, 217-712; 251 NW 85

Cumulative and exclusive remedy. A contract provision to the effect that, if damages accrue to one party, he may apply to the payment thereof any money in his hands belonging to the other party, is permissive only, and additional to the usual remedy by action in court.

Clear Lake Co-op. v Weir, 200-1293; 206 NW 297

Implied repeal because of repugnancy. It may not be successfully contended that a statute is invalid because repugnant to a prior and existing statute, since, as between repugnant statutes, the later in enactment must prevail. So held as to an alleged repugnancy between ch. 390 and §9915, C., '24.

Clear Lake Co-op. v Weir, 200-1293; 206 NW 297

Liquidated damages—contract—sufficiency. A contract for liquidated damages is sufficient if the contract provides for such damages and the bylaws of the association provide the schedule therefor.

Clear Lake Co-op. v Weir, 200-1293; 206 NW 297

8507 Reserve and educational funds—patronage dividends.

Atty. Gen. Opinion. See '28 AG Op 298

8508 Annual report—penalty.

Atty. Gen. Opinions. See '25-26 AG Op 486; '36 AG Op 136

8508.1 Exemption from report.

Atty. Gen. Opinion. See '36 AG Op 136

8509 Chapter extended to former associations.

Atty. Gen. Opinion. See '36 AG Op 205

CHAPTER 390.1

COOPERATIVE ASSOCIATIONS (NEWLY ORGANIZED)

8512.05 Permissible organizers.

Atty. Gen. Opinion. See '38 AG Op 120

8512.06 Objects.

Atty. Gen. Opinion. See '38 AG Op 120

Authorized purposes and powers—generating electricity. Where several purposes were listed in the articles of incorporation of a cooperative association, the first being the primary purpose to manufacture electricity and to sell it, with the others only powers incidental to the primary purpose, there was compliance with a statute enumerating purposes for which associations could be formed, when the statute used the terms "purposes" and "powers" interchangeably and allowed the association to exercise any power necessary or incidental to accomplish its purpose.

State v Hardin County Co-op., 226-896; 285 NW 219

Conjunctive or disjunctive use of "or"—technical rules disregarded. Under a statute permitting the formation of associations to conduct a manufacturing business or to construct or operate electric transmission lines, the words "or to construct or operate * * * electric transmission lines" could be eliminated where the manufacturing business was the operation of an electric power plant, as the right to use such lines is implied as essential to the manufacture of electricity, so whether "or" was used in a conjunctive or disjunctive sense made no difference, as courts will disregard technical rules of grammar and punctuation to arrive at the intent of a statute.

State v Hardin County Co-op., 226-896; 285 NW 219

Generating electricity as "manufacturing or mechanical business". The generation or production of electricity is a manufacturing or mechanical business within the scope of a statute permitting the formation of cooperative associations to conduct a manufacturing or mechanical business.

State v Hardin County Co-op., 226-896; 285 NW 219

Liberal construction of powers after incorporation. Statutes under which a cooperative association was organized to manufacture electricity for rural use should be liberally construed, in view of recent promotion of rural electrification and under the principle that stat-

utes should be liberally construed to find the intent of the legislature, this being especially true as to statute under which corporations are formed, and when it is necessary to sustain the legality of a corporation which has gone into operation after being organized in good faith for a legitimate purpose.

State v Hardin County Co-op., 226-896; 285 NW 219

Power to manufacture electricity—implied power to purchase current. A cooperative association organized for the purpose of generating and distributing electricity to county cooperative associations and their members has the right to purchase electricity as a necessary adjunct to its main purpose, as in case of emergency it is necessary to purchase current in order to supply customers with uninterrupted service.

State v Hardin County Co-op., 226-896; 285 NW 219

8512.07 Powers.

Atty. Gen. Opinion. See '38 AG Op 120

Authorized purposes and powers. Where several purposes were listed in the articles of incorporation of a cooperative association, the first being the primary purpose to manufacture electricity and to sell it, with the others only powers incidental to the primary purpose, there was compliance with a statute enumerating purposes for which associations could be formed, when the statute used the terms "purposes" and "powers" interchangeably and allowed the association to exercise any power necessary or incidental to accomplish its purpose.

State v Hardin County Co-op., 226-896; 285 NW 219

Liberal construction after incorporation. Statutes under which a cooperative association was organized to manufacture electricity for rural use should be liberally construed, in view of recent promotion of rural electrification and under the principle that statutes should be liberally construed to find the intent of the legislature, this being especially true as to statute under which corporations are formed, and when it is necessary to sustain the legality of a corporation which has gone into operation after being organized in good faith for a legitimate purpose.

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State v Hardin County Co-op., 226-896; 285 NW 219

8512.10 Cooperative agreements.

Atty. Gen. Opinion. See '38 AG Op 120

Power to manufacture electricity—implied power to purchase current. A cooperative association organized for the purpose of generating and distributing electricity to county cooperative associations and their members has the right to purchase electricity as a necessary adjunct to its main purpose, as in case of emergency it is necessary to purchase current in order to supply customers with uninterrupted service.

State v Hardin County Co-op., 226-896; 285 NW 219

8512.11 Legality declared.

Atty. Gen. Opinion. See '38 AG Op 120

8512.13 Membership—eligibility.

Atty. Gen. Opinion. See '38 AG Op 120

8512.36 Directors.

Atty. Gen. Opinion. See '38 AG Op 120

8512.40 Articles.

Authorized purposes and powers. Where several purposes were listed in the articles of incorporation of a cooperative association, the first being the primary purpose to manufacture electricity and to sell it, with the others only powers incidental to the primary purpose, there was compliance with a statute enumerating purposes for which associations could be formed, when the statute used the terms "purposes" and "powers" interchangeably and allowed the association to exercise any power necessary or incidental to accomplish its purpose.

State v Hardin County Co-op., 226-896; 285 NW 219

8512.53 Quo warranto.

Authorized purposes and powers. Where several purposes were listed in the articles of incorporation of a cooperative association, the first being the primary purpose to manufacture electricity and to sell it, with the others only powers incidental to the primary purpose, there was compliance with a statute enumerating purposes for which associations could be formed, when the statute used the terms "purposes" and "powers" interchangeably and allowed the association to exercise any power necessary or incidental to accomplish its purpose.

State v Hardin County Co-op., 226-896; 285 NW 219

CHAPTER 391

COLLECTIVE MARKETING

8513 Authorization.

Discussion. See 8 ILB 193—Cooperative marketing; 9 ILB 6—Cooperative marketing; 11 ILR 375—Constitutionality

CHAPTER 392

SALE OF STOCK ON INSTALLMENT PLAN

8517 Terms defined.

Atty. Gen. Opinions. See '28 AG Op 201; '30 AG Op 119; '34 AG Op 458; '38 AG Op 32

8518 Certificate—how obtained.

Atty. Gen. Opinions. See '30 AG Op 291; '32 AG Op 73; '34 AG Op 458

8521 Bonds or securities deposited.

Atty. Gen. Opinion. See '30 AG Op 129

8524 Examination.

State auditor's action affecting stockholder's contractual rights. Fact that auditor of state approved building and loan association's refusal to honor applications for withdrawal of funds does not affect stockholder's contractual rights with the association for such withdrawal.

O'Connor v Ins. Assn., 224-1127; 278 NW 636

CHAPTER 393

INVESTMENT COMPANIES

Repealed by 43GA, Ch 10, and Ch 393.1 enacted in lieu thereof

8573 Appeal to executive council. (Repealed.)

Method of service. As to proper method of service when statute simply requires the notice to be "served", and specifies no method of service, see

Casey v Hogue, 204-3; 214 NW 729

CHAPTER 393.1

IOWA SECURITIES ACT

8581.01 Title.

Constitutionality. The "Blue Sky Law" is not subject to the constitutional objection that it (1) deprives citizens of their property without due process, (2) denies equal protection of the law, (3) takes property without just compensation, (4) grants special privileges and immunities, or (5) denies an accused the right to be advised of the nature of the charge preferred against him.

State v Soeder, 216-815; 249 NW 412

8581.02 Administration.

Information required of license applicant. An applicant for a license to promote an investment trust was properly required, by the state department which issues such licenses, to furnish information concerning the financial status of the foreign trustee who was to hold the trust assets, as it would have been a neglect of duty to assume that the condition of the foreign trustee did not require investigation.

Ind. Fund v Miller, 226-1101; 285 NW 629

8581.03 Definitions.

Discussion. See 23 ILR 102—Blue sky legislation

Atty. Gen. Opinions. See '30 AG Op 176; '32 AG Op 73; '34 AG Op 127, 159, 348, 698; '36 AG Op 125; '38 AG Op 92

Stock—agreement to repurchase—agency—jury question. The existence of authority, actual or apparent, for an agreement made by an agent on behalf of a corporation to repurchase its own stock sold by the agent to a third person, being within his apparent authority, being neither denied nor repudiated by the corporation, and altho being based on circumstantial evidence, is not a question of law but a question for the jury.

Wright v Iowa P. & L. Co., 223-1192; 274 NW 892

8581.04 Exempt securities.

Atty. Gen. Opinions. See '30 AG Op 311; '34 AG Op 345, 629; '36 AG Op 125, 287; '38 AG Op 92

Exemption from registration. Securities issued by cities or towns, even tho not constituting general obligations of the city or town, e.g., "pledge orders" payable solely from the

net income of a municipally owned utility, are exempt from registration or qualification under the Iowa securities law.

Ballard-Hassett Co. v Miller, 219-1066; 260 NW 65

"Or"—"and". Statute construed and held, not permissible to substitute "and" for "or".

Ballard-Hassett Co. v Miller, 219-1066; 260 NW 65

8581.05 Exempt transactions.

Atty. Gen. Opinions. See '32 AG Op 73; '34 AG Op 127, 159, 249, 345, 348, 457, 561

8581.06 Registration of securities.

Atty. Gen. Opinions. See '30 AG Op 223; '32 AG Op 73

8581.07 Registration by qualification.

Atty. Gen. Opinion. See '38 AG Op 214

Delegation of powers by legislature—Iowa securities act. Because the Iowa securities act covers such a broad field of transactions that it cannot cover each particular case in detail, it was proper for the legislature to delegate to an officer certain discretionary powers in administering the statute and in making such rules as were necessary to carry out the purposes of the law within the general policy set forth by the legislature.

Ind. Fund v Miller, 226-1101; 285 NW 629

Information required of license applicant. An applicant for a license to promote an investment trust was properly required by the state department which issued such licenses to furnish information concerning the financial status of the foreign trustee who was to hold the trust assets, as it would have been a neglect of duty to assume that the condition of the foreign trustee did not require investigation.

Ind. Fund v Miller, 226-1101; 285 NW 629

Registration refusal based on issuing officer's rule. Statutory authority granted to a state officer to find out whether the sale of a security would tend to work a fraud and to forbid sales of securities which would be unfair to purchasers, was sufficient authority to justify an order made by him limiting the percentage of "loading charges" on investment trusts, when his restriction was based on the computations of a statistician, and for his refusal to register securities which violated this order.

Ind. Fund v Miller, 226-1101; 285 NW 629

8581.08 May limit price and commission.

Compensation—unallowable defense. In an action by a broker for a commission, it is no defense that the plaintiff had an arrangement with another broker for the sharing of the commission in return for services rendered in effecting a sale for defendant.

Lowery Co. v Lamp, 200-853; 205 NW 538

8581.10 Revocation of registration of securities.

Atty. Gen. Opinions. See '32 AG Op 73; '34 AG Op 629

8581.11 Registration of dealers and salesmen.

Atty. Gen. Opinion. See '36 AG Op 59

False representations—liability under Iowa securities act. A corporation's false representations and statements made to the secretary of state and purchasers are within provision of the Iowa securities act, and evidence of such false representations supported a judgment for plaintiff in an action to set aside sales of corporate stock and to recover amounts paid, with attorney's fees, for violation of such act.

Associated Mfr. Corp. v De Jong, 64 F 2d, 64

Information not furnished by applicant upon request. When an applicant for a license failed to furnish information when so ordered by the officer issuing the license, there was no waiver of the right to object to the failure to furnish such information when additional demands for it were not made.

Ind. Fund v Miller, 226-1101; 285 NW 629

Registration refusal based on issuing officer's rule. Statutory authority granted to a state officer to find out whether the sale of a security would tend to work a fraud and to forbid sales of securities which would be unfair to purchasers, was sufficient authority to justify an order made by him limiting the percentage of "loading charges" on investment trusts, when his restriction was based on the computations of a statistician, and for his refusal to register securities which violated this order.

Ind. Fund v Miller, 226-1101; 285 NW 629

Security dealer's license refusal. An "issuer-dealer's" license to deal in securities should not have been refused on the ground that the affairs of the applicant corporation were in an unsound condition due to previous financial losses, when additional capital had later been secured to make the applicant apparently solvent and the securities to be issued were not those of the applicant, which was to be manager of an investment trust, with a third party to have possession of the assets invested.

Ind. Fund v Miller, 226-1101; 285 NW 629

8581.12 Deposits for special examinations.

Atty. Gen. Opinions. See '36 AG Op 35, 59

8581.18 Bond and conditions.

Action on bond—joinder of causes. An action on a bond, brought against both the principal and surety, presents no question of misjoinder of causes of action. So held as to a bond given under this section.

Kellogg v Bell, 222-510; 268 NW 534

Bond—dual liability. Statutory bonds under the Iowa securities act cover a dual liability, viz:

1. A failure properly to account for any moneys or securities received from or belonging to another, and

2. A failure to pay any judgment against the dealer in consequence of unlawfully sold securities.

Dickson v Fidelity Co., 223-518; 273 NW 102

Breach of condition—judgment as condition precedent. A bond executed under the Iowa securities act, and conditioned to "pay * * * any judgment * * * that may be rendered against such dealer" is not breached until the injured party first obtains a judgment against the principal in the bond—the dealer in securities—and until said dealer fails to pay said judgment.

Kellogg v Bell, 222-510; 268 NW 534

Maximum liability. The surety on the bond of a dealer in securities under the Iowa securities act (Ch 393-C1, C., '31 [Ch 393.1, C., '39]) is not liable beyond the statutory amount of the bond—$5,000—irrespective of the number or amount of the claims sought to be enforced against it. Order impounding a bond as a trust fund for the pro rata benefit of numerous claimants affirmed.

Witter v Ins. Co., 215-1322; 247 NW 831; 89 ALR 1065

Unallowable action by stranger. A bond which, in effect, is limited to the indemnification of the obligee only, for pecuniary loss sustained by the obligee through the dishonest acts of his officers or employees, is a contract of indemnity. In other words, such bond does not cover liability to a third party for loss sustained by said third party through the dishonesty of the officers or employees of the said obligee.

Allen v Bonding Co., 218-294; 253 NW 498

8581.19 Burden of proof.

Indictment — requisites and sufficiency — negativing exceptions—nonnecessity. An indictment charging violation of securities act is not defective on ground that it fails to negative exceptions legalized by the act.

State v Dunley, 227-1085; 290 NW 41

Negativing exceptions in indictment—lack of basis for attack on validity. As respects statute providing that exceptions to securities act need not be negatived in an indictment thereunder, a contention that such statute deprived defendant of information as to the nature of charge against him, and was therefore unconstitutional, could not be sustained on record showing that defendant was in fact provided with such information when summary of evidence to be introduced at trial was served on him.

State v Dunley, 227-1085; 290 NW 41

Burden of proving exceptions—lack of basis for attack on validity. In prosecution for violation of securities act wherein defendant attacked validity of statute requiring that burden of proving exceptions to the act shall be on party seeking benefit thereof, and contended that such burden should be placed on state, held, defendant's contention was without merit in view of trial court's instructions which in fact did place such burden on the state.

State v Dunley, 227-1085; 290 NW 41

8581.23 Remedies.

Concert of action—evidence—sufficiency. Evidence reviewed and held insufficient to present a jury question on the issue of concert of action between the officers and directors of a corporation for the purpose of defrauding plaintiff in the purchase of stock, except as to two defendants.

Stambaugh v Haffa, 217-1161; 253 NW 137; 38 NCCA 114

False representations—liability under Iowa securities act. A corporation's false representations and statements made to the secretary of state and purchasers are within provision of the Iowa securities act, and evidence of such false representations supported a judgment for plaintiff in an action to set aside sales of corporate stock and to recover amounts paid, with attorney's fees, for violation of such act.

Assoc. Mfr. Corp. v De Jong, 64 F 2d, 64

Recovery of purchase price—sales in violation of securities law—tender of securities necessary. Purchaser suing to recover price paid for securities sold in violation of Iowa securities law must at least tender to seller securities equivalent in value to those purchased.

Huglin v Byllesby, 72 F 2d, 341

8581.26 False statements, entries, and representations.

Evidence—corporate books and records. In a prosecution, under the securities act, of an officer of a corporation for having made, before the secretary of state, a false statement relative to the financial condition of the corporation, the corporate books and a tabulated statement and summary thereof, properly identified, are admissible, even tho there is no showing (1) that said books were made in the ordinary course of business, or (2) that they were true or correct, or (3) that they were books of original entry, or (4) that the accused made or directed their making,—it appearing that the examination of the books was made in the office of the corporation and largely in the immediate presence of the accused.

State v Dobry, 217-858; 250 NW 702

False representations—liability under Iowa securities act. A corporation's false represen-

tations and statements made to the secretary of state and purchasers are within provision of the Iowa securities act, and evidence of such false representations supported a judgment for plaintiff in an action to set aside sales of corporate stock and to recover amounts paid, with attorney's fees, for violation of such act.

Assoc. Mfr. Corp. v De Jong, 64 F 2d, 64

Fraud in incorporation—effect on title of receiver. Even tho the court, in proceedings for the dissolution of a so-called corporation, found and decreed, in effect, that the concern was conceived, born, and nurtured in fraud, nevertheless, in receivership proceedings for the ordering of an assessment on those who had contracted for stock in the concern and had not paid therefor, the receiver will be deemed to have prima facie title to such contracts of subscriptions.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

When knowledge immaterial. Under the Iowa securities act, the provision that the making of a "false" statement before the secretary of state relative to the financial condition of a corporation is a felony, renders immaterial testimony that the accused did not know that the statement was false.

Reason: The legislature may declare an act criminal irrespective of the knowledge or intent of the doer.

State v Dobry, 217-858; 250 NW 702

8581.28 False representations.

False representations—liability under Iowa securities act. A corporation's false representations and statements made to the secretary of state and purchasers are within provision of the Iowa securities act, and evidence of such false representations supported a judgment for plaintiff in an action to set aside sales of corporate stock and to recover amounts paid, with attorney's fees, for violation of such act.

Assoc. Mfr. Corp. v De Jong, 64 F 2d, 64

CHAPTER 394

CORPORATIONS NOT FOR PECUNIARY PROFIT

GENERAL PROVISIONS

8582 Articles.

Gifts generally. See under Ch 445, Note 1
Labor unions and disputes. See under Ch 74, Note 1

Discussion. See 14 ILR 212—Liability to beneficiaries for negligence

Atty. Gen. Opinion. See '34 AG Op 205

Charitable institutions liable to strangers, invitees, or employees. Public policy has never demanded nor has the legislature adopted any immunity to charitable institutions from liability to strangers, invitees, or employees arising because of negligence of the servants of such institutions, and the court will not grant such immunity.

Andrews v Y. M. C. A., 226-374; 284 NW 186; 5 NCCA(NS) 335

Charitable institutions—nonliability to beneficiaries for employees' negligence — WPA worker not beneficiary. Tho as between benefactor and beneficiary, an institution conducted solely for doing charity may not be liable for the negligence of its employees to a person receiving the benefits of that charity; however, a WPA worker doing work on the premises of a Y. M. C. A. was not a beneficiary of the charitable work of the institution, so as to be within this rule.

Andrews v Y. M. C. A., 226-374; 284 NW 186; 5 NCCA(NS) 335

Constructing a grotto for charitable organization. Since a license is a permission to do particular acts on another's land without possessing an interest therein, revocable at licensor's pleasure except where coupled with an expenditure of money or labor, an individual constructing a grotto on the land of a charitable organization under an agreement containing a provision for entry on the land for purposes of the agreement, has a personal privilege of going on the land to complete the undertaking.

Sisters of Mercy v Lightner, 223-1049; 274 NW 86

Cy pres doctrine invoked by state in equity court. A public charity, created by trust, about to fail, is properly represented in court of equity to invoke jurisdiction to apply cy pres doctrine by the state or some authorized agency thereof.

Schell v Leander Clark College, 10 F 2d, 542

Contributory negligence — WPA worker crushed in Y. M. C. A. elevator shaft—place of danger—elevator operator violating instructions. When, in order to make repairs, a WPA carpenter descended to the bottom of an elevator shaft in a Y M. C. A. while the superintendent of the building assisted him, and when the superintendent had twice repeated an instruction to the elevator operator in the presence of the carpenter, that the elevator was not to go below the first floor, the carpenter, who died because the elevator descended on him, was not required to anticipate that the elevator operator would negligently violate the instructions. Under these facts, contributory negligence was a jury question.

Andrews v Y. M. C. A., 226-374; 284 NW 186

Negligence — immunity rule — basis. Such immunity as is granted a public charity insti-

tution for its negligence has been sustained by the courts on (1) the trust fund theory, or (2) the nonapplicability of the rule of respondeat superior, or (3) the waiver theory, or (4) the public policy theory.

Andrews v Y. M. C. A., 226-374; 284 NW 186; 5 NCCA(NS) 335

Y. M. C. A.—charitable institution. The Young Men's Christian Association is a charitable institution.

Andrews v Y. M. C. A., 226-374; 284 NW 186

Inheritance tax—exemptions—public charities. A trust for the purpose of aiding young men and women of the Protestant faith in obtaining an education in the colleges or universities of this state is a public charity, within the meaning of the statute which exempts such charities from an inheritance tax.

Heald v Johnson, 204-1067; 216 NW 772

County fair associations — negligence. It may not be said, as a matter of law, that a county fair association is under a legal duty to erect a fence along its race track sufficiently high to prevent a horse from jumping over such fence. The association is not an insurer. Reasonable care under varying circumstances is the full measure of its duty.

Clark v Fair Assn., 203-1107; 212 NW 163; 33 NCCA 40

County fair associations—liability for negligence. Nonpecuniary incorporated county fair associations are not such governmental agencies as are exempt from liability for negligence.

Clark v Fair Assn., 203-1107; 212 NW 163

Offer of reward by nonlegal entity—liability of members. An incorporated bank which, in effect, represents that it is a member of an association which is offering a reward for information leading to the conviction of bank robbers, thereby obligates itself to pay the reward when, in truth, the association is but a voluntary, unincorporated association.

Carr v Mahaska Assn., 222-411; 269 NW 494; 107 ALR 1080

Property—right of possession. A religious organization is not entitled to the unconditional possession of real property of which it is the equitable owner, but the legal title of which is vested in trustees, when the property and the income therefrom are being used and employed, and the property improved, by a duly organized federation of different churches, all with the knowledge, approval, and express authorization of the said equitable owner.

Church v Gardner, 204-907; 215 NW 970

Race associations—powers. Articles, rules, and regulations of a horse-racing association reviewed, and held to invest no power in the secretary to suspend members or to revoke the licenses of drivers.

Davis v Howard Soc., 208-957; 226 NW 90

8583 Powers—duration.

"Church purposes". A broad and comprehensive meaning must be accorded to the term "church purposes" in a conveyance of land to trustees "so long as used for church purposes".

Presbyterian Church v Johnson, 213-49; 238 NW 456

Express trusts — validity. A testamentary trust will be sustained when the intent of testator is evident, even tho the bequest runs to an unincorporated entity.

Meeker v Lawrence, 203-409; 212 NW 688

Plaintiffs—trustees of unincorporated association. The trustees of a voluntary unincorporated association, and not the association itself, are proper plaintiffs in an action to quiet title to real estate of which the association is the beneficial owner.

Presbyterian Church v Johnson, 213-49; 238 NW 456

8587 When society deemed extinct.

Extinct society — legal control of property. When a local church organization becomes extinct, the larger organization of which the local organization is a part may assume control over the property of the defunct church, and validly cause to be issued conveyances and assignments of said property.

Board v Rader, 210-482; 231 NW 329

8589 Trustees or managers.

Vacancies — power to fill — majority of quorum. Vacancies on an official board (which is empowered to fill vacancies) may be filled by a majority of a quorum, in the absence of a statute which requires a majority of the entire membership of the board.

Cowles v School Dist., 204-689; 216 NW 83

8599 Contract and rights not affected.

Abandoned property — right of mother church. The statutory authorization to a mother church organization to take over the abandoned property of a local church organization of the same denomination has no application to cases in which property rights in the property have been acquired prior to the passage of the statute.

Church v Gardner, 204-907; 215 NW 970

TITLE XX

INSURANCE

CHAPTER 395

INSURANCE DEPARTMENT

8605 Appointment and term.

Atty. Gen. Opinions. See '30 AG Op 52; '34 AG Op 734

8608 Deputy—assistants—bond.

Atty. Gen. Opinion. See '36 AG Op 612

Original notice — service — deputy commissioner may accept. Valid service of an original notice of suit against a foreign insurance company doing business in this state, is made by the act of the deputy commissioner of insurance in accepting, in writing and in the name of said commissioner, service of said notice for and on behalf of said company, tho the authority filed by the company only authorized the commissioner to accept such service.

Woodmen v Dist. Court, 219-1326; 260 NW 713; 98 ALR 1431

8612 Fees.

Atty. Gen. Opinion. See '34 AG Op 734

8612.1 Discrimination against Iowa companies.

Doing business in state—no absolute right. A foreign insurance company has no absolute right to come into the state and do business.

State v Ins. Co., 223-1301; 275 NW 26

8613 General powers and duties.

Atty. Gen. Opinion. See '32 AG Op 116

Commissioner—power of suspension denied. The commissioner of insurance is not empowered to suspend the business of a fraternal beneficiary association for failure to comply with commissioner's order to pay a gross premium tax, such order being based on his interpretation of a statute in controversy.

Homesteaders Life v Murphy, 224-173; 275 NW 146

Nonimpeachable officer. The commissioner of insurance, being only an appointive, ministerial agency of the executive department of the state is not an impeachable officer.

Clark v Herring, 221-1224; 260 NW 436

CHAPTER 396

ORGANIZATION OF DOMESTIC INSURANCE COMPANIES

8623 Appeal.

Method of service. As to proper method of service when statute simply requires the notice to be "served", and specifies no method of service, see

Casey (Town) v Hogue, 204-3; 214 NW 729

CHAPTER 397

EXAMINATION OF INSURANCE COMPANIES

8634 Suspension or revocation of certificate—receivership.

Allowance and payment of claims by receiver —unallowable claims. Attorney fees, disbursements, and costs incurred by a policyholder on his own behalf with reference to a policy of insurance, after the insurer had passed into the hands of a receiver, are not allowable against the receiver.

State v Cas. Co., 213-197; 238 NW 731

Commissioner—power of suspension denied. The commissioner of insurance is not empowered to suspend the business of a fraternal beneficiary association for failure to comply with commissioner's order to pay a gross premium tax, such order being based on his interpretation of a statute in controversy.

Homesteaders Life v Murphy, 224-173; 275 NW 146

Dissipation of assets—liability. The act of the directors of a financially embarrassed corporation in selling their individually owned corporate shares of stock to a third party and in receiving pay therefor out of the partly frozen bank deposits of the corporation, under an understanding that said third party would replace said dissipated deposits with securities of equal value, is per se fraudulent and necessarily violative of the law-imposed trust relationship of the directors to existing and future-contemplated corporate creditors; and this is true irrespective of the plea that the directors in good faith believed that said third party would carry out the said understanding. It follows that the receiver of the corporation may repudiate such transaction and recover the dissipated assets from the directors.

Hoyt v Hampe, 206-206; 214 NW 718; 220 NW 45

CHAPTER 398

LIFE INSURANCE COMPANIES

8643 Level premium plan companies.

Foreign corporations—doing business in state—no absolute right. A foreign insurance company has no absolute right to come into the state and do business.

State v Ins. Co., 223-1301; 275 NW 26

8652 Foreign companies — capital or surplus—investments.

Foreign corporations—doing business in state—no absolute right. A foreign insurance company has no absolute right to come into the state and do business.

State v Ins. Co., 223-1301; 275 NW 26

8655 Deposit to cover valuation—policy loan agreements.

Atty. Gen. Opinions. See '25-26 AG Op 452; '32 AG Op 79; '34 AG Op 147

8657 Annual certificate of authority.

Certificate of authority. A foreign life insurance company which holds an annual certificate from the commissioner of insurance authorizing it to transact its business in this state is not subject to the provision of chapter 386, C., '31, requiring foreign corporations generally to obtain a permit from the secretary of state in order to transact business in this state. It is not the intent to require two permits.

John Hancock Ins. v Lookingbill, 218-373; 253 NW 604

Foreign corporations—doing business in state—no absolute right. A foreign insurance company has no absolute right to come into the state and do business.

State v Ins. Co., 223-1301; 275 NW 26

8658 Violation by domestic company.

Commissioner—power of suspension denied. The commissioner of insurance is not empowered to suspend the business of a fraternal beneficiary association for failure to comply with commissioner's order to pay a gross premium tax, such order being based on his interpretation of a statute in controversy.

Homesteaders Life v Murphy, 224-173; 275 NW 146

8663 Securities.

Insolvency—assets transferred to obtain reinsurance—propriety. The trial court has power to cause assets of insolvent insurance company to be transferred and used to obtain reinsurance for policyholders without subjecting assets to judicial sale, and under proceedings where it is shown that it is impossible for company to function any longer, the trial court is justified in finding that value of assets upon a fair basis of valuation was insufficient to pay its obligations, and that the interest of policyholders would best be served by obtaining reinsurance.

Royal Ins. v Gross, 76 F 2d, 219

8666 Discriminations—rebates.

Atty. Gen. Opinions. See '28 AG Op 279; '34 AG Op 432; '36 AG Op 4; '38 AG Op 262

Forfeiture of policy—nonpayment premium lien note—discriminatory provisions. In an action by beneficiary to recover insurance on a policy which, at the expiration of an extension permitted by a premium lien note, the insured had allowed to lapse, and which policy contained certain provisions as to "cash surrender value" and "participating paid up insurance" granting to an insured three months after default in any premium payment to elect to surrender his policy for cash, thereby contains an unlawful discrimination providing longer insurance in favor of a more delinquent insured, and under above circumstances the failure to pay the premium lien note resulted in cancelling the policy subject to the terms of the policy itself, which giving insured a specified amount of insurance for a limited time, which having expired at the time of his death, it follows that the policy having lapsed, a recovery should be denied.

Clausen v Ins. Co., 224-802; 276 NW 427

Permissible collateral agreements. The act of an insurer in granting to the insured through the medium of a promissory note an extension of time in which to pay an accrued annual premium on condition that the nonpayment of the note at maturity shall ipso facto void the policy, is not violative of this statute.

Diehl v Ins. Co., 204-706; 213 NW 753; 53 ALR 1528

Reinstatement revives lapsed policy—suicide clause. Reinstatement of an insurance policy four years after it was originally written does not create a new contract as of date of reinstatement but revives the lapsed policy, and a clause in the original policy excluding liability for suicide for two years from date of contract is not revived to mean two years from date of reinstatement.

Johnson v Ins. Co., 224-797; 276 NW 595

Self-adjusting benefit provisions — effect. Where a policy of accident insurance, which has lapsed because of the nonpayment of premiums, is self-adjusting as regards death benefits in case death occurs while the insured is pursuing an occupation which is more hazardous than the one specified in the policy, such self-adjusting provisions are in no manner changed by the act of the insurer in reinstating the policy by accepting and retaining the past due premium with full knowledge that the insured was then pursuing a more hazardous occupation than the one specified in the policy. Especially is this true if a contrary construction would result in a discrimination between policyholders which is prohibited by statute.

Stephan v Ins. Co., 209-576; 221 NW 57

8668 Policy forms—approval.

Construction—ambiguity. A clause in a life insurance policy which is ambiguous, in that insanity (1) might not, under a given state of facts, release the insurer from liability, or (2) might, under the same state of facts, very materially reduce the insurer's liability, will be given that construction which is most favorable to the insured.

Crowe v Cas. Co., 202-43; 209 NW 406

Inconsistent and repugnant provisions. A provision in a health policy that sick benefits will be paid provided the sickness is contracted thirty days after the date of the policy, and a distinct and separate provision that said benefits will be paid for every sickness contracted subsequent to the issuance of the policy, are so inconsistent and repugnant that the court will reject the first provision and apply the latter.

Schmith v Cas. Co., 216-936; 247 NW 655

Incontestability and suicide clauses compared. A clause, in an insurance reinstatement agreement, providing for incontestability after two years from reinstatement, is a limitation on contestability and on the company's rights and is opposite in character to a suicide clause which affords additional contestability and adds to the company's rights.

Johnson v Ins. Co., 224-797; 276 NW 595

Nonpayment of premium—effect of custom. An insured cannot excuse the nonpayment of his premium on the plea that the insurer customarily notified the policyholder of the maturity date, but failed so to do in his case when said policyholder did not know of the custom at the time in question and necessarily did not rely thereon.

Wall v Ins. Co., 217-1106; 253 NW 46

Forfeiture of policy—nonpayment premium lien note—discriminatory provisions. In an action by beneficiary to recover insurance on a policy which, at the expiration of an extension permitted by a premium lien note, the insured had allowed to lapse, and which policy contained certain provisions as to "cash surrender value" and "participating paid up insurance" granting to an insured three months after default in any premium payment to elect to surrender his policy for cash, thereby contains an unlawful discrimination providing longer insurance in favor of a more delinquent insured, and under above circumstances the failure to pay the premium lien note resulted in cancelling the policy subject to the terms of the policy itself, which giving insured a specified amount of insurance for a limited time, which having expired at the time of his death, it follows that the policy having lapsed, a recovery should be denied.

Clausen v Ins. Co., 224-802; 276 NW 427

"Void" for nonpayment of premiums means "voidable". An insurance policy written as a unilateral contract, containing a provision that the policy will be void upon default in premium payment, means in effect that the policy is "voidable"—said clause being for the exclusive benefit of the insurer.

Pennebaker v Ins. Co., 226-314; 284 NW 147

Waiver—no release by insured without consideration. A purported release by one party to a contract of the other party's obligations is without effect unless duly supported by a consideration. So held where an insured accepted the return of his premium upon the statement that the policy had lapsed and thereupon the insurer claimed a waiver of its obligations.

Pennebaker v Ins. Co., 226-314; 284 NW 147

8671 Policy provision for medical examination.

Atty. Gen. Opinion. See '32 AG Op 41

Conditions precedent to taking effect of policy. The insurer and insured in a life policy may validly contract that the policy shall not take effect unless, during the continuance in good health of the insured,

1. The policy has been delivered, and
2. The first premium has been paid,—

and such agreement imposes on the insured, as conditions precedent to any recovery, affirmative proof that the policy was delivered, and the first premium paid.

Range v Ins. Co., 216-410; 249 NW 268

8673 Liability.

Failure to pay premium—effect. A combined life and accident policy of insurance becomes void in accordance with its terms, to wit:

"on failure to pay the premium at maturity", without any notice from the insurer that the premium is due or when it will be due. In other words, §8959, as supplemented by this section, has no application to such a policy.

Wall v Ins. Co., 217-1106; 253 NW 46

See Federal Bank v Ins. Assn., 217-1098; 253 NW 52

Premium—application of dividends. An insured is not entitled to notice from the insurer as to the amount of dividends due under the policy in order to determine how much cash, in addition, is necessary to pay his premium when, under the policy, the condition does not yet exist under which he would have the right to apply the dividends on the premium.

Wall v Ins. Co., 217-1106; 253 NW 46

Waiver—no release by insured without consideration. A purported release by one party to a contract of the other party's obligations is without effect unless duly supported by a consideration. So held where an insured accepted the return of his premium upon the statement that the policy had lapsed and thereupon the insurer claimed a waiver of its obligations.

Pennebaker v Ins. Co., 226-314; 284 NW 147

8673.1 Annuities.

Annuity contract as "wager." An annuity contract, entered into in good faith, under which the annuitant, for a lump sum payment determined by skilled actuaries, is promised a definite annual payment during the lifetime of the annuitant, does not offend against public policy—is not a "wager" contract.

Hult v Ins. Co., 213-890; 240 NW 218

Death of annuitant—balance due. The executor of a deceased annuitant is entitled to recover the balance of the annuity due at the time of the annuitant's death.

Peterson v Floberg, 214-1398; 242 NW 18

When annuity vests. A testamentary life annuity becomes vested on the date when the annuity becomes due.

In re Hekel, 205-521; 218 NW 297

Release of dower for annuity—fraud—evidence. Evidence held insufficient to show that a contract by which a surviving spouse accepted an annuity in lieu of distributive share was fraudulently obtained.

In re Silkett, 209-417; 227 NW 905

Unambiguous life income trust—annuity policy substitution nonpermissible. Under a clear, unambiguous will setting up a trust fund and providing for a $30 a month bequest to be paid therefrom to a beneficiary as long as she lived, a different method of paying said bequest, by purchase of an annuity for said beneficiary, not permitted.

First Methodist Church v Hull, 225-306; 280 NW 531

CHAPTER 399.1

GROUP INSURANCE

8684.05 Life policy—requirements.

Group insurance—construction in re employment. A provision in a group life insurance policy to the effect that the insurance on an employee shall terminate when the employment terminates is, of course, valid and enforceable, but when the policy also provides that the employer may elect that any insured employee temporarily laid off shall be considered in his (the employer's) employment, the beneficiary of a deceased employee may show that a summary and unconditional written dismissal of the employee from the service of the employer was intended by the employer as a "temporary lay-off".

Zeigler v Assur. Soc., 219-872; 259 NW 769

8684.13 Exemption.

Discussion. See 21 ILR 153—Property purchased with proceeds

Statutes—applicability. Exemption statutes are applicable to residents and nonresidents unless the benefits thereof are confined to residents.

Stark v Stark, 203-1261; 213 NW 235

CHAPTER 400

ASSESSMENT LIFE INSURANCE

8686 Assessment plan of life insurance defined.

Assessment accident insurance—rules of life insurance inapplicable. The statute defining assessment plan of life insurance does not require that the rules applicable to life insurance shall be applicable to accident insurance.

Rainsbarger v Acc. Assn., 227-1076; 289 NW 908

8688 Articles—approval.

Atty. Gen. Opinion. See '36 AG Op 64

Acts of administrative officers. Certiorari may be the proper remedy to review the action of the commissioner of insurance and attorney general in refusing to approve amended articles of incorporation of an assessment association.

National Assn., v Murphy, 222-98; 269 NW 15

Judgment in certiorari — improper form. Upon sustaining a writ of certiorari relative to the alleged illegal act of the commissioner of insurance in refusing to approve amended articles of incorporation of an insurance company, the trial court has no authority by its judgment to decree such approval, other than to substantially direct the defendant to take such action as will give full force and effect to the decision of the court.

National Assn. v Murphy, 222-98; 269 NW 15

8693 Assessments—diversion of funds.

Assessments in fraternal organizations. See under §8784

Change to level premium—assessment—estoppel. A mutual benefit life assessment company has no legal right, after transforming itself, under statutory authority, into a legal reserve or level premium company, to represent or state to the public insurance authorities or to its old assessment members that such members would not be placed in a class by themselves and compelled to pay their own death losses without future acquisition to their membership, but that both the old assessment members and the level premium members would be treated as one class for the purpose of arriving at the basis of mortality costs; and the making of such representations furnishes no basis for an estoppel against the transformed company to deny its right to levy assessment on level premium policyholders for the benefit of the old assessment members. Such representations cannot be deemed a plan for the handling of "operating expenses".

Wall v Life Co., 208-1053; 223 NW 257

8694 Insurable age — beneficiary and change thereof—assignment.

See also annotations under §8785, et seq., Vol I

Assignment of policy as collateral—effect on beneficiary. Reservation in a policy of life insurance of right in the insured to change the beneficiary prevents the vesting, during the lifetime of the insured, of any interest in the designated beneficiary, and arms the insured with power to assign the policy as security for a pre-existing indebtedness, and it is quite immaterial whether the designated beneficiary joins or fails to join with the insured in said assignment.

Potter v Ins. Co., 216-799; 247 NW 669

Assignment of policy—estoppel. The beneficiary of a legal reserve life insurance policy who, without fraud, joins with the insured in an assignment of all right, title, and interest in the policy in order to collaterally secure a debt due from each of said assignors, is estopped, after the death of the insured, from asserting any interest in the policy except as the same may exceed the said secured indebtedness, it appearing that the policy reserved to the insured both the right to assign the policy and to change the beneficiary.

Andrew v Life Co., 214-573; 240 NW 215

Change in beneficiary — justifiable and unjustifiable payment. An insurer who, in compliance with the policy-authorized demand of the insured, changes the beneficiary of a life insurance policy, and, on the death of the insured, makes full payment to said substituted beneficiary, must be deemed to have discharged the obligation of the policy, unless said insurer knew, or ought to have known, when payment was made, that, notwithstanding the provision of the policy authorizing a change of beneficiary, the first-named beneficiary had such interest or ownership in the policy as entitled him to receive said payment. Petition in equity held subject to motion to dismiss (equitable demurrer) because not sufficiently alleging such interest or ownership and the insurer's knowledge thereof.

Bennett v Ins. Co., 220-927; 263 NW 25

Change of beneficiaries. A policy method of changing beneficiaries under life insurance policies is admittedly exclusive; but a testamentary bequest of the proceeds of such policies, payable to the estate of the insured or to his executors or administrators, does not constitute a "change of beneficiaries", but constitutes a disposal of that much of the estate left by the insured.

Miller v Miller, 200-1070; 205 NW 870; 43 ALR 567

Changing beneficiary—following policy—exceptions—effect of death. Death vests interests in insurance, and the method provided in a benefit certificate to change a beneficiary during lifetime of insured is exclusive, except (1) where the company has waived strict compliance and issued a new certificate, (2) where it is beyond the power of insured to comply literally, equity will consider the change made, and (3) where insured has performed all necessary prerequisites, but dies before a new certificate is actually issued. Held in instant case beneficiary change not accomplished.

Jacobs v Ins. Co., 223-1157; 274 NW 879

Changing beneficiary — mere "clear intention" ineffectual. Insured's actions merely indicating a "clear intention to change the beneficiary" are not sufficient. Required acts to effect a change are neither directory nor ministerial but essential, subject only to equitable exceptions.

Jacobs v Ins. Co., 223-1157; 274 NW 879

Changing beneficiary—where policy silent. Where a benefit certificate is silent as to the manner of change, such change of beneficiary may be effected in any manner clearly indicating insured's intention.

Jacobs v Ins. Co., 223-1157; 274 NW 879

Conclusiveness — insurance rights — beneficiaries not parties. A decree establishing rights to insurance does not adjudicate rights of a beneficiary not a party to the action.

Jacobs v Ins. Co., 223-1157; 274 NW 879

Contract provision—effect. The rule of law that when the insured in a policy of life insurance makes a series of changes of beneficiary, and the last beneficiary is legally ineligible, the next preceding, designated, eligible beneficiary is entitled to the proceeds of the policy, does not apply when the policy, by bylaw or otherwise, distinctly provides who, in such circumstances, shall be entitled to the proceeds.

Farrens v Benefit Dept., 213-608; 239 NW 544

Fraternal benefit certificate—changing beneficiary—complying with certificate—necessity. A change of beneficiary on a fraternal benefit society certificate, executed by insured on the day of her death, delivered to an attorney and kept until the next day, then delivered to the company's agent and forwarded to the company, not being in compliance with the certificate requirement, was ineffective.

Jacobs v Ins. Co., 223-1157; 274 NW 879

Right to change beneficiary. The insured in a policy of life insurance, who has the right, under the policy, to change the beneficiary, does not deprive himself of said right by delivering the policy to the beneficiary therein named accompanied by the statement or assurance that he is thereby making a "gift" to said named beneficiary, such policy not being the subject matter of a completed gift inasmuch as it simply proffers an expectancy, and an expectancy does not constitute property.

Penn Ins. v Mulvaney, 221-925; 265 NW 889

8695 Business year—annual report—fees.

Discretion in re managerial expenses. An insurance company which is conducting the business of assessment, and level premium life insurance will not be controlled by the courts in its allotment between the two classes of insurance, of the managerial expenses so long as such allotment is not violative of law, is reasonable and is not arbitrary.

Wall v Life Co., 208-1053; 223 NW 257

8716 Distribution of surplus.

Default—no duty to apply surrender value. Under a policy which provides that default in the payment of a premium shall forfeit the policy, the insurer is under no obligation, upon the happening of such default, to apply the cash surrender value to the payment of such premium, when, under the policy and governing statutes, the insured controlled the disposition of such surrender value and had never exercised any option with reference thereto.

Rogers v Ins. Co., 204-804; 213 NW 757

8718 Assessment associations prohibited.

Atty. Gen. Opinions. See '34 AG Op 205, '36 AG Op 64

Act in excess of title—effect. A legislative act entitled "An act to provide a method whereby assessment life associations may be reincorporated as legal reserve life insurance companies", is void insofar as said act assumes to cover an additional subject matter not mentioned or referred to in the title, e.g., provisions prohibiting designated insurance companies or associations from writing life insurance on the assessment plan. (This section re-enacted by 47 GA, ch 217.)

National Assn. v Murphy, 222-98; 269 NW 15

8724 Reincorporation.

Act in excess of title. A legislative act entitled "An act to provide a method whereby assessment life associations may be reincorporated as legal reserve life insurance companies", is void insofar as said act assumes to cover an additional subject matter not mentioned or referred to in the title, e.g., provisions prohibiting designated insurance companies or associations from writing life insurance on the assessment plan.

National Assn. v Murphy, 222-98; 269 NW 15

Change to level premium—assessment—estoppel. A mutual benefit life assessment company has no legal right, after transforming itself, under statutory authority, into a legal

reserve or level premium company, to represent or state to the public insurance authorities or to its old assessment members that such members would not be placed in a class by themselves and compelled to pay their own death losses without future acquisition to their membership, but that both the old assessment members and the level premium members would be treated as one class for the purpose of arriving at the basis of mortality costs; and the making of such representations furnishes no basis for an estoppel against the transformed company to deny its right to levy assessment on level premium policyholders for the benefit of the old assessment members. Such representations cannot be deemed a plan for the handling of "operating expenses".

Wall v Life Co., 208-1053; 223 NW 257

Change to level premium plan—right of assessment. A statute which authorizes the directors of a mutual benefit life assessment company to transform the company into a legal reserve or level premium company, and which declares that, after such transformation, the company "shall incur the obligations and enjoy the benefits thereof, the same as though originally thus incorporated", clearly eliminates any legislative intention to incumber the level premium policyholders with any assessments to pay death losses of the old assessment certificate holders, even tho the statute does provide that such transformation "shall not affect existing rights or contracts", because the perpetual existence of the assessment insurance scheme is not a contractual right of the assessment certificate holders'.

Wall v Life Co., 208-1053; 223 NW 257

Mutual assessment company—change to level premium—right of policyholder. Where the certificate of a mutual benefit life assessment company provides that the contribution made by the holder to a guarantee fund shall, if he dies in good standing, be repaid to his beneficiary, but be forfeited to the assessment emergency reserve fund if he does not so die, and where the company is, under statutory authority, transformed into a legal reserve or level premium company, and assessment certificate holder and the transformed company may validly contract for the cancellation and surrender of the assessment certificate and for the substitution of a level premium policy in lieu thereof, and may therein validly contract as was formerly contracted in the assessment certificate, to wit: that, if the new policyholder dies in good standing, his former contribution to said guarantee fund will be repaid to the beneficiary, and if he does not so die, said contribution shall be forfeited to the old assessment emergency reserve fund.

Wall v Life Co., 208-1053; 223 NW 257

Statutory change—constitutionality. Article VIII, §12, Constitution of Iowa and §1090, C., '73 (§8376, C., '27), are constitutional and statutory authority for a legislative act authorizing the board of directors of a mutual benefit life assessment company to transform said company into a legal reserve or level premium company, even tho such transformation results in leaving the old assessment certificate holders to carry their own assessments for death losses without further addition to their membership.

Wall v Life Co., 208-1053; 223 NW 257

CHAPTER 401

PROVISIONS APPLYING TO LIFE INSURANCE COMPANIES AND ASSOCIATIONS

Life insurance generally. See Note 1 at end of chapter

8728 Annual statement of foreign companies.

Gross premiums tax—when payable—legislative intent. Legislative intent being the cardinal rule of statutory construction, the plain intent of statute taxing gross premiums of foreign corporations is a tax computed on and payable at the end of the year.

State v Ins. Co., 223-1301; 275 NW 26

8731 Advertisements — who deemed agent.

Service on foreign insurer—physician not agent. An Iowa accident insurance association which has not been licensed to transact its business in a foreign state (in which it has neither office, agent, nor property), and whose certificates of insurance are strictly Iowa contracts, cannot be deemed to have subjected itself to the jurisdiction of the courts of such foreign state (1) because a very large number of its certificate holders reside in said foreign state, or (2) because said association, from time to time and by mail from its Iowa office, requests a physician in said foreign state to examine claimants and to report as to accidental injuries received by claimants,—it appearing that said physician was under no contract obligation to comply with said requests and to make such examinations tho he had done so for several years and had received a stated fee for each separate examination.

Held, the foreign court, in an action on a certificate, acquired no jurisdiction under process served on said physician.

Saunders v Trav. Assn., 222-969; 270 NW 407

8732 Agent's certificate to act.

Unlicensed agents—noneffect on insurer—statements regarding effective date of policy. Where an accident policy is to become effect-

ive at 12 o'clock noon on date of delivery to insured, the application having been made on August 24, 1937, providing (1) it should not bind insurer until accepted nor (2) until policy was accepted by insured, while in good health and free from injury, and where policy, issued September 17, was delivered to insured September 22, while insured was in hospital as result of injuries sustained on August 26, insured could not recover on policy notwithstanding insurance agent's statements to insured that policy would be effective August 26. The fact that agent was unlicensed did not thereby make him a general agent of the insurer, the burden of proving which would be on insured. While an unlicensed agent may be criminally punished, this does not enlarge his authority to bind insurer.

Rainsbarger v Acc. Assn., 227-1076; 289 NW 908

8737 Investment of funds.

Atty. Gen. Opinions. See '25-26 AG Op 449; '30 AG Op 129, 158, '32 AG Op 79, 280; '34 AG Op 601

8739 Real estate as deposit of legal reserve.

Atty. Gen. Opinion. See '34 AG Op 147

8741 Securities deposited.

Atty. Gen. Opinions. See '30 AG Op 40; '32 AG Op 117

Mistaken view of law. Securities deposited by an insurance company with the commissioner of insurance for the specific purpose of protecting the policyholders constitute a trust fund for said specified purpose, both in the hands of the commissioner and, in case of insolvency, in the hands of the receiver of the company, even tho said deposit was made on demand of the commissioner, acquiesced in by the company, in the mutually mistaken but good-faith belief that the statute required such deposit before a license to transact business could legally issue to the company.

State v Cas. Co., 206-988; 221 NW 585

8744 Purpose of withdrawal.

Atty. Gen. Opinion. See '34 AG Op 147

8756 Contracts void—recovery—damages—attorney fees.

Misrepresentation—when unallowable as a defense. False and fraudulent representations on the part of an insured, in his original application for a policy of insurance, are not available as a defense to an action on the policy, when the policy provides that it is incontestable except as provided in named paragraphs which, on examination, reveal no grounds of contest whatever, but only matters of which the insurer could avail himself in the enforcement of the contract.

Wilson v Ins. Co., 220-321; 262 NW 525

8757 Fraud in procuring insurance.

Avoidance of policy. The insurer in an accident insurance policy has the burden of proof to establish the defense that the policy is wholly avoided because the insured, in obtaining the policy, had falsely represented that his habits of life were "correct and temperate", and had thereby intentionally deceived the insurer.

Olson v Surety Co., 201-1334; 208 NW 213

Unallowable cancellation in equity of insurance policy. Equity will not, after the death of the insured in a life insurance policy, entertain jurisdiction to cancel the policy unless exceptional circumstances render cancellation necessary for the protection of the insurer. The fact that the policy becomes incontestable after two years does not constitute such circumstance when said time has not yet elapsed.

Bankers Life v Bennett, 220-922; 263 NW 44

8766 Commissioner as process agent.

Original notice — service — deputy commissioner may accept. Valid service of an original notice of suit against a foreign insurance company doing business in this state, is made by the act of the deputy commissioner of insurance in accepting, in writing and in the name of said commissioner, service of said notice for and on behalf of said company, tho the authority filed by the company only authorized the commissioner to accept such service.

Woodmen v Dist. Court, 219-1326; 260 NW 713; 98 ALR 1431

8769 Intoxication as defense.

Avoidance of policy. The insurer in an accident insurance policy has the burden of proof to establish the defense that the policy is wholly avoided because the insured, in obtaining the policy, had falsely represented that his habits of life were "correct and temperate", and had thereby intentionally deceived the insurer.

Olson v Surety Co., 201-1334; 208 NW 213

8770 Physician's certificate — conclusiveness.

Nonapplicability of statute. This section relative to the conclusiveness on a life insurance company or association of a certificate of insurability issued by its own physician, is not applicable to fraternal societies acting under chapter 402 of the code.

Bukowski v Security Assn., 221-416; 265 NW 132

Accident insurance—estoppel by conclusiveness of physician's certificate—nonapplicability. The statute which provides for the conclusiveness of a physician's certificate of

health or declaring an applicant a fit subject for life insurance after medical examination, and thereafter estops an insurance company from setting up as a defense to an action on policy, that insured was not in the condition of health required by policy, unless policy was procured by fraud, is not applicable to an accident insurance policy, since the characteristics of the risks are so different that it would not seem reasonable, nor would there be any necessity for any such rule in cases where the provisions of the policy are solely as to injury by accident.

Rainsbarger v Acc. Assn., 227-1076; 289 NW 908

Nonestoppel to question insurability. This section does not apply when there has been no delivery of the policy because of the insured's noninsurability.

Range v Ins. Co., 216-410; 249 NW 268

Certification of health or insurability—what constitutes. The questions which an insurer requires his own medical examiner to answer relative to an applicant for life insurance, and the answers of said examiner thereto, may, in connection with the questions put by said examiner to said applicant and the latter's answers thereto, constitute a "certificate of health" or "declaration of applicant's insurability", within the meaning, purpose, and intent of this section.

Faber v Ins. Co., 221-740; 265 NW 305

Delivery—estoppel to question. The actual delivery of a policy of life insurance after the insured has, without fraud, been examined by the insurer's medical examiner and reported insurable, precludes the insurer from questioning the effectiveness of such delivery, on the ground that, after the said examination and report, and before the delivery of the policy, the insured had, unbeknown to the insurer, contracted a fatal disease; and this is true even tho the application distinctly provides that the policy shall not take effect unless the insured is in good health at the time of delivery.

Mickel v Ins. Co., 204-1266; 213 NW 765

Estoppel to question. An insurer against total, permanent disability is, in the absence of plea and proof of fraud on the part of the insured, conclusively bound by a certificate of the health insurability of the insured issued by the insurer's examining physician as a basis for the issuance of the policy.

Foy v Ins. Co., 220-628; 263 NW 14

False answers to medical examiner—effect. The giving to a medical examiner by an applicant for insurance of absolutely false answers relative to the past medical history of the applicant, will not avoid the conclusive effect of the physician's favorable certificate unless the physician was deceived and misled by the false answers into issuing a certificate which he would not have issued, had true answers been given. Evidence reviewed, and held to present a jury question on this latter issue.

Boos v Ins. Co., 205-653; 216 NW 50

Fraud—jury question. Fraud or deceit in obtaining from the medical examiner of an insurance company a certificate of life insurability is not established per se by proof that the applicant for insurance, in response to an all-inclusive and comprehensive question, omitted any reference to the fact that, on one occasion, a physician had prescribed a tonic for him, and that on another occasion an oculist had prescribed glasses for him as a corrective of a defect of vision.

Colver v Continental Co., 220-407; 262 NW 791

Fraud and false warranty—evidence—insufficiency. An insurer who, in an action on a policy of insurance, presents the intermingled defense of fraud and false warranty has the burden to establish such defense. Evidence reviewed and held to present no jury question.

Post v Lodge, 211-786; 232 NW 140

Medical examination—effect. There may be a valid compromise and settlement of liability under a life insurance policy, prior to the death of the insured, even tho the policy was issued on a medical examination made by the insurer.

Vande Stouwe v Life Co., 218-1182; 254 NW 790

Misrepresentation—jury question. On the issue whether a policy of life insurance had been obtained by the insured by means of false and fraudulent representations relative to the prior and present state of health of the insured, record reviewed in detail and held to present a jury question.

Getsinger v Ins. Co., 216-610; 247 NW 260

Misrepresentation—in re sanity. Presumptively, a person is sane from and after such person is discharged from an asylum for the insane to which the person has been committed for treatment for insanity. Evidence, expert and nonexpert, reviewed and held to present a jury question on the issue whether an insured was sane at the time a policy of insurance was issued notwithstanding the conceded fact that said insured had, some four years prior to the issuance of the policy, been adjudged insane and committed to an asylum for the insane and had remained there some three years before being granted a discharge.

Foy v Ins. Co., 220-628; 263 NW 14

Physician's certificate—conclusiveness—estoppel—absence of fraud. An Iowa statute providing that medical examiner's certificate of health issued to insured would estop insurer from setting up in defense of action on policy that insured was not in condition of health required by policy at time of issuance or delivery

thereof, unless certificate was procured by fraud of insured, had the effect of changing contract through estoppel. A statute of this character does not limit the equitable jurisdiction of federal court and is enforceable therein, whether statute had been construed by Iowa supreme court as being rule of substantive law passing into contract, or as being merely a remedial right.

Mutual Ins. v Cunningham, 87 F 2d, 842

Statements by medical examiner. The positive testimony of a medical examiner that he, in the examination of an applicant (now deceased) for life insurance, correctly recorded the answers of the applicant, may be so weakened on cross-examination and by the attending circumstances, as to present a jury question whether the examiner did, in fact, correctly record said answers. So held where the examiner, (1) had no independent recollection of the answers given, (2) did not in all instances record the answers in the exact words of the applicant, and (3) in at least one instance, himself inserted his own answer to a question not stated to the applicant.

Faber v Ins. Co., 221-740; 265 NW 305

Willful deception as to health—jury question. Record reviewed on the issue whether an insured had knowingly deceived the insurer in stating his condition of health during the preceding five years, and held to present a jury question.

Parker v Ins. Co., 218-145; 254 NW 31

8772 Application for insurance—duty to attach to policy.

Similar provisions. See under §8974

Application—failure to attach—burden of proof. In an action, not on a policy of insurance, but for damages consequent on an alleged fraud-induced contract of settlement of the amount due on the policy, the burden of proof to show that the application for the insurance was not attached to or indorsed on the policy is on the insured when he pleads that the insurer may not avail itself of representations contained in the application.

Bockes v Cas. Co., 212-499; 232 NW 156; 237 NW 886

Application attached to policy—illegibly reduced photo copy—not "true copy." In action on life policies, where defense was based on false representations in application for policy, and it is shown original application is plainly printed in legible letters of fair size, while copy furnished and attached to policy is so reduced in size and so dim or blurred that it can only be read by persons with normal vision by use of a strong magnifying glass, the statute requiring "true copy" of application to be attached to policy is not complied with, and the submission of question to the jury as to legibility under an instruction that a true copy must be readable was not erroneous.

New York Ins. v Miller, 73 F 2d, 350

Delivery date of policy—other evidence competent. In an action on a life policy to which insurance company pleads a general denial and further pleads a release and settlement, wherein the delivery date of the policy is in dispute, and the insurance company assigns, as error, the exclusion of testimony of an officer of the company concerning underwriting practices of the company and a letter written by the company to its agent, upon which the agent's reply was indorsed, concerning the date of delivery of the policy, such evidence should have been admitted, and was competent to show that the company honestly believed it had a defense to the policy and explained why the company had the right to rely upon the date appearing upon the receipt for the policy.

Luce v Ins. Co., 227-532; 288 NW 681

Delivery date—evidence—admissibility. In an action to recover on a life policy of a daughter, an exhibit showing that a son's policy was delivered on September 14 was admissible to contradict testimony of father and mother that the daughter's policy was delivered August 23 and that son's policy was delivered previously.

Luce v Ins. Co., 227-532; 288 NW 681

Fraud in securing release—burden of proof. In an action on a life policy where the insurance company pleads a release, the burden of proof is on the company to show the execution and delivery of the release and payment of amount due thereunder, and where failure of consideration or fraud is alleged in obtaining the release, the burden of proof is on the party making the allegation, so where the court excluded such a release from evidence on account of insurance company's failure to establish consideration for the execution of such release, it placed a burden on the company which the company should not have been required to sustain, and the ruling was clearly erroneous.

Luce v Ins. Co., 227-532; 288 NW 681

Nondelivery because of death. A life insurance policy which, pursuant to an application, is promptly prepared (prior to the death of the insured), and delivered to the agent of the insurer, who forthwith returned the policy to the insurer because the insured was then dead, cannot be deemed in effect when the application distinctly provided that no obligation should exist against the insurer until the policy was delivered to the insured.

Hruska v Ins. Co., 203-1165; 211 NW 858

Presumption. It will be presumed that a copy of the application was attached to the policy or certificate, in the absence of evidence to the contrary.

Foley v Brotherhood, 203-39; 210 NW 585

Right to deduct unpaid annual premium. An insurer has the right, when discharging his liability under a policy of life insurance, to deduct the amount of one full annual premium, even tho, when the insured died, only the first

quarterly installment of the premium for the insurance year was due, the policy providing for such deduction and in addition providing that all premiums for an insurance year were due and payable in advance, with option to pay quarterly.

Andrews v Ins. Co., 220-719; 263 NW 255

8773 Failure to attach — defenses — estoppel.

Similar provisions. See §§8794, 8975

Application—failure to attach—burden of proof. In an action, not on a policy of insurance, but for damages consequent on an alleged fraud-induced contract of settlement of the amount due on the policy, the burden of proof to show that the application for the insurance was not attached to or indorsed on the policy is on the insured when he pleads that the insurer may not avail itself of representations contained in the application.

Bockes v Cas. Co., 212-499; 232 NW 156; 237 NW 886

8774 Limitation on proofs of loss.

Inapplicability. This section is not applicable to a certificate of insurance issued by a fraternal beneficiary association under §8777, C., '24.

Peters v Order, 203-428; 212 NW 576

Letters tending to prove inquiry. On the issue whether due and proper inquires as to the whereabouts of an insured person had been made, evidence in the form of identified letters replying to such inquiries are admissible.

Rodskier v Ins. Co., 216-121; 248 NW 295

Cause of death—testimony of attending physician nonconclusive. The testimony of a physician as to the cause of death of a person whom the physician personally attended shortly prior to said death is not conclusive, especially when the physician was, at the time of the examination, uncertain as to the cause of death. In other words, expert testimony, on proper hypothetical facts, is admissible to show a cause of death other than that testified to by the attending physician.

Dawson v Life Ins. Co., 216-586; 247 NW 279

Proofs of loss—estoppel. Statements of fact in proofs of loss are rebuttable so long as the insurer has not acted thereon.

Harrington v Surety Co., 206-925; 221 NW 577

Proofs of loss—statements rebuttable. Statements made by the insured in making a proof of loss under a policy, and also statements made by the beneficiary of the policy who testified as an eyewitness, could be relied on by the insurer, but were only prima facie proof and were subject to contradiction or explanation.

Dykes v Ins. Co., 226-771; 285 NW 201

Loss—proofs—estoppel. An insurer may not complain that proofs of loss were fatally lacking in definiteness when the proofs were on a blank furnished by the insurer and were in compliance with such blank.

Elmore v Surety Co., 207-872; 224 NW 32

Inapplicable provisions of policy. The provisions in a policy of insurance (a) that "no agent has authority to change this policy or to waive any of its provisions", and (b) that "no change shall be made in the policy unless approved by an executive officer of the insurer and the approval be indorsed hereon", have application to the provisions of the policy relating to the formation and continuance of the contract and not to the conditions which are to be performed after loss, e.g., the giving of notice of loss.

Carver v Ins. Co., 218-873; 256 NW 274

Ineffective proof by executrix. Under a policy providing for the payment, (1) of total disability benefits to the insured himself, and (2) of death benefits to another, the disability benefits alleged to have accrued to the insured prior to his death may not be recovered by the executrix of the insured when the insured, tho physically and mentally able so to do, failed to furnish during his lifetime, to the insurer, proofs of such disability, the furnishing of such proofs being clearly contemplated and required by the policy as a condition precedent to the attaching of liability on the part of the insurer.

Kantor v Ins. Co., 219-1005; 258 NW 759

Mental incapacity to furnish proofs—effect. A clear and unequivocal contract that an insured shall furnish due proofs of disability, as a condition precedent to the attaching of any liability on the part of the insurer, must be construed as assuming mental and physical capacity to furnish the proofs when due. It follows that the furnishing of such proofs will be excused if, when the disability occurs, and the policy is in force, the insured is insane, and, therefore, wholly unable to furnish said proofs.

McCoy v Ins. Co., 219-514; 258 NW 320

Notice and proof of loss—waiver. An insurer who is furnished proofs showing death from disease, and later, and within the time for furnishing proofs, is furnished amended proofs showing death from accident, waives all further proofs by refusing to furnish blanks on which to make additional proof and by peremptorily denying all liability for death by accident.

Dawson v Life Co., 216-586; 247 NW 279

Notice and proof of loss—waiver. Failure of an insured to file written proofs of loss, becomes inconsequential when, commencing with the loss and for a long time thereafter, the insurer had promised to pay the loss.

Mortimer v Ins. Assn., 217-1246; 249 NW 405

Waiver—sufficient plea. An allegation, in an action on a policy of insurance, that plaintiff, within the contract time, orally notified a general agent of the insurer of his injury, and that said agent agreed that he would give proper and timely notice to the insurer, is a sufficient plea of waiver of the insured's duty to give written notice of the loss, and sufficient to support the admission of evidence that the agent had sufficient power to waive said written notice.

Carver v Ins. Co., 218-873; 256 NW 274

Privileged communication—waived in proof of loss. In an action on a life policy where the beneficiary signed a proof of loss which contained an express waiver of the statute protecting communications in professional confidence, the testimony of a nurse who attended deceased-insured should not have been excluded, as such testimony was within the scope of the waiver.

Luce v Ins. Co., 227-532; 288 NW 681

Proof of loss—waiver by denying liability. A life insurance company's denial of liability, on grounds other than failure to furnish proofs of loss, is a waiver of their right to require proofs, if the policy was in force and proofs could have been furnished at the time of such denial, but insured, relying on the company's notice, believed the policy had lapsed.

Wood v Ins. Co., 224-179; 277 NW 241

Result of inquiries. On the issue whether due and proper inquiries as to the whereabouts of an insured person had been made, a person may testify as to the inquiries made by him and as to the results of such inquiries.

Rodskier v Ins. Co., 216-121; 248 NW 295

8775 Limitation under health and accident.

Contract limitation—validity. An agreement in a policy of insurance against total and permanent disability, specifically providing that all claim shall be forfeited if proof of such disability is not furnished the insurer "within ninety days after the happening of the total and permanent disability", is valid and enforceable, such time limit being more favorable to the insured than the statutory limit.

Fairgrave v Ins. Assn., 211-329; 233 NW 714

Inconsistent and repugnant provisions—construction against insurer. A provision in a health policy that sick benefits will be paid provided the sickness is contracted thirty days after the date of the policy, and a distinct and separate provision that said benefits will be paid for every sickness contracted subsequent to the issuance of the policy, are so inconsistent and repugnant that the court will reject the first provision and apply the latter.

Schmith v Cas. Co., 216-936; 247 NW 655

Cause of death—undue burden to establish. Expert medical opinions that an insured died from an intra-cranial, fatty embolus resulting from an external, violent and accidentally suffered injury, met by the same class of expert opinions positively to the contrary, may generate a jury question, determinable by the jury, like any other disputed question of fact, on the preponderance of testimony, the facts on which such conflicting, expert opinions are based being of such nature that the jurors could not therefrom deduce a proper opinion. So held where the court erroneously instructed that "No mere weight of evidence is sufficient to establish the cause of assured's death unless it excludes every other reasonable hypothesis as to the cause of death"—in effect requiring the theory of death by means of an embolus to be established beyond a reasonable doubt.

Aldine Co. v Acc. Assn., 222-20; 268 NW 507

Death by accident (?) or suicide (?) — directed verdict. In an action on a policy of insurance covering death by accident but excluding liability in case of suicide, the court, in view of the legal presumption against suicide, cannot properly direct a verdict on the theory of suicide unless the record is such as to conclusively establish the fact of suicide.

Jovich v Benefit Assn., 221-945; 265 NW 632

Denial of liability not constituting waiver. A denial of liability on a policy of insurance does not constitute a waiver of proofs of loss when the validity of the claim under the policy depends solely on the furnishing of proofs of loss within a specified contract time, and when said denial of liability was made long after said time had expired.

Fairgrave v Life Assn., 211-329; 233 NW 714

"Driving," "adjusting," or "explosion of" automobile—jury question. Evidence that a party successively ran two automobiles into his garage, leaving the motor of the first car running, and thereupon closed the garage doors, and was later found dead on the running board of the second car, is wholly insufficient to establish that the deceased met his death "while driving," or "while adjusting," or "by an explosion of," an automobile, it appearing that the direct cause of the death was the inhalation of carbon monoxide gas.

Field v Sur. Co., 211-1239; 235 NW 571

Riding or driving motor vehicle—insured on running board. In an action on an insurance policy, there was sufficient evidence for a jury question on whether an accident came within terms of the policy insuring against injuries received in an accident of a vehicle in which the insured was riding or driving, when it was shown that the car started moving down a grade, and the insured was thrown to the ground from a position partly in the car and

partly on the running board, while attempting to stop the car.

Dykes v Ins. Co., 226-771; 285 NW 201

Notice and proof of loss—extent and sufficiency. A policy of insurance which, inter alia, provides for indemnity "if the insured shall furnish satisfactory proof that he has been wholly disabled * * * for a period of not less than sixty days, and that such disability is presumably permanent, and that he will be wholly and continuously prevented thereby from pursuing any gainful occupation", does not require the proofs for initial indemnity to show that the disability is and will remain absolutely permanent and continuous.

Kurth v Ins. Co., 211-736; 234 NW 201

"As soon as practicable". A policy requirement that written notice of an accident shall be given "as soon as practicable" means that said notice shall be given within a reasonable length of time under all the facts and circumstances. So held in a case where the insured inadvertently lost his policy and forgot the name of the insurer until some five months after liability accrued on the policy.

Gifford v Cas. Co., 216-23; 248 NW 235

"Immediate" notice—jury question. Record reviewed and held to present a jury question on the issue whether preliminary notice to an insurer, of death, was "immediate" within the meaning of the policy.

Nelson v Acc. Soc., 212-989; 237 NW 341

Ineffective proof by executrix. Under a policy providing for the payment, (1) of total disability benefits to the insured himself, and (2) of death benefits to another, the disability benefits alleged to have accrued to the insured prior to his death may not be recovered by the executrix of the insured when the insured, tho physically and mentally able so to do, failed to furnish during his lifetime, to the insurer, proofs of such disability, the furnishing of such proofs being clearly contemplated and required by the policy as a condition precedent to the attaching of liability on the part of the insurer.

Kantor v Ins. Co., 219-1005; 258 NW 759

Proof of inability to pursue gainful occupation. Policy of insurance construed and held that proof of absolute helplessness was not necessary in order to show that the insured had been prevented by his disabilities "from pursuing any gainful occupation".

Kurth v Ins. Co., 211-736; 234 NW 201

Statements rebuttable. Statements made by the insured in making a proof of loss under a policy, and also statements made by the beneficiary of the policy who testified as an eyewitness, could be relied on by the insurer, but were only prima facie proof and were subject to contradiction or explanation.

Dykes v Ins. Co., 226-771; 285 NW 201

"Permanent" disability. A policy which provides for benefits if the insured becomes "wholly and permanently disabled" does not embrace recovery for a disability which has been total for years, but which has terminated at the time action for recovery is instituted.

Hawkins v Ins. Co., 205-760; 218 NW 313

Permanent disability — scope. Under a policy providing monthly disability benefits if insured becomes, and remains for ninety days, so physically incapacitated as to be wholly and permanently unable to engage in any occupation or work for profit, the insured, in order to recover, need carry his proofs on the issue of permanency of disability no farther than to establish (1) present permanency, and (2) a reasonable presumption that such disability will continue for an indefinite period of time. (The policy herein provides for future proofs of continuance of disability.)

Garden v Ins. Co., 218-1094; 254 NW 287

Permanent disability — ascertainment by comparative standard in policy. In weighing the evidence as to a permanent disability claim, heed must be given to the other policy provisions wherein the company of its own volition has set a comparative standard for measuring total and permanent disability as respects the insured's ability to pursue any gainful occupation, and, being so measured, the question is for the jury.

Wood v Ins. Co., 224-179; 277 NW 241

Total and permanent disability — proofs. Preliminary proofs of total and permanent disability are sufficient when prepared and furnished by the insured on and in accordance with blank forms furnished by the insurer for such purpose.

Garden v Ins. Co., 218-1094; 254 NW 287

8776 Policy exempt from execution.

Discussion. See 21 ILR 153—Property purchased with proceeds

Atty. Gen. Opinion. See '32 AG Op 161

Exemption statutes — applicability. Exemption statutes are applicable to residents and nonresidents unless the benefits thereof are confined to residents.

Stark v Stark, 203-1261; 213 NW 235

Avails of life insurance. The avails of a life or accident policy of insurance inuring or passing to the surviving wife of the insured are exempt from her prior debts, even tho she was not designated in the policy as a beneficiary, and received such avails by operation of law only.

Scott v Wamsley, 218-670; 253 NW 524

Computation of amount of exemption. Where a widow as beneficiary in life insurance policies on her husband received some $11,200 and disposed of some $7,300 before any proceedings were commenced to subject said fund

in excess of the $5,000 statutory exemption to the payment of a debt of the widow antedating the death of the husband, the said statutory exemption of $5,000 must be computed on the basis of the unexpended fund. In other words, her exemption cannot be deemed to be embraced within the $7,300 expenditure.

Booth v Propp, 214-208; 242 NW 60; 81 ALR 919

Funeral expenses nonallowable against insurance proceeds. Claims for funeral expenses consequent on the burial of the intestate deceased are not allowable against funds in the hands of the administrator when said funds constitute the proceeds of insurance on the life of deceased, the latter being survived by a minor son.

In re Galloway, 222-159; 269 NW 7

Life insurance to widow — termination of exemption by death. The unexpended proceeds of a policy of life insurance payable to a surviving widow are not exempt, after her death, from liability for debts contracted by her prior to the death of the insured husband. In other words, the exemption accorded to her does not survive her death.

In re Tellier, 210-20; 230 NW 545

Testamentary power over life insurance. A testator may validly dispose by will of the proceeds of life insurance payable to his estate, and make such proceeds subject to the payment of his debts. Such result is effected by a will (1) which provides for the payment of testator's debts, and (2) which devises the life insurance proceeds subject to such debt proviso.

In re Caldwell, 204-606; 215 NW 615

See Miller v Miller, 200-1070; 205 NW 870; 43 ALR 567

Testamentary power over life insurance. The formal statement in a will that testator's debts shall be paid out of his estate, is wholly insufficient to justify the conclusion that testator intended to appropriate to the payment of his debts the avails of life insurance payable to his personal representatives or to his estate, even tho as a matter of law such avails do become a part of his estate.

In re Grilk, 210-587; 231 NW 327

Construction—exemption—disposal of insurance payable to estate—specific legacy. When life insurance is payable to an insured's estate, he may specifically dispose of the proceeds other than as provided by statute, but there must be an agreement or assignment to contrary; however, a specific disposition of insurance proceeds by terms of a will, satisfies such requirement.

In re Clemens', 226-31; 282 NW 730

Dead man statute — failure to prosecute claim or disclaimer of interest ineffective. A divorced wife of a deceased may not become a competent witness to an oral contract made jointly between herself, her mother, and the deceased, in order to subject his insurance to payment of her mother's valid probate claim, merely by failing to prosecute a similar claim of her own and disclaiming any interest in the claim in litigation, since she still has her claim and may enforce payment if the contract is established.

In re Hazeldine, 225-369; 280 NW 568

Deceased's insurance as security—oral contract — original holder incompetent witness tho debt assigned. Altho having assigned his claim and altho the claim is duly allowed in probate, the original party to an oral contract with a deceased is incompetent as a witness, when the assignee of such contract seeks to subject the proceeds of the deceased's life insurance to payment thereof by reason of an oral contract claimed to have been entered into with the deceased.

In re Hazeldine, 225-369; 280 NW 568

Proceeds payable to estate — trusteed for statutory beneficiaries—exemption. Where a testator willed to his second wife all of his property requiring legal transmission but made no mention of his life insurance, payable to his second wife if she survived him, otherwise to his estate; and, when testator's second wife predeceased him, then upon his death, his surviving children, being a daughter by his first marriage and a son by his second marriage, became entitled under the statute to the proceeds of the insurance, and such proceeds passed into the hands of his personal representative or estate, only as a trust fund, to be distributed equally to such daughter and son.

In re Clemens', 226-31; 282 NW 730

Subjecting insurance to probate claim—dismissing as to policy in foreign court not allowable. A claimant in probate, alleging an oral contract assigning all decedent's insurance, may not split this single cause of action by dismissing part of his claim and attempting to establish it in a foreign state where one policy was held as security for the performance of a prior contract of decedent made therein.

In re Hazeldine, 225-369; 280 NW 568

Life policy payable in Iowa pledged in another state—Iowa jurisdiction. Tho a life policy payable to the estate of a deceased Iowa resident is deposited in a foreign state, as security for a debt, the proceeds are not beyond the jurisdiction of the Iowa probate court, inasmuch as the right to such proceeds depends, not upon their location, but upon the terms of the policy, supplemented by any contract relating thereto.

In re Hazeldine, 225-369; 280 NW 568

Proceeds of insurance. In mortgage receivership proceedings, and on the issue whether a wife, one of the obligated mortgagors, is solvent, no consideration can be given to the proceeds of life insurance (up to $5,000) on

the life of the husband, and in the hands of the wife as a beneficiary, the mortgage debt antedating the death of the husband.

Interstate Acc. Assn. v Nichols, 213-12; 238 NW 435

Proceeds inure to separate use of beneficiaries independently of creditors. Proceeds of life insurance policy deposited by insurer in registry of federal district court and awarded to administrator appointed by Iowa court were not subject to claims of creditors under Iowa statute.

Cramer v Phoenix Mut. Life, 91 F 2d, 141

Right to proceeds—estate as beneficiary—exempt as to creditors. Policies of life insurance made payable to insured's estate, or to the administrator thereof, are not subject to the claims of creditors, unless the insured during his lifetime agreed, orally or in writing, to the contrary.

In re Hazeldine, 225-369; 280 NW 568

Right to proceeds—assignment by deceased—convincing evidence necessary. An oral contract assigning insurance, made with a deceased, must be established by clear, satisfactory, and convincing evidence and leave no doubt as to the sufficiency of the consideration.

In re Hazeldine, 225-369; 280 NW 568

Note 1 Life insurance generally.

ANALYSIS

Accident and health generally. See under §8940 (XIII)
Agents and brokers. See under §9119
Annuities. See under §8673.1
Application for life insurance. See under §§8772, 8773
Assessment life insurance generally. See under Ch 400
Beneficiary changes, fraternal and assessment policies. See under §§8694, 8789.2, 8792
Control and regulation of companies generally. See under Chs 298, 400, 401
Exemption of policy proceeds. See under §§8684.13, 8776, 8796, 11919.
Fraternal insurance generally. See under Ch 402
Group insurance. See under §8684.05
Intoxication as a defense. See under §8769
Physician's certificate of health. See under §8770
Process agent, insurance commissioner. See under §§8766, 8767
Proofs of loss generally. See under §8774
Reinsurance. See under Ch 409

I LIFE INSURANCE POLICIES GENERALLY

(a) IN GENERAL

Contract in general—what law governs. A policy of insurance issued in Iowa to a resident thereof is an Iowa contract, even tho the insurer, as a matter of practice, collects the premiums in a foreign state.

Ragan v Ins. Co., 209-1075; 229 NW 702

Negligence—evidence—sufficiency. Evidence reviewed in an action for damages consequent on the alleged negligence of an insurer in passing on, prior to the death of the applicant, an application for industrial insurance, and held quite insufficient to establish such negligence.

Winn v Ins. Co., 216-1249; 250 NW 459

Negligence in passing on application—damages. In an action for damages consequent on the alleged negligence of an insurer in passing on an application for insurance, the plaintiff must fail, irrespective of his evidence of negligence, unless he establishes, to the extent of furnishing a measure for his damages, the substance of the contract into which he was prevented from entering.

Winn v Ins. Co., 216-1249; 250 NW 459

Presumption attending possession. Possession by an insured, at the time of his death, of a policy of life or accident insurance creates a presumption, born of necessity and based on the experience of mankind, that the policy was delivered to the insured as an effective instrument; and this presumption prevails until the court can say, as a matter of law, that the presumption has been conclusively negatived by other evidence. Applied where the issue was whether the first premium had been paid.

Beggs v Ins. Co., 219-24; 257 NW 445; 95 ALR 863

(b) WHEN POLICY BECOMES EFFECTIVE

Conditions precedent to taking effect of policy. The insurer and insured in a life policy may validly contract that the policy shall not take effect unless, during the continuance in good health of the insured,

1. The policy has been delivered, and
2. The first premium has been paid,—and such agreement imposes on the insured, as conditions precedent to any recovery, affirmative proof that the policy was delivered, and the first premium paid.

Range v Ins. Co., 216-410; 249 NW 268

Nondelivery because of death. A life insurance policy which, pursuant to an application, is promptly prepared (prior to the death of the insured), and delivered to the agent of the insurer, who forthwith returned the policy to the insurer because the insured was then dead, cannot be deemed in effect when the application distinctly provided that no obligation should exist against the insurer until the policy was delivered to the insured.

Hruska v Ins. Co., 203-1165; 211 NW 858

Premiums—payment mailed — nonreceipt — jury question. Evidence that an insurance premium had been mailed, against a claim of nonreceipt by the company, raises a jury question, especially when the company admits that in its office routine it made no note of the contents of envelopes until after they had passed through the hands of several clerks.

Wood v Ins. Co., 224-179; 277 NW 241

Unlicensed agent—noneffect on insurer—statements regarding effective date of policy. Where an accident policy is to become effective at 12 o'clock noon on date of delivery to insured, the application having been made on August 24, 1937, providing (1) it should not bind insurer until accepted nor (2) until policy was accepted by insured, while in good health and free from injury, and where policy, issued September 17, was delivered to insured September 22, while insured was in hospital as result of injuries sustained on August 26, insured could not recover on policy notwithstanding insurance agent's statements to insured that policy would be effective August 26. The fact that agent was unlicensed did not thereby make him a general agent of the insurer, the burden of proving which would be on insured. While an unlicensed agent may be criminally punished, this does not enlarge his authority to bind insurer.

Rainsbarger v Acc. Assn., 227-1076; 289 NW 908

II BENEFICIARIES AND INSURABLE INTEREST

(a) IN GENERAL

Forfeiture of policy for breach of warranty, covenant, or condition subsequent—statutory notice of nonpayment of premium—applicability. The statute (§8959, C., '27) requiring the insurer to give 30 days notice of his purpose to forfeit a policy for the nonpayment of a premium applies to a policy of accident insurance which specifies no exact date for the payment of the premium.

Ragan v Ins. Co., 209-1075; 229 NW 702

Performance by beneficiary—vested interest. The named beneficiary in a policy of life insurance acquires a vested interest in the proceeds of said policy when said beneficiary is so named in consideration of an agreement on the part of said beneficiary, (1) to furnish life-support to her parents (which she thereafter performed), and (2) to act as trustee for the protection of an acknowledged interest of said parents in said proceeds; and said vested interest must prevail over the subsequently acquired interest of another person, especially when such latter interest is based on a past consideration and evidenced by no change in the policy, but by simply a manual delivery thereof.

Aetna Ins. v Morlan, 221-110; 264 NW 58

(b) INSURABLE INTEREST

Corporation as beneficiary of policy on officer. A corporation which, for its own general benefit, is the beneficiary in a policy of life insurance on the life of one of its officers, is unconditionally entitled to the proceeds of the policy, even tho the insured had, at the time of his death, severed his official relation with the corporation.

Reilly v Ins. Co., 201-555; 207 NW 583

(c) BENEFICIARIES GENERALLY

Assignment of policy as collateral—effect on beneficiary. Reservation in a policy of life insurance of right in the insured to change the beneficiary prevents the vesting, during the lifetime of the insured, of any interest in the designated beneficiary, and arms the insured with power to assign the policy as security for a pre-existing indebtedness, and it is quite immaterial whether the designated beneficiary joins or fails to join with the insured in said assignment.

Potter v Ins. Co., 216-799; 247 NW 669

Assignment of policy—estoppel. The beneficiary of a legal reserve life insurance policy who, without fraud, joins with the insured in an assignment of all right, title, and interest in the policy in order to collaterally secure a debt due from each of said assignors, is estopped, after the death of the insured, from asserting any interest in the policy except as the same may exceed the said secured indebtedness, it appearing that the policy reserved to the insured both the right to assign the policy and to change the beneficiary.

Andrew v Bankers Life, 214-573; 240 NW 215

Change of beneficiaries. A policy method of changing beneficiaries under life insurance

II BENEFICIARIES AND INSURABLE INTEREST—continued

(c) BENEFICIARIES GENERALLY—concluded

policies is admittedly exclusive; but a testamentary bequest of the proceeds of such policies, payable to the estate of the insured or to his executors or administrators, does not constitute a "change of beneficiaries", but constitutes a disposal of that much of the estate left by the insured.

Miller v Miller, 200-1070; 205 NW 870; 43 ALR 567

Change in beneficiary — justifiable and unjustifiable payment. An insurer who, in compliance with the policy-authorized demand of the insured, changes the beneficiary of a life insurance policy, and, on the death of the insured, makes full payment to said substituted beneficiary, must be deemed to have discharged the obligation of the policy, unless said insurer knew, or ought to have known, when payment was made, that, notwithstanding the provision of the policy authorizing a change of beneficiary, the first-named beneficiary had such interest or ownership in the policy as entitled him to receive said payment. Petition in equity held subject to motion to dismiss (equitable demurrer) because not sufficiently alleging such interest or ownership and the insurer's knowledge thereof.

Bennett v Ins. Co., 220-927; 263 NW 25

Right to change beneficiary. The insured in a policy of life insurance, who has the right, under the policy, to change the beneficiary, does not deprive himself of said right by delivering the policy to the beneficiary therein named accompanied by the statement or assurance that he is thereby making a "gift" to said named beneficiary, such policy not being the subject matter of a completed gift inasmuch as it simply proffers an expectancy, and an expectancy does not constitute property.

Penn Ins. Co. v Mulvaney, 221-925; 265 NW 889

Changing beneficiary—where policy silent. Where a benefit certificate is silent as to the manner of change, such change of beneficiary may be effected in any manner clearly indicating insured's intention.

Jacobs v Ins. Co., 223-1157; 274 NW 879

Changing beneficiary — mere "clear intention" ineffectual. Insured's actions merely indicating a "clear intention to change the beneficiary" are not sufficient. Required acts to effect a change are neither directory nor ministerial but essential, subject only to equitable exceptions.

Jacobs v Ins. Co., 223-1157; 274 NW 879

Changing beneficiary — following policy — exceptions—effect of death. Death vests interests in insurance, and the method provided in a benefit certificate to change a beneficiary during lifetime of insured is exclusive, except (1) where the company has waived strict compliance and issued a new certificate, (2) where it is beyond the power of insured to comply literally, equity will consider the change made, and (3) where insured has performed all necessary prerequisites, but dies before a new certificate is actually issued. Held in instant case beneficiary change not accomplished.

Jacobs v Ins. Co., 223-1157; 274 NW 879

Conclusiveness — insurance rights — beneficiaries not parties. A decree establishing rights to insurance does not adjudicate rights of a beneficiary not a party to the action.

Jacobs v Ins. Co., 223-1157; 274 NW 879

Contract provision—effect. The rule of law that when the insured in a policy of life insurance makes a series of changes of beneficiary, and the last beneficiary is legally ineligible, the next preceding, designated, eligible beneficiary is entitled to the proceeds of the policy, does not apply when the policy, by bylaw or otherwise, distinctly provides who, in such circumstances, shall be entitled to the proceeds.

Farrens v Benefit Dept., 213-608; 239 NW 544

Corporation as beneficiary of policy on officer. A corporation which, for its own general benefit, is the beneficiary in a policy of life insurance on the life of one of its officers, is unconditionally entitled to the proceeds of the policy, even tho the insured had, at the time of his death, severed his official relation with the corporation.

Reilly v Ins. Co., 201-555; 207 NW 583

Pledge of collateral — consideration. The naming of a surety as beneficiary in a life insurance policy and the pledging of the policy in order to indemnify the said surety on signing a renewal note are supported by a sufficient consideration.

Beed v Beed, 207-954; 222 NW 442

Surety as beneficiary—secret change—effect. A debtor who, pursuant to an agreement with his surety, makes the surety a beneficiary in a life policy in order to indemnify the surety against loss on the suretyship, and agrees not to change such beneficiary during the life of the suretyship, may not later secretly change such beneficiary and endow such new beneficiary with right to the proceeds of the policy, when the new beneficiary knew at all times of the suretyship and of the pledging of the policy as indemnity; and it matters not that the new beneficiary actually kept the policy alive by paying the premium.

Beed v Beed, 207-954; 222 NW 442

(d) RIGHT TO PROCEEDS

Discussion. See 16 ILR 419—Minor beneficiary

Assignment after loss. Principle reaffirmed that after a loss occurs under a policy of insurance, the beneficiary may assign his right

of action against the insurer without the consent of the insurer.

Welch v Taylor, 218-209; 254 NW 299

Assignment of policy—estoppel. The beneficiary of a legal reserve life insurance policy who, without fraud, joins with the insured in an assignment of all right, title, and interest in the policy in order to collaterally secure a debt due from each of said assignors, is estopped, after the death of the insured, from asserting any interest in the policy except as the same may exceed the said secured indebtedness, it appearing that the policy reserved to the insured both the right to assign the policy and to change the beneficiary.

Andrew v Life Co., 214-573; 240 NW 215

Beneficiary with vested interest—effect. The named beneficiary in a policy of life insurance acquires a vested interest in the proceeds of said policy when said beneficiary is so named in consideration of an agreement on the part of said beneficiary (1) to furnish life-support to her parents (which she thereafter performed), and (2) to act as trustee for the protection of an acknowledged interest of said parents in said proceeds; and said vested interest must prevail over the subsequently acquired interest of another person, especially when such latter interest is based on a past consideration and evidenced by no change in the policy, but by simply a manual delivery thereof.

Aetna Ins. v Morlan, 221-110; 264 NW 58

Ineligible beneficiary—contract provision—effect. The rule of law that when the insured in a policy of life insurance makes a series of changes of beneficiary, and the last beneficiary is legally ineligible, the next preceding, designated, eligible beneficiary is entitled to the proceeds of the policy, does not apply when the policy, by bylaw or otherwise, distinctly provides who, in such circumstances, shall be entitled to the proceeds.

Farrens v Ben. Dept., 213-608; 239 NW 544

Life policy payable in Iowa pledged in another state — Iowa jurisdiction. Tho a life policy payable to the estate of a deceased Iowa resident is deposited in a foreign state, as security for a debt, the proceeds are not beyond the jurisdiction of the Iowa probate court, inasmuch as the right to such proceeds depends, not upon their location, but upon the terms of the policy, supplemented by any contract relating thereto.

In re Hazeldine, 225-369; 280 NW 568

Notice—claim in probate—legatees unnecessary parties. In an appeal from a holding that a claim in probate was not payable from life insurance funds, notice of appeal is all-sufficient when served solely on the executor, the legatees not being parties to the controversy.

In re Caldwell, 204-606; 215 NW 615

Surety as beneficiary—secret change—effect. A debtor who, pursuant to an agreement with his surety, makes the surety a beneficiary in a life policy in order to indemnify the surety against loss on the suretyship, and agrees not to change such beneficiary during the life of the suretyship, may not later secretly change such beneficiary and endow the new beneficiary with right to the proceeds of the policy, when the new beneficiary knew at all times of the suretyship and of the pledging of the policy as indemnity; and it matters not that the new beneficiary actually kept the policy alive by paying the premium.

Beed v Beed, 207-954; 222 NW 442

Testamentary power—proceeds of life insurance. A testator may validly dispose by will of the proceeds of life insurance payable to his estate and make such proceeds subject to the payment of his debts. Such result is effected by a will (1) which provides for the payment of testator's debts, and (2) which devises the life insurance proceeds subject to such debt proviso.

In re Caldwell, 204-606; 215 NW 615

III CONSTRUCTION AND OPERATION OF POLICIES

Ambiguous language — construction. Ambiguous language employed in an insurance policy must be construed most strongly against the insurer and in favor of the beneficiary of the policy.

Umbarger v Ins. Co., 218-203; 254 NW 87; 36 NCCA 733

Ambiguity against insurer. Principle reaffirmed that, in the construction of a policy of insurance, the court will look to all parts thereof and, guarding against making a new contract for the parties, will construe ambiguous parts thereof most strongly against the insurer who dictated the language of the instrument.

Kantor v Ins. Co., 219-1005; 258 NW 759

Discriminations, etc.—permissible collateral agreements. The act of an insurer in granting to the insured, through the medium of a promissory note, an extension of time in which to pay an accrued annual premium, on condition that the nonpayment of the note at maturity shall ipso facto void the policy, is not violative of the statutes (1) which prohibit discriminations among policyholders, (2) which require the entire contract to be inserted in the policy, and (3) which require all forms of policy or contracts of insurance to be filed with and approved by the commissioner of insurance.

Diehl v Ins. Co., 204-706; 213 NW 753; 53 ALR 1528

Liberal construction—reformation.

Wall v Ins. Co., 228- ; 289 NW 901

Equivocal provision. A policy of insurance is equivocal in providing for double indemnity if the insured dies while "a passenger within

III CONSTRUCTION AND OPERATION OF POLICIES—continued

a passenger elevator" because the term "elevator" may mean:

1. The platform or cage on which or in which the passenger rides; or

2. The entire structure, including the cage or platform, hoisting machinery and shaft in which the cage or platform operates.

The insurer being responsible for this equivocation, that construction must prevail which is most favorable to the insured. Held, therefore, that the insured was "a passenger within a passenger elevator" when, intending to be a passenger, he stepped into the elevator shaft and was killed.

Boles v Ins. Co., 219-178; 257 NW 386; 96 ALR 1400

New policy for old—conclusiveness.

Knott v Ins. Co., 228- ; 290 NW 91

Extending period for insurance. A recording or policy-issuing agent has authority to agree to an extension of the life of a policy, as written, in order to cover an additional period equal to that during which the insurer claimed the policy stood suspended and for which the insured had paid the premium.

Fillgraf v Ins. Co., 218-1335; 256 NW 421

Forfeiture of policy—nonpayment premium lien note—discriminatory provisions. In an action by beneficiary to recover insurance on a policy which, at the expiration of an extension permitted by a premium lien note, the insured had allowed to lapse, and which policy contained certain provisions as to "cash surrender value" and "participating paid up insurance" granting to an insured three months after default in any premium payment to elect to surrender his policy for cash, thereby contains an unlawful discrimination providing longer insurance in favor of a more delinquent insured, and under above circumstances the failure to pay the premium lien note resulted in cancelling the policy subject to the terms of the policy itself, which giving insured a specified amount of insurance for a limited time, which having expired at the time of his death, it follows that the policy having lapsed a recovery should be denied.

Clausen v Ins. Co., 224-802; 276 NW 427

Inapplicable provisions of policy. The provisions in a policy of insurance (a) that "no agent has authority to change this policy or to waive any of its provisions", and (b) that "no change shall be made in the policy unless approved by an executive officer of the insurer and the approval be indorsed hereon", have application to the provisions of the policy relating to the formation and continuance of the contract and not to the conditions which are to be performed after loss, e.g., the giving of notice of loss.

Carver v Ins. Co., 218-873; 256 NW 274

Unlicensed agent—noneffect on insurer—statements regarding effective date of policy. Where an accident policy is to become effective at 12 o'clock noon on date of delivery to insured, the application having been made on August 24, 1937, providing (1) it should not bind insurer until accepted nor (2) until policy was accepted by insured while in good health and free from injury, and where policy, issued September 17, was delivered to insured September 22 while insured was in hospital as result of injuries sustained on August 26, insured could not recover on policy notwithstanding insurance agent's statement to insured that policy would be effective August 26. The fact that agent was unlicensed did not thereby make him a general agent of the insurer, the burden of proving which would be on insured. While an unlicensed agent may be criminally punished, this does not enlarge his authority to bind insurer.

Rainsbarger v Acc. Assn., 227-1076; 289 NW 908

Nonpayment of premium. In case of ambiguity, a policy of insurance will be construed most strongly against the insurer who, of course, wrote the policy. So held on the question whether a provision granting a period of grace in the payment of premiums applied to both death and disability benefits provided for in the policy.

Murphy v Ins. Co., 219-609; 258 NW 749

"Passenger"—construction of term. Principle recognized and reasserted that there is a vast difference between the facts which constitute a person a passenger in a common carrier conveyance and what facts constitute a person a passenger on an ordinary elevator.

Boles v Ins. Co., 219-178; 257 NW 386; 96 ALR 1400

"Permanent" disability. A policy which provides for benefits if the insured becomes "wholly and permanently disabled" does not embrace recovery for a disability which has been total for years, but which has terminated at the time action for recovery is instituted.

Hawkins v Ins. Co., 205-760; 218 NW 313

Premiums—default—"paid-up" insurance as automatic result. A policy of insurance may not be deemed a policy for extended insurance upon the happening of a default in the payment of a premium (1) when, under the terms of the policy and governing statutes, such default automatically rendered the policy a policy for paid-up insurance, unless the insured elected to take extended insurance, and (2) when the insured had never exercised any such election, and moreover had, long after the default, ineffectually attempted to pay the premium.

Rogers v Ins. Co., 204-804; 213 NW 757

Varying contract by evidence of custom. Principle recognized that a clearly expressed

and unambiguous contract cannot be varied by evidence of a custom.

Wall v Ins. Co., 217-1106; 253 NW 46

IV PREMIUMS, DUES AND ASSESSMENTS

Failure to pay premium—effect. A combined life and accident policy of insurance becomes void in accordance with its terms, to wit: "on failure to pay the premium at maturity", without any notice from the insurer that the premium is due or when it will be due. In other words, section 8959, as supplemented by section 8673, has no application to such a policy.

Wall v Ins. Co., 217-1106; 253 NW 46
See Federal Bank v Ins. Assn., 217-1098; 253 NW 52

Forfeiture of policy—nonpayment of premium. An insured will not be deemed in default in the payment of premiums at the time of his death (1) when the premium is payable in installments, (2) when no specified date is fixed for payment, (3) when the policy provides that the payment of an installment shall continue the policy in force for a stated time, and (4) when the insured dies prior to the expiration of said stated time after the last payment; and this is true tho the premiums earned exceed the premiums paid.

Ragan v Ins. Co., 209-1075; 229 NW 702

Premiums—maturity—date of policy governs. In computing the future accruing premium paying periods under a policy of life insurance, the date of the policy as voluntarily selected by the insured, governs, (1) even tho said date is an antedate representing the date of the application for the insurance, and (2) even tho the policy provides that it shall be effective only from date of delivery to the insured.

Timmer v Ins. Co., 222-1193; 270 NW 421; 111 ALR 1412

Premium payable from wages—quitting service—effect. Where a premium is payable in installments and from the wages of the insured earned with a named employer, the abandonment of said service by the insured does not constitute a breach of the contract, when the policy provides for just such a contingency.

Ragan v Ins. Co., 209-1075; 229 NW 702

Policy date for premiums—time of lapse.

Wall v Ins. Co., 228- ; 289 NW 901

Nonpayment of premium—effect of custom. An insured cannot excuse the nonpayment of his premium on the plea that the insurer customarily notified the policyholder of the maturity date, but failed so to do in his case when said policyholder did not know of the custom at the time in question and necessarily did not rely thereon.

Wall v Ins. Co., 217-1106; 253 NW 46

Failure to pay note—lapse of policy. A policy of insurance unqualifiedly lapses upon the failure of the insured to pay at maturity a promissory note which he has given for an annual premium, such effect being expressly provided for in the application and in the policy and in the said note, and the note clearly providing that it was not given as payment.

Diehl v Ins. Co., 204-706; 213 NW 753; 53 ALR 1528

Nonright to grace in payment of note. An insured who has the policy right to 30 days grace in which to pay a premium after its maturity, before the policy lapses, but who applies for and is granted a much longer time, through the medium of a promissory note, in which to pay may not insist that the 30-day policy grace shall be added to the maturity date of the note.

Diehl v Ins. Co., 204-706; 213 NW 753; 53 ALR 1528

Nonpayment of premium. In case of ambiguity, a policy of insurance will be construed most strongly against the insurer who, of course, wrote the policy. So held on the question whether a provision granting a period of grace in the payment of premiums applied to both death and disability benefits provided for in the policy.

Murphy v Ins. Co., 219-609; 258 NW 749

Nonpayment of premium—period of grace. A policy of life insurance, in providing that a failure to pay a premium shall not void the policy until a thirty days notice is mailed to the last known address of the insured, contemplates and requires, not a notice that a premium will become due at a named date in the future, but a thirty days notice that a premium is due and unpaid; and until the thirty days have fully elapsed after the mailing of a proper notice, the policy continues in force.

Andrews v Ins. Co., 220-719; 263 NW 255

Payment in disregard of contract—waiver. A provision in the constitution and bylaws of an insurer to the effect that the failure of the insured, for three months, to pay the required monthly dues shall, without notice, automatically terminate his membership and deprive him of all benefits must be deemed to have been waived in favor of an insured who, for many years and up to the time of his death, fully paid his dues, but not in accordance with said constitutional requirement,—the insurer necessarily having knowledge of said method of payment, and having accepted and retained said payments without objection.

Sawyer v Union, 220-806; 263 NW 236

Liability of insurer—premium check received as "cash"—no lapse by nonpayment. Where an insurer notifies its insured that his premium lien note is due, but his new note and remittance mailed on or before a certain Saturday on which his policy lapses, will prevent any such lapse, the insurer knowing that

IV PREMIUMS, DUES AND ASSESSMENTS—concluded

thereby payment could not reach its office in another city before the policy lapse date, but, nevertheless, when the payment check arrives, receipts for it as cash, and when the insured shortly thereafter dies, and the check meanwhile being returned unpaid, and the insured altho then dead being notified that the policy had lapsed, is a situation justifying a finding that the check was received as payment and a repudiation of such payment to escape liability on the policy will not be permitted.

Hockert v Ins. Co., 224-789; 276 NW 422

"Void" for nonpayment of premiums means "voidable". An insurance policy written as a unilateral contract, containing a provision that the policy will be void upon default in premium payment, means in effect that the policy is "voidable"—said clause being for the exclusive benefit of the insurer.

Pennebaker v Ins. Co., 226-314; 284 NW 147

Premium—application of dividends. An insured is not entitled to notice from the insurer as to the amount of dividends due under the policy in order to determine how much cash, in addition, is necessary to pay his premium when, under the policy, the condition does not yet exist under which he would have the right to apply the dividends on the premium.

Wall v Ins. Co., 217-1106; 253 NW 46

Unpaid premiums—nonright to apply dividends. The insurer in a dividend-participating policy has no right on his own initiative—let alone being under a duty—to so apply a cash dividend belonging to the insured and in the possession of the insurer, as to furnish extended insurance and prevent a lapse of the policy, the policy granting no such right to the insurer, and vesting the insured, under the exercise of his own option, with absolute control over said dividend.

Baker v Ins. Co., 222-184; 268 NW 556

Conditionally delivered note — purchaser with knowledge not "holder in due course". Where insurance agent takes an application for life insurance, and as a part of the same transaction notes are executed and delivered conditionally, or for specific purpose of paying insurance premium, and a party takes the notes, as security for a loan to the agent, with knowledge that application has not been approved, such party is not a "holder in due course" and cannot enforce payment of the note after application has been rejected.

Economy Co. v Ins. Co., 227-1123; 290 NW 82

Conversion of premium by agent—liability of insurer. Where insurance agent taking an application for life insurance had authority to collect premiums on behalf of the insurer and where proceeds of check given with application for payment of premium were partly converted while in authorized possession of insurer's agent, and the application was thereafter rejected by insurer, the conversion was an act for which the insurer was liable.

Economy Co. v Ins. Co., 227-1123; 290 NW 82

Deceased insurance agent's liability for insurance premium. In action to cancel insurance premium notes where evidence, clearly admissible against administrator of deceased insurance agent, established that check and two notes were delivered to agent for payment of premium and that insurer rejected application for insurance, such evidence warranted cancellation of the notes and established agent's liability for the unaccounted part of the check as against administrator of the agent's estate.

Economy Co. v Ins. Co., 227-1123; 290 NW 82

V ASSIGNMENT OR TRANSFER

Absence of consideration. An assignment of the proceeds of a life insurance policy is a nullity when not supported by a consideration.

Mutual Ins. v Schubert, 201-697; 207 NW 741

Assignment of policy—estoppel. The beneficiary of a legal reserve life insurance policy who, without fraud, joins with the insured in an assignment of all right, title, and interest in the policy in order to collaterally secure a debt due from each of said assignors, is estopped, after the death of the insured, from asserting any interest in the policy except as the same may exceed the said secured indebtedness, it appearing that the policy reserved to the insured both the right to assign the policy and to change the beneficiary.

Andrew v Life Co., 214-573; 240 NW 215

Assignment as collateral—effect on beneficiary. Reservation in a policy of life insurance of right in the insured to change the beneficiary prevents the vesting, during the lifetime of the insured, of any interest in the designated beneficiary, and arms the insured with power to assign the policy as security for a pre-existing indebtedness, and it is quite immaterial whether the designated beneficiary joins or fails to join with the insured in said assignment.

Potter v Ins. Co., 216-799; 247 NW 669

Consideration—assignment to trustee. A written assignment of a fractional interest in a life insurance policy to a trustee, made for the purpose of protecting the attorneys for the agreed value of their services in prosecuting an action on the policy, is supported by adequate consideration, especially when it appears that the trustee was to receive compensation for his services.

Welch v Taylor, 218-209; 254 NW 299

Assignee of policy—venue. The assignee of a fractional interest in a life insurance policy

may, in conjunction with the original beneficiary (who retains the remaining fractional interest), maintain an action on the policy in the county of which the assignee is a resident, even tho said county is not the county of which the original beneficiary is a resident.

Welch v Taylor, 218-209; 254 NW 299

Right to proceeds—assignment after loss. Principle reaffirmed that after a loss occurs under a policy of insurance, the beneficiary may assign his right of action against the insurer without the consent of the insurer.

Welch v Taylor, 218-209; 254 NW 299

Insurable interest—corporation as beneficiary of policy on officer. A corporation which, for its own general benefit, is the beneficiary in a policy of life insurance on the life of one of its officers, is unconditionally entitled to the proceeds of the policy, even tho the insured had, at the time of his death, severed his official relation with the corporation.

Reilly v Ins. Co., 201-555; 207 NW 583

Subjecting insurance to probate claim—dismissing as to policy in foreign court not allowable. A claimant in probate, alleging an oral contract assigning all decedent's insurance, may not split this single cause of action by dismissing part of his claim and attempting to establish it in a foreign state where one policy was held as security for the performance of a prior contract of decedent made therein.

In re Hazeldine, 225-369; 280 NW 568

VI CANCELLATION, SURRENDER, RESCISSION AND REFORMATION

Cancellation in equity. Equity will not, after the death of the insured in a life insurance policy, entertain jurisdiction to cancel the policy unless exceptional circumstances render cancellation necessary for the protection of the insurer. The fact that the policy becomes incontestable after two years does not constitute such circumstance when said time has not yet elapsed.

Bankers Life v Bennett, 220-922; 263 NW 44

Fraud as defense in law action. A defendant in an action at law on a policy of insurance is not entitled to a transfer of the action to the equity calendar simply because he pleads fraudulent representation as a defense and prays a cancellation of the policy.

Beeman v Life Co., 215-1163; 247 NW 673

Reformation—age when policy exchanged—mutual mistake

Knott v Ins. Co., 228- ; 290 NW 91

Date of lapse—construction—reformation.

Wall v Ins. Co., 228- ; 289 NW 901

VII RENEWAL, REVIVAL AND REINSTATEMENT

Belated receipt of check—effect. Under a policy providing that the nonpayment of a premium shall forfeit the policy, but that the insured may be reinstated, the receipt by the insurer thru the mail, long after the maturity of a premium, of insured's check for the premium, does not constitute payment, when the insurer promptly replied by mail that the insured must first be reinstated, and when, without effort to collect the check, the insurer made proper tender thereof; and it matters not that the insured died before the insurer's letter reached him.

Rogers v Ins. Co., 204-804; 213 NW 757

Incontestability and suicide clauses compared. A clause, in an insurance reinstatement agreement, providing for incontestability after two years from reinstatement, is a limitation on contestability and on the company's rights and is opposite in character to a suicide clause which affords additional contestability and adds to the company's rights.

Johnson v Ins. Co., 224-797; 276 NW 595

Ipso facto lapse of policy—formal forfeiture unnecessary. Under an ordinary life insurance policy, a provision that default in payment of a premium shall forfeit the policy requires no formal notice of forfeiture in case of such default.

Rogers v Ins. Co., 204-804; 213 NW 757

Reinstatement revives lapsed policy—suicide clause. Reinstatement of an insurance policy four years after it was originally written does not create a new contract as of date of reinstatement but revives the lapsed policy, and a clause in the original policy excluding liability for suicide for two years from date of contract is not revived to mean two years from date of reinstatement.

Johnson v Ins. Co., 224-797; 276 NW 595

Self-adjusting benefit provisions — effect. Where a policy of accident insurance, which has lapsed because of the nonpayment of premiums, is self-adjusting as regards death benefits in case death occurs while the insured is pursuing an occupation which is more hazardous than the one specified in the policy, such self-adjusting provisions are in no manner changed by the act of the insurer in reinstating the policy by accepting and retaining the past due premium with full knowledge that the insured was then pursuing a more hazardous occupation than the one specified in the policy. Especially is this true if a contrary construction would result in a discrimination between policyholders which is prohibited by statute.

Stephan v Ins. Co., 209-576; 221 NW 57

VIII AVOIDANCE AND FORFEITURE OF POLICIES

(a) IN GENERAL

Directed verdict on defensive plea. A defendant insurance company is entitled to a directed verdict on its defensive plea that the policy sued on had, because of the nonpayment of premiums, etc., become forfeited prior to the death of the insured, when, at the close of

VIII AVOIDANCE AND FORFEITURE OF POLICIES—continued

(a) IN GENERAL—concluded

all testimony, the record reveals clear and convincing proof of such forfeiture by competent and satisfactory testimony which is wholly uncontradicted and unimpeached, directly or indirectly, by any fact, circumstance, or condition. And this is true tho it be assumed that defendant has the burden to establish his said plea.

Baker v Ins. Co., 222-184; 268 NW 556

Misrepresentation in re sanity. Presumptively, a person is sane from and after such person is discharged from an asylum for the insane to which the person has been committed for treatment for insanity. Evidence, expert and nonexpert, reviewed and held to present a jury question on the issue whether an insured was sane at the time a policy of insurance was issued notwithstanding the conceded fact that said insured had, some four years prior to the issuance of the policy, been adjudged insane and committed to an asylum for the insane and had remained there some three years before being granted a discharge.

Foy v Ins. Co., 220-628; 263 NW 14

Bylaws part of policy—nonwaiver.

Richardson v Trav. Assn., 228- ; 291 NW 408

(b) MISREPRESENTATION AND CONCEALMENT

Actions on policies—law of case—directed verdict. An insurer may not have a directed verdict on the ground that the insured had, in his application, incorrectly stated his occupation (1) when, on a former appeal, the law of the case had been settled to the effect that recovery might be had if the insurer had full knowledge of such occupation notwithstanding such incorrect statement, and (2) when the record presents a jury question on such issue of knowledge.

Murray v Ins. Co., 204-1108; 216 NW 702

False answers to medical examiner—effect. The giving to a medical examiner by an applicant for insurance of absolutely false answers relative to the past medical history of the applicant, will not avoid the conclusive effect of the physician's favorable certificate unless the physician was deceived and misled by the false answers into issuing a certificate which he would not have issued, had true answers been given. Evidence reviewed, and held to present a jury question on this latter issue.

Boos v Ins. Co., 205-653; 216 NW 50

Fraud and false warranty—evidence—insufficiency. An insurer who, in an action on a policy of insurance, presents the intermingled defense of fraud and false warranty has the burden to establish such defense. Evidence reviewed and held to present no jury question.

Post v Lodge, 211-786; 232 NW 140

Fraud—jury question. Fraud or deceit in obtaining from the medical examiner of an insurance company a certificate of life insurability is not established per se by proof that the applicant for insurance, in response to an all-inclusive and comprehensive question, omitted any reference to the fact that, on one occasion, a physician had prescribed a tonic for him, and that on another occasion an oculist had prescribed glasses for him as a corrective of a defect of vision.

Colver v Continental Co., 220-407; 262 NW 791

Misrepresentation—jury question. On the issue whether a policy of life insurance had been obtained by the insured by means of false and fraudulent representations relative to the prior and present state of health of the insured, record reviewed in detail and held to present a jury question.

Getsinger v Ins. Co., 216-610; 247 NW 260

Misrepresentation—when unallowable as a defense. False and fraudulent representations on the part of an insured, in his original application for a policy of insurance, are not available as a defense to an action on the policy, when the policy provides that it is incontestable except as provided in named paragraphs which, on examination, reveal no grounds of contest whatever, but only matters of which the insurer could avail himself in the enforcement of the contract.

Wilson v Equitable Life, 220-321; 262 NW 525

Willful deception as to health—jury question. Record reviewed on the issue whether an insured had knowingly deceived the insurer in stating his condition of health during the preceding five years, and held to present a jury question.

Parker v Ins. Co., 218-145; 254 NW 31

(c) NONFULFILLMENT OF WARRANTIES AND CONDITIONS

Contract remedies for collection—failure to comply with. The beneficiary (and his assignee), in a certificate of insurance of a mutual benefit association, is bound by the bylaws which provide that no resort shall be had to the courts to enforce payment of said certificate until said beneficiary has first exhausted the contract remedies provided by the bylaws for the allowance and payment of said claim.

Ater v Ben. Dept., 222-1390; 271 NW 517

Incapacity excusing payment. Evidence reviewed, and held insufficient to establish that an insured was "wholly and permanently" disabled within the meaning of a policy which excused nonpayment of the annual premium in case of such incapacity.

Corsuat v Assur. Soc., 203-741; 211 NW 222; 51 ALR 1035

Nonpayment of dues—automatic forfeiture. A policy or certificate holder in a fraternal insurance society who, at different times, and in violation of his contract of insurance, has escaped an automatic forfeiture of his policy by having his policy dues or assessments paid and accepted after they were wholly delinquent, must comply with a due and timely notice from the society that said practice will no longer be tolerated and that said dues and assessments must be paid strictly within the time provided by the policy contract.

If he does not so comply, and dies while in arrears, his beneficiary will not be permitted to avoid the automatic forfeiture of the policy by a then tender of the dues.

Wry v Woodmen, 222-1179; 271 NW 300

Premiums—default—no duty to apply surrender value. Under a policy which provides that default in the payment of a premium shall forfeit the policy, the insurer is under no obligation, upon the happening of such default, to apply the cash surrender value to the payment of such premium when, under the policy and governing statutes, the insured controlled the disposition of such surrender value and had never exercised any option with reference thereto.

Rogers v Ins. Co., 204-804; 213 NW 757

IX WAIVER AND ESTOPPEL

Discussion. See 13 ILR 129—Waiver

Assignment of policy. The beneficiary of a legal reserve life insurance policy who, without fraud, joins with the insured in an assignment of all right, title, and interest in the policy in order to collaterally secure a debt due from each of said assignors, is estopped, after the death of the insured, from asserting any interest in the policy except as the same may exceed the said secured indebtedness, it appearing that the policy reserved to the insured both the right to assign the policy and to change the beneficiary.

Andrew v Life Co., 214-573; 240 NW 215

Delivery of policy. The actual delivery of a policy of life insurance after the insured has, without fraud, been examined by the insurer's medical examiner and reported insurable precludes the insurer from questioning the effectiveness of such delivery on the ground that after the said examination and report, and before the delivery of the policy, the insured had, without the knowledge of the insurer, contracted a fatal disease; and this is true even though the application distinctly provides that the policy shall not take effect unless the insured is in good health at the time of delivery, such proviso being ineffective under §8770, C., '24, in those cases where the insurer makes delivery.

Mickel v Ins. Co., 204-1266; 213 NW 765

Estoppel to dispute power of agent. An insurance company estops itself from asserting that its agent is other than a recording or policy-issuing agent when it furnishes the agent with all blanks and supplies necessary for the actual execution and issuance by him of policies and otherwise recognizes his broad powers, and when a policyholder has relied on the agreement and representation of said agent.

Fillgraf v Ins. Co., 218-1335; 256 NW 421

Estoppel to avoid or forfeit policy—medical examination—effect. There may be a valid compromise and settlement of liability under a life insurance policy, prior to the death of the insured, even tho the policy was issued on a medical examination made by the insurer. (§8770, C., '31.)

Vande Stouwe v Life Co., 218-1182; 254 NW 790

Nonestoppel to question insurability. The statutory provision (§8770, C., '31) which estops an insurer from questioning the insurability of an insured after the insurer's medical examiner has certified to the insurability of the insured, does not apply when there has been no delivery of the policy because of the insured's noninsurability.

Range v Ins. Co., 216-410; 249 NW 268

Forfeiture of policy—nonpayment of premiums. The plea that the nonpayment of premiums on a policy was waived because the policy provided for such waiver in case the insured became "wholly and permanently disabled" is manifestly not established by proving that the insured was only partially disabled.

Corsuat v Assur. Soc., 203-741; 211 NW 222; 51 ALR 1035

Proof of loss—denial of liability not constituting waiver. A denial of liability on a policy of insurance does not constitute a waiver of proofs of loss when the validity of the claim under the policy depends solely on the furnishing of proofs of loss within a specified contract time, and when said denial of liability was made long after said time had expired.

Fairgrave v Life Assn., 211-329; 233 NW 714

Privileged communications—waiver of statute—scope of. A waiver, in a policy of accident insurance, of the statute which forbids a physician when testifying to reveal a professional or privileged communication, is operative whether the particular communication be favorable or unfavorable to the insurer.

Miser v Trav. Assn., 223-662; 273 NW 155

Bylaws part of policy—nonwaiver.

Richardson v Trav. Assn., 228- ; 291 NW 408

Waiver—no release by insured without consideration. A purported release by one party to a contract of the other party's obligations is without effect unless duly supported by a consideration. So held where an insured accepted the return of his premium upon the statement that the policy had lapsed and there-

upon the insurer claimed a waiver of its obligations.

Pennebaker v Ins. Co., 226-314; 284 NW 147

X CAUSES OF DEATH AS AFFECTING RECOVERY

(a) IN GENERAL

Assault to rob—jury question. The limited liability provided in a policy of insurance in case of "injuries intentionally inflicted upon the insured by another person except in the perpetration of a robbery," cannot be deemed established as a matter of law by evidence which would justify a finding either (1) that the assault was not made in the perpetration of a robbery, or (2) that it was made in the perpetration of a robbery, or (3) that the assault was the result of mistaken identity—and, therefore, not intentional within the meaning of the policy.

Carpenter v Trav. Assn., 213-1001; 240 NW 639

(b) ACCIDENTAL DEATH AND DOUBLE INDEMNITY

Drinking liquor as "accidental means". Proof that an insured drank liquor of some nature, and died from the effects thereof, without any evidence that the liquor was taken (1) unintentionally, or (2) under a mistaken notion as to amount taken, or (3) under a mistaken notion as to the character of the liquor, does not establish that the death was caused by accidental means.

Naggy v Provident Ins., 218-694; 255 NW 526

Accidental cause producing death—evidence. Evidence held sufficient to present a jury question on the issue whether an insured became accidentally infected with gas bacillus at the time of an injury to his hand, and whether said infection resulted in his death.

Martin v Bankers Life, 216-1022; 250 NW 220

"Accident" and "accidental means" defined. An "accident" is an event which, under the circumstances, is unusual and unexpected by the person to whom it happens; the happening of an event without the concurrence of the will of the person by whose agency it was caused.

The term "accidental means" signifies those means, the effect of which does not ordinarily follow, and cannot be reasonably anticipated from the use of those means, an effect which the actor did not intend to produce and which he cannot be charged with the design of producing.

Miser v Trav. Assn., 223-662; 273 NW 155

Accidental death—proof of exact manner unnecessary. In an action at law by beneficiary to recover upon a policy of life insurance containing provision for an additional benefit in event of death of insured by accidental means, it is not necessary that beneficiary set up or prove any particular theory of the exact manner of the insured's accidental death.

Waddell v Ins. Co., 227-604; 288 NW 643

Discharge of firearms. Proof by an insurer that the insured was murdered by being shot by some unknown person does not establish the defense that a limited liability is provided by the policy if the insured is killed by the discharge of firearms and there is no actual witness to the transaction "except the insured himself", because such proof establishes that there was an eyewitness other than the insured, to wit, the assailant.

Carpenter v Trav. Assn., 213-1001; 240 NW 639

Death by accident (?) or suicide (?)—directed verdict. In an action on a policy of insurance covering death by accident but excluding liability in case of suicide, the court, in view of the legal presumption against suicide, cannot properly direct a verdict on the theory of suicide unless the record is such as to conclusively establish the fact of suicide.

Jovich v Benefit Assn., 221-945; 265 NW 632

Death following disease caused by injury. A physical injury to a person must, within the meaning of the ordinary accident insurance policy, be deemed the proximate cause of the death of said person, even tho said person actually dies of bronchial pneumonia, provided said disease was precipitated or caused by said physical injury. Evidence held to present jury question.

Dewey v Ins. Co., 218-1220; 257 NW 308

Death by accidental means. In a law action by beneficiary to recover for death of insured on a policy containing additional benefits for death resulting from accidental means, the defendant insurer complaining that the court erred in submitting to the jury the question of whether or not plaintiff had successfully carried her burden of proof that death resulted from accidental means, held, there being circumstantial evidence tending to establish that the discharge of a gun was accidental, creating a presumption having probative value in favor of the theory of accident, the question was properly submitted to the jury.

Waddell v Ins. Co., 227-604; 288 NW 643

Parachute jump—"in aerial conveyance"—not covered by policy.

Richardson v Trav. Assn., 228- ; 291 NW 408

Inhaling "gas"—scope of term. An unambiguous policy provision which exempts the insurer from liability when death ensues from inhaling "any gas" embraces a death from inhaling a combination or collection of gases as well as death from inhaling a single gas.

Lamar v Traveling Men, 216-371; 249 NW 149; 92 ALR 159

"Immediate" disablement. A policy of accident insurance which provides for a death loss only when the accident "immediately, continuously, and wholly disables the insured from the date of the accident" does not cover

a loss for death where the insured, after being injured, continued to perform the usual and ordinary labors of his occupation for some twenty days, before total disablement took place as a result of the accidental injury.

Walters v Acc. Assn., 208-894; 224 NW 494

Disablement of automobile—condition constituting. Insurance against accidental loss of life from "disablement" of an automobile embraces such loss consequent on the carburetor of the car being in such defective condition that gas is ignited from the engine, and forced into the cab, with fatal results to the operator of the car.

Thomas v Ins. Co., 223-761; 273 NW 862

"Freight" elevator as "passenger" elevator. Under a policy of insurance providing double indemnity for death while the insured is "a passenger within a passenger elevator", a jury question may arise whether an ordinary freight elevator may not also be a passenger elevator within the meaning of the policy and in view of the use of said elevator for the carrying of passengers.

Boles v Ins. Co., 219-178; 257 NW 386; 96 ALR 1400

Contractor as passenger. On the question whether an insured under an accident insurance policy was a "passenger" in an elevator at the time of his death, the fact that he was an independent contractor of the work then being carried on is quite immaterial.

Boles v Ins. Co., 219-178; 257 NW 386; 96 ALR 1400

"Passenger"—construction of term. Principle recognized and reasserted that there is a vast difference between the facts which constitute a person a passenger in a common carrier conveyance and what facts constitute a person a passenger on an ordinary elevator.

Boles v Ins. Co., 219-178; 257 NW 386; 96 ALR 1400

"Riding in" or "driving" automobile—proof—sufficiency. On the issue (under an insurance policy) whether an insured died while "riding in", or while "driving" an automobile, no recovery can be had on proof only that the insured, shortly after he was expecting to start on a journey, was found dead in his securely closed garage and in his automobile (the engine of which had manifestly been very recently running) and behind the steering wheel, with the left front door partly open, and his left foot resting on the running board and his right foot near the accelerator; and especially is this true when the attending circumstances clearly indicate that before the car could be put into actual motion other acts must be done which would necessitate the absence of the deceased from the car.

Mould v Cas. Co., 219-16; 257 NW 349

Equivocal provision. A policy of insurance is equivocal in providing for double indemnity if the insured dies while "a passenger within a passenger elevator" because the term "elevator" may mean:

1. The platform or cage on which or in which the passenger rides, or

2. The entire structure, including the cage or platform, hoisting machinery and shaft in which the cage or platform operates.

The insurer being responsible for this equivocation, that construction must prevail which is most favorable to the insured. Held, therefore, that the insured was "a passenger within a passenger elevator" when, intending to be a passenger, he stepped into the elevator shaft and was killed.

Boles v Ins. Co., 219-178; 257 NW 386; 96 ALR 1400

Directed verdict—war of expert testimony. Whether a death resulted from an accident "independent of all other causes" is necessarily a jury question under a war of conflicting and contradictory expert testimony.

Martin v Life Co., 216-1022; 250 NW 220

Finding by court—conclusiveness. The finding of the court in a trial to the court on supporting evidence on the issue whether an insured died "solely through external, violent, and accidental means" or from disease, is conclusive on the appellate court. And it is immaterial that the court determines its findings by sustaining a motion to dismiss at the close of all the evidence or by overruling such motion and later dismissing the action on its own motion.

Cherokee v Ins. Co., 215-1000; 247 NW 495

Forfeiture of policy—violation of law as sole or proximate cause of death. A policy of accident insurance which provides, in effect, that it does not cover or embrace loss "resulting from or in consequence of" any act of the insured's while engaged in any violation of law, does not justify an instruction to the effect that the violation of law must be the sole cause of the loss. Proximate cause, not sole cause, is the legal test.

Whyte v Cas. Co., 209-917; 227 NW 518

Mending hold. Answer reviewed in an action for recovery of double benefits on a life insurance policy, and held not strikable on motion on the alleged ground that defendant was thereby changing his defensive position after action had been brought on the policy.

Wenger v Assur. Soc., 222-1269; 271 NW 220

(c) DISEASE

Death following disease caused by injury. A physical injury to a person must, within the meaning of the ordinary accident insurance policy, be deemed the proximate cause of the death of said person, even tho said person actually dies of bronchial pneumonia, provided said disease was precipitated or caused by said physical injury. Evidence held to present jury question.

Dewey v Ins. Co., 218-1220; 257 NW 308

X CAUSES OF DEATH AS AFFECTING RECOVERY—concluded

(d) SUICIDE

Certificate of death—admissibility. In an action to recover on a policy of insurance, a certificate of death of the insured, tho duly and legally executed by a coroner, is inadmissible as evidence insofar as said certificate assumes to state the cause of death as "suicide by hanging", said stated cause of death being simply the opinion or conclusion of the coroner and not a statement of fact.

Morton v Ins. Co., 218-846; 254 NW 325; 96 ALR 315

Directed verdict. An insurer is not entitled to a directed verdict on its defensive plea of suicide unless the facts and circumstances preclude every reasonable hypothesis except that of suicide. Evidence held insufficient to overcome presumption of nonsuicide.

Wilkinson v Life Assn., 203-960; 211 NW 238

Accidental death—presumption against suicide. Under a policy providing for additional payment in case of death from accidental means, the beneficiary has burden of showing that insured shot himself accidentally, which need not be proved by direct evidence, but may be proved by proper inferences and presumptions from facts, and the beneficiary is aided in carrying this burden of proof by the presumption that death was not the result of suicide. Such presumption, however, is a rebuttable one and ordinarily a question of fact to be determined by the jury. So where evidence on a fact matter is of such character that reasonable men, in an impartial and fair exercise of their judgment, may honestly reach different conclusions, the question was properly held for the jury.

Mutual Ins. v Hatten, 17 F 2d, 889

Presumption as basis of jury question. The common law presumption that a death was not a suicide does not necessarily create a jury question, because the presumption may be wholly negatived by the attending facts and circumstances.

Warner v Ins. Co., 219-916; 258 NW 75

Death by accident (?) or suicide (?)—directed verdict. In an action on a policy of insurance covering death by accident but excluding liability in case of suicide, the court, in view of the legal presumption against suicide, cannot properly direct a verdict on the theory of suicide unless the record is such as to conclusively establish the fact of suicide.

Jovich v Benefit Assn., 221-945; 265 NW 632

Evidence of suicide as affirmative defense. In a law action by a beneficiary to recover for the death of the insured on a policy containing additional benefits on account of accidental death, to which defendant insurer pleaded an affirmative defense of suicide and at the close of testimony moved for a directed verdict in favor of plaintiff beneficiary for amount of premiums paid, such motion was properly overruled where the question decided was that the results of insured's own actions, as reconstructed from the circumstances and surroundings, may have been intentional or may have been accidental, the evidence not being of such weight as to make it appear conclusively on the whole record that insured died by suicide.

Waddell v Ins. Co., 227-604; 288 NW 643

XI ADJUSTMENT, SETTLEMENT, PAYMENT AND DISCHARGE OF LOSS

Discussion. See 21 ILR 642—Undue influence to secure release

Application—failure to attach—burden of proof. In an action, not on a policy of insurance, but for damages consequent on an alleged fraud-induced contract of settlement of the amount due on the policy, the burden of proof to show that the application for the insurance was not attached to or indorsed on the policy is on the insured when he pleads that the insurer may not avail itself of representations contained in the application.

Bockes v Cas. Co., 212-499; 232 NW 156; 237 NW 886

Change of occupation—self-adjusting benefit provisions—effect. Where a policy of accident insurance which has lapsed because of the nonpayment of premiums is self-adjusting as regards death benefits in case death occurs while the insured is pursuing an occupation which is more hazardous than the one specified in the policy, such self-adjusting provisions are in no manner changed by the act of the insurer in reinstating the policy by accepting and retaining the past-due premium with full knowledge that the insured was then pursuing a more hazardous occupation than the one specified in the policy. Especially is this true if a contrary construction would result in a discrimination between policyholders, which is prohibited by statute.

Stephan v Ins. Co., 209-576; 221 NW 57

Compromise and settlement—fraud. Evidence reviewed on the issue of fraud in the settlement of the amount due under a life insurance policy and held to present a jury question.

Colver v Assur. Co., 220-407; 262 NW 791

Executory contracts—bona fide dispute. A policy of life insurance may, prior to the death of the insured, be validly compromised, settled, and released irrespective of the existence or nonexistence of any bona fide dispute or controversy between the parties. After the death of the insured, the rule is otherwise.

Vande Stouwe v Life Co., 218-1182; 254 NW 790

Impeachment—burden of proof. He who seeks to avoid a duly proven compromise, settlement and release must establish:

1. That the release was procured by fraud, or

2. That the contention or claim on which the compromise and settlement was based was wholly unfounded, and, therefore, could not support a compromise and settlement.

Evidence reviewed and held wholly insufficient to impeach a compromise and settlement of liability under a policy of life insurance.

Vande Stouwe v Life Co., 218-1182; 254 NW 790

Medical examination—effect. There may be a valid compromise and settlement of liability under a life insurance policy, prior to the death of the insured, even tho the policy was issued on a medical examination made by the insurer.

Vande Stouwe v Life Co., 218-1182; 254 NW 790

Right to deduct unpaid annual premium. An insurer has the right, when discharging his liability under a policy of life insurance, to deduct the amount of one full annual premium, even tho, when the insured died, only the first quarterly installment of the premium for the insurance year was due, the policy providing for such deduction and in addition providing that all premiums for an insurance year were due and payable in advance, with option to pay quarterly.

Andrews v Ins. Co., 220-719; 263 NW 255

XII ACTIONS ON POLICIES

Assignee of policy—venue. The assignee of a fractional interest in a life insurance policy may, in conjunction with the original beneficiary (who retains the remaining fractional interest), maintain an action on the policy in the county of which the assignee is a resident, even tho said county is not the county of which the original beneficiary is a resident.

Welch v Taylor, 218-209; 254 NW 299

Enjoining action in foreign state. A defendant who is a resident of this state may, even after he has filed formal answer, enjoin a plaintiff who is a resident of this state from maintaining in a foreign state an action on a contract arising in this state, when said action is sought to be maintained for the purpose of vexatiously harassing the defendant and subjecting him to unnecessary costs, part of which are untaxable as costs.

Bankers Life v Loring, 217-534; 250 NW 8

Right to interpleader. The pre-code, equitable action of "Interpleader" is available to an insurer who is faced by different, mutually hostile claimants to the amount due under the policy, which amount the insurer admits less deduction provided by the policy. And said insurer will be entitled to an injunction restraining the institution or further prosecution against him of separate actions on the policy by said warring parties.

Equitable v Johnston, 222-687; 269 NW 767; 108 ALR 257

Delivery date—evidence. In an action to recover on a life policy of a daughter, an exhibit showing that a son's policy was delivered on September 14 was admissible to contradict testimony of father and mother that the daughter's policy was delivered August 23, and that son's policy was delivered previously.

Luce v Ins. Co., 227-532; 288 NW 681

Delivery date of policy — other evidence competent. In an action on a life policy to which insurance company pleads a general denial and further pleads a release and settlement wherein the delivery date of the policy is in dispute, and the insurance company assigns, as error, the exclusion of testimony of an officer of the company concerning underwriting practices of the company and a letter written by the company to its agent, upon which the agent's reply was indorsed, concerning the date of delivery of the policy, such evidence should have been admitted, and was competent to show that the company honestly believed it had a defense to the policy and explained why the company had the right to rely upon the date appearing upon the receipt for the policy.

Luce v Ins. Co., 227-532; 288 NW 681

Unlicensed agent—noneffect on insurer—statements regarding effective date of policy. Where an accident policy is to become effective at 12 o'clock noon on date of delivery to insured, the application having been made on August 24, 1937, providing (1) it should not bind insurer until accepted nor (2) until policy was accepted by insured, while in good health and free from injury, and where policy, issued September 17, was delivered to insured September 22, while insured was in hospital as result of injuries sustained on August 26, insured could not recover on policy notwithstanding insurance agent's statement to insured that policy would be effective August 26. The fact that agent was unlicensed did not thereby make him a general agent of the insurer, the burden of proving which would be on insured. While an unlicensed agent may be criminally punished, this does not enlarge his authority to bind insurer.

Rainsbarger v Acc. Assn., 227-1076; 289 NW 908

Application attached to policy—illegibly reduced photo copy—not "true copy". In action on life policies, where defense was based on false representations in application for policy, and it is shown original application is plainly printed in legible letters of fair size, while copy furnished and attached to policy is so reduced in size and so dim or blurred that it can only be read by persons with normal vision by use of a strong magnifying glass,

XII ACTIONS ON POLICIES—continued

the statute requiring "true copy" of application to be attached to policy is not complied with, and the submission of question to the jury as to legibility under an instruction that a true copy must be readable was not erroneous.

New York Ins. v Miller, 73 F 2d, 350

Directed verdict for insurer. In an action on a fraternal life insurance policy, when evidence did not show complete payment of premiums, and there was no waiver of terms of the policy providing for lapse for nonpayment of premiums, nor reinstatement after lapse of the policy, a motion for a directed verdict for the insurer should have been sustained.

Craddock v Fidelity Life, 226-744; 285 NW 169

Suicide—directed verdict. An insurer is not entitled to a directed verdict on its defensive plea of suicide unless the facts and circumstances preclude every reasonable hypothesis except that of suicide. Evidence held insufficient to overcome presumption of nonsuicide.

Wilkinson v Life Assn., 203-960; 211 NW 238

Fraud and false warranty—evidence—insufficiency to generate jury question. An insurer who, in an action on a policy of insurance, presents the intermingled defense of fraud and false warranty has the burden to establish such defense. Evidence reviewed, and held to present no jury question on such issue.

Post v Grand Lodge, 211-786; 232 NW 140

Fraud in securing release—burden of proof. In an action on a life policy where the insurance company pleads a release, the burden of proof is on the company to show the execution and delivery of the release and payment of amount due thereunder, and where failure of consideration or fraud is alleged in obtaining the release, the burden of proof is on the party making the allegation, so where the court excluded such a release from evidence on account of insurance company's failure to establish consideration for the execution of such release, it placed a burden on the company which the company should not have been required to sustain, and the ruling was clearly erroneous.

Luce v Ins. Co., 227-532; 288 NW 681

Future payments—total disability. In action on life insurance policy for total disability payments, where supreme court ordered insurance company in prior case decided in 1931 to pay annual benefits up to that time, the decision of the trial court in a subsequent action on the same policy ordering payments up to 1937 and thereafter, was erroneous as to that part requiring future payments, particularly since opinion in first appeal is binding not only under the doctrine of stare decisis, but also under the rule of res adjudicata, when the first opinion held that "continuance of such disability must be established by later proofs".

Kurth v Ins. Co., 227-242; 288 NW 90

Liability of insurer—total and permanent disability. A policy which provides for compensation, only in the event of total and permanent disability, necessarily excludes compensation for a disability which is total for the time being but not permanent.

Petersen v Ins. Co., 217-1122; 253 NW 63

Negligence—evidence—sufficiency. Evidence reviewed in an action for damages consequent on the alleged negligence of an insurer in passing on, prior to the death of the applicant, an application for industrial insurance, and held quite insufficient to establish such negligence.

Winn v Ins. Co., 216-1249; 250 NW 459

Negligence in passing on application. In an action for damages consequent on the alleged negligence of an insurer in passing on an application for insurance, the plaintiff must fail, irrespective of his evidence of negligence, unless he establishes, to the extent of furnishing a measure for his damages, the substance of the contract which he was prevented from entering into.

Winn v Ins. Co., 216-1249; 250 NW 459

Proof of loss—contract limitation—validity. An agreement in a policy of insurance against total and permanent disability, specifically providing that all claim shall be forfeited if proof of such disability is not furnished the insurer "within 90 days after the happening of the total and permanent disability," is valid and enforceable, such time limit being more favorable to the insured than the statutory limit.

Fairgrave v Life Assn., 211-329; 233 NW 714

Proof of loss—extent and sufficiency under "permanent disability" clause. A policy of insurance which, inter alia, provides for indemnity "if the insured shall furnish satisfactory proof that he has been wholly disabled * * * for a period of not less than 60 days, and that such disability is presumably permanent, and that he will be wholly and continuously prevented thereby from pursuing any gainful occupation" does not require the proofs for initial indemnity to show that the disability is and will remain absolutely permanent and continuous.

Kurth v Ins. Co., 211-736; 234 NW 201

Risks and causes of loss—violation of law. Proof that an insured, at the time of his death, was riding in a railroad freight car reveals no violation of a statute against "climbing upon or holding to" a moving railroad freight car.

Ragan v Ins. Co., 209-1075; 229 NW 702

Time of lapse—construction—reformation.
Wall v Ins. Co., 228- ; 289 NW 901

Service on foreign insurer—physician not agent. An Iowa accident insurance association which has not been licensed to transact its business in a foreign state (in which it has neither office, agent nor property), and whose certificates of insurance are strictly Iowa contracts, cannot be deemed to have subjected itself to the jurisdiction of the courts of such foreign state (1) because a very large number of its certificate holders reside in said foreign state, or (2) because said association, from time to time and by mail from its Iowa office, requests a physician in said foreign state to there examine claimants and to report as to accidental injuries received by claimants,—it appearing that said physician was under no contract obligation to comply with said requests and to make such examinations tho he had done so for several years and had received a stated fee for each separate examination.

Held, the foreign court, in an action on a certificate, acquired no jurisdiction under process served on said physician.

Saunders v Trav. Assn., 222-969; 270 NW 407

CHAPTER 402

FRATERNAL BENEFICIARY SOCIETIES, ORDERS, OR ASSOCIATIONS

Atty. Gen. Opinion. See '34 AG Op 146

GENERAL PROVISIONS

8777 Definition.

"Homestead" as lodge — Brotherhood of American Yeomen. Where the Brotherhood of American Yeomen used the word "homestead" to denote a local lodge, had no capital stock, no dividends from earnings, and established a home for orphans of members, held to be a fraternal beneficiary association.

Yeomen Ins. v Murphy, 223-1315; 275 NW 127

Violations of statutory requirements—non-effect on organizational character—premium tax. A fraternal beneficiary association organized under this chapter "not for profit" is not subject to a tax on gross premiums under §7025, C., '35, even tho such association does accumulate a surplus and a profit. Violations of this chapter by any such association are punishable as provided but such offenses do not change its organizational character.

Lutheran Soc. v Murphy, 223-1151; 274 NW 907

Homesteaders Life v Murphy, 224-173; 275 NW 146

Gross premium tax inapplicable. Fraternal benefit societies doing business in this state including one organized under foreign nation are not subject to gross premium tax levied on foreign insurance companies, in view of executive and departmental construction of taxing statute and acquiesced in by legislature.

State v Ind. Foresters, 226-1339; 286 NW 425

Certificates—not taxable after reorganization. A fraternal beneficiary association may reorganize into an old line company, but the amounts the new organization collects under the original certificates, which it has assumed, are not taxable under the gross premium tax provision of §7025, C., '35.

Yeomen Ins. v Murphy, 223-1315; 275 NW 127

Manager's promise—association not bound. A personal promise by the district manager of a fraternal benefit association that he would take care of premiums on the life policy of a member of the society was not binding on the association and did not excuse the failure of the insured to pay such premiums.

Craddock v Life Assn., 226-744; 285 NW 169

Automatic suspension of members. A provision in a policy of fraternal insurance that the insured member "shall stand suspended" in case he, in effect, violates a specified policy agreement, is self-executing. Such violation automatically works a suspension of membership without further action on the part of the association.

Smith v Bagmen Fund, 222-958; 270 NW 13

Nonpayment of premiums—automatic suspension. When fraternal beneficiary association bylaws, which were part of a policy of insurance, provide that on failure to pay monthly premiums the policy shall "be and stand suspended" without notice or action by the association, the failure to pay premiums works an automatic suspension of the policy.

Craddock v Life Assn., 226-744; 285 NW 169

Violation of membership agreement. No recovery can be had on the life policy of a benefit association when the insured has violated his agreement in his application for the policy and in the policy itself to continuously maintain his membership in a named other association.

Smith v Bagmen Fund, 222-958; 270 NW 13

Suspension from membership—validity. The members of a fraternal insurance association are bound by the method provided in the articles of incorporation and bylaws for the suspension of the membership of the members. Record reviewed and held to show a proper suspension for nonpayment of dues.

Smith v Bagmen Fund, 222-958; 270 NW 13

Lapse of policy waived by accepting premiums. Provisions of a policy and the bylaws of a fraternal insurance association that the policy shall lapse if premiums are not paid on time, are for the benefit of the association and may be waived by the acceptance of further premiums after the insured has defaulted in his payments.

Craddock v Life Assn., 226-744; 285 NW 169

Forfeiture—nonwaiver by accepting premiums. A fraternal insurance association by accepting premiums due on a forfeited policy does not waive its right to plead the forfeiture when, at the time of accepting said premiums, it had no knowledge of said acts of forfeiture.

Smith v Bagmen Fund, 222-958; 270 NW 13

Lapsed policy—reinstatement—pleading and proof. When a fraternal life insurance policy had lapsed for nonpayment of premiums and there was no waiver of the lapse by the company, there could be no recovery on the policy without both pleading and proving that it had been reinstated.

Craddock v Life Assn., 226-744; 285 NW 169

Mistake in date of lapse. When the terms of a fraternal life insurance policy provided for ipso facto suspension of the policy for failure to pay dues timely, a mistake of one or two months by the association in naming the date when lapse occurred because of nonpayment, did not waive the provisions and estop the insurer from asserting the lapse.

Craddock v Life Assn., 226-744; 285 NW 169

Actions on policies—shifting defense not permitted. An insurance company which asserts a specific defense which it has to a claim on a policy, and has knowledge of another defense, will not be permitted thereafter to shift its ground and assert the other defense after expense of suit has been incurred.

Craddock v Life Assn., 226-744; 285 NW 169

Action on life policy—directed verdict for insurer. In an action on a fraternal life insurance policy when evidence did not show complete payment of premiums and there was no waiver of terms of the policy providing for lapse for nonpayment of premiums, nor reinstatement after lapse of the policy, a motion for a directed verdict for the insurer should have been sustained.

Craddock v Life Assn., 226-744; 285 NW 169

Limitation of action. Section 8774, C., '24, which nullifies the provisions of a policy or contract of insurance insofar as it limits the time to less than one year in which notice or proofs of death or the occurrence of other contingency may be given, is not applicable to a certificate of insurance issued by a fraternal beneficiary association under this section.

Peters v Order, 203-428; 212 NW 576

Right to proceeds—change of beneficiary. The original beneficiary, interpleaded in an action on a fraternal insurance policy, acquires no vested interest in benefit as against the subsequent beneficiary designated as such in accordance with bylaws of insurer and statute of this state, notwithstanding insured member's agreement with such original beneficiary that she should remain beneficiary.

Kohler v Kohler, 104 F 2d, 38

8778 Death, sick, and disability benefits.

Insurance premiums accepted by lodge. When a grand lodge accepted insurance premiums from a member, leading him to believe that he would receive death benefits, the grand lodge was estopped to deny the effects of its acts.

Phillips v Brotherhood Ry. Clerks, 226-864; 285 NW 159

Secretary of local lodge as agent of grand lodge in collecting premiums. A secretary of a local lodge who accepted insurance premiums from a lodge member who was ill during a time when dues were suspended because of the illness, and forwarded the full amount of dues and premium to the grand lodge without informing it of the illness, acted as agent of the grand lodge, charging it with accceptance of the premiums, with knowledge of the illness, and with knowledge that the member had not applied for membership in the lodge's "death benefit department".

Phillips v Brotherhood Ry. Clerks, 226-864; 285 NW 159

Nonextension of term. A certificate or policy of insurance in a fraternal association, providing for benefits in case death occurs prior to the insured's attaining the age of sixty years, cannot be deemed extended beyond the contracted termination date, because of the fact that the association had received a premium for the full year during which the insured attained the age of sixty years, it appearing that the excess part of said premium had been duly tendered back.

Pierce v Life Assn., 223-211; 272 NW 543

Limited term insurance—burden of proof. In an action on a fraternal, beneficiary certificate which promises benefits in case of death, "provided death occurs prior to the member attaining the age of sixty years", plaintiff must plead and prove, as a condition precedent to any recovery, that the insured had not attained the age of sixty years at the time of death.

Pierce v Life Assn., 223-211; 272 NW 543

Policy limitation on actions not condition precedent. An insurance certificate issued by a mutual benefit society, containing a statement, that any action thereon shall be barred

unless commenced within 6 months from final rejection of the claim by the highest tribunal of the brotherhood, is purely a clause of limitation and not a condition precedent to commencing action.

Duncan v Brotherhood, 225-539; 281 NW 121

Mutual benefit—"applicant" in constitution not equivalent to "beneficiary". In a fraternal insurance association's constitution, incorporated by reference in its beneficiary certificate, the word "applicant", when used in a paragraph limiting such applicant's right to sue after disapproval of a claim without first exhausting his remedy of appeal to the highest tribunal of the brotherhood, construed as not equivalent to the word "beneficiary".

Duncan v Brotherhood, 225-539; 281 NW 121

Actions on policies—failure of lodge member to apply for death benefits as defense. In an action to collect death benefits, a lodge which maintained a death benefit department into which lodge members were admitted on written application, but collected insurance premiums as well as dues from all members whether or not they had made such application, was entitled to use the defense of failure to apply for membership in the department in the absence of avoidance of the defense by the plaintiff.

Phillips v Brotherhood Ry. Clerks, 226-864; 285 NW 159

8780 Sick and funeral benefits only.

Atty. Gen. Opinion. See '34 AG Op 205

8781 Certificates permitted.

Additional annotations. See under §8688

Presumption attending possession of policy. Possession by an insured, at the time of his death, of a policy of life or accident insurance creates a presumption, born of necessity and based on the experience of mankind, that the policy was delivered to the insured as an effective instrument; and this presumption prevails until the court can say, as a matter of law, that the presumption has been conclusively negatived by other evidence.

Beggs v Ins. Co., 219-24; 257 NW 445; 95 ALR 863

Dues—payment to authorized agent. The requirement of a certificate of insurance, that premium dues shall be paid to a named officer of the local camp, is not a limitation on the insured's right to pay to some other officer who has been authorized by the association to receive such dues.

Forrest v Sovereign Camp, 220-478; 261 NW 802

Dues—application of payments—right of debtor to control. An insured in paying his premium dues to an officer authorized to receive them may direct that the money be applied on said dues, and arbitrarily enforce such direction.

Forrest v Sovereign Camp, 220-478; 261 NW 802

Premiums on life policy—nonpayment—automatic suspension. When fraternal beneficiary association bylaws, which were part of a policy of insurance, provide that on failure to pay monthly premiums the policy shall "be and stand suspended" without notice or action by the association, the failure to pay premiums works an automatic suspension of the policy.

Craddock v Life Assn., 226-744; 285 NW 169

Lapse of policy waived by accepting premiums. Provisions of a policy and the bylaws of a fraternal insurance association that the policy shall lapse if premiums are not paid on time, are for the benefit of the association and may be waived by the acceptance of further premiums after the insured has defaulted in his payments.

Craddock v Life Assn., 226-744; 285 NW 169

Mistake in stating date of lapse—no estoppel. When the terms of a fraternal life insurance policy provided for ipso facto suspension of the policy for failure to pay dues timely, a mistake of one or two months by the association in naming the date when lapse occurred because of nonpayment, did not waive the provisions and estop the insurer from asserting the lapse.

Craddock v Life Assn., 226-744; 285 NW 169

"Legal reserve" not available to carry certificate after failure to pay assessments. The statutory "legal reserve" on a fraternal beneficiary certificate of insurance is not available for carrying the certificate past forfeiture consequent on the nonpayment of assessment and dues.

Plumley v Ins. Co., 210-1104; 229 NW 727

Mutual benefit—"applicant" in constitution not equivalent to "beneficiary". In a fraternal insurance association's constitution, incorporated by reference in its beneficiary certificate, the word "applicant", when used in a paragraph limiting such applicant's right to sue after disapproval of a claim without first exhausting his remedy of appeal to the highest tribunal of the brotherhood, construed as not equivalent to the word "beneficiary".

Duncan v Brotherhood, 225-539; 281 NW 121

Evidentiary effect of disappearance—validity. An agreement in a mutual benefit insurance certificate to the effect that the unexplained disappearance or long continued absence of the insured from his family or place of residence, shall not be regarded as evidence of the death of the insured, or of any right to recover under the certificate, until after the expiration of the life expectancy of the in-

sured, is reasonable, valid, and binding on the beneficiary.

Lunt v Grand Lodge, 209-1138; 229 NW 323

Findings of fraud—conclusiveness. Supported findings by the court of material facts, in a law action submitted to the court under a waiver of jury, are as conclusive as like findings by the jury. So held as to findings relative to fraud and misrepresentation in obtaining a policy of life insurance.

Bukowski v Security Assn., 221-416; 265 NW 132

8782 Benefits.

Exercise of option—effect. Where the insured in a fraternal beneficiary policy of insurance is limited to the exercise of one of several options, and elects to take the option known as "loan value", and thereafter is automatically suspended because of the nonpayment of assessment and dues, the beneficiary may not claim that the policy was kept in force under another option which the insured might have elected to take.

Plumley v Ins. Co., 210-1104; 229 NW 727

8784 Assessments.

Additional annotations. See under §8693

Prompt payment of dues—waiver. The contract right of an insurer to demand prompt payment of dues and to avail himself of an automatic suspension of the insured in case such payment is not made, is waived by habitually accepting such dues after the insured has become delinquent in making payment.

Clark v Council, 200-699; 205 NW 355

Nonpayment—automatic suspension. When fraternal beneficiary association bylaws, which were part of a policy of insurance, provide that on failure to pay monthly premiums the policy shall "be and stand suspended" without notice or action by the association, the failure to pay premiums works an automatic suspension of the policy.

Craddock v Life Assn., 226-744; 285 NW 169

Nonpayment — automatic forfeiture — nonavoidance. A policy or certificate holder in a fraternal insurance society who, at different times, and in violation of his contract of insurance, has escaped an automatic forfeiture of his policy by having his policy dues or assessments paid and accepted after they were wholly delinquent, must comply with a due and timely notice from the society that said practice will no longer be tolerated and that said dues and assessments must be paid strictly within the time provided by the policy contract.

If he does not so comply, and dies while in arrears, his beneficiary will not be permitted to avoid the automatic forfeiture of the policy by a then tender of the dues.

Wry v Modern Woodmen, 222-1179; 271 NW 300

Acceptance of premiums—waiver of insurance application. A lodge which collected insurance premiums from all members but required a written application for admission into its death benefit department waived the requirement for such application by repeated acceptance of monthly premiums from a member.

Phillips v Brotherhood Ry. Clerks, 226-864; 285 NW 159

Payment in disregard of contract—waiver. A provision in the constitution and bylaws of an insurer to the effect that the failure of the insured, for three months, to pay the required monthly dues shall, without notice, automatically terminate his membership and deprive him of all benefits must be deemed to have been waived in favor of an insured who, for many years and up to the time of his death, fully paid his dues, but not in accordance with said constitutional requirement,—the insurer necessarily having knowledge of said method of payment, and having accepted and retained said payments without objection.

Sawyer v Iowa Conference, 220-806; 263 NW 236

Lapse of policy waived by accepting premiums. Provisions of a policy and the bylaws of a fraternal insurance association that the policy shall lapse if premiums are not paid on time, are for the benefit of the association and may be waived by the acceptance of further premiums after the insured has defaulted in his payments.

Craddock v Life Assn., 226-744; 285 NW 169

Mistake in date of lapse—no estoppel. When the terms of a fraternal life insurance policy provided for ipso facto suspension of the policy for failure to pay dues timely, a mistake of one or two months by the association in naming the date when lapse occurred because of nonpayment, did not waive the provisions and estop the insurer from asserting the lapse.

Craddock v Life Assn., 226-744; 285 NW 169

Unpaid dividends and advance interest on loan not available to avoid forfeiture. Unpaid dividends on a fraternal certificate of insurance, and interest paid in advance on a loan on the certificate are not available to carry the certificate past a forfeiture consequent on the nonpayment of assessments.

Plumley v Ins. Co., 210-1104; 229 NW 727

"Arrearages" not available to carry certificate after failure to pay assessments. Arrearages in assessments paid by a suspended insured in a fraternal certificate of insurance in order to effect a reinstatement, even tho such assessments covered a period when the certificate was wholly suspended, are not available for carrying the certificate past a subsequent forfeiture consequent on the nonpayment of assessments.

Plumley v Ins. Co., 210-1104; 229 NW 727

Ineffective payment of assessment. The payment of an assessment on a fraternal certificate of insurance does not avoid a forfeiture of the certificate when the assessment was paid on an application for reinstatement which was not granted, the insured then being on her death bed, and the bylaws providing there could be no reinstatement unless the insured was in good health.

Plumley v Ins. Co., 210-1104; 229 NW 727

Reinstatement of member on payment of arrearages. A fraternal beneficiary insurance association may validly provide, by bylaw, that the reinstatement of a suspended member shall be conditioned upon payment of all arrearages in assessments and dues, even tho such assessments and dues cover a period when the certificate was wholly suspended.

Plumley v Ins. Co., 210-1104; 229 NW 727

8789.2 Beneficiaries—vested interest.

Right to change. The insured in a policy of life insurance, who has the right, under the policy, to change the beneficiary, does not deprive himself of said right by delivering the policy to the beneficiary therein named accompanied by the statement or assurance that he is thereby making a "gift" to said named beneficiary, such policy not being the subject matter of a completed gift inasmuch as it simply proffers an expectancy, and an expectancy does not constitute property.

Penn Ins. v Mulvaney, 221-925; 265 NW 889

Changing beneficiary—complying with certificate—necessity. A change of beneficiary on a fraternal benefit society certificate, executed by insured on the day of her death, delivered to an attorney and kept until the next day, then delivered to the company's agent and forwarded to the company, not being in compliance with the certificate requirement, was ineffective.

Jacobs v Ins. Co., 223-1157; 274 NW 879

Changing beneficiary where policy silent. Where a benefit certificate is silent as to the manner of change, such change of beneficiary may be effected in any manner clearly indicating insured's intention.

Jacobs v Ins. Co., 223-1157; 274 NW 879

Changing beneficiary — mere "clear intention" ineffectual. Insured's actions merely indicating a "clear intention to change the beneficiary" are not sufficient. Required acts to effect a change are neither directory nor ministerial but essential, subject only to equitable exceptions.

Jacobs v Ins. Co., 223-1157; 274 NW 879

Changing beneficiary—effect of death. Death vests interests in insurance, and the method provided in a benefit certificate to change a beneficiary during lifetime of insured is exclusive, except (1) where the company has waived strict compliance and issued a new certificate, (2) where it is beyond the power of insured to comply literally, equity will consider the change made, and (3) where insured has performed all necessary prerequisites, but dies before a new certificate is actually issued. Held in instant case beneficiary change not accomplished.

Jacobs v Ins. Co., 223-1157; 274 NW 879

Change of beneficiaries by will. A policy method of changing beneficiaries under life insurance policies is admittedly exclusive; but a testamentary bequest of the proceeds of such policies, payable to the estate of the insured or to his executors or administrators, does not constitute a "change of beneficiaries", but constitutes a disposal of that much of the estate left by the insured.

Miller v Miller, 200-1070; 205 NW 870; 43 ALR 567

Assignment as collateral—effect on beneficiary. Reservation in a policy of life insurance of right in the insured to change the beneficiary prevents the vesting, during the lifetime of the insured, of any interest in the designated beneficiary, and arms the insured with power to assign the policy as security for a pre-existing indebtedness, and it is quite immaterial whether the designated beneficiary joins or fails to join with the insured in said assignment.

Potter v Ins. Co., 216-799; 247 NW 669

Assignment of policy—estoppel. The beneficiary of a legal reserve life insurance policy who, without fraud, joins with the insured in an assignment of all right, title, and interest in the policy in order to collaterally secure a debt due from each of said assignors, is estopped, after the death of the insured, from asserting any interest in the policy except as the same may exceed the said secured indebtedness, it appearing that the policy reserved to the insured both the right to assign the policy and to change the beneficiary.

Andrew v Life Co., 214-573; 240 NW 215

Ineligible beneficiary—contract provision—effect. The rule of law that when the insured in a policy of life insurance makes a series of changes of beneficiary, and the last beneficiary is legally ineligible, the next preceding, designated, eligible beneficiary is entitled to the proceeds of the policy, does not apply when the policy, by bylaw or otherwise, distinctly provides who, in such circumstances, shall be entitled to the proceeds.

Farrens v Benefit Dept., 213-608; 239 NW 544

Mutual benefit—"applicant" in constitution not equivalent to "beneficiary". In a fraternal insurance association's constitution, incorporated by reference in its beneficiary certificate, the word "applicant", when used in a para-

graph limiting such applicant's right to sue after disapproval of a claim without first exhausting his remedy of appeal to the highest tribunal of the brotherhood, construed as not equivalent to the word "beneficiary".

Duncan v Brotherhood, 225-539; 281 NW 121

Conclusiveness — insurance rights — beneficiaries not parties. A decree establishing rights to insurance does not adjudicate rights of a beneficiary not a party to the action.

Jacobs v Ins. Co., 223-1157; 274 NW 879

8792 Change in beneficiary notwithstanding contract.

Beneficiary — right to change. A contract between the insured and one of two beneficiaries in a fraternal policy of life insurance to the effect that said contracting beneficiary will pay the future accruing assessments, and that in consideration of such payments the insured will not make any change in said beneficiary, does not deprive the insured of his statutory right subsequently to change his beneficiary and exclude the contracting beneficiary from all benefit under the policy, even tho the excluded beneficiary has, for many years, paid the said assessments.

Sovereign Camp v Russell, 214-39; 241 NW 395

Change in beneficiary—justifiable and unjustifiable payment. An insurer who, in compliance with the policy-authorized demand of the insured, changes the beneficiary of a life insurance policy, and, on the death of the insured, makes full payment to said substituted beneficiary, must be deemed to have discharged the obligation of the policy, unless said insurer knew, or ought to have known, when payment was made, that, notwithstanding the provision of the policy authorizing a change of beneficiary, the first-named beneficiary had such interest or ownership in the policy as entitled him to receive said payment. Petition in equity held subject to motion to dismiss (equitable demurrer) because not sufficiently alleging such interest or ownership and the insurer's knowledge thereof.

Bennett v Ins. Co., 220-927; 263 NW 25

Agreement not to change—effect. The original beneficiary, interpleaded in an action on a fraternal insurance policy, acquires no vested interest in benefit as against the subsequent beneficiary designated as such in accordance with bylaws of insurer and statute of this state, notwithstanding insured member's agreement with such original beneficiary that she should remain beneficiary.

Kohler v Kohler, 104 F 2d, 38

Beneficiary with vested interest — change nonallowable. The named beneficiary in a policy of life insurance acquires a vested interest in the proceeds of said policy when said beneficiary is so named in consideration of an agreement on the part of said beneficiary, (1) to furnish life-support to her parents (which she thereafter performed), and (2) to act as trustee for the protection of an acknowledged interest of said parents in said proceeds; and said vested interest must prevail over the subsequently acquired interest of another person, especially when such latter interest is based on a past consideration and evidenced by no change in the policy, but by simply a manual delivery thereof.

Aetna Ins. v Morlan, 221-110; 264 NW 58

8793 Duty to attach copy of application.

Similar provisions. See under §§8772, 8974

Applicability. The duty of an insurer to attach to a beneficiary certificate a copy of the insured's application, or lose the right to plead fraudulent representations in the certificate or application, applies to a policy issued by a foreign beneficiary association, as well as to a domestic association.

Baldwin v Tribe, 203-198; 212 NW 562

Presumption. It will be presumed that a copy of the application for insurance was attached to the policy or certificate, in the absence of evidence to the contrary.

Foley v Brotherhood, 203-39; 210 NW 585

8794 Failure to attach.

Similar provisions. See under §§8773, 8975, Vol I

Failure to attach—effect. An insurer who fails to attach to a beneficiary certificate of insurance a copy of the insured's application may not prove fraudulent representations in the application or certificate as a basis for the cancellation of the certificate.

Baldwin v Tribe, 203-198; 212 NW 562

Failure to attach—burden of proof. In an action, not on a policy of insurance, but for damages consequent on an alleged fraud-induced contract of settlement of the amount due on the policy, the burden of proof to show that the application for the insurance was not attached to or indorsed on the policy is on the insured when he pleads that the insurer may not avail itself of representations contained in the application.

Bockes v Cas. Co., 212-499; 232 NW 156; 237 NW 886

Misrepresentation—when unallowable as a defense. False and fraudulent representations on the part of an insured, in his original application for a policy of insurance, are not available as a defense to an action on the policy, when the policy provides that it is incontestable except as provided in named paragraphs which, on examination, reveal no grounds of contest whatever, but only matters of which the insurer could avail himself in the enforcement of the contract.

Wilson v Ins. Co., 220-321; 262 NW 525

Settlement—impeachment. A plaintiff who attacks a compromise settlement of the amount due under a policy of insurance on the ground that it was fraud induced has the burden to show that the representations inducing the settlement were knowingly false, and that he innocently relied thereon.

Bockes v Cas. Co., 212-499; 232 NW 156; 237 NW 886

8795 Where suable.

Contract remedies for collection—failure to comply with—fatal effect. The beneficiary (and his assignor), in a certificate of insurance of a mutual benefit association, is bound by the bylaws which provide that no resort shall be had to the courts to enforce payment of said certificate until said beneficiary has first exhausted the contract remedies provided by the bylaws for the allowance and payment of said claim.

Ater v Mutual Dept., 222-1390; 271 NW 517

8796 Exemption of proceeds.

Exemption of proceeds of other insurance. See under §§8776, 11919

Discussion. See 21 ILR 153—Property purchased with proceeds

Applicability to nonresidents. Exemption statutes are applicable to residents and nonresidents unless the benefits thereof are confined to residents.

Stark v Stark, 203-1261; 213 NW 235

Computation of amount of exemption. Where a widow as beneficiary in life insurance policies on her husband received some $11,200 and disposed of some $7,300 before any proceedings were commenced to subject said fund in excess of the $5,000 statutory exemption to the payment of a debt of the widow antedating the death of the husband, the said statutory exemption of $5,000 must be computed on the basis of the unexpended fund. In other words, her exemption cannot be deemed to be embraced within the $7,300 expenditure.

Booth v Propp, 214-208; 242 NW 60; 81 ALR 919

Funeral expenses nonallowable against insurance proceeds. Claims for funeral expenses consequent on the burial of the intestate deceased are not allowable against funds in the hands of the administrator when said funds constitute the proceeds of insurance on the life of deceased, the latter being survived by a minor son.

In re Galloway, 222-159; 269 NW 7

Proceeds payable to estate—trusteed for beneficiaries. Where a testator willed to his second wife, all of his property requiring legal transmission but made no mention of his life insurance, payable to his second wife if she survived him, otherwise to his estate; and, when testator's second wife predeceased him, then upon his death, his surviving children, being a daughter by his first marriage and a son by his second marriage, became entitled under the statute, to the proceeds of the insurance, and such proceeds passed into the hands of his personal representative or estate, only as a trust fund, to be distributed equally to such daughter and son.

In re Clemens, 226-31; 282 NW 730

8801 Commissioner as process agent.

Relevant annotations. See under §§8766, 8767

8808 Permit—fees.

Commissioner—power of suspension denied. The commissioner of insurance is not empowered to suspend the business of a fraternal beneficiary association for failure to comply with commissioner's order to pay a gross premium tax, such order being based on his interpretation of a statute in controversy.

Homesteaders Life v Murphy, 224-173; 275 NW 146

8812 Employment of agents.

Manager's promise to take care of premiums—association not bound. A personal promise by the district manager of a fraternal benefit association that he would take care of premiums on the life policy of a member of the society was not binding on the association and did not excuse the failure of the insured to pay such premiums.

Craddock v Life Assn., 226-744; 285 NW 169

8816 Delinquency reported — injunction.

Violations of statutory requirements—effect. A fraternal beneficiary association organized under chapter 402, C., '35, "not for profit" is not subject to a tax on gross premiums under §7025, C., '35, even tho such association does accumulate a surplus and a profit. Violations of chapter 402 by any such association are punishable as provided but such offenses do not change its organizational character.

Lutheran Soc. v Murphy, 223-1151; 274 NW 907

Homesteaders Life v Murphy, 224-173; 275 NW 146

RATES

8823 Mortuary assessment rates.

Discussion. See 15 ILR 76—Admissibility of tables

Evidence—tables of life expectancy. The introduction of tables of life expectancy is not a condition precedent to the recovery of damages for future pain.

Cuthbertson v Hoffa, 205-666; 216 NW 733

Evidence—life tables. Life tables are not conclusive on the subject of life expectancy

and instructions should carefully elucidate such fact.

Droullard v Rudolph, 207-367; 223 NW 100
Bauer v Reavell, 219-1212; 260 NW 39

Mortality tables. Instructions held not subject to the vice of treating mortality tables as conclusive on the jury.

Rulison v X-ray Corp., 207-895; 223 NW 745

INVESTMENTS

8826 Real estate for home office.

Atty. Gen. Opinion. See '25-26 AG Op 137

8828 Conveyance to commissioner—valuation.

Atty. Gen. Opinion. See '25-26 AG Op 137

8829 Schedule of investments.

Atty. Gen. Opinions. See '30 AG Op 264; '32 AG Op 280

Exemptions—"accumulations and funds" of beneficiary association. The statutory exemption from taxation of the "accumulations and funds" of a fraternal beneficiary association does not embrace an exemption from taxation of lands acquired by such association through a mortgage foreclosure deed, even tho loan in question was made from the "funds" of the association.

Grand Lodge v Madigan, 207-24; 222 NW 545

Conspiracy—evidence—sufficiency. Evidence held to sustain a conviction for conspiracy to defraud a fraternal beneficiary society by making fraudulent loans of its funds.

State v Blackledge, 216-199; 243 NW 534

Conspiracy — evidence — nature and sufficiency. Conspiracy may be established by circumstantial evidence only. Evidence held sufficient to support a verdict of guilt of conspiracy to defraud a fraternal beneficiary society of its funds.

State v Lowenberg, 216-222; 243 NW 538

BENEFITS ON LIVES OF CHILDREN

8845 No vested interest in new certificate.

Additional annotations. See under §§8789.2, 8792

Right to change beneficiary. The insured in a policy of life insurance, who has the right, under the policy, to change the beneficiary, does not deprive himself of said right by delivering the policy to the beneficiary therein named accompanied by the statement or assurance that he is thereby making a "gift" to said named beneficiary, such policy not being the subject matter of a completed gift inasmuch as it simply proffers an expectancy, and an expectancy does not constitute property.

Penn Ins. v Mulvaney, 221-925; 265 NW 889

Assignment of policy as collateral—effect on beneficiary. Reservation in a policy of life insurance of right in the insured to change the beneficiary prevents the vesting, during the lifetime of the insured, of any interest in the designated beneficiary, and arms the insured with power to assign the policy as security for a pre-existing indebtedness, and it is quite immaterial whether the designated beneficiary joins or fails to join with the insured in said assignment.

Potter v Ins. Co., 216-799; 247 NW 669

REORGANIZATION

8869 Authorization.

Atty. Gen. Opinion. See '32 AG Op 79

8880 Conditions precedent.

Atty. Gen. Opinion. See '32 AG Op 79

8881 Effect of reorganization—officers.

Certificates—not taxable after reorganization. A fraternal beneficiary association may reorganize into an old line company, but the amounts the new organization collects under the original certificates, which it has assumed, are not taxable under the gross premium tax provision of §7025, C., '35.

Yeomen Ins. v Murphy, 223-1315; 275 NW 127

EXAMINATION AND RECEIVERSHIP

8888 Revocation or suspension of authority—action by attorney general.

Commissioner—power of suspension denied. The commissioner of insurance is not empowered to suspend the business of a fraternal beneficiary association for failure to comply with commissioner's order to pay a gross premium tax, such order being based on his interpretation of a statute in controversy.

Homesteaders Life v Murphy, 224-173; 275 NW 146

CHAPTER 404

INSURANCE OTHER THAN LIFE

Atty. Gen. Opinions. See '32 AG Op 86, 220, 285; '36 AG Op 115

8896 Incorporation.

Policyholder as creditor. The policyholders of an insurance company organized on the stock plan are "creditors" of the corporation from the date of their policies, within the meaning of the legal principle that an unlawful dissipation of the funds of the corporation is constructively fraudulent as to existing creditors.

Hoyt v Hampe, 206-206; 214 NW 718; 220 NW 45

8907 Membership in mutuals.

Atty. Gen. Opinions. See '32 AG Op 42; '36 AG Op 115

8909 Maximum premium.

Contract basis for recovery. In an action by an insurer to recover of the insured premiums under a policy indemnifying the insured against injury to his workmen, there is a total failure of proof when the premium is, by contract, computable at a certain rate on the amount paid by the insured to his workmen in a limited and specified class of work, and the insurer wholly fails to present any evidence as to the amount so paid.

Globe Ind. Co. v Anderson-Deering Co., 200-1035; 205 NW 845

Action to recover—proof of condition precedent. In an action by an insurer to recover premiums due on an insurance rider which by its terms is valid only "when signed by an authorized representative", a failure of proof results from the failure of the insurer to prove that the rider was signed as required.

Globe Ind. Co. v Anderson-Deering Co., 200-1035; 205 NW 845

8915 Existing companies.

Refusal to approve articles. Certiorari may be the proper remedy to review the action of the commissioner of insurance and attorney general (§8688, C., '35) in refusing to approve amended articles of incorporation of an assessment association.

National Assn. v Murphy, 222-98; 269 NW 15

8918 Directors.

Dissipation of assets—liability. The act of the directors of a financially embarrassed corporation in selling their individually owned corporate shares of stock to a third party, and in receiving pay therefor out of the partly frozen bank deposits of the corporation, under an understanding that said third party would replace said dissipated deposits with securities of equal value, is per se fraudulent, and necessarily violative of the law-imposed trust relationship of the directors to existing and future contemplated corporate creditors; and this is true irrespective of the plea that the directors in good faith believed that said third party would carry out the said understanding. It follows that the receiver of the corporation may repudiate such transaction and recover the dissipated assets from the directors.

Hoyt v Hampe, 206-206; 214 NW 718; 220 NW 45

8927 Investments.

Atty. Gen. Opinions. See '34 AG Op 645; AG Op Feb. 28, '39

8937 Reserve fund required.

Unearned premiums—trust fund—construction. A trust fund "for the protection of policyholders" is for the protection of the claims of policyholders for unearned premiums under their policies, equally with the claims of policyholders for loss under their policies.

State v Cas. Co., 206-988; 221 NW 585

Unearned premiums—unallowable theory of damages. A policyholder's claim, under the express terms of his policy, for unearned premiums consequent on the legal termination of his policy may not be deemed damages for breach of the contract.

State v Cas. Co., 206-988; 221 NW 585

Nonexistent reserve to pay—effect. The statutory requirement that an insurance company shall, before declaring a dividend, set aside a specified reserve for the purpose of paying unearned premiums, is no impediment to a stockholder enforcing his claim for unearned premiums against a special trust fund created, inter alia, for the payment of such claims against a company which never had occasion to set aside such reserve because it had never made a dollar of profit.

State v Cas. Co., 206-988; 221 NW 585

8940 Kinds of insurance.

ANALYSIS

Accident and health policies, proof of loss. See under §8775
Accidental death. See under Ch 401, Note 1 (X)
Agents and brokers. See under §9119
Annuities. See under §8673.1
Fire insurance. See under §9018
Forfeiture of policy for nonpayment of premiums. See under §8959
Fraternal insurance. See under §§8777–8893
Group insurance. See under §§8684.01–8684.14
Inurement of legal liability policies. See under §9024.1
Life insurance policies. See under Ch 401, Note 1
Reinsurance. See under §9115

I CONTRACT OF INSURANCE AND POLICY GENERALLY

Assessment accident insurance—rules of life insurance inapplicable. The statute defining assessment plan of life insurance does not require that the rules applicable to life insurance shall be applicable to accident insurance.

Rainsbarger v Acc. Assn., 227-1076; 289 NW 908

Voluntary insertion of nonrequired agreement. The fact that one class of insurance companies is required, by statute, to insert in its policies a provision that an injured third party shall have a right of action against the insurer, does not prevent other insurance companies from inserting such provision in their policies even tho they are not required so to do, and when the provision is so inserted the company is bound thereby.

Venz v Ins. Assn., 217-662; 251 NW 27

Delivery—presumption attending possession. Possession by an insured, at the time of his death, of a policy of life or accident insurance creates a presumption, born of necessity and based on the experience of mankind, that the policy was delivered to the insured as an effective instrument; and this presumption prevails until the court can say, as a matter of law, that the presumption has been conclusively negatived by other evidence.

Beggs v Ins. Co., 219-24; 257 NW 445; 95 ALR 863

Insurance policy admitted by pleadings. In an action to recover on a policy of fire insurance where the plaintiff's petition, a petition of intervention, and the answer to the petition of intervention all agreed that the policy was issued on a certain date and that it covered the same property that was covered by the mortgage and by another insurance contract issued by the intervenor, the record was not fatally deficient when it contained no evidence of the execution of the policy.

Calendro v Ins. Co., 227-829; 289 NW 485

Acceptance of policy—acts constituting. A provision in a delivered policy of insurance giving the insured a named time in which to accept and retain the policy, or to reject and return it, is for the sole benefit of the insured; and when the insured not only retains the policy after the lapse of said time, but forwards his check for the premium (which the insurer retains), the said act of the insured in so retaining the policy and the act of the insurer in retaining the check render the policy effective from the date thereof.

Schmith v Cas. Co., 216-936; 247 NW 655

Implied authority of agent. An insurance company which, in the issuance of policies against loss by hail, customarily dates said policies from the date of the insured's written application therefor, and not from the date of the acceptance by the company of such applications, must, notwithstanding provisions in said applications to the contrary, be deemed to have impliedly authorized its soliciting agents, on taking such applications, to validly enter into oral, preliminary contracts of insurance covering the period from the date of said applications to the date of their acceptance or rejection.

Boever v Ins. Co., 221-566; 266 NW 276

Agent's cancellation of policy—nonconsenting insured unaffected. Under an agreed statement of facts tried to the court, an insured, by transferring his insurance from one company to another at the former's request, cannot, as a matter of law, be said to have mutually consented that his first insurance be canceled before he received his insurance from the second company, when there is evidence he contemplated continued protection, altho the agent for both companies notified the first to cancel as of a certain date, which was before the second policy was issued and before a loss occurred.

Home Ins. v Ins. Co., 225-36; 279 NW 425

Accident insurance—estoppel by conclusiveness of physician's certificate—nonapplicability. The statute which provides for the conclusiveness of a physician's certificate of health or declaring an applicant a fit subject for life insurance after medical examination, and thereafter estops an insurance company from setting up as a defense to an action on policy, that insured was not in the condition of health required by policy, unless policy was procured by fraud, is not applicable to an accident insurance policy, since the characteristics of the risks are so different that it would not seem reasonable, nor would there be any necessity for any such rule in cases

where the provisions of the policy are solely as to injury by accident.

Rainsbarger v Acc. Assn., 227-1076; 289 NW 908

Construction—absence of ambiguity. When the terms employed in a policy of insurance are plain and unambiguous, there is no room for the application of the oft-quoted rule that the policy must be construed most strongly against the insurer.

Field v Sur. Co., 211-1239; 235 NW 571

Ambiguities construed against insurer. Ambiguous language employed in an insurance policy will generally be construed most strongly against the insurer.

Githens v Ins. Co., 201-266; 207 NW 243; 44 ALR 863

Umbarger v Ins. Co., 218-203; 254 NW 87; 36 NCCA 733

Kantor v Ins. Co., 219-1005; 258 NW 759

Parker v Ins. Assn., 220-262; 260 NW 844

Iowa Bond. Co. v Cram, 209-424; 228 NW 24

Word applicable to either insurer or insured —not strictly construed. Word, e.g., "representative", in an insurance policy, not wholly for the insurer's benefit, should not be strictly construed against the insurer.

Eller v Guthrie, 226-467; 284 NW 412

"Total disability" clauses — liberal construction required. In policies of insurance against loss of time consequent on accidentally inflicted injuries, "total disability" clauses must be given a liberal construction in favor of the insured. So held where the policy required the injuries to be such as to "totally disable and prevent the insured from transacting any and every duty pertaining to any and every business and occupation". Evidence held to present jury question on the issue of the insured's total disablement.

Prusiner v Ins. Co., 221-572; 265 NW 919; 2 NCCA(NS) 87

"Burning or explosion of automobile". Insurance against injury "caused by the burning or explosion of an automobile" does not embrace injury caused by the inhalation of carbon monoxide gas thrown off by the ordinary explosion of motor vehicle fuel in the engine of the car.

Field v Sur. Co., 211-1239; 235 NW 571

Title insurance—refusal by insurer to defend—effect. An insurer who gives a bond to indemnify against loss consequent on defect of title (with certain exceptions), and agrees to defend actions which attack the title, and is given the opportunity to defend, and refuses to defend, on the mistaken ground that the defect alleged is not covered by the bond, thereby authorizes the insured to conduct the defense in good faith and to make any reasonable compromise of the action, with resultant liability on the part of the insurer for the damages suffered and for the value of the services rendered by insured's attorneys.

Jones v Sur. Co., 210-61; 230 NW 381

Title insurance—burden of proof. A title insurer has the burden to show that a defect of title is within the exceptions provided by the policy.

Jones v Sur. Co., 210-61; 230 NW 381

Exemption from liability—burden of proof. The insurer has the burden to establish a contract exception which exempts him from liability.

Lamar v Trav. Assn., 216-371; 249 NW 149; 92 ALR 159

II INSURABLE INTEREST

Discussion. See 8 ILB 181—Purchaser's insurable interest in stolen automobile; 12 ILR 235—Insurance of interests—conditional sales; 15 ILR 481—Interest in property of spouse

Naked titleholder. One who holds the legal title to land in trust for another, and who personally executes his note and secures it by mortgage on the land for the benefit of such other person, has an insurable interest in the buildings on the land.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Crop insurance—landlord's interest. A statement in an application for crop insurance to the effect that applicant has "full interest in the crop" when his only interest was in the cash rentals due him as a landlord, furnishes no basis for avoiding liability when both the insurer and its agent had full knowledge, from a prior application which was in their possession, that applicant's interest was that of landlord only.

Boever v Ins. Co., 221-566; 266 NW 276

Right to redeem from foreclosure. A mortgagor's insurable interest in the mortgaged property does not terminate until the period for redemption has expired.

Parker v Ins. Assn., 220-262; 260 NW 844

III PREMIUMS, DUES, AND ASSESSMENTS

Quarterly periods—nonretroactive premium. A policy of accident insurance which provides a scheme for quarterly periods of insurance and for quarterly payments of premiums in advance, but provides that the acceptance of a premium after it is due shall reinstate the policy only as to injuries received after such acceptance, does not cover an injury received after the beginning of a quarterly period and before payment of premium for that quarter is made.

Hiatt v Cas. Co., 208-974; 224 NW 53

IV ASSIGNMENT OF POLICY AND RIGHT TO PROCEEDS

Discussion. See 16 ILR 419—Proceeds payable to minor

Assignment after loss—effect. The assignment of a policy after loss, without the consent of the insurer, does not invalidate a policy under the usual policy provision prohibiting assignments.

Parker v Ins. Assn., 220-262; 260 NW 844

Right to proceeds—defaulting vendor (?) or nondefaulting purchaser (?). The vendor of real estate (and necessarily his assignee of the contract) has no basis for claiming the proceeds of a noncontested policy of fire insurance taken out on the property by the nondefaulting purchaser in his own name long after the vendor was in hopeless default under the contract of sale, even tho the said contract provided that the puchaser should take out insurance for the benefit of the vendor.

Reason: Neither the vendor nor his assignee can, under the circumstances, enforce the contract clause for insurance for their benefit.

Martinsen v Ins. Assn., 217-335; 251 NW 503

V NOTICE AND PROOFS OF LOSS

"Immediate" notice—jury question. Record reviewed and held to present a jury question on the issue whether a preliminary notice of death, to an insurer, was "immediate" within the meaning of the policy.

Nelson v Acc. Soc., 212-989; 237 NW 341

"As soon as practicable" construed. A policy requirement that written notice of an accident shall be given "as soon as practicable" means that said notice shall be given within a reasonable length of time under all the facts and circumstances. So held in a case where the insured inadvertently lost his policy and forgot the name of the insurer until some five months after liability accrued on the policy.

Gifford v Cas. Co., 216-23; 248 NW 235

Delay—effect. Even tho it be conceded that particular facts and circumstances may excuse delay on the part of an insured policyholder in making proofs of loss, yet such facts and circumstances cannot excuse the total failure to make any such proofs.

Woodard v Ins. Co., 201-378; 207 NW 351

Mental incapacity to furnish proofs—effect. A clear and unequivocal contract that an insured shall furnish due proofs of disability, as a condition precedent to the attaching of any liability on the part of the insurer, must be construed as assuming mental and physical capacity to furnish the proofs when due. It follows that the furnishing of such proofs will be excused if, when the disability occurs, and the policy is in force, the insured is insane, and, therefore, wholly unable to furnish said proofs.

McCoy v Ins. Co., 219-514; 258 NW 320

Inapplicable provisions of policy. The provisions in a policy of insurance (a) that "no agent has authority to change this policy or to waive any of its provisions", and (b) that "no change shall be made in the policy unless approved by an executive officer of the insurer and the approval be endorsed hereon", have application to the provisions of the policy relating to the formation and continuance of the contract and not to the conditions which are to be performed after loss, e. g., the giving of notice of loss.

Carver v Ins. Co., 218-873; 256 NW 274

Insufficient proof. The letter of an insured to an insurer may not be deemed to constitute proof of loss when there is no evidence that insured so intended the letter, and, on the contrary, inquired therein as to what proof he should make.

Woodard v Ins. Co., 201-378; 207 NW 351

Total and permanent disability—proofs. Preliminary proofs of total and permanent disability are sufficient when prepared and furnished by the insured on and in accordance with blank forms furnished by the insurer for such purpose.

Garden v Ins. Co., 218-1094; 254 NW 287

Waiver by denial of liability. An insurer who is furnished proofs showing death from disease, and later, and within the time for furnishing proofs, is furnished amended proofs showing death from accident, waives all further proofs by refusing to furnish blanks on which to make additional proof and by peremptorily denying all liability for death by accident.

Dawson v Life Co., 216-586; 247 NW 279

Denial of liability—waiver. An insurer who, upon the happening of a loss, promptly asserts that the policy has been cancelled long prior to the loss, thereby denies all liability, and waives proofs of loss.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Denial of liability—waiver. A policy provision to the effect that when a partial loss of a crop is occasioned by hail, the insured shall, by a certain date, furnish the insurer an account or statement of the crop harvested, is waived when, before the date in question, the insurer unequivocally denies liability under the policy.

Richardson v Ins. Assn., 214-30; 241 NW 414

Examination of premises after loss—effect. The act of the insurer in examining the insured premises after loss and thereupon denying all liability, constitutes a waiver of proofs of loss, even tho the insurer makes an offer of settlement.

Lee v Ins. Co., 214-932; 241 NW 403

Waiver of bylaw. Section 9045, C., '27, fixing the requirements of notice and proof of loss under mutual insurance policies, does not prevent the company from waiving in its bylaws such notice and proof except when it may see fit to demand them.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Insufficient waiver. The letter of an insured to an insurer, making inquiry as to what proof of loss he should make, and the letter of the insurer in reply, in which the insured is referred to the requirements of the policy, will not constitute a waiver of proof of loss, the insured not claiming that he was misled by the correspondence or that he in any manner changed his position by reason thereof.

Woodard v Ins. Co., 201-378; 207 NW 351

Waiver—pleading—sufficiency. Waiver of proofs of loss is sufficiently presented by pleading the facts constituting waiver, even tho the pleader does not allege the legal conclusion of waiver; and especially so when the pleadings are unquestioned in the trial court.

Lee v Ins. Co., 214-932; 241 NW 403

Waiver—sufficient plea. An allegation, in an action on a policy of insurance, that plaintiff, within the contract time, orally notified a general agent of the insurer of his injury, and that said agent agreed that he would give proper and timely notice to the insurer, is a sufficient plea of waiver of the insured's duty to give written notice of the loss, and sufficient to support the admission of evidence that the agent had sufficient power to waive said written notice.

Carver v Ins. Co., 218-873; 256 NW 274

VI SURRENDER, RESCISSION AND REFORMATION OF POLICY

Inconsistent and repugnant provisions—construction against insurer. A provision in a health policy that sick benefits will be paid provided the sickness is contracted thirty days after the date of the policy, and a distinct and separate provision that said benefits will be paid for every sickness contracted subsequent to the issuance of the policy, are so inconsistent and repugnant that the court will reject the first provision and apply the latter.

Schmith v Cas. Co., 216-936; 247 NW 655

Nonpayment of premiums — "suspension" and "cancellation" of policy distinguished. Section 9054, C., '24, providing that a policy of insurance issued by an assessment insurance association may be canceled by the association on a five-day notice to the insured, has no application to a policy provision which suspends the membership of the policyholder and denies him right of recovery for loss while he is delinquent in the payment of assessments.

Early v Ins. Assn., 201-263; 207 NW 117

Knowledge of agent. The knowledge of a soliciting agent that the insured understood that he was to receive a policy which would permit additional insurance will, on the issue of reformation, be imputed to the insurer, even tho not communicated to the latter.

Smith v Ins. Co., 201-363; 207 NW 334

Indemnity converted into liability. A policy of insurance which is otherwise strictly a contract of indemnity against loss is converted into a contract of indemnity against liability by the insertion therein of a provision which, in effect, provides that the policy shall, under named conditions, inure to the benefit of an injured third party.

Venz v Ins. Assn., 217-662; 251 NW 27

VII RENEWAL, REVIVAL AND REINSTATEMENT

Accident insurance — quarterly periods — nonretroactive premium. A policy of accident insurance which provides a scheme for quarterly periods of insurance and for quarterly payments of premiums in advance, but provides that the acceptance of a premium after it is due shall reinstate the policy only as to injuries received after such acceptance, does not cover an injury received after the beginning of a quarterly period and before payment of premium for that quarter is made.

Hiatt v Cas. Co., 208-974; 224 NW 53

Suspension—unliquidated set-off in favor of insured—effect. Whether the existence of an unliquidated disputed right of set-off may be made use of by an insured to obviate the suspension of a policy of insurance due to nonpayment of premiums or assessments, quaere.

Hart v Ins. Assn., 208-1020; 226 NW 777

Change in title—nonassignment of policy—waiver. An insurer who knows, through his agent, that the property covered by the policy has been transferred to another, and continues to treat the policy as in force by collecting and retaining the premiums, may not thereafter defensively assert such change of title or that no formal transfer of the policy had been made.

Neiman v Ins. Co., 202-1172; 211 NW 710

VIII AVOIDANCE OF POLICIES, MISREPRESENTATION

False statement as to responsibility. An insured may not recover on an indemnity bond which is given for the performance of a building contract when, in or in connection with the application for the bond, he willfully gives the insurer a false statement relative to the contractor's financial responsibility, and the insurer innocently relies thereon. This is especially true when the insured is, at the time, acting as the agent of the insurer.

Cook v Heinbaugh, 202-1002; 210 NW 129

VIII AVOIDANCE OF POLICIES, MISREPRESENTATION—concluded

Failure to reveal mortgages. A policy of insurance is not invalidated because the insured did not, in his written application, reveal the existence of mortgages on the property when he was not questioned concerning the mortgages.

Parker v Ins. Assn., 220-262; 260 NW 844

Reinsurance—disclosure of material facts—duties—presumptions. In an action on a reinsurance contract against reinsurer, held, not breached on account of original insurer's failure to retain full amount of liability agreed upon where original insurer was liable on another contract with the same principal and the evidence was insufficient to show any wrongful or fraudulent concealment of material facts, since the same principles of law as to false representations and concealments govern in reinsurance as in original insurance. Altho insured and reinsured have duty to exercise good faith and disclose all material facts, a presumption must be based on facts, not upon other presumptions. The mere nondisclosure of facts possibly known is not fraudulent concealment of facts, so reinsurer, to establish concealment of facts, must show intentional concealment or bad faith in ascertaining facts.

General Reins. v Surety Co., 27 F 2d, 265

IX WAIVER AND ESTOPPEL

Discussion. See 13 ILR 129—Waiver

Company's waiver of provision—insured's burden of proof. In action against an insurance company to recover on a policy covering tractors destroyed by fire, where defense was that plaintiff's ownership was not unconditional and that the property was not kept on the described location as the policy required, plaintiff was required to prove that, with full knowledge of facts disclosed to its agent by plaintiff, the defendant admitted its liability and waived those provisions of policy.

Buettner v Ins. Assn., 225-847; 282 NW 733

Maintenance of status quo—effect. A stipulation entered into by an insured and insurer relative to the employment of attorneys by the insurer to defend an action brought against the insured by a third party, and designed to maintain the status quo of the stipulating parties, cannot be deemed to have any bearing on a waiver of a policy provision already effected by the insurer.

Venz v Ins. Assn., 217-662; 251 NW 27

Bylaws part of policy—nonwaiver.

Richardson v Trav. Assn., 228- ; 291 NW 408

Notice and proof of loss—waiver by denial of liability. An insurer who is furnished proofs showing death from disease, and later, and within the time for furnishing proofs, is furnished amended proofs showing death from accident, waives all further proofs by refusing to furnish blanks on which to make additional proof and by peremptorily denying all liability for death by accident.

Dawson v Life Co., 216-586; 247 NW 279

Retention of premiums—effect. Where an automobile insurance policy exempts the insurer from liability while the car is being operated by a person under 16 years of age and where the monthly premiums are based on a named sum for each trip of the car occurring during the preceding month, the act of the insurer in demanding, receiving and retaining the premium for a particular trip with knowledge that the car on the trip in question had been operated by a person under 16 years of age, works a waiver of said exemption as to said trip.

Venz v Ins. Assn., 217-662; 251 NW 27

X ADJUSTMENT, SETTLEMENT, PAYMENT AND DISCHARGE OF LOSS

Discussion. See 21 ILR 642—Undue influence to secure release

Compromise and settlement—justifiable representation of defense. An officer of an insurance company is amply justified in believing that his company has a good defense to an action on a policy and in so stating to the insured in negotiations for a compromise settlement when the application for the insurance contained false representations of a material nature and an agreement that "the right to recover * * * should be barred" if any of the statements in the application "material either to the acceptance of the risk or the hazard assumed by the company is false and made with the intent to deceive."

Bockes v Cas. Co., 212-499; 232 NW 156

Check not necessarily payment. A check issued by an insurer for the amount of an adjusted loss and payable to a mortgagor and mortgagee, jointly, and never cashed because the mortgagor refused to indorse it, cannot be deemed a payment of the loss when there was no express or implied agreement to that effect—when the insurer-drawer first asserted such claim after the bank on which the check was drawn failed.

Union Ins. v Ins. Co., 216-762; 249 NW 653

Breach of condition subsequent—indemnity policy—failure to cooperate. An insured in an automobile indemnity policy of insurance has no right arbitrarily or unreasonably to refuse to substantially comply with his policy agreement to cooperate in specified ways with the insurer in protecting the rights of said insurer, but any default in so cooperating must be such as to prejudice the insurer in order to absolve him from liability.

Glade v Ins. Assn., 216-622; 246 NW 794

XI SUBROGATION AND CONTRIBUTION

Discussion. See 9 ILB 291—Clauses giving carrier the benefit of shipper's insurance

Subrogation contract by carrier. A contract provision to the effect that a lessor railway

company "shall have full benefit of any insurance effected by the lessee on structures erected on the leased premises" is valid and enforceable if the lessor has an insurable interest in the property.

Queen Ins. Co. v Railway, 201-1072; 206 NW 804

Rule for prorating. Between coinsurers, the liability of each under the standard pro rata clause is not the amount which he may pay the insured by way of settlement, but is such fractional part of the loss as the total amount of his policy bears to the total amount of all the valid and collectible coinsurance policies.

Globe Ins. v Bonding & Cas. Co., 205-1085; 217 NW 268; 56 ALR 463

Pro rata clause—valid and collectible insurance. In the application of the standard pro rata clause, the validity and collectibility of a policy are prima facie established by evidence that the insurer was solvent, did not question the validity of the policy, and, after suit, compromised the action and paid the judgment.

Globe Ins. v Bonding & Cas. Co., 205-1085; 217 NW 268; 56 ALR 463

Pro rata clause—effect on reinsurers. The lessened liability which an insurer automatically acquires (as regards a coinsurer) under the standard pro rata coinsurance clause, automatically works a pro rata reduction in the liability of his reinsurers who have contracted that the total loss under the policy shall likewise be prorated among the reinsurers.

Globe Ins. v Bonding & Cas. Co., 205-1085; 217 NW 268; 56 ALR 463

Action based on forged indorsement of checks and drafts. Where an employee wrongfully possessed himself of checks and drafts belonging to his employer, and by forged indorsements caused a bank to pay them, the act of a surety company in paying the employer the amount of his loss does not discharge the bank from its liability to the employer for having paid the checks and drafts on forged indorsements. The employer, upon being so indemnified, may assign his cause of action against the bank to the surety, and the surety may maintain the action against the bank.

National Surety Co. v Bankers Tr. Co., 210-323; 228 NW 635

XII ACTIONS ON POLICIES GENERALLY

Insured's remedy—law (?) or equity (?)—law action on contract proper. An insured under an accident policy has a plain, speedy, and adequate remedy at law, to wit: action on the contract, and, unless the insurer makes unreasonable and bad-faith demands on insured, he is not entitled to relief in equity.

Eller v Guthrie, 226-467; 284 NW 412

Avoidance of multiplicity of law actions. A strict action at law may not be brought and maintained in equity on the mere allegation that thereby a multiplicity of actions will be avoided. So held where plaintiff sought, in equity, to recover not only presently accrued but future possibly accruing weekly total disability benefits under a policy of accident insurance.

Gephardt v Ins. Co., 213-354; 239 NW 235

Multiple actions—multiple defenses and physical examinations proper. An insured, under an accident policy, who elects to try his disputed claims in a multiple series of suits, may not complain if the insurer prepares his defense in the same way and requires a separate physical examination before each suit.

Eller v Guthrie, 226-467; 284 NW 412

Premature action—defect cured. Defendant's right to complain because an action on a policy of insurance was prematurely commenced is lost by delaying the complaint until a time when an action, if then commenced, would not have been premature and when the action stood for trial on a substituted petition.

Slinger v Ins. Assn., 219-329; 258 NW 101

Nonpremature action. An action brought some eleven months after loss is not premature when the insurer has by his conduct waived proofs of loss.

Lee v Ins. Co., 214-932; 241 NW 403

Special appearance and motion to dismiss. In an action against insurance company to recover value of property destroyed by fire, in which action a special appearance attacked only one count of petition, the overruling of the special appearance and motion to dismiss was proper, inasmuch as jurisdiction that may be attacked by special appearance is jurisdiction of court over the entire action, and not jurisdiction of court as to part of such action.

Sanford Co. v Ins. Co., 225-1018; 282 NW 771

Specific performance. An action to compel the specific issuance of a policy of insurance against loss of income on a named occasion and for judgment on the policy, or in lieu, for judgment for damages, must be dismissed when it is made to appear that, in view of the amount of income actually received by the plaintiff on the occasion in question, and in view of the conditions of the usual and ordinary policy had one been issued, no recovery could have been had on the policy.

Amer. Legion v Ins. Co., 212-1371; 238 NW 458

Wrongful refusal to defend—attorney fees. A title insurer who wrongfully refuses to comply with his contract to defend an action hostile to the title is liable to the insured for

XII ACTIONS ON POLICIES GENERALLY—concluded

reasonable attorney fees, whether such fees have or have not been paid by the insured.

Jones v Sur. Co., 210-61; 230 NW 381

Burden of proof—affirmative elaboration of general denial—effect. The beneficiary in an accident insurance policy has the burden of proof to establish that the insured was killed under the particular condition covered by the policy and alleged in the petition, notwithstanding elaborate affirmative assertions by the defendant in addition to a general denial.

Nelson v Acc. Soc., 212-989; 237 NW 341

Exemption from liability—burden of proof. The insurer has the burden to establish a contract exception which exempts him from liability.

Lamar v Trav. Assn., 216-371; 249 NW 149; 92 ALR 159

Accidental death—burden of proof. In order to recover on the ordinary accident insurance policy, claimant must show by a preponderance of the evidence that the injury or death resulted solely from bodily injury received through accidental means. Evidence held to present a jury question.

Dawson v Life Co., 216-586; 247 NW 279

Evidence—accidental cause producing death. Evidence held sufficient to present a jury question on the issue whether an insured became accidentally infected with gas bacillus at the time of an injury to his hand, and whether said infection resulted in his death.

Martin v Life Co., 216-1022; 250 NW 220

Accidental means—allowable inference. Evidence that an insured in passing through an opening in a building knocked a piece of skin from his hand, coupled with the legal presumption that he did not intend such injury (there being no evidence tending to negative such presumption) justifies the inference or conclusion that the injury was caused by accidental means.

Martin v Life Co., 216-1022; 250 NW 220

Cause of death—testimony of attending physician nonconclusive. The testimony of a physician as to the cause of death of a person whom the physician personally attended shortly prior to said death is not conclusive, especially when the physician was, at the time of the examination, uncertain as to the cause of death. In other words, expert testimony, on proper hypothetical facts, is admissible to show a cause of death other than that testified to by the attending physician.

Dawson v Life Co., 216-586; 247 NW 279

Causes of loss—explosion—evidence. Under a policy of insurance against damages "caused by explosion occurring in the structure, provided the explosion results from the hazard inherent in the occupancy", a judgment against the insurer has ample support in evidence that an ordinary furnace was refueled and left in a normal condition with the feed door closed, the pipe to the chimney intact and in place and the fire burning; that during the following two and one-half hours no person was in the house; that upon the return of the owner the furnace door was open, the smoke pipe on the floor and the house filled with smoke and soot; and that there was no fire outside the furnace.

Sargent v Ins. Co., 216-688; 247 NW 267

Excluding evidence of fraud. Excluding a letter offered by a defendant insurer, in connection with a claim of fraud, is harmless error when all question of fraud was withdrawn from the jury.

Eller v Ins. Co., 226-474; 284 NW 406

Directed verdicts—function of court. It is not the function of the court to determine which of a series of irreconcilable theories of experts, as to the death of a person, is correct. All the court can do or is permitted to do is (1) to consider the war of testimony in the permissible light most favorable to the party on whom rests the burden of proof, and (2) to determine whether a verdict in favor of such party would be adequately supported by the testimony.

Martin v Life Co., 216-1022; 250 NW 220

Directed verdict—war of expert testimony. Whether a death resulted from an accident "independent of all other causes" is necessarily a jury question under a war of conflicting and contradictory expert testimony.

Martin v Life Co., 216-1022; 250 NW 220

Partial disability—jury question. Evidence held to justify the submission to the jury of the issue of partial disability.

Vorpahl v Surety Co., 208-348; 223 NW 366

Reversal with order to dismiss—when justifiable. The appellate court, on entering an order of reversal in a law action, may, in the exercise of its broad statutory discretion, terminate long protracted litigation, by ordering the trial court to dismiss plaintiff's action. So ordered where an action on a policy of insurance had been four times tried and had been three times reversed on defendant's appeal.

Stoner v Ins. Co., 220-984; 263 NW 46

XIII RISKS AND CAUSES OF LOSS

(a) IN GENERAL

Indemnity converted into liability. A policy of insurance which is otherwise strictly a contract of indemnity against loss is converted into a contract of indemnity against liability by the insertion therein of a provision which, in effect, provides that the policy shall, under named conditions, inure to the benefit of an injured third party.

Venz v Ins. Assn., 217-662; 251 NW 27

"No action clause"—effect. A policy of insurance indemnifying the insured from damages resulting from the holding of a hazardous automobile racing contest on a race track at a county fair, and which policy specifies that "No action shall be brought against the insurer * * * unless brought by and in the name of the insured for loss actually sustained and paid in money by the assured in satisfaction of a judgment after trial of the issues," is a contract of indemnity against loss, and not a contract of indemnity against liability, and gives no right of action on the policy to a person who was wrongfully injured as a result of holding said race; and this is true notwithstanding subsec. 5-e, §8940, C., '24, '27, '31, giving, under certain conditions, an injured person a right of action on an automobile accident policy issued to the wrongdoer, said statute having application solely to automobiles used in the usual course on highways, and not to use on race tracks in racing contests.

Zieman v Ins. Co., 214-468; 238 NW 100

Explosion—evidence. Under a policy of insurance against damages "caused by explosion occurring in the structure, provided the explosion results from the hazard inherent in the occupancy", a judgment against the insurer has ample support in evidence that an ordinary furnace was refueled and left in a normal condition with the feed door closed, the pipe to the chimney intact and in place and the fire burning; that during the following two and one-half hours no person was in the house; that upon the return of the owner the furnace door was open, the smoke pipe on the floor and the house filled with smoke and soot; and that there was no fire outside the furnace.

Sargent v Ins. Co., 216-688; 247 NW 267

(b) ACCIDENT OR HEALTH INSURANCE

Discussion. See 10 ILB 64—Total disability in accident policies; 16 ILR 251—Anticipatory breach

Acceptance of policy—acts constituting. A provision in a delivered policy of insurance giving the insured a named time in which to accept and retain the policy, or to reject and return it, is for the sole benefit of the insured; and when the insured not only retains the policy after the lapse of said time, but forwards his check for the premium (which the insurer retains), the said act of the insured in so retaining the policy and the act of the insurer in retaining the check render the policy effective from the date thereof.

Schmith v Cas. Co., 216-936; 247 NW 655

Nonretroactive premium. A policy of accident insurance which provides a scheme for quarterly periods of insurance and for quarterly payments of premiums in advance, but provides that the acceptance of a premium after due shall reinstate the policy only as to injuries received after such acceptance, does not cover an injury received after the beginning of a quarterly period and before payment of premium for that quarter is made.

Hiatt v Cas. Co., 208-974; 224 NW 53

Prorating clause. Divers accident insurance policies issued to the same insured may not be deemed to cover the "same loss", within the meaning of an attempted prorating clause concerning death benefits, when the recipients of said benefits under each policy are different from the recipients under any other policy.

Wahl v Acc. Assn., 201-1355; 207 NW 395; 50 ALR 1374

Death benefit not proratable. A death benefit is not proratable, under a policy of accident insurance against death, specified injuries, loss of time, surgeon's fees, etc., which contains a clause (violated by the insured) that, if the insured, without written notice to the insurer, carry other insurance in other companies, covering the same loss, the insurer "shall be liable only for such portion of the indemnity promised as said indemnity bears to the total amount of like indemnity in all policies covering such loss".

Wahl v Acc. Assn., 201-1355; 207 NW 395; 50 ALR 1374

Health insurance—liberal construction of policy. Principle reaffirmed that a health insurance policy must be construed liberally in favor of the insured.

Garvin v Cas. Co., 207-977; 222 NW 25; 61 ALR 633

Health insurance—confinement "within the house". An agreement by an insurer to pay sick benefits during such time as the insured "shall be strictly and continuously confined within the house" embraces time spent in hospitals on advice of physicians; also, necessary time spent in going to and from said physicians and hospitals if the sickness of the insured is, during said time, of such grave and serious nature that the time so spent is purely incidental to the necessary resumption of confinement "within the house". But said agreement does not embrace time spent by the insured in traveling about the country on his own motion in quest of health.

Garvin v Cas. Co., 207-977; 222 NW 25; 61 ALR 633

Inconsistent and repugnant provisions. A provision in a health policy that sick benefits will be paid provided the sickness is contracted 30 days after the date of the policy, and a distinct and separate provision that said benefits will be paid for every sickness contracted subsequent to the issuance of the policy, are so inconsistent and repugnant that the court will reject the first provision and apply the latter.

Schmith v Cas. Co., 216-936; 247 NW 655

Carpenter v Trav. Assn., 213-1001; 240 NW 639

XIII RISKS AND CAUSES OF LOSS—continued

(b) ACCIDENT OR HEALTH INSURANCE—continued

Certificate of health insurability—effect. An insurer against total, permanent disability is, in the absence of plea and proof of fraud on the part of the insured, conclusively bound by a certificate of the health insurability of the insured issued by the insurer's examining physician as a basis for the issuance of the policy.

Foy v Ins. Co., 220-628; 263 NW 14

"Accident" and "accidental means" defined. An "accident" is an event which, under the circumstances, is unusual and unexpected by the person to whom it happens; the happening of an event without the concurrence of the will of the person by whose agency it was caused.

The term "accidental means" signifies those means, the effect of which does not ordinarily follow, and cannot be reasonably anticipated from the use of those means, an effect which the actor did not intend to produce and which he cannot be charged with the design of producing.

Miser v Trav. Assn., 223-662; 273 NW 155

"Accidental means" defined. An injury caused by the intentional lifting of a log upon a wagon is one resulting from "accidental means" when such resulting injury was unexpected, undesigned, and not the usual or natural result of such an act.

Clarkson v Cas. Co., 201-1249; 207 NW 132

Accidental means—allowable inference. Evidence that an insured in passing through an opening in a building knocked a piece of skin from his hand, coupled with the legal presumption that he did not intend such injury (there being no evidence tending to negative such presumption) justifies the inference or conclusion that the injury was caused by accidental means.

Martin v Life Co., 216-1022; 250 NW 220

Accidental discharge of firearm. A requirement in a policy of accident insurance that the accidental cause of the discharge of a firearm shall be proven by a particular class of witnesses "who saw the cause in operation at the time of the discharge" simply requires the testimony of witnesses of such class who, by reason of their presence, can personally speak of such competent and attending facts and circumstances as will fairly justify the jury in finding from such testimony and from the inferences justifiably deducible therefrom, that the cause of the discharge was accidental.

Pride v Acc. Assn., 207-167; 216 NW 62; 62 ALR 31

Ballplayer sliding to base. Proof tending to show that a ballplayer was internally injured by sliding to a base, with proof that such act is ordinarily attended by no serious consequences, justifies a finding that the injury was accidental.

Dawson v Life Co., 216-586; 247 NW 279

"Burning or explosion of automobile." Insurance against injury "caused by the burning or explosion of an automobile" does not embrace injury caused by the inhalation of carbon monoxide gas thrown off by the ordinary explosion of motor vehicle fuel in the engine of the car.

Field v Sur. Co., 211-1239; 235 NW 571

"Driving," "adjusting," or "explosion of" automobile—jury question. Evidence that a party successively ran two automobiles into his garage, leaving the motor of the first car running, and thereupon closed the garage doors, and was later found dead on the running board of the second car, is wholly insufficient to establish that the deceased met his death "while driving," or "while adjusting," or "by an explosion of," an automobile, it appearing that the direct cause of the death was the inhalation of carbon monoxide gas.

Field v Sur. Co., 211-1239; 235 NW 571

Air travel—forced jump—risk not covered. Richardson v Trav. Assn., 228- ; 291 NW 408

Horse not a "vehicle". A horse, saddled and bridled, and being used as a means of conveyance or transportation, is not a "vehicle" within the meaning of a policy of insurance which provides indemnity "sustained by the wrecking or disablement of any vehicle or car * * * in which the insured is riding, or by being accidentally thrown therefrom".

Riser v Ins. Co., 207-1101; 224 NW 67; 63 ALR 292

Inhaling "gas"—scope of term. An unambiguous policy provision which exempts the insurer from liability when death ensues from inhaling "any gas" embraces a death from inhaling a combination or collection of gases as well as a death from inhaling a single gas. Such is the ordinary and popular understanding of the term "gas" and so the term must be construed.

Lamar v Trav. Assn., 216-371; 249 NW 149; 92 ALR 159

Policy—construction—"train wreck". The smashing in of a portion of one side of a passenger coach by swinging a loading bucket against the coach as it was passing constitutes a "train wreck" within the meaning of a policy of accident insurance, even tho the coach (the only one injured) was not derailed, and was not taken from the train for repairs until a division point on the line was reached.

Mochel v Trav. Assn., 203-623; 213 NW 259; 51 ALR 1327

Violation of law. A policy of accident insurance which provides, in effect, that it does not cover or embrace loss "resulting from or in consequence of" any act of the insured while engaged in any violation of the law, does not justify an instruction to the effect that the

violation of law must be the sole cause of the loss. Proximate cause, not sole cause, is the legal test.

Whyte v Cas. Co., 209-917; 227 NW 518

Presumption that injuries are accidental. In the absence of direct or circumstantial evidence to the contrary, physical injuries to a person are presumed accidental.

Dewey v Ins. Co., 218-1220; 257 NW 308

Intentionally inflicted injuries. The limited liability provided in a policy of insurance in case of "injuries intentionally inflicted upon the insured by another person except in the perpetration of a robbery", cannot be deemed established as a matter of law by evidence which would justify a finding either (1) that the assault was not made in the perpetration of a robbery, or (2) that it was made in the perpetration of a robbery, or (3) that the assault was the result of mistaken identity—and, therefore, not intentional within the meaning of the policy.

Carpenter v Trav. Assn., 213-1001; 240 NW 639

Intentional acts—presumption. Under a policy of accident insurance which exempts the insurer from liability for injuries sustained by the insured by reason of "intentional" acts, the presumption will be indulged that injuries inflicted upon the insured by another person were not intentional.

Olson v Surety Co., 201-1334; 208 NW 213

Declarations of insured. Declarations, not part of the res gestae, of an insured under an accident policy of insurance, tending to prove that an injury to the insured was self-inflicted, are not admissible against the beneficiary of the policy.

Pride v Acc. Assn., 207-167; 216 NW 62; 62 ALR 31

Accident as jury question. Evidence reviewed and held properly to present a jury question on the issue whether an injury was caused by accidental means.

Miser v Trav. Assn., 223-662; 273 NW 155

Injuries resulting from accident complained of—jury question. Record held replete with evidence that an insured's injuries and loss of time were caused directly and exclusively by the accident in issue and held to justify a refusal to direct a verdict for insurer on the ground that there was no competent evidence that the injuries were caused by the accident.

Eller v Ins. Co., 226-474; 284 NW 406

Noncausal relation. In an action on a policy of accident insurance covering death "by being accidentally thrown from a wrecked or disabled horsedrawn vehicle", plaintiff must, in order to present a prima facie case for recovery, show (1) that the vehicle was a "wrecked or disabled" vehicle when the insured was thrown therefrom, and (2) that said wreckage or disablement bore some causal relation to the accidental throwing of the insured from the vehicle. In other words, plaintiff fails to show a cause of action by establishing a disablement which had nothing to do with throwing the insured from the vehicle.

Slaughter v Ins. Co., 214-451; 240 NW 229

Total and permanent disability. A policy which provides for compensation, only in the event of total and permanent disability, necessarily excludes compensation for a disability which is total for the time being but not permanent.

Petersen v Ins. Co., 217-1122; 253 NW 63

Permanent disability—scope. Under a policy providing monthly disability benefits if insured becomes, and remains for 90 days, so physically incapacitated as to be wholly and permanently unable to engage in any occupation or work for profit, the insured, in order to recover, need carry his proofs on the issue of permanency of disability no further than to establish (1) present permanency, and (2) a reasonable presumption that such disability will continue for an indefinite period of time. (The policy herein provides for future proofs of continuance of disability.)

Garden v Ins. Co., 218-1094; 254 NW 287

Permanent disability—ascertainment by comparative standard in policy. In weighing the evidence as to a permanent disability claim, heed must be given to the other policy provisions wherein the company of its own volition has set a comparative standard for measuring total and permanent disability as respects the insured's ability to pursue any gainful occupation, and, being so measured, the question is for the jury.

Wood v Ins. Co., 224-179; 277 NW 241

Permanent disability — when recovery denied. A policy which provides, (1) for stated benefits in event insured becomes "wholly and permanently disabled", and (2) that "such total disability shall be presumed to be permanent when it is present and has existed continuously for not less than 3 months," does not authorize recovery for a disability which has been total for a continuous period of some 10 months, but which, when action for recovery of said benefits is commenced, has proven to be only temporary.

Graham v Assur. Soc., 221-748; 266 NW 820

Total disability clauses—liberal construction required. In policies of insurance against loss of time consequent on accidentally inflicted injuries, "total disability" clauses must be given a liberal construction in favor of the insured. So held where the policy required the injuries to be such as to "totally disable and prevent the insured from transacting any and every duty pertaining to any and every business and occupation". Evidence held to

XIII RISKS AND CAUSES OF LOSS—continued

(b) ACCIDENT OR HEALTH INSURANCE—continued

present jury question on the issue of the insured's total disablement.

Prusiner v Ins. Co., 221-572; 265 NW 919; 2 NCCA(NS) 87

Total disability—reasonable construction. "Total disability" as used in accident insurance policies does not mean a state of absolute helplessness but, rather, inability to do all the substantial and material acts necessary to the prosecution of the business or occupation of the insured, or some other business or occupation which he might enter, in a customary and usual manner.

Eller v Ins. Co., 226-474; 284 NW 406

Total disability—reasonable construction. Where a life insurance policy provides for monthly payments as disability benefits to an insured, total disability, which was defined therein as disability preventing insured "from engaging in any occupation or performing any work for compensation of financial value", does not mean a state of absolute helplessness, but, rather, inability to do all the substantial and material acts necessary to the prosecution of the business or occupation of the insured, or some other business or occupation which he might enter, in a customary and usual manner.

Hoover v Ins. Co., 225-1034; 282 NW 781

Disability benefits—conditional payment. A policy which provides that total disability benefits are payable "on each anniversary (of the policy) during the lifetime and continued disability of the insured", imposes no obligation to pay such benefits, or any part thereof, when the insured dies prior to such anniversary date. And this is true when the annual premium is payable in advance, but when it is impossible to determine what part of such premium is the consideration for the agreement to pay disability benefits.

Peek v Ins. Co., 206-1237; 219 NW 487

Instructions—disability continuing to time of trial. When an insurance policy provides that, in order to recover permanent disability benefits, an insured must be disabled "for life", an instruction that the jury must find insured disabled at the time of trial is correct.

Wood v Ins. Co., 224-179; 277 NW 241

Permanent disability—jury question. In an action on a life insurance policy providing against "total and permanent disability", evidence that insured, afflicted with an incurable condition of osteomyelitis of the vertebrae, was able to do a few hours bookkeeping, drive an automobile occasionally and enrolled in the State University for a short time, will not necessarily negative permanent disability but presents a question properly submitted to the jury.

Wood v Ins. Co., 224-179; 277 NW 241

Total disability—jury question. Where the insured, a farmer afflicted with arthritis, brings an action on a life insurance policy providing monthly payments for total disability, which was defined as disability preventing insured "from engaging in any occupation or performing any work for compensation of financial value", and where the insured farmer was unable to perform the labor on his farm, but still was able to direct the farming operations of his hired men, it was a jury question whether or not insured was totally and permanently disabled under terms of policy.

Hoover v Ins. Co., 225-1034; 282 NW 781

Total disability—evidence. Evidence reviewed, and held to show that plaintiff was "immediately, continuously and wholly disabled" by an accident, and from the date thereof.

Harrington v Surety Co., 206-925; 221 NW 577

Adjudication of physical condition—not binding in later action. Where an insured's claim is embodied in a series of suits, an adjudication of a plaintiff-insured's physical condition, determined in one action, does not adjudicate said condition in a subsequent independent action.

Eller v Guthrie, 226-467; 284 NW 412

Accepting payment for partial disability but reserving claim for total. An insured by accepting payment under an accident policy for three weeks total disability and two weeks partial disability, does not preclude himself from claiming further total disability when the payment was accepted with the distinct understanding with the insurer that such acceptance was without prejudice to any future claim for total disability.

Eller v Ins. Co., 226-474; 284 NW 406

Hospital expense—confinement in different hospitals permissible. A requirement in an accident policy, that in order for an insured to recover for hospitalization he must be confined in a hospital within 90 days of the accident, does not require that he must be confined in the same hospital for the entire time pending his recovery.

Eller v Ins. Co., 226-474; 284 NW 406

Pleading special limitations. Special limitations on the right to recover under a policy of accident insurance, inserted in the policy after the general insurance clause, must be pleaded and established by the insurer.

Carpenter v Trav. Assn., 213-1001; 240 NW 639

Accident insurance—burden of proof. Under an accident policy against bodily injury

through accidental means, resulting directly, independently, and exclusively of all other causes, the insured must necesarily meet the burden of showing that the injuries received resulted solely from accidental means. Evidence held insufficient.

Michener v Cas Co., 200-476; 203 NW 14

Burden of proof. In order to recover on the ordinary accident insurance policy, claimant must show by a preponderance of the evidence that the injury or death resulted solely from bodily injury received through accidental means.

Dawson v Life Co., 216-586; 247 NW 279

Avoidance of policy—burden of proof. The insurer in an accident insurance policy has the burden of proof to establish the defense that the policy is wholly avoided because the insured, in obtaining the policy, had falsely represented that his habits of life were "correct and temperate", and had thereby intentionally deceived the insurer.

Olson v Surety Co., 201-1334; 208 NW 213

Avoidance—burden of proof. An accident insurance policy (against injury sustained solely through external, violent, and accidental means) which provides, in effect, that it does not cover injuries sustained by reason of the intentional act of any person except assaults upon the insured by a person committing or attempting to commit robbery, casts upon the insurer the burden to establish (1) that the insured was injured by the intentional acts of another person, (2) that the injury was intentional, and (3) that such other person was not committing or attempting to commit robbery.

Olson v Surety Co., 201-1334; 208 NW 213

Cause of death—undue burden to establish. Expert medical opinions that an insured died from an intracranial, fatty embolus resulting from an external, violent and accidentally suffered injury, met by the same class of expert opinions positively to the contrary, may generate a jury question, determinable by the jury, like any other disputed question of fact, on the preponderance of testimony, the facts on which such conflicting, expert opinions are based being of such nature that the jurors could not therefrom deduce a proper opinion. So held where the court erroneously instructed that "No mere weight of evidence is sufficient to establish the cause of assured's death unless it excludes every other reasonable hypothesis as to the cause of death"—in effect requiring the theory of death by means of an embolus to be established beyond a reasonable doubt.

Aldine Co. v Acc. Assn., 222-20; 268 NW 507

Ineffective proof by executrix. Under a policy providing for the payment, (1) of total disability benefits to the insured himself, and (2) of death benefits to another, the disability benefits alleged to have accrued to the insured prior to his death may not be recovered by the executrix of the insured when the insured, tho physically and mentally able so to do, failed to furnish during his lifetime, to the insurer, proofs of such disability, the furnishing of such proofs being clearly contemplated and required by the policy as a condition precedent to the attaching of liability on the part of the insurer.

Kantor v Ins. Co., 219-1005; 258 NW 759

Finding by court—conclusiveness. The finding of the court in a trial to the court on supporting evidence on the issue whether an insured died "solely through external, violent, and accidental means" or from disease is conclusive on the appellate court; and it is immaterial that the court determines its findings by sustaining a motion to dismiss at close of all the evidence, or by overruling such motion and later dismissing the action on its own motion.

Cherokee v Ins. Co., 215-1000; 247 NW 495

(c) AUTOMOBILE INSURANCE

Discussion. See 9 ILB 196—Collision insurance —protection; 15 ILR 73—Recovery from insurer

Scope of policy. Insurance on a distinctly described automobile does not, of course, cover any other automobile.

Chambers v Ins. Assn., 214-1353; 242 NW 30

Merger of prior oral contracts. An oral contract that a policy on an automobile should automatically apply to any other car which the insured might subsequently acquire, entered into at the time the policy was applied for, will not support an action—said contract not being inserted in the policy.

Chambers v Ins. Assn., 214-1353; 242 NW 30

Oral contract—estoppel. Even tho the agent of an insurer, when receiving an application for insurance on an automobile, represents that the insured will have a policy automatically applicable to any car which the insured may acquire in the future, yet the insurer is not estopped to deny the existence of any such oral contract when the policy delivered and accepted contained no such provision.

Chambers v Ins. Assn., 214-1353; 242 NW 30

Transfer—prima facie effect. An insurer against the theft of an automobile, defending on the ground that the insured was not the "unconditional and sole" owner, may not complain that the jury is instructed that a transfer of the certificate of registration is only prima facie evidence of change of title.

Abraham v Ins. Co., 215-1; 244 NW 675

Transfer—right to contradict. On the issue whether plaintiff, in an action on a policy of insurance covering the theft of an automobile, was the "unconditional and sole" owner of the vehicle, plaintiff may testify to facts attending a written transfer of the certificate of regis-

XIII RISKS AND CAUSES OF LOSS—continued

(c) AUTOMOBILE INSURANCE—continued

tration tending to show that he, in fact, remained the owner of the vehicle notwithstanding said transfer.

Abraham v Ins. Co., 215-1; 244 NW 675

Company knowledge of automobile conditional sale—instructions. Where claim is made against an automobile insurance company under the collision clause of a policy transferred from one automobile to another on which a conditional sale is outstanding, knowledge of which conditional sale is denied by the company, instructions reviewed and held to properly submit question of company's knowledge and waiver of the conditional sale lien.

Mougin v Ins. Assn., 224-1202; 278 NW 336

Wrong motor numbers not invalidating liability policy. Motor numbers in an automobile insurance policy are only for the purpose of aiding in identifying the car, and, tho the numbers be wrong, a liability policy will not be invalidated if the car is otherwise properly identified, for which purpose other evidence may be resorted to, and, if sufficient, will cure the error without resort to a proceeding in equity to reform the policy.

Fucaloro v Cas. Co., 225-437; 280 NW 605

Indemnity insurance—law governing. A policy of insurance issued under subsec. 5-e of this section, insuring the ordinary operation of an automobile necessarily embraces the statutory provision that said policy shall inure to the benefit of a party who obtains a judgment against the insured, even tho said policy purports to be an indemnity policy only. (Zieman case, 214 Iowa 468 overruled in part.)

Schmid v Underwriters, 215-170; 244 NW 729

Indemnity (?) or liability (?)—legality. Either indemnity or liability insurance covering the operation of an automobile may be validly written by mutual associations under §9029 or by reciprocal or interinsurance concerns under §9083, C., '31, even tho subsec. 5-e, §8940, of said code prohibits the companies there designated from writing anything but liability insurance, the latter section not controlling the two former sections.

Schmid v Underwriters, 215-170; 244 NW 729

Indemnity policy—right of injured party. When the owner or operator of a motor vehicle has insured his liability for damages consequent on the operation of his vehicle, an injured party may not sue directly on the policy which indemnifies the wrongdoer—the insured—until he has obtained a judgment against the wrongdoer—the insured—and until an execution on the judgment has been returned unsatisfied. There is one exception to this statutory rule, to wit: When the policy is one obtained by a motor vehicle carrier as a mandatory statutory condition precedent to obtaining a certificate to operate as such carrier, an injured party may maintain an action on the policy when service of notice of suit cannot be had on the carrier within this state. (§5105-a26, C., '31 [§5100.26, C., '39]).

Ellis v Bruce, 215-308; 245 NW 320

Evidence of insurance—failure to strike not cured by instructions. Evidence that the owner of an automobile had stated that he did not go out to the scene of the accident after a collision in which the automobile was involved because the car was insured and he would let the insurance company take care of it, improperly injected the question of insurance in an action for damages resulting from the collision. The failure to strike such evidence was error which was not cured by the court's direction to the jury to disregard it.

Floy v Hibbard, 227-154; 289 NW 905

Indemnity policy—failure to cooperate. An insured in an automobile indemnity policy of insurance has no right arbitrarily or unreasonably to refuse to substantially comply with his policy agreement to cooperate in specified ways with the insurer in protecting the rights of said insurer, but any default in so cooperating must be such as to prejudice the insurer in order to absolve him from liability.

Glade v Ins. Assn., 216-622; 246 NW 794

Retention of premiums—effect. Where an automobile insurance policy exempts the insurer from liability while the car is being operated by a person under 16 years of age and where the monthly premiums are based on a named sum for each trip of the car occurring during the preceding month, the act of the insurer in demanding, receiving and retaining the premium for a particular trip with knowledge that the car on the trip in question had been operated by a person under 16 years of age, works a waiver of said exemption as to said trip.

Venz v Ins. Assn., 217-662; 251 NW 27

Chauffeur defined. An employee of a business who is not known as a chauffeur, and who is solely employed and paid for services wholly distinct from the operation of a delivery truck, does not become a "chauffeur" within the meaning of §4943, C., '27, by operating the truck during the time the regular chauffeur operator is temporarily absent.

Des Moines Co. v Underwriters, 215-246; 245 NW 215

"Driving", "adjusting", or "explosion" of automobile. Evidence that a party successively ran two automobiles into his garage, leaving the motor of the first car running, and thereupon closed the garage doors, and was later found dead on the running board of the second car, is wholly insufficient to establish that

the deceased met his death "while driving", or "while adjusting" or "by an explosion", of an automobile, it appearing that the direct cause of the death was the inhalation of carbon monoxide gas.

Field v Surety Co., 211-1239; 235 NW 571

"Riding in" or "driving" automobile—proof —sufficiency. On the issue (under an insurance policy) whether an insured died while "riding in", or while "driving" an automobile, no recovery can be had on proof only that the insured, shortly after he was expecting to start on a journey, was found dead in his securely closed garage and in his automobile (the engine of which had manifestly been very recently running) and behind the steering wheel, with the left front door partly open, and his left foot resting on the running board and his right foot near the accelerator; and especially is this true when the attending circumstances clearly indicate that before the car could be put into actual motion other acts must be done which would necessitate the absence of the deceased from the car.

Mould v Cas. Co., 219-16; 257 NW 349

Riding or driving motor vehicle—insured on running board. In an action on an insurance policy, there was sufficient evidence for a jury question on whether an accident came within terms of the policy insuring against injuries received in an accident of a vehicle in which the insured was riding or driving, when it was shown that the car started moving down a grade, and the insured was thrown to the ground from a position partly in the car and partly on the running board, while attempting to stop the car.

Dykes v Ins. Co., 226-771; 285 NW 201

"Person of same household"—scope of term. Where an insurance policy insured the assured against liability arising or resulting from automobile accidents, but excepted liability for injuries to "the assured or persons of the same household as the assured", held that a married woman who furnished the assured a room and board for a stated compensation could not be deemed a "person of the same household as the assured."

Umbarger v Ins. Co., 218-203; 254 NW 87; 36 NCCA 733

Fire as proximate cause of breakage. If an automobile takes fire while traveling upon the highway, and said fire is the proximate cause of the car's swerving and going into the ditch and overturning, then a policy of insurance against direct loss or damage from fire covers not only the parts of the car actually burned by the fire, but the parts of the car which were broken or injured by the overturning.

Tracy v Ins. Co., 207-1042; 222 NW 447; 1 NCCA(NS) 313, 319

Action on insurance policy—real party in interest—authority to make admission in pleading. A defendant corporation formed to underwrite reciprocal insurance contracts of its unincorporated group of subscribers is the real party in interest in an action to enforce a judgment against the corporation. The group of subscribers is not a legal entity and, when the corporation is the only legal entity of the two, an admission of an important fact by the corporation made in a counterclaim in the action in which judgment was obtained is binding on it in the later action.

Mitchell v Underwriters, 225-906; 281 NW 832

"No action clause"—effect. A policy of insurance indemnifying the insured from damages resulting from the holding of a hazardous automobile racing contest on a race track at a county fair, and which policy specifies that "No action shall be brought against the insurer * * * unless brought by and in the name of the insured for loss actually sustained and paid in money by the assured in satisfaction of a judgment after trial of the issues," is a contract of indemnity against loss, and not a contract of indemnity against liability, and gives no right of action on the policy to a person who was wrongfully injured as a result of holding said race; and this is true notwithstanding subsec. 5-e of this section, giving, under certain conditions, an injured person a right of action on an automobile accident policy issued to the wrongdoer, said statute having application solely to policies on automobiles used on race tracks in racing contests.

Zieman v Fidelity Co., 214-468; 238 NW 100

Joinder—tort of one and contract of another. A joint action (1) against a wrongdoer upon his tort consequent on the negligent operation of a motor vehicle, and (2) against a surety company upon its policy to indemnify the wrongdoer from loss because of said tort, even tho but one recovery is sought, presents two different causes of action, and the joinder thereof is wholly unallowable. And this is true whether the policy is simply a private, optional contract between the insured and insurer, or a policy mandatorily required by statute to be filed with and approved by the railroad commission as a condition precedent to the obtaining of a permit to operate said vehicle.

Ellis v Bruce, 215-308; 245 NW 320

Pleading—sufficiency. An unpleaded claim that an oral contract existed for the transfer of a policy of insurance on one automobile to a subsequently acquired automobile amounts to nothing.

Chambers v Ins. Assn., 214-1353; 242 NW 30

Inadequate instructions. In an action on a policy of insurance against theft, the court, after properly placing the burden on plaintiff to show that the taker intended to steal the insured property, must also instruct that plain-

XIII RISKS AND CAUSES OF LOSS—continued

(c) AUTOMOBILE INSURANCE—concluded

tiff supplies that element of proof, prima facie, by testimony that the insured property disappeared from the place where plaintiff left it, without the knowledge or consent of plaintiff or of any other person having control of the property.

Tullar v Ins. Co., 214-166; 239 NW 534

Contract measure of damages—effect. A contract measure of damages in case of loss under a policy of insurance against theft precludes the court from instructing as to another and different measure of damages.

Salinger v Ins. Corp., 214-1021; 243 NW 183

Extent of loss—collision damage to automobile. In an action on an automobile collision insurance policy, the measure of damages is (1) the reasonable cost to repair or replace the damaged parts with others of like kind and quality, if the evidence shows it can be so repaired, or (2) if the evidence shows it cannot be repaired, then the difference between the fair and reasonable market value before and such value after the collision—and fact that insured advantageously traded the wrecked automobile to a dealer on a new automobile does not affect the measure of damage.

Kellogg v Ins. Co., 225-230; 280 NW 485

Judgment against insured — conclusive against insurer. A judgment determining liability of insured for damages for death resulting from use of automobile was conclusive against liability insurance company as to its liability on policy where there was no fraud or collusion in obtaining the judgment and insurance company had timely notice of suit and elected to make no defense, in view of provision of policy and of statute permitting injured person to maintain action against insurance company for amount of judgment against insured after return of execution unsatisfied, irrespective of insured's insolvency.

International Co. v Steil, 30 F 2d, 654

(d) FIDELITY INSURANCE

Fidelity insurance—construction. The conduct of an officer of a bank in intentionally and deceitfully omitting to make any entry on the books of the bank of payments made on the bills receivable of the bank (other than a memorandum slip, hung on a spindle), with resulting loss to the bank, is covered by a bond or policy of insurance which guarantees indemnity against "dishonest or criminal acts or omissions" of said officers.

Andrew v Ind. Co., 207-652; 223 NW 529

Fidelity insurance—loss to bank—construction. Proof that an officer of a bank received money of the bank and made no entry of the receipt on the books of the bank necessarily presents a prima facie showing of financial loss to the bank.

Andrew v Ind. Co., 207-652; 223 NW 529

Unallowable action by stranger. A bond which, in effect, is limited to the indemnification of the obligee only, for pecuniary loss sustained by the obligee through the dishonest acts of his officers or employees, is a contract of indemnity. In other words, such bond does not cover liability to a third party for loss sustained by said third party through the dishonesty of the officers or employees of the said obligee. (See §8581-c14, C., '31 [§8581.18, C., '39], for bonds covering liability.)

Allen v Ins. Co., 218-294; 253 NW 498

(e) HAIL INSURANCE

Avoidance of policy for misrepresentation, etc.—knowledge of insurer and agent—effect. A statement in an application for crop insurance to the effect that applicant has "full interest in the crop" when his only interest was in the cash rentals due him as a landlord furnishes no basis for avoiding liability when both the insurer and its agent had full knowledge, from a prior application which was in their possession, that applicant's interest was that of landlord only.

Boever v Ins. Co., 221-566; 266 NW 276

Computation of damages—instructions. Instructions relative to the computation of damages to crops by hail reviewed, and held sufficiently clear in view of the ambiguous provision of the policy.

Richardson v Ins. Assn., 214-30; 241 NW 414

Damage by hail—improper measure. The percentage of crop destruction due to hail cannot be measured by a comparison between the ultimate crop after damage by hail, and the amount of yield in an average year, when the record affirmatively shows that the year in which the damage occurred was not, because of drought conditions, an average year.

Slinger v Ins. Assn., 219-329; 258 NW 101

Notice and proof of loss—waiver. A policy provision to the effect that when a partial loss of a crop is occasioned by hail, the insured shall, by a certain date, furnish the insurer an account or statement of the crop harvested, is waived when, before the date in question, the insurer unequivocally denies liability under the policy.

Richardson v Ins. Assn., 214-30; 241 NW 414

(f) THEFT INSURANCE

Impossible performance—when no excuse. A person is not legally excused from performing an act which he has unconditionally contracted to perform, but is prevented from performing because of the happening of a contingency of which he had knowledge when he contracted, and against which he might have

protected himself. For instance, an insurer may not rely on a contract that he will, in full satisfaction of his liability, repossess a stolen automobile and properly repair it, and return it to the insured, when such return to the insured was prevented by the act of the seller of the car rightfully seizing the car, while it was in the possession of the insurance company, for nonpayment of installments due on the car, such possible seizure being well known to the insurance company when it so contracted.

Salinger v Ins. Corp., 217-560; 250 NW 13

Theft—prima facie showing—shifting of burden. In an action on a policy of insurance against theft, plaintiff generates a prima facie showing for recovery by testimony that the insured automobile disappeared from the place where plaintiff had left it, without the knowledge or consent of plaintiff or of any other person having control over said vehicle. Defendant must then overcome the presumption, if he can, that the taker took the car with intent to steal it.

Tullar v Ins. Co., 214-166; 239 NW 534

Evidence—sufficiency. Principle reaffirmed, in an action on a policy of insurance against theft, that the possession of recently stolen property may be sufficient to establish the larceny of the property.

Tullar v Ins. Co., 214-166; 239 NW 534

Unauthorized taking of motor vehicle—presumption of theft. When an owner of a motor vehicle establishes that his car was taken without his knowledge or consent from the place he left it, he has made a prima facie case of theft. The law raises a rebuttable presumption that the taking was with intent to steal the same.

Whisler v Ins. Co., 224-201; 276 NW 606

Intoxication subsequent to automobile theft—inadmissibility. Exclusion of evidence offered by an insurance company, in an effort to escape liability on a theft policy, as to a thief's intoxicated condition an hour after the alleged theft of motor vehicles, as bearing on his condition at the time of the taking, held not prejudicial.

Whisler v Ins. Co., 224-201; 276 NW 606

Relevancy of insured's settlement offer—inadmissibility. A letter written by plaintiff's attorney before trial offering settlement without expense of litigation is inadmissible in a trial on the merits seeking recovery on an automobile theft insurance policy.

Whisler v Ins. Co., 224-201; 276 NW 606

(g) TORNADO AND WINDSTORM INSURANCE

Notice and proof of loss. Proof of loss under a policy of insurance is all-sufficient when executed and furnished to the insurer by the insured's duly appointed receiver.

Parker v Ins. Assn., 220-262; 260 NW 844

8941 Limitation on risks.

Loss—rule for prorating. Between coinsurers, the liability of each under the standard pro rata clause is not the amount which he may pay the insured by way of settlement, but is such fractional part of the loss as the total amount of his policy bears to the total amount of all the valid and collectible coinsurance policies.

Globe Ins. v Cas. Co., 205-1085; 217 NW 268; 56 ALR 463

Coinsurance—solvent and insolvent insurers. Separate insurers of the same loss are coinsurers, even tho one of the insurers issued his policy at a time when the other insurers had gone into the hands of a receiver and the extent of their ability to pay losses had become problematical.

Globe Ins. v Cas. Co., 205-1085; 217 NW 268; 56 ALR 463

8943 Execution of policies.

Delivery—presumption attending possession. Possession by an insured, at the time of his death, of a policy of life or accident insurance creates a presumption, born of necessity and based on the experience of mankind, that the policy was delivered to the insured as an effective instrument; and this presumption prevails until the court can say, as a matter of law, that the presumption has been conclusively negatived by other evidence.

Beggs v Ins. Co., 219-24; 257 NW 445; 95 ALR 863

8952 Commissioner as process agent.

Original notice—service—deputy commissioner may accept. Valid service of an original notice of suit against a foreign insurance company doing business in this state, is made by the act of the deputy commissioner of insurance in accepting, in writing and in the name of said commissioner, service of said notice for and on behalf of said company, tho the authority filed by the company only authorized the commissioner to accept such service.

Woodmen v Dist. Court, 219-1326; 260 NW 713; 98 ALR 1431

8958 Notes taken for insurance.

Discussion. See 15 ILR 389—Statement that note is given for insurance

"Unless". The term "unless", as employed in this section, is used in the sense of "if it be not a fact that".

Plunkett v Hopley, 208-1042; 226 NW 772

Noncollectibility. A promissory note which is given for the premium on a policy of life insurance is not void or noncollectible because such fact is not stated upon the face of the note.

Plunkett v Hopley, 208-1042; 226 NW 772

Failure to pay note—lapse of policy. A policy of insurance unqualifiedly lapses upon the failure of the insured to pay at maturity a promissory note which he has given for an annual premium, such effect being expressly provided for in the application and in the policy and in the said note, and the note clearly providing that it was not given as payment.

Diehl v Ins. Co., 204-706; 213 NW 753; 53 ALR 1528

8959 Forfeiture of policies—notice.

Applicability. The statute requiring the insurer to give 30 days notice of his purpose to forfeit a policy for the nonpayment of a premium applies to a policy of accident insurance which specifies no exact date for the payment of the premium.

Ragan v Ins. Co., 209-1075; 229 NW 702

Dual statutes governing. Cancellation of an insurance policy for nonpayment of premium is governed by this section; other cancellations by §9018, par. XI, C., '31.

Ryerson v Ins. Co., 213-524; 239 NW 64

Reciprocal insurance contracts not controlled by general statutes. The specific provisions of an application for a policy of reciprocal insurance, of which provisions the applicant had notice, to the effect that the policy will not be in force, (1) until the application is approved by the insurer, and (2) until the premium is paid, cannot be waived by the insurer's agent entering into a different arrangement relative to said acceptance and payment of premium; this section and section 9004, C., '31, relative to the power of agents, not being applicable to reciprocal insurance contracts.

Gisin v Ins. Exch., 219-1373; 261 NW 618

Nonapplicable procedure. The procedure for the forfeiture or suspension of a nonmutual fire insurance policy of insurance is not applicable to policies issued by mutual assessment companies. (Ch. 406, C., '27.)

Hart v Ins. Assn., 208-1020; 226 NW 777

Nonstatutory cancellation of policy. A reciprocal or interinsurance policy of insurance is effectively canceled by complying with the contract method for cancellation even tho such method is materially different than the statutory method provided by this section, because this section does not apply to such policies.

Schmid v Underwriters, 215-170; 244 NW 729

Attempted cancellation contrary to bylaws. A mutual insurance company which, in its bylaws, provides for the cancellation of a policy by giving notice "in person or by registered letter", and which in its attempt to cancel a policy ignores its own bylaws and attempts to give notice by an unregistered letter, must prove that said letter actually reached the insured, and the presumption of delivery attending the mailing of such letter and the positive testimony that such letter was never received by the insured are of equal probative force; therefore, the insurer has not established the receipt of said notice by the insured.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Ipso facto lapse of policy. Under an ordinary life insurance policy, a provision that default in payment of a premium shall forfeit the policy requires no formal notice of forfeiture in case of such default.

Rogers v Ins. Co., 204-804; 213 NW 757

Failure to pay illegal assessment—nonforfeiture. An assessment on the policyholders of a mutual insurance association, made by the board of directors at a duly called meeting, is not a legal assessment and no forfeiture of a policy can be based on the nonpayment of such assessment, when the articles of incorporation provide that an executive committee consisting of the president, vice president, secretary, and treasurer shall meet quarterly (and specially on call of the president) and make all assessments; and this is true even tho all said officers were present at said directors' meeting but as directors.

Maasdam v Ins. Assn., 222-162; 268 NW 491

Nonpayment of premium. An insured will not be deemed in default in the payment of premiums at the time of his death (1) when the premium is payable in installments, (2) when no specified date is fixed for payment, (3) when the policy provides that the payment of an installment shall continue the policy in force for a stated time, and (4) when the insured dies prior to the expiration of said stated time after the last payment; and this is true tho the premiums earned exceed the premiums paid.

Ragan v Ins. Co., 209-1075; 229 NW 702

Failure to pay premium—effect. A combined life and accident policy of insurance becomes void in accordance with its terms, to wit: "on failure to pay the premium at maturity", without any notice from the insurer that the premium is due or when it will be due. In other words, this section, as supplemented by section 8673, C., '31, has no application to such a policy.

Wall v Ins. Co., 217-1106; 253 NW 46

See Federal Bank v Ins. Assn., 217-1098; 253 NW 52

Premiums—payment mailed—nonreceipt—jury question. Evidence that an insurance premium had been mailed, against a claim of nonreceipt by the company, raises a jury question, especially when the company admits that in its office routine it made no note of the con-

tents of envelopes until after they had passed through the hands of several clerks.

Wood v Ins. Co., 224-179; 277 NW 241

Premium—application of dividends. An insured is not entitled to notice from the insurer as to the amount of dividends due under the policy in order to determine how much cash, in addition, is necessary to pay his premium when, under the policy, the condition does not yet exist under which he would have the right to apply the dividends on the premium.

Wall v Ins. Co., 217-1106; 253 NW 46

Belated receipt of check—effect. Under a policy providing that the nonpayment of a premium shall forfeit the policy, but that the insured may be reinstated, the receipt by the insurer through the mail, long after the maturity of a premium, of insured's check for the premium does not constitute payment when the insurer promptly replied by mail that the insured must first be reinstated, and when, without effort to collect the check, the insurer made proper tender thereof; and it matters not that the insured died before the insurer's letter reached him.

Rogers v Ins. Co., 204-804; 213 NW 757

Ineffectual notice. A policy of fire insurance, silent as to the post-office address of the insured, is not canceled, for nonpayment of a premium note, by a registered notice of cancellation addressed to the insured at the post-office address employed in dating the policy, when such place had never been the post-office address of the insured, and when, owing to no fault of the insured, said notice was never delivered to him; and this is true tho the postal authorities forwarded said mail matter to the post office through which the insured received mail by rural delivery.

Ryerson v Ins. Co., 213-524; 239 NW 64

Fatally defective notice. A notice of forfeiture of a policy of insurance for nonpayment of a premium note is fatally defective when it infers that the payment of the customary short rates is necessary if the insured wished to cancel the policy, but wholly fails to state the amount of such rates; and this is true even tho at said time the unearned premium is less in amount than the sum already paid by the insured.

Nolte v Ins. Co., 208-716; 224 NW 50

Proof of loss—waiver by denying liability. A life insurance company's denial of liability, on grounds other than failure to furnish proofs of loss, is a waiver of their right to require proofs, if the policy was in force and proofs could have been furnished at the time of such denial, but insured, relying on the company's notice, believed the policy had lapsed.

Wood v Ins. Co., 224-179; 277 NW 241

Suspension of policy—waiver—effect. Conceding, arguendo, that the levy of an assessment on a policy of insurance worked a waiver of the suspension of the policy for nonpayment of a prior assessment, yet such waiver becomes immaterial when the policy is legally suspended for nonpayment of the last assessment.

Hart v Ins. Assn., 208-1020; 226 NW 777

8960 Cancellation of policy.

Mutual cancellation by parties—policy method not exclusive. An insurance policy may be canceled by mutual consent of the parties, without resorting to the method provided in the policy.

Home Ins. v Ins. Co., 225-36; 279 NW 425

Unallowable in equity. Equity will not, after the death of the insured in a life insurance policy, entertain jurisdiction to cancel the policy unless exceptional circumstances render cancellation necessary for the protection of the insurer. The fact that the policy becomes incontestable after two years does not constitute such circumstance when said time has not yet elapsed.

Bankers Life v Bennett, 220-922; 263 NW 44

Agent's cancellation of policy—nonconsenting insured unaffected. Under an agreed statement of facts tried to the court, an insured, by transferring his insurance from one company to another at the former's request, cannot, as a matter of law, be said to have mutually consented that his first insurance be canceled before he received his insurance from the second company, when there is evidence he contemplated continued protection, altho the agent for both companies notified the first to cancel as of a certain date, which was before the second policy was issued and before a loss occurred.

Home Ins. v Ins. Co., 225-36; 279 NW 425

Hail insurance—failure to read settlement—cancellation—nonestoppel. An insurer may not cancel a hail insurance policy nor avoid payment for a second hail loss by predicating an estoppel upon the negligent failure of the insured to read a written settlement where the insured reposed confidence in the agent who, on a busy threshing day, negotiated the settlement for the first hail damage and then added a policy cancellation clause not discussed in settlement.

Conrad v Ins. Assn., 223-828; 273 NW 913

Cancellation—burden of proof on insurer. The burden of proving cancellation of a fire insurance policy is on the insurer who denies liability thereunder.

Home Ins. v Ins. Co., 225-36; 279 NW 425

Notice and proof of loss—waiver by cancellation. An insurer who, after a loss occurs, assumes to cancel the policy, and denies all li-

ability, waives his right to formal notice and proofs of loss.

Parker v Ins. Assn., 220-262; 260 NW 844

Unearned premiums—establishment against trust fund. A policyholder who has actually paid the premium under an Iowa standard form of insurance policy has a right, upon the insolvency of the company, and upon the conceded cancellation of the policy by the appointment of a permanent receiver, to have his claim for unearned premiums established against a trust fund which has been created "for the protection of policyholders".

State v Cas. Co., 206-988; 221 NW 585

8964 Examination—dissolution.

Consolidation—right of creditors. Where a domestic consolidated insurance company unconditionally assumed the obligations of both a domestic and a foreign company, and where the courts of the foreign state ordered that certain assets of the foreign company be administered on by receivership proceedings in said foreign state, the creditors of the foreign company have the right, after establishing their claims in the foreign receivership and being paid a percentage of their claims, to establish the balance of their claims against the assets in the hands of the domestic consolidated company (it having become insolvent) even tho a portion of said assets consists of a trust fund originally deposited with the state by the original domestic company "for the protection of its policyholders"; but dividends must be equalized by the domestic receiver among all creditors of the same class.

State v Cas. Co., 213-200; 238 NW 726

Unearned premiums—establishment against trust fund. A policyholder who has actually paid the premium under an Iowa standard-form-of-insurance policy has a right, upon the insolvency of the company, and upon the conceded cancellation of the policy by the appointment of a permanent receiver, to have his claim for unearned premiums established against a trust fund which has been created "for the protection of policyholders".

State v Cas. Co., 206-988; 221 NW 585

8974 Copy of application—duty to attach.

Attaching copy of premium note—insufficiency. A premium note for $100 which does not show the policy number is not a true copy of a premium note for $128 which does show the policy number, even tho the maker of the note was entitled to and was given a credit on the note for $28.

Nolte v Ins. Co., 208-716; 224 NW 50

Unauthorized mortgage. A standard fire insurance policy is wholly voided as to a subject matter therein covered by the policy, if said subject matter is, subsequent to the issuance of the policy, voluntarily mortgaged by the insured without the consent of the insurer; and in such case it is quite immaterial that the insured made no formal, written application for the policy.

Greco v Ins. Co., 219-150; 257 NW 201

8975 Failure to attach—effect.

Application—failure to attach—burden of proof. In an action, not on a policy of insurance, but for damages consequent on an alleged fraud-induced contract of settlement of the amount due on the policy, the burden of proof to show that the application for the insurance was not attached to or indorsed on the policy is on the insured when he pleads that the insurer may not avail itself of representations contained in the application.

Bockes v Cas. Co., 212-499; 232 NW 156; 237 NW 886

Misrepresentation—when unallowable as a defense. False and fraudulent representations on the part of an insured, in his original application for a policy of insurance, are not available as a defense to an action on the policy, when the policy provides that it is incontestable except as provided in named paragraphs which, on examination, reveal no grounds of contest whatever, but only matters of which the insurer could avail himself in the enforcement of the contract.

Wilson v Ins. Co., 220-321; 262 NW 525

8976 Presumption as to value.

See annotations under §9018

8977 Value of building—liability.

See annotations under §9018

8978 Prima facie right of recovery.

Inapplicable provisions of policy. The provisions in a policy of insurance (a) that "no agent has authority to change this policy or to waive any of its provisions", and (b) that

"no change shall be made in the policy unless approved by an executive officer of the insurer and the approval be indorsed hereon", have application to the provisions of the policy relating to the formation and continuance of the contract and not to the conditions which are to be performed after loss, e. g., the giving of notice of loss.

Carver v Ins. Co., 218-873; 256 NW 274

Hail insurance—failure to read settlement—cancellation—nonestoppel. An insurer may not cancel a hail insurance policy nor avoid payment for a second hail loss by predicating an estoppel upon the negligent failure of the insured to read a written settlement where the insured reposed confidence in the agent who, on a busy threshing day, negotiated the settlement for the first hail damage and then added a policy cancellation clause not discussed in settlement.

Conrad v Ins. Assn., 223-828; 273 NW 913

Notice and proof of loss—"as soon as practicable". A policy requirement that written notice of an accident shall be given "as soon as practicable" means that said notice shall be given within a reasonable length of time under all the facts and circumstances. So held in a case where the insured inadvertently lost his policy and forgot the name of the insurer until some five months after liability accrued on the policy.

Gifford v Cas. Co., 216-23; 248 NW 235

Notice by receiver adequate. Proof of loss under a policy of insurance is all-sufficient when executed and furnished to the insurer by the insured's duly appointed receiver.

Parker v Ins. Assn., 220-262; 260 NW 844

Mental incapacity to furnish proofs—effect. A clear and unequivocal contract that an insured shall furnish due proofs of disability, as a condition precedent to the attaching of any liability on the part of the insurer, must be construed as assuming mental and physical capacity to furnish the proofs when due. It follows that the furnishing of such proofs will be excused if, when the disability occurs, and the policy is in force, the insured is insane, and, therefore, wholly unable to furnish said proofs.

McCoy v Ins. Co., 219-514; 258 NW 320

Insufficient proof. The letter of an insured to an insurer may not be deemed to constitute proof of loss when there is no evidence that insured so intended the letter, and, on the contrary, inquired therein as to what proof he should make.

Woodard v Ins. Co., 201-378; 207 NW 351

Proofs of loss—waiver. Statutory proof of loss need not be furnished by an insured when the policy provides a definite and ample scheme for determining the actual loss, and the insured complies therewith.

Glandon v Ins. Assn., 207-1068; 224 NW 65

Waiver. The act of an insurer in receiving and taking under advisement proofs of loss after the time for filing such proofs had expired may, with other facts of an equivocal nature, constitute a waiver by the insurer of formal, timely filing of such proofs.

Jack v Ins. Assn., 205-1294; 217 NW 816

Insufficient waiver. The letter of an insured to an insurer, making inquiry as to what proof of loss he should make, and the letter of the insurer in reply, in which the insured is referred to the requirements of the policy, will not constitute a waiver of proof of loss, the insured not claiming that he was misled by the correspondence, or that he in any manner changed his position by reason thereof.

Woodard v Ins. Co., 201-378; 207 NW 351

Waiver—sufficient plea. An allegation, in an action on a policy of insurance, that plaintiff, within the contract time, orally notified a general agent of the insurer of his injury, and that said agent agreed that he would give proper and timely notice to the insurer, is a sufficient plea of waiver of the insured's duty to give written notice of the loss, and sufficient to support the admission of evidence that the agent had sufficient power to waive said written notice.

Carver v Ins. Co., 218-873; 256 NW 274

Waiver—declaration of apparent adjuster. When evidence would warrant the jury in finding that an employee of an insurer had apparent authority to adjust a loss, the statement of such employee to a fellow employee and communicated to parties interested in the loss as claimants, to the effect that the insurer "would pay the loss", is admissible on the issue whether the insurer had waived proofs of loss.

Basta v Ins. Assn., 217-240; 252 NW 125

Waiver by denying liability. An insurer who, after a loss occurs, assumes to cancel the policy, and denies all liability, waives his right to formal notice and proofs of loss.

Parker v Ins. Assn., 220-262; 260 NW 844

Denial of liability as waiver. A denial by the insurer of all liability under a policy of insurance operates as a waiver of notice and proof of loss.

Green v Ins. Co., 218-1131; 253 NW 36

Nonexcuse for failure to give. The requirement of a statutory form of fire insurance policy that proof of loss shall be given in a specified time and manner is not abrogated by a statute which declares that the policy shall be deemed a valued policy,—that is, a policy on which, in case of loss, the entire amount of the policy is collectible.

Woodard v Ins. Co., 201-378; 207 NW 351

Delay—effect. Even tho it be conceded that particular facts and circumstances may excuse delay on the part of an insured policyholder in making proofs of loss, yet such facts and circumstances cannot excuse the total failure to make any such proofs.

Woodard v Ins. Co., 201-378; 207 NW 351

Proofs of loss—estoppel. Statements of fact in proofs of loss are rebuttable so long as the insurer has not acted thereon.

Harrington v Surety Co., 206-925; 221 NW 577

Reliance on waiver. On the issue of waiver of proofs of loss under a fire insurance policy, a party who had been directed by the insured to attend to the collection of the loss may testify that he learned from a soliciting agent of the insurer the fact that the company's adjuster had stated that the loss would be paid, and that he relied on such statement and took no further steps toward presenting proofs of loss.

Basta v Ins. Assn., 217-240; 252 NW 125

Affidavit of fact—waiver. Failure of an insured to accompany his notice of loss with an affidavit as to the facts of loss becomes quite immaterial if the insurer waives such affidavit.

Stoner v Ins. Co., 215-665; 246 NW 615

Waiver—jury question. A promise by an adjuster of an insurance company, made after he had investigated the loss, that the loss would be paid, coupled with other conduct on the part of the insurer indicating a purpose not to require proofs of loss, creates a jury question on the issue of waiver of such proof.

Basta v Ins. Assn., 217-240; 252 NW 125

Pleading — construction. Answer held to plead properly the total failure of an insured to furnish proofs of loss.

Woodard v Ins. Co., 201-378; 207 NW 351

Forfeiture of policy for breach of condition subsequent—burden of proof. The grantee of property insured under a statutory, standard policy of fire insurance (§9018, C., '35) and the assignee of said policy, before loss, has the burden, in an action on the policy in his own behalf, to prove that said conveyance of the property and assignment of the policy were consented to or acquiesced in by the insurer thru some agent of the insurer who had authority so to consent or acquiesce.

Stoner v Ins. Co., 220-984; 263 NW 46

Incendiary fire—jury question. Circumstantial evidence reviewed at length, and held to present a jury question both, (1) on the incendiary nature of a fire, and (2) on the insured's connection therewith.

Natalini v Ins. Co., 219-806; 259 NW 577

8979 Proofs of loss of personal property.

Proofs of loss—estoppel. Statements of fact in proofs of loss are rebuttable so long as the insurer has not acted thereon.

Harrington v Surety Co., 206-925; 221 NW 577

Proofs—estoppel. An insurer may not complain that proofs of loss were fatally lacking in definiteness when the proofs were on a blank furnished by the insurer and were in compliance with such blank.

Elmore v Surety Co., 207-872; 224 NW 32

Waiver. Failure of an insured to file written proofs of loss, becomes inconsequential when, commencing with the loss and for a long time thereafter, the insurer had promised to pay the loss.

Mortimer v Ins. Assn., 217-1246; 249 NW 405

Waiver. The act of the insurer in examining the insured premises after loss and thereupon denying all liability, constitutes a waiver of proofs of loss, even tho the insurer makes an offer of settlement.

Lee v Ins. Assn., 214-932; 241 NW 403

Waiver. A policy provision to the effect that when a partial loss of a crop is occasioned by hail, the insured shall, by a certain date, furnish the insurer an account or statement of the crop harvested, is waived when, before the date in question, the insurer unequivocally denies liability under the policy.

Richardson v Ins. Assn., 214-30; 241 NW 414

Offer and acceptance—effect. An agreement of settlement of a loss under a policy of insurance, consummated thru an offer by the insured in his proofs of loss, and by an acceptance of the offer by the insurer, and relied and acted on by the latter, is conclusive on the parties in the absence of fraud or mistake.

Williams v Ins. Assn., 204-991; 216 NW 269

Waiver—pleading. Waiver of proofs of loss is sufficiently presented by pleading the facts constituting waiver, even tho the pleader does not allege the legal conclusion of waiver; and especially so when the pleadings are unquestioned in the trial court.

Lee v Ins. Assn., 214-932; 241 NW 403

Sufficiency of proofs. Proofs of loss held sufficient; also the manner in which accounts of loss were kept even tho not wholly accurate.

Hansell v Ins. Assn., 209-378; 228 NW 88

8980 Invalidating stipulations—avoidance.

Transfer of property. In equitable action against mutual insurance association where defendant admitted that property in question was

insured under a fire policy, defendant's contention that a certain transfer of the property had invalidated the policy, having not been pleaded as a special defense, was not in issue under the pleadings.

Webber v Ins. Assn., 227-793; 288 NW 868

Change of title. A conveyance, without consideration, by a husband to his wife of a stock of insured goods with the intent to place the goods beyond the reach of his apprehended creditors, without any actual change of possession or use taking place, followed later by a reconveyance, without consideration, by the wife to the husband, constitutes no such change in the interest or title of the insured as will void the policy, the wife never having had any financial interest in the property.

McVay v Ins. Co., 218-402; 252 NW 548

Change in location—negligence. An insurer may estop himself from pleading nonliability on the policy, because of a change in location of the insured property, by negligently delaying (until after the fire, and after an authorized and favorable examination) the execution of the written consent to such change in location.

Bemisdarfer v Ins. Assn., 217-770; 252 NW 551

Concealment of unrecorded mortgage. The concealment by the insured, in his application for fire insurance on property, of the existence of an unrecorded mortgage on the property, of which mortgage the insurer had no knowledge, is fatal to recovery on the policy in case of loss.

Moore v Ins. Assn., 221-953; 266 NW 12

Knowledge of insurer and agent—effect. A statement in an application for crop insurance to the effect that applicant has "full interest in the crop" when his only interest was in the cash rentals due him as a landlord, furnishes no basis for avoiding liability when both the insurer and its agent had full knowledge, from a prior application which was in their possession, that applicant's interest was that of landlord only.

Boever v Ins. Co., 221-566; 266 NW 276

Waiver. Forfeiture clauses and conditions against transfer of title, encumbrance, and assignment of policies are for the protection of the insurance company against increase of hazard without their knowledge and consent, and therefore may be waived.

Webber v Ins. Assn., 227-793; 288 NW 868

Estoppel—recognizing transfer. In equitable action against a mutual insurance association to require the completion of an assignment of a policy and to recover for fire loss, the association was, under the evidence, estopped from asserting that policy was not properly assigned, where plaintiff's grantor delivered policy to office of association's secretary for purpose of having the assignment completed and where the association recognized transfer of property to plaintiff and his ownership in the policy by mailing to him a notice of assessment thereon.

Webber v Ins. Assn., 227-793; 288 NW 868

Condition subsequent—burden of proof. In an action on a policy of fire insurance which excepts loss "by theft or neglect", the burden to establish the theft or neglect is on the insurer.

Hall v Ins. Co., 217-1005; 252 NW 763

8981 Conditions invalidating policy.

Conditions invalidating fire insurance. See under §9018

Strict construction required. Principle applied that forfeiture provisions in a policy of insurance must be strictly construed against the insurer.

Kiser v Ins. Assn., 216-928; 249 NW 753

Sale—what constitutes. A policy provision to the effect that any "selling or transferring" of the insured property shall, in the absence of a specified notice to the insurer "after transfer of the property", automatically cancel the insurance is not violated by the mere execution of a contract of sale of said property providing for delivery of possession at a specified future date—the loss occurring prior to said date.

Kiser v Ins. Assn., 216-928; 249 NW 753

Sale and assignment of policy—consent of insurer. The grantee of property insured under a statutory, standard policy of fire insurance (§9018, C., '35) and the assignee of said policy, before loss, has the burden, in an action on the policy in his own behalf, to prove that said conveyance of the property and assignment of the policy were consented to or acquiesced in by the insurer through some agent of the insurer who had authority so to consent or acquiesce.

Stoner v Ins. Co., 220-984; 263 NW 46

Sale by partner—effect. Assuming that one partner has no authority to sell the partnership property without the consent of the other partner, and thereby invalidate the insurance, yet where such sale was not rescinded it must necessarily be deemed a legally completed sale.

Larsen & Son v Ins. Co., 212-943; 237 NW 468

Appointment of receiver not "sale". The appointment of a receiver of the property of an insured, and the possession of the property by the receiver, does not constitute a "sale" of the property within the meaning of a clause invalidating the policy in case of a sale.

Parker v Ins. Assn., 220-262; 260 NW 844

Assignment after loss—effect. The assignment of a policy after loss, without the consent of the insurer, does not invalidate a policy

under the usual policy provision prohibiting assignments.

Parker v Ins. Assn., 220-262; 260 NW 844

Misrepresentation—mortgages. A truthful representation in an application for insurance as to the mortgages existing on the specifically described land on which the insured building is located, is not rendered a misrepresentation by showing the existence of other mortgages on other and separately described tracts on the same farm.

Hart v Ins. Assn., 208-1030; 226 NW 781

Failure to reveal mortgages when not asked. A policy of insurance is not invalidated because the insured did not, in his written application, reveal the existence of mortgages on the property when he was not questioned concerning the mortgages.

Parker v Ins. Assn., 220-262; 260 NW 844

Recordation of mortgage—effect. The due recordation of a mortgage on insured property does not, in and of itself, carry to the insurer any notice or knowledge which can thereafter have any bearing on the acceptance of premiums on the insurance.

Hart v Ins. Assn., 208-1030; 226 NW 781

Renewal of mortgage. As to how far an insured may go in allowing interest and taxes to accumulate on a mortgage and in executing a new mortgage in renewal of the old mortgage without thereby increasing the hazard of carrying the insurance and avoiding the policy, quaere.

Hart v Ins. Assn., 208-1030; 226 NW 781

Renewing existing mortgage — burden of proof. A policyholder who claims that a mortgage executed on the insured property subsequent to the issuance of the policy was but a renewal of a smaller mortgage mentioned in the application for insurance must, in his evidence, so account for the increased amount of the mortgage as to show that there was no increase of hazard in carrying the insurance.

Hart v Ins. Assn., 208-1030; 226 NW 781

Company knowledge of automobile conditional sale. Where claim is made against an automobile insurance company under the collision clause of a policy transferred from one automobile to another on which a conditional sale is outstanding, knowledge of which conditional sale is denied by the company, instructions reviewed and held to properly submit question of company's knowledge and waiver of the conditional sale lien.

Mougin v Ins. Assn., 224-1202; 278 NW 336

Increase of hazard. The provision of a fire insurance policy providing invalidation "if there be a change in the occupancy or use of the property, making the risk more hazardous", is not violated if the building becomes vacant and the hazard is thereby increased.

Danels v Ins. Assn., 213-352; 239 NW 24

Insurable interest—right to redeem from foreclosure. A mortgagor's insurable interest in the mortgaged property does not terminate until the period for redemption has expired.

Parker v Ins. Assn., 220-262; 260 NW 844

Waiver. Forfeiture clauses and conditions against transfer of title, encumbrance, and assignment of policies are for the protection of the insurance company against increase of hazard without their knowledge and consent, and therefore may be waived.

Webber v Ins. Assn., 227-793; 288 NW 868

Estoppel, waiver, or agreement affecting right to forfeit policy. The retention by an insurer of the unearned premium paid on a fire insurance policy does not estop the insurer from pleading the invalidity of the policy consequent on the sale of the insured property and the assignment of the policy before loss without the knowledge of the insurer, when such knowledge came to the insurer only after loss had occurred.

Stoner v Ins. Co., 220-984; 263 NW 46

Estoppel—recognizing transfer. In equitable action against a mutual insurance association to require the completion of an assignment of a policy and to recover for fire loss, the association was, under the evidence, estopped from asserting that policy was not properly assigned, where plaintiff's grantor delivered policy to office of association's secretary for purpose of having the assignment completed and where the association recognized transfer of property to plaintiff and his ownership in the policy by mailing to him a notice of assessment thereon.

Webber v Ins. Assn., 227-793; 288 NW 868

Cancellation in equity. Equity will not, after a claim has arisen on an insurance policy, entertain jurisdiction to cancel the policy unless exceptional circumstances render cancellation necessary for the protection of the insurer.

Bankers Life v Bennett, 220-922; 263 NW 44

Invalidating conditions—specially pleaded. In equitable action against mutual insurance association where defendant admitted that property in question was insured under a fire policy, defendant's contention that a certain transfer of the property had invalidated the policy, having not been pleaded as a special defense, was not in issue under the pleadings.

Webber v Ins. Assn., 227-793; 288 NW 868

8982 Arbitration agreements.

Agreement for appraisal. See under §8976, Vol I

Optional arbitration—nonpremature action. When the provision for arbitration in a policy of insurance is purely optional, an action on the policy, brought immediately after the arbitrators have failed to agree as to the loss, is not premature even tho the bylaws provide that the loss is not payable until 30 days after the arbitrators have rendered their decision.

Hansell v Ins. Assn., 209-378; 228 NW 88

Inadequate award — fraud — effect. Equity will vacate a grossly inadequate award by arbitrators, especially when an element of fraud exists in the appointment and proceedings of the arbitrators.

Koopman v Ins. Assn., 209-958; 229 NW 221

8983 Right to rebuild.

Election to rebuild — effect. Principle reaffirmed that an insurer converts a fire insurance policy into a building contract by electing, under the policy, to rebuild the damaged property.

Cocklin v Ins. Assn., 207-4; 222 NW 368

Default in rebuilding—measure of damages. An insurer who elects to rebuild a fire-damaged building, and so substantially fails to restore the building to its condition just prior to the fire that the insured must tear down and rebuild the structure, must respond in damages to the extent of the difference between the value of the structure before the fire and its value as defectively reconstructed; but the insurer may not, in addition, be mulcted in damages for loss of rentals.

Cocklin v Ins. Assn., 207-4; 222 NW 368

Substantial replacement—evidence. On the issue whether an insurance company, in rebuilding a fire-damaged building, had substantially restored it to the condition existing before the fire, evidence of the condition of the building just prior to the fire is manifestly material.

Cocklin v Ins. Assn., 207-4; 222 NW 368

8984 Pleadings.

Insurance policy admitted by pleadings. In an action to recover on a policy of fire insurance where the plaintiff's petition, a petition of intervention, and the answer to the petition of intervention all agreed that the policy was issued on a certain date and that it covered the same property that was covered by the mortgage and by another insurance contract issued by the intervenor, the record was not fatally deficient when it contained no evidence of the execution of the policy.

Calendro v Ins. Co., 227-829; 289 NW 485

8986 Notice and proof of loss—limitation of actions.

Contract limitations — unreasonableness. A provision in a contract of insurance which prohibits the bringing of an action earlier than 60 days or later than 90 days after loss is unreasonable per se and void.

Page Co. v Deposit Co., 205-798; 216 NW 957

Inapplicable provisions of policy. The provisions in a policy of insurance (a) that "no agent has authority to change this policy or to waive any of its provisions", and (b) that "no change shall be made in the policy unless approved by an executive officer of the insurer and the approval be indorsed hereon", have application to the provisions of the policy relating to the formation and continuance of the contract and not to the conditions which are to be performed after loss, e. g., the giving of notice of loss.

Carver v Ins. Co., 218-873; 256 NW 274

Nonpremature action. An action brought some 11 months after loss is not premature when the insurer has by his conduct waived proofs of loss.

Lee v Ins. Assn., 214-932; 241 NW 403

Notice and proof of loss—"as soon as practicable". A policy requirement that written notice of an accident shall be given "as soon as practicable" means that said notice shall be given within a reasonable length of time under all the facts and circumstances. So held in a case where the insured inadvertently lost his policy and forgot the name of the insurer until some five months after liability accrued on the policy.

Gifford v Cas. Co., 216-23; 248 NW 235

Notice and proof of loss — waiver. When evidence would warrant the jury in finding that an employee of an insurer had apparent authority to adjust a loss, the statement of such employee to a fellow employee and communicated to parties interested in the loss as claimants, to the effect that the insurer "would pay the loss", is admissible on the issue whether the insurer had waived proofs of loss.

Basta v Ins. Assn., 217-240; 252 NW 125

Waiver. Failure of an insured to file written proofs of loss, becomes inconsequential when, commencing with the loss and for a long time thereafter, the insurer had promised to pay the loss.

Mortimer v Ins. Assn., 217-1246; 249 NW 405

Waiver. The act of the insurer in examining the insured premises after loss and thereupon denying all liability, constitutes a waiver of proofs of loss, even tho the insurer makes an offer of settlement.

Lee v Ins. Assn., 214-932; 241 NW 403

Waiver. A policy provision to the effect that when a partial loss of a crop is occasioned by hail, the insured shall, by a certain date, furnish the insurer an account or statement of the crop harvested, is waived when, before the date in question, the insurer unequivocally denies liability under the policy.

Larsen & Son v Ins. Co., 212-943; 237 NW 468
Richardson v Ins. Assn., 214-30; 241 NW 414

Reliance on waiver. On the issue of waiver of proofs of loss under a fire insurance policy, a party who had been directed by the insured to attend to the collection of the loss may testify that he learned from a soliciting agent of the insurer the fact that the company's adjuster had stated that the loss would be paid, and that he relied on such statement and took no further steps toward presenting proofs of loss.

Basta v Ins. Assn., 217-240; 252 NW 125

Waiver—pleading. Waiver of proofs of loss is sufficiently presented by pleading the facts constituting waiver, even tho the pleader does not allege the legal conclusion of waiver; and especially so when the pleadings are unquestioned in the trial court.

Lee v Ins. Assn., 214-932; 241 NW 403

Waiver — sufficient plea. An allegation, in an action on a policy of insurance, that plaintiff, within the contract time, orally notified a general agent of the insurer of his injury, and that said agent agreed that he would give proper and timely notice to the insurer, is a sufficient plea of waiver of the insured's duty to give written notice of the loss, and sufficient to support the admission of evidence that the agent had sufficient power to waive said written notice.

Carver v Ins. Co., 218-873; 256 NW 274

Waiver — jury question. A promise by an adjuster of an insurance company, made after he had investigated the loss, that the loss would be paid, coupled with other conduct on the part of the insurer indicating a purpose not to require proofs of loss, creates a jury question on the issue of waiver of such proof.

Basta v Ins. Assn., 217-240; 252 NW 125

Delay in pleading—abatement. Defendant's right to plead in abatement is wholly lost when delayed until the plaintiff might legally have brought his action.

Larsen & Son v Ins. Co., 212-943; 237 NW 468

8994 Signing of rider.

Unsigned rider. A coinsurance rider which is not signed by the insured is a nullity though it is attached to the policy.

Neiman v Ins. Co., 202-1172; 211 NW 710

8996 Stipulation as to prorating.

Proration of fire losses. See under §9018 (XVI)

Burden of proof on insurer to show right to prorate.

Cole v Ins. Co., 201-979; 205 NW 3

Accident insurance—death benefit not proratable. A death benefit is not proratable, under a policy of accident insurance against death, specified injuries, loss of time, surgeon's fees, etc., which contains a clause (violated by the insured) that, if the insured, without written notice to the insurer, carry other insurance in other companies, covering the same loss, the insurer "shall be liable only for such portion of the indemnity promised as said indemnity bears to the total amount of like indemnity in all policies covering such loss".

Wahl v Acc. Assn., 201-1355; 207 NW 395; 50 ALR 1374

Accident insurance — prorating clause — "same loss" negatively defined. Divers accident insurance policies issued to the same insured may not be deemed to cover the "same loss", within the meaning of an attempted prorating clause concerning death benefits, when the recipients of said benefits under each policy are different from the recipients under any other policy.

Wahl v Acc. Assn., 201-1355; 207 NW 395; 50 ALR 1374

9002 "Soliciting agent" defined.

Implied authority. The act of an insurance company at its policy-issuing office, and in response to the request of its soliciting agent, in attaching a "loss payable" clause to a theretofore issued policy of fire insurance, and in returning said policy to its said agent with said clause unsigned, impliedly authorizes said agent to sign said clause on behalf of said insurer.

Stoner v Ins. Co., 220-984; 263 NW 46

Authority of agent—burden. Plaintiff as the assignee before loss of a policy of fire insurance has the burden, in case of loss and action on the policy, to show that the insurer consented to the assignment. If the consent is in the form of a writing signed by a purported agent of the insurer said assignee must show the agent's authority. Of course, the insurer may negative such showing of authority.

Stoner v Ins. Co., 215-665; 246 NW 615

Authority—evidence. Evidence held to show that the authority of an agent ceased upon the delivery of a policy, and that his subsequent knowledge of the execution of a mortgage on the insured premises would not be imputed to the insurer.

Hart v Ins. Assn., 208-1030; 226 NW 781

Knowledge of agent. The knowledge of a soliciting agent that the insured understood

that he was to receive a policy which would permit additional insurance will, on the issue of reformation, be imputed to the insurer, even tho not communicated to the latter.

Smith v Ins. Co., 201-363; 207 NW 334

Agents—imputable and nonimputable knowledge. Knowledge on the part of a mere soliciting agent of an insurance company is imputable to his principal when such knowledge is acquired in connection with an application for insurance. Knowledge acquired by such agent subsequent to the issuance of the policy, and relative to an act which invalidates the policy, is not so imputable.

Green v Ins. Co., 215-1220; 247 NW 660

Nonimputed knowledge and promises. The knowledge and promises of an agent employed, paid by, and working for a general agent of an insurance company, with no authority except to solicit insurance for his principal, the general agent, may not be imputed to the insurance company.

Neiman v Ins. Co., 205-119; 217 NW 258

When knowledge imputed to insurer. The information imparted to the soliciting agent of an insurer by the applicant for insurance, as to the particular kind of insurance required by the applicant, will be imputed to the insurer.

Green v Ins. Co., 218-1131; 253 NW 36

Removal of property to new location. A standard policy of insurance on personal property at a specified location, issued in strict accord with the application for such insurance, does not cover a loss of the same property at another location to which it is removed without the consent of the insurer; and testimony that the soliciting agent through whom the policy was obtained orally promised that he would have the policy so issued as to cover the property at either location is wholly inadmissible.

Garton v Ins. Co., 215-1213; 247 NW 639

Sale and assignment of policy—consent of insurer. The grantee of property insured under a statutory, standard policy of fire insurance (§9018, C., '35) and the assignee of said policy, before loss, has the burden, in an action on the policy in his own behalf, to prove that said conveyance of the property and assignment of the policy were consented to or acquiesced in by the insurer through some agent of the insurer who had authority so to consent or acquiesce.

Stoner v Ins. Co., 220-984; 263 NW 46

Extending period for insurance. A recording or policy-issuing agent has authority to agree to an extension of the life of a policy, as written, in order to cover an additional period equal to that during which the insurer claimed the policy stood suspended and for which the insured had paid the premium.

Fillgraf v Ins. Co., 218-1335; 256 NW 421

Oral application. An oral application for additional insurance under an existing policy and the payment of the premium for such additional insurance to an agent whose authority is limited to the taking and forwarding of applications do not render the additional insurance effective until the insurer in the orderly and timely course of its business approves the said application.

Fenley v Ins. Co., 215-1369; 245 NW 332; 247 NW 635

9003 Agent—general definition.

License—admissibility. The written request of an insurance company to the commissioner of insurance for a license for a named agent "to transact its authorized business" is admissible for the purpose of showing that said person was the company's agent, but not for the purpose of showing the scope of the powers of such agent.

Stoner v Ins. Co., 218-720; 253 NW 821

9004 Agent—specific definition.

Oral contract—authority. The statutory provision that a soliciting agent of an insurer shall be deemed to have authority to transact all business within the scope of his employment, does not render the insurer liable on an oral contract which said agent, in fact, had no authority to make.

Chambers v Ins. Assn., 214-1353; 242 NW 30

Oral contract—implied authority of agent. An insurance company which, in the issuance of policies against loss by hail, customarily dates said policies from the date of the insured's written application therefor, and not from the date of the acceptance by the company of such applications, must, notwithstanding provisions in said applications to the contrary, be deemed to have impliedly authorized its soliciting agents, on taking such applications, to validly enter into oral, preliminary contracts of insurance covering the period from the date of said applications to the date of their acceptance or rejection.

Boever v Ins. Co., 221-566; 266 NW 276

Assignment of policy—notice to company—consent. Where owner transferred insured property and fire policy to trustee for creditors, the insurance company was not liable to trustee for fire loss on mere notice to insurer of change of ownership, and while the insurance company may consent to carry risk notwithstanding change of ownership or may waive right to assert forfeiture of its policy, its soliciting agent is not authorized to waive terms or conditions of policy, and insurance company must consent to assignment of policy to be liable for loss.

Neiman v Ins. Co., (NOR); 215 NW 244

Effect of agent's mistake or negligence. In negotiations an insured may ordinarily rely

upon the integrity of the agent and the insurer cannot take advantage of mistakes or the negligence of its agent not involving fraud or bad faith on the part of the insured.

Conrad v Ins. Assn., 223-828; 273 NW 913

Failure to repudiate unauthorized act. An insurer is bound by the unauthorized act of his agent when he fails to repudiate such act promptly when it comes to his knowledge, and permits and invites the insured to act upon the assumption that the policy is in force.

Terry v Ins. Co., 202-1291; 211 NW 716

Estoppel to dispute power of agent. An insurance company estops itself from asserting that its agent is other than a recording or policy-issuing agent when it furnishes the agent with all blanks and supplies necessary for the actual execution and issuance by him of policies and otherwise recognizes his broad powers, and when a policyholder has relied on the agreement and representation of said agent.

Fillgraf v Ins. Co., 218-1335; 256 NW 421

Authority to waive policy provisions. An insurer which permits its agents to issue a policy in the name of the insurer, to collect the premiums, and to attach riders to the policy, under which it claims advantages, may not say that said agent did not have authority to waive policy provisions.

Neiman v Ins. Co., 202-1172; 211 NW 710

Waiver—declaration of apparent adjuster. When evidence would warrant the jury in finding that an employee of an insurer had apparent authority to adjust a loss, the statement of such employee to a fellow employee and communicated to parties interested in the loss as claimants, to the effect that the insurer "would pay the loss", is admissible on the issue whether the insurer had waived proofs of loss.

Basta v Ins. Assn., 217-240; 252 NW 125

Reliance on waiver. On the issue of waiver of proofs of loss under a fire insurance policy, a party who had been directed by the insured to attend to the collection of the loss may testify that he learned from a soliciting agent of the insurer the fact that the company's adjuster had stated that the loss would be paid, and that he relied on such statement and took no further steps toward presenting proofs of loss.

Basta v Ins. Assn., 217-240; 252 NW 125

Waiver per se. Whether an insurance company has waived the unauthorized act of its agent becomes a question of law, on nonconflicting testimony.

Terry v Ins. Co., 202-1291; 211 NW 716

Waiver—jury question. A promise by an adjuster of an insurance company, made after he had investigated the loss, that the loss would be paid, coupled with other conduct on the part of the insurer indicating a purpose not to require proofs of loss, creates a jury question on the issue of waiver of such proof.

Basta v Ins. Assn., 217-240; 252 NW 125

Enlarged power—jury question. Record reviewed and held to present a jury question whether an insurance company had held out its purported soliciting agent as really having the powers of a recording agent.

Stoner v Ins. Co., 218-720; 253 NW 821

Nonimputed knowledge and promises. The knowledge and promises of an agent employed, paid by, and working for, a general agent of an insurance company, with no authority except to solicit insurance for the general agent, may not be imputed to the insurance company.

Neiman v Ins. Co., 205-119; 217 NW 258

Dual agency—effect. In an action on a policy, a defensive plea that the agent who issued the policy was, without the knowledge of the insurer, interested in the property insured, becomes quite immaterial when it appears that, subsequent to the issuance of the policy and at a time when the issuing agent had been discharged, the insured, for a new consideration, materially modified the contract.

Hawkeye Works v Ins. Co., 202-1270; 211 NW 860

Reciprocal insurance contracts. The specific provisions of an application for a policy of reciprocal insurance, of which provisions the applicant had notice, to the effect that the policy will not be in force, (1) until the application is approved by the insurer, and (2) until the premium is paid, cannot be waived by the insurer's agent entering into a different arrangement relative to said acceptance and payment of premium; §8959 with reference to the procedure in case of nonpayment of premiums and this section not being applicable to reciprocal insurance contracts.

Gisin v Ins. Exch., 219-1373; 261 NW 618

Service on foreign insurer—physician not agent. An Iowa accident insurance association which has not been licensed to transact its business in a foreign state (in which it has neither office, agent, nor property), and whose certificates of insurance are strictly Iowa contracts, cannot be deemed to have subjected itself to the jurisdiction of the courts of such foreign state (1) because a very large number of its certificate holders reside in said foreign state, or (2) because said association, from time to time and by mail from its Iowa office, requests a physician in said foreign state to examine claimants and to report as to accidental injuries received by claimants—it appearing that said physician was under no contract obligation to comply with said requests and to make such examinations tho he had

done so for several years and had received a stated fee for each separate examination.

Held, the foreign court, in an action on a certificate, acquired no jurisdiction under process served on said physician.

Saunders v Trav. Assn., 222-969; 270 NW 407

9018 Form of standard policy.

ANALYSIS

Evidence of value of insured property. See under §§8976, 8977, Vol I

Nonlife insurance generally. See under §8940

Proof of loss—other insurance. See under §§8774, 8775, 8978, 8979, 8986

I PAR. I OF POLICY

(a) FIRE INSURANCE IN GENERAL

Construction of policy—construction against insurer. Principle reaffirmed that an insurance policy will, speaking generally, be construed most favorably to the insured.

Githens v Ins. Co., 201-266; 207 NW 243; 44 ALR 863

Ambiguous language — construction. Ambiguous language employed in an insurance policy must be construed most strongly against the insurer and in favor of the beneficiary of the policy.

Umbarger v Ins. Co., 218-203; 254 NW 87; 36 NCCA 733

Parker v Ins. Assn., 220-262; 260 NW 844

Burning of property by insured—effect on loss-payable clause of mortgage. A condition in a policy of fire insurance that the insurer shall not be liable for loss caused by the design of the insured applies to a mortgagee and prevents recovery by him when his loss-payable clause is made subject to all the conditions of the policy, and when the insured designedly sets fire to the buildings and destroys them.

Carlile v Ins. Assn., 218-248; 254 NW 805

Incendiary fire—jury question. Circumstantial evidence reviewed at length, and held to present a jury question both, (1) on the incendiary nature of a fire, and (2) on the insured's connection therewith.

Natalini v Ins. Co., 219-806; 259 NW 577

"Friendly fires." Insurance against loss and damage "by fire" does not cover loss and damage to eggs consequent on the wick of an oil heating stove in the storage room burning too high, and thereby throwing off a quantity of smoke and soot, and generating excess heat in the storage room—nothing in the room being burned except said wick.

Sigourney Prod. Co. v Ins. Co., 211-1203; 235 NW 284

Waiver of conditions generally. Forfeiture clauses and conditions against transfer of title, encumbrance, and assignment of policies are for the protection of the insurance company against increase of hazard without their knowledge and consent, and therefore may be waived.

Webber v Ins. Assn., 227-793; 288 NW 868

Details of conversation—legal limits. Details of a conversation between the soliciting agent of an insurance company and the insured, after the issuance of the policy, with reference to a letter to be written by the agent

I PAR. I OF POLICY—concluded

(a) FIRE INSURANCE IN GENERAL—concluded

to the company concerning a loss, are not competent when they extend beyond reference to the subject-matter of the letter.

Miller v Fire Assn., 219-689; 259 NW 572

Right to proceeds—sheriff's deed holder. A second mortgagee who forecloses, and, after redeeming from a first mortgage foreclosure, takes a sheriff's deed, is entitled to the proceeds of a fire insurance policy taken out by the mortgagor for the benefit of the first mortgagee; and this is true even tho the fire occurred during the period for redemption from the second mortgage.

In re Hackbart, 203-763; 210 NW 544; 52 ALR 895

Right to proceeds—title holder (?) or mortgagee (?). A title holder who, for his own personal protection, and at his own expense, takes out insurance, and who is in no manner a party to a mortgage on the premises, except that he has, by deed in escrow, conveyed the property to the mortgagee, on condition that the deed be surrendered to him if he pays the mortgage by a named date, is entitled, in case of loss prior to said named date, to the proceeds of the policy, even tho, subsequent to the loss, he fails to pay the mortgage, and thereby loses the property to the mortgagee.

Canavan v Coleman, 204-901; 216 NW 292

Application of proceeds. The proceeds of fire insurance under a policy payable to the vendor and purchaser of real estate, "as their interests may appear", is not payable to the vendor when, at the time of the loss, the purchaser is in no manner in default on his contract. Such proceeds may be impounded and utilized, on the application of the purchaser, in the rebuilding of the burned structure.

Hatch v Ins. Co., 216-860; 249 NW 164

"Real party in interest"—partial loss paid—insurer's rights. The circuit court of appeals is bound by decisions of federal court in construing a state statute, in the absence of state court's construction on similar facts, so on question of construction of statute providing for the prosecution of an action in the name of the "real party in interest" held, an insurer cannot maintain an action against a defendant causing loss for amount paid insured, after a judgment has been rendered against defendant and in favor of insured for total amount of loss less insurance received, since the right of action for the entire loss is single and cannot be split and separately maintained by the owner and the various insurers who have paid parts of the loss.

Fireman's Ins. v Bremner, 25 F 2d, 75

Negligence in issuing policy. An insurance company, even tho it be but a mutual association which resorts to assessments on its members for funds with which to pay losses "and necessary expenses", must respond in damages for its tort in negligently failing to issue a policy which had been duly contracted for.

Mortimer v Ins. Assn., 217-1246; 249 NW 405; 35 NCCA 134

(b) PROPERTY INSURED

Property covered. Under a policy which provides that it covers a stock of merchandise "consisting chiefly of groceries", it may be shown that certain articles which were not groceries were carried as part of the stock, and that such carrying was customary in like stores in the locality in question.

Larsen v Ins. Co., 212-943; 237 NW 468

Location of property—evidence. When the description of the location of insured personal property as inserted in a fire insurance policy is wholly indefinite, evidence is admissible as to the location contemplated by the parties when the policy was executed.

Hall v Ins. Co., 217-1005; 252 NW 763

(c) ADDITIONAL INSURANCE

"Additional" and "existing" insurance. A policy which stipulates for its invalidity in case the insured without permission obtains additional insurance is rendered void by the issuance of a second policy which stipulates for its invalidity in case there is existing insurance on the property, when it is made to appear that the second insurer had knowledge of the existence of the first policy when the second policy was issued.

Cornett v Ins. Assn., 208-450; 224 NW 524

Commencement of risk—oral application. An oral application for additional insurance under an existing policy and the payment of the premium for such additional insurance to an agent whose authority is limited to the taking and forwarding of applications do not render the additional insurance effective until the insurer in the orderly and timely course of its business approves the said application.

Fenley v Ins. Co., 215-1369; 245 NW 332; 247 NW 635

II PAR. II OF POLICY

(a) LIABILITY LIMITED TO CASH VALUE OF PROPERTY

Fire as proximate cause of breakage. If an automobile takes fire while traveling upon the highway, and said fire is the proximate cause of the car's swerving and going into the ditch and overturning, then a policy of insurance against direct loss or damage from fire covers not only the parts of the car actually burned by the fire, but the parts of the car which were broken or injured by the overturning.

Tracy v Ins. Co., 207-1042; 222 NW 447; 1 NCCA (NS) 313, 319

Damages—evidence supporting trial court's finding. In action on fire insurance policy to recover for damages to dwelling, evidence sup-

ported trial court's finding as to amount of damages allowed.

Horn v Ins. Co., 227-1045; 290 NW 8

Water between plastered and outer walls—judicial notice of wood deterioration. It is a matter of common knowledge and one of which the court has a right to take judicial notice, that, when water is confined in a space as between the plastered and outer walls of a building where the air cannot circulate, many times the water will cause a deterioration of the lumber and sometimes cause rotting of the wood.

Horn v Ins. Co., 227-1045; 290 NW 8

(b) TIME OF PAYMENT FOR LOSS

No annotations in this volume

III PAR. III MISREPRESENTATION OR CONCEALMENT

Misrepresentation—mortgages. A truthful representation in an application for insurance as to the mortgages existing on the specifically described land on which the insured building is located, is not rendered a misrepresentation by showing the existence of other mortgages on other and separately described tracts of the same farm.

Hart v Ins. Assn., 208-1030; 226 NW 781

Concealment of unrecorded mortgage. The concealment by the insured, in his application for fire insurance on property, of the existence of an unrecorded mortgage on the property, of which mortgage the insurer had no knowledge, is fatal to recovery on the policy in case of loss.

Moore v Ins. Assn., 221-953; 266 NW 12

Knowledge of agent. The knowledge of a soliciting agent that the insured understood that he was to receive a policy which would permit additional insurance will, on the issue of reformation, be imputed to the insurer, even tho not communicated to the latter.

Smith v Ins. Co., 201-363; 207 NW 334

Agent—when knowledge imputed to insurer. The information imparted to the soliciting agent of an insurer by the applicant for insurance, as to the particular kind of insurance required by the applicant, will be imputed to the insurer.

Green v Ins. Co., 218-1131; 253 NW 36

Agents—imputable and nonimputable knowledge. Knowledge on the part of a mere soliciting agent of an insurance company is imputable to his principal when such knowledge is acquired in connection with an application for insurance. Knowledge acquired by such agent subsequent to the issuance of the policy, and relative to an act which invalidates the policy, is not so imputable.

Green v Ins. Co., 215-1220; 247 NW 660

IV PAR. IV OF POLICY

Discussion. See 11 ILR 73—Third party rights—fire insurance

(a) OTHER INSURANCE

Other or double insurance. The prohibition in a liability insurance policy against other or double insurance applies to additional insurance on the same interest in the same property.

Amer. Alliance Ins. v Brady Co., 101 F 2d, 144

Additional and existing insurance. A policy which stipulates for its invalidity in case the insured without permission obtains additional insurance is rendered void by the issuance of a second policy which stipulates for its invalidity in case there is existing insurance on the property, when it is made to appear that the second insurer had knowledge of the existence of the first policy when the second policy was issued.

Cornett v Ins. Assn., 208-450; 224 NW 524

Policy of insurance and contract with mortgagee—construed together. A contract by which an insurance company agreed to insure all property on which a mortgagee held mortgages, and a certificate issued by the company when a policy was issued in compliance with the contract, when both referred to an open policy, must be construed together with the open policy so that a statutory provision of the open policy preventing the insured from obtaining additional insurance on his property becomes a part of his contract of insurance.

Calendro v Ins. Co., 227-829; 289 NW 485

Insurance obtained by mortgagee—assignment to insurer when policy voided by insured—mortgage not extinguished. When an insurance company, in addition to insuring property mortgaged to a certain mortgagee, agreed that if any property owner should by any act void the insurance as to himself, the insurance company would purchase from the mortgagee the note and mortgage on the property and obtain an assignment of the mortgagee's rights against the property owner, the company's payment of the amount of a note and mortgage to the mortgagee to obtain an assignment according to the agreement did not extinguish the note and mortgage.

Calendro v Ins. Co., 227-829; 289 NW 485

Validity of policies. Where property was covered by fire insurance policy containing a clause that the policy would be void if other insurance on the property was procured, and where, after obtaining a second policy, the insured sustained a fire loss which the second company compromised and paid the amount thereof into court, the second policy was valid as to the insured to the extent of the amount paid into court, and the first policy which had been obtained to protect a mortgagee was valid as to an assignee of the mortgagee to the extent of the amount paid to obtain an assignment of the mortgage.

Calendro v Ins. Co., 227-829; 289 NW 485

IV PAR. IV OF POLICY—continued
(a) OTHER INSURANCE—concluded

Additional insurance obtained without insurer's consent. An insurance policy containing statutory standard fire policy clause providing that if the insured obtains other insurance the first policy is void, was voided as to the insured when he obtained other insurance on the property without the consent of the insurer, even tho the act of the insured was not an intentional breach of the policy.

Calendro v Ins. Co., 227-829; 289 NW 485

Insurance to protect mortgagee—assignee of mortgagee has no right to proceeds of second policy. When a mortgagor complied with the terms of a mortgage and obtained insurance on property to protect the mortgagee, and then procured another policy, in the absence of a provision in the mortgage or in the second policy making its proceeds payable to the mortgagee, the mortgagee had no interest in funds paid into court as a compromise payment of a fire loss on the second policy. So an assignee from the mortgagee could not collect from the fund the amount paid in obtaining the assignment, as the assignee's rights could rise no higher than those of the assignor.

Calendro v Ins. Co., 227-829; 289 NW 485

Other insurance—invalidity as to one policy, validity as to other. When there are two policies on the same property, and one policy is voided because of prohibited incumbrance, the remaining policy containing no such provision must pay the entire loss.

Mosher v Ins. Co., 212-85; 235 NW 743

Existing, known insurance—waiver. Principle reaffirmed that an insurer may not predicate the invalidity of a policy on the existence of other insurance of which he had knowledge through his agents.

Cornett v Ins. Assn., 208-450; 224 NW 524

(b) NONOPERATION OF MANUFACTURING PLANT

Failure to operate plant. Policy provision reviewed, and held clearly to avoid the effect of the nonoperation of a manufacturing plant.

Hawkeye Works v Ins. Co., 202-1270; 211 NW 860

(c) VACANT OR UNOCCUPIED BUILDING

Policy clause—vacancy—increase of hazard. The provision of a fire insurance policy providing invalidation "if there be a change in the occupancy or use of the property, making the risk more hazardous", is not violated if the building becomes vacant and the hazard is thereby increased.

Danels v Ins. Assn., 213-352; 239 NW 24

(d) UNCONDITIONAL AND SOLE OWNERSHIP

Insurable interest. One who holds the legal title to land in trust for another, and who personally executes his note and secures it by mortgage on the land for the benefit of such other person, has an insurable interest in the buildings on the land.

Boyce v Ins. Assn., 209-11; 227 NW 523
Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Insurable interest—right to redeem from foreclosure. A mortgagor's insurable interest in the mortgaged property does not terminate until the period for redemption has expired.

Parker v Ins. Assn., 220-262; 260 NW 844

Change of title—undelivered or void deed. The unconditional and sole ownership of insured property is not changed by the execution and recording by the insured and his wife of a deed of conveyance which is never delivered to the grantee or followed by any change in possession or dominion; nor by the execution and delivery by the said grantee to the insured and to his wife jointly, of a deed of conveyance to the insured property which was executed without consideration and therefore void.

Mosher v Ins. Co., 212-85; 235 NW 743

Evidence of ownership in insured—nominal title in wife. In an action on a fire policy to recover for damages to dwelling where the uncontradicted evidence shows the contract for the purchase of the property was with insured and that he was grantee in the deed and he and his wife substituted her name in the deed to enable them to secure a loan on the premises, there being personal taxes against the insured, and where insured paid the entire purchase price and the wife never claimed to be the owner, the title of the wife being merely nominal, held, there being no change in title in fact, the provision in policy requiring unconditional sole ownership in the insured was not violated.

Horn v Ins. Co., 227-1045; 290 NW 8

Negativing presumptive effect of conveyance. Any "presumption" that all "insurable interest" in property is terminated by a conveyance of the property by the insured by warranty deed, tho the consideration named be nominal, is wholly overcome by uncontradicted testimony which is explanatory of the transaction, to wit: that at said time a mortgage debt which had matured on the property was renewed, and that the deed was then executed and delivered, with an oral agreement that the mortgagor-grantor should remain in possession and have a stated time in which to redeem. Especially is this true inasmuch as the law would, under such circumstances, create a presumption substantially equivalent to the said oral agreement.

Morton Ins. v Farquhar, 200-1206; 206 NW 123

Title—waiver and estoppel. An insured is estopped to plead that a policy issued to an administrator was void for lack of insurable

interest when such insurer knew, when the policy was issued, and when the premiums were paid, that the policy was for the sole benefit of the estate.

Jack v Ins. Assn., 205-1294; 217 NW 816

Ownership—inadvertent plea. An inadvertent pleading to the effect that a person other than plaintiff had an interest in the insured property, becomes of no consequence when the pleading was duly corrected and when the proofs conclusively establish sole ownership in plaintiff.

Havirland v Ins. Co., 204-335; 213 NW 762

Subrogation—contract for by carrier. A contract provision to the effect that a lessor railway company "shall have full benefit of any insurance effected by the lessee on structures erected on the leased premises" is valid and enforceable if the lessor has an insurable interest in the property.

Queen Ins. v Railway, 201-1072; 206 NW 804

(e) NONINTEREST OF INSURED IN REALTY

Change in title—nullifying effect. A standard fire insurance policy is wholly voided by a conveyance of the insured property by the owner thereof, after the execution of the policy, and without the knowledge or consent of the insurer, even tho the conveying owner had no knowledge of said insurance. So held in an action at law on a policy taken out in the name of the owner by a mortgagee on his own motion to protect said mortgagee's interest.

Green v Ins. Co., 215-1220; 247 NW 660

Contract of sale not sale. A policy provision to the effect that any "selling or transferring" of the insured property shall, in the absence of a specified notice to the insurer "after transfer of the property", automatically cancel the insurance is not violated by the mere execution of a contract of sale of said property providing for delivery of possession at a specified future date—the loss occurring prior to said date.

Kiser v Ins. Assn., 216-928; 249 NW 753

Change in ownership—failure to give notice—effect. The contract duty of a mortgagee under a so-called standard or New York mortgage payment clause (attached to a policy of fire insurance) to give the insurer notice of a "change in ownership" of the insured property has no application to a transaction wherein the mortgagee takes absolute deed to the insured property in satisfaction of the secured debt. Such deed works no "change in ownership" but simply an increase in the mortgagee's interest.

Union Ins. Co. v County Assn., 222-964; 270 NW 398

Appointment of receiver not "sale". The appointment of a receiver of the property of an insured, and the possession of the property by the receiver, do not constitute a "sale" of the property within the meaning of a clause invalidating the policy in case of a sale.

Parker v Ins. Assn., 220-262; 260 NW 844

Insurable interest—right to redeem from foreclosure. A mortgagor's insurable interest in the mortgaged property does not terminate until the period for redemption has expired.

Parker v Ins. Assn., 220-262; 260 NW 844

(f) CHANGE IN INTEREST, TITLE, POSSESSION, OR USE

Forfeiture — strict construction required. Principle applied that forfeiture provisions in a policy of insurance must be strictly construed against the insurer.

Kiser v Ins. Assn., 216-928; 249 NW 753

Increase of hazard. The provision of a fire insurance policy providing invalidation "if there be a change in the occupancy or use of the property, making the risk more hazardous", is not violated if the building becomes vacant and the hazard is thereby increased.

Danels v Ins. Assn., 213-352; 239 NW 24

Change in title—nullifying effect. A standard fire insurance policy is wholly voided by a conveyance of the insured property by the owner thereof, after the execution of the policy, and without the knowledge or consent of the insurer, even tho the conveying owner had no knowledge of said insurance. So held in an action at law on a policy taken out in the name of the owner by a mortgagee on his own motion to protect said mortgagee's interest.

Green v Ins. Co., 215-1220; 247 NW 660

Conveyance and reconveyance — noninvalidating. A conveyance, without consideration, by a husband to his wife of a stock of insured goods with the intent to place the goods beyond the reach of his apprehended creditors, without any actual change of possession or use taking place, followed later by a reconveyance, without consideration, by the wife to the husband, constitutes no such change in the interest or title of the insured as will void the policy, the wife never having had any financial interest in the property.

McVay v Ins. Co., 218-402; 252 NW 548

Sale of part of property—effect. The sale of a part of the stock of insured goods does not invalidate the insurance on the part not sold.

Larsen v Ins. Co., 212-943; 237 NW 468

Sale by partner—effect. Assuming that one partner has no authority to sell the partnership property without the consent of the other partner, and thereby invalidate the insurance, yet where such sale was not rescinded it must necessarily be deemed a legally completed sale.

Larsen v Ins. Co., 212-943; 237 NW 468

IV PAR. IV OF POLICY—continued
(f) CHANGE IN INTEREST, TITLE, POSSESSION, OR USE—continued

Change in ownership—failure to give notice —effect. The contract duty of a mortgagee under a so-called standard or New York mortgage payment clause (attached to a policy of fire insurance) to give the insurer notice of a "change in ownership" of the insured property has no application to a transaction wherein the mortgagee takes absolute deed to the insured property in satisfaction of the secured debt. Such deed works no "change in ownership" but simply an increase in the mortgagee's interest.

Union Ins. v Ins. Assn., 222-964; 270 NW 398

Change of ownership—deed to mortgagee not such change. In a fire insurance policy with an attached uniform standard Iowa mortgage clause providing for loss payment to a mortgagee as such interest appears, a provision requiring notice to the insurer of a "change of ownership" of the insured property has no application when the mortgagor quitclaims to the mortgagee in satisfaction of the mortgage debt, for such deed is not an ownership change but only an increase in mortgagee's interest.

Guaranty Ins. v Ins. Assn., 224-1207; 278 NW 913

Change in title—nonassignment of policy. An insurer who knows, through his agent, that the property covered by the policy has been transferred to another, and continues to treat the policy as in force by collecting and retaining the premiums, may not thereafter defensively assert such change of title or that no formal transfer of the policy had been made.

Neiman v Ins. Co., 202-1172; 211 NW 710

Executory contract of sale. A policy provision to the effect that any "selling or transferring" of the insured property shall, in the absence of a specified notice to the insurer "after transfer of the property", automatically cancel the insurance is not violated by the mere execution of a contract of sale of said property providing for delivery of possession at a specified future date—the loss occurring prior to said date.

Kiser v Ins. Assn., 216-928; 249 NW 753

Nonintent to pass title. Proof that an insured, after the issuance of a policy, and without notice to the insurer, executed, physically delivered, and permitted to be recorded an unqualified warranty deed to the insured property, establishes, prima facie, an automatic forfeiture of the policy when the policy provides that such forfeiture shall follow any "sale or transfer" of the property without notice; but evidence is admissible, under proper plea, in avoidance of the apparent forfeiture, to show that there was no completed sale or transfer in fact—that the insured-grantor and grantee mutually understood and agreed that such execution, delivery, and recording should not have the effect to pass title until a future date; but ordinarily such evidence can only generate a jury question on the issue of intent to pass title.

Kiser v Ins. Assn., 213-18; 237 NW 328

Appointment of receiver not "sale". The appointment of a receiver of the property of an insured, and the possession of the property by the receiver, do not constitute a "sale" of the property within the meaning of a clause invalidating the policy in case of a sale.

Parker v Ins. Assn., 220-262; 260 NW 844

Transfer to creditors' trustee. Where owner transferred insured property and fire policy to trustee for creditors, the insurance company was not liable to trustee for fire loss on mere notice to insurer of change of ownership, and while the insurance company may consent to carry risk notwithstanding change of ownership or may waive right to assert forfeiture of its policy, its soliciting agent is not authorized to waive terms or conditions of policy, and insurance company must consent to assignment of policy to be liable for loss.

Neiman v Ins. Co., (NOR); 215 NW 244

Change in title—nonimputed knowledge and promises. The knowledge and promises of an agent employed, paid by, and working for, a general agent of an insurance company, with no authority except to solicit insurance for his principal, the general agent, may not be imputed to the insurance company.

Neiman v Ins. Co., 205-119; 217 NW 258

Waiver of conditions generally. Forfeiture clauses and conditions against transfer of title, encumbrance, and assignment of policies are for the protection of the insurance company against increase of hazard without their knowledge and consent, and therefore may be waived.

Webber v Ins. Assn., 227-793; 288 NW 868

Estoppel—recognizing transfer. In equitable action against a mutual insurance association to require the completion of an assignment of a policy and to recover for fire loss, the association was, under the evidence, estopped from asserting that policy was not properly assigned, where plaintiff's grantor delivered policy to office of association's secretary for purpose of having the assignment completed and where the association recognized transfer of property to plaintiff and his ownership in the policy by mailing to him a notice of assessment thereon.

Webber v Ins. Assn., 227-793; 288 NW 868

Pursuing noninconsistent remedies. A policyholder who, in an action at law, pleads that the insurer has waived that provision of the policy which invalidates the insurance in case of a change in the title to the insured property, and is unsuccessful on appeal in sustaining said plea, does not thereby make such an elec-

tion of remedies as will prevent him, after remand, from amending and praying in equity that the policy be so reformed as to eliminate the invalidating provision.

Green v Ins. Co., 218-1131; 253 NW 36

Transfer of property—specially pleaded. In equitable action against mutual insurance association where defendant admitted that property in question was insured under a fire policy, defendant's contention that a certain transfer of the property had invalidated the policy, having not been pleaded as a special defense, was not in issue under the pleadings.

Webber v Ins. Assn., 227-793; 288 NW 868

Conveyance—retention of premiums—effect. The retention by an insurer of all premiums paid on a policy of fire insurance does not work a waiver of, or estoppel to plead, the defense that the policy was invalidated by a conveyance of the insured property without the knowledge of the insurer until after loss had occurred.

Green v Ins. Co., 215-1220; 247 NW 660

(g) INCUMBRANCES OR LIENS PROHIBITED

Unauthorized mortgage. A standard fire insurance policy is wholly voided as to a subject matter therein covered by the policy, if said subject matter is, subsequent to the issuance of the policy, voluntarily mortgaged by the insured without the consent of the insurer; and in such case it is quite immaterial that the insured made no formal, written application for the policy.

Greco v Ins. Co., 219-150; 257 NW 201

Mortgage—noninvalidating effect. A provision to the effect that a policy shall be invalidated by the creation of a lien on the insured property without the consent of the insurer is not violated by the execution of a mortgage as security for claims which are already liens on the property by operation of statutory law.

Jack v Ins. Assn., 205-1294; 217 NW 816

Recordation of mortgage—effect. The due recordation of a mortgage on insured property does not, in and of itself, carry to the insurer any notice or knowledge which can thereafter have any bearing on the acceptance of premiums on the insurance.

Hart v Ins. Assn., 208-1030; 226 NW 781

Renewal of mortgage. As to how far an insured may go in allowing interest and taxes to accumulate on a mortgage and in executing a new mortgage in renewal of the old mortgage without thereby increasing the hazard of carrying the insurance and avoiding the policy, quaere.

Hart v Ins. Assn., 208-1030; 226 NW 781

Renewal of mortgage—effect on forfeiture. The fact that a mortgage executed on the subject-matter of the insurance after the policy was issued was a renewal of a former mortgage is, on the question of forfeiture of the policy, quite immaterial when the insurer has no knowledge of either mortgage.

Greco v Ins. Co., 219-150; 257 NW 201

Renewing existing mortgage — burden of proof. A policyholder who claims that a mortgage executed on the insured property subsequent to the issuance of the policy was but a renewal of a smaller mortgage mentioned in the application for insurance must, in his evidence, so account for the increased amount of the mortgage as to show that there was no increase of hazard in carrying the insurance.

Hart v Ins. Assn., 208-1030; 226 NW 781

Failure to reveal mortgages when not asked. A policy of insurance is not invalidated because the insured did not, in his written application, reveal the existence of mortgages on the property when he was not questioned concerning the mortgages.

Parker v Ins. Assn., 220-262; 260 NW 844

Concealment of unrecorded mortgage. The concealment by the insured, in his application for fire insurance on property, of the existence of an unrecorded mortgage on the property, of which mortgage the insurer had no knowledge, is fatal to recovery on the policy in case of loss.

Moore v Ins. Assn., 221-953; 266 NW 12

Delivery of mortgage—actual or constructive delivery. The delivery of a mortgage on insured property, in order to have the effect of invalidating the insurance on the property, may be actual or constructive, and reversible error results from requiring the jury to find an actual delivery when the record might justify a finding of constructive delivery.

Hoover v Ins. Co., 218-559; 255 NW 705

Delivery of mortgages—jury question. Record held to present a jury question whether mortgages, alleged to have voided a policy of insurance, had been delivered.

Hoover v Ins. Co., 218-559; 255 NW 705

Invalidating mortgage — burden of proof. Proof by an insurer that a mortgage on the insured property was, without his consent, signed and recorded subsequent to the issuance of the policy presumptively establishes the execution and delivery of said mortgage, yet, the insurer is not entitled to an instruction that the burden of proof is, by such proof, shifted to the insured; but the insurer would, on request, be entitled to an instruction that, in view of such proof, the insured would not be entitled to recover unless he proceeds to negative the presumption aforesaid.

Hoover v Ins. Co., 218-559; 255 NW 705

IV PAR. IV OF POLICY—concluded

(g) INCUMBRANCES OR LIENS PROHIBITED—concluded

Mortgage — instruction — amplification. Instruction as to the effect of knowledge, on the part of an insurance agent, of an existing mortgage on the insured property held correct as far as it went, and to impose on defendant the obligation to request amplification relative to the effect of knowledge acquired by the agent when he was not transacting the business of defendant.

Hoover v Ins. Co., 218-559; 255 NW 705

(h) REMOVAL OF PROPERTY PROHIBITED

Removal of property to new location. A standard policy of insurance on personal property at a specified location, issued in strict accord with the application for such insurance, does not cover a loss of the same property at another location to which it is removed without the consent of the insurer; and testimony that the soliciting agent through whom the policy was obtained orally promised that he would have the policy so issued as to cover the property at either location is wholly inadmissible.

Garton v Ins. Co., 215-1213; 247 NW 639

Change in location—negligence. An insurer may estop himself from pleading nonliability on the policy, because of a change in location of the insured property, by negligently delaying (until after the fire, and after an authorized and favorable examination) the execution of the written consent to such change in location.

Bemisdarfer v Ins. Assn., 217-770; 252 NW 551

(i) ASSIGNMENT OF POLICY

Oral assignment—validity. An oral assignment of a policy of fire insurance is valid (especially when the insurer consents thereto) and is prior in right to a subsequent assignment.

Boyce v Ins. Assn., 209-11; 227 NW 523

Sale and assignment of policy—consent of insurer—burden of proof. The grantee of property insured under a statutory, standard policy of fire insurance and the assignee of said policy, before loss, has the burden, in an action on the policy in his own behalf, to prove that said conveyance of the property and assignment of the policy were consented to or acquiesced in by the insurer thru some agent of the insurer who had authority so to consent or acquiesce.

Stoner v Ins. Co., 215-665; 246 NW 615
Stoner v Ins. Co., 220-984; 263 NW 46

Notice to company—consent. Where owner transferred insured property and fire policy to trustee for creditors, the insurance company was not liable to trustee for fire loss on mere notice to insurer of change of ownership, and while the insurance company may consent to carry risk notwithstanding change of ownership or may waive right to assert forfeiture of its policy, its soliciting agent is not authorized to waive terms or conditions of policy, and insurance company must consent to assignment of policy to be liable for loss.

Neiman v Ins. Co., (NOR); 215 NW 244

Assignment after loss—effect. Principle reaffirmed that after a loss occurs under a policy of insurance, the beneficiary may assign his right of action against the insurer without the consent of the insurer.

Welch v Taylor, 218-209; 254 NW 299
Parker v Ins. Assn., 220-262; 260 NW 844

Sheriff's deed holder — mortgagor's insurance. A second mortgagee who forecloses and, after redeeming from a first mortgage foreclosure, takes a sheriff's deed, is entitled to the proceeds of a fire insurance policy taken out by the mortgagor for the benefit of the first mortgagee; and this is true even tho the fire occurred during the period for redemption from the second mortgage.

In re Hackbart, 203-763; 210 NW 544; 53 ALR 895

Retention of premium may work no estoppel. The retention by an insurer of the unearned premium paid on a fire insurance policy does not estop the insurer from pleading the invalidity of the policy consequent on the sale of the insured property and the assignment of the policy before loss without the knowledge of the insurer, when such knowledge came to the insurer only after loss had occurred.

Stoner v Ins. Co., 220-984; 263 NW 46

V PAR. V OF POLICY

Damage "by fire"—expanding force of ignited gas. A policy of insurance against damage by fire (and which does not except damage by explosion) covers a damage resulting solely from the expanding force of a sheet of flame caused by the accidental ignition of inflammable gas in the basement of the insured building. And this is true tho no part of the building itself was burned.

Scully v Ins. Assn., 215-368; 245 NW 280

Unpleaded defense—evidence. In an action on policy of fire insurance, evidence that the fire was of incendiary origin and that the property was, at the time of the fire, being used for an unlawful purpose, is inadmissible in the absence of a defensive plea to that effect.

Basta v Ins. Assn., 217-240; 252 NW 125

VI PAR. VI OF POLICY

(a) ACTS OF VIOLENCE, WAR, OR THEFT

Condition subsequent—burden of proof. In an action on a policy of fire insurance which excepts loss "by theft or neglect", the burden to establish the theft or neglect is on the insurer.

Hall v Ins. Co., 217-1005; 252 NW 763

(b) NEGLECT OF INSURED

No annotations in this volume

(c) EXPLOSION OR LIGHTNING

Explosion caused by hostile fire. Damages resulting solely from an explosion which is caused by a hostile fire in an insured building are recoverable under a policy which insures "against all direct loss or damages by fire", even tho the policy exempts the insurer from "loss caused directly or indirectly by explosion of any kind unless fire ensues, and in that event for damages by fire only".

Githens v Ins. Co., 201-266; 207 NW 243; 44 ALR 863

Actions on policies—evidence. Evidence that partly burned garments were found in a room adjoining that part of the building injured by an explosion may be admissible as bearing on the issue whether a fire existed in the attic of the injured building and whether such fire caused the explosion in question.

Githens v Ins. Co., 201-266; 207 NW 243; 44 ALR 863

VII PAR. VII PREMIUMS, FAILURE TO PAY

Additional annotations. See under §8959

Unliquidated set-off in favor of insured—effect. Whether the existence of an unliquidated disputed right of set-off may be made use of by an insured to obviate the suspension of a policy of insurance due to nonpayment of premiums or assessments, quaere.

Hart v Ins. Assn., 208-1020; 226 NW 777

Evidence of levy and nonpayment. Evidence held insufficient to establish either that an assessment had been levied or that the assessment had not been paid, if levied.

Hart v Ins. Assn., 208-1030; 226 NW 781

VIII PAR. VIII FALLING BUILDINGS

No annotations in this volume

IX PAR. IX PERSONAL PROPERTY—COVERAGE

Location of property—evidence. When the description of the location of insured personal property as inserted in a fire insurance policy is wholly indefinite, evidence is admissible as to the location contemplated by the parties when the policy was executed.

Hall v Ins. Co., 217-1005; 252 NW 763

X PAR. X COPIES REFERRED TO IN POLICY—REPRESENTATION—NONWARRANTY

Attaching copy of premium note—insufficiency. A premium note for $100 which does not show the policy number is not a true copy of a premium note for $128 which does show the policy number, even tho the maker of the note was entitled to and was given a credit on the note for $28.

Nolte v Ins. Co., 208-716; 224 NW 50

XI PAR. XI CANCELLATION, SURRENDER, RESCISSION, OR REFORMATION

Additional annotations. See under §§8959, 8960

Reformation—evidence to be clear and satisfactory. A court of equity will only reform a written instrument when it is moved to do so by clear and satisfactory evidence of a mutual mistake or other reason for reformation.

Knott v Ins. Co., 228- ; 290 NW 91

Forfeiture of policy—dual statutes governing. Cancellation of an insurance policy for nonpayment of premium is governed by §8959, C., '31; other cancellations by this section.

Ryerson v Ins. Co., 213-524; 239 NW 64

Burden of proof. The burden of proving cancellation of a fire insurance policy is on the insurer who denies liability thereunder.

Home Ins. v Ins. Co., 225-36; 279 NW 425

Mutual cancellation by parties—policy method not exclusive. An insurance policy may be canceled by mutual consent of the parties, without resorting to the method provided in the policy.

Home Ins. v Ins. Co., 225-36; 279 NW 425

Cancellation contrary to bylaws. A mutual insurance company which, in its bylaws, provides for the cancellation of a policy by giving notice "in person or by registered letter", and which in its attempt to cancel a policy ignores its own bylaws and attempts to give notice by an unregistered letter, must prove that said letter actually reached the insuree, and the presumption of delivery attending the mailing of such letter and the positive testimony that such letter was never received by the insuree are of equal probative force; therefore, the insurer has not established the receipt of said notice by the insuree.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Cancellation—ineffectual notice. A policy of fire insurance, silent as to the post-office address of the insured, is not canceled, for nonpayment of a premium note, by a registered notice of cancellation addressed to the insured at the post-office address employed in dating

XI PAR. XI CANCELLATION, SURRENDER, RESCISSION, OR REFORMATION—continued

the policy, when such place had never been the post-office address of the insured, and when, owing to no fault of the insured, said notice was never delivered to him; and this is true tho the postal authorities forwarded said mail matter to the post office through which the insured received mail by rural delivery.

Ryerson v Ins. Co., 213-524; 239 NW 64

Cancellation—10-day requirement—shorter demand on mortgagee ineffectual. As affecting a mortgagee's interest in a fire insurance policy containing a cancellation clause upon 10 days notice, the insurer's written request upon mortgagee to return the policy, occurring less than 10 days before a fire loss, is not a cancellation barring recovery thereunder.

Guaranty Ins. v Ins. Assn., 224-1207; 278 NW 913

Failure to pay illegal assessment—nonforfeiture. An assessment on the policyholders of a mutual insurance association, made by the board of directors at a duly called meeting, is not a legal assessment and no forfeiture of a policy can be based on the nonpayment of such assessment, when the articles of incorporation provide that an executive committee consisting of the president, vice president, secretary, and treasurer shall meet quarterly (and specially on call of the president) and make all assessments; and this is true even tho all said officers were present at said directors' meeting but as directors.

Maasdam v Ins. Assn., 222-162; 268 NW 491

Status after termination of policy. Upon the insolvency of an insurance company, and upon the cancellation of its policies by the permanent appointment of a receiver, the policyholders remain policyholders as to every right then accrued to them under their policies.

State v Cas. Co., 206-988; 221 NW 585

Unearned premiums—establishment against trust fund. A policyholder who has actually paid the premium under an Iowa standard form of insurance policy has a right, upon the insolvency of the company, and upon the conceded cancellation of the policy by the appointment of a permanent receiver, to have his claim for unearned premiums established against a trust fund which has been created "for the protection of policyholders".

State v Cas. Co., 206-988; 221 NW 585

"Suspension" and "cancellation" compared. The suspension of a policy of insurance is not synonymous with cancellation of the policy.

Federal Bank v Ins. Assn., 217-1098; 253 NW 52

Suspension — nonpayment of assessment — waiver. Evidence held insufficient to establish waiver of the suspension of a policy because of nonpayment of an assessment.

Hart v Ins. Assn., 208-1020; 226 NW 777

Nonpayment of premiums—effect. A policy of fire insurance for a named period in a mutual company is not automatically suspended by the nonpayment of an assessment when the policy contains no provision for suspension, but simply a declaration that the association shall not be liable for any loss if the insured fails to pay any assessment when due "provided the association shall give the insured notice as required by law". In other words, the insurer, in order to escape liability because of such nonpayment, must cancel the policy under §9054, C., '31.

Federal Bank v Ins. Assn., 217-1098; 253 NW 52

Agents—extending period for insurance. A recording or policy-issuing agent has authority to agree to an extension of the life of a policy, as written, in order to cover an additional period equal to that during which the insurer claimed the policy stood suspended and for which the insured had paid the premium.

Fillgraf v Ins. Co., 218-1335; 256 NW 421

Policy reformable. A mutual mistake as to the location of insured buildings is reformable.

Jack v Ins. Assn., 205-1294; 217 NW 816

Reformation of policy—knowledge of agent. The knowledge of a soliciting agent that the insured understood that he was to receive a policy which would permit additional insurance will, on the issue of reformation, be imputed to the insurer, even tho not communicated to the latter.

Smith v Ins. Co., 201-363; 207 NW 334

Reformation for mutual mistake. Proof that in the execution of two policies of insurance the insurer and insured intended one policy to cover a set of farm buildings on one tract of land, and the other policy to cover a set of farm buildings on another tract of land, but that in the execution of the policies the descriptions of the two sets of buildings were inadvertently interchanged, establishes mutual mistake with resulting right to a reformation of the policies, even after loss.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Evidence — sufficiency. Evidence held to clearly and convincingly show a mutual mistake in the execution of a policy of insurance.

Sargent v Ins. Co., 218-430; 253 NW 613

Evidence — sufficiency. Evidence held to justify the reformation of a policy of fire insurance by eliminating therefrom the provision which invalidated the insurance in case of a change in the title to the insured property.

Green v Ins. Co., 218-1131; 253 NW 36

Absence of required plea. A plea of fraud, accident, or mistake, is a condition precedent to the right to reform any written instrument.

Sargent v Ins. Co., 217-225; 251 NW 71

Moot questions. Questions with reference to the reformation of a policy of insurance will not be reviewed on appeal when it appears that the policy has expired by its own terms, and without loss.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

XII PAR. XII INTEREST OF THIRD PARTY IN PROPERTY

Covenant for insurance does not run with land. A covenant by a mortgagor to keep the buildings on the mortgaged premises insured for the benefit of the mortgagee is entirely personal in character, and does not run with the land. Where a mortgagor obtained a policy payable to himself, and later sold the premises to one who did not assume the mortgage, and assigned the policy, held that the grantee, upon discovering that the policy had lapsed because of nonpayment of premiums, might reinstate the policy by paying the premiums, and henceforth carry the policy solely for his own benefit, and free from any equitable claim of the mortgagee.

First JSL Bk. v Duroe, 212-795; 237 NW 319

Vendor and purchaser—application of proceeds. The proceeds of fire insurance under a policy payable to the vendor and purchaser of real estate, "as their interests may appear", is not payable to the vendor when, at the time of the loss, the purchaser is in no manner in default on his contract. Such proceeds may be impounded and utilized, on the application of the purchaser, in the rebuilding of the burned structure.

Hatch v Ins. Co., 216-860; 249 NW 164; 249 NW 824

Defaulting vendor (?) or nondefaulting purchaser (?). The vendor of real estate (and necessarily his assignee of the contract) has no basis for claiming the proceeds of a noncontested policy of fire insurance taken out on the property by the nondefaulting purchaser in his own name long after the vendor was in hopeless default under the contract of sale, even tho the said contract provided that the purchaser should take out insurance for the benefit of the vendor.

Reason: Neither the vendor nor his assignee can, under the circumstances, enforce the contract clause for insurance for their benefit.

Martinsen v Ins. Assn., 217-335; 251 NW 503

Quitclaim to avoid foreclosure—effect of existing junior liens—insurance unaffected. A mortgagee's status as such, as affecting his rights under a fire insurance policy, is not lost by merger when he takes a quitclaim deed from mortgagor, agreeing to dismiss his foreclosure action only in event no junior liens existed against the property, when thereafter it is found that such liens do exist the presence of which would cause a merger to be against the interest and inconsistent with the intention of the mortgagee.

Guaranty Ins. v Ins. Assn., 224-1207; 278 NW 913

XIII PAR. XIII PROPERTY ENDANGERED BY FIRE—REMOVAL—COVERAGE

No annotations in this volume

XIV PAR. XIV NOTICE OF LOSS—DUTIES OF INSURED

Notice and proof of loss—failure to give. The requirement of a statutory form of fire insurance policy that proof of loss shall be given in a specified time and manner is not abrogated by a statute which declares that the policy shall be deemed a valued policy,—that is, a policy on which, in case of loss, the entire amount of the policy is collectible.

Woodard v Ins. Co., 201-378; 207 NW 351

Mental incapacity to furnish proofs—effect. A clear and unequivocal contract that an insured shall furnish due proofs of disability, as a condition precedent to the attaching of any liability on the part of the insurer, must be construed as assuming mental and physical capacity to furnish the proofs when due. It follows that the furnishing of such proofs will be excused if, when the disability occurs, and the policy is in force, the insured is insane, and, therefore, wholly unable to furnish said proofs.

McCoy v Ins. Co., 219-514; 258 NW 320

Delay—effect. Even tho it be conceded that particular facts and circumstances may excuse delay on the part of an insured policyholder in making proofs of loss, yet such facts and circumstances cannot excuse the total failure to make any such proofs.

Woodard v Ins. Co., 201-378; 207 NW 351

Pleading in re proofs. Answer reviewed, and held to plead properly the total failure of an insured to furnish proofs of loss.

Woodard v Ins. Co., 201-378; 207 NW 351

Notice and proof of loss—insufficiency. The letter of an insured to an insurer may not be deemed to constitute proof of loss when there is no evidence that insured so intended the letter, and, on the contrary, inquired therein as to what proof he should make.

Woodard v Ins. Co., 201-378; 207 NW 351

Notice by receiver adequate. Proof of loss under a policy of insurance is all-sufficient when executed and furnished to the insurer by the insured's duly appointed receiver.

Parker v Ins. Assn., 220-262; 260 NW 844

XIV PAR. XIV NOTICE OF LOSS — DUTIES OF INSURED—continued

Notice of loss without affidavit of fact—waiver. Failure of an insured to accompany his notice of loss with an affidavit as to the facts of loss becomes quite immaterial if the insurer waives such affidavit.

Stoner v Ins. Co., 215-665; 246 NW 615

Waiver—apparent authority to waive—instructions. Instructions relative to the duty of an insured to furnish proofs of loss, and to the burden resting on him in case he relied on a waiver of such proofs; also relative to the actual or apparent authority of the insurer's agent to bind the company by a waiver, reviewed and held correct.

Basta v Ins. Assn., 217-240; 252 NW 125

Waiver of bylaw. Section 9045, C., '27, fixing the requirements of notice and proof of loss under mutual insurance policies does not prevent the company from waiving in its bylaws such notice and proof except when it may see fit to demand them.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Waiver of statutory proof. Statutory proof of loss need not be furnished by an insured when the policy provides a definite and ample scheme for determining the actual loss, and the insured complies therewith.

Glandon v Ins. Assn., 207-1068; 224 NW 65

Waiver by denying liability. An insurer who, after a loss occurs, assumes to cancel the policy, and denies all liability, waives his right to formal notice and proofs of loss.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153
Larsen v Ins. Co., 212-943; 237 NW 468
Green v Ins. Co., 218-1131; 253 NW 36
Parker v Ins. Assn., 220-262; 260 NW 844

Proofs of loss—waiver. The act of an insurer in receiving and taking under advisement proofs of loss after the time for filing such proofs had expired may, with other facts of an equivocal nature, constitute a waiver by the insurer of formal, timely filing of such proofs.

Jack v Ins. Assn., 205-1294; 217 NW 816

Waiver—promise to pay loss. Failure of an insured to file written proofs of loss, becomes inconsequential when, commencing with the loss and for a long time thereafter, the insurer had promised to pay the loss.

Mortimer v Ins. Assn., 217-1246; 249 NW 405

Waiver—letter of inquiry. The letter of an insured to an insurer, making inquiry as to what proof of loss he should make, and the letter of the insurer in reply, in which the insured is referred to the requirements of the policy, will not constitute a waiver of proof of loss, the insured not claiming that he was misled by the correspondence or that he in any manner changed his position by reason thereof.

Woodard v Ins. Co., 201-378; 207 NW 351

Waiver—declaration of apparent adjuster. When evidence would warrant the jury in finding that an employee of an insurer had apparent authority to adjust a loss, the statement of such employee to a fellow employee and communicated to parties interested in the loss as claimants, to the effect that the insurer "would pay the loss", is admissible on the issue whether the insurer had waived proofs of loss.

Basta v Ins. Assn., 217-240; 252 NW 125

Waiver—jury question. Evidence to the effect that an insured, in a talk with the adjuster of the insurance company, was informed that the loss was being investigated by the state fire marshal, and that there was nothing for the insured to do until she heard from the company, is sufficient to present a jury question on the issue of waiver of sworn proofs of loss, especially when the adjuster was somewhat evasive in his talk with the insured.

Havirland v Ins. Co., 204-335; 213 NW 762

Waiver—jury question. A promise by an adjuster of an insurance company, made after he had investigated the loss, that the loss would be paid, coupled with other conduct on the part of the insurer indicating a purpose not to require proofs of loss, creates a jury question on the issue of waiver of such proof.

Basta v Ins. Assn., 217-240; 252 NW 125

Insufficient basis for waiver. Conceded arguendo, that an insurance company through its adjuster promised to pay a claim under a policy, yet such promise furnishes no support whatever for a plea that the company waived the sworn proofs of loss required both by the statutes and the policy, when such promise (if made) was made after the insured was in hopeless default in furnishing said sworn proofs.

Miller v Fire Assn., 219-689; 259 NW 572

Inapplicable provisions of policy. The provisions in a policy of insurance (a) that "no agent has authority to change this policy or to waive any of its provisions", and (b) that "no change shall be made in the policy unless approved by an executive officer of the insurer and the approval be indorsed hereon", have application to the provisions of the policy relating to the formation and continuance of the contract and not to the conditions which are to be performed after loss, e.g., the giving of notice of loss.

Carver v Ins. Co., 218-873; 256 NW 274

Silence of insurer — insufficient basis for waiver. The fact that an insurance company failed to answer letters from the insured, notifying the company in a general way that he

had suffered a loss under a policy, furnishes no support whatever for the plea that the company had waived the sworn proofs of loss required both by the statutes and by the policy.

Miller v Fire Assn., 219-689; 259 NW 572

Reliance on waiver. On the issue of waiver of proofs of loss under a fire insurance policy, a party who had been directed by the insured to attend to the collection of the loss may testify that he learned from a soliciting agent of the insurer the fact that the company's adjuster had stated that the loss would be paid, and that he relied on such statement and took no further steps toward presenting proofs of loss.

Basta v Ins. Assn., 217-240; 252 NW 125

Submission of unsupported issue. The submission, in an action on a policy of insurance, of the insured's pleaded claim that he had "offered to furnish additional proofs of loss", is erroneous when said claim was wholly without support in the evidence.

Miller v Fire Assn., 219-689; 259 NW 572

XV PAR. XV EXAMINATION OF LOSS OR DAMAGE

Water between plastered and outer walls—judicial notice of wood deterioration. It is a matter of common knowledge and one of which the court has a right to take judicial notice, that, when water is confined in a space as between the plastered and outer walls of a building where the air cannot circulate, many times the water will cause a deterioration of the lumber and sometimes cause rotting of the wood.

Horn v Ins. Co., 227-1045; 290 NW 8

XVI PAR. XVI APPORTIONMENT OF LOSS BY INSURERS

Rule for prorating. Between coinsurers, the liability of each under the standard pro rata clause is not the amount which he may pay the insured by way of settlement, but is such fractional part of the loss as the total amount of his policy bears to the total amount of all the valid and collectible coinsurance policies.

Globe Ins. v Cas. Co., 205-1085; 217 NW 268; 56 ALR 463

Prorating loss—burden of proof. An insurer who pleads that the loss should be prorated with another policy must assume the burden to show indubitably that such other policy was "valid and collectible".

Cole v Ins. Co., 201-979; 205 NW 3

Pro rata clause—valid and collectible insurance. In the application of the standard pro rata clause, the validity and collectibility of a policy are prima facie established by evidence that the insurer was solvent, did not question the validity of the policy, and, after suit, compromised the action and paid the judgment.

Globe Ins. v Cas. Co., 205-1085; 217 NW 268; 56 ALR 463

Pro rata clause—effect on reinsurers. The lessened liability which an insurer automatically acquires (as regards a coinsurer) under the standard pro rata coinsurance clause, automatically works a pro rata reduction in the liability of his reinsurers who have contracted that the total loss under the policy shall likewise be prorated among the reinsurers.

Globe Ins. v Cas. Co., 205-1085; 217 NW 268; 56 ALR 463

Reinsurance—insolvency of original insurer—effect on pro rata clause. The fact that an original insurer becomes insolvent after he has, in part, reinsured his risk, does not deprive his reinsurers of the benefit of the pro rata clause in their contract.

Globe Ins. v Cas. Co., 205-1085; 217 NW 268; 56 ALR 463

Facts provable since trial. No procedure exists under which an insurance company may show, on appeal from a judgment against it on a policy, that since the appeal was taken judgment on another policy issued by another company on the same loss has been affirmed by the supreme court and paid, and that, therefore, appellant should be granted a reversal so that the loss may be prorated on the basis of all valid and collectible insurance.

Sargent v Ins. Co., 218-430; 253 NW 613

XVII PAR. XVII LIMITATION OF ACTION

Amendment for new relief after action barred. A timely action to set aside the cancellation of a policy of insurance may be amended by asking for a reformation of the policy even tho the amendment is filed at a time which would have barred the original action.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Action—amendments after expiration of allowable period. The right to reform a policy of insurance (if such right exists) and to recover on it as reformed, is incident to the right to recover on the instrument in its original form. It follows that where plaintiff is unsuccessful on appeal in his effort to recover on the instrument in its original form, he may, after remand, amend and tender the issue of reformation, even tho when the amendment is filed an original action would have been barred by the statute of limitation.

Green v Ins. Co., 218-1131; 253 NW 36

XVIII PAR. XVIII DEFINITIONS, "INSURED"—"LOSS"

Proximate loss. Proximate loss includes not only losses which are directly caused by the

XVIII PAR. XVIII DEFINITIONS, "INSURED"—"LOSS"—concluded

fire itself, but also losses of which the fire is the efficient cause, by setting in motion other agencies.

Tracy v Ins. Co., 207-1042; 222 NW 447

Scope of insurance—"friendly fires". Insurance against loss and damage "by fire" does not cover loss and damage to eggs consequent on the wick of an oil heating stove in the storage room burning too high, and thereby throwing off a quantity of smoke and soot, and generating excess heat in the storage room —nothing in the room being burned except said wick.

Sigourney Prod. Co. v Ins. Co., 211-1203; 235 NW 284

Explosion caused by hostile fire. Damages resulting solely from an explosion which is caused by a hostile fire in an insured building are recoverable under a policy which insures "against all direct loss or damages by fire", even tho the policy exempts the insurer from "loss caused directly or indirectly by explosion of any kind unless fire ensues, and in that event for damages by fire only".

Githens v Ins. Co., 201-266; 207 NW 243; 44 ALR 863

Damage "by fire"—expanding force of ignited gas. A policy of insurance against damage by fire (and which does not except damage by explosion) covers a damage resulting solely from the expanding force of a sheet of flame caused by the accidental ignition of inflammable gas in the basement of the insured building. And this is true tho no part of the building itself was burned.

Scully v Ins. Assn., 215-368; 245 NW 280

XIX PAR. XIX PROVISIONS, AGREEMENTS, OR CONDITIONS

Immaterial rearrangement of provisions. The provisions of the statutory standard fire insurance policy need not necessarily be arranged in the policy in the same consecutive form as set forth in the statute. It is all-sufficient to set forth the major portion of said form on the reverse side of the policy proper, with proper reference in said policy to the reverse provisions as part of the policy as a whole.

Green v Ins. Co., 215-1220; 247 NW 660

CHAPTER 404.1

LIABILITY POLICIES—UNSATISFIED JUDGMENTS

9024.1 Inurement of policy.

Discussion. See 15 ILR 73—Torts—recovery from insurer

Judgment against insured — conclusive against insurer. A judgment determining liability of insured for damages for death resulting from use of automobile was conclusive against liability insurance company as to its liability on policy where there was no fraud or collusion in obtaining the judgment and insurance company had timely notice of suit and elected to make no defense, in view of provision of policy and of statute permitting injured person to maintain action against insurance company for amount of judgment against insured after return of execution unsatisfied, irrespective of insured's insolvency.

International Co. v Steil, 30 F 2d, 654

Wrong motor numbers not invalidating liability policy. Motor numbers in an automobile insurance policy are only for the purpose of aiding in identifying the car, and, tho the numbers be wrong, a liability policy will not be invalidated if the car is otherwise properly identified, for which purpose other evidence may be resorted to, and, if sufficient, will cure the error without resort to a proceeding in equity to reform the policy.

Fucaloro v Cas. Co., 225-437; 280 NW 605

Consent to operate vehicle — admission in pleading. In an action against an insurance carrier to collect an unsatisfied judgment arising out of an automobile collision, and where the insurance carrier raises the question of consent to operate the vehicle, its admission of this fact in a pleading in a previous action is sufficient to carry to the jury such question of consent to operation.

Mitchell v Underwriters, 225-906; 281 NW 832

Automobile policy—evidence sufficient for jury and to sustain verdict. In action against automobile liability insurer to recover on judgment previously obtained against insured who owned two trucks, evidence that truck which struck plaintiff was the truck which was covered by defendant's policy held to be jury question and to sustain verdict for plaintiff.

Cunningham v Cas. Co., (NOR); 258 NW 681

CHAPTER 406

MUTUAL FIRE, TORNADO, HAILSTORM AND OTHER ASSESSMENT INSURANCE ASSOCIATIONS

9029 Organization—purpose and powers.

Atty. Gen. Opinions. See '30 AG Op 294; '36 AG Op 115

Indemnity (?) or liability (?)—legality. Either indemnity or liability insurance covering the operation of an automobile may be validly written by mutual associations under this section or by reciprocal or interinsurance concerns under §9083, C., '31, even tho subsec. 5-e, §8940, of said code prohibits the companies there designated from writing anything but liability insurance, the latter section not controlling the two former sections.

Schmid v Underwriters, 215-170; 244 NW 729

Indemnity insurance—law governing. A policy of insurance issued under subsec. 5-e, §8940, C., '31, insuring the ordinary operation of an automobile necessarily embraces the statutory provision that said policy shall inure to the benefit of a party who obtains a judgment against the insured, even tho said policy purports to be an indemnity policy only. (Zieman case, 214 Iowa, 468 overruled in part.)

Schmid v Underwriters, 215-170; 244 NW 729

Negligence in issuing policy. An insurance company, even tho it be but a mutual association which resorts to assessments on its members for funds with which to pay losses "and necessary expenses", must respond in damages for its tort in negligently failing to issue a policy which had been duly contracted for.

Mortimer v Ins. Assn., 217-1246; 249 NW 405; 35 NCCA 134

Special appearance and motion to dismiss—attacking only part of jurisdiction improper. In an action against insurance company to recover value of property destroyed by fire, in which action a special appearance attacked only one count of petition, the overruling of the special appearance and motion to dismiss was proper, inasmuch as jurisdiction that may be attacked by special appearance is jurisdiction of court over the entire action, and not jurisdiction of court as to part of such action.

Sanford Co. v Ins. Co., 225-1018; 282 NW 771

9036 Approval by commissioner.

Atty. Gen. Opinion. See '38 AG Op. 649

9037 Allowable assessments and fees.

Atty. Gen. Opinion. See '30 AG Op 294

Assessments—validity. An assessment by a mutual hail association may be valid even tho the minutes of the board of directors do not affirmatively show compliance with all requirements of the articles and bylaws relating to assessments.

Hauge v Ins. Assn., 205-1099; 212 NW 473

Illegal assessment. An assessment on the policyholders of a mutual insurance association, made by the board of directors at a duly called meeting, is not a legal assessment and no forfeiture of a policy can be based on the nonpayment of such assessment, when the articles of incorporation provide that an executive committee consisting of the president, vice president, secretary and treasurer shall meet quarterly (and specially on call of the president) and make all assessments; and this is true even tho all said officers were present at said directors' meeting but as directors.

Maasdam v Ins. Assn., 222-162; 268 NW 491

Oral evidence. Oral testimony may be admissible as to the manner in which an assessment was made when such testimony bears on matters not revealed by the minutes of the board of directors or is explanatory of such minutes.

Hauge v Ins. Assn., 205-1099; 212 NW 473

Evidence of levy and nonpayment. Evidence held insufficient to establish either that an assessment had been levied, or that the assessment had not been paid, if levied.

Hart v Ins. Assn., 208-1030; 226 NW 781

9040 Emergency fund.

Atty. Gen. Opinion. See '30 AG Op 294

9041 Policies with fixed premiums.

Atty. Gen. Opinions. See '25-26 AG Op 379; '30 AG Op 294

9043 Hail assessments—payment of losses.

Assessments—validity. An assessment by a mutual hail association may be valid even

tho the minutes of the board of directors do not affirmatively show compliance with all requirements of the articles and bylaws relating to assessments.

Hauge v Ins. Assn., 205-1099; 212 NW 473

Agent signing in representative capacity—nonliability. In an action to recover hail insurance premium under a policy to which was attached an application with a promise to pay and signed by defendant, alleged to be a member of a partnership, and who used the symbol "%" in signing partnership name, such defendant is not liable individually where it is shown that defendant received commission for selling property and merely acted as agent for the partnership.

Inter-Ocean Co. v Gabrielson, 226-1242; 286 NW 514

9045 Proof of loss—sixty-day limit.

Contract limitation—validity. An agreement in a policy of insurance against total and permanent disability, specifically providing that all claim shall be forfeited if proof of such disability is not furnished the insurer "within ninety days after the happening of the total and permanent disability", is valid and enforceable, such time limit being more favorable to the insured than the statutory limit.

Fairgrave v Life Assn., 211-329; 233 NW 714

Inapplicable provisions of policy. The provisions in a policy of insurance (a) that "no agent has authority to change this policy or to waive any of its provisions", and (b) that "no change shall be made in the policy unless approved by an executive officer of the insurer and the approval be indorsed hereon", have application to the provisions of the policy relating to the formation and continuance of the contract and not to the conditions which are to be performed after loss, e.g., the giving of notice of loss.

Carver v Ins. Co., 218-873; 256 NW 274

Sufficiency of proofs. Proofs of loss held sufficient; also the manner in which accounts of loss were kept even tho not wholly accurate.

Hansell v Ins. Assn., 209-378; 228 NW 88

Notice and proof of loss—"as soon as practicable". A policy requirement that written notice of an accident shall be given "as soon as practicable" means that said notice shall be given within a reasonable length of time under all the facts and circumstances. So held in a case where the insured inadvertently lost his policy and forgot the name of the insurer until some five months after liability accrued on the policy.

Gifford v Cas. Co., 216-23; 248 NW 235

Waiver of statutory proof. Statutory proof of loss need not be furnished by an insured when the policy provides a definite and ample scheme for determining the actual loss, and the insured complies therewith.

Glandon v Ins. Assn., 207-1068; 224 NW 65

Bylaw waiver. This section does not prevent the company from waiving, in its bylaws, such notice and proof except when it may see fit to demand them.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Waiver—denial of liability—effect. An insurer who, upon the happening of a loss, promptly asserts that the policy had been canceled long prior to the loss thereby denies all liability and waives proofs of loss.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Denial of liability as waiver. A denial by the insurer of all liability under a policy of insurance operates as a waiver of notice and proof of loss.

Green v Ins. Co., 218-1131; 253 NW 36

Denial of liability for crop loss—waiver. A policy provision to the effect that when a partial loss of a crop is occasioned by hail, the insured shall, by a certain date, furnish the insurer an account or statement of the crop harvested, is waived when, before the date in question, the insurer unequivocally denies liability under the policy.

Larsen & Son v Ins. Co., 212-943; 237 NW 468

Richardson v Ins. Assn., 214-30; 241 NW 414

Lee v Ins. Assn., 214-932; 241 NW 403

Denial of liability not constituting waiver. A denial of liability on a policy of insurance does not constitute a waiver of proofs of loss when the validity of the claim under the policy depends solely on the furnishing of proofs of loss within a specified contract time, and when said denial of liability was made long after said time had expired.

Fairgrave v Life Assn., 211-329; 233 NW 714

Promise to pay claim—insufficient basis for waiver. Conceded arguendo, that an insurance company through its adjuster promised to pay a claim under a policy, yet such promise furnishes no support whatever for a plea that the company waived the sworn proofs of loss required both by the statutes and the policy, when such promise (if made) was made after the insured was in hopeless default in furnishing said sworn proofs.

Miller v Fire Assn., 219-689; 259 NW 572

Waiver—promise to pay loss. Failure of an insured to file written proofs of loss, becomes inconsequential when, commencing with the loss and for a long time thereafter, the insurer had promised to pay the loss.

Mortimer v Ins. Assn., 217-1246; 249 NW 405

Silence of insurer—insufficient basis for waiver. The fact that an insurance company failed to answer letters from the insured, notifying the company in a general way that he had suffered a loss under a policy, furnishes no support whatever for the plea that the company had waived the sworn proofs of loss required both by the statutes and by the policy.

Miller v Fire Assn., 219-689; 259 NW 572

Waiver—declaration of apparent adjuster. When evidence would warrant the jury in finding that an employee of an insurer had apparent authority to adjust a loss, the statement of such employee to a fellow employee and communicated to parties interested in the loss as claimants, to the effect that the insurer "would pay the loss", is admissible on the issue whether the insurer had waived proofs of loss.

Basta v Ins. Assn., 217-240; 252 NW 125

Reliance on waiver. On the issue of waiver of proofs of loss under a fire insurance policy, a party who had been directed by the insured to attend to the collection of the loss may testify that he learned from a soliciting agent of the insurer the fact that the company's adjuster had stated that the loss would be paid, and that he relied on such statement and took no further steps toward presenting proofs of loss.

Basta v Ins. Assn., 217-240; 252 NW 125

Waiver—pleading—sufficiency. Waiver of proofs of loss is sufficiently presented by pleading the facts constituting waiver, even tho the pleader does not allege the legal conclusion of waiver; and especially so when the pleadings are unquestioned in the trial court.

Lee v Ins. Assn., 214-932; 241 NW 403

Waiver—sufficient plea. An allegation, in an action on a policy of insurance, that plaintiff, within the contract time, orally notified a general agent of the insurer of his injury, and that said agent agreed that he would give proper and timely notice to the insurer, is a sufficient plea of waiver of the insured's duty to give written notice of the loss, and sufficient to support the admission of evidence that the agent had sufficient power to waive said written notice.

Carver v Ins. Co., 218-873; 256 NW 274

When allegation and proof unnecessary. There need be no allegation or proof of the furnishing of proofs of loss under a policy which by its terms waives such proofs.

Glandon v Ins. Assn., 211-60; 232 NW 804

Waiver—jury question. A promise by an adjuster of an insurance company, made after he had investigated the loss, that the loss would be paid, coupled with other conduct on the part of the insurer indicating a purpose not to require proofs of loss, creates a jury question on the issue of waiver of such proof.

Basta v Ins. Assn., 217-240; 252 NW 125

9048 Limitation of action.

Limitation of nonlife actions generally. See under §8986

Premature action—action prior to due date of loss. The statutory command that no action shall be brought on a policy until the date when the loss is due in accordance with the articles of incorporation or bylaws of the insurer, has no application when the said articles and bylaws contain no provision as to the date when the loss is due.

Hansell v Ins. Assn., 209-378; 228 NW 88

Nonpremature action. An action brought some 11 months after loss is not premature when the insurer has by his conduct waived proofs of loss.

Lee v Ins. Assn., 214-932; 241 NW 403

9051 Value of personal property—value of crops.

Computation of damages—instructions. Instructions relative to the computation of damages to crops by hail, reviewed, and held sufficiently clear in view of the ambiguous provision of the policy.

Richardson v Ins. Assn., 214-30; 241 NW 414

Damage by hail—improper measure. The percentage of crop destruction due to hail cannot be measured by a comparison between the ultimate crop after damage by hail, and the amount of yield in an average year, when the record affirmatively shows that the year in which the damage occurred was not, because of drouth conditions, an average year.

Slinger v Ins. Assn., 219-329; 258 NW 101

Interest recoverable. Interest is allowable, on the amount recovered under a hail insurance policy, from the date when the loss occurred.

Glandon v Ins. Assn., 211-60; 232 NW 804

Similar facts—competency. A witness should not be permitted to testify to the crop yield of his land as bearing on the probable yield of another farm in the same vicinity unless it appears that the two farms possess similar soil conditions.

Slinger v Ins. Assn., 219-329; 258 NW 101

9051.1 Arbitration.

Inadequate award — fraud — effect. Equity will vacate a grossly inadequate award by arbitrators, especially when an element of fraud exists in the appointment and proceedings of the arbitrators.

Koopman v Ins. Assn., 209-958; 229 NW 221

9054 Cancellation by association — notice.

"Suspension" and "cancellation" of policy distinguished. The statutory provision that

a policy of insurance issued by an assessment insurance association may be canceled by the association on a five-day notice to the insured has no application to a policy provision which suspends the membership of the policyholder and denies him right of recovery for loss while he is delinquent in the payment of assessments.

Early v Ins. Assn., 201-263; 207 NW 117

"Suspension" and "cancellation" compared. The suspension of a policy of insurance is not synonymous with cancellation of the policy.

Federal Bank v Ins. Assn., 217-1098; 253 NW 52

Suspension — nonapplicable procedure. The procedure for the forfeiture or suspension of a nonmutual fire insurance policy of insurance (§8959, C., '27) is not applicable to policies issued by mutual assessment companies.

Hart v Ins. Assn., 208-1020; 226 NW 777

Cancellation in equity. Equity will not, after the death of the insured in a life insurance policy, entertain jurisdiction to cancel the policy unless exceptional circumstances render cancellation necessary for the protection of the insurer. The fact that the policy becomes incontestable after two years does not constitute such circumstance when said time has not yet elapsed.

Bankers Life v Bennett, 220-922; 263 NW 44

Cancellation—statutory and contract provisions. In an action on an insurance policy to recover damages for loss by hail, held, that statutory provisions for benefit of insured cannot be contracted away and terms of contract are only binding upon the insured if not contrary to applicable statutes. A policy is construed to give the insured his indemnity in questions of cancellation or forfeiture.

Sorensen v Ins. Assn., 226-1316; 286 NW 494

Actions—bylaws and statutes in conflict. In an action to recover damages for loss by hail, bylaws of mutual hail insurance association which are inconsistent with statute relating to notice of cancellation must give way to statute.

Sorensen v Ins. Assn., 226-1316; 286 NW 494

Attempted cancellation contrary to bylaws —effect. A mutual insurance company which, in its bylaws, provides for the cancellation of a policy by giving notice "in person or by registered letter", and which in its attempt to cancel a policy ignores its own bylaws and attempts to give notice by an unregistered letter, must prove that said letter actually reached the insured, and the presumption of delivery attending the mailing of such letter and the positive testimony that such letter was never received by the insured are of equal probative force; therefore, the insurer has not established the receipt of said notice by the insured.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Notice of cancellation — sufficiency. In an action on an insurance policy for damages as a result of hail, on appeal from ruling sustaining a demurrer to defendant's answer, in which one defense is cancellation of the policy in accordance with the terms of the contract, by giving five days notice, "mailed to the address of the assured", and the statute provides notice may be given, "by the association giving five days written notice thereof to the insured", held that the statute leaves the parties free to meet its requirements in such manner as to them seem best adapted to their purpose and the policy provided a reasonable way of termination. It was a method to which both parties agreed and not being in conflict with the statute, the court was in error in sustaining the demurrer.

Sorensen v Ins. Assn., 226-1316; 286 NW 494

Mailing notice of cancellation—presumption of receipt by addressee. In an action on an insurance policy to recover damages for loss by hail and where the answer alleges cancellation of policy by mailing five days written notice to insured, receipt of which notice plaintiff denies, it may be presumed or inferred by the supreme court in reviewing a decision on demurrer, that the letter properly addressed and mailed reached the plaintiff in due time.

Sorensen v Ins. Assn., 226-1316; 286 NW 494

Refusal to accept and failure to cancel—effect. A policy of hail insurance (issued by a mutual association) once in force remains in force even tho the insured refuses to accept it, and the association fails to cancel the policy in the manner provided by statute.

Murchison v Ins. Co., 204-528; 215 NW 598

Nonpayment of premium—effect. A policy of fire insurance for a named period in a mutual company is not automatically suspended by the nonpayment of an assessment when the policy contains no provision for suspension, but simply a declaration that the association shall not be liable for any loss if the insured fails to pay any assessment when due "provided the association shall give the insured notice as required by law". In other words, the insurer, in order to escape liability because of such nonpayment, must cancel the policy under this section.

Federal Bank v Ins. Assn., 217-1098; 253 NW 52

See Wall v Ins. Co., 217-1106; 253 NW 46

Waiver — effect. Even if it be conceded, arguendo, that the levy of an assessment on a policy of insurance worked a waiver of the suspension of the policy for nonpayment of a prior assessment, yet such waiver becomes

immaterial when the policy is legally suspended for nonpayment of the last assessment.

Hart v Ins. Assn., 208-1020; 226 NW 777

Acquiescence. A statement by the insured to the insurer to the effect that he (the insured) did not like the steps taken by the insurer in canceling a policy does not constitute an acquiescence in such cancellation, the truth being that the cancellation was a nullity, tho this fact was unknown to the insured.

Harrington v Ins. Assn., 203-282; 211 NW 383

Hail insurance—failure to read settlement—cancellation—nonestoppel. An insurer may not cancel a hail insurance policy nor avoid payment for a second hail loss by predicating an estoppel upon the negligent failure of the insured to read a written settlement where the insured reposed confidence in the agent who, on a busy threshing day, negotiated the settlement for the first hail damage and then added a policy cancellation clause not discussed in settlement.

Conrad v Ins. Assn., 223-828; 273 NW 913

9057 When pro rata assessment retained.

Abortive attempt to cancel. An attempted cancellation by the insurer of a policy of insurance in a mutual fire insurance association is a nullity when the insurer neither returns nor tenders to the insured all advance assessments less the insurer's pro rata part thereof.

Harrington v Ins. Assn., 203-282; 211 NW 383

CHAPTER 407

LIABILITY INSURANCE—CERTAIN PROFESSIONS

9077 Cancellation of policy.

Attempted cancellation contrary to bylaws—effect. A mutual insurance company which, in its bylaws, provides for the cancellation of a policy by giving notice "in person or by registered letter", and which in its attempt to cancel a policy ignores its own bylaws and attempts to give notice by an unregistered letter, must prove that said letter actually reached the insured, and the presumption of delivery attending the mailing of such letter and the positive testimony that such letter was never received by the insured are of equal probative force; therefore, the insurer has not established the receipt of said notice by the insured.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

CHAPTER 408

RECIPROCAL OR INTERINSURANCE CONTRACTS

9083 Authorization.

Atty. Gen. Opinion. See '32 AG Op 220

Indemnity insurance—law governing. A policy of insurance issued under subsec. 5-e, §8940, C., '31, insuring the ordinary operation of an automobile necessarily embraces the statutory provision that said policy shall inure to the benefit of a party who obtains a judgment against the insured, even tho said policy purports to be an indemnity policy only. (Zieman case, 214 Iowa 468 overruled in part.)

Schmid v Underwriters, 215-170; 244 NW 729

Indemnity (?) or liability (?) — legality. Either indemnity or liability insurance covering the operation of an automobile may be validly written by mutual associations under §9029 or by reciprocal or interinsurance concerns under this section, even tho subsec. 5-e, §8940, C., '31, prohibits the companies there designated from writing anything but liability insurance, the latter section not controlling the two former sections.

Schmid v Underwriters, 215-170; 244 NW 729

9087 Actions—venue—commissioner as process agent.

Real party in interest—authority to make admission in pleading. A defendant corporation formed to underwrite reciprocal insurance contracts of its unincorporated group of subscribers is the real party in interest in an action to enforce a judgment against the corporation. The group of subscribers is not a legal entity and, when the corporation is the only legal entity of the two, an admission of an important fact by the corporation made in a counterclaim in the action in which judgment was obtained is binding on it in the later action.

Mitchell v Underwriters, 225-906; 281 NW 832

9103 Laws applicable.

Reciprocal insurance contracts not controlled by general statutes. The specific provisions of an application for a policy of reciprocal insurance, of which provisions the applicant had notice, to the effect that the policy will not be

in force, (1) until the application is approved by the insurer, and (2) until the premium is paid, cannot be waived by the insurer's agent entering into a different arrangement relative to said acceptance and payment of premium; §8959 with reference to the procedure in case of nonpayment of premiums and §9004, C., '31, relative to the power of agents, not being applicable to reciprocal insurance contracts.

Gisin v Ins. Exch., 219-1373; 261 NW 618

Voluntary insertion of nonrequired agreement. The fact that one class of insurance companies is required, by statute, to insert in its policies a provision that an injured third party shall have a right of action against the insurer, does not prevent other insurance companies from inserting such provision in their policies even tho they are not required so to do, and when the provision is so inserted the company is bound thereby.

Venz v Ins. Assn., 217-662; 251 NW 27

Nonstatutory cancellation of policy. A reciprocal or interinsurance policy of insurance is effectively canceled by complying with the contract method for cancellation even tho such method is materially different than the statutory method provided by §8959, C., '31, because said section does not apply to such policies.

Schmid v Underwriters, 215-170; 244 NW 729

CHAPTER 409

CONSOLIDATION AND REINSURANCE

9105 Life companies — consolidation and reinsurance.

Insolvency—assets transferred to obtain reinsurance — propriety. The trial court has power to cause assets of insolvent insurance company to be transferred and used to obtain reinsurance for policyholders without subjecting assets to judicial sale, and under proceedings where it is shown that it is impossible for company to function any longer, the trial court is justified in finding that value of assets upon a fair basis of valuation was insufficient to pay its obligations, and that the interest of policyholders would best be served by obtaining reinsurance.

Royal Ins. v Gross, 76 F 2d, 219

Reinsurance—disclosure of material facts—duties—presumptions. In an action on a reinsurance contract against reinsurer, held, not breached on account of original insurer's failure to retain full amount of liability agreed upon where original insurer was liable on another contract with the same principal and the evidence was insufficient to show any wrongful or fraudulent concealment of material facts, since the same principles of law as to false representations and concealments govern in reinsurance as in original insurance. Altho insured and reinsured have duty to exercise good faith and disclose all material facts, a presumption must be based on facts, not upon other presumptions. The mere nondisclosure of facts possibly known is not fraudulent concealment of facts, so reinsurer, to establish concealment of facts, must show intentional concealment or bad faith in ascertaining facts.

General Co. v Surety Co., 27 F 2d, 265

9106 Submission of plan.

Acts of administrative officers. Certiorari may be the proper remedy to review the action of the commissioner of insurance and attorney general (§8688, C., '35) in refusing to approve amended articles of incorporation of an assessment association.

National Assn. v Murphy, 222-98; 269 NW 15

9115 Companies other than life—approval of plan.

Consolidation—assumption of obligations—consideration. The assumption by a consolidating company of the obligations of the companies consolidated will not be rendered nugatory by mere inadequacy of consideration. At any rate, it is not for the court to pass on the sufficiency of the consideration growing out of a consolidation approved by the companies consolidated, by their stockholders, and by duly empowered public officials.

State v Cas. Co., 213-200; 238 NW 726

Consolidation—right of creditors. Where a domestic consolidated insurance company unconditionally assumed the obligations of both a domestic and a foreign company, and where the courts of the foreign state ordered that certain assets of the foreign company be administered on by receivership proceedings in said foreign state, the creditors of the foreign company have the right, after establishing their claims in the foreign receivership and being paid a percentage of their claims, to establish the balance of their claims against the assets in the hands of the domestic consolidated company (it having become insolvent) even tho a portion of said assets consists of a trust fund originally deposited with the state by the original domestic company "for the protection of its policyholders"; but dividends must be equalized by the domestic receiver among all creditors of the same class.

State v Cas. Co., 213-200; 238 NW 726

Loss—pro rata clause—effect on reinsurers. The lessened liability which an insurer automatically acquires (as regards a coinsurer) under the standard pro rata coinsurance clause, automatically works a pro rata reduction in the liability of his reinsurers who have con-

tracted that the total loss under the policy shall likewise be prorated among the reinsurers.

Globe Ins. v American Co., 205-1085; 217 NW 268; 56 ALR 463

Coinsurance—solvent and insolvent insurers. Separate insurers of the same loss are coinsurers, even tho one of the insurers issued its policy at a time when the other insurers had gone into the hands of a receiver and the extent of their ability to pay losses had become problematical.

Globe Ins. v American Co., 205-1085; 217 NW 268; 56 ALR 463

CHAPTER 410

LICENSING OF AGENTS

9119 License required.

License—admissibility. The written request of an insurance company to the commissioner of insurance for a license for a named agent "to transact its authorized business" is admissible for the purpose of showing that said person was the company's agent, but not for the purpose of showing the scope of the powers of such agent.

Stoner v Ins. Co., 218-720; 253 NW 821

License not possessed by agent. An application for registration of securities and for an "issuer-dealer's" license was properly refused to a corporation which proposed to issue investment trusts in which the buyer would obtain life insurance through a foreign insurance company to cover unpaid balances on his contract, when such provision would violate the insurance laws because the corporation was to procure such insurance for the buyer, and neither it nor its salesmen had qualified as insurance agents.

Ind. Fund v Miller, 226-1101; 285 NW 629

Soliciting agent—implied authority. The act of an insurance company at its policy-issuing office, and in response to the request of its soliciting agent, in attaching a "loss payable" clause to a theretofore issued policy of fire insurance, and in returning said policy to its said agent with said clause unsigned, impliedly authorizes said agent to sign said clause on behalf of said insurer.

Stoner v Ins. Co., 220-984; 263 NW 46

TITLE XXI

BANKS

CHAPTER 412

BANKING DEPARTMENT

9130 Superintendent of banking — term.

Atty. Gen. Opinion. See '36 AG Op 28

Banking superintendent as good-faith plaintiff—attorney fees—nonliability. The superintendent of banking as a good-faith, tho unsuccessful, plaintiff in a quiet title action is not liable to the defendant for attorney fees.

Bates v Mullins, 223-1000; 274 NW 117

9131 Appointment—qualifications.

Atty. Gen. Opinions. See '30 AG Op 52; '36 AG Op 28

9134 Removal of superintendent.

Atty. Gen. Opinion. See '36 AG Op 28

9137 Salaries.

Initial power to fix salary. The superintendent of banking has the initial power to fix the salary of a bank examiner appointed by him to assist in the liquidation of an insolvent bank of which the superintendent is receiver. The district court has no right to grant a greater salary.

In re City Bank, 210-581; 231 NW 342

9140 Duties and powers.

Discussion. See 15 ILR 511—New banking legislation

Atty. Gen. Opinions. See '36 AG Op 28, 666

Affected with public interest. Principle affirmed that the business of banking is affected with a public interest.

Priest v Whitney Co., 219-1281; 261 NW 374

Assessment—nonpower of superintendent. The superintendent of banking has no power to order an assessment on the stockholders of an insolvent bank.

Home Bank v Berggren, 211-697; 234 NW 573

Guaranty of solvency of bank. A contract between the state superintendent of banking and the officers and directors of a state bank,

wherein the said officers and directors guarantee that the bank "is at this time solvent", and wherein the contract "to keep and maintain the bank in a solvent" condition, in consideration that the superintendent will permit the bank to continue business, tho the superintendent questions its solvency, is a nullity, because gravely inconsistent with the statutory powers and duties of said superintendent, and therefore against public policy.

Andrew v Breon, 208-385; 226 NW 75

Guaranty by officers — effective delivery. Delivery of a written guaranty of payment, by officers and directors of a bank, of questionable assets of the bank, is shown by evidence that a state bank examiner took the guaranty into his possession with the consent of the guarantors and delivered it to the state superintendent of banking.

Boyd v Miller, 210-829; 230 NW 851

Survival of service of notice. Service on the superintendent of banking, as such, of an original notice of mortgage foreclosure, survives the retirement of said official from office—is valid and binding on his duly appointed successor.

Greenleaf v Bates, 223-274; 271 NW 614

9143 Fees for examination.

Atty. Gen. Opinion. See '36 AG Op 28

9144 Expenses.

Atty. Gen. Opinion. See '25-26 AG Op 372

9145 Payment.

Atty. Gen. Opinions. See '36 AG Op 28, 35

PRIVATE BANKS

9151 Use of banking terms prohibited.

Atty. Gen. Opinion. See AG Op May 8, '39

Stockholders operating subsidiary unincorporated bank—greater liability than partners. Bank directors, who start unincorporated subsidiary banks owned by stockholders of the parent bank in the same ratio as they hold stock in the parent bank, create more than a simple partnership, and thereunder a deceased stockholder's liability, arising out of the subsidiary banking operations, unlike that of a mere partner, does not cease upon death.

Daniel v Best, 224-1348; 279 NW 374

9153 Exceptions.

Nonpartnership tho sharing profits. Where it is contemplated that a private unincorporated bank will be reorganized by incorporating the business (apparently in the same name as the private bank) and where stock in the contemplated incorporation is subscribed for, paid, and issued in a name identical with that of the private bank, and where the plans for incorporation are later wholly abandoned, the subscribers do not become partners in the private business when they never intended such relation, or held themselves out as such partners, or as having any interest in said bank; and this is true even tho said private bank continues for several years to pay said subscribers annual dividends out of its earnings.

Kinney v Bank, 213-267; 236 NW 31

Stockholders operating subsidiary unincorporated bank—greater liability than partners. Bank directors, who start unincorporated subsidiary banks owned by stockholders of the parent bank in the same ratio as they hold stock in the parent bank, create more than a simple partnership, and thereunder a deceased stockholder's liability, arising out of the subsidiary banking operations, unlike that of a mere partner, does not cease upon death.

Daniel v Best, 224-1348; 279 NW 374

9154.03 Administration—receivership.

Remedies of creditors—creditor's bill—conditions. The obtaining of a judgment against a purported partner in an insolvent private bank is a condition precedent to the right of the receiver to maintain a general equitable action to set aside an alleged fraudulent conveyance by the partner.

Cooper v Erickson, 213-448; 239 NW 87

Allowance and payment of claims—property available. Where an estate consists of two general classes of assets, to wit, (1) assets employed by a decedent in operating his exclusively owned private bank, and (2) lands and other assets not so employed, and where, under the will, the bank is temporarily continued after the death of the decedent, an unappealed order of the probate court, entered on due notice and service, to the effect that bank depositors be paid from the general assets of the estate, precludes devisees and legatees from thereafter successfully asserting that depositors could only be paid from the assets employed in the operation of the bank, and that, as a consequence, the said lands could not be legally mortgaged in order to effect such payment. Especially should this be true when it appears that large sums of money employed in carrying on the bank have been used by the executors in paying claims not connected with the operation of the bank.

In re Griffin, 220-1028; 262 NW 473

Joining law and equity. It is not permissible for the receiver of an insolvent private bank to join (1) a law action to obtain a judgment against an alleged partner in the bank, and (2) an equitable action against the partner and his grantee to set aside a conveyance alleged to be fraudulent.

Cooper v Erickson, 213-448; 239 NW 87

CHAPTER 413

SAVINGS BANKS

Atty. Gen. Opinions. See '28 AG Op 233; '34 AG Op 76

9155 Organization.

Atty. Gen. Opinion. See '25-26 AG Op 43

9156 Banking powers.

Discussion. See 17 ILR 505—Access to safety deposit boxes

Right to contract for payment of debts. A good-faith contract by the board of directors of a state bank, for and on behalf of the bank, and providing for the payment of the bank's debts incurred in the operation of the bank, is valid without any approval by the stockholders of the bank.

Andrew v Bank, 216-252; 249 NW 352; 89 ALR 783

Corporate powers and liabilities—ultra vires and lack of authority—ratification. A corporation is estopped to plead that the contract of its vice president on behalf of the corporation to repurchase a note and mortgage at face value was neither expressly nor impliedly authorized, and was ultra vires, when the corporation, with full knowledge of all the facts, elects to retain the consideration paid it for the paper.

Hawkeye Ins. v Cent. Trust, 210-284; 227 NW 637

Deposits received on condition—violation—effect. A bank which receives cash, checks, and notes on the agreed condition that said receipts will be held intact, and not placed in the general assets of the bank, and will be returned intact on the happening of a named event, must respect and comply with the condition, even tho at the time the bank has enforceable financial obligations against the parties delivering the property. And, in case of violation of the condition and in case of insolvency, the claimants will be entitled to an order on the receiver for restitution, or for preferred payment out of the funds on hand at the time of insolvency, or for such other relief as will be equitable and possible under the circumstances.

Andrew v Bank, 218-1313; 256 NW 292

Deposits — general (?) or special (?). Whether a bank deposit be general or special necessarily depends on the use to which the depositor puts it.

Andrew v Bank, 218-489; 255 NW 871

Deposits—bank's general right to set-off. The fact that a bank unlawfully invests its funds in securities not permitted by law as proper bank investments, does not prevent the receiver of the bank from offsetting the amount of said securities against the deposit of the party who is obligated to pay said securities; and this is true even tho the bank was a mortgagee for the benefit of holders generally of said securities.

Andrew v Bank, 218-489; 255 NW 871

Special deposit superior to garnishment. Money deposited or caused to be deposited by a depositor in a bank for the sole use and benefit of a bona fide creditor of the depositor, and under an agreement to that effect between the depositor and said creditor, of which arrangement the bank had full knowledge, constitutes a special deposit. It follows that a subsequent garnishment of the fund is subject to the prior rights of the creditor for whom the deposit was made.

Hamilton v Imes, 216-855; 249 NW 135

General manager—power to deposit and withdraw funds. The general manager of an incorporated, cooperative, dairy company who, for years, and to the general knowledge of the banking and business interest of the locality in question, is in unrestricted management of the entire business of the company, must be deemed to have both actual and ostensible authority to select banks of deposit for the corporate funds, and like authority to withdraw said funds—an authority as to which, both as to the making of deposits and as to the withdrawal thereof, the bank need ask no questions, assuming, of course, it acts at all times in perfect good faith.

Fidelity Co. v Bank, 223-446; 273 NW 141

Rediscounting—estoppel to deny authority of officers. A savings bank, notwithstanding statutory limitations on the power of bank officers, will not be permitted to deny the authority of its officers to rediscount the bank's paper by indorsing said paper "without recourse" but accompanying such indorsement with formal, written agreement binding the bank to repurchase said paper prior to or at a named time, when the party advancing the credit relied thereon, and when said bank received, retained, and availed itself of the entire fruits of the said rediscounting.

Bates v Bank, 219-1358; 261 NW 797

Agreement to repurchase—demand for performance unnecessary. When a bank, (1) rediscounts its paper under indorsements "without recourse", but (2) accompanies the indorsement with a formal written agreement to repurchase the said paper on a named date, demand for performance on said date, or on any date, is unnecessary.

Bates v Bank, 219-1358; 261 NW 797

Question of fact—finding by court—conclusiveness. A finding by the trial court on supporting testimony in an action tried to it that a nondrawee-bank was not, and that the

drawee-bank was, negligent in cashing a check is conclusive on the appellate court.

Bank of Pulaski v Bloomfield, 210-817; 232 NW 124

9157 Articles of incorporation.

Atty. Gen. Opinions. See '25-26 AG Op 43; '28 AG Op 233; '34 AG Op 351

Proof of incorporation. A copy of the articles of incorporation of a banking corporation, duly certified by the secretary of state, is sufficient proof of such incorporation.

State v Niehaus, 209-533; 228 NW 308

Joint stock land banks—legal status. Joint stock land banks, tho organized under federal statutes, are privately owned corporations, organized for profit to their stockholders through the business of making loans on farm mortgages, are not governmental instrumentalities, and are suable in the proper state courts.

Higdon v Bank, 223-57; 272 NW 93

Insolvency — assessment on stock — expiration of charter—effect. The liability of stockholders of a state bank to assessment on their stock is not terminated by the expiration of the charter of the bank.

Bates v Bank, 218-1320; 256 NW 286

9159 Notice of incorporation.

Atty. Gen. Opinions. See '25-26 AG Op 43, 488; AG Op June 29, '39

9161 Commencement of business—conditions.

Atty. Gen. Opinion. See '25-26 AG Op 488

9162 Powers.

Right to question corporate management. The corporate management of a corporation may not be questioned by stockholders who became such subsequent to the acts in question.

Pomeroy v Bank, 203-524; 211 NW 219

Unauthorized assignment of mortgage—ratification. An unauthorized assignment by bank officials of a note and mortgage belonging to the bank is ratified and confirmed by the act of the bank in receiving and retaining the consideration paid by the purchaser for said note and mortgage.

Iowa Convention v Howell, 218-1143; 254 NW 848

Ratification equal to express authorization. A contract under which a debtor-bank agrees to transfer certain assets to a creditor-bank in payment of an indebtedness entered into on behalf of the debtor-bank by its cashier, but without authorization from his board of directors, is valid and enforceable if the debtor-bank, through its board of directors, had full knowledge of the contract, caused or permitted it to be executed, and availed itself of the full benefits thereof.

In re Johnson, 210-891; 232 NW 282

Collections—subagency. A bank which receives a blank-indorsed check from its correspondent bank, with directions to "collect and credit" the correspondent bank, and thereupon conditionally credits the correspondent bank with the amount of the check, and allows the correspondent bank to later withdraw the credit, in the course of business, cannot be deemed the subagent of the original depositor of the check even tho the original depositor, in depositing the check with the first bank, expressly or impliedly authorized said first bank to select a subagent to do the actual collecting; and, on the question of subagency, it is quite immaterial that the check was nonnegotiable.

Thompson v Bank, 207-786; 223 NW 517; 31 NCCA 493

Officer acting in private and personal matter. The acts of an officer of a bank, tho he be a managing officer, in receiving the funds of a relative, and in managing the investment thereof, purely as a personal matter between himself and said relative, imposes no obligation on the bank, even tho the funds are carried on the books of the bank as a matter of convenient bookkeeping. It follows that, upon the insolvency of the bank, the tender to the relative of the investments belonging to him, and found in the bank, carries down any claim of preferential trust against the bank and its receiver.

Andrew v Bank, 212-649; 235 NW 735

Officers—authority—burden of proof. In an action for preferential payment of funds passing through a bank, the plaintiff, if the issue be raised, has the burden to show that the officer receiving the funds was acting in his official capacity and not in a private capacity.

Andrew v Bank, 212-649; 235 NW 735

Collections—negligence—measure of damages. The measure of damages consequent on the negligent failure of a collecting bank to notify the payee of deposited checks of their nonpayment is not, prima facie, the amount of the checks, but such sum or amount as the payee-plaintiff may be able to prove to a reasonable degree of probability he has lost because he was not promptly notified of the nonpayment—not exceeding the amount of said checks. Substantial but conflicting testimony reviewed and held to present a jury question.

Schooler Motor Co. v Bankers Trust, 216-1147; 247 NW 628

9163 Directors—citizenship.

Insolvency—knowledge of officers presumed. Principle reaffirmed that for many purposes the managing officers of a bank will be conclusively presumed to have knowledge of the insolvent condition of their bank.

Leach v Beazley, 201-337; 207 NW 374

Evidence insufficient to establish relation. Agency arises out of contract, express or implied. Stockholder of bank held not bound by

purchase of stock for him by cashier, and charging his account therefor, in view of showing as to cashier's authority.

Andrew v Bank, (NOR); 239 NW 551

Authority to sell realty—jury question. Evidence reviewed and held to present a jury question on the issue whether the cashier of a savings bank had been given actual authority by the board of directors to sell certain real estate belonging to the bank.

Chismore v Bank, 221-1256; 268 NW 137

Cashier—nonimplied authority. A five-year contract involving an expenditure of $500 for advertising a small village bank in a bank directory is not an ordinary contract within the duties of the cashier, but an extraordinary one requiring the authority of the board of directors in order to bind the bank.

Ashland Corp. v Bank, 216-780; 248 NW 336

Director—violation of trust in re tax deed. A director of a bank may not, for his own personal enrichment, take assignment of a tax sale certificate covering land on which the bank of which he is director holds a first mortgage lien, and take tax deed under such certificate. Such deed will, on timely action and proper proof, be set aside and the bank, or its legal representative in case of insolvency, accorded the right to redeem from the tax sale.

Bates v Pabst, 223-534; 273 NW 151

9169 Officers and employees—bonds.

Atty. Gen. Opinion. See AG Op May 10, '39

Authority. An agreement by the president of a bank to pay the note of another party to the bank does not preclude the bank from maintaining an action against the maker of the note, it appearing that the transaction between the president and the maker of the note was purely personal, and was concerning a matter in which the bank had no interest.

McRoberts v Ordway, 206-947; 221 NW 507

Cashier's authority. The cashier of a state bank has no authority to bind the bank by representations to a bank director as to the value of bank assets personally taken over by the director and replaced by the director's personal promissory note.

Andrew v Shimerda, 218-27; 253 NW 845

Authority — presumption. The cashier and general manager of a private bank will be presumed to have authority to enter into a contract of rescission relative to the indorsement of negotiable paper.

Runge v Benton, 205-845; 216 NW 737

Estoppel to dispute president's authority. A bank may not dispute the authority of its president in making or causing to be made an unauthorized charge against a depositor's account, and at the same time claim the benefit of the charge.

Dow v Bank, 202-594; 210 NW 815

Inactive president. The president of an insolvent bank cannot escape the legal consequence of her trusteeship because she was inactive and permitted most of the business to be transacted by other officers.

Andrew v Bank, 207-386; 221 NW 954

Officers and agents—duty to protect assets —filing probate claim. A duty is imposed on bank officers and directors to file a claim against the estate of a deceased bank director when the bank's bills receivable are covered by a guaranty agreement executed by such deceased director.

In re Sterner, 224-617; 278 NW 216

Sale of entire assets of bank.

Oskaloosa Bk. v Bank, 205-1351; 219 NW 530; 60 ALR 1204

Responsibility for worthless loans. The president of a bank is personally liable to the bank for loaning the funds of the bank to persons known by him to be financially irresponsible, and especially so when he secures the approval of the directors as to such loans on the repeated assurance that he is back of said loans and will see that they are paid.

Farmers Bk. v Kaufmann, 201-651; 207 NW 764

Investment for customer—burden of proof. A customer who seeks to hold a bank liable for an investment made for and on his behalf has the burden to show that the officers of the bank through whom he dealt were acting for the bank, and not in their individual or private capacity.

Mehaffy v Bank, 210-116; 230 NW 557; 31 NCCA 728

Guaranty of described bank notes—erroneous description—effect. An officer of a bank who, on demand of the state banking department, guarantees in writing the payment of certain separately described bills receivable belonging to the bank, is not liable on a bill receivable which does not strictly correspond to that described in the guaranty. So held where the difference between the bill receivable in the bank and that described in the guaranty was (1) as to amount, or (2) as to name of debtor, or (3) as to the aggregate amount of several bills receivable.

Andrew v Austin, 213-963; 232 NW 79

Fidelity required — violation. The scrupulous fidelity required by law of an agent to his principal is such that one holding the position of vice president and general manager of a bank and who is personally liable as surety on a discounted promissory note, held by the bank as part of its assets, may not cancel his said liability by the simple expedient of surrendering said note to the principal makers thereof and accepting in renewal a new note executed by all the original parties except himself as surety.

Clapp v Wallace, 221-672; 266 NW 493

Fraudulent abstraction of assets. The president of a bank who, knowing that the bank is insolvent, takes the promissory note of the bank for the amount of her personal deposit plus the amount of an actual loan to the bank, will not be permitted to take and retain assets of the bank as collateral security for the payment of the note, except insofar as said note represents said loan.

Andrew v Bank, 207-386; 221 NW 954

Cashier's shortage—acceptance of benefits.

Community Bk. v Gaughen, 228- ; 289 NW 727

Directors — nonviolation of trust relationship. A bank director who, while the bank is a going concern but allegedly insolvent, transfers and sells his certificate of deposit in the bank to the president thereof, and long subsequent thereto receives payment therefor from said president, or who, under the same conditions, transfers a like certificate to another bank and receives a new certificate in such other bank—the transferred certificate in each instance being promptly cashed by the issuing bank—violates no trust duty which he owes to his bank or to the depositors thereof, there being no evidence whatever that either transaction was other than one in the ordinary course of business.

Andrew v Kelly, 215-408; 245 NW 755; 84 ALR 1488

9175 Voting of stock—stockholder disqualified.

Atty. Gen. Opinions. See '34 AG Op 76, 351

9176 Deposits.

General deposit. The depositing in a bank of money and checks which are at once entered upon the customer's pass book with right to immediately draw against the amount constitutes a general deposit.

Andrew v Bank, 204-1190; 216 NW 723

General deposit—effect. A general deposit of money in a bank necessarily passes to the bank title to the money.

Andrew v Bank, 205-872; 219 NW 62

Deposits — general (?) or special (?). Whether a bank deposit be general or special necessarily depends on the use to which the depositor puts it. Evidence held to show that a deposit was general.

Andrew v Bank, 218-489; 255 NW 871

Deposits—application to debt due bank. The fact that a bank agreed to carry and did carry a portion of a deposit as a special deposit, for the purpose of paying certain contingent prizes offered by the depositor in his business, does not deprive the bank of the right to apply said special deposit on its matured claim against the depositor—subject, of course, to the rights of the prize winners, if any.

Peterson v Bank & Trust, 219-699; 259 NW 199

Deposits received on condition—violation—effect. A bank which receives cash, checks, and notes on the agreed condition that said receipts will be held intact, and not placed in the general assets of the bank, and will be returned intact on the happening of a named event, must respect and comply with the condition, even tho at the time the bank has enforceable financial obligations against the parties delivering the property. And, in case of violation of the condition and in case of insolvency, the claimants will be entitled to an order on the receiver for restitution, or for preferred payment out of the funds on hand at the time of insolvency, or for such other relief as will be equitable and possible under the circumstances.

Andrew v Bank, 218-1313; 256 NW 292

Bank deposit for particular purpose. A trust fund is created by depositing money in a bank with the definite understanding and agreement at the time between the depositor and the bank that said deposit is for the specific purpose of paying a certain check thereafter to be drawn in a named amount.

Townsend v Bank, 212-1078; 237 NW 356

Deposit account for contest winners—nontrust. A "special account" is not a "special deposit" and does not change the relationship of debtor and creditor existing between a corporation and its banker and does not constitute a trust for the benefit of undetermined contest winners, who, however, had they been so determined, would merely have a prior lien on said deposit.

Bielen v Bank, 224-19; 276 NW 25

Deposit may constitute loan. A deposit of money in a bank for a fixed period of time constitutes a loan.

In re Fahlin, 218-121; 254 NW 296

Bank deposits bonded—time deposits excluded—nonliability. A surety on a bond covering bank deposits, but excluding "indebtedness not subject at all times to immediate withdrawal", held not liable for amount of depositor's savings account, where depositor also had checking account and bank's bylaws reserved right to notice of withdrawals of savings deposits as provided by state statute.

U. S. Guarantee Co. v Walsh Const. Co., 67 F 2d, 679

Title to deposited drafts. The act of a consignor in drawing against a consignee a draft (with bill of lading attached) in favor of a bank, and depositing the same in said bank and receiving credit on his checking account to the full amount thereof, constitutes the bank the unqualified owner of the draft and of the proceeds thereof, notwithstanding the fact that at a later time the consignor recognized the right

of the consignee-drawee to a reduction on the draft, and requested the bank to make such reduction, and the bank voluntarily complied with the request.

Dubuque Fruit Co. v Emerson & Co., 201-129; 206 NW 672

Termination of trust relationship. Where a bank deposit was made for the sole purpose of enabling the depositor to procure a certified check for use in bidding on a public improvement, with the understanding that if the depositor was not awarded the contract he would surrender the certified check and receive a draft for the amount of the deposit, held, that no trust relationship existed after the depositor surrendered his certified check and in return received a draft for the amount of his deposit.

Andrew v Bank, 215-1336; 245 NW 226

Management and disposal of trust property —legal deposit (?) or illegal investment (?). A deposit by a trustee of trust funds in a savings bank, at a stated rate of interest but with the legal right to withdraw said deposit at any time, does not constitute an "investment" within the meaning of §12772, C., '31.

In re Moylan, 219-624; 258 NW 766

Trusts—pleading—essential allegation. In an action to establish a bank deposit as a trust fund, an allegation as to the trust character of the deposit is all-essential.

Peterson v Bank & Trust, 219-699; 259 NW 199

Change in relation between bank and depositor. A bank depositor wholly ceases to be the creditor of the bank when he turns over his deposit to one of the officers of the bank in furtherance of a personal undertaking in which the bank has no interest whatever.

Leach v Bank, 200-954; 205 NW 790

Wrongful deposit of public funds—preference. A deposit in a bank of municipal pension funds (police and firemen) under conditions which deprive the trustees of the power to immediately withdraw said funds is wrongful, and being wrongful the trustees do not lose title to said funds. It follows that in case the bank becomes insolvent, the deposit is entitled to preferential payment from the cash on hand at the time of insolvency.

Andrew v Bank, 222-881; 270 NW 465

Nonpreferential deposits. Record reviewed and held that bank deposits in an insolvent bank were attended by no circumstances that justified a preference in payment.

Bates v Bank, 222-1323; 271 NW 638

Nonright to charge back. A bank which credits its depositor with the amount of a check on another bank, and on clearance surrenders such check to the drawee-bank, and receives in payment thereof the drawee's draft, may not, on the nonpayment of the draft, charge back to the depositor any part of said check, even tho said bank had posted a rule authorizing it so to do, but of which rule the depositor had no knowledge.

Virtue v Bank, 205-392; 218 NW 58; 31 NCCA 461

Deposits—best and secondary evidence. The books of a bank constitute the best evidence of the deposits of estate funds by the administrator—not what appears to be deposit slips and letters of the bank relative thereto.

Varga v Guar. Co., 215-499; 245 NW 765

Bank charged with converted receipts.

Peterson v Citizens Bk., 228- ; 290 NW 546

9177 Payment.

Discussion. See 2 ILB 36—Deposits—unmatured claims set off

Fictitious payee. The absolute duty of a bank, before it pays its depositor's check, to know that the payee's indorsement is genuine, and to pay only on such genuine indorsement, applies to a check which the depositor has unwittingly and without negligence made payable to a fictitious person.

McCornack v Bank, 203-833; 211 NW 542; 52 ALR 1297

Unintended payee. When a check is unwittingly made payable to a fictitious payee, and delivered to the assumed and supposed agent of such fictitious payee, and the supposed agent indorses the check in the name of the payee and receives the money thereon, it may not be said that the money was paid to the very person to whom the drawer intended it to be paid.

McCornack v Bank, 203-833; 211 NW 542; 52 ALR 1297

Unintended payee. The drawer of a check who unwittingly and without negligence makes it payable to a fictitious person to whom he supposed he was making a loan may not be said to have intended payment to be made to the supposed agent of the named payee (to whom it was delivered) because said supposed agent was, without the knowledge of said drawer, doing business in the name of such fictitious payee.

McCornack v Bank, 203-877; 211 NW 561

Payment on forged indorsement. Evidence reviewed, in an action by a depositor against a bank to recover the amount paid by the bank on a forged indorsement and charged to the depositor's account, and held amply to support a finding that the depositor was not guilty of any negligence which prejudiced the bank.

McCornack v Bank, 207-274; 222 NW 851

Negligence not imputable to state. Negligence and laches of public officers in the handling of state funds are not imputable to the state; for instance, in an action to recover from a drawee-bank the amount paid by the

bank on a forged indorsement of a check drawn by a county treasurer against state school funds on deposit with said drawee, it is no defense that the county treasurer was negligent in drawing or delivering the check, or that county officers generally were negligent in not making early discovery of the forged indorsement, and notifying the drawee accordingly.

New Amst. Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

Inadvertently paid check. A drawee of a check may recover of the payee the amount inadvertently paid on the check at a time when the payee knew that the drawer had no funds on deposit with the drawee—knew that the drawer had gone into the hands of a receiver and that his deposit had been transferred to the receiver.

Bankers Tr. Co. v Reg. Co., 200-1014; 205 NW 838

Excessive interest-bearing certificates. A certificate of deposit issued by a savings bank is not illegal because made to draw an apparently very high rate of interest, to wit, seven and one-half percent, nor because part of the interest is paid the depositor in advance, the directors never having fixed any rate of interest on such certificates.

Murray v Bank, 201-1325; 207 NW 781
See Partch v Krogman, 202-524; 210 NW 612

Interest paid in advance—receivership—effect. In case interest is paid a depositor in advance, the termination of the accrual of all interest by the appointment of a receiver necessitates the charging of the deposit with the amount of unearned interest.

Murray v Bank, 201-1325; 207 NW 781

Pass book—ambiguity—parol to explain. A pass book issued by a savings bank to a depositor and containing certain printed provisions governing deposits, but silent as to the date when the deposit was payable, and carrying the indorsement "Maytag Employee's Special Savings Account", creates such ambiguity (assuming that the printed provisions embraced the full agreement) as to justify the reception of parol evidence to explain the ambiguity.

Popofsky v Wearmouth, 216-114; 248 NW 358
See In re Olson, 206-706; 219 NW 401

Manipulation of deposit not constituting payment. Evidence relative to the surrender by a depositor to his bank of certificates of deposit issued by the bank, reviewed and held not to reveal payment of said certificates; also held that a subsequently dated certificate of deposit issued by the bank to said depositor was intended to be, and was, but a continuation of the former unpaid deposit.

Bates v Bank, 221-1251; 268 NW 74

Certificate of deposit—permissible impairment. A bank depositor may not successfully claim that his certificate of deposit was unconstitutionally impaired by a later, state-approved, good-faith, bank reorganization (in which he did not join) under which all claimants (claims over $10) were given equal but less favorable terms of payment than their contracts originally contemplated, when, at the time of his deposit, the statute law contemplated and substantially provided for such reorganization and change in terms of payment; and if the actual reorganization was effected under later statutes amplifying the said former ones, the answer is that he was dealing with a quasi-public corporation, and that his contract of deposit must reasonably yield to the police power in the interest of the public generally, especially in an emergency resulting from a great financial depression.

Priest v Whitney Co., 219-1281; 261 NW 374

Unauthorized charge against deposit. A bank must pay out its depositors' funds strictly as directed by the depositor. Evidence reviewed, relative to an unauthorized charge against a deposit, and held that the depositor was not estopped to question such charge, nor was he negligent in reference thereto, nor had he ratified said charge.

Dow v Bank, 202-594; 210 NW 815

Unauthorized payment. A depositor is not bound to anticipate that his banker will wrongfully make payment from the deposit, and is under no obligation to call for his pass book in order to determine whether such payment has been made.

Dow v Bank, 202-594; 210 NW 815

Acquiescence in bank statements—effect.

State Bank v Cooper, 201-225; 205 NW 333

9178 Regulations—posting.

Failure to post—effect. Tho rules and regulations relative to the payment by a bank of deposits are not conspicuously posted in the office of the bank, as required by statute, yet, if the depositor in question has personal knowledge of the unposted rules, he will be bound thereby.

Andrew v Bank, 222-881; 270 NW 465

Deposits—nonright to charge back. A bank which credits its depositor with the amount of a check on another bank, and on clearance surrenders such check to the drawee-bank, and receives in payment thereof the drawee's draft, may not, on the nonpayment of the draft, charge back to the depositor any part of said check, even tho said bank had posted a rule authorizing it so to do, but the depositor had no knowledge of this rule.

Virtue v Bank, 205-392; 218 NW 58; 31 NCCA 461

9179 Notice of withdrawal.

Deposits payable on demand—exception. A deposit of trust funds in a savings bank, tho at a stated rate of interest, is legally with-

drawable at the pleasure of the trustee unless the bank, prior to the deposit, has adopted and promulgated a rule requiring a 60-day notice of withdrawal as authorized by this section.

In re Moylan, 219-624; 258 NW 766

Bank deposits bonded—time deposits excluded—nonliability. A surety on a bond covering bank deposits, but excluding "indebtedness not subject at all times to immediate withdrawal", held not liable for amount of depositor's savings account, where depositor also had checking account and bank's bylaws reserved right to notice of withdrawals of savings deposits as provided by state statute.

U. S. Guarantee Co. v Walsh Const. Co., 67 F 2d, 679

9181 Demand certificates.

Authority to issue. The issuance of time certificates of deposit by savings banks is clearly contemplated by our statutes.

Murray v Bank, 201-1325; 207 NW 781

Wrongful issuance—timely repudiation. A party to whom a bank, without authority, has issued a certificate of deposit in payment of a claim due from the bank, may not be deemed estopped to repudiate such certificate, or be deemed to have ratified the issuance of such certificate, when his repudiation was reasonably prompt, and when no injury resulted to the bank or to its receiver from any delay in repudiating.

Andrew v Bank, 217-232; 251 NW 860

Illegal issuance. Certificates of deposit issued by a savings bank in payment or exchange for promissory notes when the bank has no funds with which to pay for the notes are absolutely void in the hands of any holder.

Sweet v Bank, 200-895; 205 NW 470

9183 Investment of funds.

Atty. Gen. Opinions. See '25-26 AG Op 191; '34 AG Op 228, 645

Unlawful investment—bank's general right to set-off. The fact that a bank unlawfully invests its funds in securities not permitted by law as proper bank investments does not prevent the receiver of the bank from offsetting the amount of said securities against the deposit of the party who is obligated to pay said securities; and this is true even tho the bank was a mortgagee for the benefit of holders generally of said securities.

Andrew v Bank, 218-489; 255 NW 871

9183.3 Investments by state banks and trust companies.

Atty. Gen. Opinion. See '34 AG Op 228

9184 Commercial paper.

Discussion. See 16 ILR 85—Drafts taken in payment of checks; 19 ILR 338—Bank as purchaser of paper

Atty. Gen. Opinions. See '25-26 AG Op 158; '34 AG Op 228

Public policy—agreement to repurchase note and mortgage. A contract on the part of a trust company to repurchase a note and mortgage sold by it is not against public policy, it appearing that the company was organized to deal in commercial paper and, inter alia, to receive time deposits and issue drafts on its depositories.

Hawkeye Ins. v Cent. Trust, 210-284; 227 NW 637

Rights and liabilities on indorsement or transfer—negotiable certificate of deposit as payment. A bank which issues and delivers its negotiable certificate of deposit in exchange for an unmatured negotiable promissory note then and thereby effects full payment for the note, within the meaning of the negotiable instrument law.

People's Bank v Smith, 210-136; 230 NW 565; 69 ALR 399

Insolvency—right to transfer note. A bank which is a going concern, but insolvent, and known by all its officers to be insolvent, may, for full value, validly transfer a promissory note held by it, to a transferee who knows of such insolvency, even tho the incidental effect of such transfer may be to deprive the maker of said note of his right to offset against said note the amount of his deposit in said insolvent bank at the time of the transfer.

Ottumwa Bank v Crawford, 215-1386; 244 NW 674

Issuance of certificate of deposit in payment of note—validity. A certificate of deposit issued by a savings bank in payment of a negotiable promissory note constitutes a payment of value for the note, it appearing that the bank at the time had ample funds on hand for the purchase of said note; and this is true tho the directors had never authorized the purchase in such manner.

Andrew v Peterson, 214-582; 243 NW 340

Bank's obligation on depositor's check. A bank which agrees to pay checks issued from time to time by an insolvent livestock dealer for stock purchased, and to reimburse itself from the sight drafts drawn from time to time by the dealer when reselling the stock, and which, for a time, carries out the arrangement and encourages its continuance, and, in part, applies the proceeds of such sight drafts to the discharge of other obligations of the dealer in which the bank is financially interested, may not, after taking over sight drafts covering certain resales with knowledge that unpaid checks for said stock were outstanding, apply

the proceeds of said drafts to an overdraft against the dealer, and thereby shift the loss to the unpaid check holder. On the contrary, the bank must be held, impliedly, to have agreed to loan to the dealer money sufficient to pay said outstanding checks. In other words the bank is obligated to pay said checks.

Pascoe v Bank, 217-205; 251 NW 63

Payment of funds to one with apparent authority to collect. When the plaintiff gave a third party his passbook to be used to withdraw an account from an Italian bank, and the third party used the passbook to secure a personal note given to the defendant bank through which the exchange transaction was made, the bank was not liable for using the funds received from the Italian bank as payment of the note, when it might have thought that the note was given to obtain an advance for the plaintiff, and had no knowledge of wrongdoing, and previous transactions indicated an apparent authority to transact the business in such manner.

Matalone v Bank, 226-1031; 285 NW 648

9192 Shares—transfers.

Atty. Gen. Opinions. See '25-26 AG Op 272; '34 AG Op 710

Guaranty—long-continued mutual construction. The mutual construction which parties have for years placed on a guaranty against loss on bank stock, arising from the uncollectibility of bank loans, is very, very influential with the court, especially when the definite and comprehensive terms of the guaranty support said mutual construction.

Nelson v Hamilton, 213-1231; 240 NW 738

Stock, subscription for—payment—trust relation. One who subscribes for corporate shares of stock, pays therefor, and receives a valid receipt evidencing such payment may not claim that he continued to retain title to the money because no certificate of stock was issued to him.

Andrew v Bank, 219-921; 258 NW 911

Issuance of stock—estoppel. One, who has explicit knowledge of the facts under which corporate shares of stock were issued to him and later accepts and retains a dividend paid on the stock, will not, at least as against creditors of the corporation, be heard to say that the stock was improperly issued to him.

Andrew v Bank, 219-939; 258 NW 925

Double liability—bank official's wife—stock transfer to husband. Where a wife transfers her bank stock to her husband, a bank officer, who informed other bank officials thereof, who contributed to the insolvent bank on a basis including this stock and who personally, instead of by proxy as previously, voted this stock, he was in fact the actual owner of bank stock, even tho it had not been transferred to him on the bank's books, and the double liability assessment is not recoverable from the wife.

Bates v Bank, 223-1215; 275 NW 91

9193 Deposits—to whom payable.

Relation between bank and depositor. Principle reaffirmed that the deposit of money in a bank creates the relation of debtor and creditor, and not that of borrower and lender.

Leach v Beazley, 201-337; 207 NW 374

Deposit may constitute loan. A deposit of money in a bank for a fixed period of time constitutes a loan.

In re Fahlin, 218-121; 254 NW 296

General deposit—effect. A general deposit of money in a bank necessarily passes to the bank title to the money.

Andrew v Bank, 205-872; 219 NW 62

What constitutes general deposit. A general, and not a special or specific, deposit is shown by proof that a buyer and shipper of stock (who was also engaged in two other different lines of business) had but one bank deposit account, and that in buying stock he simply delivered his bank check to the seller, and then, as a general course of business, shipped the stock in the name of his bank, which thereupon at his direction, drew on the consignee, and credited the shipper's deposit with the amount of the draft, thereby creating a deposit credit out of which any and all checks issued by the shipper, whether for stock purchases or otherwise, would be paid, if and when presented; and this is true even tho the bank knew that the particular purpose in the mind of the shipper was to protect his outstanding checks for purchases of stock.

Andrew v Bank, 205-888; 219 NW 53

Deposits — general (?) or special (?). Whether a bank deposit be general or special necessarily depends on the use to which the depositor puts it.

Andrew v Bank, 218-489; 255 NW 871

Presumption. Deposits are presumed to be general, in the absence of testimony to the contrary.

Andrew v Bank, 205-872; 219 NW 62

Pension money as special or specific deposit. A deposit in a bank may not be deemed either a "special" or a "specific" deposit, and therefore entitled to a preference in payment, from the naked fact that the subject-matter of the deposit was pension money of the depositor's, especially when the deposit was evidenced by a time certificate.

Andrew v Bank, 205-872; 219 NW 62

Special deposit superior to garnishment. Money deposited or caused to be deposited by a depositor in a bank for the sole use and

benefit of a bona fide creditor of the depositor, and under an agreement to that effect between the depositor and said creditor, of which arrangement the bank had full knowledge, constitutes a special deposit. It follows that a subsequent garnishment of the fund is subject to the prior rights of the creditor for whom the deposit was made.

Hamilton v Imes, 216-855; 249 NW 135

Special deposits—evidence—sufficiency. Evidence held insufficient to show that a deposit was made for the special purpose of meeting payment on a particular draft, or was made under such circumstances that the issuance of the draft effected a pro tanto equitable assignment of the deposit.

Heckman v Bank, 208-322; 223 NW 164

Certificate of deposit. Parol evidence is admissible to show that a time certificate of deposit was accompanied by a collateral oral agreement between the depositor and the bank to the effect that the bank would pay the certificate on demand.

In re Olson, 206-706; 219 NW 401

See Popofsky v Wearmouth, 216-114; 248 NW 358

Purchase price—escrow deposit—ownership. The purchaser of land who, on the day of performance, and with the knowledge and acquiescence of the vendor, and pending the perfecting and delivering of the deed, goes into possession, and deposits the purchase money in a bank, on condition that it be paid to the vendor when the deed is perfected and delivered, and himself retains the evidence of such deposit until he receives the deed, must be held to be the owner of the deposit and to suffer the loss which results from the subsequently discovered fact that the bank, immediately after receiving the deposit, dissipated it, the bank being then, without the knowledge of both parties, insolvent.

Bolte v Schenk, 205-834; 210 NW 797

Deposits—stated account. Principle reaffirmed that the monthly and customary statement of a bank to its customer of the condition of the customer's account becomes an account stated after the lapse of a reasonable time without objection by the customer.

Pierce & Gamet v Bank, 213-1388; 239 NW 580

Certificate of deposit not collected from insolvent bank—executor a bank director. A finding by the trial court that loss to an estate through the failure to collect on a certificate of deposit belonging to the estate was not caused by the fault of the executor was sustained by evidence that the executor who was a director of the bank on which the certificate was drawn, but took no active part in the management of the bank and did not know it was insolvent, had properly presented the certificate for payment and had been refused because of the insolvency of the bank.

In re Smith, 228- ; 289 NW 694

Administrator—surety—liability—disobeying order of court. An administrator and the surety on his bond are liable for a shortage in estate funds occasioned by the failure of the administrator's own private bank in which the funds were deposited, the administrator having been ordered by the court prior to the insolvency of said bank to remove the funds to another depository, and, while able to comply with said order, had neglected so to do.

In re Kendrick, 214-873; 243 NW 168

Administrator—disobeying order of court—unallowable defense. An administrator who disobeys an order of court as to the bank in which he should deposit estate funds may not, in case of loss, plead in defense that, had he complied with the order, his own private bank in which the funds in fact were on deposit would have been rendered insolvent.

In re Kendrick, 214-873; 243 NW 168

Administrator's bank account — decedent's debt—no offset. Receiver of insolvent bank held unauthorized to set off amount of checking account standing in name of administrator against indebtedness owing to bank by intestate where, immediately on appointment of administrator, checking account passed to administrator who added to account by deposits at various times and drew checks against account until closing of bank.

In re Schwarting, (NOR); 257 NW 189

Right to offset on debt to bank. A bank may apply the deposit of a deceased depositor on the promissory note of the depositor to the bank, even tho such note is barred by the statute of limitation.

Merritt v Peterson, 208-672; 222 NW 853

Deposits by guardian without order of court —effect. A deposit in a bank by a guardian of guardianship funds, as a loan, without a directing or approving order of court, is wrongful, and the bank at once becomes a trustee of the fund for the benefit of the ward.

Andrew v Bank, 207-394; 223 NW 249

Guardian—proper plaintiff. The guardian is the proper plaintiff in an action to recover the property of the minor, even tho the matter is one in which the minor had assumed to act for himself.

McFerren v Bank, 214-198; 238 NW 914

Payment of funds to one with apparent authority to collect. When the plaintiff gave a third party his passbook to be used to withdraw an account from an Italian bank, and the third party used the passbook to secure a personal note given to the defendant bank through which the exchange transaction was made, the bank was not liable for using the funds re-

ceived from the Italian bank as payment of the note, when it might have thought that the note was given to obtain an advance for the plaintiff, and had no knowledge of wrongdoing, and previous transactions indicated an apparent authority to transact the business in such manner.

Matalone v Bank, 226-1031; 285 NW 648

Forged indorsement—burden of proof. A drawee-bank, when sued for paying a check on a forged indorsement, must affirmatively establish prejudice as a result of the failure of the drawer to give notice of the forged indorsement upon the discovery thereof.

New Amst. Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

Fraudulent dissipation—nonliability of bank. A bank is not responsible to its depositor for the fraudulent conduct of the depositor's employee, aided by an employee of the bank, in fraudulently withdrawing from the bank the funds of the depositor, on checks which the depositor's employee had specific written authority to draw to himself personally, when the bank had no knowledge or reason to know of any of said wrongdoings.

Pierce & Gamet v Bank, 213-1388; 239 NW 580

Wrongful issuance of certificate—repudiation. A party to whom a bank, without authority, has issued a certificate of deposit, in payment of a claim due from the bank, may not be deemed estopped to repudiate such certificate, or be deemed to have ratified the issuance of such certificate, when his repudiation was reasonably prompt, and when no injury resulted to the bank or to its receiver from any delay in repudiating.

Andrew v Bank, 217-232; 251 NW 860

Dissolution — nonpreference in deposits. Principle reaffirmed that, in the settlement of the affairs of an insolvent state bank, the deposit of a municipal corporation has no preference over other deposits. (§9239, C., '24.)

Leach v Bank, 201-346; 207 NW 331

Insolvency—claims — general deposit—nontrust relationship. Where receipts from sale of livestock in Chicago were remitted to local bank, which in turn entered the remittance as a deposit for local livestock shipping association, held that association was not entitled to preference on its claim in receivership proceeding of the local bank, there being no element of trust involved in the transaction and the fund being simply a general deposit.

Leach v Bank, (NOR); 212 NW 390

Notice—coparties. In an action by a municipality against the receiver of an insolvent bank and its surety, to obtain a preference in the payment of the municipal deposit, an appeal from the decree granting the prayer on the plea of both plaintiff and the surety will be dismissed when no notice of appeal is had upon the surety.

Independent Dist. v Bank, 204-1; 213 NW 397

Waiver by depositors—effect on nonsigners. The act of a majority of the depositors of a bank (owning a large majority of the deposits) in signing waivers deferring payment of their deposits, in order to preserve the bank as a going concern, cannot be deemed the legal equivalent of an express agreement on their part that the depositors who do not sign such waivers shall be paid in full before such signers are paid; nor can such signing be deemed prejudicial to the nonsigners; nor, by such signing, can said signers be deemed to have lost their status as depositors and thereby become mere lenders of money to the bank.

Andrew v Bank, 216-739; 249 NW 768; 88 ALR 1003

Bank deposits bonded—time deposits excluded—nonliability. A surety on a bond covering bank deposits, but excluding "indebtedness not subject at all times to immediate withdrawal", held not liable for amount of depositor's savings account, where depositor also had checking account and bank's bylaws reserved right to notice of withdrawals of savings deposits as provided by state statute.

U. S. Guarantee Co. v Walsh Const. Co., 67 F 2d, 679

9199 Pre-existing obligations.

Dissolution—wholesale transfer of assets—right of creditors. A good-faith transfer by a going bank of substantially all its assets, and a good-faith acceptance of such transfer by the transferee under an agreement by the transferee to pay all record depositors, do not impose on the transferee liability to pay a nonrecord depositor when the transferred assets prove insufficient to pay the record depositors, and the transferor is not shown to have been insolvent at the time of the transfer.

Garvey v Trust Co., 214-401; 239 NW 518

CHAPTER 414

STATE BANKS

Atty. Gen. Opinions. See '36 AG Op 28, 213, 666

9202 "State banks" defined.

Insolvency—right to transfer note. A bank which is a going concern, but insolvent, and known by all its officers to be insolvent, may, for full value, validly transfer a promissory note held by it, to a transferee who knows of such insolvency, even tho the incidental effect of such transfer may be to deprive the maker of said note of his right to offset against said note the amount of his deposit in said insolvent bank at the time of the transfer.

Ottumwa Bank v Crawford, 215-1386; 244 NW 674

Deposits received on condition—violation—effect. A bank which receives cash, checks, and notes on the agreed condition that said receipts will be held intact, and not placed in the general assets of the bank, and will be returned intact on the happening of a named event, must respect and comply with the condition, even tho at the time the bank has enforceable financial obligations against the parties delivering the property. And, in case of violation of the condition and in case of insolvency, the claimants will be entitled to an order on the receiver for restitution, or for preferred payment out of the funds on hand at the time of insolvency, or for such other relief as will be equitable and possible under the circumstances.

Andrew v Bank, 218-1313; 256 NW 292

Certificate of deposit—permissible impairment. A bank depositor may not successfully claim that his certificate of deposit was unconstitutionally impaired by a later, state-approved, good-faith, bank reorganization (in which he did not join) under which all claimants (claims over $10) were given equal but less favorable terms of payment than their contracts originally contemplated, when, at the time of his deposit, the statute law contemplated and substantially provided for such reorganization and change in terms of payment; and if the actual reorganization was effected under later statutes amplifying the said former ones, the answer is that he was dealing with a quasi-public corporation, and that his contract of deposit must reasonably yield to the police power in the interest of the public generally, especially in an emergency resulting from a great financial depression.

Priest v Whitney Co., 219-1281; 261 NW 374

Transfer of stock after expiration of charter—effect. When the charter of a bank expires, the legal existence of the corporation terminates. Likewise terminates the legal right to transfer the stock in such sense that the transferor ceases to be a stockholder.

Andrew v Bank, 211-649; 234 NW 542

9203 Other use of name prohibited.

Atty. Gen. Opinion. See '30 AG Op 162

9204 Incorporation — articles — contents.

Right to question corporate management. The corporate management of a corporation may not be questioned by stockholders who became such subsequent to the acts in question.

Pomeroy v Bank, 203-524; 211 NW 219

Proof of incorporation. A copy of the articles of incorporation of a banking corporation, duly certified by the secretary of state, is sufficient proof of such incorporation.

State v Niehaus, 209-533; 228 NW 308

Authority—presumption. The cashier and general manager of a private bank will be presumed to have authority to enter into a contract of rescission relative to the indorsement of negotiable paper.

Runge v Benton, 205-845; 216 NW 737

Joint stock land banks—legal status. Joint stock land banks, tho organized under federal statutes, are privately owned corporations, organized for profit to their stockholders through the business of making loans on farm mortgages, are not governmental instrumentalities, and are suable in the proper state courts.

Higdon v Bank, 223-57; 272 NW 93

Officers—authority—burden of proof. In an action for preferential payment of funds passing through a bank, the plaintiff, if the issue be raised, has the burden to show that the officer receiving the funds was acting in his official capacity and not in a private capacity.

Andrew v Bank, 212-649; 235 NW 735

Officer acting in private and personal matter. The acts of an officer of a bank, tho he be a managing officer, in receiving the funds of a relative, and in managing the investment thereof, purely as a personal matter between himself and said relative, imposes no obligation on the bank, even tho the funds are carried on the books of the bank as a matter of convenient bookkeeping. It follows that, upon the insolvency of the bank, the tender to the relative of the investments belonging to him, and found in the bank, carries down any claim of preferential trust against the bank and its receiver.

Andrew v Bank, 212-649; 235 NW 735

Release or subordination of mortgage—authority of president. A corporation is bound by the act of its president in subordinating its

mortgage to another mortgage, (1) when the president is expressly authorized by the articles of incorporation to release and satisfy such mortgages, (2) when the president first executed, on adequate consideration, a written release and subordination without the corporate seal being attached, and later confirmed said act by a new release and subordination with said seal attached, and (3) when the corporation at all times intended so to subordinate its mortgage.

Homesteaders Life v Salinger, 212-251; 235 NW 485

9205 Record and notice of incorporation.

Atty. Gen. Opinion. See AG Op June 29, '39

9209 Shares.

Atty. Gen. Opinion. See '34 AG Op 710

Issuance of stock—estoppel to question. One, who has explicit knowledge of the facts under which corporate shares of stock were issued to him and later accepts and retains a dividend paid on the stock, will not, at least as against creditors of the corporation, be heard to say that the stock was improperly issued to him.

Andrew v Bank, 219-939; 258 NW 925

Subscription for—payment—trust relation. One who subscribes for corporate shares of stock, pays therefor, and receives a valid receipt evidencing such payment may not claim that he continued to retain title to the money because no certificate of stock was issued to him.

Andrew v Bank, 219-921; 258 NW 911

9210 Directors.

Cashier—nonimplied authority. A 5-year contract involving an expenditure of $500 for advertising a small village bank in a bank directory is not an ordinary contract within the duties of the cashier, but an extraordinary one requiring the authority of the board of directors in order to bind the bank.

Ashland Towson v Bank, 216-780; 248 NW 336

Corporate contract—unallowable rescission. A stockholder may not rescind a contract entered into by the corporation of which he is a stockholder and another corporation.

Andrew v Bank, 219-921; 258 NW 911

Directors—nonliability. The director of a corporation is not liable, to a person dealing with the corporation, for mere nonfeasance—naked inaction as a director. So held where the director of a bank took no action with reference to the practice of the bank in commingling trust funds with the general funds of the corporation.

Proksch v Bettendorf, 218-1376; 257 NW 383; 38 NCCA 292

Directors—nonviolation of trust relationship. A bank director who, while the bank is a going concern but allegedly insolvent, transfers and sells his certificate of deposit in the bank to the president thereof, and long subsequent thereto receives payment therefor from said president, or who, under the same conditions, transfers a like certificate to another bank and receives a new certificate in such other bank,—the transferred certificate in each instance being promptly cashed by the issuing bank,—violates no trust duty which he owes to his bank or to the depositors thereof, there being no evidence whatever that either transaction was other than one in the ordinary course of business.

Andrew v Kelly, 215-408; 245 NW 755; 84 ALR 1488

Director—violation of trust in re tax deed. A director of a bank may not, for his own personal enrichment, take assignment of a tax sale certificate covering land on which the bank of which he is director holds a first mortgage lien, and take tax deed under such certificate. Such deed will, on timely action and proper proof, be set aside and the bank, or its legal representative in case of insolvency, accorded the right to redeem from the tax sale.

Bates v Pabst, 223-534; 273 NW 151

Fraudulent abstraction of assets. The president of a bank who, knowing that the bank is insolvent, takes the promissory note of the bank for the amount of her personal deposit plus the amount of an actual loan to the bank, will not be permitted to take and retain assets of the bank as collateral security for the payment of the note, except insofar as said note represents said loan.

Andrew v Bank, 207-386; 221 NW 954

Inactive president. The president of an insolvent bank cannot escape the legal consequence of her trusteeship because she was inactive and permitted most of the business to be transacted by other officers.

Andrew v Bank, 207-386; 221 NW 954

Liability of bank president. The board of directors of a state bank, not the president of the bank, is the statutory governing body of the bank. Evidence reviewed in detail and held to reveal no neglect of the president which rendered him personally liable to the bank for damages suffered by the bank consequent on customers being permitted, to the knowledge of the directors, to overdraw their accounts, it appearing, inter alia, that the president's efforts to prevent such overdrafts were secretly frustrated by other officers of the bank, appointed by the board.

Bates v Seeds, 223-70; 272 NW 515

Right to contract for payment of debts. A good-faith contract by the board of directors of a state bank, for and on behalf of the bank, and providing for the payment of the bank's

debts incurred in the operation of the bank, is valid without any approval by the stockholders of the bank.

Andrew v Bank, 216-252; 249 NW 352; 89 ALR 783

Sale of entire assets. The board of directors of an insolvent banking corporation which is on the verge of complete financial collapse has power to sell en masse the assets of the corporation without the consent of the stockholders, and especially when the directors own a majority of the stock.

Oskaloosa Bank v Bank, 205-1351; 219 NW 530; 60 ALR 1204

CHAPTER 415

GENERAL PROVISIONS RELATING TO BANKS AND TRUST COMPANIES

Atty. Gen. Opinions. See '28 AG Op 233; '32 AG Op 46; '34 AG Op 117

9217.2 Directors—eligibility.

Mortgage of director—guaranty by bank. Evidence quite exhaustively reviewed and held insufficient to establish a contract of guaranty of payment by a bank of the personal mortgage of a director.

Lindburg v Engster, 220-1073; 264 NW 31; 116 ALR 591

Knowledge of insolvency—not imputable to nonactive director. Knowledge that a bank is insolvent is not imputed to one who is a director and minor stockholder of the bank, when he takes no active part in its management and has no actual knowledge of the insolvency.

In re Smith, 228- ; 289 NW 694

Certificate of deposit not collected from insolvent bank—executor a bank director. A finding by the trial court that loss to an estate through the failure to collect on a certificate of deposit belonging to the estate was not caused by the fault of the executor was sustained by evidence that the executor who was a director of the bank on which the certificate was drawn, but took no active part in the management of the bank and did not know it was insolvent, had properly presented the certificate for payment and had been refused because of the insolvency of the bank.

In re Smith, 228- ; 289 NW 694

9217.3 Bonds of officers and employees.

Director's personal note. The cashier of a state bank has no authority to bind the bank by representations to a bank director as to the value of bank assets personally taken over by the director and replaced by the director's personal promissory note.

Andrew v Shimerda, 218-27; 253 NW 845

Guaranty of described bank notes—erroneous description—effect. An officer of a bank who, on demand of the state banking department, guarantees in writing the payment of certain separately described bills receivable belonging to the bank, is not liable on a bill receivable which does not strictly correspond to that described in the guaranty. So held where the difference between the bill receivable in the bank and that described in the guaranty was (1) as to amount, or (2) as to name of debtor, or (3) as to the aggregate amount of several bills receivable.

Andrew v Austin, 213-963; 232 NW 79

Bank charged with converted receipts.

Peterson v Citizens Bk., 228- ; 290 NW 546

Fidelity required — violation. The scrupulous fidelity required by law of an agent to his principal is such that one holding the position of vice president and general manager of a bank and who is personally liable as surety on a discounted promissory note, held by the bank as part of its assets, may not cancel his said liability by the simple expedient of surrendering said note to the principal makers thereof and accepting in renewal a new note executed by all the original parties except himself as surety.

Clapp v Wallace, 221-672; 266 NW 493

Unallowable defense. It is no defense on the part of one of two sureties on the bond of a public officer that said officer, while so acting, was also acting as cashier of a bank; that, as cashier, he was short in his account with the bank; that said other surety was also surety on the private bond of the cashier; and that said other surety and said cashier conspired to use and did use the public funds with which to make good the cashier's shortage to the bank.

School Dist. v Sass, 220-1; 261 NW 30

9220 Loans to officers or employees—use of funds.

Oral guaranty by bank of payment of director's mortgage. Testimony that a bank, acting through its board of directors, orally guaranteed the payment of the personal mortgage of one of said directors, is incompetent under the statute of frauds.

Lindburg v Engster, 220-1073; 264 NW 31; 116 ALR 591

9221.1 Unsecured loans—conditions.

Money lent—contract for repayment. One seeking to recover money loaned must prove a contract express or implied for its repayment.

In re Green, 227-702; 288 NW 881

9221.2 Owning or loaning on its own stock—prior lien of bank.

Payment of voluntary assessment on bank stock owned by estate. An administrator is properly given credit for paying a voluntary assessment on bank stock owned by the estate when such payment was in the interest of the estate and was necessary in order to reorganize the bank and to maintain it as a going concern.

In re Atkinson, 210-1245; 232 NW 640

9221.3 Loans—conditions—gratuities.

Instruction requested—loan to be approved by loan committee—properly refused. In action on fidelity bond of a bank cashier, a request that the court inform jury that statute required that loans be made by executive officer and not by a loan committee was properly refused, since requirement that loan be approved by loan committee was lawful.

Fidelity Co. v Bates, 76 F 2d, 160

9222 Indebtedness. (Repealed)

Additional annotations. See under §9239

Assumption of liabilities. The written agreement by a bank to take over the assets of an insolvent bank and apparently to assume the payment of all the liabilities of the insolvent will be controlled, in its general terms, by the official bank resolution pertaining to the matter. Held, under this rule, that the assumption in a certain case embraced liabilities appearing only on the books of the insolvent bank.

German Amer. Bank v Bank, 203-276; 211 NW 386

Assumption of mortgage. A bank, as grantee in a deed of conveyance, may validly assume and agree to pay an existing mortgage on the land, it appearing that the board of directors had, with full knowledge of all the facts, formally authorized the receipt of such deed.

Sheley v Engle, 204-1283; 213 NW 617

Assumption of mortgage. The action of the directors of a bank in authorizing the receipt by the bank of a deed "as additional security" does not have the effect of overcoming the effect of a clause in the deed whereby grantee assumed and agreed to pay an existing mortgage on the land, when such clause was inserted in the deed as the result of a valid agreement between the bank and the mortgagor, of which the directors had full knowledge.

Sheley v Engle, 204-1283; 213 NW 617

Change in relation between bank and depositor. A bank depositor wholly ceases to be the creditor of the bank when he turns over his deposit to one of the officers of the bank in furtherance of a personal undertaking in which the bank has no interest whatever.

Leach v Bank, 200-954; 205 NW 790

Issuance of certificate of deposit in payment for note—validity. A certificate of deposit issued by a savings bank in payment of a negotiable promissory note constitutes a payment of value for the note, it appearing that the bank at the time had ample funds on hand for the purchase of said note; and this is true tho the directors had never authorized the purchase in such manner.

Andrew v Peterson, 214-582; 243 NW 340

Nonliability of bank for personal deal of officers. A bank is not responsible for the acts of an officer of the bank in misappropriating the proceeds of a draft when said draft, tho payable to the officer in his official capacity, was received by him, not as an officer of the bank, but in his individual capacity, and in the furtherance of a private transaction between himself and others with whom he was associated.

Security Bk. v Bigelow, 205-695; 216 NW 96

Right to secure deposits. The officers of a savings bank which is a duly selected and acting depository of county funds under a statutory depository bond may, in addition to the security afforded by said previously executed bond, validly transfer to the county, and the county through its fiscal officers may validly accept, notes and mortgages of the bank as additional collateral security for said deposits.

Andrew v Bank, 203-1335; 214 NW 559

Unallowable guaranty. A state bank is wholly without authority to guarantee the payment of a credit which has no relation to the ordinary functions of the bank.

Dewey Wks. v Ryan, 206-1100; 221 NW 800

9222.1 Interest on time deposits.

Atty. Gen. Opinion. See '30 AG Op 266

9222.2 Pledge of bank assets.

Agreement to repurchase—demand for performance unnecessary. When a bank, (1) rediscounts its paper under indorsements "without recourse", but (2) accompanies the indorsement with a formal written agreement to repurchase the said paper on a named date, demand for performance on said date, or on any date, is unnecessary.

Bates v Bank, 219-1358; 261 NW 797

Authority of cashier-director. Authority from the board of directors of a bank to its cashier (who was one of the directors) to secure a loan to the bank and to pledge such securities of the bank's as might be necessary embraces power in the cashier to pledge such securities, not only for the payment of the loan then obtained, but for the payment of a preexisting indebtedness of the bank's to another party with whom the loaner was affiliated in business, when the cashier-director had full knowledge, prior to obtaining authority to se-

cure the loan, that the loaner would not loan under any other conditions.

Leach v Bank, 206-265; 217 NW 865

Hypothecating assets—legality. The statutory prohibition that no "cashier or other officer or employee" of a state bank shall hypothecate any asset of the bank unless authority so to do is granted at least annually by recorded resolution of the board of directors does not prohibit the board from legally ordering the cashier, with the approval of the superintendent of banking, to hypothecate bank assets in order to secure a legal indebtedness of the bank, even tho no formal, written resolution to that effect was actually passed by the board. (§§9222-c3, 9297, C., '31 [§§9222.3, 9297, C., '39]).

Andrew v Bank, 216-1170; 250 NW 492

Hypothecating assets—legality. The statutory prohibition that no "cashier or other officer or employee" of a state bank shall hypothecate any asset of the bank, unless authority so to do is granted at least annually by recorded resolution of the board of directors, does not prohibit the board itself from legally ordering the president and cashier to hypothecate bank assets in order to secure the bank's legal indebtedness, even tho no formal written record of the order is entered. (§§9222-c2, 9297, C., '31 [§§9222.2, 9297, C., '39].)

In re Hannahs, 217-1016, 252 NW 539

Right to contract for payment of debts. A good-faith contract by the board of directors of a state bank, for and on behalf of the bank, and providing for the payment of the bank's debts incurred in the operation of the bank, is valid without any approval by the stockholders of the bank.

Andrew v Bank, 216-252; 249 NW 352; 89 ALR 783

Rediscounting—estoppel to deny authority of officers. A savings bank, notwithstanding statutory limitations on the power of bank officers, will not be permitted to deny the authority of its officers to rediscount the bank's paper by indorsing said paper "without recourse" but accompanying such indorsement with formal, written agreement binding the bank to repurchase said paper prior to or at a named time, when the party advancing the credit relied thereon, and when said bank received, retained, and availed itself of the entire fruits of the said rediscounting.

Bates v Bank, 219-1358; 261 NW 797

Unauthorized assignment of mortgage—ratification. An unauthorized assignment by bank officials of a note and mortgage belonging to the bank is ratified and confirmed by the act of the bank in receiving and retaining the consideration paid by the purchaser for said note and mortgage.

Iowa Convention v Howell, 218-1143; 254 NW 848

9222.3 Pledge to secure public funds.

Atty. Gen. Opinions. See '32 AG Op 150; '34 AG Op 109, 403; '36 AG Op 169, 446, 666

9223 Limit of liabilities.

Atty. Gen. Opinion. See '25-26 AG Op 478

Authority of cashier-director. Authority from the board of directors of a bank to its cashier (who was one of the directors) to secure a loan to the bank and to pledge such securities of the bank as might be necessary, embraces power in the cashier to pledge such securities, not only for the payment of the loan then obtained, but for the payment of a pre-existing indebtedness of the bank to another party with whom the loaner was affiliated in business, when the cashier-director had full knowledge, prior to obtaining authority to secure the loan, that the loaner would not loan under any other conditions.

Leach v Bank, 206-265; 217 NW 865

Debts beyond lawful limit. A debt contracted by a corporation in excess of the maximum limitation prescribed by law is not void.

German Amer. Bk. v Bank, 203-276; 211 NW 386

Dragnet security agreement. A bank which, upon making a loan, exacts from the borrower certain collateral security and an agreement, in effect, that such security may be applied to the discharge of any other liability of the borrower, either to said bank or to a named affiliated bank, arms the said affiliated bank with legal right to apply any remaining balance of said collateral to the discharge of the borrower's pre-existing obligation to such affiliated bank.

Leach v Bank, 206-265; 217 NW 865

Excess loans—note of third party to conceal. One who, in order to enable a state banking institution to conceal the fact that it has made loans to a borrower in excess of the amount permitted by law, executes and delivers to the bank his promissory note in lieu of such excess loans, is entitled, when the said excess notes are paid by the borrower, to a surrender of his note and the collateral pledged therewith.

Pomeroy v Bank, 203-524; 211 NW 219

Certificates of deposit—illegal issuance. Certificates of deposit issued by a savings bank in payment or exchange for promissory notes when the bank has no funds with which to pay for the notes are absolutely void in the hands of any holder.

Sweet v Bank, 200-895; 205 NW 470

Guaranty of payment of rediscounts. A written, individual guaranty by the officers of a bank of the payment of all promissory notes which the bank or its officers might take and rediscount with the guarantee is supported by ample consideration, it appearing that the

taking and rediscounting of the notes were part of a plan under which the bank could continue to accommodate its customers with loans which it could not otherwise make because of statutory restrictions on loans.

Bankers Tr. v Hill, 207-1375; 221 NW 916

Officers as guarantors—nonright to set-off. The officers of a bank who, to further the interest of their bank, enter into an individual guaranty of the payment of all promissory notes which their bank or its officers may rediscount with the guarantee, are not entitled, when sued on the guaranty, to offset against their liability the amount of a deposit which their bank had with the guarantee at the time it became insolvent and passed into the hands of a receiver, and which deposit the guarantee surrendered to the receiver on his demand.

Bankers Tr. v Hill, 207-1375; 221 NW 916

Rewards—liability of members. An incorporated bank which, in effect, represents that it is a member of an association which is offering a reward for information leading to the conviction of bank robbers, thereby obligates itself to pay the reward when, in truth, the association is but a voluntary, unincorporated association.

Carr v Mahaska Assn., 222-411; 269 NW 494; 107 ALR 1080

9224 Oath of directors.

Directors — nonliability for naked nonfeasance. The director of a corporation is not liable, to a person dealing with the corporation, for mere nonfeasance—naked inaction as a director. So held where the director of a bank took no action with reference to the practice of the bank in commingling trust funds with the general funds of the corporation.

Proksch v Bettendorf, 218-1376; 257 NW 383; 38 NCCA 292

Director—violation of trust in re tax deed. A director of a bank may not, for his own personal enrichment, take assignment of a tax sale certificate covering land on which the bank of which he is director holds a first mortgage lien, and take tax deed under such certificate. Such deed will, on timely action and proper proof, be set aside and the bank, or its legal representative in case of insolvency, accorded the right to redeem from the tax sale.

Bates v Pabst, 223-534; 273 NW 151

9224.1 Meetings—examining committee.

Directors—nonliability for mere neglect. The directors of a bank are not personally liable for the loss of bonds in the possession of the bank as bailee, consequent on the wrongful act of other officers of the bank in hypothecating said bonds as security for a loan to the bank, and consequent on the neglect of the directors to exercise reasonable diligence to learn of said wrongful act and to prevent or correct it.

Cornick v Weir, 212-715; 237 NW 245; 32 NCCA 616

9228 Statements.

Banking corporations — officers — presumed knowledge. The active managing officers of a bank will not be permitted to say that they did not know the condition of the bank when the condition was a mere matter of computation.

Baumchen v Donahoe, 215-512; 242 NW 533

9235 Illegal practices—insolvency.

Atty. Gen. Opinion. See '28 AG Op 38

Indemnity to bank—construction. An instrument in writing, though addressed to the state superintendent of banking, entered into by the stockholders of a bank in order to avoid an impairment of the capital stock of the bank, wherein the stockholders "guarantee the said bank against loss" in a named amount on certain bills receivable, is a contract of indemnity to the bank; and the bank may maintain an action thereon, its acceptance of the instrument being presumed. (§10982, C., '24.)

In re Prunty, 201-670; 207 NW 785

Insolvency—presumption. Principle reaffirmed that for many purposes the managing officers of a bank will be conclusively presumed to have knowledge of the insolvent condition of their bank.

Leach v Beazley, 201-337; 207 NW 374

When bank insolvent. It is not true that a bank is insolvent only when it is unable to pay its obligations in the ordinary and usual course of business.

Andrew v Bank, 207-386; 221 NW 954

Invalid guaranty of solvency of bank. A contract between the state superintendent of banking and the officers and directors of a state bank, wherein the said officers and directors guarantee that the bank "is at this time solvent", and wherein they contract "to keep and maintain the bank in a solvent" condition, in consideration that the superintendent will permit the bank to continue business, tho the superintendent questions its solvency, is a nullity, because gravely inconsistent with the statutory powers and duties of said superintendent, and therefore against public policy.

Andrew v Breon, 208-385; 226 NW 75

9236 Examination—oath—evidence.

Atty. Gen. Opinion. See '36 AG Op 28

9238 Liquidation—right of levy suspended.

Atty. Gen. Opinions. See '25-26 AG Op 325; '28 AG Op 38, '32 AG Op 211; '36 AG Op 28, 666; AG Op Feb. 16, '39

Permissible or optional liquidations. The successful liquidation of the deposit liabilities

of a failing bank by a transfer of assets to a stronger financial institution, under a good faith contract approved by the superintendent of banking, constitutes no bar to a final liquidation of the remaining indebtedness of the failing bank by said superintendent, and to the enforcement by said officer of the stockholders' double liability on their stock.

Andrew v Bank, 216-252; 249 NW 352; 89 ALR 783

Guaranty by officers—effective delivery. Delivery of a written guaranty of payment, by officers and directors of a bank, of questionable assets of the bank, is shown by evidence that a state bank examiner took the guaranty into his possession with the consent of the guarantors and delivered it to the state superintendent of banking.

Boyd v Miller, 210-829; 230 NW 851

9239 Receivership—distribution.

Discussion. See 19 ILR 90—Drafts—cashier's checks; 20 ILR 113—Foreign assets; 20 ILR 140—Collection of deposited items

Atty. Gen. Opinions. See '32 AG Op 211; '36 AG Op 28, 666; AG Op June 29, '39

ANALYSIS

I LIQUIDATION IN GENERAL

Assets augmentation theory. The assets of an insolvent may be said to have been augmented by a trust fund whenever the trust owner is able to point out the trust property, either by actual proof or by legal presumption of fact.

Andrew v Bank, 204-565; 215 NW 742

Fraudulent abstraction of assets. The president of a bank who, knowing that the bank is insolvent, takes the promissory note of the bank for the amount of her personal deposit plus the amount of an actual loan to the bank, will not be permitted to take and retain assets of the bank as collateral security for the payment of the note, except insofar as said note represents said loan.

Andrew v Bank, 207-386; 221 NW 954

Transfer of assets—trust fund doctrine. The transfer by an insolvent bank, while in the hands of a receiver, of all or of a part of its assets to another bank which pays nothing therefor, but assumes the payment of certain liabilities of the insolvent, does not deprive a judgment creditor of the insolvent of the right to follow said assets into the hands of the transferee and to impress a lien thereon on the basis of the pro rata value of the assets transferred; and this is true tho the transferee bank had no knowledge of the creditor's claim when it accepted the transfer.

German Amer. Bk. v Bank, 203-276; 211 NW 386

Assignment of promissory notes carries pledged collateral securities. An assignment by the receiver of an insolvent bank, duly ordered by the court, of bank assets in the form of promissory notes, automatically carries to the assignee the right to the possession of, and right to enforce, all collateral legally pledged to the bank for the payment of said notes.

Bates v Bank, 219-1358; 261 NW 797

Bidder at sale of trust property—nonaggrieved party. In the sale of the personal property assets of an insolvent bank by the liquidating receiver, a bidder who is not a creditor of the bank, or interested in any manner in the trust property except as a proposed buyer, has no such standing or interest as authorizes him to appeal from an order of the court rejecting his bid for an item of said assets, and approving a lesser bid of another party for the same item. Nor will the court, under such circumstances, order a remand when the difference between the two bids is slight. (This is not suggesting (1) that the unsuccessful bidder may not very properly call the attention of the court to the disparity in bids, or (2) that the court has unbridled discretion to reject high bids and to approve low bids.)

Dean v Clapp, 221-1270; 268 NW 56

Commercial paper held for collection. The receiver of an insolvent bank takes no title to commercial paper coming into his hands and received by the bank for collection only.

Leach v Bank, 201-349; 207 NW 332

Receiver after unsuccessful attempt to liquidate. An unsuccessful attempt, under a good-faith contract, to liquidate, out of court, the deposit liability of a failing state bank by a transfer of assets to stronger financial institutions, constitutes no bar to the appointment of the superintendent of banking as receiver to make final and complete liquidation.

Bates v Bank, 218-1320; 256 NW 286

Receiver—borrowing from federal agency. The superintendent of banking, as a duly appointed statutory receiver of an insolvent bank, has legal right to make application to the district court for authority to borrow money from the Reconstruction Finance Corporation, and the court has jurisdiction in directing the "affairs" of said bank to grant or reject such application.

Andrew v Bank, 214-1337; 244 NW 394

I LIQUIDATION IN GENERAL—continu'd

Current statutory law applicable. Receivership proceedings and the method of distribution thereunder are governed by the statute in force at the time of the appointment of the receiver.

Dickinson County v Leach, (NOR); 211 NW 542

Liens and equities unchanged. The title to property is not changed by the appointment of a receiver, as he takes it subject to existing liens and equities, and his taking exclusive possession thereof does not interfere with or disturb any pre-existing liens, preferences, or priorities.

Andrew v Union B. & T., 225-929; 282 NW 299

Nonabatement of action. The appointment of a receiver for an insolvent corporation does not abate an action by the corporation as a judgment creditor to set aside conveyances as fraudulent; and if the receiver be not substituted as plaintiff the action may be continued by the corporation in its corporate name.

Grimes Bank v McHarg, 217-636; 251 NW 51

Nonestoppel in enforcing liabilities. The receiver of an insolvent bank by the mere institution of an action on a promissory note, which had (apparently without the then knowledge of the receiver) been taken through a breach of duty by the managing officer of the bank, does not thereby estop himself from proceeding against the parties on a prior improperly surrendered note payable to the bank.

Clapp v Wallace, 221-672; 266 NW 493

Ratification of unlawful acts. The receiver of an insolvent bank has no power to ratify wrongful acts of the officers of the bank committed while the bank was a going concern.

Clapp v Wallace, 221-672; 266 NW 493

Trust funds — augmentation. Funds passing into the hands of the receiver of an insolvent bank must be deemed augmented by the amount of a trust fund in the hands of the bank, when, at all times since the creation of the trust, the cash in the bank exceeded the amount of the trust fund.

McCue v Foster, 219-89; 257 NW 559

Knowledge of insolvency—not imputable to nonactive director. Knowledge that a bank is insolvent is not imputed to one who is a director and minor stockholder of the bank, when he takes no active part in its management and has no actual knowledge of the insolvency.

In re Smith, 228- ; 289 NW 694

Certificate of deposit not collected from insolvent bank—executor a bank director. A finding by the trial court that loss to an estate through the failure to collect on a certificate of deposit belonging to the estate was not caused by the fault of the executor was sustained by evidence that the executor who was a director of the bank on which the certificate was drawn, but took no active part in the management of the bank and did not know it was insolvent, had properly presented the certificate for payment and had been refused because of the insolvency of the bank.

In re Smith, 228- ; 289 NW 694

Unallowable preference to bank officials. A president or director of an insolvent banking corporation will not be permitted to surrender his personal deposits in the bank and to take the good assets of the bank in payment therefor; otherwise, if the deposits represent the funds of an estate of which the bank official is administrator, and the exchange involves no element of personal gain to the administrator.

Leach v Beazley, 201-337; 207 NW 374

Cashier's authority. The cashier of a state bank has no authority to bind the bank by representations to a bank director as to the value of bank assets personally taken over by the director and replaced by the director's personal promissory note.

Andrew v Shimerda, 218-27; 253 NW 845

Checks—conflicting claims to proceeds. The holder of a check who, before payment thereof is stopped, indorses the same to a nondrawee private banker, and unwittingly receives in exchange therefor the worthless draft of said private banker, is entitled, in a subsequent action on the check, to the amount recovered thereon, in preference to the receiver for the private banker. Especially is this true when the banker was insolvent when he issued the draft.

Runge v Benton, 205-845; 216 NW 737

Subrogation accorded to check holder. When a drawee-bank receives for collection a check drawn upon itself and at once charges the drawer's checking account with the amount thereof, the owner of the check will be subrogated to the rights of said depositor to the amount of the check.

Leach v Bank, 207-1254; 219 NW 496; 224 NW 583

Claim for conversion—priority. A claim against an insolvent bank for conversion must await the payment of the expense attending liquidation and the payment of depositors.

Bailey v Bank, 200-1147; 206 NW 126

Claims—allowance and payment—property available for payment. Where an estate consists of two general classes of assets, to wit, (1) assets employed by decedent in operating his exclusively owned private bank, and (2) lands and other assets not so employed, and where, under the will, the bank is tempor-

arily continued after the death of the decedent, an unappealed order of the probate court, entered on due notice and service, to the effect that bank depositors be paid from the general assets of the estate, precludes devisees and legatees from thereafter successfully asserting that depositors could only be paid from the assets employed in the operation of the bank, and that, as a consequence, the said lands could not be legally mortgaged in order to effect such payment. Especially should this be true when it appears that large sums of money employed in carrying on the bank have been used by the executors in paying claims not connected with the operation of the bank.

In re Griffin, 220-1028; 262 NW 473

Belated filing of claims—effect. The belated filing of a claim against a receiver is not necessarily fatal to the claim.

Andrew v Bank, 218-1313; 256 NW 292

Builders' loan department—crediting payments after insolvency. A borrower in a so-called "builders' loan department" of a trust company whose monthly payments on the loan are seemingly carried by the trust company as deposits and not indorsed on the note, has the right, after the trust company has become insolvent, to have his payments credited on his note, and to pay the balance due and to receive a discharge irrespective of the rights of creditors of the company.

In re Wash. Loan Co., 214-884; 241 NW 308

Estoppel to present claim. Plea of estoppel to present a claim in bank receivership reviewed and held not sustained.

Andrew v Bank, 218-1313; 256 NW 292

Failure to object to claim. A receiver may contest the allowance of a claim filed with him, even tho he files no formal objections to the claim.

Leach v Bank, 207-471; 220 NW 10
Andrew v Church, 216-1134; 249 NW 274

Fatal delay in filing claim. A secured creditor of an insolvent bank who fails to file with the receiver, within the time fixed by the court, his claim for a contemplated deficiency, may very properly be refused the right, after the receiver has been discharged, to file such claim with and against trustees of the assets of the bank who are such under an order of court entered in accordance with an agreement of unsecured creditors.

Spooner v Blair, 209-1113; 229 NW 826

Filing claims—fatal delay. A depositor in an insolvent bank has no right to have his account corrected so as to exclude therefrom an erroneous debit, when he delays his application for such correction until long after the time has elapsed for the filing of claims as provided by a duly published order of the court.

Andrew v Bank, 209-277; 227 NW 899

Liberality in pleadings. In the adjudication of claims pending in receivership proceedings, compliance with the strict rules of pleadings will not ordinarily be demanded.

Andrew v Bank, 207-948; 222 NW 8

Setting aside order. The court in bank receivership proceedings has discretionary power to set aside an order relative to the classification of claims as general or preferential.

Leach v Bank, 207-1254; 219 NW 496; 224 NW 583

Consideration—director's note to bank. The directors of a financially embarrassed bank who execute their individual promissory notes to the bank, and receive in return certain assets of the bank to which the state banking department had objected, may not say that the notes were executed without consideration.

Andrew v Shimerda, 218-27; 253 NW 845

Conversion by officer—effect. The fraudulent conversion by an officer of a bank of a promissory note which had been sent to the bank for collection by the bank renders the bank liable for the conversion, and the owner of the note must be given the status of a general creditor of the bank.

Andrew v Bank, 204-1317; 217 NW 438

Debts due federal government—preference. Bank deposits made by federal trustees in bankruptcy and belonging to pending estates in bankruptcy are not, in case of insolvency of the bank, within the scope of the federal statutes which require a preference in the payment of debts due to the United States, even tho such deposits are secured by bonds running to the United States.

Andrew v Bank, 208-1248; 224 NW 499

Partnership—action to enforce partner's liability—waiver. The liquidating receiver of a private bank, when appointed with power to bring action against the partners on their individual liability, may, with the approval of the court, and notwithstanding the objections of a creditor, settle and compromise the liability of a partner when the creditor has appeared in the receivership proceedings and secured the allowance of his claim.

Ellis v Bank, 218-750; 251 NW 744

Action against partners—receivership—effect. A creditor of an insolvent banking partnership who, under an authorizing order of court, files proof of his claim with a duly appointed and unquestioned receiver of the partnership will not be permitted thereafter to maintain an independent action against the partners until after the receivership has been closed, when the receiver, under an order of court, has already instituted an action against all the partners to collect the amount necessary to settle the indebtedness of said bank; especially is this true when a multiplicity of suits is avoided.

Bierma v Ellis, 212-366; 236 NW 402

I LIQUIDATION IN GENERAL—continu'd

Adjusting debits and credits. When a partnership is indebted to a bank, and the bank fails, an individual deposit in the bank belonging to one of the partners of said partnership, should be credited on the partnership debt to the bank.

Boeger v Hagen, 204-435; 215 NW 597; 55 ALR 562

See In re Trusteeship, 214-884; 241 NW 308

Authorizing suit against partners. In an action for the dissolution of an insolvent partnership, a court of equity has power to authorize its receiver to bring suit against the partners to collect the funds necessary to pay the debts of the partnership in full.

Bierma v Ellis, 212-366; 236 NW 402

Preference—nonapplicability of statute. The statute which gives depositors in insolvent banks a preference in payment does not apply to private banks.

In re Thomas, 203-174; 210 NW 747

Nonpreference as to private banks. The statutory right of depositors in insolvent incorporated banking institutions to be first paid, in preference to general creditors, does not apply to depositors in private banks.

Mowatt v Bank, 204-1106; 216 NW 760

Appeal from orders in re preference. Depositors and creditors in a bank receivership have a right to appeal from an order of court which grants to a depositor an unallowable preference in the payment of his deposits.

Schubert v Andrew, 205-353; 218 NW 78

Interest on preferred claims. The holder of a preferential claim, for public funds, which has been allowed against the receiver of an insolvent bank, is not entitled to interest on the claim, tho payment be long delayed on account of litigation.

Leach v Bank, 210-613; 231 NW 497; 69 ALR 1206

Municipal preference. Principle reaffirmed that in the settlement of the affairs of an insolvent state bank the deposit of a municipal corporation has no preference over other deposits.

Leach v Bank, 201-346; 207 NW 331

Conclusiveness of judgment—nonparty to action. A decree or order to the effect that a deposit in an insolvent bank belonged to a municipality, but was not entitled to an equitable preference in the liquidation of the assets of the bank, is not binding on a party who actually made the deposit, but who was in no manner made a party to, or had any control over, the proceeding which resulted in said decree or order, tho he had requested the municipality and its treasurer to apply to the court for an order granting said preference.

Leach v Bank, 206-265; 217 NW 865

Notice—coparties. In an action by a municipality against the receiver of an insolvent bank and its surety, to obtain a preference in the payment of the municipal deposit, an appeal from the decree granting the prayer on the plea of both plaintiff and the surety will be dismissed when no notice of appeal is had upon the surety.

Independent Dist. v Bank, 204-1; 213 NW 397

Municipal preference—vested right. A municipal corporation which, at the time an insolvent bank is placed under receivership, is entitled, under a statute as construed by the supreme court, to a priority in the payment of its municipal deposit, is not deprived of such priority by a subsequently enacted statute which denies such priority.

Murray v Bank, 202-281; 208 NW 212

Pension funds—preference. The fact that the subject-matter of a time certificate of deposit in a bank is the pension money of the depositor furnishes no legal basis for a preference in payment in settling up the affairs of the insolvent bank, even tho the federal and state statutes exempt pension money from seizure for the debts of the pensioner.

Andrew v Bank, 205-872; 219 NW 62

Tax claims—nonpreference. Taxes on corporate bank stock and against the individual owners thereof may not be collected from the receiver of a bank which is insolvent to the extent that it cannot pay its depositors.

Andrew v Munn, 205-723; 218 NW 526

Set-offs unallowable. A debtor of an insolvent bank may not, after the appointment of a receiver for the bank, buy up claims against the bank and offset such purchased claims against the amount he is owing the bank. Statutory right of set-off not applicable.

Parker v Schultz, 219-100; 257 NW 570

Administrator's bank account — decedent's debt—no offset. Receiver of insolvent bank held unauthorized to set off amount of checking account standing in name of administrator against indebtedness owing to bank by intestate where, immediately on appointment of administrator, checking account passed to administrator who added to account by deposits at various times and drew checks against account until closing of bank.

In re Schwarting, (NOR); 257 NW 189

Bank's general right to set-off. The fact that a bank unlawfully invests its funds in securities not permitted by law does not prevent the receiver of the bank from offsetting the amount of said securities against the deposit of the party who is obligated to pay said securities; and this is true even tho the bank was a mortgagee for the benefit of holders generally of said securities.

Andrew v Bank, 218-489; 255 NW 871

Deposit as set-off. Where, prior to the insolvency of a bank, said bank and a depositor became irrevocably obligated under a letter of credit issued to said depositor to enable him to make a purchase of goods in a foreign country, and where the drafts drawn in the foreign country under said letter of credit did not mature until after the insolvency of said bank, and where the receiver of said bank paid said drafts in full on their maturity, the claim of said receiver against said depositor for reimbursement is subject to an offset to the extent of the depositor's deposit in said insolvent bank.

Andrew v Trust Co., 217-657; 251 NW 48

Equitable set-off—nature and scope. The doctrine of equitable set-off is a rule of equity, and is applied quite independently of the limitations which attach to a so-called legal or statutory offset.

Andrew v Bank, 216-240; 249 NW 154; 93 ALR 1156

Right of set-off. In receivership matters the rights of all parties as to set-off are to be determined as of the date of the appointment of the receiver.

Andrew v Trust Co., 217-657; 251 NW 48

Right of set-off. An order of court approving the report of the receiver of an insolvent bank as to the amount of various deposits owing by the bank does not constitute an adjudication against the receiver precluding him from later setting off against a particular deposit the amount owing by the depositor to the bank, it appearing that the approving order was entered without the joining of any issue as to the right of set-off.

Andrew v Bank, 218-489; 255 NW 871

Stockholders—double liability — change of venue. A stockholder in an insolvent bank who is sued by the receiver, on his "double liability", in the forum of the receivership, in one equitable action, along with all other stockholders, is not entitled to a change of venue in case the county of suit is not the county of his residence in this state.

Broulik v Henderson, 218-640; 254 NW 63

Stock held in trust—double assessment liability. Under decree of an Iowa equity court assessing statutory liability on stock in a closed Iowa bank against a national bank as trustee under an identified trust, the bank does not become personally liable, under laws of Iowa, for such assessment. Neither could the receiver of the Iowa closed bank, in a common-law action, charge the trust property with such statutory liability.

Bates v Bank, 101 F 2d, 278

Double liability—national bank as stockholder. A resident national bank as a stockholder in an insolvent state bank of this state is subject to suit in equity by the receiver in the county of the receivership forum, along with all other stockholders, to enforce the statutory double liability of stockholders, even tho the county of said forum is not the county of which the national bank is a resident.

Merchants Bank v Henderson, 218-657; 254 NW 65

Double liability not subject to offset. Funds voluntarily paid into a bank by a stockholder thereof, in order to repair or make good the impaired capital of the bank while it is a going concern, may not later, after the bank has gone into the hands of a receiver for liquidation because of insolvency, be set off by the stockholder against the demand of the receiver for a 100 percent statutory assessment on the stock for the benefit of creditors.

Andrew v Bank, 204-243; 213 NW 925; 56 ALR 521

Double liability—application of assets as condition precedent. The application of the assets of an insolvent bank to the payment of the debts of the bank is not a condition precedent to the right of the receiver to maintain an action to enforce the double liability of stockholders.

Andrew v Bank, 206-1070; 221 NW 809

Basis for assessment. A showing that the assets of a state bank plus a 100 percent assessment on the stock will not be sufficient to pay the debts of the bank furnishes abundant basis for an assessment on the stock, even tho there be no showing as to the amount of claims filed and approved.

Bates v Bank, 218-1320; 256 NW 286

Deprivation of jury—constitutionality. An action by the receiver of an insolvent bank against stockholders for the purpose of determining the necessity for an assessment on stock holdings, and adjudicating the amount of such assessment, is not inherently a law action and, therefore, the legislature may provide that the action shall be brought in equity.

Broulik v Henderson, 218-640; 254 NW 63

Insolvency—stock assessments nonassignable. An assessment against a holder of corporate bank stock in an insolvent bank, ordered by the court under the so-called "double liability" statute (§9251, C., '31, now repealed), even tho said assessment is in the form of a judgment, is nonassignable by the receiver, even under an authorizing order of court, and if formally assigned, is nonenforceable by the assignee, said attempted assignment being for a purpose other than the payment of creditors.

Roe v King, 217-213; 251 NW 81

II DEPOSITORS

Discussion. See 2 ILB 36—Deposit—unmatured claims set off

"Depositor" defined. The act of a bank, while a going concern, in receiving money for and

II DEPOSITORS—continued

on behalf of a customer, and entering the same as a deposit, constitutes the customer a "depositor", which relation is not lost by the subsequent insolvency of the bank.

Leach v Bank, 202-265; 209 NW 422

Depositor (?) or creditor (?). A certificate of deposit does not necessarily carry a conclusive presumption that the holder is a mere lender of money to the bank.

Partch v Krogman, 202-524; 210 NW 612

Depositor (?) or money loaner (?). An actual depositor in a savings bank under interest-drawing time certificates of deposit does not cease to be a depositor because of the fact that, when he demanded his existing deposit for the purpose of re-investing in securities drawing an increase of interest over his existing certificates, he was, in good faith on his part, induced to accept from the bank new and long-time certificates of deposit drawing legal interest (part of which was paid in advance) at the rate desired by him, with an oral understanding that he might have his money on demand by a proportional refund of interest advanced; and it is immaterial that the bank officials, without his knowledge, were not acting in good faith.

Murray v Bank, 201-1325; 207 NW 781

Bank as depositor. A bank may lawfully become a depositor of another bank. So held where a bank was the sole depository of the funds of a municipality, and upon receipt of such funds deposited a part thereof with other banks under a so-called "gentlemen's agreement" with reference thereto.

Leach v Bank, 206-265; 217 NW 865

Bank deposits of public funds. Principle reaffirmed that a good-faith, nonnegligent deposit by a public officer of public funds in a bank for temporary safekeeping does not constitute a conversion of said funds by said officer.

Andrew v Bank, 214-105; 241 NW 412

Effect of usury. The act of a depositor in accepting a certificate of deposit which is tainted with usury does not destroy his status as a depositor.

Partch v Krogman, 202-524; 210 NW 612

Holder of bank's note. One who sells land to a party and receives in return the promissory note of a private bank which is operated by said party may not be said to be a depositor in the bank.

In re Thomas, 203-174; 210 NW 747

Manipulation of deposit not constituting payment. Evidence relative to the surrender by a depositor to his bank of certificates of deposit issued by the bank, reviewed and held not to reveal payment of said certificates; also held that a subsequently dated certificate of deposit issued by the bank to said depositor was intended to be, and was, but a continuation of the former unpaid deposit.

Bates v Bank, 221-1251; 268 NW 74

Relation between bank and depositor. Principle reaffirmed that the deposit of money in a bank creates the relation of debtor and creditor, and not that of borrower and lender.

Leach v Beazley, 201-337; 207 NW 374

Withdrawals—debtor—creditor relationship. Each new deposit creates a new or additional indebtedness to the depositor, and each withdrawal operates as a payment of such indebtedness to the extent of the amount received.

Duckworth v Manning's Estate, (NOR); 252 NW 559

Deposits—"notice" in pass book—effect. The deposit in a bank of unrestrictedly indorsed checks and the crediting of the depositor's checking account with the amount of the checks creates, in the absence of any contract to the contrary, the relation of debtor and creditor, and the contrary is not shown by a "notice" printed in the customer's pass book that "In receiving items for deposit or collection this bank acts only as depositor's collecting agent and assumes no responsibility beyond the exercise of due care" (with added provision for charging back uncollected items). The sole function of such notice, in view of the terms thereof, and of the intention of the parties as reflected in the attending facts and circumstances, is to confirm the right of the bank to charge back bad items, and to exempt the bank from the negligence of its corresponding collecting banks.

Andrew v Bank, 214-1199; 243 NW 542

Assignment of deposit. An executed agreement between a bank depositor and an administrator (who was cashier of the bank) and an estate debtor that, in order to discharge the estate debtor, the depositor will surrender his pass book to the administrator and accept the note of the estate debtor for the full amount of the deposit, works a complete assignment of said deposit to the estate, and gives said estate the status of a general depositor to the full amount of the assigned deposit; and this is true even tho the bank books fail to show the full amount of the assigned deposit or any formal transfer thereof to the estate.

Leach v Bank, 203-988; 213 NW 601

Holder of cashier's check. The holder of cashier's checks, in case of the subsequent insolvency of the bank, is properly classified as a depositor when he has been permitted without objection to show by oral testimony that the said checks were in fact intended to evidence a deposit of money.

Townsend v Andrew, 206-1006; 221 NW 572

Inconsistent remedies—holder of draft. One who receives a check from his debtor and, on presenting it, receives in payment from the drawee-bank a draft which is dishonored because of the insolvency of the bank, and who thereupon seeks to be decreed the status of a preferential trust holder to the amount of the draft, but is decreed the status of a general creditor only, may not later reshape and refile his claim and be decreed subrogated to the rights of the depositor who originally drew the check; and especially is this true when the latter remedy was alternatively sought in the prior litigation.

Becker v Leach, 208-1347; 227 NW 344

Interest paid in advance. In case interest is paid a depositor in advance, the termination of the accrual of all interest by the appointment of a receiver necessitates the charging of the deposit with the amount of unearned interest.

Murray v Bank, 201-1325; 207 NW 781

Payment—check in escrow—effect. A vendor who causes the vendee to make payment of matured interest in the form of an interest-bearing certificate of deposit payable to himself, which certificate is placed in escrow with the issuing bank, pending the vendor's effort to make the title merchantable, must bear the loss resulting from the subsequent failure of the issuing bank.

Downey v Gifford, 206-848; 218 NW 488

Set-off by depositor. Where notes are executed and delivered to a bank, and the bank in return executes its certificates of deposit for a like amount to the maker of the notes, the transaction being simply a paper one, the certificates aforesaid will be set off against the notes aforesaid.

Andrew v Bank, 211-483; 231 NW 293

Depositor by subrogation. In settling and adjusting the affairs of an insolvent bank, a claimant who is not a depositor in fact may not be decreed to be subrogated to the rights of certain depositors who are not parties to the controversy over the claim in question.

Leach v Bank, 207-471; 220 NW 10

Notes for collection only—not bank's property. Notes of depositors pledged as collateral with the Reconstruction Finance Corporation for a bank loan and, upon insolvency of the bank, sent to examiner for collection and remittance to the corporation, do not thereupon become assets of the bank; therefore, depositors would not be entitled to offset their deposits against their indebtedness thereunder.

Andrew v Bank, 225-929; 282 NW 299

Collateral — holder in due course — set-off against holder denied. Where commercial paper is rediscounted or put up as collateral, the holder is a bona fide holder in due course and the plea of set-off is not available against such holder.

Andrew v Bank, 225-929; 282 NW 299

Offsetting deposit against note. A bank depositor who, after the bank becomes insolvent, pays to a collateral holder his outstanding note to the bank, may not compel the receiver to refund to him an amount equal to that part of his deposit which he would have had the right to offset against his note had it remained in the hands of the bank. And this is true tho the payment is under protest and is made because of the fraudulent representations of the collateral holder.

Leach v Bank, 207-1254; 219 NW 496; 224 NW 583

Depositor's right to set-off—receiver refunding amount paid on note. A bank depositor, who, after the bank becomes insolvent, pays to one holding as collateral such depositor's outstanding note to the bank, may not compel the receiver to refund to him an amount equal to his deposit which he would have been allowed to offset against his note, had it remained in the hands of the bank.

Andrew v Bank, 225-929; 282 NW 299

Wrongful issuance of certificate of deposit—timely repudiation. A party to whom a bank, without authority, has issued a certificate of deposit in payment of a claim due from the bank, may not be deemed estopped to repudiate such certificate, or be deemed to have ratified the issuance of such certificate, when his repudiation was reasonably prompt, and when no injury resulted to the bank or to its receiver from any delay in repudiating.

Andrew v Bank, 217-232; 251 NW 860

Right of review—receivers. The receiver of an insolvent bank has a right to appeal from an order which grants to a depositor an equitable preference over all other creditors in the payment of his claim.

Andrew v Bank, 205-1248; 218 NW 24

Claims arising out of extrinsic transactions. A defendant sued by the receiver of an insolvent bank on indebtedness due the bank may not, in order to establish a set-off, plead an interest in certain deposits in the bank, and interest in extraneous transactions when such interests can only be determined by bringing in total strangers to the transactions sued on, and adjudicating their interests.

Foster v Read, 212-803; 237 NW 634

Equitable set-off—surety of insolvent. In an action by the receiver of an insolvent, the defendant may set off, against the obligation sued on, the amount which the defendant, as surety for the insolvent, has been compelled to pay on the contract of suretyship.

Leach v Bassman, 208-1374; 227 NW 339

II DEPOSITORS—concluded

Equitable set-off. Where an insolvent bank in the hands of a receiver owes an estate on a deposit, an heir who owes the bank, tho he is the executor of the estate, may have his interest in the deposit set off against his indebtedness to the bank, subject, of course, to claims which may be filed against the estate.

Andrew v Bank, 216-240; 249 NW 154; 93 ALR 1156

Husband's deposit in wife's name—set off against indebtedness. It may be shown that a deposit in an insolvent bank, solely in the name of a wife, is, in truth and fact, the money of the husband, and upon such proof being made, the husband may have the deposit applied on his indebtedness to the bank.

Andrew v Bank, 216-777; 249 NW 276

Waiver by depositors—effect on nonsigners. The act of a majority of the depositors of a bank (owning a large majority of the deposits) in signing waivers deferring payment of their deposits, in order to preserve the bank as a going concern, cannot be deemed the legal equivalent of an express agreement on their part that the depositors who do not sign such waivers shall be paid in full before such signers are paid; nor can such signing be deemed prejudicial to the nonsigners; nor, by such signing, can said signers be deemed to have lost their status as depositors and thereby become mere lenders of money to the bank.

Andrew v Bank, 216-739; 249 NW 768; 88 ALR 1003

III NONTRUST RELATIONSHIPS

Discussion. See 14 ILR 206—Establishment of preference; 15 ILR 195—Checks sent to drawee-bank for collection

Banking corporations—nonpreferential deposits. Record reviewed and held that bank deposits in an insolvent bank were attended by no circumstances that justified a preference in payment.

Bates v Bank, 222-1323; 271 NW 638

Claims—general deposit. Where receipts from sale of livestock in Chicago were remitted to local bank, which in turn entered the remittance as a deposit for local livestock shipping association, held that association was not entitled to preference on its claim in receivership proceeding of the local bank, there being no element of trust involved in the transaction and the fund being simply a general deposit.

Leach v Bank, (NOR); 212 NW 390

Deposits—nonequitable preference. A temporary deposit of money in a bank for safekeeping by parties who had accumulated it for a special purpose does not constitute a trust fund (entitled to an equitable preference in payment in case of the insolvency of the bank) simply because the bank had knowledge, when it accepted the deposit, of the nature of the fund, and of the manner in which, and purposes for which, it would be withdrawn by check.

Andrew v Bank, 217-684; 251 NW 508

Deposit of trust funds as general deposit—effect. A deposit in a bank of actual trust funds in a manner identical with that pursued in making a general deposit subject to check, creates the relation of debtor and creditor and not that of trustee and trustor.

Andrew v Bank, 209-271; 228 NW 55

Trust funds—nonpreference. The title to a testamentary fund perpetually bequeathed as a saving deposit to a bank as trustee with direction to pay the interest thereon to a church organization, for the sole purpose of repairing the church, necessarily passes to the trustee, and becomes a general deposit, with result that the fund is not entitled to an equitable preference in payment when the bank becomes insolvent.

Andrew v Church, 216-1134; 249 NW 274

Trust funds treated as private deposit. A trustee who deposits trust funds in his individual name is not entitled to a preference in the settlement of the affairs of the insolvent depository.

In re F. & M. Bank, 202-859; 211 NW 532; 51 ALR 910

Resulting trusts—fraud—elements. The plea that a trust resulted against one who fraudulently obtained the property necessitates proof of representation, reliance thereon, falsity thereof, scienter, deception, and injury.

Andrew v Bank, 205-244; 216 NW 551

Issuance of cashier's check. The mere issuance and delivery of a cashier's check to a depositor creates no trust relation whatever.

Leach v Bank, 202-879; 211 NW 526

Deposits—when deemed made. A deposit in a bank cannot be deemed a trust fund and entitled to an equitable preference in payment because of the fact that the books of the bank show that the deposit was made after the bank had permanently closed its doors, when in truth the deposit was made before the bank so closed its doors.

Andrew v Bank, 204-1190; 216 NW 723

General deposit. The depositing in a bank of money and checks which are at once entered upon the customer's pass book with right to immediately draw against the amount constitutes a general deposit.

Andrew v Bank, 204-1190; 216 NW 723

What constitutes general deposit. A general and not a special or specific deposit is shown by proof that a buyer and shipper of stock (who was also engaged in two other different lines of business) had but one bank

deposit account, and that in buying stock he simply delivered his bank check to the seller, and then, as a general course of business, shipped the stock in the name of his bank, which thereupon, at his direction, drew on the consignee, and credited the shipper's deposit with the amount of the draft, thereby creating a deposit credit out of which any and all checks issued by the shipper, whether for stock purchases or otherwise, would be paid, if and when presented; and this is true even tho the bank knew that the particular purpose in the mind of the shipper was to protect his outstanding checks for purchases of stock.

Andrew v Bank, 205-888; 219 NW 53

Deposit—fraud in reception. The fact that a deposit in a bank was made only two hours prior to the permanent closing of the bank does not necessarily show that the bank was insolvent when the deposit was received, and that the officers must have known of such insolvency, and that, therefore, the deposit was fraudulently obtained and should be decreed to be a trust fund.

Andrew v Bank, 204-1190; 216 NW 723

Deposit of check—presumptive passing of title. The depositing in a bank of duly indorsed checks and the entry of the amount thereof on the customer's pass book with right to immediately draw against the same presumptively constitutes the bank the owner of the checks, and the depositor has the burden to overcome the presumption.

Andrew v Bank, 204-1190; 216 NW 723

Deposit of official funds. A deposit in a bank by a clerk of the district court of his official funds (known to be such by the bank) does not make the bank a trustee of the county or of its treasurer.

Andrew v Bank, 204-878; 216 NW 1

Deposit of public funds—nonpreference. The trustees of a municipal firemen's pension fund may validly make a bank deposit of its funds in an amount sufficient to meet current pension demands. It follows that if the bank becomes insolvent the trustees are simply depositors and no preference over other depositors exists.

Andrew v Bank, 214-105; 241 NW 412

Denial of deposit. The fact that a banker falsely states to an administrator that the deceased had no deposit in the bank furnishes no basis for decreeing the administrator a preference in the settlement of the affairs of the insolvent bank.

In re F. & M. Bank, 202-859; 211 NW 532; 51 ALR 910

Changing general deposit into special trust deposit. A seizure, by garnishment proceedings, of a general bank deposit, followed, (1) by a direction by the garnishing plaintiff to the garnishee bank to hold said deposit in a named amount (which was 150 percent of the amount sued for), and (2) by an answer by the garnishee in accordance with said direction, does not have the legal effect of changing said sum from the status of a general deposit to the status of a special deposit,—to the status of a trust fund,—with consequent right to preferential payment in case the bank becomes insolvent.

Andrew v Bank, 220-712; 263 NW 495

Draft by insolvent drawer. The rule that a trust relation is created by the act of an insolvent in drawing a draft which he knows will not be paid, has no application on a record revealing the fact that the payee of the draft long delayed presentation, and that, in the meantime, numerous drafts subsequently issued by the same drawer were paid by the same drawee.

Leach v Bank, 203-790; 211 NW 516

Drafts—purchase from insolvent. On the issue whether the purchase of drafts at different times from an insolvent bank created the relation of debtor and creditor or a trust relation, knowledge on the part of the officers of such insolvency (as a basis for fraud) will not be presumed from proof that, when the drafts were issued, the account of the drawer-bank with the drawee-bank was overdrawn, but that the drawer-bank had, almost simultaneously with the issuance of the drafts, made a remittance to replenish said account, which remittance proved abortive because of the sudden closing of the bank.

Andrew v Bank, 206-65; 218 NW 957

Nondrawee bank cashing checks. No trust relation results from the act of one bank in cashing checks drawn upon another bank and presenting and having them accepted by the drawee-bank and receiving in payment a draft on a third bank, which draft was never paid.

Danbury Bk. v Leach, 201-321; 207 NW 336

Nonpayment of draft. The fact that a depositor in an insolvent but going bank causes a draft to be drawn upon himself, through his said bank, and directs the bank to pay the same upon presentation, out of his general deposit, which direction the bank fails to comply with, creates no trust relationship which will, in liquidating the affairs of the bank, give the depositor a preference to the amount of the draft.

Border v Bank, 202-27; 209 NW 302

Preference under worthless collection. The remittance of a draft to a bank with direction to "collect and remit", and the act of the collecting bank in receiving a worthless draft in payment, present no possible basis for a preference in payment in case the collecting bank becomes, insolvent.

Andrew v Bank, 203-1014; 212 NW 124

III NONTRUST RELATIONSHIPS — continued

Purchase of draft—effect. The purchase of a draft on a drawee which has ample funds of the drawer's is but the purchase of the credit of the drawer. In other words, the purchaser of such a draft voluntarily makes himself one of the general creditors of the drawer.

Leach v Bank, 203-790; 211 NW 516

Draft works no assignment. A bank which pays checks drawn on foreign banks and remits said checks to its correspondent bank for collection is not entitled to be preferred in the payment of its claim (the collecting bank having become insolvent) on the naked showing that it holds the unpaid draft of the collecting bank for the amount of said collection.

Leach v Bank, 202-871; 211 NW 519

Draft works no assignment. The issuance of a draft works no equitable assignment to the payee of the funds of the drawer in the hands of the drawee, and consequently, in case of the subsequent insolvency of the drawer, the payee is not a preferred creditor, (1) even though the drawer at once charges himself and credits the drawee with the amount of the draft, (2) even tho the draft was issued by the drawer in payment of checks drawn upon himself by his depositors, whom he at once charges with the amounts of their checks, and (3) even tho the controversy over the funds is solely between the receiver of the insolvent drawer of the draft and the payee of the draft.

Leach v Bank, 202-894; 211 NW 517

Leach v Bank, 202-899; 211 NW 506; 50 ALR 888

Leach v Bank, 203-507; 211 NW 520; 212 NW 760

Leach v Bank, 203-782; 211 NW 522

Drawee-bank as agent to collect from self. The act of the indorsee of a check in sending it to the drawee-bank for collection and remittance, and the act of the drawee-bank in charging the account of the drawer of the check with the amount thereof, creates no relation of principal and agent and consequently no trust relationship.

Leach v Bank, 207-471; 220 NW 10

Drawee-bank as agent to collect from self. The holder of a bank check in sending it to the drawee-bank for "collection and remittance" does not create the relation of principal and agent or any trust relation sufficient to support a claim of preference in case the draft of the said drawee-bank in payment of the check is not paid because of the insolvency of the bank.

Leach v Burton & Co., 205-973; 219 NW 43

Directors—nonviolation of trust relationship. A bank director who, while the bank is a going concern but allegedly insolvent, transfers and sells his certificate of deposit in the bank to the president thereof, and long subsequent thereto receives payment therefor from said president, or who, under the same conditions, transfers a like certificate to another bank and receives a new certificate in such other bank —the transferred certificate in each instance being promptly cashed by the issuing bank —violates no trust duty which he owes to his bank or to the depositors thereof, there being no evidence whatever that either transaction was other than one in the ordinary course of business.

Andrew v Kelly, 215-408; 245 NW 755; 84 ALR 1488

Officer acting in private and personal matter —liability of bank. The acts of an officer of a bank, tho he be a managing officer, in receiving the funds of a relative, and in managing the investment thereof, purely as a personal matter between himself and said relative, imposes no obligation on the bank, even tho the funds are carried on the books of the bank as a matter of convenient bookkeeping. It follows that, upon the insolvency of the bank, the tender to the relative of the investments belonging to him, and found in the bank, carries down any claim of preferential trust against the bank and its receiver.

Andrew v Bank, 212-649; 235 NW 735

Conversion by officer of bank—effect. The act of an officer of a bank in fraudulently converting to his own use a promissory note which had been sent to the bank for collection by the bank furnishes no basis for decreeing to the owner of the note an equitable preference in payment out of the assets of the insolvent bank.

Andrew v Bank, 204-1317; 217 NW 438

Payment of note — acts constituting. The acts of a bank (1) in receiving, without authority, payment of its customer's notes at a time when said bank had either rediscounted or collaterally pledged and indorsed said notes to another bank, and (2) in forwarding to the then holder a draft and other remittances sufficient to cover the amount of the notes, and the act of the then holder (1) in accepting the remittances, (2) in marking the notes "paid", and (3) in returning them, work a complete payment of the notes, even tho the draft was not paid, owing to the failure of the drawer-bank, it appearing that, at the time of each transaction, both parties had entered the proper debits and credits on their mutual accounts in harmony with the theory of payment. No right of preference was created by reason of the issuance or nonpayment of the draft.

Leach v Bank, 204-493; 215 NW 617

Pension money as special or specific deposit. A deposit in a bank may not be deemed either a "special" or a "specific" deposit, and therefore entitled to a preference in payment, from the naked fact that the subject-matter of the deposit was pension money of the depositor's,

especially when the deposit was evidenced by a time certificate.

Andrew v Bank, 205-872; 219 NW 62

Relation of debtor and creditor. The act of the indorsee of a check in sending it to the drawee-bank for "collection and remittance" creates no relation of principal and agent. The result is that, if the drawee-bank becomes insolvent, the indorsee's claim on account of the check is not a preferred claim.

Leach v Bank, 203-782; 211 NW 522; 38 NCCA 426

Relation of debtor and creditor. The act of a bank in forwarding a collection made by it for another, in the form of a draft, in accordance with an agreement to that effect, creates the relation of debtor and creditor and consequently no trust relationship.

Leach v Bank, 207-471; 220 NW 10

Relation of debtor and creditor. When a bank pays checks on foreign banks and remits said checks to its correspondent for "collection and remittance", and when the understanding and course of dealing between said banks is for the remittance to be by draft, and such draft is executed and delivered, no trust relation is created, but the relation of general debtor and creditor is created, and there can be no preference in payment to the draft holder in the subsequent settlement of the affairs of the insolvent drawer.

Leach v Bank, 202-894; 211 NW 517

Relation of debtor and creditor. When the understanding and general course of dealing between two banks are that each will cash checks drawn on the other and that the daily balance will be paid by draft in favor of the bank to which the balance is due, and such draft is issued and delivered, no trust relation is created, but the relation of general debtor and creditor is created, with the result that no preference in payment may be demanded by the payee of the draft in the subsequent settlement of the affairs of the insolvent drawer.

Leach v Bank, 203-507; 211 NW 520; 212 NW 760

Relation of debtor and creditor. When the general course of dealing between two banks is for each to cash checks drawn upon the other and then to exchange the checks and adjust the same by mutual credits and debits, they thereby voluntarily create a shifting relation of debtor and creditor, and the one who is the final creditor will not be entitled to a preference in payment out of the assets of the debtor if he becomes insolvent.

Leach v Bank, 202-871; 211 NW 519

Relation of debtor and creditor. The act of the officers of a local fraternal order in executing in favor of the grand lodge a warrant on the local lodge funds, and therewith purchasing an ordinary bank draft in favor of the grand lodge, creates no trust relation and furnishes no basis for a claim of preference to the assets of the drawer-bank in case the latter becomes insolvent.

Leach v Bank, 203-235; 212 NW 485

Relation of debtor and creditor. The mere purchase of a draft gives rise to no trust relation between the purchaser and the bank issuing the draft.

Leach v Bank, 203-782; 211 NW 522

Leach v Bank, 204-497; 212 NW 748; 215 NW 728

Relation of debtor and creditor. Principal reaffirmed that no relation of principal and agent—in other words, no trust relation—is created by the act of the transferee of a draft in sending it to the drawer for payment.

Leach v Bank, 202-894; 211 NW 517

Relation of debtor and creditor. A bank which cashes checks drawn upon another bank, and in payment receives from the latter a draft (which is not paid), will not be accorded a preference in the settlement of the affairs of the insolvent drawee-bank.

Leach v Bank, 202-95; 209 NW 279

Relation of debtor and creditor. A bank which pays a series of checks on foreign banks and remits the checks to its correspondent with direction to collect and "to credit" the paying and remitting bank, thereby makes itself one of the general creditors of the collecting bank and deprives itself of the right of preference which it otherwise would have had, had the relation of principal and agent been created (the collecting bank having subsequently become insolvent).

Leach v Bank, 202-871; 211 NW 519

Temporary deposit by guardian. A temporary deposit by a guardian of guardianship funds in a bank for safekeeping does not constitute a trust fund (entitled to an equitable preference in payment in case of the insolvency of the bank) simply because the bank had knowledge of the nature of the funds and of the manner in which they would be withdrawn.

Andrew v Bank, 205-1248; 218 NW 24

Unlawful relation. A federal reserve bank may not predicate a claim for preferential payment out of the assets of an insolvent bank on the plea that a federal reserve bank may not legally become the creditor of a nonmember bank.

Leach v Bank, 207-471; 220 NW 10

IV TRUST RELATIONSHIPS

Discussion. See 18 ILR 362—Pension money

Trust relation—insufficient showing. The receipt by a bank of money with full knowledge

IV TRUST RELATIONSHIPS—continued

that the money constituted trust funds in the hands of the depositor, and the issuance to the depositor of cashier's checks for the amount thereof, in lieu of an ordinary deposit, do not, in and of themselves, constitute the bank a trustee of the fund. Under such circumstances, it must be shown that the bank expressly or impliedly agreed to act as agent or bailee either of the depositor or of the beneficiary of the trust.

Townsend v Andrew, 206-1006; 221 NW 572

Trust treated as general deposit — effect. The carrying on the books of a bank of an admitted express trust as a general deposit in no manner changes the nature of the trust.

Andrew v Bank, 203-546; 213 NW 245

Trust funds—presumption—insufficient basis. The court cannot, in the face of affirmative evidence to the contrary, presume that trust funds over and above the amount of cash on hand in the trustee-bank when it closed its doors were embraced in the bills receivable or in the cash in the hands of correspondent banks, on the somewhat specious basis that, inasmuch as there was not cash enough in the bank when the trust was created to pay the trustor in full, therefore the balance of the trust fund must have been embraced in assets of the bank other than the cash in the bank.

In re American Bank, 210-568; 231 NW 311

Augmentation of bank funds. An augmentation in the funds of a bank may result from what might, to the layman, seem to amount to nothing more than naked bookkeeping entries in the books of the bank; for instance, such augmentation is shown by proof that a bank as agent made a collection (1) by loaning to the debtor on his note and from its actual, existing funds, an amount sufficient to enable the debtor to pay the claim, (2) by crediting the checking account of the borrower with the amount of the loan, (3) by accepting the latter's check for the amount of the claim, and (4) by marking the check "paid" and charging the checkmaker's account with the amount of the check.

Andrew v Bank, 217-232; 251 NW 860

Dissipated trust funds—nonliability of receiver. The receiver of an insolvent bank may not be charged with that part of a trust fund which has been wrongfully and unlawfully dissipated prior to the time when the balance of the fund came into his hands.

Leach v Bank, 206-675; 220 NW 113

Dissipation of trust funds. Proof that a bank collected certain checks as agent for the holder thereof, but that in so doing the entire amount of the collection was applied in the payment of the general obligations of the collecting bank, conclusively negatives any augmentation of the assets of the collecting bank.

Leach v Bank, 204-497; 212 NW 748; 215 NW 728

Want of authority—effect. Want of authority in a bank to assume a trusteeship in no manner changes the nature of the trust and in no manner gives the bank title to the subject-matter of the trust.

Andrew v Bank, 203-546; 213 NW 245

Transfer of property—effect. Property impressed by a trust and received by a bank with full knowledge of that fact continues to retain its trust character in the hands of the bank and its subsequent receiver.

Andrew v Bank, 209-1149; 229 NW 819

Liability of bank. A bank will be deemed the trustee of an express trust when such was the understanding, even tho an officer of the bank was treated on the books of the bank as trustee.

Andrew v Bank, 203-546; 213 NW 245

Directors — nonliability for naked nonfeasance. The director of a corporation is not liable, to a person dealing with the corporation, for mere nonfeasance—naked inaction as a director. So held where the director of a bank took no action with reference to the practice of the bank in commingling trust funds with the general funds of the corporation.

Proksch v Bettendorf, 218-1376; 257 NW 383; 38 NCCA 292

Wrongful act of trustee—right to ratify. A bank which, as guardian, wrongfully treats the guardianship funds as its own property (by carrying said funds as a general deposit with itself) may not complain if, after the failure of the bank, the succeeding guardian ratifies the former wrongful act, and elects to retain the position of an ordinary depositor.

Bates v Bank, 219-258; 257 NW 806

Bank as involuntary trustee. A bank may, because of the wrongful conduct of its cashier, become the trustee of a trust fund, and especially so when the misconduct is in the interest of the bank and hostile to the interest of the owner of the trust fund. So held where the clerk of an auction sale, in bad faith, converted the proceeds of the sale into a cashier's check issued by himself as cashier to himself as clerk in an insolvent bank of which he was cashier, said conversion being without the knowledge, consent, or subsequent ratification of his principal, the owner of said funds.

Andrew v Bank, 217-780; 253 NW 133

Trust fund—bookkeeping—effect. An actual trust fund is not changed into a nontrust fund by the fact that the bank receiving the fund

credited the owner's general deposit account with the amount of the fund.

Miller v Andrew, 206-957; 221 NW 543

Receipt of funds after closing of bank. The receiver of an insolvent bank, who, after the closing of the bank, receives the proceeds of a shipment of stock, with knowledge of the ownership thereof, must be deemed to hold said proceeds as a trust fund.

Leach v Bank, 206-675; 220 NW 113

Agent of court only—trustee of funds. A receiver is not an agent of anyone except the court appointing him, but he holds any fund at least as quasi-trustee for the benefit of whoever may eventually establish title thereto.

Andrew v Bank, 225-929; 282 NW 299

Sales contract—court approval as condition. A definite written offer by the superintendent of banking of this state to sell to a foreign administrator Iowa real estate, belonging to a bank receivership, and the written acceptance of the offer, by said foreign administrator, may constitute a valid and specifically enforceable contract tho the offer and the acceptance be both conditioned on the approval of the respective state courts.

Bates v Bank, 223-385; 272 NW 412

Draft fraudulently procured. The drawer of a draft who receives in payment therefor a draft which the payee has no reasonable grounds to believe will be paid, may enforce an equitable preference against the receiver of the wrongdoer for the full amount of his —the drawer's—loss, it appearing that the draft issued by the said drawer has been paid and that the proceeds thereof are in the hands of the receiver.

Leach v Trust Co., 203-1060; 213 NW 777; 57 ALR 1165

Bank as executor—merger and subsequent insolvency. Funds which were held by a bank as executor of an estate, and which belonged to such estate at the time of merger of such bank with another bank, were "trust funds" and did not constitute part of assets of bank, with respect to whether such funds were payable as preferred claim against such merged bank which subsequently became insolvent.

Bates v Bank, (NOR); 269 NW 346

Estate funds as preferential deposit. Estate funds on deposit in a bank which has been appointed executor, administrator or trustee of the estate, even tho carried in the name of the estate, constitute a trust fund, and, in case of insolvency of the bank, must be paid in full on a showing that, after the trust deposit was made, the deposit in the bank has never been less than the amount of said trust funds. (Ch 416, C., '24.)

Leach v Bank, 205-114; 213 NW 414; 217 NW 437; 56 ALR 801

Andrew v Bank, 208-252; 225 NW 379

Estate funds as preferential deposit. Estate funds on deposit in a bank which has been appointed trustee or guardian of the estate constitute a trust fund, and in case of insolvency of the bank, are entitled to preference in payment; and an order of court entered without notice to interested parties, and authorizing the appointee-bank to deposit the estate funds with itself, cannot change this rule of preference. (§9285, C., '27.)

Andrew v Bank, 208-392; 226 NW 73

Estate—deposits without order of court. A deposit in a bank by a guardian of guardianship funds, as a loan, without a directing or approving order of court, is wrongful, and the bank at once becomes a trustee of the fund for the benefit of the ward.

Andrew v Bank, 207-394; 223 NW 249

Insolvent estates—unallowable payment in full. The act of the administratrix of an insolvent estate in applying estate funds to the full payment of a debt, which is the personal obligation of both the deceased and the administratrix, is fundamentally unallowable. It follows that the creditor, by receiving such payment, becomes a trustee of the fund for the use and benefit of the estate, especially when he knew that the estate was insolvent.

Reason: The administratrix could not legally make such payment, even on an authorizing order of the court.

Andrew v Bank, 217-69; 251 NW 23

Express trusts. The deposit of funds with a bank under an agreement that the bank will keep the same invested and pay the interest income to a named beneficiary necessarily constitutes an express trust.

Andrew v Bank, 203-546; 213 NW 245

Bank deposit for particular purpose. A trust fund is created by depositing money in a bank with the definite understanding and agreement at the time between the depositor and the bank that said deposit is for the specific purpose of paying a certain check thereafter to be drawn in a named amount.

Townsend v Bank, 212-1078; 237 NW 356

Special deposit as part of real estate deal. A cash deposit in a bank, understood by all parties, including the bank, to be made for the purpose of paying a vendor for land sold, and which, with accompanying papers, was held in escrow pending completion of title, must be deemed a special deposit and entitled to preferential payment on the insolvency of the bank, even tho a certificate of deposit, payable to the vendor, was issued by the bank and retained among the papers evidencing the deal.

Gillett v Bank, 219-497; 258 NW 99

Special deposit as trust fund. A special deposit (and consequently a trust fund) is created in favor of an administrator by the

IV TRUST RELATIONSHIPS—continued

action of bank directors in waiving the interest of the bank in a particular fund in its possession, and owned jointly by the bank and a guardian, and doing so in order to enable the guardian to have the entire fund for the immediate payment of his liability to the administrator of the deceased ward, and by the action of the guardian carrying out the arrangement by taking a check to himself for the entire fund, and by immediately issuing and delivering (after banking hours) to the administrator a check for the same amount.

Rime v Andrew, 217-1030; 252 NW 542

Special deposits — evidence — sufficiency. Evidence held insufficient to show that a deposit was made for the special purpose of meeting payment on a particular draft, or was made under such circumstances that the issuance of the draft effected a pro tanto equitable assignment of the deposit.

Heckman v Bank, 208-322; 223 NW 164

Deposit as trust fund. Cash and checks deposited by the owner thereof in a bank, under a written instrument which provides that the receipt is "in trust for the purpose only of transmittal to" the owner in another locality, and which instrument is utilized solely for the purpose of effecting such transmittal, constitutes a trust fund and entitles the holder of the instrument to a preference in payment, in case the bank fails, provided such trust fund is traced into the hands of the receiver, even tho in some minor respects the deposits were made, and carried on the bank books as ordinary deposits.

Standard Oil v Andrew, 218-438; 255 NW 497

Deposits received on condition—violation—effect. A bank which receives cash, checks, and notes on the agreed condition that said receipts will be held intact, and not placed in the general assets of the bank, and will be returned intact on the happening of a named event, must respect and comply with the condition, even tho at the time the bank has enforceable financial obligations against the parties delivering the property. And, in case of violation of the condition and in case of insolvency, the claimants will be entitled to an order on the receiver for restitution, or for preferred payment out of the funds on hand at the time of insolvency, or for such other relief as will be equitable and possible under the circumstances.

Andrew v Bank, 218-1313; 256 NW 292

Relation of principal and agent. The act of a county treasurer in sending tax receipts to a bank with the implied understanding that the bank would collect the amount thereof and then deliver the receipts, and the act of the bank in so doing, create the relation of principal and agent, and give the funds in the hands of the bank and the receiver thereof the character of a preferred claim, it appearing (1) that the treasurer had no lawful authority to make deposit of such funds in said bank, and (2) that the treasurer gave no direction as to the manner of remitting said fund to him.

Leach v Bank, 202-881; 211 NW 536

Principal and agent. Principle reaffirmed that the act of the owner of a draft in forwarding the same to a bank for collection, and the act of the bank in making the collection, create the relation of principal and agent, and not that of debtor and creditor.

Andrew v Bank, 207-403; 223 NW 176

Receipt by agent for special purpose. A bank which, as agent either of the lender or the borrower, receives the proceeds of a loan for the specific purpose of discharging certain incumbrances on property, holds said proceeds in a trust capacity.

Leach v Bank, 202-265; 209 NW 422

Second Bk. v Millbrandt, 211-1299; 235 NW 577

Collections—resulting trusts. A bank upon making a collection for its implied principal, under authority to "collect and remit", takes no title to the collected funds, but immediately becomes a trustee thereof and remains such trustee until said funds are paid over to the principal. It follows that such relationship is not affected in the least by the unauthorized act of the bank in issuing and mailing to the principal a certificate of deposit for the amount of the collection.

Andrew v Bank, 217-232; 251 NW 860

Funds received for investment. A bank which makes a collection for a customer, under instructions immediately to invest the proceeds in a specified and agreed way, must be deemed to hold such proceeds in trust for the customer. It follows that, in case the bank becomes insolvent, the customer may reclaim his money from the funds which passed into the hands of the receiver, provided the cash bank balance at all times since the collection was made equaled or exceeded the collection.

Miller v Andrew, 206-957; 221 NW 543

Instructions to "collect and return" — effect of custom. The direction of a sending bank to a collecting bank to "collect and return" the items inclosed conclusively implies a collection and return in cash or its equivalent, and a return by draft does not terminate the relation of principal and agent; and this is true even tho a general custom exists among banks to return such collections by draft.

Leach v Bank, 207-1254; 219 NW 496; 224 NW 583

Collection of draft. A bank which, as agent, receives for collection a draft, with orders to collect in cash only, and to remit to the owner

of the draft, and which accepts in payment of the draft the amply protected check of the drawee upon itself, must be deemed to have collected the draft in cash, even tho it fails either (1) to cancel the said check, or (2) to charge the account of the drawer of the check with the amount thereof. It follows that the collection belongs to the principal, is impressed with a trust character, and, upon the insolvency of the bank, is entitled to preferential payment out of the appropriate cash balance passing to the receiver.

Andrew v Bank, 204-565; 215 NW 742

Bailment—nondissipation—effect. The deposit in a bank of specifically identified bonds with the mutual understanding between the depositor and the officers of the bank that the identical bonds will be returned on demand, creates a trust, even tho the bank carried said bonds as a part of its assets and liabilities.

Leach v Bank, 202-887; 211 NW 529
Leach v Bank, 202-885; 211 NW 535
In re F. & M. Bank, 202-859; 211 NW 532; 51 ALR 910
Andrew v Bank, 203-345; 212 NW 745; 51 ALR 906

Unidentified bailments. When the subject matter of various bailments with the same bailee is identical in kind—e. g., government bonds—and becomes so intermingled that the owners are unable to identify their separate property, the entire series of bailments must, in case of the insolvency of the bailee, be ratably distributed among the bailors.

In re Bank, 202-859; 211 NW 532; 51 ALR 910

Bailment—preferential order. The deposit of government bonds with a bank for safekeeping only, creates the relation of bailor and bailee; but the bailor may not have a preferential order against the receiver of the bank for the return of his bonds or the proceeds thereof when he is wholly unable to identify any bond as belonging to him, and equally unable to identify any property in the hands of the receiver as the proceeds of his bonds.

Leach v Bank, 206-675; 220 NW 113

No fraud by bank—no constructive trust.

Community Bk. v Gaughen, 228- ; 289 NW 727

Trust funds—facts showing. A bank which through its officers manages a public sale as agent for a party, and holds the cash proceeds thereof in the bank without settlement with the said party, will be deemed to hold the money as trustee, and in case of insolvency the trust funds will be presumed embraced in a final cash balance which is in excess of the trust; and it is immaterial how or in what manner the bank, on its own motion, treated said cash on its books.

Andrew v Bank, 209-1147; 229 NW 907

Wrongful hypothecation—effect. A trust is not destroyed by the fact that the insolvent trustee, without the knowledge of the beneficiary of the trust, has wrongfully pledged the subject-matter of the trust and other securities of his own as collateral to his personal debt, and by the fact that the subject-matter of the trust has been actually sold by the collateral holder, with the consent of the insolvent's receiver, when the receiver had unhampered opportunity to direct the sale of the insolvent's personally owned collateral (which was ample), and thus save and protect the subject-matter of the trust.

Leach v Bank, 202-887; 211 NW 529

Reinstating trust after wrongful dissipation. A trust which has been inadvertently or wrongfully converted and dissipated by the trustee to his own use is effectually reinstated by the subsequent act of the trustee, while solvent, in repurchasing with his own funds the subject-matter of said trust, with the specific intent to effect such reinstatement.

Leach v Bank, 202-887; 211 NW 529

Wrongful deposits. A bank acquires no title to wrongfully deposited funds, and consequently becomes a trustee for the actual owner.

Leach v Bank, 207-478; 223 NW 171

Wrongful deposit basis of trust. Principle reaffirmed that the wrongful deposit in a bank of the funds of a municipality gives rise to a trust relation between the bank and the municipality.

Leach v Bank, 205-971; 219 NW 59

Wrongful deposit of public funds. The deposit in a state bank by a city treasurer of municipal funds without the execution and delivery of the indemnifying bond required by statute is wrongful, and brings into existence a constructive trust, which is enforceable against the receiver of said bank when it is made to appear, by presumption or proof, that said fund has passed into his hands to the augmentation of the assets of the bank.

New Hampton v Leach, 201-316; 207 NW 348

Wrongful deposit of public funds. A deposit in a bank of municipal firemen's pension funds under conditions which deprive the trustees of the power to immediately withdraw said funds, is wrongful and being wrongful the trustees do not lose title to said funds. It follows that in case the bank becomes insolvent the deposit is entitled to preferential payment from the cash on hand at the time of insolvency; and it matters not that the trustees and bank are in pari delicto.

Andrew v Bank, 214-105; 241 NW 412
Andrew v Bank, 222-881; 270 NW 465

Wrongful deposit — presumption. Public funds, unlawfully deposited in a bank because no statutory bond guaranteeing the return of

IV TRUST RELATIONSHIPS—concluded

the deposits was given by the bank, constitute a trust fund which presumptively is included in the cash, if any, which comes into the hands of the receiver upon the insolvency of the bank. Evidence held to overcome the presumption.

Poweshiek Co. v Bank, 209-467; 228 NW 32; 82 ALR 39

Estoppel. Where the funds of a municipality have been wrongfully deposited in a bank, the municipality will not be deemed estopped from insisting that the deposit constitutes a trust fund simply on the assumption that the municipality received statutory interest on the deposit.

Leach v Bank, 205-971; 219 NW 59

Wrongful deposit—estoppel. Where school funds have been wrongfully deposited in a bank, the fact that such funds draw interest works no estoppel on the school district to insist that such funds constitute a trust.

Leach v Bank, 205-1345; 219 NW 483

Wrongful deposit of public funds. School funds deposited in a bank by a school treasurer without authority from the school board constitute a trust fund, which presumptively exists and remains in the cash on hand when the bank passes into the hands of a receiver.

Leach v Bank, 205-1345; 219 NW 483

Wrongful deposits—resulting trust. A deposit of school funds in a bank is wrongful when made without the filing of a depository bond and the approval thereof by the school treasurer and the board of directors. Held that the finding of a bond not formally approved, in the desk of the president of the school board after the failure of the bank, and the evidence in connection therewith, were insufficient to show an implied approval of the bond.

Leach v Bank, 207-478; 223 NW 171

Wrongful deposits. Deposits by a city treasurer of city funds in a bank are wrongful and title to such deposits does not pass to the bank when the city council had simply "designated" the bank as a city depository, without specifying the amount of deposits authorized and without requiring or receiving any bond as required by statute. (§5651, C., '27 [§7420.01. et seq., C., '39]).

Leach v Bank, 204-1083; 216 NW 748; 65 ALR 679

V TERMINATION OF TRUST RELATIONSHIPS

Trust relation terminated by accepting draft. Trust funds in a bank lose their trust character and become general assets of the bank when the bank, under authority from the owner of the trust funds, remits to the owner its draft against existing funds, for the amount of the trust funds. The loss of said trust character necessarily precludes any claim of preference in case of the subsequent insolvency of the drawer-bank.

Leach v Bank, 203-398; 212 NW 746

Andrew v Bank, 203-343; 212 NW 744

Leach v Bank, 204-497; 212 NW 748; 215 NW 728

Trust relation — termination. The relation of principal and agent which exists between a collecting bank and the party who remits a claim for collection, terminates (and necessarily the trust relationship) when the collecting bank remits the proceeds of the collection by draft, in accordance with the instructions of the principal.

Leach v Bank, 207-1254; 219 NW 496; 224 NW 583

Remittance by draft—termination of trust relation. The act of a bank which had made a collection for the owner of a claim, in forwarding the proceeds to the owner by draft, as the owner had directed, terminates any trust relation which may have attended the collection and substitutes therefor the relation of debtor and creditor.

Andrew v Bank, 204-870; 216 NW 553

Trust relation terminated by accepting draft. The act of the holder of a promissory note in forwarding it to a bank for collection from the maker (not the bank) creates the trust relation of principal and agent, but such relation is ipso facto terminated and the relation of debtor and creditor substituted by the act of the bank in issuing and forwarding to said holder its draft for the proceeds of said collection strictly in accordance with the holder's direction.

Leach v Bank, 202-875; 211 NW 527

Trust deposit — termination of trust relationship. Where a bank deposit was made for the sole purpose of enabling the depositor to procure a certified check for use in bidding on a public improvement, with the understanding that if the depositor was not awarded the contract he would surrender the certified check and receive a draft for the amount of the deposit, held, that no trust relationship existed after the depositor surrendered his certified check and in return received a draft for the amount of his deposit.

Andrew v Bank, 215-1336; 245 NW 226

Fatal delay in enforcing unknown trust. A trust fund created without the knowledge of the cestui que trust, in the form of a bank deposit in a national bank, and carried on the books of the bank for many years, and then dropped, may not, after the bank has become insolvent, a receiver appointed, its affairs liquidated, and its charter surrendered and canceled, be enforced against a bank which took over certain assets of the old insolvent bank

and assumed certain of its obligations, not including, however, the trust fund in question.

Short v Bank, 210-1202; 232 NW 507

Acceptance of draft—effect. A cestui que trust who accepts from the trustee a certificate of deposit in lieu of the actual trust funds, and later accepts a draft in lieu of the certificate of deposit, thereby cancels the trust relation, and substitutes therefor the relation of debtor and creditor.

Leach v Bank, 204-954; 216 NW 267

Loss of trust relation. A principal who, instead of demanding cash of his collecting agent, his bank, accepts the certificates of deposit of the latter, thereby terminates the trust relation, becomes a simple depositor, and loses any right of preference in case of the insolvency of the bank; and this result is not overcome by oral testimony to the effect that no such result was intended.

Valentine v Andrew, 203-463; 212 NW 674

Estoppel to set up trust. A chattel mortgagee who, knowing that the mortgaged property has been sold without his consent, and that the proceeds of the sale have been deposited in a bank to the mortgagor's credit, accepts the mortgagor's check on said deposited proceeds for the amount due under the mortgage, together with security for the payment of said check in the form of an assignment by the mortgagor of the balance of said deposit in the bank (which had failed), thereby estops himself from asserting that said deposited proceeds have always belonged to him and therefore constitute a trust fund in his favor.

Andrew v Bank, 209-273; 228 NW 12

Check on trust fund—delayed presentation. Where a check is drawn on a special deposit or trust fund, the act of the payee in withholding presentation for a few days, and until the bank had become insolvent and closed its doors, does not nullify the trust.

Rime v Andrew, 217-1030; 252 NW 542

Non-change in trust funds. The unauthorized act of a bank in drawing in favor of the owner of trust funds in its possession a cashier's check for the amount of such funds, and its act in placing said check among the papers of said owner, cannot change the trust character of said funds.

Leach v Bank, 204-497; 212 NW 748; 215 NW 728

Receivership for insolvent trustee creates vacancy—power to fill. A judicial finding that a banking institution is insolvent and the appointment of a receiver to liquidate its affairs, ipso facto, (1) transfer, to the custody of the law, trust property held by said insolvent as a duly appointed testamentary trustee, (2) deprive said insolvent trustee of power further to act in said trusteeship, and (3) necessarily create a vacancy in the office of said trust—which vacancy the probate court has legal power to fill by appointing a successor in trust, (1) on the sworn application therefor supplemented by the professional statement of counsel, (2) at an ex parte hearing and without notice to interested parties, and (3) without any formal proceedings whatever for the termination of said former trusteeship; and especially is this true when said former trustee, formally and by its conduct, abandons its said trusteeship and all right and interest therein.

In re Strasser, 220-194; 262 NW 137; 102 ALR 117

In re Carson, 221-367; 265 NW 648

Final report by trustee after receivership. The filing of a final report by a trust company as trustee of an estate after the company had gone into receivership and could no longer perform any duty as active trustee, was not an act in administering the trust, but was the performance of its duty to make such final report upon its removal as trustee.

In re Carson, 227-941; 289 NW 30

Noninference as to manner of remitting funds. Authority to a banker to remit trust funds to the owner thereof by means of a draft may not be inferred from the simple fact that said owner expected the remittance to be made in that manner, the actual fact being that the owner had never given any direction as to the manner of remitting.

Andrew v Bank, 204-870; 216 NW 553

Unauthorized draft or check remittance. Trust funds in the possession of a bank do not lose their trust character by the unauthorized issuance by the bank of drafts or cashier's checks to the trust owner for the amount of the fund.

Leach v Bank, 204-497; 212 NW 748; 215 NW 728

VI PRESUMPTION OF PRESERVATION

Presumption. The presumption that a trustee has preserved a cash trust fund in his cash balance applies solely to the lowest cash balance subsequent to the creation of the trust and prior to insolvency.

Leach v Bank, 205-114; 213 NW 414; 217 NW 437; 56 ALR 801

Presumption of preservation — limitation. The presumption of fact that a trustee has preserved a cash trust fund in his cash balances applies exclusively to the lowest cash balance possessed by him subsequent to the receipt of the trust funds; and, upon proof that all other cash balances prior to such low balance have been used in the payment of the debts of the trustee, the trustor must find his

VI PRESUMPTION OF PRESERVATION —continued

funds in such low balance, or not find them at all.

Andrew v Bank, 205-1064; 217 NW 250

Presumption. Presumptively, a cash trust fund in the hands of a bank has been preserved intact, and exists in the cash balance of the bank on hand when the bank becomes insolvent; and said presumption is applicable even tho the bank originally received the trust fund through a check drawn upon itself at a time when it had insufficient funds with which to pay the check, when it is stipulated that, at a later time, the bank did receive the entire amount.

Andrew v Bank, 207-394; 223 NW 249

Following trust funds — presumption. An established trust in a bank is presumed to be embraced in the final balance turned over to the receiver (in case of insolvency) provided the cash balance in the bank at all times since the trust was created has not dropped below the amount of the trust fund.

Andrew v Bank, 217-232; 251 NW 860

Presumption as to preservation. Upon the establishment of a trust in cash funds in the hands of an insolvent bank, the rebuttable presumption is not that the bank preserved the trust in the general mass of bank assets, but that the bank preserved the trust in the smallest cash bank balance existing between the creation of the trust and the time of enforcing the trust.

Leach v Bank, 204-497; 212 NW 748; 215 NW 728

Poweshiek County v Bank, 209-467; 228 NW 32; 82 ALR 39

Limit on preference. When a cestui que trust fails to trace a cash trust fund into the assets of the bank other than the cash assets, an order of preference in payment against the receiver must not exceed a sum coming into the hands of the receiver in excess of the lowest cash balance existing in the bank after the trust came into existence.

Leach v Bank, 205-971; 219 NW 59

Intermingled funds—presumption—scope of. The presumption that the cash on hand in an insolvent bank and coming into the hands of the receiver embraces a cash trust fund with which the bank has been intrusted is a rigidly limited presumption—a presumption having no application beyond its literal terms. If the trustor lays claim to other non-cash items of bank assets he must, by evidence, trace his trust funds into such items, even tho the receiver has in the meantime converted such non-cash items into cash.

Townsend v Bank, 212-1078; 237 NW 356

Intermingled trust and private funds. Upon the insolvency of a trustee, it cannot be presumed that trust funds were preserved in the cash and loan notes taken over by the receiver when the proof shows (1) that the trustee received trust funds in the form of checks and, instead of cashing the checks and holding the cash for application on certain bonds as was his sole duty, he converted said checks by indorsing and depositing them in a bank in his personally owned deposit account, and thereby promiscuously intermingled both classes of funds, (2) that, from time to time, he drew checks against said intermingled funds for the purpose of carrying on his own private loan business, or so drew checks and placed the proceeds in his cash drawer for the same purpose, (3) that during all said time said private business was carried on at a heavy loss, and (4) that at one time after the trust funds were received the trustee's deposit account was materially overdrawn.

Andrew v Trust Co., 217-464; 250 NW 177

Presumption—right to rebut. The presumption that a cash trust fund was preserved in the trustee's cash balance may be rebutted by the receiver of the insolvent trustee.

Andrew v Bank, 204-1317; 217 NW 438

Presumption as to cash balance. Presumptively a cash trust fund in the hands of a bank has been preserved in the actual cash on hand in the bank at the time it closes and passes into the hands of a receiver, and when the presumption is not rebutted the beneficiary of the trust is entitled to receive his property out of said cash balance or to share therein pro rata with other preferred creditors.

Andrew v Bank, 217-69; 251 NW 23

Preservation—presumption. Trust funds in the form of cash are presumptively preserved in the cash balance which passed into the hands of the receiver for the insolvent trustee.

Leach v Bank, 204-1083; 216 NW 748; 65 ALR 679

Negativing preservation. Proof that a bank used cash trust funds in the payment of the debts of the bank necessarily proves that the bank did not preserve said funds in the non-cash assets of the bank.

Andrew v Bank, 205-1064; 217 NW 250

Nullifying presumption. Even if it be conceded, arguendo, that the agreement of a bank was to hold the trust funds in "liquid assets" and to return to the trustor "in kind all cash or its equivalent", and that said agreement authorized the bank to convert the trust funds into bills receivable or to deposit them with correspondent banks, yet the court cannot presume that said trust funds, over and above the amount of cash on hand in the bank when it closed its doors, were embraced in the bank's

bills receivable or in the bank's deposits in correspondent banks, when the receiver affirmatively shows not only that the trust funds were not invested in bills receivable or deposited with correspondent banks, but that from the time the trust was created the bills receivable and the deposits with correspondent banks steadily declined.

In re American Bank, 210-568; 231 NW 311

Wrongful deposits—presumption. Presumptively a bank retains intact a wrongful deposit of money, and has it on hand in its cash balance on the day of insolvency, a presumption which becomes conclusive in the absence of contrary evidence by the receiver.

Leach v Bank, 207-478; 223 NW 171

Presumption. It will be presumed, in the absence of a counter showing, that a bank receiving a wrongful deposit of municipal funds retained the same in its possession, and that the same passed to its receiver.

New Hampton v Leach, 201-316; 207 NW 348

Unallowable presumption. No presumption exists that a bank which has wrongfully received an ordinary deposit of money, has converted the same into other non-cash items of property belonging to the bank at the time of insolvency.

Leach v Bank, 207-478; 223 NW 171
Andrew v Bank, 207-394; 223 NW 249

Limited equitable preference. A bank which, in making collection on a draft sent to it "for collection", receives in payment the check of the drawee on itself for the full amount of the draft cannot, in a proceeding between the drawer of the draft and the subsequently appointed receiver of the bank, be deemed to have collected the draft, except to the extent that the check drawer then had money in his checking account in the collecting bank. Resultantly, an equitable preference to the funds in the hands of the receiver is limited to the amount so on deposit.

Andrew v Bank, 207-948; 222 NW 8

Presumption—evidence to overcome. It will be presumed that a bank acting as trustee has preserved the subject-matter of the trust; and in case of insolvency, the receiver does not establish dissipation of the trust by a mere showing that he, when appointed, received in money much less than the amount of the trust, it appearing that the amount of the trust had passed into the general assets of the bank.

Andrew v Bank, 203-546; 213 NW 245

Tracing trust property — requirements. No presumption exists that a cash trust fund in the hands of a bank was preserved in any or all of the many general, non-cash assets of the bank, nor in the cash deposits of the bank in other banks. In other words, while the beneficiary of the trust may trace his property into such items of assets, yet this can be done only by definite evidence and by proof that the assets have been augmented and the extent of such augmentation.

Andrew v Bank, 217-69; 251 NW 23

Essential allegation—presumption. The presumption that a trustee has preserved the subject-matter of the trust cannot exist, in the absence of an allegation that said subject-matter came into the hands of the representative of the trustee, and some proof to sustain the allegation.

Andrew v Bank, 204-431; 215 NW 623

Presumption as to retaining. The act of a banker, after collecting a trust fund, in issuing and retaining in his own possession, on his own motion, a demand certificate of deposit payable to the owner of the fund will not, of itself, overcome the presumption that he did in fact retain the actual trust funds.

Andrew v Bank, 204-870; 216 NW 553

VII ENFORCEMENT OF TRUST

Discussion. See 16 ILR 256—Recovery of trust assets

Fundamental requirements. A trust may not be impressed upon funds in the hands of the receiver of an insolvent unless it is established (1) that the insolvent received in a trust capacity the particular funds in question, and (2) that the receiver also received said particular funds either in specie or by way of augmentation of the assets which did come into his hands.

Leach v Bank, 202-265; 209 NW 422
Andrew v Bank, 204-870; 216 NW 553

Following trust funds. A cestui que trust owns the property into which he can trace dissipated trust funds.

Mandel v Siverly, 213-109; 238 NW 596

Necessary proof to enforce. A trust deposit in an insolvent bank cannot be enforced as such against the receiver of the bank when the proof is silent on the issue whether the receiver, actually or presumptively, received said trust fund.

Andrew v Bank, 215-1336; 245 NW 226

Insufficient tracing of funds. A trust fund is not traced into the hands of a collecting bank by simply showing that the bank, in collecting a draft as agent of the owner, accepted (1) an unnamed amount in cash, and (2) checks on various other local banks; and this is true even tho the cash on hand in the bank on the day of insolvency exceeded the amount of the trust fund.

Andrew v Bank, 207-403; 223 NW 176

Check as working augmentation of assets. The act of a bank in receiving and accepting an amply protected check on itself in payment

VII ENFORCEMENT OF TRUST—cont.

of a collection for its principal works a legal augmentation of the assets of the bank, even tho the account of the check drawer is not charged with the amount of the check.

Leach v Bank, 204-1343; 217 NW 445

Augmentation of assets—acts constituting. The act of a bank in accepting a surrender of its outstanding general certificate of deposit, and in issuing in lieu thereof, and for the same amount, a special certificate of deposit, wherein it specifically recognized that it was holding said amount in a named trust capacity, constitutes an augmentation of the assets of the bank, even tho no money was actually handled in the transaction.

Dugan v Bank, 205-171; 217 NW 831

Augmentation of assets — nonpresumption. An equitable preference in the payment of trust funds may not be decreed against the receiver of the insolvent trustee when there is no evidence whatever as to the property taken over by the receiver except the concession by the receiver that he had "assets sufficient to pay" the claims if the court decreed an equitable preference in payment.

Leach v Bank, 204-760; 216 NW 16
Andrew v Bank, 205-237; 216 NW 12

Presumption in re augmentation of assets. Mere proof that a check payable to a bank was paid by the remotely located drawee will not warrant the presumption that the amount of such payment actually reached the payee bank and became a part of its cash assets.

Andrew v Bank, 207-407; 219 NW 929

Presumption as to payment. The law will presume that a check was paid on proof that the check was, subsequent to its execution, (1) stamped "Paid", and (2) charged by the drawee to the account of the drawer.

Andrew v Bank, 207-407; 219 NW 929

Charging and crediting accounts—augmentation of assets. The act of a bank which is the common depository of both the drawer and payee of a check in charging the amount of the check to the account of the drawer and in crediting the same amount to the account of the payee constitutes an augmentation of the assets of the bank.

Leach v Bank, 204-1083; 216 NW 748; 65 ALR 679

Nonaugmentation of assets. Proof that a bank to which checks were sent for collection put them through the clearing house on a day when the clearance was against said bank affirmatively shows that the assets of the bank were not augmented by the amount of said checks because such handling of the checks amounted to applying them to the bank's own debt; otherwise, if the clearance was in favor of said bank and the amount thereof is paid in cash.

Leach v Bank, 207-1254; 219 NW 496; 224 NW 583

Nonaugmentation of assets. When a trust fund in an insolvent bank is wrongfully deposited with the bank's correspondent and is used in the general operations of the depositing bank, it may not be said that the funds of the depositing bank were "augmented" because the corresponding bank returned to the depositing bank a larger amount of collateral than it would have returned had the wrongful deposit not been made.

Ronna v Bank, 213-855; 236 NW 68

Negativing augmentation of assets. The fact that the cash balance in a bank after the receipt by the bank of trust funds never dropped below the amount of such trust is of no avail to the beneficiary of the trust when the further fact affirmatively appears that the trust funds were, immediately upon their receipt, used by the bank in the payment of its debts.

Andrew v Bank, 204-878; 216 NW 1

Trust fund—improper allowance against assets. The allowance of a trust fund as a preferred claim should be against the fund properly traced into the hands of the receiver, not against the assets of the bank.

Standard Oil v Andrew, 218-438; 255 NW 497

Trust fund—interest. Interest is not allowable on an established trust fund against an insolvent bank.

Standard Oil v Andrew, 218-438; 255 NW 497

Interest as affecting status. A testamentary trust fund deposited as an investment in a saving account under the terms of the will does not lose its preferential character because of the payment of interest on the deposit.

Bates v Bank, 222-370; 269 NW 341

Intermingled funds—cash in excess of trust —effect. A bank, having been appointed trustee of testamentary trust funds, deposited said funds with itself, and intermingled said trust funds with its general funds, but carried the trust funds in an account which clearly revealed their trust character. The bank was merged into another bank. The trust account, and all other deposit accounts (general and special), and the entire cash balance, of the bank, were transferred to the merging bank, the latter agreeing to pay all deposit liabilities of the merged bank. The transferred deposit accounts were thereafter carried in the merging bank as theretofore carried in the merged bank. The merging bank became insolvent. The cash balances of the respective banks were always in excess of said trust funds.

Held, said trust funds were intact, and were entitled to preference in payment over the general creditors of the merging bank.

Bates v Bank, 222-370; 269 NW 341

Bailment—dissipation—effect. Even tho a trust relation is clearly established in relation to the deposit of government bonds with a bank as a bailment, yet the receiver of such insolvent bank may defeat a plea of preference in payment by showing that, prior to his appointment, the bank had wholly dissipated the bailment and that, therefore, no part of the same came in any form into his possession.

Leach v Bank, 203-401; 212 NW 694; 51 ALR 900

Bailment—dissipation—effect. A bailor who asks that his claim against the receiver of an insolvent bailee be decreed preferred, on the plea that the insolvent wrongfully converted the subject-matter of the bailment by hypothecating the same for a loan, must trace the proceeds of the conversion into the hands of the insolvent to the augmentation of the assets coming into the hands of the receiver.

In re F. & M. Bank, 202-859; 211 NW 532; 51 ALR 910

Leach v Bank, 202-885; 211 NW 535

Affirmative showing of misappropriation. An affirmative showing that a bank, prior to its failure, used trust funds in part in the payment of the obligations of the bank and in part in the payment of the personal obligations of one of the officers of the bank necessarily precludes any equitable preference in payment of such trust funds from the assets of the insolvent bank.

Andrew v Bank, 204-870; 216 NW 553

Mowatt v Bank, 204-1106; 216 NW 760

Presumption of misappropriation. The act of a bank in actively, for several months, concealing from the owner of trust funds the receipt of such funds, and later in making remittance of small amounts thereof, justifies the legal presumption that the bank had wholly misappropriated said fund, especially when no effort is made to trace the funds into the hands of a subsequently appointed receiver for the bank.

Andrew v Bank, 204-870; 216 NW 553

Check as equivalent of cash—presumption. When the deposit of a county treasurer in an insolvent bank consists merely of transfers of credit from the accounts of private depositors in the same bank to the account of said treasurer, made on the basis of checks drawn by the private depositors on said bank (in order to enable the bank to pay the taxes due from the drawers to the treasurer), the law cannot presume that said checks were the equivalent of cash, in the absence of evidence as to the cash on hand in the bank at the various times; nor can the law presume under such circumstances that the bank, on receipt of a check, would, if requested, have forthwith paid said taxes to the treasurer in cash.

Poweshiek County v Bank, 209-467; 228 NW 32; 82 ALR 39

Wrongful sale of mortgaged property—dissipation of proceeds. Conceding, arguendo, that when mortgaged personal property is sold without the consent of the mortgagee, and the proceeds are deposited in a bank to the mortgagor's credit, said proceeds constitute a trust fund of which the mortgagee is the beneficiary, yet such trust is dissolved if such proceeds are wholly dissipated in the payment of the debts of the bank.

Andrew v Bank, 209-273; 228 NW 12

VIII PAYMENT OF TRUST

Depleted fund. If a cash trust fund is duly established, and successfully traced into the final cash balance of an insolvent bank, and paid from said balance under an order of court, a subsequently established trust, which is likewise traced into said balance, can be enforced only against the amount remaining when the subsequent trust is established; and even then, such latter trust beneficiary may be compelled to prorate said remaining amount with other trust beneficiaries.

Andrew v Bank, 207-394; 223 NW 249

Equitable preference in payment—limitation. An equitable preference in the payment of cash trust funds may not be allowed against all the assets of an insolvent bank, but only against the cash balance which passed to the receiver, there being no claim that such trust funds have been preserved in the non-cash assets of the bank.

Leach v Bank, 204-1343; 217 NW 445

Preference — from what moneys payable. The money actually on hand in an insolvent bank at the time it closes its doors is the only fund from which preferred claims may be paid,—in the absence of a successful attempt to trace trust funds into other moneys or property.

Andrew v Bank, 208-392; 226 NW 73

Prorating. An inadequate common trust fund to which various claimants have traced their trust funds must be prorated between the established claims.

Leach v Bank, 204-497; 212 NW 748; 215 NW 728

Leach v Bank, 204-1343; 217 NW 445

Leach v Bank, 205-114; 213 NW 414; 217 NW 437; 56 ALR 801

Andrew v Bank, 205-1064; 217 NW 250

Leach v Bank, 205-1345; 219 NW 483

Leach v Bank, 205-971; 219 NW 59

Leach v Bank, 207-478; 223 NW 171

Prorating trust funds. A decree which provides for the payment of trust funds from the cash on hand in an insolvent bank when it closed its doors, must provide for prorating said cash among all established trust claimants if the amount is insufficient to pay all such claimants in full.

In re American Bank, 210-568; 231 NW 311

VIII PAYMENT OF TRUST—concluded

Tracing trust funds. A solvent bank, which, in due course of business, comes into possession of a trust fund of which its correspondent bank is trustee, effects full delivery of said fund to the said trustee by crediting said trustee with the amount of said fund, and notifying the trustee accordingly.

McCue v Foster, 219-89; 257 NW 559

9239.1 Clearings, and purchasers of drafts preferred.

Holdings prior to statute.

Leach v Bank, 202-879; 211 NW 526

Leach v Bank, 203-782; 211 NW 522; 38 NCCA 426

Leach v Bank, 204-497; 212 NW 748; 215 NW 728

Andrew v Bank, 206-65; 218 NW 957

Townsend v Andrew, 206-1006; 221 NW 572

Applicability of statute. This statute does not apply to drafts issued by private banks.

Ellis v Bank, 211-1082; 234 NW 849

Shifflett v Bank, 215-823; 246 NW 757

Galvin v Citizens Bank, 217-494; 250 NW 729

Failure to argue vital statutory question. Where the holder of a cashier's check on an insolvent bank is given by the receiver, the preferential classification of a "depositor", the appellate court will not accord an enlarged preference under this section, when said statute manifestly presents a grave problem of construction and is in no manner argued.

Andrew v Bank, 214-590; 243 NW 152

"Clearings" defined. The word "clearings" in banking parlance relates only to transactions between banks.

Andrew v Bank, 215-1336; 245 NW 226

Collections—insolvency of collecting bank. The drawer of drafts which were paid by drawees by checks drawn on bank to which drafts had been sent for collection was not entitled to preference on failure of bank on theory of trust relationship, since there was no increase in bank's funds, and where another draft sent to such collecting bank was paid by drawee by check on another bank, which check was used in exchange of checks between collecting bank and such other bank, the drawer was not entitled to preference on insolvency of such collecting bank since its funds were not augmented by payment of draft.

Rorebeck v Benedict Co., 26 F 2d, 440

Draftholder — when not entitled to preference. Where a bank, instead of paying a certificate of deposit from its cash on hand, issued and delivered to the certificate holder a draft in order to enable the latter to obtain the cash from the drawee, it may not be said that the draft was issued "for the bona fide transfer of funds" within the meaning of this section. It follows that, if the draft is not paid, the holder is not entitled, under said section, to a preference in payment over other creditors of the bank.

Andrew v Bank, 215-290; 245 NW 329

Draft as preferred claim. Delay in cashing a draft purchased by the holder and payable to himself for the purpose of transferring his funds from the drawer-bank to another bank will not deprive the holder of his statutory right to a preferential repayment of the money paid for the draft in case the drawer-bank becomes insolvent before the draft is cashed, when such delay was induced by the conduct of the officers of the drawer-bank.

Andrew v Bank, 212-1375; 238 NW 425

Draft for clearances. The payee of a draft given for bank clearances and unpaid because of the insolvency of the drawer is entitled to be paid in full before the payment of any general claim or of any depositor.

Andrew v Bank, 215-1150; 247 NW 797

Draft for clearings. A draft drawn and issued, in payment of clearings at a time when the drawer's account with the drawee is overdrawn, is not drawn "against actual existing values", even tho the drawee holds, on another transaction with the drawer, excess collateral belonging to the drawer sufficient to pay said draft, the drawee never having agreed that the drawer might draw drafts against said excess collateral. (Statute since amended.)

Andrew v Bank, 216-972; 250 NW 152

Purchase of draft — nonpreference. Record reviewed and held that the purchase of a draft was for the purpose of more safely preserving the money, and for the purpose of concealing the money from the holder's creditors, with resulting consequence that the holder, when the bank became insolvent, was entitled to no preference over other creditors.

Iiams v Andrew, 215-923; 247 NW 277

Insolvency—draft as preferred claim. One who, in good faith and for the bona fide purpose of meeting an obligation, long prior thereto contracted, buys a draft of his bank of deposit, and pays therefor with a check drawn by him on his deposit in said bank, will hold said draft as a preferred claim in case the drawer-bank becomes insolvent, it being shown that at the time the bank possessed ample funds to pay said check.

In re Bank, 220-61; 261 NW 807; 101 ALR 627

"Money paid for draft". A bank depositor who holds unpaid certified checks to the full amount of his deposit, and surrenders the checks to the certifying bank at a time when the bank does not have sufficient funds with which to pay the checks, and then receives in return, from the bank, a draft for the amount

of the checks, may not be said to have paid money for the draft.

Andrew v Bank, 215-1336; 245 NW 226

Preference for clearance drafts. The statutory provision that the payee of a draft drawn and issued "against actual existing values", for bank clearances, is entitled to a preference in payment in case the drawer-bank becomes insolvent, imposes an obligation on the payee bank to establish that the draft was drawn against values which the drawer-bank then had on deposit with the drawee-bank. (Statute now changed.)

Andrew v Bank, 214-204; 242 NW 80

Transfer of funds by draft—statutory preference. A bank depositor who, with the bona fide intent to transfer his deposit to a new depository, presents to his bank of deposit a check for the full amount of his deposit, and receives a draft therefor (the bank having cash funds with which to pay the check), thereby in legal effect "pays money" for the draft, and acquires a statutory preferred claim against all the assets of the draft-issuing bank, irrespective of the amount of cash on hand in said bank when it failed.

Bates v Bank, 219-78; 257 NW 578

Transfer of funds by check. Where, "for the bona fide transfer of funds" a cashier's check is purchased by one who supposed he was receiving a draft (and the bank official so knew), the court may treat the check as a draft in order to afford the check holder a preference in case the bank becomes insolvent before the check is paid.

Reason: So treating the check constitutes, in effect, a proper reformation of the check to comply with the mutual understanding of the parties.

Andrew v Bank, 216-1165; 250 NW 487

Trust relationship — pleading. The claim that the purchase price of a bank draft which was not paid constitutes a trust fund because the bank was insolvent at the time of the receipt of the money and the issuance of the draft, must, manifestly, be presented by definite plea and supported by sufficient proof.

Shifflett v Bank, 215-823; 246 NW 757

9239.2 Agreement as to reorganization, consolidation, or sale.

Atty. Gen. Opinions. See '32 AG Op 211; '34 AG Op 88, 93, 592

Granting discretionary power to administrative officer. The statutory grant of discretionary power to the superintendent of banking in re reorganization of banks is not a violation of due process.

Priest v Whitney Co., 219-1281; 261 NW 374

Reorganization—waiver—estoppel. A general waiver by a depositor and creditor of an insolvent bank of a percentage of "any and all claims" which he may have against the bank, in return for which he receives an agreement from a reorganizing bank for payment of the balance of his claims, is final and conclusive when he knows the full purpose of such waiver, and acquiesces therein until the reorganization is effected.

Ronna v Bank, 213-855; 236 NW 68

Waiver by depositors—effect on nonsigners. The act of a majority of the depositors of a bank (owning a large majority of the deposits) in signing waivers deferring payment of their deposits, in order to preserve the bank as a going concern, cannot be deemed the legal equivalent of an express agreement on their part that the depositors who do not sign such waivers shall be paid in full before such signers are paid; nor can such signing be deemed prejudicial to the nonsigners; nor, by such signing, can said signers be deemed to have lost their status as depositors and thereby become mere lenders of money to the bank.

Andrew v Bank, 216-739; 249 NW 768; 88 ALR 1003

Depositor's agreement—conditions. An order of the probate court, authorizing a national bank acting as executor of an estate to execute a depositor's agreement relative to the estate funds, should specifically provide that said order is entered on the condition that the same shall not prejudice the right of the heirs, (1) to a lien upon any securities in possession of the executor, (2) to the right of action against the executor to recover the amount due, and (3) to any existing rights under federal law.

In re McElfresh, 218-97; 254 NW 84

Collection and management of estate—compounding claim. An application in probate by a national bank as executor of an estate for authority to execute a depositor's agreement on behalf of the estate presents no question of the compounding of a claim against a debtor of the estate within the meaning of §11928, C., '31.

In re McElfresh, 218-97; 254 NW 84

Deception constituting fraud and liability therefor. False representations by the managing officers of a reorganized bank to the effect that all objectionable assets of the old bank had been eliminated from the new bank are actionable if relied on to one's damage.

Baumchen v Donahoe, 215-512; 242 NW 533

Novation—substitution of new debtor—consent. A creditor may, by his actions and conduct, consent to the substitution of a new debtor.

Andrew v Trust Co., 219-1059; 258 NW 921

Dissolution—wholesale transfer of assets—right of creditors. A good-faith transfer by a going bank of substantially all its assets, and a good-faith acceptance of such transfer

by the transferee under an agreement by the transferee to pay all record depositors, does not impose on the transferee liability to pay a nonrecord depositor when the transferred assets prove insufficient to pay the record depositors, and the transferor is not shown to have been insolvent at the time of the transfer.

Garvey v Trust Co., 214-401; 239 NW 518

Reorganization—classifying claims. In the reorganization of an insolvent bank under statutory authority, the small claims, such as $10 and less, may be constitutionally placed in a class by themselves and paid in full while larger claims are accorded less favorable terms of payment.

Priest v Whitney Co., 219-1281; 261 NW 374

Certificate of deposit — permissible impairment. A bank depositor may not successfully claim that his certificate of deposit was unconstitutionally impaired by a later, state-approved, good-faith, bank reorganization (in which he did not join) under which all claimants (claims over $10) were given equal but less favorable terms of payment than their contracts originally contemplated, when, at the time of his deposit, the statute law contemplated and substantially provided for such reorganization and change in terms of payment; and if the actual reorganization was effected under later statutes amplifying the said former ones, the answer is that he was dealing with a quasi-public corporation, and that his contract of deposit must reasonably yield to the police power in the interest of the public generally, especially in an emergency resulting from a great financial depression.

Priest v Whitney Co., 219-1281; 261 NW 374

Insolvency—assumption of liabilities—construction. The written agreement by a bank to take over the assets of an insolvent bank and apparently to assume the payment of all the liabilities of the insolvent will be controlled, in its general terms, by the official bank resolution pertaining to the matter. Held, under this rule, that the assumption in a certain case embraced liabilities appearing only on the books of the insolvent bank.

German Bank v Bank, 203-276; 211 NW 386

Merger—creditor's right to follow assets. A creditor of a banking corporation may, for the satisfaction of his claim, follow the assets of the corporation into the hands of another like corporation which has bodily taken over said assets and paid therefor by an issuance of its corporate shares of stock—it appearing that the latter corporation had assumed the liabilities of the former but had become insolvent.

Andrew v Bank & Trust, 219-1059; 258 NW 921

Merger—nontrust relation. Under a valid agreement between two banking institutions to the effect that one should be merged into the other, the title of the bank receiving the assets of the merged bank and the title of said receiving bank to the money paid to it by the stockholders of the merged bank must be deemed absolute and not in trust, when every material term of the agreement affecting the financial interest of the stockholders of the merged bank has been substantially fulfilled.

Andrew v Bank & Trust, 219-921; 258 NW 911

Merger — immaterial failure to perform — trust relation. On the question whether a merger contract between two banks had been so far performed that the bank receiving the assets of the merged bank (and other moneys) took absolute title or only in trust, it will be deemed immaterial that said receiving bank failed to comply with a provision which was, in truth and fact, no part of the consideration for the merger and which was not performed because the superintendent of banking legally refused his approval.

Andrew v Bank & Trust, 219-921; 258 NW 911

Merger contract—nonrescission. A contract for the merger of two banking corporations must be deemed final and irrevocable, even tho there has not been full compliance with every provision thereof, (1) when the corporation receiving the merger has passed into insolvency, (2) when, prior to such insolvency, substantial and good-faith acts were performed by both parties in fulfillment of the contract, (3) when neither corporation ever attempted to rescind, and (4) when the restoration of the status quo would probably be impossible.

Andrew v Bank & Trust, 219-921; 258 NW 911

9239.3 Agreement by public bodies.

Atty. Gen. Opinions. See '32 AG Op 151; '34 AG Op 88, 139, 142, 153, 188

9239.4 Hearing—notice.

Atty. Gen. Opinion. See '32 AG Op 211

9239.6 Receivership concluded—report.

Bank examiner's final report vacated—procedure. An application by the superintendent of banking to set aside and vacate on the ground of fraud an order approving the final report and discharging the receiver and examiner of a closed bank is governed by Ch 552 of the code—the statutory procedure to vacate and modify judgments—which provides a complete legal remedy for setting aside a judgment or order after the term in which it is entered and within one year of the rendition of the judgment.

Bates v Loan Co., 227-1347; 291 NW 184

Vacating final report of receiver—jurisdiction of court. After approval of the final report of the receiver of a closed bank which discharged both the receiver and the examiner

in charge, an application by the receiver for vacation of the order consented to the jurisdiction of the court only as to the receiver, but the court had jurisdiction to deal summarily with the examiner by prescribing the form of notice to be served on him and to set the time for his appearance so long as the statutory provisions for vacating and modifying judgments were complied with and the application filed within one year from the date of rendition of the order attacked.

Bates v Loan Co., 227-1347; 291 NW 184

Appearance date agreed on — waiver of notice. Where the parties in a proceeding to vacate an order of court approving the final report of a bank receiver stipulate that the court may set a date for appearance later than the second day of the term, and that the bank examiner will file an appearance or pleading on or before that date, and that no other or further notice to him shall be necessary, the examiner may not assert the departure from the statutory requirements as to the appearance date as a ground for challenging the jurisdiction of the court by a special appearance.

Bates v Loan Co., 227-1347; 291 NW 184

9239.7 Secured creditors — contracts with third parties.

Insolvency—transfer of assets—trust fund doctrine. The transfer by an insolvent bank, while in the hands of a receiver, of all or of a part of its assets to another bank which pays nothing therefor, but assumes the payment of certain of the liabilities of the insolvent, does not deprive a judgment creditor of the insolvent's of the right to follow said assets into the hands of the transferee and to impress a lien thereon on the basis of the pro rata value of the assets transferred; and this is true tho the transferee bank had no knowledge of the creditor's claim when it accepted the transfer.

German Bank v Bank, 203-276; 211 NW 386

9242 Superintendent as receiver.

Atty. Gen. Opinions. See '25-26 AG Op 325; '32 AG Op 211; '36 AG Op 28, 666

Nonretrospective statute. A statute which provides that "the superintendent of banking henceforth shall be the sole and only receiver" for state banks and trust companies in no manner displaces a then qualified and acting receiver.

Andrew v Bank, 206-869; 221 NW 668

Superintendent as sole receiver—exceptions. The statutory declaration that the superintendent of banking shall be the sole and only receiver or liquidating officer for state incorporated banks has no application (1) when the receiver is prayed for, not by said superintendent, but by private parties, and for a bank which has largely closed out its business as a bank, and is preparing to dissolve, and (2) when the receiver is prayed for as an auxiliary remedy in an action for the adjudication of matters in which the superintendent of banking is interested adversely to plaintiff.

Harris Est. v Bank, 207-41; 217 NW 477

Liability of banking superintendent. The superintendent of banking in his official capacities as superintendent and as bank receiver is, in law, two persons, and may be held responsible for his own acts or those of his assistants.

Bates v Niles, 226-1077; 285 NW 626

Liability of bank superintendent for failure to collect claims. When there was no evidence of wrongdoing on the part of the superintendent of banking in his capacity as bank receiver, nor sufficient evidence to show negligence on the part of the bank examiner, a previous decision that the superintendent was negligent in not filing claims within the statutory time for filing in order to collect them, does not control when an objection was made because there was no accounting of these claims in the final report of the receiver when neither the issues nor parties are identical with the previously decided case.

Bates v Niles, 226-1077; 285 NW 626

Compromise of claims. A receiver may not compromise claims except under prior authority of, or under subsequent ratification by, the court.

Sherman v Linderson, 204-532; 215 NW 501

Waiver of valuable rights. A chancery receiver may not waive a valuable right without the authority of the court, nor may an agent of a statutory receiver waive such valuable right without the authority of such statutory receiver.

Andrew v Rivers, 207-343; 223 NW 102

Rents—priority over receiver. The receiver of an insolvent bank who, pending receivership, acquires, on behalf of the insolvent, a deed to real estate "subject to" a specified first mortgage, holds the rent notes and the proceeds thereof, covering the redemption period, subject to the said mortgagee's right thereto under his mortgage pledge thereof.

Connecticut Ins. v Stahle, 215-1188; 247 NW 648

Rents—priority over receiver. The receiver of an insolvent bank who forecloses a second mortgage belonging to the insolvent and receives a sheriff's deed, acquires by said deed simply the rights formerly possessed by the mortgagor-owner. It follows that the receiver holds said land subject to the right of the first mortgagee subsequently to perfect and enforce a pledge of the undisposed of rents, in order to satisfy a deficiency judgment, as provided in the first mortgage. (Schlesselman v Martin, 207 Iowa 907, overruled.)

Northwestern Ins. v Gross, 215-963; 247 NW 286

Metropolitan v Smith, 215-1052; 247 NW 503

Rents—priority over receiver. The receiver of an insolvent bank must be deemed to hold the insolvent's mortgaged land subject to the right of the mortgagee, in order to satisfy a deficiency judgment, to perfect and enforce a pledge of the undisposed of rents as provided in the mortgage. In other words, the receiver may no more deny the mortgagee's right to said rents than might the insolvent deny such right.

Metropolitan v Sheldon, 215-955; 247 NW 291
Willey v Andrew, 215-1104; 247 NW 501
Lincoln Bank v Barlow, 217-323; 251 NW 501

Receiver not protected by dead man statute. In an action by the receiver of an insolvent bank to recover on promissory notes allegedly due the bank, wherein defendant pleaded payment, held that the receiver was not within the class protected by the dead man statute.

Bates v Zehnpfennig, 220-164; 262 NW 141

Compromise — approval by court — review. The action of the court in bank receivership proceedings in approving a compromise on a written guaranty by the directors of payment of certain assets of the bank will not be set aside in the absence of a showing that such approval is not in the interest of the depositors; and especially is this true when an element of uncertainty exists as to the extent of the legal recovery under the guaranty.

Andrew v Bank, 205-712; 218 NW 520

Bank examiner's final report vacated—procedure. An application by the superintendent of banking to set aside and vacate on the ground of fraud an order approving the final report and discharging the receiver and examiner of a closed bank is governed by Ch 552 of the code—the statutory procedure to vacate and modify judgments—which provides a complete legal remedy for setting aside a judgment or order after the term in which it is entered and within one year of the rendition of the judgment.

Bates v Loan Co., 227-1347; 291 NW 184

9243 Expenses of liquidation.

Atty. Gen. Opinions. See '36 AG Op 28, 666

Assistant examiner—initial power to fix salary. The superintendent of banking has the initial power to fix the salary of a bank examiner appointed by him to assist in the liquidation of an insolvent bank of which the superintendent is receiver. The district court has no right to grant a greater salary.

In re City Bank, 210-581; 231 NW 342

Fees of bank receiver—review. When objections were made to the salaries and expenses of bank examiners as set forth in the final report of the receiver it was proper for the court to refuse to examine whether the fees were excessive when they were fixed by statute and approved at a court hearing, which was ex parte in accordance with the general practice in such hearings, when there was no evidence to show that the court was misled in making the approval.

Bates v Niles, 226-1077; 285 NW 626

9246 Impairment of capital stock—assessments. (Repealed)

Assessment—purpose. An assessment on the stock of a bank in order to restore the impaired capital, and in order to enable the bank to continue as a going concern, and followed by a continuation of the bank's business, cannot be deemed an assessment for liquidating purposes, even tho the bank, within a very short time, becomes insolvent and passes into the hands of a receiver.

Andrew v Bank, 206-869; 221 NW 668

Double liability not subject to off-set. Funds voluntarily paid into a bank by a stockholder thereof, in order to repair or make good the impaired capital of the bank while it is a going concern, may not later, and after the bank has become insolvent and has passed into the hands of a receiver, be offset by the stockholder against the demand of the receiver for a 100 percent assessment on the stock for the benefit of the creditors.

Leach v Bank, 203-1052; 213 NW 772
Andrew v Bank, 204-243; 213 NW 925; 56 ALR 521

Bank deposits—no set-off against assessment irregularly made. A purported assessment by the directors of a bank is not chargeable against the deposit of a deceased stockholder in the bank, when, under the record, the payments to be made were purely voluntary in nature as distinguished from enforceable statutory assessments by order of the state banking department.

Younkin v Bank, 226-343; 284 NW 151

Legal and equitable owners differentiated. The legal owners of corporate shares of stock may be legally liable to assessments, while one who simply has an equitable interest in said shares of stock may not be so liable.

Andrew v Bank & Trust, 219-921; 258 NW 911

Stockholders' assessment to replace impaired capital—jury question. Conflicting evidence reviewed and held to present a jury question on the issue whether an assessment on bank stockholders was for the purpose of making good the impaired capital of the bank, or whether it was a voluntary arrangement among the stockholders to form a pool and purchase from the bank certain assets of doubtful value and thereby to relieve, in part, the individual guarantors thereon.

Andrew v Austin, 213-963; 232 NW 79

Assessment — nonpower of superintendent. The superintendent of banking has no power

to order an assessment on the stockholders of an insolvent bank.

Home Bk. v Berggren, 211-697; 234 NW 573

Improper payment — assessment on bank stock. An executor will not be given credit for estate funds voluntarily used by him, in discharging an assessment on bank stock which is held by the estate solely as collateral security.

In re Moe, 213-95; 237 NW 228; 238 NW 718

Corporate entity—unallowable disregard of. Where collaterally secured bonds, owned by a corporation, were depreciated in value by the wrongful act of the collateral-holding trustee in permitting worthless collaterals to be substituted for valuable collaterals, the resulting damages belong solely to the corporation. In other words, a stockholder may not maintain an action against the trustee for alleged special damages suffered by said stockholder consequent on the fact that said depreciation so impaired the capital of the corporation that an assessment on the corporate shares became necessary, and that the stockholder was unable to pay said assessment and thereby lost his said stock.

Grimes v Brammer, 214-405; 239 NW 550

9248 Assessment enforced. (Repealed.)

Issuance of stock—estoppel to question. One, who has explicit knowledge of the facts under which corporate shares of stock were issued to him and later accepts and retains a dividend paid on the stock, will not, at least as against creditors of the corporation, be heard to say that the stock was improperly issued to him.

Andrew v Bank & Trust, 219-939; 258 NW 925

9248-a1 Liability for deficiency. (Repealed.)

Additional remedy to enforce. A statutory assessment against a holder of bank stock in order to restore the impaired capital of the bank creates a personal liability on the part of the stockholder, and the statutory remedy for enforcing such personal liability by a sale of the stockholder's stock may, after the stockholder acquires his stock, be constitutionally supplemented by an additional statutory remedy, to wit: an action at law to recover of the stockholder the balance due on said assessment after selling said stock. The granting of such additional remedy does not impair the stockholder's contract in a constitutional sense.

Woodbine Bk. v Shriver, 212-196; 236 NW 10

Sale of stock for payment of assessment—common-law or statutory right of action. As to a stockholder who acquired his stock prior to the enactment of a statute permitting the sale of stock to enforce payment of a stockholder's assessment to reimburse an impairment of the bank capital, such statute does not necessarily exclude a common-law remedy by action when not so construed by the highest state court, and such statute declaring that the stockholder shall be liable for any deficiency after applying the proceeds of such sale, and providing for its collection by suit, is not a deprivation of property without due process by impairing a contract obligation.

Shriver v Bank, 285 US 467

9250 Liability of directors. (Repealed.)

Directors' right to contract for payment of debts. A good-faith contract by the board of directors of a state bank, for and on behalf of the bank, and providing for the payment of the bank's debts incurred in the operation of the bank, is valid without any approval by the stockholders of the bank.

Andrew v Bank, 216-252; 249 NW 352; 89 ALR 783

Personal liability. The directors of a bank who personally know of, and connive at, the investment of the funds of a cemetery association (in the hands of the president of said bank as trustee) in the time certificates of deposit of the bank—in violation of §10202, C., '35—are personally liable, ex maleficio, for the loss of said funds consequent on the insolvency of said bank.

Olin Assn. v Bank, 222-1053; 270 NW 455; 112 ALR 1205

9251 Liability of stockholders. (Repealed.)

Discussion. See 21 ILR 611—Scope of statute; 21 ILR 630—Corporate device to avoid liability

Improper plaintiff. An insolvent bank may not maintain an action against its stockholders to enforce and collect the superadded double liability imposed by this section.

Home Bk. v Berggren, 211-697; 234 NW 573

Foreign receiver as plaintiff.

Gruetzmacher v Quevli, 208-537; 226 NW 5

Enforcement of liability. The successful liquidation of the deposit liabilities of a failing bank by a transfer of assets to a stronger financial institution, under a good-faith contract approved by the superintendent of banking, constitutes no bar to a final liquidation of the remaining indebtedness of the failing bank by said superintendent, and to the enforcement by said officer of the stockholders' double liability on their stock.

Andrew v Bank, 216-252; 249 NW 352; 89 ALR 783

Heirs as owners of corporate shares. The heirs of an intestate may not be said to own the corporate shares of stock of the intestate, and may not, therefore, be said to be stockholders, (1) when they have never held themselves out as such owners, (2) when there has been

no administration on the estate, and (3) when there is no showing as to the extent or distribution of the estate, or as to the debts and the discharge thereof.

Andrew v Dunn, 202-364; 210 NW 425

Stockholders—acts constituting. One who buys corporate bank stock necessarily becomes a stockholder even tho the bank officials in good faith but mistakenly represented that such purchase would rehabilitate the impaired capital of the bank.

Andrew v Bank, 211-649; 234 NW 542

Voluntary purchase of stock to rehabilitate bank. Persons who, in an effort to rehabilitate a financially embarrassed bank and make good its impaired capital, voluntarily purchase of the bank corporate stock which had been surrendered to the bank by impecunious stockholders, must be deemed full-fledged stockholders, on ample consideration, and subject to an assessment on said stock in case the bank later becomes insolvent and passes into the hands of the superintendent of banking.

Andrew v Bank, 209-1153; 229 NW 905

Acts constituting transfer. A stockholder in a bank who has never held a formal certificate for his stock and who, having made a bona fide sale of his stock, notifies an officer of the bank of such sale, and requests a transfer of the stock on the books of the bank, and is told that such transfer would be made, ceases to be a stockholder even tho no transfer is entered on the stock book of the bank.

Andrew v Sanford, 212-300; 233 NW 529

Stockholder—who is—wholly inadequate evidence. In an equitable action to enforce, against an estate, "double" liability on bank stock, a finding and decree (based almost exclusively on the testimony of the record owner of said stock) that the deceased had actually owned said stock for some thirty years and was such owner at the time of his death, will (notwithstanding the deference accorded to the trial court in judging of the credibility of witnesses) be annulled on appeal as without adequate support in the evidence when the actions and conduct of said record owner during substantially all of said time in asserting exclusive ownership in himself, even after the death of the deceased, is wholly at war with his present testimony that he had never owned said stock and that the deceased had always owned it.

Andrew v Bank, 220-219; 261 NW 810

Who are not stockholders. A person does not, within the meaning of this section, become the owner of bank stock when, in supposedly buying the stock, he is designedly led by the president of the bank to believe and does believe that the purchase is of stock owned by the bank when in truth and fact the stock was owned by the president himself.

Bates v Bank, 222-407; 269 NW 437

Nonrecord stockholder. The statutory "double" liability of stockholders in banks is enforceable against all actual owners of stock whether they are or are not recorded on the stock book of the bank as such owners.

Andrew v Bank, 220-219; 261 NW 810

Insufficient sale. An absolute and good-faith transfer by a failing bank of part of its assets to a stronger financial institution, under a contract by which the latter agreed to discharge the deposit liabilities of the former (which contract was fulfilled) does not constitute such a "sale" or "transaction" as to relieve stockholders of their stock liability on the final liquidation of the remaining liabilities.

Andrew v Bank, 216-252; 249 NW 352; 89 ALR 783

Transfer of stock after expiration of charter—effect. When the charter of a bank expires, the legal existence of the corporation terminates; likewise terminates the legal right to transfer the stock in such sense that the transferor ceases to be a stockholder.

Andrew v Bank, 211-649; 234 NW 542

Expiration of charter—effect. The liability of stockholders of a state bank to assessment on their stock is not terminated by the expiration of the charter of the bank.

Bates v Bank, 218-1320; 256 NW 286

"Trustee" not subject to double liability. The holder of corporate bank stock as "trustee" is not personally subject to double liability on the stock in case the bank becomes insolvent.

Andrew v Bank, 205-42; 217 NW 431; 57 ALR 767

Stock held in trust—double assessment liability. Under decree of an Iowa equity court assessing statutory liability on stock in a closed Iowa bank against a national bank as trustee under an identified trust, the bank does not become personally liable, under laws of Iowa, for such assessment. Neither could the receiver of the Iowa closed bank, in a common-law action, charge the trust property with such statutory liability.

Bates v Bank, 101 F 2d, 278

"Accruing" defined. The statutory provision that the stockholders of a bank are under a double liability as to "liabilities accruing while they remain such stockholders" means that such liability, in case of the insolvency of the bank, embraces any liability within the purview of the statute which exists while a stockholder remains a stockholder.

Andrew v Bank, 206-1070; 221 NW 809

"Accruing" defined. The statutory double liability of stockholders on bank stock owned by them for all liabilities "accruing while they remained such stockholders" embraces all lia-

bilities "incurred" by the bank during said period of ownership.

Andrew v Bank, 217-447; 252 NW 245

Double liability—bank official's wife—stock transfer to husband. Where a wife transfers her bank stock to her husband, a bank officer, who informed other bank officials thereof, who contributed to the insolvent bank on a basis including this stock and who personally, instead of by proxy as previously, voted this stock, he was in fact the actual owner of bank stock, even tho it had not been transferred to him on the bank's books, and the double liability assessment is not recoverable from the wife.

Bates v Bank, 223-1215; 275 NW 91

Indebtedness to pay depositors—assessment of stockholders. An insolvent bank may, under §9297, C., '31, and under authority of a majority of its stockholders, legally take the written agreement of a solvent bank to pay in full the depositors of said insolvent bank, and in return for such agreement legally transfer its assets to said solvent bank, and legally obligate itself to pay to said solvent bank any deficiency existing after said transferred assets are liquidated and applied. It follows that if said solvent bank pays said depositors in full, notwithstanding the fact that the said liquidating receipts are insufficient so to do, the stockholders of the insolvent bank, even tho they did not consent to said arrangement, must submit to an assessment to pay the unsatisfied obligations of their bank.

Andrew v Bank, 215-627; 246 NW 618

Depositors — assessment to pay. A state bank, through its directors, may validly create an indebtedness for the good-faith purpose of paying its depositors, and the stockholders must submit to an assessment for the purpose of discharging said indebtedness, even tho they had no knowledge of said proposed indebtedness at the time it was entered into.

Bates v Bank, 218-1320; 256 NW 286

Basis for assessment. A showing that the assets of a state bank plus a 100 percent assessment on the stock will not be sufficient to pay the debts of the bank furnishes abundant basis for an assessment on the stock, even tho there be no showing as to the amount of claims filed and approved.

Bates v Bank, 218-1320; 256 NW 286

Stock liability assessment—100 percent not mandatory. Statute imposing liability assessment on a bank stockholder does not mandatorily require a 100 percent levy in every instance, but the assessment is determined by ascertaining the deficiency between the assets and the liabilities proportioned to the amount of stock owned.

Bates v Bank, 225-232; 280 NW 487

Assessment—amount necessary—fact question. The question as to what amount of assessment on the stockholders of a bank is necessary to repair the bank's assets is one of fact to be determined by the court from evidence of the bank's assets and liabilities.

Bates v Bank, 225-232; 280 NW 487

Unauthorized assessment. A stockholder in an insolvent bank is not liable to an assessment on his stock to discharge the personal obligations of other stockholders that were contracted in effecting a consolidation with a solvent bank, when the stockholder proposed to be assessed did not participate in the said consolidation.

Andrew v Dunn, 202-364; 210 NW 425

Bank deposits—no set-off against assessment irregularly made. A purported assessment by the directors of a bank is not chargeable against the deposit of a deceased stockholder in the bank, when, under the record, the payments to be made were purely voluntary in nature as distinguished from enforceable statutory assessments by order of the state banking department.

Younkin v Bank, 226-343; 284 NW 151

Successive assessments. An assessment on stockholders and the payment of the same for the purpose of restoring the impaired capital of the bank is no impediment to the subsequent assessment on stockholders to pay the debts of the insolvent bank.

Andrew v Bank, 206-869; 221 NW 668

Liability survives. The cause of action for the enforcement of an assessment on corporate bank stock survives the death of the stockholder, the stock continuing to stand in his name on the books of the bank until the necessity for, and right to, the assessment arose.

Andrew v Bank, 219-1244; 260 NW 849

Nonallowable set-off. Advancements made by a stockholder in a bank for the purpose of enabling the bank to continue as a going concern cannot be offset against the receiver's demand for judgment against the stockholder on his "double" liability to creditors on his stock, even tho the advancements were so fraudulently induced by the bank that the bank, itself, might be held as a trustee.

Bates v Bank, 217-741; 252 NW 138

Nonallowable set-off. Stockholders of an insolvent savings bank may not offset against their "double" liability on stock, (1) the amount of their deposits in the bank and other sums due them from the bank, or (2) the amount of assessments voluntarily or involuntarily paid by them to the bank while it was a going concern and made for the purpose of restoring the impaired capital of the bank; and this is true tho the proceeds of said assessments were used to pay depositors.

Andrew v Bank, 221-98; 265 NW 113

Double liability not subject to off-set. Funds voluntarily paid into a bank by a stockholder thereof, in order to repair or make good the impaired capital of the bank while it is a going concern, may not later, and after the bank has become insolvent and has passed into the hands of a receiver, be offset by the stockholder against the demand of the receiver for a 100 percent assessment on the stock for the benefit of the creditors.

Leach v Bank, 203-1052; 213 NW 772

Andrew v Bank, 204-243; 213 NW 925; 56 ALR 521

Credit by amount of former assessment unallowable. One who purchases corporate bank stock by paying an existing assessment thereon (and but little in addition thereto) will not be permitted, after the bank has become insolvent, to assert that said assessment was coercive as to him and that the amount of such assessment should be credited on his "double liability".

Andrew v Bank, 211-649; 234 NW 542

Double liability of stockholders—nonassignability. The statutory "double liability" of a stockholder in an insolvent state bank to all the creditors of the bank is not of such nature that a sale or assignment thereof by the receiver, even under an order of court, will vest in the vendee or assignee the right to enforce such liability exclusively for his own use and benefit.

Andrew v Bank, 214-1339; 242 NW 62; 82 ALR 1280

Fraud-induced purchase of stock—damages. The measure of damages for false representations inducing the purchase of corporate bank stock is the price paid for the stock; also, in addition, the amount of assessments subsequently paid on the stock if said assessments are the proximate results of the cause which brought about the original loss.

Baumchen v Donahoe, 215-512; 242 NW 533

Liability of life tenants. Life tenants of substantially all of testator's property, which consists in part of certain shares of corporate bank stock, are liable to a judgment, payable from said property, in satisfaction of the statutory "double" liability on such stock.

Andrew v Bank, 219-1334; 261 NW 815

Nonliability of children of deceased stockholder. The children of a deceased stockholder in a state bank, which has become insolvent since the death of the deceased and the probate of his will, are not personally subject to judgment on an assessment on said stock, (1) when the will of the deceased granted to his widow a life estate in his entire estate with power to sell any part of the corpus of the estate if necessary for her support, and with remainder to said children, (2) when the widow has taken possession of said estate after probating the will (tho the stock still stands in the name of the deceased), and (3) when said children have not in any manner whatever indicated a willingness to become stockholders in said bank.

Andrew v Bank, 219-1244; 260 NW 849

Life-estate holder nonliable. The holder of a testamentary life estate in corporate bank stock standing on the books of the insolvent bank in testator's name, is not personally liable for an assessment on the stock, even tho said holder would have power, under the will, to sell said stock if such sale was necessary for her support.

Andrew v Bank, 219-1244; 260 NW 849

Statutory double liability repealed. After the effective date of chapter 219 of the 47th GA, the act repealing the statutory double assessment liability on bank stock, a closed bank's receiver may not maintain against the executor and beneficiaries under the will an action to enforce the double liability as to stock issued prior to December 1, 1933, and formerly owned by decedent.

Bates v Bank, 227-925; 289 NW 735

When estate beneficiary liable. One who, in the final settlement of an estate, receives the corporate bank stock of the deceased intestate as his or her share of the estate, becomes a "stockholder", and is subject to assessment like other stockholders, even tho the stock has not been transferred on the stock books of the bank.

Bates v Bank, 218-1320; 256 NW 286

When heir not liable. An heir is not liable to a statutory assessment on state bank stock owned by his deceased, intestate ancestor when, in the final settlement of the ancestor's estate, said heir, under contract with other heirs, receives his share solely in property other than said stock.

Bates v Bank, 218-1320; 256 NW 286

Liability of assets of settled estate. An assessment on corporate bank stock standing on the corporate bank books in the name of a deceased stockholder may, by an action in equity, be enforced against the assets comprising the estate of the deceased stockholder, tho the estate has been legally settled and closed, and the said assets have passed into the hands of a testamentary devisee, when the necessity for, and right to said assessment arose, and the assessment was made, long after the settlement of said estate.

Andrew v Bank, 219-1244; 260 NW 849

Bank stock assessment claim—judgment—conclusiveness. State superintendent of banking, who in a final decree in equity was denied right of recovery on stock assessment against executor and beneficiaries under will of decedent, could not thereafter recover the same assessment by way of a claim filed in the

estate, even tho in the latter instance he acted in statutory capacity as receiver. So held in reaffirming principles that one not a party to a suit, who assumes control of the litigation, employs counsel and has a right to control and conduct the same, is bound by the judgment, and that a judgment is conclusive as to all parties to a suit and all parties in privity.

In re Lyman, 227-1191; 290 NW 537

Double liability—change of venue. A stockholder in an insolvent bank who is sued by the receiver, on his "double liability", in the forum of the receivership, in one equitable action, along with all other stockholders, is not entitled to a change of venue in case the county of suit is not the county of his residence in this state.

Broulik v Henderson, 218-640; 254 NW 63

Double liability—national bank as stockholder. A resident national bank as a stockholder in an insolvent state bank of this state is subject to suit in equity by the receiver in the county of the receivership forum, along with all other stockholders, to enforce the statutory double liability of stockholders, even tho the county of said forum is not the county of which the national bank is a resident.

Merchants Bank v Henderson, 218-657; 254 NW 65

Assessment to discharge receiver's certificates. In an action against the stockholders of an insolvent bank on an assessment on their corporate shares of stock, it is no defense that the proceeds of the assessment will be used in discharging the amount due on certificates of indebtedness issued and sold by the receiver and used by him in discharging the original debts of the bank.

Andrew v Bank, 206-869; 221 NW 668

Subrogation. The holder of certificates of indebtedness issued and sold by the receiver of an insolvent bank in order to raise funds with which to pay the debts of the bank will, in an action by the receiver to enforce an assessment on corporate stock in order to pay the certificates, be deemed to stand in the shoes of the original creditors of the bank.

Andrew v Bank, 206-869; 221 NW 668

Double liability—liability of homestead. The very act of acquiring the ownership of corporate bank stock ipso facto creates a contract "debt" for the statutory double liability on the stock. It follows that a judgment against the stockholder on such double liability may (the debtor having no other leviable property) be enforced against the stockholder's subsequently acquired homestead, even tho the judgment was rendered subsequent to the acquisition of the homestead.

Smith v Andrew, 209-99; 227 NW 587

Voluntary, nonfraudulent conveyance—valid against judgment on subsequent bank stock assessment. Altho wholly voluntary, a conveyance executed when the grantor has no fraudulent intent cannot be impeached by a subsequent creditor, so a real estate conveyance by a husband to his wife many years before he becomes a bank stockholder cannot be invalidated by the creditors of the bank, seeking to collect a judgment on stock liability assessment.

Bates v Kleve, 225-255; 280 NW 501

Allowable defense. The receiver of an insolvent bank may not recover of a stockholder on the latter's superadded liability on his stock (1) when, at a time when it was believed the bank would continue as a going concern, the said stockholder had, under a contract approved by the state banking department, surrendered his stock to the bank and turned over to the bank a fund equal to the amount of his surrendered stock for the sole and specific purpose of discharging said superadded liability, should necessity arise therefor, and (2) when said fund, intact, came into the hands of said receiver. In other words, the receiver must treat said fund as a trust and therewith discharge the stockholder's superadded liability.

Andrew v Bank, 216-830; 249 NW 373

Unallowable defense. An unperformed agreement between a bank and its stockholders to the effect that an assessment to repair the depreciated capital of the bank would be returned to the stockholders, in case the bank could not continue as a going concern, constitutes no defense to an action by the receiver against the stockholders after the bank has become insolvent to collect an assessment for the benefit of the creditors of the bank.

Andrew v Bank, 212-329; 236 NW 392

Laches as bar. Record reviewed and held insufficient to show such laches as would bar an action to enforce, against the estate of a stockholder, the latter's statutory, superadded liability on capital stock.

Bates v McGill, 223-62; 272 NW 535

How enforced. A claim by the receiver of an insolvent state bank for the statutory, superadded, contingent liability on capital stock need not, as to the liability of a stockholder who has died prior to the insolvency of the bank, be filed as a claim against the stockholder's estate. Such claim may be enforced by action against the executor or administrator as such.

Bates v McGill, 223-62; 272 NW 535

Statute of limitations. An action by the receiver of an insolvent state bank, to enforce the statutory, superadded, contingent liability on capital stock, is not necessarily barred by the statute of limitation because not commenced within five years after the stockholder ceased to own the stock.

Bates v McGill, 223-62; 272 NW 535

Stock assessments nonassignable. An assessment against a holder of corporate bank stock in an insolvent bank, ordered by the court under the so-called "double liability" statute, even tho said assessment is in the form of a judgment, is nonassignable by the receiver, even under an authorizing order of court, and if formally assigned, is nonenforceable by the assignee, said attempted assignment being for a purpose other than the payment of creditors.

Roe v King, 217-213; 251 NW 81

Payments of prior assessments no defense. Payment of assessments on bank stock prior to insolvency is no defense to an action after insolvency to enforce the statutory "double" liability.

Bates v Bank, 219-1356; 261 NW 614

9252 Enforcement. (Repealed.)

Application of assets as condition precedent. The application of the assets of an insolvent bank to the payment of the debts of the bank is not a condition precedent to the right of the receiver to maintain an action to enforce the double liability of stockholders.

Andrew v Bank, 206-1070; 221 NW 809

Assessment—amount necessary—fact question. The question as to what amount of assessment on the stockholders of a bank is necessary to repair the bank's assets is one of fact to be determined by the court from evidence of the bank's assets and liabilities.

Bates v Bank, 225-232; 280 NW 487

Stock liability assessment—100 percent not mandatory. Statute imposing liability assessment on a bank stockholder does not mandatorily require a 100 percent levy in every instance, but the assessment is determined by ascertaining the deficiency between the assets and the liabilities proportioned to the amount of stock owned.

Bates v Bank, 225-232; 280 NW 487

Stock held in trust—double assessment liability. Under decree of an Iowa equity court assessing statutory liability on stock in a closed Iowa bank against a national bank as trustee under an identified trust, the bank does not become personally liable, under laws of Iowa, for such assessment. Neither could the receiver of the Iowa closed bank, in a common-law action, charge the trust property with such statutory liability.

Bates v Bank, 101 F 2d, 278

9253 Action by creditor. (Repealed.)

Title constitutional. The constitutional provision (Art. III, §29) which provides that "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title" is not violated by the title preceding this section, to wit: "Action by creditor", even tho said section does provide for action by three different parties, viz: action by an assignee, action by a receiver, and action by a creditor.

Andrew v Bank, 216-244; 249 NW 377

Deprivation of jury—constitutionality. An action by the receiver of an insolvent bank against stockholders for the purpose of determining the necessity for an assessment on stock holdings, and adjudicating the amount of such assessment, is not inherently a law action and, therefore, the legislature may provide that the action shall be brought in equity.

Broulik v Henderson, 218-640; 254 NW 63

Procedure. The question whether an assessment on the stockholders of an insolvent banking institution is necessary and, if necessary, the legal amount of such assessment on each stockholder, must be determined in one equitable action, instituted by the receiver in the forum of the receivership, against all the stockholders. No change of venue is allowable to a defendant who is not a resident of the county where suit is properly brought.

Williams v McCord, 204-851; 214 NW 702

National bank as stockholder. A resident national bank as a stockholder in an insolvent state bank of this state is subject to suit in equity by the receiver in the county of the receivership forum, along with all other stockholders, to enforce the statutory double liability of stockholders, even tho the county of said forum is not the county of which the national bank is a resident.

Merchants Bank v Henderson, 218-657; 254 NW 65

Change of venue. A stockholder in an insolvent bank who is sued by the receiver, on his "double liability", in the forum of the receivership, in one equitable action, along with all other stockholders, is not entitled to a change of venue in case the county of suit is not the county of his residence in this state.

Broulik v Henderson, 218-640; 254 NW 63

Petition—sufficiency. A foreign bank receiver, in an action in this state to collect "double" stock liability, need not allege that the defendant stockholder had notice of the hearing on the necessity for such assessment; nor need the petition set forth a copy of the order entered by the foreign court on such hearing.

Baird v Cole, 207-664; 223 NW 514

Proper joinder. The various stockholders of an insolvent bank are all proper defendants in an action to enforce the statutory "double" liability of such stockholders.

Andrew v Bank, 206-1070; 221 NW 809

Personal judgment. In an action to enforce the double liability of the stockholders of an insolvent bank, a personal judgment neces-

sarily follows a successful prosecution of the action.

Andrew v Bank, 206-1070; 221 NW 809

9255 List of officers, stockholders, and holdings.

Atty. Gen. Opinion. See '25-26 AG Op 272

Double liability of nonrecord stockholder. The statutory "double" liability of stockholders in banks is enforceable against all actual owners of stock whether they are or are not recorded on the stock book of the bank as such owners.

Andrew v Bank, 220-219; 261 NW 810

9257 Lists filed with superintendent.

Atty. Gen. Opinion. See '25-26 AG Op 272

9258.1 Branch banking prohibited—exceptions.

Atty. Gen. Opinion. See '32 AG Op 46

Several banks—one owner—when not branch banks. Unincorporated banks in different towns operated independently under different names, but owned by the stockholders of an incorporated bank, do not constitute branch banks as contemplated by the prohibitory statute.

Daniel v Best, 224-1348; 279 NW 374

9259 Loan and trust companies.

Atty. Gen. Opinions. See '30 AG Op 209; '34 AG Op 175, 351

9261.1 Shares.

Atty. Gen. Opinions. See '34 AG Op 351, 710

9266 Forged or raised checks—liability of bank.

Scope of statute. The statute which relieves a bank from liability for paying a forged check unless it is notified of the forgery within six months after it has returned to the depositor the voucher showing payment has no application to the payment of a genuine check on a forged indorsement.

McCornack v Bank, 203-833; 211 NW 542; 52 ALR 1297

Fictitious payee. The absolute duty of a bank, before it pays its depositor's check, to know that the payee's indorsement is genuine, and to pay only on such genuine indorsement, applies to a check which the depositor has unwittingly and without negligence made payable to a fictitious person.

McCornack v Bank, 203-833; 211 NW 542; 52 ALR 1297

Intent of drawer. The drawer of a check who unwittingly and without negligence makes it payable to a fictitious person to whom he supposed he was making a loan may not be said to have intended payment to be made to the supposed agent of the named payee (to whom it was delivered) because said supposed agent was, without the knowledge of said drawer, doing business in the name of such fictitious payee.

McCornack v Bank, 203-877; 211 NW 561

Unintended payee. When a check is unwittingly made payable to a fictitious payee, and delivered to the assumed and supposed agent of such fictitious payee, and the supposed agent indorses the check in the name of the payee and receives the money thereon, it may not be said that the money was paid to the very person to whom the drawer intended it to be paid.

McCornack v Bank, 203-833; 211 NW 542; 52 ALR 1297

Unauthorized payment. A depositor is not bound to anticipate that his banker will wrongfully make payment from the deposit, and is under no obligation to call for his pass book in order to determine whether such payment has been made.

Dow v Bank, 202-594; 210 NW 815

Unauthorized charge against deposit. A bank must pay out its depositor's fund strictly as directed by the depositor. Evidence reviewed, relative to an unauthorized charge against a deposit, and held that the depositor was not estopped to question such charge, nor was he negligent in reference thereto, nor had he ratified said charge.

Dow v Bank, 202-594; 210 NW 815

Inadvertently paid check. A drawee of a check may recover of the payee the amount inadvertently paid on the check at a time when the payee knew that the drawer had no funds on deposit with the drawee—knew that the drawer had gone into the hands of a receiver and that his deposit had been transferred to the receiver.

Bankers Tr. v Reg. Co., 200-1014; 205 NW 838

Check paid on forged indorsement—negligence of drawer—effect. Tho a drawee-bank is under an absolute duty to pay its depositor's check only to a holder thereof under a genuine indorsement, yet the depositor is estopped to question the payment of a check on a forged indorsement when he, by his own negligence or by the negligence of his authorized agents, materially misleads the drawee-bank into the justifiable belief that the indorsement on the check is genuine.

Erickson Co. v Bank, 211-495; 230 NW 342

Deposits—estoppel to question payment. The right of the drawer of a check to question the payment of the check on a forged indorsement is lost by such negligent delay as deprives the drawee of the opportunity to recoup his loss from the party committing the forgery.

McCornack v Bank, 203-833; 211 NW 542; 52 ALR 1297

Failure to examine monthly statement—effect. The failure of a depositor to examine the monthly statement furnished to him by the bank and the paid checks accompanying the same, may have a material bearing on the issue whether the depositor's negligence has materially misled the bank, to its loss, into paying checks on forged indorsements.

Erickson Co. v Bank, 211-495; 230 NW 342

Deposits—stated account. Principle reaffirmed that the monthly and customary statement of a bank to its customer of the condition of the customer's account becomes an account stated after the lapse of a reasonable time without objection by the customer.

Pierce & Gamet v Bank, 213-1388; 239 NW 580

Payment on forged indorsement — recovery —negligence. Evidence reviewed, in an action by a depositor against a bank to recover the amount paid by the bank on a forged indorsement and charged to the depositor's account, and held amply to support a finding that the depositor was not guilty of any negligence which prejudiced the bank.

McCornack v Bank, 207-274; 222 NW 851

Forged indorsement—prejudice—burden of proof. A drawee-bank, when sued for paying a check on a forged indorsement, must affirmatively establish prejudice as a result of the failure of the drawer to give notice of the forged indorsement upon the discovery thereof.

New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

Surety—taking assignment of claim. Where, because of the peculations of a county auditor, a depository bank pays a forged check on school funds, the county, on effecting settlement with the surety on the auditor's official bond, may assign to the said surety its cause of action against the bank, and the assignee may enforce the said assigned action as the county might have enforced it.

New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

Negligence not imputable to state. Negligence and laches of public officers in the handling of state funds are not imputable to the state; for instance, in an action to recover from a drawee-bank the amount paid by the bank on a forged indorsement of a check drawn by a county treasurer against state school funds on deposit with said drawee, it is no defense that the county treasurer was negligent in drawing or delivering the check, or that county officers generally were negligent in not making early discovery of the forged indorsement, and notifying the drawee accordingly.

New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

Action based on forged indorsement of checks and drafts. Where an employee wrongfully possessed himself of checks and drafts belonging to his employer, and by forged indorsements caused a bank to pay them, the act of a surety company in paying the employer the amount of his loss does not discharge the bank from its liability to the employer for having paid the checks and drafts on forged indorsements. The employer, upon being so indemnified, may assign his cause of action against the bank to the surety, and the surety may maintain the action against the bank.

National Co. v Bank, 210-323; 228 NW 635

9266.1 Stop-order on checks and drafts —requirements.

Deposit for collection—ill-advised indorsement. The payee of a negotiable check, who, when depositing it with a nondrawee bank, intends to retain title to the proceeds of the check, should indorse "for collection only" or words of similar import; should he indorse in blank he thereby presumptively vests said bank with unrestricted ownership of the check, and should said bank forward said check to its correspondent bank with direction to collect "and credit" the account of the forwarding bank, and should said correspondent enter said credit and, in reliance thereon, pay the drafts drawn on it by said forwarding bank to the full amount of said credit, and does so in good faith and without knowledge of any defect in the title of said forwarding bank or that said forwarding bank had ceased to be a going concern, then said correspondent bank will thereby acquire an unimpeachable title to said check, even tho the drawer thereof has assumed to stop payment thereon because of the insolvency of said forwarding bank.

Bureau Service v Lewis, 220-662; 263 NW 7

9267 Deposit in names of two persons.

Alternate payees—effect. A certificate of deposit taken out by a mother, and "payable to the order of self or Hazel Pent, daughter" may be treated as a gift to the daughter when the mother dies without change in the certificate, and when there is no evidence to the contrary as to the intent of the mother.

Andrew v Bank, 205-237; 216 NW 12

What constitutes general deposit. A general, and not a special or specific, deposit is shown by proof that a buyer and shipper of stock (who was also engaged in two other different lines of business) had but one bank deposit account, and that in buying stock he simply delivered his bank check to the seller, and then, as a general course of business, shipped the stock in the name of his bank, which thereupon, at his direction, drew on the consignee, and credited the shipper's deposit with the amount of the draft, thereby creating a deposit credit out of which any and all checks

issued by the shipper, whether for stock purchases or otherwise, would be paid, if and when presented; and this is true even tho the bank knew that the particular purpose in the mind of the shipper was to protect his outstanding checks for purchases of stock.

Andrew v Bank, 205-888; 219 NW 53
See Andrew v Bank, 204-1190; 216 NW 723

Gifts inter vivos—evidence—sufficiency. Evidence that bonds had donee's name added, were turned over to her, and she kept them in a safety deposit box registered in her name but rented by donor, that donee had the key, coupled with other testimony of disinterested persons, shows a conclusive intention of a completed gift inter vivos.

Reeves v Lyon, 224-659; 277 NW 749

Personal earnings represented by bank deposit. A joint bank deposit in the name of a husband and wife which represents the earnings of the husband for his personal services at any time within 90 days preceding a levy is exempt from an execution against both husband and wife, the wife being made a joint depositor as a matter of convenience in the payment of bills.

Staton v Vernon, 209-1123; 229 NW 763; 67 ALR 1200

Muniment of title—right to bank deposits. In an action by a son against a bank to recover funds which the son claimed his father had deposited for him, a previous adjudication that the funds belonged to the father and not to the son, rendered in an action by the father against the bank and the son, was not res judicata, but constituted a muniment of title showing that the son had no title to the funds, and barred the present action.

Bennett v Bank, 226-705; 285 NW 266

Survivor as owner of balance. Upon the death of one of two joint bank depositors, the survivor is entitled to the balance in the account, when the money originally belonged to said survivor, and was deposited under an agreement with the bank (1) that withdrawals should be on the joint order of both depositors, and (2) that the balance should be paid to the survivor.

Hollingsworth v Hollingsworth, 212-1165; 235 NW 726

Gifts inter vivos—joint (?) bank account. The mere opening of a joint bank account is insufficient to create a gift and claimant has the burden to prove by clear, convincing evidence that depositor had present intention to (1) make a gift, and (2) divest himself of all control and dominion over the subject of the gift.

Taylor v Grimes, 223-821; 273 NW 898

Fraudulent dissipation—nonliability of bank. A bank is not responsible to its depositor for the fraudulent conduct of the depositor's employee, aided by an employee of the bank, in fraudulently withdrawing from the bank the funds of the depositor, on checks which the depositor's employee had specific written authority to draw to himself personally, when the bank had no knowledge or reason to know of any of said wrongdoings.

Pierce & Gamet v Bank, 213-1388; 239 NW 580

Husband's deposit in wife's name. It may be shown that a deposit in an insolvent bank, solely in the name of a wife, is, in truth and fact, the money of the husband, and upon such proof being made, the husband may have the deposit applied on his indebtedness to the bank.

Andrew v Bank, 216-777; 249 NW 276

9267.1 Safe-deposit boxes—liability.

Trust officer's brokerage account—husband pledging wife's securities. Where a husband having a general agency, acquiesced in and ratified by the wife, to transact the wife's business, has a key to her bank deposit box, and personally removes certain securities therefrom which he pledges as collateral for a brokerage account in the name of the bank's assistant trust officer, of which transaction the wife receives knowledge, the fact that the brokerage account is in the name of such trust officer will not impose liability on the bank for a breach of a fiduciary relation, because, the husband having authority to pledge the stock, the account for which he pledged it would not matter.

Clark v Bank, 223-1176; 274 NW 919

9268 Securities—deposit with federal treasurer.

Atty. Gen. Opinions. See '25-26 AG Op 401; '28 AG Op 269; '30 AG Op 133

9272 Acceptance of drafts.

Payment by check. A draft is paid (1) by the act of the drawee in delivering to the collecting bank his personal check for the amount of the draft on his ample checking account in said bank, without knowledge that the bank was then insolvent, and (2) by the act of the bank in surrendering the draft to the drawee, and in marking the check "paid" and charging the amount thereof to the check drawer's account, the bank then having on hand ample funds with which to pay said check.

Wells Co. v Marcus Co., 206-1010; 221 NW 547; 65 ALR 1145

Deposit for collection—ill-advised indorsement. The payee of a negotiable check, who, when depositing it with a nondrawee bank, intends to retain title to the proceeds of the check, should indorse "for collection only" or words of similar import; should he indorse in blank he thereby presumptively vests said bank

with unrestricted ownership of the check, and should said bank forward said check to its correspondent bank with direction to collect "and credit" the account of the forwarding bank, and should said correspondent enter said credit and, in reliance thereon, pay the drafts drawn on it by said forwarding bank to the full amount of said credit, and does so in good faith and without knowledge of any defect in the title of said forwarding bank or that said forwarding bank had ceased to be a going concern, then said correspondent bank will thereby acquire an unimpeachable title to said check, even tho the drawer thereof has assumed to stop payment thereon because of the insolvency of said forwarding bank.

Bureau Service v Lewis, 220-662; 263 NW 7

9273 Acceptances limited.

Excess loans—note of third party to conceal —effect. One who, in order to enable a state banking institution to conceal the fact that it has made loans to a borrower in excess of the amount permitted by law, executes and delivers to the bank his promissory note in lieu of such excess loans, is entitled, when the said excess notes are paid by the borrower, to a surrender of his note and the collateral pledged therewith.

Pomeroy v Bank, 203-524; 211 NW 219

9278.3 Method—court approval.

Stock—no restriction on judicial sale—mandamus to transfer. Sale of assets of insolvent national bank made in obedience to an order of court is not a voluntary but a judicial sale; therefore, a corporation whose stock was sold thereunder is not entitled to notice thereof, even tho its articles of incorporation required notice of proposed sale of stock, and mandamus will lie to compel the transfer of said stock on its records.

McDonald v Farley Co., 226-53; 283 NW 261

9279 Receiving deposits when insolvent.

Federal court's jurisdiction limited—persons detained by state. The federal court, in the absence of exceptional circumstances or emergencies, held without jurisdiction on habeas corpus action to determine constitutionality of Iowa statutes as applying to state banks on receiving deposits while insolvent and providing penalty therefor. The supreme court of Iowa has jurisdiction therein.

Ketcham v State, 41 F 2d, 38

Unconstitutional application of valid statute. The holding by the federal supreme court that the statute of this state prohibiting the receipt of deposits by insolvent banks and bankers generally, was constitutionally inapplicable to national banks and bankers, did not have the effect of carrying down the statute in toto—did not have the effect of thereafter rendering said statute inapplicable to state banks and bankers, even tho the state legislature did not, after said holding, re-enact said sections.

State v Bevins, 210-1031; 230 NW 865

Definition of offense—ascertainable standard of guilt or innocence. The statute which prohibits banks and bankers from receiving deposits when they know they are insolvent, and the interpretation by the courts and by the legislature of the term "insolvency" to mean "inability to pay, through their own agencies, all liabilities within a reasonable time, and in the ordinary course of business" presents no instance of prescribing or fixing an unascertainable standard of guilt or innocence, violative of the due-process clauses of the federal and state constitutions.

State v Bevins, 210-1031; 230 NW 865

Indictment—duplicity. In a prosecution for receiving bank deposits with knowledge of the bank's insolvency, separate and distinct deposits by separate and distinct individuals may not be charged, even in separate counts. (§13737, C., '24.)

State v McCarty, 202-162; 209 NW 288

General allegation of intent. An indictment for fraudulent banking need not specifically allege the name of the person whom the defendant intended to defraud by receiving the deposit in question; but nevertheless, an allegation that defendant (a private banker), knowing of his insolvency, received a named deposit from a named person, with intent to defraud, is, in effect, an allegation to defraud the named person.

State v Boysen, 214-46; 238 NW 581

Harmless error—action favorable to accused. In a prosecution for fraudulent banking, the action of the court in withdrawing that part of the indictment which charges an "intent to receive a financial benefit" constitutes no error of which the accused may complain.

State v Boysen, 214-46; 238 NW 581

"Deposit" defined. The act of a drawee-bank in charging the amount of a check to the drawer's existing money deposit and in crediting the payee's deposit in the same bank with a like amount constitutes a deposit, within the meaning of this statute.

State v Ostby, 203-333; 210 NW 934; 212 NW 550

When bank insolvent. It is not true that a bank is insolvent only when it is unable to pay its obligations in the ordinary and usual course of business.

Andrew v Bank, 207-386; 221 NW 954

Solvency of partners. The state, in prosecuting a managing officer of an unincorporated bank owned by various persons as partners, for receiving deposits at a time when the

bank was knowingly insolvent, is under no obligation to show that the various individual partners were insolvent; but the solvency of said partners may be admissible on the issue whether the defendant had knowledge of the insolvency of the bank when the deposits were received by him.

State v Childers, 202-1377; 212 NW 63

Unallowable defense. On an indictment for receiving deposits from a partnership while the bank was insolvent, it is no defense that one of the members of the partnership was a director of the bank, and that said deposit was made with his approval and with full knowledge on his part of the financial condition of the bank.

State v Pierson, 204-837; 216 NW 43

Insolvency subsequent to receipt of deposit. On the issue whether a bank was insolvent when a deposit was received, evidence of the conduct of the accused tending to show that the bank was insolvent on a subsequent day is admissible when accompanied by other evidence that, in the meantime, no substantial change had taken place in the financial condition of the bank.

State v Bevins, 210-1031; 230 NW 865

Evidence—other deposits. Upon a prosecution for receiving deposits while insolvent, testimony of deposits other than that alleged in the indictment is admissible over the objection of incompetency, irrelevancy, immateriality, and failure to lay proper foundation.

State v Ostby, 203-333; 210 NW 934; 212 NW 550

Subsequent deposits. Under an indictment for fraudulent banking, and on the issue of the bank's solvency or insolvency, evidence is admissible of deposits other than, and subsequent to, the specific deposit on which the indictment is based.

State v Boysen, 214-46; 238 NW 581

Proof of going concern. Testimony tending to show that deposits were made in an insolvent bank on the day when it closed its doors or on the day preceding such closing, is admissible to show that the bank was then a going concern.

State v Niehaus, 209-533; 228 NW 308

Admissions of insolvency. In a prosecution for receiving bank deposits with knowledge that the bank was insolvent, evidence is admissible that the accused some two weeks prior to the closing of the bank admitted in effect that the bank was cramped for funds.

State v Niehaus, 209-533; 228 NW 308

Other offenses. In a prosecution for receiving bank deposits when the bank is insolvent, testimony tending to show a criminal diversion by the defendant of the funds of the bank, subsequent to the occurrence of the specific charge on which the indictment is based, is wholly inadmissible as bearing on the question of the solvency or insolvency of the bank on the prior date alleged in the indictment.

State v Brown, 215-600; 246 NW 258

Evidence—subsequent deposits. On a prosecution for receiving a specific deposit, evidence tending to show all of the existing deposits in the bank, both prior and subsequent to the specific deposit in question, is, as to the prior deposits, admissible as bearing on the liabilities of the bank, and, as to the subsequent deposits, as bearing on the status of the bank's solvency or insolvency.

State v Bevins, 210-1031; 230 NW 865

Declarations subsequent to receipt of deposit. On the issue whether a bank deposit was received by the accused with knowledge of the bank's insolvency, declarations of the accused subsequent to the receipt of the deposit tending to show that he then and at the time of the deposit, knew that the bank was insolvent, is admissible.

State v Bevins, 210-1031; 230 NW 865

Knowledge of insolvency — evidence. The statement of a mere employee of a bank, made long prior to the closing of the bank, and inferentially reflecting his belief that the bank was insolvent, is wholly inadmissible against an accused on the issue of knowledge of the accused of the insolvency of the bank, no attempt being made to connect the accused with the statement.

State v Childers, 202-1377; 212 NW 63

Opinion evidence. In a prosecution for receiving deposits with knowledge that the bank was insolvent, the value of the assets of the bank may be proven by any witness who is familiar with such assets and knows the value thereof.

State v Childers, 202-1377; 212 NW 63

Itemized tabulation or summary of bank books. A correct, itemized tabulation or summary of bank books is admissible in a prosecution for fraudulent banking.

State v Niehaus, 209-533; 228 NW 308

Banking corporations — incompetent evidence. In a prosecution for receiving a bank deposit when the bank was insolvent, an unsigned written report by an employee of the state banking department, covering an examination of the bank a year prior to the date on which the prosecution is based, and consisting of the opinion of the author of the report concerning various features of the business and assets of the bank, is inadmissible either to show the insolvency of the bank or the defendant's knowledge of such insolvency.

State v Henderson, 212-144; 232 NW 172

Opinion evidence — solvency of note-maker. A witness who has made a personal investigation as to the solvency of the maker of a promissory note, and has personal knowledge of the property owned by such maker, is competent to express an opinion as to such solvency.

State v Niehaus, 209-533; 228 NW 308

Bankruptcy proceedings as evidence. On the issue of the insolvency of a bank on the date when a deposit was accepted, the state may show by means of bankruptcy proceedings that certain debtors of the bank have listed their obligations to the bank and been discharged therefrom.

State v Henderson, 212-144; 232 NW 172

Incompetency of witness—excessive motion to strike. A motion to strike the entire testimony of a bank examiner as to the value of the assets of an alleged insolvent bank, should not be sustained simply because it appears that, as to some of many particular assets, he was not competent to express an opinion.

State v Niehaus, 209-533; 228 NW 308

Former jeopardy as rebuttal. When the state, in a prosecution for receiving deposits while the bank was insolvent, seeks to establish the insolvency by proof which tends to show that the accused had both embezzled funds of the bank and had made false reports concerning the assets of the bank, the accused may show, in rebuttal, that he has been indicted for both of said alleged offenses and acquitted.

State v Pierson, 204-837; 216 NW 43

Intent — instructions. Instructions relative to intent to defraud and to the conditions under which it might be inferred, and to the presumption that a person intends the reasonable and natural consequences of acts deliberately and intentionally done by him, reviewed and held to reveal no error.

State v Boysen, 214-46; 238 NW 581

Instructions — popular designation of offense. Designating an offense in instructions by its popular name is quite unobjectionable when the specific elements of the offense are correctly set forth.

State v Bevins, 210-1031; 230 NW 865

9280 Violations.

Adding new element of criminal offense—effect as pardon. The amendment of a criminal statute by adding a new and additional element of the offense does not, because of the saving clause in subsec. 1, §63, C., '31, have the effect of pardoning all unconvicted violators of the statute as it existed prior to the enactment of the additional element, unless the act which adds the new element evinces an intent to pardon.

State v Brown, 215-600; 246 NW 258

"Renewal" of certificate of deposit. A certificate of deposit cannot be said to be "renewed" within the meaning of the fraudulent banking act (§9279 et seq., C., '27) when the holder presents the certificate to the bank, causes it to be canceled, is paid a substantial part thereof, and receives a new certificate of deposit for the balance.

State v Niehaus, 209-533; 228 NW 308

Violation of constitutional right. The constitutional right of an accused in a criminal case to be confronted by the witnesses against him is violated, in a criminal case wherein the value of various items of property is material, by an instruction to the effect that the jurors "have the right to use their own knowledge of values * * * in connection with the testimony as to values which have been given by the different witnesses".

State v Henderson, 217-402; 251 NW 640

9281 Official neglect of officers.

Directors — nonliability for naked nonfeasance. The director of a corporation is not liable, to a person dealing with the corporation, for mere nonfeasance—naked inaction as a director. So held where the director of a bank took no action with reference to the practice of the bank in commingling trust funds with the general funds of the corporation.

Proksch v Bettendorf, 218-1376; 257 NW 383; 38 NCCA 292

9282 False statements or entries—diversion of funds.

Bank responsible for converted receipts.

Peterson v Citizens Bk., 228- ; 290 NW 546

Fidelity bond—fraud in extension of credit by overdrafts—evidence. In action on fidelity bond of bank cashier the exclusion of evidence of bank's custom of deferring posting of checks creating an overdraft was not erroneous where the dishonest acts complained of were the extension of credit by means of overdrafts in violation of statute.

Fidelity Co. v Bates, 76 F 2d, 160

Fidelity insurance—construction. The conduct of an officer of a bank in intentionally and deceitfully omitting to make any entry on the books of the bank of payments made on the bills receivable of the bank (other than a memorandum slip hung on a spindle), with resulting loss to the bank, is covered by a bond or policy of insurance which guarantees indemnity against "dishonest or criminal acts or omissions" of said officers.

Andrew v Ind. Co., 207-652; 223 NW 529

Opinion evidence—assets of bank. A qualified expert accountant is competent to testify that certain proven payments of money to a

bank "did not come into the assets of the bank as shown by the books and records of the bank".

Andrew v Ind. Co., 207-652; 223 NW 529

False return—verdict set aside. Judgments of conviction in criminal cases will be set aside when they are clearly against the weight of the evidence and the instructions of the court. So held where, in a prosecution for making a false bank return, the issue turned on whether certain notes were accommodation paper.

State v Klein, 218-1060; 256 NW 741

Cashier's shortage—drafts on other bank—no constructive trust—inconsistent contentions.

Community Bk. v Gaughen, 228- ; 289 NW 727

9283 Intentional fraud—unlawful dividends.

Acts constituting fraud—legal opinion. A representation, tho false, that a bank and the directors thereof are personally liable, as a matter of law, on certain paper rediscounted by the bank cannot constitute a fraud when the parties concerned stand on equal footing as to all the material facts. Otherwise when such equality does not exist, and when the statement is made for the purpose of being relied on as a statement of fact, and is justifiably so relied on by the party to whom made. And instructions must make this distinction clear to the jury.

Commercial Bk. v Kietges, 206-90; 219 NW 44

Responsibility for worthless loans. The president of a bank is personally liable to the bank for loaning the funds of the bank to persons known by him to be financially irresponsible, and especially so when he secures the approval of the directors as to such loans on the repeated assurance that he is back of said loans and will see that they are paid.

Farmers Bk. v Kaufmann, 201-651; 207 NW 764

9283.01 Unauthorized sale of real estate or securities.

Scope of prohibition. The statutory prohibition against officers and employees of a bank offering for sale or promoting the sale of real estate etc., unless such acts are sanctioned and approved of record by the directors, has no application whatever to lands owned by the bank.

Shanda v Bank, 220-290; 260 NW 841

9283.03 False statements for credit.

Discussion. See 21 ILR 151—False representation

MANAGEMENT BY SUPERINTENDENT

9283.05 Management by superintendent—legal and equitable remedies suspended.

Atty. Gen. Opinions. See '34 AG Op 77, 82, 87, 88, 97, 105, 108, 116, 118, 120, 139, 141, 142, 144, 155, 168, 182, 185, 198, 205, 210, 212, 218, 235, 282, 369, 408, 456, 469, 471, 523, 592; '36 AG Op 74, 166, 474

Surrender of management to superintendent. The right of a stockholder in a bank, or his representative, to have or make an examination of the books and records of the bank in order to determine its financial condition and the value of its corporate stock, is not negatived or suspended by an emergency act of the legislature providing for the taking over of the bank and of its management by the superintendent of banking on application of the bank directors and suspending legal and equitable remedies during the time of such management.

Becker v Trust Co., 217-17; 250 NW 644

Bank deposits—no set-off against assessment irregularly made. A purported assessment by the directors of a bank is not chargeable against the deposit of a deceased stockholder in the bank, when, under the record, the payments to be made were purely voluntary in nature as distinguished from enforceable statutory assessments by order of the state banking department.

Younkin v Bank, 226-343; 284 NW 151

Banker's conveyance—balancing sister's false entries—no consideration. Transfers of land to the superintendent of banking as receiver of an insolvent bank by a banker in order to balance false entries made by sister as cashier, on the bank books, are, in an action by trustee in bankruptcy to set the deeds aside, fraudulent as to creditors of the banker because lacking consideration, when it is shown that the banker's sister and not the banker himself was personally indebted to the bank on account of the false entries.

Bagley v Bates, 224-637; 276 NW 797

9283.07 Power to reorganize.

Discussion. See 17 ILR 384—Merger—transfer of assets

Right of depositor to question. A depositor in a bank may not question the reorganization of the bank unless he shows that he will be substantially injured by said reorganization.

Pugh v Polk County, 220-794; 263 NW 315

DEPOSITORS AGREEMENTS

9283.10 Power to enter into.

Atty. Gen. Opinions. See '34 AG Op 183, 188, 205, 210, 212, 214, 281, 369, 456, 469, 523, 592

Agreements in re county deposits—right of taxpayer. The statutory discretion of the board of supervisors to enter into an agreement with legally and approved reorganized banks, with reference to the county's deposits in said banks, cannot be questioned by a taxpayer except on proof of fraud or arbitrary abuse of said discretion.

Pugh v Polk County, 220-794; 263 NW 315

9283.11 Depositors agreement—effect.

Depositor's agreement—conditions. An order of the probate court, authorizing a national bank acting as executor of an estate to exe-

cute a depositor's agreement relative to the estate funds, should specifically provide that said order is entered on the condition that the same shall not prejudice the right of the heirs, (1) to a lien upon any securities in possession of the executor, (2) to the right of action against the executor to recover the amount due, and (3) to any existing rights under federal law.

In re McElfresh, 218-97; 254 NW 84

9283.14 Conditions precedent to reorganization.

Discussion. See 21 ILR 633—Constitutionality
Atty. Gen. Opinions. See '34 AG Op 197, 211, 244, 369, 456, 469, 739

Certificate of deposit—permissible impairment. A bank depositor may not successfully claim that his certificate of deposit was unconstitutionally impaired by a later, state-approved, good-faith, bank reorganization (in which he did not join) under which all claimants (claims over $10) were given equal but less favorable terms of payment than their contracts originally contemplated, when, at the time of his deposit, the statute law contemplated and substantially provided for such reorganization and change in terms of payment; and if the actual reorganization was effected under later statutes amplifying the said former ones, the answer is that he was dealing with a quasi-public corporation, and that his contract of deposit must reasonably yield to the police power in the interest of the public generally, especially in an emergency resulting from a great financial depression.

Priest v Whitney Co., 219-1281; 261 NW 374

Compliance with statute—sufficiency. Record, relative to the reorganization of an incorporated bank, reviewed, and held to show compliance with the governing statute.

Timmons v Bank, 221-102; 264 NW 708

Action on certificate of deposit unallowable. After the legal reorganization, under state supervision, of a financially embarrassed banking institution, the holder of a prior-issued certificate of deposit in said bank may not maintain an action for a money judgment on said certificate, even tho he did not consent to said reorganization.

Timmons v Bank, 221-102; 264 NW 708

Statutory reorganization—constitutionality. Constitutionality of this and following sections on bank reorganization reaffirmed.

Timmons v Bank, 221-102; 264 NW 708

9283.23 Majority agreement governs minority.

Reorganization—majority binding minority. In the reorganization of an insolvent bank, an equitable plan proposed by the majority of claimants as required by statute may be validly approved and made binding on the minority when it appears that the minority claimants are not deprived of any assets of the bank.

Priest v Whitney Co., 219-1281; 261 NW 374

DEPOSITORS SUPPLEMENTAL AGREEMENTS

9283.29 Method of reorganization—approval.

Merger—agreement to pay deposit liabilities—scope. An agreement by a merging bank to pay the deposit liabilities of the merged bank must be deemed to include liability for all deposits, special as well as general.

Bates v Bank, 222-370; 269 NW 341

CAPITAL STOCK—CLASSES—NONASSESSABILITY

9283.43 Assessment limitations.

Nonpower of superintendent. The superintendent of banking has no power to order an assessment on the stockholders of an insolvent bank.

Home Bk. v Berggren, 211-697; 234 NW 573

Successive assessments. An assessment on stockholders and the payment of the same for the purpose of restoring the impaired capital of the bank is no impediment to the subsequent assessment on stockholders to pay the debts of the insolvent bank.

Andrew v Bank, 206-869; 221 NW 668

Stockholders—acts constituting. One who buys corporate bank stock necessarily becomes a stockholder even tho the bank officials in good faith, but mistakenly, represented that such purchase would rehabilitate the impaired capital of the bank.

Andrew v Bank, 211-649; 234 NW 542

Credit by amount of former assessment unallowable. One who purchases corporate bank stock by paying an existing assessment thereon (and but little in addition thereto) will not be permitted, after the bank has become insolvent, to assert that said assessment was coercive as to him, and that the amount of such assessment should be credited on his "double liability".

Andrew v Bank, 211-649; 234 NW 542

Stockholders assessment to replace impaired capital—jury question. Conflicting evidence reviewed, and held to present a jury question on the issue whether an assessment on bank stockholders was for the purpose of making good the impaired capital of bank or whether it was a voluntary arrangement among the stockholders to form a pool and purchase from the bank certain assets of doubtful value and thereby to relieve, in part, the individual guarantors thereon.

Andrew v Austin, 213-963; 232 NW 79

Assessment on stock—receiver's certificates. In an action against the stockholders of an insolvent bank on an assessment on their corporate shares of stock, it is no defense that the proceeds of the assessment will be used in discharging the amount due on certificates of indebtedness issued and sold by the receiver and used by him in discharging the original debts of the bank.

Andrew v Bank, 206-869; 221 NW 668

Purpose of assessment. An assessment on the stock of a bank, in order to restore the impaired capital and in order to enable the bank to continue as a going concern, followed by a continuation of the bank's business, cannot be deemed an assessment for liquidating purposes, even tho the bank, within a very short time, becomes insolvent and passes into the hands of a receiver.

Andrew v Bank, 206-869; 221 NW 668

Double liability—"accruing" defined. The statutory provision that the stockholders of a bank are under a double liability as to "liabilities accruing while they remain such stockholders" means that such liability, in case of the insolvency of the bank, embraces any liability within the purview of the statute which exists while a stockholder remains a stockholder.

Andrew v Bank, 206-1070; 221 NW 809

Double liability—proper joinder. The various stockholders of an insolvent bank are all proper defendants in an action to enforce the statutory "double" liability of such stockholders.

Andrew v Bank, 206-1070; 221 NW 809

Double liability—personal judgment. In an action to enforce the double liability of the stockholders of an insolvent bank, a personal judgment necessarily follows a successful prosecution of the action.

Andrew v Bank, 206-1070; 221 NW 809

Superadded double liability—improper plaintiff. An insolvent bank may not maintain an action against its stockholders to enforce and collect the superadded double liability imposed by §9251, C., '27 (now repealed).

Home Bk. v Berggren, 211-697; 234 NW 573

CHAPTER 415.2

COOPERATIVE BANKS

9283.58 Loans and investments.

Money lent. One seeking to recover money loaned must prove a contract express or implied for its repayment.

In re Green, 227-702; 288 NW 881

CHAPTER 416

BANKS AND TRUST COMPANIES ADDITIONAL POWERS AS FIDUCIARIES

Atty. Gen. Opinion. See '30 AG Op 209

9284 Authorization—additional powers.

Trust relations. See under §9239

Atty. Gen. Opinions. See '25-26 AG Op 478; '28 AG Op 233

Receivership for insolvent trustee creates vacancy—power to fill. A judicial finding that a banking institution is insolvent and the appointment of a receiver to liquidate its affairs, ipso facto, (1) transfer, to the custody of the law, trust property held by said insolvent as a duly appointed testamentary trustee, (2) deprive said insolvent trustee of power further to act in said trusteeship, and (3) necessarily create a vacancy in the office of said trust,—which vacancy the probate court has legal power to fill by appointing a successor in trust, (1) on the sworn application therefor supplemented by the professional statement of counsel, (2) at an ex parte hearing and without notice to interested parties, and (3) without any formal proceedings whatever for the termination of said former trusteeship; and especially is this true when said former trustee, formally and by its conduct, abandons its said trusteeship and all right and interest therein.

In re Strasser, 220-194; 262 NW 137; 102 ALR 117

In re Carson, 221-367; 265 NW 648

Final report by trustee after receivership. The filing of a final report by a trust company as trustee of an estate after the company had gone into receivership and could no longer perform any duty as active trustee, was not an act in administering the trust, but was the performance of its duty to make such final report upon its removal as trustee.

In re Carson, 227-941; 289 NW 30

Objections to executor's final report—failure to dispose of securities. Objections to the final report of a trust company are not subject to

a motion for more specific statement when officers of the trust company have equal or better knowledge of the facts called for by the motion, especially where the motion calls for evidentiary facts. Held, also, that trustee was charged with maladministration and not fraud.

In re Carson, 227-941; 289 NW 30

Accounting by trustee—bank inducing lien release—proof. Where a bank holds a chattel mortgage on horses, executed as part of an arrangement with the mechanic lienholder for payment of his lien, the release of which was induced by the execution of the chattel mortgage, a sale of the horses by the bank, under a subsequent chattel mortgage, would constitute the bank a trustee required to account to the mechanic lienholder, but, without proof that the horses sold were the same ones in both mortgages, no showing is made of trust funds to be accounted for.

Shimp Bros. v Place, 225-1098; 281 NW 471

Payment of funds to one with apparent authority to collect. When the plaintiff gave a third party his passbook to be used to withdraw an account from an Italian bank, and the third party used the passbook to secure a personal note given to the defendant bank through which the exchange transaction was made, the bank was not liable for using the funds received from the Italian bank as payment of the note, when it might have thought that the note was given to obtain an advance for the plaintiff, and had no knowledge of wrongdoing, and previous transactions indicated an apparent authority to transact the business in such manner.

Matalone v Bank, 226-1031; 285 NW 648

Trust officer's brokerage account—husband pledging wife's securities. Where a husband having a general agency, acquiesced in and ratified by the wife, to transact the wife's business, has a key to her bank deposit box, and personally removes certain securities therefrom which he pledges as collateral for a brokerage account in the name of the bank's assistant trust officer, of which transaction the wife receives knowledge, the fact that the brokerage account is in the name of such trust officer will not impose liability on the bank for a breach of a fiduciary relation, because, the husband having authority to pledge the stock, the account for which he pledged it would not matter.

Clark v Bank, 223-1176; 274 NW 919

Trusteed special assessment certificates—pro rata distribution. Where a corporation, dealing in securities, owns a group of special assessment certificates for public improvements, and places them in a trust, against which trust are sold certain "ownership certificates" issued in numerical order as representing an interest therein and redeemable in their numerical order, and when, subsequently, it becomes apparent that the trust is insolvent, an application by the trustee to the court for instructions as to whether payment was to be made in numerical order or pro rata was properly decided for the pro rata method on the equity rule of equality and proportionate distribution of the remaining assets.

Iowa-Des Moines Bank v Dietz, 225-566; 281 NW 134

9285 Deposit of trust funds—payment.

Estate funds as preferential deposit. Estate funds on deposit in a bank which has been appointed trustee or guardian of the estate constitute a trust fund and, in case of insolvency of the bank, are entitled to preference in payment; and an order of court entered without notice to interested parties, and authorizing the appointee-bank to deposit the estate funds with itself, cannot change this rule of preference.

Andrew v Bank, 208-392; 226 NW 73

Administrator's bank account—decedent's debt—no offset. Receiver of insolvent bank held unauthorized to set off amount of checking account standing in name of administrator against indebtedness owing to bank by intestate where, immediately on appointment of administrator, checking account passed to administrator who added to account by deposits at various times and drew checks against account until closing of bank.

In re Schwarting, (NOR); 257 NW 189

Keeping funds in insolvent bank. An executor or administrator who, on his own motion and authority, deposits and keeps estate funds in an insolvent bank of which he is cashier must account for the resulting loss.

In re Foster, 218-1202; 256 NW 744

Surety—liability—disobeying order of court. An administrator and the surety on his bond are liable for a shortage in estate funds occasioned by the failure of the administrator's own private bank in which the funds were deposited, the administrator having been ordered by the court prior to the insolvency of said bank to remove the funds to another depository, and, while able to comply with said order, had neglected so to do.

In re Kendrick, 214-873; 243 NW 168

Administrator disobeying order of court—unallowable defense. An administrator who disobeys an order of court as to the bank in which he should deposit estate funds may not, in case of loss, plead in defense that, had he complied with the order, his own private bank in which the funds in fact were on deposit would have been rendered insolvent.

In re Kendrick, 214-873; 243 NW 168

Management of estate—unauthorized bank deposit. An executor who, on his own motion and without any authorizing order of court, deposits the funds of the estate in a financially

embarrassed bank of which he was president, in which he was heavily interested, and which later failed, must account to the estate in cash for the loss. The president of a bank must be held to have knowledge of the general financial condition of the bank.

In re Rorick, 218-107; 253 NW 916

Trust property—legal deposit (?) or illegal investment (?). A deposit by a trustee of trust funds in a savings bank, at a stated rate of interest but with the legal right to withdraw said deposit at any time, does not constitute an "investment" within the meaning of §12772, C., '31.

In re Moylan, 219-624; 258 NW 766

Wrongful act of trustee — right to ratify. A bank which, as guardian, wrongfully treats the guardianship funds as its own property (by carrying said funds as a general deposit with itself) may not complain if, after the failure of the bank, the succeeding guardian ratifies the former wrongful act, and elects to retain the position of an ordinary depositor.

Bates v Bank, 219-258; 257 NW 806

Inferential authorization of deposit. The due approval by the probate court of a guardian's report wherein he recited that he had deposited the funds of the ward in a bank and had received a stated amount of interest on such deposit, is in legal effect an authorization to the guardian to continue the deposit, with resulting consequence that, irrespective of this section, the guardian is relieved of personal responsibility in case the bank subsequently becomes insolvent.

Robinson v Irwin, 204-98; 214 NW 696

Deposit in bank—subsequent approval by court. The rule of law that the approval by the probate court or a judge thereof of a guardian's report showing the depository of the ward's funds is in legal effect an authorization to deposit said funds with said depository is a rule which necessitates a showing that said report was actually called to the attention of the court.

Snyder v Ind. Co., 214-1055; 243 NW 343

Depositing funds with itself. A corporate guardian and its surety will not be permitted to escape liability for guardianship funds on the plea that the guardian on its own motion but in good faith deposited said funds with itself.

Snyder v Ind. Co., 214-1055; 243 NW 343

Loss notwithstanding reasonable care—liability of assignee. An assignee for the benefit of creditors, who deposits in a bank trust funds coming into his hands and loses them because the bank subsequently closes its doors in consequence of insolvency, while not protected from loss under an ex parte order of court authorizing such deposit yet he is protected from such loss if, in making such deposit, and in looking after and caring for said funds, he exercised that degree of care which a person of ordinary care and prudence would exercise under the same or similar circumstances.

In re Stone, 220-1341; 264 NW 604

Bank deposit without authority of court. The temporary deposit by a guardian of guardianship funds in a bank for safekeeping is not rendered wrongful because made without an authorizing order of the court or judge, such deposit not being within the scope of either this section or section 12581, C., '24.

Andrew v Bank, 205-1248; 218 NW 24

Unambiguous life income trust—annuity policy substitution nonpermissible. Under a clear, unambiguous will setting up a trust fund and providing for a $30 a month bequest to be paid therefrom to a beneficiary as long as she lived, a different method of paying said bequest, by purchase of an annuity for said beneficiary, not permitted.

First Methodist Church v Hull, 225-306; 280 NW 531

9287 Payment of deposited funds.

No failure of trust for want of trustee. A trust estate will not fail for want of a trustee. So held where the bank, named as trustee in a will, failed.

First Methodist Church v Hull, 225-306; 280 NW 531

9288 National banks.

Statutory reward applicable to national banks. The statute which obligates the owner of lost goods, money, etc., to compensate the finder of such property, is applicable to a national bank as owner, even tho the federal statutes are silent on the subject, as said statute does not impair the efficiency of said bank as a federal, governmental agency.

Flood v Bank, 220-935; 263 NW 321

9290 Separation of funds—liability.

Estate funds as preferential deposit. Estate funds on deposit in a bank which has been appointed executor, administrator, or trustee of the estate, even tho carried in the name of the estate, constitute a trust fund, and in case of insolvency of the bank, must be paid in full on a showing that, after the trust deposit was made, the deposit in the bank has never been less than the amount of said trust funds.

Leach v Bank, 205-114; 213 NW 414; 217 NW 437; 56 ALR 801

Andrew v Bank, 208-252; 225 NW 379

Andrew v Bank, 208-392; 226 NW 73

Bank as executor—merger and subsequent insolvency. Funds which were held by a bank as executor of an estate, and which belonged to such estate at the time of merger of such bank with another bank, were "trust funds"

and did not constitute part of assets of bank, with respect to whether such funds were payable as preferred claim against such merged bank which subsequently became insolvent.

Bates v Bank, (NOR); 269 NW 346

Commingling funds. Where trust funds are deposited in the individual account of the trustee, the cestui que trust has the right to elect to sue the trustee for the conversion, or he may pursue the trust funds and establish a preference thereto if they can be traced.

In re Riordan, 216-1138; 248 NW 21

Intermingled funds—cash in excess of trust—effect. A bank, having been appointed trustee of testamentary trust funds, deposited said funds with itself, and intermingled said trust funds with its general funds, but carried the trust funds in an account which clearly revealed their trust character. The bank was merged into another bank. The trust account, and all other deposit accounts (general and special), and the entire cash balance, of the bank, were transferred to the merging bank, the latter agreeing to pay all deposit liabilities of the merged bank. The transferred deposit accounts were thereafter carried in the merging bank as theretofore carried in the merged bank. The merging bank became insolvent. The cash balances of the respective banks were always in excess of said trust funds.

Held, said trust funds were intact, and were entitled to preference in payment over the general creditors of the merging bank.

Bates v Bank, 222-370; 269 NW 341

Trustee buying property from himself. The act of a trustee in transferring his individually owned bonds and mortgages to himself as trustee and charging the trust funds with the amount thereof is wholly void even when authorized by an order of court. A fortiori is this true when the order was not obtained in good faith.

In re Riordan, 216-1138; 248 NW 21

Bank as executor and depositor. A state or savings bank when acting as an administrator or executor and carrying the estate funds in its own bank does not sustain the relation of a general depositor of funds in a banking corporation.

In re McElfresh, 218-97; 254 NW 84

Interest as affecting status. A testamentary trust fund deposited as an investment in a savings account under the terms of the will does not lose its preferential character because of the payment of interest on the deposit.

Bates v Bank, 222-370; 269 NW 341

Wrongful act of trustee—right to ratify. A bank which, as guardian, wrongfully treats the guardianship funds as its own property (by carrying said funds as a general deposit with itself) may not complain if, after the failure of the bank, the succeeding guardian ratifies the former wrongful act, and elects to retain the position of an ordinary depositor.

Bates v Bank, 219-258; 257 NW 806

9291 Analogous rights and duties—compensation—bonds.

Receiver—liens and equities unchanged. The title to property is not changed by the appointment of a receiver, as he takes it subject to existing liens and equities, and his taking exclusive possession thereof does not interfere with or disturb any pre-existing liens, preferences, or priorities.

Andrew v Bank & Trust, 225-929; 282 NW 299

Receiver—agent of court only—trustee of funds. A receiver is not an agent of anyone except the court appointing him, but he holds any fund at least as quasi-trustee for the benefit of whoever may eventually establish title thereto.

Andrew v Bank & Trust, 225-929; 282 NW 299

9292 Appointment of successor.

Receivership for insolvent trustee creates vacancy—power to fill. A judicial finding that a banking institution is insolvent and the appointment of a receiver to liquidate its affairs, ipso facto, (1) transfer, to the custody of the law, trust property held by said insolvent as a duly appointed testamentary trustee, (2) deprive said insolvent trustee of power further to act in said trusteeship, and (3) necessarily create a vacancy in the office of said trust,—which vacancy the probate court has legal power to fill by appointing a successor in trust, (1) on the sworn application therefor supplemented by the professional statement of counsel, (2) at an ex parte hearing and without notice to interested parties, and (3) without any formal proceedings whatever for the termination of said former trusteeship; and especially is this true when said former trustee, formally and by its conduct abandons its said trusteeship and all right and interest therein.

In re Strasser, 220-194; 262 NW 137; 102 ALR 117

In re Carson, 221-367; 265 NW 648

9293 Release from liability.

Discussion. See 10 ILB 319—Preference of claims against banks

9297 Indebtedness or liability—exceptions.

Unallowable guaranty. A state bank is wholly without authority to guarantee the payment of a credit which has no relation to the ordinary functions of the bank.

Dewey Works v Ryan et al, 206-1100; 221 NW 800

Issuance of certificate of deposit to pay note —validity. A certificate of deposit issued by a savings bank in payment of a negotiable promissory note constitutes a payment of value for the note, it appearing that the bank at the time had ample funds on hand for the purchase of said note; and this is true tho the directors had never authorized the purchase in such manner.

Andrew v Peterson, 214-582; 243 NW 340

Indebtedness to pay depositors—assessment of stockholders. An insolvent bank may, under this section and under authority of a majority of its stockholders, legally take the written agreement of a solvent bank to pay in full the depositors of said insolvent bank, and in return for such agreement legally transfer its assets to said solvent bank, and legally obligate itself to pay to said solvent bank any deficiency existing after said transferred assets are liquidated and applied. It follows that if said solvent bank pays said depositors in full, notwithstanding the fact that the said liquidating receipts are insufficient so to do, the stockholders of the insolvent bank, even tho they did not consent to said arrangement, must submit to an assessment to pay the unsatisfied obligations of their bank.

Andrew v Bank, 215-627; 246 NW 618

Assessment to pay. A state bank, through its directors, may validly create an indebtedness for the good-faith purpose of paying its depositors, and the stockholders must submit to an assessment for the purpose of discharging said indebtedness, even tho they had no knowledge of said proposed indebtedness at the time it was entered into.

Bates v Bank, 218-1320; 256 NW 286

Hypothecating assets—legality. The statutory prohibition that no "cashier or other officer or employee" of a state bank shall hypothecate any asset of the bank, unless authority so to do is granted at least annually by recorded resolution of the board of directors, does not prohibit the board itself from legally ordering the president and cashier to hypothecate bank assets in order to secure the bank's legal indebtedness, even tho no formal written record of the order is entered (§9222-c2, C., '31 [§9222.2, C., '39]).

In re Hannahs, 217-1016; 252 NW 539

Hypothecating assets. The statutory prohibition that no "cashier or other officer or employee" of a state bank shall hypothecate any asset of the bank unless authority so to do is granted at least annually by recorded resolution of the board of directors (§9222-c2, C., '31, [§9222.2, C., '39]) does not prohibit the board from legally ordering the cashier, with the approval of the superintendent of banking, to hypothecate bank assets in order to secure a legal indebtedness of the bank, even tho no formal, written resolution to that effect was actually passed by the board. (§9222-c3, C., '31 [§9222.3, C., '39]).

Andrew v Bank, 216-1170; 250 NW 492

Rediscounting—agreement to repurchase—demand for performance unnecessary. When a bank, (1) rediscounts its paper under indorsements "without recourse", but (2) accompanies the indorsement with a formal written agreement to repurchase the said paper on a named date, demand for performance on said date, or on any date, is unnecessary.

Bates v Bank, 219-1358; 261 NW 797

Estoppel to deny authority of officers. A savings bank, notwithstanding statutory limitations on the power of bank officers, will not be permitted to deny the authority of its officers to rediscount the bank's paper by indorsing said paper "without recourse" but accompanying such indorsement with formal, written agreement binding the bank to repurchase said paper prior to or at a named time, when the party advancing the credit relied thereon, and when said bank received, retained, and availed itself of the entire fruits of the said rediscounting.

Bates v Bank, 219-1358; 261 NW 797

9304 Applicable provisions.

Atty. Gen. Opinions. See '25-26 AG Op 43, 478; '34 AG Op 175

CHAPTER 416.1

CREDIT UNIONS

9305.16 Loans.

Money lent—burden of proof. One seeking to recover money loaned must prove a contract express or implied for its repayment.

In re Green, 227-702; 288 NW 881

TITLE XXII

BUILDING AND LOAN ASSOCIATIONS

CHAPTER 417

ORGANIZATION AND GENERAL REGULATIONS

Atty. Gen. Opinions. See '25-26 AG Op 229; '32 AG Op 219; '38 AG Op 472

INCORPORATED ASSOCIATIONS

9306 Defined generally.

Atty. Gen. Opinion. See '28 AG Op 351

9310 Organization.

Atty. Gen. Opinion. See '36 AG Op 528

9313 Articles.

Atty. Gen. Opinions. See '25-26 AG Op 229; '36 AG Op 306

Stockholder's contractual right of withdrawal of funds—unalterable by amendments or bylaws. A stockholder contracting with a building and loan association, a financially sound going concern, for withdrawal of funds on specified terms, has an unqualified vested right of withdrawal not subject to the association's subsequent modification through amendment or bylaw changes.

O'Connor v Home Assn., 224-1127; 278 NW 636

Contract with stockholders for withdrawal of funds—essentials. Where a right of withdrawal of funds is involved, a contract between stockholders and a building and loan association consists of the certificates, the charter, the bylaws, and the statute, but right of withdrawal afforded therein is applicable only to a going concern.

O'Connor v Home Assn., 224-1127; 278 NW 636

State auditor's action affecting stockholder's contractual rights. Fact that auditor of state approved building and loan association's refusal to honor applications for withdrawal of funds does not affect stockholder's contractual rights with the association for such withdrawal.

O'Connor v Home Assn., 224-1127; 278 NW 636

9315 Approval of articles—certificate of authority.

Atty. Gen. Opinions. See '36 AG Op 528; '38 AG Op 100

9316 Amendments—approval.

Atty. Gen. Opinion. See '38 AG Op 100

9319 Domestic companies — bonds — custody.

Atty. Gen. Opinion. See '34 AG Op 155

9328 Banking prohibited.

Atty. Gen. Opinion. See '28 AG Op 224

9329 Powers.

Atty. Gen. Opinions. See '25-26 AG Op 229; '28 AG Op 224, 409; '32 AG Op 124, 219; '38 AG Op 324, 535

9331 Foreclosure—debit and credit.

Atty. Gen. Opinion. See '38 AG Op 535

9335 Foreclosure—debits and credits. (Repealed.)

Crediting payments after insolvency. A borrower in a so-called "builders' loan department" of a trust company, whose monthly payments on the loan are seemingly carried by the trust company as deposits and not indorsed on the note, has the right, after the trust company has become insolvent, to have his payments credited on his note, and to pay the balance due and to receive a discharge irrespective of the rights of creditors of the company.

In re Trusteeship, 214-884; 241 NW 308

9340.01 Investments.

Atty. Gen. Opinions. See '34 AG Op 355; '36 AG Op 8; '38 AG Op 324

9340.02 Deposit of funds.

Atty. Gen. Opinion. See '34 AG Op 155

9340.08 Requirements for loan.

Money lent—burden of proof. One seeking to recover money loaned must prove a contract express or implied for its repayment.

In re Green, 227-702; 288 NW 881

9340.13 Interest rates variable.

Atty. Gen. Opinions. See '28 AG Op 318; '36 AG Op 317

9342 Voting shares of stock.

Atty. Gen. Opinions. See '36 AG Op 68, 306; '38 AG Op 472

9346 Membership fee—"expenses" defined.

Atty. Gen. Opinion. See '25-26 AG Op 225

9347 Dividends.

Atty. Gen. Opinion. See '25-26 AG Op 225

9348 Expenditures and expenses.

Atty. Gen. Opinion. See '25-26 AG Op 225

9352 Withdrawals.

Atty. Gen. Opinions. See '38 AG Op 100, 535

9356 Expenses and per diem.

Atty. Gen. Opinion. See AG Op May 9, '39

9362 Quo warranto—receiver.

Quo warranto statute inapplicable to breach of contract. The statutory authority, by which the attorney general on complaint of the auditor of the state is permitted for specified causes to wind up the affairs of a building and loan association, is not applicable to a breach of contract occurring between a stockholder and the association—such a controversy not being determinable by the auditor of state.

O'Connor v Home Assn., 224-1127; 278 NW 636

UNINCORPORATED ASSOCIATIONS

9390 Statutes applicable.

Rewards—liability of members. An incorporated bank which, in effect, represents that it is a member of an association which is offering a reward for information leading to the conviction of bank robbers, thereby obligates itself to pay the reward when, in truth, the association is but a voluntary, unincorporated association.

Carr v Mahaska Assn., 222-411; 269 NW 494; 107 ALR 1080

TITLE XXIII

TRADE AND COMMERCE

CHAPTER 418

MONEY AND INTEREST

9403 Denominations of money.

Economic conditions and fluctuations in values. Equity cannot refuse to foreclose a mortgage because of a depressed economic condition existing throughout the country, nor, in foreclosing, may it assume to adjust the judgment to the fluctuating value of the legal tender as declared by the federal government.

Federal Bank v Wilmarth, 218-339; 252 NW 507; 94 ALR 1338

Money given to obstruct justice—recovery denied. The courts will not aid one to recover money that has been given to another to be used in obstructing or interfering with the orderly course of justice, nor will they protect one who obtains the money of another for a particular lawful purpose when he fails to so use it and refuses to return it.

Sarico v Romano, (NOR); 205 NW 862

9404 Rate of interest.

Atty. Gen. Opinions. See '36 AG Op 253, 479; '38 AG Op 387

ANALYSIS

I INTEREST RECOVERABLE
II INTEREST UPON INTEREST
III TIME INTEREST COMMENCES TO RUN
IV RATE OF INTEREST

I INTEREST RECOVERABLE

Interest on claims not necessarily allowable. An assignee for the benefit of creditors of an insolvent estate pays interest on claims at his peril. The court may wholly or partially disapprove of such payments, but where a fund belonging to a claimant has been drawing interest as a bank deposit, claimant is entitled to the interest.

In re Cutler & Horgen, 213-983; 234 NW 238; 238 NW 80

Unallowable interest. Interest on claims of laborers and materialmen on public improvements will not be allowed when the fund from which payment must be made is insufficient to pay the principal of all allowed claims.

Southern Sur. v Jenner, 212-1027; 237 NW 500

Interest on compromise agreement. Creditors who, in a composition agreement with their debtor, contract to accept specified sums in settlement of their respective demands, are not entitled to interest on said sums during the time required to carry out the agreement.

Bailey v Ins. Co., 221-1195; 268 NW 173

Administratrix — accounting — interest on security. A widow to whom support allowance is awarded in the form of a bond or security, belonging to the estate, is under no duty as administratrix to account for the interest subsequently accruing on said bond.

In re Paulson, 221-706; 266 NW 563

Fraud—disallowance of interest. Where in setting aside a conveyance as fraudulent the court decrees grantee a lien for the amount which grantor was owing grantee, the failure of the court to allow interest on the claim will not be disturbed on a record showing that

I INTEREST RECOVERABLE—continued

grantee has been in possession of the land for some two years without accounting to grantor for the rents, and that the trial court deemed said rents ample to meet the said interest, said interest being a matter of future adjustment on any balance remaining after satisfying the creditor's claim.

Lietz v Grieme, 212-1305; 236 NW 395

Nonrecoverable interest. A guardian, in a successful action to cancel an exchange of property which the minor ward assumed to enter into, may not recover of the other party to the exchange interest on money which was never in the hands of such other party, and from which he derived no interest, but which was held by a third party as custodian, pending the litigation, especially when the deposit was made with the custodian without any arrangement as to interest.

Cloud v Burnett, 207-593; 223 NW 379

Compensation—interest. Interest on a long delayed award of compensation will not be allowed when the delay was consequent on the applicant's neglect to perfect her petition for review of the decision of the board of arbitration.

Bushing v Railway, 208-1010; 226 NW 719

Deposits—interest paid in advance—receivership—effect. In case interest is paid a depositor in advance, the termination of the accrual of all interest by the appointment of a receiver necessitates the charging of the deposit with the amount of unearned interest.

Murray v Bank, 201-1325; 207 NW 781

Receivers—interest. Where allowed claims in a receivership are all general claims and of the same class, any balance of funds remaining after paying said claims in full and costs of administration will be applied as interest on a pro rata basis among said claimants.

State v Cas. Co., 216-1221; 250 NW 496

Tender—nonproduction of money. A litigant who admits his indebtedness and is able and willing to pay it, and who, in order to protect himself, equitably interpleads warring claimants to the fund, and therein tenders the sum to whomsoever it is adjudged to belong, may not be held liable for interest because he does not actually bring the money into court until after the issues are determined.

Kelly v Bank, 217-725; 248 NW 9; 250 NW 171

Interest on deferred payment. Interest on long deferred payments due to a contractor may properly be ordered.

Gjellefald v Drain. Dist., 203-1144; 212 NW 691

Interest on unpaid legacy. Interest, but not compound interest, should be allowed on a legacy not paid when due.

In re Mann, 212-17; 235 NW 733

Interest on unpaid legacy. An executor may be chargeable with interest on an unpaid cash legacy to a minor, even tho his actions have been in perfect good faith.

Irwin v Bank & Trust, 218-477; 255 NW 671

Trust fund—interest. Interest is not allowable on an established trust fund against an insolvent bank.

Standard Oil v Andrew, 218-438; 255 NW 497

Advance by executor of his own funds—repayment and interest. An executor who, because of a temporary shortage in estate funds, advances sums from his own private funds and therewith pays legal claims against the estate, rather than to sell, on a poor market, assets of the estate, is properly allowed interest on the amount so advanced.

In re Shepherd, 220-12; 261 NW 35

Executor's indebtedness to estate—interest charged. In probate proceedings on objections to executor's final report, where the executor owed a note to the estate bearing interest which was not added to principal, held, interest should be charged in the absence of any evidence to warrant a finding for the principal only.

In re Sheeler, 226-650; 284 NW 799

Funds used by executor—interest chargeable. In probate proceedings on objections to executor's final report where it is shown that the estate funds were intermingled with executor's funds and used by him with no attempt being made to reinvest such funds, executor is held chargeable with interest at six percent a year with annual rests.

In re Sheeler, 226-650; 284 NW 799

Advancement (?) or debt (?)—interest. An ordinary promissory note executed by an heir to his ancestor, and representing money received by the heir from the ancestor, must, in the settlement of the estate, be deemed, presumptively, a debt and not an advancement; consequently, interest is chargeable as provided in the note.

In re Manatt, 214-432; 239 NW 524

Interest on purchase price. Interest on the purchase price is properly decreed from the time the purchase price was due and payable.

In re Hager, 212-851; 235 NW 563

Interest on preferred claims. The holder of a preferential claim, for public funds, which has been allowed against the receiver of an insolvent bank, is not entitled to interest on the claim, tho payment be long delayed on account of litigation.

Leach v Bank, 210-613; 231 NW 497; 69 ALR 1206

Eminent domain—improper addition of interest. It is improper for the court in the trial

of an appeal in eminent domain proceedings to direct the jury to add to their verdict interest from the date of the taking, such direction being an assumption by the court that the jury would return a verdict for damages in excess of the damages awarded by the condemnation jury.

Welton v Highway Com., 211-625; 233 NW 876

Recovery dependent on pleading. In an action on a nonnegotiable promissory note, by a transferee thereof, defendant's plea that he be given a set-off in a stated sum, because of an account held by defendant against the original payee, will not be construed as embracing a demand for interest on said "stated sum".

Lewis v Grain Co., 214-143; 241 NW 469

Promissory note—severability of interest—when barred. Unless the maker and payee on a promissory note agree to sever the promise to pay interest installments from the promise to pay principal so as to make each promise separate and independent of the other, the interest is an incident to the principal debt and as such is barred when the statute of limitations has run against the principal debt.

Yeadon v Farmers Co., 224-829; 277 NW 709; 115 ALR 725

Verdicts—responsive to issues—sufficiency. A verdict, in an action on promissory notes, for "$5000 and interest dollars" is all-sufficient to authorize the court to compute the interest, add it to the principal, and enter judgment accordingly.

Grimes Bank v McHarg, 213-969; 236 NW 418; 36 NCCA 205

II INTEREST UPON INTEREST

Executor chargeable with compound interest. An executor who wrongfully fails to close an estate within the statutory three-year period and uses the estate funds for his personal enrichment is properly charged with interest at six percent, with annual rests, from the expiration of said three years, even tho the net interest would only have been four percent had the executor closed the estate within the time required by statute and turned the remaining assets over to a trustee as directed by the will.

In re Mowrey, 210-923; 232 NW 82

Compound interest. Interest on interest may not be compounded, in the absence of an agreement to that effect.

Riggs v Gish, 201-148; 205 NW 833

Mutual construction of parties. The maker of a promissory note who is unable to pay at maturity because of an unapprehended and long-continued change of condition, for which the payee is not responsible, and who repeatedly and voluntarily renews his note by including in each renewal the amount of principal and legal interest then due, may not claim that he was improperly charged with interest upon interest, when such renewals appear to have been the mutual and practical construction by the parties of the contract out of which the original note arose.

Frank Cram v Trust Co., 205-408; 216 NW 71

III TIME INTEREST COMMENCES TO RUN

Right in general. Interest is recoverable on any claim from the date when the damages become complete, whether the claim arises out of express or implied contract, or in tort.

Olson v Shuler, 203-518; 210 NW 453

Ambiguous provision as to interest. A certificate of deposit payable "on the return of this certificate properly indorsed 12 months after date with interest at 5 percent or six months after date with interest at 5 percent per annum", is payable on demand, (1) with interest at 5 percent if presented in 12 months or later, (2) with interest at 5 percent if presented in six months or later, and (3) with no interest if presented within six months.

Partch v Krogman, 202-524; 210 NW 612

Compensation—interest. Interest on a long delayed award of compensation will not be allowed when the delay was consequent on the applicant's neglect to perfect her petition for review of the decision of the board of arbitration.

Bushing v Railway, 208-1010; 226 NW 719

Excise taxes—mistaken refunds—recovery interest. The state treasurer who, under a mistaken interpretation of the law, refunds to a distributor of motor vehicle fuel a portion of the excise properly paid on account of said fuel, may, on behalf of the state, legally recover the amount of said mistaken refund, but with interest only from the date of the judgment.

State v Standard Oil Co., 222-1209; 271 NW 185

Foreclosure—interest on accelerated debt. Where a mortgage provides for an increased but legal rate of interest on all sums due and unpaid, and foreclosure is instituted (1) on sums due and in default, and (2) because of an acceleration clause, on the balance called for by the mortgage, interest on the accelerated part of the debt can only be computed from the date when foreclosure was commenced.

Federal Bank v Wilmarth, 218-339; 252 NW 507; 94 ALR 1338

Increased rate of interest—when effective. A mortgage clause to the effect that upon the exercise by the mortgagee of his right to declare the entire debt due because of default in payment of any part of the matured debt the mortgage debt shall bear an increased rate of interest, is valid, and such increased

III TIME INTEREST COMMENCES TO RUN—concluded

rate commences to run from the date of action to foreclose.

Whitney v Krasne, 209-236; 225 NW 245

Interest on antenuptial-contract allowance. A provision in an antenuptial contract that the wife shall be paid a named sum within a named time after the death of the husband contemplates interest on said sum from the maturity date, even tho said contract also provides that the widow shall be paid a monthly sum until the former main sum is paid.

In re Shepherd, 220-12; 261 NW 35

Policies of insurance. Interest is allowable, on the amount recovered under a hail insurance policy, from the date when the loss occurred.

Glandon v Ins. Assn., 211-60; 232 NW 804

Rentals for successive seasons. In an action to recover the rental of lands for successive seasons, interest is properly computed from the end of each annual period on each item of annual rent.

Bigelow v Ins. Co., 206-884; 221 NW 661

Abandonment and dismantlement of railroad—claims of donors. In the establishment against the owner of a railroad of claims for donations made for the construction of the road, interest should be allowed only from the date when the claims were established.

State v Beaton, 209-1291; 228 NW 111

Unliquidated set-off. In an action on a note executed with the mutual understanding that the maker and payee would, at some future date, agree on and adjust certain set-offs against the note, interest on the set-offs may very properly be allowed from the date of filing the answer pleading such set-offs.

Riggs v Gish, 201-148; 205 NW 833

IV RATE OF INTEREST

Increased rate after default. Interest on a note and mortgage is necessarily computable, after default in payment, at the increased rate provided by the mortgage, for such a contingency, provided said rate does not exceed the maximum legal rate.

Penn Ins. v. Orr, 217-1022; 252 NW 745

Repossessed motor vehicles—no retaking on ground that conditional sale usurious. A replevin action to retake a motor vehicle covered by, and repossessed under, a conditional bill of sale, is not maintainable on the ground that the conditional bill of sale was allegedly usurious. The debt in the conditional bill of sale is valid and still exists even tho a usury penalty attaches.

Hill v Rolfsema, 226-486; 284 NW 376

When foreign law governs. In an action on a foreign contract to recover a money judgment, it is proper to allow interest at the rate authorized by the laws of such foreign state.

Benson v Sawyer, 216-841; 249 NW 424

Funds used by executor—interest chargeable. In probate proceedings on objections to executor's final report where it is shown that the estate funds were intermingled with executor's funds and used by him with no attempt being made to reinvest such funds, executor is held chargeable with interest at 6 percent a year with annual rests.

In re Sheeler, 226-650; 284 NW 799

Improper interest. Tho the lien of a materialman may, in a certain case, be superior to the lien of a prior mortgage on the land, yet the court is in error in computing interest at a rate in excess of 6 percent and in allowing an attorney's fee and taxing it as costs and decree a lien for such excess interest and costs, even tho the claim of the materialman is evidenced by a promissory note calling for such excess interest and attorney fees.

Spieker v Fair Assn., 216-424; 249 NW 415

Mortgages—increased interest rate—penalty. A mortgage provision empowering the mortgagee to declare the entire debt due and payable in case of nonpayment of an installment of principal, or of interest, taxes, etc., imposes no penalty on the mortgagor, likewise a provision fixing one rate of interest on unmatured sums, and a different and higher rate on matured and unpaid sums, provided the legal rate is not exceeded.

Federal Bank v Wilmarth, 218-339; 252 NW 507; 94 ALR 1338

Savings banks—deposits—excessive interest-bearing certificates. A certificate of deposit issued by a savings bank is not illegal because made to draw an apparently very high rate of interest to wit, 7½ percent, nor because part of the interest is paid the depositor in advance, the directors never having fixed any rate of interest on such certificates.

Murray v Bank, 201-1325; 207 NW 781

9405 Interest on judgments and decrees.

Atty. Gen. Opinion. See '36 AG Op 253

Amount in controversy—including interest on judgment. In determining the amount in controversy under the statute limiting supreme court appeals to cases involving over one hundred dollars, the allegations of the pleadings are controlling, and where the propriety of the judgment is the only issue, interest or costs will not be considered in determining the amount in controversy, but where defendant's motion attacked purported judgment of district court confirming justice's judgment in sum of $74, together with accrued interest of $35,

amount of interest would be added to judgment in determining whether amount involved was sufficient to authorize appeal to supreme court.

Yost v Gadd, 227-621; 288 NW 667

Interest under condemnation proceedings. In eminent domain proceedings where the property owner recovers on appeal more than was awarded by the sheriff's jury, interest should be allowed on the verdict from the date when the condemnor takes possession of the land.

Beal v Highway Com., 209-1308; 230 NW 302; 36 NCCA 196

9406 Illegal rate prohibited—usury.

Atty. Gen. Opinions. See '25-26 AG Op 146; '38 AG Op 387

ANALYSIS

Building and loan associations. See under §9329, Vol I
Interest on interest. See under §9404, Vol I

I USURY IN GENERAL

Interest in advance—effect. A bank certificate of deposit which is payable on demand, and on which the interest is in part paid in advance, will not be declared usurious, in the absence of evidence tending to establish an express or an implied agreement for the payment of usurious interest.

Partch v Krogman, 202-524; 210 NW 612

Seeking and doing equity — unconscionable mortgage. Equity will not foreclose an unconscionable mortgage—i. e., a mortgage pyramided with usury, and given as additional security for part of a debt already secured by mortgage; and especially is this true when the mortgagee is manifestly seeking to sequester the property situated in a foreign state and covered by the original security without accounting for the value thereof.

Tansil v McCumber, 201-20; 206 NW 680

II TRANSACTIONS CONSTITUTING USURY

Usurious transactions. Notes and mortgages which are untainted with usury are not so tainted by subsequent contracts by which forbearance of the holder to insist upon an accelerated maturity is secured.

Squire Co. v Hedges, 200-877; 205 NW 525

Usurious transactions. A note and mortgage which calls for less than the maximum legal rate of interest, but requires the mortgagor to pay in addition certain known charges, and taxes assessable to the mortgagee, will not be deemed usurious in the absence of proof that the interest contracted for, plus the added exactions, when computed over the full term of the note and mortgage, will exceed the said maximum legal rate.

Penn Ins. v Orr, 217-1022; 252NW 745

Usurious transactions — rule to determine (Nebraska contract). A Nebraska note and accompanying mortgage calling for interest at six and one-half percent, when the maximum legal rate is ten percent, is not rendered usurious by the additional provision that the maker-mortgagor will pay all taxes on the mortgage debt, the Nebraska law being that such contracts are not usurious unless it is made affirmatively to appear that the borrower intended to give and the lender intended to receive interest in excess of the legal limit.

Federal Trust v Nelson, 221-759; 266 NW 509

III COMMISSIONS FOR NEGOTIATING LOANS

Full period of loan used in determining usury. When mortgagor is required to pay a commission for securing the loan, the note and mortgage which call for less than the maximum legal rate of interest are not usurious when the interest, plus the amount of the commission, when computed over the full term of the note and mortgage, does not exceed the maximum legal rate.

Penn Ins. Co. v Orr, 217-1022; 252 NW 745

IV USURY BY AGENTS

Attorney and client—fraud—illegal interest charge. Evidence held insufficient to show fraud on the part of an attorney in charging interest in excess of the legal rate on certain obligations.

Tobin v Budd, 217-904; 251 NW 720

V USURIOUS PAYMENTS

Usury—interest in advance—effect. A bank certificate of deposit which is payable on demand, and on which the interest is in part paid in advance, will not be declared usurious in the absence of evidence tending to establish an express or an implied agreement for the payment of usurious interest.

Partch v Krogman, 202-524; 210 NW 612

VI PURGING CONTRACT OF USURY

Rights to nonusurious item of indebtedness. When foreclosure of a mortgage is refused in toto because of the fact that unconscionable usury permeated the entire debt except as to one item, and when the court separates such item from the rest of the contract and, without objection, renders personal judgment against the mortgagor therefor, it should grant the plaintiff legal interest thereon. In other words,

it is not justified in rendering judgment for interest on such item in favor of the school fund.

Tansil v McCumber, 201-20; 206 NW 680

VII CONFLICT OF LAWS

Usurious transactions — rule to determine (Nebraska contract). A Nebraska note and accompanying mortgage calling for interest at six and one-half percent, when the maximum legal rate is ten percent, is not rendered usurious by the additional provision that the maker-mortgagor will pay all the taxes on the mortgage debt, the Nebraska law being that such contracts are not usurious unless it is made affirmatively to appear that the borrower intended to give and the lender intended to receive interest in excess of the legal limit.

Federal Trust Co. v Nelson, 221-759; 266 NW 509

9407 Penalty for usury.

Discussion. See 17 ILR 402—"Void" and "voidable"—usury statutes

Atty. Gen. Opinion. See '38 AG Op 387

ANALYSIS

I USURY AS DEFENSE AND AS AFFIRMATIVE RELIEF

(a) DEFENSE

Defense not available to third party. The plea of usury is not available to one who is a stranger to the contract attacked.

Squire Co. v Hedges, 200-877; 205 NW 525

(b) AFFIRMATIVE RELIEF

Rights and remedies—nonusurious item of indebtedness. When foreclosure of a mortgage is refused in toto because of the fact that unconscionable usury permeated the entire debt except as to one item, and when the court separates such item from the rest of the contract and, without objection, renders personal judgment against the mortgagor therefor, it should grant the plaintiff legal interest thereon. In other words, it is not justified in rendering judgment for interest on such item in favor of the school fund.

Tansil v McCumber, 201-20; 206 NW 680

Repossessed motor vehicles—no retaking by replevin on ground that conditional sale usurious. A replevin action to retake a motor vehicle covered by, and repossessed under, a conditional bill of sale is not maintainable on the ground that the conditional bill of sale was allegedly usurious. The debt in the conditional bill of sale is valid and still exists even tho a usury penalty attaches.

Hill v Rolfsema, 226-486; 284 NW 376

Seeking and doing equity—unconscionable mortgage. Equity will not foreclose an unconscionable mortgage—i. e., a mortgage pyramided with usury, and given as additional security for part of a debt already secured by mortgage; and especially is this true when the mortgagee is manifestly seeking to sequester the property situated in a foreign state and covered by the original security without accounting for the value thereof.

Tansil v McCumber, 201-20; 206 NW 680

(c) PLEADING USURY

Unconscionable action—pleadings — waiver. A court of equity will not reject testimony before it showing the unconscionable nature of the transaction upon which action is brought (i. e., that a contract is pyramided with unconscionable usury), simply because the pleadings are general and indefinite, and do not specifically plead such usury. Especially is this true when the parties have treated the pleadings as all-sufficient.

Tansil v McCumber, 201-20; 206 NW 680

Nonavailable to stranger. The plea that a promissory note is usurious cannot be raised by an entire stranger to the note.

Capital Loan v Keeling, 219-969; 259 NW 194

Repossessed motor vehicles—no retaking on ground that conditional sale usurious. A replevin action to retake a motor vehicle covered by, and repossessed under, a conditional bill of sale, is not maintainable on the ground that the conditional bill of sale was allegedly usurious. The debt in the conditional bill of sale is valid and still exists even tho a usury penalty attaches.

Hill v Rolfsema, 226-486; 284 NW 376

(d) EVIDENCE

Usury as defense—burden of proof. The burden of proving that a note is usurious is on the defendant.

Penn Ins. Co. v Orr, 217-1022; 252 NW 745

II USURY AS AFFECTING RIGHTS OF THIRD PARTIES

Defense not available to third party. The plea of usury is not available to one who is a stranger to the contract attacked.

Squire Co. v Hedges, 200-877; 205 NW 525

Usurious transactions — nonavailable to stranger. The plea that a promissory note is usurious cannot be raised by an entire stranger to the note.

Capital Loan v Keeling, 219-969; 259 NW 194

III FORFEITURES

Interest in advance—effect. A bank certificate of deposit which is payable on demand, and on which the interest is in part paid in advance, will not be declared usurious in the absence of evidence tending to establish an express or an implied agreement for the payment of usurious interest.

Partch v Krogman, 202-524; 210 NW 612

IV JUDGMENTS

Nonusurious item of indebtedness. When foreclosure of a mortgage is refused in toto because of the fact that unconscionable usury permeated the entire debt except as to one item, and when the court separates such item from the rest of the contract and, without objection, renders personal judgment against the mortgagor therefor, it should grant the plaintiff legal interest thereon. In other words, it is not justified in rendering judgment for interest on such item in favor of the school fund.

Tansil v McCumber, 201-20; 206 NW 680

9408 Interest in excess of two percent per month.

Atty. Gen. Opinion. See '38 AG Op 387

CHAPTER 419.1

CHATTEL LOANS

Atty. Gen. Opinion. See '38 AG Op 137

9438.01 License and rights thereunder.

Legislative power to regulate. Regulation and control of the small loan business is a proper field for legislation.

Miller v Schuster, 227-1005; 289 NW 702

Disclaiming agency—effect. If a loan company and a party through whom loans are made occupy, in truth and fact, the relation of principal and agent, it matters not that, in their contract, they positively disclaim such relation, or provide that the party through whom loans are made shall be deemed the agent of the borrower, or otherwise studiously seek to disguise such relation.

Burlington Bk. v Ins. Co., 206-475; 218 NW 949

Moneyed capital used in small loan business. Moneyed capital employed, under this section, in the making of small loans of $300 or less on personal or chattel security is taxable as moneys and credits, and not at the rate at which national bank stock is taxable, when the evidence shows that such moneyed capital does not come into competition with the business of national banks.

Univ. Corp. v Board, 205-1391; 219 NW 536
Welfare Soc. v City, 205-1400; 219 NW 534

9438.02 Application—fees.

Atty. Gen. Opinions. See '36 AG Op 61, 254; '38 AG Op 387, 406, 717

9438.05 License—form—posting.

Atty. Gen. Opinion. See '38 AG Op 137

9438.07 Separate license—change of place of business.

Atty. Gen. Opinion. See '38 AG Op 406

9438.13 Banking board—report—additional restrictions.

Delegation of powers to executive. A statute, which delegates to the state banking board authority to determine and fix by regulation such maximum rate of interest or charges upon each class of small loans as will induce efficiently managed commercial capital to enter such business in sufficient amounts to make available adequate credit facilities to persons without the security usually required by commercial banks, is not an invalid delegation of legislative power because the standards fixed by the legislature are sufficiently definite and carefully defined to warrant conferring on such board the power to adopt rules and regulations and give effect to the legislative policy.

Miller v Schuster, 227-1005; 289 NW 702

9438.15 Usury—limitation on principal loan.

Usury—nonavailable to stranger. The plea that a promissory note is usurious cannot be raised by an entire stranger to the note.

Capital Loan v Keeling, 219-969; 259 NW 194

9438.16 Loan—what constitutes.

Money lent—burden of proof. One seeking to recover money loaned must prove a contract express or implied for its repayment.

In re Green, 227-702; 288 NW 881

9438.17 Assignment of wages.

Incumbrance of exempt property—invalidity because of failure of consideration. A chattel mortgage on the exempt property of a husband and wife is void when the wife is in no manner indebted to the mortgagee, and concurs in and signs said mortgage with her husband solely because of the explicit promise of the mortgagee that he would advance certain funds to the mortgagors for use in their business, which promise the mortgagee subsequently wholly failed to perform.

Whittier Bank v Smith, 214-171; 241 NW 481

9438.18 Interest limited—violation—effect.

Atty. Gen. Opinion. See AG Op Sept. 28, '39

9438.19 Violations.

Atty. Gen. Opinion. See AG Op Sept. 28, '39

CHAPTER 420

CONTRACTS

Contracts in general. See Note 1 at end of chapter

9439 Seals abolished.

Instruments not under corporate seal—legality. Principle recognized that corporations may be bound by written contracts which are not executed under their corporate seals.

Homesteaders Life v Salinger, 212-251; 235 NW 485

Authority of corporate president. A corporation is bound by the act of its president in subordinating its mortgage to another mortgage (1) when the president is expressly authorized by the articles of incorporation to release and satisfy such mortgages, (2) when the president first executed, on adequate consideration, a written release and subordination without the corporate seal being attached, and later confirmed said act by a new release and subordination with said seal attached, and (3) when the corporation at all times intended so to subordinate its mortgage.

Homesteaders Life v Salinger, 212-251; 235 NW 485

9440 Consideration implied.

Additional annotations. See §9484 et seq.

ANALYSIS

I IMPLIED CONSIDERATION IN GENERAL
II DEEDS

I IMPLIED CONSIDERATION IN GENERAL

Implied in written contracts. The presumption created by statute providing that all contracts in writing, signed by the party to be bound, should import consideration is sufficient to cast burden upon defendant asserting lack of consideration to overcome such presumption.

Beal v Milliron, (NOR); 267 NW 83

Presumption. Presumptively a written contract is supported by a sufficient consideration, and the burden of proof rests on him who asserts to the contrary.

Krcmar v Krcmar, 202-1166; 211 NW 699

Presumption. A written contract of guaranty carries an evidentiary presumption that it was entered into on adequate consideration, and he who contends to the contrary has the burden to establish his contention, and he does not do so by showing that the recited nominal money consideration was not paid.

Boyd v Miller, 210-829; 230 NW 851

Conclusive presumption. A specifically recited consideration must be treated as correct, in the absence of any counter showing.

Burrow v County, 200-787; 205 NW 460
Y. M. C. A. v Caward, 213-408; 239 NW41

Tax certificate priority waived—extension of time of payment of mortgage. Extension of the time of payment on bonds secured by mortgage held sufficient consideration to support waiver of priority of tax certificate owned by mortgagor's daughter.

Beal v Milliron, (NOR); 267 NW 83

Requisites and validity—compromise and settlement as consideration. A promissory note executed without fraud and in compromise and settlement of a disputed but honestly asserted claim—which may have been unfounded—must be deemed supported by an adequate consideration. Evidence held to support such a finding.

Booth v Johnston, 223-724; 273 NW 847

Signature of surety obtained by fraudulent representations — nonliability. Extension of mortgage debt would be sufficient consideration to support signature of mortgagor's daughter to extension agreement if extension were granted on condition that such daughter sign, but where such signature of the daughter is obtained by fraudulent misrepresentations, it is without consideration and void as to the daughter.

Beal v Milliron, (NOR); 267 NW 83

Joint adventure. The requisites of an ordinary contract, and of a contract of joint adventure, as to form and validity, are substantially the same.

Smith, et al. v Hollingsworth, 218-920; 251 NW 749

Antenuptial contract — when acknowledgment unnecessary. A simple antenuptial contract, not involving the conveyance of real property, needs no acknowledgment to be valid.

Finn v Grant, 224-527; 278 NW 225

Construction—entire or severable. Principle recognized that, if the consideration for a contract is single and not apportionable, the contract is single or entire, and not apportionable.

Peek Est. v Ins. Co., 206-1237; 219 NW 487

Breach of part not destructive of whole. Generally, where contracts are severable and divisible, and the consideration justly apportioned to part of the contract, a breach of that part does not destroy the contract in toto, but the defendant may only recoup himself in damages.

Paramount Pictures v Maxon, 226-308; 284 NW 119

Evidence of custom and usage—contract prevails. Evidence of custom and usage cannot prevail against an express contract to the contrary.

Paramount Pictures v Maxon, 226-308; 284 NW 119

Director's note to bank. The directors of a financially embarrassed bank who execute their individual promissory notes to the bank and receive in return certain assets of the bank to which the state banking department had objected, may not say that the notes were executed without consideration.

Andrew v Shimerda, 218-27; 253 NW 845

See North Side Bank v Schreiber, 219-380; 258 NW 690

Officers and agents—liability for excess indebtedness. Ample consideration for a contract waiver by the purchaser of corporate bonds, of his statutory right (now repealed) to hold the officers and directors personally liable for a prohibited excess indebtedness of the corporation, may be found in the fact that the corporation has withdrawn a large amount of its assets and specifically pledged them with a trustee for the purpose of paying said bonds.

Preston v Howell, 219-230; 257 NW 415; 97 ALR 1140

Waiver—no release by insured without consideration. A purported release by one party to a contract of the other party's obligations is without effect unless duly supported by a consideration. So held where an insured accepted the return of his premium upon the statement that the policy had lapsed and thereupon the insurer claimed a waiver of its obligations.

Pennebaker v Ins. Co., 226-314; 284 NW 147

Assignment in payment of pre-existing debt. The assignment of funds by the legal owner thereof in payment of a pre-existing debt is not effective against the equitable owner of said funds.

Stegemann v Bendixen, 219-1190; 260 NW 14

Assignment to trustee. A written assignment of a fractional interest in a life insurance policy to a trustee, made for the purpose of protecting the attorneys for the agreed value of their services in prosecuting an action on the policy, is supported by adequate consideration, especially when it appears that the trustee was to receive compensation for his services.

Welsh v Taylor, 218-209; 254 NW 299

Gifts inter vivos—consideration—presumption—burden. Altho a promissory note for which there is no consideration is an unenforceable promise to make a future gift, nevertheless in an action against an executor on a note the presumption that the note imports a consideration, if negatived, must be overcome by evidence and this burden is on the maker or his representatives.

In re Cheney, 223-1076; 274 NW 5

Father promising son's creditor not to change son's legacy. Simply because a testator contracts with a bank not to change his will bequeathing $10,000 to a son who was indebted to the bank, and when the father did not contract to pay the son's debt, there is no "unjust enrichment" of devisees and legatees who accept property willed to them, altho father during his lifetime had depleted his estate by property transfers and conveyances to his other children.

Evans v Cole, 225-756; 281 NW 230

Devise and bequest—consideration unnecessary—resulting trust not created. Heirs and devisees are not required to give a consideration for devises and bequests to them; consequently, a resulting trust cannot be impressed on property conveyed to them, on the theory that they are not bona fide purchasers, when the property was not subject to the lien before conveyed.

Evans v Cole, 225-756; 281 NW 230

Voluntary gratuitous services—recovery for. Services, tho valuable and continued for years, when voluntarily rendered as a gratuity, and accepted as such, furnish no basis for a later action in quantum meruit.

Equitable v Crosley, 221-1129; 265 NW 137

Marriage as high consideration. Marriage is a good consideration for a contract—one of the highest known to the law.

In re Shepherd, 220-12; 261 NW 35

Consideration—claim in probate. On a wife's claim against her deceased, divorced husband's estate, a promissory note expressly stating a consideration, which, however, is invalid to support the claim, will not under this section import a valid consideration, so as to generate a jury question. This section was not intended to furnish the consideration but only import it when not stated, which in any event could not be different than that stated in the contract.

In re Straka, 224-109; 275 NW 490

Consideration for wife's signature. The signature of a wife to her husband's note and mortgage is supported by ample consideration

I IMPLIED CONSIDERATION IN GENERAL—concluded

when her signature was a condition precedent to obtaining the loan represented by the note.

Andrew v Ingvoldstad, 218-8; 254 NW 334

Wife signing to release dower — inadequate evidence to show lack of consideration. The presumption of consideration for a promissory note and mortgage, signed jointly by a husband and wife but evidencing and securing an originally created debt of the husband only, is not overcome, as to the wife, by evidence that she was a stranger to the negotiations for the loan, received no part of the loan, had no interest in the mortgaged lands except a contingent dower interest, signed the instruments without reading them and solely at the request of the husband and solely to release said contingent interest. The fatal defect in such evidence is its failure to establish the fact that the loan would have been made without the wife's signature—that the payee-mortgagee did not part with the money in reliance on the wife's signature.

Northern Trust v Anderson, 222-590; 262 NW529

Liability of wife on husband's note. A wife, after signing promissory notes which represent the husband's indebtedness only, may not avoid personal liability on the ground of absence of consideration flowing to her when it appears that the notes were so signed on demand of the payee and as a condition precedent to the granting by payee of an extension of time of payment.

First N. Bank v Mether, 217-695; 251 NW 505

Bates v Green, 219-136; 257 NW 198

II DEEDS

Future support—when not consideration. A conveyance of property in consideration of future support is voluntary as to existing creditors.

Grimes Bank v McHarg, 224-644; 276 NW 781

Overthrowing presumption. The statutory presumption that a deed of conveyance was supported by a consideration is not overcome by the naked testimony of the grantor that he was never paid anything for the conveyance.

Carr v McCauley, 215-298; 245 NW 290

Exception. A written clause in a deed of conveyance, to the effect that the grantee assumes and agrees to pay an existing mortgage on the land does not import a consideration.

Sheley v Engle, 204-1283; 213 NW 617

Assumption of mortgage—burden of proof. A mortgagee who, in foreclosure proceedings, asks for judgment on an assumption clause in a subsequent deed of conveyance not signed by the assumptor, and pleads a specified consideration for said assumption, must, if met by a denial, establish said consideration by a preponderance of the evidence.

Peilecke v Cartwright, 213-144; 238 NW 621

Cancellation—want of consideration not a ground. Want of consideration in itself will not warrant the setting aside of a deed, it being competent for a grantor to make a gift of his property and, altho want of consideration is a good defense to an executory contract, a deed is not such a contract, but instead represents a contract executed and a conveyance fully accomplished.

Lawson v Boo, 227-100; 287 NW 282

Wife's deed for husband's debt—consideration—estoppel. Wife who was not illiterate, and who deeded her land in payment of husband's notes, and who, by placing deed in husband's hands, clothed him with apparent authority to deliver the deed, thereby inducing creditors to surrender other land owned by the husband, is estopped from questioning the validity of the deed. The consideration to wife was advantage to husband and detriment to creditors.

Allen v Hume, 227-1224; 290 NW 687

Adequacy. A deed of conveyance which recites (1) that it is in payment for services performed by grantee in caring for her mother in her lifetime and (2) that grantee will support and care for grantor during his lifetime, is supported by an adequate consideration.

Ellis v Allman, 217-483; 250 NW 172

Setting aside fraudulent deed on condition. The grantee in a deed of conveyance executed for the primary purpose of preserving a means of support for the aged grantor (tho not so expressed in the deed) has a right, in an equitable action by grantor's executor to set aside the deed, to demand that his reasonable claim for furnishing the grantor a very substantial support be first paid as a condition precedent to any judgment setting aside the deed; and this is true tho said deed would have been declared fraudulent and invalid had it been attacked by the grantor's existing creditors.

Meyers v Schmidt, 220-370; 261 NW 502

Fraud—burden of proof. A creditor, seeking to set aside an alleged fraudulent conveyance which recites a consideration which is apparently valid and substantial tho indefinite in amount, must carry his proof beyond showing that the grantor and grantee were husband and wife and that the grantor was insolvent when he delivered the conveyance. In other words, such proof does not cast upon grantee the burden (1) to sustain the adequacy of the consid-

eration, and (2) to negative bad faith in the transaction, or (3) to show that the grantor at the time retained sufficient other property to pay his creditors.

First N. Bank v Currier, 218-1041; 256 NW 734

Evidence insufficient to show fraud. Evidence held sufficient to sustain a judgment refusing to set aside a conveyance of realty by devisee thereof to claimant against estate on ground of lack of consideration or fraud in making conveyance.

First N. Bank v Adams, (NOR); 266 NW 484

9441 Failure of consideration.

ANALYSIS

I PLEADING AND PROOF OF CONSIDERATION
II SUFFICIENCY OF CONSIDERATION

Negotiable instruments. See under §§9484, 9485

Consideration in promissory notes. See under §§9484, 9485

Discussion. See 21 ILR 621—Gratuitous promises

I PLEADING AND PROOF OF CONSIDERATION

Pleading. The all-essential element of a plea of failure of consideration is the facts. There need not necessarily be any formal statement "that there was a total failure of consideration".

Miller v Laing, 212-437; 236 NW 378

Parol evidence to establish. Principle reaffirmed that parol evidence may be admissible to establish lack of consideration for a written instrument.

Northern Trust v Anderson, 222-590; 262 NW 529

Evidence of assumption of note—discharge of maker—insufficient. Evidence held insufficient to establish oral agreement discharging makers from liability on note and substituting purchaser of property for maker.

Citizens Bank v Probasco, (NOR); 233 NW 510

Parol as affecting writings—clearly expressed consideration. The clearly expressed consideration recited in an unambiguous written instrument cannot be contradicted by parol evidence.

Burrier v Sheriff, 207-692; 223 NW 395

Parol or extrinsic evidence affecting writings —"exceptions" catalogued. The so-called "exceptions" to the parol evidence rule may be stated thus: Parol evidence is admissible,

1. To establish grounds for the reformation of a written contract.
2. To establish the unnamed consideration for a unilateral written contract.
3. To establish a distinctly separate and complete contract contemporaneous with, and noncontradictory of, a written contract.
4. To establish the conditional delivery of a written contract, and the failure of said condition.
5. To complete a written contract which shows on its face that it is fragmentary and incomplete.

In re Simplot, 215-578; 246 NW 396

Conclusiveness of one's own plea. A plaintiff who, in an action on a promissory note, specifically pleads a definite consideration, must stand or fall thereon. Having fallen, he will not be permitted to advantage himself of a consideration possibly reflected in the record, but not embraced within his own chosen plea.

Persia Bk. v Wilson, 214-993; 243 NW 581

Unallowable conclusion plea. An allegation that the transferee of a negotiable promissory note received it without consideration,—that said transferee was not a bona fide holder for value,—is a conclusion plea, and is not justified by the additional allegation of fact that said transferee took the note as a "donation or gift".

Benton v College, 202-15; 209 NW 516

Failure to plead—effect. Refusal to instruct as to the want of consideration in the signing of a promissory note is proper when defendant (1) causes plaintiff's plea of consideration to be stricken, and (2) does not himself plead want of consideration.

Conner v Henry, 205-95; 215 NW 506

Unavailable plea of want of consideration. The purchaser of corporate stock in praesenti by cash and by delivering his promissory note to the corporation for the balance, which note is sold by the corporation for cash, may not plead want of consideration when sued on the note, because, by such transaction, he has acquired the status of a stockholder, even tho no stock has been formally issued to him.

Conover v Hasselman, 206-100; 220 NW 42

Estoppel to plead. The maker of a promissory note may not plead failure of consideration when his own fraud brought about such failure.

Cloud v Burnett, 201-733; 206 NW 283

Estoppel to plead. One who signs a promissory note as surety, and also a renewal thereof, in order to secure a dismissal of an action on a prior note for the same debt, and in order to increase the security of the note, may not plead want of consideration for his signing.

Castelline v Pray, 200-695; 205 NW 339

Nonestoppel to plead. The maker of a promissory note is not estopped to plead failure of consideration for the note as to him because of the fact that, subsequent to the sign-

I PLEADING AND PROOF OF CONSIDERATION—continued

ing, he was a party to a contract under which there was a novation of security.

Insell v McDaniels, 201-533; 207 NW 533

When consideration operative on all original makers. The consideration which supports a strictly original promissory note operates, in the absence of fraud or mistake, upon all the original and contemporaneous signers of said note; and especially must this be true when a maker who pleads want of consideration signs as a prospective participant in the enterprise.

Starry v Starry, 212-274; 234 NW 281

When consideration unnecessary. One who obtains from the owner of real estate a written permission to erect improvements on the property and agrees that he will look solely to a third party for compensation, and not to the owner, may not, after the improvements have been erected, plead want of consideration for said writing.

Coen & Conway v Bank, 205-483; 218 NW 325

Statutory bond. The surety on the statutory bond of an executor may not plead want of consideration for signing the bond.

New Amsterdam Cas. v Bookhart, 212-994; 235 NW 74; 76 ALR 897

Burden of proof. A husband who signs a note and mortgage along with his wife has the burden to show failure of consideration for his signature, and he does not meet such burden by proof that his wife received all of the money borrowed and that he signed the mortgage in order to waive his dower interest.

Penn Ins. v Orr, 217-1022; 252 NW 745

Insufficient proof of failure of consideration. In an action for the balance due on a contract of subscription, a denial that the amount already paid was applied to the purpose for which the subscription was executed, availeth nothing.

Y. M. C. A. v Caward, 213-408; 239 NW 41

Assumption of obligations of insolvent estate. Where heirs of a deceased take up the outstanding obligations of the latter and execute their personal note for the same, their plea of want of consideration, when sued on the note, imposes on them the burden to show that the estate of the said deceased was insolvent.

Alpha Bank v Ostrander, 214-563; 243 NW 198

Rent—eviction by foreclosure decree. Even tho a wife who had joined with her husband in the execution of rent obligations was not made a party to subsequent mortgage foreclosure wherein her husband and the landlord were evicted by the appointment of a receiver, yet she may, when sued on the rent obligations by the landlord or by his assignee, plead the foreclosure decree as establishing a total failure of consideration.

Miller v Laing, 212-437; 236 NW 378

Inadequate consideration. A creditor may be unable to prove actual fraud in a conveyance carrying substantially all of the debtor's property, but may be able to prove a constructive fraud in said conveyance, to wit: that the consideration paid by the grantee was substantially inadequate in view of the value of the property conveyed. And, on such proof, the power of a court of equity is so boundless as to justify the entry of most any decree which will equitably protect both the grantee in the conveyance, the complaining creditor, and all other parties involved.

McFarland v Johnston, 219-1108; 260 NW 32

Impeaching recited consideration. The general recital in a deed of conveyance of a valuable consideration may be impeached, in an action to cancel the deed for fraud, by showing that no consideration passed, and by showing that the only relation of grantor and grantee was that of aunt and niece.

Guenther v Kurtz, 204-732; 216 NW 39

Failure of consideration—facts showing. The signer of a promissory note (no holdership in due course being involved) may plead want of consideration (1) when the note grew out of a transaction with which he was in no manner connected, (2) when he was under no possible obligation to sign the note, and (3) when he received nothing of value for so signing.

Insell v McDaniels, 201-533; 207 NW 533

Lack of mutuality and consideration—agreement to purchase steers retained and fed by alleged seller. In law action based on written instrument, wherein plaintiff agreed to feed 24 head of steers for a period from 90 to 120 days, and defendant agreed to purchase the steers at any time during such period at 14 cents per pound, hoof weight, at Chicago or other reasonable marketing point, such agreement was not enforceable due to lack of mutuality and consideration, especially where there was no other consideration than that imported by the instrument, and this being a law action rather than in equity to make contract mean what plaintiff contends that it was intended to say, hence plaintiff could not recover on instrument the difference between 14 cents per pound and price at which plaintiff sold the steers on Chicago market.

May v Burns, 227-1385; 291 NW 473

Suretyship—want of consideration. A plea of want of consideration, interposed by a gratuitous surety on a promissory note may be very properly ignored in the instructions of the court when the record shows (1) that

the surety signed the note without fraud imposed upon him, and (2) that there was a consideration between the principal and the payee.

Granner v Byam, 218-535; 255 NW 653

Want of consideration—burden of proof. The beneficiaries of a trust, defendants in an action on a note and mortgage executed by their authorized agent, have the burden to show want of consideration.

Daries v Hart, 214-1312; 243 NW 527

Payment—jury question. The issue of accord and satisfaction is for the jury when the evidence is not clear whether one party tendered the sum in full settlement, or, if he did so tender it, whether the other party so accepted the sum.

Zabawa v Osman, 202-561; 210 NW 602

Verdicts on conflicting evidence—conclusive. A jury verdict on competent, but conflicting testimony, relative to the consideration—if any—for a chattel mortgage, is conclusive on the appellate court.

McDonald v Webb, 222-1402; 271 NW 521

II SUFFICIENCY OF CONSIDERATION

Discussion. See 13 ILR 332—Promissory estoppel; 17 ILR 233—Antecedent debt; 18 ILR 445—Restatement and decisions; 19 ILR 395—Past and moral consideration

Statutory presumption — when conclusive. A consideration specifically recited in a written contract signed by the defendant must be treated as correct in the absence of any counter showing.

Y. M. C. A. v Caward, 213-408; 239 NW 41

Consideration—who may not question. A plaintiff has no standing to attack a conveyance of land for want of consideration when, if he be successful, his only interest in the land would be that of an heir of the grantor.

O'Neil v Morrison, 211-416; 233 NW 708

Consideration — adequacy. Evidence reviewed relative to an assignment of a note and mortgage for $5,000, and held that a life annuity of $200 per year to the assignor was sufficiently adequate to prevent any imputation of fraud, actual or constructive.

Scott v Seabury, 220-655; 262 NW 804

Default of loan agent. A mortgagor may not assert failure of consideration for the mortgage because his own duly authorized agent to procure the loan and receipt for the proceeds did not remit the proceeds to him.

Hedges Co. v Holland, 203-1149; 212 NW 480

Rendering consideration worthless. The consideration for a contract to purchase a nonnegotiable promissory note necessarily fails when the vendor-holder of the note cancels the contract out of which the note arose, and thereby renders the note worthless.

Durband v Nicholson, 205-1264; 216 NW 278; 219 NW 318

Mutual enlargement of business. Where parties are carrying on a business under written contract, a subsequent and additional oral contract under which they mutually enlarge their operations, obligations, and prospective benefits manifestly cannot be deemed without consideration.

Fisher v Nicola, 214-801; 241 NW 478

Absence of consideration. An assignment of the proceeds of a life insurance policy is a nullity when not supported by a consideration.

Mutual Ins. v Schubert, 201-697; 207 NW 741

Illegal sale. The sale of an automobile, the engine number of which has been defaced, altered, or tampered with, without an official certificate showing good and sufficient reasons for such change, presents a case of total failure of consideration, and no formal rescission of contract is necessary in order to recover the price paid.

Espe v McClelland, 208-512; 226 NW 130

Compounding offense as consideration.

Cotten v Halverson, 201-636; 207 NW 795

See Queen Ins. v Railway, 201-1072; 206 NW 804

Remote consideration. A bank may not be said to have received the benefit of a loan transaction between parties not connected with the bank, simply because the proceeds of the loan were used by one of the parties in purchasing the treasury stock of the bank.

McRoberts v Ordway, 206-947; 221 NW 507

Assumption of mortgage. Consideration for an agreement by a subsequent grantee of mortgaged premises to pay the mortgage is found in the fact that such agreement is the result of a settlement of the good-faith contention of the mortgagee that said grantee had, by the modification of a deed, wrongfully obliterated all evidence that the mortgagor ever had any interest in the land, to the damage of said mortgagee.

Sheley v Engle, 204-1283; 213 NW 617

Assumption of mortgage. The grantee of mortgage-incumbered land by absolute deed of conveyance but for the purpose of effecting security only, is not liable on his agreement to assume and pay the existing mortgage unless a consideration for such assumption and agreement is made to appear.

Herbold v Sheley, 209-384; 224 NW 781

Assumption of mortgage. An oral agreement by the grantee of land to assume and pay an existing mortgage on the land, whether made before or after the execution of a written contract of sale which was silent as to such

II SUFFICIENCY OF CONSIDERATION—continued

assumption, is without consideration when, in the final closing of the sale, the grantor was paid not only the full and conceded value of his equity in the land, but the amount of said mortgage.

Crane v Leclere, 206-1270; 221 NW 925

Assumption and agreement to pay. Consideration for an agreement to pay an existing mortgage on land is prima facie shown by proof (1) that the grantee accepted a deed which recited such agreement to pay "as part of the consideration" for the land, and (2) that he went into full possession under such deed.

First N. Bank v McDonough, 205-1329; 219 NW 329

Conveyance—consideration. Evidence held to show that the consideration for a conveyance of land was the satisfaction both of a mortgage indebtedness and also of certain judgments against the grantors.

Taylor v Heiny, 210-1320; 232 NW 695

Unjust enrichment. Where the purchaser of land was at no time delinquent in his payments or other conditions to be performed on his part, it would be unjust and inequitable to allow the vendor to retain the payments when, through his own fault, he failed to perform his part of the contract.

Trammel v Kemler, 226-918; 285 NW 196

Subordination in favor of other mortgages. The act of a corporation in waiving its priority and subordinating its mortgage to a mortgage held by another party, finds ample consideration in the fact that such waiver and subordination enabled the creditor of the corporation to obtain a new loan and to so refinance his obligations as to avoid foreclosures, and thereby protect the corporation from the necessity of paying off prior mortgages in order to protect its own mortgage.

Homesteaders Life v Salinger, 212-251; 235 NW 485

Vendor's inability to perform—purchaser's tender unnecessary. When the vendor had put it out of his power to perform a contract to sell realty by permitting a mortgage on the property to be foreclosed, it was not necessary for the purchaser to tender the unpaid part of the purchase price before commencing suit for the amounts paid.

Trammel v Kemler, 226-918; 285 NW 196

Pre-existing debt. A pre-existing indebtedness is ample consideration, as between the debtor and creditor, for the execution of a mortgage securing its payment.

Charlson v Bank, 201-120; 206 NW 812

Equitable estoppel—detriment and change of position. A chattel mortgage on property which the mortgagor does not own cannot prevail against the claim of the actual owner, even tho the latter has permitted the mortgagor to treat the property as his own, when the mortgagee takes such mortgage as additional security to a pre-existing debt, and without parting with anything of value, and without in any manner changing his position to his detriment.

People's Bank v McCarthy, 206-28; 217 NW 453

Pre-existing debt. A pre-existing indebtedness furnishes ample consideration for a transfer by a mortgagor of rent notes.

First Tr. JSL Bk. v Conway, 215-1031; 247 NW 253

Hypothecation to secure extension. The hypothecation of corporate stock as collateral security to a note, in order to secure an extension of time of payment, is supported by ample consideration.

Klatt v Bank, 206-252; 220 NW 318

Agreement extending time—consideration. The extension of the time for the payment of the debt was sufficient consideration for an agreement extending a mortgage, even tho the holder reserved the right to sue at any time any person who did not consent in writing to the extension.

Lincoln Ins. v McKenney, 227-727; 289 NW 4

Extending time on mortgage as consideration—burden of proof. In an action by a bank to foreclose a mortgage on land, the defendants had the burden of proving their defenses of fraud and want of consideration, and altho there was testimony that the mortgage was given to enable the bank to make a good showing to bank examiners and that there had been a promise that it would never be foreclosed, the court was justified in finding from other evidence that there was no fraud and that the consideration was the granting of an extension of time, on a past-due mortgage on other land.

Panama Bank v Arkfeld, 228- ; 291 NW 182

Promise to answer for debt, default, or miscarriage of another—extension of time—insufficient consideration. An oral promise to pay the debt of another person if the creditor will give such other person—the original debtor—an extension of time in which to pay is within the statute of frauds.

Leytham v McHenry, 209-692; 228 NW 639

Consideration for chattel mortgage—credit on debt—extension of time. A vendor of a house whose vendee had not completed the payments on the contract of purchase gave valuable consideration for two mortgages on an automobile owned by the vendee by taking the mortgages in return for payments advanced on the contract, by paying cash to the

chattel mortgagee, and by extending the time on the payments for the house.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Consideration — mutuality — constructing a grotto. An agreement between an individual and a charitable organization for the construction of a grotto is neither lacking in consideration, nor in mutuality where the parties clearly intended and provided for corresponding mutual obligations.

Sisters of Mercy v Lightner, 223-1049; 274 NW 86

Reconveyance of land. A contract cannot rest on a past consideration, but has ample support in a consideration consisting of the doing of something of value which the promisor was under no legal duty to do. So held where the mortgagor of land, in order to escape obligation on the mortgage, contracted to reconvey the land and to assume and pay the attorney fees of the mortgagee.

Anderson v Lundt, 200-1265; 206 NW 657

Consideration—adequacy. A deed of conveyance which recites (1) that it is in payment for services performed by grantee in caring for her mother in her lifetime and (2) that grantee will support and care for grantor during his lifetime, is supported by an adequate consideration.

Ellis v Allman, 217-483; 250 NW 172

Consideration—nonconclusiveness. The consideration named in a deed of conveyance is only prima facie evidence of the amount, and as to the fact of payment.

Gilbert v Plowman, 218-1345; 256 NW 746

Novation. A contract of novation under a contract for the sale of real estate is supported by ample consideration when the vendor agrees to divide the original contract and to have it executed by different parties and in a different manner than as provided in said original contract.

Montgomery v Beller, 207-278; 222 NW 846

Nonmoney agreement — justifiable refusal. A servant who agrees to accept corporate stock in a contemplated corporation in payment of his wages is justified in refusing the stock at a time when, without his consent, the corporation has become heavily encumbered by mortgage.

Tracey v Judy, 202-646; 210 NW 793

Agreement to pay in other than money—refusal—effect. An agreement to receive corporate stock in payment of wages is converted into a money demand by a failure to deliver the stock.

Tracey v Judy, 202-646; 210 NW 793

Past services or past indebtedness as consideration for contract to will property. Altho past services or past indebtedness may be a lawful consideration for an agreement, the parol evidence of such past services or indebtedness will not establish a contract by which the debtor agrees to sell or transfer his property by will in satisfaction of such services or debt.

Fairall v Arnold, 226-977; 285 NW 664

Mutual expectations — presumption. The rendition on one hand and the acceptance on the other of valuable services (board and lodging) for a series of years generates a presumption that the one rendering was to receive pay and that the one receiving was to pay; and this is true tho the receiver and the giver were lifelong associates, and related, but were not members of the same family.

Peterson v Johnson, 205-16; 212 NW 138

Future support—when not consideration. A conveyance of property in consideration of future support is voluntary as to existing creditors.

Grimes Bk. v McHarg, 224-644; 276 NW 781

Consideration and revocability. An executed, delivered, and accepted gift needs no consideration for its support, and is irrevocable.

Stonewall v Danielson, 204-1367; 217 NW 456

Love and affection—when not consideration. A conveyance of property in consideration of love and affection is voluntary as against existing creditors.

Grimes Bk. v McHarg, 224-644; 276 NW 781

Naming child. A promise by grandfather to will property to grandson, if the parents name the grandson after the grandfather, is void for lack of legal consideration when such promise was made over three months after grandson had already been named after the grandfather.

Lanfier v Lanfier, 227-258; 288 NW 104

Love and affection — consideration — sufficiency. In an action to enforce grandfather's oral promise to will property to grandson in return for naming grandson after him, court held that love and affection, while being a "good" consideration, was not a sufficient consideration when unsupported by a pecuniary or material benefit, and created, at most, a bare moral obligation.

Lanfier v Lanfier, 227-258; 288 NW 104

Oral agreement to devise realty—insufficiency of evidence to set aside. In an equity action to recover a sum of money alleged to be the share of plaintiff's intestate in the estate of his father, where evidence shows the mother of plaintiff's intestate was left with five minor children, and that she filed a partition proceeding involving 400 acres of land

II SUFFICIENCY OF CONSIDERATION—continued

owned by her husband who died intestate, and she thereafter was the successful purchaser at a sale of the land, and that, as a part of the purchase price, she executed a note and mortgage on the land to a guardian appointed for the minor children to secure their respective shares in the father's estate, and that, as the children became of age, there were no guardianship funds to pay their respective shares, and that it was orally agreed that the children would receipt for their respective shares, in cash, to the guardian (altho no cash was received), and the mother agreed to, and did execute a will leaving the land to the children in equal shares, the plaintiff's evidence was insufficient to set aside the agreement, and the trial court's order, affirming the agreement and impounding the mother's will until her death, was affirmed.

Baumann v Willemssen, 228- ; 292 NW 77

Care and nursing. An oral contract for a deed of conveyance is supported by ample consideration,—if any consideration be necessary,—in the agreement of the grantee to care for and nurse the aged grantor during his lifetime, whether such time be long or short.

Kissling v Bank, 203-62; 212 NW 314

Contract for care and support. A contract for the support of an aged person during his lifetime will not be deemed to be without adequate support simply because death follows quickly in the wake of the execution of the contract.

Burmeister v Hamann, 208-412; 226 NW 10

Agreement to support grantor. Principle recognized that ample consideration for a deed of conveyance may be found in the agreement of the grantee to support the grantor for life, even tho it may ultimately develop that the value of the property materially exceeds the value of the support.

In re O'Hara, 204-1331; 217 NW 245

Honest but inadequate consideration. Even tho a conveyance of land by an insolvent father to his son may not be actually fraudulent, yet it may be constructively fraudulent to the extent of the substantial difference between the actual value of the land and the lesser price paid therefor by the son; and in such case a court of equity may make such order as will protect both the grantee and the complaining creditor.

Williams Bk. v Murphy, 219-839; 259 NW 467

Fraudulent conveyance—repaying grantee's consideration. In an action by a bankruptcy trustee, where property was conveyed to a brother by a sister, who thereafter took bankruptcy and such property was considerably in excess of consideration therefor, the deeds were only constructively fraudulent as to grantee, and the setting aside of such deeds required that grantee be paid amount he gave as consideration for the conveyance.

McGarry v Mathis, 226-37; 282 NW 786

Foreclosure—transfer of rents—consideration. Record reviewed and held that a written transfer of the right to the use and occupancy of mortgaged premises during the period of redemption was supported by adequate consideration and was free from fraud.

Andrew v Miller, 218-301; 255 NW 492

Chattel mortgage foreclosure—defense. The right of a mortgagee to foreclose a chattel mortgage by notice and sale (1) under the statute (Ch 523, C., '31), or (2) under the terms of the mortgage itself, may not be transferred to the district court on the application of the mortgagor on the ground of fraud and want of consideration in obtaining the mortgage, when an action of replevin involving the mortgaged chattels, and pending against the mortgagor furnishes him ample opportunity to test the mortgagee's right to foreclose by interposing said plea of fraud and want of consideration.

McDonald v Johnston, 218-1352; 256 NW 676

Mortgage without consideration as to wife. A mortgage on homestead property duly signed by both husband and wife cannot be enforced against the wife when it appears that there was no consideration for the wife's signature.

Greenland v Abben, 218-255; 254 NW 830

Wife signing mortgage and note to release dower. Evidence to the effect that a wife signed, not only the mortgage of her husband, but also the promissory note, and did so in order to enable the husband to obtain the loan and complete the deal, does not establish that the note was without consideration as to her, even tho she asserts that she signed solely to release her dower interest.

Des Moines JSL Bank v Allen, 220-448; 261 NW 912

First Tr. JSL Bank v Diercks, 222-534; 267 NW 708

Consideration—avoiding execution levy. A deed for 120 acres of land which recites "$2,300 and other valuable consideration", the payment of which is otherwise sustained by evidence, is supported by a sufficient consideration when the transaction was made at a time when land values were depressed and the grantor needed to make the sale to satisfy a judgment creditor who was threatening to levy an execution on grantor's real estate.

Gilligan v Jones, 226-86; 283 NW 434

Husband to wife—"one dollar and other valuable consideration"—sufficiency. A deed from husband to wife, executed two years prior to

the rendition of a judgment against the husband and which deed recites a consideration of "one dollar and other valuable consideration", is not fraudulent as against such judgment creditor of the grantor-husband, when it is shown that the "other consideration" consisted of $3,000 actually paid by the wife.

Donovan v White, 224-138; 275 NW 889

Consideration—definition—resolution deferring corporate salary. Consideration being a benefit or advantage accruing to one party or a loss or disadvantage incurred by the other, a corporation resolution deferring salary payment is a benefit to the corporation and a detriment to the employees constituting a valid consideration.

Bankers Trust Co. v Economy Coal Co., 224-36; 276 NW 16

Public benefit. Principle recognized that the contract of a municipal corporation must be supported by a consideration in the nature of a public benefit.

Love v City, 210-90; 230 NW 373

Revival of discharged debt. Principle recognized that the moral obligation to pay a debt which has been discharged in bankruptcy will support an oral promise to pay the discharged debt.

Fierce v Fleming, 205-1281; 217 NW 806

Moral obligation. Principle recognized that a moral obligation is not sufficient consideration to support a subsequent promise.

Northwest. Bk. v Muilenburg, 209-1223; 229 NW 813

Settlement of action. A stipulation of settlement of an action is supported by an adequate consideration.

Salinger v Elev. Co., 210-668; 231 NW 366

Contract of reguaranty. A guarantor who, in a new written contract, reguarantees the payment of the amount past due on a former contract on which he is guarantor, and also guarantees the payment of future accruing indebtedness, will not be heard to say that there was no consideration for the guaranty in the new contract of the old indebtedness when by the new contract an extension of time of payment of the old indebtedness was secured.

Watkins Co. v Peterson, 210-661; 231 NW 489

Assignment of expectancy as security. An assignment of an expectancy, in a contemplated estate, as security for a debt is supported by adequate consideration.

Gannon v Graham, 211-516; 231 NW 675; 73 ALR 1050

Burk v Morain, 223-399; 272 NW 441

Contract to relinquish part of devise. A written agreement between devisees that they would so divide the devised property that certain nondevisees would also share in the property is supported by a sufficient consideration in that the agreeing devisees suffered a detriment by relinquishing part of the devise, and the nondevisees acquired a benefit.

Clayman v Bibler, 210-497; 231 NW 334

Pledge of collateral — consideration. The naming of a surety as beneficiary in a life insurance policy, and the pledging of the policy in order to indemnify the said surety on signing a renewal note, are supported by a sufficient consideration.

Beed v Beed, 207-954; 222 NW 442

Part payment of debt in discharge of whole. An executed agreement between a debtor and a creditor to the effect that the debtor will, before any part of the indebtedness is legally due, pay a part thereof in full satisfaction of the entire indebtedness, is supported by ample consideration, and is, therefore, enforceable.

Fisher Co. v Gravel Co., 216-909; 249 NW 664

Recovery of consideration paid. A vendee of land who is and always has been in undisturbed possession of the land, and who has never rescinded the contract of purchase, but is distinctly standing thereon, may not recover the consideration paid because the vendor is unable to convey good title.

Weech v Read, 208-1083; 226 NW 768

Contemporaneous collateral contract. An oral contract contemporaneous with the execution of a written contract cannot be deemed collateral to said written contract unless said oral contract has a supporting consideration separate and distinct from the consideration which supports the written contract.

In re Simplot, 215-578; 246 NW 396

Subscriptions—validity. A written undertaking to pay a named sum for the purpose of discharging the debts of a Young Men's Christian Association is an enforceable obligation.

Y. M. C. A. v Caward, 213-408; 239 NW 41

Bona fide dispute. The settlement of a bona fide dispute as to the amount of an account is ample consideration for an accord and satisfaction.

Minn. Paper Co. v Register, 205-1228; 219 NW 321

Compromise and settlement. A written contract of compromise and settlement of a bona fide controversy between parties is supported by adequate consideration.

Kilts v Read, 216-356; 249 NW 157

Unsupported promise. An oral compromise and settlement of a bona fide controversy between parties relative to a claim of one of the

II SUFFICIENCY OF CONSIDERATION—continued

parties is not established by evidence which affirmatively shows that no controversy existed between the parties, but that one of the parties made a promise to the other for which promise no consideration appears.

Marron v Lynch, 215-341; 245 NW 346

Promise to pay legal debt. A promise to pay a part of what one is legally owing cannot furnish a consideration for a contract which is collateral to said promise.

Durband v Nicholson, 205-1264; 216 NW 278; 219 NW 318

Compromise of illegal claim. A compromise in the amount of a claim which a municipal corporation has no legal authority to pay, in any amount, affords no consideration for the agreement to pay the lesser sum.

Love v City, 210-90; 230 NW 373

Barred claim as consideration. A conveyance by a husband to his wife will not be set aside on the sole ground that the conveyance was in satisfaction of an indebtedness against which the statute of limitation had fully run.

Cover v Wyland, 205-915; 218 NW 915

Past or moral consideration. Past or moral consideration is not sufficient to support an executory contract.

Lanfier v Lanfier, 227-258; 288 NW 104

Inheritance tax—transfer without consideration. A bona fide transfer of property for a fair consideration, sufficient to render the property nontaxable under the inheritance tax law, is not established by evidence that the instruments of transfer—concededly executed in contemplation of death and to take effect after death—were, at the most, supported only by a past and wholly executed consideration.

McEvoy v Wegman, 216-395; 249 NW 263

Past consideration. Where plaintiff agreed to construct, at his own expense, an electric power line from his residence to defendant's power plant, a subsequent promise by defendant, without a new consideration, to pay the expense of constructing said line is nudum pactum.

Heggen v Clover Leaf Co., 217-820; 253 NW 140

Cancellation of nudum pactum. An agreement that one of two stockholders shall draw all dividends up to a certain time, unsupported by any consideration, is properly canceled in an action in equity.

Petersen v Heywood, 212-1174; 236 NW 63

Promise to pay debt of another—consideration. Tho the vendee of a stock of goods did not, in making the purchase, assume the payment of an outstanding account for goods, yet his later written promise to pay said bill if the creditor would extend the time of payment and furnish additional stock for the store—which was done—is supported by ample consideration.

Smith Bros. Co. v Carmichael, 221-301; 264 NW 65

Earnings of minor as consideration. The fact that a parent has received the earnings of his unemancipated minor child will not support a conveyance to the minor when the conveyance leaves the parent without property sufficient to pay his debts.

Scovel v Pierce, 208-776; 226 NW 133

Wages of minor as consideration. A deed from a father to a son of a $2,500 town property for admittedly no consideration, and a deed of a $12,000, partly encumbered farm, in fulfillment of an alleged contract that the son (at the time of contract, an unemancipated, unmarried, nineteen-year-old minor) should, when married, be given said farm if he remained on, and helped in the management of said farm, are, irrespective of any actual fraud, constructively fraudulent as to a prior existing creditor of the grantor, because of want of, or grossly inadequate, consideration, it appearing that the son married within a month after attaining majority; and grantee must, in order to sustain said deeds, prove that grantor still continued to retain sufficient property to pay his said creditor.

Commercial Bank v Balderston, 219-1250; 260 NW 728

Waiver of tax sale certificates—detriment to promisee. The holder of tax sale certificates covering mortgaged real estate who, in writing, waives the priority of said certificates over the lien of said mortgage, in order to enable the mortgagor to ward off foreclosure by obtaining an extension of time in which to pay the mortgage debt, may not, after the mortgagor has obtained said extension on the strength of the waiver, successfully assert that said waiver was without consideration.

Goff v Milliron, 221-998; 266 NW 526

Unilateral contract as to wage scale. An action to enjoin the violation of a so-called wage agreement will not lie when the writing is wholly unilateral,—when it purports to impose on the defendant an obligation to pay a certain scale of wages but imposes no obligation whatever on the other party or parties to the writing.

Wilson v Coal Co., 215-855; 246 NW 753

Bank night — consideration for unilateral contract. Where the promoter of a motion picture bank night drawing voluntarily makes certain requirements to qualify for the prize which is promised, he does not merely extend an offer to make a gift, but a unilateral con-

tract is created in which the promoter determines the adequacy of the consideration for his promise, and when a person is induced to accept the promise and perform the specified act which was bargained for, it does not matter how insignificant the benefit of the performance may apparently be to the promoter, the promise can be enforced by the winner of the drawing.

St. Peter v Theatre, 227-1391; 291 NW 164

Lottery—bank night—value of consideration in contract. A bank night scheme is not a lottery merely because a legal consideration is given in return for the promise to give the prize. The value of the consideration given in a lottery is important, as a lottery depends on whether persons are induced to hazard something of value on a mere chance, but in a civil action to enforce the payment of a bank night prize the value of the consideration does not control, as any legal consideration is sufficient to support the promise.

St. Peter v Theatre, 227-1391; 291 NW 164

Consolidation — assumption of obligations. The assumption by a consolidating company of the obligations of the companies consolidated will not be rendered nugatory by mere inadequacy of consideration. At any rate, it is not for the court to pass on the sufficiency of the consideration growing out of a consolidation approved by the companies consolidated, by their stockholders, and by duly empowered public officials.

State v Cas. Co., 213-200; 238 NW 726

Adequacy of executed consideration. The court will not pass upon the adequacy of a fully executed consideration.

Kisor v Litzenberg, 203-1183; 212 NW 343

Surrender of legal right. The execution of an obligation to make good the embezzlement of a relative is supported by adequate consideration when, in return for the obligation, the obligee waives or surrenders his right to proceed against the embezzler's surety bond.

Smith v Morgan, 214-555; 240 NW 257

Fraudulent conveyance. Consideration for a conveyance of land by a son to his mother is found in the fact that the mother is executrix under a will which gives her the personal property subject to the debts of the estate, and that she agrees, in return for the land, to pay off all the debts of the estate and, on so doing, to cancel and return to the son all his direct and indirect liabilities to the estate.

Cherokee Auto v Stratton, 210-1236; 232 NW 646

Exchange of property. Instruments duly executed in exchange of property cannot be impeached without convincing proof of fraud, and values of exchanged properties are liberally regarded in determining adequacy of consideration.

Ragan v Lehman, (NOR); 216 NW 717

Antenuptial contracts — consideration marriage—validity. Antenuptial contracts the same as other contracts, if fair and free from fraud, are valid, binding, and enforceable, being based upon the consideration of marriage which is of the very highest known to the law.

In re Onstot, 224-520; 277 NW 563

Antenuptial contract. The consideration for an antenuptial contract necessarily inheres in the resulting marriage.

Kalsem v Froland, 207-994; 222 NW 3

Marriage settlements — validity. A marriage settlement, duly and in good faith executed, and confirmed by the subsequent marriage of the parties, is valid against the creditors of the husband when not grossly out of proportion to the husband's station and circumstances.

Benson v Burgess, 214-1220; 243 NW 188

Withholding action. The fact that the obligee in a bond of indemnity withheld action for failure of title furnishes ample consideration for the bond.

Duke v Tyler, 209-1345; 230 NW 319

Forbearance to sue. Forbearance on the part of a creditor to institute an action may furnish ample consideration to pay a claim.

Heflen v Brown, 208-325; 223 NW 763

Rent—payment in advance—ouster—right to recover. A tenant who pays the rent in advance to the landlord, and is legally evicted by foreclosure proceedings before the commencement of the term, may recover of the landlord the sum so paid as for a total failure of consideration.

Ransier v Worrell, 211-606; 229 NW 663

Individual mortgages by bank directors. Bank directors may not question the legality of individual mortgages executed by them when, through such execution, they obtain (1) the surrender of their formerly executed guaranty in behalf of their bank, (2) an extension of time in which to pay the guaranteed obligations, and (3) the surrender by the mortgagee of assets of which the director-mortgagors individually avail themselves.

Live Stock Bk. v Irwin, 207-1083; 224 NW 76

Repossessed motor vehicles—no retaking on ground that conditional sale usurious. A replevin action to retake a motor vehicle covered by, and repossessed under, a conditional bill of sale, is not maintainable on the ground that the conditional bill of sale was allegedly usurious. The debt in the conditional bill of sale

is valid and still exists even tho a usury penalty attaches.

Hill v Rolfsema, 226-486; 284 NW 376

9442 Gaming contracts void.

Discussion. See 17 ILR 524—"Void" and "voidable"

ANALYSIS

I In General
II Action on Wagering Contract
III Negotiable Instruments
IV Money Paid on Wager
V Money Deposited With Stakeholder

I IN GENERAL

Annuity contract as "wager". An annuity contract, entered into in good faith, under which the annuitant, for a lump sum payment determined by skilled actuaries, is promised a definite annual payment during the lifetime of the annuitant, does not offend against public policy—is not a "wager" contract.

Hult v Ins. Co., 213-890; 240 NW 218

Connivance at violation of commerce statutes —effect. A shipper of goods will be deemed as participating in the doing of an illegal act when he enters into a contract with a motor vehicle freight operator for the transportation of freight over the highways of this state by said operator as an independent contractor, and knows, at the time of so contracting, that said operator has no right to carry on his said business because of the failure of said operator (1) to obtain from the board of railroad commissioners (now commerce commission) the legally required official permit to carry on said business, and (2) to file with said board the legally required bond. It follows that said operator will not be deemed an independent contractor but simply the agent of said shipper.

Hough v Freight Service, 222-548; 269 NW 1

Dealing in "futures"—implied or apparent authority of agent—unallowable plea. A commission firm was prohibited by the mandatory rules of the board of trade of which it was a member from dealing in so-called "futures" for and on behalf of a nonmember corporation unless the firm first obtained from said nonmember corporation a writing authorizing the latter's manager to contract for such "futures". The firm disregarded said rule and accepted orders for such "futures" from a manager who had been expressly forbidden to exercise such power. Held, that said firm, when sued by the injured corporation for the resulting loss, would not be permitted to defend on the ground that said manager had implied or apparent power to issue said orders.

Watkins Co. v Smith Co., 221-1164; 267 NW 115

II ACTION ON WAGERING CONTRACT

Property sold in furtherance of gambling. A vendor of property susceptible of a perfectly legitimate use may not recover therefor when he sells it for the very purpose of enabling the vendee to operate a gambling device, to wit, a punch board.

Parker-Gordon Co. v Benakis, 213-136; 238 NW 611

Contracts and transactions — presumption. The presumption under the bucket shop act that grain, the subject matter of a purported contract of sale, was never intended to be delivered by the broker is not overcome by the simple expedient of having the broker testify that he intended to deliver the grain unless he had sooner sold it prior to the date of delivery.

Yoerg v Geneser, 219-132; 257 NW 541

Bank night—value of consideration in contract. A bank-night scheme is not a lottery merely because a legal consideration is given in return for the promise to give the prize. The value of the consideration given in a lottery is important, as a lottery depends on whether persons are induced to hazard something of value on a mere chance, but in a civil action to enforce the payment of a bank night prize the value of the consideration does not control, as any legal consideration is sufficient to support the promise.

St. Peter v Theatre, 227-1391; 291 NW 164

III NEGOTIABLE INSTRUMENTS

Dealing in margins—illegality—jury question. Evidence that promissory notes sued on were furnished for illegal transactions in dealing in margins on corn on the board of trade, and that the parties had no intention of having the corn delivered, was sufficient to make a case for the jury.

Hamilton v Wilson, (NOR), 240 NW 685

IV MONEY PAID ON WAGER

No annotations in this volume

V MONEY DEPOSITED WITH STAKEHOLDER

No annotations in this volume

Note 1. Contracts generally.

Discussion. See 20 ILR 607—Conflict of laws

ANALYSIS

Adoption contracts. See under Ch 473
Ambiguity in contracts. See under §11275
Annuities. See under §8673.1
City contracts in general. See under §5738
Consideration. See under §§9440, 9441
Consideration (negotiable instruments). See under §§9484, 9485
Construction of contracts, ambiguities. See under §11275
Contracts to devise or bequeath. See under §11846(II)
Evidence generally. See under §11254 (II)
Evidence, implied contracts. See under §11275
Fraudulent conveyances. See under §11815
Gambling contracts. See under §9442
Gratuity of services. See under Ch 445, Note 1; §11957 (II)
Guaranty and suretyship generally. See under §11577
Guaranty and surety companies, state regulation. See under §12760, et seq.
Husband and wife contracts. See under Ch 470
Implied contracts, claims against estates. See under §11957
Injunction to restrain breach. See under §12512
Land contracts. See under Ch 527
Life insurance generally. See Ch 401, Note 1
Merger, realty interests. See under §10084 (III)
Part performance. See under §11286
Partnership contracts. See under §10983
Principal and agent, contracts. See under §10966
Real estate brokers. See under §1905.41
Real estate contracts. See under Ch 527
Rescission of land contracts. See under §12389 (II)
Rescission of life policies. See under Ch 401, Note 1 (VI)
Rescission of sale by seller. See under §9994
Rescission, setting aside deeds. See under §§10084, 11815
Revival by written admission. See under §11018
Sales. See Ch 435
Simmer law contracts. See under §6134.01, et seq.
Specific performance against decedent's estate. See under §12061
Statute of frauds. See under §§9933, 11285
Subrogation contracts. See under §11667
Third party beneficiaries, actions. See under §10968 (II)
Understanding of parties to agreement. See under §11275
Vendor and purchaser. See under §12389 (II)
Waiver in life insurance cases. See Ch 401, Note 1 (IX)
Warranties. See under §9941

I REQUISITES AND VALIDITY IN GENERAL

(a) IN GENERAL

Power of courts. Courts may not make contracts for the parties.

Beal v Milliron, (NOR); 267 NW 83

Valid statutes read into contracts. Principle affirmed that contracts are conclusively presumed to have been entered into in view of the valid statutes then existing and controlling the subject-matter.

Priest v Whitney Co., 219-1281; 261 NW 374

Requirements generally—express contract. To constitute an "express contract" there must have been an offer and acceptance as to the same thing. Usually an agreement is arrived at by means of an expressed or implied proposal or offer from one side, expressly or impliedly accepted on the other, but formality in proposing and accepting is not required, providing there is an intention to assume legal liability as distinguished from a mere ebullition of emotion or expression of intention to do an act of generosity. A promissory expression without intention to contract is not sufficient.

In re McKeon, 227-1050; 289 NW 915

Execution—signing of duplicates. There may be a valid written contract altho one party signs one duplicate original of the contract, and the other party signs a different duplicate original.

Hunt, Hill & Betts v Moore, 213-1323; 239 NW 112

Execution—unreasonableness of contract—effect. It would require a very clear showing which would justify the court in holding as a matter of law that a contract was not entered into because some of its terms were unreasonable.

Goben v Paving Co., 214-834; 239 NW 62

Signing without knowing contents. A party may not dispute the binding force of a contract which, without fraud, he freely signs without informing himself of its contents.

Proctor v Hansel, 205-542; 218 NW 255; 58 ALR 153

Unilateral contract. A simple order for goods constitutes a unilateral contract—one in which the promisor receives no promise in return for his promise.

Port Huron Co. v Wohlers, 207-826; 221 NW 843

I REQUISITES AND VALIDITY IN GENERAL—continued

(a) IN GENERAL—continued

Joint adventure. The requisites of an ordinary contract, and of a contract of joint adventure, as to form and validity, are substantially the same. Evidence held to establish such adventure.

Smith & Co. v Hollingsworth, 218-920; 251 NW 749

Place of contract—order in this state and acceptance in foreign state. The execution in this state by a proposed vendee of a naked order for goods, and the oral acceptance of such order by the vendor at his place of business in a foreign state, do not constitute the making of a contract in this state.

Anderson & Co. v Monument Co., 210-1226; 232 NW 689

Interstate carrier — employment — lex loci contractus. A contract of employment for and on behalf of an interstate commerce carrier is consummated in this state when the conditional offer of employment is accepted in this state by a resident thereof, even tho the offer is made in a foreign state.

Chicago, Burl. Ry. v Lundquist, 206-499; 221 NW 228

Sales contract—court approval as condition. A definite written offer by the superintendent of banking of this state to sell to a foreign administrator Iowa real estate, belonging to a bank receivership, and the written acceptance of the offer, by said foreign administrator, may constitute a valid and specifically enforceable contract tho the offer and the acceptance be both conditioned on the approval of the respective state courts.

Bates v Bank, 223-385; 272 NW 412

Consideration—benefit to third person. A written agreement between devisees to divide the devised property in such proportions that certain nondevisees will also share in the property is supported by a sufficient consideration in that the agreeing devisees suffer a detriment by relinquishing part of the devise and the nondevisees acquire a benefit.

Clayman v Bibler, 210-497; 231 NW 334

Contract for benefit of third party. Principle reaffirmed that two parties may validly contract for the benefit of a third party, and that the third party may accept, and avail himself of, said contract.

Hunt, Hill & Betts v Moore, 213-1323; 239 NW 112

Evidence—weight and sufficiency. Evidence reviewed and held to establish the making of a contract for the benefit of a third party.

Climan v Lepley, 218-1038; 256 NW 739

Fiduciary relation — evidence — sufficiency. Evidence held insufficient to show that a fiduciary relation existed between a minister and a member of his church.

Felton v Thompson, 209-29; 227 NW 529

Delivery—intent of parties. An effective delivery of an instrument is made to the grantee by the naked execution of the instrument and by simply leaving said instrument at the place of execution, if such was the actual intent of the parties. Evidence relative to the delivery of a chattel mortgage held to present jury question.

Beery v Glynn, 214-635; 243 NW 365

Offer—ineffectual acceptance. An offer by a mortgagor to deed the mortgaged land to the mortgagee on condition that the mortgage notes would be deemed canceled from the time the deed was received is not accepted by the act of the mortgagee in forwarding for execution a blank deed on condition that the mortgage notes would be deemed canceled from the time the deed was recorded.

O'Brien v Fitzhugh, 204-787; 215 NW 944

Corporate powers and liabilities—authority of president—insufficient showing. A contract is not binding on a corporation, tho entered into in its name by its president, to the effect that the corporation shall be and remain liable on promissory notes negotiated by it without recourse, when authority to the president to enter into such contract cannot be found in the articles of incorporation, in the bylaws, in the proceedings of the directors, in any act of corporate ratification, or in the customs and practices of the corporation.

First N. Bank v Cement Co., 209-358; 227 NW 908

Contracts partly written, partly oral. Parol evidence is admissible to show that a building contract was partly in writing and partly oral.

Golwitzer v Hummel, 201-751; 206 NW 254

Municipal utility—rates in contract. A contractor who is paid in cash for building a municipal public utility plant is not interested in the electric rates the city proposes to charge nor in the rate of interest on the bonds sold to provide the cash, nor does the statute contemplate that these items be inserted in the construction contract when such contractor is to be paid in cash.

Interstate Co. v Forest City, 225-490; 281 NW 207

Power to bind future councils. A city council, under legislative authority, may validly enter into a contract which will be binding on future city councils.

Iowa-Neb. Co. v Villisca, 220-238; 261 NW 423

When offer becomes contract. An unconditional offer by mail to enter into a specified contract becomes a contract in fact at the time and place at which a duly stamped and addressed acceptance is mailed.

International Assn. v Des Moines Co., 215-268; 245 NW 244

Proposal and acceptance—use of mails. An offer by mail invites a reply by mail.

Rogers v Ins. Co., 204-804; 213 NW 757

Offer and acceptance not necessarily consummated contract. Principle reaffirmed that a contract of purchase of real estate is not necessarily completely consummated when the buyer asserts that he will pay a certain sum, and the seller says he will accept said sum, when it is manifest that the parties contemplated the execution of a writing as such consummated contract.

Starry v Starry & Lynch, 212-274; 234 NW 281

Offer to pay attorney fees not accepted. When an attorney, who had received a retainer fee of $100 to represent the insured in a criminal case arising from an automobile accident, received a letter from the attorney for the insurer requesting him to tell the insured that the insurer was willing to take care of attorney fees, such letter was admissible to show an offer to pay such fees, but was insufficient to show that such offer was authorized by the insurer, and his reply that he would look to the company for payment of only those fees exceeding $100, did not amount to an acceptance of the offer.

Gipp v Lynch, 226-1020; 285 NW 659

Consideration—part payment of debt in discharge of whole. An executed agreement between a debtor and a creditor to the effect that the debtor will, before any part of the indebtedness is legally due, pay a part thereof in full satisfaction of the entire indebtedness, is supported by ample consideration, and is, therefore, enforceable.

Fisher Co. v Northwestern Co., 216-909; 249 NW 664

Promise to pay debt of another—consideration. Tho the vendee of a stock of goods did not, in making the purchase, assume the payment of an outstanding account for goods, yet his later written promise to pay said bill if the creditor would extend the time of payment and furnish additional stock for the store—which was done—is supported by ample consideration.

Smith Co. v Carmichael, 221-301; 264 NW 65

Offer and acceptance—disregard of conditions—effect. One who enters into a word-building contest for an award or prize for the largest list, and intentionally and materially violates the rules of the contest, cannot be said to create any contract relation with the party who made the offer, even tho such contestant furnishes the largest list of words.

Scott v People's Monthly Co., 209-503; 228 NW 263; 67 ALR 413

Prize money deposit—insolvency of sponsor—availability. Where, after starting a contest to place small "R's" within a large "R", the sponsor company became insolvent and its receiver under agreement with defendant bank set up a special bank account as prize contest payment money,—which account was later applied by the bank on a note of the insolvent sponsor company,—an individual contestant, altho complying with all contest rules, may not, without being declared to be the winner according to the contest rules, recover against the bank the amount of the first prize from such special account.

Bielen v Bank, 224-19; 276 NW 25

Bank night — consideration for unilateral contract. Where the promoter of a motion picture bank-night drawing voluntarily makes certain requirements to qualify for the prize which is promised, he does not merely extend an offer to make a gift, but a unilateral contract is created in which the promoter determines the adequacy of the consideration for his promise, and when a person is induced to accept the promise and perform the specified act which was bargained for, it does not matter how insignificant the benefit of the performance may apparently be to the promoter, the promise can be enforced by the winner of the drawing.

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Lottery—bank night—value of consideration in contract. A bank-night scheme is not a lottery merely because a legal consideration is given in return for the promise to give the prize. The value of the consideration given in a lottery is important, as a lottery depends on whether persons are induced to hazard something of value on a mere chance, but in a civil action to enforce the payment of a bank night prize the value of the consideration does not control, as any legal consideration is sufficient to support the promise.

St. Peter v Theatre, 227-1391; 291 NW 164

Allowable restraint of trade — newspaper publications. An agreement, entered into on the sale of a newspaper, to the effect that the seller will not in any manner engage, either alone or with others, in the publication or circulation of a newspaper in the locality specified for a period of fifteen years, is not invalid as being in restraint of trade.

Henry & Sons v Rhinesmith, 219-1088; 260 NW 9

Taxes not contract — decisions involving former assessments not res judicata. Taxes do not arise out of contract and each year's taxes

I REQUISITES AND VALIDITY IN GENERAL—continued

(a) IN GENERAL—concluded

constitute a separate cause of action. Therefore, a decision or judgment involving assessments on the same property in former years cannot be res judicata as to future assessments.

Board v Sioux City Yards, 223-1066; 274 NW 17

Unincorporated associations — noncapacity to contract or sue. Strictly speaking, a voluntary unincorporated association organized for literary and social purposes has no right to contract and cannot maintain a suit in the name of such voluntary unincorporated association alone.

Lamm v Stoen, 226-622; 284 NW 465

(b) MUTUALITY

Discussion. See 1 ILB 65—Doctrine of mutuality; 6 ILB 129, 209—"Illusory" promises and options; 15 ILR 42—Enforceable promises

Executed contracts unassailable. An executed contract may not be assailed on the ground of want of mutuality.

Burmeister v Hamann, 208-412; 226 NW 10

Unilateral wage agreement—effect of intervention. A wage agreement which is void as to plaintiff who seeks to enforce it (because wholly lacking in mutuality of obligation and remedy) is necessarily void as to interveners who join in the prayer of plaintiff.

Wilson v Airline Co., 215-855; 246 NW 753

Unilateral contract as to wage scale. An action to enjoin the violation of a so-called wage agreement will not lie when the writing is wholly unilateral—when it purports to impose on the defendant an obligation to pay a certain scale of wages but imposes no obligation whatever on the other party or parties to the writing.

Wilson v Airline Co., 215-855; 246 NW 753

Unilateral contract—when promise binding. An order for the shipment of goods and a promise to pay therefor become a binding promise when the order is filled and shipped.

Port Huron Co. v Wohlers, 207-826; 221 NW 843

Noninconsistency. Manifestly there is no inconsistency in a contract that services should be rendered for a specified present compensation, and for an enlarged and additional compensation to be paid in the future, under specified conditions.

In re Newson, 206-514; 219 NW 305

Acceptance—conclusive presumption. It must be presumed that an advantageous contract, entered into by an uncle for and on behalf of his motherless and paternally abandoned infant nephew and niece, has been accepted by the beneficiaries, when for some 40 years they have been fulfilling their part of the contract.

Kisor v Litzenberg, 203-1183; 212 NW 343

Belated and unallowable withdrawal. An offerer may not withdraw his offer after having received an acceptance thereof, even tho the offerer imposed as a condition that the deal should be closed "at once", it appearing that the parties manifestly intended that "at once" meant a reasonable time, in view of the circumstances.

Harris v Bills, 203-1034; 213 NW 929

Proposal and acceptance—imposing implied law condition. An offer by mail of certain lands and of a certain sum of money in exchange for certain corporate stock, followed by a timely acceptance by mail if the land was free of incumbrance, constitutes a binding contract, as the condition imposed exactly what the law would impose; and it is quite immaterial that, in the subsequent dealings between the parties, the party ultimately denying the existence of a contract injected conditions to which the other party did not object.

Harris v Bills, 203-1034; 213 NW 929

Transportation furnished pupils—no implied contract by board to pay for services. When a school district failed to provide transportation for a pupil as required by statute, the pupil's father who had taken the child to school could not recover for his services on a theory of contract implied in fact when there was no meeting of the minds or agreement that he should be compensated for such transportation, as no promise to pay can be inferred from the refusal of the school to furnish transportation upon demand and the subsequent transportation of the child by the father, as the school was in no position to reject such services.

Bruggeman v Sch. Dist., 227-661; 289 NW 5

Third parties. A contract between a mortgagor and a mortgagee by which the former purchased his freedom from a deficiency judgment on foreclosure sale cannot work an obligation on the part of a grantee of the premises who was in no manner a party to the contract.

Marx v Clark, 201-1219; 207 NW 357

Antenuptial contract—validity. Antenuptial contract reviewed, and held not invalid on the grounds of unfairness, unconscionableness, and nonmutuality, or because it contained an invalid provision in relation to property interest and the right to children, which in no manner affected the consideration actually received by the wife.

Kalsem v Froland, 207-994; 222 NW 3

Merchandise sold—seller determining quantity—unenforceability. In an action for damages where an alleged contract was to sell surplus stock of merchandise, to be subsequently listed, a list previously sent merely as information in response to a request from buyer to the seller is inadmissible to complete a contract, under statute of frauds, §4625, C., '97 [§11285, C., '39]. Where such list could only be made a part of contract by proof of distinct oral contract, no connection appearing between the two papers by comparison or surrounding circumstances of parties, the contract leaving the quantity to be delivered to buyer to be determined by the will, want, or wish of the seller, makes the contract unenforceable because of lack of mutuality.

Midland Co. v Waterloo Co., 9 F 2d, 250

Lack of mutuality and consideration—agreement to purchase steers retained and fed by alleged seller. In law action based on written instrument, wherein plaintiff agreed to feed 24 head of steers for a period from 90 to 120 days, and defendant agreed to purchase the steers at any time during such period at 14 cents per pound, hoof weight, at Chicago or other reasonable marketing point, such agreement was not enforceable due to lack of mutuality and consideration, especially where there was no other consideration than that imported by the instrument, and this being a law action rather than in equity to make contract mean what plaintiff contends that it was intended to say, hence plaintiff could not recover on instrument the difference between 14 cents per pound and price at which plaintiff sold the steers on Chicago market.

May v Burns, 227-1385; 291 NW 473

(c) IMPLIED AND QUASI-CONTRACTS AND QUANTUM MERUIT

1 In General

Implied contracts distinguished. Implied contracts are of two kinds:

First, those implied in law, irrespective of the consent of the parties, on the principle that one will not be permitted to unjustly enrich himself at the expense of another without making compensation therefor, and

Second, those implied in fact from the consenting acts of the parties.

Pella v Fowler, 215-90; 244 NW 734

Power of city. A city may, in the absence of a prohibiting statute, validly enter into an implied contract for the grading of its streets preparatory to the construction of permanent sidewalks.

Carlson v Marshalltown, 212-373; 236 NW 421

Petition—separate counts required. A plaintiff who pleads both quantum meruit and express contract in the same count should be compelled, on motion, to separate his cause of action into separate counts.

Donahoe v Gagen, 217-88; 250 NW 892

Voluntary nonpaper issues—sufficiency. In an action to recover quantum meruit for the use of machinery, the court, in submitting defendant's nonpaper issue (acquiesced in by plaintiff) whether the use was under a contract for an agreed rental entered into with plaintiff's employee, must submit the question of the authority of the employee to enter into such a contract, there being evidence of the lack of such authority.

Des Moines Co. v Lincoln Co., 201-502; 207 NW 563

Pleading—contract and quantum meruit value. Evidence of both the reasonable and contract value of services is admissible when so pleaded, even tho the pleading is embraced in one slovenly drawn but unquestioned count.

Pressley v Stone, 214-449; 239 NW 567

Alleging quantum meruit and proving express contract. An allegation of quantum meruit cannot be supported by proof of an express contract.

Wayman v Cherokee, 208-905; 225 NW 950

Commission—express contract. A broker may plead in different counts (1) an express contract to pay a specified commission and (2) an implied contract to pay a reasonable commission, and may insist on the submission of both issues to the jury if the evidence supports both. It follows that evidence may be admissible on the issue of quantum meruit, even tho plaintiff produces evidence of an agreement to pay the specifically named commission.

Ransom-Ellis Co. v Eppelsheimer, 205-809; 218 NW 566

Pleading quantum meruit and proving express contract. A fatal variance between allegation and proof results from pleading quantum meruit and proving an express contract for compensation.

Sammon v Roach, 211-1104; 235 NW 78

Express contract excludes implied contract, and vice versa. There cannot be an express and an implied contract embracing the same subject-matter.

Hodgson v Keppel, 211-795; 232 NW 725

Implied from conduct—express contract contrasted. A contract implied in fact, differing from an express contract only in the method of proof, may be inferred under certain circumstances from acts and conduct justifying a promisee in understanding a promisor intended to contract.

Snell v Kresge, 223-911; 274 NW 35

Joint ownership — accounting — division of receipts. When it happens that only one of two joint, equal, equitable owners of real estate is personally obligated on the contract for a deed under which the land is held, it is

I REQUISITES AND VALIDITY IN GENERAL—continued
(c) IMPLIED AND QUASI CONTRACTS AND QUANTUM MERUIT—continued
1. In General—continued

quite manifest that the law cannot presume, without supporting evidence, that forfeited payments received by said parties as the result of a futile attempt at sale of said premises, belong wholly to said nonobligated party; and equally manifest that the law cannot, on such circumstances, rear a so-called quasi contract to the same effect, in the absence of like evidence.

In re Kelly, 221-1067; 267 NW 667

Contract price (?) or quantum meruit (?). A plaintiff who pleads that he partially performed an express contract for services and thereupon abandoned the work because of a breach of the contract by defendant must not be permitted to recover the contract price for the work actually performed unless he establishes his pleaded justifiable abandonment; and if he fails to establish justifiable abandonment, he may not recover on the basis of a quantum meruit which does not exceed the contract price when he neither pleads nor proves a quantum meruit.

Goben v Paving Co., 208-1113; 224 NW 785

Liability of school district to transport pupils. When a state boundary river renders a portion of a consolidated school district inaccessible to the consolidated school, and the school authorities agree with the parent of grade pupils, residing on such inaccessible lands, to pay the tuition of said pupils in a school in a foreign state, but later refuse to pay for transporting said pupils to said school (a distance of five miles), the parent may supply the transportation in the foreign state and the district will be liable for the reasonable value thereof.

Dermit v School Dist., 220-344; 261 NW 636

Breach—damages (?) or quantum meruit (?). An action for damages for breach of a contract of employment may be supported by evidence of the reasonable value of the services rendered, when the pleadings present such sum as the damages.

Westerfield v Oil Co., 208-912; 223 NW 894

Acceptance of offer—implication. Principle recognized that the conduct of parties to an alleged contract may furnish ample evidence that an offer by one party of certain terms was accepted by the other party.

Breen v Central L. Co., 207-1161; 224 NW 562

Proposal or offer—implied acceptance. One who is, in writing, offered work at a specified price and proceeds to perform the work without further negotiation necessarily agrees to do the work for the offered compensation.

Commercial Bank v Broadhead, 212-688; 235 NW 299

Offers—when implied acceptance not recognized. Proof that a party made an offer to pay a stated sum for services to be performed and that the offeree thereafter proceeded to perform the services, creates a presumption that the offeree accepted all the terms of the offer; not so, however, when such offer is made after a large part of the services has been rendered on the basis of a quantum meruit, and the offeree continues to perform the remaining services. In the latter instance, the quantum meruit contract will be deemed to continue unless an acceptance of the offer is actually proven.

Kelly, etc. v Trust Co., 217-725; 248 NW 9

Compensation—implied agreement. One who calls upon a physician and hospital authorities to attend an injured person to whom he is under no legal obligation may, by his acts and conduct, give rise to an implied promise to pay for the services rendered.

Valentine v Morgan, 207-232; 222 NW 412

Contract for services—question of quantum meruit—insufficient for jury. In an action against city for engineering services rendered in reconstruction of sewage disposal plant wherein plaintiff bases his claim on quantum meruit, and city contends services were contemplated by contract providing for lump sum compensation, question of liability of city for services on quantum meruit basis held insufficient for jury.

Slippy Corp. v Grinnell, 226-1293; 286 NW 508

Public improvements—contract—substantial failure to perform—nonallowable recovery. Principle reaffirmed that a contractor who, in the construction of a street pavement, substantially fails to comply with the contract specifications, and is thereby barred from recovering the contract price, may not recover on quantum meruit, either from the city or from the property owners — and especially is this true when the contractor is guilty of fraud in the construction work.

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

Obstructions—removal. The removal by an owner of land of fences across a public highway on the land, in compliance with a demand by the public authorities, gives rise to no implied contract on the part of the municipality to pay the value of the work and materials necessary in effecting such removal.

Hall v Union County, 206-512; 219 NW 929

Renewal of written contract by conduct. Where a heating plant owner contracted to furnish to a storekeeper heat for a period of one year at the termination of which no new written nor verbal contract was made, but for seven years more the heat was furnished and accepted at the same price as in the original agreement, until discontinued at nearly the end of the 1933-34 season, in an action to recover the contract price for the 1933-34 year's heat, a contract would be implied from the storekeeper's conduct, to pay the contract price regardless of fact that storekeeper shut off some of the radiators.

Snell v Kresge Co., 223-911; 274 NW 35

Allowance and payment of estate claims—persons in family relation. A daughter-in-law who enters the home of her father-in-law and cares for him for many years while performing the duties of a housewife, as had formerly been done by other relatives, cannot recover from the estate of the father-in-law for said services in the absence of an express or implied contract; and an implied contract is not established by proof that on occasions the father-in-law expressed appreciation for the personal care rendered him, and a purpose to pay therefor.

In re Unangst, 213-1064; 240 NW 618

Services in family — evidence — sufficiency. An agreement to pay for services rendered by a member of a family is established by testimony which shows that the one rendering the services justifiably expected pay therefor, and that the one receiving such services equally expected to make such payment.

In re Newson, 206-514; 219 NW 305

Compensation—nonliability. The theory that a party is personally liable for an improvement for which he has in no manner contracted, because he has received the full benefit thereof (if its correctness be assumed, as a proposition of law), can have no application when the party has received exactly what he contracted for with a third party.

Coen v Bank, 205-483; 218 NW 325

Independent contractor—burden of proof. One who claims that labor and services accepted by him were performed by an independent contractor has the burden to prove such claim.

Buescher v Schmidt, 209-300; 228 NW 26

Deeds—delivery—presumption attending acceptance. Principle reaffirmed that the acceptance of a deed of conveyance implies an agreement by the grantee to perform legal conditions imposed on him by the deed, e.g., the payment of stated sums to named persons.

Carlson v Hamilton, 221-529; 265 NW 906

Relevancy, materiality, and competency. On the issue of quantum meruit for services rendered, a former contract between the same parties for similar services performed under like conditions, and specifying the compensation, is admissible as a circumstance for the jury's consideration.

Olson v Shuler, 203-518; 210 NW 453
Olson v Shuler, 208-70; 221 NW 941

Compensation of brokers. Under the issue of quantum meruit, evidence of the commission usually and customarily paid as reasonable in the community in question is admissible.

Northrup v Herrick, 206-1225; 219 NW 419

Services of partner—value. In action for accounting and dissolution of partnership, reasonable value of services of partner managing garage held properly fixed at $30 per week.

Boldrini v Beneventi, (NOR); 240 NW 680

Compensation of brokers—independent judgment of jurors. A jury may be instructed that, in determining the reasonable value of services rendered, they may give due heed to their own knowledge and experience on the subject at issue.

Northrup v Herrick, 206-1225; 219 NW 419

Uncertainty as to compensation. The fact that a contract of employment is fatally uncertain in its inception as to the compensation to be paid is no ground for denying a quantum meruit after the services have been fully performed.

Olson v Shuler, 203-518; 210 NW 453

School district—compelling transportation to be furnished to pupils. When a school district failed to provide transportation for a pupil as required by statute, the pupil's father, who had furnished such transportation after making a demand on the school district, could not recover for such services under quasi contract or contract implied in law, as the statute did not contemplate that the costs of transportation be paid except under an arrangement with the school board, as provided by statute.

Bruggeman v Sch. Dist., 227-661; 289 NW 5

City election favoring utility—no implied obligation to construct. Under the Simmer law an action by an engineering company for a general judgment against a city for engineering services cannot be maintained, based on an implied obligation of the city to erect light and power plant, even after repeal of the enabling ordinance, and altho the special election therefor had carried. Such would be unlawful and contrary to public policy and beyond powers of city council. Persons dealing with a municipality are bound to take notice of legislative restrictions upon its authority.

Burns & McDonnell Co. v Iowa City, 225-1241; 282 NW 708

Contractual prerequisites—burden of proof. In an action against a husband and wife on a

I REQUISITES AND VALIDITY IN GENERAL—continued

(c) IMPLIED AND QUASI CONTRACTS AND QUANTUM MERUIT—continued

1. In General—concluded

promissory note signed only by the husband, and involving the wife on a theory that both were engaged in a joint adventure for which the money was used, liability of the wife may be predicated only upon a joint adventure contract, either express or implied, and plaintiff has the burden to prove the existence of such contract.

Valley Bank v Staves, 224-1197; 278 NW 346

Contract of indemnity—implied agreement. An agreement by a defendant to indemnify plaintiff if plaintiff would sign a promissory note with defendant's son is not per se fatally incomplete because the agreement did not embrace any reference to the time the note was to run or to the rate of interest it should bear.

Kladivo v Melberg, 210-306; 227 NW 833

Inducing third party to perform one's covenants. An owner of mortgaged premises who leases the same and agrees with the lessee to erect certain improvements on the land, and who pledges the lease with the mortgagee as additional collateral security for the mortgage debt, and who, in the foreclosure of the mortgage, fully acquiesces in and approves and ratifies an application by the receiver for authority to borrow money and therewith to make the improvements which the lessor had obligated himself to make, thereby impliedly empowers the mortgagee, who advanced the funds with which to make the improvements, to reimburse himself out of the rentals accruing under the lease and collected prior to the expiration of the period for redemption from the mortgage sale. Under such state of facts, it is quite immaterial that the mortgagee bought in the property at foreclosure sale for the full amount of the mortgage debt.

Quaintance v Bank, 201-457; 205 NW739

Failure to enter formal judgment on collateral order. The failure of the court, following a dismissal of a quantum meruit count by plaintiff, to enter a formal judgment of dismissal of the said count cannot possibly detrimentally affect the defendant on his appeal from a judgment against him on the remaining count.

Hunt v Moore, 213-1323; 239 NW 112

2 Right of Contribution

Contribution—nature of doctrine. The doctrine of contribution applies in a proper case even tho there was no contract between the parties to the effect that each would make contribution.

Licht v Klipp, 213-1071; 240 NW 722; 1 NCCA(NS) 419

Contribution between husband and wife. Husband cannot secure contribution from divorced wife for payment of notes signed by both and paid by husband when wife signed as surety only.

Hall v Brownlee, (NOR); 216 NW 953

Property rights of joint adventurers. Property and profits of joint adventure after division between participants therein become separate and distinct property of joint adventurers. However, joint adventurer sustaining loss through transactions involving mortgage received in settlement and division of property and profits held not entitled to contribution.

Scott v McEvoy, (NOR); 228 NW 16

Co-obligors on note. Joint obligor on note was obliged to reimburse co-obligor for amount paid on common obligation in excess of co-obligor's share.

Carter v Lechty, 72 F 2d, 320

Tenants in common—contribution for taxes, interest, repairs, and tiling. A surviving mother, in partition of lands left by the deceased husband, is entitled to proper contribution from the children for money paid by her for taxes, interest on mortgages, and necessary repairs, but not (under certain facts) for tiling of the land.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

Sale—redemption by co-tenant. One who, during the period for redemption from mortgage foreclosure and sale en masse, purchases by quitclaim the undivided interests in the land of a part of the personal judgment defendants, can redeem only by paying the full amount of the sheriff's certificate of purchase, plus interest and costs, the remedy of such redemptioner being to enforce contribution from his co-tenants.

Kupper v Schlegel, 207-1248; 224 NW 813

Tenants in common—accounting—limitation of action. Between tenants in common, the statute of limitation does not commence to run on a claim of one of the tenants for the amount individually paid by him on a mortgage on the common property, until there has been a demand for an accounting.

Creger v Fenimore, 216-273; 249 NW 147

Tenants in common—purchase of outstanding lease, etc. One of several tenants in common of the fee to land who, on his own behalf, purchases of a lessee both an outstanding long-time lease on the said land and the building thereon, erected and owned by the lessee under said lease, may not enforce contribution from his co-tenants for his outlay; neither may said co-tenants legally demand the right to make contribution to the purchasing tenant and become tenants in common of the building.

Fleming v Casady, 202-1094; 211 NW 488

Costs—persons liable—right to contribution. Principle recognized that a coparty paying all the costs taxed against coparties may enforce contribution from other coparties.

Read v Gregg, 215-792; 247 NW 199

Bank directors' note. Evidence held sufficient to present a jury question on the issue whether bank directors had entered into an agreement as to what each, as between themselves, should pay on a promissory note given for the benefit of the bank.

Adamson v McKeon, 208-949; 225 NW 414; 65 ALR 817

Heirs—decedent's debt—election of remedies. In an action to compel certain heirs to contribute a share of a judgment arising out of a decedent's ownership of bank stock, a petition that alleges defendants' liability as individuals is not an election of remedies so as to prevent an amendment thereto setting up liability against an estate as an additional party, since there was no change in the nature of relief asked and no choice was made between inconsistent remedies at the time of the election.

Daniel v Best, 224-1348; 279 NW 374

(d) PARTIES

Transacting business in assumed or trade name. Contracts which are otherwise valid are not rendered invalid because entered into by one of the parties in an assumed or trade name without having complied with the statutory command to file with the county recorder a statement of the names and addresses of the persons so carrying on the business. Such statutes are regulatory only, even tho they declare it to be "unlawful" to carry on business in an assumed or trade name without the filing of said statement.

Ambro Agency v Speed-way Co., 211-276; 233 NW 499

Ratification by stranger to contract. A contract cannot be "ratified" by a party who is a total stranger thereto.

Fitch v Stephenson, 217-458; 252 NW 130

Privity of contract. A lessee who has contracted with his lessor to erect, at his own expense, permanent improvements on the property, but who, with the consent of his lessor, subleases to a subtenant who agrees to erect such improvements at his own expense, is not personally liable to the contractor who erects such improvements under a contract exclusively with the subtenant.

Coen v Bank, 205-483; 218 NW 325

Real party in interest—equitable owner. An equitable owner of land who effects a sale of the land through an agent, but permits the contract of sale to be made between the purchaser and the legal titleholder in order to secure to the latter the amount due him, remains the real party in interest in an action against the agent to compel him to account for a consideration received by him in the sale of the land and concealed from the said equitable owner.

Hiller v Betts, 204-197; 215 NW 533

Signing in representative capacity. The principle that an agent is not personally liable on a contract when the writing shows that another person is the principal is necessarily not applicable when the signer intended to make the contract his own.

Vance v Sowden, 205-389; 217 NW 874

General rule of liability. Persons of unsound mind will be held liable as to executed contracts when the transaction is in the ordinary course of business, when it is reasonable, when the mental condition was not known to the other party, and when the parties cannot be put in statu quo.

Farmers Ins. v Ryg, 209-330; 228 NW 63

Disaffirmance—estoppel. A minor may estop himself by his conduct from disaffirming or questioning the legality of his contract.

First Bk. v Torkelson, 209-659; 228 NW 655

Written contract not signed by wife—ineffectual as to wife. Where a husband and wife had an oral agreement for the sale of farm personalty in which they had a joint interest, and a written contract, specifying manner of disposition of proceeds of sale, which was signed by the husband but not by wife, she was not bound by written contract.

Russell v Moeller, (NOR); 268 NW 60

Construction—joint contracts. A contract wherein two parties, for one and the same consideration, agree to pay to another party a named sum in stated proportions is a joint contract.

Lockie v Baker, 206-21; 218 NW 483

Associations—unincorporated—noncapacity to contract or sue. Strictly speaking, a voluntary unincorporated association organized for literary and social purposes has no right to contract and cannot maintain a suit in the name of such voluntary unincorporated association alone.

Lamm v Stoen, 226-622; 284 NW 465

Merger and consolidation—liability on contracts. A contract with a public utility corporation which has apparently gone out of business, with the advent in the same place of another corporation of identically the same nature, is not enforceable against the latter corporation, in the absence of some adequate allegation and proof of merger and consolidation.

Hess v Iowa Co., 207-820; 221 NW 194

I REQUISITES AND VALIDITY IN GENERAL—continued

(e) UNDUE INFLUENCE, DURESS, FRAUD, MISTAKE, ASSENT GENERALLY

Discussion. See 24 ILR 337—Mistake of law

Undue influence—showing required. Influence, to be undue, must be such as to destroy the free agency of the person influenced, and substitute the will of the influencer for the will of the person influenced. Evidence reviewed in detail, and held quite insufficient.

Hult v Ins. Co., 213-890; 240 NW 218

Gifts—undue influence—destroying free will. Undue influence necessary to set aside a conveyance must be enough to destroy the free agency of the grantor. Evidence reviewed and found insufficient to establish undue influence.

Mastain v Butschy, 224-68; 276 NW 79

Undue influence—burden of proof. The mental incompetency of a grantor to execute a deed of conveyance, or the obtaining of said conveyance by the grantee by undue influence, when assigned as ground for setting aside said conveyance, must be established by plaintiff and by clear, satisfactory and convincing evidence—there being no proof that a confidential relationship existed. Evidence reviewed and held insufficient to meet said burden of proof.

Foster v Foster, 223-455; 273 NW 165

Fraud—undue influence as phase. Undue influence, a phase of actual fraud, will invalidate a transaction between persons in a confidential relationship.

Merritt v Easterly, 226-514; 284 NW 397

Nonpresumption and burden of proof. Principle reaffirmed (1) that no presumption of fiduciary relationship arises from the fact of kinship, and (2) that in the absence of proof of such relationship, plaintiff in an action to set aside a conveyance because of undue influence, has the burden to establish such fraud by convincing evidence. Evidence held quite insufficient.

Craig v Craig, 222-782; 269 NW 743

Monomania and undue influence unproved. Where a daughter, among other things, testified against her father in a divorce action and left him to live with her mother, she furnished the evidence for his belief of her lack of filial affection, and conveyances of his property executed pursuant to his intention to disinherit her upheld over her contentions that he was a monomaniac and that the conveyances resulted from the use of undue influence.

Mastain v Butschy, 224-68; 276 NW 79

Cancellation of instruments—duress—required showing. A contract obtained by so oppressing a person, by threats regarding his personal safety or liberty as to deprive him of the free exercise of his will and prevent the meeting of minds necessary to a valid contract, may be avoided on the ground of duress. So held in case of mortgages and notes.

Guttenfelder v Iebsen, 222-1116; 270 NW 900

Long acquiescence. Long recognition of a contract by a party thereto has material bearing on a subsequently raised issue of duress.

Krcmar v Krcmar, 202-1166; 211 NW 699

Duress—threat of prosecution. The execution of an obligation to make good the embezzlement of a relative cannot be deemed the result of duress when the signer is motivated, without threats, solely by a purpose to save the good name of his family, and to protect the estate of the embezzler from financial demands, and especially by a purpose to prevent a demand on the embezzler's surety bond and a criminal prosecution which would probably result from such demand.

Smith v Morgan, 214-555; 240 NW 257

Duress—pleading—conclusiveness. A party must stand or fall on the particular threat alleged by him as constituting duress. Reversible error results from permitting the jury to base its finding of duress on unpleaded matters.

Gray v Shell Corp., 212-825; 237 NW 460

Execution of note—duress. Evidence held insufficient to establish duress in the execution of a promissory note.

Mohler v Andrew, 206-297; 218 NW 71

Duress—estoppel to assert. The plea that an obligation was signed under duress must fall when the signer, during a long time following the execution of said obligation, recognized it as legally binding, and caused others to act on such recognition to their detriment.

Smith v Morgan, 214-555; 240 NW 257

Duress—inadequate instructions. On the issue whether a settlement was invalid because of duress in the form of threats to arrest and imprison, it is not sufficient to define "duress" as "compulsion or restraint by which a person is illegally forced to do an act". The jury must be told, in effect, that the duress must be such as to deprive the party of the power to enter into a contract.

Gray v Shell Corp., 212-825; 237 NW 460

Fraud pleas—status in court. In fraud actions, courts are reluctant to permit a cheater to profit by his own wrongdoing, tho at the same time courts are constrained by another consideration—that it is for the public welfare not to afford parties to written agreements such ready avenues of escape from their obligations that the purpose of lastingly recording such obligations in writing would be quite indifferently attained—the aim being to minimize both evils without accentuating either of them.

Griffiths v Brooks, 227-966; 289 NW 715

Deception constituting fraud—essential elements. The defense of fraudulent representations inducing a contract must fall when the alleged victim fails to show that he had a right to rely on, and did rely on, and was misled by, the said representations.

Boyd v Miller, 210-829; 230 NW 851

Fraud—absurd representations—reliance on —effect. It is no defense to liability for false representations, actually made with intent to deceive, and actually relied on by the one to whom made, that said representations were too unreasonable to deceive an ordinarily sensible person. The credulity of humankind remains yet unmeasured.

McTee & Co. v Ryder, 221-407; 265 NW 636

Knowledge of fraud—effect. One who knows that he is being defrauded and voluntarily submits thereto and consummates the transaction waives the fraud.

Loots v Knoke, 209-447; 228 NW 45

Validity of assent—fraudulently induced signature—negligence. A party may, by his own negligence, be precluded from relying on a fraud which induced him to sign an instrument.

State Bank v Deal, 200-490; 203 NW 293

Essential elements. A jury question is presented by testimony which tends to show that defendants, with the intent to defraud, falsely represented the value and ownership of corporate stock and its great desirability as an investment, and that the victim thereof justifiably relied thereon to his damage.

Faust v Parker, 204-297; 213 NW 794

Contracts performable. A fraudulently obtained contract will not be specifically enforced, but will, on proper plea and proof, be canceled.

Boyle v Geling, 206-1208; 218 NW 506

Deception constituting fraud. The purchaser of corporate shares of stock will not be permitted to say that he relied to his damage on false representations as to the assets of the corporation and the value thereof, and as to amount originally paid in on the stock and the dividends declared, when, at the time the representations were made, he personally knew that some of the representations were false, and when, at said time, he had equal opportunity with the seller to know and learn the actual truth of the remaining representations but did not avail himself of said opportunity.

Wead v Ganzhorn, 216-478; 249 NW 271

Negativing fraud. The plea of fraudulent representation as to the value of property must necessarily fall in the face of testimony that the complainant was a person of unusual business ability and experience and had had long, personal and intimate knowledge of the property in question far superior to that of the alleged wrongdoer.

Tobin, Tobin & Tobin v Budd, 217-904; 251 NW 720

Rescission for fraud—general denial. Where plaintiff alleges rescission of a contract of sale because of defendant's fraud, and seeks to recover the money paid, a general denial does not raise the issue that plaintiff, after discovering the fraud, elected to affirm the contract.

Blecher v Schmidt, 211-1063; 235 NW 34

Fraud as defense to law action—nonright to transfer. A defendant who is sued at law for damages for breach of contract, and who defensively pleads that he was fraudulently induced to enter into the contract, and prays for the cancellation of the contract, is not entitled to an order transferring the action to the equity calendar.

Randolph v Ins. Co., 216-1414; 250 NW 639

Intrinsic and extrinsic fraud. A default judgment on a promissory note is justifiably set aside and a new trial ordered on proof that the execution of the note was induced by false representations as to the consideration therefor, and that said fraud was repeated shortly prior to the entry of said judgment and the maker thereby induced to believe, until after judgment was entered, that he had no defense to said note.

Rock Island Co. v Brunkan, 215-1264; 248 NW 32

Fraud-induced signing. The peculiar arrangement of the various subject-matters of a writing, and the various sizes of the type in which said subject-matters are printed, together with the subtle manner in which the writing is presented to one who signs without reading, may justify a finding by the court or jury that the entire transaction was an intentionally fraudulent scheme to induce such signing without thought on the part of the signer that he was entering into a contract.

International Assn. v Atlantic Co., 216-339; 249 NW 240

Fraudulently procured release. Evidence reviewed at length relative to a written release of damages consequent on shockingly severe injuries, and held to present a jury question on the issues (1) of defendant's fraudulent procurement of the release, and (2) of plaintiff's negligence in signing said release.

Engle v Ungles, 223-780; 273 NW 879; 4 NCCA(NS) 92

Avoiding release for fraud. The burden of proof to avoid a written release of damages, on the ground that said release was obtained by fraud, rests on the party who alleges the fraud. Instructions reviewed and held adequately to impose such burden in substance

I REQUISITES AND VALIDITY IN GENERAL—continued

(e) UNDUE INFLUENCE, DURESS, FRAUD, MISTAKE, ASSENT GENERALLY—continued

tho not in words, assuming ordinary intelligence on the part of the jury.

Engle v Ungles, 223-780; 273 NW 879; 4 NCCA(NS) 92

Release — false representation — jury question. A jury question as to the validity of a release of personal injury damages is made by proof that the releasee represented that the doctor's charges would be "about" $10, and that the representation was materially false and was made to the releasor and acted on by him when he was alone and practically helpless from his injuries.

Robinson v Meek, 203-185; 210 NW 762; 5 NCCA(NS) 434

False promise not to sue. A statement to the effect that, if a party will sign an obligation, "he will never be sued thereon," is fraudulent when made for the purpose of deceiving the party to whom made, and when the latter justifiably relies thereon.

Commercial Bank v Kietges, 206-90; 219 NW 44

Note—jury question. Evidence held to generate a jury question on the issue whether a promissory note was signed as the result of a good-faith, nonfraudulent compromise and settlement.

Rounds v Butler, 207-735; 223 NW 487

Will contests—contract of settlement. In action to set aside contract for settlement of will contest, representations that "lawyers would get all the property" and that devisee "did not need a lawyer" were not fraudulent representations, and failure of court to submit issue of undue influence and constructive fraud was not error under the evidence.

Smith v Smith, (NOR); 230 NW 401

Fraud by seller—future promises—opinions. In an action for the purchase price of a trade-named beer dispenser bought for resale, purchaser, altho same may have been an inducement to buy, may neither predicate fraud on seller's promise to procure for purchaser future resales, unless the promise is made with a secret intent to disavow, nor upon statements amounting to an opinion as to superior design; however, the jury should determine whether a statement as to merchantableness is an opinion or representation of fact.

Rowe Co. v Curtis-Straub Co., 223-858; 273 NW 895

Fiduciary relationship—required proof. In an action to set aside a trust agreement executed to a son and attorney by plaintiff, evidence held to support decree dismissing plaintiff's petition. The existence of a confidential relationship or facts giving rise thereto must be proved before doctrine of fiduciary relationship can be applied—the mere relationship of parent and child does not create fiduciary relationship.

Hatt v Hatt, (NOR); 265 NW 640

Fraud in lease. In action for rent, answer alleging fraudulent representations regarding condition of leased building held to charge fraud, tho not alleging lessee had not examined premises.

Gamble-Robinson Co. v Buzzard, 65 F 2d, 950

Making restoration. Where defrauded party is suing to rescind, he must do equity by restoring whatever he received from wrongdoer; but, when wrongdoer as plaintiff is attempting to enforce tainted contract, he can have no relief.

First Tr. Bank v Bridge Co., 98 F 2d, 416

Bridges. In suit to foreclose trust deed securing bridge company's bonds, evidence supported findings of fraud in transfer of almost 90 percent of bonds to corporations controlled by bridge corporation's president, where transfer of bonds was partly in exchange for bridge corporation's stock contrary to statute, and partly in liquidation of pretended indebtedness.

First Tr. Bank v Bridge Co., 98 F 2d, 416

Combination of fraudulent transactions. In suit by trustees and finance corporation to foreclose fraudulent trust deed securing bridge company's bonds, most of which were fraudulently issued to such finance corporation or its successor, plaintiffs were not entitled to such modification of decree denying foreclosure as would command reissuing of certain stock to finance corporation, which canceled stock when fraudulently obtaining bonds, where court found that all of transactions leading up to issuance of bonds were steps in single fraudulent enterprise to obtain ownership of bridge after a foreclosure.

First Tr. Bank v Bridge Co., 98 F 2d, 416

Fraud in compromise. A party who compromises and settles his claim for damages consequent on an alleged fraudulent sale, and voluntarily and under no additional fraud does so on the basis of his then knowledge of the claimed fraud, may not have the compromise set aside on the claim that he later discovered an additional element of fraud in the sale not known to him when he compromised.

Williams v Herman, 216-499; 249 NW 215

Public improvements — acceptance — avoidance by proof of fraud. A nonfraudulently induced acceptance by a city council of a street pavement estops the city thereafter to plead nonperformance of the contract, but not so when the city pleads and proves that, at the time of said acceptance, the contractor, unbeknown to the council and in collusion with city employees, had constructed said pavement of a thickness substantially less than the thickness required by the contract.

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

Fraud—cancellation. Evidence reviewed, and held wholly insufficient to warrant cancellation of a contract for fraud in its execution.

Anders v Crowl, 210-469; 229 NW 744

Failure to read contract—effect. A party will not, in an action on a contract, be permitted to defend on the ground that his signature to the writing was obtained by false and fraudulent representations as to the contents of such writing when he is fully able to read, but does not read, and when the other party to the contract does nothing whatever to prevent such reading.

Bixler Co. v Argyros, 206-1081; 221 NW 828

Legler v West Side Assn., 214-937; 243 NW 157

Mutual mistake and fraud—proof necessary. To entitle a person to reformation of a contract, there must be some showing of fraud, ambiguity, or mutual mistake, and the general rule is that proof must be clear, satisfactory, and convincing. A contract cannot be reformed on grounds of both mutual mistake and fraud, as such claims would be mutually destructive. Evidence insufficient to warrant finding of fraud or mutual mistake.

Wall v Ins. Co., 228- ; 289 NW 901

Public improvements—void contract—sweeping deprivation of rights. A contract for the repair or reconstruction of a street pavement, entered into in total disregard of the mandatory statute requiring competitive bidding (§6004, C., '31), is void ab initio, and, if performed, it follows as a matter of public policy and irrespective of the motives of the parties:

1. That special assessments may not be legally levied to defray the cost of such performance, and

2. That the contractor may not, either, (1) on the theory of a contract implied in fact, or (2) on the theory of quasi contract or contract implied in law (unjust enrichment), recover against the city for the expenditures made by him even tho all profit be excluded therefrom.

Especially is the foregoing true when the record reveals a contract manipulation which emits an unmistakable odor of fraud and evasion.

Horrabin Co. v Creston, 221-1237; 262 NW 480

Husband and wife—property-settlement contract. A defendant sued by his former wife on a property-settlement contract, fully performed by her, availeth himself nothing in the way of a defense by nakedly alleging fraud by the wife in obtaining the contract when such allegation is made neither as a basis for a rescission of the contract nor for damages.

Poole v Poole, 219-70; 257 NW 305

Oral agreement to devise realty—insufficiency of evidence to set aside. In an equity action to recover a sum of money alleged to be the share of plaintiff's intestate in the estate of his father, where evidence shows the mother of plaintiff's intestate was left with five minor children, and that she filed a partition proceeding involving 400 acres of land owned by her husband who died intestate, and she thereafter was the successful purchaser at a sale of the land, and that, as a part of the purchase price, she executed a note and mortgage on the land to a guardian appointed for the minor children to secure their respective shares in the father's estate, and that, as the children became of age, there were no guardianship funds to pay their respective shares, and that it was orally agreed that the children would receipt for their respective shares, in cash, to the guardian (altho no cash was received), and the mother agreed to, and did, execute a will leaving the land to the children in equal shares, the plaintiff's evidence was insufficient to set aside the agreement, and the trial court's order, affirming the agreement and impounding the mother's will until her death, was affirmed.

Baumann v Willemssen, 228- ; 292 NW 77

Notes—fraud—failure to establish per se. Evidence held insufficient to show as a matter of law that promissory notes were obtained by false representations.

Andrew v Peterson, 214-582; 243 NW 340

Parol—proof of fraud. The parol evidence rule is not an obstacle to the proof of fraud in obtaining a contract.

Schmidt v Twedt, 219-128; 257 NW 325

Fraud—burden of proof. A plaintiff who attacks a compromise settlement of the amount due under a policy of insurance on the ground that it was fraud-induced has the burden to show that the representations inducing the settlement were knowingly false and that he innocently relied thereon; and plaintiff must, of course, fail on a record showing that the representations were true, and that he knew they were true.

Bockes v Cas. Co., 212-499; 232 NW 156

Burden of proof. He who pleads fraud must prove it by a preponderance of the evidence.

Klatt v Bank, 206-252; 220 NW 318

I REQUISITES AND VALIDITY IN GENERAL—continued

(e) UNDUE INFLUENCE, DURESS, FRAUD, MISTAKE, ASSENT GENERALLY—continued

Evidence—weight and sufficiency. Principle reaffirmed that proof of fraud must be clear, satisfactory, and convincing.

Goff v Milliron, 221-998; 266 NW 526

Elements and degree of proof. An action to set aside a contract of compromise and settlement because of alleged fraudulent representations must be supported by proof which clearly, satisfactorily and convincingly establishes (1) the actual making of the material representations, (2) the falsity thereof, (3) the defendant's knowledge of the falsity, (4) the plaintiff's ignorance of the falsity, and (5) plaintiff's reliance thereon. If plaintiff fails to show by the required amount of proof the actual making of the representations, the court, of course, need proceed no farther, except to enter a dismissal.

Kilts v Read, 216-356; 249 NW 157

Evidence of intent to defraud—sufficiency. In an action to cancel an alleged fraud-induced compromise settlement of indebtedness, proof that in the negotiations leading up to said settlement defendant made to plaintiff inducing and material statements as of fact but which defendant, at the time, knew to be false, justifies the finding, without further proof, that defendant made said statements with intent to defraud and deceive the plaintiff.

Andrew v Baird, 221-83; 265 NW 170

Evidence required to establish fraud. Principle reaffirmed that fraud, actual or constructive, duress, and undue influence must be established by clear, convincing, and satisfactory evidence. Evidence held wholly insufficient to show such fraud in the assignment by a grandmother to a grandson of a note and mortgage.

Scott v Seabury, 220-655; 262 NW 804

Presumption and burden of proof. Fraud is never presumed. He who alleges its existence must establish it by clear, convincing and satisfactory evidence. Principle applied in an equitable action to set aside and cancel certain financial obligations allegedly obtained by fraud.

Eckhardt v Trust Co., 223-471; 273 NW 347

Signing without reading—fraud. A signed release and settlement of a claim for damages is conclusive on the signer, even tho he signed it because of a false statement of its contents, when he had ample time and ability to read, and was in no manner prevented from reading.

Crum v McCollum, 211-319; 233 NW 678

Mental unsoundness — fraud — degree of proof. A deed of conveyance will be set aside on the ground of fraud or grantor's mental unsoundness, only on clear and convincing evidence in support of the charge. Evidence held insufficient.

Ellis v Allman, 217-483; 250 NW 172

Mistake and fraud—evidence. Evidence reviewed, and held ample to justify the reformation of a deed because of the mistaken, and fraudulently induced, omission therefrom of a clause reserving to grantors a life estate in the land in question.

Foote v Soukup, 221-1218; 266 NW 904

Recovery of payments—mutual mistake—evidence—sufficiency. Evidence reviewed in an action to recover back money alleged to have been paid under a mutual mistake for heat furnished, and held insufficient to establish such mistake.

Thomas v Central Co., 217-899; 251 NW 616

Reformation of instruments—assumption of mortgage debt—mistake. Where an instrument is executed without consideration on the part of a grantee, to assume and pay the mortgage debt, the contract is not binding upon him, or if the deed is delivered in blank, or the conveyance made as security only, or if a clause if inserted by fraud, inadvertance, or mistake, without the knowledge or acquiescense of the grantee, he may have the instrument reformed in equity so as to make it express the true intent and understanding of the parties.

Guarantee Co. v Cox, 201-598; 206 NW 278

Validity—failure to read. A party may not avoid the binding effect of a contract by the plea that he did not know what he was signing, when he could read, and was not prevented from reading.

Williams v Ins. Assn., 204-991; 216 NW 269

Assent—mental weakness. Mere weakness of mental power will not constitute mental incapacity if the person retains mind enough to know and comprehend in a general way the nature and extent of his estate, the natural objects of his bounty, and the distribution he desires to make of his property.

Penn Ins. v Mulvaney, 221-925; 265 NW 889

Mental capacity—existence—burden to disprove. Mental weakness from disease does not deprive a person of capacity to dispose of property until the power of intelligent action is destroyed, and executor relying thereon to recover gift made by decedent to sister has burden of proof.

Wilson v Findley, 223-1281; 275 NW 47

Adjudication of insanity—nonretroactive presumption. An adjudication of insanity creates no presumption that the person in question was insane at any particular period of time prior to said adjudication.

Davidson v Piper, 221-171; 265 NW 107

Deeds—mental incapacity—proof required to set aside. In order to set aside conveyances on the grounds of mental incapacity and undue influence, the burden is on the plaintiff to establish same by evidence which is clear, satisfactory, and convincing.

Merritt v Easterly, 226-514; 284 NW 397

Insane persons — contracts — validity — demand for accounting—burden of proof. In an action by the guardian of an insane ward to compel defendant to account for property paid or delivered by the ward to defendant, without consideration, and at various periods of time prior to the time the ward was adjudged insane, the guardian must establish the insanity of the ward at each particular transaction, or must establish such fact condition as compels an accounting. Evidence held insufficient to meet the burden of proof as to one transaction.

Davidson v Piper, 221-171; 265 NW 107

Mental incompetent—degree of proof. Evidence of mental incompetency sufficient to invalidate a contract must be clear, satisfactory, and convincing.

Hult v Ins. Co., 213-890; 240 NW 218

Insane delusion—insufficiency. The plea that a contract of purchase was impelled by an "insane" delusion, and therefore invalid, signally fails when it appears that said purchaser had some basis in fact for entertaining the belief which he did entertain, even tho it be conceded that said belief was erroneous.

Hult v Ins. Co., 213-890; 240 NW 218

Insane person—expert and lay opinions—which must yield. An expert opinion, that a person was insane at a named time prior to the time when said person was judicially declared insane, will not be permitted to outweigh overwhelming lay testimony which strongly tends to establish the contrary,—when said expert opinion is based almost wholly on information obtained from said person after she was adjudged insane, and on information obtained from the relatives of said person. (Equity case.)

Davidson v Piper, 221-171; 265 NW 107

Validity of assent—mental weakness and mental incapacity contrasted. Capacity to enter into a contract does not necessarily require entire soundness of mind.

Dunlop v Wever, 209-590; 228 NW 562

Insane person — contracts — legality. An adjudicated incompetent may not, while under guardianship, execute a valid and binding contract, since such person is under protection of the court. Contract of incompetent is voidable, not void, and facts and circumstances of each case are controlling.

Dean v Est. of Atwood, (NOR); 212 NW 371

Insane persons — guardianship — advancing funds to retry issue of sanity—discretion of court. Where a person is under guardianship and confined in a state hospital under an adjudication of insanity, an application in his behalf for an order directing the guardian to pay a substantial sum for the purpose of retrying the issue of insanity is properly denied on a showing by affidavit that two laymen consider the patient sane.

In re Ost, 211-1085; 235 NW 70

(f) LEGALITY OF OBJECT

Statutes against public policy. See under Const Art XII, §1 (II)

Discussion. See 21 ILR 149—Agreements not to compete

Performance illegal—recovery thereunder barred. A contract to do an illegal act, which cannot be performed without violating the constitution, a constitutional statute or ordinance, is illegal and void, even in some cases when no penalty is provided for the violation.

Keith Co. v MacVicar, 225-246; 280 NW 496

Public policy—inducing allowance of claim against city. A contract by which a party agrees to use his influence to induce a municipality to allow a just and legal claim against it is valid, in the absence of any showing that nonlegitimate means were contemplated.

Stoner v Stehm, 200-809; 202 NW 530

Money given to obstruct justice—recovery denied. The courts will not aid one to recover money that has been given to another to be used in obstructing or interfering with the orderly course of justice, nor will they protect one who obtains the money of another for a particular lawful purpose when he fails to so use it and refuses to return it.

Sarico v Romano, (NOR); 205 NW 862

Public policy—guaranty of solvency of bank. A contract between the state superintendent of banking and the officers and directors of a state bank, wherein the said officers and directors guarantee that the bank "is at this time solvent", and wherein they contract "to keep and maintain the bank in a solvent" condition, in consideration of an agreement that the superintendent will permit the bank to continue business, tho the superintendent questions its solvency, is a nullity, because gravely inconsistent with the statutory powers and duties of said superintendent, and therefore against public policy.

Andrew v Breon, 208-385; 226 NW 75

Trade unions—contracts—legality. A contract between a street railway company and a local labor union representing the employees will not be decreed illegal by a court of equity on the ground that the contract requires the company, against public policy, to maintain two employees on each car, (1) when the city has not exercised its undoubted power over such subject-matter, (2) when the city is not a party to the action, and (3) when

I REQUISITES AND VALIDITY IN GENERAL—concluded

(f) LEGALITY OF OBJECT—concluded

the object of the action seems to be to obtain a declaratory decree only.

Des Moines Ry. v Amalgamated Assn., 204-1195; 213 NW 264

Public improvements—patentee as bidder—legality of bid. When the city calls for competitive bids on four different kinds of paving mixtures, all of substantially the same utility, desirability, and cost of commercial materials, three of which mixtures are unpatented and one of which is patented, the bid of the patentee, tho the only bid on the patented article, to furnish and lay the patented mixture for one cent per square yard above the price (not shown to be exorbitant) at which he had agreed simply to furnish it to all other bidders, is not fraudulent and void as stifling competition, tho the cost of laying the mixture is some 28 cents per square yard.

Hoffman v Muscatine, 212-867; 232 NW 430; 77 ALR 680

Public policy—agreement to repurchase note and mortgage. A contract on the part of a trust company to repurchase a note and mortgage sold by it is not against public policy, it appearing that the company was organized to deal in commercial paper and, inter alia, to receive time deposits and issue drafts on its depositories.

Hawkeye Ins. v Central Trust, 210-284; 227 NW 637

Dragnet clause in mortgage. An oppressive and unconscionable dragnet clause in a mortgage is void as against public policy, even in the hands of a bona fide holder.

Sullivan v Murphy, 212-159; 232 NW 267

Legality of object—contract in re rule of evidence. It is not against public policy for parties to contract that, in an action on the contract, a specified nonstatutory rule of evidence shall not apply.

Lunt v Grand Lodge, 209-1138; 229 NW 323

Legality of object—reasonable restraint on trade. An agreement by the vendor of a furniture business and its good will that he will not sell or offer for sale furniture "so long as the vendee is in business" in a named town is reasonable as far as the time element is concerned, and is enforceable by injunction; and such agreement will not be held unlimited as to scope of territory (and therefore unreasonable) when the contract as a whole and the attending circumstances clearly show that the parties had in mind the town in question and the trade territory adjacent thereto.

Haggin v Derby, 209-939; 229 NW 257

Annuity contract as "wager". An annuity contract, entered into in good faith, under which the annuitant, for a lump sum payment determined by skilled actuaries, is promised a definite annual payment during the lifetime of the annuitant, does not offend against public policy—is not a "wager" contract.

Hult v Ins. Co., 213-890; 240 NW 218

Gambling contracts and transactions—property sold in furtherance of gambling. A vendor of property which is capable of a perfectly legitimate use may not recover therefor when he sells it for the very purpose of enabling the vendee to operate a gambling device, to wit, a punch board.

Parker-Gordon Co. v Benakis, 213-136; 238 NW 611

Compounding offense—proof of agreement. The plea that an obligation is invalid because executed in consideration of the compounding of a crime necessitates proof of an agreement, express or implied, (1) to compound or conceal the offense, or (2) not to prosecute the same, or (3) not to give evidence thereof.

Cotten v Halverson, 201-636; 207 NW 795

Verdicts—directed on questions of law only. Directed verdicts have no place in jury trials unless the record clearly presents controlling questions of law. Record evidence held wholly insufficient to justify a directed verdict against plaintiff on the ground that as a matter of law the contract for damages for assault—on which plaintiff sued—was based in part (1) on an agreement by plaintiff to compound or conceal the commission of a public offense, or (2) on an agreement by plaintiff as an employee to refrain from circulating scandalous information concerning his employer.

In re Cuykendall, 223-526; 273 NW 117

Assessments—jurisdictional objections. The objection that an assessment for sewer is void because the work was let on a cost-plus contract when the specifications and notice to bidders were silent as to any such contract goes to the jurisdiction of the council to make the assessment, and may be raised for the first time on appeal.

Chi., RI Ry. v Dysart, 208-422; 223 NW 371

Entire or severable contract. A contract provision which is valid when standing alone is not necessarily rendered invalid by the fact that in the contract in question it is interwoven with other contract provisions which may be violative of a statute. So held where a lease sought to exempt the lessor, a railroad company, from liability to the lessee for negligence, but provided that, if such exemption legally failed, "the lessor shall have full benefit of any insurance effected by the lessee on structures erected on the premises".

Queen Ins. v Railway, 201-1072; 206 NW 804

II CONSTRUCTION AND OPERATION

(a) IN GENERAL

Discussion. See 5 ILB 65—Nonnegotiable bills and notes

Construction—intention of parties controls. In construing any instrument in writing, the primary object is to arrive at what the parties had in mind when it was drawn.

Osceola v Gjellefald Co., 225-215; 279 NW 590

When construed. Purpose of construction of a contract is to arrive at intent of parties, and, where intent is so plainly expressed that a mere reading of the contract leads the mind at once to a satisfactory conclusion as to what parties intended, there is no room for construction.

Beal v Milliron, (NOR); 267 NW 83

Different instruments treated as one. Two instruments executed at the same time and as part of the same transaction constitute, for purposes of construction, one instrument.

In re Barnett, 217-187; 251 NW 59

Policy of insurance and contract with mortgagee—construed together. A contract by which an insurance company agreed to insure all property on which a mortgagee held mortgages, and a certificate issued by the company when a policy was issued in compliance with the contract, when both referred to an open policy, must be construed together with the open policy so that a statutory provision of the open policy preventing the insured from obtaining additional insurance on his property becomes a part of his contract of insurance.

Calendro v Ins. Co., 227-829; 289 NW 485

Implied adoption of terms of related contract. A contract by a "subcontractor" to furnish the principal contractor certain artificial stone "according to the plans and specifications" of the architects of the building, together with samples and setting plans "approvable" by said architects, impliedly adopts and embraces within its terms the provisions of the plans and specifications of the general contract (between the principal contractor and the owner of the building) to the effect (1) that the architects may reject any and all materials, and their rejection shall be final; (2) that the subcontractor will, at his own expense, remove from the premises all rejected materials; and (3) that the subcontractor will replace rejected material with other proper material.

Granette Co. v Neumann & Co., 200-572; 203 NW 935; 205 NW 205

Long-continued mutual construction. Long-continued mutual construction of a contract by the parties thereto necessarily points strongly to the real intent of the parties.

Tucker v Leise, 201-48; 206 NW 258

Union Rep. Co. v Anderson, 211-1; 232 NW 492

Nelson v Hamilton, 213-1231; 240 NW 738

Melman Co. v Melman, 216-45; 245 NW 743

Mutual construction of parties. The maker of a promissory note who is unable to pay at maturity because of an unapprehended and long-continued change of condition for which the payee is not responsible, and who repeatedly and voluntarily renews his note by including in each renewal the amount of principal and legal interest then due, may not claim that he was improperly charged with interest upon interest, when such renewals appear to have been the mutual and practical construction by the parties of the contract out of which the original note arose.

Frank Cram v Trust Co., 205-408; 216 NW 71

Intention and practical construction of parties. A pledge of corporate shares of stock as collateral security will not be deemed novated into subsequently taken security and by an agreement in connection therewith, when such novation was never discussed between the parties, when the collateral holder never intended such novation, when pledgor's claim of novation was very belated, and when the parties had by their practical conduct negatived such novation.

Winfield Bk. v Snell, 208-1086; 226 NW 774

General words—scope. A written contract to act as agent "in the purchase, inspection, erection, and supervision of all labor employed and material purchased in the building of two additional stories upon" an existing building does not embrace mechanical equipment to be installed in the structure,—i. e., installation of elevators. Especially is this true when the parties never mutually treated the contract as embracing such equipment.

Parks & Co. v Howard Co., 200-479; 203 NW 247

Conflicting clauses—construction as an entirety. In an action upon written contract for real estate commission, in which there are conflicting clauses as to time of payment of commission, the rule is that a contract should be read and interpreted as an entirety rather than seriatim by clauses and that the position of clauses in such instrument is not material nor controlling.

Mealey v Kanealy, 226-1266; 286 NW 500

Intent derived from entire contract. Contract should be considered in its entirety in arriving at the intent of the parties.

State v Sprague, 225-766; 281 NW 349

II CONSTRUCTION AND OPERATION—continued

(a) IN GENERAL—continued

Selling price—standard price as basis. The selling price of goods was as definitely fixed in a contract as tho it were expressed in money or some other medium, when placed at a certain amount lower than the standard price on standard staple goods of the same kind.

Lee v Sundberg, 227-1375; 291 NW 146

Parol or extrinsic evidence affecting writings—right to enlarge writing. When the written evidence of a contract provides, in effect, that named subject matters shall be controlled thereby, oral evidence is admissible to enlarge said subject matters when the writing on its face reveals the contemplation of the parties to make such addition.

Smith & Co. v Hollingsworth, 218-920; 251 NW 749

Right to explain ambiguous clause. The rule that an ambiguous provision in a written contract may be explained by parol evidence, for the purpose of arriving at a basis on which to rest a legal conclusion as to the meaning of said provision, assuredly does not embrace the right of one party to the contract to show, (1) his understanding of said provision, and (2) the understanding of a former assignee of the contract (at a time when the question of the meaning of the provision had not arisen) as evidence of the understanding which a later assignee had or should have had of said provision.

Zimbelman v Boone Coal, 220-1310; 263 NW 335

Lease—oral explanation. The fact that both of two parties sign a lease and the accompanying rent notes does not necessarily establish, in a controversy strictly between said two parties, that each party should pay one-half the rent. The said fact is open to oral explanation.

Fisher v Nicola, 214-801; 241 NW 478

Mutual construction—effect. Conduct of a party in executing a contract as to matters over which there is no controversy may not be deemed a construction of the contract as to after-arising matters concerning which there is a controversy.

Iowa Co. v Coal Co., 204-202; 215 NW 229

Joint and several (?) or several only (?). Whether a contract is joint and several must be determined by the terms thereof, viewed in the light of the attending circumstances, and especially in view of the practical mutual construction placed thereon by the parties.

Shively v Mfg. Co., 205-1233; 219 NW 266
Licht v Klipp, 213-1071; 240 NW 722

Practical construction by parties—partial performance—effect. Where parties to a contract have given the contract a practical construction,—as by acts of partial performance,—such construction is entitled to great, if not controlling, weight.

Dodds Co v Sch. Dist., 220-812; 263 NW 552

Conclusiveness of conditions. Distinct contract provisions to the effect that a highway between two named points shall be located on either of two clearly specified routes cannot be so construed as to justify a departure from both of said routes, nothing otherwise appearing in said contract which justifies such construction.

Clayton County v Thein, 204-911; 216 NW 276

Charities—devise—power of municipality to take. Devises and bequests for charitable purposes are such favorites of the law that "they will not be construed void if, by law, they can be made good." Will construed, and held that the conditions attending a devise and bequest to a municipality of a charitable trust in the form of a free public library, were conditions subsequent, and not conditions precedent, to the vesting of said trust, and that said conditions were within the legal power of the municipality to accept—under prescribed statutory procedure—and perform.

In re Nugen, 223-428; 272 NW 638

Surrounding circumstances. A contract to the effect that certain orders for goods should be "uniformly distributed" over a named period of time does not imply that there shall be mathematical uniformity in the orders. Reasonableness in the matter must prevail.

Weitz' Sons v Fidelity Co., 206-1025; 219 NW 411

Written confirmation of oral sale—effect. Where, immediately following a telegraphic inquiry and answer as to the price of an article, and a telephone order by the buyer, the seller prepares and furnishes to the buyer a confirmatory writing, in the form of a contract reflecting his understanding, and the buyer makes no objection until after shipment is made, the contract will be deemed to consist solely of the confirmatory writing.

Lamis v Grain Co., 210-1069; 229 NW 756

Evidence attending interwoven transactions. Conversations had at the time of entering into a series of contracts at different times may be so closely related to, and so closely interwoven with, a subsequent contract as fully to justify their consideration on the issue whether the latter contract was entered into.

Adamson v McKeon, 208-949; 225 NW 414; 65 ALR 817

Forfeiture notwithstanding supplemental contracts. That part of a land-sale contract which provides for the forfeiture of the contract, in case of nonpayment of stipulated sums, applies to supplemental contracts, (1)

which simply extend the time of payments, or (2) which simply make a new division and new time of payment of former agreed payments, and in addition specifically provide that the provisions of the original contract shall not be deemed otherwise changed.

Schwab v Roberts, 220-958; 263 NW 19

Legality of object—entire or severable contract. A contract provision which is valid when standing alone is not necessarily rendered invalid by the fact that in the contract in question it is interwoven with other contract provisions which may be violative of a statute. So held where a lease sought to exempt the lessor, a railroad company, from liability to the lessee for negligence, but provided that, if such exemption legally failed, "the lessor shall have full benefit of any insurance effected by the lessee on structures erected on the premises".

Queen Ins. v Railway, 201-1072; 206 NW 804

Effect of separable invalid covenant. In an agreement to construct a grotto, an invalid provision as to restraint on alienation of property will not vitiate other valid covenants therein when separable therefrom.

Sisters of Mercy v Lightner, 223-1049; 274 NW 86

Unilateral contract—voiding contract by one's own default. A provision in a deed of conveyance to the effect that if the grantee fails to make any of the payments which he has agreed to make, or fails to perform any of the obligations which he has agreed to perform the deed "shall be void and the title immediately revest" in grantor, simply means that the grantee has covenanted that if he defaults his default shall void the deed if the grantor so elects. Especially is this true when the acts of the parties indicate that they mutually so construe the contract.

Earle v Rehmann, 214-784; 243 NW 345

Equality in corporate control. Contracts relative to the purchase of corporate stock reviewed, and held to require plaintiff to pay therefor a sum equal to what defendant had paid therefor.

Holsinger v Herring, 207-1218; 224 NW 766

Avoidance of absurd, uncontemplated results. The court, in construing a contract, must necessarily view the contract as a whole, and not from the angle of one ambiguous provision, and must arrive at a conclusion, if possible, which will avoid results which, in the very reason of things, the parties manifestly never contemplated. So held as to contract provisions relative to the terms on which a party might purchase an interest in property.

Conn v Heaps, 205-248; 216 NW 73

Purchase of land. Evidence held to show that a contract for the purchase of land embraced all the land within the limits of an existing and visible inclosure.

Elliott v Horton, 205-156; 217 NW 829

Variation of terms. A written contract relative to the purchase, holding, management, and sale of land may not, in the absence of fraud or mistake, be contradicted as to that part thereof which clearly states the amount of money which one party had put into the land.

Conn v Heaps, 205-248; 216 NW 73

Assignment of rent construed. In construing the provisions of a settlement wherein a judgment debtor agreed to assign to his judgment creditor " * * * the amount due from the tenant * * * " of the debtor on certain real estate, the same " * * * being all rentals * * * " for a certain year, held, that federal agricultural conservation payments received by the debtor on the land in question were not in contemplation of the parties, hence creditor was not, on the basis of said assignment, entitled to these payments.

Cooke v Harrington, 227-145; 287 NW 837

Vendor and purchaser. Contract between the vendor and the purchaser of land in modification of the original contract of purchase reviewed, and held not to create the relation of landlord and tenant, notwithstanding the fact that the contract referred to the income from the land as "rent".

Thielen v Davenport Co., 203-100; 212 NW 352

Punctuation a fallible standard. Punctuation is ordinarily of little aid in the construction of a contract.

Seeger v Manifold, 210-683; 231 NW 479

Joint adventures—mutual liabilities of parties. A contract provision to the effect that if income fails to pay expenses of a joint adventure, "at the end of two years and thereafter", the deficiency shall be carried in named proportions by named parties, "after the two years have expired", means, that if, during the first two years, income fails to pay expenses, thereafter the named parties are liable therefor, in said proportions, whether said deficiency occurred during said two years or thereafter,—in view of other contract declarations that should any loss be incurred by reason of said adventure, such loss shall be borne by said parties in said proportions.

Fitzhugh v Thode, 221-533; 265 NW 893

Joint adventures — losses — joint liability. Two or more parties to a contract of joint adventure who agree to pay one-half of resulting losses, if any, are each individually liable for said one-half, tho no provision is made for any division among themselves.

Fitzhugh v Thode, 221-533; 265 NW 893

II CONSTRUCTION AND OPERATION—continued

(a) IN GENERAL—continued

Indemnity for operation of dam. A contract which provides that one joint owner of a dam to whom it is turned over for joint mutual use shall hold the other joint owner harmless from any damages arising from the "operation" thereof, imposes upon the operator of the dam, as between said joint owners, liability for damages to overflowed property owners, consequent on the general maintenance of the dam above the authorized level, even tho the other joint owner does reserve some control over the movable parts of said dam in order to avoid such damages.

Ellis Co. v Iowa Co., 204-1325; 217 NW 262

Contradictory provisions. A contract which provides (1) that, in consideration of a mortgagor's reconveying the property to the mortgagee (a former owner), the latter will pay the former a specified sum out of a contemplated future sale, and (2) that said sum "will not be paid under any circumstances until the farm shall have been sold", and (3) that "this contract is to continue for two years, and the sale provided for and full settlement hereunder shall be made in that time", obligates the promisor to pay the specified sum at the end of two years, even tho the land be not then sold.

Yerkes v Edmonds, 202-205; 208 NW 624

Pipe-line right of way—ambiguity as to compensation. Where landowner made written agreement giving pipe-line company a right of way, and where receipt, executed simultaneously with the agreement, aided by extrinsic oral proof, showed that he actually received five dollars per rod for the first line put in, held, landowner was entitled to judgment compensating him at same rate for installation of a second pipe-line under the agreement, which provided that "additional lines shall be laid for a consideration the same as for the first", despite the fact that such agreement also provided for a compensation of only fifty cents per rod.

Vorthmann v Pipe Line Co., 228- ; 289 NW 746

Undertaker's services—fee including casket. The fact that an undertaker makes a contract, wherein he furnishes a casket and a vault, tho called a contract for services, does not change the legal character of the transaction nor preclude it from being a sale of personal property nor prevent a transfer of title of said property to the purchaser.

Kistner v Board, 225-404; 280 NW 587

Indefinite duration—termination. A contract for the furnishing of a named commodity may be terminated on reasonable notice when the contract is silent as to its duration.

Hess v Iowa L. & P. Co., 207-820; 221 NW 194

Guarding against one's own fraud—effect. Contract provisions, designed to protect one from the effects of his own fraud, present no obstacles to the judicial uncovering of such fraud and the application of the proper principles thereto.

McTee & Co. v Ryder, 221-407; 265 NW 636

Construction against party using words. Principle reaffirmed that, speaking generally, a contract will be construed most strongly against the author of the words employed in the contract.

Buser v Land Co., 211-659; 234 NW 241

Ambiguity clarified by parol — doubts resolved against maker. In reviewing various canons of construction, principles reaffirmed that (1) if a contract is clear-cut and unambiguous the wording of the contract must control, but, if it is ambiguous, then parol evidence is admissible to ascertain intention of the parties, and (2) where there is ambiguity the doubt will be resolved against the party who prepared the instrument.

Vorthmann v Pipe Line Co., 228- ; 289 NW 746

Strict construction against sole drafter. The rule that a written obligation will be construed most strongly against the sole drafter thereof manifestly has no application where the form and phraseology of the obligation are provided by statute.

Ballard-Hassett Co. v City, 207-1351; 224 NW 793

Perpetuities—not validated by estoppel or ratification. Since a restraint on alienation of title is in contravention of public policy, such a provision in a contract cannot be validated by ratification or estoppel.

Sisters of Mercy v Lightner, 223-1049; 274 NW 86

Paving—suing city on express contract. Where a holder of invalid paving assessment certificates elects to base his recovery solely on an express written contract, no question of estoppel, waiver, ratification, or accord and satisfaction is involved.

Lytle v Ames, 225-199; 279 NW 453

Promissory note—severability of interest—when barred. Unless the maker and payee on a promissory note agree to sever the promise to pay interest installments from the promise to pay principal so as to make each promise separate and independent of the other, the interest is an incident to the principal debt and as such is barred when the statute of limitations has run against the principal debt.

Yeadon v Farmers Elevator Co., 224-829; 277 NW 709

Statutes and articles as part of contracts. The corporation charter and the statutes of the

state of domicile of the corporation become a part of any contract between the corporation and a purchaser of its stock.

Bishop v Middle States Co., 225-941; 282 NW 305

Municipal discharge of statutory liability. A contract between a county and a city wherein the city, in discharge of its statutory liability relative to one-half of the cost of paving a city boundary-line road, agrees to issue to the county road certificates in anticipation of the collection of special assessments on benefited property, cannot be construed as an unconditional promise on the part of the city to pay said statutory liability.

Polk County v Des Moines, 210-342; 226 NW 718

Unpermitted furnace installation — lawful and unlawful acts. A contract to install an oil burner, being a lawful act, is not rendered void on account of a failure to first secure an installation permit required by a city ordinance, inasmuch as this wrongful omission, not inhering in the contract, does not make an otherwise valid contract void. A distinction exists between doing a per se unlawful and prohibited thing, and doing a lawful thing in a prohibited manner.

Keith Co. v MacVicar, 225-246; 280 NW 496

Promise for benefit of third party is enforceable. The promise, made on adequate consideration, for the benefit of a third person, is enforceable by said third party.

Tracewell v Sanborn, 210-1324; 232 NW 724

Agreement for benefit of third party. Principle recognized that a third party, for whose benefit a contract is made, has a right to bring an action on the contract.

Venz v State Auto. Assn., 217-662; 251 NW 27

Transfer of property—assumption of mortgage debt—insufficiency. An agreement between partners in their contract of partnership to pay mortgages on land to which they have taken title "subject" to existing mortgages, will be deemed an agreement solely for their own mutual benefit, and not for the benefit of third parties, to wit, said mortgagees.

Bankers Tr. Co. v Knee, 222-988; 270 NW 438

"Bi-monthly payments." A contract for services providing for payments each two weeks is obligatory, even tho the party rendering the service has not worked two full weeks.

Goben v Paving Co., 218-829; 252 NW 262

Contract for haulage—unoccupied time. A contract for hauling material at a stated price per load, with right in the hirer to designate the number of hours each day and the number of days each week on which the work should be done, does not embrace a right of recovery for days on which there was no hauling to do. Especially is this true in view of repeated unexplained receipts "in full of account to date".

Peerboom v Minges, 201-706; 207 NW 753

Extraneous documents as part of contract. The words, "Regarding the sand and gravel to be used in the construction of the Spottsville Bridge, which contract you have, we agree to deliver" etc., contained in a letter of offer which was accepted, cannot be construed as making the "Spottsville" contract a part of the contract by letter, or as having any other force than to identify the subject-matter of the offer and the place of delivery.

Koch Co. v Koss Co., 221-685; 266 NW 507

Building contract—extra costs—written authorization required—effect. A written building contract which, in effect, excludes all claims for extra costs consequent on changes in the plans unless such claims are evidenced by written authorization signed by the owner or by the architect on behalf of the owner, must be given the legal effect of excluding all evidence of oral authorization, there being no plea or proof, on behalf of the contractor, of waiver or ratification.

Iowa Elec. Co. v Hopp, 221-680; 266 NW 512

Requirement of written order for extra work —effect. A building contractor may not recover for extra work performed under the oral advice of the architect when the contract specifically required a written order in such cases. Especially is this true when the owner lived in a distant part of the state and had no knowledge of the extra work until after it had been performed.

Des Moines Co. v Magarian, 201-647; 207 NW 750

Suggested change in contract—effect. A subcontractor who "suggests" to the contractor that the latter make certain modifications in the plans in the way of extras does not thereby obligate himself to pay to the contractor the cost entailed by such changes, even tho such changes were advantageous to the subcontractor.

Berger Co. v Salyers Co., 203-565; 213 NW 212

Public improvements—estimated quantities as basis for contract. In awarding a contract to build an electric plant, the function of plans and estimated quantities is to permit a uniform comparison of bids, and the requirement of "unit prices", as a means of payment for variations from the estimated quantities, indicates their variable character, so certain variations between the plans and specifications will not result in a failure of competitive bidding invalidating a contract based thereon.

Interstate Co. v Forest City, 225-490; 281 NW 207

II CONSTRUCTION AND OPERATION—continued

(a) IN GENERAL—continued

Commission on "refund" of taxes—computation. Under a contract to pay an accountant a percentage of the amount "refunded" by the federal government as excess payment for certain years of income and war-profit taxes, the percentage must be computed on the actual amount returned by the government, even tho the government arrived at said amount by deducting from what would otherwise have been the refund the amount of tax inadequately paid in a certain year.

Gregerson Bros. v Cherry Co., 210-538; 231 NW 350

Homestead—debts enforceable against—contingent contract—noncertain debt. Under a written contract providing that first party will pay second party a named fee whenever second party secures the legal allowance of a certain claim in first party's favor, no debt is contracted which can be enforced against the subsequently acquired homestead of first party until said second party actually obtains the allowance of said claim, because until such allowance is obtained no debt accrues against first party which is certain and in all events payable.

Hunt v Moore, 219-451; 258 NW 114

Liability of principal and independent contractors. A contract granting the right of way over land for an underground pipe line, on payment of a certain sum per rod, and on payment of "damages to growing crops, fences, or improvements occasioned in laying, repairing, or removing lines", does not constitute an agreement by grantee that he will pay damages consequent on the negligent act—tort—of an independent contractor in injuring grantor's private bridge which was located wholly outside said right of way.

Asher v Continental Corp., 216-977; 250 NW 179

Contracts in name of association—personal liability. One who contracts for, or in the name or on behalf of, a legal nonentity, e. g., an unincorporated society or association, is personally liable on the contract unless he establishes the fact that at the time of so contracting his nonpersonal liability was agreed on.

Haldeman v Addison, 221-218; 265 NW 358

Prohibited changes—futility. A written contract, which in effect declares that no change in any portion of the contract shall be valid, cannot be construed to take away the right of the parties to subsequently orally modify the contract; nor does a provision for the termination of the contract in a certain manner preclude the parties from mutually terminating it in some other manner.

Webster County Co. v Nebraska Co., 216-485; 249 NW 203

Construction of undefined term. A stipulation that certain property was sold for the purpose of using the same as prizes in the operation of a punch board, is a concession that the term "punch board" has a general recognized meaning which must control the construction of the stipulation.

Parker-Gordon v Benakis, 213-136; 238 NW 611

Statutes part of special assessment certificate holder's contract—no effect by amending tax sale statute. The right of a special assessment certificate holder to take advantage of statutes providing that special assessments be collected in the same manner as ordinary taxes, and to have the property sold to pay assessments, was a part of his contract when he purchased the certificates, and was not defeated when another statute providing for tax sales was amended to prevent the tax sale of property against which the county holds a tax sale certificate.

Bennett v Greenwalt, 226-1113; 286 NW 722

Right to lien—vendee's contract to keep in repair. An executory contract by a vendee of premises that he will keep the premises in reasonably good repair cannot be construed as authorizing the vendee to install an entirely new bathroom equipment, and to bind the vendor's interest therefor.

Darragh v Knolk, 218-686; 254 NW 22

Restraint of trade—scope of territory. An agreement not to engage in a named business in a named place presumptively embraces said named place and the trade territory adjacent thereto.

Haggin v Derby, 209-939; 229 NW 257

Contract pending appeal. Where, pending an appeal which involved the title to land, the rival claimants under a landlord's lien and under a chattel mortgage on the crop entered into an agreement for the harvesting and sale of the crop and the holding of the proceeds until the appeal was decided, held that the contract evidently contemplated that the final holding on appeal would settle the right of one or the other of the parties to the controversy without further litigation.

Farber v Andrew, 208-964; 225 NW 850

Varying contract by evidence of custom. Principle recognized that a clearly expressed and unambiguous contract cannot be varied by evidence of a custom.

Wall v Ins. Co., 217-1106; 253 NW 46

Evidence of custom and usage—contract prevails. Evidence of custom and usage cannot prevail against an express contract to the contrary.

Paramount Pictures v Maxon, 226-308; 284 NW 119

Change in venue of action. A legislative change in the venue of an action may validly be applied to an existing contract.

Grain Belt Ins. v Gentry, 208-21; 222 NW 855

(b) GOOD WILL

Sale or transfer. Principle reaffirmed that the "good will" of a business may be sold or otherwise transferred.

Haggin v Derby, 209-939; 229 NW 257

Contract not to practice profession. Injunction will lie to restrain the violation of a contract wherein the defendant has agreed not to practice his profession in a named place for a stated period, the contract not being oppressive, unreasonable, or inequitable; and this is true even tho the plaintiff might have a remedy at law in the form of damages.

Proctor v Hansel, 205-542; 218 NW 255; 58 ALR 153

(c) TIME AS OF ESSENCE

Time of making payments as condition precedent. The making of payments under a contract at the exact time specified therein will not be deemed a condition precedent to the right to maintain an action for breach of the contract by the payee, when the contract does not, expressly or impliedly, make the time of payment the essence of the contract.

Armstrong Pav. v Nielsen, 215-238; 245 NW 278

Equitable relief—proof. Time will not, in equity, be deemed of the essence of a contract when the parties thereto have neither expressly so stipulated, nor, by their conduct, revealed that such was their understanding of the contract. So held as to the time of performance of a compromise settlement of mortgage indebtedness.

First Tr. JSL Bk. v Hanlon, 223-440; 273 NW 114

Services and compensation—ambiguous contract in re commissions. Contract construed, and held to provide no commission on sales until said sales exceeded a named amount.

Clinton v Music Co., 209-636; 228 NW 664

(d) WHAT LAW GOVERNS—LEX LOCI CONTRACTUS

Interstate carrier—lex loci contractus. A contract of employment for and on behalf of an interstate commerce carrier is consummated in this state when the conditional offer of employment is accepted in this state by a resident thereof, even tho the offer is made in a foreign state.

Chicago RI Ry. v Lundquist, 206-499; 221 NW 228

Mortgages—deficiency after foreclosure—action to recover—lex loci contractus. In an action in this state on promissory notes executed in Nebraska, and secured by mortgage on Nebraska land, to recover the balance due after foreclosure of said mortgage, the substantive rights of the parties must be determined by the lex loci contractus.

Federal Tr. Co. v Nelson, 221-759; 266 NW 509

What law governs. When the payee of a promissory note prepares it in blank in this state and sends it to the proposed maker in another state without any specific direction as to the method or manner in which it is to be returned to the payee after being signed, delivery takes place only when the note reaches the hands of the payee in this state. It follows that the statute of limitation of this state governs such note.

In re Young, 208-1261; 226 NW 137

Statutory bonds—law governing. A statutory bond executed in a foreign state and delivered in this state will be construed under the laws of this state.

Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495

Interest rate—when foreign law governs. In an action on a foreign contract to recover a money judgment, it is proper to allow interest at the rate authorized by the laws of such foreign state.

Benson v Sawyer, 216-841; 249 NW 424

Foreign law—comity. The law of a foreign state, which holds parties who are interested as shareholders in an unincorporated association, personally and individually liable as partners for the debts of such association even tho said parties, to the knowledge of the creditor, specifically contracted against such liability, will not be enforced by the courts of this state.

Farmers Bank v Anderson, 216-988; 250 NW 214

Place of contract—order in this state and acceptance in foreign state. The execution in this state by a proposed vendee of a naked order for goods, and the oral acceptance of such order by the vendor at his place of business in a foreign state, do not constitute the making of a contract in this state.

Anderson & Co. v Monument Co., 210-1226; 232 NW 689

Statute of limitation—what law governs. A note and mortgage representing a loan on land in a foreign state, duly signed in a foreign state by a resident thereof, and forwarded to the payee in this state, is an Iowa contract insofar as the statute of limitation is concerned, when such forwarding and receiving were with the understanding that the payee would apply the amount of the loan in discharging a prior matured mortgage on the land, if in so doing payee would be assured of a first lien.

Andrew v Ingvolstad, 218-8; 254 NW 334

II CONSTRUCTION AND OPERATION—concluded

(d) WHAT LAW GOVERNS—LEX LOCI CONTRACTUS—concluded

Iowa employment contract—action—place of business. Action for damages under oral contract of employment made in Iowa is not governed by the place where the contract was entered into, but may be maintained in state where employer's business was "localized".

Severson v Hanford Air Lines, 105 F 2d, 622

Foreign corporation without business permit—action on contract barred. A foreign stock corporation which, through its president while personally present in Iowa, sells on contract, accepts payment, part in cash and part in notes, and makes delivery of a machine, is doing business in the state, and not having first secured a permit to do business may not maintain an action on such contract.

Actino Lab v Lamb, 224-573; 278 NW 234

Common-law rule for recovery — modification. Principle reaffirmed that the common law rule that there can be no recovery on a written contract without a showing that it has been strictly performed has been modified in this state.

Gibson v Miller, 215-631; 246 NW 606

III ORAL CONTRACTS IN GENERAL

Parol evidence of execution of oral contract. Oral evidence of the execution of an oral contract, which has been performed or partially performed by one of parties, may be introduced in evidence, altho the witnesses who testified were not present when the contract was made.

Ford v Young, 225-956; 282 NW 324

Fully performed oral contract. A count which pleads a fully performed oral contract for an interest in real estate is not subject to a plea of the statute of frauds.

Halstead v Rohret, 212-837; 235 NW 293

Contemporaneous collateral contract. An oral contract contemporaneous with the execution of a written contract cannot be deemed collateral to said written contract unless said oral contract has a supporting consideration separate and distinct from the consideration which supports the written contract.

In re Simplot, 215-578; 246 NW 396

Specific performance—transfer to equity. In consolidated actions at law, involving a promissory note payable "to ourselves", the issue of specific performance of an oral contract by one of the makers to indorse the note, should be transferred to the equity calendar.

In re Divelbess, 216-1296; 249 NW 260

Statute of frauds—part performance. An oral agreement that a mortgagor of real estate will pay the mortgagee a stated sum, and, in addition, will convey to the mortgagee the mortgaged premises in full satisfaction of the mortgage debt, is not within the statute of frauds. (Contra, Fairall v Arnold, 226-977; 285 NW 664)

Northwestern Ins. v Steckel, 216-1189; 250 NW 476

Promise to answer for debt of another—promise prior to any indebtedness. A defendant who is simply an old acquaintance of a deceased, and who, before any funeral expenses are contracted, orally promises to pay such expenses may not say that he contracted to pay the debt of "another". Evidence held to present jury question on the issue whether an oral promise was direct or collateral.

Samuels Bros. v Falwell, 215-650; 246 NW 657

Striking legally unprovable allegation. Legally unprovable allegations in pleadings are properly stricken on motion. So held where, in an action at law to recover the amount due on a written lease, defendant, while admitting the due execution by him of the written lease, pleaded a prior oral lease—contradictory of the written lease—as containing the correct terms of the leasing.

Jacobsen v Moss, 221-1342; 268 NW 162

Absence of agreement to pay entire price—effect. An allegation of oral sale of an article to a defendant is prima facie established, with consequent liability for the entire purchase price, by evidence that the price was fully understood and agreed upon, and that the defendant took and retained possession of the article, notwithstanding the fact that the defendant (1) promised to pay one-half only of the purchase price, and (2) promised, without warrant or authority, that a third party would pay the remaining one-half.

Finnerty v Shade, 210-1338; 228 NW 886

Assumption of mortgage—unallowable contradiction. A deed to land wherein the grantee assumes one-half of an existing mortgage on the land may not be modified by testimony to the effect that when the deed was executed it was orally agreed that the grantee should continue to be bound by the original written contract of sale wherein he agreed to assume the entire mortgage.

Reit v Driesen, 212-1011; 237 NW 325

Mortgages — priority — oral agreement of parties. The assignee of one of two simultaneously executed mortgages on the same property to different parties may show, in an action wherein the foreclosure of each mortgage is asked, that just prior to the execution of said mortgages it was orally agreed by all parties to both mortgages that a certain one

of said mortgages should be the first lien on the property.

Wuennecke v Hausman, 216-725; 247 NW 531

Oral wage agreement—erroneous writing—effect of employee's conduct. An oral wage scale agreement applicable to the first few weeks of employment, incorrectly reduced to writing by employer's agent, but correctly followed in paying wages which was not challenged by employee during the several years he continued in this employment, justifies a reformation of the writing to conform to the oral agreement.

Koch v Abramson, 223-1356; 275 NW 58

Oral employment agreement—no consideration for promissory note. Where one person agrees to make a loan of $3,500 to start a corporation and does loan $1,500 of this sum taking in exchange a promissory note, the borrower agreeing to employ the lender as a bookkeeper and salesman but for no definite period of time, such employment feature of the agreement is a separate contract and not the consideration for the loan.

Hillje v Tri-City Co., 224-43; 275 NW 880

Apparent scope of agent's authority—evidence. Evidence that an agent, for many years, had charge of a certain department of his principal's business and had, during said times, negotiated many written contracts relative to the subject-matter in his charge, may create a jury question on the issue whether the agent had authority, within the scope of his apparent powers, to enter into an oral contract covering the subject matter in his charge.

Webster Co. v Nebr. Co., 216-485; 249 NW 203

Liability on note—discharge of maker—insufficient evidence. Evidence held insufficient to establish oral agreement discharging makers from liability on note and substituting purchaser of property for maker.

Citizens Bank v Probasco, (NOR); 233 NW 510

Custody and care of ward's estate—valid contract by ward. A mentally competent adult person who has, on her own voluntary application, been placed under guardianship solely because of her physical inability to freely move about and transact her business—tho no statute existed which authorized the appointment of a guardian under such application—is not deprived of power to enter into a valid oral contract for necessaries in the form of board and lodging and personal care for herself. And such contract, when executed, will be binding on her estate, even tho never approved by the probate court having jurisdiction over the guardianship.

Dean v Atwood, 221-1388; 221 NW 371

Enforceability—time limit. An oral agreement between a debtor and his creditors under which the creditors agree to accept a composition amounting to less than their demands is enforceable in equity; and if no time for performance be agreed on, the law will imply a reasonable time. Evidence reviewed and held to establish such agreement, and that the debtor's offer of performance was within a reasonable time.

Bailey v Ins. Co., 221-1195; 268 NW 173

Sale of goods—unenforceable contracts. Replevin for the possession of an existing article of personal property cannot be maintained when the action is based solely on an oral contract of purchase which is clearly within the statute of frauds, and under which contract title necessarily did not pass.

Lockie v McKee, 221-95; 264 NW 918

Conditional sale (?) or contract of agency (?). The act of the owner of an article in reluctantly permitting it to pass into the possession of a party (to whom he had theretofore actually sold many like articles) with permission to forthwith sell the article (which sale was then practically assured) at a stated cash price or to forthwith return the article, without any expressed intention of selling the article to the party so given possession, presents a jury question on the issue whether the transaction was one of simple agency, or whether the transaction constituted an oral conditional sale contract which would not be valid against a third party who had no knowledge thereof.

Greenlease-Lied Motors v Sadler, 216-302; 249 NW 383

Oral testimony showing sale conditions—inadmissibility. In an action to recover on trade acceptances by indorsee thereof, where there is no provision in sales contract prohibiting either delivery, negotiation, or transfer of such acceptances which are regular on their face, held, proof of an alleged oral agreement that acceptances were subject to certain conditions in sale contract is inadmissible in evidence.

State Bank v Feed Co., 227-596; 288 NW 614

Lease—husband's oral termination invalid. An oral agreement between the landlord and the tenant-husband, to terminate a joint lease of the husband and wife, will not terminate their homestead rights in 40 acres of the land, so as to permit a forcible entry and detainer action, since a homestead can be terminated only in writing by both husband and wife signing the same joint instrument containing a legal description of the homestead.

Wright v Flatterich, 225-750; 281 NW 221

Insurance—assignment by deceased. An oral contract assigning insurance, made with a deceased, must be established by clear, satis-

III ORAL CONTRACTS IN GENERAL—continued

factory, and convincing evidence and leave no doubt as to the sufficiency of the consideration.

In re Hazeldine, 225-369; 280 NW 568

Implied authority of insurance agent. An insurance company which, in the issuance of policies against loss by hail, customarily dates said policies from the date of the insured's written application therefor, and not from the date of the acceptance by the company of such applications, must, notwithstanding provisions in said applications to the contrary, be deemed to have impliedly authorized its soliciting agents, on taking such applications, to validly enter into oral, preliminary contracts of insurance covering the period from the date of said applications to the date of their acceptance or rejection.

Boever v Ins. Co., 221-566; 266 NW 276

Contractor authorized by owner to hire architect. It is common knowledge that ordinarily the architect is employed by the owner and not by contractor, but evidence held to show that owner authorized contractor to employ an architect in owner's behalf.

Sugarman Co. v Phoenix System, (NOR); 243 NW 369

Well drilling—casing damage—discovery. In action on oral contract to recover for drilling well where, more than four months after judgment, defendant discovered damage to casing caused by plaintiff in digging the well, and thereupon moved for new trial, held that newly discovered evidence was not cumulative, and that under peculiar circumstances existing, the defendant was not guilty of lack of diligence in making such discovery.

Ross v Fahey, (NOR); 205 NW 855

Maintenance of fences. Principle reaffirmed that adjoining property owners may validly bind themselves by oral contract to maintain designated portions of partition fences.

Nichols v Fierce, 202-1358; 212 NW 151

Dead man statute—failure to prosecute claim or disclaimer of interest ineffective. A divorced wife of a deceased may not become a competent witness to an oral contract made jointly between herself, her mother, and the deceased, in order to subject his insurance to payment of her mother's valid probate claim, merely by failing to prosecute a similar claim of her own and disclaiming any interest in the claim in litigation, since she still has her claim and may enforce payment if the contract is established.

In re Hazeldine, 225-369; 280 NW 568

Life estate—proof of creation. A series of mortgages accepted by a bank describing the undivided third interest of a son subject to the life estate of the mother, together with other evidence, held to establish an alleged oral contract of the heirs and their mother to create such life estate in the property of a deceased intestate husband and father; consequently, partition of the realty was properly denied against the mother.

Redding v Redding, 226-327; 284 NW 167

Oral contract to devise—evidence to establish. Evidence to establish an alleged oral contract between a father and son, that the father would leave to the son a farm when he died, must be established by clear, satisfactory, and convincing evidence and it is the duty of the court to subject the evidence to every fair test which may tend to weaken its credibility.

Blezek v Blezek, 226-237; 284 NW 180

Love and affection — consideration — sufficiency. In an action to enforce grandfather's oral promise to will property to grandson in return for naming grandson after him, court held that love and affection, while being a "good" consideration, was not a sufficient consideration when unsupported by a pecuniary or material benefit, and created, at most, a bare moral obligation.

Lanfier v Lanfier, 227-258; 288 NW 104

Oral contract to convey land at death—absence of "strong equities". Absence of strong equities in favor of the plaintiff, a son trying to establish an oral contract with his father, since deceased, does not tend to weaken his corroborating testimony.

Blezek v Blezek, 226-237; 284 NW 180

Attachment when not waiver of unknown right to equitable lien. Where a father had orally contracted with a bank to pledge his son's share in his estate as security for a note executed by his son, later a bankrupt, on the understanding that payment from the father would not be sought while he lived, and where the father's copy of the contract contained an additional notation, made by a bank officer, that the bank would seek payment only from the son's share in the estate, which notation was unknown to the succeeding officers of the bank at the time of commencing an attachment action based on the father's attempted disposal of the pledged real estate, the bank's equitable lien on the real estate was not waived by the proceeding in attachment.

Emerson Bank v Cole, 225-281; 280 NW 515

Interest in real estate—part payment. Principle reaffirmed that part payment of the purchase price on an oral contract for an interest in land takes the contract out of the statute of frauds.

Bremhorst v Coal Co., 202-1251; 211 NW 898

Contract of sale—statute of frauds. In buyer's action on an oral contract for sale of a business college where there was no competent

evidence taking case out of statute of frauds, a directed verdict for defendant was proper.

Patterson v Beard, 227-401; 288 NW 414

Change and correction—statute of frauds. An oral agreement to change a long established boundary fence is enforceable when taken out of the statute of frauds (1) by the mutual taking of a new survey, (2) by the building of a new fence in accordance with the said survey, and (3) by taking possession of the lands inclosed by such new fence.

Cheshire v McCoy, 205-474; 218 NW 329

Debt or default of another—original or collateral promise. The statute of frauds relative to answering for the debt of another does not enter into the proof of an oral contract to the effect that plaintiff should perform stated services and that the defendant would unconditionally pay therefor.

Richmann v Beach, 201-1167; 206 NW 806

IV MODIFICATION AND MERGER

General rule. Principle reaffirmed that there can be no modification of a contract unless there is a meeting of the minds of the parties on the modification.

Heggen v Coal Co., 217-820; 253 NW 140

Evidence to be clear and satisfactory. A court of equity will only reform a written instrument when it is moved to do so by clear and satisfactory evidence of a mutual mistake or other reason for reformation.

Knott v Ins. Co., 228- ; 290 NW 91

Oral contract merged in written. Principle reaffirmed that the terms of an oral contract are presumed to be merged into a subsequently executed written contract covering the same subject matter.

Jacobsen v Moss, 221-1342; 268 NW 162

Subsequent contract working merger. A contract is merged into a subsequent contract only in those cases where the subsequent contract completely covers the subject matter of the first contract, is inconsistent with the first contract, and is intended as a substitute for the first contract.

Oskaloosa Bank v Bank, 205-1351; 219 NW 530; 60 ALR 1204

Nonmerger of oral in subsequent written contract. An oral contract on a distinct consideration, and in no manner varying or contradicting a later written contract between the same parties on another and different consideration, is not merged in said written contract, even tho said oral contract was the inducing cause for the execution of the written contract.

Stoner v Stehm, 200-809; 202 NW 530

Contemporaneous writing. An absolute promise in a promissory note to pay on or before a named time cannot be deemed qualified and limited by a contemporaneous written contract which reaches no further than a promise by the maker to exercise certain economies in his business and thereby possibly effect payment before the stipulated time.

Hughes v Campbell, 202-1352; 212 NW 115

Independent undertakings. An original written contract obligation is necessarily not abridged, enlarged, or modified by a subsequent undertaking which is independent of and separate from said original undertaking.

Schmoller Co. v Smith, 204-661; 215 NW 628

Evidence—sufficiency. Evidence reviewed and held wholly insufficient to establish a pleaded modification of a contract relative to the compensation of an agent for his services and for the use of his automobile in performing said services.

Hueston v Pointer Co., 222-630; 269 NW 754

Mutual partial modification—remainder in force. In a well drilling contract, a provision to use 4 inch casing all the way to the bottom of the well may be subsequently modified by an oral agreement to use 3 inch pipe, implied from the conduct of one party in accord with a change proposed by the other; but such a modification will not, necessarily, also modify the contract price per foot for the drilling.

Collins v Gard, 224-236; 275 NW 392

Right of action and defense—grounds—mistake. Equity will, on clear, satisfactory, and convincing evidence that such was the actual contract of the parties, insert in a contract for the exchange of lands a provision that one of the parties shall pay the interest on the mortgage on his land up to the time he delivers possession of the land; and this is true tho, at the time of executing the contract, the parties mistakenly believed that a particular clause of the contract covered said matter of interest.

Wormer v Gilchrist, 210-463; 230 NW 856

Fraud-induced contract. One who, after discovering that he had been fraudulently induced to enter into a contract of lease, secures a modification of the contract substantially beneficial and advantageous to himself, thereby waives the fraud and the original rights arising by reason thereof.

Timmerman v Gurnsey, 206-35; 217 NW 879

Prohibited changes—futility. A written contract, which in effect declares that no change in any portion of the contract shall be valid, cannot be construed to take away the right of the parties to subsequently orally modify the contract; nor does a provision for the termination of the contract in a certain manner preclude the parties from mutually terminating it in some other manner.

Webster Co. v Nebr. Co., 216-485; 249 NW 203

IV MODIFICATION AND MERGER—concluded

Consummating contract in manner inconsistent therewith—effect. An original contract of sale of real estate is necessarily merged and discharged when the parties, on final settlement day, consummate the deal in a manner which is entirely inconsistent with the original contract as regards parties, price, terms, payments, conveyances, assumption of mortgage clause, and covenants generally.

Reit v Driesen, 212-1011; 237 NW 325

Contract to convey merged in resulting deed. A contract to convey land is presumed to be merged in the subsequent deed executed in performance thereof, except that the contract may be resorted to for explanation of an ambiguity or collateral agreement not incorporated in the deed, but, in instant case, deed held to be unambiguous when it warranted against all persons other than those asserting rights under existing tenancies and when the contract provided for possession upon delivery of the deed subject to all leases. Thereunder, the provisions of the contract merged in the deed so that grantee could not look to grantor for relief when the tenant in possession refused to vacate.

Swensen v Ins. Co., 225-428; 280 NW 600

Physician's certificate—conclusiveness—estoppel—absence of fraud. An Iowa statute providing that medical examiner's certificate of health issued to insured would estop insurer from setting up in defense of action on policy that insured was not in condition of health required by policy at time of issuance or delivery thereof, unless certificate was procured by fraud of insured, had the effect of changing contract through estoppel. A statute of this character does not limit the equitable jurisdiction of federal court and is enforceable therein, whether statute had been construed by Iowa supreme court as being rule of substantive law passing into contract, or as being merely a remedial right.

Mutual Ins. v Cunningham, 87 F 2d, 842

V NOVATION

Affirmative showing required. There is no such thing as an implied novation.

Blank v Michael, 208-402; 226 NW 12

Essential elements to establish. The necessary legal elements to establish a novation are (1) parties capable of contracting, (2) a valid prior obligation to be displaced, (3) consent of all parties to the substitution based on sufficient consideration, and (4) extinction of the old obligation and creation of a new one.

Wade v Central Co., 227-422; 288 NW 439

Pleading—sufficiency. A plea of novation must allege a mutual assent of all the parties affected by the transaction.

Benton v College, 202-15; 209 NW 516

Evidence—sufficiency. Evidence held ample to establish a novation under a contract for the purchase of real estate.

Montgomery v Beller, 207-278; 222 NW 846

Contract for sale of realty—consideration. A contract of novation under a contract for the sale of real estate is supported by ample consideration when the vendor agrees to divide the original contract and to have it executed by different parties and in a different manner than as provided in said original contract.

Montgomery v Beller, 207-278; 222 NW 846

New agreement supersedes old contract. When the parties to a contract mutually enter upon a new agreement abandoning the old contract, the old agreement is extinguished and any new rights accruing because of a default will not revive the old agreement, but will arise under the new and substituted contract.

Munn v Drakesville, 226-1040; 285 NW 644

New policy substituted for original contract—conclusiveness. Where a life policy is surrendered by insured to insurer, and a new policy issued therefor, the later executed policy is conclusive as to what the contract was, in the absence of mistake or fraud, and the probative force of the prior policy goes no further than the extent to which it may tend to prove there was a mistake.

Knott v Ins. Co., 228- ; 290 NW 91

Promissory note as accommodation. On the issue whether promissory notes were received by a bank in payment of commercial paper surrendered by the bank, it may be shown that the notes were intended by all the parties to be accommodations for the bank receiving the surrender and to enable the surrendering bank to account, as a matter of bookkeeping, for the paper in question, and that the said accommodation notes were not to be paid by the makers thereof, but by other means.

Flack v Bank, 211-6; 228 NW 667
Flack v Bank, 211-15; 228 NW 670

Mere extension of note at reduced interest. An agreement to extend the time of payment of a promissory note, and mortgage securing it, at a reduced rate of interest does not constitute a novation.

Des Moines JSL Bk. v Allen, 220-448; 261 NW 912

Consideration, failure of — nonestoppel to plead. The maker of a promissory note is not estopped to plead failure of consideration for the note as to him because of the fact that, subsequent to the signing, he was a party to a contract under which there was a novation of security.

Insell v McDaniels, 201-533; 207 NW 533

Insufficient showing. A purchaser of real estate who has assumed the payment of existing incumbrances may not base a novation

of his obligation on the simple expedient of causing the deed to be made to his wife as grantee.

Richardson v Short, 201-561; 207 NW 610

Consummating contract in manner inconsistent therewith. An original contract of sale of real estate is necessarily merged and discharged when the parties, on final settlement day, consummate the deal in a manner which is entirely inconsistent with the original contract as regards parties, price, terms, payments, conveyances, assumption of mortgage clause, and covenants generally.

Reit v Driesen, 212-1011; 237 NW 325

Pledge of stock—intention and practical construction of parties. A pledge of corporate shares of stock as collateral security will not be deemed novated into subsequently taken security by an agreement in connection therewith when such novation was never discussed between the parties, when the collateral holder never intended such novation, when the pledgor's claim of novation was very belated, and when the parties had by their practical conduct negatived such novation.

Winfield Bk. v Snell, 208-1086; 226 NW 774

Intent as controlling element. An agreement between a partnership and the individual members thereof, on one side, and a corporation, on the other side,—the corporation having succeeded to the business of the partnership,—to the effect that the corporation "hereby assumes and takes over as its own all the liabilities and obligations of said partnership", does not constitute a novation of an individual claim held by one of the partners against the partnership, unless the parties actually intended such novation.

In re Talbott, 209-1; 224 NW 550

Action for purchase price. A plaintiff-vendor who seeks to recover on a contract of sale of land, but pleads that, on performance day, he conveyed to a party other than the contract purchaser, but under an oral agreement that, by so doing, the contract purchaser would not be released, must stand or fall on his chosen theory. In other words, he must establish his own theory of non-novation.

Bobbitt v Van Eaton, 208-404; 226 NW 79

Contract for employment of acrobats—assignment to booking agency — non-novation. Where a broadcasting company assigned to a booking agency an oral contract for employment of an acrobatic team, and such agency subsequently became the booker of the acrobats under a written contract, the company was not relieved of liability under the employment contract on the ground of "novation", because there was no evidence that all parties consented to a substitution of the agency for the company.

Wade v Central Co., 227-422; 288 NW 439

Accord and satisfaction (?) or novation (?). An "accord" without "satisfaction" is a nullity; but nevertheless, the agreement of the parties, even tho the subject-matter be a tort, may rise to the dignity of a novation—the mutual substitution of a new obligation for an existing one which is thereby extinguished. Whether an obligation has been novated is necessarily a jury question, on conflicting testimony.

Wheeler v Woods, 205-1240; 219 NW 407

Novation as species of accord and satisfaction. Since the term "novation" is frequently applied when a substitution of obligation is effected as the result of an accord and satisfaction, it may be said that novation is a species of accord and satisfaction.

Munn v Drakesville, 226-1040; 285 NW 644

Substitution of new debtor. A debtor may validly contract with another that such other will wholly take over and assume the debtor's obligation, and such debtor is thereby fully released if the creditor acquiesces in the substitution of the new debtor and subsequently accepts acts of performance by the latter.

Reimers v Tonne, 207-1011; 221 NW 574

Substitution of new debtor—consent. A creditor may, by his actions and conduct, consent to the substitution of a new debtor.

Andrew v American Tr. Co., 219-1059; 258 NW 921

Nondischarge of existing obligations—extension of mortgage. An agreement between a mortgagee and an assumptor of the mortgage for an extension of time of payment does not constitute a novation, when the prior existing obligations for the same debt are not referred to, and when such extension agreement was entered into without the knowledge or consent of prior existing obligors.

Royal Ins. v Wagner, 209-94; 227 NW 599

Substitution and release—determination—new contract not creating presumption. The mere fact of the making of a new contract by which a third party becomes obligated to pay another person's previously existing indebtedness does not alone give rise to presumption that the creditor accepts the new debtor and releases the original debtor—question as to whether there is such a release is one of fact to be determined by all the evidence in the case.

Wade v Central Co., 227-422; 288 NW 439

VI ACCORD AND SATISFACTION

Discussion. See 3 ILB 240—Accord and satisfaction; 24 ILR 697—Outmoded terminology

Accord without satisfaction. An accord without a satisfaction is a nullity.

Hughes v National Corp., 216-1000; 250 NW 154

Officers—compensation—acceptance in part—effect. An officer who accepts part of a statutory compensation does not thereby es-

VI ACCORD AND SATISFACTION—cont.

top himself from enforcing payment of the balance.

Broyles v Mahaska County, 213-345; 239 NW 1

Action commenced—note to settle unlawful transaction—estoppel. Where, after an original notice of an action to recover commissions in purchase and sale of grain on Board of Trade had been served so that action was deemed commenced under the statute providing for service of original notice, a compromise was consummated whereby defendant executed a note extending payment for a period of 6 months, defendant is estopped in subsequent action on note to plead or prove that transactions were unlawful, since, regardless of validity of original transaction, the compromise, effected in good faith, estopped either party from any further litigation of matter in dispute.

Hoyt v Wickham, 25 F 2d, 777

Inadvertent cashing of check. When parties are in a bona fide dispute as to the amount due on account, the receipt by the creditor from the debtor of a check marked "In full of account," and accompanied by a letter to the same effect, and the cashing of said check in the ordinary course of business, constitute a complete accord and satisfaction, even tho the creditor, in cashing the check, overlooked the fact that both the check and the letter notified him that the remittance was in full settlement of the account.

Minnesota Co. v Register Co., 205-1228; 219 NW 321

Bona fide dispute. The settlement of a bona fide dispute as to the amount of an account is ample consideration for an accord and satisfaction.

Minnesota Co. v Register Co., 205-1228; 219 NW 321

Nature and requisites—execution. Principle recognized that an accord and satisfaction can exist only when there is a bona fide dispute, a compromise as to the amount to be paid, and an execution of the compromise agreement.

Olson v Shuler, 203-518; 210 NW 453

Debts included—plain and literal meaning controlling. In construing an "assumption-and-agreement-to-pay" clause in a deed of conveyance which, concededly, was executed and delivered in connection with a compromise and settlement agreement between a creditor and debtor, the court has no choice but to give effect to the plain and literal meaning of the words employed in said clause, there being no competent evidence dehors the written clause reflecting a different intention.

Monticello Bk. v Schatz, 222-335; 268 NW 602

Offer accepted or rejected as a whole. When a town warrant was issued in full payment of a disputed claim and was accepted with such knowledge, there was an accord and satisfaction of all claims, as such offer must be accepted or rejected as a whole.

Munn v Drakesville, 226-1040; 285 NW 644

Claims against county. The allowance by the board of supervisors of a lump sum on a claim consisting of several unliquidated items, and the taking and cashing by claimant of a warrant for said allowed amount, constitute a final accord and satisfaction.

Smith v Cherokee Co., 219-475; 257 NW 788

When plea unallowable. A plea of accord and satisfaction is properly stricken from a pleading when the pleading affirmatively shows that no basis existed or could exist for the plea—affirmatively shows that no bona fide dispute existed or could exist as to the amount due under the instrument on which suit was brought.

Jacobsen v Moss, 221-1342; 268 NW 162

Burden of proof. A debtor has the burden to establish his plea that the creditor accepted a check in full payment of the debt in question.

Kruidenier Co. v Manhardt, 220-787; 263 NW 282

Evidence—sufficiency. Evidence held insufficient to establish per se an accord and satisfaction.

Goben v Paving Co., 218-829; 252 NW 262
Koch Co. v Koss Co., 221-685; 266 NW 507

Evidence—sufficiency. Evidence exhaustively reviewed in an equitable action wherein was involved the issue of accord and satisfaction, and, inter alia, held that it is not in accord with reason that an aged and experienced, and financially involved business man would convey property of substantial value (and the last remnant of his once ample fortune) for no consideration whatever except that the grantee would pay to the public authorities the taxes thereon.

Stuart v Beans, 221-307; 263 NW 816

Payment—jury question. The issue of accord and satisfaction is for the jury when the evidence is not clear whether one party tendered the sum in full settlement, or, if he did so tender it, whether the other party so accepted the sum.

Zabawa v Osman, 202-561; 210 NW 602

Question of fact—conclusiveness of findings. Whether the facts and circumstances attending the receipt by a creditor from a debtor of a check for an amount less than claimed by the creditor, and the cashing of the check by the creditor, constituted an accord and satisfaction may be a question of fact; and the findings of the court thereon in a law action tried to

the court, on conflicting and supporting testimony, are necessarily conclusive on the appellate court.

Barth Co. v Kelly, 211-1154; 235 NW 471

New trial—grounds. New trial is necessarily proper when based on the established ground that the court failed to submit a defensive issue (e. g., accord and satisfaction) as to which the testimony makes a jury question.

Goben v Paving Co., 204-466; 215 NW 508

VII RESCISSION OR ABANDONMENT

(a) IN GENERAL

Technical breach. Principle reaffirmed that a purely technical and nonsubstantial breach of a contract affords no proper grounds for a rescission.

White v Massee, 202-1304; 211 NW 839; 66 ALR 1434

Executory contract—mutual disregard. Mutual disregard of an executory contract nullifies it.

Kortum v Kortum, 211-729; 234 NW 220

Cancellation by defaulting party. A contract may not be canceled by the arbitrary action of a party who is in default.

Atlas Co. v Huffman, 217-1217; 252 NW 133

Rescission as alternative remedy. Rescission will not be granted as a matter of course on denial of specific performance.

Davis v Eaton, 211-837; 234 NW 252

Burden of proof. To sustain a cause of action for rescission, proof of fraud must be clear, satisfactory, and convincing, and a mere preponderance is not sufficient.

Wiley v Bank, (NOR); 257 NW 214

Fraud—irrevocable waiver of action for damages. One who, with full knowledge that he has been fraudulently inveigled into signing an option contract for the sale of his property, elects not to rescind but to affirm and perform the contract, and does perform at a time when the contract is wholly executory and without consideration, thereby irrevocably waives, as a matter of law, any and all right to sue the wrongdoer for damages.

Ankeney v Brenton, 214-357; 238 NW 71

Loss of right by foreclosure. The purchaser of a mortgage-secured promissory note may not rescind on the ground of fraudulent representations as to the value of the security when, with full knowledge of the fraud, he forecloses the mortgage, bids in the property for the full amount of the judgment, and later takes a sheriff's deed to the premises.

Iowa Loan Co. v Bank, 200-952; 205 NW 744

Rescission for fraud—general denial—effect. Where plaintiff alleges rescission of a contract of sale because of defendant's fraud, and seeks to recover the money paid, a general denial does not raise the issue that plaintiff, after discovering the fraud, elected to affirm the contract.

Blecher v Schmidt, 211-1063; 235 NW 34

Mutuality of rescission—proof required. The vendee of goods who, in an action for the purchase price, defends on a plea of rescission must show that the rescission was mutual, expressly or impliedly.

Central Co. v Clancy, 206-1090; 221 NW 774

Rescission of sales contract — incurable breach. A dairyman who contracts to have his cows tested for tuberculosis, and to sell his milk to a retailer at a price substantially in excess of the market price for other milk of the same butterfat test, fatally breaches his contract by failing, for twelve months, (§3077, C., '27) to have his cows so tested, even tho a test, subsequent to the retailer's rescission, shows that the cows are free from tuberculosis.

Niederhauser v Jackson Co., 213-285; 237 NW 222

Unauthorized representations of seller's agent—buyer's rescission for falsity—seller's responsibility. Where buyer rescinds contract induced by fraudulent misrepresentations of seller's agent and seeks recovery of purchase price, the agent's limited authority, otherwise binding on the buyer, does not preclude the buyer from alleging and proving such representations, and the seller is bound by such representations even tho unauthorized and even tho the contract expressly limits the agent's authority to make agreements.

Robinson v Main, 227-1195; 290 NW 539

Corporate contract—rescission by stockholder unallowable. A stockholder may not rescind a contract entered into by the corporation of which he is a stockholder and another corporation.

Andrew v Trust Co., 219-921; 258 NW 911

Termination without cause. A contract for the transportation of pupils for an entire school year, but containing a reservation by the board of right to terminate the contract at any time, enables the board to terminate the contract peremptorily at its pleasure, and without assigning any reason for such action.

Black v School Dist., 206-1386; 222 NW 350

School sites—contract—rescission and cancellation. The purchase by a school board of a schoolhouse site after bonds for such purchase had been duly voted, but prior to any bond levy, and the due issuance of a warrant in payment for such site, are not canceled or rescinded by the subsequent action of the

VII RESCISSION OR ABANDONMENT—continued

(a) IN GENERAL—continued

electors in voting to rescind their former action authorizing the bonds.

Looney v School Dist., 201-436; 205 NW 328

Contract employing physician—future practice restraint unaffected by indefinite employment extension. When a physician is employed by a medical clinic in a locality where he is not acquainted, his contract, agreeing that at its termination he will not practice his profession for ten years within a certain locality, is not invalidated by reason of an indefinite extension of the employment period mutually acted upon by all parties, and injunctive relief was properly granted to employer.

Larsen v Burroughs, 224-740; 277 NW 463

Contracts to devise. The abandonment of a contract which is, in effect, a contract to devise property, and which is highly advantageous to the party who is alleged to have done the abandonment, must be established by very clear and cogent testimony.

Kisor v Litzenberg, 203-1183; 212 NW 343

Alteration of plans — nonabandonment of contract. Where a city council hired an engineer to reconstruct a sewage disposal plant for a lump sum compensation, and thereafter adopted a motion to hire an engineer to investigate the adoption of a "trickling filter system" as a substitute for the original plan, to which the engineer who had been employed protested that the original contract was for the entire engineering work, and where a motion before the council to reject engineer's original plans was lost, but a motion was adopted to instruct the engineer to change the original plans, nevertheless the adoption of such motion to change original plans was not an abandonment of the original contract as respects the right of the engineer to compensation.

Slippy Corp. v Grinnell, 226-1293; 286 NW 508

Banking corporations — merger contract — nonrescission. A contract for the merger of two banking corporations must be deemed final and irrevocable, even tho there has not been full compliance with every provision thereof, (1) when the corporation receiving the merger has passed into insolvency, (2) when, prior to such insolvency, substantial and good faith acts were performed by both parties in fulfillment of the contract, (3) when neither corporation ever attempted to rescind, and (4) when the restoration of the status quo would probably be impossible.

Andrew v Trust Co., 219-921; 258 NW 911

Instructions—nonrequest for elaboration. An instruction to the effect, in substance, that plaintiff must prove that he fully carried out the contract sued on necessarily embraces and covers defendant's contention that the plaintiff had abandoned the contract. If defendant desires elaboration of the idea of abandonment, he must request an additional instruction.

Hornish v Overton, 206-780; 221 NW 483

Forfeiture by delay. The right of rescission of a contract of purchase is per se forfeited by a delay of almost two years after the full execution of the contract, with knowledge, or with ample means of acquiring knowledge, of every fact relevant to the deal.

Edmunds v Ninemires, 200-805; 204 NW 219

Nonfatal delay. A delay of over a year in declaring a rescission because of a failure of title to the land contracted for is not shown to be unreasonable, on a record revealing a conflict as to negotiations for a settlement of the controversy.

Bredensteiner v Oviatt, 202-993; 210 NW 133

Cancellation—proceedings and relief—laches —when no defense. Delay, on the part of the signer of an unmatured, negotiable promissory note, in bringing action to cancel the note for want of consideration, is quite immaterial when the delay has not been harmful to anyone.

Sterner v Bank, 221-1362; 268 NW 158

Sales—reasonable time for rescission—jury question. Whether the right to rescind a contract of sale for fraud was exercised within a reasonable time is ordinarily a jury question. Held that a rescission of a contract for the purchase of a store within five or six days after discovery of the fraud presented a jury question on the issue of reasonable time.

Blecher v Schmidt, 211-1063; 235 NW 34

Rescission within reasonable time — jury question—waiver. Where an Iowa seller's agent, by falsely representing that buyer would have exclusive territory, fraudulently induced a buyer in Texas to purchase vending machines and confections to be vended therein, the buyer, after discovering their falsity, waived such representations by accepting the machines and placing them in operation for about two months, but as to representations that the confections would withstand heat and humidity of Texas climate, and that a surety company bond would be filed with a certain bank, question as to whether rescission was made within reasonable time after discovery of falsity was for jury. It is buyer's duty to rescind contract within reasonable time after discovery that representations by seller are false, and what is a reasonable time must be determined with reference to all the circumstances, and ordinarily such question is for the jury.

Robinson v Main, 227-1195; 290 NW 539

Delay in rescinding induced by promises of other party. When the purchaser's delay in rescinding a contract to buy real estate was

induced by promises and representations of the vendor, there could be no complaint because rescission was not made within a reasonable time.

Trammel v Kemler, 226-918; 285 NW 196

Use and occupancy—measure. When the assignee of an option contract for the purchase of land rescinds after he has been put in possession, his liability for the use and occupancy of the land is measured by the reasonable value thereof, and not by the provisions of the rescinded contract.

Bredensteiner v Oviatt, 202-993; 210 NW 133

Cancellation—right of action—nudum pactum. An unmatured, negotiable, promissory note, in the hands of the original payee, will be canceled, in equity, as to a party who signs it without consideration after the transaction giving rise to the note as to the other signer had been fully closed without obligation on the part of said other signer to obtain the additional signature in question.

Sterner v Bank, 221-1362; 268 NW 158

Defaulting plaintiff—equitable relief denied. Plaintiff vendee, after first defaulting under a contract for the sale of real estate, may not in equity, while still in default, rescind the contract because defendant vendor had later allowed a prior mortgage on the real estate to be foreclosed, and, therefore, had no title to deliver if plaintiff fully performed.

Fitchner v Walling, 225-8; 279 NW 417

Loss of right. A purchaser of land may not rescind the contract, prior to final performance, because the vendor did not have title and because the incumbrances on the land exceeded the amount the purchaser was to assume, when, with full knowledge of such facts, he takes possession of the land and makes payment on his contract; neither may the purchaser rescind at a time when the deed is due, under the contract, from the vendor, if he (the purchaser) is then in default.

Keifer v Dreier, 200-798; 205 NW 472

Subscription contract—when rescission unallowable. Principle reaffirmed that a contract of subscription for corporate shares of stock cannot be rescinded after the insolvency of the corporation, there being corporate creditors who became such after the subscription was executed.

Andrew v Bank, 219-921; 258 NW 911

Contract termination. A nondefaulting party to a contract who, because of a total breach of the contract by the other party thereto, proceeds to the formal termination of the contract in the manner required by the contract is standing upon and enforcing the contract, and not rescinding it.

Dunkelbarger v Ladd, 204-1208; 212 NW 726

Rescission by assignee—effect. The assignee of an option contract does not, by giving notice that he rescinds the contract between the original optionor and optionee, destroy the rights of the original optionee under the contract. Especially is such notice inconsequential when the record shows that the original option had no value.

Bredensteiner v Oviatt, 202-993; 210 NW 133

Disaffirmance—sufficiency. Where a party has not received the property purchased and paid for, and the status quo has not been disturbed, a notice to the adverse party of disaffirmance and rescission is all-sufficient.

Ayres v Nopoulos, 204-881; 216 NW 258

Fraud—nonvariance. An allegation of fraudulent representations of title, as a basis in equity for rescission of a contract of purchase, is sufficiently met by proof of a mutual mistake by the parties as to the title.

Bredensteiner v Oviatt, 202-993; 210 NW 133

Husband and wife—property-settlement contract—fraud—insufficient defense. A defendant sued by his former wife on a property-settlement contract, fully performed by her, availeth himself nothing in the way of a defense by nakedly alleging fraud by the wife in obtaining the contract when such allegation is made neither as a basis for a rescission of the contract nor for damages.

Poole v Poole, 219-70; 257 NW 305

Finality of election—right to change remedy. A plaintiff who pleads a rescission of a fraud-induced contract, and prays for judgment for the consideration paid, may, upon discovering his inability to prove the rescission, amend his pleadings and pray for damages caused by the fraud. (Note that the reverse of this proposition presents a different rule.)

Reinertson v Struthers, 201-1186; 207 NW 247

Setting aside executed contract. A court of equity is not warranted in setting aside an executed contract such as a warranty deed in the absence of actual or constructive fraud.

O'Brien v Stoneman, 227-389; 288 NW 447

Innocent false representations. False representations, when material and justifiably relied on, furnish ample grounds for an equitable decree of rescission, even tho it be conceded that the representations were innocently made.

Lorenzen v Langman, 204-1096; 216 NW 768

Nature or subject of action—real property—action to establish and foreclose vendee's lien. An action by the vendee of land for rescission of the contract, for personal judgment against the defendant, and for the establishment and foreclosure of a lien on the land for the purchase money paid under mutual mistake, is properly brought in the county in which the

VII RESCISSION OR ABANDONMENT—continued

(a) IN GENERAL—concluded

land is located, irrespective of the residence of the defendant.

Lee v Bank, 209-609; 228 NW 570

Proper law action nontransferable in toto. An action brought on a contract (e. g., a property settlement between husband and wife), and properly brought at law, is not rendered transferable in toto to the equity calendar by defendant's plea of fraud and prayer for a judicial rescission of the contract.

Poole v Poole, 221-1073; 265 NW 653

Adjudication as to legal effect of contract. A final holding on appeal that a certain agreement between a corporation and a purchaser of its corporate shares constituted an absolute rescission of a contract of purchase of such shares becomes the law of the case, and precludes the after-presented contention that such agreement was a contract of indemnity only.

In re Selway Co., 211-89; 232 NW 831

(b) TENDER OR RETURN OF PROPERTY

Rescission—condition precedent. Rescission of a contract of sale imperatively requires a return of the status quo.

Rogers v Hale, 205-557; 218 NW 264

Rescission by buyer—restoration of goods—tender—placing goods within jurisdiction of court unnecessary. When a buyer rescinds contract for purchase of goods, his duty to restore the status quo only requires that he tender return of the goods at place of delivery, and the tender may be kept good by holding them in readiness for delivery to seller at such place on demand, it not being necessary that the goods be actually or constructively placed within the jurisdiction of the court.

Robinson v Main, 227-1195; 290 NW 539

Rescission by buyer—restoration of worthless goods unnecessary—buyer's duty to do substantial justice. On rescission of contract for purchase of vending machines and confections to be vended therein, the buyer was not obliged to return confections that had become worthless, and his failure to tender to seller a few coins found in the vending machines did not constitute such a failure to restore the status quo as would prevent him from recovering purchase price, the buyer being required only to do substantial justice to the seller.

Robinson v Main, 227-1195; 290 NW 539

Useless formal tenders unnecessary. A formal tender of property as a basis for the rescission of a contract is excusable when the one to whom the tender is to be made has given advance warning that the formal tender, if made, will not be accepted.

McTee & Co. v Ryder, 221-407; 265 NW 636

Indorsement of check. An agreement between the indorser of a check and the indorsee-bank, to the effect that the indorser would return to said indorsee that which he had received for the check, and that the indorsee-bank would return the check to the indorser, constitutes a full rescission of the contract of indorsement.

Runge v Benton, 205-845; 216 NW 737

Inability to return property. The purchaser of corporate bank stock cannot rescind when he has pledged the stock and is unable to tender it back to the seller.

Rogers v Jungkunz, 204-1119; 216 NW 705

Plea of return of consideration. The maker of a renewal note may not plead that said renewal note was executed to the indorsee of the original note because of the false and fraudulent representation of said indorsee that he was a holder without notice or knowledge of fraud in the original note, unless said maker also pleads and proves that he has returned or tendered everything of value received by him for the original note. So held where the original note was given for corporate shares of stock.

Continental Bank v Greene, 200-568; 203 NW 9

Judgment on note—relief—indivisible transaction. A party who is entitled to judgment for the return of a promissory note is necessarily entitled, on proper prayer, to a judgment for the return of another note which grew out of the same transaction and was attended by the same conditions.

Breza v Federal Society, 200-507; 205 NW 206

Status quo—nonapplication of principle. The rule of law that, when a party to a contract of sale rescinds the contract, he must restore the status quo has no application to a case where the vendor repossesses himself of the property after default of the vendee and, under and in accordance with the terms of the contract, retains the preceding payments and betterments made on the property as liquidated damages for nonperformance of the contract, depreciation, and rental; and in such case it is immaterial that the vendor, after so doing, surrendered the unpaid notes and released the contract of record.

Stauffer v Motor Co., 207-1038; 221 NW 918

Recovery for betterments. The assignee of an option contract for the purchase of land may, upon rescission, recover of his assignor the value of betterments which he—the assignee—has necessarily been compelled to place on the land.

Bredensteiner v Oviatt, 202-993; 210 NW 133

Nonrecovery. The assignee of an option contract for the purchase of land may not, upon rescinding, recover of the original option-

or (with whom he has no contract) the amount paid for the option.

Bredensteiner v Oviatt, 202-993; 210 NW 133

Unallowable rescission by purchaser. A vendor who is able to convey, who is not legally in default, and who has at all times insisted on performance by the purchaser, does not (1) by serving the 30-day notice of forfeiture, (2) by retaking possession, and (3) by instituting an action to quiet title, breach, abandon, or repudiate the contract in such sense that the purchaser may declare a rescission, and on the basis thereof recover the payments made by him.

Mintle v Sylvester, 202-1128; 211 NW 367

Recovery on sales in violation of securities law—tender of securities necessary. Purchaser suing to recover price paid for securities sold in violation of Iowa securities law must at least tender to seller securities equivalent in value to those purchased.

Huglin v Byllesby & Co., 72 F 2d, 341

Mental incompetency — realty exchange — voidable—duty to restore status quo. Where one of the parties to an exchange contract of realty is mentally incompetent, such contract is only voidable, not void, being valid until disaffirmed, and can only be disaffirmed as a whole, not in part, and when party seeks to avoid such contract it is necessary to restore, or offer to restore, status quo.

In re Gensicke, (NOR); 237 NW 333

Conditional sales—action for contract possession works no rescission. The vendor in a conditional sale contract by instituting replevin for the possession of the article, as provided by the contract in case of the vendee's default, manifests a clear intent to stand on the contract, and not to rescind it. It follows that the refusal of the court to submit to the jury the issue of rescission and return of the purchase price is proper. (Analogous holding, 202-1128.)

Schmoller Co. v Smith, 204-661; 215 NW 628

Liability—effect of rescission. A defendant who is tendered in court his promissory note, in rescission of the transaction out of which the note arose, and accepts said note may not defend against a claim based on the original transaction. In other words, defendant cannot, by accepting the offered rescission, defeat rescission and also escape all liability.

Miller v Nesbitt, 204-771; 212 NW 733

Contract price (?) or quantum meruit (?). A plaintiff who pleads that he partially performed an express contract for services and thereupon abandoned the work because of a breach of the contract by defendant must not be permitted to recover the contract price for the work actually performed unless he establishes his pleaded justifiable abandonment; and if he fails to establish justifiable abandonment, he may not recover on the basis of a quantum meruit which does not exceed the contract price when he neither pleads nor proves a quantum meruit.

Goben v Paving Co., 208-1113; 224 NW 785

Prohibited repudiation. A vendor who accepts and retains a partial payment for goods on the condition that the balance will be paid by the vendee when the goods are delivered may not, after a subsequent tender of the balance, repudiate the contract on the claim that the initial payment should have embraced the entire purchase price.

Daeges v Beh, 207-1063; 224 NW 80

Rescission and accounting — payments to third party by mistake. A purchaser of land who has been granted a rescission of the contract may compel an accounting by other executory vendors and vendees to whom part of the purchaser's payments has been made by mistake or inadvertence.

Winn v Williams, 200-905; 205 NW 541

Joint adventures—termination and accounting. A contract of joint adventure, which is wholly silent as to its duration, is terminable at will by a notice of any one of the parties to all other parties, especially when such other parties make no objection to such termination, and the right to an accounting necessarily follows.

Fitzhugh v Thode, 221-533; 265 NW 893

Guardianship—disaffirmance of contract—tender. The guardian of an incompetent may disaffirm the contract of his ward without going into equity and recover the amount paid by the ward on the contract.

Ayres v Nopoulos, 204-881; 216 NW 258

Unexecuted rescission of fraudulent contract. A subscriber for corporate shares of stock who, while the corporation is a going concern, enters into a bona fide agreement with the corporation for the complete rescission of the stock subscription contract, will be entitled to judgment against a subsequently appointed receiver for the amount of the stock subscription notes executed by him and transferred by the corporation and not returned to him as provided in the contract of rescission.

Lex v Selway Corp., 203-792; 206 NW 586

Breach of patent license contract. When a patent licensee ceased to pay royalties due the licensor, the licensor was not limited to an action against the licensee as a patent infringer, but could elect to treat the contract as still in force and bring an action to collect royalties.

Eulberg v Cooper, 226-776; 285 NW 131

Defaulting vendor may not recover payments. A vendor may not recover of his de-

faulting vendee payments advanced on incumbrances when the vendor is himself in default because of his inability to convey title.

Keifer v Dreier, 200-798; 205 NW 472

VIII PERFORMANCE OR BREACH

(a) PERFORMANCE GENERALLY

Justifiable abandonment—recovery. Principle reaffirmed that one who has contracted to render services, and justifiably abandons the work because of the breach of the contract by the other party, may recover at the contract price for the work already done.

Goben v Paving Co., 214-834; 239 NW 62
Goben v Paving Co., 218-829; 252 NW 262

Justifiable abandonment—instructions. Instructions held adequately to present the issue whether the performance of a contract was justifiably abandoned.

Goben v Paving Co., 218-829; 252 NW 262

Voluntary part performance—effect. Voluntary part performance of a contract by a legal stranger to the contract imposes no legal obligation to continue such performance.

Hess v Iowa L. & P. Co., 207-820; 221 NW 194

Impossible performance—when no excuse. A person is not legally excused from performing an act which he has unconditionally contracted to perform, but is prevented from performing because of the happening of a contingency of which he had knowledge when he contracted, and against which he might have protected himself. For instance, an insurer may not rely on a contract that he will, in full satisfaction of his liability, repossess a stolen automobile and properly repair it, and return it to the insured, when such return to the insured was prevented by the act of the seller of the car rightfully seizing the car, while it was in the possession of the insurance company, for nonpayment of installments due on the car, such possible seizure being well known to the insurance company when it so contracted.

Salinger v General Corp., 217-560; 250 NW 13

Failure to complete loan—no bar to recovery of part loaned. Where one person agrees to loan money to form a corporation, pursuant to which he loans a part and takes a note therefor, his failure to loan the balance will not prevent recovery of the part loaned, and a counterclaim so alleging states no cause of action and should be stricken.

Hillje v Tri-City Co., 224-43; 275 NW 880

Partnership changes after contract — performance. A physician as a party to a contract of employment with a medical clinic partnership is not in a position to question its validity on the ground that there had been a change in the members of the partnership and consequently no contract with the new entity, when his full performance of and under the contract had been with the new entity, including an extension of the contract.

Larsen v Burroughs, 224-740; 277 NW 463

Executory contract. Principle argumentatively recognized that a party to an executory agreement who is wholly in default may not maintain an action to enforce a part of the contract.

Crane v Leclere, 206-1270; 221 NW 925

Readiness and ability to perform. In an action by an architect on a contract of employment to draw plans and specifications, on the claim that the owner abandoned the contemplated construction, the all-important issue is the readiness, ability, and willingness of the architect to carry out his part of the contract.

Shockley v Davis Co., 200-1094; 205 NW 966

Exact (?) or substantial (?) performance. A building contractor, in order to recover the contract price, need not establish a technical, exact, and perfect performance of the contract. Substantial, good-faith performance is all-sufficient.

Miller v Gray, 205-1305; 217 NW 228

Breakage of tile—neglect of buyer. Burden of proof in action on contract providing for delivery of drain tile was upon seller to show that tile were "sound and true", and evidence held to show that breakage was due to neglect of buyer.

Graettinger Works v Gjellefald, (NOR); 214 NW 579

Public improvements — substantial compliance with contract. Evidence relative to the performance of a paving contract reviewed, and held to show substantial compliance in the matter of performance.

Central Co. v Des Moines, 204-678; 216 NW 41

Public improvements — acceptance — avoidance by proof of fraud. A nonfraudulently induced acceptance by a city council of a street pavement estops the city thereafter to plead nonperformance of the contract, but not so when the city pleads and proves that, at the time of said acceptance, the contractor, unbeknown to the council and in collusion with city employees, had constructed said pavement of a thickness substantially less than the thickness required by the contract.

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

Reasonable time to construct grotto. An individual constructing a grotto for a charitable organization under an agreement containing

no time for completion has a reasonable time for performance.

Sisters of Mercy v Lightner, 223-1049; 274 NW 86

Contract restraining competition—liquidated damages. Injunction is a proper remedy to restrain one physician from practicing his profession contrary to the provisions of his contract not to engage in competitive practice in the same county for a specified period. A provision in the contract for "liquidated damages" will not bar injunctive relief.

McMurray v Faust, 224-50; 276 NW 95

Right to complete contract. Upon a substantial breach of a building contract and the refusal of the contractor to proceed with the work, the owner of the property may himself take over the completion of the contract according to its terms, and charge the cost thereof against the contractor.

Golwitzer v Hummel, 201-751; 206 NW 254

Nonrecoverable damages. In the construction of a building, defects and imperfections which do not establish a substantial failure to comply with the contract may not be compensated for by an allowance of damages when complainant plants his claim for damages solely on the difference between the value of the house as built and its value if built in compliance with the contract.

Hayes v Ramsey, 205-167; 217 NW 808

Action by subcontractor—principal contract admissible. A subcontractor under a building contract is impliedly bound by the standards of performance provided in the principal contract; therefore it is error to reject the principal contractor's offer of such contract as evidence.

Lantz v Goodwin, 210-605; 231 NW 331

(b) SUBSTANTIAL PERFORMANCE

Evidence. Plaintiff in an action to recover for materials furnished under a building contract may very properly be permitted to show that the quality of the materials furnished was as called for by the contract, even tho defendant was defending on the theory that, irrespective of such quality, the architect had a legal right, under the contract, arbitrarily to reject the materials, and that the architect had so done.

Granette Co. v Neumann & Co., 208-24; 221 NW 197

Statute of limitation—completion of work. Where a statutory provision declares that action may not be brought on the bond of a contractor "after six months of the completion" of a public improvement, the improvement will be deemed completed when the contractor has substantially performed on the improvement all that he contracted to perform, and has turned it over to the public authorities; and it is immaterial that controversy exists as to extras, or that trifling defects or shortcomings afterwards come to light, or that the formal certificate of acceptance was delayed.

Daniels Co. v Const. Co., 204-268; 214 NW 481

Contract to bring infringement suits. A contract between a patent owner as licensor and the manufacturer of the patented article as licensee, providing that the licensor receive royalties and should bring suits to prevent infringement upon the patent using royalties received, was fully performed on the part of the licensor when he spent, in bringing infringement suits, more than the amount of the royalties received.

Eulberg v Cooper, 226-776; 285 NW 131

(c) BREACH GENERALLY

Breach of part not destructive of whole. Generally, where contracts are severable and divisible, and the consideration justly apportioned to part of the contract, a breach of that part does not destroy the contract in toto, but the defendant may only recoup himself in damages.

Paramount Pictures v Maxon, 226-308; 284 NW 119

Nonwaiver. A party to a contract does not waive a breach of the contract by the other party thereto by failing to notify such other party that he has knowledge of such breach. Instructions held not to announce a contrary doctrine.

Cox v Fleisher Constr. Co., 208-458; 223 NW 521

Waiver by inconsistent conduct. When minority and majority stockholders agree that the former will withdraw their objections to the renewal of the corporation and the latter will vote for such directors as will employ the minority in certain corporate positions, the minority waives all rights under the contract by subsequently joining with all the other stockholders in the adoption of renewal articles which wholly ignores the said contract.

Clark v Bank, 219-637; 259 NW 211

Discharge of employee. The peremptory discharge without cause of an employee under a definite time contract is, of course, a breach of the contract.

Westerfield v Liberty Oil Co., 208-912; 223 NW 894

Failure to make repairs. The measure of damages for breach of a contract to make all necessary repairs to a pavement is the fair and reasonable cost of such repairs, and not the difference in value of the real estate with and without said repairs.

Armstrong, Inc. v Nielsen, 215-238; 245 NW 278

VIII PERFORMANCE OR BREACH—concluded

(c) BREACH GENERALLY—concluded

Refusal of employer to sell at price stated—not excused by resulting loss. One who contracted to pay a commission to a dealer for selling goods at a certain price could not excuse his breach of the contract by refusing to sell except at a higher price, at least as to orders for goods taken before the breach, on the ground that to fulfill the contract would cause him to operate his business at a loss.

Lee v Sundberg, 227-1375; 291 NW 146

Violation in re publication of newspaper. An agreement not to engage in the publication or circulation of a "newspaper" in a named locality is violated by the publication and circulation in said locality, without charge, of a so-called "Shopper's Guide" of eight pages arranged in the form of an ordinary newspaper, and containing much advertisement, some current news, serial stores, editorial comment, and newspaper clippings.

Henry & Sons v Rhinesmith, 219-1088; 260 NW 9

Discharging acrobatic team. In acrobatic team's action for breach of contract of employment for two bookings, evidence, that plaintiffs were ready to perform and that employer replaced them in one of the engagements and told them they would not be used in the other, justified finding that plaintiffs were discharged.

Wade v Central Co., 227-422; 288 NW 439

Building contracts—right to take over work. A building contractor who materially breaches his contract to erect a building at a certain minimum cost and refuses to proceed with the work opens the door to the other party to the contract to take over the work and complete it and recover of the contractor the resulting damages.

Johnson v Vogel, 208-44; 222 NW 864

Agreement to give, deed, or will property. One who orally contracts that, upon his death, he will pay for certain services "by giving, deeding, or willing" certain real property to the promisee, constructively breaches his contract by failing to either give, deed, or will the property as promised, and thereby opens the door to the promisee to maintain an action at law for damages; and especially is this true when the promisee establishes the contract by the same degree of proof as would be required in equity, and, moreover, offers to accept a deed to the property in lieu of damages allowed for the breach.

Ballard v Miller, 210-1144; 229 NW 159

Foreclosure—agreement to defer. An owner of mortgaged premises who has not assumed the mortgage, but who makes a payment thereon on the express or implied agreement that the mortgagee will defer foreclosure for a stated time, may recover back the payment from the mortgagee if the latter breaches the agreement.

First Tr. JSL Bk. v Cuthbert, 215-718; 246 NW 810

Approval by architect—conclusiveness. An architect who, in the absence of fraud or mistake, approves material may not, after the material is furnished, reverse his decision and reject the material.

Granette Co. v Neumann & Co., 208-24; 221 NW 197

Injunction—inducing breach of contract. Injunction will lie to prevent a third party from inducing parties to a contract to violate it.

Henry & Sons v Rhinesmith, 219-1088; 260 NW 9

Injunction—fatally indefinite decree. A decree which enjoins a party from doing any act which "would infringe upon the rights of the plaintiff" under a specified contract is fatally indefinite and therefore unallowable.

Henry & Sons v Rhinesmith, 219-1088; 260 NW 9

IX RELEASES AND SETTLEMENTS AND WAIVER IN GENERAL

Discussion. See 20 ILR 106—"Mending hold doctrine"; 21 ILR 146—Rescission of release from liability

(a) IN GENERAL

Impeachment—burden of proof. He who seeks to avoid a duly proven compromise, settlement and release must establish:

1. That the release was procured by fraud, or
2. That the contention or claim on which the compromise and settlement was based was wholly unfounded, and, therefore, could not support a compromise and settlement.

Evidence reviewed and held wholly insufficient to impeach a compromise and settlement of liability under a policy of life insurance.

Vande Stouwe v Life Co., 218-1182; 254 NW 790

Compromise and settlement—impeachment—burden of proof. Fraud, in impeachment of a compromise and settlement, must be established by the pleader who alleges it.

Coffman v Brenton, 214-185; 239 NW 9

Personal injury release—mutual mistake. A contract for settlement of damages for personal injury in a motor vehicle accident, and for release of further liability, will be set aside when it is shown that both the injured party and the agent of the defendant relied on the physician's good-faith statement that the injury was healing and the patient would soon recover, tho it later developed that the doctor was mistaken—such mistake is a mutual mistake of fact by both parties to the contract.

Jordan v Brady Co., 226-137; 284 NW 73

Delivery date of policy—other evidence competent. In an action on a life policy to which insurance company pleads a general denial and further pleads a release and settlement, wherein the delivery date of the policy is in dispute, and the insurance company assigns, as error, the exclusion of testimony of an officer of the company concerning underwriting practices of the company and a letter written by the company to its agent, upon which the agent's reply was indorsed, concerning the date of delivery of the policy, such evidence should have been admitted, and was competent to show that the company honestly believed it had a defense to the policy and explained why the company had the right to rely upon the date appearing upon the receipt for the policy.

Luce v Ins. Co., 227-532; 288 NW 681

Release—fraud—jury question. A jury question as to the validity of a release of personal injury damages is made by proof that the release represented that the doctor's charges would be "about" $10, and that the representation was materially false, and was made to the releasor and acted on by him when he was alone and practically helpless from his injuries.

Robinson v Meek, 203-185; 210 NW 762; 5 NCCA(NS) 434

(b) RELEASES GENERALLY

Burden of proof. The burden of proof that a release was executed rests on the party alleging the release.

Vande Stouwe v Life Co., 218-1182; 254 NW 790

General release of claim avoided by mutual mistake. A general release of a claim for personal injuries may, under proper circumstances, be avoided on the ground of mutual mistake as to the nature or seriousness of the injury.

Jordan v Brady Co., 226-137; 284 NW 73

Personal injury release—doctor's belief in recovery—mutual mistake. A contract for settlement of damages for personal injury in a motor vehicle accident, and for release of further liability will be set aside when it is shown that both the injured party and the agent of the defendant relied on the physician's good-faith statement that the injury was healing and the patient would soon recover, tho it later developed that the doctor was mistaken —such mistake is a mutual mistake of fact by both parties to the contract.

Jordan v Brady Co., 226-137; 284 NW 73

Joint wrongdoers. A party who has been negligently injured and settles with and releases the original wrongdoer may not thereafter maintain an action against a physician for malpractice in treating the very injuries for which he has effected a settlement.

Phillips v Werndorff, 215-521; 243 NW 525; 39 NCCA 574

Discharge of employer's liability—effect on third party wrongdoer. Where an injury, which is mandatorily compensable under the workmen's compensation act, is received by an employee in consequence of the actionable negligence of the operator of an automobile owned by, and operated with the consent of, the employer, the fact that the employer fully discharges his statutory liability to the employee does not ipso facto discharge the legal liability of the said negligent operator to said employee.

McGraw v Seigel, 221-127; 263 NW 553; 106 ALR 1035

Covenant not to sue—joint wrongdoers. The driver of an oil truck sued for damages consequent on his negligent operation of the truck is not released from liability because another party who owned the oil tank and grease rack carried on the truck obtained from the injured party a covenant wherein the injured party agreed not to sue such other party—the record failing to show that the truck driver and the owner of the tank were joint wrongdoers.

Lang v Siddall, 218-263; 254 NW 783

Release of joint tort-feasor. An injured party, who voluntarily, and without being imposed on by fraud, accepts and receives from one alleged joint tort-feasor a legal consideration in the form of property in settlement of his injuries, may not thereafter maintain an action against another joint tort-feasor for damages for the same injury.

Barden v Hurd, 217-798; 253 NW 127

Notice of release after promising to pay for goods furnished to third person. A landlord who promised his tenant, in the presence of a gasoline dealer, to pay for tractor fuel furnished by the dealer to the tenant, and who later was released from his promise, was not obligated to pay the dealer for fuel sold to the tenant after the dealer received notice of the release.

Reichart v Downs, 226-870; 285 NW 256

Substitution and release—new contract not creating presumption. The mere fact of the making of a new contract by which a third party becomes obligated to pay another person's previously existing indebtedness does not alone give rise to presumption that the creditor accepts the new debtor and releases the original debtor—question as to whether there is such a release is one of fact to be determined by all the evidence in the case.

Wade v Central Co., 227-422; 288 NW 439

Fraudulent release. A written release of all damages suffered by an injured party is fraudulent and void when it was in fact mutually intended as a receipt for wages only, and was signed by the injured party without negligence on his part; and the failure of the injured person, who was himself unable to

IX RELEASES AND SETTLEMENTS AND WAIVER IN GENERAL—continued

(b) RELEASES GENERALLY—concluded

read, to have such instrument read to him does not necessarily constitute negligence per se.

Farwark v Railway, 202-1229; 211 NW 875; 26 NCCA 231; 4 NCCA(NS) 98

Fraud in securing release—consideration—burden of proof. In an action on a life policy where the insurance company pleads a release, the burden of proof is on the company to show the execution and delivery of the release and payment of amount due thereunder, and where failure of consideration or fraud is alleged in obtaining the release, the burden of proof is on the party making the allegation, so where the court excluded such a release from evidence on account of insurance company's failure to establish consideration for the execution of such release, it placed a burden on the company which the company should not have been required to sustain, and the ruling was clearly erroneous.

Luce v Ins. Co., 227-532; 288 NW 681

Fraudulent procurement—negligent execution—jury question. Evidence reviewed at length relative to a written release of damages consequent on shockingly severe injuries, and held to present a jury question on the issues (1) of defendant's fraudulent procurement of the release, and (2) of plaintiff's negligence in signing said release.

Engle v Ungles, 223-780; 273 NW 879; 4 NCCA(NS) 92

Bank promising father to carry son's debt until father's death. A father's contract with a bank, by which the bank agreed to carry a son's indebtedness to the bank until the death of the father, is personal and involves a trust and confidence, and such contract may not be assigned without the consent of the father, and when the bank's assignee started action for a money judgment, during the lifetime of the father, he was released from the obligation of his contract.

Evans v Cole, 225-756; 281 NW 230

Signing a release without reading. A signed release and settlement of a claim for damages is conclusive on the signer, even tho he signed it, because of a false statement of its contents, when he had ample time and ability to read, and was in no manner prevented from reading.

Crum v McCollum, 211-319; 233 NW 678; 4 NCCA(NS) 142

Implied fraud. Evidence reviewed and held to present a jury question on the issue whether a release of damages was binding on the plaintiff who signed the same without reading it.

Shadduck v Railway, 218-281; 252 NW 772

Consideration—presumption. Presumptively, a written release by a mortgagee of a mortgage is supported by a sufficient consideration.

Shaffer v Zubrod, 202-1062; 208 NW 294

(c) SETTLEMENTS GENERALLY

Construction — intent as polestar. Quite manifestly a written compromise and settlement may not be given an interpretation contrary to the actual intention of the parties.

Bates v Bank, 223-729; 273 NW 867

Construction—same as other contracts. An unjust compromise or private settlement will not be accorded by the court any different construction or treatment than any other unjust contract.

Jordan v Brady Co., 226-137; 284 NW 73

Agreement "to take care of claim". An agreement by one party to a compromise and settlement that he will "take care of" the claim of a named third party may not, in view of the circumstances attending the parties, be equivalent to an agreement to pay said claim.

Southern Surety v Railway, 215-525; 245 NW 864

Consideration. A written contract of compromise and settlement of a bona fide controversy between parties is supported by adequate consideration.

Kilts v Read, 216-356; 249 NW 157

Notes—compromise and settlement as consideration. A promissory note executed without fraud and in compromise and settlement of a disputed but honestly asserted claim—which may have been unfounded—must be deemed supported by an adequate consideration. Evidence held to support such a finding.

Booth v Johnston, 223-724; 273 NW 847

Promissory note—liability. A compromise and settlement which results from a bona fide controversy as to the liability of one of the parties on promissory notes is final. In other words, there need be no evidence that the party denying liability was not, in fact, legally liable on the notes.

Fairfax Bank v Coligan, 211-670; 234 NW 537

Compromising barred claim. If parties have actually compromised a bona fide controversy between themselves relative to the claim of one of the parties, it is immaterial whether, at the time of the compromise, the claim in controversy was barred by the statute of limitation.

Marron v Lynch, 215-341; 245 NW 346

Failure to plead and prove avoidance. A clearly established contract of settlement must prevail in the absence of plea and proof of matter in avoidance.

Bebensee v Blumer, 219-261; 257 NW 768

Absence of controversy—unsupported promise. An oral compromise and settlement of a bona fide controversy between parties relative to a claim of one of the parties is not established by evidence which affirmatively shows that no controversy existed between the parties, but that one of the parties made a promise to the other for which promise no consideration appears.

Marron v Lynch, 215-341; 245 NW 346

Mortgage indebtedness—time as essence of contract. Time will not, in equity, be deemed of the essence of a contract when the parties thereto have neither expressly so stipulated, nor, by their conduct, revealed that such was their understanding of the contract. So held as to the time of performance of a compromise settlement of mortgage indebtedness.

First Tr. JSL Bk. v Hanlon, 223-440; 273 NW 114

Offer of settlement—insufficient evidence. A statement by a creditor to his debtor that "You can do one of three things—pay the bill, return the merchandise, or beat the bill" held quite insufficient, in view of the record, to constitute an offer of settlement justifying the debtor in returning the goods in full settlement of the creditor's claim.

United Service v Heinen, 220-859; 263 NW 343

Performance—interest—when not allowable. Creditors who, in a composition agreement with their debtor, contract to accept specified sums in settlement of their respective demands are not entitled to interest on said sums during the time required to carry out the agreement.

Bailey v Ins. Co., 221-1195; 268 NW 173

Compromise by guardian — nonadversary proceedings. The good-faith compromise by a guardian, with the approval of the court, of pending litigation to which the minor is a party is not a proceeding adversary to the minor.

Kreamer v Wendel, 204-20; 214 NW 712

Corporation judgment compromised—former stockholder—no authority. Stockholders who had sold their stock after the corporation had recovered a judgment no longer had an interest in the judgment which remained the property of the corporation even when its name was changed, so a compromise settlement of the judgment had no validity when made by attorneys with consent given by one former stockholder, as only the corporation could authorize such settlement.

Glenwood Lbr. Co. v Hammers, 226-788; 285 NW 277

Apparent authority of agent—showing preliminary to receiving testimony. Testimony relative to a contract of compromise with a corporate agent on behalf of the corporation is admissible upon proof that the party offering the testimony, preliminary to entering into such contract, in good faith availed himself of the bureau of information maintained by the corporation, and by means thereof made contact with corporate agents who had physical possession of the papers and files relative to the subject-matter of said compromise, and who were, apparently and to all appearance, in authoritative charge of said matter for settlement. (Of course, the issue of apparent authority may be a jury question.)

Northwestern Ins. v Steckel, 216-1189; 250 NW 476

Building contracts—final certificate by architect—what constitutes. A certificate by an architect that the contractor has been overpaid a stated amount, even tho it purports to be an "opinion" only, is a final certificate when the parties mutually expected that the certificate would be final, and mutually so treated it, and when the certificate contains an itemized computation showing how the overpayment was determined.

Van Dyck Co. v Central Co., 200-1003; 205 NW 650

Injury from motor vehicle—fraud in settlement. A plaintiff, injured when the automobile in which she is riding in a snowstorm is struck from the rear by another automobile, and who, in the presence of her husband and sister, makes a written settlement with the insurance company for such injuries, and who delays two years thereafter before attacking as fraudulent the validity of such settlement, does not meet her burden to overcome the written instruments by giving her own self-contradictory testimony with no proof of actual fraud or misrepresentations.

Mosher v Snyder, 224-896; 276 NW 582

Setting aside—insufficient grounds. A party who compromises and settles his claim for damages consequent on an alleged fraudulent sale, and voluntarily and under no additional fraud does so on the basis of his then knowledge of the claimed fraud, may not have the compromise set aside on the claim that he later discovered an additional element of fraud in the sale not known to him when he compromised.

Williams v Herman, 216-499; 249 NW 215

Validity—good faith—fraud—duress. Evidence held to generate a jury question on the issue whether a promissory note was signed as the result of a good-faith, nonfraudulent compromise and settlement.

Rounds v Butler, 207-735; 223 NW 487

Matters included—presumption. It being conceded, arguendo, that the execution and delivery of a promissory note generate a presumption that all prior mutual claims between the maker and payee were thereby settled, yet such presumption is necessarily rebuttable.

Fitzgerald v Miller, 200-718; 205 NW 324

IX RELEASES AND SETTLEMENTS AND WAIVER IN GENERAL—continued

(c) SETTLEMENTS GENERALLY—concluded

Posted signs—settlement offer. Denying a directed verdict based on a general standing offer of settlement, made by posted signs to all patrons of a beauty shop in the event of injury, pleaded in answer but stricken on motion by an order not alleged as error, cannot be reviewed on appeal.

Pearson v Butts, 224-376; 276 NW 65

(d) COMPOSITION WITH CREDITORS

Oral agreement enforceable—time limit. An oral agreement between a debtor and his creditors under which the creditors agree to accept a composition amounting to less than their demands is enforceable in equity; and if no time for performance be agreed on, the law will imply a reasonable time. Evidence reviewed and held to establish such agreement, and that the debtor's offer of performance was within a reasonable time.

Bailey v Ins. Co., 221-1195; 268 NW 173

Fatally delayed execution. A written composition with creditors, silent as to the time of performance, must be executed within a reasonable time in view of all the attending circumstances.

Federal Corp. v Western Co., 219-271; 257 NW 785

Consideration—part payment of debt in discharge of whole. An executed agreement between a debtor and a creditor to the effect that the debtor will, before any part of the indebtedness is legally due, pay a part thereof in full satisfaction of the entire indebtedness, is supported by ample consideration, and is, therefore, enforceable.

Fisher Supply Co. v Northwestern Co., 216-909; 249 NW 664

Deception constituting fraud and liability therefor—right to rely on false statement. A debtor who falsely asserts his complete insolvency, and thereby induces his creditor, wholly ignorant of the true facts, to enter into a compromise settlement of indebtedness, will not, in an action to cancel the fraud-induced settlement, be heard to assert that the creditor had no right to rely on said false statement—that the creditor, before acting, should have made an independent investigation as to the truth of said statement.

Andrew v Baird, 221-83; 265 NW 170

(e) WAIVER GENERALLY

Waiver defined—burden of proof. A waiver is the voluntary and intentional relinquishment or abandonment of an existing legal right. He who relies thereon has the burden of establishing all elements thereof. Evidence involving the payment of renewal commissions on insurance policies reviewed and held insufficient to establish a waiver.

McPherrin v Assur. Co., 219-159; 257 NW 316

Jones v Des Moines, 225-1342; 283 NW 924

Mechanics' liens — waiver by conduct. A materialman who files his lien after inducing a mortgagee to take his mortgage on the express or implied promise that no lien will be filed, will not be decreed priority over the mortgage.

Fullerton Co. v Miller, 217-630; 252 NW 760

Matters specially pleadable. "Waiver" must be specially pleaded.

Cole v Ins. Co., 201-979; 205 NW 3

Schmid v Underwriters, 215-170; 244 NW 729

Fraud—irrevocable waiver of action for damages. One who, with full knowledge that he has been fraudulently inveigled into signing an option contract for the sale of his property, elects not to rescind but to affirm and perform the contract, and does perform at a time when the contract is wholly executory and without consideration, thereby irrevocably waives, as a matter of law, any and all right to sue the wrongdoer for damages.

Ankeney v Brenton, 214-357; 238 NW 71

"Estoppel" and "waiver" contrasted. Principle reaffirmed that, to constitute waiver, action to the prejudice of the party relying thereon is not essential; while such showing is essential to estoppel.

Euclid Bank v Nesbit, 201-506; 207 NW 761

Renewal of note—waiver of defense. Principle reaffirmed that the maker of a promissory note waives his defense to the note when he renews the note with full knowledge of the defense; and especially is this true if the maker secures an extension of time.

Euclid Bank v Nesbit, 201-506; 207 NW 761

Validity—renewal of forged note. The execution of a promissory note in renewal of a known forged note necessarily works a waiver of the fraud consequent on the forgery. Evidence held sufficient to establish the absence of such knowledge.

Bacon v Bank, 204-887; 216 NW 274

Incorporation denied by state—partnership formed. Promoters of a corporation are liable to an investor for money received as the agreed purchase price for stock in a corporation, even tho the failure to deliver stock occurred because the state denied the right to incorporate, and they are not relieved by a partnership agreement, signed by the investor, who nowhere waives nor abandons the agreement for delivery of the corporate stock.

Smith v Secor, 225-650; 281 NW 178

Merchandise return as condition for refund —waiver by correspondence manager. A requirement that buyer return warranted machines as a prerequisite to a refund of the purchase price may be waived by seller's agent in charge of correspondence when, in reply to buyer's offer to return, he instructs buyer not to return the machines.

Henriott v Main, 225-20; 279 NW 110

Right to discharge employee. Principle recognized that, tho an employer, by continuing the employment after knowledge of the breach of duty by the servant, is deemed thereby to waive his right to discharge, yet he is not thereby deemed to waive the breach of duty.

Durr v Park Co., 205-279; 218 NW 54

Insurance company's waiver of policy provision. When facts are disputed as to whether insurance company waived policy provisions as to unconditional ownership and as to location where property was to be kept which was later destroyed by fire, such dispute is for the jury.

Buettner v Ins. Assn., 225-847; 282 NW 733

Reply or amendment—waiver of objections. Altho a pleading, denominated as a reply, is really an amendment to the petition, but the question of proper pleading was not raised, and the defendants amended their answers as tho the reply had been an amendment to petition, and parties, without objection, offered evidence pertaining thereto, any objections possibly arising on account of the departure from the rules of pleading were waived.

Burns & McDonnell Co. v Iowa City, 225-1241; 282 NW 708

Error in pleadings by filing answer. To preserve an objection that an allegation of negligence was too general and indefinite to constitute basis of cause of action, a defendant should stand on its motion to strike and for more specific statement. Failing in this and filing its answer, it waived any error of court in overruling motion. A cause of action should be sufficiently precise to enable the defendant to prepare his defense.

O'Meara v Green Const. Co., 225-1365; 282 NW 735

X ACTIONS

(a) IN GENERAL

Counts—express and implied contract. A plaintiff may, in different counts, plead an express and an implied contract as to the same subject matter.

Richmann v Beach, 201-1167; 206 NW 806

Reformation—implied contract. A court of equity cannot reform a written contract, let alone an implied contract.

Snell v Kresge Co., 220-837; 263 NW 493

Account—inconsequential plea. In an action on a contract to recover a money judgment for plaintiff's interest in certain property, the plea of an intervenor who claims an interest in the property that there must first be an accounting between plaintiff and defendant is of no consequence where there is no evidence that defendant has ever paid plaintiff anything on his claim.

Benson v Sawyer, 216-841; 249 NW 424

Action for breach—variance. Principle reaffirmed that a contract relied on must be established as pleaded.

Economy P. Co. v Honett, 222-894; 270 NW 842

Pleading—want of consideration. The all-essential element of a plea of failure of consideration is the facts. There need not necessarily be any formal statement "that there was a total failure of consideration".

Miller v Laing, 212-437; 236 NW 378

Lack of mutuality and consideration—agreement to purchase steers retained and fed by alleged seller. In law action based on written instrument, wherein plaintiff agreed to feed 24 head of steers for a period from 90 to 120 days, and defendant agreed to purchase the steers at any time during such period at 14 cents per pound, hoof weight, at Chicago or other reasonable marketing point, such agreement was not enforceable due to lack of mutuality and consideration, especially where there was no other consideration than that imported by the instrument, and this being a law action rather than in equity to make contract mean what plaintiff contends that it was intended to say, hence plaintiff could not recover on instrument the difference between 14 cents per pound and price at which plaintiff sold the steers on Chicago market.

May v Burns, 227-1385; 291 NW 473

Proper law action nontransferable in toto. An action brought on a contract (e. g., a property settlement between husband and wife), and properly brought at law, is not rendered transferable in toto to the equity calendar by defendant's plea of fraud and prayer for a judicial rescission of the contract.

Poole v Poole, 221-1073; 265 NW 653

Contract for repayment—burden of proof. One seeking to recover money loaned must prove a contract express or implied for its repayment.

In re Green, 227-702; 288 NW 881

X ACTIONS—continued
(a) IN GENERAL—continued

Judgment—nonbar or estoppel. A decree that a subscriber for corporate stock could not recover of the corporate receiver the amount already paid to the corporation on his subscription contract—such being the sole issue—does not estop the subscriber, when sued by the receiver for the unpaid amount of said contract, from pleading in defense that the purported corporation never had any corporate existence.

State v Packing Co., 216-1344; 249 NW 761; 90 ALR 1339

Contract omitted from evidence. In a law action, where a written contract to furnish advertising material was not offered in evidence, a judgment for defendant was proper.

Clare v Pearson, 227-928; 289 NW 737

Plea of oral contract—failure of proof. There is a total failure of proof when plaintiff bases his action solely on a plea of oral contract and establishes a written contract.

Lamis v Des Moines Co., 210-1069; 229 NW 756

Coal mining—royalties—reduction by oral agreement—jury question. In an action to recover alleged balance due under coal mining contract for royalties, whether payments provided for in contract were reduced by subsequent oral agreement held to be a jury question.

Heggen v Mining Co., (NOR); 263 NW 268

Cashier of bank—nonimplied authority. A five-year contract involving an expenditure of $500 for advertising a small village bank in a bank directory is not an ordinary contract within the duties of the cashier, but an extraordinary one requiring the authority of the board of directors in order to bind the bank.

Ashland Towson Corp. v Bank, 216-780; 248 NW 336

Contract entered into by business department of real party. An action on a contract is properly brought by the real contracting party, even tho such contract was entered into by one of the business departments of said party.

Butler Co. v Elliott, 211-1068; 233 NW 669

Execution of promissory notes—subsequent ratification—effect. A plea that promissory notes were executed on Sunday is avoided by a plea, and proof thereof, that the maker of the notes subsequently ratified the execution of said notes.

Witmer v Fitzgerald, 209-997; 229 NW 239

Execution on Sunday—collateral agreement. The fact that a promissory note was signed on Sunday has no legal bearing on an agreement growing out of and relating to said note, but wholly collateral thereto.

Hirtz v Koppes, 212-536; 234 NW 854

Compensation—unallowable defense. In an action by a broker for a commission, it is no defense that the plaintiff had an arrangement with another broker for the sharing of the commission in return for services rendered in effecting a sale for defendant.

Lowery Co. v Lamp, 200-853; 205 NW 538

Illegal transaction. Principle reaffirmed that in an action on a fraudulent contract, as to which both parties are in pari delicto, the court will refuse relief to either party.

Schmidt v Twedt, 219-128; 257 NW 325

Teachers—issue as to terms of contract. Evidence held to present a jury question on the issue whether a contract had been entered into with a teacher.

Krutsinger v Township of Liberty, 219-291; 257 NW 797

Contract price (?) or quantum meruit (?). A plaintiff who pleads that he partially performed an express contract for services and thereupon abandoned the work because of a breach of the contract by defendant must not be permitted to recover the contract price for the work actually performed unless he establishes his pleaded justifiable abandonment; and if he fails to establish justifiable abandonment, he may not recover on the basis of a quantum meruit which does not exceed the contract price when he neither pleads nor proves a quantum meruit.

Goben v Paving Co., 208-1113; 224 NW 785

Form of remedy—quantum meruit for services covered by express contract. Plaintiff may not recover on quantum meruit for services which are inseparably connected with, and a part of, services which plaintiff has contracted to perform for an agreed compensation.

Gregerson Bros. v Cherry Co., 210-538; 231 NW 350

Oral express contract—compensation—evidence of reasonable value. On the issue whether parties to an express oral contract for services agreed on a certain stated compensation, evidence of the fair, reasonable, and usual compensation for such services is admissible.

Goben v Akin, 208-1354; 227 NW 400

Voluntary gratuitous services—recovery for. Services, tho valuable and continued for years, when voluntarily rendered as a gratuity, and accepted as such, furnish no basis for a later action in quantum meruit.

Equitable v Crosley, 221-1129; 265 NW 137

Validity of assent—confidential relations. No presumption of confidential relations arises

from the mere fact that the parties are closely related by blood.

Krcmar v Krcmar, 202-1166; 211 NW 699

Contract for equality in stock holdings—violation—injunction. Equity will, by injunction and other proper orders, protect a stockholder of a corporation from a violation of his contract with another stockholder under which equality of stockholdings of the two stockholders was clearly intended.

Holsinger v Herring, 207-1218; 224 NW 766

Transaction with deceased — coplaintiffs. When plaintiff and an intervening plaintiff are each claiming an undivided one-third interest in land, and one is incompetent to testify to a personal transaction with a deceased and thereby establish his contract, he is equally incompetent to testify to said personal transaction and thereby establish the contract for his coplaintiff.

Wagner v Wagner, 208-1004; 224 NW 583

Breach of patent license contract. When a patent licensee ceased to pay royalties due the licensor, the licensor was not limited to an action against the licensee as a patent infringer, but could elect to treat the contract as still in force and bring an action to collect royalties.

Eulberg v Cooper, 226-776; 285 NW 131

Violation in re publication of newspaper. An agreement not to engage in the publication or circulation of a "newspaper" in a named locality is violated by the publication and circulation in said locality, without charge, of a so-called "Shopper's Guide" of eight pages arranged in the form of an ordinary newspaper, and containing much advertisement, some current news, serial stories, editorial comment, and newspaper clippings.

Henry & Sons v Rhinesmith, 219-1088; 260 NW 9

Injunction—subjects of protection and relief—inducing breach of contract. Injunction will lie to prevent a third party from inducing parties to a contract to violate it.

Henry & Sons v Rhinesmith, 219-1088; 260 NW 9

Conditions precedent—inconsistent theories of recovery. When a plaintiff can, as a matter of law, avail himself of a contract provision only on the supported theory that defendant has performed the contract, it is baldly manifest that plaintiff cannot recover under said provision when his entire action rests on the asserted theory that defendant has not performed the contract.

Andrew v American Tr. Co., 219-921; 258 NW 911

Counterclaim — nullification. Proof that plaintiff substantially performed part of a contract for services and justifiably abandoned the performance of the remaining part necessarily precludes recovery by the defendant on his counterclaim for damages, (1) for negligent performance of the part performed, and (2) for failure to complete the work. Instructions held properly to present the issues.

Goben v Paving Co., 218-829; 252 NW 262

Redundant matter. In an action for breach of a written contract to sell all fine coal screenings "produced" during a stated time, a pleading that the parties mutually understood that the contract required the delivery of all fine screenings "produced * * * during the term of said contract" is redundant and properly stricken on motion.

Iowa Co. v Coal Co., 204-202; 215 NW 229

Irrelevant and immaterial matter. In an action for breach of a written contract to sell all fine coal screenings "produced" during a stated time, a pleading that the parties mutually understood that the contract required the seller "to screen all the coal mined during the term" of the contract, is irrelevant and immaterial, and properly stricken on motion, (1) even tho the contract specifies what shall be deemed "screenings", and (2) even tho such pleading is sought to be aided by a plea of estoppel and custom.

Iowa Co. v Coal Co., 204-202; 215 NW 229

Motion picture booking as severable contract. A motion picture exhibitor who books a series of films under contract, a part of which contract specified that he should have a certain film to exhibit on a certain date, is not entitled to breach the entire contract, when distributor fails to provide this certain film on the specified date, but exhibitor must recoup by way of damages, if any.

Paramount Pictures v Maxon, 226-308; 284 NW 119

Foreign corporation's contract to install pipe organ—interstate commerce. In an action on contract by a Connecticut corporation doing business in New Jersey to build, deliver, and install a pipe organ in a theater in Iowa, held, the transaction was in "interstate commerce", and therefore local statutes governing foreign corporations doing business within this state were inapplicable.

Palmer v Aeolian Co., 46 F 2d, 746

(b) SPECIFIC PERFORMANCE GENERALLY

Discussion. See 1 ILB 53—Specific performance for the purchase price; 11 ILR 69—Contract terminable by plaintiff; 25 ILR 766—Extended supervision by the court

Contracts enforceable—conditions precedent. Principle reaffirmed that a contract may not be specifically enforced (1) unless the execution is established by very clear and definite proof, and (2) unless the terms of the contract as established are equally clear and definite.

Lockie v Baker, 206-21; 218 NW 483

X ACTIONS—continued

(b) SPECIFIC PERFORMANCE GENERALLY—cont.

Uncertainty in terms. Specific performance cannot be decreed of a contract which is uncertain in its terms.

Fenton v Clifton, 204-933; 216 NW 53

Rescission as alternative remedy. Rescission will not be granted as a matter of course on denial of specific performance.

Davis v Eaton, 211-837; 234 NW 252

Contracts performable—fraud. A fraudulently obtained contract will not be specifically enforced, but will, on proper plea and proof, be canceled.

Boyle v Geling, 206-1208; 218 NW 506

Nature and form—legal relief. Tho plaintiff in equity prays for a decree for the specific performance by defendant of the latter's written contract to repurchase corporate shares of stock sold to plaintiff, yet, if plaintiff's alternate prayer be sufficiently broad, the court may, on supporting evidence, enter such a judgment in favor of plaintiff as would be his legal due were his action strictly at law. And, in such case, it is manifestly wholly aside the mark for defendant to contend that specific performance was unallowable (1) because the life of the corporation in question had expired, (2) because of the nature of the property involved, and (3) because the contract in question was nonmutual.

Patterson v Bingham, 222-107; 268 NW 30

Contract of sale—right to conveyance. The purchaser of real estate who has fully complied with the contract is entitled to specific performance, in the absence of some fact or condition which renders such decree inequitable.

May v Haynie, 212-66; 236 NW 98

Probate claimant for services—incompetency as witness. In probate action to establish a claim against an estate based on an express contract for services rendered to decedent, claimant could not testify as to existence of contract.

In re McKeon, 227-1050; 289 NW 915

Action against estate—evidence—sufficiency. The rule of law, that he who asks the specific performance of a contract must establish said contract by clear, satisfactory, and convincing evidence, is pre-eminently and with added force applicable to prayers for the specific performance of oral contracts against the estates of deceased persons. Alleged contract to convey property, in return for privilege of naming a child, held unproven.

Baker v Fowler, 215-1157; 247 NW 676

Wills—contract to devise or bequeath—irrevocableness of will. A will is irrevocable when executed in compliance with a contract which is (1) in writing, and (2) contains mutual promises then and there executed by the parties; nor is such a will rendered revocable by the death of the beneficiary therein prior to the death of the testator.

Powell v McBlain, 222-799; 269 NW 883

Wills—contract to devise or bequeath—disposal during lifetime—validity. A contract that one will make a will and devise and bequeath to the promisee "all property which I may own at the time of my death" and the due execution of a will of the same scope, leaves the promisor (testator) free to use, control and dispose of his property in his lifetime, and nonfraudulent transfers and conveyances by him before his death are valid.

Powell v McBlain, 222-799; 269 NW 883

Contracts for estate in return for services. An oral executed contract to the effect that, in return for personal services, the party shall, on the death of the other party to the contract, have the entire personal and real estate of such other party, is specifically enforceable, provided that the evidence is clear and convincing. Evidence held insufficient.

Jordan v Doty, 200-1047; 205 NW 964

Contract to will—evidence—sufficiency. Evidence reviewed, and held wholly insufficient to establish the genuineness of an alleged written contract to will property.

Shisler v Catholic Cem. Impr. Assn., 207-306; 222 NW 838

Oral contract to devise. An alleged oral contract between a childless couple and a neighbor, that such couple would leave all their property to the neighbor's minor son when he became of age, if he would live with them until that time, must be established by clear, satisfactory and convincing evidence, and when so established, along with proof of compliance by the son, entitles the son to specific performance of the contract.

Ford v Young, 225-956; 282 NW 324

Oral contract to will property. Where the plaintiff had done work for a woman who was ill, and had been promised that she would give him certain property in her will in return for the services, and plaintiff seeks specific performance of the agreement, claiming as consideration his oral agreement not to file a claim against the estate for the services until after such claim had been barred by the statute of limitations, such oral agreement was only the manner adopted for extinguishing the claim for the past services and the consideration for the oral agreement was the cancellation of the claim for the services and the discharge and compromise of the obligation which had accrued.

Fairall v Arnold, 226-977; 285 NW 664

Contract not to change will—not guaranty of son's debt. A son being indebted to a bank in the sum of $10,000, the father entered into a contract with the bank, that he would not alter his will wherein said son was bequeathed that sum, in consideration of which the bank would not press payment while the father lived. Held that such contract was not an absolute guarantee that the son was to have $10,000 from his father's estate regardless of its condition at the father's death, nor an undertaking that would nullify other provisions of the will.

Evans v Cole, 225-756; 281 NW 230

Mutual wills enforced as contract. Clear and satisfactory evidence that husband and wife entered into a mutual contract, and in accordance therewith executed mutual and reciprocal wills providing for the disposition of all their property to each other and to certain named beneficiaries upon the death of survivor, entitles beneficiaries to specific performance thereof and to restrain probating of another will, executed by husband after the wife's death, making provision contrary thereto.

Child v Smith, 225-1205; 282 NW 316

Unconscionable fraud-induced contract. An inequitable and unconscionable contract, obtained by fraudulent representations, will not be specifically enforced.

Yarcho v Dawson, 211-248; 233 NW 21

Contract procured by misrepresentation. Where purchaser of grain elevator falsely represented to vendor that another person would furnish necessary financial assistance to perform the contract, and vendor relied thereon, held, purchaser was not entitled to specific performance of the contract.

Dunkelbarger v Brasted, (NOR); 212 NW 676

Writing repudiated before fully signed. Specific performance of a contract of purchase of real estate will not be decreed when the purchaser, prior to the actual signing of the contract by the actual title holder, rejected the title except on a condition which the said owner never complied with after he did sign the writing.

Jones v Anderson, 213-788; 239 NW 522

Waiver of time element—effect. When the vendee in a contract of sale of real estate waives the time element for the performance of the contract, he, in legal effect, arms the vendor with right to perform within a reasonable time, and to enforce specific performance if vendee then refuses to perform.

Andrew v Miller, 216-1378; 250 NW 711

Contract to repurchase note and mortgage. A written contract by the seller of a note and mortgage to repurchase the same in case the mortgage is foreclosed is specifically enforceable.

Hawkeye Ins. v Cent. Trust, 210-284; 227 NW 637

Reconveyance of property—estoppel. The fractional owner of property who quit-claims his interest to his co-owner in order to enable the co-owner to mortgage the entire property for his own purpose, and who receives from the co-owner an agreement to reconvey, free of incumbrance, within a named time or to pay a named sum, may not, after the mortgage is executed, and after the mortgagee has in good faith agreed to take over the property in satisfaction of the mortgage debt, obtain specific performance of the agreement to reconvey, even tho the mortgagee, before the deal was fully closed, had notice of the agreement to reconvey.

Clarkson v Bank, 218-326; 253 NW 25

Nondelivery of abstract company records—plaintiff's burden. Plaintiff had burden of proving defendant did not deliver all of property of abstract company as provided in contract whereby assets of abstract company were to be turned over to plaintiff, in that all "take-offs" were not delivered.

Mills Co. v Otis, (NOR); 228 NW 47

Trade unions—unilateral contract as to wage scale—enforcement. An action to enjoin the violation of a so-called wage agreement will not lie when the writing is wholly unilateral, —when it purports to impose on the defendant an obligation to pay a certain scale of wages but imposes no obligation whatever on the other party or parties to the writing.

Wilson v Coal Co., 215-855; 246 NW 753

Transfer of liability—receivership—effect. An action for specific performance is not abated by the subsequent appointment of a receiver for the defendant.

Hawkeye Ins. v Cent. Trust, 210-284; 227 NW 637

Sales contract—court approval as condition. A definite written offer by the superintendent of banking of this state to sell to a foreign administrator Iowa real estate, belonging to a bank receivership, and the written acceptance of the offer, by said foreign administrator, may constitute a valid and specifically enforceable contract tho the offer and the acceptance be both conditioned on the approval of the respective state courts.

Bates v Bank, 223-385; 272 NW 412

Composition—oral agreement enforceable—time limit. An oral agreement between a debtor and his creditors under which the creditors agree to accept a composition amounting to less than their demands, is enforceable in equity; and if no time for performance be agreed on, the law will imply a reasonable

X ACTIONS—continued
(b) SPECIFIC PERFORMANCE GENERALLY—cont.

time. Evidence reviewed and held to establish such agreement, and that the debtor's offer of performance was within a reasonable time.

Bailey v Life Co., 221-1195; 268 NW 173

Construction and operation—time as essence of contract. Time will not, in equity, be deemed of the essence of a contract when the parties thereto have neither expressly so stipulated, nor, by their conduct, revealed that such was their understanding of the contract. So held as to the time of performance of a compromise settlement of mortgage indebtedness.

First Tr. JSL Bk. v Hanlon, 223-440; 273 NW 114

Cashing conditional down payment check—claim of mistake. In an action for specific performance of a land purchase contract, the act of an agent having power to contract in allowing a down payment check to be cashed when it bears a notation, of which he is aware, that it is not to be cashed until and unless the contract is accepted, furnishes support for a finding in equity that the contract was accepted, even tho the agent later claims that the check was cashed by mistake.

Hotz v Assur. Soc., 224-552; 276 NW 413

Irretrievably abandoned contract. An irretrievably abandoned contract necessarily cannot be specifically enforced. So held where the heirs of an estate sought specific performance of an alleged contract by the donee of a deceased donor to reconvey the gift to the donor's estate and to take the share of a general heir, and where it developed that said heirs had, regardless of said alleged contract, fully settled the estate among themselves to the exclusion of the said donee.

McGaffin v Helmts, 210-108; 230 NW 532

Fatal indefiniteness. A written contract for the sale of real estate is not specifically enforceable when it is silent as to (1) the date of final settlement, (2) when possession is to be given, and (3) what kind of conveyance shall be executed.

Donovan v Murphy, 203-214; 212 NW 466

Divorce settlement stipulation—unenforceable if uncertain. Where a divorce stipulation of settlement leaves for future decision certain matters of education of the children, there is such uncertainty and ambiguity and lack of definiteness, that specific performance cannot be granted.

Johnstone v Johnstone, 226-503; 284 NW 379

Unconscionable contract. Equity will not decree the specific performance of a contract of exchange under which plaintiff would obtain defendant's property for nothing.

Pickett v Comstock, 209-968; 229 NW 249

Proceedings and relief—general inequitableness—nonmutuality—innocent third parties. A decree awarding specific performance cannot be justified (1) when the party awarded such performance has neither tendered performance nor specifically shown his ability to perform, (2) when the decree contains mandates on parties over whom the court has no jurisdiction, (3) when the decree awards such performance both in favor of and against parties who are not and never have been parties to the contract in question, and (4) when the decree compels parties who are strangers to the contract in question to change their position to their possible financial loss.

Anders v Crown, 210-469; 229 NW 744

Nature and grounds of remedy—enforcing partial performance. When a vendor has contracted to convey an entire property, but owns only a fractional part thereof, the purchaser who shows that he is entitled to specific performance may elect to take and may enforce specific performance as to the part which the vendor is able to convey; and in such case, the purchaser will be entitled to a pro tanto abatement of the purchase price.

Anderson v Weirsmith, 209-714; 229 NW 199

Discretion of court—trustee in bankruptcy. Principle reaffirmed that whether specific performance shall be granted rests largely in the discretion of the court. Record held to justify specific performance, on the prayer of a trustee in bankruptcy.

Wilson v Holub, 202-549; 210 NW 593; 58 ALR 646

Improvident contract. Equity cannot relieve a person of the duty to perform his contract simply because the contract turns out to be ill-advised, unprofitable, or disadvantageous.

Carson v Mikel, 205-657; 216 NW 60

Failure of proof—retention of suit to award damages. When plaintiff in an action for specific performance has quite successfully shown that he is not entitled to any equitable relief, equity will not retain the suit in order to award damages.

Fisher v Bank, 206-1105; 221 NW 816

Specific performance action — amendment asking damages. Where a plaintiff, after starting a specific performance action to require a federal land bank to complete a loan as agreed, loses the land by foreclosure because the money from the agreed loan is not available to pay off the outstanding mortgage —thereby damaging the plaintiff-landowner by the loss of his equity in the land—an amendment to the specific performance petition changing the relief sought and seeking dam-

ages ascertainable after institution of the original suit does not set up a new cause of action.

Johnston v Bank, 226-496; 284 NW 393

Repurchase of securities. Specific performance of a contract to repurchase securities or to exchange them for other securities will not be ordered on a showing which tacitly concedes that an action at law for damages would be full, complete, adequate, and speedy.

Fisher v Bank, 206-1105; 221 NW 816

Proceedings and relief—damages in lieu of specific performance. A party who has failed to establish his right to specific performance may not complain that the court of equity refused to allow damages in lieu of specific performance and relegated him to an action at law as to such damages.

Dunlop v Wever, 209-590; 228 NW 562

Moot case—dismissal. An appeal by plaintiff-appellant from an order dismissing his action for specific performance will be dismissed on motion when it is made to appear that since the ruling in the trial court the defendant-appellee has specifically performed, and that such performance has been accepted by appellant. The court will not retain the appeal for the purpose of determining costs.

Fish v Sioux City, 210-862; 232 NW 118

Defensive matter — evidence — sufficiency. Evidence reviewed, and held insufficient to show such fraud, inadequacy of consideration, or undue hardship as would justify a refusal of a prayer for specific performance.

Anderson v Weirsmith, 209-714; 229 NW 199

XI PARTICULAR CONTRACTS

(a) IN GENERAL

Breach of contract not to engage in business. In an action to recover damages consequent on the breach by defendant of a contract not to engage for a named time in a named business in a named place, a judgment is sustained by competent and adequate evidence as to the value of plaintiff's business immediately prior to the said breach by defendant and a like showing of the effect which said breach of contract had on such value.

Eyerly v Smith, 210-1056; 231 NW 383

Surface waters—natural flow—contract to change. Adjoining land owners, as between themselves, may validly contract for ditches and dikes which will free the servient estate from the burden of natural drainage, and the right, if not abandoned, to have such ditches and dikes maintained will pass to subsequent owners of the land. But he who alleges such contract must establish the same by clear and satisfactory evidence.

Young v Scott, 216-1253; 250 NW 484

Improvements — assessments. The assessment procedure to cover the cost of remodeling a public drainage improvement is controlled by the statute in effect when the contract is let.

Mayne v Board, 208-987; 223 NW 904; 225 NW 953

Pipe-line right of way—ambiguity as to compensation. Where landowner made written agreement giving pipe-line company a right of way, and where receipt, executed simultaneously with the agreement, aided by extrinsic oral proof, showed that he actually received five dollars per rod for the first line put in, held, landowner was entitled to judgment compensating him at same rate for installation of a second pipe-line under the agreement, which provided that "additional lines shall be laid for a consideration the same as for the first", despite the fact that such agreement also provided for a compensation of only fifty cents per rod.

Vorthmann v Pipe Line Co., 228- ; 289 NW 746

Bank night — consideration for unilateral contract. Where the promoter of a motion picture bank night drawing voluntarily makes certain requirements to qualify for the prize which is promised, he does not merely extend an offer to make a gift, but a unilateral contract is created in which the promoter determines the adequacy of the consideration for his promise, and when a person is induced to accept the promise and perform the specified act which was bargained for, it does not matter how insignificant the benefit of the performance may apparently be to the promoter, the promise can be enforced by the winner of the drawing.

St. Peter v Theatre, 227-1391; 291 NW 164

(b) ESCROWS

Discussion. See 14 ILR 461—Power of recall

Wrongful delivery of deed—effect. Principle recognized that no title passes where the escrow holder of a deed of conveyance delivers the deed to the grantee without performance of the conditions upon which it was to be delivered.

Lindberg v Younggren et al., 209-613; 228 NW 574

Delivery of deed as gift. The unconditional delivery, as a gift, of a duly executed and acknowledged deed of conveyance, by the compos mentis grantor therein, and without fraud, to a third party with explicit direction, both orally and in writing, to said party, to hold said deed for the grantee, and to record the same immediately upon the death of the grantor, constitutes an irrevocable delivery to said grantee; and a priori, when, in addition to the foregoing, it affirmatively appears from the circumstances of the transaction that the

XI PARTICULAR CONTRACTS—cont.

(b) ESCROWS—concluded

grantor was intending to pass title to the grantee.

Keating v Augustine, 213-1336; 241 NW 429

Stock—assignment without delivery of certificate. A written assignment by the owner of corporate shares of stock of all his right, title and interest therein conveys good title, (1) even tho the owner places the assignment in escrow and causes it, together with the stock certificate, to be delivered to the assignee after his death, and (2) even tho the assignor, prior to his death, pledges the said stock certificate as security for a personal loan, which his estate later paid.

Leedham v Leedham, 218-767; 254 NW 61

Liability of escrow holder. The holder of funds in escrow becomes personally liable for the fund when he makes application thereof contrary to or in violation of the escrow agreement.

Stevens v Eggerichs, 219-479; 257 NW 775

Delivery to trustee—no reservation of right to recall. Where deed is delivered by grantor to a third party with instructions to deliver it to the grantee or record the same upon the death of the grantor, with no reservations of a right to recall the same during the lifetime of the grantor, there is sufficient delivery.

Bohle v Brooks, 225-980; 282 NW 351

Authority of depository—assessment on corporate stock. The holder in escrow of corporate stock has no implied authority to pay an assessment on said stock.

Harris v Bills, 203-1034; 213 NW 929

Special deposit as part of real estate deal. A cash deposit in a bank, understood by all parties, including the bank, to be made for the purpose of paying a vendor for land sold, and which, with accompanying papers, was held in escrow pending completion of title, must be deemed a special deposit and entitled to preferential payment on the insolvency of the bank, even tho a certificate of deposit, payable to the vendor, was issued by the bank and retained among the papers evidencing the deal.

Gillett v Bank, 219-497; 258 NW 99

Contract pending appeal. Where, pending an appeal which involved the title to land, the rival claimants under a landlord's lien and under a chattel mortgage on the crop entered into an agreement for the harvesting and sale of the crop and the holding of the proceeds until the appeal was decided, held that the contract evidently contemplated that the final holding on appeal would settle the right of one or the other of the parties to the controversy without further litigation.

Farber v Andrew, 208-964; 225 NW 850

(c) OPTIONS

Discussion. See 3 ILB 173—Mutuality in option contracts

Option distinguished from executory contract. An obligation on the part of the owner of real estate to sell, and of another party to buy, are all-essential elements of an executory contract of purchase of said land. Writing reviewed and held to constitute a mere option to buy which became a nullity on failure of optionee to exercise the option.

Burmeister v Council Bluffs Co., 222-66; 268 NW 188

Sale (?) or option (?). A writing wherein the vendor agrees to sell and convey, and the vendee agrees to buy, on stated terms and conditions, and under which the vendee takes possession, is a contract of sale, and not an option to buy.

Wilson v Holub, 202-549; 210 NW 593; 58 ALR 646

Personal liability (?) or option (?). Contract construed, and in the light of the conduct of the parties, held to impose a personal obligation, and not to constitute a mere option.

Spencer v Likes, 214-1066; 241 NW 493

Option to buy in lease. An option reserved in an ordinary lease of real estate for the purchase of the described property by the lessee at a fixed price, and on specified time and methods of payment (among which was an agreement that the rent paid should be credited on the purchase price), is specifically enforceable, even tho no provision is embodied therein as to (1) formal possession or (2) title or (3) conveyance, and even tho the parties thereto unnecessarily reserved the right generally to enter into additional agreements relative to such option.

Carter v Bair, 201-788; 208 NW 283

Strip mining coal—back-filling required. A holder of a strip mine coal lease who enters upon and strips coal from land, upon which land a pipe line company holds an easement, knowing that by so mining violates his lease, must back-fill the land when the easement holder exercises his option to buy; and upon his failure to make the back-fill, a judgment against the coal lessee for the cost thereof is proper.

Penn v Pipe Line Co., 225-680; 281 NW 194

Rescission by optionee—nonrecovery. The assignee of an option contract for the purchase of land may not, upon rescinding, recover of the original optionor (with whom he has no contract) the amount paid for the option.

Bredensteiner v Oviatt, 202-993; 210 NW 133

Rescission—recovery for betterments. The assignee of an option contract for the purchase of land may, upon rescission, recover of his

assignor the value of betterments which he—the assignee—has necessarily been compelled to place on the land.

Bredensteiner v Oviatt, 202-993; 210 NW 133

Rescission — use and occupancy — measure. When the assignee of an option contract for the purchase of land rescinds after he has been put in possession, his liability for the use and occupancy of the land is measured by the reasonable value thereof, and not by the provisions of the rescinded contract.

Bredensteiner v Oviatt, 202-993; 210 NW 133

Rescission by assignee—effect. The assignee of an option contract does not, by giving notice that he rescinds the contract between the original optionor and optionee, destroy the rights of the original optionee under the contract. Especially is such notice inconsequential when the record shows that the original option had no value.

Bredensteiner v Oviatt, 202-993; 210 NW 133

(d) EMPLOYMENT CONTRACTS

Discussion. See 17 ILR 388—Negative covenants enforced

Employer-employee relation—test. The test of the relationship between employer and employee is the right of the employer to exercise control of the details and method of performing the work.

State v Ritholz, 226-70; 283 NW 268

Master and servant — the relation — when question of law. When the relationship of parties is fixed by a written contract, the question whether they occupy the relation of master and servant (employer and employee) is one of law to be determined by the court and not one of fact to be determined by the jury.

Page v Constr. Co., 215-1388; 245 NW 208

Proposal or offer—implied acceptance. One who is, in writing, offered work at a specified price and proceeds to perform the work without further negotiation necessarily agrees to do the work for the offered compensation.

Commercial Bank v Broadhead, 212-688; 235 NW 299

Receiver — federal appointment — effect on state courts. The mere pendency of federal receivership proceedings over a party does not necessarily oust the jurisdiction of the state courts over the party and over his property, and such pendency may not be allowed as a defense to an employment contract.

Lippke v Milling Co., 215-134; 244 NW 845

Attorney and client—summary proceedings —findings conclusive. In a summary proceeding by a client against his attorney, the finding by the trial court on conflicting testimony is conclusive on the appellate court.

Norman v Bennett, 216-181; 246 NW 378

Employee earning bonus—effect. Evidence held to sustain a verdict that a bonus under an employment contract had been fully earned before the execution of a subsequent contract which supplanted the former contract.

Williams v Oil Corp., 216-821; 247 NW 817

Bonus at end of year—question of fraud. Oral contract of employment at fixed hourly rate and providing for bonus at end of year held not within statute of frauds.

Meredith v Youngstrom Co., (NOR); 205 NW 749

Partnership changes—performance with new entity—waiver. A physician as a party to a contract of employment with a medical clinic partnership is not in a position to question its validity on the ground that there had been a change in the members of the partnership and consequently no contract with the new entity, when his full performance of and under the contract had been with the new entity, including an extension of the contract.

Larsen v Burroughs, 224-740; 277 NW 463

Oral wage agreement—erroneous writing—effect of employee's conduct. An oral wage scale agreement applicable to the first few weeks of employment, incorrectly reduced to writing by employer's agent, but correctly followed in paying wages which was not challenged by employee during the several years he continued in this employment, justifies a reformation of the writing to conform to the oral agreement.

Koch v Abramson, 223-1356; 275 NW 58

Teachers—contract—oral extension—validity. An oral extension of time for teaching under a teacher's contract (under which no services were rendered) cannot be recognized.

Krutsinger v Township of Liberty, 219-291; 257 NW 797

Estates—payment for services. Where a deceased had taken his nephew, reared him, and promised to pay him for working on decedent's farm, testimony as to statements made by the deceased in conversations wherein deceased had said the boy was to be paid from his estate when he died, may be received from the wife of deceased, the wife of claimant, and the claimant himself, provided they took no part in the conversations.

Gardner v Marquis, 224-458; 275 NW 493

Evidence of express contract for services—jury question. In probate action to establish claim against estate based on express contract; where evidence that claimant acted as housekeeper, assisted with clerical work, and performed other duties about the farm for decedent, pursuant to his agreement to pay her a small amount sufficient to cover the cost of her clothing and other personal expenses, and in addition thereto to compensate her out of his estate at his decease in such amount as

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(d) EMPLOYMENT CONTRACTS—continued

would be in excess of any amount she could earn teaching school, a jury question was presented as to the existence of an enforceable contract and as to its nature.

In re McKeon, 227-1050; 289 NW 915

Services rendered to decedent—evidence of agreement admissible—jury question. In probate action where a claimant seeks to recover for services rendered to decedent under an express contract, the performance of such services must have been induced by a proposal and must have been in accordance therewith. Testimony by a witness to a conversation with decedent, who stated that he intended to see that claimant was properly cared for, that he would give her spending money (the little she would need), and at the end of his life he would leave her a home, was admissible and proper evidence for the jury to consider on question of whether or not there was any such arrangement or agreement. What the parties agreed to must be determined by the jury.

In re McKeon, 227-1050; 289 NW 915

Estates—partnership checks not showing payment. In proving a claim against an estate, by showing an oral contract to pay for services extending over a period of many years, neither the lapse of time nor checks payable to claimant drawn by decedent during the fourteen years just preceding his death, when a partnership existed between them for those years, raises a presumption of payment in view of decedent's admission of the debt shortly before his death.

Gardner v Marquis, 224-458; 275 NW 493

Services to be paid for "on or before" death. An oral contract to pay for services, payable "on or before" the death of the promisor, matures at his death and therefore is not barred by the statute of limitations, even tho the claim was running for over 20 years.

Gardner v Marquis, 224-458; 275 NW 493

Employment of acrobats—assignment to booking agency—nonnovation. Where a broadcasting company assigned to a booking agency an oral contract for employment of an acrobatic team, and such agency subsequently became the booker of the acrobats under a written contract, the company was not relieved of liability under the employment contract on the ground of "novation", because there was no evidence that all parties consented to a substitution of the agency for the company.

Wade v Central Broadcasting Co., 227-422; 288 NW 439

Discharging acrobatic team. In acrobatic team's action for breach of contract of employment for two bookings, evidence, that plaintiffs were ready to perform and that employer replaced them in one of the engagements and told them they would not be used in the other, justified finding that plaintiffs were discharged.

Wade v Central Broadcasting Co., 227-422; 288 NW 439

Discharge of employer's liability—effect on third party wrongdoer. Where an injury, which is mandatorily compensable under the workmen's compensation act, is received by an employee in consequence of the actionable negligence of the operator of an automobile owned by, and operated with the consent of, the employer, the fact that the employer fully discharges his statutory liability to the employee does not ipso facto discharge the legal liability of the said negligent operator to said employee.

McGraw v Seigel, 221-127; 263 NW 553; 106 ALR 1035

Unilateral contract as to wage scale—enforcement. An action to enjoin the violation of a so-called wage agreement will not lie when the writing is wholly unilateral—when it purports to impose on the defendant an obligation to pay a certain scale of wages but imposes no obligation whatever on the other party or parties to the writing.

Wilson v Airline Co., 215-855; 246 NW 753

Contingent attorney fee—validity of contract. A contract between an attorney and a client fixing the contingent compensation of the attorney at one-third of the amount recovered, entered into at a time when the extent of the litigation was quite problematical, is not rendered unenforceable because ultimately the services necessary to effect a recovery were quite small. Nor is such a contract champertous.

State v Cas. Co., 212-1052; 237 NW 360

Compensation liability—contract in avoidance—effect. A contract must be wholly rejected insofar as it appears to be a mere device resorted to by the employer in order to relieve himself of liability under the workmen's compensation act.

Mallinger v Oil Co., 211-847; 234 NW 254

Compensation—use of auto. Evidence reviewed and held wholly insufficient to establish a pleaded modification of a contract relative to the compensation of an agent for his services and for the use of his automobile in performing said services.

Hueston v Pointer Co., 222-630; 269 NW 754

Devoting full time—question for jury. In action to recover for services in securing contract for construction of building, question of whether plaintiff breached his contract by failing to devote full time to developing and financing the project was for the jury.

Cox v Fleisher Const. Co., (NOR); 213 NW 442

Overdrawn moneys — counterclaim — pleadings. Where defendant employee's answer, in action by employer to recover overdrawn moneys sets up counterclaim for moneys due him under oral employment contract the lower court properly denied the counterclaim when the contract was not established as pleaded.

Economy Hog Co. v Honett, 222-894; 270 NW 842

Deducting employee's debt to employer. Where a defendant-employer in paying his employee deducted an amount which the employee was owing the employer, and, when sued, based his right so to do (1) on an oral contract that he might so deduct, and (2) on his right to so deduct irrespective of such oral contract, the court prejudicially errs, in its instructions, in making the right to deduct dependent on proof of the oral contract.

Jorgensen v Cocklin, 219-1103; 260 NW 6

Breach—acts constituting. An employee who is employed for a definite time to assist in or to supervise the sale of corporate securities may treat his contract of employment as breached when the master discontinues the sale of the securities and offers him employment in peddling merchandise from house to house.

Breen v Power Co., 207-1161; 224 NW 562

Contract employing physician—future practice restraint unaffected by indefinite employment extension. When being employed by a medical clinic in a locality where he is not acquainted, a contract by a physician agreeing that at the termination thereof he will not practice his profession for ten years within a certain locality is not invalidated by reason of an indefinite extension of the employment period mutually acted upon by all parties, and injunctive relief was properly granted to employer.

Larsen v Burroughs, 224-740; 277 NW 463

Contract restraining competition. An employment contract between two physicians, which after setting forth several requirements of the employee, further provides for "liquidated damages" in case the employee independently practices in the county within five years after termination of the employment, may be construed, not as a contract for liquidated damages, but as a penalty.

McMurray v Faust, 224-50; 276 NW 95

Contract restraining competition of profession—liquidated damages—nonbar. Injunction is a proper remedy to restrain one physician from practicing his profession contrary to the provisions of his contract not to engage in competitive practice in the same county for a specified period. A provision in the contract for "liquidated damages" will not bar injunctive relief.

McMurray v Faust, 224-50; 276 NW 95

Contract not to competitively engage in guarding property. Where a discharged employee of a company engaged in guarding business houses at night threatens to breach his contract prohibiting him from entering into competition therewith, a petition seeking injunctive relief against him and alleging these facts sets up a good cause of action for an injunction.

Sioux City Patrol v Mathwig, 224-748; 277 NW 457

Infringement and unfair competition—employee entering employ of rival. An employee may lawfully terminate his employment with his employer, and enter into the employment of a rival of his former employer, and advertise and circularize such fact, and no legal right of the former employer is violated so long as it appears that the employee furnishes to his new employer no list of the former employer's customers and that no confidential information acquired in the former employment is used in the latter.

Universal Corp. v Jacobson, 212-1088; 237 NW 436

Unfair competition — evidence — sufficiency. Evidence reviewed and held insufficient to show that a party, in leaving an employment and entering into the same business in the same territory, took anything that could be deemed the property of his former employer.

Rosenstein v Smith, 218-1381; 257 NW 397

Performance or breach—waiver—evidence—sufficiency. A waiver is the voluntary and intentional relinquishment or abandonment of an existing legal right. He who relies thereon has the burden of establishing all elements thereof. Evidence involving the payment of renewal commissions on insurance policies reviewed and held insufficient to establish a waiver.

McPherrin v Assur. Co., 219-159; 257 NW 316

Breach—damages (?) or quantum meruit (?). An action for damages for breach of a contract of employment may be supported by evidence of the reasonable value of the services rendered, when the pleadings present such sum as the damages.

Westerfield v Oil Co., 208-912; 223 NW 894

Iowa employment contract—action—place of business. Action for damages under oral contract of employment made in Iowa is not governed by the place where the contract was entered into, but may be maintained in state where employer's business was "localized".

Severson v Hanford Air Lines, 105 F 2d, 622

Wage recovery dependent on reformation. In a law action for wages, allegedly due an employee under contract, where parties stipulate that the employee shall not recover such wages if the defendant prevails on his cross-

XI PARTICULAR CONTRACTS—continued
(d) EMPLOYMENT CONTRACTS—continued
petition for reformation, transferred to equity on motion, the employee may not thereafter deny the court's right to try the reformation issue and is bound by the decree if not contrary to the evidence.

Koch v Abramson, 223-1356; 275 NW 58

Duplicate counts pleading quantum meruit and express contract. In an action for services, duplicate counts are proper, one pleading quantum meruit, and the other an express contract for definite compensation, and a refusal to compel plaintiff to elect between the two counts is not erroneous.

Halstead v Rohret, 212-837; 235 NW 293

Value of services—issues control. Issues control the relevancy, materiality and competency of evidence. Principle applied where it is held that evidence of the value of services is not admissible on the narrow issue whether an oral contract for services for $500 had been entered into.

McManus v Kucharo, 219-865; 259 NW 926

Oral contract—bonus—submission of issues. In action on oral contract of employment submission to jury of controlling issue of whether plaintiff is entitled to $10 weekly bonus is sufficient even tho the court did not literally and technically follow the pleadings.

Yaus v Shawmutt Egg Co., 204-426; 213 NW 230

Employment contract—duration—jury question not within statute of frauds. Whether an employer agreed to pay bonus on wages earned by employee for each year of employment, or only for year in which agreement was made, held for jury on conflicting evidence and under the facts and circumstances such agreement was not within the statute of frauds.

Meredith v Youngstrom Co., (NOR); 205 NW 749

Duration — evidence — sufficiency. Evidence reviewed, and held to present a jury question on the issue whether a contract of employment had been entered into for a definite time.

Breen v Power Co., 207-1161; 224 NW 562

Employment of school janitor. When a school board each year considered hiring the janitor at a specified salary, the board proceedings invited a contract with the janitor, the acceptance being evidenced by performance on his part. The employment was for definite yearly periods, and the board proceedings being public records accessible to the janitor, he should have known that the employment was yearly, and he could not avoid the terms of the contract and claim an indefinite period of employment when by the exercise of reasonable diligence he could have known upon what he was agreeing.

Durst v Board, 228- ; 292 NW 73

Teachers—issue as to terms of contract. Evidence held to present a jury question on the issue whether a contract had been entered into with a teacher.

Krutsinger v Township of Liberty, 219-291; 257 NW 797

Injecting unpleaded issue into instructions. On the one duly joined issue whether plaintiff was orally employed to render services for defendant in a certain matter, the court commits reversible error by injecting into the instructions the unpleaded issue whether defendant knew that plaintiff was performing services for defendant and accepted the benefits of such services.

Graeser v Jones, 217-499; 251 NW 162

Similar but independent contracts. Parol evidence of a contract binding defendant to purchase and deliver to plaintiff a named number of corporate shares of stock in payment for services performed by plaintiff is independent of a subsequent written agreement binding plaintiff to buy of defendant the same number of shares of stock of the same company.

Cox v Constr. Co., 208-458; 223 NW 521

Value of services—harmless error—competent and incompetent evidence. It is not reversible error to permit to remain in the record on the issue of the quantum meruit of services testimony of what amount an expert witness would be willing to pay for such services, when the witness further testifies that said amount is the reasonable value of such services.

Olson v Shuler, 208-70; 221 NW 941

Services and compensation—evidence—sufficiency. Evidence held to support a finding that the salary received by plaintiff while she was in the employ of an individual was continued when she became an employee of a corporation of which her former individual employer was president.

Crawford v Finance Corp., 217-175; 251 NW 57

Unreasonable and unconscionable contract—evidence. On the issue whether a contract of employment was unreasonable and unconscionable, evidence of the salaries paid to former employees of the same corporation may be material.

Schulte v Ideal Co., 208-767; 226 NW 174

Breach—discharge of employee. The peremptory discharge without cause of an employee under a definite time contract is, of course, a breach of the contract.

Westerfield v Oil Co., 208-912; 223 NW 894

Teaching contract—modification by extrinsic matters. In an action at law by a teacher upon a written contract of employment, the rights of the parties are necessarily determinable by the actual terms of the contract,

unmodified by extraneous matters or circumstances.

Miner v Sch. Dist., 212-973; 234 NW 817

School contract — termination on notice — validity. A provision in a public school contract authorizing either party to the contract to terminate it by giving written notice of such termination for a named number of days is not violative of or inconsistent with either §4229 or §4237, C., '27.

Miner v Sch. Dist., 212-973; 234 NW 817

Teacher's contract—termination on notice. A provision, in a public school contract, which authorizes the school district to terminate the contract on stated notice at any time and for any reason, is valid, and, if a termination is effected under such contract authorization and not under statutory authorization (§4237, C., '35), no appeal will lie to the county superintendent or, in turn, to the state superintendent. In other words, neither superintendent has jurisdiction to review such a discharge.

School Dist. v Samuelson, 222-1063; 270 NW 434

Sales contract — indefinite term — termination. The oral granting, on adequate consideration, by a manufacturer to another party of the exclusive right to sell a legal article in prescribed territory so long as there is a demand for the article, and so long as such other party desires to continue such sale, is, on acceptance, a valid contract until terminated by reasonable notice.

Atlas Co. v Huffman, 217-1217; 252 NW 133

Employment of soldier for definite time—effect. An honorably discharged soldier who is employed by the board of supervisors, under a written contract, for a definite period of time as janitor of the courthouse, does not, by serving said contract period of time, acquire a legal right, even tho his competency and conduct are unquestioned, to continue in said position in preference to another honorably discharged soldier of equal qualifications.

Sorenson v Andrews, 221-44; 264 NW 562

Cancellation—instructions. In action by ballplayer to recover for services under written contract which could be terminated by defendant at any time, an instruction that oral notice of termination given by any of the members of the defendant baseball club would cancel the contract was not prejudicial when in fact all members of the club were present and in complete accord at the meeting at which the contract was canceled.

Jacobs v Vander Wicken, (NOR); 218 NW 147

Foreign employer — adjudication on registered mail service. The Workmen's Compensation Act, in the absence of a statutory rejection thereof, becomes a part of a contract of employment which is performable by the employee wholly within this state, and entered into between a resident employee of this state and a foreign nonresident employer doing business in this state without a state permit; but in case the employee dies from an injury compensable under said act, the industrial commissioner acquires no jurisdiction to determine and adjudicate the compensation due on account of said death by simply sending, by registered mail, notices of said proceedings to said employer in said foreign state, tho, concededly, the addressee received said notices. An adjudication on such service does not constitute due process.

Elk River Co. v Funk, 222-1222; 271 NW 204; 110 ALR 1415

(e) BROKERS AND COMMISSION CONTRACTS GENERALLY

Petition—separate counts required. A plaintiff who pleads both quantum meruit and express contract in the same count should be compelled, on motion, to separate his cause of action into separate counts.

Donahoe v Gagen, 217-88; 250 NW 892

Compensation—insufficient proof. It is a far-fetched proposition that a broker employed to effect a sale of all the capital stock of a corporation has established his right to a commission by proof that he contacted a party in the effort to effect such sale but was unsuccessful, and that some two years later, without any further effort on his part, the party so contacted and said corporation effected a reorganization of the corporation on the basis of a stock issue entirely different than that formerly existing.

Jackley-Wiedman Co. v Washer Co., 220-486; 262 NW 97; 101 ALR 1216

Presence or absence of directions as to sale. Factors must comply with specific directions as to time of sale. In the absence of such directions, they must sell within a reasonable time.

Alley Co. v Cream. Co., 201-621; 207 NW 767

Contract to find purchaser—tentative offer —effect. The issue whether a broker found a purchaser ready, able, and willing to buy the property of his principal is not affirmatively established by proof that the broker found one who made a tentative proposition to purchase, which was specifically dependent on a further investigation as to the legality and probable security of the property—an issue of bonds—which investigation the person making the offer never made.

MacVicar v Paving Corp., 201-355; 207 NW 378

Action for compensation—status as licensee —failure to allege—effect. The failure of a broker in his petition for the recovery of commission to allege his status as a duly licensed broker is quite harmless (1) when the petition is not attacked because of such omission, and (2) when the evidence, received without objection, clearly establishes such status.

Baehr-Shive Co. v Stoner-McCray, 221-1186; 268 NW 53

Action for compensation—quantum meruit —irrelevant testimony. In an action by a broker to recover commission on a basis of quantum meruit, evidence is properly rejected as to the compensation generally received by brokers when they work by the day, the actual evidence received fairly showing that the customary method of employment of brokers was on a commission basis.

Baehr-Shive Co. v Stoner-McCray, 221-1186; 268 NW 53

Refusal of employer to sell at price stated —not excused by resulting loss. One who contracted to pay a commission to a dealer for selling goods at a certain price could not excuse his breach of the contract by refusing to sell except at a higher price, at least as to orders for goods taken before the breach, on the ground that to fulfill the contract would cause him to operate his business at a loss.

Lee v Sundberg, 227-1375; 291 NW 146

Loss of commissions on sales—price raised after orders taken. Where a manufacturer contracted with a dealer who was to take orders for twine at a certain price and the manufacturer later refused to fill the orders taken except at a higher price, in an action by the dealer for loss of commissions, damages were sufficiently proven by evidence that the dealer had incurred expenses in taking the orders, and that only about 25 percent of the orders were accepted by customers because of the increased price, while normally 95 percent of the orders would have been accepted.

Lee v Sundberg, 227-1375; 291 NW 146

Duties and liabilities to principal—acting for parties adversely interested. A broker may act for adversely interested parties provided that they consent to such dual agency.

Loots v Knoke, 209-447; 228 NW 45

CHAPTER 421

TENDER OF PAYMENT AND PERFORMANCE

9443 Demand required.

Refusal—effect. An agreement to receive corporate stock in payment of wages is converted into a money demand by a failure to deliver the stock.

Tracey v Judy, 202-646; 210 NW 793

Contracts — performance — reasonable time to construct grotto. An individual constructing a grotto for a charitable organization under an agreement containing no time for completion has a reasonable time for performance.

Sisters of Mercy v Lightner, 223-1049; 274 NW 86

Cashing conditional down-payment check—claim of mistake. In an action for specific performance of a land purchase contract, the act of an agent having power to contract in allowing a down-payment check to be cashed when it bears a notation, of which he is aware, that it is not to be cashed until and unless the contract is accepted, furnishes support for a finding in equity that the contract was accepted, even tho the agent later claims that the check was cashed by mistake.

Hotz v Assur. Soc., 224-552; 276 NW 413

Nonpayment of royalties not repudiation of patent license. A contract to pay royalties under a patent license was not repudiated by the mere refusal to make the royalty payments which were legally due.

Eulberg v Cooper, 226-776; 285 NW 131

Proof—deferred salary—later payments nonwaiver. Waiver being an intentional relinquishment of a known right and provable only by clear, satisfactory, unambiguous evidence, where a corporation resolution deferring payment of certain delinquent salary accounts due corporate officers, did not of itself prevent payments thereon, fact of withdrawals thereafter from such salary accounts is not a waiver of such resolution.

Bankers Trust v Economy Coal, 224-36; 276 NW 16

Parol evidence to explain ambiguous contract. A written contract for storage of corn, which makes no provision as to when the seller is to exercise an option to sell nor as to when the storage is to be paid, does not contain the entire agreement entered into, and parol evidence is admissible on the question as to what was reasonable time to perform.

Andreas & Son v Hempy, 224-561; 276 NW 791

Waiver—definition—fact question. Waiver is the voluntary and intentional relinquishment of a known right and is a question of fact.

Jones v Des Moines, 225-1342; 283 NW 924

9444 Tender of labor or property.

Payment generally. See under §11209

Conditional tender. Principle reaffirmed that a tender is not good unless made unconditionally.

Schwab v Roberts, 220-958; 263 NW 19

Tender—sufficiency. On rescission of a contract of purchase of corporate shares of stock because of fraud which induced the purchase, an unconditional tender to the seller of the stock certificate is all-sufficient, even tho the certificate is being held as collateral security for the debt of the one who makes the rescission.

North Amer. Ins. v Holstrum, 208-722; 217 NW 239; 224 NW 492

Tax titles—paying taxes before attacking tax deed—valid tender sufficient. Statute requiring payment of taxes as a prerequisite to attacking a tax deed, §7290, does not preclude questioning the title by a person who repeatedly offers to do equity by tendering the whole of the taxes legally and rightfully due together with interest and penalties thereon.

Jordan v Beeson, 225-460; 280 NW 625

Mode and sufficiency. Evidence held to show a good tender of corporate shares of stock.

Calvert v Mason City Co., 219-963; 259 NW 452

Right to increase tender. Tho a tender of the amount due under a contract is slightly inadequate, the court, in an equitable action involving the contract, may very properly permit the purchaser to increase his tender to the required amount.

May v Haynie, 212-66; 236 NW 98

Tender of deeds before suit—nonnecessity. In an equity action for specific performance of a land contract, a vendor need not formally tender the deeds before starting suit, and when vendee specifically contracts to first pay the purchase price before getting the deed, the vendor need only get himself in readiness to perform.

Utterback v Stewart, 224-1135; 277 NW 735

Justifiable refusal. A servant who agrees to accept corporate stock in a contemplated corporation in payment of his wages is justified in refusing the stock at a time when, without his consent, the corporation has become heavily incumbered by mortgage.

Tracey v Judy, 202-646; 210 NW 793

Sale for delinquent taxes not carried forward—setting aside—insufficient tender. A tax sale for delinquent taxes not carried forward will not be set aside in equity nor the deed issuance restrained when the titleholder's offer to do equity by tendering such taxes as "constitute a valid lien" and "actually paid" by the purchaser is a disingenuous tender.

McClelland v Polk County, 225-177; 279 NW 423

9446 Effect of tender.

Payment generally. See under §11209

Sufficiency—effect—burden of proof. Tender will not discharge a debt, and is of no avail unless kept good, and the burden of proving affirmatively that it has been kept good is on the party relying thereon.

Hill v Rolfsema, 226-486; 284 NW 376

Specific performance of real estate sale contract—tender. In an action to recover rent a counterclaim for specific performance of a contract to sell the property was properly prepared when it contained allegations that the purchaser was at that time, and at all times had been, ready, willing, and able to perform, and had made a tender of performance which was refused, and a copy of the letter constituting such tender was attached to the counterclaim.

First Tr. JSL Bk. v Resh, 226-780; 285 NW 192

9448 Offer in writing—effect.

Offer in pleadings. An offer by a litigant in an equitable pleading to pay whatever sums are legally necessary to effect a redemption constitutes a sufficient tender.

Fidelity Inv. v White, 208-519; 223 NW 884

Sufficiency in equity. In equity, it is sufficient to tender in the pleadings and at the trial, the restoration of the status quo.

Hoyt v Hampe, 206-206; 214 NW 718; 220 NW 45

Nonproduction of money. A litigant who admits his indebtedness and is able and willing to pay it, and who, in order to protect himself, equitably interpleads warring claimants to the fund, and therein tenders the sum to whomsoever it is adjudged to belong, may not be held liable for interest because he does not actually bring the money into court until after the issues are determined.

Kelly etc. v Bank, 217-725; 248 NW 9; 250 NW 171

Tender of conveyance—sufficiency. Tender of a deed is not a condition precedent to the beginning of an equitable action by a vendor to enforce a contract for the sale of land. A tender in the petition is all-sufficient.

Vanderwilt v Broerman, 201-1107; 206 NW 959

Specific performance. One who had agreed to obtain a loan to be used for the purchase of land did not make a sufficient showing that he was ready, willing, and able to perform the alleged contract to buy the land so as to entitle him to specific performance when it was never shown that he had the purchase money, when an attempted loan of the money was never completed, when there was no application on file for the loan at the time of trial, and when it was not shown that the loan would have been granted had the application been made.

First Tr. JSL Bk. v Resh, 226-780; 285 NW 192

Tender—real estate contract. When the vendor had put it out of his power to perform a contract to sell realty by permitting a mortgage on the property to be foreclosed, it was not necessary for the purchaser to tender the unpaid part of the purchase price before commencing suit for the amounts paid.

Trammel v Kemler, 226-918; 285 NW 196

Check as good tender. The tender of a valid, collectible check in payment of a debt is good when not objected to because not lawful money, but objected to on an untenable ground.

Schmith v Cas. Co., 216-936; 247 NW 655

Time of performance—relative rights of parties. The vendor in a contract specifically requiring the vendee to first pay before getting the deed, need only get himself in readiness to perform, and need make no tender until payment is made or offered by vendee, and the vendor is not in default until this is done.

Foft v Page, 215-387; 245 NW 312

9449 Nonacceptance of tender.

ANALYSIS

I SUFFICIENCY AND NECESSITY OF TENDER
II MAINTENANCE OF TENDER
III EFFECT OF TENDER

Payment generally. See under §11209

I SUFFICIENCY AND NECESSITY OF TENDER

Conditional tender. Principle reaffirmed that a tender is not good unless made unconditionally.

Schwab v Roberts, 220-958; 263 NW 19

Rescission of promissory note—status quo. An offer by the maker of a promissory note, on rescission thereof, to return everything received by virtue of the note is a sufficient offer to put the holder in statu quo.

Larson v Bank, 202-333; 208 NW 726

Payment of dues and fines. When a lodge and the officers thereof are subject to contempt for failure to reinstate a member "upon the payment of all dues and fines", no basis for contempt proceedings is shown by testimony that a representative of the member attended a session of the lodge, made inquiry as to said member, discovered that the members present were hostile, and thereupon sat down without producing or offering to produce money for said dues and fines and without even giving notice that he was representing said member.

St. George's Soc. v Sawyer, 204-103; 214 NW 877

Contract for sale of land. A contract purchaser of land may rescind and recover the payment made by him when, at the contract time for performance, the vendor has no title, and in such case the purchaser need make no tender of performance by himself.

Dolliver v Elmer, 220-348; 260 NW 85

Real estate contract — vendor's inability to perform. When the vendor had put it out of his power to perform a contract to sell realty by permitting a mortgage on the property to be foreclosed, it was not necessary for the purchaser to tender the unpaid part of the purchase price before commencing suit for the amounts paid.

Trammel v Kemler, 226-918; 285 NW 196

Nontender of abstract and deed. In an action against a defaulting vendee, to foreclose a contract of sale of real estate for matured and unpaid installments, no tender of abstract and deed is necessary as a condition precedent to maintaining the action, when the right to said abstract and deed has not yet matured under the contract.

Dimon v Wright, 206-693; 214 NW 673

Replevin under conditional sale. In an action of replevin based on a conditional sale contract which provides for possession by the vendor in case of condition broken, tender of payments already made is not a condition precedent to the institution of the action.

Schmoller Co. v Smith, 204-661; 215 NW 628

Payment of disputed claim accepted. When a town had contracted to pay a certain rate for furnishing street lighting services, and later a reduced rate was adopted, and there was a disagreement as to the rate to be paid on certain months, there was accord and satisfaction when the plaintiff accepted and cashed a warrant knowing that it was tendered in full payment of all claims.

Munn v Drakesville, 226-1040; 285 NW 644

Offer accepted or rejected as a whole. When a town warrant was issued in full payment of a disputed claim, and was accepted with such knowledge, there was an accord and satisfaction of all claims, as such offer must be accepted or rejected as a whole.

Munn v Drakesville, 226-1040; 285 NW 644

Public utility—justifiable refusal to furnish product. A public utility company is within its rights in refusing to furnish its product—electric energy—to one who fails to pay his current bill for such product, and it is not sufficient that the customer tenders payment for future service.

Bailey v Power Co., 209-631; 228 NW 644

Recovery of purchase price—sales in violation of securities law — tender of securities necessary. Purchaser suing to recover price paid for securities sold in violation of Iowa securities law must at least tender to seller securities equivalent in value to those purchased.

Huglin v Byllesby & Co., 72 F 2d, 341

II MAINTENANCE OF TENDER

Rejection—effect. Even tho a tender has been refused, equity may require it to be kept good.

Thompson v Mott, 202-246; 210 NW 91

Temporary injunction — automatic dissolution. Under an order providing that defendant's motion to dissolve a temporary injunction "be sustained" if defendant, within a named time, paid plaintiff a named sum, and also certain costs, the injunction is automatically dissolved both (1) by the act of defendant in paying, within said time, the said costs and tendering to plaintiff the named sum (tho plaintiff refused the tender), and (2) by the affirmance of the order on appeal by plaintiff. It follows that a further unnecessary order, subsequent to the affirmance, finally dissolving the injunction, is not erroneous, even tho defendant had not kept good his tender.

Peoples Bk. v McCarthy, 210-952; 231 NW 487

III EFFECT OF TENDER

Workmen's compensation act. A tender by an employer of the proper amount of compensation payments, and for the proper compensation period, absolves the employer from all obligation to pay interest on such payments pending an unsuccessful attempt by the employee to secure an increase in the compensation period.

Pappas v Tile Co., 201-607; 206 NW 146

Workmen's compensation act. The acceptance by an employee of tendered compensation payments under the workmen's compensation act cannot prejudice him when the sole dispute between the employer and employee is as to the time the payments should continue.

Pappas v Tile Co., 201-607; 206 NW 146

Modification of contract — repudiation — effect. Where a vendor and purchaser of real estate mutually agree to an extension of time for the final performance of the contract, the purchaser may not put the vendor in default by a tender and demand during said extension of time. But, nevertheless, the vendor may acquiesce in the act of the purchaser in repudiating the extension agreement, and, within a reasonable time, put himself in a position to fulfill his contract to sell, and make tender and demand accordingly.

Foft v Page, 215-387; 245 NW 312

CHAPTER 422

ASSIGNMENT OF ACCOUNTS AND NONNEGOTIABLE INSTRUMENTS

9451 Assignment of nonnegotiable instruments.

ANALYSIS

I ASSIGNMENTS IN GENERAL
II ASSIGNABILITY OF INSTRUMENTS AND CLAIMS

Assignee as party to action. See under §10971
Assignment of leases. See under §10159 (III)
Assignment of leases in mortgage foreclosures. See under §§10107, 12372
Assignment of thing in action. See under §10971
Contracts prohibiting assignment. See under §9452

I ASSIGNMENTS IN GENERAL

Owner's right of disposal. Under ordinary circumstances one has the absolute right to dispose of his property as he pleases.

O'Brien v Stoneman, 227-389; 288 NW 447

Note and mortgage — consideration — adequacy. Evidence reviewed relative to an assignment of a note and mortgage for $5,000, and held that a life annuity of $200 per year to the assignor was sufficiently adequate to prevent any imputation of fraud, actual or constructive.

Scott v Seabury, 220-655; 262 NW 804

Pre-existing debt as consideration. A pre-existing indebtedness furnishes ample consideration for a transfer by a mortgagor of rent notes.

First Tr. JSL Bank v Conway, 215-1031; 247 NW 253

Writing designated as "check". An instrument in the form of a combined voucher and receipt, and containing no words of negotiability, is not a negotiable instrument and does not become such when indorsed by the indicated payee, tho the instrument states that when so indorsed "it becomes a check".

Soldier V. S. Bank v Camanche Co., 219-614; 258 NW 879

Draft not ipso facto assignment. The oral statement by the president of a bank, made to the payee of a draft at the time of its issuance and delivery, that the draft "operated as an assignment" of an equal amount of money then in the hands of the drawee-bank and belonging to the issuing bank does not constitute an actual assignment.

Andrew v Bank, 215-290; 245 NW 329

Contract for sale of realty—liability of assignee. One who receives, from a purchaser, an assignment of a contract for a deed, which assignment binds the said assignee to fully perform the assigned contract, must be deemed to have ratified the terms of said assignment and be bound thereby when, henceforth, he treats said land as his land and said contract as his obligation, even tho the assignee did not sign said instrument of assignment.

Gables v Kleaveland, 220-1280; 263 NW 339

Statutory bonds—surety (?) or assignee (?). A surety who takes over the work of a defaulting public drainage contractor and proceeds to pay off claims which are statutorily lienable against the funds due under the con-

I ASSIGNMENTS IN GENERAL—continued

tract acquires a right of subrogation superior to that of a prior assignee of said funds.

Ottumwa Works v O'Meara, 206-577; 218 NW 920

Pledgee as purchaser—nonallowable lien on sale price. An assignee of a promissory note as collateral security who takes his assignment without delivery to him of the note may not have a lien for the amount of his claim established on the sum paid for the note by a subsequent pledgee of the note at a judicial foreclosure sale of said pledged note, it appearing that said pledgee acted in perfect good faith, and without notice of the assignee's equity in said note.

Reyelts v Feucht, 206-1326; 221 NW 937

Rights on indorsement—nonprotected party. A nonnegotiable instrument in the hands of a third party indorsee is subject to the equities existing between the original parties to the instrument.

Soldier V. S. Bank v Camanche Co., 219-614; 258 NW 879

Rents assigned—equities of parties. Principle recognized that an assignee of a landlord's right to demand an accounting for rents simply stands in the shoes of the assignor.

Quaintance v Bank, 201-457; 205 NW 739

Miller v Sievers, 213-45; 238 NW 469

Culavin v Telephone Co., 224-813; 276 NW 621

Attorney fees—persons liable—assignee of written lease. Attorney fees may be taxed as costs under a written lease so providing, when the action for rent is against the written assignee of the lease who orally accepted the assignment.

Central Bk. v Herrick, 214-379; 240 NW 242

Rents — assignee (?) or mortgagee (?). Rents accruing during the year in which a mortgage is foreclosed, and based on crops harvested or matured by the time the period starts to run, belong to the assignee of such rents who (1) became such assignee prior to the commencement of foreclosure, (2) was not made a party to the foreclosure, and (3) had no knowledge of the foreclosure.

Bain v Washburn, 214-609; 243 NW 286

Assignee of lease—rights limited to interest of mortgagor-landlord. The assignee of a lease from a landlord-mortgagor cannot take, as against mortgagee, any greater interest than held by the landlord-mortgagor.

Bankers Life v Garlock, 227-1335; 291 NW 536

Foreclosure—transfer of rents—consideration. Record reviewed and held that a written transfer of the right to the use and occupancy of mortgaged premises during the period of redemption was supported by adequate consideration and was free from fraud.

Andrew v Miller, 218-301; 255 NW 492

Forfeiture by assignee of contract. The assignee of a contract of sale of real estate has the same right to forfeit the contract as the assignor had.

Moore v Elliott, 213-374; 239 NW 32

Defense available against transferee. The maker of a nonnegotiable promissory note who, subsequent to the execution of the note, and before he had knowledge of the transfer of the note, has on deposit with the payee (a private banker), subject to check, an amount equal to the entire amount due on the note, may plead said claim against a transferee of the note when it is made to appear that the said maker, under an arrangement with the banker to apply the deposit on the note, never withdrew any part of said deposit.

Benton v College, 202-15; 209 NW 516

Nonnegotiable note—estoppel to plead defense. The maker of a nonnegotiable promissory note who signs it in blank for the accommodation of a bank, and delivers it to the cashier of the bank in such incomplete condition, is estopped to plead, against a good-faith and innocent indorsee, that, without his knowledge or consent, the cashier wrongfully inserted his own name in the note as the accommodation payee instead of the name of the bank. This is true because the maker must, under such circumstances, be held, impliedly at least, to have constituted the cashier his agent to fill out and complete the note, and must, as regards the perfectly innocent holder, bear the loss resulting from the wrongful act of his own agent.

First N. Bk. v McCartan, 206-1036; 220 NW 364

Interest—recovery dependent on pleading. In an action on a nonnegotiable promissory note, by a transferee thereof, defendant's plea that he be given a set-off in a stated sum because of an account held by defendant against the original payee, will not be construed as embracing a demand for interest on said "stated sum".

Lewis v Grain Co., 214-143; 241 NW 469

Counterclaim — unquestioned establishment — procedure. A duly pleaded counterclaim which is unquestionably established by the evidence should not be submitted to the jury, but should be summarily allowed by the court; and in a personal injury action the court should direct the jury how to proceed if plaintiff's recovery be more than the amount of the counterclaim; likewise how to proceed if plaintiff's recovery be less than the amount of the counterclaim.

Forrest v Abbott, 219-664; 259 NW 238; 38 NCCA 315

Waiver of counterclaim. A party who is sued on a nonnegotiable claim by the assignee or quasi assignee thereof or by one who has been subrogated to the right to the claim, and fails to plead in defense a counterclaim which he then holds against the assignor, whether such counterclaim be liquidated or unliquidated, unconditionally waives the right to use such counterclaim as an offset against the judgment obtained by the assignee or subrogated party on the claim sued on.

Southern Sur. v Ins. Co., 210-359; 228 NW 56

Dual assignment of same chose—priority. As between two assignees of the same chose in action,—e. g., money due on contract,—the assignee who first obtains his assignment is prior in right, even tho he gives the debtor no notice of his assignment, while the subsequent assignee does give such notice.

Ottumwa Boiler v O'Meara, 206-577; 218 NW 920

Dual assignment of same chose—priority. An unconditional assignment of a chose in action—one effective instanter—takes priority over a prior conditional assignment of the same chose—one effective only on the happening of a future contingency. And this is true irrespective of the time notice of the assignments is given to the debtor.

Coon River Assn. v Constr. Co., 215-861; 244 NW 847

Conflicting assignments by partnership and partners. An unrecorded assignment by a partnership to a partnership creditor, of a lease of real estate and of the rents accruing thereunder, is superior in right to a subsequent recorded assignment by one of the partners to his individual creditor of the individual partner's one-half interest in said rents; and especially is this true when the partnership creditor holds a mortgage which pledges the rents of said land.

Phelps v Kroll, 211-1097; 235 NW 67

Delivery of assignment—sufficiency. Proof that a written assignment of a claim has been in the possession of the assignee since its execution constitutes prima facie proof of delivery by the assignor to the assignee, and especially when the delivery of such assignment is substantially admitted by the hostile pleadings.

Steenhoek v Trust Co., 205-1379; 219 NW 492

Admission by assignor of chose. In an action on a chose in action by the assignee thereof, suing on behalf of himself and said assignor (because the assignor had retained an interest in the claim), an affidavit by the assignor, containing a recital of facts materially discrediting the claimed chose in action, is admissible even tho made long after the assignment was executed.

Lake v Moots, 215-126; 244 NW 693

Apparent authority to transfer — estoppel. An owner who leaves in the hands of another, negotiable paper or nonnegotiable choses in action or security which can be transferred without the execution of further documents, thereby creates an appearance of ownership or control in the custodian, and is estopped as against an innocent party who has acted in reliance on the appearance thus created.

Matalone v Bank, 226-1031; 285 NW 648

II ASSIGNABILITY OF INSTRUMENTS AND CLAIMS

Owner's right of disposal. Under ordinary circumstances one has the absolute right to dispose of his property as he pleases.

O'Brien v Stoneman, 227-389; 288 NW 447

Oral assignment of insurance policy. An oral assignment of a policy of fire insurance is valid (especially when the insurer consents thereto) and is prior in right to a subsequent assignment.

Boyce v Ins. Assn., 209-11; 227 NW 523

Interest in proceeds of life policy. A written assignment of a fractional interest in a life insurance policy to a trustee, made for the purpose of protecting the attorneys for the agreed value of their services in prosecuting an action on the policy, is supported by adequate consideration, especially when it appears that the trustee was to receive compensation for his services.

Welch v Taylor, 218-209; 254 NW 299

Assignment of life policy — estoppel. The beneficiary of a legal reserve life insurance policy who, without fraud, joins with the insured in an assignment of all right, title, and interest in the policy in order to collaterally secure a debt due from each of said assignors, is estopped, after the death of the insured, from asserting any interest in the policy except as the same may exceed the said secured indebtedness—it appearing that the policy reserved to the insured both the right to assign the policy and to change the beneficiary.

Andrew v Life Co., 214-573; 240 NW 215

Real estate contract—nonnegotiable instrument law inapplicable—assignor not liable to assignee. Under statute, assignor of nonnegotiable instruments guarantees payment thereof to assignee, but such statute is limited to commercial paper and does not embrace bilateral real estate purchase contract and does not create a right of action in vendor's assignee against such vendor as assignor under statute.

Nash v Rehmann Bros., 53 F 2d, 624

Lease and rent notes—priority. The simple delivery by a landlord to his creditor of his real estate lease and rent notes, with the intent thereby to effect an assignment to his

II ASSIGNABILITY OF INSTRUMENTS AND CLAIMS—continued

creditor as collateral security, is valid against a mortgagee who subsequently institutes foreclosure action on a mortgage pledging the rents.

First Tr. JSL Bank v Bank, 217-620; 252 NW 519

Nonexistent lease. A naked oral promise or understanding to assign a nonexistent but contemplated lease is not good against the subsequently accruing rights of a stranger to the understanding.

Kooistra v Gibford, 201-275; 207 NW 399

Lease — assignability — when lease survives death of lessee. A lease which requires the lessee to diligently farm a portion of the land and to "vigorously utilize" a portion of said land "by extraction of the available sand and gravel" thereon is assignable and survives the death of the lessee, it appearing that the lease was entered into without reliance on any particular personal fitness of the lessee.

In re Grooms, 204-746; 216 NW 78

Assignment of rent not recordable. A written assignment of a lease of real estate and of the rents accruing thereunder, (especially when the lease is at the time manually delivered to the assignee) is not an instrument which the law requires to be recorded, and if recorded the record imparts no notice.

Phelps v Kroll, 211-1097; 235 NW 67

Equitable assignment—sheriff's certificate—homestead—redemption by judgment creditor. Where judgment creditor redeemed from foreclosure sale and secured an assignment of the sheriff's certificate from the mortgagee, and appellant-owners failed to make a statutory redemption, the judgment creditor was an equitable assignee of the sheriff's certificate entitled to deed, even assuming that he had no right to redeem because of the homestead character of the land, since it made no difference to appellant-owners whether the mortgagee or judgment creditor was the holder of the certificate.

Ackerman v Bank, 228- ; 291 NW 150

Stock — assignment without delivery of certificate. A written assignment by the owner of corporate shares of stock of all his right, title and interest therein conveys good title, (1) even tho the owner places the assignment in escrow and causes it, together with the stock certificate, to be delivered to the assignee after his death, and (2) even tho the assignor, prior to his death, pledges the said stock certificate as security for a personal loan, which his estate later paid.

Leedham v Leedham, 218-767; 254 NW 61

Equitable conversion — nonapplicability of doctrine. An assignment by an heir of all his interest in the "personal property" of an estate carries to the assignee the assignor's interest in funds derived from the sale of real estate for the purpose of paying debts and remaining in the hands of the administrator as an unused balance. The doctrine of equitable conversion has no application to such a state of facts.

In re Wilson, 218-368; 255 NW 489

Father's guaranty of son's debts — nonassignability. A father's contract with a bank, by which the bank agreed to carry a son's indebtedness to the bank until the death of the father, is personal and involves a trust and confidence, and such contract may not be assigned without the consent of the father, and when the bank's assignee started action for a money judgment, during the lifetime of the father, he was released from the obligation of his contract.

Evans v Cole, 225-756; 281 NW 230

Assignment of expectancy. An assignment by a debtor to his creditor of the debtor's expectancy in an estate as collateral security to the debt, with a proviso that, if the debtor does not pay within a stated time, the assignment shall operate as a "full receipt" against said expectancy, simply extends to the creditor an option to so treat the proviso. The creditor may ignore the proviso and maintain an action on his claim.

Smoley v Smoley, 203-685; 213 NW 229

Assignment of expectancy. Principle reaffirmed that while an assignment of an expectancy is not a favorite of the law, yet if, after careful scrutiny, it appears to have been made in good faith, for an adequate consideration, without fraud, and is not unconscionable or otherwise invalid, equity will sustain and enforce it.

Gannon v Graham, 211-516; 231 NW 675; 73 ALR 1050

Burk v Morain, 223-399; 272 NW 441

Assignment of expectancy. A mortgage which recites that the mortgagor "sells and conveys her undivided interest and all future rents, issues, and profits" in named lands (in which the mortgagor then has no interest whatever) speaks solely in the present tense, and is wholly ineffectual to convey the mortgagor's future expectant interest in the land as an heir.

Lee v Lee, 207-882; 223 NW 888

See Berg v Shade, 203-1352; 214 NW 513

Assignment of expectancy as security. An assignment of an expectancy in a contemplated estate as security for a debt is supported by adequate consideration.

Gannon v Graham, 211-516; 231 NW 675; 73 ALR 1050

Assignment of promissory notes carries pledged collateral securities. An assignment

by the receiver of an insolvent bank, duly ordered by the court, of bank assets in the form of promissory notes, automatically carries to the assignee the right to the possession of, and right to enforce, all collateral legally pledged to the bank for the payment of said notes.

Bates v Bank, 219-1358; 261 NW 797

Drainage warrants. Record reviewed and held that a written assignment of a drainage warrant must be deemed to have deprived the assignor of all interest therein.

Simmons v Tatham, 219-1407; 261 NW 434

Action based on forged indorsement of checks and drafts. Where an employee wrongfully possessed himself of checks and drafts belonging to his employer, and by forged indorsements caused a bank to pay them, the act of a surety company in paying the employer the amount of his loss does not discharge the bank from its liability to the employer for having paid the checks and drafts on forged indorsements. The employer, upon being so indemnified, may assign his cause of action against the bank to the surety, and the surety may maintain the action against the bank.

National Sur. v Trust Co., 210-323; 228 NW 635

New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

Surety—taking assignment of claim. Where, because of the peculations of a county auditor, a depository bank pays a forged check on school funds, the county, on effecting settlement with the surety on the auditor's official bond, may assign to the said surety its cause of action against the bank, and the assignee may enforce the said assigned action as the county might have enforced it.

New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

Set-offs against insolvent bank. A debtor of an insolvent bank may not, after the appointment of a receiver for the bank, buy up claims against the bank and offset such purchased claims against the amount he is owing the bank. Statutory right of set-off not applicable.

Parker v Schultz, 219-100; 257 NW 570

Partial assignment of chose in action. The owner of a chose in action has a legal right to assign a part of his interest in such chose, and thereafter to join with the assignee in the prosecution of the entire cause of action.

Welch v Taylor, 218-209; 254 NW 299

9452 Assignment prohibited by instrument.

Scope of statute. This statute has no applicability to a personal executory contract, e. g., a lease of lands prohibiting an assignment by the tenant.

Snyder v Bernstein Bros., 201-931; 208 NW 503

Probate order for sale of lease which prohibits sale.

In re Owen, 219-750; 259 NW 474

Assignment working acceleration of maturity. A proviso in a contract for the purchase of real estate on installment payments, entered into without artifice or deception, to the effect that an assignment of the contract by the vendee without the written consent of the vendor will ipso facto mature the entire indebtedness, is valid, even tho our statute authorizes the assignment of such an instrument irrespective of the terms of any contract by the parties to the contrary.

Risser v Sec. Co., 200-987; 205 NW 648

Assignment in payment of pre-existing debt. The assignment of funds by the legal owner thereof in payment of a pre-existing debt is not effective against the equitable owner of said funds.

Stegemann v Bendixen, 219-1190; 260 NW 14

Stock assessments nonassignable. An assessment against a holder of corporate bank stock in an insolvent bank, ordered by the court under the so-called "double liability" statute (§9251, C., '31), even tho said assessment is in the form of a judgment, is nonassignable by the receiver, even under an authorizing order of court, and if formally assigned, is nonenforceable by the assignee, said attempted assignment being for a purpose other than the payment of creditors. (Double liability statute repealed.)

Roe v King, 217-213; 251 NW 81

Double liability of stockholders—nonassignability. The statutory "double liability" of a stockholder in an insolvent state bank to all the creditors of the bank is not of such nature that a sale or assignment thereof by the receiver, even under an order of court, will vest in the vendee or assignee the right to enforce such liability exclusively for his own use and benefit.

Andrew v Bank, 214-1339; 242 NW 62; 82 ALR 1280

9453 Assignment of open account.

Limitation of action on open account. See under §11011

Assignment for collection. Principle reaffirmed that the holder of a claim or account may validly assign it to another solely for collection.

Carson, et al. v Long, 219-444; 257 NW 815

Proceedings and relief—evidence. Evidence reviewed, in an action for an accounting, and

held that an assignment of a claim by plaintiff to defendant was absolute and not for collection for the benefit of plaintiff.

Moore v Bolton, 220-258; 260 NW 676

Causes assigned for collection—right of assignee to join. Plaintiff, in an action at law against a defendant, may join in separate counts:

1. Any number of causes of action against defendant of which plaintiff is the unqualified holder, and which are triable at law in said county of suit, and

2. Any number of causes of action against defendant of which plaintiff is holder as assignee for collection only, and which are triable at law in said county of suit.

Carson, et al. v Long, 222-506; 268 NW 518

Future accounts not founded on existing contract. An assignment of book accounts to accrue in the future is void when there is no obligation on the part of the assignor to sell, and no obligation on the part of customers to buy.

In re Nelson, 211-168; 233 NW 115; 72 ALR 850

Assignee of claim—priority. An assignment of a bank deposit in an insolvent bank, with notice thereof to the receiver, is prior in right to a subsequent garnishment of the receiver, if it be assumed that the receiver is subject to garnishment.

Newell v Edwards, 208-1214; 227 NW 151

9454 Assignment of wages.

Liability of assignee to assignor. Where an employee assigns his wages and said wages are paid by the employer to the assignee, the amount so paid may not be recovered by the employee-assignor of the assignee even tho it be conceded that the assignment was void because of defective acknowledgment.

Hutchins v Piano Co., 209-394; 228 NW 281

Procuring discharge. A person who voluntarily executes an assignment of his wages may not predicate damages against the assignee on the fact that when the assignee brought the assignment to the attention of the employer, the employer discharged the assignor.

Hutchins v Piano Co., 209-394; 228 NW 281

9456 Assignor liable.

Real estate contract—nonnegotiable instrument law inapplicable—assignor not liable to assignee. Under statute, assignor of nonnegotiable instruments guarantees payment thereof to assignee, but such statute is limited to commercial paper and does not embrace bilateral real estate purchase contract and does not create a right of action in vendor's assignee against such vendor as assignor under statute.

Nash v Rehmann Bros., 53 F 2d, 624.

Change in form of debt guaranteed—scope of guaranty. A vendor who, upon assigning his contract for the sale of land, guarantees the payment of the amount due on the contract, must be held to guarantee the payment of a mortgage for said amount subsequently accepted by the assignee, when the converting of the amount due on the contract into a mortgage was of the very essence of the contract of sale.

Buser v Land Co., 211-659; 234 NW 241

Discharge of guarantor—nonrelease by conduct of guarantee. The guarantor of the payment of the amount due on a contract of sale of land is not relieved of his contract of guaranty because the assignee-guarantee of the contract failed to control the action of the purchaser of the land in disbursing building funds, when the assignee-guarantee had no knowledge of the wrongful disbursement.

Buser v Land Co., 211-659; 234 NW 241

Rent—liability of assignee under his written acceptance. One who, in writing, accepts an assignment of a lease, with the consent of the lessor, thereby contracts to carry out the terms of the lease irrespective of any later assignment of the lease by the said assignee, and it is no defense that the lessor, the property being vacant, obtains the aid of a receiver.

Pickler v Mershon, 212-447; 236 NW 382

Rent—assignee—liability to discharge rent obligations. The written assignee of a lease of real estate who orally accepts the assignment, or effects such acceptance by his conduct, with the approval or acquiescence of the lessor, thereby binds himself to discharge the rent obligations; especially is this true when the express provisions of the lease impose such obligation.

Central Bank v Herrick, 214-379; 240 NW 242

Rent—obligation of assignee of lease to pay rent. The assignee of a lease (which simply binds the "lessee, his heirs, and assigns" to pay the rent) is obligated to pay rent because of privity of estate, and when said privity of estate is terminated by a valid reassignment of the lease the obligation of the assignee to pay rent necessarily terminates unless said assignee has, expressly or impliedly, otherwise obligated himself. And the fact that the lessor accepts the rent from the assignee during the assignee's occupancy is not sufficient to show that the assignee has assumed the obligation to pay rent after reassignment.

Seeburger v Cohen, 215-1088; 247 NW 292; 89 ALR 427

CHAPTER 423

SURETIES

9457 Requiring creditor to sue.

Scope of statute. This section applies even tho the principal on the obligation is not a resident of the state.

Cleophas v Walker, 211-122; 233 NW 257

Oral notice to sue—effect. Written notice by a surety to the holder of a promissory note to sue the principal is essential, in order to base thereon a plea of discharge because of failure to comply with the notice. Oral notice is ineffective.

Johnson v Hollis, 205-965, 218 NW 615

Unsigned notice to creditor. A written notice by a surety to a creditor requiring the creditor to sue on the obligation or to permit the surety so to do in the name of the creditor, is valid and effective tho wholly unsigned (1) when it is addressed to the creditor, (2) when the context thereof suggests that it is being given by the surety, and (3) when the surety personally delivers the notice to the creditor.

Cleophas v Walker, 211-122; 233 NW 257

Proof of lost notice and service thereof. The contents of a written notice by a surety to a creditor requiring the creditor to sue on the obligation or to permit the surety so to do in the name of the creditor, and the service of such notice, may be proven by oral evidence when neither the original notice nor a copy thereof can be produced, but such proof must be clear, positive, convincing, and satisfactory.

Cleophas v Walker, 211-122; 233 NW 257

9458 Refusal or neglect of creditor.

Discharge of surety. Principle reaffirmed that a contract of settlement which releases a principal ipso facto releases the surety.

Iowa Co. v Wagner Co., 203-179; 210 NW 775

See Warman v Ranch Co., 202-198; 207 NW 532

CHAPTER 424

NEGOTIABLE INSTRUMENTS LAW

Discussion. See 5 ILB 65—Nonnegotiable bills and notes

FORM AND INTERPRETATION

9461 [§1] Form of negotiable instrument.

Atty. Gen. Opinion. See '36 AG Op 287

Construction—modern tendency. Principle reaffirmed that, within the bounds of reason, liberality of construction will be exercised in favor of the negotiability of promissory notes.

Townsend v Adams, 207-326; 222 NW 878; 77 ALR 1079

Negotiability not terminated by maturity. The mere maturity of a negotiable promissory note does not destroy its negotiable character.

Federal Trust v Nelson, 221-759; 266 NW 509

Maturity on failure to give security. A promissory note, otherwise negotiable, is rendered nonnegotiable by a provision to the effect that the holder may at any time demand additional security, and if the demand is not complied with the note shall instantly mature.

First N. Bk. v McCartan, 206-1036; 220 NW 364

Extension of payment—effect. A promissory note which is payable on a specified day is not rendered nonnegotiable by the inclusion of a provision to the effect that, "after" the note falls due, the time of payment may be extended,—the term "after" being construed to refer to a time subsequent to the day of maturity.

Townsend v Adams, 207-326; 222 NW 878; 77 ALR 1079

"Myself" note. Principle reaffirmed that a promissory note payable to "myself" is a nullity until duly indorsed by the maker.

In re Richardson, 202-328; 208 NW 374

Writing designated as "check". An instrument in the form of a combined voucher and receipt, and containing no words of negotiability, is not a negotiable instrument and does not become such when indorsed by the indicated payee, tho the instrument states that when so indorsed "it becomes a check".

Soldier Valley Bank v Camanche Co., 219-614; 258 NW 879

Note on foreign letterhead—effect. The fact that a promissory note, made by a resident of this state and payable in this state to a resident of this state, was written in longhand on the letterhead of a foreign business concern does not establish, as a matter of law, that the note was executed and delivered in such foreign state and intended to be a foreign contract.

In re Thorne, 202-681; 210 NW 952

Contemporaneous writing as to time of payment. An absolute promise in a promissory

note to pay on or before a named time cannot be deemed qualified and limited by a contemporaneous written contract which reaches no further than a promise by the maker to exercise certain economies in his business and thereby possibly effect payment before the stipulated time.

Hughes v Campbell, 202-1352; 212 NW 115

Contemporaneous written contract. An ordinary promissory note must, between the original parties thereto, be construed in the light of a contemporaneous written agreement which makes reference to the note as a part thereof. So held where the two instruments were construed as an agency contract, with liability on the note limited to the amount of goods sold by the maker thereof.

Nolta v Lander, 200-608; 203 NW 710

No priority between equally dated and maturing notes. Neither of two promissory notes secured by the same mortgage have priority over the other when they carry the same date of execution and maturity.

Templeton v Stephens, 212-1064; 233 NW 704

Unallowable modification. Principle reaffirmed that oral evidence may not be introduced to nullify, modify, or change the character of a written obligation.

First N. Bk. v Mether, 217-695; 251 NW 505

Unallowable variation. Parol evidence is inadmissible to show that a note is not payable according to its terms.

Farmers Bk. v Fisher, 204-1049; 216 NW 709

Parol evidence as to fund. Proof of an oral agreement contemporaneous with the signing of a promissory note, to the effect that the note is to be paid out of a particular or specified fund only, is inadmissible.

Davenport v Mullins, 200-836; 205 NW 499

Promise to pay in application for insurance. An application for hail insurance containing a promise to pay insurer a certain amount upon designated dates is not a "negotiable instrument" within the meaning of statute concerning requirements of such instruments.

Inter-Ocean Co. v Gabrielson, 226-1242; 286 NW 514

Parol evidence to show maturity date. Parol evidence is admissible to show that a time certificate of deposit was accompanied by a collateral oral agreement between the depositor and the bank, to the effect that the bank would pay the certificate on demand.

In re Olson, 206-706; 219 NW 401

Parol in re accommodation note. Parol evidence to the effect that the payee of a note orally assured the maker, when the note was executed, and at later times, that the maker was not liable on the note and would never be called upon to pay it, is admissible on the issue whether the note was an accommodation note for the accommodation of the payee plaintiff.

Security Bk. v Carlson, 210-1117; 231 NW 643

Oral testimony as to liability. The accommodation maker of a promissory note may not, in the absence of evidence of fraud, testify that when he executed the note an oral agreement was entered into that he was not to assume any liability on the note.

Citizens Bk. v Rowe, 214-715; 243 NW 363

Parol—plea of fraud—effect. In an action on a promissory note, parol evidence to the effect that the maker was assured he would never be compelled to pay the note is admissible as bearing on the maker's plea of fraud in the procurement of the note.

Schipfer v Stone, 206-328; 218 NW 568

Bank officer—estoppel to deny liability. An officer of a national bank who, being unable to obtain a loan for his bank on the bank's own real estate, from a First Trust Joint Stock Land Bank—because such land banks are prohibited by federal statutes from making loans to a corporation such as a national bank—enters into a plan, without the knowledge of the land bank, to circumvent the federal statutes and obtain the loan for his bank by falsely representing to the land bank that he personally owns the land in question, and who successfully consummates said fraudulent scheme and obtains the loan on his personal note and mortgage, is estopped to deny his personal responsibility on said note and mortgage.

First Tr. JSL Bank v Diercks, 222-534; 267 NW 708

Genuineness of signature—jury question. Where in an action on a promissory note the defendant in his answer denies under oath the genuineness of the signature, a jury question is generated by positive testimony of the payee that the purported maker did sign the note, together with expert testimony on handwriting tending to prove that the signature was genuine, met by equally positive testimony by the purported maker that he did not sign the note.

Seibel v Fisher, 213-388; 239 NW 34

Unusual signature—allegation—sufficiency. An allegation, in an action on a promissory note, that both defendants executed and delivered the note, followed by a copy of the note bearing the signature "H. G. & L. T. Greenland", sufficiently alleges the signature of "H. G. Greenland".

Greenland v Carter, 219-369; 258 NW 678

Agent signing in representative capacity—nonliability. In an action to recover hail insurance premium under a policy to which was attached an application with a promise to pay and signed by defendant, alleged to be a member of a partnership, and who used the symbol

"%" in signing partnership name, such defendant is not liable individually where it is shown that defendant received commission for selling property and merely acted as agent for the partnership.

Inter-Ocean Co. v Gabrielson, 226-1242; 286 NW 514

Joint payees—rebuttable presumption of equal ownership. The presumption, that joint payees of a promissory note and of a mortgage securing the same are equal, must yield to evidence establishing the actual interest of each. So held in the settlement of an estate.

In re Morrison, 220-42; 261 NW 436

Alleging note as receipt—sham defense—striking. Where a written instrument sued upon contains the legal elements of a negotiable promissory note, an allegation in an answer that such written instrument was a receipt shows on its face that such pleading is false and should be stricken on motion.

Hillje v Tri-City Co., 224-43; 275 NW 880

9462 [§2] Certainty as to sum—what constitutes.

Naked reference to mortgage. A promissory note, otherwise negotiable, is not rendered nonnegotiable by the insertion therein of a statement to the effect that it is "secured by mortgage".

Williamson v Craig, 204-555; 215 NW 664

Incorporating mortgage into note — effect. A promissory note, otherwise negotiable, is rendered nonnegotiable by incorporating into the note, by definite reference, the provisions of the mortgage security which give the mortgagee holder the option to secure insurance on the mortgaged property and to pay therefor, and also to discharge unpaid "taxes, charges, and assessments" on the property, and, if not repaid for such outlay, to declare the maturity of the note and of all of said outlay; and this is true even tho the purpose of making the terms of the mortgage a part of the note is to emphasize the fact that the note is secured by mortgage.

Hubbard v Wallace Co., 201-1143; 208 NW 730; 45 ALR 1065

Note incorporating mortgage providing payment of taxes. The federal court is bound only by superior federal court decisions in determining note's negotiability where state law merely declares principles of commercial law. Note incorporating mortgage authorizing holder to pay taxes in default, for which note was security, held nonnegotiable, as being uncertain in amount as contemplated by the law merchant and the negotiable instrument law of Iowa.

Peterson v Ins. Co., 19 F 2d, 74

Mortgage provisions not incorporated in note. The provisions of a mortgage will not be deemed incorporated into the mortgage-secured promissory note by a statement in such note to the effect that the note is secured by a first mortgage on real estate in a named county.

Des M. Bank v Stanley, 206-134; 220 NW 80

9463 [§3] When promise is unconditional.

Oral agreement as to fund. Proof of an oral agreement contemporaneous with the signing of a promissory note, to the effect that the note is to be paid out of a particular or specified fund only, is inadmissible.

Davenport v Mullins, 200-836; 205 NW 499

Recital of transaction. An instrument, otherwise negotiable, is not rendered nonnegotiable by the insertion therein of a statement of the transaction which gives rise to the instrument.

First N. Bk. v Power Equip. Co., 211-153; 233 NW 103

9464 [§4] Determinable future time—what constitutes.

Atty. Gen. Opinion. See '36 AG Op 287

Indefinite maturity. A promissory note which is payable "on settlement of William Dagel estate after date" is nonnegotiable.

Scott v Dagel, 200-1090; 205 NW 859

Agreement for extensions of time of payment. A promissory note, otherwise negotiable, is rendered nonnegotiable by the insertion therein of an agreement by the makers and indorsers "to extension of time from time to time by any one of the signers".

Second N. Bk. v Mielitz, 211-218; 233 NW 108

Reference in trade acceptance to maturity date. A trade acceptance, otherwise negotiable, is rendered nonnegotiable by the insertion therein of the clause "maturity being in conformity with the original terms of the purchase".

First N. Bk. v Power Equip. Co., 211-153; 233 NW 103

9465 [§5] Provisions not affecting negotiability.

Discussion. See 14 ILR 458—Extension provisions

9466 [§6] Omissions—seal—particular money.

Discussion. See 5 ILB 209—Payable in foreign money; 8 ILB 92—Unstamped paper; 9 ILB 128, 10 ILB 135—Instruments payable "in current funds"

Instrument payable in "current" funds. An instrument otherwise negotiable is not ren-

dered nonnegotiable by the fact that it provides for payment in "current funds".

Peoples Bk. v Smith, 210-136; 230 NW 565; 69 ALR 399

Note payable at particular office — effect. Principle recognized that the fact that a promissory note is payable at the office of a particular person does not, in and of itself, authorize or empower such particular person to receive payment on the note.

Whitney v Krasne, 209-236; 225 NW 245

9467 [§7] When payable on demand.

Signing after maturity—effect. A promissory note which is signed by a party after maturity is, as to such signer, payable on demand and parol evidence is inadmissible to contradict or vary such legal effect.

Fairley v Falcon, 204-290; 214 NW 538

Ambiguous provision as to interest. A certificate of deposit payable "on the return of this certificate properly indorsed, twelve months after date with interest at 5 percent or six months after date with interest at 5 percent per annum", is payable on demand, (1) with interest at 5 percent if presented in 12 months or later, (2) with interest at 5 percent if presented in six months or later, and (3) with no interest if presented within six months.

Partch v Krogman, 202-524; 210 NW 612

Statute of limitation. A promissory note due on demand is barred after ten years from the date thereof.

Citizens Bk. v Taylor, 201-499; 207 NW 570

Time of payment—marginal entry. A properly dated promissory note which fails to state, in the strict body thereof, any time for payment, is, nevertheless, for the purpose of a demurrer presenting the bar of the statute of limitation, payable at a fixed and definite date when, in the corner of the note and opposite the signature to the note, appear the words, "the term of five years".

Nylander v Nylander, 221-1358; 268 NW 7

Novation—mere extension of note at reduced interest. An agreement to extend the time of payment of a promissory note and mortgage securing it, at a reduced rate of interest does not constitute a novation.

Des M. Bank v Allen, 220-448; 261 NW 912

9469 [§9] When payable to bearer.

Fictitious payee. Evidence held to show knowledge of the fictitious character of a payee.

American Exp. Co. v Bank, 200-408; 205 NW 1

Fictitious payee. A check unwittingly made payable to a fictitious person is not payable to bearer.

McCornack v Bank, 203-833; 211 NW 542; 52 ALR 1297

Fictitious payee. The absolute duty of a bank, before it pays its depositor's check, to know that the payee's indorsement is genuine, and to pay only on such genuine indorsement, applies to a check which the depositor has unwittingly and without negligence made payable to a fictitious person.

McCornack v Bank, 203-833; 211 NW 542; 52 ALR 1297

Fictitious mortgagee. A mortgage which is executed to a fictitious mortgagee with the acquiescence of the mortgagor, but which is wholly free from fraud, is valid between the mortgagor and the actual mortgagee and likewise valid between the mortgagor and one who has acquired all the interest of the actual mortgagee. And this is true tho it be conceded, arguendo, that the note was nonnegotiable, and that the mortgage was not entitled to recordation.

Richardson v Stewart, 216-683; 247 NW 273

9471 [§11] Date—presumption as to.

Time of execution immaterial. When the one narrow issue is whether the defendant signed the note in question, the court may very properly instruct the jury that the time of signing is immaterial.

Conner v Henry, 205-95; 215 NW 506

9474 [§14] Blanks — when may be filled.

Discussion. See 4 ILB 195—Payee's name in blank

Unauthorized filling of blanks—ratification. Ratification by the signer of a promissory note of an unauthorized filling of blanks is simply dependent on the fact that the signer, when he acts, must have full knowledge of all the facts relative to such unauthorized filling.

Windahl v Vanderwilt, 200-816; 203 NW 252

Filling in place of payment. The holder of a negotiable promissory note has authority to fill in the place of payment in a blank provided for that purpose, there being no agreement between the parties relative to such completion of the note.

Citizens Bk. v Martens, 204-1378; 215 NW 754

Place of payment—materiality. Testimony by the maker of a negotiable promissory note to the effect that he had never authorized any one to fill in the place of payment in a blank which had been inserted in the note for that purpose is material (1) on the question whether the note was incomplete when issued, and (2) on the issue whether there had been any agreement between the parties relative to such completion.

Citizens Bk. v Martens, 204-1378; 215 NW 754

Place of payment — material alteration. Testimony that a negotiable promissory note had been delivered without any agreement relative to the filling of a blank therein for the place of payment, and that the holder had filled the blank without any authority from the maker, presents, on the issue of material alteration, a question of law for the court, and not a question of fact for the jury.

Citizens Bk. v Martens, 204-1378; 215 NW 754

Accommodation payee—wrongful insertion. The maker of a nonnegotiable promissory note who signs it in blank for the accommodation of a bank, and delivers it to the cashier of the bank in such incomplete condition, is estopped to plead, against a good-faith and innocent indorsee, that, without his knowledge or consent, the cashier wrongfully inserted his own name in the note as the accommodation payee instead of the name of the bank. This is true because the maker must, under such circumstances, be held, impliedly at least, to have constituted the cashier his agent to fill out and complete the note, and must, as regards the perfectly innocent holder, bear the loss resulting from the wrongful act of his own agent.

First N. Bk. v McCartan, 206-1036; 220 NW 364

9476 [§16] Delivery—when effectual.

Discussion. See 5 ILB 257—Delivery

Delivery as essential element—restatement of common law. This section, providing that every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto, is a restatement of the common-law rule.

In re Martens, 226-162; 283 NW 885

Right to show conditional delivery—limitation. The statutory right of the maker of a negotiable promissory note to show, against nonholders in due course, that the delivery of the note was on a condition, and not for the purpose of transferring the property in the instrument, does not embrace the right of the maker of an admittedly delivered note to show that the note was not to be paid according to its terms: e. g., that a director's note to a bank was to be paid by an assessment on the stockholders, or out of the future earnings of the bank, or was not to be paid at all, unless the bank was forced into liquidation.

Hills Bk. v Hirt, 204-940; 216 NW 281

Trade acceptance—authority conferred. In an action to recover on negotiable trade acceptances by indorsee bank, wherein drawee alleges nonliability on account of nonperformance by drawer of a condition in sales contract entered into between drawee and drawer providing for repurchasing of goods after certain date and furnishing salesman to assist drawee in selling goods, held, evidence established that delivery of acceptances was made, without condition, for the purpose of transferring all property rights therein to seller with full authority to negotiate acceptances or put them up as collateral security.

State Bank v Feed Co., 227-596; 288 NW 614

Lien of garnishment and liability of garnishee—ineffectual plea of payment by check. A garnishee should not be discharged on his plea that, prior to the garnishment, he issued his check to the judgment defendant in full payment of his indebtedness, when the facts and circumstances attending the issuance of such check show that the parties thereto never intended to treat the check as a negotiable instrument—never intended that it, in and of itself, should constitute payment of the indebtedness.

Lee v Lee, 210-618; 231 NW 426

Parol evidence affecting. Where the holder of a promissory note indorsed and surrendered it, and received in payment the duly indorsed note of a third party, parol evidence that, at the time the respective indorsements were made, there was talk to the effect that if such indorsements were made, one indorsement would cancel the other indorsement, has no probative force to show (1) inducement, or (2) conditional delivery, or (3) delivery for a specific purpose, of said indorsements, or (4) that the paid note was reissued and payment thereof guaranteed.

Versteeg v Hoeven, 214-92; 239 NW 709

Trade acceptances negotiated. In an action to recover on trade acceptances by indorsee thereof, where there is no provision in sales contract prohibiting either delivery, negotiation, or transfer of such acceptances which are regular on their face, held, proof of an alleged oral agreement that acceptances were subject to certain conditions in sale contract is inadmissible in evidence.

State Bank v Feed Co., 227-596; 288 NW 614

Execution of note—presumption. Principle recognized that the execution and delivery of a promissory note is prima facie evidence of the settlement of all existing demands between the parties up to the date of the note.

In re Kahl, 210-903; 232 NW 133

Place of delivery determines governing law. When the payee of a promissory note prepares it in blank in this state and sends it to the proposed maker in another state without any specific direction as to the method or manner in which it is to be returned to the payee after being signed, delivery takes place only when the note reaches the hands of the payee in this state. It follows that the statute of limitation of this state governs such note.

In re Young, 208-1261; 226 NW 137

See County Bk. v Jacobson, 202-1263; 211 NW 864

Directors' notes to bank. Bank directors who execute their promissory notes to the bank for the sole purpose of making good an impairment of the bank's capital and of preventing the immediate closing of the bank, and who know that said notes have been placed in the assets of the bank, may not say that a jury question exists as to the delivery of the notes to the bank.

Farmers Bk. v Bunge, 211-1357; 231 NW 651

Delivery by decedent—dead man statute. In the absence of contrary evidence, a valid delivery was proved by the statutory presumption of delivery arising from possession of a note, aided by evidence, secured without violating the dead man statute, to the effect that the note was in decedent maker's hands while visiting payee during an illness and after decedent left, the note was reposing on payee's bed.

In re Cheney, 223-1076; 274 NW 5

Notes of deceased—prima facie case. In an action in probate by payees of notes to establish notes as claims against maker's estate, the conceded signature of deceased and admission of the notes in evidence establish a prima facie case for claimants.

In re Humphrey, 226-1230; 286 NW 488

Note found in decedent's safe—no delivery. In spite of a mother's declarations as to the existence of a note and her instructions to her daughter to get it after the mother's death, a promissory note executed by a mother, with her daughter as payee, in repayment of money allegedly borrowed from the daughter, and found by said daughter in the mother's safe after her death, is not a valid claim against the estate of the mother—there having been no sufficient delivery thereof to payee. Quaere, as to validity of claim if based on the debt independent of the note.

In re Martens, 226-162; 283 NW 885

Death of payee—prima facie showing. Prima facie delivery of notes is shown by testimony that the notes were found, after the death of payee, among the private papers of the payee.

Lusby v Wing, 207-1287; 224 NW 554

Conditional delivery. Principle recognized that the delivery of a promissory note may be shown to have been conditional or for a particular purpose.

Kline v Reeder, 203-396; 212 NW 693

Conditional delivery—parol evidence. Parol evidence is admissible to prove that a surety signed a promissory note on the express condition that the note should not be deemed effective until another named party signed it.

Andrew v Hanson, 206-1258; 222 NW 10

Conditional delivery—parol evidence. While parol evidence is not admissible to vary the terms of a written instrument, yet it is competent as between the immediate parties to show that the delivery thereof may have been conditional or for a special purpose only, and not for the purpose of transferring the property in the instrument.

Walker v Todd, 225-276; 280 NW 512

Conditional delivery—waiver. The plea that a promissory note was negotiated in violation of a conditional delivery must fail in the face of conclusive testimony that said note was surrendered by the indorsee to the maker, who thereupon executed and unconditionally delivered the note in suit.

Anderson, etc. v Reinking, 204-239; 213 NW 775

Conditional delivery—signatures of others. A written contract which provides that the failure of any party named therein to sign shall not affect the liability of those who do sign, may be shown to have been delivered on the condition that the writing was to be effective only after being signed by all of the parties.

Boyd v Miller, 210-829; 230 NW 851

Conditional delivery — sale of property. A surety on a promissory note may show, as against the payee, that he signed the note and permitted the delivery thereof on the express agreement with the principal and payee that the principal would sell certain property and deliver the proceeds to the payee, and that the payee would indorse such proceeds on the note.

Randolph Bk. v Osborn, 207-729; 223 NW 493

Conditional delivery — option to buy farm. With the evidence in conflict, a jury question is generated as to whether or not the delivery of a note was conditional, when it was given at the time of the execution of a farm lease which contained an option to purchase the farm on condition that the note should be paid.

Walker v Todd, 225-276; 280 NW 512

Conditionally delivered note—purchaser with knowledge not "holder in due course". Where insurance agent takes an application for life insurance, and as a part of the same transaction notes are executed and delivered conditionally, or for specific purpose of paying insurance premium, and a party takes the notes, as security for a loan to the agent, with knowledge that application has not been approved, such party is not a "holder in due course" and cannot enforce payment of the note after application has been rejected.

Economy Co. v Ins. Co., 227-1123; 290 NW 82

Right to show conditional delivery. Defendant in an action on a promissory note may show, against the plaintiff who is not a holder in due course, that the original delivery of the note was conditional, and for a special purpose only.

Hill v May, 205-948; 218 NW 946

Instructions in re delivery. Instruction to the effect that delivery of a promissory note is largely a matter of intention, and as to what acts will constitute delivery, reviewed and held unobjectionable.

Chariton Bank v Wright, 222-417; 269 NW 439

Evidence—jury question. Evidence held to present jury question on the issue of delivery.

Chariton Bank v Wright, 222-417; 269 NW 439

Proof of execution and delivery. In an action in probate to establish notes of deceased as claims, proof of the execution and delivery being established, it is presumed that notes were issued for a valuable consideration and the burden of showing lack of consideration is on the defense.

In re Humphrey, 226-1230; 286 NW 488

Consideration and delivery—proof by presumptions — instructions. The questions of want of consideration and nondelivery of a note, supported only by presumptions, need not be submitted to the jury when such presumptions are not overcome by evidence, and when the only conflict arises over the genuineness of the signature, the submission of this single question was proper.

In re Cheney, 223-1076; 274 NW 5

Delivery as nonjury question. The plea of a surety (1) of want of consideration for, and (2) of improper delivery of, the notes sued on, is wholly ineffective:

1. When the surety signed and forwarded the notes for delivery on the prearranged and contracted condition that the payee would receive delivery only on condition that he—payee —would first cancel and surrender specified indebtedness held by him against the principal maker of the notes, and

2. When the surety knew that the payee had complied with said condition and had received delivery of the notes, and

3. When the surety thereafter, until sued, interposed no objection of illegality in the notes or improper delivery thereof, but on the contrary promised to pay them and negotiated for additional time in which to pay.

North Side Bank v Schreiber, 219-380; 258 NW 690

9477 [§17] Construction.

Conflict between note and mortgage. In case of a conflict between the note and the mortgage securing it, as to the conditions under which the mortgagee may treat the entire debt as due for the nonpayment of interest, the note will prevail.

Wilson v. Tolles, 210-1218; 229 NW 724

Signature of spouse to mortgage only—effect. The defeasance clause in a real estate mortgage on the lands of a husband, to the effect that the mortgage shall be void if the signers shall "pay or cause to be paid" the secured notes, does not, in and of itself, impose personal liability on the wife who is one of the signers to the mortgage.

Fairfax Bk. v Coligan, 211-670; 234 NW 537

Waiver of homestead right—unauthorized decree. A waiver in a promissory note of the maker's homestead right does not constitute authority in the court in an action on the note to decree a lien on the maker's homestead for the amount due on the note.

First N. Bk. v Phillips, 203-372; 212 NW 678

Notes designed to resemble checks and so treated. Instruments for the payment of obligations, which papers resembled checks and were treated as such, but upon which the maker had cleverly executed certain qualifying words whereby he hoped that they could be treated as promissory notes, held to be in fact ordinary checks when it was noted that the payee was required to indorse them before payment.

State v Doudna, 226-351; 284 NW 113

9478 [§18] Liability of person signing in trade or assumed name.

Action in trade name. A person has the legal right to maintain an action in the duly registered trade name under which he transacts his business.

Keeling v Priebe, 219-155; 257 NW 199

Unusual signature—allegation—sufficiency. An allegation, in an action on a promissory note, that both defendants executed and delivered the note, followed by a copy of the note bearing the signature "H. G. & L. T. Greenland", sufficiently alleges the signature of "H. G. Greenland".

Greenland v Carter, 219-369; 258 NW 678

Discharge of surety—conditional signing—nonestoppel. A surety on a promissory note who signs and delivers the note on the condition that another named party also signs is not bound because he makes no response to a later notification from the payee that other parties have been substituted as signers in lieu of the one named and specified by the surety.

Andrew v Hanson, 206-1258; 222 NW 10

9479 [§19] Signature by agent—authority—how shown.

Agency of husband. Testimony tending to show a custom by a husband to sign the name of his wife to promissory notes, with her express or implied knowledge and approval, extending continuously through many years prior to the transaction in question, is admissible on the issue whether the husband had such authority from the wife.

State Bk. v Fairholm, 201-1094; 206 NW 143

"Apparent authority" defined. "Apparent authority" is the result of the manifestation by one person of consent that another shall act as his agent, made to a third person, where such manifestation differs from that made to the purported agent.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Pleading agent's apparent authority—sufficiency. In payee's action against bank which had cashed checks indorsed without actual authority by payee's local attorney, bank's answer alleging (1) payee's knowledge and acquiescence in the attorney's custom of indorsing payee's checks and remitting proceeds to it by his personal checks, (2) the bank's reliance thereon, and (3) that payee was estopped from asserting lack of authority held sufficient to raise question of attorney's implied, apparent, or ostensible authority.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Attorney indorsing client's checks. In payee's action against bank which had cashed checks indorsed without actual authority by payee's local attorney who, over a period of years, had collected rents for the payee, evidence of transactions to show custom of attorney in indorsing payee's checks and in remitting by his personal checks was admissible, even tho bank did not have knowledge of all of the transactions, and it warranted finding that payee had knowledge of and acquiesced in such custom and was bound thereby.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Undisclosed limitation of agent's authority—effect. Altho a principal may by special limitations restrict the authority of his agent, and altho such restrictions are obligatory between the principal and his agent, such limitations are not binding upon third parties, and, in the absence of knowledge of such restrictions by them, the principal will be bound to the same extent as tho the restrictions were not made.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Agent's authority to indorse check. In payee's action against bank which had cashed checks upon indorsement by payee's attorney, the burden of proof is upon defendant-bank to establish apparent, ostensible, or implied authority in the attorney to indorse the checks as the basis for estoppel against payee to assert lack of authority on part of attorney.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Estoppel to deny agent's authority. In payee's action against bank which had cashed checks indorsed by payee's attorney without actual authority, where bank defended on ground that payee was estopped from asserting lack of authority, held, strict rules relating to equitable estoppel based upon false misrepresentation or concealment were not applicable in determining such defense.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Implied ratification of agent's acts. Acquiescence by the principal in a series of acts by the agent indicates authorization to perform similar acts in the future, and an affirmance of an unauthorized transaction may be inferred from a failure to repudiate it.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Indorsement by payee's attorney—authority. In action to recover against bank which had cashed checks indorsed by payee's attorney, the authority to make such indorsements is, under this section, determinable from the rules applicable in cases of agency generally.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Liability to third persons. As between a principal and third parties, the principal is bound by the acts of his agent within the limits of the apparent scope of his authority.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

9480 [§20] Liability of person signing as agent.

Knowledge of agent—when not imputed to principal. The knowledge of an agent—especially an agent with limited authority—will not be imputed to his principal when such knowledge involves a breach of duty to the principal and is in regard to a transaction which is so unusual and exceptional—so out of the ordinary—as necessarily to put on guard the party dealing with the agent.

Clapp v Wallace, 221-672; 266 NW 493

First Tr. JSL Bank v Diercks, 222-534; 267 NW 708

Directors—personal liability. A director of a corporation who indorses the promissory obligations of the corporation for the purpose of guaranteeing payment cannot escape the obligation assumed because of the fact that he affixed to his signature the official designation of "director".

Northern Bk. v Ellwood, 200-1213; 206 NW 256

Signing in representative capacity—liability. No recovery can be had against one who, as treasurer of an unincorporated association, assumes to execute a promissory note in the name of the association, when he is allowed to plead and prove, without objection, that when the note was executed it was agreed with the

payee that no personal liability should attach to the said treasurer.

Andrew v Golf Club, 217-577; 250 NW 709

Execution of unauthorized contract—effect. An executor or administrator who signs a contract of subscription in the name of the estate and by himself as such officer, without authority so to do, thereby personally binds and obligates himself.

Y. M. C. A. v Caward, 213-408; 239 NW 41

9481 [§21] Signature by procuration —effect of.

Unusual signature—allegation—sufficiency. An allegation, in an action on a promissory note, that both defendants executed and delivered the note, followed by a copy of the note bearing the signature "H. G. & L. T. Greenland", sufficiently alleges the signature of "H. G. Greenland".

Greenland v Carter, 219-369; 258 NW 678

9483 [§23] Forged signature—effect of.

Discussion. See 15 ILR 357—Double forgery —bank liability

Agent's authority to indorse check. In payee's action against bank which had cashed checks upon indorsement by payee's attorney, the burden of proof is upon defendant-bank to establish apparent, ostensible, or implied authority in the attorney to indorse the checks as the basis for estoppel against payee to assert lack of authority on part of attorney.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Attorney indorsing client's checks. In payee's action against bank which had cashed checks indorsed without actual authority by payee's local attorney who, over a period of years, had collected rents for the payee, evidence of transactions to show custom of attorney in indorsing payee's checks and in remitting by his personal checks was admissible, even tho bank did not have knowledge of all of the transactions, and it warranted finding that payee had knowledge of and acquiesced in such custom and was bound thereby.

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Federal Land Bank v Trust Co., 228- ; 290 NW 512

Pleading agent's apparent authority—sufficiency. In payee's action against bank which had cashed checks indorsed without actual authority by payee's local attorney, bank's answer alleging (1) payee's knowledge and acquiescence in the attorney's custom of indorsing payee's checks and remitting proceeds to it by his personal checks, (2) the bank's reliance thereon, and (3) that payee was estopped from asserting lack of authority held sufficient to raise question of attorney's implied, apparent, or ostensible authority.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Action based on forged indorsement of checks and drafts. Where an employee wrongfully possessed himself of checks and drafts belonging to his employer, and by forged indorsements caused a bank to pay them, the act of a surety company in paying the employer the amount of his loss does not discharge the bank from its liability to the employer for having paid the checks and drafts on forged indorsements. The employer, upon being so indemnified, may assign his cause of action against the bank to the surety, and the surety may maintain the action against the bank.

National Sur. v Tr. Co., 210-323; 228 NW 635

New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

Payment on forged indorsement—negligence not imputable to state. Negligence and laches of public officers in the handling of state funds are not imputable to the state; for instance, in an action to recover from a drawee bank the amount paid by the bank on a forged indorsement of a check drawn by a county treasurer against state school funds on deposit with said drawee, it is no defense that the county treasurer was negligent in drawing or delivering the check, or that county officers generally were negligent in not making early discovery of the forged indorsement, and notifying the drawee accordingly.

New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

Renewal of forged note—effect. The execution of a promissory note in renewal of a known forged note necessarily works a waiver of the fraud consequent on the forgery. Evidence held sufficient to establish the absence of such knowledge.

Bacon v Bank, 204-887; 216 NW 274

Failure to examine monthly statement—effect. The failure of a depositor to examine

the monthly statement furnished to him by the bank and the paid checks accompanying the same, may have a material bearing on the issue whether the depositor's negligence has materially misled the bank, to its loss, into paying checks on forged indorsements.

Erickson Co. v Bank, 211-495; 230 NW 342

Forged indorsement—negligence of drawer—effect. Tho a drawee-bank is under an absolute duty to pay its depositor's check only to a holder thereof under a genuine indorsement, yet the depositor is estopped to question the payment of a check on a forged indorsement when he, by his own negligence or by the negligence of his authorized agents, materially misleads the drawee-bank into the justifiable belief that the indorsement on the check is genuine.

Erickson Co. v Bank, 211-495; 230 NW 342

Forged indorsement—evidence—sufficiency. An indorsement "Hazen Spears" on a check payable to "Hazen Spears" is not shown to be a forgery by evidence (1) that a person by the name of Hazen Speer lived in the county in which the check purported to be drawn and in which it was cashed, and (2) that said Hazen Speer did not make the said indorsement.

Bank of Pulaski v Bank, 210-817; 232 NW 124

Genuineness of signature—jury question. Where in an action on a promissory note the defendant in his answer denies under oath the genuineness of the signature, a jury question is generated by positive testimony of the payee that the purported maker did sign the note, together with expert testimony on handwriting tending to prove that the signature was genuine, met by equally positive testimony by the purported maker that he did not sign the note.

Seibel v Fisher, 213-388; 239 NW 34

Consideration and delivery—proof by presumptions—instructions. The questions of want of consideration and nondelivery of a note, supported only by presumptions, need not be submitted to the jury when such presumptions are not overcome by evidence, and when the only conflict arises over the genuineness of the signature, the submission of this single question was proper.

In re Cheney, 223-1076; 274 NW 5

CONSIDERATION

9484 [§24] Presumption of consideration.

Consideration implied in contracts generally. See under §9440

Pleading and proof of consideration generally. See under §9441 (I)

Actions—sufficiency of proof. The payee in possession of a promissory note the execution of which is not denied makes a prima facie case for recovery by the simple introduction of the note in evidence.

Henderson v Holt, 201-1017; 206 NW134

Consideration—when operative on all original makers. The consideration which supports a strictly original promissory note operates, in the absence of fraud or mistake, upon all the original and contemporaneous signers of said note; and especially must this be true when a maker who pleads want of consideration signs as a prospective participant in the enterprise.

Starry v Starry, 212-274; 234 NW 281

Executed consideration. The plea of fraud is unavailing in an action on promissory notes given for the purchase price of corporate stock when it appears (1) that the contract of purchase has been fully executed by the note maker, and (2) that there is no plea of rescission.

Conover v Hasselman, 206-100; 220 NW 42

Consideration and signature—resting on presumption. Plaintiff in an action on a promissory note which he has set forth by copy in his pleadings, may, on the trial, introduce the note in evidence and rest his case, it appearing that the purported maker of the note (defendant) has made no denial, under oath, of the genuineness of his signature; and this is true tho the defendant maker has pleaded want of consideration as a defense.

Booth v Johnston, 223-724; 273 NW 847

Failure to plead—effect. Refusal to instruct as to the want of consideration in the signing of a promissory note is proper when defendant (1) causes plaintiff's plea of consideration to be stricken, and (2) does not himself plead want of consideration.

Conner v Henry, 205-95; 215 NW 506

Notes of deceased—prima facie case. In an action in probate by payees of notes to establish notes as claims against maker's estate, the conceded signature of deceased and admission of the notes in evidence establish a prima facie case for claimants.

In re Humphrey, 226-1230; 286 NW 488

Notes of deceased—lack of consideration. In probate action to establish as claims notes signed by deceased, evidence submitted by defense to show lack of consideration, was properly held to be insufficient to present a jury question.

In re Humphrey, 226-1230; 286 NW 488

Notes of deceased—consideration presumed. In an action in probate to establish notes of deceased as claims, proof of the execution and delivery being established, it is presumed that notes were issued for a valuable consideration and the burden of showing lack of consideration is on the defense.

In re Humphrey, 226-1230; 286 NW 488

Note given by decedent in settlement of claim. In an action in probate to establish a claim against the estate based upon a note which was the third renewal of a note originally given as the result of an accounting and settlement between deceased and claimants in 1913, such note is supported by consideration.

In re Humphrey, 226-1230; 286 NW 488

Gifts inter vivos — note as future gift. Altho a promissory note for which there is no consideration is an unenforceable promise to make a future gift, nevertheless in an action against an executor on a note the presumption that the note imports a consideration, if negatived, must be overcome by evidence and this burden is on the maker or his representatives.

In re Cheney, 223-1076; 274 NW 5

Consideration for wife's signature. The signature of a wife to her husband's note and mortgage is supported by ample consideration when her signature was a condition precedent to obtaining the loan represented by the note.

Andrew v Ingvoldstad, 218-8; 254 NW 334

Wife signing to release dower—inadequate evidence to show lack of consideration. The presumption of consideration for a promissory note and mortgage, signed jointly by a husband and wife but evidencing and securing an originally created debt of the husband only, is not overcome, as to the wife, by evidence that she was a stranger to the negotiations for the loan, received no part of the loan, had no interest in the mortgaged lands except a contingent dower interest, signed the instruments without reading them and solely at the request of the husband and solely to release said contingent interest. The fatal defect in such evidence is its failure to establish the fact that the loan would have been made without the wife's signature—that the payee-mortgagee did not part with the money in reliance on the wife's signature.

Northern Trust v Anderson, 222-590; 262 NW 529

Execution by agent. The beneficiaries of a trust, defendants in an action on a note and mortgage executed by their authorized agent, have the burden to show want of consideration.

Daries v Hart, 214-1312; 243 NW 527

Consideration and delivery—proof by presumptions — instructions. The questions of want of consideration and nondelivery of a note, supported only by presumptions, need not be submitted to the jury when such presumptions are not overcome by evidence, and when the only conflict arises over the genuineness of the signature, the submission of this single question was proper.

In re Cheney, 223-1076; 274 NW 5

Consideration — accommodation — evidence. Evidence reviewed and held to show that a promissory note was executed without consideration and purely as an accommodation to the payee who was attempting to collect it.

Markworth v Bank, 217-341; 251 NW 857

Parol evidence to establish. Principle reaffirmed that parol evidence may be admissible to establish lack of consideration for a promissory note.

Northern Trust v Anderson, 222-590; 262 NW 529

Assumption of obligations of insolvent estate—consideration. Where heirs of a deceased take up the outstanding obligations of the latter and execute their personal note for the same, their plea of want of consideration, when sued on the note, imposes on them the burden to show that the estate of the said deceased was insolvent.

Alpha Bank v Ostrander, 214-563; 243 NW 198

Corporate note to director. Adequate consideration for a promissory note is revealed by proof that the note was executed by a corporation to one of its directors for the purpose of raising money for the corporation in an emergency, and by supporting proof that the director's check to the corporation for the amount of the note was paid.

Lewis v Grain Co., 214-143; 241 NW 469

Jury question. Evidence held to present a jury question on the issue whether a note was signed, without consideration, by defendant after the full execution and delivery of the note by other signers thereof.

Persia Bk. v Wilson, 214-993; 243 NW 581

Signing after execution and delivery by another. The signer of a promissory note may show that he signed it after its full execution and delivery by another signer and that there was no consideration for his belated signing.

Hiatt v Hamilton, 215-215; 243 NW 578

Employing third party note as payment. The payee of an unquestioned promissory note who surrenders the same to the maker, and in payment receives from said maker, under proper indorsement, a negotiable, unmatured promissory note which the maker holds against a third party, must be presumed, there being no evidence to the contrary, to pay value for the latter note to the full face value of the surrendered note.

Sword v Spry, 205-266; 215 NW 737

9485 [§25] Consideration—what constitutes.

Discussion. See 12 ILR 69—Debt as consideration for signature after delivery

Consideration generally. See under §§9440–9442

Face value presumed actual value. The face value of negotiable instruments and other like

or similar choses in action is presumptively the actual value.

Leonard v Sehman, 206-277; 220 NW 77

Pleading. The all-essential element of a plea of failure of consideration is the facts. There need not necessarily be any formal statement "that there was a total failure of consideration".

Miller v Laing, 212-437; 236 NW 378

Detriment—forbearance—benefit. The indorsement of a promissory note subsequent to its full execution is without a supporting consideration, and therefore nonenforceable by the payee, when the payee suffered no detriment and extended no forbearance by reason of such subsequent indorsement, and when no benefit passed to such indorsers by reason of their indorsement.

Northern Bk. v Ellwood, 200-1213; 206 NW 256

Agreement to pay another's debt. A promissory note which represents in part the separate debt of the maker and in part the separate debt of a nonparty to the note, is supported by sufficient consideration when the maker, by reason of the note, obtains a material extension of time in the payment of his debt.

Mohler v Andrew, 206-297; 218 NW 71

Promise to pay another's note. A promise by one party to pay the promissory note of another if such other will do certain things which he is under no legal obligation to do, is supported by adequate consideration.

Lange v Nissen, 208-211; 225 NW 266

Agreement relative to payment by indorser and surety. An agreement by the indorser and accommodation signer of a promissory note that each will pay one-half of the note to the indorsee, and that the accommodation signer will then sue the maker, and pay the indorser one-half of the amount collected, is supported by ample consideration and is enforceable.

Hirtz v Koppes, 212-536; 234 NW 854

Consideration to surety. It is quite immaterial that a surety, in signing a promissory note, received no actual consideration for such signing.

Castelline v Pray, 200-695; 205 NW 339
Windahl v Vanderwilt, 200-816; 203 NW 252
Granner v Byam, 218-535; 255 NW 653

Renewal notes signed by wife—burden of proof. The signing of a promissory note in renewal of the prior original note on which the signer was also a signer, ipso facto constitutes sufficient consideration for such renewal note, even tho no consideration for such renewal signing actually moved to the signer; and if there was no consideration for the original signing, the said signer must assume the burden of so showing.

Aetna Bank v Hawks, 213-340; 239 NW 91

Husband's renewal note signed by wife—contemporaneous signing. The signing of a promissory note by a wife with her husband in renewal of a note signed by the husband alone, is supported by sufficient consideration as to the wife if the wife signs contemporaneously with the husband; otherwise there must be a new consideration as to the wife. Evidence held to present a jury question on the issue.

Nolte v Nolte, 211-1289; 235 NW 483

Wife signing without reading. A wife who can read, but, voluntarily and without circumvention, signs, as surety, and without reading, the promissory note of her husband, in pursuance of a prior agreement to that effect between the husband and the payee, is bound thereby, both on the basis of assent and on the basis of consideration.

First N. Bk. v Phillips, 203-372; 212 NW 678

Signing husband's promissory note. Even tho a wife signed a promissory note solely because her husband asked her to do so, and even tho she received no benefit whatever for so signing, nevertheless she is personally liable on the note if it appears that the payee would not, without her signature, have advanced the money for the husband.

Hakes v Franke, 210-1169; 231 NW 1

Wife signing to secure extension on husband's debt. Principle reaffirmed that a wife who signs the promissory note of her husband, in order to enable him to secure an extension of time of his indebtedness, may not say there was no consideration for her signature.

American Bk. v Kramer, 204-49; 219 NW 931
Commercial Bk. v Carey, 207-1060; 224 NW 62
First N. Bank v Mether, 217-695; 251 NW 505
Bates v Green, 219-136; 257 NW 198

Wife signing mortgage and note to release dower. Evidence to the effect that a wife signed, not only the mortgage of her husband, but also the promissory note, and did so in order to enable the husband to obtain the loan and complete the deal, does not establish that the note was without consideration as to her, even tho she asserts that she signed solely to release her dower interest.

Des Moines JSL Bk. v Allen, 220-448; 261 NW 912
First Tr. JSL Bk. v Diercks, 222-534; 267 NW 708

Signing note to release dower—effect. A wife is not personally liable to the original payee of a promissory note which grew out of her husband's real estate transaction to which she was an entire stranger, except that she

signed said note (and mortgage) for the sole and only purpose of releasing her possible dower interest.

Gorman v Sampico, 202-802; 211 NW 429
Cooley v Will, 212-701; 237 NW 315
Bates v Green, 219-136; 257 NW 198
First B. & T. Co. v Welch, 219-318; 258 NW 96
Jones v Wilson, 219-324; 258 NW 82
See Bank v Mether, 217-695; 251 NW 505

Husband waiving dower interest. A husband who signs a note and mortgage along with his wife has the burden to show failure of consideration for his signature, and he does not meet such burden by proof that his wife received all of the money borrowed and that he signed the mortgage in order to waive his dower interest.

Penn Ins. v Orr, 217-1022; 252 NW 745

Corporate president's authority to write checks—burden of proof. In action by payee of check drawn by president of corporation for interest on officer's note it was held that payee had burden to prove check was executed by the corporation, that president had no implied authority to give check for interest on officer's personal debt, that president's check on corporation for officer's debt was without consideration as to the corporation, and that payee could not recover on the check as a matter of law without proof of president's authority or benefit received by the corporation.

Smoltz v Meat Co., (NOR); 224 NW 536

Extension of time of payment. Principle reaffirmed that an extension to a debtor of time for payment furnishes ample consideration for the signature to a new note by another for a debt owing by the principal debtor.

Frank Cram v Trust Co., 205-408; 216 NW 71
Scovel v Pierce, 208-776; 226 NW 133

Surrendering note and substituting new note. The act of the payee of a promissory note in surrendering it and thereby waiving his remedy against the signers, and accepting a new note signed in part by new parties, constitutes ample consideration for said substituted note.

Hirtz v Koppes, 212-536; 234 NW 854

Surrender of legal right. The execution of an obligation to make good the embezzlement of a relative is supported by adequate consideration when, in return for the obligation, the obligee waives or surrenders his right to proceed against the embezzler's surety bond.

Smith v Morgan, 214-555; 240 NW 257

Collateral signing. The collateral signing of a promissory note is supported by a consideration (1) when the collateral signer omits to inform himself of the agreement out of which the note arose, and (2) when part of such agreement was that he should sign the note.

Van Houten v Van Houten, 202-1085; 209 NW 293

Notes given in renewal of former notes. Promissory notes given in renewal of former notes of the same party are supported by a sufficient consideration.

Powers v Rogers, 212-1184; 234 NW 849

Surrender of old obligations. A showing that a mortgagee surrendered outstanding notes and mortgages of the mortgagor and took from the mortgagor a new note and mortgage, necessarily reveals full consideration for the latter obligations.

Winterset Bk. v Iiams, 211-1226; 233 NW 749

Mutual mistake as to maker's financial worth. The plea, in an action on a promissory note given by a husband to his wife as part of a separation agreement, to the effect that, when the note was executed, the husband and wife were mutually mistaken as to the husband's financial condition, is not established by evidence that a subsequent depreciation in the value of property left the husband insolvent. Whether such plea, if proved, is permissible, quaere.

Castelline v Pray, 200-695; 205 NW 339

Cancellation proceedings—laches—when no defense. Delay, on the part of the signer of an unmatured, negotiable promissory note, in bringing action to cancel the note for want of consideration, is quite immaterial when the delay has not been harmful to anyone.

Sterner v Bank, 221-1362; 268 NW 158

Right of action to cancel—nudum pactum. An unmatured, negotiable, promissory note, in the hands of the original payee, will be canceled, in equity, as to a party who signs it without consideration after the transaction giving rise to the note as to the other signer had been fully closed without obligation on the part of said other signer to obtain the additional signature in question.

Sterner v Bank, 221-1362; 268 NW 158

Employing third party note as payment. The payee of an unquestioned promissory note who surrenders the same to the maker, and in payment receives from said maker, under proper indorsement, a negotiable, unmatured promissory note which the maker holds against a third party, must be presumed, there being no evidence to the contrary, to pay value for the latter note to the full face value of the surrendered note.

Sword v Spry, 205-266; 215 NW 737

Pledge of collateral. The naming of a surety as beneficiary in a life insurance policy and the pledging of the policy in order to

indemnify the said surety on signing a renewal note constitute a sufficient consideration.

Beed v Beed, 207-954; 222 NW 442

Indemnity against impairment of bank capital. An agreement by the stockholders of a bank with the state superintendent of banking that the former will indemnify the bank (a third party) against loss on certain bills receivable, needs no consideration for its support; but if the rule were otherwise, such consideration is found in the interest of the stockholders in preserving the bank as a going concern and in preventing an impairment of the bank's capital.

In re Prunty, 201-670; 207 NW 785

Guaranty of payment of rediscounts. A written, individual guaranty by the officers of a bank of the payment of all promissory notes which the bank or its officers might take and rediscount with the guarantee is supported by ample consideration, it appearing that the taking and rediscounting of the notes were part of a plan under which the bank could continue to accommodate its customers with loans which it could not otherwise make because of statutory restrictions on loans.

Bankers Tr. Co. v Hill, 207-1375; 221 NW 916

Pre-existing debt. Principle reaffirmed that he who takes an unmatured negotiable promissory note as collateral security for a pre-existing indebtedness is a holder for value.

Des M. Bk. v Stanley, 206-134; 220 NW 80

First Tr. JSL Bk. v Conway, 215-1031; 247 NW 253

Subsequent signing—effect. A party who signs a note after its execution, delivery, and acceptance is not liable to the payee when there was no consideration for such signing, either in the form (1) of some advantage to some of the signers, or (2) of some disadvantage to the payee, or (3) of an agreement, at the time of the original execution and delivery, that the note would be so signed.

Merchants Bk. v Roline, 200-1059; 205 NW 863

Subsequent unauthorized signing — effect. One who signs a promissory note after its execution, delivery, and maturity, and without the consent of the original maker, thereby releases the original maker and makes the note his own: it follows that such belated signer may not successfully assert want of consideration for his signature.

Fairley v Falcon, 204-290; 214 NW 538

Release of existing maker as consideration for signature of new signer. The court will not, in order to supply a consideration for a third party's signing a pre-existing note, hold, as a matter of law, that the said signing, being without the knowledge or consent of the existing signers, (1) worked an absolute release of said existing signers, and (2) constituted the making of a new note by the new signer, when plaintiff was pressing his action on a theory flatly contradictory to such a holding.

Blain v Johnson, 201-961; 208 NW 273

Rent and advances—failure of consideration. The consideration for a lease of mortgaged premises (which mortgage pledges the rents) and for the promissory note given for the rent, wholly fails when the assignee in an unrecorded assignment of the lease and note stands by, during foreclosure, and, without asserting his claim by intervention or otherwise, knowingly permits the mortgagee to foreclose and oust the mortgagor and his tenant, and obtain a decree against the rents and a receiver therefor in order to discharge a deficiency judgment.

Miller v Sievers, 213-45; 238 NW 469

Compromise and settlement. A compromise and settlement which results from a bona fide controversy as to the liability of one of the parties on promissory notes, is final; in other words, there need be no evidence that the party denying liability was not, in fact, legally liable on the notes.

Fairfax Bk. v Coligan, 211-670; 234 NW 537

Compromise and settlement as consideration. A promissory note executed without fraud and in compromise and settlement of a disputed but honestly asserted claim—which may have been unfounded—must be deemed supported by an adequate consideration. Evidence held to support such a finding.

Booth v Johnston, 223-724; 273 NW 847

Accommodation party—consideration—jury question. Absence of consideration for the signing of a promissory note by an accommodation party is properly submitted to the jury when the record justifies a finding that the original delivery of the note was conditional, and for a specified purpose only, and that the accommodation signing was with the design of perpetuating said condition and special purpose, and that the indorsee-plaintiff had ample knowledge of all said facts when he assumed to purchase the note.

Hill v May, 205-948; 218 NW 946

Forbearance — evidence. Evidence held insufficient to establish an agreement to forbear suit on a pre-existing promissory note as a consideration for the signing of the note by a third party.

Blain v Johnson, 201-961; 208 NW 273

Forbearance of suit. An express or implied agreement by the payee and principal debtor in a promissory note to the effect that the time of paying the note shall be extended for one year is supported by ample

consideration in that the payee forbears suit for one year, and in that the maker secures the benefit of the forbearance.

Eilers v Frieling, 211-841; 234 NW 275

Directors' note to bank. The directors of a financially embarrassed bank who execute their individual promissory notes to the bank and receive in return certain assets of the bank to which the state banking department had objected, may not say that the notes were executed without consideration.

Andrew v Shimerda, 218-27; 253 NW 845

Directors' note to bank. Ample consideration for promissory notes executed to a bank by the directors and stockholders thereof conclusively appears when undisputed testimony shows that said notes were executed and delivered for the sole purpose of being substituted in lieu of certain questionable assets of the bank and thereby making good an impairment of the bank's capital and preventing the immediate closing of the bank.

In re Prunty, 201-670; 207 NW 785
Hills Bk. v Hirt, 204-940; 216 NW 281
Farmers Bk. v Fisher, 204-1049; 216 NW 709
Live S. Bk. v Irwin, 207-1083; 224 NW 76
Bankers Tr. Co. v Hill, 207-1375; 221 NW 916
Farmers Bk. v Bunge, 211-1357; 231 NW 651

Conveyance by parent to minor child. The fact that a parent has received the earnings of his unemancipated minor child will not support a conveyance to the minor when the conveyance leaves the parent without property sufficient to pay his debts.

Scovel v Pierce, 208-776; 226 NW 133

Disaffirmance by minor and acquiescence. A promissory note executed by a minor for undelivered property is deprived of all consideration by the disaffirmance of the note by the minor prior to any delivery of the property, and by the acquiescence of the payee in such disaffirmance.

Lagerquist v Guar. Co., 201-430; 205 NW 977; 43 ALR 585

Sale of note by agent. When a promissory note is executed and delivered by a principal to his agent, in furtherance of a plan for the agent to sell the note, and thereby secure money with which to pay certain debts of the principal, the consideration becomes complete when the note is sold and the money is received by the agent.

Old Line Ins. v Jones, 206-664; 221 NW 210

Indorsement in blank. An indorsement in blank of a promissory note is necessarily supported by ample consideration when the indorser has a personal interest in the transaction, and likewise when the indorsee parts with his money on the strength of the indorsement.

Kent Bk. v Campbell, 208-341; 223 NW 403

Indorsement without consideration—effect. The indorser of a promissory note may not be held on his indorsement by a holder who is not such in due course, even tho the indorser was the original payee of the note, when he never personally had any interest in the note, and indorsed it solely for the purpose of passing the legal title to the actual owner.

Spurway v Read, 210-710; 231 NW 306

Indorsement without consideration. The indorsement of a promissory note by a stranger thereto, and subsequent to the execution and delivery of the note, must be accompanied by some consideration in order to impose any legal obligation on the indorser.

Young v Jackson, 218-628; 255 NW 877

Conclusiveness of one's own plea. A plaintiff, who, in an action on a promissory note, specifically pleads a definite consideration, must stand or fall thereon. Having fallen, he will not be permitted to advantage himself of a consideration possibly reflected in the record, but not embraced within his own chosen plea.

Persia Bk. v Wilson, 214-993; 243 NW 581

Instructions in re failure of consideration. Instructions in re failure of consideration for a promissory note reviewed and, in view of the record, held quite unobjectionable.

Chariton Bank v Wright, 222-417; 269 NW 439

9486 [§26] What constitutes holder for value.

See under §9485

9488 [§28] Effect of want of consideration.

Failure of consideration—contracts generally. See under §9441

Stranger to contract—volunteer. The signer of a promissory note (no holdership in due course being involved) may plead want of consideration (1) when the note grew out of a transaction with which he was in no manner connected, (2) when he was under no possible obligation to sign the note, and (3) when he received nothing of value for so signing.

Insell v McDaniels, 201-533; 207 NW 533

Wife signing bank note at home. Evidence to the effect that defendant signed a promissory note to a bank at her home, at the request of her husband (an officer of the bank) and that she was paid nothing for so signing and never had had, up to that time, any business transaction with the bank, is quite insufficient to establish the broad plea of want of consideration.

Millard v Curtis, 208-682; 223 NW 489

Wife signing to release dower. Parol evidence is admissible between the original parties to a note and mortgage to show that the wife signed the obligations without any

consideration flowing to her, and solely for the purpose of releasing her possible dower interest, and without any knowledge that her signature was being required or demanded by the payee.

Cooley v Will, 212-701; 237 NW 315

Fraud—estoppel to plead no consideration. The maker of a promissory note may not plead failure of consideration when his own fraud brought about such failure.

Cloud v Burnett, 201-733; 206 NW 283

Novation—nonestoppel to plead. The maker of a promissory note is not estopped to plead failure of consideration for the note as to him because of the fact that, subsequent to the signing, he was a party to a contract under which there was a novation of security.

Insell v McDaniels, 201-533; 207 NW 533

Note for stock purchase—unavailable plea. The purchaser of corporate stock in praesenti by cash and by delivering his promissory note to the corporation for the balance, which note is sold by the corporation for cash, may not plead want of consideration when sued on the note, because by such transaction he has acquired the status of a stockholder, even tho no stock has been formally issued to him.

Conover v Hasselman, 206-100; 220 NW 42

Waiver by not pleading. Refusal to instruct as to the want of consideration in the signing of a promissory note is proper when defendant (1) causes plaintiff's plea of consideration to be stricken, and (2) does not himself plead want of consideration.

Conner v Henry, 205-95; 215 NW 506

Note as gift—unallowable conclusion plea. An allegation that the transferee of a negotiable promissory note received it without consideration,—that said transferee was not a bona fide holder for value,—is a conclusion plea, and is not justified by the additional allegation of fact that said transferee took the note as a "donation or gift".

Benton v College, 202-15; 209 NW 516

Indorsement—absence of consideration. The indorser of a promissory note may not be held on his indorsement, even tho he was the original payee of the note, when he never owned any interest in the note, and when his indorsement was wholly without any consideration.

Pomeroy v Bank, 207-1310; 224 NW 512

Disaffirmance by minor—effect.

Lagerquist v Guar. Co., 201-430; 205 NW 977; 43 ALR 585

Corporate president's authority to write checks—burden of proof. In action by payee of check drawn by president of corporation for interest on officer's note it was held that payee had burden to prove check was executed by the corporation, that president had no implied authority to give check for interest on officer's personal debt, that president's check on corporation for officer's debt was without consideration as to the corporation, and that payee could not recover on the check as a matter of law without proof of president's authority or benefit received by the corporation.

Smoltz v Meat Co., (NOR); 224 NW 536

9489 [§29] Liability of accommodation party.

Discussion. See 23 ILR 335—Defenses

Party accommodated. Evidence reviewed and held to show that note was signed as an accommodation for the maker and not for the payee of the note in question.

Hirtz v Koppes, 212-536; 234 NW 854

Holder for value. The holder for value of accommodation paper may, of course, sue the accommodation maker.

Pennington v Nelson, 208-1310; 227 NW 163

When defense. The fact that a signer of a promissory note, negotiable or nonnegotiable, was an accommodation maker, is not, as against third persons, an infirmity or ground of defense.

Aetna Bank v Hawks, 213-340; 239 NW 91

Insufficient defense. It is no defense against the transferee of a promissory note that one of the signers was an accommodation maker, and that the transferee had knowledge of such fact at the time of acquiring the note; and it is immaterial whether the accommodation maker was loaning his name to the payee or to the principal maker.

Aetna Bank v Hawks, 213-340; 239 NW 91

Guaranty of payment. A general, unlimited guaranty of payment of an obligation is absolute. It follows that the neglect of the creditor to collect of the principal debtor becomes quite immaterial.

Schaffer v Acklin, 205-567; 218 NW 286

Varying indorsement of note. An unrestricted indorsement of a promissory note may not be modified by oral evidence to the effect that the indorser was not to be held personally liable on his indorsement.

Aetna Bank v Hawks, 213-340; 239 NW 91

Promises to answer for debt of another. Evidence that promissory notes were accommodation paper, and that the party accommodated was the real debtor, is not a violation of the statute of frauds.

Flack v Linden Bk., 211-15; 228 NW 670

Wife's separate estate—signing husband's promissory note—consideration. Even tho a

wife signed a promissory note solely because her husband asked her to do so, and even tho she received no benefit whatever for so signing, nevertheless she is personally liable on the note if it appears that the payee would not, without her signature, have advanced the money for the husband.

Hakes v Franke, 210-1169; 231 NW 1

Parol evidence. Parol evidence is admissible on the issue whether a promissory note is accommodation paper.

State Bk. v Markworth, 203-461; 212 NW 729

Parol on issue of "accommodation". Parol evidence to the effect that the payee of a note assured the maker, when the note was executed, that the maker would never be compelled to pay it is admissible on the issue whether the note was an accommodation note for the accommodation of plaintiff.

First N. Bank v Holley, 200-938; 205 NW 767

Oral testimony as to liability. The accommodating maker of a promissory note may not, in the absence of evidence of fraud, testify that when he executed the note an oral agreement was entered into that he was not to assume any liability on the note.

Citizens Bank v Rowe, 214-715; 243 NW 363

Who was accommodated party. Parol evidence to the effect that the payee of a note orally assured the maker, when the note was executed, and at later times, that the maker was not liable on the note and would never be called upon to pay it, is admissible on the issue whether the note was an accommodation note for the accommodation of the payee-plaintiff.

Security Bk. v Carlson, 210-1117; 231 NW 643

Burden of proof. On the issue whether a promissory note was an accommodation, it seems that the introduction of the note makes a prima facie case for the payee, and that thereupon the maker must establish the fact that the note was an accommodation.

Markworth v Bank, 217-341; 251 NW 857

Consideration — accommodation — evidence. Evidence reviewed and held to show that a promissory note was executed without consideration and purely as an accommodation to the payee who was attempting to collect it.

Markworth v Bank, 217-341; 251 NW 857

Accommodation note to bank. On the issue whether promissory notes were received by a bank in payment of commercial paper surrendered by the bank, it may be shown that the notes were intended by all the parties to be accommodations for the bank receiving the surrender, and to enable the surrendering bank to account as a matter of bookkeeping for the paper in question and that said accommodation notes were not to be paid by the makers thereof but by other means.

Flack v Linden Bank, 211-6; 228 NW 667
Flack v Linden Bank, 211-15; 228 NW 670

Liability—evidence. The maker of an accommodation note is not liable thereon to the party accommodated. Evidence held to show that the plaintiff was the accommodated party, and not the bank of which the makers were directors.

First N. Bk. v Holley, 200-938; 205 NW 767
State Bk. v Markworth, 203-461; 212 NW 729

Execution and delivery—evidence. One who executes and delivers a promissory note solely as an accommodation to another is not liable on the note to the person accommodated. Evidence reviewed and held that plaintiff was not the party accommodated in the execution of the note in question.

Citizens Bank v Rowe, 214-715; 243 NW 363

Ultra vires in re corporate accommodation note. A corporation is not estopped to plead ultra vires in becoming the maker of an accommodation promissory note, from the fact that its officers knew that the payee (who was not the accommodated party) was making advances to the party actually accommodated, when the payee knew (1) that the note was an accommodation solely to the party receiving the advances, and (2) that the note was not executed in conformity with the authority which the corporation had granted to its officers.

Black H. Bk. v Monarch Co., 201-240; 207 NW 121

Directors not to relieve excess bank loans. A director of a bank who executes a promissory note in order to raise the money which he, as a partner, had contracted to put into a partnership for the pecuniary profit of the partners, may not be said to be an accommodation party, even tho the object and purpose of forming the partnership was to relieve the bank of excess loans.

Pennington v Nelson, 208-1310; 227 NW 163

Plea of accommodation guarantor rejected. A nonstockholder of a corporation who, in order to enable the corporation to borrow money, signs a promissory note for the purpose of inducing certain stockholders of the corporation to sign it, may not, when sued on the note, proceed on the theory that he is simply an accommodation guarantor and that the stockholder signers are principals; it follows that the nonstockholder is not entitled to judgment against the other signers for what-

ever sum he may be compelled to pay on the note.

Bankers Tr. v Beinhauer, 211-112; 233 NW 34

Jury question. Evidence reviewed and held to present a jury question on the issue, who was the party accommodated, by the maker of an admittedly accommodation note.

Security Bk. v Carlson, 210-1117; 231 NW 643

Conditional delivery — jury question. Absence of consideration for the signing of a promissory note by an accommodation party is properly submitted to the jury when the record justifies a finding that the original delivery of the note was conditional, and for a specified purpose only, and that the accommodation signing was with the design of perpetuating said condition and special purpose, and that the indorsee-plaintiff had ample knowledge of all said facts when he assumed to purchase the note.

Hill v May, 205-948; 218 NW 946

Breach of agreement—waiver—jury question. Evidence held to present a jury question on the issue whether a surety signed a renewal note with knowledge that the payee had violated an agreement to apply certain moneys on the preceding note.

Randolph Bank v Osborn, 207-729; 223 NW 493

Signature in blank—estoppel. The maker of a nonnegotiable promissory note who signs it in blank for the accommodation of a bank and delivers it to the cashier of the bank in such incomplete condition, is estopped to plead, against a good-faith and innocent indorsee, that, without his knowledge or consent, the cashier wrongfully inserted his own name in the note as the accommodation payee instead of the name of the bank. This is true because the maker must, under such circumstances, be held, impliedly at least, to have constituted the cashier his agent to fill out and complete the note, and must, as regards the perfectly innocent holder, bear the loss resulting from the wrongful act of his own agent.

First N. Bk. v McCartan, 206-1036; 220 NW 364

Recitals not an adjudication. Recitals in the nondecretal portions of a foreclosure decree that the wife of the maker of the note in question was an accommodation maker are not evidence in a subsequent hearing in probate on the wife's claim against the estate that she was such accommodation maker, especially when the foreclosure order left such question open for future determination.

In re Cohen, 216-649; 246 NW 780

False return—unsustained verdict. Judgments of conviction in criminal cases will be set aside when they are clearly against the weight of the evidence and the instructions of the court. So held where, in a prosecution for making a false bank return, the issue turned on whether certain notes were accommodation paper.

State v Klein, 218-1060; 256 NW 741

NEGOTIATION

9490 [§30] What constitutes negotiation.

Lex loci contractus. A tentative understanding between an Iowa and a Minnesota bank to the effect that the foreign bank would negotiate commercial paper to the Iowa bank and guarantee the payment thereof, becomes a consummated Iowa contract upon the receipt and acceptance in this state of the paper aforesaid.

County Bk. v Jacobson, 202-1263; 211 NW 864

See In re Young, 208-1261; 226 NW 137

Authorized but bad-faith indorsement. The fact that the duly authorized officers of a corporation in indorsing in the name of the corporation a promissory note payable to it were not in good faith furthering the interest of the corporation, will not affect the rights of the good-faith indorsee who was not chargeable with knowledge of the bad faith actuating the said officers.

Lex v Selway Corp., 203-792; 206 NW 586

Indorsement by executor — effect. An executor may, for a proper consideration, and under a duly authorized permissive order by the court, indorse a promissory note belonging to the estate, and bind the estate to liability on the indorsement.

University Bk. v Johnson, 202-654; 210 NW 785

"Myself" note. Principle reaffirmed that a promissory note payable to "myself" is a nullity until duly indorsed by the maker.

In re Richardson, 202-328; 208 NW 374

Implied authority to negotiate note. The maker of a nonnegotiable promissory note will not be held to be estopped to deny liability on the theory that he impliedly clothed the payee with authority to negotiate the note, when the entire transaction contemplated such transfer.

Hubbard v Wallace Co., 201-1143; 208 NW 730; 45 ALR 1065

Rescission — authority — presumption. The cashier and general manager of a private bank will be presumed to have authority to enter into a contract of rescission relative to the indorsement of negotiable paper.

Runge v Benton, 205-845; 216 NW 737

Indorsement contract—rescission. An agreement between the indorser of a check and the indorsee-bank to the effect that the indorser would return to said indorsee that which he had received for the check, and that the indorsee-bank would return the check to the indorser, constitutes a full rescission of the contract of indorsement.

Runge v Benton, 205-845; 216 NW 737

"Indorsement" or "assignment" — instructions. Instructions relative to acquiring negotiable promissory notes by "assignment", instead of by "indorsement", are quite harmless, when complainant does not claim the rights of a holder in due course.

First Bk. v Tobin, 204-456; 215 NW 767

9491 [§31] Indorsement—how made.

Indorsement in blank—parol explanation. Parol evidence is admissible to show that an indorsement in blank of commercial paper was made solely to enable the holder to make collection, and not to transfer title. Especially is this true when the other writings accompanying the indorsement are ambiguous.

Leach v Bank, 201-349; 207 NW 332

Varying legal effect of blank indorsement. Oral evidence is inadmissible to vary the legal effect of a blank indorsement of a promissory note.

First N. Bk. v Raatz, 208-1189; 225 NW 856
Kent Bk. v Campbell, 208-341; 223 NW 403
See Aetna Bk. v Hawks, 213-340; 239 NW 91

Ratification of unauthorized indorsement. Evidence held to show the ratification of an unauthorized indorsement of a promissory note.

Lex v Steel Corp., 203-792; 206 NW 586

By corporate payee—prima facie sufficiency. An indorsement on a negotiable check payable to the "order of" a corporate payee, tho consisting simply of the name of said corporation, effects a prima facie transfer of absolute ownership of the check to a bank to which the check is delivered by the said corporation as a deposit; and especially so when it appears that said indorsement is in the handwriting of a general, managerial officer of the corporation.

Bureau Service v Lewis, 220-662; 263 NW 7

9493 [§33] Kinds of indorsement.

Blank indorsement. The indorsement "For value received, I guarantee payment and waive protest to F. A. Sword", duly signed by the payee, is, in effect, a blank indorsement.

Sword v Spry, 205-266; 215 NW 737

9494 [§34] Special indorsement—indorsement in blank.

Parol explanation. Parol evidence is admissible to show that an indorsement in blank of commercial paper was made solely to enable the holder to make collection, and not to transfer title. Especially is this true when the other writings accompanying the indorsement are ambiguous.

Leach v Bank, 201-349; 207 NW 332

9495 [§35] Blank indorsement—how changed to special indorsement.

Blank indorsement—material alteration. The act of converting a blank indorsement into a special indorsement is proper so long as the indorser's liability is not increased, but the unauthorized insertion in such special indorsement of a guaranty of payment of any renewal of the note (no such provision otherwise appearing in the note) constitutes a material alteration and releases the indorser.

First N. Bk. v Sweeney, 203-35; 212 NW 333

9496 [§36] When indorsement restrictive.

Deposit for collection—ill-advised indorsement. The payee of a negotiable check who, when depositing it with a nondrawee bank, intends to retain title to the proceeds of the check, should indorse "for collection only" or by words of similar import; should he indorse in blank he thereby presumptively vests said bank with unrestricted ownership of the check, and should said bank forward said check to its correspondent bank with direction to collect "and credit" the account of the forwarding bank, and should said correspondent enter said credit and, in reliance thereon, pay the drafts drawn on it by said forwarding bank to the full amount of said credit, and does so in good faith and without knowledge of any defect in the title of said forwarding bank or that said forwarding bank had ceased to be a going concern, then said correspondent bank will thereby acquire an unimpeachable title to said check, even tho the drawer thereof has assumed to stop payment thereon because of the insolvency of said forwarding bank.

Bureau Service v Lewis, 220-662; 263 NW 7

9498 [§38] Qualified indorsement.

Indorsement "without recourse". The indorsee of a mortgage-secured note is not entitled to a personal judgment against the indorser for the amount due on the note when such indorsee is holding the note (1) under an indorsement "without recourse", and (2) under an agreement by the indorser to repurchase the note in case of nonpayment by the maker at maturity, and when, after the indorser refuses to repurchase, the indorsee continues to

treat the note and mortgage as his own property, and sues in foreclosure as such owner.

Hawkeye Ins. v Trust Co., 208-573; 221 NW 486

Agreement to repurchase—effect. The payee of a promissory note does not convert his indorsement "without recourse" into a general and unqualified indorsement by separately executing an agreement to repurchase the note in case it was not paid by the maker at maturity.

Hawkeye Ins. v Trust Co., 208-573; 221 NW 486

Agreement to be bound contrary to indorsement. A contract is not binding on a corporation, tho entered into in its name by its president, to the effect that the corporation shall be and remain liable on promissory notes negotiated by it "without recourse" when authority to the president to enter into such contract cannot be found in the articles of incorporation, in the bylaws, in the proceedings of the directors in any act of corporate ratification, or in the customs and practices of the corporation.

First N. Bk. v Products Co., 209-358; 227 NW 908

Alteration of instruments — indorsement— jury question. Evidence held to present a jury question whether an alteration of an indorsement "without recourse" was made as part of the negotiations for the purchase of the note or after the transaction of purchase was fully consummated.

Falcon v Falcon, 214-490; 240 NW 735

9501 [§41] Indorsement where payable to two or more persons.

Essential indorsements. A promissory note payable "to ourselves" and signed by two makers and indorsed by only one of the makers, is obviously an incomplete instrument.

In re Divelbess, 216-1296; 249 NW 260

Indorsement without authority — effect. Where, at a sale of the joint property of a landlord and tenant, promissory notes were, without authority from the landlord or the tenant, taken in their names and later formally indorsed by the tenant in the name of both payees for the sole purpose of obtaining what was due to the landlord and tenant, held that neither of the so-called indorsers was liable as such, and especially the landlord, who did not even know that the notes had been so executed.

Johnson v Watland, 208-1370; 227 NW 410

9502 [§42] Effect of instrument drawn or indorsed to a person as cashier.

Deposit for collection—ill-advised indorsement. The payee of a negotiable check who, when depositing it with a nondrawee bank, intends to retain title to the proceeds of the check, should indorse "for collection only" or by words of similar import; should he indorse in blank he thereby presumptively vests said bank with unrestricted ownership of the check, and should said bank forward said check to its correspondent bank with direction to collect "and credit" the account of the forwarding bank, and should said correspondent enter said credit and, in reliance thereon, pay the drafts drawn on it by said forwarding bank to the full amount of said credit, and does so in good faith and without knowledge of any defect in the title of said forwarding bank or that said forwarding bank had ceased to be a going concern, then said correspondent bank will thereby acquire an unimpeachable title to said check, even tho the drawer thereof has assumed to stop payment thereon because of the insolvency of said forwarding bank.

Bureau Service v Lewis, 220-662; 263 NW 7

Election of remedies. Where a bank credits its correspondent bank with the amount of a check forwarded by the correspondent, and, in reliance on said credit, pays the drafts drawn on it by the correspondent, the act of said crediting bank in canceling the said credit on learning of the insolvency of said correspondent, and in returning said check to the receiver as a claim against the correspondent, is not such an election of remedies as will estop the crediting bank from later contending that it had, in due course of business, become the absolute owner of said check.

Bureau Service v Lewis, 220-662; 263 NW 7

9507 [§47] Continuation of negotiable character.

Negotiability not terminated by maturity. The mere maturity of a negotiable promissory note does not destroy its negotiable character.

Federal Trust v Nelson, 221-759; 266 NW 509

9509 [§49] Transfer without indorsement—effect of.

Applicability. This section has no application whatever to a promissory note payable "to ourselves" and not indorsed by the maker. (See §9501, C., '31.)

In re Divelbess, 216-1296; 249 NW 260

RIGHTS OF HOLDER

9511 [§51] Right of holder to sue—payment.

Real party in interest—disproving ownership of note. The plea that plaintiff in an action on a note as indorsee is not the real party in interest because the note carries a subsequent indorsement by plaintiff to another indorsee becomes of no consequence when said

subsequent indorsee is in court and personally causes proof to be made that plaintiff is the real owner of the note.

First Bank v Johnson, 202-799; 211 NW 373

Actions—nonadmissibility as evidence. Promissory notes, when offered in evidence, are properly excluded as to a party not shown to be liable thereon.

West Chester Bank v Dayton, 217-64; 250 NW 695

Transfer of title after action brought—effect. The fact that plaintiff, after commencing an action on promissory notes, transfers the title thereof does not prevent the prosecution of said action to judgment in the name of the original plaintiff.

Grimes Bank v McHarg, 213-969; 236 NW 418.

Right to transfer note. A bank which is a going concern, but insolvent, and known by all its officers to be insolvent, may, for full value, validly transfer a promissory note held by it, to a transferee who knows of such insolvency, even tho the incidental effect of such transfer may be to deprive the maker of said note of his right to offset against said note the amount of his deposit in said insolvent bank at the time of the transfer.

Ottumwa Bank v Crawford, 215-1386; 244 NW 674

Conflicting claims to proceeds. The holder of a check who, before payment thereof is stopped, indorses the same to a nondrawee private banker, and unwittingly receives in exchange therefor the worthless draft of said private banker, is entitled, in a subsequent action on the check, to the amount recovered thereon, in preference to the receiver for the private banker. Especially is this true when the banker was insolvent when he issued the draft.

Runge v Benton, 205-845; 216 NW 737

Title to deposited drafts. The act of a consignor in drawing against a consignee a draft (with bill of lading attached) in favor of a bank, and depositing the same in said bank and receiving credit on his checking account to the full amount thereof, constitutes the bank the unqualified owner of the draft and of the proceeds thereof, notwithstanding the fact that at a later time the consignor recognized the right of the consignee-drawee to a reduction on the draft, and requested the bank to make such reduction, and the bank voluntarily complied with the request.

Dubuque Fruit Co. v Emerson & Co., 201-129; 206 NW 672

Bearer or holder of negotiable paper. The trustee in a deed of trust which secures a series of bonds payable "to said trustee or to bearer", and which have been sold and delivered to numerous parties who continue to be the owners thereof, may maintain an action at law against the maker, on all the bonds, (1) when the trust deed empowers the trustee to declare the entire debt due in case of any default of the maker, and to proceed by means of any legal or equitable action to enforce collection, and imposes on the trustee the duty so to declare and proceed when the bondholders request him so to do, and (2) when all said bondholders, after default in payment of interest, individually redeliver to said trustee all of said bonds and specifically request the trustee in writing to declare the entire debt due and to proceed against the maker by legal action. Authority in plaintiff to maintain said action rests on a two-fold legal basis, viz:

1. Plaintiff is the legal bearer and holder of said bonds.
2. Plaintiff is the trustee of an express trust.

Minnesota Co. v Hannan, 215-1060; 247 NW 536

Lien on funds representing check. A drawee-bank which certifies a negotiable check at the request of a stranger to the check, and is informed that the stranger claims a lien on the proceeds, is nevertheless under no obligation to recognize such claim. The bank's sole duty is to pay the check on presentation with proper indorsement.

Parker v Walsh, 200-1086; 205 NW 853; 42 ALR 622

Prima facie showing for recovery. In an action on a promissory note, the introduction of the note with proof of the genuineness of the signature thereto makes a prima facie case for the plaintiff.

Pfeffer v Corey, 211-203; 233 NW 126

Matured principal and interest—permissible splitting of action. When a promissory note and the last interest coupon note both mature at the same time in the hands of the same holder, a judgment in an action solely on the interest coupon note (which contains no promise to pay the principal) is not an adjudication of the amount due on the principal note. In other words, the holder may first sue on the coupon note and later on the principal note.

Des Moines Bk. v Littell, 209-22; 227 NW 503

Accommodation note—burden of proof. On the issue whether a promissory note was an accommodation, it seems that the introduction of the note makes a prima facie case for the payee, and that thereupon the maker must establish the fact that the note was an accommodation.

Markworth v Bank, 217-341; 251 NW 857

Equitable estoppel—silence. The holder of a note and mortgage as collateral, who stands by, and even encourages and assists the maker and payee of the note to execute a rescission of the transaction out of which the note and mort-

gage arose, may not thereafter assert against the maker his right as a collateral holder, the said maker being ignorant that the said obligations were being so held as collateral.

Iowa Bank v Rons, 203-51; 212 NW 362

Ownership of note—adjudication. A judgment in an action between the payee of a promissory note and a former collateral holder, to the effect that the latter had become and was the unqualified owner of the note, precludes the maker of the note, when sued on the note by the adjudged owner, from readjudicating the ownership of the note on the basis of the same facts existing in the former action.

Commercial Bk. v Allaway, 207-419; 223 NW 167

9512 [§52] What constitutes a holder in due course.

Discussion. See 9 ILB 299—Payee as holder in due course

Payee as holder in due course. Conceding, arguendo, that the payee of a promissory note might, under some circumstances, be a holder in due course, yet he cannot have such standing when he knew, when he acquired the note, that it had not been executed by the proper officers of the corporation maker.

Black H. Bk. v Monarch Co., 201-240; 207 NW 121

Assignment of mortgage or debt. The rights acquired by a holder in due course of a negotiable promissory note attach to and accompany the mortgage securing said note, even tho the mortgage is simply "assigned" to said holder.

Fed. Bank v Sherburne, 213-612; 239 NW 778

Collateral — holder in due course — set-off against holder denied. Where commercial paper is rediscounted or put up as collateral, the holder is a bona fide holder in due course and the plea of set-off is not available against such holder.

Andrew v Union B. & T. Co., 225-929; 282 NW 299

Pre-existing debt as "value". Principle reaffirmed that he who takes a negotiable promissory note as collateral security for a pre-existing debt takes the note "for value".

Miller v Miller, 211-901; 232 NW 498

Employing third party note as payment. The payee of an unquestioned promissory note who surrenders the same to the maker, and in payment receives from said maker, under proper indorsement, a negotiable, unmatured promissory note which the maker holds against a third party, must be presumed, there being no evidence to the contrary, to pay value for the latter note to the full face value of the surrendered note.

Sword v Spry, 205-266; 215 NW 737

Release of surety—nonapplicability of principle. The maker of a fraud-induced promissory note may not claim against a collateral holder in due course that he is released on the note because, without his consent, the collateral holder extended payment on the payee's note for which the fraud-induced note was collaterally pledged, on the theory that the act of collaterally pledging constituted the payee a principal and the maker a surety.

Mid-West Bk. v Struble, 203-82; 212 NW 377

Cashing fraud-induced check — nonliability to maker. The payee of a check, negotiable in form and regular on its face, and received in the ordinary course of business, and for value, and wholly without knowledge of a fraud which attended and induced the execution and delivery of the check, may not be held liable to the drawer of the check for damages consequent on said fraud.

Deater v City N. Bank, 223-86; 272 NW 423

Circumstances evincing bad faith. The indorsee of a negotiable promissory note must, upon proof that the note was fraud-induced, establish his bona fide holdership in due course. Evidence reviewed, and held to furnish substantial support for a finding by the trial court (which tried the case under waiver of jury) that the indorsee had acquired the note under circumstances evincing bad faith.

Windell v Steinhoff, 211-999; 234 NW 795

Burden of proof. The claim that, fraud being shown, the holder must establish his holdership in due course is manifestly answered by a record which, by findings of fact, judicially shows such holdership.

Sword v Spry, 205-266; 215 NW 737

Holder in due course—burden to show. Where a check is issued on a condition, placing limitations on payee's right to negotiate it, in spite of which defective title the check is negotiated to a bank, after which payment is refused by drawee-bank because payment stopped, the burden, in an action between the bank to whom check was negotiated and the maker, is on the bank to show that it was a holder in due course and had no notice of payee's defective title.

Newton Bank v Strand Co., 224-536; 277 NW 491

Conditionally delivered note—purchaser with knowledge not "holder in due course". Where insurance agent takes an application for life insurance, and as a part of the same transaction notes are executed and delivered conditionally or for specific purpose of paying insurance premium, and a party takes the notes, as security for a loan to the agent, with knowledge that application has not been approved, such party is not a "holder in due course" and can-

not enforce payment of the note after application has been rejected.

Economy Co. v Ins. Co., 227-1123; 290 NW 82

Value in form of "credits". Where the purchaser of a negotiable promissory note paid for the same by giving the payee a credit on others of payee's notes then held by the purchaser, the question of the value of said credit should not be submitted to the jury when the uncontradicted testimony shows that the payee was solvent; and this is true even tho the jury finds (contrary to the evidence) (1) that the credit had no value, and (2) that the purchaser was not a holder in due course.

State Bk. v Behm, 202-192; 209 NW 523

Issuance of certificate of deposit to pay note —validity. A certificate of deposit issued by a savings bank in payment of a negotiable promissory note constitutes a payment of value for the note, it appearing that the bank at the time had ample funds on hand for the purchase of said note; and this is true tho the directors had never authorized the purchase in such manner.

Andrew v Peterson, 214-582; 243 NW 340

9513 [§53] When person not deemed holder in due course.

Burden of proving bad faith. Where payee returned check to maker on account of a debt owing to maker, but by some unknown means again obtained possession of the check, which had not been put in a place of safety, and negotiated it to plaintiff eight days after execution, burden was on defendant-maker to prove plaintiff's lack of good faith in acquiring the check, and lapse of eight days was not such an unreasonable time within statute as to rebut presumption that plaintiff was a holder in due course. What constitutes such an unreasonable time must be determined on facts of each particular case.

Clarinda Sales Co. v Radio Sales, 227-671; 288 NW 923

9514 [§54] Notice before full amount paid.

Negotiable certificate of deposit as payment. A bank which issues and delivers its negotiable certificate of deposit in exchange for an unmatured negotiable promissory note, then and thereby effects full payment for the note within the meaning of the negotiable instruments law.

People's Bk. v Smith, 210-136; 230 NW 565; 69 ALR 399

Amount recoverable by good-faith holder.

Sword v Spry, 205-266; 215 NW 737

9515 [§55] When title defective.

Fraud—nonavailability. Fraud, in order to be available as a defense to a promissory note in the hands of the original payee, must, of course, in some manner be brought home to the said payee.

Henderson v Holt, 201-1017; 206 NW 134

Incredible representations. The plea of fraud in the execution of a promissory note is not necessarily defeated by the fact that the fraud was such that only a gullible person would rely thereon.

McCorkle v Lessenger, 200-967; 205 NW 781

Parol as affecting writings—plea of fraud. In an action on a promissory note, parol evidence to the effect that the maker was assured that he would never be compelled to pay the note is admissible as bearing on the maker's plea of fraud in the procurement of the note.

Schipfer v Stone, 206-328; 218 NW 568; 219 NW 933

Renewal with knowledge of fraud. A fraud-induced note is validated by the act of the maker in renewing the note at a time when he knew of the fraud, or in reason ought to have had such knowledge.

Home Bk. v Heizer, 200-793; 205 NW 467
Walnut Bk. v Mueller, 202-961; 211 NW 215

Repeated renewals—fraud—effect. The maker of a negotiable promissory note who repeatedly renews the note in the hands of a transferee, with full knowledge of the fraud perpetrated upon him in the execution of the original note, and with like knowledge, necessarily, that an agreement that the original note should not be transferred, had been violated, thereby irrevocably waives his right to rescind the transaction out of which the original note grew.

First N. Bk. v Bensene, 200-1165; 206 NW 122

Renewal—waiver of defense. Principle reaffirmed that the maker of a promissory note waives his defense to the note when he renews the note with full knowledge of the defense; and especially is this true if the maker secures an extension of time.

Euclid Bk. v Nesbit, 201-506; 207 NW 761

Renewal with knowledge of fraud — jury question. Evidence reviewed, on the issue whether a maker of fraudulently procured promissory notes renewed them at a time when he had knowledge of the fraud, or in reason ought to have had such knowledge, and held to present a jury question.

Larson v Bank, 202-333; 208 NW 726

Renewal with partial knowledge — effect. The fact that a fraudulently induced maker

of a promissory note knew, when he renewed the note, that one of the very material inducing representations was false does not necessarily constitute a waiver of all other actionable fraud of which he was then ignorant; nor does such knowledge ipso facto charge him with knowledge of such other fraud.

Larson v Bank, 202-333; 208 NW 726

Fraud—similar facts and transactions. A party alleged to have been defrauded may show, on the issue of fraudulent representations inducing the execution of a promissory note, that the defendant made like representations to other parties at about the time in question.

Larson v Bank, 202-333; 208 NW 726

Holder in due course—burden to show. Where a check is issued on a condition, placing limitations on payee's right to negotiate it, in spite of which defective title the check is negotiated to a bank, after which payment is refused by drawee-bank because payment stopped, the burden, in an action between the bank to whom check was negotiated and the maker, is on the bank to show that it was a holder in due course and had no notice of payee's defective title.

Newton Bank v Strand Co., 224-536; 277 NW 491

Conditionally delivered note—purchaser with knowledge not "holder in due course". Where insurance agent takes an application for life insurance, and as a part of the same transaction notes are executed and delivered conditionally, or for specific purpose of paying insurance premium, and a party takes the notes, as security for a loan to the agent, with knowledge that application has not been approved, such party is not a "holder in due course" and cannot enforce payment of the note after application has been rejected.

Economy Co. v Ins. Co., 227-1123; 290 NW 82

Fictitious payee — indorsement as forgery. Principle recognized that the indorsement of a check payable to a fictitious payee, by one to whom the drawer did not intend payment to be made, is forgery.

McCornack v Bank, 203-833; 211 NW 542; 52 ALR 1297

Signing without reading. A wife who can read, but voluntarily and without circumvention signs as surety and without reading the promissory note of her husband, in pursuance of a prior agreement to that effect between the husband and the payee, is bound thereby, both on the basis of assent and on the basis of consideration.

First N. Bk. v Phillips, 203-372; 212 NW 678
Legler v Ins. Assn., 214-937; 243 NW 157
See Crum v McCollum, 211-319; 233 NW 678

Rescission—status quo. An offer by the maker of a promissory note, on rescission thereof, to return everything received by virtue of the note is a sufficient offer to put the holder in statu quo.

Larson v Bank, 202-333; 208 NW 726

9516 [§56] What constitutes notice of defect.

When notice imputed to corporate holder. A corporation may not be deemed to be a holder in due course of a negotiable promissory note when its holdership was acquired solely through the instrumentality of its own president, who owned substantially all the stock of the corporation, and who was an active participant in the fraud which permeated the note.

Kenwood Lbr. v Armstrong, 201-888; 208 NW 371

Holder in due course—burden to show. Where a check is issued on a condition, placing limitations on payee's right to negotiate it, in spite of which defective title the check is negotiated to a bank, after which payment is refused by drawee-bank because payment stopped, the burden, in an action between the bank to whom check was negotiated and the maker, is on the bank to show that it was a holder in due course and had no notice of payee's defective title.

Newton Bank v Strand Co., 224-536; 277 NW 491

Instructions in re holder in due course. Instructions in re holder in due course reviewed and, in view of other instructions, held quite unobjectionable.

Chariton Bank v Wright, 222-417; 269 NW 439

Knowledge of agent—when not imputed to principal. The knowledge acquired by the director of a corporation as to the proceedings of its directors will not be imputed to a bank of which the director is cashier, especially when the director-cashier is interested adversely to the bank.

Hancock Bk. v McMahon, 201-657; 208 NW 74

Nonevidence of bad faith. The fact that the transferee of a negotiable promissory note, when he acquired the note, required the transferor to guarantee its payment furnishes no evidence of a lack of good faith.

Williamson v Craig, 204-555; 215 NW 664

Rights on indorsement—holder in due course. One who executes a negotiable promissory note to his agent under an agreement that the agent will sell the note and with the proceeds discharge an existing mortgage on the principal's property, runs the risk that the agent

may, in discharge of his own debt, transfer the note, before due, to a bona fide holder.

Mynster v Baker, 215-456; 245 NW 722

Stolen bonds—when purchaser protected. The purchaser of stolen United States liberty bonds will be protected in his purchase when he purchases in good faith, for full value, in the ordinary course of business, and without actual notice or knowledge of any defect in the title of the seller, and without notice or knowledge of any fact which would put said purchaser on inquiry as to said seller's title.

State Bank v Iowa-Des Moines Bank, 223-596; 273 NW 160

9517 [§57] Rights of holder in due course.

Gambling obligations. See under §9442

Former statute—amount of recovery—implied repeal. The former statutory rule (§3070, C., '97) to the effect that when a note has its inception in fraud, a holder in due course could only recover the amount which he paid for the note was impliedly repealed by the enactment of the negotiable instruments law.

Sword v Spry, 205-266; 215 NW 737

Insanity as defense. Neither a negotiable promissory note nor a mortgage given by the makers to secure the same, even tho the mortgage is on a homestead, is subject, when in the hands of a holder in due course, to the plea that the maker was insane at the time of the execution of such note and mortgage.

Farmers Ins. v Ryg, 209-330; 228 NW 63

Liability of indorsee. One who has been induced to issue his check because of the criminal fraud of the payee may not recover the amount thereof from an indorsee on the naked showing that said indorsee received the said check from said payee in settlement of a like criminal fraud perpetrated by said payee on said indorsee.

Bogle v Goldsworthy, 202-764; 211 NW 257

Offsetting deposit against note—loss of right. The maker of a promissory note to a bank may not, after the insolvency of the bank, set off against the amount due on the note the amount of the maker's deposit in the bank, when, prior to insolvency, the note had been transferred by the bank to a holder in due course.

Leach v Bank, 207-1254; 219 NW 496; 224 NW 583

Prima facie case established without disproof—when credibility of witnesses not jury question. In an action on a note by alleged holder in due course, letters written by prior indorsee, after maturity, demanding payment from maker were properly excluded as hearsay, and in the absence of any disproof of prima facie case made under such circumstances it is not the duty of the court to submit case to jury solely on matter of credibility of witness.

Colthurst v Lake View Bank, 18 F 2d, 875

Second mortgage to secure items secured by first mortgage. Even tho a first mortgage on land is, by its terms, security for both accruing interest and taxes, nevertheless, where the owner of the land, after the first mortgage-secured notes had passed into the hands of holders in due course, executes to the mortgagee additional promissory notes in the amount of the then accrued interest and taxes, and secures such notes by an additional mortgage which is distinctly made subject to the first mortgage, the holders of such latter notes may not, as against said holders in due course, claim that such notes are secured by the first mortgage.

Des M. Bk. v Stanley, 206-134; 220 NW 80

Unallowable defense. A promissory note taken by a payee-bank without fraud and on a valuable consideration is not subject to an after-discovered fraud perpetrated on the same maker in the execution of another and different note to another and different party, in a transaction to which the payee-bank was in no manner a party; and this is true even tho the note in question worked a readjustment or rearrangement of the indebtedness represented by the said other note.

Hancock Bk. v McMahon, 201-657; 208 NW 74

Unallowable defense. In an action by the indorsee of a nonnegotiable promissory note for judgment thereon, and to foreclose the mortgage securing the same, it is no defense that the payee of the note did not use the proceeds derived from the negotiation of the note as he and his joint co-adventurers had agreed; and especially is this true where all of said proceeds were used for the benefit of the joint adventurers.

Co. Bluffs Bk. v Towl, 205-1185; 219 NW 315

9518 [§58] When subject to original defenses.

Certificates of deposit — illegal issuance. Certificates of deposit issued by a savings bank in payment or exchange for promissory notes when the bank has no funds with which to pay for the notes are absolutely void in the hands of any holder.

Sweet v Bank, 200-895; 205 NW 470

Defense available against transferee. The maker of a nonnegotiable promissory note who, subsequent to the execution of the note, and before he had knowledge of the transfer of the note, has on deposit with the payee (a private banker), subject to check, an amount equal to the entire amount due on the note, may plead

said claim against a transferee of the note when it is made to appear that the said maker, under an arrangement with the banker to apply the deposit on the note, never withdrew any part of said deposit.

Benton v College, 202-15; 209 NW 516

Duress—estoppel to assert. The plea that an obligation was signed under duress must fall when the signer, during a long time following the execution of said obligation, recognized it as legally binding, and caused others to act on such recognition to their detriment.

Smith v Morgan, 214-555; 240 NW 257

Failure to reply to letter as to ownership of instrument. The acceptor of a trade acceptance does not estop himself from pleading defensive matter by failing to reply to a letter from an indorsee to the effect that the indorsee has purchased the acceptance.

First N. Bk. v Power Equip. Co., 211-153; 233 NW 103

Ineffectual rescission—effect on nonholder in due course. The nonholder in due course of a promissory note is not exempt from a plea of fraud in the inception of the note because the maker of the note, after discovering the fraud, had demanded of the payee a rescission, and said payee had agreed to return the note, even tho he did not then own it.

Galloway v Hobson, 206-507; 220 NW 74

Fraud—estoppel. The maker of a negotiable promissory note may not be said to be estopped to plead fraud in the inception of the note, against a transferee, on a record which fails to show that the maker's conduct ever came to the knowledge of the transferee or in any manner controlled his conduct.

State Bk. v Behm, 202-192; 209 NW 523

Fraud—evidence. Evidence held to present a jury question on the issue of fraud in the inception of a negotiable certificate of deposit.

Sweet v Bank, 200-895; 205 NW 470

Fraud—evidence. Evidence reviewed, and held ample to show that the promissory note in question was fraud-induced.

Andrew v Hanson, 206-1258; 222 NW 10

North Amer. Ins. v Holstrum, 208-56; 221 NW 215

Fraud — evidence — insufficiency. Evidence held insufficient to present a jury question on the issue of fraud in the execution of notes to a bank by the directors thereof in order to prevent the closing of the bank.

Farmers Bank v Bunge, 211-1357; 231 NW 651

Fraud of payee—failure to establish. In action on promissory note, evidence failed to show payee fraudulently represented amount due upon various occasions when respective accounts were stated.

Conrad v Ashby, (NOR); 247 NW 218

Renewal of fraud-induced note. The renewal of a fraudulently induced note does not, of itself, alter the position of the victim of the fraud.

Hills Bk. v Cress, 205-306; 218 NW 74

Settlement for fraud. A mere promise by the payee of a fraud-induced note to return it to the maker cannot be deemed a settlement of the fraud.

Galloway v Hobson, 206-507; 220 NW 74

Holdership in due course—burden of proof —circumstances evincing bad faith. The indorsee of a negotiable promissory note must, upon proof that the note was fraud-induced, establish his bona fide holdership in due course. Evidence reviewed, and held to furnish substantial support for a finding by the trial court (which tried the case under waiver of jury) that the indorsee had acquired the note under circumstances evincing bad faith.

Windell v Steinhoff, 211-999; 234 NW 795

Holdership in due course—participation in fraudulent transaction — evidence. Evidence reviewed, and held to sustain a verdict to the effect that the acquisition of a negotiable promissory note by the holder thereof was part of a fraudulent transaction of which the holder had full knowledge and in which he actively participated.

Kenwood Co. v Armstrong, 201-888; 208 NW 371

Negativing fraud. The plea of fraudulent representation as to the value of property must necessarily fall in the face of testimony that the complainant was a person of unusual business ability and experience and had had long, personal and intimate knowledge of the property in question far superior to that of the alleged wrongdoer.

Tobin v Budd, 217-904; 251 NW 720

Ratification or waiver of fraud. A person who has been fraudulently induced to sign a promissory obligation may not be deemed to ratify or waive the fraud because he is not swift to notify the swindler that his fraud has been discovered.

Commercial Bank v Kietges, 206-90; 219 NW 44

Instructions as regards note not in issue. Instructions relative to the liability of the maker of an original note, are quite harmless when the action is on a renewal note and the instructions relative thereto are correct.

Farmers Bk. v DeWolf, 212-312; 233 NW 524

Nonprotected party. A nonnegotiable instrument in the hands of a third party indorsee is

subject to the equities existing between the original parties to the instrument.

Soldier Valley Bank v Camanche Co., 219-614; 258 NW 879

Note as receipt and not as loan. Evidence held to support a finding by the trial court that the nonnegotiable promissory note sued on was not intended to represent a loan by the payee to the maker, but was intended to evidence the fact that the payee had advanced to the maker the sum called for in the note as pro tanto payment of the payee's obligation to the maker.

Second N. Bk. v Mielitz, 211-218; 233 NW 108

Unallowable conclusion plea. An allegation that the transferee of a negotiable promissory note received it without consideration,—that said transferee was not a bona fide holder for value,—is a conclusion plea, and is not justified by the additional allegation of fact that said transferee took the note as a "donation or gift".

Benton v College, 202-15; 209 NW 516

Unpleaded defense—effect. The maker of a promissory note cannot be given the benefit of testimony tending to show that he signed the note under duress when he rests his defense on a distinctly different defense; and the court should so inform the jury.

Farmers Bk. v DeWolf, 212-312; 233 NW 524

9519 [§59] Who deemed holder in due course.

Holder in due course — presumption. The possessor of a negotiable promissory note, as owner, prior to its maturity, is presumptively a holder in due course.

Union Cent. Life v Mitchell, 206-45; 218 NW 40

Holder in due course — sufficiency of evidence. It is not necessarily true in all cases that a bank must prove its holdership in due course of a negotiable promissory note, by the testimony of all the officers of the bank.

Williamson v Craig, 204-555; 215 NW 664

Sufficiency of evidence. Testimony by a bank officer to the effect that he, on behalf of the bank, made the purchase of a promissory note, and that he had no notice of any defense to the note, may be sufficient to establish the bank's holdership in due course, even tho the other officers of the bank do not testify to their lack of knowledge of any defense.

Old Line Ins. v Jones, 206-664; 221 NW 210

Evidence—sufficiency. The corporate holder of a promissory note sufficiently establishes its holdership in good faith and for value by calling those of its officers only who participated in the purchase of said note.

Grimes Bk. v McHarg, 213-969; 236 NW 418

Sufficiency of evidence. Evidence fairly tending to negative holdership in due course of a negotiable promissory note presents a jury question, especially when not all of the officers of the plaintiff (a bank) testify, and negative knowledge of the pleaded fraud.

State Bk. v Behm, 202-192; 209 NW 523

Evidence. Evidence reviewed, and held to show that the holder of a promissory note was not a holder in due course.

McCorkle v Lessenger, 200-967; 205 NW 781

Evidence of ownership. The introduction in evidence by the payee-holder of a promissory note makes a prima facie showing of right of recovery.

Nolta v Lander, 200-608; 203 NW 710

Burden to show. Where a check is issued on a condition, placing limitations on payee's right to negotiate it, in spite of which defective title the check is negotiated to a bank, after which payment is refused by drawee-bank because payment stopped, the burden, in an action between the bank to whom check was negotiated and the maker, is on the bank to show that it was a holder in due course and had no notice of payee's defective title.

Newton Bank v Strand Co., 224-536; 277 NW 491

Burden of proof. The claim that, fraud being shown, the holder must establish his holdership in due course, is manifestly answered by a record which, by findings of fact, judicially shows such holdership.

Sword v Spry, 205-266; 215 NW 737

Burden of proving bad faith. Where payee returned check to maker on account of a debt owing to maker, but by some unknown means again obtained possession of the check, which had not been put in a place of safety, and negotiated it to plaintiff eight days after execution, burden was on defendant-maker to prove plaintiff's lack of good faith in acquiring the check, and lapse of eight days was not such an unreasonable time within statute as to rebut presumption that plaintiff was a holder in due course. What constitutes such an unreasonable time must be determined on facts of each particular case.

Clarinda Sales Co. v Radio Sales, 227-671; 288 NW 923

Burden of proof — circumstances evincing bad faith. The indorsee of a negotiable promissory note must, upon proof that the note was fraud-induced, establish his bona fide holdership in due course. Evidence reviewed and held to furnish substantial support for a finding by the trial court (which tried the case under waiver of jury) that the indorsee had

acquired the note under circumstances evincing bad faith.

Windell v Steinhoff, 211-999; 234 NW 795

Evidence — decree of dissolution. A decree of dissolution of a corporation based on the fraud of the corporation is admissible, on the issue of fraud and want of consideration, against an alleged bona fide holder of a negotiable promissory note which was given to the corporation as the purchase price for its corporate stock, even tho neither of the parties to the action on the note were parties to the dissolution suit.

Andrew v Peterson, 214-582; 243 NW 340

Holder in due course — sufficiency of evidence. A jury question on the issue of holdership in due course of a negotiable promissory note is made by the explicit testimony of the trustee-plaintiff for the corporate indorsee that he had sole charge of the negotiations attending the purchase of the note, and that he had no notice whatever of any infirmity in the note; and this is true even tho he did not call all the other officers of the corporation to testify to their want of notice.

Brainerd v Koffmeal, 200-1281; 206 NW 606

Conflicting testimony. Holdership in due course of a negotiable promissory note as collateral security for a pre-existing debt is not shown as a matter of law by testimony which, besides being in part impeached, is uncertain as to how, when, and under what circumstances the note was acquired and when the indorsement was made; and especially is this true when the holdership in due course bears the appearance of being an afterthought, born subsequent to the filing of the petition.

Ottumwa Bk. v Starns, 202-412; 210 NW 455

Conflicting inference from testimony. The court has no right to say that the holder of a negotiable note is a holder in due course and to direct a verdict accordingly when conflicting inferences may be drawn from the facts whether viewed individually or collectively.

Grimes Bk. v McHarg, 204-322; 213 NW 798
Pierce v Lichtenstein, 214-315; 242 NW 59

Earmarks of knowledge of fraud. The extraordinary discount allowed in the negotiation of a promissory note, and the unusualness of the transaction in general, may very clearly create a jury question on the issue of holdership in due course.

Sweet v Bank, 200-895; 205 NW 470

Fraud—failure to establish per se. Evidence held insufficient to show as a matter of law that promissory notes were obtained by false representations.

Andrew v Peterson, 214-582; 243 NW 340

Estoppel to plead fraud.

Macedonia Bk. v Graham, 198-12; 199 NW 248

Estoppel to plead fraud. The maker of negotiable promissory notes is not estopped to plead fraud in the inception of the notes because he appeared in the insolvency proceedings against the payee, and obtained judgment for the amount of the notes (which had been negotiated), and in such proceedings took the position, in effect, that the indorsees were holders in due course, when the evidence fails to show that anyone had relied on such course of conduct to his injury.

Citizens Bk. v Martens, 204-1378; 215 NW 754

Waiver of fraud. The holdership in due course of a negotiable promissory note is not put in issue by testimony that a former note of which the note sued on was a renewal was obtained by fraud.

Walnut Bk. v Mueller, 202-961; 211 NW 215

Waiver of fraud. It is quite immaterial whether the holder of a negotiable promissory note is or is not a holder in due course if the maker has waived the circumstances which originally invalidated the note.

Home Bk. v Heizer, 200-793; 205 NW 467

Waiver of fraud. The purchaser of a mortgage-secured promissory note may not rescind on the ground of fraudulent representations as to the value of the security when, with full knowledge of the fraud, he forecloses the mortgage, bids in the property for the full amount of the judgment, and later takes a sheriff's deed to the premises.

Iowa Co. v Bank, 200-952; 205 NW 744

Incompetent witness. In an action on a promissory note by the indorsee thereof, the maker is not a competent witness to testify to the fraud perpetrated on him by the payee in the execution of the note, when, at the time of the action, said payee is insane.

Cherokee Bk. v Lawrey, 203-20; 212 NW 359

Instructions re holder in due course. Instructions in re holder in due course reviewed and, in view of other instructions, held quite unobjectionable.

Chariton Bank v Wright, 222-417; 269 NW 439

Payee as holder in due course. Conceding, arguendo, that the payee of a promissory note might, under some circumstances, be a holder in due course, yet he cannot have such standing when he knew, when he acquired the note, that it had not been executed by the proper officers of the corporation maker.

Black Hawk Bk. v Monarch Co., 201-240; 207 NW 121

Undisclosed principal as indorsee. An indorsee of a negotiable promissory note has no basis for a claim of holdership in due course when he was the sole owner of the note from

its inception, and simply took under an indorsement by his own agent, to whom the note had been made payable.

Nolta v Lander, 200-608; 203 NW 710

LIABILITIES OF PARTIES

9520 [§60] Liability of maker.

When indorser primarily liable. A vendor of land who negotiates the purchase-price note received by him, and later either acquiesces in the abandonment of the contract by the purchaser or himself rescinds the contract and conveys the land to a new purchaser, thereby becomes primarily liable on the negotiated note, as between himself and a surety on said note.

First N. Bk. v LeBarron, 201-853; 208 NW 364

Agreement relative to payment by indorser and surety—enforceability. An agreement by the indorser and accommodation signer of a promissory note that each will pay one-half of the note to the indorsee, and that the accommodation signer will then sue the maker, and pay the indorser one-half of the amount collected, is supported by ample consideration and is enforceable.

Hirtz v Koppes, 212-536; 234 NW 854

Extension to principal available to surety — abatement of action. An order of a court of bankruptcy granting, to a maker of a negotiable promissory note, an extension of time in which to make payment, is not personal to said maker only, but inures, under USC, title 11, §204, to the benefit of another maker of said note who in fact signed said note as surety only, but without so indicating on the face of the note; and said latter maker, when sued alone by the original payee, may, for the purpose of abating the action, establish his suretyship and consequent secondary liability.

Benson v Alleman, 220-731; 263 NW 305

Liability of parties—beneficiary of loan. A promissory note executed by the maker in order to raise funds with which to take up his personal indebtedness to a bank is not in any sense the obligation of said bank (1) because the president of said bank personally indorsed the note, or (2) because the payee (who was correspondent for said bank), on accepting the note, credited said bank with the amount, or (3) because said bank applied the credit on the maker's indebtedness to said bank.

Andrew v Bank, 203-1; 212 NW 320

Payment on forged indorsement—negligence not imputable to state. Negligence and laches of public officers in the handling of state funds are not imputable to the state; for instance, in an action to recover from a drawee-bank the amount paid by the bank on a forged indorsement of a check drawn by a county treasurer against state school funds on deposit with said drawee, it is no defense that the county treasurer was negligent in drawing or delivering the check, or that county officers generally were negligent in not making early discovery of the forged indorsement, and notifying the drawee accordingly.

New Amst. Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

Release of surety—nonapplicability of principle. The maker of a fraud-induced promissory note may not claim, against a collateral holder in due course, that he is released on the note because, without his consent, the collateral holder extended payment on the payee's note for which the fraud-induced note was collaterally pledged, on the theory that the act of collaterally pledging constituted the payee a principal and the maker a surety.

Mid-West Bank v Struble, 203-82; 212 NW 377

Release of existing maker as consideration for signature of new signer. The court will not, in order to supply a consideration for a third party's signing a pre-existing note, hold, as a matter of law, that the said signing, being without the knowledge or consent of the existing signers, (1) worked an absolute release of said existing signers, and (2) constituted the making of a new note by the new signer, when plaintiff was pressing his action on a theory flatly contradictory of such a holding.

Blain v Johnson, 201-961; 208 NW 273

Statutory admission of existence and capacity to indorse. The maker of a promissory note who makes it payable "to the order of" a named payee thereby admits the existence of such payee and his then capacity to indorse the note, even tho the maker, when he executed the note, actually believed the named payee to be a corporation, when in fact the payee was only the trade name of an individual.

Schipfer v Stone, 206-328; 218 NW 568

Wife's separate estate—no joint adventure from husband's management. Where a wife inherits real property which is managed, as an incident to their marital relation, by her husband, his individual purchase of livestock in connection with such management and executing his individual promissory note therefor will not make the wife liable thereon as a joint adventure.

Valley Bank v Staves, 224-1197; 278 NW 346

Wife signing husband's notes—unallowable defense. Assuming that a wife was advised, when she signed promissory notes evidencing the husband's sole indebtedness that her signature would have no other effect than to release her dower interest in the husband's land

(which was embraced in the accompanying mortgage which she signed) constitutes no defense to personal judgment against her on the notes when there is no issue or proof of fraud or conditional delivery, no prayer for reformation or proof supporting such prayer, and when the notes are wholly bare of any reference to dower interest.

First N. Bank v Mether, 217-695; 251 NW 505

9521 [§61] Liability of drawer.

Drafts—demand necessary within limitation period. Before an action can be maintained against a drawer upon a check, demand for its payment must be made upon the drawee bank, but the demand cannot be postponed indefinitely and must be made within the 10-year limitation period.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Admitting existence of payee. The statutory provision that by drawing a check the drawer "admits the existence of the payee and his then capacity to indorse" is solely for the protection of the holders in case the drawee fails to pay. The statute does not, in case a check is unwittingly and without negligence made payable to a fictitious person, relieve the drawee of the duty to ascertain the identity of the indorser and the genuineness of the indorsement.

McCornack v Bank, 203-833; 211 NW 542; 52 ALR 1297

Deposits — cancellation of credit. A bank which, having issued foreign exchange, later receives it back (when its value is problematical), under an agreement to sell the same and collect the proceeds, does not thereby become the owner either of the returned exchange or of a check subsequently received as the result of the collection, and may cancel a credit which was entered on the mistaken assumption that the check was of face value.

Tropena v Bank, 203-701; 213 NW 398

Dishonor by drawee—drawer's recourse to drawee's funds in indorsee's hands. When a check is honored by the drawee's depository bank in satisfaction of payee's debt to said bank, and is properly charged to the drawee's deposit in said bank, and is later dishonored by the drawee because of insolvency, the cancellation of all of said entries, and the return of said check to the drawer who paid the amount thereof to the payee, leaves the drawer without any claim against the funds of the drawee in the said depository bank.

Davis Bros. v Bank, 216-277; 249 NW 170

Payment on forged indorsement — recovery —negligence. Evidence reviewed, in an action by a depositor against a bank to recover the amount paid by the bank on a forged indorsement, and charged to the depositor's account, and held ample to support a finding that the depositor was not guilty of any negligence which prejudiced the bank.

McCornack v Bank, 207-274; 222 NW 851

Drafts — laches in presentment — action barred. An action to collect a draft is barred by the statute of limitations where no presentment for payment is made for over 19 years, on the theory that a creditor may not postpone the running of the statute by his own neglect or inaction.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

9525 [§65] Warranty where negotiation by delivery.

"Without recourse" — liability. The payee of a promissory note who, without fraud or deceit, indorses "without recourse" both the note and the mortgage securing it, cannot be deemed to warrant the solvency of the maker of the note.

Leekley v Short, 216-376; 249 NW 363; 91 ALR 394

9526 [§66] Liability of general indorser.

Absence of consideration. The indorser of a promissory note may not be held on his indorsement, even tho he was the original payee of the note, when he never owned any interest in the note, and when his indorsement was wholly without any consideration.

Pomeroy v Bank, 207-1310; 224 NW 512

Agreement relative to payment by indorser and surety—enforceability. An agreement by the indorser and accommodation signer of a promissory note that each will pay one-half of the note to the indorsee, and that the accommodation signer will then sue the maker, and pay the indorser one-half of the amount collected, is supported by ample consideration and is enforceable.

Hirtz v Koppes, 212-536; 234 NW 854

Agreement to repurchase as guaranty. An agreement by the seller of a promissory note to repurchase the note of the vendee, in the event of nonpayment at maturity, cannot be given the force and effect of a guaranty that the maker will pay at maturity.

Hawkeye Ins. v Trust Co., 208-573; 221 NW 486

Change of venue — indorser sued in wrong county. The indorser in blank of a promissory note, when sued alone on his indorsement in the county in which the note requires the maker to make payment, is entitled to a change of venue to the county of his residence when said first county is not the county of his residence in this state.

Dougherty v Shankland, 217-951; 251 NW 73
See Darling v Blazek, 142-355; 120 NW 961

Disaffirmance of promissory note — release of surety. The disaffirmance by a minor of his contract of purchase and of his negotiable promissory note given in connection therewith, before the property is delivered to him, releases the surety on the note of all liability to the payee, even tho the surety signed the note because of the known minority of the principal. In case the note has passed to a holder in due course by indorsement by the payee, the liability of the indorser becomes primary and the liability of the surety becomes secondary.

Lagerquist v Guar. Co., 201-430; 205 NW 977; 43 ALR 585

Delivery — parol evidence affecting. Where the holder of a promissory note indorsed and surrendered it, and received in payment the duly indorsed note of a third party, parol evidence that, at the time the respective indorsements were made, there was talk to the effect that if such indorsements were made, one indorsement would cancel the other indorsement, has no probative force to show (1) inducement, or (2) conditional delivery, or (3) delivery for a specific purpose, of said indorsements, or (4) that the paid note was reissued and payment thereof guaranteed.

Versteeg v Hoeven, 214-92; 239 NW 709

Forged indorsement — evidence—sufficiency. An indorsement "Hazen Spears" on a check payable to "Hazen Spears" is not shown to be a forgery by evidence (1) that a person by the name of Hazen Speer lived in the county in which the check purported to be drawn and in which it was cashed, and (2) that said Hazen Speer did not make the said indorsement.

Bank of Pulaski v Bank, 210-817; 232 NW 124

Indorsement without consideration — effect. The indorser of a promissory note may not be held on his indorsement by a holder who is not such in due course, even tho the indorser was the original payee of the note, when he never personally had any interest in the note, and indorsed it solely for the purpose of passing the legal title to the actual owner.

Spurway v Read, 210-710; 231 NW 306

Judgment against maker — effect. A judgment obtained by the indorsee of a promissory note solely against the maker thereof, does not adjudicate or affect any right or obligation of the indorser.

Callaway v Hauser Bros., 211-307; 233 NW 506

Liability of indorsee. One who has been induced to issue his check because of the criminal fraud of the payee may not recover the amount thereof from an indorsee on the naked showing that said indorsee received the said check from said payee in settlement of a like criminal fraud perpetrated by said payee on said indorsee.

Bogle v Goldsworthy, 202-764; 211 NW 257

Liability of parties—beneficiary of loan. A promissory note executed by the maker in order to raise funds with which to take up his personal indebtedness to a bank is not in any sense the obligation of said bank (1) because the president of said bank personally indorsed the note, or (2) because the payee (who was correspondent for said bank), on accepting the note, credited said bank with the amount, or (3) because said bank applied the credit on the maker's indebtedness to said bank.

Andrew v Bank, 203-1; 212 NW 320

Neglect to collect of maker. The plea of the indorser of a note that the indorsee negligently failed to file a claim against the estate of the maker for the amount of the note becomes of no consequence when it appears that the indorser himself had filed such claim.

First Bk. v Johnson, 202-799; 211 NW 373

Parol modification. Parol evidence is inadmissible to vary the legal effect of an indorsement in blank of a promissory note.

Union Mtg. v Evans, 200-1000; 205 NW 776
In re Newson, 206-514; 219 NW 305
Kent Bk. v Campbell, 208-341; 223 NW 403
First N. Bk. v Raatz, 208-1189; 225 NW 856
See Leach v Bank, 201-349; 207 NW 332

Payment by indorser revests original rights. The payee of a promissory note who indorses with recourse, necessarily continues to be a party to the note, and if he pays the note when due because of the default of the maker, he thereby re-acquires his original rights under the note. It follows that if the note was originally given for the purchase price of property, the indorser may enforce said note against such property, and it is quite immaterial that he does so under a duly assigned judgment obtained by the indorsee against the maker.

Callaway v Hauser Bros., 211-307; 233 NW 506

Unallowable counterclaim. A defendant sued on his indorsement of a promissory note manifestly may not avail himself, by way of counterclaim, of an indorsement by plaintiff to defendant of a promissory note which has been fully discharged. Somewhat unusual circumstances reviewed and held to show such discharge.

Versteeg v Hoeven, 214-92; 239 NW 709

PRESENTMENT FOR PAYMENT

9530 [§70] Effect of want of demand on principal debtor.

Deposit certificate—action accrues only after demand. Makers of notes, acceptors of bills

of exchange and issuers of certificates of deposit are charged on the instruments from their inception, and presentment to the maker or acceptor is unnecessary; but, as to the issuer of a certificate of deposit, there is an imputed agreement that before the depositor may sue the bank thereon, actual demand is necessary to mature the debt.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

"Reasonable time" for presentment—primary and secondary liability. The "reasonable time" clause of §9531, C., '35, negotiable instruments law, applies only to persons secondarily liable on the instrument. It has no application in determining what is a reasonable time for presentment where such step is only preliminary to the enforcement of a remedy against a party primarily liable.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Insufficient excuse for nonpresentment. Principle reaffirmed that presentment for payment of a negotiable promissory note is not excused because the bank which is named as the place of payment is insolvent, or because the indorser knew of such insolvency.

Wood v Roe, 205-399; 218 NW 51

Drafts—statute runs after reasonable time for presentment. Where no demand or presentment for payment of draft is made for over 19 years after its issuance, and where only person who could make due presentation was plaintiff-holder, the statute of limitations began to run after a reasonable time for presentment.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Lapse of time with other circumstances—presumption. Mere lapse of time for less than 20 years may, with other circumstances, raise a presumption of payment, but it is not alone sufficient.

Citizens Bank v Probasco, (NOR); 233 NW 510

Nonpresentment of check. The plea that a loss resulting from the nonpayment of a check must be borne by the payee because of delay by the attorney who received it to present it for payment must fall when there is no showing that the attorney had authority to make the indorsement.

Prudential v Hart, 205-801; 218 NW 529

Pleading. In an action on a negotiable promissory note and against the indorser thereof, the petition is demurrable when it fails to allege (1) that presentation and demand of payment were made on the due date of the instrument, and (2) that notice of dishonor was served on the indorser within the time required by the statute.

Wood v Roe, 205-399; 218 NW 51

9531 [§71] Presentment—instrument payable and not payable on demand.

"Reasonable time" for presentment—primary and secondary liability. The "reasonable time" clause of this section applies only to persons secondarily liable on the instrument. It has no application in determining what is a reasonable time for presentment where such step is only preliminary to the enforcement of a remedy against a party primarily liable.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Drafts—demand necessary within limitation period. Before an action can be maintained against a drawer upon a check, demand for its payment must be made upon the drawee bank, but the demand cannot be postponed indefinitely and must be made within the 10-year limitation period.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Drafts — laches in presentment — action barred. An action to collect a draft is barred by the statute of limitations where no presentment for payment is made for over 19 years, on the theory that a creditor may not postpone the running of the statute by his own neglect or inaction.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Notice—pleading. In an action on a negotiable promissory note and against the indorser thereof, the petition is demurrable when it fails to allege (1) that presentation and demand of payment were made on the due date of the instrument, and (2) that notice of dishonor was served on the indorser within the time required by the statute.

Wood v Roe, 205-399; 218 NW 51

9532 [§72] Sufficient presentment.

Demand and notice—pleading. In an action on a negotiable promissory note and against the indorser thereof, the petition is demurrable when it fails to allege (1) that presentation and demand of payment were made on the due date of the instrument, and (2) that notice of dishonor was served on the indorser within the time required by the statute.

Wood v Roe, 205-399; 218 NW 51

9533 [§73] Place of presentment.

Presentment, demand, and notice—failure to make. Principle reaffirmed that presentment for payment of a negotiable promissory note is not excused because the bank which is named as the place of payment is insolvent, or because the indorser knew of such insolvency.

Wood v Roe, 205-399; 218 NW 51

Note payable at particular place. Principle reaffirmed that the fact that a note is payable at a particular office does not authorize the persons in charge of said office to receive payment without the production and surrender of the note, nor warrant the belief on the part of the maker that said persons were so authorized.

Engelke v Drager, 213-598; 239 NW 569

9534 [§74] Instrument must be exhibited.

Agent's authority to receive payment. The maker of a promissory note who pays it to one who is not the payee or indorsee and does not receive a surrender of the note, must show that the recipient of the payment had actual or implied authority from the payee or holder to receive payment.

Engelke v Drager, 213-598; 239 NW 569

Note payable at particular place. Principle reaffirmed that the fact that a note is payable at a particular office does not authorize the persons in charge of said office to receive payment without the production and surrender of the note, nor warrant the belief on the part of the maker that said persons were so authorized.

Engelke v Drager, 213-598; 239 NW 569

9535 [§75] Presentment where instrument payable at bank.

Presentment, demand, and notice—failure to make. Principle reaffirmed that presentment for payment of a negotiable promissory note is not excused because the bank which is named as the place of payment is insolvent, or because the indorser knew of such insolvency.

Wood v Roe, 205-399; 218 NW 51

9542 [§82] Presentment dispensed with.

Guaranty with agreement for extension. A guarantor of payment of a promissory note who waives demand and consents to renewals and extensions must keep himself informed as to the nonpayment of the paper and protect himself if he can.

Granger v Graef, 203-382; 212 NW 730

9545 Holidays affecting presentation.

Atty. Gen. Opinions. See '38 AG Op 890, 896

Execution of promissory notes—subsequent ratification—effect. A plea that promissory notes were executed on Sunday is avoided by a plea, and proof thereof, that the maker of the notes subsequently ratified the execution of said notes.

Witmer v Fitzgerald, 209-997; 229 NW 239

9548 [§87] Rule where instrument payable at bank.

Construction—notes designed to resemble checks and so treated. Instruments for the payment of obligations, which papers resembled checks and were treated as such, but upon which the maker had cleverly executed certain qualifying words whereby he hoped that they could be treated as promissory notes, held to be in fact ordinary checks when it was noted that the payee was required to indorse them before payment.

State v Doudna, 226-351; 284 NW 113

Refusal of bank to pay. Making a promissory note payable at a named bank is equivalent to an order to the bank to pay the note, but such statutory rule has no application when the bank does not see fit to make such payment.

Iowa Co. v Seaman, 203-310; 210 NW 937

9549 [§88] What constitutes payment in due course.

Bills and notes—actions—prima facie proof of default in payment. The introduction in evidence of a promissory note which fails to carry any indorsement of the payment of an installment which, under the terms of the note, is past due, establishes, prima facie, a default in payment enabling the holder to avail himself of an accelerating payment clause in the note.

First Bank v Kruse, 219-1229; 260 NW 665

NOTICE OF DISHONOR

9550 [§89] Notice of dishonor.

Notice and protest—allowable and unallowable proof. Testimony tending to show the contents of a lost official notarial certificate of protest of a promissory note is inadmissible, but the facts constituting a legal protest of the note may, in such case, be established by any competent oral testimony.

Frank v Johnson, 212-807; 237 NW 488; 75 ALR 128

Pleading. In an action on a negotiable promissory note and against the indorser thereof, the petition is demurrable when it fails to allege (1) that presentation and demand of payment were made on the due date of the instrument, and (2) that notice of dishonor was served on the indorser within the time required by the statute.

Wood v Roe, 205-399; 218 NW 51

Waiver of notice. A surety may not complain that he was not notified of the nonpayment of the note by the principal when the surety has expressly waived notice of nonpayment.

Davenport v Mullins, 200-836; 205 NW 499

9564 [§103] Where parties reside in same place.

Presentment, demand, and notice—pleading. In an action on a negotiable promissory note and against the indorser thereof, the petition is demurrable when it fails to allege (1) that presentation and demand of payment were made on the due date of the instrument, and (2) that notice of dishonor was served on the indorser within the time required by the statute.

Wood v Roe, 205-399; 218 NW 51

9566 [§105] When sender deemed to have given due notice.

Delay. Mere delay in the delivery to an indorser of a notice of dishonor of a negotiable instrument is not sufficient to make a jury question on the issue whether such notice, properly addressed, was mailed within the statutory time, when the record reveals positive testimony of such mailing.

City Bk. v Edson, 202-671; 210 NW 898

9570 [§109] Waiver of notice.

Waiver by agreement. An indorser who has specifically agreed to carry out an extension agreement which provides for optional maturity if the interest be not paid, is not entitled to demand presentment and notice of dishonor when the option is exercised.

Hansen v Bowers, 208-545; 223 NW 891

Waiver by conduct. An indorser may, by his conduct, both before and after dishonor, clearly waive the failure to present the note to the maker and to accord him (the indorser) notice of such dishonor.

Hansen v Bowers, 208-545; 223 NW 891

Waiver by subsequent promise. Presentment to and demand on the maker and notice to the indorser of dishonor are waived by the subsequent unconditional promise of the indorser to pay the obligation.

County Bk. v Jacobson, 202-1263; 211 NW 864

9576 [§115] When notice need not be given to indorser.

Discussion. See 12 ILR 175—Joint accommodation indorsers—notice of dishonor

9579 [§118] When protest need not be made—when must be made.

Allowable and unallowable proof. Testimony tending to show the contents of a lost official notarial certificate of protest of a promissory note is inadmissible, but the facts constituting a legal protest of the note may, in such case, be established by any competent oral testimony.

Frank v Johnson, 212-807; 237 NW 488; 75 ALR 128

DISCHARGE OF NEGOTIABLE INSTRUMENTS

9580 [§119] How instrument discharged.

See also annotations under §9526
Conditional delivery of note. See under §9476

Payment—acts constituting. The act of a bank (1) in receiving, without authority, payment of its customer's notes at a time when said bank had either rediscounted or collaterally pledged and indorsed said notes to another bank, and (2) in forwarding to the then holder a draft and other remittances sufficient to cover the amount of the notes, and the act of the then holder (1) in accepting the remittances, (2) in marking the notes "paid", and (3) in returning them, work a complete payment of the notes, even tho the draft was not paid, owing to the failure of the drawer-bank, it appearing that, at the time of each transaction, both parties had entered the proper debits and credits on their mutual accounts in harmony with the theory of payment.

Leach v Bank, 204-493; 215 NW 617

Payment—acts constituting. Payment of a check which is amply protected by an available deposit is effected by the act of the payee in presenting it to the drawee-bank for payment, in having it honored, and in receiving, at his own request, in lieu of cash, a certificate of deposit on the bank on which the check was drawn, even tho the certificate of deposit is not paid, owing to the subsequent failure of the bank.

Cavanaugh v Praska, 205-660; 216 NW 15

Payment—acts constituting. Absolute payment of a promissory note is established by a showing that the payee received as payment from his collecting agent the full amount of the note, and thereafter retained said amount, and that his right so to do was not questioned by anyone; and this is true even tho it does appear that the check which was forwarded to the collecting agent in payment of the note went to protest.

Braun v Cox, 202-1244; 211 NW 891

Payment by check. A draft is paid (1) by the act of the drawee in delivering to the collecting bank his personal check for the amount of the draft on his ample checking account in said bank without knowledge that the bank was then insolvent, and (2) by the act of the bank in surrendering the draft to the drawee, and in marking the check "paid", and charging the amount thereof to the check drawer's account,—the bank then having on hand ample funds with which to pay said check.

Wells Oil v Supply Co., 206-1010; 221 NW 547; 65 ALR 1145

Check not necessarily payment. A check issued by an insurer for the amount of an adjusted loss and payable to a mortgagor and

mortgagee, jointly, and never cashed because the mortgagor refused to indorse it, cannot be deemed a payment of the loss when there was no express or implied agreement to that effect —when the insurer-drawer first asserted such claim after the bank on which the check was drawn failed.

Union Ins. v Ins. Co., 216-762; 249 NW 653

Payment by note. A mortgagee who accepts from the mortgagor the latter's promissory note for an item of interest, and in his then and subsequent conduct treats such note as payment of the said interest, will not be permitted to enforce payment of such interest against one who has assumed and agreed to pay said mortgage.

Gilmore v Geiger, 206-161; 220 NW 7

Payment — incompleted transactions. An agreement to the effect that the payee of a promissory note would accept as pro tanto payment an outstanding promissory note for a lesser amount in which he was maker, does not constitute payment of said smaller note when the agreement was never carried out, even to the extent of delivering said smaller note to the maker thereof, or to the extent of indorsing the amount thereof on the larger note.

Jasper Bk. v Saheroff, 205-774; 218 NW 486

Payment by guarantor—effect. Payment of a promissory note by the guarantor thereof will be deemed a purchase of the note as regards the maker, when such is the manifest intent of the guarantor.

Whitney v Eichner, 204-1178; 216 NW 625

Application of payments. A chattel mortgagee who consents to the shipment and sale of the mortgaged property in his name must obey the instructions of the mortgagor to apply the receipts on the mortgage-secured debt, irrespective of his right in the absence of such instructions.

Reichenbach v Bank, 205-1009; 218 NW 903

Application of payment prejudicial to surety. The fact that the common maker of two promissory notes signed by different sureties and payable to the same payee was aided by a loan by one of the sureties in order to enable the common maker to make up the amount of a payment to the payee, with the understanding that the total payment would be applied—indorsed—on the note on which said surety was obligated, does not estop or prevent the payee long afterwards (five years) from applying said payment (in accordance with the wishes of the common maker) on the note on which said surety was not obligated, the payee having no knowledge of said agreement. And this is true tho the common maker, and the surety on the note receiving the application, had, in the meantime, become insolvent.

Mitchell v Burgher, 216-869; 249 NW 357

Contradicting method of payment. A promissory note "payable in gold coin of the United States" may not be modified by a parol agreement, contemporaneous with the execution of the note, to the effect that the payee might pay the note by surrendering stock certificates which were pledged as collateral to the note.

Union Mtg. v Evans, 200-1000; 205 NW 776

Judgment—when not payment. The entry of judgment against the maker and assumptors of a note does not work a payment and discharge of the note as to an indorser, especially when the cause was continued to a future day for hearing on the liability of the indorser.

Hansen v Bowers, 208-545; 223 NW 891

Note payable at particular office. Principle recognized that the fact that a promissory note is payable at the office of a particular person does not, in and of itself, authorize or empower such particular person to receive payment on the note.

Whitney v Krasne, 209-236; 225 NW 245
Engelke v Drager, 213-598; 239 NW 569

Note payable at particular place. Principle reaffirmed that the fact that a note is payable at a particular office does not authorize the persons in charge of said office to receive payment without the production and surrender of the note, nor warrant the belief on the part of the maker that said persons were so authorized.

Engelke v Drager, 213-598; 239 NW 569

Payment to agent without production of note. Payment of a promissory note to one who is the actual or implied agent of the owner of the note, even tho the note is not produced and surrendered, effects a full discharge of the note, even tho the payer supposed he was making payment to the actual owner of the note.

Lusby v Bank, 207-147; 217 NW 459; 222 NW 450
Carr v Benjamin, 207-1139; 222 NW 373
Whitney v Krasne, 209-236; 225 NW 245
Northwest. Life v Blohm, 212-89; 234 NW 268

Payment without production of note. The maker of a promissory note who makes partial payment thereof to the original payee at the office at which the note is payable by its terms, and at a time when an assignment of the note (and mortgage securing it) is of record, without knowing that said original payee has possession of said note, and without demanding the production of said note, must, in order to receive credit on the note, prove that said original payee was then the agent of the then holder of said note to receive payment; and especially is this true when at the time of payment no part of the principal and no interest were due.

Holden v Batten, 215-448; 245 NW 750

Payment without production of note—effect. Principle reaffirmed that the payment of a negotiable promissory note without the production and surrender of the note is at the peril of the payer.

Commercial Bk. v Allaway, 207-419; 223 NW 167

Payment without production of note. The maker of a promissory note secured by mortgage who pays the same to the payee-mortgagee without requiring the production and surrender of the note does so at his peril, even tho the record reveals no assignment of the note and mortgage, such maker not being a subsequent purchaser, within the meaning of the recording acts.

Shoemaker v Nodland, 202-945; 211 NW 567
Shoemaker v Ragland, 202-947; 211 NW 564
Shoemaker v Minkler, 202-942; 211 NW 563
Wood v Swan, 206-1198; 221 NW 791

Right to possession of note. The court very properly refuses to instruct that a surety on a promissory note has a right to the possession of the note when it is paid by the principal maker.

Mitchell v Burgher, 216-869; 249 NW 357

Wrongful receipt of payment of note—ratification. The payee of a promissory note does not ratify and confirm the act of a third person in wrongfully receiving payment of the note by subsequently receiving and accepting partial payments from said wrongdoer.

Moron v Tuttle, 211-584; 233 NW 691

"Payment" is affirmative defense.

Columbia College v Hart, 204-265; 213 NW 761

Equitable estoppel — evidence — degree of proof required. The plea of a surety on a promissory note that he, under an arrangement with the principal maker, furnished a portion of the funds with which to make full payment of the note, but that the payee wrongfully applied said payment on another note owing by said maker, and that, therefore, said payee is estopped to maintain an action against him, must be supported by clear, convincing, and satisfactory evidence that said payee had full knowledge of said arrangement before he made application of said payment.

Reason: Fundamentally, estoppel is not a favorite of the law.

Stookesberry v Burgher, 220-916; 262 NW 820

Evidence of payment—burden of proof. A debtor has the burden to establish his plea that the creditor accepted a check in full payment of the debt in question.

Kruidenier Co. v Manhardt, 220-787; 263 NW 282

Payment—burden of proof. A plaintiff who alleges the nonpayment of the note and mortgage which he is seeking to foreclose must prove such nonpayment even tho defendant pleads payment.

Larson v Church, 213-930; 239 NW 921

Payment — burden of proof. Defendants, claiming payment on note which plaintiff denied, had burden to prove such payment by a preponderance of evidence, whether payment was made as partial payment on note or on property purchased, held for jury.

Sager v Skinner, (NOR); 229 NW 846

Burden of proof. The maker of a promissory note who claims prospective credits on the note, other than those shown by the record, must point out and establish such credits.

Aetna Bank v Hawks, 213-340; 239 NW 91

Unchangeable burden to show payment.

Riggs v Gish, 201-148; 205 NW 833

Circumstantial evidence showing payment. Payment of a promissory note may be established by circumstantial evidence, i. e., that the payee was a careful business man; that the maker and payee resided in the same place; that business transactions occurred between them which might have furnished opportunity for payment; that the note was always readily collectible; that no annual interest and no part of the principal were ever indorsed on the note; that 17 years elapsed from the maturity of the first annual interest, and 11 years after the maturity of the principal before any claim was made on the note and then only after the death of both maker and payee.

Finley v Thorne, 209-343; 226 NW 103

Deceased payee—proof of payment—when interested witness competent. In a proceeding between the maker of a promissory note and the administratrix of the estate of the deceased payee (involving the issue whether said note had been paid), the wife of said maker, tho herself a joint maker of said note, is a competent witness to testify to a conversation and transaction which occurred between her husband and said payee and which strongly tended to establish said payment—provided said witness took no part in said conversation and transaction.

In re Fish, 220-1247; 264 NW 123

Payment — insufficient evidence. Evidence held wholly insufficient to present a prima facie showing of payment.

McCornack v Bank, 207-274; 222 NW 851

Evidence—sufficiency. Evidence held quite insufficient to establish payment of a note.

Andrew v Ingvoldstad, 218-8; 254 NW 334

Payment—sufficient evidence. Testimony reviewed, and held that defendant had estab-

lished his plea of payment of interest by the equivocal and contradictory testimony of the plaintiff.

Pace v Mason, 206-794; 221 NW 455

Evidence — sufficiency. Evidence reviewed and held to show that a party who received money with which to pay a note and mortgage was the agent of the maker of the note and mortgage and not of the payee thereof.

Clayton Bk. v McMorrow, 209-165; 225 NW 859

Evidence—sufficiency. Evidence reviewed, and held wholly insufficient to show that a party who received the amount due on a note and mortgage was the agent of the holder to receive such payment.

Wood v Swan, 206-1198; 221 NW 791

Presumption of payment. The law will presume that a check was paid on proof that the check was, subsequent to its execution, (1) stamped "Paid", and (2) charged by the drawee to the account of the drawer.

Andrew v Bank, 207-407; 219 NW 929

Presumption from payment. Mere proof that a check payable to a bank was paid by the remotely located drawee will not warrant the presumption that the amount of such payment actually reached the payee bank and became a part of its cash assets.

Andrew v Bank, 207-407; 219 NW 929

Lapse of time with other circumstances—presumption. Mere lapse of time for less than 20 years may, with other circumstances, raise a presumption of payment, but it is not alone sufficient.

Citizens Bank v Probasco, (NOR); 233 NW 510

Presumption from possession. Possession of an unmatured negotiable promissory note by the maker thereof creates no presumption of payment and discharge, especially when such possession is open to the suspicion of being wrongful.

Haldeman v Martin, 205-302; 217 NW 851

Prima facie proof of default in payment. The introduction in evidence of a promissory note which fails to carry any indorsement of the payment of an installment which, under the terms of the note, is past due, establishes, prima facie, a default in payment enabling the holder to avail himself of an accelerating payment clause in the note.

First Bank v Kruse, 219-1229; 260 NW 665

Release—presumption. A marginal release of a mortgage, executed by the agent of the holder constitutes prima facie evidence of payment and discharge of both the note and the mortgage securing the note.

Larson v Church, 213-930; 239 NW 921

Receipts — parol showing purpose. Under plea of payment of a promissory note, parol evidence is admissible to show that nonexplanatory receipts represented money paid on the note and accepted as such by the payee.

Hallowell v Van Zetten, 213-748; 239 NW 593

Overcoming presumption of nonpayment. An instruction that the possession of an uncanceled promissory note creates a presumption of nonpayment is erroneous insofar as it further directs the jury, in effect, that it may find the presumption to be overcome by long delay in bringing action on the note and other circumstances, when the delay was some nine years, coupled with the circumstances that the defendant was at all times a nonresident of the state.

Mitchell v Burgher, 216-869; 249 NW 357

Agent's authority to receive payment. The maker of a promissory note who makes payment to some one other than the payee or holder must take on the burden of showing that the recipient of the payment had actual or apparent authority from the payee or holder to receive it. Evidence held to show that the party receiving payment on a note was the agent of the holder.

Whitney v Krasne, 209-236; 225 NW 245

Agent's authority to receive payment. The maker of a promissory note who pays it to one who is not the payee or indorsee, and does not receive a surrender of the note, must show that the recipient of the payment had actual or implied authority from the payee or holder to receive payment.

Engelke v Drager, 213-598; 239 NW 569

Agency to receive payment. Record reviewed and held to present a jury question on the issue whether the original payee of a promissory note was the agent of the indorsee to receive payment.

Andrew v Kolsrud, 218-15; 253 NW 913

Authority to receive payment. Authority or agency in a third party to receive payment of a promissory note is not shown by evidence:

1. That the note provided for payment at the office of said third party,
2. That the payee received payments of interest from said third party,
3. That the payee authorized said third party to grant an extension of the mortgage security,
4. That the payee wrote to said third party relative to the payment of the note, but long after said third party had collected the amount due thereon.

Moron v Tuttle, 211-584; 233 NW 691

Authority to collect interest not authority to collect principal. Principle reaffirmed that authority in an agent to receive interest on a

promissory note does not, in and of itself, carry authority to receive the amount of the principal.

Holden v Batten, 215-448; 245 NW 750

Payment and discharge—apparent agency. A payment made in a bank that is open and transacting business, to one behind the counter, with the permission of the managing officers of the bank, and with apparent authority to receive the money, constitutes a payment to the bank. It follows that the conversation at the time, relative to the subject matter of the payment, is competent.

First Bk. v Tobin, 204-456; 215 NW 767

Assumed agency—ratification. The holder of a note and mortgage was informed by one who had subsequently bought the mortgaged property that he had, without requiring the production of the note, paid the note to one of the original makers of the note. Thereupon, the holder admitted that he had received part payment from the said maker, and exhibited the mortgage papers to the informant. Held insufficient to show ratification of the payment to the said maker.

Ritter v Plumb, 203-1001; 213 NW 571

Implied agency to receive payment. The assignee of a promissory note who receives numerous payments of principal and interest from the original payee, with knowledge that such payments had been made to such payee by the makers of the note, thereby impliedly constitutes such payee his agent to receive such payments.

Shoemaker v Ragland, 202-947; 211 NW 564

Nonimplied agency to receive payment. Makers of promissory notes who make payment to the original payee without then demanding the surrender of the paid notes and without then knowing that the original payee had hypothecated said notes and others, as collateral security, may not assert apparent agency in said original payee to receive payment on behalf of the collateral holder, on the mere showing that the collateral holder, upon actual receipt from said original payee of the amount of a matured collateral note, credited said payee on his debt and returned the note to him.

Iowa Co. v Seaman, 203-310; 210 NW 937

Nonimplied agency to receive payment. The holder of notes and mortgage who accepts payment of one of the notes from a maker thereof, in form of part cash and part check payable to the holder, from one who had bought the property subject to the mortgage, cannot be held thereby to have held out the said maker as his agent to receive payment of the remaining note; nor will the added fact that on two occasions subsequent to the payment in question, and on one occasion prior thereto, the said holder had authorized the said maker to receive payments on wholly different transactions constitute such "holding out".

Ritter v Plumb, 203-1001; 213 NW 571
See Huismann v Althoff, 202-70; 209 NW 525

Receiving agent's authority to accept—maker's duty to know and prove. One who pays his promissory note has a duty to know and the burden to prove that (1) an agent to whom he makes payment has authority to receive on behalf of the holder, or that (2) the holder received the payment; and without proving one or the other the note is not discharged.

Fisher v Pride, 225-6; 280 NW 492

Payment to holder's agent. The holder of a promissory note who permits another person for a series of years to collect both interest and installments of principal on the note will not be permitted to deny the authority of such other person to make all collections on the note. And it is immaterial that the note was not surrendered to the maker when he made his final payment.

Ragatz v Diener, 218-703; 253 NW 824

Unauthorized agency — ratification by accepting benefit. The holder of a note is not estopped to challenge the unauthorized act of a party in receiving payment of the note, by accepting from such unauthorized agent part of the payment, (1) when he accepted such payment without knowledge that the party was assuming such agency, and (2) when such party was a maker of the note.

Ritter v Plumb, 203-1001; 213 NW 571

Assignment — payment to original payee — effect. The maker of a promissory note and mortgage who for four years before maturity of the principal and for eight years after maturity of the principal pays the accruing interest to an agent of the original payee without knowledge that the note and mortgage had been assigned, and finally pays the principal in the same manner without asking for or receiving the note in question, effects a complete discharge of the note and mortgage against an assignee thereof who had been such during all said times of payment but without recording his assignment, and in the meantime had permitted the original payee, a corporation, (1) to appear on the records as the owner of the paper, and (2) to collect the interest and pay it to him.

Kann v Fish, 209-184; 224 NW 531

Conditional sales — replevin of automobile conditionally sold under "trust receipt". Trust receipt for automobile delivered by a finance company was in effect conditional sale when accompanied by promissory note and agreement to return the automobile on demand. Held, in a replevin action the finance company

sustained its burden to prove its right to immediate possession by a showing of default in payment, which gave the right to possession.

General Motors v Koch, 225-897; 281 NW 728

Conditional sales — purchase without notice — effecting payment. Full payment for an article, bought in good faith, and for value and without notice of an existing conditional sales contract thereon, is effected by the act of the vendee in delivering to the vendor his negotiable check on actual funds in a foreign bank for the purchase price, and by the act of the vendor-payee in immediately negotiating the check to his bank as a general deposit, even tho the deposit slip in the latter transaction provided that the receiving bank took the check for collection only. It follows that the vendee is under no obligation to stop payment on the check issued by him because he learned of the conditional sale contract after said deposit and before his drawee-bank had paid the check.

General Motors v Whiteley, 217-998; 252 NW 779

Dishonor by drawee — drawer's recourse to drawee's funds in indorsee's hands. When a check is honored by the drawee's depository bank in satisfaction of payee's debt to said bank, and is properly charged to the drawee's deposit in said bank, and is later dishonored by the drawee because of insolvency, the cancellation of all of said entries, and the return of said check to the drawer who paid the amount thereof to the payee, leaves the drawer without any claim against the funds of the drawee in the said depository bank.

Davis Bros. v Bank, 216-277; 249 NW 170

Execution sale—purchase by maker—effect. The maker of a promissory note and mortgage may, by himself or through others, validly purchase said note and mortgage at execution sale against the payee or holder thereof, and thereby completely discharge the same.

Buter v Slattery, 212-677; 237 NW 232

Payee obtaining and negotiating check previously returned to maker. Where payee returned an executed check to maker on account of a debt owing to maker, but by some unknown means again obtained possession of the check, which had not been put in a place of safety, and negotiated it to plaintiff, evidence in action against maker warranted trial court's finding that check was never in hands of payee after indorsement and that it had never been canceled or paid.

Clarinda Sales Co. v Radio Sales, 227-671; 288 NW 923

Principles — sleeping on rights. One who, without requiring the production of a note, innocently pays the note to one who is not the agent of the holder, may not insist that the said holder, and not himself, should suffer the loss, especially when the latter, upon discovering the truth, does nothing to protect himself against the solvent wrongdoer.

Ritter v Plumb, 203-1001; 213 NW 571

Promissory note as collateral—release and discharge per se. The payment of the promissory notes for which another promissory note is held solely as collateral, necessarily releases and discharges the collateral note, the maker of all of said notes being one and the same person; especially is this true when the collateral note was without original consideration other than as collateral, and when the record is void of any competent evidence that said collateral had taken on any new or different status.

Monticello Bank v Schatz, 222-335; 268 NW 602

Recorded assignment — constructive notice. A duly recorded assignment of a mortgage and of the promissory note secured, carries constructive notice to the world that the assignee is the owner of said note.

Holden v Batten, 215-448; 245 NW 750

9581 [§120] When persons secondarily liable discharged.

Extension of time of payment. The surety on a promissory note is released from all liability whenever the payee makes a binding agreement with the principal debtor, without the consent of the surety, to extend the time of payment to a certain definite time.

Eilers v Frieling, 211-841; 234 NW 275

Extension of time—prima facie presumption. The indorsement on an overdue promissory note of interest in advance of its maturity does not constitute conclusive evidence that the parties have entered into a binding agreement for the extension of the time of payment. The presumption is not more than a prima facie one.

Commer. Bk. v Dunning, 202-478; 210 NW 599; 59 ALR 983

Extension of time of payment. An extension of time of payment of a promissory note will not work a release of the surety when the note contains the consent of all parties to all such extensions.

Johnson v Hollis, 205-965; 218 NW 615

Extension of time to assuming vendee. The principle that the holder of an obligation releases the surety on the obligation by granting an extension of time of payment to the principal without the consent of the surety, has no application to a case where the maker of a mortgage-secured promissory note sells the mortgaged property to a vendee who assumes and agrees to pay the note, and where the holder of the note subsequently grants an extension of time of payment to the assuming

grantee without the consent of the original maker of the note.

Blank v Michael, 208-402; 226 NW 12
Iowa Co. v Clark, 209-169; 224 NW 774
Herbold v Sheley, 209-384; 224 NW 781

Consideration for extension of time of payment. An express or implied agreement by the payee and principal debtor in a promissory note to the effect that the time of paying the note shall be extended for one year is supported by ample consideration, in that the payee forbears suit for one year, and in that the maker secures the benefit of the forbearance.

Eilers v Frieling, 211-841; 234 NW 275

9585 [§124] Alteration of instrument —effect of.

Alteration by stranger—effect. A purported alteration of a promissory note by a stranger thereto does not invalidate the note.

Mandel v Siverly, 213-109; 238 NW 596

Stranger to instrument—defense of alteration not available. A third-party stranger to an instrument cannot avail himself of the alteration of such instrument by one of the parties thereto, as a defense against his own wrongful and fraudulent acts.

Winker v Tiefenthaler, 225-180; 279 NW 436

Attorney correcting instrument after employment terminates — invalidity. Attorneys hired to draft a mortgage, altho discovering that they have made a mistake in the description of the land, have no authority on their own initiative after termination of their employment and without consulting the mortgagee, to change the description and re-record the mortgage in the recorder's office.

Winker v Tiefenthaler, 225-180; 279 NW 436

Burden of proof. He who alleges a material alteration of an instrument has the burden to prove his allegation. No presumption exists that the alteration was made after the execution of the instrument.

Council Bluffs Bank v Wendt, 203-972; 213 NW 599

Pleading — burden of proof. A pleader who wishes to avoid the legal effect of an instrument, because of a material and unauthorized alteration therein, must plead that the alteration was made after delivery.

Hartwick v Hartwick, 217-758; 252 NW 502

Indorsement—jury question. Evidence held to present a jury question whether an alteration of an indorsement "without recourse" was made as part of the negotiations for the purchase of the note or after the transaction of purchase was fully consummated.

Falcon v Falcon, 214-490; 240 NW 735

Nonmaterial changes—effect on surety.

Throp v Chaloupka, 202-360; 208 NW 299

9586 [§125] What constitutes a material alteration.

Burden of proof. The maker of a promissory note must establish his plea of material alteration without his consent, but he may not be compelled to establish that the payee knew of the alteration and of the maker's nonconsent thereto.

Schram v Johnson, 208-222; 225 NW 369

Change of place of payment.
Johnson v Ballou, 201-202; 204 NW 427

Law (?) or jury (?) question. Testimony that a negotiable promissory note had been delivered without any agreement relative to the filling of a blank therein for the place of payment, and that the holder had filled the blank without any authority from the maker, presents, on the issue of material alteration, a question of law for the court, and not a question of fact for the jury.

Citizens Bk. v Martens, 204-1378; 215 NW 754

Adding new signer to note. After a promissory note is fully executed and delivered, the signing of an additional name thereto as maker, without the consent of the first maker, constitutes a material alteration, and avoids the note in the hands of the original payee.

Schram v Johnson, 208-222; 225 NW 369

Blank indorsement — material alteration. The act of converting a blank indorsement into a special indorsement is proper so long as the indorser's liability is not increased, but the unauthorized insertion in such special indorsement of a guaranty of payment of any renewal of the note (no such provision otherwise appearing in the note) constitutes a material alteration and releases the indorser.

First N. Bk. v Sweeny, 203-35; 212 NW 333

Erasure and reinsertion — effect. The defense of material alteration in a promissory note after its delivery fails when the proof shows the erasure of a material provision and the subsequent exact reinsertion of that which had been erased.

Anderson v Foglesong, 201-481; 207 NW 562

Extension of time of payment. An agreement between a mortgagee and an assuming grantee for an extension of time of payment of the mortgage-secured note does not constitute a material alteration of the note.

Blank v Michael, 208-402; 226 NW 12
Royal Union v Wagner, 209-94; 227 NW 599

Extension agreement. The entering upon a promissory note of an agreement to extend the maturity date does not constitute an "alteration of the instrument".

Cresco Bk. v Terry & T., 202-778; 211 NW 228

Presumption as to time of alteration. A material alteration, manifest on the face of a promissory note, creates no presumption that the alteration was made after delivery.

In re Thorne, 202-681; 210 NW 952

Release of existing maker as consideration for signature of new signer. The court will not, in order to supply a consideration for a third party's signing a pre-existing note, hold, as a matter of law, that the said signing, being without the knowledge or consent of the existing signers, (1) worked an absolute release of said existing signers, and (2) constituted the making of a new note by the new signer, when plaintiff was pressing his action on a theory flatly contradictory of such a holding.

Blain v Johnson, 201-961; 208 NW 273

Subsequent unauthorized signing. One who signs a promissory note after its execution, delivery, and maturity, and without the consent of the original maker, thereby releases the original maker and makes the note his own. It follows that such belated signer may not successfully assert want of consideration for his signature.

Fairley v Falcon, 204-290; 214 NW 538

BILLS OF EXCHANGE—FORM AND INTERPRETATION

9587 [§126] "Bill of exchange" defined.

Drafts and checks—distinction. The distinguishing feature between a "check" and a "draft" is that in a draft the drawer is a bank, while in a check the drawer is an individual.

Leach v Bank, 202-899; 211 NW 506; 50 ALR 388

9588 [§127] Bill not an assignment of funds in hands of drawee.

See annotations on related matters under §9239

Operation and effect as to assignment. The issuance of a draft or check works no equitable assignment to the payee of the funds of the drawer in the hands of the drawee, and consequently, in case of the subsequent insolvency of the drawer, the payee is not a preferred creditor, (1) even tho the drawer at once charges himself and credits the drawee with the amount of the draft, (2) even tho the draft was issued by the drawer in payment of checks drawn upon himself by his depositors, whom he at once charges with the amounts of their checks, and (3) even tho the controversy over the funds is solely between the receiver of the insolvent drawer of the draft and the payee of the draft.

Leach v Bank, 202-894; 211 NW 517

Leach v Bank, 202-899; 211 NW 506; 50 ALR 388

Leach v Bank, 203-507; 211 NW 520; 212 NW 760

Leach v Bank, 203-782; 211 NW 522

Dishonor by drawee—drawer's recourse to drawee's funds in indorsee's hands. When a check is honored by the drawee's depository bank in satisfaction of payee's debt to said bank, and is properly charged to the drawee's deposit in said bank, and is later dishonored by the drawee because of insolvency, the cancellation of all of said entries, and the return of said check to the drawer who paid the amount thereof to the payee, leaves the drawer without any claim against the funds of the drawee in the said depository bank.

Davis Bros. v Bank, 216-277; 249 NW 170

Special deposits. Evidence held insufficient to show that a deposit was made for the special purpose of meeting payment on a particular draft, or was made under such circumstances that the issuance of the draft effected a pro tanto, equitable assignment of the deposit.

Heckman v Bank, 208-322; 223 NW 164

9590 [§129] Inland and foreign bills of exchange.

Deposits — cancellation of credit. A bank which, having issued foreign exchange, later receives it back (when its value is problematical), under an agreement to sell the same and collect the proceeds, does not thereby become the owner either of the returned exchange or of a check subsequently received as the result of the collection, and may cancel a credit which was entered on the mistaken assumption that the check was of face value.

Tropena v Bank, 203-701; 213 NW 398

9591 [§130] Bill treated as promissory note.

Cashier's check as bill of exchange—demand unnecessary — action accrues at making — barred after ten years. The holder of a cashier's check, certain in amount, containing no provision respecting demand and not in the nature of a certificate of deposit, has a right to sue thereon at any time from and after its issuance. Treated as a bill of exchange, presentment and demand for payment are not necessary to start running the statute of limitations. Therefore, after ten years from its issuance, a right of action thereon is barred.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

ACCEPTANCE

9593 [§132] Acceptance—how made.

Bank's obligation on depositor's check. A bank which agrees to pay checks issued from time to time by an insolvent livestock dealer for stock purchased, and to reimburse itself from the sight drafts drawn from time to time by the dealer when reselling the stock, and which, for a time, carries out the arrangement and encourages its continuance, and, in part,

applies the proceeds of such sight drafts to the discharge of other obligations of the dealer in which the bank is financially interested, may not, after taking over sight drafts covering certain resales with knowledge that unpaid checks for said stock were outstanding, apply the proceeds of said drafts to an overdraft against the dealer, and thereby shift the loss to the unpaid check holder. On the contrary, the bank must be held, impliedly, to have agreed to loan to the dealer money sufficient to pay said outstanding checks.

Pascoe v Bank, 217-205; 251 NW 63

PROMISSORY NOTES AND CHECKS

9645 [§184] "Promissory note" defined.

Promissory notes in general. See under §§9461–9477

Oral employment agreement—no consideration for promissory note. Where one person agrees to make a loan of $3,500 to start a corporation and does loan $1,500 of this sum taking in exchange a promissory note, the borrower agreeing to employ the lender as a bookkeeper and salesman but for no definite period of time, such employment feature of the agreement is a separate contract and not the consideration for the loan.

Hillje v Tri-City Co., 224-43; 275 NW 880

Severability of interest—when barred. Unless the maker and payee on a promissory note agree to sever the promise to pay interest installments from the promise to pay principal so as to make each promise separate and independent of the other, the interest is an incident to the principal debt and as such is barred when the statute of limitations has run against the principal debt.

Yeadon v Farmers Co., 224-829; 277 NW 709; 115 ALR 725

9646 [§185] "Check" defined.

Discussion. See 15 ILR 195—Checks sent to drawee bank for collection

Parol as affecting check as receipt. A check "in full", duly indorsed by the payee, is but a receipt, and subject to explanation and even contradiction.

In re Newson, 206-514; 219 NW 305

Bank's obligation on depositor's check. A bank which agrees to pay checks issued from time to time by an insolvent livestock dealer for stock purchased, and to reimburse itself from the sight drafts drawn from time to time by the dealer when reselling the stock, and which, for a time, carries out the arrangement and encourages its continuance, and, in part, applies the proceeds of such sight drafts to the discharge of other obligations of the dealer in which the bank is financially interested, may not, after taking over sight drafts covering certain resales with knowledge that unpaid checks for said stock were outstanding, apply the proceeds of said drafts to an overdraft against the dealer, and thereby shift the loss to the unpaid check holder. On the contrary, the bank must be held, impliedly, to have agreed to loan to the dealer money sufficient to pay said outstanding checks. In other words, the bank is obligated to pay said checks.

Pascoe v Bank, 217-205; 251 NW 63

Check not payment without agreement. The acceptance of a check by a creditor is not payment of a debt unless an understanding to that effect appears from the circumstances and conduct of the parties, as where a receipt stating "cash" was issued for an insurance premium check—such check later returned marked "insufficient funds".

Hockert v Ins. Co., 224-789; 276 NW 422

Payment by check. Principle reaffirmed that the delivery of a check to a creditor does not constitute payment unless, in due course of time, the check is actually paid.

Schwab v Roberts, 220-958; 263 NW 19

Conflicting claims to proceeds. The holder of a check who, before payment thereof is stopped, indorses the same to a nondrawee private banker, and unwittingly receives in exchange therefor the worthless draft of said private banker, is entitled, in a subsequent action on the check, to the amount recovered thereon, in preference to the receiver for the private banker. Especially is this true when the banker was insolvent when he issued the draft.

Runge v Benton, 205-845; 216 NW 737

Damages—check as measure of. Where in the sale of a business, the vendee gives a check for the full purchase price of a particularly designated part of said business, and later repudiates the entire contract except that part pertaining to said particularly designated part, the vendor may maintain an action to recover as damages the full amount of the check.

Courshon Co. v Brewer, 215-885; 245 NW 354

Deposits—cancellation of credit. A bank which, having issued foreign exchange, later receives it back (when its value is problematical), under an agreement to sell the same and collect the proceeds, does not thereby become the owner either of the returned exchange or of a check subsequently received as the result of the collection, and may cancel a credit which was entered on the mistaken assumption that the check was of face value.

Tropena v Bank, 203-701; 213 NW 398

Drafts and checks—distinction. The distinguishing feature between a "check" and a "draft" is that in a draft the drawer is a bank, while in a check the drawer is an individual.

Leach v Bank, 202-899; 211 NW 506; 50 ALR 388

Forged indorsement—burden of proof. A drawee bank, when sued for paying a check on a forged indorsement, must affirmatively establish prejudice as a result of the failure of the drawer to give notice of the forged indorsement upon the discovery thereof.

New Amst. Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

Inadvertently paid check. A drawee of a check may recover of the payee the amount inadvertently paid on the check at a time when the payee knew that the drawer had no funds on deposit with the drawee—knew that the drawer had gone into the hands of a receiver and that his deposit had been transferred to the receiver.

Bank. Tr. Co. v Reg. Co., 200-1014; 205 NW 838

Payment of checks—fictitious payee. The absolute duty of a bank, before it pays its depositor's check, to know that the payee's indorsement is genuine, and to pay only on such genuine indorsement, applies to a check which the depositor has unwittingly and without negligence made payable to a fictitious person.

McCornack v Bank, 203-833; 211 NW 542; 52 ALR 1297

McCornack v Bank, 207-274; 222 NW 851

9647 [§186] Within what time a check must be presented.

Drafts—demand necessary within limitation period. Before an action can be maintained against a drawer upon a check, demand for its payment must be made upon the drawee-bank, but the demand cannot be postponed indefinitely and must be made within the 10-year limitation period.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Presentation mandatory. A check must be presented for payment within a reasonable time, even tho the drawer's deposit in the drawee-bank is less than the amount of the check, it appearing that the drawer had arranged with the drawee-bank for payment in full.

Knauss v Aleck, 202-91; 209 NW 444

Check not necessarily payment. A check issued by an insurer for the amount of an adjusted loss and payable to a mortgagor and mortgagee, jointly, and never cashed because the mortgagor refused to indorse it, cannot be deemed a payment of the loss when there was no express or implied agreement to that effect—when the insurer-drawer first asserted such claim after the bank on which the check was drawn failed.

Union Ins. v Ins. Co., 216-762; 249 NW 653

Collections — negligence — measure of damages. The measure of damages consequent on the negligent failure of a collecting bank to notify the payee of deposited checks of their nonpayment, is not, prima facie, the amount of the checks, but such sum or amount as the payee-plaintiff may be able to prove to a reasonable degree of probability he has lost because he was not promptly notified of the nonpayment—not exceeding the amount of said checks.

Schooler Motor v Bankers Tr. Co., 216-1147; 247 NW 628; 38 NCCA 361

Delayed presentation — effect. Where a check is drawn on a special deposit or trust fund, the act of the payee in withholding presentation for a few days, and until the bank had become insolvent and closed its doors, does not nullify the trust.

Rime v Andrew, 217-1030; 252 NW 542

Indorsement of check. The plea that a loss resulting from the nonpayment of a check must be borne by the payee because of delay by the attorney who received it to present it for payment must fall when there is no showing that the attorney had authority to make the indorsement.

Prudential v Hart, 205-801; 218 NW 529

Negligence of collecting bank. The indorsee for collection of a check who forwards it to the drawee-bank for payment is chargeable with the negligence of the drawee-bank in holding the check until such drawee-bank becomes insolvent and is unable to pay the check; and such negligence is attributable to the original payee.

Forgan v Allen Bros., 207-1198; 224 NW 500

Negligent delay — burden of proof. The payee of a check who is guilty of negligent delay in presenting the check for payment, has the burden to show that his negligence did not injure the drawer of the check.

Forgan v Allen Bros., 207-1198; 224 NW 500

Payment of taxes—uncashed check. The uncashed check of a taxpayer to the county treasurer in payment of taxes does not constitute such payment, even tho said check would have been paid, had it been properly presented, and even tho the treasurer, as a matter of bookkeeping, treated said check as cash, and prepared receipts accordingly.

Morgan v Gilbert, 207-725; 223 NW 483

Unreasonable delay. The holding of a check until after the drawee-bank became insolvent and closed its doors, 27 days after the check was received, ipso facto discharges the drawer to the extent of the loss suffered, when presentation for payment might have been made manually or by mail without undue effort on

the part of the payee. This is true even tho, when the check was given, the drawer's account was insufficient to meet the check, but was replenished and rendered ample within three days succeeding the date of the check.

Ostrander v Sauer, 208-77; 224 NW 581

Unreasonable delay. The presentation of a check for payment is not made within a reasonable time when the check is drawn on a bank located at the place of business of the payee, and there received by him, and forwarded by a circuitous route of 200 miles for collection, and presented some four days later, and after the bank had failed.

Northern Lbr. v Clausen, 201-701; 208 NW 72

Unreasonable delay. A check is not presented for payment within a reasonable time, as a matter of law, when it was received by the payee in the town in which the drawee bank was located and was taken by the payee "to his farm" and not presented until six days later.

Knauss v Aleck, 202-91; 209 NW 444

Drafts — laches in presentment — action barred. An action to collect a draft is barred by the statute of limitations where no presentment for payment is made for over 19 years, on the theory that a creditor may not postpone the running of the statute by his own neglect or inaction.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

9648 [§187] Certification of check — effect of.

Certified check as certificate of deposit—action accrues only after demand. The act of a bank in certifying a check, at the request of the holder, creates a new obligation on the part of the bank to that holder, and the check then becomes in legal effect an ordinary certificate of deposit for the holder. Being such, an action thereon does not accrue until it is presented for payment.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

9649 [§188] Effect where the holder of check procures it to be certified.

Certified check as certificate of deposit—action accrues only after demand. The act of a bank in certifying a check, at the request of the holder, creates a new obligation on the part of the bank to that holder, and the check then becomes in legal effect an ordinary certificate of deposit for the holder. Being such, an action thereon does not accrue until it is presented for payment.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

9650 [§189] Check not an assignment —when bank liable.

Holdings under analogous statute relative to drafts. See under §§9239, 9588

Discussion. See 9 ILB 64, 210—Checks—as assignment of funds

Bank's obligation on depositor's check. A bank which agrees to pay checks issued from time to time by an insolvent livestock dealer, for stock purchased, and to reimburse itself from the sight drafts drawn from time to time by the dealer, when reselling the stock, and which, for a time, carries out the arrangement and encourages its continuance, and, in part, applies the proceeds of such sight drafts to the discharge of other obligations of the dealer, in which the bank is financially interested, may not, after taking over sight drafts covering certain resales with knowledge that unpaid checks for said stock were outstanding, apply the proceeds of said drafts to an overdraft against the dealer, and thereby shift the loss to the unpaid check holder. On the contrary, the bank must be held, impliedly, to have agreed to loan to the dealer money sufficient to pay said outstanding checks. In other words, the bank is obligated to pay said checks.

Pascoe v Bank, 217-205; 251 NW 63

Draft not ipso facto assignment. The oral statement by the president of a bank, made to the payee of a draft at the time of its issuance and delivery, that the draft "operated as an assignment" of an equal amount of money then in the hands of the drawee-bank and belonging to the issuing bank does not constitute an actual assignment.

Andrew v Bank, 215-290; 245 NW 329

Payment of taxes—uncashed check. The uncashed check of a taxpayer to the county treasurer in payment of taxes does not constitute such payment, even tho said check would have been paid, had it been properly presented, and even tho the treasurer, as a matter of bookkeeping, treated said check as cash, and prepared receipts accordingly.

Morgan v Gilbert, 207-725; 223 NW 483

Premium check received as "cash"—no lapse by nonpayment. Where an insurer notifies its insured that his premium lien note is due, but his new note and remittance mailed on or before a certain Saturday on which his policy lapses, will prevent any such lapse, the insurer knowing that thereby payment could not reach its office in another city before the policy lapse date, but, nevertheless, when the payment check arrives, receipts for it as cash, and when the insured shortly thereafter dies, and the check meanwhile being returned unpaid, and the insured altho then dead being notified that the policy had lapsed, is a situation justifying a finding that the check was received as payment and a repudiation of such

payment to escape liability on the policy will not be permitted.

Hockert v Ins. Co., 224-789; 276 NW 422

GENERAL PROVISIONS

9651 [§190] Short title.

Effect on prior rulings. The negotiable instrument law will not be construed as repealing former rulings unless there is such repugnancy between the two that they cannot be consistently reconciled.

Dougherty v Shankland, 217-951; 251 NW 73

9653 [§192] Person primarily liable on instrument.

When indorser primarily liable.

First N. Bk. v Le Barron, 201-853; 208 NW 364

Deposit certificate—action accrues only after demand. Makers of notes, acceptors of bills of exchange and issuers of certificates of deposit are charged on the instruments from their inception, and presentment to the maker or acceptor is unnecessary; but, as to the issuer of a certificate of deposit, there is an imputed agreement that before the depositor may sue the bank thereon, actual demand is necessary to mature the debt.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Extension to principal available to surety—abatement of action. An order of a court of bankruptcy granting, to a maker of a negotiable promissory note, an extension of time in which to make payment, is not personal to said maker only, but inures, under USC, title 11, §204, to the benefit of another maker of said note who in fact signed said note as surety only, but without so indicating on the face of the note; and said latter maker, when sued alone by the original payee, may, for the purpose of abating the action, establish his suretyship and consequent secondary liability.

Benson v Alleman, 220-731; 263 NW 305

9654 [§193] Reasonable time—what constitutes.

Collections — negligence — measure of damages. The measure of damages consequent on the negligent failure of a collecting bank to notify the payee of deposited checks of their nonpayment, is not, prima facie, the amount of the checks, but such sum or amount as the payee-plaintiff may be able to prove to a reasonable degree of probability he has lost because he was not promptly notified of the nonpayment,—not exceeding the amount of said checks.

Schooler Motor v Bankers Tr. Co., 216-1147; 247 NW 628; 38 NCCA 361

Drafts — laches in presentment — action barred. An action to collect a draft is barred by the statute of limitations where no presentment for payment is made for over 19 years, on the theory that a creditor may not postpone the running of the statute by his own neglect or inaction.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Drafts—statute runs after reasonable time for presentment. Where no demand or presentment for payment of draft is made for over 19 years after its issuance, and where only person who could make due presentation was plaintiff-holder, the statute of limitations began to run after a reasonable time for presentment.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Reasonable time—undisputed facts. Whether a check is presented for payment within a reasonable time is a question of law for the court to decide, when the facts are undisputed.

Knauss v Aleck, 202-91; 209 NW 444

Unreasonable time. Where payee returned check to maker on account of a debt owing to maker, but by some unknown means again obtained possession of the check, which had not been put in a place of safety, and negotiated it to plaintiff eight days after execution, burden was on defendant-maker to prove plaintiff's lack of good faith in acquiring the check, and lapse of eight days was not such an unreasonable time within statute as to rebut presumption that plaintiff was a holder in due course. What constitutes such an unreasonable time must be determined on facts of each particular case.

Clarinda Sales Co. v Radio Sales, 227-671; 288 NW 923

9657 [§196] Law merchant — when governs.

Wife signing husband's notes—unallowable defense. Assuming that a wife was advised, when she signed promissory notes evidencing the husband's sole indebtedness that her signature would have no other effect than to release her dower interest in the husband's land (which was embraced in the accompanying mortgage which she signed) constitutes no defense to personal judgment against her on the notes when there is no issue or proof of fraud or conditional delivery, no prayer for reformation or proof supporting such prayer, and when the notes are wholly bare of any reference to dower interest.

First N. Bank v Mether, 217-695; 251 NW 505

9658 Days of grace—demand made on.

See annotations under §9546, Vol I

9659 Indemnifying bond to protect payer.

Stolen bonds — when purchaser protected. The purchaser of stolen United States liberty bonds will be protected in his purchase when he purchases in good faith, for full value, in the ordinary course of business, and without actual notice or knowledge of any defect in the title of the seller, and without notice or knowledge of any fact which would put said purchaser on inquiry as to said seller's title.

State Bank v Bank, 223-596; 273 NW 160

CHAPTER 425

WAREHOUSE RECEIPTS LAW

PART I

THE ISSUE OF WAREHOUSE RECEIPTS

9662 [§2] Form of receipts—essential terms.

Atty. Gen. Opinion. See '25-26 AG Op 185

PART II

OBLIGATIONS AND RIGHTS OF WAREHOUSEMEN UPON THEIR RECEIPTS

9681 [§21] Liability for care of goods.

Negligence—degree. The failure of a warehouseman to exercise such care in regard to goods stored with him "as a reasonably careful owner of similar goods would exercise" renders him liable in damages, but any instruction which substantially embodies this rule is all-sufficient.

Kline v Transfer Co., 215-943; 247 NW 215

Presumption of negligence—required elaboration. An instruction, to the effect that on proof that goods were in good condition when stored with a warehouseman and in damaged condition when returned a presumption of negligence on the part of the warehouseman arises, is correct, but, on proper plea and proof, it may be necessary for the court to explain further the nonliability of the warehouseman for damages consequent on causes over which he has no control.

Kline v Transfer Co., 215-943; 247 NW 215

Fatally inconsistent instructions. A definite and unqualified instruction which, in effect, holds a warehouseman to liability as an insurer, and an additional instruction holding him to liability for negligence only, presents a fatal inconsistency.

Kline v Transfer Co., 215-943; 247 NW 215

Negligence—jury question. Evidence held to present a jury question on the issue whether a warehouseman was negligent in not properly guarding goods against damage from water.

Kline v Transfer Co., 215-943; 247 NW 215

CHAPTER 426

BONDED WAREHOUSES FOR AGRICULTURAL PRODUCTS

Atty. Gen. Opinions. See '28 AG Op 436; '36 AG Op 238

CHAPTER 427

UNBONDED AGRICULTURAL WAREHOUSES

Atty. Gen. Opinions. See '25-26 AG Op 306; '36 AG Op 238

9752 Definitions.

Atty. Gen. Opinions. See '25-26 AG Op 184; '36 AG Op 238

9752.25 Uniform warehouse receipts law.

Atty. Gen. Opinion. See '25-26 AG Op 130

CHAPTER 428

LIMITED PARTNERSHIP LAW

9806 [§1] "Limited partnership" defined.

Sharing of losses as essential element. Principle reaffirmed that an express or implied sharing of losses as well as profits is an essential element of an ordinary partnership.

Butz v Hahn Co., 220-995; 263 NW 257

9847 [§23] Distribution of assets.

Chattel mortgage to secure partner's debt. A chattel mortgage by a partner on his undivided chattel interest in the partnership, to secure his individual debt, becomes absolute when it is made to appear that the partnership is free of debt.

Schwanz v. Co-op. Co., 204-1273; 214 NW 491; 55 ALR 644

Discovered assets. A partner may recover his proportionate share of partnership assets discovered subsequent to a dissolution and settlement, and collected by a copartner.

Power v Wood, 200-979; 205 NW 784; 41 ALR 1452

Father-son partnership—no claim in father's estate—no estoppel. Estoppel would not prevent a son from maintaining an action against his mother for an accounting and dissolution of a partnership which was established between son and father and mother and upon father's death was continued with mother; theory being that estoppel arose on account of son's acquiescence in mother's taking possession of and disposing of certain partnership assets as executrix and sole beneficiary of her husband's estate under his will. Son, having no claim against estate of his father, and not knowing of mother's claim that she was sole partner with her husband, could not be estopped thereby.

Eggleston v Eggleston, 225-920; 281 NW 844

Joint adventures—accounting. One of two joint adventurers may not wholly exclude his co-adventurer from all fruits of a successful consummation by claiming that the undertaking was accomplished solely through his efforts when he has never rescinded the contract with his co-adventurer, claims no damages because of a breach of contract by the co-adventurer, and when he has to some material extent profited from the funds and efforts of his co-adventurer.

O'Neil v Stoll, 218-908; 255 NW 692

Liability to third parties. Parties who enter into a joint adventure for the purchase of land for purpose of speculation are all liable for the purchase price thereof, even tho the note and mortgage for such price are executed by only one of the parties.

Bond v O'Donnell, 205-902; 218 NW 898; 63 ALR 901

CHAPTER 429.1

CONDUCTING BUSINESS UNDER TRADE NAME

9866.1 Use of trade name—verified statement required.

Action in trade name. A person has the legal right to maintain an action in the duly registered trade name under which he transacts his business.

Keeling v Priebe, 219-155; 257 NW 199

Bad check—issued in trade name with maker as agent. A livestock buyer who issues a bad check under a trade name, with himself as manager, cannot by this device escape criminal liability, since it is not essential in a prosecution that he obtained the property for himself; and there is no doctrine of agency in the criminal law which will permit an officer of a corporation to shield himself on the ground that his wrongful acts were for the corporation.

State v Doudna, 226-351; 284 NW 113

Husband and wife as partners—joint or separate liability—evidence. A transfer company operating under a trade name, headquartering at defendants' home, having trucks registered in wife's name, but with the state permit in the husband's name, and performing contracts in husband's name, are facts so indicating a partnership that court properly submitted automobile collision case as a joint liability of the husband and wife operating the transfer company.

Schalk v Smith, 224-904; 277 NW 303

Transacting business in assumed or trade name. Contracts which are otherwise valid are not rendered invalid because entered into by one of the parties in an assumed or trade name without having complied with the statutory command to file with the county recorder a statement of the names and addresses of the persons so carrying on the business; such statutes are regulatory only, even tho they declare it to be "unlawful" to carry on business in an assumed or trade name without the filing of said statement.

Ambro Adv. v Mfg. Co., 211-276; 233 NW 499

Unfair competition. Employing the business name of "Jasper Products Company" in the sale of jasper stone as "jasper silica" does not constitute unfair trade as regards an existing business carried on under the name of "Jasper Stone Company", and engaged in selling the same article as "adamant silica", complainant establishing neither fraud nor deception calculated to reasonably mislead.

Lytle v Smith, 204-619; 215 NW 668

CHAPTER 430

REGISTRATION OF TRADEMARKS, LABELS, AND ADVERTISEMENTS

9867 Registration.

Discussion. See 19 ILR 28—False advertising

Atty. Gen. Opinions. See '30 AG Op 100, 233; '38 AG Op 649

9872 Damages and general relief.

Unfair competition. Employing the business name of "Jasper Products Company" in the sale of jasper stone as "jasper silica" does not constitute unfair trade as regards an existing business carried on under the name of "Jasper Stone Company", and engaged in selling the same article as "adamant silica", complainant establishing neither fraud nor deception calculated to reasonably mislead.

Lytle v Smith, 204-619; 215 NW 668

Unfair competition — evidence — sufficiency. Evidence reviewed and held insufficient to show that a party, in leaving an employment and entering into the same business in the same territory, took anything that could be deemed the property of his former employer.

Rosenstein v Smith, 218-1381; 257 NW 397

"Wormix"—neither descriptive nor parts of two words. The word, "Wormix", an artificial word coined and used as the name of a hog remedy, is not descriptive in such sense that it may not be used as a valid trademark and registered, nor the fact that it is composed of parts of two words does not disqualify it for registration as a trademark. So the use by defendant of the word, "Worm-X", for a similar remedy was held a colorful imitation and an infringement, and where defendant has refused on notice to cease the use of an infringing device, and has continued to infringe, neither a fraudulent intent to injure complainant nor an actual misleading of the public need be proved, but will be presumed.

Feil v American S. Co., 16 F 2d, 88

CHAPTER 431

TRADEMARKS FOR ARTICLES MANUFACTURED IN IOWA

9876 "Manufacturer" defined.

Blaster and crusher of stone not manufacturer. One who blasts stone from a quarry and breaks it into merchantable size and sells such resulting product is not a manufacturer, within the taxation statute, §6975, C., '27.

Iowa Co. v Cook, 211-534; 233 NW 682

CHAPTER 431.1

DISTRIBUTION OF TRADEMARKED ARTICLES

9884.1 Contracts as to selling price.

Discussion. See 4 ILB 40—Price fixing by patentee; 13 ILR 324—Retail price fixing; 14 ILR 338—Price discrimination—Clayton Act; 19 ILR 577—Due process; 21 ILR 175, 486—Unfair competition—general survey

Price cutting—goods purchased before notice to desist. A wholesaler who had a contract to market a trademarked product at a certain price, after he gave a retailer notice to desist from selling the product at less than the established price and was refused, was entitled to an injunction to restrain the unfair trade practice, even tho he had refused to sell the product to the retailer who had made an attempt to buy, not in good faith, but as an attempt to establish a defense in the threatened injunction suit, and altho the retailer's stock was purchased before the notice to desist was received.

Barron Motor v May's Drug Stores, 227-1344; 291 NW 152

Refusal of wholesaler to sell to price-cutting retailer. A wholesaler was under no obligation to sell a trademarked product to a retailer who had refused to desist from selling the article at a price less than was specified by the manufacturer.

Barron Motor v May's Drug Stores, 227-1344; 291 NW 152

CHAPTER 432

UNFAIR DISCRIMINATION

Atty. Gen. Opinion. See '36 AG Op 565

9885 Unfair discrimination in sales.

Discussion. See 21 ILR 175, 486—Unfair competition—general survey; 22 ILR 736—Legislation favoring economic groups

Atty. Gen. Opinion. See '28 AG Op 63

Damages—failure to establish. Proof that defendants have conspired to injure plaintiff's business or to employ unfair competition against plaintiff becomes of no consequence in a law action when plaintiff fails to establish damages.

Roggensack v Winona Co., 211-1307; 233 NW 493

Essential elements—rejected opportunity. A claim of unfair competition because a particular bank was chosen as the depository of funds arising from a thrift system introduced into a public school falls when it is made to appear that the complainant was given full opportunity to be such depository.

Security N. Bank v Bagley, 202-701; 210 NW 947; 49 ALR 705

Infringement and unfair competition—employee entering employ of rival. An employee may lawfully terminate his employment with his employer, and enter into the employment of a rival of his former employer, and advertise and circularize such fact, and no legal right of the former employer is violated so long as it appears that the employee furnishes to his new employer no list of the former employer's customers and that no confidential information acquired in the former employment is used in the latter.

Universal Corp. v Jacobson, 212-1088; 237 NW 436

Literary property—trade secrets. Originator or proprietor may have property in idea, trade secret, or system, but, if it cannot be sold, negotiated or used without disclosure, contract should guard or regulate disclosure, or otherwise the idea becomes the acquisition of whoever receives it.

Young v Ralston-Purina Co., 88 F 2d, 97

Nonpayment of royalties not repudiation of patent license. A contract to pay royalties under a patent license was not repudiated by the mere refusal to make the royalty payments which were legally due.

Eulberg v Cooper, 226-776; 285 NW 131

Right to reject advertisement. The business of publishing a newspaper is a strictly private enterprise, and the owner thereof is free to accept or reject tendered advertisements as he sees fit.

Shuck v Daily Herald, 215-1276; 247 NW 813; 87 ALR 975

Unfair competition — evidence — sufficiency. Evidence reviewed and held insufficient to show that a party, in leaving an employment and entering into the same business in the same territory, took anything that could be deemed the property of his former employer.

Rosenstein v Smith, 218-1381; 257 NW 397

Royalties to pay costs of infringement suits —nonrepugnant provisions. A provision in a patent license contract which provided that the amount spent by the licensor in bringing suits to prevent patent infringements should not exceed the amount of royalties received by him, was not repugnant to other clauses providing that such suits should be brought by the licensor, or if not brought by him, the licensee could use the royalties to bring such suits.

Eulberg v Cooper, 226-776; 285 NW 131

Contract to bring infringement suits. A contract between a patent owner as licensor and the manufacturer of the patented article as licensee, providing that the licensor received royalties and should bring suits to prevent infringement upon the patent using royalties received, was fully performed on the part of the licensor when he spent, in bringing infringement suits, more than the amount of the royalties received.

Eulberg v Cooper, 226-776; 285 NW 131

Breach of patent license contract. When a patent licensee ceased to pay royalties due the licensor, the licensor was not limited to an action against the licensee as a patent infringer, but could elect to treat the contract as still in force and bring an action to collect royalties.

Eulberg v Cooper, 226-776; 285 NW 131

Evidence—sufficiency. In an action for injunction, where plaintiffs advanced capital to organize a corporation for the purpose of putting invention on market—the inventor in turn assigning to them an absolute interest in patent, and where plaintiffs thereafter organize a separate corporation to engage in marketing the patented device both directly and by license, the evidence held sufficient to entitle plaintiffs to injunction restraining inventor from circulating to plaintiffs' prospective customers material to effect plaintiffs had no interest in patent, and restraining the threatening of such prospective customers with litigation in event they should buy from plaintiffs.

Burlington Corp. v Debrey, 226-1190; 286 NW 473

9886 Unfair discrimination in purchases.

Atty. Gen. Opinion. See '34 AG Op 634

CHAPTER 433

OPTIONS AND BUCKET SHOPS

9895 Dealing in options—bucket shops.

ANALYSIS

I IN GENERAL
II EVIDENCE
III INSTRUCTIONS

I IN GENERAL

Implied or apparent authority of agent—unallowable plea. A commission firm was prohibited by the mandatory rules of the board of trade of which it was a member from dealing in so-called "futures" for and on behalf of a nonmember corporation unless the firm first obtained from said nonmember corporation a writing authorizing the latter's manager to contract for such "futures". The firm disregarded said rule and accepted orders for such "futures" from a manager who had been expressly forbidden to exercise such power. Held, that said firm, when sued by the injured corporation for the resulting loss, would not be permitted to defend on the ground that said manager had implied or apparent power to issue said orders.

Watkins Co. v Smith Co., 221-1164; 267 NW 115

Stock market profits—when not taxable—refunds—stipulated record. In an action to cancel and secure a refund of income taxes submitted on a stipulated record, stock market transactions involved therein would be illegal and void as based on a gaming transaction if the buyer neither intended nor contemplated taking actual delivery but intended that the profits or losses should be settled on the market quotations; however, illegality is not presumed, and without illegality appearing in the record, profits accruing from such transactions must be held to be profits from the sale of capital assets, and not taxable as income, hence taxes paid thereon must be refunded.

Martin v Board, 225-1319; 283 NW 418; 120 ALR 1273

II EVIDENCE

Money loaned—used for mutual benefit—jury question. Whether notes sued on represented money furnished by plaintiff to be used by defendants for benefit of both in illegal dealing in margins held for jury.

Hamilton v Wilson, (NOR); 240 NW 685

III INSTRUCTIONS

No annotations in this volume

9905 Prima facie evidence.

Presumption. The presumption, under the bucket shop act, that grain, the subject-matter of a purported contract of sale, was never intended to be delivered by the broker is not overcome by the simple expedient of having the broker testify that he intended to deliver the grain unless he had sooner sold it prior to the date of delivery.

Yoerg v Geneser, 219-132; 257 NW 541

CHAPTER 434

COMBINATIONS, POOLS, AND TRUSTS

Atty. Gen. Opinions. See '34 AG Op 538; '36 AG Op 591

9906 Pools and trusts.

Discussion. See 21 ILR 175, 486—Unfair competition—general survey

Allowable restraint of trade. An agreement, entered into on the sale of a newspaper, to the effect that the seller will not in any manner engage, either alone or with others, in the publication or circulation of a newspaper in the locality specified for a period of 15 years, is not invalid as being in restraint of trade.

Henry & Sons v Rhinesmith, 219-1088; 260 NW 9

9915 Combinations, pools, and trusts—fixing prices.

Implied repeal because of repugnancy. It may not be successfully contended that a statute is invalid because repugnant to a prior and existing statute, since, as between repugnant statutes, the later in enactment must prevail. So held as to an alleged repugnancy between chapter 390 and this section.

Clear Lake Co-op. v Weir, 200-1293; 206 NW 297

9916 Labor—unions.

Labor disputes. See under Ch 74, Note 1

9921 "Gift enterprise" defined.

Consideration for chance indispensable element. A scheme for the distribution, by lot or chance, of valuable prizes does not constitute a lottery when the recipient of the prize neither pays nor hazards anything of value for the chance to obtain said prize. And it is quite immaterial that the donor of such prizes expects

such distribution of prizes will work a financial betterment of his business.

State v Hundling, 220-1369; 264 NW 608; 103 ALR 861

Bank night — consideration for unilateral contract. Where the promoter of a motion picture bank night drawing voluntarily makes certain requirements to qualify for the prize which is promised, he does not merely extend an offer to make a gift, but a unilateral contract is created in which the promoter determines the adequacy of the consideration for his promise, and when a person is induced to accept the promise and perform the specified act which was bargained for, it does not matter how insignificant the benefit of the performance may apparently be to the promoter, the promise can be enforced by the winner of the drawing.

St. Peter v Theatre, 227-1391; 291 NW 164

Bank night—value of consideration in contract. A bank night scheme is not a lottery merely because a legal consideration is given in return for the promise to give the prize. The value of the consideration given in a lottery is important, as a lottery depends on whether persons are induced to hazard something of value on a mere chance, but in a civil action to enforce the payment of a bank night prize the value of the consideration does not control, as any legal consideration is sufficient to support the promise.

St. Peter v Theatre, 227-1391; 291 NW 164

Theatre employees—announcement of bank night winner. Testimony by the manager of a theatre that he had hired a lady to call out the name of the bank night drawing in front of the theatre, with evidence that she habitually announced the name drawn on former occasions, was sufficient to establish that she was employed to announce the winner and to establish her agency and make her announcement binding on the theatre owner.

St. Peter v Theatre, 227-1391; 291 NW 164

Winner's failure to act promptly caused by act of agent. Where the plaintiff's name was called outside a theatre as winner of a bank night drawing, and when she entered she was told that it was her husband's name that was called, and he was told he was one second too late when he followed her in, the theatre could not claim that neither she nor her husband had claimed the prize within the time set. If the husband was the one entitled to the prize, the theatre was estopped to claim the advantage of the one-second delay caused by the act of their agent in calling the wrong name outside the theatre.

St. Peter v Theatre, 227-1391; 291 NW 164

Bank night—evidence of drawing of winner —statements of agents. When one agent of a theatre announced the name of the plaintiff as winner of a bank night drawing and her husband's name was announced by another agent, both agents being in a position to bind the theatre, there was evidence that the name of one was drawn.

St. Peter v Theatre, 227-1391; 291 NW 164

9928 Provision part of every contract —forfeit.

Atty. Gen. Opinion. See '36 AG Op 591

Competitive bidding—patentee as bidder—legality of bid. When the city calls for competitive bids on four different kinds of paving mixtures, all of substantially the same utility, desirability, and cost of commercial materials, three of which mixtures are unpatented and one of which is patented, the bid of the patentee, tho the only bid on the patented article, to furnish and lay the patented mixture for one cent per square yard above the price (not shown to be exorbitant) at which he had agreed simply to furnish it to all other bidders, is not fraudulent and void as stifling competition, tho the cost of laying the mixture is some 28 cents per square yard.

Hoffman v Muscatine, 212-867; 232 NW 430; 77 ALR 680

TITLE XXIV

PERSONAL PROPERTY

CHAPTER 435

SALES LAW

Discussion. See 3 ILB 67—Uniform sales act—effect

PART I

FORMATION OF THE CONTRACT

9930 [§1] Contracts to sell and sales.

ANALYSIS

I CONTRACTS GENERALLY

Formal bill of sale unnecessary. Execution of formal bill of sale is not essential to pass title to restaurant.

Bain v Thompson, (NOR); 239 NW 561

Conditional sale (?) or contract of agency (?). The act of the owner of an article in reluctantly permitting it to pass into the possession of a party (to whom he had theretofore actually sold many like articles) with permission to forthwith sell the article (which sale was then practically assured) at a stated cash price or to forthwith return the article, without any expressed intention of selling the article to the party so given possession, presents a jury question on the issue whether the transaction was one of simple agency, or whether the transaction constituted an oral conditional sale contract which would not be valid against a third party who had no knowledge thereof.

Greenlease-Lied Motors v Sadler, 216-302; 249 NW 383

Severable (?) or indivisible (?) contract. A bill of sale which transfers different fractional parts of property to different parties for different prices is a severable contract.

Ayres v Nopoulos, 204-881; 216 NW 258

II SALES

Sale of article "produced". The operator of a coal mine who contracts to sell "all fine screenings produced by him" during a named period—the screenings being defined as the coal which will pass through described screens —may not absolve himself of his obligation by the simple expedient of failing to screen the coal.

Iowa Co. v Coal Co., 204-202; 210 NW 440; 215 NW 229

***Liability* for sales tax—undertaker as retailer.** A funeral director becomes a retailer when he transfers title to personal property, the casket, vault, etc., to relatives of the deceased, by contract for his services in which such articles are used, and as such is liable for the retail sales tax on such articles.

Kistner v Board, 225-404; 280 NW 587

III CONTRACT TO SELL

Nonmeeting of minds. There can be no sale or contract of sale so long as the parties do not definitely agree upon the subject-matter nor upon the terms thereof.

Des M. Marble v Seevers, 201-642; 207 NW 743

Offer or order—insufficient acceptance by corporation. A contract for the purchase of an article from a corporation is not established by the simple, naked showing that the purported buyer signed an order addressed to the corporation for the article, and that said order carries an acceptance signed individually by a person who was, in fact, the vice president and general manager of the corporation.

Birum-Olson v Johnson, 213-439; 239 NW 123

Unaccepted order. Necessarily, no contract of sale results from a mere written order signed by the intended purchaser and delivered to an agent known to have no authority to accept it, and especially so when the order was conditioned on acceptance by the "general office", and was affirmatively rejected by the latter.

Am. Coal Co. v Hide Co., 201-306; 207 NW 347

IV OFFERS

Offers and acceptances. A contract for the sale of goods cannot result from an offer and acceptance unless (1) the offer is definite and certain in its terms, and (2) the acceptance is

an unqualified and unconditional acceptance of the identical terms set out in the offer.

Bradley Lbr. v Hunting Lbr., 218-739; 255 NW 711

Unilateral contract. A simple order for goods constitutes a unilateral contract—one in which the promisor receives no promise in return for his promise.

Port Huron Co. v Wohlers, 207-826; 221 NW 843

V ACCEPTANCES

Order—acceptance—sufficiency. A buyer's written order for goods "subject to the approval" of the seller does not necessarily require a written acceptance—in fact, requires nothing more in the way of an acceptance than proof of unequivocal acts done by the seller on the faith of the order and evincing an intent to accept.

Gibson v Miller, 215-631; 246 NW 606

Parol evidence to show acceptance. Parol evidence is admissible to show that a naked order for goods was accepted and, when material, that such acceptance was at a certain place.

Anderson Bros. v Monument Co., 210-1226; 232 NW 689

Unilateral contract—when promise binding. An order for the shipment of goods and a promise to pay therefor become a binding promise when the order is filled and shipped.

Port Huron Co. v Wohlers, 207-826; 221 NW 843

Unallowable assumption of fact. Assuming that a contract was fully executed as soon as it was signed by the plaintiff by his agent, and by the defendant, is erroneous when the contract on its face demonstrates that no contract resulted unless plaintiff accepted the order, and the fact of such acceptance was in issue.

Gibson v Miller, 215-631; 246 NW 606

VI CANCELLATION OR WITHDRAWAL OF ORDERS

Order—right to cancel. An order for goods may be canceled prior to acceptance of the order, and it is quite immaterial that the maker of the order referred in his cancellation to the "order" as a contract.

Doll & Smith v Dairy Co., 202-786; 211 NW 230

Prohibited repudiation. A vendor who accepts and retains a partial payment for goods on the condition that the balance will be paid by the vendee when the goods are delivered, may not, after a subsequent tender of the balance, repudiate the contract on the claim that the initial payment should have embraced the entire purchase price.

Daeges v Beh, 207-1063; 224 NW 80

VII PAROL AS AFFECTING WRITING

Delivery—intent—evidence. The intent of the parties necessarily controls the issues (1) whether, in a parol contract of purchase, title passed on delivery, with a right to rescind if a trial proved unsatisfactory, or (2) whether title passed only after a satisfactory trial. Necessarily, what the parties said to each other at the time the contract was entered into is admissible.

Bishop v Starrett, 201-493; 207 NW 561

9931 [§2] Capacity — liabilities for necessaries.

Minors generally. See under Ch 472

Invalid signature—nonratification. The invalid signature of a husband to a mortgage on the homestead—invalid because of his inebriate condition when he signed—is not ratified by a delay of some eight months in repudiating such signature (1) when the delay was caused in part by his continued inebriate condition and in part by a proper investigation by his attorney, and (2) when he did not actually intend to ratify.

State Bank v Nolan, 201-722; 207 NW 745

FORMALITIES OF THE CONTRACT

9932 [§3] Form of contract or sale.

Order—acceptance—sufficiency. A buyer's written order for goods "subject to the approval" of the seller does not necessarily require a written acceptance—in fact, requires nothing more in the way of an acceptance than proof of unequivocal acts done by the seller on the faith of the order and evincing an intent to accept.

Gibson v Miller, 215-631; 246 NW 606

Extraneous documents as part of contract. The words "Regarding the sand and gravel to be used in the construction of the Spottsville Bridge, which contract you have, we agree to deliver" etc., contained in a letter of offer which was accepted, cannot be construed as making the "Spottsville" contract a part of the contract by letter, or as having any other force than to identify the subject-matter of the offer and the place of delivery.

Koch Co. v Koss Co., 221-685; 266 NW 507

Telegrams and letters—intention of parties. Telegrams which are brief and incomplete and which reserve the right in each instance to clarify and amplify by letter point quite conclusively to the conclusion that the parties intended that the contract should be determined by a consideration of both the telegrams and letters.

Appel v Carr, 216-64; 246 NW 608

9933 [§4] Statute of frauds.

ANALYSIS

General statute of frauds. See under §§11285–11288

I CONTRACT IN GENERAL

Discussion. See 17 ILR 87—Construction of "void"

Memo sufficient to take contract out of statute. A written order for goods prepared by the seller but not signed by the buyer is taken out of the statute of frauds by a subsequent letter signed by the buyer and addressed to the seller, and requesting the seller to hold said order "until we give further notice".

Morris Co. v Braverman, 210-946; 230 NW 356

Memorandum of contract—essentials. In an action to recover damages for seller's refusal to perform an alleged oral contract for sale of a business college, a letter written to buyer merely indicating that seller would, in the near future, attend to the matter of writing the contract was not a "memorandum of contract" satisfying statute of frauds, it being essential that such a memorandum completely evidence the contract which the parties made, and not just merely indicate that a contract was made.

Patterson v Beard, 227-401; 288 NW 414

Merchandise sold—seller determining quantity—unenforceability. In an action for damages where an alleged contract was to sell surplus stock of merchandise, to be subsequently listed, a list previously sent merely as information in response to a request from buyer to the seller is inadmissible to complete a contract, under statute of frauds, §4625, C., '97 [§11285, C., '39]. Where such list could only be made a part of contract by proof of distinct oral contract, no connection appearing between the two papers by comparison or surrounding circumstances of parties, the contract leaving the quantity to be delivered to buyer to be determined by the will, want, or wish of the seller, makes the contract unenforceable because of lack of mutuality.

Midland Co. v Waterloo Co., 9 F 2d, 250

Oral contract of purchase. Replevin for the possession of an existing article of personal property cannot be maintained when the action is based solely on an oral contract of purchase which is clearly within the statute of frauds, and under which contract title necessarily did not pass.

Lockie v McKee, 221-95; 264 NW 918

Oral contract for particular manufacture. An oral contract under which the seller agrees to manufacture for the buyer certain goods in particular styles, is not within the statute of frauds when such goods are not suitable for sale to others in the ordinary course of the seller's business.

Morris Co. v Braverman, 210-946; 230 NW 356

Oral contract to repurchase. An oral contract that the vendor of corporate shares of stock will repurchase the stock from the vendee, at the latter's option, is not within the statute of frauds when the vendor is selling as owner and not as agent of the owner.

Calvert v Mason City Co., 219-963; 259 NW 452

Oral contract to repurchase—when within statute. An oral contract by one who effects a sale of corporate shares of stock as agent of the owner thereof, that he will repurchase the shares on demand of the purchaser, is within the statute of frauds.

Thomas v Peoples Co., 220-850; 263 NW 499

Oral contract unenforceable. In buyer's action on an oral contract for sale of a business college where there was no competent evidence taking case out of statute of frauds, a directed verdict for defendant was proper.

Patterson v Beard, 227-401; 288 NW 414

Rule of evidence rather than invalidating statute. The Iowa statute of frauds relating to sales of goods is held to be a rule of evidence and not an invalidating statute, in view of subsequent provision of statute that regulations related merely to proof of contracts and should not prevent enforcement of those not denied in pleadings, and that oral evidence of maker against whom unwritten contract was sought to be enforced should be competent to establish contract. Under Iowa rule, both delivery and passing of title in sale of personal property are determined by intent of parties at time of transaction.

Tipton v Miller, 79 F 2d, 298

Telephone order. A telephone conversation wherein the buyer orders and the seller agrees to ship stated goods constitutes an oral contract, and is within the statute of frauds, notwithstanding the fact that the buyer had, im-

mediately preceding the telephone talk, telegraphed the seller as to the price of the goods and the seller had wired his reply.

Lamis v Grain Co., 210-1069; 229 NW 756

II PROPERTY NOT OWNED BY VENDOR

Frauds, statute of—sales of goods—oral contract to repurchase. An oral contract that the vendor of corporate shares of stock will repurchase the stock from the vendee, at the latter's option, is not within the statute of frauds when the vendor is selling as owner and not as agent of the owner. Evidence held to justify a finding that a vendor sold as owner.

Calvert v Loan Co., 219-963; 259 NW 452

III PART PAYMENT OR PERFORMANCE

Giving "something" to bind contract. Under exception in this section, authorizing enforcement of an oral contract when buyer gives to seller "something in earnest to bind the contract", the "something" given must be money or a thing that possesses value, tho the value may be of a small amount, and evidence that the buyer of a business college resigned from position of superintendent of a public school pursuant to alleged oral agreement of purchase did not satisfy such requirement. The determination of such a question is purely one of statutory construction and not a matter of equities between the parties.

Patterson v Beard, 227-401; 288 NW 414

Readiness to perform. Where there was no competent evidence to take case out of statute of frauds, it was not error to exclude oral testimony tending to show the making of an oral contract to sell a business college and the buyer's readiness and ability to perform the same.

Patterson v Beard, 227-401; 288 NW 414

IV DELIVERY

Nonphysical delivery of goods. An actual physical delivery of goods to a purchaser is not absolutely essential in order to take an oral contract out of the statute of frauds.

Madden v Eldridge, 210-938; 230 NW 371

THE PRICE

9938 [§9] Definition and ascertainment of price.

Selling price—standard price as basis. The selling price of goods was as definitely fixed in a contract as tho it were expressed in money or some other medium, when placed at a certain amount lower than the standard price on standard staple goods of the same kind.

Lee v Sundberg, 227-1375; 291 NW 146

Total failure of consideration. The sale of an automobile, the engine number of which has been defaced, altered, or tampered with, without an official certificate showing good and sufficient reasons for such change, presents a case of total failure of consideration, and no formal rescission of contract is necessary in order to recover back the price paid.

Espe v McClelland, 208-512; 226 NW 130

Nonpremature action. An action for the price of goods sold under a contract which provides that one-half of the purchase price is due on delivery, and the balance 6 months thereafter, is not premature when the goods were furnished, duly tendered to the defendant, and refused, and the action commenced some 4 years after said refusal.

Gibson v Miller, 215-631; 246 NW 606

CONDITIONS AND WARRANTIES

9940 [§11] Effect of conditions.

Failure to perform condition—effect. Failure of a vendor to furnish a pedigree, in accordance with his contract, after title to animals had passed to the purchaser and after they had died, does not render the sale without consideration.

Stanhope Bk. v Peterson, 205-578; 218 NW 262

Contract for warranty satisfactory to buyer. One who orders goods on the express condition that, before shipment, he be furnished a written guaranty which will be satisfactory to him, covering the effectiveness of the goods, is under no obligation to accept or pay for the goods until he receives such warranty, and when he acts honestly and in good faith his decision that he is not satisfied is final.

Mortemoth Co. v Furniture Co., 211-188; 233 NW 133

Motion picture booking as severable contract—damages as remedy. A motion picture exhibitor who books a series of films under contract, a part of which contract specified that he should have a certain film to exhibit on a certain date, is not entitled to breach the entire contract, when distributor fails to provide this certain film on the specified date, but exhibitor must recoup by way of damages, if any.

Paramount Pictures v Maxon, 226-308; 284 NW 119

Warranty—merchandise return as condition for refund—waiver by correspondence manager. A requirement that buyer return warranted machines as a prerequisite to a refund of the purchase price may be waived by seller's agent in charge of correspondence when, in reply to buyer's offer to return, he instructs buyer not to return the machines.

Henriott v Main, 225-20; 279 NW 110

Warranty—waiver—jury question. Evidence held to present a jury question on the issue

whether the buyer of goods had waived the warranty for which he had contracted.

Mortemoth Co. v Home Co., 211-188; 233 NW 133

9941 [§12] Definition of "express warranty".

ANALYSIS

Implied warranties. See under §9944
Discussion. See 22 ILR 118—Recoupment for breach of warranty

I WARRANTIES IN GENERAL

Warranty—what constitutes. The assertion by the vendor to the vendee of animals that they were "healthy and all right" will constitute a warranty if such was the mutual intention of the parties.

Cavanaugh v Farm Co., 206-893; 221 NW 512

Fact assertion (?) or opinion (?). A representation that water softeners "would produce sufficient water, properly softened, with which to conduct the business" of the prospective buyer, may constitute a warranty.

Brennan v Laundry Co., 209-922; 229 NW 321

Operation of tractor. In action by seller to foreclose a chattel mortgage on a tractor, the trial court's finding that the tractor would not operate properly as warranted was sustained by the evidence.

Cunningham v Drake, (NOR); 224 NW 48

Fraud by seller—promise of future resales. In an action for the purchase price of a trade-named beer dispenser bought for resale, purchaser, altho same may have been an inducement to buy, may neither predicate fraud on seller's promise to procure for purchaser future resales, unless the promise is made with a secret intent to disavow, nor upon statements amounting to an opinion as to superior design; however, the jury should determine whether a statement as to merchantableness is an opinion or representation of fact.

Rowe Mfg. Co. v Curtis-Straub Co., 223-858; 273 NW 895

Reports on vending machine earning power —noncompliance waived by acceptance. A seller of vending machines, who warrants their earning power and agrees to repurchase if they fail, may not in buyer's action on this warranty to recover the purchase price complain for the first time as to buyer's periodical reports not conforming to the contract, when, after being asked if they were satisfactory, he made no reply.

Henriott v Main, 225-20; 279 NW 110

II RELIANCE ON WARRANTY

Sales—reliance on warranty—unallowable defense. The vendor of animals who actually warrants them to be "healthy and all right" may not avail himself of the claim that he had only recently purchased them, and that the vendee had equal knowledge with him as to their state of health.

Cavanaugh v Farm Co., 206-893; 221 NW 512

III WRITTEN AND PAROL WARRANTIES

Seller escaping warranty — contract construed against him. A sale contract prepared by the seller limiting his liability under a warranty will be strictly construed against him.

Henriott v Main, 225-20; 279 NW 110

IV PRINCIPAL AND AGENT

Waiver of warranty by agent. A requirement that buyer return warranted machines as a prerequisite to a refund of the purchase price may be waived by seller's agent in charge of correspondence when, in reply to buyer's offer to return, he instructs buyer not to return the machines.

Henriott v Main, 225-20; 279 NW 110

V CONSTRUCTION

Construction against writer of contract. A sale contract prepared by the seller limiting his liability under a warranty will be strictly construed against him.

Henriott v Main, 225-20; 279 NW 110

Vending machine repurchase contingent on earning power failure. A seller of forty vending machines, who writes in the sale contract many avenues to escape liability on his warranty as to their earning power and his promise to repurchase if they fail in this respect, cannot, after notice of and acquiescence in the nonoperation of three of the machines, be relieved of his warranty on the claim that it only covered the full time operation of the entire forty machines sold.

Henriott v Main, 225-20; 279 NW 110

VI PLEADINGS AND PROOF

Breach of warranty—burden of proof. Burden of proof in action on contract providing for delivery of drain tile was upon seller to show that tile were "sound and true", and evidence held to show that breakage was due to neglect of buyer.

Graettinger Works v Gjellefald, (NOR); 214 NW 579

Negligence as defense. In an action for the breach of an express warranty as to the healthfulness of animals, it is incumbent on the defendant to allege contributory negligence on the part of the plaintiff, rather than for plaintiff to allege his freedom from negligence.

Cavanaugh v Farm Co., 206-893; 221 NW 512

Unallowable defense. The vendor of animals who actually warrants them to be "healthy and all right" may not avail himself of the claim that he had only recently purchased them, and that the vendee had equal knowledge with him as to their state of health.

Cavanaugh v Farm Co., 206-893; 221 NW 512

Warranty—failure of proof. An action for damages consequent on the breach of an express warranty as to the operation of automatic candy vending machines cannot, manifestly, be maintained unless there is evidence tending to establish said warranty, especially when the machines purchased were strictly in accordance with the sample furnished prior to the sale.

Dorman v Thorpe, 217-91; 250 NW 902

9942 [§13] Implied warranties of title.

Implied warranty of right to sell. The seller of an automobile impliedly warrants that he has a right to sell it.

Espe v McClelland, 208-512; 226 NW 130

Transfer of title—incumbrance—effect. The existence of an implied warranty that goods sold are free from incumbrance, and a breach of such warranty, do not prevent the title from passing to the purchaser.

Stanhope Bank v Peterson, 205-578; 218 NW 262

9943 [§14] Implied warranty in sale by description.

Implied warranty—reasonable fitness. Where a written contract to sell a specified trade-named beer dispenser contains no express warranties, but does contain a stipulation excluding all other agreements not mentioned therein, the purchaser, in seller's action for purchase price, may nevertheless go to the jury on defense of breach of implied warranty as to reasonable fitness for particular purpose, since this is not inconsistent with nor negatived by such express condition or stipulation.

Rowe Mfg. Co. v Curtis-Straub Co., 223-858; 273 NW 895

9944 [§15] Implied warranties of quality.

Discussion. See 22 ILR 118—Recoupment for breach of warranty

ANALYSIS

I REASONABLE FITNESS FOR SPECIAL PURPOSE
II PURCHASE BY DESCRIPTION—MERCHANTABLENESS
III EXAMINATION PRIOR TO PURCHASE
IV PURCHASE OF SPECIFIED ARTICLE
V EXPRESS EXCLUDING IMPLIED WARRANTY

I REASONABLE FITNESS FOR SPECIAL PURPOSE

Discussion. See 5 ILB 6, 86—Unwholesome food—liability; 5 ILB 259—Liability for unwholesome food

Animal for breeding purposes. There may be an implied warranty that an animal is suitable for breeding purposes. Evidence reviewed, and held to sustain such implied warranty.

Trousdale v Burkhardt, 207-1133; 224 NW 93

Buyer relying on seller—article for known purpose. Ordinarily no warranty of fitness will be implied where buyer orders specific article for specific purpose known to the seller, but where buyer relies on seller to furnish a suitable article for a known purpose warranty of fitness will be implied altho articles may have a well-known trade name. So whether seller impliedly warranted that certain lumber was fit for manufacture of tool chests, held, a jury question.

Davenport Co. v Edward Hines Co., 43 F 2d, 63

Contract exclusion. A written clause in a contract of sale of an article which declares that the contract contains the entire agreement does not exclude an implied warranty where one would otherwise be found.

Hughes v Equip. Corp., 216-1000; 250 NW 154

Fraud by seller—promise of future resales. In an action for the purchase price of a trade-named beer dispenser bought for resale, purchaser, altho same may have been an inducement to buy, may neither predicate fraud on seller's promise to procure for purchaser future resales, unless the promise is made with a secret intent to disavow, nor upon statements amounting to an opinion as to superior design; however, the jury should determine whether a statement as to merchantableness is an opinion or representation of fact.

Rowe Mfg. Co. v Curtis-Straub Co., 223-858; 273 NW 895

Implied warranty—reasonable fitness. Where a written contract to sell a specified trade-named beer dispenser contains no express warranties, but does contain a stipulation excluding all other agreements not mentioned therein, the purchaser, in seller's action for purchase price, may nevertheless go to the jury on defense of breach of implied warranty as to

I REASONABLE FITNESS FOR SPECIAL PURPOSE—concluded

reasonable fitness for particular purpose, since this is not inconsistent with nor negatived by such express condition or stipulation.

Rowe Mfg. Co. v Curtis-Straub Co., 223-858; 273 NW 895

Negativing implied warranty. An implied warranty that a rebuilt tractor is reasonably fit for the particular purpose for which it is purchased, which purpose is specifically stated to the seller at and before the sale is consummated, cannot exist when the written contract of sale contains the clause: "No warranty on second-hand or rebuilt tractors."

Dollen v Tractor Co., 214-774; 241 NW 307

Passenger elevator falling—nonliability elevator manufacturer. The builder of a passenger elevator is neither liable for a personal injury caused by the falling of the car where the safety device, designed to prevent such falling and to stop the car, was of an approved pattern in general use and was not shown to have ever before failed to work efficiently, nor where it is disclosed by the accident a device could have been made which would have obviated the particular defect which caused the particular accident, unless it is further shown that reasonable prudence would have discovered this defect and remedied it. Due care, in a legal sense, does not require an uncanny foresight.

Hoskins v Otis Elev. Co., 16 F 2d, 220

Parol warranty—when incompetent. Principle reaffirmed that when a written contract of sale contains no warranty, a parol one may not be engrafted thereon.

Blecher v Schmidt, 211-1063; 235 NW 34

Patented article — implied warranty. The fact that an article purchased is patented and is generally sold under a trade name does not exclude an implied warranty when, to the knowledge of the seller, it is purchased for a particular purpose.

Hughes v Equip. Corp., 216-1000; 250 NW 154

See Dorman v Thorpe, 217-91; 250 NW 902

Purchase for particular purpose. The knowledge of the authorized agent of the seller of an article that the article was being bought by the buyer for a particular purpose is imputed to the seller even tho the agent fails so to inform his principal.

Hughes v Equip. Corp., 216-1000; 250 NW 154

Waiver of breach by use or making payments. The buyer of an article by retaining it in his possession, and using it, and making payments thereon, after he knows it is not fulfilling the implied warranty, does not thereby estop himself from rescinding when said retention, use and payments were at the request of the seller and in consequence of the seller's promise to make the article work in a satisfactory manner.

Hughes v Equip. Corp., 216-1000; 250 NW 154

Warranty—necessity to plead. In an action for the purchase price of a machine, an offset of damages consequent on the defective construction and inefficient operation of the machine cannot be allowed when defendant fails to allege any representations or warranties relative to said defects.

Baker v Ward, 217-581; 250 NW 109

II PURCHASE BY DESCRIPTION—MERCHANTABLENESS

Documentary evidence — Coca-Cola advertisements—admissibility. In an action against a beverage bottler and wholesaler for damages caused by drinking unwholesome Coca-Cola, sold by the bottler to a retailer, the admission of Coca-Cola advertisements in evidence held nonprejudicial.

Anderson v Tyler, 223-1033; 274 NW 48

Implied warranty of merchantability. The assertion by a dealer in effecting a sale of a fur coat that "it is an A-No. 1 fur coat" and that the purchaser "would get a number of years' service out of the coat", may constitute the basis of an implied warrant of merchantability, when the buyer relies thereon.

Brandenberg v Stores, 211-1321; 235 NW 741; 77 ALR 1161

Remedies of buyer — breach of warranty, negligence, or both. A failure to use care in preparation and manufacture of a beverage constitutes negligence and anyone suing for injuries therefrom may rely on either this breach of duty or a breach of warranty, or both.

Anderson v Tyler, 223-1033; 274 NW 48

Sales on Sunday—unwholesome food—damages. Fact that beverage was sold on Sunday, in violation of §13227, C., '35, does not deprive plaintiff of right to recover proven damages.

Anderson v Tyler, 223-1033; 274 NW 48

III EXAMINATION PRIOR TO PURCHASE

Latent defects and equal opportunity to inspect. The rules of law pertaining to latent defects and equal opportunity to inspect do not apply to the sale of an article, the possession of which the law unconditionally prohibits.

Espe v McClelland, 208-512; 226 NW 130

Nonwaiver by inspection of goods. The inspection and acceptance of goods by the buyer thereof do not terminate an implied warranty

of quality when the buyer immediately notifies the seller of the breach of warranty.

Roland v Markman, 207-1322; 224 NW 826

IV PURCHASE OF SPECIFIED ARTICLE

Implied warranty—trade name as affecting reasonable fitness. Where a newly designed and marketed beer dispenser not generally known to the trade was purchased for a particular purpose on seller's recommendation therefor, fact that it was purchased under a trade name will not relieve seller of implied warranty as to fitness under this section.

Rowe Mfg. Co. v Curtis-Straub Co., 223-858; 273 NW 895

V EXPRESS EXCLUDING IMPLIED WARRANTY

Express and implied warranty. An express written warranty does not bar a noninconsistent implied warranty.

Wise v Motors Co., 207-939; 223 NW 862

SALE BY SAMPLE

9945 [§16] Implied warranties in sale by sample.

Unallowable directed verdict. The existence of conflicting evidence on the issue whether goods furnished were according to samples by which ordered, or whether a portion of the goods were ever ordered and were consequently properly returned, necessarily justifies the court in overruling a motion for a directed verdict for the entire sum sued for.

Central Shoe Co. v Kraft Co., 213-445; 239 NW 238

PART II

TRANSFER OF PROPERTY AS BETWEEN SELLER AND BUYER

9946 [§17] When property passes.

Unascertained goods. The title to unascertained or unexamined goods contracted for does not pass to the vendee upon their delivery to the carrier.

Hostler Co. v Stuff, 205-1341; 219 NW 481

9947 [§18] Property in specific goods passes when parties so intend.

Motor vehicle act. The requirement of the motor vehicle act that delivery shall not be deemed made or title passed until a registration of transfer is consummated has no reference to a contract delivery and passing of title strictly between private parties.

Cerex Co. v Peterson, 203-355; 212 NW 890

Conditional seller not "owner". Statute making owner of automobile liable for damage caused by its operation when being driven with owner's consent, held not to extend to seller of automobile under conditional sales contract even when, under the contract of sale, seller retained title, for the buyer is the beneficial, equitable, and substantial owner, and the seller retains only naked title subject to complete divestation upon payment of the final installment of the purchase price.

Craddock v Bickelhaupt, 227-202; 288 NW 109

Incumbrance—effect. The existence of an implied warranty that goods sold are free from incumbrance, and a breach of such warranty, does not prevent the title from passing to the purchaser.

Stanhope Bk. v Peterson, 205-578; 218 NW 262

Purchase with option to return unused portion. Where manufactured lumber is shipped freight prepaid under a contract that the buyer may return whatever portion he does not use, title to the entire shipment passes to the buyer, not as he uses the lumber, but when he receives and accepts the shipment.

Queal Lbr. v Anderson, 211-210; 229 NW 707

9948 [§19] Rules for ascertaining intention.

Title to unascertained goods. See under §9946

Atty. Gen. Opinion. See '34 AG Op 582

Delivery—intent—evidence. The intent of the parties necessarily controls the issues (1) whether, in a parol contract of purchase, title passed on delivery, with a right to rescind if a trial proved unsatisfactory, or (2) whether title passed only after a satisfactory trial. Necessarily, what the parties said to each other at the time the contract was entered into is admissible.

Bishop v Starrett, 201-493; 207 NW 561

Registration statutes. Purpose of §4964, C., '35, in the motor vehicle laws, providing that title does not pass until the registration provisions have been completed, is to enable officials to perform their duty, collect tax, and prevent fraud on state, and does not restrict the contract rights of parties as between themselves, which they would have had in the absence of such statute.

Craddock v Bickelhaupt, 227-202; 288 NW 109

Unenforceable oral contracts. Replevin for the possession of an existing article of personal property cannot be maintained when the action is based solely on an oral contract of purchase which is clearly within the statute of frauds, and under which contract title necessarily did not pass.

Lockie v McKee, 221-95; 264 NW 918

9949 [§20] Reservation of right of possession or property when goods are shipped.

Defective acknowledgment—trustee's rights. Where conditional sale contract provided that title to goods should remain in vendor until contract was performed, the property did not pass to trustee in bankruptcy of such vendee, notwithstanding that contract was not acknowledged in accordance with Iowa statute so as to entitle it to be recorded.

In re Pointer Brewing Co., 105 F 2d, 478

9950 [§21] Sale by auction.

When title passes. The act of a bidder at auction in settling with the clerk for his purchase by part payment in money and by the execution of a note conclusively establishes title in the purchaser.

Stanhope Bk. v Peterson, 205-578; 218 NW 262

9951 [§22] Risk of loss.

Retention of title as security—effect in case of loss. After full and proper delivery of an automobile has been made by the seller to the buyer, the risk of future loss of the car by fire or theft is on the buyer, even tho by contract the seller reserves title to the property merely as security for the performance of the contract of purchase.

Securities Inv. Corp. v Noltze, 222-678; 269 NW 866

Part III

Performance of the Contract

9970 [§41] Seller must deliver and buyer accept goods.

Contract for warranty satisfactory to buyer—effect. One who orders goods on the express condition that, before shipment, he be furnished a written guaranty which will be satisfactory to him, covering the effectiveness of the goods, is under no obligation to accept or pay for the goods until he receives such warranty, and when he acts honestly and in good faith his decision that he is not satisfied is final. Evidence held to present a jury question on the issue.

Mortemoth Co. v Furniture Co., 211-188; 233 NW 133

Delivery prevented by buyer—instructions. The court cannot properly instruct in an action to recover for goods sold that a verdict should be for defendant if no delivery was made when, under the record, the jury might find that the defendant prevented the plaintiff from making delivery.

Gibson v Miller, 215-631; 246 NW 606

Failure to perform contract—effect. Failure of a vendor to furnish a pedigree, in accordance with his contract, after title to animals had passed to the purchaser and after they had died, does not render the sale without consideration.

Stanhope Bank v Peterson, 205-578; 218 NW 262

Nondelivery of abstract company records—plaintiff's burden. Plaintiff had burden of proving defendant did not deliver all of property of abstract company as provided in contract whereby assets of abstract company were to be turned over to plaintiff, in that all "take-offs" were not delivered.

Mills Co. v Otis, (NOR); 228 NW 47

9971 [§42] Delivery and payment are concurrent conditions.

Acceptance of goods by paying draft—effect. The act of the vendee of goods in paying the draft attached to the bill of lading for the goods, cannot be deemed an acceptance of the goods as of the quality purchased.

Kelly Co. v Strand Co., 213-852; 239 NW 568

Prohibited repudiation. A vendor who accepts and retains a partial payment for goods on the condition that the balance will be paid by the vendee when the goods are delivered, may not, after a subsequent tender of the balance, repudiate the contract on the claim that the initial payment should have embraced the entire purchase price.

Daeges v Beh, 207-1063; 224 NW 80

9972 [§43] Place, time, and manner of delivery.

"About November first." A contract to deliver a commercial product "about November first" requires a delivery substantially on said date, or near approximation thereto. An offer to deliver six weeks after said date is not a compliance with the contract.

North Am. Co. v Gilbertson, 200-1349; 206 NW 610

Time of delivery—waiver. A waiver of the contract time for the delivery of goods is not established by testimony simply showing forbearance on the part of the buyer to specifically insist upon immediate delivery according to the contract.

North Am. Co. v Gilbertson, 200-1349; 206 NW 610

Varying contract as to delivery. A seller who has contracted to deliver "about" a named date a specified quantity of "dry ginseng" may not excuse his failure to deliver at approximately said time by the plea of a general custom to the effect "that delivery was not to be made until the roots had been thoroughly

dried according to a well established method of treatment".

North Am. Co. v Gilbertson, 200-1349; 206 NW 610

9976 [§47] Right to examine the goods.

Latent defects and equal opportunity to inspect. The rules of law pertaining to latent defects and equal opportunity to inspect do not apply to the sale of an article the possession of which the law unconditionally prohibits.

Espe v McClelland, 208-512; 226 NW 130

Unascertained goods. A vendee of unexamined goods has a right to examine them when delivery is tendered, and if he discovers that the goods are not what he ordered, and that a fraud has been perpetrated on him, his prompt refusal to receive the goods, and notification to the vendor accordingly, constitute a justifiable rescission.

Hostler Co. v Stuff, 205-1341; 219 NW 481

9977 [§48] What constitutes acceptance.

Acceptance of goods by paying draft—effect. The act of the vendee of goods in paying the draft attached to the bill of lading for the goods cannot be deemed an acceptance of the goods as of the quality purchased.

Kelly Mill. v Baking Co., 213-852; 239 NW 568

9978 [§49] Acceptance does not bar action for damages.

ANALYSIS

I Acceptance of Belated Deliveries
II Acceptance After Inspection

I ACCEPTANCE OF BELATED DELIVERIES

No annotations in this volume

II ACCEPTANCE AFTER INSPECTION

Acceptance of goods—estoppel. A buyer who knows that the goods received are not the kind ordered, and is given by the seller the unrestricted option to return the goods, and who thereupon proceeds to use the goods, may not, when sued for the price, plead the defect as a defense.

McDonald Co. v Morrison, 211-882; 228 NW 878

Nonwaiver by inspection of goods. The inspection and acceptance of goods by the buyer thereof does not terminate an implied warranty of quality when the buyer immediately notifies the seller of the breach of warranty.

Roland v Markman, 207-1322; 224 NW 826

9980 [§51] Buyer's liability for failing to accept delivery.

Contracts—breach of part not destructive of whole. Generally, where contracts are severable and divisible, and the consideration justly apportioned to part of the contract, a breach of that part does not destroy the contract in toto, but the defendant may only recoup himself in damages.

Paramount Pictures v Maxon, 226-308; 284 NW 119

Incurable breach. A dairyman who contracts to have his cows tested for tuberculosis, and to sell his milk to a retailer at a price substantially in excess of the market price for other milk of the same butter-fat test, fatally breaches his contract by failing, for twelve months, (§3077, C., '27) to have his cows so tested, even tho a test, subsequent to the retailer's rescission, shows that the cows are free from tuberculosis.

Niederhauser v Dairy Co., 213-285; 237 NW 222

Part IV

RIGHTS OF UNPAID SELLER AGAINST THE GOODS

9982 [§53] Remedies of an unpaid seller.

Rescission—conflict of testimony. Evidence reviewed, and held to present a jury question on the issue whether parties to a contract had mutually rescinded the contract.

Percival v Sea, 207-245; 222 NW 886

RESALE BY THE SELLER

9989 [§60] When and how resale may be made.

Buyer's rescission—seller's duty to resell—measure of damages. Where a stock buyer after purchasing cattle under contract refuses to accept them and stops payment on the check given to seller, it becomes the seller's duty to exercise reasonable care within a reasonable time to dispose of the cattle at the best market price available, and an instruction measuring the damages as the difference between the sum obtained and the contract price is correct.

Bogren v Conn., 224-1031; 278 NW 289

Rent and advances—liability under assignment of lease. A vendee who in the purchase of a business takes an assignment of the lease and agrees to pay the future accruing rental, but later abandons the property, is liable for said rentals for the time consumed by the vendor in effecting a resale of the property for and on behalf of the defaulting vendee.

Courshon Co. v Brewer, 215-885; 245 NW 354

Right to resell—reasonable time. The right of a vendor to resell the property on vendee's

account and because of vendee's abandonment of the property and refusal to pay for the property, must be exercised within a reasonable time. Three months after the original sale held reasonable under the circumstances.

Courshon Co. v Brewer, 215-885; 245 NW 354

Vendor's right to resell for vendee. A vendee who, under a contract of purchase, takes title to and possession of personal property, and later abandons said property without paying the contract price, arms the vendor, by reason of said abandonment and refusal to pay, with legal right, on notice to the vendee, to retake possession of said property within a reasonable time, for and on behalf of said vendee, and to sell the property, credit the net proceeds on the contract price, and sue vendee for the balance.

Courshon Co. v Brewer, 215-885; 245 NW 354

Agreement to purchase steers retained and fed by alleged seller. In law action based on written instrument, wherein plaintiff agreed to feed 24 head of steers for a period from 90 to 120 days, and defendant agreed to purchase the steers at any time during such period at 14 cents per pound, hoof weight, at Chicago or other reasonable marketing point, such agreement was not enforceable due to lack of mutuality and consideration, especially where there was no other consideration than that imported by the instrument, and this being a law action rather than in equity to make contract mean what plaintiff contends that it was intended to say, hence plaintiff could not recover on instrument the difference between 14 cents per pound and price at which plaintiff sold the steers on Chicago market.

May v Burns, 227-1385; 291 NW 473

RESCISSION BY THE SELLER

9990 [§61] When and how the seller may rescind the sale.

Rescission of contract—material evidence. The fact that a vendee at no time offered to place the vendor in statu quo—in fact had so handled the property that he was unable so to do,—tends quite forcibly to show that there had never been a mutual rescission of the contract of purchase.

Courshon Co. v Brewer, 215-885; 245 NW 354

Rescission of contract — evidence — sufficiency. Evidence held quite conclusively to show that a contract of sale had not been rescinded.

Marshall v Greenlease-Lied, 218-597; 255 NW 666

Useless formal tenders unnecessary. A formal tender of property as a basis for the rescission of a contract is excusable when the one to whom the tender is to be made has given advance warning that the formal tender, if made, will not be accepted.

McTee & Co. v Ryder, 221-407; 265 NW 636

PART V

ACTIONS FOR BREACH OF THE CONTRACT REMEDIES OF THE SELLER

9992 [§63] Actions for the price.

Action for damages—check as measure of. Where in the sale of a business, the vendee gives a check for the full purchase price of the good will of the business, and later repudiates the entire sale except that part pertaining to said good will, the vendor may maintain an action to recover as damages the amount of such check.

Courshon Co. v Brewer, 215-885; 245 NW 354

Conditional sales—breach—rescission. The seller of an automobile, under a conditional sales contract, who, when the buyer is not in default, peremptorily repossesses himself of the car, and applies unreasonable and exorbitant repairs on the car, and refuses to redeliver possession unless the buyer agrees to pay such charges, arms the buyer with right to rescind the contract, even tho the seller had reserved the right to make necessary repairs.

Manbeck Sales Co. v Davis, 217-1141; 251 NW 61

Agreement to purchase steers retained and fed by alleged seller. In law action based on written instrument, wherein plaintiff agreed to feed 24 head of steers for a period from 90 to 120 days, and defendant agreed to purchase the steers at any time during such period at 14 cents per pound, hoof weight, at Chicago or other reasonable marketing point, such agreement was not enforceable due to lack of mutuality and consideration, especially where there was no other consideration than that imported by the instrument, and this being a law action rather than in equity to make contract mean what plaintiff contends that it was intended to say, hence plaintiff could not recover on instrument the difference between 14 cents per pound and price at which plaintiff sold the steers on Chicago market.

May v Burns, 227-1385; 291 NW 473

Conditional sales—seizure of property. A vendor of goods who retains title until the purchase price is paid, and who, on default in payment, repossesses himself of the goods and sells them, may not thereupon collect the balance of the purchase price from the vendee.

McNabb v Bunting, 207-1300; 224 NW 506

Defect as defense—waiver. The buyer of an article may not predicate objections to it on the ground of a defect which, at his request, was wholly corrected.

Gibson v Miller, 215-631; 246 NW 606

Delivery prevented by buyer—instructions. The court cannot properly instruct in an action to recover for goods sold that a verdict should be for defendant if no delivery was made when, under the record, the jury might find that the defendant prevented the plaintiff from making delivery.

Gibson v Miller, 215-631; 246 NW 606

Nonpremature action. An action for the price of goods sold under a contract which provides that one-half of the purchase price is due on delivery, and the balance six months thereafter, is not premature when the goods were furnished, duly tendered to the defendant, and refused, and the action commenced some four years after said refusal.

Gibson v Miller, 215-631; 246 NW 606

Payment on condition. A vendor who has contracted for payment of an article after he has delivered and erected it at a named place may not recover the purchase price, in the absence of proof that he has complied with said conditions.

Capitol Hill Co. v Chadwick, 200-916; 205 NW 766

Property sold in furtherance of gambling. A vendor of property which is capable of a perfectly legitimate use may not recover therefor when he sells it for the very purpose of enabling the vendee to operate a gambling device, to wit, a punch board.

Parker-Gordon v Benakis, 213-136; 238 NW 611

Representation or warranty—necessity to plead. In an action for the purchase price of a machine, an offset of damages consequent on the defective construction and inefficient operation of the machine cannot be allowed when defendant fails to allege any representations or warranties relative to said defects.

Baker v Ward, 217-581; 250 NW 109

Total breach. Proof that an article was worthless for the purpose for which purchased precludes recovery therefor.

Crouch v Remedy Co., 205-51; 217 NW 557

Wrongful repudiation of contract—splitting action. A party to a continuing, executory contract may, notwithstanding the wrongful repudiation of the contract by the other party, insist on the contract and sue and recover the matured installments to date; and such action is no bar to a subsequent action to recover henceforth for the wrongful breach of the contract.

Collier v Rawson, 202-1159; 211 NW 704

9993 [§64] Action for damages for nonacceptance of the goods.

Refusal to receive—resumption by seller of dominion over goods—effect. The seller of goods, by resuming dominion over the shipment after the buyer had unqualifiedly refused to receive it on the ground that the goods were not in accordance with the contract, does not thereby waive his rights under the contract—does not thereby waive the breach of the contract by the buyer if there was such breach; and especially is this true when the goods are bulky, valuable, and at the time, subject to railroad demurrage and other expenses.

Appel v Carr, 216-64; 246 NW 608

Nonmarketable goods — refusal to accept. The measure of damages consequent on the refusal of the vendee to accept goods which have no market value because manufactured or remodeled for the vendee for a particular purpose is the difference between the nonmarket value, if any, and the contract price, and not the profit which the vendor would have made on the deal, had it been consummated.

Percival Co. v Sea, 207-245; 222 NW 886

Lack of mutuality and consideration—agreement to purchase steers retained and fed by alleged seller. In law action based on written instrument, wherein plaintiff agreed to feed 24 head of steers for a period from 90 to 120 days, and defendant agreed to purchase the steers at any time during such period at 14 cents per pound, hoof weight, at Chicago or other reasonable marketing point, such agreement was not enforceable due to lack of mutuality and consideration, especially where there was no other consideration than that imported by the instrument, and this being a law action rather than in equity to make contract mean what plaintiff contends that it was intended to say, hence plaintiff could not recover on instrument the difference between 14 cents per pound and price at which plaintiff sold the steers on Chicago market.

May v Burns, 227-1385; 291 NW 473

Offer or order—insufficient acceptance by corporation. A contract for the purchase of an article from a corporation is not established by the simple, naked showing that the purported buyer signed an order addressed to the corporation for the article, and that said order carries an acceptance signed individually by a person who was, in fact, the vice president and general manager of the corporation.

Birum-Olson v Johnson, 213-439; 239 NW 123

Unallowable directed verdict. The existence of conflicting evidence on the issue whether goods furnished were according to samples by which ordered, or whether a portion of the goods were ever ordered and were consequently properly returned, necessarily justifies the court in overruling a motion for a directed verdict for the entire sum sued for.

Central Shoe Co. v Kraft Co., 213-445; 239 NW 238

9994 [§65] When seller may rescind contract or sale.

Status quo—nonapplication of principle. The rule of law that when a party to a contract of sale rescinds the contract he must restore the status quo has no application to a case where the vendor repossesses himself of the property after default of the vendee and, under and in accordance with the terms of the contract, retains the preceding payments and betterments made on the property as liquidated damages for nonperformance of the contract, depreciation, and rental; and in such case it is immaterial that the vendor after so doing surrendered the unpaid notes and released the contract of record.

Stauffer v Motor Co., 207-1038; 221 NW 918

Conflict of testimony. Evidence reviewed, and held to present a jury question on the issue whether parties to a contract had mutually rescinded the contract.

Percival Co. v Sea, 207-245; 222 NW 886

Prohibited repudiation. A vendor who accepts and retains a partial payment for goods on the condition that the balance will be paid by the vendee when the goods are delivered may not, after a subsequent tender of the balance, repudiate the contract on the claim that the initial payment should have embraced the entire purchase price.

Daeges v Beh, 207-1063; 224 NW 80

REMEDIES OF THE BUYER

9995 [§66] Action for converting or detaining goods.

Option to resell to vendor—reasonable time. The course of dealings between a vendor and vendee of personal property may have a very material bearing on the question whether the vendee exercised, within a reasonable time, his option to demand a repurchase of the property by the vendor.

Calvert v Mason City Co., 219-963; 259 NW 452

9996 [§67] Action for failing to deliver goods.

ANALYSIS

I ACTION IN GENERAL
II DAMAGES RECOVERABLE

I ACTION IN GENERAL

Refusal of employer to sell at price stated—not excused by resulting loss. One who contracted to pay a commission to a dealer for selling goods at a certain price could not excuse his breach of the contract by refusing to sell except at a higher price, at least as to orders for goods taken before the breach, on the ground that to fulfill the contract would cause him to operate his business at a loss.

Lee v Sundberg, 227-1375; 291 NW 146

Construction of contract—termination. The oral granting, on adequate consideration, by a manufacturer to another party of the exclusive right to sell a legal article in prescribed territory so long as there is a demand for the article, and so long as such other party desires to continue such sale, is, on acceptance, a valid contract until terminated by reasonable notice.

Atlas Co. v Huffman, 217-1217; 252 NW 133

Evidence—self-serving declarations. A contract of sale fully executed and no longer in controversy may be so related to and connected with a later contract between the same parties that the correspondence attending the former may be admissible as interpreting the latter, but the offerer must not be permitted to go to the extent of showing, by his own self-serving letters, his dissatisfaction with the goods furnished to him under said first contract, and the loss he suffered thereunder.

Appel v Carr, 216-64; 246 NW 608

Evidence—unallowable conclusion and assumption. A buyer of goods who is seeking to recover back from the seller the price paid because the goods were not in accordance with the contract and who has testified on cross-examination that he rejected the goods because his buyer refused to take the goods, may not show on re-direct that his buyer refused the goods because the goods "were not up to the grade purchased".

Appel v Carr, 216-64; 246 NW 608

II DAMAGES RECOVERABLE

Buyer's right to treat contract terminated. Seller's unjustified refusal to furnish materials under a continuing contract was ground for buyer (1) to treat contract as terminated and purchase elsewhere and (2) to make counterclaim for damages in seller's action against buyer on account.

Eastman Stores, Inc. v Eckert Studio, (NOR); 231 NW 434

Net profits as damages — evidence. The measure of damages suffered by one who has been wrongfully deprived of the exclusive right to sell a specified article in prescribed territory, is the net profits or commissions, provided for or contemplated by the contract, which he would have earned had the contract been carried out. And the evidentiary basis for computing such profits may be (1) proof of the number of such articles sold in the territory up to time of trial by plaintiff's successor, and (2) the profits and commissions he would have received on such sales, less the expenses and value of time necessarily entailed on him had he made such sales.

Atlas Co. v Huffman, 217-1217; 252 NW 133

9997 [§68] Specific performance.

Cancellation by defaulting party. A contract may not be canceled by the arbitrary action of a party who is in default.

Atlas Co. v Huffman, 217-1217; 252 NW 133

9998 [§69] Remedies for breach of warranty.

Discussion. See 22 ILR 118—Recoupment for breach of warranty

ANALYSIS

I REMEDIES IN GENERAL

As offer of settlement. A statement by a creditor to his debtor that "You can do one of three things—pay the bill, return the merchandise, or beat the bill" held quite insufficient, in view of the record, to constitute an offer of settlement justifying the debtor in returning the goods in full settlement of the creditor's claim.

United Service v Heinen, 220-859; 263 NW 343

Duty to pay notwithstanding breach. One who buys an article of substantial value, and is precluded by his own delay from rescinding because of a breach of warranty, must pay for the article, in the absence of evidence of the damage caused by the breach of warranty.

Chariton Co. v Lester, 202-475; 210 NW 584

II ACTION FOR BREACH OF WARRANTY

Evidence of breach—sufficiency. Evidence held to demonstrate a breach of warranty on a radio.

Des M. Music v Lindquist, 214-117; 241 NW 425

Evidence—sufficiency. Evidence held insufficient to show breach of warranty of a tractor and plow.

Wetmore v Wooster, 212-1365; 237 NW 430

Failure to prove. A buyer who relies on breach of warranty and fraud must fail if he fails to prove his allegations.

Oelwein Co. v Baker, 204-66; 214 NW 595

Nonwaiver of breach by renewing note. The fact that the buyer of various goods gives his promissory note for the entire amount and renews said note after he knew that an express warranty as to one class of the goods had been breached, does not constitute a waiver of his right, when sued on the note, to counterclaim for damages consequent on such breach.

Peet Co. v Bruene, 210-131; 230 NW 327

Nonwaiver by inspection of goods. The inspection and acceptance of goods by the buyer thereof does not terminate an implied warranty of quality when the buyer immediately notifies the seller of the breach of warranty.

Roland v Markman, 207-1322; 224 NW 826

Performance of contract — acceptance of goods—estoppel. A buyer who knows that the goods received are not the kind ordered, and is given by the seller the unrestricted option to return the goods, and who thereupon proceeds to use the goods, may not, when sued for the price, plead the defect as a defense.

McDonald Co. v Morrison, 211-882; 228 NW 878

Proof of both affirmative and negative. A vendee who, in defense to an action for the purchase price of hogs, alleges that he purchased under a representation that the stock had been doubly vaccinated, and that the representation was false, has the burden to establish not only (1) the representation, but (2) the falsity thereof.

Co-operative Sales Co. v Van Der Beek, 219-974; 259 NW 586

Representation or warranty—necessity to plead. In an action for the purchase price of a machine, an offset of damages consequent on the defective construction and inefficient operation of the machine cannot be allowed when defendant fails to allege any representations or warranties relative to said defects.

Baker v Ward, 217-581; 250 NW 109

Scienter. In an action on warranty, it is not necessary for plaintiff to prove that defendant knew that his warranty was false.

Passcuzzi v Pierce, 208-1389; 227 NW 409

Warranty—breach—evidence. Evidence held to present a jury question on the issue whether animals were, contrary to a warranty, infected with a disease at the time they were purchased.

Passcuzzi v Pierce, 208-1389; 227 NW 409

Warranty—total breach. Proof that an article was worthless for the purpose for which purchased precludes recovery therefor.

Crouch v Remedy Co., 205-51; 217 NW 557

Warranty—insufficient proof of breach. In an action for damages consequent on the alleged breach of a warranty that certain powders would prevent clover bloat in cattle, plaintiff must establish (1) that the powders were administered to the cattle in accordance with the instructions of the seller, and (2) that thereafter the cattle died of clover bloat.

Peet Co. v Bruene, 210-131; 230 NW 327

Warranty — reports on vending machine earning power—noncompliance waived by acceptance. A seller of vending machines, who warrants their earning power and agrees to repurchase if they fail, may not in buyer's action on this warranty to recover the purchase price complain for the first time as to buyer's periodical reports not conforming to the contract, when, after being asked if they were satisfactory, he made no reply.

Henriott v Main, 225-20; 279 NW 110

III RESCISSION

Rescission—belated assertion of right. The purchase and receipt of household furnishings and the use thereof for some three years constitute an irrevocable acceptance of the goods.

Braverman v Naso, 203-1297; 214 NW 574

Rescission—damages recoverable. A vendee of material for a particular purpose may rescind for failure of the material to meet the contract terms, and may recover his reasonable expense in attempting to use the material.

Granette Prod. v Neumann, 200-572; 203 NW 935; 205 NW 205

Rescission—fatal delay. A delay of more than a year to rescind the purchase of a fresh-water-pumping apparatus, with full knowledge at all times of its defects, is unreasonable per se.

Chariton Co. v Lester, 202-475; 210 NW 584

Delay in rescission—excuse. The fact that the seller of an article induces the buyer to retain it, with the assurance that he—the seller—will make it comply with the warranty, is very material on the issue whether the buyer rescinded the contract within a reasonable time.

Brennan v Laundry Co., 209-922; 229 NW 321
Van Dyck v Abramsohn, 214-87; 241 NW 461

Rescission within reasonable time—jury question—waiver. Where an Iowa seller's agent, by falsely representing that buyer would have exclusive territory, fraudulently induced a buyer in Texas to purchase vending machines and confections to be vended therein, the buyer, after discovering their falsity, waived such representations by accepting the machines and placing them in operation for about two months, but as to representations that the confections would withstand heat and humidity of Texas climate, and that a surety company bond would be filed with a certain bank, question as to whether rescission was made within reasonable time after discovery of falsity was for jury. It is buyer's duty to rescind contract within reasonable time after discovery that representations by seller are false and what is a reasonable time must be determined with reference to all the circumstances and ordinarily such question is for the jury.

Robinson v Main, 227-1195; 290 NW 539

Rescission—inability to return property. The purchaser of corporate bank stock cannot rescind when he has pledged the stock and is unable to tender it back to the seller.

Rogers v Jungkunz, 204-1119; 216 NW 705

Rescission—total failure of consideration. The sale of an automobile, the engine number of which has been defaced, altered, or tampered with, without an official certificate showing good and sufficient reasons for such change, presents a case of total failure of consideration, and no formal rescission of contract is necessary in order to recover back the price paid.

Espe v McClelland, 208-512; 226 NW 130

Rescission—waiver by unauthorized use. The buyer of a machine who substantially operates it in his business and for his own profit after thoroughly testing it and tendering it back with notice of rescission, thereby irrevocably waives the rescission once made by him.

Advance Co. v Wharton, 211-264; 233 NW 673; 77 ALR 1153

Rescission—waiver by using article. The buyer of a fur coat will not be held to waive his right to rescind for breach of an implied warranty of merchantableness because of the fact that he temporarily wore the coat once or twice after asserting such rescission.

Brandenberg v Stores, 211-1321; 235 NW 741; 77 ALR 1161

Contract limitation on remedy. It seems that the seller and buyer of goods may validly contract to the effect that the sole remedy of the buyer for a breach of warranty shall be a rescission of the contract.

Advance Co. v Wharton, 211-264; 233 NW 673; 77 ALR 1153

Corporation stock—fraud. On rescission of a contract of purchase of corporate shares of stock because of fraud which induced the purchase, an unconditional tender to the seller of the stock certificate is all-sufficient, even tho the certificate is being held as collateral security for the debt of the one who makes the rescission.

North Amer. Ins. v Holstrum, 208-722; 217 NW 239; 224 NW 492

Tender—sufficiency. The buyer of an installed refrigerator performs his full legal duty, as far as rescission is concerned, by tendering an installed refrigerator at the place where the buyer received it and by keeping the tender good.

Van Dyck v Abramsohn, 214-87; 241 NW 461

Unauthorized representations of seller's agent—buyer's rescission for falsity—seller's responsibility. Where buyer rescinds contract induced by fraudulent misrepresentations of seller's agent and seeks recovery of purchase price, the agent's limited authority, otherwise binding on the buyer, does not preclude the buyer from alleging and proving such representations, and the seller is bound by such representations even tho unauthorized and even tho the contract expressly limits the agent's authority to make agreements.

Robinson v Main, 227-1195; 290 NW 539

Unascertained goods—right of examination. A vendee of unexamined goods has a right to examine them when delivery is tendered, and if he discovers that the goods are not what he ordered, and that a fraud has been perpetrated on him, his prompt refusal to receive the goods, and notification to the vendor accordingly, constitute a justifiable rescission.

Hostler Co. v Stuff, 205-1341; 219 NW 481

When tender excused. The buyer of an article is not required as a condition precedent to rescinding to tender the article to the seller at the railway depot where it was received when the seller has demonstrated by his conduct and declarations that he would not receive the article if so tendered.

Hughes v Equip. Corp., 216-1000; 250 NW 154

IV RETURN OF GOODS AND STATUS QUO

Rescission—condition precedent. Rescission of a contract of sale imperatively requires a return of the status quo.

Rogers v Hale, 205-557; 218 NW 264

Tender—placing goods within jurisdiction of court unnecessary. When a buyer rescinds contract for purchase of goods, his duty to restore the status quo only requires that he tender return of the goods at place of delivery and the tender may be kept good by holding them in readiness for delivery to seller at such place on demand, it not being necessary that the goods be actually or constructively placed within the jurisdiction of the court.

Robinson v Main, 227-1195; 290 NW 539

Restoration of worthless goods unnecessary —buyer's duty to do substantial justice. On rescission of contract for purchase of vending machines and confections to be vended therein, the buyer was not obliged to return confections that had become worthless, and his failure to tender to seller a few coins found in the vending machines did not constitute such a failure to restore the status quo as would prevent him from recovering purchase price, the buyer being required only to do substantial justice to the seller.

Robinson v Main, 227-1195; 290 NW 539

V PLEADINGS IN RE RESCISSION

Express and implied—pleading. An express written warranty does not bar a noninconsistent implied warranty. So held in the sale of an automobile for a particular purpose.

Wise v Central Co., 207-939; 223 NW 862

Estoppel to assert partial rescission. A buyer of goods who, in resisting payment, rests his defense solely on a total rescission of the contract of purchase, may not, after the close of the evidence, interpose a plea of partial rescission even tho the terms of the contract be severable.

Butler Co. v Elliott, 211-1068; 233 NW 669

Finality of election of remedy. A plaintiff who pleads a rescission of a fraud-induced contract, and prays for judgment for the consideration paid, may, upon discovering his inability to prove the rescission, amend his pleadings and pray for damages caused by the fraud. (Note that the reverse of this proposition presents a different rule.)

Reinertson v Struthers, 201-1186; 207 NW 247

Rescission — proof required. The vendee of goods who, in an action for the purchase price, defends on a plea of rescission must show that the rescission was mutual, expressly or impliedly.

Cent. Motors v Clancy, 206-1090; 221 NW 774

Rescission—jury question. In an action by the vendee of an article to recover payments made, a jury question on the issue of rescission of the contract is made by evidence tending to show that the vendor made repeated but unsuccessful efforts to repair and adjust the article so it would work to vendee's satisfaction, and that thereupon vendee (1) refused to accept it, (2) returned it to the vendor, (3) received from the vendor the note executed when the purchase was made, and (4) was told by the vendor that he would order a new article for vendee.

Trester v Swan, 216-465; 249 NW 168

Unauthorized representations of seller's agent—buyer's rescission for falsity—seller's responsibility. Where buyer rescinds contract induced by fraudulent misrepresentations of seller's agent and seeks recovery of purchase price, the agent's limited authority, otherwise binding on the buyer, does not preclude the buyer from alleging and proving such representations, and the seller is bound by such representations even tho unauthorized and even tho the contract expressly limits the agent's authority to make agreements.

Robinson v Main, 227-1195; 290 NW 539

VI DAMAGES

Failure to rescind — damages. The buyer of an article who fails to rescind within a

VI DAMAGES—concluded

reasonable time for breach of warranty will be deemed to have elected to retain the article and to rely on damages for relief.

Brennan v Laundry Co., 209-922; 229 NW 321

Giving note for goods—estoppel. A vendee who executes and delivers his promissory note for goods purchased does not thereby estop himself from the recovery of damages consequent on feeding the goods to his stock.

Crouch v Remedy Co., 205-51; 217 NW 557

PART VI

INTERPRETATION

10000 [§71] Variation of implied obligations.

Negativing implied warranty. An implied warranty that a rebuilt tractor is reasonably fit for the particular purpose for which it is purchased, which purpose is specifically stated to the seller at and before the sale is consummated, cannot exist when the written contract of sale contains the clause: "No warranty on second-hand or rebuilt tractors."

Dollen v Tractor Co., 214-774; 241 NW 307

Option to resell to vendor—reasonable time. The course of dealings between a vendor and vendee of personal property may have a very material bearing on the question whether the vendee exercised, within a reasonable time, his option to demand a repurchase of the property by the vendor.

Calvert v Inv. Co., 219-963; 259 NW 452

10002 [§73] Rule for cases not provided for herein.

ANALYSIS

I FRAUD IN GENERAL

Fraud pleas—status in court. In fraud actions, courts are reluctant to permit a cheater to profit by his own wrongdoing, tho at the same time courts are constrained by another consideration—that it is for the public welfare not to afford parties to written agreements such ready avenues of escape from their obligations that the purpose of lastingly recording such obligations in writing would be quite indifferently attained—the aim being to minimize both evils without accentuating either of them.

Griffiths v Brooks, 227-966; 289 NW 715

Fraud — cancellation and return of goods — burden of proof. A seller who seeks the cancellation and rescission of a contract of sale for fraud must prove that the buyer, when he bought the goods, did not intend to pay for them.

Vacuum Oil v Carstens, 211-1129; 231 NW 380

Deception constituting fraud—duty to investigate. Under clause in bonds entitling buyers to statement of securities, it is no excuse for failing to request the same, to say that statement from fraud perpetrators if furnished would not be true.

McGrath v Dougherty, 224-216; 275 NW 466

Transfer of note. Evidence held insufficient to show that transfer of a promissory note was fraudulent.

Hoyer v Jordan, 208-1256; 224 NW 574

Fraud—scienter as essential element. A demand for damages based on alleged fraud cannot be sustained without proof of scienter, or its equivalent, whether the action be at law or in equity.

Appleby v Kurtz, 212-657; 237 NW 312

Property sold in furtherance of gambling. A vendor of property which is capable of a perfectly legitimate use may not recover therefor when he sells it for the very purpose of enabling the vendee to operate a gambling device, to wit, a punch board.

Parker-Gordon v Benakis, 213-136; 238 NW 611

Remedy of buyer. A buyer who relies on breach of warranty and fraud must fail if he fails to prove his allegations.

Oelwein Co. v Baker, 204-66; 214 NW 595

Sale by known nonowner. A vendee of property takes nothing by his conveyance when he knows who is the actual owner of the property, and that his vendor is simply in possession of the property as manager.

Kollmann v Kollmann, 204-950; 216 NW 77

II RESCISSION IN GENERAL

Rescission—useless formal tenders unnecessary. A formal tender of property as a basis for the rescission of a contract is excusable when the one to whom the tender is to be made has given advance warning that the formal tender, if made, will not be accepted.

McTee & Co. v Ryder, 221-407; 265 NW 636

Unauthorized representations of seller's agent—buyer's rescission for falsity—seller's responsibility. Where buyer rescinds contract induced by fraudulent misrepresentations of seller's agent and seeks recovery of purchase price, the agent's limited authority, otherwise binding on the buyer, does not preclude the

buyer from alleging and proving such representations, and the seller is bound by such representations even tho unauthorized and even tho the contract expressly limits the agent's authority to make agreements.

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Robinson v Main, 227-1195; 290 NW 539

III GROUNDS FOR RESCISSION

Fraud-induced sales. Principle reaffirmed that a fraud-induced sale of goods may be rescinded by the seller and the goods recovered.

Endicott Johnson v Shapiro, 200-843; 205 NW 511

Guardianship — disaffirmance of contract. The guardian of an incompetent may disaffirm the contract of his ward without going into equity, and recover the amount paid by the ward on the contract.

Ayres v Nopoulos, 204-881; 216 NW 258

Disaffirmance — sufficiency. Where a party has not received the property purchased and paid for, and the status quo has not been disturbed, a notice to the adverse party of disaffirmance and rescission is all-sufficient.

Ayres v Nopoulos, 204-881; 216 NW 258

IV NONGROUNDS FOR RESCISSION

Inability to restore status quo. The assignee or transferee of a mortgage-secured promissory note who forecloses the mortgage, buys in the property for the full amount of the judgment, and takes a deed, thereby necessarily releases the maker of the note from all personal liability. Manifestly, such assignee may not thereafter, in an action against his assignor, rescind the contract of purchase on the ground of fraud in the purchase, because he has disabled himself from putting the assignor in statu quo.

Iowa Co. v Bank, 200-952; 205 NW 744

Rescission—loss of right. The purchaser of a mortgage-secured promissory note may not rescind on the ground of fraudulent representations as to the value of the security when, with full knowledge of the fraud, he forecloses the mortgage, bids in the property for the full amount of the judgment, and later takes a sheriff's deed to the premises.

Iowa Co. v Bank, 200-952; 205 NW 744

V TIME OF RESCISSION

Reasonable time for rescission—jury question. Whether the right to rescind a contract of sale for fraud was exercised within a reasonable time is, ordinarily, a jury question.

Blecher v Schmidt, 211-1063; 235 NW 34

Reasonable time—jury question—waiver. Where an Iowa seller's agent, by falsely representing that buyer would have exclusive territory, fraudulently induced a buyer in Texas to purchase vending machines and confections to be vended therein, the buyer, after discovering their falsity, waived such representations by accepting the machines and placing them in operation for about two months, but as to representations that the confections would withstand heat and humidity of Texas climate, and that a surety company bond would be filed with a certain bank, question as to whether rescission was made within reasonable time after discovery of falsity was for jury. It is buyer's duty to rescind contract within reasonable time after discovery that representations by seller are false and what is a reasonable time must be determined with reference to all the circumstances and ordinarily such question is for the jury.

Robinson v Main, 227-1195; 290 NW 539

VI ELECTION OF REMEDIES

Bankruptcy—nondischargeable debt. A tenant who fraudulently causes the consumption and disposal of property belonging to his landlord as rent, thereby matures a cause of action against himself for the "malicious injury" to the said property—a claim not dischargeable in bankruptcy.

Russell v Peters, 219-708; 259 NW 197

Cases not covered by uniform act. The Uniform Sales Act is not a substitute for the entire law merchant existing before its adoption on the subject of sales.

Courshon Co. v Brewer, 215-885; 245 NW 354

Corn storage and sale—time indefinite—directing verdict. A contract for storage and sale of corn, "seller's option as to time", being indefinite as to what constitutes a reasonable time, the trial court's exclusion of defendants'

VI ELECTION OF REMEDIES—concluded

proffered evidence on this point and direction of a verdict for the plaintiff was error.

Andreas & Son v Hempy, 224-561; 276 NW 791

Defect as defense—waiver. The buyer of an article may not predicate objections to it on the ground of a defect which, at his request, was wholly corrected.

Gibson v Miller, 215-631; 246 NW 606

Irrevocable waiver of action for damages. One who, with full knowledge that he has been fraudulently inveigled into signing an option contract for the sale of his property, elects not to rescind but to affirm and perform the contract, and does perform at a time when the contract is wholly executory and without consideration, thereby irrevocably waives, as a matter of law, any and all right to sue the wrongdoer for damages.

Ankeney v Brenton, 214-357; 228 NW 71

Option to resell to vendor—reasonable time. The course of dealings between a vendor and vendee of personal property may have a very material bearing on the question whether the vendee exercised, within a reasonable time, his option to demand a repurchase of the property by the vendor.

Calvert v Mason City Co., 219-963; 259 NW 452

Rescission for fraud—general denial—effect. Where plaintiff alleges rescission of a contract of sale because of defendant's fraud and seeks to recover the money paid, a general denial does not raise the issue that plaintiff after discovering the fraud elected to affirm the contract.

Blecher v Schmidt, 211-1063; 235 NW 34

Right to change remedy. A plaintiff who pleads a rescission of a fraud-induced contract, and prays for judgment for the consideration paid, may, upon discovering his inability to prove the rescission, amend his pleadings and pray for damages caused by the fraud. (Note that the reverse of this proposition presents a different rule.)

Reinertson v Struthers, 201-1186; 207 NW 247

Specific performance — cashing conditional down-payment check—mistake. In an action for specific performance of a land-purchase contract, the act of an agent having power to contract in allowing a down-payment check to be cashed when it bears a notation, of which he is aware, that it is not to be cashed until and unless the contract is accepted, furnishes support for a finding in equity that the contract was accepted, even tho the agent later claims that the check was cashed by mistake.

Hotz v Equitable, 224-552; 276 NW 413

VII DAMAGES

Defendants not fraud perpetrators—directing verdict. In an action against the incorporators of an investment company for damages for fraud in the sale of bonds, a directed verdict in favor of the incorporators was proper when the evidence, other than the outlawed printed representations on the back of the bonds, showed the fraud, if any, was committed by a bank trustee of the securities.

McGrath v Dougherty, 224-216; 275 NW 466

Fraud and negligence—damages—recovery. Instructions reviewed, and held to correctly state the conditions under which recovery could be had for damages consequent on the feeding of a so-called hog remedy to hogs.

Crouch v Remedy Co., 205-51; 217 NW 557

10004 [§75] Provisions not applicable to mortgages.

Qualified indorsement — liability. The indorsee of a mortgage-secured note is not entitled to a personal judgment against the indorser for the amount due on the note when such indorsee is holding the note (1) under an indorsement "without recourse", and (2) under an agreement by the indorser to repurchase the note in case of nonpayment by the maker at maturity, and when, after the indorser refuses to repurchase, the indorsee continues to treat the note and mortgage as his own property, and sues in foreclosure as such owner.

Hawkeye Ins. v Trust Co., 208-573; 221 NW 486

Rescission—loss of right. The purchaser of a mortgage-secured promissory note may not rescind on the ground of fraudulent representations as to the value of the security when, with full knowledge of the fraud, he forecloses the mortgage, bids in the property for the full amount of the judgment, and later takes a sheriff's deed to the premises.

Iowa Tr. Co. v Bank, 200-952; 205 NW 744

10005 [§76] Definitions.

Pre-existing debt is not value. Where a car was sold on a conditional sales contract which was not recorded, and the purchaser later gave a chattel mortgage in payment of a pre-existing debt evidenced by a demand note, there being no extension of time or other new consideration for the mortgage, the pre-existing debt did not constitute value to entitle the mortgage to priority over the conditional sales contract.

Hughes v Wessell, 226-811; 285 NW 200

Consideration for chattel mortgage—credit on debt—extension of time. A vendor of a house whose vendee had not completed the payments on the contract of purchase gave valuable consideration for two mortgages on

an automobile owned by the vendee by taking the mortgages in return for payments advanced on the contract, by paying cash to the chattel mortgagee, and by extending the time on the payments for the house.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Value of realty bequest determined as of date of testator's death. Where, prior to his death, testator had given land of the value of $15,600 to four of his five children and directed his executors to purchase, for a daughter who had rejected partial distribution before his death, good Iowa land of the value of $15,600, the will, which was clear and definite as to the intention of testator, spoke as of date of testator's death, and the value of $15,600 fixed for land to be purchased for daughter was required to be determined as of the date of testator's death.

In re Holdorf, 227-977; 289 NW 756

Valuation of realty—evidence. In an equity action brought by trustee in bankruptcy to set aside an attachment lien on bankrupt's property, where judgment creditor complains of the evidence establishing the valuation in order to determine debtor's insolvency, and where creditor relies on a valuation of $4,500 offered for the property several years previous, but which offer had not been subsequently made by anyone, the reasonable finding, in view of all the evidence, is that the fair value of such property did not exceed $2,600.

Matthews v Engineering Co., 228- ; 292 NW 64

Valuation of accounts. The fair valuation of accounts is that amount which, with reasonable diligence, can be realized from their collection within a reasonable time, and the amount as shown on the face of ordinary retail business accounts is not usually their fair value, tho of course accounts may be such that their face value, as a matter of fact, is their fair value.

Matthews v Engineering Co., 228- ; 292 NW 64

Valuation of business assets—evidence. In an equity action by trustee in bankruptcy to set aside an attachment lien wherein the attaching creditor urges the insufficient showing of the debtor's insolvency, the evidence of the trustee as to fair valuation of the personal assets of a lumber company was sufficient to sustain the finding of the court as to valuation. Since the record stipulated the appraisal found by two competent lumbermen, acquainted with such values, substantiated the value placed thereon by the trustee, and, as the trustee was not bound by any one witness' testimony, it was the function of the court to consider all the admissible evidence.

Matthews v Engineering Co., 228- ; 292 NW 64

CHAPTER 436

SALES IN BULK

10008 Inventory—creditors—notice.

Discussion. See 20 ILR 815—Iowa Bulk Sales Act

Bulk sales act—scope. The bulk sales act is for the protection of all creditors of the seller, not of any particular class of creditors.

Iowa Bank v Young, 214-1287; 244 NW 271; 84 ALR 1400

Nonapplicability of statute. This chapter has no application to a sale of a partnership interest to a copartner.

Peterson Co. v Freeburn, 204-644; 215 NW 746

Insufficient list of creditors. This chapter is not substantially complied with when the purported "list of creditors" simply states, under oath, (1) that the goods sold "have been paid for, and (2) that there are no creditors existing at the time of sale who could, by any process of law, obtain any interest in said goods"; and it is quite immaterial that the purchaser, in good faith, orally questioned the seller in regard to his creditors.

Hronik v Warty, 205-1111; 217 NW 449

Noncompliance with act—duty of creditor. A creditor who learns that neither his debtor nor his debtor's vendee has complied with this chapter must, within a reasonable time thereafter, determine his course of action, and by some appropriate legal procedure announce such determination; but he is not necessarily limited to seven days.

Andrew v Rivers, 207-343; 223 NW 102

Credit due purchaser. One, who purchases a stock of merchandise without compliance with the bulk sales act, will, when called upon to account for the property, be given full credit for the amount paid by him in discharging a prior and existing lien on the property, and a proportional credit for the amount paid by him in discharging unsecured claims of creditors of the seller.

Iowa Bank v Young, 214-1287; 244 NW 271; 84 ALR 1400

Receiver — waiver of valuable rights. A chancery receiver may not waive a valuable right without the authority of the court, nor may an agent of a statutory receiver (e. g., the superintendent of banking) waive such val-

uable right without the authority of such statutory receiver. So held under this chapter.

Andrew v Rivers, 207-343; 223 NW 102

Waiver of illegality in sale. A creditor knowing that his debtor's stock of merchandise has been sold in bulk without notice to him, irrevocably waives all illegality in the sale by accepting, three months later, the debtor's note in full of his account—a note which enlarged the previous obligation of the debtor on the account.

Schramm & Co. v Shope, 200-760; 205 NW 350

See Andrew v Rivers, 207-343; 223 NW 102

10011 Purchaser deemed a receiver.

Second transferee as receiver. One, who receives title to a stock of merchandise, through the medium of a purported transfer from the former owner to a third party, with full knowledge that neither himself nor said other party had complied with the bulk sales act, will be held to hold said stock as receiver for the creditors of said former owner.

Iowa Bank v Young, 214-1287; 244 NW 271; 84 ALR 1400

Violation—election by creditor. In case of a sale in disregard of this chapter a creditor waives his right to hold the bona fide vendee for value as a receiver by failing to assert such right with due diligence.

Lietchfield Co. v Heinicke, 200-958; 205 NW 774

CHAPTER 437

CHATTEL MORTGAGES AND CONDITIONAL SALES OF PERSONAL PROPERTY

Atty. Gen. Opinions. See '32 AG Op 204; '34 AG Op 588; '38 AG Op 45

GENERAL PROVISIONS

10013 Exempt property—mortgage by husband and wife—exception.

Belated waiver of exemptions. The invalidity of a lease (unsigned by the wife of the lessee), insofar as it attempts to grant a lien for rent on the exempt property of the lessee, is not cured by the act of the wife in waiving her exemptions after the commencement of an action to determine the rights of existing creditors.

Brownlee v Masterson, 215-993; 247 NW 481

Necessity for proof. A chattel mortgagee who pleads that the mortgage covers exempt property and that the mortgage is void because his wife did not join therein, can be given no relief in the absence of proof of the facts upon which exemption can be based.

Citizens Bank v Scott, 217-584; 250 NW 626

Right of spouse to sell. The statutory provision which, in effect, provides that if a debtor "absconds", the property exempt to him shall be exempt to his wife and children, does not deprive the debtor, who is about to be sentenced to the penitentiary, of his legal right validly to sell, in good faith, his exempt property without the consent of his wife.

Brayman v Brayman, 215-1183; 247 NW 621

Bankruptcy — effect on existing liens. The discharge in bankruptcy of the mortgagor of exempt chattels does not discharge the lien of such mortgage.

Schwanz v Co-op. Co., 204-1273; 214 NW 491; 55 ALR 644

Enforcement after contest in bankruptcy. The holder of a chattel mortgage on exempt property who appears in bankruptcy proceedings against the mortgagor and unsuccessfully contests the asserted right of the mortgagor to have said property set off to him—the mortgagor—as exempt, is not thereby estopped to later and after the mortgagor has been discharged, enforce the lien of said mortgagor.

Schwanz v Co-op. Co., 204-1273; 214 NW 491; 55 ALR 644

Federal jurisdiction. The jurisdiction of the federal bankruptcy court over the exempt property of the bankrupt extends no further than to enter an order setting off such property to the bankrupt. Irrespective of the proceedings in such court, the right to the exempt property, as between the owner and a mortgagee thereof, must be determined in the state court.

Eckhardt v Hess, 200-1308; 206 NW 291

Invalidity because of failure of consideration. A chattel mortgage on the exempt property of a husband and wife is void when the wife is in no manner indebted to the mortgagee, and concurs in and signs said mortgage with her husband solely because of the explicit promise of the mortgagee that he would advance certain funds to the mortgagors for use in their business, which promise the mortgagee subsequently wholly failed to perform.

Whittier Bank v Smith, 214-171; 241 NW 481

Nonexecution by wife — effect. A chattel mortgage on the exempt personal property of a husband and wife, not concurred in and signed by both of said parties, is absolutely void as to such exempt property.

Nat. Bank v Chapman, 212-561; 234 NW 198
Brownlee v Masterson, 215-993; 247 NW 481

Purchase of car—wife not joining—payment by employer—replevin. Where defendant was unable to meet payments on car, and employer, under an agreement with defendant, made delinquent and future payments to the finance company and took an assignment of the note and chattel mortgage, the employer was entitled to the possession of the car as against contentions that intervenor (defendant's wife) did not join in the execution of the chattel mortgage, that the assignment to employer did not create any right or lien sufficient to systain writ of replevin, and that the payments made by the employer constituted a satisfaction and payment and not a purchase of the chattel mortgage.

Simpson v McConnell, 228- ; 291 NW 862

Signing chattel mortgage—effect. The mere signing of a chattel mortgage in a partnership name does not, in and of itself, estop the signer from denying that the mortgaged property is partnership property.

Citizens Bank v Scott, 217-584; 250 NW 626

Unrecorded mortgage lease — priority. A lien on the exempt personal property of a tenant by virtue of the terms of an unrecorded lease, signed by both husband and wife, is subordinate in right to a subsequently executed and recorded chattel mortgage on the property, even tho the mortgagee takes his mortgage with knowledge that the mortgagor was a tenant, but without knowledge that the lease granted the landlord a lien on the tenant's exempt property.

Brenton v Bream, 202-575; 210 NW 756
Brownlee v Masterson, 215-993; 247 NW 481

10014 Right to possession—title.

Right to execution levy on mortgaged property. See under §11682, Vol I

Conversion by mortgagee. Where a chattel mortgage stipulates that the mortgagee may take possession of the mortgaged chattels "and sell the same", the mortgagee is guilty of conversion when he seizes the property and holds it in his possession for some four years without sale.

Wetmore v Wooster, 212-1365; 237 NW 430

Description omitting livestock increase or additions—effect. A chattel mortgage description not specifying future increase or additions to livestock will not be amplified by the court to include the same under a clause mortgaging "all personal property owned * * * and kept * * * in their possession", which clause speaks from the execution date of the mortgage.

Central B. & T. v Squires & Co., 225-416; 280 NW 594

Repossessed motor vehicles—no retaking on ground that conditional sale usurious. A replevin action to retake a motor vehicle covered by, and repossessed under, a conditional bill of sale, is not maintainable on the ground that the conditional bill of sale was allegedly usurious. The debt in the conditional bill of sale is valid and still exists even tho a usury penalty attaches.

Hill v Rolfsema, 226-486; 284 NW 376

Stipulation for possession. A stipulation in a chattel mortgage to the effect that the mortgagee, may, on default, take possession of the mortgaged chattels "and sell the same", excludes the mortgagee from seizing the property for any other purpose except to sell it.

Wetmore v Wooster, 212-1365; 237 NW 430

10015 Sales or mortgages—recording.

Discussion. See 20 ILR 616—Protection, purchasers and creditors; 20 ILR 800—Remedies

Atty. Gen. Opinions. See '25-26 AG Op 78, 188, 396; '30 AG Op 70; '32 AG Op 223; '34 AG Op 293; '38 AG Op 578

ANALYSIS

Conditional sales generally. See under §10016
Real property—rights of purchasers and creditors. See under §§10105, 12389

I NECESSITY OF RECORDING AND INSTRUMENTS TO BE RECORDED

Discussion. See 14 ILR 329—Conditional sales distinguished

"Actual possession" defined. A mortgagor must be deemed in actual possession of the mortgaged chattels when he has them on his own farm and in the actual custody of his own servant, even tho he—the mortgagor—does not reside upon said premises.

Raybourn v Creger, 204-961; 216 NW 272

Belated delivery. One who buys personal property from a seller who is not then or afterwards in actual possession of the property cannot be affected by a chattel mortgage

I NECESSITY OF RECORDING AND INSTRUMENTS TO BE RECORDED—concl'd

subsequently acknowledged and subsequently delivered by the seller. The naked execution of a chattel mortgage confers no right on the one named therein as mortgagee.

Meredith v Beadle, 211-390; 233 NW 512

Chattel mortgage clause in real estate mortgage — when lien effective. The lien on the rents and profits created by a chattel mortgage clause in a real estate mortgage is effective from the date of the execution of the mortgage, and not from the date when petition for foreclosure and for the appointment of a receiver is filed.

Equitable v Brown, 220-585; 262 NW 124

Consideration for chattel mortgage—credit on debt—extension of time. A vendor of a house whose vendee had not completed the payments on the contract of purchase gave valuable consideration for two mortgages on an automobile owned by the vendee by taking the mortgages in return for payments advanced on the contract, by paying cash to the chattel mortgagee, and by extending the time on the payments for the house.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Chattel mortgage to secure partner's debt. A chattel mortgage by a partner on his undivided chattel interest in the partnership to secure his individual debt, becomes absolute when it is made to appear that the partnership is free of debt.

Schwanz v Co-op. Co., 204-1273; 214 NW 491; 55 ALR 644

Mortgage on partner's interest. A recorded chattel mortgage executed by an incoming partner to an outgoing partner on the one-half interest in the partnership property and on future additions thereto, and representing the purchase price of said interest (all with the consent of the old partner who remains in the business), is superior in right to the subsequently contracted debts of the new partnership.

In re Cutler & Horgen, 204-739; 212 NW 573; 54 ALR 527

Priority of creditor's claim over taxes. A chattel mortgagee may not have his claim reduced by taxes which have never been a lien on the mortgaged chattels superior to that of the mortgage.

In re Cutler, 213-983; 234 NW 238; 238 NW 80

See Linn County v Steele, 223-864; 273 NW 926

Lien on exempt property. A lease of land, unsigned by the lessee's wife, is a nullity insofar as it attempts to give the lessor a lien for rent on the exempt property of the lessee. Unnecessary to say that such a lease is of no validity against a subsequent valid chattel mortgage on the same property.

Brownlee v Masterson, 215-993; 247 NW 481

Delivery—intent of parties. An effective delivery of an instrument is made to the grantee by the naked execution of the instrument and by simply leaving said instrument at the place of execution, if such was the actual intent of the parties.

Beery v Glynn, 214-635; 243 NW 365

Limitation of actions—failure to index. The breach of official duty, and not the resulting damage, creates the cause of action making operative the statute of limitations, so where a recorder negligently omitted to index a chattel mortgage resulting in a subsequent mortgagee obtaining priority through lack of notice of first mortgage, the cause of action accrued at the time of such omission and an action against the recorder for this nonfeasance was barred after three years by §11007, C., '35.

Baie v Rook, 223-845; 273 NW 902; 110 ALR 1062

Unrecorded conditional sales contract. An automobile which the state seeks to forfeit because such vehicle had been employed in the unlawful transportation of intoxicating liquors may not be returned by the court to one who had sold the vehicle under a conditional sales contract which he had not recorded prior to the seizure, such contract having been taken, manifestly, as security only.

State v Automobile, 208-794; 226 NW 48

Pledge and mortgage distinguished. The deposit of collateral securities with a trustee, in order to secure the payment of bonds issued by the depositor, constitutes a pledge, and not a mortgage.

Central Bk. v Sec. Co., 206-75; 218 NW 622

Receiver's nonright to question mortgage. The receiver of an insolvent corporation has no such standing as will enable him to advantage himself of technical defects in a chattel mortgage executed by the corporation when solvent.

Silver v Farms, Inc., 209-856; 227 NW 97

Validity of unrecorded conditional sale. Altho a conditional sale contract on an automobile was not properly recorded, it was valid and enforceable between the parties and all others except purchasers for value and without notice.

Hughes v Wessell, 226-811; 285 NW 200

II CHANGE OF POSSESSION

Conditional sales contract — defective acknowledgment—trustee's rights. Where conditional sale contract provided that title to goods should remain in vendor until contract was performed, the property did not pass to

trustee in bankruptcy of such vendee, notwithstanding that contract was not acknowledged in accordance with Iowa statute so as to entitle it to be recorded.

In re Pointer Brewing Co., 105 F 2d, 478

Conditional sales—motor vehicles—ownership. An instruction was erroneous in stating that a conditional sales contract, containing a clause that title remained in seller, left the ownership of an automobile in the seller, because the buyer became the substantial and beneficial owner under the contract. Section 4964, C., '35, stating that title to motor vehicle shall not be deemed to pass until transferee has received and written his name on the registration certificate, is not construed to make seller liable as owner of the vehicle.

Craddock v Bickelhaupt, 227-202; 288 NW 109

III DESCRIPTION OF PROPERTY

Discussion. See 12 ILR 421—Description of goods

Description of property—rule of sufficiency. The description of property covered by a chattel mortgage is sufficient if the description is such as to enable third persons, aided by inquiries which the instrument itself indicates and directs, to identify the property. Description considered and held sufficient for the purposes of the case at bar.

Producers Assn. v Morrell & Co., 220-948; 263 NW 242

Description of property—standard of sufficiency. Principle reaffirmed that to render a chattel mortgage valid as to third parties the description of the property embraced in the mortgage must be such as to direct the mind to evidence whereby the precise thing conveyed may be ascertained with absolute certainty.

Pierre v Pierre, 210-1304; 232 NW 633

Chattel mortgage clause in real estate mortgage—sufficiency. A complete chattel mortgage results from inserting, in a real estate mortgage following the description of the land conveyed, the words, "And, also, the rents, issues, use and profits of said land and the crops raised thereon, from now until the debt secured thereby shall be paid", coupled with a habendum clause to the effect that said property shall be held by the mortgagee forever.

Capital Bank v Riser, 215-680; 246 NW 763

Purchase of immature mortgaged animals. When pigs are covered by a chattel mortgage, and a nonfraudulent purchaser with knowledge of the mortgage matures said pigs into hogs, the holder of the mortgage may enforce against the proceeds of a sale of the hogs a trust for the full value of the hogs, not exceeding, of course, the amount of the mortgage debt.

Schwanz v Co-op. Co., 204-1273; 214 NW 491; 55 ALR 644

Synonymous terms for "rent". A sale and conveyance in a real estate mortgage of "all the rents, issues, uses, profits and income therefrom and all crops raised thereon" as security additional to that afforded by the land, and in connection with a receivership clause, simply constitutes a chattel mortgage on "all the rents" (in whatever represented), said various terms in such case being deemed synonymous.

Equitable v Brown, 220-585; 262 NW 124

Unallowable blanket clause. The filing for record or recording of a chattel mortgage works no constructive notice to a third party of a mortgage on chattels which are sought to be embraced in the general, unlimited, blanket clause, "all other personal property which either of us own or may own so long as this mortgage may remain unpaid".

Reinig v Johnson, 202-1366; 212 NW 59

IV CONSTRUCTION OF DESCRIPTIONS

Description of property—fatal indefiniteness. A description in a chattel mortgage of "about 40 stock hogs" is insufficient to enable a searcher to identify the mortgaged property with absolute certainty, even tho the location of the hogs is shown, and consequently no constructive notice is imparted by the record of the mortgage.

Panama Bk. v De Cou, 209-450; 228 NW 35

Erroneous description—effect. An erroneous statement in a chattel mortgage as to the location of the property is not necessarily fatal. The description may be such, notwithstanding the erroneous statement, as to generate a jury question as to whether the property could have been identified from the entire description contained in the mortgage.

Wertheimer v Shultice, 202-1140; 211 NW 568

Description—fatal error in location. A chattel mortgage on property in this state, which gives the permanent location of the property at a point outside the state, imparts no constructive notice to a subsequent purchaser.

Slimmer v Lawler, 205-813; 218 NW 516

Description — jury question — instructions. When the sufficiency of a description of mortgaged chattels to impart constructive notice becomes a jury question, it is quite inaccurate for the court to instruct that "the recording gives notice of what its terms contained—but nothing more than its terms contained".

Wertheimer v Parsons, 209-1241; 229 NW 829

Description of property—nonjury question. A jury must not be permitted to pass on the sufficiency of a description of mortgaged chattels which is sufficient as a matter of law. So held where the description revealed the particular kind of cattle, their age, average

weight, the particular brand thereon, the particular farm where kept, and the particular possessor.

Wertheimer v Parsons, 209-1241; 229 NW 829

V PURCHASERS AND CREDITORS

(a) IN GENERAL

Discussion. See 17 ILR 223—Antecedent debt

Actual notice without actual knowledge. A mortgagee will be deemed to have had "actual notice" of a prior unrecorded mortgage (or of a prior mortgage so defectively acknowledged that the record thereof imparts no constructive notice) when the facts and circumstances attending and surrounding the taking of the second mortgage are such as to lead him as a reasonably prudent person to make inquiries, and when such inquiries if prosecuted with ordinary diligence would have revealed the former mortgage.

Mill Owners Ins. v Goff, 210-1188; 232 NW 504

Amount in controversy—chattel mortgage under $100, judgment for $330. Where in an action to foreclose a conditional sale contract on an automobile, the court granted priority of a lien of less than $100, and gave a judgment for $330 to the seller, an appeal therein involved more than $100 and was not subject to dismissal, altho no certificate had been filed by the trial court.

Hughes v Wessell, 226-811; 285 NW 200

Authorized sale waives lien. The purchaser of mortgaged chattels is not liable to the mortgagee, as for a conversion, when the mortgagee has waived his lien by expressly or impliedly consenting to a sale by the mortgagor.

Producers Assn. v Morrell & Co., 220-948; 263 NW 242

Conditional sale lien—superiority of tax lien. Taxes assessed (§§7205, 7206, C., '35) after execution of a conditional sale contract on a stock of goods and other personalty are superior to the lien of such contract inasmuch as (1) historically these sections were contained in a single section; (2) one section already carries a construction creating a lien paramount to all other liens; (3) necessarily security of the revenue is an incident of sovereignty; and (4) the above sections contain language which by necessarily implied legislative intent creates liens continuing and paramount to all other liens.

Linn County v Steele, 223-864; 273 NW 920; 110 ALR 1492

See In re Cutler, 213-983; 234 NW 238; 238 NW 80

Conversion. A senior chattel mortgagee who, without foreclosure, takes possession of the mortgaged property and sells it at private sale must account to a junior mortgagee for such part of the proceeds as he applies to unsecured claims due him.

Money v Bank, 202-106; 209 NW 275

Trial—limiting damages—issue not raised in trial. Where an action in replevin by one claiming an automobile under a conditional sales contract was brought against a chattel mortgagee who had given some cash and extended credit in return for his mortgage, the plaintiff, having permitted the trial to be concluded on the issue of possession without raising any other issue or requesting instructions on any other issue, could not complain that the mortgagee's recovery should have been limited to the amount of actual cash given for the mortgage.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Forfeiture of real estate contract—rights of chattel mortgagee. An equitable owner of land who, while holding the land under a contract of purchase which, in case of forfeiture, unconditionally forfeits all improvements thereon to the legal title holder, erects a dwelling house on the land with materials sold for such purpose, and on individual credit, may not, after he has forfeited or surrendered his contract of purchase, and while he is in possession of the land solely as a tenant, execute a chattel mortgage on the house to the seller of the materials, as security for the past-due purchase price of the materials, and thereby invest the mortgagee with any right against the owner of the realty.

O'Bryon v Weatherly, 201-190; 206 NW 828

Impounding proceeds. While a chattel mortgagee may not follow the proceeds of wrongfully sold mortgaged property and enforce a lien thereon, yet the court will recognize an arrangement under which such proceeds are impounded in the hands of a third party and the right thereto litigated.

Slimmer v Lawler, 205-813; 218 NW 516

Mortgage on rents — exclusive power of mortgagee to collect. A chattel mortgage on the rents and income of real estate, tho combined in a real estate mortgage as dual security for the same debt, vests the mortgagee with full and exclusive power to collect said rents and income.

Equitable v McNamara, 220-297; 259 NW 231; 262 NW 466

Mortgage on rents—right to receiver to protect. A mortgagee of the rents and income of real estate is entitled to have a receiver appointed to protect his right to said rents and income when said right is jeopardized by the unauthorized acts of an impecunious mortgagor.

Equitable v McNamara, 220-297; 259 NW 231; 262 NW 466

Sub-purchaser as subsequent purchaser. The third purchaser of mortgaged chattels does not establish the status of "subsequent purchaser", within the meaning of the recording statute, unless he shows that his immediate vendor purchased of the mortgagor.

Wertheimer v Shultice, 202-1140; 211 NW 568

Subsequent purchaser — assignee of mortgage. The good-faith assignee for value of a chattel mortgage and of the promissory note secured thereby, without actual or constructive notice of a prior existing mortgage, is a "subsequent purchaser", within the meaning of the recordation statutes, and therefore protected against such prior mortgage.

Slimmer v Lawler, 205-813; 218 NW 516

Wrongful application of trust funds. The principle that the lien of a chattel mortgage does not follow the proceeds of a sale of the mortgaged property has no application to an action to recover wrongfully dissipated or applied trust funds.

In re Aasheim, 212-1300; 236 NW 49

Impressment of trust on proceeds. An understanding between a lienor and a lienee to the effect that personal property upon which the lienor has a lien may be sold by the lienee and the lien satisfied from the proceeds of the sale, will be enforced in equity by impressing a trust on said proceeds. So held as to rent due a landlord.

Stegemann v Bendixen, 219-1190; 260 NW 14

Wrongful release of conditionally canceled mortgage—effect. Where, in rescission proceedings, a decree in effect provided that a promissory note and recorded real estate mortgage given for the purchase price of goods should be null and void from and after the return of the goods by the mortgagor to the mortgagee, and where the goods were never so returned, and where the mortgage was wrongfully released of record by a court-appointed commissioner, the mortgage may be foreclosed against a purchaser of the land who innocently bought in reliance on the wrongful release. This is true because, while both the mortgagee and the subsequent purchaser were innocent, yet the purchaser had the means of knowing whether the goods had been returned to the mortgagee,—the very act which, under the decree, would work a nullification of the mortgage and note and justify a release.

Moore v Crawford, 210-632; 231 NW 363

(b) WITHOUT NOTICE—PRIORITY

Agreed public sale—lien on proceeds. An agreement between chattel mortgagees and the chattel mortgagor that the mortgaged property shall be sold at public sale and the proceeds turned over to the mortgagees in the order of their liens, is valid and enforceable in equity. In other words equity, in order to enforce the agreement, will impress a trust on said proceeds in favor of said mortgagees, even tho the occasion so to do arises in a proceeding at law, to wit, a garnishment.

Jasper Co. Bank v Klauenberg, 218-578; 255 NW 884

Antenuptial contract — preference — "existing creditors". On the issue whether a widow has the right in the settlement of her husband's estate to be paid, prior to all third and fourth class claimants, a sum provided for her in an unrecorded, antenuptial contract, said third and fourth class claimants will be deemed "existing creditors" within the meaning of this section, there being no evidence that said third and fourth class claimants had any knowledge of said antenuptial contract until after the death of the husband.

In re Shepherd, 220-12; 261 NW 35

Assigned rent note—priority over chattel mortgage. A mortgagor may, in the absence of fraud, deed his land to another who, as owner, may lease for an ensuing term within the period of redemption and assign to a bank his lease and rent note, which assignment made prior to any foreclosure action will be superior to the lien of the chattel mortgage clause and entitle the bank to the rent as against the receiver in the foreclosure action claiming under such chattel mortgage clause.

Equitable v Hastings, 223-808; 273 NW 908

Assignments for benefit of creditors—recording not necessary. Where the interest of a beneficiary of a testamentary trust is assigned for the benefit of creditors, such assignment need not be recorded to be valid against existing creditors without notice.

Friedmeyer v Lynch, 226-251; 284 NW 160

Date of recording immaterial. A chattel mortgage which is taken without actual knowledge of an existing unrecorded chattel mortgage is prior in right to said first mortgage, even tho said first mortgage is first recorded.

Iowa Bk. v Bradfield, 204-488; 215 NW 602

Equitable estoppel. A chattel mortgage on property which the mortgagor does not own cannot prevail against the claim of the actual owner, even tho the latter has permitted the mortgagor to treat the property as his own, when the mortgagee takes such mortgage as additional security to a pre-existing debt, and without parting with anything of value, and without in any manner changing his position to his detriment.

Peoples Bk. v McCarthy, 206-28; 217 NW 453

Mortgage given for pre-existing debt—no priority over unrecorded conditional sale. Where a car was sold on a conditional sales contract which was not recorded, and the purchaser later gave a chattel mortgage in pay-

V PURCHASERS AND CREDITORS—continued

(b) WITHOUT NOTICE—PRIORITY—continued

ment of a pre-existing debt evidenced by a demand note, there being no extension of time or other new consideration for the mortgage, the pre-existing debt did not constitute value to entitle the mortgage to priority over the conditional sales contract.

Hughes v Wessell, 226-811; 285 NW 200

Priority — pledge for pre-existing debt. A pledge of rents contained in a real estate mortgage and taken as security for a pre-existing indebtedness is not entitled to priority over chattel mortgage clauses in prior real estate mortgages for value on the same land, even tho said prior mortgages are not indexed in the chattel mortgage index.

Soehren v Hein, 214-1060; 243 NW 330

Priority of unrecorded mortgage. An unrecorded chattel mortgage has priority over a subsequent bill of sale based on a pre-existing consideration.

National Bk. v Chapman, 212-561; 234 NW 198

Notice only issue—unnecessary instructions. Where the plaintiff claimed the right to possession of an automobile under a conditional sales contract and the defendant claimed under two chattel mortgages acquired subsequent to the conditional sale but recorded first, instructions which submitted only the issue of whether the chattel mortgagee had notice of the prior conditional sale were not erroneous in failing to define "subsequent purchaser" as used in recording statutes and in failing to require the jury to determine whether the defendant gave value so as to constitute himself a "subsequent purchaser".

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Remedies of creditors — evidence — sufficiency. Proof, (1) that the vendee of personal property did not record or file his bill of sale as required by law, (2) that there was no change of possession following the bill of sale, and (3) that the vendee actively aided the vendor in disposing of the property as the property of the vendor, furnishes ample justification for the holding that the rights of a good-faith and innocent attaching creditor of the vendor were superior to the asserted rights of the vendee.

Beno Co. v Perrin, 221-716; 266 NW 539

Sale—right to proceeds. A chattel mortgagee who consents to a sale of the mortgaged property on condition that the proceeds be paid to him acquires a right to such proceeds superior to the rights of the garnishing creditor of the mortgagor.

Scurry v Quaker Co., 201-1171; 208 NW 860

Sale—right to proceeds. While the lien of a chattel mortgage does not follow the proceeds of a sale of the mortgaged property, yet the mortgagee may in equity impress a trust on such proceeds when in the hands of one who had full knowledge of the mortgage and of the source of said proceeds.

Jones v Bank, 200-1186; 206 NW 107

Sale—right to proceeds. The sale and converting into money of incumbered chattels under agreement between the lienholder, the debtor, and a third party, under which the third party agrees to collect the proceeds and apply the same on the existing lien, create in the lienholder a right to said proceeds which is superior to garnishments of said third party by the creditors of the debtor.

Korner v McKirgan, 202-515; 210 NW 562

Subsequent purchaser — burden of proof. A mortgagee in an action for the conversion of the mortgaged chattels need only allege the existence of his unsatisfied mortgage. The defendant must allege and prove not only (1) that he is a subsequent purchaser, but (2) that he became such purchaser without notice of the plaintiff's mortgage.

Loranz & Co. v Smith, 204-35; 214 NW 525; 53 ALR 662

Manbeck Motor v Garside, 208-656; 226 NW9

Subsequent mortgages securing pre-existing indebtedness. An unrecorded chattel mortgage (or one improperly recorded because fatally defective in its acknowledgment) is nevertheless prior in right to a subsequent chattel mortgage given in satisfaction of or as security for a pre-existing indebtedness.

Chariton Bk. v Taylor, 210-1153; 232 NW 487

Unacknowledged subsequent mortgage—priority. A chattel mortgage, even tho the acknowledgment thereto is wholly void—in legal effect, no acknowledgment at all—is superior to a prior chattel mortgage of which the subsequent mortgagee had no actual or constructive notice.

Heitzman v Hannah, 206-775; 221 NW 470

Unrecorded mortgage—lease. A provision in a valid lease of land that the lessor shall have a lien for rent on the exempt property of the lessee constitutes a chattel mortgage, and must be recorded or filed in order to have priority over a subsequent good-faith mortgagee of said exempt property, without notice.

Brownlee v Masterson, 215-993; 247 NW 481

Chattel mortgage on rents—priority. The right to the appointment of a receiver under a receivership clause in a real estate mortgage, and the right to have the rents accruing during the redemption year applied to discharge a foreclosure deficiency, are superior to a chattel mortgage executed subsequent to the real estate mortgage on crop to be grown by the mortgagor on said land during said

year, said crop not being yet in existence when the real estate foreclosure was commenced.

Louis v Hansen, 205-1216; 219 NW 523
Phelps v Taggart, 207-164; 219 NW 528
Virtue v Teget, 209-157; 227 NW 635

Chattel mortgage as part of real estate mortgage—lien and priority. A clause (inserted in a mortgage of real estate) which sells and conveys to the mortgagee "all the rents" of the mortgaged land as security for the payment of the debt in question, constitutes a legal chattel mortgage which, inter alia, (1) gives to the mortgagee, as against the mortgagor and others having actual knowledge thereof, a first lien on all subsequently executed leases of said land and on the promissory notes which represent the rental under said leases, and (2) gives to the mortgagee a first lien on such leases and notes against all assignees thereof provided that when the assignees became such the real estate mortgage had been duly recorded as such, and the record thereof had been duly indexed in the chattel-mortgage index book. (No plea in this case of holdership in due course.)

Equitable v Brown, 220-585; 262 NW 124

Rent—unrecorded contract lien. An unrecorded lease giving the landlord a lien on exempt property kept on the premises is not effective against a purchaser of the exempt property without notice of the written lease.

Sparks v Flesher, 217-1086; 252 NW 529

Chattel mortgage clause—failure to index—effect. A recorded real estate mortgage containing a mortgage on the rents of the mortgaged real estate, but not indexed in the chattel mortgage index, is, as regards the rents, subject to a subsequent like mortgage taken by one for value and without notice of the former chattel mortgage clause, even tho the latter mortgage is not indexed in the chattel mortgage index.

Soehren v Hein, 214-1060; 243 NW 330

Chattel mortgage clause—lien—when acquired. Under a combined real estate and chattel mortgage of the rents, the mortgagee, as against parties not subsequent purchasers for value and without notice, acquires a lien from the date of the execution of the mortgage.

Soehren v Hein, 214-1060; 243 NW 330

Lien on crops pending foreclosure. The remedial provisions of a mortgage, including a pledge of the rents and profits, are such a part of the subject-matter of a foreclosure action that indexing in lis pendens imparts to a purchaser of the mortgagor-landlord's share of the corn constructive notice of the mortgagee's lien on the corn.

Sutton v Schnack, 224-251; 275 NW 870

Mortgage on crop-share rent superior to garnishment of tenant. The lien of a chattel mortgage on a landlord's share of crops reserved as rent, but in the possession of the tenant, is, as to matured crops actually set aside to the landlord or otherwise actually determined as belonging to the landlord, superior to a subsequent garnishment of the tenant by a judgment creditor of the landlord.

Pierre v Pierre, 210-1304; 232 NW 633

Chattel mortgage on rents—priority. A chattel mortgage on a landlord's crop-rental share of growing crops is prior in right to the claim of a receiver appointed in real estate mortgage foreclosure proceedings instituted subsequent to the execution of the chattel mortgage, even tho the real estate mortgage was executed prior to the chattel mortgage, and pledged the rents to the payment of the real estate mortgage debt.

Hansen v Sheffer, 205-1191; 219 NW 529

Pledge of rents and subsequent chattel mortgage on crops—priority. A pledge, in a duly recorded real estate mortgage, of the rents of the mortgaged premises is superior to a subsequently executed and duly recorded chattel mortgage on crops which the chattel mortgagee was obligated to grow on said premises, but which crops were not in existence when the real estate mortgagee instituted his foreclosure proceedings.

Bunting v Berns, 212-1127; 237 NW 220

Priority over rent accruing under tenancy at will. A recorded chattel mortgage on the property of a tenant used on the demised premises under a lease for years, attains priority, immediately upon the termination of the lease, over the landlord's claim for future rent accruing under a succeeding tenancy at will of the same premises; likewise a recorded chattel mortgage executed by a tenant at will, on property used on the leased premises, attains priority immediately upon the expiration of 30 days after the execution and recording of the mortgage, over the landlord's claim for future accruing rent.

Nickle v Mann et al., 211-906; 232 NW 722

Rent notes subject to prior chattel mortgage. The receiver of an insolvent takes the land of said insolvent subject to the lien of a prior unsatisfied, combined real estate and chattel mortgage covering both the said real estate and the "rents, issues, use and profits" thereof. It necessarily follows that notes taken by the receiver for the rent of said mortgaged premises for the year embracing foreclosure proceedings and the redemption period are subject to said chattel mortgage lien.

Capital Bank v Riser, 215-680; 246 NW 763

Rents—adjudication against chattel mortgage. On the issue, in real estate mortgage foreclosure, whether an outstanding lease be-

V PURCHASERS AND CREDITORS—concluded

(b) WITHOUT NOTICE—PRIORITY—concluded

tween the owner and his tenant (parties to the action) was superior to the mortgagee's right to a receiver for said premises and for the rents thereof, an unappealed decree which orders the appointment of such receiver works an eviction of said tenant and the consequent nullification of a chattel mortgage by the landlord on his share of the crop rent under said lease, it appearing that the real estate mortgagee had no notice or knowledge of such chattel mortgage until after the entry of his decree of foreclosure.

Keenan v Jordan, 204-1338; 217 NW 248

Rents—conflicting claims. The lien on matured crops, acquired by virtue of the commencement of foreclosure proceedings on a second mortgage carrying simply a pledge of the rents, is inferior to the lien acquired under the first mortgage, which is a duly recorded, combined real estate and chattel mortgage on the land and on the rents and crops thereof. This is true because the lien under the first mortgage necessarily attaches ahead of the lien of the second mortgage. Likewise the lien acquired by such second mortgage on unmatured rents is inferior to the lien of the first mortgage because, while both liens attach at the same instant of time, the first mortgage lien is first in time of origin.

Equitable v Read, 215-700; 246 NW 779

(c) UNLAWFUL PREFERENCES

"Rent"—taxes included—notice to creditors—recording. The term "rent", within statutes giving a landlord a lien for rent, cannot be construed to include taxes in absence of a clear intention of parties to that effect expressed in lease, and so a lessor was held not entitled to preferential lien against assets of bankrupt assignee of lease for unpaid taxes, interest, and penalties, on ground that chattel mortgage clause of lease, which was recorded in deed and chattel mortgage records, was sufficient to protect lessor's lien, the assignment of lease being recorded only in deed record and not in chattel mortgage records. Such filing did not give notice to creditors, as required by recording statutes.

Lamoine Mott Estate v Neiman, 77 F 2d, 744

Bankruptcy—limitation on evidence. Where a chattel mortgage was executed within four months preceding the filing of bankruptcy proceedings against the mortgagor, and where, later, the mortgaged property was sold by the mortgagor and a new mortgage was executed by the purchaser on the same property to the former mortgagee, and where the original mortgage was thereupon released, and where the two transactions were attacked by the trustee in bankruptcy as an unlawful preference, the evidence must be confined to the conditions existing on the date of the first transaction.

Stark v White, 215-899; 245 NW 337

VI AFTER-ACQUIRED PROPERTY AND PROPERTY NOT IN BEING

Discussion. See 10 ILB 224—Mortgages on "potential property"

After-acquired stock. Even tho a chattel mortgage on a stock of goods does not provide that it shall cover after-acquired stock, it must be deemed to cover the existing stock, in the absence of some definite evidence as to what part of the original stock had been sold.

Smith Bros. v Goldberg, 204-816; 215 NW 956

Chattel clause in real estate mortgage. A real estate mortgage which, in addition to the land, conveys the crops raised on the land "from now until the debt secured is paid" is also a chattel mortgage to the extent of the crops.

Farmers Bk. v Miller, 203-1380; 214 NW 546

Future grown crops—death of mortgagor—effect. A chattel mortgage on crops to be grown in the future (combined in a real estate mortgage as additional security) does not become a lien on crops grown subsequent to the death of the mortgagor.

Fawcett Co. v Rullestad, 218-654; 253 NW 131; 94 ALR 800

Landlord's share of crops to be grown. A chattel mortgage executed by a landlord on all grain, feed, and hay "to be grown" on definitely and accurately described lands which were then under lease for the ensuing year, is a valid incumbrance on the landlord's share of the crops reserved as rent under said lease.

Pierre v Pierre, 210-1304; 232 NW 633

Lien—increase of animals. The lien of a chattel mortgage (prior in time to a lease) on animals and on the increase thereof is superior to the landlord's lien as to all increase born prior to the actual execution of the lease, and inferior to the landlord's lien on all increase born subsequent to the actual execution of the lease and prior to its termination. An agreement between the landlord and tenant that the lease shall be effective from a date prior to its actual execution is not binding on the mortgagee.

Wunder v Schram, 217-920; 251 NW 762

Lien—priority on increase of mortgaged stock. A landlord's lien on the increase of stock after the stock is taken upon the leased premises is superior to the lien of a chattel mortgage executed on the stock and on its prospective increase, and prior to the commencement of the rent term.

Corydon Bank v Scott, 217-1227; 252 NW 536

"Increase of livestock"—subsequent exception—effect. A chattel mortgage which, in the granting clause, enumerates certain livestock "together with all increase of livestock of every description now on said farm" must be held to cover such increase even tho it is exempt from execution, notwithstanding the fact that, after enumerating yet other classes of property as covered by the mortgage, the said granting clause terminates with the subclause "Also all personal property of every description, except that covered by legal exemptions".

Chambers v Bank & Trust, 218-63; 254 NW 309

Mortgaged and unmortgaged goods. When a chattel mortgage covered the crops grown on a designated part of a farm only, the unmortgaged crops are properly segregated by placing them in a separate crib.

Peoples Bk. v McCarthy, 206-28; 217 NW 453

VII FIXTURES

Movable farm structures. Movable hog houses and feed bunks on a farm will not constitute fixtures when to so declare would be contrary to the actual expressed intent of the person—a tenant—who placed them on the farm, and contrary to the intent as reflected in the nature of the articles, their use, and the mode of attachment to the realty.

Speer v Donald, 201-569; 207 NW 581.

VIII WAIVER OF MORTGAGE LIEN

Mortgagee authorizing sale of property by mortgagor—waives lien. The purchaser of mortgaged chattels is not liable to the mortgagee, as for a conversion, when the mortgagee has waived his lien by expressly or impliedly consenting to a sale by the mortgagor.

Producers Livestock Assn. v Morrell & Co., 220-948; 263 NW 242

IX ACKNOWLEDGMENT AND RECORDING

Acknowledgment—disqualification of officer. A chattel mortgage which is acknowledged before a notary public who is the mortgagee is not recordable, and if recorded, the record imparts no constructive notice.

Heitzman v Hannah, 206-775; 221 NW 470

Recording—law governing. A chattel mortgage executed and delivered in a foreign state on property there situated will be governed by the recording laws of this state when the parties mutually contemplate the immediate transfer of the property to this state to the domicile of the mortgagor, under a lien good under the laws of this state.

Wertheimer v Shultice, 202-1140; 211 NW 568

Recording after death of mortgagor—effect. The recording of a chattel mortgage after the death of an insolvent mortgagor does not, as between the mortgagee and other creditors of the estate, give the mortgage any preferential standing over what it had prior to the recording.

Raybourn v Creger, 204-961; 216 NW 272

Recording after death of mortgagor. The rule of law that a valid chattel mortgage recorded after the death of the insolvent mortgagor is void as to the creditors of the deceased can have no application where the mortgaged chattels are delivered to the mortgagee prior to the death of the mortgagor, or where the mortgagor is solvent. Evidence held to present jury question on both insolvency and change of possession.

Beery v Glynn, 214-635; 243 NW 365

Real estate mortgage pledging rents. A real estate mortgage which pledges the rents and profits of the land need not be recorded as a chattel mortgage.

Union Ins. v Eggers, 212-1355; 237 NW 240

Limitation of actions—failure to index. The breach of official duty, and not the resulting damage, creates the cause of action making operative the statute of limitations, so where a recorder negligently omitted to index a chattel mortgage resulting in a subsequent mortgagee obtaining priority through lack of notice of first mortgage, the cause of action accrued at the time of such omission and an action against the recorder for this nonfeasance was barred after three years by §11007, C., '35.

Baie v Rook, 223-845; 273 NW 902; 110 ALR 1062

Chattel mortgage not properly acknowledged or recorded—secured claim denied. Where a chattel mortgage on restaurant fixtures, given to secure purchase price, was never properly acknowledged, and hence not properly recorded as required by statute, mortgagee was not entitled to secured claim against trustee in bankruptcy of purchaser.

Albert Pick v Wilson, 19 F 2d, 18

Conditional sales contract — defective acknowledgment—trustee's rights. Where conditional sale contract provided that title to goods should remain in vendor until contract was performed, the property did not pass to trustee in bankruptcy of such vendee, notwithstanding that contract was not acknowledged in accordance with Iowa statute so as to entitle it to be recorded.

In re Pointer Brewing Co., 105 F 2d, 478

Inference of execution. The fact that a mortgage carries a notarial certificate of acknowledgment by the parties purporting to execute it is persuasive evidence that said

IX ACKNOWLEDGMENT AND RECORDING—concluded

parties did, in fact, execute it—that their signatures are genuine.

Greenland v Abben, 218-255; 254 NW 830

Mandamus to compel recording.

Weyrauch v Johnson, 201-1197; 208 NW 706

"Rent"—taxes included—notice to creditors—recording. The term "rent", within statutes giving a landlord a lien for rent, cannot be construed to include taxes in absence of a clear intention of parties to that effect expressed in lease, and so a lessor was held not entitled to preferential lien against assets of bankrupt assignee of lease for unpaid taxes, interest, and penalties, on ground that chattel mortgage clause of lease, which was recorded in deed and chattel mortgage records, was sufficient to protect lessor's lien, the assignment of lease being recorded only in deed record and not in chattel mortgage records. Such filing did not give notice to creditors, as required by recording statutes.

Lamoine Mott Estate v Neiman, 77 F 2d, 744

Unacknowledged subsequent mortgage—priority. A chattel mortgage, even tho the acknowledgment thereto is wholly void—in legal effect, no acknowledgment at all—is superior to a prior chattel mortgage of which the subsequent mortgagee had no actual or constructive notice.

Heitzman v Hannah, 206-775; 221 NW 470

X FOREIGN MORTGAGES

Foreign mortgage—priority. A chattel mortgage validly executed and recorded in and according to the laws of a foreign state where the mortgagor then resides, and where the property is then situated, retains its priority over a subsequent mortgage executed and recorded in this state after the mortgagor has removed to this state with said property; and this is true even tho the foreign mortgagee knew that the property had been removed to this state.

First N. Bk. v Ripley, 204-590; 215 NW 647

See Wertheimer v Shultice, 202-1140; 211 NW 568

Forfeiture—conveyance—unrecorded claim—effect. In proceedings for the forfeiture of a conveyance which has been employed in the unlawful transportation of intoxicating liquors, a claimant of the conveyance under an unrecorded sales contract may not have the conveyance returned to him, and it is quite immaterial that such contract was executed in a foreign state in which claimant's lien would be valid against subsequent purchasers without recording.

State v Kelsey, 206-356; 220 NW 324

State v Jennings, 206-361; 220 NW 327

XI LOSS OF RIGHTS UNDER RECORDING LAW THROUGH FRAUD

(a) FRAUD IN FACT

Foreclosure—transfer to court. The right of a mortgagee to foreclose a chattel mortgage by notice and sale (1) under the statute (Ch 523, C., '31), or (2) under the terms of the mortgage itself, may not be transferred to the district court on the application of the mortgagor on the ground of fraud and want of consideration in obtaining the mortgage, when an action of replevin involving the mortgaged chattels, and pending against the mortgagor furnishes him ample opportunity to test the mortgagee's right to foreclose by interposing said plea of fraud and want of consideration.

McDonald v Johnston, 218-1352; 256 NW 676

Remedies of creditors and purchasers—evidence—sufficiency. Evidence reviewed, and held to show that a chattel mortgage was fraudulent.

Northwestern Bk. v Muilenburg, 209-1223; 229 NW 813

(b) RETENTION OF POSSESSION BY MORTGAGOR

Actual possession defined. A mortgagor must be deemed in actual possession of the mortgaged chattels when he has them on his own farm and in the actual custody of his own servant, even tho he (the mortgagor) does not reside upon said premises.

Raybourn v Creger, 204-961; 216 NW 272

(c) RIGHT TO SELL IN ORDINARY COURSE OF TRADE

Sale of property—right to proceeds. A chattel mortgagee who consents to a sale of the mortgaged property on condition that the proceeds be paid to him acquires a right to such proceeds superior to the rights of the garnishing creditor of the mortgagor.

Scurry v Quaker Oats Co., 201-1171; 208 NW 860

Impounding proceeds of wrongful sale. While a chattel mortgagee may not follow the proceeds of wrongfully sold mortgaged property and enforce a lien thereon, yet the court will recognize an arrangement under which such proceeds are impounded in the hands of a third party and the right thereto litigated.

Slimmer v Lawler, 205-813; 218 NW 516

(d) DELAY IN RECORDING

Withholding from record—effect. Creditors who seek to avoid a chattel mortgage because it has been withheld from record must show that such withholding was for the purpose of enabling the debtor to obtain credit.

Baxter v Baxter, 204-1321; 217 NW 231

(e) CIRCUMSTANCES TENDING TO SHOW FRAUD

Corporate officer's lien denied. In an action by the state for dissolution of a mining corporation, a chattel mortgage and conditional sale contract covering the mine property are fraudulently invalid and may not be established as first liens when held and asserted by a defendant who, among other things, as an incorporator, director, president, and general manager of the corporation, secured such instruments while acting in his fiduciary capacity for the purpose of insuring payment to himself of debts previously created, thus serving his personal interests, rather than as fiduciary, preserving the assets for the creditors and stockholders.

State v Exline Fuel Co., 224-466; 276 NW 41

Evidence — fraudulent transfer. Evidence held to establish a fraudulent transfer by a bankrupt.

Schnurr v Miller, 211-439; 233 NW 699

10016 Conditional sales.

Discussion. See 20 ILR 616—Protection—purchasers and creditors; 20 ILR 800—Remedies

Atty. Gen. Opinions. See '25-26 AG Op 341, 397; '30 AG Op 70; '32 AG Op 183; '34 AG Op 293; '38 AG Op 578

ANALYSIS

I THE COMMON LAW AND THE STATUTE
II WHAT CONSTITUTES A CONDITIONAL SALE
III CREDITORS AND PURCHASERS WITHOUT NOTICE
IV VALIDITY OF SALES NOT IN COMPLIANCE WITH STATUTE
V EXECUTION OF CONTRACT, RECORDING, AND REMEDIES

Chattel mortgages generally. See under §10015

I THE COMMON LAW AND THE STATUTE

Discussion. See 5 ILB 129—Uniform conditional sales act; 12 ILR 235—Insurance of interests

Conditional sale vendor not liable for negligence of vendee. The vendor of a motor vehicle under a conditional sales contract and his assignee are not to be held responsible for the negligent operation of the vehicle by the vendee on the ground that they have a duty to see if the vendee is responsible before turning him loose on the highway with a dangerous instrumentality.

Hansen v Kuhn, 226-794; 285 NW 249

II WHAT CONSTITUTES A CONDITIONAL SALE

Discussion. See 14 ILR 329—Chattel mortgages distinguished

Definition. A contract of sale of personal property in which the seller reserves and retains title until the purchase price is fully paid constitutes a conditional sales contract and not a chattel mortgage.

Northern Fin. v Meinhardt, 209-895; 226 NW 168

Stull v Davidson, 211-239; 233 NW 114

Ownership depending on condition—statute applicable. Under a contract for sale of automatic sprinkler system where the title or ownership is made to depend on a condition, it comes within this section, making such contracts invalid against creditors, and where seller by way of counterclaim to buyer's action to avoid a mechanic's lien for the same property, elected to recover the purchase price, such seller made an irrevocable exercise of his option and neither the fact of filing such action nor filing the notice of lis pendens was a notice of lien as against the trustee for bondholders whose bonds were secured by a mortgage on all equipment of the corporation filed subsequent to such action. However, the action was a notice of an election to recover purchase price which waived any right to title, but was not such notice as was required by this section.

Fire Protection Co. v Hawkeye Co., 8 F 2d, 810

Bailment (?) or conditional sale (?). A so-called "trust receipt" for goods delivered constitutes a conditional sale contract when accompanied, as a part of the same transaction, by an unconditional promise to pay for the goods.

General Motors v Whiteley, 217-998; 252 NW 779

Conditional sale (?) or contract of agency (?). The act of the owner of an article in reluctantly permitting it to pass into the possession of a party (to whom he had theretofore actually sold many like articles) with permission to forthwith sell the article (which sale was then practically assured) at a stated cash price or to forthwith return the article, without any expressed intention of selling the article to the party so given possession, presents a jury question on the issue whether the transaction was one of simple agency, or whether the transaction constituted an oral conditional sale contract which would not be valid against a third party who had no knowledge thereof.

Greenlease-Lied Motors v Sadler, 216-302; 249 NW 383

Conditional sales—elements. When a truck was sold under a written agreement reserving title in the seller for the purpose of security to be divested on the payment of the final installment on a note given for the purchase price, the vendee was clearly obligated by a promise to pay for the truck, so it was a conditional sale contract rather than a bailment or lease.

Hansen v Kuhn, 226-794; 285 NW 249

II WHAT CONSTITUTES A CONDITIONAL SALE—concluded

Contract covering future sales. A conditional sale contract covering specific goods may legally provide that all future purchases of goods by vendee shall be controlled by said contract.

Davidson Co. v Francis, 214-1317; 243 NW 333

Right to sell in ordinary course of business—effect. A conditional sale contract with proviso that the vendee may sell in the ordinary course of business, remains and continues as a conditional sale contract as to all unsold goods; especially is this true when the contract provides that the vendee shall hold the proceeds of goods sold for the benefit of the vendor.

Internat. Co. v Poduska, 211-892; 232 NW 67; 71 ALR 973

Ownership in vendee. When a motor vehicle is sold under a conditional sales contract, altho the seller retains legal title for the purpose of security, the ownership of the car passes to the buyer.

Hansen v Kuhn, 226-794; 285 NW 249

Replevin of automobile conditionally sold under "trust receipt". Trust receipt for automobile delivered by a finance company was in effect conditional sale when accompanied by promissory note and agreement to return the automobile on demand. Held, in a replevin action the finance company sustained its burden to prove its right to immediate possession by a showing of default in payment, which gave the right to possession.

General Motors v Koch, 225-897; 281 NW 728

III CREDITORS AND PURCHASERS WITHOUT NOTICE

Innocent subsequent purchaser. Principle reaffirmed that the right of a vendor under a sale on condition that the vendee pay the purchase price is subordinate to the rights of a subsequent purchaser without notice in good faith from the vendee.

Hart v Wood, 202-58; 209 NW 430

Purchase without notice—effecting payment. Full payment for an article, bought in good faith, and for value and without notice of an existing conditional sales contract thereon, is effected by the act of the vendee in delivering to the vendor his negotiable check on actual funds in a foreign bank for the purchase price, and by the act of the vendor-payee in immediately negotiating the check to his bank as a general deposit, even tho the deposit slip in the latter transaction provided that the receiving bank took the check for collection only. It follows that the vendee is under no obligation to stop payment on the check issued by him because he learned of the conditional sale contract after said deposit and before his drawee-bank had paid the check.

General Motors v Whiteley, 217-998; 252 NW 779

Mortgage given for pre-existing debt—no priority over unrecorded conditional sale. Where a car was sold on a conditional sales contract which was not recorded, and the purchaser later gave a chattel mortgage in payment of a pre-existing debt evidenced by a demand note, there being no extension of time or other new consideration for the mortgage, the pre-existing debt did not constitute value to entitle the mortgage to priority over the conditional sales contract.

Hughes v Wessell, 226-811; 285 NW 200

Acknowledgment—form and contents—failure of statutory requirements—not constructive notice. Under statute requiring that, in order to give constructive notice, conditional sales contracts be acknowledged in the same manner as chattel mortgages, a certificate of acknowledgment on a conditional sales contract, stating merely that person making acknowledgment was personally known to notary and that person making acknowledgment said he signed it voluntarily, held defective, because notary did not therein identify the person making the acknowledgment as signer of contract acknowledged. Hence contract was invalid as against creditors of bankrupt conditional buyer.

In re Elliott, 72 F 2d, 300

Notice and means of knowledge — instructions—adequacy. Instructions defining "notice" and "means of knowledge" and concretely applying such definitions to the evidence, reviewed, and held adequate without further elaboration.

General Motors v Whiteley, 217-998; 252 NW 779

Notice only issue—unnecessary instructions. Where the plaintiff claimed the right to possession of an automobile under a conditional sales contract and the defendant claimed under two chattel mortgages acquired subsequent to the conditional sale but recorded first, instructions which submitted only the issue of whether the chattel mortgagee had notice of the prior conditional sale were not erroneous in failing to define "subsequent purchaser" as used in recording statutes and in failing to require the jury to determine whether the defendant gave value so as to constitute himself a "subsequent purchaser".

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Failure to index. The breach of official duty, and not the resulting damage, creates the cause of action making operative the statute of limitations, so where a recorder negligently omitted to index a chattel mortgage resulting in a subsequent mortgagee obtaining priority

through lack of notice of first mortgage, the cause of action accrued at the time of such omission and an action against the recorder for this nonfeasance was barred after three years by §11007 (4), C., '35.

Baie v Rook, 223-845; 273 NW 902; 110 ALR 1062

False representation—law of foreign state. A representation to the effect that, when a good-faith purchaser of property acquired it, a conditional sale contract was already of record in a foreign state in conformity with the laws thereof, is a representation of fact, and, if false, will sustain a plea of fraud in the execution of notes by said purchaser in the good-faith reliance on such representation, even tho such purchaser makes no examination of the laws of the foreign state.

Baker v Bockelman, 208-254; 225 NW 411

Nonwaiver of rights. A vendor who sells an article under the conditions (1) that the title shall not pass to vendee until the purchase-money note is paid in full, and (2) that the vendor may at any time repossess himself of the article and sell the same and hold the vendee for a deficiency, does not, as to a purchaser with notice of said conditional sale, waive or relinquish any right possessed by him under such conditional sale by simply taking judgment on the purchase-money note.

Murray v McDonald, 203-418; 212 NW 711; 56 ALR 233

Public service vehicles—tax—nonliability of vehicle. An automobile truck purchased under an ordinary conditional sale contract, and operated by a motor vehicle carrier as such under a certificate of authority issued by the board of railroad commissioners, is not subject to levy for the payment of the statutory motor vehicle carrier tax under a tax warrant issued by the commissioners after the vendor had repossessed himself of said truck for default in payment of the purchase price.

Universal Co. v Mamminga, 214-1135; 243 NW 513

Wrongful conveyance by agent. An agent in possession of chattels, with power "to sell" and to account immediately to the principal, may not, in payment of his pre-existing personal debt, transfer the property to a third party, even tho such possession is under a contract which is in the nature of a conditional sale, said third party making no claim that he did not have notice of the contract.

Ohio Co. v Schneider, 202-938; 211 NW 248

IV VALIDITY OF SALES NOT IN COMPLIANCE WITH STATUTE

Conditional sale contract valid against bankruptcy trustee tho not acknowledged as per statute. Where conditional sale contract provided that machinery and equipment should remain the property of the seller until contract was completely performed by buyer, title remained in seller, so that, on buyer's filing of petition for reorganization under the Bankruptcy Act, the property did not, under Iowa law, pass to trustee in bankruptcy, notwithstanding that contract was not acknowledged in accordance with Iowa laws.

In re Pointer Brewing Co., 105 F 2d, 478

V EXECUTION OF CONTRACT, RECORDING, AND REMEDIES

Acknowledgment — dual purpose. The sole purpose of a certificate of acknowledgment of a conditional sale contract is (1) to prove the execution of the instrument, and (2) to render the instrument legally recordable.

Atlas Co. v O'Donnell, 210-810; 232 NW 121; 30 NCCA 273

Surplus acknowledgment. When a conditional sale contract is validly acknowledged by the vendor, an acknowledgment by the vendee may be deemed surplusage.

Atlas Co. v O'Donnell, 210-810; 232 NW 121; 30 NCCA 273

Defective acknowledgment—trustee's rights. Where conditional sale contract provided that title to goods should remain in vendor until contract was performed, the property did not pass to trustee in bankruptcy of such vendee, notwithstanding that contract was not acknowledged in accordance with Iowa statute so as to entitle it to be recorded.

In re Pointer Brewing Co., 105 F 2d, 478

False certificate—proximate cause. A willfully false certificate by a notary public as to the acknowledgment by the vendee of the execution of a forged conditional sale contract, is not the proximate cause of the damage suffered by one who purchases the forged contract and the forged promissory note accompanying it.

Atlas Co. v O'Donnell, 210-810; 232 NW 121; 30 NCCA 273

Conditional sales contract in foreign state —priority. The lien of a garage keeper on an automobile for storage in this state is subject to the superior right of the vendor of said vehicle, or his assignee, under a conditional sales contract executed, delivered and recorded solely in a foreign state at the place of sale, said vehicle having been removed to this state without the knowledge or consent of the vendor.

Northern Fin. v Meinhardt, 209-895; 226 NW 168

Validity against trustee in bankruptcy. An ordinary conditional sale contract, covering present and future purchases, is enforceable against the vendee's assignee for the benefit

V EXECUTION OF CONTRACT, RECORDING, AND REMEDIES—continued

of creditors, and against the vendee's trustee in bankruptcy who has never had possession of the property; and this is true irrespective (1) of the recording or filing of the contract, and (2) of the fact that the contract imperfectly describes the goods.

Internat. Co. v Poduska, 211-892; 232 NW 67; 71 ALR 973

Remedy of trustee in bankruptcy. Where property sold under a conditional sale contract is replevined by the vendor and thereafter bankruptcy proceedings are instituted against the vendee, the trustee in bankruptcy necessarily has notice of the rights and claims of the vendor, and occupies, as to such property, the legal position of a judgment creditor holding an execution duly returned unsatisfied.

Internat. Co. v Poduska, 211-892; 232 NW 67; 71 ALR 973

Validity of unrecorded conditional sale. Altho a conditional sale contract on an automobile was not properly recorded, it was valid and enforceable between the parties and all others except purchasers for value and without notice.

Hughes v Wessell, 226-811; 285 NW 200

Unrecorded contract—election of remedy by seller—third party's rights. Under a contract for sale of automatic sprinkler system where the title or ownership is made to depend on a condition, it comes within this section making such contracts invalid against creditors, and where seller by way of counterclaim to buyer's action to avoid a mechanic's lien for the same property, elected to recover the purchase price, such seller made an irrevocable exercise of his option and neither the fact of filing such action nor filing the notice of lis pendens was a notice of lien as against the trustee for bondholders whose bonds were secured by a mortgage on all equipment of the corporation filed subsequent to such action. However, the action was a notice of an election to recover purchase price which waived any right to title, but was not such notice as was required by this section.

Fire Protection Co. v Hawkeye, 8 F 2d, 810

Foreclosure. A conditional sales contract which provides that, on default, the vendor may seize the property and sell at public or private sale and credit the vendee with the net proceeds may be foreclosed by judicial proceedings.

Cent. Motors v Clancy, 206-1090; 221 NW 774

Right to foreclose. A conditional sale contract which retains title in the vendor, but which binds the vendee to pay the entire price, and provides for foreclosure in case of default of payment, arms the vendor in case of such default to proceed in equity for the foreclosure of his lien.

Jensen v Kissick, 204-756; 215 NW 962

Foreclosure—required credit on judgment. Where a vendor under a conditional sale contract elects to declare the entire debt due and to foreclose, and to hold the vendee for the deficiency judgment, the vendor must (under the contract in question) credit on the judgment the net amount received on the foreclosure sale, notwithstanding he was compelled to expend a substantial sum in buying in the property at tax sale in order to protect his lien.

Wis. Chair v Bluechel, 216-717; 246 NW 817

Unallowable foreclosure. In an action to foreclose a conditional sales contract on a specifically described article, foreclosure may not be decreed on another and different article, but of the same general nature, in the absence of allegation and proof that the latter article had been mutually substituted for the former.

Des M. Music v Lindquist, 214-117; 241 NW 425

Action for contract possession works no rescission. The vendor in a conditional sale contract by instituting replevin for the possession of the article, as provided by the contract in case of the vendee's default, manifests a clear intent to stand on the contract, and not to rescind it. It follows that the refusal of the court to submit to the jury the issue of rescission, and return of purchase price, is proper. (Analogous holding, 202-1128.)

Schmoller Piano v Smith, 204-661; 215 NW 628

Rescission. The seller of an automobile, under a conditional sales contract, who, when the buyer is not in default, peremptorily repossesses himself of the car, and applies unreasonable and exorbitant repairs on the car, and refuses to redeliver possession unless the buyer agrees to pay such charges, arms the buyer with right to rescind the contract, even tho the seller had reserved the right to make necessary repairs.

Manbeck Sales Co. v Davis, 217-1141; 251 NW 61

Right of forfeiture—effect. Tho the vendor in a conditional contract of sale has retained the right to forfeit the contract for nonpayment and to resume absolute ownership, yet, so long as he has not done so, his assignment of the contract invests the transferee with no greater right than the vendor had under the contract.

Soodhalter v Coal Co., 203-688; 213 NW 213

Right to remove fixture. A dealer who, under an unrecorded conditional sale contract, permanently installs for the vendee of real estate a furnace in the house situated thereon,

may not legally remove said furnace, as against the vendor of the real estate who did not authorize or know of the installation, and who has sold under a contract which he has caused to be forfeited in accordance with the terms thereof.

Holland Co. v Pope, 204-737; 215 NW 943

Removal against mortgagee. A steam boiler and a bake oven so erected on mortgaged real estate that they become fixtures, in lieu of former articles of the same kind, cannot be legally removed, even tho sold under a contract providing for retention of title in the vendor until paid for, when such removal would materially diminish the security of the said mortgagee.

Comly v Lehmann, 218-644; 253 NW 501

Concealment by vendee under conditional sale—demand necessary. The state, in a prosecution for larceny based solely on the charge that the vendee in a conditional bill of sale "willfully and with intent to defraud concealed the property", must, in order to create, under §13037-c1, C., '31 [§13037.1, C., '39], prima facie evidence of such concealment, establish the making of a demand by the vendor on the vendee that the latter pay for the property or produce and return it, and that the latter failed to comply with said demand.

State v Delevie, 219-1317; 260 NW 737

Forcible repossession of property. That part of a conditional sale contract which provides that the vendor, in case of default under the contract, may repossess himself of the property "forcibly and without process of law" is void because violative of public policy.

Girard v Anderson, 219-142; 257 NW 400; 4 NCCA(NS) 203

Seizure of property—collection of purchase price. A vendor of goods who retains title until the purchase price is paid, and who, on default in payment, repossesses himself of the goods and sells them, may not thereupon collect the balance of the purchase price of the vendee.

McNabb v Bunting, 207-1300; 224 NW 506

Absence of annexation or connection of fixtures—effect. An oil tank buried entirely in the parking of a public street and covered with cement, and a pump connected with said tank and bolted into said cement, tho wholly used in connection with the operation of an automobile service garage on a lot abutting said street and adjacent to said tank and pump, do not become fixtures to said lot, (1) when said tank and pump are in no manner in contact with said lot or with any building thereon or fixture thereof, and (2) when the parties to the original installation distinctly intended that the title to said tank and pump should remain in the party installing them, the latter not being the owner of said lot.

McCoun v Drews, 221-227; 265 NW 160

Tender—when unnecessary. In an action of replevin based on a conditional sale contract, which provides for possession by the vendor in case of condition broken, tender of payments already made is not a condition precedent to the institution of the action.

Schmoller Piano v Smith, 204-661; 215 NW 628

Default on payments—nonright to redeem. The buyer, under a conditional sale contract, of an article of personal property, who has long been in default on payments, and who has lost possession to the seller, has no right to redeem by tendering the amount then due, the contract providing (1) that title to the property shall remain in the conditional seller until all payments have been made, and (2) that in case of default on payments, the seller may repossess the property and treat all payments made as rent for use of the property.

Smith v Russell, 223-123; 272 NW 121

Unallowable lien. A provision in a conditional sale contract reserving a lien on the goods and providing that said contract shall control future purchases, does not, manifestly, authorize the vendor to charge into the future account charges for goods purchased prior to the date of the said sale contract, and claim a lien for said prior purchases.

Davidson Co. v Francis, 214-1317; 243 NW 333

10017 Filing equivalent of recording.

Atty. Gen. Opinions. See '25-26 AG Op 78; '30 AG Op 70; '34 AG Op 293; '38 AG Op 578

10018 Receipt.

Atty. Gen. Opinions. See '30 AG Op 70; '38 AG Op 578

10020 Time of filing noted—effect.

Real property conveyances—filing and indexing. See under §10115

10021 Index book.

Atty. Gen. Opinions. See '34 AG Op 449; AG Op June 30, '39

10023 Mortgage void after five years—extension.

Atty. Gen. Opinion. See '30 AG Op 343

10024 Assignments—how made.

Atty. Gen. Opinion. See AG Op Oct. 18, '39

10025 Copy furnished and certified—additional filings.

Atty. Gen. Opinions. See '32 AG Op 204; '34 AG Op 124

10026 Certified copies.

Certificate of county recorder. The certificate of the county recorder showing the recordation or filing of a chattel mortgage is competent and admissible evidence.

Wertheimer v Parsons, 209-1241; 229 NW 829

10028 Release of mortgage.

Atty. Gen. Opinions. See '25-26 AG Op 396; 32 AG Op 139

10030 Originals destroyed.

Atty. Gen. Opinions. See '28 AG Op 325; '30 AG Op 343; AG Op April 26, '39

10031 Fees.

Atty. Gen. Opinions. See '25-26 AG Op 96, 98; '30 AG Op 70; '32 AG Op 176, 204; '34 AG Op 56, 588; '38 AG Op 45; AG Op May 24, '39; June 26, '39; Aug. 25, '39

10032 Real estate mortgage with chattel mortgage clause.

Atty. Gen. Opinions. See '25-26 AG Op 96, 164; '28 AG Op 213, 218; '32 AG Op 101, 145; '34 AG Op 449

Application of rents—foreclosure. See under §12372 (III)

Appointment of receiver on foreclosure. See under §12372 (VII)

Chattel mortgages. See under §10015

Chattel clause in real estate mortgage. A real estate mortgage which, in addition to the land, conveys the crops raised on the land "from now until the debt secured is paid" is also a chattel mortgage to the extent of the crops.

Farmers Bk. v Miller, 203-1380; 214 NW 546

Sufficiency. A complete chattel mortgage results from inserting, in a real estate mortgage following the description of the land conveyed, the words, "And, also, the rents, issues, use and profits of said land and the crops raised thereon, from now until the debt secured thereby shall be paid", coupled with a habendum clause to the effect that said property shall be held by the mortgagee forever.

Capital Bank v Riser, 215-680; 246 NW 763

Reference to realty mortgage provisions for interpretation. In a realty mortgage, a chattel mortgage clause conveying all the rents, issues, uses, profits and income therefrom and crops raised thereon "from date of this agreement until the terms of this instrument are complied with and fulfilled" was not invalid on ground that such provision required reference to realty mortgage provisions for interpretation or effect.

Bankers Life v Garlock, 227-1335; 291 NW 536

Chattel mortgage as part of real estate mortgage—lien and priority. A clause (inserted in a mortgage of real estate) which sells and conveys to the mortgagee "all the rents" of the mortgaged land as security for the payment of the debt in question, constitutes a legal chattel mortgage which, inter alia, (1) gives to the mortgagee, as against the mortgagor and others having actual knowledge thereof, a first lien on all subsequently executed leases of said land and on the promissory notes which represent the rental under said leases, and (2) gives to the mortgagee a first lien on such leases and notes against all assignees thereof provided that when the assignees became such the real estate mortgage had been duly recorded as such, and the record thereof had been duly indexed in the chattel-mortgage index book. (No plea in this case of holdership in due course.)

Equitable v Brown, 220-585; 262 NW 124

When lien effective. The lien on the rents and profits created by a chattel mortgage clause in a real estate mortgage is effective from the date of the execution of the mortgage, and not from the date when petition for foreclosure and for the appointment of a receiver is filed.

Equitable v Brown, 220-585; 262 NW 124

Effective date—priority over subsequent assignee of rents and profits. A clause in realty mortgage, duly recorded and indexed, providing that mortgagor conveyed in addition to realty "also all the rents, issues, uses, profits and income therefrom, and all the crops raised thereon from the date of this agreement until the terms of this instrument are complied with and fulfilled", created a valid chattel mortgage, effective from date of execution of the mortgage and not from date of filing the foreclosure petition in which appointment of receiver is asked, and subsequent assignee of property, described in instrument, took subject to lien provided in such chattel mortgage clause.

Bankers Life v Garlock, 227-1335; 291 NW 536

Lien on rents—priority. The commencement of foreclosure proceedings on a real estate mortgage which pledges the rents as security gives the mortgagee a lien on the crop rent of the legal title holder superior to a prior attempted levy on the immature crops; and this is true even tho the mortgage is not indexed in the chattel mortgage record.

Rodgers v Oliver, 200-869; 205 NW 513

Priority of creditor's claim over rents. A chattel mortgagee may not have his claim reduced by a claim for unpaid rent accruing subsequent to the mortgage and on the premises whereon the mortgaged chattels were kept.

In re Cutler, 213-983; 234 NW 238; 238 NW 80

Pledge of rents—what constitutes. A provision in a mortgage to the effect that, in case of foreclosure, a receiver may be appointed to collect the rents and to apply the same to the payment of taxes and principal and interest constitutes a pledge of the rents.

Wilson v Tolles, 210-1218; 229 NW 724

Construing decree—pledge of rents not a chattel mortgage. A decree, which recites that a real estate mortgage is also foreclosed as a chattel mortgage and that the receiver shall

collect the rents "during the period of redemption", will, when construed as a whole —resort being taken to the pleadings—be taken to mean that the receiver collect the rents "pending foreclosure sale, and redemption"—the petition neither alleging nor asking for such foreclosure but instead praying for a receiver from the date of the petition.

Sutton v Schnack, 224-251; 275 NW 870

Pledge of rents not chattel mortgage. Clause in real estate mortgage not conveying but merely pledging rents and profits is not chattel mortgage.

First JSL Bk. v Blount, 223-1339; 275 NW 64

Synonymous terms for "rent". A sale and conveyance in a real estate mortgage of "all the rents, issues, uses, profits and income therefrom and all crops raised thereon" as security additional to that afforded by the land, and in connection with a receivership clause, simply constitutes a chattel mortgage on "all the rents" (in whatever represented), said various terms in such case being deemed synonymous.

Equitable v Brown, 220-585; 262 NW 124

Real estate mortgage pledging rents. A real estate mortgage which pledges the rents and profits of the land need not be recorded as a chattel mortgage.

Union Ins. v Eggers, 212-1355; 237 NW 240

Rents—transfer—effect on pledge. Under a mortgage which carries a simple pledge of the rents, an unconditional transfer, by the mortgagor prior to foreclosure proceedings, of rent notes for the redemption period passes the rents beyond the reach of the mortgagee, the transferee being a good faith holder for consideration.

First Tr. JSL Bk. v Conway, 215-1031; 247 NW 253

Landlord mortgagor's assignment of lease—no effect on chattel clause of realty mortgage. A lien on rents and profits created by chattel mortgage clause in realty mortgage, duly recorded and indexed, was not invalid as to mortgagor's share of crops produced under two-year lease, because such crops did not belong to mortgagor at time they came into existence, and, the landlord having assigned the lease, the subsequent assignee of property described in mortgage would take subject to the lien provided therein.

Bankers Life v Garlock, 227-1335; 291 NW 536

Chattel mortgage clause—effect on landlord's agreement to rent to third party. Where a valid chattel mortgage clause is contained in a realty mortgage, duly recorded and indexed, providing that mortgagor conveyed, in addition to realty, all the rents, issues, uses, profits and income therefrom and all crops raised thereon from date of instrument until payment of debt, an agreement by mortgagor to rent land to a third party was subject to such chattel mortgage clause, as against contention that agreement to rent was not the same as rents, issues, income, profit, or crops.

Bankers Life v Garlock, 227-1335; 291 NW 536

When lien under pledge of rent attaches. Principle reaffirmed that a mortgagee has no lien on rents pledged under the mortgage until foreclosure action is commenced with prayer for a receiver.

First Tr. JSL Bk. v Conway, 215-1031; 247 NW 253

Pledge of rents—when lien perfected. A mortgagee's lien on the rents of the mortgaged premises under a pledge of the rents, accrues only when the mortgagee makes proper prayer or request, in his duly commenced foreclosure suit, for the appointment of a receiver. It follows that, if prior to such prayer or request said rents have been unconditionally transferred, the good faith transferee thereof has an unassailable title thereto.

First Tr. JSL Bk. v Stevenson, 215-1114; 245 NW 434

Lien—when acquired. Under a combined real estate and chattel mortgage of the rents, the mortgagee, as against parties not subsequent purchasers for value and without notice, acquires a lien from the date of the execution of the mortgage.

Soehren v Hein, 214-1060; 243 NW 330

Pledge of rents and subsequent chattel mortgage on crops—priority. A pledge, in a duly recorded real estate mortgage, of the rents of the mortgaged premises is superior to a subsequently executed and duly recorded chattel mortgage on crops which the chattel mortgagee was obligated to grow on said premises, but which crops were not in existence when the real estate mortgagee instituted his foreclosure proceedings.

Bunting v Berns, 212-1127; 237 NW 220

Rent notes subject to prior chattel mortgage. The receiver of an insolvent takes the land of said insolvent subject to the lien of a prior unsatisfied, combined real estate and chattel mortgage covering both the said real estate and the "rents, issues, use and profits" thereof. It necessarily follows that notes taken by the receiver for the rent of said mortgaged premises for the year embracing foreclosure proceedings and the redemption period are subject to said chattel mortgage lien.

Capital Bank v Riser, 215-680; 246 NW 763

Receiver to collect unpaid rents. A pledge of rents in a real estate mortgage entitles the mortgagee, even tho the redemption period has expired (a deficiency judgment existing), to the appointment of a receiver to collect unpaid

rents which had accrued when the lien on the rents attached, and rents which accrued thereafter prior to the expiration of the redemption period. And this is true tho the rent be in the form of an agreement by lessee to support and maintain the mortgagor-lessors during their lifetime, and to pay said lessors such sums as they might request.

Metropolitan v Andrews, 215-1049; 247 NW 551

"Pledge" and "chattel mortgage" contrasted —priority. A mere pledge of rents written into a real estate mortgage remote from the granting clause of the mortgage cannot be deemed a chattel mortgage. It follows that such pledge is inferior to the rights of the good-faith assignee of a lease and rent notes executed subsequent to the real estate mortgage and prior to an action to foreclose such mortgage, and accompanying pledge.

Owen v Fink, 218-412; 255 NW 459

Foreclosure—rents—conflicting claims. The lien on matured crops, acquired by virtue of the commencement of foreclosure proceedings on a second mortgage carrying simply a pledge of the rents, is inferior to the lien acquired under the first mortgage, which is a duly recorded, combined real estate and chattel mortgage on the land and on the rents and crops thereof. This is true because the lien under the first mortgage necessarily attaches ahead of the lien of the second mortgage. Likewise the lien acquired by such second mortgage on unmatured rents is inferior to the lien of the first mortgage because, while both liens attach at the same instant of time, the first mortgage lien is first in time of origin.

Equitable v Read, 215-700; 246 NW 779

Rents and profits—secondary security after exhausting land—showing for immediate receiver. A pledge of rents and profits in a real estate mortgage, being secondary and unavailable until the land as primary security is exhausted, the filing of a petition in foreclosure does not immediately entitle mortgagee to a receiver prior to the sale without a showing both of mortgagor's insolvency and the insufficiency of the land alone to pay the mortgage indebtedness.

First JSL Bk. v Blount, 223-1339; 275 NW 64

Harmless error. In the foreclosure of a real estate mortgage and of a chattel mortgage clause embraced therein, the fact that the lower court failed to enter an order for the formal foreclosure of the chattel mortgage is quite inconsequential when the court did appoint a receiver of said mortgaged chattels and properly ruled that plaintiff's lien was superior to that of appellant's.

Equitable v Brown, 220-585; 262 NW 124

Priority—pledge for pre-existing debt. A pledge of rents contained in a real estate mortgage and taken as security for a pre-existing indebtedness is not entitled to priority over chattel mortgage clauses in prior real estate mortgages for value on the same land, even tho said prior mortgages are not indexed in the chattel mortgage index.

Soehren v Hein, 214-1060; 243 NW 330

Pledge of possession—effect. A pledge in a real estate mortgage of the right of possession of the premises is in substance a pledge of the rents and profits of the premises.

Mickelson v Rehnstrom, 215-1056; 247 NW 275

Real estate mortgage with chattel provision —failure to index. Failure to index the record of a real estate mortgage in the chattel mortgage index in order to give notice of chattel provisions in the real estate mortgage becomes quite immaterial when the complainant, a subsequent chattel mortgagee, simply held a chattel mortgage on crops which had not yet come into existence.

Louis v Hansen, 205-1216; 219 NW 523

Failure to index—effect. A recorded real estate mortgage containing a mortgage on the rents of the mortgaged real estate, but not indexed in the chattel mortgage index, is, as regards the rents, subject to a subsequent like mortgage taken by one for value and without notice of the former chattel mortgage clause, even tho the latter mortgage is not indexed in the chattel mortgage index.

Soehren v Hein, 214-1060; 243 NW 330

Recording "instrument relating to real estate". A mortgage (1) on chattels on certain described real estate and (2) on all crops "sown, planted, raised, growing or grown" on said real estate for two specified years following the execution of said instrument, being an instrument which "relates to real estate", is recordable as a real estate mortgage, and such recording may be enforced by mandamus.

Weyrauch v Johnson, 201-1197; 208 NW 706

TITLE XXV

REAL PROPERTY

CHAPTER 438

REAL PROPERTY IN GENERAL

GENERAL PRINCIPLES

10040 Who deemed seized.

Discussion. See 4 ILB 48—Landowner's rights in underground waters; 16 ILR 169—Ownership of air above land; 18 ILR 67—Subjacent land

Owner's right of disposal. Under ordinary circumstances one has the absolute right to dispose of his property as he pleases.

O'Brien v Stoneman, 227-389; 288 NW 447

10041 Estate in fee simple.

Estate by entirety not recognized.

Fay v Smiley, 201-1290; 207 NW 369

Nature of estate devised—fee (?) or life (?). A testamentary devise, to testator's wife of specified real estate "to be and become the absolute property" of said wife, must be deemed to convey a fee simple estate unless accompanied by some other valid and enforceable provision manifesting a contrary intent. So held where the contrary intent was sought to be drawn from other provisions of the will which were either (1) precatory, or (2) repugnant to the granted fee.

Baker v Elder, 223-395; 272 NW 153

Deed—life estate (?) or fee (?). A deed which is in consideration of love and affection, which contains no words of inheritance, nor the word "heirs", which reserves to the grantor the right to control the premises during his life, which provides that, when the grantor dies, the grantee shall take absolute control of the premises, and which provides that, when the grantee dies, the absolute title shall vest in the grantee's children, (1) reserves a life estate in grantor, (2) conveys a life estate to grantee, and (3) conveys the fee to grantee's children.

Farmers Mtg. v Walker, 207-696; 223 NW 497

Conveyance to "heirs and assigns"—effect. A grant of land to a named person "and to his heirs and assigns" conveys a fee simple title, irrespective of a habendum clause which provides that, upon the death of the grantee, the property shall revert to the grantor or to his heirs.

Dolan v Newberry, 204-443; 215 NW 599

Will—words "to own" conveying absolute title. A devise of "one-half of all property I may own at the time of my death" to testator's wife "to own, hold and enjoy as her own", conveys an absolute title to one half of testator's estate.

In re Bigham, 227-1023; 290 NW 11

Will—property devised in fee—subsequent limitation void. Principle reaffirmed that a testator cannot make an absolute devise of his property in fee and in a subsequent clause destroy or place a limitation on such title. The subsequent limitation is void for repugnancy.

In re Bigham, 227-1023; 290 NW 11

Rule in Shelley's case—when inapplicable. The rule in Shelley's case has no application when the conveyance, deed, or will is to one for life with remainder over to the children of the life tenant, unless it is manifest that the grantor used the word "children" as the equivalent of the word "heirs".

Blair v Kenaston, 223-620; 273 NW 184

10042 Conveyance passes grantor's interest.

Discussion. See 22 ILR 696—Alienability—contingent remainders—defeasible fees.

ANALYSIS

Deeds as mortgages. See under §12372
Easements granted by conveyance. See under §10175 (II)
Fee simple. See under §10041
Fixtures involved in leases. See under §10159 (III)
Fixtures involved in real estate contracts. See under §12389 (II)
Fraudulent conveyances to defeat creditors. See under §11815
Future estates. See under §10045
Gifts. See Ch 445, Note 1
Joint tenancy. See under §10054
Life estates created by will. See under §11846 (V)
Life estates, enlargement into fee. See under §10060
Life estates in partition. See under §12350
Merger of contract of sale and deed. See under §12389 (II)
Mortgages generally. See under §12372
Reformation of instruments generally. See under §10941 (XI)
Tenants in common. See under §10054
Vendor and purchaser generally. See under §12389 (II)

I IN GENERAL

Owner's right of disposal. Under ordinary circumstances one has the absolute right to dispose of his property as he pleases.

O'Brien v Stoneman, 227-389; 288 NW 447

Elements of conveyance—delivery. All the elements for conveying the title to land were established by evidence that when a warranty deed was given to prevent an expected judgment against the grantor from becoming a lien on the land, with a lease back to the grantor to terminate at the death of himself and his wife, it was signed by all parties in the presence of the others, a copy was given the grantee, it was acknowledged by a notary and given him to record and keep, and three years later the grantor affixed a federal stamp to the deed and re-recorded it.

Huxley v Liess, 226-819; 285 NW 216

Transfer of present interest necessary—intent of grantor. Any instrument to be effective as conveyance of real estate must operate to convey a present interest in the real estate, and the intent of the grantor is the controlling factor in determining whether or not such present interest is conveyed.

Bohle v Brooks, 225-980; 282 NW 351

Accretion passes by ordinary deed. Accretion to land passes by a deed of the upland owner unless expressly excepted.

Haynie v May, 217-1233; 252 NW 749

Excessive conveyance—reversion—effect. A deed in which two cotenant-grantors purport to convey the whole of premises, tho they owned but a two-thirds interest therein, to a cotenant who already owned the other one-third interest, with proviso that, in case a named condition fails, "the aforesaid premises shall revert back" to the grantors and their heirs, works the effect, in case the said condition does fail, of reinvesting the grantors and their heirs with precisely the interest which the grantors parted with by said deed: to-wit, a two-thirds interest, and no more.

Boley v Boley, 206-1394; 220 NW 121

Invalid reservation in land grant. Principle reaffirmed that the insertion in a patent issued by the federal government, under a public improvement grant, of a clause "excepting and reserving all mineral lands" is, in the absence of fraud, a nullity, even tho the grant itself did except mineral lands.

Herman v Engstrom, 204-341; 214 NW 588

Boundary line between farm buildings—grantor's alleged use and occupancy of buildings denied. In a special action to determine the true location of an east and west half-section line, where the grantor, owning the entire west half of the section, sells the northwest quarter, thinking his barn and corncrib were situated south of the half-section line, whereas a survey showed the buildings to be situated north of the half-section line, grantor's claim of a reservation of the use and occupancy of the barn and corncrib and ground appurtenant thereto under an implied easement on the theory that the barn and corncrib were necessary to the use and enjoyment of the land retained by grantor, could not be sustained, since the use of such buildings was just as essential, to the part sold, in proportion to the acreage, as it was to the part retained.

Dyer v Knowles, 227-1038; 289 NW 911

Part of single ownership conveyed—implied easement or reservation—clear intent of parties necessary. Principle reaffirmed that, where real estate has been used under single ownership and as a unity, one part of it may be burdened with a use which is largely or entirely for the benefit of another part of it, and when divided by devise, descent or sale, one part may be burdened or benefited by an implied reservation or granting of an easement right if it is apparent and necessary, but such implied grant or reservation must be clearly within the intention of the parties.

Dyer v Knowles, 227-1038; 289 NW 911

Fee devised but alienation restricted—coexistence impossible. The fee simple title to real property cannot be devised coupled with a restriction on alienation of said property.

Hudnutt v Ins. Co., 224-430; 275 NW 581

"Church purposes". A broad and comprehensive meaning must be accorded to the term "church purposes" in a conveyance of land to trustees "so long as used for church purposes".

Presbyterian Church v Johnson, 213-49; 238 NW 456

Right of way deed—abandonment—effect. A deed to a strip of land for highway purposes is ipso facto annulled and rendered ineffective by the definite abandonment of the proposal to establish the highway. In other words, the municipality may not, years after definitely abandoning the project, establish the highway and claim anything under the deed.

Beim v Carlson, 209-1001; 227 NW 421

Express trusts—unconditional conveyance—parol evidence. A parol, unexecuted, and unadmitted trust cannot be ingrafted on an unconditional conveyance in fee of real estate.

Hospers v Watts, 209-1193; 229 NW 844

Termination—merger—acquisition of title by stockholder of corporate lessee. A lease in which a corporation with many stockholders is lessee may not be said to be merged, and thereby terminated, simply because some of the stockholders acquire the equitable title to the real estate.

Fleming v Casady, 202-1094; 211 NW 488

Mortgages — priority — right of parties in possession. Assuming, arguendo, that a person who is negotiating with the record grantee of land for an interest in the land (e. g., as mortgagee), is under duty to make inquiry as to the rights of the former warranty deed grantor who has remained in actual possession, yet said duty is fully performed when the negotiator is assured by said former grantor that said grantee is the absolute owner of the land. It follows that said grantor will not thereafter be permitted to assert that when he conveyed the land by warranty deed he orally reserved an equitable interest in the land.

Clark v Chapman, 213-737; 239 NW 797

Loan to discharge mortgage — subsequent mortgagee subrogated to former's rights. A governmental loaning agency, set up to meet an emergency, by making loans to save homes from foreclosure, is entitled to be subrogated to the rights of the original mortgagee, when it discovers that there is an heir of one of the original mortgagors who has an interest in the title and who did not join in the mortgage it holds, and when through no fault or negligence on its part, said heir's interest was not discovered and he was not prejudiced by this latter mortgage, but was given the right to redeem in the event of foreclosure.

Home Owners Corp. v Rupe, 225-1044; 283 NW 108

Strip mining—when back-filling required. A holder of a strip mine coal lease who enters upon and strips coal from land, upon which land a pipe line company holds an easement, knowing that by so mining violates his lease, must back-fill the land when the easement holder exercises his option to buy; and upon his failure to make the back-fill, a judgment against the coal lessee for the cost thereof is proper.

Penn v Pipe Line Co., 225-680; 281 NW 194

Strip mining—pipe line easement. Where a pipe line company has an easement across land and an option to buy a designated strip of land along the pipe line if a strip coal mine should be opened on the land, a subsequent strip mine coal lease, subject to the pipe line easement and option, gives the coal lessee no rights to strip mine coal on the land covered by the purchase option and thus destroy the lateral support of the pipe line, nor is such lessee entitled to any part of the purchase price for such strip of land.

Penn v Pipe Line Co., 225-680; 281 NW 194

II ESTATES CONVEYED—LIFE ESTATES, ETC.

Discussion. See 22 ILR 543—Renunciation of life estate

Future-acquired interest. A conveyance which purports to convey the grantor's present interest in land cannot be held to convey an interest subsequently acquired in the land by the grantor.

Lee v Lee, 207-882; 223 NW 888

Assignment by heir—construction. A written assignment by an heir "of all interest of every kind and nature" in the estate works a complete conveyance of the heir's interest in the real estate of the estate, as against a subsequently rendered judgment against the assignor.

Berg v Shade, 203-1352; 214 NW 513
See Funk v Grulke, 204-314; 213 NW 608

Expectancies — ineffectual conveyance. A mortgage which recites that the mortgagor "sells and conveys her undivided interest and all future rents, issues, and profits" in named lands (in which the mortgagor then has no interest whatever) speaks solely in the present tense, and is wholly ineffectual to convey the mortgagor's future expectant interest in the land as an heir.

Lee v Lee, 207-882; 223 NW 888

Conditions—unallowable disregard of. A conveyance "of the fee title" of land may make the vesting, in the grantee, of said fee conditional on the happening of any named, legal condition; and, in such case, it is idle to contend that this section furnishes authority to disregard the conditions and to hold the conveyance absolute.

So held where the vesting was, inter alia, dependent on the conditions:

1. That grantees should survive their mother, the holder of a preceding life estate.
2. That in case grantees did not survive their mother, only direct heirs of the body of grantees should take said title.

Schultz v Peters, 223-626; 273 NW 134

Repugnancy between clauses—modern rule. The technical rules of the common law as to the division of deeds of conveyances into formal parts, i. e., premises or granting clause, and habendum clause, will not prevail as against the manifest intention of the parties as shown by the deed as a whole. Applied (1) where the granting clause clearly granted a life estate, while (2) the habendum clause defined the estate received by the grantee as the fee.

Blair v Kenaston, 223-620; 273 NW 184

Life estate (?) or fee (?). A deed which is in consideration of love and affection, which contains no words of inheritance, nor the word "heirs" which reserves to the grantor the

II ESTATES CONVEYED—LIFE ESTATES, ETC.—continued

right to control the premises during his life, which provides that, when the grantor dies, the grantee shall take absolute control of the premises, and which provides that, when the grantee dies, the absolute title shall vest in the grantee's children, (1) reserves a life estate in grantor, (2) conveys a life estate to grantee, and (3) conveys the fee to grantee's children.

Farmers Co. v Walker, 207-696; 223 NW 497

Will—property devised in fee—subsequent limitation void. Principle reaffirmed that a testator cannot make an absolute devise of his property in fee and in a subsequent clause destroy or place a limitation on such title. The subsequent limitation is void for repugnancy.

In re Bigham, 227-1023; 290 NW 11

Devisees and heirs joining in deed. A conveyance of land carries the entire fee when properly joined in (1) by all those who could take under the probated will of the fee owner, and (2) by all those who would take the property under the laws of inheritance in case said property proved to be intestate property.

Bahls v Dean, 222-1291; 270 NW 861

Construction—life estate—title vests on termination. Will bequeathing income of property to widow for life with remainder equally to his then living brothers and sisters, a woman not related to testator, and a business associate also not related, construed to vest title at widow's death rather than at death of testator so as to entitle unrelated legatees to take entire remainder as against heirs of brothers and sisters who predeceased widow.

Rice v Yockey-Klein, 227-175; 288 NW 63

Remainder—vested (?) or contingent (?). A provision in a deed of conveyance that the remainder—after the termination of a life estate—shall pass to the named remaindermen "on the death of" or "at the death of" the life tenant, has reference solely to the time of enjoyment by the remaindermen of their estate in remainder—not to the time of the vesting of said remainder.

Blair v Kenaston, 223-620; 273 NW 184

Conveyance to deceased junior mortgagee. In an equity action for foreclosure against mortgagor and administrators of deceased junior mortgagee to whom mortgagor had allegedly executed the land, evidence held to establish that a deed had been executed by mortgagor in favor of deceased junior mortgagee.

Federal Bank v Ditto, 227-475; 288 NW 618

Conveyance to junior mortgagee. In an equity action for foreclosure of realty mortgage, where it is shown mortgagor made a conveyance of land to junior mortgagee who surrendered note and mortgage and accepted land in payment, and who, at the same time assumed payment of first mortgage and thereafter took possession and rented the land, held, sufficient consideration to bind junior mortgagee on his assumption agreement as to first mortgage.

Federal Bank v Ditto, 227-475; 288 NW 618

Valuable improvements—nonliability of remainderman. Principle recognized that a life tenant of realty may not, on his own initiative, place valuable improvements on the property, and legally hold the remainderman liable for the value of such improvements.

Kinnett v Ritchie, 223-543; 273 NW 175

Life estate — proof — mortgage recitals. A series of mortgages accepted by a bank describing the undivided third interest of a son subject to the life estate of the mother, together with other evidence, held to establish an alleged oral contract of the heirs and their mother to create such life estate in the property of a deceased intestate husband and father; consequently, partition of the realty was properly denied against the mother.

Redding v Redding, 226-327; 284 NW 167

Lands subject to mortgage—contingent interest. Lands devised by will are mortgageable by the devisee tho the devise be subject (1) to a preceding life estate in another, and (2) to the payment, after the death of the life tenant, of a named legacy; being thus legally mortgageable, the mortgage is legally foreclosable during the life of the life tenant, but subject, of course, to all outstanding superior equities.

State Bank v Bolton, 223-685; 273 NW 121

Mortgage of life estate and remainder. A court of equity, in an emergency, has inherent power, on the application of life tenants and remaindermen—tho some of the latter be minors—to authorize the execution of a mortgage on the entire fee title in the property in question regardless of the respective interest of the parties among themselves, when such order or authorization is necessary to preserve the property for all said parties and prevent loss to any of them. And this is true tho the creator of the two estates did not contemplate such emergency.

John Hancock Ins. v Dower, 222-1377; 271 NW 193

Delivery to trustee—no reservation of right to recall. Where deed is delivered by grantor to a third party with instructions to deliver it to the grantee or record the same upon the death of the grantor, with no reservations of a right to recall the same during the lifetime of the grantor, there is sufficient delivery.

Bohle v Brooks, 225-980; 282 NW 351

Deeds to children delivered to trustee—wife acquiescing in husband's instructions. An agreement reached by a husband and wife, that he should deed his property to her and she would deed it to the children, the deeds to be placed with a trustee, who was to record the first deed on the death of the husband and then record the second deeds on the death of the wife, is binding on the wife, when she is present at the execution of the deeds and, by her silence, acquiesces in the instructions given by the husband to the trustee.

Bohle v Brooks, 225-980; 282 NW 351

Escrow delivery—life estate reserved. Delivery of a deed to a trustee for redelivery to grantee after grantor's death reserves a life estate in the grantor, with title immediately passing to grantee, but with his right to possession and enjoyment of land therein conveyed postponed until grantor's death.

Bohle v Brooks, 225-980; 282 NW 351

Admission by nominal defendant not binding on principal defendant—guardianship. A wife seeking to quiet title in herself by virtue of a deed from her deceased husband, recorded by a trustee after the husband's death, must prevail on the strength of her own title as opposed by her insane son's title, obtained through a deed from her, also in the hands of the trustee, the two deeds being executed at the same time; but she gains nothing because the trustee concedes her title, when the real party in interest, the son, through his guardian, made no such admission in his separate answer.

Bohle v Brooks, 225-980; 282 NW 351

Resulting trust denied—deed from father to son—conduct of parties. In a partition action involving a decedent's property, tried on issues raised by defendant's cross-petition, alleging that another property of decedent, which had been deeded by decedent to one of his sons, should be included in the partition action—in the absence of fraud—such deed therefor will not be set aside on the theory of a resulting trust in favor of the decedent's estate, when there is no evidence that either the grantor or grantee so considered it altho they both lived several years after the deed was made.

Gilligan v Jones, 226-86; 283 NW 434

When life estate not subject to sale. A trust agreement and a deed of conveyance accompanying it, executed as security for a named debt, and granting the trustee immediate possession with right and duty to apply the rents to the secured debt, may not be foreclosed and the grantor's life estate sold, when the trust agreement and conveyance (1) recite the grantor's interest as a life estate only, but (2) contain no agreement or inference that the trustee may alienate said life estate.

In re Barnett, 217-187; 251 NW 59

Execution sale purchaser—buying tax certificates — remainderman unaffected. Where a judgment creditor purchases a life estate at execution sale and then purchases tax certificates outstanding against such life estate he is merely redeeming the taxes and cannot acquire any interest adverse to the remainderman.

Rich v Allen, 226-1304; 286 NW 434

Life tenant—duty to pay taxes. It is the duty of a life tenant to pay taxes.

Kinnett v Ritchie, 223-543; 273 NW 175
Rich v Allen, 226-1304; 286 NW 434

Taxes paid by life tenant—heirs cannot recover from remainderman. Heirs of a life tenant, who acquired life estate at execution sale, cannot recover from the remainderman, contribution for delinquent taxes paid on life estate which accrued prior to execution sale, since it is the duty of life tenant to pay taxes.

Rich v Allen, 226-1304; 286 NW 434

Transfers taxable—life reservation, by grantor, of income. Section 7307, C., '24, declaring that property passing by a "transfer made or intended to take effect in possession or enjoyment after the death of the grantor or donor" is subject to an inheritance or transfer tax, embraces property which passes by a conveyance in trust in which the grantor or donor reserves unto himself, during his lifetime, the net annual income of the conveyed property; and this is true even tho said section is later so amended as to specifically declare the above to be the effect of such a reservation.

In re Toy, 220-825; 263 NW 501

Administrator liable only for funds in hands of life tenant. Administrator who was garnished by judgment creditor of decedent's widow, who was life tenant, held liable only for property constituting income of life estate which was in his hands at time of service of notice of garnishment, and not for such income that might come into his hands thereafter.

Yoss v Sampson, (NOR); 269 NW 22

III FIXTURES INVOLVED

Essential elements—intent controlling. The essential elements in determining whether a chattel is a fixture are (1) actual annexation to the realty, (2) the use or purpose to which that part of the realty is appropriated, and (3) the intent of the party making the annexation to make a permanent accession to the freehold. The latter, being the most controlling factor, is determined from the expressed inten-

III FIXTURES INVOLVED—concluded

tion or by the facts and circumstances surrounding the annexation.

Equitable v Chapman, 225-988; 282 NW 355

Intent in making annexation. The particular method of attaching a thing to the realty becomes quite inconsequential when the parties admit that it was bought, sold, and erected with the mutual intent of having it become a fixture.

O'Bryon v Weatherly, 201-190; 206 NW 828

Intent and purpose in making annexation. Buildings resting solely on beveled skids, to which they are securely attached in the process of construction, and therefore capable of being moved from place to place, are fixtures, when they are appropriate and essential to the successful use of the land upon which they rest and to which they relate, and when they were placed upon said land with intent to make them permanent structures on the land.

College v Crain, 211-1343; 235 NW 731

Steam boiler and bake oven. A steam boiler weighing a ton and a half becomes a fixture—a part of the realty—(1) when set on a cement foundation, (2) when it is so large that when installed it cannot be removed from the building without removing a portion of the wall of the building, and (3) when it is connected with a bake oven and with various radiators throughout the building; likewise a bake oven weighing eleven tons (1) when set upon a cement foundation without fastenings other than its own weight, and (2) when so built into the building as seemingly to be a part thereof.

Comly v Lehmann, 218-644; 253 NW 501

Removal against mortgagee. A steam boiler and a bake oven so erected on mortgaged real estate that they become fixtures, in lieu of former articles of the same kind, cannot be legally removed, even tho sold under a contract providing for retention of title in the vendor until paid for, when such removal would materially diminish the security of the said mortgagee.

Comly v Lehmann, 218-644; 253 NW 501

Right to remove fixture as against vendor. A dealer who permanently installs a furnace in a house for a subvendee, under a contract that he (the dealer) shall retain title to the furnace and the right to remove it in case of nonpayment, may not lawfully remove the furnace for nonpayment, as against the vendor, who did not expressly or impliedly consent to such installation, and who sold under a written forfeitable contract, which was, subsequent to the installation of the furnace, forfeited and abandoned by both the original vendee and the subvendee.

Des Moines Co. v Holland Co., 204-274; 212 NW 551

Movable farm structures. Movable hog houses and feed bunks on a farm will not constitute fixtures, when to so declare would be contrary to the actual expressed intent of the person who placed them on the farm—a tenant—and contrary to the intent as reflected in the nature of the articles, their use, and the mode of attachment to the realty.

Speer v Donald, 201-569; 207 NW 581

Mortgage foreclosure—effect of decree on pipe line fixtures — damages. A mortgagee, having foreclosed and taken a sheriff's deed, may not require a gas pipe line company to pay for its pipe and fixtures previously installed across the mortgaged premises in addition to the damages for right of way on the theory that the foreclosure decree vested in mortgagee the title to such pipe and fixtures.

Titus Co. v Natural Gas Co., 223-944; 274 NW 68

Eminent domain—compensation—fixtures on mortgaged premises—res judicata. In a proceeding to condemn right of way for a gas pipe line, the fact that the pipe was already installed under an easement which was held in a foreclosure action to be inferior to a prior mortgage, did not thereby give the mortgagee through his foreclosure decree title and ownership of the pipe and fixtures installed on the mortgaged premises, nor is such foreclosure decree res judicata as to title to such pipe and fixtures without in the foreclosure action trying the issue thereon.

Titus Co. v Natural Gas Co., 223-944; 274 NW 68

10043 After-acquired interest—exception.

Future-acquired interest. A conveyance which purports to convey the grantor's "present" interest in land cannot be held to convey an interest subsequently acquired in the land by the grantor.

Lee v Lee, 207-882; 223 NW 888

After-acquired interest in buildings. A grantee of land under a full warranty deed may hold the buildings on the land even tho, unbeknown to him when he contracted for the land, the grantor did not own said buildings, it appearing that, since the execution of the deed, the grantor did become the owner of said buildings.

Schiltz v Ferguson, 210-677; 231 NW 358

Remedies of purchaser—right to lien. The contracting purchaser of land who rescinds, because the contracting vendor has no title whatever, is nevertheless entitled to a lien on the land for payments advanced in case the vendor, subsequent to the rescission, acquires such title.

Dolliver v Elmer, 220-348; 260 NW 85

10045 Future estates.

Estates created by will. See under §11846 (V)

Discussion. See 3 ILB 133—Possibilities of reverter after determinable fees; 3 ILB 170—Conveyances to take effect on death of grantor; 6 ILB 198—Freeholds in future; 8 ILB 104—Future interests in personalty; 18 ILR 289—Modern classification; 21 ILR 1—Conversion of use into a legal interest; 22 ILR 437; 23 ILR 1; 24 ILR 1, 635; 25 ILR 1, 707—Alienability and perpetuities; 22 ILR 696—Alienability—contingent remainders—defeasible fees

Educational and religious purposes—not a conditional limitation. A conditional limitation in a deed is self-operative and determines the period of the existing estate without any act on the part of the person entitled to the next expectant estate, and therefore a deed containing merely a provision for educational and religious purposes is not restricted by a conditional limitation.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

Educational and religious purposes—not condition subsequent. A deed, conveying the title and the fee and containing the single statement "said land to be used for educational purposes and religious purposes only" followed by a warranty but by no words of condition, and no conditions appearing in the circumstances surrounding its execution, does not signify an intention by the grantor to create a condition subsequent which, in case the land is not used as designated or is conveyed by grantee, will upon re-entry by an heir, invest him with title.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

Delivery to trustee—no reservation of right to recall. Where deed is delivered by grantor to a third party with instructions to deliver it to the grantee or record the same upon the death of the grantor, with no reservations of a right to recall the same during the lifetime of the grantor, there is sufficient delivery.

Bohle v Brooks, 225-980; 282 NW 351

Escrow delivery—life estate reserved. Delivery of a deed to a trustee for redelivery to grantee after grantor's death reserves a life estate in the grantor, with title immediately passing to grantee, but with his right to possession and enjoyment of land therein conveyed postponed until grantor's death.

Bohle v Brooks, 225-980; 282 NW 351

Admission by nominal defendant not binding on principal defendant—guardianship. A wife seeking to quiet title in herself by virtue of a deed from her deceased husband, recorded by a trustee after the husband's death, must prevail on the strength of her own title as opposed by her insane son's title, obtained through a deed from her, also in the hands of the trustee, the two deeds being executed at the same time; but she gains nothing because the trustee concedes her title, when the real party in interest, the son, through his guardian, made no such admission in his separate answer.

Bohle v Brooks, 225-980; 282 NW 351

Particular estate. A "particular estate" is an estate for life or for years for the reason that it is only a small part or portion of the inheritance.

Anderson v Anderson, 227-25; 286 NW 446

Death of joint life tenant without issue—remainder over in fee. In a will where father devised realty to surviving spouse for life, then to three named children for life with remainder over in fee per stirpes to their lawful issue, and one of such children died without lawful issue, after mother's death, remainder over of her share, being a one-third of said realty, became intestate property and through the father passed to the two remaining children in fee, subject to payment of taxes and debts against estate of deceased child to the extent of one-third interest in the lapsed estate.

Anderson v Anderson, 227-25; 286 NW 446

Remainder over—absence of issue. In a will where father devised realty to surviving spouse for life, then to three named children for life with remainder over in fee per stirpes to their lawful issue, the fact that there were no grandchildren in being at the time of mother's death did not lapse the remainder so as to cause it to descend intestate and merge with life estate in children, since, at mother's death, the life estate in children was a "particular estate" supporting the contingent remainder, which was not required to vest until termination of such life estate.

Anderson v Anderson, 227-25; 286 NW 446

Remainder over—in fee per stirpes to lawful issue. When a will provides for a devise of realty to wife for life, then to three named children for life as tenants in common and remainder over in fee per stirpes to their lawful issue, held, life estate vested in children after wife's death with contingent remainder over in fee, as provided by statute—the life estates being the particular estate supporting the contingent estate which would vest, upon death of each of testator's named children, in that child's lawful issue, if any.

Anderson v Anderson, 227-25; 286 NW 446

Vested (?) or contingent (?) estate. A will giving a life estate to a sister and the remainder to a nephew receivable immediately upon

sister's death if nephew had reached majority, or if he had not attained majority, providing for a guardianship during minority, creates not a contingent but a vested remainder with only the enjoyment postponed, and as such, on the death of the nephew after reaching majority by marriage, goes to his widow rather than as residuary property in the estate.

Boehm v Rohlfs, 224-226; 276 NW 105

Debt-encumbered remainder—equitable action to enforce. Where a testator devises to his wife a life estate in all his property (which estate she accepts), with remainder to his children, a provision of the will to the specific effect that "all just debts and funeral expenses" of said wife shall be paid out of testator's estate, will enable the wife's creditor, who became such subsequent to the probating of the will and the closing of the estate, and shortly prior to the death of the wife some 30 years later, to maintain an action in equity to establish the debt, and to subject the lands, passing under the will and in the hands of remaindermen, to the satisfaction of said debt.

Diagonal Bank v Nichols, 219-342; 258 NW 700

Special assessments—duty to discharge. As between life tenants and remaindermen, the former, during their tenancy, should pay the interest on special assessments, and the latter should pay the principal; and refunds on such assessments should be distributed in the same proportions.

Cooper v Barton, 208-447; 226 NW 70

10046 Contingent remainders.

Discussion. See 8 ILB 49—Restraints on the alienation of fee; 8 ILB 109—Invalidity of new estates of inheritance; 8 ILB 247—Alienation of contingent interests; 10 ILB 89, 275—Contingent remainder act; 10 ILB 317—Restraints on the alienation of equitable fee; 14 ILR 80—Vested and contingent remainders—executions; 18 ILR 425—Common law estates; 22 ILR 543—Renunciation of life estate; 22 ILR 696—Alienability—contingent remainders—defeasible fees; 22 ILR 437; 23 ILR 1; 24 ILR 1, 635; 25 ILR 1, 707—Alienability and perpetuities; 24 ILR 268—Seizin and possession—title

Vested (?) or contingent (?)—definition. A vested remainder is an estate which passes by will or other conveyance with possession and enjoyment postponed until a particular preceding estate terminates—an estate which is invariably fixed by the will or other conveyance "to remain to certain determinate persons". A remainder is not vested when it is dependent on the grantee being alive when the preceding life tenant dies or re-marries.

Fulton v Fulton, 179-948; 162 NW 253; LRA 1918E, 1080

Saunders v Wilson, 207-526; 220 NW 344; 60 ALR 786

In re Est. Phearman, 211-1137; 232 NW 826; 82 ALR 674

Skelton v Cross, 222-262; 268 NW 499; 109 ALR 129

See Callison v Morris, 123-297; 98 NW 780
Archer v Jacobs, 125-467; 101 NW 195
Shafer v Tereso, 133-342; 110 NW 846
Lingo v Smith, 174-461; 156 NW 402
Atchison v Francis, 182-37; 165 NW 587
Hiller v Herrick, 189-668; 179 NW 113
Moore v Dick, 208-693; 225 NW 845
In re Est. Gordon, 213-6; 236 NW 37
Diagonal Bank v Nichols, 219-342; 258 NW 700

Distinction between a vested and a contingent interest. In an action to partition land, it is not uncertainty of time of enjoyment in the future, but the uncertainty of the right to that enjoyment, which marks difference between a vested and a contingent interest.

Flanagan v Spalti, 225-1231; 282 NW 347

Remainder—contingent (?) or vested (?). The remainder is contingent, in a devise of a life estate to a daughter, with remainder to the "surviving children", if any, of the life tenant at the time of her death; otherwise to certain designated devisees.

Saunders v Wilson, 207-526; 220 NW 344; 60 ALR 786

Vested (?) or contingent (?)—general rule. A remainder must be deemed vested, generally speaking, when a designated taker is living and ready to go into possession instantly upon the termination of the preceding estate, even tho such person may, in the course of time, die prior to the preceding life tenant.

Bogenrief v Law, 222-1303; 271 NW 229

Vested or contingent remainder—transfer and alienation. Remainders, whether vested or contingent, may be transferred, alienated or incumbered.

Bogenrief v Law, 222-1303; 271 NW 229

Vested estates. The estate of a remainderman must be deemed vested upon the probate of a will devising a life estate to testator's wife with remainder to testator's children.

Diagonal Bank v Nichols, 219-342; 258 NW 700

Remainder to class—rule as to vesting. When there is an immediate gift to a class of persons, the gift vests in the members of that class who are existent at the time testator dies, unless a different intention appears from the context of the will. So held where the gift was "to the children living of my brothers and sisters living or dead".

In re Gordon, 213-6; 236 NW 37

Contingency—person not in esse. A remainder, so limited as to take effect in persons not in esse, is a contingent remainder.

Bankers Trust v Garver, 222-196; 268 NW 568

Estate "to heirs of father at death of husband"—vested interest. A will devising a portion of an estate "to the legal heirs of my father to be distributed * * * at the death of my husband" vests this portion in such heirs of the father as were living at the time of testatrix' death—the father being dead at that time.

Flanagan v Spalti, 225-1231; 282 NW 347

Right to possession on expiration of life estate—vested remainder. A person in being who, under a will, would have an immediate right to possession of the lands devised upon the termination of a life tenancy therein provided, has a vested remainder.

Flanagan v Spalti, 225-1231; 282 NW 347

Perpetuities — limitations void ab initio. Testamentary attempts by means of limitations to create in property contingent interests or estates, which will not necessarily become vested within the period of time prescribed by the statute prohibiting perpetuities, are futile, all such limitations being void ab initio. (§10127, C., '35.)

Bankers Tr. Co. v Garver, 222-196; 268 NW 568

Unborn contingent remaindermen. The contingent interest in land of the unborn children of a life tenant arising out of the terms of a testamentary devise is not cut off by a decree in an action to quiet title by making the life tenant a party defendant as a "representative" of such unborn children; especially so when said life tenant assumes a hostile attitude toward said unborn children.

Mennig v Graves, 211-758; 234 NW 189

Merger of life estate and contingent remainder into fee. The grantee of a life estate, on condition, however, that if grantee violates any one of named prohibited acts the said estate shall ipso facto instantly terminate, and the fee pass to grantee's issue, or to named remaindermen if grantee then has no issue, may, if without issue, take a conveyance by warranty deed from said contingent remaindermen of all their present and possible future interest in the land, and thereby merge the life estate and contingent remainders into a fee in himself.

Thorsen v Long, 212-1073; 237 NW 515

Interest of remainderman passes to trustee. The interest of a bankrupt as a real estate remainderman, whether the interest be vested or contingent, passes to the trustee in bankruptcy.

Noonan v Bank, 211-401; 233 NW 487

Attachment or execution levy. A contingent remainder—contingent because of the uncertainty of the person who will take the property—is not subject to attachment or execution levy and sale.

Saunders v Wilson, 207-526; 220 NW 344; 60 ALR 786

Sale under execution. A contingent remainder, being legally mortgageable, is necessarily subject to sale on mortgage foreclosure execution.

John Hancock Ins. v Dower, 222-1377; 271 NW 193

Protection from execution sale. Principle reaffirmed that a contingent remainderman may maintain an action to protect his contingent interest from execution sale.

Skelton v Cross, 222-262; 268 NW 499; 109 ALR 129

10048 Defeating expectant estate.

Discussion. See 10 ILB 314—Destruction of contingent remainders by merger; 22 ILR 268—Tax on trust income; 22 ILR 696—Alienability — contingent remainders — defeasible fees; 22 ILR 437; 23 ILR 1; 24 ILR 1, 635; 25 ILR 1, 707—Alienability and perpetuities

Merger of life estate and contingent remainder into fee. The grantee of a life estate, on condition, however, that if grantee violates any one of named prohibited acts the said estate shall ipso facto instantly terminate, and the fee pass to grantee's issue, or to named remaindermen if grantee then has no issue, may, if without issue, take a conveyance by warranty deed from said contingent remaindermen of all their present and possible future interest in the land, and thereby merge the life estate and contingent remainders into a fee in himself.

Thorsen v Long, 212-1073; 237 NW 515

Establishing trust to defeat heir's judgment creditors. When a will devised all of testatrix's property to daughter in trust, directing trustee to make a monthly payment to a third party and to transfer a one-fourth interest in the trust estate to each of two grandchildren when they reached a certain age, and providing that daughter should have a one-half interest in the estate during her life only in the event obligations to her judgment creditors were barred or satisfied, such will established a trust, and did not repose entire beneficial interest in daughter. Nor was the trust extinguished by a merger of daughter's legal and equitable estate so that property could be subjected to satisfaction of creditor's judgments, because in equity the doctrine of merger will not be invoked if it would frustrate the testatrix's expressed intentions or if there is some other reason for keeping the estates separate.

Freier v Longnecker, 227-366; 288 NW 444

10049 Declarations of trust.

ANALYSIS

Bank deposits—receivership—trusts. See under §9239
Conveyance to husband—effect on dower. See under §10447
Deeds generally. See under §10084
Deeds of trust (as mortgages). See under §§12363, 12373
Equitable proceedings generally. See under §10941
Pledgee as trustee. See under Ch 524, Note 1
Testamentary trusts. See under §11876

I IN GENERAL

Discussion. See 18 ILR 43—Continuation of business; 19 ILR 574—Charitable bequest—construction; 25 ILR 836—Action against trustee—attorney paid from trust funds

Cy pres doctrine invoked by state in equity court. A public charity, created by trust, about to fail, is properly represented in court of equity to invoke jurisdiction to apply cy pres doctrine by the state or some authorized agency thereof.

Schell v Leander Clark College, 10 F 2d, 542

Trust property for educational purposes. Property transferred to a county in trust for the establishment of a prescribed seminary of learning, and duly accepted by the board of supervisors on behalf of the county, becomes a special part of the school fund of the county, and remains such, tho the legal title be transferred to court-appointed trustees for managerial purposes. It follows that, being county property and devoted to public use and not held for pecuniary profit, said property is exempt from taxation (§6944, subsec. 2, C., '35), even tho no action has been taken to actually execute the trust.

McColl v Dallas County, 220-434; 262 NW 824

Charitable trust to county for paving roads. A first codicil devising an estate to trustees to be administered under county supervision in building roads, and a second codicil appointing one executor to aid the county in building roads, created a lawful charitable trust with the county as trustee and taxpayers as beneficiaries which was not necessarily invalid because the executor was given administrative duties in the road construction in violation of statute.

Blackford v Anderson, 226-1138; 286 NW 735

Trust fund doctrine—unpaid stock subscription. A subscriber for corporate stock who is not a promoter of the purported corporation is not liable on his fraud-induced, unpaid stock subscription contract in an action by the receiver of the corporation when the charter of the corporation has been judicially annulled, subsequent to the subscription contract, by the state, for fraud perpetrated on the state in obtaining the charter; in other words, the so-called English "equitable trust fund doctrine" does not apply to such a condition.

Fundamental reason. Such purported corporation, having been conceived, born, and nurtured in fraud, was never, in truth or fact, a corporation de jure or de facto, in a business sense.

State v Packing Co., 216-1344; 249 NW 761; 90 ALR 1339

Augmentation theory. The assets of an insolvent may be said to have been augmented by a trust fund whenever the trust owner is able to point out the trust property, either by actual proof or by legal presumption of fact.

Andrew v Bank, 204-565; 215 NW 742

Equitable preference—pro rata distribution. A trust fund must be prorated among the established claims when the fund is insufficient to pay all in full.

Leach v Bank, 205-114; 213 NW 414; 217 NW 437; 56 ALR 801

Following trust funds into property. A cestui que trust owns the property into which he can trace dissipated trust funds.

Mandel v Siverly, 213-109; 238 NW 596

Impressing trust on proceeds of lienable property—limitation. An action to impress a trust on the proceeds of property on which a landlord had a lien, against a depository who had full knowledge that the sale had been had for the benefit of the landlord, is not barred immediately after the lapse of six months from the termination of the lease.

Andrew v Bank, 208-1184; 225 NW 957

Lien—sale of property—impressing trust on proceeds. Where property subject in part to a lien for rent was sold by the tenant-owner for the benefit of the landlord, and at public sale, in order to save court costs, a depository of the proceeds who was also a creditor of the tenant's, and who had full knowledge of the purpose of the sale, may not complain that the court impressed a trust on such proceeds to the amount of the lien which the landlord had on the property.

Andrew v Bank, 208-1184; 225 NW 957

Assessment certificates create no trust relationship. A city or town in issuing valid special assessment certificates for street improvements and in levying valid assessments for the payment of the certificates, does not constitute itself a trustee for said certificate holders.

Stockholders Inv. Co. v Brooklyn, 216-693; 246 NW 826

Deed and agreement creating trust. Where a husband conveyed his separate property to wife pursuant to an agreement providing that upon her death property was to go to a granddaughter either by will or deed, and where, after consummation of this transaction, the husband tore up the original copy of the agreement and executed an absolute conveyance of the same property to his wife, held, that the original deed and agreement, which were simultaneously executed, must be construed as one instrument, and that an irrevocable trust was created in favor of the granddaughter since no power of revocation was expressly reserved.

Young v Young-Wishard, 227-431; 288 NW 420

Prohibitory statute—excludes trust conveyance. Where a husband conveyed his separate property to wife pursuant to agreement providing that, upon her death, property was to go to granddaughter either by will or proper deed of conveyance, such an agreement was not a contract dealing primarily with the inchoate right of dower of the wife and therefore was not void under statute providing that a husband or wife has no interest in the property owned by the other which can be the subject of contract between them, since that statute prohibits only such transactions when they relate directly to dower rights.

Young v Young-Wishard, 227-431; 288 NW 420

Partnership and trust—construed separately. A trust deed and a partnership agreement, altho executed at the same time, cannot be construed together, when the parties thereto and the purposes thereof are not the same.

Lunt v Van Gorden, 224-1323; 278 NW 631

Establishing trust to defeat heir's judgment creditors. When a will devised all of testatrix's property to daughter in trust, directing trustee to make a monthly payment to a third party and to transfer a one-fourth interest in the trust estate to each of two grandchildren when they reached a certain age, and providing that daughter should have a one-half interest in the estate during her life only in the event obligations to her judgment creditors were barred or satisfied, such will established a trust, and did not repose entire beneficial interest in daughter. Nor was the trust extinguished by a merger of daughter's legal and equitable estate so that property could be subjected to satisfaction of creditor's judgments, because in equity the doctrine of merger will not be invoked if it would frustrate the testatrix's expressed intentions or if there is some other reason for keeping the estates separate.

Freier v Longnecker, 227-366; 288 NW 444

Validity—nonright to question. A creditor may not have his claim decreed a lien on the property of a nonfraudulent trust which the debtor has created for the specific purpose of discharging an obligation as to which the said creditor is a stranger; and especially is this true when the said creditor fails to show that he was injured by the creation of said trust.

Clark v Langerak, 205-748; 218 NW 280

Enforcement—loss of right against innocent grantee. The owner of an equitable interest in land loses all right (1) to establish his interest as a trust in the land, and (2) to personal judgment against the grantees of the land, when, after refusing a proffered deed to the land, he knowingly permits the legal title holder to convey the land by quitclaim deed and for a valuable consideration to another equitably interested party who had no notice or knowledge of said first party's claim; and especially is this true when the consideration for the quitclaim deed was at all times a senior claim.

Brenton Bros. v Bissell, 214-175; 239 NW 14

Estoppel—knowledge and acceptance of benefits. Beneficiaries of a trust will not be heard in equity to assert the invalidity of a lease entered into by their trustee, when they (1) had full general knowledge thereof, (2) long acquiesced therein, (3) accepted and retained the rentals arising from the lease, and (4) knew at all times that the lessee was relying thereon at great expense.

Bowman v Swanwood Co., 201-1236; 207 NW 591

Transaction with deceased—intervenor—competency. In equity action to quiet title and to declare a trust in realty, an intervenor who claims same relief as plaintiff may not testify to alleged oral agreement between parties, some of whom are deceased.

Wagner v Wagner, (NOR); 224 NW 583

Rights of legatees—election—notice—right of wife as cestui to ignore. A wife who ignores a notice requiring her to elect whether she would take under her husband's will does not estop herself from alleging and proving that the property which the husband assumed to devise was held by him in trust for her.

Spring v Spring, 210-1124; 229 NW 147

Computation of period of limitation—repudiation necessary to start statute. The statute of limitation does not commence to run against the beneficiary of an express and continuing trust until the trustee directly repudiates the trust. Evidence held insufficient to show repudiation at such remote date as to bar an action for accounting. So held where the grantee of land—the trustee—took title under written agreement to account to grantor for one-half of the profits which might be realized on a sale.

Howes v Sutton, 221-1326; 268 NW 164

I IN GENERAL—concluded

Shelley's case inapplicable. The so-called "rule in Shelley's case" has no application to a deed of conveyance which creates a trust in the grantee for the benefit of his heirs.

Hibler v Hibler, 208-586; 226 NW 8

Transfers taxable—life reservation, by grantor, of income. The statutory declaration of §7307, C., '24, that property passing by a "transfer made or intended to take effect in possession or enjoyment after the death of the grantor or donor" is subject to an inheritance or transfer tax, embraces property which passes by a conveyance in trust in which the grantor or donor reserves unto himself, during his lifetime, the net annual income of the conveyed property; and this is true even tho said section is later so amended as to specifically declare the above to be the effect of such a reservation.

In re Toy, 220-825; 263 NW 501

Note—consideration—absence of—burden of proof. The beneficiaries of a trust, defendants in an action on a note and mortgage executed by their authorized agent, have the burden to show want of consideration.

Daries v Hart, 214-1312; 243 NW 527

Creation—evidence—sufficiency. Evidence held quite insufficient to create a trust in funds passing through the hands of the defendant.

Federal Sur. v Morris Plan, 213-464; 239 NW 99

Oral evidence—when competent. Parol evidence is admissible to establish and show the nature of an admitted, or partially or wholly executed trust.

Andrew v Bank, 209-1149; 229 NW 819

Presumption from possession. A mere preponderance of the evidence is not sufficient to overcome the presumption arising from the possession of the legal title to real property.

Wagner v Wagner, 208-1004; 224 NW 583

II EXPRESS TRUSTS

Discussion. See 12 ILR 66—Beneficiaries in charitable trusts

Equality of benefits—ambiguous provision. The fact that various provisions of a conveyance in trust clearly require, under named conditions, equality of benefits between beneficiaries, may very materially influence the construction of other provisions which are ambiguous as to equality of benefits under other and different conditions.

Dunn v Dunn, 219-349; 258 NW 695

Designation of devisee. The fact that the name of the beneficiary of a religious or charitable trust as specified in a will is different than the name of the claimant of the devise becomes unimportant, in the face of ample testimony that the designated beneficiary and the claimant are one and the same institution.

Ross v Seminary, 204-648; 215 NW 710

Establishing trust by oral agreement—prohibitory statute. Under the Iowa statute an express trust cannot be established by a parol agreement, but such statute is inapplicable to constructive trusts.

D. M. Terminal v D. M. Union, 52 F 2d, 616

When parol evidence competent. Principle reaffirmed that parol evidence is competent to impress an express trust upon an absolute deed, provided the trust has been partially executed.

Hardy v Daum, 219-982; 259 NW 561

Conveyance by grantor to himself as trustee—effect. A conveyance in which the grantor as an individual divests himself, by comprehensive and unequivocal language, of all interest in the conveyed property and casts said property upon himself (and successors) as trustee for a specified purpose, and containing no clause authorizing a revocation, must be deemed to create an absolute and irrevocable trust.

Dunn v Dunn, 219-349; 258 NW 695

Trustee and beneficiary as same person—conveyance to self-quieting title. A sister, as the only heir in her brother's estate, who conveys by a trust instrument to a nonrelated person her entire interest in such estate, in exchange for the trustee providing her life support, and upon fulfillment of which the trustee became the beneficiary and was directed to convey the balance of the property from himself, as a trustee, to himself, individually, evidence, in trustee-beneficiary's quieting title action against settlor's heirs, held to establish soundness of mind and freedom of action by settlor in executing the trust instrument.

Goodman v Bauer, 225-1086; 281 NW 448

Testamentary trusts. A devise for charitable purposes tho apparently uncertain will be enforced if the court can from extrinsic evidence discover the testator's meaning.

In re Durham, 203-497; 211 NW 358

Testamentary trust. A testamentary devise of a charitable trust the object and beneficiaries of which are designated with any reasonable certainty will be sustained.

Martinson v Jacobson, 200-1054; 205 NW 849

Testamentary trust — validity. A testamentary trust will be sustained when the intent of testator is evident, even tho the bequest runs to an unincorporated entity.

Meeker v Lawrence, 203-409; 212 NW 688

Powers—execution of notes. Power in a testamentary trustee to invest and reinvest

the subject-matter of the trust and generally to do substantially whatever the testator might do, were he alive, necessarily embraces the power to purchase lands and to execute promissory notes therefor.

Arnette v Watson, 203-552; 213 NW 270

Nontermination by beneficiaries. The beneficiaries of a testamentary trust may not, by mutual agreement, even tho approved and confirmed by the court, terminate the trust and accelerate the final vesting of the corpus of the trust, when the testator has clearly demonstrated a contrary intent.

Windsor v Barnett, 201-1226; 207 NW 362

Renunciation of trust by wife—effect. A testamentary trust embracing all of testator's property, and for the benefit of the testator's wife and other named beneficiaries in named proportions, is not terminated by the renunciation of the will by the wife. The trust will proceed as to two-thirds of the property, for the benefit of the remaining beneficiaries.

Windsor v Barnett, 201-1226; 207 NW 362

Nontestamentary instrument. A declaration of trust in and over real estate for the benefit of the trustor and named beneficiaries, and a contemporaneously executed and delivered warranty deed to the same property to the trustee, cannot be deemed a will, even tho the trustor-grantor reserves in the declaration of trust complete control, management, and dominion over the property during his lifetime, even to the power to revoke the trust and to demand a reconveyance, or to dispose of the property by testament.

Keck v McKinstry, 206-1121; 221 NW 851

Nonalienable interest. No present alienable interest which can be made subject to a lien by the creditor of a cestui que trust son passes to the son under a testamentary trust which is created for the express purpose of maintaining, supporting, and educating testator's son, wife, and family, with proviso (1) that the income of the trust fund shall be paid periodically to the wife of said son, and (2) that the corpus of the trust shall be paid, at a named future date, to both the son and wife, with direction, in substance, for the son and wife thereafter to continue the trust for the benefit of any of their then surviving children.

Damhoff v Shambaugh, 200-1155; 206 NW 248

Charities—devise—power of municipality to take. Devises and bequests for charitable purposes are such favorites of the law that "they will not be construed void if, by law, they can be made good". Will construed, and held that the conditions attending a devise and bequest to a municipality of a charitable trust in the form of a free public library, were conditions subsequent, and not conditions precedent, to the vesting of said trust, and that said conditions were within the legal power of the municipality to accept—under prescribed statutory procedure—and perform.

In re Nugen, 223-428; 272 NW 638

Voluntary association — personal liability. Individuals who voluntarily associate themselves in a business venture in the form of a trust are each personally liable for the authorized acts of their agent.

Daries v Hart, 214-1312; 243 NW 527

Educational and religious purposes—declaration of purpose or trust. A covenant in a deed specifying use for educational and religious purposes is only a "declaration of purpose" or a trust.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

Indefinitely named charitable beneficiary. A testamentary devise in trust to "some old ladies' home" in a named locality necessarily implies a substantial institution devoted to said purposes, and manifestly, the court will not be compelled to bestow such bounty only on one of those who apply for such bounty.

In re Clifton, 207-71; 218 NW 926

Joint purchase of property. When the beneficiaries of a trust in real property and in the long-time lease thereon are given the right either to continue to receive the rent under the lease or to terminate the lease by jointly purchasing of the lessee the building which the lessee has erected on the land, under the lease, then the assignees of the beneficiaries must likewise act jointly in the purchase of the building.

Fleming v Casady, 202-1094; 211 NW 488

Alimony—property settlement under trust agreement. A property settlement under an irrevocable trust agreement made by husband and wife previous to and confirmed in divorce decree discharged husband's obligation for further support and precluded right to further alimony.

Fitch v Com. of Internal Rev., 103 F 2d, 702

Trustor's life support—gift "when funds are available". Where a will and trust instrument, designed to support two trustors as long as either one of them lived, contains also a $5,000 gift for each of two named beneficiaries, payable as soon as funds are available, such gifts may not be paid until after the death of last trustor, when it appears uncertain from the encumbered status of the trusteed property whether or not the property is adequate to provide the required support for last surviving trustor, and even then the gifts or legacies with interest thereon are not due until one year after death of the last trustor.

In re Jeffrey, 225-316; 280 NW 536

II EXPRESS TRUSTS—concluded

Trust agreement—evidence insufficient to set aside. Evidence held insufficient to entitle trustor to set aside trust agreement and conveyances of property to trustees pursuant thereto on ground of mismanagement of trust property by trustees in failing to pay trustor full amount of monthly payments provided under trust agreement.

Hatt v Hatt, (NOR); 265 NW 640

Foreclosure—when life estate not subject to sale. A trust agreement and a deed of conveyance accompanying it, executed as security for a named debt, and granting the trustee immediate possession with right and duty to apply the rents to the secured debt, may not be foreclosed and the grantor's life estate sold, when the trust agreement and conveyance recite, (1) the grantor's interest as a life estate only, but (2) contain no agreement or inference that the trustee may alienate said life estate.

In re Barnett, 217-187; 251 NW 59

Relief—decree beyond issues. In a quiet title action by grantee against grantor's heir and successor in interest, a decree based on a deed containing a declaration of purpose (educational and religious use), goes beyond the issues when it finds the grantee to be the "sole and absolute owner, in fee simple"; the effect being to adjudicate the rights of persons, not before the court, who may have trust interests under the terms in the deed.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

III RESULTING TRUSTS

Discussion. See 6 ILB 177—Cy pres doctrine

Resulting trust—insufficient basis. A resulting trust cannot be based on facts showing the purchase of land and the taking of title in the name of the purchaser, and the long subsequent borrowing of money with which to pay the purchase price.

Andrew v Martin, 218-19; 254 NW 67

Devise and bequest—resulting trust not created. Heirs and devisees are not required to give a consideration for devises and bequests to them; consequently, a resulting trust cannot be impressed on property conveyed to them, on the theory that they are not bona fide purchasers, when the property was not subject to the lien before conveyed.

Evans v Cole, 225-756; 281 NW 230

Payment by one and title in another. Principle reaffirmed that a husband who takes title to real estate which has been wholly paid for by the wife will be deemed to hold the title in resulting trust for the wife.

State Bk. v Nolan, 201-722; 207 NW 745

Consideration paid by one and deed taken in name of another. Where, upon the purchase of property, the consideration is paid by one, and the legal title is conveyed to another, a resulting trust is thereby raised in favor of the one paying the consideration.

Spring v Spring, 210-1124; 229 NW 147

Warranty deed and contemporaneous trust. A warranty deed which absolutely and unconditionally conveys real estate to the grantee and to "his heirs and assigns forever" will, in equity, be restricted, in its apparently limitless legal effect and operation, to such extent as will bring it into harmony with the terms of a contemporaneously executed instrument of trust covering the same property, which trust the grantee has acquiesced in and agreed to carry out as trustee.

Keck v McKinstry, 206-1121; 221 NW 851

Resulting trust denied—deed from father to son—conduct of parties. In a partition action involving a decedent's property, tried on issues raised by defendant's cross-petition, alleging that another property of decedent, which had been deeded by decedent to one of his sons, should be included in the partition action—in the absence of fraud—such deed therefor will not be set aside on the theory of a resulting trust in favor of the decedent's estate, when there is no evidence that either the grantor or grantee so considered it altho they both lived several years after the deed was made.

Gilligan v Jones, 226-86; 283 NW 434

Wife's funds in husband's realty. A deceased wife's administrator, seeking to impress a resulting trust on her surviving second husband's realty, held by him for more than 30 years, has the burden to prove the trust, not by a mere preponderance, but by clear, satisfactory evidence. Evidence held insufficient where alleged funds of wife came from wife's land, whose value arose largely from husband's improvements thereon, and which funds were turned over by wife to husband, commingled with his money and used to purchase realty, later exchanged for the property upon which a trust impressment is sought.

Keshlear v Banner, 225-471; 280 NW 631

Deed and agreement creating trust. Where a husband conveyed his separate property to wife pursuant to an agreement providing that upon her death property was to go to a granddaughter either by will or deed, and where, after consummation of this transaction, the husband tore up the original copy of the agreement and executed an absolute conveyance of the same property to his wife, held, that the original deed and agreement, which were simultaneously executed, must be construed as one instrument, and that an irrevocable trust was created in favor of the granddaughter

since no power of revocation was expressly reserved.

Young v Young-Wishard, 227-431; 288 NW 420

Resulting trust—fraud—elements. The plea that a trust resulted against one who fraudulently obtained the property necessitates proof of representation, reliance thereon, falsity thereof, scienter, deception and injury.

Andrew v Bank, 205-244; 216 NW 551

Resulting trust—surety as cestui que. Where a party, by his promissory note and by the aid of a surety thereon, (1) effects a loan and with the proceeds thereof buys land of an equitable owner who, himself, had not yet paid for the land, and (2) where said borrower and purchaser later loses all interest in said land, the dual facts (1) that the surety was compelled to pay said note, and (2) that said equitable owner employed the money—the proceeds of said loan—in carrying out his contract of purchase, will not enable said surety to establish a resulting trust in said land against said former equitable owner.

Harnagel v Fett, 215-868; 244 NW 704

Banking corporations — making collections. A bank upon making a collection for its implied principal, under authority to "collect and remit", takes no title to the collected funds, but immediately becomes a trustee thereof and remains such trustee until said funds are paid over to the principal. It follows that such relationship is not affected in the least by the unauthorized act of the bank in issuing and mailing to the principal a certificate of deposit for the amount of the collection.

Andrew v Bank, 217-232; 251 NW 860

Fraudulent conveyance—dower nonexistent. Where a debtor, as grantor, made a conveyance to sister-in-law without consideration in order to escape payment of judgment which he feared would be rendered against him, and where 25 days after settlement of claim for which grantor was being sued she reconveyed without consideration, sister-in-law obtained no beneficial interest in the property. Hence, her husband could not claim a one-third interest in property upon her death, altho he signed deed of reconveyance only as a witness.

Renne v Tumbleson, 227-159; 287 NW 839

Establishing trust to defeat heir's judgment creditors. When a will devised all of testatrix's property to daughter in trust, directing trustee to make a monthly payment to a third party and to transfer a one-fourth interest in the trust estate to each of two grandchildren when they reached a certain age, and providing that daughter should have a one-half interest in the estate during her life only in the event obligations to her judgment creditors were barred or satisfied, such will established a trust, and did not repose entire beneficial interest in daughter. Nor was the trust extinguished by a merger of daughter's legal and equitable estate so that property could be subjected to satisfaction of creditor's judgments, because in equity the doctrine of merger will not be invoked if it would frustrate the testatrix's expressed intentions or if there is some other reason for keeping the estates separate.

Freier v Longnecker, 227-366; 288 NW 444

Voluntary deed to persons entitled to property. When land, which was part of an estate, was purchased by decedent's two sons who paid no cash consideration, but occupied, paying rent to the other heirs, and who later, in order to protect the land from creditors, deeded it to two sisters who did not know of the indebtedness of the brothers, and when the sons made a contract with the sisters at the time of the deed protecting the other heirs in case the land were sold, a creditor of one of the brothers who knew of the rent payments and knew of the deed, but made no objection, could neither have it set aside as a fraudulent conveyance nor have the real estate subjected to a judgment against the debtor-brother, as the deed and contract conveyed the mere legal title to the sisters in trust for the heirs who were the persons entitled to the property.

Lakin v Eittreim, 227-882; 289 NW 433

Evidence—sufficiency. A resulting trust will be established only on testimony which is clear and certain.

Irving v Grimes, 208-298; 225 NW 453
See Kortum v Kortum, 211-729; 234 NW 220

Evidence to establish in order to justify compulsory deed. The court will order an executor to execute a deed to real property, and to the proper person, on proof that the deceased personally owned no interest in the property and was holding the legal title in consequence of a resulting trust; but the evidence must be so explicit and decisive as to leave the existence of no essential fact to conjecture, or to remote and uncertain inference.

In re Moore, 211-804; 232 NW 729

Avoidance of statute of frauds. Parol evidence is competent to show that the titleholder to land has admitted he was to hold such title only until such time as he was reimbursed for money expended on the property, and that such arrangement has been in part carried out.

Neilly v Hennessey, 208-1338; 220 NW 47

Unconditional conveyance—parol evidence. A parol, unexecuted, and nonadmitted trust cannot be ingrafted on an unconditional conveyance in fee of real estate.

Hospers v Watts, 209-1193; 229 NW 844

Parol to prove execution of unenforceable trust. It is true that one claiming to be the absolute owner of land may not, as against the

III RESULTING TRUSTS—concluded

grantee in a conveyance, prove, by parol evidence, that when the conveyance was executed grantee's name was inserted in the conveyance as grantee under an oral agreement that said substituted grantee would hold said land solely and exclusively for said secret grantee, but said parties may show by parol evidence, as against a stranger, that said oral agreement was actually carried out and executed by said parties.

Bates v Zehnpfennig, 220-164; 262 NW 141

Estoppel. A party estops himself from ingrafting a trust on an absolute conveyance of real estate after he has stood by and allowed the grantee to treat the property as his own and to pledge it to grantee's innocent creditors.

Hospers v Watts, 209-1193; 229 NW 844

Waiver of trust relation. Any possible presumption of a resulting trust in a husband who pays for realty conveyed to the wife cannot prevail against the act of the husband, after the death of the wife, in founding an action in behalf of himself and his children on the solemn declaration that he and the children inherited the property from the wife and mother.

Campbell v Humphreys, 202-472; 210 NW 558

IV CONSTRUCTIVE TRUSTS

Discussion. See 2 ILB 78—Following trust money

Applicability of statute. This statute has no application to constructive or resulting trusts.

Durband v Nicholson, 205-1264; 216 NW 278; 219 NW 318

Constructive trusts solely cognizable in equity. An action to establish and enforce a constructive trust, e.g., an action to recover funds to which plaintiff has equitable title against a defendant who holds the legal title, must, on timely motion by the defendant, be tried as an equitable action, (1) even tho plaintiff disclaims all equitable relief, and prays for a money judgment only, and (2) even tho, under plaintiff's allegation defendant obtained possession of the funds by fraud practiced on a third party, but under circumstances excluding any inference or presumption that he received the funds for the use and benefit of plaintiff.

Markworth v Bank, 212-954; 237 NW 471

Fraud between banks—constructive trust not established. The plaintiff bank, in failing to establish that the defendant bank was guilty of fraudulent conduct in aiding the plaintiff's cashier to conceal a shortage in his accounts, thereby failed to establish any basis for a constructive trust against the assets of the defendant bank for the amount of the shortage, or a basis for requiring the defendant bank to be held to account for the loss.

Community Sav. Bk. v Gaughen, 228- ; 289 NW 727

Constructive trusts—when existent. A constructive trust arises where a conveyance of real estate is without consideration and:

1. It appears that the grantee was not intended to take beneficially, or as a gift; or
2. Where the conveyance is fraud-induced.

This is true irrespective of the statute which renders parol evidence incompetent to establish an unexecuted express trust in real property.

Wellman v Wellman, 206-445; 220 NW 82

Constructive trust—secret intent not to perform condition. A grantee of land who receives the conveyance on the oral condition that the land will be reconveyed to grantor on the happening of a named event, e. g., on return from a trip abroad, and who secretly intends not to comply with said condition, will be deemed in equity a trustee ex maleficio.

Carlson v Smith, 213-231; 236 NW 387; 80 ALR 186

Constructive trust—fraud by grantee. Where grantee obtained title by false assurance that he would hold title as trustee to protect grantor's ownership, and immediately placed a mortgage on the property for his own benefit after obtaining title, a constructive trust was created and grantee became a trustee ex maleficio for benefit of grantor.

Rance v Gaddis, 226-531; 284 NW 468

Fraud in procuring deed. Where deed containing recital of consideration was obtained by fraud, the grantor is not precluded as a matter of law from showing a constructive trust arising from the fraud, and equity will allow such showing to be made by parol evidence, but such evidence must be clear and satisfactory.

Rance v Gaddis, 226-531; 284 NW 468

Constructive trusts—fiduciary relation—burden of proof. One who exercises exclusive management of the funds of an aged, sick, infirm, illiterate, inexperienced, unadvised, and mentally dependent person (especially a relative) and assumes a position of trust and confidence toward such person, and thereby acquires from such person, either for himself or for members of his family, a profit and benefit, will be presumed to do so fraudulently and must establish that such profit and benefit was acquired with the full, free, and intelligent consent of such dependent person, and if he fails in such proof he will be held to account for all such benefits.

Burger v Krall, 211-1160; 235 NW 318

Fraudulent purchase of property. An owner of real estate who has been fraudulently induced to convey the same because of the

secret intent of the supposedly solvent purchaser not to pay the promissory note given therefor may enforce a trust therein against one who holds the property as security for the pre-existing debt of the fraudulent purchaser. Especially is this true when the security holder had, in legal effect, made himself a party to the fraudulent transaction of the purchaser.

Bogle v Goldsworthy, 202-764; 211 NW 257

Evidence—sufficiency. Evidence reviewed, and held insufficient to show that a deed was other than what it purported to be, to wit: a voluntary, good-faith gift to grantor's sister, of the land in question, and insufficient to establish any constructive trust therein in favor of other relatives of the grantor.

Redden v Murray, 213-519; 239 NW 129

Cancellation of fraudulently acquired deed. A person who secretly buys up a certificate of execution sale and takes a sheriff's deed in his own name, in violation of his agreement with the judgment defendant to pay off the judgment in question and thereby satisfy his own debt to the judgment defendant, has no standing to contest an action by the latter for the cancellation of said deed.

Swearingen v Neff, 204-1167; 216 NW 621

Constructive trust — evidence — sufficiency. An express trust in real property cannot be legally established by parol, nor may an implied or constructive trust in such property be established except by evidence which is clear, convincing, and satisfactory.

McMains v Tullis, 213-1360; 241 NW 472

Establishing trust by oral agreement—prohibitory statute—inapplicable to constructive trusts. Under the Iowa statute an express trust cannot be established by a parol agreement, but such statute is inapplicable to constructive trusts.

D. M. Terminal v D. M. Union, 52 F 2d, 616

Gifts inter vivos—fiduciaries—donee's burden. The donee of a gift inter vivos, when holding a fiduciary relationship with the donor, has the burden to rebut the presumption that the transaction was fraudulent and voidable, but this does not apply to testamentary gifts. So held where a mother first willed, and later assigned, all her property to one son, in consideration of a contract that he should support her as long as she lived—the result being to disinherit another son.

Reed v Reed, 225-773; 281 NW 444

Property held by administrator. Where trust property in the possession of an administrator is identifiable and not affected by rights of innocent third parties, equity may impress a trust thereon.

Carpenter v Lothringer, 224-439; 275 NW 98

Loss of improperly created trust fund—reimbursement. Where an executor is devised a named sum of money in trust for a named person, and where the executor assumes to set aside or hold certain bank stock as said trust fund, which stock becomes worthless, by the failure of the bank, the estate must make good the resulting loss (or pro rata if the estate is insufficient to pay all legacies) less any payments made to the cestui que trust.

Mills v Manchester, 213-95; 237 NW 228; 238 NW 718

Insolvent estates—unallowable payment in full. The act of the administratrix of an insolvent estate in applying estate funds to the full payment of a debt, which is the personal obligation of both the deceased and the administratrix, is fundamentally unallowable. It follows that the creditor, by receiving such payment, becomes a trustee of the fund for the use and benefit of the estate, especially when he knew that the estate was insolvent.

Reason: The administratrix could not legally make such payment, even on an authorizing order of the court.

Andrew v Bank, 217-69; 251 NW 23

Recovery of funds expended without order of court. Guardianship funds expended by a guardian in the purchase of property without an authorizing order of court may be recovered from the seller who had knowledge of the trust nature of the funds when he received them.

Kowalke v Evernham, 210-1270; 232 NW 670

Collections by agent. An agent necessarily holds collections in trust for his principal, and an assignee of the agent for the benefit of creditors has no title or interest thereto.

Second N. Bank v Millbrandt, 211-1299; 235 NW 577

V SPENDTHRIFT TRUSTS

Discussion. See 4 ILB 139—Spendthrift trusts; 9 ILB 305—Spendthrift trusts; 11 ILR 386—Words necessary to create

Spendthrift trusts — general requirements. If the terms of a trust provide that the income be applied to the cestui at the discretion of the trustee, or the income is payable to the cestui at his demand, or the trust is for a special purpose, or in general where no debt is owed the cestui by the trustee, the creditors of the cestui cannot appropriate the benefaction.

Standard Chemical v Weed, 226-882; 285 NW 175

Spendthrift trust—intent to create must be in instrument. The intention to create a spendthrift trust must be found on the face of the instrument creating the trust and cannot be found from the circumstance that the

V SPENDTHRIFT TRUSTS—concluded

cestui was a spendthrift and insolvent when a will creating such trust was executed.

Standard Chemical v Weed, 226-882; 285 NW 175

Spendthrift trust — beneficiary's quitclaim. A trust in a deed vesting in grantees as trustees the absolute control of the property from which two beneficiaries receive the income until termination of the trust at a future time, if said beneficiaries are free from debt, is a spendthrift trust and a quitclaim grantee from one beneficiary secures thereby no present interest in the property.

Beemer v Challas, 224-411; 276 NW 60

Trusts which vest no inheritable interest in beneficiary. A testator who bequeaths directly to his wife a specific fund in trust, with directions to the wife to pay to their daughter for the latter's "care and support" such part of the accruing interest on said fund as the wife "shall deem advisable", and such part of the principal of said fund as the wife "shall deem advisable", will not be deemed to have intended to vest in the daughter any interest in said fund which would survive her death, it appearing as side lights that the daughter was debt-ridden, was possessed of an impecunious, inefficient, and likewise debt-ridden husband, and that the testator, prior to his death, had supported said daughter.

In re Bunting, 220-186; 261 NW 922

No spendthrift trust created — creditor's rights in. When the testator's will created a trust for his son, providing that the proceeds of the trust be paid to the son "yearly or oftener if collected for shorter periods," and contained no words showing an intent to place the trust income beyond the reach of the son's creditors, a debt due the son from the trustee was created, which was a vested right which could be assigned and was subject to claims of creditors.

Standard Chemical v Weed, 226-882; 285 NW 175

Judgment creditor of devisee-heir. When a father's will left property to a son and heir in trust so that it could not be subjected to the son's debts, a judgment creditor of the son was an interested person who had a beneficial and pecuniary interest in the estate of the deceased and in the son's share therein, of which he would be deprived to his prejudice if the will were probated.

In re Duffy, 228- ; 292 NW 165

Termination or removal of trustee by court —evidence insufficient. Evidence sustained trial court's refusal to terminate a spendthrift trust, or discharge trustees, upon application of beneficiary who alleged mismanagement and lack of cooperation on part of trustees, and also that beneficiary was not a spendthrift and that trust was not accomplishing purpose intended.

In re Sexauer's Trust, (NOR); 287 NW 247

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Trust funds—nonpreference. The title to a testamentary fund perpetually bequeathed as a saving deposit to a bank as trustee with direction to pay the interest thereon to a church organization, for the sole purpose of repairing the church, necessarily passes to the trustee, and becomes a general deposit, with result that the fund is not entitled to an equitable preference in payment when the bank becomes insolvent.

Andrew v Presbyterian Church, 216-1134; 249 NW 274

Wrongful payment of dividends. Stockholders who, while their corporation is solvent and so remains, in good faith receive dividends which, unbeknown to them, are paid from corporate capital and not from corporate profits or surplus, are not, in case the corporation subsequently becomes insolvent, liable, in an action at law, to corporate creditors for the amount of such dividends. And it is quite immaterial whether the claimed liability is predicated on the statutes (§§8377, 8378, C., '35) or on and under the so-called corporate "trust fund" doctrine of the common law.

Bates v Brooks, 222-1128; 270 NW 867; 109 ALR 1371

Bank deposit—evidence to establish. In action to establish trust in funds in bank, represented by certificate of deposit which defendants claimed as a gift, evidence held to warrant decree for plaintiff.

Wier v Davidson, (NOR); 242 NW 37

Fatal delay in enforcing unknown trust. A trust fund, created without the knowledge of the cestui que trust, in the form of a bank deposit in a national bank and carried on the books of the bank for many years and then dropped, may not, after the bank has become insolvent, a receiver appointed, its affairs liquidated, and its charter surrendered and canceled, be enforced against a bank which took over certain assets of the old insolvent bank, and assumed certain of its obligations, not including, however, the trust fund in question.

Short v Bank, 210-1202; 232 NW 507

Rent—lien—impression of trust. A landlord may, against one who has no lien thereon, impress a trust upon the proceeds of property on which he—the landlord—had a lien for rent.

Federal Bank v Wylie, 207-816; 221 NW 831

Wrongful sale of mortgaged property—dissipation of proceeds. It being conceded, arguendo, that, when mortgaged personal property is sold without the consent of the mortgagee,

and the proceeds are deposited in a bank to the mortgagor's credit, said proceeds constitute a trust fund, of which the mortgagee is the beneficiary, yet such trust is dissolved if such proceeds are wholly dissipated in the payment of the debts of the bank.

Andrew v Bank, 209-273; 228 NW 12

Stock held in trust—double assessment liability—form of action to enforce. Under decree of an Iowa equity court assessing statutory liability on stock in a closed Iowa bank against a national bank as trustee under an identified trust, the bank does not become personally liable, under laws of Iowa, for such assessment. Neither could the receiver of the Iowa closed bank, in a common-law action, charge the trust property with such statutory liability.

Bates v Bank, 101 F 2d, 278

Trusteed special assessment certificates—pro rata distribution. Where a corporation, dealing in securities, owns a group of special assessment certificates for public improvements, and places them in a trust, against which trust are sold certain "ownership certificates" issued in numerical order as representing an interest therein and redeemable in their numerical order, and when, subsequently, it becomes apparent that the trust is insolvent, an application by the trustee to the court for instructions as to whether payment was to be made in numerical order or pro rata was properly decided for the pro rata method on the equity rule of equality and proportionate distribution of the remaining assets.

Iowa-Des Moines Bank v Dietz, 225-566; 281 NW 134

Improper allowance of attorney fees. A trust created by a legislative appropriation act solely for the "education, care, and keep" of a designated person may not be depleted by the allowance by the court of attorney fees for services rendered not in the administration of the trust, but in inducing the legislature to make the appropriation.

In re Gage, 208-603; 226 NW 64

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Powers of trustee. Principle reaffirmed that the power of a trustee to dispose of trust property is limited to the powers granted in the trust agreement.

In re Barnett, 217-187; 251 NW 59

Dry trust—duty of trustee. A trustee who holds the naked legal title to property under a trust which has become legally dry should convey to the beneficial owners.

Fleming v Casady, 202-1094; 211 NW 488

Trust rendered dry by conveyance. A testamentary, nonspendthrift trust in real estate and in the income thereof, which imposes no limitation or prohibition on the right of the beneficiaries to convey, is rendered passive by the conveyance by all the beneficiaries of their respective interests; and this is true where the beneficiaries have the right, under the will, to compel the trustee, on petition to him, to sell the subject-matter of the trust and to divide the proceeds among themselves.

Fleming v Casady, 202-1094; 211 NW 488

Defending dry trust. A trustee may not employ attorneys at the expense of the estate to defend a trust which has become legally dry.

Fleming v Casady, 202-1094; 211 NW 488

Death of trustee—title of new appointee. A declaration of trust which makes a conveyance of the real estate to the trustee, and which reserved the right in the trustor to appoint a new trustee on the death of the original trustee, necessarily has the effect of casting upon such new trustee the identical title formerly held by the said original trustee.

Keck v McKinstry, 206-1121; 221 NW 851

Consent to change in trustee. An owner of land under trust deed to secure a bond issue, who unqualifiedly consents to a change of trustee may not thereafter claim that the new trustee is not the proper party to foreclose the trust deed, and especially when the bondholders unanimously approve of such change.

Central Bk. v Benson, 209-1176; 229 NW 691

Receivership for insolvent trustee creates vacancy—power to fill. A judicial finding that a banking institution is insolvent and the appointment of a receiver to liquidate its affairs, ipso facto, (1) transfer, to the custody of the law, trust property held by said insolvent as a duly appointed testamentary trustee, (2) deprive said insolvent trustee of power further to act in said trusteeship, and (3) necessarily create a vacancy in the office of said trust,—which vacancy the probate court has legal power to fill by appointing a successor in trust, (1) on the sworn application therefor supplemented by the professional statement of counsel, (2) at an ex parte hearing and without notice to interested parties, and (3) without any formal proceedings whatever for the termination of said former trusteeship; and especially is this true when said former trustee, formally and by its conduct, abandons its said trusteeship and all right and interest therein.

In re Strasser, 220-194; 262 NW 137; 102 ALR 117

In re Carson, 221-367; 265 NW 648

Final report by trustee after receivership. The filing of a final report by a trust company as trustee of an estate after the company had gone into receivership and could no longer perform any duty as active trustee, was not

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an act in administering the trust, but was the performance of its duty to make such final report upon its removal as trustee.

In re Carson, 227-941; 289 NW 30

Right to collect collateral. Trust deed held unequivocally to authorize the pledgor of collateral as security for a bond issue, to collect the principal and interest maturing on the collateral so long as the pledgor was not sixty days in default in himself paying the maturing principal and interest of the bonds, in which latter case the right and duty to collect devolved on the trustee.

Walker v Howell, 209-823; 226 NW 85

Trustee by contract—jurisdiction of court. A trustee who is such by contract between himself and the beneficiaries, but who applies to the district court for formal appointment, who is so appointed, who qualifies as such trustee under order of court, and who, in compliance with a prayer therefor, is authorized to take possession of, and manage the property in question under "orders of court", is subject to the jurisdiction of the court in the matter of reports, the rejection thereof, and final accounting.

In re Skinner, 215-1021; 247 NW 484

Trustees — control and removal by court. Trustees are subject to control or removal by the court.

In re Sexauer's Trust, (NOR); 287 NW 247

Execution of trust—trustees (?) or receiver (?). A court of equity may not terminate or violate a trust agreement between the issuer of bonds and trustees to the effect that the former will transfer to the latter securities for the benefit of bondholders, and that if the issuer defaults in the payment of interest on, or principal of, the bonds, the trustees, on notice from the unpaid bondholders, shall liquidate said securities and apply the proceeds to the payment of the bonds. It follows that, if the issuer of the bonds becomes insolvent, the trustees, in the absence of any counterwish of the bondholders, have a right, superior to that of the receiver, to liquidate the securities, the securities being less than the outstanding bonds; and this is true even tho the securities in question are not actually transferred to the trustees but only delivered to them.

In re Trusteeship, 214-884; 241 NW 308

Trustee for beneficiaries. The administrator is a trustee for the benefit of persons interested in the estate.

Goodman v Bauer, 225-1086; 281 NW 448

Right of trustee-plaintiff. When a plaintiff is a trustee with power simply to receive the amount of the recovery and deliver the same to the real party in interest, the action will be determined solely on the basis of the rights of such real party.

Ronna v Bank, 213-855; 236 NW 68

No failure for want of trustee. A trust estate will not fail for want of a trustee. So held where the bank, named as trustee in a will, failed.

First Methodist Church v Hull, 225-306; 280 NW 531

Trustee—disqualification—effect. Equity will not permit a trust to fail simply because a particular trustee is disqualified from acting.

State v Cas. Co., 206-988; 221 NW 585

Management of trust property—compensation and attorney fees. The compensation of a trustee and of his attorney necessarily rests quite largely in the discretion of the trial court.

Turner v Ryan, 223-191; 272 NW 60; 110 ALR 554

Rights and liabilities as to third persons—imputation of notice or knowledge. A party who, as managing officer of a company, transfers the company's mortgage-secured promissory notes, and orally agrees that the indorsee shall have priority over other prior maturing notes secured by the same mortgage, must be held to have knowledge of said agreement when said prior maturing notes are subsequently transferred by the company to him as trustee of an estate.

White v Gutshall, 213-401; 238 NW 909

Commingling funds. Where trust funds are deposited in the individual account of the trustee, the cestui que trust has the right to elect to sue the trustee for the conversion, or he may pursue the trust funds and establish a preference thereto if they can be traced.

In re Riordan, 216-1138; 248 NW 21

Intermingled trust and private funds—presumption. Upon the insolvency of a trustee, it cannot be presumed that trust funds were preserved in the cash and loan notes taken over by the receiver when the proof shows (1) that the trustee received trust funds in the form of checks and, instead of cashing the checks and holding the cash for application on certain bonds as was his sole duty, he converted said checks by indorsing and depositing them in a bank in his personally owned deposit account, and thereby promiscuously intermingled both classes of funds, (2) that, from time to time, he drew checks against said intermingled funds for the purpose of carrying on his own private loan business, or so drew checks and placed the proceeds in his cash drawer for the same purpose, (3) that during all said time said private business was carried on at a heavy loss, and (4) that at one time after the trust

funds were received the trustee's deposit account was materially overdrawn.

Andrew v Trust Co., 217-464; 250 NW 177

Unauthorized and unallowable investments. The court may charge a court-appointed trustee with the amount of an investment purchased by the trustee from himself at a profit and without an authorizing order of court.

In re Siberts, 216-336; 249 NW 196

Wrongful purchase of securities by trustee. An objection to the final report of a trust company acting as trustee and executor was sufficient in alleging that securities were purchased without the approval of the court, altho the date of each purchase was not stated, and it was not stated whether the purchases were made as executor or trustee.

In re Carson, 227-941; 289 NW 30

Wrongful retention of securities by trustee. An objection to the final report of a trust company acting as trustee and executor of an estate is sufficient in alleging generally that the trust company wrongfully retained securities which it should have disposed of altho it does not state on what dates the securities should have been sold and what their values were on those dates.

In re Carson, 227-941; 289 NW 30

Mortgages — authority of trustee. Trust agreement construed and held to authorize the trustee to execute mortgages and to bind the beneficiaries of the trust for the payment thereof.

Daries v Hart, 214-1312; 243 NW 527

Consideration—assignment to trustee. A written assignment of a fractional interest in a life insurance policy to a trustee, made for the purpose of protecting the attorneys for the agreed value of their services in prosecuting an action on the policy, is supported by adequate consideration, especially when it appears that the trustee was to receive compensation for his services.

Welch v Taylor, 218-209; 254 NW 299

Escrow delivery—life estate reserved. Delivery of a deed to a trustee for redelivery to grantee after grantor's death reserves a life estate in the grantor, with title immediately passing to grantee, but with his right to possession and enjoyment of land therein conveyed postponed until grantor's death.

Bohle v Brooks, 225-980; 282 NW 351

Fiduciary relationship. A person is said to receive money in a fiduciary capacity when it does not belong to him or for his benefit, but is received for the benefit of another person to whom the receiver stands in a relation implying great confidence and trust on the one part and a high degree of good faith on the other.

Vertman v Drayton, 223-380; 272 NW 438

Fiduciary relationship—when not presumed. Principle reaffirmed that no presumption of fiduciary relationship arises from the fact of kinship. Evidence held quite insufficient to invalidate a deed on the ground of undue influence.

Craig v Craig, 222-783; 269 NW 743

Purchase of corporate stock by officers—fiduciary relation. Principle recognized that an officer or director of a corporation occupies a fiduciary relation towards a fellow stockholder in the purchase of the latter's corporate stock and is under duty to disclose to the selling stockholder evidence which has bearing on the value of the stock and which has come to him as such officer or director. Held, principle not applicable under certain facts.

Humphrey v Baron, 223-735; 273 NW 856

Fiduciary relationship—required proof. In an action to set aside a trust agreement executed to a son and attorney by plaintiff, evidence held to support decree dismissing plaintiff's petition. The existence of a confidential relationship or facts giving rise thereto must be proved before doctrine of fiduciary relationship can be applied—the mere relationship of parent and child does not create fiduciary relationship.

Hatt v Hatt, (NOR); 265 NW 640

Order fixing fiduciary's liability. An unappealed order of court, entered on the objections of a beneficiary to the report of a fiduciary, fixing the amount of liability of the fiduciary, is conclusive (in the absence of fraud) on the surety and those claiming under said surety.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Nonpermissible purchase by trustee. A trustee of property may not sell trust property to himself, nor to a co-trustee, nor to his or her spouse, without the consent of all beneficiaries of the trust, nor may the court authorize or approve such a sale without the consent of said beneficiaries.

In re Holley, 211-77; 232 NW 807

Trustee buying property from himself. The act of a trustee in transferring his individually owned bonds and mortgages to himself as trustee and charging the trust funds with the amount thereof is wholly void even when authorized by an order of court. A fortiori is this true when the order was not obtained in good faith.

In re Riordan, 216-1138; 248 NW 21

Conflict of duty with personal interest—fiduciary's burden. A fiduciary may not appropriate funds to himself without consent of the beneficiary having full knowledge of the facts and any act by the fiduciary wherein personal interest and duty conflict is voidable at the mere option of the beneficiary. Fiduciary has

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the burden of showing his utmost good faith and fairness.

State v Exline Fuel Co., 224-466; 276 NW 41

Presumption of nondissipation. Principle reaffirmed that there is no presumption that a trust fund has been invested by the trustee in property other than cash.

Poweshiek County v Bank, 209-467; 228 NW 32; 82 ALR 39

Preservation—presumption. Trust funds in the form of cash are presumptively preserved in the cash balance which passed into the hands of the receiver for the insolvent trustee.

Leach v Bank, 204-1083; 216 NW 748; 65 ALR 679

Trust fund—presumption. The presumption that a trustee has preserved a cash trust fund in his cash balance applies solely to the lowest cash balance subsequent to the creation of the trust and prior to insolvency.

Leach v Bank, 205-114; 213 NW 414; 217 NW 437; 56 ALR 801

Augmentation of assets—nonpresumption. An equitable preference in the payment of trust funds may not be decreed against the receiver of the insolvent trustee when there is no evidence whatever as to the property taken over by the receiver except the concession by the receiver that he had "assets sufficient to pay" the claim if the court decreed an equitable preference in payment.

Andrew v Bank, 205-237; 216 NW 12

Trust to secure bond issue—withdrawal of securities. Trust agreement under which mortgage securities were deposited with a trustee as security for the payment of a bond issue construed, and held not to authorize, expressly or impliedly, the withdrawal of securities from the trustee and the substitution of other securities in lieu of the ones withdrawn.

Richardson v Union Co., 210-346; 228 NW 103

Impressing unpaid warrant on excess assessment—necessary parties. Where two counties, by contract between both boards of supervisors and the contractors, issued warrants for construction of an intercounty drain and one county had a balance remaining from its assessments after paying all its drainage warrants but the other county after exhausting all funds from its assessments still owed outstanding unpaid warrants, an action in equity by an assignee of one of the unpaid warrants of the latter county to impress a trust for the amount of his warrant on the excess balance of the assessment in the former county, cannot be maintained against the former county alone because the other unpaid warrant holders and the landowners who paid the excess assessment are necessary parties.

Straub v Board, 223-1099; 274 NW 84

Substitution of securities. A trustee who, in violation of a trust agreement, permits valuable securities (pledged with him as security for payment of bonds issued by the trustor) to be withdrawn by the trustor and other securities to be substituted for the ones withdrawn has the burden of proof to show that the substituted securities were of the actual value of the securities withdrawn.

Richardson v Union Co., 210-346; 228 NW 103

Withdrawal and substitution of securities—liability of trustee. A trustee who, in violation of the trust agreement, permits valuable securities to be withdrawn from him by the trustor, and worthless securities to be substituted by the trustor, in lieu of the securities withdrawn, thereby fraudulently breaches his trust, and renders himself personally liable for the damages resulting to bondholders for whose benefit and security the trustee was holding said securities.

Richardson v Union Co., 210-346; 228 NW 103

Objections to trustee's final report—failure to dispose of securities. Objections to the final report of a trust company are not subject to a motion for more specific statement when officers of the trust company have equal or better knowledge of the facts called for by the motion, especially where the motion calls for evidentiary facts. Held, also, that trustee was charged with maladministration and not fraud.

In re Carson, 227-941; 289 NW 30

Testamentary trustee's conduct. The intentions of a testator must be ascertained from the terms of the will and such intentions must prevail. In a matter of doubtful construction, circumstances surrounding the execution of the will may be shown to aid in determining what the testator meant by the language used. The conduct of a testamentary trustee is not such a circumstance and is therefore not a material, evidential matter in determining testator's intention.

Freier v Longnecker, 227-366; 288 NW 444

Reinstating trust after wrongful dissipation. A trust which has been inadvertently or wrongfully converted and dissipated by the trustee to his own use is effectually reinstated by the subsequent act of the trustee, while solvent, in repurchasing with his own funds the subject-matter of said trust, with the specific intent to effect such reinstatement.

Leach v Bank, 202-887; 211 NW 529

Accounting by trustee—bank inducing lien release. Where a bank holds a chattel mortgage on horses, executed as part of an arrangement with the mechanic lienholder for payment of his lien, the release of which was induced by the execution of the chattel mortgage, a sale of the horses by the bank, under a subsequent chattel mortgage, would constitute the bank a trustee required to account to the mechanic lienholder, but, without proof that the horses sold were the same ones in both mortgages, no showing is made of trust funds to be accounted for.

Shimp Bros. v Place, 225-1098; 281 NW 471

Reports—justification—burden of proof. A trustee has the burden to justify his own reports.

In re Bartholomew, 207-109; 222 NW 356

Reports — disapproval — jurisdiction. A trustee who, in his acceptance of a nontestamentary trust, agrees to report annually to the district court, and does so report, and who invokes the jurisdiction of the probate court to pass upon his reports, may not thereafter question the power and right of such court to act upon such reports.

In re Bartholomew, 207-109; 222 NW 356

Right to impeach action of trustee. The act of a trustee in individually buying in property at tax sale and receiving a tax sale certificate when a mortgage on the property constituted part of the trust fund is unimpeachable except by the cestui que trust. In other words, the subsequent purchaser of said property at foreclosure sale may not impeach such act, especially when such purchaser had both actual and constructive knowledge when he purchased that the taxes had not been paid.

Eyres v Koehler, 212-1290; 237 NW 351

Fraud of trustee—affirmance or disaffirmance. It is of no concern to a surety on the bond of a trustee whether the beneficiary affirms or disaffirms the fraudulent conduct of the trustee.

Dodds v Cartwright, 209-835; 226 NW 918

Fraudulent substitution of pledged securities—effect on purchaser. The plea that the holder of bonds bought with full knowledge of the nature of the securities held by a trustee for the payment of the bonds can avail nothing when the holder, in purchasing, had no knowledge that said securities were inadequate because the trustee fraudulently permitted the trustor fraudulently to withdraw valuable securities and to substitute worthless securities with the trustee.

Richardson v Union Co., 210-346; 228 NW 103

Misconduct—attempted exemption — effect. A trustee may not, by any provision in a trust agreement, exempt himself from the consequences of his own fraudulent conduct, nor escape responsibility for an act done by an employee when the act was the trustee's own act, nor escape like responsibility for the doing of a prohibited act on the plea that he simply exercised a mistaken judgment.

Richardson v Union Co., 210-346; 228 NW 103

Maladministration by trustee—definiteness of allegation. When the final report of an executor and trustee of an estate was objected to on the ground of maladministration, the objection was sufficient tho it did not state whether the alleged wrongful acts were performed while the trustee was acting in its official capacity as executor or trustee.

In re Carson, 227-941; 289 NW 30

Self-enrichment of trustee—insufficient evidence of misconduct. A testamentary trustee of a coal mining company who, personally or in connection with employees of the company, with his own funds, buys up lands or mining rights in lands and leases to the company the right to mine coal from said lands under a royalty, will not be compelled, long afterward, to account to the legatees and devisees for the royalties so received and for salary drawn during said time (1) when the trustee had been vested, under the will, with substantially the same power over the business as the deceased possessed when living, (2) when the policy of operating on leases was but a continuance of the life-long policy of the deceased, (3) when the royalties paid were the royalties ordinarily and customarily paid in said locality, and (4) when the existence and history of said transactions were carried openly on the books of the company, and were either personally known or capable of being easily known by all the legatees and devisees.

Evans v Hynes, 212-1; 232 NW 72

Transfer of trust funds—recovery. Funds transferred from one trust fund by the trustee thereof to another trust fund of which he is also the trustee, in order to make good a wrongful shortage in the latter fund, may be recovered by the beneficiary of the wrongfully depleted fund.

In re Aasheim, 212-1300; 236 NW 49

Action against joint parties. Two or more persons acting jointly in a fiduciary capacity in relation to the same property for the same beneficiary, are properly made joint defendants in an action to enforce the trust.

Burger v Krall, 211-1160; 235 NW 318

Debt due—prerequisite proof. In actions in which an accounting is sought to determine the balance due from one party to another, it must be alleged and established that something is due before an accounting will be undertaken. This rule does not apply, however, in cases

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where an accounting is asked of a trustee who is under duty to account.

Burkey v Bank, (NOR); 256 NW 300

Credit for overpayment of income. On final accounting, a trustee will be credited with an overpayment to the beneficiary of income even tho such payment was made in advance of the actual receipt of the income.

In re Siberts, 216-336; 249 NW 196

Garnishment of trustee and trust funds. A trustee cannot be made a garnishee by a creditor of the cestui que trust when, at the time of garnishment, the net income only of the trust is (under the terms of the trust) payable to the cestui, and then only on his optional demand, and when such net income was not only then undeterminable, but the cestui had not exercised his option to demand it.

Darling v Dodge, 200-1303; 206 NW 266
See Ober v Dodge, 210-643; 231 NW 444

Discretion of trustee—review by court. The discretion of a trustee in carrying out the purposes of the trust is always subject to review by the court.

In re Cool, 210-30; 230 NW 353

Findings of fact in probate. A supported finding of fact by trustees that the beneficiary of a testamentary bequest had fulfilled the conditions imposed on the payment of said bequest is conclusive on the appellate court.

In re Sams, 219-374; 258 NW 682

Adjudication of liability — conclusiveness. An order of court unappealed from, adjudicating the amount of the liability of a trustee to the beneficiary, is conclusive on the trustee, and ipso facto on his surety.

Dodds v Cartwright, 209-835; 226 NW 918

Subrogation—conditional order. An order subrogating a surety to all the rights of his principal—a trustee—in unauthorized investments of trust funds is properly conditioned on payment being first made of all sums due the trust.

In re Riordan, 216-1138; 248 NW 21

10050 Conveyances by married women.

See annotations under §§10051, 10052, 10446, 10447, 10449
After-acquired title of wife. See §10043

10051 Conveyances by husband and wife.

Vendor and purchaser generally. See under §12389 (II)

Warranty deed—effect. A warranty deed duly signed by both husband and wife necessarily constitutes a complete subordination and waiver of all the rights of both husband and wife, including homestead and dower.

Clark v Chapman, 213-737; 239 NW 797

Wife's deed for husband's debt—cancellation—consideration—estoppel. Wife who was not illiterate and who deeded her land in payment of husband's notes, and who, by placing deed in husband's hands, clothed him with apparent authority to deliver the deed, thereby inducing creditors to surrender other land owned by the husband, is estopped from questioning the validity of the deed. The consideration to wife was advantage to husband and detriment to creditors.

Allen v Hume, 227-1224; 290 NW 687

Reservation of homestead right—evidence. Where a form book used for the recordation of warranty deeds in the office of the recorder of deeds contained a printed relinquishment by a spouse of "dower and homestead", the fact that in a certain instance the word "homestead" has been erased furnishes no evidence that the grantors had orally reserved a homestead right in the conveyed property.

Clark v Chapman, 213-737; 239 NW 797

Elements of conveyance—delivery. All the elements for conveying the title to land were established by evidence that when a warranty deed was given to prevent an expected judgment against the grantor from becoming a lien on the land, with a lease back to the grantor to terminate at the death of himself and his wife, it was signed by all parties in the presence of the others, a copy was given the grantee, it was acknowledged by a notary and given him to record and keep, and three years later the grantor affixed a federal stamp to the deed and re-recorded it.

Huxley v Liess, 226-819; 285 NW 216

Forfeiture of insurance policy for breach of condition subsequent—change of title. A conveyance, without consideration, by a husband to his wife of a stock of insured goods with the intent to place the goods beyond the reach of his apprehended creditors, without any actual change of possession or use taking place, followed later by a reconveyance, without consideration, by the wife to the husband, constitutes no such change in the interest or title of the insured as will void the policy, the wife never having had any financial interest in the property.

McVay v Ins. Co., 218-402; 252 NW 548

"One dollar and other valuable consideration"—sufficiency. A deed from husband to wife, executed two years prior to the rendition of a judgment against the husband and which deed recites a consideration of "one dollar and other valuable consideration", is not fraudulent as against such judgment creditor of the grantor-husband, when it is shown

that the "other consideration" consisted of $3,000 actually paid by the wife.

Donovan v White, 224-138; 275 NW 889

10052 Covenants—spouse not bound.

Legal cancellation of covenant of seizin. A grantee of land, in legal effect, cancels the covenant of seizin contained in his deed, and likewise cancels an indemnity bond which is tantamount to a covenant of seizin, by reconveying the land to the grantor with covenant of seizin.

Duke v Tyler, 209-1345; 230 NW 319

Restrictions as to use—omission from deed—effect. The grantee of a lot who takes by quitclaim deed which contains no restrictions as to the use of the property is, nevertheless, bound by restrictions as to the use of the property contained in the deed to his grantor and in substantially all other deeds to lots in the addition, it appearing that the addition in question was publicly and notoriously platted as a restricted residence area.

Shuler v Gravel Co., 203-134; 209 NW 731

Signature of spouse to mortgage only—effect. The defeasance clause in a real estate mortgage on the lands of a husband, to the effect that the mortgage shall be void if the signers shall "pay or cause to be paid" the secured notes, does not, in and of itself, impose personal liability on the wife who is one of the signers to the mortgage.

Fairfax Bank v Coligan, 211-670; 234 NW 537

"Mortgagor" defined. A "mortgagor" is he who holds title to the premises mortgaged. A wife who joins in a mortgage of the husband's land for the purpose of releasing her distributive share is not a mortgagor.

Wood v Schwartz, 212-462; 236 NW 491

Covenant to pay taxes—nonduty of wife to pay. A wife who, for the purpose of releasing her distributive share, joins with her husband in a mortgage of the husband's lands is not bound by the husband's covenants or legal obligation to pay future accruing taxes on the land.

Wood v Schwartz, 212-462; 236 NW 491

Covenant for insurance does not run with land. A covenant by a mortgagor to keep the buildings on the mortgaged premises insured for the benefit of the mortgagee is entirely personal in character, and does not run with the land. Where a mortgagor obtained a policy payable to himself, and later sold the premises to one who did not assume the mortgage, and assigned the policy, held that the grantee, upon discovering that the policy had lapsed because of nonpayment of premiums, might reinstate the policy by paying the premiums, and henceforth carry the policy solely for his own benefit, and free from any equitable claim of the mortgagee.

First Tr. JSL Bk. v Duroe, 212-795; 237 NW 319

10053 Title and possession of mortgagor.

Rights to possession and rents. A grantee of land who takes possession under his deed at a time when the purchaser under an outstanding, unforfeited bond-for-a-deed contract of sale of the land is entitled to possession, cannot be deemed a "mortgagee in possession", and must account to said purchaser or to his grantees for rents.

Harrington v Feddersen, 208-564; 226 NW 110; 66 ALR 59

Mortgagee in possession. A mortgagee who, under an agreement with the mortgagor, takes possession of the mortgaged premises, and rents the land and applies the rents in accordance with the agreement, must be deemed a mortgagee in possession.

Richardson v Rusk, 215-470; 245 NW 770

Right of mortgagee to possession. A general provision in a real estate mortgage that the mortgagee may, for any default of the mortgagor, declare the entire debt due, and thereupon "shall be entitled to the immediate possession of said premises and to the appointment of a receiver", does not contemplate or authorize any possession of the premises by the mortgagee except a possession obtained by a foreclosure and by the appointment of a receiver thereunder.

First Tr. JSL Bk. v Stevenson, 215-1114; 245 NW 434

Andrew v Haag, 215-282; 245 NW 436

Transfer to mortgagee — nonmerger of lien. A mortgagee who, subsequent to the execution of his mortgage, acquires the fee title to the mortgaged land does not thereby merge the lien of the mortgage into the fee when such was not his intention and when such merger would be detrimental to his interest.

Andrew v Woods, 217-453; 252 NW 112

Quitclaim to avoid foreclosure—effect of existing junior liens—insurance unaffected. A mortgagee's status as such, as affecting his rights under a fire insurance policy, is not lost by merger when he takes a quitclaim deed from mortgagor agreeing not to foreclose if no junior liens exist against the property, when thereafter it is found that such liens do exist whose presence would cause a merger to be against the interest and inconsistent with the intention of the mortgagee.

Guaranty Ins. v Farmers Assn., 224-1207; 278 NW 913

10054 Tenancy in common.

Discussion. See 12 ILR 415—Estates by entireties

Estate by entirety. The common-law estate by entirety has not been recognized in this state.

Fay v Smiley, 201-1290; 207 NW 369

Conveyance by husband to wife and himself. A conveyance of land by a husband to his wife and to himself creates a tenancy in common.

Fay v Smiley, 201-1290; 207 NW 369

Conveyances — statutory presumption. Conveyances of land to two grantees in their own right create a tenancy in common (no contrary intent appearing in the conveyance) irrespective of the legal terms privately employed by the grantees in describing their relation to the property.

Conlee v Conlee, 222-561; 269 NW 259

Partners as tenants in common. Principle reaffirmed that the legal title to partnership realty is held by the partners as tenants in common.

Bankers Trust v Knee, 222-988; 270 NW 438

Surviving spouse and children. Upon the death of the owner of land, the surviving spouse and children become tenants in common of said land.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

Prichard v Anderson, 224-1152; 278 NW 348

Joint tenancy—validity. Two or more persons may validly orally agree that their accumulations of real and personal property shall be held and owned jointly, and that, upon the death of one of the parties, the property shall pass to the survivors, and that the final survivor shall take the property absolutely.

Stonewall v Danielson, 204-1367; 217 NW 456

Possession of tenant possession of landlord. The possession of a tenant is the possession of the landlord, and is notice of the rights of the landlord.

Phelps v Kroll, 211-1097; 235 NW 67

Mutual liabilities—contribution for necessary expenditures. A tenant in common is entitled to contribution from his co-tenant for expenditures absolutely necessary for the benefit and preservation of the common property. So held where one tenant paid off a mortgage.

Yagge v Tyler, 225-352; 280 NW 559

Action for partition—allowance to co-tenant for improvements. A co-tenant who, in good faith, makes valuable and beneficial improvements upon the common property, even without the knowledge or consent of the other co-tenant, will, on final decree in partition, be protected to the extent which the improvements have enhanced the sale value of the land.

Nelson v Pratt, 212-441; 230 NW 324; 236 NW 386

Paying mortgage to protect undivided interest—not gift to co-tenant. Payment, by a mother, of a mortgage on property she holds as a tenant in common with her adopted son, held to be for the preservation and protection of her share in the property, when otherwise unexplained.

Yagge v Tyler, 225-352; 280 NW 559

Widow preserving unadministered estate—contribution from co-tenant — nonestoppel. Where an adopted son and the widow are tenants in common in a deceased husband's estate, the fact that the widow did not open administration, no showing being made that she administered de son tort, does not estop her executor from claiming contribution from the adopted son for payments made by the widow to preserve the common property.

Yagge v Tyler, 225-352; 280 NW 559

Joint tenancy not favored—words creating strictly construed. The rule of joint tenancy with right of survivorship is not favored in public policy, and the mere inclusion of the words in a deed "Said real estate being taken jointly" will not be sufficient to establish a joint tenancy, especially when followed by words tending to negative such assumption, such as, "to the grantees, their assigns, heirs, and devisees forever".

Albright v Winey, 226-222; 284 NW 86

Ouster of all tenants by superior title—effect. Principle reaffirmed that after tenants in common are all ousted by a superior title, e. g., a tax deed, one who was such former tenant in common may buy in the superior title exclusively for his own benefit.

Wood v Schwartz, 212-462; 236 NW 491

Accounting—division of receipts. When it happens that only one of two joint, equal, equitable owners of real estate is personally obligated on the contract for a deed under which the land is held, it is quite manifest that the law cannot presume, without supporting evidence, that forfeited payments received by said parties as the result of a futile attempt at sale of said premises, belong wholly to said non-obligated party; and equally manifest that the law cannot, on such circumstances, rear a so-called quasi contract to the same effect, in the absence of like evidence.

In re Kelly, 221-1067; 267 NW 667

Highway assessment — tenants in common. Jurisdiction to establish an assessment district as to only one of two tenants in common does

not embrace jurisdiction to levy an assessment against the farm as a whole.

In re Road Dist., 213-988; 238 NW 66

Sale—redemption by co-tenant. One who, during the period for redemption from mortgage foreclosure and sale en masse, purchases by quitclaim the undivided interests in the land of a part of the personal judgment defendants, can redeem only by paying the full amount of the sheriff's certificate of purchase, plus interest and costs, the remedy of such redemptioner being to enforce contribution from his co-tenants.

Kupper v Schlegel, 207-1248; 224 NW 813

Contribution for taxes, interest, repairs, and tiling. A surviving mother, in partition of lands left by the deceased husband, is entitled to proper contribution from the children for money paid by her for taxes, interest on mortgages, and necessary repairs, but not (under certain facts) for tiling of the land.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

Accrual of right of action—contribution by co-tenant. The cause of action in favor of one tenant in common against his co-tenant for contribution for the outlay in discharging an incumbrance on the common property accrues instantly upon payment of the incumbrance and is barred in five years.

Lawrence v Melvin, 202-866; 211 NW 440

Accounting—limitation of action. Between tenants in common, the statute of limitation does not commence to run on a claim of one of the tenants for the amount individually paid by him on a mortgage on the common property, until there has been a demand for an accounting.

Creger v Fenimore, 216-273; 249 NW 147

10055 Co-tenant liable for rent.

Purchase of outstanding lease, etc. One of several tenants in common of the fee to land who, on his own behalf, purchases of a lessee both an outstanding long-time lease on the said land and the building thereon, erected and owned by the lessee under said lease, may not enforce contribution from his co-tenants for his outlay; nor may said co-tenants legally demand the right to make contribution to the purchasing tenant and become tenants in common of the building.

Fleming v Casady, 202-1094; 211 NW 488

Purchase by tenant of undivided interest. A lessee who exercises his option under the lease to buy an undivided half of the leased premises does not cease to be the tenant of the lessor as to the undivided interest retained by the lessor, and after the purchase, such tenant remains liable under the lease to the lessor for one half of the originally reserved rent.

Schick v Realty Co., 200-997; 205 NW 782

Nonduty to account for rents. A surviving wife is under no legal obligation, in partition proceedings, to account to her children for the rent of their shares of the land left by the deceased husband and father, when, upon the death of the latter, the wife and children continued to jointly occupy and farm the land in the usual way, and to apply the resulting profits and products to their joint maintenance and education.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

10057 Vendor's lien.

ANALYSIS

I NATURE OF LIEN
II PRIORITY
III LOSS OR WAIVER OF LIEN

Foreclosure of vendee's rights. See under §§12382, 12383
Vendor and purchaser generally. See under §12389 (II)

I NATURE OF LIEN

Vendor's and equitable lien contrasted. The power of a court of equity to establish an equitable lien is quite independent of the law applicable to a vendor's lien.

Bogle v Goldsworthy, 202-764; 211 NW 257

Vendee as owner under executory contract. The vendee of land under a contract calling for installment payments is the equitable title-holder, and therefore, the "owner" of the land within the mechanic lien statutes, and may contract for improvements on the land and subject his interest to the resulting mechanic liens.

Knapp v Baldwin, 213-24; 238 NW 542

Specific performance—allowable relief under general prayer. In bank receiver's specific performance action to compel heirs to perform contract to purchase receiver's interest in estate property, a prayer for general equitable relief warrants a decree establishing vendor's lien, ordering a special execution sale of the receiver's interest, and a general execution for any deficiency.

Utterback v Stewart, 224-1135; 277 NW 735

Waiver of time element. When the vendee in a contract of sale of real estate waives the time element for the performance of the contract, he, in legal effect, arms the vendor with right to perform within a reasonable time, and to enforce specific performance if vendee then refuses to perform.

Andrew v Miller, 216-1378; 250 NW 711

I NATURE OF LIEN—concluded

Enforcement of vendee's lien — burden of proof. A vendee who rescinds, and seeks to establish a lien on the land for his proper advancements, need not show that a subsequent titleholder had knowledge of his (vendee's) rights. The subsequent titleholder must show his want of knowledge.

Larson v Metcalf, 201-1208; 207 NW 382; 45 ALR 344

Rescission by vendee—lien. A vendee of land is entitled in equity, on proper rescission by him of the contract of purchase, to a lien on the land (1) for the amount of the purchase price advanced by him, (2) for the reasonable value of all proper improvements made on the land by him, and (3) for any other proper expenditure suffered by him and growing out of the contract,—a right enforceable against all parties who take rights in the land with knowledge, actual or constructive, of vendee's rights.

Larson v Metcalf, 201-1208; 207 NW 382; 45 ALR 344

II PRIORITY

Purchase-money mortgage. A real estate mortgage may not be deemed a purchase-money mortgage and have extended to it the pre-eminent right of priority over all other liens and claims arising through the mortgagor, unless the holder distinctly establishes the fact that the money secured by the mortgage was advanced for the express purpose of paying the purchase price of the land.

Ely Bk. v Graham, 201-840; 208 NW 312

Purchase-money mortgage. A mortgage on land given to secure a balance due the mortgagee from the mortgagor on a transaction disconnected with the land, is not a purchase-money mortgage in such sense as to give the mortgagee priority over pre-existing liens.

Miller v Miller, 211-901; 232 NW 498

When superior to mechanic's lien. A vendor's lien for the purchase price of land sold on installments without obligating or requiring the vendee to make any improvement on the property is superior to mechanics' liens growing out of the repair and improvement of a building existing on the land when it was sold; and this is true even tho the vendor may have expected that the vendee would or might make such repairs or improvements, or may have actually known that the vendee was making them.

Knapp v Baldwin, 213-24; 238 NW 542

Unremovable repairs and improvements. Where the vendee of land, exclusively on his own authority, places repairs and improvements upon an existing building on the land of such a nature that they cannot be removed without material damage to the building, the vendor's lien for the purchase price of the land is superior to the lien of the mechanic lien claimants both as to the real estate, and as to repairs and improvements.

Knapp v Baldwin, 213-24; 238 NW 542

III LOSS OR WAIVER OF LIEN

Absence of necessary parties. A vendor's lien may not be established against land after it has been transferred by the purchaser and the new owners are not made party defendants.

In re Thomas, 203-174; 210 NW 747

Deed—new grantee. The grantor in a deed of conveyance in escrow who consents to the substitution in the deed of the name of a new grantee, and to the delivery of the deed to such new grantee, and who permits such new grantee to pay taxes and interest on incumbrances and ultimately to sell and convey the land to a good-faith purchaser for value, necessarily loses the right to establish a vendor's lien on the land.

Lindberg v Younggren, 209-613; 228 NW 574

Election of remedies. A purchaser of land who rescinds, and obtains against the vendor judgment at law for the amount advanced as purchase price and for other proper expenditures, does not thereby waive his right to bring an action in equity to have the judgment declared a lien on the land.

Larson v Metcalf, 201-1208; 207 NW 382; 45 ALR 344

10058 Fraudulent conveyances.

Actual or constructive fraud required. A court of equity is not warranted in setting aside an executed contract such as a warranty deed in the absence of actual or constructive fraud.

O'Brien v Stoneman, 227-389; 288 NW 447

Evidence insufficient to show fraud. Evidence held sufficient to sustain a judgment refusing to set aside a conveyance of realty by devisee thereof to claimant against estate on ground of lack of consideration or fraud in making conveyance.

First N. Bank v Adams, (NOR); 266 NW 484

Fraud in procuring deed. Where deed containing recital of consideration was obtained by fraud, the grantor is not precluded as a matter of law from showing a constructive trust arising from the fraud, and equity will allow such showing to be made by parol evidence, but such evidence must be clear and satisfactory.

Rance v Gaddis, 226-531; 284 NW 468

Constructive trust—fraud by grantee. Where grantee obtained title by false assurance that he would hold title as trustee to protect grantor's ownership, and immediately placed a

mortgage on the property for his own benefit after obtaining title, a constructive trust was created and grantee became a trustee ex maleficio for benefit of grantor.

Rance v Gaddis, 226-531; 284 NW 468

Trustee in bankruptcy—remedy. A trustee in bankruptcy cannot maintain an action at law against a grantee of the bankrupt to recover the "value" of property collusively and fraudulently transferred to said grantee in fraud of creditors. This is not saying that the trustee may not treat the property in the hands of the grantee as belonging to the bankrupt, or impress a trust on the proceeds of the property if grantee has disposed of it.

Lambert v Reisman Co., 207-711; 223 NW 541

Unallowable action for damages. A judgment plaintiff may not maintain an action at law for damages against the fraudulent grantee of land transferred by the judgment defendant, even tho the action is aided by an allegation of conspiracy to defraud plaintiff.

McKay v Barrick, 207-1091; 224 NW 84

Proof required. Principle reaffirmed that a deed of conveyance will not be set aside on an allegation of fraudulent representation which is sustained by a mere preponderance of the evidence.

Clark v Beck, 208-156; 225 NW 353

Burden of proof. In an action to set aside a deed and an assignment of a mortgage executed by mother to stepson, burden was on plaintiff to establish the existence of confidential relationship raising presumption of fraud.

O'Brien v Stoneman, 227-389; 288 NW 447

Conveyance and assignment to stepson. Where an elderly but unusually self-willed woman executed a deed to her stepson during time in which she managed her own affairs, and relationship with grantee was only that which ordinarily exists between a mother and son, evidence in action to set aside the deed did not warrant finding that confidential relationship existed so as to raise presumption of fraud, but as to the assignment of a mortgage procured by this stepson after he came to live with her and had taken over management of her affairs, evidence justified finding that such relationship did exist.

O'Brien v Stoneman, 227-389; 288 NW 447

Fraud and undue influence not proved. In an action in equity by a 73-year-old grantor, who had no children of his own, to set aside deed to adult children of second wife, subject to a life estate in grantor, where associations of the grantor and grantees, over a long period of years, were not unlike that ordinarily observed between natural parents and children, evidence did not sustain charge that deed was procured by fraud and undue influence.

Lawson v Boo, 227-100; 287 NW 282

Undue influence as phase. Undue influence, a phase of actual fraud, will invalidate a transaction between persons in a confidential relationship.

Merritt v Easterly, 226-514; 284 NW 397

Monomania and undue influence unproved. Where a daughter, among other things, testified against her father in a divorce action and left him to live with her mother, she furnished the evidence for his belief of her lack of filial affection, and conveyances of his property executed pursuant to his intention to disinherit her upheld over her contentions that he was a monomaniac and that the conveyances resulted from the use of undue influence.

Mastain v Butschy, 224-68; 276 NW 79

Undue influence—destroying free will. Undue influence necessary to set aside a conveyance must be enough to destroy the free agency of the grantor. Evidence reviewed and found insufficient to establish undue influence.

Mastain v Butschy, 224-68; 276 NW 79.

Evidence necessary to invalidate deed. A deed is presumed to express the intention of the grantor and one who attempts to set it aside on the ground of undue influence or insanity has the burden of proof to present evidence that is clear, satisfactory, and convincing.

Mastain v Butschy, 224-68; 276 NW 79

Mental incompetency — undue influence — burden of proof. The mental incompetency of a grantor to execute a deed of conveyance, or the obtaining of said conveyance by the grantee by undue influence, when assigned as ground for setting aside said conveyance, must be established by plaintiff and by clear, satisfactory and convincing evidence—there being no proof that a confidential relationship existed. Evidence reviewed and held insufficient to meet said burden of proof.

Foster v Foster, 223-455; 273 NW 165

10059 Rule in Shelley's case.

Application. A conveyance to grantee "during his natural lifetime with remainder to his legal heirs" carries the fee to grantee under the rule in Shelley's case. (Deed executed prior to July 4, 1907.)

Biddle v Worthington, 216-102; 248 NW 301

When inapplicable. The rule in Shelley's case has no application when the conveyance, deed, or will is to one for life with remainder over to the children of the life tenant, unless it is manifest that the grantor used the word

"children" as the equivalent of the word "heirs".

Blair v Kenaston, 223-620; 273 NW 184

Shelley's case inapplicable. The so-called "rule in Shelley's case" has no application to a deed of conveyance which creates a trust in the grantee for the benefit of his heirs.

Hibler v Hibler, 208-586; 226 NW 8

Inapplicability of rule. The so-called "rule in Shelley's case" has no application to a deed of conveyance which creates a trust in the grantee for the benefit of his heirs.

Hibler v Hibler, 208-586; 226 NW 8

Construction of wills—intent of testator to nullify rule. While the rule in Shelley's case applied to wills as well as deeds, yet, wills being construed more liberally than deeds, if the intent of the testator appears to create a life estate, the rule did not apply.

Friedmeyer v Lynch, 226-251; 284 NW 160

Abrogative statute not retroactive. The legislature by abrogating the rule in Shelley's case did not give the statute any retroactive effect; therefore, the rule applies to wills made before the enactment of the statute.

Friedmeyer v Lynch, 226-251; 284 NW 160

Testator's intention—rules of construction—when used. Intention of testator will be determined from the actual language of the entire will, but if this is not possible, then rules of construction will be employed, not including rule in Shelley's case abrogated by statute.

Hudnutt v John Hancock Ins., 224-430; 275 NW 581

10060 Devise, bequest, or conveyance not enlarged.

Discussion. See 22 ILR 543—Renunciation of life estate

Sale of life estate—interest acquired. Judgment creditor of a life tenant in purchasing a life estate at execution sale cannot acquire any greater interest than that held by the life tenant.

Rich v Allen, 226-1304; 286 NW 434

Life estate (?) or fee (?)—intestacy. An unambiguous will of property for the devisee's "perfectly free use during his lifetime", without any gift over, conveys a life estate only. It is not permissible to construe such a will as conveying the fee simply to avoid intestacy.

Horak v Stanley, 216-318; 249 NW 166

"Particular estate". A "particular estate" is an estate for life or for years for the reason that it is only a small part or portion of the inheritance.

Anderson v Anderson, 227-25; 286 NW 446

Testator's intention. In construing a will the principal concern will be to ascertain and determine the intention of the testator, and it is the duty of the court, if it be reasonably possible, to give effect to all of the will's provisions.

Anderson v Anderson, 227-25; 286 NW 446

Life estates—remainder over. When a will provides for a devise of realty to wife for life, then to three named children for life as tenants in common and remainder over in fee per stirpes to their lawful issue, held, life estate vested in children after wife's death with contingent remainder over in fee, as provided by statute—the life estates being the particular estate supporting the contingent estate which would vest, upon death of each of testator's named children, in that child's lawful issue, if any.

Anderson v Anderson, 227-25; 286 NW 446

Remainder over—absence of issue—no lapse of remainder. In a will where father devised realty to surviving spouse for life, then to three named children for life with remainder over in fee per stirpes to their lawful issue, the fact that there were no grandchildren in being at the time of mother's death did not lapse the remainder so as to cause it to descend intestate and merge with life estate in children, since, at mother's death, the life estate in children was a "particular estate" supporting the contingent remainder, which was not required to vest until termination of such life estate.

Anderson v Anderson, 227-25; 286 NW 446

Deeds—creation of vested interest—inviolability. A deed, (1) which is conditioned on grantee paying, after the death of grantor, named sums to each of grantee's two sisters, and (2) which is executed and delivered by grantor and accepted by grantee in accordance with a plan entered into by all of said parties for the settlement of their inherited interests in said land, creates, instanter, in said sisters a vested landed interest which is immune from change without their consent. So held where the grantor, later, erroneously assumed the right to treat the deed as testamentary and, by a new deed, to reduce the payments to the sisters.

Carlson v Hamilton, 221-529; 265 NW 906

Death of joint life tenant without issue—remainder over in fee. In a will where father devised realty to surviving spouse for life, then to three named children for life with remainder over in fee per stirpes to their lawful issue, and one of such children died without lawful issue, after mother's death, remainder over of her share, being a one-third of said realty, became intestate property and through the father passed to the two remaining children in fee, subject to payment of taxes and debts

against estate of deceased child to the extent of one-third interest in the lapsed estate.

Anderson v Anderson, 227-25; 286 NW 446

Devise—life estate (?) or fee (?)—mortgage validity. Where a will devised land to a son to use until son's youngest child became twenty years old, or if such child died before such age, then until January 1, 1940, when the land became the property of the "son and his heirs", a mortgage placed on the land by the son, altho before 1940, is a valid lien, not merely on a life estate, but on the fee, and an equitable action by son's children against the mortgagee and others to establish title in the land was properly dismissed.

Hudnutt v John Hancock Ins., 224-430; 275 NW 581

CHAPTER 439

CONVEYANCES

10066 "Instruments affecting real estate" defined—revocation.

Atty. Gen. Opinion. See '30 AG Op 277

Recording "instrument relating to real estate". A mortgage (1) on chattels on certain described real estate and (2) on all crops "sown, planted, raised, growing or grown" on said real estate for two specified years following the execution of said instrument, being an instrument which "relates to real estate", is recordable as a real estate mortgage, and such recording may be enforced by mandamus.

Weyrauch v Johnson, 201-1197; 208 NW 706

Lease—assignment—recordation. A lease of real estate and the assignment thereof are recordable for the purpose of conveying constructive notice to a mortgagee and his subsequently appointed receiver under a mortgage which contains a pledge of the rents, even tho said parties are not entitled, as a matter of right, to such notice.

King v Good, 205-1203; 219 NW 517

Assignment of rent not recordable. A written assignment of a lease of real estate and of the rents accruing thereunder, (especially when the lease is at the time manually delivered to the assignee) is not an instrument which the law requires to be recorded, and if recorded the record imparts no notice.

Phelps v Kroll, 211-1097; 235 NW 67

10067 Corporation having seal.

Release or subordination of mortgage—authority of president. A corporation is bound by the act of its president in subordinating its mortgage to another mortgage (1) when the president is expressly authorized by the articles of incorporation to release and satisfy such mortgages, (2) when the president first executed, on adequate consideration, a written release and subordination without the corporate seal being attached, and later confirmed said act by a new release and subordination with said seal attached and (3) when the corporation at all times intended so to subordinate its mortgage.

Homesteaders Life v Salinger, 212-251; 235 NW 485

Duty to affix — scope of requirement. A writing granting to a party a mere option to repurchase land from a corporation within a named time and at a named price, is not an instrument such as is contemplated by the statute which requires the corporate seal to be affixed to instruments "conveying, incumbering or affecting real estate", nor as is contemplated by substantially similar requirements in articles of incorporation.

Shanda v Bank, 220-290; 260 NW 841

10069 Release of corporate lien—omission of seal.

Change in name of mortgagee—presumption. A recital in a formal release of a mortgage, to the effect that the mortgagee has, by proper amendment to its articles of incorporation, changed its name to the name indicated by the one executing the release, will be deemed presumptively true.

Vanderwilt v Broerman, 201-1107; 206 NW 959

10070 Contract for deed — presumption of abandonment.

Lost instrument—real property title affected. Where a lost instrument relied upon affects the record title to real estate, public policy demands that the proof of its former existence, its loss and its contents, should be strong and conclusive—rule applied to real estate contract.

Forrest v Otis, 224-63; 276 NW 102

10071 Christian names — variation — effect.

Variation in names—notice to purchasers. See under §10105 (V), Vol I

"Idem sonans" doctrine—applicability. The doctrine of idem sonans is recognized by Iowa courts and, while each case must be determined according to its own facts, the mere fact that names spelled differently from true name could be pronounced like the true name by a strained pronunciation would not make the doctrine applicable, but where the names, when general and ordinary rules of pronunciation are applied, are so identical in pronunciation and so alike that there is no possibility of mis-

take, the doctrine should be applied; or where two names, as commonly pronounced in the English language, are sounded alike, a variance in their spelling is immaterial; and even slight difference in their pronunciation is unimportant, if the attentive ear finds difficulty in distinguishing the two names when pronounced. Such names are "idem sonans" and, altho spelled differently, are to be regarded as the same.

Webb v Ferkins, 227-1157; 290 NW 112

Discrepancy in names—effect. The fact that in the body of a mortgage, and in the certificate of acknowledgment of said mortgage, the name of the wife of the mortgagor-owner appears as "Mary F. McNeff" instead of "Mary T. McNeff" (her correct name) is not of controlling importance on the issue as to the validity of the mortgage as to the wife, it appearing that she was correctly identified in said certificate of acknowledgment "as the wife" of said mortgagor-owner.

First Tr. JSL Bank v McNeff, 220-1225; 264 NW 105

10072 Assignment of certificate of entry deemed deed.

Patents—collateral attack. The issuance by the state of a patent to lands is an assertion of the existence of the property conveyed; and such patent is immune from attack in a collateral proceeding.

Meeker v Kautz, 213-370; 239 NW 27

10074 Railroad land grants—duty to record.

Invalid reservation in land grant. Principle reaffirmed that the insertion in a patent issued by the federal government under a public improvement grant of a clause "excepting and reserving all mineral lands", is, in the absence of fraud, a nullity even tho the grant itself did except mineral lands.

Herman v Engstrom, 204-341; 214 NW 588

10075 Patents covering land in different counties.

Patents—presumption. A government patent is not conclusive that the government owned the land at the date of the patent.

Bigelow v Herrink, 200-830; 205 NW 531

User—estoppel. In an action to enjoin the repair of a dike originally constructed in connection with drainage system created jointly by adjoining landowners, including plaintiff's predecessor in title, and used with knowledge of plaintiff for over 20 years without objection, principles reaffirmed (1) that where there is proof of more than mere user, the statute providing that an easement cannot be established by proof of mere user alone does not apply, and (2) that the owner of a dominant estate may by consent, express or implied, estop himself from insisting upon adherence to the principle that the owner of a servient estate has no right to interfere with the natural flow of water in a well-defined course so as to cast it back upon the dominant estate.

Dodd v Aitken, 227-679; 288 NW 898

10083 Certification—effect.

Certified copies of records. See §11296

10084 Forms of conveyance.

Atty. Gen. Opinion. See '38 AG Op 546

ANALYSIS

Building restrictions in deeds. See under §6452 (II)
Consideration implied in deeds. See under §9440 (II)
Conveyance passing grantor's interest. See under §10042
Creditor's rights, fraudulent deeds. See under §11815
Dedication, highways. See under §6277 (II)
Deeds as mortgages. See under §12372
Delivery. See also under §10105 (I)
Easements granted by conveyance. See under §10175 (II)
Fee simple. See under §10041
Fixtures involved in deeds. See under §10042
Fixtures involved in leases. See under §10159 (III)
Fixtures involved in real estate contracts. See under §12389 (II)
Fraudulent conveyances to defeat creditors. See under §11815
Future estates. See under §10045
Gifts. See under Ch 445, Note 1
Joint tenancy. See under §10054
Life estates. See under §10042 (II)
Merger of contract of sale and deed. See under §12389 (II)
Mortgage foreclosures. See under §12372, et seq
Reformation and cancellation of instruments. See under §10941 (XI)
Tenants in common. See under §10054
Vendor and purchaser generally. See under §12389 (II)

I DEEDS IN GENERAL

(a) IN GENERAL

Owner's right of disposal. Under ordinary circumstances one has the absolute right to dispose of his property as he pleases.

O'Brien v Stoneman, 227-389; 288 NW 447

Estate by entirety. The common-law estate by entirety has not been recognized in this state.

Fay v Smiley, 201-1290; 207 NW 369

Instrument not passing present title.

Tilton v Klingaman, 214-67; 239 NW 83

Repugnancy between clauses—modern rule. The technical rules of the common law as to the division of deeds of conveyances into formal

parts, i. e., premises or granting clause, and habendum clause, will not prevail as against the manifest intention of the parties as shown by the deed as a whole. Applied (1) where the granting clause clearly granted a life estate, while (2) the habendum clause defined the estate received by the grantee as the fee.

Blair v Kenaston, 223-620; 273 NW 184

Repugnancy—modern rule. The technical rules of the common law as to the division of deeds of conveyances into formal parts, i. e., premises or granting clause and habendum clause, will not prevail as against the manifest intention of the parties as shown by the deed as a whole. Applied (1) where the granting clause granted a fee and, apparently, vested it at once, while (2) the habendum clause clearly revealed a purpose to render the vesting conditional.

Shultz v Peters, 223-626; 273 NW 134

"Subject to liens of record." The expression "subject to liens of record", when embraced in the habendum clause of a deed of conveyance, does not have the effect of continuing the lien of a judgment after the holder thereof has failed to exercise his right to redeem.

Paulsen v Jensen, 209-453; 228 NW 357

Substitution of grantee. Principle recognized that substitution of grantees in a deed of conveyance may be made, with the consent of the parties concerned.

Lindberg v Younggren, 209-613; 228 NW 574

Transfer of present interest necessary—intent of grantor. Any instrument to be effective as conveyance of real estate must operate to convey a present interest in the real estate, and the intent of the grantor is the controlling factor in determining whether or not such present interest is conveyed.

Bohle v Brooks, 225-980; 282 NW 351

Unreasonable deed—validity. If a grantor is of sound mind, and acts of his own free will and accord, he has a legal right to make an unjust and unreasonable conveyance.

O'Neil v Morrison, 211-416; 233 NW 708

Absolute deed as mortgage—evidence—sufficiency. Evidence reviewed at length and held, that a deed of conveyance, absolute in form, was intended to be such, and not a mortgage.

Shanda v Bank, 220-290; 260 NW 841

Accretion passes by ordinary deed. Accretion to land passes by a deed of the upland owner unless expressly excepted.

Haynie v May, 217-1233; 252 NW 749

Acknowledgment before disqualified notary. The validity of a deed of conveyance is, as between the grantor and grantee, in no manner affected by the fact that the deed was acknowledged before a disqualified notary public.

Shanda v Bank, 220-290; 260 NW 841

Acquiescence in title by grantor—deed not set aside. When the grantor of a warranty deed had acquiesced for five years in the title of the grantee, he could not set aside the deed and quiet title in himself without establishing a plain, clear, and decisive case.

Huxley v Liess, 226-819; 285 NW 216

Assignment of share—construction. A written assignment by an heir "of all interest of every kind and nature" in the estate works a complete conveyance of the heir's interest in the real estate of the estate, as against a subsequently rendered judgment against the assignor.

Berg v Shade, 203-1352; 214 NW 513
See Funk v Grulke, 204-314; 213 NW 608

Bona fide purchaser—recital in deed—effect. A grantee of real estate is bound by a recital in his deed that the land is taken subject to all recorded mortgages.

Citizens Bank v Hamilton, 209-626; 227 NW 112

Cancellation. Want of consideration in itself will not warrant the setting aside of a deed, it being competent for a grantor to make a gift of his property and, altho want of consideration is a good defense to an executory contract, a deed is not such a contract, but instead represents a contract executed and a conveyance fully accomplished.

Lawson v Boo, 227-100; 287 NW 282

Cancellation of deed—statements to attorney subsequent to execution—incompetency. In an action by a grantor to set aside deed, testimony as to the contents of statements made by grantor to his attorneys eight days after execution of deed, was incompetent and inadmissible.

Lawson v Boo, 227-100; 287 NW 282

Confidential relations—independent advice. In connection with a gift from a person occupying a confidential relation with another, "independent advice" means the donor's opportunity of conferring fully and privately with a person competent to advise as to the legal effect of the transaction and who will advise in a manner disassociated from the interests of the donee.

Merritt v Easterly, 226-514; 284 NW 397

Consideration—adequacy. A deed of conveyance which recites (1) that it is in payment for services performed by grantee in caring for her mother in her lifetime and (2) that grantee will support and care for grantor during his lifetime, is supported by an adequate consideration.

Ellis v Allman, 217-483; 250 NW 172

I DEEDS IN GENERAL—continued
(a) IN GENERAL—continued

Wife's deed for husband's debt—cancellation—consideration—estoppel. Wife who was not illiterate and who deeded her land in payment of husband's notes, and who, by placing deed in husband's hands, clothed him with apparent authority to deliver the deed, thereby inducing creditors to surrender other land owned by the husband, is estopped from questioning the validity of the deed. The consideration to wife was advantage to husband and detriment to creditors.

Allen v Hume, 227-1224; 290 NW 687

Consideration—nonconclusiveness. The consideration named in a deed of conveyance is only prima facie evidence of the amount, and as to the fact of payment.

Gilbert v Plowman, 218-1345; 256 NW 746

Levy and assessment — equalization — evidence—recitals of consideration. The recitals of consideration in deeds of conveyances are not admissible to prove the value of real estate for the purpose of taxation.

Iowa Corp. v Board, 209-687; 228 NW 623

Deed consideration—no negative fact from affirmative testimony. Positive, uncontradicted testimony of husband and wife, defendants, called to testify by plaintiff, affirming, in their own behalf, fact of consideration for a deed to wife, cannot be held to have proven a negative fact of lack of consideration.

Donovan v White, 224-138; 275 NW 889

Construction — meaning of "children". At common law, the word "children", when used in wills, deeds, or other conveyances, means legitimate children unless will reveals a clear intention to use the generic term "children" so as to include an illegitimate child, or it is impossible under the circumstances that legitimate children could take.

In re Estate of Ellis, 225-1279; 282 NW 758

Conveyance to "heirs and assigns"—effect. A grant of land to a named person "and to his heirs and assigns" conveys a fee simple title, irrespective of a habendum clause which provides that, upon the death of the grantee, the property shall revert to the grantor or to his heirs.

Dolan v Newberry, 204-443; 215 NW 599

Conveyance—insufficiency. A stipulation between plaintiff and defendant in a divorce proceeding to the effect that the defendant, for the good of the children of the parties, shall not "convey, incumber, or mortgage in any manner" certain named lands does not constitute a conveyance to the children, even tho the stipulation is fully embraced in the subsequently entered decree.

Putensen v Dreeszen, 206-1242; 219 NW 490

Conveyance and devise of same property. A deed of conveyance in the ordinary form and placed in proper escrow for delivery immediately after the death of grantor conveys full title, even tho the grantor, a few days after the execution of the deed, devises the same property to the same grantee.

In re Champion, 206-6; 218 NW 37

Conveyance by husband to wife and himself. A conveyance of land by a husband to his wife and to himself creates a tenancy in common.

Fay v Smiley, 201-1290; 207 NW 369

Corporate seal—duty to affix. A writing, granting to a party a mere option to repurchase land from a corporation within a named time and at a named price, is not an instrument such as is contemplated by the statute which requires the corporate seal to be affixed to instruments "conveying, incumbering or affecting real estate", nor as is contemplated by substantially similar requirements in articles of incorporation.

Shanda v Bank, 220-290; 260 NW 841

Deed as mortgage—consideration. A warranty deed may not be decreed to be a mortgage when the daughter-grantee pays a good-faith and complete consideration to her father, the grantor.

Witousek & Co. v Holt, (NOR); 224 NW 530

Deed to trustees—grantor's subsequent land contract invalid. An absolute warranty deed subject only to a trust created therein precludes the grantor from later contracting to sell the property to another and will support an action to quiet title in the trustees.

Beemer v Challas, 224-411; 276 NW 60

Descriptions — acreage — representations in deed—effect. Principle reaffirmed that a deed covenant which specifies the acreage, "be it more or less", constitutes a representation that the specified acreage is approximately correct.

Mahrt v Mann, 203-880; 210 NW 566

Fatally indefinite description. A deed which is so indefinite that the land intended to be conveyed cannot be determined, is a nullity.

Beim v Carlson, 209-1001; 227 NW 421

Particular description followed by recital of acreage—effect. A deed to a governmental described 20-acre division of land, but containing the recital "containing 18½ acres, more or less", does not convey a tract of 1½ acres contained in said division and already conveyed by the grantor to another grantee.

Montgomery Co. v Case, 212-73; 232 NW 150

Educational and religious purposes — not condition subsequent. A deed, conveying the title and the fee and containing the single statement "said land to be used for educational purposes and religious purposes only" followed by a warranty but by no words of condition,

and no conditions appearing in the circumstances surrounding its execution, does not signify an intention by the grantor to create a condition subsequent which, in case the land is not used as designated or is conveyed by grantee, will upon re-entry by an heir, invest him with title.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

Educational and religious purposes—not a conditional limitation. A conditional limitation in a deed is self-operative and determines the period of the existing estate without any act on the part of the person entitled to the next expectant estate, and therefore a deed containing merely a provision for educational and religious purposes is not restricted by a conditional limitation.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

Escrow agent's memorandum made in absence of parties — inadmissible. An escrow agent's understanding of the arrangement by which he was to record deeds after the death of the grantor, noted on the envelope in the absence of the parties, is not admissible in evidence as to the substance of the arrangement and would be of doubtful evidentiary value even if admitted.

Bohle v Brooks, 225-980; 282 NW 351

Equitable ownership superior to judgment lien. An actual bona fide oral agreement between a debtor and creditor, that the debtor will convey to the creditor certain lands in part satisfaction of the debt, creates in the creditor an equitable ownership in the land (especially when the creditor is already in possession of the land) which is superior to the rights of a subsequent judgment creditor of said debtor. It follows that delay in making delivery of the deed, or even the loss of the deed, will not elevate the subsequent judgment creditor into priority.

Richardson v Estle, 214-1007; 243 NW 611

Foreclosure—agreement to pay. The recital in a deed to real estate that the grantee assumed and agreed to pay an existing mortgage is conclusive unless the grantee overcomes the presumption that the deed correctly expresses the final contract of the parties, even tho the original contract of sale is silent as to such agreement to pay.

Royal Ins. v Hughes, 205-563; 218 NW 251

Foreclosure against vendor — purchaser's payments recoverable. An action to recover payments made on the purchase of a lot was not barred by a quitclaim deed given by the purchaser to one who had bought the land at a foreclosure sale, when it was given for the purpose of transferring possession during the period of redemption and in order to reduce the loss to the purchaser, after the vendor had failed to obtain a release of the lot from a mortgage and had no intention of redeeming after the mortgage was foreclosed.

Trammel v Kemler, 226-918; 285 NW 196

Fraud — cancellation — grounds. When a grantee in securing a deed to land acquires an unconscionable and inequitable advantage over the grantor, equity will infer fraud; likewise when the grantee obtains the deed through a promise which he intends to breach in the future.

Bruner v Myers, 212-308; 233 NW 505; 235 NW 726

Part performance—fraud. An oral contract for the sale of land is not within the statute of frauds when the owner of the land executes and delivers to the buyer a deed of conveyance even tho said deed is blank as to grantee.

Gilbert v Plowman, 218-1345; 256 NW 746

Gifts—inter vivos—fiduciary relation—evidence. A fiduciary relationship is not established or even presumed from the naked fact that the parties are closely related by blood, or live and reside in the same house.

Humphrey v Norwood, 213-912; 240 NW 232

Granting and habendum clauses. The habendum clause of a deed of conveyance which clearly indicates the quality of the estate conveyed will be given full force and effect when the granting clause does not clearly indicate such quality.

Central Life v Spangler, 204-995; 216 NW 116

Impeachment of title. Principle recognized that the grantor in a deed of conveyance may not by subsequent declarations impeach the title conveyed by him.

Jones v Betz, 203-767; 210 NW 609; 213 NW 282

Unallowable impeachment. The ex parte recitals in a will by a grantor of real estate are insufficient to impeach the title conveyed by the deed.

Bibler v Bibler, 205-639; 216 NW 99

Mortgage embraces conveyance. A valid prohibition against the "conveyance" of real property embraces a mortgage.

Iowa Corp. v Halligan, 214-903; 241 NW 475

Nature and effect—controlling elements. The nature and effect of a deed of conveyance must be determined from the words therein contained which are descriptive of the estate conveyed, and not from the mere legal name employed. So held where the deed named the estate conveyed as one "by entirety", while the covenants of the deed demonstrated that it was a warranty in fee.

Fay v Smiley, 201-1290; 207 NW 369

I DEEDS IN GENERAL—continued
(a) IN GENERAL—continued

Oral contract contemporaneous with deed. When a duly recorded deed contains a prohibition against a sale or conveyance of any part of the land during the lifetime of the grantor, parol evidence is admissible against a subsequent mortgagee to show that the purpose of said prohibition was to protect the grantor during his lifetime in a contract reservation of rent in the land.

Iowa Corp. v Halligan, 214-903; 241 NW 475

Parol testimony—deed as mortgage. Parol testimony is admissible to show that deed was in fact a mortgage and was so intended.

Rance v Gaddis, 226-531; 284 NW 468

Proceedings and relief — negligence — mistake—evidence—sufficiency. A deed of conveyance will not, on the plea of the grantor, be reformed by inserting therein an assumption by the grantee of an existing mortgage, when the grantor executed the deed without reading it, tho he was able to read, and was not prevented from reading, when his testimony in support of a mutual mistake is neither satisfactory nor convincing; and especially when the grantee has, in the meantime, justifiably changed his position in reliance on the omission of the assumption clause.

Scover v Gauley, 209-1100; 229 NW 684

Prohibition against conveyance—validity—record. A provision in an ordinary warranty deed absolutely prohibiting a sale or conveyance of any part of the land during the lifetime of the grantor without the consent of the grantor, is not repugnant to the deed if the unrevealed purpose of said prohibition is legal, and a part of the consideration for the deed, and is expressed in a contract which accompanies the execution of the deed, even tho the contract be oral. It follows that the record of such deed charges third parties with notice of said contract if reasonable inquiry would reveal it.

Iowa Corp. v Halligan, 214-903; 241 NW 475

Quiet title—issues under general denial. In an action to quiet title where plaintiff's claim of ownership arose out of a deed deposited with a bank for delivery, and delivered to plaintiff after grantor's death, a general denial puts in issue both the execution and the delivery of the deed.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

Defaulted real estate vendee's deed after decree—invalidity. In a quieting title action against a real estate contract vendee, the decree ends all rights of the vendee under a defaulted contract, and if he deeds to another before the decree, the grantee takes nothing.

Forrest v Otis, 224-63; 276 NW 102

Previous and subsequent chain of title lacking—title not established as against tax deed. In a quiet title action, stipulated evidence that an ancestor of defendant's received and recorded a deed to the land from another is insufficient to overthrow plaintiff's tax deed without a further showing of the previous and subsequent chain of title.

Inter-Ocean Co. v Morrison, 225-1336; 283 NW 909

Relief—decree beyond issues. In a quiet title action by grantee against grantor's heir and successor in interest, a decree based on a deed containing a declaration of purpose (educational and religious use), goes beyond the issues when it finds the grantee to be the "sole and absolute owner, in fee simple"; the effect being to adjudicate the rights of persons, not before the court, who may have trust interests under the terms in the deed.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

Quitclaim grantees — knowledge of prior equities. The grantee of land under a quitclaim deed is conclusively presumed to have known of all prior equities in and to the land, and will be held to have taken and to hold said land subject to said equities.

Junkin v McClain, 221-1084; 265 NW 362

Quitclaim deed from spendthrift trust beneficiary. The rights of a grantee under a quitclaim deed from a spendthrift trust beneficiary cannot be determined until the trust is terminated, and cannot be litigated in an action between the trustees and grantee where the rights between the grantee and beneficiary are not issues.

Beemer v Challas, 224-411; 276 NW 60

Quitclaim — prior claims — nonapplicability of rule. The principle that one who acquires title by quitclaim takes with notice of prior bona fide claims has no application to a case where a mortgagee receives his mortgage for a valuable consideration and without notice of any infirmity, and later, in order to avoid the expense of a foreclosure, receives a quitclaim deed to the land in satisfaction of the mortgage.

Brenton Bros. v Bissell, 214-175; 239 NW 14

Reservation of right to repurchase. A recital in a conveyance that the grantor "reserves the right to repurchase said premises under his contract with said grantee" does not, in and of itself, show that said deed was intended as a mortgage.

Sheley v Engle, 204-1283; 213 NW 617

Riparian rights—accretion—apportionment—estoppel. Riparian land owners interested in accretions to their lands may by agreement, acquiescence, or other conduct, apportion the accretion in a manner and way different than the law would apportion it, and thereby estop

themselves, in an action to quiet title, from asserting that land did not pass under their deed because is was not accretion land.

Haynie v May, 217-1233; 252 NW 749

Riparian rights—when not withheld by deed. A conveyance of lands by a riparian owner, especially when the lands are largely accretions, will not be deemed to withhold conveyance of riparian rights simply because the land is described by metes and bounds.

Harrington v Foster, 220-1066; 264 NW 51

Sale by known nonowner. A vendee of property takes nothing by his conveyance when he knows who is the actual owner of the property and that his vendor is simply in possession of the property as manager.

Kollman v Kollman, 204-950; 216 NW 77

Signing and executing without reading—effect. One who signs and delivers a deed of conveyance without either reading it or asking to have it read to him is bound thereby, when he can read it and is given free and unlimited opportunity to read it.

Raible v Bernstein, 209-1083; 229 NW 753

Spendthrift trust—beneficiary's quitclaim—interest conveyed. A trust in a deed vesting in grantees as trustees the absolute control of the property from which two beneficiaries receive the income until termination of the trust at a future time, if said beneficiaries are free from debt, is a spendthrift trust and a quitclaim grantee from one beneficiary secures thereby no present interest in the property.

Beemer v Challas, 224-411; 276 NW 60

Validity—evidence. Evidence reviewed, and held insufficient to establish the invalidity of a deed.

Bibler v Bibler, 205-639; 216 NW 99

Banking corporations—director—violation of trust in re tax deed. A director of a bank may not, for his own personal enrichment, take assignment of a tax sale certificate covering land on which the bank of which he is director holds a first mortgage lien, and take tax deed under such certificate. Such deed will, on timely action and proper proof, be set aside and the bank, or its legal representative in case of insolvency, accorded the right to redeem from the tax sale.

Bates v Pabst, 223-534; 273 NW 151

Consideration — overthrowing presumption. The statutory presumption that a deed of conveyance was supported by a consideration is not overcome by the naked testimony of the grantor that he was never paid anything for the conveyance.

Carr v McCauley, 215-298; 245 NW 290

(b) WANT OF ASSENT (Undue Influence, Mistake, Insanity, etc.)

Evidence—sufficiency. Principle reaffirmed that, in an action to set aside a conveyance because of fraud, undue influence, or mistake, the proof must be clear, satisfactory, and convincing.

Stonewall v Danielson, 204-1367; 217 NW 456

Evidence—insufficiency. In action to set aside deed, evidence held insufficient to support contention that deed was executed through fraud, duress, undue influence, or lack of mental capacity.

Ryan v Church, (NOR); 216 NW 713

Freedom of disposal. Courts must be zealous to guard the right of every man to dispose of his own property as he sees fit, so long as he has the mental capacity (1) to know what property he possesses, (2) to know what he desires to do with it, and (3) to exercise his free and voluntary will in such disposition.

Coughlin v Church, 201-1268; 203 NW 812

Invalidity—burden of proof. Principle reaffirmed that (barring fiduciary relationships) the burden of proof rests on the party who alleges fraud, undue influence, or mental incompetency as the basis for invalidating a deed of conveyance.

Kramer v Leinbaugh, 219-604; 259 NW 20

Undue influence. "Influence" exercised over the grantor by the grantee in a deed of conveyance in obtaining the deed is not "undue" in a legal sense unless it submerges the free agency of the grantor.

Osborn v Fry, 202-129; 209 NW 303

Validity—substitution of will. Principle reaffirmed that a deed of conveyance will not be set aside on the ground of undue influence unless it is made to appear that the will of the wrongdoer was substituted for the will of the grantor.

Utterback v Hollingsworth, 208-300; 225 NW 419

Age of grantor—undue influence. In an action contesting deeds on the ground of undue influence, the age of the grantor is an important consideration, but it is not conclusive.

Tedemandson v Morris, 227-774; 289 NW 1

Mental incapacity—proof required. Clear, satisfactory, and convincing proof of mental incapacity must be produced in order to invalidate a deed of conveyance on that ground.

Bardsley v Spencer, 215-616; 244 NW 275

Burden of proof. The burden to establish undue influence in the execution of a deed rests on the one who so alleges.

Bardsley v Spencer, 215-616; 244 NW 275

I DEEDS IN GENERAL—continued
(b) WANT OF ASSENT (Undue Influence, Mistake, Insanity, etc.)—continued

Undue influence—evidence. Influence, to be undue, within the meaning of the law, must be such as to substitute the will of the person exercising the influence for the will of the party upon whom the influence is brought to bear. Evidence held insufficient to meet the rule.

Arndt v Lapel, 214-594; 243 NW 605

Undue influence—claim not supported by evidence. When two daughters had cared for their aged mother for about twenty years while the mother was in good health, neat in appearance, mentally alert, and did much reading in a foreign language, altho she could not read English, and the daughters went with the mother to a lawyer's office, but remained outside while deeds were drawn up by which the mother granted property to them to be effective after her death, there was no showing of mental weakness, fraud, or undue influence upon which to base a decree setting aside the deeds.

Tedemandson v Morris, 227-774; 289 NW 1

Undue influence—parent and child. There was sufficient evidence to warrant setting aside a deed on the ground of undue influence when it was made by an aged, eccentric father who was not in the best of health and had a limited business experience and had a kindly feeling toward all his children, the deed to the farm, which consisted of almost all his property, being made to a son, without the father having an independent adviser, seven days after the father had gone to live with the son who handled his business affairs and to whom he had at one time sold the farm, receiving a reconveyance when the payments were not kept up.

Stout v Vesely, 228- ; 290 NW 116

Confidential relationship established—grantee's failure to sustain burden. In an action to set aside a deed from a deceased mother, 83 years of age and ill at the time of execution of the deed, to her daughter, who had handled her mother's business for a number of years, who had the deed prepared by an attorney, and who was the only person present when mother signed the deed, evidence held to establish that there was a confidential relationship between mother and daughter, thus placing burden of proof on daughter to show that deed was not procured by fraud, and, such burden not having been met, the deed could not be sustained.

Tiernan v Brulport, 227-1152; 290 NW 53

Undue influence—evidence to negative. On the issue of undue influence in the execution of a deed to land, it seems that the grantee may show that the grantor, subsequent to the execution of the deed, repeatedly expressed his full satisfaction with, and approval of, said deed.

Hess v Pittman, 214-269; 242 NW 113

Deed from parent to child—constructive fraud—presumption. The doctrine of constructive fraud arises from the existence of a fiduciary relationship, and equity raises a presumption against the validity of a transaction where the superior party obtains a possible benefit, as in a case where a parent has become the dependent person in his relationship with a child, trusting his interests to the advice and guidance of the child, and has deeded his land to the child.

Stout v Vesely, 228- ; 290 NW 116

Fiduciary relation between husband and wife. Whether in an action by an heir to set aside a conveyance by a wife to her husband on the ground of undue influence the burden of disproof of said ground shifts to the defendant-husband, quaere.

Browne v Johnson, 218-498; 255 NW 862

Gifts—inter vivos. Undue influence necessary to set aside a conveyance must be enough to destroy the free agency of the grantor. Evidence reviewed and found insufficient to establish undue influence.

Coughlin v Church, 201-1268; 203 NW 812
Mastain v Butschy, 224-68; 276 NW 79

Undue influence—degree of proof. A deed to land must not be disturbed on the ground of undue influence unless the proof clearly and convincingly establishes that the said instrument is not the free and voluntary act of the grantor, but is the will and purpose of the grantee. Evidence reviewed and, conceding, arguendo, that a confidential relation existed between the grantor and grantee, held that the grantee had met the burden of proof to sustain the deed.

Hess v Pittman, 214-269; 242 NW 113

Relationship—effect. Blood relationship between a grantor and a grantee furnishes, in and of itself, no basis for a presumption of undue influence.

O'Neil v Morrison, 211-416; 233 NW 708

Mistake—evidence. Evidence held quite insufficient to show any mistake in the reservation in a conveyance of an easement.

Spalding v McCartney, 207-1025; 221 NW 665

Performance of contract—implied reformation. A decree which correctly, by metes and bounds, describes the land which was mutually sold and purchased, impliedly reforms the grantor's deed, which inadvertently described slightly less acreage than as correctly described by the decree.

Elliott v Horton, 205-156; 217 NW 829

Reformation of deed. The statute of limitation does not commence to run against an action to reform a deed on the ground of mutual mistake until the mistake has been discovered.

American Bank v Borcherding, 205-633; 216 NW 719

Reformation—proceedings and relief. Evidence reviewed, and held to establish clearly, satisfactorily, and convincingly plaintiff's right, on the ground of mutual mistake, to the reformation of a deed by striking therefrom an agreement by the grantee to pay an existing mortgage.

Eglin v Miller, 209-326; 228 NW 305

Insanity—effect. Principle reaffirmed that a deed of conveyance by an insane person is not necessarily void.

Montagne v Cherokee County, 200-534; 205 NW 228

Mental incompetency affecting validity. Principle reaffirmed that old age and physical impairment do not, in and of themselves, invalidate deeds of conveyance.

Utterback v Hollingsworth, 208-300; 225 NW 419

Burden of proof—failure to meet. In an action to set aside the probate of a will, and to cancel a deed (1) on the ground of the mental incapacity of the testator-grantor, and (2) on the ground of the undue influence of the devisee-grantee, the burden rests on plaintiff to establish at least one of said grounds. Evidence quite elaborately reviewed and held, plaintiff had failed to meet the burden of proof resting upon him.

Walters v Heaton, 223-405; 271 NW 310

Canceling deed—nonright to withdraw answer. In an action (1) to cancel a deed and (2) to set aside the probate of a will on the ground of mental incapacity of the testator-grantor—both instruments having been executed by the same party and at the same time —it is not necessarily error for the court to refuse to permit defendant to withdraw his answer in order to permit defendant to file motion to separate the alleged separate causes of action and to transfer to the law docket.

Walters v Heaton, 223-405; 271 NW 310

Grantor 90 years old—evidence insufficient. Evidence reviewed, as to the mental capacity of a 90-year-old mother who, to the exclusion of one son, willed and assigned her property to another son, in exchange for life support and care; and held that she still was sane and that the charge of undue influence was not substantiated.

Reed v Reed, 225-773; 281 NW 444

Mental incapacity — evidence — sufficiency. Principle reaffirmed that the courts will zealously guard the right of every person to make such legal disposition of his property as he sees fit, and to that end will demand the production of very convincing evidence in support of the plea of mental incapacity interposed by strangers to the deed.

Keating v Augustine, 213-1336; 241 NW 429

Mental incapacity—proof required to set aside. In order to set aside conveyances on the grounds of mental incapacity and undue influence, the burden is on the plaintiff to establish same by evidence which is clear, satisfactory, and convincing.

Merritt v Easterly, 226-514; 284 NW 397

Mental incompetency — realty exchange — voidable—duty to restore status quo. Where one of the parties to an exchange contract of realty is mentally incompetent, such contract is only voidable, not void, being valid until disaffirmed, and it can only be disaffirmed as a whole, not in part, and when party seeks to avoid such contract it is necessary to restore, or offer to restore, status quo.

In re Gensicke, (NOR); 237 NW 333

Mental incompetency—undue influence—burden of proof. The mental incompetency of a grantor to execute a deed of conveyance, or the obtaining of said conveyance by the grantee by undue influence, when assigned as ground for setting aside said conveyance, must be established by plaintiff and by clear, satisfactory and convincing evidence—there being no proof that a confidential relationship existed. Evidence reviewed and held insufficient to meet said burden of proof.

Foster v Foster, 223-455; 273 NW 165

Mental unsoundness — fraud — degree of proof. A deed of conveyance will be set aside on the ground of fraud or grantor's mental unsoundness, only on clear and convincing evidence in support of the charge. Evidence held insufficient.

Ellis v Allman, 217-483; 250 NW 172

Rescission of contract of sale — evidence sufficiency. Evidence reviewed and held insufficient to justify the rescission and cancellation of a contract of purchase of real estate on the ground of the mental incompetency of the purchaser.

Ridenour v Jamison, 218-277; 254 NW 802

Setting aside deed—burden of proof. A delivered deed carries a presumption in favor of its validity, so one suing to set aside a deed has the burden of proving that at the time of execution of deed, grantor was incapable of understanding her property and her relations thereto, or understanding natural objects of her bounty or nature and effect of instrument.

Bishop v Leighty, (NOR); 237 NW 251

I DEEDS IN GENERAL—continued
(b) WANT OF ASSENT (Undue Influence, Mistake, Insanity, etc.)—continued

Validity. Evidence relative to the validity of deeds reviewed, and held insufficient to show that the grantor was mentally incompetent to execute them, or that they were the result of undue influence.

Thompson v Mott, 202-246; 210 NW 91

Validity of deed. Record reviewed, and held insufficient to establish such mental incapacity in a grantor as to invalidate a deed executed by him.

Goodman v Andrews, 203-979; 213 NW 605

Fraud—evidence—sufficiency. Principle reaffirmed that testimony sufficient to overthrow a duly acknowledged deed of conveyance must amount to more than a preponderance—must be clear, satisfactory, and convincing. Record held insufficient to meet said rule of law.

Richardson v Richardson, 216-1205; 250 NW 481

Fiduciary relationship — nonpresumption. Principle reaffirmed (1) that no presumption of fiduciary relationship arises from the fact of kinship, and (2) that in the absence of proof of such relationship, plaintiff in an action to set aside a conveyance because of undue influence, has the burden to establish such fraud by convincing evidence. Evidence held quite insufficient.

Craig v Craig, 222-783; 269 NW 743

Fraud—evidence—sufficiency. Evidence held sufficient to set aside deed for fraud in its procurement.

Marsh v Hanna, 219-682; 259 NW 225

Assumption of mortgage debt—reformation of instruments—generally. Where an instrument is executed without consideration on the part of a grantee, to assume and pay the mortgage debt, the contract is not binding upon him, or if the deed is delivered in blank, or the conveyance made as security only, or if a clause if inserted by fraud, inadvertence, or mistake, without the knowledge or acquiescence of the grantee, he may have the instrument reformed in equity so as to make it express the true intent and understanding of the parties.

Guarantee Co. v Cox, 201-598; 206 NW 278

Age of grantor—insufficient to invalidate deed. Before the supreme court will set aside a deed executed by a person advanced in years, there must be evidence that such individual was not capable of carrying on his business transactions, and that he did not understand the nature of the transaction into which he was entering.

Gilligan v Jones, 226-86; 283 NW 434

Cancellation of fraudulently acquired deed. A person who secretly buys up a certificate of execution sale and takes a sheriff's deed in his own name in violation of his agreement with the judgment-defendant to pay off the judgment in question and thereby satisfy his own debt to the judgment-defendant has no standing to contest an action by the latter for the cancellation of said deed.

Swearingen v Neff, 204-1167; 216 NW 621

Confidential relation. Where an elderly but unusually self-willed woman executed a deed to her stepson during time in which she managed her own affairs, and relationship with grantee was only that which ordinarily exists between a mother and son, evidence in action to set aside the deed did not warrant finding that confidential relationship existed so as to raise presumption of fraud, but as to the assignment of a mortgage procured by this stepson after he came to live with her and had taken over management of her affairs, evidence justified finding that such relationship did exist.

O'Brien v Stoneman, 227-389; 288 NW 447

Confidential relationship—showing grantor's freedom of action. One who stands in a confidential relationship to another may not retain advantages of a transaction with the cestui when they may reasonably be the result of the confidence reposed, unless he shows that the cestui acted with freedom, intelligence, and with full knowledge of the facts.

Merritt v Easterly, 226-514; 284 NW 397

Transactions scrutinized with vigilance. Courts of equity must scrutinize, with jealous vigilance, transactions between persons sustaining relations of trust and confidence, to the end that the dominating member shall conduct himself with the utmost good faith.

Merritt v Easterly, 226-514; 284 NW 397

Confidential relations — presumption — burden of proof. The law presumes that a deed of conveyance is fraudulent and void whenever it is made to appear that, when the deed was executed, the grantee occupied a position of trust and confidence as regards the grantor, or held a dominating and controlling influence over the grantor. It follows that the grantee must overthrow the presumption by a showing of the eminent fairness and legality of the transaction. Evidence held insufficient to overthrow the presumption.

McNeer v Beck, 205-196; 217 NW 825

Burden of proof. In an action to set aside a deed and an assignment of a mortgage executed by mother to stepson, burden was on plaintiff to establish the existence of confidential relationship raising presumption of fraud.

O'Brien v Stoneman, 227-389; 288 NW 447

Actual or constructive fraud. A court of equity is not warranted in setting aside an executed contract such as a warranty deed in the absence of actual or constructive fraud.

O'Brien v Stoneman, 227-389; 288 NW 447

Constructive fraud. Evidence held to show affirmatively that the execution of a deed was not brought about by any constructive fraud arising out of the intimate relations of the parties.

Utterback v Hollingsworth, 208-300; 225 NW 419

Constructive fraud not inevitable from blood relationship. As to constructive fraud arising from the gift of real property to one standing in a confidential or fiduciary relationship to the grantor, the rule placing the burden of proof on the grantee, to show the bona fides of the transaction, is of necessity applied according to the peculiar circumstances of each particular case, and not necessarily applied because mere blood relationship exists.

Jensen v Phippen, 225-302; 280 NW 528

Duty to set aside fraud-induced deed. When a deed has been manifestly obtained by the fraud of the grantee, and without consideration, a court of equity must set it aside, on a distinct prayer for such relief, and not assume to reform it, without any prayer therefor, and decree a life interest in the defrauded grantor.

Guenther v Kurtz, 204-732; 216 NW 39

Fiduciary relation—burden of proof. Plaintiff, in an action to avoid a deed of conveyance, makes a prima facie case of constructive fraud by proof that, when the deed was executed, the grantor, tho mentally competent, was, in the transaction of his business and in his conduct generally, under the absolute domination of the grantee. After such proof, the grantee must take on the burden of affirmatively showing the complete bona fides of the transaction. Proof that the deed left grantor practically penniless, that grantee paid no consideration and was aggressively active in obtaining the deed, accentuates the presumption of fraud instead of overcoming it.

Ennor v Hinsch, 219-1076; 260 NW 26

Fiduciary relation between husband and wife. A fiduciary relation within the meaning of the law is not established by a showing that the parties were husband and wife and that the wife frequently aided her husband in the transaction of his business, it appearing that the husband was physically infirm.

Arndt v Lapel, 214-594; 243 NW 605

Fiduciary relation—proof. The fact that a grantor and grantee in a deed (being father and son) frequently talk over business matters is, in and of itself, quite insufficient to establish a fiduciary relation.

Bardsley v Spencer, 215-616; 244 NW 275

Fiduciary relationship—intestate and heir—receiving property—failure of proof. In an action by heirs of intestate to set aside a conveyance of realty made by intestate to son, on the ground of an alleged fiduciary relationship existing between aged intestate and son, held, that evidence was insufficient to establish such relationship, and even tho such relationship existed, whatever property the son received from his mother was by her voluntary and intelligent act, and without duress, dominance or overreaching on his part.

Robbins v Daniel, 226-678; 284 NW 793

Fiduciary relationship—required proof. In an action to set aside a trust agreement executed to a son and attorney by plaintiff, evidence held to support decree dismissing plaintiff's petition. The existence of a confidential relationship or facts giving rise thereto must be proved before doctrine of fiduciary relationship can be applied—the mere relationship of parent and child does not create fiduciary relationship.

Hatt v Hatt, (NOR); 265 NW 640

Fraudulent conveyance—sufficient showing. A deed from a mother to her son will be set aside as fraudulent, in a proper action by the administrator of the mother, on a showing that the mother, when the deed was executed, was in serious financial embarrassment, of which the son had full knowledge, and that the son, who then occupied a close fiduciary relation to his mother, presented no competent evidence of any consideration for the deed, or evidence overcoming the presumption of fraud and bad faith.

Howell v Howell, 211-70; 232 NW 816

Gift to daughter—no fiduciary relation—no fraud. Where a daughter, receiving a real estate gift from her parents, did not transact, nor advise concerning, her parents' business, nor dominate nor support them but, on the contrary, was more or less dependent upon them, such gift does not present a case of fiduciary or confidential relationship sufficient to nullify the deed on the ground of constructive fraud.

Jensen v Phippen, 225-302; 280 NW 528

Mere inference of invalidity. A mere alleged inference of fraud or illegality cannot overthrow a deed of conveyance.

Carr v McCauley, 215-298; 245 NW 290

Nullifying fraud—degree of proof required. A deed of conveyance will not be set aside for fraud practiced on the grantor unless proof of the fraud is clear, satisfactory, and convincing. Evidence held insufficient.

Valentine v Read, 217-57; 250 NW 634

Resulting trust denied—deed from father to son—conduct of parties. In a partition action involving a decedent's property, tried on issues

I DEEDS IN GENERAL—continued
(b) WANT OF ASSENT (Undue Influence, Mistake, Insanity, etc.)—continued
raised by defendant's cross-petition, alleging that another property of decedent, which had been deeded by decedent to one of his sons, should be included in the partition action—in the absence of fraud—such deed therefor will not be set aside on the theory of a resulting trust in favor of the decedent's estate, when there is no evidence that either the grantor or grantee so considered it altho they both lived several years after the deed was made.

Gilligan v Jones, 226-86; 283 NW 434

Secret deeds — 87-year-old grantor. A nephew, who was a sort of de facto guardian for his 87-year-old aunt, who procured from her certain deeds with utmost secrecy a short time before her death, and who did not record one of them until the day of her death, has the burden to prove his aunt acted of her own free will or from independent advice, when there is evidence bearing on her mental incapacity.

Merritt v Easterly, 226-514; 284 NW 397

Transfer of land. A vendee of land who has never agreed to assume and pay a mortgage on the land cannot be made so liable by the act of the vendor in executing and recording, without the knowledge or consent of the vendee, a deed containing such assumption and agreement to pay, it appearing that the vendee promptly repudiated and rejected said deed.

Steffes v Hale, 204-226; 215 NW 248

Validity of assent—signing without reading. A party will not be permitted to say that he was defrauded into signing an instrument without knowing its contents when he could read, did not read, and was in no manner prevented from reading.

Legler v Ins. Assn., 214-937; 243 NW 157

(c) DELIVERY

Discussion. See 8 ILB 254—Conditional delivery

Delivery—acts constituting. Delivery of a deed is necessarily established by uncontradicted, competent testimony that the grantor personally handed the deed to the grantee, with the intent to make the delivery.

Buckley v Ebendorf, 204-896; 216 NW 20

Delivery — indispensable elements. The physical delivery by a grantor to a grantee of a warranty deed passes no title unless such was the intent of the parties.

Kiser v Ins. Assn., 213-18; 237 NW 328

Intent of grantor as element of delivery. The intent of the grantor is the controlling element in the delivery of a deed.

Huxley v Liess, 226-819; 285 NW 216

Acceptance of deed—no waiver of easement rights under contract. When a contract of sale of land provided that the deed would grant an easement for the right of ingress and egress to the property, but the deed drawn on the same day failed to make such provision, the acceptance of the deed by the grantee did not waive the provision of the collateral contract, altho ordinarily the acceptance of a deed would complete the execution of the contract and would be conclusive evidence of its complete fulfilment.

Dawson v McKinnon, 226-756; 285 NW 258

Delivery—burden of proof. A judgment creditor who claims that his transcript of judgment was filed prior to the delivery of a deed of conveyance by the judgment debtor has the burden of so showing.

Richardson v Estle, 214-1007; 243 NW 611

Burden on plaintiff to show delivery of deed. In a replevin action against an administrator for possession of a deed found in the safety deposit box of the deceased, the burden is on the plaintiffs to show a valid delivery of the deed effective to pass title.

Orris v Whipple, 224-1157; 280 NW 617

Delivery of deed as gift. The unconditional delivery, as a gift, of a duly executed and acknowledged deed of conveyance, by the compos mentis grantor therein, and without fraud, to a third party with explicit direction, both orally and in writing, to said party, to hold said deed for the grantee, and to record the same immediately upon the death of the grantor, constitutes an irrevocable delivery to said grantee; and a priori, when, in addition to the foregoing, it affirmatively appears from the circumstances of the transaction that the grantor was intending to pass title to the grantee.

Keating v Augustine, 213-1336; 241 NW 429

Deeds to children delivered to trustee—wife acquiescing in husband's instructions. An agreement reached by a husband and wife, that he should deed his property to her and she would deed it to the children, the deeds to be placed with a trustee, who was to record the first deed on the death of the husband and then record the second deeds on the death of the wife, is binding on the wife, when she is present at the execution of the deeds and, by her silence, acquiesces in the instructions given by the husband to the trustee.

Bohle v Brooks, 225-980; 282 NW 351

Delivery — evidence — sufficiency. Evidence reviewed and held to establish the delivery of a deed.

McCloud v Bates, 220-252; 261 NW 766

Delivery—evidence—sufficiency. On the issue of delivery of a deed, the recitals in the will of the grantor that he was then deeding the property to said grantee, and other oral

statements of the purported grantor to the same effect, may have material and influential bearing.

Arndt v Lapel, 214-594; 243 NW 605

Insufficient delivery. No delivery of a deed of conveyance is shown by the act of the grantor (without the knowledge of the grantee) in executing and acknowledging the deed, with the continuing purpose in mind to change the grantee if the grantee predeceased the grantor, and thereafter retaining the deed among his (grantor's) private papers, with a memorandum attached to the deed, directing the grantor's executor to make delivery.

Lathrop v Knoop, 202-621; 210 NW 764

Deposit by grantor in safety deposit box. Legal delivery of deeds of conveyance is established, (1) by proof that the grantor executed them, placed them in her safety deposit box in a bank, and apparently never thereafter disturbed them during her lifetime, and (2) by proof, aliunde the deeds, that, in doing that which she did do, she intended to pass title to the grantees; and this is true even tho grantor after executing said deeds continued, until her death, to manage said lands as she had managed them prior to the execution of said deeds. (Overruled, see Orris v Whipple, 224-1157; 280 NW 617.)

Robertson v Renshaw, 220-572; 261 NW 645

Depositing with third party. The depositing of a duly executed deed with a third party with direction without reservation to record the same in case of the death of the grantor constitutes a delivery to the grantee.

Goodman v Andrews, 203-979; 213 NW 605

Escrow delivery—effect on title—life estate reserved. Delivery of a deed to a trustee for redelivery to grantee after grantor's death reserves a life estate in the grantor, with title immediately passing to grantee, but with his right to possession and enjoyment of land therein conveyed postponed until grantor's death.

Bohle v Brooks, 225-980; 282 NW 351

Escrow—safety deposit box—recall power nullifies delivery. No valid delivery of a deed is made by depositing it in a safety deposit box over which grantor thereafter maintains full dominion, with power to recall the deed. (Davis v College, 208 Iowa 480; Robertson v Renshaw, 220 Iowa 572; and Boone College v Forrest, 223 Iowa 1260, overruled.)

Orris v Whipple, 224-1157; 280 NW 617

Delivery—intent of parties. An effective delivery of an instrument is made to the grantee by the naked execution of the instrument and by simply leaving said instrument at the place of execution, if such was the actual intent of the parties.

Beery v Glynn, 214-635; 243 NW 365

Delivery by mail. Where it was definitely agreed between a debtor and creditor that the debtor would execute a deed of specified land to the creditor in partial satisfaction of the debt, and that the debtor upon the execution of the deed would forward it to the county recorder with direction to record and forward to the grantee, delivery will be deemed complete at the point of time when the deed is duly mailed by the debtor to the recorder.

Richardson v Estle, 214-1007; 243 NW 611

Delivery to notary—acceptance by grantee without obtaining possession of deed. Acceptance is a necessary element of the delivery of a deed and may be presumed where the conveyance is beneficial to the grantee and carries no onerous obligations. Where the grantee agreed to accept a deed, and it was executed and, in her presence, delivered for her to a notary to be recorded, there was acceptance and title vested in her at the time of delivery to the notary, altho the notary kept the deed and she never had possession of it.

Huxley v Liess, 226-819; 285 NW 216

Delivery to trustee with power to recall. A grantor, in depositing a deed with a trustee for delivery to the grantee upon grantor's death, may reserve the right to recall the deed; but if he does not exercise such right, the final passing of the deed by the trustee to the grantee, after the death of the grantor, consummates a valid delivery. (Overruled, see Orris v Whipple, 224-1157; 280 NW 617.)

Davis v College, 208-480; 222 NW 858

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

Delivery—presumption. A deed in the possession of the grantee, tho the estate created is to take effect in the future, carries a presumption of delivery.

Browne v Johnson, 218-498; 255 NW 862

Delivery—presumption attending possession by grantee. A deed of conveyance when produced by the grantee therein, need not be accompanied by any evidence of the execution or of the delivery of the deed, because due execution and delivery will be presumed until he who attacks it shows to the contrary. And this is true even tho the deed did not reach the hands of the grantee, or was not recorded, until after the death of the grantor.

Heavner v Kading, 209-1275; 228 NW 313

Delivery — overthrowing presumption. The presumption of delivery of a deed which arises from possession and recording of the deed by the grantee cannot be overthrown by equivocal testimony.

Jones v Betz, 203-767; 210 NW 609

Delivery — presumption from record. The fact that a deed of conveyance has been duly recorded generates a presumption of delivery

I DEEDS IN GENERAL—continued
(c) DELIVERY—continued

so strong and persuasive that only clear and satisfactory evidence will overthrow such presumption. Evidence held insufficient.

Gibson v Gibson, 205-1285; 217 NW 852

Delivery presumed from recording. Recording of a deed does not constitute delivery, but it is evidence which creates a presumption of delivery rebuttable only by clear and satisfactory evidence.

Huxley v Liess, 226-819; 285 NW 216

Delivery—rebutting presumption by possession—forgery. Transfers and assignments of property of a deceased, in the hands of certain heirs, raise a presumption that they were delivered. However, facts and circumstances may overcome this presumption, especially when it is shown that the signatures of the deceased to the instruments are forgeries.

Brien v Davidson, 225-595; 281 NW 150

Elements of conveyance—delivery. All the elements for conveying the title to land were established by evidence that when a warranty deed was given to prevent an expected judgment against the grantor from becoming a lien on the land, with a lease back to the grantor to terminate at the death of himself and his wife, it was signed by all parties in the presence of the others, a copy was given the grantee, it was acknowledged by a notary and given him to record and keep, and three years later the grantor affixed a federal stamp to the deed and re-recorded it.

Huxley v Liess, 226-819; 285 NW 216

Equitable estoppel—fraud as essential element. If there be no fraud, actual or constructive, in the execution and delivery of a deed of conveyance, there can be no estoppel against the grantee.

McCloud v Bates, 220-252; 261 NW 766

Management of estate—unlawful delivery of deed. An administrator who has in his possession a deed of conveyance purporting to have been executed by the deceased has no authority to deliver said deed to the grantee in said deed without an authorizing order of court.

Blain v Blain, 215-69; 244 NW 827

Mortgage assumed by grantee—accrual of action. When grantees of property accepted a deed by which they assumed a mortgage debt on the property, the statute of limitations began to run from the time of the acceptance of the deed, but the grantees were still liable after the 10 years when they had extended the time of maturity.

Lincoln Ins. v McKenney, 227-727; 289 NW 4

Nondelivery of pledge—effect. An agreement that a deed of conveyance may be held by a creditor as collateral security to an indebtedness of the debtor is ineffective when unaccompanied by an express or implied delivery of the deed to the creditor.

Andrew v Hanchett, 208-1179; 226 NW 3

Non-presumption of delivery. Assuming that, at the trial of an action to quiet title, the production of a deed of conveyance by the grantee named therein creates a presumption that the deed was duly delivered to the grantee, yet such presumption does not prevail when the deed was in the possession of the grantor's administrator at the commencement of said action, and when the grantee is enabled to produce the deed at the trial because the administrator, before the trial, unlawfully delivered said deed to the grantee.

Blain v Blain, 215-69; 244 NW 827

Passing with intent to transfer title. An intent on the part of a grantor to make the passing of the instrument a present transfer of title is an element of an effective delivery.

Lawson v Boo, 227-100; 287 NW 282

Proof of delivery. In an action for partition, wherein defendant claimed absolute title under a deed which she first physically obtained, after the grantor's death, by going to the bank where it was on deposit, the defendant is a competent witness to testify, (1) that she knew where the deed was kept, but (2) not that grantor told her where it was kept.

Robertson v Renshaw, 220-572; 261 NW 645

Recording long after grantor's death—no delivery—nonvalidity. A deed, found among the personal effects of a deceased grantor and recorded seven or eight years after the estate was closed, not having been delivered by grantor nor ordered delivered by the court, has no validity.

Forrest v Otis, 224-63; 276 NW 102

Delivery intended by recording. If a deed, after being signed and acknowledged by grantor, is placed of record by him with the intention of making the recording stand for delivery, the title will pass to the grantees, assuming there was acceptance by them of the title.

Lawson v Boo, 227-100; 287 NW 282

Rebuttable presumption from recording. In an action by a 73-year-old grantor to set aside deed to stepchildren, wherein grantor reserved a life estate to himself, the grantor failed to overcome by clear and satisfactory evidence the presumption arising from the recording of the deed that there was a delivery that transferred the title.

Lawson v Boo, 227-100; 287 NW 282

Sale or transfer—nonintent to pass title—effect. Proof that an insured, after the issuance of a policy, and without notice to the insurer, executed, physically delivered, and

permitted to be recorded an unqualified warranty deed to the insured property, establishes, prima facie, an automatic forfeiture of the policy when the policy provides that such forfeiture shall follow any "sale or transfer" of the property without notice; but evidence is admissible, under proper plea, in avoidance of the apparent forfeiture, to show that there was no completed sale or transfer in fact—that the insured-grantor and grantee mutually understood and agreed that such execution, delivery, and recording should not have the effect to pass title until a future date; but ordinarily such evidence can only generate a jury question on the issue of intent to pass title.

Kiser v Ins. Assn., 213-18; 237 NW 328

Symbolical delivery. Evidence relative to an alleged symbolical delivery of a deed of conveyance reviewed, and held insufficient to establish delivery.

Blain v Blain, 215-69; 244 NW 827

Symbolical or constructive delivery. An effective symbolical or constructive delivery of a deed of conveyance is established by proof (1) that the grantor showed the deed to a party (not the grantee) and, in effect, said: "I am going to keep this deed in my safety deposit box in the bank. After my death you get the deed from the box and record it"; (2) that later when the grantor was stricken with a fatal illness he handed a key to said party and in effect said it was the key to his said box, and told said party to look after the recording of the deed, and (3) that after the death of the grantor, the safety deposit box was unlocked by said party with said key, the deed was found therein, and thereupon recorded.

Heavner v Kading, 209-1271; 228 NW 311
Heavner v Kading, 209-1275; 228 NW 313

Surrender—effect. The voluntary surrender of an unrecorded deed by the grantee therein, with the intent thereby to relinquish the title conveyed by such deed, and the acceptance of such surrender by the grantor, in consideration of other agreements entered into by the grantor and grantee, estop the grantee from asserting any further rights under the deed.

Bibler v Bibler, 205-639; 216 NW 99

Wrongful delivery—effect. Principle recognized that no title passes where the escrow holder of a deed of conveyance delivers the deed to the grantee without performance of the conditions upon which it was to be delivered.

Lindberg v Younggren, 209-613; 228 NW 574

(d) COVENANTS

Discussion. See 3 ILB 40—Equitable restrictions on land; 8 ILB 259—Liability of grantor to remote grantee on covenants

Attorney fees. Attorney fees may be a proper element of recovery in an action for breach of a covenant of warranty.

Kellar v Lindley, 203-57; 212 NW 360

Breach of warranty—evidence available against vouchee. In an action for breach of warranty because of an existing mortgage on the property, the foreclosure proceedings and judgment entry therein are admissible against the covenantor-defendant to prove the plaintiff's measure of damages, it appearing that the covenantor had been duly vouched into said foreclosure proceedings.

Kellar v Lindley, 203-57; 212 NW 360

Breach—evidence—sufficiency. A covenant against incumbrance, or to defend the title against the lawful claims of all persons whomsoever cannot be deemed broken on a naked showing that the covenantee remained out of possession because some one else was in possession. The nature of that possession is, manifestly, all-important; e.g., whether it is lawful and paramount and hostile to the rights of the covenantee.

Pope v Coe, 208-759; 225 NW 939

Breach—insufficient record. A mortgagee may not maintain an action for damages for breach of the covenant of warranty of title in the mortgage, on a record which fails to show that the mortgage is invalid in any particular.

Churchman v Wilson, 204-1017; 216 NW 726

"Buildings"—intent of parties. The word "building" as used in restrictive covenants in deeds of conveyance will be so construed as to give effect to the manifest intention and purposes of the parties. Held, inter alia, that structures for screening sand, and a derrick with hoisting machinery were "buildings" within the meaning of restrictive covenants against the erection of buildings which would cut off a view.

Curtis v Schmidt, 212-1279; 237 NW 463

Building restrictions—knowledge of. A grantee of land who at the time of purchasing knows, generally, that there are building restrictions running with the land, is bound by such restrictions even tho they are omitted from the deed taken by him.

Burgess v Magarian, 214-694; 243 NW 356

Contract—presumption as to waiver. A provision for the forfeiture of a life estate reserved in a contract for the sale of land will be presumed waived, prima facie, when not inserted in the subsequently executed deed.

Toedt v Bollhoefer, 206-39; 218 NW 56

Damages—improper measure. In an action for damages consequent on a breach of the covenant of warranty of title contained in a mortgage, the amount of the mortgage is not the proper measure of damages, when the mortgagor received no consideration for executing the mortgage, and when the mortgagee parted with no consideration, except to

I DEEDS IN GENERAL—concluded
(d) COVENANTS—concluded

forbear the enforcement of his judgment against a third party.

Churchman v Wilson, 204-1017; 216 NW 726

Educational and religious purposes—declaration of purpose or trust. A covenant in a deed specifying use for educational and religious purposes is only a "declaration of purpose" or a trust.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

Indemnity bond as covenant of seizin. An indemnity bond conditioned to hold the obligee harmless from any loss which he may sustain by reason of a defect of title to certain real estate, is equivalent to a covenant of seizin and governed by the same rule, to-wit: no action for substantial damages is maintainable on the bond until a hostile, paramount title is asserted.

Duke v Tyler, 209-1345; 230 NW 319

Legal cancellation of covenant of seizin. A grantee of land in legal effect cancels the covenant of seizin contained in his deed, and likewise cancels an indemnity bond which is tantamount to a covenant of seizin, by reconveying the land to the grantor with covenant of seizin.

Duke v Tyler, 209-1345; 230 NW 319

Restrictions as to use of property—estoppel. Record reviewed, and held insufficient to show that property owners were estopped to insist on compliance with certain restrictions as to the use of platted lots.

Shuler v Sand Co., 203-134; 209 NW 731

Restrictions as to use of property—omission from deed. The grantee of a lot who takes by quitclaim deed which contains no restrictions as to the use of the property is, nevertheless, bound by restrictions as to the use of the property contained in the deed to his grantor and in substantially all other deeds to lots in the addition, it appearing that the addition in question was publicly and notoriously platted as a restricted residence area.

Shuler v Sand Co., 203-134; 209 NW 731

Unilateral contract—voiding contract by one's own default. A provision in a deed of conveyance to the effect that if the grantee fails to make any of the payments which he has agreed to make, or fails to perform any of the obligations which he has agreed to perform, the deed "shall be void and the title immediately revest" in grantor, simply means that the grantee has covenanted that if he defaults, his default shall void the deed if the grantor so elects. Especially is this true when the acts of the parties indicate that they mutually so construe the contract.

Earle v Rehmann, 214-784; 243 NW 345

Warranty and incumbrance—drainage improvement. A covenant against incumbrance is not broken by the existence of a public drainage improvement on the land, nor is a general covenant of warranty breached by the fact that, subsequent to the deed, an additional assessment is levied on the land for such improvement.

Kleinmeyer v Willenbrock, 202-1049; 210 NW 447

II MERGER OF REALTY INTERESTS GENERALLY

Merger and cancellation. The fact that the holder of trust or mortgage-secured bonds later acquires an incomplete title to the mortgaged premises, and later conveys both the premises and bonds in trust, as security to a creditor, and yet later has his title to the premises fully completed, does not work a merger and cancellation of the bonds, it appearing that such merger and cancellation would have been to the disadvantage of said titleholder and his transferee in trust.

Sunset Park Co. v Eddy, 205-432; 216 NW 93

Merger of life estate and contingent remainder into fee. The grantee of a life estate, on condition, however, that if grantee violates any one of named prohibited acts the said estate shall ipso facto instantly terminate, and the fee pass to grantee's issue, or to named remaindermen if grantee then has no issue, may, if without issue, take a conveyance by warranty deed from said contingent remaindermen of all their present and possible future interest in the land, and thereby merge the life estate and contingent remainders into a fee in himself.

Thorsen v Long, 212-1073; 237 NW 515

Contract to convey merged in resulting deed. A contract to convey land is presumed to be merged in the subsequent deed executed in performance thereof, except that the contract may be resorted to for explanation of an ambiguity or collateral agreement not incorporated in the deed, but, in instant case, deed held to be unambiguous when it warranted against all persons other than those asserting rights under existing tenancies and when the contract provided for possession upon delivery of the deed subject to all leases. Thereunder, the provisions of the contract merged in the deed so that grantee could not look to grantor for relief when the tenant in possession refused to vacate.

Swensen v Ins. Co., 225-428; 280 NW 600

Merger of easement in title and fee. A recorded conveyance of land which, in addition to conveying the land, also grants a private roadway over other lands of the grantor, creates an easement which runs with the land, even tho the grantor subsequently reacquires title to the lands first conveyed and again becomes the owner of both tracts and subse-

quently conveys both tracts by separate conveyances to different grantees.

Feilhaber v Swiler, 203-1133; 212 NW 417

Establishing trust to defeat heir's judgment creditors. When a will devised all of testatrix's property to daughter in trust, directing trustee to make a monthly payment to a third party and to transfer a one-fourth interest in the trust estate to each of two grandchildren when they reached a certain age, and providing that daughter should have a one-half interest in the estate during her life only in the event obligations to her judgment creditors were barred or satisfied, such will established a trust, and did not repose entire beneficial interest in daughter. Nor was the trust extinguished by a merger of daughter's legal and equitable estate so that property could be subjected to satisfaction of creditor's judgments, because in equity the doctrine of merger will not be invoked if it would frustrate the testatrix's expressed intentions or if there is some other reason for keeping the estates separate.

Freier v Longnecker, 227-366; 288 NW 444

Quitclaim to avoid foreclosure — effect of existing junior liens—insurance unaffected. A mortgagee's status as such, as affecting his rights under a fire insurance policy, is not lost by merger when he takes a quitclaim deed from mortgagor agreeing not to foreclose if no junior liens exist against the property, when thereafter it is found that such liens do exist whose presence would cause a merger to be against the interest and inconsistent with the intention of the mortgagee.

Guaranty Ins. v Ins. Assn., 224-1207; 278 NW 913

Termination—acquisition of title by stockholder of corporate lessee. A lease in which a corporation with many stockholders is lessee may not be said to be merged, and thereby terminated, simply because some of the stockholders acquire the equitable title to the real estate.

Fleming v Casady, 202-1094; 211 NW 488

Transfer of property mortgaged—merger—general rule. Where a titleholder of real estate pays off a prior existing mortgage thereon, the mortgage lien merges in the fee, but where a mortgagee acquires the fee to the mortgaged premises his mortgage lien does not thereby merge therewith if this would be detrimental to his interest unless he intends such merger.

Bankers Trust v Stallcop, 223-1344; 275 NW 120

10085 Acknowledgments within state.

Atty. Gen. Opinion. See '34 AG Op 672

ANALYSIS

I PARTIES AUTHORIZED TO TAKE
II LEGALIZING ACKNOWLEDGMENTS

I PARTIES AUTHORIZED TO TAKE

Disqualification of officer. A chattel mortgage which is acknowledged before a notary public who is the mortgagee, is not recordable, and if recorded, the record imparts no constructive notice.

Heitzman v Hannah, 206-775; 221 NW 470

Elements of conveyance—delivery. All the elements for conveying the title to land were established by evidence that when a warranty deed was given to prevent an expected judgment against the grantor from becoming a lien on the land, with a lease back to the grantor to terminate at the death of himself and his wife, it was signed by all parties in the presence of the others, a copy was given the grantee, it was acknowledged by a notary and given him to record and keep, and three years later the grantor affixed a federal stamp to the deed and re-recorded it.

Huxley v Liess, 226-819; 285 NW 216

II LEGALIZING ACKNOWLEDGMENTS

Discussion. See 16 ILR 541—Acknowledgment statute

10094 Certificate of acknowledgment.

Atty. Gen. Opinion. See '28 AG Op 135

ANALYSIS

I FORM OF CERTIFICATE
II CERTIFICATE AS EVIDENCE
III OFFICIAL TITLE OF OFFICER

I FORM OF CERTIFICATE

Note: A legal form of a certificate of acknowledgment is set out in §10103

Statutory form. In absence of express requirements to that effect, exact language of statute need not be used, it being sufficient if necessary facts required to be contained in acknowledgment be expressed in words of substantially equivalent import.

Hauser v Callaway, 36 F 2d, 667

Statutory forms—recital as to authority of officer—sufficiency. It is the general rule that forms of acknowledgment as prescribed in statutes are permissive, and not mandatory, and it is therefore sufficient if substantial compliance as to essentials is present. So where title of acknowledging officer did not appear in body of certificate as suggested by statute, but appeared in subscription of certificate, the acknowledgment was held valid.

Advance-Rumely Co. v Wagner, 29 F 2d, 984

Insufficient form. Notary's certificate of acknowledgment to conditional sale contract, not mentioning in body name, title, or county of subscribing notary, held insufficient as basis for record.

In re Holley, 25 F 2d, 979

Sufficient acknowledgment. Under statute, requiring notary in acknowledgment of mort-

I FORM OF CERTIFICATE—concluded

gage to show that mortgagor acknowledged execution of instrument to be his voluntary act and deed, acknowledgment, reciting that mortgagor named who executed said instrument "acknowledged said instrument to be his voluntary act and deed," held sufficient to make filing and recording of such mortgage constructive notice; the objection that the acknowledgment stated that the instrument, and not the execution of the instrument, was the mortgagor's free act and deed, being hypercritical.

Hauser v Callaway, 36 F 2d, 667

Form and contents—failure of statutory requirements—not constructive notice. Under statute requiring that, in order to give constructive notice, conditional sales contracts be acknowledged in the same manner as chattel mortgages, a certificate of acknowledgment on a conditional sales contract, stating merely that person making acknowledgment was personally known to notary and that person making acknowledgment said he signed it voluntarily, held defective, because notary did not therein identify the person making the acknowledgment as signer of contract acknowledged. Hence contract was invalid as against creditors of bankrupt conditional buyer.

In re Elliott, 72 F 2d, 300

Name variation of mortgagor—when noneffective. A mortgage executed by "Chester C. Callaway", which was acknowledged, filed, and recorded, was constructive notice to trustee in bankruptcy of the estate of Charles Chester Callaway, bankrupt, the bankrupt being best known in the community in which he lived by the name which he signed to the mortgage, and the fact that the acknowledgment stated that he "acknowledged said instrument", instead of statutory requirement of "acknowledged execution of instrument", was held sufficient to make the filing and recording of such mortgage constructive notice.

Hauser v Callaway, 36 F 2d, 667

II CERTIFICATE AS EVIDENCE

Impeachment by notary of his own certificate. Very little weight will be given to the testimony of a notary public that the recitals of his certificate are false.

McDaniel v Bank, 210-1287; 232 NW 653

Denial of signature overcome by certificate of acknowledgment. Tho a proper denial of the genuineness of the signature to an instrument casts the burden on the opposing litigant to prove the genuineness of such signature, yet, if the instrument is one which is legally acknowledgeable and is duly acknowledged and properly introduced in evidence with the acknowledgment, the burden of proof henceforth is on the party causing the signature to be denied to overcome, by clear, satisfactory, and convincing evidence, the very strong presumption, generated by the certificate of acknowledgment, that the instrument was actually executed by the acknowledging party. Held, presumption not overcome.

Northwestern Ins. Co. v Blohm, 212-89; 234 NW 268

Presumption. Principle reaffirmed that great weight is accorded to a certificate of acknowledgment.

Hutchins v Jones Piano Co., 209-394; 228 NW 281

III OFFICIAL TITLE OF OFFICER

Certificate sufficient. Certificate of acknowledgment held valid, tho title of acknowledging officer did not appear in body of certificate.

Advance-Rumely Co. v Wagner, 29 F 2d, 984

10098 Use of seal.

Atty. Gen. Opinion. See '38 AG Op 650

10101 Certificate of acknowledgment.

Curing defects. A notary public may not, after his term of appointment has expired, voluntarily or under order of court validly attach a new certificate of acknowledgment to a statutory agreement for arbitration executed during his expired term, even tho, at the time of attaching such new certificate, he was a notary public under a new appointment.

Koht v Towne, 201-538; 207 NW 596

Disqualified notary — when inconsequential. The validity of a deed of conveyance is, as between the grantor and grantee, in no manner affected by the fact that the deed was acknowledged before a disqualified notary public.

Shanda v Bank, 220-290; 260 NW 841

Impeachment—evidence—sufficiency. Principle recognized that testimony sufficient to overthrow the probative force of a certificate of acknowledgment must amount to more than a preponderance in the balancing of probabilities.

Parry v Reinertson, 208-739; 224 NW 489; 63 ALR 1051

Presumption. Principle reaffirmed that great weight is accorded to a certificate of acknowledgment.

Hutchins v Piano Co., 209-394; 228 NW 281

10103 Forms of acknowledgment.

Atty. Gen. Opinions. See '28 AG Op 135; '30 AG Op 144

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Northwestern Ins. v Blohm, 212-89; 234 NW 268

Discrepancy in names—effect. The fact that in the body of a mortgage, and in the certificate of acknowledgment of said mortgage, the name of the wife of the mortgagor-owner appears as "Mary F. McNeff" instead of "Mary T. McNeff" (her correct name) is not of controlling importance on the issue as to the validity of the mortgage as to the wife, it appearing that she was correctly identified in said certificate of acknowledgment "as the wife" of said mortgagor-owner.

First Tr. JSL Bk. v McNeff, 220-1225; 264 NW 105

Evidence — inference of execution. The fact that a mortgage carries a notarial certificate of acknowledgment by the parties purporting to execute it is persuasive evidence that said parties did, in fact, execute it—that their signatures are genuine.

Greenland v Abben, 218-255; 254 NW 830

Fraudulent assignment—evidence. In an action by heirs of an intestate against a son and heir of intestate to set aside a transfer of a note and mortgage from intestate to said son, evidence held insufficient to show signatures of aged mother are not the genuine signatures of intestate on assignments.

Robbins v Daniel, 226-678; 284 NW 793

Impeaching signature but not acknowledgment — effect. Even tho it appears that the purported signature of a wife to a promissory note and mortgage (admittedly executed by the husband on his own land) was affixed by someone other than the wife, yet if the mortgage carries a certificate of acknowledgment in due and proper form as required by law reciting an acknowledgment by said wife of said mortgage as her voluntary act and deed, the wife must, in order to avoid the mortgage as to herself, overcome by clear, satisfactory and convincing evidence the facts affirmed in said certificate.

First Tr. JSL Bk. v McNeff, 220-1225; 264 NW 105

Official title—sufficiency. A certificate of acknowledgment which in the body thereof describes the acknowledging officer as a "notary public in and for said county" is all-sufficient, when the heading to the acknowledgment specifically names the county.

Dunham v Grant, 207-602; 223 NW 385

See Citizens Bk. v Hamilton, 209-626; 227 NW 112

Omission of name of officer—effect. A certificate of acknowledgment may be sufficient without any recital therein of the name of the officer before whom the acknowledgment was taken.

Manbeck Motor v Garside, 208-656; 226 NW 9

Statutory forms—recital as to authority of officer—sufficiency. It is the general rule that forms of acknowledgment as prescribed in statutes are permissive, and not mandatory, and it is therefore sufficient if substantial compliance as to essentials is present. So where title of acknowledging officer did not appear in body of certificate as suggested by statute, but appeared in subscription of certificate, the acknowledgment was held valid.

Advance-Rumely v Wagner, 29F 2d, 984

10105 Recording.

Discussion. See 2 ILB 52—Recording of instruments affecting land; 2 ILB 109—Effect of recording; 2 ILB 169—Record as notice; 3 ILB 25—Void and defective deeds

ANALYSIS

Chattel mortgages—purchasers and creditors—priority. See under §10015 (V)
Fraudulent conveyances. See under §11815 (I)

I NECESSITY AND EFFECT OF RECORDING

Discussion. See 4 ILB 266—Torrens land title system

Certificates—nonnecessity to record. Conceding arguendo, that municipal improvement certificates and assignments thereof are in-

I NECESSITY AND EFFECT OF RECORDING—concluded

struments which require filing and recordation under this section, yet the failure to so file and record is quite inconsequential as to parties who had full knowledge that the certificates were outstanding.

Hawkeye Ins. v Valley-Des Moines Co., 220-556; 260 NW 669; 105 ALR 1018

Delivery of deed—presumption from record. The fact that a deed of conveyance has been duly recorded generates a presumption of delivery so strong and persuasive that only clear and satisfactory evidence will overthrow such presumption. Evidence held insufficient.

Gibson v Gibson, 205-1285; 217 NW 852

Delivery of deed presumed from recording. Recording of a deed does not constitute delivery, but it is evidence which creates a presumption of delivery rebuttable only by clear and satisfactory evidence.

Huxley v Liess, 226-819; 285 NW 216

Fraudulent conveyances—transfers invalid—withholding from record. The withholding of a mortgage from record until after the mortgagor became involved in litigation is not, in and of itself, sufficient to justify an inference of fraud, in the face of unquestioned evidence that the debt secured was genuine.

Citizens Bank v Hamilton, 209-626; 227 NW 112

Husband and wife—secret, unrecorded deed—estoppel. A wife who, even without fraudulent intent, receives from her husband a secret, voluntary conveyance of land, and withholds the deed from record for many years, and allows her husband publicly to treat, manage, and control the land as his own and to obtain credit on the strength of such apparent ownership, thereby estops herself from asserting her ownership against said creditors.

Meltzer v Shafer, 215-785; 244 NW 851

Delivery intended by recording. If a deed, after being signed and acknowledged by grantor, is placed of record by him with the intention of making the recording stand for delivery, the title will pass to the grantees, assuming there was acceptance by them of the title.

Lawson v Boo, 227-100; 287 NW 282

Delivery—rebuttable presumption from recording. In an action by a 73-year-old grantor to set aside deed to stepchildren, wherein grantor reserved a life estate to himself, the grantor failed to overcome by clear and satisfactory evidence the presumption arising from the recording of the deed that there was a delivery that transferred the title.

Lawson v Boo, 227-100; 287 NW 282

Disqualification of officer. A chattel mortgage which is acknowledged before a notary public who is the mortgagee is not recordable, and, if recorded, the record imparts no constructive notice.

Heitzman v Hannah, 206-775; 221 NW 470

Elements of conveyance. All the elements for conveying the title to land were established by evidence that when a warranty deed was given to prevent an expected judgment against the grantor from becoming a lien on the land, with a lease back to the grantor to terminate at the death of himself and his wife, it was signed by all parties in the presence of the others, a copy was given the grantee, it was acknowledged by a notary and given him to record and keep, and three years later the grantor affixed a federal stamp to the deed and re-recorded it.

Huxley v Liess, 226-819; 285 NW 216

Failure to record deed—effect. In a controversy between a landlord and a chattel mortgagee over the priority of their liens, it is quite immaterial that the landlord's title deed is not of record.

Corydon Bank v Scott, 217-1227; 252 NW 536

Mortgages executed on same day on same property. As between mortgages executed and delivered on the same day on the same property, it will be presumed, nothing appearing to the contrary, that the mortgage first recorded was first executed and delivered, and consequently entitled to priority.

Miller v Miller, 211-901; 232 NW 498

Nonconstructive knowledge. One who takes a mortgage from a mortgagor who, under the recording acts, appears to be the sole owner of the fee is not charged with constructive knowledge of matter which appears in the "probate record" (§11842, C., '31) and which suggests or implies that some person other than the apparent fee owner has an interest in the property.

Booth v Cady, 219-439; 257 NW 802

Recording long after grantor's death—no delivery—nonvalidity. A deed, found among the personal effects of a deceased grantor and recorded seven or eight years after the estate was closed, not having been delivered by grantor nor ordered delivered by the court, has no validity.

Forrest v Otis, 224-63; 276 NW 102

II INSTRUMENTS AFFECTING REAL ESTATE

Discharge in bankruptcy—effect. The discharge in bankruptcy of a mortgagor does not affect the lien of the mortgage.

Webber v King, 205-612; 218 NW 282

Attorney and client—correcting instrument after employment terminates. Attorneys hired

to draft a mortgage, altho discovering that they have made a mistake in the description of the land, have no authority on their own initiative after termination of their employment and without consulting the mortgagee, to change the description and re-record the mortgage in the recorder's office.

Winker v Tiefenthaler, 225-180; 279 NW 436

Deeds to children delivered to trustee—wife acquiescing in husband's instructions. An agreement reached by a husband and wife, that he should deed his property to her and she would deed it to the children, the deeds to be placed with a trustee, who was to record the first deed on the death of the husband and then record the second deeds on the death of the wife, is binding on the wife, when she is present at the execution of the deeds and, by her silence, acquiesces in the instructions given by the husband to the trustee.

Bohle v Brooks, 225-980; 282 NW 351

III SUBSEQUENT PURCHASERS

Failure to record—who may complain.

Johnson v Railway, 202-1282; 211 NW 842

Inadvertent antedating and recording of intended second mortgage—priority. Altho all parties to two mortgages, growing out of the same transaction and executed at substantially the same time, intended that one of them should be a first lien, yet if the intended second mortgage and note are inadvertently antedated and recorded, a subsequent purchaser of said antedated and recorded mortgage acquires a first lien when he purchased in good faith, for value, before maturity, without notice of the intention of said original parties, and in the honest and justifiable belief that he was acquiring a first mortgage lien; and it is quite immaterial that said purchaser long delayed the recording of his formal assignment of the mortgage.

Fed. Bank v Sherburne, 213-612; 239 NW 778

Mortgage on interest of joint adventurer. Land belonging to a joint adventure becomes individually owned land when the joint adventurers execute and place of record an instrument which specifically states the fractional individual ownership of each in the land. It follows that as subsequent mortgagee who in good faith relies on such record cannot be detrimentally affected by equities arising out of the joint adventure and existing between the joint adventurers.

State Bank v Calvert, 219-539; 258 NW 713

Oral contract contemporaneous with deed. When a duly recorded deed contains a prohibition against a sale or conveyance of any part of the land during the lifetime of the grantor, parol evidence is admissible against a subsequent mortgagee to show that the purpose of said prohibition was to protect the grantor during his lifetime in a contract reservation of rent in the land.

Iowa Corp. v Halligan, 214-903; 241 NW 475

Mortgages—recitals—effect. One who in good faith and for value purchases a note and a mortgage which from its face and recording date is a first lien, is not charged with notice that another mortgage of later date and record is in fact the first lien on the same land because the later mortgage runs to a federal land bank (which is prohibited from taking second mortgages) and recites that the land is free from incumbrance.

Fed. Bk. v Sherburne, 213-612; 239 NW 778

Unrecorded conveyance of interest of co-tenant. A tenant in common who, while in possession under a deed granting such tenancy, orally purchases his co-tenant's interest may not thereafter claim that his continued possession is notice to the world of his newly acquired right to his co-tenant's share. It follows that if the co-tenant, who has sold his interest, subsequently mortgages his apparent record interest to a good-faith mortgagee without notice of the oral purchase, the mortgage will take priority over the said purchase.

Oxford Jct. Bk. v Hall, 203-320; 211 NW 389

IV VALUABLE CONSIDERATION

Exchange of property. Instruments duly executed in exchange of property cannot be impeached without convincing proof of fraud, and values of exchanged properties are liberally regarded in determining adequacy of consideration.

Ragan v Lehman, (NOR); 216 NW 717

Purchaser—nonpayment—effect. The purchaser of land from a fraudulent grantee will not be protected as a purchaser in good faith and for a valuable consideration when, at the time notice of the fraud is brought home to him, the purchase-price note was in the hands of the grantor, and unpaid.

Reining v Nevison, 203-995; 213 NW 609

Transfers and transactions invalid—good-faith grantee. Principle reaffirmed that a conveyance will be sustained in favor of a grantee who in good faith paid an adequate consideration, without participating in the fraudulent purpose, if any, of the grantor.

First N. Bk. v Currier, 218-1041; 256 NW 734

V NOTICE

(a) RECORD NOTICE

Prohibition against conveyance—validity—record. A provision in an ordinary warranty deed absolutely prohibiting a sale or conveyance of any part of the land during the lifetime of the grantor without the consent of the grantor, is not repugnant to the deed if the unrevealed purpose of said prohibition is legal, and a part of the consideration for the deed,

V NOTICE—continued

(a) RECORD NOTICE—concluded

and is expressed in a contract which accompanies the execution of the deed, even tho the contract be oral. It follows that the record of such deed charges third parties with notice of said contract if reasonable inquiry would reveal it.

Iowa Corp. v Halligan, 214-903; 241 NW 475

Landlord's contractual lien—constructive notice to trustee. Where a lease provided for lien in favor of lessors for taxes and other money paid by lessors under provisions of lease, and when assignments of lease to corporations, articles of incorporation of bankrupt lessee under its original name, and amendment changing its name to that of bankrupt had all been recorded, that record gave constructive notice to trustee in bankruptcy and all subsequent lienors of lessor's prior lien.

Ginsberg v Lindel, 107 F 2d, 721

(b) ACTUAL AND IMPLIED NOTICE

Actual notice without actual knowledge. A mortgagee will be deemed to have had "actual notice" of a prior unrecorded mortgage (or of a prior mortgage so defectively acknowledged that the record thereof imparts no constructive notice) when the facts and circumstances attending and surrounding the taking of the second mortgage are such as to lead him as a reasonably prudent person to make inquiries, and when such inquiries if prosecuted with ordinary diligence would have revealed the former mortgage.

Mill Owners Ins. v Goff, 210-1188; 232 NW 504

Codicil as deed. A duly signed, acknowledged, and recorded contract to the effect that a specified devise in the will of one of the parties to the contract should act as a deed to the other party to the contract will prevail over a subsequent conveyance of the property by the testator, especially when the grantee had actual notice of the contents of the will and of the contract in reference thereto.

Krcmar v Krcmar, 202-1166; 211 NW 699

Constructive notice imposes duty to make inquiry. A mortgagee who is constructively charged with notice of another mortgage executed on the same day is actually charged with notice that said other mortgage was first executed if appropriate inquiry would have revealed such fact.

Miller v Miller, 211-901; 232 NW 498

Inquiry and constructive notice. A purchaser of real estate must be charged with actual notice of such facts as he would have ascertained had he made such inquiries as ordinary prudence reasonably suggested.

Young v Hamilton, 213-1163; 240 NW 705

Maintenance of railroad bridge—notice implied. The existence, on a minor fractional part of a government 40-acre tract, of permanent improvements in the form of a railway bridge spanning a public drainage ditch constitutes implied notice to the purchaser of the remaining part of the said 40-acre tract of the unrecorded written contract right of the railway company to maintain said bridge in its then length and elevation without liability in damages to the owner of the abutting land.

Johnson v Railway, 202-1282; 211 NW 842

Mortgage on partner's undivided interest. The mortgagee of an undivided interest in land, taken on the supposition or assumption that the mortgagor's interest was absolute, is subject to a showing that the owners of the land were partners and that the land was the property of the partnership, and needed for the payment of partnership obligations, when the fact of such partnership and its ownership of the property in question could readily have been discovered by the mortgagee by the exercise of reasonable diligence before he accepted the mortgage.

Norwood v Parker, 208-62; 224 NW 831

Mortgages—unknown lessee—estoppel. A lessee of mortgaged land whose rights are such that the mortgagee is not chargeable with notice thereof, will not be permitted to assert his rights when he deliberately withholds such assertion until after the court enters a decree making permanent the receivership over the rents.

Ferguson v White, 213-1053; 240 NW 700

Wrongful release of conditionally canceled mortgage. Where, in rescission proceedings, a decree in effect provided that a promissory note and recorded real estate mortgage given for the purchase price of goods should be null and void from and after the mortgagor returned the goods to the mortgagee, and where the goods were never so returned, and where the mortgage was wrongfully released of record by a court-appointed commissioner, the mortgage may be foreclosed against a purchaser of the land who innocently bought in reliance on the wrongful release. This is true because, while both the mortgagee and subsequent purchaser were innocent, yet the purchaser had the means of knowing whether the goods had been returned to the mortgagee—the very act which, under the decree, would work a nullification of the mortgage and note and justify a release.

Moore v Crawford, 210-632; 231 NW 363

(c) NOTICE IMPARTED BY POSSESSION

1 Nature of Notice

Buildings as personalty—rights of one in possession. A mortgagee of real estate, tho his mortgage contains no reservation or exception of the buildings situated on the land, is charged with notice of the possible fact

that said buildings are personal property, and belong exclusively, not to the mortgagor, but to the person who, when the mortgage is executed, is in the open, visible and unequivocal possession and use of said buildings.

Lutton v Steng, 208-1379; 227 NW 414

Notice of rights of party in possession. A party who in good faith takes a mortgage of land from the record owner thereof, who was then and had been for years in the unrestricted possession, control, and management of the land, is not chargeable with notice of the rights of a nonrecord owner from the simple fact that said nonrecord owner had moved some household goods into a small building on the land and had lived there "part of the time".

Burmeister v Walz, 216-265; 249 NW 197

Overcoming presumption from possession—amount of proof. A mere preponderance of the evidence is not sufficient to overcome the presumption arising from the possession of the legal title to real property. The evidence for that purpose must be clear, convincing, and satisfactory.

Wagner v Wagner, (NOR); 224 NW 583

Possession insufficient to impart notice. One who acquires an interest in real estate is charged with knowledge of the rights of the person in possession, provided the possession is of such a character as to indicate that the party is claiming ownership, partial or otherwise.

Booth v Cady, 219-439; 257 NW 802

Rights of grantor in possession. One who acquires a mortgage from the record warranty-deed grantee is not chargeable with notice of the rights of the warranty-deed grantor who continues in possession of the property, when said grantor wholly fails to overthrow the legal presumption that his possession is in subordination to the said deed—that his possession is without claim of right, and by sufferance of his grantee.

Clark v Chapman, 213-737; 239 NW 797

Rights of one in possession. A contract purchaser of real estate becomes the equitable owner, and his actual possession is notice to the world of his rights, even tho he purchases from a person who has no title whatever, but who assumed equitable ownership, and who later had such assumption ratified and confirmed in himself by a contract of purchase and by a deed of conveyance from the legal titleholder.

Ely Bank v Graham, 201-840; 208 NW 312

Rights of person in possession. A mortgagee is not chargeable with notice that one of the members of the mortgagor's family residing upon the mortgaged property, is a lessee of the land when to all appearances, the possession of said person is the possession of the mortgagor.

Ferguson v White, 213-1053; 240 NW 700

2 What Constitutes Possession

Possession of tenant—landlord's right. The possession of a tenant is the possession of the landlord and is notice of the rights of the landlord.

Phelps v Kroll, 211-1097; 235 NW 67

Possession insufficient to impart notice. One who acquires an interest in real estate is charged with knowledge of the rights of the person in possession, provided the possession is of such a character as to indicate that the party is claiming ownership, partial or otherwise.

Booth v Cady, 219-439; 257 NW 802

When possession not notice of adverse claim. The actual possession of real estate by the grantor in a duly recorded conveyance in fee during a reasonable time following the execution of such conveyance does not charge a good-faith subsequent purchaser for value of the land with notice that the one in possession continues to claim ownership notwithstanding said conveyance.

Tutt v Smith, 201-107; 204 NW 294; 48 ALR 394

Vendor and purchaser—purchase from nontitleholder—equitable ownership. A contract purchaser of real estate becomes the equitable owner, and his actual possession is notice to the world of his rights, even tho he purchases from a person who has no title whatever, but who assumed equitable ownership, and who later had such assumption ratified and confirmed in himself by a contract of purchase and by a deed of conveyance from the legal titleholder.

Ely Bank v Graham, 201-840; 208 NW 312

VI NOTICE OF EXISTING EQUITIES AND LIENS

Advancements after judgment. A mortgage on realty actually given to secure future advances of money to the mortgagor is prior in right to subsequently rendered judgments against the mortgagor as to advances made after the rendition of the judgments, it not appearing that the mortgagee had actual knowledge of said judgments.

Everist v Carter, 202-498; 210 NW 559

Devise and bequest—resulting trust not created. Heirs and devisees are not required to give a consideration for devises and bequests to them; consequently, a resulting trust cannot be impressed on property conveyed to them, on the theory that they are not bona fide purchasers, when the property was not subject to the lien before conveyed.

Evans v Cole, 225-756; 281 NW 230

VI NOTICE OF EXISTING EQUITIES AND LIENS—concluded

Mortgage on devise—prior rights of estate.

Bell v Bell, 216-837; 249 NW 137

Subsequent easement in land. A permanent easement in land, granted subsequent to the recording of a mortgage on the land, is subsequent in right to said mortgage.

Kellogg v Railway, 204-368; 213 NW 253; 215 NW 258

VII NOTICE UNDER PARTICULAR CONVEYANCES

Assignment of rent not recordable. A written assignment of a lease of real estate and of the rents accruing thereunder, (especially when the lease is at the time manually delivered to the assignee) is not an instrument which the law requires to be recorded, and if recorded the record imparts no notice.

Phelps v Kroll, 211-1097; 235 NW 67
See King v Good, 205-1203; 219 NW 517

Bona fide purchaser — quitclaim claimant. Principle reaffirmed that a quitclaim deed holder is not entitled to be considered a bona fide purchaser, and does not acquire priority over equities which are valid against the grantor.

Howell v Howell, 211-70; 232 NW 816

Conflicting assignments by partnership and partners—priority. An unrecorded assignment by a partnership to a partnership creditor, of a lease of real estate and of the rents accruing thereunder, is superior in right to a subsequent recorded assignment by one of the partners to his individual creditor of the individual partner's one-half interest in said rents; and especially is this true when the partnership creditor holds a mortgage which pledges the rents of said land.

Phelps v Kroll, 211-1097; 235 NW 67

Foreclosure—rents—grantee not entitled to retain. The grantee under quitclaim deed of premises which are subject to a duly recorded mortgage pledging the rents and profits, even tho he does not assume the payment of said mortgage, is not entitled to collect and retain the rents accruing during the redemption period following foreclosure of the mortgage with a deficiency judgment. This is true because the grantee takes the premises subject to the same burdens under which the mortgagor held them.

Equitable v Jeffers, 215-696; 246 NW 784

Fraudulent release of prior mortgage by agent. A mortgagee who takes his mortgage as a first mortgage, in good-faith reliance on the release by his agent of a prior mortgage, does not lose his priority because of the fact that the release was fraudulent in that, prior to the release, the prior mortgage had been assigned, without a recording of the assignment, the knowledge of the agent of his own dishonesty not being imputable to his principal, the first mortgagee.

Leach v Bank, 202-265; 209 NW 422

Quitclaim — prior claims — non-applicability of rule. The principle that one who acquires title by quitclaim takes with notice of prior bona fide claims has no application to a case where a mortgagee receives his mortgage for a valuable consideration and without notice of any infirmity, and later, in order to avoid the expense of a foreclosure, receives a quitclaim deed to the land in satisfaction of the mortgage.

Brenton Bros. v Bissell, 214-175; 239 NW 14

Quitclaim security. A mortgagee of an "undivided interest" in certain land is not protected against unrecorded instruments which affect the land and which are valid against the mortgagor.

Young v Hamilton, 213-1163; 240 NW 705

VIII BURDEN OF PROOF

Equitable estoppel—unrecorded conveyance —pleader's burden. One alleging an equitable estoppel must prove it by clear, satisfactory, and convincing evidence, hence in asserting in a fraudulent conveyance action, an equitable estoppel against the wife of a bank stockholder, because she withheld from record, for many years, a deed to herself from her husband, the creditors of the bank have not sustained the burden of proving estoppel when they admit that they did not deposit their money on the wife's representation, nor upon their belief in the husband's ownership of the land.

Bates v Kleve, 225-255; 280 NW 501

Escrow agent's memorandum made in absence of parties—inadmissible. An escrow agent's understanding of the arrangement by which he was to record deeds after the death of the grantor, noted on the envelope in the absence of the parties, is not admissible in evidence as to the substance of the arrangement and would be of doubtful evidentiary value even if admitted.

Bohle v Brooks, 225-980; 282 NW 351

Unrecorded conveyance—burden of proof. Where children, holding undivided interests in lands as heirs, vest their mother, by an unrecorded instrument, with actual possession of the lands during her widowhood, a subsequent deed holder of the interest of one of the children may not have partition of the land unless he pleads and proves (1) his subsequent purchase, (2) that he paid value therefor, and (3) that he had no notice of said unrecorded instrument.

Young v Hamilton, 213-1163; 240 NW 705

Unrecorded mortgage—estoppel to assert lien. Naked proof that, during the time the

mortgagee of land neglected to record his mortgage, the mortgagor obtained credit from another, who placed his claim in judgment, is wholly insufficient to estop the mortgagee from insisting on the priority of his mortgage lien. Additional proof of fraud or deception in some form is indispensable.

Brauch v Freking, 219-556; 258 NW 892

IX COUNTY OF RECORDING

No annotations in this volume

10106 Acknowledgment as condition precedent.

Atty. Gen. Opinion. See '28 AG Op 317

Acknowledgment of chattel mortgages. See under §10015 (IX)

Disqualified notary—when inconsequential. The validity of a deed of conveyance is, as between the grantor and grantee, in no manner affected by the fact that the deed was acknowledged before a disqualified notary public.

Shanda v Bank, 220-290; 260 NW 841

Name variation of mortgagor—when noneffective. A mortgage executed by "Chester C. Callaway", which was acknowledged, filed, and recorded, was constructive notice to trustee in bankruptcy of the estate of Charles Chester Callaway, bankrupt, the bankrupt being best known in the community in which he lived by the name which he signed to the mortgage, and the fact that the acknowledgment stated that he "acknowledged said instrument", instead of statutory requirement of "acknowledged execution of instrument", was held sufficient to make the filing and recording of such mortgage constructive notice.

Hauser v Callaway, 36 F 2d, 667

10107 Assignment by separate instrument.

Mortgage foreclosure provisions. See under §12372 (III)

Assignment—failure to record—effect. The failure of the assignee of a duly recorded first mortgage on real estate to record his assignment does not deprive him of his position of priority over the assignee of subsequently executed mortgages on the same property who records his assignment.

Wood v Swan, 206-1198; 221 NW 791
Kuhn v Larson, 220-365; 259 NW 765

Assignment of note—payment to original payee—effect. The maker of a promissory note and mortgage who, for four years before maturity of the principal, and for eight years after maturity of the principal, pays the accruing interest to the agent of the original payee, without knowledge that the note and mortgage had been assigned, and finally pays the principal in the same manner, without asking for or receiving the note in question, effects a complete discharge of the note and mortgage against an assignee thereof who had been such during all said times of payment, but without recording his assignment, and in the meantime had permitted the original payee, a corporation, (1) to appear on the records as the owner of the paper and (2) to collect the interest and pay it to him.

Kann v Fish, 209-184; 224 NW 531

Assignment—recordation—scope of notice. The recording of an assignment of a promissory note and of a real estate mortgage securing the note charges the world with no constructive notice except of the assignee's interest in the land. Such record does not charge a subsequent pledgee of the note and mortgage with constructive notice of the assignee's equity in the note as personal property.

Reyelts v Feucht, 206-1326; 221 NW 937

Recorded assignment—constructive notice. A duly recorded assignment of a mortgage and of the promissory note secured, carries constructive notice to the world that the assignee is the owner of said note.

Holden v Batten, 215-448; 245 NW 750

Assignment reserving interest—construction. A broker who, in negotiating a loan, takes the note and mortgage in his own name and, pursuant to an agreement, adds to the rate of interest due the actual mortgagee a fractional percent to cover his commission, and who, in assigning the note and mortgage to said actual mortgagee, reserves to himself said fractional percent of the interest "when and as the interest matures and is paid, without right of priority or interest in the mortgage", thereby deprives himself of all interest in the mortgage in case the mortgagor voluntarily, or involuntarily because of foreclosure, ceases to pay interest.

Metropolitan v Sutton, 219-879; 259 NW 788

Failure to record assignment. The assignee of a real estate mortgage and the note secured thereby is under no legal obligation to record his assignment as to a person who buys the property with particular reference to said note and mortgage.

Shoemaker v Minkler, 202-942; 211 NW 563

Failure to record assignment. A transferee of one of several notes secured by a recorded junior real estate mortgage who fails to take and record any assignment to himself of said mortgage is bound by the subsequent wrongful agreement of the record mortgagee that a prior mortgagee (who had no notice of the transfer of the note) might take a new mort-

gage in lieu of his old mortgage, and for an increased amount, and retain priority over the junior mortgage; and it is immaterial that said agreement is evidenced by an unacknowledged entry on the margin of the recorded mortgage.

Squire Co. v Hedges, 200-877; 205 NW 525

Fraudulent assignment. In an action by heirs of an intestate against a son and heir of intestate to set aside a transfer of a note and mortgage from intestate to said son, evidence held insufficient to show signatures of aged mother are not the genuine signatures of intestate on assignments.

Robbins v Daniel, 226-678; 284 NW 793

Lease—assignment—recordation—effect. A lease of real estate and the assignment thereof are recordable for the purpose of conveying constructive notice to a mortgagee and his subsequently appointed receiver under a mortgage which contains a pledge of the rents, even tho said parties are not entitled, as a matter of right, to such notice.

King v Good, 205-1203; 219 NW 517

Payment without production of note. The maker of a promissory note secured by mortgage who pays the same to the payee-mortgagee without requiring the production and surrender of the note does so at his peril, even tho the record reveals no assignment of the note and mortgage, such maker not being a subsequent purchaser, within the meaning of the recording acts.

Shoemaker v Nodland, 202-945; 211 NW 567
Shoemaker v Ragland, 202-947; 211 NW 564

Transfer of part of mortgage-secured debt —effect. Principle reaffirmed that a transfer of part of a mortgage-secured debt operates ipso facto as a pro tanto assignment of the mortgage security.

Miller & C. Bk. v Collis, 211-859; 234 NW 550

10109 Index books.

Recording "Instrument relating to real estate". A mortgage (1) on chattels on certain described real estate and (2) on all crops "sown, planted, raised, growing or grown" on said real estate for two specified years following the execution of said instrument, being an instrument which "relates to real estate", is recordable as a real estate mortgage, and such recording may be enforced by mandamus.

Weyrauch v Johnson, 201-1197; 208 NW 706

10115 Filing and indexing—constructive notice.

Atty. Gen. Opinions. See '34 AG Op 57, 588

ANALYSIS

I NECESSITY AND EFFECT OF INDEXING
II SUFFICIENCY OF INDEXING
III PRIORITY

Sufficiency of recording. See under §10118, Vol. I

I NECESSITY AND EFFECT OF INDEXING

Assignment of mortgage or debt—recorded —constructive notice. A duly recorded assignment of a mortgage and of the promissory note secured carries constructive notice to the world that the assignee is the owner of said note.

Holden v Batten, 215-448; 245 NW 750

II SUFFICIENCY OF INDEXING

Fatally defective index. An index of the recording of a written instrument constituting an equitable mortgage is fatally defective when it designates the actual grantor as grantee and the actual grantee as grantor.

Parry v Reinertson, 208-739; 224 NW 489; 63 ALR 1051

III PRIORITY

Failure to index. The breach of official duty, and not the resulting damage, creates the cause of action making operative the statute of limitations, so where a recorder negligently omitted to index a chattel mortgage resulting in a subsequent mortgagee obtaining priority through lack of notice of first mortgage, the cause of action accrued at the time of such omission and an action against the recorder for this nonfeasance was barred after three years by §11007 (4), C., '35.

Baie v Rook, 223-845; 273 NW 902; 110 ALR 1062

10115.1 Marginal entries indexed.

Atty. Gen. Opinion. See AG Op Aug. 25, '39

10116 Entry on auditor's transfer books.

Atty. Gen. Opinions. See '25-26 AG Op 136; '28 AG Op 115

10118 Final record.

Effect of record notice. See under §10105

Property conveyed — ownership not paramount—title at issue. In an action between a creditor and a grantee to set aside a deed, ownership by the grantor being the question in issue rather than recovery by virtue of a superior title, an uncontradicted public record showing ownership in grantor at time the deeds were made is conclusive on that issue.

Bagley v Bates, 224-637; 276 NW 797

10122 Book of plats—how kept.

Atty. Gen. Opinion. See '38 AG Op 177

10123 Entries of transfers.

Atty. Gen. Opinion. See '38 AG Op 177

10126 Correction of books and instruments.

Atty. Gen. Opinion. See '32 AG Op 181

10127 Perpetuities prohibited.

Discussion. See 22 ILR 437; 23 ILR 1; 24 ILR 1; 24 ILR 635; 25 ILR 1—Perpetuities

Clause repugnant to fee. A stipulation in divorce proceedings, even tho carried into the

decree, is a nullity insofar as it seeks to render land exempt from the claims of creditors of the fee-title owner.

Putensen v Dreeszen, 206-1242; 219 NW 490

Limitations void ab initio. Testamentary attempts by means of limitations to create in property contingent interests or estates, which will not necessarily become vested within the period of time prescribed by the statute prohibiting perpetuities, are futile, all such limitations being void ab initio.

Bankers Trust v Garver, 222-196; 268 NW 568

Partial invalidity of will—effect on valid part. The invalidity of a testamentary limitation—invalid because prohibited by the statute against perpetuities—will not affect the validity of preceding limitations which are otherwise valid, when it is manifest from the will that testator had no intent to make said preceding limitations dependent on said subsequent limitations—ultimately rejected as void.

Bankers Trust v Garver, 222-196; 268 NW 568

Perpetual care of burial lot. A bequest for the perpetual maintenance of testator's cemetery lot is not violative of this statute.

Hipp v Hibbs, 215-253; 245 NW 247

Prohibition against conveyance—validity. A provision in an ordinary warranty deed absolutely prohibiting a sale or conveyance of any part of the land during the lifetime of the grantor, without the consent of the grantor, is not repugnant to the deed if the unrevealed purpose of said prohibition is legal, and a part of the consideration for the deed, and is expressed in a contract which accompanies the execution of the deed, even tho the contract be oral. It follows that the record of such deed charges third parties with notice of said contract if reasonable inquiry would reveal it.

Iowa Corp. v Halligan, 214-903; 241 NW 475

Restraint on alienation—as affecting charitable organization—validity. Where an individual agrees to construct a grotto on land then belonging to a charitable organization which in return agrees among other things not to alienate the land, such a covenant, not being created in a gift for charitable purposes and as such an exception to the rule against perpetuities or against restraint on alienation, but instead, an attempt by the fee titleholder to retain his land while separating from the fee the unlimited power of alienation, is violative of public policy, void and unenforceable in equity.

Sisters of Mercy v Lightner, 223-1049; 274 NW 86

Restraint on alienation—definitions. Rule against perpetuities concerns vesting of estates and rule against restraint on alienation concerns limitations on enjoyment of property, both of which are founded on the public policy preventing property being taken out of commerce.

Sisters of Mercy v Lightner, 223-1049; 274 NW 86

Restraint on alienation—not validated by estoppel or ratification. Since a restraint on alienation of title is in contravention of public policy, such a provision in a contract cannot be validated by ratification or estoppel.

Sisters of Mercy v Lightner, 223-1049; 274 NW 86

Void remainders as intestate property. Property embraced in a void, testamentary limitation—void because prohibited by the statute relating to perpetuities—passes to those persons who would have been entitled thereto under the laws of intestacy had the limitation been omitted from the will, and a judgment creditor may, by proper procedure, have a lien established thereon.

Bankers Trust v Garver, 222-196; 268 NW 568

Will suspending property control—terminable at death of heirs—no perpetuity. A will which suspends the power of controlling the property during the life of persons now in being only until the time it passes to the heirs does not create a perpetuity.

Friedmeyer v Lynch, 226-251; 284 NW 160

CHAPTER 440
OCCUPYING CLAIMANTS

10128 Right to improvements.

Improvements. In an action to quiet title the court may, on proper pleading and proof, decree a lien on the land in defendant's favor for improvements made in good faith on the property.

Rainsbarger v same, 208-764; 224 NW 45

Loss of remedy. An unsuccessful defendant in an action for the recovery of real property who is afforded no opportunity therein to interpose a claim for permanent improvements (§§12235, 12249, C., '27), must necessarily resort to the occupying claimant's act for relief, and when he fails to resort to such remaining and exclusive remedy, and quits and surrenders the premises, he will not be permitted, when subsequently sued on a supersedeas bond growing out of the litigation, to interpose a claim for such improvements as a set-off.

Bigelow v Ins. Co., 206-884; 221 NW 661

10129 "Color of title" defined.

Discussion. See 20 ILR 551—"Color of title" —adverse possession; 22 ILR 437; 23 ILR 1; 24 ILR 1, 635; 25 ILR 1—Alienability and perpetuities

See additional annotations under §11007 (XXVIII)

CHAPTER 441
HOMESTEAD

10135 "Homestead" defined.

Atty. Gen. Opinion. See '38 AG Op 531

ANALYSIS

I ACQUISITION AND ESTABLISHMENT
- (a) NECESSITY AND SUFFICIENCY OF OCCUPANCY
- (b) OCCUPANCY OF PORTION OF PREMISES

II PROPERTY CONSTITUTING HOMESTEAD
- (a) OWNERSHIP, ESTATE, OR INTEREST IN PROPERTY
- (b) RENTS, PROFITS, PRODUCTS, AND PROCEEDS OF HOMESTEAD

III ABANDONMENT AND WAIVER OF RIGHT
- (a) ABANDONMENT IN GENERAL
- (b) TEMPORARY ABSENCE WITH INTENT TO RETURN
- (c) ACTS RELEVANT TO ABANDONMENT
- (d) WAIVER OF RIGHT

I ACQUISITION AND ESTABLISHMENT

(a) NECESSITY AND SUFFICIENCY OF OCCUPANCY

Acquisition—evidence—sufficiency. Evidence reviewed and held ample to show the homestead character of property.

Hagge v Gonder, 222-954; 270 NW 371

Acquisition—necessity of occupancy. Principle reaffirmed that mere intention to occupy property as a home, howsoever definite the intention may be, is insufficient to give said property a homestead character.

In re McClain, 220-638; 262 NW 666

Adjudication of homestead status. An unquestioned order in bankruptcy setting off to a bankrupt certain land as a homestead is, as to all parties to the proceedings, a final adjudication that said land was then a homestead.

Bracewell v Hughes, 214-241; 242 NW 66

Homestead exemption—waiver of residence relates to year of homestead acquisition. The provision in the homestead tax exemption statute waiving the six months requirement for residence, for the first year of a newly acquired homestead, is not sufficient to extend the exemption back to taxes levied a year previous to the year in which it was acquired.

Ahrweiler v Board, 226-229; 283 NW 889

Infirmity in title—effect. A homestead in land exists from the time of actual, good-faith occupancy by claimant and his family under a parol gift, and if the occupancy is continuous it matters not that said occupant does not acquire the legal title until many years later.

Lennert v Cross, 215-551; 241 NW 787; 244 NW 693

Nonoccupancy. The naked act of a husband and wife in moving certain of their belongings to a farm and leaving them there does not constitute the farm the homestead of the husband and wife.

Harris v Carlson, 201-169; 205 NW 202

Presumption of continuance. Upon proof that a homestead in property was acquired by a mother because of the occupancy of the property by herself and minor daughter as a home, and that such occupancy continued until the mother died, it will be rebuttably presumed that the property was the homestead of the mother at the time of her death, even tho, in the meantime, the daughter marries and, with her husband, continues joint occupancy of the property with the mother.

In re McClain, 220-638; 262 NW 666

Subordinate to contract under which acquired. Homestead rights which are acquired under a contract of sale are necessarily subordinate to the contract under which they are acquired.

Westerman v Raid, 203-1270; 212 NW 134

(b) OCCUPANCY OF PORTION OF PREMISES

Extent—noncontiguous tracts. One-half of a double garage, situated on property used by the owner solely for rental purposes, may not be deemed an appurtenance of the said owner's homestead, composed of a nearby, separate, independent and wholly different tract, noncontiguous to the rental property. So held in an action involving the validity of a sheriff's deed based on a sale en masse—a sale without platting.

Van Law v Waud, 223-208; 272 NW 523

II PROPERTY CONSTITUTING HOMESTEAD

(a) OWNERSHIP, ESTATE, OR INTEREST IN PROPERTY

Debts enforceable against. One of several remaindermen may not acquire, in a portion of the common property, a homestead based on his occupancy of the property as a tenant of the life tenant. If, after the death of the life tenant, he acquires a homestead by virtue of his new occupancy, such homestead is necessarily subject to a judgment based on claims long antedating the death of the life tenant.

Kramer v Hofmann, 218-1269; 257 NW 361

Homestead character of property—evidence. Evidence held to show that the property in question was, at the time of a conveyance by a husband to his wife, the homestead of the grantor and grantee, and therefore not fraudulent as to creditors.

Hansen v Richter, 208-179; 225 NW 361

Setting off homestead — effect. An unappealed order in bankruptcy proceedings setting off a homestead to the bankrupt does not constitute an adjudication of the bankrupt's rights in the homestead, e. g., the existence of liens and the order and priority thereof.

Kramer v Hofmann, 218-1269; 257 NW 361

(b) RENTS, PROFITS, PRODUCTS, AND PROCEEDS OF HOMESTEAD

Abandonment—subsequent sale and investment in homestead—effect. When the owner of a homestead in lands moves therefrom with the intent never to return thereto,—in other words, when the owner of a homestead abandons it,—no part of the proceeds of a subsequent sale by the owner of the lands can be said to represent a homestead; and the investing of any part of such proceeds in lands then used as a homestead simply constitutes the acquisition of an original homestead, just as tho he had never theretofore had a homestead.

Crail v Jones, 206-761; 221 NW 467

Temporary business structures on homestead land — no effect on homestead exemptions. Temporary structures, built on land otherwise exempt to bankrupt as part of homestead, removable without injury to themselves or the land, tho not themselves exempt, having been used in business of the bankrupt, held, not to render the land nonexempt under state statutes.

Duffy v Tegeler, 19 F 2d, 305

III ABANDONMENT AND WAIVER OF RIGHT

(a) ABANDONMENT IN GENERAL

Abandonment—evidence. Evidence reviewed, and held insufficient to show an abandonment of a homestead.

Phoenix Tr. v Vaught, 201-450; 205 NW 792

Abandonment — evidence — sufficiency. Evidence held to establish the abandonment of a homestead.

Des M. Marble v McConn, 210-266; 227 NW 521

Abandonment — evidence. Record reviewed and held to establish the existence of a homestead and the nonabandonment thereof.

Mill Owners Ins. v Petley, 210-1085; 229 NW 736

Abandonment — evidence. The homestead character of rural property is seriously questioned by testimony that, upon the destruction of the residence, the husband and wife did not rebuild, but moved to town, purchased a new residence, and thereafter continued to live and vote in said town. Especially is this true when the record is silent as to the intentions of the husband.

Evans v Evans, 202-493; 210 NW 564

Abandonment — nonvoluntary removal. An abandonment of the homestead by a wife may not be predicated on her involuntary absence from the property: i. e., her removal from the property in compliance with a court order which practically evicted her, pending divorce proceedings.

Novotny v Horecka, 200-1217; 206 NW 110; 42 ALR 1158

Presumption of abandonment. A presumption of abandonment of a homestead arises when the owners thereof actually cease to occupy it as a homestead. Evidence held insufficient to overcome the presumption.

Citizens Bk. v Frank, 212-707; 235 NW 30

Antenuptial contract specifying manner of property descent—dower lost. An antenuptial contract, preserving the property of each party for the benefit of their respective heirs, operates to extinguish the homestead right, and, in the absence of children to the union, the property of each descends to his heirs as tho no marriage existed.

Finn v Grant, 224-527; 278 NW 225

(b) TEMPORARY ABSENCE WITH INTENT TO RETURN

Abandonment—burden of proof. Ceasing to occupy a homestead creates a presumption of

III ABANDONMENT AND WAIVER OF RIGHT—concluded

(b) TEMPORARY ABSENCE WITH INTENT TO RETURN—concluded

abandonment, and the burden of proof is on the claimant to overcome the presumption by showing a fixed and definite purpose to return to the homestead.

Fardal v Satre, 200-1109; 206 NW 22

Abandonment — temporary leasing. The temporary leasing of a homestead does not affect its homestead character.

Hatter v Icenbice, 207-702; 223 NW 527

Intent to return necessary—burden of proof. In order to preserve the homestead character of property when the owner goes to live elsewhere, it is necessary that said owner have a fixed, specific, and abiding intent to return and burden of proving same is on the owner.

Grimes Bank v McHarg, 224-644; 276 NW 781

Temporary removal—effect. The homestead character of property is not lost by a removal therefrom by the owner in order to be more conveniently located for medical treatment, with the continuing intent to return to the homestead as soon as the treatment ceases.

Southwick v Strong, 218-435; 255 NW 523

(c) ACTS RELEVANT TO ABANDONMENT

Removal from old, and acquiring new—effect. A homestead must be deemed abandoned on naked testimony that the owner thereof removed therefrom, and immediately acquired a new homestead which he continuously maintained until his death many years later.

In re McClain, 220-638; 262 NW 666

Voting as evidence of change of residence. Voting at a place other than where a homestead is located is a very strong circumstance tending to show a permanent change of residence.

Citizens Bk. v Frank, 212-707; 235 NW 30

(d) WAIVER OF RIGHT

Abandonment—burden of proof on claimant—sufficiency. Ceasing to occupy a homestead creates a presumption of abandonment, and the burden of proof is on the claimant to overcome the presumption by showing a fixed and definite purpose to return to the homestead. Burden held amply sustained.

Fardal v Satre, 200-1109; 206 NW 22

Abandonment — evidence. The homestead character of rural property is seriously questioned by testimony that, upon the destruction of the residence, the husband and wife did not rebuild, but moved to town, purchased a new residence, and thereafter continued to live and vote in said town. Especially is this true when the record is silent as to the intentions of the husband.

Evans v Evans, 202-493; 210 NW 564

10136 Extent and value.

Discussion. See 16 ILR 96—Determining value

Temporary business structures on homestead land—no effect on homestead exemptions. Temporary structures, built on land otherwise exempt to bankrupt as part of homestead, removable without injury to themselves or the land, tho not themselves exempt, having been used in business of the bankrupt, held, not to render the land nonexempt under state statutes.

Duffy v Tegeler, 19 F 2d, 305

Town property exceeding half acre. A homestead within the corporate limits of a town may consist of contiguous subdivisions of a government forty, habitually and in good faith used as a part of the homestead, even tho such subdivisions aggregate more than half an acre. To reduce such a homestead to a half acre, the creditor must show that the property has taken on an exclusively municipal aspect, nature, or use.

Hatter v Icenbice, 207-702; 223 NW 527

10137 Dwelling and appurtenances.

Temporary business structures on homestead land — no effect on homestead exemptions. Temporary structures, built on land otherwise exempt to bankrupt as part of homestead, removable without injury to themselves or the land, though not themselves exempt, having been used in business of the bankrupt, held, not to render the land nonexempt under state statutes.

Duffy v Tegeler, 19 F 2d, 305

10139 Platted by officer having execution.

Notice to plat before execution sale—nonprejudicial failure. A sheriff's failure to notify a mortgagor to plat his homestead before selling under mortgage foreclosure execution is immaterial under a showing that the sheriff himself platted the homestead, offered separately the nonexempt property and then the homestead, but, receiving no bids, he then sold the property as a whole.

Travelers Ins. v Brooks, 224-170; 276 NW 617

10141 Changes—nonconsenting spouse.

Change of homestead—evidence. Evidence reviewed, and held wholly insufficient to sustain a claim to homestead exemption of the proceeds of an execution sale on the ground of intended use in acquiring another homestead.

Phoenix Tr. v Vaught, 201-450; 205 NW 792

Nonmutual abandonment. The abandonment of a homestead by a husband without the consent of the wife in possession is ineffective as to the wife.

Novotny v Horecka, 200-1217; 206 NW 110; 42 ALR 1158

Change to a different portion of the same tract. An owner of land who, while possessing an unplatted homestead right in one portion of the land, erects new residence buildings on another unplatted portion of the land, and removes thereto, simply continues in the new homestead his former homestead right. In other words, if, after so doing, he sells the entire tract of land except that embraced in the new homestead, such new homestead will not be liable for a debt for which the original homestead was not liable.

Berner v Dellinger, 206-1382; 222 NW 370

10145 Occupancy by surviving spouse.

Antenuptial contract—effect on homestead occupancy. An antenuptial contract under which the wife agrees to accept a named fractional part of the husband's property in case she survives, does not have the legal effect of depriving her of her statutory right to occupy the homestead, free of all rent, until her share is actually set off to her or otherwise actually disposed of.

Fraizer v Fraizer, 201-1311; 207 NW 772

Antenuptial contract—forfeiture of homestead and life estate. When by an antenuptial contract a spouse has relinquished all right to homestead or distributive share, the rights ordinarily accorded under this section and section 10146, C., '35, do not apply.

Finn v Grant, 224-527; 278 NW 225

No presumption of election from mere occupancy by spouse. Surviving spouse's occupancy of the homestead will not alone, unless inconsistent with every other right, raise a presumption of an election to occupy the homestead for life.

Prichard v Anderson, 224-1152; 278 NW 348

Exemption from debt. Principle reaffirmed that a homestead, set aside to the widow as her dower or distributive share, passes to her free from the debts of the husband-owner.

Southwick v Strong, 218-435; 255 NW 523

Occupancy not newly created right. The right of a surviving spouse to freely occupy the homestead until it is otherwise disposed of according to law, is but a continuation of the right possessed by him or her prior to the death of the homestead owner.

Crouse v Crouse, 219-736; 259 NW 443

Right to free occupancy. In case rents accumulate in an estate prior to the setting off of the wife's distributive share, the wife, in the division of said rents with the other tenants in common, cannot be charged with the rental value of the homestead occupied by her. Moreover if the other tenants have wrongfully ousted the wife for a time of her said occupancy, they must account to her for the rentals received.

Crouse v Crouse, 219-736; 259 NW 443

Surviving spouse's occupancy not conclusive on taking homestead. Inasmuch as the surviving spouse's occupancy of the homestead may be as a tenant in common, as a life tenant, or under the statute pending administration, such occupancy, altho being evidence, is not conclusive of her election to take the homestead right, but the true character of the occupancy is determinable from all the surrounding facts and circumstances.

Jackson v Grant, 224-579; 278 NW 190
Prichard v Anderson, 224-1152; 278 NW 348

Failing to plead and prove election. An adopted son, defending a contribution action growing out of expenditures made by his mother as tenant in common in inherited real estate, and in his answer admitting that his mother possessed by right of dower, but nowhere claiming or assuming his burden to prove that the widow elected to take a life estate in lieu of other dower rights, is estopped to raise such point on appeal or matters corollary thereto.

Yagge v Tyler, 225-352; 280 NW 559

Undue length of occupation. The heirs of an intestate will not be heard to complain of the extreme length of time the surviving spouse has maintained the free occupancy of the homestead when they were the direct cause of delaying the admeasurement of the spouse's distributive share.

Crouse v Crouse, 219-736; 259 NW 443

Warranty deed—effect. A warranty deed duly signed by both husband and wife necessarily constitutes a complete subordination and waiver of all the rights of both husband and wife, including homestead and dower.

Clark v Chapman, 213-737; 239 NW 797

Wrongful ouster—effect. Manifestly a surviving spouse who has been wrongfully ousted from her occupancy of the homestead following the death of her husband-owner cannot be held thereby to have lost said right.

Crouse v Crouse, 219-736; 259 NW 443

10146 Life possession in lieu of dower.

ANALYSIS

I ESTATE AND RIGHTS OF SURVIVOR
II ELECTION BETWEEN HOMESTEAD AND DISTRIBUTIVE SHARE

Making election of record. See under §12012, Vol I

I ESTATE AND RIGHTS OF SURVIVOR

Discussion. See 22 ILR 543—Renunciation of life estate

Antenuptial contract—forfeiture of homestead and life estate. When by an antenuptial contract a spouse has relinquished all right to homestead or distributive share, the rights ordinarily accorded under this section and section 10145, C., '35, do not apply.

Finn v Grant, 224-527; 278 NW 225

II ELECTION BETWEEN HOMESTEAD AND DISTRIBUTIVE SHARE

Dower—when vested—divesting by choosing homestead. Instantly on the death of a married intestate, an undivided one-third interest and estate in his real estate vests in the surviving spouse as tenant in common, which vested estate is subject to being divested by a later election to take the homestead for life in lieu of such distributive share.

Jackson v Grant, 224-579; 278 NW 190

Homestead or distributive share—election—evidence necessary. The distributive share being the primary and more worthy right of the surviving spouse, evidence that the survivor elected to take the homestead right in lieu thereof should be clear and satisfactory.

Prichard v Anderson, 224-1152; 278 NW 348

Life occupancy—unprayed-for relief. A surviving spouse who, in a contest with an heir of the intestate's, claims absolute ownership of the entire homestead, and who is decreed to own only an undivided fractional part thereof, may be decreed the right to elect to occupy the homestead for life, even tho there is no prayer for such relief.

Myrick v Bloomfield, 202-401; 210 NW 428

Nonforfeiture by taking foreign homestead. A wife who is legally disinherited by her husband's will executed in a foreign state, where the parties had their domicile, is not deprived of her dower or distributive share in the husband's Iowa real estate because of the fact that in said foreign state the homestead there situated was set off to her by the probate court on her application. In other words, the Iowa statute according to a wife the right to take the homestead in lieu of dower applies solely to an Iowa homestead.

Ehler v Ehler, 214-789; 243 NW 591

No presumption of election from mere occupancy by spouse. Surviving spouse's occupancy of the homestead will not alone, unless inconsistent with every other right, raise a presumption of an election to occupy the homestead for life.

Prichard v Anderson, 224-1152; 278 NW 348

Selling homestead for debts—necessity of election between will and dower. An order of court to an executrix to sell real estate, to pay claims, is erroneous where the only real estate was the homestead, and the surviving husband, who was willed one-third of the estate, had never been required to make an election as to whether or not he took under the will. In such case the presumption remains that he took his distributive share.

In re Dyer, 225-1238; 282 NW 359

Surviving spouse's occupancy not conclusive on taking homestead. Inasmuch as the surviving spouse's occupancy of the homestead may be as a tenant in common, as a life tenant, or under the statute pending administration, such occupancy, altho being evidence, is not conclusive of her election to take the homestead right, but the true character of the occupancy is determinable from all the surrounding facts and circumstances.

Jackson v Grant, 224-579; 278 NW 190
Prichard v Anderson, 224-1152; 278 NW 348

Vesting and divesting. The unadmeasured distributive share (dower) of a surviving spouse vests immediately upon the death of the other spouse, subject to being divested by the subsequent election of the surviving spouse to take under the will, if there be one, or to take homestead rights in lieu of distributive share.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718
Prichard v Anderson, 224-1152; 278 NW 348

10147 Conveyance or incumbrance.

Atty. Gen. Opinion. See '38 AG Op 325

ANALYSIS

I NATURE OF HOMESTEAD RIGHT OF SPOUSE
II CONSENT AND JOINDER OF HUSBAND AND WIFE
  (a) CONVEYANCES
  (b) CONTRACTS TO CONVEY
  (c) MORTGAGES AND OTHER INCUMBRANCES
  (d) ASSIGNMENTS AND LEASES
  (e) EASEMENTS
III NATURE AND SUFFICIENCY OF CONSENT
  (a) CONSENT BY JOINDER IN EXECUTION OF INSTRUMENT
  (b) VERBAL ASSENT
  (c) RATIFICATION
  (d) CONSENT BY CONDUCT
  (e) MENTAL INCAPACITY OF SPOUSE
  (f) FRAUD AND DURESS
IV FORM AND EXECUTION OF INSTRUMENT
V EFFECT OF DEFECTIVE INSTRUMENT

I NATURE OF HOMESTEAD RIGHT OF SPOUSE

Purpose of statute. The purpose of the statute was to prevent the destruction of the homestead rights of married persons except in the manner prescribed by the statute.

Wright v Flatterich, 225-750; 281 NW 221

II CONSENT AND JOINDER OF HUSBAND AND WIFE

(a) CONVEYANCES

Ineffectual partial conveyance to wife. A conveyance by a husband to his wife of a life estate in their homestead and of the fee to another, when the wife does not join therein, is a nullity.

Thayer v Sherman, 218-451; 255 NW 506

(b) CONTRACTS TO CONVEY

Insane persons' contracts—general rule of liability. Persons of unsound mind will be held liable as to executed contracts when the transaction is in the ordinary course of business, when it is reasonable, when the mental condition was not known to the other party, and when the parties cannot be put in statu quo.

Farmers Ins. Co. v Ryg, 209-330; 228 NW 63

(c) MORTGAGES AND OTHER INCUMBRANCES

Joint execution—sufficiency. An incumbrance upon a homestead must be jointly executed by the husband and wife, but not necessarily at the same point of time.

Harlow v Larson, 204-328; 213 NW 417

Instrument reformable. A mortgage which is duly and jointly executed by a husband and wife on part of their homestead when they unquestionably intended to embrace in the mortgage the entire homestead, is so reformable, on proper showing of the mistake, as to make the instrument in form exactly what it always has been in law; and such reformation is not violative of this statute.

Rankin v Taylor, 204-384; 214 NW 725

Mortgage—invalidity—estoppel. A husband, by accepting from his wife a conveyance of homestead property subject to a named existing mortgage thereon, thereby estops himself from questioning the validity of said mortgage on the ground that he never joined in the execution thereof.

Truro Bk. v Foster, 206-432; 220 NW 20

(d) ASSIGNMENTS AND LEASES

Extent—tenant's right to homestead before termination of lease. A tenant may have a homestead right under a leasehold interest which is available to him as against all persons, including the holder of the superior title, the lessor-owner, during the term of the tenancy and before the lease has expired.

Wright v Flatterich, 225-750; 281 NW 221

Lease—husband's oral termination invalid—statutory requisites. An oral agreement between the landlord and the tenant-husband, to terminate a joint lease of the husband and wife, will not terminate their homestead rights in 40 acres of the land, so as to permit a forcible entry and detainer action, since a homestead can be terminated only in writing by both husband and wife signing the same joint instrument containing a legal description of the homestead.

Wright v Flatterich, 225-750; 281 NW 221

Unexpired lease—tenant's oral agreement to vacate as "conveyance" of homestead. This section will not be construed narrowly as referring only to a conveyance or incumbrance of a homestead. Oral termination of a lease during the term and the homestead thereunder held invalid.

Wright v Flatterich, 225-750; 281 NW 221

(e) EASEMENTS

No annotations in this volume

III NATURE AND SUFFICIENCY OF CONSENT

(a) CONSENT BY JOINDER IN EXECUTION OF INSTRUMENT

Partial conveyance—nonjoinder by wife. A conveyance by a husband to his wife of a life estate in their homestead and of the fee to another, when the wife does not join therein, is a nullity.

Thayer v Sherman, 218-451; 255 NW 506

Unexpired lease—tenant's oral agreement to vacate as "conveyance" of homestead. Statute requiring written joint instrument by husband and wife to terminate a homestead will not be construed narrowly as referring only to a conveyance or incumbrance of a homestead. Oral termination of a lease during the term and the homestead thereunder held invalid.

Wright v Flatterich, 225-750; 281 NW 221

(b) VERBAL ASSENT

Lease—husband's oral termination invalid—statutory requisites. An oral agreement between the landlord and the tenant-husband, to terminate a joint lease of the husband and wife, will not terminate their homestead rights in 40 acres of the land, so as to permit a forcible entry and detainer action, since a homestead can be terminated only in writing by both husband and wife signing the same joint instrument containing a legal description of the homestead.

Wright v Flatterich, 225-750; 281 NW 221

III NATURE AND SUFFICIENCY OF CONSENT—concluded

(c) RATIFICATION

Invalid signature—nonratification. The invalid signature of a husband to a mortgage on the homestead—invalid because of his inebriate condition when he signed—is not ratified by a delay of some eight months in repudiating such signature (1) when the delay was caused in part by his continued inebriate condition and in part by a proper investigation by his attorney, and (2) when he did not actually intend to ratify.

State Bank v Nolan, 201-722; 207 NW 745

(d) CONSENT BY CONDUCT

Conveyance to husband subject to mortgage —estoppel. A husband, by accepting from his wife a conveyance of homestead property subject to a named existing mortgage thereon, thereby estops himself from questioning the validity of said mortgage on the ground that he never joined in the execution thereof.

Truro Bank v Foster, 206-432; 220 NW 20

(e) MENTAL INCAPACITY OF SPOUSE

Note and mortgage in hands of holder in due course. Neither a negotiable promissory note nor a mortgage given by the makers to secure the same, even tho the mortgage is on a homestead, is subject, when in the hands of a holder in due course, to the plea that the maker was insane at the time of the execution of such note and mortgage.

Farmers Ins. v Ryg, 209-330; 228 NW 63

(f) FRAUD AND DURESS

Nonhomestead character of land. A creditor who is seeking to set aside the deed of his debtor as fraudulent need not prove the nonhomestead character of the land even tho he alleges such fact, because the homestead character of the land is an affirmative defense, pleadable and provable by the grantee.

Malcolm Bk. v Mehlin, 200-970; 205 NW 788

IV FORM AND EXECUTION OF INSTRUMENT

Life estate to wife—fee simple title to another by husband only—ineffectual. A conveyance by a husband to his wife of a life estate in their homestead and of the fee to another, when the wife does not join therein, is a nullity.

Thayer v Sherman, 218-451; 255 NW 506

V EFFECT OF DEFECTIVE INSTRUMENT

Reformation of mortgage embracing homestead. A mortgage which is duly and jointly executed by a husband and wife on part of their homestead, when they unquestionably intended to embrace in the mortgage the entire homestead, is so reformable, on proper showing of the mistake, as to make the instrument in form exactly what it always has been in law; and such reformation is not violative of this section, which declares conveyances of the homestead invalid when the husband and wife do not join in the execution of the same joint instrument.

Rankin v Taylor, 204-384; 214 NW 725

VI RIGHTS AND LIABILITIES OF PURCHASERS

Insane persons — validity and liability of contract. Persons of unsound mind will be held liable as to executed contracts when the transaction is in the ordinary course of business, when it is reasonable, when the mental condition was not known to the other party, and when the parties cannot be put in statu quo.

Farmers Ins. Co. v Ryg, 209-330; 228 NW 63

VII FORECLOSURE OF INCUMBRANCES AGAINST HOMESTEAD

Mortgage foreclosures generally. See under §12372 (VII)

Nonloss of lien in bankruptcy proceedings.

First Bk. v Kleih, 201-1298; 205 NW 843

Eviction of husband — effect. The eviction of a husband, by foreclosure decree, of lands of which he and his wife are both tenants is, to all practical purposes, an eviction of the wife.

Miller v Laing, 212-437; 236 NW 378

Equitable assignment—sheriff's certificate —redemption by judgment creditor. Where judgment creditor redeemed from foreclosure sale and secured an assignment of the sheriff's certificate from the mortgagee, and appellant-owners failed to make a statutory redemption, the judgment creditor was an equitable assignee of the sheriff's certificate entitled to deed, even assuming that he had no right to redeem because of the homestead character of the land, since it made no difference to appellant-owners whether the mortgagee or judgment creditor was the holder of the certificate.

Ackerman v Bank, 228- ; 291 NW 150

Redemption of homestead by judgment creditor. A judgment creditor who was made a defendant in a foreclosure action against appellant's 120-acre farm is a junior lienholder under the statute, not a stranger nor interloper, and is entitled to redeem from sheriff's sale, even tho the judgment was not a lien on the 40 acres constituting appellant's homestead.

Ackerman v Bank, 228- ; 291 NW 150

VIII EFFECT OF FAILURE TO CLAIM HOMESTEAD EXEMPTION

Reservation of homestead right — evidence. Where a form book used for the recordation of

warranty deeds in the office of the recorder of deeds contained a printed relinquishment by a spouse of "dower and homestead", the fact that in a certain instance the word "homestead" has been erased furnishes no evidence that the grantors had orally reserved a homestead right in the conveyed property.

Clark v Chapman, 213-737; 239 NW 797

10148 Devise.

Intention to render homestead subject to debts. A testator in devising a homestead will not be deemed to have intended to render it subject to his debts—even to his funeral expenses—unless such intention is clearly and unequivocally expressed in the will.

Buck v MacEachron, 209-1168; 229 NW 693

10149 Removal of spouse or children.

Atty. Gen. Opinion. See '38 AG Op 325

Unexpired lease—tenant's oral agreement to vacate as "conveyance" of homestead. Section 10147, C., '35, requiring written joint instrument by husband and wife to terminate a homestead, will not be construed narrowly as referring only to a conveyance or incumbrance of a homestead. Oral termination of a lease during the term and the homestead thereunder held invalid.

Wright v Flatterich, 225-750; 281 NW 221

10150 Exemption—divorced spouse.

Application of payments—preservation of homestead. In the absence of any direction by a debtor as to how his payment shall be applied, as between a homestead-secured obligation and a non-secured obligation, the equities of the law may require an application which will preserve the homestead of the debtor and family.

Pospishil v Jensen, 205-1360; 219 NW 507

Consideration—value of homestead. On the issue whether a creditor took a conveyance of real property at a fair valuation, the value of that part of the land which represented the debtor's homestead must be excluded from the computation.

Commercial Bk. v McLaughlin, 203-1368; 214 NW 542

Findings in re homestead—conclusiveness. On an application by an executor for an order to sell real estate to pay debts, a finding by the court that certain land was not the homestead of the deceased is conclusive on appeal (1) unless such finding is without substantial support in the evidence, or (2) unless the court erroneously applied the law to conceded facts.

In re McClain, 220-638; 262 NW 666

Homestead exemption—waiver. A decree to the effect that a conveyance was fraudulent as to a judgment plaintiff and that plaintiff's judgment was a lien on the land is immune from subsequent attack on the ground that the land was, at the time of the conveyance, the homestead of the grantor and grantee, such fact not being pleaded in the action.

Reining v Nevison, 203-995; 213 NW 609

Liabilities—family expenses. A homestead is exempt from execution on a judgment for a family expense contracted after the acquisition of the homestead. In other words, the statutory declaration that a homestead is exempt from judicial sale "when there is no special declaration of statute to the contrary" has no reference whatever to the statutory declaration that a family expense is "chargeable upon the property of both husband and wife". (§10459, C., '27.)

Dorsey v Bentzinger, 209-883; 226 NW 52

Unenforceable agreement. An oral agreement by one of several heirs of homestead property that the funeral expenses of the deceased should stand against the property is of no validity.

Warner v Tullis, 206-680; 218 NW 575

Notice of homestead right. The holder of a sheriff's deed under execution sale necessarily takes the deed subject to the homestead rights of the execution defendant of which he had actual or constructive notice.

Frum v Kueny, 201-327; 207 NW 372

Subrogation. If a second mortgagee uses his own funds in discharging a first mortgage in order to save the property he will be subrogated to the rights of said first mortgagee; on the other hand, if funds are obtained through a new mortgage, and used in the discharge of said first mortgage, then the new mortgagee will acquire said right of subrogation, and in either case, the homestead character of part of the mortgaged property is quite immaterial.

Clark v Chapman, 213-737; 239 NW 797

Waiver in promissory note—effect. A waiver in a promissory note of the maker's homestead right does not constitute authority in the court in an action on the note to decree a lien on the maker's homestead for the amount due on the note.

First N. Bk. v Phillips, 203-372; 212 NW 678

Waiver through antenuptial contract. An antenuptial contract will not be construed to embrace a waiver of homestead rights in the absence of plain and unmistakable language to that effect. Such waiver must have a more secure basis than a mere inference from broad and sweeping language referable to waiver of right to dower or distributive share.

Mill Owners Ins. v Petley, 210-1085; 229 NW 736

10151 "Family" defined.

ANALYSIS

I PERSONS ENTITLED TO EXEMPTION

"Family" defined. Principle reaffirmed that, within the meaning of the homestead exemption statute, a family is a collective body of persons who live in one house, under one head or manager.

Solnar v Solnar, 205-701; 216 NW 288

Father and crippled son. A father who substantially supports his adult, motherless, crippled son in his home is the head of a family, and consequently capable of acquiring and holding a homestead.

Poffinbarger v Admr., 206-961; 221 NW 550

Acquisition — presumption of continuance. Upon proof that a homestead in property was acquired by a mother because of the occupancy of the property by herself and minor daughter as a home, and that such occupancy continued until the mother died, it will be rebuttably presumed that the property was the homestead of the mother at the time of her death, even tho, in the meantime, the daughter marries and, with her husband, continues joint occupancy of the property with the mother.

In re McClain, 220-638; 262 NW 666

Childless widow—right to sell and acquire new homestead. A childless widow to whom the family homestead has been devised by her husband may sell said homestead and invest the proceeds thereof in a new homestead and hold the latter, to the extent in value of the old homestead, exempt from execution in all cases where the old homestead would have been exempt had she retained it.

Magel v Hunt, 221-199; 265 NW 119

Noninterest of absent spouse. The fact that a homestead was both acquired and lost by the wife, during a time when the whereabouts of the husband was unknown, renders quite immaterial the question whether the husband is yet alive.

Solnar v Solnar, 205-701; 216 NW 288

Termination of family relation. Land which acquires the status of a homestead because of its occupancy by the owner and by her minor children as a family (the mother being, long prior thereto, permanently deserted by her husband) loses such status when the family relation is destroyed by the death of some of the minors and by the attaining of maturity by the others and the removal to homes of their own, thereby leaving the owner-mother in sole occupancy of the property.

Solnar v Solnar, 205-701; 216 NW 288

II DISPOSAL OF HOMESTEAD IN DIVORCE ACTIONS

Divorce—sale of homestead. The court may properly decree in divorce proceedings that a monthly allowance solely for the support and education of a child shall be a lien on the defendant-parent's homestead—all the property the parent possesses—but may not properly decree that in case of a failure to pay the allowance the homestead shall be sold and the proceeds impounded solely for the support and education of the child. On the contrary, a sale of the parent's homestead should be permitted only on proof of the parent's willful refusal or neglect to pay as far as he can reasonably pay.

Paul v Paul, 217-977; 252 NW 114

10152 Descent.

Devise subject to unenforceable debts — requirements. The will of a spouseless testator will not be held to devise testator's homestead to his children subject to debts which could not be otherwise enforced against said homestead, unless the intent so to do is evidenced by testamentary language which is unequivocal and imperative. The usual and formal paragraph in the preliminary part of a will directing the payment of "all my just debts" is quite insufficient to evince such intent.

Luckenbill v Bates, 220-871; 263 NW 811; 103 ALR 252

Homestead possession—effect. An heir cannot successfully claim that he is the owner of premises because his father continuously occupied said premises for some thirty-five years and until his death, as a homestead, when it appears that during said time the premises went to tax deed, and that thereupon the mother re-acquired title from the tax deed holder and thereunder adversely occupied said premises under said newly acquired deed for more than ten years.

Mann v Nies, 213-121; 238 NW 601

Foreclosure — unallowable collateral attack. In the foreclosure of a mortgage, executed by an administrator on lands of the deceased and on due order and authorization of the court, the defending heirs, who were parties to the order and authorization for the mortgage, will not be permitted to collaterally attack the validity of the mortgage on the ground that part of the land was the homestead of the deceased and therefore descended to the heirs exempt from the debts of the deceased.

Reinsurance Life v Houser, 208-1226; 227 NW 116

10153 Exemption in hands of issue.

Right of heirs. A homestead devised by the owner thereof to his wife, who accepts the same in lieu of her distributive share, de-

scends, upon the death of the wife intestate, to her heirs at law, free from the debts of the original owner contracted subsequent to his acquisition of the said homestead.

Wheeler v Meyer, 201-59; 206 NW 301

Devisee takes exempt from testator's debts. Homestead may be devised exempt from the debts of the testator contracted subsequent to its acquisition.

Long v Northup, 225-132; 279 NW 104; 116 ALR 1475

See In re Schultz, 192-436; 185 NW 24

Purchase (?) or descent (?). A homestead cannot be deemed to descend under the laws of descent to the children of a spouseless parent when the parent leaves a will which provides that no child contesting the will shall take anything under the will, altho the will otherwise gives to the children the identical shares which the laws of descent would give.

Luglan v Lenning, 214-439; 239 NW 692

Title under will (?) or law of descent (?)—attending rights. Devisees whose shares under a will are, both in quantity and quality, exactly the shares which they, in the absence of a will, would take under the statute law of descent, are deemed to take title, not under the will, but under the said statutes of descent—the worthier title—and so taking they necessarily take the statutory exemptions, if any, attending the property.

Luckenbill v Bates, 220-871; 263 NW 811; 103 ALR 252

Exemption from debt. When an intestate homestead owner is survived by a spouse, or by issue, or by both spouse and issue, the homestead property cannot be subject to the debts of the deceased owner except as provided in §10155, C., '31.

Southwick v Strong, 218-435; 255 NW 523

Immateriality as to source of title. On the question of the descent to heirs of the homestead of an intestate, the source of title of the intestate is quite immaterial.

Oskaloosa Bk. v Jamison, 205-349; 218 NW 29

Involuntary sale—effect. When, in probate proceedings, the sale of the homestead of an intestate is involuntary as to an heir, then the proceeds of such sale, insofar as the interest of such heir is concerned, are exempt from execution levy.

Oskaloosa Bk. v Jamison, 205-349; 218 NW 29

Rights of children. Homestead property which descends to children of an intestate and spouseless owner is exempt from all antecedent debts of such children.

Dever v Turner, 200-926; 205 NW 755

Arispe Bk. v Werner, 201-484; 207 NW 578

Rights of children. Homestead property passing by will to testator's children by way of remainder after the termination of a life estate in the surviving spouse is not exempt from the antecedent debts of such children.

Arispe Bk. v Werner, 201-484; 207 NW 578

See Bracewell v Hughes, 214-241; 242 NW 66

Liability for debts of children. Children who take a homestead under the will of their spouseless parent, take it subject to their own debts created subsequent to the acquisition of the homestead by their parent.

Luglan v Lenning, 214-439; 239 NW 692

10154 New homestead exempt.

Acquisition of new homestead. A present homestead is shown to be a continuation of a prior homestead by evidence that, immediately after the sale of the prior homestead, the ground for the present homestead was acquired, and that thereon a residence was erected with all due diligence, and occupied as a home by the owner and his family, all at an expense which did not exceed the value of the prior homestead; and it is immaterial that part of the said expense was not shown to be the identical money which was received from the prior sale.

Harm v Hale, 206-920; 221 NW 582

Burden of proof. One who claims that his present homestead was purchased with funds received from the sale of a prior homestead has the burden so to show.

Harm v Hale, 206-920; 221 NW 582

Childless widow—right to sell and acquire new homestead. A childless widow to whom the family homestead has been devised by her husband may sell said homestead and invest the proceeds thereof in a new homestead and hold the latter, to the extent in value of the old homestead, exempt from execution in all cases where the old homestead would have been exempt had she retained it.

Magel v Hunt, 221-199; 265 NW 119

Destruction by fire—proceeds of insurance—exemption. The act of the owners of a homestead destroyed by fire in immediately using a portion of the proceeds of the insurance on the destroyed homestead in the purchase of a new homestead does not deprive them of the right to hold, for a reasonable time, the balance of said proceeds as exempt, when they have the bona fide intention of applying said balance in the repair and improvement of the new homestead, said entire proceeds being less than the value of the old homestead.

Blakeslee v Paul, 212-1385; 238 NW 447

Exemption of proceeds. A homesteader who exchanges his homestead for other property—even for property other than money—may, for a reasonable time, hold exempt the property

so received, when he made the exchange in the then bona fide intent to acquire a new homestead with the proceeds.

Fardal v Satre, 200-1109; 206 NW 22

Trading old for new — rule for valuation. When the owner of a mortgage-incumbered homestead trades it for a new homestead, and the issue arises, under this section, whether the value of the new homestead exceeds the value of the old homestead, the old homestead must be valued as wholly unincumbered.

[The fundamental reason for such holding is that the owner of such incumbered homestead would have the right, of course, to pay off or discharge the incumbrances, and, after so doing, would have the legal right to hold the entire unincumbered homestead, exempt from any debt contracted after it became his homestead.]

American Bank v Willenbrock, 209-250; 228 NW 295

Selling, investing and buying new homestead. A person who temporarily moves away from his homestead, but later sells it on credit, may invest the proceeds, as collected, in loans, with the bona fide purpose at all times of using said proceeds and the accumulations therefrom in the purchase of a new homestead, and if said purpose is executed within a reasonable time, the new homestead, to the extent in value of the old, is exempt from execution in all cases where the old one would have been exempt.

Elliott v Till, 219-649; 259 NW 460

When unimproved lot exempt. An unimproved city lot purchased with the proceeds of the purchaser's former homestead, and within a reasonable time after the sale of said homestead, and with the bona fide purpose of at once improving said lot as a new homestead —said proceeds never having lost their homestead character,—is, to the extent in value of the old homestead, exempt from execution where the old would have been exempt.

Elliott v Till, 219-649; 259 NW 460

10155 Debts for which homestead liable.

Atty. Gen. Opinion. See '25-26 AG Op 315

ANALYSIS

Mechanics' liens in general. See under Ch 451

I DEBTS CONTRACTED PRIOR TO ACQUISITION OF THE HOMESTEAD

(a) NATURE AND KIND OF DEBTS

Descent of homestead free from prior debts of devisor.

Wheeler v Meyer, 201-59; 206 NW 301

Devise subject to unenforceable debts. The will of a spouseless testator will not be held to devise testator's homestead to his children subject to debts which could not be otherwise enforced against said homestead, unless the intent so to do is evidenced by testamentary language which is unequivocal and imperative. The usual and formal paragraph in the preliminary part of a will directing the payment of "all my just debts" is quite insufficient to evince such intent.

Luckenbill v Bates, 220-871; 263 NW 811; 103 ALR 252

Rights of children or heirs. When an intestate homestead owner is survived by a spouse, or by issue, or by both spouse and issue, the homestead property cannot be subject to the debts of the deceased owner except as provided in this section.

Southwick v Strong, 218-435; 255 NW 523

(b) METHOD OF ACQUIRING AND HOLDING HOMESTEAD IN RE LIABILITY FOR DEBTS

Devisee takes exempt from testator's debts. Homestead may be devised exempt from the debts of the testator contracted subsequent to its acquisition.

Long v Northup, 225-132; 279 NW 104; 116 ALR 1475

See In re Schultz, 192-436; 185 NW 24

Presumption from continued occupancy. Upon proof that a homestead in property was acquired by a mother because of the occupancy of the property by herself and minor daughter as a home, and that such occupancy continued until the mother died, it will be rebuttably presumed that the property was the homestead of the mother at the time of her death, even tho, in the meantime, the daughter marries and, with her husband, continues joint occupancy of the property with the mother.

In re McClain, 220-638; 262 NW 666

Will subjecting homestead to debts of life tenant. A provision in a will, setting up a life estate with remainder over to certain devisees, after all indebtedness and funeral expenses of the life tenant are paid, subjects the estate to a claim for funeral expenses of the life tenant, even if it was his homestead, such provision being a condition upon the devise to the remaindermen.

De Cook v Johnson, 226-246; 284 NW 118

(c) ACCRUAL AND ENFORCEMENT OF CLAIM AGAINST THE HOMESTEAD

Jurisdiction of bankruptcy court. The jurisdiction of the federal bankruptcy court over the exempt property of the bankrupt extends no further than to enter an order setting off such property to the bankrupt. Irrespective of the proceedings in such court, the right to the exempt property, as between the owner and a mortgagee thereof, must be determined in the state court.

Eckhardt v Hess, 200-1308; 206 NW 291

Debts enforceable against—unallowable procedure. After a court of bankruptcy had adjudged a debtor to be a bankrupt and after the court has set off a homestead to said debtor, a creditor holding a duly scheduled, unliquidated, and unsecured debt has no right to proceed in equity in the state court, and have his debt adjudicated and enforced as a lien on the said homestead because said debt antedates the acquisition of said homestead. And it is immaterial that the creditor, preceding his action in the state court, obtained an order staying the final discharge of the bankrupt.

Bracewell v Hughes, 214-241; 242 NW 66

Failure of junior mortgagee to redeem—effect. The holder of a junior mortgage on both homestead and nonhomestead property of a bankrupt, who is not satisfied out of the proceeds of a "free-from-lien" sale of the nonhomestead property by the trustee in bankruptcy, does not lose his lien on the homestead property by failing to redeem from the foreclosure of senior mortgages which are satisfied out of said proceeds, because the satisfaction of said senior mortgages left nothing from which redemption could be made.

First Bk. v Kleih, 201-1298; 205 NW 843

Homestead and nonhomestead property—sale en masse—appropriation of surplus. A junior execution creditor who, at a senior mortgage foreclosure sale, buys in property which, in accordance with the mortgagor's agreement to that effect, is sold en masse, and regardless of the homestead character of part of the property, and who, in so buying, bids an amount in excess of the senior mortgage debt, on the express condition that said excess be indorsed on his junior execution (which is done), and who, with the full knowledge of the mortgagor, and without objection by him, complies with his bid, and after a year for redemption takes a deed, is not thereafter liable to the mortgagor for the amount of said excess on the theory that such excess represents the mortgagor's homestead, on which the junior execution creditor admittedly had no lien.

Phoenix Tr. v Vaught, 201-450; 205 NW 792

Receiver under mortgage foreclosure. The right of a homestead to be protected from receivership in mortgage foreclosure is fully protected by delaying the appointment of a receiver until after the sale of all the mortgaged lands under foreclosure has revealed a deficiency judgment.

Finken v Schram, 212-406; 236 NW 408

Incumbrance—right to receiver. In the foreclosure of a mortgage solely on a homestead and for the purchase price thereof, the mortgagee is entitled (except under exceptional circumstances) to the appointment of a receiver without proof of the insolvency of the debtor, (1) when the mortgage pledges a lien on the rents in case of default in payment, and provides for a receiver in case of foreclosure, and (2) when the inadequacy of the security is clearly made to appear.

Iowa-D. M. Bank v Crawford, 217-609; 252 NW 97

Receiver—inequitable circumstances. On the issue whether a receiver for pledged rents should be appointed in the foreclosure of a mortgage solely on a homestead, the court cannot give consideration to the plea that extensive improvements have been made on the property since the mortgage was given when there is no proof that the mortgagee is the grantor of the defendant homestead owner.

Iowa-D. M. Bank v Crawford, 217-609; 252 NW 97

(d) LIEN OF JUDGMENTS

Administrator's settlement of unenforceable lien—homestead's nonliability. Altho a settlement agreement was made between a claimant and an administrator, a decedent's homestead may not be subjected to a mortgage or judgment which has never become a lien thereon, which was not filed nor allowed against the estate, which was not enforced within two years after judgment entry, and when such settlement was never approved by the probate court.

Finn v Grant, 224-527; 278 NW 225

Antecedent debts—double liability on bank stock. The very act of acquiring the ownership of corporate bank stock ipso facto creates a contract "debt" for the statutory double liability on the stock. It follows that a judgment against the stockholder on such double liability may (the debtor having no other leviable property) be enforced against the stockholder's subsequently acquired homestead, even tho the judgment was rendered subsequent to the acquisition of the homestead.

Smith v Andrew, 209-99; 227 NW 587

I DEBTS CONTRACTED PRIOR TO ACQUISITION OF HOMESTEAD—concluded

(d) LIEN OF JUDGMENTS—concluded

Family expenses. A homestead is exempt from execution on a judgment for a family expense contracted after the acquisition of the homestead. In other words, the statutory declaration that a homestead is exempt from judicial sale "where there is no special declaration of statute to the contrary" (§10150, C., '27) has no reference whatever to the statutory declaration that a family expense is "chargeable upon the property of both husband and wife". (§10459, C., '27.)

Dorsey v Bentzinger, 209-883; 226 NW 52

Judgment on loans to pay alimony. Judgments against a husband on obligations contracted since the acquisition of a homestead are not liens on the homestead which is awarded to the wife in divorce proceedings as alimony, even tho the judgment be for money borrowed by the husband to pay temporary alimony and attorney fees for the wife in said proceedings.

Novotny v Horecka, 200-1217; 206 NW 110; 42 ALR 1158

Subsequent loan to pay prior debt. A judgment on a loan made to the owners of a homestead long after the acquisition of the homestead is not a lien on the homestead, because of the fact that said loan was made and used for the specific purpose of paying off a debt antedating the acquisition of said homestead.

Brauch v Freking, 219-556; 258 NW 892

Unallowable acquisition—debts enforceable against. One of several remaindermen may not acquire, in a portion of the common property, a homestead based on his occupancy of the property as a tenant of the life tenant. If, after the death of the life tenant, he acquires a homestead by virtue of his new occupancy, such homestead is necessarily subject to a judgment based on claims long antedating the death of the life tenant.

Kramer v Hofmann, 218-1269; 257 NW 361

Valueless and oppressive lien. A court of equity will not decree a lien on the nonexempt portion of the judgment defendant's homestead and award a special execution for the enforcement of such lien, tho plaintiff is technically entitled thereto, when on the record such procedure would be valueless, and possibly oppressive on the defendant.

American Bk. v Willenbrock, 209-250; 228 NW 295

Wife's homestead not liable for husband's debt. A judgment against a husband is not enforceable against a homestead acquired by his wife in her own name,—even tho so acquired long after the inception of the debt on which said judgment was rendered,—on proof that the husband, while perfectly solvent, and with no fraudulent intent, and without expressly or impliedly acquiring any interest in the land, voluntarily permitted a portion of his own assets to be applied on the debt of the wife for her said homestead.

Price v Scharpff, 220-125; 261 NW 511

Admissions of husband—when inadmissible against wife. In an action against a wife to subject her homestead to a judgment which had been rendered against her husband on his debt antedating the acquisition by the wife of her said homestead, admissions of the husband tending to show that he furnished the money to pay for the said homestead are not binding on, or admissible against, the wife.

Price v Scharpff, 220-125; 261 NW 511

(e) PURCHASE MONEY

Incumbrance—pledge of rents—effect. The purchaser of property who, simultaneously with the purchase, mortgages the property for the purchase price, and therein pledges the rents in case of default, and agrees to a receivership in case of foreclosure, does not, by subsequently occupying the property as a homestead, acquire a homestead right which will be superior to the right of the mortgagee to enforce, by receivership, the pledge of rents in order to pay a deficiency judgment.

Iowa-D. M. Bank v Crawford, 217-609; 252 NW 97

II DEBTS CREATED BY WRITTEN CONTRACT

Contingent contract—noncertain debt. Under a written contract providing that first party will pay second party a named fee whenever second party secures the legal allowance of a certain claim in first party's favor, no debt is contracted which can be enforced against the subsequently acquired homestead of first party until said second party actually obtains the allowance of said claim, because until such allowance is obtained no debt accrues against first party which is certain and in all events payable.

Hunt, etc. v Moore, 219-451; 258 NW 114

Mortgage without consideration as to wife. A mortgage on homestead property duly signed by both husband and wife cannot be enforced against the wife when it appears that there was no consideration for the wife's signature.

Greenland v Abben, 218-255; 254 NW 830

III EXHAUSTION OF OTHER PROPERTY BEFORE RESORTING TO HOMESTEAD

(a) ASSERTING RIGHT TO HAVE OTHER PROPERTY EXHAUSTED

Homestead and nonhomestead property—sale en masse—apportionment of surplus. Tho it be conceded, arguendo, that, where mortgaged property is sold on foreclosure en masse, and regardless of the homestead character of part of the property, to a junior execution creditor on an indivisible bid in excess of the mortgage debt, the mortgagor would have a

recoverable interest in the excess on the theory that it represented his homestead, on which the junior creditor had no lien, nevertheless the mortgagor would not be entitled to recover the entire excess, because equity would require the bid to be apportioned between the homestead and the nonhomestead property, in order that the homestead should bear its just proportion of the mortgage debt.

Phoenix Co. v Vaught, 201-450; 205 NW 792

(b) INCUMBRANCES ON BOTH HOMESTEAD AND OTHER PROPERTY

Exhausting nonhomestead property. The right, under this section, of a mortgagor of both homestead and nonhomestead property to insist that the nonhomestead property be first exhausted before resorting to the homestead property, is a right which a subsequent mortgagee of the same property may insist on against a prior mortgagee of the nonhomestead property only.

Moody v Century Sav. Bank, 239 US 374

Exhausting other property. A sheriff in selling a homestead forty, and a nonhomestead forty (under special mortgage-foreclosure execution) may very properly call for and receive, in turn, separate, substantial, and good-faith bids, (1) on the nonhomestead forty, (2) on the homestead forty, and (3) on the two forties en masse, and, over the objections of the debtor, may accept the bid en masse and sell thereunder when said bid en masse is substantially in excess of the aggregate of the other two bids, tho insufficient to completely satisfy the execution.

Prudential v Westfall, 219-1119; 260 NW 344
American Bk. v Davis, 221-1183; 268 NW 9

(c) PROCEDURE IN EXHAUSTING OTHER PROPERTY

Failure of junior mortgagee to redeem. The holder of a junior mortgage on both homestead and nonhomestead property of a bankrupt, who is not satisfied out of the proceeds of a "free-from-lien" sale of the nonhomestead property by the trustee in bankruptcy, does not lose his lien on the homestead property by failing to redeem from the foreclosure of senior mortgages which are satisfied out of said proceeds, because the satisfaction of said senior mortgages left nothing from which redemption could be made.

First Tr. & Sav. Bk. v Kleih, 201-1298; 205 NW 843

Liabilities enforceable against—exhausting other property. A sheriff in selling a homestead forty, and a nonhomestead forty (under special mortgage-foreclosure execution) may very properly call for and receive, in turn, separate, substantial, and good-faith bids, (1) on the nonhomestead forty, (2) on the homestead forty, and (3) on the two forties en masse, and, over the objections of the debtor, may accept the bid en masse and sell thereunder when said bid en masse is substantially in excess of the aggregate of the other two bids, tho insufficient to completely satisfy the execution.

Prudential Ins. v Westfall, 219-1119; 260 NW 344

American Bk. v Davis, 221-1183; 268 NW 9

Liabilities enforceable against—prayer for valueless and oppressive lien. A court of equity will not decree a lien on the nonexempt portion of the judgment defendant's homestead and award a special execution for the enforcement of such lien, tho plaintiff is technically entitled thereto, when, on the record, such procedure would be valueless, and possibly oppressive on the defendant.

American Savings Bk. v Willenbrock, 209-250; 228 NW 295

IV DISPOSAL OF HOMESTEAD AS AFFECTING RIGHTS OF CREDITORS

Voluntary conveyance—burden of proof. The principle that the grantee in a voluntary conveyance of a homestead may sustain the conveyance against the claims of the creditors of the grantor necessarily imposes on the grantee the burden of showing the homestead character of the property.

Dolan v Newberry, 200-511; 202 NW 545; 205 NW 205

V MECHANICS' LIENS

No annotations in this volume

VI ABSENCE OF SPOUSE OR ISSUE

Acquisition and loss—noninterest of absent spouse. The fact that a homestead was both acquired and lost by the wife during a time when the whereabouts of the husband was unknown renders quite immaterial the question whether the husband is yet alive.

Solnar v Solnar, 205-701; 216 NW 288

Loss of homestead status—termination of family relation—effect. Land which acquires the status of a homestead because of its occupancy by the owner and by her minor children as a family (the mother being, long prior thereto, permanently deserted by her husband) loses such status when the family relation is destroyed by the death of some of the minors and by the attainment of maturity by the others and the removal to homes of their own, thereby leaving the owner-mother in sole occupancy of the property.

Solnar v Solnar, 205-701; 216 NW 288

CHAPTER 442

LANDLORD AND TENANT

10156 Apportionment of rent.

Rentals for successive seasons. In an action to recover the rental of lands for successive seasons, interest is properly computed from the end of each annual period on each item of annual rent.

Bigelow v Ins. Co., 206-884; 221 NW 661

10157 Double rental value—liability.

Constructive eviction—effect. The constructive eviction of a tenant does not absolve him from the payment of the agreed rent unless he surrenders the premises.

Zimbelman v Boone Coal, 220-1310; 263 NW 335

10158 Attornment to stranger.

Attornment—acts not constituting. No attornment takes place by the mere act of a tenant in assigning his interest in the lease and placing the assignee in possession of the leased premises.

Snyder v Bernstein, 201-931; 208 NW 503

Disputing title. Proof that an apparently valid lease is in reality a fraud and a sham is not violative of the rule that a tenant will not be permitted to deny the title of his landlord.

Schmidt v Twedt, 219-128; 257 NW 325

Estoppel to dispute landlord's title. One who mistakenly supposes that he has lost his property by the issuance of a tax deed (which in fact is void) and, under the influence of legal duress, becomes the tenant of the deed holder, is not estopped to dispute the latter's title.

Galleger v Duhigg, 218-521; 255 NW 867

Estoppel of tenant. A lessee in possession will not be heard to assert against his lessor that he never intended to carry out his agreement to surrender the premises and every part thereof, on the termination of his lease.

Taylor v Olmstead, 201-760; 206 NW 88

Landlord's title—estoppel to dispute. A tenant who remains in undisturbed possession of realty under a lease with an executor, and refuses to quit and surrender said premises at the termination of said lease, may not defend his wrongful possession by or under the plea that the executor had no legal right to lease the land.

Wright v Zachgo, 222-1368; 271 NW 512

Nonpermissible plea by tenant. In an action to quiet title to lands, a defendant who is in peaceable possession of the premises under a lease from plaintiff will not be permitted to assert that plaintiff had no title when the lease was executed.

McKenney & Seabury v Nelson, 220-504; 262 NW 101

Rents — adjudication against chattel mortgage. On the issue, in real estate mortgage foreclosure, whether an outstanding lease between the owner and his tenant (parties to the action) was superior to the mortgagee's right to a receiver for said premises and for the rents thereof, an unappealed decree which orders the appointment of such receiver works an eviction of said tenant and the consequent nullification of a chattel mortgage by the landlord on his share of the crop rent under said lease, it appearing that the real estate mortgagee had no notice or knowledge of such chattel mortgage until after the entry of his decree of foreclosure.

Keenan v Jordan, 204-1338; 217 NW 248

Rent — incident to land — passes to heirs. General rule is that rents accruing after the owner's death belong to the heirs or devisees, as an incident to the ownership of the land which descends to them.

In re Jensen, 225-1249; 282 NW 712

Title of landlord. In an action by a landlord to recover damages consequent on the conversion by defendant of property on which the landlord had a lien for rent, the question of the ownership of the land by the landlord is wholly irrelevant and immaterial.

Mau v Rice Bros., 216-864; 249 NW 206

10159 Tenant at will—notice to quit.

ANALYSIS

Adverse possession by tenant. See under §11007 (XXVIII)
Estoppel to deny landlord's title. See under §10158
Landlord's lien. See under §10261
Leased premises, negligence. See under §6392
Leases and assignments involved in mortgage foreclosures. See under §§10107, 12372
Negligence liability generally. See Ch 484, Note 1
Priorities, realty mortgage involved. See under §10105
Receivers' leases in mortgage foreclosures. See under §12372 (III)
Rent generally. See under §10261 (VII)
Rents and profits under mortgages. See under §12372 (III)
Repairs, housing law. See under §6392
Tenants in common and joint tenancy. See under §10054

I NATURE AND CREATION OF TENANCY AT WILL

Lease (?), joint adventure (?), or partnership (?). Instrument reviewed and held to create the relation of landlord and tenant, and not that of a joint adventure or partnership.

Johnson v Watland, 208-1370; 227 NW 410

Apparent authority of manager sufficient to bind corporation to tenancy. Corporation held liable for rent as tenant at will, based on correspondence and telephone conversations with corporation's manager, as against contention that manager was not authorized to enter into arrangement made—principal being bound by apparent authority of its agent.

Daly Co. v Brunswick Co., (NOR); 263 NW 234

Implied obligation. Proof that the holder of a first mortgage on real estate was himself in occupancy of the premises, and continued such occupancy after the issuance of a sheriff's deed under a junior lien, generates the presumption that such occupancy was with the assent of the said occupant and the said deed holder, with consequent obligation of the occupant to pay reasonable rental to said deed holder until such time as a deed might be executed under foreclosure of the first mortgage.

Norman v Dougan, 201-923; 208 NW 366

Payment of rent not essential. Payment of rent is not an essential element to the creation of the relation of landlord and tenant.

Reynolds v Oil Co., 227-163; 287 NW 823

Possession of tenant possession of landlord. The possession of a tenant is the possession of the landlord, and is notice of the rights of the landlord.

Phelps v Kroll, 211-1097; 235 NW 67

II TERMINATION OF TENANCY

Constructive eviction. The constructive eviction of a tenant does not absolve him from the payment of the agreed rent unless he surrenders the premises.

Zimbelman v Boone Coal, 220-1310; 263 NW 335

Injunction not available in lieu of possessory action. One, who claims the possession of realty against another who is in actual possession as a tenant at will, may not resort to injunction proceedings to adjudicate his claimed right of possession.

Austin v Perry, 219-1344; 261 NW 615

Oral sale with part payment. An oral agreement to sell land, accompanied at the time by part payment, constitutes a "sale", within the terms of a lease which provides that, in case of a sale of the premises, the tenancy may be terminated.

Luse v Elliott, 204-378; 213 NW 410

Termination—30 days notice—insufficiency appearing in petition. In a forcible entry and detainer action where the petition alleged a notice dated January 12th terminating a tenancy at will "within 30 days from the date of this notice", such notice being served on January 13th, a demurrer should have been sustained, as only 29 and not the statutory 30 days written notice was given.

Murphy v Hilton, 224-199; 275 NW 497

Unavailable defense. A tenant who has agreed that his tenancy may be terminated in case the landlord sells the property may not predicate a defense to such termination on the fact that the landlord (concededly in good faith) actually conveyed a part of the land to his wife, solely in consideration of the wife's agreement to sign a conveyance of the remaining part of the land.

Luse v Elliott, 204-378; 213 NW 410

III LEASES

Discussion. See 6 ILB 173—Occupation of premises by employee

(a) IN GENERAL

Discussion. See 9 ILB 119—Duty of landlord to relet premises

Change of relation—effect. Manifestly a landlord and his tenant may, at the close of the tenancy, take on and assume the relationship of vendor and purchaser, and thereby enable the former tenant to hold the premises in question adversely to the former landlord.

Burch v Wickliff, 209-582; 227 NW 133

Commencement of term. A lease which definitely provides that the term of the lease shall begin with the execution of the lease, but which, with equal definiteness, provides that the landlord shall not give possession until a named date after the execution of the lease, gives the landlord no lien for rent on property which the tenant takes and keeps upon the property after the execution of the lease, but which he removes before the day for possession under the lease arrives, it appearing that such short-time possession by the tenant was for a purpose foreign to the lease.

Federal Bank v Wylie, 207-816; 221 NW 831

Conditional delivery. No contract relation is created by the execution of a lease and the delivery thereof on a condition which later fails.

Standard v Kinseth, 204-974; 215 NW 972

Collateral evidence—interference by lessor—evidence. Evidence reviewed and held insufficient to show that the parties to a lease had entered into an alleged collateral agreement, or that the lessor had so interfered

III LEASES—continued
(a) IN GENERAL—continued
with the lessee and his possession as to render impossible the carrying on of lessee's business.

Woodhull v Trainor, 215-1330; 247 NW 808

Conflicting evidence. Conflicting testimony on the issue whether a tenant had waived his right to certain refrigerating room, as called for by the lease, necessarily generates a jury question; and the verdict thereon is a finality.

Rocho Bros. v Dairy, 204-391; 214 NW 685

Oral explanation. The fact that both of two parties sign a lease and the accompanying rent notes does not necessarily establish, in a controversy strictly between said two parties, that each party should pay one half the rent. The said fact is open to oral explanation.

Fisher v Nicola, 214-801; 241 NW 478

Nonabuse of discretion. In action for forcible entry and detainer, where there was evidence of error in instructions in that court assumed that an alleged lease was made with agent of plaintiff with authority to make an oral lease, and that court did not specifically define to jury necessary elements of an oral lease, and there was also question that verdict was not supported by evidence, granting new trial held not an abuse of discretion.

Holman v Rook, (NOR); 271 NW 612

Precautionary instructions. A jury may very properly be told not to allow a recovery of rents prior to a specified time, even tho no claim is made in the pleadings for such prior rents, when it is manifest that the court was simply guarding against possible confusion because of the state of the record.

Bigelow v Ins. Co., 206-884; 221 NW 661

Contract lien—enforcement. An action to establish and enforce a contract lien for rent is properly brought in equity, and is not transferable to law, because the answer presents law issues. Held that a contract lien for rent is validly created by a lease provision that the landlord should have, not only the statutory lien for rent, but also a lien upon all property of the tenant used or situated on the leased premises whether exempt from execution or not.

Beh v Tilk, 222-729; 269 NW 751

Contract against lien—validity. An owner of land in leasing his property has a right to contract that improvements made by the lessee on the land shall not be made on credit, and that said property shall not be liable therefor.

Thompson Yards v Haakinson Co., 209-985; 229 NW 266

Contract of sale in lease. An option reserved in an ordinary lease of real estate for the purchase of the described property by the lessee at a fixed price, and on specified time and methods of payment (among which was an agreement that the rent paid should be credited on the purchase price), is specifically enforceable, even tho no provision is embodied therein as to (1) formal possession or (2) title or (3) conveyance, and even tho the parties thereto unnecessarily reserved the right generally to enter into additional agreements relative to such option.

Carter v Bair, 201-788; 208 NW 283

Construction—joint purchase of property. When the beneficiaries of a trust in real property and in the long-time lease thereon are given the right either to continue to receive the rent under the lease, or to terminate the lease by jointly purchasing of the lessee the building which the lessee has erected on the land, under the lease, then the assignees of the beneficiaries must likewise act jointly in the purchase of the building.

Fleming v Casady, 202-1094; 211 NW 488

Lease—readjustment of rent—construction. A long-time lease which provides (1) that the rental shall be computed at a named percentage on the value of the land (subject to a minimum rental); (2) that, for the first five-year period, a specified rental shall be paid (which was said percentage on the agreed and estimated value); (3) that the rental for the balance of the term shall, at the close of each five-year period, be subject to revision, "based upon any increase in the estimated value of the land"; and (4) that such valuation shall be made by certain valuers or appraisers, requires the valuers, in making such valuation, to treat the last preceding value as a verity. In other words, the valuers may not adjudge that the preceding valuers were mistaken in their judgment. Phrased otherwise, the valuers must confine themselves to a determination of the simple question whether the value has increased or decreased since the last preceding valuation, and add such increase to, or subtract such decrease from, the last preceding valuation.

Minot v Pelletier Co., 207-505; 223 NW 182

Disputing landlord's title—fraud. Proof that an apparently valid lease is in reality a fraud and a sham is not violative of the rule that a tenant will not be permitted to deny the title of his landlord.

Schmidt v Twedt, 219-128; 257 NW 325

Execution by husband only—liability of wife. A wife is not liable on a written lease signed by the husband alone as lessee, tho the leased premises be occupied by the husband and wife as a family residence.

Whether the wife be liable for the rent as a family expense under §10459, C., '35, is a quite different question—a question which cannot be deemed before the court in landlord's attachment proceedings manifestly based solely on the lease signed by the husband alone.

Rogers v Davis, 223-373; 272 NW 539

Foreclosure—sale—deed—right to unaccrued rents. The principle that one who receives a sheriff's deed is entitled to unaccrued rents under an outstanding lease can have no application when the lease had terminated immediately prior to the issuance of said sheriff's deed.

Kerr v Horn, 211-1093; 232 NW 494

Forfeiture—noncontract grounds. A lease may not be forfeited on a noncontract ground.

In re Grooms, 204-746; 216 NW 78

Landlord's contractual lien—recording articles and assignments—constructive notice to trustee. Where a lease provided for lien in favor of lessors for taxes and other money paid by lessors under provisions of lease, and when assignments of lease to corporations, articles of incorporation of bankrupt lessee under its original name, and amendment changing its name to that of bankrupt had all been recorded, that record gave constructive notice to trustee in bankruptcy and all subsequent lienors of lessor's prior lien.

Ginsberg v Lindel, 107 F 2d, 721

Measure of damages—wrongful act without profit to wrongdoer — essential proof. The lessee of coal lands who seeks to recover damages consequent on the wrongful act of the owner of the land in taking coal from the land, need not show that the defendant-owner made any profit from his wrongful operations. Plaintiff need only show wherein and to what extent he was damaged.

Hartford Coal Co. v Helsing, 220-1010; 263 NW 269

Merger—acquisition of title by stockholder of corporate lessee. A lease in which a corporation with many stockholders is lessee may not be said to be merged, and thereby terminated, simply because some of the stockholders acquire the equitable title to the real estate.

Fleming v Casady, 202-1094; 211 NW 488

Mutual rights—compensation—nondual employment. The fact that different property owners employ the same rental agent to obtain the same tenant does not constitute such a dual employment as to deprive the agent of his compensation from the owner for whom a lease is obtained.

Foley v Mathias, 211-160; 233 NW 106; 71 ALR 696

Mutual termination—jury question. Whether a lease has been mutually terminated is necessarily a jury question on conflicting testimony.

Benson v Iowa Co., 207-410; 221 NW 464

Negligence of tenant — liability of landlord. Principle recognized that a property owner who has parted with full possession and control of his premises by lease is not liable to third persons for injuries caused by the negligence of the tenant.

Updegraff v City, 210-382; 226 NW 928

Nonpermissible power of partner—burden of proof. A partnership is not bound by the act of one partner in consenting to, and acquiescing in, an act which is subversive of the very purpose of the partnership, unless he who seeks so to bind the partnership establishes the fact that all the partners consented to, and acquiesced in, said act.

Hartford Coal Co. v Helsing, 220-1010; 263 NW 269

Option conditioned on payment of note—conditional delivery—jury question. With the evidence in conflict, a jury question is generated as to whether or not the delivery of a note was conditional when it was given at the time of the execution of a farm lease which contained an option to purchase the farm on condition that the note should be paid.

Walker v Todd, 225-276; 280 NW 512

Pledge of rents and profits—tenant's right of offset. The right which a mortgagee has, as pledgee of the rents and as assignee of a lease executed by the mortgagor-owner, is subordinate to the right of the tenant under said lease to offset against the rents owed by him to the insolvent landlord-mortgagor an unpaid indebtedness which was due to the tenant from said landlord-mortgagor prior to the time when the mortgage and lease were executed.

Loots v Clancey, 209-442; 228 NW 77

Priority over rent accruing under tenancy at will. A recorded chattel mortgage on the property of a tenant used on the demised premises under a lease for years, attains priority, immediately upon the termination of the lease, over the landlord's claim for future rent accruing under a succeeding tenancy at will of the same premises; likewise a recorded chattel mortgage executed by a tenant at will, on property used on the leased premises, attains priority immediately upon the expiration of 30 days after the execution and recording of the mortgage, over the landlord's claim for future accruing rent.

Nickle v Mann, 211-906; 232 NW 722

Reformation of lease—right of action—negligence barring relief. A party who has no excuse whatever for signing a writing without reading it, or without requesting a reading of it, will not be granted reformation. And the rights of the wife of the signer insofar as she is interested in the writing, tho not a signer thereof, will be foreclosed by her like inexcusable neglect to read or request the reading of the instrument.

Stillman v Bank, 216-957; 249 NW 230

Reformation of lease—mandatory degree of proof. Plaintiff seeking the reformation of a written instrument must fail unless he estab-

III LEASES—continued
(a) IN GENERAL—concluded

lishes by clear, satisfactory, and convincing evidence—by evidence exceeding a mere preponderance—by evidence approximating proof beyond a reasonable doubt—the definite contract which the executed writing does not embrace. Evidence reviewed in detail under a prayer for the reformation of a lease, and held insufficient to comply with the rule.

Stillman v Bank, 216-957; 249 NW 230

Rents—payment in advance—ouster—right to recover. A tenant who pays the rent in advance to the landlord and is legally evicted by foreclosure proceedings before the commencement of the term may recover of the landlord the sum so paid as for a total failure of consideration.

Ransier v Worrell, 211-606; 229 NW 663

Right to terminate. Lease reviewed and held that the lessor in terminating the lease was acting strictly within his contract right.

Liberty Oil v Green, 208-1136; 225 NW 858

Securing modification of fraud-induced contract—effect. One who, after discovering that he had been fraudulently induced to enter into a contract of lease, secures a modification of the contract substantially beneficial and advantageous to himself, thereby waives the fraud, and the original rights arising by reason thereof.

Timmerman v Gurnsey, 206-35; 217 NW 879

Strip mining coal—pipe-line right-of-way easement—back-filling required. A holder of a strip mine coal lease who enters upon and strips coal from land, upon which land a pipe-line company holds an easement, knowing that by so mining violates his lease, must back-fill the land when the easement holder exercises his option to buy; and upon his failure to make the back-fill, a judgment against the coal lessee for the cost thereof is proper.

Penn v Pipe Line Co., 225-680; 281 NW 194

Lease of minable coal—breach—burden of proof. In an action to recover minimum royalties under a lease of coal lands because of defendant's breach of contract to mine all minable, workable and merchantable coal underlying said lands, plaintiff has the burden to establish the existence of such coal, especially when plaintiff assumed such burden by his pleadings. Evidence exhaustively reviewed and held insufficient to generate a question for the jury.

Scovel v Coal Co., 222-354; 269 NW 9

Tenant's right to homestead before termination of lease. A tenant may have a homestead right under a leasehold interest which is available to him as against all persons, including the holder of the superior title, the lessor-owner, during the term of the tenancy and before the lease has expired.

Wright v Flatterich, 225-750; 281 NW 221

Unilateral right to terminate. The fact that a lease accords to the lessee the right to terminate the lease on a given notice, without a corresponding right in the lessor, does not render the lease unenforceable when the consideration for the lease does not lie in mutual promises.

Standard v Veland, 207-1340; 224 NW 467

(b) ASSIGNMENT GENERALLY

Assignees—original relationship continues. Lessor's assignee of a lease, and a telephone corporation succeeding to the ownership of the original lessee corporation, stand in the same position as the original parties to the lease.

Culavin v Tel. Co., 224-813; 276 NW 621

Assignee of lease—rights limited to interest of mortgagor-landlord. The assignee of a lease from a landlord-mortgagor cannot take, as against mortgagee, any greater interest than held by the landlord-mortgagor.

Bankers Life v Garlock, 227-1335; 291 NW 536

Assignment prohibited. A lease of lands may validly prohibit the tenant from assigning the lease and validly provide for an optional termination by the landlord of the lease in case the prohibition is violated.

Snyder v Bernstein, 201-931; 208 NW 503

Acceptance of assignment of lease—effect. One who, in writing, accepts an assignment of a lease, with the consent of the lessor, thereby contracts to carry out the terms of the lease irrespective of any later assignment of the lease by the said assignee, and it is no defense that the lessor, the property being vacant, obtains the aid of a receiver.

Pickler v Mershon, 212-447; 236 NW 382

Assignee—liability to discharge rent obligations. The written assignee of a lease of real estate who orally accepts the assignment, or effects such acceptance by his conduct, with the approval or acquiescence of the lessor, thereby binds himself to discharge the rent obligations; especially is this true when the express provisions of the lease impose such obligation.

Central Bk. v Herrick, 214-379; 240 NW 242

Assignment of rent construed—federal soil conservation payments not included. In construing the provisions of a settlement wherein a judgment debtor agreed to assign to his judgment creditor "* * * the amount due from the tenant * * *" of the debtor on certain real estate, the same "* * * being all rentals * * *" for a certain year, held, that federal agricultural conservation payments received by the debtor on the land in question were not in

contemplation of the parties, hence creditor was not, on the basis of said assignment, entitled to these payments.

Cooke v Harrington, 227-145; 287 NW 837

Conflicting assignments by partnership and partners—priority. An unrecorded assignment by a partnership to a partnership creditor of a lease of real estate and of the rents accruing thereunder is superior in right to a subsequent recorded assignment by one of the partners to his individual creditor of the individual partner's one-half interest in said rents; and especially is this true when the partnership creditor holds a mortgage which pledges the rents of said land.

Phelps v Kroll, 211-1097; 235 NW 67

Liability under assignment of lease. A vendee who in the purchase of a business takes an assignment of the lease and agrees to pay the future accruing rentals, but later abandons the property, is liable for said rentals for the time consumed by the vendor in effecting a resale of the property for and on behalf of the defaulting vendee.

Courshon Co. v Brewer, 215-885; 245 NW 354

Liabilities—equities between original parties. Principle recognized that an assignee of a landlord's right to demand an accounting for rents simply stands in the shoes of the assignor.

Quaintance v Bank, 201-457; 205 NW 739

Estate—sale of lease which prohibits sale. The probate court may validly order the administrator of an insolvent estate to sell and assign a lease of realty of which the deceased was lessee, notwithstanding the fact that the lease prohibits the lessee from assigning the lease without the lessor's consent, and provides that the terms of the lease are binding on the heirs, executors, and administrators of the parties, but contains no provision specifically applicable to a sale or assignment by operation of law.

In re Owen, 219-750; 259 NW 474

When lease survives death of lessee. A lease which requires the lessee to diligently farm a portion of the land and to "vigorously utilize" a portion of said land "by extraction of the available sand and gravel" thereon is assignable, and survives the death of the lessee, it appearing that the lease was entered into without reliance on any particular personal fitness of the lessee.

In re Grooms, 204-746; 216 NW 78

Obligation of assignee of lease to pay rent. The assignee of a lease (which simply binds the "lessee, his heirs, and assigns" to pay the rent) is obligated to pay rent because of privity of estate, and when said privity of estate is terminated by a valid re-assignment of the lease the obligation of the assignee to pay rent necessarily terminates unless said assignee has, expressly or impliedly, otherwise obligated himself. And the fact that the lessor accepts the rent from the assignee during the assignee's occupancy is not sufficient to show that the assignee has assumed the obligation to pay rent after re-assignment.

Seeburger v Cohen, 215-1088; 247 NW 292; 89 ALR 427

Recording of assignment of rent not authorized. A written assignment of a lease of real estate and of the rents accruing thereunder (especially when the lease is, at the time, manually delivered to the assignee) is not an instrument which the law requires to be recorded; and if it is recorded, the record imparts no notice.

Phelps v Kroll, 211-1097; 235 NW 67

Recording—effect. A lease of real estate and the assignment thereof are recordable for the purpose of conveying constructive notice to a mortgagee and his subsequently appointed receiver under a mortgage which contains a pledge of the rents, even tho said parties are not entitled, as a matter of right, to such notice.

King v Good, 205-1203; 219 NW 517

Rents—release of tenant—insufficient evidence. Knowledge on the part of a landlord that his tenant has assigned his lease, and the subsequent receipt by the landlord of rent payments from the assignee, are not sufficient, in and of themselves, to show that the landlord has released the original tenant.

Lazerus v Shapiro, 211-376; 233 NW 723

Sale, assignment or sub-letting—principles governing. Principles recognized that provisions in a lease of realty prohibiting the sale or assignment of the lease:

1. Are not favorites of the law and are construed most strongly against the lessor.
2. Will, when unambiguous, be enforced between the original parties.
3. Are not deemed broken when the assignment is by operation of law, unless such an assignment is specifically and by apt words prohibited.

In re Owen, 219-750; 259 NW 474

Sale by known nonowner. A vendee of property takes nothing by his conveyance when he knows who is the actual owner of the property and that his vendor is simply in possession of the property as manager.

Kollman v Kollman, 204-950; 216 NW 77

Stock—restraint on transfer—strictly construed. Restraints on powers to transfer corporate stock, or to assign leases, must be strictly construed.

McDonald v Manufacturing Co., 226-53; 283 NW 261

III LEASES—continued

(b) ASSIGNMENT GENERALLY—concluded

Sufficiency — nonexistent lease. A naked oral promise or understanding to assign a nonexistent but contemplated lease is not good against the subsequently accruing rights of a stranger to the understanding.

Kooistra v Gibford, 201-275; 207 NW 399

Validity—scope of statute. Section 9452, C., '24, which, in effect, provides that an instrument is assignable even tho such assignment is prohibited by the instrument, has no applicability to a personal executory contract, e. g., a lease of lands prohibiting an assignment by the tenant.

Snyder v Bernstein Bros., 201-931; 208 NW 503

(c) FIXTURES INVOLVED

Discussion. See 3 ILB 243—Removing trade fixtures; 18 ILR 527—Renewal—right of removal

Fixtures—absence of annexation or connection. An oil tank buried entirely in the parking of a public street and covered with cement, and a pump connected with said tank and bolted into said cement, tho wholly used in connection with the operation of an automobile service garage on a lot abutting said street and adjacent to said tank and pump, do not become fixtures to said lot, (1) when said tank and pump are in no manner in contact with said lot or with any building thereon or fixture thereof, and (2) when the parties to the original installation distinctly intended that the title to said tank and pump should remain in the party installing them, the latter not being the owner of said lot.

McCoun v Drews, 221-227; 265 NW 160

Constructive severance doctrine inapplicable to movable chattel. When a tenant purchases an electric lighting plant on agreement with the landlord that he may take it with him upon termination of the tenancy, and when, at the termination of such tenancy, the tenant purchases the reversion, there is no occasion to apply the doctrine of constructive severance, because the plant maintained at all times its character as a movable chattel.

Equitable v Chapman, 225-988; 282 NW 355

Farm light plant—not part of realty. In a replevin action for a Delco lighting plant placed on a concrete block in the basement of a farmhouse, such electric plant is not essential to the main business of operating the farm, but is a mere convenience, and is not a part of the realty when it is easily removable, along with the batteries resting on a shelf, and without damage to the house, the wiring being capable of use with any other electrical installation, and when there is no evidence of an intent that it be permanently fixed.

Equitable v Chapman, 225-988; 282 NW 355

Improvement by tenant with right to remove. A mechanic's lien may not be established for a building erected on land by a tenant under an agreement with the landlord-owner that the tenant may, and if required by the landlord will, remove it when the lease terminates.

Southern Sur. v Tire Serv., 209-104; 227 NW 606

Movable farm structures. Movable hog houses and feed bunks on a farm will not constitute fixtures, when to so declare would be contrary to the actual expressed intent of the person, a tenant, who placed them on the farm, and contrary to the intent as reflected in the nature of the articles, their use, and the mode of attachment to the realty.

Speer v Donald, 201-569; 207 NW 581

Removal of building. A mechanic's lien is properly decreed against an improvement erected by a tenant on leased ground when the tenant and his lessor have mutually contracted that the tenant might, at the end of the term, remove all improvements placed on the property by the tenant; and this is true even tho the removal cannot be made without damage to the premises.

Lane-Moore Co. v Kloppenburg, 204-613; 215 NW 637

(d) REPAIRS GENERALLY

Discussion. See 9 ILB 250—Rights of tenant —repairs

Injury to tenant—common-law rules. The housing law (Ch 323, C., '31) providing that "Every dwelling and all the parts thereof shall be kept in good repair by the owner", (§6392, C., '31) does not change the common-law rule of tort liability of the lessor to the lessee.

Johnson v Carter, 218-587; 255 NW 864; 93 ALR 774

Nonduty to repair. Principle reaffirmed that a landlord is under no duty to repair or maintain the leased premises in a safe and suitable condition in the absence of a covenant to that effect.

Chicago JSL Bank v Eggers, 214-710; 243 NW 193

Premises and enjoyment and use thereof—abandonment—recovery for work done. A tenant who, at his own instance, and to advance his own interest under his lease, performs fall plowing on the leased premises, and later, over the landlord's protest, voluntarily surrenders and abandons the premises, may not recover of the landlord the reasonable value of said plowing, even tho the landlord has advantaged himself on account thereof.

Hill v Groves, 209-45; 227 NW 582

Tenantable premises—jury question. In an action on a lease which provided for the payment of rent except when the premises are

"untenantable by reason of fire", the issue whether certain painting, papering, and decorating were necessary to render the premises tenantable after a fire, is a jury question, under conflicting testimony.

Benson v Iowa Co., 207-410; 221 NW 464

10160 Termination of farm tenancies.

Abandonment—recovery for work done. A tenant who at his own instance and to advance his own interest under his lease performs fall plowing on the leased premises, and later, over the landlord's protest, voluntarily surrenders and abandons the premises, may not recover of the landlord the reasonable value of said plowing even tho the landlord has advantaged himself on account thereof.

Hill v Groves, 209-45; 227 NW 582

Assignability of lease which survives death of lessee. A lease which requires the lessee to diligently farm a portion of the land and to "vigorously utilize" a portion of said land "by extraction of the available sand and gravel" thereon, is assignable and survives the death of the lessee, it appearing that the lease was entered into without reliance on any particular personal fitness of the lessee.

In re Grooms, 204-746; 216 NW 78

Evidence supporting oral lease for year. In action for conversion by landlord against purchaser of tenant's buckwheat, the findings of trial court that tenant leased premises for one year rather than being a sharecropper held supported by evidence and conclusive on appeal.

Schaper v Farmers' Exch., (NOR); 239 NW 134

Nonduty to repair. Principle reaffirmed that a landlord is under no duty to repair or maintain the leased premises in a safe and suitable condition in the absence of a covenant to that effect.

Chicago JSL Bank v Eggers, 214-710; 243 NW 193

Right to remove tenant if landlord dissatisfied. A landlord, under a lease authorizing either party thereto to cancel the same "in case the farming conditions are not satisfactory", need not, in a petition to remove the tenant, allege or set forth the reasons for his alleged dissatisfaction.

Jepson v Conner, 210-1267; 232 NW 693

10161 Agreement for termination.

Evidence supporting oral lease for year. In action for conversion by landlord against purchaser of tenant's buckwheat, the findings of trial court that tenant leased premises for one year rather than being a sharecropper held supported by evidence and conclusive on appeal.

Schaper v Farmers' Exch., (NOR); 239 NW 134

Eviction by foreclosure decree—plea of want of consideration. Even tho a wife who had joined with her husband in the execution of rent obligations was not made a party to subsequent mortgage foreclosure wherein her husband and the landlord were evicted by the appointment of a receiver, yet she may, when sued on the rent obligations by the landlord or by his assignee, plead the foreclosure decree as establishing a total failure of consideration.

Miller v Laing, 212-437; 236 NW 378

Lease—assignees—original relationship continues. Lessor's assignee of a lease, and a telephone corporation succeeding to the ownership of the original lessee corporation, stand in the same position as the original parties to the lease.

Culavin v Telephone Co., 224-813; 276 NW 621

Lease construed — automatic renewal. A lease providing for a written notice of discontinuance, and in the absence of which a "renewal shall be assumed and in force" for an additional term, is automatically renewed unless the notice provided for is given by lessee.

Culavin v Telephone Co., 224-813; 276 NW 621

Noncontract grounds. A lease may not be forfeited on a noncontract ground.

In re Grooms, 204-746; 216 NW 78

Tenant's right to homestead before termination of lease. A tenant may have a homestead right under a leasehold interest which is available to him as against all persons, including the holder of the superior title, the lessor-owner, during the term of the tenancy and before the lease has expired.

Wright v Flatterich, 225-750; 281 NW 221

CHAPTER 443

WALLS IN COMMON

10163 Resting wall on neighbor's land.

Discussion. See 8 ILB 249—Lateral support

Creek channel excavation destroying lateral support—rules for liability. A city excavating a new creek channel near the boundary of its land must use reasonable care that it does not destroy the natural lateral support for the adjoining land. Nevertheless, (1) if despite using reasonable precautions the adjoining land falls under its own weight, a liability arises for damage to the land but not to the superstructure; but (2) if a fall is occasioned solely by the weight of a superstructure, no liability arises for damage to either land or superstructure; however (3) if negligent excavation causes the fall, liability arises for damage to both soil and superstructure.

Covell v Sioux City, 224-1060; 277 NW 447

Strip mining—coal lease subject to pipe line easement. Where a pipe line company has an easement across land and an option to buy a designated strip of land along the pipe line if a strip coal mine should be opened on the land, a subsequent strip mine coal lease, subject to the pipe line easement and option, gives the coal lessee no rights to strip mine coal on the land covered by the purchase option and thus destroy the lateral support of the pipe line, nor is such lessee entitled to any part of the purchase price for such strip of land.

Penn v Pipe Line Co., 225-680; 281 NW 194

10174 Special agreements—evidence.

Damages. The fact that a party, who legally attaches his building to a wall, does not actually own the wall does not prevent him from recovering damages to his goods consequent on the wrongful act of the actual owner in causing surface waters to seep through the wall.

Dravis v Sawyer, 218-742; 254 NW 920

CHAPTER 444

EASEMENTS

Discussion. See 10 ILB 72—Rights and remedies of burial lot holder

10175 Adverse possession — "use" as evidence.

Discussion. See 20 ILR 551; 738—Adverse possession

Atty. Gen. Opinion. See '38 AG Op 239

ANALYSIS

Adverse possession generally. See under §11007
Dedication of highways. See under §6277
Merger of realty interests generally. See under §10084 (II)

I EASEMENTS BY PRESCRIPTION

(a) IN GENERAL

Discussion. See 17 ILR 235—Assignability in gross

Prescription—essential elements. An easement by prescription demands a showing (1) of some claim of right which is independent of use, and (2) of knowledge of such claim on the part of the person against whom the easement is sought to be enforced.

Black v Whitacre, 206-1084; 221 NW 825

Easements and tenements — relation. An easement is a privilege or right without profit which the owner of one piece of realty may have in another, or conversely, it is a service which one tract of land owes to another. The land entitled to the easement is the dominant tenement, and the land burdened with the servitude is the servient tenement, neither the easement nor servitude being personal, but accessory, running with the land.

Dawson v McKinnon, 226-756; 285 NW 258

Claim broad as possession — unaccepted street. Where their claim extending to a certain fence was as broad as their possession, persons, who for more than ten years had continuous and exclusive possession of a dedicated but unaccepted street secured title thereto by adverse possession.

Brewer v Claypool, 223-1235; 275 NW 34

Creation by ancient grantors—effect. An owner of land may not, except with the consent of all interested parties, question a visible and permanent drainage easement imposed upon the land by his ancient grantors.

Ehler v Stier, 205-678; 216 NW 637

Easement—loss of right. One who bases his attempt to enjoin interference with a public or private easement in a strip of land solely on the ground of his ownership of the abutting land loses such right by an unconditional conveyance of the abutting land.

Rider v Narigon, 204-530; 215 NW 497

Easement—scope and extent. Where a right of way is jointly used by the fee owner, and by the owner of a duly granted easement

therein, (1) the width of said easement, (2) the duty of the owner of the easement to close the gates leading thereto, (3) the duty of each party to refrain from interfering with the use by the other, (4) the mutual right to repair the way, and (5) the proper division of the expense of such repairs, should, under proper evidence, be specifically decreed, and all violations thereof enjoined.

Bina v Bina, 213-432; 239 NW 68; 78 ALR 1216

Element of "right" and "notice"—evidence. The fact that a property owner claimed an easement in the land of another "as his right", and "that the party against whom the claim is made had express notice thereof", may manifestly be conclusively deduced from evidence of the negotiations, conduct, and acts which led to and culminated in the creation and establishment of the easement by the parties.

Ehler v Stier, 205-678; 216 NW 637

Establishment—evidence—sufficiency. Record reviewed in detail, and held insufficient to establish an easement in the form of a driveway by oral agreement, by prescription, by estoppel, or by or from necessity.

Black v Whitacre, 206-1084; 221 NW 825

Equitable estoppel—nonestoppel to deny existence of street. Where a dedicated but unaccepted street is partly enclosed within defendants' land and partly used by both plaintiffs and defendants for mutual access to their properties, defendants are not thereby estopped from denying the legal existence of the street and claiming title thereto by adverse possession.

Brewer v Claypool, 223-1235; 275 NW 34

Estoppel—evidence—sufficiency. An easement by estoppel may not, of course, be established on the basis of a fact or transaction which is as consistent with mere permissive use as the contrary.

Black v Whitacre, 206-1084; 221 NW 825

Hostile possession—notice. An easement in the form of a driveway on the land of another can be established only by evidence distinct from and independent of its use, to the effect that, for ten years, the user has claimed such use as a right, and that for all of said time the owner of the land has had notice of such asserted right.

Manning v George, 205-994; 219 NW 135

Long and unquestioned use—effect. Thirty years of continuous and unquestioned use of an easement across land is persuasive that the owners of the dominant and servient estates were interpreting the easement as a permanent one and not a mere temporary and personal one.

Thul v Weiland, 213-713; 239 NW 515

Mutual agreement and acquiescence. A driveway equally upon the dividing line between two adjoining owners may be used by them under such condition of mutual acquiescence and agreement as to ripen in each an irrevocable easement.

Molene v Tansey, 203-992; 213 NW 759
Ellsworth v Martin, 208-169; 225 NW 417

Natural watercourses—duty to maintain. It is the duty of the owner of a servient estate to maintain free from obstruction the natural watercourses, even tho they have no well-defined banks.

Heinse v Thorborg, 210-435; 230 NW 881

Necessity—scope. Easements in the form of a roadway by or from necessity arise, generally speaking, only in favor of a grantee as against his grantor.

Black v Whitacre, 206-1084; 221 NW 825

Permissive use. Mere use of a way over the land of another by permission of the latter furnishes no basis for a title by prescription.

Feilhaber v Swiler, 203-1133; 212 NW 417

Permissive use—revocation. A naked permissive use of land as a driveway may be revoked at the pleasure of the person granting the permission.

Black v Whitacre, 206-1084; 221 NW 825

Permissive use of passageway. Mere permissive use of an opening under a railroad track, howsoever long continued, will not ripen into an irrevocable easement.

Chicago, Mil. Ry. v Cross, 212-218; 234 NW 569

Termination—violating conditions. The owner of a duly established right of way easement in the land of another does not forfeit the right to said easement by inadvertently or carelessly leaving open the gates leading to said easement even tho the duty to close said gates is made mandatory by the conveyance granting said easement; but the easement owner will be enjoined from violating said mandatory duty.

Bina v Bina, 213-432; 239 NW 68; 78 ALR 1216

Unaccepted platted street—applicability. Where parties claim land, dedicated in plat as a street but, not being accepted, never became a street, the public has no interest therein and the doctrine of adverse possession is applicable.

Brewer v Claypool, 223-1235; 275 NW 34

Unallowable obstruction. Principle recognized that an easement which is appurtenant to specific land only may not be used in connection with other land to which the easement is not appurtenant, but that a violation of such rule by the owner of the dominant estate does not justify the owner of the servient es-

I EASEMENTS BY PRESCRIPTION—concluded

tate in excluding the dominant owner from all use of the easement.

Thul v Weiland, 213-713; 239 NW 515

(b) HIGHWAYS

Essential elements. Principle reaffirmed that to establish a public highway by prescription there must be satisfactory evidence of a general, uninterrupted public use, under a claim of right, continued for the statutory period.

Shuler v Gravel Co., 203-134; 209 NW 731

Easement—fundamental requirements. The mere use of a roadway, howsoever long continued, will not ripen into an irrevocable private easement in favor of the private user nor into a dedicated public highway in favor of the public generally, unless, in the case of a claim of private easement, the fact is established, independent of the evidence of use, that the private user has, for at least ten years, and to the knowledge of the landowner, asserted or claimed a hostile right to use such way, and unless, in the case of a claimed public dedication, the fact is established that the landowner has, by deliberate, unequivocal, and decisive acts and declarations, manifested a positive intention permanently to abandon the land in question to the public for highway purposes.

Culver v Converse, 207-1173; 224 NW 834

Adjoining landowner—no title accrues from encroachment on highway. Encroachment by an adjoining landowner on an established public highway will not ripen into a title through any statute of limitations, doctrine of acquiescence, adverse possession, or estoppel—the establishment and maintenance of public highways being a governmental function.

Richardson v Derry, 226-178; 284 NW 82

Evidence—old road records—different location in use—use alone insufficient. In an action to establish a road by prescription, evidence in the form of a page from an old road record made in 1850, which was a copy of the surveyor's notes, and introduced as evidence of an adverse claim, is not sufficient, when it does not show that such road as shown on the old record was the same as the road now in use. Without this, the road could not be established on the sole evidence of long continued use.

Slack v Herrick, 226-336; 283 NW 904

(c) RAILWAY RIGHT OF WAY

No annotations in this volume

II EASEMENTS CREATED BY CONVEYANCES

Discussion. See 9 ILB 309—Easements—implied grant and reservation; 13 ILR 74—Easements by implication.

Part of single ownership conveyed—implied easement or reservation—clear intent of parties necessary. Principle reaffirmed that, where real estate has been used under single ownership and as a unity, one part of it may be burdened with a use which is largely or entirely for the benefit of another part of it, and when divided by devise, descent or sale, one part may be burdened or benefited by an implied reservation or granting of an easement right if it is apparent and necessary, but such implied grant or reservation must be clearly within the intention of the parties.

Dyer v Knowles, 227-1038; 289 NW 911

License — definition — revocability — constructing a grotto for charitable organization. Since a license is a permission to do particular acts on another's land without possessing an interest therein, revocable at licensor's pleasure except where coupled with an expenditure of money or labor, an individual constructing a grotto on the land of a charitable organization under an agreement containing a provision for entry on the land for purposes of the agreement, has a personal privilege of going on the land to complete the undertaking.

Sisters of Mercy v Lightner, 223-1049; 274 NW 86

Abandonment of easement—affirmative defense. Abandonment is an affirmative defense, and clear, unequivocal evidence is required to establish that an easement was abandoned.

Dawson v McKinnon, 226-756; 285 NW 258

Acceptance of deed—no waiver of easement rights under contract. When a contract of sale of land provided that the deed would grant an easement for the right of ingress and egress to the property, but the deed drawn on the same day failed to make such provision, the acceptance of the deed by the grantee did not waive the provision of the collateral contract, altho ordinarily the acceptance of a deed would complete the execution of the contract and would be conclusive evidence of its complete fulfilment.

Dawson v McKinnon, 226-756; 285 NW 258

Contract for definite easement—substitute. A contract under which land was purchased, which provided that the purchaser would receive a definitely established easement for the right of ingress and egress to the land, entitled the purchaser to all the contract gave her, and not merely to another easement as a substitute for what was granted.

Dawson v McKinnon, 226-756; 285 NW 258

Easement rights omitted from deed—extrinsic evidence. When land was purchased under a contract providing that the deed would grant an easement of the right of ingress and egress to the property, and that the exact description of the easement would be made a part of the deed, but such description having been omitted, it was proper, in purchaser's action to assert such easement rights, to ad-

mit extrinsic evidence to show the exact location of the easement.

Dawson v McKinnon, 226-756; 285 NW 258

Easement running with land. A recorded conveyance of land which, in addition to conveying the land, also grants a private roadway over other lands of the grantor, creates an easement which runs with the land, even tho the grantor subsequently re-acquires title to the lands first conveyed (and again becomes the owner of both tracts) and subsequently conveys both tracts by separate conveyances to different grantees.

Feilhaber v Swiler, 203-1133; 212 NW 417

Grant—construction. An instrument which grants to a railway company a release of all present and future damages resulting from the overflow of land consequent on the maintenance of tracks and bridges, but also grants, as running with the land, the right to maintain the railway as then or thereafter existing, together with the right to overflow the land, creates not only (1) a settlement of damages, present and prospective, but (2) a permanent easement in the land.

Kellogg v Railway, 204-368; 213 NW 253; 215 NW 258

Boundary line between farm buildings—grantor's alleged use and occupancy of buildings denied. In a special action to determine the true location of an east and west half-section line, where the grantor, owning the entire west half of the section, sells the northwest quarter, thinking his barn and corncrib were situated south of the half-section line, whereas a survey showed the buildings to be situated north of the half-section line, grantor's claim of a reservation of the use and occupancy of the barn and corncrib and ground appurtenant thereto under an implied easement on the theory that the barn and corncrib were necessary to the use and enjoyment of the land retained by grantor, could not be sustained, since the use of such buildings was just as essential, to the part sold, in proportion to the acreage, as it was to the part retained.

Dyer v Knowles, 227-1038; 289 NW 911

Highway construction — interference with easement. When a highway was established through a city, taking the larger part of land over which the plaintiff had been granted an easement, a property right belonging to the plaintiff was thereby destroyed, and when she was compelled to sell the property at a loss because of its impaired value, she was entitled to a writ of mandamus against the highway commission to compel the assessment of the damages sustained.

Dawson v McKinnon, 226-756; 285 NW 258

Release of part of easement—no waiver of remainder. One who had an easement for the right of ingress and egress to her land over a curved driveway with two exits, and who consented to the closing of one exit, did not thereby waive or abandon her easement rights to the other exit.

Dawson v McKinnon, 226-756; 285 NW 258

Reservation—construction. Reservation of an easement construed, and held to demonstrate that the right to beautify the land in question rested in the defendant, and not in the plaintiff and defendant jointly.

Spaulding v McCartney, 207-1025; 221 NW 665

Right of way—deed—effect as to subsequently laid out streets. An ordinary railroad right-of-way deed simply grants to the railroad an easement, and works no impediment to the vesting in a municipality, subject to such easement, of streets subsequently laid out across such right of way; and especially so when the railroad company acquiesces in and recognizes the statutory dedication to the public.

Ackley v Elec. Co., 206-533; 220 NW 315

Stipulation in sidewalk dispute. A stipulation disposing of litigation over use of sidewalk, and providing for joint use, creates an easement for said purpose, and injunction would lie for interference with such right.

McEachron v Schick, (NOR); 218 NW 955

Water easement—protection by injunction. Where a contract easement exists to pipe water from the premises of the owner of land to the premises of the easement owner, it necessarily follows that the latter's right to go upon said premises of the former to make reasonable repairs to the pipes and related equipment will be protected from interference by injunction.

Hawkeye Cement v Williams, 213-482; 239 NW 120

Pipe-line right of way—ambiguity as to compensation. Where landowner made written agreement giving pipe-line company a right of way, and where receipt, executed simultaneously with the agreement, aided by extrinsic oral proof, showed that he actually received $5 per rod for the first line put in, held, landowner was entitled to judgment compensating him at same rate for installation of a second pipe-line under the agreement, which provided that "additional lines shall be laid for a consideration the same as for the first", despite the fact that such agreement also provided for a compensation of only 50 cents per rod.

Vorthmann v Pipe Line Co., 228- ; 289 NW 746

10176 Light and air.

Overhanging windows and box screens. A property owner who builds upon a boundary line has no right to operate and maintain

windows and box screens that overhang adjoining property.

Minear v Furnace Co., 213-663; 239 NW 584

10177 Footway.

License—evidence. A contract easement in a footway over land is not established by evidence which is perfectly consistent with a mere naked license only.

Hawkeye Cement v Williams, 213-482; 239 NW 120

Mutual agreement and acquiescence. A driveway upon and along the dividing line between two adjoining owners may be used by them under such conditions of mutual acquiescence and agreement as to ripen in each an irrevocable easement.

Ellsworth v Martin, 208-169; 225 NW 417

CHAPTER 445

GIFTS

Gifts generally. See Note 1 at end of chapter

10185 Gifts to state.

Atty. Gen. Opinions. See '34 AG Op 285, 357; '36 AG Op 224

Codicil with invalid provision giving executor highway construction powers. Where a conflict exists between a second codicil and the will and first codicil, the second codicil prevails, but under the doctrine of dependent relative revocation, if the later codicil contains an invalid provision, such provision does not revoke the provisions with which it conflicts in the earlier will and codicil. Where a will and two codicils left property to a county for use in building roads, even if a provision in the second codicil was invalid in improperly delegating county powers to the executor, the doctrine prevented a complete revocation of the previous documents, but they were revoked only to give effect to the second codicil, as there was no change in the purpose of the will, but only a change in the manner of effectuating the gift.

Blackford v Anderson, 226-1138; 286 NW 735

Lapsing of legacy. A condition in a charitable bequest, that if the legatee takes no steps within a named time to augment said bequest the same shall revert to testator's estate, must be deemed a condition precedent and not a condition subsequent. It follows that said bequest lapses upon the expiration of said time if the legatee, with actual knowledge of the bequest, fails to signify any acceptance of the bequest, and fails to take any steps to augment said bequest.

In re Hillis, 215-1015; 247 NW 499

10186 Management of property.

Atty. Gen. Opinions. See '34 AG Op 285, 357; '36 AG Op 224

10187 Gifts to state institutions.

Atty. Gen. Opinions. See '34 AG Op 357; '36 AG Op 224, 293, 416, 429

Cy pres doctrine invoked by state in equity court. A public charity, created by trust, about to fail, is properly represented in court of equity to invoke jurisdiction to apply cy pres doctrine by the state or some authorized agency thereof.

Schell v Leander Clark College, 10 F 2d, 542

10188 Gifts to municipal corporations.

Atty. Gen. Opinion. See '34 AG Op 357

Devise for charity—power of municipality to take. Devises and bequests for charitable purposes are such favorites of the law that "they will not be construed void if, by law, they can be made good". Will construed, and held that the conditions attending a devise and bequest to a municipality of a charitable trust in the form of a free public library, were conditions subsequent and not conditions precedent, to the vesting of said trust, and that said conditions were within the legal power of the municipality to accept—under prescribed statutory procedure—and perform.

In re Nugen, 223-428; 272 NW 638

Waterworks—Simmer law unaffected by federal money grants. The words "maximum amount to be expended" in the so-called "Simmer law" refer not to the size of the plant but to the amount to be paid from the earnings. It follows that the construction fund may be enlarged by other funds that do not have to be repaid from taxes or from earnings.

Keokuk W. Co. v Keokuk, 224-718; 277 NW 291

Abbott v Iowa City, 224-698; 277 NW 437

Bequest for paving roads — acceptance by county not enjoined. In an action by a taxpayer to obtain an injunction restraining a county from accepting a bequest to be used for paving roads, the injunction was refused where a will and two codicils provided for the bequest, as when all papers were construed together a valid gift to the county was found to have been created which the county had the authority to accept.

Anderson v Board, 226-1177; 286 NW 735

Absolute bequest—later repugnant provision disregarded. Where a codicil made an absolute bequest of a residuary estate to a county to be used in paving a highway, and a later provision in the codicil gave certain directions to the executor and imposed conditions for acceptance of the bequest by the county, such later conditions were repugnant and would defeat the purpose of the testator and must be disregarded when void in delegating power to the executor in violation of statute, and the intention of the testator as expressed in the first provision must be given effect to prevent intestacy.

Blackford v Anderson, 226-1138; 286 NW 735

Codicil creating charitable trust to county for paving roads. A first codicil devising an estate to trustees to be administered under county supervision in building roads, and a second codicil appointing one executor to aid the county in building roads, created a lawful charitable trust with the county as trustee and taxpayers as beneficiaries which was not necessarily invalid because the executor was given administrative duties in the road construction in violation of statute.

Blackford v Anderson, 226-1138; 286 NW 735

Federal grant for constructing municipal plant. Under this section, authorizing municipal corporations to accept gifts and providing that "conditions attached to such gifts or bequests become binding upon the corporation * * * upon acceptance thereof", a city may accept a federal grant of money to construct a municipal electric light and power plant, tho the grant is conditioned upon the payment of a minimum wage for labor, notwithstanding the Simmer law requiring such contracts be let by competitive bidding, where the wages provided did not in any manner increase the cost of construction.

Iowa Electric v Cascade, 227-480; 288 NW 633

Note 1 Gifts.

ANALYSIS

Advancements. See under §12029
Conveyances in fraud of creditors. See under §11815
Deeds given by parents for support—consideration. See under §9440 (II)
Gratuitous services to decedent. See under §11957 (II)

I GIFTS GENERALLY

(a) IN GENERAL

Cancellation—fraud and undue influence not proved. In an action in equity by a 73-year-old grantor, who had no children of his own, to set aside deed to adult children of second wife, subject to a life estate in grantor, where associations of the grantor and grantees, over a long period of years, were not unlike that ordinarily observed between natural parents and children, evidence did not sustain charge that deed was procured by fraud and undue influence.

Lawson v Boo, 227-100; 287 NW 282

Confidential relations—independent advice—sufficiency. In connection with a gift from a person occupying a confidential relation with another, "independent advice" means the donor's opportunity of conferring fully and privately with a person competent to advise as to the legal effect of the transaction and who will advise in a manner disassociated from the interests of the donee.

Merritt v Easterly, 226-514; 284 NW 397

Confidential relations — presumption of fraud. The act of a mother, in causing a certificate of deposit to be changed from her own name to that of a son who, it is made to appear, occupied a very close and confidential relation with his mother, is presumptively fraudulent, and will be sustained only on proof by the son that the transfer was free from all undue influence and fraud.

Roller v Roller, 201-1077; 203 NW 41

Construction of writing. Language which clearly indicates a completed gift may be so controlled by other parts of the same writing and by attending circumstances as to show that no such gift was intended.

Rodgers v Reinking, 205-1311; 217 NW 441

Conveyances as gifts. A surviving wife has no interest in lands which the husband bought and paid for, and which he, without working any fraud upon the wife and without intending such fraud, caused to be conveyed directly by his vendor to grantees other than himself, as a gift.

Grout v Fairbairn, 204-727; 215 NW 963

Deposits—alternate payees—effect. A certificate of deposit taken out by a mother, and "payable to the order of self or Hazel Pent, daughter," may be treated as a gift to the daughter when the mother dies without change in the certificate, and when there is no evidence to the contrary as to the intent of the mother.

Andrew v Bank, 205-237; 216 NW 12

Evidence—weight and sufficiency. Proof of an oral gift of real estate must be clear, substantial and convincing. Evidence reviewed and held quite insufficient to comply with the rule.

Long v Kline, 222-81; 268 NW 150

Advancements—burden of proof. An irrevocable gift by a parent to a child is pre-

I GIFTS GENERALLY—continued
(a) IN GENERAL—continued

sumptively an advancement, but the child may show, by any competent evidence, that the parent did not intend the gift to be an advancement. Evidence held to overthrow the presumption.

Fell v Bradshaw, 205-100; 215 NW 595

Bank deposit—evidence to establish as gift. In action to establish trust in funds in bank, represented by certificate of deposit which defendants claimed as a gift, evidence held to warrant decree for plaintiff.

Wier v Davidson, (NOR); 242 NW 37

Deeds—evidence necessary to invalidate. A deed is presumed to express the intention of the grantor and one who attempts to set it aside on the ground of undue influence or insanity has the burden of proof to present evidence that is clear, satisfactory, and convincing.

Mastain v Butschy, 224-68; 276 NW 79

Delivery—evidence—sufficiency. The act of a donor in inclosing his gifts to different persons in an envelope, with an indorsement on each gift of the name of the donee, and forwarding the envelope by mail to one of the donees, constitutes a delivery of the gifts to each donee, such being the manifest intent of the donor.

In re Higgins, 207-95; 222 NW 401

Evidence—insufficiency. Evidence held insufficient to show that the transfer of a certificate of deposit by a mother to her son was intended as a gift.

Roller v Roller, 201-1077; 203 NW 41

Fiduciary relationship—intestate and heir receiving property—failure of proof. In an action by heirs of intestate to set aside a conveyance of realty made by intestate to son, on ground of an alleged fiduciary relationship existing between aged intestate and son, held, that evidence was insufficient to establish such relationship, and even tho such relationship existed, whatever property the son received from his mother was by her voluntary and intelligent act, and without duress, dominance or overreaching on his part.

Robbins v Daniel, 226-678; 284 NW 793

Incompetency of donor—evidence. Evidence held insufficient to establish the mental incompetency of a donor.

Humphrey v Norwood, 213-912; 240 NW 232

Oral contract—evidentiary demands. Principle reaffirmed that oral evidence of the gift of real estate must be clear, cogent, and convincing.

Black v Nichols, 213-976; 240 NW 261

Transfer for support—insufficiency to show mental incapacity. In an action by heirs to set aside an assignment of note and mortgage and transfer of realty by an intestate to a son, who had lived with and cared for her a number of years, on ground of mother's mental incapacity, evidence which tended to show preference to son is insufficient to support claim of mental incapacity.

Robbins v Daniel, 226-678; 284 NW 793

Electric plant—Simmer law unaffected by federal money grant. The words "maximum amount to be expended" in the Simmer law refer not to the entire cost of the plant but to the amount to be paid from the earnings, therefore the amount expended for construction may be enlarged by gifts or other funds not repayable from taxes nor from earnings.

Abbott v Iowa City, 224-698; 277 NW 437

Owner's right of disposal. Under ordinary circumstances one has the absolute right to dispose of his property as he pleases.

O'Brien v Stoneman, 227-389; 288 NW 447

Intent to make—effect. An expressed intention to make a gift is, of course, quite insufficient to constitute a gift in praesenti.

Nugent v Dittel, 213-671; 239 NW 559

Inconsistent conduct. Grossly inconsistent conduct may outweigh direct testimony to the contrary. So held as to the making of a gift.

Cherniss v Thompson, 209-309; 228 NW 66

Mental competency and elements of gift—when jury question. In a replevin action by executor against decedent's sister to recover property held under claim of gift inter vivos from decedent, where clear, cogent, definite, and convincing evidence conclusively established mental competency and all the essential elements of a completed gift inter vivos appear without conflict, no jury question is presented.

Wilson v Findley, 223-1281; 275 NW 47

Monomania and undue influence unproved. Where a daughter, among other things, testified against her father in a divorce action and left him to live with her mother, she furnished the evidence for his belief of her lack of filial affection, and conveyances of his property executed pursuant to his intention to disinherit her upheld over her contentions that he was a monomaniac and that the conveyances resulted from the use of undue influence.

Mastain v Butschy, 224-68; 276 NW 79

Mutual expectations—presumption. The rendition on one hand and the acceptance on the other of valuable services (board and lodging) for a series of years generates a presumption that the one rendering was to receive pay and that the one receiving was to pay; and this is true tho the receiver and the giver were life-

long associates, and related, but were not members of the same family.

Peterson v Johnson, 205-16; 212 NW 138

Renunciation—no control by creditors—not a conveyance. A creditor has no control over a beneficiary's right to refuse or accept a gift, as a renunciation is not equivalent to a conveyance.

McGarry v Mathis, 226-37; 282 NW 786

Right of debtor to renounce gift after suit brought. The act of the life beneficiary of an annual interest charge imposed as a gift in her favor in a deed (which the grantee duly accepted), in formally and unconditionally renouncing and rejecting all benefits "which do, may, or might accrue" to her under the deed, legally places such interest charge beyond the reach of a judgment creditor who duly institutes an equitable action to subject such interest charge to the satisfaction of his judgment, even tho the said renunciation was not made until long after the said action was duly instituted.

Gottstein v Hedges, 210-272; 228 NW 93; 67 ALR 1218

Rights of legatees—advancement (?) or gift (?). The cancellation by a testator, after making his will, of notes held by him against a legatee, and the surrender of said notes to the legatee (after carefully computing the amount due thereon) are not sufficient to overcome the presumption of an advancement, in view of the declaration in the will (1) that testator intended an equal division between his legatees, and (2) that all loans to legatees, as shown by testator's account book (made part of the will) should be deemed part of his estate, and in view of the fact that said account book listed the notes in question as loans, and not as gifts.

In re Francis, 204-1237; 212 NW 306

Secret deeds — 87-year-old grantor — confidential relation—grantee's burden of proof. A nephew, who was a sort of de facto guardian for his 87-year-old aunt, who procured from her certain deeds with utmost secrecy a short time before her death, and who did not record one of them until the day of her death, has the burden to prove his aunt acted of her own free will or from independent advice, when there is evidence bearing on her mental incapacity.

Merritt v Easterly, 226-514; 284 NW 397

Verdict sustaining part of gift as establishing mental competency. In a replevin action by executor to recover property held under claim of gift inter vivos from decedent, a jury verdict validating part of the gift made on a later date, from which part of the verdict no appeal is taken, also establishes the donor's mental competency to consummate that part of the gift made on an earlier date.

Wilson v Findley, 223-1281; 275 NW 47

(b) GRATUITOUS SERVICES GENERALLY

Cosmetology schools—charges for services of students. A statute defining cosmetologists as being persons who receive compensation for services and which provides that no person or corporation shall use any person as a practitioner of cosmetology unless the person is an apprentice or licensed cosmetologist, is an unconstitutional exercise of police power in requiring that students of cosmetology schools do gratuitous work while obtaining practical experience, as such requirement would be an arbitrary interference with private business and the right to contract and would impose unnecessary restrictions upon lawful occupations in violation of due process of law.

State v Thompson's School, 226-556; 285 NW 133

Family relation—presumption. Services rendered in a family by one member thereof to another member are presumptively gratuitous, but claimant may overthrow the presumption by proof of an express contract to pay for such services, or by proof of such circumstances as will justify a finding that the member rendering the services expected to be paid therefor and that the member receiving the services expected to pay therefor. Instructions reviewed in detail, and held to adequately present the law.

Wilson v Else, 204-857; 216 NW 33

Living with and caring for parents at their request — nongratuitous services — allowable probate claim upheld on appeal. Reciprocal services rendered by and between members of a family are presumed to be gratuitous, yet, the court, a jury being waived, may find that a married daughter, who with her family, returns to the home of her aged parents at their request to care for them, for which she expected to receive and the parents expected to pay remuneration, did not re-establish a family relationship with her parents so as to raise the presumption of gratuitous services. Such finding will be binding on the appellate court.

Clark v Krogh, 225-479; 280 NW 635

Services by child—presumption. Principle reaffirmed that services rendered by a member of a family are presumptively gratuitous.

Howell v Howell, 211-70; 232 NW 816

Services in family—presumption. There can be no presumption that services performed for a deceased were gratuitous when claimant and deceased were not related and not members of the same family.

In re Walton, 213-104; 238 NW 577

II GIFTS INTER VIVOS

Bank deposit with symbolical delivery. A bank deposit made with the intent to make a gift, and followed by a symbolical delivery to the donee, constitutes a consummated gift.

In re Belgard, 202-1356; 212 NW 116

Consideration and revocability. An executed, delivered, and accepted gift needs no consideration for its support, and is irrevocable.

Stonewall v Danielson, 204-1367; 217 NW 456

Oral gift of real property. An oral, executed gift of real estate, established to a reasonable certainty, is valid.

Mann v Nies, 213-121; 238 NW 601

Mere "expectancy" as subject-matter. The insured in a policy of life insurance, who has the right, under the policy, to change the beneficiary, does not deprive himself of said right by delivering the policy to the beneficiary therein named accompanied by the statement or assurance that he is thereby making a "gift" to said named beneficiary, such policy not being the subject-matter of a completed gift inasmuch as it simply proffers an expectancy, and an expectancy does not constitute property.

Penn Ins. v Mulvaney, 221-925; 265 NW 889

Gift inter vivos—notes assigned direct to donee on purchase by donor—donor retaining interest and notes deposited at bank. To constitute a gift inter vivos there must be a clear intention to make a present gift fully executed by actual, constructive, or symbolic delivery, so where donor purchased notes and mortgages from a trust company, and had assignments thereof made to her sister, established a gift inter vivos and neither the fact that the donor reserved the right to collect interest thereon nor that trust company retained possession of the notes and mortgage invalidate the gift.

Ratterman v Lodge, 13 F 2d, 805

Perpetuities—charitable organization—validity. Where an individual agrees to construct a grotto on land then belonging to a charitable organization which in return agrees among other things not to alienate the land, such a covenant, not being created in a gift of land for charitable purposes and as such an exception to the rule against perpetuities or against restraint on alienation, but instead, an attempt by the fee titleholder to retain his land while separating from the fee the unlimited power of alienation, is violative of public policy, void and unenforceable in equity.

Sisters of Mercy v Lightner, 223-1049; 274 NW 86

Retention of authority and interest—effect. It is not essential to the validity of a gift that the donor relinquish all authority or even all interest in the subject of it. So held as to a banking account, consisting of money and securities.

Eaton v Blood, 201-834; 208 NW 508; 44 ALR 1516

Right of revocation. A writing which on its face carries a presumption of a consummated gift of the property which accompanies the writing does not foreclose the apparent donor from establishing in his lifetime that such was not his intention; that, in the execution of the writing, he did not intend to surrender either his dominion over the property or his right to revoke the writing.

Needles v Bank, 202-927; 211 NW 392

Evidence. Proof of an oral gift of real estate must be clear, substantial and convincing. Evidence reviewed and held quite insufficient to comply with the rule.

Long v Kline, 222-81; 268 NW 150

Evidence—failure to list for taxation—effect. The naked fact that a donee fails to list the gift (a substantial sum in cash) for taxation cannot have such evidentiary force as to overthrow other evidence which persuasively shows that the gift was actually made and executed.

Humphrey v Norwood, 213-912; 240 NW 232

Evidence—sufficiency. Evidence that bonds had donee's name added, were turned over to her, and she kept them in a safety deposit box registered in her name but rented by donor, that donee had the key, coupled with other testimony of disinterested persons, shows a conclusive intention of a completed gift inter vivos.

Reeves v Lyon, 224-659; 277 NW 749

Confidential or fiduciary relationship—presumption of fraud. A gift of a deed to one who stands in a confidential or fiduciary relationship to the donor raises a presumption of constructive fraud, and the burden is on the donee to make such showing of fact as to overcome the presumption.

Jensen v Phippen, 225-302; 280 NW 528

Deed—confidential relationship established—grantee's failure to sustain burden. In an action to set aside a deed from a deceased mother, 83 years of age and ill at the time of execution of the deed, to her daughter, who had handled her mother's business for a number of years, who had the deed prepared by an attorney, and who was the only person present when mother signed the deed, evidence held to establish that there was a confidential relationship between mother and daughter, thus placing burden of proof on daughter to show that deed was not procured by fraud, and, such burden not having been met, the deed could not be sustained.

Tiernan v Brulport, 227-1152; 290 NW 53

Delivery — evidence — sufficiency. Evidence that a father and mother mutually intended at one time to make a gift of land to their daughter; that a deed conveying the land to the daughter, subject to a life estate in grantors, was actually executed by the father and mother but was never manually delivered; that the daughter paid rent to the parents during their lifetime; that the father who held the legal title often declared that the land belonged to the daughter; and that the daughter made substantial and permanent improvements on the land at her own expense, may be ample to establish an actual delivery of the subject matter of the gift—the land.

Rapp v Losee, 215-356; 245 NW 317

Essential elements—evidence. The subject of a gift inter vivos must be certain; and there must be the mutual consent and concurrent will of both parties followed by delivery of the specific subject-matter. Evidence held insufficient to establish these essential requirements.

Woodward v Woodward, 222-145; 268 NW 540

Fiduciary relation—evidence. A fiduciary relationship is not established or even presumed from the naked fact that the parties are closely related by blood, or live and reside in the same house.

Humphrey v Norwood, 213-912; 240 NW 232

General denial—evidence of gift admitted. Evidence to establish a gift is admissible under a general denial.

Wilson v Findley, 223-1281; 275 NW 47

Gifts inter vivos—joint (?) bank account—evidence. Where during her lifetime decedent permitted defendant, for years her confidential advisor, to sign with her the bank's signature card applying to decedent's personal bank account, whereupon the bank added defendant's name thereto as a joint bank account, but decedent kept her passbook and an interest in and control over the account, then under these circumstances, defendant, whose custody of the account during decedent's lifetime was never inconsistent with decedent's sole ownership, cannot after her death claim a gift of the deposit on the sole basis of the signature card.

Taylor v Grimes, 223-821; 273 NW 898

Inter vivos—evidence—ownership and presumption. The fact that an alleged donee was, for a time prior to the death of the alleged donor, in possession of bonds (the subject of the alleged gift) does not in and of itself, establish ownership in the alleged donee, or raise a presumption of gift to said alleged donee, the record unquestionably showing that the alleged donor died in the full ownership of said bonds unless he had made a gift thereof.

Malcor v Johnson, 223-644; 273 NW 145

Mental competency and elements of gift—when jury question. In a replevin action by executor against decedent's sister to recover property held under claim of gift inter vivos from decedent, where clear, cogent, definite, and convincing evidence conclusively established mental competency and all the essential elements of a completed gift inter vivos appear without conflict, no jury question is presented.

Wilson v Findley, 223-1281; 275 NW 47

Mother to son gift for mother's life support. The donee of a gift inter vivos, when holding a fiduciary relationship with the donor, has the burden to rebut the presumption that the transaction was fraudulent and voidable, but this does not apply to testamentary gifts. So held where a mother first willed, and later assigned, all her property to one son, in consideration of a contract that he should support her as long as she lived—the result being to disinherit another son.

Reed v Reed, 225-773; 281 NW 444

Note as future gift—presumption—burden. Altho a promissory note for which there is no consideration is an unenforceable promise to make a future gift, nevertheless in an action against an executor on a note the presumption that the note imports a consideration, if negatived, must be overcome by evidence and this burden is on the maker or his representatives.

In re Cheney's Estate, 223-1076; 274 NW 5

Oral gift—possession followed by improvements. Evidence that the donee in an alleged oral gift of land took possession of the land, but that said possession was not necessarily referable solely to said alleged gift, together with evidence of the making of temporary and inconsequential improvements on the land, is wholly insufficient to take the transaction out of the statute of frauds.

Nugent v Dittel, 213-671; 239 NW 559

Setting aside deed—lack of assent. In action to set aside deed, evidence held insufficient to support contention that deed was executed through fraud, duress, undue influence, or lack of mental capacity.

Ryan v Church, (NOR); 216 NW 713

Trusts — creation — evidence — sufficiency. Evidence reviewed, and held insufficient to show that a deed was other than what it purported to be, to wit, a voluntary, good-faith gift to grantor's sister, of the land in question, and insufficient to establish any constructive trust therein in favor of other relatives of the grantor.

Redden v Murray, 213-519; 239 NW 129

Undue influence—rule—destroying free will. Undue influence necessary to set aside a conveyance must be enough to destroy the free

II GIFTS INTER VIVOS—concluded

agency of the grantor. Evidence reviewed and found insufficient to establish undue influence.

Mastain v Butschy, 224-68; 276 NW 79

Verdict sustaining part of gift as establishing mental competency. In a replevin action by executor to recover property held under claim of gift inter vivos from decedent, a jury verdict validating part of the gift made on a later date, from which part of the verdict no appeal is taken, also establishes the donor's mental competency to consummate that part of the gift made on an earlier date.

Wilson v Findley, 223-1281; 275 NW 47

Bonds—nonexclusive possession — unallowable directed verdict. An alleged donee of bonds may not, as defendant in replevin proceedings, have a verdict directed in her favor, (1) on the strength of her claimed exclusive possession, or (2) on the strength of lack of evidence of ownership in the alleged donor, when the jury might properly find that the possession of the alleged donee was not exclusive, and when the alleged donor was manifestly the owner of the bonds if the jury found there had been no gift.

Malcor v Johnson, 223-644; 273 NW 145

III GIFTS CAUSA MORTIS

Essential elements. A gift causa mortis is a gift of personal property, intentionally made, even orally, by the mentally competent owner of said property, in expectation of his or her imminent death from an impending disorder or peril (tho not necessarily so imminent as to exclude the opportunity to execute a will), and made and delivered by the donor to the donee on the essential condition that, if the gift be not in the meantime revoked, the property shall belong to the donee in case the donor dies, as anticipated, of the disorder or peril, leaving said donee surviving.

Flint v Varney, 220-1241; 264 NW 277

Bank deposit—delivery. The act of a donor in making a bank deposit in the joint name of himself and a donee, and in retaining no authority to withdraw the deposit except on the signature of himself and the donee, with unqualified directions to the bank to pay the deposit to the donee on the death of the donor, constitutes full delivery.

In re Hanson, 205-766; 218 NW 308

Burden of proof. The burden to establish a gift causa mortis rests on the donee claiming thereunder. Evidence reviewed, and held that said burden had been successfully met.

Flint v Varney, 220-1241; 264 NW 277

Evidence—competency. Delivery of a gift causa mortis may be established by circumstantial evidence; likewise the gift itself may be established by the declarations of the donor tho they be not res gestae.

Flint v Varney, 220-1241; 264 NW 277

Delivery of deed as gift. The unconditional delivery, as a gift, of a duly executed and acknowledged deed of conveyance, by the compos mentis grantor therein, and without fraud, to a third party with explicit direction, both orally and in writing, to said party, to hold said deed for the grantee, and to record the same immediately upon the death of the grantor, constitutes an irrevocable delivery to said grantee; and a priori, when, in addition to the foregoing, it affirmatively appears from the circumstances of the transaction that the grantor was intending to pass title to the grantee.

Keating v Augustine, 213-1336; 241 NW 429

Delivery to third person. The act of a donor in placing the subject-matter of a gift in the unqualified possession of a third party for the benefit of the donee constitutes a complete delivery.

In re Hanson, 205-766; 218 NW 308

CHAPTER 446

CEMETERIES AND MANAGEMENT THEREOF

10198 Trustee appointed—trust funds.

"Donations" defined. Funds received by a court-appointed trustee "for the perpetual care" of a named cemetery are "donations" within the meaning of the statute requiring a bond securing such funds.

Belmond Assn. v Luick, 217-805; 253 NW 521

Testamentary trust. A testamentary trust will be sustained when the intent of testator is evident, even tho the bequest runs to an unincorporated entity.

Meeker v Lawrence, 203-409; 212 NW 688

10202 Loans—security.

Directors of bank—trust funds—personal liability. The directors of a bank who personally know of, and connive at, the investment of the funds of a cemetery association (in the hands of the president of said bank as trustee) in the time certificates of deposit of the bank —in violation of this section—are personally liable, ex maleficio, for the loss of said funds consequent on the insolvency of said bank.

Olin Assn. v Bank, 222-1053; 270 NW 455; 112 ALR 1205

10204 Bond—approval—oath.

Construction and operation—intent of parties controls. A bond given to secure cemetery funds in the hands of a trustee will be construed in accordance with the undoubted intentions of the parties thereto. Held, bond not given to secure funds received during the one year term of the bond only, but to secure the entire fund as it might exist at any time during said term.

Olin Assn. v Bank, 222-1053; 270 NW 455; 112 ALR 1205

Equitable estoppel — pleading one's own wrong. In an action on a bond given by a bank as principal and by its directors as sureties to secure a trust fund which was in the possession of the bank, the defensive plea that plaintiff was estopped from prosecuting the action by his laches in so doing, is not available to the sureties when they at all times, before the bank became insolvent, had unhampered opportunity to compel compliance with the bond, and thus protect themselves, but, on the contrary, manifestly connived at a continuous breach of the bond in order to conserve the interest of the bank.

Olin Assn. v Bank, 222-1053; 270 NW 455; 112 ALR 1205

Evidence required to reform bond. To justify the reformation of a written instrument, the evidence must be clear, satisfactory and convincing and free from reasonable doubt. So held in an action to reform the term of a bond, the evidence being held insufficient.

Olin Assn. v Bank, 222-1053; 270 NW 455; 112 ALR 1205

Unauthorized deposit of trust funds. A court-appointed trustee of cemetery funds and the sureties on his bond are liable for said funds deposited, without authority of court, in a bank of which both the trustees and the sureties were officers, and lost because of the insolvency of said bank.

Belmond Assn. v Luick, 217-805; 253 NW 521

10213.1 Settlement of estates—maintenance fund.

Perpetual care of burial lot. A bequest for the perpetual maintenance of testator's cemetery lot is not violative of the statute relating to perpetuities.

Hipp v Hibbs, 215-253; 245 NW 247

CHAPTER 448

ISLANDS AND ABANDONED RIVER CHANNELS

Atty. Gen. Opinion. See '38 AG Op 352

10221 Sale authorized.

Atty. Gen. Opinion. See '38 AG Op 352

Islands—accretion. An island in a navigable stream cannot be deemed an accretion to another island when the surface of said islands at the point where they connect is not visible even at ordinary stage of the water, let alone being visible when the water is at its high watermark.

Meeker v Kautz, 213-370; 239 NW 27

Sudden shifting of boundary river—effect. Principle applied that the sudden shiftings of boundary rivers do not change state boundary lines.

Dermit v School Dist., 220-344; 261 NW 636

10227 Appraisement.

Atty. Gen. Opinion. See '30 AG Op 364

10230 Sale—how effected—rights of occupants.

Atty. Gen. Opinions. See '30 AG Op 364; '38 AG Op 352

10231 Lease authorized—lands re-advertised—sale.

Atty. Gen. Opinion. See '30 AG Op 364

10238 Good-faith possession—preference.

Discussion. See 8 ILB 100—Accretion as affected by surveyed and determinable boundaries

Atty. Gen. Opinion. See '38 AG Op 352

Accretions — construction of decree quieting title. A decree quieting title to accretions, and based on adverse possession, will be deemed to quiet title up to the high watermark of the river in question, even tho when literally and hypercritically construed it seemingly quiets title only to the high watermark as it existed when the action to quiet title was commenced. So held where, pending the action, trial and entry of decree, the river continued to recede.

Harrington v Foster, 220-1066; 264 NW 51

Accretion—apportionment—estoppel. Riparian landowners interested in accretions to their lands may by agreement, acquiescence, or other conduct, apportion the accretion in a manner and way different than the law would apportion it, and thereby estop themselves, in an action to quiet title, from asserting that land did not pass under their deed because it was not accretion land.

Haynie v May, 217-1233; 252 NW 749

Accretion passes by ordinary deed. Accretion to land passes by a deed of the upland owner unless expressly excepted.

Haynie v May, 217-1233; 252 NW 749

Accretion—original land washed away—new land in same place. Where original lands in place are washed away by river erosion and at a later time redeposited, then such deposits are accretions becoming a part of the land to which at such later time they accrete.

Sheldon v Chambers, 225-716; 281 NW 438

Lands under water—continuing ownership of land in place. The mere fact that land may disappear for a time, because river water enters a slough and spreads over it, will not destroy the ownership thereto as lands in place after the water recedes.

Sheldon v Chambers, 225-716; 281 NW 438

Estoppel—disclaimer filed — foreclosure of adjoining property in prior action. In an action foreclosing a mortgage and also asking for the reformation of the description of land in said mortgage in which one of the defendants by way of answer denies that plaintiff is entitled to reformation of description because of confusion as to the property covered by said mortgage as a result of a shifting river channel between the mortgaged land and the defendant's adjoining land, and alleging the plaintiff is estopped from asserting any interest in such adjoining land on account of a disclaimer filed by plaintiff's predecessor in a prior foreclosure action involving said adjoining land, held that such estoppel and disclaimer in the present action is ineffective in the absence of any evidence of any confusion or encroachment upon the adjoining land.

State Central Bank v Mapel, 226-1328; 286 NW 517

Ownership of lands—accretions. The owner of land along the bank of a navigable stream is entitled to accretions to the land even tho such accretions extend over the exact spot where another person formerly owned land eroded by the river, because the complete erosion of land works a complete destruction of the title and of all governmental descriptions pertaining thereto.

Bone v May, 208-1094; 225 NW 367

Riparian rights—accretions—formation of sand bars. Land by accretions is not established by showing that sand bars formed in the bed of the stream beyond high watermark and became visible as the waters of the river receded.

McFerrin v Wiltse, 210-627; 231 NW 438

Riparian rights—islands—accretion. An island in a navigable stream cannot be deemed an accretion to another island when the surface of said islands at the point where they connect is not visible even at ordinary stage of the water, let alone being visible when the water is at its high watermark.

Meeker v Kautz, 213-370; 239 NW 27

Riparian rights—when not withheld by deed. A conveyance of lands by a riparian owner, especially when the lands are largely accretions, will not be deemed to withhold conveyance of riparian rights simply because the land is described by metes and bounds.

Harrington v Foster, 220-1066; 264 NW 51

10241 Sale or lease authorized.

Atty. Gen. Opinion. See '38 AG Op 352

10242 Survey—appraisement—sale.

Atty. Gen. Opinion. See '38 AG Op 352

10245 Patent or lease.

Atty. Gen. Opinion. See '38 AG Op 352

CHAPTER 449

ACQUISITION OF TITLE BY STATE OR MUNICIPAL CORPORATION

Atty. Gen. Opinions. See '38 AG Op 111, 149, 314

10246 Right to receive conveyance.

Atty. Gen. Opinions. See '28 AG Op 348; '30 AG Op 224; '38 AG Op 149

10247 Bidding in at execution sale.

Atty. Gen. Opinion. See '38 AG Op 111

10249 Costs and expenses.

Atty. Gen. Opinion. See '28 AG Op 348

10260.1 Management.

Atty. Gen. Opinions. See '36 AG Op 399; '38 AG Op 149, 314, 328, 354; AG Op Nov. 8, '39

10260.3 Execution of deeds and leases.

Sale—contract without official action. Proof that a writing purporting to be a contract for the sale by the board of supervisors of county-owned land, signed by the purported purchaser and by one member of the board as "acting chairman", together with proof that the board never took any official action in regard to the said matter, is quite insufficient to show a valid and enforceable contract.

Smith v Standard Oil, 218-709; 255 NW 674

10260.4 Title under tax deed—sale—apportionment of proceeds.

Atty. Gen. Opinions. See '38 AG Op 2, 36, 153, 213, 328, 354, 396, 542, 622, 658, 733; AG Op May 3, '39, Nov. 8, '39

TITLE XXVI

CERTAIN SPECIAL LIENS

CHAPTER 450

LANDLORD'S LIEN

10261 Lien created — property subjected.

Atty. Gen. Opinions. See '38 AG Op 76; AG Op Aug. 23, '39

ANALYSIS

Leases in general. See under §10159 (III)
Rents in mortgage foreclosures. See under §12372 (III)

I CREATION AND EXISTENCE OF LIEN

"Lien" defined. A "lien" is a right of property, and not mere matter of procedure.

Britton v Western Iowa Co., 9 F 2d, 488

Landlord's lien—vested right prior to Chandler Act. Under Iowa statutes and the bankruptcy act of 1898, rent accruing within year preceding lessee's bankruptcy was secured by a valid statutory lien and was entitled to priority in bankruptcy proceeding, such a lien being a vested property right. So the provision of Chandler Act which became effective two months before filing of petition in bankruptcy, restricting priority for rent to the rent accruing within three months before bankruptcy, would not be allowed to destroy priority of rent claim for preceding 12 months under the Iowa statute.

Ginsberg v Lindel, 107 F 2d, 721
Miles Corp. v Lindel, 107 F 2d, 729

The relation—insufficient showing. Contract between the vendor and the purchaser of land in modification of the original contract of purchase reviewed, and held not to create the relation of landlord and tenant, notwithstanding the fact that the contract referred to the income from the land as "rent".

Thielen v Elev. Co., 203-100; 212 NW 352

Leases—execution by husband only—liability of wife. A wife is not liable on a written lease signed by the husband alone as lessee, tho the leased premises be occupied by the husband and wife as a family residence.

Whether the wife be liable for the rent as a family expense under §10459, Code, '35, is a quite different question—a question which cannot be deemed before the court in landlord's attachment proceedings manifestly based solely on the lease signed by the husband alone.

Rogers v Davis, 223-373; 272 NW 539

No lien prior to possession given. A lease which definitely provides that the term of the lease shall begin with the execution of the lease, but which provides that the landlord shall not give possession until a named date after the execution of the lease, gives the landlord no lien for rent on property which the tenant takes and keeps upon the property after the execution of the lease, but which he removes before the day for possession under the lease arrives, it appearing that such short-time possession by the tenant was for a purpose foreign to the lease.

Federal Bk. v Wylie, 207-816; 221 NW 831

Rent and advances—liability of assignee under his written acceptance. One who, in writing, accepts an assignment of a lease, with the consent of the lessor, thereby contracts to carry out the terms of the lease irrespective of any later assignment of the lease by the said assignee, and it is no defense that the lessor, the property being vacant, obtains the aid of a receiver.

Pickler v Mershon, 212-447; 236 NW 382

II RENT AND OTHER INDEBTEDNESS FOR WHICH LIEN MAY BE CLAIMED

General equitable relief prayed. In equity action seeking the appointment of a receiver, defendant's contention, that a receiver could not be appointed because no main cause of action was stated, was without merit, since plaintiff was in fact seeking to foreclose a lien on rents and had asked for general equitable relief, the rule being that "equity does not deal in technicalities, but rather it seeks to ascertain the true intent of the pleading filed."

Wagner v Securities Co., 226-568; 284 NW 461

Tenantable premises. In an action on a lease which provided for the payment of rent

except when the premises are "untenantable by reason of fire", the issue whether certain painting, papering, and decorating were necessary, to render the premises tenantable after a fire, is a jury question, under conflicting testimony.

Benson v Bake-Rite Co., 207-410; 221 NW 464

III PROPERTY SUBJECT TO LIEN

Burden of proof to show lien. A landlord seeking to enforce a landlord's lien on pigs must show that they were kept on the leased premises after they became six months old.

Sparks v Flesher, 217-1086; 252 NW 529

Crops grown by subtenant. A landlord has a lien for his rent on crops which have been grown upon the leased premises by a subtenant between whom and the landlord no privity of contract exists; and a sale of such crops by the subtenant will not defeat the lien.

Hanson v Carl, 201-521; 207 NW 579

Purchaser of nonexempt property. Pigs farrowed on leased premises but removed from said premises before they were six months old, and not thereafter returned to said premises, are not subject to the landlord's lien for rent.

Sparks v Flesher, 217-1086; 252 NW 529

Unincorporated association—property liable for rent. Where a provision of a lease executed by members of a voluntary unincorporated association mortgaged the property of the society as security for the rent, a further provision exempting the individual members from liability did not exempt the assets of the association, as the individual members had only a severable interest in the association's property which terminated with the membership.

Lamm v Stoen, 226-622; 284 NW 465

IV PRIORITIES

(a) PRIORITY BETWEEN LANDLORD'S LIEN AND LIEN OF MORTGAGE

Discussion. See 21 ILR 109—Relative priority

Lien—failure to record deed. In a controversy between a landlord and a chattel mortgagee over the priority of their liens, it is quite immaterial that the landlord's title deed is not of record.

Corydon Bank v Scott, 217-1227; 252 NW 536

Lien — increase of animals — priority over mortgagee. The lien of a chattel mortgage (prior in time to a lease) on animals and on the increase thereof is superior to the landlord's lien as to all increase born prior to the actual execution of the lease, and inferior to the landlord's lien on all increase born subsequent to the actual execution of the lease and prior to its termination. An agreement between the landlord and tenant that the lease shall be effective from a date prior to its actual execution is not binding on the mortgagee.

Wunder v Schram, 217-920; 251 NW 762

Lien—priority on increase of mortgaged stock. A landlord's lien on the increase of stock after the stock is taken upon the leased premises is superior to the lien of a chattel mortgage executed on the stock and on its prospective increase, and prior to the commencement of the rent term.

Corydon Bank v Scott, 217-1227; 252 NW 536

Priority of mortgage over rent. A recorded chattel mortgage on the property of a tenant used on the demised premises under a lease for years, attains priority, immediately upon the termination of the lease, over the landlord's claim for future rent accruing under a succeeding tenancy at will of the same premises; likewise a recorded chattel mortgage executed by a tenant at will, on property used on the leased premises, attains priority immediately upon the expiration of 30 days after the execution and recording of the mortgage, over the landlord's claim for future accruing rent.

Nickle v Mann, 211-906; 232 NW 722

Mortgage on crop-share rent superior to garnishment of tenant. The lien of a chattel mortgage on a landlord's share of crops reserved as rent, but in the possession of the tenant, is, as to matured crops actually set aside to the landlord or otherwise actually determined as belonging to the landlord, superior to a subsequent garnishment of the tenant by a judgment creditor of the landlord.

Pierre v Pierre, 210-1304; 232 NW 633

Sale of crops—landlord's and purchaser's rights. A tenant's sale of crops will not divest a landlord of his statutory lien, and the landlord may maintain a conversion action against the purchaser who, if he has disposed of grain, is liable for damages unless he shows a waiver or estoppel of such lien which he must prove as an affirmative defense. So, in an equity action to enforce landlord's lien on grain sold to elevator by tenant, wherein evidence shows the manager of the elevator informed landlord's agent by telephone that tenant was selling grain, and landlord's agent replied that they had a man in the field looking after corn, the trial court was justified, under such circumstances, in holding that landlord rather than elevator company rendered the wrongful act of tenant possible, and therefore was the one to suffer from such wrongful act.

Sensibar v Hughett, 227-591; 288 NW 674

(b) PRIORITY BETWEEN LANDLORD'S LIEN AND OTHER CLAIMS

Enlargement against third party. A tenant may not, against a third party, enlarge the landlord's lien provided by statute.

O'Donell v Davis, 201-214; 205 NW 347

Impressing trust for rent on proceeds of property sold. Where property subject in part to a lien for rent was sold by the tenant-owner for the benefit of the landlord, and at public sale, in order to save court costs, a depository of the proceeds who was also a creditor of the tenant's, and who had full knowledge of the purpose of the sale, may not complain that the court impressed a trust on such proceeds to the amount of the lien which the landlord had on the property.

Federal Bk. v Wylie, 207-816; 221 NW 831
Andrew v Bank, 208-1184; 225 NW 957

Mortgage on crop-share rent superior to garnishment of tenant. The lien of a chattel mortgage on a landlord's share of crops reserved as rent, but in the possession of the tenant, is, as to matured crops actually set aside to the landlord, or otherwise actually determined as belonging to the landlord, superior to a subsequent garnishment of the tenant by the landlord's judgment creditor.

Pierre v Pierre, 210-1304; 232 NW 633

"Rent"—taxes included—notice to creditors —recording. The term "rent", within statutes giving a landlord a lien for rent, cannot be construed to include taxes in absence of a clear intention of parties to that effect expressed in lease, and so a lessor was held not entitled to preferential lien against assets of bankrupt assignee of lease for unpaid taxes, interest and penalties, on ground that chattel mortgage clause of lease, which was recorded in deed and chattel mortgage records, was sufficient to protect lessor's lien, the assignment of lease being recorded only in deed record and not in chattel mortgage records. Such filing did not give notice to creditors, as required by recording statutes.

Lamoine Mott Estate v Neiman, 77 F 2d, 744

Right to rents after sheriff's deed. Upon the execution and delivery of a deed by the sheriff in real estate mortgage foreclosure, the grantee becomes vested eo instanti with the right to future-maturing rents—no contract or stipulation to the contrary appearing—even tho such rents accrued in part during the period of redemption and in part afterward. In other words, the right of the grantee to such rents may be superior to that of the assignee of the lease and of the rent notes executed thereunder.

First JSL Bank v Ingels, 217-705; 251 NW 630

Unrecorded contract lien. An unrecorded lease giving the landlord a lien on exempt property kept on the premises is not effective against a purchaser of the exempt property without notice of the written lease.

Sparks v Flesher, 217-1086; 252 NW 529

Landlord's lien—vested right prior to Chandler Act. Under Iowa statutes and the bankruptcy act of 1898, rent accruing within year preceding lessee's bankruptcy was secured by a valid statutory lien and was entitled to priority in bankruptcy proceeding, such a lien being a vested property right. So the provision of Chandler Act which became effective two months before filing of petition in bankruptcy, restricting priority for rent to the rent accruing within three months before bankruptcy, would not be allowed to destroy priority of rent claim for preceding 12 months under the Iowa statute.

Ginsberg v Lindel, 107 F 2d, 721
Miles Corp. v Lindel, 107 F 2d, 729

V REMOVAL OR TRANSFER OF PROPERTY SUBJECT TO LIEN

(a) LIABILITIES OF PURCHASERS

Evidence supporting oral lease for year. In action for conversion by landlord against purchaser of tenant's buckwheat, the findings of trial court that tenant leased premises for one year rather than being a sharecropper held supported by evidence and conclusive on appeal.

Schaper v Farmers' Exch., (NOR); 239 NW 134

(b) ACTIONS

Contract lien—enforcement. An action to establish and enforce a contract lien for rent is properly brought in equity, and is not transferable to law, because the answer presents law issues. Held that a contract lien for rent is validly created by a lease provision that the landlord should have, not only the statutory lien for rent, but also a lien upon all property of the tenant used or situated on the leased premises whether exempt from execution or not.

Beh v Tilk, 222-729; 269 NW 751

"Destruction" of building. In an action on a lease which provided that it should be void in case the building was "destroyed" by fire, evidence reviewed, and held not to show a destruction of the building within the meaning of the lease.

Benson v Bake-Rite Co., 207-410; 221 NW 464

Title of landlord. In an action by a landlord to recover damages consequent on the conversion by defendant of property on which the landlord had a lien for rent, the question of the ownership of the land by the landlord is wholly irrelevant and immaterial.

Mau v Rice Bros., 216-864; 249 NW 206

VI ESTOPPEL AND WAIVER OF LIEN

Liability of purchaser. A landlord may successfully maintain an action for conversion against the purchaser of property on which he has a lien for rent unless such purchaser avoids the action by a plea of waiver or estoppel. Especially is it erroneous to instruct the jury that the landlord must prove that he had no "knowledge" of the sale.

Wilson v Fortune, 209-810; 229 NW 190

Sale of crops—landlord's and purchaser's rights. A tenant's sale of crops will not divest a landlord of his statutory lien, and the landlord may maintain a conversion action against the purchaser who, if he has disposed of grain, is liable for damages unless he shows a waiver or estoppel of such lien which he must prove as an affirmative defense. So, in an equity action to enforce landlord's lien on grain sold to elevator by tenant, wherein evidence shows the manager of the elevator informed landlord's agent by telephone that tenant was selling grain, and landlord's agent replied that they had a man in the field looking after corn, the trial court was justified, under such circumstances, in holding that landlord rather than elevator company rendered the wrongful act of tenant possible, and therefore was the one to suffer from such wrongful act.

Sensibar v Hughett, 227-591; 288 NW 674

Statute of limitation—estoppel to plead—delay induced by debtor. The fact that a debtor repeatedly requests time in order to investigate the claim made against him before paying it, and the fact that the creditor repeatedly acquiesces in such delay tho under no obligation so to do, will not estop the debtor, when sued, from pleading the statute of limitation which in the meantime has fully run because of said delays.

Bundy v Grinnell Co., 215-674; 244 NW 841

VII RENT IN GENERAL

Discussion. See 13 ILR 328—Liability when premises untenantable; 18 ILR 251—Mortgagee's right during redemption

Payment of rent not essential element. Payment of rent is not an essential element to the creation of the relation of landlord and tenant.

Reynolds v Oil Co., 227-163; 287 NW 823

Abandonment—duty of landlord. A landlord is under duty, in case the tenant abandons the premises, to use reasonable diligence to re-lease the premises, in order to avoid unnecessary damages.

Benson v Bake-Rite Co., 207-410; 221 NW 464

Acceleration of maturity of rent — construction. Under a farm lease for a stated number of years at a stated yearly rental payable semiannually, a provision that "a failure to pay any portion of the rent as the same becomes due shall mature the whole amount of rent", must, in case of default, be construed as having reference solely to the rent of each rental year as it falls due. In other words a default during the first rental year does not mature the rent for all the remaining years of the lease.

Hoefer v Fortmann, 219-746; 259 NW 494

Action on separate installments. The bringing of separate actions on separate installments of rent as they fall due under a lease does not constitute a splitting of a single cause of action, because the maturing of each installment matures a new cause of action.

Hoefer v Fortmann, 219-746; 259 NW 494

Allowable failure to collect rents. A widow who is entitled to receive during life from the executor the annual rents accruing on lands belonging to residuary devisees may allow such devisee to occupy the land free of rent, and objections to the executor's final report will not lie because of such action.

In re Murphy, 209-679; 228 NW 658

Assignee—liability to discharge rent obligations. The written assignee of a lease of real estate who orally accepts the assignment, or effects such acceptance by his conduct, with the approval or acquiescence of the lessor, thereby binds himself to discharge the rent obligations; especially is this true when the express provisions of the lease impose such obligation.

Central Bank v Herrick, 214-379; 240 NW 242

Directed verdict—payment of rent — sufficiency of evidence. Direction of verdict in action to recover on rent note from tenant was erroneous when there was sufficient evidence of payment by tenant in turning over proceeds of crop to warrant submission of the case to jury.

McCann v McCann, (NOR); 226 NW 922

Implied obligation. Proof that the holder of a first mortgage on real estate was himself in occupancy of the premises, and continued such occupancy after the issuance of a sheriff's deed under a junior lien, generates the presumption that such occupancy was with the assent of the said occupant and the said deed holder, with the consequent obligation of the occupant to pay reasonable rental to said deed holder until such time as a deed might be executed under foreclosure of the first mortgage.

Norman v Dougan, 201-923; 208 NW 366

Leases—readjustment of rent—construction. A long-time lease which provides (1) that the rental shall be computed at a named percentage on the value of the land (subject to a minimum rental); (2) that, for the first five-year period, a specified rental shall be

paid (which was said percentage on the agreed and estimated value); (3) that the rental for the balance of the term shall, at the close of each five-year period, be subject to revision, "based upon any increase in the estimated value of the land"; and (4) that such valuation shall be made by certain valuers or appraisers, requires the valuers, in making such valuation, to treat the last preceding value as a verity. In other words, the valuers may not adjudge that the preceding valuers were mistaken in their judgment. Phrased otherwise, the valuers must confine themselves to a determination of the simple question whether the value has increased or decreased since the last preceding valuation, and add such increase to, or subtract such decrease from, the last preceding valuation.

Minot v Pelletier Co., 207-505; 223 NW 182

Mortgage of landlord's share of crops to be grown. A chattel mortgage executed by a landlord on all grain, feed, and hay "to be grown" on definitely and accurately described lands which were then under lease for the ensuing year, is a valid incumbrance on the landlord's share of the crops reserved as rent under said lease.

Pierre v Pierre, 210-1304; 232 NW 633

Nonimplied promise to pay rent. No implied promise by a parent to pay rent is shown by proof that the parent bought the property, and caused it to be conveyed to his minor child, and immediately erected substantial improvements on the property and continued to occupy the property as a homestead, together with the grantee, for a great number of years, without any claim for rent being made during the lifetime of the parties.

Hodgson v Keppel, 214-408; 238 NW 439

Obligation of assignee of lease to pay rent. The assignee of a lease (which simply binds the "lessee, his heirs, and assigns" to pay the rent) is obligated to pay rent because of privity of estate, and when said privity of estate is terminated by a valid reassignment of the lease the obligation of the assignee to pay rent necessarily terminates unless said assignee has, expressly or impliedly, otherwise obligated himself. And the fact that the lessor accepts the rent from the assignee during the assignee's occupancy is not sufficient to show that the assignee has assumed the obligation to pay rent after reassignment.

Seeburger v Cohen, 215-1088; 247 NW 292; 89 ALR 427

Purchase by tenant of undivided interest—effect. A lessee who exercises his option under the lease to buy an undivided half of the leased premises does not cease to be the tenant of the lessor as to the undivided interest retained by the lessor, and after the purchase, such tenant remains liable under the lease to the lessor for one-half of the originally reserved rent.

Schick v Realty Co., 200-997; 205 NW 782

Release of tenant. Knowledge on the part of a landlord that his tenant has assigned his lease, and the subsequent receipt by the landlord of rent payments from the assignee, is not sufficient, in and of itself, to show that the landlord has released the original tenant.

Lazerus v Shapiro, 211-376; 233 NW 723

Rent—constructive eviction. The constructive eviction of a tenant does not absolve him from the payment of the agreed rent unless he surrenders the premises.

Zimbelman v Boone Coal, 220-1310; 263 NW 335

Rent incident to land—passes to heirs. General rule is that rents accruing after the owner's death belong to the heirs or devisees, as an incident to the ownership of the land which descends to them.

In re Jensen, 225-1249; 282 NW 712

Rent—when due in absence of agreement. In the absence of a contrary agreement, rentals of realty are not due prior to the customary time of payment.

Wilson v Wilson, 220-878; 263 NW 830

"Rent"—taxes included—notice to creditors—recording. The term "rent", within statutes giving a landlord a lien for rent, cannot be construed to include taxes in absence of a clear intention of parties to that effect expressed in lease, and so a lessor was held not entitled to preferential lien against assets of bankrupt assignee of lease for unpaid taxes, interest, and penalties, on ground that chattel mortgage clause of lease, which was recorded in deed and chattel mortgage records, was sufficient to protect lessor's lien, the assignment of lease being recorded only in deed record and not in chattel mortgage records. Such filing did not give notice to creditors, as required by recording statutes.

Lamoine Mott Estate v Neiman, 77 F 2d, 744

Rescission of contract—status quo—rents—permanent improvements. A decree confirmatory of a rescission of a real estate contract of purchase should, inter alia, charge the rescinding purchaser with the fair and reasonable rental of the property during the time he was in possession, and credit said purchaser with the reasonable value of permanent improvements placed on the property.

Kunde v O'Brian, 214-921; 243 NW 594

Right to rents prior to sheriff's deed—exception to general rule. Ordinarily, the owner of mortgaged real estate is entitled to the rents until the issuance of the sheriff's deed on foreclosure sale; but where, substantially at the close of the redemption period, litigation arose over the right to redeem, and where it

was agreed that the rights of the parties should remain in statu quo without the issuance of a deed until the litigation was determined, and where the court later decreed the ownership of the property as of the date when redemption expired, held that the rents accruing subsequent to the expiration of the period of redemption belonged to the parties so decreed to be the owners, even tho the sheriff's deed was executed long subsequent to said expiration.

Peoples Bank v McCarthy, 209-1283; 228 NW 7

10262 Duration of lien.

Lien—automatic termination. A landlord's lien automatically expires six months after the lease terminates.

Kerr v Horn, 211-1093; 232 NW 494

Computation of six months period. In computing the six months during which a landlord's lien survives the expiration of the lease, the count must commence with the first day following the said expiration. The statutory rule to exclude the first day and to include the last day has no application.

Welch v Welch, 212-1245; 238 NW 81

Barred claim as counterclaim. The statutory right under the general statute of limitations to plead as a counterclaim a barred claim, does not extend to a claim barred under a limitation contained in this chapter.

Miller Bk. v Collis, 211-859; 234 NW 550

Delay induced by debtor. The fact that a debtor repeatedly requests time in order to investigate the claim made against him before paying it, and the fact that the creditor repeatedly acquiesces in such delay tho under no obligation so to do, will not estop the debtor, when sued, from pleading the statute of limitation which in the meantime has fully run because of said delays.

Bundy v Canning Co., 215-674; 244 NW 841

Impressing trust on proceeds of lienable property. An action to impress a trust on the proceeds of property on which a landlord had a lien, against a depository who had full knowledge that the sale had been had for the benefit of the landlord, is not barred immediately after the lapse of six months from the termination of the lease.

Andrew v Bank, 208-1184; 225 NW 957

Insufficient "commencement" of action. In landlord attachment, the filing of a petition only, and the issuance of the writ prior to the expiration of six months after the termination of the lease, and the levying of the writ after the expiration of said six months, do not constitute the "commencement" of an action in such sense as will preserve the lien against a general creditor who levies after the expiration of said six months.

O'Donell v Davis, 201-214; 205 NW 347

Landlord's lien—vested right prior to Chandler Act. Under Iowa statutes and the bankruptcy act of 1898, rent accruing within year preceding lessee's bankruptcy was secured by a valid statutory lien and was entitled to priority in bankruptcy proceeding, such a lien being a vested property right. So the provision of Chandler Act which became effective two months before filing of petition in bankruptcy, restricting priority for rent to the rent accruing within three months before bankruptcy, would not be allowed to destroy priority of rent claim for preceding 12 months under the Iowa statute.

Ginsberg v Lindel, 107 F 2d, 721
Miles Corp. v Lindel, 107 F 2d, 729

Limitation on landlord's lien—nonapplicability to rents and profits pledge. This section does not apply to a contract lien against a mortgagor-landlord and in favor of a mortgagee under a "rents and profits" pledge in a real estate mortgage.

Sutton v Schnack, 224-251; 275 NW 870

Loss of lien as to one who has converted crops. A landlord's lien automatically terminates six months after the termination of the lease; likewise, the right of the landlord to proceed after said six months in any form against a third party who has converted to his own use the crops grown on the leased premises.

Miller Bk. v Collis, 211-859; 234 NW 550

Three-year lease—period of lien. The term of a 3-year lease (March 1, 1934, to March 1, 1937) cannot, as to the 1935 crops, be said to expire on March 1, 1936, under the provisions of this section, giving the landlord a lien on the crops for six months after "the expiration of the term".

Sutton v Schnack, 224-251; 275 NW 870

10263 Limitation on lien in case of sale under judicial process.

Refusal of future rent. A landlord who buys the property of the tenant under a sale by an assignee for the benefit of creditors and immediately resumes possession of said property on his own premises and continues the business formerly carried on by the tenant is properly refused any allowance of future rent under the interrupted lease.

In re Cutler & Horgen, 204-739; 212 NW 573; 54 ALR 527

"Lien" defined. A "lien" is a right of property, and not mere matter of procedure.

Britton v Western Iowa Co., 9 F 2d, 488

Landlord's lien—vested right prior to Chandler Act. Under Iowa statutes and the bankruptcy act of 1898, rent accruing within year preceding lessee's bankruptcy was secured by a valid statutory lien and was entitled to priority in bankruptcy proceeding, such a lien being a vested property right. So the provision of Chandler Act which became effective two months before filing of petition in bankruptcy, restricting priority for rent to the rent accruing within three months before bankruptcy, would not be allowed to destroy priority of rent claim for preceding 12 months under the Iowa statute.

Ginsberg v Lindel, 107 F 2d, 721
Miles Corp. v Lindel, 107 F 2d, 729

10264 Enforcement — proceeding by attachment.

Atty. Gen. Opinion. See '32 AG Op 270

Contract for lien — enforcement — proper forum. An action to establish and enforce a contract lien for rent is properly brought in equity, and is not transferable to law, because the answer presents law issues. Held that a contract lien for rent is validly created by a lease provision that the landlord should have, not only the statutory lien for rent, but also a lien upon all property of the tenant used or situated on the leased premises whether exempt from execution or not.

Beh v Tilk, 222-729; 269 NW 751

Conversion by commission merchant. A defendant may not defend his conversion of property on which a plaintiff-landlord had a lien for rent on the plea that he received the property as agent for the tenant and sold the property on commission.

Mau v Rice Bros., 216-864; 249 NW 206

Conversion—chattel mortgage—materiality. In an action by a landlord to recover damages consequent on the conversion by defendant of property on which the landlord had a lien for rent, the rejection of defendant's offer in evidence of a chattel mortgage on the property is proper (1) when the record demonstrated that the landlord's lien was prior to the lien of the said mortgage, and (2) when it appeared that the mortgage had been satisfied.

Mau v Rice Bros., 216-864; 249 NW 206

Lien—nonwaiver by taking general judgment. The plaintiff in landlord's attachment by failing to ask for a special execution for the sale of the attached property, and by taking a general judgment against the lessee, does not thereby waive his landlord's lien. On the contrary, the lien follows the general judgment upon which a special execution may issue notwithstanding the failure to pray therefor, and notwithstanding the failure of the judgment to provide therefor.

Wunder v Schram, 217-920; 251 NW 762

Loss of lien. The levy of a landlord's writ of attachment after the lien has expired effects nothing.

O'Donell v Davis, 201-214; 205 NW 347

Right to docket action. A judgment creditor, after perfecting a garnishment of the tenant of the judgment debtor, has a right to have an action docketed, without fee, for the purpose of enforcing the landlord's lien theretofore held by said judgment debtor, and such action may not be deemed a "creditor's bill," in the ordinary sense.

Kinart v Churchill, 210-72; 230 NW 349

Sale—impressment of trust on proceeds. An understanding between a lienor and a lienee to the effect that personal property upon which the lienor has a lien may be sold by the lienee and the lien satisfied from the proceeds of the sale, will be enforced in equity by impressing a trust on said proceeds. So held as to rent due a landlord.

Stegemann v Bendixen, 219-1190; 260 NW 14

See Jasper County Bank v Klauenberg, 218-578; 255 NW 884

Statutory and contract lien for rent. A landlord who seeks to enforce his statutory lien for rent through an ordinary landlord's attachment makes no election of remedies such as will prevent him from amending his pleading and asking the foreclosure of a contractual lien embraced in the lease. Both remedies are coexistent and consistent.

Pickler v Lanphere, 209-910; 227 NW 526
Mau v Rice Bros., 216-864; 249 NW 206

Subsequent writs authorized. When a landlord's attachment is timely in that it was commenced within 6 months after the expiration of the lease, and the writ is improperly levied on property in a foreign county, a new writ may issue, even after the 6 months has expired, and a valid levy made thereunder on the same property if it has, in the meantime, been brought into the county of suit.

Welch v Welch, 212-1245; 238 NW 81

Subtenant as party. A landlord need not, in an action to enforce his lien, make a subtenant a party defendant, even tho a lien is claimed on crops grown by the subtenant.

Hanson v Carl, 201-521; 207 NW 579

Landlord's statutory lien—taxes as part of rent—interest—lien on proceeds of sale. Where bankrupt's stock of merchandise was sold by receiver and proceeds turned over to trustee, bankruptcy court had jurisdiction to enforce against the proceeds a landlord's lien as provided by §6502, C.C., '19 (§§10261-10263, C., '24-'39), regardless of whether debt was provable under §63 of the bankruptcy act (Comp. St. §9647; 11 USC 103). Taxes are part of rent protected by landlord's lien under a lease requiring tenant to pay taxes, and landlord is

entitled to legal interest from the dates rental payments and taxes became due, but not from date of filing bankruptcy petition.

Britton v Western Iowa Co., 9 F 2d, 488

Want of probable cause—improper submission. In an action for malicious prosecution in suing out a writ of landlord's attachment for rent admittedly due (but which was canceled by a pleaded and established counterclaim), manifest error results from submitting to the jury the question whether the landlord had probable grounds to believe the truth of the ground alleged as a basis for the writ.

Kelp v McManus, 218-226; 253 NW 813

Writ of attachment—legality. The issuance of a landlord's writ of attachment for rent admittedly due is not rendered unlawful because the tenant subsequently pleads and establishes a counterclaim which cancels the landlord's admitted claim for rent.

Kelp v McManus, 218-226; 253 NW 813

10265 Lien upon additional property.

Belated waiver of exemptions. The invalidity of a lease (unsigned by the wife of the lessee), insofar as it attempts to grant a lien for rent on the exempt property of the lessee, is not cured by the act of the wife in waiving her exemptions after the commencement of an action to determine the rights of existing creditors.

Brownlee v Masterson, 215-993; 247 NW 481

Lien on exempt property. A lease of land, unsigned by the lessee's wife, is a nullity insofar as it attempts to give the lessor a lien for rent on the exempt property of the lessee. Unnecessary to say that such a lease is of no validity against a subsequent valid chattel mortgage on the same property.

Brownlee v Masterson, 215-993; 247 NW 481

Nonpriority over mortgage. A lien on the exempt personal property of a tenant by virtue of the terms of an unrecorded lease, signed by both husband and wife, is subordinate in right to a subsequently executed and recorded chattel mortgage on the property, even tho the mortgagee takes his mortgage with knowledge that the mortgagor was a tenant, but without knowledge that the lease granted the landlord a lien on the tenant's exempt property.

Brenton v Bream, 202-575; 210 NW 756
Brownlee v Masterson, 215-993; 247 NW 481

10267 Acts sufficient to constitute taking of property.

Return—permissible amendment. The return of the levy of an attachment may be so amended as (1) to definitely locate the property levied on and (2) to specifically describe the kind of property levied on.

Salinger v Elev. Co., 210-668; 231 NW 366

CHAPTER 451

MECHANIC'S LIEN

10270 Definitions and rules of construction.

ANALYSIS

I OWNERSHIP OR POSSESSION OF LAND
II ESTATES OR INTERESTS SUBJECT TO LIEN

I OWNERSHIP OR POSSESSION OF LAND

"Owner" defined. The legal titleholder of real estate and a prospective purchaser, for whose benefit and use an improvement is erected upon the real estate, may both be considered "owners" of the property within the meaning of the mechanic's lien law.

American Bk. v West, 214-568; 243 NW 297

Scope of term "owner". The term "owner" embraces not only an "owner" in the ordinary acceptance of such term, but "every person for whose use or benefit" an improvement is made.

Schoeneman Lbr. v Davis, 200-873; 205 NW 502

Owner requiring improvements by vendee. An owner of land, who, in a contract of sale,

binds the purchaser to make specified improvements on the existing buildings, will be deemed the owner of the property in proceedings for the enforcement of the mechanics' liens resulting from such improvements. It follows that the statutes (§§10287, 10290, C., '27) which adjust the equities between rival lienholders have no application to the case of said owner.

Consumers v Rozema, 212-696; 237 NW 433

Vendee as owner under executory contract. The vendee of land under a contract calling for installment payments is the equitable titleholder, and, therefore, the "owner" of the land within the mechanic's lien statutes, and may contract for improvements on the land and subject his interest to the resulting mechanics' liens.

Knapp v Baldwin, 213-24; 238 NW 542

II ESTATES OR INTERESTS SUBJECT TO LIEN

Right to lien—vendor's interest bound—consent to improvement. The term "owner" in the mechanic's lien statutes includes a vendor who expressly or impliedly consents to improvements on the real estate and the interest of said vendor is subject to mechanics' liens for labor and materials furnished for such improvements.

Murray v Kelroy, 223-1331; 275 NW 21

10271 Persons entitled to lien.

ANALYSIS

Labor and material on public improvements. See Ch 452

I MECHANIC'S LIEN IN GENERAL

Contract waiver. A principal contractor may, by explicit contract with the owner of the premises, validly waive his statutory right to a mechanic's lien as against the owner.

Van Dyck Co. v Bldg. Co., 200-1003; 205 NW 650

Contractor of vendee. A mechanic's lien may not be established against the land of a vendor or against a building thereon of which the improvement became an integral part, when the vendor is not directly or indirectly a party to such improvement. Especially is this true when the vendee is not a party to the action to foreclose such claimed lien.

Joyce Lbr. Co. v Wick, 200-796; 205 NW 476

Improper interest and attorney fees. Tho the lien of a materialman may, in a certain case, be superior to the lien of a prior mortgage on the land, yet the court is in error in computing interest at a rate in excess of 6 percent and in allowing an attorney's fee and taxing it as costs and decree a lien for such excess interest and costs, even tho the claim of the materialman is evidenced by a promissory note calling for such excess interest and attorney fees.

Spieker v Fair Assn., 216-424; 249 NW 415

Model house constructed by lienholders' joint enterprise—priority of vendor's lien. Where materialmen and laborers who enter into an enterprise, whereby all agree to furnish labor and materials to construct a model home to be given away by a chance drawing and agree that they will receive their reimbursement from the sale of tickets to an entertainment at which said drawing will be held, and when the returns from the ticket sale are insufficient to pay all claims, the mechanics' liens are not superior to a vendor's lien held by the vendor of the land on which the house was built, when such vendor did not enter the joint enterprise; such cooperating mechanics' lienholders share pro rata.

Joyce Co. v Marshalltown League, 226-274; 283 NW 912

House constructed by lienholders' joint enterprise—vendor's lien inferior to noncooperating worker's mechanic's lien. Where an owner sells land knowing that certain materialmen and laborers are promoting a joint enterprise to build a model home thereon and dispose of the property at an advertising chance drawing scheme, such owner's vendor's lien is inferior to a mechanic's lien acquired by a laborer whose work was not performed as a part of, nor in cooperation with, the joint enterprise.

Joyce Co. v Marshalltown League, 226-274; 283 NW 912

Nature of lien—waiver or estoppel by conduct. A mechanic's lien is a statutory right given to contractor furnishing labor or material to protect himself from loss. He may, by contract or by his actions, expressly or impliedly waive that right or be estopped from asserting it.

Joyce Co. v Marshalltown League, 226-274; 283 NW 912

Parties to appeal—fatal defect in parties. In an action by the purchaser of land to quiet title against certain claims for mechanics' liens, the decree confirmed the claims as liens on the land, and ordered said land sold for the payment—at least pro tanto—of said liens, and, in addition, entered personal judgments against a former owner of the land for the amount of each of said claims. Plaintiff appealed from the decree insofar as it established said claims as liens.

I MECHANIC'S LIEN IN GENERAL—concluded

Held, the appeal could not be maintained without service of notice of appeal on said former owner.

Gordon-Van Tine Co. v Ideal Co., 223-313; 271 NW 523

Property subject—mechanic's lien debtor's right of redemption. A mechanic's lien debtor's right of redemption and right of possession are not subject to levy nor to junior mechanic's lien judgments obtained more than nine months after the sale, but within the year for redemption.

Murray v Kelroy, 223-1331; 275 NW 21

Property subject to lien—furnace. The refusal to establish a mechanic's lien against a duly installed furnace is proper when the removal of the furnace would leave the building in a dilapidated condition.

Ilten & Taege v Pfister, 202-833; 211 NW 407

Quasi-mechanics' liens—materialman not subcontractor. A party who contracts to furnish and deliver gravel to a contractor on a public improvement, at the contractor's place of work, and at a stated price per ton, is not a subcontractor but is a materialman. It follows that demands for labor, gasoline, and oil furnished to various parties, in the execution of a part of the gravel contract which the materialman sublets, cannot be enforced against the retained percentage of the contract price in the hands of the public authorities.

Forsberg v Const. Co., 218-818; 252 NW 258

Right to lien—agency—facts not constituting. The vendor of land sold on installments does not constitute the vendee his agent to make improvements and repairs on the property by requiring the vendee to obligate himself to the effect that all improvements placed upon the property shall remain thereon and not be destroyed until final payment is made.

Knapp v Baldwin, 213-24; 238 NW 542

Unauthorized sale by co-tenant. One tenant in common may not, without authority from his co-tenants, so sell the property as to render it liable to a mechanic's lien for material contracted for by the purchaser.

Ilten & Taege v Pfister, 202-833; 211 NW 407

Waiver—obligation of mortgagee. A mortgagee who consents that insurance money collected by him on a destroyed building on the mortgaged premises may be used by the mortgagor in the construction of a new building on the premises, tho said consent is communicated to a materialman, does not thereby obligate himself to pay the deficiency in the cost of said new building after applying the insurance money, nor does the mortgagee thereby waive the priority of his mortgage in favor of the materialman; and this is true tho the mortgagee knew that the insurance money would not be sufficient to pay the cost of the new building.

First Bank v Westendorf, 213-475; 239 NW 73

II PERSONS ENTITLED TO LIEN

Quasi-mechanics' liens—employee of materialman. One who assists a materialman in producing the material which the materialman has contracted to furnish to a county for highway purposes has no quasi lien on, or claim to, the fund due the materialman from the county.

Nolan v Larimer, Inc., 218-599; 254 NW 45

Performance—well drilling—faulty pump. A well driller's guarantee to secure an ample supply of water has been fulfilled when the evidence in a mechanic's lien foreclosure fairly establishes that there is a constant head of 180 feet of water in the well, and the lack of ample water was due entirely to the improper pump line furnished by the owner.

Collins v Gard, 224-236; 275 NW 392

III SERVICES AND MATERIALS SECURED BY LIEN

Proof of claim—evidence. A claim for extra work is not proved by the production of the contractor's books of account, showing items of time employed, and made up from oral statements by workmen who were not called as witnesses, neither the contractor nor the bookkeeper having any personal knowledge of the correctness of the items.

Van Dyck Co. v Bldg. Co., 200-1003; 205 NW 650

Quasi-mechanics' liens—nonlienable claims. Claims for meals furnished employees of a contractor on a public improvement are not lienable; likewise claims for groceries bought by an employee for his personal use.

Coon River Co-op. v McDougall Co., 215-861; 244 NW 847

Lumber for cement forms nonlienable. Lumber furnished to a contractor on a public improvement, solely for the purpose of building forms to hold cement or concrete while it is solidifying, is not lienable under the statute providing for quasi mechanics' liens growing out of public improvements.

Melcher Co. v Robertson Co., 217-31; 250 NW 594

Right to complete contract. Upon a substantial breach of a building contract and the refusal of the contractor to proceed with the work, the owner of the property may himself take over the completion of the contract ac-

cording to its terms, and charge the cost thereof against the contractor.

Golwitzer v Hummel, 201-751; 206 NW 254

Right to take over work. A building contractor who materially breaches his contract to erect a building at a certain minimum cost, and refuses to proceed with the work, opens the door to the other party to the contract to take over the work and complete it, and recover of the contractor the resulting damages.

Johnson v Vogel, 208-44; 222 NW 864

Well drilling—compensation per foot to ample water, as a basis for a mechanic's lien. A contract to drill a well at an agreed price per foot for each foot drilled, coupled with a guarantee by the driller to secure an ample supply of water with no limitation on the depth of the well, means that the driller is to be paid at the contract price for every foot drilled to whatever depth it is necessary to go to fulfill the guarantee.

Collins v Gard, 224-236; 275 NW 392

IV REQUIREMENT OF CONTRACT WITH OWNER

Contract against lien—validity. An owner of land in leasing his property has a right to contract that improvements made by the lessee on the land shall not be made on credit, and that said property shall not be liable therefor.

Thompson Yards, Inc. v Haakinson & Beaty Co., 209-985; 229 NW 266

Contract forfeiture of improvements. One who purchases property under a contract which provides that, in case of forfeiture, all improvements placed thereon by the purchaser shall belong to the vendor, and who voluntarily surrenders and abandons the property, has no such interest in the property as may be made subject to a mechanic's lien.

Ilten & Taege v Pfister, 202-833; 211 NW 407

Contract with purchaser—forfeiture—effect. One who erects an improvement on land solely under a contract with the purchaser of the land is not entitled to a mechanic's lien on the land when the purchaser has lost all interest in the land because of the legal forfeiture of his contract of purchase; and this is true, even tho the legal owner had knowledge that the improvement was being erected.

Nolan v Wick, 218-660; 254 NW 80

Contract with owners of land in severalty. Fundamentally, there must be a contract with the owner of land as a basis for a mechanic's lien thereon. Evidence reviewed relative to the remodeling by a tenant of a building situated on three separate, contiguous tracts of land owned in severalty by three different owners, and held, insufficient to show the existence of any contract, express or implied, with either of the landowners, even tho said owners did know that the work was being carried on.

Thompson Yards, Inc. v Haakinson & Beaty Co., 209-985; 229 NW 266

Contract with landowner—evidence—sufficiency. Evidence reviewed, and held to justify the finding of the trial court that the owner of realty had authorized his tenant as his agent to contract for material for making repairs to improvements on the farm and that a mechanic's lien was properly foreclosed against said owner and his subsequent grantee.

Iowa Supply v Petersen, 221-978; 267 NW 716

Contract with nonowner of premises. Failure of a mechanic's lien claimant to prove that he furnished the materials in question, under and by virtue of a contract with the owner of the premises or with some one legally representing the said owner, is fatal to his claim to a lien.

Eclipse Lbr. v Murphy Co., 206-1280; 221 NW 930

Improvements by tenant. A mechanic's lien may not be decreed on the land of a landlord, for improvements erected on the land by the tenant with the knowledge of the landlord, the tenant having reserved in the lease the right to remove, at the end of the term, all improvements erected by him.

Lane-Moore Lbr. Co. v Kloppenburg, 204-613; 215 NW 637

Enforcement — contract not foreclosed or made with owner. A mechanic's lien claimant has no lien against intestate property when (1) his claim was not foreclosed within the time allowed by statute, and (2) his contract for furnishing the labor and material was not made with decedent's heirs as owners of the property.

Finn v Grant, 224-527; 278 NW 225

Impossible ratification. A vendor of land who, upon discovering that his vendee has placed repairs and improvements upon the property, does nothing in the way of repudiating the actions of the vendee, cannot be held thereby to have ratified the actions of the vendee and constituted the vendee his agent to make the improvements, when the vendee in making said repairs and improvements never assumed to act for the vendor.

Knapp v Baldwin, 213-24; 238 NW 542

Improvement by tenant with right to remove. A mechanic's lien may not be established for a building erected on land by a tenant under an agreement with the landlord-owner that the tenant may, and if required by the landlord will, remove it when the lease terminates.

Southern Sur. v Serv. Co., 209-104; 227 NW 606

IV REQUIREMENT OF CONTRACT WITH OWNER—concluded

Tenant's agency for landlord—burden of proof on mechanic's lien claimant. Burden of proving agency is upon the one who seeks to impress a mechanic's lien on a landlord's real estate for material furnished at the instance of the tenant, and such agency is not found in a lease which consents to the building of a room on the premises, but specifically provides that no obligation shall be imposed on the landlord therefor, such a contract being one which he had a right to make when no fraud is involved.

Perkins Service v Rosenberg, 226-27; 282 NW 371.

Grounds — contract as necessary element. Before one can successfully maintain a mechanic's lien, he must have a contract with the owner, his agent, trustee, contractor, or subcontractor.

Perkins Service v Rosenberg, 226-27; 282 NW 371.

Priority—avoidance of prior mortgage. A mechanic's lien claimant may not complain of the act of the legal titleholder in taking a mortgage on a part only of a number of lots, instead of asserting his prior right to a mortgage on all the lots, when the mechanic's lien claimant has made no attempt to perfect his lien on any of the lots omitted from the mortgage.

Marker v Davis, 200-446; 204 NW 287

Priority—rights of titleholder under contract of sale. A mechanics' lienholder takes subject to the rights of the legal, recorded titleholder, including the rights of such holder under a contract of sale of the land: e. g., the right of the said holder ultimately to receive a mortgage on every part and parcel of the land as security for the entire unpaid purchase price.

Marker v Davis, 200-446; 204 NW 287

Right to lien—vendor's interest bound—consent to improvement. The term "owner" in the mechanic's lien statutes includes a vendor who expressly or impliedly consents to improvements on the real estate and the interest of said vendor is subject to mechanics' liens for labor and materials furnished for such improvements.

Murray v Kelroy, 223-1331; 275 NW 21

Right to remove fixture as against vendor. A dealer who permanently installs a furnace in a house for a subvendee, under a contract that he (the dealer) shall retain title to the furnace and the right to remove it in case of nonpayment, may not lawfully remove the furnace for nonpayment, as against the vendor, who did not expressly or impliedly consent to such installation, and who sold under a written forfeitable contract, which was, subsequent to the installation of the furnace, forfeited and abandoned by both the original vendee and the subvendee.

Des M. Impr. v Furnace Co., 204-274; 212 NW 551

Vendee's contract to keep in repair — construction. An executory contract by a vendee of premises that he will keep the premises in reasonably good repair cannot be construed as authorizing the vendee to install an entirely new bathroom equipment, and to bind the vendor's interest therefor.

Darragh v Knolk, 218-686; 254 NW 22

Vendee under contract for deed—forfeiture of contract—effect. One who erects or installs an improvement on premises under a contract with a bond-for-deed vendee may establish a mechanic's lien against the vendee's interest, but if said vendee's contract for a deed be legally forfeited and he be left without interest, said lien cannot be established against the vendor's interest unless said vendor required or authorized said improvement.

Darragh v Knolk, 218-686; 254 NW 22

V CONTRACT WITH HUSBAND FOR IMPROVEMENT ON WIFE'S LAND

No annotations in this volume

VI SUFFICIENCY OF CONTRACT

Well drilling—compensation per foot to ample water, as a basis for a mechanic's lien. A contract to drill a well at an agreed price per foot for each foot drilled, coupled with a guarantee by the driller to secure an ample supply of water with no limitation on the depth of the well, means that the driller is to be paid at the contract price for every foot drilled to whatever depth it is necessary to go to fulfill the guarantee.

Collins v Gard, 224-236; 275 NW 392

10273 Security after completion of work.

Action at law aided by attachment. The obtaining of a judgment at law on an account and the sale of property seized on an attachment, do not constitute a waiver of a mechanic's lien for the same account to the extent that the judgment remains unpaid.

Southern Sur. v Serv. Co., 209-104; 227 NW 606

Accounting by trustee—bank inducing lien release by mortgage on horses. Where a bank holds a chattel mortgage on horses, executed as part of an arrangement with the mechanic's lienholder for payment of his lien, the release of which was induced by the execution of the chattel mortgage, a sale of the horses by the bank, under a subsequent chattel mortgage, would constitute the bank a trustee required to account to the mechanic's lienholder, but, without proof that the horses sold were the same

ones in both mortgages, no showing is made of trust funds to be accounted for.

Shimp Bros. v Place, 225-1098; 281 NW 471

10274 Extent of lien.

Dower—not subject to mechanic's lien. A mechanic's lien filed after the death of the titleholder is not a lien on the unassigned dower, of the surviving spouse, in the property in question.

Fullerton Lbr. Co. v Miller, 217-630; 252 NW 760

10275 In case of leasehold interest.

Improvement by tenant—sale and removal. A mechanic's lien may not be enforced against a tenant's leasehold interest and against the improvement erected by him, other than by a sale of the leasehold interest and the improvement as a whole,—as a unit,—when the improvement was erected by the tenant under a specific agreement that the improvement should, upon the termination of the lease, become the property of the lessor. In other words, the improvement may not be separately sold and removed.

Queal Lbr. v Lipman, 200-1376; 206 NW 627

Removal of building. A mechanic's lien is properly decreed against an improvement erected by a tenant on leased ground when the tenant and his lessor have mutually contracted that the tenant might, at the end of the term, remove all improvements placed on the property by the tenant; and this is true, even tho the removal cannot be made without damage to the premises.

Lane-Moore Lbr. Co. v Kloppenburg, 204-613; 215 NW 637

10277 Perfection of lien.

Nonfraudulent claim for nonlienable articles. Principle reaffirmed that the nonfraudulent inclusion in an account of nonlienable items will not nullify the lien to which the materialman is entitled.

Consumers Lbr. v Rozema, 212-696; 237 NW 433

Public improvements—"verified" statement as condition precedent. Failure to file a verified statement of materials or labor employed on a public improvement, as the basis of an action under §3102, C., '97, and Ch 347, 38 GA, is fatal to the validity of the claim; and a mere "certification" is not a "verification".

Francesconi v School Dist., 204-307; 214 NW 882

10278 Time of filing.

Computation of time. The 60-day period within which a subcontractor is permitted to file a statement for a mechanic's lien commences to run when all interested parties regard the subcontractor's contract as completed, and not from a subsequent time when some trifling work is done, for the purpose (1) of correcting defective work, or (2) of furnishing an excuse for further time in which to file the statement.

Nielson v Buser, 207-288; 222 NW 856

Fatal delay in perfecting. A mechanic's lien claimant acquires no lien when he delays the perfecting of his claimed lien by proper filing until long after the expiration of the 90 days given by statute, and until, in the meantime, a mortgage has been taken and foreclosed on the land by parties who had no knowledge of any claim for such nonperfected lien.

Cochran v Ory, 222-772; 269 NW 764

10282 Liability of owner to original contractor.

Payment of subcontractors—receipts and waivers. In action for foreclosure of a mechanic's lien, the amount due to subcontractors must be determined when the contractor fails to furnish receipts and waivers of claims for liens as required by statute.

Newell Co. v Fyler, (NOR); 230 NW 322

10283 Liability to subcontractor after payment of original contractor.

Right to lien—misapplication of payments. A subcontractor who receives money from the contractor with knowledge that the money had been paid to the contractor by the owner of the improvement may not apply said funds on other claims which he holds against the contractor.

McDonald Mfg. Co. v Leverett, 203-1215; 211 NW 849

Establishment — misapplied payments. A subcontractor who attempts to establish his lien against the premises is very properly charged with the amount of payments received by him from the contractor with knowledge that they came from the owner and wrongfully applied by crediting them on an antecedent debt of the contractor.

Hawkeye Lbr. v Day, 203-172; 210 NW 430

Payment of subcontractors—receipts and waivers. In action for foreclosure of a mechanic's lien, the amount due to subcontractors must be determined when the contractor fails to furnish receipts and waivers of claims for liens as required by statute.

Newell Co. v Fyler, (NOR); 230 NW 322

10287 Priority over other liens.

Discussion. See 17 ILR 516—Mortgages and mechanics' liens

ANALYSIS

I PRIORITY OVER CONVEYANCES, LIENS, AND INCUMBRANCES

(a) PRIORITY IN GENERAL

Decree does not inure to nonappellant. Where an equitable decree adjudged (1) that one of two assignees of the same fund took priority over the other assignee, but (2) that certain mechanics and dealers had lienable claims on said fund prior to both of said assignees, and where, on appeal solely by the defeated assignee, it was adjudged not only (1) that the appellant-assignee took priority over the appellee-assignee, but (2) that said mechanics and dealers had no lienable claims on said fund, held that the judgment on appeal that the mechanics and dealers had no lienable claims on said fund did not inure to the benefit of the appellee-assignee. In other words, the appellee-assignee was still bound by the decree of the trial court because he did not appeal therefrom.

Ottumwa Works v O'Meara, 208-80; 224 NW 803

(b) CONVEYANCES

Sale on foreclosure. A purchaser of land at mechanic's lien foreclosure sale (there being no redemption) acquires the entire title of the then owner of the property, and such right is necessarily transmitted to the purchaser's grantee and to all others claiming title from such source. It follows that a mechanic's lien claimant has no standing who delays the filing of his lien against the same owner until after said sale, even tho he files it before the issuance of the sheriff's deed.

Soltow v Roth, 204-665; 215 NW 705

(c) MORTGAGES

Improvements contemplated—effect on priority of purchase money mortgage. Contract of sale held not to contemplate improvements to the purchased premises so that mechanic's lien has priority over seller's purchase money mortgage.

Queal Lbr. v McNeal, 226-631; 284 NW 479

Intent to give—constructive notice. When the mortgagor has told materialman that mortgagor intended to give a mortgage for the purchase price, materialman, claiming mechanic's lien, has constructive notice of such prior mortgage of record, even tho the acknowledgment thereof is defective.

Queal Lbr. v McNeal, 226-631; 284 NW 479

Mortgage to finance improvement. A mortgage on unimproved land in an amount much in excess of the value of the land, made for the specific purpose of enabling the owner to obtain funds with which to erect, and with which he does erect, an improvement on the land, (1) carries in equity a lien on the entire property as improved, superior to the mechanic's lien of a claimant who at all times had full knowledge of the purpose of the mortgage, and (2) carries, under the statute (§3095, C., '97), a superior right to the entire proceeds of a sale of the improved property.

Crawford-Fayram Lbr. Co., v Mann, 203-748; 211 NW 225

Priority—actual notice of mortgage not required. Statute making mechanic's lien inferior to mortgage, where materialman has notice of the mortgage, construed not to require actual notice.

Queal Lbr. v McNeal, 226-631; 284 NW 479

Priority—belated filing of lien. A mechanic's lien, tho not filed within the statutory limit of time, is prior in right to a mortgage on the premises executed during the construction of the improvement in question.

American Bk. v West, 214-568; 243 NW 297

Priority—mechanic's lien. Materialman is not entitled to priority of his mechanic's lien over previously recorded mortgage to the extent of balance of mortgage funds not paid to borrower who built the house, when such amount was past due to mortgagee and was applied on the mortgage debt.

Queal Lbr. v McNeal, 226-631; 284 NW 479

Priority — mortgage less than permitted amount. Materialman, claiming mechanic's lien, has no priority to extent of $300 over prior recorded mortgage, where a contract for the sale of land upon which the building was constructed permitted a $3200 mortgage, but contract vendee mortgaged it for only $2900.

Queal Lbr. v McNeal, 226-631; 284 NW 479

Priority over mortgage—time of furnishing material. Where material is furnished to a building for one property, and part of the material is left over and taken to another property for which the materialman also furnishes material and upon which a mechanic's lien is being asserted, the materialman may not incorporate into his claim against the second property the cost of such remaining material and thus carry back the first item of his claim for a mechanic's lien to defeat an intervening mortgage.

Queal Lbr. v McNeal, 226-631; 284 NW 479

Priority on building over prior mortgage on land. A mechanic's lien on a new and independent building on mortgaged land for material furnished in the construction of such building may be decreed priority on the build-

ing, with right to remove it in case such removal can be effected without substantial injury to either the land or the building.

Lincoln Ins. v McSpadden, 211-97; 232 NW 824

Priority—title to realty not in purchaser of materials. In determining priority of mechanic's lien for materials furnished prior to time mortgage was recorded, the court properly denied priority to mechanic's lien when record title to the property was not in the purchaser of the materials, and materialman was charged with notice of an unrecorded contract which provided that the mortgage was to be executed.

Queal Lbr. v McNeal, 226-631; 284 NW 482

Priority over equitable mortgage. The making and acceptance of a written application for a loan, together with a written agreement to secure the loan on land in which the proposed borrower then had no interest whatever (tho he later acquired the title), no money being then advanced on the strength of the acceptance, create no equitable mortgage which will be superior to mechanics' liens accruing prior to the actual execution and recording of the contemplated mortgage.

Iowa Co. v Plewe, 202-79; 209 NW 399

Waiver by conduct. A materialman who files his lien after inducing a mortgagee to take his mortgage on the express or implied promise that no lien will be filed, will not be decreed priority over the mortgage.

Fullerton Lbr. Co. v Miller, 217-630; 252 NW 760

Waiver—mortgage to secure funds. Proof, provided it is clear, satisfactory, and convincing, that a materialman agreed that the owner of land should, by a mortgage on the land, raise the funds with which to pay for the materials going into an improvement, and that such mortgage was so executed during the period of construction, subordinates the lien of said materialman to the lien of the mortgage.

Eclipse Lbr. v Bitler, 213-1313; 241 NW 696

(d) VENDOR'S LIEN

Improvement by vendee. A mechanic's lien for an improvement erected by a vendee cannot have precedence over the vendor's lien and claim for the unpaid purchase price when the improvement was not for the vendor's "use or benefit", and when, in its last analysis, the vendor simply knew that the vendee was making the improvement.

Schoeneman Lbr. v Davis, 200-873; 205 NW 502

Rights of titleholder under contract of sale. A mechanic's lien claimant who commences to furnish material to a vendee of land while the recorded title is in the vendor, is chargeable with notice of the contract rights of the vendor.

Magnesite Products Co. v Bensmiller, 207-1303; 224 NW 514

Unremovable repairs and improvements. Where the vendee of land, exclusively on his own authority, places repairs and improvements upon an existing building on the land of such a nature that they cannot be removed without material damage to the building, the vendor's lien for the purchase price of the land is superior to the lien of the mechanic's lien claimants both as to the real estate, and as to repairs and improvements.

Knapp v Baldwin, 213-24; 238 NW 542

Vendor's lien—when superior to mechanic's lien. A vendor's lien for the purchase price of land sold on installments without obligating or requiring the vendee to make any improvement on the property is superior to mechanics' liens growing out of the repair and improvement of a building existing on the land when it was sold; and this is true even tho the vendor may have expected that the vendee would or might make such repairs or improvements, or may have actually known that the vendee was making them.

Knapp v Baldwin, 213-24; 238 NW 542

10289 Priority as to buildings over prior liens upon land.

Priority over prior mortgage. A mechanic's lien for materials furnished for a grandstand, on lands belonging to a fair association, to replace one burned, may, in a proper case, have priority over a prior mortgage on the land when the structure can be removed without damage to the realty; and this is true tho the insurance on the burned structure was applied in payment of the material going into the new structure, a fact which the materialman did not know until long after the building had been completed.

Spieker v Fair Assn., 216-424; 249 NW 415

10290 Foreclosure of mechanic's lien when lien on land.

Appeal—triable de novo. An appeal from judgment of dismissal in action to foreclose mechanic's lien is triable de novo in supreme court.

Sloan Co. v Hall, (NOR); 206 NW 573

Curtailing right of mortgagee. Whether a mortgagee of unimproved land may constitutionally be deprived of a lien on future-erected and permanent improvements on the land, quaere.

Crawford-Fayram Lbr. Co. v Mann, 203-748; 211 NW 225

Enforcement—modern house—removal without undue loss. The trial court's finding in a

mechanic's lien foreclosure that a house built on a concrete foundation, having a sewer and other improvements, could be removed from the soil without undue loss or damage, held justified from the evidence; especially when the house was on a farm possessing in addition a full complement of farm buildings, including another house.

Anfinson v Cook, 224-833; 276 NW 762

Enforcement—modern house—court discretion in removal. The fact that a building is modern, with gas, sewer, and water connections to the soil, does not necessarily, in a mechanic's lien foreclosure, take it from the realm of discretion of the trial court to order it removed under proper evidence.

Anfinson v Cook, 224-833; 276 NW 762

Priority—estoppel. A mortgagee cannot be held estopped to insist on the priority of his mortgage over the mechanic's lien of a materialman on an indefinite showing of the conduct of the mortgagee on which the materialman never relied.

First Bank v Westendorf, 213-475; 239 NW 73

Priority on building over prior mortgage on land. A mechanic's lien on a new and independent building on mortgaged land for material furnished in the construction of such building, may be decreed priority on the building with right to remove it in case such removal can be effected without substantial injury to either the land or the building.

Lincoln Ins. v McSpadden, 211-97; 232 NW 824

Spieker v Fair Assn., 216-424; 249 NW 415

Refusal of proportional distribution on sale. Failure of the court to decree a proportional part of the proceeds of a mortgage foreclosure sale to the prior mortgagee and a proportional part to the subsequent mechanic's lien holder for additions, repairs, and betterments is harmless error when the property sold simply for the amount of the mortgage and the mechanic's lien holder did not redeem.

Hedges Co. v Holland, 203-1149; 212 NW 480

Right to remove improvement. Principle recognized that the removal from land of a modern residence, as ordinarily constructed, entails unjustifiable waste.

Crawford-Fayram Lbr. Co. v Mann, 203-748; 211 NW 225

First Bank v Westendorf, 213-475; 239 NW 73

Sale en masse and division of proceeds. Where land with a residence thereon was mortgaged and the residence burned and was replaced by a new one, the court cannot order a sale of the land and so divide the proceeds as to give the mortgagee priority on the land, and the mechanic's lien claimant priority on the new residence, when there is no evidence demonstrating how the division should be made; and especially when the mortgagee has surrendered the insurance on the old residence and allowed it to be expended on the new residence.

First Bank v Westendorf, 213-475; 239 NW 73

Unremovable repairs and improvements. Where the vendee of land, exclusively on his own authority, places repairs and improvements upon an existing building on the land of such a nature that they cannot be removed without material damage to the building, the vendor's lien for the purchase price of the land is superior to the lien of the mechanic's lien claimants both as to the real estate, and as to repairs and improvements.

Knapp v Baldwin, 213-24; 238 NW 542

10293 Time of bringing action—court.

Adjudication and loss of right. The right to foreclose a mechanic's lien is wholly lost by the act of the claimant, when made a party to mortgage foreclosure, (1) in filing a cross-petition for foreclosure of his lien without service of notice of such filing and of hearing thereon; (2) in filing an answer which, in effect, repeats all the allegations of the cross-petition; (3) in allowing the proceedings to go to decree, which omitted any foreclosure of the mechanic's lien, but determined the status and priority of all parties, and which ordered a sale of the premises and foreclosed all subordinate parties of all rights after sale, except the right of redemption; and (4) in failing to appeal from said decree.

Matthews v Quaintance, 200-736; 205 NW 361

Contract limitation — unreasonableness. A contract provision in an indemnity bond which requires the obligee to begin suit thereon before the amount of his recovery on the bond is determinable, is unreasonable, and therefore unenforceable. In such case, the general statute which limits actions applies. So held as to a building performance bond which involved mechanics' liens.

Cook v Heinbaugh, 202-1002; 210 NW 129

Sale on foreclosure—effect. A purchaser of land at mechanic's lien foreclosure sale (there being no redemption) acquires the entire title of the then owner of the property; and such right is necessarily transmitted to the purchaser's grantee and to all others claiming title from such source. It follows that a mechanic's lien claimant has no standing who delays the filing of his lien against the same owner until after said sale, even tho he files it before the issuance of the foreclosure deed.

Soltow v Roth, 204-665; 215 NW 705

10295 Kinds of action.

Receiver—appointment. The appointment in mechanic's lien foreclosure proceedings of a receiver of the rents, at the instance of a vendor and lien claimants, may be proper when the equitable owner of the property in question is insolvent, and when the property itself is inadequate security for the established claims.

Des M. Marble v McConn, 210-266; 227 NW 521

Foreclosure—amount due. Plaintiff's failure to prove that some amount is due him necessarily precludes a foreclosure.

Hagen v Reid, 207-39; 222 NW 377

Performance—well drilling—faulty pump. A well driller's guarantee to secure an ample supply of water has been fulfilled when the evidence in a mechanic's lien foreclosure fairly establishes that there is a constant head of 180 feet of water in the well, and the lack of ample water was due entirely to the improper pump line furnished by the owner.

Collins v Gard, 224-236; 275 NW 392

10296 Limitation on action.

Contract not foreclosed or made with owner. A mechanic's lien claimant has no lien against intestate property when (1) his claim was not foreclosed within the time allowed by statute, and (2) his contract for furnishing the labor and material was not made with decedent's heirs as owners of the property.

Finn v Grant, 224-527; 278 NW 225

Principal contractor. An action to enforce the mechanic's lien of a principal contractor is not barred until the lapse of two years from the expiration of 90 days for filing the claim.

Fryman v McCaffrey, 208-531; 222 NW 19; 224 NW 95

Statute, not contract, governs. Where an owner of land in a contract of sale requires the vendee to make certain improvements on the property within a certain time, it cannot be held that the time for the enforcement of the mechanic's lien commences to run from the time the vendee contracts to have the improvements finished.

Consumers Lbr. v Rozema, 212-696; 237 NW 433

When action deemed commenced. An action to enforce a mechanic's lien is deemed commenced at the time the original notice of the action is delivered to the sheriff for immediate service.

Consumers Lbr. v Rozema, 212-696; 237 NW 433

CHAPTER 452

LABOR AND MATERIAL ON PUBLIC IMPROVEMENTS

10299 Terms defined.

Atty. Gen. Opinions. See '28 AG Op 46; '32 AG Op 166

Statute not retroactive.

Francesconi v School Dist., 204-307; 214 NW 882

Bonds—scope. A bond conditioned to pay all subcontractors for "materials" furnished embraces "fuel", when the statute under which the bond is given defines "materials" as including "fuel".

Standard v Marvill, 201-614; 206 NW 37

Right to lien — groceries, meats, oil, and money loaned.

Teget v Drain. Ditch, 202-747; 210 NW 954

See Monona County v O'Connor, 205-1119; 215 NW 803

Right to lien—"materials, feed, provisions, and fuel".

Aetna Cas. v Kimball, 206-1251; 222 NW 31

Nonlienable claims. Claims for labor and materials furnished to a contractor on a public drainage improvement in repairing the machinery which the contractor employed on the work are not lienable on the drainage funds.

Ottumwa Boiler v O'Meara, 206-577; 218 NW 920

Nonlienable claims. Claims for meals furnished employees of a contractor on a public improvement are not lienable; likewise claims for groceries bought by an employee for his personal use.

Coon River Assn. v Constr. Co., 215-861; 244 NW 847

Lumber for cement forms. Lumber furnished to a contractor on a public improvement, solely for the purpose of building forms to hold cement or concrete while it is solidifying, is not lienable under the statute providing for quasi mechanics' liens growing out of public improvements.

Melcher Lbr. Co. v Robertson Co., 217-31; 250 NW 594

Public improvements—estimated quantities as basis for contract—variation with specifications not fatal. In awarding a contract to build an electric plant, the function of plans and estimated quantities is to permit a uniform comparison of bids, and the requirement

of "unit prices", as a means of payment for variations from the estimated quantities, indicates their variable character, so certain variations between the plans and specifications will not result in a failure of competitive bidding invalidating a contract based thereon.

Interstate Co. v Forest City, 225-490; 281 NW 207

10300 Public improvements—bond and conditions.

Atty. Gen. Opinions. See '25-26 AG Op 26; '36 AG Op 527

Assignments of contracts—priorities.

Ottumwa Boiler v O'Meara, 206-577; 218 NW 920

Coon River Assn. v McDougall, 215-861; 244 NW 847

Statutory bond not deemed common-law bond. A statutory bond may not be treated as a common-law bond.

Zeidler Co. v Ryan & Fuller, 205-37; 215 NW 801

Execution and delivery in foreign state. A statutory bond which is executed and delivered in a foreign state for the performance of a contract in this state will be construed in accordance with the laws of this state when such was the intention of the parties, as shown (1) by the nature of the transaction, (2) by the subject matter, and (3) by the attending circumstances.

Philip Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495

Statutory bonds — sufficiency. A statutory bond conditioned to pay a subcontractor on a public improvement the amount owed him by the principal contractor need not be signed by the latter.

Ft. Dodge Co. v Miller, 200-1169; 206 NW 141

Statutory bonds—estoppel. A surety on a bond given for the performance of a public building contract, and containing some of the conditions which the statute mandatorily prescribes for such bond,—anything in any contract to the contrary notwithstanding,—will be deemed a statutory bond, with all the statutory conditions impliedly inserted therein.

Philip Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495

See Francesconi v School Dist., 204-307; 214 NW 882

Action on bond—accrual. The right of a public corporation to bring an action on a public contractor's bond conditioned to hold the municipality harmless from all loss which it may suffer in consequence of the contractor's default does not accrue until after judgment is rendered against the city and the same is paid by the city.

Waukon v Surety Co., 214-522; 242 NW 632

Construction against party using words—premium on contractor's bond. On the question whether, under a written application for a contractor's bond on a grading contract, the contractor had agreed to pay, when the contract was fully executed, an additional percentage premium on the amount received by him on "overhaul", doubts and uncertainties arising from the noncomprehensiveness of the language used will be construed most strongly against the insurer who solely drafted the application on information solely obtained by himself, without fraud on the part of the contractor.

Iowa Co. v Cram, 209-424; 228 NW 24

Bond of contractor—breach—no piecemeal recovery. Recovery on a contractor's bond may not be piecemeal, consequently that part of trial court's decree, holding its judgment is not a bar nor an adjudication of any future claim against the bond, will be stricken on appeal.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Contractor's bond — implied condition — no acceptance of hidden defects. A bond filed by a contractor, assuming the sole responsibility of constructing a water-tight dam for a city reservoir, contains the implied condition that acceptance by the city of the work will not bar recovery by the city on account of defects unknown and undiscovered at the time of acceptance.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Nonpermissible assumption of liability. A statutory bond for the performance of a public improvement contract is void insofar as it attempts to assume liability for the nonperformance of independent obligations which the statute does not contemplate, but which are voluntarily inserted into the contract; and this is true as to the surety, even tho the public authorities have on hand and undistributed, a fund arising under the contract and sufficient to discharge such nonstatutory obligations.

Monona County v O'Connor, 205-1119; 215 NW 803

Ottumwa Boiler v O'Meara, 206-577; 218 NW 920

Breach of contract to build. In an action for damages based on alleged breach of a written contract for the erection, under written specifications, of a structure (especially when it is of magnitude and complexity), general conclusion allegations by plaintiff of the use by defendant of defective materials and workmanship must, on proper motion, be accompanied and supported by fact allegations showing, with reasonable certainty, (1) wherein said material and workmanship were defective, (2) the location of the several alleged defects, and (under some circumstances) when

each of said defects became manifest, and (3) the particular specification which was violated by using such material and workmanship.

Osceola v Gjellefald Co., 220-685; 263 NW 1

Leakage through dam—causal connection with contract violation. In an action on a contractor's bond because of leakage through a dam, a defense that no causal connection existed between the violation of the specifications and the damage, inasmuch as extreme heat and freezing as natural causes could also produce the leakage between the cement slabs, raises a fact question for the court, in the absence of a jury, to determine along with other circumstances as to whether this explanation sufficiently justifies a 12- to 18-inch separation of the concrete slabs.

Osceola v Gjellefald Co., 225-215; 279 NW 590

City engineer supervising construction—no abrogation of contract duty. The fact that a city had an engineer directing the construction of a dam does not relieve the contractor of his specified duty to make a water-tight dam when contractor practically concedes that, had he followed the specifications, the dam would hold water.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Damages—superior replacement construction—contractor nonliable. A contractor should not be required to pay in damages for a quality and quantity of replacement construction superior to what he originally contracted to do.

Osceola v Gjellefald Co., 225-215; 279 NW 590

10302 Deposit in lieu of bond.

Atty. Gen. Opinion. See '36 AG Op 527

10303 Amount of bond.

Contractor's bond—implied condition—no acceptance of hidden defects. A bond filed by a contractor, assuming the sole responsibility of constructing a water-tight dam for a city reservoir, contains the implied condition that acceptance by the city of the work will not bar recovery by the city on account of defects unknown and undiscovered at the time of acceptance.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Successive actions by several beneficiaries. A recovery on a statutory bond by one beneficiary constitutes no bar to an action by another beneficiary to the extent of the unexhausted penalty of the bond.

Philip Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495

10304 Subcontractors on public improvements.

Settlement between contractor and subcontractor—effect. In an action by a second subcontractor on a bond for the performance of a contract for a public improvement, it is no defense, as to claims properly filed and established, that the principal contractor has fully settled with the first subcontractor, especially when the principal contractor knew that plaintiff was a subcontractor.

Ryerson v Schraag, 211-558; 229 NW 733

10305 Claims for material or labor.

Atty. Gen. Opinions. See '28 AG Op 64; '30 AG Op 142; '32 AG Op 167

Failure to file with proper officer—effect. The failure of a laborer or materialman on a public improvement to make a timely and proper filing of his claim with the officer designated by statute, even tho after action is brought he files his claim with the court, deprives him of all right to a judgment against the surety on the contractor's bond in case the retained percentage of the contract price is insufficient to pay his claim.

Southern Sur. v Jenner, 212-1027; 237 NW 500

Lumber for cement forms nonlienable. Lumber furnished to a contractor on a public improvement, solely for the purpose of building forms to hold cement or concrete while it is solidifying, is not lienable under the statute providing for quasi-mechanics' liens growing out of public improvements.

Melcher Co. v Robertson Co., 217-31; 250 NW 594

Quasi-mechanics' liens—nonlienable claims. Claims for meals furnished employees of a contractor on a public improvement are not lienable; likewise claims for groceries bought by an employee for his personal use.

Coon River Co-op. v McDougall Co., 215-861; 244 NW 847

Employee of materialman. One who assists a materialman in producing the material which the materialman has contracted to furnish to a county for highway purposes has no quasi-lien on, or claim to, the fund due the materialman from the county.

Nolan v Larimer, 218-599; 254 NW 45

Fatally defective petition. A petition by a subcontractor on a public improvement to establish, on public funds due his contractor, his claim for rentals of machinery leased to said contractor and used "in the construction" of said improvement, is fatally defective when it fails to allege how long or to what definite extent said machinery was used "in" said construction. Whether the leasing of machinery

and the use thereof constitutes the furnishing of "services" within the meaning of the statute, quaere.

Byers Mach. v Highway Com., 214-1347; 242 NW 22

Itemized statement—sufficiency. A statement for labor employed by the week upon a public improvement is sufficiently itemized when it shows the dates between which the labor was performed; likewise a statement for labor which consists of duly indorsed weekly time checks which show the date and number of hours worked during each day, even tho the statement fails specifically to identify the building on which the work was performed.

Francesconi v Sch. Dist., 204-307; 214 NW 882

Materialman not subcontractor. A party who contracts to furnish and deliver gravel to a contractor on a public improvement, at the contractor's place of work, and at a stated price per ton, is not a subcontractor but is a materialman. It follows that demands for labor, gasoline, and oil furnished to various parties, in the execution of a part of the gravel contract which the materialman sublets, cannot be enforced against the retained percentage of the contract price in the hands of the public authorities.

Forsberg v Const. Co., 218-818; 252 NW 258

"Verified" statement as condition precedent. Failure to file a verified statement of materials or labor employed on a public improvement, as the basis of an action under §3102, C., '97 and Ch 347, 38 GA, is fatal to the validity of the claim and a mere "certification" is not a "verification".

Francesconi v School Dist., 204-307; 214 NW 882

Use of materials—burden of proof. A subcontractor on a public improvement is not entitled to have his claim established against the retained portion of the contract price due the contractor unless he establishes the fact that the materials furnished by him were actually used "in the construction" of the improvement, that is, were used in some proper way in connection with said construction work.

Rainbo Oil v *McCarthy* Co., 212-1186; 236 NW 46

Place of filing claims. Claims for labor or materials employed on a public improvement were properly filed with the warrant-issuing officer, as provided by Ch 347, 38 GA, even tho a prior enacted and existing statute (§3102, C., '97) provided for filing with the warrant-paying officer.

Francesconi v School Dist., 204-307; 214 NW 882

"Warrant-issuing officer" determined. (Statute now changed.)

Missouri Gravel v Surety Co., 212-1322; 237 NW 635

10306 Highway improvements.

Atty. Gen. Opinions. See '30 AG Op 142; '32 AG Op 166

Primary road improvements. Under prior statutes (§3102, C., '97, and Chs. 237 and 380, 38 GA) now repealed, claims for labor or material furnished by subcontractors on primary road improvements were fileable with the county auditor.

Fuller & Hiller v Shannon, 205-104; 215 NW 611

10308 Time of filing claims.

Belated filing of claim and bringing of action. Failure of a subcontractor on a municipal improvement to file his claim and to bring his action on the bond of the principal contractor within a stated statutory time is fatal to the right to maintain such action when such timely filing and bringing of action is made a statutory condition precedent to the right to bring the action.

Zeidler Co. v Ryan & Fuller, 205-37; 215 NW 801

Belated filing of claim—belated suit—effect. A materialman who furnishes material to a contractor who is constructing a public improvement is twice barred of any right to enforce his claim against the municipality or against the surety on the contractor's bond, (1) when he files his claim after the expiration of the 30 days given him by statute, and after the municipality has fully settled with the contractor (except for a merely nominal sum), and (2) when he fails to commence action to enforce his claim until after the expiration of the six months given him by statute in which to commence such action.

Perkins Co. v School Dist., 206-1144; 221 NW 793

"Completion and final acceptance." "The completion and final acceptance" of a public improvement, within the meaning of this section, may be made by the municipality by acts other than a formal resolution.

Perkins Co. v School Dist., 206-1144; 221 NW 793

Failure to make timely filing of claim. Under a statute making the liability of a surety on a statutory bond for the performance of a public contract dependent on the filing by the claimant of a verified statement of the goods sold, within a specified time after the goods are "furnished", it is not necessarily sufficient to file such statement within the time specified by the statute, after the goods are

"used" by the buyer, even tho the goods were bought under a contract providing that the buyer might return such portion as he did not use.

Queal Lbr. v Anderson, 211-210; 229 NW 707

10309 Claims filed after action brought.

Quasi-mechanics' liens—failure to file with proper officer—effect. The failure of a laborer or materialman on a public improvement to make a timely and proper filing of his claim with the officer designated by statute, even tho after action is brought he files his claim with the court, deprives him of all right to a judgment against the surety on the contractor's bond in case the retained percentage of the contract price is insufficient to pay his claim.

So. Sur. Co. v Jenner, 212-1027; 237 NW 500

10310 Payments under public contracts.

Atty. Gen. Opinions. See '25-26 AG Op 73, 85, 86, 102, 338; '28 AG Op 312

Construction aside contract. A public drainage contractor may not recover for construction work which is neither provided for in his contract nor ordered nor approved by the board of supervisors, even tho it was ordered by the engineer in charge.

Gjellefald v Drainage Dist., 203-1144; 212 NW 691

Interest on deferred payment. Interest on long deferred payments due to a contractor may properly be ordered.

Gjellefald v Drainage Dist., 203-1144; 212 NW 691

Ten percent retention fund—loss of status. The "ten percent retention fund", which a public corporation is required to hold for at least 30 days following the completion and acceptance of a public improvement under contract, loses its statutory status immediately after the expiration of said 30 days when no claims for labor or materials have been filed.

Southern Sur. v Jenner, 212-1027; 237 NW 500

Failure to include statutory provisions. A contract let by a town for the erection of a municipal light and power plant was not void for failure to require that 10 percent of the contract price be retained to cover possible claims for labor and materials as required by statute, when the statute protects the persons furnishing labor and materials on public contracts without regard for the express provisions of the contract.

Weiss v Woodbine, 228- ; 289 NW 469

10311 Inviolability and disposition of fund.

Atty. Gen. Opinions. See '25-26 AG Op 86, 102; '28 AG Op 312

Lien on retained percentage only. Claimants for material, labor, or services furnished in the execution of a public improvement contract can assert no claim to or lien on any part of the monthly estimates except to or on that part of the estimates which the municipality holds back as a retained percentage.

Federal Sur. v Morris Plan, 213-464; 239 NW 99

10312 Retention of unpaid funds.

Atty. Gen. Opinions. See '25-26 AG Op 73, 85, 86, 102; '28 AG Op 312; '30 AG Op 148; '32 AG Op 166

Premature payment to contractor—effect. The fact that a municipality pays its contractor immediately after the completion and final acceptance of a public improvement becomes quite immaterial when the materialman fails to file his claim or to commence action to enforce his claim until after the time provided by statute.

Perkins Co. v School Dist., 206-1144; 221 NW 793

Failure to file claim—right of public corporation. The public corporation is under no legal obligation to retain any percentage of the contract price beyond 30 days after the completion and acceptance of the work if no claims have been filed by laborers or materialmen.

Southern Sur. v Jenner, 212-1027; 237 NW 500

10313 Optional and mandatory actions —bond to release.

Atty. Gen. Opinions. See '25-26 AG Op 102; '28 AG Op 312; '30 AG Op 148; '32 AG Op 166

Accrual of action—contractor's bond. The right of a public corporation to bring an action on a public contractor's bond conditioned to hold the municipality harmless from all loss which it may suffer in consequence of the contractor's default does not accrue until after judgment is rendered against the city and the same is paid by the city.

Waukon v Sur. Co., 214-522; 242 NW 632

Assignment as security—effect. The second subcontractor on a public improvement may recover on the bond given by the principal contractor for the full amount of his properly filed and established claim notwithstanding the fact that he has received from the first subcontractor an assignment of the amount due the latter from the principal contractor (1) when, at the time of the assignment, the principal contractor had already honored a trade acceptance for the entire amount due to the first subcontractor, and (2) when the second subcontractor had, consequently, never received anything on his assignment.

Ryerson v Schraag, 211-558; 229 NW 733

Bond as written contract. The statute of limitation relative to unwritten contracts manifestly has no relevancy to an action for damages consequent on the breach of the statutory bond of a public contractor.

Waukon v Sur. Co., 214-522; 242 NW 632

"Completion of work". Where a statutory provision declares that action may not be brought on the bond of a contractor "after six months of the completion" of a public improvement, the improvement will be deemed completed when the contractor has substantially performed on the improvement all that he contracted to perform, has turned it over to the public authorities, and it is immaterial that controversy exists as to extras, or that trifling defects or shortcomings afterwards come to light or that the formal certificate of acceptance was delayed.

Daniels Lbr. v Ottumwa Co., 204-268; 214 NW 481

Dismissal before trial—effect. The dismissal of an action by plaintiff before trial, even tho it is an equitable action which involves the liability of a defendant city relative to various claimants for work and materials on a public improvement, deprives the court of all jurisdiction thereafter to proceed with the trial and adjudicate any right of the dismissing plaintiff, when the pleadings of the defendant are solely defensive.

Eclipse Lbr. v City, 204-278; 213 NW 804
Eclipse Lbr. v Kepler, 204-286; 213 NW 809

Belated filing of claim and bringing of action —effect. Failure of a subcontractor on a municipal improvement to file his claim and to bring his action on the bond of the principal contractor within a stated statutory time is fatal to the right to maintain such action when such timely filing and bringing of action is made a statutory condition precedent to the right to bring the action.

Zeidler Co. v Ryan, 205-37; 215 NW 801

Belated filing of claim—belated suit—effect. A materialman who furnishes material to a contractor who is constructing a public improvement is twice barred of any right to enforce his claim against the municipality or against the surety on the contractor's bond (1) when he files his claim after the expiration of the 30 days given him by statute, and after the municipality has fully settled with the contractor (except for a merely nominal sum), and (2) when he fails to commence action to enforce his claim until after the expiration of the six months given him by statute in which to commence such action.

Perkins Co. v School Dist., 206-1144; 221 NW 793

Equitable action—adjudication. The general equitable action, authorized by this section, in favor of any party interested under a public improvement contract, may be utilized for two purposes, to wit: (1) to adjudicate the rights of the various parties to the contract funds retained by the public corporation, and (2) to adjudicate the liability, to said parties, of the surety on the contractor's bond to the municipality; but a decree in such action is not an adjudication of the right of the municipality to recover on the said bond when such issue was in no manner presented in such action.

Waukon v Surety Co., 214-522; 242 NW 632

Limitation of actions. The statutory provision authorizing a public corporation to bring an action within a specified time to adjudicate the rights of claimants to the funds retained by the municipality imposes no limitation of time on the right of the municipality to proceed against the surety on the bond held by it.

Waukon v Surety Co., 214-522; 242 NW 632

Provisional and conditional order of condemnation. When the court on appeal in an action to adjudicate rights to a fund growing out of a public improvement, is in a quandary as to how far an admitted claim can be enforced against a fund belonging to a nonparty to the action, it may enter a provisional and conditional order of condemnation.

Commercial Bank v Broadhead, 212-688; 235 NW 299

Relief notwithstanding partial failure of recovery. A subcontractor on a public improvement who, in an equitable action, establishes a contract right of recovery against the principal contractor, is entitled to judgment accordingly, notwithstanding the fact that, because of his noncompliance with the statute, he is denied recovery either against the surety for the principal contractor, or against the municipality, or against the undistributed funds in the hands of the municipality.

Zeidler Co. v Ryan, 205-37; 215 NW 801

Statutory bond—subrogation of surety. A surety on a statutory bond for the performance of a public improvement contract who has performed his statutory contract at an expense which exceeds the balance on hand and due under the contract is ipso facto subrogated to the right of the principal contractor to such balance, in preference to subcontractors who hold claims which arise out of contract obligations which are not contemplated by the statute, but which were, nevertheless, inserted into the contract.

Monona County v O'Connor, 205-1119; 215 NW 803

10315 Adjudication—payment of claims.

Right to personal judgment. One who sues on and establishes his claim against a materialman for a county is entitled to a personal judgment against the materialman, even tho his prayer for a lien on the amount due the materialman from the county is denied.

Nolan v Larimer, 218-599; 254 NW 45

When interest unallowable. Interest on claims of laborers and materialmen on public improvements will not be allowed when the

fund from which payment must be made is insufficient to pay the principal of all allowed claims.

Southern Sur. v Jenner, 212-1027; 237 NW 500

10318 Attorney fees.

Nonpermissible allowance by court. The allowance by the court of attorney fees to a party not contemplated by the statute is manifestly erroneous.

Teget v Drain. Ditch, 202-747; 210 NW 954

10319 Unpaid claimants—judgment on bond.

Issue of liability. In an action on a bond running to a subcontractor on a public improvement and conditioned to pay whatever amount may be found due him from the principal contractor, a stipulation for judgment signed by the said contractor and subcontractor is material and competent on the issue of the proper amount due the subcontractor.

Ft. Dodge Co. v Miller, 200-1169; 206 NW 141

10323 Public corporation—action on bond.

Acceptance of completed construction work—undiscoverable defects—recovery. In the absence of fraud or mistake, the acceptance of construction work by a city bars recovery on the contractor's bond, except as to defects undiscoverable or unknown at the time of acceptance; however, the fraud or mistake necessary to overcome the acceptance must be alleged and proven.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Bond of contractor—breach—no piecemeal recovery. Recovery on a contractor's bond may not be piecemeal, consequently that part of trial court's decree, holding its judgment is not a bar nor an adjudication of any future claim against the bond, will be stricken on appeal.

Osceola v Gjellefald Co., 225-215; 279 NW 590

CHAPTER 453

MINER'S LIEN

10324 Nature of miner's lien.

Agreement for payment in stock—effect. A miner who, under a contract with a lessee, opens a mine, is entitled to a lien on the land of the lessor to the extent that his work has enhanced the value of the land, notwithstanding the fact that the work was done under an agreement to receive part payment in corporate stock, which was never delivered.

Tracey v Judy, 202-646; 210 NW 793

Priority. A miner who opens and works a coal mine for a lessee has a lien on the leasehold prior to a mortgage on the entire tract of land, the mortgage not assuming to cover such leasehold.

Ford v Dayton, 201-513; 207 NW 565

Priority. The lien of a miner on land for work in opening a mine thereon is superior to a mortgage given within the lienable period on the leasehold interest to one who had full knowledge of the work already performed.

Tracey v Judy, 202-646; 210 NW 793

Extent. A miner's lien for opening and working a coal mine for a lessee whose lease covers only the coal and a necessary part of the surface, does not extend to the entire tract of land covering the mine and owned by the lessor.

Ford v Dayton, 201-513; 207 NW 565

Lien for improvements—limit. A person contracting to open a slope coal mine is entitled to a lien for the work done, not to exceed the increase in the value of the property because of the improvement, when the tipple is built, the track laid, and the coal is reached.

Hazen v Penn, 226-263; 284 NW 139

Sale—impressment of trust on proceeds. An understanding between a lienor and a lienee to the effect that personal property upon which the lienor has a lien may be sold by the lienee and the lien satisfied from the proceeds of the sale, will be enforced in equity by impressing a trust on said proceeds.

Stegemann v Bendixen, 219-1190; 260 NW 14

CHAPTER 454

COMMON CARRIER'S LIEN

10326 Lien of common carrier.

Interstate shipment—building contractor not consignee—nonliability. A common carrier's petition against a building contractor alleging transportation as a benefit received, alleging unjust enrichment and nonpayment, and seeking to collect transportation charges on an interstate shipment of building material is demurrable and fails to state a cause of action in omitting an allegation showing a contractual liability on the defendant contractor as a party to the shipping contract.

Des Moines & C. I. Ry. v Ins. Co., 224-15; 276 NW 56

CHAPTER 455

FORWARDING AND COMMISSION MERCHANT'S LIEN

10341 Nature of lien.

Belated and unexplained sale at low price—effect. A sale by a commission merchant at an extremely low price, and on a steadily falling market, and after a long and unexplained delay, may be sufficient to present a jury question on the issue of negligence.

Blanchard v Wood Co., 204-255; 214 NW 583

Failure to obey instructions. A commission merchant is excused from all liability for failure to sell goods on the terms prescribed by the principal when such failure was because of conditions over which he had no control.

Blanchard v Wood Co., 204-255; 214 NW 583

Presence or absence of directions as to sale. Factors must comply with specific directions as to time of sale. In the absence of such directions, they must sell within a reasonable time.

Alley Co. v Cream Co., 201-621; 207 NW 767

CHAPTER 456

ARTISAN'S LIEN

10344 Enforcement of lien.

Sale—impressment of trust on proceeds. An understanding between a lienor and a lienee to the effect that personal property upon which the lienor has a lien may be sold by the lienee and the lien satisfied from the proceeds of the sale, will be enforced in equity by impressing a trust on said proceeds.

Stegemann v Bendixen, 219-1190; 260 NW 14

CHAPTER 457

LIEN FOR CARE OF STOCK AND STORAGE OF MOTOR VEHICLES

10345 Nature of lien.

Bailment from unauthorized person. A garage keeper has no lien on an automobile for the storage thereof when received from one who has the wrongful possession thereof.

Lewis v Garage, 200-1051; 205 NW 983

Conditional sales contract in foreign state—priority. The lien of a garage keeper on an automobile for storage in this state is subject to the superior right of the vendor of said vehicle, or his assignee, under a conditional sales contract executed, delivered, and recorded solely in a foreign state at the place of sale, said vehicle having been removed to this state without the knowledge or consent of the vendor.

Northern Fin. v Meinhardt, 209-895; 226 NW 168

10346 Satisfaction of lien by sale.

Atty. Gen. Opinion. See AG Op June 12, '39

10347 Disposal of proceeds.

Sale—impressment of trust on proceeds. An understanding between a lienor and a lienee to the effect that personal property upon which the lienor has a lien may be sold by the lienee and the lien satisfied from the proceeds of the sale, will be enforced in equity by impressing a trust on said proceeds.

Stegemann v Bendixen, 219-1190; 260 NW 14

CHAPTER 457.1

LIEN FOR SERVICES OF ANIMALS

10347.08 Sale—application of proceeds.

Sale—impressment of trust on proceeds. An understanding between a lienor and a lienee to the effect that personal property upon which the lienor has a lien may be sold by the lienee and the lien satisfied from the proceeds of the sale, will be enforced in equity by impressing a trust on said proceeds.

Stegemann v Bendixen, 219-1190; 260 NW 14

See Jasper County Bk. v Klauenberg, 218-578; 255 NW 884

CHAPTER 458

HOTELKEEPER'S LIEN

10348 Definitions.

Automobile not "baggage". An automobile kept by the occupant of an apartment house in a garage adjacent to the apartment is not "baggage", within the meaning of this chapter.

Cedar R. Inv. v Hotel Co., 205-736; 218 NW 510; 56 ALR 1098

"Rooming" house defined. An apartment house is not a "rooming" house, within the meaning of this chapter.

Cedar R. Inv. v Hotel Co., 205-736; 218 NW 510; 56 ALR 1098

Lien on personal effects. An incorporated hospital in which a patient is furnished board and room, in addition to care, medicine, hospital supplies, treatment and nursing, is not entitled to a lien on personal effects left by the patient in the hospital.

Reason: A "hospital" is not a "hotel" within the meaning of the hotel lien act. [§§10347.14-10347.17, C., '39.]

Hull Hospital v Wheeler, 216-1394; 250 NW 637

10352 Disposal of proceeds—statement.

Sale—impressment of trust on proceeds. An understanding between a lienor and a lienee to the effect that personal property upon which the lienor has a lien may be sold by the lienee and the lien satisfied from the proceeds of the sale, will be enforced in equity by impressing a trust on said proceeds.

Stegemann v Bendixen, 219-1190; 260 NW 14

CHAPTER 459

RELEASE OF LIENS BY BOND

10354 Liens subject to release.

Procedure optional. The statutory right of an owner of personal property who disputes the existence of a lien thereon, to give a bond conditioned to pay the amount of any lien which may be established, and thereby secure right to possession of the property, is a procedure entirely optional with the owner.

Lewis v Garage, 200-1051; 205 NW 983

Statutory bond to discharge receiver and pay claims—effect. Where, in order to secure an order for the discharge of a receiver, the defendant in the receivership proceedings executes and delivers to a claimant in said proceedings a bond conditioned to pay said claimant whatever judgment he may obtain on his claim, it follows that the claimant's lien on the assets in the hands of the receiver is thereby transferred to the bond, and recovery may be had on said bond, for whatever judgment the claimant secures on his claim.

Shanahan v Truck Co., 209-1231; 229 NW 748

TITLE XXVII

LEGALIZING ACTS

CHAPTER 460

PUBLICATION OF PROPOSED LEGALIZING ACTS

10358 Publication prior to passage.

Discussion. See 11 ILR 390—Validity of curative legislation on judgments

Legalizing acts—self-nullification. A legislative act which purports to legalize specified municipal warrants, the legality of which is then being litigated, is completely nullified, so far as said question of legality is concerned, by the insertion in the act of a proviso that "nothing in this act shall affect any pending litigation".

Mote v Town, 211-392; 233 NW 695

CHAPTER 461

NOTARIES PUBLIC AND ACKNOWLEDGMENTS

10367 Mayors and notaries.

Atty. Gen. Opinion. See '38 AG Op 798

CHAPTER 462

JUDGMENTS AND DECREES

10378 Judgments or decrees respecting wills.

Creditor's suit. Record involving an equitable proceeding to discover property belonging to a judgment defendant, and to subject said discovered property to the satisfaction of said judgment, reviewed and held not barred by this section or §§11007 and 11882, C., '35.

Bankers Tr. v Garver, 222-196; 268 NW 568

CHAPTER 462.1

EXECUTION SALES

10383.1 Failure to make proper entries.

Curative acts—omission of levying officer. The failure of an officer to indorse on an execution the procedural matter required by statute may be legalized by an act of the legislature.

Francis v Todd & Co., 219-672; 259 NW 249
Nelson v Hayes, 222-701; 269 NW 861

TITLE XXVIII

DOMESTIC RELATIONS

CHAPTER 469

MARRIAGE

10427 Contract.

Antenuptial agreements. See under §11990(IV)
Postnuptial agreements. See under §10447

Discussion. See 8 ILB 245—Mohammedan marriage; 13 ILR 210—State's interest in marital relation; 14 ILR 215—Presumptions in common law marriage; 16 ILR 534—Marriage by proxy; 23 ILR 75—Cohabitation necessary—common law marriage

Antenuptial agreement—sufficiency of evidence. Evidence held sufficient to show execution of antenuptial agreement precluding widow from dower share.

In re Dunn, (NOR); 224 NW 38

Evidence of marriage—heirs claiming estate. In probate proceedings by heirs claiming under the deceased spouse of intestate, the evidence was sufficient to establish the marriage between the intestate and deceased spouse, tho the trial court found that there was insufficient evidence to establish heirship and rendered judgment that the property escheat to the state as uninherited property.

In re Clark, 228- ; 290 NW 13

Common-law requisites—known inability to contract. A common-law marriage may not exist between parties who mutually know that one of them has a legal spouse, living and undivorced.

Baldwin v Sullivan, 201-955; 204 NW 420; 208 NW 218

Common-law marriage—evidence. Evidence held insufficient to establish a common-law marriage.

Hoese v Hoese, 205-313; 217 NW 860
Reppert v Reppert, 214-17; 241 NW 487

Common-law marriage—written contract—sufficiency. A written agreement between a man and a woman "to live as husband and wife until such time that we are lawfully married" is insufficient to constitute a common-law marriage, because the writing not only furnishes a cover for illicit relation but fails to carry on its face the required element of a present intention to assume the legal relation.

State v Grimes, 215-1287; 247 NW 664

Marriage settlements—validity. A marriage settlement, duly and in good faith executed, and confirmed by the subsequent marriage of the parties, is valid against the creditors of the husband when not grossly out of proportion to the husband's station and circumstances.

Benson v Burgess, 214-1220; 243 NW 188

Marriage as consideration. Marriage is a good consideration for a contract,—one of the highest known to the law.

In re Shepherd, 220-12; 261 NW 35

Interest on antenuptial-contract allowance. A provision in an antenuptial contract that the wife shall be paid a named sum within a named time after the death of the husband contemplates interest on said sum from the maturity date, even tho said contract also provides that the widow shall be paid a monthly sum until the former main sum is paid.

In re Shepherd, 220-12; 261 NW 35

Claim under antenuptial contract—nontransferability to equity. A simple, unsecured claim for money, filed against an estate by the surviving widow, is not, against the objections of the administrator, transferable to equity for trial. So held as to a claim due the widow under an alleged antenuptial contract.

In re Mason, 223-179; 272 NW 88

Manslaughter—marriage as inference of suppressing testimony. It is reversible error in a manslaughter case for the state to call accused's wife as a witness and, in the presence of the jury after discovering her relationship, to elicit testimony over accused's objection thereby creating the prejudicial inference that accused's marriage was purposefully to suppress testimony.

State v Chismore, 223-957; 274 NW 3

Support and maintenance—stepchildren. The legal obligation of a father to support his minor children extends to stepchildren.

Rule v Rule, 204-1122; 216 NW 629

Construction of will—conditions and restrictions—restraint of marriage. That part of a devise to testator's widowed daughter-in-law which provides that the property shall pass to her children upon her remarriage is not void because in undue restraint of marriage.

Anderson v Crawford, 202-207; 207 NW 571; 45 ALR 1216

10428 Age.

Valid where made, valid everywhere. Generally speaking, a marriage valid where made is valid everywhere.

Boehm v Rohlfs, 224-226; 276 NW 105

Foreign state—parties below age requirement. A marriage, the parents consenting thereto, in a foreign state, between two persons, one of whom has not reached the age at and above which parents may give their consent for marriage, is not void but merely voidable, and as affecting rights in Iowa such parties thereby legally reach majority.

Boehm v Rohlfs, 224-226; 276 NW 105

10429 License.

Atty. Gen. Opinions. See '32 AG Op 90; AG Op June 20, '39

10430 Age and qualification—affidavit.

Atty. Gen. Opinions. See '32 AG Op 84, 90

10437 Nonstatutory solemnization—forfeiture.

Common-law requisites—known inability to contract. A common-law marriage may not exist between parties who mutually know that one of them has a legal spouse, living and undivorced.

Baldwin v Sullivan, 201-955; 204 NW 420; 208 NW 218

10445 Void marriages.

Discussion. See 17 ILR 254—"Void" and "voidable"

"Sister" contemplates "half-sister". The statute which declares void a marriage between a man and his sister's daughter, embraces a marriage between a man and his half-sister's daughter. As a consequence carnal knowledge between a man and the daughter of his half-sister constitutes incest. (§12978, C., '27.)

State v Lamb, 209-132; 227 NW 830

Temporary alimony—showing. Ample showing of marriage justifying an order for temporary alimony, suit money, and attorney fees in an action for separate maintenance, is made by proof that even tho plaintiff and defendant were married at a time when plaintiff's decree of divorce from a former husband had not been entered of record, yet plaintiff and defendant for several years lived together as husband and wife after said decree had been so entered.

Hanford v Hanford, 214-839; 240 NW 732

CHAPTER 470

HUSBAND AND WIFE

10446 Property rights of married women.

Conveyances by wife. See under §10050, Vol. I

Discussion. See 25 ILR 351—Larceny of spouse's property

Admissions of husband—when inadmissible against wife. In an action against a wife to subject her homestead to a judgment which had been rendered against her husband on his debt antedating the acquisition by the wife of her said homestead, admissions of the husband tending to show that he furnished the money to pay for the said homestead are not binding on, or admissible against, the wife.

Price v Scharpff, 220-125; 261 NW 511

Antenuptial contract—validity. Antenuptial contract reviewed, and held not invalid on the grounds of unfairness, unconscionableness, and non-mutuality, or because it contained an invalid provision in relation to property interest and the right to children, which in no manner affected the consideration actually received by the wife.

Kalsem v Froland, 207-994; 222 NW 3

Equitable conversion—right to reconvert—consent of spouse. The right of a legatee to make and enforce an election to take real estate in lieu of a devise of the proceeds thereof, does not depend in any degree on the consent of the spouse of such legatee.

In re Warner, 209-948; 229 NW 241

Mutual wills—husband and wife. Where wills were drawn by the same scrivener, executed by the husband and wife, at the same time and place, before the same witnesses, and each will containing reciprocal provisions, such wills, in and of themselves, establish prior agreement to execute mutual wills and no other evidence is necessary, even when wills contain no memorandum of the agreement.

Maurer v Johansson, 223-1102; 274 NW 99
Child v Smith, 225-1205; 282 NW 316

Purchase by wife who joined in mortgage—effect. A wife who joins with her husband in a mortgage on the husband's land, but who assumes no obligation, contractual or otherwise, to pay subsequently accruing taxes on the land, may, after the land has gone to tax deed to a stranger without collusion with her and while she was not in possession, purchase the land of the tax deed holder and acquire his title, viz, a fee simple indefeasible title—a title free from the lien of said mortgage.

Wood v Schwartz, 212-462; 236 NW 491

Property rights determinable after death. Principle reaffirmed that the mutual property rights of a husband and wife may be determined after the death of one of the parties.

Melvin v Lawrence, 203-619; 213 NW 420

Torts during coverture. A wife may not maintain an action against her husband for

damages consequent upon willful injuries inflicted upon her by her husband.

In re Dolmage, 203-231; 212 NW 553

Wife's separate estate—no joint adventure from husband's management. Where a wife inherits real property which is managed, as an incident to their marital relation, by her husband, his individual purchase of livestock in connection with such management and executing his individual promissory note therefor will not make the wife liable thereon as a joint adventure.

Valley Bank v Staves, 224-1197; 278 NW 346

Wife's homestead not liable for husband's debt. A judgment against a husband is not enforceable against a homestead acquired by his wife in her own name—even tho so acquired long after the inception of the debt on which said judgment was rendered—on proof that the husband, while perfectly solvent, and with no fraudulent intent, and without expressly or impliedly acquiring any interest in the land, voluntarily permitted a portion of his own assets to be applied on the debt of the wife for her said homestead.

Price v Scharpff, 220-125; 261 NW 511

Written contract not signed by wife. Where a husband and wife had an oral agreement for the sale of farm personalty in which they had a joint interest, and a written contract, specifying manner of disposition of proceeds of sale, which was signed by the husband but not by wife, she was not bound by written contract.

Russell v Moeller, (NOR); 268 NW 60

10447 Interest of spouse in other's property.

ANALYSIS

Antenuptial agreements. See under §§10427, 11285(III), 11990(IV)

I TRANSACTIONS BETWEEN HUSBAND AND WIFE IN GENERAL

Discussion. See 15 ILR 481—Insurable interest

Accounting against bank—husband as wife's agent. In an action by a wife against a bank challenging her husband's speculations and transactions in her behalf and for an accounting as to funds and securities where the wife having (1) permitted, acquiesced in, and cooperated with her husband in managing her business with the bank for a period of years, (2) kept a personal record showing she had knowledge of many challenged transactions (proved through ultra violet ray photography of obliterated items), (3) reported income tax on other challenged transactions, (4) a bank account in her own name showing profits from other challenged transactions, (5) been a woman personally familiar with business and speculative dealings, and (6) made a settlement with the bank after ample consideration and acting upon the advice of friends skilled in the business of securities, cannot thereafter claim that the bank could not rely upon her husband's apparent general agency, nor that his dealings with the bank involving her securities and obligations arising therefrom were not the joint operations of herself and husband, nor that a settlement thereof she thereafter made with the bank resulted from the bank's concealment and duress.

Clark v Iowa-D. M. Bank, 223-1176; 274 NW 919

Action for partition. A husband may not maintain an action to partition lands of which his wife holds the legal title, and in which he has no interest except the contingent interest of a husband.

Jones v Park, 220-903; 262 NW 801

Antenuptial contract—insufficiency. A written instrument purporting to be an antenuptial contract waiving all interest which each of the contracting parties would have after marriage in the property of the other, but shown to have been actually signed after marriage, will not bar such property interest when the instrument neither recites (1) that it was executed for the purpose of furnishing evidence of a previous antenuptial oral contract nor (2) that it was executed in consideration of a previous oral antenuptial contract.

Battin v Bank, 202-976; 208 NW 343

Claims — peculiar circumstances excusing service of notice of hearing. Altho claimant is executor's wife, peculiar circumstances excusing a claimant's failure to serve notice of hearing may be found in evidence showing that the claim was filed within six months from executor's appointment, that executor told claimant he had knowledge of the matters upon which the claim was based, and that it would be unnecessary to serve notice. Suspicious circumstances surrounding the claim are to be considered in the trial of the claim on its merits.

In re Hill, 225-527; 281 NW 500

Marriage settlements. The parties to an antenuptial contract which simply and generally provides that the wife shall, on the death of the husband, "be paid" a named sum by the latter's personal representative, will not be deemed to have intended that in the settlement of the estate of the husband, the said sum to be paid the wife should have priority over third and fourth class claims. (Holding based on the intent of the parties as reflected in the contract and surrounding circumstances.)

In re Shepherd, 220-12; 261 NW 35

I TRANSACTIONS BETWEEN HUSBAND AND WIFE IN GENERAL—concluded

Deed and agreement creating trust. Where a husband conveyed his separate property to wife pursuant to an agreement providing that upon her death property was to go to a granddaughter either by will or deed, and where, after consummation of this transaction, the husband tore up the original copy of the agreement and executed an absolute conveyance of the same property to his wife, held, that the original deed and agreement, which were simultaneously executed, must be construed as one instrument, and that an irrevocable trust was created in favor of the granddaughter since no power of revocation was expressly reserved.

Young v Young-Wishard, 227-431; 288 NW 420

Mutual wills not prohibited contract. Mutual reciprocal wills, drawn pursuant to a compact between husband and wife, do not violate the statute prohibiting agreements affecting the right which, by reason of the marriage relation, one party has in the property of the other.

Maloney v Rose, 224-1071; 277 NW 572

Wife's claim for services—public policy. When necessarily including compensation for purely domestic duties, a wife's claim against the estate of her deceased, divorced husband, furnishes in itself sufficient ground for denying it, under the rule that agreements that a wife be compensated for the performance of obligations incident to the marital relation violate public policy and are void.

In re Straka, 224-109; 275 NW 490

Mutual wills enforced as contract. Clear and satisfactory evidence that husband and wife entered into a mutual contract, and in accordance therewith executed mutual and reciprocal wills providing for the disposition of all their property to each other and to certain named beneficiaries upon the death of survivor, entitles beneficiaries to specific performance thereof and to restrain probating of another will, executed by husband after the wife's death, making provision contrary thereto.

Child v Smith, 225-1205; 282 NW 316

Taxes—nonduty of wife to pay. A wife who, for the purpose of releasing her distributive share, joins with her husband in a mortgage of the husband's lands is not bound by the husband's covenants or legal obligation to pay future accruing taxes on the land.

Wood v Schwartz, 212-462; 236 NW 491

Transactions concerning separate property. Where a husband conveyed his separate property to wife pursuant to agreement providing that, upon her death, property was to go to granddaughter either by will or proper deed of conveyance, such an agreement was not a contract dealing primarily with the inchoate right of dower of the wife and therefore was not void under statute providing that a husband or wife has no interest in the property owned by the other which can be the subject of contract between them, since that statute prohibits only such transactions when they relate directly to dower rights.

Young v Young-Wishard, 227-431; 288 NW 420

II SEPARATION AGREEMENTS

Division of property pending divorce. An agreement for a division of property between husband and wife pending contemplated divorce proceedings is enforceable.

Castelline v Pray, 200-695; 205 NW 339

Property-settlement contract. A defendant sued by his former wife on a property-settlement contract, fully performed by her, availeth himself nothing in the way of a defense by nakedly alleging fraud by the wife in obtaining the contract when such allegation is made neither as a basis for a rescission of the contract nor for damages.

Poole v Poole, 219-70; 257 NW 305

Property settlement action nontransferable in toto. An action brought on a contract (e.g., a property settlement between husband and wife), and properly brought at law, is not rendered transferable in toto to the equity calendar by defendant's plea of fraud and prayer for a judicial rescission of the contract. Said alleged fraud, if established in the law action, constitutes a complete defense, and remaining equitable issues are properly transferred to and disposed of in equity. Failure, in the law action, to establish said alleged fraud, necessarily removes from the case said equitable issue of rescission.

Poole v Poole, 221-1073; 265 NW 653

III OWNER'S LIABILITY FOR SPOUSE'S DEBTS

Discussion. See 18 ILR 30—Torts of wife

Estoppel in favor of creditors or trustee in bankruptcy. A husband who, in the sale of his land, permits a note and mortgage to be given on the land to his wife for one-third of the deferred payments, and later mutually rescinds the sale with the vendee, and causes the mortgage to be released and accepts a reconveyance of the land, is estopped, as against the wife's creditors or trustee in bankruptcy, to dispute the lien and full validity of said note and mortgage, when, with the knowledge of the husband, and without objection by him, the creditors extended credit to the wife in reliance on her supposed ownership of the note and mortgage.

Browning v Kannow, 202-465; 210 NW 596

Signature of spouse to mortgage only—effect. The defeasance clause in a real estate

mortgage on the lands of a husband, to the effect that the mortgage shall be void if the signers shall "pay or cause to be paid" the secured notes, does not, in and of itself, impose personal liability on the wife who is one of the signers to the mortgage.

Fairfax Bank v Coligan, 211-670; 234 NW 537

Wife's separate estate—surety on mortgage. Where a married woman without any consideration therefor mortgages her separate property to secure the separate debt of the husband, he is the principal and she is a surety as to such indebtedness.

Clindinin v Graham, 224-142; 275 NW 475

10448 Remedy by one against the other.

Action by wife against the husband. See under §10461(II)

Atty. Gen. Opinion. See AG Op Jan. 24, '39

Accounting—evidence—insufficiency. A husband will not be compelled to account to his wife for the amount of certificates of deposit discovered by the wife in the common safety-deposit box of the husband and wife and payable to the wife, when there is no evidence of the source of the money represented by the certificates and no evidence of what became of the certificates.

Junger v Bank, 208-336; 223 NW 381

Converted bank account. A husband must account to his wife for the proceeds of a bank deposit personally made by her in her own name, and of her own funds, but credited on the books of the bank to the husband and converted by him to his own use without the consent of the wife.

Junger v Bank, 208-336; 223 NW 381

Joint securities deposit—settlement. Where securities are deposited with a bank by husband and wife as joint principals, a settlement thereon can be made by the joint cooperation of the principals or by one as authorized legal representative of both.

Clark v Bank, 223-1176; 274 NW 919

Tort action by one against other. The rule of the common law that neither the husband nor wife may maintain an action against the other for damages consequent on the negligent or willful injuring of one by the other, is the law of this state,—not having been abrogated by anything contained in §10991-d1, C., '35. [§10991.1, C., '39].

Aldrich v Tracy, 222-84; 269 NW 30

When wife not creditor. A wife does not, against her husband's creditors, become the creditor of her husband by turning over to him her money for indiscriminate use in the family, and without any agreement for or expectation of repayment.

Harris v Carlson, 201-169; 205 NW 202

10449 Conveyances to each other.

ANALYSIS

Antenuptial agreements. See under §§10427, 11285(III), 11990(IV)
Fiduciary relations, fraudulent transactions. See under §11815

I CONTRACTS BETWEEN HUSBAND AND WIFE

Deeds to children delivered to trustee—wife acquiescing. An agreement reached by a husband and wife, that he should deed his property to her and she would deed it to the children, the deeds to be placed with a trustee, who was to record the first deed on the death of the husband and then record the second deeds on the death of the wife, is binding on the wife, when she is present at the execution of the deeds and, by her silence, acquiesces in the instructions given by the husband to the trustee.

Bohle v Brooks, 225-980; 282 NW 351

Resulting trust—payment by wife and title in husband.

State Bank v Nolan, 201-722; 207 NW 745

Fraud—remedies of creditors—burden of proof. A creditor, seeking to set aside an alleged fraudulent conveyance which recites a consideration which is apparently valid and substantial tho indefinite in amount, must carry his proof beyond showing that the grantor and grantee were husband and wife and that the grantor was insolvent when he delivered the conveyance. In other words, such proof does not cast upon grantee the burden, (1) to sustain the adequacy of the consideration, and (2) to negative bad faith in the transaction, or (3) to show that the grantor at the time retained sufficient other property to pay his creditors.

First N. Bank v Currier, 218-1041; 256 NW 734

Transfers and transactions invalid—bona fide conveyance to wife. A conveyance by a husband to his wife, for the sole purpose of paying a bona fide indebtedness long owing by the husband to the wife, is unimpeachable, even tho the creditors of the husband are thereby hindered or perhaps wholly prevented from collecting their claims, it appearing that the value of the land was less than the debt due the wife.

Andrew v Martin, 218-19; 254 NW 67

Transfers and transactions invalid—right of wife—burden of proof. A wife as a bona fide creditor of her husband has the legal right to take from her husband a conveyance of all his real and personal property provided she is actuated by the sole purpose of obtaining pay-

ment of her claim. And if the property received is out of proportion to the debt, the party questioning the conveyance has the burden so to show.

Farmers Bank v Ringgenberg, 218-86; 253 NW 826

II TRANSFERS OF PROPERTY BETWEEN HUSBAND AND WIFE

Alimony—property settlement under trust agreement. A property settlement under an irrevocable trust agreement made by husband and wife previous to and confirmed in divorce decree discharged husband's obligation for further support and precluded right to further alimony.

Fitch v Com. of Internal Rev., 103 F 2d, 702

Equitable estoppel—unrecorded conveyance —pleader's burden. One alleging an equitable estoppel must prove it by clear, satisfactory, and convincing evidence, hence in asserting in a fraudulent conveyance action, an equitable estoppel against the wife of a bank stockholder, because she withheld from record, for many years, a deed to herself from her husband, the creditors of the bank have not sustained the burden of proving estoppel when they admit that they did not deposit their money on the wife's representation, nor upon their belief, in the husband's ownership of the land.

Bates v Kleve, 225-255; 280 NW 501

Estoppel to dispute husband's title. A wife who permits her husband to take and record title to her lands, and for a long series of years, to exercise the usual and customary indicia of ownership, is estopped to assert her title against the claims of the husband's creditors who have extended credit to him in reliance on his apparent title.

Farmers Bank v Pugh, 204-580; 215 NW 652

Fiduciary relation between husband and wife. Whether in an action by an heir to set aside a conveyance by a wife to her husband on the ground of undue influence the burden of disproof of said ground shifts to the defendant-husband, quaere.

Browne v Johnson, 218-498; 255 NW 862

Fiduciary relation between husband and wife. A fiduciary relation within the meaning of the law is not established by a showing that the parties were husband and wife and that the wife frequently aided her husband in the transaction of his business, it appearing that the husband was physically infirm.

Arndt v Lapel, 214-594; 243 NW 605

Fraud—validity of transfer. A wife who has a bona fide claim against her husband may, when actuated by the sole and good-faith purpose of obtaining payment, take a non-excessive conveyance of property from her husband, even tho she knows at the time that the husband is financially embarrassed and that he intends by the conveyance to circumvent another of his creditors.

Clark v Clark, 209-1179; 229 NW 816

Sustaining constructively fraudulent deed. A deed from a husband to his wife, constructively fraudulent as to an existing creditor because it left the husband insolvent, will, nevertheless, be sustained as superior in right to that of the creditor, to the extent of the valuable consideration admittedly paid by the wife for the land, when the creditor fails to establish some active fraud on the part of the wife.

Malcolm Bank v Mehlin, 200-970; 205 NW 788

Homestead character of property—evidence. Evidence held to show that the property in question was, at the time of a conveyance by a husband to his wife, the homestead of the grantor and grantee, and therefore not fraudulent as to creditors.

Hansen v Richter, 208-179; 225 NW 361

Nonestoppel against wife. One who purchases a promissory note without any consultation whatever with the maker or the maker's wife, may not successfully assert that the wife is estopped to lay claim to lands which stood in the name of the husband-maker at the time of said purchase.

Jordan v Sharp, 204-11; 214 NW 572

"One dollar and other valuable consideration"—sufficiency. A deed from husband to wife, executed two years prior to the rendition of a judgment against the husband and which deed recites a consideration of "one dollar and other valuable consideration", is not fraudulent as against such judgment creditor of the grantor-husband, when it is shown that the "other consideration" consisted of $3,000 actually paid by the wife.

Donovan v White, 224-138; 275 NW 889

Personal liability of grantee. A wife who, knowing that her husband intended to hinder and delay his creditors, accepts a voluntary transfer of his bank deposit is, nevertheless, not personally liable to the husband's subsequently appointed trustee in bankruptcy for that part of the deposit which is expended prior to the bankruptcy proceedings in carrying on in good faith the ordinary business of the husband.

Barks v Kleyne, 201-308; 207 NW 329

Preference to wife—insolvency of husband. A conveyance of land by a husband to his wife for the sole purpose on his part of repaying, and for the sole purpose on her part of receiving, that which he is actually owing to her, (no question of adequacy of consideration being raised) is unassailable, even tho such conveyance works a direct preference in favor of

the wife over other creditors of the husband; and especially is this true when the party attacking the conveyance fails to plead and prove that the conveyance left the husband insolvent.

Bartlett v Webber, 218-632; 252 NW 892

Allowable preference to wife. A wife who permits her husband to use her personal funds in payment for land purchased by him in his own name, and so permits under circumstances fairly justifying the inference that said use was as a loan and not as a gift, may thereafter (some 20 years in present case), validly take from the husband a conveyance of said land at a fair valuation and for the sole and only purpose of satisfying said loan; and this is true tho such conveyance works a preference in her favor over other creditors of the husband. (No issue of estoppel in the case.)

Bates v Maiers, 223-183; 272 NW 444

Voluntary, nonfraudulent conveyance. Altho wholly voluntary, a conveyance executed when the grantor has no fraudulent intent cannot be impeached by a subsequent creditor, so a real estate conveyance by a husband to his wife many years before he becomes a bank stockholder cannot be invalidated by the creditors of the bank, seeking to collect a judgment on stock liability assessment.

Bates v Kleve, 225-255; 280 NW 501

Wife as noncreditor. A husband who takes title to land paid for by the wife without any agreement to repay the wife, may not later by a conveyance to the wife validly prefer the wife over his creditors on the theory that the wife was a creditor.

Farmers Bank v Pugh, 204-580; 215 NW 652
See Harris v Carlson, 201-169; 205 NW 202

Right of wife—burden of proof. A wife as a bona fide creditor of her husband has the legal right to take from her husband a conveyance of all his real and personal property provided she is actuated by the sole purpose of obtaining payment of her claim. And if the property received is out of proportion to the debt, the party questioning the conveyance has the burden to so show.

Farmers Bank v Ringgenberg, 218-86; 253 NW 826

Right of wife to take conveyance solely to protect herself.

Harris v Carlson, 201-169; 205 NW 202
Johnson v Warrington, 213-1216; 240 NW 668

Right to prefer. A conveyance by a husband to his wife, executed and received for the sole purpose of paying an actual bona fide debt of the husband to the wife, is beyond the reach of other creditors provided the property conveyed is not substantially in excess of the debt.

Johnson v Warrington, 213-1216; 240 NW 668

Securing wife against loss on homestead mortgage. A bona fide conveyance of personal property by a husband to his wife, to secure her from liability on a mortgage on her homestead, executed for the purpose of raising money to discharge a debt of the husband's, is prior in right to subsequently rendered judgments against the husband and levies thereunder on the said conveyed property; but the security will be sustained only insofar as will make the wife whole.

Sherman v Linderson, 204-532; 215 NW 501

Secret, unrecorded deed—estoppel. A wife who, even without fraudulent intent, receives from her husband a secret, voluntary conveyance of land, and withholds the deed from record for many years, and allows her husband publicly to treat, manage, and control the land as his own and to obtain credit on the strength of such apparent ownership, thereby estops herself from asserting her ownership against said creditors.

Meltzer v Shafer, 215-785; 244 NW 851

Setting aside—limitation of actions—laches. A suit in equity by trustee in bankruptcy to set aside deed by bankrupt to husband on grounds of want of consideration, fraud, and failure to take possession of land, brought more than 6 years after recording of deed, is barred by laches under statute of limitations where only one creditor secured allowance of claim, which claim was based on note past due when deed was recorded.

Monroe v Ordway, 103 F 2d, 813

Tenancy—termination—unavailable defense. A tenant who has agreed that his tenancy may be terminated in case the landlord sells the property may not predicate a defense to such termination on the fact that the landlord (concededly in good faith) actually conveyed a part of the land to his wife, solely in consideration of the wife's agreement to sign a conveyance of the remaining part of the land.

Luse v Elliott, 204-378; 213 NW 410

Transfers and transactions invalid. Record reviewed and held that a deed from a husband to his wife was executed for the sole purpose of repaying the wife a bona fide indebtedness, and was without any intent to defraud the husband's creditors.

Farmers Bk. v Skiles, 220-462; 261 NW 643

Nonimpeachable transfer to wife. A nonexcessive conveyance by a husband to his wife in satisfaction of an actual and good faith indebtedness owing by him to her is unimpeachable when in taking the conveyance the

II TRANSFERS OF PROPERTY BETWEEN HUSBAND AND WIFE—concluded

wife is motivated by the sole purpose of obtaining payment of her claim; and this is true irrespective of her knowledge of the financial condition of her husband.

Steffy v Schultz, 215-837; 246 NW 910

Wife's separate estate—surety on mortgage. Where a married woman without any consideration therefor mortgages her separate property to secure the separate debt of the husband, he is the principal and she is a surety as to such indebtedness.

Clindinin v Graham, 224-142; 275 NW 475

Withholding from record—effect. The nonfraudulent act of a wife in withholding from record a deed of land from the husband will not estop her from disputing the title of the husband, when she did not know or have reason to know that anyone would be extending credit to the husband in reliance on his supposed title.

Farmers Bk. v Schleisman, 203-585; 213 NW 211; 52 ALR 182

See Crowley v Brower, 201-257; 207 NW 230

10450 Attorney in fact.

Accounting against bank—husband as wife's agent—evidence. In an action by a wife against a bank challenging her husband's speculations and transactions in her behalf and for an accounting as to funds and securities where the wife having (1) permitted, acquiesced in, and cooperated with her husband in managing her business with the bank for a period of years, (2) kept a personal record showing she had knowledge of many challenged transactions (proved through ultra violet ray photography of obliterated items), (3) reported income tax on other challenged transactions, (4) a bank account in her own name showing profits from other challenged transactions, (5) been a woman personally familiar with business and speculative dealings, and (6) made a settlement with the bank after ample consideration and acting upon the advice of friends skilled in the business of securities, cannot thereafter claim that the bank could not rely upon her husband's apparent general agency, nor that his dealings with the bank involving her securities and obligations arising therefrom were not the joint operations of herself and husband, nor that a settlement thereof she thereafter made with the bank resulted from the bank's concealment and duress.

Clark v Bank, 223-1176; 274 NW 919

Custom as evidence. Testimony tending to show a custom by a husband to sign the name of his wife to promissory notes, with her express or implied knowledge and approval, extending continuously through many years prior to the transaction in question, is admissible on the issue whether the husband had such authority from his wife.

State Bk. v Fairholm, 201-1094; 206 NW 143

Evidence of agency. Prima facie proof of agency of a husband for his wife is shown by evidence that the husband had, in a transaction in question, always acted for his wife, both in her presence and in her absence, and that the wife had never denied or repudiated the right of the husband so to act.

Herron v Temple, 198-1259; 200 NW 917

Dealings—trust officer's brokerage account—husband pledging wife's securities. Where a husband having a general agency, acquiesced in and ratified by the wife, to transact the wife's business, has a key to her bank deposit box, and personally removes certain securities therefrom which he pledges as collateral for a brokerage account in the name of the bank's assistant trust officer, of which transaction the wife receives knowledge, the fact that the brokerage account is in the name of such trust officer will not impose liability on the bank for a breach of a fiduciary relation, because, the husband having authority to pledge the stock, the account for which he pledged it would not matter.

Clark v Bank, 223-1176; 274 NW 919

Joint securities deposit—settlement—manner. Where securities are deposited with a bank by husband and wife as joint principals, a settlement thereon can be made by the joint cooperation of the principals or by one as authorized legal representative of both.

Clark v Bank, 223-1176; 274 NW 919

10459 Family expenses.

ANALYSIS

Action by one parent against the other for contribution. See under §10448, Vol I
Minors' contracts. See under §10493

I NATURE OF THE OBLIGATION FOR FAMILY EXPENSES

Liabilities enforceable against. A homestead is exempt from execution on a judgment for a family expense contracted after the acquisition of the homestead. In other words, the statutory declaration that a homestead is exempt from judicial sale "where there is no special declaration of statute to the contrary" (§10150, C., '27) has no reference whatever to the statutory declaration that a family expense is "chargeable upon the property of both husband and wife".

Dorsey v Bentzinger, 209-883; 226 NW 52

Living with and caring for parents at their request — nongratuitous services — allowable probate claim upheld on appeal. Reciprocal services rendered by and between members of a family are presumed to be gratuitous, yet, the court, a jury being waived, may find that a married daughter, who with her family, returns to the home of her aged parents at their request to care for them, for which she expected to receive and the parents expected to pay remuneration, did not re-establish a family relationship with her parents so as to raise the presumption of gratuitous services. Such finding will be binding on the appellate court.

Clark v Krogh, 225-479; 280 NW 635

Services by child—presumption. Principle reaffirmed that services rendered by a member of a family are presumptively gratuitous.

Howell v Howell, 211-70; 232 NW 816

II WHAT CONSTITUTES FAMILY EXPENSES

Evidence—sufficiency. Evidence held to present jury questions on the issues of the delivery of certain articles of family expense and the liability of the husband therefor.

Younker Bros. v Meredith, 217-1130; 253 NW 58

Leases—execution by husband only—liability of wife. A wife is not liable on a written lease signed by the husband alone as lessee, tho the leased premises be occupied by the husband and wife as a family residence.

Whether the wife be liable for the rent as a family expense under this section is a quite different question—a question which cannot be deemed before the court in landlord's attachment proceedings manifestly based solely on the lease signed by the husband alone.

Rogers v Davis, 223-373; 272 NW 539

III DUTY TO SUPPORT MINOR CHILDREN

Divorce—liability of parent. The father of a minor child is liable for necessary medical and hospital services rendered without his knowledge to the child in an emergency even tho the mother has obtained a divorce and the custody of said child, and has been paid the decreed alimony.

Stech v Holmes, 210-1136; 230 NW 326
Hensen v Hensen, 212-1226; 238 NW 83

Stepchildren. The legal obligation of a stepfather to support his minor children extends to stepchildren.

Rule v Rule, 204-1122; 216 NW 629

Support and education of child. Principle recognized that, ordinarily, a parent is not entitled to compensation for the support of his child when the parent has sufficient means of his own.

In re Nolan, 216-903; 249 NW 648

10460 Custody of children.

Alienation of affections. A mother may not maintain an action for damages for the alienation of the affection for her of her minor son, in the absence of an allegation that she has thereby been deprived of the custody and services of said minor.

Pyle v Waechter, 202-695; 210 NW 926; 49 ALR 557

Award of custody of child ordinarily not disturbed. In deciding the custody of child so much depends on appearance and demeanor of the parties, witnesses, trial court's discretion, and child's welfare as disclosed by his appearance and affections, that supreme court is not ordinarily justified in disturbing trial court's finding.

Ellison v Platts, 226-1211; 286 NW 413

Best interest of child. The paramount consideration in determining the custody of a child is the best interest of the child.

Ellison v Platts, 226-1211; 286 NW 413

Modification of order of custody—considerations. In an action for the modification of an order for the custody of a 10-year-old child, where the affection and care received in the homes of each of the divorced parents was satisfactory, the wishes of the child cannot have great weight, the controlling consideration being the welfare of the child, and, when there was no change in circumstances to require the action of the court, a previous adjudication that the child remain with his mother should not be modified.

Vierck v Everson, 228- ; 291 NW 865

Custody of child. Evidence held not to warrant disturbing trial court's decree in habeas corpus denying mother custody of her 20-months-old child when child had been in custody of mother's aunt and uncle with whom child had resided and been cared for since her birth out of wedlock.

Ellison v Platts, 226-1211; 286 NW 413

Proceeding for child custody treated as equitable action. Habeas corpus actions involving the custody of minor children treated as equitable proceeding.

Ellison v Platts, 226-1211; 286 NW 413

Controlling considerations. The fact that one custody of a child may offer larger financial and educational advantages than another custody, is not necessarily a controlling consideration on the issue of the child's best welfare.

Jensen v Sorenson, 211-354; 233 NW 717

Death of custodial mother—revival of paternal rights—conditions. Assuming that the death of a mother (to whom the custody of

her infant child had been judicially awarded) revives the custodial rights of the father, yet he must assert such rights with a promptness commensurate with the helplessness of the child, or he will be deemed to have forfeited and waived them, and will not, thereafter, be permitted to challenge the rights of another custodian except on the grounds of unfitness.

Jensen v Sorenson, 211-354; 233 NW 717

Dying request—materiality. Evidence of the dying request of a mother as to the future custody of her infant child is highly material on the issue of such custody.

Jensen v Sorenson, 211-354; 233 NW 717

Guardian—invalid appointment as to parent. The right of a fit and proper father to the custody of his minor child whom he has never abandoned, and whose custody he has neither forfeited nor waived, is in no manner affected by orders of court (1) appointing, without notice to said parent, the maternal grandfather as guardian of said child, and (2) authorizing said guardian to proceed and adopt said child; especially is this true when the petition by the mother for the appointment of the grandfather was not filed until after the appointment was made.

In re McFarland, 214-417; 239 NW 702

Illegitimate child. The mother of an illegitimate child is entitled to its custody, service, and earnings.

Pitzenberger v Schnack, 215-466; 245 NW 713

Loss of right. The mother of an illegitimate child, who has for a long series of years evinced but a very casual interest in the child, may not successfully urge her right to the custody of the child, against fit and proper parties who have nurtured, cared for, and educated the child, from birth, even tho they have been paid compensation by parties other than the mother, it appearing that it would not be to the best interest of the child to decree custody to the mother.

Barry v Reeves, 203-1345; 214 NW 519

Pre-eminent right of child. The moral and legal right of a father to the custody of his motherless child must yield to a custodial order which is best for the child.

Werling v Heggen, 208-908; 225 NW 952

Presumptive right. A father is necessarily given the custody of his motherless child when he has neither abandoned the child, nor surrendered his right to the custody of the child, and when there is no showing that the welfare of the child requires its custody to be awarded to another.

Bonnarens v Klett, 213-1286; 241 NW 483

10461 Wages of wife—actions by.

Atty. Gen. Opinion. See '25-26 AG Op 146

ANALYSIS

I RIGHT TO PERSONAL EARNINGS OF WIFE
II ACTIONS BY WIFE AGAINST HUSBAND

I RIGHT TO PERSONAL EARNINGS OF WIFE

Wife as employee of husband. A husband who is the sole owner of a printing plant may validly employ his wife as a linotype and press operator in said plant and the wife may legally accept such employment and collect therefor, because such services are wholly outside of, and foreign to, the usual and ordinary marital duties of a wife. It follows that the wife is entitled to compensation under the workmen's compensation act for injuries arising out of and in the course of said employment.

Reid v Reid, 216-882; 249 NW 387

II ACTIONS BY WIFE AGAINST HUSBAND

Action by one spouse against the other. See under §10448

Contribution between husband and wife. Husband cannot secure contribution from divorced wife for payment of notes signed by both and paid by husband when wife signed as surety only.

Hall v Brownlee, (NOR); 216 NW 953

10462 Action for personal injuries—elements of recovery. (Repealed.)

Separate occupations — decreased earning capacity—damages.

Rulison v X-ray Corp., 207-895; 223 NW 745

Torts during coverture. A wife may not maintain an action against her husband for damages consequent upon willful injuries inflicted upon her by her husband.

In re Dolmage, 203-231; 212 NW 553

10463 Action by administrator—elements of recovery. (Repealed.)

Excessive verdict—wrongful death of wife. In an action for the wrongfully caused death of a wife, the statutory power to allow "such sum as the jury may deem proportionate to the injury" is not an unbridled discretion. Evidence reviewed and held that a verdict of $10,000 was excessive to the extent of $4,000. The deceased was childless and illiterate, had accumulated no property, was a beet weeder for a small part of the year at small wages, and also operated a boarding house, but whether at a profit did not appear.

Hanna v Electric Co., 210-864; 232 NW 421

Judgment of jurors. Jurors must necessarily rely on their own fair and unbiased judg-

ment as to the amount of damages recoverable for pain and suffering and for disability as a wife and homekeeper.

Rulison v X-ray Corp., 207-895; 223 NW 745

Separate occupations—double recovery (?). Whether a married woman and a mother who has an independent occupation and who also occupies a home with her family may recover in both capacities for loss of the same time and for services at the same time, quaere. Record held to show no double recovery in instant case.

Rulison v X-ray Corp., 207-895; 223 NW 745

10464 Exemplary damages—maximum recovery. (Repealed.)

Instructions inviting excess recovery. Instructions allowing the jury to return damages in excess of statutory limitation are harmless when the jury returns a verdict for less than the statutory limit.

Siesseger v Puth, 211-775; 234 NW 540

10465 Liability for separate debts.

Court findings—when conclusive. A finding by the trial court on supporting testimony that a wife signed both the note and mortgage of her husband solely for the purpose of waiving her dower interest, and received no actual consideration herself, is conclusive on the appellate court.

Bates v Green, 219-136; 257 NW 198

Liability of wife on husband's note. A wife, after signing promissory notes which represent the husband's indebtedness only, may not avoid personal liability on the ground of absence of consideration flowing to her when it appears that the notes were so signed on demand of the payee and as a condition precedent to the granting by payee of an extension of time of payment.

First N. Bank v Mether, 217-695; 251 NW 505

Liability—wife signing husband's note. A wife who signs the note and mortgage of her husband cannot escape personal liability thereon on the ground of want of consideration as to her—because she signed simply to release her dower interest—when, without her signature, the husband would be unable to obtain the loan.

First Tr. JSL Bank v Diercks, 222-534; 267 NW 708

Signing husband's promissory note—consideration. Even tho a wife signed a promissory note solely because her husband asked her to do so, and even tho she received no benefit whatever for so signing, nevertheless she is personally liable on the note if it appears that the payee would not, without her signature, have advanced the money for the husband.

Hakes v Franke, 210-1169; 231 NW 1

Signing mortgage to release dower—effect. Principle recognized that a wife who is an entire stranger to her husband's note and mortgage, except to sign the same solely for the purpose of releasing her possible dower interest, is not personally liable thereon.

First B. & T. Co. v Welch, 219-318; 258 NW 96

Wife signing husband's notes—unallowable defense. Assuming that a wife was advised, when she signed promissory notes evidencing the husband's sole indebtedness that her signature would have no other effect than to release her dower interest in the husband's land (which was embraced in the accompanying mortgage which she signed) constitutes no defense to personal judgment against her on the notes when there is no issue or proof of fraud or conditional delivery, no prayer for reformation or proof supporting such prayer, and when the notes are wholly bare of any reference to dower interest.

First N. Bank v Mether, 217-695; 251 NW 505

Wife's deed for husband's debt—cancellation—consideration—estoppel. Wife who was not illiterate, and who deeded her land in payment of husband's notes, and who, by placing deed in husband's hands, clothed him with apparent authority to deliver the deed, thereby inducing creditors to surrender other land owned by the husband, is estopped from questioning the validity of the deed. The consideration to wife was advantage to husband and detriment to creditors.

Allen v Hume, 227-1224; 290 NW 687

Signing to release dower. A promissory note and mortgage for the pre-existing debt of a husband are without consideration as to the wife who signs the same for the sole purpose of releasing her dower interest.

Gorman v Sampica, 202-802; 211 NW 429

Signing note to release dower. A wife is not personally liable to the original payee of a promissory note which grew out of her husband's real estate transaction to which she was an entire stranger, except that she signed said note (and mortgage) for the sole and only purpose of releasing her possible dower interest.

Jones v Wilson, 219-324; 258 NW 82

Transfers and transactions invalid—wife's suretyship for husband—effect in husband's bankruptcy. Where land owned jointly by husband and wife is mortgaged and the wife signs the note and mortgage on her separate interest to secure the loan to the husband who received and used the loan for his own personal debts and later conveyed his one-half interest in the land to his wife, then, in an action by the husband's trustee in bankruptcy to set aside the conveyance as in fraud of creditors, the wife, as surety, is entitled to have the husband's interest in the land applied first to

the satisfaction of the mortgage debt in preference to the claims of the trustee in bankruptcy, and the conveyance accomplishing her subrogation thereto was valid.

Clindinin v Graham, 224-142; 275 NW 475

Wife's separate estate—no joint adventure from husband's management. Where a wife inherits real property which is managed, as an incident to their marital relation, by her husband, his individual purchase of livestock in connection with such management and executing his individual promissory note therefor will not make the wife liable thereon as a joint adventure.

Valley Bank v Staves, 224-1197; 278 NW 346

Wife's separate estate—surety on mortgage. Where a married woman without any consideration therefor mortgages her separate property to secure the separate debt of the husband, he is the principal and she is a surety as to such indebtedness.

Clindinin v Graham, 224-142; 275 NW 475

10466 Contracts of wife.

See under §10465

10467 Husband not liable for wife's torts.

Coercion of wife in crime. See under §12895

Coercion of wife by husband. No presumption exists that a wife who commits a crime in the presence of her husband does so under the coercion of the husband.

State v Renslow, 211-642; 230 NW 316; 71 ALR 1111

Crimes—presumption of coercion. The presumption that the participation of a wife, in the presence of her husband, in the commission of a crime is the result of the coercion of the husband applies only when the wife is in the near presence of her husband.

State v Kuhlman, 206-622; 220 NW 118

Tort action by one against other. The rule of the common law that neither the husband nor wife may maintain an action against the other for damages, consequent on the negligent or willful injuring of one by the other, is the law of this state,—not having been abrogated by anything contained in §10991-d1, C., '35 [§10991.1, C., '39].

Aldrich v Tracy, 222-84; 269 NW 30

Note 1. Husband and wife generally.

ANALYSIS

I IN GENERAL
II ALIENATION OF AFFECTIONS
III CRIMINAL CONVERSATION

Husband or wife as witness against the other. See under §11260

I IN GENERAL

Discussion. See 2 ILB 137—Loss of citizenship by marriage; 4 ILB 166—Breach of marriage; 10 ILB 68—Physical condition as excuse for breach of marriage

Coercion—no presumption. In arson prosecution against husband and wife, it is no longer presumed that a wife, committing a crime in the presence of her husband, did so under his coercion.

State v Bazoukas, 226-1385; 286 NW 458

II ALIENATION OF AFFECTIONS

Son from mother. A mother may not maintain an action for damages for the alienation of the affection for her of her minor son, in the absence of an allegation that she has thereby been deprived of the custody and services of said minor.

Pyle v Waechter, 202-695; 210 NW 926

Evidence—declarations of wife—hearsay. In an action by a husband for damages for alienation of affection, declarations of the wife made long after she had separated from her husband, and explanatory of such separation, are manifestly hearsay.

McGlothlen v Mills, 221-204; 265 NW 117

Evidence—sufficiency. Evidence held to present a jury question on the issue whether the affections of the wife had been alienated.

Weyer v Vollbrecht; 208-914; 224 NW 568

Hearsay. Plaintiff in an action against the parents of her husband for damages for alienating the affections of her husband must not, under the guise of showing the state of mind of her husband toward her, be permitted to testify to a recital by her husband of what his parents had said to him about the plaintiff.

Paup v Paup, 208-215; 225 NW 251

Judgment for temporary alimony. In an action for damages consequent on defendants' acts in alienating the affections of plaintiff's husband, evidence that plaintiff obtained a judgment for temporary alimony and for attorney fees in an action by her husband for divorce and that the judgment was never paid is wholly irrelevant to the issue of relationship existing between plaintiff and defendant.

Case v Case, 212-1213; 238 NW 85

Measure of damages—inadequate instructions. A husband's right of action for the wrongful alienation and enticing of his wife is based on the loss of her consortium, not alone on the loss of her love. Instructions held inadequate.

McGlothlen v Mills, 221-204; 265 NW 117

Pleadings—sufficiency. An allegation that the affections of a wife were alienated by slandering the plaintiff-husband and by cultivating in the wife a dislike for plaintiff is

sufficient without setting out the words uttered and the persons in whose presence they were spoken; likewise an allegation that defendants "jointly and severally" conspired to alienate the affections of the wife from the husband.

Depping v Hansmeier, 202-314; 208 NW 288

Presumption. Presumptively a wife has affection for her husband, and a defendant has the burden to overcome such presumption.

Weyer v Vollbrecht, 208-914; 224 NW 568

Prosecution of plaintiff by husband. In an action for damages consequent on the acts of defendants in alienating the affections of plaintiff's husband, the fact that plaintiff was criminally prosecuted by her husband is admissible provided it is shown that defendants participated in or instigated such prosecution. But neither the docket entries of the justice of the peace nor the verdict of the jury is competent to show such participation or instigation.

Case v Case, 212-1213; 238 NW 85

Relevancy and competency. In an action by a wife for damages for the alienation of the affections of her husband, an information filed by the plaintiff, charging the defendants with having threatened to injure her, is wholly irrelevant and incompetent.

Paup v Paup, 208-215; 225 NW 251

Unallowable conclusions. The mere conclusions of a plaintiff in an action for damages for alienating the affections of her husband as to what the defendants had done in procuring the enlistment of the husband in the army and thereby effecting a separation of plaintiff and her husband, are wholly unallowable.

Paup v Paup, 208-215; 225 NW 251

III CRIMINAL CONVERSATION

Cross-examination. A plaintiff who, in an action for damages for criminal conversation, testifies, in effect, on direct examination, that the defendant's criminal relation with plaintiff's husband was the sole cause of disrupting plaintiff's home, thereby opens the door to cross-examination of the husband's criminal relations with other women and plaintiff's knowledge thereof, even though defendant has not pleaded such matter in mitigation of damages.

Morrow v Scoville, 206-1134; 221 NW 802

Criminal conversation — instructions. Instructions in action for damages for criminal conversation which allegedly occurred "on or about" a certain date "or at any time thereafter" are prejudicially erroneous when the record reveals the fact that the jury might have found the existence of said wrongful act from transactions occurring some four months prior to the limiting date specified by the instructions.

Newcomer v Ament, 214-307; 242 NW 82

CHAPTER 471

DIVORCE AND ANNULMENT OF MARRIAGES

10468 Jurisdiction.

ANALYSIS

I JURISDICTION IN GENERAL
II RESIDENCE
III SETTING ASIDE DIVORCE DECREES
IV PRESUMPTION OF DIVORCE

Validity of foreign decrees. See under §11567 (XII)

I JURISDICTION IN GENERAL

Discussion. See 13 ILR 320—Recognition of foreign decrees; 18 ILR 492—Divorce by judicial process

Absence of recital of facts found. A decree of divorce is not void because it contains no recitals of facts as found by the court.

Oliver v Oliver, 216-57; 248 NW 233

Consent decree. The mere fact that a defendant in divorce proceedings makes, during the trial, certain concessions of fact does not render the decree a consent decree.

Radle v Radle, 204-82; 214 NW 602

Jurisdiction—estoppel to question. A party, who instigates and successfully promotes a fraudulent proceeding on the part of his wife under which she is granted a decree of divorce, who pays the alimony decreed, and who promptly remarries, will not be permitted, after the death of his former wife, to maintain an action to annual said decree (and thereby restore his property rights) on the ground that the court had no jurisdiction to enter said decree.

Robson v Kramer, 215-973; 245 NW 341

Notice by publication — plaintiff assailing own decree not permitted. A wife who obtains a divorce by publication may not in a subsequent action between the same parties for divorce, aided by attachment, complain that her previous divorce decree is void for defective publication on the ground that the record fails to show selection of the newspaper by "plaintiff or his attorney", when she relied on the publication and induced the court to grant a decree thereon.

Hanson v Hanson, 226-423; 284 NW 141

I JURISDICTION IN GENERAL — concluded

Previous divorce by publication — defense. Decree of divorce denied on the ground that the parties were already divorced in a previous proceeding in which the court had full and complete jurisdiction upon service of notice by publication.

Hanson v Hanson, 226-423; 284 NW 141

Separate maintenance. Principle reaffirmed that an action by a wife against the husband for separate maintenance is a creature of equity only, not of statute.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

State party by implication. The state is impliedly a party to every divorce action.

Walker v Walker, 205-395; 217 NW 883

Unallowable new trial. The statutory provision for a new trial for a defaulting defendant served by publication only does not apply to divorce proceedings.

Girdey v Girdey, 213-1; 238 NW 432

II RESIDENCE

Change of venue mistaken remedy. Motion for change of venue in an action for divorce is not the proper remedy to present the claim that plaintiff is not a resident of the county in which the action is instituted.

Garside v Garside, 208-534; 224 NW 586

Effect of military service. A person who has once acquired a legal residence in this state does not lose it by entering the military service of the federal government, and by being stationed, in accordance with superior military order, for a series of years at various military posts, his intentions being at all times ultimately to return to his formerly acquired residence, and his conduct being in harmony with such expressed intention.

Harris v Harris, 205-108; 215 NW 661

Foreign divorce—when not recognized. A foreign decree of divorce will not be recognized in this state when it is made to appear that the defendant (1) was at all times domiciled in this state, the matrimonial domicile, (2) was never subject to the jurisdiction of such foreign court, and (3) had never consented to, or justified by misconduct, the acquisition by plaintiff of a domicile in such foreign country. Especially is this true when there is no showing that the plaintiff ever acquired a domicile in such foreign country.

Bonner v Reandrew, 203-1355; 214 NW 536

Foreign decree—"full faith and credit"—comity. The "full faith and credit" clause of the federal constitution does not compel the courts of this state to recognize as valid a default decree of divorce against a defendant domiciled in this state, rendered in a foreign state in appropriate proceedings in rem; but such a decree, when valid on its face, will, as a matter of reciprocal comity between the states, be recognized as valid in this state, in the absence of allegation and proof of fraud in obtaining it.

Miller v Miller, 200-1193; 206 NW 262

Fraud—motion to set aside decree. A motion to set aside a decree of divorce for fraud, in that plaintiff had not acquired a bona fide residence required by statute, is a proper procedure, but the burden of proof necessarily rests on the maker of the motion.

Girdey v Girdey, 213-1; 238 NW 432

Vacation for nonresidence. Record reviewed, in an action to vacate a decree of divorce on the ground of nonresidence of both of the parties, and held to show that the husband at least was, at the time of the divorce action, a resident of the county in which the decree was rendered.

Melvin v Lawrence, 203-619; 213 NW 420

III SETTING ASIDE DIVORCE DECREES

Vacation of illegal order. A motion to set aside and vacate an order which is in excess of the jurisdiction of the court is proper.

Guisinger v Guisinger, 201-409; 205 NW 752

Evidence—sufficiency. Evidence held insufficient to set aside a decree of divorce and to grant a new trial on the grounds of fraud and unavoidable casualty and misfortune.

McAtlin v McAtlin, 205-339; 217 NW 864

Fraudulently obtained decree—swift annulment. In view of the confidential relationship existing between a husband and wife, a court of equity should be swift to set aside a decree of divorce obtained by the husband by fraudulent means, the application by the innocent party for such annulment being made promptly after learning of the deception.

Petersen v Petersen, 221-897; 267 NW 719

Incompetent testimony in disregard of statute. A final decree of divorce, rendered by a court which has jurisdiction of the subject matter and of the parties, is not void because no witness was sworn or testified in the cause and no corroborating testimony was offered.

Radle v Radle, 204-82; 214 NW 602

Nonextrinsic fraud. Principle reaffirmed that the fraud which will justify the setting aside of a decree must be extrinsic and collateral to the matter determined by the decree—something other than false swearing in procuring the decree.

Girdey v Girdey, 213-1; 238 NW 432

Void decree—collateral attack. A decree of divorce, wheresoever rendered, is always open

to collateral attack by proof that the court was without jurisdiction to render it.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Vacation—unallowable grounds. A decree of divorce, rendered on full jurisdiction, will not be set aside and cancelled on the ground that the applicant for the cancellation fraudulently colluded with the other party to the action to obtain the decree.

Reppert v Reppert, 214-17; 241 NW 487

IV PRESUMPTION OF DIVORCE

Foreign decree—duty of court. The "full faith and credit" clause of the federal constitution does not compel the courts of this state to recognize as valid a default decree of divorce against a defendant domiciled in this state, rendered in a foreign state in appropriate proceedings in rem; but such a decree, when valid on its face, will, as a matter of reciprocal comity between the states, be recognized as valid in this state, in the absence of allegation and proof of fraud in obtaining it.

Miller v Miller, 200-1193; 206 NW 262

Presumption of sameness of foreign laws. It is presumed that the laws of every other state are the same as those of this state, in the absence of any showing to the contrary.

Harris v Harris, 205-108; 215 NW 661

Jurisdiction—unappealed decree of separate maintenance in foreign state—final adjudication. An unappealed decree of a court of competent jurisdiction of a sister state, granting separate maintenance to a wife on the ground of desertion, and dismissing the husband's cross-petition for divorce on the same ground, constitutes a final adjudication that the husband was not entitled to a divorce on any ground (the laws of the two states being the same), and is binding on the courts of this state, and a decree of divorce subsequently obtained in this state by the husband on service by publication and on the ground of desertion, and without revealing the foreign decree, will be deemed fraudulent and will be set aside on timely petition by the wife and a new trial granted on her prayer.

Bowen v Bowen, 219-550; 258 NW 882

10469 Kind of action—joinder.

Adjudication of bastardy—effect on child. That part of a decree of divorce which adjudges that a child of the wife is not the child of the husband is a nullity as far as the child is concerned.

Ryke v Ream, 212-126; 234 NW 196

Decree — refusal—nonallowable accounting. The court, after refusing a decree of divorce, may not enter into an accounting and make a division of property between the parties.

Henriksen v Henriksen, 205-684; 216 NW 636

Separate maintenance. Record held to justify the entry of a decree and for the allowance of $40 per month for the separate maintenance of the wife, on her counter plea in divorce action.

Crees v Crees, 218-338; 255 NW 515

10470 Petition.

Condonation—pleading. Principle recognized that condonation must be specifically pleaded.

Nelson v Nelson, 208-713; 225 NW 843

Pleadings—objections not raised in lower court. In an action for divorce based on cruelty, where the defendant made no objection either to the verification or the form of an amendment to a petition which alleged conviction of a felony, and the cause proceeded to trial without objection to petition as amended, the defendant on appeal could not complain that, because of the finding that equities were with plaintiff and were based on facts alleged in petition, trial court could not consider ground set out in amendment.

Ayers v Ayers, 227-646; 288 NW 679

10471 Verification—evidence.

Evidence—sufficiency. Evidence held to sustain a decree of divorce.

Garside v Garside, 208-534; 224 NW 586

Former decree — effect. In a second action for divorce, evidence of events antedating the first decree and including the history of the parties, and their relations, is not objectionable insofar as such evidence throws light upon the conduct of the parties subsequent to the former decree.

Garside v Garside, 208-534; 224 NW 586

Objections not raised in lower court. In an action for divorce based on cruelty, where the defendant made no objection either to the verification or the form of an amendment to a petition which alleged conviction of a felony, and the cause proceeded to trial without objection to petition as amended, the defendant on appeal could not complain that, because of the finding that equities were with plaintiff and were based on facts alleged in petition, trial court could not consider ground set out in amendment.

Ayers v Ayers, 227-646; 288 NW 679

10473 Residence—failure of proof.

Residence—absence on visit—effect. A bona fide residence in this state, once acquired, is not lost by a temporary visit of some considerable length in a foreign state.

Coulter v Coulter, 204-575; 215 NW 619

Void decree—collateral attack. A decree of divorce, wheresoever rendered, is always open

to collateral attack by proof that the court was without jurisdiction to render it.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

10474 Corroboration of plaintiff.

Corroborative evidence. It is unnecessary that every fact and circumstance detailed by complaining party to divorce action be corroborated. Evidence held corroborated sufficiently to entitle wife to divorce on ground of cruel and inhuman treatment.

Bohlmann v Bohlmann, (NOR); 240 NW 693

Disregard of statute. A final decree of divorce, rendered by a court which has jurisdiction of the subject matter and of the parties, is not void because no witness was sworn or testified in the cause and no corroborating testimony was offered.

Radle v Radle, 204-82; 214 NW 602

Difficulty attending proof. Corroboration of testimony tending to establish grounds for divorce is indispensable, irrespective of the difficulty of obtaining such corroboration.

Hummel v Hummel, 200-1176; 206 NW 115

Evidence sufficient. In an action for divorce resulting in decree for plaintiff on a general finding, where defendant assigns error based on a failure of proof of cruelty, and where, during the same term and before the same judge hearing the divorce proceedings, the defendant pleaded guilty to a grand jury indictment charging him with the crime of assault with intent to inflict great bodily injury upon plaintiff, and where on the following day plaintiff amended her petition for divorce by alleging defendant had been convicted of felony, and, while plaintiff did not personally testify to cruel and inhuman treatment, the record of conviction was offered and introduced in evidence without objection, the trial court did not err in granting a divorce as both parties apparently assumed the court was fully advised of the cruelty. Moreover, since defendant made no objection in court below, the question cannot be considered on appeal.

Ayers v Ayers, 227-646; 288 NW 679

Sufficiency. Corroboration sufficient to sustain a divorce is found in evidence, other than that of complainant, either direct or circumstantial, tending to establish the grounds charged, even tho such corroborative testimony does not extend to every part of complainant's testimony.

Courtney v Courtney, 214-721; 243 NW 510
Blazek v Blazek, 216-775; 249 NW 199

Vacation of decree. A final decree of divorce may not be vacated, even during the term at which entered, on a motion by defendant which alleges that no witness was sworn or testified in the cause and no corroborating testimony was offered, but which is silent as to any showing that plaintiff had no cause of action, or that defendant had a defense to plaintiff's action, or that there was fraud in obtaining the decree.

Radle v Radle, 204-82; 214 NW 602

10475 Causes.

ANALYSIS

Separate maintenance actions. See under §10481 (V)

I IN GENERAL

Attorney fees — when nontaxable. Tho a husband's action against his wife for the annulment of the marriage is legally nonmaintainable, and is therefore dismissed, attorney fees for the wife for defending the action may not be taxed against him.

Clark v Clark, 219-338; 258 NW 719

Connivance at wrongdoing. A husband who connives at the wrongdoing of his wife may not avail himself of such wrongdoing as a ground for divorce.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Hopeless conflict of testimony. No divorce will be granted on a petition and cross-petition therefor when the testimony and the weight thereof are in hopeless and irreconcilable conflict.

Ross v Ross, 205-424; 216 NW 22

Imputation of unchastity. The act of a husband, for a long series of years, in accusing his wife, without foundation, of unchastity, may furnish ample grounds for divorce.

Miller v Miller, 203-1218; 211 NW 705; 214 NW 613
Blazek v Blazek, 216-775; 249 NW 199

Two-fold insufficiency. Evidence reviewed and held wholly insufficient to justify the granting of a divorce because (1) of lack of evidence of cruel and inhuman treatment and (2) of lack of evidence that the treatment accorded plaintiff endangered her life.

Siverson v Siverson, 217-1167; 251 NW 653

II ADULTERY

Adultery — insufficient evidence. Circumstantial evidence on the issue of adultery reviewed and held, in view of its improbability in part, and in view of its manifest fabrica-

tion in part, to be quite insufficient on which to base a decree of divorce.

Goodrich v Goodrich, 205-1096; 216 NW 609

Adultery — evidence. The court will not be swift to impose the stigma of adultery upon a party even tho the party has been very indiscreet and has seriously violated the laws of propriety.

Turner v Turner, 219-334; 257 NW 819

Separate maintenance — evidence — insufficiency. Evidence held insufficient to justify a decree of separate maintenance either on the ground of cruel and inhuman treatment or on the ground of adultery.

Agnew v Agnew, 216-1; 248 NW 241

III DESERTION

Discussion. See 15 ILR 477—Denial of intercourse

Desertion. The act of a wife in leaving her husband without legal cause necessarily constitutes desertion.

Depping v Depping, 206-1203; 219 NW 416

Desertion—insanity—burden of proof. When it appears that the defendant in an action for divorce based on desertion has been judicially declared insane, plaintiff must overcome the presumption that such insanity continued. In other words, plaintiff must establish a return to sanity on the part of defendant—must establish a mental condition such as would enable defendant to form an intent to desert.

Carr v Carr, 209-160; 225 NW 948

Desertion—computation of period. In order to establish willful desertion for two years, plaintiff will not be permitted to include the time intervening between the date of a former decree of divorce for desertion and the date when said decree was wholly reversed on appeal, because during said time the defendant was excusably absent from the home of the plaintiff.

Carr v Carr, 212-1130; 237 NW 492

IV CONVICTION OF FELONY

Evidence sufficient. In an action for divorce resulting in decree for plaintiff on a general finding, where defendant assigns error based on a failure of proof of cruelty, and where, during the same term and before the same judge hearing the divorce proceedings, the defendant pleaded guilty to a grand jury indictment charging him with the crime of assault with intent to inflict great bodily injury upon plaintiff, and where on the following day plaintiff amended her petition for divorce by alleging defendant had been convicted of felony, and, while plaintiff did not personally testify to cruel and inhuman treatment, the record of conviction was offered and introduced in evidence without objection, the trial court did not err in granting a divorce as both parties apparently assumed the court was fully advised of the cruelty. Moreover, since defendant made no objection in court below, the question cannot be considered on appeal.

Ayers v Ayers, 227-646; 288 NW 679

V HABITUAL DRUNKENNESS

Inebriacy defined. Inebriacy is the state of drunkenness or habitual intoxication.

Maher v Brown, 225-341; 280 NW 553

Drunkenness—cruelty. Evidence as to habitual drunkenness and cruel and inhuman treatment reviewed and held to justify decree.

Converse v Converse, 225-1359; 282 NW 368

VI INHUMAN TREATMENT

Discussion. See 14 ILR 266—Cruelty as ground

Corroborative evidence. It is unnecessary that every fact and circumstance detailed by complaining party to divorce action be corroborated. Evidence held corroborated sufficiently to entitle wife to divorce on ground of cruel and inhuman treatment.

Bohlmann v Bohlmann, (NOR); 240 NW 693

Inhuman treatment—proof required. Proof of inhuman treatment sufficient to endanger life, and thereby justify the granting of a decree of divorce, must be clear, definite and satisfactory.

Wallace v Wallace, 212-190; 235 NW 728

Imperative requirements. Proof that alleged inhuman treatment endangered the life of the victim thereof, and the required statutory corroboration, are essential conditions to the right to a divorce.

Bartlett v Bartlett, 214-616; 243 NW 588

Cruelty — evidence — sufficiency. Evidence held sufficient to require a decree of divorce on the grounds of cruel and inhuman treatment.

Coulter v Coulter, 204-575; 215 NW 619
McGrath v McGrath, 205-192; 217 NW 821
O'Brien v O'Brien, 205-212; 217 NW 629
McCulla v McCulla, 213-1348; 241 NW 453
Courtney v Courtney, 214-721; 243 NW 510
Strickler v Strickler, (NOR); 255 NW 528

Drunkenness—cruelty. Evidence as to habitual drunkenness and cruel and inhuman treatment reviewed and held to justify decree.

Converse v Converse, 225-1359; 282 NW 368

Evidence sufficient. In an action for divorce resulting in decree for plaintiff on a general finding, where defendant assigns error based on a failure of proof of cruelty, and where, during the same term and before the same judge hearing the divorce proceedings, the defendant pleaded guilty to a grand jury in-

VI INHUMAN TREATMENT—continued

dictment charging him with the crime of assault with intent to inflict great bodily injury upon plaintiff, and where on the following day plaintiff amended her petition for divorce by alleging defendant had been convicted of felony, and, while plaintiff did not personally testify to cruel and inhuman treatment, the record of conviction was offered and introduced in evidence without objection, the trial court did not err in granting a divorce as both parties apparently assumed the court was fully advised of the cruelty. Moreover, since defendant made no objection in court below, the question cannot be considered on appeal.

Ayers v Ayers, 227-646; 288 NW 679

Evidence—sufficiency. Evidence held insufficient to justify a decree of divorce on the ground of cruel and inhuman treatment.

Walker v Walker, 205-395; 217 NW 883
Nelson v Nelson, 208-713; 225 NW 843
Vogt v Vogt, 208-1329; 227 NW 107
Krotz v Krotz, 209-433; 228 NW 30
Wallace v Wallace, 212-190; 235 NW 728

Evidence — sufficiency. Evidence reviewed, and held that certain treatment of a refined and cultured woman was "inhuman" within the meaning of the statute, and amply justified a decree of divorce.

Roach v Roach, 213-314; 237 NW 439

Evidence—sufficiency. Evidence of mistreatment of feeble old man in failing health and at times dangerously ill held sufficient to justify decree of divorce.

Graham v Graham, 227-223; 288 NW 78

Endangering health and life. On husband's cross-petition, trial court properly denied divorce where there was no evidence to show that wife's refusal to share the burdens naturally incident to the relationship of marriage so affected him as to injure his health and ultimately endanger his life. In the absence of physical violence, cruel and inhuman treatment to justify a divorce must not only endanger health, but must also be such as to ultimately endanger life.

Goecker v Goecker, 227-697; 288 NW 884

Mere filing of petition. The mere filing of a petition for divorce in which no actual moral delinquency is charged against the defendant does not establish cruel and inhuman treatment.

Biebesheimer v Biebesheimer, 202-668; 210 NW 896

Nonphysical violence. Life may be endangered by treatment tho it involves no physical violence.

Coulter v Coulter, 204-575; 215 NW 619

Insufficiency of evidence. Evidence reviewed and held insufficient to warrant divorce for cruel and inhuman treatment.

West v West, (NOR); 218 NW 292

Indirect charges of infidelity. Indirect charges of infidelity may constitute cruel and inhuman treatment.

McClurg v McClurg, 207-271; 222 NW 862
Williges v Williges, 215-960; 247 NW 222

Mental cruelty — evidence — sufficiency. Record reviewed and held to reveal such cruel and inhuman treatment of a wife by her husband as amply to support a decree of divorce to the wife, said cruelty being in the form of a systematic course of conduct, by the husband, deliberately designed to mentally harass the wife.

Hemmen v Hemmen, 221-894; 267 NW 687

Showing of indiscretion. The act of a husband in obtaining an affidavit which tends to show indiscretions on the part of the wife with other male persons does not establish cruel and inhuman treatment, it appearing that the existence of the affidavit was not revealed until the trial.

Biebesheimer v Biebesheimer, 202-668; 210 NW 896

Separate maintenance — evidence — insufficiency. Evidence held insufficient to justify a decree of separate maintenance either on the ground of cruel and inhuman treatment or on the ground of adultery.

Agnew v Agnew, 216-1; 248 NW 241

Unsustained charge of infidelity. Unsustained charges by a husband that his wife, at the time of their marriage, was, unbeknown to him, pregnant with child by another than the husband, may constitute cruel and inhuman treatment.

Heath v Heath, 222-660; 269 NW 761

Unwarranted charges and threats. Unwarranted charges of unchastity and violent threats may constitute such cruel and inhuman treatment as to justify a decree of divorce provided they endanger the life of complainant.

Massie v Massie, 202-1311; 210 NW 431

Inhuman treatment — sufficiency. Evidence that a husband treated his wife as a mere servant and mistress, constantly swore at and reviled her, struck her on occasions, drew a gun on her, threatened her life, begrudgingly furnished her medical services, and falsely accused her of infidelity, and that such treatment seriously undermined her health, held ample to support a decree of divorce.

Schneckloth v Schneckloth, 209-496; 228 NW 290

Impairment of health. (1) Impairment of health and (2) endangering the life of complainant are indispensable elements of "inhuman treatment," within the meaning of the divorce statutes.

White v White, 200-779; 205 NW 305
Hill v Hill, 201-864; 208 NW 377
Henriksen v Henriksen, 205-684; 216 NW 636

VII CONDONATION

Condonation. Condonation is always conditional upon the fact that the party forgiven will thereafter abstain from the commission of offenses similar to those forgiven.

Massie v Massie, 202-1311; 210 NW 431

Condonation. A formal agreement to withhold divorce proceedings pending the good conduct of the other party to the marriage relation, followed by no resumption of the marriage relation, does not constitute condonation of existing grounds for divorce.

Vincent v Vincent, 201-299; 207 NW 114

Condonation—insufficient basis. The plea of condonation is not established by evidence that, on one occasion, and for a considerable period of time, the wife visited the husband in order that he might visit with the children, the husband and wife not cohabitating as husband and wife; and especially is this true when, throughout said visit, there was no reformation in the husband's conduct.

Coulter v Coulter, 204-575; 215 NW 619

Condonation — cohabitation — husband and wife during continued cruelty. The fact that a wife during long and continued cruelty on the part of the husband, lived and cohabited with him as his wife, does not constitute condonation of such cruelty, especially when she was justifiably in fear of him.

Schneckloth v Schneckloth, 209-496; 228 NW 290

Unpleaded condonation. After adultery has been unquestionably established, the court, in the absence of plea and proof of condonation, may not legally refuse a decree of divorce to the innocent party on the theory that said party has condoned the adultery by apparently living with the guilty party after the adultery but before learning thereof.

Stambaugh v Stambaugh, 214-327; 242 NW 46

Condonation. A husband who, with full knowledge of the misconduct of his wife, resumes the marital relation thereby condones the wrong.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

10476 Husband from wife — other causes.

Pregnancy at time of marriage. A husband who marries his wife in the belief that he was the father of her unborn child is entitled to a divorce upon discovery of his mistake, he having no illegitimate children living at the time of said marriage.

Wiley v Wiley, 204-553; 215 NW 705

"Annulment" and "divorce" distinguished. A husband may not maintain an independent action in equity to nullify a marriage on the ground that the wife, at the time of marriage, was, unbeknown to him, pregnant by another than himself. His action should be one for divorce on said ground.

Clark v Clark, 219-338; 258 NW 719

Unknown pregnancy — evidence — insufficiency. Evidence reviewed and held insufficient to rebut the presumption of legitimacy which attends a child born in lawful wedlock.

Heath v Heath, 222-660; 269 NW 761

10477 Cross petition.

Separate maintenance. Principle recognized that in an action by a husband for divorce the wife may, on proper pleading and supporting evidence, be granted a decree for separate maintenance.

Waddington v Waddington, 218-460; 255 NW 462

10478 Maintenance during litigation.

Absence of marriage relation — effect. A prayer, in a divorce action, for alimony, attorney fees, and costs becomes a nullity when it is found that the plaintiff and defendant are not husband and wife.

Reppert v Reppert, 214-17; 241 NW 487

Attorney fees — inadequacy. An inadequate allowance to the wife for attorney fees will be corrected on appeal.

Tennigkeit v Tennigkeit, 222-657; 269 NW 877

Decree for attorney fees — nonadjudication as to attorney. A decree in divorce proceedings awarding plaintiff (in addition to a divorce) a specified sum as attorney fees is not an adjudication as to the amount owing by plaintiff to her attorney for services rendered in the action,—the attorney, of course, not being a party to the action.

Duke v Park, 220-889; 262 NW 799
Maddy v Park, 220-899; 262 NW 796
Jones v Park, 220-894; 262 NW 797; 264 NW 700

Attorney fees — ordering clerk to satisfy. When at the time of agreeing to a property

settlement, plaintiff in divorce proceeding also orally agreed to pay her attorney a fee of $250 for his services, the court should order the clerk to satisfy said fee from the money paid into his hands in satisfaction of said property settlement and on which money the attorney had perfected a lien,—it appearing that said fee was reasonable in amount and the agreement therefor untainted with any illegality.

Mickelson v Mickelson, 222-942; 270 NW 365

Nonallowable attorney fees. Attorney fees may not be allowed in a proceeding to modify a decree of divorce as to alimony.

Handsaker v Handsaker, 223-462; 272 NW 609

Action on divorce settlement stipulation—unallowable attorney fees. A stipulation or contract of settlement in a divorce action as a basis for a money recovery is in no different category from any other contract, and, unless provided for therein, attorney fees are not taxable in an action based thereon.

Johnstone v Johnstone, 226-503; 284 NW 379

Dismissal — effect on taxation of attorney fees. The action of plaintiff in divorce proceedings in dismissing his action pending defendant's application for suit money, deprives the court of jurisdiction thereafter to tax to plaintiff, as costs, any allowance to compensate defendant for attorney fees for services performed prior to said dismissal.

Dallas v Dallas, 222-42; 268 NW 516

Modification — attorney fees unallowable. The statutory authority to allow attorney fees in an original divorce proceeding, does not apply to proceedings for the modification of a decree of alimony.

Nicolls v Nicolls, 211-1193; 235 NW 288

Rule for allowance. Temporary alimony and suit money will be gauged in harmony with the station in life of the parties and the financial ability of the husband to pay. An allowance of $500 per month as temporary alimony, $1,000 as suit money, and $1,000 as attorney fees held not excessive.

Hanford v Hanford, 214-839; 240 NW 732

Suit money and attorney fees not allowable. Suit money and attorney fees are not allowable to the defendant in an action or application for the modification of a decree of divorce as to the custody of a child of the parties.

Hensen v Hensen, 212-1226; 238 NW 83

Temporary alimony, etc. — showing. Ample showing of marriage justifying an order for temporary alimony, suit money, and attorney fees in an action for separate maintenance, is made by proof that even tho plaintiff and defendant were married at a time when plaintiff's decree of divorce from a former husband had not been entered of record, yet plaintiff and defendant for several years lived together as husband and wife after said decree had been so entered.

Hanford v Hanford, 214-839; 240 NW 732

10479 Attachment.

Statutory origin. Principle reaffirmed that proceedings in attachment are of statutory origin only, and in derogation of the common law.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Fatally delayed presentation. The objection that a motion to discharge an attachment was not timely may not be raised for the first time on appeal.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Separate maintenance. The statutory power of a judge of the district court in action for divorce to order an attachment, with or without bond, does not authorize him to enter such order in an action for separate maintenance.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

10481 Alimony—custody of children —changes.

ANALYSIS

Custody of illegitimate children. See under §10460
Separation agreements. See under §10447 (II)

I CUSTODY AND SUPPORT OF CHILDREN

Discussion. See 11 ILR 365—Jurisdiction of status created by award of custody

Affirmance of order—effect. The affirmance, on appeal, of an order relative to the custody of children will not prevent a future modification by the trial court of such order.

Oliver v Oliver, 216-57; 248 NW 233

Alimony—support when husband able. A decree of divorce should not make the divorced husband and father destitute for purpose of permitting the wife and children to live in idleness and luxury, but, on other hand, so long as the divorced husband and father has property or income, the divorced wife and

children of tender age should not be deprived of a decent home and decent support.

Converse v Converse, 225-1359; 282 NW 368

Appeal — deference to trial court. Tho divorce proceedings are triable de novo on appeal, yet the wide discretion vested in the trial court in determining the custody of children will be respected and confirmed in all cases except where the discretion has been abused.

Wood v Wood, 220-441; 262 NW 773

Allowance for child—sale of homestead. The court may properly decree in divorce proceedings that a monthly allowance solely for the support and education of a child shall be a lien on the defendant-parent's homestead—all the property the parent possesses—but may not properly decree that in case of a failure to pay the allowance the homestead shall be sold and the proceeds impounded solely for the support and education of the child. On the contrary, a sale of the parent's homestead should be permitted only on proof of the parent's willful refusal or neglect to pay as far as he can reasonably pay.

Paul v Paul, 217-977; 252 NW 114

Change in condition—burden of proof—supplemental decree—effect. When plaintiff in divorce proceedings is unconditionally awarded the custody of children, a supplemental decree which is plainly temporary in its provisions in that it clearly awards custody to defendant only during plaintiff's then sickness, necessarily loses all force and effect when plaintiff is admittedly restored to good health. Defendant, to justify his refusal to surrender custody, has the burden to establish a material change in conditions since the original decree, by proof other than by proof of the facts on which the supplemental decree rests.

Wood v Wood, 220-441; 262 NW 773

Conditional custody. The court in a decree of divorce has power to award to one of the parties the custody of the children so long as such party maintains his or her residence in this state.

Goodrich v Goodrich, 209-666; 228 NW 652

Controlling considerations. The fact that one custody of a child may offer larger financial and educational advantages than another custody, is not necessarily a controlling consideration on the issue of the child's best welfare.

Jensen v Sorenson, 211-354; 233 NW 717

Custody of child—best interest of child. The paramount consideration in determining the custody of a child is the best interest of the child.

Ellison v Platts, 226-1211; 286 NW 413

Selecting parent—custody—when not disturbed. Where children are old enough to elect with which parent they will live, the refusal of the lower court to disturb their custody sustained on appeal.

Johnstone v Johnstone, 226-503; 284 NW 379

Custodial order as adjudication. An order in divorce proceedings awarding to the mother, without fraud on her part, the unconditional custody of her children, constitutes a final adjudication in her favor of each and every fact then bearing on her fitness for such custody.

Wood v Wood, 220-441; 262 NW 773

Custodial order improper. In wife's action for divorce wherein husband also sought divorce by way of cross-petition and trial court found neither party guilty of grounds for divorce, it was improper and inequitable to grant wife custody of child and support money, because under such circumstances husband was under no duty to support wife and child away from home, and because such order would merely serve to continue the estrangement and create a situation naturally productive of evil results and inimical to the best interests of society.

Goecker v Goecker, 227-697; 288 NW 884

Divorce—effect as to children. Principle reaffirmed that the duties and liabilities of the parents to a minor child do not terminate by a decree of divorce.

Hensen v Hensen, 212-1226; 238 NW 83

Divorce settlement stipulation—unenforceable if uncertain. Where a divorce stipulation of settlement leaves for future decision certain matters of education of the children, there is such uncertainty and ambiguity and lack of definiteness, that specific performance cannot be granted.

Johnstone v Johnstone, 226-503; 284 NW 379

Dying request—materiality. Evidence of the dying request of a mother as to the future custody of her infant child is highly material on the issue of such custody.

Jensen v Sorenson, 211-354; 233 NW 717

Foreign decree. A foreign decree of divorce fixing the custody of a child is not res judicata of the rights of a third party in this state to such custody. In any event, such third party may show that, by statute in such foreign state, the custodial decree is not conclusive and unalterable; or he may rest on the presumption that the foreign statute is the same as in this state, relative to such decree's being non res judicata as to subsequent changed conditions.

Barnett v Blakley, 202-1; 209 NW 412

Garnishment — divorce proceedings — allowance for children. Money awarded to a mother in a decree of divorce "for the support and maintenance" of her minor children is not sub-

I CUSTODY AND SUPPORT OF CHILDREN—continued

ject to process of garnishment under a personal judgment against the mother.

Peck v Peck, 207-1008; 222 NW 534

Health of mother as element—discretion of court. The action of the trial court in reaffirming, or refusing to modify, an original decree which unconditionally awarded to a mother the custody of her immature, minor children, will not be disturbed when the mother is admittedly in good mental and physical health, and when the sole support for cancellation of the decree is limited to nonpersuasive, opinion evidence relative to the mother being afflicted with epileptic insanity, and whether, if so afflicted, the disease may or probably will light up at some future time.

Wood v Wood, 220-441; 262 NW 773

Improper allowance for support. The fact that a wife, successful plaintiff in divorce proceedings, (1) has title to or possession of the life-accumulations of the parties, (2) has but recently personally inherited, in her own right, substantial amounts of property, and (3) that the health of the defendant has failed with consequent lessened earning power, may render improper any monthly financial allowance to the plaintiff for the support of the minor children.

Tennigkeit v Tennigkeit, 222-657; 269 NW 877

Irrevocable decree prohibited. The court cannot, in divorce proceedings, make an irrevocable order relative to the custody of children.

Goodrich v Goodrich, 209-666; 228 NW 652

Justifiable order. In an action for divorce, the property rights of the parties and the custody of the children cannot be adjudicated unless a case is made warranting a decree of divorce.

Oliver v Oliver, 216-57; 248 NW 233

Maternal preference. All other matters being equal, the court will be strongly inclined to favor the mother as the proper custodian of immature children.

Werner v Werner, 204-550; 212 NW 569

Modification of decree—conditions. A decree of divorce will not be modified as to the custody of children except on a clear showing by the applicant of such facts and circumstances occurring subsequent to the date of the decree, as affect the well-being of the children, and demand a change in their custody.

Neve v Neve, 210-120; 230 NW 339

Modification — insufficient showing. That part of a decree of divorce which conditionally awards the successful party the custody of children cannot be so modified as to avoid the conditions except on allegation and proof of a substantial change in the conditions or circumstances of the parties. So held where a mother was decreed the custody of children while she remained a resident of the state, with right of visitation in the father. Held, the investment of her assets in property outside the state was insufficient as such change of circumstances.

Goodrich v Goodrich, 209-666; 228 NW 652

Private modification—confirmation by court. When parties to a divorce voluntarily modify the decree relative to the custody of the children, the court may, by a subsequent order, very properly confirm the said modification when it is conducive to the welfare of the children.

Wheeler v Wheeler, 217-422; 251 NW 693

Refusal to modify. Evidence in proceedings supplemental to divorce reviewed, and held to sustain the refusal of the trial court to order a change in the custody of a minor child in favor of a parent who had never contributed to the support of the child, and had not even seen it until it was some eighteen months old.

Reeves v Reeves, 205-215; 217 NW 823

Review — divorce modification. Where a woman seeks, by virtue of a divorce settlement stipulation, to collect, from her ex-husband, the expenses of a son while at college, and the trial court, after hearing the evidence, reduced the amount she was seeking, held no error.

Johnstone v Johnstone, 226-503; 284 NW 379

Moot questions. An order of the supreme court on appeal that the trial court enter a decree of divorce in favor of plaintiff, and all proper orders relative to the custody of the children, renders moot the legality of all prior orders of the trial court in injunctional proceedings relative to the custody of such children.

McGrath v Dist. Court, 205-191; 217 NW 823

Preference to mother. To separate immature, minor children from a mother possessing a normal outlook on life, and normal motherly instincts, is a tragedy which should be avoided wherever reasonably possible.

Wood v Wood, 220-441; 262 NW 773

Paternal preference. Circumstances may be such as to justify the trial court in divorce proceedings in giving the custody of an immature infant to the father, even tho he is the party in the wrong.

Watland v Watland, 206-1191; 221 NW 819

Presumptive right of parent. A father is necessarily given the custody of his motherless child when he has neither abandoned the child, nor surrendered his right to the custody of the child, and when there is no showing that

the welfare of the child requires its custody to be awarded to another.

Bonnarens v Klett, 213-1286; 241 NW 483

Revival of paternal rights—conditions. Assuming that the death of a mother (to whom the custody of her infant child had been judicially awarded) revives the custodial rights of the father, yet he must assert such rights with a promptness commensurate with the helplessness of the child, or he will be deemed to have forfeited and waived them, and will not, thereafter, be permitted to challenge the rights of another custodian except on the grounds of unfitness.

Jensen v Sorenson, 211-354; 233 NW 717

Unallowable condition. The right of a father and child to visit each other should not be conditioned on the father's paying the alimony decreed to the mother.

Fitch v Fitch, 207-1193; 224 NW 503

Welfare of child sole question. Orders in divorce proceedings as to the custody of minor children of the parties will, irrespective of the wishes of the parents, be made on the basis of what the equity court deems to be for the best interest of the child.

Horn v Horn, 221-190; 265 NW 148

II PERMANENT ALIMONY

(a) IN GENERAL

Discussion. See 13 ILR 164—Garnishment of alimony; 18 ILR 64—Enforcement by contempt; 24 ILR 735—Separate action after divorce

Alimony—nonabatement by death. A decree for alimony does not abate on the subsequent death of the party to whom the alimony was awarded.

Higgins v Higgins, 204-1312; 216 NW 693

Alimony—property settlement under trust agreement. A property settlement under an irrevocable trust agreement made by husband and wife previous to and confirmed in divorce decree discharged husband's obligation for further support and precluded right to further alimony.

Fitch v Com. of Internal Rev., 103 F 2d, 702

Lien against homestead. In a divorce action granting wife a decree of divorce and alimony, decree could make provision for the disposition of the homestead or make charges against it in favor of one of the parties as against the other.

Ayers v Ayers, 227-646; 288 NW 679

Right to alimony—how determined. In action for divorce the right to alimony must be determined in light of all facts and circumstances, and is not mandatory, but depends somewhat on parties' ages, sex, health, abilities to earn, properties, resources, etc.

Retman v Retman, (NOR); 254 NW 804

(b) NATURE OF ALIMONY

Alimony—nonlienable decree for money. A decree (in divorce proceedings) which, inter alia, simply "orders" defendant to pay to the clerk for the use of plaintiff a stated sum each month, but renders against defendant no present judgment for money but authorizes the clerk to enter such judgment for payments in default, neither becomes a lien on defendant's lands, nor authorizes the issuance of an execution.

Millisack v O'Brien, 223-752; 273 NW 875

Temporary appointment of guardian—validity. The appointment of a temporary guardian on proper and sufficient notice to the person sought to be placed under guardianship is valid, even tho the statute authorizing such appointment is silent as to notice.

In re Barner, 201-525; 207 NW 613

(c) JURISDICTION

Alimony to guilty party. The allowance of alimony to a guilty party is within the legal discretion of the court.

Mitchell v Mitchell, 193-153; 185 NW 62
Blain v Blain, 200-910; 205 NW 785

Allowance on prior divorce. The court may be justified in wholly denying to a successful party in divorce proceedings any alimony, in view of the amount allowed to said party on a former decree of divorce between the same parties.

Black v Black, 200-1016; 205 NW 970

Decree—refusal—nonallowable accounting. The court, after refusing a decree of divorce, may not enter into an accounting and make a division of property between the parties.

Henriksen v Henriksen, 205-684; 216 NW 636

(d) CONDITIONS UNDER WHICH ALIMONY ALLOWED

Unallowable allowance to guilty party. Alimony should not be allowed to a defendant against whom a decree of divorce is entered, when he has never made any contribution to plaintiff's property.

Rule v Rule, 204-1122; 216 NW 629

(e) AMOUNT OF ALIMONY

Alimony—refusal of—construction of decree. A decree of divorce will not be held to deny all alimony if it makes some provision for the maintenance of plaintiff. So held on an application to modify alimony.

Handsaker v Handsaker, 223-462; 272 NW 609

Allowance for children. Allowance to a successful party in divorce proceedings for the support of children reviewed, and order increased by 100 percent.

Black v Black, 200-1016; 205 NW 970

II PERMANENT ALIMONY—concluded

(e) AMOUNT OF ALIMONY—concluded

Excessive alimony.

Blain v Blain, 200-910; 205 NW 785

Nonexcessive alimony.

Schneckloth v Schneckloth, 209-496; 228 NW 290

Williges v Williges, 215-960; 247 NW 222

Nonexcessive allowance. An award of $22,000 as alimony, and of $100 per month for the support and education for a named time of minor children, is not excessive as regards a defendant who is worth at least $75,000.

Goodrich v Goodrich, 205-1096; 216 NW 609

Nonexcessive allowance. Decree for alimony reviewed, and held that an allowance of $75 per month out of the husband's income of $125 per month was proper.

Roach v Roach, 213-314; 237 NW 439

Nonexcessive allowance. Record reviewed, and held that an allowance to the wife of $40 per month for five years was not excessive in view of the financial condition, earning power, and health of the parties.

Ellsworth v Ellsworth, 218-957; 256 NW 690

Equitable allowance. Evidence reviewed and held that alimony of $30 per month to a wife to whom was decreed the custody of three minor children was not inequitable in view of the wife's contribution to the tangible property and the division of such property.

Crouch v Crouch, 213-460; 239 NW 106

Equitable apportionment. An order for alimony in divorce proceedings should be based on a reasonable and equitable apportionment of the income of the defendant, and not solely on the basis of the amount of money necessary to support the wife and children.

Schorr v Schorr, 206-334; 220 NW 31

Reasonableness. Award of $7,000 for the first year, of $6,000 for each ensuing year, and $4,000 for attorney fees, reviewed and held reasonable in view of the circumstances of the parties.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Fundamental considerations. A decree for alimony and support must fundamentally rest on the necessities and financial condition of both the husband and wife and children, yet the court will not be blind to the relative deserts of the principal parties as reflected in their conduct and in the aggravations and palliations thereof. Decree reviewed, and held unreasonably burdensome.

Saunders v Saunders, 211-976; 234 NW 830

Manifest inability to pay. Alimony which is so large in amount as manifestly to be wholly beyond the ability of the husband to pay is legally excessive, irrespective of the needs of the wife.

Fitch v Fitch, 207-1193; 224 NW 503

One-half of property to wife. Record reviewed and held to demand a modification to the extent of awarding one-half of the property to the injured wife, and an increase in the amount of a monthly award in money.

Parizek v Parizek, 210-1099; 229 NW 689

(f) PROPERTY SUBJECT TO ALIMONY—ENFORCEMENT OF DECREE

Contingent liability not debt "to become due". The defendant in a decree for alimony (assuming such decree to create a "debt") is not garnishable on an installment which is unmatured on the date of the garnishment, and the maturity of which will be wholly defeated by the death of the plaintiff in alimony before the maturity date as provided by the decree.

Malone v Moore, 204-625; 215 NW 625; 55 ALR 356

Property subject to garnishment—decree for alimony. A decree for alimony in fixed monthly payments does not create a "debt". It follows that the defendant in alimony cannot be legally garnished for unpaid installments as a debtor of the plaintiff in alimony, even tho the claim on which the garnishment is based is for necessaries sold to the plaintiff in alimony since the entry of the decree and in reliance on said decree.

Malone v Moore, 212-58; 236 NW 100

III SUBSEQUENT CHANGES IN ALIMONY AND CUSTODY OF CHILDREN

Discussion. See 2 ILB 204—Alimony—modification; 6 ILB 233—Modification of alimony decree

Custody of children—subsequent modification of orders. The fact that a parent who was given the right to visit her child at stated times has, since the entry of the order, become better circumstanced financially to provide for the child will not necessarily constitute such "change of condition" as to justify a change in the court order; and whether the court order should be changed may be materially controlled by a consideration of the difficulties which the parties have experienced since the entry of the order and which relate to the welfare of the child.

Bennett v Bennett, 200-415; 203 NW 26

Modification in re children. A decree of divorce which specifically denies all allowance of alimony may be subsequently so modified as to require the defendant to pay a stated sum for the care and support of his children.

Duvall v Duvall, 215-24; 244 NW 718; 83 ALR 1242

Insufficient grounds. A decree for alimony with right in defendant to visit his children

will not necessarily be suspended because the wife, immediately upon the rendition of the decree, took the children beyond the jurisdiction of the court.

Schneider v Schneider, 207-189; 222 NW 400

Loss of right. The mother of an illegitimate child, who has for a long series of years evinced but a very casual interest in the child, may not successfully urge her right to the custody of the child against fit and proper parties who have nurtured, cared for, and educated the child from birth, even tho they have been paid compensation by parties other than the mother, it appearing that it would not be to the best interest of the child to decree custody to the mother.

Barry v Reeves, 203-1345; 214 NW 519

Modification of order of custody—considerations. In an action for the modification of an order for the custody of a 10-year-old child, where the affection and care received in the homes of each of the divorced parents was satisfactory, the wishes of the child cannot have great weight, the controlling consideration being the welfare of the child, and, when there was no change in circumstances to require the action of the court, a previous adjudication that the child remain with his mother should not be modified.

Vierck v Everson, 228- ; 291 NW 865

Modification refused—evidence. Evidence justified trial court's refusal to modify divorce decree giving custody of children to be reared in home of wife's parents. Lower court's discretion and responsibility in such cases discussed.

Townsend v Townsend, (NOR); 213 NW 273

Support of children—stipulated settlement. Altho a divorced father's financial condition has changed but he is still able to carry out a settlement stipulation merged in a divorce decree, and altho his ex-wife has property and an income of her own, a review of the evidence on appeal held to justify the refusal of the lower court to modify the support provisions of the divorce decree.

Johnstone v Johnstone, 226-503; 284 NW 379

Alimony—modification. Order for alimony reviewed, and an equitable modification ordered.

McClurg v McClurg, 207-271; 222 NW 862

Accounting between parties. Where in an application to modify a decree in alimony it is made to appear that the defendant is in arrears on payments, but it also appears that plaintiff has seized and converted certain property of the defendant, the court may work out an accounting by plaintiff for the property seized, and may, on supporting testimony, decree that the property seized equals the payments which are in arrears, it appearing that the parties had, without objection, litigated such issue.

Woodall v Woodall, 204-423; 214 NW 483

Accrued and unpaid installments unchangeable. While the court, in divorce proceedings, has ample power, on a showing of change of conditions of the parties, to modify a former order or judgment for alimony or support money, yet the court is wholly without jurisdiction to cancel installments which have accrued and which remain unpaid under said former order or judgment.

Horn v Horn, 221-190; 265 NW 148

Unpaid accrued installments—status. Accrued and unpaid installments of alimony cannot be modified by the court.

Roach v Oliver, 215-800; 244 NW 899

Adjudicated grounds. A modification of a decree of divorce as to the property rights of the parties may not be had on grounds known to exist at the time the decree was entered.

Guisinger v Guisinger, 201-409; 205 NW 752

Appeal—nonabatement by death. The death of a party to whom a decree of divorce has been awarded does not abate an appeal insofar as property rights and the custody of children are affected by the decree.

Oliver v Oliver, 216-57; 248 NW 233

Fatally belated objection. The objection that a party to a divorce decree filed no pleadings in resistance to an application for a modification of the decree may not be raised for the first time on appeal.

McNary v McNary, 206-942; 221 NW 580

Findings in alimony modifications—weight on appeal. In equity cases triable de novo, much weight should be given to findings of the trial court because of the better opportunities of that court to weigh the testimony, and in matters like modification of alimony decrees the court exercises a large discretion which, unless abused, will not be interfered with on appeal.

Siders v Siders, 227-764; 288 NW 909

Jurisdiction. The statutory provision that the court in divorce proceedings may make changes in prior orders ipso facto works a retention in the court of jurisdiction of both (1) the subject-matter of the orders and (2) the parties, even tho the decree is silent as to such retention of jurisdiction.

Franklin v Bonner, 201-516; 207 NW 778

Notice. The retained jurisdiction of the court may be reasserted by the court at any time on such reasonable notice as the court may order.

Franklin v Bonner, 201-516; 207 NW 778

Presentation and reservation of grounds of review. On application to modify an award of

III SUBSEQUENT CHANGES IN ALIMONY AND CUSTODY OF CHILDREN—continued

alimony and support money, a plea of adjudication must be presented to the trial court, or it will not be considered on appeal.

Kruckman v Kruckman, 209-1218; 229 NW 700

Decree on publication service—effect on alimony. A plaintiff who takes a decree of divorce on service by publication may not thereafter resurrect the proceeding for the purpose of an allowance of alimony. This is true even tho plaintiff prayed for alimony, and even tho the court assumed to continue the proceeding on the question of alimony.

Doeksen v Doeksen, 202-488; 210 NW 545

Decree providing alimony until child attains majority—not subject to change thereafter. Decree of divorce providing that husband's monthly payments of alimony for child should continue "until said minor child has attained his 21st birthday, unless this decree should be modified or changed by said court", held not to authorize change in decree after child attained majority.

Hartwick v Hartwick, (NOR); 227 NW 341

Default — effect. The alimony provisions of a decree of divorce will not be modified as a matter of course simply because the other party to the decree defaults when the application for modification comes on for hearing.

McNary v McNary, 206-942; 221 NW 580

General equitable relief. In an application for the modification of a decree of alimony, a prayer for general equitable relief justifies, under proper showing, a modification of that part of the alimony decree pertaining to the maintenance of insurance.

Nicolls v Nicolls, 211-1193; 235 NW 288

Interest. Circumstances may be such as to justify an award of interest on an agreed settlement of alimony long delayed by the wrong of the defendant.

Miller v Miller, 203-1218; 211 NW 705; 214 NW 613

Legally unmodifiable decree. A final, legal decree of divorce, which denies alimony, may not be modified by the court as to alimony, even under a showing of materially changed circumstances.

Handsaker v Handsaker, 223-462; 272 NW 609

Lessened earning power. A material decrease in the earning power of a person subsequent to the time when he was decreed to pay monthly alimony, is such change of circumstances as will justify a modification of the decree.

Nicolls v Nicolls, 211-1193; 235 NW 288
Keller v Keller, 214-909; 243 NW 182
Junger v Junger, 215-636; 246 NW 659

Lessened earning power — willful neglect. The plea of lessened earning power of one who has been decreed to pay alimony will not be deemed such "change in circumstances" as to justify a modification of the decree of alimony when such lessened earning power is the result of his own willful neglect.

Stone v Stone, 212-1344; 235 NW 492

Lessened earning power. Basis for a modification of a decree for monthly alimony may be found in the unavoidable lessened earning power of the defendant.

Corl v Corl, 217-812; 253 NW 125

Lien on homestead. Defendant, in an application for modification of an alimony allowance, by praying for general equitable relief thereby offers to do equity, and arms the court with power to make the reduced allowance a lien on defendant's homestead, even tho former allowances had not thus been made a lien on said homestead.

Paul v Paul, 217-977; 252 NW 114

Life estate to wife, remainder to children—modified on appeal. A decree of divorce awarding to the wife a life estate in real property, with remainder to the children, modified on appeal to give the remainder to the husband subject to the wife's life estate.

Converse v Converse, 225-1359; 282 NW 368

Modification—changed financial condition. A change for the better in the financial condition of a party to divorce proceedings may furnish basis for an application for modification of the decree. Decrees in re alimony will be subsequently modified only under unusual circumstances.

Handsaker v Handsaker, 223-462; 272 NW 609

Contemplated change of circumstances. A plea for modification of a decree of alimony must be based on some condition or state of circumstances not known to or reasonably contemplated by the parties when the decree was originally entered.

Handsaker v Handsaker, 223-462; 272 NW 609

Modification by action by executor. Whether an action or proceeding to modify an alimony allowance survives the death of the obligated party, and passes to the latter's executor, quaere, but, conceding such survival, there must be proof that the right to such modification existed in the obligated party during his lifetime.

Goldsberry v Goldsberry, 217-750; 252 NW 531

No modification without substantially changed condition. Trial court may not modify an original divorce decree without a substantial change in the condition of the parties, which must be more than small income employment for the wife and remarriage of the husband.

Metzger v Metzger, 224-546; 278 NW 187

Facts warranting modification. Divorce decree providing for $75 monthly payments for alimony and child support modified on showing of defendant's ownership of 120-acre farm and $1,500 unsecured debt as only assets.

Jones-Holmes v Jones, (NOR); 216 NW 688

Justifiable modification. A modification of a decree for monthly payments of alimony is justified by a showing that, since the entry of the decree, the defendant has, by reason of age, been retired by his employer on a pension which is defendant's sole means of support, and which is a very material reduction of his former income.

Toney v Toney, 213-398; 239 NW 21

Justifiable modification. A decree for alimony may be subsequently modified by reducing the amount on a showing of loss of health and lessened earning ability, even tho the allowance is solely for the benefit of a child.

Paul v Paul, 217-977; 252 NW 114

Factors justifying reduction. On application for modification of alimony decree, evidence relating to both parties' ages, health, wages, earning capacities, expenses and indebtedness justified trial court's reduction of alimony from $50 to $30.

Siders v Siders, 227-764; 288 NW 909

Insufficient change in condition. Evidence held insufficient to show such change in the condition of the parties to a divorce decree as to justify a modification of the provisions relative to alimony by returning to the applicant a part of a specific property once awarded to plaintiff.

McNary v McNary, 206-942; 221 NW 580

Justifiable refusal to increase. The refusal of the court to increase a former award of alimony finds full justification in the fact that, at the time of the application for the increase, the applicant was in affluent circumstances.

Miller v Miller, 200-1193; 206 NW 262

Unallowable modification. Where parties to a divorce proceeding formally stipulated that they owned all the capital stock of a corporation, and that said stock should be equally divided between them, and said stipulation was carried into, and confirmed by, the decree, the defendant will not later be granted a modification assigning to plaintiff a minority of the stock on the ground that defendant was mistaken, when the decree was entered, in the ownership of one share, when at said time he had knowledge of every fact bearing on the ownership of said share.

Parker v Parker, 214-1327; 241 NW 497

Unallowable modification. An unappealed decree of divorce, which specifically denies all allowance of alimony because the parties had theretofore entered into a property settlement, is a finality on the subject matter of alimony, and may not, long after the court term has expired, be modified by inserting said settlement therein as alimony, because (1) said modification would contradict said final decree, and (2) any prior contract between the parties relative to alimony necessarily merges into the final decree.

Duvall v Duvall, 215-24; 244 NW 718; 83 ALR 1242

Nonallowable modification. Where parties to a divorce proceeding owned the entire capital stock of a corporation, and said stock was decreed to the parties in equal shares, a subsequent modification of the decree will not be entered because of the doing of acts in the course of the corporate management in which each acquiesced, nor because one of the parties now apprehends that said equal division of stock will ultimately result in a deadlock in corporate management.

Parker v Parker, 214-1327; 241 NW 497

Unauthorized modification. A decree in divorce proceedings to the effect that the wife should, until a named date, have the possession of certain property belonging to the husband, and that the husband, in the meantime, should pay off an existing mortgage and accruing taxes on the property, works a vested interest in the husband when he complies with the decree—an interest which the court has no jurisdiction to disturb by a subsequent order conferring the property absolutely on the wife.

Guisinger v Guisinger, 201-409; 205 NW 752

Modification refused—noninterference on appeal. The refusal of the trial court to modify its previous order relative to monthly payments will not be interfered with in the absence of a showing of abuse. Evidence held insufficient to reveal such abuse.

Kirk v Kirk, 222-945; 270 NW 432

Unsupported modification. A decree in divorce action may not be subsequently modified on hearsay evidence of misconduct on the part of one of the parties.

McDaniel v McDaniel, 218-772; 253 NW 803

Unallowable grounds. An unappealed decree in divorce proceedings as to the property rights of the parties may not be modified on the grounds that the applicant did not "understand" the decree.

Guisinger v Guisinger, 201-409; 205 NW 752

III SUBSEQUENT CHANGES IN ALIMONY AND CUSTODY OF CHILDREN—concluded

Overestimated values. A decree for alimony will not be modified on the ground (1) that the stipulation for alimony and the decree confirming it overestimated the value of the husband's property, or (2) that the defendant has unexpectedly been called upon to discharge an obligation of suretyship of which he had knowledge when the decree was entered.

Goldsberry v Goldsberry, 217-750; 252 NW 531

Remarriage. One who asks for a modification of a decree for alimony has the burden to plead and prove the change of circumstances which will justify such modification. Where the only proven change in circumstances was that the defendant had remarried and had a dependent family, held that the modification granted was ample and would not be increased.

Morrison v Morrison, 208-1384; 227 NW 330

Remarriage—lessened earning power, etc. The remarriage of a person at a time when an unsatisfied decree for alimony in monthly installments exists against him does not constitute grounds for an order reducing said alimony, but an unavoidable reduction in earning power of the defendant, and the fact that the family of the plaintiff in alimony has decreased in size may furnish such grounds.

Boquette v Boquette, 215-990; 247 NW 255

Remarriage—effect. While remarriage is not, in and of itself, such change of circumstances as will justify a modification of a decree of alimony, yet the remarried person may secure a modification if his evidence, other than the mere showing of remarriage, meets the requirements of the statute.

Nicolls v Nicolls, 211-1193; 235 NW 288

Remarriage—effect. Remarriage of divorced husband does not alone present such change in the circumstances as to justify a modification of alimony requirements.

Siders v Siders, 227-764; 288 NW 909

Remarriage as "change of circumstances". The continuing expense consequent on the remarriage of a person decreed to pay alimony is not, in and of itself, such "change in circumstances" as to authorize a modification of that part of the decree pertaining to alimony, especially when such remarriage is in violation of the statute.

Stone v Stone, 212-1344; 235 NW 492

Impaired health and remarriage. The fact (1) that the health, but not the income, of a defendant has become impaired since the entry of a decree for alimony, (2) that the defendant has remarried since the divorce, and that a child will soon be born to him, and (3) that the plaintiff has since the decree become more able to support herself and child (such being contemplated by the decree) are not such "change in circumstances" as will authorize a modification of the decree for alimony.

Newburn v Newburn, 210-639; 231 NW 389

Remarriage justifying modification. Monthly payments decreed to a wife "for the support" of her minor child, will be canceled when it is made to appear (1) that the wife was also decreed substantial alimony "for the support of herself and minor child"; (2) that she has since remarried and is being amply supported by her present husband, (3) that she has adequate means from the alimony awarded to her to support the child, and (4) that the financial condition of the father has changed to his detriment.

Kruckman v Kruckman, 209-1218; 229 NW 700

Subsequent birth of child. A decree of divorce will not be modified by increasing the alimony because of the subsequent birth of a child when consideration was given to such possible birth in fixing the original amount of alimony.

Kiger v Kiger, 205-1200; 219 NW 314

Subsequent entry of omitted provision. An agreement as to alimony inadvertently omitted from the decree may be subsequently entered on proper application.

Bennett v Bennett, 200-415; 203 NW 26

Stipulated decree—effect. The fact that the alimony part of a decree was based upon an agreed stipulation of the parties, does not place it in the category of an enforceable contract and therefore beyond the power of the court to modify.

Nicolls v Nicolls, 211-1193; 235 NW 288

Waiver of notice. Failure to serve an adverse party in divorce proceedings with notice of a hearing to modify the decree becomes quite immaterial when such adverse party appears at said hearing in person and by attorney.

Guisinger v Guisinger, 201-409; 205 NW 752

IV COSTS AND ATTORNEY FEES

Attorney fees. A successful party in divorce proceedings is entitled to an allowance for attorney fees.

Black v Black, 200-1016; 205 NW 970

Attorney fees. Equity will not set aside a consent judgment for attorney fees for both parties in divorce proceedings, against the defeated party and his land, when no fraud is shown, and when the court had personal jurisdiction over both parties to the proceeding.

Coulter v Smith, 201-984; 206 NW 827

Decree for attorney fees—nonadjudication as to attorney. A decree in divorce proceed-

ings awarding plaintiff (in addition to a divorce) a specified sum as attorney fees is not an adjudication as to the amount owing by plaintiff to her attorney for services rendered in the action,—the attorney, of course, not being a party to the action.

Jones v Park, 220-894; 262 NW 797; 264 NW 700

Duke v Park, 220-889; 262 NW 799

Maddy v Park, 220-899; 262 NW 796

Former dismissed actions. The court may refuse to a successful party in divorce proceedings any allowance by way of costs and attorney fees contracted in prior and voluntarily dismissed actions for divorce between the same parties.

Black v Black, 200-1016; 205 NW 970

Nonallowable attorney fees. Attorney fees are not allowable on an application to modify alimony allowance.

Barish v Barish, 190-493; 180 NW 724

Nicolls v Nicolls, 211-1193; 235 NW 288

Stone v Stone, 212-1344; 235 NW 492

Hensen v Hensen, 212-1226; 238 NW 83

Duvall v Duvall, 215-24; 244 NW 718; 83 ALR 1242

V SEPARATE MAINTENANCE

Discussion. See 24 ILR 137—Separate maintenance

Creature of equity only. Principle reaffirmed that an action by a wife against the husband for separate maintenance is a creature of equity only, not of statute.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Separate decree to wife. Principle recognized that in an action by a husband for divorce the wife may, on proper pleading and supporting evidence, be granted a decree for separate maintenance.

Waddington v Waddington, 218-460; 255 NW 462

Separate maintenance. Separate maintenance may not be decreed on evidence which would be insufficient to justify a decree of divorce.

Depping v Depping, 206-1203; 219 NW 416

Krotz v Krotz, 209-433; 228 NW 30

Bartlett v Bartlett, 214-616; 243 NW 588

Agnew v Agnew, 216-1; 248 NW 241

Separate maintenance. Tho a husband is guilty of no personal violence toward his wife, yet she may be entitled to separate maintenance on a showing that his conduct toward her has been domineering, arbitrary, unsympathetic, unkind, stubborn, uncommunicative, and parsimonious, and that such treatment has endangered her life.

Cruse v Cruse, 201-810; 208 NW 324

Divorce in lieu of separate maintenance. The court has no right to decree a divorce on a cross-petition which alleges cruel and inhuman treatment but specifically prays for separate maintenance only; and this is true tho there is also a prayer for general equitable relief, it appearing that cross-petitioner's attitude on the trial was in strict accord with said prayer.

Davis v Davis, 209-1186; 229 NW 855

DeReus v DeReus, 212-762; 237 NW 323

Essential conditions. A wife in an action against her husband for separate maintenance, on the ground of inhuman treatment, is entitled to a decree only in case her supporting evidence is such as would entitle her to a divorce if she asked such relief. Evidence held amply to meet said requirement.

Bartlett v Bartlett, 214-616; 243 NW 588

Approved allowance. An allowance of $60 per month for separate maintenance reviewed, and held proper.

Bartlett v Bartlett, 214-616; 243 NW 588

Attachment not authorized. The statutory power of a judge of the district court in action for divorce to order an attachment, with or without bond, does not authorize him to enter such order in an action for separate maintenance.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Counter plea—allowance. Record held to justify the entry of a decree and for the allowance of $40 per month for the separate maintenance of the wife, on her counter plea in divorce action.

Crees v Crees, 218-338; 255 NW 515

Divorce and remarriage as bar. An action for separate maintenance presupposes the existence of the marriage relation, and a wife who institutes such action while the marriage relation exists may not, after the entry of a valid decree of divorce, and after the remarriage of both parties, maintain the action, even to the extent of recovering (1) for her own past support up to the time of her remarriage, or (2) for the past and future support of her minor child.

Freet v Holdorf, 205-1081; 216 NW 619

Foreign decree. The recognition of the validity in this state of a foreign divorce decree in rem does not preclude the courts of this state from adjusting the property rights of one of the parties, under a decree in this state for separate maintenance.

Miller v Miller, 200-1193; 206 NW 262

Foreign judgment — full-faith-and-credit clause. An unmodified judgment in personam in a court of competent jurisdiction of a foreign state which is then the matrimonial domicile of both husband and wife, for the

V SEPARATE MAINTENANCE—concluded

maintenance of the wife, payable in monthly installments, is entitled to the full-faith-and-credit clause of the federal constitution as to all matured installments, even tho, subsequent to the entry of such judgment, the judgment defendant departs from the matrimonial domicile and obtains in this state a naked degree of divorce on service by publication.

Bennett v Tomlinson, 206-1075; 221 NW 837

Fraudulent decree — new trial. An unappealed decree of a court of competent jurisdiction of a sister state, granting separate maintenance to a wife on the ground of desertion, and dismissing the husband's cross-petition for divorce on the same ground, constitutes a final adjudication that the husband was not entitled to a divorce on any ground (the laws of the two states being the same), and is binding on the courts of this state, and a decree of divorce subsequently obtained in this state by the husband on service by publication and on the ground of desertion, and without revealing the foreign decree, will be deemed fraudulent and will be set aside on timely petition by the wife and a new trial granted on her prayer.

Bowen v Bowen, 219-550; 258 NW 882

Habitual drunkenness — fixed habit as essential element. In determining whether a husband or wife, after marriage, has become an habitual drunkard, the element of "fixed habit" in the excessive use of intoxicants is an all-essential element.

Leonard v Leonard, 221-722; 266 NW 537

Statute of limitation. In case of a judgment for the separate maintenance of a wife through monthly installments, the statute of limitation does not commence to run from the date of the judgment, but on each separate installment from the maturity thereof.

Bennett v Tomlinson, 206-1075; 221 NW 837

Weight given decision of lower court. Altho a divorce action, being in equity, is triable de novo on appeal, yet the supreme court will give serious consideration to the decision of the lower court when there is a conflict in the testimony. Evidence reviewed and held to justify award of separate maintenance to the wife and to deny divorce to the husband.

Blew v Blew, 225-832; 282 NW 361

Written stipulation for decree—effect. The signing by a plaintiff and a defendant in an action for separate maintenance of an agreement which specifies the amount and terms of such maintenance and provides for the entry of decree in accordance therewith, and the filing of such stipulation in the action, constitute an appearance by the defendant to said action.

Kalde v Kalde, 207-121; 222 NW 351

VI DISPOSITION OF PROPERTY

Disposition of property. An adjudication of property interests and a disposition of the household goods in a divorce action, is proper, there being a prayer by both parties for general equitable relief, and the issue, moreover, being voluntarily litigated.

Garside v Garside, 208-534; 224 NW 586

Cancellation of instruments. In divorce action, trial court was justified in cancelling notes and deeds from husband to wife for lack of consideration, under statute empowering court to make proper disposition of the property of the parties.

Graham v Graham, 227-223; 288 NW 78

Death of party—appeal not abated. Death of appellee during pendency of divorce appeal to the supreme court does not abate the action when property rights are involved.

Graham v Graham, 227-223; 288 NW 78

Division in kind not desirable. In divorce action, where trial court awarded the wife unincumbered land, a dwelling house, household goods, a money judgment, and various sums of money for child support, payment of a debt, costs, attorney fees, and temporary alimony, all of which, at court's valuation, amounted to approximately one-third of husband's property, held, the decree was as nearly equitable as was possible, especially in view of fact that his nonliquid assets consisted of various interests in real estate and were of such nature that even an equal division in kind would have put the wife in a worse position.

Twombley v Twombley, 227-177; 287 NW 841

Factors considered in dividing property. In divorce action, general principle recognized that in division of property court should take into consideration the sex, age, health, future prospects of the parties, the private estate of each, the contributions of each to the joint or accumulated property, the earning capacity of each, their respective incomes and their respective indebtedness, and so of necessity each case involving disposition of property must stand on its own facts.

Twombley v Twombley, 227-177; 287 NW 841

Factors in disposition of property. Where wife is offending party and contributed nothing to property of husband, the court, taking into consideration the age, health, and future prospects of the parties was justified in granting property to the husband.

Graham v Graham, 227-223; 288 NW 78

Noninvalidating provision. That part of a decree in divorce proceedings which, in disposing of the property of the parties, purports to impose an obligation on a corporation, the entire capital stock of which is owned by the

parties and decreed to them in equal shares, is not void as between the parties to the action, or as to the property decreed to each of the parties.

Parker v Parker, 214-1327; 241 NW 497

Lien against homestead. In a divorce action granting wife a decree of divorce and alimony, decree could make provision for the disposition of the homestead or make charges against it in favor of one of the parties as against the other.

Ayers v Ayers, 227-646; 288 NW 679

Property-settlement contract — fraud — insufficient defense. A defendant sued by his former wife on a property-settlement contract, fully performed by her, availeth himself nothing in the way of a defense by nakedly alleging fraud by the wife in obtaining the contract when such allegation is made neither as a basis for a rescission of the contract nor for damages.

Poole v Poole, 219-70; 257 NW 305

Stipulation in re property—effect. A stipulation between plaintiff and defendant in a divorce proceeding to the effect that the defendant, for the good of the children of the parties, shall not "convey, incumber, or mortgage in any manner" certain named lands does not constitute a conveyance to the children, even tho the stipulation is fully embraced in the subsequently entered decree.

Putensen v Dreeszen, 206-1242; 219 NW 490

Unconscionable stipulation. A stipulation relative to the property and personal rights of a wife, tho signed by her, may be so unconscionable that a court of equity will refuse to enforce it.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Validity of deeds—clause repugnant to fee. A stipulation in divorce proceedings, even tho carried into the decree, is a nullity insofar as it seeks to render land exempt from the claims of creditors of the fee-title owner.

Putensen v Dreeszen, 206-1242; 219 NW 490

10482 Contempt.

Burden to purge. In proceedings for contempt in failing to pay alimony, defendant must purge himself.

Roach v Oliver, 215-800; 244 NW 899

Contempt proceedings—constitutionality. A defendant who is decreed to pay alimony and who willfully secretes his property for the purpose of avoiding compliance with said order, may be imprisoned as for a contempt of court, an award of alimony not being a "debt" in the sense of the constitutional prohibition against imprisonment for "debt".

Mason v Dist. Court, 209-774; 229 NW 168
Roberts v Fuller, 210-956; 229 NW 163
Roach v Oliver, 215-800; 244 NW 899

Disobedience of divorce decree. In an equity action involving alleged nonpayment of support under a divorce decree and seeking punishment for alleged disobedience of the decree, a contempt order will not issue unless the disobedience was willful and the proof thereof clear and satisfactory, and where a father is willing to pay a reasonable sum for his son's expenses at college, a refusal to cite for contempt is proper.

Johnstone v Johnstone, 226-503; 284 NW 379

Inability to pay. Actual inability to pay alimony is a complete defense to a charge of contempt of court.

Pewick v Meyer, 202-134; 209 NW 396
Porter v Maxwell, 208-1224; 226 NW 917
Mason v Dist. Court, 209-774; 229 NW 168

Orders—violation. The violation of an order to the defendant in pending divorce proceedings not to interfere with the person of the plaintiff or with plaintiff's peaceable possession of her home is properly punished as a contempt.

Blunk v Walker, 206-1389; 222 NW 358

Willful avoidance of decree. A willful refusal to pay an award of alimony may be punished as a contempt of court by imprisonment until the award is paid.

Roberts v Fuller, 210-956; 229 NW 163

Unallowable avoidance. Under a decree awarding a wife and mother the custody of minor children, and directly awarding her alimony for herself and children, the defendant may not excuse his default in making payment by showing that he has expended a named amount for the support of one of the said children and obligated himself for other sums for the same purpose, there being no proof that the wife consented to such method of payment.

Roach v Oliver, 215-800; 244 NW 899

10484 Remarriage.

Atty. Gen. Opinion. See AG Op June 20, '39

10486 Annulling illegal marriage—causes.

"Annulment" and "divorce" distinguished. A husband may not maintain an independent action in equity to nullify a marriage on the ground that the wife, at the time of marriage, was, unbeknown to him, pregnant by another than himself. His action should be one for divorce on said ground.

Clark v Clark, 219-338; 258 NW 719

Insanity—sufficiency of evidence. Evidence reviewed and held sufficient to authorize default decree annulling marriage on ground of insanity at time of marriage.

Kurtz v Kurtz, 228- ; 290 NW 686

Foreign judicial records—improper certification first raised on appeal. Admission of

improperly certified judicial records of Texas and Michigan bearing on issue of defendant's sanity in trial of default action to annul marriage is not ground for reversal of court's action in refusing to set aside the default annulment when lower court was not given opportunity to pass upon the competency of the records. The rule is that a party is not to be surprised on appeal by new objections and issues, nor as to defects within his power to remedy had he been advised in the proper time and manner.

Kurtz v Kurtz, 228- ; 290 NW 686

Attorney fees — when nontaxable. Tho a husband's action against his wife for the annulment of the marriage is legally nonmaintainable, and is therefore dismissed, attorney fees for the wife for defending the action may not be taxed against him.

Clark v Clark, 219-338; 258 NW 719

Temporary alimony and suit money. In an action by a wife for separate maintenance, a prayer by the husband for an annulment of the marriage because of the alleged invalidity of said marriage, furnishes sufficient showing of a marriage to justify an allowance of temporary alimony and suit money.

Hanford v Hanford, 214-839; 240 NW 732

10489 Children—legitimacy.

Adjudication of bastardy — effect on child. That part of a decree of divorce which adjudges that a child of the wife is not the child of the husband is a nullity as far as the child is concerned.

Ryke v Ream, 212-126; 234 NW 196

Child begotten out of, but born in, wedlock —presumption. A child manifestly begotten out of wedlock but born during wedlock is presumed to be the child of such intermarried persons.

Ryke v Ream, 212-126; 234 NW 196

CHAPTER 472

MINORS

10492 Period of minority.

Atty. Gen. Opinions. See '30 AG Op 173; '38 AG Op 899

Contributory negligence — duty to negative —sufficient proof by infant. Plaintiff, in an action for damages for negligently inflicted injuries, establishes prima facie freedom from contributory negligence by proof that when he suffered the injuries in question he was only ten years of age, thereby advantaging himself of the common-law presumption arising from such proof. And the case would be quite rare where defendant's rebutting testimony would be so convincing and overwhelming as per se to overthrow said prima facie showing.

Flickinger v Phillips, 221-837; 267 NW 101

Contributory negligence. Where a minor bicyclist collided with a car unlawfully parked on left side of city street without tail light, when he pulled over to his right to avoid an approaching car the question of his contributory negligence, which depended on whether or not he should have observed the parked car in time to avoid the collision, was for the jury.

Trailer v Schelm, 227-780; 288 NW 865

Marriage in foreign state—parties below age requirement—voidable only. A marriage, the parents consenting thereto, in a foreign state, between two persons, one of whom has not reached the age at and above which parents may give their consent for marriage, is not void but merely voidable, and as affecting rights in Iowa such parties thereby legally reach majority.

Boehm v Rohlfs, 224-226; 276 NW 105

Support and maintenance—stepchildren. The legal obligation of a father to support his minor children extends to stepchildren.

Rule v Rule, 204-1122; 216 NW 629

Will construction—reaching majority—law of testator's domicile controls. When the property is situated and the testator was domiciled in Iowa, provisions of the will as to real and personal property and question as to named devisee attaining majority are to be determined according to the law of testator's domicile.

Boehm v Rohlfs, 224-226; 276 NW 105

10493 Contracts—disaffirmance.

Family expenses. See under §10459

Discussion. See 11 ILR 394—Liability of surety when infant disaffirms; 20 ILR 785—Infant's liability on contract

Disaffirmance of joint contract. A party who jointly contracts with an adult and a minor must take notice of the amount which the minor contributed to the deal.

Roeper v Danese, 206-964; 221 NW 506

Disaffirmance—release of surety. The disaffirmance by a minor of his contract of purchase and of his negotiable promissory note given in connection therewith, before the property is delivered to him, releases the surety on the note of all liability to the payee, even tho the surety signed the note because of the known minority of the principal. In case the note has passed to a holder in due course by indorsement by the payee, the liability of the indorser becomes primary and the liability of the surety becomes secondary.

Lagerquist v Guar. Co., 201-430; 205 NW 977; 43 ALR 585

Ineffectual affirmance. A minor, being under a disability to enter into a contract during his minority, is likewise under a disability to affirm the contract during his minority. Held, that the bringing of an action by the minor during minority for damages consequent on the contract did not prevent him, after withdrawing from the action during minority, and before trial, from bringing an action to disaffirm the contract.

Roeper v Danese, 206-964; 221 NW 506

Disaffirmance by minor. A void order of the probate court authorizing the executor to satisfy a cash bequest to a minor by transferring a note and mortgage to the father of the minor as the latter's natural guardian, may be disaffirmed and repudiated by the minor on reaching his majority.

Irwin v Bank & Trust, 218-477; 255 NW 671

Timely disaffirmance. A delay of some fifty days after a person attains his majority before disaffirming a contract of exchange of automobiles is not necessarily untimely.

Eckrich v Hogan Bros., 220-755; 263 NW 308

Disaffirmance—reasonable time. A minor, upon becoming of age, is required to disaffirm contracts made during minority within a reasonable time after attaining majority or within a reasonable time after discovery of the fraud.

In re Fisher, 226-596; 284 NW 821

Limitation on right. A minor may not disaffirm a contract which has been entered into by a partnership of which he is a member, and recover of the other party to the contract on the theory that the money of the minor was paid out under such contract, when such other party in good faith entered into the contract, without knowledge that the minor was a member of the partnership.

Kuehl v Means, 206-539; 218 NW 907; 58 ALR 1359

Nonliability of agent. A minor upon disaffirmance of his contract may not recover of an agent who disclosed his principal and acted strictly within his authority.

Hubler v Gates, 209-1198; 229 NW 767

Ratification of settlement—failure to disaffirm. In guardianship proceeding, wherein father acting as guardian made a settlement with his children after son had reached his majority, but daughter lacked three months of being 21 years of age, and suit against the father for an accounting was not brought until two and one-half years after the settlement, held, evidence sufficient to support finding of trial court in approving the guardian's report which, in effect, approved the settlement, the same having been ratified by failure to disaffirm within a reasonable period of time.

In re Fisher, 226-596; 284 NW 821

Guardian—unauthorized investments—rejection by ward. A ward, on the hearing on the final report of the guardian, may reject any or all loans or investments made by the guardian without the authority or approval of the court.

In re Jefferson, 219-429; 257 NW 783

Guardian—unauthorized and imprudent investments. A guardian who, without authorization from the court, invests his ward's funds in real estate does so at his peril and irrespective of his good faith; nor may he compel the ward to accept such property even tho the ward did not promptly disavow the investment on attaining his majority.

In re Pharmer, 211-1285; 235 NW 478

Unauthorized and invalid investments—who may question. The invalidity which attends the act of a guardian in loaning guardianship funds to himself, individually, and in securing such loan by a first mortgage on real estate, —all without any preauthorizing order of court,—may not be pleaded by a second mortgagee of the land on the theory that such invalidity absolutely voided the said note and mortgage to the guardian, and thereby left the purported second mortgage as the first lien on the land. The sole right to question the legality of said acts of the guardian rests in the ward, or in his heirs, or in those properly representing said ward or heirs.

Richardson v Lampe, 221-410; 265 NW 629

10494 Misrepresentations—engaging in business.

Disaffirmance barred by misrepresentation. A person may not disaffirm his contract on the ground that he was a minor when the contract

was entered into, when, at said time, he falsely represented that he was an adult, and, to all appearance, was such.

Eckrich v Hogan Bros., 220-755; 263 NW 308

Failure to restore property—effect. A minor may not disaffirm his contract when he has entered into it as an apparent adult, and when the party contracted with had good reason to believe, and did believe, that he was contracting with an adult. Especially is this true when the minor fails to make any restoration of the property received by him under the contract.

Kuehl v Means, 206-539; 218 NW 907; 58 ALR 1359

CHAPTER 473

ADOPTION

Atty. Gen. Opinions. See '38 AG Op 421, 464, 559

10501.1 Who may adopt—petition.

Contracts to devise and bequeath. See under §11846 (II)
Invalid articles of adoption as enforceable contract. See under §11846 (II), Vol. I
Right of foster parents to inherit from adopted child. See under §12017

Discussion. See 3 ILB 48—Specific performance in adoption contracts; 13 ILR 84—Specific performance of contracts to adopt

Atty. Gen. Opinion. See '38 AG Op 421

Articles—liberal construction. In determining the validity of articles of adoption, the court will note, if such is the fact, that the attack is being made by collateral heirs.

In re Wadst, 209-1200; 229 NW 835

Articles—noninvalidating defects. Articles of adoption otherwise valid, are not, under Ch. 7, Title 15, C., '73, rendered invalid:

1. When they are signed and consented to by only one of the natural parents, the other being insane, and confined in a state hospital, or
2. Because they do not literally contain the statutory provision that the consenting parent "gives the child to the adopter for the purpose of adoption as his own child", or
3. Because, while they state the residence of the consenting parent, they fail to state the residence of the child or insane parent, or
4. Because, while they state the present name of the child, they fail to state the future name of such child.

In re Wadst, 209-1200; 229 NW 835

Creature of statute. Adoption of children is a procedure unknown to the common law.

In re Fitzgerald, 223-141; 272 NW 117

Adoption by estoppel. The execution, by the actual and the foster parents of a child, of articles of adoption of the child, with implicit reliance thereon by said parties that said articles were legally complete, followed during the ensuing years by full performance by the child of all duties legally incident to a complete adoption (even tho said articles were never entered of record as required by statute, and even tho the contents of said articles cannot be determined because they have been lost) creates an adoption by estoppel absolutely binding on the foster parents and necessarily on their heirs.

Shaw v Scott, 217-1259; 252 NW 237

Adoption by estoppel. Evidence that deceased recognized plaintiff as his own son and so referred to him, that plaintiff gave deceased the obedience, loyalty, and affection of a natural son, and that deceased reciprocated in kind and gave plaintiff his name and took him into his home, created an adoption by estoppel, so that heirs of deceased were estopped from denying the adoption, and plaintiff held entitled to inherit as adopted son.

Bergman v Carson, 226-449; 284 NW 442

Adoption by estoppel. Evidence that at the age of thirteen months the plaintiff was taken by foster parents from her natural parents under an agreement to adopt her, and that she was reared by the foster parents, the foster mother referring to her as a daughter in conversation and in a will, established an adoption by estoppel, estopping other heirs of the foster mother from denying the adoption.

Vermillion v Sikora, 227-786; 289 NW 27

Charitable institution. A charitable institution, concededly a home-finding agency, under statutory authorization which, however, did not engage in finding homes and did not comply with the law in accepting children and did not comply with adoption law, was nevertheless properly held to be entitled to benefits of school law for the reason that violations of other statutes were immaterial issues.

School Twp. v Nicholson, 227-290; 288 NW 123

Domicile of abandoned child. Upon the death of a parent of a child and the abandonment of the child by the other parent, the next of kin may, if acting in good faith, legally determine the domicile of said child for the purpose of adoption.

Jensen v Sorenson, 211-354; 233 NW 717

Parol agreement to adopt. A parol agreement to adopt a child is unenforceable.

Morris v Trotter, 202-232; 210 NW 131

Material departure from statute. A material departure from the statutory requirements for the adoption of a child nullifies the articles of adoption.

In re Williamson, 205-772; 218 NW 469

Support and maintenance—stepchildren. The legal obligation of a father to support his minor children extends to stepchildren.

Rule v Rule, 204-1122; 216 NW 629

10501.3 Consent, when necessary.

Atty. Gen. Opinions. See '38 AG Op 421, 559

Consent by guardian ad litem. A guardian ad litem in adoption proceedings need not consent to such adoption.

In re Burkholder, 211-1222; 233 NW 702

Consent by guardian. The statutory requirement that a guardian consent to the adoption of his ward is complied with when the guardian consents that he adopt the child himself.

In re Burkholder, 211-1222; 233 NW 702

Consent of both divorced parents—father contributing to support. Under adoption statute providing that, where the parents are not married to each other, the "parent having the care and providing for the wants of the child" may give consent to adoption, where mother and father, who were divorced, had stipulated that in case of divorce the father would contribute to the support of child and have the right of visitation and thereafter divorce decree gave effect to the stipulation, the mother was not "parent having the care and providing for the wants of child" to the exclusion of father so as to authorize child's adoption with mother's consent without consent of natural father.

Rubendall v Bisterfelt, 227-1388; 291 NW 401

Divorced father contributing child support not notified—adoption invalid. Where a father and mother stipulated that father would contribute to support of child and have the right to visit the child, and divorce decree gave effect to the provisions, and thereafter the mother gave consent to adoption in an adoption proceeding without notice to the father, he not having consented, abandoned, waived, or forfeited his paternal right, the mother's consent to the adoption was not sufficient and the decree of adoption was void.

Rubendall v Bisterfelt, 227-1388; 291 NW 401

Controlling considerations. The fact that one custody of a child may offer larger financial and educational advantages than another custody, is not necessarily a controlling consideration on the issue of the child's best welfare.

Jensen v Sorenson, 211-354; 233 NW 717

Custody of child—loss of right. The mother of an illegitimate child, who has for a long series of years evinced but a very casual interest in the child, may not successfully urge her right to the custody of the child, against fit and proper parties who have nurtured, cared for, and educated the child from birth, even tho they have been paid compensation by parties other than the mother, it appearing that it would not be to the best interest of the child to decree custody to the mother.

Barry v Reeves, 203-1345; 214 NW 519

Death of mother—revival of paternal rights—conditions. Assuming that the death of a mother (to whom the custody of her infant child has been judicially awarded) revives the custodial rights of the father, yet he must assert such rights with a promptness commensurate with the helplessness of the child, or he will be deemed to have forfeited and waived them, and will not, thereafter, be permitted to challenge the rights of another custodian except on the grounds of unfitness.

Jensen v Sorenson, 211-354; 233 NW 717

Dying request — materiality. Evidence of the dying request of a mother as to the future custody of her infant child is highly material on the issue of such custody.

Jensen v Sorenson, 211-354; 233 NW 717

Invalid appointment of guardian. The right of a fit and proper father to the custody of his minor child whom he has never abandoned, and whose custody he has neither forfeited nor waived, is in no manner affected by orders of court (1) appointing, without notice to said parent, the maternal grandfather as guardian of said child, and (2) authorizing said guardian to proceed and adopt said child; especially is this true when the petition by the mother for the appointment of the grandfather was not filed until after the appointment was made.

In re McFarland, 214-417; 239 NW 702

10501.4 Notice of hearing.

Fabricated ground of abandonment. A decree of adoption of a child, based solely on a finding that the child had been abandoned by its parent, and entered without notice to the parent of the hearing, tho her residence was known, will be set aside on a direct attack supported by affirmative and conclusive evidence that the child had never been so abandoned.

Pitzenberger v Schnack, 215-466; 245 NW 713

10501.5 Decree—change of name.

Atty. Gen. Opinion. See '28 AG Op 360

10501.6 Status of the adopted child.

Discussion. See 16 ILR 538—Visits by natural parents; 22 ILR 145—Inheritance by adopted children

Atty. Gen. Opinion. See '36 AG Op 191

Scope of section. This section "does not determine the status of the adopted child as to the ancestor or other relative of the adopting parent".

Cook v Underwood, 209-641; 228 NW 629

Right of inheritance.

McCune v Oldham, 213-1221; 240 NW 678

Status of children of adopted child. The legal status of children of an adopted child is, inter alia, that of grandchildren of their foster grandparents.

Shaw v Scott, 217-1259; 252 NW 237

Liberal construction against collateral heirs. Articles of adoption, executed under §3251, C., '97, will not, in an action involving the right of the alleged adopted child to inherit from the alleged foster parents in preference to collateral heirs, be held invalid simply because the name of the father of said child is not stated in said articles, tho said section literally requires such statement.

Eggimann-Eckard v Evans, 220-762; 263 NW 328

Collateral heirs over natural parents. The estate of a legally adopted, intestate, spouseless and issueless person whose adopting parents are both dead leaving surviving collateral heirs only, descends to said collateral heirs and not to the surviving natural parents or parent of said adopted person.

In re Fitzgerald, 223-141; 272 NW 117

Descent and distribution—persons entitled. The heirs as a class of each adopting parent, each class receiving one half, rather than the natural parents or their heirs, inherit the estate of an adopted child dying intestate to the exclusion of adopting father's surviving second wife who was decreed no part of the estate and did not appeal—but, quaere, if surviving second wife had claimed a dower interest.

In re Smith, 223-817; 273 NW 891

Adoption by estoppel. Evidence that deceased recognized plaintiff as his own son and so referred to him, that plaintiff gave deceased the obedience, loyalty, and affection of a natural son, and that deceased reciprocated in kind and gave plaintiff his name and took him into his home, created an adoption by estoppel, so that heirs of deceased were estopped from denying the adoption, and plaintiff held entitled to inherit as adopted son.

Bergman v Carson, 226-449; 284 NW 442

Adoption by estoppel. Evidence that at the age of thirteen months the plaintiff was taken by foster parents from her natural parents under an agreement to adopt her, and that she was reared by the foster parents, the foster mother referring to her as a daughter in conversation and in a will, established an adoption by estoppel, estopping other heirs of the foster mother from denying the adoption.

Vermillion v Sikora, 227-786; 289 NW 27

Adoption by estoppel—surrender of child as consideration. An oral contract to adopt a child, not followed by legal adoption, was not within the statute of frauds when part of the consideration, the surrender of the child, was given at the time the agreement was made. So the child was entitled to specific performance of the contract even tho it was contended that the contract was void under the statute of frauds of a foreign state.

Vermillion v Sikora, 227-786; 289 NW 27

10501.7 Annulment.

Atty. Gen. Opinion. See AG Op March 27, '40

TITLE XXIX

JUSTICES OF THE PEACE

CHAPTER 474

JUSTICE OF THE PEACE COURT

10502 Jurisdiction.

Criminal jurisdiction. See under §13557
Atty. Gen. Opinion. See '25-26 AG Op 205

Exclusive jurisdiction to first court acquiring. The first court of competent jurisdiction to acquire jurisdiction of the subject matter of a case does so to the exclusion of all other courts of coordinate authority.

First Methodist Church v Hull, 225-306; 280 NW 531

Requirements for valid decree. To be valid and binding, the acts of a court must be within the court's jurisdiction, i. e., it must have (1) jurisdiction of the subject, which is power to hear and determine cases in the general class of the question presented, and (2) jurisdiction of the person, which is power to subject the parties to the judgment.

Collins v Powell, 224-1015; 277 NW 477

Failure to notify party of trial day. The failure of a justice of the peace to notify defendant of the time to which a cause had been continued at defendant's request does not deprive the justice of jurisdiction to render judgment against the defendant.

Hensch v Meyers, 200-850; 205 NW 510

10503 Amount in controversy.

Exceeding amount—replevin a nullity. Under the statute allowing an enlarged jurisdiction for a justice of the peace up to $300 by written agreement, he is without authority to issue a writ of replevin for automobiles whose value exceeds such amount limiting his jurisdiction.

In re Sweet, 224-589; 277 NW 712

10505 Where defendant served.

Resident of adjoining township. A resident of a township in which there is no justice of the peace is suable in justice court in an adjoining township on personal service in the township of his residence.

Coulter Bros. v Riegel, 204-1032; 216 NW 715

10506 Replevin.

Constructive severance doctrine inapplicable to movable chattel. When a tenant purchases an electric lighting plant on agreement with the landlord that he may take it with him upon termination of the tenancy, and when, at the termination of such tenancy, the tenant purchases the reversion, there is no occasion to apply the doctrine of constructive severance, because the plant maintained at all times its character as a movable chattel.

Equitable Life v Chapman, 225-988; 282 NW 355

Farm light plant—not part of realty. In a replevin action for a Delco lighting plant placed on a concrete block in the basement of a farm house, such electric plant is not essential to the main business of operating the farm, but is a mere convenience, and is not a part of the realty when it is easily removable, along with the batteries resting on a shelf, and without damage to the house, the wiring being capable of use with any other electrical installation, and when there is no evidence of an intent that it be permanently fixed.

Equitable Life v Chapman, 225-988; 282 NW 355

Jurisdiction—exceeding amount—replevin a nullity. Under the statute allowing an enlarged jurisdiction for a justice of the peace up to $300 by written agreement, he is without authority to issue a writ of replevin for automobiles whose value exceeds such amount limiting his jurisdiction.

In re Sweet, 224-589; 277 NW 712

10515 In adjoining township.

Resident of adjoining township. A resident of a township in which there is no justice of the peace is suable in justice court in an adjoining township on personal service in the township of his residence.

Coulter Bros. v Riegel, 204-1032; 216 NW 715

10516 Docket furnished.

Atty. Gen. Opinion. See '28 AG Op 96

10517 Entries on docket.

Confession of judgment—mandatory duties. A "statement of confession", or "cognovit" oftentimes referred to as a "power of attorney" or simply as a "power", is the written authority of the debtor and his direction to the clerk of the district court, or justice of the

peace, to enter judgment against him as stated therein and the statutory provision that "the clerk shall thereupon make an entry of judgment" is definite and mandatory, so the mere recording by the clerk of the debtor's admission of indebtedness, confession of judgment, and authorization to the clerk to enter judgment was not the "entry of judgment by confession" required by statute. Execution issued thereon was properly annulled and decree quieting title to land in owners as against execution levy and making permanent a temporary injunction enjoining execution sale was proper.

Blott v Blott, 227-1108; 290 NW 74

10524 Service and return.

Atty. Gen. Opinion. See '34 AG Op 396

10529 Time for appearance.

Municipal courts. This section is not applicable to municipal courts.

Boody v Sawyer, 201-496; 207 NW 589

10531 Adjournment.

Jurisdiction. The failure of a justice of the peace to notify defendant of the time to which a cause had been continued at defendant's request does not deprive the justice of jurisdiction to render judgment against the defendant.

Hensch v Myers, 200-850; 205 NW 510

10536 Written instruments filed.

Atty. Gen. Opinion. See AG Op July 17, '39

10548 Judgment set aside.

Forcible entry and detainer — dismissal — effect. A justice of the peace who, after an action of forcible entry and detainer has been returned to him on a writ of error, enters an authorized order of dismissal, has no jurisdiction, so long as said order of dismissal remains on the docket, to enter in said assumed proceedings "The decision of Justice Jones reversed. Order of removal cancelled."; moreover, assuming jurisdiction, the form of such entry is quite nugatory.

Rasmussen v Alberts, 215-644; 246 NW 620

10560 Mutual judgments set off.

Effect on lien of attorney. The offsetting of the larger against the smaller of two mutual judgments wholly terminates an unadjudicated attorney's lien duly noticed in the judgment docket of the smaller judgment, when the indebtedness represented by the larger judgment antedates the indebtedness represented by the smaller judgment.

McIntosh v McIntosh, 211-750; 234 NW 234

10568 Costs in case of set-off.

See §11740

10574 Effect.

Atty. Gen. Opinions. See '38 AG Op 272; AG Op July 17, '39

10576 Form.

Form of execution. See §11659

10577 Return.

Sale—right to withdraw bid because of mistake. A plaintiff in execution, who bids at the sale the full amount of the judgment and costs in the honest belief that he was bidding on two separate tracts of land, when only one tract was being offered, may, on the discovery of his mistake, withdraw his bid, and the levying officer has discretion, without the consent of the defendant in execution, to accede to said withdrawal and to treat the sale as a nullity, and to resell, if there be time enough, and if there be not time enough, to return the execution in accordance with said facts. And in such latter case plaintiff may order out a new execution.

Van Rheenen v Windell, 220-211; 262 NW 120

10582 Appeal.

De novo status. An appeal from justice court, perfected and docketed, is in the district court as tho it had been commenced there; the justice's judgment is completely annulled; the appeal brings up the action for trial on its merits; and it is the duty of the plaintiff to prosecute the action. So where a district court, under its rule providing for dismissal of all actions remaining on the court calendar for over one year without being noticed for trial, dismissed such an appeal under its rule, and the clerk of court entered judgment in favor of plaintiff for the amount recovered in justice court together with interest and against appealing defendant, the defendant's motion to expunge the clerk's entry and correct the record was well-grounded and should have been sustained.

Yost v Gadd, 227-621; 288 NW 667

10583 Amount in controversy.

Amount in controversy as bearing on appeals generally. See under §12833

Claim for attorney fee. In computing the amount involved in an appeal from a court of a justice of the peace, costs cannot be considered whether they be ordinary costs or costs claimed as attorney fees.

Johnson v Boren, 215-453; 245 NW 711

10589 Proceedings suspended.

Expunging clerk's judgment entry after court's dismissal. An appeal from justice court, perfected and docketed, is in the district court as tho it had been commenced there; the justice's judgment is completely annulled; the appeal brings up the action for trial on its merits; and it is the duty of the plaintiff

to prosecute the action. So where a district court, under its rule providing for dismissal of all actions remaining on the court calendar for over one year without being noticed for trial, dismissed such an appeal under its rule, and the clerk of court entered judgment in favor of plaintiff for the amount recovered in justice court together with interest and against appealing defendant, the defendant's motion to expunge the clerk's entry and correct the record was well-grounded and should have been sustained.

Yost v Gadd, 227-621; 288 NW 667

10595 Affirmance—trial.

Docketing appeals. See under §11440

Expunging clerk's judgment entry after court's dismissal. An appeal from justice court, perfected and docketed, is in the district court as tho it had been commenced there; the justice's judgment is completely annulled; the appeal brings up the action for trial on its merits; and it is the duty of the plaintiff to prosecute the action. So where a district court, under its rule providing for dismissal of all actions remaining on the court calendar for over one year without being noticed for trial, dismissed such an appeal under its rule, and the clerk of court entered judgment in favor of plaintiff for the amount recovered in justice court together with interest and against appealing defendant, the defendant's motion to expunge the clerk's entry and correct the record was well-grounded and should have been sustained.

Yost v Gadd, 227-621; 288 NW 667

10597 How served.

Appeal—notice of—proper service. A statute which distinctly provides that a notice, e. g., a notice of appeal, shall be "served as an original notice", authorizes a service on the designated party by leaving a copy of said notice at the usual place of residence of said party with some member of his family over 14 years of age—when said party is not present in the county at the time of said service. So held as to the service of a notice of appeal under §7133, C., '35.

In re Sioux City Yards, 222-323; 268 NW 18

10598 Trial of appeal.

Allowable amendment. On appeal from the judgment of a justice of the peace, an unassailed amendment by defendant, setting up a counterclaim which was stricken in the justice court, is good.

Davis v Robinson, 200-840; 205 NW 520

De novo status. An appeal from justice court, perfected and docketed, is in the district court as tho it had been commenced there; the justice's judgment is completely annulled; the appeal brings up the action for trial on its merits; and it is the duty of the plaintiff to prosecute the action. So where a district court, under its rule providing for dismissal of all actions remaining on the court calendar for over one year without being noticed for trial, dismissed such an appeal under its rule, and the clerk of court entered judgment in favor of plaintiff for the amount recovered in justice court together with interest and against appealing defendant, the defendant's motion to expunge the clerk's entry and correct the record was well-grounded and should have been sustained.

Yost v Gadd, 227-621; 288 NW 667

10602 Judgment on appeal bond.

Suretyship generally. See under §11577

10605 Writs of error—when allowed.

Futile writ. It is futile for defendant in an action of forcible entry and detainer to sue out a writ of error after he has been found guilty, and after he has surrendered possession of the premises in controversy.

Rasmussen v Alberts, 215-644; 246 NW 620

Writ coram nobis. Holding reaffirmed that the common law writ of error coram nobis is not available in this state.

State v Harper, 220-515; 258 NW 886

10613 Restitution.

Writ of error (?) or appeal (?)—order of restitution. The district court has no jurisdiction, on writ of error, in an action of forcible entry and detainer, to enter an order restoring the defendant to the possession of the premises in question.

Rasmussen v Alberts, 215-644; 246 NW 620

10627 Special constables.

Atty. Gen. Opinion. See '32 AG Op 133

Peace officers' qualifications. The public has a right to have, as peace officers, men of character, sobriety, judgment, and discretion.

Edwards v Civil Service, 227-74; 287 NW 285

10629 Constables—duties.

Atty. Gen. Opinions. See AG Op Jan. 16, '39, March 22, '40

10630 Sheriff and constable.

Atty. Gen. Opinion. See AG Op March 22, '40

10634 Report of unclaimed witness fees.

Atty. Gen. Opinion. See '32 AG Op 11

10636 Fees of justice.

Atty. Gen. Opinions. See '25-26 AG Op 204; '28 AG Op 445; AG Op March 30, '39

10637 Fees of constable.

Atty. Gen. Opinions. See '25-26 AG Op 179; '32 AG Op 149, 247; '38 AG Op 164, 326, 558, 798; AG Op Oct. 12, '39

10638 In criminal cases.

Atty. Gen. Opinions. See '25-26 AG Op 179; '28 AG Op 445; '32 AG Op 149; '38 AG Op 798

Criminal process in state cases. A county is liable to the bailiff of a municipal court for mileage and expenses incurred in the service of warrants and subpoenas in state cases pending in said court.

Brookins v Polk Co., 203-567; 213 NW 258

10639 Accounting for fees—compensation.

Atty. Gen. Opinions. See '28 AG Op 445; '32 AG Op 27; '38 AG Op 171, 798

Compensation—acceptance in part—effect. An officer who accepts part of a statutory compensation does not thereby estop himself from enforcing payment of the balance.

Broyles v County, 213-345; 239 NW 1

Compensation—contradictory provisions. A constable in a township having a population of ten thousand and under twenty thousand is entitled to $800 per annum and no more, all fees belonging to the county, except such as may be legally allowed for office expenses.

Broyles v County, 213-345; 239 NW 1

Non-estoppel to claim compensation. A constable is not estopped to claim a specific compensation as distinguished from fees (the former being due him because of a change in population) because of the fact that during a time when the population was not officially known he continued to act on a fee basis.

Broyles v County, 213-345; 239 NW 1

TITLE XXX

COURTS OF RECORD OF ORIGINAL JURISDICTION

CHAPTER 475

MUNICIPAL COURT

10643 Election.

Percentage of voters required. The phrase "fifteen per cent of the qualified electors as shown by the poll list" as employed in this section, must be deemed to refer to the "poll books" in cities having no statutory system of permanent registration of voters, while in cities having such system of registration (where poll books are not employed) the phrase must be deemed to refer to the "certificates of registration" duly signed by voters just preceding their actual voting.

Gilman v Sioux City, 215-442; 245 NW 868

10648 Qualification and duties of officers.

Atty. Gen. Opinion. See '38 AG Op 789

10655 Jurisdiction—civil matters.

Territorial limitations—effect. The municipal court has concurrent jurisdiction with the district court in the territory within the municipal court district, and not otherwise. (§§694-c1, 694-c18, 694-c23, SS., '15.)

Gumbert v Sheehan, 200-1310; 206 NW 604

Enjoining proceedings—proper court. An action to enjoin proceedings on a judgment rendered in a municipal court cannot be maintained in the district court, even tho both courts are located in the same county.

Keeling v Priebe, 219-155; 257 NW 199

Enjoining proceedings to enforce judgment in another county. A municipal court of one county has no jurisdiction to enjoin proceedings to enforce a judgment entered by a municipal court of another county.

Educational Film v Hansen, 221-1153; 266 NW 487

Establishing and foreclosing lien. An action in equity in municipal court on an account with prayer for the establishment and foreclosure of a lien on certain real estate should be dismissed for want of jurisdiction as far as equitable relief is concerned. The court may, on application of plaintiff, proceed at law on the account.

Avon Lakes v Deaton, 218-303; 255 NW 531

Exclusive jurisdiction to first court acquiring. The first court of competent jurisdiction to acquire jurisdiction of the subject matter of a case does so to the exclusion of all other courts of co-ordinate authority.

First Methodist Church v Hull, 225-306; 280 NW 531

Jurisdiction defined. Jurisdiction means the power of a court to take cognizance of and to decide a case and carry its judgment and decree into execution.

Western Grocer Co. v Glenn, 226-1374; 286 NW 441

Dropping action from calendar—reinstatement. The district court has jurisdiction to

reinstate a cause which, under order of court, has been "dropped from the calendar," if such dropping from the calendar was not with the intent to dismiss.

Bankers Trust v Dist. Court, 209-879; 227 NW 536

Lack of jurisdiction—raised at any time. Objection based upon the want of jurisdiction of the court over the subject matter of the action may be raised at any time, and, when the law withholds from a court, authority to determine a case, jurisdiction cannot be conferred, even by consent of parties.

Johnson v Purcell, 225-1265; 282 NW 741

Special appearance and motion to dismiss. In an action against insurance company to recover value of property destroyed by fire, in which action a special appearance attacked only one count of petition, the overruling of the special appearance and motion to dismiss was proper, inasmuch as jurisdiction that may be attacked by special appearance is jurisdiction of court over the entire action, and not jurisdiction of court as to part of such action.

Sanford Co. v Ins. Co., 225-1018; 282 NW 771

10657 Territorial jurisdiction and powers.

Resident of county but not city. Municipal courts have jurisdiction, on proper service, of a resident of the county in which the court exists tho not a resident of the city in which the court is established.

Kinsey v Clark, 215-765; 246 NW 840

Contracts performable in county. A municipal court has jurisdiction on personal service on the defendant within this state, but outside the county of the court's organization, to render judgment for not exceeding $1,000 on a promissory note signed by the defendant and payable within the said county, even tho the defendant is a nonresident of said county.

West v Heyman, 214-1173; 241 NW 451

Procedure in general—correcting erroneous decisions. Courts have a duty to correct their own decisions when found to be wrong.

Montanick v McMillin, 225-442; 280 NW 608

10658 Inferior courts abolished.

Atty. Gen. Opinion. See '32 AG Op 30

10664 Laws applicable—rules.

Atty. Gen. Opinions. See '34 AG Op 616; '38 AG Op 739

Change of venue. An action instituted in the municipal court at Council Bluffs must be transferred, on proper motion, to the Avoca district court, on a showing that the plaintiff and defendant are both residents of the latter district. (§§694-c1, 694-c18, 694-c23, SS., '15.)

Gumbert v Sheehan, 200-1310; 206 NW 604

Contracts performable in county. A municipal court has jurisdiction on personal service on the defendant within this state, but outside the county of the court's organization, to render judgment for not exceeding $1,000 on a promissory note signed by the defendant and payable within the said county, even tho the defendant is a nonresident of said county.

West v Heyman, 214-1173; 241 NW 451

Default—affidavit of merit. Defaults in municipal courts may not be set aside in the absence of an affidavit which specifically sets forth the facts relied on as a defense to the action sued on.

Boody v Sawyer, 201-496; 207 NW 589

Defaults—nonapplicable statutes. The statute (§11589, C., '35) requiring applications to set aside defaults in the district court, to be made "at the term" in which default is entered, is not applicable to defaults in municipal courts because said latter courts have no terms.

La Forge v Cooter, 220-1258; 264 NW 268

Judgment by default—setting aside—"practice of court" includes practices of attorneys. Expression "practice of this court" fairly includes more than acts of presiding judge and means practices characteristic of the proceedings when attorneys appear for litigants therein, including practice of attorneys of informing opposing counsel of intention to take default, and evidence of such practice of attorneys was admissible under a petition to set aside a default judgment, altho petition alleged practice of this court.

Lunt v Van Gorden, 225-1120; 281 NW 743

Jurisdiction. The municipal court has jurisdiction to enter an order extending the time to file a motion for a new trial and exceptions to instructions and judgment non obstante veredicto. Such order is reviewable by appeal, not by certiorari.

Eller v Mun. Court, 225-501; 281 NW 441

Jurisdiction to dismiss pending an appeal. An appeal from the municipal court to the supreme court from an interlocutory order involving part of an answer (order striking pleaded set-offs from part of the divisions of the answer), without supersedeas bond in, or stay order by, the appellate court, does not deprive the municipal court of jurisdiction to dismiss the action, in accordance with its rules, for want of attention.

Des M. & CI Ry. v Powers, 215-567; 246 NW 274

No right to set aside orders on own motion. A judge of the municipal court has no jurisdiction to set aside, on his own motion, a duly rendered and journalized order of another judge of the same court sustaining a motion to set aside a default; and equally without

jurisdiction, thereupon, to overrule said motion.

Denman v Sawyer, 211-56; 232 NW 819

10665 Change of venue.

Discussion. See 11 ILR 336—Code revision—change of venue in municipal courts

10667 Filing petition—pleadings.

Time for appearance. Parties do not have one hour in which to appear as provided in justice courts.

Boody v Sawyer, 201-496; 207 NW 589

10668 Return day.

Appearance. Party litigants in class B actions do not have one hour in which to appear after the time fixed in the original notice.

Boody v Sawyer, 201-496; 207 NW 589

10669.1 Information by county attorney.

Atty. Gen. Opinion. See AG Op June 9, '39

10670.1 Payment of witness fees.

Atty. Gen. Opinion. See '30 AG Op 235

10671 Fees, costs, and expenses.

Atty. Gen. Opinions. See '30 AG Op 73, 196, 235, 252, '34 AG Op 133; AG Op Oct. 12, '39

Criminal process in state cases. A county is liable to the bailiff of a municipal court for mileage and expenses incurred in the service of warrants and subpoenas in state cases pending in said court.

Brookins v Polk Co., 203-567; 213 NW 258

10678 Jurors—number—demand for jury.

Municipal court jury trial. Where plaintiff requested jury trial and later withdrew such request, municipal court's refusal to allow defendant trial by jury was error.

Metier v Brewer, (NOR); 205 NW 734

Number of jurors. The trial of a nonindictable misdemeanor may legally be had in municipal court before a jury of six persons.

State v Porter, 206-1247; 220 NW 100

Jury of six—constitutionality. The municipal court act is not unconstitutional because, in the absence of a demand for a jury of twelve, it compels a defendant residing outside the city in which the court is established to submit to a trial by a jury of six which are drawn from the city and not from the county at large.

Kinsey v Clark, 215-765; 246 NW 840

Presumption of regularity. In municipal courts, judgments rendered by the court without a jury must, on appeal, be deemed regular in the absence of any showing as to the rules of the court governing demand for a jury.

La Forge v Cooter, 220-1258; 264 NW 268

10681 Entry judgment—jurisdiction—setting aside default.

Atty. Gen. Opinion. See '38 AG Op 739

Absence of affidavit of merit. Judgments by default in municipal courts, after proper service, may not be set aside in the absence of an affidavit of merit, nor may such judgments be set aside on a motion filed more than ten days after the default is entered, nor are such defects remedied by renewing the motion, after the ruling of the court, with an affidavit of merit.

Borden v Voegtlin, 215-882; 245 NW 331

Affidavit of merit. Defaults in municipal courts may not be set aside in the absence of an affidavit which specifically sets forth the facts relied on as a defense to the action sued on.

Boody v Sawyer, 201-496; 207 NW 589

Defaults—nonapplicable statutes. Section 11589, C., '35, requiring applications to set aside defaults in the district court to be made "at the term" in which default is entered, is not applicable to defaults in municipal courts because said latter courts have no terms.

La Forge v Cooter, 220-1258; 264 NW 268

Notice of taking default—attorneys' custom. Defendants may have a default judgment set aside, where two reputable attorneys, one of which resided in the county where the action was brought, were employed, and where such attorneys rely on a practice among the attorneys in that county to inform opposing counsel of intention to take default, and where a default without notice pending appeal would not have been anticipated.

Lunt v Van Gorden, 225-1120; 281 NW 743

"Practice of court" includes practices of attorneys. Expression "practice of this court" fairly includes more than acts of presiding judge and means practices characteristic of the proceedings when attorneys appear for litigants therein, including practice of attorneys of informing opposing counsel of intention to take default, and evidence of such practice of attorneys was admissible under a petition to set aside a default judgment, altho petition alleged practice of this court.

Lunt v Van Gorden, 225-1120; 281 NW 743

Case reinstated after dismissal. Where an action is dismissed by the clerk under district court rules, but the judge thereof, without notice to the defendant, reinstates the case on motion and showing that the clerk acted erron-

eously, and where an application to vacate the order of reinstatement is denied, supreme court could not on appeal assume that judge lacked jurisdiction to reinstate without notice to defendant, without the district court rules of practice being in evidence and before the appellate court.

Eggleston v Eggleston, 225-920; 281 NW 844

Court acting on own motion contrary to agreement of counsel. Consolidated actions, dismissed by the court on its own motion in the absence of counsel, for want of prosecution, are properly reinstated on a showing of "unavoidable casualty and misfortune" in that there was no negligence on the part of plaintiffs or their counsel and that they were relying on an agreement between counsel that certain motions would not be made nor issues made up until convenient to all counsel.

Thoreson v Central States Co., 225-1406; 283 NW 253

Filing motions after verdict—extending time —jurisdiction. The municipal court has jurisdiction to enter an order extending the time to file a motion for a new trial and exceptions to instructions and judgment non obstante veredicto. Such order is reviewable by appeal, not by certiorari.

Eller v Munic. Court, 225-501; 281 NW 441

Improper to review setting aside of default —appeal proper. Appeal, not certiorari, is the proper method to proceed to attack an alleged erroneous order of the municipal court in sustaining a motion to set aside a default judgment, where the court had jurisdiction to enter the order.

Weston v Allen, 225-835; 282 NW 278

Judgment by default—timely motion to reconsider. In municipal court a motion to reconsider the overruling of a motion to set aside a default judgment, tho filed more than 10 days but within 90 days after entry of the order refusing to set aside the default, when such motion to reconsider was based on irregularity in obtaining the judgment, was a timely motion and the court had jurisdiction to sustain it.

Weston v Allen, 225-835; 282 NW 278

Non-jurisdiction to set aside dismissal. A municipal court having entered a valid order of dismissal of an action has no jurisdiction, seven months later, to set aside said order and reinstate said action without notice to the defendant.

Des M. & CI Ry. v Powers, 215-567; 246 NW 274

No right to set aside orders on judge's own motion. A judge of the municipal court has no jurisdiction to set aside, on his own motion, a duly rendered and journalized order of another judge of the same court sustaining a motion to set aside a default; and equally without jurisdiction, thereupon, to overrule said motion.

Denman v Sawyer, 211-56; 232 NW 819

Opening or vacating—discretion of court. The action of the municipal court, on timely motion, in vacating a judgment for irregularity in obtaining the judgment will not be disturbed on appeal in the absence of a clear showing of abuse on the part of the court.

Mitchell v Brennan, 213-1375; 241 NW 408

Revoking order for costs. An order relative to the costs of a continuance may be set aside by the municipal court when motion for new trial is heard.

Main v Brown, 202-924; 211 NW 232

Setting aside — different allowable procedures. When final judgment is erroneously rendered in municipal court against a defendant (1) because of the mistaken assumption by the court that defendant was in default for want of an answer, and (2) because of the fraud of plaintiff, said defendant may (at least when he acts diligently under the circumstances) proceed by petition under §12787 et seq., C., '35, for the setting aside of said judgment, instead of proceeding by motion under this section for the same relief. It necessarily follows that if defendant so proceeds, he is not bound by the 90-day limitation imposed by said last named section.

La Forge v Cooter, 220-1258; 264 NW 268

Setting aside—fatal delay. A delay of over five months in instituting proceedings to set aside a default judgment in municipal court, bars relief.

Harding v Quinlan, 209-1190; 229 NW 672

Setting aside judgment. Judgments in municipal courts may not be set aside after the lapse of ten days from the entry simply on the ground that the petition shows on its face that the claim sued on was barred by the statute of limitation.

Merkel v Hallagan, 207-153; 222 NW 393

Timely motion to set aside default. Where judgment is entered in a municipal court on April 9th, a motion filed on April 19th following, to set aside the default, is timely.

Service System v Johns, 206-1164; 221 NW 777

Vacating—nonpermissible issue. In an action to cancel a judgment by default on a promissory note, the defendant will not be permitted to present the issue that he was not personally liable on said note.

West v Heyman, 214-1173; 241 NW 451

Void judgment always subject to attack. A void judgment may be attacked in any proceeding in which it is sought to be enforced.

Gohring v Koonce, 224-1186; 278 NW 283

10682 Judgment liens.

Establishing and foreclosing lien. An action in equity in municipal court on an account with prayer for the establishment and foreclosure of a lien on certain real estate should be dismissed for want of jurisdiction as far as equitable relief is concerned. The court may, on application of plaintiff, proceed at law on the account.

Avon Lakes v Deaton, 218-303; 255 NW 531

10685 Shorthand reporter.

Atty. Gen. Opinion. See '30 AG Op 235

10688 Salary.

Atty. Gen. Opinion. See AG Op Oct. 12, '39

CHAPTER 476

SUPERIOR COURT

10697 Establishment and effect of.

Discussion. See 12 ILR 138—Classification of cities

10702 Vacancy.

Atty. Gen. Opinion. See AG Op July 26, '39

10704 Concurrent jurisdiction.

Atty. Gen. Opinion. See '38 AG Op 464

Dropping action from calendar—reinstatement. The district court has jurisdiction to reinstate a cause which, under order of court, has been "dropped from the calendar," if such dropping from the calendar was not with the intent to dismiss.

Bankers Trust v Dist. Court, 209-879; 227 NW 536

Exclusive jurisdiction to first court acquiring. The first court of competent jurisdiction to acquire jurisdiction of the subject matter of a case does so to the exclusion of all other courts of coordinate authority.

First Methodist Church v Hull, 225-306; 280 NW 531

Procedure in general—correcting erroneous decisions. Courts have a duty to correct their own decisions when found to be wrong.

Montanick v McMillin, 225-442; 280 NW 608

Special appearance and motion to dismiss—attacking only part of jurisdiction improper. In an action against insurance company to recover value of property destroyed by fire, in which action a special appearance attacked only one count of petition, the overruling of the special appearance and motion to dismiss was proper, inasmuch as jurisdiction that may be attacked by special appearance is jurisdiction of court over the entire action, and not jurisdiction of court as to part of such action.

Sanford Co. v Ins. Co., 225-1018; 282 NW 771

Lack of jurisdiction—not conferred by consent. Objection based upon the want of jurisdiction of the court over the subject matter of the action may be raised at any time, and, when the law withholds from a court, authority to determine a case, jurisdiction cannot be conferred, even by consent of parties.

Johnson v Purcell, 225-1265; 282 NW 741

10716 Court of record—laws applicable.

Atty. Gen. Opinion. See '38 AG Op 739

Default—setting aside. The superior court has ample jurisdiction, during a term at which a motion to set aside a default is overruled, to reconsider its judgment and to enter an order sustaining said motion.

Braverman v Burns, 207-1382; 224 NW 596

Requirements for valid decree. To be valid and binding, the acts of a court must be within the court's jurisdiction, i. e., it must have (1) jurisdiction of the subject, which is power to hear and determine cases in the general class of the question presented, and (2) jurisdiction of the person, which is power to subject the parties to the judgment.

Collins v Powell, 224-1015; 277 NW 477

10719 Marshal as sheriff.

Atty. Gen. Opinions. See '28 AG Op 287; '32 AG Op 131

10721 Accounting by clerk.

Atty. Gen. Opinion. See '32 AG Op 149

10722 Violations of ordinances.

Atty. Gen. Opinion. See AG Op Feb. 21, '39

10723 Criminal actions.

Atty. Gen. Opinion. See '32 AG Op 149

10745 Judgments made liens.

Enforcement—void judgment always subject to attack. A void judgment may be attacked in any proceeding in which it is sought to be enforced.

Gohring v Koonce, 224-1186; 278 NW 283

10748 Salary of judge.

Atty. Gen. Opinion. See AG Op Feb. 21, '39

10750 Compensation of marshal.

Atty. Gen. Opinions. See '28 AG Op 287; '32 AG Op 131, 149

CHAPTER 477

DISTRICT COURT

10761 General jurisdiction.

Discussion. See 20 ILR 83—Jurisdiction—federal receiverships

Atty. Gen. Opinion. See '38 AG Op 464

ANALYSIS

Certiorari to test jurisdiction. See under §12456 (III)
Constitutional provision. See also under Art V, §§1, 6
Equitable jurisdiction. See under §10941
Jurisdiction in criminal cases. See under §13449
Power to pass on constitutional questions. See under Art XII, §1

I NATURE AND EXTENT OF JURISDICTION IN GENERAL

Discussion. See 15 ILR 309, 434—Restatement of conflicts; 19 ILR 385—Nonjudicial functions; 19 ILR 406, 540—U. S. Courts—consent receiverships

Jurisdiction defined. Jurisdiction means the power of a court to take cognizance of and to decide a case and carry its judgment and decree into execution.

Western Grocer v Glenn, 226-1374; 286 NW 441

Jurisdictional questions always presentable.

Latta v Utterback, 202-1116; 211 NW 503

Requirements for valid decree. To be valid and binding, the acts of a court must be within the court's jurisdiction, i. e., it must have (1) jurisdiction of the subject, which is power to hear and determine cases in the general class of the question presented, and (2) jurisdiction of the person, which is power to subject the parties to the judgment.

Collins v Powell, 224-1015; 277 NW 477

Rules—general order—dismissal for want of prosecution. Under the recognized rule that courts have the inherent power to prescribe such rules of practice and rules to regulate their proceedings in order to expedite the trial of cases, to keep their dockets clear, and to facilitate the administration of justice, the judges of a judicial district could adopt and enforce a general order requiring parties to cause each case to be finally determined within two years from date of filing petition and providing upon failure to comply with such order the clerk should enter upon the record, "Dismissed without prejudice for want of prosecution".

Hammon v Gilson, 227-1366; 291 NW 448

Dropping action from calendar—reinstatement. The district court has jurisdiction to reinstate a cause which, under order of court, has been "dropped from the calendar", if such dropping from the calendar was not with the intent to dismiss.

Bankers Trust v Dist. Court, 209-879; 227 NW 536

Procedure in general—correcting erroneous decisions. Courts have a duty to correct their own decisions when found to be wrong.

Montanick v McMillin, 225-442; 280 NW 608

Concurrent jurisdiction—possession of res. The court appointing a receiver and having possession of the res has exclusive jurisdiction to hear and determine all controversies affecting title, possession and control of the property, which jurisdiction must be respected by all other courts, except that another court may entertain another cause concerning the same subject matter if it does not oust the appointing court from possession of the res, or appropriate disposal of the cause there entertained.

Bates v Evans, 226-438; 284 NW 385

Unauthorized release of bond. The liability of a surety on an appeal (supersedeas) bond, attaches the moment when the bond is accepted. It follows that an order of court assuming to set aside and to cancel the bond and to authorize the filing of a new and different bond, without notice to the appellee-obligee, is a nullity as to the first filed bond.

State v Packing Co., 219-419; 258 NW 456

Death of party without substitution. Where no personal representative was substituted for plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence application made during same term to vacate the dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

Deposition of adversary. The court has no legal right, even in an equitable action, to enter an order authorizing plaintiff to take, on his own behalf and by deposition, the testimony of the defendants bearing on the issues joined between plaintiff and all of said defendants.

Bagley v Dist. Court, 218-34; 254 NW 26

I NATURE AND EXTENT OF JURISDICTION IN GENERAL—continued

Disbarment—jurisdictional order. The order of court, finding that formal charges against an attorney are sufficient to justify disbarment proceedings, and ordering copy thereof served on him and for his appearance is jurisdictional, but not the preliminary order for the investigation into the conduct of the attorney.

In re Cloud, 217-3; 250 NW 160

District court—enjoining unlicensed person practicing law. In an equity suit brought by members of bar for injunction to restrain an unlicensed person from professing to be an attorney and from practicing law, where irreparable damage was the gist of the action, this subject matter was within the jurisdiction of the district court.

Johnson v Purcell, 225-1265; 282 NW 741

Enjoining proceedings—proper court. An action to enjoin proceedings on a judgment rendered in a municipal court cannot be maintained in the district court, even tho both courts are located in the same county.

Keeling v Priebe, 219-155; 257 NW 199

Exclusive jurisdiction to first court acquiring. The first court of competent jurisdiction to acquire jurisdiction of the subject matter of a case does so to the exclusion of all other courts of coordinate authority.

First M. E. Church v Hull, 225-306; 280 NW 531

Personal jurisdiction assumed when unchallenged. Where the jurisdiction of the person is not challenged in an action to set aside a default judgment, it must be assumed that the court had such jurisdiction, and, if it also had jurisdiction of the subject matter, it was warranted in entering judgment.

Jensen v Martinsen, 228- ; 291 NW 422

Foreign corporation — interference with internal affairs. Where a foreign corporation receives, as a consideration for the legal sale of its entire assets, a certain amount in money and the balance in the bonds, and in the preferred and participating stock of the purchaser, the courts of this state will not, in an action against the corporation, adjudicate the question whether a dissenting stockholder should be paid in cash the value of his stock, as such adjudication would be an unallowable interference with the internal affairs of said foreign corporation.

Graeser v Finance Co., 218-1112; 254 NW 859

Foreign law—refusal to enforce. The law of a foreign state, which holds parties who are interested as shareholders in an unincorporated association, personally and individually liable as partners for the debts of such association even tho said parties, to the knowledge of the creditor, specifically contracted against such liability, will not be enforced by the courts of this state.

Reason: Said foreign law is directly contrary to the law of this state.

Farmers & M. Bk. v Anderson, 216-988; 250 NW 214

Action involving land along Missouri river. In an action to enjoin trespass and recover damages, wherein cross-action to quiet title was brought, and where all parties appeared, and where at the time of the action and for many years prior thereto, the land in controversy was situated on the Iowa side of the Missouri river and within Pottawattamie county, altho formerly as result of changes in course of river, such land lay, for a certain period of time, on the Nebraska side, the district court for said county had jurisdiction.

Arnd v Harrington, 227-43; 287 NW 292

Federal appointment of receiver—effect on state courts. The mere pendency of federal receivership proceedings over a party does not necessarily oust the jurisdiction of the state courts over the party and over his property.

Lippke v Milling Co., 215-134; 244 NW 845

Lands in foreign state. The district court, when it has jurisdiction of all parties to a controversy, has jurisdiction to determine their contract relations to lands situated in a foreign state: e. g., whether an absolute deed to such lands was an absolute conveyance or a mortgage.

Tansil v McCumber, 201-20; 206 NW 680

Lex rei sitae. The title to real estate in this state under a will must be determined by the courts of this state, and under the law of this state.

Scofield v Hadden, 206-598; 220 NW 1

Life policy payable in Iowa pledged in another state—Iowa jurisdiction. Tho a life policy payable to the estate of a deceased Iowa resident is deposited in a foreign state, as security for a debt, the proceeds are not beyond the jurisdiction of the Iowa probate court, inasmuch as the right to such proceeds depends, not upon their location, but upon the terms of the policy, supplemented by any contract relating thereto.

In re Hazeldine, 225-369; 280 NW 568

Probate—nonwaiver of federal jurisdiction. Agreed postponements of a probate hearing in the state court will not prevent the Reconstruction Finance Corporation, a party authorized by act of congress to sue in the federal courts, from thereafter commencing action thereon in the federal courts.

RFC v Dingwell, 224-1172; 278 NW 281

Service on foreign insurer—physician not agent. An Iowa accident insurance association which has not been licensed to transact its business in a foreign state (in which it has neither office, agent nor property), and whose certificates of insurance are strictly Iowa contracts, cannot be deemed to have subjected itself to the jurisdiction of the courts of such foreign state (1) because a very large number of its certificate holders reside in said foreign state, or (2) because said association, from time to time and by mail from its Iowa office, requests a physician in said foreign state to there examine claimants and to report as to accidental injuries received by claimants,—it appearing that said physician was under no contract obligation to comply with said requests and to make such examinations tho he had done so for several years and had received a stated fee for each separate examination.

Held, the foreign court, in an action on a certificate, acquired no jurisdiction under process served on said physician.

Saunders v Trav. Assn., 222-969; 270 NW 407

Indictments—district court (?) or juvenile court (?). The juvenile court act has not deprived the district court of jurisdiction over indictments against persons under eighteen years of age. (Ch 179, C., '27.)

State v Reed, 207-557; 218 NW 609

Judgment of dismissal—nonjurisdiction to set aside. The district court, having at one term entered a judgment of dismissal of an action for want of prosecution of the action as required by the rules of the court, has no jurisdiction at a subsequent term, tho the judgment entry remains unsigned, to set aside said judgment under §10801, C., '35, and reinstate the action. The governing procedure, under such circumstances, is provided by §12787 et seq., C., '35.

Workman v Dist. Court, 222-364; 269 NW 27

Rules in re failure to prosecute action. Rules of the district court for the dismissal of actions for want of reasonable prosecution thereof are proper.

Workman v Dist. Court, 222-364; 269 NW 27

Dismissal of cases for want of prosecution —validity of general order. The fact that an order of the judges of a judicial district, requiring the parties to cause each case to be finally determined within two years from date of filing petition, was a general order applicable to all cases or proceedings pending or to come before the courts of the district did not invalidate such order.

Hammon v Gilson, 227-1366; 291 NW 448

Clerk's entry of dismissal under general order—nonreviewable when court approves entry. Where a general order of the judges of a judicial district provided for the dismissal of all actions and proceedings undetermined after a period of two years, and directed the clerk of court to enter the dismissal without prejudice, and where such order was so entered in the district court record by the clerk, the supreme court is not required to pass upon the question of whether such entry by the clerk would be an effective dismissal, when at the same term of court the presiding judge made an entry in the same record "approving, affirming and ratifying" this and all other orders of dismissal under the general order.

Hammon v Gilson, 227-1366; 291 NW 448

Clerk's dismissal for want of prosecution—reinstatement—statutory proceedings necessary. The power of the court to modify or set aside a judgment, when once entered, is purely statutory, and where clerk of court, under a general order of judges of judicial district, on April 20, 1935, entered an order dismissing action without prejudice for want of prosecution, and trial court's order of approval was entered on August 28, 1935, the trial court could set aside judgment of dismissal by statutory proceedings only, and by bringing defendants into court by same proceedings, respecting notice and service, as an ordinary action, hence, an order of reinstatement made September 8, 1938, was unauthorized where application for reinstatement was made on November 27, 1936, and a five-day notice of hearing on application was given defendants by mail and defendants appeared specially in response to notice.

Hammon v Gilson, 227-1366; 291 NW 448

Master and servant — original action for damages—jurisdiction. The district court has no jurisdiction to try and determine an original action against an employer for damages consequent upon the alleged negligence of the employer, resulting in the death of an employee, when both the employer and the employee are under the terms and conditions of the workmen's compensation act.

Hlas v Oats Co., 211-348; 233 NW 514

Social welfare board—administrative duties —nonjudicial review. While the lines of demarcation between the three branches of government are sometimes difficult to determine and the duties sometimes overlap, the duties of the state board of social welfare in determining eligibility for old-age assistance are clearly administrative and, under the statute, in the absence of fraud or abuse of discretion, they are not and could not well be the subject of judicial inquiry.

Schneberger v Board, 228- ; 291 NW 859

I NATURE AND EXTENT OF JURISDICTION IN GENERAL—concluded

Money given to obstruct justice—recovery denied. The courts will not aid one to recover money that has been given to another to be used in obstructing or interfering with the orderly course of justice, nor will they protect one who obtains the money of another for a particular lawful purpose when he fails to so use it and refuses to return it.

Sarico v Romano, (NOR); 205 NW 862

Motions—sua sponte simplification by court. The district court has inherent power, sua sponte, to simplify pleadings.

Collins v Cooper, 215-99; 244 NW 858

Retention of jurisdiction—effect. In judicial proceedings to accomplish a certain purpose, e. g., the proper and legal protection of both life tenants and remaindermen in the matter of preserving the estate for all the parties, the record retention by the court of jurisdiction over the proceedings and parties thereto, will enable the court subsequently to make valid and supplementary orders in furtherance of the said purpose.

John Hancock Ins. v Dower, 222-1377; 271 NW 193

Removal of administrator. Jurisdiction to remove an administrator is furnished by an application by the surety on the bond wherein he prays for an order (1) removing the administrator or (2) requiring the filing of a report and the making of distribution, when notice of the application is duly served on all interested parties and when no part of the prayer has been withdrawn of record. The filing of a report under a mutual arrangement between the parties does not exhaust the jurisdiction of the court.

In re Donlon, 201-1021; 206 NW 674

Stipulation—effect. A stipulation in an equity cause that testimony may be taken before any judge of the district does not deprive the court of the county wherein the action is brought of jurisdiction.

Gotsch v Schoenjahn, 201-1317; 207 NW 567

Vacating final report of receiver of closed bank—jurisdiction of court. After the approval of the final report of the receiver of a closed bank which discharged both the receiver and the examiner in charge, an application by the receiver for vacation of the order consented to the jurisdiction of the court only as to the receiver, but the court had jurisdiction to deal summarily with the examiner by prescribing the form of notice to be served on him and to set the time for his appearance so long as the statutory provisions for vacating and modifying judgments were complied with and the application filed within one year from the date of rendition of the order attacked.

Bates v Loan & Tr., 227-1347; 291 NW 184

Refunding erroneous tax — administrative remedies must be exhausted before resorting to court. Under the statute providing for refunding erroneous tax, stockholders of a national bank are not entitled to money judgment in alternative of statute. All adequate administrative remedies must be exhausted to recover tax illegally collected before resorting to the courts.

First Nat. Bk. v Harrison County, 57 F 2d, 56

Hammerstrom v Toy Nat. Bk., 81 F 2d, 628

Wrongful assessment—administrative remedy to be exhausted before appeal to court. All adequate administrative remedies in matters of taxation must be exhausted before resort can be had to court, so when administrative stage of action is completed, judicial power of court may begin, and the parties may resort to any tribunal having jurisdiction. Hence, where national banks bring an action to restrain collection of alleged illegal taxes on capital stock, basing alleged illegality on fact that other competitive "moneyed capital" was taxed intentionally and consistently at lower rate in violation of federal statutes, held, banks failed to exhaust remedy provided by statutes providing appeal from assessor to board of review.

Nelson v First Nat. Bk., 42 F 2d, 30

Crawford Co. Bk. v Crawford Co., 66 F 2d, 971

II LAW AND EQUITY

Avoidance of multiplicity of law actions. A strict action at law may not be brought and maintained in equity on the mere allegation that thereby a multiplicity of actions will be avoided. So held where plaintiff sought, in equity, to recover not only presently accrued but future possibly accruing weekly total disability benefits under a policy of accident insurance.

Gephardt v Ins. Co., 213-354; 239 NW 235

Fraud as defense in law action—nonright to transfer. A defendant in an action at law on a policy of insurance is not entitled to a transfer of the action to the equity calendar simply because he pleads fraudulent representation as a defense and prays a cancellation of the policy.

Beeman v Life Co., 215-1163; 247 NW 673

Proper law action nontransferable in toto. An action brought on a contract (e. g., a property settlement between husband and wife), and properly brought at law, is not rendered transferable in toto to the equity calendar by defendant's plea of fraud and prayer for a judicial rescission of the contract. Said alleged fraud, if established in the law action, constitutes a complete defense, and remaining equitable issues are properly transferred to and disposed of in equity. Failure, in the law action, to establish said alleged fraud, necessarily removes from the case said equitable issue of rescission.

Poole v Poole, 221-1073; 265 NW 653

Sales—remedies of purchaser—optional remedies. A vendee who has been fraudulently induced to purchase property may exercise one of three remedies, to wit:

1. He may, within a reasonable time, offer to place the vendor in statu quo, and, when the vendor refuses, keep his tender good, and ask a court of equity to cancel and rescind the contract and give him a judgment for the price paid.

2. He may himself, within a reasonable time, do the canceling and rescinding of the contract, by offering to place the vendor in statu quo; and, when the vendor refuses, keep his tender good, and sue at law for the purchase price.

3. He may affirm the contract and sue at law for the damages suffered by him.

Lambertson v Natl. Inv. & Fin., 200-527; 202 NW 119

Equity proceeding to establish heirs—triable de novo. In a probate proceeding to assist administrator to determine heirs of intestate, it being determined upon appeal from (1) the form of the pleadings as prescribed in equity, (2) the record of proceedings indicating use of equitable powers, (3) the reception of evidence under equitable procedure, and (4) rulings of the court reserved as in equity, that such proceeding, having been conducted in a manner wholly foreign to procedure at law, was tried in equity and therefore was triable de novo on appeal.

In re Clark, 228- ; 290 NW 13

Transfer as sole remedy. A court which has jurisdiction of an action when brought in the right forum has jurisdiction when brought in the wrong forum. The remedy for an incorrect forum is to transfer to the correct docket.

In re Nish, 220-45; 261 NW 521; 100 ALR 1516

III COURT AND JUDGE

Discussion. See 13 ILR 456—Control of master's fees; 15 ILR 141—Powers of court and judge

Distinction between "court" and "judge". Statutes, providing for the prosecution of injunction violators, which do not prohibit the "court" from trying the defendant forthwith should be construed as consistent with statutes providing punishment for contempt, which allow the court to try the defendant forthwith, when both statutes recognize the distinction between the terms "judge" and "court", so that when acting in the capacity of "court" rather than as "judge", the court could try the defendants for an injunction violation during the same term in which the precept to punish them for contempt was issued.

Carey v District Court, 226-717; 285 NW 236

Procedure in general—correcting erroneous decisions. Courts have a duty to correct their own decisions when found to be wrong.

Montanick v McMillin, 225-442; 280 NW 608

Nonjurisdiction to dismiss action. When a cause is assigned to, and tried by, a judge of the district court, all other judges of the same court are thereby deprived of jurisdiction to dismiss the cause while it is pending before said trial judge.

Dunkelbarger v Myers, 211-512; 233 NW 744

Rules in re failure to prosecute action. Rules of the district court for the dismissal of actions, for want of reasonable prosecution thereof, are proper.

Workman v Dist. Court, 222-364; 269 NW 27

Ruling on motion as adjudication—unallowable review. An order overruling plaintiff's motion (1) to strike an answer, and (2) for judgment nil dicit (assuming the propriety of such procedure) constitutes an adjudication that plaintiff has no legal right to a judgment on the pleadings as they then stand; and plaintiff has no right later to present, to another judge of the same court, a motion for judgment on the same pleadings, and said latter judge has no right to review the rulings of the former judge by sustaining said latter motion.

Taylor v Canning Corp., 218-1281; 257 NW 353

IV ATTACKING JURISDICTION—COLLATERAL AND DIRECT

Reports — disapproval — jurisdiction. A trustee who, in his acceptance of a nontestamentary trust, agrees to report annually to the district court and does so report, and who invokes the jurisdiction of the probate court to pass upon his reports, may not thereafter question the power and right of such court to act upon such reports.

In re Bartholomew, 207-109; 222 NW 356

IV ATTACKING JURISDICTION—COLLATERAL AND DIRECT—concluded

Special appearance and motion to dismiss. In an action against insurance company to recover value of property destroyed by fire, in which action a special appearance attacked only one count of petition, the overruling of the special appearance and motion to dismiss was proper, inasmuch as jurisdiction that may be attacked by special appearance is jurisdiction of court over the entire action, and not jurisdiction of court as to part of such action.

Sanford Co. v Western Ins., 225-1018; 282 NW 771

Irregular petition for appointment of guardian—collateral attack. Irregularities in the form of a petition for the appointment of a guardian, while perhaps subject to direct attack, were not sufficient to justify a collateral attack in an action to set aside a default judgment obtained by the guardian.

Jensen v Martinsen, 228- ; 291 NW 422

V CONFERRING JURISDICTION

Lack of jurisdiction not conferred by consent. Objection based upon the want of jurisdiction of the court over the subject matter of the action may be raised at any time, and, when the law withholds from a court authority to determine a case, jurisdiction cannot be conferred, even by consent of parties.

Johnson v Purcell, 225-1265; 282 NW 741
Eby v Phipps, 225-1328; 283 NW 423

VI EXCEEDING JURISDICTION

Judicial legislation. A court enters the wholly unallowable field of judicial legislation when it assumes to enter ex parte orders directing the payment of mileage to grand jurors in an amount different than the amount provided by statute.

Park v Polk County, 220-120; 261 NW 508

Retaining jurisdiction. In action on life insurance policy for payment of annual total disability benefits, where court ordered payment up to time of trial, court's action in retaining jurisdiction for adjudication of rights and liabilities of parties accruing in the future held erroneous.

Kurth v Ins. Co., 227-242; 288 NW 90

Mandatory procedendo for dismissal. On the reversal and remand in toto, on the merits, of a judgment for plaintiff in an equitable action, a procedendo directing the trial court, generally, to take "further proceedings not inconsistent with the opinion of the supreme court," must be deemed, in the absence of additional pleadings or evidence in the trial court, a mandatory direction to the trial court to dismiss the action. In the absence of such pleadings or evidence, the trial court has no jurisdiction to enter a judgment on a basis not presented by the pleadings or authorized by the opinion.

Ronna v Bank, 215-806; 246 NW 798

VII REMOVAL OF CAUSES

State and federal courts—comity. The necessity for comity between state and federal courts demands that controversies shall not arise concerning their respective jurisdictional powers on account of unsubstantial considerations, and certiorari from the supreme court of Iowa will lie to require a district court of the state to relinquish jurisdiction over a probate matter after the federal court, through diversity of citizenship, has assumed jurisdiction.

RFC v Dingwell, 224-1172; 278 NW 281

Removal of causes by nonresident. When a petition for removal to the federal court was filed, the state court did not lose jurisdiction of the action when both the trial court and federal court decided that the petition was insufficient to confer jurisdiction on the federal court, and all the petitioners but one were residents of the state with no right to removal, and the one nonresident failed to make a claim of a separable controversy.

Carey v Dist. Court, 226-717; 285 NW 236

Joinder of "separable controversy"—removal to federal court by nonresident. The liability of several insurance companies which were members of an association which insured plaintiff's property against loss by fire presented a "separable controversy", and when plaintiff under the statute joined the several defendants in a single action, it did not create a joint liability so as to preclude a nonresident defendant from removing cause from state to federal court.

D. M. Elev. Co., v Underwriters' Gr. Assn., 63 F 2d, 103

United States courts—transfer of jurisdiction. A petition for removal to federal court must be filed before noon of second day of term for which the action is brought, and if good and sufficient, and so filed with proper notice and bond, the state court loses jurisdiction to the federal court.

Johannsen v Mid-Cont. Corp., 227-712; 288 NW 911

Filing of petition—general (?) or special (?) appearance. Rule of federal courts recognized that filing of petition for removal of cause to federal court constitutes special and not general appearance. Under Iowa statute,

the filing of such petition with notation thereof on record would constitute a special appearance even tho not expressly announced as such, since court will look to substance rather than form in determining whether an appearance is general or special.

Johannsen v Mid-Cont. Corp., 227-712; 288 NW 911

10762 Appeals and writs of error.

Stay under inherent power of court.

Francis v Todd, 219-672; 259 NW 249

Writ of error (?) or appeal (?)—order of restitution. The district court has no jurisdiction, on writ of error, in an action of forcible entry and detainer to enter an order restoring the defendant to the possession of the premises in question.

Rasmussen v Alberts, 215-644; 246 NW 620

De novo status. An appeal from justice court, perfected and docketed, is in the district court as though it had been commenced there; the justice's judgment is completely annulled; the appeal brings up the action for trial on its merits; and it is the duty of the plaintiff to prosecute the action. So where a district court, under its rule providing for dismissal of all actions remaining on the court calendar for over one year without being noticed for trial, dismissed such an appeal under its rule, and the clerk of court entered judgment in favor of plaintiff for the amount recovered in justice court together with interest and against appealing defendant, the defendant's motion to expunge the clerk's entry and correct the record was well-grounded and should have been sustained.

Yost v Gadd, 227-621; 288 NW 667

10763 Wills—administration—guardianship.

ANALYSIS

I Estates of Deceased Persons
II Guardianship

I ESTATES OF DECEASED PERSONS

Nature of probate proceedings. Probate proceedings by which jurisdiction of a probate court is asserted over the estate of a decedent for the purpose of administering the same, is in the nature of a proceeding in rem, and is one as to which all the world is charged with notice.

In re Harsh, 207-84; 218 NW 537

Jurisdiction—domicile of deceased — evidence. Evidence reviewed and held to warrant finding that deceased was resident of Boone county at time of death, giving the district court of that county exclusive jurisdiction to appoint an administrator for his estate.

Crawford County v Kock, 227-1235; 290 NW 682

Jurisdiction—appointment of administrator —recital of residence in petition. The district court of the county in which deceased resided at time of his death has exclusive jurisdiction to appoint an administrator and petition for appointment need not recite the place of residence of the deceased.

Crawford County v Kock, 227-1235; 290 NW 682

Approval of unauthorized act. The contention that the court by approving a report of an administrator thereby approved a former unauthorized act of the administrator, cannot be sustained when the alleged approval was subsequent to the joinder of issues in the action in question, when such approval was in no manner pleaded, and when there was no showing that the court had jurisdiction to enter the approval.

Blain v Blain, 215-69; 244 NW 827

Jurisdiction—exclusiveness. Where a clear and unambiguous will is admitted to probate and administration is being had thereon in probate court, the jurisdiction of such court to determine any rights thereunder, and to administer and direct the disposition of the property involved, cannot be interfered with by a court of equity.

Anderson v Meier, 227-38; 287 NW 250

Equity proceeding to establish heirs—triable de novo. In a probate proceeding to assist administrator to determine heirs of intestate, it being determined upon appeal from (1) the form of the pleadings as prescribed in equity, (2) the record of proceedings indicating use of equitable powers, (3) the reception of evidence under equitable procedure, and (4) rulings of the court reserved as in equity, that such proceeding, having been conducted in a manner wholly foreign to procedure at law, was tried in equity and therefore was triable de novo on appeal.

In re Clark, 228- ; 290 NW 13

Jurisdiction. The district court of the county in which an unsatisfied judgment was rendered has jurisdiction to appoint administration upon the estate of the nonresident judgment plaintiff.

Edwards v Popham, 206-149; 220 NW 16

Jurisdiction when will exists. The appointment of an administrator cannot be said to be without jurisdiction even tho a will existed.

Murphy v Hahn, 208-698; 223 NW 756

I ESTATES OF DECEASED PERSONS—concluded

Lost will — probate jurisdiction exclusive. An action to establish a lost will must be brought in the probate court.

Coulter v Petersen, 218-512; 255 NW 684

II GUARDIANSHIP

Presumption. Orders in probate appointing guardians are presumptively regular.

Marsh v Hanna, 219-682; 259 NW 225

Testamentary guardian of person. Principle recognized that a testamentary guardianship of the person is unknown to our law.

Turner v Ryan, 223-191; 272 NW 60; 110 ALR 554

Appointment—foreign courts—jurisdiction. Record reviewed, and held to show jurisdiction in the courts of a foreign state validly to appoint a guardian of the property and person of an adult former resident of this state who has had a mental defect (tho not an imbecile or idiot) from birth, and who has lived in said foreign state continuously for some 25 years with a protecting chaperon.

Turner v Ryan, 223-191; 272 NW 60; 110 ALR 554

Approval of unauthorized act. A court order which impliedly approves a former unauthorized hypothecation by a guardian of the ward's property as security for a loan does not deprive the probate court of jurisdiction over the hypothecated property.

Fansher v Bank, 204-449; 215 NW 498

Compromise settlement—approval — conclusiveness. An order in guardianship proceedings approving a settlement of a claim on behalf of the ward is conclusive until set aside by some direct and appropriate proceedings in the probate court.

Bennett v Ryan, 206-1263; 222 NW 16

Settlement of claim—irregularities — effect. The validity of a settlement of a claim on behalf of a ward is not affected by the fact that the settlement was signed shortly before the guardian was actually appointed, or that there was some delay in filing the order of court approving the settlement.

Bennett v Ryan, 206-1263; 222 NW 16

Testamentary provision in re guardianship. A testamentary request that "the court" appoint a guardian of the property devised to minors does not give the presiding judge a personal power to appoint, but contemplates an appointment by the court acting as a judicial tribunal.

Hodgen's Executors v Sproul, 221-1104; 267 NW 692

Ward's control over appointment. In proceedings for the appointment of a guardian or trustee of the property of a minor who is over 14 years of age and under no legal disability, the court abuses its discretion when it refuses to appoint the concededly competent and qualified person formally requested by the ward for such appointment. So held where the court ignored the request solely because the person whose appointment was requested resided just outside the judge's judicial district and some short distance from the location of the trust property.

Hodgen's Executors v Sproul, 221-1104; 267 NW 692

10764 Executors and trustees.

Testamentary trusts. See under §11876

Findings of fact in probate. A supported finding of fact by trustees that the beneficiary of a testamentary bequest had fulfilled the conditions imposed on the payment of said bequest is conclusive on the appellate court.

In re Sams' Est., 219-374; 258 NW 682

Nonpower to approve termination of testamentary trust.

Windsor v Barnett, 201-1226; 207 NW 362

Creation of trust—mistaken view of law. Securities deposited by an insurance company with the commissioner of insurance for the specific purpose of protecting the policyholders constitute a trust fund for said specified purpose, both in the hands of the commissioner and, in case of insolvency, in the hands of the receiver of the company, even tho said deposit was made on demand of the commissioner, acquiesced in by the company, in the mutually mistaken, but good-faith, belief that the statute required such deposit before a license to transact business could legally issue to the company.

State v Cas. Co., 206-988; 221 NW 585

Escrow delivery—recall power nullifies delivery. No valid delivery of a deed is made by depositing it in a safety deposit box over which grantor thereafter maintains full dominion, with power to recall the deed. (Davis v College, 208-480; Robertson v Renshaw, 220-572; and Boone College v Forrest, 223-1260, overruled.)

Orris v Whipple, 224-1157; 280 NW 617

Unlawful delivery of deed. An administrator who has in his possession a deed of conveyance purporting to have been executed by the deceased has no authority to deliver said deed to the grantee in said deed without an authorizing order of court.

Blain v Blain, 215-69; 244 NW 827

Improper allowance of attorney fees. A trust created by a legislative appropriation act, solely for the "education, care, and keep" of a designated person, may not be depleted

by the allowance by the court of attorney fees for services rendered, not in the administration of the trust, but in inducing the legislature to make the appropriation.

In re Gage, 208-603; 226 NW 64

"Net income"—what constitutes. "Net income" does not mean the general income of the estate without provision for the payment of just charges, taxes, and reasonable repair and upkeep. On the contrary, it means the income remaining, if any, after such charges and expenses are taken care of. (So held as to a testamentary trust which provided for the keeping of the trust estate intact and for the annual distribution of the net income.)

In re Whitman, 221-1114; 266 NW 28

Distribution of trust income — when conclusive. When the sole beneficiaries of the annual net income of a trust estate have been and are, themselves, trustees of the trust estate, the court will not disturb the annual distributions which the trustee-beneficiaries, on an erroneous but good-faith interpretation of the trust instrument, have made among themselves during a long series of years. But the court will give proper directions as to future distributions.

In re Whitman, 221-1114; 266 NW 28

Note found in decedent's safe—no delivery. In spite of a mother's declarations as to the existence of a note and her instructions to her daughter to get it after the mother's death, a promissory note executed by a mother, with her daughter as payee, in repayment of money allegedly borrowed from the daughter, and found by said daughter in the mother's safe after her death, is not a valid claim against the estate of the mother—there having been no sufficient delivery thereof to payee. Quaere, as to validity of claim if based on the debt independent of the note.

In re Martens, 226-162; 283 NW 885

Property held by administrator. Where trust property in the possession of an administrator is identifiable and not affected by rights of innocent third parties, equity may impress a trust therein.

Carpenter v Lothringer, 224-439; 275 NW 98

Receiver of insolvent executor bank—duty. Where the Scott county district court appoints a receiver to take charge of an insolvent trust company, which company had been previously appointed by the Johnson county district court as co-executor in an estate pending in the Johnson county district court, such receiver did not become an officer accountable to the Johnson county district court but was an officer of the Scott county district court having possession of the property and his duty was only to deliver such property under direction of the Scott county district court to the person entitled thereto.

Bates v Evans, 226-438; 284 NW 385

Rent-free occupancy by beneficiary. A testamentary trust manifestly cannot be construed to authorize one of the beneficiaries to occupy a portion of the trust estate free of rent when the trust instrument contains no such authorization, but clearly provides that the net income of the entire trust estate shall be divided in a stated manner among named beneficiaries.

In re Whitman, 221-1114; 266 NW 28

Rescission of contract—tender of performance to trustee. The guardian of an incompetent has no authority, even with the approval of the court, to contract for the sale of lands held by the ward as trustee only, yet the purchaser under such a contract may not base a rescission of the contract on such a lack of authority only, and recover payments already made, if, on the death of the trustee-ward, and before full performance of the contract is due, the guardian is also appointed successor trustee, thereby enabling said purchaser to tender performance to the trustee.

Copple v Morrison, 221-183; 264 NW 113

Trustee — disqualification — effect. Equity will not permit a trust to fail simply because a particular trustee is disqualified from acting.

State v Cas. Co., 206-988; 221 NW 585

Trustee for beneficiaries. The administrator is a trustee for the benefit of persons interested in the estate.

Goodman v Bauer, 225-1086; 281 NW 448

Compensation and attorney fees. The compensation of a trustee and of his attorney necessarily rests quite largely in the discretion of the trial court.

Turner v Ryan, 223-191; 272 NW 60; 110 ALR 554

Commingling funds. Where trust funds are deposited in the individual account of the trustee, the cestui que trust has the right to elect to sue the trustee for the conversion, or he may pursue the trust funds and establish a preference thereto if they can be traced.

In re Riordan, 216-1138; 248 NW 21

Trustee by contract. A trustee who is such by contract between himself and the beneficiaries but who applies to the district court for formal appointment, who is so appointed, who qualifies as such trustee under order of court, and who, in compliance with a prayer therefor, is authorized to take possession of, and manage the property in question under "orders of court", is subject to the jurisdiction of the court in the matter of reports, the rejection thereof, and final accounting.

In re Skinner, 215-1021; 247 NW 484

Credit for overpayment of income. On final accounting, a trustee will be credited with an overpayment to the beneficiary of income even tho such payment was made in advance of the actual receipt of the income.

In re Siberts, 216-336; 249 NW 196

Liability on trustee's bonds — receipt of funds. Where a party was guardian of minors and also trustee for said minors (bond in each case having been given), his written receipt showing the receipt of funds as guardian is not necessarily conclusive on the issue whether he received said funds as trustee.

In re Baldwin, 217-279; 251 NW 696

Powers of trustee. Principle reaffirmed that the power of a trustee to dispose of trust property is limited to the powers granted in the trust agreement.

In re Barnett, 217-187; 251 NW 59

Trustee borrowing from himself. A trustee, duly appointed by the court to execute a contract trusteeship, who loans the trust funds to himself, and uses the same in the purchase and improvement of various properties, without any authorizing order of court and without the knowledge or consent of the beneficiaries of the trust, will, on final report, be ordered to account in cash for said funds, and not in the physical properties bought by him, especially when said properties are inferior to the standard of investments required by said contract.

In re Skinner, 215-1021; 247 NW 484

Trustee buying property from himself. The act of a trustee in transferring his individually owned bonds and mortgages to himself as trustee and charging the trust funds with the amount thereof is wholly void even when authorized by an order of court. A fortiori is this true when the order was not obtained in good faith.

In re Riordan, 216-1138; 248 NW 21

Death of trustee—revesting of title. Upon the death of a trustee, the title to the trust property vests in the beneficiary of the trust.

Copple v Morrison, 221-183; 264 NW 113

Investments — negligence — evidence. Evidence held to support a finding that a trustee had failed to exercise a fair and sound discretion in investing trust funds.

In re Bartholomew, 207-109; 222 NW 356

Investments without authorizing order — subsequent confirmation. Assuming, arguendo, that an authorizing order of court is absolutely necessary in order to render legal an investment of trust funds, yet a trustee, who, without such order, has made an investment in good faith, and without loss to the estate, may, subsequently, on a full showing of the controlling facts, and at a time when the estate has suffered no loss, be granted a valid order confirming said investment. (See §12772, C., '31.)

In re Lawson, 215-752; 244 NW 739; 88 ALR 316

Unauthorized and unallowable investments. The court may charge a court-appointed trustee with the amount of an investment purchased by the trustee from himself at a profit and without an authorizing order of court.

In re Siberts, 216-336; 249 NW 196

Unauthorized investment—advice of counsel —effect. An illegal and unauthorized investment by a trustee will not, on an accounting, be treated as legal and authorized on a showing that the investment was made on the advice of an attorney.

In re Skinner, 215-1021; 247 NW 484

Wrongful purchase of securities by executor or trustee. An objection to the final report of a trust company acting as trustee and executor was sufficient in alleging that securities were purchased without the approval of the court, altho the date of each purchase was not stated, and it was not stated whether the purchases were made as executor or trustee.

In re Carson, 227-941; 289 NW 30

Probate application by trustee—transfer to equity. Where an application in probate brought by a trustee under a will asking for directions of the court was transferred to equity on a motion by intervenors after a hearing at which all parties appeared and submitted arguments but did not except to the transfer, it was proper for the court to refuse a motion made eight months later asking that the transfer be canceled, when it was not shown that the rights of the parties could be better determined in probate than in equity, the question being a matter of forum rather than of jurisdiction.

In re Proestler, 227-895; 289 NW 436

Trust—precatory words as basis. Expression in a will, following an absolute devise of property, of an apparent wish that said devisee will, on his death, distribute said property among named persons, cannot be deemed to create a trust on behalf of said persons unless it is clear from the will as a whole that said so-called wish was not, in fact, a wish, but a mandatory direction.

In re Hellman, 221-552; 266 NW 36

Trusts — precatory statements — legal effect. The construction of a testamentary trust cannot be controlled by a written, precatory statement made by the testatrix subsequent to the execution of the will and not even made a part thereof.

In re Whitman, 221-1114; 266 NW 28

Trust property held by ward. A contract by the guardian of an incompetent, for the sale of land owned by the ward solely as trustee, tho approved by the court, cannot, in any sense, be deemed the contract of the ward; therefore, such contract cannot, in the event of the death of the ward, be deemed to create any indebtedness against the estate of the ward.

Copple v Morrison, 221-183; 264 NW 113

Receivership for insolvent trustee creates vacancy—power to fill. A judicial finding that a banking institution is insolvent and the appointment of a receiver to liquidate its affairs, ipso facto, (1) transfer, to the custody of the law, trust property held by said insolvent as a duly appointed testamentary trustee, (2) deprive said insolvent trustee of power further to act in said trusteeship, and (3) necessarily create a vacancy in the office of said trust,—which vacancy the probate court has legal power to fill by appointing a successor in trust, (1) on the sworn application therefor supplemented by the professional statement of counsel, (2) at an ex parte hearing and without notice to interested parties, and (3) without any formal proceedings whatever for the termination of said former trusteeship; and especially is this true when said former trustee, formally and by its conduct, abandons its said trusteeship and all right and interest therein.

In re Strasser, 220-194; 262 NW 137; 102 ALR 117

In re Carson, 221-367; 265 NW 648 .

Final report by trustee after receivership. The filing of a final report by a trust company as trustee of an estate after the company had gone into receivership and could no longer perform any duty as active trustee, was not an act in administering the trust, but was the performance of its duty to make such final report upon its removal as trustee.

In re Carson, 227-941; 289 NW 30

10767 Counties bordering on Missouri river.

Mississippi and Missouri rivers, concurrent jurisdiction. See under §13449 (III)

Accretion and avulsion—presumptions. In an action involving title to land affected by changes in course of Missouri river, court recognized principles that boundaries established in the middle of the main channels vary as channels change by accretion, but that boundaries are unaffected where change takes place suddenly by avulsion; that land on Iowa side of Missouri river is presumed to be in Iowa, and that land, left by recession of the river, is presumed to be the result of accretion rather than avulsion.

Arnd v Harrington, 227-43; 287 NW 292

Jurisdiction. In an action to enjoin trespass and recover damages, wherein cross-action to quiet title was brought, and where all parties appeared, and where at the time of the action and for many years prior thereto, the land in controversy was situated on the Iowa side of the Missouri river and within Pottawattamie county, altho formerly as result of changes in course of river, such land lay, for a certain period of time, on the Nebraska side, the district court for said county had jurisdiction.

Arnd v Harrington, 227-43; 287 NW 292

10794 Decisions and entries in vacation.

Judgment in vacation—when a lien. Where a cause is tried, submitted, and taken under advisement under a stipulation that judgment may be entered "during term time or vacation", a subsequently rendered judgment becomes a lien on the defendant's land from the date of its actual entry, and not from the date of actual trial and submission under said stipulation, even tho the judgment entry recites such day of trial and submission.

Andrew v Winegarden, 205-1180; 219 NW 326

Entry two terms after submission. In an action between co-sureties on probate bond, the fact that two terms intervene between date cause was submitted to trial court and date of trial court's judgment does not divest trial court of jurisdiction of parties or subject matter of litigation such as to invalidate judgment and decree notwithstanding statute concerning decisions and entries in vacation.

Bookhart v Cas. Co., 226-1186; 286 NW 417

10795 Expiration of term—pending trials.

Adjournment sine die—sufficient entry. The entry by the clerk of the court in the permanent records of the court, of the usual entry of adjournment sine die, all in compliance with the oral direction of the court, effectually terminates the term of court, tho said entry is not signed by the court or by any judge thereof.

State v Harper, 220-515; 258 NW 886

10797 Judges not to sit together.

Dismissal—nonjurisdiction of court. When a cause is assigned to and tried by a judge of the district court, all other judges of the same court are thereby deprived of jurisdiction to dismiss the cause while it is pending before said trial judge.

Dunkelbarger v Myers, 211-512; 233 NW 744

10798 Preparation and signing of record.

ANALYSIS

I MEMORANDA OF DECREE
II RECORDING, APPROVING, AND SIGNING
III JUDICIAL NOTICE OF RECORDS

I MEMORANDA OF DECREE

Unallowable amendment. A record cannot be amended by affidavits of counsel.

Parker-Gordon v Benakis, 213-136; 238 NW 611

Calendar memorandum—approval by judge. A calendar memorandum of findings of fact may be sufficient basis for a judgment entry by the clerk in the proper record, when approved by the judge.

Rance v Gaddis, 226-531; 284 NW 468

Order noted on calendar. A party may not appeal from an order in the form of a mere notation on the judge's calendar, which order is later incorporated into the final decree.

Yeomen v Ressler, 216-983; 250 NW 169

II RECORDING, APPROVING, AND SIGNING

Adjournment sine die—sufficient entry. The entry by the clerk of the court in the permanent records of the court, of the usual entry of adjournment sine die, all in compliance with the oral direction of the court, effectually terminates the term of court, tho said entry is not signed by the court or by any judge thereof.

State v Harper, 220-515; 258 NW 886

Calendar memorandum—approval by judge. A calendar memorandum of findings of fact may be sufficient basis for a judgment entry by the clerk in the proper record, when approved by the judge.

Rance v Gaddis, 226-531; 284 NW 468

III JUDICIAL NOTICE OF RECORDS

Another case in same county—same parties. The supreme court cannot take judicial notice of the record of another case involving the same parties and tried in the same county, when the record of such prior case is not before it.

Lawrence v Melvin, 202-866; 211 NW 410

Notice of information and warrant—condemnation of gambling devices. In proceeding to condemn slot machines and punch boards as gambling devices, failure to introduce in evidence the information, search warrant, and the property seized was not error where the defendant in his answer admitted seizure of the property and since information and warrant were a part of the case and court would take judicial notice of the files therein.

State v Doe, 227-1215; 290 NW 518

Bankruptcy proceedings in another court. Court cannot take judicial notice of bankruptcy proceedings in another court however seriously they affect the rights of parties to the suit already pending. Defense of discharge in bankruptcy should have been pleaded.

Reining v Nevison, 203-995; 213 NW 609

Dismissal for lack of prosecution—another action pending. In denying motion for reinstatement of case which had lain dormant for 25 years, it was not error for the court to take notice that such cause was eliminated from the calendar for want of prosecution under circumstances inherent in the record; and it was also proper to take notice of another pending action even tho the record was silent in regard to it.

Benjamin v Jackson, 207-581; 223 NW 383

History of state — statutes — decisions of court. Court may take judicial notice of history of events in the state, and especially of the statutes of the state and the decisions of this court.

Mathews v Turner, 212-424; 236 NW 412

Probate and equity jurisdiction exercised by same judge. The court will judicially notice the fact that the same judge was exercising both probate jurisdiction, and equity jurisdiction in an action for appointment of a receiver for the estate property—the extent that an appellate tribunal may divide the equity and probate functions of the same judge, so that the equity judge may know nothing of the probate proceedings, and the probate judge know nothing of the equity proceedings, being a puzzle sui generis.

Frazier v Wood, 214-237; 242 NW 78

Supreme court's own records. Principle reaffirmed that the supreme court will take judicial notice of its own records.

Dayton v Ins. Co., 202-753; 210 NW 945
Farmers Bk. v Miles, 206-766; 221 NW 449

10799 Signing after term—effect.

Filing for record after term time—effect. A judgment is not rendered erroneous because signed, filed and entered of record after the adjournment of the trial term, when the decision was rendered in term time, and then noted on the court calendar and on the appearance docket, with directions to the attorneys to prepare a decree in accordance with the decision.

Andrew v Bank, 209-1149; 229 NW 819

Costs—motion to retax—limited applicability. A motion to retax costs can reach only errors of the clerk and not errors inhering in a judgment.

Grimes Sav. Bk. v Jordan, 224-28; 276 NW 71

10801 Amending or expunging entry.

ANALYSIS

I Corrections During Term
II Corrections After Term
III Notice of Change

I CORRECTIONS DURING TERM

Application to vacate. Where no personal representative was substituted for plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence, application made during same term to vacate the dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

Calendar memorandum—superseded by subsequent decree. Where trial judge made calendar memorandum of findings of fact which he did not sign, and the clerk's record thereof was not signed, the signing of the recorded entry of a subsequent decree was convincing proof that the subsequent decree and not the memorandum was the final decree.

Rance v Gaddis, 226-531; 284 NW 468

Entry of judgment—record clarified by later entry. When the court stated in its entry of judgment: "The defendant excepts to said judgment. Exceptions allowed and granted.", and in ruling on a motion for a new trial, made an entry that the above-quoted was intended to save an exception for the defendant, the court was correct in its action to clarify the record, and on appeal the defendant could not contend that the entry could only be interpreted to mean that the exception to the judgment was sustained.

Wessman v Sundholm, 228- ; 291 NW 137

Default—setting aside. The superior court has ample jurisdiction, during a term at which a motion to set aside a default is overruled, to reconsider its judgment and to enter an order sustaining said motion.

Braverman v Burns, 207-1382; 224 NW 596

Default—setting aside—when affidavit of merit unnecessary. A default may be legally set aside, tho the mover therefor files no affidavit of merit, when the court, in entering the default, stated that he would set aside the default if a motion so asking be filed, and when the applicant for the default then affirmatively acquiesced in such purpose of the court.

Wagoner v Ring, 213-1123; 240 NW 634

Dismissal—jurisdiction to set aside. The voluntary dismissal of an action may not, even during the same term, be set aside and the action reinstated when such dismissal was brought about by the negligence of the dismissing party and such negligence is wholly unexplained or unexcused. Whether the court has jurisdiction in any case to set aside a voluntary dismissal, quaere.

Ryan v Ins. Co., 204-655; 215 NW 749

Inaccurate judgment — correction without new trial. When parties to an action voluntarily (tho irregularly) submit to a referee certain counts only of the petition, and later judgment is entered on the report of the referee in such form as to indicate that all counts of the petition had been so submitted, the court, on proper proof, is under mandatory duty, during the term at which the judgment was entered, to exercise its statutory and inherent power and, itself, correct said inaccuracy.

Watters v Knutsen, 223-225; 272 NW 420

Inherent power of court. The district court has inherent power to set aside a judgment during the term at which it was rendered on proof that the judgment was obtained by fraud, extrinsic and collateral to the judgment, even tho there was no default.

Cedar R. Co. v Bowen, 211-1207; 233 NW 495

Misunderstanding as to decree. A pardonable misunderstanding between parties and their attorneys which results in a consenting by one of the parties to an unintended decree, affords ample grounds for vacating the decree during the term at which it is entered.

Dimick v Munsinger, 202-784; 211 NW 404

Municipal court—filing motions after verdict. The municipal court has jurisdiction to enter an order extending the time to file a motion for a new trial and exceptions to instructions and judgment non obstante veredicto. Such order is reviewable by appeal, not by certiorari.

Eller v Munic. Court, 225-501; 281 NW 441

Non-jurisdiction to set aside dismissal. A municipal court having entered a valid order of dismissal of an action has no jurisdiction, seven months later, to set aside said order and reinstate said action without notice to the defendant.

Des M. & CI Ry. v Powers, 215-567; 246 NW 274

No right to set aside orders on judge's motion. A judge of the municipal court has no jurisdiction to set aside, on his own motion, a duly rendered and journalized order of another judge of the same court sustaining a motion to set aside a default; and equally without jurisdiction, thereupon, to overrule said motion.

Denman v Sawyer, 211-56; 232 NW 819

Recitals—presumption—insufficient showing to overcome. A judgment recital that a plain-

I CORRECTIONS DURING TERM — concluded

tiff appeared and requested the dismissal of the action will not be expunged on motion on testimony which is in equipoise on the issue whether such recital is correct.

Sullivan v Coakley, 205-225; 217 NW 820

Trial record—not corrected in appellate court. Any correction of the trial court record should be made by a motion to correct or expunge in the lower court as provided by statute, and not in the appellate court.

Rance v Gaddis, 226-531; 284 NW 468

Unauthorized entry. A provision in a judgment sentence to the county jail to the effect that the sentence shall be served in the penitentiary is a nullity, even tho the defendant consents thereto; and the court may at the same term, and in the absence of the defendant, strike said provision from the judgment entry and change the commitment to a county other than the county of trial.

State v Herzoff, 200-889; 205 NW 500

Vacation of divorce decree. A final decree of divorce may not be vacated, even during the term at which entered, on a motion by defendant which alleges that no witness was sworn or testified in the cause and no corroborating testimony was offered, but which is silent as to any showing that plaintiff had no cause of action, or that defendant had a defense to plaintiff's action, or that there was fraud in obtaining the decree.

Radle v Radle, 204-82; 214 NW 602

II CORRECTIONS AFTER TERM

Attorney's lien—belated cost modification. Where an action was instituted to set aside conveyances and to subject land to a judgment, and an attorney having a lien on such judgment intervenes, establishes and gets an adjudication of priority in the decree, which made no provision for payment of costs but later was invalidly modified under guise of a motion to retax costs, the trial court being without jurisdiction to modify the decree (1) after an appeal therefrom had been perfected and (2) because the modification was not made during the term the decree was entered, certiorari will lie to correct the lower court's excess of jurisdiction, and fact that plaintiff is a banking corporation no longer in existence will not defeat the certiorari, since corporation must be regarded as existing to the degree necessary to wind up its affairs.

Grimes Sav. Bk. v Jordan, 224-28; 276 NW 71

Case reinstated after dismissal—court rules not in evidence. Where an action is dismissed by the clerk under district court rules, but the judge thereof, without notice to the defendant, reinstates the case on motion and showing that the clerk acted erroneously, and where an application to vacate the order of reinstatement is denied, supreme court could not on appeal assume that judge lacked jurisdiction to reinstate without notice to defendant, without the district court rules of practice being in evidence and before the appellate court.

Eggleston v Eggleston, 225-920; 281 NW 844

Expunging clerk's judgment entry after court's dismissal. An appeal from justice court, perfected and docketed, is in the district court as tho it had been commenced there; the justice's judgment is completely annulled; the appeal brings up the action for trial on its merits; and it is the duty of the plaintiff to prosecute the action. So where a district court, under its rule providing for dismissal of all actions remaining on the court calendar for over one year without being noticed for trial, dismissed such an appeal under its rule, and the clerk of court entered judgment in favor of plaintiff for the amount recovered in justice court together with interest and against appealing defendant, the defendant's motion to expunge the clerk's entry and correct the record was well-grounded and should have been sustained.

Yost v Gadd, 227-621; 288 NW 667

Foreclosure — decree — nonjurisdiction to amend. The district court has no jurisdiction, long after a duly rendered decree in mortgage foreclosure has become final, to amend said decree by striking therefrom a provision for redemption from execution sale, and by substituting therefor a provision directing the sheriff to issue deed forthwith upon making such sale. So held where the judgment plaintiff sought such amendment on the theory that the judgment defendant had lost his right to redeem because of a stay of execution obtained by him pending ineffectual bankruptcy proceedings.

Nibbelink v De Vries, 221-581; 265 NW 913

Judgment of dismissal — nonjurisdiction to set aside. The district court, having at one term entered a judgment of dismissal of an action for want of prosecution of the action as required by the rules of the court, has no jurisdiction at a subsequent term, tho the judgment entry remains unsigned, to set aside said judgment under this section, C., '35, and reinstate the action. The governing procedure, under such circumstances, is provided by §12787 et seq., C., '35.

Workman v Dist. Court, 222-364; 269 NW 27

Modification under curative and legalizing act. A decree which adjudges the rights of the public under a statute as it exists at the date of the decree may, after the term and after the enactment of a curative and legalizing act, be so modified as to express the public rights under the statute as it exists under the curative act.

Wilcox v Miner, 201-476; 205 NW 847

Unallowable modification. The court, having overruled a motion (1) to strike an answer, and (2) for judgment nil dicit, has no right, later and after the term of court has expired, and while the cause is pending, to materially amend said ruling without pleadings, without hearing, and without notice to the defendant.

Taylor v Canning Corp., 218-1281; 257 NW 353

Motion to retax costs—limited applicability. A motion to retax costs can reach only errors of the clerk and not errors inhering in a judgment.

Grimes Sav. Bk. v Jordan, 224-28; 276 NW 71

Nunc pro tunc—inherent power. It is fundamental law that courts possess the inherent power to correct their records so as to make them speak the truth and enter judgments nunc pro tunc, and the lapse of time is no obstacle to the exercise of such power. So where a district court clerk's entry of judgment on record not only misinterpreted trial judge's entry on calendar, but was such an interpretation as would constitute action which was beyond jurisdiction of the district court, aggrieved party's right to have judgment set aside was neither waived by delay and negligence, nor by failure to show fraud, unavoidable casualty, or misfortune preventing defendant from filing his motion promptly.

Yost v Gadd, 227-621; 288 NW 667

III NOTICE OF CHANGE

Absence of notice. A material amendment to a judgment of conviction of contempt, without notice to the defendant, is a nullity.

Ciccio v Utterback, 205-482; 218 NW 253

Notice as condition precedent. A decree may not be materially corrected or amended, even during the term at which the decree was entered, without notice to the adverse party.

Chariton Bk. v Taylor, 210-1153; 232 NW 487

10802 Unauthorized alteration.

Expunging clerk's judgment entry after court's dismissal. An appeal from justice court, perfected and docketed, is in the district court as tho it had been commenced there; the justice's judgment is completely annulled; the appeal brings up the action for trial on its merits; and it is the duty of the plaintiff to prosecute the action. So where a district court, under its rule providing for dismissal of all actions remaining on the court calendar for over one year without being noticed for trial, dismissed such an appeal under its rule, and the clerk of court entered judgment in favor of plaintiff for the amount recovered in justice court together with interest and against appealing defendant, the defendant's motion to expunge the clerk's entry and correct the record was well-grounded and should have been sustained.

Yost v Gadd, 227-621; 288 NW 667

Nunc pro tunc—inherent power. It is fundamental law that courts possess the inherent power to correct their records so as to make them speak the truth and enter judgments nunc pro tunc, and the lapse of time is no obstacle to the exercise of such power. So where a district court clerk's entry of judgment on record not only misinterpreted trial judge's entry on calendar, but was such an interpretation as would constitute action which was beyond jurisdiction of the district court, aggrieved party's right to have judgment set aside was neither waived by delay and negligence, nor by failure to show fraud, unavoidable casualty, or misfortune preventing defendant from filing his motion promptly.

Yost v Gadd, 227-621; 288 NW 667

10803 Corrections because of mistakes.

ANALYSIS

I GENERAL POWER TO MAKE CORRECTIONS

Judgment — amendment without notice. A trial court has no jurisdiction, after term time and after a proceeding for contempt has been removed to the supreme court by certiorari, to enter, without notice to the defendant (petitioner in certiorari), a nunc pro tunc amendment to the record to the effect that the defendant entered a plea of guilty in said contempt proceeding.

Sergio v Utterback, 202-713; 210 NW 907

Correction of record. Corrections of the trial court record must be made in the trial court, not in the appellate court.

Educational Exchanges v Thornburg, 217-178; 251 NW 66

Default—right to set aside after term. An order declaring that defendant is in default for want of appearance—in other words, a "simple" or "naked" default unaccompanied by any judgment on the claim sued on—may be validly set aside at a subsequent term on proper showing.

Weinhart v Meyer, 215-1317; 247 NW 811

Effect on decree and mistaken stipulation. An order, on appeal, for a new trial on the ground of a conceded mutual mistake in entering into a written stipulation for judgment

I GENERAL POWER TO MAKE CORRECTIONS—concluded

necessarily works a setting aside, not only of the judgment, but of the stipulation; and, after procedendo, the trial court does not exceed its jurisdiction in entering a formal order to said effect.

Hall v Dist. Court, 206-179; 215 NW 606

Evident mistake. The evident mistake of the court in entering upon its calendar that a motion was sustained, when in fact the motion had been overruled, may, on notice, etc., be corrected at a subsequent term.

State v Frey, 206-981; 221 NW 445

Rulings in re change of records. A ruling of the trial court relative to changing its records will not be interfered with by the appellate court in the absence of a clear and satisfactory showing that the trial court was in error.

Gow v County, 213-92; 238 NW 578

Unallowable modification. An unappealed decree of divorce, which specifically denies all allowance of alimony because the parties had theretofore entered into a property settlement, is a finality on the subject matter of alimony, and may not, long after the court term has expired, be modified by inserting said settlement therein as alimony, because (1) said modification would contradict said final decree, and (2) any prior contract between the parties relative to alimony necessarily merges into the final decree.

Duvall v Duvall, 215-24; 244 NW 718; 83 ALR 1242

Unallowable modification. The court, having overruled a motion (1) to strike an answer, and (2) for judgment nil dicit, has no right, later and after the term of court has expired, and while the cause is pending, to materially amend said ruling without pleadings, without hearing, and without notice to the defendant.

Taylor v Canning Corp., 218-1281; 257 NW 353

II NATURE OF MISTAKE

Attorney's lien—belated cost modification—review. Where an action was instituted to set aside conveyances and to subject land to a judgment, and an attorney having a lien on such judgment intervenes, establishes and gets an adjudication of priority in the decree, which made no provision for payment of costs but later was invalidly modified under guise of a motion to retax costs, the trial court being without jurisdiction to modify the decree (1) after an appeal therefrom had been perfected and (2) because the modification was not made during the term the decree was entered, certiorari will lie to correct the lower court's excess of jurisdiction, and fact that plaintiff is a banking corporation no longer in existence will not defeat the certiorari, since corporation must be regarded as existing to the degree necessary to wind up its affairs.

Grimes Sav. Bk. v Jordan, 224-28; 276 NW 71

Mistake of clerk—unpardonable delay. A judgment may not be corrected for error of the clerk in computing the amount thereof, when the defendant, before the expiration of the year following the entry felt in his own mind that such error had been made, but, without explanation, delayed the filing of his application for correction until after the expiration of said year, and until after land had been sold under the judgment; and especially when his application is accompanied by an inequitable demand.

Floyd County v Ramsey, 213-556; 239 NW 237

III ALLOWABLE CORRECTIONS

Correction of order for new trial. The trial court has power to so correct an order for a new trial as to show the grounds upon which the order was made.

Euclid Bank v Nesbit, 201-506; 207 NW 761

Costs—motion to retax—limited applicability. A motion to retax costs can reach only errors of the clerk and not errors inhering in a judgment.

Grimes Sav. Bk. v Jordan, 224-28; 276 NW 71

Erroneous entry of amount. The inadvertent entry on the appearance docket of the amount of a judgment, followed by the issuance of an execution in the erroneous amount, sale thereunder, and issuance of sale certificate, must, on proper motion, be corrected by expunging the erroneous entry, recalling the execution, setting aside the sale, and canceling the certificate, no rights of third parties having intervened.

Equitable v Carpenter, 202-1334; 212 NW 145

Judgment after death of defendant. Principle recognized that the court having taken a cause under advisement, and delayed decision until after the death of the defendant, may validly render judgment as of the date of the submission.

Chariton Bk. v Taylor, 213-1206; 240 NW 740

Modification under curative and legalizing act. A decree which adjudges the rights of the public under a statute as it exists at the date of the decree may, after the term and after the enactment of a curative and legalizing act, be so modified as to express the public rights under the statute as it exists under the curative act.

Wilcox v Miner, 201-476; 205 NW 847

IV NOTICE OF CHANGE

Absence of notice. A material amendment to a judgment of conviction of contempt, without notice to the defendant, is a nullity.

Ciccio v Utterback, 205-482; 218 NW 253

V NUNC PRO TUNC ORDERS IN GENERAL

Discussion. See 13 ILR 241, 426—Corrective entries

Nunc pro tunc generally. The power is inherent in the court to make nunc pro tunc entries.

State v Frey, 206-981; 221 NW 445

Nunc pro tunc entry—effect. The recital in a judgment entry of the date on which a cause came on for trial does not, in and of itself, constitute a nunc pro tunc order that a subsequently entered judgment shall be a lien from said recited date of trial.

Andrew v Winegarden, 205-1180; 219 NW 326

Nunc pro tunc—inherent power. It is fundamental law that courts possess the inherent power to correct their records so as to make them speak the truth and enter judgments nunc pro tunc, and the lapse of time is no obstacle to the exercise of such power. So where a district court clerk's entry of judgment on record not only misinterpreted trial judge's entry on calendar, but was such an interpretation as would constitute action which was beyond jurisdiction of the district court, aggrieved party's right to have judgment set aside was neither waived by delay and negligence, nor by failure to show fraud, unavoidable casualty, or misfortune preventing defendant from filing his motion promptly.

Yost v Gadd, 227-621; 288 NW 667

Nunc pro tunc order for more time—ineffective after five days from verdict. An application for a nunc pro tunc order for an extension of time to file motion for new trial is properly overruled when made more than five days after the verdict.

In re Larimer, 225-1067; 283 NW 430

Amendment without notice. A trial court has no jurisdiction, after term time and after a proceeding for contempt has been removed to the supreme court by certiorari, to enter, without notice to the defendant (petitioner in certiorari), a nunc pro tunc amendment to the record to the effect that the defendant entered a plea of guilty in said contempt proceeding.

Sergio v Utterback, 202-713; 210 NW 907

Denying moratorium cancels restraining order on sheriff. An order restraining the sheriff from issuing a deed, pending a hearing on a moratorium application for extension of period for redemption, is automatically dissolved when the application is denied, and a deed issued is valid when a nunc pro tunc order places the moratorium denial order on record as of a date prior to the issuance of deed.

Lincoln Bk. v Brown, 224-1256; 278 NW 294

Expunging clerk's judgment entry after court's dismissal. An appeal from justice court, perfected and docketed, is in the district court as though it had been commenced there; the justice's judgment is completely annulled; the appeal brings up the action for trial on its merits; and it is the duty of the plaintiff to prosecute the action. So where a district court, under its rule providing for dismissal of all actions remaining on the court calendar for over one year without being noticed for trial, dismissed such an appeal under its rule, and the clerk of court entered judgment in favor of plaintiff for the amount recovered in justice court together with interest and against appealing defendant, the defendant's motion to expunge the clerk's entry and correct the record was well-grounded and should have been sustained.

Yost v Gadd, 227-621; 288 NW 667

Harmless error—nunc pro tunc correction—waiver. Overruling a special appearance to plaintiff's application for a nunc pro tunc order and then correcting the trial record thereunder by substituting "plaintiff" for "defendant" in an order extending time to file exceptions to instructions and motion for new trial is harmless error where defendant appeared and without objections thereto permitted and participated in hearing on the merits of such exceptions and motion for new trial.

Thompson v Butler, 223-1085; 274 NW 110

Inherent power of court. The district court is but exercising its inherent power when, on motion, it corrects by nunc pro tunc order, and regardless of the one-year limitation imposed by §12791, C., '35, the unquestionably established error of its own clerk in entering a judgment against a judgment defendant for a less amount than theretofore ordered by the court,—it appearing that the judgment plaintiff had not, by laches, forfeited the right to demand such correction against the judgment defendant.

Murnan v Schuldt, 221-242; 265 NW 369

Unallowable nunc pro tunc entry. The supreme court may not enter a nunc pro tunc order to the effect that an abstract was filed within the time provided by statute when, in truth and in fact, it was not so filed.

Farmers Bank v Miles, 206-766; 221 NW 449

VI MATTERS CORRECTABLE BY NUNC PRO TUNC ORDERS

Nunc pro tunc correction—appeal as sole remedy. The nunc pro tunc correction of an unsigned decree in order to make it conform to the original order of the court, such correction being made on motion, service, and ap-

VI MATTERS CORRECTABLE BY NUNC PRO TUNC ORDERS—concluded

pearance of all parties, is a finality in the absence of an appeal therefrom.

Samek v Taylor, 203-1064; 213 NW 801

Nunc pro tunc correction of manifest error. A decree in chattel mortgage foreclosure may be so corrected by nunc pro tunc entry that the detailed enumeration of the mortgaged property will appear in the corrected decree exactly as the court unquestionably intended such enumeration to appear in the original judgment entry.

Chariton Bk. v Taylor, 213-1206; 240 NW 740

VII PROCEDURE

Rules long established—disturbing not favored. Rules of practice and procedure which have been long established by decisions of the court should not be lightly disturbed.

McKee v National Assn., 225-1200; 282 NW 291

CHAPTER 478

GENERAL PROVISIONS RELATING TO JUDGES AND COURTS

10805 Expenses.

Atty. Gen. Opinion. See '34 AG Op 53

10809 Compensation.

Atty. Gen. Opinion. See '38 AG Op 577

10811 Expenses.

Atty. Gen. Opinion. See AG Op June 14, '39

10818 When judge disqualified.

Direct pecuniary interest. The interest which disqualifies a trial judge, means some direct pecuniary gain or property interest, and has no reference to the remote interest which he, along with every other citizen and taxpayer of a city, might have in the result of a judgment against a city.

Sioux City v Western Corp., 223-279; 271 NW 624

Nondisqualifying interest of judge. A judge of the district court does not, by signing a petition to a city council for an election to vote on the proposition whether the city shall erect a specified public utility plant, thereby disqualify himself from fully presiding over litigation questioning the legal sufficiency of said petition.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

10820 Rules for conciliation.

Discussion. See 5 ILB 200—Conciliation law

CHAPTER 479

CLERK OF THE DISTRICT COURT

10825 General duties.

Payment to clerk—effect. Payment by an administrator to the clerk of the district court of the amount of an allowed claim is an authorized and legal payment and discharges the estate from further liability.

In re Nairn, 209-52; 227 NW 585

Affidavit lacking seal of court clerk. Affidavit of publication of notice of hearing on drainage assessment was sufficient altho court seal was not attached by court clerk before whom the affidavit was made. Moreover, statute did not require that proof of service be by affidavit.

Whisenand v Van Clark, 227-800; 288 NW 915

Confession of judgment—mandatory duties. A "statement of confession", or "cognovit" oftentimes referred to as a "power of attorney" or simply as a "power", is the written authority of the debtor and his direction to the clerk of the district court, or justice of the peace, to enter judgment against him as stated therein and the statutory provision that "the clerk shall thereupon make an entry of judgment" is definite and mandatory, so the mere recording by the clerk of the debtor's admission of indebtedness, confession of judgment, and authorization to the clerk to enter judgment was not the "entry of judgment by confession" required by statute. Execution issued thereon was properly annulled and decree quieting title to land in owners as against execution levy and making permanent a temporary injunction enjoining execution sale was proper.

Blott v Blott, 227-1108; 290 NW 74

10826 Payment of money—notice.

Not insurer of official funds. The clerk of the district court is not liable for loss of official funds coming into his hands and lost because of the failure of the bank in which they were deposited, when, at the time of deposit, he in good faith justifiably believed the bank to be solvent.

Prudential v Hart, 205-801; 218 NW 529

10830 Records and books.

ANALYSIS

I RECORDS GENERALLY

Rules—general order—dismissal for want of prosecution. Under the recognized rule that courts have the inherent power to prescribe such rules of practice and rules to regulate their proceedings in order to expedite the trial of cases, to keep their dockets clear, and to facilitate the administration of justice, the judges of a judicial district could adopt and enforce a general order requiring parties to cause each case to be finally determined within two years from date of filing petition and providing upon failure to comply with such order the clerk should enter upon the record, "Dismissed without prejudice for want of prosecution".

Hammon v Gilson, 227-1366; 291 NW 448

Entry—necessity. Principle reaffirmed that the oral rendition by the court of his decision, the entry of such decision on the court calendar, and the transcribing of such entry into the appearance docket and fee book, do not constitute a judgment.

State v Wieland, 217-887; 251 NW 757

Clerk's entry of dismissal under general order—nonreviewable when court approves entry. Where a general order of the judges of a judicial district provided for the dismissal of all actions and proceedings undetermined after a period of two years, and directed the clerk of court to enter the dismissal without prejudice, and where such order was so entered in the district court record by the clerk, the supreme court is not required to pass upon the question of whether such entry by the clerk would be an effective dismissal, when at the same term of court the presiding judge made an entry in the same record "approving, affirming and ratifying" this and all other orders of dismissal under the general order.

Hammon v Gilson, 227-1366; 291 NW 448

II RECORD BOOK (PAR. 1)

Belated entry in clerk's record—showing by later order. Where a proceeding was shown on the judge's calendar as held on November 15, and, although given that date in the district court record book, was not entered therein before December 12, plaintiff was entitled to an entry on the record book showing that the proceedings were not therein entered before the latter date.

Buser v Kriechbaum, 224-1147; 278 NW 330

III JUDGMENT DOCKET (PAR. 2)

Calendar memorandum as basis for judgment. A calendar memorandum of findings of fact may be sufficient basis for a judgment entry by the clerk in the proper record, when approved by the judge.

Rance v Gaddis, 226-531; 284 NW 468

Expunging clerk's judgment entry after court's dismissal. An appeal from justice court, perfected and docketed, is in the district court as though it had been commenced there; the justice's judgment is completely annulled; the appeal brings up the action for trial on its merits; and it is the duty of the plaintiff to prosecute the action. So where a district court, under its rule providing for dismissal of all actions remaining on the court calendar for over one year without being noticed for trial, dismissed such an appeal under its rule, and the clerk of court entered judgment in favor of plaintiff for the amount recovered in justice court together with interest and against appealing defendant, the defendant's motion to expunge the clerk's entry and correct the record was well-grounded and should have been sustained.

Yost v Gadd, 227-621; 288 NW 667

Journal entry as evidence. As a general rule, a judgment must be entered of record in order to be of any validity, but for many purposes the court's decision is effective from the time it is actually pronounced, or when the judge writes in his calendar a statement of the decision, but there is no competent evidence of the rendition until the memorandum is entered in the court record, and, after recording, the judgment may for some purposes relate back to the time when it was actually ordered.

Street v Stewart, 226-960; 285 NW 204

Nunc pro tunc—courts' inherent power. It is fundamental law that courts possess the inherent power to correct their records so as to make them speak the truth and enter judgments nunc pro tunc, and the lapse of time is no obstacle to the exercise of such power. So where a district court clerk's entry of judgment on record not only misinterpreted trial judge's entry on calendar, but was such an interpretation as would constitute action which was beyond jurisdiction of the district court, aggrieved party's right to have judgment set aside was neither waived by delay and negligence, nor by failure to show fraud, unavoidable casualty, or misfortune preventing defendant from filing his motion promptly.

Yost v Gadd, 227-621; 288 NW 667

Transcript of evidence filed prior to judgment. When the reporter's notes and a transcript thereof were made a part of the record before final judgment was signed, filed, or entered, there was no merit in a contention that the court had no jurisdiction because the evi-

dence was not properly made of record before entering judgment.

Carey v Dist. Court, 226-717; 285 NW 236

IV INCUMBRANCE BOOK (PAR. 5)

No annotations in this volume

V APPEARANCE OR COMBINATION DOCKET (PAR. 6)

"Filing"—acts constituting. The indorsement and signing on the combination docket of the court of a remittitur constitutes a "filing" of a remittitur within the meaning of a court order to the effect that a new trial would automatically follow the failure "to file" such remittitur.

Fox v McCurnin, 210-429; 228 NW 582

Curing erroneous docketing. The erroneous docketing on the equity side of the calendar of an action of forcible entry and detainer becomes inconsequential when subsequent pleadings put title in issue and thereby convert the original law action into an equitable action.

Suiter v Wehde, 218-200; 254 NW 33

VI LIEN INDEX (PAR. 7)

No annotations in this volume

10833 Pleadings—when deemed filed—removal of papers.

Drainage appeal notice—proper filing notwithstanding auditor's failure to mark "filed". A paper is said to be "filed" when it is delivered to the proper officer and by him received to be kept on file.

Mills v Board, 227-1141; 290 NW 50

Court rule contravening statute. A court-established rule, as to when a motion shall be deemed filed, is a nullity when the rule is in contravention of the statute.

Tate v Delli, 222-635; 269 NW 871

Appeal—filing of notice. The filing of a duly served notice of appeal with the clerk of the trial court is an essential step in perfecting an appeal.

Educational Exch. v Thornburg, 217-178; 251 NW 66

Notice of amendment unnecessary. A plaintiff who at one stage of the pleadings wholly withdraws his claim for personal judgment against the defendant may later, by proper amendment, reassert such claim without notice to the defendant who has appeared, personally and by counsel, and is actively contesting the relief sought by plaintiff.

Gotsch v Schoenjahn, 201-1317; 207 NW 567

Notice of appeal—fatally deficient record. An appeal cannot be entertained when the record affirmatively shows (1) that the appearance docket of the trial court carries no notation of the filing of a notice of appeal, and (2) that no notice of appeal can be found in the office of the clerk of said court.

Educational Exch. v Thornburg, 217-178; 251 NW 66

10836 Change in title—certification.

Atty. Gen. Opinions. See '25-26 AG Op 153; '28 AG Op 322

10837 Fees.

Atty. Gen. Opinions. See '28 AG Op 292, 372; '32 AG Op 54, 260; '34 AG Op 283; AG Op Jan. 24, '39; May 22, '39; June 20, '39

Statute of limitation—clerk's costs barred after five years. Clerk's costs inuring to the general fund when collected are no part of the judgment to which they are incident, but are only a debt, not necessarily arising out of a governmental function, which costs are such debts as become outlawed at the expiration of five years and may not then be retaxed and collected.

Great Western Ins. v Saunders, 223-926; 274 NW 28

10838 Accounting for fees.

Not insurer of official funds. The clerk of the district court is not liable for loss of official funds coming into his hands and lost because of the failure of the bank in which they were deposited, when, at the time of deposit, he in good faith justifiably believed the bank to be solvent.

Prudential v Hart, 205-801; 218 NW 529

10840 Allowed claims—payment.

Atty. Gen. Opinion. See '32 AG Op 11

10841 Salary exclusive.

Clerk as commissioner of insanity. The clerk of the district court may not, in addition to his regular salary, retain the fees collected by him for acting as a commissioner of insanity.

Baldwin v Stewart, 207-1135; 222 NW 348

CHAPTER 480

JURORS IN GENERAL

10842 Competency.

Competency of jurors. See under §§11472, 13830

10843 Exemption.

Atty. Gen. Opinions. See '32 AG Op 13; '34 AG Op 58

10846 Fees of jurors.

Atty. Gen. Opinions. See '25-26 AG Op 441; '32 AG Op 13; AG Op Feb. 27, '40

Equitable estoppel — when inapplicable to public. A county is not estopped to recover back unlawful excess mileage paid a grand juror, even tho the payment was made under an ex parte order of court.

Park v Polk County, 220-120; 261 NW 508

Judicial legislation. A court enters the wholly unallowable field of judicial legislation when it assumes to enter ex parte orders directing the payment of mileage to grand jurors in an amount different than the amount provided by statute.

Park v Polk County, 220-120; 261 NW 508

Mileage—limitation on. A grand juror is entitled, for each term of court, to only one mileage of ten cents for each mile traveled from his residence to the county seat. If more be paid the county may recover back the illegal excess.

Park v Polk County, 220-120; 261 NW 508

CHAPTER 482

SELECTION OF JURORS

10868 Lists by board of supervisors.

Atty. Gen. Opinion. See '34 AG Op 463

Correction. A jury list which contains the names of the judges of election of the precinct from which the list is sent, is not a list, as provided by statute, and is properly corrected by the board of supervisors by striking the names of said judges and by inserting the names of qualified persons in lieu thereof.

State v Pierson, 204-837; 216 NW 43

Correction without formal record. The act of the board of supervisors in correcting a jury list by substituting the names of competent jurors in lieu of those who are incompetent, is not rendered illegal because the substituted names were all suggested by one member of the board, nor because no record of the correction was preserved in the minutes of the proceedings, it appearing that the final correction was approved by the board.

State v Pierson, 204-837; 216 NW 43

10869 Certification.

Competency—waiver. The fact that a juror was an election judge at the election at which the jury list was selected and certified is not a ground for challenge for cause under §13830, C., '24, even tho his name is certified as a juror in violation of this statute. In any event, any tenable objection to the juror is waived by not discovering the incompetency until after the verdict.

State v Burch, 202-348; 209 NW 474

10873 Preparation of ballots.

Drawn on precept. If a grand jury be once regularly drawn, and for any cause fails to appear at a subsequent term, a precept for a jury should, at that term, issue to the body of the county, and §240, C., '73 [§§10873, 10874, C., '39] providing that the jurors shall be drawn 20 days before the term, does not apply.

State v Beste, 91-565; 60 NW 112

10879 Notice of drawing.

Ignoring statutory time-notice. The fact that the ex officio jury commission under order of court drew a petit jury panel to take the place of discharged jurors on the regular panel, and did so without the five-day notice provided by the statute, will not be deemed prejudicial in the absence of an affirmative showing by complainant that he was prejudiced.

State v Archibald, 208-1139; 226 NW 186

10885 Number from township limited.

Setting aside indictment. An indictment must be set aside when returned by a grand jury two members of which were from the same township. (But now see §13781.1)

State v Judkins, 200-1234; 206 NW 119

CHAPTER 483

ATTORNEYS AND COUNSELORS

10907 Admission to practice.

Discussion. See 17 ILR 50—Integration of the bar; 17 ILR 83—Practice by corporations

Supreme court — no power to enjoin unlicensed person practicing law. Supreme court has no implied power, by virtue of its exclusive statutory power to admit persons to practice as attorneys, to enjoin unlicensed law practice, for it has no original jurisdiction to grant injunctive relief, and an equity action therefor by members of bar is in no way related to the matter of admission to bar or disbarment.

Johnson v Purcell, 225-1265; 282 NW 741

District court's power to enjoin unlicensed person practicing law—certiorari thereon annulled. Whether attorneys admitted to practice law are possessed of valuable right, privilege, or franchise which may be unlawfully encroached upon by an unlicensed person, thereby causing irreparable damage and injury to such attorneys and others similarly situated, and whether they are entitled to injunctive relief in equity, were all questions determinable by the district court after hearing of evidence, so a writ of certiorari, issued by the supreme court to the district court, for want of jurisdiction of subject matter, must be quashed and annulled.

Johnson v Purcell, 225-1265; 282 NW 741

10919 Nonresident attorney—appointment of local attorney.

Appointment of resident attorney. This section does not apply to an action (1) in which the foreign attorney is a plaintiff, or (2) in which a resident attorney appears of record with the foreign attorney.

Arthaud v Griffin, 202-462; 210 NW 540

10920 Duties of attorneys and counselors.

ANALYSIS

Judgment against attorneys on motion. See under §11608

I OFFICER OF COURT

Discussion. See 11 ILR 224—Duty of lawyer to the court

Attorney as witness. An attorney in a cause is not per se incompetent to testify in his client's behalf.

Kellar v Lindley, 203-57; 212 NW 360

Attorney as witness. It still seems necessary for the courts to express their strong disapproval of the conduct of an attorney in voluntarily maintaining the dual attitude of counsel and vital witness in his own case.

Bibler v Bibler, 205-639; 216 NW 99

Attorney as counsel and witness in same case. While the court views with emphatic disfavor the act of an attorney in assuming the dual attitude of both counsel and witness in the same case, yet such conduct does not go to the competency of the attorney as a witness, but to the weight and credibility of his testimony, which latter fact may be very properly presented to the jury by appropriate instruction.

Cuvelier v Dumont, 221-1016; 266 NW 517

Attorney fees—material evidence withheld from court. An executor being an officer of the court, the matter of his expenses is at all times subject to revision, so an order fixing his attorney's fees should be set aside when it appears that material matters were not before the court at the hearing.

In re Schropfer, 225-576; 281 NW 139

Affidavit for cost bond—valid execution by attorney for corporation. The statutory affidavit supporting a motion for cost bond may be made and filed by a defendant corporation's attorney, and a corporation need not personally make and file such affidavit.

Schultz v Ins. Co., 225-1024; 282 NW 776

II FIDUCIARY RELATION

When fiduciary relationship exists. No fiduciary relation exists between an attorney and another relative to the contract which creates the relation of attorney and client.

State v Cas. Co., 212-1052; 237 NW 360

Presumption of fraud. Transactions between an attorney and his aged and mentally infirm client which are apparently advantageous to the attorney and disadvantageous to the client, and which are not merely incidental to the relationship of attorney and client, are pre-

sumptively fraudulent. Evidence held insufficient to overcome said presumption.

Reeder v Lund, 213-300; 236 NW 40

Parent and child—required proof. In an action to set aside a trust agreement executed to a son and an attorney by plaintiff, evidence held to support decree dismissing plaintiff's petition. The existence of a confidential relationship or facts giving rise thereto must be proved before doctrine of fiduciary relationship can be applied—the mere relationship of parent and child does not create fiduciary relationship.

Hatt v Hatt, (NOR); 265 NW 640

Negativing fraud. The plea of fraudulent representation as to the value of property must necessarily fall in the face of testimony that the complainant was a person of unusual business ability and experience and had had long, personal and intimate knowledge of the property in question far superior to that of the alleged wrongdoer.

Tobin v Budd, 217-904; 251 NW 720

Insufficient showing. The relation of attorney and client is not established by the simple showing that the attorney in question had, at one time in the past, examined an abstract of title for the juror.

Tobin v Budd, 217-904; 251 NW 720

Payment of claims—death of claimant's attorney — peculiar circumstances relieving barred claim. Where an attorney files a probate claim for a nonresident claimant, but dies one day before the expiration of the year and without serving a notice of hearing on such claim—claimant, not learning of his attorney's death until later, and tho then delaying several months while his new attorney negotiated with the estate, held to have shown peculiar circumstances entitling him to equitable relief considering the estate was still unsettled and solvent.

Hagen v Nielsen, 225-127; 279 NW 94; 281 NW 356

Note—evidence. Record reviewed and held wholly insufficient to establish any fiduciary relation as attorney and client between the payee and the maker of a promissory note at the time the note was executed.

Tobin v Budd, 217-904; 251 NW 720

III DISABILITIES

Communications between attorney and client —when not privileged. A client who consults his attorney for the simple purpose of having the attorney put him in touch with a broker, with whom the client could arrange for the sale of property, may not claim that the resulting conversation is privileged or confidential; likewise, if the client's purpose is to obtain such assistance as will enable him to consummate a crime.

State v Kirkpatrick, 220-974; 263 NW 52

Improper appearance—who may object. An objection that an attorney was appearing both for and against a party litigant cannot be made by a litigant other than the one affected.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

IV LIABILITY TO CLIENT

Fraud — illegal interest charge. Evidence held insufficient to show fraud on the part of an attorney in charging interest in excess of the legal rate on certain obligations.

Tobin v Budd, 217-904; 251 NW 720

Fraud in foreclosure. Evidence held insufficient to show fraud in the receipt by an attorney of a portion of an attorney fee taxed in a foreign foreclosure.

Tobin v Budd, 217-904; 251 NW 720

Fraud—sufficiency. Evidence held insufficient to show fraud on the part of an attorney in withholding facts which were of no concern to the complainant.

Tobin v Budd, 217-904; 251 NW 720

Inadvertent misrepresentation. Evidence held insufficient to show fraud by an attorney in the making of an inadvertent false representation.

Tobin v Budd, 217-904; 251 NW 720

Summary proceedings—appeal—no hearing de novo. A summary proceeding by a client against his attorney will be heard on appeal only on errors assigned—not de novo.

Norman v Bennett, 216-181; 246 NW 378

Attorney omitting defense—belated attack ineffectual. A regularly entered decree against a person represented by reputable counsel will not seven years thereafter be set aside for alleged fraud of an attorney in failing to plead a bankruptcy discharge as a defense.

Ware v Eckman, 224-783; 277 NW 725

V ACQUIRING CLIENT'S PROPERTY

Presumption of fraud. Transactions between an attorney and his aged and mentally infirm client which are apparently advantageous to the attorney and disadvantageous to the client, and which are not merely incidental to the relationship of attorney and client, are presumptively fraudulent. Evidence held insufficient to overcome said presumption.

Reeder v Lund, 213-300; 236 NW 40

VI COMPENSATION

Discussion. See 3 ILB 43—Attorney's services —void or champertous contract

Action for services in effecting settlement—evidence. An attorney in an action against a client on a contract of employment may testify to the acts and things done by him in effecting an agreement of settlement of the claim in question.

Coughlon v Pedelty, 211-138; 233 NW 63

VI COMPENSATION—continued

Attorney's fee fixed by agreement of heirs. The fee of an administrator's attorney may be fixed by agreement of the heirs and the amount is of no concern to anyone else, where no rights of creditors are involved.

In re Schropfer, 225-576; 281 NW 139

Attorney fees as matter of right. A defendant in attachment who counterclaims on the bond and recovers both actual and exemplary damages is entitled to a taxation of reasonable attorney fees as a matter of right, even tho the sureties on the bond are not made parties to the counterclaim.

Mogler v Nelson, 211-1288; 234 NW 480

Fees for services to estate. The burden of proof is on attorney claiming fees for services, whether ordinary or extraordinary, and, while court may to a certain extent use its own judgment, claim should be based on evidence.

Glynn v Bank, 227-932; 289 NW 722

Fees for extraordinary services. An executor has the burden to prove the extraordinary services and the reasonableness of additional compensation.

In re Metcalf, 227-985; 289 NW 739

Fees for extraordinary services. Without evidence as to extent and value of extraordinary services, an allowance therefor to executor and his attorney is not res judicata as to factual matters, and the attorney's statement which fails to separate time spent in courtroom from time spent in briefing and consultation will not furnish proper legal basis for any final adjudication.

In re Metcalf, 227-985; 289 NW 739

Counterclaim—justifiable dismissal. An unsupported counterclaim for damages consequent on the negligent handling of a claim by an attorney who sued for fees due him, is, of course, properly dismissed by the court.

Hunt v Moore, 213-1323; 239 NW 112

Contract of employment not presumptively fraudulent. The rule that contracts entered into between attorney and client subsequent to the creation of such relation are presumptively fraudulent, has no application to the contract by which the relation of attorney and client is created.

Coughlon v Pedelty, 211-138; 233 NW 63

Contracts—offers—when implied acceptance not recognized. Proof that a party made an offer to pay a stated sum for services to be performed and that the offeree thereafter proceeded to perform the services, creates a presumption that the offeree accepted all the terms of the offer; not so, however, when such offer is made after a large part of the services has been rendered on the basis of a quantum meruit, and the offeree continues to perform the remaining services. In the latter instance, the quantum meruit contract will be deemed to continue unless an acceptance of the offer is actually proven.

Kelly, etc. v Trust Co., 217-725; 248 NW 9; 250 NW 171

Directed verdict—when required. Plaintiff in an action to recover, e. g., attorney fees, is necessarily entitled to a directed verdict when the evidence on all the controverted issues is uncontradicted, sufficient, and conclusive in plaintiff's favor.

Hunt v Moore, 213-1323; 239 NW 112

Elements to be considered. In fixing the compensation for attorneys on a quantum meruit basis, due consideration must be given (1) to the amount involved, (2) to the nature of the litigation in question, (3) to the time occupied, (4) to the results accomplished, and (5) to the standing of the attorney.

Kelly, etc. v Trust Co., 217-725; 248 NW 9; 250 NW 171

Employment by apparent agent. An attorney who claims to have been employed, by an alleged apparent agent, to defend an action, may not, after the action is dismissed and immediately recommenced, continue to rely on the alleged contract with the apparent agent when he then knows that said agent never had any authority to employ.

Orwig v Railway, 217-521; 250 NW 148; 90 ALR 258

Essentials of employment. A contract of employment of an attorney is established on a showing that the advice and assistance of the attorney in a matter pertinent to his profession were solicited and received.

Anderson v Lundt, 200-1265; 206 NW 657

Harmless error—taxation of attorney fees. Error in taxing attorney fees when the instrument sued on does not provide therefor is fully cured by a statement in the written argument on appeal by the attorney in whose favor the taxation was had, to the effect that he had fully released and satisfied the judgment for such fees, such statement, though irregularly presented, being irrevocably binding on the attorney.

Koontz v Clark Bros., 209-62; 227 NW 584

Injecting unpleaded issue into instructions. On the one duly joined issue whether plaintiff was orally employed to render services for defendant in a certain matter, the court commits reversible error by injecting into the instructions the unpleaded issue whether defendant knew that plaintiff was performing services for defendant and accepted the benefits of such services.

Graeser v Jones, 217-499; 251 NW 162

Instructions. In an action by an attorney for services based on an express contract to assist in the settlement of an appeal, the court, in its instructions, should not make plaintiff's recovery dependent on proof that defendant was apprised of just what efforts plaintiff was making to effect a settlement.

Graeser v Jones, 220-354; 261 NW 439

Record—materiality. In an action by an attorney for services in obtaining a decree for the defendant, the record of the decree is receivable in evidence, as bearing on the issue of the performance of the contract.

Hornish v Overton, 206-780; 221 NW 483

Trusts—compensation and attorney fees. The compensation of a trustee and of his attorney necessarily rests quite largely in the discretion of the trial court.

Turner v Ryan, 223-191; 272 NW 60; 110 ALR 554

VII CONTINGENT FEE—CHAMPERTY

Belated presentation of defense. In summary proceedings between an attorney and a client, the defense that a contract between the parties was champertous, or against public policy, must be presented in some manner in the trial court, even tho such summary proceedings are heard by the trial court without written pleadings.

Norman v Bennett, 216-181; 246 NW 378

Contingent fee—validity of contract. A contract between an attorney and a client fixing the contingent compensation of the attorney at one-third of the amount recovered, entered into at a time when the extent of the litigation was quite problematical, is not rendered unenforceable because ultimately the services necessary to effect a recovery were quite small. Nor is such a contract champertous.

State v Cas. Co., 212-1052; 237 NW 360

10921 Deceit or collusion.

Recovery of fraudulently induced fee. Ordinarily, one who has paid an attorney for services and seeks to recover the entire fee on the ground that payment was fraudulently induced, must show that the services were of no value, and the evidence is fatally deficient if services are performed, but their value is not shown, as the plaintiff thereby fails to establish the amount of his damage.

Gipp v Lynch, 226-1020; 285 NW 659

10922 Authority.

ANALYSIS

I GENERAL AUTHORITY

Liability to third persons. As between a principal and third parties, the principal is bound by the acts of his agent within the limits of the apparent scope of his authority.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

"Apparent authority" defined. "Apparent authority" is the result of the manifestation by one person of consent that another shall act as his agent, made to a third person, where such manifestation differs from that made to the purported agent.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Undisclosed limitation of agent's authority—effect. Altho a principal may by special limitations restrict the authority of his agent, and altho such restrictions are obligatory between the principal and his agent, such limitations are not binding upon third parties and, in the absence of knowledge of such restrictions by them, the principal will be bound to the same extent as tho the restrictions were not made.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Admissions—when receivable. Admissions or statements by an attorney during the course of, and pertaining to, his client's litigation are not admissible against, nor binding on, his client unless made for the express purpose of dispensing with formal proof of a fact at the trial. A priori, admissions or statements made after the litigation has terminated and relating to a distinctly different subject matter are in no manner chargeable to said former client.

Dugan v Midwest Co., 213-751; 239 NW 697

Admissions by attorney—conditions. Admissions of fact by an attorney are admissible against his client when said admissions are relevant and material and within the actual or ostensible scope of the attorney's employment, and are not in effect an offer of compromise.

Suntken v Suntken, 223-347; 272 NW 132

Admission binding on client. A party is bound by the admission of his attorneys, made in a counterclaim to another action.

Mitchell v Automobile Underwriters, 225-906; 281 NW 832

Admissions of attorney—effect. The admission of an attorney, made during a trial, as to the agency of a party for his client, is not necessarily binding on the client in other and subsequent litigation of a similar nature.

Iowa Co. v Seaman, 203-310; 210 NW 937

Implied ratification of agent's acts. Acquiescence by the principal in a series of acts by the agent indicates authorization to perform similar acts in the future, and an affirm-

I GENERAL AUTHORITY—continued

ance of an unauthorized transaction may be inferred from a failure to repudiate it.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Attorney signing notice and accepting service thereof. An attorney who signs a notice of appeal on behalf of an appealing defendant, for whom he appeared in the trial court, may validly accept service of said notice on behalf of a nonappealing co-defendant for whom said attorney also appeared in the trial court.

Osceola v Gjellefald Co., 220-685; 263 NW 1

Authority of attorney to employ attorney. Record held to be wholly insufficient to present a jury question on the issue whether an attorney for defendant had apparent authority to employ another attorney on behalf of defendant; also whether an alleged employment was ratified.

Orwig v Ry. Co., 217-521; 250 NW 148; 90 ALR 258

Correcting instrument after employment terminates—invalidity. Attorneys hired to draft a mortgage, altho discovering that they have made a mistake in the description of the land, have no authority on their own initiative after termination of their employment and without consulting the mortgagee, to change the description and re-record the mortgage in the recorder's office.

Winker v Tiefenthaler, 225-180; 279 NW 436

Costs — persons acting officially. Costs should not be taxed against a county auditor in a matter in which he acts officially, in good faith, and on the advice of counsel.

Northwestern Bank v Van Roekel, 202-237; 207 NW 345

Death of party. Where no personal representative was substituted for plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence, application made during same term to vacate the dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

Forfeiture—notice—sufficient signing. Notices of forfeiture of a real estate contract are all-sufficient when signed in the name of the vendor by his duly authorized attorney.

Cassady v Mott, 203-17; 212 NW 332

Indorsement of check. The plea that a loss resulting from the nonpayment of a check must be borne by the payee because of delay by the attorney who received it to present it for payment must fail when there is no showing that the attorney had authority to make the indorsement.

Prudential v Hart, 205-801; 218 NW 529

Indorsement by payee's attorney—authority. In action to recover against bank which had cashed checks indorsed by payee's attorney, the authority to make such indorsements is, under §9479, C., '39, determinable from the rules applicable in cases of agency generally.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Attorney's authority to indorse check. In payee's action against bank which had cashed checks upon indorsement by payee's attorney, the burden of proof is upon defendant-bank to establish apparent, ostensible, or implied authority in the attorney to indorse the checks as the basis for estoppel against payee to assert lack of authority on part of attorney.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Attorney indorsing client's checks. In payee's action against bank which had cashed checks indorsed without actual authority by payee's local attorney who, over a period of years, had collected rents for the payee, evidence of transactions to show custom of attorney in indorsing payee's checks and in remitting by his personal checks was admissible, even tho bank did not have knowledge of all of the transactions, and it warranted finding that payee had knowledge of and acquiesced in such custom and was bound thereby.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Instructing on basis of counsel's admissions. The court is not in error in peremptorily instructing in an action of replevin that plaintiff is entitled to the immediate possession of all property claimed by him (except specifically enumerated articles) when said instruction is in strict accord with the explicit admission in court of defendant's counsel, tho no such admission appears in defendant's answer.

Luther v Investment Co., 222-305; 268 NW 589

Mandatory duty of court to vacate judgment. A judgment must be set aside on proper and timely application when an agreement or understanding existed between the respective counsel such that one of the counsel was justified in assuming, and in good faith did assume, that the cause would not be assigned for trial without notice to him, and when the judgment was the result of a violation of said agreement or understanding.

First N. Bk. v Bank, 210-521; 231 NW 453; 69 ALR 1329

Nonright of attorney to bind estate. An executor is not estopped to enforce a liability against a surety on the bond of a former ex-

ecutor by reason of the fact that his attorney has represented to such surety that the estate intends to enforce said liability solely against the estate of another surety, even tho said surety acted on such representation and did not file any contingent claim against the estate of the other surety.

In re Carpenter, 210-553; 231 NW 376

Estoppel to deny agent's authority. In payee's action against bank which had cashed checks indorsed by payee's attorney without actual authority, where bank defended on ground that payee was estopped from asserting lack of authority, held, strict rules relating to equitable estoppel based upon false misrepresentation or concealment were not applicable in determining such defense.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Notice of additional testimony — acceptance of service by attorney valid. Service of notice, and copy thereof, of the intention of the state, on the trial of an indictment, to offer stated testimony additional to that receivable under the indictment as returned, may be validly accepted in writing for and on behalf of the defendant, by the defendant's acting attorney of record.

State v Froah, 220-840; 263 NW 525

Opinion by attorney—effect. The written opinion of an attorney as to the law governing a certain matter is not admissible against the client to whom the opinion is addressed.

In re Dodge, 207-374; 223 NW 106

Oral stipulations — conflicting affidavits — effect. A war of conflicting affidavits between counsel as to what oral understanding was had relative to the filing of abstracts will not necessarily be determined by the supreme court. Moral: Oral stipulations and agreements should be reduced to writing and duly signed.

Reppert v Reppert, 214-17; 241 NW 487

Payment of claims — death of claimant's attorney — peculiar circumstances relieving barred claim. Where an attorney files a probate claim for a nonresident claimant, but dies one day before the expiration of the year and without serving a notice of hearing on such claim—claimant, not learning of his attorney's death until later, and tho then delaying several months while his new attorney negotiated with the estate, held to have shown peculiar circumstances entitling him to equitable relief considering the estate was still unsettled and solvent.

Hagen v Nielsen, 225-127; 279 NW 94; 281 NW 356

"Practice of court" includes practices of attorneys. Expression "practice of this court" fairly includes more than acts of presiding judge and means practices characteristic of the proceedings when attorneys appear for litigants therein, including practice of attorneys of informing opposing counsel of intention to take default, and evidence of such practice of attorneys was admissible under a petition to set aside a default judgment, altho petition alleged practice of this court.

Lunt v Van Gorden, 225-1120; 281 NW 743

Proof of authority — necessity in general. Aside from the statutory powers and authority of an attorney, a client is not bound by the contract of his attorney in his behalf unless the authority of the attorney so to bind the client is made to appear.

Albright v Albright, 209-409; 227 NW 913

Pleading agent's apparent authority—sufficiency. In payee's action against bank which had cashed checks indorsed without actual authority by payee's local attorney, bank's answer alleging (1) payee's knowledge and acquiescence in the attorney's custom of indorsing payee's checks and remitting proceeds to it by his personal checks, (2) the bank's reliance thereon, and (3) that payee was estopped from asserting lack of authority held sufficient to raise question of attorney's implied, apparent, or ostensible authority.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Reservation of grounds—belated attack on stipulation. The contention that a stipulation in the trial court as to the testimony of a party was collusive and fraudulent may not be presented for the first time on appeal.

Bolte v Schenk, 205-834; 210 NW 797

Redemption — 90-day notice — defective return of service. An affidavit of service of the 90-day notice to redeem from tax sale is insufficient when served by a sheriff at the instance of the certificate holder's attorney, thereby failing to show that the person who made the service was the certificate holder's agent or attorney and, consequently, the period of redemption was not terminated.

Weidman v Pocahontas, 225-141; 279 NW 146

II EXECUTION OF BONDS AND OTHER PAPERS

Affidavit for cost bond—valid execution by attorney for corporation. The statutory affidavit supporting a motion for cost bond may be made and filed by a defendant corporation's attorney, and a corporation need not personally make and file such affidavit.

Schultz v Ins. Co., 225-1024; 282 NW 776

Bonds — presumption of validity. A bond executed in the name of a plaintiff in attachment, by the attorney appearing for such plaintiff, is presumptively valid.

Carson, etc., v Long, 219-444; 257 NW 815

II EXECUTION OF BONDS AND OTHER PAPERS—concluded

Cost bond affidavit by attorney. A corporation defendant's attorney making statutory affidavit in support of a motion for cost bond will be presumed to have had sufficient knowledge of facts to enable him to make such affidavit and such knowledge need not be alleged.

Schultz v Ins. Co., 225-1024; 282 NW 776

III AGREEMENTS GENERALLY

Cost bond application before answer is timely. Court erred in overruling a motion for cost bond and holding that defendant's application therefor was not filed in time, because filed after time for defendant's appearance when evidence showed that the plaintiff's attorney, through correspondence, gave defendant's attorney more time, and where it was filed long prior to filing of any answer in cause, there being no order of court therein requiring such motion for cost bond to be filed within certain time.

Schultz v Ins. Co., 225-1024; 282 NW 776

Corporation judgment compromised—former stockholder—no authority. Stockholders who had sold their stock after the corporation had recovered a judgment no longer had an interest in the judgment which remained the property of the corporation even when its name was changed, so a compromise settlement of the judgment had no validity when made by attorneys with consent given by one former stockholder, as only the corporation could authorize such settlement.

Glenwood Lbr. Co. v Hammers, 226-788; 285 NW 277

Court acting on own motion contrary to agreement of counsel. Consolidated actions, dismissed by the court on its own motion in the absence of counsel, for want of prosecution, are properly reinstated on a showing of "unavoidable casualty and misfortune" in that there was no negligence on the part of plaintiffs or their counsel and that they were relying on an agreement between counsel that certain motions would not be made nor issues made up until convenient to all counsel.

Thoreson v Central States Elec. Co., 225-1406; 283 NW 253

In re evidence and objections thereto. Litigants may validly agree of record (at least with the consent of the court) that, in the taking of testimony, objections thereto need not be made at the time of offer, but that such testimony shall be deemed objected to on "all grounds known to the law".

Lindburg v Engster, 220-1073; 264 NW 31; 116 ALR 591

Oral nonrecord agreements. Oral agreements between litigants or their attorneys when not brought to the attention of the court are entitled to little favor on hearings to set aside default judgments.

Standard v Marvill, 201-614; 206 NW 37

Stipulations—appearance date agreed on—waiver of notice. Where the parties in a proceeding to vacate an order of court approving the final report of a bank receiver stipulate that the court may set a date for appearance later than the second day of the term, and that the bank examiner will file an appearance or pleading on or before that date, and that no other or further notice to him shall be necessary, the examiner may not assert the departure from the statutory requirements as to the appearance date as a ground for challenging the jurisdiction of the court by a special appearance.

Bates v Loan & Trust Co., 227-1347; 291 NW 184

Stipulations — indefiniteness as to time — effect accorded. An oral agreement or understanding between opposing counsel that one of them should have time, additional to that specified by statute, in which to file exceptions to the report of a referee, tho the extent of such additional time is quite indefinite, will be construed and recognized by the court in the spirit and to the extent reasonably contemplated by the parties.

Holdorf v Miller, 220-1380; 264 NW 602

Waiver of jury by agreement of attorneys—validity. A written agreement or stipulation, duly signed and filed by opposing attorneys in a law action and approved of record by the court, agreeing to waive a jury and to try the action to the court is, in the absence of fraud or proof that an attorney had no authority so to agree, binding on the parties to the action for at least one trial to the court, even tho, after the stipulation was entered into, the pleadings be amended and the cause be continued to a later term.

Shores Co. v Chemical Co., 222-347; 268 NW 581; 106 ALR 198

IV AUTHORIZED AGREEMENTS

Consent decree. While counsel cannot exceed their authority in making contract or settlement affecting their clients' rights, an attorney having full charge of client's action for mandatory injunction is authorized to consent to decree substantially complying with supreme court order.

Vaughan v Dist. Court, (NOR); 226 NW 49

V UNAUTHORIZED AGREEMENTS

Corporation judgment compromised. Stockholders who had sold their stock after the corporation had recovered a judgment no longer had an interest in the judgment which remained the property of the corporation even when its name was changed, so a compromise

settlement of the judgment had no validity when made by attorneys with consent given by one former stockholder, as only the corporation could authorize such settlement.

Glenwood Lbr. Co. v Hammers, 226-788; 285 NW 277

Employment by apparent agent. An attorney who claims to have been employed, by an alleged apparent agent, to defend an action, may not, after the action is dismissed and immediately recommenced, continue to rely on the alleged contract with the apparent agent when he then knows that said agent never had any authority to employ.

Orwig v Ry. Co., 217-521; 250 NW 148; 90 ALR 258

Involuntary dismissal — justifiable setting aside. The court is, manifestly, within its discretion in setting aside the dismissal of an action when the dismissal was entered by the plaintiff's counsel at a time when he had been discharged.

Pilcher Co. v Clark, 218-150; 253 NW 907

Unauthorized investment—advice of counsel —effect. An illegal and unauthorized investment by a trustee will not, on an accounting, be treated as legal and authorized on a showing that the investment was made on the advice of an attorney.

In re Skinner, 215-1021; 247 NW 484

VI EVIDENCE OF AGREEMENT

Offer to pay attorney fees not accepted. When an attorney, who had received a retainer fee of $100 to represent the insured in a criminal case arising from an automobile accident, received a letter from the attorney for the insurer requesting him to tell the insured that the insurer was willing to take care of attorney fees, such letter was admissible to show an offer to pay such fees, but was insufficient to show that such offer was authorized by the insurer, and his reply that he would look to the company for payment of only those fees exceeding $100, did not amount to an acceptance of the offer.

Gipp v Lynch, 226-1020; 285 NW 659

VII RIGHT TO RECEIVE MONEY

Compromise of judgment by attorney. A statute authorizing an attorney to receive money claimed by his client in an action, and upon payment thereof, to acknowledge satisfaction of the judgment, means not payment in part, but payment in full, as the general rule is that an attorney who has recovered a judgment for his client has authority to receive payment, but cannot accept in satisfaction of the claim a sum less than is actually due.

Glenwood Lbr. Co. v Hammers, 226-788; 285 NW 277

Attorney indorsing client's checks. In payee's action against bank which had cashed checks indorsed without actual authority by payee's local attorney who, over a period of years, had collected rents for the payee, evidence of transactions to show custom of attorney in indorsing payee's checks and in remitting by his personal checks was admissible, even tho bank did not have knowledge of all the transactions, and it warranted finding that payee had knowledge of and acquiesced in such custom and was bound thereby.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Nonpresumption as to authority. It will not be presumed that an attorney for a plaintiff in partition has authority, after the death of said plaintiff, to receive on behalf of the resulting estate the share which said plaintiff would have received had he lived, it appearing that said plaintiff's administrator was not substituted in the partition action.

Albright v. Moeckley, 209-1304; 230 NW 351

10923 Proof of authority.

ANALYSIS

I In General
II Employment of Attorney
III Proof of Authority

I IN GENERAL

Agency not asserted—no estoppel to deny. In an action to recover a retainer fee given an attorney for defending a criminal case, the attorney was not estopped from denying that he was the agent for an insurance company, when he had made no claim of being such agent and had told the client that the company was not interested in the case and would not pay the attorney fee.

Gipp v Lynch, 226-1020; 285 NW 659

Presumption. An attorney who appears for a party to an action will be presumed to have been authorized so to appear—until the opposing party shows the want of such authority.

Carson, etc. v Long, 219-444; 257 NW 815
Bleakley v Long, 222-76; 268 NW 152

Retainer and authority. Aside from the statutory powers and authority of an attorney, a client is not bound by the contract of his attorney in his behalf unless the authority of the attorney so to bind the client is made to appear.

In re Lipp, 209-409; 227 NW 913

II EMPLOYMENT OF ATTORNEY

Compensation—contract of employment not presumptively fraudulent. The rule that contracts entered into between attorney and client subsequent to the creation of such relation are presumptively fraudulent has no application to

II EMPLOYMENT OF ATTORNEY—concluded

the contract by which the relation of attorney and client is created.

Coughlon v Pedelty, 211-138; 233 NW 63

Defending dry trust. A trustee may not employ attorneys at the expense of the estate to defend a trust which has become legally dry.

Fleming v Casady, 202-1094; 211 NW 488

Employment by apparent agent. An attorney who claims to have been employed, by an alleged apparent agent, to defend an action, may not, after the action is dismissed and immediately recommenced, continue to rely on the alleged contract with the apparent agent when he then knows that said agent never had any authority to employ.

Orwig v Railway, 217-521; 250 NW 148; 90 ALR 258

Ratification. Record held to be wholly insufficient to present a jury question on the issue whether an attorney for defendant had apparent authority to employ another attorney on behalf of defendant; also whether an alleged employment was ratified.

Orwig v Railway, 217-521; 250 NW 148; 90 ALR 258

Refusal to establish drains—appeal. The board of supervisors, after refusing to establish a proposed drainage improvement because such establishment would not be conducive to public benefit, utility, health, convenience, and welfare, has no power to employ attorneys and an engineer to defend, on appeal, the action of the board. Such employment being a nullity, the resulting expense may not be taxed to the petitioners.

Christensen v Agan, 209-1315; 230 NW 800

School district property, contracts, and liabilities. An informal employment of attorneys by the directors of a school district in a matter as to which the district had a right to employ attorneys is fully ratified by the good-faith formal action of the board, with full knowledge of the facts, in allowing the claim of the attorneys.

Beers v Lasher, 209-1158; 229 NW 821

III PROOF OF AUTHORITY

Presumption attending appearance. The law presumes that an attorney who appears for a party to an action had authority from the party so to do. Evidence held insufficient to overcome the presumption.

Sloan v Jepson, 217-1082; 252 NW 535

10924 Attorney's lien—notice.

ANALYSIS

I NATURE, EXTENT, AND SUBJECT MATTER
II NOTICE OF LIEN
III PRIORITY OF LIEN
IV DEFEATING LIEN
V ENFORCEMENT OF LIEN

I NATURE, EXTENT, AND SUBJECT MATTER

Attorney fees — ordering clerk to satisfy. When at the time of agreeing to a property settlement, plaintiff in divorce proceeding also orally agreed to pay her attorney a fee of $250 for his services, the court should order the clerk to satisfy said fee from the money paid into his hands in satisfaction of said property settlement and on which money the attorney had perfected a lien,—it appearing that said fee was reasonable in amount and the agreement therefor untainted with any illegality.

Mickelson v Mickelson, 222-942; 270 NW 365

Attorney's lien as assignment—effect. The duly perfected lien of an attorney with reference to the judgment obtained by him for his client, is tantamount to an assignment of an interest in the judgment. It follows that the attorney has such interest in the judgment as to support an intervention by him in an action by the judgment plaintiff to set aside certain conveyances as fraudulent.

Grimes Bank v McHarg, 217-636; 251 NW 51

Burden of proof. An attorney who seeks to establish a lien for his fees on money in the hands of the adverse party has the burden to show that the adverse party, after the service of notice of such lien, had money in his possession belonging to the attorney's client.

Hemingway v Bank, 206-1308; 221 NW 920

Decree in divorce for attorney fees—nonadjudication as to attorney. A decree in divorce proceedings awarding plaintiff (in addition to a divorce) a specified sum as attorney fees is not an adjudication as to the amount owing by plaintiff to her attorney for services rendered in the action,—the attorney, of course, not being a party to the action.

Duke v Park, 220-889; 262 NW 799
Maddy v Park, 220-899; 262 NW 796
Jones v Park, 220-894; 262 NW 797; 264 NW 700

Compensation—elements to be considered. In fixing the compensation for attorneys on a quantum meruit basis, due consideration must be given (1) to the amount involved, (2) to the nature of the litigation in question, (3) to the time occupied, (4) to the results accomplished, and (5) to the standing of the attorney.

Kelley v Bank, 217-725; 248 NW 9; 250 NW 171

Error against noncomplainant. A defendant in an action by an attorney for professional services may not complain that the jury was instructed that no consideration should be given to the fact, if it was a fact, that the

plaintiff possessed extraordinary skill and experience as a lawyer.

Klass v Ins. Co., 210-78; 230 NW 314

Nonallowable attorney fees. An attorney who, under employment by a debtor whose property is under receivership, successfully defends an attempt to throw the debtor into bankruptcy, may not have his attorney fees paid from the receivership funds, when the receiver and his attorney, under order of court, also appeared and successfully contested said bankruptcy proceeding.

Cook v McHenry, 208-442; 223 NW 377

Offers—when implied acceptance not recognized. Proof that a party made an offer to pay a stated sum for services to be performed and that the offeree thereafter proceeded to perform the services, creates a presumption that the offeree accepted all the terms of the offer; not so, however, when such offer is made after a large part of the services has been rendered on the basis of a quantum meruit, and the offeree continues to perform the remaining services. In the latter instance, the quantum meruit contract will be deemed to continue unless an acceptance of the offer is actually proven.

Kelley v Bank, 217-725; 248 NW 9; 250 NW 171

Statutory liens—discharge. An attorney's lien which is adjudicated by a foreclosure decree unappealed from, to have become a lien on defendant's land as of a date several years prior to the filing by defendant of a petition in bankruptcy (to which the attorney was not a party) is not discharged by §67f of the bankruptcy act [11 USC, §107f], even tho the foreclosure decree was entered within the four-months period immediately preceding the filing of said petition in bankruptcy.

Sweatt v Acres, 209-1288; 228 NW 74

Unauthorized order for lien. An order establishing the heirship of persons to an estate and, without notice, decreeing a lien in favor of the attorney on the cash shares of certain heirs for whom the attorney has never appeared, is a nullity insofar as the order establishing the lien and the amount thereof is concerned.

In re Lear, 204-346; 213 NW 240

Witness—inexperience of attorney. The fact that a lawyer never drew a particular legal instrument does not disqualify him from testifying as to the reasonable value of the services of an attorney in drawing such instrument.

Klass v Ins. Co., 210-78; 230 NW 314

II NOTICE OF LIEN

Fatally delayed notice. An attorney loses his lien for attorney fees when he delays serving an adverse party with notice of his lien until after the adverse party has in good faith settled and discharged in full his indebtedness to the attorney's client.

Hemingway v Bank, 206-1308; 221 NW 920

III PRIORITY OF LIEN

Set-off of judgments—effect on lien. The offsetting of the larger against the smaller of two mutual judgments wholly terminates an unadjudicated attorney's lien duly noticed in the judgment docket of the smaller judgment, when the indebtedness represented by the larger judgment antedates the indebtedness represented by the smaller judgment.

McIntosh v McIntosh, 211-750; 234 NW 234

Belated cost modification—review by certiorari. Where an action was instituted to set aside conveyances and to subject land to a judgment, and an attorney having a lien on such judgment intervenes, establishes and gets an adjudication of priority in the decree, which made no provision for payment of costs but later was invalidly modified under guise of a motion to retax costs, the trial court being without jurisdiction to modify the decree (1) after an appeal therefrom had been perfected and (2) because the modification was not made during the term the decree was entered, certiorari will lie to correct the lower court's excess of jurisdiction, and fact that plaintiff is a banking corporation no longer in existence will not defeat the certiorari, since corporation must be regarded as existing to the degree necessary to wind up its affairs.

Grimes Sav. Bank v Jordan, 224-28; 276 NW 71

IV DEFEATING LIEN

Lien—burden of proof. An attorney who seeks to establish a lien for his fees on money in the hands of the adverse party has the burden to show that the adverse party, after the service of notice of such lien, had money in his possession belonging to the attorney's client.

Hemingway v Bank, 206-1308; 221 NW 920

Lien—fatally delayed notice. An attorney loses his lien for attorney fees when he delays serving an adverse party with notice of his lien until after the adverse party has in good faith settled and discharged in full his indebtedness to the attorney's client.

Hemingway v Bank, 206-1308; 221 NW 920

Lien—unauthorized order. An order establishing the heirship of persons to an estate and, without notice, decreeing a lien in favor of the attorney on the cash shares of certain heirs for whom the attorney has never appeared, is a nullity, insofar as the order establishing the lien and the amount thereof is concerned.

In re estate of Lear, 204-346; 213 NW 240

Bankruptcy — distribution of estate — discharge of lien. A statutory attorney's lien which is adjudicated by a foreclosure decree unappealed from, to have become a lien on de-

IV DEFEATING LIEN—concluded

fendant's land as of a date several years prior to the filing by defendant of a petition in bankruptcy (to which the attorney was not a party) is not discharged by §67f of the bankruptcy act [11 USC, §107f], even tho the foreclosure decree was entered within the four-months period immediately preceding the filing of said petition in bankruptcy.

Sweatt v Acres, 209-1288; 228 NW 74

Receivers — claims — unallowable attorney fees. An attorney who, under employment by a debtor whose property is under receivership, successfully defends an attempt to throw the debtor into bankruptcy, may not have his attorney fees paid from the receivership funds when the receiver and his attorney, under order of court, also appeared and successfully contested said bankruptcy proceeding.

Cook v McHenry, 208-442; 223 NW 377

V ENFORCEMENT OF LIEN

Lien as interest in judgment—basis for intervention. An attorney's lien, when perfected, creates an interest in a judgment and is a sustaining basis for an intervention by the attorney in a separate equity action to subject land to the payment of the judgment.

Grimes Sav. Bank v Jordan, 224-28; 276 NW 71

10925 Release of lien by bond.

Transaction with deceased partner. In an action by the surviving members of a firm of attorneys to recover attorney fees on the basis of a quantum meruit, the surety on the bond to release the lien for said fees is incompetent to testify that; after a large part of the services had been rendered, he had an oral agreement with the deceased partner to the effect that the firm would accept a certain definite sum for all services performed and to be performed.

Kelley v Bank, 217-725; 248 NW 9; 250 NW 171

10929 Revocation of license.

Discussion. See 8 ILB 65—Character qualifications—disbarment

Right to practice mere privilege. The right to practice law is not a constitutional right—not a vested right—but a mere privilege.

In re Cloud, 217-3; 250 NW 160

10930 Grounds of revocation.

Conviction of felony—judicial notice of reversal. On an appeal from an order disbarring an attorney on the ground that he has been convicted of a felony, the appellate court will take judicial notice that said conviction has been reversed by said court subsequent to the entry of the order of disbarment.

State v Metcalfe, 204-123; 214 NW 874

Abandoned conviction. A conviction of an attorney in police court for keeping a disorderly house followed by an appeal which has remained dormant for six years must be deemed abandoned as a ground for disbarment of the attorney.

State v Metcalfe, 204-123; 214 NW 874

Disbarment—evidence—sufficiency. Record reviewed and held ample to justify a judgment of disbarment of an attorney.

In re Cloud, 217-3; 250 NW 160

Disbarment—modification of judgment on appeal. A judgment of disbarment of an attorney may, in view of the immature age and inexperience of the accused, and the unappealing nature of the charges preferred and established against him, be modified on appeal by providing that the accused may, after a stated time, apply for reinstatement.

In re DeCaro, 220-176; 262 NW 132

Disbarment—settlement with client—effect. The fact that an attorney has settled with his client and fully accounted for all funds of the client does not preclude an examination of his conduct and his disbarment on proper proof of misconduct.

In re Cloud, 217-3; 250 NW 160

Grounds—false certificate as to bond.

In re Hunt, 201-181; 205 NW 321

Intoxicating liquor nuisance. Proof that an attorney has been enjoined from trafficking in intoxicating liquors, but that his participation in such trafficking was purely passive, does not furnish grounds for disbarment.

State v Metcalfe, 204-123; 214 NW 874

Quarreling, fighting and breaches of the peace. The fact that an attorney has been personally embroiled in quarrels with others and has inflicted grievous wounds upon them, does not furnish grounds for disbarment unless such transactions establish a lack of that professional integrity, honesty, and fidelity which are required in an attorney.

State v Metcalfe, 204-123; 214 NW 874

Solicitation of business. The solicitation of business by attorneys and the working up of legal controversies are unprofessional, and violate all the ethics of the profession.

State v Kaufmann, 202-157; 209 NW 417

10931 Proceedings.

Discussion. See 23 ILR 83—Liability of bar association—libel

Jurisdiction—how acquired.

In re Hunt, 201-181; 205 NW 321

Disbarment—jurisdictional order. The order of court, finding that formal charges against an attorney are sufficient to justify disbarment proceedings, and ordering copy thereof served on him and for his appearance, is juris-

dictional, but not the preliminary order for the investigation into the conduct of the attorney.

In re Cloud, 217-3; 250 NW 160

Disbarment—preliminary order. An order signed by all the judges of a district court directing the making of an investigation of the conduct of an attorney, and directing the conditional filing of disbarment proceedings, becomes an order of the district court when filed by the presiding judge in the proper county with the clerk of said court. And this is true tho said order was prepared and signed outside said county.

In re Cloud, 217-3; 250 NW 160

10934.4 Trial court.

Special court—constitutionality. The act of the supreme court in appointing three district court judges as a special court to hear and determine disbarment proceedings against an attorney is necessarily a holding that the statute providing for such appointment is constitutional.

In re Cloud, 217-3; 250 NW 160

Special court. The legislature has ample constitutional power to create a special court to hear and determine disbarment proceedings against an attorney and the fact that said special court is composed of three district court judges appointed by the supreme court does not constitute an attempt by the legislature to create a district court of three judges in violation of Art. V, §5, of the constitution.

In re Cloud, 217-3; 250 NW 160

10934.7 Record and judgment.

Majority decree. The findings and judgment of the special court for the trial and determination of disbarment proceedings, concurred in by a majority of the members of said court, are the findings and judgment of a court of record, because the requirement that such findings and judgment of said court shall constitute a part of the records of the district court ipso facto constitutes said special court a court of record.

In re Cloud, 217-3; 250 NW 160

10934.8 Pleadings—evidence— preservation.

Disbarment — evidence required. Evidence sufficient to disbar an attorney must clearly, satisfactorily and convincingly establish the wrongdoing charged.

In re DeCaro, 220-176; 262 NW 132

10936 Appeal.

Appeal heard de novo. An appeal by the accused in disbarment proceedings is triable de novo.

In re DeCaro, 220-176; 262 NW 132

De novo procedure. An appeal in disbarment proceedings against an attorney is, on a proper record, triable de novo, even tho tried by the special court as an action at law.

In re Cloud, 217-3; 250 NW 160

Modification of judgment on appeal. A judgment of disbarment of an attorney may, in view of the immature age and inexperience of the accused, and the unappealing nature of the charges preferred and established against him, be modified on appeal by providing that the accused may, after a stated time, apply for reinstatement.

In re DeCaro, 220-176; 262 NW 132

Permissible record. On appeal from an order of disbarment, the state has the right to present the entire record, even tho it embraces testimony relative to charges on which the accused was acquitted.

State v Kaufmann, 202-157; 209 NW 417

TITLE XXXI

GENERAL PROVISIONS RELATING TO CIVIL PRACTICE AND PROCEDURE

CHAPTER 484

FORMS OF ACTIONS

Malicious prosecution. See under §13728. **Negligence liability generally.** See Note 1 at end of chapter. **Torts generally.** See Note 2 at end of chapter

10938 "Proceedings" classified.

Atty. Gen. Opinion. See '36 AG Op 395

Election between securities. The holder of both a chattel and a real estate mortgage securing the same debt has the right to elect to proceed to the foreclosure of his mortgages and to abandon all interest in a block of trust bonds secured by trust deed on other real estate and held by him as collateral security for said debt, and in such case the foreclosure by the trustee of the trust deed and the buying in of the trust property by the trustee in the interest of the bondholders will not be deemed a payment to any extent of the chattel and real estate mortgage-secured debt.

Silver v Wickfield Farms, 209-856; 227 NW 97

Allowable legal and equitable actions at same time. Where each of a series of matured, mortgage-secured, promissory notes of the same maker possesses the same grade of lien, and is, by a trust agreement executed by the various noteholders, placed in the hands of a trustee with power to institute such actions as he may deem fit in order to effect collection, the trustee may maintain and carry on at the same time an action at law on a portion of said notes, and an action in equity to foreclose the mortgage for the remainder of the notes.

Iowa T & L Co. v Clark, 215-929; 247 NW 211

Presumptions—parties and actions. Presumptively, parties to an action in this state are residents of this state, and presumptively, the cause of action sued on arose in this state.

Farmers & M. Bk. v Anderson, 216-988; 250 NW 214

Duplicate actions on same subject matter—priority. When two actions involving the same subject matter are commenced by different parties (e.g., partition of land), the action in which completed service is first made on all necessary parties must be deemed first commenced even tho the other action was first formally filed with the clerk, unless said first action was commenced by an unauthorized plaintiff.

Jones et al. v Park, 220-903; 262 NW 801

Objections to executrix's report—real estate title issue not misjoinder—statewide jurisdiction. Where an executrix after resigning files her reports, objections thereto asking that she account for land in another county allegedly purchased with estate money does not misjoin equitable action to impose trust on or establish title in land, but is special probate proceeding to compel executrix to account for assets over which probate court has statutory jurisdiction coextensive with the state.

In re Rinard, 224-100; 275 NW 485

10939 Civil and special actions.

Discussion. See 20 ILR 106—"Mending hold doctrine"; 22 ILR 128—Cause of action defined

Atty. Gen. Opinion. See '36 AG Op 395

ANALYSIS

I ACTIONS IN GENERAL

Splitting causes—pleading. See under §11111 (II)

Special action defined. A proceeding for the forfeiture of a conveyance because of its use in the unlawful transportation of liquors is a special action, and not triable de novo on appeal.

State v Coupe, 205-597; 218 NW 346

Action at law as nonwaiver of lien. The obtaining of a judgment at law on an account and the sale of property seized on an attachment, do not constitute a waiver of a mechanic's lien for the same account to the extent that the judgment remains unpaid.

Southern Sur. v Serv. Co., 209-104; 227 NW 606

Condemnation of automobile—non de novo hearing. A proceeding for the condemnation of an automobile because employed in the unlawful transportation of intoxicating liquors will not be tried de novo on appeal. Whether the statutory presumption of knowledge of such use, by the claimant, has been negatived rests with the trial court.

State v Chrysler Coupe, 215-1308; 245 NW 243; 247 NW 639

Cumulative and exclusive remedy. A contract provision to the effect that, if damages accrue to one party, he may apply to the payment thereof any money in his hands belonging to the other party, is permissive only, and additional to the usual remedy by action in court.

Clear Lake Co-op. v Weir, 200-1293; 206 NW 297

Enjoining action in foreign state. A defendant who is a resident of this state may, even after he has filed formal answer, enjoin a plaintiff who is a resident of this state from maintaining in a foreign state an action on a contract arising in this state, when said action is sought to be maintained for the purpose of vexatiously harassing the defendant and subjecting him to unnecessary costs, part of which are untaxable as costs.

Bankers Life v Loring, 217-534; 250 NW 8

Illegal transaction. Principle reaffirmed that in an action on a fraudulent contract, as to which both parties are in pari delicto, the court will refuse relief to either party.

Schmidt v Twedt, 219-128; 257 NW 325

Lex fori procedure—exclusiveness. While, as a matter of comity, the courts of this state will, under proper pleading, recognize and enforce the civil rights and liabilities of parties to a tort committed in a foreign state—if not contrary to the public policy of this state—yet in determining all issues of fact on which such rights and liabilities depend, the judicial procedure of the courts of this state must be followed.

Kingery v Donnell, 222-241; 268 NW 617

Nature and form—submission with and without action. The filing of a petition and answer, without service of an original notice, and the submission of the matter to the court on an agreed statement of facts which stipulated for judgment for plaintiff in case the court found that a recovery should be allowed, followed by a motion by defendant for a verdict in his favor, show the institution and prosecution of an ordinary action, and not the submission of a controversy to the court without action, as provided by Ch 547, C., '24.

Robinson v Bruce Co., 205-261; 215 NW 724; 61 ALR 851

Splitting—insufficient showing. A mortgagee who, in foreclosure, continues until after decree and sale his application for the appointment of a receiver for the pledged rents does not thereby "split" his cause of action.

Equitable v Rood, 205-1273; 218 NW 42

Treating sight draft as paid and later denying payment. The drawer of a sight draft who sends it to a bank for collection, and knows that said bank has assumed to collect it, and has forwarded its own bank draft in payment of the collection, and who, after payment of the bank draft is refused because of the insolvency of the collecting bank, lays claim to said bank draft and establishes his claim thereon against the receiver, may not thereafter proceed against the receiver and the original drawee in the sight draft and obtain judgment against them on the pleaded theory that said drawee in the sight draft never in fact paid it—paid it by an overdraft on the collecting bank, and that the defendants must account to plaintiff for said overdraft.

Enterline v Andrew, 211-176; 231 NW 416

Writs of prohibition. The supreme court has original jurisdiction, under the constitution, to issue common-law writs of prohibition; but, when the application is for a writ directed to a district court and commanding it to discontinue further jurisdiction over named actions pending in said lower court, the supreme court must act solely on the established facts as revealed in the proceedings in said district court, and, if material disputed issues of fact arise, the writ will be refused, as the supreme court has no power to take testimony on disputed questions of fact dehors said district court records.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

Inquisitions—appeal—special proceeding. An appeal to the district court from the finding of the county insanity commission is a special proceeding, and, since the legislature did not provide for a jury trial, the issue is triable to the court.

In re Brewer, 224-773; 276 NW 766

II ELECTION OF REMEDIES

Splitting causes. See under §§11111 (II), 11567 (VII)

Election of remedy. It cannot be said that a party conclusively elected his remedy by proceeding under a statute under which he was adjudged to have no right.

Hansen v Bank, 209-1352; 230 NW 415

Election of remedy. A mortgagor who, in foreclosure, pleads for judgment against his subsequent purchaser on the original contract of purchase, makes no such election of remedies as will prevent him from subsequently praying for such reformation of the deed to such purchaser as to show that the purchaser had assumed the mortgage debt.

American Bk. v Borcherding, 205-633; 216 NW 719

Election of remedies. A purchaser of land who rescinds, and obtains against the vendor judgment at law for the amount advanced as purchase price and for other proper expenditures, does not thereby waive his right to bring an action in equity to have the judgment declared a lien on the land.

Larson v Metcalf, 201-1208; 207 NW 382; 45 ALR 344

II ELECTION OF REMEDIES—continued

Election of remedies. The fact that a city institutes an action against its treasurer to recover its public funds is not an election of remedies such as will preclude the city from maintaining an action against a county treasurer to recover its funds illegally paid to the city treasurer.

State v Hanson, 210-773; 231 NW 428

Election of remedies—when doctrine applicable. The doctrine of election of remedies applies only when a party is attempting to pursue inconsistent remedies.

Andrew v Bank, 218-1313; 256 NW 292

When doctrine not applicable. The doctrine of election of remedies is applicable only to inconsistent remedies, but in a probate proceeding, the filing of a claim against estate of husband for the support of widow to whom husband bequeathed realty for life, with right of disposal of realty for her necessary support, held, not such an election of remedy as to bar proceeding in equity to establish the claim for support as a lien on realty.

Hoskin v West, 226-612; 284 NW 809

Inconsistent remedies. An administrator who has credible information for the belief and does believe that a wrongdoer has caused bank certificates of deposit belonging to the deceased to be paid by the bank on forged indorsements, and who, in an action between said wrongdoer and himself involving the estate, cross-petitions for judgment for the amount of the proceeds of said certificates, and who successfully prosecutes said cross-petition to judgment against the wrongdoer, thereby makes an election of remedies which precludes said administrator from subsequently maintaining an action against the bank on said certificates.

Sackett v Bank, 209-487; 228 NW 51

Inconsistent remedies — creditor bound by election. A creditor who is faced by the dilemma (1) of foreclosing his mortgage and treating the mortgagor as the sole debtor, or (2) of proceeding against a third party on the theory that said third party actually received the money in question under circumstances giving rise to an implied promise to return said money, and who chooses the former procedure, is irrevocably bound by his election. In other words, after taking personal judgment against the mortgagor and foreclosing against and selling the land with unfavorable results, he will not be permitted to proceed against said third party on the remaining, inconsistent theory.

Lindburg v Engster, 220-1073; 264 NW 31; 116 ALR 591

Inconsistent remedies—holder of draft. One who receives a check from his debtor and, on presenting it, receives in payment from the drawee bank a draft which is dishonored because of the insolvency of the bank, and who thereupon seeks to be decreed the status of a preferential trust holder to the amount of the draft, but is decreed the status of a general creditor only, may not later reshape and refile his claim and be decreed subrogated to the rights of the depositor who originally drew the check; and especially is this true when the latter remedy was alternatively sought in the prior litigation.

Becker v Leach, 208-1347; 227 NW 344

Inconsistent remedies—irrevocable election —effect. A judgment creditor who, instead of satisfying his judgment (1) by enforcing his lien on personal property which his judgment debtor had assigned to him as security, satisfies said judgment, (2) by buying in the same property under a general execution levy and sale under his said judgment, must be deemed to have irrevocably waived all right under his said assignment as security, it appearing that after said levy but before the sale thereunder, the said judgment creditor learned that the judgment defendant had also assigned said property to another party.

Zimmerman v Horner, 223-149; 272 NW 148

Noninconsistent remedies. The commencement of an action of replevin to recover the possession of promissory notes does not constitute the election of a remedy which will preclude the subsequent filing of a substituted petition presenting the controversy in the form of an action in equity.

Pickford v Smith, 215-1080; 247 NW 256

Noninconsistent action. Where a bank credits its correspondent bank with the amount of a check forwarded by the correspondent, and, in reliance on said credit, pays the drafts drawn on it by the correspondent, the act of said crediting bank in cancelling the said credit on learning of the insolvency of said correspondent, and in returning said check to the receiver as a claim against the correspondent, is not such an election of remedies as will estop the crediting bank from later contending that it had, in due course of business, become the absolute owner of said check.

Bureau Service v Lewis, 220-662; 263 NW 7

Pursuing noninconsistent remedies. A policy holder who, in an action at law, pleads that the insurer has waived that provision of the policy which invalidates the insurance in case of a change in the title to the insured property, and is unsuccessful on appeal in sustaining said plea, does not thereby make such an election of remedies as will prevent him, after remand, from amending and praying in equity that the policy be so reformed as to eliminate the invalidating provision.

Green v Ins. Co., 218-1131; 253 NW 36

Action for contract possession works no rescission. The vendor in a conditional sale con-

tract by instituting replevin for the possession of the article, as provided by the contract in case of the vendee's default, manifests a clear intent to stand on the contract, and not to rescind it. It follows that the refusal of the court to submit to the jury the issue of rescission and return of the purchase price is proper.

Mintle v Sylvester, 202-1128; 211 NW 367
Schmoller Co. v Smith, 204-661; 215 NW 628

Action to enforce partner's liability — waiver. The liquidating receiver of a private bank, when appointed with power to bring action against the partners on their individual liability, may, with the approval of the court, and notwithstanding the objections of a creditor, settle and compromise the liability of a partner when the creditor has appeared in the receivership proceedings and secured the allowance of his claim.

Reason: The creditor, by submitting himself to the jurisdiction of the receivership court, irrevocably elects his remedy.

Ellis v Bank, 218-750; 251 NW 744

Amendment—no election of remedies. In an action to compel certain heirs to contribute a share of a judgment arising out of a decedent's ownership of bank stock, a petition that alleges defendants' liability as individuals is not an election of remedies so as to prevent an amendment thereto setting up liability against an estate as an additional party, since there was no change in the nature of relief asked and no choice was made between inconsistent remedies at the time of the election.

Daniel v Best, 224-1348; 279 NW 374

Changing amendment. A plaintiff who, in a timely brought action, pleads a rescission of a fraud-induced contract, and prays for judgment for the consideration paid, and who, after discovering his inability to prove the pleaded rescission, and after the statute of limitation has fully run against his cause of action, amends his pleadings by praying for damages consequent upon the fraud, does not thereby plead a new cause of action. He simply exercises his permissible right to change the remedy.

Reinertson v Struthers, 201-1186; 207 NW 247

Breach of patent license contract. When a patent licensee ceased to pay royalties due the licensor, the licensor was not limited to an action against the licensee as a patent infringer, but could elect to treat the contract as still in force and bring an action to collect royalties.

Eulberg v Cooper, 226-776; 285 NW 131

Conclusive election of remedy—nonapplicability of doctrine. A party who elects to pursue one of two or more concurrent, inconsistent remedies is absolutely bound thereby, but the purchaser of land who, subsequent to the purchase, pays the contract price by reconveying to the vendor is not thereby necessarily estopped to sue for false representation in the original sale.

Boysen v Petersen, 203-1073; 211 NW 894

Irrevocable abandonment of action. An intervenor who pleads a personal claim to specific attached property, but later joins with other intervenors in a joint demand for judgment for all the property seized on the attachment belonging to all the intervenors, and receives a part of the resulting judgment when it is paid, must be held to have irrevocably abandoned her formerly pleaded personal claim.

Peoples Bank v McCarthy, 211-40; 231 NW 482

Mistake in remedy. The filing of a claim against an estate will not estop the party from abandoning such claim and instituting an action for a partnership accounting with deceased when such latter proceeding was his sole allowable remedy.

Hull v Padgett, 207-430; 223 NW 154

Noninconsistent action. The bringing of an action against a party on his obligation is not such election of remedies as will bar an action on the same obligation, but against a third party who has agreed to pay it.

Mohler v Andrew, 206-297; 218 NW 71

Paving — suing city on express contract. Where a holder of invalid paving assessment certificates elects to base his recovery solely on an express written contract, no question of estoppel, waiver, ratification, or accord and satisfaction is involved.

Lytle v Ames, 225-199; 279 NW 453

Rent—dual lien—election. A landlord seeking to enforce a dual lien for the rent, viz: a contract lien by virtue of the lease, and the statutory lien by virtue of the statute, need not elect on which lien he will proceed.

Mau v Rice Bros., 216-864; 249 NW 206

Statutory and contract lien for rent. A landlord who seeks to enforce his statutory lien for rent through an ordinary landlord's attachment makes no election of remedies such as will prevent him from amending his pleading and asking the foreclosure of a contractual lien embraced in the lease. Both remedies are coexistent and consistent.

Pickler v Lanphere, 209-910; 227 NW 526

III IN REM GENERALLY

Discussion. See 7 ILB 138—Actions in personam and actions in rem in Iowa; 25 ILR 329—General appearance—quasi in rem

Cancellation of mortgage as real action—venue change to land situs. Ultimate test of applicability of §11034, C., '35, is not whether

III IN REM GENERALLY—concluded

proceeding is in personam or in rem but whether determination of a right in real estate is involved, and therefore an action for cancellation of mortgages involving a determination of a right in real estate, which is the subject of the action, must be brought in the county where the land is located, and granting change of venue thereto will be upheld on certiorari.

Whalen v Ring, 224-267; 276 NW 409

Primary jurisdiction in personam—decree affecting status of bank deposit. Primarily and fundamentally, courts of equity act only in personam, and it is only by statute that they have acquired jurisdiction to act directly in rem. The fact that a decree determines the rights of parties to a bank deposit from insurance proceeds, and indirectly affects the status thereof, does not make the proceeding one in rem.

In re Hazeldine, 225-369; 280 NW 568

10940 Forms of action.

Abolition of forms. See under §11108

Foreclosure—agreed public sale. An agreement between chattel mortgagees and the chattel mortgagor that the mortgaged property shall be sold at public sale and the proceeds turned over to the mortgagees in the order of their liens, is valid and enforceable in equity. In other words equity, in order to enforce the agreement, will impress a trust on said proceeds in favor of said mortgagees, even tho the occasion so to do arises in a proceeding at law, to wit, a garnishment.

Jasper Co. Bank v Klauenberg, 218-578; 255 NW 884

Foreign remedial statute—nonapplicability. The remedial statutes of a foreign state, authorizing an action in said state against a corporation which has been dissolved at the instance of said state, do not and cannot control the procedure when the action is sought to be maintained in this state; and especially is this true when said authorized foreign procedure is contrary to the procedural law of this state.

Peoria Co. v Streator Co., 221-690; 266 NW 548

Insured's remedy—law (?) or equity (?)—law action on contract proper. An insured under an accident policy has a plain, speedy, and adequate remedy at law, to wit: action on the contract; and, unless the insurer makes unreasonable and bad-faith demands on insured, he is not entitled to relief in equity.

Eller v Guthrie, 226-467; 284 NW 412

Nature and form—statutory remedies not necessarily exclusive. A statutory remedy will not be construed as abrogating an existing common-law remedy unless the statute affirmatively indicates an intention to make the statutory remedy exclusive.

Jones v Knutson, 212-268; 234 NW 548

Nontransfer to equity on cross-petition merely re-stating answer. An action at law to recover bank deposits does not become a suit in equity because of defendant's cross-petition which only served to amplify and repeat the defense pleaded in the answer.

Younkin v Bank, 226-343; 284 NW 151

Paternity statutes—proceedings civil. The statutory proceeding to determine paternity and for support money is not a criminal proceeding but is tried as an ordinary action.

State v Devore, 225-815; 281 NW 740

Prayer not necessarily controlling. The prayer to a petition is not necessarily controlling on the question whether the action is at law or in equity.

Markworth v Bank, 212-954; 237 NW 471

Submission with and without action. The filing of a petition and answer, without service of an original notice, and the submission of the matter to the court on an agreed statement of facts which stipulated for judgment for plaintiff in case the court found that a recovery should be allowed, and followed by a motion by defendant for a verdict in his favor, show the institution and prosecution of an ordinary action, and not the submission of a controversy to the court without action, as provided by Ch 547, C., '24.

Robinson v Bruce Co., 205-261; 215 NW 724; 61 ALR 851

Taking gravel—injury to mortgage security—measure of damages. A mortgagee, being a lienholder, may not maintain trespass against third persons but must sue for injury to his security, and in taking gravel from mortgaged premises the measure of damages is not the value of the gravel taken but the difference in the value of the premises before and after the taking.

Bates v Humboldt County, 224-841; 277 NW 715

Wrong form of action. Supreme court cannot assume jurisdiction on appeal where the matter in issue is not such as was triable in the form of action brought in the trial court below.

Anderson v Meier, 227-38; 287 NW 250

10941 Equitable proceedings.

Discussion. See 20 ILR 1—Equity and property law; 20 ILR 106—"Mending hold doctrine"

ANALYSIS

Cancellation of deeds. See under §10084 (I)
Cancellation of mortgages. See under §10084 (II)
Consideration generally. See under §§9440, 9441
Deeds, setting aside. See under §§10084, 11815
De novo trial. See under §11433
Depositions in equity cases. See under §11432
Equitable circumstances, probate claims. See under §11972
Equitable issues. See under §10947
Estoppel in life insurance cases. See under Ch 401, Note 1 (IX)
Estoppel to deny issue. See under §11201 (III)
Evidence generally. See under §11254
Fraudulent conveyances. See under §11815
Injunctions. See under Ch 535
In rem actions. See under §10939 (III)
Insurance cases generally. See under §§8940, 9018
Judgments vacated or modified. See under §10972 (III)
Life insurance policies. See Ch 401, Note 1
Reformation, life policies. See Ch 401, Note 1 (VI)
Rescission of contracts. See under Ch 420, Note 1 (VII)
Specific performance, contracts generally. See under Ch 420, Note 1
Specific performance, land contracts. See under §§12382, 12383
Wills construed. See under §11846

I EQUITABLE ACTIONS—JURISDICTION

Discussion. See 19 ILR 406, 540—U.S. courts—consent receiverships

Exclusive equitable action. Equity has exclusive jurisdiction of a petition which, in effect, alleges that a husband and wife mutually pooled their efforts and respective personal properties in a joint undertaking under their joint management, and with title in the husband to the properties and to their future accumulations; that it was agreed that the properties should be so employed by the survivor of the two, and on the death of the latter, should be divided equally among the heirs of each; that both parties are now dead; that plaintiffs are the heirs of the wife,—with prayer for a money judgment and general relief, together with other allegations of an equitable nature.

McAnulty v Peisen, 208-625; 226 NW 144

Primary jurisdiction in personam. Primarily and fundamentally, courts of equity act only in personam, and it is only by statute that they have acquired jurisdiction to act directly in rem. The fact that a decree determines the rights of parties to a bank deposit from insurance proceeds, and indirectly affects the status thereof, does not make the proceeding one in rem.

In re Hazeldine, 225-369; 280 NW 568

Accounting—opening de novo—exceptions. In some cases of gross fraud, mistake or disadvantage, equity will open the whole accounting de novo, but if all items are not so affected, equity may (1) allow the account to stand except to the extent invalidated by the opposing party, who has the burden to prove errors, or (2) open the account to contest as to such items as are specified to be erroneous, otherwise conclusive.

Clark v Bank, 223-1176; 274 NW 919

Contract to purchase estate property—equity action. Bank receiver's specific performance action to require heirs to perform contract to purchase receiver's interest in estate property is not lacking in mutuality and is not transferable to law because involving both personal and real property, since equity once acquiring jurisdiction retains it for all purposes, and since cross-petition filed by heirs also asking specific performance, is sufficient reason to deny transfer to law.

Utterback v Stewart, 224-1135; 277 NW 735

Court's jurisdiction—legal issues. In action for a money judgment, foreclosure of a mortgage and appointment of a receiver, the equity court had jurisdiction of the controversy and parties. The action having been properly brought in equity, all issues, legal and equitable, are triable therein.

Deaton v Hollingshead, 225-967; 282 NW 329

Claims—lapsed time for hearing—reopening discretionary. Trial court administering receiverships has a discretion dependent upon equitable circumstances and not a mandatory duty to permit a claim to be presented and heard after the time fixed therefor.

Headford et al. Co. v Associated Co., 224-1364; 278 NW 624

Election of remedies. The doctrine of election of remedies is applicable only to inconsistent remedies, but in a probate proceeding, the filing of a claim against estate of husband for the support of widow to whom husband bequeathed realty for life, with right of disposal of realty for her necessary support, held, not such an election of remedy as to bar proceeding in equity to establish the claim for support as a lien on realty.

Hoskin v West, 226-612; 284 NW 809

I EQUITABLE ACTIONS — JURISDICTION—continued

Enjoining unlicensed person practicing law. In an equity suit brought by members of bar for injunction to restrain an unlicensed person from professing to be an attorney and from practicing law, where irreparable damage was the gist of the action, this subject matter was within the jurisdiction of the district court.

Johnson v Purcell, 225-1265; 282 NW 741

Mandamus. A mandamus proceeding, altho originally an action at law under Iowa practice, is now triable in equity and, in the determination of such action, the court must necessarily apply equitable principles.

Briley v Board, 227-55; 287 NW 242

Selection of official county newspapers — speedy and adequate remedy — jurisdiction. Mandamus to compel county supervisors to select petitioner's newspaper as one of three official newspapers was a proper procedure where petitioner was one of three applicants and had no plain, speedy, and adequate remedy at law, since there was no contest in the selection from which an appeal would lie under §5406, C., '39.

Bredt v Franklin County, 227-1230; 290 NW 669

Probate court. Where a clear and unambiguous will is admitted to probate and administration is being had thereon in probate court, the jurisdiction of such court to determine any rights thereunder, and to administer and direct the disposition of the property involved, cannot be interfered with by a court of equity.

Anderson v Meier, 227-38; 287 NW 250

Merger of estates—nonapplicability of doctrine. When a will devised all of testatrix's property to daughter in trust, directing trustee to make a monthly payment to a third party and to transfer a one-fourth interest in the trust estate to each of two grandchildren when they reached a certain age, and providing that daughter should have a one-half interest in the estate during her life only in the event obligations to her judgment creditors were barred or satisfied, such will established a trust, and did not repose entire beneficial interest in daughter. Nor was the trust extinguished by a merger of daughter's legal and equitable estate so that property could be subjected to satisfaction of creditor's judgments, because in equity the doctrine of merger will not be invoked if it would frustrate the testatrix's expressed intentions or if there is some other reason for keeping the estates separate.

Freier v Longnecker, 227-366; 288 NW 444

Mutual wills—enforcement in equity. Mutual wills are those made as separate wills of two people which are reciprocal in provision. Such wills may be enforced in equity.

Child v Smith, 225-1205; 282 NW 316

Objections to executrix's report—real estate title issue not misjoinder. Where an executrix after resigning files her reports, objections thereto asking that she account for land in another county allegedly purchased with estate money does not misjoin equitable action to impose trust on or establish title in land, but is special probate proceeding to compel executrix to account for assets over which probate court has statutory jurisdiction coextensive with the state.

In re Rinard, 224-100; 275 NW 485

Ordinary probate proceedings—noninterference by equity court. An equity court may not interfere with the ordinary proceedings of the probate court in exercising its exclusive jurisdiction in the administration of estates. Rule applies when probate court is following the manner and the method provided by the testator in the will.

First Methodist Church v Hull, 225-306; 280 NW 531

Widow's support—probate claim denied—no bar in subsequent equity action. A prior judgment in a law action tried on the merits is conclusive as to a subsequent action in equity between the same parties and the same facts, but where a widow is bequeathed a life estate in realty with the right to dispose of such realty for her necessary support, a probate adjudication on the merits that her claim for widow's support could not be established against husband's estate, is not such an adjudication as bars a later equity proceeding to establish such support claim as a lien on such realty.

Hoskin v West, 226-612; 284 NW 809

Pupils' residence determined by school district. When school district had exclusive jurisdiction to determine residence of pupils, it waived such exclusive jurisdiction by bringing equitable action in district court, as all material matters necessary to determine the issues, including the determination of residence, were before the court and within its jurisdiction.

School Twp. v Nicholson, 227-290; 288 NW 123

Practicing medicine without license—injunction — constitutionality. The statute which authorizes injunction to restrain the practice of medicine and surgery without a license is

constitutional for the reason that such practice constitutes a nuisance under the general law of the state, and chancery has, from time immemorial, possessed jurisdiction to enjoin nuisances; and this is true irrespective of the question whether the district court may be constitutionally vested with an equitable jurisdiction not possessed by chancery courts when the state constitution was adopted.

State v Howard, 214-60; 241 NW 682

Remedy at law. Equity will not assume jurisdiction to declare illegal and to enjoin the enforcement of a contract between an employer and a local labor union on behalf of the employees when the controversy may readily be presented in a law action. So held where the contract required the employer to retain certain sums from the pay of each employee and to pay the same to the local union as members' dues, it appearing that some of the employees had objected to the retention of said sums.

Des Moines Railway v Amalgamated Assn.. 204-1195; 213 NW 264

Setting aside executed contract or deed. A court of equity is not warranted in setting aside an executed contract such as a warranty deed in the absence of actual or constructive fraud.

O'Brien v Stoneman, 227-389; 288 NW 447

State statute providing review on tax assessments—federal equity jurisdiction. The statutes offering a remedy to banks for review of excessive assessments, held, not sufficiently adequate to preclude federal jurisdiction in equity.

Munn v D. M. Nat. Bank, 18 F 2d, 269

Unallowable cancellation in equity of insurance policy. Equity will not, after the death of the insured, entertain jurisdiction to cancel the life insurance policy unless exceptional circumstances render cancellation necessary for the protection of the insurer. The fact that the policy becomes incontestable after two years does not constitute such circumstance when said time has not yet elapsed.

Bankers Life v Bennett, 220-922; 263 NW 44

Vacation of plat. A county auditor's plat may be vacated by a court of equity at the instance of a plaintiff who, since the plat was duly executed, has become the owner of all the various tracts embraced in said plat.

Schemmel v Town, 214-321; 242 NW 89

II LAW AND EQUITY CONCURRENT

Law action tried by equity procedure—errors must be assigned. Where an essentially law action to recover a money judgment is brought and recognized as such by the parties and the court, it is not, without a record entry transferring it to equity, converted to an equity action because the parties with the consent of the court use an equity procedure, and appeal therefrom will be dismissed when no errors are assigned.

Petersen v Ins. Co., 225-293; 280 NW 521

III LAW OR EQUITY DEPENDING ON ALLEGATIONS AND RELIEF

Calendars—right to trial at law. A plaintiff who, in an ordinary action on a promissory note, alleges a fraudulent transfer by defendant of his property and prays for an attachment and a decree subjecting the property to his judgment, does not, by docketing said action in equity, deprive defendant of the right to a transfer to the law calendar of that part of the action which involves his liability on the note.

Fed. Bk. v Geannoulis, 203-1385; 214 NW 576

Claims against estate—belated filing—equitable circumstances. While establishing a probate claim is a law proceeding, the determination of the existence of peculiar circumstances relieving the failure to file a probate claim within the statutory period is an equitable proceeding.

Ontjes v McNider, 224-115; 275 NW 328

Oral agreement to devise realty—insufficiency of evidence to set aside. In an equity action to recover a sum of money alleged to be the share of plaintiff's intestate in the estate of his father, where evidence shows the mother of plaintiff's intestate was left with five minor children, and that she filed a partition proceeding involving 400 acres of land owned by her husband, who died intestate, and she thereafter was the successful purchaser at a sale of the land, and that, as a part of the purchase price, she executed a note and mortgage on the land to a guardian appointed for the minor children to secure their respective shares in the father's estate, and that, as the children became of age, there were no guardianship funds to pay their respective shares, and that it was orally agreed that the children would receipt for their respective shares, in cash, to the guardian (altho no cash was received), and the mother agreed to, and did, execute a will leaving the land to the children in equal shares, the plaintiff's evidence was insufficient to set aside the agreement, and the trial court's order, affirming the agreement and impounding the mother's will until her death, was affirmed.

Baumann v Willemssen, 228- ; 292 NW 77

Damages in lieu of specific performance. A party who has failed to establish his right to specific performance, may not complain that the court of equity refused to allow damages in lieu of specific performance, and relegated him to an action at law as to such damages.

Dunlop v Wever, 209-590; 228 NW 562

Redemption—law remedy to remove tax sale cloud. A property owner, presumed to have been informed of his tax assessments, know-

III LAW OR EQUITY DEPENDING ON ALLEGATIONS AND RELIEF—concluded

ing that they will become due and payable without demand, yet allowing the taxes to become delinquent and the property to go to tax sale, may not resort to equity to remove the cloud on his title when he has by redemption a plain, speedy, and adequate remedy at law.

Jones v Mills County, 224-1375; 279 NW 96

Trial de novo. An action which plaintiff denominates when commenced as "in equity", and which is fully tried "in equity" without objection or effort to transfer to law, will, on appeal by defendant, be treated as "in equity" and tried de novo, without assignment of error.

Bates v Seeds, 223-70; 272 NW 515

IV GRANTING OF RELIEF IN GENERAL

(a) IN GENERAL

Discussion. See 18 ILR 266—Champerty with third party; 24 ILR 337—Mistake of law

Common fund doctrine.

In re Lear, 204-346; 213 NW 240

Accounting — setting aside final report. Principle reaffirmed that the final report of an executor or administrator, after due approval and discharge, will be set aside only on a clear and satisfactory showing of fraud, mistake, or other equitable grounds. Evidence held to justify such order.

Becker v Becker Bros., 202-7; 209 NW 447

Defense arising or discovered since judgment entered. The fact that a claim, when judgment was entered thereon, had been discharged in bankruptcy is not a "defense which has arisen or been discovered since the judgment was rendered," and therefore within the power of a court of equity to annul or modify.

Harding v Quilan, 209-1190; 229 NW 672

Duty to set aside fraud-induced deed. When a deed has been manifestly obtained by the fraud of the grantee, and without consideration, a court of equity must set it aside, on a distinct prayer for such relief, and not assume to reform it, without any prayer therefor, and decree a life interest in the defrauded grantor.

Guenther v Kurtz, 204-732; 216 NW 39

Fraudulent acts by bank cashier—repudiation of only part of transaction. Where the cashier of the plaintiff bank obtained credit with the defendant bank in order to conceal a shortage in the accounts of the plaintiff, giving unauthorized drafts on the plaintiff and crediting the plaintiff with the amounts, it was erroneous for the court to find that the cashier had borrowed from the defendant to pay the plaintiff and then paid the defendant with the drafts with the result that the defendant then held assets of the plaintiff equal to the amount of the drafts. To hold thus would permit the plaintiff bank to accept payment of the shortage through the unauthorized acts of its agent, the cashier, and at the same time repudiate the remainder of the transaction and deny the right of the defendant to use the unauthorized drafts.

Community Sav. Bk. v Gaughen, 228- ; 289 NW 727

Equitable relief for fraud. In action for equitable relief and damages, where proof justified the purely equitable relief of quieting title and cancellation of mortgage because of fraud, entry of personal judgment for damages against grantee was proper.

Rance v Gaddis, 226-531; 284 NW 468

Equitable assignment. The oral statement by the president of a bank, made to the payee of a draft at the time of its issuance and delivery, that the draft "operated as an assignment" of an equal amount of money then in the hands of the drawee-bank and belonging to the issuing bank does not constitute an actual assignment.

Andrew v Bank, 215-290; 245 NW 329

Promise to apply proceeds—equitable assignment. Promise not to sell or mortgage any real estate (which was not described) and that proceeds of any sale or mortgage should be applied on payment of debt, held not to create an equitable assignment of proceeds of sale or mortgage.

Kuppenheimer v Mornin, 78 F 2d, 261

Father promising son's creditor not to change son's legacy. Simply because a testator contracts with a bank not to change his will bequeathing $10,000 to a son who was indebted to the bank, and when the father did not contract to pay the son's debt, there is no "unjust enrichment" of devisees and legatees who accept property willed to them, although father during his lifetime had depleted his estate by property transfers and conveyances to his other children.

Evans v Cole, 225-756; 281 NW 230

Oral agreement to devise realty—insufficiency of evidence to set aside. In an equity action to recover a sum of money alleged to be the share of plaintiff's intestate in the estate of his father, where evidence shows the mother of plaintiff's intestate was left with five minor children, and that she filed a partition proceeding involving 400 acres of land owned by her husband, who died intestate, and she thereafter was the successful purchaser at a sale of the land, and that, as a part of the purchase price, she executed a note and mortgage on the land to a guardian appointed for the minor children to secure their respective shares in the father's estate, and that, as the children became of age, there were no guardianship funds to pay their respective shares, and that it was orally agreed that the

children would receipt for their respective shares, in cash, to the guardian (altho no cash was received), and the mother agreed to, and did, execute a will leaving the land to the children in equal shares, the plaintiff's evidence was insufficient to set aside the agreement, and the trial court's order, affirming the agreement and impounding the mother's will until her death, was affirmed.

Baumann v Willemssen, 228- ; 292 NW 77

Improvements—special assessment—appeal as sole remedy. The objection that the board of supervisors levied an assessment for a highway improvement against an entire 40-acre tract, instead of that part only which was at right angles to the improvement, must be presented on appeal from the assessment, and not by an independent action in equity.

Paul v Marshall County, 204-1114; 216 NW 736

Legal and conventional subrogation distinguished. Legal subrogation exists only in favor of one who, to protect his own rights, pays the debt of another. Conventional subrogation arises only upon agreement, between the lender and the debtor or old creditor, that the lender shall be subrogated to the old lien.

HOLC v Rupe, 225-1044; 483 NW 108

Liens—impressment of trust on proceeds of sale. An understanding between a lienor and a lienee to the effect that personal property upon which the lienor has a lien may be sold by the lienee, and the lien satisfied from the proceeds of the sale, will be enforced in equity by impressing a trust on said proceeds. So held as to rent due a landlord.

Stegemann v Bendixen, 219-1190; 260 NW 14

Origin and theory of subrogation. The doctrine of subrogation is purely of equitable origin and grew out of the need, in aid of natural justice, in placing a burden where it of right ought to rest.

HOLC v Rupe, 225-1044; 483 NW 108

Relief notwithstanding partial failure of recovery. A subcontractor on a public improvement who, in an equitable action, establishes a contract right of recovery against the principal contractor is entitled to judgment accordingly, notwithstanding the fact that, because of his noncompliance with the statute, he is denied recovery, either against the surety for the principal contractor, or against the municipality, or against the undistributed funds in the hands of the municipality.

Zeidler Co. v Ryan, 205-37; 215 NW 801

Restoration of status quo. An incompetent, through his guardian, may, on proper grounds, maintain an action to set aside and annul a judgment in foreclosure without offering to restore the status quo, when the incompetent received no part of the money secured by the mortgage.

Engelbercht v Davison, 204-1394; 213 NW 225

Equitable assignment—sheriff's certificate—homestead—redemption by judgment creditor. Where judgment creditor redeemed from foreclosure sale and secured an assignment of the sheriff's certificate from the mortgagee, and appellant-owners failed to make a statutory redemption, the judgment creditor was an equitable assignee of the sheriff's certificate entitled to deed, even assuming that he had no right to redeem because of the homestead character of the land, since it made no difference to appellant-owners whether the mortgagee or judgment creditor was the holder of the certificate.

Ackerman v Bank, 228- ; 291 NW 150

Unjust enrichment as basis for recovery. No basis for recovery against a city, on the theory that the city has been unjustly enriched and must pay therefor, is established by proof of the reasonable value of that which the city has received.

Roland Co. v Town, 215-82; 244 NW 707

Interstate shipment—building contractor not consignee—nonliability. A common carrier's petition against a building contractor alleging transportation as a benefit received, alleging unjust enrichment and nonpayment, and seeking to collect transportation charges on an interstate shipment of building material is demurrable and fails to state a cause of action in omitting an allegation showing a contractual liability on the defendant contractor as a party to the shipping contract.

Des Moines & C. I. Ry. v Ins. Co., 224-15; 276 NW 56

Right to reconvert—consent of spouse. The right of a legatee to make and enforce an election to take real estate in lieu of a devise of the proceeds thereof does not depend in any degree on the consent of the spouse of such legatee.

In re Warner, 209-948; 229 NW 241

Scope of relief. In equitable action where pleading "was not as clear as it might have been", yet prayed for general equitable relief, court enforced express provisions of legal contract to preserve rents and profits under the rule that where general equitable relief is prayed, any relief may be granted consistent with the pleadings and the evidence.

Wagner v Securities Co., 226-568; 284 NW 461

Supreme court—no power to enjoin unlicensed person practicing law. Supreme court has no implied power, by virtue of its exclusive statutory power to admit persons to prac-

IV GRANTING OF RELIEF IN GENERAL—continued

(a) IN GENERAL—concluded

tice as attorneys, .to enjoin unlicensed law practice, for it has no original jurisdiction to grant injunctive relief, and an equity action therefor by members of bar is in no way related to the matter of admission to bar or disbarment.

Johnson v Purcell, 225-1265; 282 NW 741

Unpaid stock subscription—nonliability. A subscriber for corporate stock who is not a promoter of the purported corporation is not liable on his fraud-induced, unpaid stock subscription contract in an action by the receiver of the corporation when the charter of the corporation has been judicially annulled, subsequent to the subscription contract, by the state, for fraud perpetrated on the state in obtaining the charter; in other words, the so-called English "equitable trust fund doctrine" does not apply to such a condition.

Fundamental reason. Such purported corporation, having been conceived, born, and nurtured in fraud, was never, in truth or fact, a corporation de jure or de facto, in a business sense.

State v Packing Co., 216-1344; 249 NW 761; 90 ALR 1339

Accounting—trial de novo—record. Tho defendant, in an equitable action for an accounting, unsuccessfully moves at the close of plaintiff's testimony for a dismissal of the action, yet the final determination of the action must be determined, in the trial court and on appeal, on the entire record testimony including that introduced by said unsuccessful movant.

Economy Co. v Honett, 222-894; 270 NW 842

(b) EQUITABLE LIENS GENERALLY

Claimant planting crops subsequent to receiver's appointment—value of labor and material allowed. Claimant who, before institution of foreclosure suit in which receiver for mortgagor was appointed, had furnished and planted seed under oral agreement with mortgagor's heirs held entitled to reasonable value of labor and material from receivership fund.

Chicago JSL Bank v Hargrove, (NOR); 234 NW 801

Wife's deed to husband's creditors as mortgage. Wife's deed to creditors in payment of husband's notes, under circumstances, construed as mortgage with right to creditors to foreclose.

Allen v Hume, 227-1224; 290 NW 687

Franchise renewal—no corporate obligation nor lien. Statute requiring majority stockholders, voting for renewal of corporate franchise, to purchase objecting stockholders' stock creates no liability against the corporation nor lien on its assets.

Terrell v Tel. Co., 225-994; 282 NW 702

Attachment liens set aside—insolvency. In an equity action brought by trustee in bankruptcy to set aside and annul an attachment lien upon the bankrupt's property, the provisions of the Bankruptcy Act are such that it is essential that the person attacking a lien must show that debtor was insolvent when the lien was obtained.

Matthews v Engineering Co., 228- ; 292 NW 64

Impressment of lien—special execution. A court of equity upon impressing a lien on property should order the issuance of a special execution for the sale of the property and the satisfaction of the lien.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

No lien. Where no real estate was described, promise not to convey or mortgage any real estate then owned until payment of debt guaranteed by promisor, and that proceeds of any sale or mortgage should be applied on such debt, held not to have created equitable lien on promisor's real estate.

Kuppenheimer & Co. v Mornin, 78 F 2d, 261

Partners—agreement for lien—construction. A partnership agreement which provides that it shall stand as security for all money "advanced to said business" by the second party, and all indebtedness of the first party to the second party, does not embrace the right to a lien for money not shown to have been "advanced to said business", nor for money advanced subsequent to the said agreement.

Reilly v Woods, 216-419; 249 NW 381

Testator's contract to devise to son—will changed after loan relying thereon. A bank, after contracting with debtor's father to wait until father's death for payment of the son's debt from his share in father's estate, under existing devise in will, has a right to impress an equitable lien on the land when it discovers that the father had changed his will and was fraudulently, without consideration, transferring his property to others than the debtor son.

Emerson Bank v Cole, 225-281; 280 NW 515

Vendor's and equitable lien contrasted. The power of a court of equity to establish an equitable lien is quite independent of the law applicable to a vendor's lien.

Bogle v Goldsworthy, 202-764; 211 NW 257

(c) MARSHALING ASSETS

Discussion. See 24 ILR 328—Marshaling assets

Marshaling assets—inadequate showing in order to apply doctrine. An assignee of property subject to a prior judgment is not entitled to the benefit of the doctrine of marshaling of assets by simply alleging and proving the naked fact that the judgment holder has mort-

gage security on other property for his judgment debt.

Iowa Co. v Clark, 213-875; 237 NW 336

Marshaling of assets. In the foreclosure of a valid and good-faith real estate mortgage by a mortgagee who also holds chattel security for the same debt, a judgment creditor and a junior lienholder may not have a marshaling of assets in the absence of any duly joined issue relating thereto, and when the real estate is of a value sufficient to satisfy all liens against it; neither may the court arbitrarily decree that the plaintiff's mortgage shall have priority over the junior lien to an amount less than the full amount due on the mortgage.

White v Smith, 210-787; 231 NW 309

Partnership assets marshaled. Where partnership property and the individual property of all the partners are in the hands of the partnership receiver, a creditor whose claim is against the partnership because of a partnership transaction, and also against an individual partner because the partner has individually guaranteed the claim, may have the assets so marshaled that he will share in the partnership property along with the other partnership creditors, and then resort to the individual property of the guaranteeing partner to the exclusion of partnership creditors.

Simmons v Simmons, 215-654; 245 NW 597

Valuation of accounts. The fair valuation of accounts is that amount which, with reasonable diligence, can be realized from their collection within a reasonable time, and the amount as shown on the face of ordinary retail business accounts is not usually their fair value, tho of course accounts may be such that their face value, as a matter of fact, is their fair value.

Matthews v Engineering Co., 228- ; 292 NW 64

Valuation of business assets—evidence. In an equity action by trustee in bankruptcy to set aside an attachment lien wherein the attaching creditor urges the insufficient showing of the debtor's insolvency, the evidence of the trustee as to fair valuation of the personal assets of a lumber company was sufficient to sustain the finding of the court as to valuation. Since the record stipulated the appraisal found by two competent lumbermen, acquainted with such values, substantiated the value placed thereon by the trustee, and, as the trustee was not bound by any one witness' testimony, it was the function of the court to consider all the admissible evidence.

Matthews v Engineering Co., 228- ; 292 NW 64

Valuation of realty—evidence. In an equity action brought by trustee in bankruptcy to set aside an attachment lien on bankrupt's property, where judgment creditor complains of the evidence establishing the valuation in order to determine debtor's insolvency, and where creditor relies on a valuation of $4500 offered for the property several years previous, but which offer had not been subsequently made by anyone, the reasonable finding, in view of all the evidence, is that the fair value of such property did not exceed $2600.

Matthews v Engineering Co., 228- ; 292 NW 64

V PRINCIPLES AND MAXIMS

Preservation of property by administrator. In proceeding to recover from surety on administrator's bond, principle held applicable that a trustee is presumed to have preserved the property and that such presumption stands until overcome by evidence. Fact that such proceeding is at law does not preclude application of equitable principles.

In re Willenbrock, 228- ; 290 NW 503

Clean hands—collateral transaction. Principle recognized that a plaintiff is not deprived of his right to equitable relief in a given transaction simply because his hands were somewhat soiled by fraud in another subsequent transaction which is only incidentally or collaterally connected with said prior transaction.

Benson v Sawyer, 216-841; 249 NW 424

Construction—clear and unambiguous wills. In equitable action for construction of wills of deceased husband and wife, where husband's will provided for payment of debts and funeral expenses and devised to his wife all his estate; and where wife's will contained certain specific bequests and directed that remainder and after-acquired property be divided into equal shares for distribution, held, both wills to be clear and unambiguous and therefore not open to construction. Actions for that purpose are entertained by a court of equity or probate only when there is uncertainty or ambiguity.

Anderson v Meier, 227-38; 287 NW 250

Equal equities—which shall prevail. Principle reaffirmed that as between equal equities, the first in time shall prevail—that the first in time shall be first in right. Applied as between special assessment certificates issued at different times against the same lots or land for different improvements.

Inter-Ocean Co. v Dickey, 222-995; 270 NW 29

Two innocent parties—one liable who made wrongful act possible. Where one of two innocent parties must suffer from the wrongs of a third person, he who placed the wrongdoer in a position to do the wrong must suffer the consequences of his act.

Allen v Hume, 227-1224; 290 NW 687

Equitable representation—limit to doctrine. The rule that in some instances a person may,

V PRINCIPLES AND MAXIMS—concluded

on the principle of "equitable representation", be bound by an adjudication bearing on the title to realty, tho said person is not a party to the action in which the adjudication is had, cannot be extended to include persons who are in being and subject to being brought under the jurisdiction of the court, and who are entitled to notice and hearing as to the matter in question.

Skelton v Cross, 222-262; 268 NW 499; 109 ALR 129

Reformation of deed—refusal to surrender advantage. The grantee in a deed of conveyance who has obtained a decree quieting his title on the plea that the deed was in satisfaction of the grantor's prior mortgage on the land may not, while insisting on all the advantages accruing to him under the decree, have the deed so reformed as to include the grantor's homestead, on the claim that the homestead was mistakenly or fraudulently omitted from the deed.

Galvin v Taylor, 203-1139; 212 NW 709

Sale—tax tender as doing equity before enjoining deed issuance. One who allows his property to go to tax sale and later seeks to enjoin the county from issuing a tax deed claiming a void sale must, if seeking equity, do equity by tendering the amount of the taxes due and attempt to make redemption as by statute provided.

Jones v Mills County, 224-1375; 279 NW 96

VI LACHES AND STALE DEMANDS

Action in 1923 to enjoin excessive assessment of 1919—no laches. Banks suing in 1923 to enjoin excessive levy in years 1919 to 1922, inclusive, held, not estopped by laches.

Munn v D. M. Nat. Bank, 18 F 2d, 269

Federal court rule as applied to state statute. The rule in federal courts in equitable actions is that state statutes of limitations are not controlling but will be followed in application of the doctrine of laches unless the circumstances of the particular case are convincing that a shorter or longer period would be just.

Crawford Bank v Crawford County, 66 F 2d, 971

Limitation of action—failure to plead—no question of laches presented. In action to quiet title by owner of land against a tax deed which had been issued on an insufficient affidavit of service of notice of expiration of redemption from tax sale, where the right to redeem had not expired, and no claim of statute of limitations was made, no question of laches was presented.

Weideman v Pocahontas, 225-141; 279 NW 146

Banking corporations—stockholders—double liability—laches as bar. Record reviewed and held insufficient to show such laches as would bar an action to enforce, against the estate of a stockholder, the latter's statutory, superadded liability on capital stock.

Bates v McGill, 223-62; 272 NW 535

Bridge abandoned—sleeping on one's rights. A property owner who, with his grantor, has acquiesced for over a half century in the action of public authorities in substituting a solid earth embankment for a bridge spanning a natural drain across a public highway, need not expect a court of equity to listen to his belated demand for a reinstatement of the bridge.

Thomas v Cedar Falls, 223-229; 272 NW 79

County paying support of insane person—*laches of officials imputed to county.* When a county was not liable for the support of a person committed to a state institution as insane, and through the negligence and laches of its officials paid such support for about 14 years before objecting, the negligence was imputed to the county, and the bar of laches prevented a recovery for such expenditures from the county which should have paid, but the burden of continuing payments was on the other county from the time payments ceased.

State v Clay County, 226-885; 285 NW 229

Detachment of territory—unallowable defense. The fact that territory has remained within a municipality for some half century without the institution of proceedings to have it detached, furnishes no basis, when such proceedings are instituted, for the defensive plea of laches, equitable estoppel, or acquiescence.

McKeon v Council Bluffs, 206-556; 221 NW 351; 62 ALR 1006

Estoppel to rely on limitation—essential evidence. The maker of a promissory note cannot be held estopped to plead the statute of limitation in the absence of evidence of some act of omission or commission upon which the holder relied to his detriment.

King v Knudson, 209-1214; 229 NW 839

Laches—nonoperative as to unknown issue. Where an equitable issue involving an oral contract is unknown to plaintiff until pleaded by defendant, plaintiff is neither guilty of laches in withholding the issue nor thereby deprived of its benefits, when, because of death, the defendants have in the meantime lost the benefit of the testimony of one of the parties to the oral contract and equitable issue.

Emerson Bank v Cole, 225-281; 280 NW 515

Unavailable plea. Laches will not be imputed to a person in possession of property to the advantage of one who has contracted in relation thereto without inquiry or investigation as to the rights of such possessor.

Lutton v Steng, 208-1379; 227 NW 414

Licenses—for occupations—estoppel—evidence—sufficiency. It is futile for the defendant, in an action by the state to enjoin the defendant from practicing medicine without a license, to plead that the state and its officers are estopped to question his right to so practice, and assume to support such plea by the fact that the state had not, for twenty years, questioned his right so to practice tho he had never offered to take the statutory examination for any recognized system of practice.

State v Howard, 216-545; 245 NW 871

Partnership—accounting. An action to establish a partnership of some 35 years standing and for an accounting thereunder is not barred by laches when the plaintiff moved with reasonable promptness after his interest was questioned.

Hull v Padgett, 207-430; 223 NW 154

Principles—sleeping on rights. One who, without requiring the production of a note, innocently pays the note to one who is not the agent of the holder may not insist that the said holder, and not himself, should suffer the loss, especially when the latter, upon discovering the truth, does nothing to protect himself against the solvent wrongdoer.

Ritter v Plumb, 203-1001; 213 NW 571

Right to corporate transfer of stock. Delay of some seven years by a pledgee of corporate shares of stock, to enforce his right to have the stock transferred on the corporate stock records, will not bar the enforcement of said right when there are no unprotected rights of third parties intervening and when the corporation has not been harmed by the delay.

Bankers Tr. v Rood, 211-289; 233 NW 794; 73 ALR 1421

VII ESTOPPEL GENERALLY

Discussion. See 1 ILB 142—Estoppel by silence; 17 ILR 472—By record and in pais

"Estoppel" and "waiver" contrasted. Principle reaffirmed that, to constitute waiver, action to the prejudice of the party relying thereon is not essential, while such showing is essential to estoppel.

Euclid Bank v Nesbit, 201-506; 207 NW 761

Acting to one's detriment. An estoppel necessitates proof that a party has acted to his detriment because of something done by the other party.

In re Sarvey, 206-527; 219 NW 318

Innocent parties—most blameworthy to suffer. Where one of two innocent people must suffer because of the wrongful act of a third person, that one must suffer who has placed the third person in a position to do the wrong.

Deater v Bank, 223-86; 272 NW 423

Wife's deed for husband's debt—cancellation—consideration—estoppel. Wife who was not illiterate, and who deeded her land in payment of husband's notes, and who, by placing deed in husband's hands, clothed him with apparent authority to deliver the deed, thereby inducing creditors to surrender other land owned by the husband, is estopped from questioning the validity of the deed. The consideration to wife was advantage to husband and detriment to creditors.

Allen v Hume, 227-1224; 290 NW 687

Absence of fraudulent intent. Principle reaffirmed that a fraudulent intent is not a necessary element of an equitable estoppel.

Browning v Kannow, 202-465; 210 NW 596

Fundamental element. Fundamentally a plea of estoppel demands proof that the person alleged to be estopped has done something, or omitted to do something which he ought to have done, which has justifiably caused the pleader to change his position to his detriment.

Macheak v Adamsen, 214-446; 239 NW 574

Inconsistent conduct not relied on. An estoppel may not be rested on alleged inconsistent conduct on which the pleader never relied.

Hartford Co. v Helsing, 220-1010; 263 NW 269

Streets and alleys—estoppel to open. A city estops itself from asserting any right in and to a public alley when, knowing that a person has taken possession of such alley under a claim of right, it permits such person to remain in undisturbed possession under such claim for ten years and to erect valuable improvements on such alley.

Page Co. v Clear Lake, 208-735; 225 NW 841

Fraud as essential element. If there be no fraud, actual or constructive, in the execution and delivery of a deed of conveyance, there can be no estoppel against the grantee.

McCloud v Bates, 220-252; 261 NW 766

Appeal—failure to file brief and argument—estoppel to assert claim. In action by subcontractor against principal and drainage district jointly to establish claim as a lien on the district's fund, where drainage district filed no brief or argument, court need give no attention to its plea that subcontractor was estopped from asserting claim by his action in accepting auditor's warrant for a lesser amount than that to which he was entitled.

Graettinger Works v Gjellefald, (NOR); 214 NW 579

Adoption by estoppel. Evidence that at the age of 13 months the plaintiff was taken by foster parents from her natural parents under an agreement to adopt her, and that she was

VII ESTOPPEL GENERALLY—continued

reared by the foster parents, the foster mother referring to her as a daughter in conversation and in a will, established an adoption by estoppel, estopping other heirs of the foster mother from denying the adoption.

Vermillion v Sikora, 227-786; 289 NW 27

Adjudication—inconsistent attitude of party. A plaintiff who successfully prevents an attempted intervention on the grounds that the intervener's claim would not be prejudiced by the adjudication of the issues between the plaintiff and the defendant, may not thereafter claim that the adjudication so had did adjudicate the claim of the party attempting to intervene.

Tutt v Smith, 201-107; 204 NW 294; 48 ALR 394

Establishment by consent—user—estoppel. In an action to enjoin the repair of a dike originally constructed in connection with drainage system created jointly by adjoining landowners, including plaintiff's predecessor in title, and used with knowledge of plaintiff for over 20 years without objection, principles reaffirmed (1) that where there is proof of more than mere user, the statute providing that an easement cannot be established by proof of mere user alone does not apply, and (2) that the owner of a dominant estate may by consent, express or implied, estop himself from insisting upon adherence to the principle that the owner of a servient estate has no right to interfere with the natural flow of water in a well-defined course so as to cast it back upon the dominant estate.

Dodd v Aitken, 227-679; 288 NW 898

Establishment—estoppel to question validity. One who redeemed land from tax sale for nonpayment of drainage assessment installments and who acquiesced in drainage proceedings during years in which her land received benefits of the improvement is estopped from questioning establishment of the drainage district.

Whisenand v Van Clark, 227-800; 288 NW 915

Contested election — appeal from consent judgment. An election contestant may not appeal from the judgment of the contest board holding the election in question illegal and providing for the calling of a new election by said board, when he consented to the entry of such judgment; nor may an estoppel to question such appeal be based upon the fact that the official board of which appellees were members refused to recognize the validity of the new election called by the contest board.

Leslie v Barnes, 201-1159; 208 NW 725

Erroneous but nonreversible error. Where an indorser of a promissory note pleaded an estoppel as consisting (1) of a mere promise by the payee to collect the note from the maker and a prior indorser, and (2) of a later statement by the payee that the note had been paid, the submission of said pleaded promise in one instruction, and of said statement as to payment in another instruction, thereby inferentially indicating that there were two estoppels, will not be deemed reversible error when the record reveals the fact that the maker and prior indorser both remained solvent up to the time and after the statement as to payment was made.

Birmingham Bank v Keller, 205-271; 215 NW 649

Estoppel to deny agent's authority. In payee's action against bank which had cashed checks indorsed by payee's attorney without actual authority, where bank defended on ground that payee was estopped from asserting lack of authority, held, strict rules relating to equitable estoppel based upon false misrepresentation or concealment were not applicable in determining such defense.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Banking corporations—insolvency—estoppel to present claim. Plea of estoppel to present a claim in bank receivership reviewed and held not sustained.

Andrew v Bank, 218-1313; 256 NW 292

Equitable estoppel—unrecorded conveyance —pleader's burden. One alleging an equitable estoppel must prove it by clear, satisfactory, and convincing evidence, hence in asserting in a fraudulent conveyance action, an equitable estoppel against the wife of a bank stockholder, because she withheld from record, for many years, a deed to herself from her husband, the creditors of the bank have not sustained the burden of proving estoppel when they admit that they did not deposit their money on the wife's representation, nor upon their belief in, the husband's ownership of the land.

Bates v Kleve, 225-255; 280 NW 501

Wrongful issuance of certificate of deposit —timely repudiation. A party to whom a bank, without authority, has issued a certificate of deposit in payment of a claim due from the bank, may not be deemed estopped to repudiate such certificate, or be deemed to have ratified the issuance of such certificate, when his repudiation was reasonably prompt, and when no injury resulted to the bank or to its receiver from any delay in repudiating.

Andrew v Bank, 217-232; 251 NW 860

Bills and notes—estoppel when negotiable paper transferred by apparent owner. An owner who leaves in the hands of another, negotiable paper or nonnegotiable choses in action or security which can be transferred without the execution of further documents

thereby creates an appearance of ownership or control in the custodian, and is estopped as against an innocent party who has acted in reliance on the appearance thus created.

Matalone v Bank, 226-1031; 285 NW 648

Consideration, failure of — nonestoppel to plead. The maker of a promissory note is not estopped to plead failure of consideration for the note as to him because of the fact that, subsequent to the signing, he was a party to a contract under which there was a novation of security.

Insell v McDaniels, 201-533; 207 NW 533

Failure of consideration—when plea unallowable. The maker of a promissory note may not plead failure of consideration when his own fraud brought about such failure.

Cloud v Burnett, 201-733; 206 NW 283

Failure to reply to letter as to ownership of instrument. The acceptor of a trade acceptance does not estop himself from pleading defensive matter by failing to reply to a letter from an indorsee to the effect that the indorsee has purchased the acceptance.

First N. Bank v Power Co., 211-153; 233 NW 103

Grounds—giving note for goods. A vendee who executes and delivers his promissory note for goods purchased does not thereby estop himself from the recovery of damages consequent on feeding the goods to his stock.

Crouch v Remedy Co., 205-51; 217 NW 557

Holdership in due course—fraud. The maker of a negotiable promissory note may not be said to be estopped to plead fraud in the inception of the note, against a transferee, on a record which fails to show that the maker's conduct ever came to the knowledge of the transferee or in any manner controlled his conduct.

State Bank v Behm, 202-192; 209 NW 523

Holdership in due course—inconsistent attitude. The maker of negotiable promissory notes is not estopped to plead fraud in the inception of the notes because he appeared in the insolvency proceedings against the payee and obtained judgment for the amount of the notes (which had been negotiated), and in such proceedings took the position, in effect, that the indorsees were holders in due course, when the evidence fails to show that anyone had relied on such course of conduct to his injury.

Citizens Bank v Martens, 204-1378; 215 NW 754

Implied authority to negotiate note. The maker of a nonnegotiable promissory note will not be held to be estopped to deny liability on the theory that he impliedly clothed the payee with authority to negotiate the note, when the entire transaction contemplated such transfer.

Hubbard v Wallace, 201-1143; 208 NW 730; 45 ALR 1065

Party entitled to allege error. A plaintiff who prays for and is given judgment on a promissory note may not insist, on appeal by the defendant, that a particular and material provision of the note was not embraced in the note when it was executed and delivered.

Anderson v Foglesong, 201-481; 207 NW 562

Failure to act promptly caused by act of agent. Where the plaintiff's name was called outside a theatre as winner of a bank night drawing, and when she entered she was told that it was her husband's name that was called, and he was told he was one second too late when he followed her in, the theatre could not claim that neither she nor her husband had claimed the prize within the time set. If the husband was the one entitled to the prize, the theatre was estopped to claim the advantage of the one-second delay caused by the act of their agent in calling the wrong name outside the theatre.

St. Peter v Theatre, 227-1391; 291 NW 164

Payment to holder's agent. The holder of a promissory note who permits another person for a series of years to collect both interest and installments of principal on the note will not be permitted to deny the authority of such other person to make all collections on the note. And it is immaterial that the note was not surrendered to the maker when he made his final payment.

Ragatz v Diener, 218-703; 253 NW 824

Silence. The holder of a note and mortgage as collateral, who stands by, and even encourages and assists the maker and payee of the note to execute a rescission of the transaction out of which the note and mortgage arose, may not thereafter assert against the maker his right as a collateral holder, the said maker being ignorant that the said obligations were being so held as collateral.

Iowa Bank v Rons, 203-51; 212 NW 362

Bonds — validity — estoppel to question. A duly appointed referee in partition will not be permitted to question the authorized execution in his name of a bond as such referee, when, subsequent to the said execution and filing of said bond, he reports to the court and under oath, that he had given said bond and had effected a sale of said property.

Indemnity Ins. v Opdycke, 223-502; 273 NW 373

Liability of surety—authority of agent. A surety company will not, in an action on a bond issued in its name by its agent, be permitted to dispute the authority which it has specifically conferred on said agent in a written power of attorney filed with the clerk of the district court

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and relied on by said clerk in approving the bond, the obligee in the bond having no knowledge of any limitation on the authority of the agent.

State v Packing Co., 219-419; 258 NW 456

Permitting reliance on unauthorized bond. The surety on an appeal (supersedeas) bond is estopped to question its liability on the bond when, knowing of the execution of the bond by its agent and the filing and acceptance thereof, it permits the appellee-obligee and the clerk accepting the bond, innocently to act and rely on said bond until the full purpose of the bond had been accomplished.

State v Packing Co., 219-419; 258 NW 456

Pleading one's own wrong. In an action on a bond given by a bank as principal and by its directors as sureties to secure a trust fund which was in the possession of the bank, the defensive plea that plaintiff was estopped from prosecuting the action by his laches in so doing, is not available to the sureties when they at all times, before the bank became insolvent, had unhampered opportunity to compel compliance with the bond, and thus protect themselves, but, on the contrary, manifestly connived at a continuous breach of the bond in order to conserve the interest of their bank.

Olin Assn. v Bank, 222-1053; 270 NW 455; 112 ALR 1205

Statutory bond — validity questioned. The sureties on a bond to secure deposits of county funds in a bank who, upon the failure of the bank, induce the county, because of their suretyship, to institute an action against the receiver for an order of preference in the payment of said deposits, and who intervene in such action because and on the basis of their confessed suretyship, and who later, after preference is denied, induce the county to delay action on the bond under a promise that, as soon as all dividends have been paid on the deposit account, they will, without further question, pay the balance due under the bond, will not be permitted, when sued on the bond, to question either the validity of the bond or the validity of the deposits made thereunder.

Plymouth County v Schulz, 209-81; 227 NW 622

Statutory bonds—estoppel to deny. A bond given for the performance of a public building contract, and containing some of the conditions which the statute mandatorily prescribes for such a bond, anything in any contract to the contrary notwithstanding, will be deemed a statutory bond, with all the statutory conditions impliedly inserted therein.

Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495

Corporations—issuance of stock. One, who has explicit knowledge of the facts under which corporate shares of stock were issued to him and later accepts and retains a dividend paid on the stock, will not, at least as against creditors of the corporation, be heard to say that the stock was improperly issued to him.

Andrew v Bank & Trust, 219-939; 258 NW 925

Necessity to plead. Under an allegation that plaintiff was the owner of corporate stock when it was sold, no defense is presented by a general denial. If defendant claims that plaintiff is estopped to assert such ownership, then defendant must specially so plead.

Wilson v Lindhart, 216-825; 249 NW 218

Stock subscriber — nonbar or estoppel. A decree that a subscriber for corporate stock could not recover of the corporate receiver the amount already paid to the corporation on his subscription contract—such being the sole issue—does not estop the subscriber, when sued by the receiver for the unpaid amount of said contract, from pleading in defense that the purported corporation never had any corporate existence.

State v Packing Co., 216-1344; 249 NW 761; 90 ALR 1339

Issuance of unpaid stock—pledge to innocent party. A corporation which issues and delivers its corporate shares of stock without receiving payment therefor estops itself to question such issuance and delivery after the stock has been pledged by the holder thereof to a good-faith pledgee for value and without notice of the fact of nonpayment.

Bankers Tr. v Rood, 211-289; 233 NW 794; 73 ALR 1421

Repurchase of stock—equitable issues not raised by demurrer. The facts, set up in answer by a Delaware corporation, that (1) it had no surplus, and (2) the laws of the state of its domicile prohibited a repurchase of its stock from capital, present a defense to an action for recovery on an alleged breach of contract to repurchase stock when such answer is attacked simply by demurrer rather than by an appropriate remedy based on equitable rights. Demurrer does not raise estoppel, ratification, implied contract nor any other equitable theory.

Bishop v Middle States Co., 225-941; 282 NW 305

Ultra vires in re corporate accommodation note. A corporation is not estopped to plead ultra vires in becoming the maker of an accommodation promissory note, from the fact that its officers knew that the payee (who was not the accommodated party) was making advances to the party actually accommodated, when the payee knew (1) that the note was an accommodation solely to the party receiving the advances, and (2) that the note was not

executed in conformity with the authority which the corporation had granted to its officers.

Black Hawk Bk. v Monarch Co., 201-240; 207 NW 121

Contracts—duress—estoppel to assert. The plea that an obligation was signed under duress must fall when the signer, during a long time following the execution of said obligation, recognized it as legally binding, and caused others to act on such recognition to their detriment.

Smith v Morgan, 214-555; 240 NW 257

Contracts—disaffirmance. A minor may estop himself by his conduct from disaffirming or questioning the legality of his contract.

First Bank v Torkelson, 209-659; 228 NW 655

Devisees' rights—election by spouse. The heirs of a surviving wife are not estopped to insist that the wife took her dower interest, and did not take under the will, by the fact that, separately and apart from the will and prior to its execution, the husband had turned over certain funds to a society under an agreement that the society should pay interest on the funds to him and to the wife during their lifetime, and that the wife received such interest after the death of the husband.

In re Culbertson, 204-473; 215 NW 761

Estoppel by deed. Mortgagors will not be permitted to deny that they own the quality of title which they have assumed to mortgage.

John Hancock Ins. v Dower, 222-1377; 271 NW 193

By deed—signing chattel mortgage—effect. The mere signing of a chattel mortgage in a partnership name does not, in and of itself, estop the signer from denying that the mortgaged property is partnership property.

Citizens Bank v Scott & Son, 217-584; 250 NW 626

Father-son partnership—no estoppel. Estoppel would not prevent a son from maintaining an action against his mother for an accounting and dissolution of a partnership which was established between son and father and mother and upon father's death was continued with mother; theory being that estoppel arose on account of son's acquiescence in mother's taking possession of and disposing of certain partnership assets as executrix and sole beneficiary of her husband's estate under his will. Son, having no claim against estate of his father, and not knowing of mother's claim that she was sole partner with her husband, could not be estopped thereby.

Eggleston v Eggleston, 225-920; 281 NW 844

Guardian's delayed report—failure to rely. A party will not be permitted to say that he relied, to his financial disadvantage, on the long delay of a guardian to file his final report, when it appears that he did not change his position because of said delay—did not, because of his own lack of due diligence, have knowledge of said delay until long after he had acted to his disadvantage.

Bates v Remley, 223-654; 273 NW 180

Care of ward's estate—when ward estopped to object. A mentally competent adult person, who, on his own application, causes a guardian of his property to be appointed (§12617, C., '35), will be estopped to object to fair and honest investment of guardianship funds in real estate, when said investment, tho made without first securing the approval of the court, was made with the knowledge, consent, and approval of the ward, and when the ward at once entered into possession of the property and thereon resided for some seven years without payment of rent of any kind.

In re Meinders, 222-236; 268 NW 537

Evidence—degree of proof required. The plea of a surety on a promissory note that he, under an arrangement with the principal maker, furnished a portion of the funds with which to make full payment of the note, but that payee wrongfully applied said payment on another note owing by said maker, and that, therefore, said payee is estopped to maintain an action against him, must be supported by clear, convincing, and satisfactory evidence that said payee had full knowledge of said arrangement before he made application of said payment.

Reason: Fundamentally, estoppel is not a favorite of the law.

Stookesberry v Burgher, 220-916; 262 NW 820

Parol or extrinsic evidence affecting writings. A party may not object to oral evidence which shows that an apparently absolute note and mortgage were given as collateral security for other debts when the absence of such evidence would leave the objector without any defense whatever.

Bilharz v Martinsen, 209-296; 228 NW 268

Governmental agency—estoppel against. A county which accepts, and for some thirty years retains, the financial benefits arising from a particular action of its governing body will not be permitted, as to said transaction, to question the legal authority of its governing body to act as it did act.

Plymouth County v Koehler, 221-1022; 267 NW 106

Public funds — misappropriation—recovery. Where, during a series of years, public funds have been appropriated by a county to a farm bureau organization under the good-faith but mistaken belief that a statute authorized such appropriations, and where said funds have been expended in furtherance of the agricultural

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activities of said bureau, an action to recover such funds on behalf of the county will not lie by a taxpayer who has at all time had actual knowledge of the making of such appropriations and of the use to which they were being put, and took no action to question them.

Blume v Crawford County, 217-545; 250 NW 733; 92 ALR 757

Public improvements — hidden fraud—nonestoppel by use. A city, by using a pavement for some three and a half years, does not estop itself from legally moving against the contractor because of a hidden-from-view, fraudulent defect in the work for which the contractor was responsible.

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

Simmer law—no estoppel to deny general liability for engineering services. Where a city contracts for engineering services necessary to construct a municipal electric light and power plant to be paid for under the Simmer law, out of plant's future earnings, and then later repeals the ordinance authorizing its construction and adopts a resolution withdrawing the application for the federal loan therefor, yet the city was not estopped to deny a general liability for the engineering services performed, when it was known to the engineering company, when the services were commenced, that no money derived from taxation was payable for any services it might render, and there was no showing of reliance by the plaintiff company on alleged implied obligation to erect the plant.

Burns & McDonnell Co. v Iowa City, 225-1241; 282 NW 708

Estoppel to dispute power of insurance agent. An insurance company estops itself from asserting that its agent is other than a recording or policy-issuing agent when it furnishes the agent with all blanks and supplies necessary for the actual execution and issuance by him of policies and otherwise recognizes his broad powers, and when a policyholder has relied on the agreement and representation of said agent.

Fillgraf v Ins. Co., 218-1335; 256 NW 421

Physician's certificate—conclusiveness. An Iowa statute providing that medical examiner's certificate of health issued to insured would estop insurer from setting up in defense of action on policy that insured was not in condition of health required by policy at time of issuance or delivery thereof, unless certificate was procured by fraud of insured, had the effect of changing contract through estoppel. A statute of this character does not limit the equitable jurisdiction of federal court and is enforceable therein, whether statute had been construed by Iowa supreme court as being rule of substantive law passing into contract, or as being merely a remedial right.

Mutual Ins. v Cunningham, 87 F 2d, 842

Jurisdiction—estoppel to question. A party who instigates and successfully promotes a fraudulent proceeding on the part of his wife under which she is granted a decree of divorce, who pays the alimony decreed, and who promptly remarries, will not be permitted, after the death of his former wife, to maintain an action to annul said decree (and thereby restore his property rights) on the ground that the court had no jurisdiction to enter said decree.

Robson v Kramer, 215-973; 245 NW 341

Mortgages—equitable estoppel—nonchange of position. Estoppel to declare a mortgage-secured debt due for nonpayment of interest, as provided in an accelerating clause, may not be based on transactions and conversations between the parties which in no manner caused the mortgagor to change his position.

Collins v Nagel, 200-562; 203 NW 702

Non-change in position. The plea of a mortgagee that a mortgagor was estopped to deny the validity of his signature to the mortgage because, when the mortgagor was thrown into bankruptcy, the mortgage prevented the mortgagee from participating in dividends to unsecured creditors, must fall when there is no showing that there were any such dividends.

State Bank v Nolan, 201-722; 207 NW 745

Allegation of mortgageable interest. A mortgagor is presumed to have a mortgageable interest in the property mortgaged, and is estopped to assert the contrary.

Gotsch v Schoenjahn, 201-1317; 207 NW 567

Allegation of ownership or mortgageable interest. A petition in mortgage foreclosure need not allege that the mortgagor owned the land or had a mortgageable interest therein; neither need it allege that the mortgagor is estopped to deny such ownership or interest because the execution of such mortgage worked such estoppel in and of itself.

Watts v Wright, 201-1118; 206 NW 668

Equitable relief for fraud. In action for equitable relief and damages, where proof justified the purely equitable relief of quieting title and cancellation of mortgage because of fraud, entry of personal judgment for damages against grantee was proper.

Rance v Gaddis, 226-531; 284 NW 468

Receiver for rents—estoppel to question. A mortgagor is estopped, in foreclosure proceedings, to question the appointment of a receiver for the rents of the mortgaged premises when it was made with his consent, and for his benefit, and recognized by him without objec-

tion throughout some three years of protracted proceedings.

Wenstrand v Kiddoo, 222-284; 268 NW 574

Appointment of receiver. A mortgagee who consents to the appointment of a receiver in foreclosure proceedings in which the court would not otherwise have made the appointment may not, on change of mind, recover of the receiver funds properly applied by him.

Malvern Bank v Swain, 203-616; 213 NW 216

Unrecorded mortgage — estoppel to assert lien. Naked proof that, during the time the mortgagee of land neglected to record his mortgage, the mortgagor obtained credit from another, who placed his claim in judgment, is wholly insufficient to estop the mortgagee from insisting on the priority of his mortgage lien. Additional proof of fraud or deception in some form is indispensable.

Brauch v Freking, 219-556; 258 NW 892

Partnerships—personal property of other partner—liability. In equity action to subject junior partner's personal property to payment of judgment against senior partner, evidence held insufficient to show that former acted fraudulently or that he was estopped as against senior partner's judgment creditors to claim such personal property.

Creston Bank v Wessels, (NOR); 232 NW 496

Money advanced on joint representations—suing jointly. Where money is invested with several persons representing themselves to be jointly interested in a hemp production scheme, such joint promoters may be sued jointly notwithstanding one of them asserts that he was not in fact so interested,—he is estopped from denying his interest.

Smith v Secor, 225-650; 281 NW 178

Equitable estoppel—pleading. An estoppel and the facts supporting it must be pleaded.

Securities Corp. v Noltze, 222-678; 269 NW 866

Pleading—sufficiency. An estoppel is properly pleaded by setting forth the facts upon which the estoppel is based, even tho the term "estoppel" is not used.

Bibler v Bibler, 205-639; 216 NW 99

Essential requirements. A good plea of estoppel requires a succinct fact basis and an allegation that because of said facts the pleader has been misled or has detrimentally changed his position.

Federal Land Bk. v Sherburne, 213-612; 239 NW 778

Failure to submit plea—effect. Failure to submit a plea of estoppel to rely on an alleged agreement may be quite harmless in view of the full and explicit instructions on the subject of waiver of the right to rely on the said alleged agreement.

Adamson v McKeon, 208-949; 225 NW 414; 65 ALR 817

Mending hold. Answer reviewed in an action for recovery of double benefits on a life insurance policy, and held not strikeable on motion on the alleged ground that defendant was thereby changing his defensive position after action had been brought on the policy.

Wenger v Assur. Soc., 222-1269; 271 NW 220

Nonnecessity to plead. A mortgagee who seeks to enforce the agreement of a grantee of the land to pay the mortgage debt need not plead that the grantee, by taking and retaining possession of the land, has waived, or is estopped to assert, any defect in the title to the land.

Richardson v Short, 201-561; 207 NW 610

Special plea required. He who relies on a prior adjudication must plead it.

Andrew v Bank, 205-237; 216 NW 12

Probate—belated claimant not entitled to hotchpot. A claimant against an estate who, by grace of the statute and by grace of the court, is permitted, because of "peculiar circumstances", to file and prove his claim after the expiration of the 12 months given for the filing of claims (§11972, C., '27), has no right, when the estate is found to be insolvent, to pursue other fourth class claimants who have filed and had their claims allowed within said 12 months and to recapture and put in hotchpot the payments legally made to them, in order that a new distribution may be made.

Elliott v Bank, 209-1258; 228 NW 274

Inconsistent conduct — contesting will and claiming property as gift. The fact that a daughter contests the probate of her father's will does not estop her from later claiming as a gift a portion of the devised property; nor does the judgment admitting the will to probate constitute an adjudication against her of her claim of gift.

Rapp v Losee, 215-356; 245 NW 317

Real property—assessments. Principle reaffirmed that when property owners stand by and see a drainage improvement made, and take no steps of legal interference, they are estopped to raise the question of validity when called upon to pay their assessments.

Dashner v Woods Co., 205-64; 217 NW 464

Drains—assessments—validity—estoppel. A property owner cannot be deemed estopped to question the illegality of a drainage improvement because of the action of a former owner of the land on which no one relied; nor because the property owner, after he discovered that the work has been substantially completed, entered a formal complaint as to certain defects in the work.

Kelleher v Drain. Dist., 216-348; 249 NW 401

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Change of position. A landowner is estopped to deny the effectiveness of his consent to the relocation of an established boundary line after the adjoining landowner has acted on such consent and rebuilt the fence in accordance with the relocation agreement.

Cheshire v McCoy, 205-474; 218 NW 329

Clothing one with apparent title. A creditor who claims that the actual owner of property is estopped to assert his title because such actual owner has so dealt with the property as to apparently clothe another person with the title, and has thereby misled the creditor into extending credit to such other person, must show some actual or implied knowledge on the part of the actual owner that such credit was being extended.

Bihlmeier v Budzine, 201-398; 205 NW 763

Ejectment. A recorded titleholder who learns that his grantor, without authority, has contracted to sell the property, and thereupon consents that the contract may be consummated provided he—the titleholder—receives the purchase price, is not estopped to insist on his title and right to possession thereunder, by receiving part of said sale price, it appearing that the contracting purchaser had no knowledge of such consent and made no payment in reliance on such consent.

Fitch v Stephenson, 217-458; 252 NW 130

Estoppel to dispute husband's title. A wife who permits her husband to take and record title to her lands, and for a long series of years to exercise the usual and customary indicia of ownership, is estopped to assert her title against the claims of the husband's creditors who have extended credit to him in reliance on his apparent title. So held where the husband, a farmer, became a debtor by reason of having signed notes as a surety.

Farmers Bank v Pugh, 204-580; 215 NW 652

Homestead and nonhomestead property—sale en masse—appropriation of surplus. A junior execution creditor who, at a senior mortgage foreclosure sale, buys in property which, in accordance with the mortgagor's agreement to that effect, is sold en masse, and regardless of the homestead character of part of the property, and who, in so buying, bids an amount in excess of the senior mortgage debt, on the express condition that said excess be indorsed on his junior execution (which is done), and who, with the full knowledge of the mortgagor, and without objection by him, complies with his bid, and after a year for redemption takes a deed, is not thereafter liable to the mortgagor for the amount of said excess on the theory that such excess represents the mortgagor's homestead, on which the junior execution creditor admittedly had no lien. This is true (1) because the mortgagor by his silence has permitted the junior execution creditor to change his position to his detriment, and is estopped to question the appropriation of said excess, and (2) because the mortgagor, by failing to attack said sale, and by demanding said excess under and by virtue of the sale, has confirmed the bid and all matters inhering therein,—i. e., the condition attending said bid.

Phoenix Co. v Vaught, 201-450; 205 NW 792

Knowledge of grantee—nonparticipation in fraud. A creditor will be protected in taking a conveyance from his debtor when the creditor acts solely for his own protection, and not to aid the debtor in defrauding other creditors.

Jordan v Sharp, 204-11; 214 NW 572

Landlord's title—estoppel to dispute. A tenant who remains in undisturbed possession of realty under a lease with an executor, and refuses to quit and surrender said premises at the termination of said lease, may not defend his wrongful possession by or under the plea that the executor had no legal right to lease the land.

Wright v Zachgo, 222-1368; 271 NW 512

Recognizing invalid tax deed—effect. An owner of land who, for his own advantage, recognizes the validity of a tax deed to his land, and thereby causes another to change his position, may not thereafter plead invalidating irregularities in the deed.

First N. Bank v Barthell, 201-857; 208 NW 286

Reconveyance of property. The fractional owner of property who quitclaims his interest to his co-owner in order to enable the co-owner to mortgage the entire property for his own purpose, and who receives from the co-owner an agreement to reconvey, free of incumbrance, within a named time or to pay a named sum, may not, after the mortgage is executed, and after the mortgagee has in good faith agreed to take over the property in satisfaction of the mortgage debt, obtain specific performance of the agreement to reconvey, even tho the mortgagee, before the deal was fully closed, had notice of the agreement to reconvey.

Clarkson v Bank, 218-326; 253 NW 25

Remainderman's offer to pay taxes adjudged by court. Where remainderman offers to reimburse the heirs of a life tenant for delinquent taxes paid by life tenant in such amount as the court may find to be due, it cannot be held that the remainderman recognized or acquiesced in the claim for reimbursement, and is not thereby estopped from refusing to pay.

Rich v Allen, 226-1304; 286 NW 434

Repudiating one's own chain of title. A titleholder who, by contract, repudiates the deeds under which he claims title and agrees that they shall be deemed null and void, thereby estops himself from asserting said deeds

against parties who subsequently acquire title in reliance on said repudiation.

Carr v McCauley, 215-298; 245 NW 290

Riparian rights—accretion—apportionment. Riparian landowners interested in accretions to their lands may by agreement, acquiescence, or other conduct, apportion the accretion in a manner and way different than the law would apportion it, and thereby estop themselves, in an action to quiet title, from asserting that land did not pass under their deed because it was not accretion land.

Haynie v May, 217-1233; 252 NW 749

Self-imposed knowledge of vendor. A vendor of land will not be heard to claim that he did not know that his purchaser was holding adversely to him.

Burch v Wickliff, 209-582; 227 NW 133

Surviving spouse—failing to plead and prove election. An adopted son, defending a contribution action growing out of expenditures made by his mother as tenant in common in inherited real estate, and in his answer admitting that his mother possessed by right of dower, but nowhere claiming or assuming his burden to prove that the widow elected to take a life estate in lieu of other dower rights, is estopped to raise such point on appeal or matters corollary thereto.

Yagge v Tyler, 225-352; 280 NW 559

Special interrogatories. One who causes a special interrogatory to be submitted to the jury is estopped thereafter to claim that the record contains no sufficient evidence to support the answer.

Tigue Co. v Motor Co., 207-567; 221 NW 514

Trademark signs. In an action for injuries caused by alleged negligence of filling station operator, the fact that trademark signs of defendant oil company were displayed did not estop it from claiming that it was not the owner of filling station business and that operator was not employee of company, it being a matter of common knowledge that such signs are displayed throughout country by independent dealers.

Reynolds v Oil Co., 227-163; 287 NW 823

Trust—establishment and enforcement. A party estops himself from ingrafting a trust on an absolute conveyance of real estate after he has stood by and allowed the grantee to treat the property as his own and to pledge it to grantee's innocent creditors.

Hospers v Watts, 209-1193; 229 NW 844

Consent to change in trustee. An owner of land under trust deed to secure a bond issue, who unqualifiedly consents to a change of trustee, may not thereafter claim that the new trustee is not the proper party to foreclose the trust deed, especially when the bondholders unanimously approve of such change.

Central Bank v Benson, 209-1176; 229 NW 691

Establishment and enforcement of trust. A chattel mortgagee who, knowing that the mortgaged property has been sold without his consent and that the proceeds of the sale have been deposited in a bank to the mortgagor's credit, accepts the mortgagor's check on said deposited proceeds for the amount due under the mortgage, together with security for the payment of said check in the form of an assignment by the mortgagor of the balance of said deposit in the bank (which had failed), thereby estops himself from asserting that said deposited proceeds have always belonged to him and therefore constitute a trust fund in his favor.

Andrew v Bank, 209-273; 228 NW 12

Knowledge and acceptance of benefits. Beneficiaries of a trust will not be heard in equity to assert the invalidity of a lease entered into by their trustee, when they (1) had full general knowledge thereof, (2) long acquiesced therein, (3) accepted and retained the rentals arising from the lease, and (4) knew at all times that the lessee was relying thereon at great expense.

Bowman v Coal Co., 201-1236; 207 NW 591

Trusts—loss of right against innocent grantee. The owner of an equitable interest in land loses all right (1) to establish his interest as a trust in the land, and (2) to personal judgment against the grantees of the land, when, after refusing a proffered deed to the land, he knowingly permits the legal titleholder to convey the land by quitclaim deed and for a valuable consideration to another equitably interested party who had no notice or knowledge of said first party's claim; and especially is this true when the consideration for the quitclaim deed was at all times a senior claim.

Brenton Bros. v Bissell, 214-175; 239 NW 14

Witness—estoppel to change testimony. A clerk of the district court who testifies, in an action to which he is not a party, that he has "in his hands" the amount of a tender deposited with him, will not, in a later action against him by one of said litigants who relied on said testimony and thereby materially altered his position, be permitted to show that at the time of so testifying he did not have said money "in his hands" because he had already lost it by failure of the bank in which it was deposited.

Andresen v Andresen, 219-434; 258 NW 107

Truthful answer to inquiry. The holder of a mortgage on the individual share of an heir does not estop himself from insisting on his mortgage because, upon receiving a subsequent inquiry whether there was any incumbrance on

the estate, he truthfully answered in the negative.

Halbert v Halbert, 204-1227; 214 NW 535

VIII PLEADING

Motion to dismiss—optional rights. When a motion to dismiss an equitable action is sustained, the plaintiff may (1) stand on his pleadings and appeal, or (2) amend.

Schwartzendruber v Polke, 205-382; 218 NW 62

Mandamus—petition—motion to dismiss as proper attack. Attack on mandamus petition should have been made by a motion to dismiss rather than by a demurrer, since statutes provide that mandamus shall be tried as an equitable action, and that a petition in equity may be attacked by motion to dismiss.

Bredt v Franklin County, 227-1230; 290 NW 669

Motion to consolidate actions by plaintiffs. Two personal injury actions arising out of the same accident and brought against the same defendant cannot be consolidated on motion by the plaintiffs for altho equity has the power to consolidate causes of action to avoid multiplicity of suits, the right to move for a consolidation of causes of action in law is by statute granted only to the defendant, and a plaintiff has no such right.

Brooks v Paulson, 227-1359; 291 NW 144

Technicalities ignored. In equity action seeking the appointment of a receiver, defendant's contention, that a receiver could not be appointed because no main cause of action was stated, was without merit, since plaintiff was in fact seeking to foreclose a lien on rents and had asked for general equitable relief, the rule being that "equity does not deal in technicalities, but rather it seeks to ascertain the true intent of the pleading filed".

Wagner v Securities Co., 226-568; 284 NW 461

Trust—essential allegation. In an action to establish a bank deposit as a trust fund, an allegation as to the trust character of the deposit is all-essential.

Peterson v Bank & Trust, 219-699; 259 NW 199

Unallowable repetition—procedure. The filing of a petition once held insufficient is properly reached by a plea to the jurisdiction, or by a motion to strike, treated as such plea.

Schwartzendruber v Polke, 205-382; 218 NW 62

IX EVIDENCE GENERALLY

Appeals—weight of court's findings. In the trial of an equity case where the credibility of the witnesses is in issue, great weight will be given to the findings of the trial court.

Panama Bank v Arkfeld, 228- ; 291 NW 182

Equity proceeding to establish heirs—triable de novo. In a probate proceeding to assist administrator to determine heirs of intestate, it being determined upon appeal from (1) the form of the pleadings as prescribed in equity, (2) the record of proceedings indicating use of equitable powers, (3) the reception of evidence under equitable procedure, and (4) rulings of the court reserved as in equity, that such proceeding, having been conducted in a manner wholly foreign to procedure at law, was tried in equity and therefore was triable de novo on appeal.

In re Clark, 228- ; 290 NW 13

Estoppel—nonchange of position. Estoppel may not be predicated on conversations and negotiations which induced no change in the position of a party.

School District v Morris, 208-588; 226 NW 66

Accord and satisfaction. Evidence exhaustively reviewed in an equitable action wherein was involved the issue of accord and satisfaction, and, inter alia, held that it is not in accord with reason that an aged and experienced, and financially involved, business man would convey property of substantial value (and the last remnant of his once ample fortune) for no consideration whatever except that the grantee would pay to the public authorities the taxes thereon.

Stuart v Beans, 221-307; 263 NW 816

Sale for delinquent taxes not carried forward—insufficient tender. A tax sale for delinquent taxes not carried forward will not be set aside in equity nor the deed issuance restrained when the titleholder's offer to do equity by tendering such taxes as "constitute a valid lien" and "actually paid" by the purchaser is a disingenuous tender.

McClelland v Polk County, 225-177; 279 NW 423

X DISMISSAL

Motion to dismiss equitable action—authority. There is no statutory authority for a motion to dismiss an equitable action at the close of plaintiff's testimony.

Appanoose Bureau v Board, 218-945; 256 NW 687

Motion to dismiss. If any of the grounds of a motion to dismiss petition for construction of a will are well-taken, it is not error to sustain such motion.

Anderson v Meier, 227-38; 287 NW 250

Motion to dismiss in equity—operation and effect. A defendant who, at the close of plaintiff's testimony in an equitable action, makes and stands on a motion for judgment in his own favor and for dismissal of plaintiff's pe-

tition, in effect, announces that he rests his case.

Haggin v Derby, 209-939; 229 NW 257

Trial after dismissal. A judgment entered as the result of an attempted trial after plaintiff had dismissed his action is a nullity as to the dismissing plaintiff when the defendant's pleadings were purely defensive.

Eclipse Co. v Kepler, 204-286; 213 NW 809

Unallowable equitable action. An order of court which, in bank receivership proceedings, mistakenly grants, under a misapprehension of the law, an absolute preference in payment of the deposit of a municipality may not, on the ground of such mistake, be set aside by an independent action in equity by other depositors and creditors of the insolvent bank, when such depositors and creditors neither (1) appealed from said order nor (2) entered, in the receivership proceedings, any objection to such order.

Schubert v Andrew, 205-353; 218 NW 78

When trial precluded. The dismissal of an action by plaintiff before trial, even tho it is an equitable action which involves the liability of a defendant-city relative to various claimants for work and materials on a public improvement, deprives the court of all jurisdiction thereafter to proceed with the trial and adjudicate any right of the dismissing plaintiff's when the pleadings of the defendant are solely defensive.

Eclipse Co. v Waukon, 204-278; 213 NW 804

XI PARTICULAR ACTIONS

(a) IN GENERAL

Appeals triable de novo. Equity appeals are triable de novo both as to the facts and the law.

Kurth v Ins. Co., 227-242; 288 NW 90

Avoidance of multiplicity of law actions. A strict action at law may not be brought and maintained in equity on the mere allegation that thereby a multiplicity of actions will be avoided. So held where plaintiff sought, in equity, to recover not only presently accrued, but future possibly accruing weekly total disability benefits under a policy of accident insurance.

Gephardt v Ins. Co., 213-354; 239 NW 235

Constructive trusts solely cognizable in equity. An action to establish and enforce a constructive trust, e. g., an action to recover funds to which plaintiff has equitable title against a defendant who holds the legal title, must, on timely motion by the defendant, be tried as an equitable action, (a) even tho plaintiff disclaims all equitable relief, and prays for a money judgment only, and (b) even tho, under plaintiff's allegation defendant obtained possession of the funds by fraud practiced on a third party, but under circumstances excluding any inference or presumption that he received the funds for the use and benefit of plaintiff.

Markworth v Bank, 212-954; 237 NW 471

Fraud between banks—constructive trust not established. The plaintiff bank, in failing to establish that the defendant bank was guilty of fraudulent conduct in aiding the plaintiff's cashier to conceal a shortage in his accounts, thereby failed to establish any basis for a constructive trust against the assets of the defendant bank for the amount of the shortage, or a basis for requiring the defendant bank to be held to account for the loss.

Community Sav. Bk. v Gaughen, 228- ; 289 NW 727

Decree—broad power under general prayer for relief. A court of equity, in dealing with and adjusting involved and complicated matters of fact, has exceptionally broad power to effect equity and justice when both parties pray for general equitable relief. Illustrated where defendant, who was the owner of coal lands, and those working in conjunction with him, had wrongfully interfered with the rights of lessees, and were held liable in a reasonable amount for permanent improvements placed in the mine by lessees, even tho said improvements became worthless, it appearing that defendant's misconduct had materially contributed to said latter condition.

Hartford Co. v Helsing, 220-1010; 263 NW 269

Interpleader—availability of remedy. The pre-code equitable action of "interpleader" is available to an insurer who is faced by different, mutually hostile claimants to the amount due under the policy, which amount the insurer admits less deduction provided by the policy. And said insurer will be entitled to an injunction restraining the institution or further prosecution against him of separate actions on the policy by said warring parties.

Equitable Life v Johnston, 222-687; 269 NW 767; 108 ALR 257

Accounting—burden of proof. In action for accounting plaintiff has burden to prove account and show balance and amount due.

Palmer v Manville, (NOR); 228 NW 20

Accounting—evidence. Evidence reviewed, in an action for an accounting, and held that an assignment of a claim by plaintiff to defendant was absolute and not for collection for the benefit of plaintiff.

Moore v Bolton, 220-258; 260 NW 676

Accounting—inconsequential plea. In an action on a contract to recover a money judgment for plaintiff's interest in certain property, the plea of an intervenor who claims an

XI PARTICULAR ACTIONS—continued
(a) IN GENERAL—continued

interest in the property that there must first be an accounting between plaintiff and defendant is of no consequence where there is no evidence that defendant has ever paid plaintiff anything on his claim.

Benson v Sawyer, 216-841; 249 NW 424

Debt due—prerequisite proof. In actions in which an accounting is sought to determine the balance due from one party to another, it must be alleged and established that something is due before an accounting will be undertaken. This rule does not apply, however, in cases where an accounting is asked of a trustee who is under duty to account.

Burkey v Bank, (NOR); 256 NW 300

Duty to account as unavoidable preliminary issue. The court has no authority, in an action for an accounting, to appoint, without the consent of the defendant, a referee to take the accounting, until defendant's plea that he is under no legal duty to account is first determined adversely to the defendant.

Benson v Weitz' Sons, 211-489; 231 NW 431

Agreement excluding increase in livestock—accounting denied. Where defendants, in consideration of cancellation of debts, deeded farm to plaintiffs and gave bill of sale for farm personalty under agreement that defendants would operate farm, and as payment therefor take increase from livestock and surplus crops not needed for feeding livestock, plaintiffs were not entitled to accounting for produce or increase of livestock, but only for property turned over by plaintiffs under the contract.

Russell v Moeller, (NOR); 268 NW 60

Contract not to change son's legacy—creditor bank estopped as to other legacies. Where a son is indebted to a bank, and his father contracts with the bank to make no change in his will respecting a $10,000 bequest to the son, and bank seeks liability against all of father's property, there is no estoppel against the other heirs claiming the son's indebtedness be deducted from any bequest payable to him.

Evans v Cole, 225-756; 281 NW 230

Affirmation (?) or rescission (?) of contract. A purchaser of land, after he has given notice of rescission and moved off the land, will not be held to have elected to affirm the contract and to recover damages at law by bringing an action which is entitled neither at law nor in equity, and which prays for the same money relief to which he would be entitled on a rescission, even tho the petition as it stands would be triable at law.

Bredensteiner v Oviatt, 202-993; 210 NW 133

Boundary line between farm buildings—grantor's alleged use and occupancy of buildings denied. In a special action to determine the true location of an east and west half-section line, where the grantor, owning the entire west half of the section, sells the northwest quarter, thinking his barn and corncrib were situated south of the half-section line, whereas a survey showed the buildings to be situated north of the half-section line, grantor's claim of a reservation of the use and occupancy of the barn and corncrib and ground appurtenant thereto under an implied easement on the theory that the barn and corncrib were necessary to the use and enjoyment of the land retained by grantor, could not be sustained, since the use of such buildings was just as essential to the part sold, in proportion to the acreage, as it was to the part retained.

Dyer v Knowles, 227-1038; 289 NW 911

Easements—part of single ownership conveyed—implied easement or reservation—clear intent of parties necessary. Principle reaffirmed that, where real estate has been used under single ownership and as a unity, one part of it may be burdened with a use which is largely or entirely for the benefit of another part of it, and when divided by devise, descent or sale, one part may be burdened or benefited by an implied reservation or granting of an easement right if it is apparent and necessary, but such implied grant or reservation must be clearly within the intention of the parties.

Dyer v Knowles, 227-1038; 289 NW 911

Rescission of contract—wife denying husband's agency. A wife, owning a rooming house, sold on the fraudulent representation of her husband, made in response to purchaser's direct question, that the furnace heated the upstairs rooms, will not, in purchaser's action to rescind and recover the down payment, be permitted to deny her husband's authority to represent her and at the same time retain the down payment as fruits of the deceit.

Smith v Miller, 225-241; 280 NW 493

Rescission of contract—defaulting plaintiff. Plaintiff vendee, after first defaulting under a contract for the sale of real estate, may not in equity, while still in default, rescind the contract because defendant vendor had later allowed a prior mortgage on the real estate to be foreclosed, and, therefore, had no title to deliver if plaintiff fully performed.

Fitchner v Walling, 225-8; 279 NW 417

Liability for corporate debts. The personal and individual liability imposed by statute (§8380, C., '24) on the corporate directors and officers for corporate debts to which they have knowingly consented, and which are in excess of the indebtedness permitted by law, is a liability which is enforceable, not by action at law by each creditor in piecemeal, and against one or more or all offending officers and directors, but by an action in equity for and on behalf of all creditors, wherein may be ad-

judicated, once for all, the extent of liability of each defendant and the extent of right of each creditor.

Platner v Hughes, 200-1363; 206 NW 268; 43 ALR 1141

Unpaid stock subscriptions. An action by a receiver of a dissolved corporation to collect on the unpaid stock subscriptions of various parties must be by separate, ordinary proceedings at law, and not jointly in equity when the demand is solely for a money judgment; and this is true even tho in equity a multiplicity of suits would be avoided.

Kosman v Thompson, 204-1254; 215 NW 261

Damages by surface waters. Surface water collected by one landowner and drained by tile to the land of another's servient estate, where it is there conveyed by the latter's tile to the lands of a second servient estate, all through the natural course of drainage, is not such subject of damages as to entitle the third estate owner to equitable relief; especially when it is not shown that he was substantially damaged thereby.

Johannsen v Otto, 225-976; 282 NW 334

Fraud—presumption and burden of proof. Fraud is never presumed. He who alleges its existence must establish it by clear, convincing and satisfactory evidence. Principle applied in an equitable action to set aside and cancel certain financial obligations allegedly obtained by fraud.

Eckhardt v Trust Co., 223-471; 273 NW 347

Judgment creditors and mortgage holders—proper intervenors. In an action between copartners for receivership and accounting, holders of mortgages and deficiency judgments against land purchased in name of some partners for partnership purposes held proper intervenors.

Heger v Bussanmas, (NOR); 232 NW 663

Moratorium act — unallowable independent action. An independent action in equity to secure, under the moratorium act, an extension of time in which to redeem from mortgage foreclosure sale, and to enjoin the plaintiff in foreclosure from procuring a writ of possession, is not maintainable, all such matters of relief being determinable in said foreclosure proceedings.

Brown v Lincoln JSL Bank, 221-42; 265 NW 115

Municipal corporations—demand for legal salary. A city officer, who has not, for a series of months, received his full salary as legally fixed by ordinance, may not, in an equitable action, compel the city to pay him the deficiency when, during said time, he has properly received an unknown amount of fees belonging to the city (or county) but has illegally retained them as salary and makes no offer to return said fees.

King v Eldora, 220-568; 261 NW 602

Excessive assessment—nonestoppel. A property owner is not estopped to assert that his property has been assessed in excess of 25 percent of its value because he (along with a majority of the property owners) had petitioned for the improvement, and in the petition had waived the 25 percent limitation, when the record made by the city council shows that the petition was ignored, and that the improvement was ordered solely on the motion of the council.

Nelson v Sioux City, 208-709; 226 NW 41

Probate—claim against deceased's realty. In an equity action to establish a claim against deceased's real estate for services rendered deceased's widow to whom deceased devised such realty for life, with right to dispose of real estate for her necessary support, held, such action was not a "suit for construction" of will, merely because trial court's opinion mentioned word "construction", but not in such manner as to indicate that trial court held action to be for that purpose. A will which in plain and uncertain terms makes disposition of property is one which needs no construction.

Hoskin v West, 226-612; 284 NW 809

Debt-encumbered remainder—equitable action to enforce. Where a testator devises to his wife a life estate in all his property (which estate she accepts), with remainder to his children, a provision of the will to the specific effect that "all just debts and funeral expenses" of said wife shall be paid out of testator's estate, will enable the wife's creditor, who became such subsequent to the probating of the will and the closing of the estate, and shortly prior to the death of the wife some thirty years later, to maintain an action in equity to establish the debt, and to subject the lands, passing under the will and in the hands of remaindermen, to the satisfaction of said debt.

Diagonal Bk. v Nichols, 219-342; 258 NW 700

Devise—life estate (?) or fee (?)—mortgage validity. Where a will devised land to a son to use until son's youngest child became 20 years old, or if such child died before such age, then until January 1, 1940, when the land became the property of the "son and his heirs", a mortgage placed on the land by the son, although before 1940, is a valid lien, not merely on a life estate, but on the fee, and an equitable action by son's children against the mortgagee and others to establish title in the land was properly dismissed.

Hudnutt v Ins. Co., 224-430; 275 NW 581

Dower—assignment or setting off—recognized methods. The statutory provisions for admeasurement of dower do not exclude the

XI PARTICULAR ACTIONS—continued
(a) IN GENERAL—concluded

setting off of dower by an action in equity, by partition, or by any other appropriate action.

Ehler v Ehler, 214-789; 243 NW 591

Independent action reopening estate—judgment appealable. A judgment for plaintiff in a separate independent action in equity brought, not against an administrator but against the surviving spouse and heir, seeking to set aside the order in probate approving the final report and closing the estate, is a final judgment such as will entitle the defendant to appeal.

Federal Bank v Bonnett, 226-112; 284 NW 97

Equitable liens—improvements on land of another. One who places improvements on land solely because of his confident belief that his wife will ultimately become a devisee of the land will not, in case the land is otherwise willed, be accorded an equitable lien on the land for the value of said improvements.

Grecian v Steele, 208-1359; 227 NW 341

Release on basis of mistaken diagnosis. Where a settlement and release of a personal injury claim involved a mistaken diagnosis by the injured person's doctor, his statements are binding on the defendant, although he was not connected with the defendant or its liability insurance carrier, since the inquiry, not involving fraud, centers on the existence of and good-faith reliance on the mistaken diagnosis.

Jordan v Brady Co., 226-137; 284 NW 73

Representations as to priority of mortgages—owner's liability. Where owner of property represented to bank from which he was borrowing money that only specified mortgages were superior to those offered to bank as security for loans, and bank relied thereon, law of estoppel will not permit owner to acquire mortgage and assert its priority contrary to representation and agreement, since to allow such mortgage priority would constitute fraud, and equity requires owner to make his promises and representations good.

Stoner v Cook, (NOR); 229 NW 696

Specific performance—discretionary matter. Specific performance is largely a matter of discretion with the trial court and not a matter of absolute right.

Hotz v Equitable, 224-552; 276 NW 413

Cashing conditional down-payment check—claim of mistake. In an action for specific performance of a land purchase contract, the act of an agent having power to contract in allowing a down-payment check to be cashed when it bears a notation, of which he is aware, that it is not to be cashed until and unless the contract is accepted, furnishes support for a finding in equity that the contract was accepted, even tho the agent later claims that the check was cashed by mistake.

Hotz v Equitable, 224-552; 276 NW 413

Mutual wills enforced as contract. Clear and satisfactory evidence that husband and wife entered into a mutual contract, and in accordance therewith executed mutual and reciprocal wills providing for the disposition of all their property to each other and to certain named beneficiaries upon the death of survivor, entitles beneficiaries to specific performance thereof and to restrain probating of another will, executed by husband after the wife's death, making provision contrary thereto.

Child v Smith, 225-1205; 282 NW 316

Trusteed special assessment certificates. Where a corporation, dealing in securities, owns a group of special assessment certificates for public improvements, and places them in a trust, against which trust are sold certain "ownership certificates" issued in numerical order as representing an interest therein and redeemable in their numerical order, and when, subsequently, it becomes apparent that the trust is insolvent, an application by the trustee to the court for instructions as to whether payment was to be made in numerical order or pro rata was properly decided for the pro rata method on the equity rule of equality and proportionate distribution of the remaining assets.

Iowa-Des M. Bank v Dietz, 225-566; 281 NW 134

(b) REFORMATION AND CANCELLATION GENERALLY

Reformation—implied contract. A court of equity cannot reform a written contract, let alone an implied contract.

Snell v Kresge Co., 220-837; 263 NW 493

Evidence mandatorily required. A written instrument will not be reformed because of a mutual mistake unless said mistake is established substantially beyond a reasonable doubt. Evidence held insufficient.

Fischer v Bockenstedt, 215-319; 245 NW 352

Mutual mistake or fraud—proof necessary. To entitle a person to reformation of a contract, there must be some showing of fraud, ambiguity, or mutual mistake, and the general rule is that proof must be clear, satisfactory, and convincing. A contract cannot be reformed on grounds of both mutual mistake and fraud, as such claims would be mutually destructive. Evidence insufficient to warrant finding of fraud or mutual mistake.

Wall v Ins. Co., 228- ; 289 NW 901

Futile reformation. An instrument will not be reformed when the reformation asked would be entirely futile.

State v Kronstadt, 204-1151; 216 NW 707

Nonnecessity to reform. No necessity exists for reforming a written instrument when the

party thereto has a legal right to orally contradict it because his controversy is with a stranger to the instrument.

Nissen v Sabin, 202-1362; 212 NW 125; 50 ALR 1216

Proceedings and relief—absence of required plea. A plea of fraud, accident, or mistake, is a condition precedent to the right to reform any written instrument.

Sargent v Ins. Co., 217-225; 251 NW 71

Deed without contract assumption of mortgage. The holder of a mortgage on land may not have a deed to a subsequent purchaser so reformed as to embrace an assumption by the purchaser of the payment of the mortgage, on the naked plea that the purchaser, in buying the land, contracted to pay such mortgage. This is true because such contract assumption was subject to cancellation by the vendor and purchaser at any time before the mortgagee had assented to the assumption, and the passing of a deed without the incorporation therein of such assumption generates a presumption that the contract assumption had been abrogated or in some manner canceled.

American Bk. v Borcherding, 201-765; 208 NW 518

Action to cancel trust deed. An action to cancel a trust deed (which in legal effect is a mortgage), and the lien thereof, and to quiet plaintiff's title to the land is strictly local, and is properly brought in the county in which the land is situated, even tho plaintiff also prays for the cancellation of the promissory notes, a proceeding which would be transitory if separately brought.

Eckhardt v Trust Co., 218-983; 249 NW 244; 252 NW 373

Deed as mortgage—consideration. A warranty deed may not be decreed to be a mortgage when the daughter-grantee pays a good-faith and complete consideration to her father, the grantor.

Witousek & Co. v Holt, (NOR); 224 NW 530

Cancellation of sheriff's certificate—issuance of deed restrained. An action to enjoin issuance of sheriff's deed and to cancel certificate held properly brought in equity as against contention that §11792, C., '24, furnished exclusive remedy.

Paulsen v Hansen, (NOR); 216 NW 762

Defense—negligent acceptance of deed. Reformation of a deed which wrongfully obligated the grantee to pay an existing mortgage on the land will not be denied because the grantee was guilty of a measure of negligence in accepting the deed, it appearing that the objectionable clause was quite successfully camouflaged by other language of the deed.

Betz v Swanson, 200-824; 205 NW 507

Cancellation—want of consideration. Want of consideration in itself will not warrant the setting aside of a deed, it being competent for a grantor to make a gift of his property and, although want of consideration is a good defense to an executory contract, a deed is not such a contract, but instead represents a contract executed and a conveyance fully accomplished.

Lawson v Boo, 227-100; 287 NW 282

Wife's deed for husband's debt—cancellation—consideration—estoppel. Wife who was not illiterate, and who deeded her land in payment of husband's notes, and who, by placing deed in husband's hands, clothed him with apparent authority to deliver the deed, thereby inducing creditors to surrender other land owned by the husband, is estopped from questioning the validity of the deed. The consideration to wife was advantage to husband and detriment to creditors.

Allen v Hume, 227-1224; 290 NW 687

Insurance premium notes—evidence establishing cancellation. In action to cancel insurance premium notes where evidence, clearly admissible against administrator of deceased insurance agent, established that check and two notes were delivered to agent for payment of premium and that insurer rejected application for insurance, such evidence warranted cancellation of the notes and established agent's liability for the unaccounted part of the check as against administrator of the agent's estate.

Economy Co. v Ins. Co., 227-1123; 290 NW 82

Excessive deed. A deed which is shown by clear, satisfactory, and convincing evidence to embrace a larger portion of an originally integral tract of land than the grantor and the grantee mutually intended, will be so reformed in favor of a nonnegligent grantor as to meet the mutual intent of said parties.

Taylor v Lindenmann, 211-1122; 235 NW 310

Making contract for parties. Reformation of the description of land sought to be conveyed is unthinkable when the vendee would be compelled to take, under such proposed reformation, land which he in part clearly did not intend to buy, and would lose land which he unquestionably intended to buy.

Cahail v Langman, 204-1011; 216 NW 765

Motion to separate actions—nonright to withdraw answer. In an action (1) to cancel a deed and (2) to set aside the probate of a will on the ground of mental incapacity of the testator-grantor — both instruments having been executed by the same party and at the same time—it is not necessarily error for the court to refuse to permit defendant to withdraw his answer in order to permit defendant to file motion to separate the alleged separ-

XI PARTICULAR ACTIONS—continued
(b) REFORMATION AND CANCELLATION GENERALLY—continued

ate causes of action and to transfer to the law docket.

Walters v Heaton, 223-405; 271 NW 310

Particular description followed by recital of acreage—effect. In a reformation action a deed to a governmental described 20-acre division of land, but containing the recital "containing 18½ acres, more or less", does not convey a tract of 1½ acres contained in said division and already conveyed by the grantor to another grantee.

Montgomery Co. v Case, 212-73; 232 NW 150

Performance of contract—deed. A decree which correctly, by metes and bounds, describes the land which was mutually sold and purchased, impliedly reforms the grantor's deed, which inadvertently described slightly less acreage than as correctly described by the decree.

Elliott v Horton, 205-156; 217 NW 829

Refusal to surrender advantage. The grantee in a deed of conveyance who has obtained a decree quieting his title on the plea that the deed was in satisfaction of the grantor's prior mortgage on the land may not, while insisting on all the advantages accruing to him under the decree, have the deed so reformed as to include the grantor's homestead, on the claim that the homestead was mistakenly or fraudulently omitted from the deed.

Galvin v Taylor, 203-1139; 212 NW 709

Tax deed—evidence. Evidence held insufficient to show that a mortgagee had, in taking his mortgage, agreed, inter alia, to pay a tax sale certificate under which he subsequently took a tax deed.

Proctor v Williamson, 205-127; 215 NW 593

Evidence required. To justify the reformation of a written instrument, the evidence must be clear, satisfactory and convincing and free from reasonable doubt. So held in an action to reform the term of a bond, the evidence being held insufficient.

Olin Assn. v Bank, 222-1053; 270 NW 455; 112 ALR 1205

Reformation of instruments—evidence required. Principle reaffirmed that a contract will not be reformed except on clear, satisfactory, and convincing evidence establishing the grounds alleged. Evidence held insufficient to meet the rule.

Runciman v Bailey, 217-1034; 250 NW 630

Burden of proof. The plea of alteration of an instrument will be disregarded in the absence of evidence by the pleader not only that the alteration was material, but that it was made after delivery.

Monona County v Gray, 200-1133; 206 NW 26

Evidence—burden which complainant must carry. An instrument will not be reformed on the ground of mutual mistake unless the supporting testimony is clear, satisfactory, and convincing beyond a mere preponderance of the evidence, nor will such reformation be granted if the complainant has been guilty of inexcusable neglect in not having the instrument read; and especially is this true when a reformation will detrimentally affect the intervening rights of innocent third parties.

Galva Bank v Reed, 205-7; 215 NW 732

Evidence—sufficiency. Reformation of an instrument can only be decreed on testimony which is clear, satisfactory, and convincing.

King v Good, 205-1203; 219 NW 517

Evidence must be clear and satisfactory. A court of equity will only reform a written instrument when it is moved to do so by clear and satisfactory evidence of a mutual mistake or other reason for reformation.

Knott v Ins. Co., 228- ; 290 NW 91

Evidence—sufficiency. Evidence held sufficient to justify such reformation of a deed as to show that the grantee had assumed and agreed to pay a mortgage on the property.

American Bank v Borcherding, 205-633; 216 NW 719

Reformation of deed—evidence—sufficiency. A deed will not be reformed by striking therefrom a clause wherein grantee assumes an existing mortgage when the testimony of mutual mistake consists wholly of the conclusions of the witness and is otherwise uncertain.

Peilecke v Cartwright, 213-144; 238 NW 621

Evidence—insufficiency. A contract for the sale and purchase of real estate will necessarily not be so reformed as to render it a contract for sale at a stated sum per acre, when the testimony preponderates in favor of a contract for a lump-sum price.

Davis v Norton, 202-374; 210 NW 438

Documentary evidence—judgment—admissibility against stranger. A final decree and the pleadings relating thereto may, in some cases, be admissible in a subsequent action to prove an ultimate fact even tho the party against whom the decree is offered was not a party to the decree. So held where the decree was received to prove the judicial cancellation of a contract of sale upon which cancellation depended the validity of a promissory note sued on.

Pigree v Lichtenstein, 214-315; 242 NW 59

Mandatory degree of proof. Plaintiff seeking the reformation of a written instrument

must fail unless he establishes by clear, satisfactory, and convincing evidence—by evidence exceeding a mere preponderance—by evidence approximating proof beyond a reasonable doubt—the definite contract which the executed writing does not embrace. Evidence reviewed in detail under a prayer for the reformation of a lease, and held insufficient to comply with the rule.

Stillman v Bank, 216-957; 249 NW 230

Official survey on court order—evidence sufficient to support confirming report. In an action for reformation of description by metes and bounds in realty mortgages and for their foreclosure, evidence held sufficient to support judgment confirming surveyor's report, where surveyor is permitted to testify, without objection, that he was qualified to make the survey and that the plat of survey prepared by him is a true and correct survey showing the property in question and made in accordance with a previous order of court and such plat, after identification, was introduced in evidence without objection.

State Bank v Mapel, 226-1328; 286 NW 517

Parol or extrinsic evidence affecting writings —"exceptions" catalogued. The so-called "exceptions" to the parol evidence rule may be stated thus: Parol evidence is admissible,

1. To establish grounds for the reformation of a written contract.
2. To establish the unnamed consideration for a unilateral written contract.
3. To establish a distinctly separate and complete contract contemporaneous with, and noncontradictory of, a written contract.
4. To establish the conditional delivery of a written contract, and the failure of said condition.
5. To complete a written contract which shows on its face that it is fragmentary and incomplete.

In re Simplot, 215-578; 246 NW 396

Parol evidence rule. The rule of evidence which forbids oral testimony to contradict or vary the terms of a written contract has no application to proceedings in equity where a mistake in the contract is alleged, and its reformation demanded.

Floberg v Peterson, 214-1364; 242 NW 13

Parol evidence rule—nonapplicability. The parol evidence rule is not applicable to a proceeding to reform an instrument.

In re Jenkins, 201-423; 205 NW 772

Proceedings and relief — evidence — sufficiency. To justify the reformation of an instrument in the language of a bill of sale so it will stand as a chattel mortgage, the supporting evidence must be more than a preponderance. It must be clear, satisfactory, and convincing.

Scott v Menin, 216-1211; 250 NW 457

Grounds—mistake and fraud. A written release and quitclaim of all the interest of an heir in an estate will be reformed on a showing that one party thereto was mistaken in its scope and that the fraud of the other party was responsible for the mistake.

In re Jenkins, 201-423; 205 NW 772

Grounds—fraud plus unilateral mistake. A showing (1) that a grantor either mistakenly or fraudulently inserted in his deed a clause binding the grantee to pay an existing mortgage on the land, contrary to the prior contract of the parties, and (2) that the grantee without undue negligence accepted said deed without knowledge of said clause affords ample ground for the reformation of said deed.

Betz v Swanson, 200-824; 205 NW 507

Grounds—degree of proof. Reformation of an instrument on the ground of mutual mistake cannot be granted except on very clear, satisfactory, and convincing proof of the mistake, because otherwise the court might unwittingly make a contract for the parties.

Phillips v McIlrath, 205-1126; 217 NW 429

Negligence—effect. Negligence in signing an instrument is not necessarily fatal to a plea for reformation, especially when the equities are strongly in favor of the pleader.

Steele v Kluter, 204-153; 214 NW 522

Negligence in signing. The maker of an instrument may not have it reformed by striking material matters therefrom, when he had unlimited and unimpeded opportunity before signing to learn just what was in the instrument, but negligently failed to inform himself.

Turnis v Ballou, 201-468; 205 NW 746

Negligence—mutual mistake. Reformation will be denied in a proper case for negligence in failing to read a written instrument but will be granted for a mutual mistake arising from the negligence of both parties.

Conrad v Ins. Assn., 223-828; 273 NW 918

Mutual mistake—description in deed—evidence—sufficiency. Where the grantor of land executed to grantee a quitclaim deed to a strip of land 10 feet wide to provide grantee a wider, better way over grantor's land to the highway, and the evidence of grantor's attorney, who prepared quitclaim deed, shows there was no consideration for the deed and no other land was mentioned except the 10-foot roadway, this testimony being uncontradicted by defendant, the trial court's findings and decree reforming the deed, so as to except any accretions to the 10-foot strip described, was justified on the ground of mutual mistake of all the parties in not expressly excepting the accretions from the deed.

Haynie v May, 228- ; 291 NW 404

XI PARTICULAR ACTIONS—continued
(b) REFORMATION AND CANCELLATION GENERALLY—continued

Right of action—negligence barring relief. A party who has no excuse whatever for signing a writing without reading it, or without requesting a reading of it, will not be granted reformation. And the rights of the wife of the signer insofar as she is interested in the writing, tho not a signer thereof, will be foreclosed by her like inexcusable neglect to read or request the reading of the instrument.

Stillman v Bank, 216-957; 249 NW 230

Negligence—mistake—evidence—sufficiency. A deed of conveyance will not, on the plea of the grantor, be reformed by inserting therein an assumption by the grantee of an existing mortgage, when the grantor executed the deed without reading it, though he was able to read, and was not prevented from reading, when his testimony in support of a mutual mistake is neither satisfactory nor convincing; and especially when the grantee has, in the meantime, justifiably changed his position in reliance on the omission of the assumption clause.

Scover v Gauley, 209-1100; 229 NW 684

Mistake—evidence. Evidence held quite insufficient to show any mistake in the reservation in a conveyance of an easement.

Spalding v McCartney, 207-1025; 221 NW 665

Mistake. The statute of limitation does not commence to run against an action to reform a deed on the ground of mutual mistake until the mistake has been discovered.

American Bank v Borcherding, 205-633; 216 NW 719

Adopting wrong instrument to accomplish purpose—effect. The execution of an ordinary, unconditional promissory note and mortgage on the mutual supposition of the parties thereto that said instruments would exactly carry out their agreement that one of them would pay the other a life annuity only, is not such mistake of law as will prevent reformation of the note and mortgage to meet the mutual purpose of the parties; but, of course, the proof of mutual mistake must be clear, satisfactory, and convincing.

Floberg v Peterson, 214-1364; 242 NW 13

Mistake affecting interest. A deed cannot be reformed by one who is not a party thereto unless the mistake claimed therein affects his interest.

American Bk. v Borcherding, 201-765; 208 NW 518

Contracts—revocation for mistake. Mistake as a basis to set aside a settlement, release, accord and satisfaction or covenant not to sue, must be a mutual mistake of an essential fact, inducing the execution of the instrument.

Jordan v Brady Co., 226-137; 284 NW 73

Mistake—dragnet clause in mortgage. A dragnet clause in a mortgage, to the effect that the mortgage shall stand as security for any other debt which the mortgagee may hold or acquire against the mortgagor, will be stricken from the mortgage on proper plea for reformation, and on proof that, by the use of a printed form, the said clause was inadvertently embraced in the mortgage by both parties.

Pospishil v Jensen, 205-1360; 219 NW 507

Mistake—fraud—evidence—sufficiency. Reformation of an instrument because of the mistake of plaintiff and fraud on the part of defendant will not be decreed except on clear, satisfactory, and convincing proof of the existence of said grounds. Evidence held insufficient.

West v Hysham, 214-349; 242 NW 19

Mistake and fraud—evidence. Evidence reviewed, and held ample to justify the reformation of a deed because of the mistaken, and fraudulently induced, omission therefrom of a clause reserving to grantors a life estate in the land in question.

Foote v Soukup, 221-1218; 266 NW 904

Mistake—gross negligence in failure to read. The maker of an instrument may not avoid it because he did not have knowledge of its contents, when he failed to avail himself of admitted ability to read and of unrestricted and uncircumvented opportunity to read.

Charlson v Bank, 201-120; 206 NW 812

Instruments reformable—mistake. A written contract between a drainage contractor and the board of supervisors which inadvertently departs from the terms of the bid and the acceptance by the board will be reformed on an application in equity.

Gjellefald v Drainage Dist., 203-1144; 212 NW 691

Mistake—omission of lands from mortgage-judgment creditors. A mortgage may be so reformed as to correct the mutual mistake of mortgagor and mortgagee in omitting certain lands from the mortgage, even against a judgment creditor of the mortgagor's, who became such after the mortgage was executed.

Davis v Bunnell, 207-1181; 225 NW 6

Mistake tolling statute. A mortgagee, seeking to reform his mortgage to correct an error in the real estate description and escape the statute of limitations on the ground of mutual mistake which tolled the statute until discovered, has the burden of showing he did not discover the error until a time within 5 years

before bringing action, and without which proof the statute operates as a bar.

Beerman v Beerman, 225-48; 279 NW 449; 118 ALR 997

Mutual mistake—conflicting testimony. Circumstances and attending facts bearing on the issue of reformation because of mutual mistake may be ample to establish such mistake even tho the parties are hopelessly at war in their personal testimony relative to such issue.

Steele v Kluter, 204-153; 214 NW 522

Recovery of payments—mutual mistake—evidence—sufficiency. Evidence reviewed in an action to recover back money alleged to have been paid under a mutual mistake for heat furnished, and held insufficient to establish such mistake.

Thomas v Central Co., 217-899; 251 NW 616

Mortgages — omitted tract — reformation against non-innocent incumbrancers. A plaintiff-mortgagee, after having foreclosed his purchase money mortgage and purchased the land at execution sale, discovering that one 80-acre tract was erroneously omitted from the mortgage and sale, and that mortgagor, having discovered the error, had executed another mortgage thereon as security for an old loan to parties with notice and knowledge of plaintiff's equitable right in the land, is entitled to a reformation of his mortgage, since later mortgagees were not innocent incumbrancers.

Winker v Tiefenthaler, 225-180; 279 NW 426

Mortgages—assumption of mortgage debt—no consideration. Where an instrument is executed without consideration on the part of a grantee, to assume and pay the mortgage debt, the contract is not binding upon him, or if the deed is delivered in blank, or the conveyance made as security only, or if a clause is inserted by fraud, inadvertence, or mistake, without the knowledge or acquiescence of the grantee, he may have the instrument reformed in equity so as to make it express the true intent and understanding of the parties.

Guarantee Co. v Cox, 201-598; 206 NW 278

Conclusiveness of judgment. A decree in mortgage foreclosure that the mortgagee is not entitled to the reformation of a deed from the mortgagor to a subsequent purchaser so as to show an assumption by such purchaser of the mortgage debt is not an adjudication that the mortgagor is not entitled to such reformation, even tho the mortgagor was a party to the foreclosure, but not a party to the mortgagee's petition for reformation.

American Bank v Borcherding, 205-633; 216 NW 719

Dragnet clause securing multiple debts. A general clause in a mortgage to the effect that the mortgage shall stand as security for any debt in addition to the debt specifically secured which the mortgagee may hold or acquire against the mortgagors or either of them will be wholly eliminated on a prayer for reformation on proof that said clause was contrary to the mutual intent of the mortgagors and mortgagee when the mortgage was executed, because to hold that said clause was enforceable under such circumstances would be to countenance a legal fraud. And all this is true tho the mortgagors did not read and were not prevented from reading the mortgage when it was executed.

Commercial Bank v Ireland, 215-241; 245 NW 224

Estoppel—insufficiency. A mortgagee cannot be estopped to insist on a reformation of his mortgage so as to include mistakenly omitted land simply because a subsequent judgment creditor had omitted to levy on the unincumbered land and collect his judgment.

Davis v Bunnell, 207-1181; 225 NW 6

Discrepancy between mortgage and application for loan. A mortgage to secure a loan will not be reformed by striking therefrom a material clause on the ground that such clause was not embraced in the application for the loan, when the application was a naked proposal for the loan, did not assume to be a contract in itself, and did not provide for the various terms and conditions of the mortgage in case the application was accepted.

Turnis v Ballou, 201-468; 205 NW 746

Nonestoppel. A mortgagor who, in foreclosure proceedings, withholds his plea for a reformation of his deed to a subsequent purchaser in order to show an assumption of the debt until the mortgagee has unsuccessfully attempted to secure such reformation, and who actively seeks to aid the mortgagee in such attempt, does not thereby estop himself from interposing such plea after the mortgagee's attempt has proven a failure.

American Bank v Borcherding, 205-633; 216 NW 719

Mortgage on homestead. A mortgage which is duly and jointly executed by a husband and wife on part of their homestead, when they unquestionably intended to embrace in the mortgage the entire homestead, is so reformable, on proper showing of the mistake, as to make the instrument in form exactly what it always has been in law; and such reformation is not violative of the statute (§10147, C., '24) which declares conveyances of the homestead invalid when the husband and wife do not join in the execution of the same joint instrument.

Rankin v Taylor, 204-384; 214 NW 725

Relief barred by fraud. A mortgagor's prayer for cancellation of a mortgage on the plea of payment will be denied when, in connection with the transaction on which the claim of payment is based, he dishonestly ob-

XI PARTICULAR ACTIONS—continued
(b) REFORMATION AND CANCELLATION GENERALLY—continued

tained from the mortgagee, and without the knowledge of the latter, a sum exactly equal to the claimed payment.

Strahan v Strahan, 205-92; 217 NW 436

Right in general—ineffectual reformation. A contract between a mortgagor of real estate and a purchaser of the land, wherein the purchaser assumes the payment of the mortgage, will not be reformed in proceedings to foreclose the mortgage, by inserting in the contract a maturity date which is different from the admittedly true maturity date as specified in the mortgage, because such reformation could not possibly affect the mortgagee.

Richardson v Short, 201-561; 207 NW 610

Tract omitted from mortgage. Equity will not only reform a mortgage between the parties by including an omitted tract so as to carry out their intentions but also against subsequent purchasers with notice.

Winker v Tiefenthaler, 225-180; 279 NW 436

Reformation—abuse of discretion in refusing. A court of equity abuses its discretion when it refuses to reform a written contract wherein the owner of property lists it with a broker for sale and binds himself to pay a commission in case a sale is made, even by himself, when it is shown, by clear, satisfactory, and convincing testimony, that the oral preliminary contract which the parties attempted to reduce to writing embraced the definite, mutual understanding that no commission would be payable if the owner made a sale to his then tenant, and that said understanding was inadvertently omitted from said writing. (In this case the owner made a sale to his tenant and was later sued by the broker for a commission.)

Milligan Co. v Lott, 220-1043; 263 NW 262

Bail bond—necessary parties. A bail bond will not be reformed when the defendant on whose behalf the bond was given, and who signed it, is not before the court.

State v Kronstadt, 204-1151; 216 NW 707

Statutory bonds. A statutory bond may not be so reformed as to defeat its purpose.

Leach v Bank, 205-975; 213 NW 612

Reformation of promissory note—change of venue. An equitable action for the reformation of a promissory note, by changing the name of the payee, and for judgment on the note as reformed, cannot be maintained in the county wherein the note by its terms is payable, when the defendant's residence is elsewhere in this state, and he properly moves for a change of venue.

Palmas v Tankersley, 218-416; 255 NW 514

Defenses—merger of prior contract. The principle that a contract for the sale of real estate is, as a general rule, merged in the subsequently executed deed has no application to an action wherein reformation of the deed is asked in order to make it harmonize with the prior contract.

Betz v Swanson, 200-824; 205 NW 507

Dissolution of partnership. A partnership settlement on dissolution may be so reformed that it will show that it does not embrace partnership assets discovered subsequent to the dissolution and then unknown to the partners.

Power v Wood, 200-979; 205 NW 784; 41 ALR 1452

Dissolution of partnership — by order in equity—insufficient ground. A partnership or joint adventure for a definite contract term will not be cancelled and terminated by a court of equity before the time fixed by the contract, on the ground that such quarreling and bickering between the parties have resulted as to render inadvisable the further continuance of the undertaking, when the applicant for the cancellation and termination of the contract is the only one of the parties who has done any quarreling or been guilty of any bickering.

Green v Kubik, 213-763; 239 NW 589

Joint adventures—dissolution in equity. Assuming, arguendo, that proof that a joint undertaking had proven to be a losing venture is sufficient to justify an order of dissolution, by a court of equity, of a joint undertaking, yet evidence reviewed, and held insufficient to so show such fact.

Green v Kubik, 213-763; 239 NW 589

Cancellation of instruments—divorce. In divorce action, trial court was justified in cancelling notes and deeds from husband to wife for lack of consideration, under statute empowering court to make proper disposition of the property of the parties.

Graham v Graham, 227-223; 288 NW 78

Duress—required showing. A contract obtained by so oppressing a person, by threats regarding his personal safety or liberty as to deprive him of the free exercise of his will and prevent the meeting of minds necessary to a valid contract, may be avoided on the ground of duress. So held in case of mortgages and notes.

Guttenfelder v Iebsen, 222-1116; 270 NW 900

Erroneous finding against garnishee. Concede that a finding by the court that the garnishee was indebted to the defendant in attachment was erroneous, nevertheless such fact furnishes no basis for enjoining the enforcement of the judgment entered on such

finding, when the court was proceeding under fully acquired jurisdiction.

Farmers Exchange v Iowa Co., 201-78; 203 NW 283

Forgery — insufficient evidence. Evidence held insufficient to show forgery of a mortgage.

McDaniel v Life Co., 210-1279; 232 NW 649
McDaniel v Bank, 210-1287; 232 NW 653

Incomplete contract. A court of equity may not reform a written instrument by supplying any element necessary to give it validity, or by compelling the party in default to supply the omitted element. So held where the court was asked to compel or order one of the makers of a note payable "to ourselves" to indorse the note.

In re Divelbess, 216-1296; 249 NW 260

Laches—when no defense. Delay, on the part of the signer of an unmatured, negotiable promissory note, in bringing action to cancel the note for want of consideration, is quite immaterial when the delay has not been harmful to anyone.

Sterner v Bank, 221-1362; 268 NW 158

Excessive lease. A written lease which is shown by clear, satisfactory, and convincing evidence to embrace a larger portion of integral premises than the lessor and lessee mutually intended, will be so reformed as to meet the mutual intent of said parties.

Kanofsky v Woerderhoff, 211-1175; 235 NW 305

Oral wage agreement. An oral wage scale agreement applicable to the first few weeks of employment, incorrectly reduced to writing by employer's agent, but correctly followed in paying wages which was not challenged by employee during the several years he continued in this employment, justifies a reformation of the writing to conform to the oral agreement.

Koch v Abramson, 223-1356; 275 NW 58

Personal contract reformed to show contract as representative of another. A written contract of sale of property purporting to obligate the purchaser personally will, on clear, satisfactory, and convincing evidence that the purchaser was acting as guardian only, be so reformed as to avoid the mutual mistake or oversight.

Kowalke v Evernham, 210-1270; 232 NW 670

Policy of insurance. A mutual mistake as to the location of insured buildings is reformable.

Jack v Farm Ins., 205-1294; 217 NW 816

Wrong motor numbers not invalidating liability policy. Motor numbers in an automobile insurance policy are only for the purpose of aiding in identifying the car, and, tho the numbers be wrong, a liability policy will not be invalidated if the car is otherwise properly identified, for which purpose other evidence may be resorted to, and, if sufficient, will cure the error without resort to a proceeding in equity to reform the policy.

Fucaloro v Standard Co., 225-437; 280 NW 605

Public improvements—void contract—unjust enrichment as basis for recovery. No basis for recovery against a city, on the theory that the city has been unjustly enriched and must pay therefor, is established by proof of the reasonable value of that which the city has received.

Roland Co. v Carlisle (Town), 215-82; 244 NW 707

Remedies of buyer. The purchaser of goods manifestly may not have his note and mortgage canceled on the claim of payment unless he establishes such payment.

Rogers v Hale, 205-557; 218 NW 264

Right of action—nudum pactum. An unmatured negotiable promissory note, in the hands of the original payee, will be canceled, in equity, as to a party who signs it without consideration after the transaction giving rise to the note as to the other signer had been fully closed without obligation on the part of said other signer to obtain the additional signature in question.

Sterner v Bank, 221-1362; 268 NW 158

Transfer of funds by check—reformation. Where, "for the bona fide transfer of funds" a cashier's check is purchased by one who supposed he was receiving a draft (and the bank official so knew), the court may treat the check as a draft in order to afford the check holder a preference in case the bank becomes insolvent before the check is paid.

Reason: So treating the check constitutes, in effect, a proper reformation of the check to comply with the mutual understanding of the parties.

Andrew v Bank, 216-1165; 250 NW 487

Vendor and purchaser both defaulting—equity directing performance, rescission and redemption. In a vendee's action to rescind a real estate contract and promissory note, supreme court may invoke broad equitable power to protect both vendor and vendee by allowing vendor, after his mortgage on the real estate had been foreclosed, to negotiate vendee's note to provide funds with which to redeem, on the condition that he apply the proceeds to the mortgage indebtedness and then pay the remaining mortgage indebtedness so as to deliver a clear title to vendees at the time fixed in the contract, or suffer a cancellation of the real estate contract and note.

Fitchner v Walling, 225-8; 279 NW 417

10942 Action on note and mortgage.

Action at law—pendency of foreclosure in foreign state—effect. The right of a party to maintain in this state an action at law to recover of the maker of bonds the balance due after foreclosure, in a foreign state, of the securing mortgage, will not be denied on the plea that the foreclosed property is yet in the hands of the foreclosing receiver and that the amount of rents which will be derived thereunder is not made to appear, when the evidence demonstrates that the utmost that can be realized will not pay taxes and other expenses.

Minnesota Co. v Hannan, 215-1060; 247 NW 536

Action on note—prima facie showing. In an action on a promissory note, the introduction of the note with proof of the genuineness of the signature thereto makes a prima facie case for the plaintiff.

Pfeffer v Corey, 211-203; 233 NW 126

Allowable legal and equitable actions at same time. Where each of a series of matured, mortgage-secured, promissory notes of the same maker possesses the same grade of lien, and is, by a trust agreement executed by the various noteholders, placed in the hands of a trustee with power to institute such actions as he may deem fit in order to effect collection, the trustee may maintain and carry on at the same time an action at law on a portion of said notes, and an action in equity to foreclose the mortgage for the remainder of the notes.

Iowa T. & L. Co. v Clark, 215-929; 247 NW 211

Claims acquired during foreclosure—independent action to enforce. Where, pending foreclosure action, plaintiff acquires an additional claim against the defendant, he is not bound to amend and assert said claim in the foreclosure proceedings, but may maintain a subsequent and independent action on the newly acquired claim even tho it pertains to the subject-matter of the foreclosure.

Central Bk. v Herrick, 214-379; 240 NW 242

Court's jurisdiction—legal issues. In action for a money judgment, foreclosure of a mortgage and appointment of a receiver, the equity court had jurisdiction of the controversy and parties. The action having been properly brought in equity, all issues, legal and equitable, are triable therein.

Deaton v Hollingshead, 225-967; 282 NW 329

Judgment for installment as adjudication. A judgment for the amount of one installment and interest on a promissory note, being all that was then due on the note, is not an adjudication of an action to recover a future maturing installment and interest, the note not containing an accelerating clause maturing the entire indebtedness in case of a default.

Andrew v Stearns, 215-5; 244 NW 670

Judgment in equitable action. The holder of unquestioned, matured promissory notes, secured by a real estate mortgage, is entitled to judgment on the notes, on a proper prayer in an equitable proceeding, even tho the proceeding is not for the foreclosure of the mortgage.

Iowa Bank v Young, 214-1287; 244 NW 271; 84 ALR 1400

Judgment on note alone. A separate judgment on a note does not discharge the mortgage securing it.

Beckett v Clark, 225-1012; 282 NW 724; 121 ALR 912

Land situated wholly in foreign state. A mortgage on land situated wholly within a foreign state may not be foreclosed in this state, tho the mortgagee may maintain, in this state, an action at law on the note so secured.

Beach v Youngblood, 215-979; 247 NW 545

Mortgage foreclosure after judgment on note. A mortgage foreclosure action is maintainable after securing judgment on the note secured thereby.

Beckett v Clark, 225-1012; 282 NW 724; 121 ALR 912

Nonsplitting of action. A mortgagee is not guilty of splitting his cause of action (1) by suing at law on his secured note and proceeding against property of the mortgagor other than the mortgaged property, and (2) by instituting foreclosure proceeding as trustee for other secured noteholders without making any claim therein on his own note.

Iowa T. & L. Co. v Clark, 213-875; 237 NW 336

No presumption foreign foreclosure was in personam. In an action in this state on a foreign, mortgage-secured promissory note, the court will not presume that a foreclosure of the mortgage was on personal service within the jurisdiction of the foreclosing court, on the makers of the note (residents of Iowa), and that, therefore, the note sued on was merged in the foreclosure decree.

Pfeffer v Corey, 211-203; 233 NW 126

Omnibus assignment of error. In an appeal in a law action on a promissory note, tried to the court, where all assigned errors violate supreme court rule 30 as being omnibus in form and supreme court, on its own initiative, could discover no errors, an affirmance and dismissal of the appeal on motion will result.

Pickett v Wray, 225-288; 280 NW 519

Optional remedies to enforce payment. The trustee in a deed of trust securing bonds can-

not be deemed to be limited simply to a foreclosure of the deed—cannot be deemed to be excluded from maintaining an action at law against the maker—when the deed confers upon the trustee the widest discretion as to the remedy which he may choose to enforce collection.

Minnesota Co. v Hannan, 215-1060; 247 NW 536

Party defendants in foreclosure. In an action to foreclose a mortgage, it is allowable to join as defendants (1) the maker of the promissory note, (2) the payee-indorser in blank, and (3) all assumptors of the mortgage.

Hansen v Bowers, 208-545; 223 NW 891

Right of mortgagee to sue at law. A mortgagee has a legal right to sue at law on his mortgage-secured note, and to enforce the resulting judgment against leviable property of the mortgagor other than the mortgaged property.

Iowa T. & L. Co. v Clark, 213-875; 237 NW 336

10943 Ordinary proceedings.

Law (?) or equity (?)—mutual treatment of action. An action mutually treated as a law action, from its inception in the trial court to and including its presentation on appeal, must be treated on appeal as a law action.

Garden v Ins. Co., 218-1094; 254 NW 287

Appeal from fence viewers. Since an appeal to district court from decision of fence viewers is triable as a law action to a jury, if demanded, the supreme court will not interfere with verdict if there is substantial evidence to sustain it. Hence, where parties waived jury on trial of such appeal, the trial court's decision, supported by sufficient evidence, was necessarily affirmed.

Moore v Short, 227-380; 288 NW 407

Application for order in probate. Application for orders in probate which necessitate a construction of a will have no place on the jury calendar, and reversible error results from a refusal to exclude them from such calendar on application of an interested litigant.

In re Watters, 201-884; 208 NW 281

Assignment for benefit of creditors—equity (?) or law(?). The court is inclined to treat an assignment for the benefit of creditors as a proceeding in equity; but howsoever this may be, a proceeding which involves the final report of the assignee and the accounting therein made, and which embraces equitable issues, will be heard on appeal as in equity when so treated by the litigants and trial court.

In re Stone, 220-1341; 264 NW 604

Claims against estate—belated filing—equitable circumstances. While establishing a probate claim is a law proceeding, the determination of the existence of peculiar circumstances relieving the failure to file a probate claim within the statutory period is an equitable proceeding.

Ontjes v McNider, 224-115; 275 NW 328

Deception constituting fraud—nonright to rely. A plaintiff may not maintain an action at law for damages consequent on fraudulent representations not made to him or his agent.

Markworth v Bank, 212-954; 237 NW 471

Findings in re homestead — conclusiveness. On an application by an executor for an order to sell real estate to pay debts, a finding by the court that certain land was not the homestead of the deceased is conclusive on appeal (1) unless such finding is without substantial support in the evidence, or (2) unless the court erroneously applied the law to conceded facts.

In re McClain, 220-638; 262 NW 666

Law issues in equity—no transfer. Law issues in a suit properly brought in equity are not transferable to the law calendar.

Deaton v Hollingshead, 225-967; 282 NW 329

Taking gravel—injury to mortgage security —measure of damages. A mortgagee, being a lienholder, may not maintain trespass against third persons but must sue for injury to his security, and in taking gravel from mortgaged premises the measure of damages is not the value of the gravel taken but the difference in the value of the premises before and after the taking.

Bates v Humboldt Co., 224-841; 277 NW 715

Unallowable action at law. An action for money had and received cannot be maintained at law under circumstances excluding any inference or presumption that defendant received the money for the use and benefit of plaintiff.

Markworth v Bank, 212-954; 237 NW 471

Unallowable equitable remedy. Equity will not assume jurisdiction to declare illegal and to enjoin the enforcement of a contract between an employer and a local labor union on behalf of the employees when the controversy may readily be presented in a law action.

Des M. Ry. v Assn., 204-1195; 213 NW 264

Unpaid stock subscriptions. An action by a receiver of a dissolved corporation to collect on the unpaid stock subscriptions of various parties must be by separate, ordinary proceedings at law, and not jointly in equity, when the demand is solely for a money judgment; and this is true even tho in equity a multiplicity of suits would be avoided.

Kosman v Thompson, 204-1254; 215 NW 261

10944 Error—effect of.

Discussion. See 20 ILR 106—"Mending hold doctrine"

ANALYSIS

I IN GENERAL
II TRANSFER OF CAUSES
III ELECTION OF REMEDIES GENERALLY

I IN GENERAL

Equitable action—legal relief. Tho plaintiff in equity prays for a decree for the specific performance by defendant of the latter's written contract to repurchase corporate shares of stock sold to plaintiff, yet, if plaintiff's alternate prayer be sufficiently broad, the court may, on supporting evidence, enter such a judgment in favor of plaintiff as would be his legal due were his action strictly at law. And, in such case, it is manifestly wholly aside the mark for defendant to contend that specific performance was unallowable (1) because the life of the corporation in question had expired, (2) because of the nature of the property involved, and (3) because the contract in question was nonmutual.

Patterson v Bingham, 222-107; 268 NW 30

Ademption of bequest. A bequest is specific in a will where a note and real estate mortgage securing it were bequeathed to a son of testatrix, and the residuary estate was bequeathed to such son and her grandson; and cancellation by testatrix of the note and mortgage and the taking of title to such real estate in lieu thereof adeems the bequest as respects son's claim that subject matter of bequest still existed but was only changed in form.

In re Keeler, 225-1349; 282 NW 362

Wrong form of action. Supreme court cannot assume jurisdiction on appeal where the matter in issue is not such as was triable in the form of action brought in the trial court below.

Anderson v Meier, 227-38; 287 NW 250

II TRANSFER OF CAUSES

Nonapplicability of statute. The statutory provision for a transfer of a cause from law to equity is not applicable to a cause distinctly brought and tried at law,—a cause wherein plaintiff neither pleads nor proves an equitable cause of action.

Platner v Hughes, 200-1363; 206 NW 268; 43 ALR 1141

Transfer from law to equity sole remedy. Defendant's plea to the jurisdiction of the court because the action is at law, when it ought to be in equity, is unknown to our practice. A transfer on motion to equity is the sole remedy.

Ayres v Nopoulos, 204-881; 216 NW 258
Heileman v Dakan, 211-344; 233 NW 542

Error as to form—exclusive procedure. Mistakenly instituting an action in equity when it ought to be at law must be met by a motion, not to dismiss, but to transfer to the law calendar.

Solberg v Davenport, 211-612; 232 NW 477

Estoppel to allege error. A defendant who, in the trial court, in an action on an unliquidated claim, remains on the equity side of the calendar, without request for transfer to the law calendar, estops himself from complaining on appeal that he was denied a jury trial.

Ober v Dodge, 210-643; 231 NW 444

Contract to purchase estate property—specific performance—equity action. Bank receiver's specific performance action to require heirs to perform contract to purchase receiver's interest in estate property is not lacking in mutuality and is not transferable to law because involving both personal and real property, since equity once acquiring jurisdiction retains it for all purposes, and since cross-petition filed by heirs also asking specific performance, is sufficient reason to deny transfer to law.

Utterback v Stewart, 224-1135; 277 NW 735

Curing erroneous docketing. The erroneous docketing on the equity side of the calendar of an action of forcible entry and detainer becomes inconsequential when subsequent pleadings put title in issue and thereby convert the original law action into an equitable action.

Suiter v Wehde, 218-200; 254 NW 33

Injunction in lieu of certiorari—procedure. It seems that when a plaintiff brings an action in equity for injunction when certiorari is the proper action, the defendant's sole remedy is to move for a transfer of the injunction proceedings into certiorari proceedings.

Zimmerman v O'Meara, 215-1140; 245 NW 715

Law issues in proper equity action nontransferable. Principle recognized that law issues, defensively injected into an action properly commenced in equity, are not transferable to the law calendar.

Bankers Life v Bennett, 220-922; 263 NW 44

Remand in equity—untried law issue. Tho an equitable action is tried de novo on appeal, and modified as to the amount due, yet the entire judgment will be set aside and remanded for trial by the lower court of an issue improperly transferred to the law calendar, and for the final entry of such judgment by the lower court as may be fit and proper.

Pace v Mason, 206-794; 221 NW 455

Transfer from equity to law—undetermined motion—procedure. An undetermined motion by defendant to dismiss an action erroneously pending in equity immediately becomes a

demurrer when the action is properly transferred to the law calendar, and must be disposed of as any other demurrer, and with the same consequences.

State v Murray, 219-108; 257 NW 553

Wrong calendar—transfer as sole remedy. A court which has jurisdiction of an action when brought in the right forum has jurisdiction when brought in the wrong forum. The remedy for an incorrect forum is to transfer to the correct docket.

In re Nish, 220-45; 261 NW 521; 100 ALR 1516

III ELECTION OF REMEDIES GENERALLY

Petition to board of review on excessive tax assessment—not exclusion of federal court. Bank's petition to board of review, held, not to constitute a selection of statutory remedy for adjudication of alleged excessive assessment to exclusion of remedy in federal court of equity.

Munn v D. M. Nat. Bank, 18 F 2d, 269

10945 Correction by plaintiff.

Noninconsistent remedies. The commencement of an action of replevin to recover the possession of promissory notes does not constitute the election of a remedy which will preclude the subsequent filing of a substituted petition presenting the controversy in the form of an action in equity.

Pickford v Smith, 215-1080; 247 NW 256

10946 Correction on motion.

Cross-petition—provisional remedies. The right of a litigant to move to transfer an issue from the equity calendar to the law calendar is not a provisional remedy, within the meaning of §11155, C., '27.

Pace v Mason, 206-794; 221 NW 455

Dockets—transfer—exclusive remedy. Motion to transfer is the exclusive remedy when an action has been commenced at law instead of in equity.

Heileman v Dakan, 211-344; 233 NW 542

Error as to forum—failure to file motion—effect. Where an action is commenced in equity and defendants make no motion to change action to law, tho action was commenced in the wrong forum, it could remain and be concluded in equity.

Russell v Moeller, (NOR); 268 NW 60

Misjoinder — wrong calendar — waiver. A defendant in equity who files answer after the overruling of his motion (1) to strike alleged misjoined causes of action, and (2) to transfer from equity to law, may not maintain an appeal from the ruling on his said motion.

Thompson v Erbes, 221-1347; 268 NW 47

Motions—nonright to withdraw answer. In an action (1) to cancel a deed and (2) to set aside the probate of a will on the ground of mental incapacity of the testator-grantor—both instruments having been executed by the same party and at the same time—it is not necessarily error for the court to refuse to permit defendant to withdraw his answer in order to permit defendant to file motion to separate the alleged separate causes of action and to transfer to the law docket.

Walters v Heaton, 223-405; 271 NW 310

Right to transfer action waived by answer. Defendant in an equitable action, when confronted by an amendment to the petition pleading an action at law in addition to the equitable matters, waives his right to have the law action transferred to the law docket by first filing an answer to said amendment; and this is true tho the equitable issues are later entirely disposed of by decree leaving nothing for determination but the issues raised by said amendment and answer.

Kimmel Inv. Co. v Renwick, 220-362; 261 NW 775

Transfer to equity—return to probate refused. Where an application in probate brought by a trustee under a will asking for directions of the court was transferred to equity on a motion by intervenors after a hearing at which all parties appeared and submitted arguments but did not except to the transfer, it was proper for the court to refuse a motion made eight months later asking that the transfer be canceled, when it was not shown that the rights of the parties could be better determined in probate than in equity, the question being a matter of forum rather than of jurisdiction.

In re Proestler, 227-895; 289 NW 436

Trespass on real estate. Allegations to the effect that defendants on a certain occasion tore down plaintiff's fence, trespassed upon plaintiff's land, and wrongfully removed a building belonging to plaintiff disclose no equitable jurisdiction for the issuance of a mandatory injunction for the restoration of the fence and building; and such action is properly transferred to the law calendar.

Griffiths v Allen, 212-831; 237 NW 219

Unallowable transfer from equity to law. Law issues which are injected by cross-petition into an action properly commenced in equity are not transferable to the law calendar on motion of either party.

Pace v Mason, 206-794; 221 NW 455

10947 Equitable issues.

ANALYSIS

I ISSUES AND TRIALS GENERALLY

Equitable action not transferable to law. A motion will not lie to transfer an equitable action to the law calendar.

Federal Sur. v Morris Plan, 209-339; 228 NW 293

Nontransfer to equity on cross-petition merely re-stating answer. An action at law to recover bank deposits does not become a suit in equity because of defendant's cross-petition which only served to amplify and repeat the defense pleaded in the answer.

Younkin v Bank, 226-343; 284 NW 151

Equitable and law issues in probate. In appeals involving claims in probate, frequent practice of supreme court has been to review equitable issues by trial de novo, while considering alleged errors assigned in the law action.

Ontjes v McNider, 224-115; 275 NW 328

Restraint on alienation—no reformation to limited time. Where an individual agrees to construct a grotto on land of a charitable organization, such agreement will not be reformed to restrict alienation for period of individual's lifetime since restraints against alienation are void even for limited times.

Sisters of Mercy v Lightner, 223-1049; 274 NW 86

Objections to executrix's report—real estate title issue not misjoinder. Where an executrix after resigning files her reports, objections thereto asking that she account for land in another county allegedly purchased with estate money does not misjoin equitable action to impose trust on or establish title in land, but is special probate proceeding to compel executrix to account for assets over which probate court has statutory jurisdiction coextensive with the state.

In re Rinard, 224-100; 275 NW 485

Loss of right to equitable relief. A duly entered judgment against plaintiff on the merits in a law action, and affirmed on appeal, constitutes a final judgment, and §11017, C., '31, furnishes no authority to plaintiff thereafter to file in the adjudicated law action a "substituted petition in equity" (and motion to transfer to equity) involving the same subject matter, and no authority or jurisdiction to the court to entertain such attempted action.

Phoenix Ins. v Fuller, 216-1201; 250 NW 499

Fraud as defense in law action—nonright to transfer. A defendant in an action at law on a policy of insurance is not entitled to a transfer of the action to the equity calendar simply because he pleads fraudulent representation as a defense and prays a cancellation of the policy.

Beeman v Life Co., 215-1163; 247 NW 673

Fraud as defense to law action—nonright to transfer. A defendant who is sued at law for damages for breach of contract, and who defensively pleads that he was fraudulently induced to enter into the contract, and prays for the cancellation of the contract, is not entitled to an order transferring the action to the equity calendar.

Randolph v Ins. Co., 216-1414; 250 NW 639

Inaccurate stipulation for trial in equity—effect. The trial to the court of a strictly law action on the law calendar under a stipulation that the trial shall be "in the same manner as an equity cause" gives appellant no right to a trial de novo on appeal, it appearing that the cause was treated throughout as a law action.

Hostler Lbr. v Stuff, 205-1341; 219 NW 481

Assignment of part of expected judgment—effect. A transfer of a strictly law action to equity is not required simply because an intervenor, on the motion of the defendant, appears and sets up an assignment of part of the expected judgment as security for a claim held by intervenor against plaintiff, intervenor distinctly disclaiming any interest whatever in plaintiff's cause of action.

Wilkinson v Lbr. Co., 208-933; 226 NW 43

Involved account. An action commenced at law on an account may be very properly ordered transferred to the equity calendar when the account runs through a series of years, is extremely involved and complicated, and necessitates innumerable computations beyond the comprehension of the average juror.

Mann v Wilson & Co., 218-395; 253 NW 506

Law action with prayer for injunction. In an action at law for damages, with auxiliary prayer for injunction to prevent a repetition of the injury, the injunction feature of the action is not transferable to the equity calendar for trial.

Pisny v Railway, 207-515; 221 NW 205; 222 NW 609

Nontransferable to equity. A demand for an accounting is not necessarily transferable to equity. For instance, an action by a surety

(who has paid the debt) against a co-surety for proportional reimbursement is not so transferable simply because of the defensive plea that plaintiff had failed to apply to the debt funds in his hands belonging to the principal, and that defendant was, therefore, entitled to an "accounting".

Brown v Conway, 201-117; 206 NW 665

Replevin nontransferable. An action in replevin, insofar as plaintiff claims a lien on the property replevined, may not be transferred to equity.

Commer. Credit v Hazel, 214-213; 242 NW 47

Replevin—substituted petition in equity—mandatory transfer. A plaintiff who, as the maker of promissory notes, brings an action of replevin against the holder, and obtains possession of the notes on the ground of fraudulent representations and want and failure of consideration in the inception of the notes, and who, without his legal right so to do being questioned, thereupon files an amended and substituted petition in equity praying the cancellation of the notes on the grounds pleaded in the replevin action, is entitled to a transfer to the equity docket and to a trial in equity. This is true because of the favorable rule in equity that fraudulent representations may be established without proof of scienter.

Pickford v Smith, 215-1080; 247 NW 256

Transfer from equity to law—effect. A law action, e. g., quo warranto, commenced as an equitable action and properly transferred by the court to law, will, on appeal, be disposed of as a law action.

State v Murray, 219-108; 257 NW 553

Unallowable transfer to equity. An action of replevin involving mortgaged chattels, and wherein the only issue joined is that of fraud and want of consideration in the execution of the mortgage, cannot be legally transferred to equity for the equitable foreclosure of the mortgage.

McDonald v Johnston, 218-1352; 256 NW 676

Implied contract. A court of equity cannot reform a written contract, let alone an implied contract.

Snell v Kresge Co., 220-837; 263 NW 493

II WHEN EQUITABLE ISSUES ARISE

Proper calendar—equity issues. A foreclosure proceeding wherein an intervener is asking for an accounting by a receiver, and wherein an adverse party is praying for the reformation of an instrument, is manifestly properly kept on the equity side of the calendar.

King v Good, 205-1203; 219 NW 517

Retention of suit to award damages. When plaintiff in an action for specific performance has quite successfully shown that he is not entitled to any equitable relief, equity will not retain the suit in order to award damages.

Fisher v Bank, 206-1105; 221 NW 816

III EQUITABLE ISSUES IN LAW ACTION —EFFECT

Action properly at law—limitation on transfer. In an action properly commenced at law on a policy of insurance, defendant may not complain that his plea of arbitration only was transferred to equity.

Koopman v Ins. Assn., 209-958; 229 NW 221

Implied consolidation. A stipulation by parties that a jury be waived in a law action, and that said action together with an equitable action involving the same general subject matter be tried by the court as an equitable matter, constitutes a consolidation of the actions tho no actual order of consolidation is entered.

Holman v Wahner, 221-1318; 268 NW 168

Belated transfer from law to equity. After a jury has been impaneled, evidence taken, and an amendment raising an equitable issue filed, the court may enter an order transferring the cause to equity.

Benson v Weitz, 208-397; 224 NW 592

Appeal from condemnation award—transfer to equity. In a condemnation proceeding where two separate tracts of land under separate ownerships were treated as being jointly owned, and where, on appeal from a lump sum award covering both tracts, the owners in one count of their petition sought dismissal of the condemnation proceeding, and, where issues of waiver and estoppel as to such irregularity were joined, it was proper to transfer said count to equity so that such issues could be determined in advance of the trial to a jury on question of damages.

Newby v Des Moines, 227-382; 288 NW 399

Claims against estate—belated filing—equitable circumstances. While establishing a probate claim is a law proceeding, the determination of the existence of peculiar circumstances relieving the failure to file a probate claim within the statutory period is an equitable proceeding.

Ontjes v McNider, 224-115; 275 NW 328

Eminent domain proceeding. An alleged owner of land who appeals to the district court from an award of damages in eminent domain proceedings may not complain of an order which transfers to the equity side of the calendar so much of said appeal as involves the issue whether the condemnor or the appellant owns part of the land sought to be condemned.

Montgomery County v Case, 204-1104; 216 NW 633

III EQUITABLE ISSUES IN LAW ACTION—EFFECT—concluded

Fiduciary relation — proper transfer to equity. A claim in probate is properly transferred to the equity docket for trial on a showing that a confidential relation existed between claimant and the deceased, and that deceased had fraudulently concealed from claimant the existence of certain trust funds belonging to claimant, and had failed to account therefor.

In re Sibert, 220-971; 263 NW 5

Formal transfer excused. Failure to formally transfer an equitable issue of reformation of an instrument in a law action—i. e., a probate proceeding—to equity, will be disregarded on appeal when the issue was determinative of the litigation and was tried to the court without objection.

In re Jenkins, 201-423; 205 NW 772

Preliminary proceedings—motion to transfer to equity—law question. On a motion to transfer to equity an issue as to reformation of contract, the question of transfer is one of law, determinable from the pleadings.

Koch v Abramson, 223-1356; 275 NW 58

Proper law action nontransferable in toto. An action brought on a contract (e. g., a property settlement between husband and wife), and properly brought at law, is not rendered transferable in toto to the equity calendar by defendant's plea of fraud and prayer for a judicial rescission of the contract. Said alleged fraud, if established in the law action, constitutes a complete defense, and remaining equitable issues are properly transferred to and disposed of in equity. Failure, in the law action, to establish said alleged fraud, necessarily removes from the case said equitable issue of rescission.

Poole v Poole, 221-1073; 265 NW 653

Specific performance. In consolidated actions at law, involving a promissory note payable "to ourselves", the issue of specific performance of an oral contract by one of the makers to indorse the note, should be transferred to the equity calendar.

In re Divelbess, 216-1296; 249 NW 260

Wage recovery dependent on reformation. In a law action for wages, allegedly due an employee under contract, where parties stipulate that the employee shall not recover such wages if the defendant prevails on his cross-petition for reformation, transferred to equity on motion, the employee may not thereafter deny the court's right to try the reformation issue and is bound by the decree if not contrary to the evidence.

Koch v Abramson, 223-1356; 275 NW 58

IV LAW ISSUES IN EQUITABLE ACTION —EFFECT

Law issues in proper equity action nontransferable. Principle recognized that law issues, defensively injected into an action properly commenced in equity, are not transferable to the law calendar.

Bankers Life v Bennett, 220-922; 263 NW 44

Law issues in equity—no transfer. Law issues in a suit properly brought in equity are not transferable to the law calendar.

Deaton v Hollingshead, 225-967; 282 NW 329

Unallowable transfer from equity to law. Law issues which are injected by cross-petition into an action properly commenced in equity are not transferable to the law calendar on motion of either party.

Pace v Mason, 206-794; 221 NW 455

Non-right to transfer. The guarantor of a promissory note who is properly joined with the makers in equitable proceedings to foreclose the mortgage given to secure the note is not entitled to a transfer to the law calendar even tho the makers, by defaulting and suffering judgment, leave no issue for trial in the equitable proceedings except the guarantor's liability at law on his guaranty.

Williamsburg Bank v Donohoe, 203-257; 212 NW 555

Right to trial at law. A plaintiff who, in an ordinary action on a promissory note, alleges a fraudulent transfer by defendant of his property, and prays for an attachment and a decree subjecting the property to his judgment, does not by docketing said action in equity, deprive defendant of the right to a transfer to the law calendar of that part of the action which involves his liability on the note.

Federal Res. Bank v Geannoulis, 203-1385; 214 NW 576

Cross-petition at law in equitable action—nontransferability. A defendant in an equitable action who answers therein, and files therein a cross-petition at law, without questioning either the legal sufficiency of the petition or the jurisdiction of the court over such equitable action, thereby waives all right, if any, to have plaintiff's action transferred to the law calendar. Neither has defendant a right to have his cross-petition at law transferred to said law calendar.

Penn Ins. v Doyen, 211-426; 233 NW 790

Complete relief granted tho subject matter partly legal. Principle reaffirmed that equity having once obtained jurisdiction will determine all necessary matters even tho some of them are ordinarily cognizable only at law.

Penn Ins. v Doyen, 211-426; 233 NW 790

Rent and advances — contract for lien — enforcement — proper forum. An action to establish and enforce a contract lien for rent is properly brought in equity, and is not transferable to law, because the answer presents law issues. Held that a contract lien for rent is

validly created by a lease provision that the landlord should have, not only the statutory lien for rent, but also a lien upon all property of the tenant used or situated on the leased premises whether exempt from execution or not.

Beh v Tilk, 222-729; 269 NW 751

V PRIORITY IN TRIAL OF LEGAL AND EQUITABLE ISSUES

Equitable and law issues—order of trial—estoppel. The fact that the court first tries the pending equitable issues rather than the pending law issues furnishes no basis for complaint by a party who at the time neither requested a different order of trial nor objected to the order pursued by the court.

Pickler v Lanphere, 209-910; 227 NW 526

Allowance and payment of claims—nontransferability to equity. A simple, unsecured claim for money, filed against an estate by the surviving widow, is not, against the objections of the administrator, transferable to equity for trial. So held as to a claim due the widow under an alleged antenuptial contract.

In re Mason, 223-179; 272 NW 88

Law and equity—consolidation—mandatory order of trial. When litigants submit to the court, for trial by the court, both a law action and an equitable action, the court is under duty to first try the equitable issues if they be such as to dispose of both cases.

Holman v Wahner, 221-1318; 268 NW 168

Appeal from condemnation award—transfer to equity. In a condemnation proceeding where two separate tracts of land under separate ownerships were treated as being jointly owned, and where, on appeal from a lump sum award covering both tracts, the owners in one count of their petition sought dismissal of the condemnation proceeding, and, where issues of waiver and estoppel as to such irregularity were joined, it was proper to transfer said count to equity so that such issues could be determined in advance of the trial to a jury on question of damages.

Newby v Des Moines, 227-382; 288 NW 399

VI ERRONEOUS TRANSFER OR REFUSAL TO TRANSFER—EFFECT

Refusal to transfer. The refusal to transfer from equity to law is quite harmless when the record reveals the fact that movant has no defense in law or in equity.

Westerman v Raid, 203-1270; 212 NW 134

Refusal to transfer. It is error to refuse a transfer to equity of an issue of reformation arising in a law action.

Power v Wood, 200-979; 205 NW 784; 41 ALR 1452

10948 Court may order change.

Eminent domain — bringing in necessary parties. In eminent domain proceedings on appeal from the award of the sheriff's jury, the court may permit the appellant land owner to amend, and bring in, and join equitable issue of ownership as to a portion of the property involved, with a stranger to the proceedings, and to try out such issue prior to trying out the issue of damages.

McCall v Highway Com., 217-1054; 252 NW 546

10949 Errors waived.

Waiver. A defendant who, in an equitable action for injunction, prays for equitable relief may not, after trial, question the jurisdiction of the court on the ground that plaintiff's action ought to have been at law,—to wit, replevin.

Baxter v Baxter, 204-1321; 217 NW 231

Equity instead of law—estoppel. A litigant may not allow an action in the trial court to remain on the equity side of the calendar without objection, and on appeal, for the first time, claim that the action should have been at law.

Burmeister v Hamann, 208-412; 226 NW 10

Des M. Music Co. v Lindquist, 214-117; 241 NW 425

Petition at law in equitable action—nontransferability. A defendant in an equitable action who answers therein and files therein a cross-petition at law, without questioning either the legal sufficiency of the petition or the jurisdiction of the court over such equitable action, thereby waives all right, if any, to have plaintiff's action transferred to the law calendar. Neither has defendant a right to have his cross-petition at law transferred to said law calendar.

Penn Ins. v Doyen, 211-426; 233 NW 790

Waiver by answer. Defendant in an equitable action, when confronted by an amendment to the petition pleading an action at law in addition to the equitable matters, waives his right to have the law action transferred to the law docket by first filing an answer to said amendment; and this is true tho the equitable issues are later entirely disposed of by decree leaving nothing for determination but the issues raised by said amendment and answer.

Kimmel Corp. v Renwick, 220-362; 261 NW 775

Law (?) or equity (?) — presentation of question. Whether an action brought in equity should have been brought at law can only be

raised by a motion to transfer to the law side of the calendar.

Des M. Music v Lindquist, 214-117; 241 NW 425

Beach v Youngblood, 215-979; 247 NW 545

Wrong docket—waiver. When in an action brought against two defendants in equity one defendant is sought to be charged at law and the other in equity and the equity feature of the action is wholly dismissed, the remaining party waives any right to a transfer to the law docket by failing to move for such transfer.

Minnesota Co. v Hannan, 215-1060; 247 NW 536

Failure to except. Rulings relative to the transfer of a cause from law to equity or vice versa will not be reviewed in the absence of exceptions to the rulings.

Hogan v Perkins, 213-1175; 238 NW 608

Van Dyck v Abramsohn, 214-87; 241 NW 461

Following trial court method of trial. An appeal will be heard de novo when the parties mutually and without controversy tried the cause in equity in the trial court.

State v Automobile, 214-1088; 243 NW 303

Separating issues—required procedure. A party who wishes to separate the equitable issues already joined from a law action, pleaded by the adversary as an amendment, must move to separate before he answers.

Kimmel Corp. v Renwick, 220-362; 261 NW 775

Transfer to equity—return to probate refused. Where an application in probate brought by a trustee under a will asking for directions of the court was transferred to equity on a motion by intervenors after a hearing at which all parties appeared and submitted arguments but did not except to the transfer, it was proper for the court to refuse a motion made eight months later asking that the transfer be canceled, when it was not shown that the rights of the parties could be better determined in probate than in equity, the question being a matter of forum rather than of jurisdiction.

In re Proestler, 227-895; 289 NW 436

10950 Uniformity of procedure.

Comity between states. A cause of action which is predicated on the statutes of a foreign state will, as a matter of comity, be enforced in the courts of this state, but only under and in accordance with the recognized and prescribed court procedure of this state.

Rastede v Railway, 203-430; 212 NW 751

Service on foreign insurer—physician not agent. An Iowa accident insurance association which has not been licensed to transact its business in a foreign state (in which it has neither office, agent nor property), and whose certificates of insurance are strictly Iowa contracts, cannot be deemed to have subjected itself to the jurisdiction of the courts of such foreign state (1) because a very large number of its certificate holders reside in said foreign state, or (2) because said association, from time to time and by mail from its Iowa office, requests a physician in said foreign state to there examine claimants and to report as to accidental injuries received by claimants,—it appearing that said physician was under no contract obligation to comply with said requests and to make such examinations tho he had done so for several years and had received a stated fee for each separate examination.

Held, the foreign court, in an action on a certificate, acquired no jurisdiction under process served on said physician.

Saunders v Trav. Assn., 222-969; 270 NW 407

10951 Title of cause.

Immaterial deviation. The fact that a guardian brings an action in behalf of the ward as "next friend" does not necessarily affect the validity of the proceedings.

Bennett v Ryan, 206-1263; 222 NW 16

10952 Judgments annulled in equity.

Enforcement of judgments restrained. See under §12527

Consent decree. Equity will not set aside a consent judgment for attorney fees for both parties in divorce proceedings, against the defeated party and his land, when no fraud is shown, and when the court had personal jurisdiction over both parties to the proceeding.

Coulter v Smith, 201-984; 206 NW 827

Counterclaim—waiver by failure to plead. A party who is sued on a nonnegotiable claim by the assignee or quasi assignee thereof or by one who has been subrogated to the right to the claim, and fails to plead in defense a counterclaim which he then holds against the assignor, whether such counterclaim be liquidated or unliquidated, unconditionally waives the right to use such counterclaim as an offset against the judgment obtained by the assignee or subrogated party on the claim sued on.

Southern Sur. v Ins. Co., 210-359; 228 NW 56

Defense arising or discovered since judgment entered. The fact that a claim, when judgment was entered thereon, had been discharged in bankruptcy, is not a "defense which has arisen or been discovered since the judgment was rendered", and therefore within the power of a court of equity to annul or modify.

Harding v Quinlan, 209-1190; 229 NW 672

Equitable action after one year. What exact limitations a court of equity will impose on

itself in exercising its power to vacate a judgment or decree and to grant a new trial because of evidence discovered after the expiration of the statutory one year for vacation and new trial, quaere (§12787 et seq.); but such power will not be exercised either (1) when the new evidence was or ought to have been discovered during said statutory period, or (2) when such evidence falls far short of presenting strong equitable considerations, is largely incompetent, and, within the range of competency, is a double-edged sword which militates strongly against the equities of the applicant.

Abell v Partello, 202-1236; 211 NW 868

Failure to do equity. Equity will not set aside a judgment for a debt which complainant admits he owes, and which he in no manner offers to discharge.

Coulter v Smith, 201-984; 206 NW 827

Fraud of judgment plaintiff. A judgment entered against a defendant after plaintiff, for a sinister purpose, had assured defendant that he would not be held on his indorsement of the note in question, and after plaintiff had induced defendant to forego reimbursing himself by a settlement with the maker of the note, will be deemed fraudulent and set aside accordingly.

Foote v Bank, 201-174; 206 NW 819

Void judgment always subject to attack. A void judgment may be attacked in any proceeding in which it is sought to be enforced.

Gohring v Koonce, 224-1186; 278 NW 283

10953 Action to obtain discovery.

Discussion. See 19 ILR 589—Illinois-Iowa procedure; 20 ILR 68—Discovery before trial

Improper use of statute. Principle reaffirmed that the court will not extend its aid to a litigant in his effort to enter upon a roving, gambling expedition for the purpose of discovering his antagonist's evidence.

Scott v Seabury, 216-1214; 250 NW 468

Discovery proceedings—extent of jurisdiction. In a discovery proceeding against a person suspected of taking wrongful possession of decedent's property, where a dispute arises as to ownership of property, neither the trial nor appellate court has authority to order delivery of the property to the executor or administrator unless it appears beyond controversy that the person examined has wrongful possession of the property.

In re Hoffman, 227-973; 289 NW 720

Motions — more specific statement — unreasonable requirement. In an action in the nature of a discovery and for an accounting, plaintiff ought not, under a motion for a more specific statement, to be required to set forth the very facts which he is seeking to discover.

Garretson v Harlan, 218-1049; 256 NW 749

10956 Successive actions.

Statute of limitations on successive actions. See under §11007, Vol I

Successive actions on statutory bond.

Philip Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495

Splitting action. A party to a continuing, executory contract may, notwithstanding the wrongful repudiation of the contract by the other party, insist on the contract and sue and recover the matured installments to date; and such action is no bar to a subsequent action to recover henceforth for the wrongful breach of the contract.

Collier v Rawson, 202-1159; 211 NW 704

Permissible splitting of action. When a promissory note, and the last interest coupon note, both mature at the same time in the hands of the same holder, a judgment in an action solely on the interest coupon note (which contains no promise to pay the principal) is not an adjudication of the amount due on the principal note. In other words, the holder may first sue on the coupon note and later on the principal note.

Des M. Trust Co. v Littell, 209-22; 227 NW 503

Failure to enforce all security in mortgage foreclosure.

Schnuettgen v Mathewson, 207-294; 222 NW 893

Failure to plead available claim in foreclosure.

Miller Bk. v Collis, 211-859; 234 NW 550
Jones v Knutson, 212-268; 234 NW 548

Allowable partial assignment. The owner of a chose in action has a legal right to assign a part of his interest in such chose, and thereafter to join with the assignee in the prosecution of the entire cause of action.

Welch v Taylor, 218-209; 254 NW 299

Future payments—total disability. In action on life insurance policy for total disability payments, where supreme court ordered insurance company in prior case, decided in 1931, to pay annual benefits up to that time, the decision of the trial court in a subsequent action on the same policy ordering payments up to 1937 and thereafter, was erroneous as to that part requiring future payments, particularly since opinion in first appeal is binding not only under the doctrine of stare decisis, but also under the rule of res adjudicata, when the first opinion held that "continuance of such disability must be established by later proofs".

Kurth v Ins. Co., 227-242; 288 NW 90

Mortgagee suing for delinquent taxes omitted from foreclosure judgment—splitting action. A mortgagee who had paid delinquent

taxes on the mortgaged land, according to a provision of the mortgage that if taxes were not paid the mortgagee could pay them and obtain repayment, should have taken care of his claim for taxes in the foreclosure proceedings and was not permitted by Ch. 501, C., '35, to split his cause of action and bring an action for the taxes after the mortgagor had redeemed.

Monroe v Busick, 225-791; 281 NW 486

10957 Actions survive.

Discussion. See 3 ILB 196—Instantaneous death; 10 ILB 169—Liability for wrongful death; 11 ILR 28—Liability for wrongful death

ANALYSIS

I SURVIVAL OF ACTIONS AND RESULTING RIGHTS

II ASSIGNABILITY OF ACTIONS

Assignment of chose in action. See under §10971
Assignment of nonnegotiable instruments and accounts. See under §9451

I SURVIVAL OF ACTIONS AND RESULTING RIGHTS

What causes of action survive. While the right of an injured employee to compensation under the workmen's compensation act is based on disability, and the right of his dependents to compensation in event of his death is based on loss of support, nevertheless the facts maturing each right are substantially the same, and therefore, in case the injured employee dies while his application for compensation is pending, the cause of action survives to his dependents, they being his "successors in interest" within the meaning of the statute.

Dille v Coal Co., 217-827; 250 NW 607

Death of spouse—effect. Principle reaffirmed that the mutual property rights of a husband and wife may be determined after the death of one of the parties.

Melvin v Lawrence, 203-619; 213 NW 420

Damages for death—evidence. In an action for damages for wrongful death, evidence is admissible of the recent purchase, solely on credit, by decedent, of a business, and of the marked reduction by decedent of his indebtedness subsequent to such purchase, together with evidence of his ability, health, and other kindred matters.

Scott v Hinman, 216-1126; 249 NW 249

Assessment on bank stock—liability survives. The cause of action for the enforcement of an assessment on corporate bank stock survives the death of the stockholder, the stock continuing to stand in his name on the books of the bank until the necessity for, and right to, the assessment arose.

Andrew v Bank, 219-1244; 260 NW 849

Alimony—modification by action by executor. Whether an action or proceeding to modify an alimony allowance survives the death of the obligated party, and passes to the latter's executor, quaere, but, conceding such survival, there must be proof that the right to such modification existed in the obligated party during his lifetime.

Goldsberry v Goldsberry, 217-750; 252 NW 531

Death of defendant—effect. The death of a defendant in a criminal prosecution, even after trial, conviction, judgment and appeal, but before the final determination of the latter proceeding, works a complete abatement of the proceeding ab initio.

State v Kriechbaum, 219-457; 258 NW 110; 96 ALR 1317

Bonds—enforcement against heirs et al. The bond of a fiduciary, under the terms of which a surety purports to bind "his heirs, devisees, and personal representatives", is not revoked by the death of the surety, and binds the estate of the surety in the hands of his heirs, devisees, or personal representative.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Common law abrogated. The original cause of action that accrued to an injured party survives his death in favor of his legal representatives, the common-law rule to the contrary being abrogated by statute.

Boyle v Bernholtz, 224-90; 275 NW 479

Death of party—appeal not abated. Death of appellee during pendency of divorce appeal to the supreme court does not abate the action when property rights are involved.

Graham v Graham, 227-223; 288 NW 78

II ASSIGNABILITY OF ACTIONS

Joinder—causes assigned for collection—right of assignee. Plaintiff, in an action at law against a defendant, may join in separate counts:

1. Any number of causes of action against defendant of which plaintiff is the unqualified holder, and which are triable at law in said county of suit, and

2. Any number of causes of action against defendant of which plaintiff is holder as assignee for collection only, and which are triable at law in said county of suit.

Carson etc. v Long, 222-506; 268 NW 518

10958 Civil remedy not merged in crime.

Bar of action—acquittal as bar to civil action—penalties—forfeitures. The general rule is that a defendant's acquittal in a criminal prosecution is neither a bar to a civil action

against him nor evidence in such action of his innocence; but, when the subsequent action, altho civil in form, is quasi-criminal in nature, as to recovering penalties or declaring forfeitures, the second action may be barred by the former.

Bates v Carter, 225-893; 281 NW 727

10959 Actions by or against legal representatives—substitution.

ANALYSIS

Disposition of recovered proceeds. See under §11920

I IN GENERAL

Action against executor as such. An action at law against an executor as such, in the county in which he was appointed such officer, for damages for personal injuries inflicted by the deceased, is, in legal effect, but an action in rem against the assets of the estate. It follows that the executor is not entitled to demand a change of place of trial to another county of which he is a legal resident.

Van Iperen v Hays, 219-715; 259 NW 448

Collection of estate—breach of contract. An executor may maintain an action for the breach of a contract between the deceased and an heir of deceased by which the latter agreed to pay, as part of the estate, a named sum to another heir.

Rodgers v Reinking, 205-1311; 217 NW 441

Death of partner—action by surviving partner. A surviving partner cannot maintain an action at law against the representative of a deceased copartner to recover plaintiff's share of specific partnership property appropriated by the deceased partner, in the absence of proof that the partnership affairs have been settled and all partnership debts paid.

Dolan v McManus, 209-1037; 229 NW 687

Judgment after death of defendant. Principle recognized that the court having taken a cause under advisement, and delayed decision until after the death of the defendant, may validly render judgment as of the date of the submission.

Chariton Bank v Taylor, 213-1206; 240 NW 740

Statutory double liability repealed—limitation of action. After the effective date of Ch 219 of the 47th G.A., the act repealing the statutory double assessment liability on bank stock, a closed bank's receiver may not maintain against the executor and beneficiaries under the will an action to enforce the double liability as to stock issued prior to December 1, 1933, and formerly owned by decedent.

Bates v Bank, 227-925; 289 NW 735

Surety bond—when enforceable against heir. A claim arising under a bond wherein the surety binds "his heirs, devisees, and personal representatives", and arising after the death of said surety and the due settlement of his estate, is enforceable:

1. Against the property received by an heir, as such, from said ancestor-surety, and
2. Against the property passing from said ancestor and owned by said heir under conveyance for which he paid nothing, and
3. Against the heir, personally, for the value of the property so received if he has consumed it. And this is true even tho, necessarily, said claim was not filed against the estate of said surety.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

II SUBSTITUTION

Appeal in name of deceased party. Altho plaintiff died during pendency of action below, supreme court took jurisdiction of appeal taken in name of such decedent, because parties treated cause as one properly before the court and because it was a case where court's constitutional authority could be invoked.

Bingaman v Rosenbohm, 227-655; 288 NW 900

Death of applicant for compensation—proper substitution. Where an injured employee files with the industrial commissioner, under the workmen's compensation act, his application for compensation, and dies before compensation has been adjudicated, the surviving wife, who is the sole surviving dependent, may be substituted as claimant.

Dille v Coal Co., 217-827; 250 NW 607

Death of party without substitution. Where no personal representative was substituted for plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence, application made during same term to vacate the dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

Substitution—irregular practice. A plaintiff who permits his action to quiet title to lie dormant until the defendants are all dead is guilty of very irregular practice in his attempt to obtain a substitution of defendants by filing a purported amendment, not under the title of his pending action, but under a new title, in which the heirs of the deceased

II SUBSTITUTION—concluded

defendants are for the first time enumerated and named as the defendants, and, under such title, moving for a substitution of defendants in the old action.

Benjamin v Jackson, 207-581; 223 NW 383

Substitution of administrator. Upon the death of a party plaintiff, his administrator is properly substituted as plaintiff.

Dimon v Wright, 206-693; 214 NW 673

Substitution of county treasurer as defendant without notice. A default judgment entered against a county treasurer who had been substituted as defendant in lieu of a former treasurer, in an action to enjoin the sale of land for taxes, must be set aside when the substitution is made without the service of original notice upon him, and without knowledge on his part, even tho the former treasurer had been negligent in not entering an appearance; and especially is this true when the application to set aside is timely, and accompanied by an affidavit of merit and an apparently good answer.

Dewell v Suddick, 211-1352; 232 NW 118

Belated substitution—discretion. In an action at law by a corporation to recover on a contract, the court has discretionary power during the actual trial and after the jury has been obtained and after some testimony has been introduced, to order plaintiff's assignee for the benefit of creditors to be substituted as plaintiff,—no actual prejudice to defendant being made to appear; and this is true even tho defendant was, of course, deprived of the privilege of examining the jurors relative to their relations to the said assignee.

Webster County Buick Co. v Auto Co., 216-485; 249 NW 203

III ACCRUAL OF ACTION

Common law abrogated. The original cause of action that accrued to an injured party survives his death in favor of his legal representatives, the common-law rule to the contrary being abrogated by statute.

Boyle v Bornholtz, 224-90; 275 NW 479

IV RECOVERY AND DISTRIBUTION

Dormant action until death of defendants—substitution of heirs—irregular practice. A plaintiff who permits his action to quiet title to lie dormant until the defendants are all dead is guilty of very irregular practice in his attempt to obtain a substitution of defendants by filing a purported amendment, not under the title of his pending action, but under a new title, in which the heirs of the deceased defendants are for the first time enumerated and named as the defendants, and, under such title, moving for a substitution of defendants in the old action.

Benjamin v Jackson, 207-581; 223 NW 383

Workmen's compensation—death of party claiming disability—substitution of dependents for loss of support. While the right of an injured employee to compensation under the workmen's compensation act is based on disability, and the right of his dependents to compensation in event of his death is based on loss of support, nevertheless the facts maturing each right are substantially the same, and therefore, in case the injured employee dies while his application for compensation is pending, the cause of action survives to his dependents, they being his "successors in interest" within the meaning of the statute.

Dille v Plainview Coal, 217-827; 250 NW 607

Note 1 Negligence liability generally.

Discussion. See 21 ILR 650—Assumption of risk

ANALYSIS

Automobile cases generally. See under §5037.09
Banks, when liable. See under §9162
Buildings, defects, negligence liability. See under §6392
Cities. See under §§5738, 5945
Cities, attractive nuisance cases. See under §5945 (III)
Contributory negligence of employees, action against employer. See under §11210
County. See under §5128
Criminal liability. See under §12919
Directing verdict generally. See under §11508
Electricity and equipment, attractive nuisances. See under §8323
Evidence generally. See under §11254
Instructions generally. See under §§11491, 11493
Instructions—automobile cases generally. See under §5037.09 (IX)
Instructions—automobile guest cases. See under §5037.10 (VIII)
Instructions—negligence generally. See under §§11491, 11493
Joint tort-feasors. See under this chapter, Note 2, below
Last clear chance. See under §§5037.09, 8156
Latent defects. See under §9944
Leased premises, negligence liability. See under §6392
Malicious prosecution. See under §13728
Motor vehicle carriers generally. See under §5100.26
Pleading negligence. See under §11111 (IX)
Public officials' negligence liability: city, §5738; county, §5128; school, §4123; state, §2
Railroads, attractive nuisance cases. See under §8156 (III)
Railroads, negligence generally. See under §§8005, 8018, 8156
Res ipsa loquitur, pleading. See under §11111
School district. See under §4123
Taxicabs. See under §5023.03
Township. See under §5527

I NEGLIGENCE

(a) IN GENERAL

Discussion. See 2 ILB 122; 5 ILB 36—Last clear chance

Interpretation of uncertain and indefinite plea. An indefinite and uncertain plea of negligence may very properly be given an interpretation by the court that is not inconsistent with the plea and which is consistent with the way or manner in which both parties have treated it.

Dean v Koolish, 212-238; 234 NW 179

No warning signal at railroad crossing—statute violations—negligence. The failure of compliance with a statutory standard of care is negligence. In an action for personal injuries sustained by an automobile passenger in collision in Illinois between an automobile and railway motorcar, where petition alleged that railway employees failed to ring bell or sound whistle of motorcar while approaching a crossing, as required by Illinois statute, such allegations were sufficient to state a cause of action based on negligence of employees of defendant railroad.

Smith v Railway, 227-1404; 291 NW 417

Due care—measure affected by conditions. Care commensurate with the dangers inherent in the surroundings is required for the exercise of due care.

Denny v Augustine, 223-1202; 275 NW 117

Ordinary care—definition reaffirmed—first complaint on appeal. The standard definition of ordinary care need not be augmented by adding an extra word "ordinarily" to the phrases "would do" or "would not do under the circumstances", and, without a proper request in the trial court, complaint cannot be made on appeal.

Johnston v Johnson, 225-77; 279 NW 139; 118 ALR 233

Ordinary care—unallowable standard. Error results from instructing that a party would not be guilty of negligence if he moved machinery across a railroad track in the manner in which he usually so moved it, unless he knew such manner to be dangerous.

Graves v Railway, 207-30; 222 NW 344

Physical defect. The doctrine that a traveler upon the public highway must exercise a degree of ordinary care commensurate with a known physical defect necessarily can have no application when he did not know that he had the physical defect in question.

Greenlee v Belle Plaine, 204-1055; 216 NW 774

Intervention of second force—determining liability. Where an injury results through the operation of a second force, ordinarily liability depends upon whether or not that second force may be anticipated to be the natural and probable consequence of the negligent act of the first party.

Blessing v Welding, 226-1178; 286 NW 436

"Volenti non fit injuria" defined. The maxim "Volenti non fit injuria" means: "That to which a person assents is not esteemed in law an injury" or "He who consents cannot receive an injury."

Edwards v Kirk, 227-684; 288 NW 875

Evidence—jury question. The court cannot, ordinarily, say that conflicting testimony tending to establish a charge of negligence is per se so absurd and improbable as to be insufficient to generate a jury question.

Elmore v Railway, 207-862; 224 NW 28; 32 NCCA 185; 35 NCCA 421

Contributory negligence — jury question. Principle reaffirmed that a jury question exists on the issue of negligence whenever on the record reasonable minds might reasonably differ as to the effect of what was done or not done under the circumstances.

Rosenberg v Railway, 213-152; 238 NW 703

Submitting both negligence and recklessness. Both questions of negligence and of recklessness may in a proper case be submitted together to the jury.

Wells v Wildin, 224-913; 277 NW 308

"Last clear chance" doctrine—applicability. The "last clear chance" doctrine has no application except in those cases only where defendant actually discovers plaintiff's position of peril in time to prevent injury by the exercise of ordinary care, and fails to exercise such care.

Graves v Railway, 207-30; 222 NW 344

Assumption of risk—lack of knowledge. An injured party may not be held to assume the risk of a defect of which he had no knowledge.

Dahna v Fun House Co., 204-922; 216 NW 262

Contributory negligence per se—hotel laundry truck—failure to see. Evidence reviewed and held to establish negligence per se on the part of plaintiff in not seeing and avoiding a truck which was standing in the hallway of a hotel.

Walker v Hotel Co., 214-1150; 241 NW 484

Hotels—negligence liability.

Van Heukelom v Hotels Corp., 222-1033; 270 NW 16

Inadvertent self-inflicted injury. One may not recover damages for an injury arising out of his own act, and under circumstances under his exclusive control. So held where the party in removing a prop under a loading

I NEGLIGENCE—continued
(a) IN GENERAL—continued

chute was injured by the prop falling against his face.

Rodgers v Railway, 214-1018; 243 NW 351

Tripping over mop handle. A naked showing that a pedestrian, while walking along a public street, was tripped and caused to fall by a mop handle in the hands of a window cleaner does not present a jury question on the issue of negligence.

Aita v Beno Co., 206-1361; 222 NW 386; 61 ALR 351

Unsupported issue. An unsupported issue of negligence must not be submitted to the jury. So held on the issue whether a city had negligently maintained its dump grounds.

Nichols Co. v Des Moines, 215-894; 245 NW 358

Depositing refuse on city dump. A person who deposits, on dump grounds provided by a city, discarded materials containing acid or capable of generating acid by a process of decomposition, becomes, henceforth, a stranger to such materials. In other words, he cannot be deemed negligent, toward persons frequenting said grounds, either in making the original deposit or in leaving it unguarded on the grounds. But evidence reviewed and held insufficient to sustain plaintiff's action even on a contrary theory.

Cabrnosh v Penick & Ford, 218-972; 252 NW 88

Negligence of contractor — unanticipated event. A contractor who, while constructing a sewer under the direction of and in accordance with the plans prescribed by the city, is unexpectedly interrupted in his work by the failure of the city to acquire a continuous right of way for the sewer, is under no legal obligation to a property owner to leave his uncompleted work in such condition as will avoid damages which no reasonable foresight would anticipate.

Newton Co. v Herrick, 203-424; 212 NW 680

Governmental function—nonliability. Neither a county, as a quasi corporation, nor its board of supervisors is liable for the negligence of its employee in operating after dark a road maintainer without lights on the left-hand side of a highway, and in an action by a motorist who sustained injuries on account of such negligence demurrers to the petition by the county and its board of supervisors were properly sustained.

Shirkey v Keokuk Co., 224-1159; 276 NW 706; 281 NW 837

Drowning in swimming pool. Negligence of a corporation operating a swimming pool in which an 11-year-old boy drowned, could not be grounded upon lack of sufficient attentive life guards, where it had one competent guard who never left his post at the deep water end and no showing was made as to need for more guards and none of the many bathers saw the drowning; and where most of the bathers, including the deceased, were in special groups which had competent life guards and other adult attendants for their own special protection.

Hecht v Playground Assn., 227-81; 287 NW 259

Charitable institutions—nonliability to beneficiaries for employees' negligence. Tho as between benefactor and beneficiary, an institution conducted solely for doing charity may not be liable for the negligence of its employees to a person receiving the benefits of that charity; however, a WPA worker doing work on the premises of a Y. M. C. A. was not a beneficiary of the charitable work of the institution, so as to be within this rule.

Andrews v Y. M. C. A., 226-374; 284 NW 186

Vicious and runaway team. Evidence held insufficient to establish that a team of horses in question were vicious and addicted to running away.

Hansen v Jensen, 204-1063; 216 NW 677

Failure to warn employee. An employer is not negligent in failing to warn an experienced farm hand of the danger of going in front of a team of horses when the employee had full knowledge of the temperamental condition of the team.

Hansen v Jensen, 204-1063; 216 NW 677; 39 NCCA 431

Master and servant—injuries to servant—place for work—loose rug on polished floor. The maintenance in the doorway between the dining room and hallway of an ordinary home, and on the polished hardwood floor thereof, of a 3-ft. x 6-ft. Persian rug with ribbed undersurface but without floor fastenings of any kind, cannot, as a matter of law, be deemed negligence.

Nelson v Smeltzer, 221-972; 265 NW 924

Unguarded opening in wall—nonattractive nuisance. It is not negligent for a factory owner to maintain on his premises an unguarded opening in a wall under a building adjoining a driveway, when the opening is of a size sufficient to enable a small child to crawl through and under the building and come in contact with hidden machinery.

Nelson v Canning Co., 193-1346; 188 NW 990

Wrecking building—duty in re adjoining tenants. A party rightfully engaged in tearing down a building is under legal obligation to exercise reasonable care for the safety of

other persons who are rightfully in buildings adjoining the one which is being torn down.

Crawford v Emerson Co., 222-378; 269 NW 334

Nonpresented theory. Correct instructions relative to the duty of the defendant to guard an excavation made by him are all-sufficient, in the absence of a request by defendant that there be presented to the jury his claim that he had properly covered the excavation and that someone had, without his knowledge, wrongfully removed such covering.

McKee v Iowa Co., 204-44; 214 NW 564

Willful or wanton act—evidence. Evidence, relative to the circumstances under which a visitor in a manufacturing plant was injured by her clothing catching on a revolving shaft, reviewed, and held quite insufficient to reveal any element of willfulness or wantonness in the conduct of an employee of the plant.

Sanburn v Rollins Mills, 217-218; 251 NW 144

Boy drowning in swimming pool at boys' camp—owners of pool—liability. In an action to recover damages for the drowning of an 11-year-old boy who was attending an outing camp, where the camp director had arranged with the Red Cross to provide two swimming instructors and life guards to be on duty at a specified time to protect about one hundred boys at the camp, and when the corporation operating the swimming pool took no part in arranging for life guards, it was not, under the circumstances, negligent in presumably admitting the decedent to the pool a few moments in advance of the time fixed for the entire group and in advance of supervision by the Red Cross instructors and life guards.

Hecht v Playground Assn., 227-81; 287 NW 259

Agent's duty to care for principal's property. An agent has the duty to exercise reasonable care in safeguarding the property of his principal, and ordinarily he is not liable for loss of such property resulting from causes other than his own negligence.

Crouse v Cadwell, 226-1083; 285 NW 623

Negligence of tenant—liability of landlord. Principle recognized that a property owner who has parted with full possession and control of his premises by lease is not liable to third persons for injuries caused by the negligence of the tenant.

Updegraff v Ottumwa, 210-382; 226 NW 928

Bailments—gratuitous lender—no affirmative duty to user—injury from borrowed corn shredder. A gratuitous bailor or lendor of a chattel, deriving no advantage from the relationship, owes no affirmative duty to his donee to see that the chattel is free from danger, except to inform the donee of known dangerous conditions. Rule applied to loaned corn shredder in which a person injured his hand.

Davis v Sanderman, 225-1001; 282 NW 717

Borrowing automobile to deliver telegraph message. A telegraph company is not responsible for the act of its messenger in borrowing an automobile with which to make a delivery of a message when the usual and ordinary way of making delivery was by means of a bicycle, and when the borrowing aforesaid was wholly unauthorized by and unknown to the company.

Hughes v Western Union, 211-1391; 236 NW 8; 31 NCCA 423

Bailments—duty to user—injury from borrowed corn shredder. A person supplying a chattel for another's use, and who derives some beneficial interest therefrom, must use reasonable care to discover, and is liable for, unreasonable risks due to the condition or disrepair of the chattel or its unfitness or inadequacy for the purpose for which supplied. The user assumes only such risks as are not known and not discoverable by the supplier using ordinary care. Rule applied to corn shredder loaned to neighbor and in which shredder a person injured his hand.

Davis v Sanderman, 225-1001; 282 NW 717

Corn shredder gratuitously loaned—farm machinery mechanic injuring hand in knives—directing verdict. Directing a verdict is proper against a plaintiff, a farm machinery mechanic and salesman, seeking recovery for an injury sustained when his hand was caught in a corn shredder, which had been gratuitously loaned by defendant to a neighbor on whose farm plaintiff was operating the machine, the evidence showing plaintiff was an adult familiar with such machinery and in full possession of his faculties, and that there was no negligence attributable to defendant.

Davis v Sanderman, 225-1001; 282 NW 717

Trespassing boy—jumping from freight car to building. There are cases where the owner of premises will be held liable for injury to a child too young to understand the fact or meaning of trespass, or to care for his own safety when attracted to the premises by some act or omission of the owner which he knows, or as a reasonably prudent person ought to apprehend, would render the premises dangerous. But where, as in this case, a boy 13 years of age climbed upon a freight car standing at defendant's railway station and from there jumped to the roof of a storage building for electric cars, and when about to jump back to the car was injured by contact with an uninsulated power wire passing above the roof of the building, and it appeared that plaintiff knew he was a trespasser, that the railway was operated by electricity and that electric wires were dangerous; that the roof could only be reached by climbing the cars; that this was

I NEGLIGENCE—continued
(a) IN GENERAL—continued

the first incident of the kind and no necessity for guards or signs had been indicated to the owner, the plaintiff was guilty of such negligence as to preclude recovery for the injury.

Anderson v Railway, 150-465; 130 NW 391

Alighting from moving train. Negligence may be found in the act of a brakeman of a train in advising a passenger to alight from a moving train, and it is not necessarily negligence for the passenger to follow the advice.

Bersie v Railway, 202-1090; 211 NW 250

Nonapprehended danger. Negligence may not be predicated on the failure of the operatives of a train to stop and remove a 7-year-old child from a pile of cinders near the track when there is no occasion to apprehend danger to the child.

Radenhausen v Railway, 205-547; 218 NW 316

Sudden stopping of streetcar. Evidence that a street railway car was put in motion in order to carry it around a corner at two intersecting streets, and was momentarily thereafter brought to a sudden stop because of the unexpected act of an automobile driver in attempting to pass the streetcar and in being caught by the overswing of the rear end of the streetcar, presents no jury question on the issue of negligence in operating the streetcar.

Wheeler v Railway, 205-439; 215 NW 950; 55 ALR 473

Instructions—undue burden. No undue burden is imposed on a defending street railway company by requiring it to keep its car "under proper control and to use ordinary care," to operate its car "in a careful manner and not at a dangerous rate of speed," and to give notice of its approach "by ringing the gong or bell or otherwise," when the pleaded assignment of negligence embraces (1) excessive speed, (2) want of proper control of the car, and (3) failure to give warning of the approach of the car.

Johnson v Railway, 201-1044; 207 NW 984

Failure to instruct on general negligence. There was no prejudicial error in failing to instruct that an action was based on general negligence when, in assigning this alleged error, the defendant stated that the court set out the substance of the petition in stating the issues, but did not show in what manner the jury would have better understood the issues had the court instructed as to general negligence.

Porter v Elec. Co., 228- ; 292 NW 231

Specific negligence—res ipsa loquitur—separate counts. Having received burns from a beauty parlor treatment, a plaintiff, after pleading specific acts of negligence in one count and the doctrine of res ipsa loquitur in another count, may at the conclusion of the evidence withdraw the first count and rely on the res ipsa loquitur doctrine which is always applicable in cases where all the instrumentalities are under the control of the operator and where, had ordinary care been used, the injuries would not ordinarily have occurred.

Pearson v Butts, 224-376; 276 NW 65

Adverse result of X-ray treatment — jury question. While the adverse result attending X-ray treatment, e. g., a burn, is not in and of itself evidence of negligence, yet evidence that such result does not ordinarily follow reasonably skillful treatment, plus evidence that such result may result from too frequent treatment, or from treatment prolonged during a long period of time, and that plaintiff was so treated, may generate a jury question on the issue of negligence.

Berg v Willett, 212-1109; 232 NW 821; 38 NCCA 383

Joint action—evidence. In a joint action against two physicians for malpractice, evidence of negligence on the part of one of the defendants prior to the other defendant's connection with the case is inadmissible.

Lemon v Kessel, 202-273; 209 NW 393

Necessity for amputation—jury question. The issue whether a necessity existed for the amputation of an arm does not become a jury question on general descriptive testimony of laymen, bearing on the appearance of the arm, and tending to show no necessity for amputation, and unanimous expert testimony to the effect that amputation was necessary in order to save the life of the patient.

Jackovach v Yocom, 212-914; 237 NW 444; 76 ALR 551; 38 NCCA 346

Amputation without X-ray picture. The issue whether a surgeon was negligent in failing to have an X-ray picture taken of a broken arm before amputating it does not become a jury question on general testimony by laymen descriptive of the arm opposed by unanimous expert testimony that the extent of the broken, crushed, and mangled arm was plainly apparent without an X-ray picture, the issue being whether amputation was necessary.

Jackovach v Yocom, 212-914; 237 NW 444; 76 ALR 551; 38 NCCA 346

Malpractice—other possible causes of injury. In a malpractice action against dentist for injuries caused by lodging of root of tooth in plaintiff's lung, other possible and reasonable causes of the injury were eliminated on the contentions that the object causing injury was not the root of a human tooth, when six laymen testified that it was, even tho there was no expert testimony to this effect; that the object was a calcareous deposit when the

defendant, after viewing the object, failed to suggest that it was a calcareous deposit and stated, "We will see you through all this", that no one saw the root at the time it was expectorated when it would have been impossible to see it in the bloody mass of sputum; and that plaintiff could have unknowingly sucked the root into his lung when such objects do not unknowingly pass into the windpipe.

Whetstine v Moravec, 228- ; 291 NW 425

Collections—relying on telephone message. A bank which receives from a livestock commission company a check on a local bank, payable to a nonresident shipper (for whom the receiving bank was acting as general collector), is not, as a matter of law, negligent if, in attempting to collect the check, it relies on the telephoned statement of the drawee-bank that the drawer has no funds on deposit with which to pay the check, even tho it is made to appear that the check would have been paid if it had been personally presented at later, but unidentified, times during the same or the following day.

Steadman v Bank, 200-347; 202 NW 523

Insurance companies—negligence in issuing policy—liability. An insurance company, even tho it be but a mutual association which resorts to assessments on its members for funds with which to pay losses "and necessary expenses", must respond in damages for its tort in negligently failing to issue a policy which had been duly contracted for.

Mortimer v Ins. Assn., 217-1246; 249 NW 405; 35 NCCA 134

Sales—belated and unexplained sale at low price. A sale by a commission merchant at an extremely low price, and on a steadily falling market, and after a long and unexplained delay, may be sufficient to present a jury question on the issue of negligence.

Blanchard v Wood Co., 204-255; 214 NW 583

Truck tire—placing on rim. Where recovery is sought because a minute particle of metal, apparently chipped off of operator's hammer, flew into plaintiff's eye while his truck tire was being repaired by filling station operator, and where there was no showing that tools and methods used by the operator were not those ordinarily used, motion for directed verdict should have been sustained.

Reynolds v Oil Co., 227-163; 287 NW 823

(b) ATTRACTIVE NUISANCE IN GENERAL

Attractive nuisance—basis of theory. In this state, the doctrine of attractive nuisance has its foundation in an implied invitation of the landlord on the theory that the temptation of an attractive plaything to a child of tender years is equivalent to an express invitation to an adult.

Harriman v Afton, 225-659; 281 NW 183

Building reconstruction—attractive nuisance. In an action for damages consequent on a child falling into an opening in the floor of a building which was undergoing reconstruction after a fire, an amendment to the petition, alleging that the building was an attractive nuisance, and offered on the theory of conforming the pleadings to the proof, is properly rejected when the record is bare of any evidence that the said place was attractive to children.

Battin v Cornwall, 218-42; 253 NW 842

City reservoir and raft thereon—attractive nuisance doctrine not applicable. Neither a reservoir maintained by a city on private ground isolated from any public place or playground nor a raft thereon, capable of supporting a man, used to measure the water depth, being inherently an attractive nuisance, a combination of the two will not invoke a different rule.

Harriman v Afton, 225-659; 281 NW 183

Swimming pool not an "attractive nuisance". A swimming pool, either natural or artificial, is not an attractive nuisance.

Hecht v Playground Assn., 227-81; 287 NW 259

Concealed amusement device. The maintenance and operation of an amusement device may constitute actionable negligence as to one from whom the maintenance and operation were concealed, even tho it might be otherwise as to one who had full knowledge.

Dahna v Fun House Co., 204-922; 216 NW 262

Dangerous machinery—attractive nuisance doctrine inapplicable. The owners and proprietors of shops and factories may be liable for negligence by exposing and leaving in an unguarded condition in an open or public place dangerous machinery likely to attract children, where their presence may be known or reasonably apprehended; but such owners or proprietors are not precluded from the right to use their appliances and machinery in their own buildings and upon their own premises as may best serve their advantage, and when neither expressly inviting children to enter there or to put themselves in a place of danger they will not be liable for an injury not wantonly inflicted.

Hart v Brick & Tile Co., 154-741;135 NW 423

Park instrumentality as nuisance. A combined "teeter-totter and merry-go-round" erected and maintained in a city park by the city through its park board, for the sole purpose of amusing children, cannot be deemed an attractive nuisance, even tho said instrumentality is not kept in repair.

Smith v Iowa City, 213-391; 239 NW 29; 34 NCCA 468; 34 NCCA 553; 3 NCCA (NS) 432

I NEGLIGENCE—continued
(b) ATTRACTIVE NUISANCE IN GENERAL—concluded

Pool of water not "attractive nuisance". A small, but deep and unguarded, pond or pool of water, permitted to form at the outlet of a municipal stormwater sewer, will not be deemed an "attractive nuisance" within the law of negligence.

Raeside v Sioux City, 209-975; 229 NW 216; 30 NCCA 299; 2 NCCA(NS) 734

Water tank and electric transformer not attractive nuisance. The maintenance in a brickyard where children sometimes play of a circular water tank about 11 feet in height, with no inviting or ready means of going up and down the side thereof except a perpendicular, smooth overflow pipe 1¼ inch in diameter extending from the top to the bottom of the tank and at a distance of 8 inches from the outside wall, and the maintenance on the top of the tank of heavily charged electric transformers 4 feet high, without any warning signs of danger, will not be deemed an "attractive nuisance", within the law of negligence.

Cox v Des Moines L. Co., 209-931; 229 NW 244; 36 NCCA 160

(c) RES IPSA LOQUITUR IN GENERAL

Res ipsa loquitur—nonapplicability. Record reviewed relative to the fatal injuries received by a party on, in, or about, a freight elevator, and relative to the defendant's control of the operation of said elevator at the time said injuries were received, and held to show the inapplicability of the doctrine of res ipsa loquitur.

Boles v Hotel Maytag, 221-211; 265 NW 183

Malpractice — doctrine generally inapplicable. As a general rule, the doctrine of res ipsa loquitur does not apply in malpractice cases for the reason that the professional man is required to exercise only that degree of care and skill ordinarily exercised by other members of the same profession, in like communities, under similar circumstances; also, the doctor does not have complete and exclusive control over the instrumentality with which he is working.

Whetstine v Moravec, 228- ; 291 NW 425

Malpractice—root of tooth in lung. While the doctrine of res ipsa loquitur does not ordinarily apply in malpractice cases, the doctrine was held applicable under the pleadings and proof that plaintiff was given a general anesthetic, was completely unconscious and under the exclusive control of the defendant-dentist at the time his teeth were extracted, and that nine months later he expectorated from his lungs, after a violent spasm of coughing, a quantity of sputum, mucus and blood containing the root of a tooth.

Whetstine v Moravec, 228- ; 291 NW 425

Carriers—applicability. Principle recognized that the doctrine of res ipsa loquitur is, under appropriate facts, applicable to common carriers.

Preston v Railway, 214-156; 241 NW 648

Carriage of passengers—res ipsa loquitur applicable tho negligence pleaded specifically. The doctrine of res ipsa loquitur may be applicable under one unquestioned count of a petition which alleges negligence generally, notwithstanding the fact that the same cause of action is pleaded in another count under specific allegations of negligence.

Crozier v Hawkeye, Inc., 209-313; 228 NW 320

Limitation of actions — amendment after period has run. The identity of a cause of action is not changed by an amendment (made at a time when the action would otherwise be barred) which strikes from a petition a specific allegation of negligence in furnishing electricity for lighting purposes, and substituting therefor a general allegation of negligence in order to rely on the doctrine of res ipsa loquitur.

Orr v D. M. Elec., 213-127; 238 NW 604

Inflammable gas—explosion. Basis for the application of the doctrine of res ipsa loquitur is established by proof that pipes and appliances for conducting inflammable gas into a place of business were under the full control of the party furnishing the gas, that gas leaked from said pipes and appliances before it entered the meter, and that a violent explosion resulted from such leakage.

Sutcliffe v Elec. Co., 218-1386; 257 NW 406

Negligence—applicability. The rule of res ipsa loquitur applies where the circumstances attending the injury are of such character that the accident could not well have happened in the ordinary course of events without negligence on defendants' part, and the instrumentalities causing the injury were within exclusive control of defendants.

Peterson v De Luxe Co., 225-809; 281 NW 737

Malpractice—physicians and surgeons. It has seldom been questioned that where the act of omission or commission upon the part of a surgeon has been plainly negligent, as where a sponge, gauze, instrument, or needle has been left in the body, the rule of res ipsa loquitur applies, and that it is also unnecessary to show by expert testimony that such an act does not comport with the required standards.

Whetstine v Moravec, 228- ; 291 NW 425

Inapplicability. The doctrine of res ipsa loquitur has no place in a cause wherein plaintiff rests his action on specific allegations of negligence.

Rauch v D. M. Elec., 206-309; 218 NW 340; 34 NCCA 668

Evidence. Doctrine of res ipsa loquitur held applicable to an accident of which noninsulated electric wires were the proximate cause.

Beman v Iowa Co., 205-730; 218 NW 343; 30 NCCA 635

Pleading. A general allegation of negligence, or a pleading of facts which is equivalent to such allegation, is an essential prerequisite to the application of the doctrine of res ipsa loquitur.

Whitmore v Herrick, 205-621; 218 NW 334; 34 NCCA 670

Dangerous instrumentalities. The full limit of the doctrine of res ipsa loquitur is that the peculiar facts of the occurrence warrant or permit the jury to draw the inference of negligence, not that such facts compel the jury to draw such inference. The doctrine does not in the slightest degree change the burden of proof on the issue of negligence.

Anderson v Railway, 208-369; 226 NW 151; 3 NCCA(NS) 547

Scope. The full limit of the doctrine of res ipsa loquitur is that the peculiar facts of the occurrence warrant or permit the jury to draw the inference of negligence, not that such facts compel the jury to draw such inference in the absence of explanatory evidence. The doctrine does not in the slightest degree change the burden of proof on the issue of negligence.

Preston v Railway, 214-156; 241 NW 648; 33 NCCA 782

Pleading. Plaintiff who relies on the doctrine of res ipsa loquitur and pleads facts showing the applicability of such doctrine, may (and should) plead negligence generally —need not (and should not) plead specific acts of negligence on the part of defendant and his employees.

Van Heukelom v Hotels Corp., 222-1033; 270 NW 16

Pleading—waiver. A general allegation of negligence, supportable by the doctrine of res ipsa loquitur, is waived by inserting in the same count a specific allegation of negligence; but the rule is otherwise when the different allegations are in different counts and when the issue arising on the general allegation is alone submitted because of the dismissal by plaintiff of the count containing the specific allegation.

Sutcliffe v Elec. Co., 218-1386; 257 NW 406

Motions—more specific statement—avoidance under res ipsa loquitur. A general allegation of negligence is subject to a motion for a more specific statement unless the pleader clearly indicates in his pleading his purpose to sustain said general allegation under the doctrine of res ipsa loquitur.

Sutcliffe v Elec. Co., 218-1386; 257 NW 406

Specific allegations—effect. Proof that an agency or thing caused an injury under circumstances strongly suggestive of negligence on the part of the defendant having control of such agency or thing, but under circumstances such that direct evidence of the specific negligence is not readily available, opens the door to the injured party to rely on the doctrine of res ipsa loquitur, unless the injured party sees fit to allege and rely on specific allegations of negligence.

Orr v Des Moines L. Co., 207-1149; 222 NW 560; 30 NCCA 622; 3 NCCA (NS) 540

Trap door in leased coliseum not a nuisance. Trap door in leased coliseum opened only to dispose of refuse held not a nuisance. Doctrine of res ipsa loquitur held inapplicable where person fell into opening, especially in view of fact that trap door was not wholly under control of defendant-lessees.

Work v Coliseum Co., (NOR); 207 NW 679

Drowning—res ipsa loquitur nonapplicable. The mere fact that a person drowns in a swimming pool does not of itself establish negligence on the part of the proprietor under the doctrine of res ipsa loquitur.

Hecht v Playground Assn., 227-81; 287 NW 259

(d) NO-EYEWITNESS RULE IN GENERAL

Accidents at crossings. The presumption of care which may be indulged in case of an accident of which there is no eyewitness has no application when the record affirmatively shows that the accident would not have happened had the injured party exercised reasonable care.

Tegtmeyer v Byram, 204-1169; 216 NW 613

Improper submission of issue. When the record affirmatively shows the absence of all eyewitnesses to a fatal accident because the sole survivor was not observing the deceased persons immediately preceding the accident, the court should peremptorily instruct that there were no such witnesses; but the defendant is not, in such case, prejudiced if the existence of such witnesses is submitted to the jury.

Rastede v Railway, 203-430; 212 NW 751

Indispensable showing—nonpresumption. In an action against a railway company for damages for negligently running over and killing, during the nighttime, and within its switching yard, a pedestrian, the all-important and indispensable fact that said pedestrian was, when hit, on a near-by public sidewalk—where he had a right to be—will not be presumed from the fact that there was no eyewitness to the fatal accident, the "no-eyewitness rule" having no such function.

Young v Railway, 223-773; 273 NW 885

I NEGLIGENCE—continued

(d) NO-EYEWITNESS RULE IN GENERAL—concluded

No-eyewitness rule — instructions. Instructions relative to the permissible inference of care which the law authorizes when there are no eyewitnesses to an accident reviewed and held correct.

Azeltine v Lutterman, 218-675; 254 NW 854

Omission to state "no-eyewitness" rule — effect. Failure to instruct as to the presumption of care which the law indulges when there is no eyewitness to a fatal accident does not constitute reversible error when no such instruction was requested, and when it is somewhat questionable whether plaintiff was entitled to such instruction, and the ordinary instruction as to freedom from contributory negligence was given.

Anderson v Railway, 208-369; 226 NW 151; 3 NCCA (NS) 547

Presumption arising from human instinct. The presumption that the instinct of self preservation caused a traveler who was killed by a train at a crossing to look for a train before he went upon the crossing has no application when it affirmatively appears that, had he looked at any time while he was in the zone of danger, he must have seen the train.

Wasson v Railway, 203-705; 213 NW 388

Eyewitness requirement. Proof by an insurer that the insured was murdered by being shot by some unknown person does not establish the defense that a limited liability is provided by the policy if the insured is killed by the discharge of firearms and there is no actual witness to the transaction "except the insured himself," because such proof establishes that there was an eyewitness other than the insured, to wit, the assailant.

Carpenter v Trav. Assn., 213-1001; 240 NW 639

(e) NEGLIGENCE PER SE IN GENERAL

Discussion. See 11 ILR 78—Violation of statutes and ordinances

Electricity — charged wire. A person is guilty of contributory negligence per se when, knowing that a wire at the top of a pole carries a very dangerous voltage of electricity, and faced by no emergency requiring or excusing a relaxation of due care, he attempts to get another wire out of his way by swinging it upward in the form of a rainbow, in order to hook it over a spike which has been driven into the pole some two feet below the dangerously charged wire.

Murphy v Iowa Co., 206-567; 220 NW 360

Known obstruction on sidewalk. A pedestrian who discovers in his pathway on a public sidewalk a substantial obstruction of frozen straw and other refuse and unnecessarily attempts to walk over the same is guilty of negligence per se.

Wells v Oskaloosa, 212-1095; 235 NW 322

Machinery in enclosed building. The maintenance and operation of machinery, for a legitimate purpose, in an enclosed building and with ordinary and suitable protection is not negligence, altho attractive to children and no special guard is employed to look after their safety.

Brown v Canning Co., 132-631; 110 NW 12

Negligence of pedestrian. A pedestrian must be deemed guilty of negligence per se when, on a dark and cloudy morning, in full possession of the senses of seeing and hearing, he looks for an approaching streetcar while at the street curb line, and claims he saw none (tho a car would be visible at a distance of 100 feet), and when he thereupon quickly passes into the street for a distance of 18 feet and is hit by the car which he says he did not see.

Barboe v Service Co., 205-1074; 215 NW 740

Streets—obstructions. A pedestrian who, on a dark and rainy night, passes over a parking in a public street in close proximity to a pile of broken cement, with full knowledge of the presence of such obstruction and of its dangerous character, and is injured by stumbling over a detached piece of the cement, is guilty of contributory negligence per se when it appears that a very slight deviation in his course would have placed him in a zone of perfect safety.

Roppel v Mount Pleasant, 208-117; 224 NW 579

Stopping on streetcar track. A vehicle driver who passes a streetcar going in the same direction, and later drives upon the streetcar tracks and stops at a point 100 feet ahead of the car, is not guilty of negligence per se.

Towberman v Railway, 202-1299; 211 NW 854

Torts—defects or obstructions in streets. A pedestrian who attempts to pass over an abrupt decline, known to be dangerous, in a public street, in the belief that he can do so in safety, will be deemed guilty of negligence per se, in the absence of any showing of acts of care on his part.

Lundy v Ames, 202-100; 209 NW 427

Injury near track. Negligence per se is established by evidence which conclusively forces the mind to the conclusion that a deceased who was hit by a passing train either did not look or listen for the train, which was in plain sight, or attempted to cross the track in front of the train, which he knew to be coming.

Pieczynski v Railway, 202-625; 210 NW 758

(f) IMPUTED NEGLIGENCE IN GENERAL

Passenger elevator falling—nonliability—elevator manufacturer. The builder of a passenger elevator is neither liable for a personal injury caused by the falling of the car where the safety device, designed to prevent such falling and stop the car, was of an approved pattern in general use and was not shown to have ever before failed to work efficiently, nor where it is disclosed by the accident a device could have been made which would have obviated the particular defect which caused the particular accident, unless it is further shown that reasonable prudence would have discovered this defect and remedied it. Due care, in a legal sense, does not require an uncanny foresight.

Hoskins v Otis Elev. Co., 16 F 2d, 220

(g) RECKLESSNESS IN GENERAL

Submitting both negligence and recklessness. Both questions of negligence and of recklessness may in a proper case be submitted together to the jury.

Wells v Wildin, 224-913; 277 NW 808

Recklessness of railway employees—insufficient pleading to establish. In action for personal injuries sustained by automobile passenger in collision between automobile and railway motorcar, where petition alleged that railway motorcar had been standing a short distance from crossing, obscured from view of motorist by shrubbery along railway right of way, and was driven onto crossing and into the course of oncoming automobile without warning, and that railway motorcar could have been stopped by applying brakes, such allegations were insufficient to state a cause of action based upon recklessness of employees of defendant railroad.

Smith v Railway, 227-1404; 291 NW 417

Wantonness or recklessness. Wantonness is something more than recklessness and recklessness is something more than negligence.

Sanburn v Hosiery Mills, 217-218; 251 NW 144

II PROXIMATE, REMOTE, AND CONCURRING CAUSE IN GENERAL

Aggravation of disease—liability in general. One who is predisposed to disease which is aggravated or accelerated by negligence is entitled to recover damages necessarily and proximately resulting from such aggravation or acceleration.

Hackley v Robinson, (NOR); 219 NW 398

Proximate cause—fatal uncertainty. The theory that animals died from the effects of a so-called stock remedy administered to them cannot be said to be established when the cause of the deaths is essentially and necessarily within the domain of expert testimony, and when the experts are unable to determine with reasonable certainty whether said remedy caused or contributed to said deaths.

Tracy v Oil Co., 208-882; 226 NW 178

Burden of proof. Causal connection between the negligence proven and the injury complained of must be established by plaintiff. Evidence held insufficient.

Rauch v Elec. Co., 206-309; 218 NW 340

Causal relation. Evidence held to show causal relation between the taking of a radiograph of plaintiff's head and certain subsequent injuries.

Rulison v X-ray Corp., 207-895; 223 NW 745

Evidence. Evidence held insufficient to show that defendant's negligence was the proximate cause of an injury.

Schmidt v Hayden, 205-1369; 219 NW 399

Failure to maintain lookout. Failure of the operatives of a train to keep a lookout for pedestrians near the tracks does not constitute negligence when such failure had nothing whatever to do with the resulting accident.

Radenhausen v Railway, 205-547; 218 NW 316

Illegal payment of funds to city. The act of a county treasurer in illegally paying collected municipal taxes to the city treasurer is the proximate cause of the loss of said funds consequent on the deposit of said funds in an insolvent bank by the city treasurer,—it being assumed that the question of negligence and proximate cause is a material inquiry in such a case.

State v Hanson, 210-773; 231 NW 428

Intervening cause. The principle that a defendant is not relieved of the consequences of his negligence because some other cause operates therewith manifestly has no application to a case wherein it is not shown that defendant was negligent.

Rauch v Elec. Co., 206-309; 218 NW 340

Malpractice. In an action for malpractice, plaintiff does not make a jury question by proof that the defendant was negligent in the treatment or in the lack of treatment of the patient, but must go forward with his proof and establish by a preponderance of the testimony that such negligence, and not the original injury, was the proximate cause of death.

Ramberg v Morgan, 209-474; 218 NW 492

Malpractice—root of tooth in lung. In a malpractice action against dentist, the court erroneously directed a verdict for defendant on the ground that there was no showing that the presence of the root of a tooth in plaintiff's right lung was the proximate cause of the injury to plaintiff, under evidence that plaintiff was given a general anesthetic, was com-

II PROXIMATE, REMOTE, AND CONCURRING CAUSE IN GENERAL—concluded

pletely unconscious at time six teeth were extracted, and that plaintiff lost 60 pounds between the day of the extractions and the day he expectorated, after a violent spasm of coughing, a quantity of sputum, mucus and blood containing the root of a tooth.

Whetstine v Moravec, 228- ; 291 NW 425

Noncausal relation. Principle reaffirmed that negligence becomes quite inconsequential when it has no causal relation to the accident in question.

Simmons v Railway, 217-1277; 252 NW 516

Proximate cause of injury—when jury question. Whether certain negligence was the proximate cause of a certain injury is always a jury question when different minds might reasonably reach different conclusions.

Bell v Brown, 214-370; 239 NW 785

One conclusion by all reasonable men—court question. Ordinarily the questions of proximate cause and contributory negligence are matters for the jury, and it is only where the facts are such, that all reasonable men must draw the same conclusion, that these questions become of law for the court.

Gowing v Field, 225-729; 281 NW 281

Accident causing injury—death following—jury question. Where a healthy normal boy of 17 dies from an ear infection and mastoid involvement, the symptoms of which began shortly after the upsetting of a school bus in which he was riding, a jury question is created as to whether such accident was the moving or producing—the proximate—cause of the injury and death.

Olson v Cushman, 224-974; 276 NW 777

Repetition of instruction. A definite and correct instruction as to proximate cause of an injury need not be repeated in other instructions.

Oestereich v Leslie, 212-105; 234 NW 229

Specific grounds alleged—proximate cause. In damage action based on drowning in a swimming pool wherein several grounds of negligence were specified, it was necessary to establish one of the grounds and prove that it was the proximate cause of the drowning—actionable negligence being negligence that is fastened to the injury.

Hecht v Playground Assn., 227-81; 287 NW 259

Storm waters into sanitary sewer. A city has the duty to maintain its sanitary sewer with ordinary care and prudence and, where the city diverts storm waters into a sanitary sewer designed for a certain capacity, a jury might find the city negligent, and that such negligence was the proximate cause of damage from overflow due to the inability of the sewer to handle the increased flowage.

Wilkinson v Indianola, 224-1285; 278 NW 326

Excess voltage—evidence—sufficiency. Evidence held insufficient to show that certain acts of omission and commission were the proximate cause of the reaching and entrance to a building of an excess voltage of electricity.

Anderson v Railway, 208-369; 226 NW 151; 3 NCCA(NS) 547

Contributory negligence and proximate cause. Actionable negligence must be proximate cause whereas contributory negligence need only contribute to the injury.

Aller v Iowa Co., 227-185; 288 NW 66

III CONTRIBUTORY NEGLIGENCE IN GENERAL

Discussion. See 6 ILB 55—Self-preservation instinct—due care

Avoidance by last clear chance. Principle reaffirmed that the doctrine of the "last clear chance" has no application except where it affirmatively appears that the one charged with negligence actually knew of the position of peril of the injured person in time to prevent the injury by the exercise of reasonable care.

Hamilton v Railway, 211-924; 234 NW 810; 31 NCCA 762

"Last clear chance"—inapplicability of doctrine. The doctrine of "the last clear chance" has no application to a record which shows (1) that the plaintiff was confessedly negligent, and (2) that the accident of which plaintiff complains occurred instantly and inevitably after plaintiff's negligence was discovered.

Albrecht v Berry, 202-250; 208 NW 205; 32 NCCA 108

Injury avoidable notwithstanding contributory negligence—"last clear chance"—inapplicability. The doctrine of the "last clear chance" can have no application when the nonnegligent driver of a conveyance, after he discovers the danger, does everything in his power to prevent an accident.

Middleton v Railway, 209-1278; 227 NW 915

Degree barring recovery—model instruction. Principle reasserted that negligence is not contributory unless it contributes directly to plaintiff's injury.

Engle v Ungles, 223-780; 273 NW 879

Adequate definition. Instructions defining contributory negligence as negligence which contributes to cause the injury and stating that before plaintiff could recover he must establish by a preponderance of the evidence that he was not guilty of any negligence that in any degree contributed to cause of collision were not erroneous and did not tell jury such

negligence must be a proximate cause before it would prevent recovery.

Jakeway v Allen, 227-1182; 290 NW 507

Contributory negligence—degree. Contributory negligence sufficient to bar recovery need go no further than to contribute to the causing of plaintiff's injuries, but it is not error against plaintiff to define such negligence as that negligence without which the injury would not have been sustained.

Hellberg v Lund, 217-1; 250 NW 192

Erroneous definition—effect. Defining contributory negligence as including only acts of omission does not necessarily constitute reversible error, especially when such definition is in harmony with the trial theory.

Williams v Railway, 205-446; 214 NW 692

Contributory negligence — freedom from. Freedom from contributory negligence is proven if, under all the facts and circumstances, a jury can reasonably find a plaintiff was exercising ordinary care.

Denny v Augustine, 223-1202; 275 NW 117

Contributory negligence—jury or law question. Contributory negligence is ordinarily for the jury, but it becomes a question of law only when reasonable minds can come to but one conclusion from facts and circumstances.

O'Meara v Green Const. Co., 225-1365; 282 NW 735

Jury question unless all minds concur. Contributory negligence is for the jury, and a directed verdict should be denied except in cases where the facts are clear and undisputed and the cause and effect so apparent to every candid mind that but one conclusion may be fairly drawn.

In re Green, 224-1268; 278 NW 285

Law question. Principle reaffirmed that a very clear and unequivocal showing of negligence is required to make the issue of contributory negligence a question of law.

Beman v Iowa Co., 205-730; 218 NW 343

Law of case—implied avoidance. The law of a case on the subject of contributory negligence as declared on appeal cannot be avoided on a retrial by simply adding to the testimony of a witness, by implication, something that the witness did not say.

Russell v Elec. Co., 218-427; 255 NW 504

Nonproximate cause. Contributory negligence may bar recovery even tho it is not the proximate cause of the injury.

Towberman v Railway, 202-1299; 211 NW 854

Plaintiff's conduct—conflict in evidence. The presence or absence of contributory negligence is generally a jury question, and two elements are involved: (1) what plaintiff did, and (2) the effect of his action; if either or both of said propositions present uncertainty, there is a jury question.

Riggs v Pan-Amer., 225-1051; 283 NW 250

Assumption of risk—walking down fire escape carrying tools. A plumber, an independent contractor, who attempts the acrobatic feat of walking down a steep, but ordinarily safe, fire escape as if it were a stairway, with his hands full of wrenches and a length of pipe, or, while balancing on one heel, attempts to swing his body around while his hands were so employed, has assumed the risk arising from such conduct and must be held, as a matter of law, to have contributed to his injuries, if he falls.

Gowing v Field, 225-729; 281 NW 281

Defendant's belief as to plaintiff's safety. In an action for damages consequent on the alleged negligence of defendant in tearing down the walls of a building adjoining the building in which plaintiff, at the time, was rightfully present, the court cannot properly say that plaintiff was guilty of contributory negligence per se in being present in his said building when the evidence shows that defendant, at the time, believed plaintiff was in a safe place while in his said building.

Crawford v Emerson Co., 222-378; 269 NW 334

Burden of proof. A definite instruction that plaintiff has the burden of proof to show that he was not guilty of any negligence contributing to his injury is in no degree overcome by later instructions wherein the court, with reference to contributory-fact issues, uses the expression "if you find." In other words, such expression does not have the effect of impliedly placing the burden of proof as to contributory negligence upon the defendant.

Dean v Koolish, 212-238; 234 NW 179

Evidence—sufficiency. Evidence held insufficient to show contributory negligence per se in an accident on a sidewalk.

Sloan v Des Moines, 205-823; 218 NW 301

Contributory negligence — entering pitch-dark room. An invitee who enters a bakery in the nighttime, at a place other than a perfectly safe place where he had entered on a former occasion, and is unable to see anything owing to the darkness, and finds his progress blocked by an obstruction which, by sense of feeling, proves to be a movable, lattice gateway and who deliberately removes said gateway and, on advancing, falls into an elevator shaft, is, per se, guilty of negligence contributing to his resulting injury.

Hammer v Liberty Bak. Co., 220-229; 260 NW 720

Contributory negligence. Evidence reviewed and held to establish negligence per se on the

III CONTRIBUTORY NEGLIGENCE IN GENERAL—continued

part of plaintiff in not seeing and avoiding a laundry truck which was standing in the hallway of a hotel.

Walker v Hotel Co., 214-1150; 241 NW 484

Contracts—signing without reading. A party will not be permitted to say that he was defrauded into signing an instrument without knowing its contents when he could read, did not read, and was in no manner prevented from reading.

Legler v Ins. Assn., 214-937; 243 NW 157

Derrick—improper erection and use. Record reviewed and held that a deceased foreman of a construction company was guilty of negligence contributing to his own death, by the manner in which he erected and attempted to operate a derrick for the handling of stone.

Hatfield v Freight Co., 223-7; 272 NW 99

Electric elevator—place of danger. When, in order to make repairs, a WPA carpenter descended to the bottom of an elevator shaft in a Y. M. C. A. while the superintendent of the building assisted him, and when the superintendent had twice repeated an instruction to the elevator operator in the presence of the carpenter that the elevator was not to go below the first floor, the carpenter, who died because the elevator descended on him, was not required to anticipate that the elevator operator would negligently violate the instructions. Under these facts, contributory negligence was a jury question.

Andrews v Y. M. C. A., 226-374; 284 NW 186

Operation of electric elevator—no eyewitnesses. An expert and experienced electrician who enters an electrically operated freight elevator which he had often operated,—the mechanism and condition of which were fully known to him, and especially the fact that the elevator could be moved at any time by manipulation by other parties on other floors of the building unless the electric circuit was broken,—is guilty of negligence per se in taking the risk of the elevator moving while he was attempting, without breaking the circuit, to close a door with known defective appliances,—the circuit breaker being in his immediate presence and easily accessible; and this is true tho there were no eyewitnesses to the occurrence.

Boles v Hotel Maytag, 218-306; 253 NW 515

Inadvertent self-inflicted injury. One may not recover damages for an injury arising out of his own act, and under circumstances under his exclusive control. So held where the party in removing a prop under a loading chute was injured by the prop falling against his face.

Rodgers v Railway, 214-1018; 243 NW 351

Injuries to servant—instruction. The court may very properly instruct the jury that a master must establish his plea of contributory negligence on the part of his servant by a preponderance of the evidence, and that such plea, if so established, is available to the master only in mitigation of damages.

Oestereich v Leslie, 212-105; 234 NW 229; 34 NCCA 67

Minors — contributory negligence—12-year-old child—presumption. A child between the ages of seven and 14 is presumed to be free from contributory negligence, and where a plaintiff is between those ages a prima facie case of nonnegligence on his part is established.

Samuelson v Sherrill, 225-421; 280 NW 596

Imputed negligence—guest. The negligence of the driver of a conveyance in which a child is riding is, in an action by the child against a third party for damages, wholly immaterial as far as said child is concerned unless said negligence is the sole cause of the damages. (See also under §5028.)

Armstrong v Waffle, 212-335; 236 NW 507; 5 NCCA(NS) 763

Contributory negligence of 11-year-old boy. In an action for personal injuries sustained by an 11-year-old boy who, while playing in a tree in a public street fell into wires of public utility company, sustaining severe burns, the question of contributory negligence of the boy together with question of whether defendant company had knowledge of the use of the tree by the boys in the neighborhood in playing, and the question of proximate cause of the injury should have been submitted to the jury.

Reynolds v Utilities Co., 21 F 2d, 958

Minors—presumption and burden of proof. An instruction, in a personal injury action, that the burden of proof is on plaintiff to establish his freedom from contributory negligence is not nullified by an instruction that the plaintiff, if of the age of eight years only, is presumed to be incapable of such negligence, and that, to find to the contrary, defendant must so show.

Stutzman v Younkerman, 204-1162; 216 NW 627

Unnecessarily placing one's self in danger. A person 18 years of age and of ordinary intelligence (not an employee of the defendant) who, in attempting to drive a wagon over a manifestly heavy six-inch steel pipe, deliberately places his foot in front of and against said pipe, knowing and expecting that when the team was started the wheels of the wagon would probably roll the pipe toward him, is guilty of negligence as a matter of law.

Perkins v Schmit Co., 215-350; 245 NW 343; 37 NCCA 301

Negligence as defense. In an action for the breach of an express warranty as to the healthfulness of animals, it is incumbent on the defendant to allege contributory negligence on the part of the plaintiff, rather than for plaintiff to allege his freedom from negligence.

Cavanaugh v Stock Co., 206-893; 221 NW 512

Ordinary and extraordinary dangers contrasted. A nontrespassing party who voluntarily exposes himself to the dangers attending the ordinary and customary manner of wrecking or tearing down the walls of a building, and is injured, may be guilty of contributory negligence per se, but not necessarily so when, without his knowledge, the manner of doing the work was unusually and extraordinarily dangerous and hazardous, and by reason thereof the party was injured.

Crawford v Emerson Co., 222-378; 269 NW 334

Overdose of poison. In an action for damages consequent on the death of animals caused by an overdose of copper sulphate, in part contained in a stock food, it is manifest that plaintiff cannot recover if, by his own conduct, he has contributed to his said injury.

Jensen v Moorman Mfg. Co., 213-922; 239 NW 917

Pedestrians—defective sidewalk—duty to see defect. A person is not exercising reasonable care, as a matter of law, when, immediately after emerging from a store, she walks directly across an eight-foot cement sidewalk, of which she had a general knowledge, and fails to see that the extreme inner edge of the walk, elevated some eight inches above the vehicular part of the street, has been broken away for a distance of some 30 inches, and to an irregular depth not exceeding eight inches, when the unobscured opening is directly in front of her, and when she is walking under perfect conditions of weather, light, and sight, and attended by no mental abstraction except a voluntary conversation with her companion.

Seiser v Redfield (Town), 211-1035; 232 NW 129

Negligence of pedestrian. A pedestrian must be deemed guilty of negligence per se when, on a dark and cloudy morning, in full possession of the senses of seeing and hearing, he looks for an approaching streetcar while at the street curb line, and claims he saw none (tho a car would be visible at a distance of 100 feet), and when he thereupon quickly passes into the street for a distance of 18 feet and is hit by the car which he says he did not see.

Barboe v Service Co., 205-1074; 215 NW 740

Obstructions in street—jury question. Evidence reviewed relative to the act of plaintiff (injured by coming in contact with a wire stretched across a public street) in running, in semidarkness along the street and outside a crowded sidewalk, in order to reach shelter from a sudden and rapidly gathering thunderstorm, and held to present a jury question on the issue of contributory negligence on the part of plaintiff.

Cuvelier v Dumont (Town), 221-1016; 266 NW 517

Passing along known slippery sidewalk. A pedestrian is not guilty of negligence per se in attempting to walk along a freshly snow-covered sidewalk bounded by a foot or two of snow, even tho he knows that the walk is rough, uneven, and slippery from an accumulation of ice, when he had prepared his feet with rubbers in order to avoid slipping and, upon reaching the walk, thoughtfully slackened his speed, and was proceeding cautiously in order to avoid a fall.

Smith v Hamburg, 212-1022; 237 NW 330

Tree over transmission line—failure to remove. Where a tree limb on plaintiffs' land had broken and lodged in the fork of a dead tree and hung two or three feet over defendant's transmission line, and later electricity from the line set the tree on fire and it spread to the plaintiffs' house, in an action to recover for the fire loss it could not be said as a matter of law that the plaintiffs were contributorily negligent in not removing the limb when they had acted as reasonable and prudent persons in twice requesting the defendant to take the line down or shut off the current so the tree could be cut down and the overhanging limb removed.

Porter v Elec. Co., 228- ; 292 NW 231

Municipal corporation—construction of approach to sidewalk. A municipality is not bound to construct an approach from street to sidewalk differently because some engineer other than its own thought some other method would be better, so where a pedestrian, who was familiar with such approach, who admitted that there was plenty of room for a pedestrian to pass on meeting two other pedestrians in broad daylight, and who without thought or attention stepped off approach and fell, such pedestrian was guilty of contributory negligence precluding recovery for personal injuries.

Hoffman v Sioux City, 227-1131; 290 NW 62

Subsequent negligence aggravating injury—amount of recovery. After receiving burns in a beauty parlor treatment, a person's subsequent neglect of proper medical treatment, not contributing to the original injuries, is not contributory negligence and does not defeat but affects only the amount of recovery.

Pearson v Butts, 224-376; 276 NW 65

Contributory negligence and proximate cause. Actionable negligence must be proxi-

III CONTRIBUTORY NEGLIGENCE IN GENERAL—concluded

mate cause whereas contributory negligence need only contribute to the injury.

Aller v Iowa Co., 227-185; 288 NW 66

Drawing wire cable against power line. Farmer attempting to connect wire cable from hay carrier on barn to pole 50 or 55 feet distant is contributorily negligent in drawing cable against power line when he saw or should have seen the power line and knew that it was not insulated.

Aller v Iowa Co., 227-185; 288 NW 66

IV INVITEES, LICENSEES, AND TRESPASSERS

Discussion. See 7 ILB 65—Duty to strangers on land

(a) INVITEES

"Invitee"—"licensee." An invitee to a place of business is one who goes there, either at the express or implied invitation of the owner or occupant, on business of mutual interest to both, or in connection with the business of the owner or occupant. A licensee is one who goes upon the property of another, either at the invitation, or with the implied acquiescence, of the owner or occupant, for a purpose purely personal to himself.

Wilson v Goodrich, 218-462; 252 NW 142

Acts or omissions constituting negligence. One who enters the office of a private business as an invitee may, upon leaving the office, immediately become, by his conduct, a mere licensee.

Wilson v Goodrich, 218-462; 252 NW 142

Charitable institutions liable to strangers, invitees, or employees. Public policy has never demanded nor has the legislature adopted any immunity to charitable institutions from liability to strangers, invitees, or employees arising because of negligence of the servants of such institutions, and the court will not grant such immunity.

Andrews v Y. M. C. A., 226-374; 284 NW 186

Condition of store building—invitee (?) or licensee (?). An invitee in a public store continues as an invitee after he passes from in front of a counter and around the end thereof into a narrow space having no connection with the space back of the counter, and with no intent to pass back of the counter, but for the purpose of inspecting and possibly buying goods on a shelf directly in front of him; and when the appearance of the space in which he is then walking reasonably justifies his belief that said space is a place to which customers are impliedly admitted for the purpose of inspecting goods which they wish to purchase, and when the facts are in fair dispute, a jury question is generated.

Nelson v Woolworth Co., 211-592; 231 NW 665; 30 NCCA 542

Trap door in drug store prescription room—telephone user as invitee (?) or licensee (?). Hotel guest given permission to use telephone just inside entrance to prescription room in hotel drug store was a mere licensee and not an invitee, and could not recover damages sustained by falling through open trap door when partially entering the prescription room to reach the telephone, unless showing was made that injury was result of willful or wanton misconduct on part of hotel company, and evidence that manager of store directed plaintiff to telephone did not establish such conduct in absence of showing that he knew trap door was open.

McMullen v Hotel Co., 227-1061; 290 NW 3

Contributory negligence. A physician who enters a food-processing plant and in an effort to reach a rear room for a purpose purely personal to himself, ignores a wide, well-lighted passageway provided for and ordinarily used for reaching said rear room, and pursues a narrow, out-of-the-way course where neither licensees nor invitees were expected to be, and falls into an elevator shaft in front of which an electric light, suspended from the ceiling, was burning and immediately adjacent to which was an open, five-foot door opening into said rear room in which some thirty electric lights were burning, is guilty of negligence per se even tho he be deemed an invitee.

Wilson v Goodrich, 218-462; 252 NW 142

Damages—aged man with small earning capacity. In a personal injury action, evidence reviewed relative to past and future pain, loss of time, and decreased earning capacity, of a 67-year-old plaintiff, and held, a verdict of $5,000 was excessive and should be reduced to $4,000.

Johnson v Sioux City, 220-66; 261 NW 536

Elevator accident—liability of subtenant. Subtenants occupying only a portion of a building are not liable to the customers or employees of the tenants who enter the premises without their invitation, for injuries resulting from the negligent failure to properly guard an elevator shaft, where such subtenants had no leasehold right to use the elevator, or, having the right to use it in common, were under no obligation to repair or maintain the same.

Burner v Higman & Skinner, 127-580; 103 NW 802

Elevator accident—liability of tenants. A tenant who sublets a portion of the premises to another for the purpose of storing goods, impliedly invites his subtenant or his employees to enter upon the premises, and is liable for an injury caused by a negligent failure to properly guard an elevator shaft used in storing and removing such goods. Evidence held sufficient to take the case to the jury on the question of the tenant's negligence.

Burner v Higman & Skinner, 127-580; 103 NW 802

Independent contractor as invitee—known danger revealed. Person employing an independent contractor to put steam pipes in downspouting owes only the duty to such invitee to use reasonable care for his safety, and to warn the contractor as to defects or dangers known to the employer and not apparent to the contractor. The employer is not responsible to the contractor for injuries from defects that the contractor knew of or, in the exercise of ordinary care, ought to have known of.

Gowing v Field, 225-729; 281 NW 281

Injury to invitee. Evidence reviewed and held to sustain a verdict for damages consequent on an invitee's stepping into hot ashes piled upon the premises of the defendant.

Pomerantz v Penn. Corp., 214-1002; 243 NW 283

Invitee—deliveryman under direction of consignee. A deliveryman placing goods on consignee's premises, under direction of said consignee, is an invitee, and it is consignee's duty to furnish the deliveryman a safe place in which to discharge his duties.

Riggs v Pan-American Co., 225-1051; 283 NW 250

Invitee's duty—"reasonably safe place" defined. The operator of a filling station was under a legal obligation to exercise reasonable and ordinary care to see that his place of business was reasonably safe for an invitee who was having truck tire repaired—the phrase "reasonably safe" meaning safe according to the usage, habits, and ordinary risks of the business.

Reynolds v Oil Co., 227-163; 287 NW 823

Invitee in public store—jury question. An invitee in a public store has a right to assume that the operator of the store will not be negligent in furnishing a safe place for customers, and a jury question on the issue of the invitee's contributory negligence is presented by such assumption in connection with testimony tending to show that the invitee, in walking along a passageway, looked, but could not see the floor or an adjacent open stairway, and thereupon continued to move forward, with his eyes on some goods on a shelf slightly above the level of his eyes.

Nelson v Woolworth Co., 211-592; 231 NW 665; 30 NCCA 542

Invitees—reasonably safe premises must be provided. Customer was store owners' invitee to premises of store and it was therefore owners' duty to be reasonably sure that they were not inviting customer into a place of danger, and to that end they were required to exercise ordinary care and prudence to make the premises reasonably safe for customer's visit.

Osborn v Klaber Bros., 227-105; 287 NW 252

Inviters—waxed floor with polished surface not inherent hazard to invitees. A waxed floor resulting in a polished surface is not an inherent hazard to the safety of invitees within the standard of care required of inviters.

Osborn v Klaber Bros., 227-105; 287 NW 252

Inviters—common carriers' high liability not applicable. An inviter is not held to that high liability that attaches to common carriers of passengers for hire.

Osborn v Klaber Bros., 227-105; 287 NW 252

Lost person as invitee. A traveler who loses his way and drives upon premises on the supposition that he is on a public highway, and consequently not for a purpose which has in view the mutual benefit of the traveler and the owner of the premises, may not be deemed an invitee, it appearing that the way over which the traveler passed never had been used and could not be used for general unrestricted travel by the public.

Printy v Reimbold, 200-541; 202 NW 122; 205 NW 211

Unguarded premises—duty of inviter. Principle recognized that he who invites people to come upon his premises must exercise reasonable care to keep them free from danger. So held as to an unguarded elevator shaft.

Noyes v Des Moines Club, 178-815; 160 NW 215

(b) LICENSEES

"Invitee"—"licensee". An invitee to a place of business is one who goes there, either at the express or implied invitation of the owner or occupant, on business of mutual interest to both, or in connection with the business of the owner or occupant. A licensee is one who goes upon the property of another, either at the invitation, or with the implied acquiescence, of the owner or occupant, for a purpose purely personal to himself.

Wilson v Goodrich, 218-462; 252 NW 142

Acts or omissions constituting negligence. A licensee on the premises of a manufacturing plant is bound to accept the premises as he finds them.

Sanburn v Hosiery Mills, 217-218; 251 NW 144

Bare licensee—nonliability for injury. One upon premises by the sufferance or acquiescence of the owner is a bare licensee, and there is no liability on the owner's part to keep the premises in safe condition for the licensee's use.

Davis v Malvern Co., 186-884; 173 NW 262

Condition of store building—open stairway. The operator of a public store is not necessarily negligent toward an invitee in maintaining an open stairway in that part of the store to which customers are impliedly invited; but a jury question may arise, if an invitee falls down the stairway, whether the operator was

IV INVITEES, LICENSEES, AND TRESPASSERS—continued

(b) LICENSEES—concluded

negligent in maintaining an open, unlighted, and narrow stairway with the first step thereof immediately adjacent to the space set aside to invitees for passage.

Nelson v Woolworth Co., 211-592; 231 NW 665; 30 NCCA 542

Duty owed to licensee. When a material issue is whether a person injured in a public store because of a defect in the maintenance of the store was, at the time of the injury, an invitee or a mere licensee, the court must plainly tell the jury that, if the injured party was a mere licensee when injured, he cannot recover, even tho the operator of the store was negligent in maintaining the store, unless the injured party shows that he was injured by some willful or affirmative action of the said operator.

Nelson v Woolworth Co., 211-592; 231 NW 665

Elevator accident — liability of owner of premises. Where the owner of a building containing a freight elevator for the common use of the tenants does not by the terms of the lease part with his control of the elevator except the right to use the same, he may be liable with a tenant for injuries to a licensee of the tenant resulting from negligent construction and maintenance of the elevator, without proper gates or guards, in such a place that it could not be readily seen, and knowing that persons must frequent the place and use the elevator to make the premises available to the tenant. Evidence held sufficient to take the case to the jury on the question of the owner's liability.

Burner v Higman & Skinner, 127-580; 103 NW 802

Failure to signal approach of train. Train operatives may not be said to be negligent in failing to signal the approach of a train for the benefit of a pedestrian who had full and timely knowledge of such approach.

Radenhausen v Railway, 205-547; 218 NW 316

Nonduty to guard visible obstruction. Where pedestrians had habitually used a path on a railway right of way and near the track, the act of the company in dumping a ridge of cinders upon the path and in failing to guard or so obstruct the way as to prevent walking upon the cinders does not constitute actionable negligence.

Radenhausen v Railway, 205-547; 218 NW 316

Permitting relation of licensor and licensee. A railway company may not be said to be guilty of actionable negligence because it habitually permits or suffers pedestrians on its right of way to use a path alongside, but well removed from, the rails of its track.

Radenhausen v Railway, 205-547; 218 NW 316; 39 NCCA 36

Person not customer in store. A person who enters an ordinary retail store and discloses no purpose other than to obtain an accommodation strictly personal to himself, and is granted such accommodation by those in charge of the store, is a mere licensee, and not an invitee, and the owner of the store is not liable for an injury received by said licensee while availing himself of said accommodation, and while at a place in the store not provided for customers.

Keeran v Spurgeon Co., 194-1240; 191 NW 99

Trap door in drug store prescription room—telephone user as invitee (?) or licensee (?). Hotel guest given permission to use telephone just inside entrance to prescription room in hotel drug store was a mere licensee and not an invitee, and could not recover damages sustained by falling through open trap door when partially entering the prescription room to reach the telephone, unless showing was made that injury was result of willful or wanton misconduct on part of hotel company, and evidence that manager of store directed plaintiff to telephone did not establish such conduct in absence of showing that he knew trap door was open.

McMullen v Hotel Co., 227-1061; 290 NW 3

Private premises—owner's duty. The owner of private premises over which others are not accustomed to pass is not required to keep them in a safe condition for the benefit of a bare licensee.

Connell v Electric Ry., 131-622; 109 NW 177

Willful or wanton act—evidence. Evidence, relative to the circumstances under which a visitor in a manufacturing plant was injured by her clothing catching on a revolving shaft, reviewed, and held quite insufficient to reveal any element of willfulness or wantonness in the conduct of an employee of the plant.

Sanburn v Hosiery Mills, 217-218; 251 NW 144

(c) TRESPASSERS

Building reconstruction — trespassing children. The owner or occupier of real property is under no legal obligation to make or keep the premises safe for trespassers or bare licensees. So held where a child fell through an opening in the floor of a building which was undergoing reconstruction after a fire.

Battin v Cornwall, 218-42; 253 NW 842

Electrical structure—trespassing as defense. The fact that a person injured by coming in contact with a high-voltage wire was a trespasser on the land of a third party upon whose

land the wire was erected is no defense to an action for damages for said injury.

Lipovac v Iowa Co., 202-517; 210 NW 573
Cox v Des Moines Co., 209-931; 229 NW 244

Electric wires — owner of premises — duty. The owner of premises negligently maintaining electric wires over the same is liable for the death of a bare licensee or trespasser coming in contact therewith, where it appears that the public was accustomed to cross the premises and the owner can be reasonably charged with knowledge of that fact.

Connell v Electric Ry., 131-622; 109 NW 177

Electric pole—spikes driven in as ladder—trespassers. An owner of property may so negligently use it as to become liable in damages for a resulting injury to a trespasser. A jury question, both as to negligence and contributory negligence, is presented by testimony tending to show that an owner, without full compliance with city ordinance requirements, erected and maintained, on his own uninclosed, populously surrounded, and promiscuously frequented premises, which abutted upon an uninclosed and much frequented public park and fishing resort, a pole with a ladder thereon in the form of spikes driven therein, and with a cross arm on the pole, some 25 feet from the ground, carrying wires heavily charged with electricity, and that a trespassing boy 14 years of age, and of ordinary intelligence, climbed the pole and, upon reaching the cross arm, was killed by an electric shock.

McKiddy v Des Moines Co., 202-225; 206 NW 815

Landowner's duty to trespasser. The owner of property owes to a trespasser no duty other than not to injure him willfully or wantonly and to use reasonable care, after his presence becomes known, to avoid injuring him.

Harriman v Afton (Town), 225-659; 281 NW 183

Liability of owner or operator of machinery. In determining the liability of the owner or operator of machinery for injury to a trespasser upon the premises the mental capacity of the injured party is immaterial.

Brown v Canning Co., 132-631; 110 NW 12

Municipal market place—open manhole. A municipality is not liable in damages to a person who is injured in a municipal market place by falling through an open manhole while he is on an errand distinctly personal to himself, and not as a customer of the market, and when the manhole is located at a place where he is neither expected nor invited to be.

Knote v Des Moines, 204-948; 216 NW 52

Trespassers—duty of owner of premises. The only duty an owner of premises owes to a trespasser thereon is not to injure him willfully or wantonly, and to use reasonable care, after his presence on the premises becomes known, to avoid injuring him.

Davis v Malvern L. & P. Co., 186-884; 173 NW 262

Trespassing boy—jumping from freight car to building. There are cases where the owner of premises will be held liable for injury to a child too young to understand the fact or meaning of trespass, or to care for his own safety when attracted to the premises by some act or omission of the owner which he knows, or as a reasonably prudent person ought to apprehend, would render the premises dangerous. But where, as in this case, a boy 13 years of age climbed upon a freight car standing at defendant's railway station and from there jumped to the roof of a storage building for electric cars, and when about to jump back to the car was injured by contact with an uninsulated power wire passing above the roof of the building, and it appeared that plaintiff knew he was a trespasser, that the railway was operated by electricity and that electric wires were dangerous; that the roof could only be reached by climbing the cars; that this was the first incident of the kind and no necessity for guards or signs had been indicated to the owner, the plaintiff was guilty of such negligence as to preclude recovery for the injury.

Anderson v Railway, 150-465; 130 NW 391

Use of highway. A pedestrian is not a trespasser while walking along that part of a public highway which is not and could not be used for ordinary travel.

Eves v Const. Co., 202-1338; 212 NW 154

V ACTIONS GENERALLY

Accident — evidence — jury question. Evidence, tho somewhat inconsistent, held to present a jury question on the issue as to the manner in which an injury occurred.

Elmore v Surety Co., 207-872; 224 NW 32

Bad-faith defense by vouchee. One who is vouched by a defendant into an action, and assumes exclusive charge of the defense, and in the trial pursues a course distinctly hostile to the defendant and distinctly favorable to himself, may thereby make himself, in legal effect, a co-defendant, and be conclusively bound by the judgment against the defendant. So held where the vouchee, knowing that he was vouched into the action by the defendant on the theory that the negligence charged was primary as to the vouchee and secondary as to the defendant, actively attempted to establish that he (the vouchee) was not negligent and that the defendant was negligent.

Hoskins v Hotel, 203-1152; 211 NW 423; 65 ALR 1125

Carriage of passengers—hand baggage—condition to liability. A carrier of passengers is not liable, as an insurer, for the loss of the hand baggage of the passenger unless said

V ACTIONS GENERALLY—continued

baggage is definitely surrendered into the exclusive possession and control of the carrier. If liability is predicated on negligence, such ground must be pleaded and, of course, proven. Evidence held to show no such surrender of custody.

Jensen v Interstate Corp., 221-513; 266 NW 9

No warning signal at railroad crossing—statute violations—negligence. The failure of compliance with a statutory standard of care is negligence. In an action for personal injuries sustained by an automobile passenger in collision in Illinois between an automobile and railway motorcar, where petition alleged that railway employees failed to ring bell or sound whistle of motorcar while approaching a crossing, as required by Illinois statute, such allegations were sufficient to state a cause of action based on negligence of employees of defendant railroad.

Smith v Railway, 227-1404; 291 NW 417

Pleading negligence of employees operating railway motorcar—sufficiency. In action for personal injuries sustained by an automobile passenger in collision between automobile and railroad motorcar, where petition alleged that motorcar standing at crossing, obscured from view of motorist by shrubbery along railroad right of way, and was driven into course of the oncoming automobile without any warning and that it could have been stopped by applying the brakes, such allegations were sufficient to state a cause of action based upon negligence of railroad employees.

Smith v Railway, 227-1404; 291 NW 417

Circumstantial evidence. Circumstantial evidence is wholly insufficient, in and of itself, to generate a jury question on the issue whether a defendant in repairing an automobile so negligently replaced a wheel on the car that thereby it became detached while in operation (with resulting damage to plaintiff) when said evidence is also consistent with the additional theory that said wheel became detached because of defects and weaknesses in the car arising from its age and great use.

Tyrell v Oil Co., 222-1257; 270 NW 857

Conclusions controlled by specific allegations. An allegation that an act was done "carelessly, negligently, and fraudulently" must be construed as predicating the action solely on negligence, when such is the effect of the pleader's subsequent and particularized allegations.

Pease v Bank, 210-331; 228 NW 83

Fatally belated contention. A litigant who, in the trial court, relies solely on specific acts of negligence as a basis for his cause of action may not be heard, on appeal, to assert that he has a right to rely on a statutory presumption of negligence.

Dilley v Iowa Co., 210-1332; 227 NW 173

Insurance—negligence in passing on application—damages. In an action for damages consequent on the alleged negligence of an insurer in passing on an application for insurance, the plaintiff must fail, irrespective of his evidence of negligence, unless he establishes, to the extent of furnishing a measure for his damages, the substance of the contract which he was prevented from entering into.

Winn v Ins. Co., 216-1249; 250 NW 459

Insurance—negligence—passing on application. Evidence reviewed in an action for damages consequent on the alleged negligence of an insurer in passing on, prior to the death of the applicant, an application for industrial insurance, and held quite insufficient to establish such negligence.

Winn v Ins. Co., 216-1249; 250 NW 459

Justifiable submission. The submission to the jury, in an action for personal injury, of the question of "internal injury" is proper under evidence that the plaintiff, after receiving a grave physical injury, suffered from internal hemorrhages.

Ashcraft v Kriv, 207-574; 223 NW 365

Negligence in making bank deposits. Evidence held insufficient to show negligence on the part of a public officer in making deposit of public funds in a bank which ultimately failed.

Danbury v Riedmiller, 208-879; 226 NW 159

Contracts — signing. Principle reaffirmed that it is incumbent upon a person who executes an instrument to exercise reasonable care to ascertain its contents.

Farwark v Railway, 202-1229; 211 NW 875; 26 NCCA 231; 4 NCCA(NS) 197

Reformation of instruments — negligence barring relief. A party who has no excuse whatever for signing a writing without reading it, or without requesting a reading of it, will not be granted reformation. And the rights of the wife of the signer insofar as she is interested in the writing, tho not a signer thereof, will be foreclosed by her like inexcusable neglect to read or request the reading of the instrument.

Stillman v Bank, 216-957; 249 NW 230

Specific allegations conclusive. Principle recognized that, when negligence is the foundation of an action, specific allegations control, and plaintiff may not rely on general allegations of negligence.

McCoy v Railway, 210-1075; 231 NW 353

Res ipsa loquitur—nonapplicability. Record reviewed relative to the fatal injuries received by a party on, in, or about a freight elevator, and relative to the defendant's control of the operation of said elevator at the time said injuries were received, and held to show the

inapplicability of the doctrine of res ipsa loquitur.

Boles v Hotel, 221-211; 265 NW 183

Substituting specific negligence for general negligence. A plaintiff who, on one trial, rests on a general allegation of negligence, does not plead a new cause of action within the meaning of the statute of limitation, when on retrial he, by amendment, withdraws his general allegation and substitutes a specific allegation of negligence which, if proven, will furnish basis for the doctrine of the "last clear chance".

Reason: The latter allegation was always embraced within the former general allegation.

Pettijohn v Weede, 219-465; 258 NW 72

Use of mongrel "and/or". The use of the mongrel term "and/or" in pleading specifications of negligence or recklessness, is sharply disapproved of.

Popham v Case, 223-52; 271 NW 226

Note 2 Torts generally.

Discussion. See 21 ILR 146—Rescission of release from liability; 22 ILR 60—Tort claims in receiverships

ANALYSIS

City's tort liability generally. See under §5738 (III)
Fraud, bills and notes. See under §§9518, 9519
Governmental nonliability. See under §§2, 4123, 5128, 5527, 5738, 5903.11
Libel and slander. See under §§12412, 13256
Malpractice suits. See under §2538
Motor vehicles, liability. See under §5037.09 and cross-references thereunder
Negligence. See under Note 1 above
Sale or mortgage of personal property, fraud. See under §§10002 (I), 10015 (XI)
Transmission lines, torts involving. See under §8323

I IN GENERAL

Discussion. See 2 ILB 1—Foreign wrong; 4 ILB 67—*Permanent structures—continuing injuries;* 6 ILB 111—Damages for loss of a chance; 12 ILR 291—Confusion of goods; 15 ILR 83—Torts of corporation subsidiaries; 16 ILR 89—Malicious prosecution; 18 ILR 30—Torts of spouse

Fundamental laws govern liability. The fundamental and underlying law of torts is that he who does injury to the person or property of another is civilly liable in damages for the injuries inflicted.

Montanick v McMillin, 225-442; 280 NW 608

Lex fori procedure. While, as a matter of comity, the courts of this state will, under proper pleading, recognize and enforce the civil rights and liabilities of parties to a tort committed in a foreign state—if not contrary to the public policy of this state—yet in determining all issues of fact on which such rights and liabilities depend, the judicial procedure of the courts of this state must be followed.

Kingery v Donnell, 222-241; 268 NW 617; 1 NCCA(NS) 292

Committee of unincorporated association—suability. A committee of an unincorporated organization is not a legal entity and is not suable in tort.

Work v Coliseum Co., (NOR); 207 NW 679

"Alibi" in civil cause — burden of proof. Where a defendant in a civil case enters a general denial to a charge of having committed a tort, and in support thereof testifies that, at the time in question, he was at his home, not far from the scene of the alleged tort, the court has no right to instruct (1) that defendant's defense is that of an "alibi," and (2) that defendant has the burden to establish such alibi by evidence which will outweigh the evidence tending to show that defendant did commit the tort.

Gregory v Sorensen, 208-174; 225 NW 342

Bond of notary—action. An action against a notary public and his sureties for damages consequent on a willfully false certificate of acknowledgment does not sound in tort.

Atlas Security v O'Donnell, 210-810; 232 NW 121; 30 NCCA 273

Cause of loss of rentals—construction work (?) or business depression (?). Question as to whether rentals from property are lost because of construction of a bridge and new creek channel by a city, which construction occasioned some inconvenience to tenants in egress or ingress to the property, or because of depression in business conditions, is a question for the jury.

Edmond v Sioux City, 225-1058; 283 NW 260

Civil liability—damages—failure to establish. Proof that defendants have conspired to injure plaintiff's business or to employ unfair competition against plaintiff becomes of no consequence in a law action when plaintiff fails to establish damages.

Roggensack v Winona Co., 211-1307; 233 NW 493

Municipal corporations—liability to pedestrians. Principle reaffirmed that in determining municipality's liability for injuries to pedestrian, precedents are of little value. Each case must be determined upon its own peculiar facts.

Hoffman v Sioux City, 227-1131; 290 NW 62

Cornice on building as nuisance. Evidence that a building built flush with the street line

I IN GENERAL—concluded

was surmounted by a cornice which overhung the street for a material distance and which for several years, through some defect, cast water upon the sidewalk, and at times caused a dangerous accumulation of ice on the sidewalk, furnishes ample basis for a jury finding that the city had not and was not keeping its street free from nuisance.

Wright v A. & P. Co., 216-565; 246 NW 846; 32 NCCA 509

Defects or obstructions in streets—liability of property owner. Principle recognized that a property owner may be liable in damages for creating or permitting to exist a nuisance upon a public sidewalk, even tho the municipality rests by statute under substantially the same liability.

Updegraff v Ottumwa, 210-382; 226 NW 928

Evidence — footprints. Evidence of footprints at or near the scene of the commission of a wrongful act is admissible in an action against the defendant for the resulting damages, provided the defendant is properly connected with said footprints.

Gregory v Sorenson, 214-1374; 242 NW 91

Evidence—newspaper advertisement. In an action for damages consequent on an alleged wrongful act by defendant, a competitor of plaintiff, an advertisement inserted by defendant in a local newspaper and tending to show hostility against plaintiff, may be relevant and material in view of other evidence in the case.

Gregory v Sorenson, 214-1374; 242 NW 91

Felling tree into street. A city is not liable in damages consequent on the act of a property owner or his contractor in felling into a street a tree standing in the parking. In other words, the city is not liable because of its failure to exercise its governmental power to police the street at the place and time when the tree was felled, it knowing that the property owner intended to cut and fell said tree.

Armstrong v Waffle, 212-335; 236 NW 507

Joinder—contract and tort. A plaintiff may not base an action to recover damages for a personal injury on both (1) the commission of a tort by the defendant and (2) the breach of a contract by the defendant; and reversible error necessarily results from submitting both issues when they are not identical.

Randall v Moen Co., 206-1319; 221 NW 944

Liability of mere employee. The mere employee of a tort-feasor is not necessarily liable for the damage resulting from the tort. So held in an action by the lessee of coal lands for damages consequent on the wrongful removal of coal by the owner of the leased land.

Hartford Co. v Helsing, 220-1010; 268 NW 269

Money given to obstruct justice—recovery denied. The courts will not aid one to recover money that has been given to another to be used in obstructing or interfering with the orderly course of justice, nor will they protect one who obtains the money of another for a particular lawful purpose when he fails to so use it and refuses to return it.

Sarico v Romano, (NOR); 205 NW 862

Dunning letters—threats. Willful threats made to a debtor for the purpose of producing in the mind of the debtor such mental pain, anguish, and harassment as will induce him to pay the debt, render the offender liable in damages for the resulting pain and anguish, even tho there be no actual or threatened physical injury, provided the threats are not mere threats to resort to legal procedure.

Barnett v Collection Co., 214-1303; 242 NW 25; 4 NCCA(NS) 223

Motions—more specific pleading—erroneous denial. In an action for general and special damages, under general and somewhat meager pleading, based on an alleged libelous publication resulting (1) in loss of customers, (2) in being refused credit, and (3) in loss of earnings in business, plaintiff should, on motion for more specific statement of the action, be compelled to set forth the names of customers lost, the names of those who refused him credit, and the ultimate facts upon which he bases his demand for judgment on account of injury to his earnings.

Dorman v Credit Co., 213-1016; 241 NW 436

Surface waters—increased flowage consequent on nonnegligent execution of expert plans. Damage to a property owner from an increased flowage of water consequent on the nonnegligent execution of concededly expert plans for paving and surface-water intakes therein, and for curbing, is damnum absque injuria, especially when the damage occurs at the converging point of natural watercourses.

Cole v Des Moines, 212-1270; 232 NW 800

Trespass. The mere opening of an unlocked door and entering premises, without right or authority, constitutes a breaking and entering within the law of trespass.

Girard v Anderson, 219-142; 257 NW 400; 4 NCCA(NS) 203

II JOINT TORT-FEASORS

Discussion. See 8 ILB 115—Judgments against joint tort-feasors; 16 ILR 361—Vicarious liability

Proximate cause—concurrent causes—liability. Principle reaffirmed that when two parties by their concurrent negligence injure a nonnegligent third party, both of said two parties are liable for the resulting damages suffered by said third party.

Andersen v Christensen, 222-177; 268 NW 527

Unintentional injury. Two or more tort-feasors are suable jointly as for a joint tort when their concurring negligence is the proximate cause of a wholly unintentional injury which is indivisible in its nature.

McDonald v Robinson, 207-1293; 224 NW 820; 62 ALR 1419; 34 NCCA 306

Objections—unallowable motion to strike. In an action against several defendants for damages consequent on a negligent act, that defendant who is, in effect, alleged to have occupied the position of respondeat superior cannot have his name stricken from the petition.

Elder v Maudlin, 213-758; 239 NW 577

Release of joint tort-feasor. An injured party who voluntarily, and without being imposed on by fraud, accepts and receives from one alleged joint tort-feasor a legal consideration in the form of property in settlement of his injuries, may not thereafter maintain an action against another joint tort-feasor for damages for the same injury.

Barden v Hurd, 217-798; 253 NW 127

Action based on fraud—conspiracy. In an action based on a conspiracy to defraud, the issue of conspiracy is not determinative, the important factor being that in order to be granted relief, it is necessary that the plaintiff establish the necessary elements of actionable fraud, the amount of recovery being dependent upon the extent of damage resulting from the fraudulent conduct.

Community Sav. Bank v Gaughen, 228- ; 289 NW 727

Admissibility of contract in action sounding in tort. In an action sounding in tort only, against alleged joint tort-feasors, a contract entered into by one of the defendants with a third party, and conversations between said parties relative to matters arising under said contract, may be material, not for the purpose of permitting plaintiff to recover on the contract, but for the purpose of showing the defendant's relation to a certain subject matter, and thereby establishing a basis for the applicable law of tort.

Hanna v Central Co., 210-864; 232 NW 421

Joining contract and tort actions. A joint action cannot be maintained (1) against a contractor on his contract liability to answer for possible torts committed during the progress of work, and (2) against those who are alleged to have subsequently committed a tort during the progress of said work, when the contractor and the alleged tort-feasors are residents of different counties.

Elder v Maudlin, 213-758; 239 NW 577

Partnership — husband and wife — joint or separate liability. A transfer company operating under a trade name, headquartering at defendants' home, having trucks registered in wife's name, but with the state permit in the husband's name, and performing contracts in husband's name, are facts so indicating a partnership that court properly submitted automobile collision case as a joint liability of the husband and wife operating the transfer company.

Schalk v Smith, 224-904; 277 NW 303

Liability of principal and independent contractors. A contract granting the right of way over land for an underground pipe line, on payment of a certain sum per rod, and on payment of "damages to growing crops, fences, or improvements occasioned in laying, repairing, or removing lines", does not constitute an agreement by grantee that he will pay damages consequent on the negligent act (tort) of an independent contractor in injuring grantor's private bridge which was located wholly outside said right of way.

Asher v Continental Corp., 216-977; 250 NW 179

Malpractice—nonjoint liability. The mere fact that a physician directs his patient to go to a named dentist for the extraction of a tooth, and agrees to and does administer the anaesthetic, does not create such relation as will render the physician liable for the negligence of the dentist.

Nelson v Sandell, 202-109; 209 NW 440; 46 ALR 1447

Malpractice—negligence—evidence. In a joint action against two physicians for malpractice, evidence of negligence on the part of one of the defendants prior to the other defendant's connection with the case is inadmissible.

Lemon v Kessel, 202-273; 209 NW 393

Settlement and release—conclusiveness. A party who has been negligently injured and settles with and releases the original wrongdoer may not thereafter maintain an action against a physician for malpractice in treating the very injuries for which he has effected a settlement.

Phillips v Werndorff, 215-521; 243 NW 525; 39 NCCA 574

Attorney fees for defending. When joint wrongdoers jointly and severally employ attorneys to defend themselves in an action for damages consequent on the joint tort, the one who pays the attorney fees may enforce contribution from all the other co-defendants.

Licht v Klipp, 213-1071; 240 NW 722; 1 NCCA(NS) 419

III FRAUD GENERALLY

Discussion. See 4 ILB 46—Elements of deceit; 14 ILR 453—Misrepresentation of law; 21 ILR 158—Caveat emptor—misrepresentation

Essential elements. The elements necessary to constitute actionable fraud are representation, falsity, materiality, scienter, intent to

III FRAUD GENERALLY—continued

deceive, reliance, and resulting injury and damage.

Gipp v Lynch, 226-1020; 285 NW 659

Damage or prejudice must be shown. There can be no actionable fraud in the absence of damage or prejudice, as without these elements there is no fraud, even tho there is an intent to defraud.

Gipp v Lynch, 226-1020; 285 NW 659

Actual intent to defraud. An actual intent to defraud may be found from false and material representations made by a party as of his own knowledge.

Hills Bank v Cress, 205-306; 218 NW 74

Representations must be made to plaintiff. A plaintiff may not maintain an action at law for damages consequent on fraudulent representations not made to him or his agent.

Markworth v Bank, 212-954; 237 NW 471

Evidence of intent—other transactions. On an issue of specific fraud, other related and nonremote transactions of a fraudulent character are admissible on the question of motive and intent.

Lambertson v Finance Co., 200-527; 202 NW 119

Clean hands—collateral transaction. Principle recognized that a plaintiff is not deprived of his right to equitable relief in a given transaction simply because his hands were somewhat soiled by fraud in another subsequent transaction which is only incidentally or collaterally connected with said prior transaction.

Benson v Sawyer, 216-841; 249 NW 424

Fraud pleas—status in court. In fraud actions, courts are reluctant to permit a cheater to profit by his own wrongdoing, tho at the same time courts are constrained by another consideration—that it is for the public welfare not to afford parties to written agreements such ready avenues of escape from their obligations that the purpose of lastingly recording such obligations in writing would be quite indifferently attained—the aim being to minimize both evils without accentuating either of them.

Griffiths v Brooks, 227-966; 289 NW 715

Pleading conclusions insufficient. Pleading general charge of fraud merely by way of conclusions is insufficient to raise issue of fraud.

Nash v Rehmann Bros., 53 F 2d, 624

Burden of proof. Fraud, in the absence of any showing of fiduciary relationship between the parties, cannot be presumed, but must be established by the party alleging it.

Plymouth County v Koehler, 221-1022; 267 NW 106

Evidence—sufficiency. Fraud must be affirmatively established.

King v Good, 205-1203; 219 NW 517

Evidence—weight and sufficiency. Principle reaffirmed that proof of fraud must be clear, satisfactory, and convincing.

Goff v Milliron, 221-998; 266 NW 526

Evidence — insufficiency — directed verdict warranted. In a damage action arising out of fraudulent procurement of plaintiff's signature to note and conditional sale contract, where plaintiff predicates error on granting defendant a directed verdict on the ground that defendant's fraud was not proved—the evidence showing that plaintiff could read and write English language but failed to read instruments while having an opportunity to do so —and where plaintiff's reasons for not reading instruments were (1) he did not have his glasses, and (2) he thought he was signing an ordinary order for automobile, held, plaintiff's conduct precludes him from asserting fraud, and the ruling on the motion was warranted.

Griffiths v Brooks, 227-966; 289 NW 715

Presumption and burden of proof. Fraud is never presumed. He who alleges its existence must establish it by clear, convincing and satisfactory evidence. Principle applied in an equitable action to set aside and cancel certain financial obligations allegedly obtained by fraud.

Eckhardt v Trust Co., 223-471; 273 NW 347

Scienter as essential element. A demand for damages based on alleged fraud cannot be sustained without proof of scienter or its equivalent, whether the action be at law or in equity.

Appleby v Kurtz, 212-657; 237 NW 312

Damages—scienter. Scienter—knowledge of the falsity—is an indispensable element of an action for damages for fraudulent representation. Evidence held insufficient to show knowledge of the falsity of representation relative to the extent to which a farm was tiled.

Kleinmeyer v Willenbrock, 202-1049; 210 NW 447

False representations—reliance. The right to rely on representations in one transaction may have a very material bearing on the right to rely on the same representations in a former transaction between the same parties.

Breza v Federal Soc., 200-507; 205 NW 206

Unauthorized representations of seller's agent—buyer's rescission for falsity—seller's responsibility. Where buyer rescinds contract induced by fraudulent misrepresentations of seller's agent and seeks recovery of purchase price, the agent's limited authority, otherwise binding on the buyer, does not preclude the buyer from alleging and proving such representations, and the seller is bound by such representations even tho unauthorized and

even tho the contract expressly limits the agent's authority to make agreements.

Robinson v Main, 227-1195; 290 NW 539

Opinions—effect. Expressions of opinions may, under some circumstances, amount to representations of fact.

Baumchen v Donahoe, 215-512; 242 NW 533

Opinion (?) or fact (?). A representation may be one of fact per se, or it may be one of opinion per se, or it may be neither per se. In the latter case, whether the representation or statement be of fact or of opinion depends essentially on the subject matter of the transaction and on all the material attending facts and circumstances thereof; and the court must, in its instructions, clearly differentiate between the two questions. So held where the representation was as to presence of rock on the premises.

Boysen v Petersen, 203-1073; 211 NW 894

Representations referring to existing facts. The rule that fraud cannot be predicated upon the failure to perform a promise or stated intention to do something in the future unless the statement is made with an existing real intention not to perform does not apply when the representations relied on refer to existing facts. The representation by a corporation that it has adopted a particular sales program was such reference to existing facts.

Lee v Sundberg, 227-1375; 291 NW 146

Interwoven statements of fact and opinion. A fraud-doer may not complain of the submission to the jury of matters of opinion, as distinguished from representations of fact, when his statements of opinion are so interwoven with his statements of fact that to separate them is practically impossible.

Pullan v Struthers, 201-1179; 207 NW 235

Damages—pleading and proof. Allegation and proof of fraud without any allegation and proof of damages leave plaintiff without a cause of action.

Vorpahl v Surety Co., 208-348; 223 NW 366

Elements—damage—failure of proof. Fraud, howsoever clearly established, becomes inconsequential in a law action when it appears that the victim of the fraud was in no manner damaged.

Rawleigh v Cook, 200-412; 205 NW 57

Federal court jurisdiction—exemplary damages. Exemplary damages may be added to actual damages to make up federal jurisdictional amount where exemplary damages are recoverable, and exemplary damages may be allowed in actions on case of conspiracy or deceit.

Young v Main, 72 F 2d, 640

Knowledge of fraud. One who knows that he is being defrauded and voluntarily submits thereto and consummates the transaction waives the fraud.

Loots v Knoke, 209-447; 228 NW 45

Specific elements — instructions. An abstract instruction defining fraudulent representations is not adequate when there is a request for a specific instruction covering the elements of falsity, scienter, deception, and injury.

Gray v Shell Corp., 212-825; 237 NW 460

Discovery — petition — sufficiency. Petition for the production of papers and correspondence, in an action for damages for deceit, reviewed, and held to comply with the governing statute.

Main v Ring, 219-1270; 260 NW 859

Discovery — correspondence with defendant and his trade-name affiliates. The court, in an action against an individual for deceit, is not necessarily acting beyond its jurisdiction in ordering the production of correspondence not only with the defendant personally, but with various trade-name concerns under which the defendant is alleged to be doing business.

Main v Ring, 219-1270; 260 NW 859

Advice — when fraudulent. One who is sought out as an adviser in a contemplated purchase, and gives such advice fraudulently, and with the intent to defraud and to promote his own secret, but concealed, interest in the transaction, must respond in damages to the one who justifiably relies thereon.

Faust v Parker, 204-297; 213 NW 794

Commercial college representations. Record reviewed, and held insufficient to support a finding either (1) that an instructor in a commercial college was not an "expert," as represented, or (2) that the student in such college did not receive "individual instruction," as represented.

Mitchell v College, 200-1202; 206 NW 81

Measure of damages. The measure of damages for fraudulently representing the nature of instruction given to students in a commercial college is the difference between the value of the represented instruction and the value of the instruction actually received.

Mitchell v College, 200-1202; 206 NW 81

Ratification of part ratifies all. Partial ratification of an agency adopts it as a whole, including detriments.

Smith v Miller, 225-241; 280 NW 493

Fraud on agent, fraud on principal. Fraud on an agent, in a matter in which the agent is acting in his representative capacity, is a fraud on the principal. It follows that the principal may seek redress to the same extent

III FRAUD GENERALLY—continued

as tho the fraud was perpetrated directly and personally upon him.

Andrew v Baird, 221-83; 265 NW 170

Wife denying husband's agency but accepting benefits not permitted. A wife, owning a rooming house, sold on the fraudulent representation of her husband, made in response to purchaser's direct question, that the furnace heated the upstairs rooms, will not, in purchaser's action to rescind and recover the down payment, be permitted to deny her husband's authority to represent her and at the same time retain the down payment as fruits of the deceit.

Smith v Miller, 225-241; 280 NW 493

Attorney and client—inadvertent misrepresentation. Evidence held insufficient to show fraud by an attorney in the making of an inadvertent false representation.

Tobin v Budd, 217-904; 251 NW 720

Financial statement—future reliance. The plea that a financial statement as a basis for credit was given so long prior to the actual granting of credit that the plaintiff granting the credit had, as a matter of law, no right to rely thereon is futile when said statement distinctly recognizes that it is a continuing one, and for the purpose of future reliance.

Hills Bank v Cress, 205-306; 218 NW 74

Delay — misrepresentation by carrier. A charge of misrepresentation may not be successfully based on the good-faith statement by the agent of the carrier as to his understanding as to where a shipment was and when it would arrive.

Percy v Railway, 207-889; 223 NW 879

False promise. A statement to the effect that if a party will sign an obligation "he will never be sued thereon," is fraudulent when made for the purpose of deceiving the party to whom made, and when the latter justifiably relies thereon.

Commercial Bank v Kietges, 206-90; 219 NW 44

Waiver by action for breach of contract. He who bases his action on the breach of a contract thereby affirms the contract, and may not recover damages for fraud in the inception of the contract.

Bergman v Coal Co., 200-419; 203 NW 697

Fraud—irrevocable waiver of action for damages. One who, with full knowledge that he has been fraudulently inveigled into signing an option contract for the sale of his property, elects not to rescind but to affirm and perform the contract, and does perform at a time when the contract is wholly executory and without consideration, thereby irrevocably waives, as a matter of law, any and all right to sue the wrongdoer for damages.

Ankeney v Brenton, 214-357; 238 NW 71

Payment with knowledge of facts. Principle reaffirmed that one who voluntarily pays a disputed claim with full knowledge of the facts may not recover the sum so paid.

Meyer v Gotsdiner, 208-677; 226 NW 38

Federal jurisdiction. Where petition alleged rescission of contract obtained by fraud, and prayed for purchase price and for damages for conspiracy or deceit, federal court did not acquire jurisdiction on ground that total amount sought exceeded $3,000, where action in effect was one in assumpsit for recovery of purchase price which was less than $3,000.

Young v Main, 72 F 2d, 640

Cause of action not tort. Petition alleging that defendants by fraudulent statements induced plaintiff to buy machines, and that promptly thereafter plaintiff rescinded contract of purchase and demanded return of purchase price, and that fraudulent statements were made willfully and maliciously, and that plaintiff was entitled to recover amount of purchase price and exemplary damages held to set out cause for recovery of purchase price and not in tort.

Young v Main, 72 F 2d, 640

Damages—recovery. Instructions reviewed and held to correctly state the conditions under which recovery could be had for damages consequent on the feeding of a so-called hog remedy to hogs.

Crouch v Remedy Co., 205-51; 217 NW 557

Measure of recovery. Measure of recovery for plaintiff who has rescinded his contract on ground that contract was obtained by fraud is return of money paid or recovery of property with which he parted, and by rescinding contract plaintiff demands that parties be placed in statu quo, and plaintiff has right to have money or property with which he parted restored to him.

Young v Main, 72 F 2d, 640

Permissible relief. Where contract is obtained by fraud, person defrauded may affirm contract and sue party who defrauded him for his damages, or he may repudiate contract and recover purchase price paid, but he must elect one remedy and, if injured person pleads rescission, he cannot then say that his action is in tort.

Young v Main, 72 F 2d, 640

Husband and wife—action on property-settlement contract. A defendant sued by his former wife on a property-settlement contract, fully performed by her, availeth himself nothing in the way of a defense by nakedly alleging fraud by the wife in obtaining the contract when such allegation is made neither

as a basis for a rescission of the contract nor for damages.

Poole v Poole, 219-70; 257 NW 305

Compromise and settlement — impeachment —burden of proof. Fraud, in impeachment of a compromise and settlement, must be established by the pleader who alleges it.

Coffman v Brenton, 214-185; 239 NW 9

Evidence of intent to defraud—sufficiency. In an action to cancel an alleged fraud-induced compromise settlement of indebtedness, proof that in the negotiations leading up to said settlement defendant made to plaintiff inducing and material statements as of fact but which defendant, at the time, knew to be false, justifies the finding, without further proof, that defendant made said statements with intent to defraud and deceive the plaintiff.

Andrew v Baird, 221-83; 265 NW 170

Compromise settlement—impeachment—burden of proof. A plaintiff who attacks a compromise settlement of the amount due under a policy of insurance on the ground that it was fraud-induced has the burden to show that the representations inducing the settlement were knowingly false and that he innocently relied thereon; and plaintiff must, of course, fail on a record showing that the representations were true, and that he knew they were true.

Bockes v Cas. Co., 212-499; 232 NW 156

Insurance—fraud-induced settlement. In an action, not on a policy of insurance, but for damages consequent on an alleged fraud-induced contract of settlement of the amount due on the policy, the burden of proof to show that the application for the insurance was not attached to or indorsed on the policy is on the insured when he pleads that the insurer may not avail itself of representations contained in the application.

Bockes v Cas. Co., 212-499; 232 NW 156

Insurance—compromise settlement — justifiable representation of defense. An officer of an insurance company is amply justified in believing that his company has a good defense to an action on a policy and in so stating to the insured in negotiations for a compromise settlement when the application for the insurance contained false representations of a material nature and an agreement that "the right to recover * * * should be barred" if any of the statements in the application "material either to the acceptance of the risk or the hazard assumed by the company is false and made with the intent to deceive."

Bockes v Cas. Co., 212-499; 232 NW 156

Deception constituting fraud and liability therefor—right to rely on false statement. A debtor who falsely asserts his complete insolvency, and thereby induces his creditor, wholly ignorant of the true facts, to enter into a compromise settlement of indebtedness, will not, in an action to cancel the fraud-induced settlement, be heard to assert that the creditor had no right to rely on said false statement—that the creditor, before acting, should have made an independent investigation as to the truth of said statement.

Andrew v Baird, 221-83; 265 NW 170

Reinsurance—disclosure of material facts. In an action on a reinsurance contract against reinsurer, held, not breached on account of original insurer's failure to retain full amount of liability agreed upon where original insurer was liable on another contract with the same principal and the evidence was insufficient to show any wrongful or fraudulent concealment of material facts, since the same principles of law as to false representations and concealments govern in reinsurance as in original insurance. Altho insured and reinsured have duty to exercise good faith and disclose all material facts, a presumption must be based on facts, not upon other presumptions. The mere nondisclosure of facts possibly known is not fraudulent concealment of facts, so reinsurer, to establish concealment of facts, must show intentional concealment or bad faith in ascertaining facts.

General Reins. v Surety Co., 27 F 2d, 265

Delay—effect. Long delay (short of the running of the statute of limitation) does not bar an action for damages for deceit in the sale of land.

Boysen v Petersen, 203-1073; 211 NW 894

False representations—measure of damages. The measure of damages for false representations inducing the purchase of real estate is the difference between the value of the land as received and the value as it would have been, had the land been as represented.

Aldrich v Worley, 200-1009; 205 NW 851

Sale of land—fraudulent representations. Evidence held to present a jury question on the issue of fraud in the sale of land.

Williams v Burnside, 207-239; 222 NW 413

Measure of damages—instruction following rescission theory—error without prejudice under evidence. In vendee's action for damages for fraudulent representations of value in the sale of real estate, no rescission being asked, it is error to instruct that the measure of damages is the amount paid less the reasonable rental value for the time occupied, which error, however, is without reversible prejudice to the vendor, when the amount of recovery is so small that the hope for a more favorable verdict on a retrial is, under the evidence, too remote.

Neal v Miller, 225-252; 280 NW 499

Measure of damages. Principle reaffirmed that the measure of damages for fraudulent representations as to the condition of land sold is the difference between the reasonable value

III FRAUD GENERALLY—continued

of the land at the time in question and what would have been said value had the land been as represented.

Fry Co. v Gould, 214-983; 241 NW 666

Wholly unallowable counterclaim. The amount which a vendee of land claims to have expended on land foisted upon him because of fraudulent representations by the vendor, in order to render the land "suitable, productive, and usable," is wholly unallowable as a counterclaim because said amount as a measure of damages for the wrong suffered is unknown to the law.

Fry Co. v Gould, 214-983; 241 NW 666

Evidence—sufficiency. A showing that a conveyance by a debtor is attended by a mere suspicion of fraud is not sufficient foundation for decreeing its invalidity. Fraud must be clearly and satisfactorily established.

First N. Bank v Lynch, 202-795; 211 NW 381

Remedy—unallowable action for damages. A judgment plaintiff may not maintain an action at law for damages against the fraudulent grantee of land transferred by the judgment defendant, even tho the action is aided by an allegation of conspiracy to defraud plaintiff.

McKay v Barrick, 207-1091; 224 NW 84

False representations—actionable matters of fact and opinion. Representations (1) that land was a choice tract, (2) that it was adapted to rice culture at small expense, (3) that it was well improved, (4) that it had improvements in good repair and of ample capacity and of a named value, and (5) that the cost of operating certain machinery would not exceed a named sum are statements of present fact and actionable, if false. If treated as matters of opinion, they are likewise actionable if false, when made by a party as of his own personal knowledge.

Aldrich v Worley, 200-1009; 205 NW 851

Negativing fraud. The plea of fraudulent representation as to the value of property must necessarily fall in the face of testimony that the complainant was a person of unusual business ability and experience and had had long, personal and intimate knowledge of the property in question far superior to that of the alleged wrongdoer.

Tobin v Budd, 217-904; 251 NW 720

Nonreliance on representations. Fraud may not be based on alleged false representations as to the value and condition of property when it appears that complainant had unrestricted opportunity to investigate said representations and availed himself to the fullest extent of said opportunity.

Hall v Swanson, 201-134; 206 NW 671

Right to rely on representation. A purchaser of real estate who makes an unhampered examination of the premises prior to purchase may not rely on representations of any fact as to the truth of which he can reasonably assure himself.

Boysen v Petersen, 203-1073; 211 NW 894

Unavailing inspection—effect. The plea that the party complaining of false and fraudulent representations in an exchange of land had inspected the land prior to accepting it, and had full opportunity to learn all relevant facts, must necessarily fall when it is shown that an inspection at said time would not reveal the falsity of the particular representations relied on.

Baumhover v Gerken, 200-551; 203 NW 15

Reformation of deed—omission. Evidence reviewed, and held ample to justify the reformation of a deed because of the mistaken, and fraudulently induced, omission therefrom of a clause reserving to grantors a life estate in the land in question.

Foote v Soukup, 221-1218; 266 NW 904

Silence—effect. A vendor who, in answer to an inquiry by a proposed purchaser concerning a fact having material relation to the property, speaks half the truth and remains silent as to the other half, may be guilty of actionable false representation. Evidence held insufficient to apply the principle.

Foreman v Dugan, 205-929; 218 NW 912

Mechanic's lien release through fraud. Where a landowner desiring to refinance a mortgage on his land is unable to do so, unless he also satisfies a mechanic's lien thereon, and when the landowner's son, seeking to aid his father by securing a release of the mechanic's lien, executes to a bank a chattel mortgage, after which the mechanic's lien is released because of a special account set up by the bank for the mechanic's lien holder, but which account is available, however, only in such amounts and at such times as the son paid off the chattel mortgage to the bank, and when the same bank later took another chattel mortgage from both the landowner and son, which it later foreclosed, and in the sale disposed of the property, previously mortgaged for the benefit of the mechanic's lien holder, without crediting to the mechanic's lien holder's benefit the proceeds therefrom, a fraud action by the mechanic's lien holder against the bank held not to have been proven.

Shimp v Place, 225-1098; 281 NW 471

Nonwaiver by exercising acts of ownership. Fraud in an exchange of properties is not waived by the victim of the fraud by exercising acts of ownership over the land received, at a time when he had not fully discovered the fraud practiced on him, and at a time when the other party was asserting that the contract was not fraudulent, and that the deal,

if not satisfactory, would be mutually rescinded.

Baumhover v Gerken, 200-551; 203 NW 15

False statement as to incumbrancer. Fraud may consist of a statement that a named banking institution was the holder of an incumbrance upon land when in fact the incumbrance holder was an estate, the victim of the fraud knowing nothing of the value of the land.

Hills Bank v Cress, 205-306; 218 NW 74

Mother paying on contract while daughter gets tax deed—invalidity. A tax deed will be set aside when a mother buying property on contract allows it to go to tax sale, then contracts with the certificate purchaser to buy the certificate while continuing payments to the landowner, assuring said landowner that she is redeeming, yet, when the certificate is acquired, a daughter's name is inserted and treasurer's deed issued thereto, the mother must be held to have conspired with the daughter to defraud the landowner and to have accomplished no more than a redemption for herself.

Blotcky v Silberman, 225-519; 281 NW 496

Concealment. An heir may not predicate fraud in the sale of his share in an estate on the claim that his stepmother, the purchaser, concealed from him the amount of the estate, when the inventory was on file, when the uncertainty attending the existence of debts and a possible will was equally known to all parties, and when the heir possessed the same opportunity to learn the full amount of the estate as was possessed by the stepmother.

Ward v Ward, 207-647; 223 NW 369

Confidential relations—parent and child. A conveyance between parent and child generates no presumption of fraud, but necessarily invites critical examination of the attending circumstances. Circumstances indicative of fraud reviewed, and held to outweigh positive testimony tending to show good faith.

First N. Bank v Hartsock, 202-603; 210 NW 919

Fiduciary relationship—required proof. In an action to set aside a trust agreement executed to a son and an attorney by plaintiff, evidence held to support decree dismissing plaintiff's petition. The existence of a confidential relationship or facts giving rise thereto must be proved before doctrine of fiduciary relationship can be applied—the mere relationship of parent and child does not create fiduciary relationship.

Hatt v Hatt, (NOR); 265 NW 640

Resulting trusts. The plea that a trust resulted against one who fraudulently obtained the property necessitates proof of representation, reliance thereon, falsity thereof, scienter, deception, and injury. Evidence held affirmatively to show the contrary.

Andrew v Bank, 205-244; 216 NW 551

Recovery of money against innocent third party. One who is defrauded of his money may not recover the same of an innocent third party to whom the wrongdoer paid it in discharge of the bona fide debt of the wrongdoer to the innocent third party.

Bogle v Bank, 203-203; 212 NW 547

Law of foreign state. A representation to the effect that, when a good-faith purchaser of property acquired it, a conditional sale contract was already of record in a foreign state in conformity with the laws thereof, is a representation of fact, and, if false, will sustain a plea of fraud in the execution of notes by said purchaser in the good-faith reliance on such representation, even tho such purchaser makes no examination of the laws of the foreign state.

Baker v Bockelman, 208-254; 225 NW 411

Validity of note. Evidence reviewed and held ample to show that the promissory note in question was fraud-induced.

North Amer. Ins. v Holstrum, 208-56; 221 NW 214

Cashing fraud-induced check—nonliability to maker. The payee of a check, negotiable in form and regular on its face, and received in the ordinary course of business, and for value, and wholly without knowledge of a fraud which attended and induced the execution and delivery of the check, may not be held liable to the drawer of the check for damages consequent on said fraud.

Deater v Bank, 223-86; 272 NW 423

Holdership in due course—estoppel. The maker of a negotiable promissory note may not be said to be estopped to plead fraud in the inception of the note, against a transferee, on a record which fails to show that the maker's conduct ever came to the knowledge of the transferee or in any manner controlled his conduct.

State Bank v Behm, 202-192; 209 NW 523

Banks—objectionable assets. False representations by the managing officers of a reorganized bank to the effect that all objectionable assets of the old bank had been eliminated from the new bank are actionable if relied on to one's damage.

Baumchen v Donahoe, 215-512; 242 NW 533

Payment of funds to one with apparent authority to collect. When the plaintiff gave a third party his passbook to be used to withdraw an account from an Italian bank, and the third party used the passbook to secure a personal note given to the defendant bank through which the exchange transaction was

III FRAUD GENERALLY—continued

made, the bank was not liable for using the funds received from the Italian bank as payment of the note, when it might have thought that the note was given to obtain an advance for the plaintiff and had no knowledge of wrongdoing, and previous transactions indicated an apparent authority to transact the business in such manner.

Matalone v Bank, 226-1031; 285 NW 648

Purchase of stock—damages. The measure of damages for false representations inducing the purchase of corporate bank stock is the price paid for the stock; also, in addition, the amount of assessments subsequently paid on the stock if said assessments are the proximate results of the cause which brought about the original loss.

Baumchen v Donahoe, 215-512; 242 NW 533

Iowa securities act—false representations. A corporation's false representations and statements made to the secretary of state and purchasers are within provision of the Iowa securities act, and evidence of such false representations supported a judgment for plaintiff in an action to set aside sales of corporate stock and to recover amounts paid with attorney's fees for violation of such act.

Associated Mfr. Corp. v De Jong, 64 F 2d, 64

Sale of bonds—fraud—discovery—limitation of action. Under the rule that the statute of limitations begins to run on a law action for fraud when the fraud is consummated unless tolled by an intentional fraudulent concealment, and since §11010 does not apply to law actions, in a case where bonds were sold in 1922 and buyers could have secured at any time a detailed statement of the securities held for payment of the bonds, the buyers cannot claim they did not discover, until 1933, fraud in the sale of the bonds.

McGrath v Dougherty, 224-216; 275 NW 466

Essential elements. A jury question is presented by testimony which tends to show that defendants, with the intent to defraud, falsely represented the value and ownership of corporate stock and its great desirability as an investment, and that the victim thereof justifiably relied thereon to his damage.

Faust v Parker, 204-297; 213 NW 794

Knowledge of falsity—opportunity to learn truth. The purchaser of corporate shares of stock will not be permitted to say that he relied to his damage on false representations as to the assets of the corporation and the value thereof, and as to amount originally paid in on the stock and the dividends declared, when, at the time the representations were made, he personally knew that some of the representations were false, and when, at said time, he had equal opportunity with the seller to know and learn the actual truth of the remaining representations but did not avail himself of said opportunity.

Wead v Ganzhorn, 216-478; 249 NW 271

False promise—when actionable. The deliberate making of a promise to resell corporate stock which was being offered for sale, with the intent to defraud, and with no intention of performing such promise, matures a cause of action in one who justifiably relies thereon to his damage.

Faust v Parker, 204-297; 213 NW 794

Interwoven statements as to future possibilities. On the issue whether the purchase of corporate shares of stock was induced by fraudulent representations, the entire series of interwoven representations which were made to induce such purchase must be considered, even tho some of them relate to the future possibilities of the corporation and of its stock.

North Amer. Ins. v. Holstrum, 208-722; 217 NW 239; 224 NW 492

Fraud pleadable against corporate creditors. One who is fraudulently induced to subscribe for corporate stock and to execute his negotiable promissory note in payment therefor may plead said fraud against a creditor of the corporation who, by indorsement, became a collateral security holder of the note, with full knowledge that it was given in payment for stock, (1) whether the creditor sues on the note or (2) whether the creditor sues on the theory (conceding, arguendo, its legal permissibility) that the indorsement of the note worked an assignment to him of the corporation's right of action against the subscriber for unpaid installments of stock.

Arnd v Grell, 200-1272; 206 NW 613

Corporate stock—no market value—net value of assets. If there is no evidence of the market value of corporate stock—in an action for damages consequent on a fraudulently induced sale —said value must be determined by ascertaining the net value of the assets of the corporation.

Humphrey v Baron, 223-735; 273 NW 856

Action based on fraud—conspiracy. In an action based on a conspiracy to defraud, the issue of conspiracy is not determinative, the important factor being that in order to be granted relief, it is necessary that the plaintiff establish the necessary elements of actionable fraud, the amount of recovery being dependent upon the extent of damage resulting from the fraudulent conduct.

Community Sav. Bank v Gaughen, 228- ; 289 NW 727

Fraud on bank by officer—conspiracy. Where the cashier of the plaintiff bank concealed a shortage with the bank by making fraudulent entries in its bond account and, to further conceal the shortage, obtained credit with the defendant bank by using drafts on the

plaintiff bank as security, and concealed the monthly statements of the defendant in order to continue to conceal the shortage, the defendant having nothing to gain by aiding him in his fraud, there was neither direct nor circumstantial evidence of any arrangement between the cashier and the defendant to support a claim that there was conspiracy between them.

Community Sav. Bank v Gaughen, 228- ; 289 NW 727

Conspiracy—concert of action—evidence—sufficiency. Evidence reviewed and held insufficient to present a jury question on the issue of concert of action between the officers and directors of a corporation for the purpose of defrauding plaintiff in the purchase of stock, except as to two defendants.

Stambaugh v Haffa, 217-1161; 253 NW 137; 38 NCCA 114.

Evidence—sufficiency. Evidence reviewed, and held to present a jury question on the issue of fraud in the sale of corporate stock.

Reinertson v Products Co., 205-417; 216 NW '68

Different fraud in same transaction. A decree in an action for fraudulent representations in the sale of the corporate stock of one corporation is not an adjudication of an action for materially different fraudulent representations in the sale of the corporate stock of another and different corporation; and this is true tho said actions grew out of the same written contract of purchase.

Reinertson v Products Co., 205-417; 216 NW 68

Defendants not fraud perpetrators—directing verdict. In an action against the incorporators of an investment company for damages for fraud in the sale of bonds, a directed verdict in favor of the incorporators was proper when the evidence, other than the outlawed printed representations on the back of the bonds, showed the fraud, if any, was committed by a bank trustee of the securities.

McGrath v Dougherty, 224-216; 275 NW 466

Sale of bonds—damage accrual—later exchange no concealment of fraud. Where bonds purchased in 1922 were exchanged in 1927 and 1932 for new bonds, the damage from fraud in their sale, if any, occurred when they were first purchased, and when neither the actual fraud itself nor due diligence to discover the same are proven, the subsequent exchange transactions will not toll the statute as a concealment of the original fraud, especially if none existed.

McGrath v Dougherty, 224-216; 275 NW 466

Deception constituting fraud—sale of bonds—duty to investigate. Under clause in bonds entitling buyers to statement of securities, it is no excuse for failing to request the same, to say that statement from fraud perpetrators if furnished would not be true.

McGrath v Dougherty, 224-216; 275 NW 466

Joinder of corporations and officers. Two corporations, each organized by the same promoters, for identically the same purpose, and officered by the same officers, may be joined with the common president, in an action based upon a single joint transaction wherein the said president in the sale of corporate stock of both corporations made false representations in the interest of and for the benefit of both corporations.

McCarthy v Dixon, 219-15; 257 NW 327

Municipal officers—pensions — findings and orders—effect. The official decision of the board of trustees of the firemen's pension fund that an applicant was not entitled to a pension on account of an alleged injury, is final and conclusive in the absence of fraud, and fraud will not be presumed in the absence of proof thereof. So held as to a claimed injury which had, apparently, been concealed for some nine years before being presented as a ground for pension.

Fehrman v Sioux City, 223-308; 271 NW 500

IV CONVERSION, CIVIL LIABILITY GENERALLY

Joint liability. If two parties be liable for a conversion, plaintiff may sue either or both.

School District v Sass, 220-1; 261 NW 30

Pleading—trespass and conversion. A party may plead trespass and conversion in the same action.

Girard v Anderson, 219-142; 257 NW 400; 4 NCCA (NS) 203

Admissions showing weakness of contentions. Where the cashier of the plaintiff bank had entered into two similar credit transactions with the defendant bank in order to cover a shortage in accounts, in an action to recover the amount of the shortage, the plaintiff's brief stating that there had been a full accounting between the two banks except as to one of the two transactions, such statement recognized a weakness in the plaintiff's contentions, as the amount claimed was equal to the amount involved in only one of the transactions and, when both had been accounted for in the same manner, the accounting for both had to be either proper or improper.

Community Sav. Bank v Gaughen, 228- ; 289 NW 727

Jury question. Direct evidence is not essential in order to generate a jury question on the issue of conversion.

Mulenix v Bank, 203-897; 209 NW 432

Separate and distinct conversions. A misjoinder of causes of action and of parties occurs

IV CONVERSION, CIVIL LIABILITY GENERALLY—continued

when a petition for damages, consequent on successive sales of mortgaged chattels, reveals that two separate and distinct sales were made with actual or constructive notice of the recorded mortgage,—one by part of the defendants, and one by the remaining defendants,—without any allegation of conspiracy, unity of design, or concert of action on the part of all of said defendants, and without any allegation that the concurrent acts of all the defendants proximately contributed to the conversion.

Producers Assn. v Livingston, 216-1257; 250 NW 602

Title—evidence. On the issue of ownership of personal property, plaintiff may introduce (for what it is worth) a policy of insurance carried by him on the property, especially when defendant is insisting that plaintiff's claim of ownership is a belated afterthought.

Antes v Coal Co., 203-485; 210 NW 767

Transfer of property by mortgagor. The purchaser of mortgaged chattels is not liable to the mortgagee, as for a conversion, when the mortgagee has waived his lien by expressly or impliedly consenting to a sale by the mortgagor.

Producers Assn. v Morrell & Co., 220-948; 263 NW 242

Right to dictate application. A chattel mortgagee who consents to the shipment and sale of the mortgaged property in his name must obey the instructions of the mortgagor to apply the receipts on the mortgage-secured debt, irrespective of his right in the absence of such instructions.

Reichenbach v Bank, 205-1009; 218 NW 903

Liabilities of parties. A senior chattel mortgagee who, without foreclosure, takes possession of the mortgaged property and sells it at private sale must account to a junior mortgagee for such part of the proceeds as he applies to unsecured claims due him.

Money v Bank, 202-106; 209 NW 275

Liability of bailee. The bailee of an article is liable to the bailor for the reasonable value of the article when the bailee sells it after receiving it under an agreement to credit the bailor with a certain amount on a contemplated purchase of a new article of the same kind, it appearing that the bailor had abandoned his former contemplated new purchase.

Kinsey v Massey, 204-758; 216 NW 54

Unidentified bailments—ratable distribution. When the subject matter of various bailments with the same bailee is identical in kind,—e. g., government bonds,—and becomes so intermingled that the owners are unable to identify their separate property, the entire series of bailments must, in case of the insolvency of the bailee, be ratably distributed among the bailors.

In re F. & M. Bank, 202-859; 211 NW 532; 51 ALR 910

Insurance premium—conversion by agent—liability of insurer. Where insurance agent taking an application for life insurance had authority to collect premiums on behalf of the insurer and where proceeds of check given with application for payment of premium were partly converted while in authorized possession of insurer's agent, and the application was thereafter rejected by insurer, the conversion was an act for which the insurer was liable.

Economy Co. v Ins. Co., 227-1123; 290 NW 82

Treating collateral security as one's own. The collateral holder of mortgage-secured bonds is guilty of conversion if, when the mortgage is foreclosed, he so treats said bonds as his individual property that they pass beyond the control of himself and of the real owner, without the knowledge or consent of said real owner.

Leonard v Sehman, 206-277; 220 NW 77

Fraud on bank by officer. Where the cashier of the plaintiff bank concealed a shortage with the bank by making fraudulent entries in its bond account and, to further conceal the shortage, obtained credit with the defendant bank by using drafts on the plaintiff bank as security, and concealed the monthly statements of the defendant in order to continue to conceal the shortage, the defendant having nothing to gain by aiding him in his fraud, there was neither direct nor circumstantial evidence of any arrangement between the cashier and the defendant to support a claim that there was conspiracy between them.

Community Sav. Bank v Gaughen, 228- ; 289 NW 727

Fraudulent acts by bank cashier—repudiation of only part of transaction. Where the cashier of the plaintiff bank obtained credit with the defendant bank in order to conceal a shortage in the accounts of the plaintiff, giving unauthorized drafts on the plaintiff and crediting the plaintiff with the amounts, it was erroneous for the court to find that the cashier had borrowed from the defendant to pay the plaintiff and then paid the defendant with the drafts with the result that the defendant then held assets of the plaintiff equal to the amount of the drafts. To hold thus would permit the plaintiff bank to accept payment of the shortage through the unauthorized acts of its agent, the cashier, and at the same time repudiate the remainder of the transaction and deny the right of the defendant to use the unauthorized drafts.

Community Sav. Bank v Gaughen, 228- ; 289 NW 727

Bonds — evidence — sufficiency. Plaintiff in an action for the conversion of bonds may recover on proof of the conversion and of the value of the bonds. Proof that bonds found in the possession of the conversioner or of his executor are the identical bonds converted is material only in case plaintiff elects to recover the bonds in kind.

Annis v Morgan, 210-478; 231 NW 457

Corporate stock — evidence — jury question. Evidence held to present jury question on the issue whether corporate stock alleged to have been converted was worthless, whether a bank cashier acted individually or on behalf of the bank, and whether the bank received any funds in the transaction in question.

Butterworth v Bank, 211-1327; 236 NW 83

Official bonds—time deposit works conversion. A sheriff is guilty of instant conversion and a breach of his bond when he deposits in a bank funds properly coming into his hands in unadjudicated condemnation proceedings and takes from the bank a certificate of deposit which is payable at a definite time in the future, because he thereby fails so to "hold" said funds as commanded by statute as to enable him to account for such funds whenever the proceedings are finally determined; and in such case the question of due care or negligence in making the deposit is quite immaterial.

Northwestern Co. v Bassett, 205-999; 218 NW 932

Identification of goods—evidence. In an action against an execution plaintiff for conversion of goods stored in certain "boxes, barrels, and trunks," and sold in bulk, without inventory of the contents, plaintiff may introduce duly identified and detailed inventories of the contents, on a showing that such inventories represent the contents of said "boxes, barrels, and trunks."

Antes v Coal Co., 203-485; 210 NW 767

Chattel mortgage foreclosure — misdescription of horses. In an action against a bank for conversion of horses sold in a chattel mortgage foreclosure and allegedly being the same horses mortgaged previously to induce the release of a mechanic's lien, held, evidence failed to establish that the horses sold were the same ones described in the prior chattel mortgage.

Shimp Bros. v Place, 225-1098; 281 NW 471

Property under receivership. One who is in possession of property as agent of a duly appointed receiver is not guilty of a conversion of the property by refusing to give it up without the consent of the receiver, even tho such agent is plaintiff in the action in which the receiver was appointed, and even tho a full settlement of the action has been consummated, but not yet called to the attention of the court.

McCarthy v Cutchall, 209-193; 225 NW 865

Trusts — management—unauthorized transfer of collateral. The act of a trustee holding collateral as security for a particular bond issue in transferring, without authority, the collateral so held to another and different series of bonds, in order that the said latter bonds may be better secured, or the transfer of such collateral to any other foreign purpose, constitutes a conversion and renders the trustee and the corporate officers who connive thereat personally responsible to the bondholders for the loss suffered by them.

Walker v Howell, 209-823; 226 NW 85

Matured crops. Principle reaffirmed that matured corn, standing in the field, is personal property and therefore subject to conversion.

Durflinger v Heaton, 219-528; 258 NW 543

Rent—conversion—jury question. Record held to present jury question on issue whether property on which a landlord had a lien for rent had been sold by the tenant with or without the consent of the landlord.

Mau v Rice Bros., 216-864; 249 NW 206

Rent—lien—liability of purchaser—burden of proof. A landlord may successfully maintain an action for conversion against the purchaser of property on which he has a lien for rent, unless such purchaser avoids the action by a plea of waiver or estoppel. Especially is it erroneous to instruct the jury that the landlord must prove that he had no "knowledge" of the sale.

Wilson v Fortune, 209-810; 229 NW 190

V ASSAULTS

Disabilities—torts during coverture. A wife may not maintain an action against her husband for damages consequent upon willful injuries inflicted upon her by her husband.

In re Dolmage, 203-231; 212 NW 553

Civil liability—jury question. Evidence held to present jury question in an action for damages for assault and battery.

Fox v McCurnin, 205-752; 218 NW 499

Evidence — competency — non-res-gestae statements. In an action for damages consequent on an assault, a witness will not be permitted, over proper objection, to testify as to what plaintiff, some two hours after the occurrence, said relative to the cause of her agitation.

McQueen v Stores, 214-1300; 244 NW 278

Evidence—hearsay—incompetency. Plaintiff in an action for damages consequent on an assault, may not testify as to the "remarks" that her friends and neighbors made to her relative to the assault, such "remarks" being hearsay.

McQueen v Stores, 214-1300; 244 NW 278

V ASSAULTS—continued

Pleading—confession and avoidance. In an action for injuries inflicted upon the plaintiff when he was forcibly ejected from the home of the defendant, where the defendant's answer assumed the burden of proof by admitting the assault and battery, but by way of justification and confession and avoidance asserted that the plaintiff had been ejected after refusing to leave, the evidence was not sufficient to compel the court to direct a verdict for the defendant on the issue of whether the defendant had used more force than was necessary to accomplish the ejection.

Wessman v Sundholm, 228- ; 291 NW 137

Civil liability—trespassers—abortive issue. The plea in an action for personal injury that plaintiff was a trespasser on defendant's property presents no jury question when defendant neither pleads nor proves (1) that he had requested plaintiff to depart and that plaintiff had refused to do so, or (2) that any force was necessary to remove plaintiff—in short, when defendant does not plead or show that he was ejecting plaintiff as a trespasser.

Pettijohn v Halloran, 200-1355; 206 NW 631

Civil liability—self-defense. The aggressor in a physical encounter who is met by allowable self-defense necessarily has no cause of action against the party he assaults.

Lake v Moots, 215-126; 244 NW 693

Arrest without warrant—reasonable ground—excessive force. Testimony reviewed and held to present a jury question on the issues (1) whether a defendant-sheriff in an action for damages had reasonable cause to believe that plaintiff's automobile contained the persons who had just prior thereto committed a robbery, (2) whether the sheriff acted as a prudent and reasonable officer would act under similar circumstances, and (3) whether the sheriff employed more force than was apparently necessary to stop the car.

Lawyer v Stansell, 217-111; 250 NW 887

Combatants' consent to fight—no defense. In a case of mutual combat consent is no defense in an action by either combatant to recover damages for injuries inflicted by the other. Such fighting being unlawful, and the combat involving a breach of the peace, the mutual consent is to be regarded as unlawful and as not depriving the injured party, or, for that matter, either party, from recovering damages.

Schwaller v McFarland, 228- ; 291 NW 852

Self-defense — admitted aggression — effect. Whether defendant employed excessive force in repelling an assault upon him is the sole question at issue in a civil action for damages when plaintiff admits that he was the aggressor in the affray with defendant. In other words, in such a case neither the issue (1) whether the plaintiff was the aggressor, or (2) whether the defendant had the right of self-defense, should be submitted to the jury.

Booton v Metcalfe, 201-311; 207 NW 386

Self-defense—permissible degree of force. The degree of force which a defendant may employ in order to prevent injury to himself from an assault by one person is not necessarily the measure of defendant's permissible resistance when, at the same instant of time, he is menacingly threatened by several other persons in his immediate presence. This important fact must not be overlooked by the instructions.

Booton v Metcalfe, 201-311; 207 NW 386

Excessive force used to eject—instructions limiting recovery. When the jury was told that if it found that the defendant used more force than was reasonably necessary to eject the plaintiff from his home, they must find the defendant liable for the injuries caused by the excessive force, the instructions, when considered as a whole, were not subject to the objection that the right of recovery was not limited in the event that the injuries were due to the excessive force.

Wessman v Sundholm, 228- ; 291 NW 137

Error in favor of complainant. An instruction relative to the right of the jury to determine the extent and severity of injuries suffered by plaintiff in a personal encounter with defendant by considering, inter alia, the relative size, health, and physical conditions of the parties is harmless (conceding it to be erroneous) when apparently, on the face of the record, such instruction was to the material advantage of the complainant.

Morrow v Scoville, 206-1134; 221 NW 802

Instructions concerning assault—balancing illustration. The court, after instructing that the taking of indecent liberties with the person of a woman may constitute an assault, and after employing an illustration descriptive of indecent liberty, need not balance the illustration by giving the converse thereof.

Ransom v McDermott, 215-594; 246 NW 266

"Assault" admitted in pleadings — use of term permitted. In an action for damages in which the defendant's answer admitted an assault and battery but attempted to justify the act, he could not complain that the court, in its statement of the issues, said that he admitted the assault, as the word "assault" did not admit all that the plaintiff contended, but only the same act upon which the action was based.

Wessman v Sundholm, 228- ; 291 NW 137

Instructions as whole—self-defense properly submitted. In an assault and battery case an instruction setting out elements of plaintiff's proof without referring to "self-defense" is not erroneous when "self-defense" is suffi-

ciently explained to the jury in other instructions.

Hauser v Boever, 225-1; 279 NW 137

Self-defense—instructions. Where defendant voluntarily participated in a fight, not in his own defense, the court did not err in failing to instruct the jury on self-defense as, under such circumstances, self-defense was not available as a defense.

Schwaller v McFarland, 228- ; 291 NW 852

Damages—loss of earnings. In an action for injuries received in an assault and battery, evidence that the plaintiff had been incapacitated for 41 days and that his earnings prior to the injury were about $10 per day, was sufficient to submit to the jury an issue of loss of earnings.

Wessman v Sundholm, 228- ; 291 NW 137

Instructions—directing jury to award damages to plaintiff. Undisputed evidence held to establish that plaintiff and defendant mutually consented to engage in a fight, and that defendant unlawfully committed an assault and battery on plaintiff, warranting an instruction to the jury to return a verdict for plaintiff in some amount.

Schwaller v McFarland, 228- ; 291 NW 852

Civil liability — damages — physical pain. Damages may be awarded for physical pain and suffering consequent on an assault and battery even tho no very appreciable physical injury is made to appear.

Ransom v McDermott, 215-594; 246 NW 266

Excessive verdict—$3,500 for indecent assault. Verdict of $1,500 actual and $2,000 punitive damages held excessive as to the actual damages.

Ransom v McDermott, 215-594; 246 NW 266

Nominal damages—right to recover more. The court is not in error in instructing that a plaintiff is entitled to more than nominal damages ("such as one dollar or less") consequent on a wholly unjustified assault and battery resulting in admittedly substantial physical injury to plaintiff.

Ashby v Nine, 218-953; 256 NW 679

Exemplary damages—malice as basis. Exemplary damages are allowable for malicious assault and false imprisonment.

Schultz v Enlow, 201-1083; 205 NW 972

Elements in mental anguish—separate recoveries as double damages—curing by remittitur. Humiliation and mortification being included in mental anguish, an instruction in an assault and battery case allowing one recovery for mental anguish and another recovery for humiliation and mortification is erroneous as allowing for double damages for the element of mental anguish; however, the defect is cured by requiring the plaintiff to remit the entire amount allowed for humiliation and mortification.

Hauser v Boever, 225-1; 279 NW 137

Verdict—directed on questions of law only. Directed verdicts have no place in jury trials unless the record clearly presents controlling questions of law. Record evidence held wholly insufficient to justify a directed verdict against plaintiff on the ground that as a matter of law the contract for damages for assault—on which plaintiff sued—was based in part (1) on an agreement by plaintiff to compound or conceal the commission of a public offense, or (2) on an agreement by plaintiff as an employee to refrain from circulating scandalous information concerning his employer.

In re Cuykendall, 223-526; 273 NW 117

VI THREATS

Boycott — essential elements — intimidation and coercion. Intimidation and coercion are essential elements of boycott. It must appear that the means used are threatening and intended to overcome the will of others and compel them to do or refrain from doing that which they would or would not otherwise have done.

Smythe Co. v Local Union, 226-191; 284 NW 126

Secondary boycott—essential elements. A secondary boycott may be defined as a combination to cause a loss to one person by coercing others against their will to withdraw from their beneficial business intercourse, by threats that, unless they do so, the combination will cause similar loss to them; or by the use of such means as the infliction of bodily harm on them, or such intimidation as will put them in fear of bodily harm.

Smythe Co. v Local Union, 226-191; 284 NW 126

Peacefully picketing not secondary boycott —no injunction. A threat to do something that a person has a right to do is not a threat in a legal sense. Held that union officials, by lawfully placing a neon sign manufacturer on the unfair list, advertising to the public that he was unfair to electrical workers and peacefully picketing his place of business, were not guilty of such conspiracy as to constitute a secondary boycott, and an injunction will not lie.

Smythe Co. v Local Union, 226-191; 284 NW 126

Duress—pleading—conclusiveness. A party must stand or fall on the particular threat alleged by him as constituting duress. Reversible error results from permitting the jury to base its finding of duress on unpleaded matters.

Gray v Shell Corp., 212-825; 237 NW 460

Liability for mental pain. Willful threats made to a debtor for the purpose of producing

in the mind of the debtor such mental pain, anguish, and harassment as will induce him to pay the debt, render the offender liable in damages for the resulting pain and anguish, even tho there be no actual or threatened physical injury, provided the threats are not mere threats to resort to legal procedure.

Barnett v Collection Co., 214-1303; 242 NW 25; 4 NCCA(NS) 223

VII ABUSE OF PROCESS

Writs of prohibition — power of supreme court to issue. The supreme court has original jurisdiction, under the constitution, to issue common-law writs of prohibition; but, when the application is for a writ directed to a district court and commanding it to discontinue further jurisdiction over named actions pending in said lower court, the supreme court must act solely on the established facts as revealed in the proceedings in said district court, and, if material disputed issues of fact arise, the writ will be refused, as the supreme court has no power to take testimony on disputed questions of fact dehors said district court records.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

Evidence—sufficiency. Evidence held to present jury question on the issue of abuse of process.

Sokolowske v Wilson, 211-1112; 235 NW 80

Execution sale—presumption of ownership. In an action against a sheriff for the wrongful sale of plaintiff's machinery as the property of an execution defendant, no error results from the failure to instruct that the finding of the property on the premises of the execution defendant raised a presumption of ownership in the latter when the court specifically placed the burden on plaintiff to prove his ownership of said property. (No request for the instruction was made.)

Rosander v Knee, 222-1164; 271 NW 292

Rent—writ of attachment—legality. The issuance of a landlord's writ of attachment for rent admittedly due is not rendered unlawful because the tenant subsequently pleads and establishes a counterclaim which cancels the landlord's admitted claim for rent.

Kelp v McManus, 218-226; 253 NW 813

Threatened attachment levy. The fact that a tenant's creditor is present at a public sale of the tenant's property and threatens to levy an attachment on said property does not constitute such abuse of process as will invalidate a check given by the landlord to the creditor in payment of his claim and to prevent such levy.

Myers v Watson, 204-635; 215 NW 634

VIII ELECTRICITY GENERALLY

Danger signs—posting—sufficient evidence. Evidence sufficient to justify finding that electric company had complied with statute requiring danger signs to be posted on poles or towers along highway.

Aller v Elec. Co., 227-185; 288 NW 66

Common knowledge that metal wire will conduct electricity. Farmer 36 years of age familiar with high lines and use of electricity is presumed to have the common knowledge of all intelligent persons that a metal wire will conduct electric current.

Aller v Elec. Co., 227-185; 288 NW 66

Contributory negligence nullifies statutory presumption. When a person is injured by transmission line, the statutory presumption of defendant's negligence need not be rebutted when plaintiff fails to establish freedom from contributory negligence.

Aller v Elec. Co., 227-185; 288 NW 66

Contributory negligence—operation of electric elevator—no eyewitnesses. An expert and experienced electrician who enters an electrically operated freight elevator which he had often operated,—the mechanism and condition of which were fully known to him, and especially the fact that the elevator could be moved at any time by manipulation by other parties on other floors of the building unless the electric circuit was broken,—is guilty of negligence per se in taking the risk of the elevator moving while he was attempting, without breaking the circuit, to close a door with known defective appliances,—the circuit breaker being in his immediate presence and easily accessible; and this is true tho there were no eyewitnesses to the occurrence.

Boles v Hotel Co., 218-306; 253 NW 515

Manner of construction of lines. In an action against an electric company whose transmission line was so close to plaintiff's building that firemen could not throw water on a fire until current was turned off, which delay caused destruction of building and contents, a complaint alleging violation of town ordinance and a state statute respecting construction of transmission line held insufficient to state a cause of action.

Bowen v Ia. Public Service, 35 F 2d, 616

Tree over transmission line—failure to remove. Where a tree limb on plaintiffs' land had broken and lodged in the fork of a dead tree and hung two or three feet over defendant's transmission line, and later electricity from the line set the tree on fire and it spread to the plaintiffs' house, in an action to recover for the fire loss it could not be said as a matter of law that the plaintiffs were contributorily negligent in not removing the limb when they had acted as reasonable and prudent persons in twice requesting the defendant to take the

line down or shut off the current so the tree could be cut down and the overhanging limb removed.

Porter v Elec. Co., 228- ; 292 NW 231

Negligence—presumption. An allegation of negligent construction or maintenance of an electrical transmission line is unnecessary and, if made, need not be proved, in an action for damages caused by fire set out by such line. Proof that fire was communicated to property by said line, and proof of the amount of damages resulting, plus the statutory presumption of negligence on the part of the operator of the line, make a prima facie case for recovery.

Walters v Iowa Co., 203-471; 212 NW 884; 38 NCCA 551

Res ipsa loquitur. Evidence tending to show that decedent came to his death from an electric shock consequent on handling an ordinary electric lighting fixture, charged with electricity by the defendant, and that the ordinary lighting voltage was harmless, even tho there is evidence to the contrary as to the last proposition, furnishes basis for the application of the doctrine of res ipsa loquitur, and creates a jury question on the issue of the defendant's negligence.

Orr v Elec. L. Co., 213-127; 238 NW 604

Water tank and electric transformer not attractive nuisance. The maintenance in a brick yard, where children sometimes play, of a circular water tank about eleven feet in height with no inviting or ready means of going up and down the side thereof except a perpendicular, smooth, overflow pipe one and one-fourth inches in diameter extending from the top to the bottom of the tank and at a distance of eight inches from the outside wall, and the maintenance on the top of the tank of heavily charged electric transformers, four feet high, without any warning signs of danger, will not be deemed an "attractive nuisance" within the law of negligence.

Cox v Elec. Co., 209-931; 229 NW 244

IX EXPLOSIONS, LIABILITY

Actions — pleading — res ipsa loquitur — waiver. A general allegation of negligence, supportable by the doctrine of res ipsa loquitur, is waived by inserting in the same count a specific allegation of negligence; but the rule is otherwise when the different allegations are in different counts and when the issue arising on the general allegation is alone submitted because of the dismissal by plaintiff of the count containing the specific allegation.

Sutcliffe v Elec. Co., 218-1386; 257 NW 406

Actions — res ipsa loquitur — applicability. Basis for the application of the doctrine of res ipsa loquitur is established by proof that pipes and appliances for conducting inflammable gas into a place of business were under the full control of the party furnishing the gas, that gas leaked from said pipes and appliances before it entered the meter, and that a violent explosion resulted from such leakage.

Sutcliffe v Elec. Co., 218-1386; 257 NW 406

Negligence—proximate cause. The act of a contractor in abandoning dynamite caps in a public highway is the proximate cause of an injury to an immature boy who found the caps and was injured thereby, rather than the act of the boy in attempting to remove the explosive from the container.

Eves v Const. Co., 202-1338; 212 NW 154; 28 NCCA 155

Gas—duty as to unowned pipes and fixtures. A gas company engaged in furnishing inflammable gas for domestic or for other like or similar purposes is under legal obligation to exercise a degree of care, commensurate with the danger, to maintain in a safe condition the pipes and fixtures over which it has full control, and through which its gas passes into the meter, even tho the company does not own said pipes or fixtures and did not originally install them.

Sutcliffe v Elec. Co., 218-1386; 257 NW 406

CHAPTER 485

JOINDER OF ACTIONS

10960 When permitted.

ANALYSIS

I PROPER JOINDER OF ACTIONS

Action on bond. An action on a bond, brought against both the principal and surety, presents no question of misjoinder of causes of action. So held as to a bond given under the Iowa securities act.

Kellogg v Bell, 222-510; 268 NW 534

Causes assigned for collection—right of assignee. Plaintiff, in an action at law against a defendant, may join in separate counts:

1. Any number of causes of action against defendant of which plaintiff is the unqualified holder, and which are triable at law in said county of suit, and

2. Any number of causes of action against defendant of which plaintiff is holder as assignee for collection only, and which are triable at law in said county of suit.

Carson v Long, 222-506; 268 NW 518

Independent causes of action—appeal. When plaintiff sues on two independent causes of

I PROPER JOINDER OF ACTIONS—concluded

action, the appellate court may, on appeal, reverse as to one cause of action and affirm as to the other.

Keller v Gartin, 220-78; 261 NW 776

Concerted action without conspiracy. Joint liability may exist without allegation or proof of conspiracy. So held where there was allegation and proof of concerted action by several persons with common intent and purpose.

Baumchen v Donahoe, 215-512; 242 NW 533

Joinder—city and benefited property owners. There is no misjoinder of parties or causes of action where a city in its own behalf and in behalf of the parties beneficially interested brings an action against a contractor, combining therein both a claim for damages for defective pavement and a claim for the cost of "coring" to determine the thickness, since the basis for the latter claim was found in the contract. A motion to strike is properly overruled.

Sioux City v Krage, 225-1154; 281 NW 828

Petition in two counts—(1) guest and (2) not a guest. An automobile passenger receiving injuries in a collision may not be required to elect between counts when his petition contains (1) a count alleging recklessness based on theory he was a guest, and (2) a count alleging negligence based on theory he was not a guest—where plaintiff's cause of action is for a single wrong and he seeks in each count damages for the same injuries arising out of the same act of decedent.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Quieting title—prayer for writ of possession. An equitable action (1) to quiet title, and (2) in addition, to obtain a writ ousting defendant from the premises, is proper.

McKenney v Nelson, 220-504; 262 NW 101

Objections to executrix's report—real estate title issue not misjoinder—jurisdiction. Where an executrix after resigning files her reports, objections thereto asking that she account for land in another county allegedly purchased with estate money does not misjoin equitable action to impose trust on or establish title in land, but is special probate proceeding to compel executrix to account for assets over which probate court has statutory jurisdiction coextensive with the state.

In re Rinard, 224-100; 275 NW 485

Objections to executrix's report—conversion issue not misjoinder. Where an executrix after resigning files her reports, objections thereto asking that she report and account for certain alleged estate assets claimed by executrix as individual property do not misjoin in probate an action against executrix for conversion, and such objections are not subject to motion to strike.

In re Rinard, 224-100; 275 NW 485

Trust — action against joint trustees. Two or more persons acting jointly in a fiduciary capacity in relation to the same property for the same beneficiary are properly made joint defendants in an action to enforce the trust.

Burger v Krall, 211-1160; 235 NW 318

Trustee to collect — allowable joinder. A trustee who has been authorized by the joint instrument of several individual owners of separate promissory notes, signed by the same maker, to bring such actions as he may deem fit to enforce collection of said notes, may maintain solely in his own name as such trustee an action at law on all or on any number of said notes. It follows that a motion to require the plaintiff to elect as to the particular count on which he will proceed will not lie.

Iowa Co. v Clark, 215-929; 247 NW 211

Parties acting jointly and in cooperation. Several persons engaged jointly and in cooperation in the unlawful furnishing, prescribing and administering of medicine without a license may be properly joined in one action for injunction.

State v Baker, 212-571; 235 NW 313

Claims acquired during foreclosure—independent action to enforce. Where, pending foreclosure action, plaintiff acquires an additional claim against the defendant, he is not bound to amend and assert said claim in the foreclosure proceedings, but may maintain a subsequent and independent action on the newly acquired claim even tho it pertains to the subject matter of the foreclosure.

Central Bank v Herrick, 214-379; 240 NW 242

II IMPROPER JOINDER OF ACTIONS

Decisions reviewable—orders to strike and dismiss. An order overruling a motion to strike a pleading and to dismiss parties because of the improper joinder of actions and of party defendants is appealable.

Ontjes v McNider, 218-1356; 256 NW 277

Ruling on motion as adjudication. Whether a ruling sustaining a motion to strike a pleading on the ground that it improperly joins causes of action and party defendants constitutes (in the absence of an appeal) a final adjudication in the further progress of the cause, quaere.

Ontjes v McNider, 218-1356; 256 NW 277

Mandamus and damages. An action of mandamus to compel the board of supervisors to proceed to the assessment of damages consequent on the taking of land in order to effect a change in a highway is properly stricken on

motion when joined with an action against the county for damages for the taking of said land.

Valentine v Board, 206-841; 221 NW 517

Unallowable joinder of law and mandamus. An action at law against a county for judgment for taxes illegally exacted may not be joined with an equitable action of mandamus for an order on the board of supervisors directing the county treasurer to refund such taxes.

First N. Bank v Board, 217-702; 247 NW 617; 250 NW 887

Joining law and equity. It is not permissible for the receiver of an insolvent private bank to join (1) a law action to obtain a judgment against an alleged partner in the bank, and (2) an equitable action against the partner and his grantee to set aside a conveyance alleged to be fraudulent.

Cooper v Erickson, 213-448; 239 NW 87

Law and equity. An equitable action to foreclose a mortgage, and a law action to enforce the liability of an indorser who indorsed "without recourse", may not be joined.

Leekley v Short, 216-376; 249 NW 363; 91 ALR 394

See Murphy v Board, 205-256; 215 NW 744

Joinder—tort of one and contract of another. A joint action (1) against a wrongdoer upon his tort consequent on the negligent operation of a motor vehicle, and (2) against a surety company upon its policy to indemnify the wrongdoer from loss because of said tort, even tho but one recovery is sought, presents two different causes of action, and the joinder thereof is wholly unallowable. And this is true whether the policy is simply a private, optional contract between the insured and insurer, or a policy mandatorily required by statute to be filed with and approved by the railroad commission as a condition precedent to the obtaining of a permit to operate said vehicle.

Ellis v Bruce, 215-308; 245 NW 320

Contract and tort. A plaintiff may not base an action to recover damages for a personal injury on both (1) the commission of a tort by the defendant and (2) the breach of a contract by the defendant, and reversible error necessarily results from submitting both issues, when they are not identical.

Randall v Moen Co., 206-1319; 221 NW 944

Joining contract and tort actions. A joint action cannot be maintained (1) against a contractor on his contract liability to answer for possible torts committed during the progress of work, and (2) against those who are alleged to have subsequently committed a tort during the progress of said work, when the contractor and the alleged tort-feasors are residents of different counties.

Elder v Maudlin, 213-758; 239 NW 577

Nonpermissible joinder. An action against a corporation on its obligation and an action against the directors to enforce a statutory liability relative to such obligation may not be joined.

McPherson v Sec. Co., 206-562; 218 NW 306

Motion to consolidate actions by plaintiffs. Two personal injury actions arising out of the same accident and brought against the same defendant cannot be consolidated on motion by the plaintiffs for although equity has the power to consolidate causes of action to avoid multiplicity of suits, the right to move for a consolidation of causes of action in law is by statute granted only to the defendant, and a plaintiff has no such right.

Brooks v Paulson, 227-1359; 291 NW 144

Separate and distinct conversions. A misjoinder of causes of action and of parties occurs when a petition for damages, consequent on successive sales of mortgaged chattels, reveals that two separate and distinct sales were made with actual or constructive notice of the recorded mortgage,—one by part of the defendants, and one by the remaining defendants,—without any allegation of conspiracy, unity of design, or concert of action on the part of all of said defendants, and without any allegation that the concurrent acts of all the defendants proximately contributed to the conversion.

Producers Assn. v Livingston, 216-1257; 250 NW 602

III PROCEDURE ON IMPROPER JOINDER

Misjoinder. In an action by plaintiff to recover for money paid for the use and benefit of defendant, an allegation of money paid by a third party for the use and benefit of defendant is properly stricken on motion.

Wragg v Wragg, 208-939; 226 NW 99; 64 ALR 1292

Improper joinder in wrong county—procedure. Where a receiver joins in one proceeding (1) an equitable action asking the court to declare an assessment on unpaid stock subscriptions, and (2) a law action praying judgment on the assessment against stock subscribers who were nonresidents of the county of such proceedings, the stock subscribers need not move to strike the latter cause of action, but may very properly move (1) to separate the latter cause of action from the former, (2) to transfer the said latter cause of action to the law calendar, and (3) to transfer said latter cause of action to the various counties of the subscribers' residences.

State v Packing Co., 217-1172; 250 NW 876

Objections to executrix's report—conversion issue not misjoinder—motion to strike. Where an executrix after resigning files her reports, objections thereto asking that she report and account for certain alleged estate assets

III PROCEDURE ON IMPROPER JOINDER—concluded

claimed by executrix as individual property do not misjoin in probate an action against executrix for conversion, and such objections are not subject to motion to strike.

In re Rinard, 224-100; 275 NW 485

Motion to strike as demurrer. A motion in a law action to strike an alleged misjoined action will be treated by the appellate court as a demurrer when so treated by the trial court and by the parties to the action.

Kellogg v Bell, 222-510; 268 NW 534

Demurrer. In action on promissory notes, defendant's demurrer, filed after answer, on ground of misjoinder both of causes of action and of parties was properly overruled.

Brown v Correll, 227-659; 288 NW 907

Pleadings unamendable after dismissal. When the trial court abates an equitable action (e. g., mandamus) by dismissing it on the ground of misjoinder both of parties-plaintiffs and of causes of action, and plaintiff makes no effort to avoid the abatement by pruning out of his pleading the objectionable misjoinders, but stands on his pleadings, and on appeal suffers an affirmance of said order of dismissal, he may not thereafter amend his pleadings in the dismissed action by then pruning out said objectionable matter. The pleadings of a finally dismissed action are, manifestly, not subject to amendment.

First N. Bank v Board, 221-348; 264 NW 281; 106 ALR 566

Curing misjoinder. Any claim of misjoinder of causes of action as to defendants and of misjoinder of parties defendant because plaintiff joined an action at law on bonds against one defendant with an action in equity to set aside an alleged fraudulent conveyance against the other defendant, is effectually effaced by an order of court dismissing the action as to the equitably charged defendant.

Minnesota Co. v Hannan, 215-1060; 247 NW 536

10962 Plaintiff may strike out.

Unamendable pleadings after dismissal. When the trial court abates an equitable action (e. g., mandamus) by dismissing it on the ground of misjoinder both of parties plaintiffs and of causes of action, and plaintiff makes no effort to avoid the abatement by pruning out of his pleading the objectionable misjoinders, but stands on his pleadings, and on appeal suffers an affirmance of said order of dismissal, he may not thereafter amend his pleadings in the dismissed action by then pruning out said objectionable matter. The pleadings of a finally dismissed action are, manifestly, not subject to amendment.

First N. Bank v Board, 221-348; 264 NW 281; 106 ALR 566

10963 Motion to strike out.

Discussion. See 20 ILR 49—Defective pleading

Order refusing separation of misjoined causes of action. The court, on proper motion, must correct an unallowable joinder of causes of action and an order refusing so to do is appealable.

Ellis v Bruce, 215-308; 245 NW 320

Unallowable motion. A motion to dismiss an action because of a misjoinder of causes of action will not lie.

Federal Sur. v Morris Plan, 209-339; 228 NW 293

Improper joinder—sole remedy. A motion by defendant to require plaintiff to elect on which of two improperly joined causes of action he will proceed to trial is unallowable. Motion to strike is the sole remedy.

Neidigh v Finance System, 219-225; 257 NW 563

Motion to correct improper joinder—form. Where causes of action against different defendants are unallowably joined in the same action, a defendant wishing to correct the error should move to strike from the petition the cause of action not affecting himself.

Ellis v Bruce, 215-308; 245 NW 320

Misjoinder both of parties and of causes. In action on promissory notes, defendant's demurrer, filed after answer, on ground of misjoinder both of causes of action and of parties was properly overruled.

Brown v Correll, 227-659; 288 NW 907

Intermingled law and equity. A petition, tho divided into "divisions" and to some extent separately embracing legal and equitable matters, is not subject to a motion to strike because of misjoinder, when the petition as a whole manifestly pleads but one cause of action, viz: an action for discovery and for an accounting.

Garretson v Harlan, 218-1049; 256 NW 749

Separating issues—required procedure. A party who wishes to separate the equitable issues already joined from a law action pleaded by the adversary as an amendment must move to separate before he answers.

Kimmel Inv. Co. v Renwick, 220-362; 261 NW 775

Striking objections in probate—affidavits improper. A motion to strike objections to probate accounts on the grounds of misjoinder of actions is determinable only on the contents of the pleading attacked without aid of affidavits.

In re Rinard, 224-100; 275 NW 485

Misjoinder—motion to strike. When a defendant is sued in a county other than the county of his residence, and is not suable in

said county of suit because of misjoinder of causes of action and of parties, he may, by motion to strike, trim the petition of every defendant except himself and of every cause of action except the one pleaded against himself.

Producers Assn. v Livingston, 216-1257; 250 NW 602

Improper joinder in wrong county. Where a receiver joins in one proceeding (1) an equitable action asking the court to declare an assessment on unpaid stock subscriptions, and (2) a law action praying judgment on the assessment against stock subscribers who were nonresidents of the county of such proceedings, the stock subscribers need not move to strike the latter cause of action, but may very properly move (1) to separate the latter cause of action from the former, (2) to transfer the said latter cause of action to the law calendar, and (3) to transfer said latter cause of action to the various counties of the subscribers' residences.

State v Packing Co., 217-1172; 250 NW 876

Single or dual cause of action—test. The obligee of a bond, who pleads solely for the recovery of the amount due him under the bond, pleads but a single cause of action, tho he prays for different remedies against different parties, or in part pleads for unallowable relief.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Nonright to withdraw answer. In an action (1) to cancel a deed and (2) to set aside the probate of a will on the ground of mental incapacity of the testator-grantor—both instruments having been executed by the same party and at the same time—it is not necessarily error for the court to refuse to permit defendant to withdraw his answer in order to permit defendant to file motion to separate the alleged separate causes of action and to transfer to the law docket.

Walters v Heaton, 223-405; 271 NW 310

Refusal to strike — answer waives error. Where plaintiff filed law action to establish right to inherit as illegitimate son, then, by way of amendment, filed an equitable petition asking that he be adjudged an adopted son of deceased, and that adoption by estoppel be recognized as against grandchildren of the deceased, and later made application to transfer the cause to the equity docket, the court did not err in overruling defendant's resistance to the transfer and motion to strike the petition in equity, the same result being reached as if the court had sustained the motion to strike and plaintiff had filed his amendment as a separate petition in equity as provided by statute. Moreover, error, if any, in refusal to strike the misjoined causes of action was waived by defendant's act in filing answer.

Bergman v Carson, 226-449; 284 NW 442

Matter incidental to ruling on motion not res judicata. In a libel action brought against a newspaper and others as joint tort-feasors, when affiants testified as to the matter of agency at a hearing on a motion to strike part of the petition, a ruling by the court denying the motion was not res judicata on the question of agency, as agency question was only incidental to the question of misjoinder raised by the motion to strike and could be raised in a subsequent trial on the merits of the case.

Cooper v Gazette Co., 226-737; 285 NW 147

Unallowable motion to strike. In an action against several defendants for damages consequent on a negligent act, that defendant who is, in effect, alleged to have occupied the position of respondeat superior cannot have his name stricken from the petition.

Elder v Maudlin, 213-758; 239 NW 577

10964 Misjoinder waived.

Wrong calendar—waiver by answering. A defendant in equity who files answer after the overruling of his motion (1) to strike alleged misjoined causes of action, and (2) to transfer from equity to law, may not maintain an appeal from the ruling on his said motion.

Thompson v Erbes, 221-1347; 268 NW 47

Waiver by answer. Where plaintiff filed law action to establish right to inherit as illegitimate son, then, by way of amendment, filed an equitable petition asking that he be adjudged an adopted son of deceased, and that adoption by estoppel be recognized as against grandchildren of the deceased, and later made application to transfer the cause to the equity docket, the court did not err in overruling defendant's resistance to the transfer and motion to strike the petition in equity, the same result being reached as if the court had sustained the motion to strike and plaintiff had filed his amendment as a separate petition in equity as provided by statute. Moreover, error, if any, in refusal to strike the misjoined causes of action was waived by defendant's act in filing answer.

Bergman v Carson, 226-449; 284 NW 442

Waiver by filing answer. In action on note, filing of answer waived right to proceed under statute by motion to strike cause of action improperly joined.

Brown v Correll, 227-659; 288 NW 907

Withdrawal of pleading to file demurrer. There is no statutory authority to support common practice of withdrawing pleadings for purpose of filing a demurrer or motion, and such matter rests wholly within sound discretion of trial court.

Brown v Correll, 227-659; 288 NW 907

10965 Separate petitions.

Transfer of cause. Where plaintiff filed law action to establish right to inherit as illegiti-

mate son, then, by way of amendment, filed an equitable petition asking that he be adjudged an adopted son of deceased, and that adoption by estoppel be recognized as against grandchildren of the deceased, and later made application to transfer the cause to the equity docket, the court did not err in overruling defendant's resistance to the transfer and motion to strike the petition in equity, the same result being reached as if the court had sustained the motion to strike and plaintiff had filed his amendment as a separate petition in equity as provided by statute. Moreover, error, if any, in refusal to strike the misjoined causes of action was waived by defendant's act in filing answer.

Bergman v Carson, 226-449; 284 NW 442

10966 Principal and agent.

Discussion. See 1 ILB 83—Vice-principal rule; 8 ILB 95—Share tenancies and partnerships; 10 ILB 144—Liability of principal for acts of agent; 10 ILB 147, 228—Liability of master and servant; 19 ILR 606—Admissions of agent

ANALYSIS

I IN GENERAL
II THE RELATION
III MUTUAL RIGHTS, LIABILITIES, AND DUTIES
IV RIGHTS OF THIRD PARTIES
V ACTIONS

Master and servant. See under §1495
Motor vehicles—liability of owner. See under §5037.09

I IN GENERAL

Parties—objections—unallowable motion to strike. In an action against several defendants for damages consequent on a negligent act, that defendant who is, in effect, alleged to have occupied the position of respondeat superior cannot have his name stricken from the petition.

Elder v Maudlin, 213-758; 239 NW 577

Government nonliability for employee's tort. The exemption accorded counties and other governmental bodies and their officers from liability for torts growing out of the negligent acts of their agents or employees is a limitation or exception to the rule of respondeat superior, and in no way affects the fundamental principle of torts that one who wrongfully inflicts injury upon another is individually liable to the injured person.

Montanick v McMillin, 225-442; 280 NW 608

Negligence — immunity rule — basis. Such immunity as is granted a public charity institution for its negligence has been sustained by the courts on (1) the trust fund theory, or (2) the nonapplicability of the rule of respondeat superior, or (3) the waiver theory, or (4) the public policy theory.

Andrews v Y. M. C. A., 226-374; 284 NW 186; 5 NCCA(NS) 335

Agency and joint adventure distinguished. A contract which provides that one party shall, for a limited time and at his own expense, have the exclusive right to sell the property of another and account for sales in a named manner creates a contract of agency only, and not a joint adventure.

Coburn v Davis, 201-1253; 207 NW 586

Agency in county in which action brought. Action on a contract of agency wherein plaintiff is given the exclusive right to make sales on commission in a named county is properly brought in said county, even tho the contract was elsewhere executed, and even tho defendant does not reside in said county.

Hawbaker v Laco Co., 210-544; 231 NW 347

Buyer and seller of note and mortgage. The act of the owner of a note and mortgage in selling them and the act of the purchaser in purchasing said note and mortgage do not, in and of themselves, create the relation of principal and agent.

Federal Land Bk. v Sherburne, 213-612; 239 NW 778

Authority of agent—declarations of agent. Agency may not be established by the declarations of the alleged agent.

Huismann v Althoff, 202-70; 209 NW 525

Authority of agent—ipso facto notice of limitation. A party signing a writing which provides that it shall not constitute a contract until it is signed and expressly approved by the other party thereto is given palpable warning that the agent of such other party has no authority to bind his principal by any final agreement.

Adams v Iowa Co., 200-782; 203 NW 229

Theatre employees—announcement of bank night winner. Testimony by the manager of a theatre that he had hired a lady to call out the name of the bank night drawing in front of the theatre, with evidence that she habitually announced the name drawn on former occasions, was sufficient to establish that she was employed to announce the winner and to establish her agency and make her announcement binding on the theatre owner.

St. Peter v Theatre, 227-1391; 291 NW 164

Evidence — sufficiency. Evidence reviewed, and held to show that a party who received money with which to pay a note and mortgage was the agent of the maker of the note and mortgage, and not of the payee thereof.

Clayton Bank v McMorrow, 209-165; 225 NW 859

Vendor and vendee—agency—facts not constituting. The vendor of land sold on installments does not constitute the vendee his agent to make improvements and repairs on the property by requiring the vendee to obli-

gate himself to the effect that all improvements placed upon the property shall remain thereon and not be destroyed until final payment is made.

Knapp v Baldwin, 213-24; 238 NW 542

Service of original notice. Evidence relative to the service of an original notice on a corporation by service on an agent reviewed, and held insufficient to establish the alleged agency.

Bennett v Lumber Co., 201-770; 208 NW 519

Authority—insufficient plea. An allegation that a named party was an officer and was charged with the financial management of a college, "and, because of being such officer and financial agent, was authorized to enter into, on behalf of the college," a specified contract, is not such clear, direct, and definite allegation of authority as is required by the law.

Benton v Morningside, 202-15; 209 NW 516

Assignment of note—payment to original payee—effect. The maker of a promissory note and mortgage who, for four years before maturity of the principal, and for eight years after maturity of the principal, pays the accruing interest to the agent of the original payee, without knowledge that the note and mortgage had been assigned, and finally pays the principal in the same manner, without asking for or receiving the note in question, effects a complete discharge of the note and mortgage against an assignee thereof who had been such during all said times of payment, but without recording his assignment, and in the meantime had permitted the original payee, a corporation, (1) to appear on the records as the owner of the paper and (2) to collect the interest and pay it to him.

Kann v Fish, 209-184; 224 NW 531

Powers of agent—declarations. The declarations of an agent as to his authority may be competent and material, not to show his authority, but to show the capacity in which he acted in the transactions in question and the good faith of the party with whom the agent acted.

State Bank v Fairholm, 201-1094; 206 NW 143

Equitable estoppel—implied authority to negotiate note. The maker of a nonnegotiable promissory note will not be held to be estopped to deny liability on the theory that he impliedly clothed the payee with authority to negotiate the note, when the entire transaction contemplated such transfer.

Hubbard v Wallace, 201-1143; 208 NW 730; 45 ALR 1065

Powers of agent—apparent authority. An owner of land who authorizes his agent (1) to contract with a broker for sale of the land and (2) to pay the broker a specified and limited compensation is bound by the agreement of his agent to pay the broker a greater commission, when the broker had no knowledge of such limited authority.

Boylan v Workman, 206-469; 220 NW 49

Negligence of borrower imputable to lender—effect. One who borrows an automobile becomes, by force of our statute (§5026, C., '24 [§5037.09, C., '39]), the agent of the lender, in the operation of the car. It necessarily follows that the negligence of the borrower is imputable to the lender and is a bar to the recovery of damages by the lender in an action against a third party if such negligence contributed to the injury and resulting damages.

Secured Fin. Co. v Railway, 207-1105; 224 NW 88; 61 ALR 855; 30 NCCA 90

Authority—waiver. A principal who directs his agent to accept cash only, on making sales, waives any violation of his instructions by accepting notes of various purchasers, with full knowledge of the facts.

Donnelly v Walch, 203-32; 212 NW 310

The relation — evidence — sufficiency. Evidence relative to a contract for the exchange of lands reviewed, and held insufficient to show that a party thereto who signed the same individually was acting solely as the agent of his wife.

Richardson v Short, 201-561; 207 NW 610

Agency of husband—custom as evidence. Testimony tending to show a custom by a husband to sign the name of his wife to promissory notes, with her express or implied knowledge and approval, extending continuously through many years prior to the transaction in question, is admissible on the issue whether the husband had such authority from the wife.

State Bank v Fairholm, 201-1094; 206 NW 143

Acts constituting conversion — property under receivership. One who is in possession of property as agent of a duly appointed receiver is not guilty of a conversion of the property by refusing to give it up without the consent of the receiver, even tho such agent is plaintiff in the action in which the receiver was appointed, and even tho a full settlement of the action has been consummated, but not yet called to the attention of the court.

McCarthy v Cutchall, 209-193; 225 NW 865

Authority of agent—collection of interest. Authority in an agent to receive interest accruing on a promissory note does not embrace authority to receive the principal.

Huismann v Althoff, 202-70; 209 NW 525

Authority of agent — implied authority. Principle reaffirmed that a bank has no authority to receive payment of a note from the naked fact that the note is payable at said bank,

I IN GENERAL—continued

especially in the absence of the note, and before maturity.

Huismann v Althoff, 202-70; 209 NW 525

Agency to receive payment. Record reviewed and held to present a jury question on the issue whether the original payee of a promissory note was the agent of the indorsee to receive payment.

Andrew v Kolsrud, 218-15; 253 NW 913

Authority—note payable at particular office—effect. Principle recognized that the fact that a promissory note is payable at the office of a particular person does not, in and of itself, authorize or empower such particular person to receive payment on the note.

Whitney v Krasne, 209-236; 225 NW 245

Authority of agent—disbursement of borrowed money. The fact that a loaner of money who was the agent of the borrower to negotiate a loan and receive the money thereon retained the money and paid it to the borrower in installments, in order to protect himself (the loaner), is very persuasive that the said loaner was not also the agent of the borrower to disburse said money.

Hubbard v Wallace, 201-1143; 208 NW 730; 45 ALR 1065

Agent's authority to receive payment on note. The maker of a promissory note who makes payment to someone other than the payee or holder must take on the burden of showing that the recipient of the payment had actual or apparent authority from the payee or holder to receive it. Evidence reviewed in detail, and held to show that the party receiving payment on a note was the agent of the holder to receive any indebtedness due such holder at the place of payment.

Whitney v Krasne, 209-236; 225 NW 245

Agent of interested party. In an action by the beneficiary in a life insurance policy to recover thereon, an agent of the insurer who negotiated the policy is a competent witness to testify that the insured did not make payment to him of the premiums due on the policy.

Range v Ins. Co., 216-410; 249 NW 268

Receipt of proceeds by mutual agent—effect. Where the mortgagor of an unmatured mortgage authorizes his agent to negotiate a new mortgage and with the proceeds pay off the unmatured mortgage, and where the holder of the unmatured mortgage authorizes the same agent to collect and release his unmatured mortgage, the mere receipt by the mutual agent of the proceeds of the new mortgage in the form of checks, etc., does not ipso facto constitute a payment of the unmatured mortgage; and especially so when the mutual agent, on receipt of said proceeds, and pending the final approval of the new mortgage, deposits the said proceeds in his overdrawn general bank account and credits the mortgagor of the unmatured mortgage with the amount thereof. Payment of the unmatured mortgage can only result when the agent has, expressly or impliedly, appropriated the proceeds to said unmatured mortgage.

In re Schanke & Co., 201-678; 207 NW 756

Spurious mortgage—insufficient ratification. Evidence held quite insufficient to show that a purported mortgagor had ratified a spurious mortgage on his property.

Hagensick v Koch, 220-1055; 264 NW 13

Authority—when principal not bound. A principal is not, in the absence of assent or ratification, bound by the acts of his agent which are against the interests of the principal.

Benton v College, 202-15; 209 NW 516

Fraudulent acts by bank cashier—repudiation of only part of transaction. Where the cashier of the plaintiff bank obtained credit with the defendant bank in order to conceal a shortage in the accounts of the plaintiff, giving unauthorized drafts on the plaintiff and crediting the plaintiff with the amounts, it was erroneous for the court to find that the cashier had borrowed from the defendant to pay the plaintiff and then paid the defendant with the drafts with the result that the defendant then held assets of the plaintiff equal to the amount of the drafts. To hold thus would permit the plaintiff bank to accept payment of the shortage through the unauthorized acts of its agent, the cashier, and at the same time repudiate the remainder of the transaction and deny the right of the defendant to use the unauthorized drafts.

Community Sav. Bank v Gaughen, 228- ; 289 NW 727

Liability of agent—nonapplicability of rule. The rule that an agent binds himself by acting in his own name for an undisclosed principal may not be invoked by one who is an entire stranger to the contract.

Nissen v Sabin, 202-1362; 212 NW 125; 50 ALR 1216

Signing in representative capacity—effect. The principle that an agent is not personally liable on a contract when the writing shows that another person is the principal is necessarily not applicable when the signer intended to make the contract his own.

Vance v Sowden, 205-389; 217 NW 874

Liability as to third persons—declarations of agent. Principle recognized that a principal is not bound by the independent admissions of an agent after the event.

State Bank v Cooper, 201-225; 205 NW 333

Bank night—evidence of drawing of winner—statements of agents. When one agent of a theatre announced the name of the plaintiff as

winner of a bank night drawing and her husband's name was announced by another agent, both agents being in a position to bind the theatre, there was evidence that the name of one was drawn.

St. Peter v Theatre, 227-1391; 291 NW 164

Mistaken delivery absolves carrier. A carrier is not responsible for a loss which results from delivering a shipment to a person who is not the agent of the consignee for the purpose of such shipment, when the carrier justifiably believed such person to be such agent, and when such person was the very person to whom the consignor intended delivery to be made, because of a like belief on his part as to such agency.

Malvern Co. v Express Co., 206-292; 220 NW 322

Fraudulent release of prior mortgage by agent. A mortgagee who takes his mortgage as a first mortgage in good-faith reliance on the release by his agent of a prior mortgage does not lose his priority because of the fact that the release was fraudulent in that, prior to the release, the prior mortgage had been assigned without a recording of the assignment, the knowledge of the agent of his own dishonesty not being imputable to his principal, the first mortgagee.

Leach v Bank, 202-265; 209 NW 422

Bank deposits—fraudulent dissipation—nonliability of bank. A bank is not responsible to its depositor for the fraudulent conduct of the depositor's employee, aided by an employee of the bank, in fraudulently withdrawing from the bank the funds of the depositor, on checks which the depositor's employee had specific written authority to draw to himself personally, when the bank had no knowledge or reason to know of any of said wrongdoings.

Pierce v Bank, 213-1388; 239 NW 580

Exoneration of agent exonerates principal. If the master is responsible for an act solely under the doctrine of respondeat superior, then an exoneration of the agent or servant who actually did the act ipso facto exonerates the master.

Hobbs v Railway, 171-624; 152 NW 40
Maine v Maine, 198-1278; 201 NW 20
Lahr v Railway, 212-544; 234 NW 223
Hall v Miller, 212-835; 235 NW 298

Authority of agent—termination by death. Principle reaffirmed that the authority of an agent terminates with the death of the principal.

Huismann v Althoff, 202-70; 209 NW 525

Subagency—essentials. A subagency cannot arise without the knowledge or consent of either the principal or his agent. So held in an action involving the operation of an automobile by a mere volunteer.

McLain v Armour, 205-343; 218 NW 69

Right of action against subagent. Principle reaffirmed that a principal who has expressly or impliedly authorized his agent to employ a subagent may and should bring his action directly against the subagent for the latter's negligence.

Thompson v Bank, 207-786; 223 NW 517

II THE RELATION

Evidence insufficient to establish relation. Agency arises out of contract, express or implied. Stockholder of bank held not bound by purchase of stock for him by cashier, and charging his account therefor, in view of showing as to cashier's authority.

Andrew v Bank, (NOR); 239 NW 551

Creation of relation—effect. The implied promise of a principal to reimburse his surety if the surety is compelled to pay the debt brings into existence the relation of debtor and creditor between the principal and surety immediately upon the execution of the contract of suretyship.

Leach v Bassman, 208-1374; 227 NW 339

Admissions of attorney—effect. The admission of an attorney, made during a trial, as to the agency of a party for his client, is not necessarily binding on the client in other and subsequent litigation of a similar nature.

Iowa Co. v Seaman, 203-310; 210 NW 937

Creation and existence—circumstantial evidence. Agency may be established by circumstantial evidence, as well as by the most affirmative testimony.

Flack v Linden Bk., 211-6; 228 NW 667
Flack v Linden Bk., 211-15; 228 NW 670

Proof under general allegation. A general allegation of agency may be supported by evidence of either an express or implied agency.

Andrew v Kolsrud, 218-15; 253 NW 913

Voluntary nonpaper issues—sufficiency. In an action to recover quantum meruit for the use of machinery, the court, in submitting defendant's nonpaper issue (acquiesced in by plaintiff) whether the use was under a contract for an agreed rental entered into with plaintiff's employee, must submit the question of the authority of the employee to enter into such a contract, there being evidence of the lack of such authority.

Des Moines Co. v Lincoln Co., 201-502; 207 NW 563

Authority of agent—evidence—jury question. The jury has the right, on the issue whether an agent had authority to enter into a contract on behalf of his principal, to pass on whatever competent evidence has a tendency to prove such authority even tho such evidence is not fully and wholly satisfactory. So held as to the correspondence passing be-

II THE RELATION—continued

tween the principal and the agent as to the leasing of the land of the principal.

First JSL Bk. v Noland, 221-1305; 268 NW 69

Proof of agency. It is quite commonplace to say that, under a plea of false representation by an agent, the agency must be proven.

Ettinger v Malcolm, 208-311; 223 NW 247

Evidence—sufficiency. Evidence held insufficient to establish agency.

Teget v Polk County, 202-747; 210 NW 954

Actions—pleading and evidence—admission of agency. Record held to show no admission of a subagencyship.

Thompson v Bank, 207-786; 223 NW 517

Substituted service on agent of nonresident. Whether a nonresident may be legally sued in this state by service in this state on an alleged, resident agent (on a cause of action growing out of such alleged agency) must necessarily be determined by resorting (1) to the express contract, if any, between the resident and nonresident parties, and (2) to the course of dealings existing between the said parties. Held, agency not shown, even tho an officer of the alleged resident agent was a director of the nonresident defendant, and even tho the nonresident defendant paid commission on sales to the alleged resident agent.

Toole Co. v Dist. Group, 217-414; 251 NW 689

Rights and liabilities as to third persons—ratification of assumption of agency. Tho there is no agency, in fact, yet if there is an assumption of agency the assumed principal may ratify the unauthorized assumption.

Linn v Kendall, 213-33; 238 NW 547

Rights and liabilities as to third persons—impossible ratification. A vendor of land who, upon discovering that his vendee has placed repairs and improvements upon the property, does nothing in the way of repudiating the actions of the vendee, cannot be held thereby to have ratified the actions of the vendee and constituted the vendee his agent to make the improvements, when the vendee in making said repairs and improvements never assumed to act for the vendor.

Knapp v Baldwin, 213-24; 238 NW 542

Unauthorized acts—ratification—knowledge. The knowledge of a fiscal agent of a corporation in charge of sales of corporate stock of his corporation that an authorized subagent had received payment for stock sold is presumptively the knowledge of the corporation.

Farmers Bank v Planters Elev., 200-434; 204 NW 298

Authority of agent—receipt of money. Principle reaffirmed that the receipt by a duly authorized agent of money belonging to the principal is, of necessity, a receipt by the principal.

Farmers Bank v Planters Elev., 200-434; 204 NW 298

Remedies of purchaser—delay—unallowable rescission. A purchaser may not rescind his contract of purchase because of a delay which was occasioned by his own agent.

Gutz v Holahan, 209-839; 227 NW 504

Knowledge of agent—when not imputed to principal. The knowledge acquired by the director of a corporation as to the proceedings of its directors will not be imputed to a bank of which the director is cashier, especially when the director-cashier is interested adversely to the bank.

Hancock Bk. v McMahon, 201-657; 208 NW 74

Apparent authority to execute mortgage. Evidence reviewed and held quite insufficient to support the contention that an agent, in executing a mortgage in the name of his principal, was acting within the scope of his apparent authority.

Hagensick v Koch, 220-1055; 264 NW 13

Implied agency—insufficient "holding out." The holder of notes and mortgage who accepts payment of one of the notes from a maker thereof, in form of part cash and part check payable to the holder, from one who had bought the property subject to the mortgage, cannot be held thereby to have held out the said maker as his agent to receive payment of the remaining note; nor will the added fact that, on two occasions subsequent to the payment in question and on one occasion prior thereto, the said holder had authorized the said maker to receive payments on wholly different transactions, constitute such "holding out".

Ritter v Plumb, 203-1001; 213 NW 571

Insufficient showing—imputation of knowledge. The fact that the payee of two promissory notes signed by the same maker but by different sureties caused the maker to be consulted relative to which of the notes should be indorsed with a certain payment, and then made the indorsement in accordance with the maker's wishes, cannot have the effect of creating any agency and thereby charging said payee with knowledge of an agreement between the maker and one of the sureties for a different application of the payment.

Mitchell v Burgher, 216-869; 249 NW 357

Insolvency — preference — drawee-bank as agent to collect from self. The holder of a bank check in sending it to the drawee-bank for "collection and remittance" does not create the relation of principal and agent or any trust relation sufficient to support a claim of preference in case the draft of the said drawee-bank in payment of the check is not paid because of the insolvency of the bank.

Leach v Bank, 205-973; 219 NW 43

Bank collections. Principle reaffirmed that the act of the owner of a draft in forwarding the same to a bank for collection, and the act of the bank in making the collection, create the relation of principal and agent, and not that of debtor and creditor.

Andrew v Bank, 207-403; 223 NW 176

Insolvency — preference — drawee-bank as agent to collect from self. The act of the indorsee of a check in sending it to the drawee-bank for collection and remittance, and the act of the drawee-bank in charging the account of the drawer of the check with the amount thereof, create no relation of principal and agent, and consequently no trust relationship.

Leach v Bank, 207-471; 220 NW 10

Dual agency for borrower and loaner. A loaner of money, in closing a loan, may extend to the borrower the option (1) to sign a written direction to the loaner to pay the proceeds of the loan to a named third party as the borrower's agent, or (2) to refuse to sign such direction, and permit the loaner himself to pay out of the loan all prior incumbrances and remit to the borrower the balance, if any, of the loan; and, in the absence of fraud, if the borrower signs such direction, he will be bound by the resulting consequences, even tho said third party, in all the prior loan negotiations, had acted as the agent of the loaner, and while so acting, had furnished the loaner with a forged abstract of title, and had thereby initiated the fraud from which the borrower ultimately suffered.

Burlington Bk. v Ins. Co., 207-808; 221 NW 796; 223 NW 520

Lender and borrower. Principle reaffirmed that the issue whether a third party was the agent of the borrower or of the lender will not be determined solely from the terms of the contract between the lender and the said third party, but that the court will look to the resulting course of dealing between said contracting parties, in order to determine the very truth of the matter of agency.

Burlington Bk. v Ins. Co., 207-808; 221 NW 796; 223 NW 520

Agent as witness—individual (?) or agency (?) transaction. The president of a bank may testify that in a certain transaction he was not acting for or on behalf of the bank of which he was president, but was acting in and with reference to an individual transaction of his own.

Security Bk. v Bigelow, 205-695; 216 NW 96

Disclaiming agency—effect. If a loan company and a party through whom loans are made occupy, in truth and fact, the relation of principal and agent, it matters not that, in their contract, they positively disclaim such relation, or provide that the party through whom loans are made shall be deemed the agent of the borrower, or otherwise studiously seek to disguise such relation.

Burlington Bk. v Ins. Co., 206-475; 218 NW 949

Liability of agent—negligence in preparing estimates for contract. An agent is negligent when, in preparing estimates as a basis for bids by his contractor-principal, he fails to indicate correctly the sum total of his detailed estimates; but before the principal (who obtains the contract) may recover of the agent the amount of the error as a profit lost, he (the principal) must show that he would have secured the contract had no such error been made.

Mayberry v Newell, 200-458; 204 NW 413

Avoidance of policy—false statement as to responsibility. An insured may not recover on an indemnity bond which is given for the performance of a building contract when, in or in connection with the application for the bond, he willfully gives the insurer a false statement relative to the contractor's financial responsibility, and the insurer innocently relies thereon. This is especially true when the insured is, at the time, acting as the agent of the insurer.

Cook v Heinbaugh, 202-1002; 210 NW 129

Contractor authorized by owner to hire architect. It is common knowledge that ordinarily the architect is employed by the owner and not by contractor, but evidence held to show that owner authorized contractor to employ an architect in owner's behalf.

Sugarman Co. v Phoenix System, (NOR); 243 NW 369

Independent contractor—test. If, as to the result, and in the employment of the means, one acts entirely independent of the master, he must be regarded as an independent contractor, and not an employee.

Reynolds v Oil Co., 227-163; 287 NW 823

Liability—parties not in privity. An agent who procures contracts for his principal may not hold a subsequently formed corporation liable for his commission, even tho the agent's contract was with a person who subsequently became an officer of the corporation, and even tho the subsequently formed corporation carried out the contracts so obtained.

Heinen v Waterloo Co., 206-198; 220 NW 62

Compensation—lien of agent—proceeds of unindorsed check. A broker who, in effecting a sale for his principal, secures possession of a certified but unindorsed check, payable to the order of his principal, as part of the purchase price, has no lien for his commission on the funds on deposit representing said check, even tho the broker himself procured the certification of the check and notified the drawee-bank of his claim to a lien on the funds.

Parker v Walsh, 200-1086; 205 NW 853; 42 ALR 622

II THE RELATION—concluded

Termination of relation — agency coupled with interest. To constitute an agency coupled with an interest, the agent must have some other interest than merely to accomplish the purpose of his principal and to earn his commission.

Coburn v Davis, 201-1253; 207 NW 586

Termination when not coupled with an interest. Contract of agency reviewed in detail, and held not coupled with an interest in favor of the agent, and therefore terminable at will.

Andrew v Ins. Co., 211-282; 233 NW 473

Termination by operation of law. A contract of agency is terminated by the insolvency of the agent and the placing of his business affairs in the hands of a receiver.

Andrew v Ins. Co., 211-282; 233 NW 473

III MUTUAL RIGHTS, LIABILITIES, AND DUTIES

Banking corporations — insolvency — trust funds—facts showing. A bank which, through its officers, manages a public sale as agent for a party, and holds the cash proceeds thereof in the bank without settlement with the said party, will be deemed to hold the money as trustee, and in case of insolvency, the trust funds will be presumed to be embraced in a final cash balance which is in excess of the trust; and it is immaterial how or in what manner the bank, on its own motion, treated said cash on its books.

Andrew v Bank, 209-1147; 229 NW 907

Nonliability of bank for personal deal of officers. A bank is not responsible for the acts of an officer of the bank in misappropriating the proceeds of a draft when said draft, tho payable to the officer in his official capacity, was received by him, not as an officer of the bank, but in his individual capacity, and in the furtherance of a private transaction between himself and others with whom he was associated.

Security Bk. v Bigelow, 205-695; 216 NW 96

Liability on official bonds—unnecessary demand. In an action on the bond of a public officer to recover funds unaccounted for, no demand on the surety is necessary before commencing the action when proper demand has been made on the principal.

State v Carney, 208-133; 217 NW 472

Presence or absence of directions as to sale. Factors must comply with specific directions as to time of sale. In the absence of such directions, they must sell within a reasonable time.

Alley Co. v Cream Co., 201-621; 207 NW 767

Execution of agency—fraud of agent. In an action for an accounting in the sale of real estate lots, record reviewed, and held to establish fraud on the part of the agent.

Coburn v Davis, 201-1253; 207 NW 586

Worthless investment—ratification. The act of an agent in making for his principal a loan in the form of a mortgage of questionable value must be deemed ratified when the principal received the mortgage, retained it in his possession, and thereafter collected two annual payments of interest thereon.

Van Every v Crawford, 207-1049; 221 NW 914

Failure to obey instructions. A commission merchant is excused from all liability for failure to sell goods on the terms prescribed by the principal when such failure was because of conditions over which he had no control.

Blanchard v Wood Co., 204-255; 214 NW 583

Shortage in shipment. A commission merchant, in an action against his principal for a balance due for advances, must adequately account for all goods consigned to him.

Blanchard v Wood Co., 204-255; 214 NW 583

Assumed authority—no ratification. The act of the payee of a promissory note in receiving and accepting a payment on a note, from one who had no authority to collect it on payee's behalf, does not constitute a ratification of the act of such assumed agent in receiving an additional payment, when payee had no knowledge of such additional payment and no knowledge of such assumed agency.

Huismann v Althoff, 202-70; 209 NW 525

Apparent authority of manager sufficient to bind corporation to tenancy. Corporation held liable for rent as tenant at will, based on correspondence and telephone conversations with corporation's manager, as against contention that manager was not authorized to enter into arrangement made—principal being bound by apparent authority of its agent.

Daly Co. v Brunswick Co., (NOR); 263 NW 234

Authority to collect interest not authority to collect principal. Principle reaffirmed that authority in an agent to receive interest on a promissory note does not, in and of itself, carry authority to receive the amount of the principal.

Holden v Batten, 215-448; 245 NW 750

Broker—acting for parties adversely interested. A broker may act for adversely interested parties provided that they consent to such dual agency.

Loots v Knoke, 209-447; 228 NW 45

Compensation — nondual employment. The fact that different property owners employ the same rental agent to obtain the same tenant does not constitute such a dual employment

as to deprive the agent of his compensation from the owner for whom a lease is obtained.

Foley v Mathias, 211-160; 233 NW 106; 71 ALR 696

Assumed purchase of note and mortgage by agent—effect. Where a note and mortgage on land were executed by a principal to his agent and sold by the agent in order to acquire funds with which to discharge a pre-existing note and mortgage on the same land, and where the agent embezzled the funds so acquired, the subsequent act of the agent in assuming to purchase said pre-existing note and mortgage by taking from the holder (who acted in good faith) both an assignment in blank and also a satisfaction piece, cannot be deemed a satisfaction and discharge of said pre-existing note and mortgage (1) when no satisfaction was, in fact, intended, (2) when the agent wholly discarded the satisfaction piece, and consummated the assumed purchase by means of funds belonging solely to an innocent and good-faith re-transferee, and by forthwith delivering said pre-existing note and mortgage to said re-transferee together with said blank assignment properly made out in the latter's favor; and it is immaterial that the re-transferee took said note and mortgage when they were overdue.

Mandel v Siverly, 213-109; 238 NW 596

Mutual liabilities—incorrect expenditures by agent. An agent who disburses the money of his principal without verifying the correctness of the basis on which payment is made, e. g., the weight of stock purchased, becomes liable to the principal for the resulting damage.

McNeil v Farmers Co., 219-1010; 259 NW 594

Knowledge of agent—when not imputed to principal. The knowledge of an agent will not be imputed to his principal when such knowledge involves a breach of duty on the part of the agent to his principal, and is of such nature as to justify the presumption that the offending agent will not convey it to his principal.

Clapp v Wallace, 221-672; 266 NW 493

County board of supervisors—limited power of individual member. A single member of a board of supervisors has no power to bind the board, or to bind the county, unless specifically authorized by the board to act for the whole board, or unless an agreement made by him for the county is approved or ratified by the board.

Greusel v O'Brien County, 223-747; 273 NW 853

Itinerant vendors—agents and employees. The statute which defines an itinerant vendor of drugs as "any person who, by himself, agent or employee goes from place to place or from house to house, and sells, offers or exposes for sale any drug" etc. (§3148, C., '31) renders a person an "itinerant vendor" who goes from place to place or from house to house and does the specified acts, even tho he does such acts solely as the employee of an employer who is concededly an itinerant vendor.

State v Logsdon, 215-1297; 248 NW 4

Treating sight draft as paid and later denying payment. The drawer of a sight draft who sends it to a bank for collection, and knows that said bank has assumed to collect it, and has forwarded its own bank draft in payment of the collection, and who, after payment of the bank draft is refused because of the insolvency of the collecting bank, lays claim to said bank draft and establishes his claim thereon against the receiver, may not thereafter proceed against the receiver and the original drawee in the sight draft and obtain judgment against them on the pleaded theory that said drawee in the sight draft never in fact paid it,—paid it by an overdraft on the collecting bank,—and that the defendants must account to plaintiff for said overdraft.

Enterline v Andrew, 211-176; 231 NW 416

Insurance agents—imputable and nonimputable knowledge. Knowledge on the part of a mere soliciting agent of an insurance company is imputable to his principal when such knowledge is acquired in connection with an application for insurance. Knowledge acquired by such agent subsequent to the issuance of the policy, and relative to an act which invalidates the policy, is not so imputable.

Green v Ins. Co., 215-1220; 247 NW 660

Property damaged while in storage—liability. When motor vehicle carriers utilized the terminal facilities of a third party, who provided pickup and delivery service from the terminal, and had individual spaces rented to each trucker for the storage of that trucker's shipments, it was held that control and possession of the shipments of goods was in the truck carriers during the storage period, and when a fire destroyed the terminal, the terminal-owner was acting as agent for the truckers, who were liable to the owners of the property in transit for the losses occasioned by the fire.

Crouse v Cadwell, 226-1083; 285 NW 623.

Misappropriation by agent. A bank is not charged with notice of, nor liability for, a misappropriation of an agent from the mere fact that the agent deposits funds to his own or his principal's account and thereafter misappropriates the funds by checks drawn upon the account. The mere fact that a bank has notice that the funds deposited belong to a principal imposes no duty upon the bank to inquire as to the agent's authority to make the deposit or withdraw the funds.

Fidelity Co. v Bank, 223-446; 273 NW 141

III MUTUAL RIGHTS, LIABILITIES, AND DUTIES—concluded

New trial—nonabuse of discretion. In action for forcible entry and detainer, where there was evidence of error in instructions in that court assumed that an alleged lease was made with agent of plaintiff with authority to make an oral lease, and that court did not specifically define to jury necessary elements of an oral lease, and there was also question that verdict was not supported by evidence, granting new trial held not an abuse of discretion.

Holman v Rook, (NOR); 271 NW 612

IV RIGHTS OF THIRD PARTIES

Liability to third persons. As between a principal and third parties, the principal is bound by the acts of his agent within the limits of the apparent scope of his authority.

Fed. Bank v Trust Co., 228- ; 290 NW 512

Undisclosed limitation of agent's authority—effect. Altho a principal may by special limitations restrict the authority of his agent, and altho such restrictions are obligatory between the principal and his agent, such limitations are not binding upon third parties, and, in the absence of knowledge of such restrictions by them, the principal will be bound to the same extent as tho the restrictions were not made.

Fed. Bank v Trust Co., 228- ; 290 NW 512

Insurance agent—authority. Evidence held to show that the authority of an agent ceased upon the delivery of a policy, and that his subsequent knowledge of the execution of a mortgage on the insured premises would not be imputed to the insurer.

Hart v Ins. Assn., 208-1030; 226 NW 781

Unlicensed insurance agent—noneffect on insurer. Where an accident policy is to become effective at 12 o'clock noon on date of delivery to insured, the application having been made on August 24, 1937, providing (1) it should not bind insurer until accepted nor (2) until policy was accepted by insured, while in good health and free from injury, and where policy, issued September 17, was delivered to insured September 22, while insured was in hospital as result of injuries sustained on August 26, insured could not recover on policy notwithstanding insurance agent's statement to insured that policy would be effective August 26. The fact that agent was unlicensed did not thereby make him a general agent of the insurer, the burden of proving which would be on insured. While an unlicensed agent may be criminally punished, this does not enlarge his authority to bind insurer.

Rainsbarger v Acc. Assn., 227-1076; 289 NW 908

Knowledge of agent. Testimony as to what a party knew that an agent knew is not competent.

Hart v Ins. Assn., 208-1030; 226 NW 781

Authority of agent—variation from direction—effect. A principal who employs an agent to perform a certain act may be responsible for the doing of the act by the agent in a manner different than the principal had directed.

Herring Co. v Myerly, 207-990; 222 NW 1

Estoppel to deny agent's authority. In payee's action against bank which had cashed checks indorsed by payee's attorney without actual authority, where bank defended on ground that payee was estopped from asserting lack of authority, held, strict rules relating to equitable estoppel based upon false misrepresentation or concealment were not applicable in determining such defense.

Fed. Bank v Trust Co., 228- ; 290 NW 512

Distribution of award. The individual members of a committee appointed by an unincorporated association of banks for the purpose of making distribution of a reward offered by the association for the apprehension of criminals are not responsible to third parties for an erroneous decision as to the manner in which such reward should be distributed.

Bird v Barrett, 207-1158; 224 NW 556

Payment of note—agency—effect. Payment of a promissory note to one who is the actual agent of the owner of the note, even tho the note is not produced and surrendered, effects a full discharge of the note, even tho the payer supposed he was making payment to the actual owner of the note.

Carr v Benjamin, 207-1139; 222 NW 373

Payment of note to holder's agent. The holder of a promissory note who permits another person for a series of years to collect both interest and installments of principal on the note will not be permitted to deny the authority of such other person to make all collections on the note. And it is immaterial that the note was not surrendered to the maker when he made his final payment.

Ragatz v Diener, 218-703; 253 NW 824

Sleeping on rights. One who, without requiring the production of a note, innocently pays the note to one who is not the agent of the holder, may not insist that the said holder, and not himself, should suffer the loss, especially when the latter, upon discovering the truth, does nothing to protect himself against the solvent wrongdoer.

Ritter v Plumb, 203-1001; 213 NW 571

Payment and discharge—apparent agency. A payment made in a bank that is open and transacting business; to one behind the counter, with the permission of the managing officers of the bank, and with apparent authority to receive the money, constitutes a payment to the bank. It follows that the conversation at

the time, relative to the subject matter of the payment, is competent.

First St. Bank v Tobin, 204-456; 215 NW 767

Officers and agents—liability for corporate tort. The managing officer of a corporation who causes the corporation of which he is such officer wrongfully to withhold personal property from a person who is entitled to the immediate possession of said property, is guilty of a tort, and is personally liable for said tort along with his said corporation.

Luther v National Co., 222-305; 268 NW 589

Knowledge of agent—when not imputed to principal. The knowledge of an agent—especially an agent with limited authority—will not be imputed to his principal when such knowledge involves a breach of duty to the principal and is in regard to a transaction which is so unusual and exceptional—so out of the ordinary—as necessarily to put on guard the party dealing with the agent.

First JSL Bank v Diercks, 222-534; 267 NW 708

Undisclosed principal liable. An undisclosed principal is liable on a contract which he has permitted to be entered into in his behalf and under which he has received resulting benefits.

Util. Corp. v Chapman, 210-994; 232 NW 116

Undisclosed agency—right of principal to maintain action. An undisclosed principal has a right to maintain an action on a contract signed by the agent in his individual name.

Util. Corp. v Chapman, 210-994; 232 NW 116

Wrongful receipt of payment of note—ratification. The payee of a promissory note does not ratify and confirm the act of a third person in wrongfully receiving payment of the note by subsequently receiving and accepting partial payments from said wrongdoer.

Moron v Tuttle, 211-584; 233 NW 691

Apparent authority of agent to collect collateral. Makers of promissory notes who make payment to the original payee without then demanding the surrender of the paid notes and without then knowing that the original payee had hypothecated said notes and others as collateral security, may not assert apparent agency in said original payee to receive payment on behalf of the collateral holder, on the mere showing that the collateral holder, upon actual receipt from said original payee of the amount of a matured collateral note, credited said payee on his debt and returned the note to him.

Iowa Co. v Seaman, 203-310; 210 NW 937

Unauthorized agency—ratification by accepting benefit. The holder of a note is not estopped to challenge the unauthorized act of a party in receiving payment of the note, by accepting from such unauthorized agent part of the payment, (1) when he accepted such payment without knowledge that the party was assuming such agency, and (2) when such party was a maker of the note.

Ritter v Plumb, 203-1001; 213 NW 571

Undisclosed principal—liability. One who, through a broker with whom land is listed for sale, and without the knowledge of the owner of the land, secretly arranges to buy the land, and obligates himself to pay the purchase price thereof, and who, through said broker, causes an impecunious and fictitious buyer to enter into the contract of purchase and to execute the notes and mortgage and to become the grantee in the deed of conveyance, and who receives from the said fictitious buyer an assignment of the said contract and a deed under which he assumes no personal liability on the mortgage debt, will, nevertheless, be held personally liable to the actual vendor for the full purchase price as an undisclosed principal; and if the agent goes beyond the scope of his authority in negotiating the said contract, the undisclosed principal may not complain, if, with full knowledge of the terms of said contract, and before parting with anything of value, he appropriates to himself the full benefits of the contract.

Collentine v Johnson, 203-109; 202 NW 535; 208 NW 318

"Apparent authority" defined. "Apparent authority" is the result of the manifestation by one person of consent that another shall act as his agent, made to a third person, where such manifestation differs from that made to the purported agent.

Fed. Bank v Trust Co., 228- ; 290 NW 512

Pleading agent's apparent authority—sufficiency. In payee's action against bank which had cashed checks indorsed without actual authority by payee's local attorney, bank's answer alleging (1) payee's knowledge and acquiescence in the attorney's custom of indorsing payee's checks and remitting proceeds to it by his personal checks, (2) the bank's reliance thereon, and (3) that payee was estopped from asserting lack of authority, held sufficient to raise question of attorney's implied, apparent, or ostensible authority.

Fed. Bank v Trust Co., 228- ; 290 NW 512

Liabilities as to third persons — apparent scope of authority—evidence. Evidence that an agent, for many years, had charge of a certain department of his principal's business and had, during said times, negotiated many written contracts relative to the subject matter in his charge, may create a jury question on the issue whether the agent had authority, within the scope of his apparent powers, to enter into an oral contract covering the subject matter in his charge.

Webster Co. v Nebr. Co., 216-485; 249 NW 203

IV RIGHTS OF THIRD PARTIES—cont.

Unauthorized acts — ratification — essential elements. To constitute a ratification by a bank of the unauthorized contract of its cashier, the bank must have had full knowledge of the facts and what had been done in its name and on its behalf by said cashier. Record reviewed and held affirmatively to show no ratification.

Chismore v Bank, 221-1256; 268 NW 137

Unauthorized representations of seller's agent—buyer's rescission for falsity—seller's responsibility. Where buyer rescinds contract induced by fraudulent misrepresentations of seller's agent and seeks recovery of purchase price, the agent's limited authority, otherwise binding on the buyer, does not preclude the buyer from alleging and proving such representations, and the seller is bound by such representations even tho unauthorized and even tho the contract expressly limits the agent's authority to make agreements.

Robinson v Main, 227-1195; 290 NW 539

Authority of agent—evidence—jury question. The jury has the right, on the issue whether an agent had authority to enter into a contract on behalf of his principal, to pass on whatever competent evidence has a tendency to prove such authority even tho such evidence is not fully and wholly satisfactory. So held as to the correspondence passing between the principal and the agent as to the leasing of the land of the principal.

First JSL Bank v Noland, 221-1305; 268 NW 69

Implied or apparent authority of agent—unallowable plea. A commission firm was prohibited by the mandatory rules of the board of trade of which it was a member from dealing in so-called "futures" for and on behalf of a nonmember corporation unless the firm first obtained from said nonnmember corporation a writing authorizing the latter's manager to contract for such "futures". The firm disregarded said rule and accepted orders for such "futures" from a manager who had been expressly forbidden to exercise such power. Held, that said firm, when sued by the injured corporation for the resulting loss, would not be permitted to defend on the ground that said manager had implied or apparent power to issue said orders.

Watkins Co. v Smith Co., 221-1164; 267 NW 115

Fraud on agent, fraud on principal. Fraud on an agent, in a matter in which the agent is acting in his representative capacity, is a fraud on the principal. It follows that the principal may seek redress to the same extent as tho the fraud was perpetrated directly and personally upon him.

Andrew v Baird, 221-83; 265 NW 170

Nonimputation of hostile knowledge—exception. While a principal is not chargeable with the guilty knowledge which his agent acquires in the agent's own interest and in hostility to the interest of his principal, yet a principal is chargeable with knowledge of facts which his dishonest agent would necessarily have acquired in performing the duties of his employment if he had been honest.

Erickson Co. v Bank, 211-495; 230 NW 342

Authority to receive payment on promissory note. Authority or agency in a third party to receive payment of a promissory note is not shown by evidence:

1. That the note provided for payment at the office of said third party;
2. That the payee received payments of interest from said third party;
3. That the payee authorized said third party to grant an extension of the mortgage security;
4. That the payee wrote to said third party relative to the payment of the note, but long after said third party had collected the amount due thereon.

Moron v Tuttle, 211-584; 233 NW 691

Knowledge of agent—when not imputed to principal. Principle reaffirmed that a principal is not charged with the knowledge of his agent when the agent is interested adversely to the principal.

Templeton v Stephens, 212-1064; 233 NW 704

Trusts—management and disposal of trust property. Individuals who voluntarily associate themselves in a business venture in the form of a trust are each personally liable for the authorized acts of their agent.

Daries v Hart, 214-1312; 243 NW 527

Assumed agency—ratification. The holder of a note and mortgage was informed by one who had subsequently bought the mortgaged property that he had, without requiring the production of the note, paid the note to one of the original makers of the note. Thereupon, the holder admitted that he had received part payment from the said maker, and exhibited the mortgage papers to the informant. Held insufficient to show ratification of the payment to the said maker.

Ritter v Plumb, 203-1001; 213 NW 571

Insurance premium—conversion by agent—liability of insurer. Where insurance agent taking an application for life insurance had authority to collect premiums on behalf of the insurer and where proceeds of check given with application for payment of premium were partly converted while in authorized possession of insurer's agent, and the application was thereafter rejected by insurer, the conversion was an act for which the insurer was liable.

Economy Co. v Ins. Co., 227-1123; 290 NW 82

Embezzlement—agency. In a prosecution for embezzlement by an agent, an allegation of the defendant's agency may be supported by proof that the money in question was delivered by the owner thereof to the defendant for the special purpose of delivering it to the borrower, notwithstanding the fact that the defendant was the agent of the borrower to procure the loan.

State v Reynolds, 209-543; 228 NW 283

Payment of note to payee's agent without surrender of note. Payment of a promissory note, by the maker thereof, to the noteholder's authorized agent to receive payment, works a complete discharge of the note, even tho the maker did not receive a surrender of the note.

Northwestern Ins. v Blohm, 212-89; 234 NW 268

Agent's authority to indorse check. In payee's action against bank which had cashed checks upon indorsement by payee's attorney, the burden of proof is upon defendant-bank to establish apparent, ostensible, or implied authority in the attorney to indorse the checks as the basis for estoppel against payee to assert lack of authority on part of attorney.

Fed. Bank v Trust Co., 228- ; 290 NW 512

Attorney indorsing client's checks. In payee's action against bank which had cashed checks indorsed without actual authority by payee's local attorney who, over a period of years, had collected rents for the payee, evidence of transactions to show custom of attorney in indorsing payee's checks and in remitting by his personal checks was admissible, even tho bank did not have knowledge of all the transactions, and it warranted finding that payee had knowledge of and acquiesced in such custom and was bound thereby.

Fed. Bank v Trust Co., 228- ; 290 NW 512

Indorsement by payee's attorney—authority. In action to recover against bank which had cashed checks indorsed by payee's attorney, the authority to make such indorsements is, under §9479, C., '39, determinable from the rules applicable in cases of agency generally.

Fed. Bank v Trust Co., 228- ; 290 NW 512

Implied ratification of agent's acts. Acquiescence by the principal in a series of acts by the agent indicates authorization to perform similar acts in the future, and an affirmance of an unauthorized transaction may be inferred from a failure to repudiate it.

Fed. Bank v Trust Co., 228- ; 290 NW 512

Authority of agent—violation—ratification. A principal must be deemed to ratify irrevocably the act of his agent in making an investment contrary to instructions when, with full knowledge of the said violation, the principal for some three years accepts and retains all benefits resulting from such investment, and otherwise manifests his acquiescence.

Miller v Bank, 203-411; 212 NW 722

Disclosed principal—nonliability of agent. A minor, upon disaffirmance of his contract, may not recover of an agent who disclosed his principal and acted strictly within his authority.

Hubler v Gates, 209-1198; 229 NW 767

True implied agency—knowledge of principal's acts. He who seeks to prove an implied agency (as distinguished from an agency by estoppel) need not show that he had knowledge of, and relied on, the acts of the claimed principal.

Andrew v Kolsrud, 218-15; 253 NW 913

Powers of agent—burden of proof. A defendant who meets an action of quantum meruit for the use of machinery with the defense that he used the machinery under a contract for an agreed rental, entered into with one of the employees of plaintiff, must establish the authority of the employee to enter into such contract.

Des Moines Co. v Lincoln Co., 201-502; 207 NW 563

Constructive trusts—collections by agent. An agent necessarily holds collections in trust for his principal, and an assignee of the agent for the benefit of creditors has no title or interest thereto.

Second N. Bank v Millbrandt, 211-1299; 235 NW 577

Apparent authority—showing preliminary to receiving testimony. Testimony relative to a contract of compromise with a corporate agent on behalf of the corporation is admissible upon proof that the party offering the testimony, preliminary to entering into such contract, in good faith availed himself of the bureau of information maintained by the corporation, and by means thereof made contact with corporate agents who had physical possession of the papers and files relative to the subject matter of said compromise, and who were, apparently and to all appearance, in authoritative charge of said matter for settlement. (Of course, the issue of apparent authority may be a jury question.)

Northwestern Ins. v Steckel, 216-1189; 250 NW 476

Failure to act promptly caused by act of agent. Where the plaintiff's name was called outside a theatre as winner of a bank night drawing, and when she entered she was told that it was her husband's name that was called, and he was told he was one second too late when he followed her in, the theatre could not claim that neither she nor her husband had claimed the prize within the time set. If the

IV RIGHTS OF THIRD PARTIES—cont.

husband was the one entitled to the prize, the theatre was estopped to claim the advantage of the one-second delay caused by the act of their agent in calling the wrong name outside the theatre.

St. Peter v Theatre, 227-1391; 291 NW 164

Liability of surety—authority of agent—estoppel. A surety company will not, in an action on a bond issued in its name by its agent, be permitted to dispute the authority which it has specifically conferred on said agent in a written power of attorney filed with the clerk of the district court and relied on by said clerk in approving the bond, the obligee in the bond having no knowledge of any limitation on the authority of the agent.

State v Packing Co., 219-419; 258 NW 456

Liability of principal and independent contractors. A contract granting the right of way over land for an underground pipe line, on payment of a certain sum per rod, and on payment of "damages to growing crops, fences, or improvements occasioned in laying, repairing, or removing lines", does not constitute an agreement by grantee that he will pay damages consequent on the negligent act (tort) of an independent contractor in injuring grantor's private bridge which was located wholly outside said right of way.

Asher v Cont. Corp., 216-977; 250 NW 179

Payment to agent without production of note. Payment of a promissory note to one who is in fact the agent of the holder to receive such payment discharges the note, even tho the note is not in the possession of the agent at the time of payment.

Whitney v Krasne, 209-236; 225 NW 245

Unauthorized assignment of mortgage—ratification. An unauthorized assignment by bank officials of a note and mortgage belonging to the bank is ratified and confirmed by the act of the bank in receiving and retaining the consideration paid by the purchaser for said note and mortgage.

Iowa Convention v Howell, 218-1143; 254 NW 848

Reformation of policy—knowledge of agent. The knowledge of a soliciting agent that the insured understood that he was to receive a policy which would permit additional insurance will, on the issue of reformation, be imputed to the insurer, even tho not communicated to the latter.

Smith v Ins. Co., 201-363; 207 NW 334

Contracts in name of unincorporated association—personal liability. One who contracts for, or in the name or on behalf of, a legal nonentity, e. g., an unincorporated society or association, is personally liable on the contract unless he establishes the fact that at the time of so contracting his nonpersonal liability was agreed on.

Haldeman v Addison, 221-218; 265 NW 358

Unincorporated association—liability of members. An individual who contracts in the name of a voluntary unincorporated association is personally liable thereon in the absence of an agreement with the other party releasing him from personal liability, and such other members of said association who authorize, consent to, or ratify such undertaking are also personally liable in the absence of an agreement exempting them, the personal liability being based upon principles of agency.

Lamm v Stoen, 226-622; 284 NW 465

Conditional sale (?) or contract of agency (?). The act of the owner of an article in reluctantly permitting it to pass into the possession of a party (to whom he had theretofore actually sold many like articles) with permission to forthwith sell the article (which sale was then practically assured) at a stated cash price or to forthwith return the article, without any expressed intention of selling the article to the party so given possession, presents a jury question on the issue whether the transaction was one of simple agency or whether the transaction constituted an oral conditional sale contract which would not be valid against a third party who had no knowledge thereof.

Greenlease v Sadler, 216-302; 249 NW 383

Right to lien—contract with landowner—evidence—sufficiency. Evidence reviewed, and held to justify the finding of the trial court that the owner of realty had authorized his tenant as his agent to contract for material for making repairs to improvements on the farm and that a mechanic's lien was properly foreclosed against said owner and his subsequent grantee.

Iowa Supply Co. v Petersen, 221-978; 267 NW 716

Automobile—operation by garageman without knowledge of owner—nonowner—liability. The owner of an automobile is not liable for damages done by his car consequent on the negligent operation of the car by the proprietor of a garage who, without the knowledge of said owner, and as an independent contractor, was towing said car to his place of business in order to repair it; nor is a nonowner of the car, who directed the garageman to take the car and repair it, liable for said damages.

Johnson v Selindh, 221-378; 265 NW 622; 39 NCCA 289, 565

Release—covenant not to sue—joint wrongdoers. The driver of an oil truck sued for damages consequent on his negligent operation of the truck is not released from liability because another party who owned the oil tank and grease rack carried on the truck obtained from the injured party a covenant wherein the

injured party agreed not to sue such other party,—the record failing to show that the truck driver and the owner of the tank were joint wrongdoers.

Lang v Siddall, 218-263; 254 NW 783

Wife denying husband's agency but accepting benefits not permitted. A wife, owning a rooming house, sold on the fraudulent representation of her husband, made in response to purchaser's direct question, that the furnace heated the upstairs rooms, will not, in purchaser's action to rescind and recover the down payment, be permitted to deny her husband's authority to represent her and at the same time retain the down payment as fruits of the deceit.

Smith v Miller, 225-241; 280 NW 493

Freight elevator—res ipsa loquitur—nonapplicability. Record reviewed relative to the fatal injuries received by a party on, in, or about, a freight elevator, and relative to the defendant's control of the operation of said elevator at the time said injuries were received, and held to show the inapplicability of the doctrine of res ipsa loquitur.

Boles v Hotel Co., 221-211; 265 NW 183

V ACTIONS

Proof of relation—declarations of agent—incompetency. The fact of agency may not be established by the mere declarations of the agent.

Humphrey v Baron, 223-735; 273 NW 856

Negligence — personal injury — evidence insufficient for jury. Where recovery is sought because a minute particle of metal, apparently chipped off of operator's hammer, flew into plaintiff's eye while his truck tire was being repaired by filling station operator, and where there was no showing that tools and methods used by the operator were not those ordinarily used, motion for directed verdict should have been sustained.

Reynolds v Oil Co., 227-163; 287 NW 823

Master and servant—oil company and filling station operator. In an action to recover from an oil company for injuries allegedly caused by operator of company's filling station, evidence that operator conducted the station before approval of lease just as if it had been accepted, that he bought merchandise for cash from this company and others and kept the profits, that he received no remuneration from company, that altho company suggested things to help him, it exercised no supervision, that he took out state permits in his own name, and personally arranged for utility service, failed to establish relation of employer and employee. Hence, company's motion for directed verdict should have been sustained.

Reynolds v Oil Co., 227-163; 287 NW 823

CHAPTER 486

PARTIES TO ACTIONS

10967 Real party in interest.

ANALYSIS

Taxpayer's remedy by injunction. See under §§12512, 12513

I REAL PARTY IN INTEREST

"Idem sonans" doctrine—applicability. The doctrine of idem sonans is recognized by Iowa courts and, while each case must be determined according to its own facts, the mere fact that names spelled differently from true name could be pronounced like the true name by a strained pronunciation would not make the doctrine applicable, but where the names, when general and ordinary rules of pronunciation are applied, are so identical in pronunciation and so alike that there is no possibility of mistake, the doctrine should be applied; or where two names, as commonly pronounced in the English language, are sounded alike, a variance in their spelling is immaterial; and even slight difference in their pronunciation is unimportant, if the attentive ear finds difficulty in distinguishing the two names when pronounced. Such names are "idem sonans" and, altho spelled differently, are to be regarded as the same.

Webb v Ferkins, 227-1157; 290 NW 112

Presumption of jurisdiction. Presumptively, parties to an action in this state are residents of this state, and presumptively, the cause of action sued on arose in this state.

Farmers Bk. v Anderson, 216-988; 250 NW 214

Foreign corporation—right to maintain action. A foreign corporation which has not been authorized to do business in this state may, nevertheless, maintain an action in this state on a contract entered into in a foreign state.

Standard Co. v Sur. Co., 207-619; 223 NW 365

Foreign receivers. A foreign state officer as a foreign receiver of an insolvent foreign corporation, charged by the laws of his state with the mandatory duty of enforcing a "double" liability on the corporate stock of such corporation and of distributing the pro-

I REAL PARTY IN INTEREST—continued

ceeds among the creditors, is vested with such title to the fund accruing under said liability as will enable him to maintain an action in this state against a resident holder of stock in such corporation.

Hirning v Hamlin, 200-1322; 206 NW 617

Federal conservator—authority. The federal statute that the conservator of a national bank shall act "under the direction" of the comptroller of the currency does not require the conservator to secure specific authority from the comptroller for the bringing of an attachment and the execution of a bond on behalf of the bank.

Ross v Long, 219-471; 258 NW 94

Public officers. The proper officer charged with the enforcement of the "housing law" may maintain an action to enjoin the storage of gasoline on residence property without a permit.

Clinton v Donnelly, 203-576; 213 NW 262

Taxpayer on behalf of state. A taxpayer may, when the proper state official refuses to act, maintain, on behalf of the state, an action to recover state funds received by the defendant in violation of the constitution of the state.

Wertz v Shane, 216-768; 249 NW 661

Taxpayers. The fact that a party plaintiff is a taxpayer does not, in and of itself, give him any standing to question the action of public authorities when such action does not work any expenditure of public funds.

Sec. N. Bank v Bagley, 202-701; 210 NW 947; 49 ALR 705

Taxpayers. A taxpayer may maintain an action to enjoin the board of supervisors from issuing county bonds for a purpose not authorized by law.

Harding v Board, 213-560; 237 NW 625

Right of taxpayer to question municipal action. A plaintiff has no standing to enjoin a city from entering into a contract for the construction of an electric lighting system to be paid for by special assessments, unless he alleges and proves that, in some specified way, he will be adversely affected by such proposed contract, e. g., (1) that he owns property which will be specially assessed, or (2) that he is a taxpayer and must contribute to the improvement fund from which payment of a deficit must be made.

Donovan Co. v City, 211-506; 231 NW 499

Municipal property owner. A property owner who owns property adjacent to a building being erected in violation of a town ordinance, relating to constructions within the fire limits of the town, has such interest as will entitle him to an injunction against the erection and maintenance of such building.

Boehner v Williams, 213-578; 239 NW 545

Uninjured taxpayer. A public utility corporation, operating in a city under a duly granted franchise, may not, solely as a taxpayer, maintain injunction to test the legality of an ordinance granting a franchise to a competitor, on the grounds (1) that the ordinance rates for private consumers are unreasonable and (2) that the city has an option under the ordinance to take over the ownership of the plant after it has paid for itself out of its own earnings, when it appears that such possible "taking over" will be without the creation of any debt on the part of the city, and without resort to any taxation—in other words, when it appears that there is no present or threatened danger to the plaintiff, except the danger of competition.

Iowa Co. v City, 210-300; 227 NW 514

Assessed lands — correction of description. An owner of land which is assessed for the construction of a drainage improvement may maintain an action of mandamus against the board of supervisors for the correction of the insufficient description of other assessed lands within the district in such manner that such other lands can be sold under the assessment against them.

Plumer v Board, 203-643; 213 NW 257

Right to withdraw. Parties who, through a misunderstanding, have been joined as plaintiffs, necessarily have the right to withdraw from the action.

Schaal v Schaal, 203-667; 213 NW 207

Presumption. On appeal in an action involving the title to real estate, it will be assumed, in support of the judgment, that the plaintiffs were the proper parties in interest, tho the record is indefinite, when they were so treated without objection in the trial below.

Bullock v Smith, 201-247; 207 NW 241

When issue inconsequential. The plea that plaintiff in an action on a note as indorsee is not the real party in interest because the note carries a subsequent indorsement by plaintiff to another indorsee becomes of no consequence when said subsequent indorsee is in court and personally causes proof to be made that plaintiff is the real owner of the note.

First Bk. v Johnson, 202-799; 211 NW 373

Mandamus. One who, as an attorney in fact (tho not an attorney at law), is in good faith interested on behalf of his principal in a transfer of corporate stock, and who will become entitled to a compensation if he succeeds in collecting his client's claim, has such interest as will enable him to maintain mandamus to compel the corporation to permit an examination of the stock books and transfer records of the corporation.

Drennan v Ins. Co., 200-931; 205 NW 735

Mandamus—official newspapers—proprietor as proper party to compel selection. The rule

is now well established that the proprietor of a newspaper has such interest in the selection of official newspapers that he can maintain an action of mandamus in his own name to compel the selection by the county supervisors.

Bredt v Franklin County, 227-1230; 290 NW 669

Landlord and tenant. A lessor is the real party in interest to recover one-half of the rent due him because of a purchase by the tenant of an undivided half interest in the premises.

Schick v Realty Co., 200-997; 205 NW 782

Reformation of instrument. A deed cannot be reformed by one who is not a party thereto unless the mistake claimed therein affects his interest.

American Bank v Borcherding, 201-765; 208 NW 518

Bondholders (?) or trustees (?). When trustees for a bondholder have, under the terms of the bonds, the exclusive right to maintain an action for the protection of the bondholder, the latter may not maintain such action, and thereby convert himself into a trustee, on the naked allegation, in substance, that the trustees will, because of partiality, be less aggressive in prosecuting such action than the bondholder.

McPherson v Sec. Co., 206-562; 218 NW 306

Equitable owner. An equitable owner of land who effects a sale of the land through an agent, but permits the contract of sale to be made between the purchaser and the legal title-holder, in order to secure to the latter the amount due him, remains the real party in interest in an action against the agent, to compel him to account for a consideration received by him in the sale of the land, and concealed from the said equitable owner.

Hiller v Betts, 204-197; 215 NW 233

Promise for benefit of third party. A promise, made on adequate consideration, for the benefit of a third person, is enforceable by said third party.

Tracewell v Sanborn, 210-1324; 232 NW 724

Agreement for benefit of third party. Principle recognized that a third party, for whose benefit a contract is made, has a right to bring an action on the contract.

Venz v Ins. Assn., 217-662; 251 NW 27

Contest of will by judgment creditor. The creditor of an heir who holds a judgment against him which would be a lien upon any real estate which he would inherit from an ancestor has an interest which entitles him to contest the ancestor's will.

In re Duffy, 228- ; 292 NW 165

Judgment creditor of heir. Judgments held against a son and heir of the decedent and recorded where real estate owned by the decedent was located became liens upon the real estate at the time the title thereto vested in the son, and were a beneficial interest entitling the creditor to contest the probate of a will which would deprive him of that interest.

In re Duffy, 228- ; 292 NW 165

Judgment creditor of devisee-heir. When a father's will left property to a son and heir in trust so that it could not be subjected to the son's debts, a judgment creditor of the son was an interested person who had a beneficial and pecuniary interest in the estate of the deceased and in the son's share therein, of which he would be deprived to his prejudice if the will were probated.

In re Duffy, 228- ; 292 NW 165

Contract by business department of real party. An action on a contract is properly brought by the real contracting party even tho such contract was entered into by one of the business departments of said party.

Butler Co. v Elliott, 211-1068; 233 NW 669

Protection of easement—loss of right. One who bases his attempt to enjoin interference with a public or private easement in a strip of land solely on the ground of his ownership of the abutting land loses such right by an unconditional conveyance of the abutting land.

Rider v Narigon, 204-530; 215 NW 497

Right of trustee-plaintiff. When a plaintiff is a trustee with power simply to receive the amount of the recovery and deliver the same to the real party in interest, the action will be determined solely on the basis of the rights of such real party.

Ronna v Bank, 213-855; 236 NW 68

Action against third party wrongdoer—foreign statute—effect. Under the workmen's compensation act of Illinois, when an employer pays his employee compensation for an injury, said employer is thereby subrogated to the employee's right to maintain an action against a third party wrongdoer who caused the injury, provided all three said parties are operating under said act. Said Illinois act will not be given, in this state, the effect of depriving an employee who renders services in Illinois for his Iowa employer, but who was injured in this state by a wrongdoer resident of this state, of the right to maintain in his own name in this state an action for damages against said wrongdoer, even tho said employer has paid, in Illinois, said employee the compensation called for by the Illinois act, and even tho wrongdoer's general business extended into the state of Illinois.

Henriksen v Stages, Inc., 216-643; 246 NW 913; 32 NCCA 602

Execution of trust—trustees (?) or receiver (?). A court of equity may not terminate or violate a trust agreement between the issuer

I REAL PARTY IN INTEREST—continued

of bonds and trustees to the effect that the former will transfer to the latter securities for the benefit of bondholders, and that if the issuer defaults in the payment of interest on, or principal of, the bonds, the trustees, on notice from the unpaid bondholders, shall liquidate said securities and apply the proceeds to the payment of the bonds. It follows that, if the issuer of the bonds becomes insolvent, the trustees, in the absence of any counter-wish of the bondholders, have a right, superior to that of the receiver, to liquidate the securities, the securities being less than the outstanding bonds; and this is true even tho the securities in question are not actually transferred to the trustees but only delivered to them.

In re Trusteeship, 214-884; 241 NW 308

Corporate entity—unallowable disregard of. Where collaterally secured bonds, owned by a corporation, were depreciated in value by the wrongful act of the collateral-holding trustee in permitting worthless collaterals to be substituted for valuable collaterals, the resulting damages belong solely to the corporation. In other words, a stockholder may not maintain an action against the trustee for alleged special damages suffered by said stockholder consequent on the fact that said depreciation so impaired the capital of the corporation that an assessment on the corporate shares became necessary, and that the stockholder was unable to pay said assessment and thereby lost his said stock.

Grimes v Brammer, 214-405; 239 NW 550

Stock—rights of equitable owner. The legal rights of an equitable owner of corporate shares of stock (stock not duly transferred to him on the books of the corporation) are, in many respects, very limited, but, among such rights, is the right to maintain an action against the corporation to establish and protect the interest of such equitable owner in the corporate property.

Graeser v Finance Co., 218-1112; 254 NW 859

Fraudulent conveyance—action by trustee to set aside. A trustee in bankruptcy may not maintain an action to set aside a fraudulent conveyance by the bankrupt unless he pleads and proves that such setting aside is necessary in order to pay claims allowed in the bankruptcy proceedings.

Newman v Callahan, 212-1003; 237 NW 514

Duplicate actions on same subject matter—priority. When two actions involving the same subject matter are commenced by different parties (e. g., partition of land), the action in which completed service is first made on all necessary parties must be deemed first commenced even tho the other action was first formally filed with the clerk, unless said first action was commenced by an unauthorized plaintiff.

Jones et al. v Park, 220-903; 262 NW 801

Causes assigned for collection—right of assignee. Plaintiff, in an action at law against a defendant, may join in separate counts:

1. Any number of causes of action against defendant of which plaintiff is the unqualified holder, and which are triable at law in said county of suit, and

2. Any number of causes of action against defendant of which plaintiff is holder as assignee for collection only, and which are triable at law in said county of suit.

Carson et al. v Long, 222-506; 268 NW 518

Writ of prohibition—state as plaintiff. An original action in the supreme court, for a writ of prohibition directed to a district court and prohibiting further action by said latter court in private actions pending therein, may be brought in the name of the state ex rel its attorney general; especially is this true when said private actions arose out of proceedings instituted by the state through the governor thereof.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

Joinder of corporations and officers. Two corporations, each organized by the same promoters, for identically the same purpose, and officered by the same officers, may be joined with the common president, in an action based upon a single joint transaction wherein the said president in the sale of corporate stock of both corporations made false representations in the interest of and for the benefit of both corporations.

McCarthy v Dixon, 219-15; 257 NW 327

Incapacity to sue—waiver. An objection to the capacity in which plaintiff sues must be interposed by defendant before he pleads to the merits.

Keeling v Priebe, 219-155; 257 NW 199

Statutory bond. An action on a statutory bond is properly brought by the entity to which the bond runs.

Belmond Assn. v Luick, 217-805; 253 NW 521

Action in trade name. A person has the legal right to maintain an action in the duly registered trade name under which he transacts his business.

Keeling v Priebe, 219-155; 257 NW 199

Naked legal titleholder. A judgment plaintiff may maintain an action to set aside conveyances as fraudulent even tho he has transferred the equitable title to the judgment and holds only the legal title.

Grimes Bank v McHarg, 217-636; 251 NW 51

Husband of titleholder as improper plaintiff. A husband may not maintain an action to partition lands of which his wife holds the legal

title, and in which he has no interest except the contingent interest of a husband.

Jones et al. v Park, 220-903; 262 NW 801

Real estate contract foreclosed against bankrupt. A real estate contract may be foreclosed in the state court and vendor is real party in interest regardless of the buyer's discharge in bankruptcy when the bankruptcy court entirely ignored this property as an asset of the bankrupt, upon which land the vendor had a valid pre-existing lien.

Blotcky v Silberman, 225-519; 281 NW 496

Stockholders—superadded double liability—improper plaintiff. An insolvent bank may not maintain an action against its stockholders to enforce and collect the superadded double liability imposed by §9251, C., '27.

Home Bk. v Berggren, 211-697; 234 NW 573

Bidder at sale of trust property—nonaggrieved party. In the sale of the personal property assets of an insolvent bank by the liquidating receiver, a bidder who is not a creditor of the bank, or interested in any manner in the trust property except as a proposed buyer, has no such standing or interest as authorizes him to appeal from an order of the court rejecting his bid for an item of said assets, and approving a lesser bid of another party for the same item. Nor will the court, under such circumstances, order a remand when the difference between the two bids is slight. (This is not suggesting (1) that the unsuccessful bidder may not very properly call the attention of the court to the disparity in bids, or (2) that the court has unbridled discretion to reject high bids and to approve low bids.)

Dean v Bank, 221-1270; 268 NW 56

Promissory notes charged off assets. Fact that an agreement with a third person permits the charging off from bank assets of certain promissory notes objected to by the banking department will not divest the bank of title thereto nor render fraudulent a judgment obtained by the bank thereon.

Grimes Bank v McHarg, 224-644; 276 NW 781

School districts—tuition transfer. In an equitable action between school districts to prevent a statutory transfer by a county treasurer of funds in payment of tuition, a cross-petition of the defendant school district, not joined in by the county treasurer, may not be stricken therefrom, inasmuch as the county treasurer has no investment therein and is not a necessary party thereto.

Lincoln Dist. v Redfield Dist., 226-298; 283 NW 881

Action on insurance policy. Defendant corporation, Automobile Underwriters, formed to underwrite reciprocal insurance contracts of its unincorporated group of subscribers, called the State Automobile Insurance Association, is the real party in interest in an action to enforce a judgment against the insurance carrier. The association is not a legal entity and, when the Automobile Underwriters is the only legal entity of the two, an admission of an important fact by the underwriters made in a counterclaim in the action in which judgment was obtained is binding on them in the later action.

Mitchell v Automobile Underwriters, 225-906; 281 NW 832

Presumptions—ownership of claim. One need not affirmatively prove that he is the owner of a cause of action which arose in his favor out of the very transaction on which he is sued.

Williams v Burnside, 207-239; 222 NW 413

"Real party in interest"—partial loss paid. The circuit court of appeals is bound by decisions of federal court in construing a state statute, in the absence of state court's construction on similar facts, so on question of construction of statute providing for the prosecution of an action in the name of the "real party in interest" held, an insurer cannot maintain an action against a defendant causing loss for amount paid insured, after a judgment has been rendered against defendant and in favor of insured for total amount of loss less insurance received, since the right of action for the entire loss is single and cannot be split and separately maintained by the owner and the various insurers who have paid parts of the loss.

Fireman's Ins. Co. v Bremner, 25 F 2d, 75

Action by automobile owner—insurer and mortgagee not necessary parties. In an automobile owner's damage action against a street railway, wherein defendant pleads a general denial and alleges that plaintiff is not the real party in interest, and wherein interrogatories attached to defendant's answer disclose that plaintiff's loss had been partly settled through insurance, and when defendant then alleges that a bank holds a mortgage on plaintiff's automobile, and moves the court to bring in the insurer and the mortgagee-bank as parties, such motion was properly overruled.

Caligiuri v Railway, 227-466; 288 NW 702

II ASSIGNEES

Unallowable will contestant—assignee of expectancy. An assignee—even for value—of the interest which an heir expects to inherit in the property of his parent, may not contest the will of the parent in case the assignor-heir be disinherited by the last will and testament of the parent.

Burk v Morain, 223-399; 272 NW 441; 112 ALR 79

Assignment of claim of guest—effect. The driver of an automobile involved in an acci-

dent may take from his guest an assignment of the guest's cause of action and recover thereon even tho he—the driver—was guilty of contributory negligence, provided the guest was not guilty of such negligence. The driver's contributory negligence simply defeats his own individual claim for damages.

Albert v Trans. Co., 215-197; 243 NW 561

III PARTNERSHIP

Contract for benefit of third party. An oral contract between the joint purchasers of land that they would surrender their rights under the contract of purchase and reconvey to their vendor, upon certain terms, to be performed by the vendor, said contract being partially performed, is enforceable by the vendor, even tho he had no knowledge of such contract at the time it was entered into in his behalf.

Durband v Nicholson, 205-1264; 216 NW 278; 219 NW 318

IV PRINCIPAL AND AGENT

Agent for undisclosed principal or beneficiary. Principle reaffirmed that a mortgagee may enforce the mortgage in his own name, even tho the mortgage is for the benefit of a third party.

Turnis v Ballou, 201-468; 205 NW 746

Right of action against subagent. Principle reaffirmed that a principal who has expressly or impliedly authorized his agent to employ a subagent may and should bring his action directly against the subagent for the latter's negligence.

Thompson v Bank, 207-786; 223 NW 517

Undisclosed principal. An undisclosed principal has a right to maintain an action on a contract signed by the agent in his individual name.

Utilities Corp. v Chapman, 210-994; 232 NW 116

V UNINCORPORATED ASSOCIATIONS

Discussion. See 11 ILR 193—Jurisdiction over partnerships, associations, and joint debtors

Note—signing in representative capacity—liability. No recovery can be had against one who, as treasurer of an unincorporated association, assumes to execute a promissory note in the name of the association, when he is allowed to plead and prove, without objection, that when the note was executed it was agreed with the payee that no personal liability should attach to the said treasurer.

Andrew v Golf Club, 217-577; 250 NW 709

Contracts in name of association—personal liability. One who contracts for, or in the name or on behalf of, a legal nonentity, e. g., an unincorporated society or association, is personally liable on the contract unless he establishes the fact that at the time of so contracting his nonpersonal liability was agreed on.

Haldeman v Addison, 221-218; 265 NW 358

Unincorporated associations. Voluntary unincorporated associations may neither sue nor be sued.

Wilson v Coal Co., 215-855; 246 NW 753

Noncapacity to contract or sue. Strictly speaking, a voluntary unincorporated association organized for literary and social purposes has no right to contract and cannot maintain a suit in the name of such voluntary unincorporated association alone.

Lamm v Stoen, 226-622; 284 NW 465

Committee of unincorporated association. A committee of an unincorporated organization is not a legal entity and is not suable in tort.

Work v Coliseum Co., (NOR); 207 NW 679

VI ADMINISTRATORS AND HEIRS

Collection of estate—breach of contract. An executor may maintain an action for the breach of a contract between the deceased and an heir of deceased by which the latter agreed to pay, as part of the estate, a named sum to another heir.

Rodgers v Reinking, 205-1311; 217 NW 441

Personal property—right of heirs to protect. Tho the title to the personal property of a deceased does not pass directly to his heirs, they may, in the absence of any administration, maintain an action to protect or recover such property.

Powell v McBlain, 222-799; 269 NW 883

Removal of administrator—surety as applicant. A surety on the bond of an administrator has such "interest in the estate" as empowers him to make application for the removal of the administrator, even tho such surety has taken steps to terminate his future suretyship.

In re Donlon, 201-1021; 206 NW 674

Administrator. In an action by an administrator for damages consequent on the wrongful death of the deceased, the defendant may not raise the issue whether the plaintiff is the real party in interest.

Reidy v Railway, 216-415; 249 NW 347

Objections to executrix's report—real estate title issue not misjoinder—jurisdiction. Where an executrix after resigning files her reports, objections thereto asking that she account for land in another county allegedly purchased with estate money does not misjoin equitable action to impose trust on or establish title in land, but is special probate proceeding to

compel executrix to account for assets over which probate court has statutory jurisdiction coextensive with the state.

In re Rinard, 224-100; 275 NW 485

Replevin—testator's gift inter vivos to sister. In a case where decedent, an unmarried man 60 years of age, a physician and capable business man, high in public affairs, is starting on a vacation trip, his gift of all his property to his mother and sister, they being the natural objects of his bounty, cannot be said to be unreasonable or contrary to public policy when in a replevin action the validity of the gift is challenged by decedent's executor at the instance of decedent's second wife whom he married during the vacation trip and just 10 days before his death.

Wilson v Findley, 223-1281; 275 NW 47

VII SUBSTITUTION OF PROPER PARTY

Amendment. Amendments are allowable which substitute the real party in interest, even tho such amendment is filed during the actual trial.

Norton v Ferguson, 203-317; 211 NW 417

Substitution of administrator. Upon the death of a party plaintiff, his administrator is properly substituted as plaintiff.

Dimon v Wright, 206-693; 214 NW 673

Right to show ownership of claim. Upon the substitution of the actual owner of a promissory note sued on as plaintiff, in lieu of a plaintiff who has sued as indorsee for collection only, the substituted plaintiff should be permitted to show by written assignment, and irrespective of any consideration, that the note had been fully and formally retransferred to him.

Richardson v Clark, 202-1371; 212 NW 133

Belated substitution—discretion. In an action at law by a corporation to recover on a contract, the court has discretionary power during the actual trial and after the jury has been obtained and after some testimony has been introduced, to order plaintiff's assignee for the benefit of creditors to be substituted as plaintiff,—no actual prejudice to defendant being made to appear; and this is true even tho defendant was, of course, deprived of the privilege of examining the jurors relative to their relations to the said assignee.

Webster County Buick Co. v Auto. Co., 216-485; 249 NW 203

Death of party without substitution. Where no personal representative was substituted for plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence, application made during same term to vacate the dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

10968 Plaintiff as legal representative.

ANALYSIS

I TRUSTEE OF EXPRESS TRUST
II CONTRACTS FOR BENEFIT OF THIRD PARTY
III PLAINTIFF BY STATUTE

Additional annotations. See under §10967

I TRUSTEE OF EXPRESS TRUST

Derogation of common law. The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statute law of this state.

In re Van Vechten, 218-229; 251 NW 729

Jurisdiction on diverse citizenship. The jurisdiction of the federal court cannot be defeated by joinder of an unnecessary party, nor will the bringing in of an unnecessary party after commencement of suit oust its jurisdiction.

First Tr. & Sav. Bk. v Iowa-Wis. Bridge Co., 98 F 2d, 416

Estate funds—action to recover. An executor is the proper party to maintain an action against his predecessor and his bondsmen to recover the funds of the estate, even tho such funds ultimately belong to testamentary devisees.

Bookhart v Younglove, 207-800; 218 NW 533

Opinion—parties concluded. One on whose behalf an administrator seeks to maintain an action is necessarily bound by the opinion of the appellate court on appeal, and, on reversal and remand, he acquires no additional standing by simply joining with the administrator in a motion for judgment, without being substituted as plaintiff or in any manner making himself a party to the action by intervention or otherwise, and without in any manner changing the record.

Ronna v Bank, 215-806; 246 NW 798

Trustee to collect—allowable joinder. A trustee who has been authorized by the joint instrument of several individual owners of separate promissory notes, signed by the same maker, to bring such actions as he may deem fit to enforce collection of said notes, may maintain solely in his own name as such trustee an action at law on all or on any number of said notes. It follows that a motion to require the plaintiff to elect as to the particular count on which he will proceed will not lie.

Iowa Co. v Clark, 215-929; 247 NW 211

I TRUSTEE OF EXPRESS TRUST—concluded

Trustee of express trust. The trustee in a deed of trust which secures a series of bonds payable "to said trustee or to bearer", and which have been sold and delivered to numerous parties who continue to be the owners thereof, may maintain an action at law against the maker, on all the bonds, (1) when the trust deed empowers the trustee to declare the entire debt due in case of any default of the maker, and to proceed by means of any legal or equitable action to enforce collection, and imposes on the trustee the duty so to declare and proceed when the bondholders request him so to do, and (2) when all said bondholders, after default in payment of interest, individually redeliver to said trustee all of said bonds and specifically request the trustee in writing to declare the entire debt due and to proceed against the maker by legal action. Authority in plaintiff to maintain said action rests on a two-fold legal basis, viz:

1. Plaintiff is the legal bearer and holder of said bonds.

2. Plaintiff is the trustee of an express trust.

Minnesota Co. v Hannan, 215-1060; 247 NW 536

Continuance and dismissal by guardian. An order in partition proceedings brought by the guardian of an incompetent to the effect that the cause "be continued until certain conditions are complied with, which being fulfilled the cause should be dismissed", and a later order dismissing said cause on a recital that said "conditions" had been fulfilled, cannot be said to be illegal and beyond the jurisdiction of the court, even tho such "conditions" were not recited in the record, it appearing that the court had personal knowledge of them.

Salomon v Newby, 210-1023; 228 NW 661

Estoppel to question proceedings. An executor who institutes an authorized action against a corporate receiver in the county of the receiver's appointment, for relief against an alleged fraud-induced contract by the deceased, and (1) is met by a cross-petition for judgment on the said contract, and (2) has his action properly consolidated with divers other actions under duly joined issues which might have been the basis of an original action against the executor in said county of suit, may not thereupon, after dismissing his action, have all proceedings against himself and the estate dismissed on the claim that the probate court which appointed him had sole jurisdiction to render a judgment against him or against the estate.

Lex v Steel Corp., 203-792; 206 NW 586

Unauthorized action. An action by a plaintiff, as administrator of the estate of a deceased, to recover damages for the wrongful death of the deceased, when plaintiff was not such administrator, is a nullity, and, therefore, does not toll the statute of limitation on the said cause of action. And in case plaintiff is appointed administrator after the statute has fully run, an ex parte order of the probate court assuming to ratify, confirm, and adopt such former proceeding is likewise a nullity.

Pearson v Anthony, 218-697; 254 NW 10

Defect not cured by appearance. Lack of capacity to act as party plaintiff cannot be remedied by the appearance of the defendant in the action.

Pearson v Anthony, 218-697; 254 NW 10

II CONTRACTS FOR BENEFIT OF THIRD PARTY

Discussion. See 1 ILB 187—Suit by third party

Promise for benefit of third party enforceable. The promise, made on adequate consideration, for the benefit of a third person is enforceable by said third party.

Tracewell v Sanborn, 210-1324; 232 NW 724

Third-party action. Principle recognized that a third party, for whose benefit a contract is made, has a right to bring an action on the contract.

Venz v Ins. Assn., 217-662; 251 NW 27

Agent for undisclosed principal or beneficiary. Principle reaffirmed that a mortgagee may enforce the mortgage in his own name, even tho the mortgage is for the benefit of a third party.

Turnis v Ballou, 201-468; 205 NW 746

Party to contract but without interest. A party may maintain foreclosure proceedings on a mortgage in which he is named as mortgagee, tho he has no beneficial interest in the mortgage.

Brauch v Freking, 219-556; 258 NW 892

Bond—breach—allowable and unallowable action by city. A city, tho named as obligee in a bond for the construction of a street pavement, may not—assuming fraud-induced acceptance by the city of the work—maintain in its own right and for its sole benefit an action at law on the bond for damages consequent on the failure of the contractor to construct the pavement of the thickness required by contract. But the city may maintain such action in its own name as representative of the assessed property owners, and to recover for itself its own proper outlay.

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

Workmen's compensation—paying medical expense—no third-party contract for physician. In a workmen's compensation case a stipulation of settlement including "all medical expense incurred" does not make a contract for the benefit of third persons so as to permit an action to be maintained by the physician

who rendered medical services to the injured employee.

Casey v Creamery Co., 224-1094; 278 NW 214

Debt of another—original promise. An agreement by a vendor of real property with his purchaser to pay for the making of certain improvements on the property is an original promise, and not within the statute of frauds.

Madden Co. v Becker Co., 205-783; 218 NW 466

Agreement for benefit of third party. Principle recognized that the rights of a third party for whose benefit a promise is made are subject to the rights of the original parties and to any modifications which such parties may make before knowledge of the covenant is imparted to the third party.

Coen v Bank, 205-483; 218 NW 325

Enforceable by vendor. An oral contract between the joint purchasers of land that they would surrender their rights under the contract of purchase and reconvey to their vendor, upon certain terms to be performed by the vendor, said contract being partially performed, is enforceable by the vendor, even tho he had no knowledge of such contract at the time it was entered into in his behalf.

Durband v Nicholson, 205-1264; 216 NW 278; 219 NW 318

III PLAINTIFF BY STATUTE

Foreign receivership—right to maintain action in this state. A foreign receiver of a foreign insolvent banking corporation may maintain an action in this state to collect a "double" liability assessment on the stock of a stockholder who is a resident of this state when the receiver is charged by statute with the duty to make such collection and to distribute the proceeds among creditors.

Baird v Cole, 207-664; 223 NW 514

Recovery on excess corporate indebtedness—proper party plaintiff. A trustee in bankruptcy of a corporate bankrupt cannot maintain an action against the directors and officers of the corporation to enforce the statutory individual liability attaching to such directors and officers consequent on their act in knowingly consenting to a corporate indebtedness in excess of that permitted by law. Such right of action never, in any sense, belongs to the corporation, but on the contrary is a right extended to the corporate creditors, and is enforceable solely by such creditors, if necessary, irrespective of the bankruptcy proceedings.

Hicklin v Cummings, 211-687; 234 NW 530; 72 ALR 822

Trustees of unincorporated association. The trustees of a voluntary unincorporated association, and not the association itself, are proper plaintiffs in an action to quiet title to real estate of which the association is the beneficial owner.

Presbyterian Church v Johnson, 213-49; 238 NW 456

10969 Plaintiffs joined.

ANALYSIS

I PROPER JOINDER
II IMPROPER JOINDER
III PROCEDURE ON MISJOINDER

I PROPER JOINDER

State as party. Where a grave situation existed in the locality at the time, the state had the right to be made a party to proceedings involving an injunction violation by labor union officials, by filing a petition incorporating by reference the affidavits of the plaintiff's petition and the injunction upon which it was based, when the state did not seek different and distinct remedies from that asked by the plaintiff.

Carey v Dist. Court, 226-717; 285 NW 236

City and benefited property owners. There is no misjoinder of parties or causes of action where a city in its own behalf and in behalf of the parties beneficially interested brings an action against a contractor, combining therein both a claim for damages for defective pavement and a claim for the cost of "coring" to determine the thickness, since the basis for the latter claim was found in the contract. A motion to strike is properly overruled.

Sioux City v Krage, 225-1154; 281 NW 828

Action on supersedeas bond. The various obligees in a supersedeas bond given on appeal from a decree quieting title to different tracts of land in different parties are all proper and necessary parties in an action on the bond to recover rents during the period covered by the bond.

Bigelow v Ins. Co., 206-884; 221 NW 661

Inconsequential joinder. It is quite inconsequential in an action by a trustee to recover funds belonging to him as trustee, that the heirs, who are beneficiaries of the trust, are named in the caption of the petition as plaintiffs, said heirs making no claim in the body of the petition adverse to the trustee.

In re Van Vechten, 218-229; 251 NW 729

II IMPROPER JOINDER

Improper parties. A county and its treasurer are not proper parties to an action by the treasurer of state to recover on a depositary bond in which the county and its treasurer no longer have any interest.

State v Bartlett, 207-208; 222 NW 529

Party defendants—appraisers under lease. In an action to have the court appoint a third

II IMPROPER JOINDER—concluded

appraiser in accordance with the terms of a lease, the two already appointed appraisers are not proper parties to a cross-petition asking the court to construe the rental provisions of the lease concerning which the appraisers were to act.

Minot v Pelletier Co., 207-505; 223 NW 182

Motion to consolidate actions by plaintiffs. Two personal injury actions arising out of the same accident and brought against the same defendant cannot be consolidated on motion by the plaintiffs for altho equity has the power to consolidate causes of action to avoid multiplicity of suits, the right to move for a consolidation of causes of action in law is by statute granted only to the defendant, and a plaintiff has no such right.

Brooks v Paulson, 227-1359; 291 NW 144

Title—nonpermissible adjudication. When, in the settlement of an estate in probate, a contract of sale of land belonging to the estate is fully consummated by payment and deed, and the sale and conveyance duly approved by the court as by contract required, the purchaser, who is an entire stranger to the estate except as such purchaser, is not a proper, necessary or permissible party to a proceeding in said probate court, instituted by the residuary legatee, to set aside the probate order approving said sale and conveyance.

Reason: The probate court cannot, even in piecemeal, adjudicate the validity of the title of said purchaser.

In re Doherty, 222-1352; 271 NW 609

III PROCEDURE ON MISJOINDER

Misjoinder in equity of parties and causes—remedy. A misjoinder, in an equitable action, of parties and causes of action is properly met by motion to dismiss.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Unassailable by demurrer. Misjoinder of parties plaintiff is not a ground of demurrer.

Gibson v Union Co., 208-314; 223 NW 111
Brown v Correll, 227-659; 288 NW 907

Demurrer. In action on promissory notes, defendant's demurrer, filed after answer, on ground of misjoinder both of causes of action and of parties was properly overruled.

Brown v Correll, 227-659; 288 NW 907

10970 United interests in equity.

Quieting title—separate owners of separate tracts. Various parties, each of whom claims exclusive ownership in separate and different tracts of land formerly held by a railway company as right of way, may join as plaintiffs in an equitable action against said railway company to quiet title in each separate party to the particular tract owned by him.

Duggleby v Railway, 214-776; 243 NW 372

Authorized joinder in equity. Several heirs of an intestate having been adjudged the owners of the undivided lands of an intestate, and having later, by an exchange of deeds, effected particular distribution among themselves, may, in an action to quiet title to their respective tracts, join as plaintiffs against an heir who had been adjudged to have no interest in the said lands because of his insolvency and failure to pay his debt to the estate.

Bauer v Bauer, 221-782; 266 NW 531

10971 Assignments—exception.

Assignment of actions generally. See under §10957 (II)
Similar provisions. See under §§9451-9456

Foreign assignee of note—assignor and makers residents of state. In an action on a note by an assignee, resident of a different state than makers, held, improperly brought in federal court where assignee derived title through indorsers residing in same state as makers.

Sargent v Trust Co., 12 F 2d, 758

Sufficiency of pleading.

Benton v College, 202-15; 209 NW 516

Plaintiffs—transfer of title after action brought—effect. The fact that plaintiff, after commencing an action on promissory notes, transfers the title thereof does not prevent the prosecution of said action to judgment in the name of the original plaintiff.

Grimes Bank v McHarg, 213-969; 236 NW 418

Recovery dependent on pleading. In an action on a nonnegotiable promissory note, by a transferee thereof, defendant's plea that he be given a set-off in a stated sum because of an account held by defendant against the original payee, will not be construed as embracing a demand for interest on said "stated sum".

Lewis v Grain Co., 214-143; 241 NW 469

Assignment for collection. Principle reaffirmed that the holder of a claim or account may validly assign it to another solely for collection.

Carson, etc. v Long, 219-444; 257 NW 815

Allowable partial assignment. The owner of a chose in action has a legal right to assign a part of his interest in such chose, and thereafter to join with the assignee in the prosecution of the entire cause of action.

Welch v Taylor, 218-209; 254 NW 299

Unquestioned establishment — proper procedure. A duly pleaded counterclaim which is unquestionably established by the evidence should not be submitted to the jury, but should be summarily allowed by the court; and in a

personal injury action the court should direct the jury how to proceed if plaintiff's recovery be more than the amount of the counterclaim; likewise how to proceed if plaintiff's recovery be less than the amount of the counterclaim.

Forrest v Abbott, 219-664; 259 NW 238; 38 NCCA 315

Set-off or retainer against beneficiary — power of probate court. In probate proceedings wherein a beneficiary is indebted to the estate, the right of set-off or retainer is not restricted to a court of equity, but rests upon wholesome principles of right and justice which can be administered in probate courts without the aid of a court of conscience.

In re Sheeler, 226-650; 284 NW 799

Heir's assignment of interest subject to estate claims—rights of assignee. In a probate proceeding where one of the heirs, who is indebted to the estate, purchases a farm from the executor and assigns her one-tenth interest in the estate as security for a purchase note to the executor, who in turn assigns the note to a third party, held that such assignment of interest is taken subject to the estate claims, and whatever interest remains should be paid to the holder of the note irrespective of the fact the executor is also indebted to the estate on his final account.

In re Sheeler, 226-650; 284 NW 799

Insolvent bank—set-offs unallowable. A debtor of an insolvent bank may not, after the appointment of a receiver for the bank, buy up claims against the bank and offset such purchased claims against the amount he is owing the bank. Statutory right of set-off is not applicable.

Parker v Schultz, 219-100; 257 NW 570

Defense available against transferee. The maker of a nonnegotiable promissory note who, subsequent to the execution of the note, and before he had knowledge of the transfer of the note, has on deposit with the payee (a private banker), subject to check, an amount equal to the entire amount due on the note, may plead said claim against a transferee of the note when it is made to appear that the said maker, under an arrangement with the banker to apply the deposit on the note, never withdrew any part of said deposit.

Benton v College, 202-15; 209 NW 516

Assignment of policy—estoppel. The beneficiary of a legal reserve life insurance policy who, without fraud, joins with the insured in an assignment of all right, title, and interest in the policy in order to collaterally secure a debt due from each of said assignors, is estopped, after the death of the insured, from asserting any interest in the policy except as the same may exceed the said secured indebtedness, it appearing that the policy reserved to the insured both the right to assign the policy and to change the beneficiary.

Andrew v Life Co., 214-573; 240 NW 215

Heir's interest assigned to executor—chargeable to executor when reassigned. In a probate proceeding where a beneficiary assigns her interest in estate to executor to the extent necessary to satisfy beneficiary's note held by the executor, and the executor reassigns said interest to a third party, the executor is chargeable with value of such interest after deducting beneficiary's indebtedness to the estate.

In re Sheeler, 226-650; 284 NW 799

10972 Defendants.

ANALYSIS

I PERMISSIBLE DEFENDANTS

Receiver of national bank—liability in state court. The receiver of an insolvent national bank is not immune from suit in the state court to recover property to which neither the bank nor the receiver ever acquired any title.

Poweshiek County v Bank, 209-467; 228 NW 32; 82 ALR 39

Venue in quo warranto. The district court of one county of a judicial district, in duly authorized quo warranto proceedings in said county involving the rival claims of two parties to the office of district judge, may acquire jurisdiction of both parties even tho one of them is a nonresident of the county of suit and is sole defendant in the county of his residence in a proceeding in quo warranto involving the same office.

State v Murray, 219-108; 257 NW 553

Drainage district not legal entity. Principle reaffirmed that a drainage district is not a legal entity, and, consequently, cannot be sued.

Houghton v Bonnicksen, 212-902; 237 NW 313

Refusal of change of venue. Error in refusing to transfer an action to the county of defendant's residence becomes inconsequential when, in the further making up of the issues, either by additional pleadings in the case itself or by intervention therein or by proper consolidation of the action with other actions, the nature of the final action as tried becomes such that it might have been brought originally against all the defendants in the county in which the original action or actions were brought.

Lex v Selway Corp., 203-792; 206 NW 586

I PERMISSIBLE DEFENDANTS—concluded

Foreclosure of mortgages. In an action to foreclose a mortgage, it is allowable to join as defendants (1) the maker of the promissory note, (2) the payee-indorser in blank, and (3) all assumptors of the mortgage.

Hansen v Bowers, 208-545; 223 NW 891

Joinder of corporations and officers. Two corporations, each organized by the same promoters, for identically the same purpose, and officered by the same officers, may be joined with the common president, in an action based upon a single joint transaction wherein the said president in the sale of corporate stock of both corporations made false representations in the interest of and for the benefit of both corporations.

McCarthy v Dixon, 219-15; 257 NW 327

Bringing in parties. In an action by a testamentary legatee against an executor to recover an unpaid legacy, the executor, who has already distributed the estate and wishes to bring a third party into the action for recoupment purposes, must, at least, allege that said third party has received some portion of the estate in question.

Irwin v Bank & Trust, 218-961; 256 NW 681

Defendant by implication. A third party who is not a party defendant in an action legally submits himself to the jurisdiction of the court by directing the actual defendant to appear for and on behalf of said third party and to protect his interest.

Davis v Agr. Soc., 208-957; 226 NW 90

Bad-faith defense by vouchee. One who is vouched by a defendant into an action and assumes exclusive charge of the defense, and in the trial pursues a course distinctly hostile to the defendant and distinctly favorable to himself, may thereby make himself, in legal effect, a co-defendant, and be conclusively bound by the judgment against the defendant. So held where the vouchee, knowing that he was vouched into the action by the defendant on the theory that the negligence charged was primary as to the vouchee and secondary as to the defendant, actively attempted to establish that he (the vouchee) was not negligent and that the defendant was negligent.

Hoskins v Hotel, 203-1152; 211 NW 423; 65 ALR 1125

Evidence available against vouchee. In an action for breach of warranty because of an existing mortgage on the property, the foreclosure proceedings and judgment entry therein are admissible against the covenantor-defendant to prove the plaintiff's measure of damages, it appearing that the covenantor had been duly vouched into said foreclosure proceedings.

Kellar v Lindley, 203-57; 212 NW 360

Tort-feasors committing unintentional injury. Two or more tort-feasors are suable jointly as for a joint tort when their concurring negligence is the proximate cause of a wholly unintentional injury which is indivisible in its nature.

McDonald v Robinson, 207-1293; 224 NW 820; 62 ALR 1419; 34 NCCA 306

Party defendant—witness fee. A party defendant is not entitled to witness fees tho he has entered no appearance in the action, but has been subpoenaed.

Vacuum Oil Co. v Carstens, 211-1129; 231 NW 380

II PROPER OR NECESSARY DEFENDANTS

Expiration of official term. An appeal in an action in which the county is the real party in interest will not be dismissed because the terms of office of the official party defendants have expired.

First N. Bank v Burke, 201-994; 196 NW 287

Contending school districts. In an action to determine which of two school districts embraces certain land, both districts are absolutely necessary parties.

Whitmer v Board, 210-239; 230 NW 413

Unallowable motion to strike. In an action against several defendants for damages consequent on a negligent act, that defendant who is, in effect, alleged to have occupied the position of respondeat superior cannot have his name stricken from the petition.

Elder v Maudlin, 213-758; 239 NW 577

Cross-petition defense — state as proper party—belated objections. In an action to dissolve a mining corporation, question whether state, not being stockholder or creditor of the mining corporation, was proper party to make defense to a cross-petition, such question not having been raised in the trial court, may not be raised for the first time and reviewed on appeal.

State v Fuel Co., 224-466; 276 NW 41

Certiorari to review discharge of state employee. The custodian of public buildings and grounds (at Des Moines) is the sole, proper defendant in an action of certiorari to review the legality, under the soldiers preference law, of the discharge of an employee of said department.

Pittington v Herring, 220-1375; 264 NW 712

Parties acting jointly and in cooperation. Several persons engaged jointly and in cooperation in the unlawful furnishing, prescribing and administering of medicine without a license may be properly joined in one action for injunction.

State v Baker, 212-571; 235 NW 313

Fence viewing proceedings. On certiorari to review the action of fence viewers, the

party who initiated the proceedings is not a necessary party.

Sinnott v Dist. Court, 201-292; 207 NW 129

Bail bond—necessary parties. A bail bond will not be reformed when the defendant on whose behalf the bond was given, and who signed it, is not before the court.

State v Kronstadt, 204-1151; 216 NW 707

Vendor's lien—absence of necessary parties. A vendor's lien may not be established against land after it has been transferred by the purchaser and the new owners are not made party defendants.

In re Thomas, 203-174; 210 NW 747

Undisclosed principal liable. An undisclosed principal is liable on a contract which he has permitted to be entered into in his behalf and under which he has received resulting benefits.

Utilities Corp. v Chapman, 210-994; 232 NW 116

Replevin. A party from whom both plaintiff and defendant in replevin trace their title is a proper party defendant.

Hart v Wood, 202-58; 209 NW 430

Dissolution of corporation. All stockholders of a corporation are proper parties to an action by the state to dissolve the corporation.

Lex v Selway Corp., 203-792; 206 NW 586

Action by stockholder for contribution. All stockholders of a corporation are proper parties to an action by one stockholder who has fully paid for his stock, for contribution from the other stockholders who have not fully paid for their stock, in order to equalize the losses between stockholders.

Lex v Selway Corp., 203-792; 206 NW 586

Nominal parties—who are not. Pleadings reviewed in an action against a corporation and its officers for an accounting, and held, the corporation could not, under an application for an order for the production of papers and documents, be deemed a merely nominal defendant.

Independent Order v Scott, 223-105; 272 NW 68

Action against joint trustees. Two or more persons acting jointly in a fiduciary capacity in relation to the same property for the same beneficiary are properly made joint defendants in an action to enforce the trust.

Burger v Krall, 211-1160; 235 NW 318

Tort-feasors committing unintentional injury. Two or more tort-feasors are suable jointly as for a joint tort when their concurring negligence is the proximate cause of a wholly unintentional injury which is indivisible in its nature.

McDonald v Robinson, 207-1293; 224 NW 820; 62 ALR 1419

Action on note—failure to join surety. In an action on a promissory note, the surety is a proper, but not necessary, party defendant.

Clapp v Wallace, 221-672; 266 NW 493

Unincorporated association—individual liability of members—agency. An individual who contracts in the name of a voluntary unincorporated association is personally liable thereon in the absence of an agreement with the other party releasing him from personal liability, and such other members of said association who authorize, consent to, or ratify such undertaking are also personally liable in the absence of an agreement exempting them, the personal liability being based upon principles of agency.

Lamm v Stoen, 226-622; 284 NW 465

Inheritance taker as "representative" of contingent remainderman. A decree setting aside the probate of a will and canceling said will (the action being instituted in good faith and so tried by all parties thereto) is, on the principle or doctrine of representation, conclusive on remote, contingent remaindermen, even tho they are not parties to the action or are not served with notice of the action, when those persons are legally before the court who would take the first estate of inheritance under the will; and especially is this true when parties of the same class to which the omitted parties belong are also legally before the court.

Harris v Randolph, 213-772; 236 NW 51

See Mennig v Graves, 211-758; 234 NW 189

III UNNECESSARY DEFENDANTS

Action to vacate municipal plat. In an action for the vacation of a county auditor's plat of land within a city or town, the county auditor is not a necessary party.

Schemmel v Town, 214-321; 242 NW 89

Denial of right to implead. In an action on the bond of an administrator, the surety should be granted the right to implead the surety on another bond given by the administrator; but a refusal is nonprejudicial when the rights of the respective sureties, as between themselves, are in no manner adjudicated.

Bookhart v Younglove, 207-800; 218 NW 533

Rent—subtenant as party. A landlord need not, in an action to enforce his lien, make a subtenant a party defendant, even tho a lien is claimed on crops grown by the subtenant.

Hanson v Carl, 201-521; 207 NW 579

Dismissal as to one of defendants when other defendants not affected. In an action for injuries sustained in an automobile accident, a dismissal as to one of the defendants could not be complained of by other defendants who were not prejudicially affected by the dismissal.

Womochil v Peters, 226-924; 285 NW 151

IV IMPROPER DEFENDANTS

Unallowable cross-petition. In an action of quo warranto against a particular claimant to the office, brought, under authorization of the court, in the name of the state on the relation of a private party, the defendant will not be permitted to cross-petition against a third party claimant to the same office, and thereunder bring said third party into the proceeding for an adjudication of his right to the office.

State v Murray, 217-1091; 252 NW 556

Action on bond—prior sureties. Defendant in an action on a guardian's bond has no right to demand that a surety on a prior bond of the guardian be made a party defendant on the theory that the defendant has a right to demand contribution from such prior surety.

Brooke v Bank, 207-668; 223 NW 500

Joining contract and tort actions. A joint action cannot be maintained (1) against a contractor on his contract liability to answer for possible torts committed during the progress of work, and (2) against those who are alleged to have subsequently committed a tort during the progress of said work, when the contractor and the alleged tort-feasors are residents of different counties.

Elder v Maudlin, 213-758; 239 NW 577

Party defendants—appraisers under lease. In an action to have the court appoint a third appraiser in accordance with the terms of a lease, the two already appointed appraisers are not proper parties to a cross-petition asking the court to construe the rental provisions of the lease concerning which the appraisers were to act.

Minot v Pelletier Co., 207-505; 223 NW 182

Substitution—irregular practice. A plaintiff who permits his action to quiet title to lie dormant until the defendants are all dead is guilty of very irregular practice in his attempt to obtain a substitution of defendants by filing a purported amendment, not under the title of his pending action, but under a new title, in which the heirs of the deceased defendants are for the first time enumerated and named as the defendants, and, under such title, moving for a substitution of defendants in the old action.

Benjamin v Jackson, 207-581; 223 NW 383

V EFFECT OF DEFECT IN PARTIES

Belated objection. A claim of defect of party defendants cannot be presented for the first time on appeal.

Page & Crane v City, 208-735; 225 NW 841

Title — nonpermissible adjudication. When, in the settlement of an estate in probate, a contract of sale of land belonging to the estate is fully consummated by payment and deed, and the sale and conveyance duly approved by the court as by contract required, the purchaser, who is an entire stranger to the estate except as such purchaser, is not a proper, necessary, or permissible party to a proceeding in said probate court, instituted by the residuary legatee, to set aside the probate order approving said sale and conveyance.

Reason: The probate court cannot, even in piecemeal, adjudicate the validity of the title of said purchaser.

In re Doherty, 222-1352; 271 NW 609

Death of party without substitution. Where no personal representative was substituted for plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence, application made during same term to vacate the dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

VI MISJOINDER—PROCEDURE

Motion to strike. When a defendant is sued in a county other than the county of his residence, and is not suable in said county of suit because of misjoinder of causes of action and of parties, he may, by motion to strike, trim the petition of every defendant except himself and of every cause of action except the one pleaded against himself.

Producers Assn. v Livingston, 216-1257; 250 NW 602

Separate and distinct conversions. A misjoinder of causes of action and of parties occurs when a petition for damages, consequent on successive sales of mortgaged chattels, reveals that two separate and distinct sales were made with actual or constructive notice of the recorded mortgage—one by part of the defendants, and one by the remaining defendants—without any allegation of conspiracy, unity of design, or concert of action on the part of all of said defendants, and without any allegation that the concurrent acts of all the defendants proximately contributed to the conversion.

Producers Assn. v Livingston, 216-1257; 250 NW 602

Curing misjoinder. Any claim of misjoinder of causes of action as to defendants and of misjoinder of parties defendant because plaintiff joined an action at law on bonds against one defendant with an action in equity to set aside an alleged fraudulent conveyance against the other defendant, is effectually effaced by an order of court dismissing the action as to the equitably charged defendant.

Minnesota Co. v Hannan, 215-1060; 247 NW 536

Improper joinder in probate. One who files a claim for a simple money demand against the estate of a deceased may not join in the probate proceedings actions against other parties for the same claim for which the estate is alleged to be liable.

Ontjes v McNider, 218-1356; 256 NW 277

Misjoinder of parties — appealable order. The action of the court in overruling a motion to set aside an ex parte order making movant a party to a pending action is appealable, the motion being based on the ground of misjoinder of parties.

Irwin v Bank & Trust, 218-961; 256 NW 681

Decisions reviewable—orders to strike and dismiss. An order overruling a motion to strike a pleading and to dismiss parties because of the improper joinder of actions and of party defendants is appealable.

Ontjes v McNider, 218-1356; 256 NW 277

Ruling on motion as adjudication. Whether a ruling sustaining a motion to strike a pleading on the ground that it improperly joins causes of action and party defendants constitutes (in the absence of an appeal) a final adjudication in the further progress of the cause, quaere.

Ontjes v McNider, 218-1356; 256 NW 277

Misjoinder of corporate parties. On appeal from an order overruling a motion to strike on ground that there was misjoinder of a principal corporation and its subsidiary, where question to be determined was whether the corporate entity of the subsidiary could be disregarded because it was so organized, controlled, and conducted as to make it a mere instrumentality of the principal corporation, such question being one of fact determinable only after a hearing of the evidence, the supreme court would not decide the matter on basis of the pleadings.

Wade v Broadcasting Co., 227-427; 288 NW 441

VII NONJOINDER—PROCEDURE

Venue—domicile and residence of parties—venue in quo warranto. The district court of one county of a judicial district, in duly authorized quo warranto proceedings in said county involving the rival claims of two parties to the office of district judge, may acquire jurisdiction of both parties even tho one of them is a nonresident of the county of suit and is sole defendant in the county of his residence in a proceeding in quo warranto involving the same office.

State v Murray, 219-108; 257 NW 553

Appeal and error—harmless error—denial of right to implead. In an action on the bond of an administrator, the surety should be granted the right to implead the surety on another bond given by the administrator; but a refusal is nonprejudicial when the rights of the respective sureties as between themselves are in no manner adjudicated.

Bookhart v Younglove, 207-800; 218 NW 533

Defendant by implication. A third party who is not a party defendant in an action legally submits himself to the jurisdiction of the court by directing the actual defendant to appear for and on behalf of said third party and to protect his interest.

Davis v Agri. Soc., 208-957; 226 NW 90

10973 United interest.

Joint payees. The presumption that joint payees of a promissory note, and of a mortgage securing the same, are equal, must yield to evidence establishing the actual interest of each. So held in the settlement of an estate.

In re Morrison, 220-42; 261 NW 436

Money advanced on joint representations—suing jointly. Where money is invested with several persons representing themselves to be jointly interested in a hemp-production scheme, such joint promoters may be sued jointly, notwithstanding one of them asserts that he was not in fact so interested, because he is estopped from denying his interest.

Smith v Secor, 225-650; 281 NW 178

Action by owner—insurer and mortgagee not necessary parties. In an automobile owner's damage action against a street railway, wherein defendant pleads a general denial and alleges that plaintiff is not the real party in interest, and wherein interrogatories attached to defendant's answer disclose that plaintiff's loss had been partly settled through insurance, and when defendant then alleges that a bank holds a mortgage on plaintiff's automobile, and moves the court to bring in the insurer and the mortgagee-bank as parties, such motion was properly overruled.

Caligiuri v Railway, 227-466; 288 NW 702

10974 One suing for all.

Right of taxpayer to question municipal action. A plaintiff has no standing to enjoin a city from entering into a contract for the construction of an electric lighting system, to be paid for by special assessments, unless he alleges and proves that, in some specified way, he will be adversely affected by such proposed contract: e. g. (1) that he owns property which will be specially assessed; or (2) that he is a taxpayer, and must contribute to the im-

provement fund from which payment of a deficit must be made.

Donovan Co. v Waterloo, 211-506; 231 NW 499

Right of taxpayer. The statutory discretion of the board of supervisors to enter into an agreement with legally reorganized and approved banks, with reference to the county's deposits in said banks, cannot be questioned by a taxpayer except on proof of fraud or arbitrary abuse of said discretion.

Pugh v Polk County, 220-794; 263 NW 315

Bondholders (?) or trustees (?). When trustees for a bondholder have, under the terms of the bonds, the exclusive right to maintain an action for the protection of the bondholder, the latter may not maintain such action, and thereby convert himself into a trustee, on the naked allegation, in substance, that the trustees will, because of partiality, be less aggressive in prosecuting such action than the bondholder.

McPherson v Sec. Co., 206-562; 218 NW 306

One suing for all — ratification — effect. A member of a fraternal order may not maintain an action against a former officer of the order to recover, on behalf of the order, money belonging to the order and expended by said officer for unauthorized purposes, when the governing body of the order has formally and explicitly ratified such expenditures.

Outing v Plum, 212-1169; 235 NW 559

When demand on corporation unnecessary. Demand on an incorporated fraternal order to institute an action against a former officer of the order to recover money belonging to the order and unlawfully expended by such officer, is not a condition precedent to the commencement of such action by a member of the order, when the record reveals the fact that such demand if made would have been met by a peremptory refusal.

Outing v Plum, 212-1169; 235 NW 559

10975 Joint and several obligations.

Suretyship generally. See under §11577

Joint liability—right to sue either or both. If two parties be liable for a conversion, plaintiff may sue either or both.

School District v Sass, 220-1; 261 NW 30

Joint wrongdoers—attorney fees for defending. When joint wrongdoers jointly and severally employ attorneys to defend themselves, in an action for damages consequent on the joint tort, the one who pays the attorney fees may enforce contribution from all the other co-defendants.

Licht v Klipp, 213-1071; 240 NW 722; 1 NCCA(NS) 419

Concerted action without conspiracy. Joint liability may exist without allegation or proof of conspiracy. So held where there was allegation and proof of concerted action by several persons with common intent and purpose.

Baumchen v Donahoe, 215-512; 242 NW 533

Parties not in privity. An agent who procures contracts for his principal may not hold a subsequently formed corporation liable for his commission, even tho the agent's contract was with a person who subsequently became an officer of the corporation, and even tho the subsequently formed corporation carried out the contracts so obtained.

Heinen v Monument Co., 206-198; 220 NW 62

Notice—coparties. In an action by a municipality against the receiver of an insolvent bank and its surety to obtain a preference in the payment of the municipal deposit, an appeal from the decree granting the prayer on the plea of both plaintiff and the surety will be dismissed when no notice of appeal is had upon the surety.

Independent Dist. v Bank, 204-1; 213 NW 397

Joint contract. A contract wherein two parties, for one and the same consideration, agree to pay to another party a named sum in stated proportions, is a joint contract.

Lockie v Baker, 206-21; 218 NW 483

Joint and several (?) or several only (?). Whether a contract is joint or several must be determined by the terms thereof viewed in the light of the attending circumstances, and the practical, mutual construction, if any, placed thereon by the parties.

Shively v Mfg. Co., 205-1233; 219 NW 266
Licht v Klipp, 213-1071; 240 NW 722

Joint note-makers. A joint action against two alleged joint signers of a promissory note presents no suggestion of a misjoinder of parties.

Greenland v Carter, 219-369; 258 NW 678

Joint purchase—liability. Parties who enter into a joint mutual agreement to purchase land, and induce the vendor to accept the note and mortgage of one of them, with the assurance that the financial responsibility of all is behind the deal, all become personally liable for the indebtedness, and especially so when such has been the interpretation of the transaction by all the parties.

Bond v O'Donnell, 205-902; 218 NW 898; 63 ALR 901

Party defendants — foreclosure of mortgages. In an action to foreclose a mortgage, it is allowable to join as defendants (1) the maker of the promissory note, (2) the payee-indorser in blank, and (3) all assumptors of the mortgage.

Hansen v Bowers, 208-545; 223 NW 891

Action on note — failure to join surety — effect. In an action on a promissory note, the surety is a proper, but not necessary, party defendant.

Clapp v Wallace, 221-672; 266 NW 493

Liability of surety—joint benefit obligation —proportionate liabilities. As between themselves on a joint obligation, each person is a principal as to his own share of the debt or acts and a surety as to the shares or acts of the others.

Clindinin v Graham, 224-142; 275 NW 475

Money advanced on joint representations— suing jointly. Where money is invested with several persons representing themselves to be jointly interested in a hemp-production scheme, such joint promoters may be sued jointly, notwithstanding one of them asserts that he was not in fact so interested, because he is estopped from denying his interest.

Smith v Secor, 225-650; 281 NW 178

Action on bond—prior sureties. Defendant in an action on a guardian's bond has no right to demand that a surety on a prior bond given by the guardian be made a party defendant on the theory that the defendant has a right to demand contribution from such prior surety.

Brooke v Bank, 207-668; 223 NW 500

Motor carriers — action on bond. A party injured in person and property by the operation of a motor vehicle carrier may bring his action directly against the carrier and the statutory surety on the bond filed with the board of railroad commissioners, even tho no service is had on the carrier, and even tho the bond provides, in effect, for an action against the surety in event the injured party first obtains a judgment against the carrier and fails to collect thereon.

Curtis v Michaelson, 206-111; 219 NW 49; 1 NCCA(NS) 336

Loss on fidelity bond—recovery by surety. In action against a person covered by a fidelity bond, to indemnify plaintiff, as surety, for a loss sustained because it executed the bond, a direct evidentiary conflict precludes a directed verdict for plaintiff.

Fidelity Deposit Co. v Ryan, 225-1260; 282 NW 721

Automobile indemnity policy — right of injured party. When the owner or operator of a motor vehicle has insured his liability for damages consequent on the operation of his vehicle, an injured party may not sue directly on the policy which indemnifies the wrongdoer —the insured—until he has obtained a judgment against the wrongdoer—the insured—and until an execution on the judgment has been returned unsatisfied (§8940, C., '31). There is one exception to this statutory rule, to wit: When the policy is one obtained by a motor vehicle carrier as a mandatory statutory condition precedent to obtaining a certificate to operate as such carrier, an injured party may maintain an action on the policy when service of notice of suit cannot be had on the carrier within this state (§5105-a26, C., '31 [§5100.26, C., '39]).

Ellis v Bruce, 215-308; 245 NW 320

Rights and remedies of surety—agreement to indemnify. A written agreement in an application for a surety bond by two duly appointed referees in partition to the effect and in the language of "we hereby agree" to indemnify said surety for any damage suffered by him because of said bond, is jointly and severally binding on both principals even tho one of them received no part of the funds covered by the bond and was guilty of no personal failure to account.

Indemnity Ins. v Opdycke, 223-502; 273 NW 373

Conformity to process and pleading—absence of any issue. The court may not decree who is principal in a transaction and who is surety, and render a personal judgment in favor of the surety and against the principal for sums paid by the surety, when the original notice and petition are silent as to such matters, and when there is no other pleading which prays such relief.

Sutton v Rhodes, 205-227; 217 NW 626

Contractual prerequisites—burden of proof. In an action against a husband and wife on a promissory note signed only by the husband, and involving the wife on a theory that both were engaged in a joint adventure for which the money was used, liability of the wife may be predicated only upon a joint adventure contract, either express or implied, and plaintiff has the burden to prove the existence of such contract.

Valley Bank v Staves, 224-1197; 278 NW 346

Joinder of "separable controversy". The liability of several insurance companies which were members of an association which insured plaintiff's property against loss by fire presented a "separable controversy", and when plaintiff under the statute joined the several defendants in a single action, it did not create a joint liability so as to preclude a nonresident defendant from removing cause from state to federal court.

D. M. Elev. Co. v Grain Assn., 63 F 2d, 103

Relief notwithstanding partial failure of recovery. A subcontractor on a public improvement who, in an equitable action, establishes a contract right of recovery against the principal contractor is entitled to judgment accordingly, notwithstanding the fact that, because of his noncompliance with the statute, he is denied recovery, either against the surety for the principal contractor, or against the

municipality, or against the undistributed funds in the hands of the municipality.

Zeidler Co. v Ryan, 205-37; 215 NW 801

Cross-examination — whole of writing — admissibility. A surety who denies in toto the execution, delivery, and consideration of the promissory note in question, but sees fit to cross-examine his co-defendant principal with reference to a letter written by the principal to the payee with reference to said denied matter, may not complain of the reception in evidence of said letter as a part of his own cross-examination.

Granner v Byam, 218-535; 255 NW 653

Remedies of creditors — pleading — prima facie sufficiency. A prima facie cause of action against guarantors is presented by a pleading based on an instrument which purports to reveal a principal debtor and a guaranty of the promise of such debtor and an allegation that the debtor has defaulted.

Foundation Press v Bechler, 211-1217; 233 NW 666

10976 Adjudication.

See under §11567

10979 Service.

Director general of railroads. Service of an original notice on a delivering carrier did not, under the war emergency act, bring the director general of railroads into court as a representative of the initial carrier.

Dye Co. v Davis, 202-1008; 209 NW 744

10980 Liability of joint carriers.

Damage to privately owned car—liability. An action by a shipper to recover of an initial carrier damages to the shipper's own car which had been delivered to the said carrier, fully loaded, for transportation to a connecting carrier, and injured by the connecting carrier while returning the car to the initial carrier, cannot be maintained in the absence of some showing as to the contract or arrangement governing the return of the car.

Bott Bros. Co. v Railway, 215-16; 244 NW 679

10981 Necessary parties.

Discussion. See 21 ILR 644—Interpleader—scope of relief

Unallowable cross-petition. In an action of quo warranto against a particular claimant to the office, brought, under authorization of the court, in the name of the state on the relation of a private party, the defendant will not be permitted to cross-petition against a third party claimant to the same office, and thereunder bring said third party into the proceeding for an adjudication of his right to the office.

State v Murray, 217-1091; 252 NW 556

Necessary parties — school district. In an action to determine which of two school districts embraces certain land, both districts are absolutely necessary parties.

Whitmer v Board, 210-239; 230 NW 413

Foreign guardianship — personal judgment unallowable. A nonresident minor may, in a proper case, be made a party to litigation in this state, by service in this state on the foreign guardian, but such service will not confer jurisdiction on the court to enter a personal judgment against the minor.

Irwin v Bank & Trust, 218-474; 255 NW 670

Absence of necessary parties. The court will not construe a testamentary trust or a deed in the absence of necessary parties.

Windsor v Barnett, 201-1226; 207 NW 362
Fay v Smiley, 201-1290; 207 NW 369

Certiorari. On certiorari to review the action of fence viewers, the party who initiated the proceedings is not a necessary party.

Sinnott v Dist. Court, 201-292; 207 NW 129

Bail bond—necessary parties. A bail bond will not be reformed when the defendant on whose behalf the bond was given, and who signed it, is not before the court.

State v Kronstadt, 204-1151; 216 NW 707

Harmless error—denial of right to implead. In an action on the bond of an administrator, the surety should be granted the right to implead the surety on another bond given by the administrator; but a refusal is nonprejudicial when the rights of the respective sureties as between themselves are in no manner adjudicated.

Bookhart v Younglove, 207-800; 218 NW 533

Supersedeas bond—action—parties plaintiff. The various obligees in a supersedeas bond given on appeal from a decree quieting title to different tracts of land in different parties are all proper and necessary parties in an action on the bond to recover rents during the period covered by the bond.

Bigelow v Ins. Co., 206-884; 221 NW 661

Order of court — noncompliance — effect. The fact that an order of court that certain parties be made parties to an action was not fully complied with is of no consequence when it appears that said order was superfluous.

Harris v Randolph, 213-772; 236 NW 51

Interpleader as remedy. The pre-code equitable action of "interpleader" is available to an insurer who is faced by different, mutually hostile claimants to the amount due under the policy, which amount the insurer admits less deduction provided by the policy. And said insurer will be entitled to an injunction restraining the institution or further prosecution

against him of separate actions on the policy by said warring parties.

Equitable v Johnston, 222-687; 269 NW 767; 108 ALR 257

Recovery of unpaid legacy—bringing in parties. In an action by a testamentary legatee against an executor to recover an unpaid legacy, the executor, who has already distributed the estate and wishes to bring a third party into the action for recoupment purposes, must, at least, allege that said third party has received some portion of the estate in question.

Irwin v Bank & Trust, 218-961; 256 NW 681

Title — nonpermissible adjudication. When, in the settlement of an estate in probate, a contract of sale of land belonging to the estate is fully consummated by payment and deed, and the sale and conveyance duly approved by the court as by contract required, the purchaser, who is an entire stranger to the estate except as such purchaser, is not a proper, necessary or permissible party to a proceeding in said probate court, instituted by the residuary legatee, to set aside the probate order approving said sale and conveyance.

Reason: The probate court cannot, even in piecemeal, adjudicate the validity of the title of said purchaser.

In re Doherty, 222-1352; 271 NW 609

Eminent domain—bringing in necessary parties. In eminent domain proceedings on appeal from the award of the sheriff's jury, the court may permit the appellant landowner to amend, and bring in, and join equitable issue of ownership as to a portion of the property involved, with a stranger to the proceedings, and to try out such issue prior to trying out the issue of damages.

McCall v Hy. Com., 217-1054; 252 NW 546

Defect of parties in re objections to guardian's report. A guardian, after purchasing a residence property for his ward at a price authorized by the court, paid the vendor a trifling part of the contract price and obtained a deed from the vendor to the ward who thereafter for years remained in undisturbed possession of the property. The guardian in a later report credited himself with the full amount of the contract price. Later, the deception being discovered, the ward filed objections to the report. The guardian dying, his administrator appeared in re said objections.

Held, the court was in error in establishing a claim in favor of the ward and against the guardian's estate in the amount of the credit improperly taken by the guardian, on condition that the ward reconvey the property to the unpaid vendor,—that the court was per se without jurisdiction to adjudicate said controversy in the absence of said unpaid vendor as a party to said proceedings.

In re Bennett, 221-518; 266 NW 6

Notice of appeal—mortgagor as adverse and necessary party. A titleholder who did not assume a prior mortgage on the property and who appeals from an order in foreclosure appointing a receiver must serve notice of appeal on the mortgagor, as an adverse and necessary party, inasmuch as a personal judgment was rendered against mortgagor in the foreclosure.

Hoffman v Bauhard, 226-133; 284 NW 131

Notice of appeal—administrator failing to serve all objectors—dismissal. Notice of appeal from a judgment sustaining objections to an administrator's final report must be served on all heirs objecting to the report, and a failure will result in a dismissal of the appeal.

Kelley's Est. v Kelley, 226-156; 284 NW 133

Necessary parties—tax sales injunction. An injunction restraining tax sales of all property against which special assessment certificate holders had liens was erroneous insofar as it deprived certificate holders, who were not parties to the action and over whom the court had no jurisdiction, of their right to have the property sold to pay the special assessments.

Bennett v Greenwalt, 226-1113; 286 NW 722

Impressing unpaid warrant on excess assessment—necessary parties. Where two counties, by contract between both boards of supervisors and the contractors, issued warrants for construction of an intercounty drain and one county had a balance remaining from its assessments after paying all its drainage warrants but the other county after exhausting all funds from its assessments still owed outstanding unpaid warrants, an action in equity by an assignee of one of the unpaid warrants of the latter county to impress a trust for the amount of his warrant on the excess balance of the assessment in the former county, cannot be maintained against the former county alone because the other unpaid warrant holders and the landowners who paid the excess assessment are necessary parties.

Straub v Board, 223-1099; 274 NW 84

Insurer and mortgagee not necessary parties. In an automobile owner's damage action against a street railway, wherein defendant pleads a general denial and alleges that plaintiff is not the real party in interest, and wherein interrogatories attached to defendant's answer disclose that plaintiff's loss had been partly settled through insurance, and when defendant then alleges that a bank holds a mortgage on plaintiff's automobile, and moves the court to bring in the insurer and the mortgagee-bank as parties, such motion was properly overruled.

Caligiuri v Railway, 227-466; 288 NW 702

Death of party without substitution. Where no personal representative was substituted for

plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence, application made during same term to vacate the dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

10982 Public bond.

Execution and delivery in foreign state. A statutory bond which is executed and delivered in a foreign state for the performance of a contract in this state will be construed in accordance with the laws of this state when such was the intention of the parties, as shown (1) by the nature of the transaction, (2) by the subject matter, and (3) by the attending circumstances.

Philip Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495

Construction—law governing. A statutory bond executed in a foreign state and delivered in this state will be construed under the laws of this state.

Philip Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495

Unallowable limitation on liability. A statutory bond which is given for the express purpose of securing public deposits in a bank may not be limited in liability to less than the liability called for by the statute; and any such attempt will be deemed nugatory, even tho such bond is approved by the public governing board.

Leach v Bank, 205-1154; 213 NW 517

Bank as beneficiary. An instrument in writing, tho addressed to the superintendent of banking, entered into by the stockholders of a bank in order to avoid an impairment of the capital stock of the bank, wherein the stockholders "guarantee the said bank against loss" in a named amount on certain bills receivable, is a contract of indemnity to the bank; and the bank may maintain an action thereon, its acceptance of the instrument being presumed.

In re Prunty, 201-670; 207 NW 785

Successive actions. A recovery on a statutory bond by one beneficiary constitutes no bar to an action by another beneficiary to the extent of the unexhausted penalty of the bond.

Philip Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495

Motor carriers—action on bond. A party injured in person and property by the operation of a motor vehicle carrier may bring his action directly against the carrier and the statutory surety on the bond filed with the board of railroad commissioners, even tho no service is had on the carrier, and even tho the bond provides, in effect, for an action against the surety in event the injured party first obtains a judgment against the carrier and fails to collect thereon.

Curtis v Michaelson, 206-111; 219 NW 49; 1 NCCA(NS) 336

Indemnity against loss—"charging off" item of loss—effect. The act of a bank in "charging off" on its books an item of loss in no manner affects the right of the bank to proceed against a party who has legally agreed to indemnify the bank against such loss.

In re Prunty, 201-670; 207 NW 785

Indemnity against impairment of bank capital — consideration. An agreement by the stockholders of a bank with the state superintendent of banking that the former will indemnify the bank (a third party) against loss on certain bills receivable, needs for its support no consideration moving from the bank to the indemnitors. Sufficient consideration is found in the interest of the stockholders in preserving the bank as a going concern and in preventing an impairment of the bank's capital.

In re Prunty, 201-670; 207 NW 785

Surety's answer—effect. In mandamus action by county treasurer to obtain salary warrant where county board of supervisors answered, alleging indebtedness on part of treasurer to county for which set-off was claimed, and where county board brought treasurer's surety into the action as a cross-defendant, held, allegation in surety's answer, indicating that shortage in treasurer's office was due to the embezzlement by a third party, was not binding on board in view of its affirmative allegation that treasurer was indebted to the county.

Briley v Board, 227-55; 287 NW 242

10983 Partnership.

ANALYSIS

Limited partnership. See under Ch 428
Parties to actions. See under §10967

I THE RELATION GENERALLY

Discussion. See 13 ILR 463—Nature of partnership; 15 ILR 186—Partnership as entity

Evidence — sufficiency. Evidence reviewed, and held to establish a partnership in the buying and farming of land.

Hull v Padgett, 207-430; 223 NW 154

Pleading — general allegation and general denial—effect. A general allegation of partnership capacity met by a general denial justifies the court in treating the partnership as existing, especially when there is evidence of the existence of such partnership.

Jordison v Jordison Bros., 215-938; 247 NW 491

Unsupported issue of partnership. In an action of replevin for two articles, of which plaintiff was the absolute owner of one and the holder of a chattel mortgage on the other, defendant's issue of partnership is properly rejected when supported only by a showing that the parties had temporarily shared equally in the net earnings of the two articles.

Dieter v Coyne, 201-823; 208 NW 359

The relation—agreement—evidence. An actual or real partnership cannot exist except through an express or implied agreement containing all the elements of a partnership. Evidence held quite insufficient.

Citizens Bank v Scott, 217-584; 250 NW 626

The relation—profit and loss. Principle reaffirmed that an agreement to share in profits and losses is of the essence of a partnership.

Tracey v Judy, 202-646; 210 NW 793

The relation—fundamental essentials. Principle reaffirmed that, aside from ostensible partnerships, there can be no partnership except by agreement of the parties, and unless there exists, expressly or impliedly, an agreement for the sharing of losses as well as profits.

Farmers & M. Bank v Anderson, 216-988; 250 NW 214

The relation — evidence — sufficiency. Evidence reviewed and held wholly insufficient to establish a partnership relation.

DeLong v Whitlock, 204-701; 215 NW 954

Relation nonexistent — operation of bank. Where probate court set aside to decedent's widow a private bank which was thereafter operated for many years by her son, who received none of the profits thereof, held, evidence did not establish partnership as between the son and his mother. Hence, son's trustee in bankruptcy could claim no interest in said bank.

Duckworth v Manning's Estate, (NOR); 252 NW 559

Partnership—the relation. The fact that a party furnished much of the capital with which a partnership did business, took an active part in the business of the partnership, shared in the profits thereof, and when the partnership was merged into a corporation received a substantial block of the corporate stock, does not necessarily show that he was a partner in the partnership.

Smith, etc. v Hollingsworth, 218-920; 251 NW 749

Nonpartnership tho sharing profits. Where it is contemplated that a private unincorporated bank will be reorganized by incorporating the business (apparently in the same name as the private bank) and where stock in the contemplated incorporation is subscribed for, paid, and issued in a name identical with that of the private bank, and where the plans for incorporation are later wholly abandoned, the subscribers do not become partners in the private business when they never intended such relation, or held themselves out as such partners, or as having any interest in said bank; and this is true even tho said private bank continues for several years to pay said subscribers annual dividends out of its earnings.

Kinney v Bank, 213-267; 236 NW 31

Employee (?) or partner (?). One who has no control over the management of a business, and makes no contribution thereto except his personal services, and has no interest therein except to receive a portion of the profits thereof as compensation for his services, is an employee and not a partner.

Butz v Hahn Co., 220-995; 263 NW 257

Opinion evidence — conclusion in re partnership. The question whether an association of individuals constitutes a partnership calls for a legal conclusion.

DeLong v Whitlock, 204-701; 215 NW 954

Substituting or joining partners. Whether individual members of a partnership should be joined as defendants, or substituted for the partnership, in a suit brought against the partnership, under this section, is a question for the state court to decide and is cognizable in the federal courts only so far as it may affect the right to remove the suit from the state court.

McLaughlin v Hallowell, 228 US 278

Joint adventure. The requisites of an ordinary contract, and of a contract of joint adventure, as to form and validity, are substantially the same.

Smith, etc. v Hollingsworth, 218-920; 251 NW 749

Fundamental essentials of relationship. The partnership relation is predicated on mutual consent and is evidenced by the terms of the contract, the conduct of the parties, and the

I THE RELATION GENERALLY—concluded

circumstances surrounding the transaction. In action to dissolve partnership involving joint farming operations, evidence held insufficient to show that a partnership existed.

Criswell v Criswell, 225-1219; 282 NW 337

Partnership and trust—same property but different parties. A trust deed and a partnership agreement, altho executed at the same time, cannot be construed together, when the parties thereto and the purposes thereof are not the same.

Lunt v Van Gorden, 224-1323; 278 NW 631

Unsustained verdict — evidence. Evidence reviewed and held insufficient to sustain a jury finding that defendant was a partner, and, as a consequence, that the trial court properly set aside the verdict and ordered a new trial.

Spurway v Milling Co., 207-1332; 224 NW 564

Contract — construction. A contract which simply provides that, on the happening of certain conditions, the parties will enter into a partnership agreement cannot be deemed, in and of itself, to constitute such agreement.

Ayres v Nopoulos, 204-881; 216 NW 258

Release of surety—identity of partnership and corporation. A bona fide corporation which is engaged in one business and a bona fide partnership which is engaged in a different business may not, even in equity, be deemed identical—one and the same entity—even tho the corporate stock of the corporation is owned entirely by the partnership entity and by the individual partners, and even tho the individual partners of the partnership constitute the board of directors of the corporation. So held on the plea that a contract of the corporation worked a change in a former contract of the partnership, and thereby released the surety.

Weitz v Fidelity Co., 206-1025; 219 NW 411

Family partnership—sufficiency of evidence. Evidence reviewed in an action to dissolve a partnership, and held that the attempts of both a mother and son to exclude the other from a claimed partnership with the husband and father were not sustained by the evidence, and that each had a third interest in said partnership.

Eggleston v Eggleston, 225-920; 281 NW 844

Incorporation denied by state—partnership formed. Promoters of a corporation are liable to an investor for money received as the agreed purchase price for stock in a corporation, even tho the failure to deliver stock occurred because the state denied the right to incorporate, and they are not relieved by a partnership agreement, signed by the investor, who nowhere waives nor abandons the agreement for delivery of the corporate stock.

Smith v Secor, 225-650; 281 NW 178

Not a joint enterprise between driver and passenger. A joint enterprise is not shown between a driver of an automobile and his passenger when the passenger neither drove the car at any time nor exercised any control over its operation, but merely directed the driver which way to go so that the driver might view a team of mules which he was interested in buying.

Churchill v Briggs, 225-1187; 282 NW 280

II FIRM NAME, CAPITAL, AND PROPERTY

Identity of partnership and corporation. A bona fide corporation which is engaged in one business, and a bona fide partnership which is engaged in a different business may not, even in equity, be deemed identical—one and the same entity—even tho the corporate stock of the corporation is owned entirely by the partnership entity and by the individual partners, and even tho the individual partners of the partnership constitute the board of directors of the corporation. So held on the plea that a contract of the corporation worked a change in a former contract of the partnership, and thereby released the surety.

Weitz v Fidelity Co., 206-1025; 219 NW 411

Signing chattel mortgage—effect. The mere signing of a chattel mortgage in a partnership name does not, in and of itself, estop the signer from denying that the mortgaged property is partnership property.

Citizens Bank v Scott, 217-584; 250 NW 626

III MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS

Assumption of mortgage debt. An agreement between partners in their contract of partnership to pay mortgages on land to which they have taken title "subject" to existing mortgages, will be deemed an agreement solely for their own mutual benefit, and not for the benefit of third parties, to wit, said mortgagees.

Bankers Trust v Knee, 222-988; 270 NW 438

Sharing of losses. Principle reaffirmed that an express or implied sharing of losses as well as profits is an essential element of an ordinary partnership.

Butz v Hahn Co., 220-995; 263 NW 257

Extent of interest—presumption. The presumption, in the absence of a contrary showing, that partners hold equal interests in the partnership is, of course, rebuttable.

In re Talbott, 204-363; 213 NW 779

Trading partnership. A trading partnership and the individual members thereof are liable on a promissory note and on extensions thereof executed in the partnership name for borrowed money which, without the knowledge of the lender, was obtained by one partner

for the purpose of discharging his individual obligation to another partner.

Cresco Bank v Terry, 202-778; 211 NW 228

Action by partner on segregated matter. While a partner may maintain an action on a segregated partnership matter which has been put in the form of a promissory note in which the partner is both payee and one of several partner-makers, nevertheless, as contribution must be finally worked out when the partnership matters are finally settled, the amount of recovery by the partner-payee may, by agreement, be limited to such proportion of the amount found due on the note as the defending partner has interest in the partnership.

In re Talbott, 200-585; 203 NW 303

Dismissal of partnership suit. A partnership action cannot be legally dismissed by one half of the partners against the wishes of the remaining half of the partners when such dismissal would be materially injurious to the partnership.

Reason: Partners cannot legally dismiss such an action unless they have authority so to do.

Lunt Co. v Hamilton, 217-22; 250 NW 698

Primary liability of partner. A partnership debt is the individual, primary debt of each of the individual members of the partnership.

Boeger v Hagen, 204-435; 215 NW 597; 55 ALR 562

Williams v Schee, 214-1181; 243 NW 529

Members as tenants in common. Principle reaffirmed that the legal title to partnership realty is held by the partners as tenants in common.

Bankers Trust v Knee, 222-988; 270 NW 438

Partner's right to compete with partnership. The members of a partnership may validly authorize a partner to privately engage in the same business for the transaction of which the partnership was formed, and in such cases no partner will be permitted to lay claim, on behalf of the partnership, to any profits accruing under such private contracts,—no rights of third parties being involved.

Anderson v Dunnegan, 217-672; 250 NW 115

Mortgage on interest of joint adventurer. Lands belonging to a joint adventure become individually owned land when the joint adventurers execute and place of record an instrument which specifically states the fractional individual ownership of each in the land. It follows that a subsequent mortgagee who in good faith relies on such record cannot be detrimentally affected by equities arising out of the joint adventure and existing between the joint adventurers.

State Bank v Calvert, 219-539; 258 NW 713

Losses—joint liability. Two or more parties to a contract of joint adventure who agree to pay one half of resulting losses, if any, are each individually liable for said one half, tho no provision is made for any division among themselves.

Fitzhugh v Thode, 221-533; 265 NW 893

Property rights of joint adventurers. Property and profits of joint adventure after division between participants therein become separate and distinct property of joint adventurers. However, joint adventurer sustaining loss through transactions involving mortgage received in settlement and division of property and profits held not entitled to contribution.

Scott v McEvoy, (NOR); 228 NW 16

Agreement for lien—construction. A partnership agreement which provides that it shall stand as security for all money "advanced to said business" by the second party, and all indebtedness of the first party to the second party, does not embrace the right to a lien for money not shown to have been "advanced to said business", nor for money advanced subsequent to the said agreement.

Reilly v Woods, 216-419; 249 NW 381

Personal property of other partner—liability. In equity action to subject junior partner's personal property to payment of judgment against senior partner, evidence held insufficient to show that former acted fraudulently or that he was estopped as against senior partner's judgment creditors to claim such personal property.

Creston Bk. v Wessels, (NOR); 232 NW 496

Rights and liabilities as to third persons—burden of proof. A partnership is not bound by the act of one partner in consenting to, and acquiescing in, an act which is subversive of the very purpose of the partnership, unless he who seeks so to bind the partnership establishes the fact that all the partners consented to, and acquiesced in, said act.

Hartford Co. v Helsing, 220-1010; 263 NW 269

Foreign law—comity. The law of a foreign state, which holds parties who are interested as shareholders in an unincorporated association, personally and individually liable as partners for the debts of such association even tho said parties, to the knowledge of the creditor, specifically contracted against such liability, will not be enforced by the courts of this state.

Reason: Said foreign law is directly contrary to the law of this state.

Farmers & M. Bank v Anderson, 216-988; 250 NW 214

Contract—construction. A contract provision to the effect that if income fails to pay expenses of a joint adventure, "at the end of two years and thereafter", the deficiency shall

III MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS—concluded

be carried in named proportions by named parties, "after the two years have expired", means, that if, during the first two years, income fails to pay expenses, thereafter the named parties are liable therefor, in said proportions, whether said deficiency occurred during said two years or thereafter, in view of other contract declarations that should any loss be incurred by reason of said adventure, such loss shall be borne by said parties in said proportions.

Fitzhugh v Thode, 221-533; 265 NW 893

Disputed question of partnership business. In equity action to recover judgment against members of alleged partnership and to impress trust on certain funds in satisfaction of such judgment, where existence of partnership is shown, judgment against the members is proper, irrespective of disputed fact question as to whether parties were engaged in partnership business.

Maybaum v Bank, (NOR); 282 NW 370

IV RIGHTS AND LIABILITIES AS TO THIRD PERSONS

Application of assets to liabilities. The assets of a partnership must be applied to partnership obligations before any part thereof can be legally applied to the obligations of the individual partners.

Phelps v Kroll, 211-1097; 235 NW 67

Negotiable notes taken in name of individual partner. Partners may, in good faith, validly agree between themselves that promissory notes belonging to the partnership shall be taken in the individual name of the partner who is in active charge of the business, and that the individual indorsement of the notes when rediscounted shall bind the partnership.

Second N. Bank v Millbrandt, 211-1299; 235 NW 577

Action for goods sold—dissolution at time —jury question. Whether plaintiff suing partner for goods sold had knowledge that partnership was dissolved at time of sale held question of fact for jury.

Harlan Co. v Saylor, (NOR); 228 NW 6

Conflicting assignments by partnership and partners — priority. An unrecorded assignment by a partnership to a partnership creditor of a lease of real estate and of the rents accruing thereunder is superior in right to a subsequent recorded assignment by one of the partners to his individual creditor of the individual partner's one-half interest in said rents; and especially is this true when the partnership creditor holds a mortgage which pledges the rents of said land.

Phelps v Kroll, 211-1097; 235 NW 67

Ratification of nonpartnership obligation—unsupported instruction. Instruction authorizing a finding of ratification by partners of a nonpartnership obligation is fundamentally erroneous when there is insufficient evidence to support a finding of ratification.

Maxfield v Heishman, 209-1061; 229 NW 681

Judgment lien on partner's interest—limitation. A judgment decreeing to a judgment-creditor a lien on the uncertain interest of the judgment-debtor in a private banking partnership in process of voluntary liquidation must not exceed the interest which the said partner would be entitled to after final partnership accounting.

Anthony v Heiny, 215-1347; 244 NW 902

Presumption—note executed by partnership —erroneous instruction. An instruction to the effect that one receiving the promissory note of a partnership may presume that it was executed in the course of the partnership business, without any statement of the legal effect of the payee's knowledge that the note represented the individual debt of one of the partners (as shown by the record), is fundamentally erroneous.

Maxfield v Heishman, 209-1061; 229 NW 681

Application of partnership assets and assets of partners. Where partnership property and the individual property of all the partners are in the hands of the partnership receiver, a creditor whose claim is against the partnership because of a partnership transaction, and also against an individual partner because the partner has individually guaranteed the claim, may have the assets so marshaled that he will share in the partnership property along with the other partnership creditors, and then resort to the individual property of the guaranteeing partner to the exclusion of partnership creditors.

Iowa-D.M. Bk. v Lewis, 215-654; 246 NW 597

Levies on realty. Holding reaffirmed that §11680, C., '35, applies solely to levies on personal property.

Bankers Trust v Knee, 222-988; 270 NW 438

Judgment against partners only — effect. A joint, personal judgment solely against the members of a partnership, on a partnership transaction, does not constitute a judgment against the partnership itself.

Bankers Trust v Knee, 222-988; 270 NW 438

Transfers and transactions invalid—right of insolvent partnership to prefer creditor. A partnership engaged in the operation of a private bank may, in good faith, validly pledge promissory notes belonging to it as collateral security for its outstanding obligations, even tho the partnership is insolvent.

Second N. Bank v Millbrandt, 211-1299; 235 NW 577

V RETIREMENT AND ADMISSION OF PARTNERS

Retirement of partners — notice. A partner in a private bank, on a sale of his interest in the bank, need not give notice of such sale to one who already has full knowledge thereof.

Fidelity Co. v Bank, 218-1083; 255 NW 713

Unincorporated association—members. An association name may be regarded as designating the individuals which it represents, altho the members own no proportionate share of its property. Such members have joint use and enjoyment of the property, which right ceases upon termination of membership.

Lamm v Stoen, 226-622; 284 NW 465

Bulk sales—nonapplicability of statute. The bulk sales act has no application to a sale of a partnership interest to a copartner.

Peterson Co. v Freeburn, 204-644; 215 NW 746

Mortgage on partner's interest—priority. A recorded chattel mortgage executed by an incoming partner to an outgoing partner on the one-half interest in the partnership property and on future additions thereto, and representing the purchase price of said interest (all with the consent of the old partner who remains in the business), is superior in right to the subsequently contracted debts of the new partnership.

In re Cutler & Horgen, 204-739; 212 NW 573; 217 NW 448; 54 ALR 527

Remedies of creditors—attacking conveyance —conditions precedent. The surety on an administrator's bond who has paid the shortage of the administrator consequent on the failure of the private bank in which the estate funds were deposited, may not, in an action to recoup his loss, question a conveyance by a former partner in the bank when, prior to the giving of the bond, the said partner had, in good faith and to the full knowledge of the administrator, sold his interest in the bank at a time when the bank had ample funds with which to pay the administrator's deposit.

Fidelity Co. v Bank, 218-1083; 255 NW 713

VI DISSOLUTION, SETTLEMENT, AND ACCOUNTING

Services of partner—value. In action for accounting and dissolution of partnership, reasonable value of services of partner managing garage held properly fixed at $30 per week.

Boldrini v Beneventi, (NOR); 240 NW 680

Right of retiring partner. Articles of partnership which provide (1) for "an undistributed profit" account, as working capital and to pay off loans, (2) for the retirement of partners at their option, and (3) for payment to a retiring partner, in addition to his investment, of profits "accrued to date of effective withdrawal, figured on basis of going concern," entitle a retiring partner to his pro rata share of the undistributed profit account when there are no outstanding loans.

Slaughter v Burgeson, 203-913; 210 NW 553

Allowance of interest to partner. It is not necessarily a badge of fraud that partners, in settling their affairs, allowed one partner interest on funds advanced individually by said partner for the benefit of the firm.

Cass v Ney, 209-17; 227 NW 512

Accounting—laches. An action to establish a partnership of some 35 years standing and for an accounting thereunder is not barred by laches when the plaintiff moved with reasonable promptness after his interest was questioned.

Hull v Padgett, 207-430; 223 NW 154

Joint adventures—dissolution in equity. Assuming, arguendo, that proof that a joint undertaking had proven to be a losing venture is sufficient to justify an order of dissolution, by a court of equity, of a joint undertaking, yet evidence reviewed and held insufficient to so show such fact.

Green v Kubik, 213-763; 239 NW 589

Joint adventure. A contract of joint adventure, which is wholly silent as to its duration, is terminable at will by a notice of any one of the parties to all other parties, especially when such other parties make no objection to such termination, and the right to an accounting necessarily follows.

Fitzhugh v Thode, 221-533; 265 NW 893

Excess advancement by partner—priority of claim. The excess capital advanced to the partnership assets by one of two partners will, when such was the original intention of the partners, be treated as the debt of the partnership, and, on dissolution, will be ordered paid out of the partnership assets after the payment of other firm debts, even tho the partner making the advancement holds, for the excess, the promissory note of the partner not making the advancement. It follows that such right belonging to the partner making the advancement will be deemed superior to a mortgage of the other partner's partnership interest.

Hart v Smiley, 210-1004; 229 NW 139

Appointment of receiver—who may not object. Alleged partners in an alleged private banking business may not object to the appointment of a permanent receiver for the business on the prayer of those who are admittedly partners when the order of appointment in no manner disturbs complainants in their property and specifically withholds adjudication of the issues whether complainants are partners.

Tillinghast v Courson, 215-957; 247 NW 252

VI DISSOLUTION, SETTLEMENT, AND ACCOUNTING—concluded

Undiscovered assets. A partner may recover his proportionate share of partnership assets discovered subsequent to a dissolution and settlement, and collected by a copartner.

Power v Wood, 200-979; 205 NW 784; 41 ALR 1452

Dissolution—by order in equity. A partnership or joint adventure for a definite contract term will not be cancelled and terminated by a court of equity before the time fixed by the contract on the ground that such quarreling and bickering between the parties have resulted as to render inadvisable the further continuance of the undertaking, when the applicant for the cancellation and termination of the contract is the only one of the parties who has done any quarreling or been guilty of any bickering.

Green v Kubik, 213-763; 239 NW 589

Partners' incompatibility — dissolution for best interests. A partnership dissolution is proper on application of one of the partners, when the record is replete with disputes, bickerings, and litigation between partners and it is obvious that they can no longer work in harmony.

Lunt v Van Gorden, 224-1323; 278 NW 631

Estoppel of joint adventurer. One of two joint adventurers may not wholly exclude his co-adventurer from all fruits of a successful consummation by claiming that the undertaking was accomplished solely through his efforts when he has never rescinded the contract with his co-adventurer, claims no damages because of a breach of contract by the co-adventurer, and when he has to some material extent profited from the funds and efforts of his co-adventurer.

O'Neil v Stoll, 218-908; 255 NW 692

Death of partner—effect. Principle reaffirmed that the death of a partner, generally speaking, works a dissolution of the partnership.

Williams v Schee, 214-1181; 243 NW 529

Surviving partners—burden of proof. In an accounting between the representative of a deceased partner and the surviving partners, the burden of the accounting is upon the surviving partners.

Fleming v Fleming, 211-1251; 230 NW 359

Evidence — insufficiency. Record reviewed, and held quite insufficient to support the theory that the defendant estate was liable for the claim sued on because contracted in the liquidation of a partnership of which the deceased was a member.

Williams v Schee, 214-1181; 243 NW 529

Corporate stock — book value. In an accounting between surviving partners and the representative of a deceased partner, the surviving partners will not be heard to say, on appeal, that there is no evidence of the actual value of the stock of a corporation owned wholly by the partnership, when said partners did not, in the trial court, question the "book" value of said stock.

Fleming v Fleming, 211-1251; 230 NW 359

Liquidation—corporation as part of assets. Where a corporation is the exclusive property of a partnership, its affairs are subject, in an accounting between the surviving partners and the representatives of a deceased partner, to investigation, correction, and review.

Fleming v Fleming, 211-1251; 230 NW 359

Unallowable credits. In an accounting between the representative of a deceased partner and the surviving partners, who continued the partnership business as tho no dissolution had occurred, attorney fees in the accounting proceedings, and personal, family, and household expenses of the surviving partners are properly rejected by the referee as a credit.

Fleming v Fleming, 211-1251; 230 NW 359

Salary of surviving partners. In an accounting between the representative of a deceased partner and the surviving partners, who continued the partnership business as tho there had been no dissolution, an allowance of a credit by the referee for salaries of the surviving partners in a sum less than actually drawn by them will not be disturbed, in the absence of any evidence of the value of said services.

Fleming v Fleming, 211-1251; 230 NW 359

Rejecting salary of superintendent. In an accounting between the representative of a deceased partner and the surviving partners, who continued the partnership business as tho there had been no dissolution, the refusal of the referee to allow as a credit the salary of a superintendent (the surviving partners devoting their entire time to the business) will not be disturbed when there is no evidence of the value or necessity of such services.

Fleming v Fleming, 211-1251; 230 NW 359

Disallowance of unsupported depreciation in assets. In an accounting between the representative of a deceased partner and the surviving partners, who continued the business as tho no dissolution had occurred, the rejection by the referee of a claimed depreciation in the assets of the partnership is proper when there is no evidence to support such depreciation.

Fleming v Fleming, 211-1251; 230 NW 359

VII SURVIVING AND DECEASED PARTNERS

Mistake — effect. The filing of a claim against an estate will not estop the party from abandoning such claim and instituting an action for a partnership accounting with deceased

when such latter proceeding was his sole allowable remedy.

Hull v Padgett, 207-430; 223 NW 154

Action to recover specific property—conditions precedent. A surviving partner cannot maintain an action at law against the representative of a deceased copartner to recover plaintiff's share of specific partnership property appropriated by the deceased partner, in the absence of proof that the partnership affairs have been settled and all partnership debts paid.

Dolan v McManus, 209-1037; 229 NW 687

Accounting — proper form of judgment. Where an accounting proceeding instituted by the widow of a deceased partner, in order to determine her dower interest in the partnership property, is tried on the mutual theory that her interest, when determined, should be impressed as a trust on the entire partnership property, a judgment in rem against the partnership property should be entered, and not a personal judgment against the surviving partners.

Fleming v Fleming, 211-1251; 230 NW 359

Death of partner—liability of estate. Where a deceased was a member of a banking partnership, a plaintiff seeking to hold the estate liable for financial transactions with the bank must definitely establish that the obligation sued on was created before the death of the deceased.

Williams v Schee, 214-1181; 243 NW 529

Implied authority to continue partnership. Where a deceased had been a member of a banking partnership, an order in probate allowing a claim against the estate consequent on a defalcation of a former employee of the bank, cannot be deemed an implied authorization to the administrator to continue the partnership after the death of the deceased.

Williams v Schee, 214-1181; 243 NW 529

Property passing to survivor — contract. Tenants in common of real estate who embark their holdings, and the personal property used in connection therewith, in a partnership, violate no rights of heirship or testamentary rights of their brothers and sisters by including in their partnership contract an agreement that upon the death of one of the partners the survivor shall become the absolute owner of all the partnership property.

Conlee v Conlee, 222-561; 269 NW 259

Continuing partnership—conditions. An administrator, without an authorizing order of court, has no power to bind the estate by continuing a partnership of which the deceased was a member or by creating a new partnership. And under such circumstances the ex parte statements or pretenses of the surviving partners are quite inconsequential.

Williams v Schee, 214-1181; 243 NW 529

Right to close up business — compensation. Surviving partners have a right to continue the partnership business for the purpose of winding up its affairs, but in so doing they become trustees for the heirs of the deceased and must exercise the utmost good faith. Failure to exercise such good faith deprives them of all right to compensation for time and labor expended in closing up the business.

Anderson v Droge, 216-159; 248 NW 344

Allowance and payment of claims—belated filing—insufficient showing of delay. A depositor in a private bank will not be permitted to file and prosecute his claim against the estate of a deceased partner, after the lapse of four years after notice of administration was given, on a showing that the executor soon after his appointment believed the bank as continued by the surviving partners was insolvent, and stipulated for the possible filing, at a later period, by the surviving partners, of a contingent claim against the estate, said stipulation not being shown to be fraudulent and not deceiving said depositor; and especially is this true when the attempt of the depositor to file his claim was evidently an afterthought.

Anthony v Wagner, 216-571; 246 NW 748

Accounting and settlement—right to disregard administration. Notwithstanding the fact that in the administration of an estate the tangible interest of the deceased in a partnership has been sold to the surviving partners under order of court, and the proceeds accounted for, and the administrator discharged, the heirs may maintain, against the surviving partners, an action for an accounting as to the share of said deceased in elements of partnership property other than the tangible property, such, for instance, as profits, and going concern and good-will values. And especially is this true when the surviving partners fraudulently concealed said latter elements of value at the time of the administration aforesaid.

Anderson v Droge, 216-159; 248 NW 344

Continuance of business—effect. Where surviving partners, upon the death of a partner, continue to carry on the partnership business as tho there had been no dissolution, those interested in the share of the deceased partner have the right, on an accounting, to elect to take the profits realized from the continued use of their property.

Fleming v Fleming, 211-1251; 230 NW 359

Accounting for good will. When, on accounting, the heir of a deceased partner is given the benefits of the profits derived from the utilization of the good will of the business,

no further charge should be made against the surviving partners for such good will.

Anderson v Droge, 216-159; 248 NW 344

VIII ACTIONS

Discussion. See 11 ILR 193—Jurisdiction over partnerships, nonpartnership associations, and joint debtors

Action to enforce partner's liability—waiver. The liquidating receiver of a private bank, when appointed with power to bring action against the partners on their individual liability, may, with the approval of the court, and notwithstanding the objections of a creditor, settle and compromise the liability of a partner when the creditor has appeared in the receivership proceedings and secured the allowance of his claim.

Reason: The creditor, by submitting himself to the jurisdiction of the receivership court, irrevocably elects his remedy.

Ellis v Bank, 218-750; 251 NW 744

Creditor—right of action. A creditor of a private banking partnership may maintain an action against one of the partners only, to set aside, as fraudulent, a conveyance by said partner, and to subject said property to the satisfaction of his claim.

Biddle v Worthington, 216-102; 248 NW 301

Authority to authorize suit against partners. In an action for the dissolution of an insolvent partnership, a court of equity has power to authorize its receiver to bring suit against the partners to collect the funds necessary to pay the debts of the partnership in full.

Bierma v Ellis, 212-366; 236 NW 402

Election of remedies. A creditor of an insolvent banking partnership who, under an authorizing order of court, files proof of his claim with a duly appointed and unquestioned receiver of the partnership will not be permitted thereafter to maintain an independent action against the partners until after the receivership has been closed, when the receiver, under an order of court, has already instituted an action against all the partners to collect the amount necessary to settle the indebtedness of said bank; and especially is this true when a multiplicity of suits is avoided.

Bierma v Ellis, 212-366; 236 NW 402

Accounting—right of action. The principle that a partnership cannot sue a partner until there has been an accounting has no application to an action by a partnership against parties who have an interest in partnership assets but are not partners, which action, by amendment, is converted into an action for accounting and transferred to the equity calendar.

Lunt Co. v Hamilton, 217-22; 250 NW 698

Judgment creditors and mortgage holders—proper intervenors. In an action between copartners for receivership and accounting, holders of mortgages and deficiency judgments against land purchased in name of some partners for partnership purposes held proper intervenors.

Heger v Bussanmas, (NOR); 232 NW 663

Abatement of authorized action. A court having ordered its receiver in partnership to begin action against the partners, in order to collect funds with which to pay creditors, has discretionary power, after such action has been commenced, and on a showing that the receiver has in his possession a very large amount of unliquidated partnership assets, to abate the action until such assets are liquidated.

Day v Power, 219-138; 257 NW 187

Chattel mortgage to secure partner's debt. A chattel mortgage by a partner on his undivided chattel interest in the partnership to secure his individual debt becomes absolute when it is made to appear that the partnership is free of debt.

Schwanz v Co-op. Co., 204-1273; 214 NW 491; 55 ALR 644

Dismissal of partnership suit. A partnership action cannot be legally dismissed by one half of the partners against the wishes of the remaining half of the partners when such dismissal would be materially injurious to the partnership.

Reason: Partners cannot legally dismiss such an action unless they have authority so to do.

Lunt Co. v Hamilton, 217-22; 250 NW 698

Claim belonging to some of the defendants. In an action against a partnership and against the individual partners thereof, a claim for necessaries furnished by the partnership to plaintiff and her husband (who was a party defendant) is not pleadable as a counterclaim, because said claim does not belong to all the defendants.

Jordison v Jordison Bros., 215-938; 247 NW 491

Review de novo—irrespective of failure to file brief. An action in equity to recover a judgment against the members of an alleged partnership and to impress a trust on certain funds is triable de novo on appeal and the supreme court will examine the record despite parties' failure to furnish brief and argument.

Maybaum v Bank, (NOR); 282 NW 370

10985 Seduction.

Promise of marriage by married man. A promise of marriage will not support a charge of seduction when the promisee knows that the promisor is a married man.

Gardner v Boland, 209-362; 227 NW 902

Minor's loss of time—medical expenses. A minor, in an action for damages for her se-

duction, may not recover for loss of time, nor for the expense of medical service.

Gardner v Boland, 209-362; 227 NW 902

Illicit sexual relations with persons other than defendant. Testimony tending to show that plaintiff in an action for damages for seduction was, shortly after her claimed seduction, guilty of illicit sexual intercourse with men other than the defendant, is admissible on the issues (1) whether plaintiff was truthful in her testimony that she had never had such intercourse except with defendant, (2) whether she was under promise to marry the defendant, and (3) whether defendant was the father of plaintiff's child.

Gardner v Boland, 209-362; 227 NW 902

Instructions — misleading terms. The expression "yielding to the embraces" is not synonymous with "sexual intercourse"; likewise, the expression "wrongful acts" is not synonymous with the term "seduction".

Gardner v Boland, 209-362; 227 NW 902

Unchastity per se. Lewd and lascivious conduct on the part of a female at the very time of her alleged seduction may per se establish her unchastity.

Schultz v Schultz, 203-910; 210 NW 94

10986 Injury or death of minor child.

Emancipation by desertion. A parent who deserts and abandons his minor child thereby emancipates him, and may not maintain an action based on a plea of loss of services consequent upon the wrongful killing of the child.

Lipovac v Iowa Co., 202-517; 210 NW 573

Alienation of affections. A mother may not maintain an action for damages for the alienation of the affection for her of her minor son, in the absence of an allegation that she has thereby been deprived of the custody and services of said minor.

Pyle v Waechter, 202-695; 210 NW 926; 49 ALR 557

Measure of damages—interest on funeral expenses. The measure of damages for wrongful death, while not including reasonable funeral expenses, does include simple interest at a legal rate on such expenses for the time intervening between the premature death and the time when, in the ordinary course of events, the deceased would have died.

Lukin v Marvel, 219-773; 259 NW 782

10989 Prisoner in penitentiary.

Appeal bond—late appearance. When a criminal defendant who had posted an appeal bond did not appear after affirmance of the conviction, because he was incarcerated in a federal penitentiary, but was shortly thereafter brought to the court through the efforts of the surety on his bond, and was then taken to the state reformatory, all at the cost of the surety, there was delivery of the defendant into court so that the state could not recover on the bond.

State v Thomason, 226-1057; 285 NW 636

Convict as defendant in civil action—nonright to attendance in court. In death action against imprisoned convict, motion for production of defendant in court held properly overruled.

Collings v Gibson, (NOR); 220 NW 338

10990 Actions by state.

Discussion. See 9 ILB 225—Recovery of moneys paid out by government officials

Rights and remedies of taxpayer. A taxpayer may, when the proper state official refuses to act, maintain, on behalf of the state, an action to recover state funds received by the defendant in violation of the constitution of the state.

Wertz v Shane, 216-768; 249 NW 661

Estoppel against state. When the state allows an estate to be fully settled, and the executor to be duly and finally discharged without the payment of an inheritance tax, and makes no application to open up the accounts of the executor, it may not thereafter enforce the statutory personal liability of the executor to pay said tax. This is true on two fundamental propositions, to wit: (1) That the court, being prohibited by statute from discharging the executor until the tax is paid, must be presumed, in entering such discharge, to have found that no tax was due, and (2) that the state, by designating the court as its special statutory representative, will not be permitted to deny such presumption.

In re Meinert, 204-355; 213 NW 938

Actions—waiver. The state, after reimbursing a county for the loss of county deposits in an insolvent bank, may validly prohibit an action in its own favor on the depository bond to which it was legally subrogated by the process of reimbursing the county.

State v Bartlett, 207-208; 222 NW 529

Negligence not imputable to state. Negligence and laches of public officers in the handling of state funds are not imputable to the state; for instance, in an action to recover from a drawee-bank the amount paid by the bank on a forged indorsement of a check drawn by a county treasurer against state school funds on deposit with said drawee, it is no defense that the county treasurer was negligent in drawing or delivering the check, or that county officers generally were negligent in not making early discovery of the forged indorsement, and notifying the drawee accordingly.

New Amst. Cas. Co. v Bank, 214-541; 239 NW 4; 242 NW 538

Writ of prohibition—state as plaintiff. An original action in the supreme court, for a writ of prohibition directed to a district court and prohibiting further action by said latter court in private actions pending therein, may be brought in the name of the state ex rel its attorney general; and especially is this true when said private actions arose out of the proceedings instituted by the state through the governor thereof.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

County attorney's powers—reinstatement of action. A county attorney who, in his official capacity, brings an action in behalf of the state, and later, by amendment, changes said action to a personal action by himself and others, may not, after he ceases to be such officer, reinstate said action as one on behalf of the state. Nor may the court reinstate said action as an official action in the name of said ex-county attorney. Especially is this true when the official county attorney objects to such procedure.

State v Power Co., 214-1109; 243 NW 149

Labor union injunction. Where a grave situation existed in the locality at the time, the state had the right to be made a party to proceedings involving an injunction violation by labor union officials, by filing a petition incorporating by reference the affidavits of the plaintiff's petition and the injunction upon which it was based, when the state did not seek different and distinct remedies from that asked by the plaintiff.

Carey v Dist. Court, 226-717; 285 NW 236

Continuance. A continuance requested on the ground that the state had been made a party to proceedings involving the violation of an injunction by labor union officers was properly refused when the petition of the state alleged the same matter and sought the same relief as the petition of the plaintiff.

Carey v Dist. Court, 226-717; 285 NW 236

10990.1 Actions against state.

Action against state. Allegations in a petition to quiet title to land and to obtain a writ of possession for said land, (1) that defendants constitute the entire membership of the state board of control,—an agency of the state,—and (2) that said defendants are wrongfully withholding said possession from plaintiff, furnish no sufficient basis for the holding that said action, in truth and fact, is against the state in its sovereign capacity.

Iowa Co. v Board, 221-1050; 266 NW 543

Special appearance—nondeterminable matters. Whether an action is, in truth and fact, an action against the state in its sovereign capacity, is a question which cannot be tried out on a special appearance—the petition not showing on its face that the action is such.

Iowa Co. v Board, 221-1050; 266 NW 543

Aerial navigation statutes—governmental functions—nonliability in performance. The statutory-prescribed rules of the state governing aerial navigation (§8338-c7, C., '35 [§8338.20, C., '39]) have no application to the state in its sovereign capacity, nor to its governmental agencies, nor to the officials of said agencies when exclusively engaged in performing the duties of said agencies.

De Votie v Cameron, 221-354; 265 NW 637

Cross-petition defense—state as proper party—belated objections. In an action to dissolve a mining corporation, question whether state, not being stockholder or creditor of the mining corporation, was proper party to make defense to a cross-petition, such question not having been raised in the trial court, may not be raised for the first time and reviewed on appeal.

State v Fuel Co., 224-466; 276 NW 41

Action against agent of state. An employee of a state hospital for the insane may not maintain an action for salary against the executive officer thereof, as such action is, in effect, an action against the state.

Cross v Donohoe, 202-484; 210 NW 532

Enjoining state highway commission. An action against the state highway commission to enjoin it from relocating a primary road, unaccompanied by any allegation of wrongful acts, is, in effect, an action against the state, and nonmaintainable.

Long v Highway Com., 204-376; 213 NW 532

State fair board. The Iowa state fair board is an arm or agency of the state and, therefore, not suable.

De Votie v Fair Board, 216-281; 249 NW 429

Prohibited condemnation. Injunction will lie against the members of the state highway commission to enjoin a prohibited condemnation of private property for highway purposes, even tho such commission is an arm of the state.

Hoover v Hy. Com., 207-56; 222 NW 438

10991 Nonabatement by transfer of interest.

Right to show ownership of claim. Upon the substitution of the actual owner of a promissory note sued on, in lieu of a plaintiff who had sued as indorsee for collection only, the substituted plaintiff should be permitted to show by written assignment, and irrespective of any consideration, that the note had been fully and formally retransferred to him.

Richardson v Clark, 202-1371; 212 NW 133

Transfer of title after action brought—effect. The fact that plaintiff after commencing an action on promissory notes transfers the title thereof does not prevent the prosecution of said action to judgment in the name of the original plaintiff.

Grimes Bk. v McHarg, 213-969; 236 NW 418

Belated substitution—discretion. In an action at law by a corporation to recover on a contract, the court has discretionary power during the actual trial and after the jury has been obtained and after some testimony has been introduced, to order plaintiff's assignee for the benefit of creditors to be substituted as plaintiff,—no actual prejudice to defendant being made to appear; and this is true even tho defendant was, of course, deprived of the privilege of examining the jurors relative to their relations to the said assignee.

Webster County Buick Co. v Auto Co., 216-485; 249 NW 203

Double liability of stockholders—nonassignability. The statutory "double liability" of a stockholder in an insolvent state bank to all the creditors of the bank is not of such nature that a sale or assignment thereof by the receiver, even under an order of court, will vest in the vendee or assignee the right to enforce such liability exclusively for his own use and benefit.

Andrew v Bank, 214-1339; 242 NW 62; 82 ALR 1280

Appeal—transfer of interest—effect. An appeal may not be dismissed on the ground that the appellant has transferred to another the subject matter involved in the appeal.

Union Ins. v Eggers, 212-1355; 237 NW 240

10991.1 Women—injury or death.

Preservation of accrued right. An action to recover damages for negligently causing the death of a married woman survives the repeal of the statute authorizing such action, and the measure of recovery in such cases is governed by the repealed statute, not by the measure of recovery provided in a later and substituted statute on the same subject.

Azeltine v Lutterman, 218-675; 254 NW 854

Husband's negligence not imputed to passenger-wife. The negligence of a husband in the operation of an automobile is not imputable to his wife who is riding with him as a passenger.

Hough v Freight Service, 222-548; 269 NW 1

Disabilities of coverture—tort action by husband or wife against other. The rule of the common law that neither the husband nor the wife may maintain an action against the other for damages consequent on the negligent or willful injuring of one by the other, is the law of this state,—not having been abrogated by anything contained in this section.

Aldrich v Tracy, 222-84; 269 NW 30

Wrongfully caused death of wife. In an action for the wrongfully caused death of a wife, the statutory power to allow "such sum as the jury may deem proportionate to the injury" is not an unbridled discretion. Evidence reviewed and held that a verdict of $10,000 was excessive to the extent of $4,000. The deceased was childless and illiterate, had accumulated no property, was a beet weeder for a small part of the year, at small wages, and also operated a boarding house, but whether at a profit did not appear.

Hanna v Central Co., 210-864; 232 NW 421

Disabilities—torts during coverture. A wife may not maintain an action against her husband for damages consequent upon willful injuries inflicted upon her by her husband.

In re Dolmage, 203-231; 212 NW 553

Torts—fundamental laws govern liability. The fundamental and underlying law of torts is that he who does injury to the person or property of another is civilly liable in damages for the injuries inflicted.

Montanick v McMillin, 225-442; 280 NW 608

10996 Insane person.

Appointment of guardian—irregularities in petition—right to bring action. A petition by the wife of an inmate of a state hospital for the insane, asserting that she was the wife of the inmate who had property, and asking that she be appointed guardian, altho insufficient to meet the statutory requirements for a petition for the appointment of a guardian, was sufficient for the appointment of a temporary guardian, and when notice was accepted by the superintendent of the institution and the wife was appointed, she was at least a temporary guardian and, as such, could maintain an action in behalf of the incompetent.

Jensen v Martinsen, 228- ; 291 NW 422

10997 Defense by minor.

Unauthorized satisfaction of bequest. An order of the probate court authorizing an executor to discharge a cash bequest to a minor by transferring to the father of the minor as natural guardian a note and mortgage belonging to the estate, is wholly void when said order is entered without the appearance of any guardian, regular or ad litem, for the minor.

Irwin v Bank, 218-477; 255 NW 671

Guardian and ward—actions—prompt appointment during trial. No prejudicial error is committed when, after a trial has proceeded for some time, it develops that one of the defendants is a minor, a fact previously unknown to the court, whereupon the court promptly appoints the minor's attorney as his guardian ad litem, inasmuch as the minor's

rights had been fully protected, since said attorney, being present all the time, was fully cognizant of the proceedings up to that point.

Brien v Davidson, 225-595; 281 NW 150

11000 Defense of insane person.

When judgment voidable only. A default judgment, even tho procured by fraud not going to the jurisdiction of the court, against an insane person on personal service, and without the appointment of a guardian ad litem, is not void, but voidable only.

Montagne v County, 200-534; 205 NW 228

Unknown insanity—effect. A judgment in foreclosure which was obtained by the holder in due course of the notes secured, and which has passed to foreclosure deed, will not be set aside on the ground that the defendant was at all times mentally incompetent and that the notes and mortgage were forgeries, (1) when neither the plaintiff nor the court had knowledge of such grounds, (2) when the defendant was personally served in the foreclosure and appeared by counsel and filed answer, and (3) when the defendant had never been adjudged to be insane, nor was he an inmate of a state hospital for the insane.

Engelbercht v Davison, 204-1394; 213 NW 225

Note and mortgage in hands of holder in due course. Neither a negotiable promissory note nor a mortgage given by the makers to secure the same, even tho the mortgage is on a homestead, is subject, when in the hands of a holder in due course, to the plea that the maker was insane at the time of the execution of such note and mortgage.

Farmers Ins. v Ryg, 209-330; 228 NW 63

General rule of liability. Persons of unsound mind will be held liable as to executed contracts when the transaction is in the ordinary course of business, when it is reasonable, when the mental condition was not known to the other party, and when the parties cannot be put in status quo.

Farmers Ins. v Ryg, 209-330; 228 NW 63

Guardian ad litem—when necessary—judgment—when valid. Every person is presumed sane until the contrary appears and unless an adult person appearing in court has been judicially declared insane, there is no requirement that a guardian ad litem be appointed to represent him, this being especially true where, not being confined, he appears by counsel and presents a defense, and a judgment against him will not be set aside.

Ware v Eckman, 224-783; 277 NW 725

Judgment against insane person—validity. The validity of a judgment obtained in a law action against an insane defendant is not affected by such insanity, or by fact that a guardian had been appointed for his property.

In re Simpson, 225-1194; 282 NW 283; 119 ALR 1208

11002 Interpleader.

Availability of remedy. The pre-code equitable action of "interpleader" is available to an insurer who is faced by different, mutually hostile claimants to the amount due under the policy, which amount the insurer admits less deduction provided by the policy. And said insurer will be entitled to an injunction restraining the institution or further prosecution against him of separate actions on the policy by said warring parties.

Equitable Life v Johnston, 222-687; 269 NW 767; 108 ALR 257

Prior adjudication—pleading prerequisite to proof. A prior adjudication must be pleaded before evidence thereof is admissible. Rule applicable to interpleaders.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

Right to proceeds—change of beneficiary. The original beneficiary, interpleaded in an action on a fraternal insurance policy, acquires no vested interest in benefit as against the subsequent beneficiary designated as such in accordance with bylaws of insurer and statute of this state, notwithstanding insured member's agreement with such original beneficiary that she should remain beneficiary.

Kohler v Kohler, 104 F 2d, 38

CHAPTER 487

LIMITATIONS OF ACTIONS

GENERAL PROVISIONS

11007 Period of.

Discussion. See 22 ILR 128—Amendments after limitation has run

Atty. Gen. Opinions. See '25-26 AG Op 171; '28 AG Op 325; '30 AG Op 174, 355; '32 AG Op 232; '36 AG Op 395; AG Op Aug. 12, '39

ANALYSIS

Adverse possession and acquiescence in boundary disputes. See under §12306
Limitation of action on fire insurance policy. See under §9018

I NATURE OF STATUTORY LIMITATION

Construction—retroactive effect. A statute of limitation will be given retroactive effect only when it appears by express provision or necessary implication that such was the legislative intent.

Hinrichs v Locomotive Wks., 203-1395; 214 NW 585

Obligation of contracts—shortening limitation on action—constitutional condition. Principle reaffirmed that the legislature may constitutionally shorten the time within which an existing cause of action may be barred if a reasonable time is given for the commencement of an action before the bar takes effect.

Johnson v Leese, 223-480; 273 NW 111

Action against tax deed holder. When the owner of the fee title continued in possession with rights subservient to the rights of the tax title owner after land was sold for nonpayment of taxes, and the owner's right to bring an action for recovery of the real estate was barred by a statute of limitations, one who claimed title under the owner was not entitled to succeed in an action to quiet title against the tax title owner.

McCormick v Anderson, 227-888; 289 NW 440

II WHAT LAW GOVERNS

Bar in foreign state—effect. Action on a promissory note executed in a foreign state is barred in this state when action is barred in said foreign state, even tho such promissory note was given in renewal and in lieu of a note executed in this state.

Martin v Martin, 205-209; 217 NW 818

Bar under foreign jurisdiction. Principle reaffirmed that the statute of limitation of the forum ordinarily governs, except where a foreign-accruing claim is fully barred by the law of the foreign country.

Williams v Burnside, 207-239; 222 NW 413

Federal court rule as applied to state statute. The rule in federal courts in equitable actions is that state statutes of limitations are not controlling but will be followed in application of the doctrine of laches unless the circumstances of the particular case are convincing that a shorter or longer period would be just.

Crawford Bank v Crawford County, 66 F 2d, 971

Mortgage on foreign land. A note and mortgage representing a loan on land in a foreign state, duly signed in a foreign state by a resident thereof, and forwarded to the payee in this state, is an Iowa contract insofar as the statute of limitation is concerned, when such forwarding and receiving were with the understanding that the payee would apply the amount of the loan in discharging a prior matured mortgage on the land, if in so doing payee would be assured of a first lien.

Andrew v Ingvoldstad, 218-8; 254 NW 334

National bank directors—violation of duty—state statute invoked—construction. State statutes of limitation apply and may be invoked by directors of national bank in respect to liability for violation of duty, but two-year limitation in respect to personal reputation, held, inapplicable under such circumstances. The plain, obvious, and rational meaning of statute is always to be preferred to any curious, narrow, hidden sense, and, in case of substantial doubt, longer rather than shorter period of limitation is to be preferred.

Payne v Ostrus, 50 F 2d, 1039

Note delivered in this state. When the payee of a promissory note prepares it in blank in this state and sends it to the proposed maker in another state without any specific direction as to the method or manner in which it is to be returned to the payee after being signed, delivery takes place only when the note reaches the hands of the payee in this state. It follows that the statute of limitation of this state governs such note.

In re Young, 208-1261; 226 NW 137

III CONSTRUCTION OF LIMITATION LAWS IN GENERAL

Doing equity notwithstanding statute. The full equitable titleholder of land held under a dry trust who asks equity to invest him with the full legal title must do equity to the extent of reimbursing the trustee for good-faith expenditures made by him at the request, or with the consent and acquiescence of the equitable titleholder in improving or preserving the property, even tho the trustee's claims for such expenditures are barred at law by the statute of limitations.

Warner v Tullis, 206-680; 218 NW 575

Accrual of action—plaintiff perfecting cause of action—exception to rule. While a cause of action does not accrue so as to start the statute of limitations running unless all the facts exist so that plaintiff can allege a complete cause of action, an exception occurs where the only act necessary to perfect the plaintiff's cause of action is one to be performed by the plaintiff and he is under no restraint or disability in the performance of such act.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Drafts—statute runs after reasonable time for presentment. Where no demand or presentment for payment of draft is made for over 19 years after its issuance, and where only person who could make due presentation was plaintiff-holder, the statute of limitations began to run after a reasonable time for presentment.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Laches—effect on law action. The doctrine of laches, in the absence of elements of estoppel, finds no application to an action at law.

Reinertson v Struthers, 201-1186; 207 NW 247

Accounts—interest items. In an action by a widow to establish a claim against the estate of her deceased husband based on an alleged oral contract of decedent to repay a loan of money made by appellant widow to decedent, prior to November 1, 1912, to which the statute of limitations was pleaded, held, mere posting of items of interest applicable to one individual transaction is insufficient to show a "connected series of transactions" so as to convert the matter into a "continuous, open, current account" under statute providing cause of action accrues on date of last item, as this means a connected series of transactions.

Leland v Johnson, 227-520; 288 NW 595

Action in 1923 to enjoin excessive assessment of 1919—no laches. Banks suing in 1923 to enjoin excessive levy in years 1919 to 1922 inclusive, held, not estopped by laches.

Munn v D. M. Nat. Bank, 18 F 2d, 269

Drafts — laches in presentment — action barred. An action to collect a draft is barred by the statute of limitations where no presentment for payment is made for over 19 years, on the theory that a creditor may not postpone the running of the statute by his own neglect or inaction.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Banking superintendent. The superintendent of banking in his acts as bank receiver is not a public officer within the meaning of a statute providing for a limitation on the time for bringing an action against a sheriff or other public officer.

Bates v Niles, 226-1077; 285 NW 626

Barred claims—when pleadable. Statutory principle reaffirmed that a debtor, when sued, may employ, as a set-off against plaintiff's demand, any claim which is barred by the statute of limitation, (1) provided that the debtor owned the claim when it became barred, and (2) provided that the claim was not barred when the demand sued on accrued.

Riggs v Gish, 201-148; 205 NW 833

Right to offset barred claim. A bank may apply the deposit of a deceased depositor on the promissory note of the depositor to the bank, even tho such note is barred by the statute of limitation.

Merritt v Peterson, 208-672; 222 NW 853

Federal court rule as applied to state statute. The rule in federal courts in equitable actions is that state statutes of limitations are not controlling but will be followed in application of the doctrine of laches unless the circumstances of the particular case are convincing that a shorter or longer period would be just.

Crawford Bank v Crawford County, 66 F 2d, 971

National bank directors—violation of duty —state statute invoked. State statutes of limitation apply and may be invoked by directors of national bank in respect to liability for violation of duty, but two-year limitation in respect to personal reputation, held, inapplicable under such circumstances. The plain, obvious, and rational meaning of statute is always to be preferred to any curious, narrow, hidden sense, and, in case of substantial doubt, longer rather than shorter period of limitation is to be preferred.

Payne v Ostrus, 50 F 2d, 1039

Motion to re-tax costs—laches as bar. A delay of some six years on the part of a defendant in moving for a re-taxation of costs, held not such laches as to bar the motion, defendant having moved as soon as assured of the illegality in the taxation, and no one being materially prejudiced by the delay.

Wenstrand v Kiddoo, 222-284; 268 NW 574

Lost admission in writing reviving debt. An admittedly executed but lost written instrument providing for a payment on a real estate mortgage was an admission of indebtedness sufficient to revive the debt barred by the statute of limitations, since neither the amount nor the indebtedness need be specifically referred to, for if the natural and necessary inference from the writing is an admission of an unpaid indebtedness, it is sufficient.

Barton v Boland, 224-1215; 279 NW 87

Revival of contract—admission in writing. In an action by a widow to establish a claim against her deceased husband's estate based on an oral contract to repay to appellant widow a sum of money loaned to decedent prior to November 1, 1912, wherein it is shown by the record of entries in decedent's ledger and by checks signed and deposited by the decedent to joint savings account with the widow, that interest was computed on what purported to be a loan of $4,000, and even tho the statute of limitations had run, the conduct, circumstantial evidence, and admissions of the party to be charged sufficiently showed the existence of a contract so as to make applicable the statute providing for revival of contract by admission in writing.

Leland v Johnson, 227-520; 288 NW 595

Setting aside—limitation of actions—laches. A suit in equity by trustee in bankruptcy to set aside deed by bankrupt to husband on grounds of want of consideration, fraud, and failure to take possession of land, brought more than six years after recording of deed, is barred by laches under statute of limitations where only one creditor secured allowance of claim, which claim was based on note past due when deed was recorded.

Monroe v Ordway, 103 F 2d, 813

Statutory double liability repealed—limitation of action. After the effective date of Ch 219 of the 47th G. A., the act repealing the statutory double assessment liability on bank stock, a closed bank's receiver may not maintain against the executor and beneficiaries under the will an action to enforce the double liability as to stock issued prior to December 1, 1933, and formerly owned by decedent.

Bates v Bank, 227-925; 289 NW 735

Time of payment — marginal entry. A properly dated promissory note which fails to state, in the strict body thereof, any time for payment, is, nevertheless, for the purpose of a demurrer presenting the bar of the statute of limitation, payable at a fixed and definite date when, in the corner of the note and opposite the signature to the note, appear the words, "the term of five years".

Nylander v Nylander, 221-1358; 268 NW 7

IV RETROACTIVE OPERATION

Legislative intent. A statute of limitation will be given retroactive effect only when it appears by express provision, or necessary implication, that such was the legislative intent.

Hinrichs v Locomotive Wks., 203-1395; 214 NW 585

V CHANGE OR REPEAL OF LIMITATION

Shortening limitation on action — constitutional condition. Principle reaffirmed that the legislature may constitutionally shorten the time within which an existing cause of action may be barred if a reasonable time is given for the commencement of an action before the bar takes effect.

Johnson v Leese, 223-480; 273 NW 111

VI LIMITATION AS AGAINST GOVERNMENT, STATE, MUNICIPALITY, PUBLIC CORPORATION, OR OFFICERS

(a) IN GENERAL

Computation of period—accrual of right—official nonfeasance. The breach of official duty, and not the resulting damage, creates the cause of action making operative the statute of limitations, so where a recorder negligently omitted to index a chattel mortgage resulting in a subsequent mortgagee obtaining priority through lack of notice of first mortgage, the cause of action accrued at the time of such omission and an action against the recorder for this nonfeasance was barred, by this section, after three years.

Baie v Rook, 223-845; 273 NW 902; 110 ALR 1062

County claim for care of insane. When a county was not liable for the support of a person committed to a state institution as insane, and through the negligence and laches of its officials paid such support for about 14 years before objecting, the negligence was imputed to the county, and the bar of laches prevented a recovery for such expenditures from the county which should have paid, but the burden of continuing payments was on the other county from the time payments ceased.

State v Clay County, 226-885; 285 NW 229

Inapplicability—duration of lien. Tax sale of land for nonpayment of drainage assessments is not an action barred by statute of limitations, and the duration of a lien for such assessment or the time within which payment may be enforced is not limited by statute.

Whisenand v Van Clark, 227-800; 288 NW 915

Mandamus—when statute runs. The statute of limitation commences to run against an action of mandamus to compel the board of supervisors to levy an additional assessment to pay drainage warrants even tho the board had not levied or otherwise provided for the additional assessment to complete the fund from which the warrants are to be paid.

Lenehan v Drain. Dist., 219-294; 258 NW 91

Nonperformance of public duties. Mandamus to compel a public officer to perform a mandatory public duty is not barred by the lapse of any time.

Perley v Heath, 201-1163; 208 NW 721

(b) IN RE HIGHWAYS, STREETS, ALLEYS, AND PUBLIC GROUNDS

Public not barred. An action to oust an alleged franchise holder from public streets because of the invalidity of the alleged franchise, tho brought by the county attorney in *quo warranto*, cannot be barred by the lapse of time.

State v Munn, 216-1232; 250 NW 471

"Adverse possession" of highway. The term "adverse possession" is not employed in decisions relative to the abandonment of public highways in the technical sense which such term has acquired as a part of the statute of limitation, but rather in the sense of recognizing those antagonistic acts on the part of a landowner which, if unheeded by the public, will have evidentiary bearing on the issue of abandonment.

Clare v Wogan, 204-1021; 216 NW 739

Inadequate showing of abandonment. A duly established highway which constituted a link between other existing highways is not shown to have been abandoned by evidence that, about a year after the establishment, the landowner (who had petitioned for the highway) fenced in the part carved from his other lands, and held possession for some 15 years, and that the road had never been used, because the public officers had failed to bridge and grade impassable places thereon.

Clare v Wogan, 204-1021; 216 NW 739

Nonapplicability to nonaccepted street. In a quiet title action where land was dedicated but never accepted as street in unincorporated village, the rule that statute of limitations will not run against a municipality exercising a governmental function, does not apply.

Brewer v Claypool, 223-1235; 275 NW 34

No title accrues from encroachment on highway. Encroachment by an adjoining landowner on an established public highway will not ripen into a title through any statute of limitations, doctrine of acquiescence, adverse possession, or estoppel—the establishment and maintenance of public highways being a governmental function.

Richardson v Derry, 226-178; 284 NW 82

"Nonuser" of highway. Nonuser of an established public highway is not, in and of itself, sufficient to establish a claimed abandonment of the highway, especially when the nonuser is caused by the failure of the public officers to promptly bridge or grade places otherwise impassable.

Clare v Wogan, 204-1021; 216 NW 739

Obstructions and encroachments on highway. Encroachments on a public highway in the form of fences or like obstructions furnish no basis for a legal right, howsoever long continued.

Dickson v Davis County, 201-741; 205 NW 456

Streets and alleys—estoppel to open. A city estops itself from asserting any right in and to a public alley when, knowing that a person has taken possession of such alley under a claim of right, it permits such person to remain in undisturbed possession under such claim for ten years, and to erect valuable improvements on such alley.

Page & Crane v City, 208-735; 225 NW 841

Torts—notice to municipality of injury—proof of service. Evidence of service of notice of injury in consequence of defective street, in order to prevent the attaching of the "three month" statute of limitation, held sufficient to justify submission to jury of the issue of such service.

Cuvelier v Dumont, 221-1016; 266 NW 517

Trees in highway not property of adjoining owner. A property owner abutting and occupying a part of a highway has no rights in trees growing on such part of the highway, no matter how long his occupancy of the highway continued before public convenience and necessity required appropriation of the full highway width.

Rabiner v Humboldt Co., 224-1190; 278 NW 612; 116 ALR 89

Unallowable alteration in highway. A highway which was established substantially on a designated line, but which was actually opened and maintained by the public authorities and fenced by the various abutting property owners for more than a half century on a line variant from the established line, may not be summarily changed back to the established line and thereby made to embrace lands which were theretofore undisturbed.

Clarken v Lennon, 203-359; 212 NW 686

VII LIMITATIONS AS AGAINST QUASI-PUBLIC CORPORATIONS

Waterworks sold to city—stockholder's action to establish interest barred. Where a waterworks was sold to a city, and a stockholder seeks to establish an interest in the waterworks property on the ground that the city took the property burdened with a trust for his benefit, the action was barred by statute of limitations where no effort to enforce claim against city was made during a period of more than 10 years after the sale.

Shaver v Des Moines, 227-411; 288 NW 412

VIII LIMITATION RUNS IN FAVOR OF PUBLIC

Public not barred by statute. An action to oust an alleged franchise holder from public streets because of the invalidity of the alleged franchise, tho brought by the county attorney in quo warranto, cannot be barred by the lapse of time.

State v Munn, 216-1232; 250 NW 471

Unaccepted platted street—applicability. Where parties claim land, dedicated in plat as a street but, not being accepted, never became a street, the public has no interest therein and the doctrine of adverse possession is applicable.

Brewer v Claypool, 223-1235; 275 NW 34

Streets—nonuser—adverse possession—estoppel. Tho a street be legally established, yet where (1) the municipality does not open up the street, or there is nonuser for the statutory period, and (2) private rights have been acquired by adverse possession, then abandonment may be presumed, the public estopped from asserting any rights therein, and public rights in street extinguished.

Brewer v Claypool, 223-1235; 275 NW 34

IX PERSONS WHO MAY RELY ON LIMITATION

National bank directors—state statute invoked. State statutes of limitation apply and may be invoked by directors of national bank in respect to liability for violation of duty, but two-year limitation in respect to personal reputation, held, inapplicable under such circumstances. The plain, obvious, and rational meaning of statute is always to be preferred to any curious, narrow, hidden sense, and, in case of substantial doubt, longer rather than shorter period of limitation is to be preferred.

Payne v Ostrus, 50 F 2d, 1039

Inapplicable to tax sale for unpaid drainage assessments—duration of lien. Tax sale of land for nonpayment of drainage assessments is not an action barred by statute of limitations, and the duration of a lien for such assessment or the time within which payment may be enforced is not limited by statute.

Whisenand v Van Clark, 227-800; 288 NW 915

Failure to raise statute of limitations as defense in lower court—effect. A defense under statute of limitations not raised in lower court cannot be considered on appeal.

In re Christensen, 227-1028; 290 NW 34

X ESTOPPEL TO RELY ON LIMITATION

Estoppel to plead limitation.

Dist. Twp. v French, 40-601
Findley v Stewart, 46-655
Bradford v McCormick, 71-129; 32 NW 93
Wilder v Secor, 72-161; 33 NW 448
Carrier v Railway, 79-80; 44 NW 203
McBride v Railway, 97-91; 66 NW 73
Mereness v Bank, 112-11; 83 NW 711
Daugherty v Daugherty, 116-245; 90 NW 65
Faust v Hosford, 119-97; 93 NW 58
Simmons v Western Co., 171-429; 154 NW 166
Van Wechel v Van Wechel, 178-491; 159 NW 1039
Ogg v Robb, 181-145; 162 NW 217
Conklin v Towne, 204-916; 216 NW 264
Murphy v Hahn, 208-698; 223 NW 756

X ESTOPPEL TO RELY ON LIMITATION —concluded

Estoppel. A party may not enter into an understanding with another to the effect that a claim shall remain in status quo, and abide the outcome of pending litigation in another action, and then plead the statute of limitation because of such waiting period.

Weitz v Guar. Co., 206-1025; 219 NW 411

Elements of estoppel. The maker of a promissory note cannot be held estopped to plead the statute of limitation in the absence of evidence of some act of omission or commission upon which the holder relied to his detriment.

King v Knudson, 209-1214; 229 NW 839

Nonestoppel by municipal corporations. The act of a city attorney in stating that he would not plead the statute of limitation against a proposed action against the city for an injury claimed to have been suffered because of a defective street will not estop the city from interposing said plea when the action is actually instituted. Whether the municipality could, under any circumstances, estop itself, quaere.

Welu v Dubuque, 202-201; 209 NW 439

Compromising barred claim. If parties have actually compromised a bona fide controversy between themselves relative to the claim of one of the parties, it is immaterial whether, at the time of the compromise, the claim in controversy was barred by the statute of limitation.

Marron v Lynch, 215-341; 245 NW 346

Delay induced by debtor. The fact that a debtor repeatedly requests time in order to investigate the claim made against him before paying it, and the fact that the creditor repeatedly acquiesces in such delay tho under no obligation so to do, will not estop the debtor, when sued, from pleading the statute of limitation which in the meantime has fully run because of said delays.

Bundy v Canning Co., 215-674; 244 NW 841

Enforcing unknown trust. A trust fund, created without the knowledge of the cestui que trust, in the form of a bank deposit in a national bank and carried on the books of the bank for many years and then dropped, may not, after the bank has become insolvent, a receiver appointed, its affairs liquidated, and its charter surrendered and cancelled, be enforced against a bank which took over certain assets of the old insolvent bank, and assumed certain of its obligations, not including, however, the trust fund in question.

Short v Bank, 210-1202; 232 NW 507

Laches and stale demands. Principle recognized that delay, without any showing of prejudice, in the prosecution of a claim in equity, for a period of time less than the statute of limitation, does not constitute laches.

Lutton v Steng, 208-1379; 227 NW 414

Pleading—sufficiency. A plea, in avoidance of the statute of limitation, to the effect that, while plaintiff city had full knowledge of its cause of action against defendant under an ordinance in the form of a contract, it relied, until the statute had run, on defendant's deliberately false representation that he had never accepted or agreed to said ordinance, is demurrable because presenting no legal basis for tolling said statute, there being no allegation as to diligence to discover the falsity of said representation.

Pella v Fowler, 215-90; 244 NW 734

Right to corporate transfer of stock—laches —effect. Delay of some seven years, by a pledgee of corporate shares of stock, to enforce his right to have the stock transferred on the corporate stock records, will not bar the enforcement of said right when there are no unprotected rights of third parties intervening, and when the corporation has not been harmed by the delay.

Bankers Tr. Co. v Rood, 211-289; 233 NW 794; 73 ALR 1421

XI AGREEMENTS AS TO PERIOD OF LIMITATION

Statutory bonds. Whether parties to a statutory bond will be permitted by contract to specify the time before which, or after which, an action can be maintained, quaere.

Page County v Deposit Co., 205-798; 216 NW 957

Unreasonableness. A contract provision in an indemnity bond which requires the obligee to begin suit thereon before the amount of his recovery on the bond is determinable, is unreasonable, and therefore unenforceable. In such case, the general statute which limits actions applies.

Cook v Heinbaugh, 202-1002; 210 NW 129

Unreasonableness. A provision in a contract of insurance which prohibits the bringing of an action earlier than 60 days or later than 90 days after loss is unreasonable per se and void.

Page Co. v Deposit Co., 205-798; 216 NW 957

XII ACCRUAL OF RIGHT OF ACTION OR DEFENSE

Discussion. See 4 ILB 118—Accrual of cause of action

(a) ACCRUAL IN GENERAL

Amendment to petition—statute of limitations. An amendment to petition, setting up a new cause of action barred by the statute of limitations, may be stricken, but when both the original petition and the amendment plead the same cause of action in general allegations

of negligence, such amendment may not be stricken.

Olson v Cushman, 224-974; 276 NW 777

Claims—statute of limitations—continuing liability accruing after death—peculiar circumstances. For the liability of a decedent accruing against his estate on account of ownership of a bank, an action thereon, commenced within five years after the closing of the bank and appointment of a receiver, is neither barred by the general statute of limitation nor by the one-year limitation on filing claims against an estate, when peculiar circumstances concealed the estate's liability thereon.

Daniel v Best, 224-1348; 279 NW 374

Computation of period—claim payable "on or before" death. An oral contract to pay for services, payable "on or before" the death of the promisor, matures at his death and therefore is not barred by the statute of limitations, even tho the claim was running for over 20 years.

Gardner v Marquis, 224-458; 275 NW 493

Defect of notice of commencement of action —noninterruption of running of limitations. In action to recover erroneous refund of income tax, summons addressed to marshal only and commanding him to summon named defendants to appear on specific date "to answer to a complaint filed by the United States of America" was defective as not addressed to defendants, not stating cause of action, and not describing consequences of failure to defend, and hence did not interrupt running of limitations as of date of service.

U. S. v French, 95 F 2d, 922

Premature commencement — instructions. Record reviewed, and held to properly present defendant's plea of premature commencement of the action.

Zabawa v Osman, 202-561; 210 NW 602

School tuition deemed open account. In an action to recover tuition accumulating yearly during the period from 1930 to 1937, the court properly held that the portion of the claim accruing in the period from 1930 to 1932 was not barred by a five-year statute of limitations, since a further statute made a cause of action on a continuous, open, and current account accrue on the date of the last item therein.

School Twp. v Nicholson, 227-290; 288 NW 123

Statute of limitations not started by insufficient tax return. The mere filing of a federal income tax blank containing, not the required information, but only a notation across the face that the corporation was "hopelessly insolvent" and in the hands of a receiver, does not constitute a legal return, as will start the statute of limitations operating against the income tax assessment.

State v American B. & C. Co., 225-638; 281 NW 172

Plaintiff perfecting cause of action—exception to rule. While a cause of action does not accrue so as to start the statute of limitations running unless all the facts exist so that plaintiff can allege a complete cause of action, an exception occurs where the only act necessary to perfect the plaintiff's cause of action is one to be performed by the plaintiff and he is under no restraint or disability in the performance of such act.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Drafts—demand necessary within limitation period. Before an action can be maintained against a drawer upon a check, demand for its payment must be made upon the drawee bank, but the demand cannot be postponed indefinitely and must be made within the 10-year limitation period.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Drafts — laches in presentment — action barred. An action to collect a draft is barred by the statute of limitations where no presentment for payment is made for over 19 years, on the theory that a creditor may not postpone the running of the statute by his own neglect or inaction.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Cashier's check as bill of exchange—demand unnecessary — action accrues at making — barred after 10 years. The holder of a cashier's check, certain in amount, containing no provision respecting demand and not in the nature of a certificate of deposit, has a right to sue thereon at any time from and after its issuance. Treated as a bill of exchange, presentment and demand for payment are not necessary to start running the statute of limitations. Therefore, after 10 years from its issuance, a right of action thereon is barred.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Deposit certificate—action accrues only after demand. Makers of notes, acceptors of bills of exchange and issuers of certificates of deposit are charged on the instruments from their inception, and presentment to the maker, or acceptor is unnecessary; but, as to the issuer of a certificate of deposit, there is an imputed agreement that before the depositor may sue the bank thereon, actual demand is necessary to mature the debt.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Certified check as certificate of deposit—action accrues only after demand. The act of a

XII ACCRUAL OF RIGHT OF ACTION OR DEFENSE—continued

(a) ACCRUAL IN GENERAL—concluded

bank in certifying a check, at the request of the holder, creates a new obligation on the part of the bank to that holder, and the check then becomes in legal effect an ordinary certificate of deposit for the holder. Being such, an action thereon does not accrue until it is presented for payment.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Negotiable instrument—"reasonable time" for presentment—primary and secondary liability. The "reasonable time" clause of §9531, C., '35, negotiable instruments law, applies only to persons secondarily liable on the instrument. It has no application in determining what is a reasonable time for presentment, where such step is only preliminary to the enforcement of a remedy against a party primarily liable.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

Agreement to pay debt out of insolvent estate. A contract to pay a debt out of dividends on a claim against an insolvent may not be said to be barred when the dividends declared have been so applied and when the estate of the insolvent is still pending.

Flack v Linden Bank, 211-6; 228 NW 667
Flack v Linden Bank, 211-15; 228 NW 670

(b) ACCRUAL IN RE REAL PROPERTY

Contribution by co-tenant. The cause of action in favor of one tenant in common against his co-tenant for contribution for the outlay in discharging an incumbrance on the common property accrues instantly upon payment of the incumbrance and is barred in five years.

Lawrence v Melvin, 202-866; 211 NW 410

Damages—original or continuing. Where a bridge which spanned a natural watercourse or drain across a public highway was removed and replaced by the public authorities with a solid and permanent earth embankment, the injury or hurt to nearby lands, from flood water consequent on said change in the highway, must be deemed original damages which mature upon completion of the embankment—or at least on the occurrence of substantial damages consequent on the change. It follows that the maintenance of said embankment may not be legally questioned by action commenced after the lapse of five years from the maturity of said damages.

Thomas v Cedar Falls, 223-229; 272 NW 79

Injury to property—trespass. The cause of action in favor of a mortgagee and against a third party for wrongfully entering upon the mortgaged premises and removing gravel therefrom, and thereby impairing the mortgage security, accrues when the gravel is removed—when the actual injury is inflicted—not when the mortgagee discovers said injury.

New York Ins. v Clay County, 221-966; 267 NW 79

Mistake tolling statute—burden of proving nondiscovery on pleader. A mortgagee, seeking to reform his mortgage to correct an error in the real estate description and escape the statute of limitations on the ground of mutual mistake which tolled the statute until discovered, has the burden of showing he did not discover the error until a time within five years before bringing action, and without which proof the statute operates as a bar.

Beerman v Beerman, 225-48; 279 NW 449; 118 ALR 997

Mortgage assumed by grantee—effect of extension. When grantees of property accepted a deed by which they assumed a mortgage debt on the property, the statute of limitations began to run from the time of the acceptance of the deed, but the grantees were still liable after the 10 years when they had extended the time of maturity.

Lincoln Ins. v McKenney, 227-727; 289 NW 4

Municipal interference with ingress and egress. An action by a property owner against a city for damages consequent on a long-delayed but finally completed street improvement which, while somewhat various in its operations, is one project, and which substantially destroys the owner's means of passing to and from his property, does not accrue until the improvement is completed.

Ashman v Des Moines, 209-1247; 228 NW 316; 229 NW 907

Railway right of way. The period of adverse possession of a railway right of way begins to run when the claimant takes possession under a color of title or claim of right, and not at a later date when the court ordered the railway sold.

Montgomery County v Case, 212-73; 232 NW 150

Special limitations unaffected by general. The limitation contained in §11028, C., '35, requiring mortgage foreclosure within 20 years, is subject only to the exceptions contained in that section, and not to the exceptions appearing in §11018, C., '35, dealing with revival of action by admission of the indebtedness. This latter section applies only to the general statutes of limitations.

Lackey v Melcher, 225-698; 281 NW 225

Tenancy in common—accounting. Between tenants in common, the statute of limitation does not commence to run on a claim of one of the tenants for the amount individually paid by him on a mortgage on the common prop-

erty, until there has been a demand for an accounting.

Creger v Fenimore, 216-273; 249 NW 147

Wrongful flooding of land—when action accrues. Where a city, by the erection of a dam on its own land, wrongfully flooded adjacent private land, and some years later instituted proceedings to condemn said overflowed land for a public purpose but later wholly abandoned said proceedings, the injured property owner may not say that his cause of action for damages did not accrue until the city abandoned its condemnation proceedings.

Wheatley v Fairfield, 221-66; 264 NW 906

(c) ACCRUAL IN RE IMPLIED CONTRACTS

No annotations in this volume

(d) ACCRUAL IN RE EXPRESS CONTRACTS

Agreement extending time. The extension of the time for the payment of the debt was sufficient consideration for an agreement extending a mortgage, even tho the holder reserved the right to sue at any time any person who did not consent in writing to the extension.

Lincoln Ins. v McKenney, 227-727; 289 NW 4

Marriage contracts. An action for damages for breach of promise of marriage accrues on the breach, and is barred upon the expiration of two years therefrom.

Wilson v Stever, 202-1396; 212 NW 142

Guardianship—action on bond—accrual. Action on the bond of a guardian is barred in ten years (1) from the death of the guardian, or (2) from the death of the ward, or (3) from the attainment by the ward of his majority.

Armon v Craig, 203-1338; 214 NW 556

Guardianship — conversion — effect. Conversion by a guardian of the guardianship funds does not start the running of the statute of limitation on the bond of the guardian.

Armon v Craig, 203-1338; 214 NW 556

Guardianship — failure to account — effect. The statute of limitation is not held in abeyance on the bond of a guardian by the fact that the guardian makes no accounting or settlement.

Armon v Craig, 203-1338; 214 NW 556

Unpaid subscriptions for stock — order for assessment. The power of the court to enter an order of assessment on unpaid written contracts of subscription for corporate stock in a corporation which has become insolvent and is under receivership, is not barred from and after the lapse of five years from the time the attorney general brought the action for dissolution and alleged the insolvency of the corporation, nor from and after the lapse of five years from the time when the insolvency of the corporation was definitely determined.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

(e) ACCRUAL IN RE TRUSTS AND BAILMENTS

Impressing trust on proceeds of lienable property. An action to impress a trust on the proceeds of property on which a landlord had a lien, against a depository who had full knowledge that the sale had been had for the benefit of the landlord, is not barred immediately after the lapse of six months from the termination of the lease.

Andrew v Bank, 208-1184; 225 NW 957

Recovery of erroneous payment. An action to recover estate funds paid out by an executor under an interlocutory but erroneous order for distribution accrues when the erroneous order is set aside and the executor is ordered to proceed to recover the erroneous payments.

Dillinger v Steele, 207-20; 222 NW 564

Statute of limitation—clerk's costs barred after five years. Clerk's costs inuring to the general fund when collected are no part of the judgment to which they are incident, but are only a debt, not necessarily arising out of a governmental function, which costs are such debts as become outlawed at the expiration of five years and may not then be retaxed and collected.

Great Western Ins. v Saunders, 223-926; 274 NW 28

Trust estate. The statute of limitation does not commence to run against an action for the recovery of trust funds until the trustee, on due notice, repudiates the trust.

Hoffman v Hoffman, 205-1194; 219 NW 311

Trust relation — repudiation. Principle reaffirmed that the statute of limitation commences to run against an action to enforce a trust, from the time the trustee openly repudiates the trust relationship.

In re Hellman, 221-552; 266 NW 36
Howes v Sutton, 221-1326; 268 NW 164

Trust — repudiation necessary to start statute. The statute of limitation does not commence to run against the beneficiary of an express and continuing trust until the trustee directly repudiates the trust. Evidence held insufficient to show repudiation at such remote date as to bar an action for accounting. So held where the grantee of land—the trustee—

XII ACCRUAL OF RIGHT OF ACTION OR DEFENSE—continued

(e) ACCRUAL IN RE TRUSTS AND BAILMENTS—concluded

took title under written agreement to account to grantor for one-half of the profits which might be realized on a sale.

Howes v Sutton, 221-1326; 268 NW 164

Trusts — mere lapse of time. A plea that an action to enforce a trust is barred by the statute of limitation must allege facts other than the mere lapse of time.

Spring v Spring, 210-1124; 229 NW 147

(f) ACCRUAL IN RE NUISANCES

Injury to relative rights—nuisance. An action for damages consequent on a nuisance is not an action for injury to "relative rights" and is not, therefore, barred in two years.

Chase v Winterset, 203-1361; 214 NW 591
Hill v Winterset, 203-1392; 214 NW 592

(g) ACCRUAL IN RE TORT

Actions—accrual—sale of stock. A cause of action for damages arising out of the fraudulent sale of stock accrues when the contract induced by fraud is executed or the stock is bought and paid for.

Smith v Utilities Co., 224-151; 275 NW 158

(h) ACCRUAL IN RE OFFICIAL TRANSACTIONS

Mistake of law—statute not tolled—mistake defined. Where a sheriff collects fees under a mistake of law, the failure to discover a mistake of law will not toll the running of the statute of limitations. The word "mistake" in §11010, C., '35, means mistake of fact.

George v Webster County, 211-164; 233 NW 49

Morgan v Jasper County, 223-1044; 274 NW 310; 111 ALR 634

Contractor's bond. The right of a public corporation to bring an action on a public contractor's bond conditioned to hold the municipality harmless from all loss which it may suffer in consequence of the contractor's default does not accrue until after judgment is rendered against the city and the same is paid by the city.

Waukon v Surety Co., 214-522; 242 NW 632

Drainage outlet repair—contribution—statute of limitation. The legal right of the governing body of a drainage district located in one county to compel a drainage district located in another county, through its governing body, to contribute to the cost of cleaning out, deepening, enlarging, extending or straightening of the outlet which is common to both of said districts, accrues when the actual cost of said work is legally apportionable to the different districts; and action to enforce said right, unless instituted within five years after said accrual, is barred by the statute of limitation. And the making of an erroneous apportionment will not toll said statute.

Board v Board, 221-337; 264 NW 702

Special assessment certificates. A cause of action accrues against a city or town on special assessment certificates, issued and delivered by it for street improvements, at the point of time when it fails to levy valid assessments for the payment of said certificates, and such cause of action is barred in 10 years after said accrual.

Stockholders Inv. v Town, 216-693; 246 NW 826

Statutory liability. An action to enforce the statutory liability of a county to return mortgage foreclosure execution fees to the certificate holder (when the debtor does not redeem) is barred from and after the expiration of five years from the enactment of the statute giving the right to such return. (40 GA., Ch 102.)

Liljedahl v Montgomery County, 212-951; 237 NW 523

See George v Webster County, 211-164; 233 NW 49

(i) ACCRUAL IN RE STATUTORY ACTIONS AND LIABILITY

Mandamus against county supervisors to erect bridge—nonlapse of time. Mandamus to compel the board of supervisors to erect a bridge on an established and existing highway at the point where the highway is crossed by a public drainage improvement is not barred by the lapse of time.

Perley v Heath, 201-1163; 208 NW 721

Corporate officers' personal statutory liability. A cause of action to enforce the statutory-declared personal liability of corporate officers and directors for prohibited, excess corporate indebtedness (now repealed) is barred after the lapse of five years from the creation of the indebtedness.

Preston v Howell, 219-231; 257 NW 415; 97 ALR 1140

Transfer of corporate stock—when barred. The right of the pledgee of corporate shares of stock to have said stock transferred on the corporate stock records is based on a written contract arising out of the articles of incorporation, bylaws, certificate of stock, and statutes (§§8386, 8387, C., '27), and consequently such right may be enforced at any time within the

10-year period following a written demand for such transfer, unless the enforcement of such right is barred by laches.

Bankers Trust v Rood, 211-289; 233 NW 794; 73 ALR 1421

XIII DEATH AND ADMINISTRATION

Discussion. See 22 ILR 557—Limitations and claims against estate

Computation of period—claim payable "on or before" death. An oral contract to pay for services, payable "on or before" the death of the promisor, matures at his death and therefore is not barred by the statute of limitations, even tho the claim was running for over 20 years.

Gardner v Marquis, 224-458; 275 NW 493

Decedent's bank stock. After the effective date of Ch 219 of the 47th GA., the act repealing the statutory double assessment liability on bank stock, a closed bank's receiver may not maintain against the executor and beneficiaries under the will an action to enforce the double liability as to stock issued prior to December 1, 1933, and formerly owned by decedent.

Bates v Bank, 227-925; 289 NW 735

Statute not suspended by death of claim holder. The statute of limitation having commenced to run on a cause of action, during the lifetime of the person in whose favor the cause of action accrued (he being under no disability) is not suspended by the death of such person, even tho the claim descends to minor heirs.

Hodgson v Keppel, 211-795; 232 NW 725

Unauthorized action. An action by a plaintiff, as administrator of the estate of a deceased, to recover damages for the wrongful death of the deceased, when plaintiff was not such administrator, is a nullity, and, therefore, does not toll the statute of limitation on the said cause of action. And in case plaintiff is appointed administrator after the statute has fully run, an ex parte order of the probate court assuming to ratify, confirm, and adopt such former proceeding is likewise a nullity.

Pearson v Anthony, 218-697; 254 NW 10

Valid probate claim—no duty to interpose statute. An administrator is not required to resist a valid existing claim nor interpose the statute of limitations against a claim he believes is just.

In re Sterner, 224-605; 277 NW 366

XIV PERSONAL DISABILITIES AND PRIVILEGES

Guardianship—action on bond—accrual. Action on the bond of a guardian is barred in ten years (1) from the death of the guardian, or (2) from the death of the ward, or (3) from the attainment by the ward of his majority.

Armon v Craig, 203-1338; 214 NW 556

Infants—disaffirmance. A minor, upon becoming of age, is required to disaffirm contracts made during minority within a reasonable time after attaining majority or within a reasonable time after discovery of the fraud.

In re Fisher, 226-596; 284 NW 821

Guardian and ward—failure to disaffirm. In guardianship proceeding, wherein father acting as guardian made a settlement with his children after son had reached his majority, but daughter lacked three months of being 21 years of age, and suit against the father for an accounting was not brought until 2½ years after the settlement, held, evidence sufficient to support finding of trial court in approving the guardian's report which, in effect, approved the settlement, the same having been ratified by failure to disaffirm within a reasonable period of time.

In re Fisher, 226-596; 284 NW 821

XV PENDENCY OF LEGAL PROCEEDINGS

Amendments containing "thread" of original claim not barred. In an action for compensation for professional engineering services involved in construction of a sewage disposal plant, profuse substitutions and amendments to a petition which keep a thread of thought identifying them with the claim in the original notice, which amendments and substitutions tho not filed within the allowable period of the statute of limitations, come within the rule that commencement of the action tolls the statute.

Slippy Corp. v Grinnell, 224-212; 276 NW 58

Filing probate application not commencement of action. When heirs filed an application in probate, more than ten years after the clerk had approved certain claims, asking that the claims be disallowed and expunged from the record, the right to object to such claims was not barred by the statute of limitations, as the filing of the application was an appearance prior to any final adjudication in the still pending proceedings to collect such claims, rather than the commencement of an action.

In re Baker, 226-1071; 285 NW 641

XVI INJURIES FROM DEFECTS IN HIGHWAYS

Notice—fatal inaccuracy. A statutory notice designed to avoid the three months statute of limitation on an action against a city for

XVI INJURIES FROM DEFECTS IN HIGHWAYS—concluded

damages consequent on a defective street is fatally defective when it designates the place of injury at a point on a street some 3,000 feet distant from the place or point on said street where the injury was actually received.

Tredwell v Waterloo, 218-243; 251 NW 37

Statute governing action for damages. In a city which has abandoned its special charter and become organized under the commission form of municipal government, actions for damages consequent on defective streets are governed by §11007, subsec. 1, C., '27, and not by §6734, C., '27, such reorganized city having no "vested right" in said latter section within the meaning of §6569, C., '27.

Wilson v Cedar Rapids, 210-790; 231 NW 495

XVII INJURIES TO PERSON OR REPUTATION—RELATIVE RIGHTS

National bank directors—state statute invoked. State statutes of limitation apply and may be invoked by directors of national bank in respect to liability for violation of duty, but two-year limitation in respect to personal reputation, held, inapplicable under such circumstances. The plain, obvious, and rational meaning of statute is always to be preferred to any curious, narrow, hidden sense, and, in case of substantial doubt, longer rather than shorter period of limitation is to be preferred.

Payne v Ostrus, 50 F 2d, 1039

XVIII STATUTE PENALTY

State bank liquidating national bank. In an action by state bank, liquidating a national bank, to recover excess of liabilities over assets, held, not a suit for "statute penalty" within the statute of limitations.

Derscheid v Andrew, 34 F 2d, 884

Statutory liability. A cause of action to enforce the statutory-declared personal liability of corporate officers and directors for prohibited, excess corporate indebtedness (now repealed) is barred after the lapse of five years from the creation of the indebtedness.

Preston v Howell, 219-230; 257 NW 415; 97 ALR 1140

XIX PROBATE OF WILL

Filing probate application not commencement of action. When heirs filed an application in probate, more than 10 years after the clerk had approved certain claims, asking that the claims be disallowed and expunged from the record, the right to object to such claims was not barred by the statute of limitations, as the filing of the application was an appearance prior to any final adjudication in the still pending proceedings to collect such claims, rather than the commencement of an action.

In re Baker, 226-1071; 285 NW 641

XX ACTION AGAINST SHERIFF OR OTHER PUBLIC OFFICER

Computation of period—accrual of right—official nonfeasance. The breach of official duty, and not the resulting damage, creates the cause of action making operative the statute of limitations, so where a recorder negligently omitted to index a chattel mortgage resulting in a subsequent mortgagee obtaining priority through lack of notice of first mortgage, the cause of action accrued at the time of such omission and an action against the recorder for this nonfeasance was barred after three years by this section.

Baie v Rook, 223-845; 273 NW 902; 110 ALR 1062

Public rights—nonperformance. Mandamus to compel the board of supervisors to erect a bridge on an established and existing highway at the point where the highway is crossed by a public drainage improvement is not barred by the lapse of time.

Perley v Heath, 201-1163; 208 NW 721

XXI UNWRITTEN CONTRACTS

Accounts—interest items. In an action by a widow to establish a claim against the estate of her deceased husband based on an alleged oral contract of decedent to repay a loan of money made by appellant widow to decedent, prior to November 1, 1912, to which the statute of limitations was pleaded, held, mere posting of items of interest applicable to one individual transaction is insufficient to show a "connected series of transactions" so as to convert the matter into a "continuous, open, current account" under statute providing cause of action accrues on date of last item, as this means a connected series of transactions.

Leland v Johnson, 227-520; 288 NW 595

Continuous salary account. Statute of limitations will not commence to run against a continuous running salary account until the status of such account is changed.

Bankers Trust Co. v Economy Coal Co., 224-36; 276 NW 16

Revival of contract—admission in writing. In an action by a widow to establish a claim against her deceased husband's estate based on an oral contract to repay to appellant widow a sum of money loaned to decedent prior to November 1, 1912, wherein it is shown by the record of entries in decedent's ledger and by checks signed and deposited by the decedent to joint savings account with the widow, that interest was computed on what purported to be a loan of $4,000, and even tho the statute of limitations had run, the conduct, circumstantial evidence, and admissions of the party to be charged sufficiently showed the existence of a contract so as to make applicable the statute providing for revival of contract by admission in writing.

Leland v Johnson, 227-520; 288 NW 595

Revival of contract by undelivered check. In an action by a widow to establish a claim against deceased husband's estate based on an oral contract to repay a loan made by appellant widow to decedent prior to November 1, 1912, wherein the widow offers evidence of a check purported to have been issued to widow by husband for "interest 1935, 6 months" and deposited by him in joint account with his wife, and it is claimed by appellee that since check was not delivered to appellant widow nor to anyone acting for her, the writing is insufficient, held, such memorandum need not be delivered to opposite party nor his agent nor a person in privity with him, but is sufficient if it is signed and in any way promulgated so as to become an instrument of evidence.

Leland v Johnson, 227-520; 288 NW 595

Oral agreement to devise realty—insufficiency of evidence to set aside. In an equity action to recover a sum of money alleged to be the share of plaintiff's intestate in the estate of his father, where evidence shows the mother of plaintiff's intestate was left with five minor children, and that she filed a partition proceeding involving 400 acres of land owned by her husband, who died intestate, and she thereafter was the successful purchaser at a sale of the land, and that, as a part of the purchase price, she executed a note and mortgage on the land to a guardian appointed for the minor children to secure their respective shares in the father's estate, and that, as the children became of age, there were no guardianship funds to pay their respective shares, and that it was orally agreed that the children would receipt for their respective shares, in cash, to the guardian (altho no cash was received), and the mother agreed to, and did, execute a will leaving the land to the children in equal shares, the plaintiff's evidence was insufficient to set aside the agreement, and the trial court's order, affirming the agreement and impounding the mother's will until her death, was affirmed.

Baumann v Willemssen, 228- ; 292 NW 77

XXII INJURY TO PROPERTY

Computation of period—accrual of action—municipal interference with ingress and egress. An action by a property owner against a city for damages consequent on a long delayed but finally completed street improvement which, while somewhat various in its operations, is one project, and which substantially destroys the owner's means of passing to and from his property, does not accrue until the improvement is completed.

Ashman v Des Moines, 209-1247; 228 NW 316; 229 NW 907

Wrongful flooding of land. Where a city, by the erection of a dam on its own land, wrongfully flooded adjacent private land, and some years later instituted proceedings to condemn said overflowed land for a public purpose but later wholly abandoned said proceedings, the injured property owner may not say that his cause of action for damages did not accrue until the city abandoned its condemnation proceedings.

Wheatley v City, 221-66; 264 NW 906

Computation of period—damages—original or continuing. Where a bridge which spanned a natural watercourse or drain across a public highway was removed and replaced by the public authorities with a solid and permanent earth embankment, the injury or hurt to nearby lands, from flood water consequent on said change in the highway, must be deemed original damages which mature upon completion of the embankment—or at least on the occurrence of substantial damages consequent on the change. It follows that the maintenance of said embankment may not be legally questioned by action commenced after the lapse of five years from the maturity of said damages.

Thomas v Cedar Falls, 223-229; 272 NW 79

Computation of period—wrongful flooding of land—when action accrues. Where a city, by the erection of a dam on its own land, wrongfully flooded adjacent private land, and some years later instituted proceedings to condemn said overflowed land for a public purpose but later wholly abandoned said proceedings, the injured property owner may not say that his cause of action for damages did not accrue

until the city abandoned its condemnation proceedings.

Wheatley v City, 221-66; 264 NW 906

XXIII FRAUD

Discussion. See 22 ILR 704—Fraud tolling statute of limitations

Concealment—effect. Whether an action for damages for fraudulent representations is barred by the statute of limitations is properly presented to the jury, on evidence that the defendants had for several years concealed the fraudulent acts and conduct which they had perpetrated on the plaintiff.

Reinertson v Chem. Co., 205-417; 216 NW 68

Disaffirmance. A minor, upon becoming of age, is required to disaffirm contracts made during minority within a reasonable time after attaining majority or within a reasonable time after discovery of the fraud.

In re Fisher, 226-596; 284 NW 821

Guardian and ward—failure to disaffirm. In guardianship proceeding, wherein father acting as guardian made a settlement with his children after son had reached his majority, but daughter lacked three months of being 21 years of age, and suit against the father for an accounting was not brought until two and one-half years after the settlement, held, evidence sufficient to support finding of trial court in approving the guardian's report which, in effect, approved the settlement, the same having been ratified by failure to disaffirm within a reasonable period of time.

In re Fisher, 226-596; 284 NW 821

Fraud and mistake distinguished—mistake not involving equity conscience. Relief from the statute of limitations on account of fraud is in equity based on good conscience; whereas when pure mistake is the ground for relief, there is no occasion for weighing matters of conscience against either party.

Beerman v Beerman, 225-48; 279 NW 449; 118 ALR 997

Fraud—discovery—when statute tolled. Unless the fraud be fraudulently concealed by some affirmative act of the fraud perpetrator, a law action for damages on account of such fraud, not being an action solely cognizable in equity prior to the adoption of the statute, the five-year statute of limitations is not tolled by nondiscovery of the fraud.

Smith v Utilities Co., 224-151; 275 NW 158

Fraudulent concealment of fraud—burden of proof. To overcome the defense of statute of limitations on the ground of fraudulent concealment, the burden to both plead and prove such fraudulent concealment is on the party relying thereon.

Smith v Utilities Co., 224-151; 275 NW 158

Fraud — instructions — prejudice not presumed. Prejudice will not be presumed from instructions readily reconciled and understood by the jury as not conflicting, but in an action for damages on account of fraud where the defense was the statute of limitations it is prejudicial error to instruct on the elements of fraud as a basis for recovery without requiring consideration of the defense of the statute of limitations.

Smith v Utilities Co., 224-151; 275 NW 158

Sale of bonds—damage accrual—later exchange no concealment of fraud. Where bonds purchased in 1922 were exchanged in 1927 and 1932 for new bonds, the damage from fraud in their sale, if any, occurred when they were first purchased, and when neither the actual fraud itself nor due diligence to discover the same are proven, the subsequent exchange transactions will not toll the statute as a concealment of the original fraud, especially if none existed.

McGrath v Dougherty, 224-216; 275 NW 466

Sale of bonds—fraud—discovery. Under the rule that the statute of limitations begins to run on a law action for fraud when the fraud is consummated unless tolled by an intentional fraudulent concealment, and since §11010 does not apply to law actions, in a case where bonds were sold in 1922 and buyers could have secured at any time a detailed statement of the securities held for payment of the bonds, the buyers cannot claim they did not discover, until 1933, fraud in the sale of the bonds.

McGrath v Dougherty, 224-216; 275 NW 466

Statute tolled by fraudulent concealment. In an action for damages for fraud in the sale of stock where the defense was the statute of limitations, an instruction that fails to tell the jury that the statute of limitations would run unless tolled by some affirmative act of fraudulent concealment on the part of the fraud perpetrator is prejudicially erroneous.

Smith v Utilities Co., 224-151; 275 NW 158

Subsequent demand for accounting—bar. An administrator may not, after the lapse of more than five years from his final discharge, be compelled to account for funds claimed to have been fraudulently withheld by him, when the evidence of such withholding was accessible to the complainant at and prior to the time the order of discharge was entered.

Murphy v Hahn, 208-698; 223 NW 756

XXIV WRITTEN CONTRACTS

Action to redeem from mortgage. When the right of a mortgagee to foreclose a mortgage is barred by the statute of limitation, then the right of the mortgagor to redeem is foreclosed, and vice versa.

Volding v Goepel, 203-540; 211 NW 482

Agreement extending time. The extension of the time for the payment of the debt was sufficient consideration for an agreement extending a mortgage, even tho the holder reserved the right to sue at any time any person who did not consent in writing to the extension.

Lincoln Ins. v McKenney, 227-727; 289 NW 4

Arbitration and award—subsequent written compromise. A definite written agreement in which one party agrees to pay the other a named sum in settlement of their actual differences furnishes ample basis for a future action within 10 years after default, even tho, when it was entered into, the said differences had been submitted to statutory arbitrators, and even tho the agreement contemplated that the arbitrators would report to the court, in accordance with the agreement, which was done, but without filing in court.

In re Powers, 205-956; 218 NW 941

Bond as written contract. The statute of limitation relative to unwritten contracts manifestly has no relevancy to an action for damages consequent on the breach of the statutory bond of a public contractor.

Waukon v Surety Co., 214-522; 242 NW 632

Computation of period—promissory note—severability of interest. Unless the maker and payee on a promissory note agree to sever the promise to pay interest installments from the promise to pay principal so as to make each promise separate and independent of the other, the interest is an incident to the principal debt and as such is barred when the statute of limitations has run against the principal debt.

Yeadon v Farmers Co., 224-829; 277 NW 709; 115 ALR 725

Demand note. A promissory note due on demand is barred after 10 years from the date thereof.

Citizens Bank v Taylor, 201-499; 207 NW 570

Demand notes. A promissory note due 30 days after demand is barred after 10 years and 30 days from the date thereof, no legal justification appearing for delay in making demand.

Lovrien v Oestrich, 214-298; 242 NW 57

Foreclosure of mortgage. The right to foreclose a mortgage is not barred so long as the secured debt is not barred.

Randell v Fellers, 218-1005; 252 NW 787

Lien—mortgage recitation of previous mortgage as extension—priority. A property owner gave a note and mortgage in 1915, due in 1920, but which was not paid and in 1930, before it was barred by the statute of limitations, he gave a second mortgage reciting therein the existence of the prior mortgage, after which in 1931 he gave another note and mortgage to the heirs of the first mortgagee as a renewal of the 1915 mortgage, held that the recitation as to the first mortgage in the second mortgage extended the indebtedness of the first mortgage, so that by renewal of the first mortgage, even after 10 years, it retained priority over the second mortgage.

Lackey v Melcher, 225-698; 281 NW 225

Right to corporate transfer of stock. The right of the pledgee of corporate shares of stock to have said stock transferred on the corporate stock records is based on a written contract arising out of the articles of incorporation, bylaws, certificate of stock and statute (§§8386, 8387, C., '27) and consequently such right may be enforced at any time within the 10-year period following a written demand for such transfer, unless the enforcement of such right is barred by laches.

Bankers Tr. Co. v Rood, 211-289; 233 NW 794; 73 ALR 1421

XXV RECOVERY OF REAL PROPERTY

Recovery of real property (?) or partition (?). An action for the partition of real property by parties who are in possession of the property, and who claim to be co-owners thereof, may not be deemed an action for the recovery of real property, within the meaning of the statute of limitation, because an intervenor pleads a recorded deed which would deprive plaintiffs of all title, but which deed plaintiffs by reply claim was never delivered.

Gibson v Gibson, 205-1285; 217 NW 852

Duration of mortgage lien. Principle reaffirmed that the lien of a mortgage continues until the debt is paid, irrespective of the form in which the debt is evidenced.

Equitable v Rood, 205-1273; 218 NW 42

Waterworks sold to city—stockholder's action. Where a waterworks was sold to a city, and a stockholder seeks to establish an interest in the waterworks property on the ground that the city took the property burdened with a trust for his benefit, the action was barred by statute of limitations where no effort to enforce claim against city was made during a period of more than 10 years after the sale.

Shaver v Des Moines, 227-411; 288 NW 412

XXVI JUDGMENTS OF COURTS OF RECORD

Judgment due in installments. In case of a judgment for the separate maintenance of a wife through monthly installments, the statute of limitation does not commence to run from the date of the judgment, but on each separate installment from the maturity thereof.

Bennett v Tomlinson, 206-1075; 221 NW 837

Creditor's suit. Record involving an equitable proceeding to discover property belonging to a judgment defendant, and to subject said discovered property to the satisfaction of

XXVI JUDGMENTS OF COURTS OF RECORD—concluded

said judgment, reviewed, and held not barred by §10378 and §11882, C., '35, nor by this section.

Bankers Tr. v Garver, 222-196; 268 NW 568

Default—setting aside—when fraud no defense. When fraud in obtaining a judgment is not available to have the judgment set aside (because of the lapse of time), such fraud necessarily ceases to be a defense to an auxiliary proceeding to enforce the judgment.

Wade v Swartzendruber, 206-637; 220 NW 37

Lien—judgment is debt—action thereon is ex contractu. A judgment procured upon a judgment creates a lien of the same force and effect upon the real estate of the judgment debtor as does any other judgment of the district court.

Chader v Wilkins, 226-417; 284 NW 183

Lien on real property—attaches by operation of law. A judgment on a judgment is a lien on the real property of the debtor for 10 years and where debtor's father died, leaving real estate to the debtor-son's wife, who then in turn died intestate, the lien attaches to the debtor's one-third interest therein, even tho he quitclaimed his interest to his daughter within 10 days after his wife's death and before execution on the judgment issued.

Chader v Wilkins, 226-417; 284 NW 183

XXVII PLEADINGS

Amendment notwithstanding statute. A plaintiff who, in a timely brought action, pleads a rescission of a fraud-induced contract, and prays for judgment for the consideration paid, and who, after discovering his inability to prove the pleaded rescission, and after the statute of limitation has fully run against his cause of action, amends his pleadings by praying for damages consequent upon the fraud, does not thereby plead a new cause of action. He simply exercises his permissible right to change the remedy.

Reinertson v Struthers, 201-1186; 207 NW 247

Amendment to petition—when strikeable. An amendment to petition, setting up a new cause of action barred by the statute of limitations, may be stricken, but when both the original petition and the amendment plead the same cause of action in general allegations of negligence, such amendment may not be stricken.

Olson v Cushman, 224-974; 276 NW 777

Amendment in re conspiracy. A pleader does not, in legal effect, change the nature of his cause of action by striking from his petition the allegation that the defendants "conspired, colluded, and confederated together", and by substituting therefor the allegation that the defendants "acted together jointly and aided and abetted each other".

Dickson v Young, 202-378; 210 NW 452

Amendment setting up new cause of action. A claim in probate bottomed on a judgment on a bond, and a so-called amendment thereto bottomed on the bond itself, present different causes of action, and if the amended claim is filed after the statute of limitation has run it is barred notwithstanding the original filing.

In re Skiles, 210-935; 229 NW 235

Amendment for new relief after action barred. A timely action to set aside the cancellation of a policy of insurance may be amended by asking for a reformation of the policy even tho the amendment is filed at a time which would have barred the original action.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Amplifying facts. Plaintiff in an action for damages consequent on the dangerous condition of a sidewalk pleads no new cause of action by so amending his petition as to amplify the facts which brought about said dangerous condition.

Casper v Sioux City, 213-69; 238 NW 591

Burden to overcome bar. Proof that a claim is barred by the statute of limitation imposes on claimant the burden of showing the facts which neutralize the bar.

Lawrence v Melvin, 202-866; 211 NW 410

New cause of action under guise of amendment. A cause of action predicated on the plea that a bank wrongfully hypothecated a bailment as security for a loan to the bank, and that the directors were personally liable for the resulting loss because of their neglect to learn of said wrongful act and to prevent or correct it, is wholly separate and distinct from a cause of action predicated on a plea that the directors personally made the loan and hypothecation. It follows that said latter plea is subject to demurrer when made as an amendment to the former action, and after such latter plea is barred by the statute of limitation.

Cornick v Weir, 212-715; 237 NW 245; 32 NCCA 616

New cause of action under guise of amendment. A cause of action for damages predicated on the alleged negligence of plaintiff's agent in making improvident loans of plaintiff's funds, and a cause of action for damages predicated on the alleged fraudulent misapplication and appropriation by plaintiff's agent of plaintiff's funds, are separate and distinct causes of action. It follows that the pleading of the latter as an amendment to the former

is unallowable when the latter cause of action is barred by the statute of limitation.

Pease v Bank, 210-331; 228 NW 83

Non-issue-changing amendment. Where a petition alleges that it was negligent for the driver of a conveyance to use a street owing to its extreme slipperiness, an amendment to the effect that other safe and convenient streets existed which might have been used presents no new issue.

McDowell v Oil Co., 212-1314; 237 NW 456; 31 NCCA 305

Non-issue-changing amendment. The identity of a cause of action is not changed by an amendment (made at a time when the action would otherwise be barred) which strikes from a petition a specific allegation of negligence in furnishing electricity for lighting purposes, and substituting therefor a general allegation of negligence in order to rely on the doctrine of res ipsa loquitur.

Orr v Light Co., 213-127; 238 NW 604

Substituting specific negligence for general negligence. A plaintiff who, on one trial, rests on a general allegation of negligence, does not plead a new cause of action within the meaning of the statute of limitation, when on retrial he, by amendment, withdraws his general allegation and substitutes a specific allegation of negligence which, if proven, will furnish basis for the doctrine of the "last clear chance".

Reason: The latter allegation was always embraced within the former general allegation.

Pettijohn v Weede, 219-465; 258 NW 72

Nonallowable amendment. A timely brought action based solely on the common-law plea of defendant's liability consequent on the negligent operation of an automobile by defendant's employee, in due course of employment, may not, after the action would be barred by the statute of limitation, be so amended as to wholly abandon said pleaded basis and to substitute an entirely new basis for recovery, to wit, an allegation that defendant was liable because the automobile in question belonged to defendant and was operated at the time in question with defendant's consent.

Page v Constr. Co., 219-1017; 257 NW 426

Amendments after expiration of period. The right to reform a policy of insurance (if such right exists) and to recover on it as reformed, is incident to the right to recover on the instrument in its original form. It follows that where plaintiff is unsuccessful on appeal in his effort to recover on the instrument in its original form, he may, after remand, amend and tender the issue of reformation, even tho when the amendment is filed an original action would have been barred by the statute of limitation.

Green v Ins. Co., 218-1131; 253 NW 36

Sufficiency. An informal and defective plea of the statute of limitation, and of a former adjudication, may be sufficient in the absence of a proper attack thereon.

Murphy v Hahn, 208-698; 223 NW 756

Sufficiency. In pleading the bar of the statute of limitation, the facts must be alleged.

Conklin v Towne, 204-916; 216 NW 264

Timely plea. A plea of the statute of limitation is timely when interposed as soon as its availability becomes known, e. g., during the taking of the testimony.

Lawrence v Melvin, 202-866; 211 NW 410
Conklin v Towne, 204-916; 216 NW 264

Failure to raise statute of limitations as defense in lower court—effect. A defense under statute of limitations not raised in lower court cannot be considered on appeal.

In re Christensen, 227-1028; 290 NW 34

Unallowable motion to strike plea. A motion to strike an answering amendment which interposes the bar of the statute of limitation is not the proper procedure under which to plead facts which avoid the bar. Reply is necessary.

Lawrence v Melvin, 202-866; 211 NW 410

Unavailable plea. A plea of title to real estate by adverse possession is not available against one whose rights were acquired before the lapse of the 10 years sufficient to ripen such title, even tho said title had ripened as to the same property as against another party to the litigation.

Oxford Bk. v Hall, 203-320; 211 NW 389

Unnecessary instructions. There is no occasion to instruct relative to the statute of limitation when the parties join no issue thereon.

Dravis v Sawyer, 218-742; 254 NW 920

Waiver. The statute of limitation must be pleaded or the bar will be deemed waived.

North Am. Ins. v Holstrum, 208-722; 217 NW 239; 224 NW 492

When not demurrable. A petition which alleges that defendant, on a date more than five years prior to the commencement of the action, fraudulently converted to his own use property owned by plaintiff subject to a life estate in another, is not demurrable when the petition otherwise shows that plaintiff was entitled to the property only upon the death of the life tenant and that such death occurred less than five years before the commencement of the action.

Mastbergen v Bank, 216-1408; 250 NW 641

XXVIII ADVERSE POSSESSION

Discussion. See 2 ILB 144—Adverse possession

(a) RIGHTS BY PRESCRIPTION IN GENERAL

Discussion. See 24 ILR 268—Seizin and possession—title

Prescription — insufficient evidence. A public way by prescription will not be decreed on evidence which is just as consistent with the theory of the owner that whatever use was made of the land as a road was purely permissive as with the theory that the use was hostile, adverse, and under a claim of right.

Dugan v Zurmuehlen, 203-1114; 211 NW 986

Permissive use. Mere use of a way over the land of another by permission of the latter furnishes no basis for a title by prescription.

Feilhaber v Swiler, 203-1133; 212 NW 417

Self-imposed knowledge of vendor. A vendor of land will not be heard to claim that he did not know that his purchaser was holding adversely to him.

Burch v Wickliff, 209-582; 227 NW 133

Streets—conveyance of title after acceptance and vacation. In an action involving the title to a strip of land which had once been part of a street between town lots, it made no difference whether such street had ever been accepted by the town and opened for public use and later vacated and conveyances of the land made by the town, so long as a question of acquiescence and adverse possession was the decisive issue between the claimants.

Patrick v Cheney, 226-853; 285 NW 184

Streets — nonuser—adverse possession—estoppel. Tho a street be legally established, yet where (1) the municipality does not open up the street, or there is nonuser for the statutory period, and (2) private rights have been acquired by adverse possession, then abandonment may be presumed, the public estopped from asserting any rights therein, and public rights in street extinguished.

Brewer v Claypool, 223-1235; 275 NW 34

Unaccepted platted street — applicability. Where parties claim land, dedicated in plat as a street but, not being accepted, never became a street, the public has no interest therein and the doctrine of adverse possession is applicable.

Brewer v Claypool, 223-1235; 275 NW 34

Repair of dike—user—estoppel. In an action to enjoin the repair of a dike originally constructed in connection with drainage system created jointly by adjoining landowners, including plaintiff's predecessor in title, and used with knowledge of plaintiff for over 20 years without objection, principles reaffirmed (1) that where there is proof of more than mere user, the statute providing that an easement cannot be established by proof of mere user alone does not apply, and (2) that the owner of a dominant estate may by consent, express or implied, estop himself from insisting upon adherence to the principle that the owner of a servient estate has no right to interfere with the natural flow of water in a well-defined course so as to cast it back upon the dominant estate.

Dodd v Aitken, 227-679; 288 NW 898

(b) PROPERTY SUBJECT TO PRESCRIPTION

Highways—abandonment—"nonuser" as element. Nonuser of an established public highway is not in and of itself, sufficient to establish a claimed abandonment of the highway, especially when the nonuser is caused by the failure of the public officers to promptly bridge or grade places otherwise impassable.

Clare v Wogan, 204-1021; 216 NW 739

Unaccepted platted street — applicability. Where parties claim land, dedicated in plat as a street but, not being accepted, never became a street, the public has no interest therein and the doctrine of adverse possession is applicable.

Brewer v Claypool, 223-1235; 275 NW 34

(c) CLAIM OF RIGHT OR COLOR OF TITLE

"Claim of right". "Claim of right" as an element of adverse possession of land is furnished by an oral agreement between claimant and parties to a federal action to determine title, to the effect that if said parties were successful in their action claimant should have the land of which he was then in possession.

Wallis v Clinkenbeard, 214-343; 242 NW 86

Claim of right. A claim of right is an essential element of adverse possession.

Stone v Richardson, 206-419; 218 NW 332

Claim of right—facts militating against. Evidence tending to show that one, while in possession of an abandoned railway right of way to which he claimed title by adverse possession, (1) offered to buy the right of way from the railway company, (2) claimed to the railway company that he would ultimately get title through a reversion, (3) failed to list the right of way for taxation, (4) excluded the right of way from mortgages executed by him, and (5) farmed the right of way under permission from the railway company, is material as militating against the claimant's claim of right.

Montgomery County v Case, 212-73; 232 NW 150

Color of title—deed from tax deedholder. One who is in possession of real property under deed from a tax deedholder has color of title.

Mann v Nies, 213-121; 238 NW 601

Claim of right or title. To constitute claim of right or title something more than the mere assertion of ownership coupled with actual occupancy, must be shown.

McFerrin v Wiltse, 210-627; 231 NW 438

Accretions claimed. In an action to enjoin trespass and recover damages, where defendants filed a cross-petition to quiet title, claiming right to alleged accretions formed by recession of Missouri river, evidence, that for more than 15 years plaintiffs had been in possession of the land under color of title and claim of right, open, notorious, hostile, and adverse as against all others, established title in plaintiffs.

Arnd v Harrington, 227-43; 287 NW 292

Elements—mutually agreed possession. Possession of land under an amicable arrangement cannot ripen into title by adverse possession.

Warner v Tullis, 206-680; 218 NW 575

Knowledge of hostile claims—effect. The running of the statute of limitation in favor of one who is in good faith in the open and adverse possession of real estate under color of title is manifestly not interrupted by the fact that the possessor knows that other parties are asserting an interest in the property, or that other parties actually had an interest which they might successfully assert, but did not.

Lemker v Claimants, 201-902; 208 NW 290

Homestead possession — effect. An heir cannot successfully claim that he is the owner of premises because his father continuously occupied such premises for some 35 years and until his death, as a homestead, when it appears that during said time the premises went to tax deed, and that thereupon the mother re-acquired title from the tax deed holder and thereunder adversely occupied said premises under said newly acquired deed for more than 10 years.

Mann v Nies, 213-121; 238 NW 601

(d) ACTUAL, VISIBLE, NOTORIOUS, DISTINCT AND EXCLUSIVE POSSESSION

Discussion. See 25 ILR 78—Actual possession

Accretions claimed. In an action to enjoin trespass and recover damages, where defendants filed a cross-petition to quiet title, claiming right to alleged accretions formed by recession of Missouri river, evidence, that for more than 15 years plaintiffs had been in possession of the land under color of title and claim of right, open, notorious, hostile, and adverse as against all others, established title in plaintiffs.

Arnd v Harrington, 227-43; 287 NW 292

Acquiescence in title. Exclusive possession, control, and use for 18 years of lands by a child after the death of his parents, the owners, under a claim of absolute ownership in which all the other children of the parents acquiesced, ripen into a full title by adverse possession.

Hancock v Frok, 203-491; 211 NW 237

Claim broad as possession — unaccepted street. Where their claim to a certain fence was as broad as their possession, persons, who for more than 10 years had continuous and exclusive possession of a dedicated but unaccepted street secured title thereto by adverse possession.

Brewer v Claypool, 223-1235; 275 NW 34

Essential elements. Open, continuous, and good-faith possession of land, under claim of right, and with the knowledge of the record titleholder, by virtue of an oral contract of purchase, matures in the possessor an absolute title by adverse possession, even tho the contract price has never been paid.

Burch v Wickliff, 209-582; 227 NW 133

Adverse possession — elements — mutually agreed possession. Possession of land under an amicable arrangement cannot ripen into title by adverse possession.

Warner v Tullis, 206-680; 218 NW 575

(e) DURATION AND CONTINUITY OF POSSESSION

Acquiesced-in line—buildings. A line between adjoining tracts of land, definitely marked by a fence which, for 10 years, has been acquiesced in and recognized by the owners of the tracts as the division line, becomes, as between the parties, the conclusive line, irrespective of the true line in fact; and this is true altho neither party intended to claim more than his deed calls for. It follows that either party has a legal right to build in reliance on said acquiesced-in line.

Minear v Keith Co., 213-663; 239 NW 584

Acquiescence in boundary line—effect. Where plaintiffs for over 10 years and plaintiffs and their grantors for over 20 years acquiesced in a certain fence as the boundary of defendants' property and acquiesced in the use of the land south of the fence as a traveled highway, the fence becomes the boundary altho it may not be the true line.

Brewer v Claypool, 223-1235; 275 NW 34

Hostile character of possession. A possession that has been open, continuous, and adverse for the statutory time is a fundamental element of title by adverse possession. Evidence held insufficient.

McFerrin v Wiltse, 210-627; 231 NW 438

Hostile possession—tax deed does not interrupt. The continuity of possession by one claiming title to real estate by adverse possession is not broken by the execution and recording of a tax deed under which no right was asserted against claimant for some 16 years.

Wallis v Clinkenbeard, 214-343; 242 NW 86

XXVIII ADVERSE POSSESSION—cont.

(f) HOSTILE POSSESSION

1. Mistake and Effect Thereof

Additional notes. See under §12306

Discussion. See 7 ILB 129—Mistake and adverse possession

Mistake—effect. One may not be said to be in the adverse possession of land beyond the governmental line when, during his entire possession, he never intended to claim beyond the true line.

Kotze v Sullivan, 210-600; 231 NW 339

Boundary dispute on fenced land. In a dispute involving title to a strip of land between two town lots which were separated by a fence, where there was no acquiescence in the fence as the true boundary line, and one party had no intent to claim beyond the true boundary line, held that title was acquired by the other party by adverse possession when he claimed both title and possession to the strip irrespective of the location of the fence.

Patrick v Cheney, 226-853; 285 NW 184

Occupancy—intention. For adverse possession there must be occupancy taken with the intention to assert title beyond the true boundary line under a claim of right which must be as broad as the possession, whereas, occupancy taken by mistake beyond the true line with claim of right only up to the true line will not acquire title.

Patrick v Cheney, 226-853; 285 NW 184

2. Grantor and Grantee

Adverse possession — title — essential elements. Open, continuous, and good-faith possession of land under claim of right and with the knowledge of the record titleholder, by virtue of an oral contract of purchase, matures in the possessor an absolute title by adverse possession, even tho the contract price has never been paid.

Burch v Wickliff, 209-582; 227 NW 133

3. Mortgagor and Mortgagee

Limitation of actions—written contracts—action to redeem from mortgage. When the right of a mortgagee to foreclose a mortgage is barred by the statute of limitation, then the right of the mortgagor to redeem is foreclosed, and vice versa.

Volding v Goepel, 203-540; 211 NW 482

Adverse possession—nature and requisites—unavailable plea. A plea of title to real estate by adverse possession is not available against one whose rights were acquired before the lapse of the 10 years sufficient to ripen such title, even tho said title had ripened as to the same property as against another party to the litigation.

Oxford Junction Savings Bank v Hall, 203-320; 211 NW 389

4. Trustee and Cestui

No annotations in this volume

5. Landlord and Tenant

Landlord and tenant — change of relation. Manifestly a landlord and his tenant may, at the close of the tenancy, take on and assume the relationship of vendor and purchaser, and thereby enable the former tenant to hold the premises in question adversely to the former landlord.

Burch v Wickliff, 209-582; 227 NW 133

6. Husband and Wife

No annotations in this volume

7. Tenants in Common

Ouster—acts necessary. An ouster may not be predicated on the mere fact that one of several tenants in common, a father, farmed the premises, to the knowledge of the other tenants, his children.

Campbell v Humphreys, 202-472; 210 NW 558

Ouster of all tenants by superior title — effect. Principle reaffirmed that after tenants in common are all ousted by a superior title, e. g., a tax deed, one who was such former tenant in common may buy in the superior title exclusively for his own benefit.

Wood v Schwartz, 212-462; 236 NW 491

(g) PAYMENT OF TAXES

Nonpayment of taxes. A title by adverse possession may be acquired even tho such claimant does not pay the taxes on the land.

Wallis v Clinkenbeard, 214-343; 242 NW 86

Presumption in favor of tax deed holder. When land belonging to a daughter was sold for taxes and the tax deed was issued to her mother under an agreement between them, there was a presumption that the continuing possession of the land by the daughter was subordinate to the mother's tax deed, and to defeat the tax title, the presumption had to be overcome and the daughter's possession proven to be adverse. Adverse possession was not established by the continued possession of the daughter under a lease to a tenant, from whom the daughter collected rents and paid taxes, when she made no open claim that the land was her own and that she was asserting her title in hostility to the title under the tax deed.

McCormick v Anderson, 227-888; 289 NW 440

(h) BURDEN OF PROOF AND EVIDENCE

Failure to prove title—effect. A plaintiff in an action to quiet title must necessarily fail when he bases his title both on (1) accretion and (2) adverse possession, and establishes

neither; and this, too, irrespective of the weakness of defendant's title.

McFerrin v Wiltse, 210-627; 231 NW 438

Fraudulent concealment as tolling statute—burden of proof on pleader. After a defendant raises the defense of statute of limitations, plaintiff, alleging that because of defendant's fraud or fraudulent concealment the cause of action was not barred, has the burden of establishing such facts which he claims avoid the statute of limitations.

Carroll v Arts, 225-487; 280 NW 869

Presumption in favor of tax deed holder. When land belonging to a daughter was sold for taxes and the tax deed was issued to her mother under an agreement between them, there was a presumption that the continuing possession of the land by the daughter was subordinate to the mother's tax deed, and to defeat the tax title, the presumption had to be overcome and the daughter's possession proven to be adverse. Adverse possession was not established by the continued possession of the daughter under a lease to a tenant, from whom the daughter collected rents and paid taxes, when she made no open claim that the land was her own and that she was asserting her title in hostility to the title under the tax deed.

McCormick v Anderson, 227-888; 289 NW 440

Recovery of land after tax sale. Under a statute limiting the time in which an action may be brought for the recovery of real estate sold for taxes, the possession by the owner necessary to bar an action by the tax titleholder is ordinarily not the possession required under the general statute of limitations and need not be adverse, but need be only such possession as would entitle the tax titleholder to maintain an action against the owner.

McCormick v Anderson, 227-888; 289 NW 440

11009 Judgments.

Reducing statute of limitation on judgments. A legislative act which reduces the existing statutory period of time in which existing judgments may be enforced, yet accords to the holders of such judgments a reasonable time in which to enforce said judgments before the reduced time becomes an absolute bar, is not violative of the "due process" or "impairment of contract" clauses of the federal constitution.

Berg v Berg, 221-326; 264 NW 821

11010 Fraud—mistake—trespass.

Discussion. See 22 ILR 704—Fraud tolling statute of limitations

ANALYSIS

I FRAUDS WITHIN STATUTE
II FRAUDS NOT WITHIN STATUTE
III MISTAKE
IV KNOWLEDGE OF FRAUD OR MISTAKE

I FRAUDS WITHIN STATUTE

Concealment. Whether an action for damages for fraudulent representations is barred by the statute of limitation is properly presented to the jury, on evidence that the defendants had for several years concealed the fraudulent acts and conduct which they had perpetrated on the plaintiff.

Reinertson v Prod. Co., 205-417; 216 NW 68

Fraud — concealment — effect. A fraud-doer who by a subsequent fraud conceals the original fraud from his victim thereby tolls the statute of limitation on the original fraud until such time as the original fraud is discovered, or in reason ought to have been discovered. This is true irrespective of this section.

Pullan v Struthers, 201-1179; 207 NW 235

Foreclosure proceeding withheld — insufficient evidence. Evidence held quite insufficient to establish a charge to the effect that a plaintiff was fraudulently induced to withhold mortgage foreclosure proceeding.

Andrew v Bank, 215-401; 246 NW 48

Fraud — jury questions. Whether an action at law for damages consequent on fraud is barred by the statute of limitation, may depend, inter alia, on a finding of fact by the jury as to the time when plaintiff discovered the fraud, or should have discovered it by the exercise of due diligence; also whether defendant concealed his liability from plaintiff.

Vertman v Drayton, 223-380; 272 NW 438

Injury to property — trespass. The cause of action in favor of a mortgagee and against a third party for wrongfully entering upon the mortgaged premises and removing gravel therefrom, and thereby impairing the mortgage security, accrues when the gravel is removed—when the actual injury is inflicted—not when the mortgagee discovers said injury.

New York Ins. v Clay Co., 221-966; 267 NW 79

II FRAUDS NOT WITHIN STATUTE

Accessible fraud. An administrator may not, after the lapse of more than five years from his final discharge, be compelled to account for funds claimed to have been fraudulently withheld by him, when the evidence of such withholding was accessible to the complainant at and prior to the time the order of discharge was entered.

Murphy v Hahn, 208-698; 223 NW 756

Concealment. A plaintiff who, after the lapse of five years, brings his action for damages consequent on the fraudulent sale of corporate stock, must meet the plea of the statute of limitation by proof that, notwithstanding due diligence on his part, knowledge of the

II FRAUDS NOT WITHIN STATUTE—concluded

fraud perpetrated upon him has been fraudulently concealed from him by the defendant.

Conklin v Towne, 204-916; 216 NW 264

Fraud. An action for damages consequent on a fraud which was discovered seven years prior to commencement of the action is necessarily barred by the statute of limitations.

Van Every v Crawford, 207-1049; 221 NW 914

Fraud—concurrent remedies. An equitable action for an accounting for royalties on a patent sounding in damages and based on the fraud of the defendant is barred in five years after the fraud is perpetrated, nothing being pleaded to toll the statute.

Benedict v Hall, 201-488; 207 NW 606

Fraud—discovery—when statute tolled. Unless the fraud be fraudulently concealed by some affirmative act of the fraud perpetrator, a law action for damages on account of such fraud, not being an action solely cognizable in equity prior to the adoption of the statute, the five-year statute of limitations is not tolled by nondiscovery of the fraud.

Smith v Utilities Co., 224-151; 275 NW 158

Father and son partnership—mother as partner after father's death—dissolution. Where father and son were partners, and the partnership after father's death was continued with the mother, and tho she refused the son funds but did not, until 10 years after father died, specifically inform the son that she denied his status as a partner, the son's cause of action against his mother for an accounting and dissolution was neither barred by limitation nor laches.

Eggleston v Eggleston, 225-920; 281 NW 844

Sale of bonds—fraud—discovery. Under the rule that the statute of limitations begins to run on a law action for fraud when the fraud is consummated unless tolled by an intentional fraudulent concealment, and since this section does not apply to law actions, in a case where bonds were sold in 1922 and buyers could have secured at any time a detailed statement of the securities held for payment of the bonds, the buyers cannot claim they did not discover, until 1933, fraud in the sale of the bonds.

McGrath v Dougherty, 224-216; 275 NW 466

III MISTAKE

Mistake—reformation of deed. The statute of limitation does not commence to run against an action to reform a deed on the ground of mutual mistake until the mistake has been discovered.

American Bk. v Borcherding, 205-633; 216 NW 719

Mistake—statute operative from time of discovery. A cause of action for relief on the ground of mistake is not barred until five years after the mistake was discovered.

Winker v Tiefenthaler, 225-180; 279 NW 436

Mistake tolling statute—burden of proving nondiscovery on pleader. A mortgagee, seeking to reform his mortgage to correct an error in the real estate description and escape the statute of limitations on the ground of mutual mistake which tolled the statute until discovered, has the burden of showing he did not discover the error until a time within five years before bringing action, and without which proof the statute operates as a bar.

Beerman v Beerman, 225-48; 279 NW 449; 118 ALR 997

Computation of period under mistake of law. Where a sheriff collects fees under a mistake of law, the failure to discover a mistake of law will not toll the running of the statute of limitations. The word "mistake" in this section means mistake of fact.

George v Webster County, 211-164; 233 NW 49

Morgan v Jasper County, 223-1044; 274 NW 310; 111 ALR 634

Fraud and mistake distinguished. Relief from the statute of limitations on account of fraud is in equity based on good conscience; whereas, when pure mistake is the ground for relief, there is no occasion for weighing matters of conscience against either party.

Beerman v Beerman, 225-48; 279 NW 449; 118 ALR 997

IV KNOWLEDGE OF FRAUD OR MISTAKE

Fraud — discovery — record of deed — effect. A creditor will be deemed to have notice of the fraudulent character of duly recorded conveyances by his debtor.

Bristow v Lange, 221-904; 266 NW 808

Sale of bonds—damage accrual—later exchange no concealment of fraud. Where bonds purchased in 1922 were exchanged in 1927 and 1932 for new bonds, the damage from fraud in their sale, if any, occurred when they were first purchased, and when neither the actual fraud itself nor due diligence to discover the same are proven, the subsequent exchange transactions will not toll the statute as a concealment of the original fraud, especially if none existed.

McGrath v Dougherty, 224-216; 275 NW 466

11011 Open account.

Atty. Gen. Opinion. See '25-26 AG Op 150

Open accounts. Tho a continuous, open account runs for many years, the statute of limitation commences to run from the date of the last item.

In re Ransom, 219-284; 258 NW 78

Account—long lapse of time between items. A lapse of three years, and a lapse of 15 months, between credit items of an account, they being the last items in the account, do not constitute such breaks in the account as to start the running of the statute of limitation before the date of the last payment.

Ritter v Schultz, 211-106; 232 NW 830

Construction of pleading. Petition reviewed and held, on its face, to reveal an action on a continuous, open, current account and not an action on a single contract or order for a stipulated amount.

Miller v Boyce, 219-534; 258 NW 764

Continuous salary account. Statute of limitations will not commence to run against a continuous running salary account until the status of such account is changed.

Bankers Trust Co. v Economy Coal Co., 224-36; 276 NW 16

County claims for care of insane. When a county was not liable for the support of a person committed to a state institution as insane, and through the negligence and laches of its officials paid such support for about 14 years before objecting, the negligence was imputed to the county, and the bar of laches prevented a recovery for such expenditures from the county which should have paid, but the burden of continuing payments was on the other county from the time payments ceased.

State v Clay County, 226-885; 285 NW 229

Current account (?) or separate accounts (?). On the issue whether a claim against an estate was based on one continuous, open, current account, or on separate and distinct accounts, to some of which the statute of limitation would apply, evidence held to support the rulings of the court on the introduction of evidence, and the findings of the jury.

In re Davis, 217-509; 248 NW 497

"Continuous, open, current account" defined. A series of independent express contracts for services to be performed for an agreed compensation does not constitute a "continuous, open, current account".

Sammon v Roach, 211-1104; 235 NW 78

Fraud or mistake. An account stated may always be opened for fraud or mistake.

McCornack v Bank, 203-833; 211 NW 542; 52 ALR 1297

Improper assumption of fact. Prejudicial error results from directing the jury, on conflicting evidence, that a claim sued on was an "open, current, and running" account.

Seddon v Richardson, 200-763; 205 NW 307

Interest items—not series of transactions to toll statute. In an action by a widow to establish a claim against the estate of her deceased husband based on an alleged oral contract of decedent to repay a loan of money made by appellant widow to decedent, prior to November 1, 1912, to which the statute of limitations was pleaded, held, mere posting of items of interest applicable to one individual transaction is insufficient to show a "connected series of transactions" so as to convert the matter into a "continuous, open, current account" under statute providing cause of action accrues on date of last item, as this means a connected series of transactions.

Leland v Johnson, 227-520; 288 NW 595

Interruption — instructions. The fragmentary nature of the evidence in proof of the rendition of alleged services may justify the court in instructing as to the effect of any interruptions in the running of the account, even tho there be no direct evidence of such interruptions.

Peterson v Johnson, 205-16; 212 NW 138

School tuition deemed open account. In an action to recover tuition accumulating yearly during the period from 1930 to 1937, the court properly held that the portion of the claim accruing in the period from 1930 to 1932 was not barred by a five-year statute of limitations, since a further statute made a cause of action on a continuous, open, and current account accrue on the date of the last item therein.

School Twp. v Nicholson, 227-290; 288 NW 123

Time lapse starting statute. A lapse of a year and seven months between the first two credit items on a continuous, open, current account is not sufficient to start the running of the statute of limitation prior to the date of the last item.

Miller v Boyce, 219-534; 258 NW 764

11012 Commencement of action.

Insufficient "commencement". In landlord attachment, the filing of a petition only, and the issuance of the writ prior to the expiration of six months after the termination of the lease, and the levying of the writ after the expiration of said six months, do not constitute the "commencement" of an action in such sense as will preserve the lien against a general creditor who levies after the expiration of said six months.

O'Donnell v Davis, 201-214; 205 NW 347

Defect of notice of commencement of action —noninterruption of running of limitations. In action to recover erroneous refund of income tax, summons addressed to marshal only and commanding him to summon named defendants to appear on specific date "to answer to a complaint filed by the United States of America" was defective as not addressed to defendants, not stating cause of action, and not describing consequences of failure to defend,

and hence did not interrupt running of limitations as of date of service.

U. S. v French, 95 F 2d, 922

Filing probate application not commencement of action. When heirs filed an application in probate, more than 10 years after the clerk had approved certain claims, asking that the claims be disallowed and expunged from the record, the right to object to such claims was not barred by the statute of limitations, as the filing of the application was an appearance prior to any final adjudication in the still pending proceedings to collect such claims, rather than the commencement of an action.

In re Baker, 226-1071; 285 NW 641

Service of notice. An action to modify a judgment for mistake therein is "commenced", under §12793, C., '24, by the service of the notice of such action.

Reno v Avery, 203-645; 212 NW 564

Unsigned notice. An unsigned original notice is a nullity.

Citizens Bank v Taylor, 201-499; 207 NW 570

When action deemed commenced. An action to enforce a mechanic's lien is deemed commenced at the time the original notice of the action is delivered to the sheriff for immediate service.

Consumers Lbr. v Rozema, 212-696; 237 NW 433

11013 Nonresidence.

Nonresidence. Intermittent absences from the state by a debtor in looking after his business affairs do not toll the statute.

Freet v Holdorf, 201-748; 206 NW 609

11014 Bar in foreign jurisdiction.

Nonresidence. Action on a promissory note apparently executed and delivered in this state and not shown to have been elsewhere executed and delivered, is not barred simply because an action on the note could not be maintained in another state to which the maker had removed.

In re Thorne, 202-681; 210 NW 952

Bar in foreign state — effect. Action on a promissory note executed in a foreign state is barred in this state when action is barred in said foreign state, even tho such promissory note was given in renewal and in lieu of a note executed in this state.

Martin v Martin, 205-209; 217 NW 818

11016 Exception in case of death.

See under §11007 (XIII)

Statute not suspended by death of claim holder.

Hodgson v Keppel, 211-795; 232 NW 725

11017 Failure of action.

Applicability of statute. This section is not available to a plaintiff who has validly contracted for the period within which to begin his action and who begins his second action after expiration of the contract period.

Taylor v Railway, 208-1396; 227 NW 407

Dismissal — right to recommence action. A plaintiff who voluntarily dismisses his action without prejudice because, without negligence on his part, he is unable to proceed with the trial when the cause is reached on the assignment, has the right to recommence said action at any time within six months following said dismissal and to have said latter action treated as a continuation of said dismissed action, even tho the statutory period for bringing said action would, otherwise, have expired subsequent to said dismissal and prior to reinstituting the action.

Weisz v Moore, 222-492; 265 NW 606; 269 NW 443

Improper procedure. After judgment of dismissal of an action has been entered, plaintiff's right to bring a new action within six months and have it deemed a continuance of the first action (for the purpose of the statute of limitation) can only be exercised by the institution of a new action precisely as tho no prior action had been brought by him. Simply filing a new petition in the defunct prior proceeding is quite futile.

Bird v Nelson, 216-262; 249 NW 393

Loss of right to equitable relief. A duly entered judgment against plaintiff on the merits in a law action, and affirmed on appeal, constitutes a final judgment, and this section furnishes no authority to plaintiff thereafter to file in the adjudicated law action a "substituted petition in equity" (and motion to transfer to equity) involving the same subject matter, and no authority or jurisdiction to the court to entertain such attempted action.

Phoenix Ins. v Fuller, 216-1201; 250 NW 499

New action after failure of former action. An action in equity to mandamus the board of supervisors to order the refund of a tax which has been illegally exacted from plaintiff, may not be deemed a continuation of a former action at law by the same plaintiff against the county and its treasurer for a personal judgment for the amount of said illegally exacted tax.

Murphy v Board, 205-256; 215 NW 744

11018 Admission in writing—new promise.

Admission by attorney — competency. Whether a letter, signed only by the attorney for a debtor and containing an admission of the unpaidness of a debt which is barred by

the statute of limitation, is admissible to show a revival of the debt, quaere.

Koht v Dean, 220-86; 261 NW 491

Admission in writing. In an action by a widow to establish a claim against her deceased husband's estate based on an oral contract to repay to appellant widow a sum of money loaned to decedent prior to November 1, 1912, wherein it is shown by the record of entries in decedent's ledger and by checks signed and deposited by the decedent to joint savings account with the widow, that interest was computed on what purported to be a loan of $4,000, and even tho the statute of limitations had run, the conduct, circumstantial evidence, and admissions of the party to be charged sufficiently showed the existence of a contract so as to make applicable the statute providing for revival of contract by admission in writing.

Leland v Johnson, 227-520; 288 NW 595

Admission to attorney. A communication made by a client to his attorney, relative to the unpaidness of a debt then barred by the statute of limitation, cannot be deemed a confidential communication when made for the very purpose of being communicated to the holder of the barred debt, or to the latter's attorney.

Koht v Dean, 220-86; 261 NW 491

Agreement to pay loan in accordance with terms of note—evidence. Evidence held insufficient to show that an oral promise was made to pay a loan in accordance with the terms of a contemporaneously executed note, and that consequently the claim sued on was barred by the statute of limitations.

Hodgson v Keppel, 211-795; 232 NW 725

Ancient mortgage—debt extended—effect on lien. An admission of an old indebtedness, extending the debt another 10 years, starts the running of the statute of limitations anew, and the lien of a mortgage securing the debt is thereby extended for 20 years from its execution date, but as to whether the lien continues thereafter until the indebtedness secured by it would be barred, quaere.

Lackey v Melcher, 225-698; 281 NW 225

Lien—mortgage recitation of previous mortgage as extension—priority. A property owner gave a note and mortgage in 1915, due in 1920, but which was not paid; and in 1930, before it was barred by the statute of limitations, he gave a second mortgage reciting therein the existence of the prior mortgage, after which in 1931 he gave another note and mortgage to the heirs of the first mortgagee as a renewal of the 1915 mortgage, held that the recitation as to the first mortgage in the second mortgage extended the indebtedness of the first mortgage, so that by renewal of the first mortgage, even after 10 years, it retained priority over the second mortgage.

Lackey v Melcher, 225-698; 281 NW 225

Lost admission in writing reviving debt. An admittedly executed but lost written instrument providing for a payment on a real estate mortgage was an admission of indebtedness sufficient to revive the debt barred by the statute of limitations, since neither the amount nor the indebtedness need be specifically referred to, for if the natural and necessary inference from the writing is an admission of an unpaid indebtedness, it is sufficient.

Barton v Boland, 224-1215; 279 NW 87

Oral promise to pay. Whether an oral promise to pay a debt tolls the statute of limitation, quaere.

Bundy v Canning Co., 215-674; 244 NW 841

Oral promise prior to bar. The statute of limitation may be tolled by an admission that the debt is unpaid, or by a promise to pay the debt, made either before or after the statute has run, but such admission or promise must be in writing and signed by the party to be charged.

In re Sleezer, 209-56; 227 NW 644

Reference to prior mortgage in later admission of debt—revival of action. A statement in a second mortgage, that the premises are encumbered by another prior mortgage as of a certain date, constitutes an admission of that indebtedness such as to start the statute of limitations running anew, and the particular mortgage referred to may be established by extrinsic evidence.

Lackey v Melcher, 225-698; 281 NW 225

Revival of contract by undelivered check. In an action by a widow to establish a claim against deceased husband's estate based on an oral contract to repay a loan made by appellant widow to decedent prior to November 1, 1912, wherein the widow offers evidence of a check purported to have been issued to widow by husband for "interest 1935, 6 months" and deposited by him in joint account with his wife, and it is claimed by appellee that since check was not delivered to appellant widow nor to anyone acting for her, the writing is insufficient, held, such memorandum need not be delivered to opposite party nor his agent nor a person in privity with him, but is sufficient if it is signed and in any way promulgated so as to become an instrument of evidence.

Leland v Johnson, 227-520; 288 NW 595

Special limitations unaffected by general. The limitation contained in §11028, C., '35, requiring mortgage foreclosure within 20 years, is subject only to the exceptions contained in that section, and not to the exceptions appearing in this section, dealing with revival of

action by admission of the indebtedness. This section applies only to the general statute of limitations.

Lackey v Melcher, 225-698; 281 NW 225

Sufficiency of admission of unpaidness. A promissory note, action on which is barred by the statute of limitation, is revived by a duly signed letter of the maker which, while not directly and specifically stating in the language of the statute "that the note is unpaid", naturally and necessarily does so assert from the language used; and this is true even tho the letter contains a plea to the generosity of the creditor to compromise on the basis of a lesser amount.

Koht v Dean, 220-86; 261 NW 491
McClure v Smeltzer, 222-732; 269 NW 888

Supplementing admission by extrinsic evidence. A written acknowledgment by a debtor that a debt, action on which is barred by the statute of limitation, is unpaid, may, for the purpose of showing a revival of the debt, be supplemented by extrinsic evidence which clearly identifies the unpaid debt and the amount thereof.

Koht v Dean, 220-86; 261 NW 491

Unsigned extension. An unsigned indorsement in the handwriting of the maker of a promissory note, and appearing on the back thereof, and made with the knowledge of the payee, and purporting to extend the note to a named future date does not toll the statute of limitation.

King v Knudson, 209-1214; 229 NW 839

11019 Counterclaim.

Section applied.

Riggs v Gish, 201-148; 205 NW 833

Administrator's funds set off against insolvent bank holding secured note. An estate's deposit in an insolvent bank may be set off against a note held by bank, and contention that debts lacked mutuality was ineffective.

First Natl. Bk. v Malone, 76 F 2d, 251

Barred claim as counterclaim. A defendant, sued on his promissory note to plaintiff, may counterclaim by pleading an admittedly barred claim in defendant's favor and against plaintiff, and arising out of a former partnership between said parties, provided said barred claim was not barred when said note was executed.

Stuff v Stuff, 219-869; 259 NW 924

Judgment assigned by bank receiver. A judgment rendered on May 28, 1926, in favor of a state bank, and later assigned by the receiver of said bank, absolutely ceases to exist on January 1, 1934, for any purpose whatsoever, except as a counterclaim, unless, prior to said latter date, the holder of said judgment and the judgment debtor file in said cause a written stipulation continuing the life of said judgment. (§11033-e1, C., '35 [§11033.1, C., '39]).

Johnson v Keir, 220-69; 261 NW 792

Right to offset on debt to bank. A bank may apply the deposit of a deceased depositor on the promissory note of the depositor to the bank, even tho such note is barred by the statute of limitation.

Merritt v Peterson, 208-672; 222 NW 853

Scope of statute. The statutory right under the general statute of limitations to plead as a counterclaim a barred claim does not extend to a claim barred under a limitation contained in a distinctly different chapter of the code, e. g., a claim for a landlord's lien.

Miller & Chaney Bk. v Collis, 211-859; 234 NW 550

11020 Injunction.

See annotations under §11007

SPECIAL LIMITATIONS

11021 Recovery by cestui que trust.

From time of repudiation. Principle reaffirmed that the statute of limitation commences to run against an action to enforce a trust from the time the trustee openly repudiates the trust relationship.

In re Hellman, 221-552; 266 NW 36

11024 Claims to real estate antedating 1920.

Discussion. See 6 ILB 77—Limitation of real actions; 17 ILR 520—Adverse possession claims

11028 Foreclosure of ancient mortgages.

Lien—mortgage recitation of previous mortgage as extension—priority. A property owner gave a note and mortgage in 1915, due in 1920, but which was not paid and in 1930, before it was barred by the statute of limitations, he gave a second mortgage reciting therein the existence of the prior mortgage, after which in 1931 he gave another note and mortgage to the heirs of the first mortgagee as a renewal of the 1915 mortgage, held that the recitation as to the first mortgage in the second mortgage extended the indebtedness of the first mortgage, so that by renewal of the first mortgage, even after 10 years, it retained priority over the second mortgage.

Lackey v Melcher, 225-698; 281 NW 225

Ancient mortgage—debt extended—effect on lien. An admission of an old indebtedness, extending the debt another 10 years, starts the running of the statute of limitations anew, and the lien of a mortgage securing the debt

is thereby extended for 20 years from its execution date, but as to whether the lien continues thereafter until the indebtedness secured by it would be barred, quaere.

Lackey v Melcher, 225-698; 281 NW 225

Special limitations unaffected by general. The limitation contained in this section, requiring mortgage foreclosure within 20 years, is subject only to the exceptions contained in this section, and not to the exceptions appearing in §11018, C., '35, dealing with revival of action by admission of the indebtedness. This latter section applies only to the general statute of limitations.

Lackey v Melcher, 225-698; 281 NW 225

CHAPTER 487.1

SPECIAL LIMITATIONS ON JUDGMENTS

11033.1 Execution on certain judgments prohibited.

Deficiency judgment as basis for receivership. See under §12372 (VII)

Deficiency judgments generally. See under §12377

Failure to raise statute of limitations as defense in lower court—effect. A defense under statute of limitations not raised in lower court cannot be considered on appeal.

In re Christensen, 227-1028; 290 NW 34

Reducing statute of limitation on judgments. A legislative act which reduces the existing statutory period of time in which existing judgments may be enforced, yet accords to the holders of such judgments a reasonable time in which to enforce said judgments before the reduced time becomes an absolute bar, is not violative of the "due process" or "impairment of contract" clauses of the federal constitution.

Berg v Berg, 221-326; 264 NW 821

Permissible classification for purpose of legislation. The legislative act which singles out four classes of judgments only, and markedly reduces the period of time theretofore granted by statute for their enforcement, does not constitute prohibited class legislation because the court will judicially take notice of the fact that the enumerated judgments and the claims out of which they arise are generally, if not uniformly, attended by such superior facilities and opportunities for collection as to justify a statute of limitation applicable to them alone.

Berg v Berg, 221-326; 264 NW 821

Statute construed—two-year limitation on foreclosure judgments. Statutory provision that no judgment rendered in foreclosure proceedings "shall be enforced and * * * no force or vitality given thereto for any purpose" after two years from entry thereof, means that after two years, no action could be brought on judgment, no execution could issue thereon, the judgment would not be a lien, no proceedings to enforce the judgment could be commenced by issuance of an execution, and, generally, the judgment would be without force or effect.

Deaton v Hollingshead, 225-967; 282 NW 329

Administrator's settlement of unenforceable lien. Altho a settlement agreement was made between a claimant and an administrator, a decedent's homestead may not be subjected to a mortgage or judgment which has never become a lien thereon, which was not filed or allowed against the estate, which was not enforced within two years after judgment entry, and when such settlement was never approved by the probate court.

Finn v Grant, 224-527; 278 NW 225

Equitable action—waiver of foreclosure decree—nontransfer to law. In a suit brought for money judgment, foreclosure of mortgage, and appointment of a receiver, the plaintiff does not transform the equity action to a suit at law by waiving the foreclosure decree, and therefore the judgment therein is governed by the special limitation provided for judgments obtained in actions for foreclosure of real estate mortgages.

Deaton v Hollingshead, 225-967; 282 NW 329

Execution levy before judgment barred—validity of sale thereafter. If execution proceedings are instituted and levy made during the lifetime of the judgment, a sale thereunder is valid, tho held after the judgment is barred by the statute of limitations.

Deaton v Hollingshead, 225-967; 282 NW 329

11033.2 Revival of certain judgments prohibited.

Judgment assigned by bank receiver — irrevocable termination. A judgment rendered on May 28, 1926, in favor of a state bank, and later assigned by the receiver of said bank, absolutely ceases to exist on January 1, 1934, for any purpose whatsoever, except as a counterclaim, unless, prior to said latter date, the holder of said judgment and the judgment debtor file in said cause a written stipulation continuing the life of said judgment.

Johnson v Keir, 220-69; 261 NW 792

11033.3 Future judgments without foreclosure.

Discussion. See 25 ILR 146—Mortgages—debt barred

11033.4 Former judgments without foreclosure.

Equitable action—waiver of foreclosure decree—nontransfer to law. In a suit brought

for money judgment, foreclosure of mortgage, and appointment of a receiver, the plaintiff does not transform the equity action to a suit at law by waiving the foreclosure decree, and therefore the judgment therein is governed by the special limitation provided for judgments obtained in actions for foreclosure of real estate mortgages.

Deaton v Hollingshead, 225-967; 282 NW 329

Judgment on note — two-year limitation — effect on mortgage foreclosure. Statute outlawing, after two years, a judgment on a promissory note secured by a mortgage did not bar a subsequent foreclosure of the mortgage, commenced before the judgment was barred but while the debt was unpaid, altho the foreclosure decree was not entered until after the judgment on the note was outlawed by the statute.

Beckett v Clark, 225-1012; 282 NW 724; 121 ALR 912

CHAPTER 488

PLACE OF BRINGING ACTIONS

11034 Real property.

Action to cancel trust deed. An action to cancel a trust deed (which in legal effect is a mortgage), and the lien thereof, and to quiet plaintiff's title to the land is strictly local, and is properly brought in the county in which the land is situated, even tho plaintiff also prays for the cancellation of the promissory notes—a proceeding which would be transitory if separately brought.

Eckhardt v Trust Co., 218-983; 252 NW 373

Action to establish and foreclose vendee's lien. An action by the vendee of land for rescission of the contract, for personal judgment against the defendant, and for the establishment and foreclosure of a lien on the land for the purchase money paid under mutual mistake, is properly brought in the county in which the land is located, irrespective of the residence of the defendant.

Lee v Bank, 209-609; 228 NW 570

Cancellation of mortgage as real action—venue change to land situs. Ultimate test of applicability of this section is not whether proceeding is in personam or in rem but whether determination of a right in real estate is involved, and therefore an action for cancellation of mortgages involving a determination of a right in real estate, which is the subject of the action, must be brought in the county where the land is located, and granting change of venue thereto will be upheld on certiorari.

Whalen v Ring, 224-267; 276 NW 409

Foreclosure — lands in different counties — sale—validity. Under an ordinary mortgage foreclosure decree, covering land both in the county in which the decree is rendered and in an adjoining county, the clerk has authority to issue a special execution embracing the lands in both counties, and the sheriff of the county in which the execution is issued has authority to make a valid sale in his county of all said lands.

Tice v Tice, 208-145; 224 NW 571

Recovery of realty — jurisdictional venue. An action by the beneficiaries of a trust in real estate (located in this state) to compel the trustee holding title to convey the land, in accordance with the terms of the trust agreement, to a newly designated trustee, must be brought and litigated in the county in which the land, or some part thereof, is located. If not so brought, the court is under mandatory duty, on motion for change of venue, to transfer the action to a proper county.

Titus Co. v Kelsey, 221-1368; 268 NW 23

11035 Injuries to real property.

Questions undeterminable on certiorari. On certiorari to test the legality of an order denying petitioner a change of venue to the county of his residence, the supreme court cannot determine whether the respondent judge correctly determined (1) that a cause of action was pleaded against petitioner's co-defendant, or (2) that said co-defendant was, in fact, a resident of the county of suit, or (3) that the cause of action pleaded in the original suit was for injury to real estate.

Reason: The lower court had jurisdiction to rule on all said matters, and said rulings, tho erroneous, are not illegal acts within the law of certiorari.

Adams v Smith, 216-1365; 250 NW 466

11036 Local actions.

Official action. An action against a sheriff to set aside an execution sale by him must be brought in the county in which the sheriff made the sale, irrespective of the residence of other party defendants.

Brownell v Bank, 201-781; 208 NW 210

Certiorari—when writ lies—ruling on venue. Certiorari will not lie to review the action of the trial court in overruling a motion by the state appeal board for a change of venue of a trial questioning a decision of such board.

State Board v Dist. Court, 225-296; 280 NW 525

Action where school district located—propriety. An action against the state appeal board to review its rulings affecting a school district under the local budget law is properly brought in the county where the school district was located and where proceedings on the levy involved were held from which resulted the board's ruling.

State Board v Dist. Court, 225-296; 280 NW 525

11038 Resident—attachment.

Unallowable place of suit. All of three separately joined causes of action are brought in the wrong county (1) when brought in a county which is not the residence of the defendant; (2) when one cause of action authorizes suit in the said county, but on its face reveals a presumption of full payment; and (3) when the other two causes of action are admittedly not suable in said county.

Smith v Morrison, 203-245; 212 NW 567

Action on stock subscription. A stockholder of a dissolved corporation is entitled to a change of venue to the county of his residence when sued on a stock subscription in a county where he does not reside.

Kosman v Thompson, 204-1254; 215 NW 261

Enjoining action in foreign state. A defendant who is a resident of this state may, even after he has filed formal answer, enjoin a plaintiff who is a resident of this state from maintaining in a foreign state an action on a contract arising in this state, when said action is sought to be maintained for the purpose of vexatiously harassing the defendant and subjecting him to unnecessary costs, part of which are untaxable as costs.

Bankers Life v Loring, 217-534; 250 NW 8

Foreign assignee of note — assignor and makers residents of state—no jurisdiction. In an action on a note by an assignee, resident of a different state than makers, held, improperly brought in federal court where assignee derived title through indorsers residing in same state as makers.

Sargent v State Bk. & Tr. Co., 12 F 2d, 758

11039 Transfer—attached property held.

Harmless refusal to transfer action. Error in refusing to transfer an action to the county of defendant's residence becomes inconsequential when, in the further making up of the issues, either by additional pleadings in the case itself or by intervention therein or by proper consolidation of the action with other actions, the nature of the final action as tried becomes such that it might have been brought originally against all the defendants in the county in which the original action or actions were brought.

Lex v Selway Corp., 203-792; 206 NW 586

Action against executor as such. An action at law against an executor as such, in the county in which he was appointed such officer, for damages for personal injuries inflicted by the deceased, is, in legal effect, but an action in rem against the assets of the estate. It follows that the executor is not entitled to demand a change of place of trial to another county of which he is a legal resident.

Van Iperen v Hays, 219-715; 259 NW 448

11040 Place of contract.

Unallowable place of suit. All of three separately joined causes of action are brought in the wrong county (1) when brought in a county which is not the residence of the defendant; (2) when one cause of action authorizes suit in the said county, but on its face reveals a presumption of full payment; and (3) when the other two causes of action are admittedly not suable in said county.

Smith v Morrison, 203-245; 212 NW 567

Action against supervisors in re drainage bonds. An action against the board of supervisors relative to public drainage bonds must be brought in the county of which such supervisors are officials, even tho such bonds provide for payment in some other county. It follows that when not so brought a motion for change of venue to the proper county must be sustained. So held where the action sought not only a judgment at law against the supervisors for the amount due on the bonds, but sought mandamus to compel the levy of assessments.

Board v Dist. Court, 209-1030; 229 NW 711

Change of venue — indorser and maker in different counties. In action against maker and indorser of promissory note brought in county of maker's residence where note was payable, the indorser's motion for change of venue to county of its residence was properly overruled.

Lockie v McCauley, (NOR); 213 NW 768

Contracts performable in county. A municipal court has jurisdiction on personal service on the defendant within this state, but outside the county of the court's organization, to render judgment for not exceeding $1,000 on a promissory note signed by the defendant and payable within the said county, even tho the defendant is a nonresident of said county.

West v Heyman, 214-1173; 241 NW 451

Implication to pay in certain county. A mere implication arising from a writing that payments maturing under the writing will be made at a certain place in a certain county, furnishes no legal basis for bringing action in said county when defendant is an actual resident of some other county. Basis for such action in a county other than that of defendant's residence must be found in the express terms of the writing. So held in an action by

a holder of drainage bonds to recover assessments on land to pay the bonds.

Bechtel v Dist. Court, 215-295; 245 NW 299

Implied place of performance. The fact that a writing is, by implication only, performable in a certain county, does not justify the bringing of an action thereon in said county when the defendant is a resident of the state but a nonresident of said county.

Adams v Smith, 216-1365; 250 NW 466

Indorser sued in wrong county. The indorser in blank of a promissory note, when sued alone on his indorsement in the county in which the note requires the maker to make payment, is entitled to a change of venue to the county of his residence when said first county is not the county of his residence in this state.

Dougherty v Shankland, 217-951; 251 NW 73
See Darling v Blazek, 142-355; 120 NW 961

Reformation of promissory note. An equitable action for the reformation of a promissory note, by changing the name of the payee, and for judgment on the note as reformed, cannot be maintained in the county wherein the note by its terms is payable, when the defendant's residence is elsewhere in this state, and he properly moves for a change of venue.

Palmas v Tankersley, 218-416; 255 NW 514

Iowa employment contract—action—place of business. Action for damages under oral contract of employment made in Iowa is not governed by the place where the contract was entered into, but may be maintained in state where employer's business was "localized."

Severson v Hanford Air Lines, 105 F 2d, 622

Nonpermissible motion. In an action in the county in which a promissory note is specifically made payable, and against the apparent signers of the note, it is not permissible for a defendant to file a motion to transfer the action to the county of his residence on the ex parte showing that he never signed said note, or authorized or ratified, or confirmed any signing of said note in his name.

Greenland v Carter, 219-369; 258 NW 678

11041 Certain carriers and transmission companies—actions against.

Resident and nonresident defendants. A resident of this state who is sued in a county of which he is not a resident, as a joint defendant with a nonresident railway corporation, may have the entire cause transferred for trial to the county of his residence, even tho the railway corporation is operating its line in the county in which the suit is brought, it appearing that the nonresident defendant would not be materially inconvenienced by said transfer.

Nickell v Dist. Court, 202-408; 210 NW 563

Actions against common carriers. Statute providing that "an action may be brought against any railway corporation, the owner of stages, or other line of coaches or cars * * * in any county through which such road or line passes or is operated" was apparently based upon the thought that the public interest and convenience would be promoted by permitting suits against common carriers in any counties on their lines.

Bruce Transfer v Johnston, 227-50; 287 NW 278

Venue change denied. The terms "line", "stage", "car" and "other line of coaches and cars" as defined at the time of the enactment of the statute specifying venue of actions against carriers are comprehensive enough to include the operations of a transfer company as a common carrier using motor vehicles, and a damage action against such motor vehicle carrier is properly brought in a county where an automobile collided with one of the carrier's trucks while traveling over its regular route, altho company had no office in such county.

Bruce Transfer v Johnston, 227-50; 287 NW 278

Construction—interpretation as of time of enactment. Whether or not the intendment of the legislature as expressed in a statute providing that "an action may be brought against any railway corporation, the owner of stages, or other line of coaches or cars * * * in any county through which sueh road or line passes or is operated" included a transfer company using motor vehicle freight trucks operating over a regular route must be determined through interpretation of the words of the statute as of the time adopted.

Bruce Transfer v Johnston, 227-50; 287 NW 278

11042 Construction companies.

Construction of highway. Subgrading a street preparatory to putting down curbing and guttering constitutes "construction of a highway improvement" within the meaning of this section and the contractor is suable by the subcontractor in any county where the contract is made or performed, irrespective of the residence of the defendant.

Goben v Akin, 208-1354; 227 NW 400

Retroactive operation — venue. A plaintiff may avail himself of a statute which regulates the venue of the action, and which is in force when the action is brought, irrespective of the fact that the statute was not in force when the cause of action accrued.

Goben v Akin, 208-1354; 227 NW 400

11043 Insurance companies.

Assignee of policy—venue. The assignee of a fractional interest in a life insurance policy

may, in conjunction with the original beneficiary (who retains the remaining fractional interest), maintain an action on the policy in the county of which the assignee is a resident, even tho said county is not the county of which the original beneficiary is a resident.

Welch v Taylor, 218-209; 254 NW 299

11044 Nonlife insurance assessments.

Class legislation — venue. The legislature may validly classify the subject of insurance into (1) life insurance and (2) nonlife insurance and validly enact that actions to recover assessments under nonlife insurance contracts shall be brought in the county of the defendant's residence without applying the same statutory rule to life insurance companies.

Midwest Ins. v DeHoet, 208-49; 222 NW 548

Impairment of contract—existing statutes. An insurance company may not complain that its contracts are impaired by an unrepealed statute which was enacted prior to its incorporation and which provides that actions on assessments shall be brought in the county in which the defendant resides.

Midwest Ins. v DeHoet, 208-49; 222 NW 548

11044.1 Nonlife insurance premiums or notes.

Statutory change in venue of action. A legislative change in the venue of an action may be validly applied to an existing contract.

Grain Belt Ins. v Gentry, 208-21; 222 NW 855

11046 Office or agency.

Acts not constituting. The act of a corporation whose business was that of a retail clothier in contracting to pay an individual a commission for finding a purchaser for the corporation's real estate in a foreign county (which was the residence of said individual, and which real estate was being used as a branch store), does not constitute the establishment by the corporation of an "office or agency" in such foreign county for the sale of such real estate, no control over the actions of such individual being retained by the corporation.

Syndicate Co. v Garfield, 204-159; 214 NW 598

Change of place of trial—insufficient showing. A defendant who is sued in a county on the theory that the action grew out of an agency maintained by him in said county, is not entitled to have the action transferred to the county of his residence on the simple showing that the particular agent who was in charge when the transaction took place was not such agent when the action was commenced.

Tracy v Oil Co., 208-882; 226 NW 178

Nature or subject of action — agency in county in which action brought. Action on a contract of agency wherein plaintiff is given the exclusive right to make sales on commission in a named county, is properly brought in said county even tho the contract was elsewhere executed, and even tho defendant does not reside in said county.

Hawbaker v Laco Co., 210-544; 231 NW 347

Service on agent at maintained agency. A foreign joint stock land bank must be held to maintain an "office or agency" within the meaning of this section and §11079, C., '35, when, in a county of this state, it maintains a so-called "fieldman" charged with the duty of generally caring for and leasing (under limited authority) the lands belonging to the bank in some 14 counties of this state; and this is true tho said "fieldman" is not designated by the bank as having any office other than his residence in a designated county.

Higdon v Lincoln JSL Bank, 223-57; 272 NW 93

Substituted service on agent of nonresident. Whether a nonresident may be legally sued in this state by service in this state on an alleged, resident agent (on a cause of action growing out of such alleged agency) must necessarily be determined by resorting (1) to the express contract, if any, between the resident and nonresident parties, and (2) to the course of dealings existing between the said parties. Held, agency not shown, even tho an officer of the alleged resident agent was a director of the nonresident defendant, and even tho the nonresident defendant paid commission on sales to the alleged resident agent.

Toole Co. v Group, 217-414; 251 NW 689

Suit in foreign county. A corporation which causes its agent to go into a foreign county and to establish himself at a hotel therein, with authority to take and negotiate promissory notes in effecting sales of corporate stock of the corporation, thereby creates an "office or agency" in said county "for the transaction of business", and may be sued in said county for the return of the consideration paid for a worthless note negotiated in said county by the agent.

Farmers Bank v Planters Elev., 200-434; 204 NW 298

11049 Personal actions.

Discussion. See 13 ILR 212—Distinction between suability and residence

Change of venue—indorser and maker in different counties. In action against maker and indorser of promissory note brought in county of maker's residence where note was payable, the indorser's motion for change of venue to county of its residence was properly overruled.

Lockie v McCauley, (NOR); 213 NW 768

Dismissal—effect on cross-petition. An executor who institutes an authorized action against a corporate receiver in the county of the receiver's appointment, for relief against an alleged fraud-induced contract by the deceased, and (1) is met by a cross-petition for judgment on the said contract, and (2) has his action properly consolidated with divers other actions under duly joined issues which might have been the basis of an original action against the executor in said county of suit, may not thereupon, after dismissing his action, have all proceedings against himself and the estate dismissed on the claim that the probate court which appointed him had sole jurisdiction to render a judgment against him or against the estate.

Lex v Selway Corp., 203-792; 206 NW 586

Dismissal in lieu of change of venue. An action brought against a defendant in a county other than that of his residence, on service on a person who is not the defendant's agent, is properly dismissed, on special appearance by the defendant. Plaintiff has no right to demand that such attempted action be transferred to the county of defendant's residence.

North English Bank v Webber, 204-958; 216 NW 10

Foreign assignee of note — assignor and makers residents of state—no jurisdiction. In an action on a note by an assignee, resident of a different state than makers, held, improperly brought in federal court where assignee derived title through indorsers residing in same state as makers.

Sargent v State Bk. & Tr. Co., 12 F 2d, 758

Official action—action to annul. An action against a sheriff to set aside an execution sale by him must be brought in the county in which the sheriff made the sale, irrespective of the residence of other party defendants.

Brownell v Bank, 201-781; 208 NW 210

Questions undeterminable on certiorari. On certiorari to test the legality of an order denying a petitioner a change of venue to the county of his residence, the supreme court cannot determine whether the respondent judge correctly determined (1) that a cause of action was pleaded against petitioner's co-defendant, or (2) that said co-defendant was, in fact, a resident of the county of suit, or (3) that the cause of action pleaded in the original suit was for injury to real estate.

Reason: The lower court had jurisdiction to rule on all said matters, and said rulings, tho erroneous, are not illegal acts within the law of certiorari.

Adams v Smith, 216-1365; 250 NW 466

Reformation of promissory note. An equitable action for the reformation of a promissory note, by changing the name of the payee, and for judgment on the note as reformed, cannot be maintained in the county wherein the note by its terms is payable, when the defendant's residence is elsewhere in this state, and he properly moves for a change of venue.

Palmas v Tankersley, 218-416; 255 NW 514

Resident and nonresident defendants. A resident of this state who is sued in a county of which he is not a resident, as a joint defendant with a nonresident railway corporation, may have the entire cause transferred for trial to the county of his residence, even tho the railway corporation is operating its line in the county in which suit is brought, it appearing that the nonresident defendant would not be materially inconvenienced by said transfer.

Nickell v Dist. Court, 202-408; 210 NW 563

Stockholders — double liability — procedure. The question whether an assessment on the stockholders of an insolvent banking institution is necessary and, if necessary, the legal amount of such assessment on each stockholder, must be determined in one equitable action instituted by the receiver in the forum of the receivership against all the stockholders. No change of venue is allowable to a defendant who is not a resident of the county where suit is properly brought.

Williams v McCord, 204-851; 214 NW 702
Kosman v Thompson, 204-1254; 215 NW 261

Venue in quo warranto. The district court of one county of a judicial district, in duly authorized quo warranto proceedings in said county involving the rival claims of two parties to the office of district judge, may acquire jurisdiction of both parties even tho one of them is a nonresident of the county of suit and is sole defendant in the county of his residence in a proceeding in quo warranto involving the same office.

State v Murray, 219-108; 257 NW 553

Void sale — relief — venue. A proceeding wherein relief is sought on the theory that the petitioner bought property at a void judicial sale and received nothing for his purchase price must be brought in the court and in the proceedings out of which the execution arose.

State v Beaton, 205-1139; 217 NW 255

11050 Negotiable paper.

Change of venue—indorser and maker in different counties. In action against maker and indorser of promissory note brought in county of maker's residence where note was payable, the indorser's motion for change of venue to county of its residence was properly overruled.

Lockie v McCauley, (NOR); 213 NW 768

Contracts performable in county. A municipal court has jurisdiction on personal service on the defendant within this state but outside the county of the court's organization, to ren-

der judgment for not exceeding $1,000 on a promissory note signed by the defendant and payable within the said county, even tho the defendant is a nonresident of said county.

West v Heyman, 214-1173; 241 NW 451

Foreign assignee of note — assignor and makers residents of state—no jurisdiction. In an action on a note by an assignee, resident of a different state than makers, held, improperly brought in federal court where assignee derived title through indorsers residing in same state as makers.

Sargent v State Bk. & Tr. Co., 12 F 2d, 758

Indorser sued in wrong county. The indorser in blank of a promissory note, when sued alone on his indorsement in the county in which the note requires the maker to make payment, is entitled to a change of venue to the county of his residence when said first county is not the county of his residence in this state.

Dougherty v Shankland, 217-951; 251 NW 73
See Darling v Blazek, 142-355; 120 NW 961

11051 Right of nonresident defendant.

Change of venue—dismissal of resident defendant—effect. In an action against two defendants, one of whom only is a resident of the county of suit, the dismissal of the action as to said resident does not give the remaining defendant a right to have the action transferred to the county of his residence when the entire transaction on which the action was based occurred in the county of suit and at a time when both defendants were residents of said county.

Wilson v Lindhart, 216-825; 249 NW 218

11053 Change when brought in wrong county.

ANALYSIS

I REMEDY FOR WRONG VENUE
II RIGHT TO CHANGE
III QUESTIONS OF FACT
IV COSTS AND EXPENSES
V WAIVERS
VI NONAPPLICABILITY OF STATUTE

I REMEDY FOR WRONG VENUE

Motion to transfer as sole remedy. An action commenced on due and proper service, and concerning a subject matter of which the court has jurisdiction, should not be dismissed because commenced in the wrong county. Motion to transfer to the proper county is the sole remedy.

Baker v Bank, 205-1259; 217 NW 621

II RIGHT TO CHANGE

Action against common carrier — venue change denied. The terms "line", "stage", "car" and "other line of coaches and cars" as defined at the time of the enactment of the statute specifying venue of actions against carriers are comprehensive enough to include the operations of a transfer company as a common carrier, using motor vehicles, and a damage action against such motor vehicle carrier is properly brought in a county where an automobile collided with one of the carrier's trucks while traveling over its regular route, altho company had no office in such county.

Bruce Transfer v Johnston, 227-50; 287 NW 278

Action against executor as such. An action at law against an executor as such, in the county in which he was appointed such officer, for damages for personal injuries inflicted by the deceased, is, in legal effect, but an action in rem against the assets of the estate. It follows that the executor is not entitled to demand a change of place of trial to another county of which he is a legal resident.

Van Iperen v Hays, 219-715; 259 NW 448

Action in county of receivership forum. A resident national bank as a stockholder in an insolvent state bank of this state is subject to suit in equity by the receiver in the county of the receivership forum, along with all other stockholders, to enforce the statutory double liability of stockholders, even tho the county of said forum is not the county of which the national bank is a resident.

Merchants Bank v Henderson, 218-657; 254 NW 65

Action on stock subscriptions. Parties sued jointly as in equity, for a personal judgment on their separate stock subscriptions, by the receiver of an insolvent corporation, are entitled to a change of place of trial to the county of their respective residences, and to a trial at law in their respective counties; and this is true irrespective of any doctrine (1) of multiplicity of suits, (2) of retention of an action by equity, or (3) of the so-called trust fund doctrine.

Kosman v Thompson, 204-1254; 215 NW 261

Answering defendant — unallowable change. Tho, in an action of tort, the husband and wife are sued jointly in a county other than the county of their common residence, the action of the wife in entering a general appearance and filing answer precludes the court thereafter from granting her a change of place of trial to the county of her residence. So held where the court, on the application of the husband, properly granted him a change of place of trial, and later dismissed the entire action because the plaintiff failed to pay, as ordered, the costs consequent on bringing the action in the wrong county.

Mansfield v Municipal Court, 222-61; 268 NW 908

Assessment on stockholders. Stockholders in an insolvent corporation which is in process

II RIGHT TO CHANGE—continued

of liquidation, are not entitled to a change of place of trial to the county of their residence, on the narrow issue whether an assessment on unpaid stock subscriptions is necessary.

Kosman v Thompson, 204-1254; 215 NW 261
Williams v McCord, 204-851; 214 NW 702

Change of venue granted—order not appealable. Appeal does not lie from an order sustaining a motion for change of place of trial from one county to another and, under the statute, ordering the cause transferred.

Gervich v Cedar Rapids Co., 226-1223; 286 NW 411

Dismissal in lieu of change of venue. An action brought against a defendant in a county other than that of his residence, on service on a person who is not the defendant's agent, is properly dismissed, on special appearance by the defendant. Plaintiff has no right to demand that such attempted action be transferred to the county of defendant's residence.

North English Bk. v Webber, 204-958; 216 NW 10

Effect on nonresident of state. An order for a change of venue to the county of a defendant's residence in this state ipso facto effects a transfer of that part of the action which is against a nonresident of this state, the latter not objecting to such transfer.

Hinchcliff v Dist. Court, 204-470; 215 NW 605

Fatally delayed motion. It is mandatory that a motion for a change of venue from the county of suit to the county of defendant's residence be filed before answer. Manifestly, certiorari will not lie to question the overruling of such belated motion.

Thornburg v Mershon, 216-455; 249 NW 202

Harmless refusal to transfer action. Error in refusing to transfer an action to the county of defendant's residence becomes inconsequential when, in the further making up of the issues, either by additional pleadings in the case itself or by intervention therein or by proper consolidation of the action with other actions, the nature of the final action as tried becomes such that it might have been brought originally against all the defendants in the county in which the original action or actions were brought.

Lex v Selway Corp., 203-792; 206 NW 586

Improper joinder in foreign county. A party who is sued in a county which is not the county of his residence on two causes of action, one of which is not properly suable in such foreign county, may have the place of trial of the latter action changed to the county of his residence.

Lex v Selway Corp., 203-792; 206 NW 586

Improper joinder in wrong county — procedure. Where a receiver joins in one proceeding (1) an equitable action asking the court to declare an assessment on unpaid stock subscriptions, and (2) a law action praying judgment on the assessment against stock subscribers who were nonresidents of the county of such proceedings, the stock subscribers need not move to strike the latter cause of action, but may very properly move (1) to separate the latter cause of action from the former, (2) to transfer the said latter cause of action to the law calendar, and (3) to transfer said latter cause of action to the various counties of the subscribers' residences.

State v Packing Co., 217-1172; 250 NW 876

Insufficient showing. A defendant who is sued in a county on the theory that the action grew out of an agency maintained by him in said county, is not entitled to have the action transferred to the county of his residence on the simple showing that the particular agent who was in charge when the transaction took place was not such agent when the action was commenced.

Tracy v Oil Co., 208-882; 226 NW 178

Judgment in wrong county — collateral attack — immunity from. Conceding, arguendo, that the municipal court was in error in overruling defendant's motion for change of venue to the county of his conceded residence, yet the court manifestly had jurisdiction to rule on the motion, and defendant having failed to seek correction of the error by appeal or other appropriate direct proceedings, the ruling becomes a finality, and the subject matter thereof cannot properly be injected into subsequent collateral proceedings wherein the judgment entered on the merits is sought to be enforced. So held where the collateral proceeding was an action to recover on a stay bond.

Educational Film v Hansen, 221-1153; 266 NW 487

Nonwaiver. Appearing generally, and filing motions to set aside orders, does not work a waiver of the right to a change of place of trial when the application for such change is made before answer.

Kosman v Thompson, 204-1254; 215 NW 261

Nonwaiver of right to be heard on motion. The right to be heard on a motion for change of venue is not waived because movant simultaneously with the filing of the motion files a demurrer to the petition.

Board v Dist. Court, 209-1030; 229 NW 711

Public officer entitled to change. A sheriff who is defendant in an action to set aside an execution sale is entitled to a transfer to the county in which the sale occurred.

Brownell v Bank, 201-781; 208 NW 210

Resident and nonresident defendants. A resident of this state who is sued in a county of which he is not a resident, as a joint defendant with a nonresident railway corporation, may have the entire cause transferred for trial to the county of his residence, even though the railway corporation is operating its line in the county in which suit is brought, it appearing that the nonresident defendant would not be materially inconvenienced by said transfer.

Nickell v Dist. Court, 202-408; 210 NW 563

Stockholders—"double" liability. A stockholder in an insolvent bank who is sued by the receiver, on his "double liability", in the forum of the receivership, in one equitable action, along with all other stockholders, is not entitled to a change of venue in case the county of suit is not the county of his residence in this state.

Broulik v Henderson, 218-640; 254 NW 63

III QUESTIONS OF FACT

Cancellation of mortgage as real action—venue change to land situs. Ultimate test of applicability of §11034, C., '35, is not whether proceeding is in personam or in rem but whether determination of a right in real estate is involved, and therefore an action for cancellation of mortgages involving a determination of a right in real estate, which is the subject of the action, must be brought in the county where the land is located, and granting change of venue thereto will be upheld on certiorari.

Whalen v Ring, 224-267; 276 NW 409

Denial of signature—effect. The statutory denial under oath of one's apparent signature to a promissory note, on which suit is commenced in the county in which the note is payable, furnishes no basis for a motion to transfer the action to the county of the residence of the mover.

Greenland v Carter, 219-369; 258 NW 678

Nonpermissible motion. In an action in the county in which a promissory note is specifically made payable, and against the apparent signers of the note, it is not permissible for a defendant to file a motion to transfer the action to the county of his residence on the ex parte showing that he never signed said note, or authorized or ratified, or confirmed any signing of said note in his name.

Greenland v Carter, 219-369; 258 NW 678

IV COSTS AND EXPENSES

Items recoverable. A defendant who is sued in the wrong county, and appears in such county solely by his attorney in order to obtain a transfer to the proper county, is entitled to be reimbursed for his reasonable outlay consequent on the employment of his attorney, even tho the attorney fee is the only item of expense which he has suffered.

State v Packing Co., 215-1172; 250 NW 876

When amount discretionary. The amount which a defendant, who is sued in the wrong county, is entitled to for expenses in attending in such county lies in the sound discretion of the court.

State v Packing Co., 217-1172; 250 NW 876

When entitled to reimbursement. A defendant who is ruled to be entitled to the transfer of an action to the county of his residence on the happening of a named condition, and said condition happens, is entitled to be reimbursed for his expenses in attending in the wrong county.

State v Packing Co., 217-1172; 250 NW 876

V WAIVERS

Nature or subject of action—nonwaiver of right to be heard on motion. The right to be heard on a motion for change of venue is not waived because movant, simultaneously with the filing of the motion, files a demurrer to the petition.

Board of Supervisors v Dist. Court, 209-1030; 229 NW 711

Nonresident—nonwaiver of right. The act of a defendant who is sued in a county other than that of his residence in appearing generally, filing motions, and proceeding to trial on preliminary matters, does not work a waiver of his right to a change of place of trial to the county of his residence when the application for such change is made before answer.

Kosman v Thompson, 204-1254; 215 NW 261

VI NONAPPLICABILITY OF STATUTE

Nature and subject of action—action to cancel trust deed. An action to cancel a trust deed (which in legal effect is a mortgage), and the lien thereof, and to quiet plaintiff's title to the land is strictly local, and is properly brought in the county in which the land is situated, even tho the plaintiff also prays for the cancellation of the promissory notes—a proceeding which would be transitory if separately brought.

Eckhardt v Bankers Trust, 218-983; 249 NW 244; 252 NW 373

Change of venue—action against executor as such. An action at law against an executor as such, in the county in which he was appointed such officer, for damages for personal injuries inflicted by the deceased, is, in legal effect, but an action in rem against the assets of the estate. It follows that the executor is not entitled to demand a change of place of trial to another county of which he is a legal resident.

Van Iperen v Hays, 219-715; 259 NW 448

11054 Dismissal.

Change of venue — failure to file papers. When a motion for change of venue is sus-

tained, the papers in the case must be filed in the district court to which the change is granted 10 days before the next term, upon penalty of dismissal of the action by operation of law.

Chariton Finance Co. v Wennerstrum, 226-464; 284 NW 375

Failure to file papers—effect. When defendant has been granted a change of venue to the county of his residence (because he has been sued in the wrong county), the failure of the plaintiff to file "the papers" in the court to which the change is ordered ten days before the first day of the next term of said court, works an automatic dismissal of the action. Whether the filing of certified copies complies with the statute, quaere.

State v Packing Co., 216-1053; 250 NW 130

CHAPTER 489

MANNER OF COMMENCING ACTIONS

11055 Original notice.

Discussion. See 23 ILR 246—Requisites of original notice

ANALYSIS

Immunity from service generally. See under §11061 (III)
Sovereignty and immunity, state and federal. See under §2

I COMMENCEMENT OF ACTION

Action commenced—note to settle unlawful transaction—estoppel. Where, after an original notice of an action to recover commissions in purchase and sale of grain on board of trade had been served so that action was deemed commenced under the statute providing for service of original notice, a compromise was consummated whereby defendant executed a note extending payment for a period of six months, defendant is estopped in subsequent action on note to plead or prove that transactions were unlawful, since, regardless of validity of original transaction, the compromise, effected in good faith, estopped either party from any further litigation of matter in dispute.

Hoyt v Wickham, 25 F 2d, 777

Defect of notice of commencement of action — noninterruption of running of limitations. In action to recover erroneous refund of income tax, summons addressed to marshal only and commanding him to summon named defendants to appear on specific date "to answer to a complaint filed by the United States of America" was defective as not addressed to defendants, not stating cause of action, and not describing consequences of failure to defend, and hence did not interrupt running of limitations as of date of service.

U. S. v French, 95 F 2d, 922

II ORIGINAL NOTICES IN GENERAL

Cross-petition—notice of—sufficiency. In an action for the partition of lands, a notice by one co-defendant to another co-defendant of the filing by the former of a cross-petition, denying all interest of the latter in the lands in question, is not a nullity because said notice fails to specifically describe or identify said lands, when said notice makes proper reference to the original petition in the action for a correct description of said lands.

Bauer v Bauer, 221-782; 266 NW 531

Default—setting aside—no service of notice. Where the defendant and his witnesses testify that he was out of the state on the day of purported service of original notice, the discretion of the trial court in setting aside a default will not be reviewed without a showing of abuse, even tho a court bailiff testified that he obtained personal service on that day.

Brunswick-Balke Co. v Dillon, 226-244; 283 NW 872

Employee performing governmental function —jurisdiction through original notice. A liquor commission enforcement officer as a state employee performing a governmental function is, nevertheless, subject to the jurisdiction of the courts by proper service of an original notice.

Anderson v Moon, 225-70; 279 NW 396

Equivocal wording of original notice. An original notice will not justify a personal judgment on default when it is so drawn that a person would naturally and ordinarily conclude that the relief demanded was simply to establish the mortgage sued on as a lien paramount to the defendant's junior lien; much less would it justify such personal judgment if intentionally drawn to mislead.

Sutton v Rhodes, 205-227; 217 NW 626

Foreign corporations — burden to sustain original notice. In an action against a foreign corporation commenced by service of original notice on the secretary of state, the plaintiff has the burden to sustain its service and fail-

ing therein may not question the sufficiency of a motion to quash the service.

Keokuk Bridge v Curtin-Howe Corp., 223-915; 274 NW 78

When jurisdiction acquired. A court acquires no jurisdiction over the person of a defendant by the due service of an original notice of suit, and consequently no jurisdiction to enter judgment against the defendant, until the arrival of the time for entering default against the defendant as specified in said notice; and this is true tho the notice is served by taking defendant's signed acknowledgment of service wherein defendant "waives time" and "consents to the taking of the judgment".

Dayton v Patterson, 216-1382; 250 NW 595

Service — nonresident attending court — immunity. Nonresident witnesses and suitors attending a court outside of the territorial jurisdiction of their residence are immune from service of civil process while attending court, and for a reasonable time before and after.

Lingo v Reichenbach Co., 225-112; 279 NW 121

Service—nonresident entering state to compromise litigation. Where no fraud or bad faith of an adversary is practiced on a nonresident to induce him to enter this state but he enters solely on the instance of his own attorney in order to attempt a compromise settlement of a pending proceeding, he is not entitled to immunity from service of a civil process and a special appearance therefor will be denied.

Lingo v Reichenbach Co., 225-112; 279 NW 121

Service on nonresident — nonwaiver of immunity. Resisting in a foreign state an action involving the same money sought in an Iowa probate proceeding is not a waiver of the immunity from process permitted a party or witness while attending such probate proceeding.

Moseley v Ricks, 223-1038; 274 NW 23

Service—nonresident—when exempt. A nonresident coming into the state as a party or witness and who is sued while attending the contest of her brother's will may appear specially to secure her common-law immunity from civil process of local courts, which immunity exists and continues not only while in attendance but for a reasonable time thereafter.

Moseley v Ricks, 223-1038; 274 NW 23

Nonresident with securities office in state—statute authorizing service on agent—constitutional. A state statute permitting the service of process on any agent or clerk employed in an office or agency maintained in the state by a nonresident in all actions growing out of, or connected with, the business of such office or agency does not abridge the privileges and immunities to which he is entitled by Art. IV, §2, of the federal constitution, or deprive him of the equal protection of the laws.

Doherty & Co. v Goodman, 294 US 623

Substituted service on nonresidents—automobile cases—contents of notice. Provision in motor vehicle law invoking special method of service on nonresidents does not require that the original notice set out facts which warrant use of such method and which might be necessary to sustain jurisdiction. Notice which complies with §§5038.03 and 11055, C., '39, is sufficient.

Welsh v Ruopp, 228- ; 289 NW 760

Service of notice — presumption attending sheriff's return. A very strong presumption obtains in favor of the return of service of original notice made by an officer, and it cannot be impeached except by very clear and satisfactory proof.

Chader v Wilkins, 226-417; 284 NW 183

III NAMES OF PARTIES

Discussion. See 19 ILR 362—Effect of misnomer

"Idem sonans"—name "Ferkins" instead of "Firkins" within rule. In an action against "Dean Firkins" an original notice addressed and naming "Dean Ferkins" as defendant and which was personally served upon "Dean Firkins" was held sufficient to confer jurisdiction over "Dean Firkins" since the names were within the rule of idem sonans.

Webb v Ferkins, 227-1157; 290 NW 112

"Idem sonans"—greater applicability to constructive service. The application of the doctrine of idem sonans, by the courts, is more strict in regard to constructive service of notice than where the service is personal.

Webb v Ferkins, 227-1157; 290 NW 112

"Idem sonans" doctrine—applicability. The doctrine of idem sonans is recognized by Iowa courts and, while each case must be determined according to its own facts, the mere fact that names spelled differently from true name could be pronounced like the true name by a strained pronunciation would not make the doctrine applicable, but where the names, when general and ordinary rules of pronunciation are applied, are so identical in pronunciation and so alike that there is no possibility of mistake, the doctrine should be applied; or where two names, as commonly pronounced in the English language, are sounded alike, a variance in their spelling is immaterial; and even slight difference in their pronunciation is unimportant, if the attentive ear finds difficulty in distinguishing the two names when pronounced. Such names are "idem sonans" and, altho spelled differently, are to be regarded as the same.

Webb v Ferkins, 227-1157; 290 NW 112

III NAMES OF PARTIES—concluded

Failure to address to defendant. In an attempted action against a city, an original notice which is not addressed to the city, but to a named person with added words "city clerk", is a nullity.

Barton v Waterloo, 218-495; 255 NW 700

Fatal defect in name. An original notice directed to and duly served on "Frank Genero" confers no jurisdiction to enter a judgment by default against "Frank Geneva".

Geneva v Thompson, 200-1173; 206 NW 132

Name of plaintiff—variations. When, in a duly served original notice of suit, and in the petition filed, plaintiff's name appears as "Joseph Gulberg", the statement in the body of the petition that the plaintiff is also known as "Joseph Eulberg" and "that Joseph Gulberg and Joseph Eulberg are one and the same person" furnishes no ground for quashing the notice and dismissing the action.

Gulberg v Cooper, 219-858; 259 NW 925

IV CAUSE OF ACTION AND RELIEF

Duplicate actions — which abatable. While an action in partition, in which service of the original notice is incomplete in whole or in part, is deemed pending in the sense that said action constitutes a lis pendens from the time the clerk properly indexes it as a lis pendens, yet, until completed service of the original notice of said action is made, said action cannot be deemed "commenced" or "pending" in the sense that it bars another subsequently instituted action in partition between the same parties and involving the same real estate.

It follows that when duplicate actions in partition, involving the same parties and the same real estate, are brought, that action only is abatable in which said service was last completed.

Ohden v Abels, 221-544; 266 NW 24

Duplicate actions on same subject matter—priority. When two actions involving the same subject matter are commenced by different parties (e. g., partition of land), the action in which completed service is first made on all necessary parties must be deemed first commenced even tho the other action was first formally filed with the clerk, unless said first action was commenced by an unauthorized plaintiff.

Jones et al. v Park, 220-903; 262 NW 801

Injunction—multifarious, vexatious and bad faith litigation. Injunction will lie to restrain the bringing of an action, which has been adjudicated, on a clear showing (1) that the defendant intends in bad faith to institute other and repeated actions on said adjudicated cause of action, (2) that plaintiff has and will continue to suffer irreparable damage and injury in loss of credit and business, and (3) that plaintiff has no remedy for such harassment except to interpose the wholly inadequate plea of adjudication.

Benedict v Mfg. Co., 211-1312; 236 NW 92

Judgment to conform to process and pleading. The court may not decree who is principal in a transaction and who is surety, and render a personal judgment in favor of the surety and against the principal for sums paid by the surety, when the original notice and petition are silent as to such matters, and when there is no other pleading which prays such relief.

Sutton v Rhodes, 205-227; 217 NW 626

Nature of cause of action—failure to state. Jurisdiction is not conferred on the court by an original notice of suit which simply notifies defendant that plaintiff claims a stated sum of money—which contains no statement whatever as to the nature of the cause of action—and said notice is not aided by an inserted statement directing defendant to examine the petition, when filed, for further particulars.

Farley v Carter, 222-92; 269 NW 34

V COURT, TERM, AND APPEARANCE

Incorrect date of appearance term. An original notice of suit in which the date of the beginning of the appearance term is incorrectly stated is fatally insufficient to confer jurisdiction on the court.

Pendy v Cole, 211-199; 233 NW 47

Omission of date of commencement of term. An original notice need not state the date on which the appearance term commences. (Note statute as amended.)

Swan v McGowan, 212-631; 231 NW 440

"Place where" court convenes. The statutory requirement that an original notice state the "place where" said court will convene is complied with by a recital that the court will be held "in the courthouse" at a named place.

Ransom v Mellor, 216-197; 248 NW 361

Void when essentials determinable by inference only. An original notice is wholly void when only by inference can it be determined (1) the time of filing the petition, (2) the court in which the petition is or will be filed, and (3) the term at which defendant is required to appear.

Rhodes v Oxley, 212-1018; 235 NW 919

VI SIGNATURE TO NOTICE

Unsigned notice. An unsigned original notice is a nullity.

Citizens Bank v Taylor, 201-499; 207 NW 570

VII FRAUDULENT SERVICE

Nonresident entering state to compromise litigation—no immunity from process. Where

no fraud or bad faith of an adversary is practiced on a nonresident to induce him to enter this state but he enters solely on the instance of his own attorney in order to attempt to compromise settlement of a pending proceeding, he is not entitled to immunity from service of a civil process and a special appearance therefor will be denied.

Lingo v Reichenbach Land Co., 225-112; 279 NW 121

11056.1 Process—criminal defendant.

Discussion. See 23 ILR 253—Process—criminal defendant

Constitutionality. A statute which provided that service in any action could be made on a nonresident criminal defendant while he was within the state, was unconstitutional in providing that the statute legalized such service where it had been made in cases pending, as after the commencement of an action the question of determining jurisdiction is a judicial function which the legislature is without power to control.

Frink v Clark, 226-1012; 285 NW 681

Nonresident served while in state as criminal defendant. When nonresident defendants in a criminal case were in attendance within the state, they were privileged from the service of civil process in another action, and a special appearance filed by them should have been sustained, notwithstanding a statute passed later legalizing such notice served on criminal defendants in pending actions.

Frink v Clark, 226-1012; 285 NW 681

Service—nonresident—when exempt. A resident of a foreign state who comes into this state at the request of the sheriff of a county in which an official inquest is being held by the coroner, and for the good-faith and sole purpose of giving his testimony at said inquest, is immune from civil process until the lapse of a reasonable time after he has accomplished said purpose.

Kelly v Shafer, 213-792; 239 NW 547

11057 Dismissal.

Attempt to utilize petition in dismissed action. A plaintiff who dismisses his action without prejudice and thereupon institutes a new action may not treat the petition in the dismissed action as surviving and performing the functions of a petition in his newly brought action, even tho he causes the clerk to mark said old petition "Refiled".

Brown v Dickey, 208-410; 226 NW 65

Duplicate actions on same subject matter—priority. When two actions involving the same subject matter are commenced by different parties (e. g., partition of land), the action in which completed service is first made on all necessary parties must be deemed first commenced even tho the other action was first formally filed with the clerk, unless said first action was commenced by an unauthorized plaintiff.

Jones v Park, 220-903; 262 NW 801

Unallowable reopening of terminated cause. After a cause has gone to judgment as to the only party defendant, no procedure exists which will permit the reopening of the case by service of an original notice on a new party and trying a new case on the old pleadings.

Dye Co. v Davis, 202-1008; 209 NW 744

11058 Who may serve notice.

Service by attorney. Notice of hearing of claims against an estate may be served by the attorney for claimants.

Schroeder v Dist. Court, 213-814; 239 NW 806

11059 How long before term.

Atty. Gen. Opinion. See '38 AG Op 273

11060 Method of service.

Atty. Gen. Opinions. See '34 AG Op 396; '38 AG Op 273

ANALYSIS

I PERSONAL SERVICE
II SERVICE BY LEAVING COPY
III ACKNOWLEDGMENT OF SERVICE

I PERSONAL SERVICE

Discussion. See 11 ILR 131—Acceptance of service outside state

Default—setting aside—no service of notice. Where the defendant and his witnesses testify that he was out of the state on the day of purported service of original notice, the discretion of the trial court in setting aside a default will not be reviewed without a showing of abuse, even tho a court bailiff testified that he obtained personal service on that day.

Brunswick-Balke Co. v Dillon, 226-244; 283 NW 872

Foreign judgments—immunity from process. A defendant, who, when sued in a foreign state, litigates the issue that he was immune from the service of process in said state because he was then temporarily and involuntarily therein as a military officer of the federal government, and on land owned and used exclusively by said government for military purposes, and who fails to appeal from a ruling denying his claimed immunity may not relitigate said issue when sued in this state on the foreign judgment.

N. W. Cas. Co. v Conaway, 210-126; 230 NW 548; 68 ALR 1465

Mandatory statutory service—strict compliance required. Where jurisdiction of the person depends upon service of either notice or process, the mandatory provision of statutes in regard to such service must be strictly complied with.

Collins v Powell, 224-1015; 277 NW 477

Method of service. As to the proper method of service when statute simply requires the

I PERSONAL SERVICE—concluded

notice to be "served", and specifies no method of service, see

Casey (Town) v Hogue, 204-3; 214 NW 729

"Idem sonans"—name "Ferkins" instead of "Firkins" within rule. In an action against "Dean Firkins" an original notice addressed and naming "Dean Ferkins" as defendant and which was personally served upon "Dean Firkins" was held sufficient to confer jurisdiction over "Dean Firkins" since the names were within the rule of idem sonans.

Webb v Ferkins, 227-1157; 290 NW 112

No presumption foreign foreclosure was in personam. In an action in this state on a foreign, mortgage-secured promissory note, the court will not presume that a foreclosure of the mortgage was on personal service within the jurisdiction of the foreclosing court, on the makers of the note (residents of Iowa), and that, therefore, the note sued on was merged in the foreclosure decree.

Pfeffer v Corey, 211-203; 233 NW 126

Substituted service statute—strict adherence. Statutes providing for substituted service of original notice present a method of procedure that is extraordinary in character and allowed only because specially authorized. Because such statutes are the only authority for the procedure, the facts required in the statute must appear.

Jermaine v Graf, 225-1063; 283 NW 428

Unallowable substituted service. Service of an original notice on a member of defendant's family as a substitute for actual personal service on the defendant (he being neither sick nor under disability) is a nullity when the person making the service knows that the defendant is then within the county of his residence and where he may be readily found.

Coster v Jensen, 218-1215; 257 NW 303

II SERVICE BY LEAVING COPY

Appeal—notice of—proper service. A statute which distinctly provides that a notice, e. g., a notice of appeal, shall be "served as an original notice", authorizes a service on the designated party by leaving a copy of said notice at the usual place of residence of said party with some member of his family over 14 years of age—when said party is not present in the county at the time of said service. So held as to the service of a notice of appeal under §7133.

In re Sioux City Yards, 222-323; 268 NW 18

Public officers — survival of service. Service on the superintendent of banking, as such, of an original notice of mortgage foreclosure, survives the retirement of said official from office — is valid and binding on his duly appointed successor.

Greenleaf v Bates, 223-274; 271 NW 614

Substituted service. The district court acquires full jurisdiction over a defendant not found within the county of his residence by leaving a copy of the original notice with defendant's daughter with whom defendant lived, except during temporary absences, said daughter being over 14 years of age.

Moughan v Moughan, 218-1162; 254 NW 828

Substituted service authorized. The requirement that, in proceedings to revoke the license of a physician, the notice of the filing of the charges shall be served "in the manner provided for the service of an original notice in a civil action", authorizes substituted service on a proper member of the defendant's family, in case he cannot be found in the county.

State v Hanson, 201-579; 207 NW 769

Substituted service — presumption. A return of service of an original notice which reveals service on defendant by service on a proper member of his family is presumed correct, and judgment rendered thereon is valid tho defendant never learned of the notice.

Dickerson v Utterback, 202-255; 207 NW 752

Unallowable substituted service. Statutory authority to serve an original notice in certain exceptional instances on the defendant by leaving a copy "at his usual place of residence with some member of his family over 14 years of age" does not permit such substituted service to be made by leaving the copy with a person whose sole contact with the defendant's family is that of an employee in the family of the defendant.

Thompson v Butler, 214-1123; 243 NW 164

"Idem sonans"—greater applicability to constructive service. The application of the doctrine of idem sonans, by the courts, is more strict in regard to constructive service of notice than where the service is personal.

Webb v Ferkins, 227-1157; 290 NW 112

III ACKNOWLEDGMENT OF SERVICE

Acceptance by college graduate—knowledge of act. Court properly refused to set aside divorce decree on grounds that defendant did not know the full import of her act in accepting service of the original notice when the record disclosed that she was college-trained and majored in English.

Reppert v Reppert, 214-17; 241 NW 487

11061 Return of personal service.

ANALYSIS

I PERSONAL SERVICE IN GENERAL
II SUBSTITUTED SERVICE
III PRIVILEGES AND EXEMPTIONS
IV RETURN AND PROOF OF SERVICE
V NO NOTICE AND DEFECTIVE NOTICE CONTRASTED
VI COURT FINDINGS AND JUDGMENT RECITALS

I PERSONAL SERVICE IN GENERAL

General appearance—effect. No service of an original notice of suit need be made if the defendant enters a general appearance.

Scott v Price Bros. Co., 207-191; 217 NW 75
Tracy v Oil Co., 208-882; 226 NW 178

II SUBSTITUTED SERVICE

Substituted service statute — strict adherence. Statutes providing for substituted service of original notice present a method of procedure that is extraordinary in character and allowed only because specially authorized. Because such statutes are the only authority for the procedure, the facts required in the statute must appear.

Jermaine v Graf, 225-1063; 283 NW 428

Jurisdiction of court. The district court acquires full jurisdiction over a defendant not found within the county of his residence by leaving a copy of the original notice with defendant's daughter with whom defendant lived, except during temporary absences, — said daughter being over 14 years of age.

Moughan v Moughan, 218-1162; 254 NW 828

Nonresident corporation — substituted service—special appearance—plaintiff's burden. In a motor vehicle accident action wherein plaintiff obtained service of notice upon a nonresident corporation by serving the commissioner of motor vehicles, and wherein the defendant attacked such service by special appearance on the ground that it was not a person within the purview of the statute, the burden was on the plaintiff to make such showing that defendant was a person under the statute. Held burden not met.

Jermaine v Graf, 225-1063; 283 NW 428

Substituted service on nonresident individual. The statute (§11079, C., '31) which provides, in effect, that when a corporation, company, or individual maintains in this state an agency "in any county" other than that in which said principal resides, service of original notice of any action growing out of or connected with said agency may be personally had on the principal in this state by serving in this state an agent employed in said agency, applies to a nonresident individual maintaining an agency in this state, and when so applied does not deny to said defendant (1) due process of law, (2) the equal protection of the law, (3) any privilege or immunity granted to citizens of this state, or (4) any privilege or immunity possessed by said defendant as a citizen of the United States.

Davidson v Doherty, 214-739; 241 NW 700; 91 ALR 1308

Unallowable substituted service. Statutory authority to serve an original notice in certain exceptional instances on the defendant by leaving a copy "at his usual place of residence with some member of his family over 14 years of age" does not permit such substituted service to be made by leaving the copy with a person whose sole contact with the defendant's family is that of an employee in the family of the defendant.

Thompson v Butler, 214-1123; 243 NW 164

Unallowable substituted service. Service of an original notice on a member of defendant's family as a substitute for actual personal service on the defendant (he being neither sick nor under disability) is a nullity when the person making the service knows that the defendant is then within the county of his residence and where he may be readily found.

Coster v Jensen, 218-1215; 257 NW 303

Venue—residence of defendant—dismissal in lieu of change of venue. An action brought against a defendant in a county other than that of his residence, on service on a person who is not the defendant's agent, is properly dismissed, on special appearance by the defendant. Plaintiff has no right to demand that such attempted action be transferred to the county of defendant's residence.

North English Bank v Webber, 204-958; 216 NW 10

III PRIVILEGES AND EXEMPTIONS

Immunity of state and federal government. See under §2

Service — nonresident attending court — immunity. Nonresident witnesses and suitors attending a court outside of the territorial jurisdiction of their residence are immune from service of civil process while attending court, and for a reasonable time before and after.

Lingo v Reichenbach Co., 225-112; 279 NW 121

Service—nonresident—when exempt. A resident of a foreign state who comes into this state at the request of the sheriff of a county in which an official inquest is being held by the coroner, and for the good-faith and sole purpose of giving his testimony at said inquest, is immune from civil process until the lapse of a reasonable time after he has accomplished said purpose.

Kelly v Shafer, 213-792; 239 NW 547

Service—nonresident—when exempt. A nonresident coming into the state as a party or witness and who is sued while attending the contest of her brother's will may appear specially to secure her common-law immunity from civil process of local courts, which immunity exists and continues not only while in attendance but for a reasonable time thereafter.

Moseley v Ricks, 223-1038; 247 NW 23

Service — nonresident — when not exempt. Where no fraud or bad faith of an adversary is practiced on a nonresident to induce him to enter this state but he enters solely on the in-

stance of his own attorney in order to attempt a compromise settlement of a pending proceeding, he is not entitled to immunity from service of a civil process and a special appearance therefor will be denied.

Lingo v Reichenbach Co., 225-112; 279 NW 121

IV RETURN AND PROOF OF SERVICE

Impeachment of return. The return of a notice is impeachable on a direct attack on its validity.

Casey (Town) v Hogue, 204-3; 214 NW 729

Insufficient impeachment. Evidence held insufficient to impeach the sheriff's return of service of an original notice.

Heater v Bagan, 206-1301; 221 NW 932

V NO NOTICE AND DEFECTIVE NOTICE CONTRASTED

No annotations in this volume

VI COURT FINDINGS AND JUDGMENT RECITALS

Default—setting aside—no service of notice. Where the defendant and his witnesses testify that he was out of the state on the day of purported service of original notice, the discretion of the trial court in setting aside a default will not be reviewed without a showing of abuse, even tho a court bailiff testified that he obtained personal service on that day.

Brunswick-Balke Co. v Dillon, 226-244; 283 NW 872

11062 Indorsement and return by sheriff.

Atty. Gen. Opinion. See '30 AG Op 59

Garnishment judgment—quashing of return. Upon the quashing of an execution and return, a garnishment judgment has nothing to sustain it.

Gohring v Koonce, 224-1186; 278 NW 283

Service—presumption attending sheriff's return. A very strong presumption obtains in favor of the return of service of original notice made by an officer, and it cannot be impeached except by very clear and satisfactory proof.

Chader v Wilkins, 226-417; 284 NW 183

11063 Penalty—amendment.

Mortgage foreclosure—sale — return — correcting inadvertent error. An inadvertent error in the return of a mortgage foreclosure sale may be corrected by an amendment by the sheriff after the land has gone to sheriff's deed, provided the judgment plaintiff and defendant are the only persons affected. In such case oral testimony showing the error is quite unnecessary. Especially is this true when complainant shows no injury consequent on such correcting amendment.

Equitable v Ryan, 213-603; 239 NW 695

11068 Acknowledgment of service.

Atty. Gen. Opinion. See '38 AG Op 273

Irregularities in petition for appointment of guardian—right to bring action. A petition by the wife of an inmate of a state hospital for the insane, asserting that she was the wife of the inmate who had property, and asking that she be appointed guardian, altho insufficient to meet the statutory requirements for a petition for the appointment of a guardian, was sufficient for the appointment of a temporary guardian, and when notice was accepted by the superintendent of the institution and wife was appointed, she was at least a temporary guardian, and, as such, could maintain an action in behalf of the incompetent.

Jensen v Martinsen, 228- ; 291 NW 422

11069 Insane person out of hospital.

Unknown insanity of defendant.

Engelbercht v Davison, 204-1394; 213 NW 225

11071 County.

Atty. Gen. Opinion. See '36 AG Op 670

11072 Public utility and foreign corporations.

"Doing business in this state." A foreign corporation is "doing business in this state" and is subject to the jurisdiction of the courts of this state when it permanently maintains in this state a sample room of its goods, solicits orders, through its agents, for stocks of goods, assists its purchasers in an advisory way in carrying on their business, and receives, from customers, through said agents, checks for the purpose of the same being forwarded to the main house in the foreign state.

International Co. v Lovejoy, 219-204; 257 NW 576; 101 ALR 122

"Doing business in this state"—what constitutes. Proof that a local resident occasionally solicited and obtained orders for grave memorials to be manufactured by and shipped to this state by a foreign corporation is wholly insufficient, in and of itself, to show that such corporation was doing business in this state in such sense as to evince an intention to submit itself to the jurisdiction of the courts of this state. It follows that valid service of an original notice of suit may not be made on such corporation by serving said local resident.

Dorsey v Anderson, 222-917; 270 NW 463

Director general of railroads. Service of an original notice on a delivering carrier did not, under the war emergency act, bring the director general of railroads into court as a representative of the initial carrier.

Dye Co. v Davis, 202-1008; 209 NW 744

Service on agent. The fact that a delivering carrier is, in point of law, the agent of the

initial carrier in completing a shipment does not authorize service of an original notice on the initial carrier by service on the delivering carrier.

Dye Co. v Davis, 202-1008; 209 NW 744

Service—foreign corporation. A foreign corporation which maintains no office or agency within this state may be validly served with notice of suit by serving said notice on any general agent of the corporation at any point within this state where such agent may be found transacting the business of the corporation.

Kalbach v Equip. Co., 207-1077; 224 NW 73

Foreign corporation without permit—"transacting business" defined. A foreign corporation, even tho it has no permit to do business in this state, and even tho neither it nor its agents maintain an office in this state is, nevertheless, "transacting business" within this state, and subject to service of notice of suit on its resident agent, when, as a continuous and systematic course of business it, in part at its own expense, maintains in this state an agent with powers limited strictly to the solicitation of orders which the corporation approves or disapproves, and on which, in case of approval, it makes its own collections.

American Corp. v Shankland, 205-862; 219 NW 28; 60 ALR 986

Service on soliciting agent. A foreign corporation which has no permit from this state to transact business in this state, and which maintains no office in this state, is not subjected to the jurisdiction of the courts of this state by service in this state of process on the corporation's traveling agent whose authority begins and ends in soliciting and receiving at his own expense in this state orders for goods, and in forwarding said orders to the corporation in the foreign state for approval or disapproval.

Burnham Mfg. v Stove Works, 214-112; 241 NW 405

11073 Consolidated railways.

Atty. Gen. Opinion. See '36 AG Op 670

11074 Insurance company.

Atty. Gen. Opinion. See '36 AG Op 670

Contract remedies for collection—failure to comply with — fatal effect. The beneficiary (and his assignor), in a certificate of insurance of a mutual benefit association, is bound by the bylaws which provide that no resort shall be had to the courts to enforce payment of said certificate until said beneficiary has first exhausted the contract remedies provided by the bylaws for the allowance and payment of said claim.

Ater v Ben. Dept., 222-1390; 271 NW 517

Original notice—service—deputy commissioner may accept. Valid service of an original notice of suit against a foreign insurance company doing business in this state, is made by the act of the deputy commissioner of insurance in accepting, in writing and in the name of said commissioner, service of said notice for and on behalf of said company, tho the authority filed by the company only authorized the commissioner to accept such service.

Woodmen v Dist. Court, 219-1326; 260 NW 713; 98 ALR 1431

Submission to foreign courts — insufficient showing. An Iowa accident insurance association which has not been licensed to transact its business in a foreign state (in which it has neither office, agent nor property), and whose certificates of insurance are strictly Iowa contracts, cannot be deemed to have subjected itself to the jurisdiction of the courts of such foreign state (1) because a very large number of its certificate holders reside in said foreign state, or (2) because said association, from time to time and by mail from its Iowa office, requests a physician in said foreign state to there examine claimants and to report as to accidental injuries received by claimants,—it appearing that said physician was under no contract obligation to comply with said requests and to make such examinations tho he had done so for several years and had received a stated fee for each separate examination.

Held, the foreign court, in an action on a certificate, acquired no jurisdiction under process served on said physician.

Saunders v Iowa Assn., 222-969; 270 NW 407

11075 Municipal corporation.

Atty. Gen. Opinion. See '36 AG Op 670

11076 School township or district.

Atty. Gen. Opinion. See '36 AG Op 670

11077 Other corporations.

Atty. Gen. Opinion. See '36 AG Op 670

Change of place of trial. A defendant who is sued in a county on the theory that the action grew out of an agency maintained by him in said county, is not entitled to have the action transferred to the county of his residence on the simple showing that the particular agent who was in charge when the transaction took place was not such agent when the action was commenced.

Tracy v Oil Co., 208-882; 226 NW 178

Foreign corporation—discharged employee. Service of an original notice on a foreign corporation which has wholly withdrawn from the state may not legally be made on one who was never an officer or acting officer of the corporation, and who, at the time of service, was simply a discharged former employee.

Reliance Co. v Craig, 206-804; 221 NW 499

Garnishment — notice, service, and return. A corporation may be validly garnished by serving the notice of garnishment on an agent

employed in the office of the corporation in the general management of the corporation's business, e. g., on one employed as a bookkeeper and for general office work, and who looks after the office when the manager is absent, who signs as "cashier" checks issued by the corporation, and who has on occasions, to the knowledge of, and without objection by, the corporation accepted notice of garnishment on the corporation.

Waterloo Canning Co. v Municipal Court, 214-1169; 243 NW 287

Service on corporate director. Statutory authorization of service of an original notice on a corporation by serving a trustee, officer, or general managing agent of the corporation does not authorize such service on a mere director of the corporation.

Bennett v Coal Co., 201-770; 208 NW 519

Service of notice—agent—insufficient proof. Evidence relative to the service of an original notice on a corporation by service on an agent reviewed, and held insufficient to establish the alleged agency.

Bennett v Coal Co., 201-770; 208 NW 519

Service outside state — effect. Jurisdiction in personam of an Iowa corporation is constitutionally obtained by proper service of a proper original notice in a foreign state on one of the last known or acting officers of the corporation, as shown by the last statutory annual report of the corporation on file with the secretary of state of this state.

Bennett v Coal Co., 201-770; 208 NW 519

11079 Actions arising out of agency.

Discussion. See 18 ILR 257—Jurisdiction over nonresidents; 19 ILR 421—Jurisdiction of nonresident

Foreign corporations — burden to sustain original notice. In an action against a foreign corporation commenced by service of original notice on the secretary of state, the plaintiff has the burden to sustain its service and failing therein may not question the sufficiency of a motion to quash the service.

Keokuk Bridge v Curtin-Howe Corp., 223-915; 274 NW 78

Foreign corporations — original notice — quashing service. A foreign corporation that has no office, no representative, and at most only one transaction in Iowa is not "doing business" in the state so as to give Iowa courts jurisdiction thereof by service of original notice on the secretary of state and a motion to quash the service was properly sustained.

Keokuk Bridge v Curtin-Howe Corp., 223-915; 274 NW 78

Foreign corporation without permit—"transacting business" defined. A foreign corporation, even tho it has no permit to do business in this state, and even tho neither it nor its agents maintain an office in this state, is, nevertheless, "transacting business" within this state, and subject to service of notice of suit on its resident agent, when, as a continuous and systematic course of business, it, in part at its own expense, maintains in this state an agent with powers limited strictly to the solicitation of orders which the corporation approves or disapproves, and on which, in case of approval, it makes its own collections.

American Corp. v Shankland, 205-862; 219 NW 28; 60 ALR 986

General appearance—effect. It is of no consequence how or where the defendant was served when he enters a general appearance to the action.

Tracy v Oil Co., 208-882; 226 NW 178

Nonresident with securities office in state—statute authorizing service on agent. A state statute permitting the service of process on any agent or clerk employed in an office or agency maintained in the state by a nonresident in all actions growing out of, or connected with, the business of such office or agency does not abridge the privileges and immunities to which he is entitled by Art. IV, §2, of the federal constitution, or deprive him of the equal protection of the laws.

Henry L. Doherty & Co. v Goodman, 294 US 623

Service on agent—due process. In an action against a partnership as the sole defendant (all the partners being nonresidents of the state, and unserved), a return simply to the effect that the original notice was served on a named person as agent of defendant is fatally wanting in due process unless plaintiff, by some appropriate and adequate showing, establishes the existence of every fact which justifies such substituted service under this statute.

Thornburg v Bennett, 206-1187; 221 NW 840

Service on agent at maintained agency. A foreign joint stock land bank must be held to maintain an "office or agency" within the meaning of §11046 and this section, C., '35, when, in a county of this state, it maintains a so-called "fieldman" charged with the duty of generally caring for and leasing (under limited authority) the lands belonging to the bank in some 14 counties of this state; and this is true tho said "fieldman" is not designated by the bank as having any office other than his residence in a designated county.

Higdon v Lincoln JSL Bank, 223-57; 272 NW 93

Substituted service on nonresident individual. This section applies to a nonresident individual maintaining an agency in this state, and when so applied does not deny to said defendant (1) due process of law, (2) the equal pro-

tection of the law, (3) any privilege or immunity granted to citizens of this state, or (4) any privilege or immunity possessed by said defendant as a citizen of the United States.

Davidson v Doherty & Co., 214-739; 241 NW 700; 91 ALR 1308

Substituted service on nonresident individual. Principle reaffirmed that an individual nonresident who maintains in this state an office or agency, even tho he has never personally been within this state, may be legally personally served in this state with original notice of suit as to matters growing out of such office or agency by service directed to him and made on his agent employed in said office or agency.

Goodman v Doherty, 218-529; 255 NW 667

Substituted service on agent of nonresident. Whether a nonresident may be legally sued in this state by service in this state on an alleged, resident agent (on a cause of action growing out of such alleged agency) must necessarily be determined by resorting (1) to the express contract, if any, between the resident and nonresident parties, and (2) to the course of dealings existing between the said parties. Held, agency not shown, even tho an officer of the alleged resident agent was a director of the nonresident defendant, and even tho the nonresident defendant paid commission on sales to the alleged resident agent.

Toole Co. v Group, 217-414; 251 NW 689

11080 Minor.

Service on minor when parent is plaintiff. In an action to quiet title, statutory acceptance by a parent, of service of the original notice for his minor child under 14 years of age, is adequate, even tho the parent is plaintiff in the action, it affirmatively appearing that the action was not adverse to said minor.

John Hancock Ins. v Dower, 222-1377; 271 NW 193

11081 Service by publication.

ANALYSIS

I PUBLICATION SERVICE IN GENERAL

Alimony — decree on publication service — effect. A plaintiff who takes a decree of divorce on service by publication may not thereafter resurrect the proceeding for the purpose of an allowance of alimony. This is true even tho plaintiff prayed for alimony, and even tho the court assumed to continue the proceeding on the question of alimony.

Doeksen v Doeksen, 202-489; 210 NW 545

Jurisdiction under publication service. A decree, rendered on service by publication in the foreclosure of a second mortgage, adjudging that said second mortgage is senior and superior to a first mortgage, in accordance with a definite pleading and prayer to said effect based on a good-faith but mistaken belief that said first mortgage had been paid, is binding and conclusive on the holder of said first mortgage, and may not be collaterally assailed by said first mortgagee in an action to foreclose his mortgage. (It appears that said first mortgagee had allowed the time to elapse in which to attack said decree under §11595.)

Lyster v Brown, 210-317; 228 NW 3

Jurisdiction under publication service. In partition proceedings, service by publication only on a nonresident nonappearing defendant arms the court with jurisdiction to adjudicate the title to the property.

Clark v Robinson, 206-712; 221 NW 217

No presumption foreign foreclosure was in personam. In an action in this state on a foreign, mortgage-secured promissory note, the court will not presume that a foreclosure of the mortgage was on personal service within the jurisdiction of the foreclosing court, on the makers of the note (residents of Iowa), and that, therefore, the note sued on was merged in the foreclosure decree.

Pfeffer v Corey, 211-203; 233 NW 126

II ACTIONS IN WHICH PUBLICATION AUTHORIZED

Publication as to concealed debtor. A judgment in rem on publication service on an actual resident of the county of suit is proper when it is made to appear that the defendant locked herself in her own house and concealed herself in order to avoid personal service of the notice of suit.

Reinecke v Hinman, 202-419; 215 NW 442

III THE AFFIDAVIT

No annotations in this volume

IV THE JUDGMENT

Garnishment—judgment in rem—nonmerger of debt sued on. In an action aided by attachment, the entry, on service on defendant by publication, of a judgment in rem against property of the defendant in the hands of a garnishee, does not work a merger in said judgment of the obligation sued on, and thereby deprive the holder of said obligation of the right to proceed against defendant, at a later time, for the recovery of the balance due on said obligation,—if there be such balance.

Strand v Halverson, 220-1276; 264 NW 266; 103 ALR 835

11082 Unknown defendants.

Inheritance taker as "representative" of contingent remainderman. A decree setting

aside the probate of a will and canceling said will (the action being instituted in good faith and so tried by all parties thereto) is, on the principle or doctrine of representation, conclusive on remote, contingent remaindermen, even tho they are not parties to the action or are not served with notice of the action, when those persons are legally before the court who would take the first estate of inheritance under the will; especially is this true when parties of the same class to which the omitted parties belong are also legally before the court.

Harris v Randolph, 213-772; 236 NW 51

Unborn contingent remaindermen. The contingent interest in land of the unborn children of a life tenant, arising out of the terms of a testamentary devise, is not cut off by a decree in an action to quiet title by making the life tenant a party defendant as a "representative" of such unborn children; especially so when said life tenant assumes a hostile attitude toward said unborn children.

Mennig v Graves, 211-758; 234 NW 189

11084 Method of publication.

Atty. Gen. Opinion. See '36 AG Op 128

"General circulation" — general test. A "newspaper of general circulation" is determined not by the number of its subscribers but by the diversity of its subscribers, and is such newspaper if it contains news, tho of limited amount, of a general nature, even tho it makes a specialty of news of a particular kind.

Burak v Ditson, 209-926; 229 NW 227; 68 ALR 538

Divorce—notice by publication—plaintiff assailing own decree. A wife who obtains a divorce by publication may not in a subsequent action between the same parties for divorce, aided by attachment, complain that her previous divorce decree is void for defective publication on the ground that the record fails to show selection of the newspaper by "plaintiff or his attorney", when she relied on the publication and induced the court to grant a decree thereon.

Hanson v Hanson, 226-423; 284 NW 141

Previous divorce by publication — defense. Decree of divorce denied on the ground that the parties were already divorced in a previous proceeding in which the court had full and complete jurisdiction upon service of notice by publication.

Hanson v Hanson, 226-423; 284 NW 141

Requisites—selection of newspaper. Statute providing method of publishing original notice does not require a record showing who selected the newspaper.

Hanson v Hanson, 226-423; 284 NW 141

11085 Service complete—proof.

Service by publication—frivolous objection to affidavit. Argument that an affidavit of publication of original notice having been signed by the "foreman" of the newspaper did not constitute an affidavit by "the publisher or his foreman" in compliance with the statute is too hypercritical and frivolous to be noticed on appeal.

Hanson v Hanson, 226-423; 284 NW 141

11086 Actual service.

Indexing petition—lis pendens. The filing and due indexing of a petition to subject real estate to the lien of a personal judgment creates a lis pendens, and personal service of the action on the defendants outside the state establishes jurisdiction in rem, even tho the petition may be subject to a corrective motion or to a demurrer.

Lawrence v Stanton, 212-949; 237 NW 512

Special appearance after general appearance. A nonresident defendant who, after a service in a foreign state, enters a general appearance in an action in rem, is not thereby precluded from later entering a special appearance attacking the jurisdiction of the court because of the filing by plaintiff of an amended and substituted petition which converts his former action in rem into an action for an accounting and for personal judgment against said nonresident.

Fidelity Co. v Bank, 213-1058; 237 NW 234

11087 Mode of appearance.

ANALYSIS

I WHAT CONSTITUTES GENERAL APPEARANCE
II WHAT DOES NOT CONSTITUTE GENERAL APPEARANCE
III AUTHORITY TO APPEAR
IV EFFECT OF APPEARANCE

I WHAT CONSTITUTES GENERAL APPEARANCE

Filing of motion—effect. A defendant who appears generally and files successive motions is necessarily in court for all purposes tho he suffers judgment by default for want of an answer.

Andrew v Bank, 206-1070; 221 NW 809

Pleading to merits. A plea to the merits of a case is necessarily a general appearance.

Scott v Price Bros. Co., 207-191; 217 NW 75

Pro se appearance—new trial—grounds—insufficient record. Record reviewed in an action wherein plaintiff appeared pro se in the trial court, and held insufficient to authorize the court (1) to set aside a former order denying a new trial, and (2) thereupon—11 months

after the entry of judgment on a directed verdict—to grant a new trial.

Spoor v Price, 223-362; 272 NW 305

Stipulation for decree constitutes appearance. The signing by a plaintiff and defendant in an action for separate maintenance of an agreement which specifies the amount and terms of such maintenance and provides for the entry of decree in accordance therewith, and the filing of such stipulation in the action, constitute an appearance by the defendant to said action.

Kalde v Kalde, 207-121; 222 NW 351

What constitutes appearance. Whether a duly signed acceptance of service wherein defendant "waive time, and receipt for copy, and consent to the filing of the petition, and the taking of judgment", constitutes an appearance by the defendant, quaere, but it cannot be deemed to constitute an acceptance when the court at the time of assuming to enter judgment did not so construe it, but specifically found that defendant had made no appearance.

Dayton v Patterson, 216-1382; 250 NW 595

II WHAT DOES NOT CONSTITUTE GENERAL APPEARANCE

Consent by adversely interested party. One of two adversely interested defendants may not, as a matter of law, appear in court on behalf of such other defendant. It follows that a consent decree entered on such appearance may be set aside.

Graettinger Tile v Paine, 202-804; 211 NW 366

Filing of petition for removal—general (?) or special (?) appearance. Rule of federal courts recognized that filing of petition for removal of cause to federal court constitutes special and not general appearance. Under Iowa statute, the filing of such petition with notation thereof on record would constitute a special appearance even tho not expressly announced as such, since court will look to substance rather than form in determining whether an appearance is general or special.

Johannsen v Mid-Cont. Corp., 227-712; 288 NW 911

Improper appearance—who may object. An objection that an attorney was appearing both for and against a party litigant cannot be made by a litigant other than the one affected.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

Appearance of receiver of insolvent co-executor trust company. Where the district court of Scott county appoints a receiver to take charge of an insolvent trust company which was also a co-executor and co-trustee in an estate pending in the district court of Johnson county, and when such receiver is ordered by the Johnson district court to report and account, such receiver does not, by filing a pleading and supporting it by evidence denying the jurisdiction of the Johnson district court, thereby make a "general appearance" in the Johnson district court.

Bates v Evans, 226-438; 284 NW 385

III AUTHORITY TO APPEAR

Attorney—presumption. An attorney who appears for a party to an action will be presumed to have been authorized so to appear—until the opposing party shows the want of such authority.

Sloan v Jepson, 217-1082; 252 NW 535
Carson & Co. v Long, 219-444; 257 NW 815

IV EFFECT OF APPEARANCE

Discussion. See 25 ILR 329—Quasi in rem action

Appeal—fatally defective notice—appearance—effect. A fatal defect in a notice of appeal to the district court from the action of the board of review in a city is not cured by the entry in the district court of a general appearance by the city through its attorneys.

Midwestern Co. v Des Moines, 210-942; 231 NW 459

Defective service cured by appearance. Any defect in the service of the notice of the filing of charges in proceedings to revoke the license of a physician is cured by the appearance of the accused.

State v Hanson, 201-579; 207 NW 769

General appearance—effect. It is of no consequence how or where the defendant was served when he enters a general appearance to the action.

Scott v Price Bros. Co., 207-191; 217 NW 75
Tracy v Oil Co., 208-882; 226 NW 178

Defective notice—appearance—effect. A notice of appeal from a refusal of the board of review to lower an assessment and the form, contents, and service of such notice become quite immaterial when the board enters a general appearance and contests the appeal.

Chapman Bros. v Board, 209-304; 228 NW 28

Nonservice cured by appearance. Failure to serve an adverse party in divorce proceedings with notice of a hearing to modify the decree becomes quite immaterial when such adverse party appears at said hearing in person and by attorney.

Guisinger v Guisinger, 201-409; 205 NW 752

Notice—jurisdictional—nonwaiver of defects by appearance. A voluntary appearance by attorneys for appellee and the filing of a motion to dissolve a restraining order do not waive defective notice. Notice of appeal is jurisdic-

IV EFFECT OF APPEARANCE — concluded

tional and want of notice cannot be supplied by voluntary appearance.

Cheney v Board, (NOR); 222 NW 899

Operation and effect. Lack of capacity to act as party plaintiff cannot be remedied by the appearance of the defendant in the action.

Pearson v Anthony, 218-697; 254 NW 10

Vendor's attorneys at vendee's bankruptcy. Fact that attorneys for a real estate contract vendor appeared in vendee's bankruptcy is not a submission to nor adjudication by the bankruptcy court of vendor's rights under the real estate contract, when no claim was filed thereon and purpose of appearance was to protect a different and unsecured indebtedness of the vendee to the vendor.

Blotcky v Silberman, 225-519; 281 NW 496

11088 Special appearance.

Discussion. See 10 ILB 121—Special appearance in Iowa; 13 ILR 468, 17 ILR 81—Pleading to the merits

Special appearance—purpose. Purpose of special appearance is to protect defendant from being required to defend action in which court has no jurisdiction.

Sanford Co. v Ins. Co., 225-1018; 282 NW 771

Filing of petition for removal—general (?) or special (?) appearance. Rule of federal courts recognized that filing of petition for removal of cause to federal court constitutes special and not general appearance. Under Iowa statute, the filing of such petition with notation thereof on record would constitute a special appearance even tho not expressly announced as such, since court will look to substance rather than form in determining whether an appearance is general or special.

Johannsen v Mid-Cont. Corp., 227-712; 288 NW 911

Appearance by vouchee. A vouchee who has voluntarily taken over the defense of an action may not file a special appearance to a motion for judgment against him on the judgment rendered against the principal defendant.

Hoskins v Hotel, 203-1152; 211 NW 423; 65 ALR 1125

Appearance to fatally defective service — effect. Appearance in an appellate tribunal for the purpose of objecting because the notice of appeal was not served as required by law does not confer jurisdiction on the tribunal to hear the appeal.

Casey (Town) v Hogue, 204-3; 214 NW 729

Certiorari — defective service — no jurisdiction through special appearance nor return to writ. Where mandatory statute requiring service of writ of certiorari had neither been complied with nor service accepted, the supreme court acquires no jurisdiction of the inferior tribunal and a proper special appearance will not waive defective service nor does the return to the writ constitute a pleading to the merits.

Collins v Powell, 224-1015; 277 NW 477

Employee performing governmental function —jurisdiction through original notice. A liquor commission enforcement officer as a state employee performing a governmental function is, nevertheless, subject to the jurisdiction of the courts by proper service of an original notice.

Anderson v Moon, 225-70; 279 NW 396

Failure of service—dismissal. The dismissal of an action is proper when it appears that no defendant has been legally served with the original notice.

Thompson v Butler, 214-1123; 243 NW 164

Certiorari—respondent's right to appear specially. A respondent in certiorari has a right to appear specially to question jurisdiction, in the absence of a statute to the contrary, regardless of whether or not this right is conferred by this section.

Collins v Powell, 224-1014; 277 NW 477

Service — nonresident — when not exempt. Where no fraud or bad faith of an adversary is practiced on a nonresident to induce him to enter this state but he enters solely on the instance of his own attorney in order to attempt a compromise settlement of a pending proceeding, he is not entitled to immunity from service of a civil process and a special appearance therefor will be denied.

Lingo v Reichenbach Co., 225-112; 279 NW 121

Service—nonresident—when exempt. A nonresident coming into the state as a party or witness and who is sued while attending the contest of her brother's will may appear specially to secure her common law immunity from civil process of local courts, which immunity exists and continues not only while in attendance but for a reasonable time thereafter.

Moseley v Ricks, 223-1038; 274 NW 23

Special appearance after general appearance. A nonresident defendant who, after service in a foreign state, enters a general appearance in an action in rem, is not thereby precluded from later entering a special appearance attacking the jurisdiction of the court because of the filing by plaintiff of an amended and substituted petition which converts his former action in rem into an action for an accounting and for personal judgment against said nonresident.

Fidelity & Cas. v Bank, 213-1058; 237 NW 234

See Dunlop v Land Bank, 222-887; 270 NW 362

Special appearance after judgment. Where a salesman obtained an Iowa judgment against an Indiana company and after judgment the company filed a combination pleading consisting of a special appearance (the propriety of which is doubtful) and a petition to vacate the judgment for lack of jurisdiction, and a decision is rendered thereon adversely to the company, from which no appeal was taken, such judgment becomes a final judgment, and where company subsequently brings a separate action in equity to vacate such judgment for lack of jurisdiction, the trial court properly dismissed the equity petition and refused to enjoin its enforcement, since the former decision on the jurisdiction question was res adjudicata. The company cannot relitigate the same questions that were, or might have been, determined upon its former petition to vacate the judgment.

Martin Bros. v Fritz, 228- ; 292 NW 143

Special appearance—burden to sustain jurisdiction. On special appearance directly attacking the jurisdiction of the court because of a defect in the original notice or in the service thereof, the burden of proof rests upon the plaintiff to sustain the jurisdiction by proof of an adequate notice and the service thereof; and such burden is not met by the production of a captionless, unaddressed, and unsigned notice.

Pendy v Cole, 211-199; 233 NW 47

Special appearance — standing on. In appealing from an adverse ruling on the issues raised by a special appearance, it is not necessary for appellant especially to elect to stand upon his special appearance, or to suffer judgment to be entered against him.

Irwin v Bank & Trust, 218-470; 254 NW 806

Special appearance — sufficiency. A special appearance for the sole purpose of attacking the jurisdiction of the court, may be made in the form of a motion to dismiss wherein the movant recites that he appears "specially to the jurisdiction".

Hlas v Quaker Co., 211-348; 233 NW 514

Subsequent plea to merits—effect. One who, on special appearance, challenges the jurisdiction of the court on the ground of defective service of the notice of suit, and who, after his challenge is overruled, pleads to the merits and participates in the trial, thereby submits himself to the jurisdiction of the court, and is in no position to ask, on appeal, for a review of the ruling on his special appearance; especially is this true as to suits in equity.

Crouch v Remedy Co., 205-51; 217 NW 557
Scott v Price Bros. Co., 207-191; 217 NW 75
Webster County Buick Co. v Auto Co., 216-485; 249 NW 203

Substituted service on nonresident corporation—special appearance. In a motor vehicle accident action, wherein plaintiff obtained service of notice upon a nonresident corporation by serving the commissioner of motor vehicles, and wherein the defendant attacked such service by special appearance on the ground that it was not a person within the purview of the statute, the burden was on the plaintiff to make such showing that defendant was a person under the statute. Held burden not met.

Jermaine v Graf, 225-1063; 283 NW 428

Original notice—service on nonresidents under motor vehicle law—showing required. Where an attack by special appearance and motion to quash is made upon use of special method of securing service on nonresidents provided for in motor vehicle law, a showing is required of facts essential to jurisdiction, and one of such basic facts is nonresidence of defendant at the time the use and operation of the vehicle allegedly causing the damage upon which suit is brought. Accordingly, proof of nonresidence at time suit is started would not be sufficient where accident in question occurred one and one-half years earlier.

Welsh v Ruopp, 228- ; 289 NW 760

Writ of prohibition — right to issue. The jurisdiction of the supreme court to issue a writ of prohibition commanding a district court to discontinue all assumption of jurisdiction over named actions pending in said latter court does not depend on whether the district court has made rulings as to special appearances entered in said actions.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

General appearance after special appearance. General appearance subsequent to a special appearance works a waiver of the special appearance.

Music v De Long, 209-1068; 229 NW 673

Scope—applicable to entire action. Statute authorizing a special appearance contemplates such an appearance to the entire action and not to a part of it only.

Sanford Co. v Ins. Co., 225-1018; 282 NW 771

Government employee's automobile collision —immunity as a defense. In a damage action for injuries arising out of a motor vehicle collision, defendant's claim that he was a state employee performing a governmental function is a matter of defense not properly raised by special appearance.

Groves v Webster City, 222-849; 270 NW 329
Anderson v Moon, 225-70; 279 NW 396

Harmless error—nunc pro tunc correction. Overruling a special appearance to plaintiff's application for a nunc pro tunc order and then correcting the trial record thereunder by substituting "plaintiff" for "defendant" in an order extending time to file exceptions to instructions and motion for new trial is harmless error where defendant appeared and

without objections thereto permitted and participated in hearing on the merits of such exceptions and motion for new trial.

Thompson v Butler, 223-1085; 274 NW 110

Jurisdiction as sole question. Jurisdiction of the court is the only question which can be tried out on special appearance. So held where attempt was made, on such appearance, to try out the question whether attached property was exempt from attachment or execution levy.

Scott v Wamsley, 215-1409; 245 NW 214

Jurisdictional only—no pleading to merits. A special appearance goes only to jurisdictional matters and does not permit any pleading relative to the merits of the case.

Anderson v Moon, 225-70; 279 NW 396

Jurisdiction of officers. It seems that a special appearance before an administrative officer, e.g., the industrial commissioner, for the sole purpose of questioning the jurisdiction of the officer to act in a certain proceeding, is proper, and will not be deemed an appearance to the merits.

Elk River Co. v Funk, 222-1222; 271 NW 204; 110 ALR 1415

Moot case—unnecessary review. An appeal from an order sustaining a special appearance will be dismissed when it appears that since the entry of the order plaintiff has instituted a new action on the same subject matter and that defendant has entered a general appearance thereto.

Schnurr v Brazelton, 217-1125; 253 NW 152

Motion to dismiss—special appearance. In an action against insurance company to recover value of property destroyed by fire, in which action a special appearance attacked only one count of petition, the overruling of the special appearance and motion to dismiss was proper, inasmuch as jurisdiction that may be attacked by special appearance is jurisdiction of court over the entire action, and not jurisdiction of court as to part of such action.

Sanford Co. v Ins. Co., 225-1018; 282 NW 771

Nondeterminable matters. Whether an action is, in truth and fact, an action against the state in its sovereign capacity, is a question which cannot be tried out on a special appearance—the petition not showing on its face that the action is such.

Iowa Elec. Co. v Board, 221-1050; 266 NW 543

Nongeneral appearance. A special appearance to question the jurisdiction of the court on the ground that the defendant had been sued in a county other than that of his residence, and on service on a nonagent of the defendant's, is not rendered a general appearance (1) by a motion to quash the return of service of the notice and to dismiss the action, or (2) by the introduction of relevant testimony at the hearing on said motion.

North English Bk. v Webber, 204-958; 216 NW 10

Nonresident served while in state as criminal defendant. When nonresident defendants in a criminal case were in attendance within the state, they were privileged from the service of civil process in another action, and a special appearance filed by them should have been sustained, notwithstanding a statute passed later legalizing such notice served on criminal defendants in pending actions.

Frink v Clark, 226-1012; 285 NW 681

Order overruling special appearance. An order of the district court overruling a special appearance, and thereby sustaining the jurisdiction of the court, is appealable.

In re Sioux City Yards, 222-323; 268 NW 18

Appearance of receiver of insolvent company. Where the district court of Scott county appoints a receiver to take charge of an insolvent trust company which was also a coexecutor and co-trustee in an estate pending in the district court of Johnson county, and when such receiver is ordered by the Johnson district court to report and account, such receiver does not, by filing a pleading and supporting it by evidence denying the jurisdiction of the Johnson district court, thereby make a "general appearance" in the Johnson district court.

Bates v Evans, 226-438; 284 NW 385

Appearance date agreed on—waiver of notice. Where the parties in a proceeding to vacate an order of court approving the final report of a bank receiver stipulate that the court may set a date for appearance later than the second day of the term, and that the bank examiner will file an appearance or pleading on or before that date, and that no other or further notice to him shall be necessary, the examiner may not assert the departure from the statutory requirements as to the appearance date as a ground for challenging the jurisdiction of the court by a special appearance.

Bates v Loan & Trust Co., 227-1347; 291 NW 184

11091 Unserved parties—optional procedure.

Form. In rendering a decree, the court may very properly insert a precautionary clause to the effect that the decree is not binding on unserved and nonappearing parties.

Gunn v Gould Co., 206-172; 218 NW 895; 220 NW 127

11092 Real estate—action indexed.

Discussion. See 20 ILR 476—Lis pendens

Duplicate actions—which abatable. While an action in partition, in which service of the original notice is incomplete in whole or in part, is deemed pending in the sense that said action constitutes a lis pendens from the time the clerk properly indexes it as a lis pendens, yet, until completed service of the original notice of said action is made, said action cannot be deemed "commenced" or "pending" in the sense that it bars another subsequently instituted action in partition between the same parties and involving the same real estate.

It follows that when duplicate actions in partition, involving the same parties and the same real estate, are brought, that action only is abatable in which said service was last completed.

Ohden v Abels, 221-544; 266 NW 24

Lien on crops pending foreclosure—lis pendens. The remedial provisions of a mortgage, including a pledge of the rents and profits, are such a part of the subject matter of a foreclosure action that indexing in lis pendens imparts to a purchaser of the mortgagor-landlord's share of the corn constructive notice of the mortgagee's lien on the corn.

Sutton v Schnack, 224-251; 275 NW 870

Petition—index—service—effect. The filing and due indexing of a petition to subject real estate to the lien of a personal judgment creates a lis pendens, and personal service of the action on the defendants outside the state establishes jurisdiction in rem, even tho the petition may be subject to a corrective motion or to demurrer.

Lawrence v Stanton, 212-949; 237 NW 512

Rents—lis pendens—effect. The filing of a petition for the foreclosure of a real estate mortgage, with prayer for the appointment of a receiver of the rents pledged by said mortgage, and the due indexing of said petition as a lis pendens, matures the mortgagee's lien on the pledged rents, even tho at said time the original notice of the action has not been served on the mortgagor. It necessarily follows that said matured lien has priority over a subsequent assignment of the said rents.

First Tr. JSL Bk. v Jansen, 217-439; 251 NW 711

11093 Lis pendens.

Discussion. See 20 ILR 476—Lis pendens

Assignment pending action—right of grantee. One who becomes an assignee of a real estate mortgage after the commencement of a successful action to set aside the mortgage as fraudulent (the action being legally lis pendens by proper index) and who, during the trial of said action, to which he had been made a party, redeems the land from tax sale, must be deemed a mere volunteer payer of taxes with no right to have the amount paid by him made a lien on the land.

Clarkson v McCoy, 215-1008; 247 NW 270

Foreclosure — perfecting right to receivership. A mortgagee, whose mortgage contains a receivership clause covering the rents during the redemption period, perfects his right to such remedy (1) by duly filing his petition for foreclosure, (2) by praying for the appointment of such receiver, and (3) by causing his action to be indexed as a lis pendens. And this is true even tho the original notice filed with the petition is a nullity. It follows that his right to such remedy is prior to all other mortgagees subsequently foreclosing mortgages which embrace like clauses.

Union Tr. Co. v Carter, 214-1131; 243 NW 523

Indexing lis pendens—overcoming presumption. The presumption that the clerk of the district court duly indexed, as a lis pendens, a petition for the foreclosure of a real estate mortgage is so strong that convincing proof to the contrary is required to overcome it.

First Tr. JSL Bank v Jansen, 217-439; 251 NW 711

Lien on crops pending foreclosure. The remedial provisions of a mortgage, including a pledge of the rents and profits, are such a part of the subject matter of a foreclosure action that indexing in lis pendens imparts to a purchaser of the mortgagor-landlord's share of the corn constructive notice of the mortgagee's lien on the corn.

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Lawrence v Stanton, 212-949; 237 NW 512

Purchase during litigation—effect. Principle reaffirmed that one who acquires an interest in land pendente lite is bound by the resulting judgment, even tho he was not made a party to the pending litigation.

Stiles v Bailey, 205-1385; 219 NW 537

Purchase pending foreclosure. One who purchases real estate pending a properly indexed foreclosure proceeding on the property, purchases at his peril.

Eckert v Sloan, 209-1040; 229 NW 714

Purchase pending foreclosure. The purchaser of real estate pending foreclosure of a mortgage may not avoid the effect of the constructive notice imparted by such proceeding by

the claim that he purchased in reliance on a release of the mortgage by the mortgagee, (1) when he knew that the consideration for the release had wholly failed, and (2) when neither he nor the mortgagor acted in good faith in the transaction.

Eckert v Sloan, 209-1040; 229 NW 714

Mortgages—rents—lis pendens—effect. The filing of a petition for the foreclosure of a real estate mortgage, with prayer for the appointment of a receiver of the rents pledged by said mortgage, and the due indexing of said petition as a lis pendens, matures the mortgagee's lien on the pledged rents, even tho at said time the original notice of the action has not been served on the mortgagor. It necessarily follows that said matured lien has priority over a subsequent assignment of the said rents.

First Tr. JSL Bank v Jansen, 217-439; 251 NW 711

Unrecorded contract—election of remedy by seller—third party's rights. Under a contract for sale of automatic sprinkler system where the title or ownership is made to depend on a condition, it comes within §2905, C., '97 [§10016, C., '39] making such contracts invalid against creditors; and where seller by way of counterclaim to buyer's action, to avoid a mechanic's lien for the same property, elected to recover the purchase price, such seller made an irrevocable exercise of his option and neither the fact of filing such action nor filing the notice of lis pendens was a notice of lien as against the trustee for bondholders whose bonds were secured by a mortgage on all equipment of the corporation filed subsequent to such action. However, the action was a notice of an election to recover purchase price which waived any right to title, but was not such notice as was required by §2905, C., '97 [§10016, C., '39].

Fire Protection Co. v Hawkeye Co., 8 F 2d, 810

CHAPTER 490

PUBLICATION AND POSTING OF NOTICES

11098 Publications in English.

Atty. Gen. Opinion. See '25-26 AG Op 427

11099.1 "Newspaper" defined.

Atty. Gen. Opinions. See '38 AG Op 448; AG Op June 29, '39

Official newspapers—form and sufficiency of application for appointment. Under statute requiring that application shall be made to county supervisors for appointment as an official newspaper, an application which avers the qualifications of the newspaper in the words of the statute is sufficient. The application need not be in any particular form, and any written application by the publisher which apprises the board of the desire of the newspaper to be selected is sufficient to require the board to take cognizance of it.

Bredt v Franklin County, 227-1230; 290 NW 669

"General circulation" — general test. A "newspaper of general circulation" is determined not by the number of its subscribers, but by the diversity of its subscribers, and is such newspaper if it contains news, tho of limited amount, of a general nature, even tho it makes a specialty of news of a particular kind.

Burak v Ditson, 209-926; 229 NW 227; 68 ALR 538

Official newspapers—"bona fide yearly subscribers" defined. On the question whether a newspaper is entitled to be selected as an "official newspaper" of the county for a certain year, the following persons cannot be deemed "bona fide yearly subscribers," tho the newspaper is being sent to and received by them in the county, viz.:

1. Those whose subscriptions have expired prior to the year in question.
2. Those who have not subscribed for the newspaper for several years prior to the year in question.
3. Those who have never subscribed for the newspaper.

Van der Burg v Bailey, 209-991; 229 NW 253

Official newspapers—division of compensation. A newspaper which is entitled to be selected as an official newspaper for a county may agree with a newspaper which is not entitled to be so selected for a division of the compensation for official publications, and in such case both newspapers will be designated as official publications, but for one compensation only.

Van der Burg v Bailey, 209-991; 229 NW 253

11102 Selection by county officers.

Atty. Gen. Opinion. See '38 AG Op 448

11103 Refusal to publish.

Right to reject advertisement. The business of publishing a newspaper is a strictly private enterprise, and the owner thereof is free to accept or reject tendered advertisements as he sees fit.

Shuck v Herald, 215-1276; 247 NW 813; 87 ALR 975

11104 Days of publication.

Atty. Gen. Opinion. See '36 AG Op 128

11106 Fees for publication.

Atty. Gen. Opinions. See '25-26 AG Op 427; '28 AG Op 262; AG Op Jan. 25, '39; Jan. 26, '39

CHAPTER 491

PLEADINGS

11108 Technical forms.

Removal of causes—filing of petition. Rule of federal courts recognized that filing of petition for removal of cause to federal court constitutes special and not general appearance. Under Iowa statute, the filing of such petition with notation thereof on record would constitute a special appearance even tho not expressly announced as such, since court will look to substance rather than form in determining whether an appearance is general or special.

Johannsen v Mid-Cont. Corp., 227-712; 288 NW 911

Allegations—conclusiveness on party pleading. An allegation binds the one who makes it, and when its truth militates against the pleader, it must be taken as true as against him.

Reynolds v Aller, 226-642; 284 NW 825

Immaterial deviation. The fact that a guardian brings an action in behalf of the ward as "next friend" does not necessarily affect the validity of the proceedings.

Bennett v Ryan, 206-1263; 222 NW 16

Liberality in pleadings. In the adjudication of claims pending in receivership proceedings, compliance with the strict rules of pleadings will not ordinarily be demanded.

Andrew v Bank, 207-948; 222 NW 8

Mongrel "and/or". The use of the mongrel term "and/or", in pleading specifications of negligence or recklessness, is sharply disapproved.

Popham v Case, 223-52; 271 NW 226

Technical inaccuracy. The pleading of an adjudication in a reply, instead of in the petition, does not necessarily constitute an error of consequence, even tho it be conceded that the technical rules of pleading are violated.

Cochran v Sch. Dist., 207-1385; 224 NW 809

11109 "Pleadings" defined.

Treating legally insufficient pleading as sufficient. See under §12827
Voluntary issues. See under §11426
Discussion. See 20 ILR 49—Defective pleading

Allegations in one count not admissions as to another count. Different theories of recovery contained in separate counts of a petition are not admissions by which the plaintiff is bound under the rule that he may not controvert his own pleading.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Answer and motion at same time. The filing of an answer to a petition as amended, and, at the same time, a motion attacking the amendment, is unallowable. In such case the answer will stand and the motion will be deemed waived.

Bliss v Watson, 208-1199; 227 NW 108

Belated filing of motion first raised on appeal—ignored. Question, that a motion attacking an answer was not timely, raised for the first time on appeal, will not be considered by the appellate court.

Hillje v Tri-City Co., 224-43; 275 NW 880

Conclusiveness on pleader. A litigant who both concedes and alleges in his pleadings that the adverse party is in possession of premises under a lease is necessarily bound thereby.

Metropolitan v Andrews, 215-1049; 247 NW 551

Conclusiveness on party. The recitals of fact in the verified pleadings of a party may be conclusive on the same party in subsequent litigation.

Plymouth Co. v Schulz, 209-81; 227 NW 622

Contract to repurchase stock—equitable issues not presented. On appeal from a ruling sustaining plaintiff's demurrer to answer of a foreign corporation, in suit for breach of contract to repurchase from plaintiff its own stock, setting up defense that such purchase would impair its capital, which was prohibited under the statute of the state of its domicile, the supreme court could not exercise its inherent equitable power or give consideration to estoppel, ratification, implied contract, or theory that contract was loan, when proper pleading or proof relating thereto was lacking.

Bishop v Middle States Co., 225-941; 282 NW 305

Cost bond affidavit not a pleading. The statutory affidavit in support of a motion for cost bond is not a pleading.

Schultz v Ins. Co., 225-1024; 282 NW 776

Equitable estoppel—pleading—necessity. An estoppel and the facts supporting it must be pleaded.

Securities Inv. Corp. v Noltze, 222-678; 269 NW 866

Misnomer—effect. The misnomer of a pleading is of little consequence.

Wilson v Tolles, 210-1218; 229 NW 724

Motion to strike conclusions—overruling not ground for reversal. Supreme court will not assume original jurisdiction to determine a motion to strike not ruled on in the lower court; but, even tho it were overruled, a motion to strike allegations on the ground that they were

in the nature of conclusions and not statements of fact would not warrant a reversal in the supreme court.

Albright v Winey, 226-222; 284 NW 86

Receivers—nonnecessity for formal objections. The receiver of an insolvent bank is under no legal obligation to file formal objections to a claim which asserts a right to an equitable preference in payment of a deposit. In other words, he may contest the claim without formal pleadings.

Andrew v Church, 216-1134; 249 NW 274

Rejoinder. A "rejoinder" to a reply is unknown to our practice.

Cochran v Sch. Dist., 207-1385; 224 NW 809
Hiller v Felton, 208-291; 225 NW 452

Reply or amendment—waiver of objections. Altho a pleading, denominated as a reply, is really an amendment to the petition, but the question of proper pleading was not raised, and the defendants amended their answers as tho the reply had been an amendment to petition, and parties, without objection, offered evidence pertaining thereto, any objections possibly arising on account of the departure from the rules of pleading were waived.

Burns & McDonnell v Iowa City, 225-1241; 282 NW 708

Reply to reply—no legal standing. A reply to a reply brief and argument has no standing and will be stricken on motion.

In re Rinard, 224-100; 275 NW 485
See Cochran v School Dist., 207-1385; 224 NW 809

Waiver of error—answer after overruling motions to dismiss. An error in overruling a demurrer or motion to dismiss is waived by answering to merits.

Johnson v Purcell, 225-1265; 282 NW 741

Withdrawal of admission—effect. An admission by a party in his pleading is admissible against him even tho by an amended pleading he has withdrawn his admission.

Beery v Glynn, 214-635; 243 NW 365

11111 Petition.

Discussion. See 20 ILR 106—"Mending hold doctrine"

ANALYSIS

Judgments, actions split, res judicata. See under §11567 (VII)

I FORM OF PETITION

Pleadings in probate—informality. Pleadings in probate do not require the particularity and formality of pleadings in actions generally.

In re Willenbrock, 228- ; 290 NW 503

Name of plaintiff—variations. When, in a duly served original notice of suit, and in the petition filed, plaintiff's name appears as "Joseph Gulberg", the statement in the body of the petition that the plaintiff is also known as "Joseph Eulberg" and "that Joseph Gulberg and Joseph Eulberg are one and the same person" furnishes no ground for quashing the notice and dismissing the action.

Gulberg v Cooper, 219-858; 259 NW 925

Novation. A plea of novation must allege a mutual assent of all the parties affected by the transaction.

Benton v College, 202-15; 209 NW 516

II SPLITTING CAUSE OF ACTION

See also §11567 (VII)
Discussion. See 14 ILR 311—Splitting cause of action

Executory contract. A party to a continuing, executory contract may, notwithstanding the wrongful repudiation of the contract by the other party, insist on the contract and sue and recover the matured installments to date; and such action is no bar to a subsequent action to recover henceforth for the wrongful breach of the contract.

Collier v Rawson, 202-1159; 211 NW 704

Subjecting insurance to probate claim—dismissal as to policy in foreign court unallowable. A claimant in probate, alleging an oral contract assigning all decedent's insurance, may not split this single cause of action by dismissing part of his claim and attempting to establish it in a foreign state where one policy was held as security for the performance of a prior contract of decedent made therein.

In re Hazeldine, 225-369; 280 NW 568

Res judicata — persons and matters concluded. Under the doctrine of res judicata a party must try his entire cause without splitting the issues or defenses, and so a former judgment of a court of competent jurisdiction rendered on the merits between the same parties or privies and on the same cause of action estops and bars relitigation of, not only matters raised, but also matters which might properly have been raised.

Bagley v Bates, 223-836; 273 NW 924

Claims acquired during foreclosure—independent action to enforce. Where, pending foreclosure action, plaintiff acquires an additional claim against the defendant, he is not bound to amend and assert said claim in the foreclosure proceedings, but may maintain a subsequent and independent action on the newly acquired claim, even tho it pertains to the subject matter of the foreclosure.

Central Bank v Herrick, 214-379; 240 NW 242

Claim acquired during foreclosure. A junior mortgagee who, pending the foreclosure of his mortgage, pays the interest on a senior mortgage, is under no legal duty to include said payment in his foreclosure proceedings. He may subsequently assert such claim in an independent proceeding.

Jones v Knutson, 212-268; 234 NW 548

Mortgagee suing for delinquent taxes omitted from foreclosure judgment. A mortgagee who had paid delinquent taxes on the mortgaged land, according to a provision of the mortgage that if taxes were not paid the mortgagee could pay them and obtain repayment, should have taken care of his claim for taxes in the foreclosure proceedings and was not permitted by Ch 501, C., '35, to split his cause of action and bring an action for the taxes after the mortgagor had redeemed.

Monroe v Busick, 225-791; 281 NW 486

Note and mortgage—nonsplitting of action. A mortgagee is not guilty of splitting his cause of action (1) by suing at law on his secured note and proceeding against property of the mortgagor other than the mortgaged property, and (2) by instituting foreclosure proceeding as trustee for other secured note holders without making any claim therein on his own note.

Iowa Co. v Clark, 213-875; 237 NW 336

Open account for material and labor—separate counts not required. In action on open account embracing material and labor, court's refusal to require plaintiff to divide cause of action into two counts, alleging items of material in one count and items of labor in the other, held not erroneous.

Edwards v Cooper, (NOR); 222 NW 376

Permissible splitting of action. When a promissory note, and the last interest coupon note, both mature at the same time in the hands of the same holder, a judgment in an action solely on the interest coupon note (which contains no promise to pay the principal) is not an adjudication of the amount due on the principal note. In other words, the holder may first sue on the coupon note and later on the principal note.

Des M. Trust Co. v Littell, 209-22; 227 NW 503

Rent—action on separate installments. The bringing of separate actions on separate installments of rent as they fall due under a lease does not constitute a splitting of a single cause of action, because the maturing of each installment matures a new cause of action.

Hoefer v Fortmann, 219-746; 259 NW 494

III CONSTRUCTION OF PLEADINGS

Construction supporting judgment. The court will, if fairly possible, so construe a pleading as to support the judgment of the trial court.

Schramm & S. Co. v Shope, 200-760; 205 NW 350

Constitutionality of statute. A pleading assailing the constitutionality of a statute must (1) point out specifically the clause or section of the constitution which it is claimed is violated, and (2) designate the specific grounds upon which the asserted violation is based.

Peverill v Board, 201-1050; 205 NW 543

Acquiescence in construction. A pleader who acquiesces in the interpretation of the trial court of an ambiguous pleading may not, on appeal, deny the effect of his acquiescence, especially when by a simple amendment he might easily have removed all uncertainty.

Wilson v Stever, 202-1396; 212 NW 142

Alternative allegation—construction. An allegation that a party "knew, or by the exercise of reasonable diligence should have known" of a certain act, will be construed, when attacked by motion or demurrer, as simply alleging the weaker of the two alternatives, to wit: that the party "by the exercise of reasonable diligence should have known" of said act.

Cornick v Weir, 212-715; 237 NW 245

Action for discovery and accounting—intermingled law and equity. A petition, tho divided into "divisions" and to some extent separately embracing legal and equitable matters, is not subject to a motion to strike because of misjoinder, when the petition as a whole manifestly pleads but one cause of action, viz: an action for discovery and for an accounting.

Garretson v Harlan, 218-1049; 256 NW 749

Mutual construction of indefinite pleadings. Indefinite pleadings will be treated on appeal as sufficient to properly raise the issue when

III CONSTRUCTION OF PLEADINGS—concluded

the parties have so treated them in the trial court.

O'Bryon v Weatherly, 201-190; 206 NW 828

Building contracts—approval of materials—noncontradictory custom. Under a contract providing for the approval of materials to be furnished by a subcontractor to a principal contractor in part execution of a building contract, a known custom may be pleaded, to the effect that such approval was to be determined according to the plans and specifications of the general contract between the principal contractor and the owner of the building, provided that such custom is not contradictory to the subcontractor's contract.

Granette Co. v Neumann & Co., 200-572; 203 NW 935; 205 NW 205

Actions for damages—evidence. Evidence that a nuisance was a "health hazard" is fairly justified by a pleading that plaintiff and his family were, by reason of the nuisance, subject to "offensive, obnoxious, and poisonous odors * * * and detrimental to the comfort, use, and enjoyment of their property."

Hill v Winterset, 203-1392; 214 NW 592; 37 NCCA 232

Authority—insufficient plea. An allegation that a named party was an officer, and was charged with the financial management, of a college, "and, because of being such officer and financial agent, was authorized to enter into, on behalf of the college", a specified contract, is not such clear, direct, and definite allegation of authority as is required by the law.

Benton v College, 202-15; 209 NW 516

Contradicting one's own pleading. A pleader is not estopped from pleading a state of facts which is absolutely contrary to his pleaded state of facts in a former pleading in the same court and in the same trial.

First N. Bk. v Frank, 203-364; 212 NW 705

Indefinite treated as sufficient. A court of equity will not reject testimony before it showing the unconscionable nature of the transaction upon which action is brought (i. e., that a contract is pyramided with unconscionable usury), simply because the pleadings are general and indefinite, and do not specifically plead such usury. Especially is this true when the parties have treated the pleadings as all-sufficient.

Tansil v McCumber, 201-20; 206 NW 680

Pleadings as evidence—counterclaim as admission. Where corporation, within its agency for an insurance association, insured its own automobile, and when sued along with the driver thereof on account of a collision involving the automobile, and when the corporation counterclaims therein, alleging that it and driver were free from negligence, which counterclaim was subsequently dismissed, then in a later action against corporation to recover on the policy, the corporation was bound by such allegation as an admission of its consent to use the vehicle, and the pleading was admissible in evidence therefor.

Mitchell v Underwriters, 225-906; 281 NW 832

Action on insurance policy—real party in interest—authority to make admission in pleading. A defendant, Automobile Underwriters, a corporation, formed to underwrite reciprocal insurance contracts of its unincorporated group of subscribers, called the State Automobile Insurance Association, is the real party in interest in an action to enforce a judgment against the insurance carrier. The association is not a legal entity and, when the Automobile Underwriters is the only legal entity of the two, an admission of an important fact by the underwriters made in a counterclaim in the action in which judgment was obtained is binding on them in the later action.

Mitchell v Underwriters, 225-906; 281 NW 832

Scope of employment—admission. A counterclaim to the effect that defendant's employee was, at a named time and place, operating defendant's automobile in a careful manner and without negligence, with prayer for damages against plaintiff for injuring the machine, will be construed as an admission that the employee was, at the time and place, acting within the scope of his employment.

Hamilton v Sprague, 202-47; 209 NW 446

Supplemental petition after answer—pleading valid second tax deed. Even after answer, a plaintiff relying on tax deeds in a quiet title action, may, after discovering the deeds are invalid, obtain and plead second tax deeds without reserving notice of expiration of redemption, especially when the answer contained, at most, only a conditional offer to pay the taxes and redeem.

Inter-Ocean v Morrison, 225-1336; 283 NW 909

Trespass and conversion. A party may plead trespass and conversion in the same action.

Girard v Anderson, 219-142; 257 NW 400; 4 NCCA(NS) 203

Unpleaded issues—instruction. Instruction reviewed and held not open to the vice of injecting an issue not in the pleadings, to wit: that plaintiff was an unwilling guest in defendant's automobile.

Reed v Pape, 226-170; 284 NW 106

IV GENERAL TEST OF SUFFICIENCY

Allegations—res ipsa loquitur—applicability determined from pleadings. When a dispute

arose as to whether or not plaintiff was relying on res ipsa loquitur, trial court should interpret pleading, and determine therefrom—rather than from statements of counsel—whether res ipsa loquitur was applicable.

O'Meara v *Green Const. Co.*, 225-1365; 282 NW 735

Arrest of judgment—motion goes to sufficiency of petition. A motion in arrest of judgment raises only the question of whether the petition wholly fails to state a cause of action, not whether the petition should have been more specific.

Kirchner v Dorsey, 226-283; 284 NW 171

Authority of agent. An allegation that money was paid under a mistake, in that the payer (1) did not know that the payee was not a bona fide holder for value of the nonnegotiable note in question, and (2) did not know the authority of the agent of the payee, is wholly insufficient, no attempt being made to show what authority the agent had.

Benton v College, 202-15; 209 NW 516

Belated objections. The objection that a petition does not state a cause of action may be deemed waived when made for the first time in a motion for a new trial.

Clarkson v Cas. Co., 201-1249; 207 NW 132

Beneficiary's right to insurance. An insurer who, in compliance with the policy-authorized demand of the insured, changes the beneficiary of a life insurance policy, and, on the death of the insured, makes full payment to said substituted beneficiary, must be deemed to have discharged the obligation of the policy, unless said insurer knew, or ought to have known, when payment was made, that, notwithstanding the provision of the policy authorizing a change of beneficiary, the first-named beneficiary had such interest or ownership in the policy as entitled him to receive said payment. Petition in equity held subject to motion to dismiss (equitable demurrer) because not sufficiently alleging such interest or ownership and the insurer's knowledge thereof.

Bennett v Ins. Co., 220-927; 263 NW 25

Establishing claim against proceeds of realty. An equity petition which alleged that widow elected to take under will devising to her a life estate, with the right to dispose of realty for her necessary support, and which prayed that a claim for support of widow, pursuant to a contract with her, be established and declared a lien against the realty, was held to plead sufficient facts, and, together with the evidence in the case, was sufficient to warrant its submission.

Hoskin v West, 226-612; 284 NW 809

Foreign corporation's permit to do business—burden of proof. A foreign corporation for pecuniary profit, suing on an Iowa contract, has the burden to plead and prove its compliance with the statutes requiring permit to do business herein, without which a directed verdict in its favor is error.

Johnson Co. v *Hamilton*, 225-551; 281 NW 127

Judgment by default—no admission of cause of action. Principle reaffirmed that a default is not an admission of a valid cause of action where none is pleaded.

Neilan v Lytle Co., 223-987; 274 NW 103

Judgment notwithstanding the verdict—pleadings complete. Where the pleadings of the successful party averred all material facts necessary to a complete cause of action or defense, a motion for judgment notwithstanding the verdict was properly overruled.

Lee v Sundberg, 227-1375; 291 NW 146

Nonspecific allegations. Even tho a pleading is not as specific and detailed in its allegations as it ought to be, yet if it alleges the ultimate fact governing plaintiff's action, the submission of such ultimate fact will not necessarily constitute error, especially when there is no motion for a more specific statement.

Kenwood Lbr. v Armstrong, 201-888; 208 NW 371

Petition—competent allegations—striking in toto improper. A motion to strike an entire amended and substituted petition, being too broad, is properly overruled when such pleading, altho replete with objectionable matters, nevertheless contains competent allegations necessary to afford the relief prayed for.

Skaien v Witmer Co., 224-391; 276 NW 623

Public aid—mandamus—sufficiency of petition. In mandamus to compel an appropriation by a board of supervisors to a farm bureau association, the failure of the petition to state the amount of aid furnished the bureau by the federal government is not fatal when the petition was not attacked in the trial court.

Appanoose Bureau v Board, 218-945; 256 NW 687

Removal—petition failing to state grounds. A petition, challenging the appointment of an administrator with will annexed and the correctness of the report filed on behalf of the deceased executrix, concluding with a prayer that the letters of administration be set aside, is insufficient inasmuch as it fails to state any ground for such removal as contemplated by §12066, C., '35.

In re Collicott, 226-106; 283 NW 869

Slander of property or title—essential elements—when petition demurrable. A petition in an action for damages for slander of title is

IV GENERAL TEST OF SUFFICIENCY —concluded

demurrable unless, inter alia, it alleges, in some proper form, (1) the utterance and publication of the alleged slanderous words, and (2) the special legal damages suffered by plaintiff. Pleading reviewed and held fatally deficient in both particulars.

Witmer v Bank, 223-671; 273 NW 370

Subsequent purchaser—burden of proof. A mortgagee in an action for the conversion of the mortgaged chattels need only allege the existence of his unsatisfied mortgage. The defendant must allege and prove, not only (1) that he is a subsequent purchaser, but (2) that he became such purchaser without notice of the plaintiff's mortgage.

Loranz & Co. v Smith, 204-35; 214 NW 525; 53 ALR 662

V ULTIMATE FACTS

Admissions of fact—conclusiveness. Specific admissions of fact made in the pleadings which join the issues which are being tried are binding on the party making them, and as to such admissions there can be no issue.

Wilson v Oxborrow, 220-1135; 264 NW 1

Enticing and alienating. An allegation that the affections of a wife were alienated by slandering the plaintiff husband and by cultivating in the wife a dislike for plaintiff is sufficient without setting out the words uttered and the persons in whose presence they were spoken; likewise, an allegation that defendants "jointly and severally" conspired to alienate the affections of the wife from the husband.

Depping v Hansmeier, 202-314; 208 NW 288

Want of consideration. The all-essential element of a plea of failure of consideration is the facts. There need not necessarily be any formal statement "that there was a total failure of consideration."

Miller v Laing, 212-437; 236 NW 378

VI CONCLUSIONS

Conclusion plea. Alleging a legal conclusion without alleging the supporting facts is a bad plea.

Taylor County Bureau v Board, 218-937; 252 NW 498

Conclusions controlled by specific allegations. An allegation that an act was done "carelessly, negligently and fraudulently" must be construed as predicating the action solely on negligence when such is the effect of the pleader's subsequent and particularized allegations.

Pease v Bank, 210-331; 228 NW 83

Fact-supported conclusions permissible. A pleader has the right to plead conclusions provided the ultimate facts alleged support the conclusions.

Osceola v Gjellefald Co., 220-685; 263 NW 1

Harmless conclusion. An allegation of fact which is sufficient, if proven, to constitute negligence, is none the less sufficient because the pleader adds thereto his conclusion of negligence.

Townsend v Armstrong, 220-396; 260 NW 17

Unallowable conclusion plea. An allegation that a person was a financial officer of a college, and because of such fact was authorized to enter into a specified contract on behalf of the college, is an unallowable conclusion plea.

Benton v College, 202-15; 209 NW 516

Unallowable conclusion plea. An allegation that the transferee of a negotiable promissory note received it without consideration,—that said transferee was not a bona fide holder for value,—is a conclusion plea, and is not justified by the additional allegation of fact that said transferee took the note as a "donation or gift".

Benton v College, 202-15; 209 NW 516

Damages—wrongful possession of trust deed and note. In action to recover damages because defendant wrongfully procured and retained possession of trust deed and note, plaintiff's allegation that, "by reason of the alleged wrongful conduct of the defendant, plaintiff was rendered helpless and unable to comply with his contract of sale of said land and to secure an extension of the time of payment" of an incumbrance, was a mere conclusion and insufficient to show that defendant's wrongful appropriation of note and trust deed was proximate cause of plaintiff's damages.

Arthaud v Griffin, (NOR); 205 NW 528

Fraud—conclusion. A general allegation that a defendant practiced fraud and deceit on the plaintiff in procuring the latter's signature to an instrument is a pure conclusion.

Legler v Ins. Assn., 214-937; 243 NW 157

Naked conclusion. An allegation that a fund "belongs to plaintiff" is, in and of itself, a mere conclusion.

Markworth v Bank, 212-954; 237 NW 471

Proof—legal conclusion of fraud—no defense. In an action on an administrator's bond, the surety's pleading of a legal conclusion of fraud between administrator and a claimant will not constitute a defense.

In re Davie, 224-1177; 278 NW 616

Striking of conclusions. Conclusions and immaterial matter have no proper place in a pleading, and should be stricken on motion.

Andrew v Ind. Co., 207-652; 223 NW 529

VII PRESUMPTIONS

Presumption. Principle reaffirmed that it will be presumed that a pleader states a case as strongly as the facts will justify, and that nothing will be assumed in his favor except that which, upon a fair and liberal interpretation, is implied from his averments.

Pettijohn v Halloran, 200-1355; 206 NW 631

Presumption as to sustaining facts. On appeal in an action involving the title to real estate, it will be assumed, in support of the judgment, that the plaintiffs were the proper parties in interest, tho the record is indefinite, when they were so treated without objection in the trial below.

Bullock v Smith, 201-247; 207 NW 241

Probate claim—payments applied on debts due—presumption. In a probate action to establish claim for housekeeping services rendered to decedent, where decedent promised to pay claimant small amounts from time to time to cover cost of her clothing and personal expenses, with an additional amount upon his death out of his estate, it would be presumed that small payments made by decedent in his lifetime were to be applied on debts which were due for such expenses, no showing having been made to the contrary.

In re McKeon, 227-1050; 289 NW 915

Allegation of ownership or mortgageable interest. A petition in mortgage foreclosure need not allege that the mortgagor owned the land or had a mortgageable interest therein; neither need it allege that the mortgagor is estopped to deny such ownership or interest because the execution of such mortgage worked such estoppel in and of itself.

Watts v Wright, 201-1118; 206 NW 668

VIII CONDITIONS MATURING OR DEFEATING ACTION

Demurrer—self-negativing petition. A petition which alleges the personal liability of defendants as partners or members of a joint adventure predicated on a writing which on its face reveals the fact that said defendants specifically contracted against such liability—no question of ostensible partnership being raised—is demurrable as not stating a cause of action.

Bank v Anderson, 216-988; 250 NW 214

Unpleaded theory. Appellant's demand, on appeal, for judgment on an unpleaded theory will be ignored.

Forsberg v Const. Co., 218-818; 252 NW 258

IX NEGLIGENCE

Discussion. See 16 ILR 480—Pleading negligence

Action—res ipsa loquitur applicability. The rule of res ipsa loquitur applies where the circumstances attending the injury are of such character that the accident could not well have happened in the ordinary course of events without negligence on defendants' part, and the instrumentalities causing the injury were within exclusive control of defendants.

Peterson v De Luxe Co., 225-809; 281 NW 737

Res ipsa loquitur—malpractice by dentist. While the doctrine of res ipsa loquitur does not ordinarily apply in malpractice cases, the doctrine was held applicable under the pleadings and proof that plaintiff was given a general anesthetic, was completely unconscious and under the exclusive control of the defendant-dentist at the time his teeth were extracted, and that nine months later he expectorated from his lungs, after a violent spasm of coughing, a quantity of sputum, mucus and blood containing the root of a tooth.

Whetstine v Moravec, 228- ; 291 NW 425

Res ipsa loquitur. A general allegation of negligence or pleading of facts which is equivalent to such allegation, is an essential prerequisite to the application of the doctrine of res ipsa loquitur.

Whitmore v Herrick, 205-621; 218 NW 334; 34 NCCA 670

Res ipsa loquitur—specific allegations—effect. Proof that an agency or thing caused an injury under circumstances strongly suggestive of negligence on the part of the defendant having control of such agency or thing, but under circumstances such that direct evidence of the specific negligence is not readily available, opens the door to the injured party to rely on the doctrine of res ipsa loquitur, unless the injured party sees fit to allege and rely on specific allegations of negligence.

Orr v Elec. Light Co., 207-1149; 222 NW 560; 30 NCCA 622; 3 NCCA(NS) 540

Pleading—res ipsa loquitur. Plaintiff who relies on the doctrine of res ipsa loquitur and pleads facts showing the applicability of such doctrine, may (and should) plead negligence generally—need not (and should not) plead specific acts of negligence on the part of defendant and his employees.

Van Heukelom v Black Hawk Corp., 222-1033; 270 NW 16

Specific negligence—res ipsa loquitur—separate counts. Having received burns from a beauty parlor treatment, a plaintiff, after pleading specific acts of negligence in one count and the doctrine of res ipsa loquitur in another count, may at the conclusion of the evidence withdraw the first count and rely on the res ipsa loquitur doctrine which is always applicable in cases where all the instrumentalities are under the control of the operator and where, had ordinary care been used,

IX NEGLIGENCE—concluded

the injuries would not ordinarily have occurred.

Pearson v Butts, 224-376; 276 NW 65; 2 NCCA(NS) 613

Res ipsa loquitur in amendment—nonconformity to evidence. Where a prospective purchaser driving a used automobile belonging to an automobile dealer takes as a passenger a person familiar with automobiles to advise as to its value, and while so driving has an accident wherein the passenger is injured, an amended petition relying on the doctrine of res ipsa loquitur does not conform to the proof where the evidence excludes the likelihood of any automobile defect and indicates the accident was caused by driver trying to close automobile door against wind.

Sproll v Burkett Co., 223-902; 274 NW 63; 2 NCCA(NS) 424

Res ipsa loquitur—waiver. A general allegation of negligence, supportable by the doctrine of res ipsa loquitur, is waived by inserting in the same count a specific allegation of negligence; but the rule is otherwise when the different allegations are in different counts and when the issue arising on the general allegation is alone submitted because of the dismissal by plaintiff of the count containing the specific allegation.

Sutcliffe v Fort Dodge Co., 218-1386; 257 NW 406

Taxicab door striking eye—res ipsa loquitur. An action for loss of an eye caused by the sudden opening of a taxicab door as plaintiff stopped on the sidewalk to engage the cab, and when plaintiff made no move toward opening the door, the exclusive control of which was lodged in the driver inside the cab, presents a case to which the doctrine of res ipsa loquitur applies. In such case defendants' motion for a verdict is properly overruled.

Peterson v De Luxe Co., 225-809; 281 NW 737

Amendment to petition—statute of limitations. An amendment to petition, setting up a new cause of action barred by the statute of limitations, may be stricken, but when both the original petition and the amendment plead the same cause of action in general allegations of negligence, such amendment may not be stricken.

Olson v Cushman, 224-974; 276 NW 777

Facts alleged generally—arrest of judgment not tenable. A motion in arrest of judgment will not lie to a petition which recites the facts out of which plaintiff's injury arose, and which contains a general allegation of negligence on the part of the defendants.

Kirchner v Dorsey, 226-283; 284 NW 171

Allegation of negligence—definiteness determined in each case. Whether a negligence allegation is too general and indefinite to sustain a verdict, must, in every case, be determined in the light of the peculiar facts and circumstances out of which the cause of action arose.

O'Meara v Green Const. Co., 225-1365; 282 NW 735

Negligence—pleading—sufficiency. A pleader is entitled to claim as many grounds of actionable negligence as flow from his pleaded statements of fact.

Sutton v Moreland, 214-337; 242 NW 75

Pleading carrier's degree of care and res ipsa loquitur. A general allegation of negligence in a petition followed by a further allegation of negligence, dealing with the degree of care required of carriers, did not prevent application of the doctrine of res ipsa loquitur.

Peterson v De Luxe Co., 225-809; 281 NW 737

Rules and customs. Evidence of unpleaded rules and customs as a basis on which to predicate negligence is inadmissible.

Chilcote v Railway, 206-1093; 221 NW 771

Substituting last clear chance — not permitted. In a law action for damages wherein the petition alleges that defendant motorist was negligent in failing to keep a proper lookout, and such allegation was not withdrawn, and it is shown deceased pedestrian was contributorily negligent, it was proper to refuse to submit the case under last clear chance doctrine, on the theory that motorist, being under duty to keep a lookout, presumably performed such duty, but, after seeing deceased, failed to exercise due care in avoiding the injury.

Reynolds v Aller, 226-642; 284 NW 825

Ultimate facts. Assignments of negligence reviewed and held to constitute sufficient statements of ultimate facts pertaining to a collision between vehicles.

Ege v Born, 212-1138; 236 NW 75

Unnecessary particularity—name of negligent employee. Plaintiff, in an action based on negligence need not allege the names of defendant's servants and employees whom he claims were negligent.

Van Heukelom v Black Hawk Corp., 222-1033; 270 NW 16

X FRAUD

Fraud pleas—status in court. In fraud actions, courts are reluctant to permit a cheater to profit by his own wrongdoing, tho at the same time courts are constrained by another consideration—that it is for the public welfare

not to afford parties to written agreements such ready avenues of escape from their obligations that the purpose of lastingly recording such obligations in writing would be quite indifferently attained—the aim being to minimize both evils without accentuating either of them.

Griffiths v Brooks, 227-966; 289 NW 715

Fraud—conclusion. An allegation that an administrator "fraudulently and collusively" caused the allowance of a claim against the estate is wholly insufficient to constitute a good plea of fraud.

In re Kessler, 213-633; 239 NW 555

Damages—pleading and proof. Allegation and proof of fraud without any allegation and proof of damages leave plaintiff without a cause of action.

Vorpahl v Surety Co., 208-348; 223 NW 366

Acceptance of completed construction work. In the absence of fraud or mistake, the acceptance of construction work by a city bars recovery on the contractor's bond, except as to defects undiscoverable or unknown at the time of acceptance; however, the fraud or mistake necessary to overcome the acceptance must be alleged and proven.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Fraud in securing release. In an action on a life policy where the insurance company pleads a release, the burden of proof is on the company to show the execution and delivery of the release and payment of amount due thereunder, and where failure of consideration or fraud is alleged in obtaining the release, the burden of proof is on the party making the allegation, so where the court excluded such a release from evidence on account of insurance company's failure to establish consideration for the execution of such release, it placed a burden on the company which the company should not have been required to sustain, and the ruling was clearly erroneous.

Luce v Ins. Co., 227-532; 288 NW 681

Evidence—sufficiency. Principle reaffirmed that fraud cannot be assumed, and must be established by clear and convincing proof.

Edmunds v Ninemires, 200-805; 204 NW 219

Evidence — insufficiency — directed verdict warranted. In a damage action arising out of fraudulent procurement of plaintiff's signature to note and conditional sale contract, where plaintiff predicates error on granting defendant a directed verdict on the ground that defendant's fraud was not proved—the evidence showing that plaintiff could read and write English language but failed to read instruments while having an opportunity to do so—and where plaintiff's reasons for not reading instruments were (1) he did not have his glasses, and (2) he thought he was signing an ordinary order for automobile, held, plaintiff's conduct precludes him from asserting fraud, and the ruling on the motion was warranted.

Griffiths v Brooks, 227-966; 289 NW 715

Particular threat—reversible error. A party must stand or fall on the particular threat alleged by him as constituting duress. Reversible error results from permitting the jury to base its finding of duress on unpleaded matters.

Gray v Shell Corp., 212-825; 237 NW 460

XI ALLEGATION OF DAMAGES

Damages (?) or quantum meruit (?). An action for damages for breach of a contract of employment may be supported by evidence of the reasonable value of the services rendered, when the pleadings present such sum as the damages.

Westerfield v Oil Co., 208-912; 223 NW 894

Future pain. Damages for "future" physical and mental pain may not be submitted to the jury under a pleading (1) which makes no specific reference to such damages, and (2) which expressly pleads that such pain continued for a stated period, to wit, three weeks. This is true even though the pleading alleges that the injury alleged resulted in permanent, visible scars upon the "arm and wrist."

Pettijohn v Halloran, 200-1355; 206 NW 631

Future disability—submission not erroneous when permanent injury alleged. When petition, alleging that plaintiff was permanently injured, contained a general allegation for damages, an instruction on damages for future disability was not objectionable on the ground that the petition did not ask for such damages, and it was not necessary for plaintiff to specifically plead such elements of damage.

Schwaller v McFarland, 228- ; 291 NW 852

Malpractice action — measure of damages. Damages for personal injury by malpractice held not limited to the time plaintiff was in the hospital, but included defendants' treatment during the subsequent period while the wound was healing.

Kirchner v Dorsey, 226-283; 284 NW 171

Manner of construction of lines—pleading violation of statute or ordinance—insufficiency. In an action against an electric company whose transmission line was so close to plaintiff's building that firemen could not throw water on a fire until current was turned off, which delay caused destruction of building and contents, a complaint alleging violation of town ordinance and a state statute respecting construction of transmission line held insufficient to state a cause of action. .

Bowen v Iowa Public Service, 35 F 2d, 616

XI ALLEGATION OF DAMAGES — concluded

Substituting last clear chance—not permitted. In a law action for damages wherein the petition alleges that defendant motorist was negligent in failing to keep a proper lookout, and such allegation was not withdrawn, and it is shown deceased pedestrian was contributorily negligent, it was proper to refuse to submit the case under last clear chance doctrine, on the theory that motorist, being under duty to keep a lookout, presumably performed such duty, but, after seeing deceased, failed to exercise due care in avoiding the injury.

Reynolds v Aller, 226-642; 284 NW 825

XII PRAYER FOR RELIEF

Prayer not necessarily controlling. The prayer to a petition is not necessarily controlling on the question whether the action is at law or in equity.

Markworth v Bank, 212-954; 237 NW 471

General prayer—scope of relief. In equitable action where pleading "was not as clear as it might have been", yet prayed for general equitable relief, court enforced express provisions of legal contract to preserve rents and profits under the rule that where general equitable relief is prayed, any relief may be granted consistent with the pleadings and the evidence.

Wagner v Securities Co., 226-568; 284 NW 461

General equitable relief. In equity action seeking the appointment of a receiver, defendant's contention, that a receiver could not be appointed because no main cause of action was stated, was without merit, since plaintiff was in fact seeking to foreclose a lien on rents and had asked for general equitable relief, the rule being that "equity does not deal in technicalities, but rather it seeks to ascertain the true intent of the pleading filed".

Wagner v Securities Co., 226-568; 284 NW 461

Ignoring defective pleading. A defendant may not ignore a suit against him and allow judgment to be entered and then have the judgment set aside for want of jurisdiction because of merely defective pleading, as distinguished from absence of pleading and prayer.

Nelson v Higgins, 206-672; 218 NW 509

Insufficient prayer. A personal judgment without a specific prayer therefor is erroneous, and a prayer for "other and further relief" is not such prayer.

Richardson v Short, 201-561; 207 NW 610

Labor union injunction. Where a grave situation existed in the locality at the time, the state had the right to be made a party to proceedings involving an injunction violation by labor union officials, by filing a petition incorporating by reference the affidavits of the plaintiff's petition and the injunction upon which it was based, when the state did not seek different and distinct remedies from that asked by the plaintiff.

Carey v Dist. Court, 226-717; 285 NW 236

Petition — statutory requirements — prayer limits relief. Statute specifies the component parts of a petition, and the relief permitted thereunder is limited by the prayer therein.

In re Collicott, 226-106; 283 NW 869

Plea for additional relief—effect. The fact that a substituted petition asks for the same relief asked in the original petition, and for additional relief, does not change the cause of action.

Dunlop v First Tr. JSL Bank, 222-887; 270 NW 362

Teacher's pension—employment prerequisite. A public school teacher, after 30 years' service and while lacking only six months more service to be entitled to a pension, cannot mandamus the school board to compel her re-employment, and, such re-employment being the relief sought, a court may not go outside the pleaded issues and grant such a pension as the school board may have given.

Driver v School Dist., 224-393; 276 NW 37

11112 Counts or divisions—prayer.

Express contract and quantum meruit. A broker may plead in different counts (1) an express contract to pay a specified commission, and (2) an implied contract to pay a reasonable commission, and may insist on the submission of both issues to the jury if the evidence will support either finding. It follows that evidence may be admissible on the issue of quantum meruit, even tho plaintiff produces evidence of an agreement to pay the specifically named commission.

Ransom-Ellis Co. v Eppelsheimer, 205-809; 218 NW 566

Quantum meruit and express contract. In an action for services, duplicate counts are proper, one pleading quantum meruit and the other an express contract for definite compensation, and a refusal to compel plaintiff to elect between the two counts is not erroneous.

Halstead v Rohret, 212-837; 235 NW 293

Express and implied contract. A plaintiff may, in different counts, plead an express and an implied contract as to the same subject-matter.

Richmann v Beach, 201-1167; 206 NW 806

Double recovery. The submission to the jury of duplicate counts—counts praying recovery on the same elements of damages—and

permitting recovery on both such counts is clearly erroneous.

Gehlbach v McCann, 216-296; 249 NW 144

Form of judgment. Where a trustee under a trust agreement sues the maker of promissory notes on a series of notes the beneficial interest of which is in different parties, the defendant may not complain that a separate judgment is rendered on each count, and an aggregate judgment for the sum of all the separate judgments, the defendant being amply protected, by the terms of the judgments, from a double liability.

Iowa Co. v Clark, 215-929; 247 NW 211

Harmless striking of count. The striking by the court of one of several counts of a petition must be deemed quite harmless when the matter stricken is substantially repeated in an unstricken count.

McGlothlen v Mills, 221-204; 265 NW 117

Multifarious theories in one count. A cause of action which is not barred until ten years after the execution and delivery of a deed is shown by a pleading which (1) pleads a contract of purchase of land by the acre, and the deed in fulfillment thereof, (2) shows payment for the acreage represented in the deed, and (3) alleges actual material shortage in the said acreage; and this is true even tho the pleading does allege "mutual mistake" of the parties as to the acreage, and asks for the reformation of a mortgage for the purchase price.

Mahrt v Mann, 203-880; 210 NW 566

Open account for material and labor—separate counts not required. In action on open account embracing material and labor, court's refusal to require plaintiff to divide cause of action into two counts, alleging items of material in one count and items of labor in the other, held not erroneous.

Edwards v Cooper, (NOR); 222 NW 376

Pleadings—objections not raised in lower court. In an action for divorce based on cruelty, where the defendant made no objection either to the verification or the form of an amendment to a petition which alleged conviction of a felony, and the cause proceeded to trial without objection to petition as amended, the defendant on appeal could not complain that, because of the finding that equities were with plaintiff and were based on facts alleged in petition, trial court could not consider ground set out in amendment.

Ayers v Ayers, 227-646; 288 NW 679

Single count—not construed as two causes unless purpose of pleader clearly appears. While a defendant may waive the requirement that each cause of action must be set out separately, parties are presumed to follow the requirements of the statute in preparing their pleadings, and a single count or division of a petition will not be construed to state two causes of action unless the purpose of the pleader to do so clearly appears.

Young v Main, 72 F 2d, 640

Specific negligence—res ipsa loquitur—separate counts. Having received burns from a beauty parlor treatment, a plaintiff, after pleading specific acts of negligence in one count and the doctrine of res ipsa loquitur in another count, may at the conclusion of the evidence withdraw the first count and rely on the res ipsa loquitur doctrine which is always applicable in cases where all the instrumentalities are under the control of the operator and where, had ordinary care been used, the injuries would not ordinarily have occurred.

Pearson v Butts, 224-376; 276 NW 65; 2 NCCA(NS) 613

Striking matter judicially held insufficient. A plaintiff has no right to re-plead a count which had been judicially and finally held to present no cause of action even tho he combines said condemned count with another count.

Arthaud v Griffin, 212-646; 235 NW 66

Submission — nonspecific withdrawal of counts. The submission of one count of a petition may, in effect, work a withdrawal of all other counts.

Hill v Winterset, 203-1392; 214 NW 592

When separate counts required. A plaintiff who pleads both quantum meruit and express contract in the same count should be compelled, on motion, to separate his cause of action into separate counts.

Donahoe v Gagen, 217-88; 250 NW 892

Withdrawal of count by failure to instruct. Failure of the court to instruct on a pleaded count constitutes an effectual withdrawal of the count from the jury.

Cox v Fleisher Co., 208-458; 223 NW 521

11114 Answer.

Discussion. See 20 ILR 106—"Mending hold doctrine"

ANALYSIS

Counterclaims generally. See under §11151

I ANSWERS IN GENERAL

Admissions, general denial, and special defense—effect. An answer which consists (1)

I ANSWERS IN GENERAL—continued

of certain admissions, (2) of a general denial of all other allegations, and (3) of a special defense which is in harmony with the denial, has the effect of requiring the plaintiff to establish all his allegations not admitted.

Walters v Acc. Assn., 208-894; 224 NW 494

Admissions of fact — conclusiveness. Specific admissions of fact made in the pleadings which join the issues which are being tried are binding on the party making them, and as to such admissions there can be no issue.

Wilson v Oxborrow, 220-1135; 264 NW 1

Adopting pleading stating valid defense—default against aged defendant set aside. A default order unaccompanied by any judgment may be validly set aside at a subsequent term. So held in a partition suit where defendant, an 84-year-old mother holding a life estate, after defaulting, adopted the answer and cross-petition of the defendant children, which pleadings, if true, would effectually prevent partition—a sound reason for setting aside the default.

Redding v Redding, 226-327; 284 NW 167

Avoidance of matter first appearing in reply. An answer to a reply seems to be unknown to our practice. But when the defendant in an action to quiet title answers that he is the owner of the property, and is met by a reply that defendant is estopped by his own contract from claiming title, and defendant wishes to plead that said contract was obtained from him by fraud and without consideration, quaere: must defendant plead his said defense (a) by way of amendment to his answer, or (b) does the law impliedly supply such plea?

Carr v McCauley, 215-298; 245 NW 290

Bankruptcy—failure to plead discharge—effect. A discharge in bankruptcy of a claim subsequently sued on avails nothing unless the discharge is pleaded as a defense; and this is true tho the plaintiff has knowledge of the discharge.

Harding v Quinlan, 209-1190; 229 NW 672

Bank's mortgage on life estate changed to cover "undivided one-third" interest—effect. Where a bank has knowledge of an arrangement whereby a mother had a life estate in the entire property and made a mortgage accordingly, but in a later mortgage attempts to change its position by a mortgage on her interest as an "undivided one-third", its answer, admitting this allegation in the petition, estops the bank from claiming the mother had a greater interest and, when her interest develops to be a life estate, the bank's mortgage attaches only to an undivided one-third of this life estate.

Redding v Redding, 226-327; 284 NW 167

Cross-complaint — construction in view of stricken references. While the striking of portions of the first division of an answer may be proper as far as plaintiff's action is concerned, yet the court must treat said stricken portions as unstricken in construing defendant's cross-petition contained in a subsequent division of his answer when said stricken portions are essentially material to the cross-petition and are incorporated therein by distinct reference.

Andrew v Boyd, 213-1277; 241 NW 423

Cross-defendant's answer—effect on cross-petitioner. In mandamus action by county treasurer to obtain salary warrant where county board of supervisors answered, alleging indebtedness on part of treasurer to county for which set-off was claimed, and where county board brought treasurer's surety into the action as a cross-defendant, held, allegation in surety's answer, indicating that shortage in treasurer's office was due to the embezzlement by a third party, was not binding on board in view of its affirmative allegation that treasurer was indebted to the county.

Briley v Board, 227-55; 287 NW 242

Delayed defense — effect. Long delay in pleading defensive matter is not, in and of itself, sufficient to fatally discredit such defense.

Bibler v Bibler, 205-639; 216 NW 99

Demurrer—improper use in denying truth of pleadings. A so-called demurrer, to a defendant-lessee's answer of lack of consideration for an oral agreement to surrender the premises, which does not admit the truth of the answer, but in effect denies it, is properly overruled. Such application is not the function of demurrer.

Wright v Flatterich, 225-750; 281 NW 221

Equitable estoppel—failure to reply to letter as to ownership of instrument. The acceptor of a trade acceptance does not estop himself from pleading defensive matter by failing to reply to a letter from an indorsee to the effect that the indorsee has purchased the acceptance.

First N. Bank v Power Co., 211-153; 233 NW 103

Estoppel to refuse payment. Where remainderman offers to reimburse the heirs of a life tenant, for delinquent taxes paid by life tenant, in such amount as the court may find to be due, it cannot be held that the remainderman recognized or acquiesced in the claim for reimbursement, and is not thereby estopped from refusing to pay.

Rich v Allen, 226-1304; 286 NW 434

Governmental immunity — law question raised in reply. The defense of "governmental

immunity" of an employee, in a personal injury action, should properly be assailed by motion or demurrer. However, if the law question of sufficiency of this defense is raised in the reply and not challenged by the defendant, and the case tried on that theory, then the court is correct in recognizing the issue and instructing on the inadequacy of that defense.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Frauds, statute of—pleading. A defendant, who has duly denied the alleged making of a contract to answer for the debt of another, needs no further pleading on which to base, during the trial, an objection that oral testimony is incompetent to establish such contract.

Lindburg v Engster, 220-1073; 264 NW 31; 116 ALR 591

Fraud — insufficient defense. A defendant sued by his former wife on a property-settlement contract, fully performed by her, availeth himself nothing in the way of a defense by nakedly alleging fraud by the wife in obtaining the contract when such allegation is made neither as a basis for a rescission of the contract nor for damages.

Poole v Poole, 219-70; 257 NW 305

Indirect admission. An answer may, by indirection, clearly admit the truth of an allegation contained in the petition.

Arends v DeBruyn, 217-529; 252 NW 249

Invalid defense not attacked by motion—defeating recovery. If matter pleaded as a defense is not challenged by motion or demurrer or otherwise, it will, if proven, defeat the plaintiff's action, tho had the question been properly raised the answer would have been held to present no defense.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Motion to separate actions — nonright to withdraw answer. In an action (1) to cancel a deed and (2) to set aside the probate of a will on the ground of mental incapacity of the testator-grantor — both instruments having been executed by the same party and at the same time—it is not necessarily error for the court to refuse to permit defendant to withdraw his answer in order to permit defendant to file motion to separate the alleged separate causes of action and to transfer to the law docket.

Walters v Heaton, 223-405; 271 NW 310

Pleading — conclusiveness. A party must stand or fall on the particular threat alleged by him as constituting duress. Reversible error results from permitting the jury to base its finding of duress on unpleaded matters.

Gray v Shell Corp., 212-825; 237 NW 460

Plea without proof. A defensive plea without proof availeth nothing.

Hawkeye Clay v Ins. Co., 202-1270; 211 NW 860

Recklessness particulars unchallenged before answer—submitting as alleged. Error may not be predicated on the submission of certain particulars alleging recklessness when their sufficiency is not raised before answer filed and when evidence exists to sustain them.

Claussen v Johnson's Est., 224-990; 278 NW 297

Stranger to instrument—defense of alteration not available. A third-party stranger to an instrument cannot avail himself of the alteration of such instrument by one of the parties thereto, as a defense against his own wrongful and fraudulent acts.

Winker v Tiefenthaler, 225-180; 279 NW 436

Unallowable pleadings—answer and motion at same time. The filing of an answer to a petition as amended and, at the same time, a motion attacking the amendment are unallowable. In such case, the answer will stand, and the motion will be deemed waived.

Bliss v Watson, 208-1199; 227 NW 108

Unassailed answer or cross-petition. Matter pleaded by defendant in an answer or cross-petition, if not assailed by motion or demurrer, will, if proven, defeat plaintiff's action, altho, had the question been raised, the answer would have been held to present no defense. Held, defendant had failed to prove his allegations.

Maloney v Rose, 224-1071; 277 NW 572

Withdrawing answer—substituting demurrer or motion. It is within the trial court's discretion to permit a litigant to withdraw his answer and substitute therefor a motion or demurrer.

In re Arduser, 226-103; 283 NW 879

Withdrawal to file motion. There is no statutory authority to support common practice of withdrawing pleadings for purpose of filing a demurrer or motion, and such matter rests wholly within sound discretion of trial court.

Brown v Correll, 227-659; 288 NW 907

II GENERAL DENIAL

Discussion. See 6 ILB 96—Scope of the denial in Iowa

General denial. A denial of knowledge or information sufficient to form a belief constitutes a general denial of the allegation referred to.

Dean v Atkinson, 201-818; 208 NW 301

General denial—evidence of gift admitted. Evidence to establish a gift is admissible under a general denial.

Wilson v Findley, 223-1281; 275 NW 47

II GENERAL DENIAL—continued

General denial—chattel mortgage not admissible thereunder in replevin action. General denial puts in issue only facts pleaded in the petition. So, under a general denial to a replevin action for an automobile, evidence of a prior mortgage is properly excluded, when not pleaded, inasmuch as, under a general denial, the court is not called upon to decide which lien is first but only the question of whether plaintiff is entitled to possession.

General Motors v Koch, 225-897; 281 NW 728

General denial coupled with inferential admission. In an action on a promissory note, an answer which contains a general denial is not rendered demurrable by an answering statement that "defendant admits he signed a note which he assumes is the one in controversy, but he demands its production and proof at the trial herein".

Home Bank v Kelley, 205-514; 218 NW 288

General denial supported by "alibi". Where a defendant in a civil case enters a general denial to a charge of having committed a tort, and in support thereof testifies that at the time in question he was at his home not far from the scene of the alleged tort, the court has no right to instruct (1) that defendant's defense is that of an "alibi", and (2) that defendant has the burden to establish such alibi by evidence which will outweigh the evidence tending to show that defendant did commit the tort.

Gregory v Sorensen, 208-174; 225 NW 342

General denial — unavailable matters in avoidance. Under a general denial of a contract of employment, defendant may not show that the contract was terminated by the discharge of the plaintiff.

Hornish v Overton, 206-780; 221 NW 483

Answer—foreign corporation—right to sue raised by general denial. A general denial will put in issue a foreign corporation's right to sue in Iowa when so alleged, dependent upon securing the statutory permit therefor.

Johnson Co. v Hamilton, 225-551; 281 NW 127

Answer negativing petition. An answer which, in effect, is a negation of the allegations of the petition, proof of which plaintiff must make in order to recover, is not subject to a motion to dismiss.

Clark Bros. v Anderson, 211-920; 234 NW 844

Denial that plaintiff is real party in interest. In an automobile owner's damage action against a street railway, wherein defendant pleads a general denial and alleges that plaintiff is not the real party in interest, and wherein interrogatories attached to defendant's answer disclose that plaintiff's loss had been partly settled through insurance, and when defendant then alleges that a bank holds a mortgage on plaintiff's automobile, and moves the court to bring in the insurer and the mortgagee-bank as parties, such motion was properly overruled.

Caligiuri v Railway, 227-466; 288 NW 702

Denial precludes demurrer. An answer which pleads a denial of the execution of the note sued on is not demurrable, even tho, in an evident attempt to plead inconsistent defenses, the answer contains a colorable confession of such execution.

Seibel v Olson Bros., 202-711; 210 NW 925
Empire Trust v Dye, 205-1271; 215 NW 636

Denial with defendant's version. A defendant is under no obligation to prove his version of what a contract really was, even tho he pleads such version, when the plaintiff's plea of the contract has been met by a general denial.

Bremhorst v Coal Co., 202-1251; 211 NW 898

Inoperative denials. A denial of any knowledge or information sufficient to form a belief is inoperative when the admissions made remove all matters upon which issue could be joined.

Kaeser v Manderschied, 203-773; 211 NW 379

New matter and general denial in single division—new matter admissions controlling. Where new defensive matter and a general denial are pleaded in a single division answer, the admission implied of the cause of action must control; however, an answer in fact separating its general denial and other matters into numbered parts, altho lacking the word "division" before each numeral, is sufficiently divided to avoid the effect of the foregoing rule.

Keshlear v Banner, 225-471; 280 NW 631

Quiet title—issues under general denial. In an action to quiet title where plaintiff's claim of ownership arose out of a deed deposited with a bank for delivery, and delivered to plaintiff after grantor's death, a general denial puts in issue both the execution and the delivery of the deed.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

Rescission for fraud—general denial—effect. Where the plaintiff alleges rescission of a contract of sale because of defendant's fraud, and seeks to recover the money paid, a general denial does not raise the issue that plaintiff, after discovering the fraud, elected to affirm the contract.

Blecher v Schmidt, 211-1063; 235 NW 34

Unnecessary plea — burden of proof. A defendant who specifically pleads certain matter as a defense in addition to his defense of gen-

eral denial, thereby invites the court so to instruct as to impose on defendant the burden to prove said specially pleaded defense, even tho said defendant might have rested on his general denial.

Jordison v Jordison Bros., 215-938; 247 NW 491

Johnson v McVicker, 216-654; 247 NW 488

III CONCLUSION DENIALS

Proof — legal conclusion of fraud — no defense. In an action on an administrator's bond, the surety's pleading of a legal conclusion of fraud between administrator and a claimant will not constitute a defense.

In re Davie, 224-1177; 278 NW 616

IV INFORMATION OR BELIEF

Answer—inoperative denials. A denial of any knowledge or information sufficient to form a belief is inoperative when the admissions made remove all matters upon which issue could be joined.

Kaeser v Manderschied, 203-773; 211 NW 379

General denial—what constitutes. A denial of knowledge or information sufficient to form a belief as to a signature constitutes a general denial of the genuineness of such signature.

Dean v Atkinson, 201-818; 208 NW 301

V CONFESSION AND AVOIDANCE

Assault and battery. In an action for injuries inflicted upon the plaintiff when he was forcibly ejected from the home of the defendant, where the defendant's answer assumed the burden of proof by admitting the assault and battery, but by way of justification and confession and avoidance asserted that the plaintiff had been ejected after refusing to leave, the evidence was not sufficient to compel the court to direct a verdict for the defendant on the issue of whether the defendant had used more force than was necessary to accomplish the ejection.

Wessman v. Sundholm, 228- ; 291 NW 137

"Assault" admitted in pleadings—use of term permitted. In an action for damages in which the defendant's answer admitted an assault and battery but attempted to justify the act, he could not complain that the court, in its statement of the issues, said that he admitted the assault, as the word "assault" did not admit all that the plaintiff contended, but only the same act upon which the action was based.

Wessman v Sundholm, 228- ; 291 NW 137

VI SPECIAL AND AFFIRMATIVE DEFENSE AND NEW MATTER

Affirmative defense—burden of pleader. The jury, in a personal injury or death claim action where the defendant pleads "assumption of risk," should be plainly instructed that one pleading an affirmative defense must assume the burden of proving it.

White v Zell, 224-359; 276 NW 76

Instructions—reasonable value—admissions from pleadings. In action to recover price of corn sold to elevator, an instruction injecting element of reasonable value was erroneous where the pleading alleged express agreement on price, and a further erroneous instruction stating what defendant's answer admitted, but omitting qualification in defendant's pleadings, was not cured by instruction referring to a substituted oral agreement.

Hartwig v Elevator Co., (NOR); 226 NW 116

Directing verdict—stricken pleading of settlement—nonreview. Since a settlement must be pleaded, the overruling of a motion for directed verdict alleging a settlement of the action is not reviewable when the pleading setting forth the settlement has been ordered stricken and such order stands unchallenged.

Pearson v Butts, 224-376; 276 NW 65

Government employee's automobile collision. In a damage action for injuries arising out of a motor vehicle collision, defendant's claim that he was a state employee performing a governmental function is a matter of defense not properly raised by special appearance.

Anderson v Moon, 225-70; 279 NW 396

Matters which may have been litigated in prior action—res judicata. In an action by heirs of intestate against a son of intestate to have property received by such son decreed to be an advancement and be deducted from the son's interest in the estate, wherein it is shown that such son had instituted a prior action in partition to have his interest in realty determined, held that such issue of advancement should have been raised as an affirmative defense and litigated in the prior partition action, and therefore is now res judicata.

Robbins v Daniel, 226-678; 284 NW 793

Mending hold. Answer reviewed in an action for recovery of double benefits on a life insurance policy, and held not strikeable on motion on the alleged ground that defendant was thereby changing his defensive position after action had been brought on the policy.

Wenger v Assur. Soc., 222-1269; 271 NW 220

Merger and bar of defenses — nonbar or estoppel. A decree that a subscriber for corporate stock could not recover of the corporate receiver the amount already paid to the corporation on his subscription contract—such being the sole issue—does not estop the subscriber, when sued by the receiver for the unpaid amount of said contract, from pleading in

VI SPECIAL AND AFFIRMATIVE DEFENSE AND NEW MATTER—concluded

defense that the purported corporation never had any corporate existence.

State v Packing Co., 216-1344; 249 NW 761; 90 ALR 1339

Posted signs — damage — settlement offer—denying directed verdict based on stricken pleadings. Denying a directed verdict based on a general standing offer of settlement, made by posted signs to all patrons of a beauty shop in the event of injury, pleaded in answer but stricken on motion by an order not alleged as error, cannot be reviewed on appeal.

Pearson v Butts, 224-376; 276 NW 65; 2 NCCA(NS) 613

Public official's receipt of money as issue—plea of full accounting—not affirmative defense. A city seeking to recover from its clerk water rents, allegedly received and unaccounted for, must go forward with the evidence and prove by a preponderance thereof, the receipt of such funds by the clerk,—the clerk's answer denying receipt of such funds and asserting that all money received was accounted for. Such answer is not an affirmative defense requiring defendant to prove payment, but raises the receipt of funds as a controverted fact or issue submissible to a jury.

Carroll v Arts, 225-487; 280 NW 869

Res judicata plea—inapplicability—stricken on motion. In an action by citizens against the town council to enjoin the operation of a municipal electric plant, the trial court is correct in striking, on motion, that portion of defendant's answer which pleads res judicata, when it appears that a former action in the United States district court for the same purpose was by a private electric company in its individual capacity to enjoin the construction of the plant and that no judgment on the merits was rendered.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

VII EQUITABLE DEFENSE

Defense against transferee. The maker of a nonnegotiable promissory note who, in defense to an action thereon by a transferee, pleads that, before he learned of the transfer, he had on deposit with the payee (a private banker) a sum sufficient to discharge the note, sufficiently alleges his continued ownership of the deposit by alleging that he never withdrew any part thereof from the bank.

Benton v College, 202-15; 209 NW 516

VIII COUNTERCLAIM

Agreement to release judgment—attorney fee and costs included. Under a settlement in which a judgment debtor agreed to deed certain real estate to his judgment creditor in consideration for release and satisfaction of a judgment, where the debtor performed his part of the agreement and the creditor released the judgment, but refused to satisfy two items consisting of attorney fees and court costs, the debtor, who became primarily liable for said items upon rendition of the judgment, was, on his counterclaim in action brought by creditor, entitled to a decree compelling creditor to satisfy said fees and costs.

Cooke v Harrington, 227-145; 287 NW 837

Amended answer omitting objectionable parts. In an action on a promissory note where the defendant asked for a set-off of the amount of the note and counterclaimed for an additional amount, and the counterclaim was stricken on motion, a substituted answer by the defendant which omitted the counterclaim was not subject to being stricken because of being identical with the original answer.

Lowry v White, (NOR); 285 NW 687

IX WAIVER BY ANSWER

More specific statement—error waived. Error in overruling a motion for more specific statement is waived by movant filing an answer.

Kirchner v Dorsey, 226-283; 284 NW 171

Subsequent plea to the merits—effect. One who, on special appearance, challenges the jurisdiction of the court on the ground of defective service of the notice of suit, and who, after his challenge is overruled, pleads to the merits, and participates in the trial, thereby submits himself to the jurisdiction of the court, and is in no position to ask, on appeal, for a review of the ruling on his special appearance.

Crouch v Remedy Co., 205-51; 217 NW 557

Waiver by filing answer. In action on note, filing of answer waived right to proceed under statute by motion to strike cause of action improperly joined.

Brown v Correll, 227-659; 288 NW 907

Withdrawal of pleading to file motion. There is no statutory authority to support common practice of withdrawing pleadings for purpose of filing a demurrer or motion, and such matter rests wholly within sound discretion of trial court.

Brown v Correll, 227-659; 288 NW 907

Insurance policy admitted by pleadings. In an action to recover on a policy of fire insurance where the plaintiff's petition, a petition of intervention, and the answer to the petition of intervention all agreed that the policy was issued on a certain date and that it covered the same property that was covered by the mortgage and by another insurance contract issued by the intervenor, the record was not fatally deficient when it contained no evidence of the execution of the policy.

Calendro v Ins. Co., 227-829; 289 NW 485

11115 Multiple defenses and counterclaims.

Agreement to release judgment—attorney fee and costs included. Under a settlement in which a judgment debtor agreed to deed certain real estate to his judgment creditor in consideration for release and satisfaction of a judgment, where the debtor performed his part of the agreement and the creditor released the judgment, but refused to satisfy two items consisting of attorney fees and court costs, the debtor, who became primarily liable for said items upon rendition of the judgment, was, on his counterclaim in action brought by creditor, entitled to a decree compelling creditor to satisfy said fees and costs.

Cooke v Harrington, 227-145; 287 NW 837

Repurchase of stock — answer — validity against demurrer—equitable issues not raised by demurrer. The facts, set up in answer by a Delaware corporation, that (1) it had no surplus, and (2) the laws of the state of its domicile prohibited a repurchase of its stock from capital, present a defense to an action for recovery on an alleged breach of contract to repurchase stock when such answer is attacked simply by demurrer rather than by an appropriate remedy based on equitable rights. Demurrer does not raise estoppel, ratification, implied contract nor any other equitable theory.

Bishop v Middle States Co., 225-941; 282 NW 305

11117 Divisions of answer.

Answer—new matter and general denial in single division—new matter admissions controlling. Where new defensive matter and a general denial are pleaded in a single division answer, the admission implied of the cause of action must control; however, an answer in fact separating its general denial and other matters into numbered parts, altho lacking the word "division" before each numeral, is sufficiently divided to avoid the effect of the foregoing rule.

Keshlear v Banner, 225-471; 280 NW 631

Burden of proof—public official's receipt of money as issue—plea of full accounting—not affirmative defense. A city seeking to recover from its clerk water rents, allegedly received and unaccounted for, must go forward with the evidence and prove by a preponderance thereof, the receipt of such funds by the clerk, —the clerk's answer, denying receipt of such funds, and asserting that all money received was accounted for. Such answer is not an affirmative defense requiring defendant to prove payment, but raises the receipt of funds as a controverted fact or issue submissible to a jury.

Carroll v Arts, 225-487; 280 NW 869

Demurrer to several defenses—motion to divide—prerequisite. A demurrer to a part only of several defenses not separated into divisions as contemplated by statute, is not the proper method of attack; the proper procedure would have been to require defendant to separate and divide before demurring.

Bishop v Middle States Co., 225-941; 282 NW 305

Inconsistent defenses — necessity for separate counts. A general denial and a plea of settlement of plaintiff's cause of action embraced in one count or division of an answer render inadmissible evidence in support of the general denial, because, when both defenses are pleaded in the same count or division, the general denial is nullified by the plea of settlement.

Miller v Johnson, 205-786; 218 NW 472

11120 Correction of defect.

Discussion. See 20 ILR 49—Defective pleading

Demurrer to several defenses. A demurrer to a part only of several defenses not separated into divisions as contemplated by statute, is not the proper method of attack; the proper procedure would have been to require defendant to separate and divide before demurring.

Bishop v Middle States Co., 225-941; 282 NW 305

Sua sponte simplification by court. The district court has inherent power, sua sponte, to simplify pleadings.

Collins v Cooper, 215-99; 244 NW 858

11121 Time to plead.

Answer after appeal on ruling on demurrer. A defendant who assumes to appeal from an adverse ruling on his demurrer without standing on his demurrer, and without suffering a judgment to be entered against himself, has a right to file an answer after his appeal has been dismissed and before default is entered.

Gow v Dubuque County, 213-92; 238 NW 578

Answer—stricken when belated—court's discretion. When no excuse for delay is shown, striking a belated answer is within the discretion of the trial court.

In re Cheney, 223-1076; 274 NW 5

Special appearance and motion to dismiss. In an action against insurance company to recover value of property destroyed by fire, in which action a special appearance attacked only one count of petition, the overruling of the special appearance and motion to dismiss was proper, inasmuch as jurisdiction that may be attacked by special appearance is jurisdiction of court over the entire action, and not jurisdiction of court as to part of such action.

Sanford Co. v Ins. Co., 225-1018; 282 NW 771

11124 Copy of pleading—fee.

Failure to file — effect. Whether a motion should be sustained to strike a petition on the ground that no copy of the petition was also filed rests in the sound discretion of the court.

Andrew v Bank, 216-60; 245 NW 241

11127 Motion for more specific statement.

ANALYSIS

I In General
II When Motion Will Lie
III When Motion Will Not Lie
IV Waiver
V Appellate Review

I IN GENERAL

Amendment — insufficiency. Amendment, in action for damages consequent on alleged breach of building contract, reviewed and held wholly insufficient to comply with a motion for a more specific pleading.

Osceola v Gjellefald Co., 220-685; 263 NW 1

Exception to order. A plaintiff may except to an order sustaining a motion for a more specific statement and obtain a review of such ruling by refusing to plead over and appealing from the final judgment dismissing his action.

Depping v Hansmeier, 202-314; 208 NW 288

Nonpermissible objects. Motion seeking names and addresses of persons to whom alleged slanderous statements were made held properly overruled.

Johns v Cooper, (NOR); 205 NW 791

Order — attempted compliance — effect. Principle reaffirmed that a plaintiff who attempts to comply with an order of court, that he make his petition more specific, may not, when threatened with discipline for noncompliance, justify himself by the plea that the order for more specific statement ought not to have been entered.

Lamp v Williams, 222-298; 268 NW 543

Order — impossible compliance. A plaintiff who is ordered to make his petition more specific in certain particulars which he is actually or reasonably unable to state, and so demonstrates in a good faith effort to comply with the order, must be deemed to have complied with the order, and must not be disciplined by a dismissal of his action.

Lamp v Williams, 222-298; 268 NW 543

Objections to executor's final report—failure to dispose of securities. Objections to the final report of a trust company are not subject to a motion for more specific statement when officers of the trust company have equal or better knowledge of the facts called for by the motion, especially where the motion calls for evidentiary facts. Held, also, that trustee was charged with maladministration and not fraud.

In re Carson, 227-941; 289 NW 30

Maladministration by executor or trustee—definiteness of allegation. When the final report of an executor and trustee of an estate was objected to on the ground of maladministration, the objection was sufficient tho it did not state whether the alleged wrongful acts were performed while the trustee was acting in its official capacity as executor or trustee.

In re Carson, 227-941; 289 NW 30

Wrongful retention of securities by trustee or executor. An objection to the final report of a trust company acting as trustee and executor of an estate is sufficient in alleging generally that the trust company wrongfully retained securities which it should have disposed of altho it does not state on what dates the securities should have been sold and what their values were on those dates.

In re Carson, 227-941; 289 NW 30

Wrongful purchase of securities by executor or trustee. An objection to the final report of a trust company acting as trustee and executor was sufficient in alleging that securities were purchased without the approval of the court, altho the date of each purchase was not stated, and it was not stated whether the purchases were made as executor or trustee.

In re Carson, 227-941; 289 NW 30

Res ipsa loquitur — specific allegations — effect. Proof that an agency or thing caused an injury under circumstances strongly suggestive of negligence on the part of the defendant having control of such agency or thing, but under circumstances such that direct evidence of the specific negligence is not readily available, opens the door to the injured party to rely on the doctrine of res ipsa loquitur, unless the injured party sees fit to allege and rely on specific allegations of negligence.

Orr v Elec. Light Co., 207-1149; 222 NW 560; 30 NCCA 622; 3 NCCA(NS) 540

Torts—defect in street—notice—pleading. In an action in tort against a municipality, a plea that the city had notice of the defect in the street may be adequate tho such plea be subject to a motion for more specific statement.

Jensen v Magnolia, 219-209; 257 NW 584

Withdrawal of pleading to file motion. There is no statutory authority to support common practice of withdrawing pleadings for purpose of filing a demurrer or motion, and such matter rests wholly within sound discretion of trial court.

Brown v Correll, 227-659; 288 NW 907

II WHEN MOTION WILL LIE

Arrest of judgment—motion goes to sufficiency of petition. A motion in arrest of judgment raises only the question of whether the petition wholly fails to state a cause of action, not whether the petition should have been more specific.

Kirchner v Dorsey, 226-283; 284 NW 171

Avoidance under res ipsa loquitur. A general allegation of negligence is subject to a motion for a more specific statement unless the pleader clearly indicates in his pleading his purpose to sustain said general allegation under the doctrine of res ipsa loquitur.

Sutcliffe v Fort Dodge Co., 218-1386; 257 NW 406

Breach of contract to build — particularity required. In an action for damages based on alleged breach of a written contract for the erection, under written specifications, of a structure (especially when it is of magnitude and complexity), general conclusion allegations by plaintiff of the use by defendant of defective materials and workmanship must, on proper motion, be accompanied and supported by fact allegations showing, with reasonable certainty, (1) wherein said material and workmanship were defective, (2) the location of the several alleged defects, and (under some circumstances) when each of said defects became manifest, and (3) the particular specification which was violated by using such material and workmanship.

Osceola v Gjellefald Co., 220-685; 263 NW 1

Erroneous denial. In an action for general and special damages, under general and somewhat meager pleading, based on an alleged libelous publication resulting (1) in loss of customers, (2) in being refused credit, and (3) in loss of earnings in business, plaintiff should, on motion for more specific statement of the action, be compelled to set forth the names of customers lost, the names of those who refused him credit, and the ultimate facts upon which he bases his demand for judgment on account of injury to his earnings.

Dorman v Credit Co., 213-1016; 241 NW 436

Overruling motion — movant at loss. An order overruling a motion for a more specific statement is appealable when the ruling deprives the movant of a right which cannot be protected by appeal from the final judgment.

Fay v Dorow, 224-275; 276 NW 31

"Reckless and negligent"—single allegation —more specific statement required. Where two motor vehicles collide and plaintiff riding in the back seat of one of the vehicles sues both drivers alleging "concurrent, reckless, and negligent conduct", the petition is subject to motion for more specific statement as to whether or not plaintiff was a guest and whether defendants were both charged with both reckless and negligent acts.

Fay v Dorow, 224-275; 276 NW 31

Reservation of ground of review—general allegation of negligence—standing on motion to strike or make specific. To preserve an objection that an allegation of negligence was too general and indefinite to constitute basis of cause of action, a defendant should stand on its motion to strike and for more specific statement. Failing in this and filing its answer, it waived any error of court in overruling motion. A cause of action should be sufficiently precise to enable the defendant to prepare his defense.

O'Meara v Green Const. Co., 225-1365; 282 NW 735

When required — avoidance of contract. A general allegation by an answering defendant of the commission, by plaintiff, of acts of "unfaithfulness and adultery", pleaded by defendant in avoidance of the contract sued on, must be amplified, on proper motion, by alleging more specifically said alleged acts and the time when, place where, and person with whom, committed.

Poole v Poole, 221-1073; 265 NW 653

III WHEN MOTION WILL NOT LIE

Calling for evidentiary matter. A motion for more specific statement wherein evidentiary matters are largely called for is properly overruled.

Halstead v Rohret, 212-837; 235 NW 293

Excessive order. Motion for more specific statement of cause of action—sustained generally—reviewed, and held to burden plaintiff with unwarranted and unnecessary exactions, compliance with which were either most difficult or impossible.

Lamp v Williams, 222-298; 268 NW 543

Explaining common terms. Plaintiff who alleges that he furnished defendant the article or thing contracted to be furnished and that defendant accepted said article or thing, cannot be required to set forth in his pleadings how or in what manner plaintiff furnished said article or thing and how or in what manner defendant accepted it.

Hoxsey v Baker, 216-85; 246 NW 653

Nonpermissible objects. A motion for more specific statement of a petition should not call for (1) matter evidentiary in character, (2) matter essential for plaintiff's recovery, or (3) matter purely defensive to the action.

Day v Power, 219-138; 257 NW 187

Pleading carrier's degree of care and res ipsa loquitur. A general allegation of negligence in a petition followed by a further allegation of negligence, dealing with the degree of care required of carriers, did not prevent

III WHEN MOTION WILL NOT LIE—concluded

application of the doctrine of res ipsa loquitur.

Peterson v De Luxe Co.,. 225-809; 281 NW 737

Reasons for dissatisfaction. A landlord, under a lease authorizing either party thereto to cancel the same "in case the farming conditions are not satisfactory", need not, in a petition to remove the tenant, allege or set forth the reasons for his alleged dissatisfaction.

Jepson v Conner, 210-1267; 232 NW 693

Res ipsa loquitur—unnecessary particularity. Plaintiff who relies on the doctrine of res ipsa loquitur and pleads facts showing the applicability of such doctrine, may (and should) plead negligence generally—need not (and should not) plead specific acts of negligence on the part of defendant and his employees.

Van Heukelom v Black Hawk Corp., 222-1033; 270 NW 16

Specific reliance on res ipsa loquitur. A plaintiff who sues in tort and alleges generally (1) that defendant was guilty of negligence which was the proximate cause of her injuries, and (2) that she relies on the doctrine of res ipsa loquitur, cannot be compelled, by motion for more specific statement, to state the particular acts of negligence of which she complains.

Harvey v Borg, 218-1228; 257 NW 190; 39 NCCA 139

Taxicab door striking eye—res ipsa loquitur. An action for loss of an eye caused by the sudden opening of a taxicab door as plaintiff stopped on the sidewalk to engage the cab, and when plaintiff made no move toward opening the door, the exclusive control of which was lodged in the driver inside the cab, presents a case to which the doctrine of res ipsa loquitur applies. In such case defendants' motion for a verdict is properly overruled.

Peterson v De Luxe Co., 225-809; 281 NW 737

Unallowable use of motion. A motion for more specific statement must not be made a vehicle with which to obtain from a plaintiff evidence upon which defendant may frame a defense. So held where the motion largely sought the production by plaintiff of matters extraneous to that sued on.

Southern Sur. v Salinger, 213-188; 238 NW 715

Unnecessary particularity—name of negligent employee. Plaintiff, in an action based on negligence need not allege the names of defendant's servants and employees whom he claims were negligent.

Van Heukelom v Black Hawk Corp., 222-1033; 270 NW 16

Unreasonable requirement. In an action in the nature of a discovery and for an accounting, plaintiff ought not, under a motion for a more specific statement, to be required to set forth the very facts which he is seeking to discover.

Garretson v Harlan, 218-1049; 256 NW 749

IV WAIVER

General and indefinite pleadings—waiver. A court of equity will not reject testimony before it showing the unconscionable nature of the transaction upon which action is brought (e. g., that a contract is pyramided with unconscionable usury), simply because the pleadings are general and indefinite, and do not specifically plead such usury. Especially is this true when the parties have treated the pleadings as all-sufficient.

Tansil v McCumber, 201-20; 206 NW 680

General or dragnet assignment. A general or dragnet allegation of negligence is properly submitted to the jury in accordance with the supporting evidence when such allegation is neither attacked (1) by motion for more specific allegation, nor (2) by motion to strike or withdraw.

Watson v Railway, 217-1194; 251 NW 31

Failure to attack general pleading. A pleading, unquestioned in the trial court, which alleges that goods were purchased and delivered under an "oral agreement", without specification of any agreed terms as to price or quantity, will support a judgment for the unquestioned reasonable value of the goods.

Chandler Co. v Groc. Co., 200-919; 205 NW 787

Future pain. A supported allegation that certain injuries were "permanent" is sufficient basis for the recovery of damages for future pain, in the absence of a motion for a more specific statement, or of instructions bearing thereon.

Cuthbertson v Hoffa, 205-666; 216 NW 733

More specific statement—error waived by filing answer. Error in overruling a motion for more specific statement is waived by movant filing an answer.

Kirchner v Dorsey, 226-283; 284 NW 171

Nonspecific allegations. Even tho a pleading is not as specific and detailed in its allegations as it ought to be, yet if it alleges the ultimate fact governing plaintiff's action, the submission of such ultimate fact will not necessarily constitute error, especially when there is no motion for a more specific statement.

Kenwood Lbr. v Armstrong, 201-888; 208 NW 371

Waiver. Error in overruling a motion for a more specific statement as to alleged negligence is waived by the filing of an answer.

Broderick v Barry, 212-672; 237 NW 481; 75 ALR 1530

McKeehan v City, 213-1351; 242 NW 42

Y. M. C. A. v Caward, 213-408; 239 NW 41

Waiver of error by pleading over. Plaintiff may not predicate error on orders for more specific statement with which orders he has complied by pleading over.

Pride v Kittrell, 218-1247; 257 NW 204

V APPELLATE REVIEW

Appeal. An appeal will lie directly from an order overruling a motion to require plaintiff, in an action to recover the contract price for medical services rendered by him, to state whether at the time of rendering the services he was duly licensed to practice medicine; otherwise as to requiring plaintiff to set forth the contents of the formula used by plaintiff tho said formula was a subject matter of the contract.

Hoxsey v Baker, 216-85; 246 NW 653

Appeal. Orders which simply settle the issues in a case (e. g., an order overruling a motion for a more specific statement) are not ordinarily appealable.

Southern Sur. v Salinger, 213-188; 238 NW 715

Certiorari to review ruling. A litigant who moves to strike a pleading or to require it to be made more specific, may not have the rulings on his motion reviewed on certiorari; and this is necessarily true even tho it be conceded, arguendo, that the pleading in question was not legally on the calendar.

Holcomb v Franklin, 212-1159; 235 NW 474

Order overruling motion for more specific statement. An appeal will lie directly from an order overruling a motion for a more specific statement of a cause of action, when the ruling deprives the movant of a right which cannot be protected by an appeal from the final judgment.

Dorman v Credit Co., 213-1016; 241 NW 436

Motion for more specific statement—denial. An order overruling a motion for a more specific statement of allegations of negligence is not appealable when the allegations so attacked are virtually nugatory—of such nature that evidence in purported support thereof will not be admissible on the trial.

Ferguson v Cannon, 214-798; 243 NW 175

11129 Pleading contract.

Breach of contract to build — particularity required. In an action for damages based on alleged breach of a written contract for the erection, under written specifications, of a structure (especially when it is of magnitude and complexity), general conclusion allegations by plaintiff of the use by defendant of defective materials and workmanship must, on proper motion, be accompanied and supported by fact allegations showing, with reasonable certainty, (1) wherein said material and workmanship were defective, (2) the location of the several alleged defects, and (under some circumstances) when each of said defects became manifest, and (3) the particular specification which was violated by using such material and workmanship.

Osceola v Gjellefald Co., 220-685; 263 NW 1

Profert, oyer, and exhibits. The common law procedure of "oyer and profert", by which a party obtained the inspection of documents, is unknown to our code procedure.

Dunlop v Dist. Court, 214-389; 239 NW 541

Well drilling — compensation per foot to ample water, as a basis for a mechanic's lien. A contract to drill a well at an agreed price per foot for each foot drilled, coupled with a guarantee by the driller to secure an ample supply of water with no limitation on the depth of the well, means that the driller is to be paid at the contract price for every foot drilled to whatever depth it is necessary to go to fulfill the guarantee.

Collins v Gard, 224-236; 275 NW 392

11130 Equitable actions—motion to dismiss.

Discussion. See 10 ILB 193—Abolition of the equitable demurrer; 20 ILR 49—Defective pleading

Motion to dismiss — definition. A motion to dismiss an equitable action is, in legal effect, an equitable demurrer.

Swartzendruber v Polke, 205-382; 218 NW 62

Motion for dismissal—allowability and effect. A motion to dismiss an action in equity, made at the close of plaintiff's testimony, being without statutory recognition, simply constitutes an announcement by defendant that he rests his case without further testimony.

Vogt v Vogt, 208-1329; 227 NW 107

Motion as demurrer — effect. A motion to dismiss in an equitable action serves the same purpose as a demurrer in a law action, and admits as true only such facts as are well pleaded. Necessarily, then, the motion does not admit the legal conclusions of the pleader.

Duvall v Duvall, 215-24; 244 NW 718; 83 ALR 1242

Motion to dismiss. If any of the grounds of a motion to dismiss petition for construction of a will are well taken, it is not error to sustain such motion.

Anderson v Meier, 227-38; 287 NW 250

Motion to dismiss in lieu of demurrer. A motion to dismiss a petition for a writ of certiorari will be treated as a demurrer when based on statutory grounds for demurrer.

Fehrman v Sioux City, 216-286; 249 NW 200

Mandamus—petition—motion to dismiss as proper attack. Attack on mandamus petition should have been made by a motion to dismiss rather than by a demurrer, since statutes provide that mandamus shall be tried as an equitable action, and that a petition in equity may be attacked by motion to dismiss.

Bredt v Franklin County, 227-1230; 290 NW 669

Motion to dismiss—scope of confession. A motion to dismiss, under our new equity practice, confesses all facts which are properly and sufficiently pleaded in the pleading assailed, but not conclusions of law nor conclusions of fact, unless the facts from which the conclusions of fact logically follow are set out.

Benton v College, 202-15; 209 NW 516

Motion to dismiss—speaking demurrer. A motion to dismiss in equity, being in effect a demurrer, is a speaking demurrer if it refers to matters not appearing on the face of the petition: e. g., a transcript of the board of review proceedings.

Board v Sioux City Yards, 223-1066; 274 NW 17

Amended pleading—repeating bad pleading —improper striking in toto. Error results from striking in toto an amended and substituted petition in equity on the sole ground that said pleading is but a repetition of a former petition which had been held bad on equitable demurrer (motion to dismiss), when said amended and substituted petition, while in part a repetition of said former bad pleading, alleges an entirely new fact basis for recovery and a prayer in harmony therewith.

Birk v Jones County, 221-794; 266 NW 553

Demurrer in lieu of motion. The attempt to employ a demurrer in an equity cause, in lieu of a motion to dismiss, presents no question to the court, and especially so when the so-called demurrer is inherently faulty.

American Sur. v Leach, 206-1355; 220 NW 34

Demurrer in lieu of motion. A demurrer to a petition in equity will, under some circumstances, be treated by the appellate court as a motion to dismiss.

Heitzman v Hannah, 206-775; 221 NW 470

Mandamus—demurrer treated as motion to dismiss. In mandamus action, where parties treat a demurrer as a motion to dismiss, it will be so viewed on appeal.

Bredt v Franklin County, 227-1230; 290 NW 669

Demurrer or motion to dismiss—pleading over in equity. Plaintiff, in an action triable in equity, who has his action dismissed on motion because of defenses in point of law appearing on the face of the petition, must be accorded the right (1) to plead over, or (2) to elect to stand upon the ruling of the court.

Marcovis et al. v Commonwealth Inv. Co., 223-801; 273 NW 888

Equitable demurrer — effect. All material, well-pleaded fact allegations of a petition in equity are, for the purpose of a motion to dismiss (equitable demurrer), admitted to be true.

State v Des Moines, 221-642; 266 NW 41

Equitable demurrer — appeal — condition precedent. A party may not appeal from an order sustaining an equitable demurrer (motion to dismiss) unless he elects in some sufficient manner in the trial court to stand on the ruling of the court.

Benjamin v Jackson, 207-581; 223 NW 383

Sustaining equitable demurrer — failure to stand on pleading or suffer judgment — effect. An order sustaining defendant's motion to dismiss plaintiff's action on the ground that the petition fails to state a cause of action, will not be reviewed on appeal when the record fails to show that plaintiff either, (1) elected to stand on his pleadings, or (2) permitted final judgment to be entered against him. The ruling not being reviewable, the appeal will be dismissed.

Grimm v First N. Bank, 221-667; 266 NW 517

Demurrer in lieu of motion to dismiss. The action of the court in treating a demurrer in an equitable action as a motion to dismiss cannot be questioned by a party who invited such action and acquiesced therein until he suffered an adverse ruling.

Goldsberry v Goldsberry, 217-750; 252 NW 531

Change in beneficiary of insurance—justifiable and unjustifiable payment. An insurer who, in compliance with the policy-authorized demand of the insured, changes the beneficiary of a life insurance policy, and, on the death of the insured, makes full payment to said substituted beneficiary, must be deemed to have discharged the obligation of the policy, unless said insurer knew, or ought to have known, when payment was made, that, notwithstanding the provision of the policy authorizing a change of beneficiary, the first-named beneficiary had such interest or ownership in the policy as entitled him to receive said payment. Petition in equity held subject to motion to dismiss (equitable demurrer) because not sufficiently alleging such interest or ownership and the insurer's knowledge thereof.

Bennett v Ins. Co., 220-927; 263 NW 25

Conditions attending appeal. An appeal will not lie from an order overruling a motion to dismiss an equitable action on the ground of misjoinder of parties, unless the record shows (1) an election to stand on the pleading, or (2) that judgment was entered against the movant.

Fed. Sur. v Morris Plan, 209-339; 228 NW 293

Conditions precedent to appeal. An appeal from a ruling sustaining a motion to strike a plea of the statute of limitation in probate proceedings will not lie when the complainant fails to stand on the plea and fails to permit judgment to go against him.

In re Delaney, 207-451; 223 NW 486
Hawthorne v Andrew, 208-1364; 227 NW 402

Dismissal on plaintiff's testimony—effect. A defendant in an equitable action who, at the close of plaintiff's evidence, moves for and obtains a dismissal of plaintiff's action places himself in the position where, on appeal, the final determination of plaintiff's action must be determined on plaintiff's evidence.

Hirtz v Koppes, 212-536; 234 NW 854

Dissolving temporary injunction not operative as demurrer. General rule being that a preliminary injunction will be dissolved upon filing of an answer fully denying the material allegations of the petition, a motion to dissolve when filed thereafter and sustained will not operate as a demurrer to the petition nor adjudicate that the petition fails to state a cause of action.

Sioux City Patrol v Mathwig, 224-748; 277 NW 457

Franchise renewal statute—objecting stockholders selling to majority. At the termination of a mutual telephone company franchise, stockholders voting against renewal of franchise may not maintain an action against the majority stockholders to require purchase of their stock by such stockholders voting in favor thereof, until after three years from date of voting, under §8365, C., '35, permitting such franchise renewal, if the majority stockholders voting renewal purchase the stock of those voting against renewal within three years from date of voting, and an action commenced within such three-year period, being premature, will be dismissed on motion.

Terrell v Ringgold Tel. Co., 225-994; 282 NW 702

Effect of stipulated evidence. The principle that a motion to dismiss the petition in an equitable action (formerly denominated a demurrer) necessarily admits the truth of the well-pleaded allegation of the petition, may be materially modified or obviated by evidence which the parties stipulate into the record for the purpose of said motion.

Pierre v Pierre, 210-1304; 232 NW 633
Panther v Agri. Dept., 211-868; 234 NW 560

Effect of ruling. An order sustaining a motion to dismiss an equitable action and adjudging costs against plaintiff constitutes a final adjudication on the pleaded facts.

Swartzendruber v Polke, 205-382; 218 NW 62

Escheat proceeding. Where the state of Iowa in an estate proceeding files an application for the escheat to the state of the property in the estate and includes in its application extensive allegations dealing with the selection of a new administrator, a motion to strike those portions of the pleading dealing with the new administrator, when sustained, does not present an interlocutory order from which an appeal will lie, and, if taken, the appeal will be dismissed on motion.

In re Bannon, 225-839; 282 NW 287

Governmental immunity — law question raised in reply. The defense of "governmental immunity" of an employee, in a personal injury action, should properly be assailed by motion or demurrer. However, if the law question of sufficiency of this defense is raised in the reply and not challenged by the defendant, and the case tried on that theory, then the court is correct in recognizing the issue and instructing on the inadequacy of that defense.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Improper joinder. A misjoinder both of causes of action and of parties is ground for demurrer or for motion to dismiss in equitable proceedings.

McPherson v Sec. Co., 206-562; 218 NW 306
Baker v Baker, 220-1216; 264 NW 116

Improper use of motion. An issue of fact in an equity case cannot be determined on a motion to dismiss.

Lenehan v Drain. Dist., 219-294; 258 NW 91

Invalid defense not attacked by motion. If matter pleaded as a defense is not challenged by motion or demurrer or otherwise, it will, if proven, defeat the plaintiff's action, tho had the question been properly raised the answer would have been held to present no defense.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Legal effect. Plaintiff who, in an equitable action, moves to dismiss defendant's answer may not avail himself of the allegations of the petition when the allegations of the answer are diametrically the opposite to those of the petition.

Lenehan v Drain. Dist., 219-294; 258 NW 91

Misjoinder both of parties and of causes. In action on promissory notes, defendant's demurrer, filed after answer, on ground of mis-

joinder both of causes of action and of parties was properly overruled.

Brown v Correll, 227-659; 288 NW 907

Misjoinder of parties. A mere misjoinder of parties cannot be reached by demurrer.

Brown v Correll, 227-659; 288 NW 907

Misjoinder in equity of parties and causes—remedy. A misjoinder, in an equitable action, of parties and causes of action, is properly met by motion to dismiss.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Nonappealable orders—motion in equity to dismiss. An appeal will not lie from an order in an equity cause sustaining a motion to dismiss made at the close of plaintiff's testimony.

Bridges v Sams, 202-310; 202 NW 558

Optional rights. When a motion to dismiss an equitable action is sustained, the plaintiff may (1) stand on his pleadings and appeal, or (2) amend.

Swartzendruber v Polke, 205-382; 218 NW 62

Order overruling motion to strike. An order overruling a motion to strike a pleading is appealable when the ruling goes to the very merits of the controversy.

State v Murray, 217-1091; 252 NW 556

Repeating bad pleading — improper striking in toto. Error results from striking in toto an amended and substituted petition in equity on the sole ground that said pleading is but a repetition of a former petition which had been held bad on equitable demurrer (motion to dismiss), when said amended and substituted petition,—while in part a repetition of said former bad pleading,—alleges an entirely new fact basis for recovery and a prayer in harmony therewith.

Birk v Jones County, 221-794; 266 NW 553

Ruling as adjudication. The overruling of a motion to dismiss a petition in an equitable action does not amount to an adjudication unless the defendant stands on his motion and allows judgment to be entered against him.

Frazier v Wood, 219-36; 255 NW 647; 257 NW 768

Single or dual cause of action — test. The obligee of a bond, who pleads solely for the recovery of the amount due him under the bond, pleads but a single cause of action, tho he prays for different remedies against different parties, or in part pleads for unallowable relief.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Standing on motion. An order overruling a motion to strike which is not the equivalent of a demurrer imposes no necessity on the appealing party to affirmatively stand on his motion and allow judgment to be entered against him on the merits.

Ontjes v McNider, 218-1356; 256 NW 277

Standing on motion to dismiss. A ruling which denies a motion to dismiss (in lieu of the former equitable demurrer) is not appealable unless the movant unequivocally elects to stand upon his motion, and submits to a final adverse judgment; and this is true tho appellant asserts on his attempted appeal that he has nothing further to plead.

Morrison v Clinic, 204-54; 214 NW 705
Frazier v Wood, 215-1202; 247 NW 618

When appeal lies — overruled demurrer to answer. Where plaintiff after answer moved for judgment of dismissal and also for judgment on the pleadings, held that if it be permissible to treat the latter motion as a demurrer to the answer, yet an adverse ruling thereon was not appealable unless plaintiff elected to stand thereon.

Morrison v Clinic, 204-54; 214 NW 705

Waiver of error—answer after overruling motions to dismiss. An error in overruling a demurrer or motion to dismiss is waived by answering to merits.

Johnson v Purcell, 225-1265; 282 NW 741

Withdrawal of pleading to file motion. There is no statutory authority to support common practice of withdrawing pleadings for purpose of filing a demurrer or motion, and such matter rests wholly within sound discretion of trial court.

Brown v Correll, 227-659; 288 NW 907

11131 Disposal of points of law.

Disposing of law points—premature questions. In determining the effect of a ruling on a motion to dispose of points of law, it is proper to read the whole pertinent record to ascertain what the court decided, and where a court overruled such a motion which urged that a certain letter was not a sufficient memorandum to take the case out of the statute of frauds, and record revealed that ruling was made because the question could not be determined before submission of evidence, such ruling was not an adjudication which became the "law of the case" so as to prevent subsequent exclusion of the letter upon objection made during trial.

Patterson v Beard, 227-401; 288 NW 414

Law issues determined—premature motion. Where trial court made a finding in decree on final determination of the case that a finding and determination of law issues, filed three years previously on plaintiff's motion for "Disposal of points of law" under statute, was final as to the rights of litigants, it not having been

appealed from, and on appeal from decree on final determination, where plaintiff alleges supreme court is without jurisdiction to hear or determine the appeal for the reason that order determining issues is res adjudicata and notice of appeal not having been filed until after three years, held, since such order on motion to determine law issues was entered not only before any testimony was taken, but before issues were made up, no answer being filed, the motion was premature. The statute is not to be used to test the court on assumed facts which might or might not appear from evidence.

Wall v Ins. Co., 228- ; 289 NW 901

Striking cross-petition. An order in foreclosure proceedings striking a defendant's cross-petition from the files is not appealable when defendant's answer, which remained on file, properly pleaded and prayed for the sole and identical relief pleaded and prayed for in said cross-petition.

Yeomen v Ressler, 216-983; 250 NW 169

Striking objections in probate — affidavits improper. A motion to strike objections to probate accounts on the grounds of misjoinder of actions is determinable only on the contents of the pleading attacked without aid of affidavits.

In re Rinard, 224-100; 275 NW 485

11132 Plea in bar or abatement.

Duplicate actions — which abatable. While an action in partition, in which service of the original notice is incomplete in whole or in part, is deemed pending in the sense that said action constitutes a lis pendens from the time the clerk properly indexes it as a lis pendens, yet, until completed service of the original notice of said action is made, said action cannot be deemed "commenced" or "pending" in the sense that it bars another subsequently instituted action in partition between the same parties and involving the same real estate.

It follows that when duplicate actions in partition, involving the same parties and the same real estate, are brought, that action only is abatable in which said service was last completed.

Ohden v Abels, 221-544; 266 NW 24

Prior adjudication—pleading prerequisite to proof. A prior adjudication must be pleaded before evidence thereof is admissible. Rule applicable to interpleaders.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

Unamendable pleadings. When the trial court abates an equitable action (e. g., mandamus) by dismissing it on the ground of misjoinder both of parties plaintiffs and of causes of action, and plaintiff makes no effort to avoid the abatement by pruning out of his pleading the objectionable misjoinders, but stands on his pleadings, and on appeal suffers an affirmance of said order of dismissal, he may not thereafter amend his pleadings in the dismissed action by then pruning out said objectionable matter. The pleadings of a finally dismissed action are, manifestly, not subject to amendment.

First N. Bank v Board, 221-348; 264 NW 281; 106 ALR 566

11133 Notice for hearing.

Undetermined motion—procedure. An undetermined motion by defendant to dismiss an action erroneously pending in equity immediately becomes a demurrer when the action is properly transferred to the law calendar, and must be disposed of as any other demurrer, and with the same consequences.

State v Murray, 219-108; 257 NW 553

11134 Time of answer or reply.

Belated reply. A reply filed without leave of court and after the trial is concluded, and purporting to conform the pleadings to the evidence, may be considered, notwithstanding its untimeliness, when neither party is deprived thereby of any testimony.

Miller v Surety Co., 209-1221; 229 NW 909

McDonald Co. v Morrison, 211-882; 228 NW 878

11135 Motions and demurrers.

Motions generally. See under §11229

Discussion. See 20 ILR 49—Defective pleading

Brief of authorities—motion to strike. An elaborate brief of authorities, inserted in a pleading following the pleading of foreign statutes, is properly stricken on motion.

Kingery v Donnell, 222-241; 268 NW 617; 1 NCCA(NS) 292

Decisions reviewable—orders to strike and dismiss. An order overruling a motion to strike a pleading and to dismiss parties because of the improper joinder of actions and of party defendants is appealable.

Ontjes v McNider, 218-1356; 256 NW 277

Misjoinder of parties. A mere misjoinder of parties cannot be reached by demurrer.

Brown v Correll, 227-659; 288 NW 907

Motion to dismiss. If any of the grounds of a motion to dismiss petition for construction of a will are well taken, it is not error to sustain such motion.

Anderson v Meier, 227-38; 287 NW 250

Overruled motion to strike—standing on motion. An order overruling a motion to strike which is not the equivalent of a demurrer imposes no necessity on the appealing party to affirmatively stand on his motion and allow

judgment to be entered against him on the merits.

Ontjes v McNider, 218-1356; 256 NW 277

Pleadings—objections not raised in lower court. In an action for divorce based on cruelty, where the defendant made no objection either to the verification or the form of an amendment to a petition which alleged conviction of a felony, and the cause proceeded to trial without objection to petition as amended, the defendant on appeal could not complain that, because of the finding that equities were with plaintiff and were based on facts alleged in petition, trial court could not consider ground set out in amendment.

Ayers v Ayers, 227-646; 288 NW 679

Striking legally unprovable allegation. Legally unprovable allegations in pleadings are properly stricken on motion. So held where, in an action at law to recover the amount due on a written lease, defendant, while admitting the due execution by him of the written lease, pleaded a prior oral lease—contradictory of the written lease—as containing the correct terms of the leasing.

Jacobsen v Moss, 221-1342; 268 NW 162

Unallowable modification of ruling. The court, having overruled a motion (1) to strike an answer, and (2) for judgment nil dicit, has no right, later and after the term of court has expired, and while the cause is pending, to materially amend said ruling without pleadings, without hearing, and without notice to the defendant.

Taylor v Grimes Corp., 218-1281; 257 NW 353

Waiver by filing answer. In action on note, filing of answer waived right to proceed under statute by motion to strike cause of action improperly joined.

Brown v Correll, 227-659; 288 NW 907

Withdrawal of pleading to file motion or demurrer. There is no statutory authority to support common practice of withdrawing pleadings for purpose of filing a demurrer or motion, and such matter rests wholly within sound discretion of trial court.

Brown v Correll, 227-659; 288 NW 907

11135.1 One motion and demurrer only.

Motion to strike as demurrer. A motion in a law action to strike an alleged misjoined action will be treated by the appellate court as a demurrer when so treated by the trial court and by the parties to the action.

Kellogg v Bell, 222-510; 268 NW 534

Unallowable motion to strike. A second motion to strike matter from the same unamended petition is unallowable.

Conner v Henry, 205-95; 215 NW 506

Unallowable successive motions. It is not permissible for defendant to file separate, successive motions "of the same kind" to the same unamended petition. So held where defendant first filed a motion to strike portions of a petition, and, being overruled, filed a motion for a more specific statement of said petition, it being held that said motions were "of the same kind" in that each motion had the same objective, to wit, the proper settling of the pleading for trial.

The proper and necessary procedure is to combine the subject matters of both motions into one motion.

Bookin v Utilities Co., 221-1336; 268 NW 50

11136 Subsequent pleadings.

Amendments. See under §§11182, 11184

Belated filing—effect. A reply may be permitted, within the discretion of the court, after the close of plaintiff's evidence and after the court has overruled a motion for a directed verdict.

Miller v Surety Co., 209-1221; 229 NW 909

McDonald Co. v Morrison, 211-882; 228 NW 878

Belated filing of motion first raised on appeal—ignored. Question, that a motion attacking an answer was not timely, raised for the first time on appeal, will not be considered by the appellate court.

Hillje v Tri-City Co., 224-43; 275 NW 880

Supplemental petition after answer—pleading valid second tax deed. Even after answer, a plaintiff relying on tax deeds in a quiet title action, may, after discovering the deeds are invalid, obtain and plead second tax deeds without re-serving notice of expiration of redemption, especially when the answer contained, at most, only a conditional offer to pay the taxes and redeem.

Inter-Ocean v Morrison, 225-1336; 283 NW 909

11137 Pleadings suspended.

Undetermined motion—procedure. An undetermined motion by defendant to dismiss an action erroneously pending in equity immediately becomes a demurrer when the action is properly transferred to the law calendar, and must be disposed of as any other demurrer, and with the same consequences.

State v Murray, 219-108; 257 NW 553

11140 Amendment before answer.

Amendment before answer—notice—sufficiency. A notice of the filing of an amendment before answer need not comply with all the requirements of an original notice, either as to form or service.

Swan v McGowan, 212-631; 231 NW 440

Amendment after demurrer—when timely. Timely filing of an amendment to an answer by party entitled so to amend, after a demurrer to the answer was sustained, deprived the ruling on the demurrer of all effect as a final adjudication. Such ruling on demurrer in and of itself settles nothing and it becomes an adjudication only if defeated party chooses to make it such.

Schwartz v School Dist., 225-1272; 282 NW 754

Amendment to petition when ready for trial. In a contract action, when the petition had been on file for almost three years, the pleadings made up, the jury impanelled, and witnesses in attendance when their attendance at another time might have been difficult to obtain, the court acted within sound judicial discretion in striking an amendment which the plaintiff had filed without leave of the court, by which the plaintiff attempted to increase the amount of recovery sought, basing the amendment on quantum meruit rather than on the contract, as in the original petition.

Munn v Drakesville, 226-1040; 285 NW 644

Reply or amendment—waiver of objections. Altho a pleading, denominated as a reply, is really an amendment to the petition, but the question of proper pleading was not raised, and the defendants amended their answers as though the reply had been an amendment to petition, and parties, without objection, offered evidence pertaining thereto, any objections possibly arising on account of the departure from the rules of pleading were waived.

Burns & McDonnell v Iowa City, 225-1241; 282 NW 708

Failure to give notice. A plaintiff may not, after the entry of default, amend his pleadings by increasing the amount of the claim, without notice to the defendant, and take judgment on the amended pleadings.

Chandler Co. v Sinaiko, 201-791; 208 NW 323
Sutton v Rhodes, 205-227; 217 NW 626

Invalidating amendment. A petition to enjoin a defendant from maintaining a nuisance (§2017), may not be so amended, before appearance and before answer, as to convert the petition into one to enjoin the defendant from operating as a bootlegger (§1927), unless the defendant is given due notice of such amendment.

De Witt v Dist. Court, 206-139; 220 NW 70

Matters concluded—issue raised by rejected amendment. An application to amend the petition offered after submission of the case, tho overruled by the court, makes the issue raised by the amendment res judicata when the identical issue is raised in a subsequent action, especially when no appeal is taken from the ruling on such application.

Bagley v Bates, 223-836; 273 NW 924

New cause of action under guise of amendment. A cause of action for damages predicated on the alleged negligence of plaintiff's agent in making improvident loans of plaintiff's funds, and a cause of action for damages predicated on the alleged fraudulent misapplication and appropriation by plaintiff's agent of plaintiff's funds, are separate and distinct causes of action. It follows that the pleading of the latter as an amendment to the former is unallowable when the latter cause of action is barred by the statute of limitation.

Pease v Bank, 210-331; 228 NW 83

Special appearance after general appearance. A nonresident defendant who, after a service in a foreign state, enters a general appearance in an action in rem, is not thereby precluded from later entering a special appearance attacking the jurisdiction of the court because of the filing by plaintiff of an amended and substituted petition which converts his former action in rem into an action for an accounting and for personal judgment against said nonresident.

Fidelity Co. v Bank, 213-1058; 237 NW 234

11141 Demurrer—causes of—actions at law.

Discussion. See 20 ILR 49—Defective pleading

ANALYSIS

Evidence admissible under general denial. See under §11196
Pleading in abatement. See under §11222

I APPLICABILITY AND INAPPLICABILITY IN GENERAL

General denial. A general denial is not demurrable.

Dean v Atkinson, 201-818; 208 NW 301

Denial precludes demurrer. An answer which pleads a denial of the execution of the note sued on is not demurrable, even tho, in an evident attempt to plead inconsistent defenses, the answer contains a colorable confession of such execution.

Seibel v Olson Bros., 202-711; 210 NW 925

I APPLICABILITY AND INAPPLICABILITY IN GENERAL—continued

General denial precludes demurrer. A general denial precludes demurrer.

Empire Co. v Dye, 205-1271; 215 NW 636

General denial coupled with inferential admission. In an action on a promissory note, an answer which contains a general denial is not rendered demurrable by an answering statement that "defendant admits he signed a note which he assumes is the one in controversy, but he demands its production and proof at the trial herein."

Home Bank v Kelley, 205-514; 218 NW 288

Conclusions of law or fact. Conclusions of law or fact are not demurrable.

Dean v Atkinson, 201-818; 208 NW 301

Administrator—petition for removal—when not demurrable. When the allegations of a petition for removal of an administrator are sufficient to warrant a hearing on the application because of a showing of a tangible and substantial reason to believe that damage will accrue to the estate, the petition is not vulnerable to a demurrer.

In re Arduser, 226-103; 283 NW 879

Attorneys for juveniles — compensation — jury question. An action by an attorney against a county for compensation for defending a juvenile delinquent is not demurrable but presents a jury question.

Ferguson v Pottawattamie County, 224-516; 278 NW 223

Bondholders (?) or trustees (?). When trustees for a bondholder have, under the terms of the bonds, the exclusive right to maintain an action for the protection of the bondholder, the latter may not maintain such action, and thereby convert himself into a trustee, on the naked allegation, in substance, that the trustees will, because of partiality, be less aggressive in prosecuting such action than the bondholder.

McPherson v Sec. Co., 206-562; 218 NW 306

Carriage of goods — interstate shipment — building contractor not consignee. A common carrier's petition against a building contractor alleging transportation as a benefit received, alleging unjust enrichment and nonpayment, and seeking to collect transportation charges on an interstate shipment of building material is demurrable and fails to state a cause of action in omitting an allegation showing a contractual liability on the defendant contractor as a party to the shipping contract.

Des Moines & C. I. Ry. v Ins. Co., 224-15; 276 NW 56

Conclusion allegation. A petition in habeas corpus does not show on its face that the petitioner is entitled to a discharge when it simply alleges the naked conclusion that he has served the full statutory time prescribed as a penalty for "arson", the crime of arson being covered by various and different statutes and being attended by various and different terms of imprisonment.

Bailey v Hollowell, 209-729; 229 NW 189

Dissolving temporary injunction not operative as demurrer—nonadjudication. General rule being that a preliminary injunction will be dissolved upon filing of an answer fully denying the material allegations of the petition, a motion to dissolve when filed thereafter and sustained will not operate as a demurrer to the petition nor adjudicate that the petition fails to state a cause of action.

Sioux City Patrol v Mathwig, 224-748; 277 NW 457

Effect of stipulated evidence. The principle that a motion to dismiss the petition in an equitable action (formally denominated a demurrer) necessarily admits the truth of the well-pleaded allegation of the petition, may be materially modified or obviated by evidence which the parties stipulate into the record for the purpose of said motion.

Pierre v Pierre, 210-1304; 232 NW 633

Panther v Agri. Dept., 211-868; 234 NW 560

Governmental employees—personal liability for torts—demurrer inapplicability. A governmental employee committing a tortious act which causes injury to another in violation of a duty owed to the injured person, becomes, as an individual, personally liable in damages therefor. (Hibbs v School Dist., 218 Iowa 841, overruled.)

Montanick v McMillin, 225-442; 280 NW 608; 4 NCCA(NS) 4

Futter v Hout, 225-723; 281 NW 286

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Doherty v Edwards, 226-249; 284 NW 159

Improper motion to strike and judgment on pleadings. A motion to strike an answer and for judgment on the pleadings manifestly cannot be properly sustained when the answer, both by general and specific denials, puts in issue the very gist of plaintiff's cause of action.

Ind. Sch. Dist. v Sch. Dist., 216-1013; 250 NW 192

Invalid defense not attacked by motion—defeating recovery. If matter pleaded as a defense is not challenged by motion or demurrer or otherwise, it will, if proven, defeat the plaintiff's action, tho had the question been properly raised the answer would have been held to present no defense.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Misjoinder both of parties and of causes. In action on promissory notes, defendant's demurrer, filed after answer, on ground of misjoinder both of causes of action and of parties was properly overruled.

Brown v Correll, 227-659; 288 NW 907

Peace officer as agent of public—nonliability of town for tort. A law-enforcing officer, whose office is created by statute and whose duties are prescribed therein, is an agent of the public in general and not the agent of the municipality which employs him, therefore the municipality is not liable in damages for his unlawful or negligent acts, and a petition alleging cause of action thereon against the municipality is demurrable.

Hagedorn v Schrum, 226-128; 283 NW 876

Pleading ministerial character of acts. A petition for damages against a municipality because of the wrongful acts of municipal agents and employees is demurrable unless the petition alleges such facts as show that the acts complained of were corporate or ministerial (the only acts for which the municipality would be liable), and not governmental.

Rowley v City, 203-1245; 212 NW 158; 53 ALR 375; 34 NCCA 464

Pleading—prima facie sufficiency. A prima facie cause of action against guarantors is presented by a pleading based on an instrument which purports to reveal a principal debtor, and a guaranty of the promise of such debtor, and an allegation that the debtor has defaulted.

Foundation Press v Bechler, 211-1217; 233 NW 666

Repurchase of stock — answer — validity against demurrer—equitable issues not raised by demurrer. The facts, set up in answer by a Delaware corporation, that (1) it had no surplus, and (2) the laws of the state of its domicile prohibited a repurchase of its stock from capital, present a defense to an action for recovery on an alleged breach of contract to repurchase stock when such answer is attacked simply by demurrer rather than by an appropriate remedy based on equitable rights. Demurrer does not raise estoppel, ratification, implied contract nor any other equitable theory.

Bishop v Middle States Co., 225-941; 282 NW 305

Right of review—error against appellee—when considered. An answer, in an action to recover personal judgment on a promissory note, to the effect that plaintiff had theretofore foreclosed a mortgage securing the note and had thereby elected his remedy and abandoned all claim to a personal judgment against defendant and was estopped to assert the contrary, is demurrable when there is no allegation, (1) that personal judgment had been, or might have been, rendered in said foreclosure against defendant, or (2) that inconsistent remedies existed and that plaintiff had chosen one of them, or (3) that defendant had altered his position because of said foreclosure; but if error in sustaining the demurrer be conceded, yet the error is not such as an appellee may avail himself of, without appeal, in order to neutralize an error against appellant.

Northern Trust v Anderson, 222-590; 262 NW 529

Ruling on demurrer after answer. The court may, with the acquiescence of all parties, rule on a demurrer after the demurrant has answered. Such action is equivalent to permitting the demurrant to withdraw his answer.

Goldsberry v Goldsberry, 217-750; 252 NW 531

Self-negativing petition. A petition which alleges the personal liability of defendants as partners or members of a joint adventure predicated on a writing which on its face reveals the fact that said defendants specifically contracted against such liability—no question of ostensible partnership being raised—is demurrable as not stating a cause of action.

Reason: The petition on its face negatives liability.

Farmers & M. Bk. v Anderson, 216-988; 250 NW 214

Slander of property or title—when petition demurrable. A petition in an action for damages for slander of title is demurrable unless, inter alia, it alleges, in some proper form, (1) the utterance and publication of the alleged slanderous words, and (2) the special legal damages suffered by plaintiff. Pleading reviewed and held fatally deficient in both particulars.

Witmer v Bank, 223-671; 273 NW 370

Teachers—action on contract. A petition which seeks recovery of the compensation arising under a contract for teaching, but which pleads a statutory discharge of plaintiff by the board of directors, is demurrable, even tho plaintiff also pleads that his appeal from the discharge to the superintendent of public instruction was dismissed for want of jurisdiction.

Streyfeller v School Dist., 210-780; 231 NW 325

Waiver of error. An error in overruling a demurrer or motion to dismiss is waived by answering to merits.

Johnson v Purcell, 225-1265; 282 NW 741

Withdrawal of pleading to file demurrer. There is no statutory authority to support common practice of withdrawing pleadings for purpose of filing a demurrer or motion, and such matter rests wholly within sound discretion of trial court.

Brown v Correll, 227-659; 288 NW 907

II FORM AND REQUISITES

Defective form. A demurrer to a petition in quo warranto—a law action—on the ground that "the facts stated do not entitle plaintiff to the relief demanded" presents no question for the court beyond those wherein the demurrant specifically points out wherein said facts are insufficient.

State v Munn, 216-1232; 250 NW 471

Motion to dismiss as demurrer. A motion to dismiss a petition for a writ of certiorari will be treated as a demurrer when based on statutory grounds for demurrer.

Fehrman v Sioux City, 216-286; 249 NW 200

Motion to strike as demurrer. A motion in probate to strike a plea in defense to a claim sought to be enforced by the executor, admits the truth of all matters properly pleaded in the plea.

In re Carpenter, 210-553; 231 NW 376

Motion to strike as demurrer. A motion in a law action to strike an alleged misjoined action will be treated by the appellate court as a demurrer when so treated by the trial court and by the parties to the action.

Kellogg v Bell, 222-510; 268 NW 534

Conclusions of law not admitted by demurrer. In an action against a school district for the reasonable value of transportation furnished to a pupil, a demurrer by the school district did not admit that the transportation was furnished under an implied contract, as a demurrer does not admit the truth of a conclusion of law.

Bruggeman v Sch. Dist., 227-661; 289 NW 5

Nature or subject of action—nonwaiver of right to be heard on motion. The right to be heard on a motion for change of venue is not waived because movant, simultaneously with the filing of the motion, files a demurrer to the petition.

Board v Dist. Court, 209-1030; 229 NW 711

III SPEAKING DEMURRER

Power of court. The supreme court can take no notice of the allegations of a speaking demurrer.

Grimes v Taylor, (NOR); 282 NW 346

Speaking demurrer. Judicial proceedings, which are extraneous to a pleading which is demurred to, may not be considered in ruling on the demurrer, either in the trial or the appellate court.

McPherson v Sec. Co., 206-562; 218 NW 306

Speaking demurrer. A demurrer presents no questions unless the basic facts giving rise to such questions appear on the face of the pleading demurred to.

Ritter v Schultz, 211-106; 232 NW 830

Motion to dismiss — speaking demurrer — transcript from board of review. A motion to dismiss in equity, being in effect a demurrer, is a speaking demurrer if it refers to matters not appearing on the face of the petition: e. g., a transcript of the board of review proceedings.

Board v Sioux City Yards, 223-1066; 274 NW 17

IV DEMURRER TO PART OF PLEADING

Demurrer—improper use in denying truth of pleadings. A so-called demurrer, to a defendant-lessee's answer of lack of consideration for an oral agreement to surrender the premises, which does not admit the truth of the answer, but in effect denies it, is properly overruled. Such application is not the function of demurrer.

Wright v Flatterich, 225-750; 281 NW 221

Demurrer to several defenses — motion to divide—prerequisite. A demurrer to a part only of several defenses not separated into divisions as contemplated by statute, is not the proper method of attack; the proper procedure would have been to require defendant to separate and divide before demurring.

Bishop v Middle States Co., 225-941; 282 NW 305

V DEMURRER TO PLEADING GOOD IN PART

Invalid resolution of necessity—procedural requisites to paving contract—demurrer. After the supreme court has adjudged certain paving assessments and the procedural requisites to a paving contract invalid because the resolution of necessity lacked the necessary three-fourths vote of the city council, an assignee of the paving assessment certificates may not rely on said contract as an express written agreement to pay for the paving from the general fund on account of a clause in the contract requiring deficiencies to be so paid, hence a cause of action thereon is subject to demurrer.

Lytle v Ames, 225-199; 279 NW 453

VI OPERATION AND EFFECT OF DEMURRER

Answer after appeal on ruling on demurrer. A defendant who assumes to appeal from an adverse ruling on his demurrer without standing on his demurrer, and without suffering a judgment to be entered against himself, has a right to file an answer after his appeal has been dismissed and before default is entered.

Gow v County, 213-92; 238 NW 578

Appeal from ruling on demurrer. In an action to recover against the estate of a deceased executor for losses caused by improper handling of an estate, the plaintiffs had no right to appeal from a ruling sustaining a demurrer filed by the defendants when the plaintiffs did

not elect to stand on the pleadings nor suffer final judgment to be entered against them.

Hayes v Selzer, 227-693; 289 NW 25

Demurrer admitting paternity of illegitimate child. In an application in probate to construe the word "grandchild" in a will which left the residuary estate to children and grandchildren of testatrix's deceased brother-in-law, and a contention that an illegitimate child of brother-in-law's son was included in such word "grandchild", a demurrer to the petition admitted allegations that brother-in-law's son was father of such illegitimate, and that testatrix knew of such relationship at time will was executed.

In re Ellis, 225-1279; 282 NW 758; 120 ALR 975

Motions—striking revamped pleading. Striking a pleading which is simply a repleading of a formerly stricken matter is proper, but not so when the repleading is so coupled with new matter as to render the whole pleading proper.

Granette Co. v Neumann & Co., 200-572; 203 NW 935; 205 NW 205

Nonwaiver—right of appeal. If it affirmatively appears that the unsuccessful party does not waive the error in ruling on demurrer, he may properly urge, on appeal, objection to such order.

Blessing v Welding, 226-1178; 286 NW 436

Pleading over—issue abandoned. When district court determines, on demurrer, that restrictions on alienation in a will to avoid debts are invalid, and parties plead over and do not appeal from said ruling, the issue is abandoned and cannot be made the subject of an appeal.

Rich v Allen, 226-1304; 286 NW 434

Questions of fact ignored. Paragraphs of a demurrer which averred defensive matters involving controversial questions of fact, such as ratification, waiver, laches, former adjudication, and estoppel, were not entitled to recognition as grounds of demurrer and were properly ignored by the trial court.

In re Baker, 226-1071; 285 NW 641

Repleading—not waiver of exception. Pleading a restatement of original allegations of petition does not constitute a waiver of exception to ruling on demurrer, and objection may be urged upon such ruling when the party duly excepts and allows judgment to be entered.

Blessing v Welding, 226-1178; 286 NW 436

Statute violation—assumed for purpose of demurrer. In an action for injuries resulting from a motor vehicle collision at an intersection, where defendant's truck is alleged to have been parked so as to obscure the view of a stop sign, and where the violations of both city ordinance and state law are pleaded, the supreme court will assume, for the purpose of demurrer, that truck was parked within prohibited distance and did obscure the sign.

Blessing v Welding, 226-1178; 286 NW 436

Striking matter judicially held insufficient. A plaintiff has no right to replead a count which has been judicially and finally held to present no cause of action even tho he combines said condemned count with another count. It follows that said last count is properly stricken insofar as it embraces said formerly adjudicated count.

Arthaud v Griffin, 212-646; 235 NW 66

Tenancies at will—termination. In a forcible entry and detainer action where the petition alleged a notice dated January 12th terminating a tenancy at will "within 30 days from the date of this notice", such notice being served on January 13th, a demurrer should have been sustained, as only 29 and not the statutory 30 days' written notice was given.

Murphy v Hilton, 224-199; 275 NW 497

VII JURISDICTION OF PERSON OR SUBJECT MATTER

Negligent operation of road maintainer—nonliability—demurrer. Neither a county, as a quasi corporation, nor its board of supervisors is liable for the negligence of its employee in operating after dark a road maintainer without lights on the left-hand side of a highway, and in an action by a motorist who sustained injuries on account of such negligence demurrers to the petition by the county and its board of supervisors were properly sustained.

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837; 4 NCCA(NS) 4

VIII LEGAL CAPACITY TO SUE

Incapacity to sue—waiver. An objection to the capacity in which plaintiff sues must be interposed by defendant before he pleads to the merits.

Keeling v Priebe, 219-155; 257 NW 199

IX ANOTHER ACTION PENDING

No annotations in this volume

X DEFECT OF PARTIES

Improper joinder. A misjoinder both of causes of action and of parties is ground for demurrer or for motion to dismiss in equitable proceedings.

McPherson v Sec. Co., 206-562; 218 NW 306

Misjoinder both of parties and of causes. In action on promissory notes, defendant's demurrer, filed after answer, on ground of misjoinder both of causes of action and of parties was properly overruled.

Brown v Correll, 227-659; 288 NW 907

X DEFECT OF PARTIES—concluded

Misjoinder of corporate parties. On appeal from an order overruling a motion to strike on ground that there was misjoinder of a principal corporation and its subsidiary, where question to be determined was whether the corporate entity of the subsidiary could be disregarded because it was so organized, controlled, and conducted as to make it a mere instrumentality of the principal corporation, which question being one of fact determinable only after a hearing of the evidence, the supreme court would not decide the matter on basis of the pleadings.

Wade v Broadcasting Co., 227-427; 288 NW 441

Unassailable by demurrer. A mere misjoinder of parties cannot be reached by demurrer.

Gibson v Union Co., 208-314; 223 NW 111
Brown v Correll, 227-659; 288 NW 907

XI INSUFFICIENT STATEMENT OF FACTS TO JUSTIFY RELIEF PRAYED

Counterclaim—failure to complete loan—no bar to recovery of part loaned. Where one person agrees to loan money to form a corporation, pursuant to which he loans a part and takes a note therefor, his failure to loan the balance will not prevent recovery of the part loaned, and a counterclaim so alleging states no cause of action and should be stricken.

Hillje v Tri-City Co., 224-43; 275 NW 880

Franchise renewal statute—objecting stockholders selling to majority—action within three years premature—dismissal. At the termination of a mutual telephone company franchise, stockholders voting against renewal of franchise may not maintain an action against the majority stockholders to require purchase of their stock by such stockholders voting in favor thereof, until after three years from date of voting, under §8365, C., '35, permitting such franchise renewal, if the majority stockholders voting renewal purchase the stock of those voting against renewal within three years from date of voting, and an action commenced within such three-year period, being premature, will be dismissed on motion.

Terrell v Ringgold Tel. Co., 225-994; 282 NW 702

XII STATUTE OF LIMITATIONS

Bills and notes—construction and operation—time of payment—marginal entry. A properly dated promissory note which fails to state, in the strict body thereof, any time for payment, is, nevertheless for the purpose of a demurrer presenting the bar of the statute of limitation, payable at a fixed and definite date when, in the corner of the note and opposite the signature to the note, appear the words, "the term of five years".

Nylander v Nylander, 221-1358: 267 NW 7

Cashier's check as bill of exchange—demand unnecessary—accrual of action—barred after 10 years. The holder of a cashier's check, certain in amount, containing no provisions respecting demand and not in the nature of a certificate of deposit, has a right to sue thereon at any time from and after its issuance. Treated as a bill of exchange, presentment and demand for payment are not necessary to start running the statute of limitations. Therefore, after 10 years from its issuance, a right of action thereon is barred.

Dean v Bank, 227-1239; 281 NW 714; 290 NW 664

XIII STATUTE OF FRAUDS

Sale of goods — unenforceable contracts. Replevin for the possession of an existing article of personal property cannot be maintained when the action is based solely on an oral contract of purchase which is clearly within the statute of frauds, and under which contract title necessarily did not pass.

Lockie v McKee, 221-95; 264 NW 918

XIV ATTACHING WRITTEN INSTRUMENT OR ACCOUNT OR COPY THEREOF

Credit transactions with bank. Where the cashier of the plaintiff bank had entered into two similar credit transactions with the defendant bank in order to cover a shortage in accounts, in an action to recover the amount of the shortage, the plaintiff's brief stating that there had been a full accounting between the two banks except as to one of the two transactions, such statement recognized a weakness in the plaintiff's contentions, as the amount claimed was equal to the amount involved in only one of the transactions, and, when both had been accounted for in the same manner, the accounting for both had to be either proper or improper.

Community Sav. Bank v Gaughen, 228- ; 289 NW 727

11142 Insufficient statement.

ANALYSIS

I SPECIFICATION AT LAW
II SPECIFICATION IN EQUITY

I SPECIFICATION AT LAW

Demurrer—when bad. A demurrer to a petition in an action for slander will not lie solely on the ground that the petition shows on its face that defendant, at the time of speaking the words in question, was acting in a governmental capacity, because defendant's right to assert the privileged character of the spoken words is not an absolute right but a qualified right only. The demurrer—if employed under such circumstances—must point out wherein said petition fails to state a cause of action against defendant.

Brown v Cochran, 222-34; 268 NW 585

General and nonspecific demurrer. A demurrer to an answer in a law action on the ground that the facts pleaded "do not entitle the defendant to the relief demanded" is fatally defective in definiteness, and should be overruled.

Dean v Atkinson, 201-818; 208 NW 301

II SPECIFICATION IN EQUITY

Pleading—motions—for more specific pleading—when required. A general allegation by an answering defendant of the commission, by plaintiff, of acts of "unfaithfulness and adultery", pleaded by defendant in avoidance of the contract sued on, must be amplified, on proper motion, by alleging more specifically said alleged acts and the time when, place where, and person with whom, committed.

Poole v Poole, 221-1073; 265 NW 653

11144 Effect of demurrer.

ANALYSIS

I ADMISSION BY DEMURRER
II WAIVER IN GENERAL
III ANSWERING OVER AND ADJUDICATION

I ADMISSION BY DEMURRER

Allegation of fact—effect. A well pleaded allegation of ultimate fact must, for the purpose of a demurrer, be taken as true, unless other well pleaded allegation of fact affirmatively shows that the first allegation is erroneous. So held as to an allegation of the book value of corporate stock.

In re Richter, 212-38; 234 NW 285

Facts well pleaded in petition—assumed to be true. For the purpose of demurrer, any fact well pleaded in the petition is assumed to be true.

Smith v Railway, 227-1404; 291 NW 417

Allegations taken as true. The allegations of defendant's answer must be taken as true for the purpose of considering a demurrer thereto.

Sorensen v Ins. Ass'n, 226-1316; 286 NW 494

Will contest—fatal admission. A demurrer to objections to the probate of a will should have been overruled when it admitted as facts that the contestant held judgments against the devisee who was a son and heir of the decedent who died seized of real estate, that the judgments were liens against any real estate the son would inherit as heir, and that the decedent was of unsound mind when the will was made, as, if the decedent were incompetent, the will was void and he died intestate. So the title to the son's share in the real estate vested at the father's death, and, at the same instant, the judgments became liens on his share of the real estate.

In re Duffy, 228- ; 292 NW 165

Demurrer admitting paternity of illegitimate child. In an application in probate to construe the word "grandchild" in a will which left the residuary estate to children and grandchildren of testatrix's deceased brother-in-law, and a contention that an illegitimate child of brother-in-law's son was included in such word "grandchild", a demurrer to the petition admitted allegations that brother-in-law's son was father of such illegitimate, and that testatrix knew of such relationship at time will was executed.

In re Ellis, 225-1279; 282 NW 758; 120 ALR 975

Defendant admitting negligence. Negligence of defendants alleged in petition is admitted by demurrer.

Blessing v Welding, 226-1178; 286 NW 436

Sole basis for determining. The court, in passing on a demurrer, may not go outside the allegations of fact contained in the pleading demurred to, and indulge in speculation or conjecture in aid of the demurrer.

Hoefer v Fortmann, 219-746; 259 NW 494

II WAIVER IN GENERAL

Answer after demurrer—waiver waived by consent to withdrawal of answer. While ordinarily the filing of an answer after filing a demurrer waives consideration of the demurrer, the court may properly allow the withdrawal of the answer, the adverse party not objecting, and rule on the demurrer.

Goldsberry v Goldsberry, 217-750; 252 NW 531

Appeal and error—demurrer—nonwaiver—right of appeal. If it affirmatively appears that the unsuccessful party does not waive the error in ruling on demurrer, he may properly urge, on appeal, objection to such order.

Blessing v Welding, 226-1178; 286 NW 436

Demurrer in equity—waiver by treating as motion to dismiss. In equity proceeding for modification of alimony decree, appellant waived her right to insist that a demurrer could not be filed in lieu of a motion to dismiss, by electing to stand upon the ruling on the demurrer.

Goldsberry v Goldsberry, 217-750; 252 NW 531

Pleading—demurrer—repleading—when not waiver of exception. Pleading a restatement of original allegations of petition does not constitute a waiver of exception to ruling on demurrer, and objection may be urged upon such ruling when the party duly excepts and allows judgment to be entered.

Blessing v Welding, 226-1178; 286 NW 436

Pleadings—demurrer or exception—motion to dismiss—ruling as adjudication. The overruling of a motion to dismiss a petition in an equitable action does not amount to an adjudi-

cation unless the defendant stands on his motion and allows judgment to be entered against him.

Frazier v Wood, 219-36; 255 NW 647

III ANSWERING OVER AND ADJUDICATION

Amendment after demurrer—when timely. Timely filing of an amendment to an answer by party entitled so to amend, after a demurrer to the answer was sustained, deprived the ruling on the demurrer of all effect as a final adjudication. Such ruling on demurrer in and of itself settles nothing and it becomes an adjudication only if defeated party chooses to make it such.

Schwartz v School Dist., 225-1272; 282 NW 754

Ruling as adjudication. In an action at law on a money demand, aided by attachment on the ground that defendant had fraudulently conveyed his land, the overruling of defendant's demurrer based on the ground that the action was barred because not brought within five years after the recording of said deed, cannot be deemed an adjudication of the ground of said demurrer so as to prevent defendant from asserting the same ground against a later-brought action in equity to set aside said alleged fraudulent deed.

Bristow v Lange, 221-904; 266 NW 808

11145 Failure to demur.

Judgment notwithstanding verdict—waiver. The right of plaintiff to file a motion for judgment notwithstanding a verdict in favor of defendant on the ground that defendant's answer fails to plead a defense, is not waived by plaintiff because of his failure to demur to said answer.

Persia Bk. v Wilson, 214-993; 243 NW 581

11147 Pleading over.

ANALYSIS

I PLEADING OVER
II WAIVER BY PLEADING OVER

I PLEADING OVER

Motion to dismiss—pleading over in equity. Plaintiff, in an action triable in equity, who has his action dismissed on motion because of defenses in point of law appearing on the face of the petition, must be accorded the right (1) to plead over, or (2) to elect to stand upon the ruling of the court.

Marcovis v Inv. Co., 223-801; 273 NW 888

Repleading—when not waiver of exception. Pleading a restatement of original allegations of petition does not constitute a waiver of exception to ruling on demurrer, and objection may be urged upon such ruling when the party duly excepts and allows judgment to be entered.

Blessing v Welding, 226-1178; 286 NW 436

Nonwaiver—right of appeal. If it affirmatively appears that the unsuccessful party does not waive the error in ruling on demurrer, he may properly urge, on appeal, objection to such order.

Blessing v Welding, 226-1178; 286 NW 436

II WAIVER BY PLEADING OVER

Issue abandoned — not reviewable. When district court determines, on demurrer, that restrictions on alienation in a will to avoid debts are invalid, and parties plead over and do not appeal from said ruling, the issue is abandoned and cannot be made the subject of an appeal.

Rich v Allen, 226-1304; 286 NW 434

11148 Failure to plead over—effect.

Standing on demurrer. A pleader who (1) excepts to a ruling on demurrer, (2) does not plead over, and (3) suffers a final adverse judgment to be rendered, thereby affirmatively shows that he stands on his demurrer, with consequent right to appeal.

Hanson v Carl, 201-521; 207 NW 579

Standing on demurrer. Where plaintiff after answer moved for judgment of dismissal and also for judgment on the pleadings, held that if it be permissible to treat the latter motion as a demurrer to the answer, yet an adverse ruling thereon was not appealable unless plaintiff elected to stand thereon.

Morrison v Clinic, 204-54; 214 NW 705

Failure to stand on pleading. An appeal from an order sustaining a demurrer to a petition for certiorari (or sustaining a motion to dismiss when it is the equivalent of a demurrer) will not lie when plaintiff did not in the trial court stand on his pleading or suffer judgment to go against him.

Fehrman v City, 216-286; 249 NW 200

Standing on overruled motion to dismiss. A ruling which denies a motion to dismiss (in lieu of the former equitable demurrer) is not appealable unless the movant unequivocally elects to stand upon his motion, and submits to a final adverse judgment; and this is true though appellant asserts on his attempted appeal that he has nothing further to plead.

Morrison v Clinic, 204-54; 214 NW 705

Appeal — when allowable. An appeal will not lie from a ruling which sustains a demurrer unless the defeated party does one of two things, to wit: (1) elects to stand on his pleadings, or (2) suffers final judgment to be entered against himself.

Devoe v Dusey, 205-1262; 217 NW 625

Habeas corpus—adverse ruling on demurrer. Where a defendant was sentenced and imprisoned upon failing to plead after his demurrer to the indictment was overruled, an appeal will be dismissed from an adverse ruling on demurrer in a habeas corpus action to test the validity of such imprisonment, when the defendant does not (1) elect to stand upon his pleadings, or (2) suffer judgment to be entered against him in the lower court.

Besch v Haynes, 224-166; 276 NW 13

Refusal to replead—election—effect. After the sustaining of a demurrer, the adverse party may very properly refuse to plead within the time specified by the court and elect to appeal from the ruling on the demurrer.

Home Bank v Kelley, 205-514; 218 NW 288

Refusal to plead over—effect. A defendant who refuses to plead over after an adverse ruling on his demurrer may not complain of the judgment entered on the merits, insofar as it is sustained by the petition.

Shaffer v Marshall, 206-336; 218 NW 292

Answer after appeal on ruling on demurrer. A defendant who assumes to appeal from an adverse ruling on his demurrer without standing on his demurrer, and without suffering a judgment to be entered against himself, has a right to file an answer after his appeal has been dismissed and before default is entered.

Gow v Dubuque County, 213-92; 238 NW 578

Undetermined motion—procedure. An undetermined motion by defendant to dismiss an action erroneously pending in equity immediately becomes a demurrer when the action is properly transferred to the law calendar, and must be disposed of as any other demurrer, and with the same consequences.

State v Murray, 219-108; 257 NW 553

Ruling on demurrer conclusive. A ruling sustaining a demurrer in mortgage foreclosure proceeding on the ground that the estate of the mortgagor is not personally liable on the mortgage because of the failure of the mortgagee to file said claim against the estate within the time provided by statute, constitutes a final adjudication of such nonliability when plaintiff neither pleads over nor appeals from the ruling.

Oates v College, 217-1059; 252 NW 783; 91 ALR 563

Standing on motion. An order overruling a motion to strike which is not the equivalent of a demurrer imposes no necessity on the appealing party to affirmatively stand on his motion and allow judgment to be entered against him on the merits.

Ontjes v McNider, 218-1356; 256 NW 277

Action by teacher for compensation. In a teacher's action to recover compensation against a school district, where a taxpayer files a defensive petition of intervention after a demurrer to the answer had been sustained, but before defendant had made any election to stand on its answer, before any demand to make such election had been made, before default or judgment had been entered, or any demand therefor—the petition of intervention being unquestioned and raising an issue on the additional defensive matter—the court erred in sustaining a motion to strike the petition of intervention and entering judgment against the school district.

Schwartz v School Dist., 225-1272; 282 NW 754

11151 Counterclaim—how stated.

ANALYSIS

I COUNTERCLAIM, SET-OFF, RECOUPMENT, DEFENSE, AND CROSS-DEMAND

Discussion. See 22 ILR 118—Recoupment for breach of warranty; 24 ILR 310—Counterclaims

Administrator's funds set off against insolvent bank holding secured note. An estate's deposit in an insolvent bank may be set off against a note held by bank, and contention that debts lacked mutuality was ineffective.

First Natl Bk. v Malone, 76 F 2d, 251

Attorney's admission binding on client. A party is bound by the admission of his attorneys, made in a counterclaim to another action.

Mitchell v Underwriters, 225-906; 281 NW 832

Claims arising out of extrinsic transactions. A defendant sued by the receiver of an insolvent bank on indebtedness due the bank may not, in order to establish a set-off, plead an interest in certain deposits in the bank, and interest in extraneous transactions when such interests can only be determined by bringing in total strangers to the transactions sued on, and adjudicating their interests.

Foster v Read, 212-803; 237 NW 634

Conversion of collaterals. A debtor when sued may, without first paying the debt, plead a counterclaim to the effect that he deposited collateral securities with the creditor who converted the same to his individual use without the consent of the debtor.

Leonard v Sehman, 206-277; 220 NW 77

Deducting employee's debt to employer. Where a defendant-employer in paying his employee deducted an amount which the employee was owing the employer, and, when

I COUNTERCLAIM, SET-OFF, RECOUPMENT, DEFENSE, AND CROSS-DEMAND —continued

sued, based his right so to do (1) on an oral contract that he might so deduct, and (2) on his right to so deduct irrespective of such oral contract, the court prejudicially errs, in its instructions, in making the right to deduct dependent on proof of the oral contract.

Jorgensen v Cocklin, 219-1103; 260 NW 6

Equity retaining jurisdiction—law issues. An action in equity by one school district to enjoin another school district and the county treasurer from transferring, to the defendant school, certain funds claimed to be due from the plaintiff school as tuition, remains in equity although the defendant school files a cross-petition raising issues at law as to determination of the amount due, if any, and for judgment accordingly, since equity, acquiring jurisdiction, may determine all issues.

Lincoln Dist. v Redfield Dist., 226-298; 283 NW 881

Equitable set-off—nature and scope. The doctrine of equitable set-off is a rule of equity, and is applied quite independently of the limitations which attach to a so-called legal or statutory offset.

Andrew v Bank, 216-240; 249 NW 154; 93 ALR 1156

Equitable set-off—surety of insolvent. In an action by the receiver of an insolvent, the defendant may set off, against the obligation sued on, the amount which the defendant as surety for the insolvent has been compelled to pay on the contract of suretyship.

Leach v Bassman, 208-1374; 227 NW 339

Equitable set-off. Where an insolvent bank in the hands of a receiver owes an estate on a deposit, an heir who owes the bank, tho he is the executor of the estate, may have his interest in the deposit set off against his indebtedness to the bank, subject, of course, to claims which may be filed against the estate.

Andrew v Bank, 216-240; 249 NW 154; 93 ALR 1156

Equitable set-off against insolvent county treasurer. Where an insolvent county treasurer brought mandamus action to secure salary warrant, and another suit was pending against the treasurer and his surety wherein county sought to recover for shortage in treasurer's office, the fact that county's claim was unliquidated would not prevent pleading the same as an equitable set-off, in view of the fact that the treasurer was insolvent.

Briley v Board, 227-55; 287 NW 242

Erroneous but harmless striking of counterclaim. In an action for damages consequent on the collision of automobiles, the erroneous striking of defendant's counterclaim for damages growing out of the collision is harmless when the jury finds that defendant was proximately negligent and that plaintiff was not guilty of contributory negligence.

Harriman v Roberts, 211-1372; 235 NW 751

Failure to complete loan—no bar to recovery of part loaned. Where one person agrees to loan money to form a corporation, pursuant to which he loans a part and takes a note therefor, his failure to loan the balance will not prevent recovery of the part loaned, and a counterclaim so alleging states no cause of action and should be stricken.

Hillje v Tri-City Co., 224-43; 275 NW 880

Inducing third party to perform covenants. An owner of mortgaged premises who leases the same and agrees with the lessee to erect certain improvements on the land, and who pledges the lease with the mortgagee as additional collateral security for the mortgage debt, and who, in the foreclosure of the mortgage, fully acquiesces in and approves and ratifies an application by the receiver for authority to borrow money and therewith to make the improvements which the lessor had obligated himself to make, thereby impliedly empowers the mortgagee, who advanced the funds with which to make the improvements, to reimburse himself out of the rentals accruing under the lease and collected prior to the expiration of the period for redemption from the mortgage sale.

Quaintance v Bank, 201-457; 205 NW 739

Procedendo—retrial (?) or peremptory judgment (?). When an action at law is reversed because defendant had not sufficiently or properly proven his counterclaim, the cause, after procedendo, stands for retrial on said counterclaim, and the peremptory rendition of judgment by the trial court against defendant on said counterclaim is error.

Perry-Fry Co. v Gould, 217-958; 251 NW 142

Recovery of unpaid legacy—bringing in parties. In an action by a testamentary legatee against an executor to recover an unpaid legacy, the executor, who has already distributed the estate and wishes to bring a third party into the action for recoupment purposes, must, at least, allege that said third party has received some portion of the estate in question.

Irwin v Bank, 218-961; 256 NW 681

Seller's refusal to deliver — buyer's right. Seller's unjustified refusal to furnish materials under a continuing contract was ground for buyer (1) to treat contract as terminated and purchase elsewhere, and (2) to make counterclaim for damages in seller's action against buyer on account.

Eastman Stores, Inc. v Eckert Studio, (NOR); 231 NW 434

Striking counterclaim. An order striking a counterclaim in toto necessarily strikes the prayer for recovery on the counterclaim.

Davis v Robinson, 200-840; 205 NW 520

Subject matter—counterclaim in general. It is not necessary that a counterclaim arise out of the transactions set forth in the petition or be connected with the subject of the action.

Imes v Hamilton, 222-777; 269 NW 757

Tuition transfer—county treasurer—joinder. In an equitable action between school districts to prevent a statutory transfer by a county treasurer of funds in payment of tuition, a cross-petition of the defendant school district, not joined in by the county treasurer, may not be stricken therefrom, inasmuch as the county treasurer has no investment therein and is not a necessary party thereto.

Lincoln Dist. v Redfield Dist., 226-298; 283 NW 881

Unliquidated demand set off against court costs. On a motion by an administrator to tax court costs against a defeated claimant in probate, the latter may not have a duly filed but unliquidated claim in his favor and against the estate adjudicated and set off against said costs and a judgment rendered against the estate for the excess.

In re Nairn, 215-920; 247 NW 220

Unquestioned establishment—proper procedure. A duly pleaded counterclaim which is unquestionably established by the evidence should not be submitted to the jury, but should be summarily allowed by the court; and in a personal injury action the court should direct the jury how to proceed if plaintiff's recovery be more than the amount of the counterclaim; likewise how to proceed if plaintiff's recovery be less than the amount of the counterclaim.

Forrest v Abbott, 219-664; 259 NW 238; 38 NCCA 315

II ALLOWABLE COUNTERCLAIMS

Agreement to release judgment—attorney fee and costs included. Under a settlement in which a judgment debtor agreed to deed certain real estate to his judgment creditor in consideration for release and satisfaction of a judgment, where the debtor performed his part of the agreement and the creditor released the judgment, but refused to satisfy two items consisting of attorney fees and court costs, the debtor, who became primarily liable for said items upon rendition of the judgment, was, on his counterclaim in action brought by creditor, entitled to a decree compelling creditor to satisfy said fees and costs.

Cooke v Harrington, 227-145; 287 NW 837

Attachment bond—counterclaim on deficiency judgment. In suit on attachment bond for damages, principal on bond could file counterclaim based on deficiency judgment obtained in foreclosure action altho counterclaim was not in favor of surety on bond, since principal was primarily liable.

Imes v Hamilton, 222-777; 269 NW 757

Right to plead barred counterclaim.

Riggs v Gish, 201-148; 205 NW 833

Damages growing out of same transaction. Joint defendants in an action for damages consequent on a collision of two automobiles, may each separately plead as a counterclaim any damages suffered by him in the collision in question.

Harriman v Roberts, 211-1372; 235 NW 751

Principal and surety — permissible plea. In an action against the principal and surety on an attachment bond for damages consequent on the alleged wrongful issuance of the writ, the principal in said bond may plead a counterclaim which neither arises out of or is connected with the transaction on which plaintiff sues, nor in which the surety has any personal ownership. A surety is not primarily liable on the bond and the principal who is primarily liable should be permitted to defeat recovery on the bond if he can so do.

Imes v Hamilton, 222-777; 269 NW 757

Deposit as set-off. Where, prior to the insolvency of a bank, said bank and a depositor became irrevocably obligated under a letter of credit issued to said depositor to enable him to make a purchase of goods in a foreign country, and where the drafts drawn in the foreign country under said letter of credit did not mature until after the insolvency of said bank, and where the receiver of said bank paid said drafts in full on their maturity, the claim of said receiver against said depositor for reimbursement is subject to an offset to the extent of the depositor's deposit in said insolvent bank.

Andrew v Trust Co., 217-657; 251 NW 48

Specific performance of real estate contract. In an action to recover rent a counterclaim for specific performance of a contract to sell the property was properly prepared when it contained allegations that the purchaser was at that time, and at all times had been, ready, willing, and able to perform, and had made a tender of performance which was refused, and a copy of the letter constituting such tender was attached to the counterclaim.

First Tr. JSL Bk. v Resh, 226-780; 285 NW 192

III NONALLOWABLE COUNTERCLAIMS

Unallowable counterclaim. A fraudulent grantee of land may not, in an action by the judgment creditor of the grantor to set aside the conveyance, set up a counterclaim for money due to said grantee from said judgment creditor.

Evans v Evans, 202-493; 210 NW 564

III NONALLOWABLE COUNTERCLAIMS —continued

Unallowable counterclaim. A counterclaim has no place in an action of forcible entry and detainer.

Votruba v Hanke, 202-658; 210 NW 753

Unallowable counterclaim. The amount which a vendee of land claims to have expended on land foisted upon him because of fraudulent representations by the vendor, in order to render the land "suitable, productive, and usable", is wholly unallowable as a counterclaim because said amount as a measure of damages for the wrong suffered is unknown to the law.

Perry Fry Co. v Gould, 214-983; 241 NW 666

Unallowable counterclaim. A defendant sued on his indorsement of a promissory note manifestly may not avail himself, by way of counterclaim, of an indorsement by plaintiff to defendant of a promissory note which has been fully discharged. Somewhat unusual circumstances reviewed and held to show such discharge.

Versteeg v Hoeven, 214-92; 239 NW 709

Counterclaim — nullification. Proof that plaintiff substantially performed part of a contract for services and justifiably abandoned the performance of the remaining part necessarily precludes recovery by the defendant on his counterclaim for damages (1) for negligent performance of the part performed, and (2) for failure to complete the work.

Goben v Paving Co., 218-829; 252 NW 262

Counterclaim by one joint defendant. New matter which constitutes a cause of action in favor of one of several defendants is not pleadable as a counterclaim; and if an assignment of such cause of action to all the defendants is relied on, it must appear that the assignment was made prior to the commencement of the action.

Shaw v Ioerger, 203-1256; 212 NW 719

Claim belonging to some of the defendants. In an action against a partnership and against the individual partners thereof, a claim for necessaries furnished by the partnership to plaintiff and her husband (who was a party defendant) is not pleadable as a counterclaim, because said claim does not belong to all the defendants.

Jordison v Jordison Bros., 215-938; 247 NW 491

Nonright to set-off. The officers of a bank who, to further the interest of their bank, enter into an individual guaranty of the payment of all promissory notes which their bank or its officers may rediscount with the guarantee, are not entitled, when sued on the guaranty, to off-set against their liability the amount of a deposit which their bank had with the guarantee at the time it became insolvent and passed into the hands of a receiver, and which deposit the guarantee surrendered to the receiver on his demand.

Bankers Tr. Co. v Hill, 207-1375; 221 NW 916

Double liability not subject to offset. Funds voluntarily paid into a bank by a stockholder thereof, in order to repair or make good the impaired capital of the bank while it is a going concern, may not later, after the bank has gone into the hands of a receiver for liquidation because of insolvency, be set off by the stockholder against the demand of the receiver for a 100 percent statutory assessment on the stock for the benefit of creditors.

Andrew v Bank, 204-243; 213 NW 925; 56 ALR 521

Justifiable dismissal. An unsupported counterclaim for damages consequent on the negligent handling of a claim by an attorney who sued for fees due him, is, of course, properly dismissed by the court.

Hunt v Moore, 213-1323; 239 NW 112

Loss of remedy. An unsuccessful defendant in an action for the recovery of real property who is afforded no opportunity therein to interpose a claim for permanent improvements (§§12235, 12249) must necessarily resort to the occupying claimants act (§10128 et seq.) for relief, and when he fails to resort to such remaining and exclusive remedy, and quits and surrenders the premises, he will not be permitted, when subsequently sued on a supersedeas bond growing out of the litigation, to interpose a claim for such improvements as a set-off.

Bigelow v Ins. Co., 206-884; 221 NW 661

Malicious prosecution growing out of auto collision. Defendant in an action for damages consequent on a collision between automobiles, may not plead as a counterclaim damages consequent on a malicious prosecution instituted by the plaintiff against defendant for reckless driving at the time of the collision.

Harriman v Roberts, 211-1372; 235 NW 751

Recovery of property. A defendant in an action for the recovery of real property whose possession originated in a contract of purchase which has been formally and legally forfeited may not counterclaim for rescission of the contract, and for judgment against plaintiff for the amount paid on the contract, and for the value of improvements placed on the property, especially when plaintiff was never a party to said contract.

Detmers v Russell, 212-767; 237 NW 494

Representation or warranty—necessity to plead. In an action for the purchase price of a machine, an offset of damages consequent on the defective construction and inefficient operation of the machine cannot be allowed

when defendant fails to allege any representations or warranties relative to said defects.

Baker v Ward, 217-581; 250 NW 109

Review—fatally delayed objection. The point that a party may not plead a counterclaim which is based on the assignment of part of a claim unless he brings into the case other interested parties may not be first raised on appeal.

Weitz' Sons v Fidelity Co., 206-1025; 219 NW 411

Waiver by failure to plead. A party who is sued on a nonnegotiable claim by the assignee or quasi-assignee thereof or by one who has been subrogated to the right to the claim, and fails to plead in defense a counterclaim which he then holds against the assignor, whether such counterclaim be liquidated or unliquidated, unconditionally waives the right to use such counterclaim as an off-set against the judgment obtained by the assignee or subrogated party on the claim sued on.

Southern Sur. v Ins. Co., 210-359; 228 NW 56

IV TIME OF ACQUISITION OF COUNTERCLAIM

Set-offs unallowable. A debtor of an insolvent bank may not, after the appointment of a receiver for the bank, buy up claims against the bank and offset such purchased claims against the amount he is owing the bank. Statutory right of set-off not applicable.

Parker v Schultz, 219-100; 257 NW 570

11153 Counterclaim by co-maker or surety.

Administrator's funds set off against insolvent bank holding secured note. An estate's deposit in an insolvent bank may be set off against a note held by bank, and contention that debts lacked mutuality was ineffective.

First Natl Bk. v Malone, 76 F 2d, 251

11155 Cross-petition—third parties.

Rejection of issue which breeds confusion.

Cotten v Halverson, 201-636; 207 NW 795

Certiorari. Certiorari will not lie to review an order of court, entered on its own motion, striking from the files defendant's cross-petition against a co-defendant.

Collins v Cooper, 215-99; 244 NW 858

Construction in view of stricken references. While the striking of portions of the first division of an answer may be proper as far as plaintiff's action is concerned, yet the court must treat said stricken portions as unstricken in construing defendant's cross-petition contained in a subsequent division of his answer when said stricken portions are essentially material to the cross-petition and are incorporated therein by distinct reference.

Andrew v Boyd, 213-1277; 241 NW 423

Cross-complaint—when allowable. In an action by an administrator for damages consequent on the alleged negligent killing by defendant of the intestate in a collision between automobiles, the defendant may cross-petition for damages against the administrator personally under the allegation that the deceased at the time of said collision was negligently operating an automobile which was personally owned by said administrator and was so doing with the consent of said owner. And this is true irrespective of the personal residence of the administrator.

Ryan v Amodeo, 216-752; 249 NW 656

Cross-petition against plaintiff—notice not required. A pleading designated as a cross-petition asking for enforcement of a painting clause in a lease and filed at the close of the evidence was not filed in violation of statute requiring notice of a cross-petition against a co-defendant or third party, since the pleading prayed for affirmative relief against the plaintiff, who was neither a co-defendant nor third party.

Lamm v Stoen, 226-622; 284 NW 465

Cross-petition defense—state as proper party—belated objections. In an action to dissolve a mining corporation, question whether state, not being stockholder or creditor of the mining corporation, was proper party to make defense to a cross-petition, which question not having been raised in the trial court, may not be raised for the first time and reviewed on appeal.

State v Exline Fuel Co., 224-466; 276 NW 41

Cross-petition not affecting subject matter of main action. In an action on the bonds of a public officer and his bondsmen to recover a shortage, one surety may not cross-petition against a party who he alleges wrongfully received the funds resulting in the shortage, said latter party not being a party to the bond sued on.

School District v Sass, 220-1; 261 NW 30

Partition—cross-petition—notice of—sufficiency. In an action for the partition of lands, a notice by one co-defendant to another co-defendant of the filing by the former of a cross-petition, denying all interest of the latter in the lands in question, is not a nullity because said notice fails to specifically describe or identify said lands, when said notice makes proper reference to the original petition in the action for a correct description of said lands.

Bauer v Bauer, 221-782; 266 NW 531

Partition—insolvent heir's unpaid debt to estate—jurisdiction of court to offset. The court has jurisdiction, in an equitable action to

partition the lands of an intestate (to which action all heirs are parties), to entertain a cross-petition by one of the heirs as administrator of said estate, and, under proper pleading and proof:

1. To decree that a certain insolvent heir has no interest in said land because his unpaid indebtedness to said estate equals or exceeds the value of the share in said lands which he would take were he not so indebted, and

2. To decree that said lands belong solely to the other heirs who are not so indebted, and to the surviving widow, if any.

Bauer v Bauer, 221-782; 266 NW 531

Propriety—waiver. The court has authority to consider and pass upon a cross-petition which asks the court to construe the rental provisions of a lease, when issue is duly joined thereon and tried out without motion to strike or dismiss such petition; and especially is this true when the cross-petitioner alleges the existence of an unadjusted difference between the parties relative to such construction.

Minot v Pelletier Co., 207-505; 223 NW 182

Provisional remedies. The right of a litigant to move to transfer an issue from the equity calendar to the law calendar is not a provisional remedy within the meaning of this section.

Pace v Mason, 206-794; 221 NW 455

Review—scope—nonappeal from inferential rulings. When the court finds in favor of the defendant on a specifically named defense, the inference will be indulged that the court found against him on his cross-petition for relief which is affirmative, and in the nature of an independent cause of action. It follows that defendant is not entitled, on an appeal by plaintiff, to a review of the inferential rulings on said affirmative and independent matters.

Toedt v Bollhoefer, 206-39; 218 NW 56

Reviving dismissed cross-petition. A party who dismisses his cross-petition may not subsequently revive the same by giving adverse parties notice of the filing of said petition and the hearing thereon.

Matthews v Quaintance, 200-736; 205 NW 361

Tuition transfer—county treasurer—joinder. In an equitable action between school districts to prevent a statutory transfer by a county treasurer of funds in payment of tuition, a cross-petition of the defendant school district, not joined in by the county treasurer, may not be stricken therefrom, inasmuch as the county treasurer has no investment therein and is not a necessary party thereto.

Lincoln Dist. v Redfield Dist., 226-298; 283 NW 881

Wage recovery dependent on reformation. In a law action for wages, allegedly due an employee under contract, where parties stipulate that the employee shall not recover such wages if the defendant prevails on his cross-petition for reformation, transferred to equity on motion, the employee may not thereafter deny the court's right to try the reformation issue and is bound by the decree if not contrary to the evidence.

Koch v Abramson, 223-1356; 275 NW 58

11156 Reply—when necessary.

Denial by operation of law. See under §11201

When reply necessary. A motion to strike an answering amendment which interposes the bar of the statute of limitation is not the proper procedure under which to plead facts which avoid the bar. Reply is necessary.

Lawrence v Melvin, 202-866; 211 NW 410

When reply not necessary. In an action by a guardian of a minor on a certificate of deposit issued to the minor by the defendant bank, an answer alleging that the minor, in the re-organization of the bank, waived a named portion of the deposit is denied by operation of law.

McFerren v Bank, 214-198; 238 NW 914

When reply unnecessary. In an action wherein plaintiff alleges that defendant is owing him a stated sum, and wherein defendant answers that he has not received proper credit for payments made by him, no reply is necessary in order to enable plaintiff to prove an agreement that certain payments were not to be applied on the account sued on.

Northern Lbr. Co. v Clausen, 201-701; 208 NW 72

Allowable reply. An answer which alleges a failure on the part of an insured to furnish the proofs of loss required by statute is properly met by a reply which alleges that the policy itself waives such proofs.

Glandon v Ins. Assn., 207-1068; 224 NW 65

Avoidance of matter first appearing in reply. An answer to a reply seems to be unknown to our practice. But when the defendant in an action to quiet title answers that he is the owner of the property, and is met by a reply that defendant is estopped by his own contract from claiming title, and defendant wishes to plead that said contract was obtained from him by fraud and without consideration, quaere: must defendant plead his said defense (a) by way of amendment to his answer, or (b) does the law impliedly supply such plea?

Carr v McCauley, 215-298; 245 NW 290

Belated reply. A reply filed without leave of court and after the trial is concluded, and purporting to conform the pleadings to the evidence, may be considered, notwithstanding its untimeliness, when neither party is deprived thereby of any testimony.

McDonald Co. v Morrison, 211-882; 228 NW 878

Plea and answer—reply inconsistent with petition—election. Plaintiff's petition alleged a cause of action against defendant as a peace officer. Plaintiff filed a reply in which he denied that the defendant was acting as a peace officer. Such departure did not change, add to, or enlarge the cause of action alleged in the petition. The function of a reply is to avoid matters alleged in the answer or make an issue when a counterclaim is alleged. Plaintiff having alleged but one cause of action, the trial court did not err in refusing to require plaintiff to elect between causes of action.

Boyle v Bornholtz, 224-90; 275 NW 479

Reply tho no counterclaim pleaded. Even tho an answer pleads no counterclaim yet if it prays for affirmative relief, a reply may be proper.

Carr v McCauley, 215-298; 245 NW 290

Reply to reply—no legal standing. A reply to a reply brief and argument has no standing and will be stricken on motion.

In re Rinard, 224-100; 275 NW 485

See Cochran v School Dist., 207-1385; 224 NW 809

Technical inaccuracy. The pleading of an adjudication in a reply instead of in the petition, does not necessarily constitute an error of consequence, even tho it be conceded that the technical rules of pleading are violated.

Cochran v Sch. Dist., 207-1385; 224 NW 809

11157 Statements of.

Reply—improper use. Principle recognized that a plaintiff may not utilize a reply for the purpose of radically departing from the cause of action made by him in his petition. So held where plaintiff pleaded in his petition as an assignee, and in his reply as a holder in due course.

Ottumwa Bk. v Starns, 202-412; 210 NW 455

Failure to plead and prove avoidance. A clearly established contract of settlement must prevail in the absence of plea and proof of matter in avoidance.

Bebensee v Blumer, 219-261; 257 NW 768

Plea and answer—reply inconsistent with petition. Plaintiff's petition alleged a cause of action against defendant as a peace officer. Plaintiff filed a reply in which he denied that the defendant was acting as a peace officer. Such departure did not change, add to, or enlarge the cause of action alleged in the petition. The function of a reply is to avoid matters alleged in the answer or make an issue when a counterclaim is alleged. Plaintiff having alleged but one cause of action, the trial court did not err in refusing to require plaintiff to elect between causes of action.

Boyle v Bornholtz, 224-90; 275 NW 479

Confession and avoidance. Under a claim for workmen's compensation, a defense alleging that the injuries sustained by the claimant were caused by the willful act of a third person is in the nature of a confession and avoidance and places the burden of proving it to be true upon the defendant.

Everts v Jorgensen, 227-818; 289 NW 11

11158 Allegation of new matter—effect.

Inconsistent defenses. See under §11199

Establishing immaterial reply. An answer which pleads affirmative defenses and a reply which pleads adjudication of such alleged affirmative defenses both become quite immaterial when defendant offers no evidence in support of his answer, but defendant has no basis for complaint if the court finds that the allegations of the reply have been established, and renders judgment for plaintiff "under the whole record".

Hiller v Felton, 208-291; 225 NW 452

Stock—subscriptions—burden of proof. In an action by a corporation on a stock subscription contract for stock in an unorganized but contemplated corporation, plaintiff has the burden to establish every nonadmitted fact entitling it to recover, even tho defendant, in addition to a limited general denial, pleads in great detail that plaintiff's corporate organization was wholly beyond the contemplation of his subscription contract.

Cedar Rapids Amu. Assn. v Wymer, 213-1012; 240 NW 644

11159 Defenses to counterclaim—paragraphs.

Set-offs unallowable. A debtor of an insolvent bank may not, after the appointment of a receiver for the bank, buy up claims against the bank and offset such purchased claims against the amount he is owing the bank. Statutory right of set-off not applicable.

Parker v Schultz, 219-100; 257 NW 570

11160 Signing and verification.

Pleading verification requirements — nonapplicability to cost bond affidavit. Statutes requiring verification of pleadings, to be made by persons knowing facts, require the affidavit to state that affiant believed statements therein contained to be true, but such statutes relate to verification of pleadings, and not to affidavits generally in support of motions for special remedies, nor to cost bond affidavit.

Schultz v Ins. Co., 225-1024; 282 NW 776

Nonstatutory verification fatal. In an action upon a promissory note, where defendant's answer contained two inconsistent defenses in separate counts, the answer, being verified on defendant's "knowledge, information and be-

lief", was properly stricken on motion, where the statute, in such cases, provided the verification must allege that "the party believes one or the other to be true but cannot determine which".

Stern Finance Co. v Bleifuss, 226-665; 284 NW 460

Objections not raised in lower court. In an action for divorce based on cruelty, where the defendant made no objection either to the verification or the form of an amendment to a petition which alleged conviction of a felony, and the cause proceeded to trial without objection to petition as amended, the defendant on appeal could not complain that, because of the finding that equities were with plaintiff and were based on facts alleged in petition, trial court could not consider ground set out in amendment.

Ayers v Ayers, 227-646; 288 NW 679

11164 Verification by person knowing facts.

Pleading verification requirements—nonapplicability to cost bond affidavit. Statutes requiring verification of pleadings, to be made by persons knowing facts, require the affidavit to state that affiant believed statements therein contained to be true, but such statutes relate to verification of pleadings, and not to affidavits generally in support of motions for special remedies, nor to cost bond affidavit.

Schultz v Ins. Co., 225-1024; 282 NW 776

11166 Verification not required.

Action by administrator. Plaintiff suing as an administrator need not verify his pleadings.

Markworth v Bank, 217-341; 251 NW 857

11168 Failure to verify.

Nonstatutory verification fatal. In an action upon a promissory note, where defendant's answer contained two inconsistent defenses in separate counts, the answer, being verified on defendant's "knowledge, information and belief", was properly stricken on motion, where the statute, in such cases, provided the verification must allege that "the party believes one or the other to be true but cannot determine which".

Stern Finance Co., v Bleifuss, 226-665; 284 NW 460

Waiver of defective verification. Defects in the verification of a pleading are waived by failure to move to strike the defectively verified pleading.

Cutino Co. v Weeks, 203-581; 213 NW 413

11172 Mitigating facts.

Aggravation of injury by unskillful treatment—liability of original wrongdoer. It is a principle of law that one who negligently inflicts a personal injury on another is liable in damages for the aggravation of said injury resulting from the unskillful treatment of said injury by his physicians and surgeons, provided the injured party exercised reasonable care in selecting said physicians and surgeons, but to permit the application of said principle there must be a proper showing of causal connection between said wrongfully inflicted injury and the said unskillful treatment.

Johnson v Selindh, 221-378; 265 NW 622

Confession and avoidance—assault and battery. In an action for injuries inflicted upon the plaintiff when he was forcibly ejected from the home of the defendant, where the defendant's answer assumed the burden of proof by admitting the assault and battery, but by way of justification and confession and avoidance asserted that the plaintiff had been ejected after refusing to leave, the evidence was not sufficient to compel the court to direct a verdict for the defendant on the issue of whether the defendant had used more force than was necessary to accomplish the ejection.

Wessman v Sundholm, 228- ; 291 NW 137

Bad reputation of plaintiff. Under proper plea and proof, evidence of the general bad professional reputation of the plaintiff in the place where he is practicing his profession is admissible in mitigation of damages, even tho the slander was spoken at a nearby place.

Amick v Montross, 206-51; 220 NW 51; 58 ALR 1147

Breach of part not destructive of whole. Generally, where contracts are severable and divisible, and the consideration justly apportioned to part of the contract, a breach of that part does not destroy the contract in toto, but the defendant may only recoup himself in damages.

Paramount Pictures v Maxon, 226-308; 284 NW 119

Immaterial evidence. In an action for assault and false imprisonment committed by a mayor and a city marshal, evidence of violations by plaintiff of an ordinance is inadmissible when it appears that, on the occasion in question, no attempt was made to arrest plaintiff for such violations, and when the pleadings are silent as to justification and mitigation.

Schultz v Enlow, 201-1083; 205 NW 972

Joint wrongdoers release. A party who has been negligently injured and settles with and releases the original wrongdoer may not thereafter maintain an action against a physician for malpractice in treating the very injuries for which he has effected a settlement.

Phillips v Werndorff, 215-521; 243 NW 525

More specific pleading—erroneous denial. In an action for general and special damages, under general and somewhat meager pleading, based on an alleged libelous publication resulting (1) in loss of customers, (2) in being refused credit, and (3) in loss of earnings in business, plaintiff should, on motion for more specific statement of the action, be compelled to set forth the names of customers lost, the names of those who refused him credit, and the ultimate facts upon which he bases his demand for judgment on account of injury to his earnings.

Dorman v Credit Co., 213-1016; 241 NW 436

Motion picture booking as severable contract—damages as remedy. A motion picture exhibitor who books a series of films under contract, a part of which contract specified that he should have a certain film to exhibit on a certain date, is not entitled to breach the entire contract, when distributor fails to provide this certain film on the specified date, but exhibitor must recoup by way of damages, if any.

Paramount Pictures v Maxon, 226-308; 284 NW 119

Teachers—wrongful discharge—duty to seek employment. A teacher wrongfully discharged is under obligation to exercise reasonable diligence to secure like employment in the same locality—not like employment at distant places or similar employment of a lower or different grade.

Shill v School Township, 209-1020; 227 NW 412

11173 Necessity to plead.

Cross-examination. The plaintiff who, in an action for damages for criminal conversation, testifies, in effect, on direct examination, that the defendant's criminal relation with plaintiff's husband was the sole cause of disrupting plaintiff's home, thereby opens the door to cross-examination of the husband's criminal relations with other women and plaintiff's knowledge thereof, even tho defendant has not pleaded such matter in mitigation of damages.

Morrow v Scoville, 206-1134; 221 NW 802

"Assault" admitted in pleadings—use of term permitted. In an action for damages in which the defendant's answer admitted an assault and battery but attempted to justify the act, he could not complain that the court, in its statement of the issues, said that he admitted the assault, as the word "assault" did not admit all that the plaintiff contended, but only the same act upon which the action was based.

Wessman v Sundholm, 228- ; 291 NW 137

Submission without plea. The unpleaded mitigating fact that a plaintiff knew of a fire at the time it was wrongfully set out upon his premises, and made no effort to put out the fire or to lessen his damages, is properly presented to the jury when plaintiff's own testimony tended to prove such fact.

Ferber v Railway, 205-291; 217 NW 880

11174 Intervention.

ANALYSIS

I INTERVENTION IN GENERAL
II ALLOWABLE INTERVENTION
III NONALLOWABLE INTERVENTION

I INTERVENTION IN GENERAL

Preventing intervention—subsequent estoppel.

Tutt v Smith, 201-107; 204 NW 294; 48 ALR 394

Account—inconsequential plea. In an action on a contract to recover a money judgment for plaintiff's interest in certain property, the plea of an intervenor who claims an interest in the property that there must first be an accounting between plaintiff and defendant is of no consequence where there is no evidence that defendant has ever paid plaintiff anything on his claim.

Benson v Sawyer, 216-841; 249 NW 424

Action by teacher for compensation. In a teacher's action to recover compensation against a school district, where a taxpayer files a defensive petition of intervention after a demurrer to the answer had been sustained, but before defendant had made any election to stand on its answer, before any demand to make such election had been made, before default or judgment had been entered, or any demand therefor—the petition of intervention being unquestioned and raising an issue on the additional defensive matter—the court erred in sustaining a motion to strike the petition of intervention and entering judgment against the school district.

Schwartz v School Dist., 225-1272; 282 NW 754

Attorney's lien as assignment—effect. The duly perfected lien of an attorney with reference to the judgment obtained by him for his client, is tantamount to an assignment of an interest in the judgment. It follows that the attorney has such interest in the judgment as to support an intervention by him in an action by the judgment plaintiff to set aside certain conveyances as fraudulent.

Grimes Bank v McHarg, 217-636; 251 NW 51

Failure to intervene. The consideration for a lease of mortgaged premises (which mortgage pledges the rents) and for the promissory note given for the rent, wholly fails when the assignee in an unrecorded assignment of the lease and note stands by, during foreclosure, and, without asserting his claim by intervention or otherwise, knowingly permits the mortgagee to foreclose and oust the mortgagor and his tenant, and obtain a decree against the

rents and a receiver therefor in order to discharge a deficiency judgment.

Miller v Sievers, 213-45; 238 NW 469

Intervenor as interloper. An intervenor becomes an interloper and consequently is without standing when it appears that he is attempting to institute an independent action under the guise of a petition of intervention.

Cooper v Erickson, 213-448; 239 NW 87

Intervenor—failure to appeal—notice. Where the petition, and a petition of intervention, both asking the same relief, were dismissed on their merits, the fact that intervenor fails to appeal, or was not served with notice of appeal by plaintiff, is quite inconsequential as far as plaintiff's appeal is concerned.

Anderson v Dunnegan, 217-1210; 245 NW 326

Judgment—attempt by party to intervene—effect. A judgment quieting title in plaintiff on the ground that the defendant had fraudulently obtained the possession of a deed by plaintiff to defendant and had recorded the same is not an adjudication of the right of a subsequent purchaser from said defendant because said purchaser attempted to intervene in said action, the record revealing the fact that the intervention was denied on grounds not going to the merits of said purchaser's rights.

Tutt v Smith, 201-107; 204 NW 294; 48 ALR 394

Opinion on appeal—parties concluded. One on whose behalf an administrator seeks to maintain an action is necessarily bound by the opinion of the appellate court on appeal, and, on reversal and remand, he acquires no additional standing by simply joining with the administrator in a motion for judgment, without being substituted as plaintiff or in any manner making himself a party to the action by intervention or otherwise, and without in any manner changing the record.

Ronna v Bank, 215-806; 246 NW 798

Transaction with deceased — intervenor — competency. In equity action to quiet title and to declare a trust in realty, an intervenor who claims same relief as plaintiff may not testify to alleged oral agreement between parties, some of whom are deceased.

Wagner v Wagner, (NOR); 224 NW 583

Unilateral wage agreement—effect of intervention. A wage agreement which is void as to plaintiff who seeks to enforce it (because wholly lacking in mutuality of obligation and remedy) is necessarily void as to intervenors who join in the prayer of plaintiff.

Wilson v Coal Co., 215-855; 246 NW 753

Insurance policy admitted by pleadings. In an action to recover on a policy of fire insurance where the plaintiff's petition, a petition of intervention, and the answer to the petition of intervention all agreed that the policy was issued on a certain date and that it covered the same property that was covered by the mortgage and by another insurance contract issued by the intervenor, the record was not fatally deficient when it contained no evidence of the execution of the policy.

Calendro v Ins. Co., 227-829; 289 NW 485

II ALLOWABLE INTERVENTION

Attorney's lien as interest in judgment—basis for intervention. An attorney's lien, when perfected, creates an interest in a judgment and is a sustaining basis for an intervention by the attorney in a separate equity action to subject land to the payment of the judgment.

Grimes Sav. Bank v Jordan, 224-28; 276 NW 71

Garnishment—attorney's lien against estate funds. Where a casualty company secured a judgment against beneficiaries under a will and issued an execution under which the administrator with will annexed was attached as garnishee, attorneys for the beneficiaries could properly intervene in the garnishment proceedings to assert a claim to the garnished fund for legal services rendered to beneficiaries, in connection with the action by casualty company, which claim was based on written assignment of interests of beneficiaries under said will.

New Amsterdam Co. v Bookhart, 227-1150; 290 NW 61

Judgment creditors and mortgage holders—proper intervenors. In an action between copartners for receivership and accounting, holders of mortgages and deficiency judgments against land purchased in name of some partners for partnership purposes held proper intervenors.

Heger v Bussanmas, (NOR); 232 NW 663

Right of creditors to contest claims. Creditors whose claims have been allowed have a statutory right to appear and formally contest the allowance of a claim.

In re Lounsberry, 208-596; 226 NW 140

III NONALLOWABLE INTERVENTION

Unallowable intervention. A taxpayer who is given the right to intervene in an action by joining (1) with the plaintiff, or (2) with the defendant, and in an attempted intervention does neither, has no standing in the action.

Mathews v Turner, 212-424; 236 NW 412

Unallowable intervention. In an action by an heir against an executor to quiet title in himself to land which the testator purported to devise, a general creditor of the estate has no standing as an intervenor.

Rapp v Losee, 215-356; 245 NW 317

Unallowable intervention. An intervention involving the right to rents in foreclosure proceedings is unallowable, after decree has been entered, as to all issues pending at the time of such decree.

First Tr. JSL Bk. v Cuthbert, 215-718; 246 NW 810

11175 Decision—delay—costs.

Action by teacher for compensation. In a teacher's action to recover compensation against a school district, where a taxpayer files a defensive petition of intervention after a demurrer to the answer had been sustained, but before defendant had made any election to stand on its answer, before any demand to make such election had been made, before default or judgment had been entered, or any demand therefor—the petition of intervention being unquestioned and raising an issue on the additional defensive matter—the court erred in sustaining a motion to strike the petition of intervention and entering judgment against the school district.

Schwartz v School Dist., 225-1272; 282 NW 754

Avoidance of continuance by admission. An intervenor is properly denied a continuance because of his own sickness and consequent inability to be present and testify at the trial, (1) when his intervention was delayed until after the action in question had been reversed and remanded on appeal and until the very eve of the retrial, and (2) when it is admitted that intervenor, if present, would testify to the alleged facts set forth in his application.

Flood v Bank, 220-935; 263 NW 321

Intervenor as applicant for continuance—rule for determination. Whether an intervenor has a right to a continuance, even on account of his own sickness and consequent inability to be present at the trial and testify, must be determined by giving due consideration to the fact that, by this statute he "has no right to delay".

Flood v Bank, 220-935; 263 NW 321

11177 Variance.

ANALYSIS

I VARIANCE IN GENERAL
II NONFATAL VARIANCE
III FATAL VARIANCE

Unquestioned pleadings. See under §12827
Variance as to "place". See under §11195, Vol I
Variance between "time" alleged and proven. See under §11194, Vol I

I VARIANCE IN GENERAL

Alleging quantum meruit and proving express contract. An allegation of quantum meruit cannot be supported by proof of an express contract.

Wayman v Cherokee, 208-905; 225 NW 950

Express and implied contract. There is no variance between an allegation of an express contract of sale of property, and proof that the vendee accepted the offer of the vendor by acts and conduct.

Blakesburg Bk. v Blake, 207-843; 223 NW 895

Rules and customs. Evidence of unpleaded rules and customs as a basis on which to predicate negligence is inadmissible.

Chilcote v Railway, 206-1093; 221 NW 771

Implied contract to pay—absence of agreement to pay entire price—effect. An allegation of oral sale of an article to a defendant is prima facie established, with consequent liability for the entire purchase price, by evidence that the price was fully understood and agreed on, and that the defendant took and retained possession of the article, notwithstanding the fact that the defendant (1) promised to pay one-half only of the purchase price, and (2) promised, without warrant or authority, that a third party would pay the remaining one-half.

Finnerty v Shade, 210-1338; 228 NW 886

Proof under general allegation. A general allegation of agency may be supported by evidence of either an express or implied agency.

Andrew v Kolsrud, 218-15; 253 NW 913

Action for breach of contract. Principle reaffirmed that a contract relied on must be established as pleaded.

Economy Co. v Honett, 222-894; 270 NW 842

Submission of nonpleaded issues. The submission of a nonpleaded issue of negligence constitutes reversible error.

Morse v Castana (town), 213-1225; 241 NW 304

II NONFATAL VARIANCE

Absence of pleading—waiver. A litigant who, without objection, permits a material fact to be established will not be heard thereafter to assert that no appropriate pleading existed as a basis for such testimony.

Harrington v Surety Co., 206-925; 221 NW 577

Express and implied contract. A plaintiff may, in different counts, plead an express and an implied contract as to the same subject matter.

Richmann v Beach, 201-1167; 206 NW 806

Failure to attack general pleading. A pleading, unquestioned in the trial court, which alleges that goods were purchased and delivered under an "oral agreement", without specification of any agreed terms as to price or quantity, will support a judgment for the unquestioned reasonable value of the goods.

Chandler Co. v Groc. Co., 200-919; 205 NW 787

II NONFATAL VARIANCE—concluded

Fraud—nonvariance. An allegation of fraudulent representations of title, as a basis in equity for rescission of a contract of purchase, is sufficiently met by proof of the mutual mistake of the parties as to the title.

Bredensteiner v Oviatt, 202-993; 210 NW 133

Land description. In an action involving title to real estate, the decree of the court below was not objectionable on the ground that it was not in conformity with pleadings on account of the manner in which the land was described in such pleadings, where throughout the litigation, in the evidence and many of the exhibits the land was fully described, and there was no question as to just what land was in dispute, and where the decree covered the land in controversy.

Arnd v Harrington, 227-43; 287 NW 292

Similar representation. An allegation that a representation was that a doctor's charge "would not exceed $10" is properly met by proof that the representation was that the said charge "would be about $10".

Robinson v Meek, 203-185; 210 NW 762

III FATAL VARIANCE

Pleading quantum meruit and proving express contract. A fatal variance between allegation and proof results from pleading quantum meruit and proving an express contract for compensation.

Sammon v Roach, 211-1104; 235 NW 78

Specific allegations control general allegations. When negligence is the foundation of an action, specific allegations control, and plaintiff may not rely on general allegations of negligence.

McCoy v Railway, 210-1075; 231 NW 353

11179 Immaterial variance.

Pleading and proof as to entering into contract. No material variance is presented by an allegation "that plaintiff entered into a contract with defendant whereby plaintiff and another (naming him) sold to the defendant", etc., and proof that the contract was entered into by plaintiff and the named other party on the one hand, and by the defendant on the other hand.

Weinhart v Smith, 211-242; 233 NW 26

11180 Failure of proof.

Variance between pleading and proof. See under §11177

Common law rule for recovery—modification. Principle reaffirmed that the common law rule that there can be no recovery on a written contract without a showing that it has been strictly performed has been modified in this state.

Gibson v Miller, 215-631; 246 NW 606

Failure of proof. Evidence of the rental value of lands in a certain neighborhood is no evidence of the rental value of other lands in the same neighborhood, when such other lands are not shown to be similar to the land as to which there is evidence; and a judgment based thereon is improper.

Harris v Carlson, 201-169; 205 NW 202

Failure of proof of material allegation. A fatal failure of proof results from a failure to prove an allegation to the effect that services were to be paid for at the time of the death of the promisor, and where the court instructs to such effect.

Ballard v Miller, 210-1144; 229 NW 159

Failure to meet contract basis for recovery. In an action by an insurer to recover of the insured premiums under a policy indemnifying the insured against injury to his workmen, there is a total failure of proof when the premium is, by contract, computable at a certain rate on the amount paid by the insured to his workmen in a limited and specified class of work, and the insurer wholly fails to present any evidence as to the amount so paid.

Globe Ind. Co. v Anderson-Deering Co., 200-1035; 205 NW 845

Failure to prove condition precedent. In an action by an insurer to recover premiums due on an insurance rider which by its terms is valid only "when signed by an authorized representative", a failure of proof results from the failure of the insurer to prove that the rider was signed as required.

Globe Ind. Co. v Anderson-Deering Co., 200-1035; 205 NW 845

Total failure of proof. Failure of proof results from pleading a claim for money and proving a claim payable in part in money and in part in other personal property.

Hughes v Bridge Co., 204-1229; 210 NW 451

Plea of oral contract. There is a total failure of proof when plaintiff bases his action solely on a plea of oral contract and establishes a written contract.

Lamis v Grain Co., 210-1069; 229 NW 756

Pleading fraud and proving mistake. A plaintiff who pleads that he was induced to make certain payments because of fraudulent representations may not recover on proof that he made the payments because of a unilateral mistake on his own part.

Morrow v Downing, 210-1195; 232 NW 483

Pleading quantum meruit and proving express contract. A fatal variance between allegation and proof results from pleading quantum meruit, and proving an express contract for compensation.

Sammon v Roach, 211-1104; 235 NW 78

Alleging quantum meruit and proving express contract. An allegation of quantum meruit cannot be supported by proof of an express contract.

Wayman v City, 208-905; 225 NW 950

Express contract and quantum meruit. A broker may plead in different counts (1) an express contract to pay a specified commission and (2) an implied contract to pay a reasonable commission, and may insist on the submission of both issues to the jury if the evidence supports both. It follows that evidence may be admissible on the issue of quantum meruit, even though plaintiff produces evidence of an agreement to pay the specifically named commission.

Ransom-Ellis Co. v Eppelsheimer, 205-809; 218 NW 566

Contract and quantum meruit value. Evidence of both the reasonable and contract value of services is admissible when so pleaded, even tho the pleading is embraced in one slovenly drawn but unquestioned count.

Pressly v Stone, 214-449; 239 NW 567

Quantum meruit. A denied plea of quantum meruit for services rendered must be established, or plaintiff must fail, irrespective of whether the defendant does or does not establish his defensive plea that the contract of employment was different, and that thereunder the plaintiff had been paid. Instructions are necessarily erroneous when to the effect that defendant is entitled to the verdict only in case he establishes his claim as to the contract.

Olson v Shuler, 203-518; 210 NW 453

Quantum meruit for services covered by express contract. Plaintiff may not recover on quantum meruit for services which are inseparably connected with, and a part of, services which plaintiff has contracted to perform for an agreed compensation.

Gregerson v Cherry Co., 210-538; 231 NW 350

See Goben v Des M. Co., 214-834; 239 NW 62

Commission—finding sustained by evidence. In a law action by real estate agent to recover commissions for negotiating sale of realty, which had been listed with several brokers, where another agent intervenes claiming such commission, and evidence shows both agents were empowered to dispose of land at reduced price, held, evidence sustained finding of trial court that intervening agent was entitled to commission where he had conducted the preliminary negotiations and also consummated the sale. Broker claiming commission must show he was the efficient and procuring cause of the sale.

Armstrong v Smith, 227-450; 288 NW 621

Contract to find purchaser—tentative offer —effect.

MacVicar v Pav. Corp., 201-355; 207 NW 378

Failure to show agreement. In an action to recover real estate commission, the dismissal of one real estate broker's claim against an intervening real estate broker was proper under the evidence where no showing was made of any agreement for the payment of a definite amount.

Armstrong v Smith, 227-450; 288 NW 621

Granting unallowable relief. The court may not decree the cancellation of an unquestioned judgment, or decree a re-conveyance of land when the validity of the original conveyance was not properly in issue.

Benson v Sawyer, 216-841; 249 NW 424

Novation—pleadings. A plaintiff-vendor who seeks to recover on a contract of sale of land, but pleads that on performance day he conveyed to a party other than the contract purchaser, but under an oral agreement that by so doing the contract purchaser would not be released, must stand or fall on his chosen theory. In other words, he must establish his own theory of nonnovation.

Bobbitt v Van Eaton, 208-404; 226 NW 79

Partly void warrants. There can be no recovery on municipal warrants given in payment of part of a total purported indebtedness, part of which is void because in excess of constitutional debt limitation. In other words, recovery, insofar as permissible, must be had in some proceedings other than on said warrants.

Trepp v Sch. Dist., 213-944; 240 NW 247

11181 Amount of proof.

Burden of proof. See under §11487
Motor vehicle cases. See under Ch 251.1, §§5037.09, 5037.10
Probate claims—burden. See under §11972
Will contests—burden. See under §11846
Workmen's compensation cases. See under §1441

Action on note—sufficiency of proof. The payee in possession of a promissory note the execution of which is not denied makes a prima facie case for recovery by the simple introduction of the note in evidence.

Henderson v Holt, 201-1017; 206 NW 134

Cruel and inhuman treatment — separate maintenance. Principles reaffirmed that a divorce will not be granted on the ground of cruel and inhuman treatment unless such treatment endangers the life of the applicant for divorce, nor will separate maintenance be awarded on said ground unless the evidence is such as to justify a divorce if it were asked. Evidence held insufficient to justify either divorce or separate maintenance.

Krotz v Krotz, 209-433; 228 NW 30

Deed to ancestor—proof—title not established as against tax deed. In a quiet title action, stipulated evidence that an ancestor of defendant received and recorded a deed to the land from another is insufficient to overthrow

plaintiff's tax deed without a further showing of the previous and subsequent chain of title.

Inter-Ocean v Morrison, 225-1336; 283 NW 909

Directing verdict — amount of evidence. Court in directing a verdict is guided by not whether there is literally no evidence, but whether there is any evidence which ought reasonably to satisfy the jury that the fact is established.

Wilson v Findley, 223-1281; 275 NW 47

Equitable estoppel — evidence — degree of proof required. The plea of a surety on a promissory note that he, under an arrangement with the principal maker, furnished a portion of the funds with which to make full payment of the note, but that the payee wrongfully applied said payment on another note owing by said maker, and that, therefore, said payee is estopped to maintain an action against him, must be supported by clear, convincing, and satisfactory evidence that said payee had full knowledge of said arrangement before he made application of said payment.

Reason: Fundamentally, estoppel is not a favorite of the law.

Stookesberry v Burgher, 220-916; 262 NW 820

No decree on unsworn evidence. In an action to quiet title against paving assessment certificate holders, an unsworn petition supported by unsworn written statements showing, as contention for invalidity of assessments the nonconformity of plat to statutory requirements, is not the sufficient evidence as in equity will support a judgment by default and, the burden of proof thereof being on the plaintiff, the petition was properly dismissed.

Neilan v Lytle Inv. Co., 223-987; 274 NW 103

Foreign corporations — burden to sustain original notice. In an action against a foreign corporation commenced by service of original notice on the secretary of state, the plaintiff has the burden to sustain its service and failing therein may not question the sufficiency of a motion to quash the service.

Keokuk v Curtin-Howe Corp., 223-915; 274 NW 78

Gifts—inter vivos—evidence—sufficiency to establish. Evidence to establish a parol gift of personal property must be clear, unequivocal, and convincing.

Malcor v Johnson, 223-644; 273 NW 145

Grantor's action to set aside deed. When the grantor of a warranty deed had acquiesced for five years in the title of the grantee, he could not set aside the deed and quiet title in himself without establishing a plain, clear, and decisive case.

Huxley v Liess, 226-819; 285 NW 216

Instructions—evidence defined. Instruction that "evidence is whatever is admitted in the trial of a case as part of the record, whether it be an article or document marked as exhibit, other matter formally introduced and received, stipulation, or testimony of witnesses, in order to enable jury to pronounce with certainty, concerning the truth of any matter in dispute", considered with other instructions, and while not approved, could not have prejudicially misled the jury.

O'Meara v Green Const. Co., 225-1365; 282 NW 735

Instructions — negligence—requiring excessive proof. An instruction is erroneous when it requires negligence to be established "in the respects charged in the petition," and the negligence so charged is (1) excessive speed, (2) excessive speed after warning, and (3) excessive speed while traveling on loose gravel.

Codner v Stowe, 201-800; 208 NW 330

Negligence—general and specific allegations. Except in res ipsa loquitur cases a specific allegation will not waive a general allegation of negligence, which general allegation must be assailed by motion, if timely, before answer and without such motion is properly submitted to the jury if sustained by the evidence.

Gookin v Baker & Son, 224-967; 276 NW 418

Note as future gift—presumption. Altho a promissory note for which there is no consideration is an unenforceable promise to make a future gift, nevertheless in an action against an executor on a note the presumption that the note imports a consideration, if negatived, must be overcome by evidence and this burden is on the maker or his representatives.

In re Cheney's Estate, 223-1076; 274 NW 5

Oral agreement between an attorney and a promoter. An attorney who, in an action against a promoter for an accounting, alleges that he acted with the promoter to establish a corporation for conducting "sales contests", which corporation was later dissolved, and that the promoter alone then formed a similar second corporation from which by oral agreement the attorney was to share in the profits, properly has his petition for accounting dismissed, when he fails to establish the alleged oral agreement upon which his action was based.

Davies v Stayton, 226-79; 283 NW 436

Malpractice—proximate cause of damage. In an operation for conization of the cervix, evidence held to clearly place the negligence of the defendants, if any, in failing to keep the canal open while healing, as the proximate cause of plaintiff's injury.

Kirchner v Dorsey, 226-283; 284 NW 171

Materiality — adding suspicions. Rejecting evidence which simply adds suspicions held not prejudicial.

McGrath v Dougherty, 224-216; 275 NW 466

Objections in probate—securities ownership issue—no jury. The probate court having jurisdiction to compel executrix to account for all assets, and the burden to sustain her accounts being on executrix, objections to her accounts raising the issue of ownership of certain securities are triable in probate without a jury.

In re Rinard, 224-100; 275 NW 485

Oral contract to convey land at death. Absence of strong equities in favor of the plaintiff, a son trying to establish an oral contract with his father, since deceased, does not tend to weaken his corroborating testimony.

Blezek v Blezek, 226-237; 284 NW 180

Physician—revocation of license. In proceedings to revoke the license of a physician, ample proof of some of the grounds for revocation renders quite immaterial the fact that other grounds were not proved.

State v Hanson, 201-579; 207 NW 769

Pleading conspiracy and proving joint wrong. Damages for a joint wrong are recoverable even tho an allegation of conspiracy be not proven.

Andrew v Ind. Co., 207-652; 223 NW 529

Pleading carrier's degree of care and res ipsa loquitur. A general allegation of negligence in a petition followed by a further allegation of negligence, dealing with the degree of care required of carriers, did not prevent application of the doctrine of res ipsa loquitur.

Peterson v De Luxe Co., 225-809; 281 NW 737

Possession of liquor—third conviction. Where an indictment charged the defendant with committing the crime of unlawful possession of alcoholic liquor, and that he had been convicted on two previous occasions of liquor law violations, and when defendant pleaded guilty, trial court was under no duty to require proof of former convictions.

State v Erickson, 225-1261; 282 NW 728

Proof under "guest" statute. In a guest's personal injury action against a father and son, owner and driver, respectively, of the motor vehicle, where the petition alleges the son was driving with the "knowledge and consent" of the father, court's refusal to submit to the jury defendant-appellant's special interrogatory as to finding that son was driving car with "knowledge and consent" of father was not error, as it required an element not contained in the statute—proof under the statute need go no further than to show "consent", even tho the allegation of knowledge was in the petition.

Allbaugh v Ashby, 226-574; 284 NW 816

Res ipsa loquitur applicability. The rule of res ipsa loquitur applies where the circumstances attending the injury are of such character that the accident could not well have happened in the ordinary course of events without negligence on defendants' part, and the instrumentalities causing the injury were within exclusive control of defendants.

Peterson v De Luxe Co., 225-809; 281 NW 737

Res ipsa loquitur as rule of evidence. The doctrine of res ipsa loquitur is a rule of evidence not applicable where specific allegations of negligence are pleaded but only where general allegations of negligence are wholly relied upon.

Olson v Cushman, 224-974; 276 NW 777

Specific negligence—res ipsa loquitur—separate counts. Having received burns from a beauty parlor treatment, a plaintiff, after pleading specific acts of negligence in one count and the doctrine of res ipsa loquitur in another count, may at the conclusion of the evidence withdraw the first count and rely on the res ipsa loquitur doctrine which is always applicable in cases where all the instrumentalities are under the control of the operator and where, had ordinary care been used, the injuries would not ordinarily have occurred.

Pearson v Butts, 224-376; 276 NW 65; 2 NCCA(NS) 613

Scintilla evidence rule. In this state a mere scintilla of evidence will not raise a jury question and the trial court will be upheld in directing a verdict where, if the case were submitted and a verdict returned against the moving party, it would be the trial court's duty to set it aside.

Donahoe v Denman, 223-1273; 275 NW 154

Surplus allegation. Plaintiff in an action to recover the balance due on a mortgage-secured promissory note need not allege, and if he does allege, need not prove that the credit on the note arose through a mortgage foreclosure and sale.

Williams v Guy, 209-711; 228 NW 646

Undue burden. No undue burden is imposed on a defending street railway company by requiring it to keep its car "under proper control and to use ordinary care", to operate its car "in a careful manner and not at a dangerous rate of speed", and to give notice of its approach "by ringing the gong or bell or otherwise", when the pleaded assignment of negligence embraces (1) excessive speed, (2) want of proper control of the car, and (3) failure to give warning of the approach of the car.

Johnson v Railway, 201-1044; 207 NW 984

Unjust enrichment as basis for recovery. No basis for recovery against a city, on the theory that the city has been unjustly enriched and

must pay therefor, is established by proof of the reasonable value of that which the city has received.

Roland Co. v Town, 215-82; 244 NW 707

Unpleaded defense—effect. The maker of a promissory note cannot be given the benefit of testimony tending to show that he signed the note under duress when he rests his defense on a distinctly different defense; and the court should so inform the jury.

Farmers Bank v DeWolf, 212-312; 233 NW 524

11182 Amendments allowed.

Discussion. See 22 ILR 128—Amendments after limitation has run

ANALYSIS

I PLEADINGS AMENDABLE
II AMENDMENTS IN GENERAL
III LEAVE OF COURT AND TERMS
IV SUBSTANTIAL NATURE OF AMENDMENT
V ALLOWABLE AMENDMENTS
VI TIMELY AND UNTIMELY AMENDMENTS
VII CONFORMING PLEADINGS TO PROOF
VIII AMENDMENTS IN RE JUSTICE OF THE PEACE APPEALS

Amendments after statute of limitation has run. See under §11007 (XXVII)
Curative amendments. See under §11557

I PLEADINGS AMENDABLE

Right to change remedy. A plaintiff who pleads a rescission of a fraud-induced contract and prays for judgment for the consideration paid, may, upon discovering his inability to prove the rescission, amend his pleadings and pray for damages caused by the fraud. (Note that the reverse of this proposition presents a different rule.)

Reinertson v Struthers, 201-1186; 207 NW 247

II AMENDMENTS IN GENERAL

Error as to abandoned pleading. Errors in ruling on motions aimed at a reply to an amended and substituted answer are harmless when defendant later files a new amended and substituted answer.

Butler Co. v Elliott, 211-1068; 233 NW 669

Plea for additional relief—effect. The fact that a substituted petition asks for the same relief asked in the original petition, and for additional relief, does not change the cause of action.

Dunlop v First Tr. JSL Bank, 222-887; 270 NW 362

Repeating bad pleading—improper striking in toto. Error results from striking in toto an amended and substituted petition in equity on the sole ground that said pleading is but a repetition of a former petition which had been held bad on equitable demurrer (motion to dismiss), when said amended and substituted petition—while in part a repetition of said former bad pleading—alleges an entirely new fact basis for recovery and a prayer in harmony therewith.

Birk v Jones County, 221-794; 266 NW 553

Seeming illegality—explanatory amendment. In an action by private citizens to enjoin a municipality and its contractor from carrying out an alleged, illegal, written contract for the construction of a light and power plant, the defendants may be permitted by the court so to amend their answer as to plead, tho belatedly, that a provision in said contract relative to the manner of testing said plant when completed, and which provision was in material variance with the plans and specifications on which bids were received, was inadvertently inserted in said contract—that the actual agreed test was identical with that called for by said specifications, and that, since the commencement of the suit, the said defendants had entered into a supplemental contract in accordance with said plea.

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

Stipulation of fact as amendment. A duly signed stipulation as to the ultimate facts in a case may become, in legal effect, an amendment to the petition in the case, for the purpose of a subsequently interposed motion to dismiss the petition.

Pierre v Pierre, 210-1304; 232 NW 633

Reply—avoidance of matter first appearing in reply. An answer to a reply seems to be unknown to our practice. But when the defendant in an action to quiet title answers that he is the owner of the property, and is met by a reply that defendant is estopped by his own contract from claiming title, and defendant wishes to plead that said contract was obtained from him by fraud and without consideration, quaere: must defendant plead his said defense (a) by way of amendment to his answer, or (b) does the law impliedly supply such plea?

Carr v McCauley, 215-298; 245 NW 290

Substituted petition constituting new action. The filing, by plaintiff in partition, of an amended and substituted petition, in which the name of his wife is omitted as a defendant and appears as a joint plaintiff, must be deemed the commencement of an entirely new action.

Jones et al. v Park, 220-903; 262 NW 801

III LEAVE OF COURT AND TERMS

Amendment after submission. After the trial and submission of an equitable cause, the court may, without notice to the defendant, permit the filing of an amendment which amplifies a defectively pleaded statutory warranty, it appearing that the defendant ap-

peared and unsuccessfully moved to strike said belated amendment, but proffered no pleading in answer thereto.

Wise v Motors Co., 207-939; 223 NW 862
Kimmel v Mitchell, 216-366; 249 NW 151

Discretion of court. Principle reaffirmed that the granting of amendments, and the refusal to grant a continuance on account thereof, rest largely in the discretion of the court.

Wolfe v Decker, 221-600; 266 NW 4

Permitting belated amendment and receiving testimony. After the evidence in an action at law is closed the court may, in its discretion, permit the filing of an amendment presenting equitable issues, and may receive testimony thereon.

Carlson v City, 212-373; 236 NW 421

Striking amendment to petition when case ready for trial. In a contract action, when the petition had been on file for almost three years, the pleadings made up, the jury impanelled, and witnesses in attendance when their attendance at another time might have been difficult to obtain, the court acted within sound judicial discretion in striking an amendment which the plaintiff had filed without leave of the court, by which the plaintiff attempted to increase the amount of recovery sought, basing the amendment on quantum meruit rather than on the contract, as in the original petition.

Munn v Drakesville, 226-1040; 285 NW 644

IV SUBSTANTIAL NATURE OF AMENDMENT

Conformity to pleading—amendment after default. A personal judgment may not validly be entered on an amendment filed after default, of which amendment the defendant has no notice.

Sutton v Rhodes, 205-227; 217 NW 626

V ALLOWABLE AMENDMENTS

Corporate or partnership capacity. An amendment during the trial, alleging partnership capacity of the defendant in lieu of a former allegation of corporate capacity, is proper.

Mau v Rice Bros., 216-864; 249 NW 206

Substitution of real party in interest. Amendments are allowable which substitute the real party in interest, even though such amendment is filed during the actual trial.

Norton v Ferguson, 203-317; 211 NW 417

Substituting quantum meruit plea. A broker may very properly be permitted, at the close of the testimony, to withdraw his plea of express contract as to a commission, and amend by a plea of quantum meruit.

Lowery Co. v Lamp, 200-853; 205 NW 538

Allowable amendment after reversal. The elements of the doctrine of "last clear chance" may be deemed as inherently attending an allegation which, in effect, charges defendant with proximate negligence up to the very time of the infliction of the injury, even tho said allegation carries no reference to the "last clear chance" or to the doctrine thereof. It follows that after trial and reversal thereof, such allegation may be amended and amplified by alleging facts which, if proven, will specifically present the issue of the "last clear chance".

Spaulding v Miller, 220-1107; 264 NW 8

Amendments allowable after reversal and remand. Defendant, in an action at law, may, after reversal and remand on plaintiff's appeal, amend his answer by pleading new and additional grounds of defense.

Flood v Bank, 220-935; 263 NW 321

Amended answer omitting objectionable parts. In an action on a promissory note where the defendant asked for a set-off of the amount of the note and counterclaimed for an additional amount, and the counterclaim was stricken on motion, a substituted answer by the defendant which omitted the counterclaim was not subject to being stricken because of being identical with the original answer.

Lowry v White, (NOR); 285 NW 687

Amendment to cure error in computation. Amendments filed during the trial of an action to cure an error in the computation of the amount of a party's claim are presumptively proper.

Barth Prod. v Kelly, 211-1154; 235 NW 471

Change of venue—fraud in inception of contract—right to amend answer. A defendant who bases a motion for change of venue to the county of his residence on an answer alleging fraud in the inception of the contract sued on may amend such answer, if he deems it defective, and thereafter stand on the amended answer as a basis for the change of venue.

Wright v Thompson, 209-1133; 229 NW 765

Computation of period—amendment in re conspiracy. A pleader does not, in legal effect, change the nature of his cause of action by striking from his petition the allegation that the defendants "conspired, colluded, and confederated together", and by substituting therefor the allegation that the defendants "acted together jointly and aided and abetted each other".

Dickson v Young, 202-378; 210 NW 452

Issue-changing amendment — allowability. Permitting an issue-changing amendment during the course of a trial in equity is not erroneous when the opposite party is given ample time to meet the new issue.

Markworth v Sav. Bk., 217-341; 251 NW 857

V ALLOWABLE AMENDMENTS—continued

Notice of amendment. A plaintiff who at one stage of the pleadings wholly withdraws his claim for personal judgment against the defendant may later, by proper amendment, reassert such claim without notice to the defendant who has appeared, personally and by counsel, and is actively contesting the relief sought by plaintiff.

Gotsch v Schoenjahn, 201-1317; 207 NW 567

Ownership of property—inadvertent plea—effect. An inadvertent pleading to the effect that a person other than plaintiff had an interest in the insured property becomes of no consequence when the pleading was duly corrected, and when the proofs conclusively established sole ownership in plaintiff.

Havirland v Ins. Co., 204-335; 213 NW 762

Rejecting unsupported amendment. In an action for damages consequent on a child falling into an opening in the floor of a building which was undergoing reconstruction after a fire, an amendment to the petition, alleging that the building was an attractive nuisance, and offered on the theory of conforming the pleadings to the proof, is properly rejected when the record is bare of any evidence that the said place was attractive to children.

Battin v Cornwall, 218-42; 253 NW 842

Remand—right to amend. A plaintiff manifestly does not set up a new and different cause of action when, after remand on appeal in a law action based on negligence, he, by allowable pleadings, rephrases and elaborates an unadjudicated ground of negligence which was embraced in his pleadings at the time of the original trial.

Lahr v Railway, 218-1155; 252 NW 525

Admitting evidence on promise to amend. In a law case, especially, it is poor practice to permit evidence, objected to as incompetent, to be admitted on the promise that amendments would later be filed to meet the proof. Such objections coming after the witness has answered should be followed by motions to strike.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Amendments containing "thread" of original claim not barred. In an action for compensation for professional engineering services involved in construction of a sewage disposal plant, where profuse substitutions and amendments to a petition which keep a thread of thought identifying them with the claim in the original notice are filed, such amendments and substitutions, tho not filed within the allowable period of the statute of limitations, come within the rule that commencement of the action tolls the statute.

Slippy Co. v Grinnell, 224-212; 276 NW 58

Continuance—justifiable refusal. Reversible error does not result from the action of the court in permitting a belated nonissue-changing amendment to the petition to stand, and in refusing defendant a continuance until all his attorneys can be present at the opening of the trial.

Newland v McClelland & Son, 217-568; 250 NW 229

Failure to give notice. A plaintiff may not, after the entry of default, amend his pleadings by increasing the amount of the claim, without notice to the defendant, and take judgment on the amended pleadings.

Chandler Co. v Sinaiko, 201-791; 208 NW 323

Inadvertently omitted party—opening proceeding to supply. A court of equity, in the exercise of a sound discretion, may reopen a foreclosure proceeding on application of the purchaser at, and deed holder under, execution sale, in order to bring in a party who was inadvertently omitted as a party defendant in the original institution of the action, and whose claim is manifestly barred by the statute of limitation.

Johnson v Leese, 223-480; 273 NW 111

Issue-changing. The court does not abuse its discretion in refusing a belated amendment which would convert an action for damages for a permanent nuisance into an action to enjoin a nonpermanent nuisance and for damages.

Cary-Platt v Elec. Co., 207-1052; 224 NW 89

Nonissue-changing amendment—no special appearance after general appearance. If a defendant, by proper appearance to an action and pleading thereto, is in court when an amendment is filed to the petition, which amendment does not create a new cause of action, he is precluded from appearing specially to the petition as amended.

Johnston v Federal Land Bank, 226-496; 284 NW 393

Justifiable rejection. The rejection of an amendment may be justified when filed after the cause is fully submitted to the court and without explanation for the delay.

Thul v Weiland, 213-713; 239 NW 515

New party but same relief—no election of remedies. In an action to compel certain heirs to contribute a share of a judgment arising out of a decedent's ownership of bank stock, a petition that alleges defendants' liability as individuals is not an election of remedies so as to prevent an amendment thereto setting up liability against an estate as an additional party, since there was no change in the nature of relief asked and no choice was made between inconsistent remedies at the time of the election.

Daniel v Best, 224-1348; 279 NW 374

Objectionable form. The practice of amending a pleading by dictating the same into the record during the progress of the trial without any record clearly showing what was done, to the knowledge of all the litigants, is condemned.

Mitchell v College, 200-1202; 206 NW 81

Pursuing noninconsistent remedies. A policyholder who, in an action at law, pleads that the insurer has waived that provision of the policy which invalidates the insurance in case of a change in the title to the insured property, and is unsuccessful on appeal in sustaining said plea, does not thereby make such an election of remedies as will prevent him, after remand, from amending and praying in equity that the policy be so reformed as to eliminate the invalidating provision.

Green v Ins. Co., 218-1131; 253 NW 36

Specific performance action. Where a plaintiff, after starting a specific performance action to require a federal land bank to complete a loan as agreed, loses the land by foreclosure because the money from the agreed loan is not available to pay off the outstanding mortgage —thereby damaging the plaintiff-landowner by the loss of his equity in the land—an amendment to the specific performance petition changing the relief sought and seeking damages ascertainable after institution of the original suit does not set up a new cause of action.

Johnston v Federal Land Bank, 226-496; 284 NW 393

Unallowable amendment after remand. A party who attacks the constitutionality of a statute on specified grounds, and, on appeal is defeated in his contentions, will not, after remand to the trial court, be permitted to file an amendment to his pleading attacking the constitutionality of the law on new and additional grounds.

Rural Dist. v McCracken, 215-55; 244 NW 711

Unamendable pleadings. When the trial court abates an equitable action (e. g., mandamus) by dismissing it on the ground of misjoinder both of parties plaintiff and of causes of action, and plaintiff makes no effort to avoid the abatement by pruning out of his pleading the objectionable misjoinders, but stands on his pleadings, and on appeal suffers an affirmance of said order of dismissal, he may not thereafter amend his pleadings in the dismissed action by then pruning out said objectionable matter. The pleadings of a finally dismissed action are, manifestly, not subject to amendment.

First N. Bank v Board, 221-348; 264 NW 281; 106 ALR 566

Nonallowable amendment. A timely brought action based solely on the common law plea of defendant's liability consequent on the negligent operation of an automobile by defendant's employee, in due course of employment, may not, after the action would be barred by the statute of limitation, be so amended as to wholly abandon said pleaded basis and to substitute an entirely new basis for recovery, to wit, an allegation that defendant was liable because the automobile in question belonged to defendant and was operated at the time in question with defendant's consent.

Page v Constr. Co., 219-1017; 257 NW 426

Unnecessary amendment. In proceedings for the appointment of a guardian, the allegation of unsoundness of mind made when the petition is filed may be supported by testimony of unsoundness at the time of the trial, tho the proceedings be long protracted. It follows that the unnecessary allowance of an amendment alleging such subsequent unsoundness is quite harmless.

Anspach v Littler, 217-787; 253 NW 120

Workmen's compensation act — lost memorandum of agreement—procedure. In a proceeding to obtain judgment on a lost memorandum of agreement relative to compensation under the workmen's compensation act, the said memorandum, if found after the record is closed, may yet be made a part of the record, with the consent of the court, by proper amendment to the pleadings.

Biggs v Bank, 218-48; 254 NW 331

VI TIMELY AND UNTIMELY AMENDMENTS

Timely amendment. An amendment to an answer setting up a new defense, filed on the opening day of trial, and as soon as defendant learned of the defense, is timely.

Finch v Gates, 210-859; 229 NW 832

Changing issue after trial. Issue-changing amendments are properly rejected when made after trial.

Fairley v Falcon, 204-290; 214 NW 538
Benson v Sawyer, 216-841; 249 NW 424

Dual amendments on same subject matter—timeliness. Permitting several amendments as to the same subject matter, some being filed after the commencement of the trial, may be proper, especially when complainant has been in no manner surprised.

Dougherty v McFee, 221-391; 265 NW 176

Belated amendment. Striking an amendment filed after the opening statements at the second trial of the cause, is within the discretion of the court, especially when the same amendment had been stricken at the first trial.

Lockie v Baker Est., 208-1293; 227 NW 160

Belated issue-changing amendment. The refusal to allow an issue-changing amendment after the close of the testimony, and after a

VI TIMELY AND UNTIMELY AMENDMENTS—concluded

motion had been made to direct a verdict, will not be disturbed in the absence of a showing of prejudice, and especially when an element of negligence exists in not filing the amendment at an earlier date.

Lawyer v Stansell, 217-111; 250 NW 887

Belated new issue. Plaintiff may not amend after verdict and inject into his petition for the first time a plea for "future mental and physical pain".

Pettijohn v Halloran, 200-1355; 206 NW 631

Belated, issue-changing and prejudicial amendment properly stricken. An amendment to an answer is properly stricken on motion when said amendment, if allowed, would materially change the issues to the prejudice of plaintiff, would delay the trial, and was filed after the trial had proceeded some eight days, and after plaintiff had closed his evidence, and when the cause was substantially ready for submission to the jury.

McKeown v McKeown, 220-791; 263 NW 266

Amended and supplemental pleadings—issue-changing amendment. Principle reaffirmed that issue-changing amendments are unallowed after the close of the testimony.

Andrew v Golf Club, 217-577; 250 NW 709

Belated pleading — discretion to strike. Striking an amended and substituted answer and counterclaim which is filed over 18 months after the overruling of defendant's motion to strike and demurrer to petition, instead of being filed within 10 days after said ruling as provided by the court, evinces no abuse of the discretion lodged in the trial court.

Andreas & Son v Hempy, 221-1184; 268 NW 13

Belated plea of fraud. A timely petition for the vacation of a judgment on the ground that the stipulation on which the judgment was rendered was wholly unauthorized, may not, after the lapse of one year after the rendition of the judgment, be so amended as to inject the issue of fraud as a basis for such vacation. (§12790, C., '24.)

Haas v Nielsen, 200-1314; 206 NW 253

Belated and unsupported amendment. It is doubly erroneous for the court, after argument has closed, (1) to permit an amendment assigning a new ground of negligence which is without support in the evidence, and (2) to submit such alleged negligence to the jury.

Peckinpaugh v Engelke, 215-1248; 247 NW 822

Fatally belated amendment. An issue-changing amendment offered by defendant after he had repeatedly amended his pleadings and delayed the cause, and after testimony had been taken by deposition in a distant state, and after the trial had reached its closing stage, is properly rejected.

Hunt, etc. v Moore, 213-1323; 239 NW 112

Fatally belated and unallowable amendment. After an action has been twice tried in the trial court, and once heard on appeal in the supreme court on the same issues, it is not permissible to so change the issues as to present a distinctively different cause of action.

State v Cordaro, 214-1070; 241 NW 448

Fatally delayed amendment. The court may be quite justified, in the midst of a trial, in refusing an amendment which will entirely change the issues, even tho the other party to the action is willing to meet the proposed change in the issues.

Dolan v McManus, 209-1037; 229 NW 687

Pleadings amended after submission—refusal. It is not error to refuse permission to file an issue-changing amendment after submission of the cause.

Carpenter v Lothringer, 224-439; 275 NW 98

Unallowable amendment. An amendment to a petition, filed after the cause has been fully tried and submitted to the court, and without leave of the court, and brought to the appellate court as an amendment to the abstract, will be stricken on motion.

Fleming v Fleming, 211-1251; 230 NW 359

Belated presentation of proposition—nonreviewable. Where there is a failure to make a timely submission of a proposition in the court below, it will not be considered on appeal.

Whisenand v Van Clark, 227-800; 288 NW 915 .

VII CONFORMING PLEADINGS TO PROOF

Liberality of rule. Quite large discretion is lodged in the trial court in allowing amendments to pleadings in order to conform pleadings to proof.

Eilers v Frieling, 211-841; 234 NW 275

Conforming pleading to proof. One who pleads fraud in the inception of a contract and prays for rescission on that ground may, at any proper time, and in order to conform the pleadings to the proof, amend by pleading that no contract ever existed, because of the failure of the minds of the parties to meet on the terms of the contract.

Cloud v Burnett, 201-733; 206 NW 283

Conforming pleadings to proof—absence of prejudice. An amendment to a petition, which simply conforms the pleadings to the proofs already taken, cannot be deemed prejudicial.

Hardin v Ins. Co., 222-1283; 271 NW 176

Conforming pleadings to proof. Amendments after verdict are proper when they present no new issue and take no one by surprise, but simply conform the pleadings to the proofs.

Yaus v Egg Co., 204-426; 213 NW 230
State v Carney, 208-133; 217 NW 472

Pleading conforming to proof. A pleading may be amended to conform to the proof.

Henriott v Main, 225-20; 279 NW 110

Amendment after appeal. An amendment which is filed after reversal on appeal, and filed in order to conform the pleadings to the real issue as determined on the appeal, should not be stricken, especially when the same issue appears to have been voluntarily litigated in the original trial.

In re Talbott, 204-363; 213 NW 779

Amendment not permitted. An assignment of error which stated that "the court abused its discretion when it refused to permit plaintiff to amend its amended and substituted petition to conform to the proof" is insufficient when the written contract sought to be enforced was not established by the proof; and the court's refusal to permit amendment to pleadings was not an abuse of discretion.

Clare v Pearson, 227-928; 289 NW 737

Belated reply. A reply filed without leave of court and after the trial is concluded, and purporting to conform the pleadings to the evidence, may be considered, notwithstanding its untimeliness, when neither party is deprived thereby of any testimony.

McDonald v Morrison, 211-882; 228 NW 878

Correcting error in copy. An error in a copy of an instrument attached to a pleading may be corrected during the trial, especially when the error had no bearing on any issue in the case.

Mau v Rice Bros., 216-864; 249 NW 206

Nonissue changing. Plaintiff may not successfully complain of an amendment, filed at the close of all the testimony, which conforms the pleadings to the proofs and in no manner changes the defendant's position.

Andrew v Martin, 218-19; 254 NW 67

Res ipsa loquitur in amendment—nonconformity to evidence. Where a prospective purchaser driving a used automobile belonging to an automobile dealer takes as a passenger a person familiar with automobiles to advise as to its value, and while so driving has an accident wherein the passenger is injured, an amended petition relying on the doctrine of res ipsa loquitur does not conform to the proof where the evidence excludes the likelihood of any automobile defect and indicates the accident was caused by driver trying to close automobile door against wind.

Sproll v Burkett Co., 223-902; 274 NW 63; 2 NCCA (NS) 424

Unallowable amendment. An amendment filed after decree, on the theory of conforming the pleading to the facts proven, is necessarily unallowable when the record contains no evidence supporting the amendment.

Des M. Music v Lindquist, 214-117; 241 NW 425

VIII AMENDMENTS IN RE JUSTICE OF THE PEACE APPEALS

Allowable amendment. On appeal from the judgment of a justice of the peace, an unassailed amendment by defendant, setting up a counterclaim which was stricken in the justice court, is good.

Davis v Robinson, 200-840; 205 NW 520

11183 Continuance on account of amendment.

Estoppel. An order which permits the filing of an issue-changing amendment will not be reviewed on appeal when it appears that appellant rejected an offered continuance.

Kellar v Lindley, 203-57; 212 NW 360

11184 How amendment made—substitute pleading.

Discussion. See 22 ILR 128—Amendments after limitation has run

11185 Interrogatories annexed to pleading.

Interrogatories to jury. See under §§11513, 13916

Answers to interrogatories. Answers to interrogatories which are offered in evidence for a particular purpose by the party requiring them, are in evidence for other purposes.

Hart v Ins. Assn., 208-1020; 226 NW 777

Disclosure of insurance settlement. In an automobile owner's damage action against a street railway, wherein defendant pleads a general denial and alleges that plaintiff is not the real party in interest, and wherein interrogatories attached to defendant's answer disclose that plaintiff's loss had been partly settled through insurance, and when defendant then alleges that a bank holds a mortgage on plaintiff's automobile, and moves the court to

bring in the insurer and the mortgagee-bank as parties, such motion was properly overruled.

Caligiuri v Railway, 227-466; 288 NW 702

Order overruling objections to interrogatories—not appealable. An order overruling objections and exceptions to interrogatories attached to a plaintiff's petition in an action for accounting is not an order from which an appeal will lie.

Eby v Phipps, 225-1328; 283 NW 423

Review of order overruling objections. This statute simply creates a rule of evidence; and an order which overrules objections to such interrogatories on the naked ground of irrelevancy, incompetency, and immateriality, and which requires the adversary to answer such interrogatories, is not reviewable by certiorari.

Winneshiek Bank v Dist. Court, 203-1277; 212 NW 391

11191 Effect of failure to answer.

Failure to answer—effect. Defendant's failure to answer interrogatories attached to the petition will not entitle plaintiff to judgment on his affidavit and claim when the court has not fixed the time within which the interrogatories must be answered.

Union Rep. Co. v Anderson, 211-1; 232 NW 492

11196 Evidence under denial.

Issues under general denial. See under §11114
Matters specially pleadable. See under §11209

Affirmative elaboration of general denial. The beneficiary in an accident insurance policy has the burden of proof to establish that the insured was killed under the particular condition covered by the policy and alleged in the petition, notwithstanding elaborate affirmative assertions by the defendant in addition to a general denial.

Nelson v Acc. Soc., 212-989; 237 NW 341

Burden of proof. A bank which furnishes its customer periodical statements of the condition of his debits and credits which are acquiesced in by the long silence of the customer, is under no burden of proof to disprove the subsequent claim of the customer that certain specified items of the account were incorrect. The burden rests on the customer to establish his allegation of incorrectness.

State Bank v Cooper, 201-225; 205 NW 333

Collateral issue. The right to pursue a collateral issue developed on cross-examination is in distinct disfavor in our law, especially when the evidence in support thereof is ambiguous, remote from all proper issues, and otherwise incompetent.

Moen v Fry, 215-344; 245 NW 297

Exercise of option—reasonable time—jury question. In an action to recover part of an advance paid for corn stored in an elevator under a written contract to sell at seller's option, the filing of a general denial raises the issue of defendant's performance; and question as to whether defendant exercised his seller's option within a reasonable time is for the jury.

Andreas & Son v Hempy, 224-561; 276 NW 791

General denial—evidence of gift admitted. Evidence to establish a gift is admissible under a general denial.

Wilson v Findley, 223-1281; 275 NW 47

Permissible evidence. Under a general denial of an allegation of a loan, defendant may show that the money received by him was his own money.

Southhall v Berry, 207-605; 223 NW 480

Poor practice—admitting evidence on promise to amend—motion to strike. In a law case, especially, it is poor practice to permit evidence, objected to as incompetent, to be admitted on the promise that amendments would later be filed to meet the proof. Such objections coming after the witness has answered should be followed by motions to strike.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Quantum meruit. A denied plea of quantum meruit for services rendered must be established, or plaintiff must fail, irrespective of whether the defendant does or does not establish his defensive plea that the contract of employment was different, and that thereunder the plaintiff had been paid. Instructions are necessarily erroneous when to the effect that defendant is entitled to the verdict only in case he establishes his claim as to the contract.

Olson v Shuler, 203-518; 210 NW 453

Rescission for fraud—general denial—effect. Where plaintiff alleges rescission of a contract of sale because of defendant's fraud and seeks to recover the money paid, a general denial does not raise the issue that plaintiff after discovering the fraud elected to affirm the contract.

Blecher v Schmidt, 211-1063; 235 NW 34

Stock—subscriptions—burden of proof. In an action by a corporation on a stock subscription contract for stock in an unorganized but contemplated corporation, plaintiff has the burden to establish every nonadmitted fact entitling it to recover, even tho defendant, in addition to a limited general denial, pleads in great detail that plaintiff's corporate organization was wholly beyond the contemplation of his subscription contract.

Cedar Rapids Amus. Assn. v Wymer, 213-1012; 240 NW 644

Unavailable matters in avoidance. Under a general denial of a contract of employment,

defendant may not show that the contract was terminated by the discharge of the plaintiff.

Hornish v Overton, 206-780; 221 NW 483

11197 Sham defenses—redundant matter.

Discussion. See 17 ILR 508—Sham and frivolous pleading; 20 ILR 49—Defective pleading

Abstracts of record—motion to strike. The court will be slow to strike amendments to an abstract when the filing appears to be actuated by a good-faith desire to present with great thoroughness matters of unusual importance.

McCarthy Co. v Coal Co., 204-207; 215 NW 250; 54 ALR 1116

Accord and satisfaction—when plea unallowable. A plea of accord and satisfaction is properly stricken from a pleading when the pleading affirmatively shows that no basis existed or could exist for the plea—affirmatively shows that no bona fide dispute existed or could exist as to the amount due under the instrument on which suit was brought.

Jacobsen v Moss, 221-1342; 268 NW 162

Alleging note as receipt—sham defense—striking. Where a written instrument sued upon contains the legal elements of a negotiable promissory note, an allegation in an answer that such written instrument was a receipt shows on its face that such pleading is false and should be stricken on motion.

Hillje v Tri-City Co., 224-43; 275 NW 880

Answer negativing petition. An answer which, in effect, is a negation of the allegations of the petition, proof of which plaintiff must make in order to recover, is not subject to a motion to dismiss.

Clark Bros. v Anderson, 211-920; 234 NW 844

Appeal—abandonment. An appeal from the refusal of the court to strike a petition must be deemed abandoned when it is made to appear that subsequent to the perfecting of the appeal, the appellant answered the petition and went to trial on the merits.

Iowa Bk. v Raffensperger, 208-1133; 224 NW 505

Assignment of error. Error, if any, of the court, during the trial, in striking evidence or tendered issues cannot be reached by an assignment of error to the effect that the court erred in failing to instruct on said stricken matters. The assignment must be on the original alleged erroneous striking of said matters.

Reidy v Railway, 220-1386; 258 NW 675

Attorney and guardian fees—immateriality. Allegation, in petition to terminate guardianship, that 37 percent of the receipts of the guardianship had been paid to guardian and his attorney for fees and expenses, was properly stricken out on motion as not being material to the issue before the court.

In re Hawk, 227-232; 288 NW 114

Brief of authorities—motion to strike. An elaborate brief of authorities, inserted in a pleading following the pleading of foreign statutes, is properly stricken on motion.

Kingery v Donnell, 222-241; 268 NW 617

Certiorari to review ruling. A litigant who moves to strike a pleading or to require it to be made more specific, may not have the rulings on his motion reviewed on certiorari; and this is necessarily true even tho it be conceded, arguendo, that the pleading in question was not legally on the calendar.

Holcomb v Franklin, 212-1159; 235 NW 474

Conclusions. Conclusions and immaterial matter have no proper place in a pleading and should be stricken on motion.

Andrew v Indem. Co., 207-652; 223 NW 529

Construction in view of stricken references. While the striking of portions of the first division of an answer may be proper as far as plaintiff's action is concerned, yet the court must treat said stricken portions as unstricken in construing defendant's cross-petition contained in a subsequent division of his answer when said stricken portions are essentially material to the cross-petition and are incorporated therein by distinct reference.

Andrew v Boyd, 213-1277; 241 NW 423

Escheat proceeding — striking allegations asking for new administrator—no appeal—dismissal. Where the state of Iowa in an estate proceeding files an application for the escheat to the state of the property in the estate and includes in its application extensive allegations dealing with the selection of a new administrator, a motion to strike those portions of the pleading dealing with the new administrator, when sustained, does not present an interlocutory order from which an appeal will lie, and, if taken, the appeal will be dismissed on motion.

In re Bannon, 225-839; 282 NW 287

Evidence on stricken plea. After striking from a pleading a claim for damages, error necessarily results from receiving evidence as to the claim and leaving the instructions in such form that the jury may give consideration to such evidence in arriving at their verdict.

Bremhorst v Coal Co., 202-1251; 211 NW 898

Foreign procedural statutes—nonright to plead. In an action in this state to recover damages sustained in a foreign state in consequence of the alleged actionable negligence of the defendant in operating an automobile in said foreign state, plaintiff has no right to

plead the procedural statutes and rules of law of said foreign state. For example, those pertaining:

1. To what matters would be presumptive evidence of negligence.

2. To the burden of proof in the trial of the action.

3. To the right of plaintiff to submit his action on different theories of the evidence.

Reason: All said matters are purely procedural.

Kingery v Donnell, 222-241; 268 NW 617

Harmless striking of duplicate count. The striking by the court of one of several counts of a petition must be deemed quite harmless when the matter stricken is substantially repeated in an unstricken count.

McGlothlen v Mills, 221-204; 265 NW 117

Harmless striking of material allegation. No injury results from striking a material allegation from a pleading when the record shows that in the trial the matter stricken was treated as at issue, was duly tried out, and was properly submitted to the jury.

Rudd v Jackson, 203-661; 213 NW 428

Immaterial allegations. On the issue whether plaintiff is entitled to recover damages for a personal injury because of an alleged negligent act, allegations (1) that parties other than plaintiff were injured, and (2) that defendant carried indemnity insurance, are wholly immaterial, and subject to a motion to strike.

Seleine v Wisner, 200-1389; 206 NW 130

Immaterial matter. Immaterial matters are properly stricken from a pleading.

Thomas v Disbrow, 208-873; 224 NW 36; 30 NCCA 672

Improper motion to strike and judgment on pleadings. A motion to strike an answer and for judgment on the pleadings manifestly cannot be properly sustained when the answer, both by general and specific denials, puts in issue the very gist of plaintiff's cause of action.

Ind. Sch. Dist. v Sch. Dist., 216-1013; 250 NW 192

Improper rebuttal evidence—motion to strike necessary for review. If the answer of a witness does not properly constitute rebuttal evidence, it should be attacked by a motion to strike, and the court commits no reversible error in permitting it to stand in the absence of objection.

Churchill v Briggs, 225-1187; 282 NW 280

Irrelevant matter. In an action to set aside decrees canceling certain assessments for paving, because of failure to substantially perform the contract, a cross-petition repleading the formerly sustained plea of "failure substantially to perform the contract" should be stricken, on motion; because, if the decrees were valid, such repleaded matter effected nothing, and if the decrees were invalid, the court had no jurisdiction to entertain the plea, as the time within which to present such a plea had expired.

Western Corp. v City, 203-1324; 214 NW 687

Irrelevant and immaterial matter. In an action for breach of a written contract to sell all fine coal screenings "produced" during a stated time, a pleading that the parties mutually understood that the contract required the seller "to screen all the coal mined during the term" of the contract is irrelevant and immaterial, and properly stricken on motion (1) even tho the contract specifies what shall be deemed "screenings", and (2) even tho such pleading is sought to be aided by a plea of estoppel and custom.

Iowa Co. v Coal Co., 204-202; 215 NW 229

Irrelevant matter on foreclosure. An allegation by a mortgagor in mortgage foreclosure that he had sold the property to one who had not been brought into the foreclosure, and was holding the property as the tenant of said grantee, is irrelevant to any issue in the foreclosure, and is properly stricken on motion.

Kaeser v Manderschied, 203-773; 211 NW 379

Irrelevant and redundant matter.

Iowa Co. v Coal Co., 204-202; 215 NW 229

Joinder—city and benefited property owners. There is no misjoinder of parties or causes of action, where a city in its own behalf and in behalf of the parties beneficially interested brings an action against a contractor, combining therein both a claim for damages for defective pavement and a claim for the cost of "coring" to determine the thickness, since the basis for the latter claim was found in the contract. A motion to strike is properly overruled.

Sioux City v Krage, 225-1154; 281 NW 828

Matter judicially held insufficient. A plaintiff has no right to re-plead a count which has been judicially and finally held to present no cause of action even tho he combines said condemned count with another count. It follows that said last count is properly stricken insofar as it embraces said formerly adjudicated count.

Arthaud v Griffin, 212-646; 235 NW 66

Motions—as pruner for nondefensive matter. Nondefensive allegations in answers are properly stricken on motion.

McGraw v Seigel, 221-127; 263 NW 553; 106 ALR 1035

Motions—mending hold. Answer reviewed in an action for recovery of double benefits on a life insurance policy, and held not strikeable

on motion on the alleged ground that defendant was thereby changing his defensive position after action had been brought on the policy.

Wenger v Assur. Soc., 222-1269; 271 NW 220

Motions — striking immaterial allegations. When neither material nor asserted as the truth, allegations in a pleading may be stricken on motion.

Johnstone v Johnstone, 226-503; 284 NW 379

Overruled motion to strike—suffering final judgment. Where a motion to strike which is not the equivalent of a demurrer is overruled, the defeated party is under no duty to suffer final judgment as a condition precedent to an appeal—assuming a right of appeal exists.

Dorman v Credit Co., 213-1016; 241 NW 436

Scope of motion. A motion to strike a pleaded cause of action from two of three existing, specified, and separate pleadings by the same party does not embrace the striking of the cause of action from the third pleading.

Matthews v Quaintance, 200-736; 205 NW 361

Unallowable motion to strike. A second motion to strike matter from the same unamended petition is unallowable.

Conner v Henry, 205-95; 215 NW 506

Nonappealable order—dismissal sua sponte. On an attempted appeal from an order which the appellate court has no jurisdiction to review (e. g., an order striking portions of an answer) the court will dismiss sua sponte, even tho the opposing party does not move to dismiss.

Joslin v Bank, 213-107; 238 NW 715

Nonappealable ruling. An order overruling a motion to strike alleged immaterial or redundant allegations, or to strike matters which do not involve the merits of the case, is not appealable.

Morrison v Clinic, 204-54; 214 NW 705

Nonstrikeable matter. An allegation to cancel the obligations on notes joined with an allegation to cancel the mortgage securing the notes, and to quiet plaintiff's title to the land, is not strikeable. (So held where the controversy was as to the proper venue.)

Eckhardt v Bankers Trust Co., 218-983; 252 NW 373

Order striking portion of answer. An order striking part of an answer is not appealable when defendant fails to stand upon his pleading or to allow final judgment to be entered against him. In other words, he may not maintain an appeal and at the same time maintain his right in the trial court to amend.

Joslin v Bank, 213-107; 238 NW 715

Private drainage—construction under contract. On the issue whether a dominant estate holder may maintain a tile drainage system on his land, and by means thereof discharge waters on the land of a servient estate holder, a plea should not be stricken which asserts, in substance, that the tile system in question was constructed at large cost under an agreement with the former owner of the servient estate, and was open, visible, and notorious to all subsequent purchasers of the latter estate.

Salinger v Winthouser, 200-755; 205 NW 309

Redundant matter. In an action for breach of a written contract to sell all fine coal screenings "produced" during a stated time, a pleading that the parties mutually understood that the contract required the delivery of all fine screenings "produced * * * during the term of said contract" is redundant and properly stricken on motion.

Iowa Co. v Coal Co., 204-202; 215 NW 229

Redundant matter strikeable on motion. Repetitious pleadings are properly stricken on motion.

Flood v Bank, 220-935; 263 NW 321

Redundant pleadings. In an action on a written contract, that part of the pleadings which alleges the mutual understanding of the parties as to the requirements of the contract is properly stricken when such requirements appear on the face of the contract.

Iowa Co. v Coal Co., 204-202; 215 NW 229

Refusal to strike. The refusal to strike a count confined to general allegations of negligence is of no consequence when the specific allegations of the remaining count simply elaborated the general allegations.

Tissue v Durin, 216-709; 246 NW 806

Repeating bad pleading — improper striking in toto. Error results from striking in toto an amended and substituted petition in equity on the sole ground that said pleading is but a repetition of a former petition which had been held bad on equitable demurrer (motion to dismiss), when said amended and substituted petition,—while in part a repetition of said former bad pleading,—alleges an entirely new fact basis for recovery and a prayer in harmony therewith.

Birk v Jones County, 221-794; 266 NW 553

Service by publication—frivolous objection to affidavit. Argument that an affidavit of publication of original notice having been signed by the "foreman" of the newspaper did not constitute an affidavit by "the publisher or his foreman" in compliance with the statute is too hypercritical and frivolous to be noticed on appeal.

Hanson v Hanson, 226-423; 284 NW 141

Stay of proceedings — discretion of court. The matter of granting a stay pending appeal from an order overruling a motion to strike

is one resting largely in the sound discretion of the trial court.

State v Murray, 219-108; 257 NW 553

Striking allegation (?) or withdrawal of issue (?). It is not proper practice, at the close of all the evidence, to move to strike from the petition unsupported or legally insufficient allegations of negligence. The proper practice is to move to withdraw such issues from the jury.

Townsend v Armstrong, 220-396; 260 NW 17

Striking counterclaim — effect. An order striking a counterclaim in toto necessarily strikes the prayer for recovery on the counterclaim.

Davis v Robinson, 200-840; 205 NW 520

Striking cross-petition. An order in foreclosure proceedings striking a defendant's cross-petition from the files is not appealable when defendant's answer, which remained on file, properly pleaded and prayed for the sole and identical relief pleaded and prayed for in said cross-petition.

Yeomen v Ressler, 216-983; 250 NW 169

Striking definitely pleaded defense. Definitely pleaded defensive matter should not, manifestly, be stricken from an answer.

Meredith v Miller, 209-849; 228 NW 14

Striking duplicate matter. Striking one count of a petition, on the mistaken assumption that it is but a repetition of a remaining count, is necessarily erroneous.

Lamp v Williams, 222-298; 268 NW 543

Striking irrelevant and redundant matter. Where plaintiff involves in one action (1) demands, as a taxpayer, against a county, and (2) demands against reorganized banks as a depositor thereof, the court commits no error in striking, after the county has been dismissed as a party, all plaintiff's allegation relative to his status as a taxpayer.

Pugh v Polk Co., 220-794; 263 NW 315

Striking legally unprovable allegation. Legally unprovable allegations in pleadings are properly stricken on motion. So held where, in an action at law to recover the amount due on a written lease, defendant, while admitting the due execution by him of the written lease, pleaded a prior oral lease—contradictory of the written lease—as containing the correct terms of the leasing.

Jacobsen v Moss, 221-1342; 268 NW 162

Superfluous denials. A defendant who has denied generally and specifically may not complain that additional affirmative allegations of fact and of argument in emphasis of his denials are stricken from his answer.

Rudd v Jackson, 203-661; 213 NW 428

Unallowable repetition. The filing of a petition once held insufficient is properly reached by a plea to the jurisdiction, or by a motion to strike, treated as such plea.

Swartzendruber v Polke, 205-382; 218 NW 62

Using wrong side of road. An allegation that defendant's car at the time of a collision was "over the center of the pavement, and over on plaintiff's side of the pavement" may be very material and not subject to a motion to strike.

Harriman v Roberts, 211-1372; 235 NW 751

Waiver of right to ruling. Plaintiff waives his right to a ruling on his motion to strike portions of the answer before ruling is made on defendant's motion for a directed verdict, when plaintiff at the close of the trial acquiesces in the action of the court in considering both motions at the same time.

Ankeney v Brenton, 214-357; 238 NW 71

11198 Statute—how pleaded.

Foreign procedural statutes—nonright to plead. In an action in this state to recover damages sustained in a foreign state in consequence of the alleged actionable negligence of the defendant in operating an automobile in said foreign state, plaintiff has no right to plead the procedural statutes and rules of law of said foreign state. For example, those pertaining:

1. To what matters would be presumptive evidence of negligence.
2. To the burden of proof in the trial of the action.
3. To the right of plaintiff to submit his action on different theories of the evidence.

Reason: All said matters are purely procedural.

Kingery v Donnell, 222-241; 268 NW 617

Foreign remedial statutes—right to plead. In an action in this state to recover damages sustained in a foreign state in consequence of the alleged actionable negligence of defendant in operating an automobile in said foreign state, plaintiff may plead those statutes and rules of law of said foreign state from which actionable negligence, under the facts of the case, are deducible, e. g., those (1) which declare the degree of care required of defendant in such operation in said foreign state, and (2) the nature and degree of plaintiff's contributory negligence which will bar his action, said pleaded statutes and laws being of the very essence of plaintiff's cause of action, and not contrary to the public policy of this state, even tho they exact a greater degree of care than would be exacted by the law of this state had the injury occurred in this state.

Kingery v Donnell, 222-241; 268 NW 617

11199 Inconsistent defenses—verification.

ANALYSIS

I INCONSISTENT DEFENSES IN GENERAL
II "DENIAL" AND "CONFESSION AND AVOIDANCE" AS INCONSISTENT DEFENSES
III INCONSISTENT ATTITUDE

I INCONSISTENT DEFENSES IN GENERAL

Contradicting one's own pleading. A pleader is not estopped from pleading a state of facts which is absolutely contrary to his pleaded state of facts in a former pleading in the same court and in the same trial.

First N. Bk. v Frank, 203-364; 212 NW 705

Inconsistent defenses—abandonment—effect. The abandonment of certain defensive issues and the substitution of another issue in lieu thereof may not be deemed the pleading of inconsistent defenses.

Schaffer v Acklin, 205-567; 218 NW 286

Inconsistent theories of recovery. When a plaintiff can, as a matter of law, avail himself of a contract provision only on the supported theory that defendant has performed the contract, it is baldly manifest that plaintiff cannot recover under said provision when his entire action rests on the asserted theory that defendant has not performed the contract.

Andrew v Bank & Trust Co., 219-921; 258 NW 911

Nonstatutory verification fatal. In an action upon a promissory note, where defendant's answer contained two inconsistent defenses in separate counts, the answer, being verified on defendant's "knowledge, information and belief", was properly stricken on motion, where the statute, in such cases, provided the verification must allege that "the party believes one or the other to be true but cannot determine which".

Stern Finance Co. v Bleifuss, 226-665; 284 NW 460

Use of pleadings for impeaching purposes. Pleadings and amendments thereto which reveal changes and enlargements of the amount sued for may be used for impeaching purposes, and the court may so instruct.

Wilson v Else, 204-857; 216 NW 33

II "DENIAL" AND "CONFESSION AND AVOIDANCE" AS INCONSISTENT DEFENSES

Denial of contract, and payment. A defendant may very properly plead in denial of the contract of employment alleged by plaintiff, and payment of the obligation created by such alleged contract.

Baker v Davis, 212-1249; 235 NW 749

Denial precludes demurrer. An answer which pleads a denial of the execution of the note sued on is not demurrable, even though, in an evident attempt to plead inconsistent defenses, the answer contains a colorable confession of such execution.

Seibel v Olson Bros., 202-711; 210 NW 925

Necessity for separate counts. A general denial and a plea of settlement of plaintiff's cause of action embraced in one count or division of an answer render inadmissible evidence in support of the general denial, because, when both defenses are pleaded in the same count or division, the general denial is nullified by the plea of settlement.

Miller v Johnson, 205-786; 218 NW 472

New matter and general denial in single division. Where new defensive matter and a general denial are pleaded in a single division answer, the admission implied of the cause of action must control; however, an answer in fact separating its general denial and other matters into numbered parts, altho lacking the word "division" before each numeral, is sufficiently divided to avoid the effect of the foregoing rule.

Keshlear v Banner, 225-471; 280 NW 631

III INCONSISTENT ATTITUDE

Estoppel. Pleadings reviewed, and held to evince no inconsistent attitude.

Webber v King, 205-612; 218 NW 282

11201 What deemed admitted.

ANALYSIS

I IN GENERAL
II DENIAL OF FACT ALLEGATIONS
III DENIALS IN LAW
IV ESTOPPEL TO DENY ISSUE
V ADMISSIONS

Waiver of law denial. See under §11158, Vol I
When reply necessary. See under §11156

I IN GENERAL

Establishing immaterial reply. An answer which pleads affirmative defenses and a reply which pleads adjudication of such alleged affirmative defenses both become quite immaterial when defendant offers no evidence in support of his answer, but defendant has no basis for complaint if the court finds that the allegations of the reply have been established, and renders judgment for plaintiff "under the whole record".

Hiller v Felton, 208-291; 225 NW 452

II DENIAL OF FACT ALLEGATIONS

Unnecessary assumption of burden. A plaintiff may assume the burden of showing that the signature to an instrument, defensively pleaded against him by the defendant, is not genuine, even tho he might have availed him-

self of a statutorily implied denial of the answer, or might have definitely cast the burden as to genuineness upon the defendant by a denial under oath. And, if he successfully establishes the aforesaid negative, he will be accorded the same protection as tho the defendant had failed to establish the affirmative.

McFerren v Bank, 214-198; 238 NW 914

III DENIALS IN LAW

Existence of lease—conclusiveness on pleader. A litigant who both concedes and alleges in his pleadings that the adverse party is in possession of premises under a lease is necessarily bound thereby.

Metropolitan v Andrews, 215-1049; 247 NW 551

When reply not necessary. In an action by a guardian of a minor on a certificate of deposit issued to the minor by the defendant bank, an answer alleging that the minor, in the re-organization of the bank, waived a named portion of the deposit is denied by operation of law.

McFerren v Bank, 214-198; 238 NW 914

IV ESTOPPEL TO DENY ISSUE

Ex parte allowance of fees. Tho unsupported by affidavits, every material allegation in a verified motion attacking an ex parte order allowing executor's and attorney's fees for extraordinary services will, in the absence of attack thereon or resistance thereto, be taken as true.

In re Metcalf, 227-985; 289 NW 739

V ADMISSIONS

General denial coupled with inferential admission. In an action on a promissory note, an answer which contains a general denial is not rendered demurrable by an answering statement that "defendant admits he signed a note which he assumes is the one in controversy, but he demands its production and proof at the trial herein".

Home Bank v Kelley, 205-514; 218 NW 288

Admissions showing weakness of contentions. Where the cashier of the plaintiff bank had entered into two similar credit transactions with the defendant bank in order to cover a shortage in accounts, in an action to recover the amount of the shortage, the plaintiff's brief stating that there had been a full accounting between the two banks except as to one of the two transactions, such statement recognized a weakness in the plaintiff's contentions, as the amount claimed was equal to the amount involved in only one of the transactions, and, when both had been accounted for in the same manner, the accounting for both had to be either proper or improper.

Community Sav. Bank v Gaughen, 228- ; 289 NW 727

Admission of counsel in lieu of testimony. The admission of a material fact by counsel in the course of a trial and for the purpose thereof becomes a part of the record just as tho said fact had been established by testimony in the ordinary manner.

Azeltine v Lutterman, 218-675; 254 NW 854

Admissions of fact—conclusiveness. Specific admissions of fact made in the pleadings which join the issues which are being tried are binding on the party making them, and as to such admissions there can be no issue.

Wilson v Oxborrow, 220-1135; 264 NW 1

Inadvertent admission. An admission will be disregarded when, from the entire record, it clearly appears to have been inadvertent.

Campbell v Humphreys, 202-472; 210 NW 558

11202 Allegations as to value or damage.

Discussion. See 2 ILB 38—Liquidated damages —public contract

Alienation of affections—hearsay. Plaintiff in an action against the parents of her husband for damages for alienating the affections of her husband must not, under the guise of showing the state of mind of her husband toward her, be permitted to testify to a recital by her husband of what his parents had said to him about the plaintiff.

Paup v Paup, 208-215; 225 NW 251

Ambiguous contract—mutual interpretation. A co-operative marketing association, which, by written contract separately binds each member of the association to sell and deliver exclusively to the association the milk produced by the member—impliedly from day to day—or "pay as liquidated damages $25 for each and every such failure and breach of contract", will not be permitted to recover from a member said amount for each and every day there is a failure so to deliver, when such interpretation is absolutely contrary to the uniform, mutual interpretation theretofore placed on the contract during a long series of years. Especially is this true because otherwise the

court would be compelled to construe the said damage clause as a penalty.

Fort Dodge Assn. v Ainsworth, 217-712; 251 NW 85

Breach of contract not to engage in business. In an action to recover damages consequent on the breach by defendant of a contract not to engage for a named time in a named business in a named place, a judgment is sustained by competent and adequate evidence as to the value of plaintiff's business immediately prior to the said breach by defendant, and a like showing of the effect which said breach of contract had on such value.

Eyerly v Smith, 210-1056; 231 NW 383

Credibility of expert witnesses. Instructions are proper which, in substance, direct the jury that they are to use their own judgment in considering evidence relative to values, and that such judgment need not be surrendered for that of the expert witnesses.

State v Bevins, 210-1031; 230 NW 865

Fully reparable injury. If the injury to an article is fully reparable, then the measure of damages is the reasonable cost of the repairs —not the difference between the reasonable value of the article before and after the injury.

Looney v Parker, 210-85; 230 NW 570

Fraud—pleading and proof. Allegation and proof of fraud without any allegation and proof of damages leave plaintiff without a cause of action.

Vorpahl v Surety Co., 208-348; 223 NW 366

Future pain as incident to permanent injury. Even without a claim for damages for future pain and suffering, allegations and proof of permanent injuries from which future pain and suffering are reasonably certain to follow warrant the submission to the jury of this question.

Keller v Dodds, 224-935; 277 NW 467

Future pain and suffering—$4,000 not excessive. Record reviewed showing shrinkage of fractured vertebrae, and expectancy of continued pain, held, claim for future pain and suffering properly submitted and $4,000 verdict not excessive.

Smithson v Mommsen, 224-307; 276 NW 47

Hospital expenses—evidence—absence of—effect. In an action for personal injury, no recovery can be had for hospital expenses when there is no evidence of any kind bearing on the reasonableness of the charge—not even in the form of an itemized bill or that the bill had been paid.

Ege v Born, 212-1138; 236 NW 75

Instructions—measure of damages—unsupported element. Instructions to the effect that a measure of damages would be the difference between the value of property as it actually was when a party received it, and its value had it been as represented, are manifestly erroneous when the record contains no testimony of the latter value.

Vanarsdol v Farlow, 200-495; 203 NW 794

Instructions—reasonable value — admissions from pleadings. In action to recover price of corn sold to elevator, an instruction injecting element of reasonable value was erroneous where the pleading alleged express agreement on price, and a further erroneous instruction stating what defendant's answer admitted, but omitting qualification in defendant's pleadings, was not cured by instruction referring to a substituted oral agreement.

Hartwig v Elev. Co., (NOR); 226 NW 116

Intemperate habits bearing on damages. In an action for damages consequent on wrongful death, evidence is admissible tending to show the intemperate habits of the deceased.

Townsend v Armstrong, 220-396; 260 NW 17

Judgment of jurors. It is proper for the court, irrespective of §11471-d1, C., '31 [§11471.1, C., '39], to instruct the jurors that they are not compelled to rely wholly on the opinions of witnesses as to the value of services, but that in connection with such opinions they may use and be guided by their own judgment in such matters.

In re Stencil, 215-1195; 248 NW 18

Landowner—independent action. Pending eminent domain proceedings by and on behalf of a county relative to land for highway purposes preclude an independent action by the landowner for his damages.

Gibson v Union County, 208-314; 223 NW 111

Liability insurance—destruction of property —evidence of value—pleading. In motor carrier's action on liability insurance policy for loss of property destroyed by fire in freight terminal, plaintiff has burden of proof as to its "custody and control" of goods within policy provisions, also as to value thereof, and stipulation as to value of certain goods on which claims had been paid by insured does not admit value of other goods in absence of competent proof thereof.

American Ins. v Brady Co., 101 F 2d, 144

Liquidated damages (?) or penalty (?). An agreed sum as damages will be treated as "liquidated", even if not so labeled, when from

all the attending facts and circumstances it is evident that the parties must have so intended.

Shockley v Davis Co., 200-1094; 205 NW 966

Liquidated damages and penalties—contract restraining competition. An employment contract between two physicians, which after setting forth several requirements of the employee, further provides for "liquidated damages" in case the employee independently practices in the county within 5 years after termination of the employment, may be construed, not as a contract for liquidated damages, but as a penalty.

McMurray v Faust, 224-50; 276 NW 95

Acceleration clause as imposing penalty. A mortgage provision empowering the mortgagee to declare the entire debt due and payable in case of nonpayment of an installment of principal, or of interest, taxes, etc., imposes no penalty on the mortgagor; likewise a provision fixing one rate of interest on unmatured sums, and a different and higher rate on matured and unpaid sums, provided the legal rate is not exceeded.

Federal Land Bank v Wilmarth, 218-339; 252 NW 507; 94 ALR 1338

Measure of damages—instructions—assumption of fact. An instruction which is a technically incorrect statement of the measure of damages is harmless when, if a correct instruction had been given, the verdict of the jury must have been the same as found by the jury under the incorrect instruction.

Farmers Bank v Planters Elev., 200-434; 204 NW 298

Medical services. It is error to permit the recovery of expense for medical services necessitated by a personal injury when there is no evidence of the reasonable value of such services and no showing that the amount in question has been paid.

Melsha v Dillon, 214-1324; 243 NW 295

Noncontemplated damages. The purchaser of land may not recover damages because a belated delivery of the land to him prevented him from wrecking the building and using the salvage in other building operations, when the vendor was not apprised of such purpose of the purchaser when the sale was made.

In re Hager, 212-851; 235 NW 563

Nonright of jurors to substitute their own knowledge. Jurors may use and employ their own knowledge as to values in determining the weight and effect of expert testimony as to such values, but they must not be instructed, in effect, that they may disregard such expert testimony and substitute their own knowledge as evidence.

State v Brown, 215-600; 246 NW 258

Opinion evidence. If a witness shows "some qualifications" to testify as to value, the court has a discretion to admit his testimony as to value.

In re Manning, 215-746; 244 NW 860

Personalty — reparable and nonreparable injury. The measure of damages for injury to an article is:

1. For total destruction, the reasonable value at the time of destruction.
2. For a fully reparable injury, the reasonable cost of the repairs, plus the reasonable value of the use of the article during a reasonable time for repair.
3. For a partially reparable injury, the difference in the reasonable value of the article before and after the injury.

Langham v Railway, 201-897; 208 NW 356; 26 NCCA 938

Laizure v Railway, 214-918; 241 NW 480

Bush v Railway, 216-788; 247 NW 645

Remittitur to cure error. The fact that plaintiff, a layman, in a personal injury action, is permitted to testify as to the reasonable value of the medical services rendered him by a physician may not be sufficient to justify a reversal; yet such fact may demand a remittitur as a condition to affirming the case.

Wood v Branning, 215-59; 244 NW 658

Sick and unhealthy animals. Evidence of the fair, reasonable value of sound, healthy, marketable hogs is not admissible to prove the value of admittedly unhealthy and sick hogs.

Tracy v Oil Co., 208-882; 226 NW 178

Speculative damages—unsupported opinions. Damages in the purchase of corporate stock under alleged false representations as to its earning power may not be predicated on the unsupported-by-fact opinion of a witness that, had the stock had the earning power represented, it would have been worth double its par value.

Otte v James, 200-1353; 206 NW 613

Threat of injury. In an action by a wife for damages for the alienation of the affections of her husband, an information filed by the plaintiff, charging the defendants with having threatened to injure her, is wholly irrelevant and incompetent.

Paup v Paup, 208-215; 225 NW 251

Unallowable conclusions. The mere conclusions of a plaintiff in an action for damages for alienating the affections of her husband as to what the defendants had done in procuring the enlistment of the husband in the army and thereby effecting a separation of plaintiff and her husband are wholly unallowable.

Paup v Paup, 208-215; 225 NW 251

Value—competency of experts. On the issue of the solvency of a bank, expert witnesses

may be permitted to testify to the value of the bank's assets, even tho they do not possess, as to all items, the most comprehensive qualifications.

State v Bevins, 210-1031; 230 NW 865

Value—presumption. The face value of negotiable instruments and other like or similar choses in action is presumptively the actual value.

Leonard v Sehman, 206-277; 220 NW 77

Value—violation of constitutional right. The constitutional right of an accused in a criminal case to be confronted by the witnesses against him is violated, in a criminal case wherein the value of various items of property is material, by an instruction to the effect that the jurors "have the right to use their own knowledge of values * * * in connection with the testimony as to values which have been given by the different witnesses".

State v Henderson, 217-402; 251 NW 640

11203 Account—bill of particulars.

Matter specially pleadable — "account stated". An "account stated" must be specially pleaded.

Schooler Motor Co. v Trust Co., 216-1147; 247 NW 628

11204 Account deemed true.

Accounts—admission in evidence. See under §11281

Burden of proof. In an action on an account, the plaintiff must necessarily fail when he wholly fails to establish either the reasonable value of the goods or the agreed price therefor, such being the issues in the case.

Cutino Co. v Weeks, 203-581; 213 NW 413

Conclusiveness. A bank depositor may not question the correctness of the periodical balancing and statement of his account by the bank when, for years, he has uniformly acquiesced in such accounting with full knowledge of an alleged error in favor of the bank.

First N. Bk. v Williamson, 205-925; 219 NW 32

11206 Conditions precedent.

Common law rule for recovery — modification. Principle reaffirmed that the common law rule that there can be no recovery on a written contract without a showing that it has been strictly performed has been modified in this state.

Gibson v Miller, 215-631; 246 NW 606

When allegation and proof unnecessary. There need be no allegation or proof of the furnishing of proofs of loss under a policy which by its terms waives such proofs.

Glandon v Ins. Assn., 211-60; 232 NW 804

Impossible performance — when no excuse. A person is not legally excused from performing an act which he has unconditionally contracted to perform, but is prevented from performing because of the happening of a contingency of which he had knowledge when he contracted, and against which he might have protected himself.

Salinger v Ins. Corp., 217-560; 250 NW 13

Reasonable time. Principle reaffirmed that a clause in a contract of sale of real estate giving the vendor "whatever time he finds necessary" to perfect his title, must be construed as giving to the vendor a reasonable time only, in view of the circumstances.

Martinsen v Ins. Assn., 217-335; 251 NW 503

Time of making payments as condition precedent. The making of payments under a contract at the exact time specified therein will not be deemed a condition precedent to the right to maintain an action for breach of the contract by the payee, when the contract does not, expressly or impliedly, make the time of payment the essence of the contract.

Armstrong Pav. v Nielsen, 215-238; 245 NW 278

Well drilling contract performed — faulty pump. A well driller's guarantee to secure an ample supply of water has been fulfilled when the evidence in a mechanic's lien foreclosure fairly establishes that there is a constant head of 180 feet of water in the well, and the lack of ample water was due entirely to the improper pump line furnished by the owner.

Collins v Gard, 224-236; 275 NW 392

11207 Allegation of representative capacity.

Corporate or partnership capacity. An amendment during the trial, alleging partnership capacity of the defendant in lieu of a former allegation of corporate capacity, is proper.

Mau v Rice Bros., 216-864; 249 NW 206

General allegation and general denial. A general allegation of partnership capacity met by a general denial, justifies the court in treating the partnership as existing, especially when there is evidence of the existence of such partnership.

Jordison v Jordison, 215-938; 247 NW 491

Nonconclusion allegation. An allegation that plaintiffs are the duly and legally appointed and qualified trustees of a named trust estate is an all-sufficient allegation of representative capacity.

Windsor v Barnett, 201-1226; 207 NW 362

Partnership—husband and wife — liability. A transfer company operating under a trade name, headquartering at defendants' home, having trucks registered in wife's name, but with the state permit in the husband's name, and performing contracts in husband's name, are facts so indicating a partnership that court properly submitted automobile collision case as a joint liability of the husband and wife operating the transfer company.

Schalk v Smith, 224-904; 277 NW 303

Representative capacity. The conservator of a national bank may, in an action instituted by him, allege generally his official capacity and authority.

Ross v Long, 219-471; 258 NW 94

11208 Fact denial required.

"Condition precedent"—denial—effect. The statutory rule that a general allegation of performance of a "condition precedent" is not put in issue by a general denial, has no application to a general allegation of performance of a promise or agreement which was the consideration for the promise or agreement sued on. So held when plaintiff's promise was to discharge a certain promissory note, and in return the promisee agreed to make a will in favor of plaintiff.

In re Fetterman, 207-252; 222 NW 872

Denial of incorporation — insufficiency. A simple denial by a defendant that he has knowledge or information sufficient to form a belief whether plaintiff is a corporation presents no issue as to the incorporation of plaintiff.

Winterset Bk. v Iiams, 211-1226; 233 NW 749

11209 Matters specially pleaded.

ANALYSIS

I MATTERS SPECIALLY PLEADABLE, AND EXCEPTIONS

II MATTERS NOT SPECIALLY PLEADABLE

Matters provable under general denial. See under §11196
Statute of limitations. See under §11007
Waiver in life insurance cases. See under Ch 401, Note 1 (IX)

I MATTERS SPECIALLY PLEADABLE, AND EXCEPTIONS

Absence of required plea. A plea of fraud, accident or mistake is a condition precedent to the right to reform any written instrument.

Sargent v Ins. Co., 217-225; 251 NW 71

"Account stated". An "account stated" must be specially pleaded.

Schooler Motor v Trust Co., 216-1147; 247 NW 628

Adjudication. He who relies on a prior adjudication must plead it.

Andrew v Bank, 205-237; 216 NW 12

Admissions, general denial, and special defense—effect. An answer which consists (1) of certain admissions, (2) of a general denial of all other allegations, and (3) of a special defense which is in harmony with the denial, has the effect of requiring plaintiff to establish all his allegations not admitted.

Walters v Mutual Assn., 208-894; 224 NW 494

Alteration. A pleader who wishes to avoid the legal effect of an instrument, because of a material and unauthorized alteration therein, must plead that the alteration was made after delivery.

Hartwick v Hartwick, 217-758; 252 NW 502

Assumption of risk. The defense of "assumption of risk" must be specially pleaded in order to justify the submission of the issue to the jury.

Johnson v McVicker, 216-654; 247 NW 488

Authority—waiver. A principal who directs his agent to accept cash only, on making sales, waives any violation of his instructions by accepting notes of various purchasers, with full knowledge of the facts.

Donnelly v Walch, 203-32; 212 NW 310

Carriage of passengers—hand baggage—condition to liability. A carrier of passengers is not liable, as an insurer, for the loss of the hand baggage of the passenger unless said baggage is definitely surrendered into the exclusive possession and control of the carrier. If liability is predicated on negligence, such ground must be pleaded and, of course, proven. Evidence held to show no such surrender of custody.

Jensen v Inter. Corp., 221-513; 266 NW 9

Conditional sales—purchase without notice—effecting payment. Full payment for an article, bought in good faith, and for value and without notice of an existing conditional sales contract thereon, is effected by the act of the vendee in delivering to the vendor his negotiable check on actual funds in a foreign bank

for the purchase price, and by the act of the vendor-payee in immediately negotiating the check to his bank as a general deposit, even tho the deposit slip in the latter transaction provided that the receiving bank took the check for collection only. It follows that the vendee is under no obligation to stop payment on the check issued by him because he learned of the conditional sale contract after said deposit and before his drawee-bank had paid the check.

General Motors v Whiteley, 217-998; 252 NW 779

Condonation. Condonation must be specifically pleaded.

Nelson v Nelson, 208-713; 225 NW 843

Assault and battery—self-defense—instructions. Where defendant voluntarily participated in a fight, not in his own defense, the court did not err in failing to instruct the jury on self-defense as, under such circumstances, self-defense was not available as a defense.

Schwaller v McFarland, 228- ; 291 NW 852

Consideration—absence of. Refusal to instruct as to the want of consideration in the signing of a promissory note is proper when defendant (1) causes plaintiff's plea of consideration to be stricken, and (2) does not himself plead want of consideration.

Conner v Henry, 205-95; 215 NW 506

Want of consideration. Want of consideration for a pledge of collateral securities must be alleged and proven by the pledgor.

Hiatt v Hamilton, 215-215; 243 NW 578

Discharge in bankruptcy. The discharge of a debt through bankruptcy proceedings must be specially pleaded.

Fierce v Fleming, 205-1281; 217 NW 806

Discharge in bankruptcy. A decree to the effect that a conveyance was fraudulent as to a judgment plaintiff is immune from subsequent attack on the ground that, when the decree was rendered, the judgment in question had been discharged in bankruptcy, such fact not having been pleaded in said action.

Reining v Nevison, 203-995; 213 NW 609

Rights, remedies, and discharge of bankrupt —failure to plead discharge—effect. A discharge in bankruptcy of a claim subsequently sued on avails nothing unless the discharge is pleaded as a defense; and this is true tho the plaintiff has knowledge of the discharge.

Harding v Quilan, 209-1190; 229 NW 672

Equitable estoppel. A good plea of estoppel requires a succinct fact basis, and an allegation that because of said facts the pleader has been misled or has detrimentally changed his position.

Fed. Bank v Sherburne, 213-612; 239 NW 778

Equitable estoppel—degree of proof required. The plea of a surety on a promissory note that he, under an arrangement with the principal maker, furnished a portion of the funds with which to make full payment of the note, but that the payee wrongfully applied said payment on another note owing by said maker, and that, therefore, said payee is estopped to maintain an action against him, must be supported by clear, convincing, and satisfactory evidence that said payee had full knowledge of said arrangement before he made application of said payment.

Reason: Fundamentally, estoppel is not a favorite of the law.

Stookesberry v Burgher, 220-916; 262 NW 820

Equitable estoppel. Under an allegation that plaintiff was the owner of corporate stock when it was sold, no defense is presented by a general denial. If defendant claims that plaintiff is estopped to assert such ownership, then defendant must specially so plead.

Wilson v Lindhart, 216-825; 249 NW 218

Equitable relief—defense arising or discovered since judgment entered. The fact that a claim, when judgment was entered thereon, had been discharged in bankruptcy is not a "defense which has arisen or been discovered since the judgment was rendered," and therefore within the power of a court of equity to annul or modify.

Harding v Quilan, 209-1190; 229 NW 672

Estoppel. An estoppel is properly pleaded by setting forth the facts upon which the estoppel is based, even tho the term "estoppel" is not used.

Bibler v Bibler, 205-639; 216 NW 99

Fiduciary relation. The rule that a party who claims under an instrument executed by one to whom he occupies a fiduciary relation must establish the absolute good faith of the transaction has no application in the absence of plea and proof of such relation.

Steenhoek v Trust Co., 205-1379; 219 NW 492

General denial—chattel mortgage not admissible in replevin action. General denial puts in issue only facts pleaded in the petition. So, under a general denial to a replevin action for an automobile, evidence of a prior mortgage is properly excluded, when not pleaded, inasmuch as, under a general denial, the court is not called upon to decide which lien is first but only the question of whether plaintiff is entitled to possession.

General Motors v Koch, 225-897; 281 NW 728

Governmental employee—immunity—pleading.

Anderson v Moon, 225-70; 279 NW 396

I MATTERS SPECIALLY PLEADABLE, AND EXCEPTIONS—continued

Homestead exemption. A decree to the effect that a conveyance was fraudulent as to a judgment plaintiff and that plaintiff's judgment was a lien on the land is immune from subsequent attack on the ground that the land was, at the time of the conveyance, the homestead of the grantor and grantee, such fact not being pleaded in the action.

Reining v Nevison, 203-995; 213 NW 609

Nonhomestead character of land. A creditor who is seeking to set aside the deed of his debtor as fraudulent need not prove the nonhomestead character of the land even tho he alleges such fact, because the homestead character of the land is an affirmative defense, pleadable and provable by the grantee.

Malcolm Bk. v Mehlin, 200-970; 205 NW 788

"Last clear chance" doctrine. The "last clear chance" doctrine cannot be presented to the jury in the absence of a plea of the ultimate facts which furnish a basis for such doctrine.

Steele v Brada, 213-708; 239 NW 538

See also Crowley v Railway, 65-658; 20 NW 67

"Last clear chance". The doctrine of the "last clear chance" is not available unless distinctly pleaded.

Nyswander v Gonser, 218-136; 253 NW 829; 36 NCCA 1

Merger of note in foreclosure decree. The fact that a promissory note sued on has been merged in a foreclosure decree in a foreign state on good personal service must be specifically pleaded.

Pfeffer v Corey, 211-203; 233 NW 126

Mistake in partnership settlement.

Tabler v Evans, 202-1386; 212 NW 161

Mending hold. Answer reviewed in an action for recovery of double benefits on a life insurance policy, and held not strikeable on motion on the alleged ground that defendant was thereby changing his defensive position after action had been brought on the policy.

Wenger v Assur. Soc. 222-1269; 271 NW 220

Negative condition. A plaintiff who seeks to enjoin the appropriation of county funds in aid of a farm bureau organization on the ground that the bureau was not organized to cooperate with stated governmental agencies, must specially plead and prove said fact.

Blume v Crawford Co., 217-545; 250 NW 733; 92 ALR 757

Payment. Principle reaffirmed that payment as a defense to a claim must be specially pleaded.

Olson v Roberts, 218-410; 255 NW 461

Payment. A plea of payment of a promissory note is an affirmative defense.

Columbia Coll. v Hart, 204-265; 213 NW 761

Payment—burden of proof. A plaintiff who alleges the nonpayment of the note and mortgage, which he is seeking to foreclose, must prove such nonpayment even tho defendant pleads payment.

Larson v Church, 213-930; 239 NW 921

Probate claim—payment specially pleaded—burden of proof—jury question. In probate action to establish claim for services rendered to decedent under an express agreement, where defendant specially pleaded a defense of payment as a part of a different contract of employment, the burden rested upon defendant to establish such different contract, including payment, and, if evidence justified, it was the duty of the court to submit the issue to the jury, but, where defendant's evidence is also consistent with and does not negative plaintiff's claim as to her express contract, it is admissible and proper to be considered by the jury as tending to show that the present claim was an afterthought, or that claimant had failed under suitable circumstances to advance the demand now relied upon, and as tending to support defendant's theory of the nature of her employment. However, such evidence failed to establish the specially pleaded defense of payment, and the court's failure to submit the question of payment to the jury was not erroneous.

In re McKeon, 227-1050; 289 NW 915

Payment. A plaintiff suing for damages consequent on the feeding of a so-called hog remedy to hogs need not allege that the damages have not been paid.

Crouch v Remedy Co., 205-51; 217 NW 557; 38 NCCA 80

Payment—application—right of debtor. A creditor who has come into the possession of funds belonging to his debtor, but originally without the consent of the debtor, express or implied, must, at the least, obey the direction of the debtor as to the particular debt upon which the said funds shall be applied.

First B. & T. Co. v Welch, 219-318; 258 NW 96

Application of payment—right of debtor to control. An insured in paying his premium dues to an officer authorized to receive them may direct that the money be applied on said dues, and arbitrarily enforce such direction.

Forrest v Camp, 220-478; 261 NW 802

Creditor's right to apply payment. Creditor holding more than one matured obligation against his debtor has the right to apply payments received as he sees fit, where the debtor gives no directions as to application.

Baker v Bank, (NOR); 219 NW 511

Authority to receive payment on promissory note. Authority or agency in a third party to receive payment of a promissory note is not shown by evidence:

1. That the note provided for payment at the office of said third party;
2. That the payee received payments of interest from said third party;
3. That the payee authorized said third party to grant an extension of the mortgage security;
4. That the payee wrote to said third party relative to the payment of the note, but long after said third party had collected the amount due thereon.

Moron v Tuttle, 211-584; 233 NW 691

Payment of note—burden of proof. Defendants, claiming payment on note which plaintiff denied, had burden to prove such payment by a preponderance of evidence, whether payment was made as partial payment on note or on property purchased, and question was for jury.

Sager v Skinner, (NOR); 229 NW 846

Payments and credits—burden of proof. The maker of a promissory note who claims prospective credits on the note, other than those shown by the record, must point out and establish such credits.

Aetna Bank v Hawks, 213-340; 239 NW 91

Evidence—burden of proof. A debtor has the burden to establish his plea that the creditor accepted a check in full payment of the debt in question.

Kruidenier Co. v Manhardt, 220-787; 263 NW 282

Check not necessarily payment. A check issued by an insurer for the amount of an adjusted loss and payable to a mortgagor and mortgagee, jointly, and never cashed because the mortgagor refused to indorse it, cannot be deemed a payment of the loss when there was no express or implied agreement to that effect—when the insurer-drawer first asserted such claim after the bank on which the check was drawn failed.

Union Ins. v Ins. Co., 216-762; 249 NW 653

Payment by check. Principle reaffirmed that the delivery of a check to a creditor does not constitute payment unless, in due course of time, the check is actually paid.

Schwab v Roberts, 220-958; 263 NW 19

Check not payment without agreement. The acceptance of a check by a creditor is not payment of a debt unless an understanding to that effect appears from the circumstances and conduct of the parties, as where a receipt stating "cash" was issued for an insurance premium check—such check later returned marked "insufficient funds".

Hockert v Ins. Co., 224-789; 276 NW 422

Contract for haulage—payment. A contract for hauling material at a stated price per load, with right in the hirer to designate the number of hours each day and the number of days each week on which the work should be done, does not embrace a right of recovery for days on which there was no hauling to do. Especially is this true in view of repeated unexplained receipts "in full of account to date".

Peerboom v Minges, 201-706; 207 NW 753

Directed verdict—payment of rent—sufficiency of evidence. Direction of verdict in action to recover on rent note from tenant was erroneous when there was sufficient evidence of payment by tenant in turning over proceeds of crop to warrant submission of the case to jury.

McCann v McCann, (NOR); 226 NW 922

Employer paying doctor bills — negligent person still liable. Payment of an injured truck driver's doctor bills, by his employer, whether the motive be philanthropy or contract, constitutes a bounty from which a negligent defendant motorist can derive no benefit in reduction of his liability, inasmuch as he owes compensation for all damages as to which his negligence was the proximate cause.

Clark v Berry Co., 225-262; 280 NW 505

Long and unexplained delay in demanding payment. Substantive evidence of the payment of a claim may be found in the conduct of a plaintiff in failing for several years, and during the lifetime of the party obligated, to assert his claim, when the party obligated was financially able to pay, and when the circumstances were such as to fairly cause plaintiff to assert his claim if he had not been paid.

Baker v Davis, 212-1249; 235 NW 749

Nonpayment. Plaintiff must plead nonpayment in an action on contract when the gist of the action is a failure to pay according to the contract. Whether, in an action on contract, an unquestioned allegation that a specified sum is due from defendant is a sufficient plea of nonpayment, quaere.

Andrew v Boyd, 213-1277; 241 NW 423

Payment to authorized agent. The requirement of a certificate of insurance, that premium dues shall be paid to a named officer of the local camp, is not a limitation on the insured's right to pay to some other officer who has been authorized by the association to receive such dues.

Forrest v Camp, 220-478; 261 NW 802

Payment of wages not release of damages. A written release of all damages suffered by an injured party is fraudulent and void when it was in fact mutually intended as a receipt for wages only, and was signed by the injured party without negligence on his part; and the failure of the injured person, who was

I MATTERS SPECIALLY PLEADABLE, AND EXCEPTIONS—continued

himself unable to read, to have such instrument read to him does not necessarily constitute negligence per se.

Farwark v Railway, 202-1229; 211 NW 875; 26 NCCA 231, 31 NCCA 759, 4 NCCA(NS) 98, 197

Payment with knowledge of facts. Principle reaffirmed that one who voluntarily pays a disputed claim with full knowledge of the facts may not recover the sum so paid.

Meyer v Gotsdiner, 208-677; 226 NW 38

Presumption of payment. In an action on a claim which calls for payments in a particular manner, a presumption of payment in full will be indulged when the credits set up in the pleadings equal the full amount of said claim, even tho other separate causes of action are joined with the first claim.

Smith v Morrison, 203-245; 212 NW 567

Partnership checks not showing payment. In proving a claim against an estate, by showing an oral contract to pay for services extending over a period of many years, neither the lapse of time nor checks payable to claimant drawn by decedent during the fourteen years just preceding his death, when a partnership existed between them for those years, raises a presumption of payment in view of decedent's admission of the debt shortly before his death.

Gardner v Marquis, 224-458; 275 NW 493

Public official's receipt of money as issue—not affirmative defense. A city seeking to recover from its clerk water rents, allegedly received and unaccounted for, must go forward with the evidence and prove by a preponderance thereof, the receipt of such funds by the clerk,—the clerk's answer, denying receipt of such funds, and asserting that all money received was accounted for. Such answer is not an affirmative defense requiring defendant to prove payment, but raises the receipt of funds as a controverted fact or issue submissible to a jury.

Carroll, City of, v Arts, 225-487; 280 NW 869

Public utility—justifiable refusal to furnish product. A public utility company is within its rights in refusing to furnish its product—electric energy—to one who fails to pay his current bill for such product, and it is not sufficient that the customer tenders payment for future service.

Bailey v Power Co., 209-631; 228 NW 644

Recovery of payments—rule—exception as to officer. Where a sheriff not knowing that a statute has been repealed collects fees thereunder, he acts not under a mistake of fact but under a mistake of law, and such fees when paid to an officer of court, even though voluntarily, are recoverable, this being an exception to the general rule that voluntary payments under a mistake of law are not recoverable.

Morgan v Jasper County, 223-1044; 274 NW 310; 111 ALR 634

Recovery of payments—in general. Principle reaffirmed that a voluntary payment is not recoverable by the party making it.

Browning v Kannow, 202-465; 210 NW 596

Reply—necessity—plea of payment. In an action wherein plaintiff alleges that defendant is owing him a stated sum, and wherein defendant answers that he has not received proper credit for payments made by him, no reply is necessary in order to enable plaintiff to prove an agreement that certain payments were not to be applied on the account sued on.

Northern Lbr. Co. v Clausen, 201-701; 208 NW 72

Treating sight draft as paid and later denying payment. The drawer of a sight draft who sends it to a bank for collection, and knows that said bank has assumed to collect it, and has forwarded its own bank draft in payment of the collection, and who, after payment of the bank draft is refused because of the insolvency of the collecting bank, lays claim to said bank draft and establishes his claim thereon against the receiver, may not thereafter proceed against the receiver and the original drawee in the sight draft and obtain judgment against them on the pleaded theory that said drawee in the sight draft never in fact paid it,—paid it by an overdraft on the collecting bank,—and that the defendants must account to plaintiff for said overdraft.

Enterline v Andrew, 211-176; 231 NW 416

Wrongful receipt of payment of note—ratification. The payee of a promissory note does not ratify and confirm the act of a third person in wrongfully receiving payment of the note by subsequently receiving and accepting partial payments from said wrongdoer.

Moron v Tuttle, 211-584; 233 NW 691

Pleading fraud and recovering on proof of mistake. A plaintiff who pleads that he was induced to make certain payments because of fraudulent representations may not recover on proof that he made the payments because of a unilateral mistake on his own part.

Morrow v Downing, 210-1195; 232 NW 483

Pleading ministerial character of acts. A petition for damages against a municipality because of the wrongful acts of municipal agents and employees is demurrable unless the petition alleges such facts as show that the acts complained of were corporate or minis-

terial (the only acts for which the municipality would be liable), and not governmental.

Rowley v City, 203-1245; 212 NW 158; 53 ALR 375; 34 NCCA 464

Unpleaded defense—effect. The maker of a promissory note cannot be given the benefit of testimony tending to show that he signed the note under duress when he rests his defense on a distinctly different defense; and the court should so inform the jury.

Farmers Bank v DeWolf, 212-312; 233 NW 524

Unpleaded issue. An unpleaded claim that an oral contract existed for the transfer of a policy of insurance on one automobile to a subsequently acquired automobile amounts to nothing.

Chambers v Ins. Assn., 214-1353; 242 NW 30

Torts—special plea in re governmental function. The nonliability of a municipality, for the negligence of an employee in the performance of a governmental function, is a special defense and must be pleaded as such.

Groves v Webster City, 222-849; 270 NW 329

Transfer of property—invalidation of policy. In equitable action against mutual insurance association where defendant admitted that property in question was insured under a fire policy, defendant's contention that a certain transfer of the property had invalidated the policy, having not been pleaded as a special defense, was not in issue under the pleadings.

Webber v Ins. Assn., 227-793; 288 NW 868

Trust relationship—pleading. The claim that the purchase price of a bank draft which was not paid constitutes a trust fund because the bank was insolvent at the time of the receipt of the money and the issuance of the draft, must, manifestly, be presented by definite plea and supported by sufficient proof.

Shifflett v Bank, 215-823; 246 NW 757

Waiver. "Waiver" must be specially pleaded.

Breza v Loan Soc., 200-507; 205 NW 206

Cole v Ins. Co., 201-979; 205 NW 3

Harrington v Feddersen, 208-564; 226 NW 110; 66 ALR 59

Schmid v Underwriters, 215-170; 244 NW 729

"Waiver" or "acquiescence". "Waiver" or "acquiescence" is properly pleaded by setting forth the facts showing such waiver or acquiescence, even tho the pleader inaccurately designates his plea as an "estoppel".

Schramm & S. v Shope, 200-760; 205 NW 350

Waiver and estoppel. A mortgagee who seeks to enforce the agreement of a grantee of the land to pay the mortgage debt need not plead that the grantee, by taking and retaining possession of the land, has waived, or is estopped to assert, any defect in the title to the land.

Richardson v Short, 201-561; 207 NW 610

Waiver of right to divorce as consideration. The defense that a waiver by a wife of her asserted right to a divorce constitutes a valid consideration for a conveyance by the husband to the wife must be specifically pleaded.

Burgess v Stinson, 207-1; 222 NW 362

Waiver — voluntary litigated issue. Parties who voluntarily litigate the issue of waiver of the time element in a contract of sale are bound thereby even tho the written pleadings are silent as to waiver.

Andrew v Miller, 216-1378; 250 NW 711

II MATTERS NOT SPECIALLY PLEADABLE

Absence of full knowledge of facts, voluntary payment rule inapplicable. The rule that money voluntarily paid cannot be recovered does not apply where payor did not have full knowledge of all the facts, or where payment was compulsory, or was made under mistake of fact by payor under no legal obligation to make it, and especially where the mistake of fact was mutual.

New York Ins. v Talley, 72 F 2d, 715

Administratrix — voluntary payment for services to one not an attorney. Where defendant rendered services to administratrix, who was also an heir, as an intermediary between her and her attorney in administering the estate, held that she could not recover payment to defendant, made voluntarily and with full knowledge of the facts.

Hartnett v Van Alstine, (NOR); 213 NW 595

Benefits accepted under unconstitutional statute. No objection could be made to the constitutionality of a law extending the period of redemption after mortgage foreclosures by parties who accepted benefits under a court order extending the period and appointing a receiver whose acts benefited both parties.

New York Ins. v Breen, 227-738; 289 NW 16

Ex-judge's affidavit—no part of record. A judge's affidavit made after termination of his office, and three months after perfection of the appeal, is no part of the record and cannot be considered against the appellant as a basis for an alleged waiver.

In re Metcalf, 227-985; 289 NW 739

Government employee's automobile collision —immunity as a defense. In a damage action for injuries arising out of a motor vehicle collision, defendant's claim that he was a state employee performing a governmental function

II MATTERS NOT SPECIALLY PLEADABLE—concluded

is a matter of defense not properly raised by special appearance.

Anderson v Moon, 225-70; 279 NW 396

See also:

Montanick v McMillin, 225-442; 280 NW 608

Futter v Hout, 225-723; 281 NW 286

Shirkey v Keokuk Co., 225-1159; 275 NW 706; 281 NW 837

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Doherty v Edwards, 226-249; 284 NW 159

Last clear chance — amendment after reversal. The elements of the doctrine of "last clear chance" may be deemed as inherently attending an allegation which, in effect, charges defendant with proximate negligence up to the very time of the infliction of the injury, even tho said allegation carries no reference to the "last clear chance" or to the doctrine thereof. It follows that after trial and reversal thereof, such allegation may be amended and amplified by alleging facts which, if proven, will specifically present the issue of the "last clear chance".

Spaulding v Miller, 220-1107; 264 NW 8

Payment. Evidence of payment of an account is not admissible under a general denial.

Siegel Mar. v Billings, 203-190; 210 NW 749

Representation or warranty. In an action for the purchase price of a machine, an offset of damages consequent on the defective construction and inefficient operation of the machine cannot be allowed when defendant fails to allege any representations or warranties relative to said defects.

Baker v Ward, 217-581; 250 NW 109

Unpleaded defense — evidence. In an action on policy of fire insurance, evidence that the fire was of incendiary origin and that the property was, at the time of the fire, being used for an unlawful purpose, is inadmissible in the absence of a defensive plea to that effect.

Basta v Ins. Assn., 217-240; 252 NW 125

11210 Contributory negligence—burden—special exception—mitigation.

Contributory negligence generally. See under Ch 484, Note 1 (III)

Burden of proof. A definite instruction that plaintiff has the burden of proof to show that he was not guilty of any negligence contributing to his injury is in no degree overcome by later instructions wherein the court, with reference to contributory-fact issues, uses the expression "if you find"; in other words, such expression does not have the effect of impliedly placing the burden of proof as to contributory negligence on the defendant.

Dean v Koolish, 212-238; 234 NW 179

Contributory negligence — burden. An employee who voluntarily steps outside the zone of his specific employment and voluntarily engages in a work in which the employer is engaged, and is injured, must, in an action for damages, prove his own freedom from contributory negligence.

Tellier v Davenport, 203-1012; 213 NW 565

Contributory negligence plea. An instruction relative to a master's plea of assumption of risk by his servant will not be deemed to deprive the master of his plea of contributory negligence on the part of the servant when the latter element is correctly covered by a separate instruction.

Oestereich v Leslie, 212-105; 234 NW 229

Contributory negligence of servant—effect. In an action by an employee against his employer for damages consequent on the negligence of the employer, the contributory negligence of the employee may be pleaded by the employer in mitigation, only, of damages.

Bell v Brown, 214-370; 239 NW 785

Drowning—res ipsa loquitur nonapplicable. The mere fact a person drowns in a swimming pool does not of itself establish negligence on the part of the proprietor under the doctrine of res ipsa loquitur.

Hecht v Playground Assn., 227-81; 287 NW 259

Exoneration of servant exonerates master. A master cannot be held liable for an injury solely on the ground of the negligence of his servant when the jury wholly exonerates the servant from any negligence.

Hall v Miller, 212-835; 235 NW 298

Jury question — rule. Generally, contributory negligence is peculiarly for the jury, the rule being that where the conduct of the plaintiff is such that fair-minded and reasonable men might honestly and sincerely arrive at a different conclusion, then the court should submit the question to the jury.

Rogers v Jefferson, 224-324; 275 NW 874

Looking left at intersection. Principle reaffirmed that vehicle driver's failure to look to the left when entering highway intersection does not constitute contributory negligence as a matter of law.

Rogers v Jefferson, 226-1047; 285 NW 701

Minor walking on wrong side of highway. In a law action for damages where it is shown that plaintiff's decedent, a 15-year-old boy, was violating statute requiring pedestrians to walk on the left side of a highway by walking along right side, about four or five feet from west side of highway, and failing to make observations as to oncoming traffic from the rear, while walking after dark on a street traversed

by a through highway, held, he was guilty of contributory negligence as a matter of law.

Reynolds v Aller, 226-642; 284 NW 825

Passengers — termination of relation. A passenger on a streetcar ceases to be such the moment he completes his step from the car into the street.

MacLearn v Utilities Co., 212-555; 234 NW 851

Specific reliance on res ipsa loquitur. A plaintiff who sues in tort and alleges generally (1) that defendant was guilty of negligence which was the proximate cause of her injuries, and (2) that she relies on the doctrine of res ipsa loquitur, cannot be compelled, by motion for more specific statement, to state the particular acts of negligence of which she complains.

Harvey v Borg, 218-1228; 257 NW 190; 39 NCCA 139

Statutory effect. The court may very properly instruct the jury that a master must establish his plea of contributory negligence on the part of his servant by a preponderance of the evidence, and that such plea if so established is available to the master only in mitigation of damages.

Oestereich v Leslie, 212-105; 234 NW 229; 34 NCCA 67

Bell v Brown, 214-370; 239 NW 785; 34 NCCA 68

11211 Judicial notice.

Foreign statutes. See under §11312
Judicial notice of ordinances. See under §5735, Vol I

Ability to stop car. The court will take judicial notice of the fact that an automobile in good mechanical condition, with good brakes, and traveling at a speed not greater than 25 miles per hour on a highway which is in good condition, can be stopped in a less distance than 100 feet.

Wright v Railway, 222-583; 268 NW 915

Attaching bills of lading to draft. Judicial notice will be taken of the custom of attaching bills of lading to drafts.

Dubuque Fruit Co. v Emerson & Co., 201-129; 206 NW 672

Case reinstated after dismissal. Where an action is dismissed by the clerk under district court rules, but the judge thereof, without notice to the defendant, reinstates the case on motion and showing that the clerk acted erroneously, and where an application to vacate the order of reinstatement is denied, supreme court could not on appeal assume that judge lacked jurisdiction to reinstate without notice to defendant, without the district court rules of practice being in evidence and before the appellate court.

Eggleston v Eggleston, 225-920; 281 NW 844

Change in mode of transportation. Court will take judicial notice of the changes in the mode of transportation occurring during the last preceding twenty-five years.

Harris v Railway, 224-1319; 278 NW 338

Judicial notice of conditions—effect. While the court should, in a proper case, in construing a statute, take judicial notice of the statewide condition surrounding the subject matter covered by the statute, yet such condition will not warrant the court in overthrowing the clear and concise language of the statute.

Andrew v Bank, 214-204; 242 NW 80

Courts own records. The supreme court takes judicial notice of its own records in a particular case.

Farmers Bank v Miles, 206-766; 221 NW 449

Information and warrant—condemnation of gambling devices. In proceeding to condemn slot machines and punch boards as gambling devices, failure to introduce in evidence the information, search warrant and the property seized was not error where the defendant in his answer admitted seizure of the property and since information and warrant were a part of the case and court would take judicial notice of the files therein.

State v Doe, 227-1215; 290 NW 518

Depression—real estate values. Court will take judicial notice of the nation-wide depression and shrinkage in real estate values.

Bankers Life v Emmetsburg, 224-1287; 278 NW 311

Shrinkage of land values. The court will take judicial notice of the shrinkage of land values in this state following the year 1920.

In re Jeffrey, 225-316; 280 NW 536

Distance between cities, etc. The courts of this state may and do take judicial notice of the distance between cities in this state, and the direction of one from the other; also of the states which abut this state.

State v Johnson, 221-8; 264 NW 596; 267 NW 91

Foreign judicial proceedings. The judicial proceedings of the courts of a foreign state may not, of course, be given any effect except on due proof thereof.

Chi. RI Ry. v Lundquist, 206-499; 221 NW 228

Geographical locations. Courts will take judicial notice of the location of cities and towns.

State v Wagner, 207-224; 222 NW 407; 61 ALR 882

Harmless error. Error of the court in improperly taking judicial notice of the pendency of another action becomes quite harmless when the appellant demonstrates by his abstract of

the record that said other action was actually pending.

Benjamin v Jackson, 207-581; 223 NW 383

Habits and instincts of chickens. Courts will take judicial notice of the habits and instincts of chickens under different surroundings, and under familiar or unfamiliar methods of care.

State v Wagner, 207-224; 222 NW 407; 61 ALR 882

Location of farms and highways. Supreme court does not take judicial notice of the location of highways or farms.

State v Archibald, (NOR); 221 NW 814

Matters judicially noticed by supreme court. The supreme court takes judicial notice of matters of common knowledge.

Edwards v Kirk, 227-684; 288 NW 875

Water between plastered and outer walls—deterioration of wood. It is a matter of common knowledge and one of which the court has a right to take judicial notice, that, when water is confined in a space as between the plastered and outer walls of a building where the air cannot circulate, many times the water will cause a deterioration of the lumber and sometimes cause rotting of the wood.

Horn v Ins. Co., 227-1045; 290 NW 8

Moratorium act—emergency must be temporary. An emergency, in order to justify legislation in contravention of the constitution on the theory of an exercise of the reserve police power, must be temporary or it cannot be called an emergency, but becomes an established status. In determining this question, the supreme court may take judicial notice of conditions existing at the time of enactment and whether or not they constitute an emergency.

First Tr. JSL Bank v Arp, 225-1331; 283 NW 441

Moratorium act—purpose. Tho moratorium act makes no distinction between individual and corporate debtors, supreme court may take judicial notice of fact that, Iowa being an agricultural state, moratorium acts were passed primarily for purpose of preserving farm and other homes of distressed debtors.

Massachusetts Ins. v Schenkberg et al. Co., 225-1148; 281 NW 825

Nondischargeable debts. State courts will take judicial notice that, under the federal bankruptcy statutes, a debt arising from the fraud of the debtor is not dischargeable in bankruptcy.

Hills Bank v Cress, 205-306; 218 NW 74

Registration plate on automobile—county of issuance. The court cannot, from the figures alone, take judicial notice that a registration number plate on an automobile was issued by the county treasurer of a certain county.

Putnam v Bussing, 221-871; 266 NW 559

Reversal of conviction. On an appeal from an order disbarring an attorney on the ground that he has been convicted of a felony, the appellate court will take judicial notice that said conviction has been reversed by said court subsequent to the entry of the order of disbarment.

State v Metcalfe, 204-123; 214 NW 874

Sale—deed—ownership of existing crop. On the issue whether the holder of a sheriff's deed was the owner of a crop of corn grown on the land, or whether the crop had matured, and therefore belonged to the tenant, the court will not take judicial notice that corn will mature on any particular date. The holding of the trial court on clearly competent and conflicting testimony is final.

Frum v Kueny, 201-327; 207 NW 372

Sale—good cause for continuing—economic emergency—governor's proclamation. Good cause for continuing a tax sale is shown by the governor's proclamation of the existence of a great economic emergency also recognized by the legislative and judicial branches of the government.

Freemyer v Taylor Co., 224-401; 275 NW 718

Starting vehicle in reverse gear. The court will take judicial notice of the fact that if the engine of a motor vehicle is started while the vehicle is in reverse gear, said vehicle will move backward. And no evidence is necessary to establish a fact of which the court takes judicial notice.

Laudner v James, 221-863; 266 NW 15

Statutory law. The courts of a state will take judicial notice of its statutory law.

Andrew v Indem. Co., 207-652; 223 NW 529

Tender of fare—judicial notice. A passenger failing to leave the train at his destination does not render himself subject to immediate ejection from the train because he fails to tender the fare to another destination. Judicial notice is taken of the fact that it is the duty of the conductor to demand the fare.

Vanderbeck v Railway, 210-230; 230 NW 390

Trademark signs displayed—common knowledge. In an action for injuries caused by alleged negligence of filling station operator, the fact that trademark signs of defendant oil company were displayed did not estop it from claiming that it was not the owner of filling station business and that operator was not employee of company, it being a matter of common knowledge that such signs are displayed throughout country by independent dealers.

Reynolds v Oil Co., 227-163; 287 NW 823

Evidence of value. While court may take judicial notice of its own records in same case, this does not obviate necessity for proof of services and the reasonable value as to an attorney fee claim for extraordinary services to estate.

Glynn v Bank, 227-932; 289 NW 722

11216 Malice.

Exemplary damages. Exemplary damages are allowable for malicious assault and false imprisonment.

Schultz v Enlow, 201-1083; 205 NW 972

Exemplary damages—failure to submit—effect. Failure of the court to submit to the jury the question of exemplary damages is not error, even tho plaintiff's pleading was broad enough to embrace such damages, when the plaintiff neither claimed such damages in the pleading, nor requested the court to submit such issue.

Morrow v Scoville, 206-1134; 221 NW 802

Exemplary damages—purpose. Punishment of the defendant is one of the purposes in permitting an allowance of exemplary damages in a proper case; and it is proper for the court so to instruct the jury.

Gregory v Sorenson, 214-1374; 242 NW 91

Hearsay evidence. Plaintiff in an action against the parents of her husband for damages for alienating the affections of her husband must not, under the guise of showing the state of mind of her husband toward her, be permitted to testify to a recital by her husband of what his parents had said to him about the plaintiff.

Paup v Paup, 208-215; 225 NW 251

Insufficient basis. Exemplary damages may not be allowed solely on the basis of the implication of malice which the law attaches to a libel per se.

Ballinger v Demo. Co., 207-576; 223 NW 375

Malice as essential basis. The submission of the question of exemplary damages without supporting evidence of malice is prejudicially erroneous.

Sokolowske v Wilson, 211-1112; 235 NW 80

Measure of damages. The measure of damages in an action commenced during the lifetime of an injured person is what will right the wrong done, including exemplary damages, which are still recoverable if he dies during the pendency of the action; but if commenced by the administrator after death, the measure is the reasonable present value of his life without recovery for pain and suffering or exemplary damages.

Boyle v Bornholtz, 224-90; 275 NW 479

Nonexcessive verdict. A verdict for exemplary damages which is fairly in proportion to the actual damages will not be disturbed by the court.

Gregory v Sorenson, 214-1374; 242 NW 91

Recovery permissive only. Reversible error results from instructing in substance and in effect that the jury is under obligation to return a verdict for exemplary damages in case it finds that plaintiff has suffered actual damages.

Boom v Boom, 206-70; 220 NW 17

11217 Bond—breaches of.

Allowance and payment of claims against estate—failure to file—when enforceable against heir. A claim arising under a bond wherein the surety binds "his heirs, devisees, and personal representatives", and arising after the death of said surety and the due settlement of his estate, is enforceable:

1. Against the property received by an heir, as such, from said ancestor-surety, and
2. Against the property passing from said ancestor and owned by said heir under conveyance for which he paid nothing, and
3. Against the heir, personally, for the value of the property so received if he has consumed it. And this is true even tho, necessarily, said claim was not filed against the estate of said surety.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Cross-complaint. In an action on the bonds of a public officer and his bondsmen to recover a shortage, one surety may not cross-petition against a party who he alleges wrongfully received the funds resulting in the shortage, said latter party not being a party to the bond sued on.

School District v Sass, 220-1; 261 NW 30

Liabilities on bonds — existing judgment. Under the general rule that a judgment against an administrator is conclusive against the surety on his bond, where a judgment against an administrator for misappropriation of funds stands unreversed, it is error to set aside judgment on a bond and give the surety a new trial, since such order would not ipso facto vitiate a former order fixing the administrator's liability.

In re Sterner, 224-605; 277 NW 366

Right to maintain immediate action. An action on a contractor's bond to repair a street may be maintained without allegation and proof that the city has made the repairs.

Charles City v Rasmussen, 210-841; 232 NW 137; 72 ALR 638

Single or dual cause of action. The obligee of a bond, who pleads solely for the recovery of the amount due him under the bond, pleads but a single cause of action, tho he prays for

different remedies against different parties, or in part pleads for unallowable relief.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

11218 Denial of genuineness of signature.

Change of venue—nonpermissible motion. In an action in the county in which a promissory note is specifically made payable, and against the apparent signers of the note, it is not permissible for a defendant to file a motion to transfer the action to the county of his residence on the ex parte showing that he never signed said note, or authorized or ratified, or confirmed any signing of said note in his name.

Greenland v Carter, 219-369; 258 NW 678

Conclusiveness of proof. The court may not say that the genuineness of a signature, duly put in issue, is conclusively established solely by expert opinion evidence of its genuineness, and thereby rightfully exclude the jury from passing upon the issue.

In re Richardson, 202-328; 208 NW 374

Consideration and signature. Plaintiff in an action on a promissory note which he has set forth by copy in his pleadings, may, on the trial, introduce the note in evidence and rest his case, it appearing that the purported maker of the note (defendant) has made no denial, under oath, of the genuineness of his signature; and this is true tho the defendant maker has pleaded want of consideration as a defense.

Booth v Johnston, 223-724; 273 NW 847

Denial by guardian.

Farmers Bank v Bank, 201-73; 204 NW 404

Denial of signature—avoidance. The denial under oath of the signature to a promissory note may be met by the plaintiff by proof (1) that the signature is genuine, or (2) that the defendant has ratified and adopted the signature as his own.

Old Line Ins. v Jones, 206-664; 221 NW 210

Denial of signature—effect. The statutory denial under oath of one's apparent signature to a promissory note, on which suit is commenced in the county in which the note is payable, furnishes no basis for a motion to transfer the action to the county of the residence of the mover.

Greenland v Carter, 219-369; 258 NW 678

Denial of signature overcome by certificate of acknowledgment. Tho a proper denial of the genuineness of the signature to an instrument casts the burden on the opposing litigant to prove the genuineness of such signature, yet, if the instrument is one which is legally acknowledgeable, and is duly acknowledged and properly introduced in evidence with the acknowledgment, the burden of proof henceforth is on the party causing the signature to be denied to overcome, by clear, satisfactory and convincing evidence, the very strong presumption generated by the certificate of acknowledgment, that the instrument was actually executed by the acknowledging party.

Northwestern Ins. v Blohm, 212-89; 234 NW 268

Evidence—sufficiency. Evidence held to support finding that signatures to note and mortgage were genuine.

Rieper v Berner, 222-1399; 271 NW 519

Evidence—sufficiency. Evidence that the signature to a mortgage is the genuine signature of the mortgagor, and that the mortgage is in the possession of the mortgagee is prima facie evidence of the due execution of the mortgage.

Citizens Bk. v Hamilton, 209-626; 227 NW 112

Admissions—evidence—sufficiency. The mere act of a wife in joining with her husband in the execution of a deed of the husband's property in payment of certain notes executed by the husband, cannot be deemed a recognition or admission by her of personal liability on the notes when she did not know that her name had been signed to the notes.

West Chester Bank v Dayton, 217-64; 250 NW 695

Admissibility when signature not denied. A promissory note, duly pleaded and incorporated in the pleading, by original or copy, is receivable in evidence without further proof,—unless the purported maker of the signature, under oath, properly denies said signature.

Strand v Halverson, 220-1276; 264 NW 266; 103 ALR 835

Burden to establish genuineness. Principle reaffirmed that plaintiff in foreclosure has the burden to establish the genuineness of the signatures to the mortgage and accompanying promissory notes when the genuineness of said signatures is specifically denied under oath by the purported maker. Evidence reviewed in detail and held that plaintiff had not successfully carried said burden.

Hagensick v Koch, 220-1055; 264 NW 13

Signing—evidence. In an action on a written guaranty which plaintiff introduces in evidence, the fact that plaintiff dismisses his action, without prejudice, as to one alleged signer, does not render said dismissed defendant incompetent to testify that he never signed said guaranty.

Rawleigh Co. v Moel, 215-843; 246 NW 782

Unnecessary assumption of burden—effect. A plaintiff may assume the burden of showing that the signature to an instrument, defensively pleaded against him by the defendant, is

not genuine, even tho he might have availed himself of a statutorily implied denial of the answer, or might have definitely cast the burden as to genuineness upon the defendant by a denial under oath. And, if he successfully establishes the aforesaid negative, he will be accorded the same protection as tho the defendant had failed to establish the affirmative.

McFerren v Bank, 214-198; 238 NW 914

Forged signatures — expert testimony to overcome. While an acknowledgment by a notary is presumptively true and requires clear and convincing evidence to overcome it, yet by statute it is not conclusive, and the court acting as a jury may find, after reviewing the conflicting testimony of handwriting experts, properly received, that signatures to transfers and assignments of assets of an estate, attacked by an administrator de bonis non, were forgeries.

Brien v Davidson, 225-595; 281 NW 150

General denial. A denial of knowledge or information sufficient to form a belief as to a signature constitutes a general denial of the genuineness of such signature.

Dean v Atkinson, 201-818; 208 NW 301

Impeaching signature but not acknowledgment. Even tho it appears that the purported signature of a wife to a promissory note and mortgage (admittedly executed by the husband on his own land) was affixed by someone other than the wife, yet if the mortgage carries a certificate of acknowledgment in due and proper form as required by law and reciting an acknowledgment by said wife of said mortgage as her voluntary act and deed, the wife must, in order to avoid the mortgage as to herself, overcome, by clear, satisfactory and convincing evidence, the facts affirmed in said certificate.

First Tr. JSL Bank v McNeff, 220-1225; 264 NW 105

Jury question. Where in an action on a promissory note the defendant in his answer denies under oath the genuineness of the signature, a jury question is generated by positive testimony of the payee that the purported maker did sign the note, together with expert testimony on handwriting tending to prove that the signature was genuine, met by equally positive testimony by the purported maker that he did not sign the note.

Seibel v Fisher, 213-388; 239 NW 34

Jury question. A jury question is presented on the issue of the genuineness of a signature denied under oath, (1) by admitted signatures as to the genuineness of which reasonable minds might differ, after comparison with the original; (2) by expert testimony of a not very persuasive nature that the signature was genuine; (3) by testimony tending to show that the party had recognized the indebtedness as her own, and had (impliedly at least) recognized the genuineness of her signature, but had belatedly denied it; and (4) by testimony tending to show that she had adopted the signature as hers, even tho she had not physically affixed it to the instrument.

McColl v Jordan, 200-961; 205 NW 838

Ratification and adoption of signature. Principle reaffirmed that a party may be bound by a signature which he has confirmed and adopted as his own, even tho he has not physically affixed it to the instrument.

McColl v Jordan, 200-961; 205 NW 838

Undenied signature — effect. The mere introduction in evidence of promissory notes sued on makes a prima facie right of recovery when the signatures to said notes are not denied under oath.

Grimes Bank v McHarg, 204-322; 213 NW 798

Unimpeached and uncontradicted testimony. The positive and wholly uncontradicted testimony of an unimpeached and disinterested witness that he saw the purported maker of a promissory note sign it, plus the unqualified opinion of a competent and unimpeached witness to the effect that the signature to the note was genuine, justifies a directed verdict when the genuineness of the signature is the sole issue.

In re Work, 212-31; 233 NW 28

Unusual signature — allegation—sufficiency. An allegation, in an action on a promissory note that both defendants executed and delivered the note, followed by a copy of the note bearing the signature "H. G. & L. T. Greenland", sufficiently alleges the signature of "H. G. Greenland."

Greenland v Carter, 219-369; 258 NW 678

Unverified petition — written agreement. Where an unverified petition is filed in an action on a written agreement, the contents of which are challenged by general and specific denials under oath, plaintiff is not entitled to judgment on pleadings, even tho genuineness of signature is not properly challenged.

Clare v Pearson, 227-928; 289 NW 737

11221 Supplemental pleading.

Deportation grounds — reviewed in habeas corpus. On an appeal from a denial of a writ of habeas corpus under deportation order, the question of sufficiency of evidence to support the order may be properly reviewed in a habeas corpus action, and where ground of deportation is fraud committed in Canada with no showing that crimes charged were criminal under the law of Canada, the order denying the writ was reversed with instructions to grant the writ, as neither a court nor an administrative body can take judicial notice of

the laws of a foreign country. In an administrative proceeding there must be such procedure as to accord substantial justice and afford the parties a fair trial.

Smith v Hays, 10 F 2d, 145

Nonissue-changing amendment. If a defendant, by proper appearance to an action and pleading thereto, is in court when an amendment is filed to the petition, which amendment does not create a new cause of action, he is precluded from appearing specially to the petition as amended.

Johnston v Federal Land Bank, 226-496; 284 NW 393

Seeming illegality — explanatory amendment. In an action by private citizens to enjoin a municipality and its contractor from carrying out an alleged, illegal, written contract for the construction of a light and power plant, the defendants may be permitted by the court so to amend their answer as to plead, tho belatedly, that a provision in said contract relative to the manner of testing said plant when completed, and which provision was in material variance with the plans and specifications on which bids were received, was inadvertently inserted in said contract—that the actual agreed test was identical with that called for by said specifications, and that, since the commencement of the suit, the said defendants had entered into a supplemental contract in accordance with said plea.

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

Specific performance action. Where a plaintiff, after starting a specific performance action to require a federal land bank to complete a loan as agreed, loses the land by foreclosure because the money from the agreed loan is not available to pay off the outstanding mortgage —thereby damaging the plaintiff-landowner by the loss of his equity in the land—an amendment to the specific performance petition changing the relief sought and seeking damages ascertainable after institution of the original suit does not set up a new cause of action.

Johnston v Federal Land Bank, 226-496; 284 NW 393

Unnecessary amendment. In proceedings for the appointment of a guardian, the allegation of unsoundness of mind made when the petition is filed may be supported by testimony of unsoundness at the time of the trial, tho the proceedings be long protracted. It follows that the unnecessary allowance of an amendment alleging such subsequent unsoundness is quite harmless.

Anspach v Littler, 217-787; 253 NW 120

11222 Matter in abatement.

ANALYSIS

I IN GENERAL
II PLEADING
III ALLOWABLE PLEAS IN ABATEMENT
IV NONALLOWABLE PLEAS IN ABATEMENT
V JUDGMENT ON PLEA

I IN GENERAL

Abatement of authorized action. A court having ordered its receiver in partnership to begin action against the partners, in order to collect funds with which to pay creditors, has discretionary power, after such action has been commenced, and on a showing that the receiver has in his possession a very large amount of unliquidated partnership assets, to abate the action until such assets are liquidated.

Day v Power, 219-138; 257 NW 187

Nonabatement of action by receivership. The appointment of a receiver for an insolvent corporation does not abate an action by the corporation as a judgment creditor to set aside conveyances as fraudulent; and if the receiver be not substituted as plaintiff the action may be continued by the corporation in its corporate name.

Grimes Bank v McHarg, 217-636; 251 NW 51

Duplicate actions—which abatable. While an action in partition, in which service of the original notice is incomplete in whole or in part, is deemed pending in the sense that said action constitutes a lis pendens from the time the clerk properly indexes it as a lis pendens, yet, until completed service of the original notice of said action is made, said action cannot be deemed "commenced" or "pending" in the sense that it bars another subsequently instituted action in partition between the same parties and involving the same real estate.

It follows that when duplicate actions in partition, involving the same parties and the same real estate, are brought, that action only is abatable in which said service was last completed.

Ohden v Abels, 221-544; 266 NW 24

Foreign corporations—dissolution—effect on pending actions. A duly rendered decree of dissolution of a foreign corporation, at the instance of the state under the laws of which said corporation was organized, is, in effect, an executed sentence of death; being such, said decree ipso facto works an abatement, (1) of an unadjudicated action in rem pending in this state against said dissolved corporation, and (2) of garnishment proceeding pending in connection with said action. Under such cir-

cumstances, the garnishee may properly move for and be granted an order of discharge.

Peoria Co. v Streator Co., 221-690; 266 NW 548

Jury question—conflict of evidence. On a plea in abatement in an action on a note which matures when a certain farm is sold, as "per contract" (which was oral), a fair conflict of testimony as to the terms of such contract and when such provision was inserted in the note necessarily presents a jury question.

Anderson v Foglesong, 201-481; 207 NW 562

Receivership—effect. An action for specific performance is not abated by the subsequent appointment of a receiver for the defendant.

Hawkeye Ins. v Trust Co., 210-284; 227 NW 637

II PLEADING

Delay in pleading. Defendant's right to plead in abatement is wholly lost when delayed until the plaintiff might legally have brought his action.

Larsen & Son v Ins. Co., 212-943; 237 NW 468

Necessity for plea. There can be no abatement or stay of an action until another action has been determined when there is no pleading requesting such abatement or stay.

Music v De Long, 209-1068; 229 NW 673

III ALLOWABLE PLEAS IN ABATEMENT

Extension to principal available to surety—abatement of action. An order of a court of bankruptcy granting, to a maker of a negotiable promissory note, an extension of time in which to make payment, is not personal to said maker only, but inures, under USC, title 11, §204, to the benefit of another maker of said note who in fact signed said note as surety only, but without so indicating on the face of the note; and said latter maker, when sued alone by the original payee, may, for the purpose of abating the action, establish his suretyship and consequent secondary liability.

Benson v Alleman, 220-731; 263 NW 305

Pendency of another action—evidence. Indefinite evidence of the pendency of an action by the defendant as an occupying claimant presents no obstacle to the entry of a decree quieting title in the plaintiff.

Korf v Howerton, 205-534; 218 NW 274

IV NONALLOWABLE PLEAS IN ABATEMENT

Abatement—other action pending. A motion or proceeding for the abatement of an action of forcible entry and detainer because an equitable action by movant is pending in the district court for relief consequent on the alleged fraud of plaintiff in the forcible detention action, is properly overruled.

Music v De Long, 209-1068; 229 NW 673

Dissolution and receivership. A foreign decree of dissolution of a corporation, and an order appointing a receiver to wind up its affairs, do not abate an action aided by attachment in this state, because the claim of the receiver of a foreign corporation to its property in this state will not be recognized as against the valid claims of resident attaching creditors.

Watts v Surety Co., 216-150; 248 NW 347

Want of demand. Replevin will not be abated for want of demand on defendants for possession prior to the institution of the action (1) when one defendant had incapacitated himself from complying with a demand, and (2) when the other defendant asserted unqualified title against the plaintiff.

Hart v Wood, 202-58; 209 NW 430

V JUDGMENT ON PLEA

Modification of judgment to show abatement only. A judgment presumptively in bar will be modified on appeal to show that it is in abatement only, when such is in fact the effect of the judgment.

Murphy v Berry, 200-974; 205 NW 777

11223 Waiver of matter in bar.

Pleadings in abatement—effect. Principle recognized that a party may not, after trial on matter of abatement, be permitted, in the same action, to answer or reply matter in bar.

Foster & Son v Bellows, 204-1052; 216 NW 956

11224 Subsequent defenses.

Seeming illegality—explanatory amendment. In an action by private citizens to enjoin a municipality and its contractor from carrying out an alleged, illegal, written contract for the construction of a light and power plant, the defendants may be permitted by the court so to amend their answer as to plead, tho belatedly, that a provision in said contract relative to the manner of testing said plant when completed, and which provision was in material variance with the plans and specifications on which bids were received, was inadvertently inserted in said contract—that the actual agreed test was identical with that called for by said specifications, and that, since the commencement of the suit, the said defendants had entered into a supplemental contract in accordance with said plea.

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

11226 Consolidation of actions.

Law and equitable actions. Actions which seek one or more of the following purposes are properly consolidated:

1. Equitable actions for the appointment of a receiver for a corporation and for the closing up of its affairs.

2. Equitable actions by the state for the dissolution of the said corporation.

3. Equitable actions by a stockholder of the said corporation who has fully paid for his stock, for contribution from the other stockholders who have not fully paid for their stock, in order that losses may be equalized on the stockholders.

4. Equitable actions by the executor of a deceased stockholder against the receiver of the corporation for the cancellation of an alleged fraudulently induced stock subscription contract, and for the return of the money paid thereon, met by the receiver with a prayer for judgment for the amount due under the contract.

5. Law actions by the receiver of the said corporation or by the judgment creditors thereof, to recover of the stockholders the amount unpaid on their stock subscriptions.

Lex v Selway Corp., 203-792; 206 NW 586

Discretion of court. The court may be amply justified in refusing to incumber and confuse the trial of a distinct issue in mortgage foreclosure with the trial of a cross-petition by one defendant against a co-defendant.

Cotten v Halverson, 201-636; 207 NW 795

Consolidation—pending actions only. A motion by plaintiff, whereby his independent separate action to set aside a dismissal and to reinstate the cause would be consolidated with the original action to recover accident insurance dismissed by such order, is properly overruled upon defendant's resistance thereto, since, under the statute, such motion can only be made at instance of defendant and then only as to pending actions.

McKee v National Assn., 225-1200; 282 NW 291

Motion to consolidate actions by plaintiffs. Two personal injury actions arising out of the same accident and brought against the same defendant cannot be consolidated on motion by the plaintiffs, for altho equity has the power to consolidate causes of action to avoid multiplicity of suits, the right to move for a consolidation of causes of action in law is by statute granted only to the defendant, and a plaintiff has no such right.

Brooks v Paulson, 227-1359; 291 NW 144

Implied consolidation. A stipulation by parties that a jury be waived in a law action, and that said action together with an equitable action involving the same general subject matter be tried by the court as an equitable matter, constitutes a consolidation of the actions tho no actual order of consolidation is entered.

Holman v Wahner, 221-1318; 268 NW 168

Probate—hostile petitions—refusal to consolidate. Possibly the hearing on different petitions for the probate of hostile wills might be consolidated and the validity of said wills tried out in one action, yet an order which refuses such consolidation is not erroneous when the rights of all parties are fully protected by the order.

In re Fitzgerald, 219-988; 259 NW 455

Premature consolidation of actions. The fact that an order for the consolidation of actions was entered prior to the time when the issues were fully made up, and without notice to some of the parties, will not affect the judgment subsequently entered, when the results obtained were the same as would have been obtained, had the order been made on notice and after the issues were fully made up.

Lex v Selway Corp., 203-792; 206 NW 586

Proper consolidation. Separate appeals to the district court in eminent domain proceedings relative to the same award are properly consolidated.

Genco v Mfg. Co., 203-1390; 214 NW 545

11228 Immaterial errors disregarded.

Harmless error. See under §11548

Erroneous but harmless evidence. Tho the cause of death of a deceased was a question for the jury to decide, yet permitting a physician to testify that death resulted from certain injuries must be deemed harmless when the cause of death never was in issue,—when the jury would necessarily have found in accordance with said testimony had it not been received.

Lukin v Marvel, 219-773; 259 NW 782

Nonprejudicial instructions. An instruction to the effect that if the defendant failed to yield to another motorist one-half of the traveled way, the jury, "in the absence of justifiable excuse", might find the defendant negligent, cannot be deemed prejudicial to a defendant who established no excuse whatever.

Lukin v Marvel, 219-773; 259 NW 782

Refusing cumulative evidence. Refusal to admit testimony, which at the best is merely cumulative, is not prejudicially erroneous.

Hawkins v Burton, 225-707; 281 NW 342

CHAPTER 492

MOTIONS AND ORDERS

11229 "Motion" defined.

ANALYSIS

Appeal from rulings on motion. See under §12823
Appeal grounds preserved by motion. See under §12827
Arrest of judgment. See under §§11150, 11554–11559
Change of proceedings, law and equity. See under §§10944, 10947
Change of venue. See under §§11408, 11414
Continuance. See under §11446
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Demurrer as waiver of error in ruling. See under §11144 (II)
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Civil cases. See under §11508
Criminal cases. See under §13915 (IV)
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Equity—motion to dismiss. See under §11130
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Judgment notwithstanding the verdict. See under §§11553–11559
Judgments on motion. See under §§11567 (III), 11608
Judgment on pleadings. See under §11567 (III)
Misjoinder of defendants. See under §10972 (VI)
Misjoinder of plaintiffs. See under §10969 (III)
More specific statement. See under §§11127, 12823
Motions appealable. See under §§12823, 12827
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Motions in criminal cases. See under various sections below:
(a) Bill of particulars. See under §13732.04
(b) Change of venue, misdemeanors. See under §§13569, 13570
(c) Continuances. See under §§13843, 13844, 13852–13854
(d) Dismissal of actions. See under §14027
(e) Indictment set aside. See under §§13781–13786
(f) Information set aside. See under §§13659, 13660
(g) Proceedings in vacation. See under §13958.1
(h) Verdict set aside. See under §13858
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Nonjoinder of parties. See under §10972 (VII)
Objections to grand jury. See under §§13680 (VII), 13783
One motion of a kind. See under §11135.1
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Sham pleadings stricken. See under §11197
Striking irrelevant matter. See under §11197
Striking misjoined causes. See under §§10963–10965
Striking unverified pleadings. See under §11168
Summary judgment. See under §§11567 (III), 11608
Time of making motion. See under §§11121, 11136

I IN GENERAL

Motion to strike motion. A motion to strike a motion is not proper practice.

Markworth v Bank, 212-954; 237 NW 471

Motion to strike motion not recognized. A motion to strike another motion is a procedure not recognized by our practice, but an order sustaining a motion to strike a pleading consisting of objections to a receiver's report and an application for a hearing on a claim was nothing more than an order overruling the objections and denying the application.

Headford et al. Co. v Associated Co., 224-1364; 278 NW 624

Motions—unallowable successive motions. It is not permissible for defendant to file separate, successive motions "of the same kind" to the same unamended petition. So held where defendant first filed a motion to strike portions of a petition and, being overruled, filed a motion for a more specific statement of said petition, it being held that said motions were "of the same kind" in that each motion had the same objective, to wit, the proper settling of the pleading for trial.

The proper and necessary procedure is to combine the subject matters of both motions into one motion.

Bookin v Utilities Co., 221-1336; 268 NW 50

Alleging note as receipt—sham defense—striking. Where a written instrument sued upon contains the legal elements of a negotiable promissory note, an allegation in an answer that such written instrument was a receipt shows on its face that such pleading is false and should be stricken on motion.

Hillje v Tri-City Co., 224-43; 275 NW 880

Cost bond affidavit not a pleading. The statutory affidavit in support of a motion for cost bond is not a pleading.

Schultz v Ins. Co., 225-1024; 282 NW 776

Franchise renewal statute. At the termination of a mutual telephone company franchise, stockholders voting against renewal of franchise may not maintain an action against the majority stockholders to require purchase of their stock by such stockholders voting in favor thereof, until after three years from date of voting, under §8365, C., '35, permitting such franchise renewal, if the majority stockholders voting renewal purchase the stock of those voting against renewal within three years from date of voting, and an action commenced within such three-year period, being premature, will be dismissed on motion.

Terrell v Ringgold Tel. Co., 225-994; 282 NW 702

Invalid defense not attacked by motion—defeating recovery. If matter pleaded as a defense is not challenged by motion or demurrer or otherwise, it will, if proven, defeat the plaintiff's action, tho had the question been

I IN GENERAL—concluded

properly raised the answer would have been held to present no defense.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Irregular practice. A plaintiff who permits his action to quiet title to lie dormant until the defendants are all dead is guilty of very irregular practice in his attempt to obtain a substitution of defendants by filing a purported amendment, not under the title of his pending action, but under a new title, in which the heirs of the deceased defendants are for the first time enumerated and named as the defendants, and under such title, moving for a substitution of defendants in the old action.

Benjamin v Jackson, 207-581; 223 NW 383

Motion to dismiss equitable action. There is no statutory authority for a motion to dismiss an equitable action at the close of plaintiff's testimony.

Appanoose Bureau v Board, 218-945; 256 NW 687

Nongermane matters. Motions must be dealt with as presented and not utilized for nongermane purposes.

In re Nairn, 215-920; 247 NW 220

Objections to executrix's report—conversion issue not misjoinder—motion to strike. Where an executrix after resigning files her reports, objections thereto asking that she report and account for certain alleged estate assets claimed by executrix as individual property do not misjoin in probate an action against executrix for conversion, and such objections are not subject to motion to strike.

In re Rinard, 224-100; 275 NW 485

Pleading verification requirements. Statutes requiring verification of pleadings, to be made by persons knowing facts, require the affidavit to state that affiant believed statements therein contained to be true, but such statutes relate to verification of pleadings, and not to affidavits generally in support of motions for special remedies, nor to cost bond affidavit.

Schultz v Ins. Co., 225-1024; 282 NW 776

Poor practice—admitting evidence on promise to amend. In a law case, especially, it is poor practice to permit evidence, objected to as incompetent, to be admitted on the promise that amendments would later be filed to meet the proof. Such objections coming after the witness has answered should be followed by motions to strike.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Rulings on motions — correction—certiorari (?) or appeal (?). Certiorari will not lie to review rulings of the court on motions submitted to the court by the hostile litigants, the sole function of the writ being to annul illegal action and not to review mere errors. Appeal is the sole remedy for the correction of the latter.

Morrison v Patterson, 221-883; 267 NW 704

Unassailed answer or cross-petition, if proven, defeats plaintiff. Matter pleaded by defendant in an answer or cross-petition, if not assailed by motion or demurrer, will, if proven, defeat plaintiff's action, altho, had the question been raised, the answer would have been held to present no defense. Held, defendant had failed to prove his allegation.

Maloney v Rose, 224-1071; 277 NW 572

II FORM AND REQUISITES

Unallowable motion to strike. A second motion to strike matter from the same unamended petition is unallowable.

Conner v Henry, 205-95; 215 NW 506

Answer negativing petition not subject to motion to strike. An answer which, in effect, is a negation of the allegations of the petition proof of which plaintiff must make in order to recover, is not subject to a motion to dismiss.

Clark Bros. v Anderson & Perry, 211-920; 234 NW 844

When appeal lies—overruled demurrer to answer. Where plaintiff, after answer, moved for judgment of dismissal, and also for judgment on the pleadings, held that, if it be permissible to treat the latter motion as a demurrer to the answer, yet an adverse ruling thereon was not appealable unless plaintiff elected to stand thereon.

Morrison v Clinic, 204-54; 214 NW 705

Elimination of irrelevant and redundant matter. Principle reaffirmed that irrelevant and redundant matter in a pleading must be eliminated by a motion to strike.

Iowa Co. v Coal Co., 204-202; 215 NW 229

Equitable action—motion to dismiss—scope of confession. A motion to dismiss, under our new equity practice (§11130, C., '24), confesses all facts which are properly and sufficiently pleaded in the pleading assailed, but not conclusions of law or conclusions of fact, unless the facts from which the conclusions of fact logically follow are set out.

Benton v College, 202-15; 209 NW 516

Improper striking in toto. A count which contains both defensive and nondefensive matter must not be stricken in toto.

Cedar Rapids Co. v Sec. Co., 208-150; 225 NW 339

Judgment notwithstanding verdict. A motion for judgment non obstante veredicto is based wholly on a defective pleading, in that it omits to aver some material fact necessary

to complete a cause of action or defense and the motion must clearly point out the omission.

In re Larimer, 225-1067; 283 NW 430

Presentation and reservation of grounds of review—motion to strike—omnibus motion. A blanket motion to strike intermingled competent and incompetent testimony is improper, and will not be reviewed on appeal.

Koopman v Ins. Assn., 209-958; 229 NW 221

III PARTICULAR MOTIONS

Motion as proper remedy. A motion to set aside and vacate an order which is in excess of the jurisdiction of the court is proper.

Guisinger v Guisinger, 201-409; 205 NW 752

Motion to dismiss—definition. A motion to dismiss an equitable action is, in legal effect, an equitable demurrer.

Schwartzendruber v Polke, 205-382; 218 NW 62

Another action pending—necessity for plea. There can be no abatement or stay of an action until another action has been determined, when there is no pleading requesting such abatement or stay.

Music v DeLong, 209-1068; 229 NW 673

Application to vacate. Where no personal representative was substituted for plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence, application made during same term to vacate the dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

Competent allegations—striking in toto improper. A motion to strike an entire amended and substituted petition, being too broad, is properly overruled when such pleading, although replete with objectionable matters, nevertheless contains competent allegations necessary to afford the relief prayed for.

Skaien v Witwer Co., 224-391; 276 NW 623

New trial—discretion of court. A large discretion is lodged in the trial court in determining whether a new trial should be granted on the ground of newly discovered evidence, since the trial court has a much better opportunity for seeing and judging how the testimony given, and that afterward discovered, bears upon the issues, and for determining whether the facts offered are similar or dissimilar.

Larson v Meyer, 227-512; 288 NW 663

New trial—amendment after extended time for filing motion—when permitted. An amendment to a motion for a new trial may be filed after the statutory or extended time for filing the motion if it is germane to the original motion.

Mitchell v Heaton, 227-1071; 290 NW 39

Escheat proceeding—no appeal—dismissal. Where the state of Iowa in an estate proceeding files an application for the escheat to the state of the property in the estate and includes in its application extensive allegations dealing with the selection of a new administrator, a motion to strike those portions of the pleading dealing with the new administrator, when sustained, does not present an interlocutory order from which an appeal will lie, and, if taken, the appeal will be dismissed on motion.

In re Bannon, 225-839; 282 NW 287

Executor's and attorney's fees—proper attack by motion. While an estate is being administered, an ex parte order allowing executor's and attorney's fees for ordinary and extraordinary services is properly attacked by motion.

In re Metcalf, 227-985; 289 NW 739

General allegation of negligence—standing on motion. To preserve an objection that an allegation of negligence was too general and indefinite to constitute basis of cause of action, a defendant should stand on its motion to strike and for more specific statement. Failing in this and filing its answer, it waived any error of court in overruling motion. A cause of action should be sufficiently precise to enable the defendant to prepare his defense.

O'Meara v Green Const. Co., 225-1365; 282 NW 785

Improper rebuttal evidence. If the answer of a witness does not properly constitute rebuttal evidence, it should be attacked by a motion to strike, and the court commits no reversible error in permitting it to stand in the absence of objection.

Churchill v Briggs, 225-1187; 282 NW 280

Improper striking in toto. A count which contains both defensive and nondefensive matter must not be stricken in toto.

Cedar Rapids Co. v Sec. Co., 208-150; 225 NW 339

Incapacity to sue—waiver. An objection to the capacity in which plaintiff sues must be interposed by defendant before he pleads to the merits.

Keeling v Priebe, 219-155; 257 NW 199

New trial — insufficient ground. Where a jury returned a verdict in favor of payee in an action on a note executed by a partnership wherein the defense of payment was pleaded and evidence was introduced to show a tender of payment by the partnership to payee, but with payee's consent the money was retained by one partner as a personal loan from payee to such partner, defendants' motion for new

III PARTICULAR MOTIONS—concluded

trial based on newly discovered evidence consisting of other admissions at different times of the same facts presented at the trial was properly overruled, as such evidence of the same kind and to the same point was merely cumulative.

Larson v Meyer, 227-512; 288 NW 663

Judgment on pleadings — motion for — permissibility. The practice of entertaining motions for judgment on the pleadings will be recognized, on appeal, not as a matter of right in movant, but as a matter of mutual agreement between litigants.

McGraw v Seigel, 221-127; 263 NW 553; 106 ALR 1035

Judgment on pleadings denied. Where an unverified petition is filed in action on a written agreement, the contents of which are challenged by general and specific denials under oath, plaintiff is not entitled to judgment on pleadings, even tho genuineness of signature is not properly challenged.

Clare v Pearson, 227-928; 289 NW 737

Motion in lieu of reply. A motion to strike an answering amendment which interposes the bar of the statute of limitation is not the proper procedure under which to plead facts which avoid the bar. Reply is necessary.

Lawrence v Melvin, 202-866; 211 NW 410

Motion to correct trial record. Any correction of the trial court record should be made by a motion to correct or expunge in the lower court as provided by statute, and not in the appellate court.

Rance v Gaddis, 226-531; 284 NW 468

Motion to set aside by stranger to proceeding. The owner of land which has been levied upon and sold under execution as the property of the judgment defendant on the theory that the judgment became a lien on the land before said owner acquired the land may maintain a motion to set aside the sale on the ground that said judgment was not, and never had been, a lien on the land.

Dorsey v Bentzinger, 209-883; 226 NW 52

Motion to set aside decree. A motion to set aside a decree of divorce for fraud, in that plaintiff had not acquired a bona fide residence required by statute, is a proper procedure, but the burden of proof necessarily rests on the maker of the motion.

Girdey v Girdey, 213-1; 238 NW 432

Motion to strike defensive matter in probate —effect. A motion in probate to strike a plea in defense to a claim sought to be enforced by the executor admits the truth of all matters properly pleaded in the plea.

In re Carpenter, 210-553; 231 NW 376

Negligence—conclusion assignment—proper submission. Supported assignments of negligence are properly submitted to the jury, even tho as pleaded by plaintiff they are "the mere opinions and conclusions of plaintiff and not statements of fact," it appearing that defendant wholly failed to question the legal sufficiency of said assignments prior to filing answer—in fact so delayed until after the close of all the testimony in the case.

Engle v Ungles, 223-780; 273 NW 879

New trial. If a different result is not reasonably probable on account of newly discovered evidence, a new trial ought not be granted.

Larson v Meyer, 227-512; 288 NW 663

New trial not germane to non obstante veredicto. A motion for new trial is not germane to a motion for judgment notwithstanding the verdict and cannot be considered if made after a lapse of five days from the verdict.

In re Larimer, 225-1067; 283 NW 430

Overruling motion to strike after curative amendment. A motion to strike a pleading for a defect therein is properly overruled when the defect is cured by proper amendment before the motion is ruled on.

Cleophas v Walker, 211-122; 233 NW 257

Scope of motion. A motion to strike a pleaded cause of action from two of three existing, specified, and separate pleadings by the same party does not embrace the striking of the cause of action from the third pleading.

Matthews v Quaintance, 200-736; 205 NW 361

Striking objections in probate. A motion to strike objections to probate accounts on the grounds of misjoinder of actions is determinable only on the contents of the pleading attacked without aid of affidavits.

In re Rinard, 224-100; 275 NW 485

Subsequent errors harmless after refusal to direct verdict. Where the court should have directed a verdict for the defendant at the completion of testimony, subsequent errors on rulings or orders were not prejudicial and could not be relied on by the plaintiff as grounds for a new trial, after a verdict was rendered for the defendant.

Paulson v Hanson, 226-858; 285 NW 189

IV PARTIES

Death of party without substitution. Where no personal representative was substituted for plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence, application made during same term to vacate the

dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

Insurer and mortgagee not necessary parties. In an automobile owner's damage action against a street railway, wherein defendant pleads a general denial and alleges that plaintiff is not the real party in interest, and wherein interrogatories attached to defendant's answer disclose that plaintiff's loss had been partly settled through insurance, and when defendant then alleges that a bank holds a mortgage on plaintiff's automobile, and moves the court to bring in the insurer and the mortgagee-bank as parties, such motion was properly overruled.

Caligiuri v Railway, 227-466; 288 NW 702

V NOTICE

Judgment—entry—unallowable modification. The court, having overruled a motion (1) to strike an answer, and (2) for judgment nil dicit, has no right, later and after the term of court has expired, and while the cause is pending, to materially amend said ruling without pleadings, without hearing, and without notice to the defendant.

Taylor v Grimes Canning Corp., 218-1281; 257 NW 353

VI FILING AND ENTRY

Neglect to file bond within time ordered—effect. The nonwillful neglect to file a cost bond by the time ordered by the court will not justify a dismissal of the action when the bond is filed prior to the ruling on the motion to dismiss.

Arthaud v Griffin, 205-141; 217 NW 809

Motions — negligence — general and specific allegations—belated attack. Except in res ipsa loquitur cases a specific allegation will not waive a general allegation of negligence, which general allegation must be assailed by motion, if timely, before answer and without such motion is properly submitted to the jury if sustained by the evidence.

Gookin v Baker & Son, 224-967; 276 NW 418

Municipal court—extending time. The municipal court has jurisdiction to enter an order extending the time to file a motion for a new trial and exceptions to instructions and judgment non obstante veredicto. Such order is reviewable by appeal, not by certiorari.

Eller v Municipal Ct., 225-501; 281 NW 441

Withdrawal of pleading to file motion. There is no statutory authority to support common practice of withdrawing pleadings for purpose of filing a demurrer or motion, and such matter rests wholly within sound discretion of trial court.

Brown v Correll, 227-659; 288 NW 907

VII RESISTANCE

Motion to strike motion improper. Principle recognized that a motion to strike a motion is not proper practice.

Markworth v Bank, 212-954; 237 NW 471

VIII HEARING AND DETERMINATION

Action by teacher for compensation. In a teacher's action to recover compensation against a school district, where a taxpayer files a defensive petition of intervention after a demurrer to the answer had been sustained, but before defendant had made any election to stand on its answer, before any demand to make such election had been made, before default or judgment had been entered, or any demand therefor—the petition of intervention being unquestioned and raising an issue on the additional defensive matter—the court erred in sustaining a motion to strike the petition of intervention and entering judgment against the school district.

Schwartz v Con. Sch. Dist., 225-1272; 282 NW 754

Answer—res judicata plea — inapplicability —stricken on motion. In an action by citizens against the town council to enjoin the operation of a municipal electric plant, the trial court is correct in striking, on motion, that portion of defendant's answer which pleads res judicata, when it appears that a former action in the United States district court for the same purpose was by a private electric company in its individual capacity to enjoin the construction of the plant and that no judgment on the merits was rendered.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Ex parte allowance of fees—attack by motion. Tho unsupported by affidavits, every material allegation in a verified motion attacking an ex parte order allowing executor's and attorney's fees for extraordinary services will, in the absence of attack thereon or resistance thereto, be taken as true.

In re Metcalf, 227-985; 289 NW 739

Joinder—city and benefited property owners. There is no misjoinder of parties or causes of action, where a city in its own behalf and in behalf of the parties beneficially interested brings an action against a contractor, combining therein both a claim for damages for defective pavement and a claim for the cost of "coring" to determine the thickness, since the basis for the latter claim was found in the contract. A motion to strike is properly overruled.

Sioux City v Krage, 225-1154; 281 NW 828

Motion to dismiss—grounds. If any of the grounds of a motion to dismiss petition for construction of a will are well-taken, it is not error to sustain such motion.

Anderson v Meier, 227-38; 287 NW 250

VIII HEARING AND DETERMINATION—concluded

Motion to strike conclusions—overruling not ground for reversal. Supreme court will not assume original jurisdiction to determine a motion to strike not ruled on in the lower court; but, even tho it were overruled, a motion to strike allegations on the ground that they were in the nature of conclusions and not statements of fact would not warrant a reversal in the supreme court.

Albright v Winey, 226-222; 284 NW 86

Ruling on motion to strike—nonreviewable fact question. On appeal from an order overruling a motion to strike on ground that there was misjoinder of a principal corporation and its subsidiary, where question to be determined was whether the corporate entity of the subsidiary could be disregarded because it was so organized, controlled, and conducted as to make it a mere instrumentality of the principal corporation, which question being one of fact determinable only after a hearing of the evidence, the supreme court would not decide the matter on basis of the pleadings.

Wade v Broadcasting Co., 227-427; 288 NW 441

Motion sustained if any ground is good. When a motion to strike an application by an executor to have a clerk's approval of claims against an estate set aside was based on several grounds and when the granting of the motion was assailed as to only one ground, on an appeal, the supreme court was precluded from reversing the case since, if the motion was good on any of its grounds, the ruling below was correct.

In re Baker, 226-1071; 285 NW 143

Order—vacation—sanity of applicant. In an application to set aside an ex parte order in probate wherein the defendant, inter alia, pleads mental incompetency of the plaintiff, a motion by defendant to set the matter for hearing solely on the issue of plaintiff's sanity is properly overruled.

In re Brockmann, 207-707; 223 NW 473

Order overruling motion to strike. An order overruling a motion to strike a pleading is appealable when the ruling goes to the very merits of the controversy.

State v Murray, 217-1091; 252 NW 556

Reception of evidence—discretion in reopening—new trial for abuse. Granting or refusing a motion to reopen a case to admit further evidence is within the sound discretion of the court, but if a refusal to reopen is an abuse of discretion, a new trial should be granted on appeal.

In re Canterbury, 224-1080; 278 NW 210

Ruling on motion as adjudication. An order overruling plaintiff's motion (1) to strike an answer, and (2) for judgment nil dicit (assuming the propriety of such procedure) constitutes an adjudication that plaintiff has no legal right to a judgment on the pleadings as they then stand; and plaintiff has no right later to present, to another judge of the same court, a motion for judgment on the same pleadings, and said latter judge has no right to review the rulings of the former judge by sustaining said latter motion.

Taylor v Canning Corp., 218-1281; 257 NW 353

Ruling on motion as adjudication. Whether a ruling sustaining a motion to strike a pleading on the ground that it improperly joins causes of action and party defendants constitutes (in the absence of an appeal) a final adjudication in the further progress of the cause, quaere.

Ontjes v McNider, 218-1356; 256 NW 277

IX WITHDRAWAL, ABANDONMENT, OR WAIVER

Answer and motion at same time. The filing of an answer to a petition as amended, and, at the same time, a motion attacking the amendment, is unallowable. In such case the answer will stand and the motion will be deemed waived.

Bliss v Watson, 208-1199; 227 NW 108

More specific statement — error waived. Error in overruling a motion for more specific statement is waived by movant filing an answer.

Kirchner v Dorsey, 226-283; 284 NW 171

Motions—waiver by filing subsequent pleading. A motion by defendant to dismiss an application for the appointment of a receiver, and not ruled on, is waived by the subsequent filing by defendant of an answer and resistance to said application.

Interstate Assn. v Nichols, 213-12; 238 NW 435

Motions—waiver of right to ruling. Plaintiff waives his right to a ruling on his motion to strike portions of the answer before ruling is made on defendant's motion for a directed verdict, when plaintiff at the close of the trial acquiesces in the action of the court in considering both motions at the same time.

Ankeney v Brenton, 214-357; 238 NW 71

Scope of remedy—striking allegation (?) or withdrawal of issue (?). It is not proper practice, at the close of all the evidence, to move to strike from the petition unsupported or legally insufficient allegations of negligence. The proper practice is to move to withdraw such issues from the jury.

Townsend v Armstrong, 220-396; 260 NW 17

Treating unallowable motion as allowable. A litigant, by allowing a motion to be argued

and submitted to the court for determination without effort to exclude such motion from the record, waives the objection that the movant had no legal right to file said motion.

Iowa Co. v Coal Co., 204-202; 215 NW 229

Trial—effect on unruled motion. Defendant in a criminal proceeding waives a motion filed by him by going to trial without demanding a ruling on said motion.

State v Wilson, 222-572; 269 NW 205

Waiver by filing answer. In action on note, filing of answer waived right to proceed under statute by motion to strike cause of action improperly joined.

Brown v Correll, 227-659; 288 NW 907

Withdrawing answer—substituting demurrer or motion—court's discretion. It is within the trial court's discretion to permit a litigant to withdraw his answer and substitute therefor a motion or demurrer.

In re Arduser, 226-103; 283 NW 879

11230 Several objects.

Unallowable successive motions. It is not permissible for defendant to file separate, successive motions "of the same kind" to the same unamended petition. So held where defendant first filed a motion to strike portions of a petition, and, being overruled, filed a motion for a more specific statement of said petition, it being held that said motions were "of the same kind" in that each motion had the same objective, to wit, the proper settling of the pleading for trial.

The proper and necessary procedure is to combine the subject matters of both motions into one motion.

Bookin v Utilities Co., 221-1336; 268 NW 50

11231 Proof by affidavit—cross-examination.

Affidavits. See under §11342 et seq.
Oral examination of affiants. See under §11347, Vol I

Affidavit (?) or bill of exceptions (?). Misconduct of an attorney in argument (not taken down and made of record) must be presented by bill of exceptions and not by affidavit attached to the motion for new trial.

Hornish v Overton, 206-780; 221 NW 483

Conflicting affidavits—effect. A war of conflicting affidavits between counsel as to what oral understanding was had relative to the time of filing an abstract on appeal will not necessarily be determined by the supreme court.

Farmers Bank v Miles, 206-766; 221 NW 449
Reppert v Reppert, 214-17; 241 NW 487

Matter incidental to ruling on motion not res judicata. In a libel action brought against a newspaper and others as joint tort-feasors, when affiants testified as to the matter of agency at a hearing on a motion to strike part of the petition, a ruling by the court denying the motion was not res judicata on the question of agency, as agency question was only incidental to the question of misjoinder raised by the motion to strike and could be raised in a subsequent trial on the merits of the case.

Cooper v Gazette Co., 226-737; 285 NW 147

Nonpermissible affidavits. Affidavits to the effect that a juror changed his vote from "not guilty" to "guilty" because of certain misconduct occurring during the deliberation of the jury will be given no consideration whatever.

State v Clark, 210-724; 231 NW 450

Nonpermissible affidavits. Improper argument by the county attorney cannot be shown by affidavits attached to motion for new trial.

State v Hixson, 208-1233; 227 NW 166

Optional methods of proof. The grounds for a new trial need not necessarily be established by affidavits. In proper cases such grounds may be established by the testimony of witnesses.

Skinner v Cron, 206-338; 220 NW 341

Refusal to call jurors. When jurors are present in court when a motion for a new trial comes on for hearing, it is reversible error for the court to refuse to order their personal examination as to specified misconduct which, if established, would reveal grounds for a new trial; and especially so when it appears that the jurors had refused to make their personal affidavits as to the facts.

Skinner v Cron, 206-338; 220 NW 341

Refusal to call jurors. An unsupported request by an accused in a motion for a new trial that certain trial jurors be called for examination as to alleged misconduct on the part of the jury is properly overruled, especially when no affidavit of any juror had been filed.

State v Friend, 206-615; 220 NW 59

Unallowable impeachment. In a personal injury action, a verdict may not be impeached by the affidavits of jurors to the effect that a certain allowance was made for an element of damages as to which there was no evidence.

McQuillen v Meyers, 213-1366; 241 NW 442

11232 Notice of motion.

Case reinstated after dismissal. Where an action is dismissed by the clerk under district court rules, but the judge thereof, without notice to the defendant, reinstates the case on motion and showing that the clerk acted erroneously, and where an application to vacate the order of reinstatement is denied, supreme court could not on appeal assume that judge lacked jurisdiction to reinstate without notice to defendant, without the district court rules of practice being in evidence and before the appellate court.

Eggleston v Eggleston, 225-920; 281 NW 844

11240 "Order" defined.

ANALYSIS

I In General
II Ex Parte Orders

I IN GENERAL

"Order" defined. An "order" of court, speaking broadly, is any direction of the court in a proceeding, not including the judgment or decree.

Blunk v Walker, 206-1389; 222 NW 358

Alimony—nonlienable decree for money. A decree (in divorce proceedings) which, inter alia, simply "orders" defendant to pay to the clerk for the use of plaintiff a stated sum each month, but renders against defendant no present judgment for money, but authorizes the clerk to enter such judgment for payments in default, neither becomes a lien on defendant's lands, nor authorizes the issuance of an execution.

Millisack v O'Brien, 223-752; 273 NW 875

Compromise settlement — approval — effect. An order in guardianship proceedings approving a settlement of a claim on behalf of the ward is conclusive until set aside by some direct and appropriate proceedings in the probate court.

Bennett v Ryan, 206-1263; 222 NW 16

Fraudulently obtained order. A fraudulently obtained order of court may, of course, be set aside on proper application.

In re Riordan, 216-1138; 248 NW 21

Judicial legislation. A court enters the wholly unallowable field of judicial legislation when it assumes to enter ex parte orders directing the payment of mileage to grand jurors in an amount different than the amount provided by statute.

Park v Polk County, 220-120; 261 NW 508

Municipal court—filing motions after verdict —extending time—jurisdiction. The municipal court has jurisdiction to enter an order extending the time to file a motion for a new trial and exceptions to instructions and judgment non obstante veredicto. Such order is reviewable by appeal, not by certiorari.

Eller v Municipal Court, 225-501; 281 NW 441

Sales and conveyances—approval as interlocutory order. The approval by the probate court of a sale and conveyance of land belonging to an estate, must be deemed an interlocutory order.

In re Doherty, 222-1352; 271 NW 609

Extension of testator's limitation in reacceptance of bequest—effect of unappealed order. Where testator directed his executors to purchase, for a daughter, good Iowa land of the value of $15,600, such daughter having refused to accept partial distribution of realty to heirs prior to testator's death, but the testator also provided such bequest should lapse if daughter failed to select land within one year from testator's death, and where within one year the daughter filed application for extension of time on the ground that estate did not have funds to purchase such land, which extension was granted after due notice to executors and heirs, held, district court had jurisdiction to grant extension of time and, no appeal having been taken therefrom, the order became "final" and the heirs were bound by the decision.

In re Holdorf, 227-977; 289 NW 756

Unappealed but erroneous order dismissing party defendant. In an action of certiorari against the state executive council, and the custodian of public buildings and grounds, to review the legality of the discharge of an employee of the latter department, an unappealed order of court dismissing said custodian as an improper party defendant, tho unqualifiedly erroneous, becomes the law of said particular action, and precludes said plaintiff from thereafter proceeding against said custodian for the relief sought.

Pittington v Herring, 220-1375; 264 NW 712

II EX PARTE ORDERS

Attorney fee for extraordinary services—review. Tho a presumption of regularity exists as to an unassailed allowance of attorney fees for extraordinary services, and tho ex parte orders fixing such fees without introduction of evidence are not uncommon, yet such orders are always open to review on final settlement.

In re Metcalf, 227-985; 289 NW 739

Computation of period—tolling statute of limitation—unauthorized action. An action by a plaintiff, as administrator of the estate of a deceased, to recover damages for the wrongful death of the deceased, when plaintiff was not such administrator, is a nullity, and, therefore, does not toll the statute of limitation on the said cause of action. And in case plaintiff is appointed administrator after the statute has fully run, an ex parte order of the probate court assuming to ratify, confirm, and

adopt such former proceeding is likewise a nullity.

Pearson v Anthony, 218-697; 254 NW 10

Decisions reviewable—misjoinder of parties. The action of the court in overruling a motion to set aside an ex parte order making movant a party to a pending action is appealable, the motion being based on the ground of misjoinder of parties.

Irwin v Bank, 218-961; 256 NW 681

Executor's and attorney's fees — ex parte allowance. While an estate is being administered, an ex parte order allowing executor's and attorney's fees for ordinary and extraordinary services is properly attacked by motion.

In re Metcalf, 227-985; 289 NW 739

Improper vacation of order. An order approving the final report of an executor and discharging him, on due notice to all parties interested, cannot be later set aside on the ex parte application of the former executor.

In re Brockmann, 207-707; 223 NW 473

Intermediate accounts. Mistakes in ex parte orders, made during settlement of an estate, are subject to correction at any time before final settlement of the estate.

In re Metcalf, 227-985; 289 NW 739

Misjoinder of parties. The action of the court in overruling a motion to set aside an ex parte order making movant a party to a pending action is appealable, the motion being based on the ground of misjoinder of parties.

Irwin v Bank & Trust, 218-961; 256 NW 681

Power of judge at chambers. An ex parte order of a judge at chambers to the effect that a party to an action may, on the trial, use a transcript of the testimony taken in another and former action is a nullity.

Kostlan v Mowery, 208-623; 226 NW 32

11244 Filed and entered.

Irregularities — effect. The validity of a settlement of a claim on behalf of a ward is not affected by the fact that the settlement was signed shortly before the guardian was actually appointed, or that there was some delay in filing the order of court approving the settlement.

Bennett v Ryan, 206-1263; 222 NW 16

CHAPTER 493

SECURITY FOR COSTS

11245 Bond for costs.

Affidavit for cost bond. The statutory affidavit supporting a motion for cost bond may be made and filed by a defendant corporation's attorney, and a corporation need not personally make and file such affidavit.

Schultz v Ins. Co., 225-1024; 282 NW 776

Cost bond affidavit by attorney—presumption of knowledge. A corporation defendant's attorney making statutory affidavit in support of motion for cost bond will be presumed to have had sufficient knowledge of facts to enable him to make such affidavit and such knowledge need not be alleged.

Schultz v Ins. Co., 225-1024; 282 NW 776

Cost bond affidavit not a pleading. The statutory affidavit in support of a motion for cost bond is not a pleading.

Schultz v Ins. Co., 225-1024; 282 NW 776

Security for payment—cost bond application before answer. Court erred in overruling a motion for cost bond and holding that defendant's application therefor was not filed in time, because filed after time for defendant's appearance when evidence showed that plaintiff's attorney, through correspondence, gave defendant's attorney more time, and where it was filed long prior to filing of any answer in cause, there being no order of court therein requiring such motion for cost bond to be filed within certain time.

Schultz v Ins. Co., 225-1024; 282 NW 776

11248 Dismissal for failure to furnish.

Neglect to file within time ordered—effect. The nonwilful neglect to file a cost bond by the time ordered by the court will not justify a dismissal of the action when the bond is filed prior to the ruling on the motion to dismiss.

Arthaud v Griffin, 205-141; 217 NW 809

CHAPTER 494

EVIDENCE

GENERAL PRINCIPLES

11254 Witnesses—who competent.

Discussion. See 22 ILR 609—Trial technique

ANALYSIS

Agency. See under §10966
Books of account. See under §11281
Burden of proof. See under §11487 (II)
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Workmen's compensation cases. See under §1441

I WITNESSES

(a) IN GENERAL

Examination by court. An impartial examination of a witness by the court is proper.

State v Weber, 204-137; 214 NW 531

Examination—leading questions condemned. Record reviewed, and held that, in the examination of certain witnesses, leading questions were not permissible.

Wildeboer v Peterson, 201-1202; 203 NW 284

Definition of "hearing". A "hearing" is the trial of an issue, including the introduction of evidence, the arguments, the consideration by the court, and the final decree and order.

Equitable v McNamara, 224-859; 278 NW 910

Unallowable self-corroboration. A party may not corroborate the testimony of his own witness by having the witness testify that he has told the same story on other occasions.

Wertz v Hale, 206-1018; 221 NW 504

Identity of voice in telephone conversation. Identity of one speaking through a telephone may be by sound of voice or by sound of voice aided by a showing of fact that the speaker in

question was perfectly familiar with the particular subject matter of the conversation.

Hanna v Central Co., 210-864; 232 NW 421

Conclusiveness on party introducing. Plaintiff who, in his own behalf, calls the defendant as a witness, is bound by the latter's apparently frank, unequivocal and undisputed testimony.

May v Hall, 221-609; 266 NW 297

Malpractice—expert and nonexpert testimony—competency. Ordinarily the question of whether a doctor or dentist exercised the requisite care or skill in any case cannot be determined by the testimony of laymen or nonexperts, nor be left to the judgment of a jury or court, unaided by expert testimony, and only those learned or experienced in the profession may testify as to what should or should not have been done. But there are exceptions to this rule depending wholly on the fact situation, and no ironclad rule can be laid down as to when the doctrine shall be applied.

Whetstine v Moravec, 228- ; 291 NW 425

Credibility—adverse interest and impeaching circumstances. Self-evident principle applied that the most positive assertion of fact by a witness may be wholly overcome by the adverse interest of the witness, and by impeaching circumstances and sidelights. So held as to testimony relative to the signing and acknowledgment of a mortgage.

Hagensick v Koch, 220-1055; 264 NW 13

Estoppel of witness to change testimony. A clerk of the district court who testifies, in an action to which he is not a party, that he has "in his hands" the amount of a tender deposited with him, will not, in a later action against him by one of said litigants who relied on said testimony and thereby materially altered his position, be permitted to show that at the time of so testifying he did not have said money "in his hands" because he had already lost it by failure of the bank in which it was deposited.

Andresen v Andresen, 219-434; 258 NW 107

Evidence—voluntary inculpatory statements. Police officer need not warn a person in custody that incriminating statements may be used against him, for, if voluntarily made, they are admissible in evidence without warning.

State v Beltz, 225-155; 279 NW 386

Proof of felony conviction not an impeachment. Proof that witness has been convicted of felony does not of itself impeach him, discredit his testimony, nor make him wholly unworthy of belief. Such proof goes only to the weight to be given his testimony by the jury.

State v Wehde, 226-47; 283 NW 104

Conviction on testimony of felon. A defendant, in a prosecution for receiving stolen hogs, may be convicted on the testimony of one convicted of a felony and since the weight to be given such testimony is for the jury, when there is a conflict, a directed verdict for the defendant is properly refused. Held, evidence sufficient to convict.

State v Wehde, 226-47; 283 NW 104

Impeachment—effect—duty of jury. A witness at the outset is presumed to be telling the truth and it does not follow that, because there is evidence tending to impeach him, that he has thereby been successfully impeached, or that he has been successfully impeached because he has been attacked. If the jury is of the opinion that he has been successfully impeached, it should disregard his testimony unless some material part of it has been corroborated.

State v Wehde, 226-47; 283 NW 104

Stolen bonds—good-faith purchase—seller's bad character — materiality. On the issue whether stolen United States liberty bonds had been purchased by a bank in good faith, evidence that the person from whom the bank bought the bonds was a notorious underworld character is inadmissible, it appearing that he was a regular depositor of the bank, and had had prior bond deals with the purchasing bank.

State Bank v Bank, 223-596; 273 NW 160

(b) CHILDREN

Child a proper corroborating witness. Age alone of a ten-year-old corroborating witness will not vitiate her testimony, since credibility and weight are matters for the jury.

State v Beltz, 225-155; 279 NW 386

Seven-year-old boy—competency established. A seven-year-old boy is a competent witness in a criminal trial when it is shown that the court examined him and was satisfied that he knew what an oath was, and understood that he was to tell the truth.

State v Hall, 225-1316; 283 NW 414

Leading questions—discretion of court. The propriety of leading questions to immature witnesses must be left, in a large degree, to the discretion of the trial court.

State v Wheelock, 218-178; 254 NW 313

Failure to object to eight-year-old witness. In prosecution for statutory rape where it is shown on preliminary examination of eight-year-old witness that she knew what "telling the truth" meant and knew what a lie was, that it was wrong to tell a lie, and that punishment was the penalty for not telling the truth, it was not error to permit such witness to testify, especially where no objection was made to witness' competency until the conclusion of her testimony, altho she did not understand the meaning of the word "oath", nor definition of word "witness".

State v Diggins, 227-632; 288 NW 640

I WITNESSES—continued
(b) CHILDREN—concluded

Eight-year-old witness—credibility of testimony. In a prosecution for statutory rape where an eight-year-old witness testified on direct examination in a clear, frank, direct, and intelligent manner as to what she had seen or heard on the occasion in controversy, a motion to strike such testimony was properly overruled, as the question of the credit and weight to be given her testimony was clearly for the jury. The testimony of a witness must be construed in its entirety.

State v Diggins, 227-632; 288 NW 640

Statutory corroboration—trial court to determine. In a prosecution for statutory rape it is essential that the testimony of a prosecuting witness be corroborated by other testimony tending to connect the defendant with the commission of the crime, but it is not necessary that all of the material evidence of the prosecuting witness be corroborated. The question of whether there was statutory corroboration is a question for the trial court, and there was sufficient evidence of corroboration by an eight-year-old witness as to what she saw and heard to warrant the submission of the question of corroboration to the jury.

State v Diggins, 227-632; 288 NW 640

(c) COMPETENCY OR INCOMPETENCY IN GENERAL

Discussion. See 24 ILR 482—Competency

Opinion evidence—allowable conclusion. A nonexpert witness may, on proper foundation, be permitted to testify that an injured person was unable to perform labor for a named time after he was injured.

Looney v Parker, 210-85; 230 NW 570

Insanity—nonexpert witness. A nonexpert witness who has never seen an accused in a homicide case prior to the transaction which resulted in the homicide may not express an opinion as to the then insanity of the accused.

State v Maharras, 208-127; 224 NW 537

Distance in which train could be stopped—opinion. A witness, tho a farmer at the time of trial, is competent to testify concerning the distance in which a certain train could be stopped, when it appears that the witness had formerly been engaged for many years in railroad work on freight and passenger trains as brakeman and conductor; that he was acquainted with the ordinary train-control equipment of such trains; and that long observation had enabled him to know the time required for stopping trains under varying conditions.

Williams v Ry. Co., 205-446; 214 NW 692

Value in condemnation proceedings. A landowner who knows the value of land sought to be condemned for an electric power line is competent to testify to the amount of damages caused to the tract by such condemnation even tho he does not qualify as an electrical expert.

Evans v Utilities Co., 205-283; 218 NW 66

Opinion evidence—value of land. A witness is not competent to testify to the value of land when he has never been on the land and lives a material distance therefrom; neither is a witness competent who has never been on the land but once, lives at a great distance, and has manifestly superficial knowledge of the land.

Vanarsdol v Farlow, 200-495; 203 NW 794

Nonmarital communications. A divorced wife is a competent witness to testify to a communication between her former husband and a third person, prior to the divorce.

Stutzman v Bank, 205-379; 218 NW 39

Report of motor vehicle accident—remarks overheard—privileged communication. Evidence of witness who overheard statement of defendant in reporting accident, the witness being neither a peace officer nor an official, was properly excluded under statute requiring such report to be made and further providing that the report shall be confidential and not used as evidence in any trial, civil or criminal, arising out of the accident.

McBride v Stewart, 227-1273; 290 NW 700

Agent of interested party. In an action by the beneficiary in a life insurance policy to recover thereon, an agent of the insurer who negotiated the policy is a competent witness to testify that the insured did not make payment to him of the premiums due on the policy.

Range v Ins. Co., 216-410; 249 NW 268

Spouse as witness against self. In an action against a husband and wife for the reformation of a mortgage so as to include therein the entire homestead of the parties, the wife is a competent witness to testify against herself and her estate, as distinguished from that of the husband; and the same rule necessarily applies to the husband.

Rankin v Taylor, 204-384; 214 NW 725

Market value. A witness who is familiar with the market reports of an article is prima facie competent to testify to the value of such article.

State v Gill, 202-242; 210 NW 120

Customer injured in store — evidence of store's custom. Where damages are sought for injuries alleged to have been sustained when plaintiff fell down a stairway in defendant's store, and when plaintiff offered a witness to show defendant's custom of giving away boxes and that the removal of boxes by plaintiff was a benefit to defendant, the trial court did not err in excluding this evidence for that purpose when it appears that plaintiff's witness was not employed at defendant's store at

the time of the accident, and there is no showing of his competency to testify to the existence of any custom at or before the time of the accident, as no foundation was laid for the purpose of said evidence.

Lotz v United Food Markets, 225-1397; 283 NW 99

Incompetency of witness—excessive motion to strike. A motion to strike the entire testimony of a bank examiner as to the value of the assets of a bank alleged to be insolvent should not be sustained simply because it appears that, as to some of many particular assets, he was not competent to express an opinion.

State v Niehaus, 209-533; 228 NW 308

(d) PHYSICAL OR MENTAL DEFECTS

Mental competency determined by court. It is the duty of the court, on proper hearing, to determine whether a proffered witness is mentally competent to testify as such.

State v Patrick, 201-368; 207 NW 393

Evidence of subnormal mentality. The court is not in error in refusing to receive specific evidence of facts tending to show that a witness of the age of 12 years is of subnormal mentality—as bearing on the credibility of the witness—when such testimony is offered after said witness had been sworn and had testified without question having been raised as to the capacity of the witness to understand the obligation of an oath.

State v Teager, 222-392; 269 NW 348

(e) ATTORNEY AS WITNESS

Attorney as counsel and witness in same case. While the court views with emphatic disfavor the act of an attorney in assuming the dual attitude of both counsel and witness in the same case, yet such conduct does not go to the competency of the attorney as a witness, but to the weight and credibility of his testimony, which latter fact may be very properly presented to the jury by appropriate instruction.

Cuvelier v Dumont, 221-1016; 266 NW 517

Competency of attorney to testify. An attorney in a cause is not per se incompetent to testify in his client's behalf.

Kellar v Lindley, 203-57; 212 NW 360

Action for services of attorney in effecting settlement. An attorney in an action against a client on a contract of employment may testify to the acts and things done by him in effecting an agreement of settlement of the claim in question.

Coughlon v Pedelty, 211-138; 233 NW 63

Examination by court—error waived by failure to object. Where an attorney testified that he had talked with the defendant with reference to a certain car before preparing a mortgage on the car, and the court questioned him in order to decide whether there had been an attorney-client relationship on which the testimony should be excluded, when no objections were made or exceptions taken to the examination by the court, it was proper to refuse a new trial on the ground that the court had made misleading statements of the law and was guilty of misconduct in discrediting the testimony.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

(f) CROSS-EXAMINATION

Discussion. See 24 ILR 564—Cross-examination—scope

Permissible scope — court discretion. The permissible range of cross-examination of witnesses in general rests in the sound discretion of the trial court.

State v Kendall, 200-483; 203 NW 806

Court's discretion. In cross-examination for the purpose of showing partiality and interest of witness, a large discretion rests with trial court.

Higgins v Haagensen, (NOR); 220 NW 38

Discretion of court. Principle reaffirmed that the court has wide discretion as to the scope of a cross-examination.

Olson v Shuler, 208-70; 221 NW 941
Laudner v James, 221-863; 266 NW 15

Abuse—discretion of court. The discretionary power of the trial court over cross-examinations will not be interfered with by the appellate court except in cases of clear abuse.

Rawleigh Co. v Bane, 218-154; 254 NW 18

Cross-examination—unallowable scope. Reversible error results in permitting a cross-examination to develop testimony which is highly prejudicial to the party calling the witness, and which has no relation to the testimony developed on the direct examination. So held where a direct examination was strictly confined to that which the witness observed at the time and place of an accident, while the cross-examination developed the fact that the witness declared at the time of the aceident that the defendant was not to blame for the accident.

McNeely v Conlon, 216-796; 248 NW 17

Improper question—effect. The mere asking, on cross-examination of a defendant, of a wholly improper question does not necessarily result in reversible error.

State v Umphalbaugh, 209-561; 228 NW 266

Unallowable cross-examination. Cross-examination on matters which are not germane to anything testified to on direct and not bearing on any contested issue, is properly refused.

Cory v State, 214-222; 242 NW 100

I WITNESSES—continued
(f) CROSS-EXAMINATION—continued

Fatal undue limitation. Undue limitation on the cross-examination of a witness may constitute reversible error. So held where the examining party offered to prove, on cross-examination, material matter which went to the heart of the controversy.

West Branch Bank v Farmers Exc., 221-1382; 268 NW 155

Right to full cross-examination as to inconsistent statements. A witness may always be fully cross-examined as to signed statements of fact made outside the court which are inconsistent with his statements in court.

Stickling v Railway, 212-149; 232 NW 677

Nonresponsive answers — motion to strike. Error results in overruling a motion to strike, on cross-examination, an answer insofar as it constituted an opinion, conclusion, and voluntary statement, of the witness.

Miller v Fire Assn., 219-689; 259 NW 572

Expert—opinion evidence. An expert witness who, on a hypothetical question, states that in his opinion a defendant is of unsound mind, and is suffering from a form of senile dementia, may, on cross-examination, be asked, in effect, whether he would be of the same opinion if the defendant was able to accurately explain involved financial transactions—reflected in the testimony and detailed to the expert.

Richardson v Richardson, 217-127; 250 NW 897

Whole of writing—admissibility. A surety who denies in toto the execution, delivery, and consideration of the promissory note in question, but sees fit to cross-examine his co-defendant-principal with reference to a letter written by the principal to the payee with reference to said denied matter, may not complain of the reception in evidence of said letter as a part of his own cross-examination.

Granner v Byam, 218-535; 255 NW 653

Cross-examination as to writing may necessitate reception of writing itself. When a cross-examination is designed to show that a witness had asked plaintiff to sign an untruthful statement of fact, the party calling the witness must be permitted to show by a duplicate original, tho unsigned, just what plaintiff was asked to sign.

Stickling v Railway, 212-149; 232 NW 677

Credibility and impeachment—bias of witness. A witness on his cross-examination may be interrogated as to his state of mind or bias against the party against whom he testifies, for instance, that the witness and said other party are involved in hostile litigation.

Bond v Lotz, 214-683; 243 NW 586

Examination by several counsel. The act of the court in permitting more than one counsel to cross-examine witnesses does not necessarily constitute error, especially when there are several defendants in the case.

Williamson v Craig, 204-555; 215 NW 664

Ignoring statute. The concededly wide discretion of the court in controlling cross-examination does not embrace the right to ignore a statute governing such examination. So held where the court allowed the reception of only part of a conversation.

Bond v Lotz, 214-683; 243 NW 586

Eminent domain—need for fence—issue already settled. In a condemnation action, denial of cross-examination of landowner by condemnor as to necessity of fencing held not reversible error when plat of property already in evidence settled question.

Moran v Highway Com., 223-937; 274 NW 59

Arbitrary right to shape form of question. An examiner in the cross-examination of an expert has the right, as a general rule, to shape his question as he pleases. So held where the witness had testified as to the value of a farm before and after condemnation, and where the examiner chose to ask the witness as to the value of separate tracts without directing the witness, in effect, to exclude all benefits consequent on the condemnation.

Dean v State, 211-143; 233 NW 36

Sworn assessment roll competent for impeaching purposes. The defendant in eminent domain proceedings has the right, on the cross-examination of the plaintiff, and for the purpose of contradicting and impeaching him, to show the sworn statement made by the plaintiff to the assessor as to the value of the farm in question and as to the number and value of the livestock kept on said farm.

Welton v Highway Com., 211-625; 233 NW 876

Eminent domain — assessment as commissioner's personal judgment. In a condemnation action, permitting landowner to cross-examine a condemnation commissioner regarding the sworn assessment of damages as expressing his personal judgment held not error. (Distinguishing Winkelmans v Des Moines N. W. Ry. Co., 62 Iowa 11.)

Moran v Highway Com., 223-937; 274 NW 59

Accessibility of farm to market. The defendant in eminent domain proceedings has the legal right, on the cross-examination of plaintiff's witnesses as to value, to show the distance of plaintiff's farm from the market and the kind of roads leading to such market.

Welton v Highway Com., 211-625; 233 NW 876

Medical works — examination concerning. Prejudicial error results from permitting a physician, defendant in an action for malpractice, to be cross-examined as to the contents and teaching of scientific works on medicine, when the witness has not testified, directly or indirectly, as to such works.

Wilcox v Crumpton, 219-389; 258 NW 704

Harmless error—striking testimony. A party who seeks on cross-examination to secure from the witness an admission of facts derogatory to the credibility of the witness, and is met by a positive denial, may not be deemed prejudiced by the striking out of such denials, tho the cross-examination was proper.

Glass v Ice Cream Co., 214-825; 243 NW 352

Harmless error — curtailed cross-examination. Conceding that a cross-examination was unduly curtailed, yet no error results when the complaining party offered the witness as his own witness, and brought out the testimony excluded on cross-examination.

Goben v Des Moines Co., 218-829; 252 NW 262

Character and conduct of witness—particular acts or facts. Offer on cross-examination to prove certain reprehensible acts and conduct on the part of the witness reviewed, and held properly rejected.

Wilson v Fortune, 209-810; 229 NW 190

Permissible redirect. When counsel on cross-examination enters an experimental field of inquiry foreign to the essential issues of the case, he may not complain if opposing counsel exercises his right on redirect to make an exploration into the same field of inquiry with disastrous results to the first offender.

Azeltine v Lutterman, 218-675; 254 NW 854

Credibility and impeachment — conclusiveness. A party who, on cross-examination, seeks to secure from the witness an admission that he was not sober at the time of an occurrence and that he had been drinking shortly prior thereto, and is met by a positive denial, is absolutely bound by such testimony, it appearing that the pleadings presented no issue as to whether the witness was sober.

Glass v Ice Cream Co., 214-825; 243 NW 352

Paternity — incompetent evidence. On an issue as to the paternity of a child, testimony by the family pastor that at the time the child was baptized prosecutrix charged another person with the paternity of said child does not justify, on cross-examination, testimony as to what said accused party said and did, and what talk the pastor had with members of the family, relative to said charge.

Moen v Fry, 215-344; 245 NW 297

Evidence—collateral issue. The right to pursue a collateral issue developed on cross-examination is in distinct disfavor in our law, especially when the evidence in support thereof is ambiguous, remote from all proper issues, and otherwise incompetent.

Moen v Fry, 215-344; 245 NW 297

Nonexplanatory questions — nonapplicability of rule. The rule that the exclusion of questions which in no manner indicate the prospective answer is presumptively without prejudice has little, if any, application to the cross-examination of a witness.

Schulte v Ideal Co., 203-676; 213 NW 431

Admission of entire conversation as evidence. When part of a conversation relative to the execution of a guaranty is drawn from a witness, the entire conversation may be brought out on cross-examination.

Boyd v Miller, 210-829; 230 NW 851

Evidence offered covered by other testimony. Where an offer of evidence was made during cross-examination, and was covered by other testimony, there was no prejudice in sustaining an objection to the offer.

Maddy v City Council, 226-941; 285 NW 208

Limiting to matter covered in direct examination. Cross-examination was properly limited to matters brought out on direct examination in an automobile accident case in which the witness was a defendant taxicab driver with whom the plaintiff was riding, when such witness might be regarded as hostile to the plaintiff's cause.

Womochil v Peters, 226-924; 285 NW 151

No opportunity to cross-examine. When a recess was taken after the cross-examination of a witness for the defendants had begun, and through no fault of the defendants the witness did not re-appear for further cross-examination, his testimony was properly stricken on the ground that the plaintiff had been denied the right of full cross-examination.

Womochil v Peters, 226-924; 285 NW 151

Permissible cross-examination. In quiet title action brought by the husband of the former owner of land who had continued in possession after her mother had obtained the tax deed under an agreement with the daughter, it was proper to cross-examine the plaintiff as to whether he recalled the time the mother-in-law gave him certain bonds, because of the inference which might be drawn from such testimony as to the purpose for which the mother-in-law acquired the tax deed.

McCormick v Anderson, 227-888; 289 NW 440

(g) DIRECT EXAMINATION

Children—leading questions. The propriety of leading questions to immature witnesses

I WITNESSES—concluded

(g) DIRECT EXAMINATION—concluded

must be left, in a large degree, to the discretion of the trial court.

State v Wheelock, 218-178; 254 NW 313

Leading questions—when permissible. Leading questions on direct examination are permissible, within the range of fair discretion.

State v Costello, 200-313; 202 NW 212

Leading questions condemned. Record reviewed and held that, in the examination of certain witnesses, leading questions were not permissible.

Wildeboer v Peterson, 201-1202; 203 NW 284

Nonleading question—calling attention to topic. Where a question is framed so as only to call the witness' attention to the topic, it is not leading.

State v Hartwick, 228- ; 290 NW 523

Nonresponsiveness of answer—right to object. The party examining a witness has, ordinarily, the sole right to object to answers on the ground that they are not responsive to the question asked.

State v Murray, 222-925; 270 NW 355

Examination by court—error waived by failure to object. Where an attorney testified that he had talked with the defendant with reference to a certain car before preparing a mortgage on the car, and the court questioned him in order to decide whether there had been an attorney-client relationship on which the testimony should be excluded, when no objections were made or exceptions taken to the examination by the court, it was proper to refuse a new trial on the ground that the court had made misleading statements of the law and was guilty of misconduct in discrediting the testimony.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Admission in chief of evidence excluded on cross-examination. In prosecution for bootlegging, the fact that evidence as to officers' search of defendant's car for liquor was excluded on defendant's cross-examination did not require its exclusion when offered in chief by state's witness.

State v Chase, (NOR); 221 NW 796

Expert—medical works—unallowable reception. Error results from permitting a party on the direct examination of his own expert witness to read extracts from a medical work, and then to ask the witness if he agrees with the statement so read.

Morton v Ins. Co., 218-846; 254 NW 325; 96 ALR 315

Redirect examination—corroboration by testimony at former trial. After a party to an action has been cross-examined with regard to his testimony on a former trial for the purpose of laying the foundation for proving contradictory statements, it is wholly unallowable for counsel on redirect examination to read copious excerpts from the transcript of the witness' former testimony and have the witness say that he did so testify.

State v Cordaro, 214-1070; 241 NW 448

Sales—action to recover price paid—evidence—unallowable conclusion and assumption. A buyer of goods who is seeking to recover back from the seller the price paid because the goods were not in accordance with the contract and who has testified on cross-examination that he rejected the goods because his buyer refused to take the goods, may not show on redirect that his buyer refused the goods because the goods "were not up to the grade purchased".

Appel v Carr, 216-64; 246 NW 608

Extension of time for new trial motion—canvass of jury as to misconduct of court. An extension of time for filing a motion for new trial to enable counsel to canvass the jury and learn the prejudicial effect of remarks made by the court during the trial was properly refused when there was attached to the motion an affidavit by a juror that the remarks of the court had led the jury to disbelieve a witness, the affidavit not supporting its conclusion, and when no exceptions were taken to the remarks by the court.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

II EVIDENCE GENERALLY

(a) ADMISSIBILITY GENERALLY

Discussion. See 13 ILR 458—Rules—administrative tribunals

1 In General

Discussion. See 24 ILR 411—Introduction of evidence—symposium; 24 ILR 464—Before administrative bodies

Immaterial and irrelevant matters properly excluded. Immaterial and irrelevant matters are properly excluded in the trial of a cause.

Weinhart v Smith, 211-242; 233 NW 26

Intent—materiality. A person may testify to his intent when such intent is material to the issues involved.

In re Talbott, 209-1; 224 NW 550

Evidence similar to that of adverse party. The court having permitted one party to an action to support his case by a particular line of testimony, must, manifestly, permit the other party to introduce opposing testimony along the same line. So held as to testimony as to the market value of second-hand goods destroyed by fire.

Maasdam v Ins. Assn., 222-162; 268 NW 491

Quantum meruit—former contract. On the issue of the quantum meruit of services, a

former similar written contract may be relevant, material, and competent.

Olson v Shuler, 208-70; 221 NW 941

Relevancy, materiality, and competency—similar facts and transactions. On the issue whether the proximate cause of the death of hogs was a so-called hog remedy fed to them, evidence is inadmissible that other hog raisers fed the remedy to hogs which in part died, unless there is proof of substantial similarity of all the conditions that might enter into or affect the result.

Crouch v Remedy Co., 205-51; 217 NW 557

Reason for not looking for danger. The reason why a pedestrian while crossing a street did not look in the direction of an oncoming vehicle which injured him is relevant and material, and the injured party may testify as to such reason.

Orr v Hart, 219-408; 258 NW 84

Letter—admissible tho of slight materiality. Letter reviewed, and held admissible as furnishing a possible basis for impeaching party's testimony.

Redfern v Redfern, 212-454; 236 NW 399

Wholesomeness of product. On plaintiff's trial theory that a product purchased of defendant was unwholesome and injurious, defendant may, of course, counter with evidence tending to show the wholesomeness and non-injurious character of the said product.

Tracy v Oil Co., 208-882; 226 NW 178

Answers to interrogatories — use for other purposes. Answers to interrogatories which are offered in evidence for a particular purpose by the party requiring them are in evidence for other purposes.

Hart v Ins. Assn., 208-1020; 226 NW 777

Part of telephone message. A witness, in corroboration of testimony as to a conversation over the telephone, may be permitted to detail that part of the talk heard by him, even though he did not know the identity of the other party to the conversation.

Kruidenier Estate v Trust Co., 203-776; 209 NW 452

Matters of speculation. Transactions which account for a fact by a process of so-called reasoning which is purely speculative are wholly inadmissible.

Wildeboer v Peterson, 201-1202; 203 NW 284

Conversations in the presence of prosecutrix. In a civil prosecution for forcible defilement, statements may become material when made in the presence of the injured female, and long after the commission of the alleged offense, and by a member of her family who was instrumental in later initiating the prosecution, to the effect that the accused was a good man, and that a person other than the accused was responsible for the woman's condition.

Wildeboer v Peterson, 201-1202; 203 NW 284

Conduct of third party as bearing on motive. The long delayed institution of a prosecution for forcible defilement, and then its institution by a member of the family of the alleged injured female, coupled with the very serious discrediting of the testimony of the latter, may render the animus and state of mind of such member of the family justifiably material, and require the reception in evidence of threats, in the presence of the alleged injured woman, by said member "to get even" with the accused for other claimed wrongs.

Wildeboer v Peterson, 201-1202; 203 NW 284

Corroborative testimony. On the issue whether a bank in renewing a promissory note demanded additional security, evidence that the value of the security then held by the bank was ample security for the note is competently corroborative of evidence that no additional security was demanded.

Persia Bank v Wilson, 214-993; 243 NW 581

Value—market price of property. The price paid for property is not conclusive as to its value, but is admissible as evidence thereof.

State v Beaton, 209-1291; 228 NW 111

Whereabouts of insured—result of inquiries. On the issue whether due and proper inquiries as to the whereabouts of an insured person had been made, a person may testify as to the inquiries made by him and as to the results of such inquiries.

Rodskier v Ins. Co., 216-121; 248 NW 295

Relevancy and materiality—implied contract. Evidence relevant and material to the issue of an implied contract is necessarily admissible.

Valentine v Morgan, 207-232; 222 NW 412

Fictitious person—hiring post office box. On the issue whether different names on notes, mortgages, deposit accounts, and checks were fictitious, evidence of the hiring of a post office box under such alleged name, and of the manner in which mail coming thereto was handled, is admissible, in connection with other evidence connected therewith and tending to show the fictitious character of said alleged parties and who the real actor was.

Kruidenier Estate v Trust Co., 203-776; 209 NW 452

Admissibility controlled by issues. Issues control the relevancy, materiality and competency of evidence. Principle applied where it is held that evidence of the value of services is not admissible on the narrow issue whether an oral contract for services for $500 had been entered into.

McManus v Kucharo, 219-865; 259 NW 926

II EVIDENCE GENERALLY—continued
(a) ADMISSIBILITY GENERALLY—continued
1. In General—continued

Residence and occupation—harmless error in admitting. Evidence as to the residence and occupation of a defendant may be quite immaterial, yet quiet nonprejudicial.

State v Salisbury, 209-139; 227 NW 589

Admissibility of deposition—action between different parties. In an equitable action by an administrator to enforce the dower rights of the deceased, the deposition of the deceased taken in another action between other and different parties is entitled to no consideration on an issue on which the administrator has the burden of proof.

In re Mann, 201-878; 208 NW 310

Conflicting and unfair rulings. Reversible error results from (1) receiving incompetent testimony over plaintiff's objection, (2) striking such testimony at the close of defendant's testimony, and (3) reinstating such testimony, without warning to the plaintiff, after plaintiff had dismissed his witnesses and made his opening argument.

Braverman v Naso, 203-1297; 214 NW 574

Inadmissible experiments. Evidence as to experiments is inadmissible when performed under unstated conditions, or under conditions materially different from those attending the particular fact in issue.

State v Kneeskern, 203-929; 210 NW 465

Similar facts and transactions—fraud. A party alleged to have been defrauded may show, on the issue of fraudulent representations inducing the execution of a promissory note, that the defendant made like representations to other parties at about the time in question.

Larson v Bank, 202-333; 208 NW 726

Forgery of note. On the issue of forgery of a promissory note, evidence that other people dealing with the bank through which the note was issued had made no claim of forgeries is manifestly irrelevant.

Schram v Johnson, 208-222; 225 NW 369

Fictitious person—postmaster's and county auditor's testimony. On the issue whether the drawee of a check and the maker of a note and mortgage on real estate was a fictitious and nonexistent person, evidence of the postmaster at the place in question that he knew of no such person is admissible; also, that of the county auditor and of the treasurer that no such person was a taxpayer in their county; and that of the county recorder that the records of his office showed that the land in question belonged to parties other than such alleged person.

Kruidenier Estate v Trust Co., 203-776; 209 NW 452

Contract in re rule of evidence. It is not against public policy for parties to contract that in an action on the contract a specified nonstatutory rule of evidence shall not apply.

Lunt v Grand Lodge, 209-1138; 229 NW 323

Negligence and proximate cause—burden of proof. Both negligence and proximate cause are questions of fact for the jury if the evidence is of sufficient weight and character to warrant their submission, and plaintiff has burden to establish them by a preponderance of the evidence, whether the evidence be direct or circumstantial.

Whetstine v Moravec, 228- ; 291 NW 425

Gift—burden of proof. The burden to establish a gift causa mortis rests on the donee claiming thereunder. Evidence reviewed, and held that said burden had been successfully met.

Flint v Varney, 220-1241; 264 NW 277

General denial—evidence of gift admitted. Evidence to establish a gift is admissible under a general denial.

Wilson v Findley, 223-1281; 275 NW 47

Indemnity contract—immateriality of other transaction. On the issue whether defendant had contracted to indemnify plaintiff against liability as surety on an appeal bond in a criminal case, and whether defendant had received funds from the accused with which to perform such indemnity contract, evidence is wholly inadmissible that defendant had received funds from the father or brother of the accused for a purpose wholly foreign to said indemnity contract.

State v Cordaro, 211-224; 233 NW 51.

Evidence beyond issues. Evidence beyond the issues in a case is properly excluded.

West Chester Bank v Dayton, 217-64; 250 NW 695

Unpleaded defense—nonadmissibility. Evidence is inadmissible on an unpleaded defense.

Federal Corp. v Western Co., 219-271; 257 NW 785

Relevancy between evidence and issue. There must be some logical relationship between a fact offered in evidence and the fact sought to be proved, before the offered evidence can be deemed relevant.

West Chester Bank v Dayton, 217-64; 250 NW 695

Sagging wires on highway after storm—knowledge. In a case where a woman is burned by contacting a high tension electric line, sagging over a highway after a storm, and who testifies she had no knowledge it was there, newly discovered evidence to show that she was seen stepping over the broken poles prior to the accident, is not cumulative but

tends directly to establish a material fact affecting the result of the case on retrial.

Wilbur v Iowa P. & L. Co., 223-1349; 275 NW 43

Customer injured in store — evidence of store's custom. Where damages are sought for injuries alleged to have been sustained when plaintiff fell down a stairway in defendant's store, and when plaintiff offered a witness to show defendant's custom of giving away boxes and that the removal of boxes by plaintiff was a benefit to defendant, the trial court did not err in excluding this evidence for that purpose when it appears that plaintiff's witness was not employed at defendant's store at the time of the accident, and there is no showing of his competency to testify to the existence of any custom at or before the time of the accident, as no foundation was laid for the purpose of said evidence.

Lotz v United Food Markets, 225-1397; 283 NW 99

Res ipsa loquitur as rule of evidence. The doctrine of res ipsa loquitur is a rule of evidence not applicable where specific allegations of negligence are pleaded but only where general allegations of negligence are wholly relied upon.

Olson v Cushman, 224-974; 276 NW 777

Leading questions—court's own objection. Perhaps trial court should refrain from objecting on his own motion to leading questions, but no prejudice resulted where court's views as to weight of evidence were not disclosed and trial court must be allowed some latitude in supervising trials.

State v Carlson, 224-1262; 276 NW 770

City ordinance—burden to show inadmissibility. The burden of pointing out wherein city ordinance regulating train's speed is defective, either in substance or method of adoption, is on the party objecting to its admissibility.

Meier v Railway, 224-295; 275 NW 139

Accidents at crossings—obstructions. On the issue whether the view of a railway track was so obstructed at the time of an accident that an approaching train could not be seen, testimony by an eyewitness is manifestly admissible to the effect that he immediately stationed himself at the point of accident and could plainly see the entire track over which a train would approach.

Langham v Railway, 201-897; 208 NW 356

Materiality — adding suspicions. Rejecting evidence which simply adds suspicions held not prejudicial.

McGrath v Dougherty, 224-216; 275 NW 466

Administrator supporting sister's claim — not fraud. Testimony by an administrator in support of a sister's claim against estate does not amount to fraud.

In re Sterner's Estate, 224-605; 277 NW 366

Threat of injury. In an action by a wife for damages for the alienation of the affections of her husband, an information filed by the plaintiff, charging the defendants with having threatened to injure her, is wholly irrelevant and incompetent.

Paup v Paup, 208-215; 225 NW 251

Unallowable conclusions. The mere conclusions of a plaintiff in an action for damages for alienating the affections of her husband as to what the defendants had done in procuring the enlistment of the husband in the army and thereby effecting a separation of plaintiff and her husband, are wholly unallowable.

Paup v Paup, 208-215; 225 NW 251

Alienation — judgment for temporary alimony. In an action for damages consequent on defendant's acts in alienating the affections of plaintiff's husband, evidence that plaintiff obtained a judgment for temporary alimony and for attorney fees in an action by her husband for divorce and that the judgment was never paid is wholly irrelevant to the issue of relationship existing between plaintiff and defendant.

Case v Case, 212-1213; 238 NW 85

Agency of husband — custom as evidence. Testimony tending to show a custom by a husband to sign the name of his wife to promissory notes, with her express or implied knowledge and approval, extending continuously through many years prior to the transaction in question, is admissible on the issue whether the husband had such authority from the wife.

State Bk. v Fairholm, 201-1094; 206 NW 143

Attorney indorsing client's checks. In payee's action against bank which had cashed checks indorsed without actual authority by payee's local attorney who, over a period of years, had collected rents for the payee, evidence of transactions to show custom of attorney in indorsing payee's checks and in remitting by his personal checks was admissible, even tho bank did not have knowledge of all of the transactions, and it warranted finding that payee had knowledge of and acquiesced in such custom and was bound thereby.

Federal Bank v Trust Co., 228- ; 290 NW 512

Evidence determining section line—first challenged on appeal. Evidence in the record without objection by which a fence on the section line is definitely determined as the boundary of a highway cannot be objected to for the first time on appeal.

Davelaar v Marion Co., 224-669; 277 NW 744

II EVIDENCE GENERALLY—continued
(a) ADMISSIBILITY GENERALLY—continued
1. In General—continued

Abandonment of easement. Abandonment is an affirmative defense, and clear, unequivocal evidence is required to establish that an easement was abandoned.

Dawson v McKinnon, 226-756; 285 NW 258

Eminent domain—distance to markets. In a condemnation action, evidence as to distance from market centers and condition of old roads not admissible in determining damages.

Moran v Highway Com., 223-937; 274 NW 59

Value of property—trade values. Evidence of the amount which parties place upon property for the sole purpose of effecting a mere trade is not competent to show the reasonable value of such property.

Hiller v Betts, 204-197; 215 NW 533

Value of land — selling price as evidence. The value of farm land, through which a highway right of way is sought to be condemned, cannot be competently shown by evidence of the recent sale price of similar land in a nearby community.

Maxwell v Highway Com., 223-159; 271 NW 883; 118 ALR 862

Rental value of nearby lands. Evidence of the rental value of lands in a certain neighborhood is no evidence of the rental value of other lands in the same neighborhood when such other lands are not shown to be similar to the land as to which there is evidence; and a judgment based thereon is improper.

Harris v Carlson, 201-169; 205 NW 202

Crops on land in neighborhood—competency. A witness should not be permitted to testify to the crop yield of his land as bearing on the probable yield of another farm in the same vicinity unless it appears that the two farms possess similar soil conditions.

Slinger v Ins. Assn., 219-329; 258 NW 101

Eminent domain—value of land—amount of insurance. The amount of insurance carried on farm improvements, situated on a farm through which a highway right of way is sought to be condemned, does not constitute substantive evidence of the value of said farm, and is quite inadmissible for such purpose.

Maxwell v Highway Com., 223-159; 271 NW 883; 118 ALR 862

Discovery—production of noncompetent evidence. The court is not necessarily acting outside its jurisdiction in ordering the production of papers, and copies which would not or might not be admissible as competent evidence on the trial of the pending action.

Main v Ring, 219-1270; 260 NW 859

Malpractice—evidence—usual and ordinary practice. The defendant, in an action for damages for malpractice, may always establish, even by his own testimony, the usual and ordinary practice of physicians and surgeons in treating, in the locality in question, the injury which is the subject matter of the action.

Wilcox v Crumpton, 219-389; 258 NW 704

Negligence—usual and ordinary treatment—competency of witness. A witness, his competency to testify being established, may testify as to what was the usual and ordinary practice at a named time and place among physicians and surgeons in the treatment of a specified injury.

Lemon v Kessel, 202-273; 209 NW 393; 26 NCCA 82; 28 NCCA 641

Evidence — undue limitation on reception. The action of the trial court in unduly limiting litigants in the introduction of testimony having direct bearing on a vital and material issue constitutes reversible error. So held as to evidence relative to the tracks of colliding automobiles.

Harness v Tehel, 221-403; 263 NW 843

Dismissal of issue—striking evidence. The court should not permit testimony bearing on a dismissed issue to remain in the record when it has no material bearing on any remaining issue.

In re Muhr, 218-867; 256 NW 305

Evidence improperly admitted—dismissal—nonreview. In appeal from court's refusal to set aside default decree annulling marriage, alleged errors in admitting evidence are not reviewable, even tho raised on motion to set aside the decree, when the appeal from the order denying the motion is dismissed.

Kurtz v Kurtz, 228- ; 290 NW 686

Torts — newspaper advertisement. In an action for damages consequent on an alleged wrongful act by defendant, a competitor of plaintiff, an advertisement inserted by defendant in a local newspaper and tending to show hostility against plaintiff, may be relevant and material in view of other evidence in the case.

Gregory v Sorenson, 214-1374; 242 NW 91

Insolvency of corporation—inapplicable testimony. Testimony that a corporation was insolvent when it was placed under receivership is not, in and of itself, competent to establish insolvency of the corporation a year previous to the receivership.

Ryan v Cooper, 201-220; 205 NW 302

Bills and notes—fraud by dissolved corporation. Decree of dissolution of a corporation based on the fraud of the corporation is admissible, on the issue of fraud and want of consideration, against an alleged bona fide holder of a negotiable promissory note which was given to the corporation as the purchase price for its corporate stock, even tho neither of

the parties to the action on the note were parties to the dissolution suit.

Andrew v Peterson, 214-582; 243 NW 340

Contract and quantum meruit value. Evidence of both the reasonable and contract value of services is admissible when so pleaded, even tho the pleading is embraced in one slovenly drawn but unquestioned count.

Pressley v Stone, 214-449; 239 NW 567

Action for assault—immaterial evidence. In an action for assault and false imprisonment committed by a mayor and a city marshal, evidence of violations by plaintiff of an ordinance is inadmissible when it appears that, on the occasion in question, no attempt was made to arrest plaintiff for such violations, and when the pleadings are silent as to justification and mitigation.

Schultz v Enlow, 201-1083; 205 NW 972

Accident insurance—pregnancy of injured person. In an action on a policy of accident insurance, evidence that the insured was pregnant and prematurely gave birth to a child which died shortly after birth is admissible on the issue of the extent of the injuries.

Elmore v Surety Co., 207-872; 224 NW 32

Verdict of coroner's jury. The verdict of a coroner's jury is not, in an action on a policy of insurance, admissible on the issue as to the cause of death.

Wilkinson v Life Assn., 203-960; 211 NW 238

Instructions—evidence defined. Instruction that "evidence is whatever is admitted in the trial of a case as part of the record, whether it be an article or document marked as exhibit, other matter formally introduced and received, stipulation, or testimony of witnesses, in order to enable jury to pronounce with certainty, concerning the truth of any matter in dispute", considered with other instructions, and while not approved, could not have prejudicially misled the jury.

O'Meara v Green Const. Co., 225-1365; 282 NW 735

Intoxication subsequent to automobile theft. Exclusion of evidence offered by an insurance company, in an effort to escape liability on a theft policy, as to a thief's intoxicated condition an hour after the alleged theft of motor vehicles, as bearing on his condition at the time of the taking, held not prejudicial.

Whisler v Home Ins., 224-201; 276 NW 606

Examination — retention of nonresponsive answer. The court does not necessarily have to strike the nonresponsive answer of a witness when the answer reveals competent testimony. So held relative to the issue whether a party was intoxicated.

State v Fahey, 201-575; 207 NW 608

Situation—subsequent to injury. Testimony as to the condition of a rain spout on a building some days after an accident is competent when it appears that no change of condition has taken place since the accident.

Updegraff v Ottumwa, 210-382; 226 NW 928

Fraud—family relationship—effect. Principle reaffirmed that, on the issue whether a conveyance is fraudulent, the family relationship of the parties is a circumstance to be considered.

Schulein Co. v Lipschutz, 208-1315; 227 NW 141

Nuisance — admissibility under pleadings. Evidence that a nuisance was a "health hazard" is fairly justified by a pleading that plaintiff and his family were, by reason of the nuisance, subject to "offensive, obnoxious, and poisonous odors * * * and detrimental to the comfort, use, and enjoyment of their property."

Hill v Winterset, 203-1392; 214 NW 592; 37 NCCA 232

Waiver of incompetency. Error may not be predicated on the reception of irrelevant and incompetent testimony relative to the condition of a nuisance at a place remote from the place in controversy when the complainant fails to avail himself of a later indicated willingness on the part of the court to strike such testimony.

Chase v Winterset, 203-1361; 214 NW 591

Harmless error. Wholly irrelevant testimony may be harmless in view of other relevant testimony in the record.

Looney v Parker, 210-85; 230 NW 570

Harmless error—receiving pleadings in evidence. The reception in evidence of a petition already before the court may be quite inconsequential.

Kemmerer v Highway Com., 214-136; 241 NW 693

Reversal on appeal—inconsequential testimony. The reception of immaterial and inconsequential testimony is not ground for reversal.

Graeser v Jones, 217-499; 251 NW 162

Excluding evidence on conceded fact. Error may not be predicated on the exclusion of evidence when the existence of the ultimate fact which said evidence would establish is conceded.

Ankeney v Brenton, 214-357; 238 NW 71

Exclusion of evidence — other competent proof. The supreme court was not required to pass on the soundness of sustained objections to evidence that a certain road was a county trunk highway when there was other competent proof of the point and no offer of controverting testimony was made.

Davis v Hoskinson, 228- ; 290 NW 497

Review—refusing cumulative evidence. Refusal to admit testimony, which at the best is merely cumulative, is not prejudicially erroneous.

Hawkins v Burton, 225-707; 281 NW 342

II EVIDENCE GENERALLY—continued
(a) ADMISSIBILITY GENERALLY—continued
1 In General—concluded

Motion to strike — evidence admissible in part. Evidence which is clearly admissible in part will not be stricken in toto on indefinite testimony as to the inadmissible part.

Jones v Sur. Co., 210-61; 230 NW 381

Parol contract—time of passing title. The intent of the parties necessarily controls the issues (1) whether, in a parol contract of purchase, title passed on delivery, with a right to rescind if a trial proved unsatisfactory, or (2) whether title passed only after a satisfactory trial. Necessarily, what the parties said to each other at the time the contract was entered into is admissible.

Bishop v Starrett, 201-493; 207 NW 561

Enforceability of contract not shown. Where there was no competent evidence to take case out of statute of frauds, it was not error to exclude oral testimony tending to show the making of an oral contract to sell a business college and the buyer's readiness and ability to perform the same.

Patterson v Beard, 227-401; 288 NW 414

Conclusions—nonfatal admission. Admission of conclusions of witnesses that they sawed lumber according to instructions, that the logs of appellee were better than others, and other similar conclusions held not prejudicial when the same testimony was elicited by proper questions and answers.

Waterman v Gaynor Co., (NOR); 215 NW 641

Paternity — incompetent evidence. On an issue as to the paternity of a child, the material fact that prosecutrix had at a former time charged another party with said paternity presents no justification for the reception in evidence of substantially the entire judicial proceeding growing out of said former accusation.

Moen v Fry, 215-344; 245 NW 297

Will contest — immaterial and prejudicial matter. In a will contest, evidence that the wife of a witness gave birth to a child materially earlier than the ordinary period of gestation is quite improper and immaterial.

In re Thompson, 211-935; 234 NW 841

Lost will — unsuccessful search. In proceedings to establish a lost will, the loss of the will and the search for it were proved by evidence that the will could not be found altho the home of the deceased and other places where the will might have been kept were thoroughly searched. The conclusion of the trial judge on the sufficiency of such evidence will not be disturbed unless discretion is abused.

Goodale v Murray, 227-843; 289 NW 450

Effect of "no recollection" by witness. In a libel action, mere testimony that a witness has no recollection of the writing or publication of a letter does not raise an issue as to the fact of writing, but when his testimony, which must be construed as an entirety, shows a denial thereof, a court cannot as a matter of law establish the writing and publication.

Thompson v Butler, 223-1085; 274 NW 110

Competency—source of evidence—improperly obtained. Testimony is not objectionable simply because it has been obtained by the improper issuance of a search warrant.

Hammer v Utterback, 202-50; 209 NW 552

Words actionable—evidence admissible as alleged. In a slander action it is not error to admit in evidence the very statements that plaintiff alleged in his petition were spoken.

Shultz v Shultz, 224-205; 275 NW 562

Words actionable. Woman's statement that son's wife was "dirty trash" admissible as proof of slander per se when understood by hearer to mean a prostitute.

Shultz v Shultz, 224-205; 275 NW 562

2 Circumstantial Evidence

Force and effect—instruction. A jury may be told that, if they find circumstantial evidence to be strong and satisfactory, they should so treat it.

Ferber v Railway, 205-291; 217 NW 880

Weight and sufficiency. Principle reaffirmed that a theory cannot be said to be established by circumstantial evidence unless such evidence is not only consistent with said theory, but inconsistent with any other theory.

Field v Surety Co., 211-1239; 235 NW 571
Stickling v Railway, 212-149; 232 NW 677
Comparet v Metz, 222-1328; 271 NW 847

Sufficiency to establish theory. A theory cannot be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature and so related to each other that it is the only conclusion that can fairly or reasonably be drawn from them, and it is not sufficient that they be consistent merely with that theory.

Ferber v Railway, 205-291; 217 NW 880
Gregory v Sorenson, 214-1374; 242 NW 91
Jakeway v Allen, 227-1182; 290 NW 507

Voting as evidence of domicile. In determining domicile, fact that person voted in school election in Crawford county is not conclusive evidence that Crawford county was his residence.

Crawford County v Kock, 227-1235; 290 NW 682

Gift—evidence—competency. Delivery of a gift causa mortis may be established by circumstantial evidence; likewise the gift itself may be established by the declarations of the donor tho they be not res gestae.

Flint v Varney, 220-1241; 264 NW 277

Payment of note. Payment of a promissory note may be established by circumstantial evi-

dence: i. e., that the payee was a careful business man; that the maker and the payee resided in the same place; that business transactions occurred between them which might have furnished opportunity for payment; that the note was always readily collectible; that no annual interest and no part of the principal were ever indorsed on the note; that 17 years elapsed from the maturity of the first annual interest and 11 years after the maturity of the principal before any claim was made on the note, and then only after the death of both maker and payee.

Finley v Thorne, 209-343; 226 NW 103

Stock — agreement to repurchase — agency. The existence of authority, actual or apparent, for an agreement made by an agent on behalf of a corporation to repurchase its own stock sold by the agent to a third person, being within his apparent authority, being neither denied nor repudiated by the corporation, and although being based on circumstantial evidence, is not a question of law but a question for the jury.

Wright v Iowa L. & P. Co., 223-1192; 274 NW 892

Place of accident—nonapplicability of circumstantial evidence instruction. In a death claim action for negligence arising from an automobile collision occurring in a suburban district of a city where the negligence alleged was in failing to travel on the right-hand side of the street and where along with the physical facts there was direct evidence by the driver of the car wherein decedent was riding, as to decedent's travel on the right-hand side of the street, it was error to give an instruction, applicable only to cases based entirely on circumstantial evidence, when such instruction prevented the jury from properly considering the direct evidence as to where the accident occurred.

Rusch v Hoffman, 223-895; 274 NW 96

Fraud on bank by officer. Where the cashier of the plaintiff bank concealed a shortage with the bank by making fraudulent entries in its bond account and, to further conceal the shortage, obtained credit with the defendant bank by using drafts on the plaintiff bank as security, and concealed the monthly statements of the defendant in order to continue to conceal the shortage, the defendant having nothing to gain by aiding him in his fraud, there was neither direct nor circumstantial evidence of any arrangement between the cashier and the defendant to support a claim that there was conspiracy between them.

Community Sav. Bank v Gaughen, 228- ; 289 NW 727

Insufficiency to make jury question. Circumstantial evidence is wholly insufficient, in and of itself, to generate a jury question on the issue whether a defendant in repairing an automobile so negligently replaced a wheel on the car that thereby it became detached while in operation (with resulting damage to plaintiff) when said evidence is also consistent with the additional theory that said wheel became detached because of defects and weaknesses in the car arising from its age and great use.

Tyrell v Oil Co., 222-1257; 270 NW 857

Torts—footprints. Evidence of footprints at or near the scene of the commission of a wrongful act is admissible in an action against the defendant for the resulting damages, provided the defendant is properly connected with said footprints.

Gregory v Sorenson, 214-1374; 242 NW 91

Theories of equal probability. Circumstantial evidence relative to the loss of a diamond reviewed, and held that the court could not say as a matter of law that the theories of loss by theft or by fire were of equal probability.

Hall v Ins. Co., 217-1005; 252 NW 763

Positive testimony vs inherent improbability. The positive testimony of witnesses affirming the existence of an alleged fact, e. g., the entering into a contract, may be wholly overcome by the facts and circumstances attending the alleged fact and by the inherent improbability thereof.

Garretson v Harlan, 218-1049; 256 NW 749

Cause of fire—jury question. Circumstantial evidence reviewed, and held to present a jury question on the issue whether a fire was set by a passing engine.

Stickling v Railway, 212-149; 232 NW 677

Other fires set by other engines. In an action to recover damages consequent on a fire alleged to have been set by a certain passing engine, evidence of other fires set by other engines on other occasions near the place in question may be admissible, not on the issue of negligence, but on the issue as to how far an engine would throw burning embers.

Stickling v Railway, 212-149; 232 NW 677

8 Conduct of Parties

Tampering with witness. Evidence is admissible, in an equitable action for the revocation of the license of a physician, which tends to show that the defendant had tampered with a witness, in an effort to induce her to change her testimony.

State v Knight, 204-819; 216 NW 104

Easements—elements deduced from acts of parties. The fact that a property owner claimed an easement in the land of another "as his right," and "that the party against whom the claim is made had express notice thereof," may manifestly be conclusively deduced from evidence of the negotiations, conduct, and acts which led to and culminated in

II EVIDENCE GENERALLY—continued
(a) ADMISSIBILITY GENERALLY—continued
3 Conduct of Parties—concluded

the creation and establishment of the easement by the parties.

Ehler v Stier, 205-678; 216 NW 637

Habits of insured. In an action on a policy of insurance, evidence as to the habits and industry of the insured is wholly immaterial, there being no issue in the case on such matters.

Murray v Ins. Co., 204-1108; 216 NW 702

Contract—acceptance of offer—implication. Principle recognized that the conduct of parties to an alleged contract may furnish ample evidence that an offer by one party of certain terms was accepted by the other party.

Breen v Power Co., 207-1161; 224 NW 562

Direct testimony outweighed by inconsistent conduct. Grossly inconsistent conduct may outweigh direct testimony to the contrary. So held as to the making of a gift.

Cherniss v Thompson, 209-309; 228 NW 66

Malicious prosecution—ill feeling. Plaintiff in a prosecution for malicious prosecution may show that, many years prior to the prosecution in question, he had arrested the defendant, and that such arrest resulted in ill feeling on the part of defendant against plaintiff. But plaintiff should not make prominent the reason for such arrest.

Fisher v Tullar, 209-35; 227 NW 580

Renewal of written contract by conduct. Where a heating plant owner contracted to furnish to a storekeeper heat for a period of one year at the termination of which no new written nor verbal contract was made, but for seven years more the heat was furnished and accepted at the same price as in the original agreement, until discontinued at nearly the end of the 1933-34 season, in an action to recover the contract price for the 1933-34 year's heat, a contract would be implied from the storekeeper's conduct, to pay the contract price regardless of the fact that storekeeper shut off some of the radiators.

Snell v Kresge, 223-911; 274 NW 35

Fidelity bond—fraud in extension of credit by overdrafts. In action on fidelity bond of bank cashier the exclusion of evidence of bank's custom of deferring posting of checks creating an overdraft was not erroneous where the dishonest acts complained of were the extension of credit by means of overdrafts in violation of statute.

Fidelity Co. v Bates, 76 F 2d, 160

Guaranty—ambiguity—intent. In searching for the actual intention of both parties to an ambiguous written guaranty—in other words, in searching for the proper construction to place on such contract—the court may receive evidence of the conduct of the party to whom the guaranty was given tending to show that said party, shortly after the time the guaranty was executed, and contrary to his present attitude, was placing the same construction thereon as contended for by the guarantor.

West Branch Bank v Farmers Exch., 221-1382; 268 NW 155

Subscribing witness—proof of testamentary intentions. Testimony by a witness to a will that the will was read aloud in the presence of himself and the testator, and that the testator signed it and did not object to the contents, was proper to show that the instrument was executed with the belief that it disposed of the testator's property in accordance with his intentions.

Goodale v Murray, 227-843; 289 NW 450

4 Res Gestae

Discussion. See 1 ILB 36—Res gestae—exception; 14 ILR 87—Res gestae; 24 ILR 558—Unidentified persons

Hearsay — res gestae exception. Hearsay which is no part of the res gestae is inadmissible.

State v Kneeskern, 203-929; 210 NW 465

Res gestae—real test to determine. The real test whether declarations of an injured party as to how he received his injury are part of the res gestae and admissible as such, is not whether the declarations were contemporaneous with the receiving of the injury, but whether the circumstances attending the making of the declarations exclude premeditation and design.

Miser v Iowa Assn., 223-662; 273 NW 155

All-essential test. On the question whether declarations of an injured party are competent as a part of the res gestae, the length of time elapsing between the receiving of the injury and the making of said declarations is, while important, not necessarily controlling. The all-essential test is whether they (1) relate to, and are explanatory of, the principal transaction, and (2) are made under such circumstances as to reasonably show that they are spontaneous and not the result of deliberation or design. Held, court abused its discretion by excluding declarations made some two hours after the occurrence of a transaction.

Aldine Trust v Accident Assn., 222-20; 268 NW 507

Discretion of court. The ruling of the trial court that certain declarations were not part of the res gestae will not ordinarily be overruled.

Pride v Accident Assn., 207-167; 216 NW 62; 62 ALR 31

Discretion of court. Principle reaffirmed that the court has a wide discretion in ruling

on the admissibility of matters claimed to be part of the res gestae.

Case v Case, 212-1213; 238 NW 85

Reception discretionary with court. The admissibility of res gestae statements rests in the sound discretion of the trial court. So held as to nonconsequential statements attending an accident.

Fortman v McBride, 220-1003; 263 NW 345

Declarations made 15 minutes after accident. Declarations of an injured ballplayer made some 15 minutes after he had made a slide to a base, and after he had collapsed, and was apparently in great pain, to the effect that he was so sick he thought he was going to die and that when he made the slide he felt a tear in his abdomen—repeated to the physician to whom he was at once taken—are admissible as a part of the res gestae; nor are such declarations subject to the objection that they are the unallowable opinions of a lay witness.

Dawson v Life Co., 216-586; 247 NW 279

Admission by one of defendants. The declaration of the driver of an automobile almost immediately after a collision had occurred, and before or while an injured person was being removed from one of the cars, to the effect that "I know I was driving fast," is part of the res gestae, and admissible against both defendants, to wit, the driver of the car and the owner thereof.

Duncan v Rhomberg, 212-389; 236 NW 638

Execution of notes—statement by bank examiner. In an action on promissory notes executed to a bank by its directors and stockholders in order to prevent an impairment of the bank's capital, testimony is admissible as to what the state bank examiner said, at the time the notes were executed, relative to including the notes in the assets of the bank.

Farmers Bk. v Bunge, 211-1357; 231 NW 651

Declaration made two hours after assault. In an action for damages consequent on an assault, a witness will not be permitted, over proper objection, to testify as to what plaintiff, some two hours after the occurrence, said relative to the cause of her agitation.

McQueen v Stores, 214-1300; 244 NW 278

(b) PRESUMPTIONS IN GENERAL

Discussion. See 20 ILR 147; 20 ILR 516; 24 ILR 413—Presumptions

Presumptions act prospectively only. Principle recognized that presumptions do not travel backward. They look forward only.

State v Liechti, 209-1119; 229 NW 743

Laws of other states. Presumptively the law of Minnesota is the same as the law of this state.

Northern Finance v Meinhardt, 209-895; 226 NW 168

"Inference upon inference." It is not true that an inference cannot be based on an inference.

Martin v Life Co., 216-1022; 250 NW 220

Pyramiding of presumptions. Presumptions must rest on proven facts. The pyramiding of presumptions is not recognized in law.

Poweshiek County v Bank, 209-467; 228 NW 32; 82 ALR 39

Presumptions ousted by evidence. Presumptions disappear when evidence of the actual facts is introduced.

Wilson v Findley, 223-1281; 275 NW 47

Parties presumed residents—cause of action presumed local. Presumptively, parties to an action in this state are residents of this state, and presumptively, the cause of action sued on arose in this state.

Farmers Bk. v Anderson, 216-988; 250 NW 214

Injunction—presumption of continuance of condition. Proof that enjoinable acts were being committed at the time of the commencement of an action carries the presumption that the condition complained of existed at the time of the trial.

State v Kindy Co., 216-1157; 248 NW 332

Fraud not presumed. Fraud, in the absence of any showing of fiduciary relationship between the parties, cannot be presumed, but must be established by the party alleging it.

Plymouth County v Koehler, 221-1022; 267 NW 106

Incorrect instruction presumably followed. It will be conclusively presumed that the jury followed an incorrect rule of law as stated to it by the court in its instructions.

Aldine Co. v Acc. Assn., 222-20; 268 NW 507

Regularity of officials' actions. The actions of public officials are presumed to be regular unless there be clear evidence to the contrary.

Priest v Whitney Co., 219-1281; 261 NW 374

Banta v Clarke County, 219-1195; 260 NW 329

Thrasher v Haynes, 221-1137; 264 NW 915

Krueger v Mun. Court, 223-1363; 275 NW 122

Execution — levy — return — presumption—burden to overcome. A party who claims that the various entries of the acts done under an execution and constituting the officer's "return" were not entered at the time the various acts were done, has the burden to so show. In the absence of such showing, it must be presumed that the officer did his duty and made the entries at the time required by statute. (§11664, C., '31.)

Northwestern Ins. v Block, 216-401; 249 NW 395

II EVIDENCE GENERALLY—continued
(b) PRESUMPTIONS IN GENERAL—continued

Proper index of lis pendens. The presumption that the clerk of the district court duly indexed, as a lis pendens, a petition for the foreclosure of a real estate mortgage is so strong that convincing proof to the contrary is required to overcome it.

First Tr. JSL Bank v Jansen, 217-439; 251 NW 711

Jurisdictional recital as prima facie showing. A recital made in 1868 by a board of supervisors, when ordering the establishment of a highway, to the effect, "The board being fully advised in the premises", states a prima facie presumption that they had jurisdiction and had complied with all statutory requirements.

Davelaar v Marion County, 224-669; 277 NW 744

Presumption as to width of old road duly established. When the records of the establishment of a highway, made many years ago, are silent as to the width thereof, it must be presumed to be the statutory width, to wit, 66 feet.

Richardson v Derry, 226-178; 284 NW 82

Highway signs—authorized erection. It may be presumed, in the absence of evidence to the contrary, that the ordinary "Stop" and "Slow" signs, as they are found upon the public highways, were erected by and under authority of the proper public officials.

Rogers v Jefferson, 223-718; 277 NW 570; 4 NCCA (NS) 318

Supervisors representing drainage district—good faith. Acts of county supervisors concerning work done by them in their statutory capacity as representatives of a drainage district to maintain the efficiency and durability of a drainage system was presumed to have been done in good faith, and they had an absolute right on behalf of the district to stand behind the contract under which the work was done in the interest of the district.

Kilpatrick v Mills County, 227-721; 288 NW 871

Lawfulness of action. In the absence of any evidence or showing to the contrary, it will not be presumed that a public service corporation is seeking the location of its lines along a highway without having procured a franchise, or that the highway engineer is proceeding to mark such location without a written application therefor. (§4838, C., '31)

Swartzwelter v Util. Corp., 216-1060; 250 NW 121

Possession of property. Proof that stock was on the premises of a defendant and under his control, both before and after it was at large in the public highway (where it was alleged to have caused a damage), and that the defendant had inferentially admitted that the stock was his, creates a jury question on the issue of the defendant's ownership.

Stewart v Wild, 202-357; 208 NW 303

Quitclaim grantees. The grantee of land under a quitclaim deed is conclusively presumed to have known of all prior equities in and to the land, and will be held to have taken and to hold said land subject to said equities.

Junkin v McClain, 221-1084; 265 NW 362

Delivery of deed—presumption attending acceptance. Principle reaffirmed that the acceptance of a deed of conveyance implies an agreement by the grantee to perform legal conditions imposed on him by the deed, e. g., the payment of stated sums to named persons.

Carlson v Hamilton, 221-529; 265 NW 906

Execution and delivery of deed—presumption attending possession by grantee. A deed of conveyance, when produced by the grantee therein, need not be accompanied by any evidence of the execution or of the delivery of the deed, because due execution and delivery will be presumed until he who attacks it shows to the contrary. And this is true even tho the deed did not reach the hands of the grantee, or was not recorded, until after the death of the grantor.

Heavner v Kading, 209-1275; 228 NW 313

Rebutting presumption by possession. Transfers and assignments of property of a deceased, in the hands of certain heirs, raise a presumption that they were delivered. However, facts and circumstances may overcome this presumption, especially when it is shown that the signatures of the deceased to the instruments are forgeries.

Brien v Davidson, 225-595; 281 NW 150

Deed from parent to child — constructive fraud. The doctrine of constructive fraud arises from the existence of a fiduciary relationship, and equity raises a presumption against the validity of a transaction where the superior party obtains a possible benefit, as in a case where a parent has become the dependent person in his relationship with a child, trusting his interests to the advice and guidance of the child, and has deeded his land to the child.

Stout v Vesely, 228- ; 290 NW 116

Delivery of deed presumed from recording. Recording of a deed does not constitute delivery, but it is evidence which creates a presumption of delivery rebuttable only by clear and satisfactory evidence.

Huxley v Liess, 226-819; 285 NW 216

Effect of acknowledgment. Principle reaffirmed that great weight is accorded to a certificate of acknowledgment.

Hutchins v Piano Co., 209-394; 228 NW 281

Forged signatures—expert testimony to overcome. While an acknowledgment by a notary is presumptively true and requires clear and convincing evidence to overcome it, yet by statute it is not conclusive, and the court acting as a jury may find, after reviewing the conflicting testimony of handwriting experts, properly received, that signatures to transfers and assignments of assets of an estate, attacked by an administrator de bonis non, were forgeries.

Brien v Davidson, 225-595; 281 NW 150

Possession of legal title—rebutting presumption. A mere preponderance of the evidence is not sufficient to overcome the presumption arising from the possession of the legal title to real property.

Wagner v Wagner, 208-1004; 224 NW 583

Setting aside deed—burden of proof. A delivered deed carries a presumption in favor of its validity, so one suing to set aside a deed has the burden of proving that at the time of execution of deed, grantor was incapable of understanding her property and her relations thereto, or understanding natural objects of her bounty or nature and effect of instrument.

Bishop v Leighty, (NOR); 237 NW 251

Alteration of instruments after delivery. Alteration apparent on face of instrument does not raise presumption alteration was made after delivery. Evidence held insufficient to carry burden of showing mortgage was altered after delivery.

Durr v Pratt, (NOR); 240 NW 681

Setting aside conveyance—confidential relation. In an action to set aside a deed and an assignment of a mortgage executed by mother to stepson, burden was on plaintiff to establish the existence of confidential relationship raising presumption of fraud.

O'Brien v Stoneman, 227-389; 288 NW 447

Knowledge by mortgagee of adverse claim. Where mortgagee pays money to mortgagor after being notified by third parties that mortgagor's title is defective and that third parties have an adverse interest, the mortgagee is presumed to have a knowledge of all facts of the superior right or title which a reasonable and diligent search would have revealed.

Rance v Gaddis, 226-531; 284 NW 468

Tax deed. A tax deed is presumptively unassailable.

Fidelity Co. v White, 208-519; 223 NW 884; 225 NW 868

Injunction against tax sales. An injunction restraining a county treasurer from selling real estate at tax sale for special assessments could not be sustained on the ground that tax deeds issued at a sale for general taxes extinguished the lien of the special assessments when the tax deeds were never introduced in evidence to enable the court to rule on whether the statutory requirements had been properly performed to make the tax deed valid.

Bennett v Greenwalt, 226-1113; 286 NW 722

Tax deed as evidence under statute. Statutes, providing that a tax deed shall be presumptive evidence of certain things and conclusive evidence of others, are construed to mean that unless the tax deed is received in evidence there is no evidence of the tax deed before the court, and when a tax deed is introduced in evidence a prima facie case is established of the regularity of all proceedings prior to its execution. Such statutory provisions with a tendency adverse to the owner of the title under a tax deed are construed most strictly in his favor.

Bennett v Greenwalt, 226-1113; 286 NW 722

Statutory presumption of validity of tax deeds. A defendant in a quiet title action may not claim that the plaintiff by first pleading title by invalid tax deeds, and then amending by pleading second corrective tax deeds, had abandoned the statutory presumption of their validity, nor must he, therefore, resort to the common law to prove his title.

Inter-Ocean Co. v Morrison, 225-1336; 283 NW 909

Issuance of deeds prima facie evidence of regularity. The issuance by the county treasurer of tax deeds is prima facie evidence that proper notice of tax sale had been given.

Inter-Ocean Co. v Morrison, 225-1336; 283 NW 909

Consideration—written contract. Presumptively a written contract is supported by a sufficient consideration, and the burden of proof rests on him who asserts to the contrary.

Krcmar v Krcmar, 202-1166; 211 NW 699

Burden of proof—fraud—extending time on mortgage as consideration. In an action by a bank to foreclose a mortgage on land, the defendants had the burden of proving their defenses of fraud and want of consideration, and, altho there was testimony that the mortgage was given to enable the bank to make a good showing to bank examiners and that there had been a promise that it would never be foreclosed, the court was justified in finding from other evidence that there was no fraud and that the consideration was the granting of an extension of time on a past due mortgage on other land.

Panama Bank v Arkfeld, 228- ; 291 NW 182

Insolvency of bank—knowledge of officers presumed. Principle reaffirmed that for many purposes the managing officers of a bank will be conclusively presumed to have knowledge of the insolvent condition of their bank.

Leach v Beazley, 201-337; 207 NW 374

II EVIDENCE GENERALLY—continued
(b) PRESUMPTIONS IN GENERAL—continued

Banks and banking—collections—negligence—measure of damages. The measure of damages consequent on the negligent failure of a collecting bank to notify the payee of deposited checks of their nonpayment, is not, prima facie, the amount of the checks, but such sum or amount as the payee-plaintiff may be able to prove to a reasonable degree of probability he has lost because he was not promptly notified of the nonpayment—not exceeding the amount of said checks. Substantial but conflicting testimony reviewed and held to present a jury question.

Schooler Motor Co. v Trust Co., 216-1147; 247 NW 628; 38 NCCA 361

Authority of agent to collect note. The naked showing that the payee of a promissory note received from a bank or from an officer thereof a payment on the note of a third party creates no presumption that the payee had expressly or impliedly authorized the bank or its official to receive said payment on said payee's behalf.

Huismann v Althoff, 202-70; 209 NW 525

Alteration of instruments—burden of proof. He who alleges a material alteration of an instrument has the burden to prove his allegation. No presumption exists that the alteration was made after the execution of the instrument.

Council Bluffs Bank v Wendt, 203-972; 213 NW 599

Title to certificate of deposit. The mere offer in court of an unquestioned nonnegotiable certificate of deposit by the indorsee-possessor thereof constitutes prima facie evidence of title in and to the instrument.

Farmers Bank v Bank, 201-73; 204 NW 404

Holder in due course. Where payee returned check to maker on account of a debt owing to maker, but by some unknown means again obtained possession of the check, which had not been put in a place of safety, and negotiated it to plaintiff eight days after execution, burden was on defendant-maker to prove plaintiff's lack of good faith in acquiring the check, and lapse of eight days was not such an unreasonable time within statute as to rebut presumption that plaintiff was a holder in due course. What constitutes such an unreasonable time must be determined on facts of each particular case.

Clarinda Sales Co. v Radio Sales, 227-671; 288 NW 923

Consideration and delivery of note—proof by presumptions—instructions. The questions of want of consideration and nondelivery of a note, supported only by presumptions, need not be submitted to the jury when such presumptions are not overcome by evidence, and when the only conflict arises over the genuineness of the signature, the submission of this single question was proper.

In re Cheney, 223-1076; 274 NW 5

Proof of execution and delivery. In an action in probate to establish notes of deceased as claims, proof of the execution and delivery being established, it is presumed that notes were issued for a valuable consideration and the burden of showing lack of consideration is on the defense.

In re Humphrey, 226-1230; 286 NW 488

Notes—overcoming presumption of nonpayment. An instruction that the possession of an uncancelled promissory note creates a presumption of nonpayment is erroneous insofar as it further directs the jury, in effect, that it may find the presumption to be overcome by long delay in bringing action on the note and other circumstances, when the delay was some nine years, coupled with the circumstances that the defendant was at all times a nonresident of the state.

Mitchell v Burgher, 216-869; 249 NW 357

Discharge—extension of time. The indorsement on an overdue promissory note of interest in advance of its maturity does not constitute conclusive evidence that the parties have entered into a binding agreement for the extension of the time of payment. The presumption is not more than a prima facie one.

Commercial Bank v Dunning, 202-478; 210 NW 599; 59 ALR 983

Payment—lapse of time with other circumstances. Mere lapse of time for less than 20 years may, with other circumstances, raise a presumption of payment, but it is not alone sufficient.

Citizens Bk. v Probasco, (NOR); 233 NW 510

Mutual expectations—board and lodging. The rendition on one hand and the acceptance on the other of valuable services (board and lodging) for a series of years generates a presumption that the one rendering was to receive pay and that the one receiving was to pay; and this is true tho the receiver and the giver were lifelong associates, and related, but were not members of the same family.

Peterson v Johnson, 205-16; 212 NW 138

Living with and caring for parents at their request. Reciprocal services rendered by and between members of a family are presumed to be gratuitous, yet, the court, a jury being waived, may find that a married daughter, who with her family, returns to the home of her aged parents at their request to care for them, for which she expected to receive and the parents expected to pay remuneration, did not reestablish a family relationship with her parents so as to raise the presumption of gratui-

tous services. Such finding will be binding on the appellate court.

Clark v Krogh, 225-479; 280 NW 635

Probate claim—payments applied on debts due—presumption. In a probate action to establish claim for housekeeping services rendered to decedent, where decedent promised to pay claimant small amounts from time to time to cover cost of her clothing and personal expenses, with an additional amount upon his death out of his estate, it would be presumed that small payments made by decedent in his lifetime were to be applied on debts which were due for such expenses, no showing having been made to the contrary.

In re McKeon, 227-1050; 289 NW 915

Substitution and release—new contract not creating presumption. The mere fact of the making of a new contract by which a third party becomes obligated to pay another person's previously existing indebtedness does not alone give rise to presumption that the creditor accepts the new debtor and releases the original debtor—question as to whether there is such a release is one of fact to be determined by all the evidence in the case.

Wade v Central Broadcasting Co., 227-422; 288 NW 439

Consideration—note as future gift. Altho a promissory note for which there is no consideration is an unenforceable promise to make a future gift, nevertheless in an action against an executor on a note the presumption that the note imports a consideration, if negatived, must be overcome by evidence and this burden is on the maker or his representatives.

In re Cheney's Estate, 223-1076; 274 NW 5

Construction of will—death—presumption as to time. A provision in a will as to how property shall pass in case of the death of a devisee or legatee presumptively refers to a death which occurs prior to the death of the testator.

Moore v Dick, 208-693; 225 NW 845

Lost will—presumption of revocation. In the establishment of a lost will, there is a presumption that a will which was in the custody of the testator at his death, and which cannot be found, was destroyed by him with the intention of revoking it. The presumption may be rebutted or strengthened by proof of declarations of the testator, his circumstances, or his relations to the persons involved.

Goodale v Murray, 227-843; 289 NW 450

Destruction of evidence by claimant. Principle reaffirmed that a presumption is created against one who voluntarily destroys evidence of a claim asserted by him.

Meyer v Gotsdiner, 208-677; 226 NW 38

Liquidation—trust relation — presumption. The presumption that a trustee has preserved the subject matter of the trust cannot exist, in the absence of an allegation that said subject matter came into the hands of the representative of the trustee, and some proof to sustain the allegation.

Andrew v Bank, 204-431; 215 NW 623

Value of government bonds. The face value of government bonds is prima facie evidence of their actual value.

Mulenix v Bank, 203-897; 209 NW 432

Public improvements — assessments. Presumptively a special assessment for a municipal improvement is equitable. The burden of proof is on him who disputes the presumption.

In re Hume, 202-969; 208 NW 285

Assessor's valuation—burden of proof. The presumption is that the valuation placed by the assessor upon any particular property is correct, and the burden of proof is upon the person challenging that estimate to prove otherwise, as provided by statute, yet the opinion of the assessor is not conclusive, but when properly based and apparently not erroneous, excessive, or out of proportion, it is to be held as the true value of the property.

Trustees of Flynn's Estate v Board, 226-1353; 286 NW 483

Assessor's valuation—inequitable assessment even tho below value—failure of proof. There is a strong presumption in favor of the valuation fixed by the assessor which will not be disturbed on appeal, unless the presumption is overcome by proof, and altho the assessment is less than the value of the property, if it is inequitable when compared with assessments on similar property, it will be reduced to an equitable basis; so, where petition for reduction of city tax assessment on petitioner's lots did not allege that it was inequitable, where evidence showed lots were assessed pursuant to uniform system and reason for petitioner's witnesses' disagreement with assessor as to value did not appear, and, where assessments on similar lots in same amount were not challenged, the presumption in favor of assessment was not overcome and petitioner failed to sustain statutory burden of proving that assessor's valuation was inequitable.

Call v Board, 227-1116; 290 NW 109

Assessments—presumption of correctness—failure to overcome. An assessment for sewer must stand when appellant fails to establish his objections: to wit, that the assessment exceeds benefits and exceeds 25 percent of the value of the property.

Chicago, R. I. Ry. v Dysart, 208-422; 223 NW 371

Assessments—presumption of correctness. Evidence held insufficient to overcome presumption of correctness of tax assessments, where two properties, similar in construction and pro-

II EVIDENCE GENERALLY—continued
(b) PRESUMPTIONS IN GENERAL—continued

ducing about the same income, are claimed to be disproportionate to respective values.

Crary v Board of Review, 226-1197; 286 NW 428

Stock market profits—when not taxable. In an action to cancel and secure a refund of income taxes submitted on a stipulated record, stock market transactions involved therein would be illegal and void as based on a gaming transaction if the buyer neither intended nor contemplated taking actual delivery but intended that the profits or losses should be settled on the market quotations; however, illegality is not presumed, and without illegality appearing in the record, profits accruing from such transactions must be held to be profits from the sale of capital assets, and not taxable as income, hence taxes paid thereon must be refunded.

Martin v Board, 225-1319; 283 NW 418

Foreign corporation doing business without permit. A necessary statutory prerequisite, to the right of a foreign corporation for pecuniary profit to sue on an Iowa contract, is that it first have a permit to transact business in Iowa, and the very nature of its business may raise the presumption that such corporation is one for pecuniary profit.

Johnson Co. v Hamilton, 225-551; 281 NW 127

Liability of capital stock not considered. Under the statute providing for the remedy of a creditor who is damaged by the wrongful diversion of funds of a corporation, it is held, the word "liability", as used in the statute, of a corporation on its capital stock is not an indebtedness to be considered in determining whether or not a corporation may lawfully pay dividends. In the absence of a showing to the contrary the presumption is that the payment of dividends is lawful.

Majestic Co. v Orpheum Circuit, 21 F 2d, 720

Fire damage by railroad—evidence sufficiency. In an action against a railroad for loss of property by fire, the state court's construction of statute, respecting presumption against railroad causing fire damage, is binding on federal courts. So where a prima facie case is established by plaintiff and no rebuttal thereto is offered, evidence held sufficient to make case for jury.

Turner Mfg. Co. v Bremner, 40 F 2d, 368

Presumption of constitutionality of statutes. Principle recognized that a legislative act will be declared constitutional unless its unconstitutionality is clear, palpable and practically free from doubt.

State v Darling, 216-553; 246 NW 390; 88 ALR 218
Berg v Berg, 221-326; 264 NW 821
Miller v Schuster, 227-1005; 289 NW 702

Presumption of constitutionality—strong case to invalidate. In passing upon constitutionality of acts of the legislature a presumption exists in favor of constitutionality, and an act will be invalidated only when it is clearly, plainly, and palpably unconstitutional, and it is the duty of the courts to give such a construction to an act that, if possible, this necessity is avoided and the act upheld.

State v Talerico, 227-1315; 290 NW 660

Construction by executive departments—legislative intent. The legislature is presumed to know the construction of its statutes by the executive departments, and when legislature indicates no dissatisfaction with such construction, the court may conclude such construction followed legislative intent.

State v Ind. Foresters, 226-1339; 286 NW 425

Former statute revised — legislative construction. When the motor vehicle statutes were completely revised, and exempted the vendor of a motor vehicle, under a conditional sales contract, from liability for negligent operation of the vehicle, such revision did not create a legislative construction that a former statute defining "owner" as the person with the use or control of a vehicle included such vendor within its definition, as a general revision of the laws creates no presumption of an intent to change the law, as is created when a particular section or a limited part of an act is re-enacted.

Hansen v Kuhn, 226-794; 285 NW 249

Unauthorized taking of motor vehicle. When an owner of a motor vehicle establishes that his car was taken without his knowledge or consent from the place he left it, he has made a prima facie case of theft. The law raises a rebuttable presumption that the taking was with intent to steal the same.

Whisler v Home Ins., 224-201; 276 NW 606

Consent of automobile owner—inference—burden of proof. An inference arises from the ownership of an automobile that it was operated with the owner's consent, or under his direction, and the owner has the burden of establishing that such was not the case.

McCann v Downey, 227-1277; 290 NW 690

Retainer and authority of attorney. The presumption that an attorney has authority to appear for a party for whom he does appear, must prevail until the adverse party who demands proof of authority overcomes the presumption by allegation and proof of reasonable grounds tending to disprove such authority.

Bleakley v Long, 222-76; 268 NW 152

Tenants in common—accounting—division of receipts. When it happens that only one of two joint, equal, equitable owners of real estate is personally obligated on the contract for

a deed under which the land is held, it is quite manifest that the law cannot presume, without supporting evidence, that forfeited payments received by said parties as the result of a futile attempt at sale of said premises, belong wholly to said nonobligated party; and equally manifest that the law cannot, on such circumstances, rear a so-called quasi contract to the same effect, in the absence of like evidence.

In re Kelly, 221-1067; 267 NW 667

Right of parent to custody of child. Presumptively, the welfare of a child will be best served in the care and control of its parents, and a showing of such relationship makes a strong prima facie case for parents claiming the care of their children. The presumption is rebuttable in cases of extreme neglect of natural and legal duty by the parents, the controlling consideration being the present and best future interests of the children, with due regard to the natural rights of the parents.

Allender v Selders, 227-1324; 291 NW 176

Alienation of affections. Presumptively a wife has affection for her husband, and a defendant has the burden to overcome such presumption.

Weyer v Vollbrecht, 208-914; 224 NW 568

Adjudication of insanity — nonretroactive presumption. An adjudication of insanity creates no presumption that the person in question was insane at any particular period of time prior to said adjudication.

Davidson v Piper, 221-171; 265 NW 107

Denial of insanity after adjudication. One judicially held to be insane has the burden to overthrow the presumption that such insane condition continues.

Hazen v Donahoe, 208-582; 226 NW 33

Incorrectly addressed letter. There is no presumption that mail matter addressed to a person at a town which is not his post office address will be delivered to the addressee at another town which is his post office address, tho the two towns are in the same county and in the same vicinity.

Lundy v Skinner, 220-831; 263 NW 520

Mailing and delivery of mail matter. In order to raise a presumption of delivery of a paper through the mail, the essential elementary facts giving rise to the presumption may be shown by course of business properly proved; but such proof must be directed to facts, and not conclusions, and the facts proven must be legally sufficient to create the presumption. Proofs held insufficient.

Central Co. v Des Moines, 205-742; 218 NW 580

Mailing notice of cancellation—presumption of receipt. In an action on an insurance policy to recover damages for loss by hail, where the answer alleges cancellation of policy by mailing five days written notice to insured, receipt of which notice plaintiff denies, it may be presumed or inferred by the supreme court in reviewing a decision on demurrer, that the letter properly addressed and mailed reached the plaintiff in due time.

Sorensen v Ins. Assn. 226-1316; 286 NW 494

Insurance—attempted cancellation contrary to bylaws—effect. A mutual insurance company which, in its bylaws, provides for the cancellation of a policy by giving notice "in person or by registered letter," and which, in its attempt to cancel a policy, ignores its own bylaws and attempts to give notice by an unregistered letter, must prove that said letter actually reached the insuree; and the presumption of delivery attending the mailing of such letter and the positive testimony that such letter was never received by the insuree are of equal probative force. Therefore, the insurer has not established the receipt of said notice by the insuree.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Reinsurance—disclosure of material facts. In an action on a reinsurance contract against reinsurer, held, not breached on account of original insurer's failure to retain full amount of liability agreed upon where original insurer was liable on another contract with the same principal and the evidence was insufficient to show any wrongful or fraudulent concealment of material facts, since the same principles of law as to false representations and concealments governs in reinsurance as in original insurance. Although insured and reinsured have duty to exercise good faith and disclose all material facts, a presumption must be based on facts, not upon other presumptions. The mere nondisclosure of facts possibly known is not fraudulent concealment of facts, so reinsurer, to establish concealment of facts, must show intentional concealment or bad faith in ascertaining facts.

General Reins. v So. Surety Co., 27 F 2d, 265

Accidental death—burden of proof. Under a policy providing for additional payment in case of death from accidental means, the beneficiary has burden of showing that insured shot himself accidentally, which need not be proved by direct evidence, but may be proved by proper inferences and presumptions from facts, and the beneficiary is aided in carrying this burden of proof by the presumption that death was not the result of suicide. Such presumption, however, is a rebuttable one and ordinarily a question of fact to be determined by the jury. So where evidence on a fact matter is of such character that reasonable men, in an impartial and fair exercise of their judgment, may honestly reach different conclusions, the question was properly held for the jury.

Mutual Ins. v Hatten, 17 F 2d, 889

II EVIDENCE GENERALLY—continued
(b) PRESUMPTIONS IN GENERAL—continued

Accident insurance—intentional acts resulting in injury. Under a policy of accident insurance which exempts the insurer from liability for injuries sustained by the insured by reason of "intentional" acts, the presumption will be indulged that injuries inflicted upon the insured by another person were not intentional.

Olson v Surety Co., 201-1334; 208 NW 213

Suicide—burden of proof. An insurer is not entitled to a directed verdict on its defensive plea of suicide unless the facts and circumstances preclude every reasonable hypothesis except that of suicide. Evidence held insufficient to overcome presumption of nonsuicide.

Wilkinson v Life Assn., 203-960; 211 NW 238

Death by accidental means. In a law action by beneficiary to recover for death of insured on a policy containing additional benefits for death resulting from accidental means, the defendant insurer complaining that the court erred in submitting to the jury the question of whether or not plaintiff had successfully carried her burden of proof that death resulted from accidental means, held, there being circumstantial evidence tending to establish that the discharge of a gun was accidental, creating a presumption having probative value in favor of the theory of accident, the question was properly submitted to the jury.

Waddell v Ins. Co., 227-604; 288 NW 643

Unexplained absence. A rebuttable presumption of death arises from the unexplained disappearance of a person for seven years from his usual place of living.

McCoid v Norton, 207-1145; 222 NW 390

Evidence of death—presumption—fugitive from justice. Continued and unexplained absence of an insured from his home or usual place of abode for seven years, notwithstanding diligent efforts of relatives and friends to locate him, creates a jury question on the issue of death, even tho the original disappearance was caused by the fact that he was a defaulter in a large amount.

Rodskier v Ins. Co., 216-121; 248 NW 295

Original notice—substituted service. A return of service of an original notice which reveals service on defendant by service on a proper member of his family is presumed correct, and judgment rendered thereon is valid tho defendant never learned of the notice. Evidence held insufficient to overcome said presumption.

Dickerson v Utterback, 202-255; 207 NW 752

Incapacity to make will not presumed—fact question. One under guardianship is not necessarily incompetent to make a will, for instance, as to a drunkard under guardianship incapacity is not presumed. Evidence failed to establish that testator was intoxicated when he made his will, and his competency, being a fact question when decided in his favor by the court after waiver of a jury, will not be disturbed on appeal.

In re Willer, 225-606; 281 NW 155

Certificate of birth—evidentiary effect. That part of an official certificate of birth which states that the name of the father is unknown is not presumptive evidence of that fact in an action for damages for seduction, and does not contradict direct testimony as to the paternity of the child.

Gardner v Boland, 209-362; 227 NW 902

Birth during lawful wedlock—presumption—proof to overthrow. The presumption of legitimacy of a child born in lawful wedlock is so strong that it will yield only to clear, satisfactory and practically conclusive proof that the husband was:

1. Impotent, or
2. Entirely absent so as to have no access to the mother, or
3. Entirely absent from the mother at the period during which the child must have been begotten, or
4. Present with the mother under circumstances negativing sexual intercourse with her.

Craven v Selway, 216-505; 246 NW 821

Attorney fee allowance. Tho a presumption of correctness exists in favor of trial court's decision fixing compensation for administrator's attorney, yet, where objection is made to application for allowance, and no evidence is introduced as to the services other than a bare statement in the applicant's affidavit, the trial court is not warranted in making a finding involving both nature and value of services.

Glynn v Bank, 227-932; 289 NW 722

Attempted destruction of intoxicating liquors. The attempt on the part of a person to destroy a liquid while the officers are searching his premises under a warrant constitutes prima-facie proof that the liquid was intoxicating, and intended for unlawful purposes.

State v Barton, 202-530; 210 NW 551

No presumption of election from mere occupancy by spouse. Surviving spouse's occupancy of the homestead will not alone, unless inconsistent with every other right, raise a presumption of an election to occupy the homestead for life.

Prichard v Anderson, 224-1152; 278 NW 348

"Wormix"—neither descriptive nor parts of two words. The word, "Wormix", an artificial word coined and used as the name of a hog remedy, is not descriptive in such sense that it may not be used as a valid trade-mark and registered, nor the fact that it is composed of parts of two words does not disqualify it for registration as a trade-mark. So the use by

defendant of the word, "Worm-X", for a similar remedy was held a colorful imitation and an infringement, and where defendant has refused on notice to cease the use of an infringing device, and has continued to infringe, neither a fraudulent intent to injure complainant nor an actual misleading of the public need be proved, but will be presumed.

Feil v American S. Co., 16 F 2d, 88

Credibility of witness. In prosecution for subornation of perjury, where defendant complains of the court's instruction which stated in part, "it being presumed in law that a man whose general reputation for truth and veracity is bad would be less likely to tell the truth than one whose reputation is good", such instruction did not tell the jury that defendant had been impeached, that he would not tell the truth, or that they could disregard his testimony (they were only informed of a rule applicable in everyday business transactions)—it being more a statement of the reason for such a rule in impeachment than any direction to the jury, and was in no sense a presumption of guilt, but could only be applied to defendant as a witness. The weight of defendant's testimony was left entirely for the jury.

State v Hartwick, 228- ; 290 NW 523

Withholding evidence. Record reviewed and held to afford no basis for an instruction to the effect that a failure of a party to testify to facts that are wholly within his knowledge raises an inference that if he did testify the testimony would be to his disadvantage.

West Branch Bank v Farmers Exch., 221-1382; 268 NW 155

Common knowledge that metal wire will conduct electricity. Farmer 36 years of age familiar with high lines and use of electricity is presumed to have the common knowledge of all intelligent persons that a metal wire will conduct electric current.

Aller v Iowa Electric Co., 227-185; 288 NW 66

(c) BEST AND SECONDARY EVIDENCE

Antenuptial contract—proof. Record held to establish, by copy, an antenuptial contract, the original being lost.

Fraizer v Fraizer, 201-1311; 207 NW 772

Secondary evidence—admissibility as affecting title to real estate. Where title to real estate is not in issue, secondary evidence of title is admissible, when proper foundation for its introduction has been laid, otherwise, if title is in issue.

Inter-Ocean Co. v Morrison, 225-1336; 283 NW 909

Copies in lieu of originals—conditions. Carbon copies of letters, the originals of which are in the possession of the adverse party, are not admissible until the originals are properly called for and not produced.

Miller v Fire Assn., 219-689; 259 NW 572

Loss of writing as foundation for secondary. Proof of the loss of the written authority of an agent justifies the reception in evidence of a printed form with proof that such form substantially embodies the words of the lost writing.

Stoner v Ins. Co., 215-665; 246 NW 615

Deposit in banks. The books of a bank constitute the best evidence of the deposits of estate funds by the administrator—not what appears to be deposit slips and letters of the bank relative thereto.

Varga v Guaranty Co., 215-499; 245 NW 765

Requiring creditor to sue—proof of lost notice and service thereof. The contents of a written notice by a surety to a creditor requiring the creditor to sue on the obligation or to permit the surety so to do in the name of the creditor, and the service of such notice, may be proven by oral evidence when neither the original notice nor a copy thereof can be produced; but such proof must be clear, positive, convincing, and satisfactory. Evidence held to meet the rule.

Cleophas v Walker, 211-122; 233 NW 257

Value of livestock. Competent oral testimony of the value of livestock is admissible even tho a recognized market journal is in evidence showing such values.

Riddle v Railway, 203-1232; 210 NW 770

Authority of corporate officer. It is not erroneous to permit a corporate officer to testify to his authority to sign an instrument on behalf of the corporation, a copy of the authorizing resolution of the corporate directors being before the trial court.

Main v Brown, 202-924; 211 NW 232

Profits made in similar business. On the issue, in an action for an accounting, as to the amount of profits made by defendant in the operation of a gasoline and oil service station during a given time at a given place, plaintiff, in the absence of legally better evidence, may show, as bearing on the probable amount of gasoline and oil sold by defendant, the amount of gasoline and oil sold during said time in question and in said locality by other substantially similar stations, similarly situated, even tho the kind or grade of gasoline and oil sold at said latter stations is different than the gasoline and oil sold by defendant. But said evidence furnishes no basis whatever on which to compute the amount of profits made by defendant unless plaintiff supplements said evidence with proof of the wholesale price paid, and the retail price received,

II EVIDENCE GENERALLY—continued
(c) BEST AND SECONDARY EVIDENCE—concluded

by defendant for the kind or grade of gasoline and oil handled by him.

Standard Oil v Stubbs Co., 221-489; 265 NW 121

Lost will—required proof. In proceedings to establish a lost will, the proponent must prove (1) the due execution and existence of the instrument; (2) that it has been lost and could not be found through diligent search; (3) that the presumption of its destruction by the testator with intention to revoke it, arising from its absence on his death, has been rebutted, and (4) the contents or provisions of the will.

Goodale v Murray, 227-843; 289 NW 450

Cause of death—testimony of attending physician nonconclusive. The testimony of a physician as to the cause of death of a person whom the physician personally attended shortly prior to said death is not conclusive, especially when the physician was, at the time of the examination, uncertain as to the cause of death. In other words, expert testimony, on proper hypothetical facts, is admissible to show a cause of death other than that testified to by the attending physician.

Dawson v Life Co., 216-586; 247 NW 279

(d) DEMONSTRATIVE EVIDENCE

1 In General

Demonstrative evidence—order for production. It is discretionary with the court whether a witness shall or shall not produce demonstrative evidence.

State v Graham, 203-532; 211 NW 244

Identification and materiality. Duly identified demonstrative evidence is admissible when shown to be material.

State v Umphalbaugh, 209-561; 228 NW 266

Demonstrative evidence—identification. Exhibit held sufficiently identified, material and relevant, and properly received in evidence.

State v Brown, 216-538; 245 NW 306

Erroneous instruction on fact not existing—failure of circumstantial evidence to overcome error. It is error to assume or state in an instruction that certain facts exist which do not exist, and a presumption of prejudicial error arises therefrom. Therefore, in arson trial, circumstantial evidence was held insufficient to establish defendant's guilt so conclusively as to require a conviction notwithstanding an erroneous instruction on state's evidence of footprints "pointing toward and away from" burned store building when there was no evidence of footprints "pointing toward" such building.

State v Neff, 228- ; 291 NW 415

Instructions not substantiated by evidence—error. In arson trial, an instruction on the state's evidence that footprints "pointing toward and away from" burned store building was held erroneous, in absence of any evidence of footprints pointing toward building.

State v Neff, 228- ; 291 NW 415

2 Blood Tests, Urinalysis, and Other Examinations

Discussion. See 23 ILR 57—Scientific tests for intoxication; 24 ILR 191—Blood test—medico-legal aspects

Compulsory examination of defendant's person. An examination of the defendant's person, while in jail, by a physician, cannot be said to have been compulsory, where the only evidence of compulsion was that the sheriff accompanied the physician, but it was not shown that he did or said anything in respect to the examination.

State v Struble, 71-11; 32 NW 1

Blood tests. In the absence of a clear and definite statute so authorizing, state and local boards of health may not, on mere suspicion that a person is afflicted with, or has been exposed to, a venereal disease, cause such person to be compulsorily detained and physically examined by withdrawing blood from the veins and pus smear from the urethra, for the purpose of determining the existence of such disease in such person, even tho such examination, while painful, is not dangerous to life. (See 24 Iowa Law Review 191).

Wragg v Griffin, 185-243; 170 NW 400

Blood test—authority to take. When a coroner from another county, without legal warrant and without express or implied assent, acted as a volunteer and went into an operating room and took from an unconscious patient a blood sample to be used in a possible future criminal prosecution, the court was in error in a later manslaughter prosecution against the patient, in receiving in evidence, over timely objections by the defendant, the blood sample and the testimony of experts based thereon.

State v Weltha, 228- ; 292 NW 148

Blood tests—expert testimony. Greater care could have been taken in tracing a blood sample from an operating room to a trial seven months later than evidence which showed that it had passed through the hands of several persons, not all of them being identified, and had been kept for a time in some sort of mailboxes in a doctor's office in another city. Without more foundation, a statement by the doctor at the trial that the blood sample was then in the same condition as it was in the beginning was a mere conclusion.

State v Weltha, 228- ; 292 NW 148

Blood test and urinalysis—testimony as hearsay. In prosecution for driving while intoxicated, physician's testimony concerning analysis of blood and urine of defendant was not objectionable as hearsay on the ground that

an assistant made the analysis when the doctor testified that "together we analyzed it."

State v Morkrid, (NOR); 286 NW 412

Blood tests and urinalysis — voluntaryism. Admission of evidence of blood test and urinalysis in prosecution for drunken driving is not objectionable as compelling defendant to be a witness against himself when the evidence disclosed that the analyzed substances were given up voluntarily and without compulsion or entrapment.

State v Morkrid, (NOR); 286 NW 412

3 Physical Injuries

Exhibiting wounds to jury. During the final arguments in a personal injury case, the court may permit the plaintiff to seat himself alongside the jury in order that the jury may have a close-up view of wounds which, during the taking of testimony, have been fully described and exhibited to the jurors while some of them were twenty feet from the witnesses.

Mizner v Lohr, 213-1182; 238 NW 584

Exhibition of injured body. An injured party, in an action for damages, has a right to disrobe and exhibit to the jury his actual injury and the result thereof tho they present a most pitiable sight.

Olson v Tyner, 219-251; 257 NW 538

Presumption attending injuries. In the absence of direct or circumstantial evidence to the contrary, physical injuries to a person are presumed accidental.

Dewey v Ins. Co., 218-1220; 257 NW 308

4 Articles and Objects

Identity of object. The identity of an object may be established (1) by proof of facts and circumstances and (2) by positive identification by a witness who has first revealed his positive knowledge on the subject.

State v Umphalbaugh, 209-561; 228 NW 266

Nonpresented issue. Household furnishings, especially when they have been in use for some three years, are inadmissible to show their condition, when the sole issue before the jury is as to the contract price.

Braverman v Naso, 203-1297; 214 NW 574

Illegal possession of liquors—articles seized on search. In a prosecution for willful and unlawful possession of intoxicating liquors, a still seized, together with liquors, during a search of defendant's premises is admissible over the general objections of incompetency, immateriality, and irrelevancy.

State v Matthes, 210-178; 230 NW 522

Identification of subject matter. It is proper to ask a witness whether certain liquors purporting to come from a named place had been delivered to him for analysis, such liquors being otherwise properly identified.

State v Olson, 200-660; 204 NW 278

(e) ADMISSIONS IN GENERAL

Cautious consideration of. Principle reaffirmed that admissions, as a rule, are to be considered with caution and scrutinized with care.

Kuhn v Kjose, 216-36; 248 NW 230

Plea of guilty in criminal prosecution. A plea of guilty in a criminal prosecution may be admissible as an admission when the judgment entered thereon would not be admissible.

In re Johnston, 220-328; 261 NW 908; 262 NW 488

Admissions—plea of guilty. In a civil action, the plea of guilty to a criminal prosecution involving the same transaction is admissible as an admission but is not conclusive when the criminal defendant, as a witness in the civil action, gives testimony tending to contradict his plea of guilty.

Boyle v Bornholtz, 224-90; 275 NW 479

Offers of compromise—nonviolation of general rule. The reception in evidence of a written "agreement for arbitration" of a loss is not violative of the rule that "offers of compromise" are inadmissible.

Hansell v Ins. Co., 209-378; 228 NW 88

Admissions against interest—admissibility. Testimony by a party against his own interest is admissible in a subsequent proceeding against him wherein said testimony is material.

Stark v White, 215-899; 245 NW 337

Admissions of counsel in lieu of testimony. The admission of a material fact by counsel in the course of a trial and for the purpose thereof becomes a part of the record just as tho said fact had been established by testimony in the ordinary manner.

Azeltine v Lutterman, 218-675; 254 NW 854

Opinion by attorney—effect. The written opinion of an attorney as to the law governing a certain matter is not admissible against the client to whom the opinion is addressed.

In re Dodge, 207-374; 223 NW 106

Insured's settlement offer — inadmissibility. A letter written by plaintiff's attorney before trial offering settlement without expense of litigation is inadmissible in a trial on the merits seeking recovery on an automobile theft insurance policy.

Whisler v Ins. Co., 224-201; 276 NW 606

Counsel revealing offer of compromise. Statements by plaintiff's counsel in his opening statement to the jury to the effect that defendant had offered to compromise the claim sued

II EVIDENCE GENERALLY—continued
(e) ADMISSIONS IN GENERAL—continued

on, together with testimony by plaintiff to the same effect, constitutes reversible error, even tho said testimony is stricken from the record and the jury is admonished not to consider it.

Hoover v Ins. Co., 218-559; 255 NW 705

Admissions of attorney—effect. The admission of an attorney, made during a trial, as to the agency of a party for his client, is not necessarily binding on the client in other and subsequent litigation of a similar nature.

Iowa Co. v Seaman, 203-310; 210 NW 937

Admissions by attorney—conditions. Admissions of fact by an attorney are admissible against his client when said admissions are relevant and material and within the actual or ostensible scope of the attorney's employment, and are not in effect an offer of compromise.

Suntken v Suntken, 223-347; 272 NW 132

Signature on notes not admitted by spouse. The mere act of a wife in joining with her husband in the execution of a deed of the husband's property, in payment of certain notes executed by the husband, cannot be deemed a recognition or admission by her of personal liability on the notes when she did not know that her name had been signed to the notes.

West Chester Bank v Dayton, 217-64; 250 NW 695

Admissions of husband—when inadmissible against wife. In an action against a wife to subject her homestead to a judgment which had been rendered against her husband on his debt antedating the acquisition by the wife of her said homestead, admissions of the husband tending to show that he furnished the money to pay for the said homestead are not binding on, or admissible against, the wife.

Price v Scharpff, 220-125; 261 NW 511

Admissions of wife against husband. Admissions by a wife in the absence of the husband, tending to show that a claimant in probate had been employed in the business and had not been paid, are admissible against the estate of the husband when it appears that the wife was both the general manager of the business in question and a partner therein with her husband.

Nortman v Lally, 204-638; 215 NW 713

Pleading as evidence — withdrawal of admission—effect. An admission by a party in his pleading is admissible against him even tho by an amended pleading he has withdrawn his admission.

Beery v Glynn, 214-635; 243 NW 365

Allegations in one count not admissions as to another count. Different theories of recovery contained in separate counts of a petition are not admissions by which the plaintiff is bound under the rule that he may not controvert his own pleading.

Wells v Wildin, 224-913; 277 NW 308

Judgment by default—no admission of cause of action. Principle reaffirmed that a default is not an admission of a valid cause of action where none is pleaded.

Neilan v Lytle Inv. Co., 223-987; 274 NW 103

Rejection and reception of same evidence. Undue strictness in rejecting admissions by plaintiff tending to show that he was to blame for an accident is harmless when the record reveals the fact that such admissions ultimately found their way into the record.

Handlon v Henshaw, 206-771; 221 NW 489

By employee—competency. Admissions by an employee may be competent evidence against such employee while wholly incompetent against the employer.

Glass v Ice Cream Co., 214-825; 243 NW 352

By employee—competency. Statements by an employee of an electric light company made about an hour after a fatal accident to the effect that "there was a liability to the case" are inherently incompetent, especially when authority to make such statement is not shown.

Cox v Light Co., 209-931; 229 NW 244

Nonconcerted action of tort-feasors. In a joint action against two or more tort-feasors for damages consequent on their concurring negligence, plaintiff has the right to prove what each did or said, as affecting joint liability. So held where the court properly received the culpable admission of one of the tort-feasors, made after the happening of the accident.

McDonald v Robinson, 207-1293; 224 NW 820; 62 ALR 1419; 34 NCCA 306

Admissions of heirs and devisees. Where there are several devisees or legatees whose interests are several and not joint, the declarations of one are not admissible for the reason that they might operate to the prejudice of the others. In general, the admissions of an heir are not admissible to prove a claim against an estate unless he is the only heir interested upon that side of the action.

In re Green, 227-702; 288 NW 881

Declarations in disparagement of title — admissibility. On the issue whether defendant was a donee of certain bonds and had been such prior to the death of the alleged donor, a writing executed by the alleged donee subsequent to the making of the alleged gift, and tending to show ownership at said time in the alleged donor, is admissible against the alleged donee as in the nature of an admission in disparagement of donee's alleged claim.

Malcor v Johnson, 223-644; 273 NW 145

Damaging statements—failure to deny as admission. Evidence of the failure of a person to reply to material statements made in his presence and hearing, concerning facts affecting his rights, is competent if the statements are of such character and are made under such conditions that a denial would have been natural had the statements been untrue and incorrect.

Doherty v Edwards, 227-1264; 290 NW 672

Attempt to suppress testimony. While an attempt by the defendant to keep an adverse witness from testifying is not necessarily an admission by him that his claim or defense is false, yet such attempt is in effect an admission by the defendant that the testimony sought to be suppressed is unfavorable to his cause; and instructions to this effect, on supporting evidence, are proper.

Gregory v Sorenson, 214-1374; 242 NW 91

Bribery as indicating unfavorable admission. Attempt by a defendant to bribe a witness is indicative of an admission on his part that his cause or claim is unjust, dishonest, and unrighteous; and the court may so instruct the jury on supporting testimony.

Gregory v Sorenson, 214-1374; 242 NW 91

Agent—corruption of witness. An interwoven transaction tending to show that a defendant and a third party were working in conjunction to corrupt a witness, and consisting of conversations in part between said witness and said third person, and in part between all three said parties, is admissible—the court carefully limiting the jury in the consideration of said testimony.

Gregory v Sorenson, 214-1374; 242 NW 91

Destruction of property—evidence of value. In motor carrier's action on liability insurance policy for loss of property destroyed by fire in freight terminal, plaintiff has burden of proof as to its "custody and control" of goods within policy provisions, also as to value thereof, and stipulation as to value of certain goods on which claims had been paid by insured does not admit value of other goods in absence of competent proof thereof.

Amer. Alliance Ins. v Brady Co., 101 F 2d, 144

Civil service—taking examination not admission of necessity. A Sioux City policeman who served as a patrolman for about 14 years and was then promoted to rank of detective, in which capacity he served for about 4 years until demoted to former position of patrolman, came within purview of statute enacted during his service as a detective providing that any person having "* * * 5 years of service in a position or positions, shall retain his position and have full civil service rights * * *" without examination. Hence his demotion without cause was improper, and the fact that he had taken examinations for position of detective did not amount to an admission that an examination was necessary in his case.

Brown v Sturgeon, 227-136; 287 NW 834

Precautionary unbalanced instructions—correction by court. The court may very properly correct a requested precautionary instruction relative to the consideration by the jury of admissions by a deceased, by balancing the instruction, and making it applicable to the admissions of all parties to the action, including the deceased.

Halstead v Rohret, 212-837; 235 NW 293

(f) DECLARATIONS

1 In General

Impeachment—interest in outcome of litigation. An impeaching witness may not testify to declarations of another witness tending to show that such other witness had an interest in the pending litigation, no proper foundation for such declarations appearing.

Cleophas v Walker, 211-122; 233 NW 257

Alienation of affection—declarations of wife. In an action by a husband for damages for alienation of affection, declarations of the wife made long after she had separated from her husband, and explanatory of such separation, are manifestly hearsay.

McGlothlen v Mills, 221-204; 265 NW 117

Declarations of insured. Declarations, not part of the res gestae, of an insured under an accident policy of insurance, tending to prove that an injury to the insured was self-inflicted, are not admissible against the beneficiary of the policy.

Pride v Assn., 207-167; 216 NW 62; 62 ALR 31

Agent as witness—individual (?) or agency (?) transaction. The president of a bank may testify that in a certain transaction he was not acting for or on behalf of the bank of which he was president, but was acting in and with reference to an individual transaction of his own.

Security Bank v Bigelow, 205-695, 216 NW 96

Knowledge of insolvency of bank—declarations subsequent to receipt of deposit. On the issue whether a bank deposit was received by the accused with knowledge of the bank's insolvency, declarations by the accused subsequent to the receipt of the deposit, tending to show that he then, and at the time of the deposit, knew that the bank was insolvent, are admissible.

State v Bevins, 210-1031; 230 NW 865

Impeachment of title by grantor. Principle recognized that the grantor in a deed of con-

II EVIDENCE GENERALLY—continued
(f) DECLARATIONS—concluded
1. In General—concluded

veyance may not by subsequent declarations impeach the title conveyed by him.

Jones v Betz, 203-767; 210 NW 609; 213 NW 282

Damaging statements—failure to deny as admission. Evidence of the failure of a person to reply to material statements made in his presence and hearing, concerning facts affecting his rights, is competent if the statements are of such character and are made under such conditions that a denial would have been natural had the statements been untrue and incorrect.

Doherty v Edwards, 227-1264; 290 NW 672

Declarations of injured party. The declarations of an injured party, made shortly after receiving the injury, as to the manner in which the injury was received, may be admissible as substantive evidence.

Califore v Railway, 220-676; 263 NW 29

Undue influence—declarations of testator. Declarations of a testator that he intended to make disposition of his property in a manner different than that provided in the subsequently executed will is inadmissible on the issue of undue influence.

In re Diver, 214-497; 240 NW 622

Declaration by one of several heirs or devisees. Where there are several devisees or legatees whose interests are several and not joint, the declarations of one are not admissible for the reason that they might operate to the prejudice of the others. In general, the admissions of an heir are not admissible to prove a claim against an estate unless he is the only heir interested upon that side of the action.

In re Green, 227-702; 288 NW 881

Illegitimacy in general—declarations admissible. Declarations of the deceased mother of a child born out of lawful wedlock, as to who was the father of said child, are admissible on the issue of paternity; also like declarations of other members of the family as a matter of family history. Evidence reviewed and held insufficient to establish plaintiff's paternity.

Hopp v Petkin, 222-609; 269 NW 758

Bastards—nonallowable evidence. The illegitimacy of a child born in lawful wedlock, without proof that the husband was impotent or had no sexual access to the mother, cannot be established by the declarations of the mother, or of the putative father, or of said child, nor by proof of the mother's adultery.

This does not imply that after illegitimacy has been made to appear, by competent proof, the declarations of the putative father and of the mother are not admissible to identify the actual father.

Craven v Selway, 216-505; 246 NW 821

2 Self-serving Declarations

Inadmissibility. Self-serving declarations of a party are inadmissible.

Ankeney v Brenton, 214-357; 238 NW 71

Claim against estate not negatived by statements of spouse. Self-serving declarations of a husband or wife during their lifetime are inadmissible to negative a claim in probate against the estate of the husband.

Nortman v Lally, 204-638; 215 NW 713

Gifts inter vivos—self-serving acts—incompetency. An alleged donee may not affirmatively establish the gift by testifying to his own prior self-serving acts and declarations.

Malcor v Johnson, 223-644; 273 NW 145

Self-serving declarations made to physician. In an action for damages for injuries received by plaintiff almost a year previously when a rug fell on her in defendant's store, it was prejudicial error to allow a physician, who had never attended her but had examined her shortly before the trial in order to enable him to give evidence at the trial, to testify over objections as to self-serving declarations concerning her health made at that time by plaintiff, and to allow him to answer hypothetical questions based partly upon the incompetent testimony.

Mitchell v Ward & Co., 226-956; 285 NW 187

Sales—action to recover price paid—letters inadmissible. A contract of sale fully executed and no longer in controversy may be so related to and connected with a later contract between the same parties that the correspondence attending the former may be admissible as interpreting the latter, but the offerer must not be permitted to go to the extent of showing, by his own self-serving letters, his dissatisfaction with the goods furnished to him under said first contract, and the loss he suffered thereunder.

Appel v Carr, 216-64; 246 NW 608

3 Dying Declarations

Discussion. See 16 ILR 530—Dying declarations

Decedent's statements concerning will. Decedent's statements, made to the person who drew a will for him, that he wished to make a will and that he wished a certain person to have all his property, were admissible after his death as an exception to the hearsay rule to prove his existing state of mind at the time and to show that his plan was put into effect by making such a will.

Goodale v Murray, 227-843; 289 NW 450

(g) HEARSAY

Discussion. See 16 ILR 92—Pedigree declarations

Res gestae. Hearsay which is no part of the res gestae is inadmissible.

State v Kneeskern, 203-929; 210 NW 465

Expert—answers to be based on experience. An expert may not testify to matters of fact or opinion which are not based on his own knowledge or experience, but on what he has read.

Evans v Utilities Co., 205-283; 218 NW 66

Physician's observation concerning X-ray. The statement of a physician, not a party to an action, relative to an X-ray picture exhibited to him is hearsay and, therefore, incompetent.

Wilcox v Crumpton, 219-389; 258 NW 704

Workmen's compensation. Hearsay evidence is not admissible nor competent to prove any of the basic facts in a compensation case. So held, as to statements made by deceased employee to doctor that injury was received in course of employment.

Schuler v Cudahy Co., 223-1323; 275 NW 39

Physician's opinion—hearsay. The inclusion in a physician's report to an insurance company, of his opinion, that an employee sustaining an eye injury had no vision in that eye previous to the accident, is hearsay evidence.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

Competent sustaining evidence necessary—hearing before commission. Where, in a proceeding before the civil service commission, incompetent hearsay evidence, in the form of minutes of testimony before a grand jury, is considered on the question of whether suspended police officers should be reinstated, the supreme court on review in certiorari must examine the record to ascertain if there is other competent evidence to support the commission's ruling.

Luke v Civil Service, 225-189; 279 NW 443

Information of accused concerning crime charged. What an accused has been told about an offense for which he is on trial is immaterial and hearsay.

State v Papst, 221-770; 266 NW 498

Hearsay brought out in cross-examination. Defendant who, on cross-examination of the state's witness, first enters the forbidden field of hearsay testimony on a certain point, is not in an advantageous position to object when the state, on redirect, follows into the same field of inquiry, especially when the testimony erroneously received is not inherently prejudicial and is practically that which was brought out by defendant on cross-examination.

State v Philpott, 222-1334; 271 NW 617

Libel evidence excluded. Evidence as to criminal libel reviewed, and held to be in the nature of hearsay, and properly excluded.

State v Heptonstall, 209-123; 227 NW 616

Slander of title — evidence — competency. Plaintiff in an action for damages consequent on the loss of a sale of his property because of a slander of his title by defendant manifestly will not be permitted to establish by hearsay evidence that the prospective purchaser would have been able to procure a first mortgage loan in a certain amount,—such being a condition of the contemplated sale,—let alone by evidence of a less satisfactory nature.

Farmers Bank v Hintz, 206-911; 221 NW 540

Assault—remarks—incompetency. Plaintiff, in an action for damages consequent on an assault, may not testify as to the "remarks" that her friends and neighbors made to her relative to the assault, such "remarks" being hearsay.

McQueen v Safeway Stores, 214-1300; 244 NW 278

Statement concerning absent person. Evidence of what a school treasurer said to the school board on a matter material to an absent party is in the nature of hearsay, and properly excluded.

School District v Morris, 208-588; 226 NW 66

Deposition based on unidentified records. A deposition is properly excluded for incompetency (and hearsay) when offered in evidence on the trial, when it appears from the deposition itself that the testimony of the witness is based wholly on unidentified hospital records, the correctness and verity of which the witness has no personal knowledge.

Foy v Ins. Co., 220-628; 263 NW 14

Date of letter. Testimony reviewed, contradictory of the testimony of another witness as to the time a letter was written, and held not to constitute a conclusion nor hearsay.

Cleophas v Walker, 211-122; 233 NW 257

Letters demanding payment excluded. In an action on a note by alleged holder in due course, letters written by prior indorsee, after maturity, demanding payment from maker were properly excluded as hearsay, and in the absence of any disproof of prima facie case made under such circumstances it is not the duty of the court to submit case to jury solely on matter of credibility of witness.

Colthurst v Lake View Bank, 18 F 2d, 875

Admission by assignor of chose. In an action on a chose in action by the assignee thereof, suing on behalf of himself and said assignor (because the assignor had retained an interest in the claim), an affidavit by the assignor, containing a recital of facts materially discrediting the claimed chose in action, is admissible even tho made long after the assignment was executed.

Lake v Moots, 215-126; 244 NW 693

Fraud—connected transactions. Fraudulent transactions may be so related, connected, and interwoven that evidence thereof may be ad-

II EVIDENCE GENERALLY—continued
(g) HEARSAY—concluded

missible against a party who was not present at the transaction.

Leach v Edgerton, 203-512; 211 NW 538

Cancellation of deed—incompetent testimony. In an action by a grantor to set aside deed, testimony as to the contents of statements made by grantor to his attorneys eight days after execution of deed, was incompetent and inadmissible.

Lawson v Boo, 227-100; 287 NW 282

Decedent's statements concerning will. Decedent's statements, made to the person who drew a will for him, that he wished to make a will and that he wished a certain person to have all his property, were admissible after his death as an exception to the hearsay rule to prove his existing state of mind at the time and to show that his plan was put into effect by making such a will.

Goodale v Murray, 227-843; 289 NW 450

Conversation with deceased. When a person who had talked with the decedent shortly before decedent's death testified that the decedent told him that he had made a will, where it was made, and who were witnesses to the will, the testimony, when not objected to, could be given its full probative effect, and came under an exception to the hearsay rule to show the then state of mind of the decedent, tending to prove the prior execution of the will.

Goodale v Murray, 227-843; 289 NW 450

Lost will—contents shown by subscribing witness. The contents of a lost will were sufficiently established by testimony of a subscribing witness who heard the testator tell the scrivener how he wanted to dispose of his property, and heard the will read aloud to the testator who signed it without suggesting any change in the contents, when the testimony met all the requirements justifying an exception to the hearsay rule.

Goodale v Murray, 227-843; 289 NW 450

Statements of third party—competency. Principle recognized that a witness may testify to a statement of a third party for the purpose of showing a motive for his actions, but the evidence thus introduced goes only to the question whether such statement was made, not to the truth of such statement.

State v Brown, 218-166; 253 NW 836

Conversation proved by hearsay. Evidence of a conversation which otherwise would be hearsay and inadmissible is admissible when the issue is whether the conversation was actually had.

Graeser v Jones, 217-499; 251 NW 162

Persons who made statement identified. A witness who states that, on a named occasion, a party litigant asked him to name the persons who had asserted the existence of a certain fact does not testify to hearsay evidence by detailing his responsive answer.

McColl v Jordan, 200-961; 205 NW 838

Unobjected to, relevant hearsay evidence considered. In the absence of objection, relevant hearsay evidence may be given consideration.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

Alimony—unsupported modification. A decree in divorce action may not be subsequently modified on hearsay evidence of misconduct on the part of one of the parties.

McDaniel v McDaniel, 218-772; 253 NW 803

Corporate stockholder—statement by spouse. On the issue whether defendant was a corporate stockholder, declarations of her husband made out of her presence and hearing and apparently without any authority from her are hearsay and inadmissible.

Gruetzmacher v Quevli, 208-537; 226 NW 5

Alienation of affections. Plaintiff in an action against the parents of her husband for damages for alienating the affections of her husband must not, under the guise of showing the state of mind of her husband toward her, be permitted to testify to a recital by her husband of what his parents had said to him about the plaintiff.

Paup v Paup, 208-215; 225 NW 251

Bastardy—incompetent declarations by prosecutrix. On the issue as to the paternity of a child, statements by the prosecutrix, not in the presence of the defendant, to the effect that defendant was the father of her child, are wholly incompetent.

Moen v Fry, 215-344; 245 NW 297

Declarations and letters as to paternity. Ante litem motam declarations and letters of deceased parties relating to the parentage of a certain person, even tho they are not related to such person by blood or marriage, are admissible on the issue of parentage when such declarants and writers stood in such relation to the person in question as to give assurance that they would know the real truth as to such parentage, and could not be mistaken. For a stronger reason, similar declarations and letters of those related by blood or marriage to the person in question are admissible.

In re Frey, 207-1229; 224 NW 597

(h) DOCUMENTARY EVIDENCE IN GENERAL

1 In General

Discussion. See 14 ILR 326—Hospital records; 24 ILR 436—Introduction of documents; 24 ILR 751—Business entries—proposed uniform act

Identification of exhibits. Exhibits are receivable in evidence only when properly identified.

State v Halley, 203-192; 210 NW 749

Excluded evidence otherwise received. Excluding exhibits when the contents thereof so far as material are otherwise admitted presents no error.

Ankeney v Brenton, 214-357; 238 NW 71

Failure to mark exhibit—correction. Failure during trial to identify by proper exhibit mark a volume, portions of which were offered in evidence, may, pending appeal, be corrected on motion before the trial court.

Orr v Hart, 219-408; 258 NW 84

Exhibit treated by parties as being before the court. The court is not in error in treating an exhibit as in evidence when the party litigants have treated and regarded it as in evidence.

Boyd v Miller, 210-829; 230 NW 851

Improper reception of evidence cured by withdrawal and instructions. The improper reception of noninflammatory evidence is cured by the subsequent withdrawal of the evidence and by pointed instructions to the jury not to consider said evidence.

State v Slycord, 210-1209; 232 NW 636

Dragnet objections—exhibit partly admissible. A dragnet objection to an exhibit is properly overruled when the exhibit is clearly admissible in part and when the objector makes no effort to separate the admissible from the inadmissible or to expunge from the record the inadmissible part.

State v Bevins, 210-1031; 230 NW 865

Books of accounts made from sales slips. A book of accounts showing the date of purchase, nature of article sold, and amount, made up from sales slips, constitutes a book of original entries, all other statutory elements of such books being made to appear.

Younker Bros. v Meredith, 217-1130; 253 NW 58

Summary of books and records. Principle reaffirmed that a duly identified and verified summary of voluminous books and records may be admissible in connection with said books and records.

State v Dobry, 217-858; 250 NW 702

Identification of goods by inventories. In an action against an execution plaintiff for conversion of goods stored in certain "boxes, barrels, and trunks," and sold in bulk, without inventory of the contents, plaintiff may introduce duly identified and detailed inventories of the contents, on a showing that such inventories represent the contents of said "boxes, barrels, and trunks."

Antes v Coal Co., 203-485; 210 NW 767

Examination of witness—memory-refreshing memoranda. An inventory of goods which a witness shows was correct when made may be used by the witness to refresh his memory, and is admissible for that purpose.

Antes v Coal Co., 203-485; 210 NW 767

Discovery—order to produce — effect. An order to produce books and papers is not a ruling that, when produced, the books and papers will be admissible as legal evidence.

Main v Ring, 219-1270; 260 NW 859

Ownership of property—insurance policy. On the issue of ownership of personal property, plaintiff may introduce (for what it is worth) a policy of insurance carried by him on the property, especially when defendant is insisting that plaintiff's claim of ownership is a belated afterthought.

Antes v Coal Co., 203-485; 210 NW 767

Fire insurance—proof of loss. Exhibit held inadmissible to establish the giving of statutory proofs of loss.

Havirland v Ins. Co., 204-335; 213 NW 762

Excessive offer — justifiable rejection. A party may not complain of the rejection of his offer in evidence of a pleading when he makes no effort to separate the relevant from the irrelevant matter and to confine his offer to the relevant matter only.

People's Bk. v Smith, 210-136; 230 NW 565; 69 ALR 399

Tables of life expectancy. The introduction of tables of life expectancy is not a condition precedent to the recovery of damages for future pain.

Cuthbertson v Hoffa, 205-666; 216 NW 733

Life tables—effect. Life tables are not conclusive on the subject of life expectancy, and instructions should carefully elucidate such fact.

Droullard v Rudolph, 207-367; 223 NW 100

Improper disregard. The court, in its quest for a fact, may not, by assumption based on speculation or inference, refuse to accord force and effect to undisputed, unimpeached, and nondiscredited documentary evidence which unequivocally establishes said fact, especially when the fact arises out of a somewhat remote transaction, and when the party carrying the burden of proving said fact is hampered in his proof by reason of the death of parties who

II EVIDENCE GENERALLY—continued
(h) DOCUMENTARY EVIDENCE IN GENERAL—continued
1. In General—continued

had knowledge of said transaction and by his own incompetency resulting from said deaths.

In re Allis, 221-918; 267 NW 683

Ledgers—correctness—who may testify. Testimony of vice-president of bank as to correctness of ledger held inadmissible where it appeared that ledger was posted by assistant cashier and bookkeeper.

Andrew v Bank, (NOR); 213 NW 271

Evidence in other proceeding—inadmissible against nonparty. A transcript of the original, official shorthand notes of a witness in proceedings auxiliary to execution, to which proceedings the witness was not a party, is inadmissible as substantive evidence in a subsequent proceeding against the witness wherein a conveyance is sought to be set aside as fraudulent; neither is such transcript admissible, in the absence of proper foundation, to show the admissions of, or to impeach, the witness.

Hawkins v VerMeulen, 211-1279; 231 NW 361

Action by subcontractor—principal contract admissible. A subcontractor under a building contract is impliedly bound by the standards of performance provided in the principal contract; therefore it is error to reject the principal contractor's offer of such contract as evidence.

Lantz v Goodwin, 210-605; 231 NW 331

Bylaws—insufficient proof. A bylaw may not be deemed established by the mere introduction in evidence of the minute book of the corporation which reveals the presence of the alleged bylaw on pages of the book prior to the commencement of the official minutes of the corporation, which minutes contain no reference to bylaws.

Home Bank v Ratcliffe, 206-201; 220 NW 36

Exhibits bearing on nonissuable matter. In an action for damages consequent on the making of improper loans, exhibits bearing on loans should be confined in their admissibility to the loans to which they have application.

Pease v Bank, 204-70; 214 NW 486

Tax receipts. On the trial of a petition for a new trial because of the discovery of an old and forgotten deed, tax receipts which show who paid the taxes before, and who paid the taxes after, the execution of such deed may be admissible.

Mills v Hall, 202-340; 209 NW 291

General denial—chattel mortgage not admissible thereunder in replevin action. General denial puts in issue only facts pleaded in the petition. So, under a general denial to a replevin action for an automobile, evidence of a prior mortgage is properly excluded, when not pleaded, inasmuch as, under a general denial, the court is not called upon to decide which lien is first but only the question of whether plaintiff is entitled to possession.

General Motors v Koch, 225-897; 281 NW 728

Unsigned copy of fidelity bond—inadmissible. In action by a surety company against defendant, who was covered by a fidelity bond and who agreed to indemnify plaintiff against loss sustained by reason of its executing fidelity bond in his behalf, it was error to admit in evidence instrument purporting to be a certified copy of the bond, but containing no signatures and which was admittedly no true and genuine copy of original bond.

Fidelity Deposit Co. v Ryan, 225-1260; 282 NW 721

Notes—nonadmissibility as evidence. Promissory notes, when offered in evidence, are properly excluded as to a party not shown to be liable thereon.

West Chester Bank v Dayton, 217-64; 250 NW 695

Heirs' rights—evidence of shares. Where a farm, comprising a part of an estate which is settled without administration by vesting control in one of the heirs under a trust agreement, is sold, and several first and second mortgages are taken in part payment and divided among the heirs, and title subsequently reverts to trustee without foreclosure, the mortgages, altho losing their effect as liens, serve as evidencing respective share of each heir.

Meeker v Meeker, (NOR); 283 NW 873

Preferred stockholders' rights—proof by articles of incorporation. Rights of preferred stockholders in a bankrupt corporation's assets are subject to all debts of the corporation, including general creditors, and instruments having attributes commonly attached to preferred stock are construed as stock unless contrary intention clearly appears, in which respect the articles of incorporation are held competent to prove meaning and legal effect of certificates purporting to be issued under such articles.

In re Hicks-Fuller Co., 9 F 2d, 492

Objections—waiver by introducing exhibit. Objections made by the defendant to testimony given by the plaintiff's witness on direct examination were not waived when the defendant introduced an exhibit containing written statements made by the witness which tended to weaken his oral testimony. But objections

by the defendant to other testimony in the direct examination were waived by statements in the exhibit supporting the testimony to which objections had been made.

Goodale v Murray, 227-843; 289 NW 450

Ancient documents—conditions of admission. Church records of parish church in Sweden, signed by the rector and church custodian, were admissible as ancient documents when they were over 30 years old, when they were obtained from the proper custody, when they were certified as true exhibits from the consulate of Sweden, and where there were no suspicious appearances.

Bergman v Carson, 226-449; 284 NW 442

Tax deed as evidence under statute. Statutes, providing that a tax deed shall be presumptive evidence of certain things and conclusive evidence of others, are construed to mean that unless the tax deed is received in evidence there is no evidence of the tax deed before the court, and when a tax deed is introduced in evidence a prima facie case is established of the regularity of all proceedings prior to its execution. Such statutory provisions with a tendency adverse to the owner of the title under a tax deed are construed most strictly in his favor.

Bennett v Greenwalt, 226-1113; 286 NW 722

2 Public Records and Documents (See also §11296, et seq.)

Ballots—prima facie showing. Principle reaffirmed that ballots are prima facie admissible in evidence when it is shown that they have come through the channels and from the custodian provided by law, and have been so guarded and preserved by the legal custodian thereof as to exclude all reasonable possibility of tampering.

Tyler v Klaver, 220-1124; 264 NW 37

City ordinance in re flagman—lack of relevancy. A city ordinance which requires a railway company, during certain hours, to maintain a flagman at one of its street crossings, is neither relevant nor material when the accident did not occur during said hours, but at a time substantially thereafter.

Miller v Railway, 223-316; 272 NW 96

Census enumerator's report. In probate proceedings to establish heirship of certain claimants through the deceased spouse of an intestate (who died without issue), the trial court erroneously disregarded a census enumerator's report which showed that intestate was married and that she had no children. While such record was a hearsay statement, yet because of circumstances under which it was made, and because it is a part of a public record, it would have been admissible as an exception to the hearsay rule.

In re Clark, 228- ; 290 NW 13

Official certificates of death—admissibility. A certificate of death not signed, executed, and certified in accordance with the laws governing the disposal of dead bodies is inadmissible as evidence in an action between private parties.

Morton v Ins. Co., 218-846; 254 NW 325; 96 ALR 315

Certificate as to stillborn infant. A certified copy of a return by a physician showing the delivery, by a Caesarean operation, of a stillborn infant, while proper evidence, may have but little bearing on the issue whether said stillborn possessed an independent circulation after being fully separated from the mother.

Wehrman v Bank, 221-249; 259 NW 564; 266 NW 290

Records of former compensation claim inadmissible. Records in the industrial commissioner's office as to a former compensation claim are inadmissible when they have no bearing on the merits of the claim at bar.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

Bankruptcy proceeding—certified records admissible. Records certified to by the clerk of the United States District Court as to the existence of a bankruptcy proceeding are competent evidence of said bankruptcy admissible in the state courts.

Bagley v Bates, 224-637; 276 NW 797

Federal income tax from receiver. In an action involving a claim for federal income tax from an insolvent corporation, the assessment by the internal revenue collector must be treated as prima facie evidence of the amount due, and the state statutes do not control the matter of deduction for attorney fees, referee fees, court costs, and other expenses, but the burden is on the receiver to establish these deductions.

State v American B. & C. Co., 225-638; 281 NW 172

Certified copies—federal statute—effect. The admissibility of evidence relating to a nonjudicial public record of a foreign state (foreclosure of mortgage by "advertisement and sale") is not restricted by the federal statutes relating to the form of authentication of such record.

Bristow v Lange, 221-904; 266 NW 808

Photostatic copies—government documents duly authenticated. Photostatic copies of government documents, duly authenticated, are accepted instrumentalities of introducing official records. Tax returns are public records, the filing and preserving of which are official acts.

Cooper v United States, 9 F 2d, 216

II EVIDENCE GENERALLY—continued
(h) DOCUMENTARY EVIDENCE IN GENERAL—continued
2. Public Records and Documents—concluded

Inadmissible assessment rolls showing nonexistence of note. Since a party assessed need not list all liabilities, assessment rolls, which fail to show a liability promissory note of decedent, are not thereby admissible as evidence to prove the note never existed nor constituted a real indebtedness.

In re Cheney's Estate, 223-1076; 274 NW 5

Assessment rolls—contradictory statements—unallowable purpose. Assessment rolls covering personal property of the taxpayer and the total value thereof, and introduced for purpose of impeachment, are not also receivable for the purpose of showing the value placed on a particular article when the owner demonstrates that the article was not given in for taxation.

Hall v Ins. Co., 217-1005; 252 NW 763

Eminent domain—assessment rolls as evidence. In eminent domain proceedings, the duly signed assessment roll of the property in question is admissible for the purpose of showing the assessed value.

Duggan v State, 214-230; 242 NW 98

Tax deed as evidence under statute. Statutes providing that a tax deed shall be presumptive evidence of certain things and conclusive evidence of others, are construed to mean that unless the tax deed is received in evidence there is no evidence of the tax deed before the court, and when a tax deed is introduced in evidence a prima facie case is established of the regularity of all proceedings prior to its execution. Such statutory provisions with a tendency adverse to the owner of the title under a tax deed are construed most strictly in his favor.

Bennett v Greenwalt, 226-1113; 286 NW 722

Tax deed extinguishing special assessment lien. An injunction restraining a county treasurer from selling real estate at tax sale for special assessments could not be sustained on the ground that tax deeds issued at a sale for general taxes extinguished the lien of the special assessments when the tax deeds were never introduced in evidence to enable the court to rule on whether the statutory requirements had been properly performed to make the tax deed valid.

Bennett v Greenwalt, 226-1113; 286 NW 722

Tax sale register as evidence of tax certificates. In an action to enjoin a county treasurer from selling at tax sale land on which the county held either certificates of tax sale or tax deeds, books designated as "tax sale registers" containing the county record of tax sales were competent evidence of the issuance of tax certificates to the county, although not evidence of the county's alleged tax deeds.

Bennett v Greenwalt, 226-1113; 286 NW 722

Certificate of county recorder. The certificate of the county recorder showing the recording or filing of a chattel mortgage is competent and admissible evidence.

Wertheimer v Parsons, 209-1241; 229 NW 829

Notice and proof of service—drainage record book admissible. In action to cancel tax sale certificate for an unpaid drainage assessment, to enjoin issuance of treasurer's deed therefor, and to further enjoin the collection of remaining assessments on ground that drainage district was not legally established because of defective notice and failure to file proof of service, the drainage record book kept by auditor showing compliance with statutory requirements was admissible, and failure to give correct name of mortgagee in proceeding to establish the district was not a jurisdictional defect where proposed ditch did not extend through or abut upon land covered by the mortgage. (§1989-a3, S., '13.)

Whisenand v Van Clark, 227-800; 288 NW 915

3 Private Memoranda and Statements in General (See also §§11272, 11279, et seq.)

Offers en masse. An offer in evidence, en masse, of voluminous record filings, consisting of both material and immaterial matter, is very properly rejected.

Bates v Brooks, 222-1128; 270 NW 867; 109 ALR 1371

Hotel register—dual purpose. A hotel register may become material and therefore admissible in evidence, not only for the purpose of impeaching a witness who asserted he had registered at the hotel, but as tending to show the presence of the witness at the time in question at the scene of an accident.

Ritter v Fort Madison, 212-564; 234 NW 814

Bills and notes—admissibility when signature not denied. A promissory note, duly pleaded and incorporated in the pleading, by original or copy, is receivable in evidence without further proof,—unless the purported maker of the signature, under oath, properly denies said signature.

Strand v Halverson, 220-1276; 264 NW 266; 103 ALR 835

Taxation—deed not admissible to show value. The recitals of consideration in deeds of conveyances are not admissible to prove the value of real estate for the purpose of taxation.

Iowa Corp. v Board, 209-687; 228 NW 623

Deed—not impeached by will. The ex parte recitals in a will by a grantor of real estate are insufficient to impeach the title conveyed by the deed.

Bibler v Bibler, 205-639; 216 NW 99

Escrow agent's memorandum made in absence of parties. An escrow agent's under-

standing of the arrangement by which he was to record deeds after the death of the grantor, noted on the envelope in the absence of the parties, is not admissible in evidence as to the substance of the arrangement and would be of doubtful evidentiary value even if admitted.

Bohle v Brooks, 225-980; 282 NW 351

Memoranda — admissibility. Mere memoranda book entries, when material, are admissible on proper foundation. So held as to entries tending to show when a note was received by a bank.

Farmers Bk. v DeWolf, 212-312; 233 NW 524

Bank ledger. It is not erroneous to receive in evidence the ledger of a bank for the purpose of showing the credits of a depositor, the correctness of such book being first established; and it is immaterial that the account reveals credit items not in controversy.

Ryan v Cooper, 201-220; 205 NW 302

Corporation statement—insufficient authentication. A purported financial statement of a corporation is manifestly inadmissible, in the absence of testimony as to its authenticity or as to the author thereof and the circumstances of its preparation.

Helberg v Zuck, 201-860; 208 NW 209

Genuineness of corporate records. In an action against the secretary of a corporation individually, the record proceedings of the corporation are admissible against him, when material, upon an admission by such secretary that he believed them to be such records, even tho he states such belief as a conclusion, or bases his belief on hearsay, and even tho he states that he does not know that they were correctly kept.

Helberg v Zuck, 201-860; 208 NW 209

Criminal prosecution—corporate books and records. In a prosecution, under the securities law, of an officer of a corporation for having made, before the secretary of state, a false statement relative to the financial condition of the corporation, the corporate books and a tabulated statement and summary thereof, properly identified, are admissible, even tho there is no showing (1) that said books were made in the ordinary course of business, or (2) that they were true or correct, or (3) that they were books of original entry, or (4) that the accused made or directed their making,— it appearing that the examination of the books was made in the office of the corporation and largely in the immediate presence of the accused.

State v Dobry, 217-858; 250 NW 702

Account book—necessity to identify. Pages of a book containing various notations, memoranda, and accounts in the handwriting of a deceased administrator are not admissible in an action to establish a shortage on the part of said administrator without some proper proof identifying said book as the book in which the administrator kept his accounts relative to the estate in question.

Varga v Guaranty Co., 215-499; 245 NW 765

Professional memorandum by deceased. Brief notations on a slip of paper, identified by a deceased attorney's stenographer as made by him at the time a testator conferred with him about the drawing of the will, are incompetent as evidence when the notes do not state any fact. However, their admission in evidence is harmless when the witness had previously testified without objection to the whole of the conversation.

In re Iwers, 225-389; 280 NW 579

Carriers—rule requiring written orders for cars. The rule of a carrier requiring orders by a shipper for cars to be in writing, and being a part of its freight-rate schedules on file with the board of railroad commissioners, is mandatory, and compliance therewith is not shown by evidence that the station agent upon receiving an oral order made a written memorandum thereof for his own convenience. Such rule is manifestly admissible as evidence in a proper case.

Jackson v Railway, 213-365; 238 NW 912

Delivery date of insurance policy. In an action to recover on a life policy of a daughter, an exhibit showing that a son's policy was delivered on September 14 was admissible to contradict testimony of father and mother that the daughter's policy was delivered August 23 and that son's policy was delivered previously.

Luce v Ins. Co., 227-532; 288 NW 681

4 Charts and Maps Generally (See also §11300)

Plat explained by parol. A town plat which is ambiguous in its descriptions and recitals is subject to parol explanation.

Schuler v Sand Co., 203-134; 209 NW 731

5 Writings and Telegrams

Letters by persons not parties to action. Letters which pass between parties who are not parties to an action are manifestly incompetent as substantive evidence for or against the parties to the action.

Kollmann v *Kollmann*, 204-950; 216 NW 77

Construction of contract—telegrams and letters—intention of parties. Telegrams which are brief and incomplete and which reserve the right in each instance to clarify and amplify by letter point quite conclusively to the conclusion that the parties intended that the contract should be determined by a consideration of both the telegrams and letters.

Appel v Carr, 216-64; 246 NW 608

Telegram received—use as evidence. The telegram which a party receives will be deemed the original when there is no showing that a

II EVIDENCE GENERALLY—continued
(h) DOCUMENTARY EVIDENCE IN GENERAL—continued
5. Writings and Telegrams—concluded

written message was delivered to the company at the point of sending; and in case of the loss of such delivered telegram, a copy thereof is receivable in evidence when material.

State v Lozier, 200-652; 204 NW 256

Relevancy — insured's settlement offer. A letter written by plaintiff's attorney before trial offering settlement without expense of litigation is inadmissible in a trial on the merits seeking recovery on an automobile theft insurance policy.

Whisler v Home Ins., 224-201; 276 NW 606

Handwriting—proper standard for comparison. Proof that a party whose handwriting is in question admitted writing a certain exhibit renders the exhibit admissible as a proper standard for comparison.

State v Debner, 205-25; 215 NW 721

Will as entirety when only signature offered. Without an objection thereto or a showing of prejudice, it is not error to admit and send with the jury the entire will of decedent, even tho only the signature was offered in evidence.

In re Cheney's Estate, 223-1076; 274 NW 5

Insurance agents—license application. The written request of an insurance company to the commissioner of insurance for a license for a named agent "to transact its authorized business" is admissible for the purpose of showing that said person was the company's agent, but not for the purpose of showing the scope of the powers of such agent.

Stoner v Ins. Co., 218-720; 253 NW 821

Location of insured—letters tending to prove inquiry. On the issue whether due and proper inquiries as to the whereabouts of an insured person had been made, evidence in the form of identified letters replying to such inquiries are admissible.

Rodskier v Ins. Co., 216-121; 248 NW 295

Offer to pay attorney fees not accepted. When an attorney, who had received a retainer fee of $100 to represent the insured in a criminal case arising from an automobile accident, received a letter from the attorney for the insurer requesting him to tell the insured that the insurer was willing to take care of attorney fees, such letter was admissible to show an offer to pay such fees, but was insufficient to show that such offer was authorized by the insurer, and his reply that he would look to the company for payment of only those fees exceeding $100, did not amount to an acceptance of the offer.

Gipp v Lynch, 226-1020; 285 NW 659

Delivery date of policy—other evidence competent. In an action on a life policy to which insurance company pleads a general denial and further pleads a release and settlement, wherein the delivery date of the policy is in dispute, and the insurance company assigns, as error, the exclusion of testimony of an officer of the company concerning underwriting practices of the company and a letter written by the company to its agent, upon which the agent's reply was indorsed, concerning the date of delivery of the policy, such evidence should have been admitted, and was competent to show that the company honestly believed it had a defense to the policy and explained why the company had the right to rely upon the date appearing upon the receipt for the policy.

Luce v Ins. Co., 227-532; 288 NW 681

Sales—action to recover price paid—evidence—self-serving declarations. A contract of sale fully executed and no longer in controversy may be so related to and connected with a later contract between the same parties that the correspondence attending the former may be admissible as interpreting the latter, but the offerer must not be permitted to go to the extent of showing, by his own self-serving letters, his dissatisfaction with the goods furnished to him under said first contract, and the loss he suffered thereunder.

Appel v Carr, 216-64; 246 NW 608

Mailing and delivery of letter. For the purpose of proving that an original letter was presumptively received by the addressee through the mail, a proven copy of said letter is inadmissible simply on the showing that the writer of the letter personally signed it, and relied on the accuracy of his secretary to make a proper mailing of the letter in accordance with the routine of the office, there being no evidence as to such routine.

Forrest v Woodmen, 220-478; 261 NW 802

Preliminary proceedings—disposing of law points. In determining the effect of a ruling on a motion to dispose of points of law, it is proper to read the whole pertinent record to ascertain what the court decided, and where a court overruled such a motion which urged that a certain letter was not a sufficient memorandum to take the case out of the statute of frauds, and record revealed that ruling was made because the question could not be determined before submission of evidence, such ruling was not an adjudication which became the "law of the case" so as to prevent subsequent exclusion of the letter upon objection made during trial.

Patterson v Beard, 227-401; 288 NW 414

6 Publications (See also §§11276, 11349)

Coca-cola advertisements—admissibility. In an action against a beverage bottler and wholesaler for damages caused by drinking unwholesome coca-cola, sold by the bottler to a retailer, the admission of coca-cola advertisements in evidence held nonprejudicial.

Anderson v Tyler, 223-1033; 274 NW 48

7 Pictures, Photographs, X-rays (See also §11283)

Photographs inadmissible unless relevant. Photographs of a stranger to the prosecution are, manifestly, inadmissible in the absence of evidence showing relevancy.

State v Papst, 221-770; 266 NW 498

Photographs — essentials for admission. Within the sound discretion of the court, a photograph is admissible in evidence when taken under conditions similar to those material to the inquiry to which it relates, and an instruction may call the jury's attention to the difference in lighting conditions at time an injury occurred, and at the time the picture was taken.

Riggs v Pan-Amer., 225-1051; 283 NW 250

Criminal record on reverse side of photograph. The fact that the state, in identifying an accused, employs a photograph on the reverse side of which is printed the criminal record of the accused, furnishes no basis for an assignment of error when the photograph was never in the hands of any juror, and was not received in evidence, and when the criminal record was not referred to in the presence of the jurors.

State v Kelly, 202-729; 210 NW 903

Handwriting photographs — explanatory marks—court's discretion. Photographs of handwriting, although bearing explanatory markings made by the expert witness, are proper evidence to aid the jury's comparison of the disputed signature on a will, as well as to explain expert testimony and their admissibility is largely within the trial court's discretion.

In re Cheney's Estate, 223-1076; 274 NW 5

Photostatic copies—government documents duly authenticated. Photostatic copies of government documents, duly authenticated, are accepted instrumentalities of introducing official records. Tax returns are public records, the filing and preserving of which are official acts.

Cooper v United States, 9 F 2d, 216

Identification of ballistic photographs. Evidence held ample to identify certain ballistic photographs.

State v Campbell, 213-677; 239 NW 715

Accounting—obliterated items proved by photograph. In an action by a wife against a bank challenging her husband's speculations and transactions in her behalf and for an accounting as to funds and securities where the wife having (1) permitted, acquiesced in, and cooperated with her husband in managing her business with the bank for a period of years, (2) kept a personal record showing she had knowledge of many challenged transactions (proved through ultra violet ray photography of obliterated items), (3) reported income tax on other challenged transactions, (4) a bank account in her own name showing profits from other challenged transactions, (5) been a woman personally familiar with business and speculative dealings, and (6) made a settlement with the bank after ample consideration and acting upon the advice of friends skilled in the business of securities, cannot thereafter claim that the bank could not rely upon her husband's apparent general agency, nor that his dealings with the bank involving her securities and obligations arising therefrom were not the joint operations of herself and husband, nor that a settlement thereof she thereafter made with the bank resulted from the bank's concealment and duress.

Clark v Iowa-D. M. Bank, 223-1176; 274 NW 919

Radiograph—oral explanation. A radiograph may be explained or interpreted to a jury by an expert insofar as the radiograph does not interpret itself to the mere observation of a nonexpert.

Appleby v Cass, 211-1145; 234 NW 477

Amputation without X-ray picture. The issue whether a surgeon was negligent in failing to have an X-ray picture taken of a broken arm before amputating it, does not become a jury question on general descriptive testimony of the arm by laymen opposed by unanimous expert testimony that the extent of the broken, crushed, and mangled arm was plainly apparent without an X-ray picture, the issue being whether amputation was necessary.

Jackovach v Yocom, 212-914; 237 NW 444; 76 ALR 551; 38 NCCA 346

X-ray observations by stranger-physician. The statement of a physician, not a party to an action, relative to an X-ray picture exhibited to him is hearsay and, therefore, incompetent.

Wilcox v Crumpton, 219-389; 258 NW 704

X-ray pictures—sufficient foundation. Principle reaffirmed that foundation for the admissibility of X-ray pictures may be established by the testimony of the technicians who took or interpreted the pictures.

Bauer v Reavell, 219-1212; 260 NW 39; 1 NCCA(NS) 761

X-ray picture taken after amputation. An X-ray picture of an arm of the human body taken several days after amputation and when the arm is admittedly in a materially different condition than it was in when amputated, cannot be received for any other purpose than to show the condition of the arm when the picture was taken, the very material issue being as to the condition of the arm at the time of amputation.

Jackovach v Yocom, 212-914; 237 NW 444; 76 ALR 551; 38 NCCA 346

II EVIDENCE GENERALLY—continued
(h) DOCUMENTARY EVIDENCE IN GENERAL—concluded
7. Pictures, Photographs, X-rays—concluded

X-ray sciagraphs — sufficient foundation. Proof that certain X-ray sciagraphs were taken, for the use of the attending physician, by an expert in that science, and other circumstantial evidence tending to show the correctness of such sciagraphs, furnish sufficient basis for their introduction as evidence, even tho no witness specifically asserts that they "correctly portray the condition of the body affected."

Wosoba v Kenyon, 215-226; 243 NW 569; 1 NCCA(NS) 63, 747

X-ray pictures admitted. In a law action for damages for personal injuries resulting from an automobile accident, question of proper foundation being laid for introduction of X-ray pictures is largely in trial court's discretion, and where it is shown that an osteopathic physician and surgeon in charge of surgery and X-ray department in hospital had made a physical examination of injured party and testified in detail to condition of spine, back, and abdomen, the admission of X-ray pictures to illustrate the surgeon's oral testimony was not an abuse of discretion.

Kramer v Henely, 227-504; 288 NW 610

(I) PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS

Understanding of parties to agreement. See §11275

Discussion. See 7 ILB 173; 20 ILR 713—Parol evidence rule

Rule not available to stranger. The parol evidence rule is not available to a stranger to the writing in question.

Kiser v Ins. Assn., 213-18; 237 NW 328

Third parties. Principle reaffirmed that, as between persons who are not parties to a written contract, parol evidence is admissible to prove what in fact was the actual contract.

Holst v School Dist., 203-288; 211 NW 398

Stranger to transaction. The objection that a transaction is within the statute of frauds or that testimony is violative of the parol evidence rule is not available to a party who is a total stranger to the transaction, and to the title involved therein.

Lennert v Cross, 215-551; 241 NW 787; 244 NW 693

Applicability to third parties. Parol evidence rule excluding oral evidence varying terms of written agreement is applicable in case where one claims rights under such instrument even tho he is not a party thereto.

Willard Co. v Palmer, (NOR); 205 NW 976

Unambiguous contract. An unambiguous contract, being the final agreement of the parties, reduced to writing at the conclusion of the negotiations, cannot be varied by parol evidence.

Hillje v Tri-City Co., 224-43; 275 NW 880

Unallowable modification. Principle reaffirmed that oral evidence may not be introduced to nullify, modify, or change the character of a written obligation.

First N. Bank v Mether, 217-695; 251 NW 505

Ambiguity clarified by parol — doubts resolved against maker. In reviewing various canons of construction, principles reaffirmed that (1) if a contract is clear cut and unambiguous, the wording of the contract must control, but, if it is ambiguous, then parol evidence is admissible to ascertain intention of the parties, and (2) where there is ambiguity the doubt will be resolved against the party who prepared the instrument.

Vorthmann v Pipe Line Co., 228- ; 289 NW 746

Adding additional agreement. Parol evidence is inadmissible in an action at law to add to a written instrument which clearly reflects its intent and purpose, an additional agreement which the parties failed to insert therein.

Dolan v Bank, 207-597; 223 NW 400

Parol to explain judgment. The use of ambiguous words in a judgment or decree of court may open the door to parol evidence to establish what the court actually decided.

Hawkeye Ins. v Inv. Co., 217-644; 251 NW 874

Admission of debt supplemented by parol. A written acknowledgment by a debtor that a debt, action on which is barred by the statute of limitations, is unpaid may, for the purpose of showing a revival of the debt, be supplemented by extrinsic evidence which clearly identifies the unpaid debt and the amount thereof.

Koht v Dean, 220-86; 261 NW 491

Proof of novation. Evidence tending to show that a contract was novated is not violative of the parol evidence rule.

Montgomery v Beller, 207-278; 222 NW 846

Exception—proof of fraud. The parol evidence rule is not an obstacle to the proof of fraud in obtaining a contract.

Schmidt v Twedt, 219-128; 257 NW 325

Fraudulent conveyance — indebtedness of grantor. Evidence held to show that the grantor in an alleged fraudulent conveyance was indebted at the time of the execution of the conveyance.

Scovel v Pierce, 208-776; 226 NW 133

Instrument in part in form of receipt. An instrument which is in the dual form of part receipt and part agreement is not subject to

parol explanation insofar as it evidences an agreement.

Mechanics Bk. v Gish, 200-463; 203 NW 687

Ambiguous recital of settlement. An ambiguous written recital of the settlement of differences between parties may be aided by parol testimony in order to identify the differences actually settled.

Stoner v Stehm, 200-809; 202 NW 530

Registration of private vehicles—transfer—right to contradict. On the issue whether plaintiff, in an action on a policy of insurance covering the theft of an automobile, was the "unconditional and sole" owner of the vehicle, plaintiff may testify to facts attending a written transfer of the certificate of registration tending to show that he, in fact, remained the owner of the vehicle notwithstanding said transfer.

Abraham v Ins. Co., 215-1; 244 NW 675

Mutual insurance associations—validity of assessments. Oral testimony may be admissible as to the manner in which an assessment was made when such testimony bears on matters not revealed by the minutes of the board of directors or is explanatory of such minutes.

Hauge v Ins. Assn., 205-1099; 212 NW 473

Partnership interest. Parol evidence is admissible to show that, at a time subsequent to written articles of partnership which fixed the interest of each partner, the interests of the various partners were, by reason of oral agreement, different from those recited in the former writings.

In re Talbott, 204-363; 213 NW 779

Pipe-line right of way—ambiguity as to compensation. Where landowner made written agreement giving pipe-line company a right of way, and where receipt, executed simultaneously with the agreement, aided by extrinsic oral proof, showed that he actually received $5 per rod for the first line put in, held, landowner was entitled to judgment compensating him at same rate for installation of a second pipe line under the agreement, which provided that "additional lines shall be laid for a consideration the same as for the first", despite the fact that such agreement also provided for a compensation of only 50 cents per rod.

Vorthmann v Pipe Line Co., 228- ; 289 NW 746

Royalties — reduction by oral agreement — jury question. In an action to recover alleged balance due under coal mining contract for royalties, whether payments provided for in contract were reduced by subsequent oral agreement held to be a jury question.

Heggen v Mining Co., (NOR); 263 NW 268

Right to enlarge writing. When the written evidence of a contract provides, in effect, that named subject matters shall be controlled thereby, oral evidence is admissible to enlarge said subject matters when the writing on its face reveals the contemplation of the parties to make such addition.

Smith & Co. v Hollingsworth, 218-920; 251 NW 749

Composition with creditors — unambiguous. A plain and unambiguous written composition with creditors may not be modified by parol evidence tending to show that the indebtedness referred to was other than that specified in the writing.

Federal Corp. v Western Co., 219-271; 257 NW 785

Cross-examination as to writing may necessitate reception of writing itself. When a cross-examination is designed to show that a witness had asked plaintiff to sign an untruthful statement of fact, the party calling the witness must be permitted to show by a duplicate original, tho unsigned, just what plaintiff was asked to sign.

Stickling v Railway, 212-149; 232 NW 677

Contracts—prohibited changes—futility. A written contract, which in effect declares that no change in any portion of the contract shall be valid, cannot be construed to take away the right of the parties to subsequently orally modify the contract; nor does a provision for the termination of the contract in a certain manner preclude the parties from mutually terminating it in some other manner.

Webster Co. v Nebr. Co., 216-485; 249 NW 203

Execution of contract proved—witness not present when contract made. Evidence of the execution of an oral contract, which has been performed or partially performed by one of parties, may be introduced in evidence, although the witnesses who testified were not present when the contract was made.

Ford v Young, 225-956; 282 NW 324

"Exceptions" catalogued. The so-called "exceptions" to the parol evidence rule may be stated thus: Parol evidence is admissible,

1. To establish grounds for the reformation of a written contract.
2. To establish the unnamed consideration for a unilateral written contract.
3. To establish a distinctly separate and complete contract contemporaneous with, and noncontradictory of, a written contract.
4. To establish the conditional delivery of a written contract, and the failure of said condition.
5. To complete a written contract which shows on its face that it is fragmentary and incomplete.

In re Simplot, 215-578; 246 NW 396

II EVIDENCE GENERALLY—continued
(i) PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS—continued

Reformation of instruments—rule inapplicable. The parol evidence rule is not applicable to a proceeding to reform an instrument.

In re Jenkins, 201-423; 205 NW 772

Reformation of instrument—mistake. The rule that parol evidence cannot be invoked to vary the terms of a written contract has no application to prevent parol proof of a mistake or the reforming of an instrument to correct a mistake.

Wormer v Gilchrist, 210-463; 230 NW 856

Reformation of deed—mistake and fraud. Evidence reviewed, and held ample to justify the reformation of a deed because of the mistaken, and fraudulently induced, omission therefrom of a clause reserving to grantors a life estate in the land in question.

Foote v Soukup, 221-1218; 266 NW 904

Reformation of instruments — proceedings and relief—mandatory degree of proof. Plaintiff seeking the reformation of a written instrument must fail unless he establishes by clear, satisfactory, and convincing evidence—by evidence exceeding a mere preponderance—by evidence approximating proof beyond a reasonable doubt—the definite contract which the executed writing does not embrace. Evidence reviewed in detail under a prayer for the reformation of a lease, and held insufficient to comply with the rule.

Stillman v Bank, 216-957; 249 NW 230

Reformation of instruments—mistake. The rule of evidence which forbids oral testimony to contradict or vary the terms of a written contract has no application to proceedings in equity where a mistake in the contract is alleged, and its reformation demanded.

Floberg v Peterson, 214-1364; 242 NW 13

Passbook—contract partly written, partly oral. Where a passbook issued by a savings bank to a depositor contained certain printed provisions governing the deposit, but contained no provision as to the date when the deposit was payable, parol evidence is admissible to show the agreement between the bank and the depositor as to the said date of payment.

Popofsky Co. v Wearmouth, 216-114; 248 NW 358

Parol variation of check. Parol evidence that a bank agreed with its depositor not to charge a special trust deposit with the amount of a certain check which the depositor had given to the bank to correct a mistake in the depositor's account is not inadmissible as varying the terms of the check.

Townsend v Bank, 212-1078; 237 NW 356

Certificate of deposit. Parol evidence is admissible to show that a time certificate of deposit was accompanied by a collateral oral agreement between the depositor and the bank to the effect that the bank would pay the certificate on demand.

In re Olson, 206-706; 219 NW 401

Passbook—ambiguity—parol to explain. A passbook issued by a savings bank to a depositor and containing certain printed provisions governing deposits, but silent as to the date when the deposit was payable, and carrying the indorsement "Maytag Employee's Special Savings Account", creates such ambiguity (assuming that the printed provisions embraced the full agreement) as to justify the reception of parol evidence to explain the ambiguity.

Popofsky Co. v Wearmouth, 216-114; 248 NW 358

Parol to contradict cash payment. A written contract binding plaintiff to buy of defendant a certain number of shares of corporate stock "and pay for the same" cannot be so modified by parol as to show that payment by plaintiff was to be in the form of services to be performed by plaintiff for defendant.

Cox v Fleisher Co., 208-458; 223 NW 521

Similar but independent contracts. Parol evidence of a contract binding defendant to purchase and deliver to plaintiff a named number of corporate shares of stock in payment for services performed by plaintiff is independent of a subsequent written agreement binding plaintiff to buy of defendant the same number of shares of stock of the same company.

Cox v Fleisher Co., 208-458; 223 NW 521

Admissibility to show conditional delivery. While parol evidence is not admissible to vary the terms of a written instrument, yet it is competent as between the immediate parties to show that the delivery thereof may have been conditional or for a special purpose only, and not for the purpose of transferring the property in the instrument.

Walker v Todd, 225-276; 280 NW 512

Conditional delivery. A written contract, which provides that the failure of any party named therein to sign shall not affect the liability of those who do sign, may be shown to have been delivered on the condition that the writing was to be effective only after being signed by all of the parties.

Boyd v Miller, 210-829; 230 NW 851

Right to explain ambiguous clause. The rule that an ambiguous provision in a written contract may be explained by parol evidence, for the purpose of arriving at a basis on which to rest a legal conclusion as to the meaning of said provision, assuredly does not embrace the right of one party to the contract to show, (1) his understanding of said provision, and (2) the understanding of a former assignee of the contract (at a time when the question of the

meaning of the provision had not arisen) as evidence of the understanding which a later assignee had or should have had of said provision.

Zimbelman v Boone Coal, 220-1310; 263 NW 335

Parol to explain the ambiguous. It is always competent in construing inconsistent and ambiguous language in a written contract to receive parol evidence bearing on the situation of the parties, the subject matter of the writing, and the acts of the parties thereunder.

Dunn v Dunn Trust, 219-349; 258 NW 695

Clearly expressed consideration. The clearly expressed consideration recited in an unambiguous written instrument cannot be contradicted by parol evidence.

Burrier v Sheriff, 207-692; 223 NW 395

Consideration—absence of. Principle reaffirmed that parol evidence may be admissible to establish lack of consideration for a promissory note.

Northern Tr. Co. v Anderson, 222-590; 262 NW 529; 271 NW 192

Parol as affecting writings—manner of paying promissory note. Parol evidence is inadmissible to show that an ordinary promissory note to a corporation was to be paid from the earnings of the corporation.

Mechanics Bk. v Gish, 200-463; 203 NW 687

Form of note—unallowable variation. Parol evidence is inadmissible to show that a note is not payable according to its terms.

Farmers Bk. v Fisher, 204-1049; 216 NW 709

Varying legal effect of blank indorsement. Oral evidence is inadmissible to vary the legal effect of a blank indorsement of a promissory note.

First N. Bk. v Raatz, 208-1189; 225 NW 856

Independent contemporaneous oral agreement. In an action on a promissory note, parol evidence is admissible to show that at the time the note was executed an independent agreement, consistent with the note, was entered into under which certain credits under named contingencies were to be made upon the note.

Andrew v Brooks, 219-134; 257 NW 315

Evidence of assumption—discharge of maker—insufficient. Evidence held insufficient to establish oral agreement discharging makers from liability on note and substituting purchaser of property for maker.

Citizens Bk. v Probasco, (NOR); 233 NW 510

Accommodation maker. Parol evidence is admissible on the issue whether a promissory note is accommodation paper.

State Bk. v Markworth, 208-461; 212 NW 729

Transfer of note—indorsement in blank. Parol evidence is admissible to show that an indorsement in blank of commercial paper was made solely to enable the holder to make collection, and not to transfer title. Especially is this true when the other writings accompanying the indorsement are ambiguous.

Leach v Bank, 201-349; 207 NW 332

Trade acceptances negotiated. In an action to recover on trade acceptances by indorsee thereof, where there is no provision in sales contract prohibiting either delivery, negotiation, or transfer of such acceptances which are regular on their face, held, proof of an alleged oral agreement that acceptances were subject to certain conditions in sale contract is inadmissible in evidence.

State Bk. v Feed Co., 227-596; 288 NW 614

Collateral agreement—payment of note by sureties. Parol evidence is admissible to prove that, when a promissory note was signed by the sureties, it was agreed between all parties thereto that the principal would sell certain property and deliver the proceeds to the payee, and that the payee would apply the proceeds on the note.

Randolph Bk. v Osborn, 207-729; 223 NW 493

Conditional delivery. Parol evidence is admissible to prove that a surety signed a promissory note on the express condition that the note should not be deemed effective until another named party signed it.

Andrew v Hanson, 206-1258; 222 NW 10

Bills and notes—issue, who was accommodated party. Parol evidence to the effect that the payee of a note orally assured the maker, when the note was executed and at later times, that the maker was not liable on the note, and would never be called upon to pay it, is admissible on the issue whether the note was an accommodation note for the accommodation of the payee-plaintiff.

Security Bk. v Carlson, 210-1117; 231 NW 643

Note—oral testimony as to liability. The accommodating maker of a promissory note may not, in the absence of evidence of fraud, testify that when he executed the note an oral agreement was entered into that he was not to assume any liability on the note.

Citizens Bank v Rowe, 214-715; 243 NW 363

Varying written description of notes guaranteed. In an action on a written guaranty of payment of separately and unambiguously described notes, parol evidence is inadmissible to show what notes were intended, and that they are different from those described in the guaranty.

Andrew v Austin, 213-963; 232 NW 79

Varying indorsement of note. An unrestricted indorsement of a promissory note may not be modified by oral evidence to the effect

II EVIDENCE GENERALLY—continued
(i) PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS—continued

that the indorser was not to be held personally liable on his indorsement.

Aetna Bank v Hawks, 213-340; 239 NW 91

Oral agreement for mortgage priority. Oral evidence that when a promissory note and the mortgage securing it were assigned, it was agreed that the indorsee should have priority over other prior maturing notes secured by the same mortgage and then held by the assignor, is not violative of the "parol-evidence rule."

White v Gutshall, 213-401; 238 NW 909

Signing note after maturity—oral modification. A promissory note which is signed by a party after maturity is, as to such signer, payable on demand; and parol evidence is inadmissible to contradict or vary such legal effect.

Fairley v Falcon, 204-290; 214 NW 538

Receipts—parol showing of purpose. Under plea of payment of a promissory note, parol evidence is admissible to show that nonexplanatory receipts represented money paid on the note and accepted as such by the payee.

Hallowell v Van Zetten, 213-748; 239 NW 593

Direct contradiction—commission stated in contract. A written contract which provides for a commission of 10 percent on a specified expenditure may not be contradicted by parol evidence to the effect that the parties orally agreed that the commission should be 8 percent.

Parks & Co. v Howard Co., 200-479; 203 NW 247

Parol warranty—when incompetent. Principle reaffirmed that, when a written contract of sale contains no warranty, a parol one may not be engrafted thereon.

Blecher v Schmidt, 211-1063; 235 NW 34

Naked order for goods—parol evidence to show acceptance. Parol evidence is admissible to show that a naked order for goods was accepted, and, when material, that such acceptance was at a certain place.

Anderson Co. v Monument Co., 210-1226; 232 NW 689

Trade acceptances negotiated. In an action to recover on trade acceptances by indorsee thereof, where there is no provision in sales contract prohibiting either delivery, negotiation, or transfer of such acceptances which are regular on their face, held, proof of an alleged oral agreement that acceptances were subject to certain conditions in sale contract is inadmissible in evidence.

State Bk. v Feed Co., 227-596; 288 NW 614

Parol consent to sale of mortgaged chattels. Evidence is admissible that a chattel mortgagee orally consented to the sale of the chattels by the mortgagor, notwithstanding the fact that the criminal statute denominates such sales criminal unless the consent is in writing.

Hepker v Schmickle, 209-744; 229 NW 177

Deed as mortgage. Parol testimony is admissible to show that deed was in fact a mortgage and was so intended.

Rance v Gaddis, 226-531; 284 NW 468

Oral contradiction of mortgage-assumption clause. One who contracts for and receives a deed to land, and in both instances assumes payment of an existing mortgage on the land, may wholly avoid such apparent obligation, as regards the mortgagee, by oral testimony—the rule against contradicting written instruments by parol evidence to the contrary notwithstanding—to the effect that he never had any interest in the land, and without consideration therefor contracted for and received a deed, and conveyed the land simply as a matter of convenience for the real owner.

Nissen v Sabin, 202-1362; 212 NW 125; 50 ALR 1216

Oral addition to mortgage. Evidence is inadmissible that, at the time of the execution of a purchase-money mortgage, an oral contemporaneous agreement was entered into, to the effect that, if the mortgagor was unable to finance (pay) the mortgage, the mortgagee would pay to the mortgagor the value of any improvements placed on the land by the mortgagor.

Felton v Thompson, 209-29; 227 NW 529

Consideration—failure of, as to wife. Parol evidence is admissible between the original parties to a note and mortgage to show that the wife signed the obligations without any consideration flowing to her, and solely for the purpose of releasing her possible dower interest, and without any knowledge that her signature was being required or demanded by the payee.

Cooley v Will, 212-701; 237 NW 315

Reference to prior mortgage in later admission of debt—revival of action. A statement in a second mortgage, that the premises are encumbered by another prior mortgage as of a certain date, constitutes an admission of that indebtedness such as to start the statute of limitations running anew, and the particular mortgage referred to may be established by extrinsic evidence.

Lackey v Melcher, 225-698; 281 NW 225

Mortgages — priority — oral agreement of parties. The assignee of one of two simultaneously executed mortgages on the same property to different parties may show, in an action wherein the foreclosure of each mortgage is asked, that just prior to the execution of said mortgages it was orally agreed by all

parties to both mortgages that a certain one of said mortgages should be the first lien on the property.

Wuennecke v Hausman, 216-725; 247 NW 531

Contradicting mortgage. Parol evidence to the effect that, at the time of the delivery of a mortgage, the mortgagee agreed that he would extend the mortgage indefinitely, and that in no event would a certain portion of the mortgaged property be taken under the mortgage, is wholly inadmissible.

Farmers Bank v Weeks, 209-26; 227 NW 508

Parol nullification of mortgage assumption clause. A written clause in a deed to mortgaged premises purporting to bind the grantee to pay the mortgage debt may be nullified by parol evidence,—the mortgagee not being a party to the deed or to the contract of sale preceding the deed.

Andrew v Naglestad, 216-248; 249 NW 131

Partition plaintiff as purchaser assuming mortgage. A plaintiff in a partition action, becoming the purchaser, who accepts, from the referee with knowledge of its contents, a deed reciting an assumption of a mortgage together with a reference to the referee's report of sale, and who also retains an amount equal to the mortgage, does thereby assume and agree to pay such mortgage. Such a reference incorporates the report into the deed and the actual consideration may be shown by parol evidence.

First Tr. JSL Bank v Thomas, 223-1018; 274 NW 11; 275 NW 392

Parol to explain ambiguous storage contract. A written contract for storage of corn, which makes no provision as to when the seller is to exercise an option to sell nor as to when the storage is to be paid, does not contain the entire agreement entered into, and parol evidence is admissible on the question as to what was reasonable time to perform.

Andreas & Son v Hempy, 224-561; 276 NW 791

Lease—oral explanation. The fact that both of two parties sign a lease and the accompanying rent notes does not necessarily establish, in a controversy strictly between said two parties, that each party should pay one-half the rent. The said fact is open to oral explanation.

Fisher v Nicola, 214-801; 241 NW 478

Oral contract contemporaneous with deed. When a duly recorded deed contains a prohibition against a sale or conveyance of any part of the land during the lifetime of the grantor, parol evidence is admissible against a subsequent mortgagee to show that the purpose of said prohibition was to protect the grantor during his lifetime in a contract reservation of rent in the land.

Iowa F. C. Corp. v Halligan, 214-903; 241 NW 475

Assumption of mortgage—unallowable contradiction. A deed to land wherein the grantee assumes one-half of an existing mortgage on the land may not be modified by testimony to the effect that when the deed was executed it was orally agreed that the grantee should continue to be bound by the original written contract of sale wherein he agreed to assume the entire mortgage.

Reit v Driesen, 212-1011; 237 NW 325

Estoppel to object. A party may not object to oral evidence which shows that an apparently absolute note and mortgage were given as collateral security for other debts when the absence of such evidence would leave the objector without any defense whatever.

Bilharz v Martinsen, 209-296; 228 NW 268

Acceptance of deed—no waiver of easement rights under contract. When a contract of sale of land provided that the deed would grant an easement for the right of ingress and egress to the property, but the deed drawn on the same day failed to make such provision, the acceptance of the deed by the grantee did not waive the provision of the collateral contract, altho ordinarily the acceptance of a deed would complete the execution of the contract and would be conclusive evidence of its complete fulfillment.

Dawson v McKinnon, 226-756; 285 NW 258

Easement rights omitted from deed. When land was purchased under a contract providing that the deed would grant an easement of the right of ingress and egress to the property, and that the exact description of the easement would be made a part of the deed, but such description having been omitted, it was proper, in purchaser's action to assert such easement rights, to admit extrinsic evidence to show the exact location of the easement.

Dawson v McKinnon, 226-756; 285 NW 258

Avoidance of statute of frauds. Parol evidence is competent to show that the titleholder to land has admitted that he was to hold such title only until such time as he was reimbursed for money expended on the property and that such arrangement has been in part carried out.

Neilly v Hennessey, 208-1338; 220 NW 47

Shortage in acreage—evidence. Where lands of an estate are ordered sold for a lump sum, parol evidence is admissible to show that the land was, in reality, sold at a certain price per acre and that the acreage fell short of what was supposed to be the acreage, and that

II EVIDENCE GENERALLY—continued
(i) PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS—continued

the administrator properly made a deduction for said shortage.

In re Oelwein, 217-1137; 251 NW 694

Ambiguous plat. A town plat which is ambiguous in its descriptions and recitals is subject to parol explanation.

Shuler v Sand Co., 203-134; 209 NW 731

Ambiguous clause in broker's contract—limitation. In an action to recover commission under real estate broker's contract in which the clause providing for time when commission is due and payable is ambiguous, proof of the circumstances accompanying the execution of the ambiguous instrument is admissible to assist in the interpretation, but not to vary the terms of the instrument.

Mealey v Kanealy, 226-1266; 286 NW 500

Contracts partly written, partly oral. Parol evidence is admissible to show that a building contract was partly in writing and partly oral.

Golwitzer v Hummel, 201-751; 206 NW 254

Building contract—extra costs—written authorization required—effect. A written building contract which, in effect, excludes all claims for extra costs consequent on changes in the plans unless such claims are evidenced by written authorization signed by the owner or by the architect on behalf of the owner must be given the legal effect of excluding all evidence of oral authorization, there being no plea or proof, on behalf of the contractor, of waiver or ratification.

Iowa Elec. Co. v Hopp, 221-680; 266 NW 512

Express trusts — unconditional conveyance. A parol, unexecuted, and unadmitted trust cannot be engrafted on an unconditional conveyance in fee of real estate.

Hospers v Watts, 209-1193; 229 NW 844

Trusts—oral evidence — when competent. Parol evidence is admissible to establish and show the nature of an admitted or partially or wholly executed trust.

Andrew v Bank, 209-1149; 229 NW 819

Parol to prove execution of unenforceable trust. It is true that one claiming to be the absolute owner of land may not, as against the grantee in a conveyance, prove, by parol evidence, that when the conveyance was executed grantee's name was inserted in the conveyance as grantee under an oral agreement that said substituted grantee would hold said land solely and exclusively for said secret grantee, but said parties may show by parol evidence, as against a stranger, that said oral agreement was actually carried out and executed by said parties.

Bates v Zehnpfennig, 220-164; 262 NW 141

Constructive trust — evidence — sufficiency. An express trust in real property cannot be legally established by parol, nor may an implied or constructive trust in such property be established except by evidence which is clear, convincing, and satisfactory.

McMains v Tullis, 213-1360; 241 NW 472

Establishing trust by oral agreement—prohibitory statute. Under the Iowa statute an express trust cannot be established by a parol agreement, but such statute is inapplicable to constructive trusts.

D. M. Terminal v D. M. Union, 52 F 2d, 616

Testator's or grantor's meaning admissible. Where such terms as children, grandchildren, or nephews are used in a will or a deed, and there are both legitimates and illegitimates and the testator has full knowledge of such fact, and the intention of the testator is not clearly expressed in the will, the use of such words creates no presumption, but the word is a neutral one and an ambiguity exists, and the intention of the testator or grantor must be determined not only from the provisions of will, but also in the light of the circumstances surrounding the execution of the will, and parol evidence is admissible to prove the intent of the testator or grantor.

In re Estate of Ellis, 225-1279; 282 NW 758

Parol to show circumstances attending making of mutual wills. Even though extrinsic evidence is inadmissible to vary or change the terms of a will, yet evidence may be admitted to show circumstances which accompanied or attended making of the instrument, or to identify papers or writings which in fact constitute the will, especially where it is claimed that two or more writings made at or about the same time are part of a single transaction and together constitute in law a single will.

Child v Smith, 225-1205; 282 NW 316

Adding additional burden. An unambiguous written stipulation and agreement, duly filed in a will contest, providing in effect that defendant will pay, and plaintiff will accept, a named sum of money in full settlement of any and all claim which plaintiff may have against the estate cannot be added to by proof of an oral contemporaneous agreement to the effect that defendant would also execute a will devising and bequeathing all his property to plaintiff.

In re Simplot, 215-578; 246 NW 396

Appointment of executor—notice—proof of service. Parol evidence of the posting, as officially directed, of a notice of the appointment of an executor is admissible, and positive evidence to such effect will not be overcome by evidence of witnesses to the effect that they had not "observed" such posted notice.

Peterson v Johnson, 205-16; 212 NW 138

Court order ratifying oral contemporaneous contract—effect. In an action by a receiver to

recover mining royalties accruing under a written contract, the defendant may show that the court has, on due notice and hearing, approved, confirmed, and ratified an oral contract which was contemporaneous with the written contract and which varied and altered the terms of said written contract.

Dinning v Krapfel, 211-888; 232 NW 490

(j) OPINION EVIDENCE

Discussion. See 6 ILB 168—Opinion rule; 24 ILR 498—Character testimony

Nonconclusiveness on trier of fact question. Opinion evidence is not, ordinarily, conclusive on the trier of a question of fact, especially when such evidence happens to be only one of several elements which the trier must weigh in determining the fact.

Wood v Wood, 220-441; 262 NW 773

Discrimination between parties. Permitting one party to introduce opinion evidence on a certain point and denying to the opposing party the right to counter with like evidence does not necessarily constitute reversible error.

Slinger v Ins. Assn., 219-329; 258 NW 101

Conclusions invading province of jury. Questions are unallowable which call for the very conclusions which the jury must ultimately draw.

State v Johnson, 211-874; 234 NW 263

Concealed basis of opinion. An opinion resting on a basis withheld from the jury would be wholly incompetent.

Spicer v Administrator, 201-99; 202 NW 604

Subject of expert testimony—improper hypothetical question. It is not permissible for a party to gather together in the form of a hypothetical question the various circumstances established by him as bearing on a fact issue and present them to a so-called expert for his opinion, when the circumstances are such that the opinion of a lay witness would carry equal evidentiary value.

McClary v Railway, 209-67; 227 NW 646

"Safe condition"—jury question. A witness should not be permitted to testify that a walk was "ordinarily clean" when such condition is the crux of the issue before the jury.

Smith v Sioux City, 200-1100; 205 NW 956

Death of animals—invading province of the jury. The opinion of a witness as to what caused the death of certain animals is wholly incompetent when such cause was the very question submitted to the jury.

Crouch v Remedy Co., 205-51; 217 NW 557

Cause of death as question of law. Evidence reviewed, and held that the court could not say as a matter of law that the expert theory that hogs died of hog cholera after the termination of a shipment was more reasonable than the theory that they died because of the negligence of the carrier during shipment.

Brower v Railway, 218-317; 252 NW 755

Radiograph—oral explanation. A radiograph may be explained or interpreted to a jury by an expert, insofar as the radiograph does not interpret itself to the mere observation of a nonexpert.

Appleby v Cass, 211-1145; 234 NW 477

Nonright of jurors to substitute their own knowledge. Jurors may use and employ their own knowledge as to values in determining the weight and effect of expert testimony as to such values, but they must not be instructed, in effect, that they may disregard such expert testimony and substitute their own knowledge as evidence.

State v Brown, 215-600; 246 NW 258

Explanation of architectural drawings. The meaning of marks and characters unintelligible to the layman, appearing on an architectural drawing, may be shown by a witness familiar with such matters. So held as to characters which indicated the presence of a sewer.

Des Moines Co. v Magarian, 201-647; 207 NW 750

Fingerprints—expert testimony as to ultimate fact. A witness who is expert in the science of dactylography may testify that, in his opinion, judgment, or belief, different fingerprints were made by one and the same finger, but he may not testify that they were made by one and the same finger.

State v Steffen, 210-196; 230 NW 536; 78 ALR 748

Homicide — robbery. Whether a homicide was committed by one who was at the time robbing the deceased is quite beyond the proper scope of expert testimony.

Nelson v Acc. Soc., 212-989; 237 NW 341

Proof of agency by agent. Testimony by a witness that he acted as agent for the defendant was admissible evidence.

Ballard v Ballard, 226-699; 285 NW 165

Agent's opinion—cause of fire. The expression of an opinion by a party as to the "cause of a fire" is not admissible on such issue, whether viewed as the opinion of an individual or as that of the agent of the party sought to be held liable.

Walters v Elec. Co., 203-467; 212 NW 886

Knowledge of agent. Testimony as to what a party knew that an agent knew is not competent.

Hart v Ins. Assn., 208-1030; 226 NW 781

Question not to ask for opinion. It is not allowable to ask a witness whether a named

II EVIDENCE GENERALLY—continued
(j) OPINION EVIDENCE—continued

person "admitted" writing a named instrument. The question should call for what was said.

State v Debner, 202-150; 209 NW 404

Unallowable opinion on otherwise established fact. The reception of opinion evidence to the effect that a fire was caused in a certain manner is harmless when the record otherwise conclusively demonstrates that the fire was caused in said manner.

Walters v Elec. Co., 203-467; 212 NW 886

Wrongful attachment — incompetent testimony as to damage. In an action on an attachment bond, plaintiff will not be permitted to testify to his opinion as to the effect which the attachment had on a possible sale of the land upon which levy was made, there having been theretofore no negotiations whatever for such sale.

Thielen v Schechinger, 211-470; 233 NW 750

Satisfaction of claim—conclusion usurping jury function. Prejudicial error results from permitting the question whether a party to an action had ever "agreed" to accept a named sum in satisfaction of his claim, and permitting a negative answer, when the existence of such agreement is the sole question before the jury.

Strand v Bleakley, 214-1116; 243 NW 306

Custom of factors—competency. The general custom of factors in handling goods is provable by any witness familiar therewith.

Alley Co. v Cream. Co., 201-621; 207 NW 767

Mathematical computation by witness. A witness may be permitted to make a mathematical computation or summary of detail record evidence.

Johnson Corp. v Shapiro, 200-843; 205 NW 511

Conclusion—material covered in other testimony. In a quiet title action it was not prejudicial to sustain an objection to a question asking the plaintiff if the defendant had made any claim to land at, or prior to, a certain time, when the question asked for a conclusion of the witness, and the witness had answered the question in other testimony.

McCormick v Anderson, 227-888; 289 NW 440

Interwoven statements of fact and opinion. A fraud-doer may not complain of the submission to the jury of matters of opinion, as distinguished from representations of fact, when his statements of opinion are so interwoven with his statements of fact that to separate them is practically impossible.

Pullan v Struthers, 201-1179; 207 NW 235

State of mind admissible. If question calls for state of mind, answer is admissible altho in the nature of a conclusion.

Rogers v Jefferson, 224-324; 275 NW 874

Harmless error—conclusion answers. Error may not be predicated on the fact that a witness was permitted to give a conclusion answer when the witness had, prior thereto, without objection, stated the facts relative to said matter.

First St. Bank v Tobin, 204-456; 215 NW 767

Allowable conclusion. The statement that a party "was trying to get away" from another party is an allowable conclusion.

State v Graham, 203-532; 211 NW 244

Beneficiary's complaints — conclusion. The testimony of a witness that she had never heard the beneficiary of a will talk to the testator in any way "other than in a complaining way of his treatment of her" is a conclusion and properly excluded.

McCollister v Showers, 216-108; 248 NW 363

Allowable conclusion. When the actions and conduct of a witness at a certain time are material and there is no other adequate way of placing the matter before the jury, then the witness should be permitted to describe what he saw, even though his description consists of a mixed statement of fact and conclusion. So held as to the statement "It seemed as though the man jumped right in front of the car, and we hit him."

Wieneke v Steinke, 211-477; 233 NW 535

Position of vehicle—allowable conclusion of witness. Statements of a witness to the effect that a vehicle seemed to be on the wrong side of a black line drawn along the center of a paved highway, may be an allowable conclusion.

Henriksen v Crandic Stages, 216-643; 246 NW 913

Unallowable questions. Whether a motorman could have done anything which would have stopped his streetcar sooner than it was stopped is properly excluded because the question calls for an unallowable conclusion, and also invades the province of the jury.

Allen v Railway, 218-286; 253 NW 143

Speed of automobile. A witness who has operated an automobile for several years, and whose business necessitates extensive travel by him over the country, mostly by automobile, is competent to give an opinion as to the speed at which an automobile was being operated on a certain occasion.

State v Thomlinson, 209-555; 228 NW 80

Competency of testimony—brakes on train. The opinion of a witness, on proper foundation, as to the distance in which a certain train could be stopped is not rendered incompetent because the witness did not know the particular make of air brake on the train in question or the air pressure carried, he having testified that the ordinary train was so equipped and

operated that the effect of manipulating the air valve would be the same, regardless of the kind and make of brakes.

Williams v Railway, 205-446; 214 NW 692

Ability of driver—conclusion. An opinion as to "what kind of a driver" the operator of an automobile was is an unallowable conclusion.

In re Hill, 202-1038; 208 NW 334; 210 NW 241; 26 NCCA 193

Conclusion in re partnership. The question whether an association of individuals constitutes a partnership calls for a legal conclusion.

DeLong v Whitlock, 204-701; 215 NW 954

Contract—conclusions. The question whether a witness had a contract with another which would permit the witness to do thus or so calls for an unallowable conclusion.

Baitinger v Elmore, 208-1342; 227 NW 344

Questions improper—conclusions called for. Questions asking whether defendant's movements caused globe to fall from electrolier, and whether plaintiff exercised more than ordinary care for himself after injury, and whether he suffered a direct money loss in his business as a result of his absence from the store were properly excluded as calling for conclusions.

Rauch v Dengle, (NOR); 218 NW 470

Conclusions—nonfatal admission. Admission of conclusions of witnesses that they sawed lumber according to instructions, that the logs of appellee were better than others, and other similar conclusions held not prejudicial when the same testimony was elicited by proper questions and answers.

Waterman v Gaynor Co., (NOR); 215 NW 641

Cause of injury—invading province of jury. It is improper (1) to call upon an expert witness for his conclusion as to the cause of an injury, or (2) to ask such witness for his opinion as to the "sole cause" or "direct and exclusive cause" or "sole primary cause" of such injury, and reversible error results from permitting the witness to affirmatively state such conclusion or opinion.

Justis v Cas. Co., 215-109; 244 NW 696

Identification of alcohol. The opinion of a properly qualified witness is admissible on the issue whether a certain liquid is alcohol.

State v Healy, 217-1155; 251 NW 649

Taste and smell of liquor. Principle reaffirmed that witnesses may testify that certain liquors smelled or tasted like alcohol.

State v Ferro, 211-910; 232 NW 127

Homicide—character of accused. Not even a defendant in a charge of homicide is a competent witness to testify to the reputation of the deceased as to peaceableness or quarrelsomeness when he—the defendant—fails to show his qualification to so testify.

State v Reynolds, 201-10; 206 NW 635

Intoxication. The fact of intoxication may be shown by one who has observed the conduct and appearance of the person in question and describes the same.

State v Kendall, 200-483; 203 NW 806

Intoxication—basis of opinion. A witness may testify whether a person was sober or intoxicated without first stating the facts on which the opinion is based.

State v Wheelock, 218-178; 254 NW 313

Insanity—absence of fact basis. Nonexpert testimony by an accused who pleads insanity as a defense to a charge of murder, to the effect that his father was "out of his mind" for some time prior to his death, without any fact basis for such testimony, constitutes an unallowable conclusion.

State v Buck, 205-1028; 219 NW 17

Hypothetical questions to expert. It is not erroneous to permit an attending physician who has detailed the injuries of his patient to answer hypothetical questions.

McDonald v Robinson, 207-1293; 224 NW 820; 62 ALR 1419

Malpractice—evidence — usual and ordinary practice. The defendant, in an action for damages for malpractice, may always establish, even by his own testimony, the usual and ordinary practice of physicians and surgeons in treating, in the locality in question, the injury which is the subject matter of the action.

Wilcox v Crumpton, 219-389; 258 NW 704

Usual course of recovery. Evidence of an expert witness relative to the recovery usually made in average cases of certain injuries is wholly irrelevant and immaterial when there is no evidence that the injuries in question constituted an "average case."

DeMoss v Cab Co., 218-77; 254 NW 17

Nonexpert opinion of sanity. A nonexpert witness may base an opinion as to the sanity or insanity of a person on a proper detail of facts.

State v Murphy, 205-1130; 217 NW 225

Mental unsoundness—cross-examination. A witness who testifies to the mental unsoundness of a party may, on cross-examination, be questioned as to his knowledge of rumors in the neighborhood as to the party's mental condition.

Ayres v Nopoulos, 204-881; 216 NW 258

Sanity—permissible hypothetical question. A hypothetical question may embody any material and supported fact. So held as to what

II EVIDENCE GENERALLY—continued
(j) OPINION EVIDENCE—continued

witnesses had "observed" as to the actions of an alleged insane person.

State v Murphy, 205-1130; 217 NW 225

Testamentary capacity. A nonexpert witness may not express an opinion that a testator was of unsound mind on a recital of facts which pertain solely to his physical condition.

In re Paczoch, 202-849; 211 NW 500

Expert and lay opinions—which must yield. An expert opinion that a person was insane at a named time prior to the time when said person was judicially declared insane will not be permitted to outweigh overwhelming lay testimony which strongly tends to establish the contrary, when said expert opinion is based almost wholly on information obtained from said person after she was adjudged insane, and on information obtained from the relatives of said person.

Davidson v Piper, 221-171; 265 NW 107

Value of lands—familiarity. A witness who is shown to be familiar with the value of lands in the vicinity of the land in question is competent to testify as to the value of the latter.

Millard v Mfg. Co., 200-1063; 205 NW 979

Value of land—selling price as evidence. The value of farm land, thru which a highway right of way is sought to be condemned, cannot be competently shown by evidence of the recent sale price of similar land in a nearby community.

Maxwell v Highway Commission, 223-159; 271 NW 883; 118 ALR 862

Land values—familiarity with land. A witness is not competent to testify to the value of land when he has never been on the land and lives a material distance therefrom; neither is a witness competent who has never been on the land but once, lives at a great distance, and has manifestly superficial knowledge of the land.

Vanarsdol v Farlow, 200-495; 203 NW 794

Taxation—farm land within city—evidence warranting reduction in actual value. Where a 371.51-acre farm within the corporate limits of a city was very rough, the top soil washed off, the fertility gone, a third of the land infested with weeds rendering it impossible to raise even grass crops, and where the taxes exceeded the income, and qualified witnesses fixed its value at between $10 and $15 per acre, as against the tax assessor's value fixed at $65.58 per acre, on same basis as adjoining lands, tho there was no other similar land in the district, the supreme court fixed the actual value thereof for taxation at $30 per acre.

Lincoln Bank v Board, 227-1136; 290 NW 94

Abuse of discretion in curtailing cross-examination. Where an expert witness has testified, on direct, to the value of a farm as a whole before and after a condemnation for a highway right of way, it is an abuse of discretion to refuse a cross-examination as to the value of separate tracts of the farm before and after the condemnation.

Dean v State, 211-143; 233 NW 36

Accessibility of farm to market. The defendant in eminent domain proceedings has the legal right, on the cross-examination of plaintiff's witnesses as to value, to show the distance of plaintiff's farm from the market and the kind of roads leading to such market.

Welton v Hy. Comm., 211-625; 233 NW 876

Driving stock across highway. In condemnation proceeding to acquire ground to widen highway which divided plaintiff's farm, a hypothetical question asked of one witness as to whether the additional trouble experienced by plaintiff in driving his stock across highway, since it had been widened, would affect the values of the farm—altho being a question of doubtful propriety, was related to a matter so simple and self-evident that the opinion of the witness could add no force or prejudicial effect thereto.

Stoner v Hy. Comm., 227-115; 287 NW 269

Value—owner of property. An owner of personal property is a competent witness to give his opinion as to the value of the property.

Walters v Elec. Co., 203-467; 212 NW 886

Incompetency of owner of property. Proof of ownership is ordinarily prima facie proof of qualification on the part of the owner of property to testify to the value thereof, but not so when the record negatives such qualification. So held as to the value of corporate stock.

Ryan v Cooper, 201-220; 205 NW 302

Value of automobile—competency of witness. A witness is competent to testify to the value of an automobile before and after an accident when it appears that he has seen cars of that make sold, and also second-hand cars bought and sold.

Anderson v U. S. Ry. Adm., 203-715; 211 NW 872

Value—discretion of court. If a witness shows "some qualifications" to testify as to value, the court has a discretion to admit his testimony as to value.

In re Manning, 215-746; 244 NW 860

Corporate stock—no market value—net value of assets. If there is no evidence of the market value of corporate stock—in an action for damages consequent on a fraudulently induced sale—said value must be determined by ascertaining the net value of the assets of the corporation.

Humphrey v Baron, 223-735; 273 NW 856

Value for services for engineering—contract—inadmissible. In an action against a city for engineering services, consisting of inspection and reconstruction of sewage disposal plant, refusal to admit evidence of value of services rendered within contemplation of contract for lump sum compensation is not error.

Slippy Engineering Corp. v Grinnell, 226-1293; 286 NW 508

Competency of witness—value of services. Allowing a witness to testify to the value of services without a showing of competency, or after an admission of a total lack of knowledge as to such value, is manifestly erroneous.

Seddon v Richardson, 200-763; 205 NW 307

Competency of expert — value at distant market. A coal dealer who has for a long time purchased coal at points in a foreign state is competent to testify to the value of such commodity at said foreign points.

Smith v Railway, 202-292; 209 NW 465

Value—selling price. The issue of the value of an article is quite conclusively settled by evidence that the defendant had sold the article for the very sum which plaintiff contended was its value.

Kinsey v Massey, 204-758; 216 NW 54

Value—competency of testimony. Competency to testify to the value of an apparatus may not be predicated solely on the fact that the apparatus does not work efficiently.

Chariton Co. v Lester, 202-475; 210 NW 584

(k) WEIGHT AND SUFFICIENCY IN GENERAL

Taking case from jury—scintilla evidence rule. In this state a mere scintilla of evidence will not raise a jury question and the trial court will be upheld in directing a verdict where, if the case were submitted and a verdict returned against the moving party, it would be the trial court's duty to set it aside.

Donahoe v Denman, 223-1273; 275 NW 155

Evidence incapable of direct contradiction—effect. Evidence which is of such nature that it is incapable of direct contradiction must be closely scrutinized.

Heavner v Kading, 209-1271; 228 NW 311

Testimony incapable of direct contradiction—credibility tested. Where the only person who can deny the testimony of a witness is dead, it is incumbent on the court to look upon such testimony with great jealousy and to weigh it in the most scrupulous manner to see what is the character and position of the witness generally, and whether he is corroborated to such an extent as to secure confidence that he is telling the truth.

Peterson v Bank, 228- ; 290 NW 546

Circumstantial evidence—sufficiency to establish theory. A theory cannot be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature and so related to each other that it is the only conclusion that can fairly or reasonably be drawn from them, and it is not sufficient that they be consistent merely with that theory.

Jakeway v Allen, 227-1182; 290 NW 507

Inferences drawn from record. The trier of facts is entitled to draw such legitimate inferences as the record will warrant.

In re Green, 227-702; 288 NW 881

Acknowledgment — preponderance of testimony. Principle recognized that testimony sufficient to overthrow the probative force of a certificate of acknowledgment must amount to more than a preponderance in the balancing of probabilities.

Parry v Reinertson, 208-739; 224 NW 489; 63 ALR 1051

"Don't remember" testimony. Witness' testimony that he does not remember a conversation is of no probative value and is not sufficient to raise a conflict in the evidence.

Rance v Gaddis, 226-531; 284 NW 468

Testimony—effect of "improbabilities." "Improbabilities" in certain features of the testimony relative to a party's claim do not constitute a defense, and the court must not so instruct.

In re Dolmage, 204-231; 213 NW 380

Positive, affirmative and uncontradicted—effect. Positive testimony which affirms a fact cannot, when uncontradicted, be held to prove the negative.

Williams Bank v Murphy, 219-839; 259 NW 467

Burden of proof—negligence and proximate cause. Both negligence and proximate cause are questions of fact for the jury if the evidence is of sufficient weight and character to warrant their submission, and plaintiff has burden to establish them by a preponderance of the evidence, whether the evidence be direct or circumstantial.

Whetstine v Moravec, 228- ; 291 NW 425

Reformation of instruments — proceedings and relief. Reformation of an instrument because of the mistake of plaintiff and fraud on the part of defendant will not be decreed except on clear, satisfactory, and convincing proof of the existence of said grounds. Evidence held insufficient.

West v Hysham, 214-349; 242 NW 19

Reformation of instruments — mandatory degree of proof. Plaintiff seeking the reformation of a written instrument, must fail unless he establishes by clear, satisfactory, and convincing evidence—by evidence exceeding a

II EVIDENCE GENERALLY—continued
(k) WEIGHT AND SUFFICIENCY IN GENERAL—continued

mere preponderance—by evidence approximating proof beyond a reasonable doubt—the definite contract which the executed writing does not embrace. Evidence reviewed in detail under a prayer for the reformation of a lease, and held insufficient to comply with the rule.

Stillman v Bank, 216-957; 249 NW 230

Statutory bond—forgery. Evidence reviewed and held that the signature to a depositary bond was genuine.

School District v Bank, 218-91; 253 NW 920

Payment and discharge of note. Evidence held quite insufficient to establish payment of a note.

Andrew v Ingvoldstad, 218-8; 254 NW 334

Accommodation paper. Evidence held to show affirmatively that the maker of a promissory note was not an accommodation party.

Pennington v Nelson, 208-1310; 227 NW 163

Ratification of unauthorized indorsement. Evidence held to show the ratification of an unauthorized indorsement of a promissory note.

Lex v Steel Corp., 203-792; 206 NW 586

Attorney indorsing client's checks. In payee's action against bank which had cashed checks indorsed without actual authority by payee's local attorney who, over a period of years, had collected rents for the payee, evidence of transactions to show custom of attorney in indorsing payee's checks and in remitting by his personal checks was admissible, even tho bank did not have knowledge of all of the transactions, and it warranted finding that payee had knowledge of and acquiesced in such custom and was bound thereby.

Fed. Bank v Trust Co., 228- ; 290 NW 512

Consideration and delivery—proof by presumptions. The questions of want of consideration and nondelivery of a note, though supported in proof by presumptions, need not be submitted under instructions to the jury when such presumptions are not overcome by evidence and the only conflict arises over the genuineness of the signature.

In re Cheney's Estate, 223-1076; 274 NW 5

Holdership in due course—participation in fraudulent transaction. Evidence reviewed, and held to sustain a verdict to the effect that the acquisition of a negotiable promissory note by the holder thereof was part of a fraudulent transaction of which the holder had full knowledge and in which he actively participated.

Kenwood Co. v Armstrong, 201-888; 208 NW 371

Execution of contract. Evidence held sufficient to present a jury question on the issue whether bank directors had entered into an agreement as to what each, as between themselves, should pay on a promissory note given for the benefit of the bank.

Adamson v McKeon, 208-949; 225 NW 414; 65 ALR 817

Special deposits. Evidence held insufficient to show that a deposit was made for the special purpose of meeting payment on a particular draft, or was made under such circumstances that the issuance of the draft effected a pro tanto equitable assignment of the deposit.

Heckman v Bank, 208-322; 223 NW 164

Testamentary trustee of business nonchargeable with interest. Evidence reviewed, and held that a testamentary trustee, vested with unusually broad managerial powers, was not chargeable with interest on bank deposits, even though he was a stockholder in the bank.

Evans v Hynes, 212-1; 232 NW 72

Directed verdict—payment of rent. Direction of verdict in action to recover on rent note from tenant was erroneous when there was sufficient evidence of payment by tenant in turning over proceeds of crop to warrant submission of the case to jury.

McCann v McCann, (NOR); 226 NW 922

Evidence insufficient to warrant cancellation of note. Evidence held insufficient to warrant cancellation of note given to bank for loan used to purchase its stock when it did not sustain the plaintiff's charges of fraud, misrepresentation of the value of the stock, or that he received stock other than that which he intended to buy.

Bowne v Bonnifield, 226-712; 285 NW 144

Harmless error. In proceeding on claim against a decedent's estate for an alleged loan, trial court erred in holding that claimant's wife was an incompetent witness as to conversation with decedent wherein he stated that "they should get around to make a note for the $500 he gave him". However since court also found in effect that such evidence would not have been sufficiently definite to establish the claim, such error was not prejudicial.

In re Green, 227-702; 288 NW 881

Action on bond. Evidence reviewed, in action on a fidelity surety bond, and held to show abstraction of the employer's funds by the employee and consequent loss by the employer, within the terms of the bond.

Webster Bank v Ins. Co., 203-1264; 212 NW 545

Fraud—remedies of creditors. Proof (1) that the vendee of personal property did not record or file his bill of sale as required by law, (2) that there was no change of possession following the bill of sale, and (3) that the vendee actively aided the vendor in disposing of the property as the property of the vendor,

furnishes ample justification for the holding that the rights of a good faith and innocent attaching creditor of the vendor were superior to the asserted rights of the vendee.

Beno Co. v Perrin, 221-716; 266 NW 539

Fraud—evidence sufficient to sustain. Evidence held to show that conveyance by judgment-debtor was with intent to hinder, delay, and defraud creditor in collection of judgment.

Phillips v McIlrath, (NOR); 237 NW 212

Action by trustee in bankruptcy—fraudulent conveyance. Trustee in bankruptcy who introduces testimony given on examination in bankruptcy court is bound thereby, and evidence is insufficient to sustain trustee's claim that transfer of note by bankrupt to sister was in fraud of creditors.

Cooney v Graves, (NOR); 230 NW 407

Fraudulent conveyances — self-impeaching evidence. The court cannot say, at least ordinarily, that wholly undisputed testimony tending to show that a conveyance was bona fide and for value is so self-impeaching as to establish the very contrary.

Hawkins v VerMeulen, 211-1279; 231 NW 361

Conveyance and assignment to stepson — evidence to set aside. Where an elderly but unusually self-willed woman executed a deed to her stepson during time in which she managed her own affairs, and relationship with grantee was only that which ordinarily exists between a mother and son, evidence in action to set aside the deed did not warrant finding that confidential relationship existed so as to raise presumption of fraud, but as to the assignment of a mortgage procured by this stepson after he came to live with her and had taken over management of her affairs, evidence justified finding that such relationship did exist.

O'Brien v Stoneman, 227-389; 288 NW 447

Fraudulent conveyance. Evidence held to establish the fraudulent nature of a conveyance.

Hansen v Richter, 208-179; 225 NW 361

Self-enrichment of trustee—insufficient evidence of misconduct. A testamentary trustee of a coal mining company who, personally or in connection with employees of the company, with his own funds buys up lands or mining rights in lands and leases to the company the right to mine coal from said lands under a royalty, will not be compelled, long afterward, to account to the legatees and devisees for the royalties so received and for salary drawn during said time (1) when the trustee had been vested, under the will, with substantially the same power over the business as the deceased possessed when living, (2) when the policy of operating on leases was but a continuance of the lifelong policy of the deceased, (3) when the royalties paid were the royalties ordinarily and customarily paid in said locality, and (4) when the existence and history of said transactions were carried openly on the books of the company, and were either personally known or capable of being easily known by all the legatees and devisees.

Evans v Hynes, 212-1; 232 NW 72

Resulting trusts. A resulting trust will be established only on testimony which is clear and certain.

Irving v Grimes, 208-298; 225 NW 453

Validity of deed—constructive fraud. Evidence held to show affirmatively that the execution of a deed was not brought about by any constructive fraud arising out of the intimate relations of the parties.

Utterback v Hollingsworth, 208-300; 225 NW 419

Validity of deed — false representation — proof required. Principle reaffirmed that a deed of conveyance will not be set aside on an allegation of fraudulent representation which is sustained by a mere preponderance of the evidence.

Clark v Beck, 208-156; 225 NW 353

Covenants—action for breach. A covenant against incumbrance or to defend the title against the lawful claims of all persons whomsoever cannot be deemed broken on a naked showing that the covenantee remained out of possession because someone else was in possession. The nature of that possession is manifestly all-important: e. g., whether it is lawful and paramount and hostile to the rights of the covenantee.

Pope v Coe, 208-759; 225 NW 939

Standing truck—negligence per se. Evidence reviewed and held to establish negligence per se on the part of plaintiff in not seeing and avoiding a truck which was standing in the hallway of a hotel.

Walker v Hotel Co., 214-1150; 241 NW 484

Actions—evidence insufficient. In an action by a store customer to recover damages suffered when customer slipped and fell on waxed floor, evidence held insufficient to warrant instruction on question as to whether floor was excessively waxed at place where customer fell and that under the evidence such question was so conjectural as to be outside the jury's proper functioning.

Osborn v Klaber Bros., 227-105; 287 NW 252

Electricity — negligence — proximate cause. Evidence held insufficient to show that certain acts of omission and commission were the proximate cause of the reaching and entrance to a building of an excess voltage of electricity.

Anderson v Railway, 208-369; 226 NW 151; 3 NCCA(NS) 547

II EVIDENCE GENERALLY—continued
(k) WEIGHT AND SUFFICIENCY IN GENERAL—continued

Remote examination. Evidence of the existence of marks upon a public street and on the curb bordering thereon, several hours after an accident in question, is admissible over the objection that the evidence is too remote.

Stutzman v Younkerman, 204-1162; 216 NW 627

Cornice on building as nuisance. Evidence that a building built flush with the street line was surmounted by a cornice which overhung the street for a material distance and which for several years, through some defect, cast water upon the sidewalk, and at times caused a dangerous accumulation of ice on the sidewalk, furnishes ample basis for a jury finding that the city had not and was not keeping its street free from nuisance.

Wright v A. & P. Co., 216-565; 246 NW 846; 32 NCCA 509

Alienation of affections. Evidence held to present a jury question on the issue whether the affections of the wife had been alienated.

Weyer v Vollbrecht, 208-914; 224 NW 568

Annulment of marriage—insanity. Evidence reviewed and held sufficient to authorize default decree annulling marriage on ground of insanity at time of marriage.

Kurtz v Kurtz, 228- ; 290 NW 686

Health insurance—partial disability. Evidence held to justify the submission to the jury of the issue of partial disability.

Vorpahl v Surety Co., 208-348; 223 NW 366

Broker — action for compensation — presumption not jury question. In an action by a real estate broker for commission, on the theory that he was the efficient and procuring cause for a sale, his showing that he was authorized to sell and had contacted a buyer who afterward purchased directly from the owner, raises no jury question but only a rebuttable presumption which defendant successfully rebuts by direct evidence to the contrary.

Donahoe v Denman, 223-1273; 275 NW 155

Council's judgment—filling station permit. The wisdom, judgment, or lack thereof, on the part of a city council in issuing a permit to erect a "filling station" is not reviewable by the courts unless the action taken was arbitrary, oppressive, or capricious. Evidence reviewed and permit held valid.

Scott v Waterloo, 223-1169; 274 NW 897

Waiver—definition—proof—deferred salary. Waiver being an intentional relinquishment of a known right and provable only by clear, satisfactory, unambiguous evidence, where a corporation resolution deferring payment of certain delinquent salary accounts due corporate officers, did not of itself prevent payments thereon, fact of withdrawals thereafter from such salary accounts is not a waiver of such resolution.

Bankers Trust Co. v Economy Coal Co., 224-36; 276 NW 16

Deportation grounds — reviewed in habeas corpus. On an appeal from a denial of a writ of habeas corpus under deportation order, the question of sufficiency of evidence to support the order may be properly reviewed in a habeas corpus action, and where ground of deportation is fraud committed in Canada with no showing that crimes charged were criminal under the law of Canada, the order denying the writ was reversed with instructions to grant the writ, as neither a court nor an administrative body can take judicial notice of the laws of a foreign country. In an administrative proceeding there must be such procedure as to accord substantial justice and afford the parties a fair trial.

Smith v Hays, 10 F 2d, 145

Verdict set aside — criminal more readily than civil. Where the verdict is clearly against the weight of evidence, a new trial should be granted, and the appellate court will interfere more readily in a criminal case than in a civil one.

State v Carlson, 224-1262; 276 NW 770

No negative fact from affirmative testimony. Positive, uncontradicted testimony of husband and wife, defendants, called to testify by plaintiff, affirming in their own behalf fact of consideration for a deed to wife, cannot be held to have proven a negative fact of lack of consideration.

Donovan v White, 224-138; 275 NW 889

"Last clear chance"—evidence—insufficiency. The doctrine of "last clear chance" is not applicable unless peril of injured party is actually discovered and appreciated in time to prevent his injury by the exercise of ordinary care. So where plaintiff drives his truck at a speed of four or five miles per hour onto a railroad track, and is struck by a train going four or five miles per hour, and it is shown engineer of train felt a jar and, looking out of cab, saw some object in front of locomotive and immediately applied brakes and placed locomotive in reverse, held, evidence insufficient to submit to jury, and a motion for directed verdict was rightfully sustained.

Kinney v C. G. W. Ry. Co., 17 F 2d, 708

Mouse in Coca-Cola—jury question. Evidence establishing (1) purchase of a bottle of Coca-Cola from stand at country club, (2) immediate drinking of part of contents in presence of those in charge of stand, and (3) discovery of a dead mouse in bottle, and becoming ill as

consequence, presents question for the jury as to whether the mouse was in the bottle when purchased by the country club.

Anderson v Tyler, 223-1033; 274 NW 48

Special assessments — excessiveness. Evidence held to justify a materially higher assessment for paving than the assessment fixed by the trial court.

Nelson v Sioux City, 208-709; 226 NW 41

Uncontroverted evidence may be insufficient unless corroborated. Positive evidence of the truth of an all-controlling fact may be insufficient to establish such fact when such evidence is, from its very nature, incapable of contradiction by any other witness, and when, if the evidence be true, corroborative facts necessarily exist, and are not shown. So held where it was sought to trace title through a secret trust.

Nehring v Hamilton, 210-1292; 232 NW 655

Unlawful transportation of liquor—evidence —sufficiency. A jury is amply justified in finding that an accused was engaged in the unlawful transportation of intoxicating liquors when the evidence shows that he was found seated in the driver's seat of an automobile standing on a country road, with a loaded revolver by his side, and with fifty-five gallons of alcohol stored in the car.

State v Anderson, 216-887; 247 NW 306

Intoxicating liquors—illegal transportation. A charge of illegal transportation of intoxicating liquors is not sustained by unquestioned testimony that the defendant was overtaken by the operator of an automobile and was invited to ride, accepted the invitation, and entered the car (in which he had no interest), where he later found a jug of whisky, in which he likewise had no interest, but which he threw out of the car when pursued by peace officers.

State v Duskin, 202-425; 210 NW 421

Prosecution—probable cause—jury question. "Probable cause" for prosecution is defined as "the knowledge by the prosecuting witness of such a state of facts as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably, and without prejudice, to believe the person accused is guilty", and except where the evidence is so clear and undisputed that all reasonable minds must reach the same conclusion, the question of probable cause is for the jury.

Bair v Schultz, 227-193; 288 NW 119

Total disability — de novo determination. Where evidence given by licensed chiropractors testifying for plaintiff, and physicians and surgeons testifying for defendant in regard to plaintiff's total disability is widely divergent and where there is ample evidence to support a finding either way, the supreme court, in a de novo trial, will not disturb the trial court's findings, the trial court being in a far more favorable position to determine whether claim of total disability is made in good faith.

Kurth v Ins. Co., 227-242; 288 NW 90

Absence of showing of cause and effect. Evidence in an action for forcible defilement, to the effect that the injured female suffered a case of nervous prostration over two years after the alleged assault, is wholly inadmissible, in the absence of any testimony tending to show that such condition was attributable to the alleged assault.

Wildeboer v Peterson, 201-1202; 203 NW 284

11255 Credibility.

ANALYSIS

Confidential communications. See under §11263

I CREDIBILITY IN GENERAL

Testimony incapable of direct contradiction —credibility tested. Where the only person who can deny the testimony of a witness is dead, it is incumbent on the court to look upon such testimony with great jealousy and to weigh it in the most scrupulous manner to see what is the character and position of the witness generally, and whether he is corroborated to such an extent as to secure confidence that he is telling the truth.

Peterson v Bank, 228- ; 290 NW 546

Withdrawal of issue—effect on testimony introduced. Upon the withdrawal by the court of an issue, testimony which was primarily introduced on such issue is properly left in the record when it bears on the weight and credibility of the testimony of witnesses.

Birmingham Bank v Keller, 205-271; 215 NW 649

Incompetent testimony. Testimony that a witness was "arraigned" on a charge of intoxication is wholly incompetent on the issue of the credibility of the witness.

State v Voelpel, 213-702; 239 NW 677

Contradictory statements. It may always be shown that a witness has made material statements out of court contradictory of his material statements in court if proper foundation has been laid in the cross-examination.

State v Patrick, 201-368; 207 NW 393

Jury question on discredited testimony. The testimony of a prosecuting witness (forcible defilement in instant case) may be very seriously discredited, yet present a jury question as to its credibility.

Wildeboer v Peterson, 201-1202; 203 NW 284

I CREDIBILITY IN GENERAL—continued

Cross-examination affecting credibility—conclusiveness. A party who, on cross-examination, seeks to secure from the witness an admission that he was not sober at the time of an occurrence and that he had been drinking shortly prior thereto, and is met by a positive denial, is absolutely bound by such testimony, it appearing that the pleadings presented no issue as to whether the witness was sober.

Glass v Hutchinson Co., 214-825; 243 NW 352

Discretionary limit to cross-examination. After a witness, on cross-examination, has testified (1) that he is a laborer, (2) that he has been convicted of a felony, and (3) that he is now residing in the county jail, the court may very properly curtail further cross-examination by excluding questions designed to show that the witness, instead of being a laborer, has been engaged, generally, in bootlegging and in the commission of larcenies and burglaries.

State v Johnson, 215-483; 245 NW 728

Evidence of subnormal mentality. The court is not in error in refusing to receive specific evidence of facts tending to show that a witness of the age of 12 years is of subnormal mentality—as bearing on the credibility of the witness—when such testimony is offered after said witness had been sworn and had testified without question having been raised as to the capacity of the witness to understand the obligation of an oath.

State v Teager, 222-391; 269 NW 348

Rape—motive of prosecutrix. Principle recognized that the motive of a witness may be shown as bearing on the question of credibility.

State v Ingram, 219-501; 258 NW 186

Evidence revealing no inconsistency. Evidence offered for the purpose of impeaching a witness is, of course, properly rejected when such evidence reveals no inconsistency whatever with the testimony of the witness.

In re Work, 212-31; 233 NW 28

Contradictions—duty of jury. The mere fact that the testimony of a witness reveals material contradictions does not necessarily deprive it of all probative force, and deprive the jury of the right and duty to reconcile the contradictions. The fact that the witness is a foreigner and untutored in the English language may be quite material under such circumstances.

State v Andrioli, 216-451; 249 NW 379

Positive testimony vs inherent improbability. The positive testimony of witnesses affirming the existence of an alleged fact, e. g., the entering into a contract, may be wholly overcome by the facts and circumstances attending the alleged fact and by the inherent improbability thereof.

Garretson v Harlan, 218-1049; 256 NW 749

Good character as defense. Defendant in a criminal prosecution may place in issue that trait of his character which is questioned by the charge made against him, and may sustain his good character as to said trait (1) by evidence of his good reputation as to said trait, or (2) by the direct testimony of witnesses who, by knowledge, qualify to speak as to such good character.

State v Ferguson, 222-1148; 270 NW 874

Good character generating reasonable doubt. The previous good character of an accused (as to the trait involved) shown either (1) by the general reputation of the accused, or (2) by actual personal experience of witnesses with the accused, may, in connection with all the evidence in the case, generate a reasonable doubt of the guilt of the accused, and entitle him to an acquittal. And the jury must, on request, be so instructed.

State v Ferguson, 222-1148; 270 NW 874

Good character witness—cross-examination. A good character witness, who testifies that the general reputation of an accused (charged with operating an automobile while intoxicated) for moral character is good, may, on cross-examination, be asked whether he has heard within a stated recent time that the defendant, while operating a motor vehicle and while in an intoxicated condition, had been involved in certain specified accidents.

State v Wheelock, 218-178; 254 NW 313

Bribery as indicating unfavorable admission. Attempt by a defendant to bribe a witness is indicative of an admission on his part that his cause or claim is unjust, dishonest, and unrighteous; and the court may so instruct the jury on supporting testimony.

Gregory v Sorenson, 214-1374; 242 NW 91

Attempt to suppress testimony. While an attempt by the defendant to keep an adverse witness from testifying is not necessarily an admission by him that his claim or defense is false, yet such attempt is in effect an admission by the defendant that the testimony sought to be suppressed is unfavorable to his cause; and instructions to this effect, on supporting evidence, are proper.

Gregory v Sorenson, 214-1374; 242 NW 91

Instructions as to credibility. The ordinary instructions as to the credibility of witnesses are all-sufficient in the absence of a request for a specific instruction as to the effect of impeaching testimony.

Altfilisch v Wessel, 208-361; 225 NW 862

Instruction—rule as to presumption on credibility of witness. In prosecution for suborna-

tion of perjury, where defendant complains of the court's instruction which stated in part, "it being presumed in law that a man whose general reputation for truth and veracity is bad would be less likely to tell the truth than one whose reputation is good", such instruction did not tell the jury that defendant had been impeached, that he would not tell the truth, or that they could disregard his testimony (they were only informed of a rule applicable in everyday business transactions)—it being more a statement of the reason for such a rule in impeachment than any direction to the jury, and was in no sense a presumption of guilt, but could only be applied to defendant as a witness. The weight of defendant's testimony was left entirely for the jury.

State v Hartwick, 228- ; 290 NW 523

Interest of accused as witness. Principle reaffirmed that an accused as a witness in his own behalf is an interested witness, and that the court may so instruct.

State v Bird, 207-212; 220 NW 110
State v Healy, 217-1155; 251 NW 649

Instructions—refusal. Reversal of a cause will not be ordered because the court refused to instruct as to the conditions under which the jury might entirely reject the testimony of a witness for falsely testifying, when the court otherwise sufficiently guides the jury as to the credibility of witnesses.

Burke v Lawton (Town), 207-585; 223 NW 397

Former plea of guilty—not conclusive in a civil action. In a civil action the plea of guilty to a criminal prosecution involving the same transaction is admissible as an admission but is not conclusive when the criminal defendant, as a witness in the civil action, gives testimony tending to contradict his plea of guilty.

Boyle v Bornholtz, 224-90; 275 NW 479

Intoxication of motorist—evidentiary conflict. A sharp conflict in the testimony, as to whether a motor vehicle driver was intoxicated, generates a question of the credibility of the witnesses, which is a matter peculiarly for the jury.

State v Carlson, 224-1262; 276 NW 770

Prima facie case established without disproof. In an action on a note by alleged holder in due course, letters written by prior indorsee, after maturity, demanding payment from maker were properly excluded as hearsay, and in the absence of any disproof of prima facie case made under such circumstances it is not the duty of the court to submit case to jury solely on matter of credibility of witness.

Colthurst v Lake View Bank, 18 F 2d, 875

"Don't remember" testimony—no probative value. Witness' testimony that he does not remember a conversation is of no probative value and is not sufficient to raise a conflict in the evidence.

Rance v Gaddis, 226-531; 284 NW 468

Credibility — contradictory previous testimony. Inconsistent testimony by a witness at one trial as to certain facts in an automobile accident cannot as a matter of law negative his testimony in a later trial, inasmuch as the jury is the sole judge of the credibility of a witness and the weight of his testimony.

Echternacht v Herny, 224-317; 275 NW 576

Credibility—bias of witness. Fact that a doctor, the real instigator of the prosecution, as a witness in a criminal case, showed considerable feeling and interest was a matter for the jury—not for the court.

State v Carlson, 224-1262; 276 NW 770

Attorney as counsel and witness in same case. While the court views with emphatic disfavor the act of an attorney in assuming the dual attitude of both counsel and witness in the same case, yet such conduct does not go to the competency of the attorney as a witness, but to the weight and credibility of his testimony, which latter fact may be very properly presented to the jury by appropriate instruction.

Cuvelier v Dumont (Town), 221-1016; 266 NW 517

Contradictory statements—unallowable purpose. Assessment rolls covering personal property of the taxpayer and the total value thereof, and introduced for purpose of impeachment, are not also receivable for the purpose of showing the value placed on a particular article when the owner demonstrates that the article was not given in for taxation.

Hall v Ins. Co., 217-1005; 252 NW 763

Court's discretion as to cross-examination. In cross-examination for the purpose of showing partiality and interest of witness a large discretion rests with trial court.

Higgins v Haagensen, (NOR); 220 NW 38

Conflicting evidence. On conflicting testimony, the jury is to determine the credibility of the witnesses and to ascertain the facts, and on appeal the supreme court is to determine not what the facts were, but solely what the jury was warranted in finding them to be, reviewing the evidence in the light most favorable to the party in whose favor the verdict was returned.

Remer v Takin Bros., 227-903; 289 NW 477

II IMPEACHMENT UNDER STATUTE

Impeached but corroborated—effect. Rule restated for weighing the testimony of an impeached but corroborated witness.

State v Philpott, 222-1334; 271 NW 617

III IMPEACHMENT IN GENERAL

Pleadings as evidence. Pleadings containing inconsistent or contradictory statements of relevant facts are available for impeaching purposes.

Larson v Bank, 202-333; 208 NW 726

Pleadings as evidence. Pleadings and amendments thereto which reveal changes and enlargements of the amount sued for may be used for impeaching purposes, and the court may so instruct.

Wilson v Else, 204-857; 216 NW 33

Inconsistent conduct. A party who, by his pleading and testimony, denies all liability may be impeached by a showing that he made no denial of liability on a former occasion when a denial would have been natural; likewise by a showing that he has made statements out of court wholly inconsistent with his statements in court.

Starry v Starry, 208-228; 225 NW 268

Shorthand notes. The shorthand notes taken upon the trial of an action may be used for impeaching purposes.

Judd v Rudolph, 207-113; 222 NW 416; 62 ALR 1174

Evidence in other proceeding—inadmissible against nonparty. A transcript of the original, official shorthand notes of a witness in proceedings auxiliary to execution, to which proceedings the witness was not a party, is inadmissible as substantive evidence in a subsequent proceeding against the witness wherein a conveyance is sought to be set aside as fraudulent; neither is such transcript admissible, in the absence of proper foundation, to show the admissions of, or to impeach, the witness.

Hawkins v VerMeulen, 211-1279; 231 NW 361

Right to full cross-examination as to inconsistent statements. A witness may always be fully cross-examined as to signed statements of fact made outside the court which are inconsistent with his statements in court.

Stickling v Railway, 212-149; 232 NW 677

Form of question. The question used as the foundation for the impeachment of a witness by showing that the witness has made statements out of court contradictory of his statements in court, and the question asked the impeaching witness, do not necessarily have to be in the same words.

State v Patrick, 201-368; 207 NW 393

Immaterial contradictory statements. Impeachment may not be based on immaterial contradictory statements of a witness.

State v Halley, 203-192; 210 NW 749

Disregarding testimony — instructions. The court should instruct, on request, that if the jury believes a witness has been successfully impeached by the making of contradictory statements, his testimony may be disregarded unless it has been corroborated by other credible evidence.

Welton v Hy. Com., 211-625; 233 NW 876

Disregarding testimony — instructions. Instructions to the effect that the jury may peremptorily reject in toto the testimony of a witness who has testified falsely to any material fact, or who has been impeached, are prejudicially erroneous unless accompanied (1) by qualifying instructions that the false swearing must be wilful, and (2) by instructions guiding the jury in case they find for any reason that the testimony in question is reasonable and credible.

State v McCook, 206-629; 221 NW 59

Unallowable self-corroboration. A witness may not corroborate himself by testifying that on other occasions out of court he has told the same story which he has told in court. Neither may a party prove such extra recitals by other witnesses.

State v Bell, 206-816; 221 NW 521

Unallowable self-corroboration. After a party to an action has been cross-examined with regard to his testimony on a former trial for the purpose of laying the foundation for proving contradictory statements, it is wholly unallowable for counsel on redirect examination to read copious excerpts from the transcript of the witness' former testimony and have the witness say that he did so testify.

State v Cordaro, 214-1070; 241 NW 448

Effect of impeachment. A jury should not be told to reject the testimony of an impeached witness unless it has been corroborated.

State v Ellington, 200-636; 204 NW 307

Contradictory statements. A witness who has testified that, at the time of the search of an establishment for intoxicating liquors, he was the owner thereof by purchase from the accused on trial, may be impeached by testimony that, at the time of the search, he had said that he was working for the accused on trial; and it is immaterial (except as to the application of such testimony) whether the accused on trial was or was not present at the time of said search.

State v Olson, 200-660; 204 NW 278

Striking collateral and immaterial matter. Collateral and immaterial matters which are brought out on the redirect examination of a good-character witness are properly stricken from the record.

Amick v Montross, 206-51; 220 NW 51; 58 ALR 1147

Association with accomplice. An accused who becomes a witness in his own behalf may

be impeached by testimony tending to establish his personal association with an accomplice, the existence of such association being material, and having been denied by the accused.

State v Hart, 205-1374; 219 NW 405

Nonresponsive matters. An accused may not impeach a witness for the state by testifying to matters which are quite unresponsive to anything to which the witness has testified.

State v McCook, 206-629; 221 NW 59

Reputation at present time—relevancy. A question calling for the reputation of a witness is properly limited to the present time—the time when he testifies—not to the time of the occurrence concerning which he testifies.

State v Teager, 222-391; 269 NW 348

Bad moral character—scope of cross-examination. A person testifying to the general bad moral character of a witness may be cross-examined as to the reputation of the witness as to truth and veracity.

State v Smalley, 211-109; 233 NW 55

Impeachment by reputation—dual methods. The common-law rule that a witness may be impeached by showing his bad reputation for truth and veracity in the community where he resides or in which he has recently resided, has not been abrogated or in any manner changed by the statutory provision that the general moral character of a witness may be proved for the purpose of testing his credibility.

State v Teager, 222-391; 269 NW 348

Unallowable impeachment—reputation. Mere witnesses in a criminal prosecution are not impeachable by testimony that their general reputation in the community where they reside is bad as to some particular trait of character.

State v Ferguson, 222-1148; 270 NW 874

Exclusion of nonexplanatory question. The erroneous refusal of the court, in a prosecution for assault to rape, to permit a witness, proffered by the defendant, to answer a question whether the witness knew the general reputation of the prosecutrix as to truth and veracity in the community where she lived, cannot be deemed harmless error on the ground that the question did not reveal whether the witness would answer "yes" or "no", when, in connection with the proffer of the witness, defendant offered to show that said prosecutrix was "wholly unreliable in her word and statements".

State v Teager, 222-391; 269 NW 348

Adverse party as witness — contradictory testimony. Where plaintiff calls adverse party as witness he vouches for his competency, credibility, and truthfulness; however, he is entitled to the benefit of any conflict, inconsistency, or incongruity, which might be found in his testimony and is not precluded from calling other witnesses to contradict testimony or if the testimony of the adverse party appears to be inherently improbable or lacking in credit or made to appear so by the testimony of other witnesses, the court is not bound by the language in which the witnesses frame their answers, and may enter a decree setting aside a conveyance as fraudulent, notwithstanding that husband and wife, as adverse witnesses called by creditor, testified to sustain conveyances.

Goeb v Bush, 226-1224; 286 NW 492

Impeachment of one's own witness. A party may not impeach his own witness.

Endicott v Shapiro, 200-843; 205 NW 511
Bihlmeier v Budzine, 201-398; 205 NW 763
Lawton Bk. v Bremer, 205-334; 218 NW 49

Impeachment — allowable contradiction. A party may not impeach his own witness but he may offer testimony of other witnesses in contradiction thereof.

White v Zell, 224-359; 276 NW 76

Right to contradict one's own witness. While a litigant may not impeach his own witness, he may show that his witness is mistaken.

North Amer. Ins. v Holstrum, 208-722; 217 NW 239; 224 NW 492
Homestead. Life v Salinger, 212-251; 235 NW 485
Larson v Church, 213-930; 239 NW 921
Johnson v Warrington, 213-1216; 240 NW 668
In re Skinner, 215-1021; 247 NW 484

Conclusiveness on party calling witness. A party who calls a witness is not necessarily bound by the testimony of the witness, yet, when a party calls a witness on the issue of fraud and want of consideration in a conveyance, he will not be permitted to say that affirmative, uncontradicted, and positive testimony of the witness that there was no fraud and that there was a consideration establishes the direct contrary.

Pike v Coon, 217-1068; 252 NW 888

Discrediting own witness—claimant against estate. A claimant against an estate who puts the administratrix on the stand as his witness may not discredit her by attempting to show that she tried to deceive him as to the fact of decedent's death so that his claim against the estate would be barred.

Federal Bank v Bonnett, 226-112; 284 NW 97

Impeachment of one's own witness. A party may not show that his own witness has a bad reputation for truth and veracity, or for moral character, or that said witness has made prior contradictory statements relative to the subject-matter in question, but a party may always show the facts attending a transaction tho he

III IMPEACHMENT IN GENERAL—concluded

thereby contradicts one or more of his own witnesses.

Johnson v Warrington, 213-1216; 240 NW 668

Right to rebut impeaching testimony. Testimony by grand jurors which tends to show, by way of impeachment, that a witness for an accused made statements before the grand jury inconsistent with the statements of the witness at the trial arms the accused with right to show by the clerk of the grand jury that the grand jurors were mistaken,—that the testimony of the witness in question was the same on both occasions.

State v Archibald, 204-406; 215 NW 258

Limiting impeaching evidence. The failure of the court on its own motion in its instructions to specifically limit impeaching testimony to that particular purpose is not erroneous when the testimony in question is of such a nature that it could not be considered for any other purpose.

State v Brewer, 218-1287; 254 NW 834

Impeachment — inconsistent statements—insufficient foundation. Testimony by a witness that he has no remembrance of having used a certain expression in testifying before a coroner's jury, but that he would not say that he did not use the expression, furnishes no foundation for impeaching the witness by proof that he actually did use said expression.

State v Johnston, 221-933; 267 NW 698

Impeachment — permissible cross-examination. A witness who has testified to the reputed good character of a party may, within the limits of good faith on the part of the cross-examiner, be examined along the line whether said good character witness had "heard of" certain nefarious transactions in which the said party had been engaged.

State v Carter, 222-474; 269 NW 445

Witness—contradicting self and impeachment. The fact that a witness was impeached or, being mentally slow and confused, makes statements on cross-examination which might be construed as contradictory, instead of being sufficient to take the case from the jury, on the contrary presents a jury question.

Russell v Leschensky, 224-334; 276 NW 608

Impeachment—instructions by court. While in criminal cases the court must fairly present the issues to the jury, yet, after this is done, a defendant should ask for further instructions, if desired, or not be heard to complain; so where the jury would have understood from the instructions given, the purpose of introducing a written instrument for impeachment only and the meaning of the word "impeachment", it was not reversible error to fail to give a separate instruction thereon, especially without a request therefor.

State v Johnson, 223-962; 274 NW 41

Error which becomes inconsequential. Error in overruling a motion for a directed verdict at the close of plaintiff's evidence when certain all-essential testimony was not then in the record, becomes inconsequential when, at the time of renewing the motion at the close of all the evidence, such testimony is in the record.

Newland v McClelland & Son, 217-568; 250 NW 229

Going under assumed name. It is proper, on cross-examination of an accused in a criminal cause, to ask him if he has not gone under an assumed name since the commission of the offense in question, and, if denial be made, to introduce evidence tending to prove such fact.

State v Ivey, 200-649; 203 NW 38

Corruption of witness. An interwoven transaction tending to show that a defendant and a third party were working in conjunction to corrupt a witness, and consisting of conversations in part between said witness and said third person, and in part between all three said parties, is admissible—the court carefully limiting the jury in the consideration of said testimony.

Gregory v Sorenson, 214-1374; 242 NW 91

Documentary contradiction. Testimony that an insurance company would not have issued a policy to an insured had it known his true occupation may be met by the introduction of policies which negatived such testimony.

Murray v Ins. Co., 204-1108; 216 NW 702

Impeachment on unallowable point. A witness who makes no denial of his liability on the claim sued on, but by his testimony denies, in effect, the liability of his co-defendant on said claim, may not be impeached by a showing that on former occasions he made no denial of the liability of his co-defendant, it appearing that such former occasions were such as not to call for any denial by him of the liability of his co-defendant.

Starry v Starry, 208-228; 225 NW 268

IV—IMPEACHMENT BY CROSS-EXAMINATION

Sworn assessment roll competent. The defendant in eminent domain proceedings has the right, on the cross-examination of the plaintiff and for the purpose of contradicting and impeaching him, to show the sworn statement made by the plaintiff to the assessor as to the value of the farm in question and as to the number and value of the livestock kept on said farm.

Welton v Hy. Com., 211-625; 233 NW 876

Bias of witness. A witness on his cross-examination may be interrogated as to his

state of mind or bias against the party against whom he testifies, for instance, that the witness and said other party are involved in hostile litigation.

Bond v Lotz, 214-683; 243 NW 586

Improper cross-examination. Reversible error results from repeatedly and insistently injecting into the cross-examination of a defendant on trial for crime, and into the cross-examination of his character witnesses, insinuations and innuendoes to the effect that the accused had been guilty of other crimes prior to the time in question.

State v Rounds, 216-131; 248 NW 500

Remote collateral matters. The state may not, on cross-examination of an accused, delve into remote collateral matters.

State v McCumber, 202-1382; 212 NW 137

Character and conduct — particular acts or facts. Offer on cross-examination to prove certain reprehensible acts and conduct on the part of the witness reviewed, and held properly rejected.

Wilson v Fortune, 209-810; 229 NW 190

Impeachment—improper but harmless cross-examination. The cross-examination of a good character witness for a defendant in a criminal case should be limited to reports and rumors in the community to negative good reputation. But ordinarily prejudicial and reversible error will not be deemed to result from an improper cross-examination when it is not extreme, when the answers are favorable to defendant, and when the court promptly admonishes the jury to wholly disregard such examination.

State v Clay, 222-1142; 271 NW 212

Bias—indictment for same offense. A witness for parties jointly indicted for conspiracy may be cross-examined along the line of showing that he, himself, stands indicted for conspiracy of the identical nature as that for which defendants stand indicted,—such testimony being strictly confined to its bearing on the bias of the witness.

State v Moore, 217-872; 251 NW 737

11256 Interest.

Hearsay evidence. An impeaching witness may not testify to declarations of another witness tending to show that such other witness had an interest in the pending litigation, no proper foundation for such declarations appearing.

Cleophas v Walker, 211-122; 233 NW 257

Interest of accused as witness. An accused as a witness in his own behalf is an interested witness, and the court may so instruct.

State v Bird, 207-212; 220 NW 110
State v Healy, 217-1155; 251 NW 649

11257 Transaction with person since deceased.

ANALYSIS

I APPLICABILITY OF STATUTE IN GENERAL

Discussion. See 19 ILR 521—Admission of evidence

Dead man statute — difficulty in applying. Difficulty or undesirability of applying the so-called dead man statute is no justification for the courts to disregard it, so long as it remains as an act of the legislature.

Brien v Davidson, 225-595; 281 NW 150

Testimony incapable of direct contradiction —credibility tested. Where the only person who can deny the testimony of a witness is dead, it is incumbent on the court to look upon such testimony with great jealousy and to weigh it in the most scrupulous manner to see what is the character and position of the witness generally, and whether he is corroborated to such an extent as to secure confidence that he is telling the truth.

Peterson v Bank, 228- ; 290 NW 546

Contract with deceased. A claimant against an estate who is sui juris does not competently establish a mutually binding contract between claimant and the deceased for the conveyance of land by deceased to claimant by proving a conversation (1) which took place in the presence of claimant, but solely between the mother of claimant and the deceased, (2) which was in no manner addressed to claimant, and (3) in which claimant took no part.

In re Runnells, 203-144; 212 NW 327

Action against guardian—testimony by wife of indorsee. The wife of the indorsee of a certificate of deposit is incompetent to testify against the guardian of the original payee as to the genuineness of the signature of the latter as indorsee.

Farmers Bank v Bank, 201-73; 204 NW 404

Reliance on statements to third party. A claimant in probate must not be permitted to

I APPLICABILITY OF STATUTE IN GENERAL—continued

testify that he relied and acted on statements made by the deceased to a third party in a conversation in which claimant took part; otherwise as to statements made by deceased in conversation in which claimant did not take part.

In re Newson, 206-514; 219 NW 305

Nonprejudicial exclusion of question. A witness, who is incompetent to testify to material conversations with a deceased person, may be asked and permitted to answer the general question whether he had a conversation with the deceased, on a certain occasion, on the subject matter in issue, but the exclusion of such question is nonprejudicial.

Southhall v Berry, 207-605; 223 NW 480

Cashier-stockholder — incompetency of. In an action by a bank to recover on the promissory notes of a deceased maker, in which action the defendant executor pleads a settlement in full between said bank and said maker, a witness who is both cashier of, and a stockholder in, said bank, is incompetent to testify that at the time of the settlement in question it was "understood" that the notes sued on were not to be included in said settlement; likewise that one of the notes sued on (admittedly without original consideration) was to be substituted for other notes charged off as paid.

Monticello Bk. v Schatz, 222-335; 268 NW 602

Bank receiver not protected. In an action by the receiver of an insolvent bank to recover on promissory notes allegedly due the bank, wherein defendant pleaded payment, held that the receiver was not within the class protected by the dead man statute.

Bates v Zehnpfennig, 220-164; 262 NW 141

Deceased's insurance as security—original holder incompetent witness. Altho having assigned his claim and altho the claim is duly allowed in probate, the original party to an oral contract with a deceased is incompetent as a witness, when the assignee of such contract seeks to subject the proceeds of the deceased's life insurance to payment thereof by reason of an oral contract claimed to have been entered into with the deceased.

In re Hazeldine, 225-369; 280 NW 568

Testimony by one who takes no part in conversation. Where a deceased had taken his nephew, raised him, and promised to pay him for working on decedent's farm, testimony as to statements made by the deceased in conversations wherein deceased had said the boy was to be paid from his estate when he died, may be received from the wife of deceased, the wife of claimant, and the claimant himself, provided they took no part in the conversations.

Gardner v Marquis, 224-458; 275 NW 493

Decedent's admissions against interest — scrutiny. In support of a claim against an estate, testimony of decedent's alleged admissions against interest, not being susceptible of denial or explanation by decedent and its worth being measured by the veracity of the witness, should be closely scrutinized and cautiously received.

In re Straka, 224-109; 275 NW 490

Witnesses qualifying books of account — statute not applicable. Statute prohibiting testimony concerning transactions or communications with a person now deceased does not render a claimant against the estate incompetent as witness to testify to preliminary facts required for authentication of books of account, admissibility of which is permitted by statute.

In re Cummins, 226-1207; 286 NW 409

Bills and notes—requisites and validity—delivery of note. In the absence of contrary evidence, a valid delivery was proved by the statutory presumption of delivery arising from possession of a note, aided by evidence, secured without violating the dead man statute, to the effect that the note was in decedent maker's hands while visiting payee during an illness and after decedent left, the note was reposing on payee's bed.

In re Cheney, 223-1076; 274 NW 5

Offering direct examination makes cross-examination admissible. In an action for conversion of an intestate's property, testimony of a witness on direct examination, given in a prior probate discovery proceeding offered and introduced from the transcript of the discovery proceeding, renders also admissible from such transcript the cross-examination of such witness, as being the whole of the conversation, altho under the dead man statute the witness may have been incompetent.

Reeves v Lyon, 224-659; 277 NW 749

Dead man statute—circumventing by indirection. A witness is not permitted to do by indirection that which the law forbids. So held where a passenger in a motor vehicle attempted to circumvent the dead man statute by testifying that he was hired by someone to make the trip, who was no other person than the deceased driver.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

Probate claimant's wife. In proceeding on claim against a decedent's estate for an alleged loan, trial court erred in holding that claimant's wife was an incompetent witness as to conversation with decedent wherein he stated that "they should get around to make a note for the $500 he gave him". However since court also found in effect that such evidence would not have been sufficiently definite

to establish the claim, such error was not prejudicial.

In re Green, 227-702; 288 NW 881

Conversation with deceased—state of mind —lost will. When a person who had talked with the decedent shortly before decedent's death testified that the decedent told him that he had made a will, where it was made, and who were witnesses to the will, the testimony, when not objected to, could be given its full probative effect, and came under an exception to the hearsay rule to show the then state of mind of the decedent, tending to prove the prior execution of the will.

Goodale v Murray, 227-843; 289 NW 450

Fiduciary relationship—intestate and heir. In an action by heirs of intestate to set aside a conveyance of realty made by intestate to son, on the ground of an alleged fiduciary relationship existing between aged intestate and son, held, that evidence was insufficient to establish such relationship, and even tho such relationship existed, whatever property the son received from his mother was by her voluntary and intelligent act, and without duress, dominance or overreaching on his part.

Robbins v Daniel, 226-678; 284 NW 793

Widow's support—subjecting proceeds from land sale. Where real estate devised to widow for life with right to dispose of such realty for her necessary support, when an equity action was brought to establish a claim for the support of widow as a lien against this realty on the ground that widow contracted for support and intended, prior to her death, to sell such realty, in accordance with the terms of the will to provide money with which to pay such claim, held, evidence sufficient to establish claim and subject the proceeds from the sale of such realty to payment of said claim.

Hoskin v West, 226-612; 284 NW 809

II PARTIES TO ACTION

Communications between deceased and party to action. A proper party to an action is incompetent to testify, against an administrator, as to a material personal transaction with the deceased, represented by said administrator, even tho said party is only indirectly interested in the issue on trial.

Nugent v Dittel, 213-671; 239 NW 559

Resignation of administrator. An administrator who has been substituted as plaintiff in lieu of the deceased plaintiff, but who has later resigned, and been succeeded by another appointee, may not be deemed a party to the action, and therefore incompetent to testify to personal transactions with the deceased.

Buckley v Ebendorf, 204-896; 216 NW 20

Probate claimant for services—incompetency as witness. In probate action to establish a claim against an estate based on an express contract for services rendered to decedent, claimant could not testify as to existence of contract.

In re McKeon, 227-1050; 289 NW 915

Instruction — agreement with decedent — claimant incompetent to testify. In probate action to establish a claim based upon an express agreement of decedent that claimant's services should be paid for from decedent's estate, an instruction that claimant was not permitted to testify as to agreement between her and decedent, and that if any agreement was in fact made between the parties, it must be proved by testimony other than that of claimant, was not prejudicial to defendant in that jury would believe that it applied to the communication of the contract to claimant through her father, who had been informed by decedent as to the nature of the agreement—there being other testimony of the communication, and the trial court having excluded the testimony of the father after objection of defendant.

In re McKeon, 227-1050; 289 NW 915

Contract with deceased. In an action against an administrator and against a devisee, to quiet title to real estate, plaintiff is wholly incompetent to testify with respect to a contract between the plaintiff and the deceased.

Black v Nichols, 213-976; 240 NW 261

Interest of party. A party to an action against an estate is competent to testify to the material intent which actuated him or which he had in a transaction with the deceased.

In re Talbott, 209-1; 224 NW 550

Intervenor—competency. In equity action to quiet title and to declare a trust in realty, an intervenor who claims same relief as plaintiff may not testify to alleged oral agreement between parties, some of whom are deceased.

Wagner v Wagner, (NOR); 224 NW 583

Co-plaintiffs. When plaintiff and an intervening plaintiff are each claiming an undivided one-third interest in land, and one is incompetent to testify to a personal transaction with a deceased and thereby establish his contract, he is equally incompetent to testify to said personal transaction and thereby establish the contract for his co-plaintiff.

Wagner v Wagner, 208-1004; 224 NW 583

III INTERESTED PARTIES

Will contestant. A will contestant is incompetent to testify to a conversation between herself and the deceased relative to the will.

Worth v Pierson, 208-353; 223 NW 752

Husband of claimant—participation in conversation. In an action against an estate for services rendered the deceased, the husband of claimant is incompetent to testify to conversa-

III INTERESTED PARTIES—concluded

tions between his wife and the deceased, relative to said services, when the husband takes part to any extent in the subject matter of said conversations.

In re Stencil, 215-1195; 248 NW 18

Nonpayment of insurance premiums. In an action by the beneficiary in a life insurance policy to recover thereon, an agent of the insurer who negotiated the policy is a competent witness to testify that the insured did not make payment to him of the premiums due on the policy.

Range v Ins. Co., 216-410; 249 NW 268

Witness' knowledge of fact but not who told him. In an action for partition, wherein defendant claimed absolute title under a deed which she first physically obtained, after the grantor's death, by going to the bank where it was on deposit, the defendant is a competent witness to testify, (1) that she knew where the deed was kept, but (2) not that grantor told her where it was kept.

Robertson v Renshaw, 220-572; 261 NW 645

Witness — cross-examination establishing competency to testify on redirect. Altho being an incompetent witness as to conversations with the deceased, a daughter, objecting to an executor's report because against her share is offset a promissory note which she claims was canceled by the testator, may be rendered competent to testify on redirect examination when conversations with testator were partially inquired into on cross-examination.

In re Morgan, 225-746; 281 NW 346

Defendant with nominal interest only. A bank cashier, who is made a party defendant in a quiet title action, involving deeds he holds in escrow with instructions to record upon the death of the grantor, is incompetent to testify regarding a conversation had with the deceased husband of the grantor about said deeds, although his interest in the action is purely nominal.

Bohle v Brooks, 225-980; 282 NW 351

Fraud perpetrated by insane payee of note. In an action on a promissory note by the indorsee thereof, the maker is not a competent witness to testify to the fraud perpetrated on him by the payee in the execution of the note, when, at the time of the action, said payee is insane.

Cherokee Bk. v Lawrey, 203-20; 212 NW 359

IV NONINTERESTED PARTIES

Nondisqualifying interest. A person may not be deemed "interested" in the outcome of an action by an administrator, and therefore disqualified from testifying to personal communications with the deceased, from the fact that the will of the deceased directs that he be paid whatever testatrix may be owing him at the time of her death.

Buckley v Ebendorf, 204-896; 216 NW 20

Disqualifying "interest" defined—testimony as to deposit made by decedent. In action against bank to secure an accounting for funds given to cashier by decedent, where cashier, who was not associated with bank at time of trial, testified that the funds were received by him in connection with a personal transaction had with the decedent, held, that he was not an incompetent witness under dead man statute. To render a witness incompetent under that statute he must be interested in the sense that he will either gain or lose by direct legal operation of the judgment or in the sense that the record will be legal evidence for or against him in some other action.

Peterson v Citizens Bank, 228- ; 290 NW 546

Attesting witness to will—"or otherwise"—construction. An attesting witness to a will is not a person from, through, or under whom the proponents, as legatees, derive any interest or title by assignment "or otherwise" and, therefore, is not incompetent to testify under the dead man statute. Whatever interest proponents have they derive from the will.

In re Iwers, 225-389; 280 NW 579

Indirect and uncertain interest of attorney. The fact that a will directs the executor and trustee to procure the services of a named attorney (who drew the will) in carrying out the provisions of the will, does not render the said attorney incompetent to testify to personal transactions and communications with the deceased.

In re Kenney, 213-360; 239 NW 44; 78 ALR 1189

Probate claimant's wife. In proceeding on claim against a decedent's estate for an alleged loan, trial court erred in holding that claimant's wife was an incompetent witness as to conversation with decedent wherein he stated that "they should get around to make a note for the $500 he gave him". However since court also found in effect that such evidence would not have been sufficiently definite to establish the claim, such error was not prejudicial.

In re Green, 227-702; 288 NW 881

V ASSIGNEES, LEGATEES, NEXT OF KIN, EXECUTORS, ETC.

Satisfaction of legacy. On the issue whether a testator had, prior to his death, satisfied a legacy, the legatee is not a competent witness as to a personal conversation between him and the testator relative to said matter.

Heileman v Dakan, 211-344; 233 NW 542

Execution of instrument. The wife of the assignee of a claim is competent to testify that, in a transaction between her husband and

the assignor (since deceased), in which transaction she took no part, she saw the assignor affix her signature to the written assignment.

Steenhoek v Tr. Co., 205-1379; 219 NW 492

VI SURVIVORS

Transaction with deceased partner. In an action by the surviving members of a firm of attorneys to recover attorney fees on the basis of a quantum meruit, the surety on the bond to release the lien for said fees is incompetent to testify that, after a large part of the services had been rendered, he had an oral agreement with the deceased partner to the effect that the firm would accept a certain definite sum for all services performed and to be performed.

Kelly v Bk. 217-725; 248 NW 9; 250 NW 171

VII HUSBAND OR WIFE

Admissions of wife against husband. Admissions by a wife in the absence of the husband, tending to show that a claimant in probate had been employed in the business and had not been paid, are admissible against the estate of the husband when it appears that the wife was both the general manager of the business in question and a partner therein with her husband.

Nortman v Lally, 204-638; 215 NW 713

Failure to prosecute claim or disclaimer of interest ineffective. A divorced wife of a deceased may not become a competent witness to an oral contract made jointly between herself, her mother, and the deceased, in order to subject his insurance to payment of her mother's valid probate claim, merely by failing to prosecute a similar claim of her own and disclaiming any interest in the claim in litigation, since she still has her claim and may enforce payment if the contract is established.

In re Hazeldine, 225-369; 280 NW 568

Fraudulent conveyance. In action by creditor to set aside a fraudulent conveyance by decedent to claimant against estate, claimant and her husband held not incompetent to testify by reason of dead man statute.

First N. Bank v Adams, (NOR); 266 NW 484

VIII PRINCIPAL AND AGENT

Employee of plaintiff as witness. In proceedings in probate to establish a claim against an estate where the plaintiff, a gasoline dealer, sought to prove that the deceased had promised to pay a gasoline bill for his tenant, it was not error to permit the plaintiff's tank wagon driver to testify as to a conversation between the deceased and the tenant concerning the payment of the bill, when the driver took no part in the conversation, had already received his commission on the sale, and had no present, certain, and vested interest in the litigation.

Reichart v Downs, 226-870; 285 NW 256

Ratification of unauthorized act. The agent of a deceased who executes a promissory note in the name of the deceased but without authority so to do, and the person who received the consideration for said note, are incompetent in an action against the administrator on the note, to testify to personal communications with the deceased tending to show that the deceased ratified the unauthorized act of the agent.

Lyon Bank v Winter, 214-533; 242 NW 600

Agent of party litigant. An interested party litigant is a competent witness to testify to personal transactions and communications had by him with the deceased alleged agent of another party litigant who is "next of kin" to such alleged agent, but who is making no claim of right under such kinship.

State Bk. v Fairholm, 201-1094; 206 NW 143

Insurance premium—deceased agent's liability. In action to cancel insurance premium notes where evidence, clearly admissible against administrator of deceased insurance agent, established that check and two notes were delivered to agent for payment of premium and that insurer rejected application for insurance, such evidence warranted cancellation of the notes and established agent's liability for the unaccounted part of the check as against administrator of the agent's estate.

Economy Co. v Ins. Co., 227-1123; 290 NW 82

IX PERSONAL TRANSACTIONS AND COMMUNICATIONS

Delivery of notes. The maker of a promissory note is incompetent to testify against an administrator that he did not deliver promissory notes to the deceased.

Lusby v Wing, 207-1287; 224 NW 554

Creditor of heir. An heir of a deceased is a competent witness to testify against his creditor as to a personal transaction between said heir and his deceased parent.

Lennert v Cross, 215-551; 241 NW 787; 244 NW 693

Incompetency of minor claimant. A claimant against an estate for services rendered to the deceased is not a competent witness to testify to a conversation between her father and the deceased in which the deceased agreed to pay claimant, a minor, for past and future services, even tho claimant took no part in said conversation.

In re Willmott, 211-34; 230 NW 330; 71 ALR 1018

Rendition of services. Plaintiff in an action against an estate for services rendered to the deceased during his lifetime is incompetent to testify to the rendition of the services.

In re Kahl, 210-903; 232 NW 133

IX PERSONAL TRANSACTIONS AND COMMUNICATIONS—concluded

Expectation of payment. A claimant for services rendered as a member of the family of a decedent is incompetent to testify against the executor that she expected to receive compensation for the services performed.

In re Docius, 215-1193; 247 NW 796

Taking part in conversation. Testimony of a claimant in probate as to a conversation between the deceased and a third party, in which claimant took no part, should be stricken from the record, when it is later shown that claimant was present during a material part of the conversation and took part therein.

In re Newson, 206-514; 219 NW 305

Rendition of judgment against party—effect. The fact that judgment has been rendered against one of several defendants on the pleaded cause of action, does not render said judgment defendant a competent witness to testify against an administrator, who is a defendant, as to a personal transaction with the deceased intestate, said transaction being vital to plaintiff's right to recover.

Rawleigh Co. v Moel, 215-843; 246 NW 782

Stookesberry v Burgher, 220-916; 262 NW 820

Proper objector in will contest. All heirs of a testator and all beneficiaries under testator's will are affected by the ordinary probate proceedings for the proof of the will, provided they have had due service by publication of the notice promulgated by the clerk for the hearing of such proof; and when a contest of the will is injected into such proceedings, the recognized proponent of the will, even tho he is not a testamentary beneficiary, and even tho he is holding no official probate position, may, on behalf of such heirs and beneficiaries, validly interpose the objection that contestant is incompetent to testify to personal transactions and communications with the deceased testator.

Blakely v Cabelka, 207-959; 221 NW 451

Intervenor in garnishment proceedings. In garnishment proceedings involving a controversy between a judgment plaintiff and an intervenor claiming the garnished funds under an assignment, the fact that the judgment defendant is an executor of the alleged assignor does not render the intervenor-assignee incompetent to testify to personal transactions and communications with the deceased assignor, it appearing that the executor was disclaiming any interest in said funds.

Shierry v Randall, 214-1053; 243 NW 350

When incompetent testimony harmless. The reception of incompetent testimony in the form of personal transactions with a deceased becomes inconsequential when the issue on which the testimony has bearing is established beyond question by other competent testimony.

Nortman v Lally, 204-638; 215 NW 713

Evidence disregarded. Prohibited evidence, in an equitable action, of a personal transaction between a grantee in a conveyance and the deceased grantor will be disregarded on appeal.

O'Neil v Morrison, 211-416; 233 NW 708

De novo trial in equity—disregarding improper testimony. On trial de novo on appeal in equity cases, testimony given by incompetent witnesses, as to transactions and communications with a deceased person, will be disregarded.

Flint v Varney, 220-1241; 264 NW 277

X NONPERSONAL TRANSACTIONS AND COMMUNICATIONS, AND EXCEPTIONS

Nonpersonal transactions. A party to an action is competent to testify against an executor as to the receipt of letters through the mail, and as to whose signature is attached to the letter; also, as to the physical condition of an instrument when he signed it.

Riggs v Gish, 201-148; 205 NW 833

Authentication of books of account. The claimant against an estate for services rendered to the deceased is a competent witness to testify to the preliminary facts required by the statute (§11281, C., '31) for the authentication of his books of account against the deceased.

In re Davis, 217-509; 248 NW 497

Reading will which decedent held. Testimony of a claimant in probate that she read a certain provision of a will, while the will was being held in the hands of the testator (since deceased), is not testimony relating to a personal communication or personal transaction with the deceased.

In re Newson, 206-514; 219 NW 305

State of mind of donor—parents. A daughter claiming under a gift of land from her deceased parents may testify to a conversation, in which she took no part, between her said parents relative to said gift, not for the purpose of establishing a contract between herself and parents, but for the sole purpose of establishing the state of mind of said parents relative to said gift.

Rapp v Losee, 215-356; 245 NW 317

Nonapplicability of statute. Plaintiff, in an action to set aside the probate of a will on the ground that the deceased was mentally incompetent to execute a valid will, and the wife of said plaintiff, are not incompetent:

1. To testify to the personal appearance and actions of said deceased at a time material to the inquiry, or

2. To testify to statements made in their presence by said deceased in conversation with

other persons, in which conversation said witnesses took no part.

Diesing v Spencer, 221-1143; 266 NW 567

Nonparticipation in transaction. Principle reaffirmed that, under the dead man statute, a witness, otherwise incompetent, may testify to a transaction or conversation in which said witness took no part.

In re Allis, 221-918; 267 NW 683

When interested witness competent. In a proceeding between the maker of a promissory note and the administratrix of the estate of the deceased payee (involving the issue whether said note had been paid), the wife of said maker, tho herself a joint maker of said note, is a competent witness to testify to a conversation and transaction which occurred between her husband and said payee and which strongly tended to establish said payment—provided said witness took no part in said conversation and transaction.

In re Fish, 220-1247; 264 NW 123

Probate claimant's wife. In proceeding on claim against a decedent's estate for an alleged loan, trial court erred in holding that claimant's wife was an incompetent witness as to conversation with decedent wherein he stated that "they should get around to make a note for the $500 he gave him". However since court also found in effect that such evidence would not have been sufficiently definite to establish the claim, such error was not prejudicial.

In re Green, 227-702; 288 NW 881

Decedent's statements concerning will. Decedent's statements, made to the person who drew a will for him, that he wished to make a will and that he wished a certain person to have all his property, were admissible after his death as an exception to the hearsay rule to prove his existing state of mind at the time and to show that his plan was put into effect by making such a will.

Goodale v Murray, 227-843; 289 NW 450

XI OBJECTIONS AND EXCEPTIONS

Failure to object. Failure to object to testimony as to a personal transaction between an interested party and a deceased precludes assignment of error, on appeal, in receiving such testimony.

In re Willmott, 215-546; 243 NW 634

Dead man statute — operation — trial procedure. The dead man statute is placed in operation by objecting to the competency, not of the testimony, but of the witness.

In re Scholbrock, 224-593; 277 NW 5

11258 Exceptions.

Permissible testimony by executor. An executor may, in his own behalf, testify to personal communications had by him with his deceased co-executor.

In re Culbertson, 204-473; 215 NW 761

Administrator — excluding reports as evidence. Reports of an administrator are properly excluded in toto as evidence in his behalf when they contain self-serving declarations and recitals of personal transactions with the deceased as to which the administrator would be incompetent to testify, and when there is no offer to separate the competent matter from the incompetent matter.

In re Manning, 215-746; 244 NW 860

Indirect and uncertain interest of attorney who drew will. The fact that a will directs the executor and trustee to procure the services of a named attorney (who drew the will) in carrying out the provisions of the will, does not render the said attorney incompetent to testify to personal transactions and communications with the deceased.

In re Kenney, 213-360; 239 NW 44; 78 ALR 1189

Cross-examination establishing competency to testify on redirect. Altho being an incompetent witness as to conversations with the deceased, a daughter, objecting to an executor's report because against her share is offset a promissory note which she claims was canceled by the testator, may be rendered competent to testify on redirect examination when conversations with testator were partially inquired into on cross-examination.

In re Morgan, 225-746; 281 NW 346

11260 Husband or wife as witness.

ANALYSIS

I Civil Actions
II Criminal Actions

I CIVIL ACTIONS

Reformation of mortgage. In an action against a husband and wife for the reformation of a mortgage so as to include therein the entire homestead of the parties, the wife is a competent witness to testify against herself and her estate as distinguished from that of the husband; and the same rule necessarily applies to the husband.

Rankin v Taylor, 204-384; 214 NW 725

Deed consideration—no negative fact from affirmative testimony. Positive, uncontradicted testimony of husband and wife, defendants, called to testify by plaintiff, affirming, in their own behalf, fact of consideration for a deed to wife, cannot be held to have proven a negative fact of lack of consideration.

Donovan v White, 224-138; 275 NW 889

Alienation of affections. In an action by a wife for damages for the alienation of the

I CIVIL ACTIONS—concluded

affections of her husband, an information filed by the plaintiff, charging the defendants with having threatened to injure her, is wholly irrelevant and incompetent.

Paup v Paup, 208-215; 225 NW 251

Alienation — unallowable conclusions. The mere conclusions of a plaintiff in an action for damages for alienating the affections of her husband as to what the defendants had done in procuring the enlistment of the husband in the army and thereby effecting a separation of plaintiff and her husband, are wholly unallowable.

Paup v Paup, 208-215; 225 NW 251

Hearsay—improper testimony. Plaintiff in an action against the parents of her husband for damages for alienating the affections of her husband must not, under the guise of showing the state of mind of her husband toward her, be permitted to testify to a recital by her husband of what his parents had said to him about the plaintiff.

Paup v Paup, 208-215; 225 NW 251

II CRIMINAL ACTIONS

Declarations of wife in presence of husband. Declarations of a wife in the presence and hearing of her husband, and undenied by the husband at the time, as to what the husband had done on a certain occasion, are admissible against the husband in a subsequent criminal proceeding against him, wherein the truth of said declarations is material, even tho the wife, if called as a witness against her husband would not be competent to testify to the statements embodied in the declarations.

State v Sharpshair, 215-399; 245 NW 350

Motion to dismiss—improper testimony by wife. A defendant in a criminal case who knows, before the commencement of the trial, that his wife has, before the grand jury, improperly given material testimony against him, must, if he wishes to attack the indictment on such ground, move to quash the indictment. He may not utilize such objection as the basis of a motion for a directed verdict.

State v Smith, 215-374; 245 NW 309

Wife as a witness against husband. The act of the state in calling a woman as a witness against the defendant (who was accused of a felonious assault on a third party) does not constitute reversible error when a preliminary examination, on prompt objection, reveals the fact that the witness is the common law wife of the defendant, and when the witness was thereupon promptly excluded.

State v Smith, 215-374; 245 NW 309

Marriage after return of indictment. A wife, although married to accused after return of the indictment, is nevertheless incompetent as a witness to testify against him.

State v Chrismore, 223-957; 274 NW 3

Marriage as inference of suppressing testimony. It is reversible error in a manslaughter case for the state to call accused's wife as a witness and in the presence of the jury after discovering her relationship, to elicit testimony over accused's objection thereby creating the prejudicial inference that accused's marriage was purposefully to suppress testimony.

State v Chrismore, 223-957; 274 NW 3

11262 Communications between husband and wife.

Communication with third person. A divorced wife is a competent witness to testify to a communication between her former husband and a third person, prior to the divorce.

Stutzman v Bank, 205-379; 218 NW 39

Husband and wife — communications. All communications between a husband and wife during their married life are privileged.

Rodskier v Ins. Co., 216-121; 248 NW 295

Divorced wife's testimony as to venereal disease—nonprejudicial. In a rape prosecution, an unsuccessful attempt to introduce objectionable testimony relative to defendant's affliction with venereal disease, during marriage, by asking divorced wife if she had observed his condition relative to venereal disease, and if she had testified in her divorce action that she had received venereal disease from him, held nonprejudicial error.

State v Donovan, (NOR); 263 NW 516

Dead man statute—payment for services. Where a deceased had taken his nephew, raised him, and promised to pay him for working on decedent's farm, testimony as to statements made by the deceased in conversations wherein deceased had said the boy was to be paid from his estate when he died, may be received from the wife of deceased, the wife of claimant, and the claimant himself, provided they took no part in the conversations.

Gardner v Marquis, 224-458; 275 NW 493

11263 Communications in professional confidence.

ANALYSIS

Witness' competency generally. See under §11255

I PROFESSIONAL COMMUNICATIONS IN GENERAL

Discussion. See 19 ILR 104—Nurses; 24 ILR 538—Professional communications

Physician — confidential communications — admissibility in workmen's compensation case. The statutory rule of evidence that information obtained by a physician from his patient is inadmissible does not apply to workmen's compensation cases.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

Privileged communication—waived in proof of loss for insurance. In an action on a life policy where the beneficiary signed a proof of loss which contained an express waiver of the statute protecting communications in professional confidence, the testimony of a nurse who attended deceased-insured should not have been excluded, as such testimony was within the scope of the waiver.

Luce v Ins. Co., 227-532; 288 NW 681

II ATTORNEY AND CLIENT

Failure to object. One who, without objection, allows an attorney to testify to confidential communications, may not thereafter base error on the reception of such testimony.

Hepker v Schmickle, 209-744; 229 NW 177

Examination by court—error waived by failure to object. Where an attorney testified that he had talked with the defendant with reference to a certain car before preparing a mortgage on the car, and the court questioned him in order to decide whether there had been an attorney-client relationship on which the testimony should be excluded, when no objections were made or exceptions taken to the examination by the court, it was proper to refuse a new trial on the ground that the court had made misleading statements of the law and was guilty of misconduct in discrediting the testimony.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Attorney and client — when not privileged. A client who consults his attorney for the simple purpose of having the attorney put him in touch with a broker, with whom the client could arrange for the sale of property, may not claim that the resulting conversation is privileged or confidential; likewise, if the client's purpose is to obtain such assistance as will enable him to consummate a crime.

State v Kirkpatrick, 220-974; 263 NW 52

Attorney — confidential communications — what is not. A communication made by a client to his attorney relative to the unpaidness of a debt then barred by the statute of limitation, cannot be deemed a confidential communication when made for the very purpose of being communicated to the holder of the barred debt, or to the latter's attorney.

Koht v Dean, 220-86; 261 NW 491

Nonconfidential communications. An attorney for two parties having adverse interests is not disqualified from testifying to communications made to him by one client in the presence of the other client, nor to communications made to him by one client with the intent that they be communicated to the other client.

Lewis v Beh, 206-281; 218 NW 944; 220 NW 126

See Ayres v Nopoulos, 204-881; 216 NW 258

Nonconfidential communications. An attorney is not prohibited from testifying to communications arising out of a transaction between himself and parties who mutually consulted him in regard to contemplated conveyances by one to the other and the rights and duties of each thereunder, no suggestion appearing that any of the parties treated the transaction as confidential.

Crawford v Raible, 206-732; 221 NW 474

Overheard talk between accused and attorney. A witness is competent to testify to a conversation which he overheard between the accused and an attorney relative to the offense charged when the attorney was not an attorney for the accused.

State v Bittner, 209-109; 227 NW 601

Attorney—workmen's compensation settlement confidential. With respect to a workmen's compensation settlement, testimony of an attorney for the deceased workman is a confidential communication not admissible in a hearing to determine the liability of such compensation for deceased's debts, even tho such attorney had also been consulted by the claimant as to the legality of the claim against the compensation money.

Long v Northup, 225-132; 279 NW 104; 116 ALR 1475

III PHYSICIAN AND PATIENT

"Observations" of witness. Testimony by a physician and his attendants, as to their "observations" of a person confined in a state hospital for the insane, is not violative of the statute which prohibits the divulging of confidential communications.

State v Murphy, 205-1130; 217 NW 225

Nonrelation of physician and patient. The relation of physician and patient does not exist between a physician and a person who is examined by such physician, under appointment from the United States government, and for the sole purpose of determining whether said person is entitled to a pension, the said physician neither medically treating nor prescribing for said person.

Cherokee v Ins. Co., 215-1000; 247 NW 495

III PHYSICIAN AND PATIENT—concluded

Expert opinions. The expert opinion of a physician as to the possible cause of an injury, based on no fact obtained from the injured party, does not constitute the disclosing of a confidential communication.

Whitmore v Herrick, 205-621; 218 NW 334

Waiver by act of patient. A physician may testify to facts learned by him in the treatment of a patient when the patient has already detailed said facts to the grand jury or to other persons with whom the patient had no confidential or professional relation.

State v Knight, 204-819; 216 NW 104

Waiver by act of patient. An injured party who describes his injury and exhibits it to the jury thereby waives his right to object to testimony by his physician descriptive of such injury.

Whitmore v Herrick, 205-621; 218 NW 334

Contract waiver. A contract by an applicant for insurance to the effect that any physician who "has been consulted" by him may be examined as a witness as to any matter which the physician has learned from such consultation does not embrace physicians subsequently consulted by the insured.

Pride v Acc. Assn., 207-167; 216 NW 62; 62 ALR 31

Physicians testifying—nonwaiver if one testifies. An injured person who on different occasions is professionally examined and treated by different physicians may call and use as a witness one of the physicians and not thereby waive his privilege as to confidential communications with the other physician.

Pearson v Butts, 224-376; 276 NW 65

Privileged communications—waiver of statute. A waiver, in a policy of accident insurance, of the statute which forbids a physician when testifying to reveal a professional or privileged communication, is operative whether the particular communication be favorable or unfavorable to the insurer.

Miser v Iowa Assn., 223-662; 273 NW 155

Privileged communication—nonapplicable to physician performing autopsy. In an action to recover on an accident policy for the death of insured, where the court excluded testimony of a physician, who performed a post mortem examination but did not treat the patient before death, on the ground of privileged communication between patient and physician, held, court improperly excluded such testimony, since the privilege is purely statutory and for the purpose of encouraging patients to make full disclosure to the physician of all facts to enable him to prescribe and administer the proper treatment. A deceased body is not a patient and the relation of physician and patient ends when the death of the patient ensues.

Travelers Ins. Co. v Bergeron, 25 F 2d, 680

Physician—nonconfidential communications. Questions asked by a physician and answers thereto, which have no relation whatever to anything which may enable the physician medicinally to treat the persons giving the answers, are not confidential communications.

State v Johnston, 221-933; 267 NW 698

Physician — confidential communications — admissibility in workmen's compensation case. The statutory rule of evidence that information obtained by a physician from his patient is inadmissible does not apply to workmen's compensation cases.

Hamilton v Johnson & Sons, 224-1097; 276 NW 841

IV MINISTERS

No annotations in this volume

V STENOGRAPHER OR CONFIDENTIAL CLERK

Professional memorandum by deceased—incompetent when stating no fact. Brief notations on a slip of paper, identified by a deceased attorney's stenographer as made by him at the time a testator conferred with him about the drawing of the will, are incompetent as evidence when the notes do not state any fact. However, their admission in evidence is harmless when the witness had previously testified without objection to the whole of the conversation.

In re Iwers, 225-389; 280 NW 579

VI WAIVER OF PRIVILEGE

Waived in proof of loss for insurance. In an action on a life policy where the beneficiary signed a proof of loss which contained an express waiver of the statute protecting communications in professional confidence, the testimony of a nurse who attended deceased-insured should not have been excluded, as such testimony was within the scope of the waiver.

Luce v Ins. Co., 227-532; 288 NW 681

VII OTHER PRIVILEGED COMMUNICATIONS

Competency—husband and wife—communications. All communications between a husband and wife during their married life are privileged.

Rodskier v Ins. Co., 216-121; 248 NW 295

Waived in proof of loss for insurance. In an action on a life policy where the beneficiary signed a proof of loss which contained an express waiver of the statute protecting communications in professional confidence, the testimony of a nurse who attended deceased-insured should not have been excluded, as such testimony was within the scope of the waiver.

Luce v Ins. Co., 227-532; 288 NW 681

Witnesses — competency — nonmarital communications. A divorced wife is a competent

witness to testify to a communication between her former husband and a third person, prior to the divorce.

Stutzman v Bank, 205-379; 218 NW 39

11267 Criminating questions.

Discussion. See 5 ILB 174—Self-criminating testimony

Rule of evidence does not compel self-incrimination. The statutory declaration (§1966.1) that the finding of intoxicating liquors in the possession of a person under search warrant proceedings, when the liquors have been adjudged forfeited, shall be prima facie evidence that said person was maintaining a nuisance, does not violate the right of said person not to be a witness against himself.

State v Bruns, 211-826; 232 NW 684

Testimony of patrolman. In a prosecution arising from an automobile accident, testimony by a patrolman as to statements made by himself is admissible and not within the purview of statutes pertaining to accident reports and incriminating questions.

State v Weltha, 228- ; 292 NW 148

Blood tests and urinalysis—voluntary submission to tests. Admission of evidence of blood test and urinalysis in prosecution for drunken driving is not objectionable as compelling defendant to be a witness against himself when the evidence disclosed that the analyzed substances were given up voluntarily and without compulsion or entrapment.

State v Morkrid, (NOR); 286 NW 412

Self-debasement. In an equitable action by the state to revoke the license of a physician, the defendant may not base a claim of error in the fact that, over his objections, the court permitted witnesses for the state to expose themselves to public disgrace and ignominy by their testimony.

State v Knight, 204-819; 216 NW 104

Exemption from self-incrimination — nonwaiver. A witness who voluntarily appears before a grand jury, and, without duress or compulsion, testifies to matters which tend to render himself criminally liable for an offense as to which he is not given absolute immunity from prosecution (§11269, C., '35), does not thereby waive his natural, common-law, statutory, and constitutional right to refuse to testify to said matters on the subsequent trial of another party under an indictment returned in whole or in part on the original testimony of said witness.

Duckworth v District Court, 220-1350; 264 NW 715

Statutory privilege. A female upon whom it is alleged a criminal abortion has been committed by a physician may, when called to testify as to what transpired between her and the physician, legally refuse, not on the ground that her answer might render her criminally liable, but on the ground that her answer would expose her to public ignominy.

State v Brown, 218-166; 253 NW 836

11268 Exceptions.

Atty. Gen. Opinion. See '36 AG Op 591

Evidence at preliminary examination. Defendant, on cross-examination, may be examined as to his apparently voluntary testimony given on a preliminary examination in which another was accused of the crime, and not defendant.

State v Kneeskern, 203-929; 210 NW 465

11269 Immunity from prosecution.

Exemption from self-incrimination — nonwaiver. A witness who voluntarily appears before a grand jury, and, without duress or compulsion, testifies to matters which tend to render himself criminally liable for an offense as to which he is not given absolute immunity from prosecution, does not thereby waive his natural, common-law, statutory, and constitutional right to refuse to testify to said matters on the subsequent trial of another party under an indictment returned in whole or in part on the original testimony of said witness.

Duckworth v District Court, 220-1350; 264 NW 715

Nonincriminating grand jury testimony—no resulting immunity. A person involuntarily appearing before the grand jury, tho not asked self-incriminating questions, who later is charged by county attorney's information with falsification of records, a subject connected with the grand jury investigation, may not, by certiorari, review the overruling of a motion to dismiss the information on the ground of immunity because of such grand jury appearance, when a remedy by appeal existed.

Kommelter v Dist. Court, 225-273; 280 NW 511

11270 Previous conviction.

Permissible cross-examination. An accused in a criminal prosecution who, for the manifest purpose of placing himself in the light of an honorable and trusted character, testifies to his former membership on the police force may, on cross-examination, be shown to have secured his said position by falsely representing that he had never been convicted of a felony.

State v Shaw, 202-632; 210 NW 901

Former conviction of different felony. It is not erroneous to ask an accused, on cross-examination, whether he has been convicted of a specific felony, the offense on trial and the one inquired about not being the same.

State v Friend, 210-980; 230 NW 425

Conviction of felony—effect on credibility. The law does not presume that a person who has been convicted of a felony is less worthy of belief than a person who has not been so convicted, and error results from so instructing.

State v Voelpel, 208-1049; 226 NW 770

Discretionary limit to cross-examination. After a witness, on cross-examination, has testified (1) that he is a laborer, (2) that he has been convicted of a felony, and (3) that he is now residing in the county jail, the court may very properly curtail further cross-examination, by excluding questions designed to show that the witness, instead of being a laborer, has been engaged, generally, in bootlegging, and in the commission of larcenies and burglaries.

State v Johnson, 215-483; 245 NW 728

Conviction on testimony of felon. A defendant, in a prosecution for receiving stolen hogs, may be convicted on the testimony of one convicted of a felony and since the weight to be given such testimony is for the jury, when there is a conflict, a directed verdict for the defendant is properly refused. Held, evidence sufficient to convict.

State v Wehde, 226-47; 283 NW 104

Impeachment—effect—duty of jury. A witness at the outset is presumed to be telling the truth and it does not follow that, because there is evidence tending to impeach him, that he has thereby been successfully impeached, or that he has been successfully impeached because he has been attacked. If the jury is of the opinion that he has been successfully impeached, it should disregard his testimony unless some material part of it has been corroborated.

State v Wehde, 226-47; 283 NW 104

Proof of felony conviction not an impeachment. Proof that witness has been convicted of felony does not of itself impeach him, discredit his testimony, nor make him wholly unworthy of belief. Such proof goes only to the weight to be given his testimony by the jury.

State v Wehde, 226-47; 283 NW 104

Former plea of guilty—not conclusive in a civil action. In a civil action the plea of guilty to a criminal prosecution involving the same transaction is admissible as an admission but is not conclusive when the criminal defendant, as a witness in the civil action, gives testimony tending to contradict his plea of guilty.

Boyle v Bornholtz, 224-90; 275 NW 479

11271 Moral character.

ANALYSIS

Good character of defendant. See under §13897 (XIX)

I GENERAL MORAL CHARACTER

General moral character. The general reputation of a witness for good moral character may be shown in rebuttal for impeaching purposes without limiting the reputation to the time in controversy.

State v Reynolds, 201-10; 206 NW 635

Cross-examination as to remote matters. The cross-examination of a good character witness may not be carried into matters which are from eight to twelve years remote from the time of trial.

State v Bell, 206-816; 221 NW 521

Impeachment of witness—proper time limitation. A question calling for the reputation of a witness is properly limited to the present time—the time when he testifies—not to the time of the occurrence concerning which he testifies.

State v Teager, 222-391; 269 NW 348

Unnecessary limitation. Testimony of general bad moral character of an accused and of his bad reputation for truth and veracity need not be limited to the very time of the commission of the offense on trial.

State v Parsons, 206-390; 220 NW 328

Bad moral character—scope of cross-examination. A person testifying to the general bad moral character of a witness may be cross-examined as to the reputation of the witness as to truth and veracity.

State v Smalley, 211-109; 233 NW 55

Limit on cross-examination. A witness who has testified to the good reputation for honesty of an accused in the community where the accused lives can be cross-examined solely and alone as to what the witness has heard in the community in the way of rumors or reports derogatory to the honesty of the accused. In other words, the state may not, on such examination, ask the witness if he does not know that the accused has been charged with or convicted of this or that offense.

State v Bell, 206-816; 221 NW 521

General reputation—sufficiency. The point that a question calls for testimony of the "reputation" of a witness instead of testimony of the general reputation is not raised by the objection of incompetency and immateriality.

State v Dillard, 205-430; 216 NW 610

Qualification of witness. A witness who testifies that he knows the general moral character of a party, may testify thereto, even tho the witness does not reside in the locality in which the impeached party resides.

State v Weber, 204-137; 214 NW 531

Disregarding testimony of witness. The jury must not be instructed that it may disregard the testimony of a witness if it finds

that the general reputation of the witness for truth and veracity is bad.

Jorgensen v Cocklin, 219-1103; 260 NW 6

Unallowable impeachment. Mere witnesses in a criminal prosecution are not impeachable by testimony that their general reputation in the community where they reside is bad as to some particular trait of character.

State v Ferguson, 222-1148; 270 NW 874

Impeachment — dual methods. The common-law rule that a witness may be impeached by showing his bad reputation for truth and veracity in the community where he resides or in which he has recently resided, has not been abrogated or in any manner changed by the statutory provision that the general moral character of a witness may be proved for the purpose of testing his credibility.

State v Teager, 222-392; 269 NW 348

Proof of good character or reputation. Conceding, arguendo, that one accused of being the father of a child may sustain his denial by proof of good character or reputation, yet such evidence must be confined to the traits involved in the charge.

Moen v Fry, 215-344; 245 NW 297

Stolen bonds—good faith purchase. On the issue whether stolen United States liberty bonds had been purchased by a bank in good faith, evidence that the person from whom the bank bought the bonds was a notorious underworld character is inadmissible, it appearing that he was a regular depositor of the bank, and had had prior bond deals with the purchasing bank.

State Bank v Iowa-Des Moines Bank, 223-596; 273 NW 160

II SUSTAINING WITNESS

See annotations under §13897 (XIX)

11272 Whole of a writing or conversation.

Cross-examination—ignoring statute. The concededly wide discretion of the court in controlling cross-examination does not embrace the right to ignore a statute governing such examination. So held where the court allowed the reception of only part of a conversation.

Bond v Lotz, 214-683; 243 NW 586

Cross-examination as to balance of conversation. When part of a conversation relative to the execution of a guaranty is drawn from a witness, the entire conversation may be brought out on cross-examination.

Boyd v Miller, 210-829; 230 NW 851

Cross-examination — permissible redirect. When counsel on cross-examination enters an experimental field of inquiry foreign to the essential issues of the case, he may not complain if opposing counsel exercises his right on redirect to make an exploration into the same field of inquiry with disastrous results to the first offender.

Azeltine v Lutterman, 218-675; 254 NW 854

Details of conversation — legal limits. Details of a conversation between the soliciting agent of an insurance company and the insured, after the issuance of the policy, with reference to a letter to be written by the agent to the company concerning a loss, are not competent when they extend beyond reference to the subject-matter of the letter.

Miller v Mutual Assn., 219-689; 259 NW 572

Harmless error — refusal to admit all of conversation. Error in refusing to permit a witness to fully detail a conversation with another party is harmless when the excluded part is otherwise brought out by other witnesses.

Baehr-Shive Co. v Stoner-McCray, 221-1186; 268 NW 53

Examination—part of conversation—rebuttal. A defendant, who places in evidence a conversation between his witness and the plaintiff, may not complain if on rebuttal the plaintiff inquires of the witness as to the whole conversation.

Churchill v Briggs, 225-1187; 282 NW 280

Cross-examination establishing competency to testify on redirect. Altho being an incompetent witness as to conversations with the deceased, a daughter, objecting to an executor's report because against her share is offset a promissory note which she claims was canceled by the testator, may be rendered competent to testify on redirect examination when conversations with testator were partially inquired into on cross-examination.

In re Morgan, 225-746; 281 NW 346

Offering direct examination makes cross-examination admissible. In an action for conversion of an intestate's property, testimony of a witness on direct examination, given in a prior probate discovery proceeding offered and introduced from the transcript of the discovery proceeding, renders also admissible from such transcript the cross-examination of such witness, as being the whole of the conversation, although under the dead man statute the witness may have been incompetent.

Reeves v Lyon, 224-659; 277 NW 749

Improper rebuttal evidence—motion to strike necessary for review. If the answer of a witness does not properly constitute rebuttal evidence, it should be attacked by a motion to strike, and the court commits no reversible error in permitting it to stand in the absence of objection.

Churchill v Briggs, 225-1187; 282 NW 280

Objections—waiver by introducing exhibit. Objections made by the defendant to testimony

given by the plaintiff's witness on direct examination were not waived when the defendant introduced an exhibit containing written statements made by the witness which tended to weaken his oral testimony. But objections by the defendant to other testimony in the direct examination were waived by statements in the exhibit supporting the testimony to which objections had been made.

Goodale v Murray, 227-843; 289 NW 450

Whole of writing. When a cross-examination is designed to show that a witness had asked plaintiff to sign an untruthful statement of fact, the party calling the witness must be permitted to show by a duplicate original, tho unsigned, just what plaintiff was asked to sign.

Stickling v Railway, 212-149; 232 NW 677

Whole of writing offered—must be on same subject as part offered. In automobile damage action for injuries sustained by plaintiff while riding as a guest of defendant's deceased husband, where, on cross-examination of plaintiff, he was interrogated for impeachment purposes concerning statements made by him as witness in coroner's investigation, and admitted making certain statements, but claimed he was mistaken as to facts, and defendant offered such statements found in coroner's transcript as admission against interest, whereupon plaintiff offered the transcript in its entirety under statute providing the whole of a writing on the same subject may be inquired into, exclusion of transcript by the court was rightful since transcript contained statements made by plaintiff that were not on the same subject as were the answers offered by defendant, as well as being self-serving in character.

Jones v Krambeck, 228- ; 290 NW 56

Documentary evidence — will as entirety when only signature offered. Without an objection thereto or a showing of prejudice, it is not error to admit and send with the jury the entire will of decedent, even tho only the signature was offered in evidence.

In re Cheney, 223-1076; 274 NW 5

Res gestae—execution of notes. In an action on promissory notes executed to a bank by its directors and stockholders in order to prevent an impairment of the bank's capital, testimony is admissible as to what the state bank examiner said, at the time the notes were executed, relative to including the notes in the assets of the bank.

Farmers Bk. v Bunge, 211-1357; 231 NW 651

Indictment as evidence. An indictment is wholly inadmissible to show the guilt of the defendant even tho offered, on cross-examination, in connection with an offer, by the accused, of the minutes of testimony returned with the indictment.

State v Huckins, 212-283; 234 NW 554

11273 Detached acts, declarations, or conversations.

Evidence attending interwoven transactions. Conversations had at the time of entering into a series of contracts at different times may be so closely related to, and so closely interwoven with, a subsequent contract as fully to justify their consideration on the issue whether the latter contract was entered into.

Adamson v McKeon, 208-949; 225 NW 414; 65 ALR 817

Separation of relevant and irrelevant matter. When a conversation relates to two distinct and easily separated subject matters, one relevant and one irrelevant, the latter cannot be deemed admissible simply because it is a part of the conversation as a whole. So held where the conversation related (1) to the manner in which an accident happened and (2) to the insurance carried by the defendant.

Kuhn v Kjose, 216-36; 248 NW 230

Different instruments treated as one. Two instruments executed at the same time and as part of the same transaction constitute, for purposes of construction, one instrument.

In re Barnett, 217-187; 251 NW 59

Declarations in disparagement of title—admissibility. On the issue whether defendant was a donee of certain bonds and had been such prior to the death of the alleged donor, a writing executed by the alleged donee subsequent to the making of the alleged gift, and tending to show ownership at said time in the alleged donor, is admissible against the alleged donee as in the nature of an admission in disparagement of donee's alleged claim.

Malcor v Johnson, 223-644; 273 NW 145

Gifts—self-serving acts. An alleged donee may not affirmatively establish the gift by testifying to his own prior self-serving acts and declarations.

Malcor v Johnson, 223-644; 273 NW 145

Admissibility of letter in action on note. A surety who denies in toto the execution, delivery, and consideration of the promissory note in question, but sees fit to cross-examine his co-defendant principal with reference to a letter written by the principal to the payee with reference to said denied matter, may not complain of the reception in evidence of said letter as a part of his own cross-examination.

Granner v Byam, 218-535; 255 NW 653

Delivery date of policy—other evidence competent. In an action on a life policy to which insurance company pleads a general denial and further pleads a release and settlement, wherein the delivery date of the policy is in dispute, and the insurance company assigns, as error, the exclusion of testimony of an officer of the company concerning underwriting

practices of the company and a letter written by the company to its agent, upon which the agent's reply was indorsed, concerning the date of delivery of the policy, such evidence should have been admitted, and was competent to show that the company honestly believed it had a defense to the policy and explained why the company had the right to reply upon the date appearing upon the receipt for the policy.

Luce v Ins. Co., 227-532; 288 NW 681

Improper rebuttal evidence — motion to strike necessary for review. If the answer of a witness does not properly constitute rebuttal evidence, it should be attacked by a motion to strike, and the court commits no reversible error in permitting it to stand in the absence of objection.

Churchill v Briggs, 225-1187; 282 NW 280

11274 Writing and printing.

Inconsistent provisions as to title. A purchaser may not insist on a "marketable" title in accordance with the printed provisions of a blank form of contract when the typewritten provisions very clearly provide for a title of lesser quality.

Herman v Engstrom, 204-341; 214 NW 588

11275 Understanding of parties to agreement.

Contracts in general. See under Ch 420

Nonapplicability — unambiguous contract. This section has no application to an unambiguous legal written contract.

Iowa Co. v Coal Co., 204-202; 215 NW 229

Nonapplicability—two contracts in question. An instruction to the effect that, if parties had different understandings as to the terms of a contract, that understanding should prevail against a party in which he had reason to suppose that the other understood it, is wholly inapplicable when the issue is whether one or the other of two different contracts was entered into.

Olson v Shuler, 203-518; 210 NW 453

Construction — intent derived from entire contract. Contract should be considered in its entirety in arriving at the intent of the parties.

State v Sprague, 225-766; 281 NW 349

Intention of parties controls. In construing any instrument in writing, the primary object is to arrive at what the parties had in mind when it was drawn.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Parol evidence of execution of oral contract. Oral evidence of the execution of an oral contract, which has been performed or partially performed by one of parties, may be introduced in evidence, altho the witnesses who testified were not present when the contract was made.

Ford v Young, 225-956; 282 NW 324

Contemporaneous facts as aids. Principle reaffirmed that, when a contract is susceptible of different constructions, it is ambiguous, and the conversations, circumstances, negotiations, and conduct of the parties may be looked to as an aid in determining the true construction.

Cedar Rapids Co. v Sec. Co., 208-150; 225 NW 339

Unambiguous contract—parol inadmissible. An unambiguous written contract may not be aided by parol testimony tending to show the sense in which one party had reason to know the other party understood the contract.

Commercial Bank v Crissman, 214-217; 242 NW 355

Ambiguous contract. When a written contract is susceptible of two or more conflicting constructions, the court, in the quest for the proper construction, will give due consideration to (1) the situation of the parties, (2) the circumstances attending the transaction, and (3) the conduct of the parties.

Tucker v Leise, 201-48; 206 NW 258

Right to explain ambiguous clause—limitation on rule. The rule that an ambiguous provision in a written contract may be explained by parol evidence, for the purpose of arriving at a basis on which to rest a legal conclusion as to the meaning of said provision, assuredly does not embrace the right of one party to the contract to show, (1) his understanding of said provision, and (2) the understanding of a former assignee of the contract (at a time when the question of the meaning of the provision had not arisen) as evidence of the understanding which a later assignee had or should have had of said provision.

Zimbelman v Boone Coal, 220-1310; 263 NW 335

Contemporaneous agreements — circumstances attending execution. Principle reaffirmed that contemporaneous agreements as to the same subject-matter will be construed together, and if ambiguity appears, the facts and circumstances attending the execution of the instruments may be received as an aid to construction.

Seeger v Manifold, 210-683; 231 NW 479

Ambiguity—intent—conduct of parties as evidence. In searching for the actual intention of both parties to an ambiguous written guaranty,—in other words, in searching for the proper construction to place on such contract —the court may receive evidence of the conduct of the party to whom the guaranty was given, tending to show that said party, short-

ly after the time the guaranty was executed, and contrary to his present attitude, was placing the same construction thereon as contended for by the guarantor.

West Branch Bank v Farmers Exchange, 221-1382; 268 NW 155

Mutual understanding. When the parties mutually treat a written compromise and settlement as ambiguous, the court will construe it in the light of their testimony as to the circumstances attending the transaction, and if the question be close, some consideration will be given to the fact that one of the parties was the sole author of the disputed language.

Goode v Ry. Exp. 205-297; 215 NW 621; 217 NW 876

Ambiguous contract—mutual interpretation. A cooperative marketing association, which, by written contract separately binds each member of the association to sell and deliver exclusively to the association the milk produced by the member—impliedly from day to day—or "pay as liquidated damages $25 for each and every such failure and breach of contract", will not be permitted to recover from a member said amount for each and every day there is a failure so to deliver, when such interpretation is absolutely contrary to the uniform, mutual interpretation theretofore placed on the contract during a long series of years. Especially is this true because otherwise the court would be compelled to construe the said damage clause as a penalty.

Fort Dodge Assn. v Ainsworth, 217-712; 251 NW 85

Construction against party using words. On the question whether, under a written application for a contractor's bond on a grading contract, the contractor had agreed to pay, when the contract was fully executed, an additional percentage premium on the amount received by him on "overhaul", doubts and uncertainties arising from the noncomprehensiveness of the language used will be construed most strongly against the insurer who solely drafted the application on information solely obtained by himself without fraud on the part of the contractor.

Iowa Cas. v Cram, 209-424; 228 NW 24
See Buser v Land Co., 211-659; 234 NW 241

Construction against party using words. When the construction of a writing which precedes a compromise and settlement is doubtful, the doubt will be resolved against the party who deliberately employed the words in question.

Fairfax Bk. v Coligan, 211-670; 234 NW 537

Spur track to state institution—maintenance cost. After a contract places the burden on the state to pay the cost of construction, maintenance, and operation of a spur track to the industrial school for boys at Eldora, a state institution, and in a later clause requires the railway company to maintain the spur track, the contract as a whole was construed and the apparent ambiguity resolved in a finding that the railroad should do the maintenance work, but that the state should pay the cost.

State v Sprague, 225-766; 281 NW 349

Parol to explain ambiguous contract. A written contract for storage of corn, which makes no provision as to when the seller is to exercise an option to sell nor as to when the storage is to be paid, does not contain the entire agreement entered into, and parol evidence is admissible on the question as to what was reasonable time to perform.

Andreas & Son v Hempy, 224-561; 276 NW 791

Unambiguous contract to sell. An agreement by one party to sell and by another to buy "all gasoline * * * used, kept, or sold" on described premises is quite unambiguous.

Hladik v Noe, 214-854; 243 NW 180

Parol or extrinsic evidence affecting writings—right to enlarge writing. When the written evidence of a contract provides, in effect, that named subject matters shall be controlled thereby, oral evidence is admissible to enlarge said subject matters when the writing on its face reveals the contemplation of the parties to make such addition.

Smith & Co. v Hollingsworth, 218-920; 251 NW 749

Unambiguous contract. An unambiguous contract is self-interpreting. In other words, there is no occasion and no possibility of applying "rules of construction" to such a contract.

Chambers v Bank & Trust, 218-63; 254 NW 309

Rejection of hopelessly indefinite clause. In the construction of a contract, the court may be compelled to wholly reject a hopelessly indefinite clause. So held where a written contract granted to a sales agent the exclusive right to sell on a stated commission in named territory, "except in special cases".

Hawbaker v Laco Co., 210-544; 231 NW 347

Permissible proof of oral contract. Evidence which will be admissible to prove an oral contract to transfer real property must be either in writing or by tangible acts or circumstances definitely referable to the oral agreement, but when such tangible acts are shown, then parol evidence becomes competent to show the specific terms of the contract.

Fairall v Arnold, 226-977; 285 NW 664

Services and compensation—ambiguous contract in re commissions. Contract construed, and held to provide no commission on sales until said sales exceeded a named amount.

Clinton v Music Co., 209-636; 228 NW 664

Ambiguous clause in contract—limitation. In an action to recover commission under real estate broker's contract in which the clause providing for time when commission is due and payable is ambiguous, proof of the circumstances accompanying the execution of the ambiguous instrument is admissible to assist in the interpretation, but not to vary the terms of the instrument.

Mealey v Kanealy, 226-1266; 286 NW 500

Ambiguous clause—effect. In an action to recover commission under real estate broker's contract, which provides for payment of commission upon execution of the contract to which is added the phrase "The commission being due and payable upon the transfer of properties," held, that the last clause is not repugnant to the general purpose and intent of the instrument, its effect being only to modify and not to destroy an element thereof, such limitation cannot be nullified under the guise of interpretation.

Mealey v Kanealy, 226-1266; 286 NW 500

Conflicting clauses—construction as entirety. In an action upon written contract for real estate commission, in which there are conflicting clauses as to time of payment of commission, the rule is that a contract should be read and interpreted as an entirety rather than by seriatim by clauses and that the position of clauses in such instrument is not material nor controlling.

Mealey v Kanealy, 226-1266; 286 NW 500

Contract to bring infringement suits. A contract between a patent owner as licensor and the manufacturer of the patented article as licensee, providing that the licensor receive royalties and should bring suits to prevent infringement upon the patent using royalties received, was fully performed on the part of the licensor when he spent, in bringing infringement suits, more than the amount of the royalties received.

Eulberg v Cooper, 226-776; 285 NW 131

Utility plant—contract and specifications variation first alleged on appeal. A contended variation between the contract for a municipal public utility plant and the specifications, in that the contract omitted the right to call bonds at a certain time, will not be considered on appeal, when such variation, if any, was not an issue in the lower court.

Lahn v Primghar, 225-686; 281 NW 214

Contract for services—question of quantum meruit. In an action against city for engineering services rendered in reconstruction of sewage disposal plant wherein plaintiff bases his claim on quantum meruit, and city contends services were contemplated by contract providing for lump sum compensation, question of liability of city for services on quantum meruit basis held insufficient for jury.

Slippy Corp. v Grinnell, 226-1293; 286 NW 508

Value of services for engineering—inadmissible. In an action against a city for engineering services, consisting of inspection and reconstruction of sewage disposal plant, refusal to admit evidence of value of services rendered within contemplation of contract for lump sum compensation is not error.

Slippy Corp. v Grinnell, 226-1293; 286 NW 508

Alteration of plans — nonabandonment of contract. Where a city council hired an engineer to reconstruct a sewage disposal plant for a lump sum compensation, and thereafter adopted a motion to hire an engineer to investigate the adoption of a "trickling filter system" as a substitute for the original plan, to which the engineer who had been employed protested that the original contract was for the entire engineering work, and where a motion before the council to reject engineer's original plans was lost, but a motion was adopted to instruct the engineer to change the original plans, nevertheless the adoption of such motion to change original plans was not an abandonment of the original contract as respects the right of the engineer to compensation.

Slippy Corp. v Grinnell, 226-1293; 286 NW 508

Mutual partial modification—remainder in force. In a well drilling contract, a provision to use 4-inch casing all the way to the bottom of the well may be subsequently modified by an oral agreement to use 3-inch pipe, implied from the conduct of one party in accord with a change proposed by the other; but such a modification will not, necessarily, also modify the contract price per foot for the drilling.

Collins v Gard, 224-236; 275 NW 392

Requisites—implied from conduct. A contract implied in fact, differing from an express contract only in the method of proof, may be inferred under certain circumstances from acts and conduct justifying a promisee in understanding a promisor intended to contract.

Snell v Kresge Co., 223-911; 274 NW 35

Renewal of written contract by conduct. Where a heating plant owner contracted to furnish to a storekeeper heat for a period of one year at the termination of which no new written nor verbal contract was made, but for seven years more the heat was furnished and accepted at the same price as in the original agreement, until discontinued at nearly the end of the 1933-34 season, in an action to recover the contract price for the 1933-34 year's heat, a contract would be implied from the

storekeeper's conduct, to pay the contract price regardless of fact that storekeeper shut off some of the radiators.

Snell v Kresge Co., 223-911; 274 NW 35

Parol testimony—deed as mortgage. Parol testimony is admissible to show that deed was in fact a mortgage and was so intended.

Rance v Gaddis, 226-531; 284 NW 468

Easement rights omitted from deed—evidence. When land was purchased under a contract providing that the deed would grant an easement of the right of ingress and egress to the property, and that the exact description of the easement would be made a part of the deed, but such description having been omitted, it was proper, in purchaser's action to assert such easement rights, to admit extrinsic evidence to show the exact location of the easement.

Dawson v McKinnon, 226-756; 285 NW 258

Royalties to pay costs of infringement suits—nonrepugnant provisions. A provision in a patent license contract which provided that the amount spent by the licensor in bringing suits to prevent patent infringements should not exceed the amount of royalties received by him, was not repugnant to other clauses providing that such suits should be brought by the licensor, or if not brought by him, the licensee could use the royalties to bring such suits.

Eulberg v Cooper, 226-776; 285 NW 131

Escrow agent's memorandum made in absence of parties. An escrow agent's understanding of the arrangement by which he was to record deeds after the death of the grantor, noted on the envelope in the absence of the parties, is not admissible in evidence as to the substance of the arrangement and would be of doubtful evidentiary value even if admitted.

Bohle v Brooks, 225-980; 282 NW 351

Parol or extrinsic evidence—testator's or grantor's meaning admissible. Where such terms as children, grandchildren, or nephews are used in a will or a deed, and there are both legitimates and illegitimates and the testator has full knowledge of such fact, and the intention of the testator is not clearly expressed in the will, the use of such words creates no presumption, but the word is a neutral one and an ambiguity exists, and the intention of the testator or grantor must be determined not only from the provisions of the will, but also in the light of the circumstances surrounding the execution of the will, and parol evidence is admissible to prove the intent of the testator or grantor.

In re Ellis, 225-1279; 282 NW 758; 120 ALR 975

Individual liability of corporate stockholders. When two individuals who owned practically all of the stock in a corporation executed as individuals a contract in the name of the corporation, without advising the other party to the contract of the corporate character, they could not later deny individual liability, although the performance was by the corporation which in effect acted as their agent in executing the contract.

Eulberg v Cooper, 226-776; 285 NW 131

Allowable conclusion—ownership of note. It was not error for the court to permit the plaintiff, in an action on a note, to testify that he was the owner of the note over an objection that such testimony was the conclusion of the witness.

Ballard v Ballard, 226-699; 285 NW 165

Absence of ambiguity. When the terms employed in a policy of insurance are plain and unambiguous there is no room for the application of the oft-quoted rule that the policy must be construed most strongly against the insurer.

Field v Southern Sur., 211-1239; 235 NW 571

Release on basis of mistaken diagnosis. Where a settlement and release of a personal injury claim involved a mistaken diagnosis by the injured person's doctor, his statements are binding on the defendant, altho he was not connected with the defendant or its liability insurance carrier, since the inquiry, not involving fraud, centers on the existence of and good-faith reliance on the mistaken diagnosis.

Jordan v Brady Co., 226-137; 284 NW 73

Delivery date of policy. In an action on a life policy to which insurance company pleads a general denial and further pleads a release and settlement, wherein the delivery date of the policy is in dispute, and the insurance company assigns, as error, the exclusion of testimony of an officer of the company concerning underwriting practices of the company and a letter written by the company to its agent, upon which the agent's reply was indorsed, concerning the date of delivery of the policy, such evidence should have been admitted, and was competent to show that the company honestly believed it had a defense to the policy and explained why the company had the right to rely upon the date appearing upon the receipt for the policy.

Luce v Ins. Co., 227-532; 288 NW 681

Assignment of rent construed. In construing the provisions of a settlement wherein a judgment debtor agreed to assign to his judgment creditor "* * * the amount due from the tenant * * *" of the debtor on certain real estate, the same "* * * being all rentals * * *" for a certain year, held, that federal agricultural conservation payments received by the debtor on the land in question were not in contemplation of the parties. Hence creditor was not, on the basis of said assignment, entitled to these payments.

Cooke v Harrington, 227-145; 287 NW 837

Consideration and acceptance. Where a note was sent for the purchase price of land in partition, and though objections were made to it because the signature was not in ink, a judgment for the plaintiff on the note was warranted when there was evidence on which the jury could have found consideration for the note and that it was later accepted by the plaintiff after learning that the penciled signature was valid.

Ballard v Ballard, 226-699; 285 NW 165

Parol to show circumstances attending making of mutual wills. Even tho extrinsic evidence is inadmissible to vary or change the terms of a will, yet evidence may be admitted to show circumstances which accompanied or attended making of the instrument, or to identify papers or writings which in fact constitute the will, especially where it is claimed that two or more writings made at or about the same time are part of a single transaction and together constitute in law a single will.

Child v Smith, 225-1206; 282 NW 316

Contract to will property—past consideration. Altho past services or past indebtedness may be a lawful consideration for an agreement, the parol evidence of such past services or indebtedness will not establish a contract by which the debtor agrees to sell or transfer his property by will in satisfaction of such services or debt.

Fairall v Arnold, 226-977; 285 NW 664

Long continued mutual construction—effect. A written guaranty by the seller of the assets of a bank "of all outstanding paper to the extent of 93 percent owing said bank at this time" will be construed as guaranteeing 93 percent of each individual piece of commercial paper, when such construction was the construction placed upon the contract by both parties thereto on numerous occasions subsequent to the execution of the contract.

Tucker v Leise, 201-48; 206 NW 258

11276 Historical and scientific works.

Medical works — examination concerning. Prejudicial error results from permitting a physician, defendant in an action for malpractice, to be cross-examined as to the contents and teaching of scientific works on medicine, when the witness has not testified, directly or indirectly, as to such works.

Wilcox v Crumpton, 219-389; 258 NW 704

Medical works — unallowable reception. Error results from permitting a party on the direct examination of his own expert witness to read extracts from a medical work, and then to ask the witness if he agrees with the statement so read.

Morton v Ins. Co., 218-846; 254 NW 325; 96 ALR 315

11278 Handwriting.

Expert witnesses generally. See under §11329

Discussion. See 7 ILB 55—Handwriting—instructions

Effect of expert testimony. Competent expert testimony as to the genuineness of a signature is admissible notwithstanding an element of weakness therein.

McColl v Jordan, 200-961; 205 NW 838

Handwriting experts—probative value. Conceding, arguendo, that the testimony of experts on handwriting is not of the highest order, nevertheless, under proper circumstances, such testimony has probative value.

State v Manly, 211-1043; 233 NW 110

Examination of expert. An expert witness may testify that a signature "looks like" the signature of the party in question; likewise that a given signature is "in his judgment" genuine.

McColl v Jordan, 200-961; 205 NW 838

Limitation on nonexpert. A nonexpert witness may not testify that the signature to an instrument "looks like" or "resembles" the genuine signature of a named person. Such a witness is competent to testify only to his belief or opinion.

Schram v Johnson, 208-222; 225 NW 369

Unallowable standard. Manifest error results, in the trial of the issue of handwriting, from admitting in evidence writings as standards for comparison without proof that the person in question wrote the standards.

State v Debner, 202-150; 209 NW 404

Proper standard for comparison. Proof that a party whose handwriting is in question admitted writing a certain exhibit renders the exhibit admissible as a proper standard for comparison.

State v Debner, 205-25; 215 NW 721

Examination—unallowable conclusion. It is not allowable to ask a witness whether a named person "admitted" writing a named instrument. The question should call for what was said.

State v Debner, 202-150; 209 NW 404

Disparaging expert testimony—instructions. A party who requests an instruction which emphasizes the superiority of positive over expert testimony as to the genuineness of handwriting may not complain that the court gave an instruction which fully embodied the idea of the requested instruction, but which more sharply, but correctly, emphasized the inferiority of expert testimony generally.

Keeney v Arp, 212-45; 235 NW 745

Non-issue as to signature. When it is practically conceded, under the evidence, that a party did not himself sign a promissory note

(tho his name is signed thereto), the fact that the record contains an admitted signature of the party imposes no obligation on the court to permit the jury, by a comparison of signatures, to find that the party did, himself, sign the note.

West Chester Bank v Dayton, 217-64; 250 NW 695

Cross-examination. The cross-examination of an expert witness, a banker, who has testified to the genuineness of a signature to a promissory note in suit, may not be carried to the extent of questioning the witness as to his course of action in case supposed checks were presented to his bank for payment, when the answers, whatever they might be, can have no legitimate bearing on the credibility, qualification, competency, accuracy, or mental attitude or bias of the witness.

Keeney v Arp, 212-45; 235 NW 745

Signatures — jury question. The mere introduction in evidence of genuine signatures of a party in order to establish the plea that the purported signature of the party to a written release is a forgery does not generate a jury question on the issue of forgery, irrespective of other ample evidence persuasively showing that the signature to the release is genuine.

Vande Stouwe v Life Co., 218-1182; 254 NW 790

Expert and jury comparison. On the issue whether certain signatures on checks are purely fictitious and were in reality written by a named existing party, experts in handwriting and the jury may compare said signatures with the admitted or proven handwriting of said named party.

Kruidenier Est. v Trust Co., 203-776; 209 NW 452

Denial of signature—jury question. A jury question is presented on the issue of the genuineness of a signature denied under oath, (1) by admitted signatures as to the genuineness of which reasonable minds might differ, after comparison with the original; (2) by expert testimony of a not very persuasive nature that the signature was genuine; (3) by testimony tending to show that the party had recognized the indebtedness as her own, and had (impliedly at least) recognized the genuineness of her signature, but had belatedly denied it; and (4) by testimony tending to show that she had adopted the signature as hers, even tho she had not physically affixed it to the instrument.

McColl v Jordan, 200-961; 205 NW 838

Conclusiveness of proof. The court may not say that the genuineness of a signature, duly put in issue, is conclusively established solely by expert opinion evidence of its genuineness, and thereby rightfully exclude the jury from passing upon the issue.

In re Richardson, 202-328; 208 NW 374

Comparison by jury. If complainant concedes that an instruction is correct insofar as it characterizes, as of a low order, expert testimony concerning the genuineness or nongenuineness of signatures, then complainant may not complain that comparisons of handwriting by jurors are characterized in the said instruction as of an equally low order.

In re Wood, 213-254; 237 NW 237

Genuineness of signature on note—jury question. Where in an action on a promissory note the defendant in his answer denies under oath the genuineness of the signature, a jury question is generated by positive testimony of the payee that the purported maker did sign the note, together with expert testimony on handwriting tending to prove that the signature was genuine, met by equally positive testimony by the purported maker that he did not sign the note.

Seibel v Fisher, 213-388; 239 NW 34

Will as entirety when only signature offered. Without an objection thereto or a showing of prejudice, it is not error to admit and send with the jury the entire will of decedent, even tho only the signature was offered in evidence.

In re Cheney, 223-1076; 274 NW 5

Handwriting expert — striking evidence — curing error. If evidence, erroneously admitted during the progress of a trial, is distinctly withdrawn by the court, the error is cured, except where it is manifest that the prejudicial effect on the jury remained despite its exclusion. Testimony by a handwriting expert, who referred to notes, which were merely the basis or reason for his opinion as to the genuineness of signatures to a will, held not within the exception.

In re Iwers, 225-389; 280 NW 579

Forged signatures—expert testimony to overcome. While an acknowledgment by a notary is presumptively true and requires clear and convincing evidence to overcome it, yet by statute it is not conclusive, and the court acting as a jury may find, after reviewing the conflicting testimony of handwriting experts, properly received, that signatures to transfers and assignments of assets of an estate, attacked by an administrator de bonis non, were forgeries.

Brien v Davidson, 225-595; 281 NW 150

Scientifically demonstrated fact. Evidence consisting of microscopic inspection, magnified photographs, or chemical tests, may so demonstrate the nongenuineness of a writing as to become substantive evidence. It follows that such evidence not being mere expert testimony is not subject to the disparagement usually and ordinarily applied to expert testimony.

Keeney v Arp, 212-45; 235 NW 745

Handwriting photographs — court's discretion. Photographs of handwriting, altho bearing explanatory markings made by the expert witness, are proper evidence to aid the jury's comparison of the disputed signature on a will, as well as to explain expert testimony and their admissibility is largely within the trial court's discretion.

In re Cheney, 223-1076; 274 NW 5

11279 Private writing—acknowledgment.

Documentary evidence generally. See under §11254 (II)
Instruments affecting realty or adoption of minors as evidence. See under §11289, Vol I

Hotel register—dual purpose. A hotel register may become material and therefore admissible in evidence, not only for the purpose of impeaching a witness who asserted he had registered at the hotel, but as tending to show the presence of the witness at the time in question at the scene of an accident.

Ritter v City, 212-564; 234 NW 814

Documentary evidence—improper disregard of. The court, in its quest for a fact, may not, by assumption based on speculation or inference, refuse to accord force and effect to undisputed, unimpeached, and nondiscredited documentary evidence which unequivocally establishes said fact, especially when the fact arises out of a somewhat remote transaction, and when the party carrying the burden of proving said fact is hampered in his proof by reason of the death of parties who had knowledge of said transaction and by his own incompetency resulting from said deaths.

In re Allis, 221-918; 267 NW 683

11280 Entries and writings of deceased person.

Documentary evidence—necessity to identify. Pages of a book containing various notations, memoranda, and accounts in the handwriting of a deceased administrator are not admissible in an action to establish a shortage on the part of said administrator without some proper proof identifying said book as the book in which the administrator kept his accounts relative to the estate in question.

Varga v Guar. Co., 215-499; 245 NW 765

Professional memorandum by deceased. Brief notations on a slip of paper, identified by a deceased attorney's stenographer as made by him at the time a testator conferred with him about the drawing of the will, are incompetent as evidence when the notes do not state any fact. However, their admission in evidence is harmless when the witness had previously testified without objection to the whole of the conversation.

In re Iwers, 225-389; 280 NW 579

Revival of contract by undelivered check. In an action by a widow to establish a claim against deceased husband's estate based on an oral contract to repay a loan made by appellant widow to decedent prior to November 1, 1912, wherein the widow offers evidence of a check purported to have been issued to widow by husband for "interest 1935, 6 months" and deposited by him in joint account with his wife, and it is claimed by appellee that since check was not delivered to appellant widow nor to anyone acting for her, the writing is insufficient, held, such memorandum need not be delivered to opposite party nor his agent nor a person in privity with him, but is sufficient if it is signed and in any way promulgated so as to become an instrument of evidence.

Leland v Johnson, 227-520; 288 NW 595

Accounts—interest items posted. In an action by a widow to establish a claim against the estate of her deceased husband based on an alleged oral contract of decedent to repay a loan of money made by appellant widow to decedent, prior to November 1, 1912, to which the statute of limitations was pleaded, held, mere posting of items of interest applicable to one individual transaction is insufficient to show a "connected series of transactions" so as to convert the matter into a "continuous, open, current account" under statute providing cause of action accrues on date of last item, as this means a connected series of transactions.

Leland v Johnson, 227-520; 288 NW 595

11281 Books of account—when admissible.

Discussion. See 7 ILB 88—Regular entries, books of account

ANALYSIS

I Books of Original Entry
II Preliminary Proof
III Admissibility

Accounts deemed true. See under §11204

I BOOKS OF ORIGINAL ENTRY

Insufficient proof of claim. A claim for extra work is not proved by the production of the contractor's books of account showing items of time employed, and made up from oral statements by workmen who were not called as witnesses, neither the contractor nor the bookkeeper having any personal knowledge of the correctness of the items.

Van Dyck Co. v Bldg. Co., 200-1003; 205 NW 650

Books of accounts made from sales slips. A book of accounts showing the date of purchase, nature of article sold, and amount, made up from sales slips, constitutes a book of original

I BOOKS OF ORIGINAL ENTRY—concluded

entries, all other statutory elements of such books being made to appear.

Younker Bros. v Meredith, 217-1130; 253 NW 58

Counter slips and sales tickets. In seller's action for lumber sold, counter slips and sales tickets held inadmissible as "books or records of original entries" where slips were offered in whole, covered many transactions not involved in action, were not consecutively dated, and showed changes.

Alquist v Thompson, (NOR); 251 NW 509

II PRELIMINARY PROOF

Documentary evidence—insufficient authentication. A purported financial statement of a corporation is manifestly inadmissible, in the absence of testimony as to its authenticity or as to the author thereof and the circumstances of its preparation.

Helberg v Zuck, 201-860; 208 NW 209

Transaction with deceased — authentication of books of account. The claimant against an estate for services rendered to the deceased is a competent witness to testify to the preliminary facts required by the statute for the authentication of his books of account against the deceased.

In re Davis, 217-509; 248 NW 497

Witnesses qualifying books of account. Statute prohibiting testimony concerning transactions or communications with a person now deceased does not render a claimant against the estate incompetent as witness to testify to preliminary facts required for authentication of books of account, admissibility of which is permitted by statute.

In re Cummins, 226-1207; 286 NW 409

Ledgers — correctness — who may testify. Testimony of vice-president of bank as to correctness of ledger held inadmissible where it appeared that ledger was posted by assistant cashier and bookkeeper.

Andrew v Bank, (NOR); 213 NW 271

Claim for loan based on alleged book of accounts. Where claimant's evidence of loan of $1,000 based on book of accounts is held inadmissible, testimony of payment of interest and admission of existence of loan by decedent standing alone, held insufficient to prove all facts necessary to establish claim against estate of decedent, as required by statute.

In re Cummins, 226-1207; 286 NW 409

III ADMISSIBILITY

Genuineness of corporate records. In an action against the secretary of a corporation individually, the record proceedings of the corporation are admissible against him, when material, upon an admission by such secretary that he believed them to be such records, even tho he states such belief as a conclusion, or bases his belief on hearsay, and even tho he states that he does not know that they were correctly kept.

Helberg v Zuck, 201-860; 208 NW 209

Deposits—stated account. Principle reaffirmed that the monthly and customary statement of a bank to its customer of the condition of the customer's account becomes an account stated after the lapse of a reasonable time without objection by the customer.

Pierce v Bank, 213-1388; 239 NW 580

Slips containing account—admissibility as original entries. Where account books were not kept, slips containing original entries of the account were admissible.

Edwards v Cooper, (NOR); 222 NW 376

Corporate books and records. In a prosecution, under the securities act, of an officer of a corporation for having made, before the secretary of state, a false statement relative to the financial condition of the corporation, the corporate books and a tabulated statement and summary thereof, properly identified, are admissible.

State v Dobry, 217-858; 250 NW 702

Bank ledger. It is not erroneous to receive in evidence the ledger of a bank for the purpose of showing the credits of a depositor, the correctness of such book being first established; and it is immaterial that the account reveals credit items not in controversy.

Ryan v Cooper, 201-220; 205 NW 302

Summary of books and records. Principle reaffirmed that a duly identified and verified summary of voluminous books and records may be admissible in connection with said books and records.

State v Dobry, 217-858; 250 NW 702

Books of account to prove loan of money. In an action to establish a probate claim based on alleged loan to decedent, alleged to be shown in his "book of accounts", which consisted merely of vest-pocket size memorandum book in which appeared an entry indicating a loan to decedent with interest payments, such "book of accounts" is not admissible where evidence was wholly insufficient to establish the claimant as engaged in general banking business or paying out or loaning money to others.

In re Cummins, 226-1207; 286 NW 409

Fair valuation of accounts. The fair valuation of accounts is that amount which, with reasonable diligence, can be realized from their collection within a reasonable time, and the amount as shown on the face of ordinary retail business accounts is not usually their fair

value, tho of course accounts may be such that their face value, as a matter of fact, is their fair value.

Matthews v Engineering Co., 228- ; 292 NW 64

Mere memoranda. Mere memoranda book entries, when material, are admissible on proper foundation. So held as to entries tending to show when a note was received by a bank.

Farmers Bk. v De Wolf, 212-312; 233 NW 524

Admissibility in aid of memory. Memoranda of account, the correctness of which is verified by the oath of the witness, may be admissible, in connection with his testimony, as an aid to him in remembering the transactions noted therein.

Madison Bank v Phillips, 216-1399; 250 NW 598

False tax returns—corporation books admissible evidence. In a prosecution of corporate officers for conspiracy to defraud government by filing false income tax return of corporation, the books of the corporation, together with summaries obtained by expert accountants, are admissible as tending to show what the taxable income of the corporation was represented to be, where such books were present and available for cross-examination.

Cooper v United States, 9 F 2d, 216

Meeting statutory proof requirements. Before proper books of account may be received in evidence, the party offering the same must introduce proof to meet all requirements of statute.

In re Cummins, 226-1207; 286 NW 409

11283 Photographic copies.

Photographs and X-rays generally. See under §11254 (II)

X-ray sciagraphs — sufficient foundation. Proof that certain X-ray sciagraphs were taken, for the use of the attending physician, by an expert in that science, and other circumstantial evidence tending to show the correctness of such sciagraphs, furnish sufficient bases for their introduction as evidence, even tho no witness specifically asserts that they "correctly portray the condition of the body affected".

Wosoba v Kenyon, 215-226; 243 NW 569; 1 NCCA(NS) 747

X-ray pictures. Foundation for the admissibility of X-ray pictures may be established by the testimony of the technicians who took or interpreted the pictures.

Bauer v Reavell, 219-1212; 260 NW 39; 1 NCCA(NS) 761

Photographs — essentials for admission. Within the sound discretion of the court, a photograph is admissible in evidence when taken under conditions similar to those material to the inquiry to which it relates, and an instruction may call the jury's attention to the difference in lighting conditions at time an injury occurred, and at the time the picture was taken.

Riggs v Pan-American Co., 225-1051; 283 NW 250

11284 Notarial certificate of protest.

Allowable and unallowable proof. Testimony tending to show the contents of a lost official notarial certificate of protest of a promissory note is inadmissible, but the facts constituting a legal protest of the note may, in such case, be established by any competent oral testimony.

Frank v Johnson, 212-807; 237 NW 488; 75 ALR 128

11285 Statute of frauds.

Discussion. See 21 ILR 653—Oral contract to make will

ANALYSIS

Antenuptial contracts generally. See under §11990 (IV)
Express, resulting, and constructive trusts. See under §10049
Sales of personal property. See under §9933

I STATUTE IN GENERAL

Discussion. See 4 ILB 185—Foreign contracts; 21 ILR 630—Applicability to foreign contract

Scope of statute. The statute of frauds is applicable to cases in which a contractual obligation is the basis of recovery; not to cases wherein the basis of recovery is a breach of duty in a fiduciary relationship.

Farmers Bk. v Kaufmann, 201-651; 207 NW 764

Separate writings. A contract is taken out of the statute of frauds by two separate writings each containing internal reference to the other, and together constituting a complete contract.

Boyd v Miller, 210-829; 230 NW 851

Oral contract to will property. Where the plaintiff had done work for a woman who was ill, and had been promised that she would give him certain property in her will in return for the services, and plaintiff seeks specific performance of the agreement, claiming as consideration his oral agreement not to file a claim

I STATUTE IN GENERAL—concluded

against the estate for the services until after such claim had been barred by the statute of limitations, such oral agreement was only the manner adopted for extinguishing the claim for the past services and the consideration for the oral agreement was the cancellation of the claim for the services and the discharge and compromise of the obligation which had accrued.

Fairall v Arnold, 226-977; 285 NW 664

Accommodation paper. Evidence that promissory notes were accommodation paper and that the party accommodated was the real debtor, is not a violation of the statute of frauds.

Flack v Bank, 211-15; 228 NW 670

Fatally belated objection. The objection that evidence was inadmissible under the statute of frauds may not be presented for the first time on appeal.

Heflen v Brown, 208-325; 223 NW 763

Parol evidence—fraud in procuring deed. Where deed containing recital of consideration was obtained by fraud, the grantor is not precluded as a matter of law from showing a constructive trust arising from the fraud, and equity will allow such showing to be made by parol evidence, but such evidence must be clear and satisfactory.

Rance v Gaddis, 226-531; 284 NW 468

II CONTRACT IN GENERAL AND SUFFICIENCY THEREOF

Discussion. See 1 ILB 185—Mutuality—statute of frauds.

Express contract. To constitute an "express contract" there must have been an offer and acceptance as to the same thing. Usually an agreement is arrived at by means of an expressed or implied proposal or offer from one side, expressly or impliedly accepted on the other, but formality in proposing and accepting is not required, providing there is an intention to assume legal liability as distinguished from a mere ebullition of emotion or expression of intention to do an act of generosity. A promissory expression without intention to contract is not sufficient.

In re McKeon, 227-1050; 289 NW 915

Sale of goods—unenforceable contracts. Replevin for the possession of an existing article of personal property cannot be maintained when the action is based solely on an oral contract of purchase which is clearly within the statute of frauds, and under which contract title necessarily did not pass.

Lockie v McKee, 221-95; 264 NW 918

Contract to devise. Principle reaffirmed that a parol contract on due consideration to devise or leave property to another, is shown by clear and convincing testimony, is enforceable, especially when the contract is corroborated by declarations of the alleged grantor against his own interest, and when the equities are strongly in favor of the alleged grantee.

Kisor v Litzenberg, 203-1183; 212 NW 343

Adoption by estoppel—surrender of child as consideration. An oral contract to adopt a child, not followed by legal adoption, was not within the statute of frauds when part of the consideration, the surrender of the child, was given at the time the agreement was made. So the child was entitled to specific performance of the contract even tho it was contended that the contract was void under the statute of frauds of a foreign state.

Vermillion v Sikora, 227-786; 289 NW 27

III CONTRACTS IN CONSIDERATION OF MARRIAGE

Discussion. See 12 ILR 164—Evidence of oral antenuptial contract

Marriage settlements. A written instrument purporting to be an antenuptial contract waiving all interest which each of the contracting parties would have after marriage in the property of the other, but shown to have been actually signed after marriage, will not bar such property interest when the instrument neither recites (1) that it was executed for the purpose of furnishing evidence of a previous antenuptial oral contract nor (2) that it was executed in consideration of a previous oral antenuptial contract.

Battin v Bank, 202-976; 208 NW 343

Marriage settlements—antenuptial contract—proof. Record held to establish, by copy, an antenuptial contract, the original being lost.

Fraizer v Fraizer, 201-1311; 207 NW 772

Antenuptial agreement—sufficiency of evidence. Evidence held sufficient to show execution of antenuptial agreement precluding widow from dower share.

In re Dunn, (NOR); 224 NW 38

Agreements in consideration of marriage—strangers to contract. A contract made in consideration of marriage is provable against parties who are strangers to such contract.

Benson v Burgess, 214-1220; 243 NW 188

IV DEBT, DEFAULT, OR MISCARRIAGE OF ANOTHER

(a) CONTRACTS WITHIN STATUTE

Oral promise to pay orally compromised debt. An oral agreement to pay the debt of another is not taken out of the statute of frauds because the debt arose out of an oral agreement of compromise.

Leytham v McHenry, 209-692; 228 NW 639

Extension of time—insufficient consideration. An oral promise to pay the debt of another person if the creditor will give such other person—the original debtor—an extension of time in which to pay, is within the statute of frauds.

Leytham v McHenry, 209-692; 228 NW 639

Widow's groceries—nonliability of administrator. Administrator who has paid testator's widow more than amount to which she was entitled prior to alleged promise to pay for groceries furnished to widow held not authorized to make payment out of estate for such groceries.

Yoss v Sampson, (NOR); 269 NW 22

(b) CONTRACTS NOT WITHIN STATUTE

Oral contract of indemnity. An oral contract to indemnify and hold harmless a party if he would sign as surety a promissory note of the promisor's son, is an original undertaking and consequently not within the statute of frauds.

Kladivo v Melberg, 210-306; 227 NW 833.

Promise arising out of new consideration or benefit. The oral promise of a bank, upon receipt from a tenant of checks for grain sold, to pay the amount then due the landlord as rent is not within the statute of frauds as a promise to pay the debt of another.

Tracewell v Sanborn, 210-1324; 232 NW 724

Promise to pay debt of another—consideration. Tho the vendee of a stock of goods did not, in making the purchase, assume the payment of an outstanding account for goods, yet his later written promise to pay said bill if the creditor would extend the time of payment and furnish additional stock for the store —which was done—is supported by ample consideration.

Smith Co. v Carmichael, 221-301; 264 NW 65

Promise to answer for debt of another—promise prior to any indebtedness. A defendant who is simply an old acquaintance of a deceased, and who, before any funeral expenses are contracted, orally promises to pay such expenses may not say that he contracted to pay the debt of "another".

Samuels Bros. v Falwell, 215-650; 246 NW 657

Promise to answer for debt of another—direct and original agreement. An oral contract for services to be performed on the lands of third parties, and an oral and unconditional promise to pay for said services, are not within the statute of frauds as a promise to pay the debt of said third parties.

In re Davis, 217-509; 248 NW 497

Original promise. An agreement by a vendor of real property with his purchaser to pay for the making of certain improvements on the property is an original promise, and not within the statute of frauds.

Madden v Roofing Co., 205-783; 218 NW 466

Promise to reimburse party. The promise of the accommodation maker of a promissory note to reimburse the indorser, for assisting in paying the note, out of the amount collected from the principal maker, bears no semblance to a promise to pay the debt of another.

Hirtz v Koppes, 212-536; 234 NW 854

Agreement for contribution. An oral agreement between the directors of a bank to the effect that, as between themselves, each would be liable on a promissory note (given for the benefit of the bank) in proportion to the stock holdings of each, is not within the statute of frauds as an oral promise to pay the debt of another.

Adamson v McKeon, 208-949; 225 NW 414; 65 ALR 817

Promise to answer for debt of another—oral guaranty by bank of payment of director's mortgage. Testimony that a bank, acting through its board of directors, orally guaranteed the payment of the personal mortgage of one of said directors, is incompetent under the statute of frauds.

Lindburg v Engster, 220-1073; 264 NW 31; 116 ALR 591

Debt of another—basis for objection—unnecessary pleading. A defendant, who has duly denied the alleged making of a contract to answer for the debt of another, needs no further pleading on which to base, during the trial, an objection that oral testimony is incompetent to establish such contract.

Lindburg v Engster, 220-1073; 264 NW 31; 116 ALR 591

Debt of another—unallowable implied contract. The law, after refusing, under the statute of frauds, to permit a contract to answer for the debt of another to be established by incompetent parol testimony, will not imply a contract on the part of the alleged obligor to answer for the debt of said other person, or hold said obligor estopped to deny such obligation.

Lindburg v Engster, 220-1073; 264 NW 31; 116 ALR 591

Original or collateral promise. The statute of frauds relative to answering for the debt of another does not enter into the proof of an oral contract to the effect that plaintiff should perform stated services and that the defendant would unconditionally pay therefor.

Richmann v Beach, 201-1167; 206 NW 806

Notice of release after promising to pay for goods furnished to third person. A landlord who promised his tenant, in the presence of a

IV DEBT, DEFAULT, OR MISCARRIAGE OF ANOTHER—concluded
(b) CONTRACTS NOT WITHIN STATUTE—concluded

gasoline dealer, to pay for tractor fuel furnished by the dealer to the tenant, and who later was released from his promise, was not obligated to pay the dealer for fuel sold to the tenant after the dealer received notice of the release.

Reichart v Downs, 226-870; 285 NW 256

Promise to pay for goods furnished—promisor's own debt. When a landlord orally agreed to pay for tractor fuel furnished to his tenant, the agreement was not within the statute of frauds, as the landlord made the payment his own obligation rather than promising to answer for the debt of the tenant.

Reichart v Downs, 226-870; 285 NW 256

Sale of book account—payment orally guaranteed. Where the holder of a book account sold it for a consideration along with an oil station, and orally guaranteed payment, such undertaking was primarily for the benefit of the seller, and was not within the statute of frauds as an oral promise to answer for the debt of another.

Miller v Pound, 226-628; 284 NW 449

V CREATION OR TRANSFER OF INTEREST IN LAND

Permissible proof of the contract. Evidence which will be admissible to prove an oral contract to transfer real property must be either in writing or by tangible acts or circumstances definitely referable to the oral agreement, but when such tangible acts are shown, then parol evidence becomes competent to show the specific terms of the contract.

Fairall v Arnold, 226-977; 285 NW 664

Oral agreement to change boundary. A naked oral agreement to change an established boundary line is nonenforceable.

Stone v Richardson, 206-419; 218 NW 332

Oral agreement as to security. An oral agreement by one of several heirs of homestead property that the funeral expenses of the deceased should stand against the property is of no validity.

Warner v Tullis, 206-680; 218 NW 575

Evidence—insufficiency. A contract for the sale and purchase of real estate will necessarily not be so reformed as to render it a contract for sale at a stated sum per acre, when the testimony preponderates in favor of a contract for a lump-sum price.

Davis v Norton, 202-374; 210 NW 438

Parol to prove execution of unenforceable trust. It is true that one claiming to be the absolute owner of land may not, as against the grantee in a conveyance, prove, by parol evidence, that when the conveyance was executed grantee's name was inserted in the conveyance as grantee under an oral agreement that said substituted grantee would hold said land solely and exclusively for said secret grantee, but said parties may show by parol evidence, as against a stranger, that said oral agreement was actually carried out and executed by said parties.

Bates v Zehnpfennig, 220-164; 262 NW 141

Validity of contract—court approval as condition. A definite written offer by the superintendent of banking of this state to sell, to a foreign administrator, Iowa real estate belonging to a bank receivership, and the written acceptance of the offer by said foreign administrator, may constitute a valid and specifically enforceable contract tho the offer and the acceptance be both conditioned on the approval of the respective state courts.

Bates v Citizens Bank, 223-385; 272 NW 412

Land—oral agreement to surrender. An oral agreement by a mortgagor of real estate to surrender and abandon the land to the mortgagee is within the statute of frauds.

Parker v Coe, 200-862; 205 NW 505

Fully performed oral contract. A count which pleads a fully performed oral contract for an interest in real estate is not subject to a plea of the statute of frauds.

Halstead v Rohret, 212-837; 235 NW 293

Secondary evidence—admissibility. Where title to real estate is not in issue, secondary evidence of title is admissible when proper foundation for its introduction has been laid; otherwise if title is in issue.

Inter-Ocean v Morrison, 225-1336; 283 NW 909

Stranger to transaction. The objection that a transaction is within the statute of frauds or that testimony is violative of the parol evidence rule is not available to a party who is a total stranger to the transaction, and to the title involved therein.

Lennert v Cross, 215-551; 241 NW 787; 244 NW 693

Parol evidence—fraud in procuring deed. Where deed containing recital of consideration was obtained by fraud, the grantor is not precluded as a matter of law from showing a constructive trust arising from the fraud, and equity will allow such showing to be made by parol evidence, but such evidence must be clear and satisfactory.

Rance v Gaddis, 226-531; 284 NW 468

When parol evidence competent. Principle reaffirmed that parol evidence is competent to impress an express trust upon an absolute

deed, provided the trust has been partially executed.

Hardy v Daum, 219-982; 259 NW 561

Constructive trust—evidence—sufficiency. An express trust in real property cannot be legally established by parol, nor may an implied or constructive trust in such property be established except by evidence which is clear, convincing, and satisfactory.

McMains v Tullis, 213-1360; 241 NW 472

Parol testimony—deed as mortgage. Parol testimony is admissible to show that deed was in fact a mortgage and was so intended.

Rance v Gaddis, 226-531; 284 NW 468

Naming child as consideration. A promise by grandfather to will property to grandson, if the parents name the grandson after the grandfather, is void for lack of legal consideration when such promise was made over three months after grandson had already been named after the grandfather.

Lanfier v Lanfier, 227-258; 288 NW 104

VI CONTRACTS NOT PERFORMABLE WITHIN YEAR

Employment contract—bonus at end of year. Oral contract of employment at fixed hourly rate and providing for bonus at end of year held not within statute of frauds.

Meredith v Youngstrom Co., (NOR); 205 NW 749

11286 Exception.

ANALYSIS

I EXCEPTIONS IN GENERAL
II POSSESSION, PART PERFORMANCE, AND PAYMENT

I EXCEPTIONS IN GENERAL

Oral gift of real property. An oral executed gift of real estate, established to a reasonable certainty, is valid.

Mann v Nies, 213-121; 238 NW 601

Oral contract—evidentiary demands. Principle reaffirmed that oral evidence of the gift of real estate must be clear, cogent, and convincing.

Black v Nichols, 213-976; 240 NW 261
Long v Kline, 222-81; 268 NW 150

Oral contract to devise. Evidence to establish an alleged oral contract between a father and son, that the father would leave to the son a farm when he died, must be established by clear, satisfactory, and convincing evidence and it is the duty of the court to subject the evidence to every fair test which may tend to weaken its credibility.

Blezek v Blezek, 226-237; 284 NW 180

Oral contract to will property. Where the plaintiff had done work for a woman who was ill, and had been promised that she would give him certain property in her will in return for the services, and plaintiff seeks specific performance of the agreement, claiming as consideration his oral agreement not to file a claim against the estate for the services until after such claim had been barred by the statute of limitations, such oral agreement was only the manner adopted for extinguishing the claim for the past services and the consideration for the oral agreement was the cancellation of the claim for the services and the discharge and compromise of the obligation which had accrued.

Fairall v Arnold, 226-977; 285 NW 664

Oral contract to convey land at death. Absence of strong equities in favor of the plaintiff, a son trying to establish an oral contract with his father, since deceased, does not tend to weaken his corroborating testimony.

Blezek v Blezek, 226-237; 284 NW 180

Oral contract. Evidence sufficient to establish an oral contract for the conveyance of real estate may be found in the unequivocal and definite testimony of the claimed grantee, which testimony was uncontradicted, though the opportunity to contradict was present and immediately available, plus the strong corroboration afforded by the actual execution by the grantor of a deed which was not effectually delivered.

Kissling v Bank, 203-62; 212 NW 314
See Hagerty v Hagerty, 186-1329; 172 NW 259

Equitable ownership superior to judgment lien. An actual bona fide oral agreement between a debtor and creditor, that the debtor will convey to the creditor certain lands in part satisfaction of the debt, creates in the creditor an equitable ownership in the land (especially when the creditor is already in possession of the land) which is superior to the rights of a subsequent judgment creditor of said debtor. It follows that delay in making delivery of the deed, or even the loss of the deed, will not elevate the subsequent judgment creditor into priority.

Richardson v Estle, 214-1007; 243 NW 611

II POSSESSION, PART PERFORMANCE, AND PAYMENT

Discussion. See 15 ILR 351—Part performance; 19 ILR 54—"Purchase money" doctrine

Interest in realty—dual way to orally establish. An interest in real estate may be established:

1. By parol evidence of claimant and others when the purchase price or a part thereof has been paid, and

2. By parol evidence of the adverse parties. Decree held supported by both classes of evidence.

Hardy v Daum, 219-982; 259 NW 561

II POSSESSION, PART PERFORMANCE, AND PAYMENT—continued

Trusts—when parol evidence competent. Principle reaffirmed that parol evidence is competent to impress an express trust upon an absolute deed, provided the trust has been partially executed.

Hardy v Daum, 219-982; 259 NW 561

Oral contract—part payment. Principle reaffirmed that part payment of the purchase price on an oral contract for an interest in land takes the contract out of the statute of frauds.

Bremhorst v Coal Co., 202-1251; 211 NW 898

Oral sale with part payment. An oral agreement to sell land, accompanied at the time by part payment, constitutes a "sale", within the terms of a lease which provides that, in case of a sale of the premises, the tenancy may be terminated.

Luse v Elliott, 204-378; 213 NW 410

Essentials of consideration. An oral contract for the conveyance of land is not taken out of the statute of frauds (1) by establishing a past and executed consideration for the contract, or (2) by establishing the subsequent performance of an essentially nominal consideration.

In re Runnells, 203-144; 212 NW 327

Agreement by purchasers to reconvey. An oral contract between the joint purchasers of land that they would surrender their rights under the contract of purchase and reconvey to the vendor upon the repayment by the vendor of the earnest money plus a certain bonus, which oral contract was fulfilled by some of said joint purchasers, is not within the statute of frauds.

Durband v Nicholson, 205-1264; 216 NW 278; 219 NW 318

Mortgage contract. An oral agreement that a mortgagor of real estate will pay the mortgagee a stated sum, and, in addition, will convey to the mortgagee the mortgaged premises in full satisfaction of the mortgage debt, is not within the statute of frauds.

Northwestern Ins. v Steckel, 216-1189; 250 NW 476

See Fairall v Arnold, 226-977; 285 NW 664

Contract for estate in return for services. An oral executed contract to the effect that, in return for personal services, the party shall, on the death of the other party to the contract, have the entire personal and real estate of such other party, is specifically enforceable, provided that the evidence is clear and convincing.

Jordan v Doty, 200-1047; 205 NW 964

Oral contract to devise—convincing evidence necessary. An alleged oral contract between a childless couple and a neighbor, that such couple would leave all their property to the neighbor's minor son when he became of age, if he would live with them until that time, must be established by clear, satisfactory, and convincing evidence, and when so established, along with proof of compliance by the son, entitles the son to specific performance of the contract.

Ford v Young, 225-956; 282 NW 324

Oral contract to devise or convey lands. An oral offer to convey or devise land in consideration of services to be performed for the offerer, and an oral acceptance thereof by the offeree, is specifically enforceable when both the execution of the contract and the performance thereof are established by clear, convincing, and satisfactory evidence, and when the acts of performance are referable exclusively to such contract.

Houlette v Johnson, 205-687; 216 NW 679

Parol transfer of land. Clear and unequivocal testimony is an indispensable requisite, not only to the establishment, but to the performance of an oral contract between a party deceased and another for the transfer of land in return for services.

Helmers v Brand, 203-587; 213 NW 384
Elder v Brown, 203-1124; 212 NW 147
Black v Nichols, 213-976; 240 NW 261

Oral gift—possession followed by improvements. Evidence that the donee in an alleged oral gift of land took possession of the land, but that said possession was not necessarily referable solely to said alleged gift, together with evidence of the making of temporary and inconsequential improvements on the land, is wholly insufficient to take the transaction out of the statute of frauds.

Nugent v Dittel, 213-671; 239 NW 559

Parol contract—nature of proof. A parol contract for the purchase of real estate may not be deemed established unless the sustaining testimony is clear, definite, unequivocal, satisfactory, and convincing, nor unless the acts which are claimed to have been done under such contract are clearly referable to such contract.

Lane v Bank, 209-437; 227 NW 911

Permissible proof of the contract. Evidence which will be admissible to prove an oral contract to transfer real property must be either in writing or by tangible acts or circumstances definitely referable to the oral agreement, but when such tangible acts are shown, then parol evidence becomes competent to show the specific terms of the contract.

Fairall v Arnold, 226-977; 285 NW 664

Easement contracts fully performed. A right of way easement in real estate is as effectually acquired by the vendee taking possession

under an oral contract as tho a formal written deed to the easement has been delivered to the vendee.

Furgason v County, 212-814; 237 NW 214

Oral agreement—boundary change. An oral agreement to change a long established boundary fence is enforceable when taken out of the statute of frauds (1) by the mutual taking of a new survey, (2) by the building of a new fence in accordance with the said survey, and (3) by taking possession of the lands inclosed by such new fence.

Cheshire v McCoy, 205-474; 218 NW 329

Part performance—delivery of deed. An oral contract for the sale of land is not within the statute of frauds when the owner of the land executes and delivers to the buyer a deed of conveyance even tho said deed is blank as to grantee.

Gilbert v Plowman, 218-1345; 256 NW 746

Delivery of deed as part performance. An oral contract between the owner of land and all the heirs, from whom he had obtained it by different deeds, to reconvey the land and thereby cancel the purchase-money mortgage, is taken out of the statute of frauds by the act of the owner in executing and delivering to the attorney for the heirs the deeds agreed on, and the acceptance by one of the heirs of the deed to him.

Anderson v Lundt, 200-1265; 206 NW 657

Avoidance of statute. Parol evidence is competent to show that the titleholder to land has admitted he was to hold such title only until such time as he was reimbursed for money expended on the property, and that such arrangement has been in part carried out.

Neilly v Hennessey, 208-1338; 220 NW 47

Negative act as part performance. To make an oral contract to convey lands enforceable by part performance to take it out of the statute of frauds, where the performance consists of a negative act such as not filing a claim against an estate, there must be written evidence of the agreement or proof of some tangible act or circumstance other than the absence of such claim from the probate record, which will definitely tend to establish that the absence of such claim was because of the oral agreement.

Fairall v Arnold, 226-977; 285 NW 664

Part performance must be referable to oral contract and subsequent to it. In order for part performance of a contract to convey lands to take a case out of the statute of frauds, such performance must be subsequent to the alleged agreement, and when services were rendered prior to the agreement, they could not be referable to it, not having been done in the performance of, pursuant to, on the faith of, nor in reliance upon, such agreement.

Fairall v Arnold, 226-977; 285 NW 664

Part performance must refer exclusively to the contract. For part performance to take a case out of the statute of frauds, the oral contract to convey lands must be established by clear, unequivocal, and definite proof, and the acts constituting performance must be equally clear and definite, and referable exclusively to the contract.

Fairall v Arnold, 226-977; 285 NW 664

Part performance—basis of doctrine. The doctrine of part performance as an exception to the provision of the statute of frauds requiring written evidence of contracts involving the creation or transfer of an interest in lands, is based on equitable estoppel and fraud, to prevent the defendant from escaping performance of his part of an oral agreement after permitting the plaintiff to perform in reliance upon the contract.

Fairall v Arnold, 226-977; 285 NW 664

Adoption by estoppel—surrender of child as consideration. An oral contract to adopt a child, not followed by legal adoption, was not within the statute of frauds when part of the consideration, the surrender of the child, was given at the time the agreement was made. So the child was entitled to specific performance of the contract even tho it was contended that the contract was void under the statute of frauds of a foreign state.

Vermillion v Sikora, 227-786; 289 NW 27

11287 Contract not denied in the pleadings.

Rule of evidence rather than invalidating statute. The Iowa statute of frauds relating to sales of goods is held to be a rule of evidence and not an invalidating statute, in view of subsequent provision of statute that regulations related merely to proof of contracts and should not prevent enforcement of those not denied in pleadings, and that oral evidence of maker against whom unwritten contract was sought to be enforced should be competent to establish contract. Under Iowa rule, both delivery and passing of title in sale of personal property are determined by intent of parties at time of transaction.

Tipton v Miller, 79 F 2d, 298

11288 Party made witness.

Oral evidence of party. In an action against bank officers and directors on their written guaranty of payment of notes of doubtful value belonging to the bank, wherein the defendants contended that the guaranty did not identify the notes guaranteed, the testimony of a guarantor called by the plaintiff as to

what notes were intended to be guaranteed is not violative of the statute of frauds.

Boyd v Miller, 210-829; 230 NW 851

Interest in realty—dual way to orally establish. An interest in real estate may be established:

1. By parol evidence of claimant and others when the purchase price or a part thereof has been paid, and

2. By parol evidence of the adverse parties. Decree held supported by both classes of evidence.

Hardy v Daum, 219-982; 259 NW 561

11289 Instruments affecting real estate—adoption of minors.

Private writings as evidence. See under §11279

Lost real estate contract—degree of proof. Where a lost instrument relied upon affects the record title to real estate, public policy demands that the proof of its former existence, its loss and its contents, should be strong and conclusive—rule applied to real estate contract.

Forrest v Otis, 224-63; 276 NW 102

Fraudulent assignment—failure of proof. In an action by heirs of an intestate against a son and heir of intestate to set aside a transfer of a note and mortgage from intestate to said son, evidence held insufficient to show signatures of aged mother are not the genuine signatures of intestate on assignments.

Robbins v Daniel, 226-678; 284 NW 793

Conveyance to deceased junior mortgagee. In an equity action for foreclosure against mortgagor and administrators of deceased junior mortgagee to whom mortgagor had allegedly executed the land, evidence held to establish that a deed had been executed by mortgagor in favor of deceased junior mortgagee.

Federal Bank v Ditto, 227-475; 288 NW 618

11290 Record or certified copy.

Necessary preliminary proof. The record of a duly recorded deed is not admissible as proof of title until preliminary proof is offered that the original deed (1) has been lost, or (2) does not belong to the party wishing to use the same, and is not within his control.

Buckley v Ebendorf, 204-896; 216 NW 20

Unsigned copy of fidelity bond. In action by a surety company against defendant, who was covered by a fidelity bond and who agreed to indemnify plaintiff against loss sustained by reason of its executing fidelity bond in his behalf, it was error to admit in evidence instrument purporting to be a certified copy of the bond, but containing no signatures and which was admittedly no true and genuine copy of original bond.

Fidelity Deposit Co. v Ryan, 225-1260; 282 NW 721

Nonjudicial public record—certified copies—federal statute—effect. The admissibility of evidence relating to a nonjudicial public record of a foreign state (foreclosure of mortgage by "advertisement and sale") is not restricted by the federal statutes relating to the form of authentication of such record. (See page 37, C., '35 [page 39, C., '39]; also §11296.)

Bristow v Lange, 221-904; 266 NW 808

Ancient documents—conditions of admission. Church records of parish church in Sweden, signed by the rector and church custodian, were admissible as ancient documents when they were over 30 years old, when they were obtained from the proper custody, when they were certified as true exhibits from the consulate of Sweden, and where there were no suspicious appearances.

Bergman v Carson, 226-449; 284 NW 442

Admitting record of deed. In an equity action for foreclosure of realty mortgage against mortgagor and administrators of deceased junior mortgagee, to whom mortgagor had conveyed the land, where it is shown that deed to junior mortgagee was not within the control of senior mortgagee, and where attorneys for defendants stated that they would "admit what the records show", the admission in evidence of the record of such deed was not error.

Federal Bank v Ditto, 227-475; 288 NW 618

Conveyance to deceased junior mortgagee established. In an equity action for foreclosure against mortgagor and administrators of deceased junior mortgagee to whom mortgagor had allegedly executed the land, evidence held to establish that a deed had been executed by mortgagor in favor of deceased junior mortgagee.

Federal Bank v Ditto, 227-475; 288 NW 618

11293 Presumption rebuttable.

Forged signatures — expert testimony to overcome. While an acknowledgment by a notary is presumptively true and requires clear and convincing evidence to overcome it, yet by statute it is not conclusive, and the court acting as a jury may find, after reviewing the conflicting testimony of handwriting experts, properly received, that signatures to transfers and assignments of assets of an estate, attacked by an administrator de bonis non, were forgeries.

Brien v Davidson, 225-595; 281 NW 150

Secondary evidence—admissibility as affecting title to real estate. Where title to real estate is not in issue, secondary evidence of title is admissible when proper foundation for its introduction has been laid; otherwise, if title is in issue.

Inter-Ocean v Morrison, 225-1336; 283 NW 909

11294 United States and state patents.

Presumption. A government patent is not conclusive that the government owned the land at the date of the patent.

Bigelow v Herrink, 200-830; 205 NW 531

Collateral attack. The issuance by the state of a patent to lands is an assertion of the existence of the property conveyed; and such patent is immune from attack in a collateral proceeding.

Meeker v Kautz, 213-370; 239 NW 27

11295 Field notes and plats.

Plat of premises. A privately made plat of premises may be admissible even tho it contains objectionable matter, the jury being orally directed to disregard the latter.

Lee v Ins. Assn., 214-932; 241 NW 403

Official survey on court order. In an action for reformation of description by metes and bounds in realty mortgages and for their foreclosure, evidence held sufficient to support judgment confirming surveyor's report, where surveyor is permitted to testify, without objection, that he was qualified to make the survey and that the plat of survey prepared by him is a true and correct survey showing the property in question and made in accordance with a previous order of court and such plat, after identification, was introduced in evidence without objection.

State Bank v Mapel, 226-1328; 286 NW 517

Official surveys—objections. In an action for reformation of description in realty mortgage and for foreclosure, wherein a surveyor or civil engineer is appointed by the court to make a survey of property covered by mortgages, and no objections are made to his appointment nor exceptions taken thereto, objection to the surveyor's report on appeal cannot be predicated on alleged failure to strictly follow the statutory provisions applicable to the reference of an equity case to a referee when the parties have agreed to procedure.

State Bank v Mapel, 226-1328; 286 NW 517

11296 Records and entries in public offices.

Incorporation—certified copy of articles. A copy of the articles of incorporation of a banking corporation, duly certified by the secretary of state, is sufficient proof of such incorporation.

State v Niehaus, 209-533; 228 NW 308

Certificate of county recorder. The certificate of the county recorder showing the recordation or filing of a chattel mortgage is competent and admissible evidence.

Wertheimer v Parsons, 209-1241; 229 NW 829

Ownership not paramount title at issue. In an action between a creditor and a grantee to set aside a deed, ownership by the grantor being the question in issue rather than recovery by virtue of a superior title, an uncontradicted public record showing ownership in grantor at time the deeds were made is conclusive on that issue.

Bagley v Bates, 224-637; 276 NW 797

Assessment rolls as showing nonexistence of note. Since a party assessed need not list all liabilities, assessment rolls, which fail to show a liability promissory note of decedent, are not thereby admissible as evidence to prove the note never existed nor constituted a real indebtedness.

In re Cheney, 223-1076; 274 NW 5

Nonjudicial public record—certified copies—federal statute—effect. The admissibility of evidence relating to a nonjudicial public record of a foreign state (foreclosure of mortgage by "advertisement and sale") is not restricted by the federal statutes relating to the form of authentication of such record. (See page 37, C., '35 [page 39, C., '39]; also §11290.)

Bristow v Lange, 221-904; 266 NW 808

Certificate of death—admissibility. In an action to recover on a policy of insurance, a certificate of death of the insured, tho duly and legally executed by a coroner, is inadmissible as evidence insofar as said certificate assumes to state the cause of death as "suicide by hanging", said stated cause of death being simply the opinion or conclusion of the coroner and not a statement of fact.

Morton v Ins. Co., 218-846; 254 NW 325; 96 ALR 315

See Wilkinson v Assn., 203-960; 211 NW 238

Ballots—preservation. Ballots must be "carefully preserved" after the election, and without such showing they are not admissible in evidence.

Steeves v New Market, 225-618; 281 NW 162

11302 Duplicate receipt of receiver of land office.

Collateral attack. The issuance by the state of a patent to lands is an assertion of the existence of the property conveyed; and such patent is immune from attack in a collateral proceeding.

Meeker v Kautz, 213-370; 239 NW 27

11305 Judicial record—state or federal courts.

Judgment of former conviction. The record of a former conviction of an accused is admissible under an indictment which properly charges such conviction.

State v Lambertti, 204-670; 215 NW 752

Evidence available against vouchee. In an action for breach of warranty because of an existing mortgage on the property, the foreclosure proceedings and judgment entry therein are admissible against the covenantor-defendant to prove the plaintiff's measure of damages, it appearing that the covenantor had been duly vouched into said foreclosure proceedings.

Kellar v Lindley, 203-57; 212 NW 360

Admissibility against stranger. A final decree and the pleadings relating thereto may, in some cases, be admissible in a subsequent action to prove an ultimate fact even tho the party against whom the decree is offered was not a party to the decree. So held where the decree was received to prove the judicial cancellation of a contract of sale upon which cancellation depended the validity of a promissory note sued on.

Pierce v Lichtenstein, 214-315; 242 NW 59

Bankruptcy proceeding — certified records admissible. Records certified to by the clerk of the United States district court as to the existence of a bankruptcy proceeding are competent evidence of said bankruptcy admissible in the state courts.

Bagley v Bates, 224-637; 276 NW 797

Former plea of guilty—not conclusive in a civil action. In a civil action, the plea of guilty to a criminal prosecution involving the same transaction is admissible as an admission but is not conclusive when the criminal defendant, as a witness in the civil action, gives testimony tending to contradict his plea of guilty.

Boyle v Bornholtz, 224-90; 275 NW 479

Pleadings as evidence—counterclaim as admission. Where corporation, within its agency for an insurance association, insured its own automobile, and when sued along with the driver thereof on account of a collision involving the automobile, and when the corporation counterclaims therein, alleging that it and driver were free from negligence, which counterclaim was subsequently dismissed, then in a later action against corporation to recover on the policy, the corporation was bound by such allegation as an admission of its consent to use the vehicle, and the pleading was admissible in evidence therefor.

Mitchell v Underwriters, 225-906; 281 NW 832

11306 Of another state.

Foreign judicial proceedings. The judicial proceedings of the courts of a foreign state may not, of course, be given any effect except on due proof thereof.

Railway v Lundquist, 206-499; 221 NW 228

Improper certification first raised on appeal. Admission of improperly certified judicial records of Texas and Michigan bearing on issue of defendant's sanity in trial of default action to annul marriage is not ground for reversal of court's action in refusing to set aside the default annulment when lower court was not given opportunity to pass upon the competency of the records. The rule is that a party is not to be surprised on appeal by new objections and issues, nor as to defects within his power to remedy had he been advised in the proper time and manner.

Kurtz v Kurtz, 228- ; 290 NW 686

Documentary evidence — certified copies — federal statute. The admissibility of evidence relating to a nonjudicial public record of a foreign state (foreclosure of mortgage by "advertisement and sale") is not restricted by the federal statutes relating to the form of authentication of such record.

Bristow v Lange, 221-904; 266 NW 808

11309 Presumption of regularity.

Similar annotations. See under §§10502, 11548, 14010

Official action. The actions of public officials are presumed to be regular unless there be clear evidence to the contrary.

Priest v Whitney Co., 219-1281; 261 NW 374
Krueger v Mun. Court, 223-1363; 275 NW 122

Presumptions ousted by evidence. Presumptions disappear when evidence of the actual facts is introduced.

Wilson v Findley, 223-1281; 275 NW 47

Change of place of commitment. It will be presumed, in the absence of any counter showing, that the court had a legal reason for changing the place of commitment from the county jail of the county of trial to the jail of a foreign county.

State v Herzoff, 200-889; 205 NW 500

Result of election verified by canvassers. It will be presumed, in the absence of a showing to the contrary, that the state board of canvassers has duly performed its duty to certify the result of a primary election to the various chairmen of political parties.

Zellmer v Smith, 206-725; 221 NW 220

Location of public utility lines. In the absence of any evidence or showing to the contrary, it will not be presumed that a public service corporation is seeking the location of its lines along a highway without having procured a franchise, or that the highway engineer is proceeding to mark such location without a written application therefor. (§4838, C., '31.)

Swartzwelter v Utilities Corp., 216-1060; 250 NW 121

Appointment of administrator — collateral attack. The record of the appointment in a county of an administrator and his due quali-

fication is a finality and beyond collateral attack, even tho the record fails affirmatively to show the existence of the facts upon which the jurisdiction of the court depends; otherwise if the record affirmatively reveals want of jurisdiction.

Ferguson v Connell, 210-419; 230 NW 859

Regularity of inferior bodies. Jurisdiction, in an inferior governmental body over a subject matter, lies at the very threshold of a proceeding, and no presumption of regularity in such proceeding can be indulged until the fact of jurisdiction is first made to appear from a record finding of jurisdiction by the body in question, or by other equivalent showing.

McKinley v Lucas County, 215-46; 244 NW 663

Tax sale—scavenger sale. When a county treasurer sells lands to the highest bidder at "scavenger" tax sale it will be presumed, in the absence of any showing to the contrary, that said lands were duly and unsuccessfully offered for sale at prior tax sales as required by statute.

Board v Stone, 212-660; 237 NW 478

Sale under execution. A sheriff in making a sale under execution will be presumed, nothing appearing to the contrary, to have complied with the statutes governing such sales.

Ebinger v Wahrer, 213-84; 238 NW 587

Improvement of county road within town. When a board of supervisors proceeds to improve a town street which is a continuation of a county road, it will be presumed, nothing being shown to the contrary, that the board and the town council first entered into a written agreement covering the work as provided by statute.

Norwalk v County, 210-1262; 232 NW 682

Officers — when jurisdiction must appear. The statutory presumption that the proceedings of inferior tribunals, e. g., the county board of supervisors, are presumed to be regular, does not extend to the acquisition of jurisdiction of the board—this must be shown.

Davelaar v Marion Co., 224-669; 277 NW 744

Erection of proper signs along road. On appeal, the appellate court will, in the absence of proof to the contrary, assume that the board of supervisors has performed its mandatory duty to erect and maintain proper signs on local county roads where they intersect with county trunk roads.

Arends v DeBruyn, 217-529; 252 NW 249

Indexing lis pendens. The presumption that the clerk of the district court duly indexed, as a lis pendens, a petition for the foreclosure of a real estate mortgage is so strong that convincing proof to the contrary is required to overcome it.

First Tr. JSL Bk. v Jansen, 217-439; 251 NW 711

Deficient record—presumption. On appeal from action to enjoin trespass and for damages, where record before the supreme court relating to certain issues, including question of damages, was so incomplete as to make determination very difficult, it was presumed that the trial court performed its duty and reached a proper conclusion.

Arnd v Harrington, 227-43; 287 NW 292

Attorney fee for extraordinary probate services. Tho a presumption of regularity exists as to an unassailed allowance of attorney fees for extraordinary services, and tho ex parte orders fixing such fees without introduction of evidence are not uncommon, yet such orders are always open to review on final settlement.

In re Metcalf, 227-985; 289 NW 739

Mailing and delivery of letter. For the purpose of proving that an original letter was presumptively received by the addressee through the mail, a proven copy of said letter is inadmissible simply on the showing that the writer of the letter personally signed it, and relied on the accuracy of his secretary to make a proper mailing of the letter in accordance with the routine of the office, there being no evidence as to such routine.

Forrest v Sovereign Camp, 220-478; 261 NW 802

Incorrectly addressed letter. There is no presumption that mail matter addressed to a person at a town which is not his post-office address will be delivered to the addressee at another town which is his post-office address, tho the two towns are in the same county and in the same vicinity.

Lundy v Skinner, 220-831; 263 NW 520

11311 Proceedings of legislature.

Enrollment — when conclusive — when not conclusive. The text of the official enrollment of a legislative act will be treated by the courts as an absolute verity, but the courts will go behind such enrollment on the question whether the house or senate complied with the mandatory constitutional requirement that the bill be put on passage by a yea and nay vote and such vote be entered on the legislative journal.

Smith v Thompson, 219-888; 258 NW 190

11312 Printed copies of statutes.

Presumption—law of sister state. Presumptively the laws of a sister state relative to a named subject-matter are the same as those of this state.

Tansil v McCumber, 201-20; 206 NW 680

Exception to presumption. No presumption will be indulged that the statutory law of another state is the same as the statutory law of this state when the pleadings of the parties are inconsistent with such presumption.

Woodard v Ins. Co., 201-378; 207 NW 351

Presumption—laws of other states. Presumptively the law of Minnesota is the same as the law of this state.

Northern Finance v Meinhardt, 209-895; 226 NW 168

Foreign law governing foreclosure. Presumptively, the laws of a foreign state governing mortgage foreclosures are the same as the laws of this state.

Pfeffer v Corey, 211-203; 233 NW 126

Comity between states—procedure governing. A cause of action which is predicated on the statutes of a foreign state will, as a matter of comity, be enforced in the courts of this state, but only under and in accordance with the recognized and prescribed court procedure of this state.

Rastede v Railway, 203-430; 212 NW 751

Foreign corporations—dissolution—effect on pending actions. A duly rendered decree of dissolution of a foreign corporation, at the instance of the state under the laws of which said corporation was organized, is, in effect, an executed sentence of death; being such, said decree ipso facto works an abatement (1) of an unadjudicated action in rem pending in this state against said dissolved corporation, and (2) of garnishment proceeding pending in connection with said action. Under such circumstances, the garnishee may properly move for and be granted an order of discharge.

Peoria Co. v Streator Co., 221-690; 266 NW 548

Foreign procedural statutes — nonright to plead. In an action in this state to recover damages sustained in a foreign state in consequence of the alleged actionable negligence of the defendant in operating an automobile in said foreign state, plaintiff has no right to plead the procedural statutes and rules of law of said foreign state. For example, those pertaining:

1. To what matters would be presumptive evidence of negligence.
2. To the burden of proof in the trial of the action.
3. To the right of plaintiff to submit his action on different theories of the evidence.

Reason: All said matters are purely procedural.

Kingery v Donnell, 222-241; 268 NW 617

Foreign remedial statute—nonapplicability. The remedial statutes of a foreign state, authorizing an action in said state against a corporation which has been dissolved at the instance of said state, do not and cannot control the procedure when the action is sought to be maintained in this state; and especially is this true when said authorized foreign procedure is contrary to the procedural law of this state.

Peoria Co. v Streator Co., 221-690; 266 NW 548

Foreign remedial statutes — right to plead. In an action in this state to recover damages sustained in a foreign state in consequence of the alleged actionable negligence of defendant in operating an automobile in said foreign state, plaintiff may plead those statutes and rules of law of said foreign state from which actionable negligence, under the facts of the case, are deducible, e. g., those (1) which declare the degree of care required of defendant in such operation in said foreign state, and (2) the nature and degree of plaintiff's contributory negligence which will bar his action, said pleaded statutes and laws being of the very essence of plaintiff's cause of action, and not contrary to the public policy of this state, even tho they exact a greater degree of care than would be exacted by the law of this state had the injury occurred in this state.

Kingery v Donnell, 222-241; 268 NW 617

11315 Ordinances of city or town.

Ordinance book as evidence. A book purporting to be the ordinances of a municipality and duly certified as such by the city clerk is admissible, so far as material, without further showing.

Hollingsworth v Hall, 214-285; 242 NW 39

Sufficient "offer". A book purporting to have been issued by a city or town and to contain the ordinances thereof, as of a certain date, need not be formally offered as such. Counsel need only produce or bring the volume into court for the inspection of the court and thereupon formally offer such portions thereof as he may see fit.

Orr v Hart, 219-408; 258 NW 84

Burden to show inadmissibility. The burden of pointing out wherein city ordinance regulating train's speed is defective, either in substance or method of adoption, is on the party objecting to its admissibility.

Meier v Railway, 224-295; 275 NW 139

11316 Production of books and papers.

Profert, oyer, and exhibits. The common law procedure of "oyer and profert", by which a party obtained the inspection of documents, is unknown to our code procedure.

Dunlop v Dist. Court, 214-389; 239 NW 541

"Paper" defined. A laboratory analysis, duly reduced to writing, of an organ of the human body and of the contents thereof is a "paper", within the meaning of the statute

relative to the compulsory production of "papers or books", and the party to an action who has the exclusive possession thereof may be compelled to produce it for the inspection of the other party when such inspection is material to the issue whether the deceased died by accident or by suicide by means of poison; but the production of private correspondence or memoranda relative to the analysis may not be coerced.

Travelers Ins. v Jackson, 201-43; 206 NW 98

Resulting inconvenience—effect. It is inconsequential that a valid and reasonable order for the production of books and papers will inconvenience and interrupt the business of the party ordered to produce them.

Iowa Corp. v Hutchison, 207-453; 223 NW 271

Surrender of possession—legality. An order of court directing a party litigant to produce and deposit in the custody of a court officer certain documents and papers is not void because the effect of the order is temporarily to dispossess said litigant of his own property.

Foresters v Scott, 223-105; 272 NW 68

Production of noncompetent evidence. The court is not necessarily acting outside its jurisdiction in ordering the production of papers, and copies which would not or might not be admissible as competent evidence on the trial of the pending action.

Main v Ring, 219-1270; 260 NW 859

Materiality. The materiality of books and papers in view of the issues is the test by which to determine the correctness of an order of court for their production.

Iowa Corp. v Hutchison, 207-453; 223 NW 271

Dual materiality—effect. An order for the production of books and papers which are material under the pleadings of the applicant for the order is not illegal because such books and papers tend to prove the case of the party ordered to produce such books and papers.

Iowa Corp. v Hutchison, 207-453; 223 NW 271

Materiality generally—presumption. Whether an order should be entered for the production, by one of the parties, of books or papers, manifestly depends on the nature of the action and on a liberal construction of the issues joined. No nice discrimination on the question of materiality should be attempted. Presumptively the order for production is within the jurisdiction of the court.

Main v Ring, 219-1270; 260 NW 859

Sealing portions of books. A rule for the production of books should provide for the sealing up of such parts thereof as are not legally subject to the inspection of the applicant for the rule.

Fairbanks Morse v Dist. Court, 215-703; 247 NW 203

Unallowable scope of order. The court, in order to keep within its jurisdiction, must, irrespective of the scope of objections pressed upon its attention, so frame its order for the production of correspondence as will not enable the applicant for the order to go on a fishing expedition, and ransack and rifle the files of his adversary for matters irrespective of their materiality.

Main v Ring, 219-1270; 260 NW 859

Illegal rule. When an action is predicated by plaintiff on the plea that a corporation in entering into a contract with plaintiff was acting as the agent of one or both of two other corporations, and also on the plea that said contract was in furtherance of a joint adventure of said three parties, the court in granting plaintiff a rule for the production of books and papers acts illegally insofar as it fails to confine said rule to books and papers which tend to support the affirmative of either or both of said issues.

Fairbanks Morse v Dist. Court, 215-703; 247 NW 203

Minority stockholders — right to inspect books. The minority stockholders of a dissolved corporation have the right (in an action for an accounting against another corporation which has succeeded to the business, assets, books, and papers of the dissolved corporation), on a proper petition therefor, to an order for the production and inspection of the material books, records, and papers of the dissolved corporation and of the succeeding corporation.

National Prod. Co., v Dist. Court, 214-960; 243 NW 727

Right to examine books and records. An administrator and the heirs at law of a deceased stockholder in a corporation, when refused an examination by the corporation, have the right, without any plea of good faith, to an order of court, in an appropriate proceeding, permitting them and their necessary assistants to examine the books and records of the corporation in order to determine the financial condition of the corporation and the value of its stock.

Becker v Trust Co., 217-17; 250 NW 644

Certiorari—essential purpose of writ. On certiorari to review an order of the district court relative to the production of books and papers, the sole inquiry is whether the lower court had jurisdiction to enter the order in question, not whether the lower court made errors in exercising its jurisdiction.

Main v Ring, 219-1270; 260 NW 859
Foresters v Scott, 223-105; 272 NW 68

Order to produce—admissibility. An order to produce books and papers is not a ruling that, when produced, the books and papers will be admissible as legal evidence.

Main v Ring, 219-1270; 260 NW 859

Order for production — subpoena duces tecum. The power of the court to order a litigant to produce documents and papers is not dependent in any degree on any analogy to the rules of law governing subpoenas duces tecum.

Foresters v Scott, 223-105; 272 NW 68

Optional procedure—depositions. The court is not without jurisdiction to order the production of the original of documents and papers because the applicant for the order might avail himself of depositions.

Foresters v Scott, 223-105; 272 NW 68

Facts otherwise available. The court is not without jurisdiction to order the production of the originals of documents and papers because litigants, hostile to the applicant for the order, have taken depositions which reveal purported copies of said documents and papers. And especially when such depositions were not of record when the order to produce was entered.

Foresters v Scott, 223-105; 272 NW 68

Place of inspection of books. One ordered to produce books for inspection may have the right to insist that said inspection be made at his principal place of business, and not at a place where said books will pass, temporarily, entirely out of his possession.

National Prod. Co. v Dist. Court, 214-960; 243 NW 727

Place of production of books, etc. A rule for the production by defendant of books or papers kept by him at his place of business remote from the place of trial should require the production to be made at said place of business when production at the place of trial would impose on defendant undue burden and expense, and interruption of business.

Fairbanks Morse v Dist. Court, 215-703; 247 NW 203

Foreign corporations—visitatorial power of state. A foreign corporation transacting business within this state is subject to all the remedies available against a domestic corporation. So held under an application for an order for the production of papers and documents.

Foresters v Scott, 223-105; 272 NW 68

Foreign corporation — nonjurisdiction of officer—effect. An order of court directing a foreign corporation, as a litigant doing business in this state, to produce certain documents and papers, is not invalid because jurisdiction, while complete as to the corporation, has not been obtained over any corporate officer.

Foresters v Scott, 223-105; 272 NW 68

Inability to enforce order — effect. That a foreign corporation doing business in this state may not comply with an order for the production of documents and papers and that the court may be unable to enforce its order, is no adequate reason for refusing the order or for annulling such order when made.

Foresters v Scott, 223-105; 272 NW 68

Balance of convenience — order. Record evidence reviewed and held, under "balance of convenience" rule, to justify the court in ordering a defending insurance company located at Toronto, Canada, to produce in this state, and at its own expense certain documents and papers.

Foresters v Scott, 223-105; 272 NW 68

Place of inspection—balance of convenience. A foreign corporation, doing business in this state, has no absolute right to demand that its documents and papers be inspected at its home office in the foreign state. So held as to documents and papers which did not pertain to the daily operations of a foreign insurance company.

Foresters v Scott, 223-105; 272 NW 68

Harmless comprehensive order. The objection that an order for the production of correspondence is so comprehensive as to require the production of mere private letters between the parties, having nothing whatever to do with the suit in question, is neutralized by a record fairly showing that the parties are strangers, residents of distant states, and have never had any transaction except the subject matter of the suit.

Main v Ring, 219-1270; 260 NW 859

Nonexcessive order. Order for the production of the originals of certain documents and papers, and the facts attending such order, reviewed, and held such order could not be deemed a roving commission.

Foresters v Scott, 223-105; 272 NW 68

Refusal to compel production. The refusal of the court to compel the county attorney to produce the confession of a co-accused will not be deemed reversible error when the accused makes no effort to secure such confession except to unsuccessfully request the county attorney to produce it.

State v Bittner, 209-109; 227 NW 601

Correspondence between defendant and third parties. An order, in an action for damages for deceit, for the production by defendant of correspondence between himself and a third party, is within the jurisdiction of the court when the materiality of such correspondence is alleged, and appears tho in not a very definite manner.

Main v Ring, 219-1270; 260 NW 859

Correspondence with defendant and his trade-name affiliates. The court, in an action against

an individual for deceit, is not necessarily acting beyond its jurisdiction in ordering the production of correspondence not only with the defendant personally, but with various trade-name concerns under which the defendant is alleged to be doing business.

Main v Ring, 219-1270; 260 NW 859

Admitting record of deed not error. In an equity action for foreclosure of realty mortgage against mortgagor and administrators of deceased junior mortgagee, to whom mortgagor had conveyed the land, where it is shown that deed to junior mortgagee was not within the control of senior mortgagee, and where attorneys for defendants stated that they would "admit what the records show", the admission in evidence of the record of such deed was not error.

Federal Bank v Ditto, 227-475; 288 NW 618

11317 Petition—granting or refusing.

Sufficiency in general. The petition for a rule for the production of books or papers may be sufficient even tho it does not state in detail what particular facts will be proved by certain specified books or papers.

Fairbanks Morse v Dist. Court, 215-703; 247 NW 203

Order for production — sufficiency. Books and papers should, in an order for their production, be identified and pointed out with reasonable certainty, but absolute precision is not required.

Iowa Corp. v Hutchison, 207-453; 223 NW 271

Petition—sufficiency—deceit action. Petition for the production of papers and correspondence, in an action for damages for deceit, reviewed, and held to comply with the governing statute.

Main v Ring, 219-1270; 260 NW 859

Appeal from order not permitted. An order for the production of books is not appealable.

Stagg v Bank, 203-84; 212 NW 342

Certiorari to review. The legal discretion of the court to enter an order for the production of books and papers cannot be controlled by certiorari.

Iowa Corp. v Hutchison, 207-453; 223 NW 271

(Contra) Stagg v Bank, 203-84; 212 NW 342

Non-jurisdictional showing. The district court has no jurisdiction to enter an order requiring plaintiff in mortgage foreclosure action to deposit with the clerk the original note and mortgage sought to be foreclosed, for the inspection of a non-answering defendant, when the application upon which the order is entered is unverified, and contains no allegation concerning the materiality of said inspection. It follows said order is subject to review on certiorari.

Dunlop v Dist. Court, 214-389; 239 NW 541

Relevancy — determination of issue. The affidavit of one, against whom an order for the production of books is sought, to the effect that said books are wholly irrelevant to the matter in litigation, will be deemed presumptively true.

National Prod. Co. v Dist. Court, 214-960; 243 NW 727

Protection of private papers. A party defendant may not be required to expose to his adversary, or the public, his private business affairs which have no relation to the matters in litigation. If his books contain matters relevant to the litigation, and also purely non-relevant personal matters, the order for the production and inspection of the books must, by some proper provision, protect the latter.

National Prod. Co. v Dist. Court, 214-960; 243 NW 727

Order on strangers to action. The jurisdiction of the court, on a proper petition, to order a party to an action to produce books, papers, etc., does not embrace the jurisdiction to enter such order against one who is not a party to the litigation. And an amendment to the petition for such order which does no more than to insert in the caption the names of various parties as defendants does not make such parties defendants in the statutory sense.

National Prod. Co. v Dist. Court, 214-960; 243 NW 727

Order for correspondence unlimited as to time. An order for the production of correspondence between a party and his agent may be so unlimited as to time of correspondence as to call for manifestly immaterial testimony.

Main v Ring, 219-1270; 260 NW 859

11322 To whom directed—duces tecum.

Subpoena duces tecum—office. The remedy of a party to an action who desires the production of books, papers, etc., in the possession of a stranger to the action is to cause to be issued and served a subpoena duces tecum.

National Prod. Co. v Dist. Court, 214-960; 243 NW 727

Order for production distinguished. The power of the court to order a litigant to produce documents and papers is not dependent in any degree on any analogy to the rules of law governing subpoenas duces tecum.

Foresters v Scott, 223-105; 272 NW 68

Copies in lieu of originals. Carbon copies of letters, the originals of which are in the possession of the adverse party, are not ad-

missible until the originals are properly called for and not produced.

Miller v Fire Assn., 219-689; 259 NW 572

11326 Witness fees.

Atty. Gen. Opinion. See '30 AG Op 177

Party defendant. A party defendant is not entitled to witness fees tho he has entered no appearance in the action, but has been subpoenaed.

Vacuum Oil v Carstens, 211-1129; 231 NW 380

11328 Peace officer.

Atty. Gen. Opinions. See '25-26 AG Op 431; '36 AG Op 419

11329 Expert witnesses—fee.

Opinion testimony. See under §11254 (II)
Atty. Gen. Opinion. See AG Op Feb. 27, '40

Answers based on hearsay. An expert may not testify to matters of fact or opinion which are not based on his own knowledge or experience, but on what he has read.

Evans v Iowa Co., 205-283; 218 NW 66

Subsequent appeal — law of case—inability to meet. On the retrial of a reversed and remanded cause, additional testimony in the form of expert opinion which is the merest conjecture—opinion which is not predicated upon any basis (1) of scientific knowledge, or (2) of general experience—is entirely too weak to lift the cause out of the evidential law of the case as first declared on appeal.

Hartford Ins. v Mellon, 206-182; 220 NW 331

Subject of expert testimony. It is not permissible for a party to gather together in the form of a hypothetical question the various circumstances established by him as bearing on a fact issue and present them to a so-called expert for his opinion, when the circumstances are such that the opinion of a lay witness would carry equal evidentiary value.

McClary v Railway, 209-67; 227 NW 646

Cause of injury—invading province of jury. It is improper (1) to call upon an expert witness for his conclusion as to the cause of an injury, or (2) to ask such witness for his opinion as to the "sole cause" or "direct and exclusive cause" or "sole primary cause", of such injury, and reversible error results from permitting the witness to affirmatively state such conclusion or opinion.

Justis v Cas. Co., 215-109; 244 NW 696

Hypothetical question based on testimony of one witness. The inclusion in a hypothetical question of a certain fact is proper tho only one witness has testified to such fact.

Boston v Keokuk Co., 206-753; 221 NW 508

Hypothetical question based on untrue statement. The jury should be plainly instructed, at least on request, that it must give no weight or consideration to an answer to a hypothetical question if it finds that any assumed fact embodied in the question is not, in fact, true.

Wilcox v Crumpton, 219-389; 258 NW 704

Instructions—noncontrolling effect of expert testimony. Instructions to the effect that a jury is not necessarily compelled to give controlling effect to expert testimony reviewed, and held correct.

Crouch v Remedy Co., 210-849; 231 NW 323; 38 NCCA 81

Instructions—credibility of expert witnesses. Instructions are proper which, in substance, direct the jury that they are to use their own judgment in considering evidence relative to values and that such judgment need not be surrendered for that of the expert witnesses.

State v Bevins, 210-1031; 230 NW 865

Nonright of jurors to substitute their own knowledge. Jurors may use and employ their own knowledge as to values in determining the weight and effect of expert testimony as to such values, but they must not be instructed, in effect, that they may disregard such expert testimony and substitute their own knowledge as evidence.

State v Brown, 215-600; 246 NW 258

Hypothetical questions on unproven facts. The court may permit hypothetical questions to be asked and answered before all the assumed facts have been established, the jury being cautioned to disregard such testimony in case the assumed facts have not been established at any stage of the trial.

Crouch v Remedy Co., 205-51; 217 NW 557

Opinion evidence—nonconclusiveness. Opinion evidence is not, ordinarily, conclusive on the trier of a question of fact, especially when such evidence happens to be only one of several elements which the trier must weigh in determining the fact.

Wood v Wood, 220-441; 262 NW 773

Explanation of architectural drawings. The meaning of marks and characters unintelligible to the layman, appearing on an architectural drawing, may be shown by a witness familiar with such matters. So held as to characters which indicated the presence of a sewer.

Des Moines Co. v Magarian, 201-647; 207 NW 750

Arbitrary right to shape form of question. An examiner in the cross-examination of an expert has the right, as a general rule, to shape his question as he pleases. So held where the witness had testified as to the value of a farm before and after condemnation, and where the examiner chose to ask the witness as to the value of separate tracts without directing the

witness, in effect, to exclude all benefits consequent on the condemnation.

Dean v State, 211-143; 233 NW 36

Subject of expert testimony—radiograph. A radiograph may be explained or interpreted to a jury by an expert, insofar as the radiograph does not interpret itself to the mere observation of a nonexpert.

Appleby v Cass, 211-1145; 234 NW 477

Harmless error—oral testimony as to foreign statutes. No reversible error occurs in permitting a layman (without objection to his competency) to testify relative to the statute laws of a foreign state when such statutes, relative to the subject matter in question, were ultimately introduced in evidence.

Richmond v Whitaker, 218-606; 255 NW 681

Opinion evidence—qualified mechanic. It is not error to permit testimony of expert witnesses when there is a sufficient showing of their qualifications to give such testimony. So held as to a mechanic's testimony regarding brakes and lights.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

Possible cause of death—artificial heat. In workmen's compensation action in which objection is raised to the admission of expert testimony to show the heat situation in a bakeshop, where the death of a workman is allegedly caused by intensified or artificial heat, held, that insofar as the conditions, causes, and effects to which the experts testified required special study and experience to understand and explain, the admission of such expert testimony was proper.

West v Phillips, 227-612; 288 NW 625

Evidentiary (?) or ultimate (?) facts. In workmen's compensation action to recover for death of workman allegedly caused by intensified or artificial heat, wherein defendant asserts that expert witnesses testified to the ultimate fact that there was excessive heat, which fact was for the determination of the commissioner, held, the evidence given by the experts consisted of material, evidentiary facts, constituting a basis for one of the ultimate facts in the case, which was that decedent received an injury arising out of and in the course of his employment, and therefore was admissible, particularly so where defendant did not object to the testimony on the ground that it stated an ultimate fact.

West v Phillips, 227-612; 288 NW 625

Cause of death of hogs—question of law. Evidence reviewed, and held that the court could not say as a matter of law that the expert theory that hogs died of hog cholera after the termination of a shipment was more reasonable than the theory that they died because of the negligence of the carrier during shipment.

Brower v Railway, 218-317; 252 NW 755

Thickness of pavement. Whether a pavement constructed four and a half inches in thickness only is in substantial compliance with a contract requiring a thickness of six inches, is not a subject of expert testimony.

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

Hypothetical questions—wholly insufficient basis. Evidence of the naked fact that a railway locomotive was "coaled twice" within a few miles furnishes no foundation for the expert conclusion "that the front end of the engine was burned out, that the screens were in bad condition, or that the flues were dirty."

Stickling v Railway, 212-149; 232 NW 677

Fingerprints—expert testimony as to ultimate fact. A witness who is expert in the science of dactylography may testify that, in his opinion, judgment, or belief, different fingerprints were made by one and the same finger, but he may not testify that they were made by one and the same finger.

State v Steffen, 210-196; 230 NW 536; 78 ALR 748

Homicide—robbery. Whether a homicide was committed by one who was at the time robbing the deceased is quite beyond the proper scope of expert testimony.

Nelson v Acc. Soc., 212-989; 237 NW 341

Burglars' tools—expert testimony. Expert testimony is admissible as to the burglarious nature of certain tools.

State v McHenry, 207-760; 223 NW 535

Burglar's tools. In a prosecution for possessing burglar's tools, with felonious intent, the state may show by expert testimony that certain instruments could be used in the commission of a burglary, but erroneously asking the witness whether such instruments would be so used is not necessarily prejudicial.

State v Furlong, 216-428; 249 NW 132

"Conclusion" of ballistic expert. The province of a jury is not invaded by permitting a ballistic expert to testify that as a result of his detailed investigation he had "reached the conclusion" that a certain bullet had been fired through the barrel of a certain gun.

State v Campbell, 213-677; 239 NW 715

Identification of ballistic photographs. Evidence held ample to identify certain ballistic photographs.

State v Campbell, 213-677; 239 NW 715

Handwriting—unallowable standard. Manifest error results, in the trial of the issue of handwriting, from admitting in evidence writ-

ings as standards for comparison without proof that the person in question wrote the standards.

State v Debner, 202-150; 209 NW 404

Handwriting—proper standard for comparison. Proof that a party whose handwriting is in question admitted writing a certain exhibit renders the exhibit admissible as a proper standard for comparison.

State v Debner, 205-25; 215 NW 721

Signatures—jury question. The mere introduction in evidence of genuine signatures of a party in order to establish the plea that the purported signature of the party to a written release is a forgery does not generate a jury question on the issue of forgery, when other ample evidence persuasively shows that the signature to the release is genuine.

Vande Stouwe v Life Co., 218-1182; 254 NW 790

Fictitious signature—expert and jury comparison. On the issue whether certain signatures on checks are purely fictitious and represent no existing person, and were in reality written by a named existing party, experts in handwriting and the jury may compare said signatures with the admitted or proven handwriting of said named party.

Kruidenier Estate v Trust Co., 203-776; 209 NW 452

Handwriting expert—striking evidence. If evidence, erroneously admitted during the progress of a trial, is distinctly withdrawn by the court, the error is cured, except where it is manifest that the prejudicial effect on the jury remained despite its exclusion. Testimony by a handwriting expert, who referred to notes, which were merely the basis or reason for his opinion as to the genuineness of signatures to a will, held not within the exception.

In re Iwers, 225-389; 280 NW 579

Genuineness of signature. Competent expert testimony as to the genuineness of a signature is admissible notwithstanding an element of weakness therein.

McColl v Jordan, 200-961; 205 NW 838

Disparaging expert testimony—instructions. A party who requests an instruction which emphasizes the superiority of positive over expert testimony as to the genuineness of handwriting may not complain that the court gave an instruction which fully embodied the idea of the requested instruction, but which more sharply, but correctly, emphasized the inferiority of expert testimony generally.

Keeney v Arp, 212-45; 235 NW 745

Limitation on nonexpert. A nonexpert witness may not testify that the signature to an instrument "looks like" or "resembles" the genuine signature of a named person. Such a witness is competent to testify only to his belief or opinion.

Schram v Johnson, 208-222; 225 NW 369

Examination of expert. An expert witness may testify that a signature "looks like" the signature of the party in question; likewise that a given signature is "in his judgment" genuine.

McColl v Jordan, 200-961; 205 NW 838

Handwriting experts—probative value. It being conceded, arguendo, that the testimony of experts on handwriting is not of the highest order, nevertheless, under proper circumstances, such testimony has probative value.

State v Manly, 211-1043; 233 NW 110

Comparison of handwriting—cross-examination. The cross-examination of an expert witness, a banker, who has testified to the genuineness of a signature to a promissory note in suit, may not be carried to the extent of questioning the witness as to his course of action in case supposed checks were presented to his bank for payment, when the answers, whatever they might be, can have no legitimate bearing on the credibility, qualification, competency, accuracy, or mental attitude or bias of the witness.

Keeney v Arp, 212-45; 235 NW 745

Enlarged photographs of handwriting. Evidence consisting of microscopic inspection, magnified photographs, or chemical tests may so demonstrate the nongenuineness of a writing as to become substantive evidence. It follows that such evidence, not being mere expert testimony, is not subject to the disparagement usually and ordinarily applied to expert testimony.

Keeney v Arp, 212-45; 235 NW 745

Handwriting photographs. Photographs of handwriting, altho bearing explanatory markings made by the expert witness, are proper evidence to aid the jury's comparison of the disputed signature on a will, as well as to explain expert testimony and their admissibility is largely within the trial court's discretion.

In re Cheney, 223-1076; 274 NW 5

Taxation—farm land within city—evidence warranting reduction in actual value. Where a 371.51-acre farm within the corporate limits of a city was very rough, the top soil washed off, the fertility gone, a third of the land infested with weeds rendering it impossible to raise even grass crops, and where the taxes exceeded the income, and qualified witnesses fixed its value at between $10 and $15 per acre, as against the tax assessor's value fixed at $65.58 per acre, on same basis as adjoining lands, tho there was no other similar land in

the district, the supreme court fixed the actual value thereof for taxation at $30 per acre.

Lincoln Bank v Board, 227-1136; 290 NW 94

Competency of experts—value. On the issue of the solvency of a bank, expert witnesses may be permitted to testify to the value of the bank's assets even tho they do not possess, as to all items, the most comprehensive qualification.

State v Bevins, 210-1031; 230 NW 865

Assets of bank. A qualified expert accountant is competent to testify that certain proven payments of money to a bank "did not come into the assets of the bank as shown by the books and records of the bank."

Andrew v Ind. Co., 207-652; 223 NW 529

Fraudulent banking—insolvency. In a prosecution for receiving deposits with knowledge that the bank was insolvent, the value of the assets of the bank may be proven by any witness who is familiar with such assets and knows the value thereof.

State v Childers, 202-1377; 212 NW 63

Blood test—authority to take. When a coroner from another county, without legal warrant and without express or implied assent, acted as a volunteer and went into an operating room and took from an unconscious patient a blood sample to be used in a possible future criminal prosecution, the court was in error in a later manslaughter prosecution against the patient, in receiving in evidence over timely objections by the defendant, the blood sample and the testimony of experts based thereon.

State v Weltha, 228- ; 292 NW 148

Blood test—expert testimony. Greater care could have been taken in tracing a blood sample from an operating room to a trial 7 months later than evidence which showed that it had passed through the hands of several persons, not all of them being identified, and had been kept for a time in some sort of mailboxes in a doctor's office in another city. Without more foundation, a statement by the doctor at the trial that the blood sample was then in the same condition as it was in the beginning was a mere conclusion.

State v Weltha, 228- ; 292 NW 148

Attending physician. It is not erroneous to permit an attending physician who has detailed the injuries of his patient to answer hypothetical questions.

McDonald v Robinson, 207-1293; 224 NW 820; 62 ALR 1419

Privileged communications. The expert opinion of a physician as to the possible cause of an injury, based on no fact obtained from the injured party, does not constitute the disclosing of a confidential communication.

Whitmore v Herrick, 205-621; 218 NW 334

Cause of death. A physician may, on a hypothetical question based on the testimony of other witnesses and on his own examination of the body of the deceased, give his opinion as to the cause of death.

State v Korth, 204-1360; 217 NW 236

Documentary evidence—medical works—unallowable reception. Error results from permitting a party on the direct examination of his own expert witness to read extracts from a medical work, and then to ask the witness if he agrees with the statement so read.

Morton v Ins. Co., 218-846; 254 NW 325; 96 ALR 315

Physicians—success of treatment. An expert medical witness may not testify as to the success he has had in treating a specified injury in a specified manner.

Wilcox v Crumpton, 219-389; 258 NW 704

Opinion evidence—usual course of recovery. Evidence of an expert witness relative to the recovery usually made in average cases of certain injuries is wholly irrelevant and immaterial when there is no evidence that the injuries in question constituted an "average case."

DeMoss v Cab Co., 218-77; 254 NW 17

Hypothetical questions — inadmissible when not based on evidence. In a prosecution for homicide where it was shown that the deceased was found with a fractured neck, with no marks on his neck or body nor any evidence of a quarrel or struggle, after he had been left alone for only about a minute and a half with the defendant who was a friend of about the same size and weight, it was reversible error to allow a physician to demonstrate a strangle hold, and to answer a hypothetical question, not based on evidence, that force could be applied from the rear so as to break a man's neck.

State v Hillman, 226-932; 285 NW 176

Physician's cross-examination. In a murder prosecution, when a doctor on direct examination testified only as to what he found when he made physical examinations of the deceased, it was not error to deny cross-examination on the history of the patient.

State v Coleman, 226-968; 285 NW 269

Malpractice—testimony of laymen considered. The necessity or nonnecessity for removal of an organ from the body is not exclusively a subject of expert testimony.

Kirchner v Dorsey, 226-283; 284 NW 171

Self-serving declarations made to physician. In an action for damages for injuries received by plaintiff almost a year previously when a rug fell on her in defendant's store, it was prejudicial error to allow a physician, who had never attended her but had examined her

shortly before the trial in order to enable him to give evidence at the trial, to testify over objections as to self-serving declarations concerning her health made at that time by plaintiff, and to allow him to answer hypothetical questions based partly upon the incompetent testimony.

Mitchell v Ward & Co., 226-956; 285 NW 187

Cause of death—undue burden to establish. Expert medical opinions that an insured died from an intra-cranial, fatty embolus resulting from an external, violent and accidentally suffered injury, met by the same class of expert opinions positively to the contrary, may generate a jury question, determinable by the jury, like any other disputed question of fact, on the preponderance of testimony, the facts on which such conflicting, expert opinions are based being of such nature that the jurors could not therefrom deduce a proper opinion. So held where the court erroneously instructed that "No mere weight of evidence is sufficient to establish the cause of assured's death unless it excludes every other reasonable hypothesis as to the cause of death"—in effect requiring the theory of death by means of an embolus to be established beyond a reasonable doubt.

Aldine Co. v Acc. Assn., 222-20; 268 NW 507

Cause of death—testimony of attending physician nonconclusive. The testimony of a physician as to the cause of death of a person whom the physician personally attended shortly prior to said death is not conclusive, especially when the physician was, at the time of the examination, uncertain as to the cause of death. In other words, expert testimony, on proper hypothetical facts, is admissible to show a cause of death other than that testified to by the attending physician.

Dawson v Life Co., 216-586; 247 NW 279

Unallowable conclusion—method of treatment. Whether the results of a line of medical treatment which was employed on a named occasion were satisfactory is, at the best, an unallowable conclusion.

Lemon v Kessel, 202-273; 209 NW 393

Necessity for abortion. A physician who has professionally attended a woman upon whom an abortion has been attempted, and who later performed an autopsy upon her body, may state whether, in his opinion, the abortion was necessary to save the life of the woman. Otherwise as to a physician who bases his opinion on matters not appearing in the record.

State v Sweeney, 203-1305; 214 NW 735

Necessity to guard against infection. A physician may not testify to his conclusion that, in all cases of miscarriage, it is necessary to take precautions to prevent infection.

State v Candler, 204-1355; 217 NW 233

Customary medical practice. A witness, after properly testifying to the line of medical treatment employed on a certain occasion, may not testify that such treatment was the usual and ordinary practice of the profession at the time and place in question.

Lemon v Kessel, 202-273; 209 NW 393

Physicians — usual and ordinary practice. The defendant, in an action for damages for malpractice, may always establish, even by his own testimony, the usual and ordinary practice of physicians and surgeons in treating, in the locality in question, the injury which is the subject matter of the action.

Wilcox v Crumpton, 219-389; 258 NW 704

Malpractice — expert and nonexpert testimony—competency. Ordinarily the question of whether a doctor or dentist exercised the requisite care or skill in any case cannot be determined by the testimony of laymen or nonexperts, nor be left to the judgment of a jury or court, unaided by expert testimony, and only those learned or experienced in the profession may testify as to what should or should not have been done. But there are exceptions to this rule depending wholly on the fact situation, and no ironclad rule can be laid down as to when the doctrine shall be applied.

Whitestine v Moravec, 228- ; 291 NW 425

Malpractice—testimony of physician. In a malpractice action, testimony of a physician, who lived 70 miles away from the town where defendants lived, is admissible on the subject of the usual and accepted procedure in like operations in like localities, when it is shown that he had knowledge of the degree of skill, care, and attention necessary to successfully perform the operation.

Kirchner v Dorsey, 226-283; 284 NW 171

Malpractice—unsuccessful operation. Altho, in malpractice actions, an unsuccessful operation does not always indicate negligence, yet it is admissible, coupled with other evidence, in determining negligence or want of skill.

Kirchner v Dorsey, 226-283; 284 NW 171

Rape—possibility of intercourse. Expert testimony tending to show the possibility of sexual intercourse with a nine-year-old child may be proper.

State v Ingram, 219-501; 258 NW 186

Testamentary capacity — unsoundness of mind—unallowable opinion. Nonexpert witnesses must not be permitted to express their opinions that a testator was of unsound mind except on a recital of facts which fairly indicate mental unsoundness.

In re Diver, 214-497; 240 NW 622

Examination of expert — questions — form and sufficiency. On the trial of the issue whether a deceased was mentally competent to

execute a will, counsel has the right to shape his hypothetical questions to his expert witnesses in accordance with his (counsel's) theory of the case—the right to embrace in said questions such proven facts as he deems relevant and material to said theory and the right to omit all other facts, provided his questions as finally framed furnish adequate basis for an expert opinion as to mental soundness.

Diesing v Spencer, 221-1143; 266 NW 567

Nonexpert opinion as to insanity—necessary foundation—discretion of court. Nonexpert opinion as to unsoundness of mind is inadmissible unless the nonexpert witness first details such facts as tend, in the judgment of the court, to show an abnormal state of mind of the person whose mentality is under investigation; and the discretion of the court will not be interfered with unless there is a clear showing of abuse of such discretion.

Campfield v Rutt, 211-1077; 235 NW 59

Opinion as to sanity — cross-examination. An expert witness who, on a hypothetical question, states that in his opinion a defendant is of unsound mind, and is suffering from a form of senile dementia, may, on cross-examination, be asked, in effect, whether he would be of the same opinion if the defendant was able to accurately explain involved financial transactions—reflected in the testimony and detailed to the expert.

Richardson v Richardson, 217-127; 250 NW 897

Hypothetical question — fundamentally required instructions. Expert testimony tending to show that a party is of unsound mind, based solely on a hypothetical state of fact, is wholly without value unless the jury finds that the assumed state of fact is true, and fundamental error results in failure so to instruct.

Anspach v Littler, 215-873; 245 NW 304

Insanity—inadequate form of question. The opinion of an expert witness to the effect that a person was insane carries but slight probative value when the opinion is based on a hypothetical question which omits therefrom material and influential facts clearly established.

Crawford v Raible, 206-732; 221 NW 474

Expert and lay opinions—which must yield. An expert opinion that a person was insane at a named time prior to the time when said person was judicially declared insane will not be permitted to outweigh overwhelming lay testimony which strongly tends to establish the contrary, when said expert opinion is based almost wholly on information obtained from said person after she was adjudged insane, and on information obtained from the relatives of said person.

Davidson v Piper, 221-171; 265 NW 107

11330 Fees payable by county.

Fees in criminal causes. See under §13880, Vol I

11331 Fees in advance.

Party defendant. A party defendant is not entitled to witness fees tho he has entered no appearance in the action, but has been subpoenaed.

Vacuum Oil v Carstens, 211-1129; 231 NW 380

11336 When party fails to obey subpoena.

Deposition of adversary. The court has no legal right, even in an equitable action, to enter an order authorizing plaintiff to take, on his own behalf and by deposition, the testimony of the defendants bearing on the issues joined between plaintiff and all of said defendants.

Bagley v Dist. Court, 218-34; 254 NW 26

11342 Affidavits—before whom made.

Administration of oaths. See under §1215, Vol I
Proof by affidavit. See under §11231

Unallowable affidavits.

Radle v Radle, 204-82; 214 NW 602

Changing record. A record cannot be amended by affidavits of counsel.

Parker-Gordon v Benakis, 213-136; 238 NW 611

Unallowable affidavit. Improper argument by the county attorney cannot be shown by affidavits attached to motion for new trial.

State v Hixson, 208-1233; 227 NW 166

Grounds for new trial—optional proof. The grounds for a new trial need not necessarily be established by affidavits. In proper cases, such grounds may be established by the testimony of witnesses.

Skinner v Cron, 206-338; 220 NW 341

Affidavit (?) or bill of exceptions (?). Misconduct of an attorney in argument (not taken down and made of record) must be presented by bill of exceptions and not by affidavit attached to the motion for new trial.

Hornish v Overton, 206-780; 221 NW 483

Conflicting affidavits—effect. A war of conflicting affidavits between counsel as to what oral understanding was had relative to the time of filing an abstract on appeal will not necessarily be determined by the supreme court.

Farmers Bank v Miles, 206-766; 221 NW 449

Misconduct of jurors—nonpermissible affidavits. The affidavits of jurors that their verdict was or was not affected by certain verdict-inhering matters are not permissible. The

effect of such matters must be determined by the court.

State v Siegel, 221-429; 264 NW 613

Ex-judge's affidavit—no part of record. A judge's affidavit made after termination of his office, and three months after perfection of the appeal, is no part of the record and cannot be considered against the appellant as a basis for an alleged waiver.

In re Metcalf, 227-985; 289 NW 739

11349 Newspaper publications—how proved.

Proof of publication of original notices. See under §11085

11350 Proof of serving or posting notices.

Impeachment of return. The return of a notice is impeachable on a direct attack on its validity.

Casey (Town) v Hogue, 204-3; 214 NW 729

Parol proof of service. Parol evidence of the posting, as officially directed, of a notice of the appointment of an executor is admissible, and positive evidence to such effect will not be overcome by evidence of witnesses to the effect that they had not "observed" such posted notice.

Peterson v Johnson, 205-16; 212 NW 138

Proof of lost notice and service thereof. The contents of a written notice by a surety to a creditor requiring the creditor to sue on the obligation or to permit the surety so to do in the name of the creditor, and the service of such notice, may be proven by oral evidence when neither the original notice nor a copy thereof can be produced, but such proof must be clear, positive, convincing, and satisfactory.

Cleophas v Walker, 211-122; 233 NW 257

REPORTER'S NOTES AS EVIDENCE

11353 Authorized use.

Impeachment purposes. The shorthand notes taken upon the trial of an action may be used for impeaching purposes.

Judd v Rudolph, 207-113; 222 NW 416; 62 ALR 1174

Death or absence of witness—use of transcript. On the retrial of an action a duly certified transcript of the entire testimony at the former trial of a dead or absent witness is admissible.

Grimes Bk. v McHarg, 213-969; 236 NW 418

Testimony of party in former and different action. The transcript of the testimony of a party to an action is admissible against him in a subsequent and different action to which he is also a party, when such testimony is material as an admission of such party.

Duncan v Rhomberg, 212-389; 236 NW 638

Offering direct examination makes cross-examination admissible. In an action for conversion of an intestate's property, testimony of a witness on direct examination, given in a prior probate discovery proceeding offered and introduced from the transcript of the discovery proceeding, renders also admissible from such transcript the cross-examination of such witness, as being the whole of the conversation, altho under the dead man statute the witness may have been incompetent.

Reeves v Lyon, 224-659; 277 NW 749

Ex parte orders. An ex parte order of a judge at chambers to the effect that a party to an action may, on the trial, use a transcript of the testimony taken in another and former action, is a nullity.

Kostlan v Mowery, 208-623; 226 NW 32

Separate actions. The reporter's transcript of the testimony of a witness in bankruptcy proceedings before the commissioner in bankruptcy is not admissible as a deposition in a subsequent replevin action against the witness by one of his creditors.

Endicott Johnson Corp. v Shapiro, 200-843; 205 NW 511

Action between different parties. The reception in evidence (under proper objection), in an equitable action by an administrator, of the deposition of the deceased taken in another action between other and different parties is entitled to no consideration on an issue on which the administrator has the burden of proof.

In re Mann, 201-878; 208 NW 310

Nonadmissible against nonparty. A transcript of the original, official shorthand notes of a witness in proceedings auxiliary to execution, to which proceedings the witness was not a party, is inadmissible as substantive evidence in a subsequent proceeding against the witness wherein a conveyance is sought to be set aside as fraudulent; neither is such transcript admissible in the absence of proper foundation, to show the admissions of, or to impeach, the witness.

Hawkins v Vermeulen, 211-1279; 231 NW 361

DEPOSITIONS

11358 When and before whom taken.

Discussion. See 23 ILR 93—Letters rogatory

Deposition—when admissible. The deposition of an injured employee in support of his application for compensation under the workmen's compensation act, is admissible, after his death, on behalf of a dependent spouse who has been substituted as plaintiff, the proceeding by the employee during his lifetime and the proceeding by the dependent spouse as substituted plaintiff being in law one and the same cause of action.

Dille v Coal Co., 217-827; 250 NW 607

"Party" and "witness" not synonymous. The terms "party" to an action and "witness" are not synonymous within the meaning of this section.

Bagley v Dist. Court, 218-34; 254 NW 26

Right to take depositions—remedy by certiorari. Certiorari is the proper remedy to test the legal right of the district court to order defendants in an action to submit to the taking of their depositions by plaintiff.

Bagley v Dist. Court, 218-34; 254 NW 26

Deposition of adversary. The court has no legal right, even in an equitable action, to enter an order authorizing plaintiff to take, on his own behalf and by deposition, the testimony of the defendants bearing on the issues joined between plaintiff and all of said defendants.

Bagley v Dist. Court, 218-34; 254 NW 26

Who may offer. Depositions taken by one party may be offered in evidence by either party.

Justis v Cas. Co., 219-213; 257 NW 581

Order—form. An order of court authorizing the taking of depositions "during a term of court" need not necessarily recite that such order is "in furtherance of justice".

Bagley v Dist. Court, 218-34; 254 NW 26

11364 On commission—notice—interrogatories.

"Letters rogatory" as unallowable substitute. The courts of a foreign state have no jurisdiction to issue, and the district courts of this state have no jurisdiction to honor, so-called "letters rogatory" which are such in name only and not in substance, and which are clearly in evasion of the statutes of the state from which issued, which statutes prescribe the procedure to be followed by the courts of said state and by litigants therein desiring the testimony of witnesses residing in a foreign state.

Magdanz v Dist. Court, 222-456; 269 NW 498; 108 ALR 377

11391 Reasons for taking—presence of witness.

Independent testimony to justify. Upon the offer in evidence of a deposition and upon objection to leading questions therein, the court has a discretion to permit the introduction of testimony, independent of the deposition, explanatory of the circumstances under which the deposition was taken, to wit, that the witness was mentally alert but very weak physically and gave his testimony with difficulty.

Finnerty v Shade, 210-1338; 228 NW 886

11394 Exceptions.

ANALYSIS

I OBJECTIONS IN GENERAL
II OBJECTIONS LIMITED IN TIME
III INCOMPETENCY, IRRELEVANCY, OR IMMATERIALITY
IV ADMISSIBILITY

I OBJECTIONS IN GENERAL

Leading questions—independent testimony to justify. Upon the offer in evidence of a deposition, and upon objection to leading questions therein, the court has a discretion to permit the introduction of testimony, independent of the deposition, explanatory of the circumstances under which the deposition was taken: to wit, that the witness was mentally alert, but very weak physically, and gave his testimony with difficulty.

Finnerty v Shade, 210-1338; 228 NW 886

Questions not revealing purpose—exclusion—effect. The rule that the appellate court will not review the exclusion of questions which do not reveal what is proposed to be proven has no application to a question and answer appearing in a deposition.

Jensen v Sorenson, 211-354; 233 NW 717

Re-taking—motion to strike. A second deposition of a witness is, of course, not necessarily subject to a motion to strike.

Justis v Cas. Co., 215-109; 244 NW 696

II OBJECTIONS LIMITED IN TIME

No annotations in this volume

III INCOMPETENCY, IRRELEVANCY, OR IMMATERIALITY

Exclusion on trial for incompetency. A deposition is properly excluded for incompetency (and hearsay) when offered in evidence on the trial, when it appears from the deposition itself that the testimony of the witness is based wholly on unidentified hospital records, the correctness and verity of which the witness has no personal knowledge.

Foy v Ins. Co., 220-628; 263 NW 14

IV ADMISSIBILITY

"Letters rogatory" as unallowable substitute. The courts of a foreign state have no jurisdiction to issue, and the district courts of this state have no jurisdiction to honor, so-called "letters rogatory" which are such in name only and not in substance, and which are clearly in evasion of the statutes of the state from which issued, which statutes prescribe the procedure to be followed by the courts of said state and by litigants therein desiring the testimony of witnesses residing in a foreign state.

Magdanz v Dist. Court, 222-456; 269 NW 498; 108 ALR 377

CHAPTER 495
CHANGE OF VENUE

11408 Grounds for.

ANALYSIS

I CHANGE OF VENUE IN GENERAL

Fraud in inception of contract—right to amend answer. A defendant who bases a motion for change of venue to the county of his residence on an answer alleging fraud in the inception of the contract sued on may amend such answer, if he deems it defective, and thereafter stand on the amended answer as a basis for the change of venue.

Wright v Thompson, 209-1133; 229 NW 765

Impairment of contract. A legislative change in the venue of an action may validly be applied to an existing contract.

Grain Belt Ins. v Gentry, 208-21; 222 NW 855

Certiorari—when writ lies—suing state appeal board. Certiorari will not lie to review the action of the trial court in overruling a motion by the state appeal board for a change of venue of a trial questioning a decision of such board.

State Board v Dist. Court, 225-296; 280 NW 525

Time of trial—delay by criminal defendant. One convicted of larceny, who, on appeal is granted a reversal, and who, then, each time thereafter as his case is assigned for retrial, delays trial on the merits by dilatory moves such as request for rehearing and change of venue, may not complain that he has been denied a speedy trial as provided by law, and certiorari will not lie to require dismissal of the indictment.

Ferguson v Bechly, 224-1049; 277 NW 755

II STIPULATIONS FOR CHANGE

No annotations in this volume

III COUNTY AS PARTY

No annotations in this volume

IV JUDGE AS PARTY OR INTERESTED

Nondisqualifying interest of judge. A judge of the district court does not, by signing a petition to a city council for an election to vote on the proposition whether the city shall erect a specified public utility plant, thereby disqualify himself from fully presiding over litigation questioning the legal sufficiency of said petition.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

V PREJUDICE OF INHABITANTS

No annotations in this volume

VI UNDUE INFLUENCE OF PARTY OR ATTORNEY

Influence of defendant — continuance. An application by plaintiff for a change of venue made after a continuance of the action over a term, on the ground of the undue influence of the defendant, is properly overruled when plaintiff makes no showing that said ground was unknown to him prior to the continuance.

Jackovach v Yocom, 212-914; 237 NW 444; 76 ALR 551

VII DISCRETION TO GRANT OR REFUSE

Appealable orders. While direct and immediate appeal will not lie from an order denying a change of venue, yet such order is reviewable on appeal from a subsequent order refusing to strike an improperly joined cause of action.

Smith v Morrison, 203-245; 212 NW 567

11411 Fraud in written contract.

Nonapplicability of statute. This section has no application to an action brought against a stockholder of a corporation on his stock subscription which contains no agreement as to the place of payment.

Lex v Selway Corp., 203-792; 206 NW 586

Sole basis for change. The sworn answer is the sole basis for a change of venue in an action on a contract in the county of performance, but not the county of defendant's residence.

Sell v Mershon, 202-627; 210 NW 758

Nondiscretion of court. In an action on a contract in the county of performance, but not of the defendant's residence, the filing of a sworn answer which pleads fraud in the inception of the contract, with prayer for change of venue, leaves the court no discretion to refuse the change.

Sell v Mershon, 202-627; 210 NW 758

Arbitrary right. A defendant sued on a written contract in a county which is the county of performance, but which is not the county of defendant's residence, is arbitrarily entitled to a change of venue when he files, (1) a sworn answer properly alleging fraud in the inception of the contract as a complete

defense, and (2) the bond required by statute.

Eulberg v Cooper, 218-82; 254 NW 48

Sufficiency of pleading. The technical sufficiency of a sworn answer as a pleading of fraud as a basis for a change of venue will not be passed upon on certiorari, in the absence of any attack thereon in the district court.

Sell v Mershon, 202-627; 210 NW 758

Fraud — sufficiency of allegation. A sworn answer, containing substantially all the fact allegations necessary to constitute fraud in the inception of a contract, furnishes adequate basis for an order for change of venue to the county of defendant's residence, unless the absence of the omitted allegations is specifically called to the attention of the trial court by appropriate pleading.

Iowa Corp. v Allen, 217-1112; 253 NW 43

Right to amend answer. A defendant who bases a motion for change of venue to the county of his residence on an answer alleging fraud in the inception of the contract sued on, may amend such answer, if he deems it defective, and thereafter stand on the amended answer as a basis for the change of venue.

Wright v Thompson, 209-1133; 229 NW 765

Allowable amendment. An answer showing fraud in the inception of a contract constituting a complete defense to the contract, filed as a basis for a motion for a change of venue, does not necessarily have to be complete in itself, but may be amended and the motion renewed on the basis of the answer and amendment thereto.

Iowa Corp. v Sawyer, 210-43; 230 NW 409

Allegation of damages. An answer showing fraud in the inception of a contract, filed as a basis for a motion for a change of venue, sufficiently shows the damages resulting from the fraud when it alleges that said fraud deprived defendant of the only consideration which induced him to execute the obligation sued on.

Iowa Corp. v Sawyer, 210-43; 230 NW 409

Fraud in contract. An action to quiet title under a trust deed, brought in a county in which part of the land is situated, is not transferable to the county of defendant's residence on the plea of fraud in the execution of the deed, when the deed is silent as to the county in which the trustee-grantee shall perform the trust agreements.

McEvoy v Cooper, 208-649; 226 NW 13

11412 Expense and attorney fees.

Amount in controversy—unallowable computation. Where the court, on separate applications in the same case, orders separate changes of venue, and separately adjudges in favor of each party an allowance for expense and attorney fees for attending in the wrong county, the orders are not appealable simply because the sum total of the separate allowances is over $100.

In re Mann, 211-85; 232 NW 839

11413 Bond.

Bond essential. The right to a change of venue on the plea of fraud in the contract sued on is conditioned on the filing of a cost bond by the movant.

McEvoy v Cooper, 208-649; 226 NW 13

Time of filing not jurisdictional. Where a change of venue is sought by a nonresident because of fraud in the inception of the contract sued on, the time of filing the bond required by this section is not jurisdictional. Bond filed before any ruling on motion to dismiss the application is timely in the absence of prejudice.

Iowa Corp. v Sawyer, 210-43; 230 NW 409

11414 Application for change.

Continuance — effect. An application by plaintiff for a change of venue made after a continuance of the action over a term, on the ground of the undue influence of the defendant, is properly overruled when plaintiff makes no showing that said ground was unknown to him prior to the continuance.

Jackovach v Yocom, 212-914; 237 NW 444; 76 ALR 551

CHAPTER 496

TRIAL AND JUDGMENT

11426 Issues.

Discussion. See 22 ILR 609—Trial technique

ANALYSIS

I ISSUES IN GENERAL
II VOLUNTARY ISSUES
III STIPULATIONS

Equitable issues. See under §10947
Estoppel to deny issue. See under §11201 (III)
Instructions on voluntary issues. See under §11493 (II)
Legally insufficient pleading treated as sufficient. See under §12827
Voluntary or nonpaper issues—instructions. See under §11493

I ISSUES IN GENERAL

Dismissal of issue—striking evidence. The court should not permit testimony bearing on a dismissed issue to remain in the record when it has no material bearing on any remaining issue.

In re Muhr, 218-867; 256 NW 305

Claim of undue submission of issues. A preliminary recital in the language of an unquestioned pleading of an issue of negligence in maintaining a sidewalk, which embraces statements of the method by which and the source from which the alleged nuisance was created on the walk, reveals no error when the definite legal issue was alone actually submitted to the jury.

Fosselman v Dubuque, 211-1213; 233 NW 491

Alleging quantum meruit and proving express contract. An allegation of quantum meruit cannot be supported by proof of an express contract.

Wayman v Cherokee, 208-905; 225 NW 950

Undue influence—submission of dual issues. Testimony which supports the issue of undue influence necessarily has material bearing on the supported issue of the testamentary capacity of an aged and infirm person, but both issues are properly submitted, on supporting testimony.

Brogan v Lynch, 204-260; 214 NW 514

Will contests—contract of settlement—fraud and undue influence. In action to set aside contract for settlement of will contest, representations that "lawyers would get all the property" and that devisee "did not need a lawyer" were not fraudulent representations, and failure of court to submit issue of undue influence and constructive fraud was not error under the evidence.

Smith v Smith, (NOR); 230 NW 401

Unconscionable action with indefinite pleading. A court of equity will not reject testimony before it showing the unconscionable nature of the transaction upon which action is brought (i. e., that a contract is pyramided with unconscionable usury), simply because the pleadings are general and indefinite, and do not specifically plead such usury. Especially is this true when the parties have treated the pleadings as all-sufficient.

Tansil v McCumber, 201-20; 206 NW 680

Submitting doubtful issue to jury. In a damage action for fraud, the submission to the jury of an issue as to a repurchase contract held not error under the pleadings and tactics of the parties.

Smith v Utilities Co., 224-151; 275 NW 158

Matters concluded—issue raised by rejected amendment. An application to amend the petition offered after submission of the case, tho overruled by the court, makes the issue raised by the amendment res judicata when the identical issue is raised in a subsequent action, especially when no appeal is taken from the ruling on such application.

Bagley v Bates, 223-836; 273 NW 924

Mutual construction in re issues. It is quite conclusive that an issue was raised by the pleadings when the parties and the court proceed on that theory in the trial court.

Ia.-D. M. Bk. v Lewis, 215-654; 246 NW 597

Contradicting trial theory. After an action by a widow of a deceased partner to determine her dower interest in her husband's partnership interest is fully tried on the mutual theory of determining the amount and adjudging such amount as a trust against the entire property of the partnership, it is too late for the surviving partners to insist that the widow should take her interest in kind.

Fleming v Fleming, 211-1251; 230 NW 359

Appeal theory not presented to lower court. A contention, on appeal, that a plaintiff son seeking to establish his title in his father's property by reason of an oral contract with the father, inferentially admitted his father's title in his pleadings and is bound thereby, will not be considered on appeal when such was not the theory upon which the case was tried in the lower court.

Blezek v Blezek, 226-237; 284 NW 180

Agency revocation — nonpleaded issues. In an action for real estate commission, contentions as to revocation of the agency arising from disposal of the subject matter of the agency and mental incapacity and death of one of the joint principals before the sale by the agent, will not be considered on appeal when the pleadings show no issue thereon but

the action is on a contract allegedly personally made with the defendant.

Maher v Breen, 224-8; 276 NW 52

Writing and publication—when an issue. In a libel action, mere testimony that a witness has no recollection of the writing or publication of a letter does not raise an issue as to the fact of writing, but when his testimony, which must be construed as an entirety, shows a denial thereof, a court cannot as a matter of law establish the writing and publication.

Thompson v Butler, 223-1085; 274 NW 110

Quitclaim from spendthrift trust beneficiary. The rights of a grantee under a quitclaim deed from a spendthrift trust beneficiary cannot be determined until the trust is terminated, and cannot be litigated in an action between the trustees and grantee where the rights between the grantee and beneficiary are not issues.

Beemer v Challas, 224-411; 276 NW 60

Teachers — pension—employment prerequisite. A public school teacher, after 30 years service and while lacking only six months more service to be entitled to a pension, cannot mandamus the school board to compel her re-employment, and, such re-employment being the relief sought, a court may not go outside the pleaded issues and grant such a pension as the school board may have given.

Driver v School Dist., 224-393; 276 NW 37

Nonreviewable fact question. On appeal from an order overruling a motion to strike on ground that there was misjoinder of a principal corporation and its subsidiary, where question to be determined was whether the corporate entity of the subsidiary could be disregarded because it was so organized, controlled, and conducted as to make it a mere instrumentality of the principal corporation, which question being one of fact determinable only after a hearing of the evidence, the supreme court would not decide the matter on basis of the pleadings.

Wade v Broadcasting Co., 227-427; 288 NW 441

Denial of incorporation — insufficiency. A simple denial by a defendant that he has knowledge or information sufficient to form a belief whether plaintiff is a corporation presents no issue as to the incorporation of plaintiff.

Winterset Bank v Iiams, 211-1226; 233 NW 749

II VOLUNTARY ISSUES

Voluntary nonpaper issues. In an action to recover quantum meruit for the use of machinery, the court, in submitting defendant's nonpaper issue (acquiesced in by plaintiff) whether the use was under a contract for an agreed rental entered into with plaintiff's employee, must submit the question of the authority of the employee to enter into such a contract, there being evidence of the lack of such authority.

Des M. Pav. v Lincoln Co., 201-502; 207 NW 563

Voluntary issues—trial—effect. Principle reaffirmed that parties who voluntarily litigate issues which are not within the pleadings, are bound thereby.

Woodall v Woodall, 204-423; 214 NW 483
Andrew v Miller, 216-1378; 250 NW 711
Peterson v Bank, 219-699; 259 NW 199

Insufficient basis. Parties may not be held to have voluntarily litigated a nonpleaded issue—e. g., waiver—because of testimony which was admissible on the written issues.

Durr v Park Co., 205-279; 218 NW 54

Litigation of issue without plea. A party who, without objection, permits to be litigated and submitted to the jury the issue whether the adverse party relied on a pleaded estoppel may not thereafter predicate error on the absence of any formal plea of reliance.

Birmingham Sav. Bank v Keller, 205-271; 215 NW 649; 217 NW 874

Disposition of property. An adjudication of property interests and a disposition of the household goods in a divorce action, is proper, there being a prayer by both parties for general equitable relief, and the issue, moreover, being voluntarily litigated.

Garside v Garside, 208-534; 224 NW 586

III STIPULATIONS

Written stipulation for decree—effect. The signing by a plaintiff and a defendant in an action for separate maintenance of an agreement which specifies the amount and terms of such maintenance and provides for the entry of decree in accordance therewith, and the filing of such stipulation in the action, constitute an appearance by the defendant to said action.

Kalde v Kalde, 207-121; 222 NW 351

Stipulation of fact may act as amendment. A duly signed stipulation as to the ultimate facts in a case may become, in legal effect, an amendment to the petition in the case for the purpose of a subsequently interposed motion to dismiss the petition.

Pierre v Pierre, 210-1304; 232 NW 633

Submission without action — taxation of costs. When the issues in a controversy are made up by pleadings and the pleadings then abandoned and the matter submitted to the court on a stipulation of fact, the costs are properly taxed against the wholly unsuccessful party.

Chambers v Bank, 218-63; 254 NW 309

III STIPULATIONS—concluded

Motion to dismiss equitable action—effect of stipulated evidence. The principle that a motion to dismiss the petition in an equitable action (formerly denominated a demurrer) necessarily admits the truth of the well-pleaded allegations of the petition, may be materially modified or obviated by evidence which the parties stipulate into the record for the purpose of said motion.

Panther v Department, 211-868; 234 NW 560

Stipulation of fact—conclusiveness. A stipulation of facts upon which a cause is submitted is conclusive on both parties. In other words, no fact not embraced in the stipulation can be considered on appeal.

Andrew v Bank, 209-277; 227 NW 899

Wage recovery dependent on reformation. In a law action for wages, allegedly due an employee under contract, where parties stipulate that the employee shall not recover such wages if the defendant prevails on his cross petition for reformation, transferred to equity on motion, the employee may not thereafter deny the court's right to try the reformation issue and is bound by the decree if not contrary to the evidence.

Koch v Abramson, 223-1356; 275 NW 58

Withdrawing after submission of cause. Parties entering into a stipulation before trial, having knowledge or means of knowledge of its contents, may not withdraw part of the stipulated facts long after submission of the cause.

Carpenter v Lothringer, 224-429; 275 NW 98

Enforceability. The court will enforce a duly filed stipulation by the parties to an action of forcible entry and detainer to the effect that if defendant fails to comply with specified conditions judgment shall be entered against defendant for the possession of said premises.

Peak v Mulvaney, 215-1400; 245 NW 748

Maintenance of status quo—effect. A stipulation entered into by an insured and insurer relative to the employment of attorneys by the insurer to defend an action brought against the insured by a third party, and designed to maintain the status quo of the stipulating parties, cannot be deemed to have any bearing on a waiver of a policy provision already effected by the insurer.

Venz v Ins. Assn., 217-662; 251 NW 27

Settlement of claim—adding additional burden. An unambiguous written stipulation and agreement, duly filed in a will contest, providing in effect that defendant will pay, and plaintiff will accept, a named sum of money in full settlement of any and all claim which plaintiff may have against the estate cannot be added to by proof of an oral contemporaneous agreement to the effect that defendant would also execute a will devising and bequeathing all his property to plaintiff.

In re Simplot, 215-578; 246 NW 396

Trial by jury—waiver by stipulation. A written agreement or stipulation, duly signed and filed by opposing attorneys in a law action and approved of record by the court, agreeing to waive a jury and to try the action to the court is, in the absence of fraud or proof that an attorney had no authority so to agree, binding on the parties to the action for at least one trial to the court, even tho, after the stipulation was entered into, the pleadings be amended and the cause be continued to a later term.

Shores Co. v Iowa Co., 222-347; 268 NW 581; 106 ALR 198

11427 Of fact and of law.

Answer. See under §11114
Demurrer. See under §11141
Petition. See under §11111
Reply. See under §11156

Withdrawal—effect on testimony introduced. Upon the withdrawal by the court of an issue, testimony which was primarily introduced on such issue is properly left in the record when it bears on the weight and credibility of the testimony of witnesses.

Birmingham Sav. Bank. v Keller, 205-271; 215 NW 649; 217 NW 874

11428 "Trial" defined.

Law and equity—consolidation—mandatory order of trial. When litigants submit to the court, for trial by the court, both a law action and an equitable action, the court is under duty to first try the equitable issues if they be such as to dispose of both cases.

Holman v Wahner, 221-1318; 268 NW 168

Definition of "hearing". A "hearing" is the trial of an issue, including the introduction of evidence, the arguments, the consideration by the court, and the final decree and order.

Equitable v McNamara, 224-859; 278 NW 910

11429 How issues tried.

Discussion. See 1 ILB 144—Trial without jury—evidence

ANALYSIS

I RIGHT TO JURY
II NONRIGHT TO JURY
III REVIEW ON APPEAL
IV PARTICULAR JURY QUESTIONS

Automobile cases. See under §5037.09 (VIII)
Court findings as jury verdict, reviewability, conclusiveness. See under §§11435, 11581
Directing verdicts. See under §11508 (VI)
Findings inconsistent with verdict. See under §11514, Vol I
Findings of jury generally. See under §11513
Jury questions, probate of wills. See under §11863 (III)
Law issues. See under §11426
Right of trial by jury. See also under Const Art I, §§9, 10; §13571
Special interrogatories. See under §11513
Trial of issues. See under §§10947, 11519
Trial to court. See under §§11435, 11581
Waiver of jury. See under §§11519, 11581

I RIGHT TO JURY

Trial by court—submissions contrasted. The submission of a pending law action and of the pleadings and stipulations of fact filed therein, for trial by the court without a jury, cannot be deemed a submission under and subject to the provisions of Ch 547, C., '35, relating to the submission of controversies without action.

Rogers v Davis, 223-373; 272 NW 539

Right to trial by jury — default as jury waiver. Failure to appear for trial is a waiver of the right to trial by jury and a consent to trial by the court.

Vaux v Hensal, 224-1055; 277 NW 718

Jury to try fact issues. Issues of fact in a law action are for the determination of the jury unless the jury be waived.

Cooper v Gazette Co., 226-737; 285 NW 147

Reasonable minds differing as to conclusions. If reasonable men may differ as to conclusions drawn from the evidence, the question is one for the jury.

Yale v Hanson, 227-813; 288 NW 905

Taking case from jury—conflicting evidence. The court manifestly has no right to direct a verdict on an issue which is, under the evidence, a question for the jury.

Oestereich v Leslie, 212-105; 234 NW 229

Municipal court jury trial. Where plaintiff requested jury trial and later withdrew such request, municipal court's refusal to allow defendant trial by jury was error.

Metier v Brewer, (NOR); 205 NW 734

Conflict of evidence. On a plea in abatement in an action on a note which matures when a certain farm is sold, as "per contract" (which was oral), a fair conflict of testimony as to the terms of such contract and when such provision was inserted in the note necessarily presents a jury question.

Anderson v Foglesong, 201-481; 207 NW 562

Warranty of stock remedy—proximate cause of death. Evidence held to present a jury question on the issue whether the feeding of a so-called hog remedy to hogs was the proximate cause of their death.

Crouch v Remedy Co., 205-51; 217 NW 557

Waiver of jury by agreement of attorneys—validity. A written agreement or stipulation, duly signed and filed by opposing attorneys in a law action and approved of record by the court, agreeing to waive a jury and to try the action to the court is, in the absence of fraud or proof that an attorney had no authority so to agree, binding on the parties to the action for at least one trial to the court, even tho, after the stipulation was entered into, the pleadings be amended and the cause be continued to a later term.

Shores Co. v Chemical Co., 222-347; 268 NW 581; 106 ALR 198

Evidence sufficiency for jury question. Where evidence was sufficient to take a case to the jury on the question of whether the injury of the insured came within the terms of his policy, and it was submitted under proper instructions, there was no error in overruling a motion for new trial made on the ground that the verdict was contrary to the evidence.

Dykes v Washington Co., 226-771; 285 NW 201

Riding or driving motor vehicle. In an action on an insurance policy, there was sufficient evidence for a jury question on whether an accident came within terms of the policy insuring against injuries received in an accident of a vehicle in which the insured was riding or driving, when it was shown that the car started moving down a grade, and the insured was thrown to the ground from a position partly in the car and partly on the running board while attempting to stop the car.

Dykes v Washington Co., 226-771; 285 NW 201

II NONRIGHT TO JURY

Instructions—unsupported issue. Nonsupported issues must not be submitted to the jury.

Veith v Cassidy, 201-376; 207 NW 328

Description of property. A jury must not be permitted to pass upon the sufficiency of a description of mortgaged chattels which is sufficient as a matter of law. So held where the description revealed the particular kind of cattle, their age, average weight, the particular brand thereon, the particular farm where kept, and the particular possessor.

Wertheimer v Parsons, 209-1241; 229 NW 829

Insane persons—inquisitions—special proceeding—no jury. An appeal to the district court from the finding of the county insanity commission is a special proceeding, and, since the legislature did not provide for a jury trial, the issue is triable to the court.

In re Brewer, 224-773; 276 NW 766

Application for order in probate. Applications for orders in probate which necessitate a construction of a will have no place on the jury calendar, and reversible error results from a refusal to exclude them from such calendar on application of an interested litigant.

In re Watters, 201-884; 208 NW 281

Objections in probate—no jury. The probate court having jurisdiction to compel executrix to account for all assets, and the burden

to sustain her accounts being on executrix, objections to her accounts raising the issue of ownership of certain securities are triable in probate without a jury.

In re Rinard, 224-100; 275 NW 485

III REVIEW ON APPEAL

Verdicts—conclusiveness. Where question of fact as to negligence was properly submitted to jury, the supreme court cannot interfere with findings, no matter what its views might be if it were a trier of facts.

Usher v Stafford, 227-443; 288 NW 432

Conflicting evidence—conclusive on appeal. Where there is a conflict in evidence, the question is for jury, and supreme court will not disturb case.

Union Co. v Boyce, (NOR); 238 NW 471

Questions of fact—jury's verdict final. When instructions are proper and the question is one of fact for the jury, its verdict is final and the judgment of the supreme court cannot be substituted for that of the jury.

Ballard v Ballard, 226-699; 285 NW 165

Inferences drawn from record. The trier of facts is entitled to draw such legitimate inferences as the record will warrant.

In re Green, 227-702; 288 NW 881

Verdicts — conflicting evidence—conclusiveness. Where there is conflicting evidence, verdict and judgment thereon constitute a finality in absence of any error of the trial court in rulings on the evidence.

Higgins v Haagensen, (NOR); 220 NW 38

Fact findings of trial court—conclusiveness. The findings of the trial court, on supporting testimony, as to the fact bearing on a question of exemptions are conclusive on the appellate court.

Staton v Vernon, 209-1123; 229 NW 763; 67 ALR 1200

Direction of verdict—most favorable view. In reviewing the action of the trial court in overruling the defendant's motion for a directed verdict, the supreme court must consider the evidence, determining, not what the facts were, but what the jury was warranted in finding them to be, viewing the record in the light most favorable to the plaintiff.

Wessman v Sundholm, 228- ; 291 NW 137

Supreme court not trier of facts. The supreme court may not sit as a trier of fact and substitute its judgment as to the amount of damages to be awarded, for the judgment of the jury.

Stoner v Hy. Comm., 227-115; 287 NW 269

Excessiveness indicating passion and prejudice. Unless a verdict is so excessive as to indicate clearly passion and prejudice on the part of the jury, it should not be disturbed.

Stoner v Hy. Comm., 227-115; 287 NW 269

Lump sum verdict on several counts—waiver. The defendant may not predicate error on the fact that the jury returned a lump sum as the amount allowed on different counts, when he failed to avail himself of special interrogatories to the jury, and sought to accomplish the same object by requested instructions which embodied certain findings, but failed to submit his substitute for interrogatories to the opposing attorneys before argument.

Ransom v McDermott, 215-594; 246 NW 266

Undetermined issue in equity. In appeals in equity, the appellate court aims to pass upon the issues insofar only as will be necessary to a final determination, and will, especially on appropriate application, formally withdraw from adjudication any undetermined issue.

Goode v Express Co., 205-297; 215 NW 621

Argument ignoring adjudication. A cause will be summarily affirmed on appeal when the record prima facie shows a conclusively established plea of former adjudication, and appellant sees fit in his argument to ignore such condition of the record.

Franquemont v Munn, 208-528; 224 NW 39

Verdicts on conflicting evidence—conclusive. A jury verdict on competent, but conflicting testimony, relative to the consideration—if any—for a chattel mortgage, is conclusive on the appellate court.

McDonald v Webb, 222-1402; 271 NW 521

Speeding in residence district—sufficiency of evidence—jury question. Evidence that accident occurred on main street of town about four or five blocks from the business district, that defendant was driving 50 miles per hour, that there were a number of dwellings on both sides of the street, and that defendant had passed a sign which read, "Slow down, speed limit 25 miles per hour", was sufficient to raise jury question on issue of whether car was being driven in a residence dictrict in excess of 25 miles per hour.

Doherty v Edwards, 227-1264; 290 NW 672

Finding as to proximate cause conclusive on court. A finding by the jury, on supporting testimony, that the negligence of one of two alleged joint tort-feasors was the sole proximate cause of the injury in question is necessarily conclusive on the court.

Hanna v Central Co., 210-864; 232 NW 421

Female jurors—no presumption of prejudice. Contention that a fair trial was not obtained on account of female jurors, a majority of which were on the jury, having an inborn prejudice against a woman accused of keeping a house of ill fame, denied because, in absence of a contrary showing, jurors regardless of sex

are presumed to follow instructions and determine guilt upon the evidence.

State v Hathaway, 224-478; 276 NW 207

Equitable and law issues in probate—appellate practice. In appeals involving claims in probate, frequent practice of supreme court has been to review equitable issues by trial de novo, while considering alleged errors assigned in the law action.

Ontjes v McNider, 224-115; 275 NW 328

Testamentary capacity—incapacity not presumed. One under guardianship is not necessarily incompetent to make a will, for instance, as to a drunkard under guardianship, incapacity is not presumed. Evidence failed to establish that testator was intoxicated when he made his will, and his competency, being a fact question when decided in his favor by the court after waiver of a jury, will not be disturbed on appeal.

In re Willer, 225-606; 281 NW 155

Findings on conflicting evidence. Where different inferences reasonably may be drawn from undisputed facts and circumstances, the drawing of any one of such inferences by the court in a trial without a jury is a final finding which will not be disturbed on appeal.

Home Ins. v Ins. Co., 225-36; 279 NW 425

Conflicting evidence. In an action against street railway for injury to passenger in being thrown to the floor of car, the supreme court is not concerned with the question whether plaintiff got up from seat before car started, where there is a dispute in the testimony on that point, since such question is for the jury.

Havens v Railway, (NOR); 207 NW 677; 32 NCCA 680

Conflicting evidence. Conflicting testimony on the issue whether a tenant had waived his right to certain refrigerating room, as called for by the lease, necessarily generates a jury question, and the verdict thereon is a finality.

Rocho Bros. v Dairy, 204-391; 214 NW 685

Injunction violated—reopening case. After the court had announced its opinion and permitted cross-examination of the defendants as a preliminary step to the final determination of the punishment to be imposed upon them, it had the discretion, in view of the circumstances, to reopen the case.

Carey v Dist. Court, 226-717; 285 NW 236

Disputed fact questions as to value. In a condemnation proceeding to acquire ground for highway purposes, the right of the jury to decide disputed fact questions as to value will not be interfered with by the supreme court, if there is evidence upon which the jury could reach the verdict it did reach.

Stoner v Hy. Comm., 227-115; 287 NW 269

Verdict not excessive for ground and ornamental trees. In a condemnation proceeding to acquire a strip of ground for highway purposes 17 feet wide on each side of an existing highway which divided an 80 acre farm, where the land appropriated comprised 1.2 acres and included 19 trees in front of plaintiff's home, some of them being very large, hardwood, slow growing, ornamental trees, planted in connection with carefully planned landscaping, held, verdict of $2,000 was not excessive.

Stoner v Hy. Comm., 227-115; 287 NW 269

Finding of duplication in claims. Since appellant-claimant failed to challenge finding of trial court that two claims against a decedent's estate based on a note and a loan were a duplication, the sufficiency of other grounds of judgment disallowing claim for the loan was immaterial.

In re Green, 227-702; 288 NW 881

Objections to administrator's final report. Trial court's ruling on objection to administrator's final report will not be disturbed on appeal where fact question was involved, as supreme court would not substitute its judgment for that of court below.

In re Windhorst, 227-808; 288 NW 892

IV PARTICULAR JURY QUESTIONS

Reasonable minds reaching different conclusions. Where reasonable minds may reach different conclusions from the facts presented, the case is one for the jury.

Short v Powell, 228- ; 291 NW 406

Jury's judgment controls on disputed facts. The court cannot substitute its judgment for that of the jury when disputed facts are involved.

Glover v Vernon, 226-1089; 285 NW 652

Weight of evidence for jury—duty of court. The weight of the evidence is for jury, and the duty of court is to carefully instruct jury so as to furnish them a guide insofar as possible in attempting to arrive at truth.

Jakeway v Allen, 226-13; 282 NW 374

Law question submitted to jury. No prejudice can result when court submits to the jury a law question upon which the court could well have ruled adversely to complainant as a matter of law.

Central B. & T. Co. v Squires & Co., 225-416; 280 NW 594

Taking case from jury—scintilla evidence rule. In this state a mere scintilla of evidence will not raise a jury question and the trial court will be upheld in directing a verdict where, if the case were submitted and a verdict returned against the moving party, it would be the trial court's duty to set it aside.

Donahoe v Denman, 223-1273; 275 NW 155

IV PARTICULAR JURY QUESTIONS—continued

Conflict of testimony. A conflict of testimony in a law action on a material issue necessarily generates a jury question.

Percival Co. v Sea, 207-245; 222 NW 886

Harmless error—erroneous submission of unsupported issue. The submission to the jury, in an action for damages, of an unsupported measure of damages constitutes error, but record reviewed and held harmless to the complaining defendant.

Carpenter v Wolfe, 223-417; 273 NW 169

Improbability of testimony. A jury question may exist even tho material portions of plaintiff's testimony strongly suggest improbability.

Ransom v McDermott, 215-594; 246 NW 266

Agreed issue conclusive. A plaintiff is bound by his concession, in open court and at the close of his evidence, that of several pleaded grounds of negligence a certain one only should be submitted to the jury.

Gorham v Richard, 223-364; 272 NW 512

Acts not constituting submission of issue. It may not be said that an unsustained or unsustainable allegation of negligence is submitted to the jury because the court briefly, though unfortunately, mentioned such allegation in a preliminary recital of plaintiff's allegations, it appearing that such objectionable ground of recovery was thereafter studiously ignored in the instructions.

Williams v Railway, 205-446; 214 NW 692

Striking allegations (?) or withdrawal of issue (?). It is not proper practice, at the close of all the evidence, to move to strike from the petition unsupported or legally insufficient allegations of negligence. The proper practice is to move to withdraw such issues from the jury.

Townsend v Armstrong, 220-396; 260 NW 17

Taking case from jury—motion for directed verdict. The court, in passing upon a motion to direct a verdict against plaintiff, must assume that plaintiff has already established every material fact which his evidence fairly tends to prove.

Blecher v Schmidt, 211-1063; 235 NW 34

Directed verdict—absence of jurors—effect. When the court sustains a motion for a directed verdict, it is quite immaterial that all the jurors were not present.

Nyswander v Gonser, 218-136; 253 NW 829; 36 NCCA 1

Court's duty in construing evidence. In passing on a defendant's motion for a directed verdict, the court must construe the evidence in the light most favorable to plaintiff.

Mueller v State Assn., 223-888; 274 NW 106; 113 ALR 1256

Willers v Flanley Co., 224-409; 275 NW 474

Plaintiff's conduct. The presence or absence of contributory negligence is generally a jury question, and two elements are involved, (1) what plaintiff did, and (2) the effect of his action; if either or both of said propositions present uncertainty, there is a jury question.

Riggs v Pan-American Co., 225-1051; 283 NW 250

One conclusion by all reasonable men. Ordinarily the questions of proximate cause and contributory negligence are matters for the jury, and it is only where the facts are such, that all reasonable men must draw the same conclusion, that these questions become of law for the court.

Gowing v Field Co., 225-729; 281 NW 281

Contributory negligence—jury or law question. Contributory negligence is ordinarily for the jury, but it becomes a question of law only when reasonable minds can come to but one conclusion from facts and circumstances.

O'Meara v Green Const. Co., 225-1365; 282 NW 735

Veracity of witnesses. In reviewing on appeal an action involving an alleged fraudulent transaction, the appellate court must of necessity rely quite largely on the judgment of the trial court as to the veracity of witnesses, especially as to the values of real estate.

Bates v Zehnpfennig, 220-164; 262 NW 141

Contradicting self and impeachment. The fact that a witness was impeached or, being mentally slow and confused, makes statements on cross-examination which might be construed as contradictory, instead of being sufficient to take the case from the jury, on the contrary, presents a jury question.

Russell v Leschensky, 224-334; 276 NW 608

Testamentary capacity. Record reviewed and held to present a jury question on the issue of mental competency to execute a will.

Diesing v Spencer, 221-1143; 266 NW 567

Testamentary capacity — evidence — sufficiency. Evidence reviewed and held insufficient to make a jury question on the issue of testamentary capacity.

Green v Ellsworth, 221-1098; 267 NW 714

Testamentary capacity. A showing of old age, deafness, forgetfulness, inability to understand, moroseness, shyness, exclusiveness, lessened ability to transact business, and a general slowing down of the mental processes to a degree common with the aged does not

necessarily present a jury question on the issue of testamentary capacity.

In re Paczoch, 202-849; 211 NW 500

Testator's physical disabilities—lack of education. In an action to contest a will under which a son receives eight times as much property as the children of a deceased son and the evidence is disputed as to whether testator had sufficient understanding of English that when will was read over to her in English, unexplained, she fully understood its contents, a jury question is presented.

In re Younggren's Estate, 226-1377; 286 NW 467

Will contests—contract of settlement—fraud and undue influence. In action to set aside contract for settlement of will contest, representations that "lawyers would get all the property" and that devisee "did not need a lawyer" were not fraudulent representations, and failure of court to submit issue of undue influence and constructive fraud was not error under the evidence.

Smith v Smith, (NOR); 230 NW 401

Subscribing witnesses—sufficiency of request to sign. A will, to be valid, must be witnessed at the request of testator; however, the request need not be spoken but may be by acquiescence, by act or motion, or even by his silence when he knows that the witnesses are signing, though at the request of another, and he makes no objections, but the question of due execution should be left to the jury when it develops from testimony that one witness signed at the request of a beneficiary and that testator may not have, in any manner, requested the witnesses to sign.

Burgan v Kinnick, 225-804; 281 NW 734

Claims against estate—belated filing. While establishing a probate claim is a law proceeding, the determination of the existence of peculiar circumstances relieving the failure to file a probate claim within the statutory period is an equitable proceeding.

Ontjes v McNider, 224-115; 275 NW 328

Probate claim for services—express contract. In probate action to establish claim against estate based on express contract, where evidence that claimant acted as housekeeper, assisted with clerical work, and performed other duties about the farm for decedent, pursuant to his agreement to pay her a small amount sufficient to cover cost of her clothing and other personal expenses, and in addition thereto to compensate her out of his estate at his decease in such amount as would be in excess of any amount she could earn teaching school, a jury question was presented as to the existence of an enforceable contract and as to its nature.

In re McKeon, 227-1050; 289 NW 915

Services rendered to decedent—evidence of agreement admissible—jury question. In probate action where a claimant seeks to recover for services rendered to decedent under an express contract, the performance of such services must have been induced by a proposal and must have been in accordance therewith. Testimony by a witness to a conversation with decedent, who stated that he intended to see that claimant was properly cared for, that he would give her spending money (the little she would need), and at the end of his life he would leave her a home, was admissible and proper evidence for the jury to consider on question of whether or not there was any such arrangement or agreement. What the parties agreed to must be determined by the jury.

In re McKeon, 227-1050; 289 NW 915

Probate claim—payment specially pleaded—burden of proof—jury question. In probate action to establish claim for services rendered to decedent under an express agreement, where defendant specially pleaded a defense of payment as a part of a different contract of employment, the burden rested upon defendant to establish such different contract, including payment, and, if evidence justified, it was the duty of the court to submit the issue to the jury, but, where the defendant's evidence is also consistent with and does not negative plaintiff's claim as to her express contract, it is admissible and proper to be considered by the jury as tending to show that the present claim was an afterthought, or that claimant had failed under suitable circumstances to advance the demand now relied upon, and as tending to support defendant's theory of the nature of her employment. However, such evidence failed to establish the specially pleaded defense of payment, and the court's failure to submit the question of payment to the jury was not erroneous.

In re McKeon, 227-1050; 289 NW 915

Mental competency and elements of gift. In a replevin action by executor against decedent's sister to recover property held under claim of gift inter vivos from decedent, where clear, cogent, definite, and convincing evidence conclusively established mental competency and all the essential elements of a completed gift inter vivos appear without conflict, no jury question is presented.

Wilson v Findley, 223-1281; 275 NW 47

Bank cashier—authority to sell realty. Evidence reviewed and held to present a jury question on the issue whether the cashier of a savings bank had been given actual authority by the board of directors to sell certain real estate belonging to the bank.

Chismore v Bank, 221-1256; 268 NW 137

Reliance on notes by bank. Evidence held to show conclusively that a bank relied on

IV PARTICULAR JURY QUESTIONS—continued

promissory notes given to it in order to prevent an impairment of capital.

Farmers Bank v Bunge, 211-1357; 231 NW 651

Execution of contract—evidence—sufficiency. Evidence held sufficient to present a jury question on the issue whether bank directors had entered into an agreement as to what each, as between themselves, should pay on a promissory note given for the benefit of the bank.

Adamson v McKeon, 208-949; 225 NW 414; 65 ALR 817

Bank collections—negligence — measure of damages. The measure of damages consequent on the negligent failure of a collecting bank to notify the payee of deposited checks of their nonpayment, is not, prima facie, the amount of the checks, but such sum or amount as the payee-plaintiff may be able to prove to a reasonable degree of probability he has lost because he was not promptly notified of the nonpayment—not exceeding the amount of said checks. Substantial but conflicting testimony reviewed and held to present a jury question.

Schooler Motor Co. v Trust Co., 216-1147; 247 NW 628; 38 NCCA 361

Conversion of stock. Evidence held to present jury question on the issue whether corporate stock alleged to have been converted was worthless, whether a bank cashier acted individually or on behalf of the bank, and whether the bank received any funds in the transaction in question.

Butterworth v Bank, 211-1327; 236 NW 83

Holdership in due course. Evidence fairly tending to negative holdership in due course of a negotiable promissory note presents a jury question, especially when not all of the officers of the plaintiff (a bank) testify, and negative knowledge of the pleaded fraud.

State Bank v Behm, 202-192; 209 NW 523

Holdership in due course. Holdership in due course of a negotiable promissory note as collateral security for a pre-existing debt is not shown as a matter of law by testimony which, besides being in part impeached, is uncertain as to how, when, and under what circumstances the note was acquired and when the indorsement was made; and especially is this true when the holdership in due course bears the appearance of being an afterthought, born subsequent to the filing of the petition.

Ottumwa Bk. v Starns, 202-412; 210 NW 455

Rights on indorsement—holdership in due course. The court has no right to say that the holder of a negotiable note is a holder in due course and to direct a verdict accordingly when conflicting inferences may be drawn from the facts bearing on such holdership.

Pierce v Lichtenstein, 214-315; 242 NW 59

Renewal of note—breach of agreement—waiver. Evidence held to present a jury question on the issue whether a surety signed a renewal note with knowledge that the payee had violated an agreement to apply certain moneys on the preceding note.

Randolph Bk. v Osborn, 207-729; 223 NW 493

Fraud—renewal with knowledge. Evidence reviewed, on the issue whether a maker of fraudulently procured promissory notes renewed them at a time when he had knowledge of the fraud, or in reason ought to have had such knowledge, and held to present a jury question.

Larson v Bank, 202-333; 208 NW 726

Option conditioned on payment of note—conditional delivery—jury question. With the evidence in conflict, a jury question is generated as to whether or not the delivery of a note was conditional when it was given at the time of the execution of a farm lease which contained an option to purchase the farm on condition that the note should be paid.

Walker v Todd, 225-276; 280 NW 512

Action on note. A jury question is necessarily generated when the testimony is such as to justify the jury in finding in favor of a party on his plea of want of consideration for, and conditional delivery of, a promissory note, and against the opposite party on his plea of waiver.

Hill v May, 205-948; 218 NW 946

Fraudulent representations. Competent evidence of fraud in the execution of a lease and promissory notes, tho not free from inconsistencies, and contradicted in part, generates a jury question.

Ottumwa Bk. v Starns, 202-412; 210 NW 455

Blank spaces on note filled in. Testimony that a negotiable promissory note had been delivered without any agreement relative to the filling of a blank therein for the place of payment, and that the holder had filled the blank without any authority from the maker, presents, on the issue of material alteration, a question of law for the court, and not a question of fact for the jury.

Citizens Bank v Martens, 204-1378; 215 NW 754

Agency to receive payment. Record reviewed and held to present a jury question on the issue whether the original payee of a promissory note was the agent of the indorsee to receive payment.

Andrew v Kolsrud, 218-15; 253 NW 913

Nonissue as to signature. When it is practically conceded, under the evidence, that a party did not, himself, sign a promissory note (tho his name is signed thereto), the fact that the record contains an admitted signature of the party imposes no obligation on the court to permit the jury, by a comparison of signatures, to find that the party did, himself, sign the note.

West Chester Bank v Dayton, 217-64; 250 NW 695

Payment of note—burden of proof. Defendants, claiming payment on note which plaintiff denied, had burden to prove such payment by a preponderance of evidence, whether payment was made as partial payment on note or on property purchased, and question was for jury.

Sager v Skinner, (NOR); 229 NW 846

Money loaned—used for mutual benefit—dealing in options. Whether notes sued on represented money furnished by plaintiff to be used by defendants for benefit of both in illegal dealing in margins held for jury.

Hamilton v Wilson, (NOR); 240 NW 685

Actions on policies—accident as jury question. Evidence reviewed and held properly to present a jury question on the issue whether an injury was caused by accidental means.

Miser v Trav. Assn., 223-662; 273 NW 155

Death—"immediate" notice. Record reviewed and held to present a jury question on the issue whether a preliminary notice of death, to an insurer, was "immediate," within the meaning of the policy.

Nelson v Acc. Soc., 212-989; 237 NW 341

Injuries resulting from accident complained of. Record held replete with evidence that an insured's injuries and loss of time were caused directly and exclusively by the accident in issue and held to justify a refusal to direct a verdict for insurer on the ground that there was no competent evidence that the injuries were caused by the accident.

Eller v Ins. Co., 226-474; 284 NW 406

Insurance policy—willful deception as to health. Record reviewed on the issue whether an insured had knowingly deceived the insurer in stating his condition of health during the preceding five years, and held to present a jury question.

Parker v Ins. Co., 218-145; 254 NW 31

Avoidance of policy for misrepresentation. On the issue whether a policy of life insurance had been obtained by the insured by means of false and fraudulent representations relative to the prior and present state of health of the insured, record reviewed in detail and held to present a jury question.

Getsinger v Ins. Co., 216-610; 247 NW 260

Insurance—farmer afflicted with arthritis—total disability. Where the insured, a farmer afflicted with arthritis, brings an action on a life insurance policy providing monthly payments for total disability, which was defined as disability preventing insured "from engaging in any occupation or performing any work for compensation of financial value", and where the insured farmer was unable to perform the labor on his farm, but still was able to direct the farming operations of his hired men, it was a jury question whether or not insured was totally and permanently disabled under terms of policy.

Hoover v Ins. Co., 225-1034; 282 NW 781

Osteomyelitis of spine—permanent disability. In an action on a life insurance policy providing against "total and permanent disability", evidence that insured, afflicted with an incurable condition of osteomyelitis of the vertebrae, was able to do a few hours bookkeeping, drive an automobile occasionally, and enrolled in the State University for a short time, will not necessarily negative permanent disability but presents a question properly submitted to the jury.

Wood v Ins. Co., 224-179; 277 NW 241

Accidental death—burden of proof. Under a policy providing for additional payment in case of death from accidental means, the beneficiary has burden of showing that insured shot himself accidentally, which need not be proved by direct evidence, but may be proved by proper inferences and presumptions from facts, and the beneficiary is aided in carrying this burden of proof by the presumption that death was not the result of suicide. Such presumption, however, is a rebuttable one and ordinarily a question of fact to be determined by the jury. So where evidence on a fact matter is of such character that reasonable men, in an impartial and fair exercise of their judgment, may honestly reach different conclusions, the question was properly held for the jury.

Mutual Ins. v Hatten, 17 F 2d, 889

Death by accidental means. In a law action by beneficiary to recover for death of insured on a policy containing additional benefits for death resulting from accidental means, the defendant insurer complaining that the court erred in submitting to the jury the question of whether or not plaintiff had successfully carried her burden of proof that death resulted from accidental means, held, there being circumstantial evidence tending to establish that the discharge of a gun was accidental, creating a presumption having probative value in favor of the theory of accident, the question was properly submitted to the jury.

Waddell v Ins. Co., 227-604; 288 NW 643

Presumption against suicidal death. The common law presumption that a death was not a suicide does not necessarily create a jury

IV PARTICULAR JURY QUESTIONS—continued

question, because the presumption may be wholly negatived by the attending facts and circumstances.

Warner v Ins. Co., 219-916; 258 NW 75

Application attached to policy—illegibly reduced photo copy. In action on life policies, where defense was based on false representations in application for policy, and it is shown original application is plainly printed in legible letters of fair size, while copy furnished and attached to policy is so reduced in size and so dim or blurred that it can only be read by persons with normal vision by use of a strong magnifying glass, the statute requiring "true copy" of application to be attached to policy is not complied with, and the submission of question to the jury as to legibility under an instruction that a true copy must be readable was not erroneous.

New York Ins. v Miller, 73 F 2d, 350

Evidence of death—presumption — fugitive from justice. Continued and unexplained absence of an insured from his home or usual place of abode for seven years, notwithstanding diligent efforts of relatives and friends to locate him, creates a jury question on the issue of death, even tho the original disappearance was caused by the fact that he was a defaulter in a large amount.

Rodskier v Ins. Co., 216-121; 248 NW 295

Actions on insurance policies — delivery of mortgages. Record held to present a jury question whether mortgages, alleged to have voided a policy of insurance, had been delivered.

Hoover v Ins. Co., 218-559; 255 NW 705

Insurance—soliciting agents—enlarged power. Record reviewed and held to present a jury question whether an insurance company had held out its purported soliciting agent as really having the powers of a recording agent.

Stoner v Ins. Co., 218-720; 253 NW 821

Insurance company's waiver of policy provision. When facts are disputed as to whether insurance company waived policy provisions as to unconditional ownership and as to location where property was to be kept which was later destroyed by fire, such dispute is for the jury.

Buettner v Le Mars Assn., 225-847; 282 NW 733

Taking case from jury—insurance transfer—company knowledge. In an action against an automobile insurance company to collect under the collision clause of a policy after transferring the original policy to another automobile on which a conditional sale was outstanding, a directed verdict is properly refused when fact questions exist as to the company's knowledge of the outstanding conditional sale at time of transfer.

Mougin v Central Assn., 224-1202; 278 NW 336

Circumstantial evidence—theories of equal probability. Circumstantial evidence relative to the loss of a diamond reviewed, and held that the court could not say as a matter of law that the theories of loss by theft or by fire were of equal probability.

Hall v Ins. Co., 217-1005; 252 NW 763

Negligence—mouse in Coca-Cola—jury question. Evidence establishing (1) purchase of a bottle of Coca-Cola from stand at country club, (2) immediate drinking of part of contents in presence of those in charge of stand, and (3) discovery of a dead mouse in bottle, and becoming ill as consequence, presents question for the jury as to whether the mouse was in the bottle when purchased by the country club.

Anderson v Tyler, 223-1033; 274 NW 48

Accident—evidence. Evidence, tho somewhat inconsistent, held to present a jury question on the issue as to the manner in which an injury occurred.

Elmore v Surety Co., 207-872; 224 NW 32

Contributory negligence of 11-year-old boy. In an action for personal injuries sustained by an 11-year-old boy, who, while playing in a tree in a public street fell into wires of public utility company, sustaining severe burns, the question of contributory negligence of the boy together with question of whether defendant company had knowledge of the use of the tree by the boys in the neighborhood in playing, and the question of proximate cause of the injury should have been submitted to the jury.

Reynolds v Iowa Southern Utilities Co., 21 F 2d, 958

Negligence—adverse result of X-ray treatment. While the adverse result attending X-ray treatment, e.g., a burn, is not in and of itself evidence of negligence, yet evidence that such result does not ordinarily follow reasonably skillful treatment, plus evidence that such result may result from too frequent treatment, or from treatment prolonged during a long period of time, and that plaintiff was so treated, may generate a jury question on the issue of negligence.

Berg v Willett, 212-1109; 232 NW 821; 38 NCCA 383

Necessity for amputation. The issue whether a necessity existed for the amputation of an arm does not become a jury question on general descriptive testimony of laymen, bearing on the appearance of the arm, and tending to show no necessity for amputation, and unanimous expert testimony to the effect that am-

putation was necessary in order to save the life of the patient.

Jackovach v Yocom, 212-914; 237 NW 444; 76 ALR 551; 38 NCCA 346

Negligence—amputation without X-ray picture. The issue whether a surgeon was negligent in failing to have an X-ray picture taken of a broken arm before amputating it, does not become a jury question on general descriptive testimony of the arm by laymen opposed by unanimous expert testimony that the extent of the broken, crushed, and mangled arm was plainly apparent without an X-ray picture, the issue being whether amputation was necessary.

Jackovach v Yocom, 212-914; 237 NW 444; 76 ALR 551; 38 NCCA 346

Malpractice action—evidence of medical men—jury question. In a malpractice action, testimony of medical men located in the vicinity of the defendant surgeons, that in cervical operations it is essential that the canal be kept open while healing, makes a jury question when there is testimony that defendants failed to do this.

Kirchner v Dorsey, 226-283; 284 NW 171

Internal injury—justifiable submission. The submission to the jury, in an action for personal injury, of the question of "internal injury" is proper, under evidence that the plaintiff, after receiving a grave physical injury, suffered from internal hemorrhages.

Ashcraft v Kriv, 207-574; 223 NW 365

Future pain as incident to permanent injury. Even without a claim for damages for future pain and suffering, allegations and proof of permanent injuries from which future pain and suffering are reasonably certain to follow warrant the submission to the jury of this question.

Keller v Dodds, 224-935; 277 NW 467

Worker crushed in elevator shaft. When, in order to make repairs, a WPA carpenter descended to the bottom of an elevator shaft in a Y. M. C. A. while the superintendent of the building assisted him, and when the superintendent had twice repeated an instruction to the elevator operator in the presence of the carpenter that the elevator was not to go below the first floor, the carpenter, who died because the elevator descended on him, was not required to anticipate that the elevator operator would negligently violate the instructions. Under these facts, contributory negligence was a jury question.

Andrews v Y. M. C. A., 226-374; 284 NW 186

Deliveryman falling in elevator shaft. Where a deliveryman fell down an elevator shaft in consignee's building, a sharp conflict in the evidence as to whether the deliveryman, an invitee, had been on the premises before, whether the guard rail to an elevator shaft was in place, and whether the lights were burning at the time, generates a jury question on the issue of negligence and contributory negligence.

Riggs v Pan-American Co., 225-1051; 283 NW 250

Excessively waxed floor—jury question conjectural. In an action by a store customer to recover damages suffered when customer slipped and fell on waxed floor, evidence held insufficient to warrant instruction on question as to whether floor was excessively waxed at place where customer fell and that under the evidence such question was so conjectural as to be outside the jury's proper functioning.

Osborn v Klaber Bros., 227-105; 287 NW 252

Contributory negligence—invitee in public store. An invitee in a public store has a right to assume that the operator of the store will not be negligent in furnishing a safe place for customers, and a jury question on the issue of the invitee's contributory negligence is presented by such assumption in connection with testimony tending to show that the invitee, in walking along a passageway, looked, but could not see the floor or an adjacent open stairway, and thereupon continued to move forward, with his eyes on some goods on a shelf slightly above the level of his eyes.

Nelson v Woolworth, 211-592; 231 NW 665; 30 NCCA 542

When reasonable men differ—injury from street defect. When a street defect is of such character that reasonable and prudent men may reasonably differ as to whether an accident could or should have been reasonably anticipated from its existence or not, the question of city's liability for injuries caused thereby is generally one for jury.

Thomas v Fort Madison, 225-822; 281 NW 748

Defects in streets or highway—liability. In determining municipality's liability for injuries from defective streets or highways, if reasonable or prudent men could reasonably differ as to whether accident could and should have been reasonably anticipated from the existence of the defect, then the case is generally one for the jury, but if careful or prudent men would not reasonably anticipate any danger from the existence of the defect, but still an accident happens which could have been guarded against, the question of liability is one of law.

Bird v Keokuk, 226-456; 284 NW 438

Torts—cause of loss of rentals. Question as to whether rentals from property are lost because of construction of a bridge and new creek channel by a city, which construction occasioned some inconvenience to tenants in egress or ingress to the property, or because of

IV PARTICULAR JURY QUESTIONS—continued

depression in business conditions, is a question for the jury.

Edmond v Sioux City, 225-1058; 283 NW 260

Public water supply — water-tightness of dam. Tho no one testifies that a dam for a city reservoir was not water-tight when finished, there is sufficient evidence for the court, trying the case without a jury, to make the determination as to water-tightness on a record showing that when the water, a year after completion of the dam, reached for the first time the desired level, repairs were needed to prevent loss of water.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Leakage through dam — causal connection with contract violation. In an action on a contractor's bond because of leakage through a dam, a defense that no causal connection existed between the violation of the specifications and the damage, inasmuch as extreme heat and freezing as natural causes could also produce the leakage between the cement slabs, raises a fact question for the court, in the absence of a jury, to determine along with other circumstances as to whether this explanation sufficiently justifies a 12- to 18-inch separation of the concrete slabs.

Osceola v Gjellefald Co., 225-216; 279 NW 590

Obstructions in street—contributory negligence. Evidence reviewed relative to the act of plaintiff (injured by coming in contact with a wire stretched across a public street) in running, in semidarkness along the street and outside a crowded sidewalk, in order to reach shelter from a sudden and rapidly gathering thunderstorm, and held to present a jury question on the issue of contributory negligence on the part of plaintiff.

Cuvelier v Dumont (Town), 221-1016; 266 NW 517

"Last clear chance" doctrine—inapplicability. The "last clear chance" doctrine cannot operate against one who has no reason to suspect that a pedestrian is in any danger.

Radenhausen v Ry., 205-547; 218 NW 316

"Last clear chance"—justifiable submission. The mere fact that a train operator on the rear of a backing train saw a party approaching a public crossing, at a time when the party was 100 or more feet distant, affords no basis for submitting to the jury the issue of the "last clear chance," but such basis is furnished by testimony tending to show (1) that, to the knowledge of the operator, the party continued to approach said crossing, and was in a position of peril when 30 feet therefrom, and (2) that the train could have been stopped within 20 feet.

Williams v Railway, 205-446; 214 NW 692

Contributory negligence—"last clear chance" doctrine—applicability. The "last clear chance" doctrine can have no application unless it be found that defendant discovered the negligence of the plaintiff at a time such that, by the exercise of reasonable care, defendant might have avoided injuring plaintiff.

Steele v Brada, 213-708; 239 NW 538

"Last clear chance" doctrine—applicability. The "last clear chance" doctrine has no application except in those cases only where defendant actually discovers plaintiff's position of peril in time to prevent injury by the exercise of ordinary care, and fails to exercise such care.

Graves v Railway, 207-30; 222 NW 344

Positive and negative evidence—signals at railway crossings. Testimony of witnesses to the effect that they did not hear or notice any signals, when the witnesses were in no mental attitude to hear or notice such signals, creates no conflict with positive testimony that such signals were given.

Lenning v Railway, 209-890; 227 NW 828

Starting streetcar. Question whether conductor started streetcar, when passenger who was injured by being thrown to the floor of car was in position of peril and such fact was apparent to him, held for jury determination.

Havens v Railway, (NOR); 207 NW 677; 32 NCCA 680

Opening streetcar door as invitation to alight. Evidence that the conductor of a streetcar called the street, and, at a point very close to the customary place for discharging passengers, opened the exit door, after a stop signal had been given, and after he saw the passenger standing in front of the closed door, presents a jury question on the issue whether the opening of the door was an invitation to the passenger forthwith to alight, even tho unknown to the passenger, the car had not fully stopped.

Fitzgerald v Railway, 201-1302; 207 NW 602; 2 NCCA(NS) 540

Streetcar motorman—failure to maintain lookout. Evidence held to present a jury question on the issue whether a motorman in the operation of a streetcar maintained a proper lookout for pedestrians.

Allen v Railway, 218-286; 253 NW 143

Approach of streetcar—failure to give warning. Evidence held to present a jury question on the issue whether a motorman in the operation of a streetcar failed to give warning of the approach of the car.

Allen v Railway, 218-286; 253 NW 143

Streetcar—excessive speed—lack of control. Evidence held to present jury questions on the issues whether a motorman was, in view of the

presence of children in the street, operating his streetcar at an excessive rate of speed, also whether he had his car under proper control.

Allen v Railway, 218-286; 253 NW 143

Fires—circumstantial evidence. Circumstantial evidence reviewed, and held to present a jury question on the issue whether a fire was set by a passing engine.

Stickling v Railway, 212-149; 232 NW 677

Consent to operate vehicle—admission in pleading. In an action against an insurance carrier to collect an unsatisfied judgment arising out of an automobile collision, and where the insurance carrier raises the question of consent to operate the vehicle, its admission of this fact in a pleading in a previous action is sufficient to carry to the jury such question of consent to operation.

Mitchell v Underwriters, 225-906; 281 NW 832

Intoxication—physical facts considered by jury. Physical facts that a motorist drove over a sidewalk, into the front yard of a house, striking a child, together with certain remarks he made immediately after the accident which were inconsistent with sobriety, warrants the jury, trying to reconcile conflicting testimony, in finding the driver was intoxicated.

State v Carlson, 224-1262; 276 NW 770

Recklessness—jury question. Evidence that the driver of an automobile on a straight, smooth, graveled road was traveling 45 miles per hour in an attempt to pass other automobiles does not, in and of itself, furnish a jury question on the issue of reckless operation; otherwise as to evidence that after the car slipped and entered a ditch along the roadside the speed materially increased for a distance of 160 feet at which latter point the car collided with an intersecting grade, turned over twice, and came to a stop some 105 feet farther on.

White v McVicker, 216-90; 246 NW 385; 34 NCCA 371; 37 NCCA 126

Intoxication—defense to automobile theft insurance. Conflicting evidence as to whether one who took motor vehicle, without owner's consent, was intoxicated, presents a jury question.

Whisler v Ins. Co., 224-201; 276 NW 606

Absence of tail lights and reflectors. Testimony reviewed and held that the court could not say, as a matter of law, that the truck in question was not, at the time of a collision, equipped with tail lights and reflectors.

Isaacs v Bruce, 218-759; 254 NW 57; 36 NCCA 93

Agent's authority. Questions as to the nature or extent of an agent's authority, determinable or implied from the facts, are for the jury.

Wright v Iowa P. & L. Co., 223-1192; 274 NW 892

Employment—evidence—sufficiency. Evidence reviewed, and held to present a jury question on the issue whether a contract of employment had been entered into for a definite time.

Breen v Power Co., 207-1161; 224 NW 562

Apparent scope of agent's authority—evidence. Evidence that an agent, for many years, had charge of a certain department of his principal's business and had, during said times, negotiated many written contracts relative to the subject matter in his charge, may create a jury question on the issue whether the agent had authority, within the scope of his apparent powers, to enter into an oral contract covering the subject matter in his charge.

Webster Co. v Nebr. Co., 216-485; 249 NW 203

Rights and liabilities as to third persons—authority of agent—evidence. The jury has the right, on the issue whether an agent had authority to enter into a contract on behalf of his principal, to pass on whatever competent evidence has a tendency to prove such authority even tho such evidence is not fully and wholly satisfactory. So held as to the correspondence passing between the principal and the agent as to the leasing of the land of the principal.

First Tr. JSL Bk. v Noland, 221-1305; 268 NW 69

Abandonment of employment — jury question. Conflicting evidence reviewed, and held to present a jury question on the issue whether an agent at the time of committing an alleged negligent act was in the course of his employment.

Heintz v Packing Co., 222-517; 268 NW 607

Apparent authority of agent—showing preliminary to receiving testimony. Testimony relative to a contract of compromise with a corporate agent on behalf of the corporation is admissible upon proof that the party offering the testimony, preliminary to entering into such contract, in good faith availed himself of the bureau of information maintained by the corporation, and by means thereof made contact with corporate agents who had physical possession of the papers and files relative to the subject matter of said compromise, and who were, apparently and to all appearance, in authoritative charge of said matter for settlement. (Of course, the issue of apparent authority may be a jury question.)

Northwestern Ins. v Steckel, 216-1189; 250 NW 476

IV PARTICULAR JURY QUESTIONS—continued

Actions for compensation—dispute in evidence. Evidence, that defendant orally agreed to pay plaintiff a commission to assist in the sale of gypsum lands upon which plaintiff held drill plats, that agents of purchaser conferred with plaintiff and examined the plats, coupled with a denial by defendant that plaintiff accepted the offer or assisted in consummating the sale, presents a question precisely determinable by the jury.

Maher v Breen, 224-8; 276 NW 52

Broker—action for compensation—procuring cause. Evidence held to present a jury question on the issue whether a plaintiff-broker was the procuring cause of the leasing of premises when the lease was made, not to the individual produced by the broker, but to an unincorporated entity.

Baehr-Shive Co. v Stoner-McCray, 221-1186; 268 NW 53

Royalties—reduction by oral agreement. In an action to recover alleged balance due under coal mining contract for royalties, whether payments provided for in contract were reduced by subsequent oral agreement held to be a jury question.

Heggen v Mining Co., (NOR); 263 NW 268

Warranty—waiver. Evidence held to present a jury question on the issue whether the buyer of goods had waived the warranty for which he had contracted.

Mortemoth Co. v Home Co., 211-188; 233 NW 133

Sales—rescission of contract—jury question. In an action by the vendee of an article to recover payments made, a jury question on the issue of rescission of the contract of purchase is made by evidence tending to show that the vendor made repeated but unsuccessful efforts to repair and adjust the article so it would work to vendee's satisfaction, and that thereupon vendee (1) refused to accept it, (2) returned it to the vendor, (3) received from the vendor the note executed when the purchase was made, and (4) was told by the vendor that he would order a new article for vendee.

Trester v Swan, 216-465; 249 NW 168

Conditional sale (?) or contract of agency (?). The act of the owner of an article in reluctantly permitting it to pass into the possession of a party (to whom he had theretofore actually sold many like articles) with permission to forthwith sell the article (which sale was then practically assured) at a stated cash price or to forthwith return the article, without any expressed intention of selling the article to the party so given possession, presents a jury question on the issue whether the transaction was one of simple agency, or whether the transaction constituted an oral conditional sale contract which would not be valid against a third party who had no knowledge thereof.

Greenlease-Lied Motors v Sadler, 216-302; 249 NW 383

Fraud by seller—future promises—opinions. In an action for the purchase price of a trade-named beer dispenser bought for resale, purchaser, although same may have been an inducement to buy, may neither predicate fraud on seller's promise to procure for purchaser future resales, unless the promise is made with a secret intent to disavow, nor upon statements amounting to an opinion as to superior design; however, the jury should determine whether a statement as to merchantableness is an opinion or representation of fact.

Rowe Mfg. Co. v Curtis-Straub Co., 223-858; 273 NW 895

Implied warranty—buyer relying on seller. Ordinarily no warranty of fitness will be implied where buyer orders specific article for specific purpose known to the seller, but where buyer relies on seller to furnish a suitable article for a known purpose warranty of fitness will be implied although article may have a well-known trade name. So whether seller impliedly warranted that certain lumber was fit for manufacture of tool chests, held, a jury question.

Davenport Co. v Edward Hines Co., 43 F 2d, 63

Sale—disputed facts. Disputed evidence in buyer's action against seller over oral contract to deliver corn makes a jury question requiring a motion for directed verdict to be overruled.

Willers v Flanley Co., 224-409; 275 NW 474

Exercise of option—reasonable time. In an action to recover part of an advance paid for corn stored in an elevator under a written contract to sell at seller's option, the filing of a general denial raises the issue of defendant's performance; and question as to whether defendant exercised his seller's option within a reasonable time is for the jury.

Andreas & Son v Hempy, 224-561; 276 NW 791

Action for goods sold—dissolution of partnership at time. Whether plaintiff suing partner for goods sold had knowledge that partnership was dissolved at time of sale held question of fact for jury.

Harlan Co. v Saylor, (NOR); 228 NW 6

Substitution and release. The mere fact of the making of a new contract by which a third party becomes obligated to pay another person's previously existing indebtedness does not alone give rise to presumption that the creditor accepts the new debtor and releases the original debtor—question as to whether there

is such a release is one of fact to be determined by all the evidence in the case.

Wade v Broadcasting Co., 227-422; 288 NW 439

Release of damages—implied fraud. Evidence reviewed and held to present a jury question on the issue whether a release of damages was binding on the plaintiff who signed the same without reading it.

Shadduck v Railway, 218-281; 252 NW 772

Release—fraudulent procurement—negligent execution—jury question. Evidence reviewed at length relative to a written release of damages consequent on shockingly severe injuries, and held to present a jury question on the issues (1) of defendant's fraudulent procurement of the release, and (2) of plaintiff's negligence in signing said release.

Engle v Ungles, 223-780; 273 NW 879; 4 NCCA(NS) 92

Release—damages—fraud. A jury question as to the validity of a release of personal injury damages is made by proof that the releasee represented that the doctor's charges would be "about" $10, and that the representation was materially false, and was made to the releasor and acted on by him when he was alone and practically helpless from his injuries.

Robinson v Meek, 203-185; 210 NW 762; 5 NCCA(NS) 434

Opinion evidence—signatures. The mere introduction in evidence of genuine signatures of a party in order to establish the plea that the purported signature of the party to a written release is a forgery does not generate a jury question on the issue of forgery when other ample evidence persuasively shows that the signature to the release is genuine.

Vande Stouwe v Life Co., 218-1182; 254 NW 790

Conspiracy—concert of action—evidence—sufficiency. Evidence reviewed and held insufficient to present a jury question on the issue of concert of action between the officers and directors of a corporation for the purpose of defrauding plaintiff in the purchase of stock, except as to two defendants.

Stambaugh v Haffa, 217-1161; 253 NW 137; 38 NCCA 114

Nonconflicting evidence—only law questions presented. Where the only witnesses to testify at a trial were the plaintiff and her husband and their testimony did not conflict, no disputed question of fact was presented, but only questions of law.

St. Peter v Theatre, 227-1391; 291 NW 164

Arrest without warrant—reasonable ground—excessive force. Testimony reviewed and held to present a jury question on the issues (1) whether a defendant-sheriff in an action for damages had reasonable cause to believe that plaintiff's automobile contained the persons who had just prior thereto committed a robbery, (2) whether the sheriff acted as a prudent and reasonable officer would act under similar circumstances, and (3) whether the sheriff employed more force than was apparently necessary to stop the car.

Lawyer v Stansell, 217-111; 250 NW 887

"Unlawful dispensing" of liquor. Evidence that an accused made known to others the location of a cache of intoxicating liquors, assisted in actually locating it, and thereupon, jointly with the other parties, consumed the liquors, presents a jury question on the issue of "unlawful dispensing" of such liquors.

State v Meyer, 203-694; 213 NW 220

Confession of crime—claim of intoxication. A purported confession as to lascivious acts with a child, the admissibility of which confession is objected to because of a claim of intoxication at the time the confession was made, raises a question properly submitted to the jury when it appears the defendant had not taken any liquor for 15 to 18 hours before the confession was made.

State v Hall, 225-1316; 283 NW 414

Bias of witness—driving while intoxicated. Fact that a doctor, the real instigator of the prosecution, as a witness in a criminal case, showed considerable feeling and interest was a matter for the jury—not for the court.

State v Carlson, 224-1262; 276 NW 770

Homicide—deliberation and premeditation. Deliberation and premeditation as an element of murder in the second degree are necessarily provable by the facts and circumstances attending homicide. Evidence held such as to justify the jury in finding affirmatively on such evidence.

State v Woodmansee, 212-596; 233 NW 725

Conflicting testimony of ownership. In prosecution for receiving and concealing a stolen cow, cause was properly submitted to jury when testimony of ownership was conflicting.

State v McAteer, 227-320; 288 NW 72

Discredited testimony. The testimony of a prosecuting witness (forcible defilement in instant case) may be very seriously discredited, yet present a jury question as to its credibility.

Wildeboer v Peterson, 201-1202; 203 NW 284

Attorneys for juveniles—compensation. An action by an attorney against a county for compensation for defending a juvenile delinquent is not demurrable but presents a jury question.

Ferguson v Pottawattamie Co., 224-516; 278 NW 223

IV PARTICULAR JURY QUESTIONS—continued

Action for malicious prosecution. In an action for malicious prosecution, record reviewed and held to present jury questions on both the issues of (1) want of probable cause, and (2) malice.

Richmond v Whitaker, 218-606; 255 NW 681

Usurping province of jury. A question for the jury, and not for the court, is generated when the defendant in an action for damages for malicious prosecution makes substantial proof that, prior to commencing the prosecution, he made a full, fair, and good-faith recital of the facts to his attorney, and was advised to commence the prosecution.

Beard v Wilson, 211-914; 234 NW 802

Malicious prosecution—want of probable cause—landlord's writ—improper submission. In an action for malicious prosecution in suing out a writ of landlord's attachment for rent admittedly due (but which was canceled by a pleaded and established counterclaim), manifest error results from submitting to the jury the question whether the landlord had probable grounds to believe the truth of the ground alleged as a basis for the writ.

Kelp v McManus, 218-226; 253 NW 813

Arrest with warrant—issue as to person intended. In action for false arrest and imprisonment of plaintiff under an indictment and warrant for commission of an offense committed by another who falsely represented himself to be the plaintiff, issue as to what person was intended by the name used in the warrant could be shown by all the competent facts and circumstances surrounding the transaction out of which the indictment arose and warrant issued, and determination of such question was for jury.

O'Neill v Keeling, 227-754; 288 NW 887

Malicious prosecution — probable cause. "Probable cause" for prosecution is defined as "the knowledge by the prosecuting witness of such a state of facts as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably, and without prejudice, to believe the person accused is guilty", and except where the evidence is so clear and undisputed that all reasonable minds must reach the same conclusion, the question of probable cause is for the jury.

Bair v Schultz, 227-193; 288 NW 119

False imprisonment—justification. In an action for wrongful arrest and false imprisonment, where defendants, Polk county sheriff and deputies, acquired information that one "Gene or Eugene Drake, alias J. O. Drake", 40 to 45 years of age, weighing 150 pounds or more, with light hair and complexion, had committed a felony, and by telegraphic request to Omaha, Nebr., police caused arrest and imprisonment of plaintiff, Eugene Drake, 29 years old, weighing 240 pounds, with dark hair, the question as to whether defendants were justified in causing plaintiff's arrest was one for jury, hence court erred in sustaining motion for directed verdict.

Drake v Keeling, (NOR); 287 NW 596

Writing and publication—when an issue. In a libel action, mere testimony that a witness has no recollection of the writing or publication of a letter does not raise an issue as to the fact of writing, but when his testimony, which must be construed as an entirety, shows a denial thereof, a court cannot as a matter of law establish the writing and publication.

Thompson v Butler, 223-1085; 274 NW 110

Defense—evidence of crime withdrawn from jury. In an action for libel, based on a defamatory publication, that the plaintiff could not tell the truth when on the witness stand, in which action defendant offered to show that plaintiff perjured himself in a previous foreclosure hearing, as to the existence of a certain fence, the court errs in withdrawing this evidence from the jury on the ground of indefiniteness, since in this civil action the defendant was not required to prove perjury beyond a reasonable doubt.

McCuddin v Dickinson, 226-304; 283 NW 886

Transcript of evidence filed prior to judgment. When the reporter's notes and a transcript thereof were made a part of the record before final judgment was signed, filed, or entered, there was no merit in a contention that the court had no jurisdiction because the evidence was not properly made of record before entering judgment.

Carey v Dist. Court, 226-717; 285 NW 236

Assessment of damage. In a condemnation proceeding to acquire ground for highway purposes, the question of damages to be assessed for the land appropriated is peculiarly one for the jury.

Stoner v Hy. Comm., 227-115; 287 NW 269

Credibility—contradictions—duty of jury. The mere fact that the testimony of a witness reveals material contradictions does not necessarily deprive it of all probative force, and deprive the jury of the right and duty to reconcile the contradictions. The fact that the witness is a foreigner and untutored in the English language may be quite material under such circumstances.

State v Andrioli, 216-451; 249 NW 379

Chattel mortgage—replevin action. In replevin action by assignee of alleged chattel mortgage to recover possession of mortgaged property, whether mortgage had ever been executed or whether property was exempt to alleged mortgagor, who claimed he was a mar-

ried man, the head of a family, and that he made his living with such property, held to be jury question.

Brown v Heising, (NOR); 282 NW 345

Rent—conversion—jury question. Record held to present jury question on issue whether property on which a landlord had a lien for rent had been sold by the tenant with or without the consent of the landlord.

Mau v Rice Bros., 216-864; 249 NW 206

Liability of garnishee—willful destruction of property. Evidence tending to show that a garnishee had, subsequent to garnishment, willfully destroyed the property in his possession belonging to the defendant in garnishment, generates a jury question as to the liability of the garnishee.

Schooley v Efnor, 202-141; 209 NW 408

Family expenses — evidence — sufficiency. Evidence held to present jury questions on the issues of the delivery of certain articles of family expense and the liability of the husband therefor.

Younker Bros. v Meredith, 217-1130; 253 NW 58

Consideration. Evidence held to present a jury question on the issue of consideration.

Whitlock v Norris, 218-1066; 256 NW 734

Possession—presumption as to ownership. Proof that stock was on the premises of a defendant and under his control, both before and after it was at large in the public highway (where it was alleged to have caused a damage), and that the defendant had inferentially admitted that the stock was his, creates a jury question on the issue of the defendant's ownership.

Stewart v Wild, 202-357; 208 NW 303

Cause of death as question of law. Evidence reviewed, and held that the court could not say as a matter of law that the expert theory that hogs died of hog cholera after the termination of a shipment was more reasonable than the theory that they died because of the negligence of the carrier during shipment.

Brower v Railway, 218-317; 252 NW 755

11430 Evidence in ordinary actions.

Evidence generally. See under §11254

11431 Ordinary actions—evidence on appeal.

Equitable appeals triable de novo. See under §11433

Law (?) or equity (?). An action which is treated in the trial court as at law will be so treated on appeal, even tho the pleadings and filings therein are indorsed as in equity.

Kline v Reeder, 203-396; 212 NW 693

Action essentially at law. An action which is essentially at law, and so tried to the court under a specific waiver of a jury, is not triable de novo on appeal.

Bremer County v Schroeder, 200-1285; 206 NW 303

Fact questions—absence of evidence. Manifestly the appellate court cannot pass on fact questions unless the evidence is before the court.

Chicago JSL Bank v Eggers, 214-710; 243 NW 193

Inaccurate stipulation—effect. The trial to the court of a strictly law action on the law calendar under a stipulation that the trial shall be "in the same manner as an equity cause" gives appellant no right to a trial de novo on appeal, it appearing that the cause was treated throughout as a law action.

Hostler Co. v Stuff, 205-1341; 219 NW 481

Mutual treatment of action. An action mutually treated as a law action, from its inception in the trial court to and including its presentation on appeal, must be treated on appeal as a law action.

Garden v Ins. Co., 218-1094; 254 NW 287

Correct ruling on erroneous grounds—valid grounds existing. An error in sustaining a motion for new trial on two particular grounds cannot be prejudicial if other grounds exist on which it should be sustained, all of which will be considered on appeal.

Thompson v Butler, 223-1085; 274 NW 110

Review, scope of—parties entitled. A successful party as appellee may without assigning errors show, if he can, that he was so erred against as to entirely neutralize any errors against appellant.

Thompson v Butler, 223-1085; 274 NW 110

Final report of administrator — hearing. Hearings on final reports of administrators are not reviewed de novo in the appellate court.

In re Manning, 215-746; 244 NW 860

Appeals in probate. Appeals from orders in probate on the final reports of executors are not reviewed de novo.

In re Bourne, 210-883; 232 NW 169
In re Mowrey, 210-923; 232 NW 82
In re Oelwein, 217-1137; 251 NW 694

Accounting and settlement. An order of the probate court granting an executor credit on his final report for the amount paid by him on his own motion, on a claim against the estate, is conclusive on the appellate court if the record reveals supporting testimony as to the genuineness of the claim.

In re Plendl, 218-103; 253 NW 819

Hearings in probate. Hearings on the final reports of executors are at law and on appeal are reviewed as at law.

In re Mann, 217-1134; 251 NW 83

Reports reviewed on appeal—not de novo. The trial court's findings in probate proceedings relating to executor's reports are not triable or reviewable de novo on appeal to the supreme court. If the findings have support in the record, they cannot be disturbed.

In re Sheeler, 226-650; 284 NW 799

Probate—allowance of claim—review only by appeal. Errors in a probate proceeding for allowance of a claim as in law actions should be corrected by appeal, and no exceptions nor appeal therefrom being taken, a finding in such probate proceeding is a final adjudication.

In re Davie, 224-1177; 278 NW 616

Equitable and law issues in probate—appellate practice. In appeals involving claims in probate, frequent practice of supreme court has been to review equitable issues by trial de novo, while considering alleged errors assigned in the law action.

Ontjes v McNider, 224-115; 275 NW 328

Hearings in probate. Where the issue whether a trustee should be credited with a loss of trust funds was heard by the probate court without a jury (as a continuation of the probate proceedings out of which the trust arose) the holding of the court, granting such credit, will be sustained if the evidence pro and con would have presented a jury question had the hearing been before a jury.

In re Moylan, 219-624; 258 NW 766

Guardianship. A finding of fact by the court in guardianship proceedings, on supporting testimony, is conclusive on appeal, such proceedings not being reviewable de novo.

In re Roland, 212-907; 237 NW 349

Fence viewers—appeal from. Only questions of law will be considered on appeal from an order of the trial court which confirms the decision of fence viewers.

In re Swisher, 204-1072; 216 NW 673

Forfeiture of conveyance. A proceeding for the condemnation of a conveyance unlawfully used in the transportation of intoxicating liquors is not reviewable de novo on appeal. For instance, the appellate court will not review the credibility of competent and supporting testimony.

State v Ford Coupe, 205-597; 218 NW 346
State v Wilson, 212-1341; 237 NW 511
State v Coupe, 215-1308; 245 NW 243; 247 NW 639

Summary proceedings. A summary proceeding by a client against his attorney will be heard on appeal only on errors assigned—not de novo.

Norman v Bennett, 216-181; 246 NW 378

Contempt—extent of proof. Certiorari to review contempt proceedings is not triable de novo in the supreme court, and proof of guilt need not appear beyond a reasonable doubt.

Madalozzi v Anderson, 202-104; 209 NW 274

Contempt — review—extent. On certiorari to review a judgment holding a party guilty of contempt, the findings by the respondent court are not conclusive on the reviewing court, tho due regard will be accorded such findings.

Roach v Oliver, 215-800; 244 NW 899

Instructions—absence of applicable evidence precludes review. The appellate court cannot review an instruction to the jury when the correctness of such instrument depends on the contents of exhibits not embraced in the abstract.

Forrest v Sovereign Camp, 220-478; 261 NW 802

Law action tried by equity procedure. Where an essentially law action to recover a money judgment is brought and recognized as such by the parties and the court, it is not, without a record entry transferring it to equity, converted to an equity action because the parties with the consent of the court use an equity procedure, and appeal therefrom will be dismissed when no errors are assigned.

Petersen v Ins. Co., 225-293; 280 NW 521

Matter of discretion—matter of law—when reviewable. An order phrased in general terms granting a new trial will be deemed discretionary and not reviewable except for an abuse of discretion, but where granted on specific legal grounds it is reviewable like any other error of law.

Thompson v Butler, 223-1085; 274 NW 110

Objection to instruction—first raised on appeal. An instruction placing on a defendant-owner of an automobile the burden to prove its operation was without owner's consent, when first objected to on appeal, will not be considered.

Mitchell v Underwriters, 225-906; 281 NW 832

Question first raised on appeal. Questions as to possible errors of the trial court, not properly raised by motion for directed verdict, nor by request for instructions, nor by exceptions to instructions, cannot be considered on appeal.

In re Larimer, 225-1067; 283 NW 430

Verdict contrary to evidence—preserving question in lower court. In an action to establish a claim against an estate for serum, virus, and veterinary supplies furnished to decedent

over a term of eight years, argument on appeal that the verdict denying the claim was contrary to the evidence, and should be set aside, cannot be considered when not raised by appropriate procedure in the lower court.

In re Larimer, 225-1067; 283 NW 430

11432 Evidence in equitable actions.

Motion to dismiss equitable action. There is no statutory authority for a motion to dismiss an equitable action at the close of plaintiff's testimony.

Appanoose County Bureau v Board, 218-945; 256 NW 687

Stipulation. A stipulation in an equity cause that testimony may be taken before any judge of the district, does not deprive the court, of the county wherein the action is brought, of jurisdiction.

Gotsch v Schoenjahn, 201-1317; 207 NW 567

11433 Equitable actions—evidence on appeal.

ANALYSIS

I TRIAL DE NOVO
II EQUITABLE PROCEEDINGS TRIABLE ON ERRORS
III PRACTICE IN TRIALS DE NOVO

Abstracts on appeal. See under §12845
Constitutional provisions. See Const, Art V, §4
Evidence required for trial de novo. See under §12845
Law appeals not triable de novo. See under §11431
Remand of equitable cause on appeal. See §12871
Report of trial and certification thereof. See under §§11456, 11457

I TRIAL DE NOVO

Review—trial de novo in equity. Appeals in equity are triable de novo both as to the facts and the law.

Federal Bank v Bonnett, 226-112; 284 NW 97; 226-126; 284 NW 105
Kurth v Ins. Co., 227-242; 288 NW 90

Appeal in equity—method of trial. All appeals in equity are triable anew substantially as tho the appellate court had original jurisdiction.

Manning v Auto Co., 210-1182; 232 NW 501
Baker v Ward, 217-581; 250 NW 109

Record for trial de novo. In order for an appellant to have a trial de novo on appeal, it is incumbent on him to present a complete record of all the evidence heard, and certified, by the court.

In re Schlicht, 218-114; 253 nw 847
Northrup v Mikkleson, 222-1046; 270 NW 401

Absence of evidence. Trial de novo in the supreme court is impossible in the absence of the evidence.

Gotsch v Schoenjahn, 201-1317; 207 NW 567
Merritt v Ludwig-Wiese, 212-71; 235 NW 292

Consideration given lower court ruling. Altho a case is triable de novo in the supreme court, consideration will be given to the ruling of the lower court.

Donovan v White, 224-138; 275 NW 889
Chader v Wilkins, 226-417; 284 NW 183

Findings in equity cases—weight on appeal. In equity cases triable de novo, much weight should be given to findings of the trial court because of the better opportunities of that court to weigh the testimony, and in matters like modification of alimony decrees the court exercises a large discretion which, unless abused, will not be interfered with on appeal.

Siders v Siders, 227-764; 288 NW 909

Equity proceeding to establish heirs. In a probate proceeding to assist administrator to determine heirs of intestate, it being determined upon appeal from (1) the form of the pleadings as prescribed in equity, (2) the record of proceedings indicating use of equitable powers, (3) the reception of evidence under equitable procedure, and (4) rulings of the court reserved as in equity, that such proceeding, having been conducted in a manner wholly foreign to procedure at law, was tried in equity and therefore was triable de novo on appeal.

In re Clark, 228- ; 290 NW 13

On errors (?) or de novo (?). When it cannot be determined whether an action, tried to the court, was brought at law or in equity, it will, on appeal, be tried de novo in compliance with the apparent desire of the parties —the record containing all matters necessary for such review.

Martinsen v Ins. Assn., 217-335; 251 NW 503

Law (?) or equity (?). An action which is treated in the trial court as at law will be so treated on appeal, even tho the pleadings and filings therein are indorsed as in equity.

Kline v Reeder, 203-396; 212 NW 613

Inaccurate stipulation—effect. The trial to the court of a strictly law action on the law calendar under a stipulation that the trial shall be "in the same manner as an equity cause" gives appellant no right to a trial de novo on appeal, it appearing that the cause was treated throughout as a law action.

Hostler Co. v Stuff, 205-1341; 219 NW 481

Following trial court method of trial. An appeal will be heard de novo when the parties mutually and without controversy tried the cause in equity in the trial court.

State v Automobile, 214-1088; 243 NW 303

I TRIAL DE NOVO—continued

Method of trial controls appeal. An action tried in the lower court as equitable will be so treated on appeal.

Murphy v Hahn, 208-698; 223 NW 756
In re Moore, 211-804; 232 NW 729

Commenced and tried in equity—appeal in equity. An action which plaintiff denominates when commenced as "in equity", and which is fully tried "in equity" without objection or effort to transfer to law, will, on appeal by defendant, be treated as "in equity" and tried de novo, without assignment of error.

Bates v Seeds, 223-70; 272 NW 515

Vacation of judgment. A proceeding to vacate a default judgment and for new trial is not triable de novo on appeal.

Rock Island Plow Co. v Brunkan, 215-1264; 248 NW 32

Injunction violation by labor union—no trial de novo. In certiorari to review a judgment finding the defendants guilty of violating an injunction, the case was not triable de novo in the supreme court.

Carey v Dist. Court, 226-717; 285 NW 236

Fact findings in probate not triable de novo on appeal. Findings of fact by the trial court in a probate proceeding involving objections to an executor's report and payment of certain claims cannot be reviewed on appeal, such not being triable de novo.

In re Scholbrock, 224-593; 277 NW 5

Probate claims—no trial de novo. Probate claims are not triable de novo in the supreme court, as credibility of witnesses and weight of testimony are involved.

In re Martens, 226-162; 283 NW 885

Allowance of probate claim—no appeal de novo. An appeal from probate proceedings, in which a claim was established against an estate of a deceased person, was not triable de novo, but could be reversed when the judgment of the trial court was not supported by the record.

Reichart v Downs, 226-870; 285 NW 256

Workmen's compensation case. Principle reaffirmed that appeals under the workmen's compensation law are not tried de novo.

Arne v Silo Co., 214-511; 242 NW 539

Mechanic's lien foreclosure. An appeal from judgment of dismissal in action to foreclose mechanic's lien is triable de novo in supreme court.

Sloan Co. v Hall, (NOR); 206 NW 573

Record examined irrespective of failure to file brief. An action in equity to recover a judgment against the members of an alleged partnership and to impress a trust on certain funds is triable de novo on appeal, and the supreme court will examine the record despite parties' failure to furnish brief and argument.

Maybaum v Bank, (NOR); 282 NW 370

Assignment for benefit of creditors—equity (?) or law (?). The court is inclined to treat an assignment for the benefit of creditors as a proceeding in equity; but howsoever this may be, a proceeding which involves the final report of the assignee and the accounting therein made, and which embraces equitable issues, will be heard on appeal as in equity when so treated by the litigants and trial court.

In re Stone, 220-1341; 264 NW 604

Decision in general—avoidance of technical remand. The claim on appeal that an equitable action for the foreclosure of a contract for the sale of real estate is premature, and that judgment was rendered for the entire amount prior to its full maturity, will be disregarded on the de novo review on appeal, when it then appears that the entire amount is due and unpaid, and that no plea in abatement of the action, or other objection because of prematurity, was made in the trial court.

Vanderwilt v Broerman, 201-1107; 206 NW 959

Accounting—trial de novo—limitation. An appeal from a ruling on objections to a referee's report must be tried de novo on the objections specified to such report.

Fleming v Fleming, 211-1251; 230 NW 359

Disbarment—appeal heard de novo. An appeal by the accused in disbarment proceedings is triable de novo.

In re DeCaro, 220-176; 262 NW 132

Disbarment—procedure. An appeal in disbarment proceedings against an attorney is, on a proper record, triable de novo, even tho tried by the special court as an action at law.

In re Cloud, 217-3; 250 NW 160

Detaching municipal territory. Proceedings for the severance and detaching of territory from a municipality, being now purely equitable, are triable de novo on appeal.

McKeon v City, 206-556; 221 NW 351; 62 ALR 1006

Levy and assessment—board of supervisors as objectors. The board of supervisors as objectors to the assessment of a stockyards company may properly appeal to the supreme court from an order sustaining a motion to dismiss their appeal to the district court, and the case in the supreme court is triable de novo.

Board v Sioux City Yards, 223-1066; 274 NW 17

Custody of child—appeal—trial de novo. An appeal in habeas corpus proceedings involving the custody and best welfare of a child, nec-

essarily and unavoidably gravitates to a review de novo; obviously such review is proper when distinctly equitable issues are involved.

Jensen v Sorenson, 211-354; 233 NW 717

Habeas corpus proceedings—custody of child. An appeal in habeas corpus proceedings—a law action—involving the custody and best welfare of a child necessarily and unavoidably gravitates to a review de novo.

Adair v Clure, 218-482; 255 NW 658

Custody of children—appeal—deference to trial court. Tho divorce proceedings are triable de novo on appeal, yet the wide discretion vested in the trial court in determining the custody of children will be respected and confirmed in all cases except where the discretion has been abused.

Wood v Wood, 220-441; 262 NW 773

Total disability—de novo determination. Where evidence given by licensed chiropractors testifying for plaintiff, and physicians and surgeons testifying for defendant in regard to plaintiff's total disability is widely divergent and where there is ample evidence to support a finding either way, the supreme court, in a de novo trial, will not disturb the trial court's findings, the trial court being in a far more favorable position to determine whether claim of total disability is made in good faith.

Kurth v Ins. Co., 227-242; 288 NW 90

Guardianship proceedings—findings by court—conclusiveness. A finding of fact by the court in guardianship proceedings on supporting testimony is conclusive on appeal, such proceedings not being reviewable de novo. So held on the issue whether a guardian had, in effect, paid an allowed claim.

In re Roland, 212-907; 237 NW 349

Reports of executors—appeals—review not de novo. Appeals from orders in probate on the final reports of executors are not reviewed de novo.

Bourne v Bourne, 210-883; 232 NW 169
In re Mowrey, 210-923; 232 NW 82
In re Oelwein, 217-1137; 251 NW 694

Condemnation of conveyance. A proceeding for the forfeiture of a conveyance because of its use in the unlawful transportation of liquors is a special action, and not triable de novo on appeal.

State v Ford Coupe, 205-597; 218 NW 346

Duties and liabilities to client—summary proceedings—appeal—no hearing de novo. A summary proceeding by a client against his attorney will be heard on appeal only on errors assigned—not de novo.

Norman v Bennett, 216-181; 246 NW 378

Proceedings and determination—method of trial—extent of proof. Certiorari to review contempt proceedings is not triable de novo in the supreme court, and proof of guilt need not appear beyond a reasonable doubt.

Madalozzi v Anderson, 202-104; 209 NW 274

II EQUITABLE PROCEEDINGS TRIABLE ON ERRORS

Irregularities in trial of equity cause. An appeal in equity, tried solely on plaintiff's testimony, will not be reversed because the proper order for the introduction of testimony was not observed, or because defendant improperly brought out material testimony on cross-examination.

Coen & Conway v Bank, 205-483; 218 NW 325

Treating improperly stricken plea as in record. Upon appeal in an equity cause, the court, upon discovering from the record that the cause of action is barred by the statute of limitation, will treat an improperly stricken plea of such statute as still in the record, and enter judgment accordingly.

Lawrence v Melvin, 202-866; 211 NW 410

Absence of witnesses. The refusal of the court to continue a cause in order to enable counsel to obtain a witness will not be deemed error when there is no showing as to diligence or as to the time in which the witness might have been produced.

Miller v Hurburgh, 212-970; 235 NW 282
Barth Prod. v Kelly, 211-1154; 235 NW 471

Stockholder — who is — wholly inadequate evidence. In an equitable action to enforce, against an estate, "double" liability on bank stock, a finding and decree (based almost exclusively on the testimony of the record owner of said stock), that the deceased had actually owned said stock for some thirty years and was such owner at the time of his death, will (notwithstanding the deference accorded to the trial court in judging of the credibility of witnesses) be annulled on appeal as without adequate support in the evidence when the actions and conduct of said record owner during substantially all of said time in asserting exclusive ownership in himself, even after the death of the deceased, is wholly at war with his present testimony that he had never owned said stock and that the deceased had always owned it.

Andrew v Bank, 220-219; 261 NW 810

III PRACTICE IN TRIALS DE NOVO

Review de novo. The appellate court may review all legal propositions presented by the record in an equitable action even tho the trial court considered only one proposition which it deemed controlling.

Geil v Babb, 214-263; 242 NW 34

Dismissal—total absence of evidence. An appeal in an equitable action must be dismissed

III PRACTICE IN TRIALS DE NOVO—continued

when the only questions raised depend on the facts, and such facts are not presented.

Union County v Bank, 202-652; 210 NW 769

Abstract—incompleteness—effect. An appeal in an equitable action will not necessarily be dismissed nor a de novo hearing be refused, because all the evidence is not embraced in the abstract. So held where only one of several defendants was affected by the appeal.

State v Baker, 212-571; 235 NW 313

Equity cause tried on exceptions. When a cause in equity is tried on exceptions to the report of a referee, and the appeal is from the judgment rendered on said exceptions, the review on appeal is limited to the exceptions presented to the trial court and to the record there made.

Hogan v Perkins, 213-1175; 238 NW 608

Unallowable addition to record. On appeal, even in an equity case, the record as made in the trial court cannot be added to by the filing of affidavits bearing on the fact situation.

McDaniel v McDaniel, 218-772; 253 NW 803

Limited appeal in equity limits de novo hearing. The de novo hearing on appeal in an equitable action is necessarily limited to the particular part of the decree from which the appeal is taken; and, under such an appeal, appellee cannot have a de novo hearing on some other part of the decree unless he perfects a cross-appeal.

Brutsche v Coon Rapids, 220-1295; 264 NW 696

Review, scope of—ruling adverse to appellee. A part of a decree on which no appeal is taken by the party adversely affected is not before the supreme court for review.

Scott v Waterloo, 223-1169; 274 NW 897

Judgment solely on plaintiff's testimony. It is not true, in an equity case submitted solely on plaintiff's testimony, that the testimony must, on appeal, be accepted in the most favorable light which can be given to it. On the other hand, such an appeal must be heard de novo and on its merits.

Coen & Conway v Bank, 205-483; 218 NW 325

Judgment solely on plaintiff's evidence. A defendant in an equitable action who, at the close of plaintiff's evidence, successfully moves for a directed verdict against plaintiff, must, on appeal, submit to a final trial de novo solely on plaintiff's evidence.

Pickler v Lanphere, 209-910; 227 NW 526
Hirtz v Koppes, 212-536; 234 NW 854

Accounting — trial de novo — record. Tho defendant, in an equitable action for an accounting, unsuccessfully moves at the close of plaintiff's testimony for a dismissal of the action, yet the final determination of the action must be determined, in the trial court and on appeal, on the entire record testimony including that introduced by said unsuccessful movant.

Economy Co. v Honett, 222-894; 270 NW 842

Judgment solely on plaintiff's testimony—effect. A defendant in an equitable action who, at the close of plaintiff's testimony, successfully moves for a dismissal, and who suffers a reversal, on trial de novo on appeal, may not, after general remand, resume the trial in the lower court and attempt to establish his defenses, on the sole claim that when he made the motion to dismiss, he had not rested his case.

Matthews v Quaintance, 204-520; 215 NW 707
Haggin v Derby, 209-939; 229 NW 257

Motion to dismiss on plaintiff's evidence. A motion to dismiss an action in equity, made at the close of plaintiff's testimony, being without statutory recognition, simply constitutes an announcement by defendant that he rests his case without further testimony.

Vogt v Vogt, 208-1329; 227 NW 107

Absence of evidence in equity. An appeal in an action brought and tried in equity will not be dismissed because the appellant fails to include the evidence in his abstract when the record reveals everything necessary for the court to decide the narrow question of law presented by appellant.

Carlson v Layman, 214-114; 241 NW 457

Inferences drawn from record. The trier of facts is entitled to draw such legitimate inferences as the record will warrant.

In re Green, 227-702; 288 NW 881

Presumption as to evidence legally inadmissible. In a trial to the court, it will be presumed that testimony which is inadmissible as a matter of law was not considered by the court tho actually admitted in evidence.

James v Sch. Twp., 210-1059; 229 NW 750

Postponed rulings—presumption. The judgment of the trial court will be presumed to have been based solely on competent testimony when the court so certifies at the time of passing on postponed rulings and excluding certain testimony thereunder.

In re O'Hara, 204-1331; 217 NW 245

Incompetent evidence in equity. It must be presumed on appeal in an equity proceeding that the court disregarded incompetent testimony which was received under proper objection.

State v Dietz, 202-1202; 211 NW 727

Disregarding improper testimony. On trial de novo on appeal in equity cases, testimony given by incompetent witnesses, as to transactions and communications with a deceased person, will be disregarded.

Flint v Varney, 220-1241; 264 NW 277

De novo hearing regardless of decretal recitals. A recital in a mortgage foreclosure decree that of two defensive pleas one had been established, and one had not been established, does not prevent the appellate court on review de novo from adjudging that both said defensive pleas have been established, even tho the prevailing party—the appellee—does not assume to appeal from the one adverse court finding of fact against him.

Northwest. Ins. v Blohm, 212-89; 234 NW 268

Presumption attending unduly abbreviated abstract. When the complete record on which the trial court reached its conclusion on a fact proposition is not before the court on a de novo trial, and where the contrary does not appear, the presumption must be indulged that the trial court properly performed its duty and reached a proper conclusion.

Harrington v Foster, 220-1066; 264 NW 51

Certification of evidence. Evidence taken in an equitable action need not be certified by the trial judge and reporter until there exists a necessity for such certification. Conceding, arguendo, that the certification should be made within a reasonable time after such necessity arises, then the presence or absence of prejudice will materially control the question as to what is such reasonable time.

Andrew v Bank, 206-1368; 222 NW 553

Rent advanced as cost of administration. A stockholder of a clay products company in receivership, having advanced the rent due from the company on its clay pit lease, may not recover this rent as a cost of administration, especially when he advances this theory for the first time on appeal.

Parks v Carlisle Co., 224-1024; 277 NW 731

Family transaction—careful scrutiny for fraud. A transaction wherein an insolvent mortgagor, also in arrears on interest and taxes, makes an assignment to his father-in-law of a lease on his mortgaged premises, being a family transaction, will be carefully scrutinized for fraud; but without specific evidence indicating an incorrect conclusion by the lower court, its decision validating such transaction will not be disturbed on appeal.

First Tr. JSL Bank v Ver Steeg, 223-1165; 274 NW 883

Equitable and law issues in probate—appellate practice. In appeals involving claims in probate, frequent practice of supreme court has been to review equitable issues by trial de novo, while considering alleged errors assigned in the law action.

Ontjes v McNider, 224-115; 275 NW 328

Appeal de novo—weight given decision of lower court. Altho a divorce action, being in equity, is triable de novo on appeal, yet the supreme court will give serious consideration to the decision of the lower court when there is a conflict in the testimony. Evidence reviewed and held to justify award of separate maintenance to the wife and to deny divorce to the husband.

Blew v Blew, 225-832; 282 NW 361

Determining preponderance. Where one witness' word was against that of another, the supreme court, on appeal in an equity action, looked to the conduct of the parties and surrounding circumstances to determine the preponderance of the evidence.

Webber v Ins. Assn., 227-793; 288 NW 868

11434 Abstracts in equity causes.

Dismissal—total absence of evidence. An appeal in an equitable action must be dismissed when the only questions raised depend on the facts, and such facts are not presented.

Union County v Bank, 202-652; 210 NW 769

11435 Finding of facts by court.

Court findings reviewed, conclusiveness. See also under §11581
Jury findings, reviewability. See under §11429 (III)
Most favorable evidence rule. See under §11508 (VI)
Special interrogatories. See under §11513
Trial to court. See also under §11581
Discussion. See 22 ILR 609—Trial technique

Conflicting evidence — findings conclusive. Findings of the court in a law action on conflicting evidence, like a jury verdict, are conclusive upon appeal. In such cases the supreme court may not determine facts but merely decide what the court was warranted in finding them to be.

Barth Co. v Kelly, 211-1154; 235 NW 471
Jefferies v Prall, 215-763; 246 NW 816
In re Canterbury, 226-586; 284 NW 807
In re Fisher, 226-596; 284 NW 821
School District v Ida County, 226-1237; 286 NW 407
Armstrong v Smith, 227-450; 288 NW 621
Fed. Bank v Trust Co., 228- ; 290 NW 512

Supported findings of court in law actions inviolable. It is beyond the power of the appellate court in a law action tried solely to the court to disturb the findings of the court on conflicting but supporting evidence, or to disturb the judgment based on such findings.

Eilers v Frieling, 211-841; 234 NW 275

Presumption attending general findings. A defendant-appellee may not have an affirmance on appeal on the theory that the general findings of the trial court in his favor imply a finding in his favor on every material and defensive issue, when the record shows that the issues in question were abandoned by defendant in the trial court.

Schaffer v Acklin, 205-567; 218 NW 286

Grounds presentable by appellee. When the lower court in an equity cause sustains plaintiff's action on one presented ground, but overrules all other presented grounds, the appellee on appeal may very properly argue the correctness of the overruled grounds.

Reason: The appellate court must affirm the decree of the lower court if it is sustainable on any ground properly presented in the lower court, irrespective of the findings of the lower court.

Wyatt v Manning, 217-929; 250 NW 141

Findings on conflicting evidence—conclusiveness. Where different inferences reasonably may be drawn from undisputed facts and circumstances, the drawing of any one of such inferences by the court in a trial without a jury is a final finding which will not be disturbed on appeal.

Home Ins. v Ins. Co., 225-36; 279 NW 425

Supported findings in probate. Supported findings of fact by the probate court have the force and effect of a verdict of a jury and will not be reviewed on appeal.

In re Fish, 220-1328; 264 NW 542

Preservation of estate funds—findings in probate. A supported finding by the probate court that an administrator had failed to exercise ordinary care to preserve the funds of the estate is conclusive on the appellate court.

In re Foster, 218-1202; 256 NW 744

Loss to estate—certificate of deposit not collected from insolvent bank—executor a bank director. A finding by the trial court that loss to an estate through the failure to collect on a certificate of deposit belonging to the estate was not caused by the fault of the executor was sustained by evidence that the executor who was a director of the bank on which the certificate was drawn, but took no active part in the management of the bank and did not know it was insolvent, had properly presented the certificate for payment and had been refused because of the insolvency of the bank.

In re Smith, 228- ; 289 NW 694

Removal of administrator—failure to hear evidence. An order by the court removing an administrator will not necessarily be deemed invalid because the court did not formally receive any testimony.

In re Donlon, 201-1021; 206 NW 674

Court findings—effect on trial de novo. In an equitable proceeding where there is conflict in evidence, the supreme court must give weight to findings of trial court altho case is tried de novo.

Horn v Ins. Co., 227-1045; 290 NW 8

Probate orders—non de novo hearing. An appeal from an order adjudging the final liability of an administrator is not heard de novo. In other words, the supported findings of the trial court are conclusive on the appellate court.

In re Enfield, 217-273; 251 NW 637

Findings on objections to administrator's final report. Trial court's ruling on objection to administrator's final report will not be disturbed on appeal where fact question was involved, as supreme court would not substitute its judgment for that of court below.

In re Windhorst, 227-808; 288 NW 892

Probate proceedings not triable de novo. A ruling by the lower court approving the final report of an executor and overruling objections thereto is not triable de novo on appeal and will be affirmed if substantial support is found in the record.

In re Smith, 228- ; 289 NW 694

Probate findings. The supported finding of the court in probate on the issue whether funds received by a person were received by him as guardian or as trustee (bond in each case having been given) is conclusive on the appellate court.

In re Baldwin, 217-279; 251 NW 696

Allowance of claims — conclusiveness. The allowance of a claim by the probate court on supporting testimony is conclusive on the appellate court, even tho the supporting testimony is not wholly satisfactory to the judicial mind.

Olson v Roberts, 218-410; 255 NW 461

Disallowance of claims. A supported finding in probate that a claim should be disallowed is conclusive on appeal.

Chamberlain v Fay, 205-662; 216 NW 700
In re Anderson, 216-1017; 250 NW 183

Advancements—how issue tried. A proceeding in probate on the issue whether a conveyance by a father to his son constituted an advancement is triable, both in the trial and appellate court, as an action at law. It follows that a supported finding by the trial court is conclusive on the appellate court.

In re O'Hara, 204-1331; 217 NW 245

Court findings upheld. In proceedings to establish a lost will, the loss of the will and the search for it were proved by evidence that the will could not be found altho the home of the deceased and other places where the

will might have been kept were thoroughly searched. The conclusion of the trial judge on the sufficiency of such evidence will not be disturbed unless discretion is abused.

Goodale v Murray, 227-843; 289 NW 450

Supported findings in law action—conclusiveness. The finding and judgment of trial court on claim against decedent's estate has the effect of a jury verdict and may not be set aside if it finds any substantial support in the record.

In re Green, 227-702; 288 NW 881

When reviewable. Findings of the trial court in a law action (under §11972, C., '35) that plaintiff was not entitled, on the facts, to be relieved from his failure to make timely filing of a claim against an estate, will not be disturbed on appeal when substantially supported by the record.

Bates v Remley, 223-654; 273 NW 180

Assignment of errors — fatal insufficiency. Assignments of error which make no reference to any part of the record other than to the exceptions to the rulings of the court, with no specific complaint or reason assigned why the court was in error, must be deemed omnibus in form and fatally insufficient.

Rogers v Davis, 223-373; 272 NW 539

Malicious prosecution — questions for jury. Evidence reviewed in action for damages for false arrest and malicious prosecution (padlocked schoolhouse case), and held such as to preclude the court from determining the question of want of probable cause, malice, and good-faith reliance on the advice of counsel.

Gripp v Crittenden, 223-240; 271 NW 599

Cashing of check—conclusiveness of findings. Whether the facts and circumstances attending the receipt by a creditor from a debtor of a check for an amount less than claimed by the creditor, and the cashing of the check by the creditor, constituted an accord and satisfaction may be a question of fact; and the findings of the court thereon in a law action tried to the court, on conflicting and supporting testimony, are necessarily conclusive on the appellate court.

Barth Co. v Kelly, 211-1154; 235 NW 471

Fraudulent acts by bank cashier—repudiation of only part of transaction. Where the cashier of the plaintiff bank obtained credit with the defendant bank in order to conceal a shortage in the accounts of the plaintiff, giving unauthorized drafts on the plaintiff and crediting the plaintiff with the amounts, it was erroneous for the court to find that the cashier had borrowed from the defendant to pay the plaintiff and then paid the defendant with the drafts, with the result that the defendant then held assets of the plaintiff equal to the amount of the drafts. To hold thus would permit the plaintiff bank to accept payment of the shortage through the unauthorized acts of its agent, the cashier, and at the same time repudiate the remainder of the transaction and deny the right of the defendant to use the unauthorized drafts.

Community Sav. Bank v Gaughen, 228- ; 289 NW 727

Evidence supporting oral lease for year. In action for conversion by landlord against purchaser of tenant's buckwheat, the findings of trial court that tenant leased premises for one year rather than being a share cropper held supported by evidence and conclusive on appeal.

Schaper v Farmers' Exch., (NOR); 239 NW 134

Redemption of mortgage—extension of time —rent—reasonableness. An order fixing the rent to be paid by the mortgagor to the mortgagee, during a granted extension of time in which to redeem, may be conclusive on the appellate court, in view of the nature of the very meager testimony presented.

Union Ins. v Waddell, 218-1367; 257 NW 319

Homestead abandonment. A finding by the trial court, in a law action, on conflicting but supporting testimony that a homestead had been abandoned, is conclusive on the appellate court.

Crail v Jones, 206-761; 221 NW 467

When conclusive. A finding by the trial court on supporting testimony that a wife signed both the note and mortgage of her husband solely for the purpose of waiving her dower interest, and received no actual consideration herself, is conclusive on the appellate court.

Bates v Green, 219-136; 257 NW 198

Directed verdict—failure to rule on motion. Error, if any, in trial court's failure in replevin action to rule on defendant's motion to direct verdict at close of plaintiff's evidence is not prejudicial where case is tried to court.

Prehn v Kindig, (NOR); 232 NW 812

Conclusiveness of court's finding. The finding of the court in a trial to the court on supporting evidence on the issue whether an insured died "solely through external, violent, and accidental means" or from disease is conclusive on the appellate court; and it is immaterial that the court determines its findings by sustaining a motion to dismiss at the close of all the evidence, or by overruling such motion and later dismissing the action on its own motion.

Cherokee v Ins. Co., 215-1000; 247 NW 495

Judgment on bail bond—conclusiveness. A finding by the court, on conflicting and supporting testimony, in a proceeding to set aside a judgment on a bail bond, that the surety had,

at his own expense, caused the principal in the bond to be delivered to the sheriff, is not reviewable on appeal.

State v Robinson, 205-1055; 218 NW 918

Electric plant earnings — fact findings in trial to court. Where an injunction wrongfully restrained and delayed, for 11 months, construction of a municipal light plant and in an action on the injunction bonds, tried without a jury, where the trial court had evidence to determine the plant's net earnings for first year of operation and there was sufficient evidence to support his findings that earnings during 11 months lost by delay would have been substantially same, damages in that amount for such period are not too speculative, remote, and uncertain, and such findings are conclusive on appeal.

Corning v Iowa-Nebr. L. & P. Co., 225-1380; 282 NW 791

Social welfare board—findings of fact—noninterference by court. The provisions as to powers and authority of the court on appeal, under the provisions of the social welfare law as to old-age assistance, are somewhat analogous to those of the workmen's compensation law, under which the holdings of our court have always been that, when supported by competent evidence, the findings of fact by the commission will not be interfered with by the court.

Schneberger v Board, 228- ; 291 NW 859

Probate claim denied—no bar in subsequent equity action. A prior judgment in a law action tried on the merits is conclusive as to a subsequent action in equity between the same parties and the same facts, but where a widow is bequeathed a life estate in realty with the right to dispose of such realty for her necessary support, a probate adjudication on the merits that her claim for widow's support could not be established against husband's estate, is not such an adjudication as bars a later equity proceeding to establish such support claim as a lien on such realty.

Hoskin v West, 226-612; 284 NW 809

Attorney fee allowance. Tho a presumption of correctness exists in favor of trial court's decision fixing compensation for administrator's attorney, yet, where objection is made to application for allowance, and no evidence is introduced as to the services other than a bare statement in the applicant's affidavit, the trial court is not warranted in making a finding involving both nature and value of services.

Glynn v Bank, 227-932; 289 NW 722

Findings of fact in probate. The appellate court will review an attorney's allowance for ordinary or extraordinary services to an estate where it appears from the record that the allowance is excessive or the claim therefor is not supported by sufficient evidence.

Glynn v Bank, 227-932; 289 NW 722

11437 Separate trials.

Joint tort-feasors.

McDonald v Robinson, 207-1293; 224 NW 820; 62 ALR 1419; 34 NCCA 306

Denial of separate trial. An order refusing a separate trial to one of two joint defendants is appealable when it materially affects the "final decision".

Manley v Paysen, 215-146; 244 NW 863; 84 ALR 1330

Separate trial—right to. Reversible error results from refusing a separate trial to a defendant who is sued jointly with another for damages consequent on his alleged negligence, and on the alleged recklessness of his co-defendant, the defensive issues of the two defendants being wholly hostile to each other, and the opportunity existing for collusion between the plaintiff and such other defendant.

Manley v Paysen, 215-146; 244 NW 863; 84 ALR 1330

Joint tort-feasors with different defenses. Altho joint tort-feasors may be joined in one action, a petition charging two colliding motorists generally with negligence and recklessness and only alleging that plaintiff was riding in one of the vehicles with no averment as to his status as a guest or otherwise, presents to the jury such complex and confusing issues as to entitle defendants to separate trials.

Fay v Dorow, 224-275; 276 NW 31

11438 Trial notice.

Order of court in lieu of notice. No necessity exists for the filing of a trial notice in a cause when the court enters an order placing the cause on the trial calendar under conditions which operated exactly as a trial notice would have operated.

Fidelity Inv. v White, 212-782; 237 NW 518

Default for nonappearance—trial to court. Where an action on a promissory note had been assigned for trial, continued to the next day because of defendant's nonappearance for trial, and at such time called for trial a second time with defendant still not appearing until after the jury panel had been dismissed, a default having been entered, and plaintiff being allowed to prove up his case to the court, held on defendant's belated appearance and demand for jury trial, an offer by the court to require plaintiff to reintroduce his evidence but requiring a trial to the court without a jury, otherwise, permitting default and judgment thereon to stand, was not error.

Vaux v Hensal, 224-1055; 277 NW 718

Want of prosecution—court rules construed with statute. A district court rule, providing for dismissal of actions for want of prosecution if not noticed for trial within one year,

must be construed in conjunction with statute requiring trial notices to be filed.

Thoreson v Central States Co., 225-1406; 283 NW 253

Reinstating dismissed action. One seeking to reinstate an action which has been dismissed must do more than establish his ground for vacating the judgment; he must show that he has a valid cause of action or defense to the action in which the judgment was rendered. Held that the failure of plaintiffs to make a prima facie showing of a valid cause of action was fatal to their proceedings.

Thoreson v Central States Co., 225-1406; 283 NW 253

11439 Assignments—hearing of motions, etc.

Court's discretion. Assignment of causes rests largely within discretion of trial court.

Collings v Gibson, (NOR); 220 NW 338

Assignment before issues joined. The assignment of a case for trial before the issues are fully made up does not constitute error.

Bliss v Watson, 208-1199; 227 NW 108

Effect of assignment to certain judge. When a cause is assigned to, and tried by, a judge of the district court, all other judges of the same court are thereby deprived of jurisdiction to dismiss the cause while it is pending before said trial judge.

Dunkelbarger v Myers, 211-512; 233 NW 744

11440 Docketing appeals.

Bond not required. No appeal bond is required in an appeal to the district court from the judgment of an election contest court by a party who is not an incumbent of the office in question, this section having no application to such a case.

Donlan v Cooke, 212-771; 237 NW 496

Expunging clerk's judgment entry after court's dismissal. An appeal from justice court, perfected and docketed, is in the district court as tho it had been commenced there; the justice's judgment is completely annulled; the appeal brings up the action for trial on its merits; and it is the duty of the plaintiff to prosecute the action. So where a district court, under its rule providing for dismissal of all actions remaining on the court calendar for over one year without being noticed for trial, dismissed such an appeal under its rule, and the clerk of court entered judgment in favor of plaintiff for the amount recovered in justice court together with interest and against appealing defendant, the defendant's motion to expunge the clerk's entry and correct the record was well-grounded and should have been sustained.

Yost v Gadd, 227-621; 288 NW 667

11441 Calendar.

Atty. Gen. Opinion. See '34 AG Op 93

Dropping action from calendar — reinstatement. The district court has jurisdiction to reinstate a cause which, under order of court, has been "dropped from the calendar" if such dropping was not with the intent to dismiss.

Bankers Tr. v Dist. Court, 209-879; 227 NW 536

See Dunkelbarger v Myers, 211-512; 233 NW 744

Appeal from order noted on calendar. A party may not appeal from an order in the form of a mere notation on the judge's calendar, which order is later incorporated into the final decree.

Brotherhood v Ressler, 216-983; 250 NW 169

Entry—necessity. Principle reaffirmed that the oral rendition by the court of his decision, the entry of such decision on the court calendar, and the transcribing of such entry into the appearance docket and fee book do not constitute a judgment.

State v Wieland, 217-887; 251 NW 757

Extending time to file motion—journal entry valid. A statute requiring that an application for a new trial must be made within five days after the verdict is rendered unless the court grants an extension of time, contemplates orders which are only temporary and incidental to the case, and an order extending the time for such application was effective to extend the time beyond the five-day limit, when it was entered on the judge's calendar before the five days were up, even tho not entered on the record book until seven days after judgment was rendered.

Street v Stewart, 226-960; 285 NW 204

Calendar entry as judgment. From a statute requiring that all judgments and orders must be entered in the record book, it may be inferred that the judge's calendar is in the nature of a memorandum book ordinarily used by the judge to guide the clerk in entering judgments and orders in the record book which is their final place of repose, and that the clerk's entry in the record book is the legal evidence of a judgment or order.

Street v Stewart, 226-960; 285 NW 204

Competent evidence of judgment — journal entry. As a general rule, a judgment must be entered of record in order to be of any validity, but for many purposes the court's decision is effective from the time it is actually pronounced, or when the judge writes in his calendar a statement of the decision, but there is no competent evidence of the rendition until the memorandum is entered in the court record, and, after recording, the judgment may for some purposes relate back to the time when it was actually ordered.

Street v Stewart, 226-960; 285 NW 204

Curing erroneous docketing. The erroneous docketing on the equity side of the calendar of an action of forcible entry and detainer becomes inconsequential when subsequent pleadings put title in issue and thereby convert the original law action into an equitable action.

Suiter v Wehde, 218-200; 254 NW 33

11442 Continuances—application for.

Discretion of court. When no continuance was asked, trial court held not to have abused discretion in refusing new trial on ground that defendant was not present at trial.

Bergen v Baker, (NOR); 205 NW 327

Death of absent witness. An order refusing a continuance which was asked for because of the absence of a witness will be sustained when it appears that the absent witness has died since the trial.

Suiter v Wehde, 218-200; 254 NW 33

Continuance under financial emergency. The legislative power of the state may, for the purpose of ameliorating an existing, public, financial emergency, constitutionally grant to a mortgagor, on equitable conditions, the right, in an action to foreclose the mortgage, to a continuance which is very materially in excess of that ordinarily permitted or sanctioned by law. (For fundamental reason see Des Moines Bank v Nordholm, 217 Iowa 1319.)

Craig v Waggoner, 218-876; 256 NW 285
Tusha v Eberhart, 218-1065; 256 NW 740

Dismissal for want of prosecution. The dismissal of an action for want of prosecution is eminently proper (1) when plaintiff knew that defendant was insisting on immediate trial, (2) when the cause was twice assigned for trial at the same term, and (3) when defendant failed to appear at the time finally set for trial and filed no motion for continuance.

Pride v Kittrell, 218-1247; 257 NW 204

Foreclosure—continuance under emergency act. The emergency act for the continuance of mortgage foreclosure proceedings (Ch 182, 45th GA) was not designed to grant a continuance to a mortgagor of nonhomestead property who is so hopelessly insolvent that a continuance would, manifestly, work no benefit to him but would work material harm to the mortgagee.

Reed v Snow, 218-1165; 254 NW 800

11443 Causes for.

Continuances in criminal cases. See under §13843
Mortgage moratorium continuances. See under §12372 (VII)

Discussion. See 12 ILR 182—Continuance—constitutional right

Arbitrary refusal. The refusal of the board of medical examiners (§2578-a, S., '13), in proceedings for the revocation of the license of a physician, to grant a continuance until the accused had finished serving a sentence in the penitentiary is not necessarily arbitrary.

State v Hanson, 201-579; 207 NW 769

Justifiable refusal. Reversible error does not result from the action of the court in permitting a belated nonissue-changing amendment to the petition to stand, and in refusing defendant a continuance until all his attorneys can be present at the opening of the trial.

Newland v McClelland, 217-568; 250 NW 229

Unsustained grounds. Refusal of a continuance will not be deemed error when movant's ground of surprise is wholly unfounded.

Cochran v Sch. Dist., 207-1385; 224 NW 809

Wide discretion of court. An order overruling a motion for a continuance will not be interfered with on appeal in the absence of a showing that the order has resulted in grave injustice.

Twaites v Bailly, 210-783; 231 NW 332

Useless amendment. An amendment to a petition in a real estate mortgage foreclosure to the effect "that the mortgagor was the owner of the land when the mortgage was executed" is unnecessary and, if made, furnishes no basis for a continuance on the ground of surprise.

Fitz v Forbes, 208-970; 226 NW 117

Intervenor as applicant—rule for determination. Whether an intervenor has a right to a continuance, even on account of his own sickness and consequent inability to be present at the trial and testify, must be determined by giving due consideration to the fact that, by statute (§11175, C., '35) he "has no right to delay".

Flood v City N. Bank, 220-935; 263 NW 321

Labor union injunction—state as party. A continuance requested on the ground that the state had been made a party to proceedings involving the violation of an injunction by labor union officers was properly refused when the petition of the state alleged the same matter and sought the same relief as the petition of the plaintiff.

Carey v Dist. Court, 226-717; 285 NW 236

Continuance—refusal to sick litigant—denial of day in court—discretion reviewed. A motion for a continuance in a will contest, addressed to the sound discretion of the court, should have been sustained when it is properly shown that one of the proponents was seriously ill, and through no fault or negligence on her part, would be unable to attend the trial. Depriving a party in this manner of his day in court is abuse of discretion.

In re Rogers, 226-183; 283 NW 906

Receiver — application — continuance. A plaintiff in a mortgage foreclosure, who enters

upon the hearing of his application for the appointment of a receiver, may very properly be denied (1) a continuance in order to enable him to secure the note and mortgage as evidence, (2) the right to dismiss his application with the option to refile the same after execution sale, and (3) the right so to withdraw the application that the court would retain jurisdiction thereover, and act thereon after the result of the execution sale became known.

Des Moines JSL Bank v Danson, 206-897; 220 NW 102; 221 NW 542

Curing erroneous denial. If it be error for the trial court in the midst of a jury trial to refuse a 24-hour continuance to enable plaintiff to produce absent testimony rendered necessary by a sudden and unexpected ruling of the court, said error is cured or avoided by the action of the court in offering to permit plaintiff to dismiss his action without prejudice, and by the plaintiff's rejection of said offer, there being no showing that plaintiff would suffer loss on account of a dismissal.

Putnam v Bussing, 221-871; 266 NW 559

Guardianship proceedings. A motion for a continuance, even in proceedings for the appointment of a guardian, is addressed, peculiarly, to the sound legal discretion of the court, and the order overruling such motion is conclusive on the appellate court unless it clearly appears that the trial court has abused its discretion and thereby perpetrated an injustice.

Anspach v Littler, 217-787; 253 NW 120

11444 Absence of evidence.

ANALYSIS

I THE AFFIDAVIT
II NAME, RESIDENCE, AND ATTENDANCE OF WITNESS
III DILIGENCE
IV FACTS SOUGHT TO BE PROVED

Continuances in criminal cases. See under §13843

I THE AFFIDAVIT

Insufficient showing. A motion for a continuance because of the absence of witnesses, with an affidavit in support thereof, is properly overruled when they fail to set forth the facts to which such witnesses will testify.

State v Candler, 204-1355; 217 NW 233

II NAME, RESIDENCE, AND ATTENDANCE OF WITNESS

Negligence. The trial court manifestly does not abuse its discretion in overruling a motion for a continuance because of the absence of a witness when movant's predicament is directly traceable to his own fault and negligence.

Temple Lbr. v Lattner, 211-465; 233 NW 522

Death of absent witness. An order refusing a continuance which was asked for because of the absence of a witness will be sustained when it appears that the absent witness has died since the trial.

Suiter v Wehde, 218-200; 254 NW 33

III DILIGENCE

Continuance—absence of witnesses. The refusal of the court to continue a cause in order to enable counsel to obtain a witness will not be deemed error when there is no showing as to diligence or as to the time in which the witness might have been produced.

Miller v Hurburgh, 212-970; 235 NW 282

IV FACTS SOUGHT TO BE PROVED

Insufficient showing — failure to set forth facts. A motion for a continuance because of the absence of witnesses, with an affidavit in support thereof, is properly overruled when they fail to set forth the facts to which such witnesses will testify.

State v Candler, 204-1355; 217 NW 233

11445 Admission by opposite party.

Continuances in criminal cases. See under §13843

Avoidance by admission. An intervenor is properly denied a continuance because of his own sickness and consequent inability to be present and testify at the trial, (1) when his intervention was delayed until after the action in question had been reversed and remanded on appeal and until the very eve of the retrial, and (2) when it is admitted that intervenor, if present, would testify to the alleged facts set forth in his application.

Flood v Bank, 220-935; 263 NW 321

11450 Appeal.

Election of remedies generally. See under §10939 (II)

Prosecution — several offenses — election at close of direct evidence. In a statutory rape prosecution, where several acts of intercourse are shown, the state need not, before the close of the direct evidence, elect on which act it relies.

State v Beltz, 225-155; 279 NW 386

Petition in two counts—(1) guest and (2) not a guest. A passenger in an automobile receiving injuries in a collision may not be required to elect between counts when his petition contains (1) a count alleging recklessness based on theory he was a guest, and (2) a count alleging negligence based on theory he was not a guest.

Wells v Wildin, 224-913; 277 NW 308; 115 ALR 169

New party but same relief—no election of remedies. In an action to compel certain heirs to contribute a share of a judgment arising

out of a decedent's ownership of bank stock, a petition that alleges defendants' liability as individuals is not an election of remedies so as to prevent an amendment thereto setting up liability against an estate as an additional party, since there was no change in the nature of relief asked and no choice was made between inconsistent remedies at the time of the election.

Daniel v Best, 224-1348; 279 NW 374

Action by teacher for compensation—pleading—intervention by taxpayer. In a teacher's action to recover compensation against a school district, where a taxpayer files a defensive petition of intervention after a demurrer to the answer had been sustained, but before defendant had made any election to stand on its answer, before any demand to make such election had been made, before default or judgment had been entered, or any demand therefor—the petition of intervention being unquestioned and raising an issue on the additional defensive matter—the court erred in sustaining a motion to strike the petition of intervention and entering judgment against the school district.

Schwartz v School Dist., 225-1272; 282 NW 754

Plea and answer—reply inconsistent with petition—election. Plaintiff's petition alleged a cause of action against defendant as a peace officer. Plaintiff filed a reply in which he denied that the defendant was acting as a peace officer. Such departure did not change, add to, or enlarge the cause of action alleged in the petition. The function of a reply is to avoid matters alleged in the answer or make an issue when a counterclaim is alleged. Plaintiff having alleged but one cause of action, the trial court did not err in refusing to require plaintiff to elect between causes of action.

Boyle v Bornholtz, 224-90; 275 NW 479

Erroneous docketing—effect. An applicant for condemnation of realty who erroneously causes its appeal from the award of the sheriff's jury to be docketed in the name of itself as plaintiff, and in the name of the landowner as defendant, and files petition, and thereby induces the landowner to file answer thereto, is in no position, after causing its own error to be corrected by a proper redocketing, either to demand the entry of judgment in accordance with its own offer to confess judgment, or to object to the action of the court in granting to the landowner (the proper plaintiff) a continuance over the term in which to file a proper petition.

Wilcox & Sons v Omaha, 220-1131; 264 NW 5

11456 Detailed report of trial.

Correction of reporter's notes. See under §10803 (III)
Reporter's notes as evidence. See under §§11353, 11354

Record—nonnecessity for demand. A litigant need not formally demand that the "whole proceedings" be reported in the form of a complete record, when such record is being made in the presence of all the parties in pursuance of a general custom of the court and reporter.

Andrew v Bank, 206-1368; 222 NW 553

Failure to preserve record. Tho a motion to vacate a final decree for erroneous proceedings which preceded the decree, be treated in the appellate court as a motion for a new trial, yet movant cannot prevail when he deliberately permitted such proceedings to take place in the trial court without any record preservation, and seeks in his motion proceedings to establish them by mere affidavit and extraneous testimony.

Radle v Radle, 204-82; 214 NW 602

Record—proceedings after judgment. On an appeal from a judgment in mortgage foreclosure, the fact that execution has been issued and the property so sold as to leave a deficiency judgment is not properly made a part of the appellate record by including the same in an amendment to the abstract, and such amendment will be stricken on motion.

John Hancock Ins. v Linnan, 205-176; 218 NW 46

11457 Certification—ipso facto bill.

ANALYSIS

I CERTIFICATION AND FILING
II DOCUMENTARY EVIDENCE

I CERTIFICATION AND FILING

Certification of evidence—absence of time limit—effect. Evidence taken in an equitable action need not be certified by the trial judge and reporter until there exists a necessity for such certification. Conceding, arguendo, that the certification should be made within a reasonable time after such necessity arises, then the presence or absence of prejudice will materially control the question as to what is such reasonable time.

Andrew v Bank, 206-1368; 222 NW 553

Correction of certificate to shorthand notes. A purported certificate of the trial reporter to the correctness of the shorthand notes, which certificate is fatally defective because not signed by the reporter, may be corrected by said reporter by the subsequent execution of a new and duly signed certificate.

Melman Co. v Melman, 216-45; 245 NW 743

Filing abstract when notes and transcript not with clerk. An abstract filed with the clerk of the supreme court within the time provided by statute (§12847, C., '31) is a proper and valid abstract notwithstanding the fact that, at the time of said filing, the shorthand notes had not been returned to, nor had

the transcript been filed with, the clerk of the trial court.

Melman Co. v Melman, 216-45; 245 NW 743

Necessary corrections in trial court. An attack on the record as duly certified to the supreme court on appeal cannot be originated in the supreme court. If the record in the trial court is incorrect it must be there corrected by amendment on proper application.

Melman Co. v Melman, 216-45; 245 NW 743

II DOCUMENTARY EVIDENCE

Documentary evidence in general. See under §11254 (II)

Nonjudicial record of foreign state—effect of federal statute. The admissibility of evidence relating to a nonjudicial public record of a foreign state (foreclosure of mortgage by "advertisement and sale") is not restricted by the federal statutes relating to the form of authentication of such record.

Bristow v Lange, 221-904; 266 NW 808

11468 Peremptory.

Interest in insurance companies. The wide discretion of the trial court to permit counsel to ask jurors on their voir dire whether they are stockholders, officers, or directors in any insurance company writing automobile liability insurance will not be interfered with in the absence of an abuse of such discretion. But the purpose of such questions must be solely to guide counsel in exercising his peremptory challenges.

Raines v Wilson, 213-1251; 239 NW 36
Kaufman v Borg, 214-293; 242 NW 104
Holub v Fitzgerald, 214-857; 243 NW 575

Questioning jurors as insurance stockholders—when proper. Counsel, when actuated by good faith and the sole purpose of acquiring information which will control the exercise of his peremptory challenges, may very properly be permitted, in a personal injury action, to ask a juror on his voir dire whether he or any member of his family is a stockholder in any insurance company.

Montanick v McMillin, 225-442; 280 NW 608

Improper reference to insured liability. The rule of law, in actions for personal injuries, that reversible error results from the willful injection, by plaintiff, into the record and before the jury, of the fact that defendant is carrying insurance against the liability sued on, is not violated:

1. By asking, in good faith, a juror on voir dire whether he is interested in any such insurance company, or

2. By asking a witness, in good faith, for legitimate testimony, and receiving an answer which, inter alia, reveals the fact of such insurance. (And especially when defendant's cross-examination accentuates the objectionable answer.)

Bauer v Reavell, 219-1212; 260 NW 39

11469 Challenges—number—striking.

Overruled challenge—waiver. A party may not predicate error on the overruling of his challenge for cause to a juror when he fails to utilize his unused peremptory challenges.

Tobin, etc. v Budd, 217-904; 251 NW 720

11472 Challenges for cause.

Discussion. See 2 ILB 127—Unknown disqualification of juror

ANALYSIS

I CHALLENGE FOR CAUSE GENERALLY
II QUALIFICATIONS
III FIDUCIARY, CONFIDENTIAL AND OTHER SPECIAL RELATIONS
IV JUROR IN FORMER TRIAL OF SAME ISSUES
V OPINION OR BIAS
VI INTEREST IN LIKE ISSUES

General provisions in re jurors. See under §§10842-10847, Vol I

I CHALLENGE FOR CAUSE GENERALLY

Rejection of competent juror. The rejection by the court of a qualified juror does not constitute reversible error in the absence of a showing that, because of such rejection, the complainant did not have a fair trial.

Boston v Elec. Co., 206-753; 221 NW 508

Competency—excusing for insufficient cause—effect. It is suggested that it is not reversible error to exclude a juror for an insufficient cause if an impartial jury is afterwards obtained.

State v Kendall, 200-483; 203 NW 806

Competency—discretion of court. Whether a juror shall be excused on an issue as to his competency rests in the sound legal discretion of the court.

State v Kendall, 200-483; 203 NW 806

Competency—friendliness with defendant—no cause for challenge. Friendliness of a prospective juror with the defendant is not a cause for challenging his competency, when he states on examination that he would try the case on the evidence, the court's instructions, and render a fair and impartial verdict.

Tharp v Rees, 224-962; 277 NW 758

II QUALIFICATIONS

Competency—waiver. The fact that a juror was an election judge at the election at which the jury list was selected and certified, is not a ground for challenge for cause even tho his name is certified as a juror in violation of the statute. In any event, any tenable objec-

II QUALIFICATIONS—concluded

tion to the juror is waived by not discovering the incompetency until after the verdict.

State v Burch, 202-348; 209 NW 474

Competency — waiver. Incompetency of a juror because of deafness is waived (1) by failing to examine the juror as to such condition, or (2) by so examining him and accepting him without objection.

Tollackson v City, 203-696; 213 NW 222

III FIDUCIARY, CONFIDENTIAL AND OTHER SPECIAL RELATIONS

Acquaintance and relationship between jurors and witnesses. It is quite proper for counsel upon the voir dire to ascertain by proper questions the acquaintance and relationship existing between prospective jurors and prospective witnesses.

Duncan v Rhomberg, 212-389; 236 NW 638

Attorney and client. The relation of attorney and client is not established by the simple showing that the attorney in question had, at one time in the past, examined an abstract of title for the juror.

Tobin, etc. v Budd, 217-904; 251 NW 720

IV JUROR IN FORMER TRIAL OF SAME ISSUES

No annotations in this volume

V OPINION OR BIAS

Jury—competency—friendliness with defendant—no cause for challenge. Friendliness of a prospective juror with the defendant is not a cause for challenging his competency, when he states on examination that he would try the case on the evidence, the court's instructions, and render a fair and impartial verdict.

Tharp v Rees, 224-962; 277 NW 758

VI INTEREST IN LIKE ISSUES

No annotations in this volume

11473 How tried.

Injecting insurance in motor vehicle accident cases. See under §5037.09 (VII)

Discussion. See 12 ILR 433—Judicial examination of jurors; 17 ILR 501—Informing of defendant's insurance

Conduct of jurors—false answers on voir dire. False answers by a juror on his voir dire do not constitute grounds for new trial unless shown to be prejudicial.

Elmore v Railway, 207-862; 224 NW 28

Voir dire examination—permissible range. The act of the county attorney, in a prosecution for maintaining a liquor nuisance, in asking a proposed juror (whose business was transporting beer) whether he would vote to convict the accused if the accused was proven guilty beyond all reasonable doubt, will not, in and of itself, be deemed prejudicial error.

State v Harrington, 220-1116; 264 NW 24

Interest of juror in insurance company. The good faith asking on voir dire whether a prospective juror is a policyholder or in any way interested in a certain insurance association, is not reversible error.

Kaufman v Borg, 214-293; 242 NW 104

Motor vehicle collision—injecting insurance on voir dire—discretion of court. Control of voir dire examination on the subject of liability insurance is largely within the discretion of the trial court, and will not be interfered with without a showing of prejudicial abuse.

Hawkins v Burton, 225-707; 281 NW 342

Voir dire examination. In an action for damages arising out of a collision between automobiles, plaintiff, in the selection of the jury, has the right, in a proper manner, to ask each prospective juror whether he is in any manner interested in any liability insurance company.

Olson v Tyner, 219-251; 257 NW 538

Voir dire examination as to insurance — motor vehicle case. In examining jurors for an automobile accident case, where counsel asked two or three jurors if they had insurance in a certain company, and the court then learned that the plaintiff was not insured in a mutual company and so informed the counsel, such allowance of questions was not an abuse of discretion of the trial court, when no improper motive or bad faith was shown, and no other mention of insurance was made.

Kiesau v Vangen, 226-824; 285 NW 181

11479 Drawing.

Jury drawn from part of panel. An accused in a criminal cause who fails to show that he exercised any or all of his peremptory challenges, or that he did not obtain a fair and impartial jury, may not complain that he was denied the right to have the jury drawn from the entire jury panel.

State v McHenry, 207-760; 223 NW 535

11485 Procedure after jury is sworn—order of evidence.

Discussion. See 22 ILR 609—Trial technique

ANALYSIS

I TRIAL GENERALLY
II ORDER OF EVIDENCE
III NUMBER OF WITNESSES

"Burden of proof" or "burden of issue". See under §11487
Cross-examination of witnesses. See under §11254
Reopening case—oversight or mistake corrected. See under §11505

I TRIAL GENERALLY

Examination by several counsel. The act of the court in permitting more than one counsel to cross-examine witnesses does not necessa-

rily constitute error, especially when there are several defendants in the case.

Williamson v Craig, 204-555; 215 NW 664

Discretion as to nonrelevant matter. The court, having exercised its discretion to permit a litigant to introduce testimony of a somewhat nonrelevant nature, may very well permit the opposite party to counter with opposing testimony on the same point.

Nigut v Hill, 200-748; 205 NW 312

Conduct of trial—leading questions. Perhaps trial court should refrain from objecting on his own motion to leading questions, but no prejudice resulted where court's views as to weight of evidence were not disclosed and trial court must be allowed some latitude in supervising trials.

State v Carlson, 224-1262; 276 NW 770

Unnecessary assumption of burden. A plaintiff may assume the burden of showing that the signature to an instrument, defensively pleaded against him by the defendant, is not genuine, even tho he might have availed himself of a statutorily implied denial of the answer, or might have definitely cast the burden as to genuineness upon the defendant by a denial under oath. And if he successfully establishes the aforesaid negative he will be accorded the same protection as tho the defendant had failed to establish the affirmative.

McFerren v Bank, 214-198; 238 NW 914

Fraud—burden of proof. Principle reaffirmed that (barring fiduciary relationships) the burden of proof rests on the party who alleges fraud, undue influence, or mental incompetency as the basis for invalidating a deed of conveyance.

Kramer v Leinbaugh, 219-604; 259 NW 20

Striking allegation (?) or withdrawal of issue (?). It is not proper practice, at the close of all the evidence, to move to strike from the petition unsupported or legally insufficient allegations of negligence. The proper practice is to move to withdraw such issues from the jury.

Townsend v Armstrong, 220-396; 260 NW 17

Collateral issue. The right to pursue a collateral issue developed on cross-examination is in distinct disfavor in our law, especially when the evidence in support thereof is ambiguous, remote from all proper issues, and otherwise incompetent.

Moen v Fry, 215-344; 245 NW 297

Unallowable scope. Reversible error results in permitting a cross-examination to develop testimony which is highly prejudicial to the party calling the witness, and which has no relation to the testimony developed on the direct examination.

McNeely v Conlon, 216-796; 248 NW 17

Cross-examination—broad discretion of court—abuse. Principle reaffirmed that the court has broad discretion in determining the proper limits of a cross-examination,—a discretion which will not be interfered with except in case of clear abuse.

Laudner v James, 221-863; 266 NW 15

Cross-examination—fatal undue limitation. Undue limitation on the cross-examination of a witness may constitute reversible error. So held where the examining party offered to prove, on cross-examination, material matter which went to the heart of the controversy.

West Branch Bank v Farmers Exchange, 221-1382; 268 NW 155

Evidence offered covered by other testimony. Where an offer of evidence was made during cross-examination, and was covered by other testimony, there was no prejudice in sustaining an objection to the offer.

Maddy v City Council, 226-941; 285 NW 208

Opportunity to cross-examine — necessity. When a recess was taken after the cross-examination of a witness for the defendants had begun, and through no fault of the defendants the witness did not re-appear for further cross-examination, his testimony was properly stricken on the ground that the plaintiff had been denied the right of full cross-examination.

Womochil v Peters, 226-924; 285 NW 151

Question read by reporter—repeating objection unnecessary — answer stricken. An answer to a question should not be permitted to stand, even without objection, when it came as the result of the reporter reading the question previously given and objected to, which objection was sustained.

Jakeway v Allen, 226-13; 282 NW 374

Belated nonrebuttal testimony. The reception of nonrebuttal testimony after parties have rested will not be deemed reversible error unless it affirmatively appears that the court abused its discretion.

Hoegh v See, 215-733; 246 NW 787

II ORDER OF EVIDENCE

Reception of evidence — proffer in presence of jury — discretion of court. The court has discretionary power to refuse to permit counsel to state, in the presence of the jury, the controversial facts which he expects to prove by a proffered witness.

State v Teager, 222-392; 269 NW 348

Consideration and delivery—proof by presumptions — instructions. The questions of want of consideration and nondelivery of a note, supported only by presumptions, need not be submitted to the jury when such presumptions are not overcome by evidence, and when the only conflict arises over the genuine-

II ORDER OF EVIDENCE—concluded

ness of the signature, the submission of this single question was proper.

In re Cheney, 223-1076; 274 NW 5

Improper rebuttal evidence—motion to strike necessary for review. If the answer of a witness does not properly constitute rebuttal evidence, it should be attacked by a motion to strike, and the court commits no reversible error in permitting it to stand in the absence of objection.

Churchill v Briggs, 225-1187; 282 NW 280

Gifts—inter vivos—consideration. Altho a promissory note for which there is no consideration is an unenforceable promise to make a future gift, nevertheless in an action against an executor on a note the presumption that the note imports a consideration, if negatived, must be overcome by evidence and this burden is on the maker or his representatives.

In re Cheney, 223-1076; 274 NW 5

Malicious prosecution—evidence. In action for damages for malicious prosecution, plaintiff has burden to show (1) the prosecution; (2) instigation or procurement by defendant; (3) acquittal or discharge of plaintiff; (4) want of probable cause; (5) malice.

Bair v Schultz, 227-193; 288 NW 119

III NUMBER OF WITNESSES

Cross-examination—limiting to matter covered in direct examination. Cross-examination was properly limited to matters brought out on direct examination in an automobile accident case in which the witness was a defendant taxicab driver with whom the plaintiff was riding, when such witness might be regarded as hostile to the plaintiff's cause.

Womochil v Peters, 226-924; 285 NW 151

11487 Argument—opening and closing.

ANALYSIS

Amount of proof. See under §11181
Checks, burden to prove presentment. See under §9647
Criminal cases, burden. See under §13917 (IV)
Employees' contributory negligence, burden. See under §11210
Instructions generally. See under §§11491, 11493
Instructions, motor vehicle cases. See under §§5037.09, 5037.10
Misconduct in trials. See under §§11550 (IV), 13944 (VI)
Motor vehicle cases. See under Ch 251.1, §§5037.09, 5037.10
Negotiable instruments, consideration, burden. See under §9485
Probate claims, burden. See under §§11962, 11972
"Reasonable doubt". See under §13917 (IV)
Removal of executor, burden of proof. See under §12066
Supreme court arguments. See under §12871
Undenied written signatures. See under §11218
Will cases, burden. See under §11846 (III, IV)
Workmen's compensation cases, burden. See under Ch 70

I ARGUMENT IN GENERAL

Discussion. See 6 ILB 193—Oral argument

Right to open and close. It is erroneous to refuse to a party, who has the burden of the issue, the right to open and close the argument, but not necessarily reversible error.

Schipfer v Stone, 206-328; 218 NW 568

Right to open and close. The right to open and close argument is properly given to the defendant when the issues are such that plaintiff must recover unless defendant establishes his affirmative defenses.

First Bk. v Tobin, 204-456; 215 NW 767

Burden of issues. The opening and closing argument is properly accorded to a defendant who admits the allegations of the petition but avoids them by an affirmative defense.

Early v Ins. Assn., 201-263; 207 NW 117

Party having full burden of issues. A defendant is properly accorded the right to open and close the argument when he pleads that, when he executed a renewal note to an indorsee, he had knowledge of the fraud in the original note, but that he executed the renewal note because of the false and fraudulent representation of the indorsee that he was a holder of the note in due course.

Continental Bank v Greene, 200-568; 203 NW 9

Latitude allowed. Counsel has the right to draw his own conclusions from the testimony even tho his logic may be faulty, or the opinions expressed or conclusions drawn may be unjust, so long as he keeps within the record and does not appeal to passion and prejudice rather than to reason.

Lawyer v Stansell, 217-111; 250 NW 887

Curing error in argument. An oral admonition by the court to the jury, during argument not to consider a certain statement by counsel, ordinarily cures any error resulting from the making of the statement.

Stingley v Crawford, 219-509; 258 NW 316

Improper argument. An argument to the effect that plaintiff could not have known at the time of an accident of the existence of an ordinance relative to rear signal lights on vehicles, because defendant's counsel did not know such fact until long after the accident, is improper.

DeMoss v Cab Co., 218-77; 254 NW 17

Trial—prosecutor's misconduct—admonition. In a prosecution for operating a motor vehicle while intoxicated, where misconduct was alleged because of prosecutor's argument to jury that defendant had admitted his intoxication, and, if other statements of prosecutor were

not true, defendant's counsel would not jump up and squeal like a pig under a gate, and when timely admonitions to the jury are given, coupled with the discretion of the trial court in controlling arguments, no reversal should follow as supreme court will not interfere unless such misconduct results in prejudice and deprives a defendant of a fair trial.

State v Dale, 225-1254; 282 NW 715

Arguments and conduct of counsel. An opening statement in the presence of and not objectionable to the court cannot be an erroneous violation of attorney's privilege of argument since the control thereof rests largely with the trial court.

Thompson v Butler, 223-1085; 274 NW 110

II "BURDEN OF PROOF" AND "BURDEN OF ISSUE"

Plaintiff's burden—proving negligence allegations. A plaintiff's failure to carry the burden of proving at least some of his allegations of negligence properly results in a directed verdict against him.

King v Gold, 224-890; 276 NW 774

Dual meaning term "burden of proof". Burden of proof has two meanings: (1) a named litigant must establish a given proposition to succeed and (2) at a given stage in the trial it becomes the duty of one of the parties to go forward with the evidence.

Wilson v Findley, 223-1281; 275 NW 47

Admissions require no proof—binding effect. An admission in a pleading raises no issue, requires no proof, and the pleader is bound thereby.

Blezek v Blezek, 226-237; 284 NW 180

Confession and avoidance—assault and battery. In an action for injuries inflicted upon the plaintiff when he was forcibly ejected from the home of the defendant, where the defendant's answer assumed the burden of proof by admitting the assault and battery, but by way of justification and confession and avoidance asserted that the plaintiff had been ejected after refusing to leave, the evidence was not sufficient to compel the court to direct a verdict for the defendant on the issue of whether the defendant had used more force than was necessary to accomplish the ejection.

Wessman v Sundholm, 228- ; 291 NW 137

Unnecessary allegation. A pleader need not prove an unnecessary allegation.

Malcolm Bank v Mehlin, 200-970; 205 NW 788

Superfluous allegation. An allegation in mortgage foreclosure that the mortgagor was, when the mortgage was executed, a fee simple owner of the property need not be proven.

Colby v Forbes, 207-9; 216 NW 722

Right to ignore one's own allegation. A plaintiff in making his proof may ignore a negative allegation which he need not have made, when defendant pleads, as was his legal duty, an affirmative allegation as to the same subject matter.

Wilson v Fortune, 209-810; 229 NW 190

Undue influence—burden of proof. Burden of proving undue influence, and its invalidating effect on a transaction, rests on him who makes the allegation.

Penn Ins. v Mulvaney, 221-925; 265 NW 889

Answer — unnecessary plea. A defendant who specifically pleads certain matter as a defense in addition to his defense of general denial thereby invites the court so to instruct as to impose on defendant the burden to prove said specially pleaded defense, even tho said defendant might have rested on his general denial.

Jordison v Jordison Bros., 215-938; 247 NW 491

Burden to sustain jurisdiction. On special appearance directly attacking the jurisdiction of the court because of a defect in the original notice or in the service thereof, the burden of proof rests upon the plaintiff to sustain the jurisdiction by proof of an adequate notice and the service thereof; and such burden is not met by the production of a captionless, unaddressed, and unsigned notice.

Pendy v Cole, 211-199; 233 NW 47

Proving material fact—inference from isolated fact insufficient. Proof of a material fact is not accomplished by inference from one isolated incident or circumstance, but from the aggregation of all related circumstances that appear.

McGarry v Mathis, 226-37; 282 NW 786

Ownership of claim. One need not affirmatively prove that he is the owner of a cause of action which arose in his favor out of the very transaction on which he is sued.

Williams v Burnside, 207-239; 222 NW 413

City ordinance—burden to show inadmissibility. The burden of pointing out wherein city ordinance regulating train's speed is defective, either in substance or method of adoption, is on the party objecting to its admissibility.

Meier v Railway, 224-295; 275 NW 139

Burden to prove invalidity of statutes. One who attacks the constitutionality of a statute must show its invalidity beyond a reasonable doubt.

Miller v Schuster, 227-1005; 289 NW 702

Husband—nonsupport. In a prosecution for failure of a husband to support his wife and child, it is not incumbent on the accused to

II "BURDEN OF PROOF" AND "BURDEN OF ISSUE"—continued

show that he was "without fault", and reversible error results from so instructing.

State v Gude, 201-4; 206 NW 584

Divorce—desertion—insanity. When it appears that the defendant in an action for divorce based on desertion has been judicially declared insane, plaintiff must overcome the presumption that such insanity continued. In other words, plaintiff must establish a return to sanity on the part of defendant—must establish a mental condition such as would enable defendant to form an intent to desert.

Carr v Carr, 209-160; 225 NW 948

Antenuptial conveyance — fraud. A wife who pleads that her deceased husband fraudulently disposed of his property prior to marriage, in order to deprive her of the interest which she would take as a wife, must establish (1) an existing contract of marriage between herself and the deceased at the time of the conveyance by the deceased, and (2) that she had no knowledge of such conveyance prior to her marriage.

In re Mann, 201-878; 208 NW 310

Elections—contests—preserving and guarding ballots. Ballots cast at an election are not admissible as evidence in a subsequent contest unless the contestant first establishes the fact that the officer legally charged with the custody of said ballots has preserved, guarded, and protected them in such manner as to reasonably preclude the opportunity of unauthorized persons to tamper with them.

Matzdorff v Thompson, 217-961; 251 NW 867
Traeger v Meskel, 217-970; 252 NW 108

Execution — levy — return — presumption —burden to overcome. A party who claims that the various entries of the acts done under an execution and constituting the officers "return" were not entered at the time the various acts were done, has the burden to so show. In the absence of such showing, it must be presumed that the officer did his duty and made the entries at the time required by statute. (§11664, C., '31.)

Northwestern Ins. v Block, 216-401; 249 NW 395

Replevin—strength of title. Plaintiff in replevin, in order to recover, must show, by the strength of his own title, that, when the writ was issued, he was entitled to the possession of the property in question. Evidence held quite insufficient so to show.

Chorpening v Nickerson, 223-791; 273 NW 843

Requiring defendant to prove allegations of co-defendant. In damage action by one riding in an automobile against a truck driver and his employer where defense was conducted jointly and where, in respect to negligence, the question was whether negligence of the automobile driver or the negligence of the truck driver was the sole proximate cause of the accident, it was not prejudicial error to instruct jury that burden was upon both defendants to prove negligence of automobile driver, affirmatively alleged by the employer alone.

Usher v Stafford, 227-443; 288 NW 432

Injury from motor vehicle—fraud in settlement—burden. A plaintiff, injured when the automobile in which she is riding in a snowstorm is struck from the rear by another automobile, and who, in the presence of her husband and sister, makes a written settlement with the insurance company for such injuries, and who delays two years thereafter before attacking as fraudulent the validity of such settlement, does not meet her burden to overcome the written instruments by giving her own self-contradictory testimony with no proof of actual fraud or misrepresentations.

Mosher v Snyder, 224-896; 276 NW 582; 4 NCCA(NS) 132

Requiring excessive proof. An instruction is erroneous when it requires negligence to be established "in the respects charged in the petition", and the negligence so charged is (1) excessive speed, (2) excessive speed after warning, and (3) excessive speed while traveling on loose gravel.

Codner v Stowe, 201-800; 208 NW 330

Substituted service on nonresident corporation—plaintiff's burden. In a motor vehicle accident action, wherein plaintiff obtained service of notice upon a nonresident corporation by serving the commissioner of motor vehicles, and wherein the defendant attacked such service by special appearance on the ground that it was not a person within the purview of the statute, the burden was on the plaintiff to make such showing that defendant was a person under the statute. Held burden not met.

Jermaine v Graf, 225-1063; 283 NW 428

Burden — railway crossing — injuries from jolting—causal negligence necessary. Plaintiff has the burden to show wherein a railway was negligent in maintaining a viaduct crossing, since jury's verdict may not rest upon surmise, speculation, or guess, and this burden is not met when plaintiff fails to show that injuries received from being thrown against top of car while going over viaduct were caused by a condition of the viaduct resulting from negligence.

Harris v Milwaukee Ry., 224-1319; 278 NW 338

Contributory negligence — minors. An instruction, in a personal injury action, that the burden of proof is on plaintiff to establish his

freedom from contributory negligence is not nullified by an instruction that the plaintiff, if of the age of eight years only, is presumed to be incapable of such negligence, and that, to find to the contrary, defendant must so show.

Stutzman v Younkerman, 204-1162; 216 NW 627

Personal injury—contributory negligence. A definite instruction that plaintiff has the burden of proof to show that he was not guilty of any negligence contributing to his injury is in no degree overcome by later instructions wherein the court, with reference to contributory-fact issues, uses the expression "if you find." In other words, such expression does not have the effect of impliedly placing the burden of proof as to contributory negligence upon the defendant.

Dean v Koolish, 212-238; 234 NW 179

Res ipsa loquitur—scope. The full limit of the doctrine of res ipsa loquitur is that the peculiar facts of the occurrence warrant or permit the jury to draw the inference of negligence, not that such facts compel the jury to draw such inference in the absence of explanatory evidence. The doctrine does not in the slightest degree change the burden of proof on the issue of negligence.

Preston v D. M. Ry. Co., 214-156; 241 NW 648

Assumption of risk—burden on pleader. The jury, in a personal injury or death claim action where the defendant pleads "assumption of risk," should be plainly instructed that one pleading an affirmative defense must assume the burden of proving it.

White v Zell, 224-359; 276 NW 76

Death of animals—proof of cause. Proof that a preparation was fed to animals and that immediately, or shortly thereafter, some of them died, and the others became permanently stunted in growth, does not justify a presumption that the said preparation caused the deaths or stunting.

Hildebrand v Oil Co., 205-946; 219 NW 40

Falsity of statement by seller. A vendee who, in defense to an action for the purchase price of hogs, alleges that he purchased under a representation that the stock had been doubly vaccinated, and that the representation was false, has the burden to establish not only (1) the representation, but (2) the falsity thereof.

Co-operative Sales Co. v Van der Beek, 219-974; 259 NW 586

Affirmative defense—instruction on preponderance of evidence. In an action to recover damages from railroad for value of stallion which died during transportation, wherein an excepted cause of death is pleaded and relied on as an affirmative defense, railroad will be entitled only to instruction that verdict must be for railroad if such cause should appear from a preponderance of the evidence.

Vander Beek v Railway, 226-1363; 286 NW 452

Carrier's "burden of proof". In an action for damages against a railroad for the value of a stallion which died in transit, where the court clearly defined those matters and facts as to which the burden of proof was on plaintiff, and in substance charged the jury that, upon plaintiff having successfully carried this burden, the "burden of proof" would be on defendant to show, by a preponderance of the evidence, the excepted cause, held, the use of the phrase "burden of proof" as quoted in second instruction was not error.

Vander Beek v Railway, 226-1363; 286 NW 452

Contributory negligence nullifies statutory presumption. When a person is injured by transmission line, the statutory presumption of defendant's negligence need not be rebutted when plaintiff fails to establish freedom from contributory negligence.

Aller v Iowa Elec. Co., 227-185; 288 NW 66

Reasonably safe street. An injured person suing for damages consequent upon the dangerous condition of ice and snow on a public street between the curb lines has the burden of proof to show what reasonable action the city might have taken to avoid the said dangerous condition.

Ritchie v Des Moines, 211-1026; 233 NW 43

Proof justifying recovery—conspiracy. Under a plea of (1) conspiracy to commit a wrongful act, and (2) joint participation in the wrongful act, recovery may be had on proof of the latter allegation only.

De Bruin v Studer, 206-129; 220 NW 116

Malicious prosecution — elements of proof. In action for damages for malicious prosecution, plaintiff has burden to show (1) the prosecution; (2) instigation or procurement by defendant; (3) acquittal or discharge of plaintiff; (4) want of probable cause; (5) malice.

Bair v Schultz, 227-193; 288 NW 119

Death of partner, and surviving partners—accounting. In an accounting between the representative of a deceased partner and the surviving partners, the burden of the accounting is upon the surviving partners.

Fleming v Fleming, 211-1251; 230 NW 359

Corporate president's authority to write checks. In action by payee of check drawn by president of corporation for interest on officer's note it was held that payee had burden to prove check was executed by the corporation, that president had no implied authority to give check for interest on officer's personal debt, that president's check on corporation for

II "BURDEN OF PROOF" AND "BURDEN OF ISSUE"—continued

officer's debt was without consideration as to the corporation, and that payee could not recover on the check as a matter of law without proof of president's authority or benefit received by the corporation.

Smoltz v Meat Co., (NOR); 224 NW 536

Agent's authority to indorse check. In payee's action against bank which had cashed checks upon indorsement by payee's attorney, the burden of proof is upon defendant bank to establish apparent, ostensible, or implied authority in the attorney to indorse the checks as the basis for estoppel against payee to assert lack of authority on part of attorney.

Federal Bank v Trust Co., 228- ; 290 NW 512

Debts—liability of stockholders. Persons who are in good faith contracted with and extended credit as partners are personally liable for the resulting debt, in the absence of evidence by them that they are stockholders in a corporation which is at least a de facto corporation.

Wilkin Co. v Assn., 208-921; 223 NW 899

Equitable estoppel—unrecorded conveyance—pleader's burden. One alleging an equitable estoppel must prove it by clear, satisfactory, and convincing evidence, hence in asserting in a fraudulent conveyance action, an equitable estoppel against the wife of a bank stockholder, because she withheld from record, for many years, a deed to herself from her husband, the creditors of the bank have not sustained the burden of proving estoppel when they admit that they did not deposit their money on the wife's representation, nor upon their belief in, the husband's ownership of the land.

Bates v Kleve, 225-255; 280 NW 501

Foreign corporation's permit to do business—burden of proof. A foreign corporation for pecuniary profit, suing on an Iowa contract, has the burden to plead and prove its compliance with the statutes requiring permit to do business herein, without which a directed verdict in its favor is error.

Johnson Co. v Hamilton, 225-551; 281 NW 127

Accounting—burden on plaintiff. In action for accounting plaintiff has burden to prove account and show balance and amount due.

Palmer v Manville, (NOR); 228 NW 20

Account stated. A bank which furnishes its customer periodical statements of the condition of his debits and credits which are acquiesced in by the long silence of the customer is under no burden of proof to disprove the subsequent claim of the customer that certain specified items of the account were incorrect. The burden rests on the customer to establish his allegation of incorrectness.

State Bank v Cooper, 201-225; 205 NW 333

Value of goods. In an action on an account, the plaintiff must necessarily fail when he wholly fails to establish either the reasonable value of the goods or the agreed price therefor, such being the issues in the case.

Cutino Co. v Weeks, 203-581; 213 NW 413

Tender—must be kept good. Tender will not discharge a debt, and is of no avail unless kept good, and the burden of proving affirmatively that it has been kept good is on the party relying thereon.

Hill v Rolfsema, 226-486; 284 NW 376

Contract for repayment of money. One seeking to recover money loaned must prove a contract express or implied for its repayment.

In re Green, 227-702; 288 NW 881

Breach of warranty. Burden of proof in action on contract providing for delivery of drain tile was upon seller to show that tile were "sound and true", and evidence held to show that breakage was due to neglect of buyer.

Graettinger Works v Gjellefald, (NOR); 214 NW 579

Nondelivery of abstract company records—plaintiff's burden. Plaintiff had burden of proving defendant did not deliver all of property of abstract company as provided in contract whereby assets of abstract company were to be turned over to plaintiff, in that all "take-offs" were not delivered.

Mills Co. v Otis, (NOR); 228 NW 47

Consideration—implied in written contracts. The presumption created by statute providing that all contracts in writing, signed by the party to be bound, should import consideration is sufficient to cast burden upon defendant asserting lack of consideration to overcome such presumption.

Beal v Milliron, (NOR); 267 NW 83

Rescission of contract. To sustain a cause of action for rescission proof of fraud must be clear, satisfactory, and convincing, and a mere preponderance is not sufficient.

Wiley v Bank, (NOR); 257 NW 214

Chattel mortgage—subsequent purchaser. In replevin by a chattel mortgagee, if the defendant is (1) a subsequent purchaser for value, and (2) without notice, he must so allege and prove.

Manbeck Co. v Garside, 208-656; 226 NW 9

Subsequent purchaser—mortgaged chattels. A mortgagee in an action for the conversion of the mortgaged chattels need only allege the existence of his unsatisfied mortgage. The

defendant must allege and prove, not only (1) that he is a subsequent purchaser, but (2) that he became such purchaser without notice of the plaintiff's mortgage.

Loranz & Co. v Smith, 204-35; 214 NW 525; 53 ALR 662

Conditional sales—replevin of automobile conditionally sold under "trust receipt". Trust receipt for automobile delivered by a finance company was in effect conditional sale when accompanied by promissory note and agreement to return the automobile on demand. Held, in a replevin action the finance company sustained its burden to prove its right to immediate possession by a showing of default in payment, which gave the right to possession.

General Motors v Koch, 225-897; 281 NW 728

Pledges — sale. Merely showing that the relation of pledgor and pledgee existed does not cast on the pledgee the burden of proving that his sale of the pledge was bona fide.

Williams v Herman, 216-499; 249 NW 215

Alteration of instrument. He who alleges a material alteration of an instrument has the burden to prove his allegation. No presumption exists that the alteration was made after the execution of the instrument.

Council Bluffs Bank v Wendt, 203-972; 213 NW 599

Payment of note—burden on defendant. In an action in probate to establish claim based on promissory note, the burden of proving payment is upon defense.

In re Humphrey, 226-1230; 286 NW 488

Payment of note—burden of proof. Defendants, claiming payment on note which plaintiff denied, had burden to prove such payment by a preponderance of evidence, whether payment was made as partial payment on note or on property purchased, and question was for jury.

Sager v Skinner, (NOR); 229 NW 846

Execution of promissory notes. The burden to prove payment never shifts from the litigant who pleads it—not even when he creates by his evidence a presumption of payment on which he may safely rely, in the absence of counter evidence. So held where the pleader established the execution of promissory notes by his debtor, and thereby generated the rebuttable presumption that all prior claims between the parties had been settled and paid.

Riggs v Gish, 201-148; 205 NW 833

Husband's management of wife's property. In an action against a husband and wife on a promissory note signed only by the husband, and involving the wife on a theory that both were engaged in a joint adventure for which the money was used, liability of the wife may be predicated only upon a joint adventure contract, either express or implied, and plaintiff has the burden to prove the existence of such contract.

Valley Bank v Staves, 224-1197; 278 NW 346

Shifting defense after denial of directed verdict. In an action on a note, when the defendant asked for a directed verdict on the grounds of lack of consideration, he was not in a position to complain of the refusal to direct the verdict when he later shifted his defense admitting the signature on the note and setting up affirmative defenses, thereby placing the burden of proof on himself.

Ballard v Ballard, 226-699; 285 NW 165

Consideration and delivery of note—proof by presumptions. The questions of want of consideration and nondelivery of a note, supported only by presumptions, need not be submitted to the jury when such presumptions are not overcome by evidence, and when the only conflict arises over the genuineness of the signature, the submission of this single question was proper.

In re Cheney, 223-1076; 274 NW 5

Bills and notes—payment. One who pays his promissory note has a duty to know and the burden to prove that (1) an agent to whom he makes payment has authority to receive on behalf of the holder, or that (2) the holder received the payment; and without proving one or the other the note is not discharged.

Fisher v Pride, 225-6; 280 NW 492

Holder in due course — burden to show. Where a check is issued on a condition, placing limitations on payee's right to negotiate it, in spite of which defective title the check is negotiated to a bank, after which payment is refused by drawee bank because payment stopped, the burden, in an action between the bank to whom check was negotiated and the maker, is on the bank to show that it was a holder in due course and had no notice of payee's defective title.

Newton Bank v Strand Co., 224-536; 277 NW 491

Unreasonable time. Where payee returned check to maker on account of a debt owing to maker, but by some unknown means again obtained possession of the check, which had not been put in a place of safety, and negotiated it to plaintiff eight days after execution, burden was on defendant-maker to prove plaintiff's lack of good faith in acquiring the check, and lapse of eight days was not such an unreasonable time within the statute as to rebut presumption that plaintiff was a holder in due course. What constitutes such an unreasonable time must be determined on facts of each particular case.

Clarinda Sales Co. v Radio Sales, 227-671; 288 NW 923

II "BURDEN OF PROOF" AND "BURDEN OF ISSUE"—continued

Genuineness of signature—unnecessary assumption of burden—effect. A plaintiff may assume the burden of showing that the signature to an instrument, defensively pleaded against him by the defendant, is not genuine, even tho he might have availed himself of a statutorily implied denial of the answer, or might have definitely cast the burden as to genuineness upon the defendant by a denial under oath. And if he successfully establishes the aforesaid negative he will be accorded the same protection as tho the defendant had failed to establish the affirmative.

McFerren v Bank, 214-198; 238 NW 914

Alteration of bond. The burden of proof to establish a material alteration of a depositary bond is on the sureties who allege such alteration. Evidence held insufficient to show such alteration, notwithstanding its numerical strength.

Plymouth County v Schulz, 209-81; 227 NW 622

Public funds — payment by depositaries. Proof that a municipality had deposited public funds to a named amount in an authorized public depositary casts the burden on the depositary, or on the receiver therefor, to show what payments were made from such deposits and the legality of such payments. And such burden is not met by the introduction of unexplained ledger entries.

Winnebago County v Horton, 204-1186; 216 NW 769

Bonds—possession and ownership—evidence—insufficiency. Evidence reviewed and held insufficient to establish, prima facie, (1) that certain government bonds were in a certain bank of deposit when said bank was robbed, or (2) that said bonds belonged to an alleged owner.

State Bank v Bank, 223-596; 273 NW 160

Real estate commission. In an action by a real estate broker for commission he has burden to prove that he was the efficient and procuring cause of the sale.

Donahoe v Denman, 223-1273; 275 NW 154

Liability—shortage in shipment. A commission merchant, in an action against his principal for a balance due for advances, must adequately account for all goods consigned to him.

Blanchard v Wood Co., 204-255; 214 NW 583

Independent contractor. One who claims that labor and services accepted by him were performed by an independent contractor has the burden to prove such claim.

Buescher v Schmidt, 209-300; 228 NW 26

Employment—wrongful discharge—prima facie measure of damages. The prima facie measure of damages for the wrongful discharge of a servant is the contract wage. The master has the burden to show the extent to which this prima facie measure should be reduced.

Breen v Power Co., 207-1161; 224 NW 562

Consent of automobile owner—inference. An inference arises from the ownership of an automobile that it was operated with the owner's consent, or under his direction, and the owner has the burden of establishing that such was not the case.

McCann v Downey, 227-1277; 290 NW 690

Powers of agent. A defendant who meets an action of quantum meruit for the use of machinery with the defense that he used the machinery under a contract for an agreed rental, entered into with one of the employees of plaintiff, must establish the authority of the employee to enter into such contract.

Des Moines Paving Co. v Lincoln Co., 201-502; 207 NW 563

Workmen's compensation act—review for additional compensation. An employee under the workmen's compensation act, allowed and paid compensation for an injury, has the burden of proof, on his application for review and compensation for additional consequences of said injury, to establish by a preponderance of evidence that said additional consequences are such as would naturally and proximately follow said original injury,—were not the result of intervening accidents or other causes.

Oldham v Scofield, 222-764; 266 NW 480; 269 NW 925

Exception to workmen's compensation. One relying on an exception to the workmen's compensation act, providing that no compensation shall be allowed for an injury caused by the employee's willful intent to injure himself or to willfully injure another, has the burden of establishing the facts which bring the matter within the exception.

Everts v Jorgensen, 227-818; 289 NW 11

Exception to workmen's compensation—burden of proof not sustained. The defendant in an action for workmen's compensation who relied on an exception to the law failed to sustain the burden of proving the exception when there was an entire lack of evidence tending to prove or disprove the exception.

Everts v Jorgensen, 227-818; 289 NW 11

Workmen's compensation exception—confession and avoidance. Under a claim for workmen's compensation, a defense alleging that the injuries sustained by the claimant were caused by the willful act of a third person is in the nature of a confession and avoidance and places the burden of proving it to be true upon the defendant.

Everts v Jorgensen, 227-818; 289 NW 11

Fact of employment—claimant's burden of proof. The general rule that an employee is entitled to compensation for injuries arising in the course of his employment places upon him the burden of proving himself to be an employee within the meaning of the statute and proving that he received an injury which arose in the course of his employment.

Everts v Jorgensen, 227-818; 289 NW 11

Compromise and settlement—impeachment. Fraud, in impeachment of a compromise and settlement, must be established by the pleader who alleges it.

Coffman v Brenton, 214-185; 239 NW 9

Fraud—elements and degree of proof. An action to set aside a contract of compromise and settlement because of alleged fraudulent representations must be supported by proof which clearly, satisfactorily and convincingly establishes (1) the actual making of the material representations, (2) the falsity thereof, (3) the defendant's knowledge of the falsity, (4) the plaintiff's ignorance of the falsity, and (5) plaintiff's reliance thereon. If plaintiff fails to show by the required amount of proof the actual making of the representations, the court, of course, need proceed no further, except to enter a dismissal.

Kilts v Read, 216-356; 249 NW 157

Compromise and settlement—impeachment. He who seeks to avoid a duly proven compromise, settlement and release must establish:

1. That the release was procured by fraud, or

2. That the contention or claim on which the compromise and settlement was based was wholly unfounded, and, therefore, could not support a compromise and settlement.

Evidence reviewed and held wholly insufficient to impeach a compromise and settlement of liability under a policy of life insurance.

Vande Stouwe v Life Co., 218-1182; 254 NW 790

Compromise settlement—fraud. A plaintiff who attacks a compromise settlement of the amount due under a policy of insurance on the ground that it was fraud-induced has the burden to show that the representations inducing the settlement were knowingly false and that he innocently relied thereon; and plaintiff must, of course, fail on a record showing that the representations were true, and that he knew they were true.

Bockes v Cas. Co., 212-499; 232 NW 156

Release — avoidance for fraud — indirectly imposing. The burden of proof to avoid a written release of damages, on the ground that said release was obtained by fraud, rests on the party who alleges the fraud. Instructions reviewed and held adequately to impose such burden in substance tho not in words, assuming ordinary intelligence on the part of the jury.

Engle v Ungles, 223-780; 273 NW 879; 4 NCCA(NS) 92

Note as future gift—presumption—burden. Altho a promissory note for which there is no consideration is an unenforceable promise to make a future gift, nevertheless in an action against an executor on a note the presumption that the note imports a consideration, if negatived, must be overcome by evidence and this burden is on the maker or his representatives.

In re Cheney, 223-1076; 274 NW 5

Gifts inter vivos—mother to son gift for mother's life support — fiduciaries — donee's burden. The donee of a gift inter vivos, when holding a fiduciary relationship with the donor, has the burden to rebut the presumption that the transaction was fraudulent and voidable, but this does not apply to testamentary gifts. So held where a mother first willed, and later assigned, all her property to one son, in consideration of a contract that he should support her as long as she lived—the result being to disinherit another son.

Reed v Reed, 225-773; 281 NW 444

Gift causa mortis—burden of proof. The burden to establish a gift causa mortis rests on the donee claiming thereunder. Evidence reviewed, and held that said burden had been successfully met.

Flint v Varney, 220-1241; 264 NW 277

Gifts inter vivos—presumption of fraud. A gift of a deed to one who stands in a confidential or fiduciary relationship to the donor raises a presumption of constructive fraud, and the burden is on the donee to make such showing of fact as to overcome the presumption.

Jensen v Phippen, 225-302; 280 NW 528

Replevin to recover property held as gift. In a replevin action for property held under claim of gift, plaintiff has the burden throughout the trial to establish right to immediate possession.

Wilson v Findley, 223-1281; 275 NW 47

Execution of release. The burden of proof that a release was executed rests on the party alleging the release.

Vande Stouwe v Life Co., 218-1182; 254 NW 790

Fraud—presumption and burden of proof. Fraud is never presumed. He who alleges its existence must establish it by clear, convincing and satisfactory evidence. Principle applied in an equitable action to set aside and cancel certain financial obligations allegedly obtained by fraud.

Eckhardt v Trust Co., 223-471; 273 NW 347

II "BURDEN OF PROOF" AND "BURDEN OF ISSUE"—continued

Fraud—remedies of creditors. A creditor, seeking to set aside an alleged fraudulent conveyance which recites a consideration which is apparently valid and substantial tho indefinite in amount, must carry his proof beyond showing that the grantor and grantee were husband and wife and that the grantor was insolvent when he delivered the conveyance. In other words, such proof does not cast upon grantee the burden (1) to sustain the adequacy of the consideration, and (2) to negative bad faith in the transaction, or (3) to show that the grantor at the time retained sufficient other property to pay his creditors.

First N. Bank v Currier, 218-1041; 256 NW 734

Transfers and transactions invalid—voluntary conveyance — proof showing validity. Principle reaffirmed that a voluntary conveyance is constructively fraudulent as to existing creditors of the grantor unless the grantee establishes the fact that the grantor at the time of the conveyance retained sufficient property to pay his creditors.

First N. Bank v Currier, 218-1041; 256 NW 734

Fraudulent conveyance—debtor's burden. A debtor who voluntarily conveys his property to others has the burden to prove that he retained sufficient other property to pay his debts and failing this, it follows that the conveyance was fraudulent as to existing creditors.

Grimes Bank v McHarg, 224-644; 276 NW 781

Setting aside conveyance. In an action to set aside a deed and an assignment of a mortgage executed by mother to stepson, burden was on plaintiff to establish the existence of confidential relationship raising presumption of fraud.

O'Brien v Stoneman, 227-389; 288 NW 447

Transfers and transactions invalid—right of wife. A wife as a bona fide creditor of her husband has the legal right to take from her husband a conveyance of all his real and personal property provided she is actuated by the sole purpose of obtaining payment of her claim. And if the property received is out of proportion to the debt, the party questioning the conveyance has the burden to so show.

Farmers Bank v Ringgenberg, 218-86; 253 NW 826

Fraudulent conveyances—wages of minor as consideration. A deed from a father to a son, of a $2,500 town property for admittedly no consideration, and a deed of a $12,000, partly encumbered farm, in fulfillment of an alleged contract that the son (at the time of contract an unemancipated, unmarried, nineteen-year-old minor) should, when married, be given said farm if he remained on, and helped in the management of said farm, are, irrespective of any actual fraud, constructively fraudulent as to a prior existing creditor of the grantor, because of want of or grossly inadequate consideration,—it appearing that the son married within a month after attaining majority; and grantee must, in order to sustain said deeds, prove that grantor still continued to retain sufficient property to pay his said creditor.

Commercial Bank v Balderston, 219-1250; 260 NW 728

Fraudulent conveyance—family relationship. A creditor, seeking to set aside as fraudulent a conveyance from a father to son, is not aided, from the family relationship alone, by any presumption of fraud, but, on the contrary, must clearly, satisfactorily, and convincingly establish the fraudulent character of the conveyance by proof that more than preponderates over counterproof. Evidence held insufficient to show fraud.

Royer v Erb, 219-705; 259 NW 584

Fiduciary relationship — burden of proof. Principle reaffirmed (1) that no presumption of fiduciary relationship arises from the fact of kinship, and (2) that in the absence of proof of such relationship, plaintiff in an action to set aside a conveyance because of undue influence, has the burden to establish such fraud by convincing evidence. Evidence held quite insufficient.

Craig v Craig, 222-783; 269 NW 743

Setting aside deed. A delivered deed carries a presumption in favor of its validity, so one suing to set aside a deed has the burden of proving that at the time of execution of deed, grantor was incapable of understanding her property and her relations thereto, or understanding natural objects of her bounty or nature and effect of instrument.

Bishop v Leighty, (NOR); 237 NW 251

Confidential relationship—showing grantor's freedom of action—grantee's burden. One who stands in a confidential relationship to another may not retain advantages of a transaction with the cestui when they may reasonably be the result of the confidence reposed, unless he shows that the cestui acted with freedom, intelligence, and with full knowledge of the facts.

Merritt v Easterly, 226-514; 284 NW 397

Gift—confidential relations—presumption of fraud. The act of a mother, in causing a certificate of deposit to be changed from her own name to that of a son who, it is made to appear, occupied a very close and confidential relation with his mother, is presumptively fraudulent, and will be sustained only on proof by the son that the transfer was free from all undue influence and fraud.

Roller v Roller, 201-1077; 203 NW 41

Fiduciary relation between husband and wife. Whether in an action by an heir to set aside a conveyance by a wife to her husband on the ground of undue influence the burden of disproof of said ground shifts to the defendant-husband, quaere.

Browne v Johnson, 218-498; 255 NW 862

Conflict of duty with personal interest — fiduciary's burden. A fiduciary may not appropriate funds to himself without consent of the beneficiary having full knowledge of the facts and any act by the fiduciary wherein personal interest and duty conflict is voidable at the mere option of the beneficiary. Fiduciary has the burden of showing his utmost good faith and fairness.

State v Exline Fuel Co., 224-466; 276 NW 41

Fiduciary relation. No confidential relation may be said to exist between the officers of a mortgagee and the mortgagor because of the fact that on a few occasions the officers had aided the mortgagor in closing ordinary business transactions.

Charlson v Bank, 201-120; 206 NW 812

Fiduciary relations—elements—bona fides of transaction—shifting burden. One asserting the existence of a fiduciary relationship must prove it by (1) a reposal of confidence, and (2) positions of dominance and subservience, respectively, occupied by the repository and cestui, before he can shift the burden of proving the bona fides of the transaction to the other party.

Mastain v Butschy, 224-68; 276 NW 79

Surviving spouse—failing to plead and prove election. An adopted son, defending a contribution action growing out of expenditures made by his mother as tenant in common in inherited real estate, and in his answer admitting that his mother possessed by right of dower, but nowhere claiming or assuming his burden to prove that the widow elected to take a life estate in lieu of other dower rights, is estopped to raise such point on appeal or matters corollary thereto.

Yagge v Tyler, 225-352; 280 NW 559

Homestead — voluntary conveyance. The principle that the grantee in a voluntary conveyance of a homestead may sustain the conveyance against the claims of the creditors of the grantor necessarily imposes on the grantee the burden of showing the homestead character of the property.

Dolan v Newberry, 200-511; 202 NW 545; 205 NW 205

Abandonment of homestead—intent to return. In order to preserve the homestead character of property when the owner goes to live elsewhere, it is necessary that said owner have a fixed, specific, and abiding intent to return and burden of proving same is on the owner.

Grimes Bank v McHarg, 224-644; 276 NW 781

Nonhomestead character of land. A creditor who is seeking to set aside the deed of his debtor as fraudulent need not prove the nonhomestead character of the land even tho he alleges such fact, because the homestead character of the land is an affirmative defense, pleadable and provable by the grantee.

Malcolm Bk. v Mehlin, 200-970; 205 NW 788

Purchase-money mortgage—burden to establish. A real estate mortgage may not be deemed a purchase-money mortgage and have extended to it the pre-eminent right of priority over all other liens and claims arising through the mortgagor unless the holder distinctly establishes the fact that the money secured by the mortgage was advanced for the express purpose of paying the purchase price of the land. Evidence held insufficient to show such fact.

Ely Bank v Graham, 201-840; 208 NW 312

Instructions—improper shifting of burden of proof. Plaintiff who bases his claim for damages on the alleged execution and breach by defendant of a specified contract to convey various tracts of land is not relieved of the burden of establishing said alleged contract by the fact that defendant, after pleading a general denial, sees fit, unnecessarily, to plead, in defense, the contract as he claims it to be. Instruction held erroneous as violative of this principle.

Chismore v Bank, 221-1256; 268 NW 137

Delivery of deed—presumption from recording—evidence to overcome. The recording of a real estate deed constitutes prima facie proof that the grantor has made full delivery of the deed to grantee; but, on the issue that the grantee fraudulently obtained possession of the deed and recorded it, the grantor must, against a subsequent good-faith purchaser for value from the grantee, show (on the facts of the instant case) (1) that the deed was actually put in escrow by agreement of the parties, and later wrongfully delivered to the grantee without the direct or indirect fault of the grantor, and (2) that the wrongful delivery to the grantee was not the result of any act on the part of the grantor's own agents.

Tutt v Smith, 201-107; 204 NW 294; 48 ALR 394

Confidential relation—grantor and grantee. The mere showing that the grantor and grantee in a deed of conveyance are related by blood creates no presumption of confidential relationship such as to cast upon the grantee the burden to establish the bona fides of the transaction.

Osborn v Fry, 202-129; 209 NW 303

II "BURDEN OF PROOF" AND "BURDEN OF ISSUE"—continued

Deeds—confidential relations—presumption. The law presumes that a deed of conveyance is fraudulent and void whenever it is made to appear that, when the deed was executed, the grantee occupied a position of trust and confidence as regards the grantor, or held a dominating and controlling influence over the grantor. It follows that the grantee must overthrow the presumption by a showing of the eminent fairness and legality of the transaction. Evidence held insufficient to overthrow the presumption.

McNeer v Beck, 205-196; 217 NW 825

Deeds—validity—fraud—evidence—sufficiency. Principle reaffirmed that testimony sufficient to overthrow a duly acknowledged deed of conveyance must amount to more than a preponderance—must be clear, satisfactory and convincing. Record held insufficient to meet said rule of law.

Richardson v Richardson, 216-1205; 250 NW 481

Deeds—validity—evidence necessary to invalidate. A deed is presumed to express the intention of the grantor and one who attempts to set it aside on the ground of undue influence or insanity has the burden of proof to present evidence that is clear, satisfactory and convincing.

Mastain v Butschy, 224-68; 276 NW 79

Burden on plaintiff to show delivery of deed. In a replevin action against an administrator for possession of a deed found in the safety deposit box of the deceased, the burden is on the plaintiffs to show a valid delivery of the deed effective to pass title.

Orris v Whipple, 224-1157; 280 NW 617

Deeds—invalidity. Principle reaffirmed that (barring fiduciary relationships) the burden of proof rests on the party who alleges fraud, undue influence, or mental incompetency as the basis for invalidating a deed of conveyance.

Kramer v Leinbaugh, 219-604; 259 NW 20

Deeds — mental incompetency — undue influence. The mental incompetency of a grantor to execute a deed of conveyance, or the obtaining of said conveyance by the grantee by undue influence, when assigned as ground for setting aside said conveyance, must be established by plaintiff and by clear, satisfactory and convincing evidence—there being no proof that a confidential relationship existed. Evidence reviewed and held insufficient to meet said burden of proof.

Foster v Foster, 223-455; 273 NW 165

Remedies of purchaser—enforcement of vendee's lien. A vendee who rescinds, and seeks to establish a lien on the land for his proper advancements, need not show that a subsequent titleholder had knowledge of his (vendee's) rights. The subsequent titleholder must show his want of knowledge.

Larson v Metcalf, 201-1208; 207 NW 382; 45 ALR 344

Resulting trust—convincing proof by administrator necessary. A deceased wife's administrator seeking to impress a resulting trust on her surviving second husband's realty, held by him for more than 30 years, has the burden to prove the trust, not by a mere preponderance, but by clear, satisfactory evidence. Evidence held insufficient where alleged funds of wife came from wife's land, whose value arose largely from husband's improvements thereon, and which funds were turned over by wife to husband, commingled with his money and used to purchase realty, later exchanged for the property upon which a trust impressment is sought.

Keshlear v Banner, 225-471; 280 NW 631

Interest in real estate. A defendant in an action to recover real estate who claims an interest in the land derived from a source other than the plaintiff must plead and prove such interest.

O'Connor v Hassett, 207-155; 222 NW 530

Quieting title — rule governing recovery. Principle reaffirmed that plaintiff in an action to quiet title to realty must assume the burden of proof and must recover on the strength of his own title and not on the weakness of that of the defendant.

Lockie v White, 221-1044; 267 NW 671

Surface waters—natural flow—contract to change. Adjoining land owners, as between themselves, may validly contract for ditches and dikes which will free the servient estate from the burden of natural drainage, and the right, if not abandoned, to have such ditches and dikes maintained will pass to subsequent owners of the land. But he who alleges such contract must establish the same by clear and satisfactory evidence.

Young v Scott, 216-1253; 250 NW 484

Surface waters—interference by dikes. The maintenance of a dike along lands for the purpose of warding off backwater from a river may not be enjoined by an adjoining landowner unless he shows (1) that his lands constitute the dominant estate and the diked lands the servient estate, and (2) that the dike materially and substantially interferes with surface drainage. High lands which are last covered by backwater from a river are not servient to adjoining low lands which are first covered by such backwater.

Downey v Phelps, 201-826; 208 NW 499

Lease of minable coal—breach. In an action to recover minimum royalties under a lease of coal lands because of defendant's breach of

contract to mine all minable, workable and merchantable coal underlying said lands, plaintiff has the burden to establish the existence of such coal, especially when plaintiff assumed such burden by his pleadings. Evidence exhaustively reviewed and held insufficient to generate a question for the jury.

Scovel v Coal Co., 222-354; 269 NW 9

Quasi-mechanics' liens—public improvement —use of materials. A subcontractor on a public improvement is not entitled to have his claim established against the retained portion of the contract price due the contractor unless he establishes the fact that the materials furnished by him were actually used "in the construction" of the improvement, that is, were used in some proper way in connection with said construction work.

Rainbo Oil Co. v McCarthy Co., 212-1186; 236 NW 46

Moratorium—mortgagee's burden—cause for refusing—failure of proof. Trial court did not abuse its discretion in granting an extension of redemption, under the moratorium of the 47th General Assembly, where the mortgagee did not prove mortgagor's lack of possibility and good faith efforts to refinance, nor insolvency, nor inadequacy of the security, thereby failing to maintain his burden of showing good cause for denying the extension.

Larson v Ronan, 224-1248; 278 NW 641

Moratorium continuance—burden to prevent. Mortgagors, as a matter of law and equity, are entitled to moratorium continuances unless good cause is shown to the contrary, the burden of which showing is upon the mortgagee.

Prudential Ins. v Schaefer, 224-1243; 278 NW 602

Power of city to acquire property—defense. A municipality as defendant in an action for specific performance of its alleged contract for the purchase of land, has the burden to establish its plea that its attempted purchase of said land was for a purpose not authorized by law. Record reviewed and held said burden had not been met.

Golf View Co. v Sioux City, 222-433; 269 NW 451

Adjudication of insanity—presumption. One judicially held to be insane has the burden to overthrow the presumption that such insane condition continues.

Hazen v Donahoe, 208-582; 226 NW 33

Validity of contract—demand by guardian of insane person for accounting. In an action by the guardian of an insane ward to compel defendant to account for property paid or delivered by the ward to defendant, without consideration, and at various periods of time prior to the time the ward was adjudged insane, the guardian must establish the insanity of the ward at each particular transaction, or must establish such fact condition as compels an accounting. Evidence held insufficient to meet the burden of proof as to one transaction.

Davidson v Piper, 221-171; 265 NW 107

Signature and verification—denial by guardian—effect. The guardian of an insane person may, by sworn answer, put in issue the genuineness of the purported signature of his ward as indorser of a nonnegotiable certificate of deposit, and thereby throw upon the holder-plaintiff the burden of proving the genuineness of such signature.

Farmers Bank v Bank, 201-73; 204 NW 404

Mental capacity to contract—existence—burden to disprove. Mental weakness from disease does not deprive a person of capacity to dispose of property until the power of intelligent action is destroyed, and executor relying thereon to recover gift made by decedent to sister has burden of proof.

Wilson v Findley, 223-1281; 275 NW 47

Testamentary capacity—proponents' burden. In an action to contest a will under which one son receives over eight times as much property as the children of his deceased brother and evidence discloses dispute as to testator's understanding of English language in which the will is written and such circumstances lead the court to suspect testator may have been imposed upon, an additional burden is imposed upon proponents of will to show testator was acquainted with the provisions of the will.

In re Younggren, 226-1377; 286 NW 467

Will contest—testamentary capacity—how determined. In a will contest, after proponent's formal proofs, the burden of showing lack of mental capacity of testatrix is on contestant. Mere deterioration in physical or mental powers does not destroy testamentary capacity until the mental decline reaches such stage that the person is unable to intelligently comprehend the estate of which he is possessed and the natural objects of his bounty and to intelligently exercise judgment and discretion in the disposition of his property.

In re Behrend, 227-1099; 290 NW 78

Actions on policies—exemption from liability. The insurer has the burden to establish a contract exception which exempts him from liability.

Lamar v Trav. Assn., 216-371; 249 NW 149; 92 ALR 159

Insurance—prorating loss. An insurer who pleads that the loss should be prorated with another policy must assume the burden to show indubitably that such other policy was "valid and collectible".

Cole v Ins. Co., 201-979; 205 NW 3

Accident insurance — avoidance of policy. The insurer in an accident insurance policy has the burden of proof to establish the de-

II "BURDEN OF PROOF" AND "BURDEN OF ISSUE"—continued

fense that the policy is wholly avoided because the insured, in obtaining the policy, had falsely represented that his habits of life were "correct and temperate", and had thereby intentionally deceived the insurer. Evidence held insufficient to establish such defense, as a matter of law.

Olson v Surety Co., 201-1334; 208 NW 213

Accident insurance—avoidance of policy. An accident insurance policy (against injury sustained solely through external, violent, and accidental means) which provides, in effect, that it does not cover injuries sustained by reason of the intentional act of any person except assaults upon the insured by a person committing or attempting to commit robbery, casts upon the insurer the burden to establish (1) that the insured was injured by the intentional acts of another person, (2) that the injury was intentional, and (3) that such other person was not committing or attempting to commit robbery. Evidence held insufficient to sustain such defense, as a matter of law.

Olson v Surety Co., 201-1334; 208 NW 213

Actions on policies—accidental death—burden of proof. In order to recover on the ordinary accident insurance policy, claimant must show by a preponderance of the evidence that the injury or death resulted solely from bodily injury received through accidental means. Evidence held to present a jury question.

Dawson v Life Co., 216-586; 247 NW 279

Accident insurance—burden of proof. Under an accident policy against bodily injury through accidental means, resulting directly, independently, and exclusively of all other causes, the insured must necessarily meet the burden of showing that the injuries received resulted solely from accidental means. Evidence held insufficient.

Michener v Cas. Co., 200-476; 203 NW 14

Fraud in securing release—burden of proof. In an action on a life policy where the insurance company pleads a release, the burden of proof is on the company to show the execution and delivery of the release and payment of amount due thereunder, and where failure of consideration or fraud is alleged in obtaining the release, the burden of proof is on the party making the allegation, so where the court excluded such a release from evidence on account of insurance company's failure to establish consideration for the execution of such release, it placed a burden on the company which the company should not have been required to sustain, and the ruling was clearly erroneous.

Luce v Ins. Co., 227-532; 288 NW 681

Accidental death—burden of proof—presumption against suicide—jury question. Under a policy providing for additional payment in case of death from accidental means, the beneficiary has burden of showing that insured shot himself accidentally, which need not be proved by direct evidence, but may be proved by proper inferences and presumptions from facts, and the beneficiary is aided in carrying this burden of proof by the presumption that death was not the result of suicide. Such presumption, however, is a rebuttable one and ordinarily a question of fact to be determined by the jury. So where evidence on a fact matter is of such character that reasonable men, in an impartial and fair exercise of their judgment, may honestly reach different conclusions, the question was properly held for the jury.

Mutual Life Ins. v Hatten, 17 F 2d, 889

Actions on policies—condition subsequent. In an action on a policy of fire insurance which excepts loss "by theft or neglect", the burden to establish the theft or neglect is on the insurer.

Hall v Ins. Co., 217-1005; 252 NW 763

Liability insurance—destruction of property—evidence of value. In motor carrier's action on liability insurance policy for loss of property destroyed by fire in freight terminal, plaintiff has burden of proof as to its "custody and control" of goods within policy provisions, also as to value thereof, and stipulation as to value of certain goods on which claims had been paid by insured does not admit value of other goods in absence of competent proof thereof.

American Ins. v Brady Co., 101 F 2d, 144

Insurance—cancellation of fire policy—burden of proof on insurer. The burden of proving cancellation of a fire insurance policy is on the insurer who denies liability thereunder.

Home Ins. v Ins. Co., 225-36; 279 NW 425

Action on policy—insured's burden of proof. In action against an insurance company to recover on a policy covering tractors destroyed by fire, where defense was that plaintiff's ownership was not unconditional and that the property was not kept on the described location as the policy required, plaintiff was required to prove that, with full knowledge of facts disclosed to its agent by plaintiff, the defendant admitted its liability and waived those provisions of policy.

Buettner v Le Mars Assn., 225-847; 282 NW 733

Insurance policy admitted by pleadings. In an action to recover on a policy of fire insurance where the plaintiff's petition, a petition of intervention, and the answer to the petition of intervention all agreed that the policy was issued on a certain date and that it covered the same property that was covered by the mortgage and by another insurance contract issued by the intervenor, the record was not

fatally deficient when it contained no evidence of the execution of the policy.

Calendro v Ins. Co., 227-829; 289 NW 485

Mailing notice of cancellation—presumption. In an action on an insurance policy to recover damages for loss by hail and where the answer alleges cancellation of policy by mailing five days written notice to insured, receipt of which notice plaintiff denies, it may be presumed or inferred by the supreme court in reviewing a decision on demurrer, that the letter properly addressed and mailed reached the plaintiff in due time.

Sorensen v Ins. Ass'n., 226-1316; 286 NW 494

Insurance policy—invalidating mortgage—burden of proof and shifting thereof. Proof by an insurer that a mortgage on the insured property was, without his consent, signed and recorded subsequent to the issuance of the policy presumptively establishes the execution and delivery of said mortgage, yet, the insurer is not entitled to an instruction that the burden of proof is, by such proof, shifted to the insured; but the insurer would, on request, be entitled to an instruction that, in view of such proof, the insured would not be entitled to recover unless he proceeds to negative the presumption aforesaid.

Hoover v Ins. Co., 218-559; 255 NW 705

Limitation of actions—mistake tolling statute. A mortgagee, seeking to reform his mortgage to correct an error in the real estate description and escape the statute of limitations on the ground of mutual mistake which tolled the statute until discovered, has the burden of showing he did not discover the error until a time within five years before bringing action, and without which proof the statute operates as a bar.

Beerman v Beerman, 225-48; 279 NW 449; 118 ALR 997

Fraudulent concealment—statute of limitations. To overcome the defense of statute of limitations on the ground of fraudulent concealment, the burden to both plead and prove such fraudulent concealment is on the party relying thereon.

Smith v Middle States Utilities Co., 224-151; 275 NW 158

Fraudulent concealment as tolling statute—burden of proof on pleader. After a defendant raises the defense of statute of limitations, plaintiff, alleging that because of defendant's fraud or fraudulent concealment the cause of action was not barred, has the burden of establishing such facts which he claims avoid the statute of limitations.

Carroll v Arts, 225-487; 280 NW 869

Injunction against tax sales—tax deed as evidence. An injunction restraining a county treasurer from selling real estate at tax sale for special assessments could not be sustained on the ground that tax deeds issued at a sale for general taxes extinguished the lien of the special assessments when the tax deeds were never introduced in evidence to enable the court to rule on whether the statutory requirements had been properly performed to make the tax deed valid.

Bennett v Greenwalt, 226-1113; 286 NW 722

Correctness of assessment—burden of proof. One who complains of a tax assessment has burden of proof of overcoming the presumption of correctness of assessments.

Crary v Board, 226-1197; 286 NW 428

Assessor's valuation—burden of proof. The presumption is that the valuation placed by the assessor upon any particular property is correct, and the burden of proof is upon the person challenging that estimate to prove otherwise, as provided by statute, yet the opinion of the assessor is not conclusive, but when properly based and apparently not erroneous, excessive, or out of proportion, it is to be held as the true value of the property.

Trustees of Flynn's Estate v Board, 226-1353; 286 NW 483

Federal income tax from receiver—burden of sustaining deductions. In an action involving a claim for federal income tax from an insolvent corporation, the assessment by the internal revenue collector must be treated as prima facie evidence of the amount due, and the state statutes do not control the matter of deduction for attorney fees, referee fees, court costs, and other expenses, but the burden is on the receiver to establish these deductions.

State v American B. & C. Co., 225-638; 281 NW 172

Rights of heirs—collateral heirs—burden of proof. Collateral heirs, belonging as they do under the law of inheritance to a deferred class, must, in order to inherit, affirmatively negative by the greater weight of evidence, the existence, at the time the inheritance was cast, of any other heir belonging to a more favored class. Held that collateral heirs had failed to negative the independent existence of twins after they had been taken, by a Caesarian operation, from the womb of a dead mother.

Wehrman v Bank, 221-249; 259 NW 564; 266 NW 290

Administrator's report—nonprejudicial nature. An administrator has the burden of proof to establish the nonprejudicial nature of his irregular report.

In re Eschweiler, 202-259; 209 NW 273

Attorney fees for services to estate. The burden of proof is on attorney claiming fees for services, whether ordinary or extraordinary, and, while court may to a certain extent

II "BURDEN OF PROOF" AND "BURDEN OF ISSUE"—concluded

use its own judgment, claim should be based on evidence.

Glynn v Bank, 227-932; 289 NW 722

Probate claim—payment specially pleaded—burden of proof—jury question. In probate action to establish claim for services rendered to decedent under an express agreement, where defendant specially pleaded a defense of payment as a part of a different contract of employment, the burden rested upon defendant to establish such different contract, including payment, and, if evidence justified, it was the duty of the court to submit the issue to the jury, but, where defendant's evidence is also consistent with and does not negative plaintiff's claim as to her express contract, it is admissible and proper to be considered by the jury as tending to show that the present claim was an afterthought, or that claimant had failed under suitable circumstances to advance the demand now relied upon, and as tending to support defendant's theory of the nature of her employment. However, such evidence failed to establish the specially pleaded defense of payment, and the court's failure to submit the question of payment to the jury was not erroneous.

In re McKeon, 227-1050; 289 NW 915

Administrator's debt to decedent—burden of proof. In proceeding on objection to administrator's final report, burden of proof was on the administrator to show why he should not be held accountable for full value of property inventoried by him, which inventory included his own debt to decedent. He was liable on such debt to the extent of his ability to pay at any time during administration, and everything above his statutory exemptions should have been so utilized, and there being no evidence in the record from which the extent of his nonexempt property or income could be ascertained, such question would be remanded to lower court for determination.

In re Windhorst, 227-808; 288 NW 892

Lost will—proof necessary to establish. To establish a lost will, the evidence must be clear, satisfactory and convincing, but need not be free from doubt.

Goodale v Murray, 227-843; 289 NW 450

Lost will — presumption of revocation rebutted. In the establishment of a lost will, there is a presumption that a will which was in the custody of the testator at his death, and which cannot be found, was destroyed by him with the intention of revoking it. The presumption may be rebutted or strengthened by proof of declarations of the testator, his circumstances, or his relations to the persons involved.

Goodale v Murray, 227-843; 289 NW 450

Directing verdict generally on several grounds—appellant's burden to reverse. Before the supreme court can reverse the trial court's ruling in sustaining generally a motion for directed verdict, which contained several grounds, appellant must show that no one of such grounds was sufficient to support such ruling.

Lotz v United Food Markets, 225-1397; 283 NW 99

Notice of appeal—nonserved parties. The burden is on an appellant to show—should the question arise—that parties not served with notice of appeal are not necessary parties to the appeal—that they will not be prejudiced or adversely affected in any manner by any order or decree of the appellate court.

State v Sur. Co., 223-558; 273 NW 129

Death—burden of proof to show self-defense. A peace officer, in attempting an arrest for a misdemeanor, has no legal right, unless he acts in legal self-defense, to kill the offender. It follows that, if he does kill, and is sued for damages consequent on the death, he has the burden to prove self-defense, especially so (1) when death was effected by a deadly weapon used in a deadly manner, (2) when the defendant distinctly pleaded self-defense as a defense, and (3) when plaintiff neither by plea nor proof presented the question of self-defense.

Klinkel v Saddler, 211-368; 233 NW 538

Rape—mental condition. In a prosecution for unlawfully having carnal knowledge of an imbecile, the state must establish the imbecility of the prosecutrix beyond all reasonable doubt. Testimony held to present a jury question.

State v Patrick, 201-368; 207 NW 393

Arrest without warrant — justification. A party who instigates an arrest without warrant and without later filing an information against the accused must, in an action for false imprisonment, assume the burden to legally justify his action.

Fox v McCurnin, 205-752; 218 NW 499

III PREPONDERANCE OF EVIDENCE

Alibi as defense. See under §13897 (XVI)
Bastardy proceedings. See under §12663 (II)
Insanity as defense. See under §13897 (XV)

Taking case from jury. The fact that the testimony of a plaintiff in support of his cause of action is met by positive testimony to the contrary by the defendant, both witnesses being of equal credibility, does not, of itself, show that plaintiff has failed to establish his case by a preponderance of the evidence.

Reichenbach v Bank, 205-1009; 218 NW 903

Negligence and proximate cause. Both negligence and proximate cause are questions of fact for the jury if the evidence is of sufficient weight and character to warrant their submis-

sion, and plaintiff has burden to establish them by a preponderance of the evidence, whether the evidence be direct or circumstantial.

Whetstine v Moravec, 228- ; 291 NW 425

Absence of preponderance of evidence. A party who has the burden of proof must fail when the record per se reveals no preponderance of evidence in his favor.

Waxmonsky v Hoskins, 216-476; 249 NW 195

Preponderance of evidence definition held nonprejudicial. Instruction when construed in its entirety defining preponderance of evidence as that evidence which "appeals most forcibly to your judgment and is most satisfactory to your minds in determining upon which side of the issues is the truth and the right", held nonprejudicial.

Moran v Kean, 225-329; 280 NW 543

Instructions — defining "preponderance of evidence". In defining "preponderance of evidence" as evidence which is "more convincing as to its truth", the court does not, in effect, say that evidence cannot constitute a preponderance unless the jury is satisfied that it is true.

Priest v Hogan, 218-1371; 257 NW 403

Instructions — interchange of synonymous terms. In instructing on the subject of "preponderance of the evidence", it is not erroneous to interchange the terms "evidence" and "testimony".

In re Burcham, 211-1395; 235 NW 764

Acknowledgment—impeachment—sufficiency. Principle recognized that testimony sufficient to overthrow the probative force of a certificate of acknowledgment must amount to more than a preponderance in the balancing of probabilities.

Perry v Reinertson, 208-739; 224 NW 489

Overcoming presumption from possession. A mere preponderance of the evidence is not sufficient to overcome the presumption arising from the possession of the legal title to real property. The evidence for that purpose must be clear, convincing, and satisfactory.

Wagner v Wagner, (NOR); 224 NW 583

Prima facie proof of title to note. The payee in possession of a promissory note the execution of which is not denied makes a prima facie case for recovery by the simple introduction of the note in evidence.

Farmers Bank v Bank, 201-73; 204 NW 404
Henderson v Holt, 201-1017; 206 NW 134

Mortgages—payment. A plaintiff who alleges the nonpayment of the note and mortgage which he is seeking to foreclose, must prove such nonpayment even tho defendant pleads payment. Evidence held insufficient to show nonpayment.

Larson v Ames Church, 213-930; 239 NW 921

Electric plant payable out of earnings—contract not "debt" prohibited by constitution or statute. A contract for municipal electric plant payable out of earnings does not create a "debt" within meaning of constitutional inhibition where, although plant was constructed on site owned by town, it was not shown that furnishing of site was part of consideration nor that site had a substantial value. In an action to enjoin the carrying out of such contract, the burden of proof to show that contract created a debt within the meaning of such constitutional inhibition was on the plaintiff electric company.

Iowa So. Utilities v Cassill, 69 F 2d, 703

Cause of death—undue burden to establish. Expert medical opinions that an insured died from an intra-cranial, fatty embolus resulting from an external, violent and accidentally suffered injury, met by the same class of expert opinions positively to the contrary, may generate a jury question, determinable by the jury, like any other disputed question of fact, on the preponderance of testimony, the facts on which such conflicting, expert opinions are based being of such nature that the jurors could not therefrom deduce a proper opinion. So held where the court erroneously instructed that "No mere weight of evidence is sufficient to establish the cause of assured's death unless it excludes every other reasonable hypothesis as to the cause of death"—in effect requiring the theory of death by means of an embolus to be established beyond a reasonable doubt.

Aldine Co. v Acc. Assn., 222-20; 268 NW 507

Burden of proof—public official's receipt of money as issue—plea of full accounting—not affirmative defense. A city seeking to recover from its clerk water rents, allegedly received and unaccounted for, must go forward with the evidence and prove by a preponderance thereof, the receipt of such funds by the clerk, the clerk's answer denying receipt of such funds, and asserting that all money received was accounted for. Such answer is not an affirmative defense requiring defendant to prove payment, but raises the receipt of funds as a controverted fact or issue submissible to a jury.

Carroll v Arts, 225-487; 280 NW 869

Real estate commission—issues correctly submitted. In a suit for breach of oral commission contract, instructions plainly stating that burden was on plaintiff to establish by a preponderance of evidence, (1) the terms of his contract, and (2) that through his efforts a sale was "effected, obtained, and procured", reviewed and held to correctly submit the issues under the pleadings.

Maher v Breen, 224-8; 276 NW 52

Oral contract to devise—evidence to establish—duty of court. Evidence to establish an alleged oral contract between a father and son, that the father would leave to the son a farm

III PREPONDERANCE OF EVIDENCE—concluded

when he died, must be established by clear, satisfactory, and convincing evidence and it is the duty of the court to subject the evidence to every fair test which may tend to weaken its credibility.

Blezek v Blezek, 226-237; 284 NW 180

Oral contract to devise—convincing evidence necessary. An alleged oral contract between a childless couple and a neighbor, that such couple would leave all their property to the neighbor's minor son when he became of age, if he would live with them until that time, must be established by clear, satisfactory, and convincing evidence, and when so established, along with proof of compliance by the son, entitled the son to specific performance of the contract.

Ford v Young, 225-956; 282 NW 324

Unnecessary allegation of negligence. An allegation of negligent construction or maintenance of an electrical transmission line is unnecessary, and if made, need not be proved, in an action for damages caused by fire set out by such line. Proof that fire was communicated to property by said line, and proof of the amount of damages resulting, plus the statutory presumption of negligence on the part of the operator of the line, make a prima facie case for recovery.

Walters v Elec. Co., 203-471; 212 NW 884; 38 NCCA 551

Instructions—law of case. An instruction to the effect that no damage for the flooding of land could be recovered if such damages resulted partly from the wrongful act of the defendant in erecting an embankment and partly from the natural overflow of a natural stream constitutes the law of the case, and a verdict for the plaintiff must be set aside if the evidence conclusively shows that the damages were caused in part by the natural overflow of the stream.

Pfannebecker v Railway, 208-752; 226 NW 161

Burden which complainant must carry. An instrument will not be reformed on the ground of mutual mistake unless the supporting testimony is clear, satisfactory, and convincing beyond a mere preponderance of the evidence, nor will such reformation be granted if the complainant has been guilty of inexcusable neglect in not having the instrument read; and especially is this true when a reformation will detrimentally affect the intervening rights of innocent third parties.

Galva Bank v Reed, 205-7; 215 NW 732

Reformation of instruments—evidence—sufficiency. To justify the reformation of an instrument in the language of a bill of sale so it will stand as a chattel mortgage, the supporting evidence must be more than a preponderance. It must be clear, satisfactory, and convincing.

Scott v Menin, 216-1211; 250 NW 457

Defense. In an action for libel, based on a defamatory publication, that the plaintiff could not tell the truth when on the witness stand, in which action defendant offered to show that plaintiff perjured himself in a previous foreclosure hearing, as to the existence of a certain fence, the court errs in withdrawing this evidence from the jury on the ground of indefiniteness, since in this civil action the defendant was not required to prove perjury beyond a reasonable doubt.

McCuddin v Dickinson, 226-304; 283 NW 886

Determining preponderance. Where one witness' word was against that of another, the supreme court, on appeal in an equity action, looked to the conduct of the parties and surrounding circumstances to determine the preponderance of the evidence.

Webber v Ins. Assn., 227-793; 288 NW 868

11491 Instructions requested.

ANALYSIS

Motor vehicle cases. See under §5037.09

I REQUESTED INSTRUCTIONS

(a) NECESSITY FOR REQUEST IN GENERAL

Stating who asked instructions. Stating in instructions that certain instructions were given at the request of a named party does not constitute reversible error, but such practice should be avoided.

Johnson v McVicker, 216-654; 247 NW 488

Nominal damages. Instructions as to nominal damages need not be given, in the absence of a request.

Schultz v Enlow, 201-1083; 205 NW 972

Exemplary damages. Failure of the court to submit to the jury the question of exemplary damages is not error, even tho plaintiff's pleading was broad enough to embrace such damages, when the plaintiff neither claimed such damages in the pleading nor requested the court to submit such issue.

Morrow v Scoville, 206-1134; 221 NW 802

Future pain. An instruction to the effect that a recovery would be limited to "the fair

and reasonable compensation for personal injury, pain and suffering, past and future * * * as shown by the evidence", is all-sufficient on the subject of future pain and suffering in the absence of a request for elaboration.

Duncan v Rhomberg, 212-389; 236 NW 638

Limiting damages—issue not raised in trial. Where an action in replevin by one claiming an automobile under a conditional sales contract was brought against a chattel mortgagee who had given some cash and extended credit in return for his mortgage, the plaintiff, having permitted the trial to be concluded on the issue of possession without raising any other issue or requesting instructions on any other issue, could not complain that the mortgagee's recovery should have been limited to the amount of actual cash given for the mortgage.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Impeaching testimony. The ordinary instructions as to the credibility of witnesses is all-sufficient in the absence of a request for a specific instruction as to the effect of impeaching testimony.

Altfilisch v Wessel, 208-361; 225 NW 862

Presentation of particular theory. Comprehensive and correct instructions by the court render unnecessary, in the absence of a request, the submission of defendant's particular theory of the case.

State v Dillard, 205-430; 216 NW 610

Duty to request amplification. Instruction as to the effect of knowledge, on the part of an insurance agent, of an existing mortgage on the insured property, held correct as far as it went, and to impose on defendant the obligation to request amplification relative to the effect of knowledge acquired by the agent when he was not transacting the business of defendant.

Hoover v Ins. Co., 218-559; 255 NW 705

Third party nondefendant — instructions. Where, under the pleadings and evidence, the jury might find that plaintiff's injuries were caused (1) by defendant's negligence, or (2) solely by the negligence of a third party nondefendant, the court must, on proper request, fully instruct as to the negligence of said third party.

Dennis v Merrill, 218-1259; 257 NW 322

Striking testimony in absence of jury. Failure of the court to inform the jury that certain testimony had, in the absence of the jury, been stricken from the record does not necessarily constitute reversible error. So held where complainant neither orally nor by requested instruction asked that the jury be so informed.

Justis v Cas. Co., 219-213; 257 NW 581

Question first raised on appeal. Questions as to possible errors of the trial court, not properly raised by motion for directed verdict, nor by request for instructions, nor by exceptions to instructions, cannot be considered on appeal.

In re Larimer, 225-1067; 283 NW 430

Undenied statement as admission—cautionary instruction—failure to request. Court did not err in failing to give a cautionary instruction concerning evidence of damaging statements against defendant, made in his presence, to which he failed to reply or deny, when no such instruction was requested, nor when such claimed error was not raised in the trial court.

Doherty v Edwards, 227-1264; 290 NW 672

Failure to testify. Defendant's failure to be a witness in his own behalf need not be covered by an instruction, in the absence of a request.

State v Reid, 200-892; 205 NW 517

Failure to define offense—effect. The failure specifically to define an offense, in the absence of a request, does not constitute error when the elements of the offense are accurately set forth in the instructions.

State v Grimm, 212-1193; 237 NW 451

Issues in criminal cases. An accused waives nothing by failing to request the court adequately to cover all the material allegations in the indictment or information.

State v Wyatt, 207-322; 222 NW 867

Inviting court to err—not permitted. A litigant will not be permitted to entrap the court by an invitation to commit error.

In re Iwers, 225-389; 280 NW 579

(b) FURTHER AND MORE SPECIFIC INSTRUCTIONS

Amplification—failure to request. A party cannot successfully assert that a correct instruction lacks amplification when he failed in the trial court to request such amplification.

Siesseger v Puth, 216-916; 248 NW 352

When all-sufficient. Instructions which fairly present the issues to the jury are all-sufficient, and, if defendant wishes some particular theory presented, he must make request therefor.

State v Harrington, 220-1116; 264 NW 24

Correct but inexplicit—responsibility of carrier. A correct instruction as to the responsibility of a carrier for the acts of its different agencies employed in transporting and delivering a shipment is sufficient, in the absence of a request for particular limitations thereon.

Riddle v Railway, 203-1232; 210 NW 770

Correct but not elaborate. Instructions which are correct as far as they go are sufficient,

I REQUESTED INSTRUCTIONS—continued
(b) FURTHER AND MORE SPECIFIC INSTRUCTIONS —concluded

in the absence of a request for further elaboration.

State v Peacock, 201-462; 205 NW 738
Clarkson v Cas. Co., 201-1249; 207 NW 132
State v Speck, 202-732; 210 NW 913
In re Newson, 206-514; 219 NW 305
Granette v Neumann, 208-24; 221 NW 197
Brennan v Laundry Co., 209-922; 229 NW 321
Updegraff v City, 210-382; 226 NW 928
State v Bourgeoise, 210-1129; 229 NW 231
Sergeant v Challis, 213-57; 238 NW 442
McQuillen v Meyers, 213-1366; 241 NW 442
State v Griffin, 218-1301; 254 NW 841

Care in handling electricity. In an action for damages for wrongful death from electricity, the usual correct instructions given in negligence cases relative to "ordinary care" are all-sufficient. If plaintiff desires to have the attention of the jury called to the exceptional danger attending the handling of electricity and to the fact that "ordinary care" must be in keeping with such danger, he must request such additional instruction.

Hanna v Electric Co., 210-864; 232 NW 421

Correct but not detailed—damages. An instruction relative to the measure of damages which is correct as far as it goes will be deemed all-sufficient, in the absence of a request for elaboration as to the detailed method to be followed in determining the present worth of the damages.

Rastede v Railway, 203-430; 212 NW 751

Correct but not elaborate—damages. Correct instructions relative to the allowance of damages generally, rather than on the basis of present worth, are all-sufficient, in the absence of a request for elaboration as to such present worth.

Cuthbertson v Hoffa, 205-666; 216 NW 733

Non-presented theory—guarding excavation. Correct instructions relative to the duty of the defendant to guard an excavation made by him are all-sufficient in the absence of a request by defendant that there be presented to the jury his claim that he had properly covered the excavation and that some one had, unbeknown to him, wrongfully removed such covering.

McKee v Iowa Co., 204-44; 214 NW 564

Failure to request simplification. An instruction which embraces complainant's theory of the case may be all-sufficient, in the absence of a request for a simplification of the language therein employed.

Clarkson v Cas. Co., 201-1249; 207 NW 132

Failure to elaborate defendant's theory. When instructions as given are fair and correct, defendant may not, in the absence of a request, complain that his particular theory was not elaborated and specifically stated to the jury.

State v Christensen, 205-849; 216 NW 710

Waiver of elaboration—mental anguish. An instruction which directs the jury to allow a party damages for the "mental anguish she has suffered as a direct result of such injuries" is all-sufficient, in the absence of any request for a more specific statement of the elements which may in the particular case constitute mental anguish.

Strayer v O'Keefe, 202-643; 210 NW 761

Nonrequest for elaboration. An instruction to the effect, in substance, that plaintiff must prove he fully carried out the contract sued on, necessarily embraces and covers defendant's contention that the plaintiff had abandoned the contract. If the defendant desires elaboration of the idea of abandonment, he must request an additional instruction.

Hornish v Overton, 206-780; 221 NW 483

Amount deceased would have spent—reducing verdict. An instruction in a personal injury action held not prejudicially objectionable on the ground that it did not specifically tell the jury that the amount the deceased plaintiff would have spent should be considered only for the purpose of reducing the amount to be recovered.

Andrews v Y. M. C. A., 226-374; 284 NW 186

Will contestants bound by own theory. Contestants alleging that a will was not duly and legally executed may not amplify their claim thereunder after requesting instructions proceeding solely on the theory that their construction of their claim was that the signatures of the testator and one witness, now deceased, were not genuine. In such case it is not error, when otherwise unobjected to, for the court on its own motion to add an instruction which in effect limits the case to the theory propounded in contestants' requested instructions.

In re Iwers. 225-389: 280 NW 579

(c) REQUESTS OTHERWISE COVERED

Covering requested instructions. A requested instruction need not be given when the requested material is covered by another instruction.

State v McDowell, 228- ; 290 NW 65

Covering requested instructions. Instructions given in lieu of requested instructions and on the same subject-matter are all-sufficient when they fairly embody the law appli-

cable to the case, even tho such given instructions might very properly have been amplified.

In re Anderson, 203-985; 213 NW 567
Appleby v Cass, 211-1145; 234 NW 477
Duncan v Rhomberg, 212-389; 236 NW 638
Union Co. v Boyce, (NQR); 238 NW 471
Kemmerer v Highway Com., 214-136; 241 NW 693
Cory v State, 214-222; 242 NW 100
State v Moore, 217-872; 251 NW 737
Laudner v James, 221-863; 266 NW 15
Smithson v Mommson, 224-307; 276 NW 47
Buettner v LeMars Assn., 225-847; 282 NW 733
Kirchner v Dorsey, 226-283; 284 NW 171
State v Ferguson, 226-361; 283 NW 917
Womochil v Peters, 226-924; 285 NW 151

Covering requested instructions. When three similar instructions were requested, it was not error to refuse to give two of them, and give but one embodying the propositions of the other two.

Remer v Takin Bros., 227-903; 289 NW 477

Balancing request—handwriting testimony. A party who requests an instruction which emphasizes the superiority of positive over expert testimony as to the genuineness of handwriting, may not complain that the court gave an instruction which fully embodied the idea of the requested instruction, but which more sharply but correctly emphasized the inferiority of expert testimony generally.

Keeney v Arp, 212-45; 235 NW 745

Disregard of testimony. Reversal of a cause will not be ordered because the court refused to instruct as to the conditions under which the jury might entirely reject the testimony of a witness for falsely testifying, when the court otherwise sufficiently guides the jury as to the credibility of witnesses.

Burke v Town, 207-585; 223 NW 397

Requests otherwise covered. In condemnation proceeding for highway purposes, refusal to give all of defendant's requested instructions was proper, where on the whole, instructions given were more favorable to defendant than it was by right entitled and most of the matters contained in the requested instructions that could be properly included were covered by the instructions given.

Stoner v Hy. Comm., 227-115; 287 NW 269

(d) JUSTIFIABLE REFUSALS IN GENERAL

Failure to give promised instruction. Failure of the court to instruct as promised during the course of the trial will not be reviewed in the absence of an exception to such failure.

Lee v Ins. Assn., 214-932; 241 NW 403

Refusal of incorrect instruction. Instructions which assert a person's right to use, manage, and dispose of his property as he sees fit, without the qualifying clause "if of sound mind", are properly refused, when the instructions given embrace the instructions asked, insofar as they are correct.

Zander v Cahow, 200-1258; 206 NW 90

Absence of evidence. Instructions which are without support in the evidence are properly refused.

Kimmel v Mitchell, 216-366; 249 NW 151
Minks v Stenberg, 217-119; 250 NW 883

Undue emphasis on one theory of case. Requested instructions which place special emphasis on a 'party's theory of the case are properly refused.

Beardmore v New Albin, 203-721; 211 NW 430

Request which ignores defense. An instruction is properly refused when it ignores a pleaded and supported defense.

Merchants Bk. v Roline, 200-1059; 205 NW 863

Requiring disregard of evidence. Instructions are properly refused when, if given, the jury would be compelled to render a verdict in disregard of relevant and supporting testimony on a material issue.

Kiser v Ins. Assn., 216-928; 249 NW 753

Failure to plead want of consideration. Refusal to instruct as to the want of consideration in the signing of a promissory note is proper when defendant (1) causes plaintiff's plea of consideration to be stricken, and (2) does not himself plead want of consideration.

Conner v Henry, 205-95; 215 NW 506

Undue emphasis. An instruction which places undue emphasis on some particular fact or feature of a case is properly refused.

Farwark v Railway, 202-1229; 211 NW 875

Unduly comprehensive request. Instructions which are so comprehensive as to authorize and direct a verdict in favor of all defendants are properly rejected when one of the defendants would be liable in any event.

Waldman v Motor Co., 214-1139; 243 NW 555

Nonapplicability to pleadings. Requested instructions are properly rejected when they go beyond any tendered issue.

Bilharz v Martinsen, 209-296; 228 NW 268

Confusing instruction refused. The prolixity of a technically correct, requested instruction and the fact that the instruction is so grammatically framed as to require a parsing of it by the jury, in order to understand it, furnish reasons for its refusal in addition to the fact that the court's instruction adequately covers the same subject matter.

Orr v Hart, 219-408; 258 NW 84

I REQUESTED INSTRUCTIONS—continued
(d) JUSTIFIABLE REFUSALS IN GENERAL—concluded

Instructions carrying improper inference. An instruction carrying the possible inference that the court did not believe that plaintiff was entitled to recover damages is properly refused by the court.

Orr v Hart, 219-408; 258 NW 84

Invading province of jury. An instruction which deprives the jury of the right to pass on a jury question is, of course, unthinkable.

Stingley v Crawford, 219-509; 258 NW 316

Refusal of inapplicable instruction not error. It is not error to refuse a requested instruction that has no applicability to the facts of the case.

Young v Hendricks, 226-211; 282 NW 895

Condemnation — highway used for lawful purpose—unsupported issue. A requested instruction to the effect that in arriving at compensation the law presumes that the highway to be built would be used for a lawful purpose is properly refused when there is no claim that the highway would be unlawfully used.

Cutler v State, 224-686; 278 NW 327

Relative to nonpleaded negligence. Instructions that the jury should not consider the failure to ring a bell on a street car as a ground of negligence, are properly refused (1) when plaintiff pleads no such ground of negligence, (2) when no such ground was submitted to the jury, and (3) when the testimony relative to such failure was received without objection.

Watson v Railway, 217-1194; 251 NW 31

Instruction requested—loan to be approved by loan committee—properly refused. In action on fidelity bond of a bank cashier, a request that the court inform jury that statute required that loans be made by executive officer and not by a loan committee was properly refused, since requirement that loan be approved by loan committee was lawful.

Fidelity Co. v Bates, 76 F 2d, 160

Assuming issuable facts. When it assumes disputed questions of fact as established, a requested instruction may be properly refused, even tho the request embodies a correct statement of the law.

Usher v Stafford, 227-443; 288 NW 432

Right to possession of note. The court very properly refuses to instruct that a surety on a promissory note has a right to the possession of the note when it is paid by the principal maker.

Mitchell v Burgher, 216-869; 249 NW 357

(e) UNJUSTIFIABLE REFUSALS IN GENERAL

Speculative damages — condemnation proceedings. Instructions cautioning the jury in condemnation proceedings against allowing damages based on speculative matters should, on request, be given.

Dugan v State, 214-230; 242 NW 98

Eminent domain — inconvenience resulting from taking. The jury must be instructed, on request, in eminent domain proceedings for highway purposes, that damages must not be allowed on the theory that the highway through the landowner's farm will be used illegally, with resulting inconvenience to the landowner; likewise an instruction to the effect that the jury must assess the damages on the presumption that the use would be lawful.

Welton v Hy. Comm., 211-625; 233 NW 876

Right of governmental agency to be treated as individual. A governmental agency has a right, in eminent domain proceedings, to have the jury instructed that such agency is entitled to have the cause tried and determined precisely as tho said agency was an individual.

Welton v Hy. Comm., 211-625; 233 NW 876

Malpractice—new condition subsequent to discharge. If, after the discharge of a patient, new conditions arise which are not the natural result of the previously existing condition of the patient, the physician must have due notification of such condition and an opportunity to treat it, and the jury must be so instructed, if an instruction is requested.

Lemon v Kessel, 202-273; 209 NW 393

Neutralizing effect of immaterial testimony. Letters written by the son of a testator twenty years prior to a will contest, and requesting financial help from the parent, (while admissible as bearing on the issue of unequal distribution of the estate) are wholly immaterial to the issue of want of testamentary capacity and undue influence, and a refusal to so instruct constitutes error.

In re Thompson, 211-935; 234 NW 841

Specific elements of fraud. An abstract instruction defining fraudulent representations is not adequate when there is a request for a specific instruction covering the elements of falsity, scienter, deception, and injury.

Gray v Shell Corp., 212-825; 237 NW 460

Hypothetical question based on untrue statement. The jury should be plainly instructed, at least on request, that it must give no weight or consideration to an answer to a hypothetical question if it finds that any assumed fact embodied in the question is not, in fact, true.

Wilcox v Crumpton, 219-389; 258 NW 704

"Physical fact" rule — diverting circumstance. A requested instruction should be given, when the testimony is supporting, to the effect that, if the view of a railway track is unobstructed for a long distance while a traveler is knowingly approaching it, he will

be held to have seen the train approaching thereon, there being no diverting circumstance.

Langham v Ry. Co., 201-897; 208 NW 356

(f) INCORRECT REQUEST SUGGESTING CORRECT PRINCIPLE

Trial—instructions—refusal of incorrect instruction. Instructions which assert a person's right to use, manage, and dispose of his property as he sees fit, without the qualifying clause "if of sound mind", are properly refused, when the instructions given embrace the instructions asked, insofar as they are correct.

Zander v Cahow, 200-1258; 206 NW 90

(g) ESTOPPEL BY REQUESTING INSTRUCTIONS

Requesting instructions — waiver. A litigant who has suffered prejudicial error and is unable to get it out of the record, may adjust himself to the condition thus brought about, and seek to neutralize the error by requested instructions, and in so doing he does not estop himself to insist on the error.

Miller v Kooker, 208-687; 224 NW 46

Requested instruction as waiver of objections. A party whose objections to the submission of a subject matter to the jury have been erroneously overruled by the court does not waive his objections by asking an instruction which is in harmony with his objections as to said subject matter.

Ballinger v Demo. Co., 207-576; 223 NW 375

Instructions on trial theory—nonduty of court on other theories and necessity of requests. In an action by pedestrian who fell on ice which had formed on a sloping portion of sidewalk, an instruction to jury requiring, as prerequisite to recovery, a finding of knowledge or constructive notice by city of icy condition of sidewalk, was not erroneous where plaintiff failed to request an instruction that such notice was unnecessary, where action was tried on theory expressed in the instruction. A trial court is not required to instruct on theory not in the case as tried, and appellant, who invited instruction given and failed to request different instruction, could not, on appeal, complain of such instruction.

Leonard v Muscatine, 227-1381; 291 NW 446

Estoppel to allege error. A party may not predicate error on the giving of an instruction which he has requested.

Keeney v Arp, 212-45; 235 NW 745

Estoppel to object. A party is not estopped to object to the giving of an erroneous instruction because he requested it in part, when his request was for the purpose of presenting to the jury an entirely different conclusion than the one actually presented to the jury.

Cooley v Killingsworth, 209-646; 228 NW 880

Error not waived by requesting instruction. Where motion for a directed verdict is erroneously overruled, the defeated party does not waive said error by asking instructions which correctly state the law of the case as fixed by the ruling of the court on the motion. (Overruling Martens v Martens, 181 Iowa 350, and McDermott v Ida County, 186 Iowa 736)

Heavilin v Wendell, 214-844; 241 NW 654; 83 ALR 872

(h) APPELLATE REVIEW OF REFUSAL

Witnesses — credibility — instructions — refusal. Reversal of a cause will not be ordered because the court refused to instruct as to the conditions under which the jury might entirely reject the testimony of a witness for falsely testifying, when the court otherwise sufficiently guides the jury as to the credibility of witnesses.

Burke v Town of Lawton, 207-585; 223 NW 397

11492 Duty as to instructions asked.

Precautionary unbalanced instructions. The court may very properly correct a requested precautionary instruction relative to the consideration by the jury of admissions by a deceased, by balancing the instruction, and making it applicable to the admissions of all parties to the action, including the deceased.

Halstead v Rohret, 212-837; 235 NW 293

Different phraseology but same meaning. A requested instruction, tho couched in proper and accurate language, need not necessarily be given in the exact language requested.

Malcor v Johnson, 223-644; 273 NW 145

Interrogatory seeking more than statutory requirements—proper refusal. In a guest's personal injury action against a father and son, owner and driver, respectively, of the motor vehicle, where the petition alleges the son was driving with the "knowledge and consent" of the father, court's refusal to submit to the jury defendant-appellant's special interrogatory as to finding that son was driving car with "knowledge and consent" of father was not error, as it required an element not contained in the statute—proof under the statute need go no further than to show "consent", even tho allegation of knowledge was in the petition.

Allbaugh v Ashby, 226-574; 284 NW 816

11493 Instructions by the court.

Discussion. See 22 ILR 609—Trial technique

ANALYSIS

Curing error. See under §§11548 (V), 13944 (VI)
Instructions in appeal abstract—what necessary. See under §12845
Instructions in criminal cases. See under §13876
Motor vehicle cases. See under §5037.09
Nonpaper issues. See under §11426

I PROVINCE OF COURT AND JURY

(a) ASSUMPTION IN RE ISSUABLE FACTS IN CIVIL CASES

Measure of damages. An instruction which is a technically incorrect statement of the measure of damages is harmless when, if a correct instruction had been given, the verdict of the jury must have been the same as found by the jury under the incorrect instruction.

Farmers Bank v Planters Elev., 200-434; 204 NW 298

"Alibi" in civil cause—burden of proof. Where a defendant in a civil case enters a general denial to a charge of having committed a tort, and in support thereof testifies that, at the time in question, he was at his home, not far from the scene of the alleged tort, the court has no right to instruct (1) that defendant's defense is that of an "alibi," and (2) that defendant has the burden to establish such alibi by evidence which will outweigh the evidence tending to show that defendant did commit the tort.

Gregory v Sorensen, 208-174; 225 NW 342

Assumption that note was partnership business.

Maxfield v Heishman, 209-1061; 229 NW 681

Avoiding assumption of fact—use of "if any". The submission of a nonpleaded element of damages, or the submission of a nonproven element of damages, will be deemed harmless when the instruction carries the limitation "if any".

Hepker v Schmickle, 209-744; 229 NW 177
Kisling v Thierman, 214-911; 243 NW 552

Inferential assumption of fact negatived. An inferential assumption of fact in instructions may manifestly be wholly negatived by other instructions.

State v Harding, 204-1135; 216 NW 642

Unallowable assumption of fact. The court may not assume as a fact that a bill of sale was intended to convey title and not to act as a mortgage, such matter being in issue.

First N. Bk. v Schram, 202-791; 211 NW 406

Treating receipt as contract. A court must carefully refrain from stating or even inferring that a naked receipt for money constitutes a contract, the issue of contract being sharply in dispute.

Bremhorst v Coal Co., 202-1251; 211 NW 898

Wills—undue influence—presumption of testamentary capacity. When the sole issue in a will contest is that of undue influence, the court is not in error in instructing that the jury should consider as an established fact that the testator was possessed of testamentary capacity at the time of the execution of the will.

In re Muhr, 218-867; 256 NW 305

Malpractice—nonassumption of fact—improper definition. In an action based on malpractice in sewing up in a wound a piece of gauze, instruction reviewed and held not subject to the objections, (1) that it assumed the existence of an issuable fact, and that such fact constituted negligence per se, and (2) that ordinary care was improperly defined.

Forrest v Abbott, 219-664; 259 NW 238

Unwarranted assumption of fact. Assumption of the truth of an issue, as to which the testimony is in conflict, constitutes reversible error.

Millard v Mfg. Co., 200-1063; 205 NW 979
Boston v Elec. Co., 206-753; 221 NW 508
Passcuzzi v Pierce, 208-1389; 227 NW 409
Tullar v Ins. Co., 214-166; 239 NW 534

Existence of contract. Instructions must not assume the existence of a contract the existence of which is distinctly in issue.

Bremhorst v Coal Co., 202-1251; 211 NW 898
Gibson v Miller, 215-631; 246 NW 606

Improper assumption of fact. Prejudicial error results from directing the jury, on con-

flicting evidence, that a claim sued on was an "open, current, and running" account.

Seddon v Richardson, 200-763; 205 NW 307

Unallowable assumption. Instructions must not assume that a resolution of a board of directors of a corporation was adopted in good faith when the good-faith adoption was distinctly in issue.

Schulte v Ideal Co., 208-767; 226 NW 174

Family relations — compensation. On the issue whether services were rendered as a member of the family, and with the mutual expectation of paying and receiving compensation therefor, the court must not assume, in his instructions, that a statement by the recipient that he would pay for the services would necessarily establish the expectation of the party rendering the services to receive compensation.

Seddon v Richardson, 200-763; 205 NW 307

Assuming truth of fact. It is inaccurate (but not necessarily reversible error) for instructions to refer to "admitted" signatures when the testimony only tended to show that the accused had, prior to the trial, admitted their genuineness.

State v Debner, 202-150; 209 NW 404

Emergency — jury question. Instructions reviewed and held not to be subject to the vice of foreclosing the jury from passing upon the issue whether an injured party was guilty of negligence in what she did under an emergency.

Elmore v Railway, 207-862; 224 NW 28

Cooley v Killingsworth, 209-646; 228 NW 880

See In re Davis, 217-509; 248 NW 497

Assuming issuable facts—refusal. When it assumes disputed questions of fact as established, a requested instruction may be properly refused, even tho the request embodies a correct statement of the law.

Usher v Stafford, 227-443; 288 NW 432

Nonassumption of fact. Instructions reviewed as a whole and held not to assume the existence of a fact contrary to defendant's contention.

Baker v Davis, 217-509; 248 NW 497

(b) ASSUMPTION IN RE UNCONTROVERTED FACTS IN CIVIL CASES

Assumption of truth of conceded fact. Instructions may very properly assume the truth of conceded or unquestionably established facts.

Eves v Littig Co., 202-1338; 212 NW 154

Assumption of truth. The court may, in its instructions, very properly assume the truth of an admitted or unquestionably proven fact.

Rosander v Knee, 222-1164; 271 NW 292

Proper assumption of fact. An instruction may properly assume as true a fact which the record unquestionably reveals.

Engle v Nelson, 220-771; 263 NW 505

Omission of conclusively established fact. The erroneous omission from an instruction of a fact element which stands conclusively established in the testimony, is harmless.

Schipfer v Stone, 206-328; 218 NW 568; 219 NW 933

McClary v Ry. Co., 209-67; 227 NW 646

Error to submit admitted fact. Error results from submitting to the jury the question of the existence of a fact unquestionably admitted by both parties.

Jordan v Schantz, 220-1251; 264 NW 259

Failure to submit uncontroverted fact. An issue of fact is properly withheld from the jury when the record presents no controversy as to said fact.

Morris Co. v Braverman, 210-946; 230 NW 356

Submitting established fact. Instructions may not properly require a defendant to prove the truth of that which plaintiff solemnly admits to be true. Juries must not be permitted to find a material fact contrary to the clear admission of a party.

Booton v Metcalfe, 201-311; 207 NW 386

Inferential submission of uncontroverted fact—avoidance. The definite and proper assumption, by the court in its instructions, of the truth of an unquestioned fact, renders quite harmless any mere inference, in other parts of the instructions, that the truth of such fact was submitted to the jury.

In re Willmott, 215-546; 243 NW 634

Allowable assumption of fact. It is not of material consequence that instructions to a jury refer to the conceded president of a corporation as "a duly authorized agent" of the corporation.

Mortimer v Ins. Assn., 217-1246; 249 NW 405

Assumption of abandonment of project. Instructions may assume that a building project was admittedly abandoned when both parties concede throughout the trial that such was the fact.

Shockley v Davis Co., 200-1094; 205 NW 966

Real party at interest—noncontested question. The question whether plaintiff was the real party in interest need not be submitted as a jury question when such question is not raised in the trial court.

Weinhart v Smith, 211-242; 233 NW 26

Instructing on basis of counsel's admissions. The court is not in error in peremptorily instructing in an action of replevin that plaintiff

I PROVINCE OF COURT AND JURY—continued

(b) ASSUMPTION IN RE UNCONTROVERTED FACTS IN CIVIL CASES—concluded

is entitled to the immediate possession of all property claimed by him (except specifically enumerated articles) when said instruction is in strict accord with the explicit admission in court of defendant's counsel, tho no such admission appears in defendant's answer.

Luther v Investment Co., 222-305; 268 NW 589

Eyewitnesses—improper submission of issue. When the record affirmatively shows the absence of all eyewitnesses to a fatal accident because the sole survivor was not observing the deceased persons immediately preceding the accident, the court should peremptorily instruct that there were no such witnesses; but the defendant may not, in such case, be prejudiced if the existence of such witnesses is submitted to the jury.

Rastede v Railway Co., 203-430; 212 NW 751

(c) ASSUMPTION IN RE ISSUABLE FACTS IN CRIMINAL CASES

See annotations under §13876

(d) WEIGHT AND SUFFICIENCY OF EVIDENCE AND CREDIBILITY OF WITNESSES

Fallibility of testimony. A jury need not be told that testimony as to the identity of a party who did a named thing is "exceedingly fallible".

State v Flory, 203-918; 210 NW 961

Preponderance of evidence definition held nonprejudicial. Instruction when construed in its entirety defining preponderance of evidence as that evidence which "appeals most forcibly to your judgment and is most satisfactory to your minds in determining upon which side of the issues is the truth and the right", held nonprejudicial.

Moran v Kean, 225-329; 280 NW 543

Weight of evidence for jury—duty of court. The weight of the evidence is for jury, and the duty of court is to carefully instruct jury so as to furnish them a guide insofar as possible in attempting to arrive at truth.

Jakeway v Allen, 226-13; 282 NW 374

Circumstantial evidence—force and effect. A jury may be told that, if they find circumstantial evidence to be strong and satisfactory, they should so treat it.

Ferber v Railway, 205-291; 217 NW 880

Absence of applicable evidence precludes review. The appellate court cannot review an instruction to the jury when the correctness of such instrument depends on the contents of exhibits not embraced in the abstract.

Forrest v Woodmen, 220-478; 261 NW 802

Employment contract—oral cancellation. In action by ballplayer to recover for services under written contract which could be terminated by defendant at any time, an instruction that oral notice of termination given by any of the members of the defendant baseball club would cancel the contract was not prejudicial when in fact all members of the club were present and in complete accord at the meeting at which the contract was cancelled.

Jacobs v Vander Wicken, (NOR); 218 NW 147

Fraudulent representations—notes and lease. Competent evidence of fraud in the execution of a lease and promissory notes, tho not free from inconsistencies, and contradicted in part, generates a jury question.

Ottumwa Bk. v Starns, 202-412; 210 NW 455

Malicious prosecution—jury question. A question for the jury and not for the court is generated when the defendant in an action for damages for malicious prosecution makes substantial proof that, prior to commencing the prosecution, he made a full, fair, and good-faith recital of the facts to his attorney and was advised to commence the prosecution.

Beard v Wilson, 211-914; 234 NW 802

Credibility of witness—rule as to presumption. In prosecution for subornation of perjury, where defendant complains of the court's instruction which stated in part, "it being presumed in law that a man whose general reputation for truth and veracity is bad would be less likely to tell the truth than one whose reputation is good", such instruction did not tell the jury that defendant had been impeached, that he would not tell the truth, or that they could disregard his testimony (they were only informed of a rule applicable in everyday business transactions)—it being more a statement of the reason for such a rule in impeachment than any direction to the jury, and was in no sense a presumption of guilt, but could only be applied to defendant as a witness. The weight of defendant's testimony was left entirely for the jury.

State v Hartwick, 228- ; 290 NW 523

Expert testimony — nonright of jurors to substitute their own knowledge. Jurors may use and employ their own knowledge as to values in determining the weight and effect of expert testimony as to such values, but they must not be instructed in effect, that they may disregard such expert testimony and substitute their own knowledge as evidence.

State v Brown, 215-600; 246 NW 258

Expert testimony as to insanity. Instructions to the effect that certain expert testimony might be found quite reliable and satisfactory, or the reverse, and entitled to little, if any, consideration, reviewed and held quite nonprejudicial.

State v Mullenix, 212-1043; 237 NW 483

Unallowable contrasting of testimony of physicians. The court may not say to a jury, as a matter of law, that the testimony of regular attending physicians of a deceased has greater weight than the testimony of experts based solely on hypothetical questions.

Blakely v Cabelka, 203-5; 212 NW 348

Cause of death—undue burden to establish. Expert medical opinions that an insured died from an intra-cranial, fatty embolus resulting from an external, violent and accidentally suffered injury, met by the same class of expert opinions positively to the contrary, may generate a jury question, determinable by the jury, like any other disputed question of fact, on the preponderance of testimony, the facts on which such conflicting, expert opinions are based being of such nature that the jurors could not therefrom deduce a proper opinion. So held where the court erroneously instructed that "No mere weight of evidence is sufficient to establish the cause of assured's death unless it excludes every other reasonable hypothesis as to the cause of death"—in effect requiring the theory of death by means of an embolus to be established beyond a reasonable doubt.

Aldine Trust v Accident Assn., 222-20; 268 NW 507

Life tables—effect. Life tables are not conclusive on the subject of life expectancy, and instructions should carefully elucidate such fact.

Droullard v Rudolph, 207-367; 223 NW 100
Bauer v Reavell, 219-1212; 260 NW 39

Mortality tables. Instructions held not subject to the vice of treating mortality tables as conclusive on the jury.

Rulison v X-ray Corp., 207-895; 223 NW 745

Value of services—judgment of jurors. It is proper for the court, irrespective of §11471-d1, C., '31 [§11471.1, C., '39], to instruct the jurors that they are not compelled to rely wholly on the opinions of witnesses as to the value of services, but that in connection with such opinions they may use and be guided by their own judgment in such matters.

In re Stencil, 215-1195; 248 NW 18

Unallowable assumption — nonsupport of wife. Record reviewed, and held reversible error for the court to instruct that, as a matter of law, an accused had failed to show any conduct on the part of his wife which would justify him in refusing to support her.

State v Gude, 201-4; 206 NW 584

Preponderance of evidence erroneously defined. It is error to define "preponderance of the credible evidence" as the testimony which best satisfies the juror's mind "that it is true", because it implies that the jury must be fully convinced of the truth of the testimony which controls the decisions on an issue.

Heacock v Baule, 216-311; 245 NW 753; 249 NW 437; 93 ALR 151; 36 NCCA 25

"Net value". The issue of the "net value" of an estate is properly submitted on evidence showing the gross value, all contested and pending claims and the facts attending the same, and the amount of the debts.

In re Anderson, 203-985; 213 NW 567

Effect of "improbabilities". "Improbabilities" in certain features of the testimony relative to a party's claim do not constitute a defense, and the court must not so instruct.

In re Dolmage, 204-231; 213 NW 380

Verbal admissions — balanced instruction. The ordinary practice in balancing an instruction relative to the weight to be given to verbal admissions is to say to the jury, in substance, that when such admissions are voluntarily, freely, and understandingly made and clearly and correctly remembered and stated they are often most satisfactory evidence. But the omission of the qualifying word "most" is not necessarily erroneous.

Abraham v Ins. Co., 215-1; 244 NW 675

Admissions—attempt to suppress testimony. While an attempt by the defendant to keep an adverse witness from testifying is not necessarily an admission by him that his claim or defense is false, yet such attempt is in effect an admission by the defendant that the testimony sought to be suppressed is unfavorable to his cause; and instructions to this effect, on supporting evidence, are proper.

Gregory v Sorenson, 214-1374; 242 NW 91

Circumstantial evidence. Principle reaffirmed that a theory may not be said to be established by circumstantial evidence unless the facts upon which the theory is predicated are of such a nature and so related to each other that the conclusion sought to be drawn therefrom is the only conclusion that fairly and reasonably arises.

Hogan v Nesbit, 216-75; 246 NW 270

Limiting jury to testimony. An instruction which limits the jury to the testimony produced and submitted does not necessarily constitute reversible error.

Dahna v Fun House Co., 204-922; 216 NW 262

Time of execution of note immaterial. When the one narrow issue is whether the defendant signed the note in question, the court may very properly instruct the jury that the time of signing is immaterial.

Conner v Henry, 205-95; 215 NW 506

Interlocutory reference. It is not error for the court to refer to the testimony of a witness as a "fact" when such reference is man-

I PROVINCE OF COURT AND JURY—continued

(d) WEIGHT AND SUFFICIENCY OF EVIDENCE AND CREDIBILITY OF WITNESSES—concluded

ifestly for the purpose of correcting counsel in the assertion that the testimony was an "opinion" or "conclusion".

State v Bourgeoise, 210-1129; 229 NW 231

Fatal assumption of fact. Prejudicial error results (1) from the mistaken assumption by the court that a named witness had remained in the court room during the taking of testimony, in violation of the orders of the court to the contrary, and (2) from instructing that the jury might consider such conduct in determining the weight to be given to the testimony of said named witness.

State v McCook, 206-629; 221 NW 59

Opinion evidence—harmless exclusion. Error in striking testimony is harmless when the facts sought are otherwise in the record, and when if admitted the record would still present a jury question.

In re Willer, 225-606; 281 NW 155

(e) DETERMINATION OF QUESTIONS OF LAW

Incorrect statement of law—conclusive presumption. It will be conclusively presumed that the jury followed an incorrect rule of law as stated to it by the court in its instructions.

Aldine Trust v Accident Assn., 222-20; 268 NW 507

Theories of equal probability. Circumstantial evidence relative to the loss of a diamond reviewed, and held that the court could not say as a matter of law that the theories of loss by theft or by fire were of equal probability.

Hall v Ins. Co., 217-1005; 252 NW 763

See Brower v Ry. Co., 218-317; 252 NW 755

Public improvements — acceptance — fraud — instructions required. In an action by a city as representative of the assessed property owners for damages consequent on the failure of the contractor to construct a pavement of the thickness required by the contract, the court must instruct on the issues as to the effect of an acceptance by the city council of the work, and as to the fraud which would overcome the estoppel because of said acceptance.

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

Ice on sloping portion of sidewalk—recovery refused on evidence and trial theory. In an action by a pedestrian against a city to recover for personal injuries received from fall on sidewalk where it is shown that pedestrian slipped on smooth, slippery ice, unaffected by artificial causes, on sloping portion of a sidewalk which was lifted by the roots of a tree, the refusal to permit a recovery on either of the following grounds of alleged negligence, to wit, (1) in failing to remove ice, or (2) in failing to repair slope in sidewalk, without the concurrence of the other, was not error under the evidence and the trial theory of plaintiff, consequently, the court could not properly submit such propositions to the jury as independent grounds of negligence.

Leonard v Muscatine, 227-1381; 291 NW 446

When question of law. When the relationship of parties is fixed by a written contract, the question whether they occupy the relation of master and servant (employer and employee) is one of law to be determined by the court and not one of fact to be determined by the jury.

Page v Const. Co., 215-1388; 245 NW 208

Materiality of testimony. An instruction is prejudicially erroneous which directs the jury to disregard expert opinion testimony elicited through hypothetical questions which contain material statements which are not proved or which fail to contain material facts which are proved.

Blakely v Cabelka, 203-5; 212 NW 348

Materiality of facts. An instruction which permits a jury to determine the materiality of the facts assumed in a hypothetical question, preliminary to determining the value of the opinion expressed in the answer to the question, is prejudicially erroneous.

Lemon v Kessel, 202-273; 209 NW 393

Limiting one's legal right. Where a defendant-employer in paying his employee deducted an amount which the employee was owing the employer, and, when sued, based his right so to do (1) on an oral contract that he might so deduct, and (2) on his right to so deduct irrespective of such oral contract, the court prejudicially errs, in its instructions, in making the right to deduct dependent on proof of the oral contract.

Jorgensen v Cocklin, 219-1103; 260 NW 6

Submitting issue notwithstanding negligence per se. It is not necessarily reversible error for the court to fail to instruct the jury that the defendant was negligent as a matter of law, even tho had the court so instructed, the appellate court would not reverse because of such instruction.

Townsend v Armstrong, 220-396; 260 NW 17

Law question submitted to jury—when nonprejudicial. No prejudice can result when court submits to the jury a law question upon which the court could well have ruled adversely to complainant as a matter of law.

Central B. & T. Co. v Squires & Co., 225-416; 280 NW 594

Assault and battery—directing jury to award damages to plaintiff. Undisputed evidence held to establish that plaintiff and de-

fendant mutually consented to engage in a fight, and that defendant unlawfully committed an assault and battery on plaintiff, warranting an instruction to the jury to return a verdict for plaintiff in some amount.

Schwaller v McFarland, 228- ; 291 NW 852

(f) VERDICT-URGING OR COERCIVE INSTRUCTIONS

Invading province of jury. Instruction held not to direct a verdict of guilt of one or the other of two offenses.

State v Shannon, 214-1093; 243 NW 507

When prejudicial. A so-called verdict-urging instruction must be deemed prejudicial when it appears from the entire record that it did have a coercive effect on some of the jurors. (It is quite pointedly suggested that, irrespective of the foregoing, reversible error will be deemed to follow the further insertion in instructions by trial courts of the idea that "If any of the jurors differ in their view of the evidence from a larger number of their fellow jurors, such difference of opinion should induce the minority to doubt the correctness of their own judgment and cause them to scrutinize the evidence more closely and re-examine the grounds of their opinions.")

Middle States Co. v Telephone Co., 222-1275; 271 NW 180; 109 ALR 66

Ignoring defense. An instruction which mandatorily requires a verdict for plaintiff upon proof of the allegations as to which he has the burden of proof, without reference to a pleaded and supported defense, is manifestly erroneous.

Schulte v Ideal Co., 208-767; 226 NW 174

II FORM, REQUISITES, AND SUFFICIENCY

(a) WRITTEN INSTRUCTIONS

Oral statements to jury. Material statements of fact must not be orally given to the jury.

Alley Co. v Creamery Co., 201-621; 207 NW 767

Colloquy with jury. A colloquy between the court and the foreman of the jury, in the presence of the jury, relative to the instructions already given, reviewed and held not to constitute oral instructions and, therefore, not improper.

State v Mullenix, 212-1043; 237 NW 483

(b) FORM AND LANGUAGE IN GENERAL

Discussion. See 19 ILR 603—Statement by court

Inadvertent use of words. The inadvertent use in instructions of a word which could not have misled the jury, will be treated as harmless.

State v Hughey, 208-842; 226 NW 371

Harmless misdescription of land. Inadvertently omitting from instructions, in eminent domain proceedings, a minor portion of the land involved, does not constitute reversible error when otherwise the entire integral tract was consistently and persistently treated throughout the trial as the land in controversy, and when it is obvious that the jury never discovered the inadvertent error of the court.

Sherwood v Reynolds, 213-539; 239 NW 137

Ill-advised but harmless use of term. Error may not be predicated on the ill-advised use of the word "rapid" as applied to the descent of an elevator when the evidence conclusively shows that the elevator had, mechanically, but one speed and that such speed never varied.

Dean v Koolish, 212-238; 234 NW 179

Harmless inaccuracy. A reference in instructions to the amount to be allowed plaintiff on his claim as "made in the petition" instead of as "shown by the evidence" is harmless when, from the instructions as a whole, the latter was manifestly intended.

Ashby v Nine, 218-953; 256 NW 679

Harmless inaccuracy in use of terms. Instruction relative to acquiring negotiable promissory notes by "assignment", instead of by "indorsement", is quite harmless when complainant does not claim the rights of a holder in due course.

First Bk. v Tobin, 204-456; 215 NW 767

Nonmisleading terms. A grantee of land who, in buying the land, does not agree or intend to agree to assume an existing mortgage on the land, yet accepts a deed which provides for such assumption, and subsequently discovers such fact, and thereupon recognizes and accepts such obligation as binding upon him, is bound thereby; and it is not prejudicially erroneous for the court in instructions to refer to such "recognition and acceptance" as a ratification.

Carney v Jacobson, 210-485; 231 NW 436

Interrogatories—stated or agreed amount—services rendered to decedent. In probate action to establish a claim for services rendered to decedent, wherein the court submitted two interrogatories to the jury to determine (1) amount per month, if any, decedent agreed to pay claimant out of his estate at his decease, and (2) whether amount per month was to be paid for 9 or 12 months of each year, the interrogatories being submitted under an instruction to be answered in event jury found for claimant and not to be answered if verdict was for defendant, such instruction was not erroneous since, before interrogatories could be answered, the jury must have found under the evidence that there was a stated or agreed amount, and the findings therein conformed to the verdict.

In re McKeon, 227-1050; 289 NW 915

II FORM, REQUISITES, AND SUFFICIENCY—continued

(b) FORM AND LANGUAGE IN GENERAL—concluded

Inconsequential error. The erroneous designation of a count by giving the wrong number thereof becomes inconsequential when the subject-matter is such that the jury could not have been misled.

Cox v Const. Co., 208-458; 223 NW 521

Interchange of synonymous terms. In instructing on the subject of "preponderance of the evidence" it is not erroneous to interchange the terms "evidence" and "testimony".

In re Burcham, 211-1395; 235 NW 764

Interchange of conjunctions. An objection to the use, in instructions, of the conjunction "but" instead of "and" is quite hypercritical when the same objection could, with equal plausibility, be lodged against the instruction had the term "and" been used.

State v Davis, 212-131; 235 NW 759

Use of "and" and "or". An instruction to the effect that a litigant must establish the contract in question "substantially as alleged and testified to by him" cannot be deemed to mean that the contract must be established "substantially as alleged or testified to by him".

Blakesburg Bank v Blake, 207-843; 223 NW 895

Indiscriminative use of "may". An instruction to the effect that ordinary care may be in proportion to the danger that is reasonably to be feared or anticipated is not necessarily erroneous when the instructions as a whole employ the word "must" in reference to the same principle.

Thompson v City, 212-1348; 237 NW 366

Instructions—paraphrasing "legal excuse". The phrase "explained or justified by the evidence" used as a substitute in instructions for the term "legal excuse" should be avoided as possibly permitting the jury to consider evidence which would not constitute a legal excuse as defined in another instruction, but under the evidence and considered with other instructions held not reversible error.

Edwards v Perley, 223-1119; 274 NW 910

Popular designation of offense. Designating an offense in instructions by its popular name is quite unobjectionable when the specific elements of the offense are correctly set forth.

State v Bevins, 210-1031; 230 NW 865

Evidence "produced and submitted". It is not reversible error to limit a jury in the consideration of the case to the evidence "produced and submitted".

State v Speck, 202-732; 210 NW 913
State v Halley, 203-192; 210 NW 749

"Lack of evidence." It is not improper to instruct the jury in a civil case that in arriving at a verdict it should consider the "lack of evidence", if any.

Ege v Born, 212-1138; 236 NW 75

Mortgaged chattels—description—jury question. When the sufficiency of a description of mortgaged chattels to impart constructive notice becomes a jury question, it is quite inaccurate for the court to instruct that "the recording gave notice of what its terms contained, but nothing more than its terms contained."

Wertheimer v Parsons, 209-1241; 229 NW 829

(c) REPETITIONS

Repetitions unnecessary—proximate cause. A definite and correct instruction as to proximate cause of an injury need not be repeated in other instructions.

Oestereich v Leslie, 212-105; 234 NW 229
Albert v Maher Bros., 215-197; 243 NW 561

Reasonable doubt — repetition unnecessary. An instruction which clearly instructs the jury of its right to find a reasonable doubt, because of the lack or want of evidence, need not be repeated.

State v Harrington, 220-1116; 264 NW 24

Instructions—embodying substance of request. Where the trial court gives an instruction which is similar to or embodies all the principles of a requested instruction, it is not error to refuse the requested instruction.

Kirchner v Dorsey, 226-283; 284 NW 171

(d) STATEMENT OF ISSUES IN GENERAL

Omitting issue. The omission from instructions of a material issue necessarily constitutes reversible error.

Whyte v Cas. Co., 209-917; 227 NW 518

Correct but not amplified. Concise instructions which are correct and which fairly present the issues, are all-sufficient in the absence of a request for amplification.

State v Miller, 217-1283; 252 NW 121
State v Sampson, 220-142; 261 NW 769

Abstract statements of law. The inclusion in instructions of abstract statements of the law does not necessarily constitute material error.

Birmingham Sav. Bank v Keller, 205-271; 215 NW 649; 217 NW 874

Statement of issues. It is fundamental that instructions must clearly place before the jury the conflicting contentions of the party litigants.

Bremhorst v Coal Co., 202-1251; 211 NW 898
State v Hixson, 205-1321; 217 NW 814

Unnecessary issue. The submission of an unnecessary issue will not constitute error

when it is one closely interwoven with the all-controlling issue, and when the instructions as a whole fairly place the controlling issues before the jury.

Conway v Alexander, 200-705; 205 NW 351

Stating withdrawn issue. It is not necessarily prejudicial error for the court, in outlining the issues, to refer to withdrawn issues, when the jury is specifically directed to disregard them.

Reinertson v Struthers, 201-1186; 207 NW 247

General statement of issue. The submission by the court to the jury of the controlling issue in the case is all-sufficient, even though the court did not literally and technically follow the pleadings.

Yaus v Egg Co., 204-426; 213 NW 230

Recital of issuable facts. The court may very properly recite in its instructions the material and record facts which they may consider in arriving at the reasonable value of services.

Olson v Shuler, 208-70; 221 NW 941

Inferential departure from issues. Reversible error does not result from so instructing in one paragraph as to seemingly depart from the particular act of negligence alleged as a basis for recovery, when the instructions as a whole clearly remove any possible confusion or misunderstanding on the part of the jury.

Azeltine v Lutterman, 218-675; 254 NW 854

Mutually agreed theory. A trial and submission of a cause on a theory mutually agreed on by both parties, precludes a change of theory on appeal.

Rocho v Dairy, 204-391; 214 NW 685

Trial theory. The submission of a cause on the theory of common-law negligence will not be disturbed on appeal when such submission appears to have been acquiesced in in the trial court, even though the petition would justify the submission of the cause on the theory of the "attractive nuisance" doctrine.

Eves v Littig Co., 202-1338; 212 NW 154

Trial theory. One of two defendants may not complain that the court, in the submission of various forms of verdicts, adopted his trial theory of nonjoint liability.

Zieman v Amusement Assn., 209-1298; 228 NW 48

Limiting jury to evidence and instructions. An instruction that the jury should not consider anything except the evidence and the instructions, and that all statements and suggestions from any other source should be discarded, cannot (under the present record) be deemed a direction to disregard the arguments and reasoning of the attorneys.

Albert v Maher Bros., 215-197; 243 NW 561

Erroneous limitation of jury on consideration of evidence. Instructions which limit the jury on the issue of the existence of a wrongful act (which is the very gist of the action) to a consideration of transactions occurring "on or about" a certain date "or at any time thereafter" is prejudicially erroneous when the record reveals the fact that the jury might have found the existence of said wrongful act from transactions occurring some four months prior to the limiting date set by the court.

Newcomer v Ament, 214-307; 242 NW 82

Implied withdrawal of unsupported count. No affirmative withdrawal of an unsupported count is necessary in instructing the jury when the court in the instructions wholly ignored said count.

Spicer v Administrator, 201-99; 202 NW 604

Performance or breach—justifiable abandonment. Instructions held adequately to present the issue whether the performance of a contract was justifiably abandoned.

Goben v Paving Co., 218-829; 252 NW 262

Eminent domain—compensation. It is erroneous for the court to instruct that a condemnation is for the purpose of appropriating the land, when the real purpose is to determine compensation for an incidental injury.

Millard v Mfg. Co., 200-1063; 205 NW 979

Inadvisable but harmless. An instruction in eminent domain proceedings that the real right of which the property owner is deprived, and for which he is entitled to compensation, is the right to remain in undisturbed possession of his property, while ill-advised, may be quite harmless.

Maxwell v Highway Com., 223-159; 271 NW 883; 118 ALR 862

Suretyship—want of consideration. A plea of want of consideration, interposed by a gratuitous surety on a promissory note may be very properly ignored in the instructions of the court when the record shows (1) that the surety signed the note without fraud imposed upon him, and (2) that there was a consideration between the principal and the payee.

Granner v Byam, 218-535; 255 NW 653

Inadequate enumerations of elements. Instructions which direct the jury to convict on proof of named elements of an offense are prejudicially erroneous when not all the elements of such offense are enumerated.

State v Sipes, 202-173; 209 NW 458; 47 ALR 407

Undue burden—claim against estate. A claim against an estate triable at law is established by a fair preponderance of the testimony, and reversible error results from in-

II FORM, REQUISITES, AND SUFFICIENCY—continued

(d) STATEMENT OF ISSUES IN GENERAL—continued

structing that such claim must be established only by "strict and satisfactory" proof.

In re Dolmage, 204-231; 213 NW 380

Inadequate presentation of issues. When issue is joined both (1) on the terms of the contract alleged by plaintiff and (2) on the defendant's plea of fraud, error necessarily results from instructing that the verdict must be for plaintiff if defendant fails to establish his plea of fraud.

Augustine-Stalker v Bracha, 204-253; 212 NW 936

Failure to instruct on material issue. Failure to instruct on the pleaded and supported material issue of fraud in the adoption of a resolution by the board of directors of a corporation necessarily constitutes reversible error.

Schulte v Ideal Co., 208-767; 226 NW 174

Failure to submit issue—payment. Failure to submit a pleaded and supported plea of payment is necessarily prejudicial, even tho defendant makes no request for such submission.

Baker v Davis, 212-1249; 235 NW 749

Failure to submit issue—partnership. Failure to submit an issue of partnership is harmless when such failure does not change the result, especially when the evidence supporting the issue is indefinite.

First N. Bank v Schram, 202-791; 211 NW 406

Justifiable omission to instruct. The action of the court in omitting a certain subject matter from the instructions must be deemed justifiable when, after a consultation with the litigants, the court understood that such omission was requested, and when complainant entered no exception when the instructions were given, and made no objections to such omission.

McLain v Risser, 207-490; 223 NW 162

Assault and battery—self-defense. Where defendant voluntarily participated in a fight, not in his own defense, the court did not err in failing to instruct the jury on self-defense as, under such circumstances, self-defense was not available as a defense.

Schwaller v McFarland, 228- ; 291 NW 852

Waiver—apparent authority. Instructions relative to the duty of an insured to furnish proofs of loss, and to the burden resting on him in case he relied on a waiver of such proofs; also relative to the actual or apparent authority of the insurer's agent to bind the company by a waiver, reviewed and held correct.

Basta v Ins. Assn., 217-240; 252 NW 125

Harmless failure to submit. Failure to submit a plea of estoppel to rely on an alleged agreement may be quite harmless in view of the full and explicit instructions on the subject of waiver of the right to rely on the said alleged agreement.

Adamson v McKeon, 208-949; 225 NW 414; 65 ALR 817

Nonspecific withdrawal of counts. The submission of one count of a petition may in effect work a withdrawal of all other counts.

Hill v City, 203-1392; 214 NW 592

Instruction favorable to complainant. An instruction that certain testimony is not "necessarily" conclusive on a named issue cannot constitute error when the use of the term was intended to be and was favorable to complainant.

Carney v Jacobson, 210-485; 231 NW 436

Inaccurate limitation on recovery. Where a plaintiff itemized his general and particular damages in a personal injury action, the failure of the court to specifically say to the jury that it must not allow more on any item than the amount as stated in the petition, nor more than the aggregate of said items, is nonprejudicial when the evidence would not support a greater verdict on any particular item than as itemized, and when the verdict was materially less than the claim for general damages, and when the court specifically instructed the jury that it could not allow any item of damages in a greater sum than "established by the evidence".

Wosoba v Kenyon, 215-226; 243 NW 569

Failure to limit findings. An instruction which directs the jury, in determining the damages to an article, "to consider" its value before the injury and its value after injury is erroneous, because it fails to confine the jury in its findings of damages.

Langham v Railway, 201-897; 208 NW 356; 26 NCCA 938

Stating amount of plaintiff's claim. Instructions in actions for unliquidated damages are not erroneous because they state to the jury the amount of plaintiff's claim, yet preferably such statement ought not to be made.

Cory v State, 214-222; 242 NW 100

Damages—failure to limit. Reversible error results from the failure of the court in its instructions to limit the jury in its return of damages, on various items of claimed damages, to the amount claimed in the pleadings; and limiting damages "as shown by the evidence" does not necessarily cure the error.

Desmond v Smith, 219-83; 257 NW 543

Limiting recovery to sum of separate claims. Limiting a recovery of damages to the sum of one amount claimed for present and future physical pain, and one amount claimed for mental pain will not be deemed erroneous when the verdict demonstrates that less was allowed than claimed.

Danner v Cooper, 215-1354; 246 NW 223

Submission of excess recovery. The submission to the jury of a possible amount of recovery slightly in excess of what is legally recoverable does not constitute error when the final result is not affected thereby.

McQuillen v Meyers, 213-1366; 241 NW 442

Erroneous limitation on verdict. A general instruction, in a personal injury case, to the effect that the jury must not return a verdict in excess of the sum total of all the damages claimed by plaintiff is prejudicially erroneous when the plaintiff has alleged a particular amount of damages for each element of damages.

Sergeant v Challis, 213-57; 238 NW 442

See Albert v Maher Bros., 215-197; 243 NW 561

Supported assignments of negligence. Pleaded and supported assignments of negligence, which the jury might find was the proximate cause of the accident and resulting injury, must necessarily be submitted to the jury.

Muirhead v Challis, 213-1108; 240 NW 912

Grouping distinct grounds of negligence. Reversible error results from grouping separate and distinct grounds of negligence, and so instructing as to lead the jury to understand that plaintiff, before he can recover, must establish the truth of an entire group.

Leete v Hays, 211-379; 233 NW 481

Proximate cause. The court must submit to the jury, without request, the respective claims of each party as to the proximate cause of an accident.

Towberman v Ry. Co., 202-1299; 211 NW 854

Clark v Fair Assn., 203-1107; 212 NW 163

Insufficient presentation—negligence of outsider. The court must submit to the jury the supported plea that the proximate cause of an accident was the negligence of an outsider—a person not a party to the action.

Hoover v Haggard, 219-1232; 260 NW 540

Unnecessary amplification. Instructions which fully and correctly instruct the jury as to negligence and proximate cause need not (especially in the absence of a request) be amplified by the specific submission of defendant's plea that some certain act or failure to act on the part of plaintiff was the proximate cause of the injury—said latter matters having been otherwise adequately presented to the jury.

Lang v Siddall, 218-263; 254 NW 783

(e) VOLUNTARY OR NONPAPER ISSUES

Applicability to pleading—voluntary issues. The court may very properly instruct on nonpaper issues voluntarily and mutually litigated by the parties.

Farmers Bank v Planters Elev., 200-434; 204 NW 298

Sufficiency. In an action to recover quantum meruit for the use of machinery, the court, in submitting defendant's nonpaper issue (acquiesced in by plaintiff) whether the use was under a contract for an agreed rental entered into with plaintiff's employee, must submit the question of the authority of the employee to enter into such a contract, there being evidence of the lack of such authority.

Des M. Pav. Co. v Lincoln Co., 201-502; 207 NW 563

Unnecessary plea — burden of proof. A defendant who specifically pleads certain matter as a defense in addition to his defense of general denial, thereby invites the court so to instruct as to impose on defendant the burden to prove said specially pleaded defense, even tho said defendant might have rested on his general denial.

Jordison v Jordison Bros., 215-938; 247 NW 491

Johnson v McVicker, 216-654; 247 NW 488

Agreed issue conclusive. A plaintiff is bound by his concession, in open court and at the close of his evidence, that of several pleaded grounds of negligence a certain one only should be submitted to the jury.

Gorham v Richard, 223-364; 272 NW 512

Instruction foreign to record. Instruction reviewed in an action involving the issue as to the making of a gift, and held not subject to the vice of submitting to the jury a matter wholly foreign to the record.

Malcor v Johnson, 223-644; 273 NW 145

Fraud—prejudice not presumed. Prejudice will not be presumed from instructions readily reconciled and understood by the jury as not conflicting, but in an action for damages on account of fraud where the defense was the statute of limitations it is prejudicial error to instruct on the elements of fraud as a basis for recovery without requiring consideration of the defense of the statute of limitations.

Smith v Utilities Co., 224-151; 275 NW 158

Submitting doubtful issue to jury. In a damage action for fraud, the submission to the jury of an issue as to a repurchase contract held not error under the pleadings and tactics of the parties.

Smith v Utilities Co., 224-151; 275 NW 158

II FORM, REQUISITES, AND SUFFICIENCY—continued

(f) READING, USING, OR REFERRING TO PLEADINGS

Copying pleadings. The practice of stating the issues by copying the pleadings is condemned.

Dunnegan & Briggs v Ry. Co., 202-787; 211 NW 364

Copying brief and concise pleadings. No error results from copying into the instructions portions of the pleadings which are relevant to the issues, and which are concise, brief, and noninflammatory.

Wilson v Else, 204-857; 216 NW 33

McDonald v Robinson, 207-1293; 224 NW 820; 62 ALR 1419

Stilson v Ellis, 208-1157; 225 NW 346

Hoegh v See, 215-733; 246 NW 787

Forrest v Sovereign Camp, 220-478; 261 NW 802

Copying involved pleadings. Issues susceptible of brief condensation should not be presented to the jury through the easy expedient of copying long, involved, and complicated pleadings.

Mowry v Reinking, 203-628; 213 NW 274

Peet Stock Co. v Bruene, 210-131; 230 NW 327

Copying verbose pleadings. The presentation of issues to the jury by copying verbose pleadings may constitute reversible error.

Veith v Cassidy, 201-376; 207 NW 328

Granette v Neumann, 208-24; 221 NW 197

Balik v Flacker, 212-1381; 238 NW 467

Mitchell v Burgher, 216-869; 249 NW 357

Copying pleadings containing questions of law. Copying the pleadings into the instructions and instructing that such were the issues constitutes error when pure questions of law are intermingled in such pleadings.

In re Dolmage, 204-231; 213 NW 380

Copying pleadings—curing error. The appellate court again, quite pointedly, expresses its surprise that occasionally some trial courts, in attempting to state the issues to the jury, do not recognize the impropriety of copying verbose pleadings into the instructions.

But error and the resulting confusion in copying pleadings will be deemed cured by the later action of the court in the instructions, in clearly and definitely confining the jury to the proper issues.

Young v Jacobsen Bros., 219-483; 258 NW 104

Hammer v Liberty Baking Co., 220-229; 260 NW 720

Copying pleadings not always erroneous. Copying pleadings in instructions is generally bad practice; however, where the pleadings concisely and clearly state the issues, the court may adopt them and use them.

Reed v Pape, 226-170; 284 NW 106

Copying pleadings—when nonprejudicial. Practice of stating case in language of pleadings, except where pleadings concisely and clearly state the substance of the controversy, condemned by court.

Jakeway v Allen, 227-1182; 290 NW 507

Copying defendant's answer improper. Instructions should not substantially copy defendant's answer as jury may easily be confused and misled thereby.

White v Zell, 224-359; 276 NW 76

Copying pleadings and stating issues. Instructions which set forth plaintiff's claim in accordance with the petition which is somewhat at variance with the evidence are not erroneous when in later paragraphs the issues are distinctly stated.

Goben v Paving Co., 218-829; 252 NW 262

Use of synonymous terms. The fact that the court in its instructions employs not only the terms employed in the petition but additional synonymous terms is quite inconsequential.

Klass v Ins. Co., 210-78; 230 NW 314

Interpretation of uncertain and indefinite plea. An indefinite and uncertain plea of negligence may very properly be given an interpretation by the court that is not inconsistent with the plea and which is consistent with the way or manner in which both parties have treated it.

Dean v Koolish, 212-238; 234 NW 179

Paraphrasing grounds of negligence. An accurate paraphrase of various grounds of recovery is all-sufficient for submission to the jury.

Fleming v Thornton, 217-183; 251 NW 158

Copying pleadings and paraphrasing them. The fact that pleadings are copied at length into the instructions does not constitute error when such pleadings are later so paraphrased by the court as to definitely submit the controlling issues.

Elmore v Ry. Co., 207-862; 224 NW 28

Justifiable paraphrase of grounds. Both of two grounds of negligence are properly submitted to the jury (1) when the pleadings fairly justify such action, (2) when the court so paraphrased the pleadings, and (3) when the cause was tried on the theory that both grounds were involved.

Buchanan v Cream. Co., 215-415; 246 NW 41

Paraphrasing allegations of injuries. The court, in stating the issues to the jury, may very properly paraphrase an allegation as to the injuries which plaintiff claims to have suffered.

McCoy v Cole, 216-1320; 249 NW 213

See Mitchell v Burgher, 216-869; 249 NW 357

Permissible paraphrasing of issue—fraud. A plea that the signing of a promissory note was induced by trickery and fraud (1) in that the note was misread, and (2) in that the payee misstated the note which was being signed may very properly be paraphrased in the instruction as a defense of "fraud."

State Bank v Deal, 200-490; 203 NW 293

Paraphrasizing assignment of negligence. The court may very properly paraphrase in his own language one or more assignments of negligence, and if such paraphrasing is correctly done no claim will lie, of course, that an issue was submitted aside the pleadings.

Rulison v X-ray Corp., 207-895; 223 NW 745

Statement of issues—copying pleadings. A statement of issues to jury by trial court in a condemnation case was not open to the charge that it was a mere copy of the pleading where such statement of the case was as succinctly stated as could well be done and at the same time give an intelligent and understandable resume of the elements upon which plaintiffs based their claim for damages and the amount thereof.

Stoner v Hy. Comm., 227-115; 287 NW 269

Undue submission of issues. A preliminary recital in the language of an unquestioned pleading, of an issue of negligence in maintaining a sidewalk, which embraces statements of the method by which and the source from which the alleged nuisance was created on the walk, reveals no error when the definite legal issue was alone actually submitted to the jury.

Fosselman v City, 211-1213; 233 NW 491

Copying censorious and inflammatory pleading—effect. A censorious and somewhat inflammatory pleading of grounds of contest of a will should, if the context presents support for such action, be so paraphrased in the instructions as to present the simple issues of (1) want of testamentary capacity and (2) undue influence. To copy the entire pleading into the instructions constitutes reversible error.

In re Thompson, 211-935; 234 NW 841
Welton v Highway Com., 211-625; 233 NW 876

(g) DEFINING AND EXPLAINING TERMS

Failure to define "issues". It is not erroneous for the court to fail to define the term "issue".

McQuillen v Meyers, 213-1366; 241 NW 442

Failure to define "prescribe". Instructions which defined "prescribe" reviewed, and held unobjectionable.

State v Hueser, 205-132; 215 NW 643

"Family" defined. Instructions which define a "family" as "a collection or collective body of persons who live under one roof and under one head or management" are all-sufficient.

Wilson v Else, 204-857; 216 NW 33

Instruction on "stated" amount for alleged services rendered to decedent. In probate claimant's action reciting decedent's agreement to pay to claimant for services from decedent's estate an amount more than claimant could expect to make teaching school, a reference by trial court in its instructions to decedent's agreement to pay a "stated amount per month" was not objectionable where, under allegations of claim there could be no recovery unless jury found that there was an agreement to pay a stated amount, and where there was evidence as to amount stated or fixed by decedent. The word "stated" means no more than determined, fixed, or settled, and was properly used in the instruction.

In re McKeon, 227-1050; 289 NW 915

Superfluous definition—"burden of proof". A nonmisleading but superfluous definition of "burden of proof" cannot be prejudicial.

State v Matthes, 210-178; 230 NW 522

"Probable cause"—negative definition. It is not necessarily erroneous to define want of probable cause in a negative form instead of in an affirmative form.

Hepker v Schmickle, 209-744; 229 NW 177

Negligence—erroneous definition. A definition of "negligence" which is so broad as to permit the jury to predicate a finding of negligence on the violation of a statute law of the road when the facts rendering such statute applicable are neither pleaded nor proven, is necessarily erroneous and prejudicial.

Gross v Bakery, 209-40; 227 NW 620

Definition of negligence approved. Instruction defining "negligence" and otherwise correct is not rendered erroneous because it includes the statement that "such care is proportionate to the apparent danger involved; where the apparent danger is great, a greater care is required than where such apparent danger is slight". So held against the contention that degrees of negligence are not recognized in this state.

Wolfe v Decker, 221-600; 266 NW 4

Injuries from operation — negligence — correct definition. Instruction reviewed and held to constitute a correct definition of actionable negligence.

Engle v Nelson, 220-771; 263 NW 505
Wolfe v Decker, 221-600; 266 NW 4

Obscure definition of "ordinary care." An instruction which, somewhat obscurely, defines ordinary care as such care as is commensurate with the danger to be apprehended from the circumstances surrounding or facing the actor may nevertheless be adequate.

Orr v Hart, 219-408; 258 NW 84

II FORM, REQUISITES, AND SUFFICIENCY—continued

(g) DEFINING AND EXPLAINING TERMS—concluded

Ordinary care—definition reaffirmed. The standard definition of ordinary care need not be augmented by adding an extra word "ordinarily" to the phrases "would do" or "would not do under the circumstances".

Schalk v Smith, 224-904; 277 NW 303

Johnston v Johnson, 225-77; 279 NW 139; 118 ALR 233

Contributory negligence — degree of. No particular or fixed phraseology is required in conveying to a jury, in a case founded on negligence, the idea that plaintiff cannot recover if he has, by his own negligence, contributed in any degree to his own injury.

Bauer v Reavell, 219-1212; 260 NW 39

Contributory negligence—adequate definition. An instruction which defines "contributory negligence" as such negligence as "helps" to produce the injury complained of is not erroneous when accompanied by a correct definition of negligence generally.

Swan v Auto Co., 221-842; 265 NW 143

Negligence must "directly" contribute. Instruction reaffirmed requiring plaintiff's negligence to contribute "directly" to the injuries before it will defeat recovery.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

"Inevitable accident"—failure to define. Failure to define the term "inevitable accident" does not result in error when the instruction is correct as far as it goes and when a request for a definition is not made.

Hamilton v Boyd, 218-885; 256 NW 290

"Notice" and "means of knowledge." Instructions defining "notice" and "means of knowledge" and concretely applying such definitions to the evidence, reviewed, and held adequate without further elaboration.

General Motors v Whiteley, 217-998; 252 NW 779

Failure to define "prima facie". An instruction characterizing certain acts of omission and commission, if found by the jury, as prima facie evidence of negligence, is not necessarily rendered erroneous because the court failed to define said term "prima facie".

Wolfe v Decker, 221-600; 266 NW 4

"Preponderance of evidence" defined. A definition of "preponderance of evidence is meaning the greater weight of evidence" is not rendered erroneous because of the additional phrase "the evidence of superior influence or efficacy".

Bauer v Reavell, 219-1212; 260 NW 39

"Preponderance of evidence." In defining "preponderance of evidence" as evidence which is "more convincing as to its truth", the court does not, in effect, say that evidence cannot constitute a preponderance unless the jury is satisfied that it is true.

Priest v Hogan, 218-1371; 257 NW 403

Preponderance of evidence erroneously defined. It is error to define "preponderance of the credible evidence" as the testimony which best satisfies the juror's mind "that it is true", because it implies that the jury must be fully convinced of the truth of the testimony which controls the decision on an issue.

Heacock v Baule, 216-311; 249 NW 437; 93 ALR 151; 36 NCCA 25

Duress—inadequate instructions. On the issue whether a settlement was invalid because of duress in the form of threats to arrest and imprison, it is not sufficient to define "duress" as "compulsion or restraint by which a person is illegally forced to do an act". The jury must be told, in effect, that the duress must be such as to deprive the party of the power to enter into a contract.

Gray v Shell Corp., 212-825; 237 NW 460

Instructions—evidence defined. Instruction that "evidence is whatever is admitted in the trial of a case as part of the record, whether it be an article or document marked as exhibit, other matter formally introduced and received, stipulation, or testimony of witnesses, in order to enable jury to pronounce with certainty, concerning the truth of any matter in dispute", considered with other instructions, and while not approved, could not have prejudicially misled the jury.

O'Meara v Green Const. Co., 225-1365; 282 NW 735

Abstract definition of "evidence". An abstract definition of "evidence" which, standing alone, might possibly invite the jury to consider matters not received in evidence is rendered harmless by other instructions which definitely limit the jury to the evidence submitted to it.

State v Speck, 202-732; 210 NW 913

Supposed computation illustrating rule. A mathematical rule for the computation of different elements of damages is not rendered erroneous by an accompanying, nonmisleading, supposed computation illustrating the application of the rule.

Glandon v Ins. Assn., 211-60; 232 NW 804

(h) SUFFICIENCY AS TO PARTICULAR SUBJECT-MATTERS

Verbal admissions—unbalanced instruction. An instruction to the effect that verbal admissions should be received by the jury with caution as they are subject to much imperfection and mistake, is reversibly erroneous unless balanced with further instruction to

the effect that "when such admissions are deliberately made, or often repeated, and are correctly given, they are often the most satisfactory evidence."

Davis v City, 209-1324; 230 NW 421
Duncan v Rhomberg, 212-389; 236 NW 638
Abraham v Ins. Co., 215-1; 244 NW 675

Unbalanced instructions. Failure of the court to balance an instruction,—to state the negative of a proposition as well as the affirmative,—does not necessarily constitute reversible error.

Kline v Transfer Co., 215-943; 247 NW 215

Balancing illustration. The court, after instructing that the taking of indecent liberties with the person of a woman may constitute an assault, and after employing an illustration descriptive of indecent liberty, need not balance the illustration by giving the converse thereof.

Ransom v McDermott, 215-594; 246 NW 266

Testamentary capacity of individual. Principle reaffirmed that mere weakness of the mental faculties is insufficient to invalidate a will if the testator knew and comprehended the natural objects of his bounty, the nature and extent of his property, and the disposition he desired to make of it.

In re Shields, 208-607; 224 NW 69

Testamentary capacity. Instructions reviewed generally, and held to properly present the rules for weighing the testimony on the issue of testamentary capacity.

In re Shields, 208-607; 224 NW 69

Civil liability—self-defense properly submitted. In an assault and battery case an instruction setting out elements of plaintiff's proof without referring to "self-defense" is not erroneous when "self-defense" is sufficiently explained to the jury in other instructions.

Hauser v Boever, 225-1; 279 NW 137

Self-defense—permissible degree of force. The degree of force which a defendant may employ in order to prevent injury to himself from an assault by one person is not necessarily the measure of defendant's permissible resistance when, at the same instant of time, he is menacingly threatened by several other persons in his immediate presence. This important fact must not be overlooked by the instructions.

Booton v Metcalfe, 201-311; 207 NW 386

Action for causing death—force in repelling assault. A defendant in repelling an assault upon his person has a right to use such force as appeared to him, as a reasonably prudent, courageous, and cautious man, to be necessary under the circumstances, and the trial court's words "reasonably appeared necessary to him as a cautious, courageous man", while inaccurate in an instruction, are not prejudicially erroneous, the trial court having correctly stated the rule in other paragraphs of the instruction of which complaint is made.

Boyle v Bornholtz, 224-90; 275 NW 479

Elements of self-defense—action for wrongful death. In a death action against a merchant policeman for shooting an alleged robber, the plea of self-defense being an affirmative one required defendant to prove (1) that the assailant was attempting to rob him; (2) that he was reasonably apprehensive of peril; (3) that he was acting as a reasonably cautious and courageous man; and (4) that he had reasonable grounds to believe it necessary to use the force he did use, and the court commits no error in so instructing.

Boyle v Bornholtz, 224-90; 275 NW 479

"Alibi" in civil cause — burden of proof. Where a defendant in a civil case enters a general denial to a charge of having committed a tort, and in support thereof testifies that at the time in question he was at his home not far from the scene of the alleged tort, the court has no right to instruct (1) that defendant's defense is that of an "alibi", and (2) that defendant has the burden to establish such alibi by evidence which will outweigh the evidence tending to show that defendant did commit the tort.

Gregory v Sorensen, 208-174; 225 NW 342

Duty owing to licensee. When a material issue is whether a person, injured in a public store because of a defect in the maintenance of the store, was at the time of the injury an invitee or a mere licensee, the court must plainly tell the jury that if the injured party was a mere licensee when injured he cannot recover even tho the operator of the store was negligent in maintaining the store unless the injured party shows that he was injured by some willful or affirmative action of the said operator.

Nelson v Woolworth, 211-592; 231 NW 665

Legal opinion as false representation. A representation, tho false, that a bank and the directors thereof are personally liable, as a matter of law, on certain paper rediscounted by the bank, cannot constitute a fraud when the parties concerned stand on equal footing as to all the material facts; otherwise, when such equality does not exist, and when the statement is made for the purpose of being relied on as a statement of fact, and is justifiably so relied on by the party to whom made; and instructions must make this distinction clear to the jury.

Commercial Bk. v Keitges, 206-90; 219 NW 44

II FORM, REQUISITES, AND SUFFICIENCY—continued

(h) SUFFICIENCY AS TO PARTICULAR SUBJECT-MATTERS—continued

"Payment" as issue. Instructions which, as a whole, plainly submit the plea of payment as pleaded, are all-sufficient.

Blakesburg Bk. v Blake, 207-843; 223 NW 895

Multiple quantum meruit counts. No error results from instructing fully as to the issues under each of several quantum meruit counts, all pertaining to the same transaction, when the court properly protects the defendant from a double liability.

Olson v Shuler, 208-70; 221 NW 941

Quantum meruit—independent judgment of jurors. A jury may be instructed that, in determining the reasonable value of services rendered, they may give due heed to their own knowledge and experience on the subject at issue.

Northrup v Herrick, 206-1225; 219 NW 419

Quantum meruit. A denied plea of quantum meruit, for services rendered must be established, or plaintiff must fail, irrespective of whether the defendant does or does not establish his defensive plea that the contract of employment was different, and that thereunder the plaintiff had been paid. Instructions are necessarily erroneous when to the effect that defendant is entitled to the verdict only in case he establishes his claim as to the contract.

Olson v Shuler, 203-518; 210 NW 453

Nominal damages—right to recover more. The court is not in error in instructing that a plaintiff is entitled to more than nominal damages ("such as one dollar or less") consequent on a wholly unjustified assault and battery resulting in admittedly substantial physical injury to plaintiff.

Ashby v Nine, 218-953; 256 NW 679

Damages—contract basis. Where parties have contracted that contemplated damages shall not exceed a certain amount, a particular measure of damages which will give practical effect to the agreement will be approved.

Riggs v Gish, 201-148; 205 NW 833

Present worth of estate—inadequate instructions. In an action for damages to the estate of a 17-year-old minor consequent on his wrongful death, the court should instruct that the present worth of said estate must be based on the minor's expectancy at the time of his majority.

Hart v Hinkley, 215-915; 247 NW 258

Sale of stock—damages as affected by 1929 depression. In an action for damages on account of false representations inducing the purchase of stock and under an instruction giving the correct measure of damages as the difference between the actual value of the stock and its value if it had been as represented, both values as of the time of purchase which was prior to the depression of 1929, it follows that the reduction of the stock's value because of the depression did not cause plaintiff's damage and defendant's motion for a directed verdict thereon was properly denied.

Smith v Utilities Co., 224-151; 275 NW 158

Frozen condition of shipment. An allegation that the frozen condition of a shipment was negligently caused by the delivering carrier (who was in court) is properly presented by an instruction substantially so directing the jury, even tho the plaintiff has alleged that the shipment was unfrozen when received by the initial carrier (who was not in court), and even tho the instructions made no mention of such latter allegation.

Dye Co. v Davis, 202-1008; 209 NW 744

Fraudulent representations—opinion (?) or fact (?). A representation may be one of fact per se, or it may be one of opinion per se, or it may be neither per se. In the latter case, whether the representation or statement be of fact or of opinion depends essentially on the subject-matter of the transaction and on all the material attending facts and circumstances thereof; and the court must, in its instructions, clearly differentiate between the two questions.

Boysen v Petersen, 203-1073; 211 NW 894

Mitigation—libel action. In an action for libel and defamation of character, the court should clearly differentiate between the purpose and effect of evidence (1) tending to show a good-faith belief in the truth of the charges in question, and (2) tending to show the actual truth of such charges.

Mowry v Reinking, 203-628; 213 NW 274

False imprisonment — elements. The jury should be definitely instructed that there cannot be false imprisonment unless the imprisonment is against the will of the person imprisoned.

Kelley v Gardner, 213-16; 238 NW 470

Uncertain or speculative testimony. The court should instruct the jury on request, in eminent domain proceedings, that it should not, on the issue of value, take into consideration anything which is remote, or imaginary, or uncertain or speculative even tho testified to by witnesses.

Welton v Highway Com., 211-625; 233 NW 876

Contract measure of damages—effect. A contract measure of damages in case of loss under a policy of insurance against theft pre-

cludes the court from instructing as to another and different measure of damages.

Salinger v Ins. Corp., 214-1021; 243 NW 183

Enticing and alienating—measure of damages. A husband's right of action for the wrongful alienation and enticing of his wife is based on the loss of her consortium,—not alone on the loss of her love. Instructions held inadequate.

McGlothlen v Mills, 221-204; 265 NW 117

Equal degree of care. Any basis in the instructions for claiming that a greater degree of care was required of one party than of the other, is fully effaced when the court otherwise instructs definitely to the contrary.

Stilson v Ellis, 208-1157; 225 NW 346

No-eyewitness rule. Instructions relative to the permissible inference of care which the law authorizes when there are no eyewitnesses to an accident reviewed and held correct.

Azeltine v Lutterman, 218-675; 254 NW 854

Intermingling general and specific allegations. Instructions which refer the jury to the general allegations of negligence and not to the specific allegations are of harmless consequence when the latter are simply an elaboration of the former.

Tissue v Durin, 216-709; 246 NW 806

Failure to instruct on general negligence. There was no prejudicial error in failing to instruct that an action was based on general negligence when, in assigning this alleged error, the defendant stated that the court set out the substance of the petition in stating the issues, but did not show in what manner the jury would have better understood the issues had the court instructed as to general negligence.

Porter v Elec. Co., 228- ; 292 NW 231

Proximate cause—requiring excessive proof. Instructions reviewed and held not subject to the objections that plaintiff was required to prove (1) not only that the negligence of defendant was the proximate cause of plaintiff's injuries, but (2) that said negligence was the sole cause of said injuries.

Rainey v Riese, 219-164; 257 NW 346

Proximate cause of injury — concurrent negligence. The fact that the negligence of two parties is concurrent does not render improper an instruction which states what acts of one of the parties would constitute negligence.

Reidy v Ry. Co., 220-1386; 258 NW 675

Contributory negligence — sufficiency. Instructions reviewed and held properly to present the issue of contributory negligence.

Becvar v Batesole, 218-858; 256 NW 297

Contributory negligence — inadequate submission. Defendant's specific allegations as to contributory negligence on the part of plaintiff should be specifically submitted to the jury when they have adequate support in the evidence.

Lang v Siddall, 218-263; 254 NW 783

Contributory negligence — burden of proof. A definite instruction that plaintiff has the burden of proof to show that he was not guilty of any negligence contributing to his injury, is in no degree overcome by later instructions wherein the court, with reference to contributory-fact issues, uses the expression "if you find"; in other words, such expression does not have the effect of impliedly placing the burden of proof as to contributory negligence upon the defendant.

Dean v Koolish, 212-238; 234 NW 179

Contributory negligence—model instruction. Courts, in instructing as to contributory negligence which will bar recovery, should employ the model instruction approved by the appellate court, viz: "If the injured party contributed in any way or in any degree directly to the injury complained of there can be no recovery", but it is not erroneous to substitute "coöperated" or an equivalent term for "contributed".

Hoegh v See, 215-733; 246 NW 787

Contributory negligence—fundamental error. An unobjectionable definition of contributory negligence is converted into fundamental error by the addition of the clause "and but for such negligence on the part of the person injured the injury would not have occurred".

Ryan v Rendering Wks., 215-363; 245 NW 301

Third party negligence as defense—burden of proof. A defendant who pleads that the sole and proximate cause of an injury was the negligence of a third party cannot complain that the court instructs that the negligence of said third person is immaterial unless defendant establishes that such negligence was the sole and proximate cause of said injury.

Johnson v McVicker, 216-654; 247 NW 488

Jordison v Jordison Bros., 215-938; 247 NW 491

Presumption of negligence. To instruct that a railroad company must overcome a presumption of negligence in setting out a fire "by negativing every fact that would justify a finding of negligence on defendant's part" is not misleading when defendant is, by instructions, fully exempted from liability on proof that its engine was properly equipped and properly operated.

Stickling v Railway, 215-1312; 247 NW 642

Statutory presumption of negligence. Failure to instruct on the statutory presumption of negligence in an action for wrongful injury from electricity, is not erroneous (1) when plaintiff has seemingly ignored such presump-

II FORM, REQUISITES, AND SUFFICIENCY—continued

(h) SUFFICIENCY AS TO PARTICULAR SUBJECT-MATTERS—continued

tion by alleging and attempting to prove specific acts of negligence, and (2) when plaintiff requests no such instruction.

Hanna v Elec. Co., 210-864; 232 NW 421

Recklessness particulars unchallenged before answer. Error may not be predicated on the submission of certain particulars alleging recklessness when their sufficiency is not raised before answer filed and when evidence exists to sustain them.

Claussen v Johnson's Est., 224-990; 278 NW 297

Limiting impeaching evidence. The failure of the court on its own motion in its instructions to specifically limit impeaching testimony to that particular purpose is not erroneous when the testimony in question is of such a nature that it could not be considered for any other purpose.

State v Brewer, 218-1287; 254 NW 834

Expert testimony. Instructions to the effect that a jury is not necessarily compelled to give controlling effect to expert testimony, reviewed and held correct.

Crouch v Remedy Co., 210-849; 231 NW 323; 38 NCCA 81

Compensation—instructions—jurors' experience. An instruction in eminent domain proceedings that jurors have the right to weigh the testimony of experts as to values in the light of their own experience is not subject to the vice that they were told to substitute their own knowledge of values.

Cutler v State, 224-686; 278 NW 327

Personal injury—reducing verdict. An instruction in a personal injury action held not prejudicially objectionable on the ground that it did not specifically tell the jury that the amount the deceased plaintiff would have spent should be considered only for the purpose of reducing the amount to be recovered.

Andrews v Y. M. C. A., 226-374; 284 NW 186

Future and anticipatory damages. In an action to recover damages for personal injuries resulting from an automobile collision where petition alleged damages for future medical expenses and the evidence showed plaintiff received severe permanent injuries to his back and spine, suffered intense pain, and received two hernias, together with other injuries, an instruction on future and anticipatory expenses was held proper and supported by the evidence.

Kramer v Henely, 227-504; 288 NW 610

Statute of limitation—unnecessary instructions. There is no occasion to instruct relative to the statute of limitation when the parties join no issue thereon.

Dravis v Sawyer, 218-742; 254 NW 920

Instructions on trial theory—nonduty of court on other theories and necessity of requests. In an action by pedestrian who fell on ice which had formed on a sloping portion of a sidewalk, an instruction to jury requiring, as prerequisite to recovery, a finding of knowledge or constructive notice by city of icy condition of sidewalk, was not erroneous where plaintiff failed to request an instuction that such notice was unnecessary, where action was tried on theory expressed in the instruction. A trial court is not required to instruct on theory not in the case as tried, and appellant, who invited instruction given and failed to request different instruction, could not, on appeal, complain of such instruction.

Leonard v Muscatine, 227-1381; 291 NW 446

Disability continuing to time of trial—insurance benefits. When an insurance policy provides that, in order to recover permanent disability benefits, an insured must be disabled "for life", an instruction that the jury must find insured disabled at the time of trial is correct.

Wood v Federal Life Ins., 224-179; 277 NW 241

Proofs of loss under policy—comprehensiveness. Instructions relative to the inconsistency between the testimony of plaintiff and her statements in her proofs of loss under an accident policy of insurance reviewed, and held to be sufficiently comprehensive properly to present the matter to the jury.

Harrington v Surety Co., 206-925; 221 NW 577

Theft insurance — inadequate instructions. In an action on a policy of insurance against theft, the court, after properly placing the burden on plaintiff to show that the taker intended to steal the insured property, must also instruct that plaintiff supplies that element of proof, prima facie, by testimony that the insured property disappeared from the place where plaintiff left it, without the knowledge or consent of plaintiff or of any other person having control of the property.

Tullar v Ins. Co., 214-166; 239 NW 534

Application attached to policy—illegibly reduced photo copy—not "true copy". In action on life policies, where defense was based on false representations in application for policy, and it is shown original application is plainly printed in legible letters of fair size, while copy furnished and attached to policy is so reduced in size and so dim or blurred that it can only be read by persons with normal vision by use of a strong magnifying glass, the statute requiring "true copy" of application to be attached to policy is not complied with, and the submission of question to the jury as to

legibility under an instruction that a true copy must be readable was not erroneous.

New York Ins. v Miller, 73 F 2d, 350

Delivery of mortgage—actual or constructive delivery. The delivery of a mortgage on insured property, in order to have the effect of invalidating the insurance on the property, may be actual or constructive, and reversible error results from requiring the jury to find an actual delivery when the record might justify a finding of constructive delivery.

Hoover v Ins. Co., 218-559; 255 NW 705

All elements of offense charged. Comprehensive and correct instructions as to all elements of a charged offense render unnecessary, in the absence of a request, an elaborate exposition of defendant's particular theory of the case.

State v Kendall, 200-483; 203 NW 806

(i) ARGUMENTATIVE INSTRUCTIONS

Instructions—argumentative language—issues stated. The court should not instruct the jury in argumentative language, but the issues should be fairly stated without undue repetition, undue emphasis, or minimization of specific facts or circumstances.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

(j) READING OR QUOTING STATUTES

Contributory negligence—instructions—error in quoting statute only. In submitting specifications of alleged contributory negligence, the court commits error in simply quoting the statute relating to these grounds without defining just what acts of plaintiff, under the evidence, would constitute contributory negligence, and without applying the law to the facts.

Jakeway v Allen, 226-13; 282 NW 374

(k) CONFUSED OR MISLEADING INSTRUCTIONS

Conflicting instructions—when reversible error. When read as a whole, if instructions are conflicting, confusing, and misleading to the jury, they are reversibly erroneous.

Tallmon v Larson, 226-564; 284 NW 367

Cured by construction as whole. Tho an instruction standing alone may be confusing, yet it may be all-sufficient if, when the instructions are viewed and construed as a whole, the confusion necessarily disappears.

Hanrahan v Sprague, 220-867; 263 NW 514

Copying defendant's answer improper. Instructions should not substantially copy defendant's answer as jury may easily be confused and misled thereby.

White v Zell, 224-359; 276 NW 76

"Testimony" used instead of "evidence"—jury not confused. Use of the word "testimony" in an instruction in place of the word "evidence" held nonprejudicial in that the jury could not have been misled.

Moran v Kean, 225-329; 280 NW 543

Grounds for new trial. The granting of a new trial will not be interfered with by the appellate court when probably granted by the court in the belief that its withdrawal of certain issues and its unfortunate references to these defenses at inopportune times in the instructions were prejudicial.

Christensen v Bank, 218-892; 256 NW 687; 255 NW 520

Hopeless confusion—credibility of witnesses. A hopelessly confusing instruction as to what matters the jury might take into consideration in determining the credibility of witnesses, constitutes error.

Starry v Starry, 208-228; 225 NW 268

Hopeless confusion—validity of instrument. To base the validity of an instrument on the manner in which a party thereto treated it, and on the attitude which he maintained toward it, may result in such confusion on the part of the jury as to constitute reversible error.

Cornett v Ins. Assn., 208-450; 224 NW 524

Hopeless conflict—street maintenance. An instruction from which the jury would be wholly unable to determine whether a city was bound to maintain a reasonably safe traveled way to the full width of the street, or to the full width of the graded portion of the street, is prejudicially erroneous.

Morse v Town, 213-1225; 241 NW 304

Fatally confusing—action on note. An instruction may, manifestly, be so confusing as to constitute reversible error. So held as to an instruction relative to the execution of a promissory note and the renewal thereof and the consideration therefor.

Suntken v Suntken, 223-347; 272 NW 132

Hopeless conflict—duty of carrier. Hopelessly conflicting instructions relative to the duty owing by a carrier to a passenger constitute reversible error.

Boston v Elec. Co., 206-753; 221 NW 508

Confusedly worded. An unfortunately worded instruction does not constitute reversible error if its meaning is fairly discernible.

Olson v Tyner, 219-251; 257 NW 538

Reciting claims and then withdrawing them. Instructions which recite or paraphrase all the claims made in the pleadings and later withdraw certain of the claims will not be deemed erroneous when it can be said that the jury was not misled.

Ryerson v Roth Bros., 210-1179; 232 NW 500

Confused use of word "accident". The use in instruction of the word "accident", both (1)

II FORM, REQUISITES, AND SUFFICIENCY—continued

(k) CONFUSED OR MISLEADING INSTRUCTIONS—concluded

in the sense of an occurrence that was inevitable, and (2) in the sense of an occurrence happening because of negligence, is not necessarily confusing.

Keller v Gartin, 220-78; 261 NW 776

Correct and incorrect instructions. In an action for damages consequent on malpractice in sewing up a sponge in a wound, instructions which, in part, definitely confine the jury to the one ground of negligence alleged, and which, in part, fail so to confine them, constitute reversible error.

Forrest v Abbott, 219-664; 259 NW 238; 38 NCCA 315

Ordinary care—unallowable standard. Error results from instructing that a party would not be guilty of negligence if he moved machinery across a railroad track in the manner in which he usually so moved it, unless he knew such manner to be dangerous.

Graves v Railway, 207-30; 222 NW 344

Liability of defendants—conspiracy. An instruction to the effect that, in order to render defendants individually liable, it must be found that they were parties to the conspiracy charged, or that they "personally participated" in making the representations which were the basis of the conspiracy, is not erroneous when the record reveals ample testimony of the "personal participation" of all of the defendants in the making of the said representations.

Pullan v Struthers, 201-1179; 207 NW 235

Statute of limitations—tolled by fraudulent concealment. In an action for damages for fraud in the sale of stock where the defense was the statute of limitations, an instruction that fails to tell the jury that the statute of limitations would run unless tolled by some affirmative act of fraudulent concealment on the part of the fraud perpetrator is prejudicially erroneous.

Smith v Utilities Co., 224-151; 275 NW 158

(l) INCONSISTENT OR CONTRADICTORY INSTRUCTIONS

Correct and incorrect instruction on same subject matter. A correct and an incorrect instruction on the same subject matter presents a hopeless contradiction to the jury.

Hoover v Haggard, 219-1232; 260 NW 540

Contributory negligence — minors. An instruction, in a personal injury action, that the burden of proof is on plaintiff to establish his freedom from contributory negligence is not nullified by an instruction that the plaintiff, if of the age of eight years only, is presumed to be incapable of such negligence, and that, to find to the contrary, defendant must so show.

Stutzman v Younkerman, 204-1162; 216 NW 627

Inconsistent instructions — genuineness of signature. Inconsistent instructions on a material issue furnish grounds for a new trial. So held where the court instructed that the only issue submitted to the jury was the genuineness of an indorsing signature on a note, but later instructed that the jury must determine the genuineness of the signature to the note itself.

In re Richardson, 202-328; 208 NW 374

Fatal inconsistency—liability of warehouseman. A definite and unqualified instruction which, in effect, holds a warehouseman to liability as an insurer, and an additional instruction holding him to liability for negligence only, presents a fatal inconsistency.

Kline v Transfer Co., 215-943; 247 NW 215

Fatal contradiction—malicious prosecution. In an action for damages consequent on a malicious prosecution, instructions to the effect, (1) that plaintiff must negative good faith on the part of defendant in instituting the prosecution, and (2) that good faith on the part of defendant constituted no defense, are prejudicially erroneous in that they are mutually conflicting.

Dobbins v Todd & Kraft, 218-878; 256 NW 282

Conflicting instructions—proof in will contest. Instructions relative to what proponent in a will contest must establish reviewed, and held not conflicting.

In re Merrill, 202-837; 211 NW 361

Contradictory instructions—defense on note. Contradictory and misleading instructions may be ground for new trial. So held where the court unequivocally instructed that a defense to a promissory note was waived by the act of the maker in executing a renewal with full knowledge of the defense, and later instructed, in effect, that such waiver did not occur unless the holder of the new note had changed his position by reason thereof.

Euclid Bank v Nesbit, 201-506; 207 NW 761
Fisher v Tullar, 209-35; 227 NW 580

Recoverable and nonrecoverable damages—failure to differentiate. In an action for malpractice in that, after performing a successful operation except that the defendant negligently left a piece of gauze in the wound, which negligence necessitated a second operation, instructions relative to damages arising from, (1) scars, (2) bodily and mental pain, and (3) expenses paid for household servants, must clearly differentiate, in view of the two operations, between such damages as are,

under each heading, recoverable, and those that are not recoverable.

Forrest v Abbott, 219-664; 259 NW 238; 38 NCCA 315

(m) CAUTIONARY INSTRUCTIONS

Cautionary instructions—discretion of court. The giving or refusal of cautionary instructions designed to allay prejudice or sympathy on the part of the jury is discretionary with the court.

Siesseger v Puth, 211-775; 234 NW 540

Orwig v Railway, 217-521; 250 NW 148; 90 ALR 258

Precautionary instructions — recovery of rents. A jury may very properly be told not to allow a recovery of rents prior to a specified time, even tho no claim is made in the pleadings for such prior rents, when it is manifest the court was simply guarding against possible confusion, because of the state of the record.

Bigelow v Ins. Co., 206-884; 221 NW 661

Duty of jury to arrive at verdict. After jury had been out several hours it was not improper to call them for cautionary instruction that it was their duty, if possible, to arrive at an agreement.

Nelson v Hemminger, (NOR); 224 NW 49

Provisional or conditional admission of evidence. Evidence provisionally or conditionally received on a pending issue may require a cautionary instruction to the jury to disregard such evidence if the issue is removed from the case.

Stoner v Ins. Co., 215-665; 246 NW 615

Undenied statement as admission—cautionary instruction—failure to request. Court did not err in failing to give a cautionary instruction concerning evidence of damaging statements against defendant, made in his presence, to which he failed to reply or deny, when no such instruction was requested, nor when such claimed error was not raised in the trial court.

Doherty v Edwards, 227-1264; 290 NW 672

Instructions considered as a whole. A cautionary instruction to the jury that court did not attempt to embody all applicable law in any one instruction, but in considering any one instruction jury should consider each in light of and in harmony with all other given instructions and apply them as a whole to the evidence would be proper; however, a failure to do so would not be reversible error.

Churchill v Briggs, 225-1187; 282 NW 280

"Guarded" judgment of jurors. Instructions which require jurors to exercise a "guarded" judgment in finding a fact are not necessarily and prejudicially erroneous.

Ferber v Railway, 205-291; 217 NW 880

Undue limitation—harmless error. An instruction as to the caution with which proof of certain alleged statements and declarations of an alleged donor (and tending to establish an executed gift) should be considered by the jury, is not erroneous because unduly limited; neither may it be deemed harmful when analogous statements and declarations tending to show the nonmaking of said gift and to which said instruction was not made applicable, were fully, properly and correctly covered by another and separate instruction.

Malcor v Johnson, 223-644; 273 NW 145

(n) UNDUE PROMINENCE TO PARTICULAR MATTERS

Undue prominence to certain evidence. Instruction containing recitations of facts or circumstances which have probative force upon issues tendered, or which militate against one party, without a recitation of facts favorable to his contention, are improper and erroneous; as also are instructions which give undue prominence to evidentiary facts to be determined by the jury.

State v Proost, 225-628; 281 NW 167

Undue particularization or emphasis. Instructions should not attempt to marshal the evidence, or to emphasize particular phases or circumstances, and thereby by silence minimize or obscure other phases or circumstances. Instructions working such results are properly refused, especially when the instructions fairly and comprehensively cover the subject matters in such requests.

State v Blair, 209-229; 223 NW 554

State v Martin, 210-376; 228 NW 1

Undue elaboration on nonsubmitted issues.

Seddon v Richardson, 200-763; 205 NW 307

Estoppel to object. Defendant may not successfully claim that an instruction given at his request unduly magnified the importance of certain evidence.

State v Brown, 216-538; 245 NW 306

Speculative damages. Instructions in eminent domain proceedings held not subject to the vice that they emphasized evidence tending to prove speculative damages.

Kemmerer v Highway Com., 214-136; 241 NW 693

See In re Davis, 217-509; 248 NW 497

III APPLICABILITY TO PLEADINGS AND EVIDENCE

(a) APPLICABILITY TO PLEADINGS AND ISSUES

Instructions coordinated with pleadings and evidence. Instructions must always be coordinated with and limited to the pleadings and evidence.

Waldman v Motor Co., 214-1139; 243 NW 555

Necessity for pleadings as basis. It is quite elementary that issues should not be submitted

III APPLICABILITY TO PLEADINGS AND EVIDENCE—continued

(a) APPLICABILITY TO PLEADINGS AND ISSUES—continued

unless there is an appropriate pleading as a basis therefor.

Harrington v Surety Co., 206-925; 221 NW 577

Hart v Hinkley, 215-915; 247 NW 258

Plea and proof as basis. Instructions without plea or proof, as a basis thereof, are erroneous.

Enfield v Butler, 221-615; 264 NW 546

Applicability to pleadings—nonviolation of rule. The rule which condemns instruction on nonpleaded issues is not violated by instructions which are responsive to the testimony and relative to the bona fides of an affirmative defense—instructions which really go to the heart of the question whether the defense has been established.

Cary v Waybill, 200-432; 203 NW 8

Unrevealed theory not covered. A theory not brought to the attention of the court need not, of course, be covered by the instructions.

Sutton v Moreland, 214-337; 242 NW 75

Unpleaded issue. The submission to the jury of an issue, and the placing of the burden on a party to prove the affirmative thereof, when the party was in no manner presenting such issue, constitute reversible error.

Granteer v Thompson, 203-127; 208 NW 497

In re Stencil, 215-1195; 248 NW 18

Unpleaded defense. Reversible error results from submitting to the jury and requiring it to make a finding on a possible defense not presented by the defendant.

State v Dunn, 202-1188; 211 NW 850

Submission of nonpleaded issues. The submission of a nonpleaded issue of negligence constitutes reversible error.

Morse v Town, 213-1225; 241 NW 304

Sergeant v Challis, 213-57; 238 NW 442

Inaccurate submission of issue. Slight inaccuracy in submitting a pleaded item of damages will not be deemed the submission of an unpleaded issue when the jury could not have been misled.

Siesseger v Puth, 211-775; 234 NW 540

Submission of noncontested issue. It is not erroneous to submit to the jury an issue actually made by the pleadings even tho in a practical sense there was no dispute during the trial as to said issue.

Glass v Hutchinson Co., 214-825; 243 NW 352

Abstract statement of law. Instructions stating an abstract proposition of law, not wholly applicable to the subject matter on trial, are not erroneous when a later paragraph concretely applies the law to the facts.

Goben v Paving Co., 218-829; 252 NW 262

Inferential withdrawal of count. Failure of the court to instruct on a pleaded count constitutes an effectual withdrawal of the count from the jury.

Cox v Fleisher Co., 208-458; 223 NW 521

Pleadings not supported by proof. A plaintiff who has failed to establish the material allegations of his petition, and is therefore not entitled to recover in any event, cannot be deemed harmed by the failure of the court adequately to present to the jury his pleaded cause of action; nor may he be deemed harmed by an inadequate verdict.

Comparet v Metz Co., 222-1328; 271 NW 847

Reasonable value—admissions from pleadings. In action to recover price of corn sold to elevator, an instruction injecting element of reasonable value was erroneous where the pleading alleged express agreement on price, and a further erroneous instruction stating what defendant's answer admitted, but omitting qualification in defendant's pleadings, was not cured by instruction referring to a substituted oral agreement.

Hartwig v Elev. Co., (NOR); 226 NW 116

Submitting fact not in issue. The submission of the issue of mistake in a duly pleaded settlement of partnership affairs without plea of such mistake constitutes reversible error.

Tabler v Evans, 202-1386; 212 NW 161

Injecting unpleaded issue. On the one duly joined issue whether plaintiff was orally employed to render services for defendant in a certain matter, the court commits reversible error by injecting into the instructions the unpleaded issue whether defendant knew that plaintiff was performing services for defendant and accepted the benefits of such services.

Graeser v Jones, 217-499; 251 NW 162

Evidence on stricken plea. After striking from a pleading a claim for damages, error necessarily results from receiving evidence as to the claim and leaving the instructions in such form that the jury may give consideration to such evidence in arriving at their verdict.

Bremhorst v Coal Co., 202-1251; 211 NW 898

Justifiable submission without plea. The unpleaded mitigating fact that a plaintiff knew of a fire at the time it was wrongfully set out upon his premises, and made no effort to put out the fire, or to lessen his damages, is properly presented to the jury when plaintiff's own testimony tended to prove such fact. (§11173.)

Ferber v Railway, 205-291; 217 NW 880

"Assault" admitted in pleadings—use of term permitted. In an action for damages in which the defendant's answer admitted an assault and battery but attempted to justify the act, he could not complain that the court, in its statement of the issues, said that he admitted the assault, as the word "assault" did not admit all that the plaintiff contended, but only the same act upon which the action was based.

Wessman v Sundholm, 228- ; 291 NW 137

Estoppel to question submission of issue. A claimant in probate who advantages himself of the very liberal rules of pleadings recognized in the probate court and who files a claim, which, if established, will justify a recovery on the basis of either an express contract or implied contract, may not complain that the court submitted to the jury the issue of express contract, especially when the verdict was in his favor.

Wilson v Else, 204-857; 216 NW 33

Recital of nonissuable matter—effect. The mere recital in the preamble to instructions of an immaterial fact allegation of an answer does not constitute a submission of the truth or falsity of such alleged fact, when the actual charging part of the instructions studiously ignores such immaterial allegation.

Wheeler v Woods, 205-1240; 219 NW 407

Unpleaded issue of general negligence. Instruction injecting unpleaded and unproved specification of general negligence is reversible error.

Keller v Dodds, 224-935; 277 NW 467

Variation between allegation and instruction. Prejudicial error may not be predicated on instructions which incidentally refer to the negligence of a city in "constructing" a walk, when the assigned negligence is in "maintaining" the walk.

Greenlee v City, 204-1055; 216 NW 774

Inadequate submission of grounds of negligence. Prejudicial error results from failure to submit to the jury all well-pleaded, separate specifications of negligence which have been established as jury questions and as the alleged compound negligence attending a given transaction, it appearing that the plaintiff has been defeated on an inadequate submission.

Hanson v Manning, 213-625; 239 NW 793

Real estate commission—issues correctly submitted. In a suit for breach of oral commission contract, instructions plainly stating that burden was on plaintiff to establish by a preponderance of evidence, (1) the terms of his contract, and (2) that through his efforts a sale was "effected, obtained, and procured", reviewed and held to correctly submit the issues under the pleadings.

Maher v Breen, 224-8; 276 NW 52

Chattel mortgages—notice only issue—unnecessary instructions. Where the plaintiff claimed the right to possession of an automobile under a conditional sales contract and the defendant claimed under two chattel mortgages acquired subsequent to the conditional sale but recorded first, instructions which submitted only the issue of whether the chattel mortgagee had notice of the prior conditional sale were not erroneous in failing to define "subsequent purchaser" as used in recording statutes and in failing to require the jury to determine whether the defendant gave value so as to constitute himself a "subsequent purchaser".

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Improper shifting of burden of proof. Plaintiff who bases his claim for damages on the alleged execution and breach by defendant of a specified contract to convey various tracts of land is not relieved of the burden of establishing said alleged contract by the fact that defendant, after pleading a general denial, sees fit, unnecessarily, to plead, in defense, the contract as he claims it to be. Instruction held erroneous as violative of this principle.

Chismore v Marion Bank, 221-1256; 268 NW 137

Master's liability for injuries—assumption of risk. Instructions to the effect that an employee may not recover damages sustained or resulting from the ordinary and inherent hazards and dangers of an employment are wholly insufficient to submit the pleaded and supported defensive issue that plaintiff had knowledge of the defects in the instrumentalities used by him and of the deficiencies and faults in the methods of using such instrumentalities and that he fully appreciated the danger which might arise therefrom.

McClary v Railway, 209-67; 227 NW 646

Justifiable ignoring of negligence. Grounds of negligence which, if proven, would not establish a cause of action, are properly withheld from the jury.

Fleming v Thornton, 217-183; 251 NW 158

Dual proximate liability. The court, manifestly, cannot properly instruct, in a personal injury action based on negligence, that defendant would not be liable if the injuries were caused by the negligence of a third party, when, under the pleadings and evidence, the jury could find that both defendant and said third party were proximately liable.

Dennis v Merrill; 218-1259; 257 NW 322; 1 NCCA(NS) 175

Acts not constituting submission of issue. It may not be said that an unsustained or unsustainable allegation of negligence is submitted to the jury because the court briefly, tho unfortunately, mentioned such allegation in a preliminary recital of plaintiff's allegations, it appearing that such objectionable

III APPLICABILITY TO PLEADINGS AND EVIDENCE—continued

(a) APPLICABILITY TO PLEADINGS AND ISSUES—continued

grounds of recovery were thereafter studiously ignored in the instructions.

Williams v Railway, 205-446; 214 NW 692

Governmental immunity—law question raised in reply — recognizing issue—when proper. The defense of "governmental immunity" of an employee, in a personal injury action, should properly be assailed by motion or demurrer. However, if the law question of sufficiency of this defense is raised in the reply and not challenged by the defendant, and the case tried on that theory, then the court is correct in recognizing the issue and instructing on the inadequacy of that defense.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Pleaded but unsupported damages—instruction as a whole. No error results from instructing that no recovery can be allowed plaintiff in excess of the pleaded amount for a named element of damages (the evidence concededly showing that plaintiff had not suffered said maximum amount) when other instructions definitely charged the jury to base damages solely on the evidence.

Danner v Cooper, 215-1354; 246 NW 223

Failure to limit damages—fatal error. An instruction which fails to limit the jury in its return of damages (1) to the amount claimed for each item of damages, and (2) to such amount only as shown by the evidence, is prejudicially erroneous.

Andersen v Christensen, 222-177; 268 NW 527

Future pain—sufficiency. Damages for "future" physical and mental pain may not be submitted to the jury under a pleading (1) which makes no specific reference to such damages, and (2) which expressly pleads that such pain continued for a stated period, to wit, three weeks. This is true even though the pleading alleges that the injury alleged resulted in permanent, visible scars upon the "arm and wrist".

Pettijohn v Halloran, 200-1355; 206 NW 631

Measure of damages—instruction following rescission theory. In vendee's action for damages for fraudulent representations of value in the sale of real estate, no rescission being asked, it is error to instruct that the measure of damages is the amount paid less the reasonable rental value for the time occupied, which error, however, is without reversible prejudice to the vendor, when the amount of recovery is so small that the hope for a more favorable verdict on a retrial is, under the evidence, too remote.

Neal v Miller, 225-252; 280 NW 499

Limiting damages—issue not raised in trial. Where an action in replevin by one claiming an automobile under a conditional sales contract was brought against a chattel mortgagee who had given some cash and extended credit in return for his mortgage, the plaintiff, having permitted the trial to be concluded on the issue of possession without raising any other issue or requesting instructions on any other issue, could not complain that the mortgagee's recovery should have been limited to the amount of actual cash given for the mortgage.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Trespassers—abortive issue. The plea in an action for personal injury that plaintiff was a trespasser on defendant's property presents no jury question when defendant neither pleads nor proves (1) that he had requested plaintiff to depart and that plaintiff had refused to do so, or (2) that any force was necessary to remove plaintiff,—in short, when defendant does not plead or show that he was ejecting plaintiff as a trespasser.

Pettijohn v Halloran, 200-1355; 206 NW 631

Preliminary statement of controversy—effect. An issue or controversial fact is not necessarily submitted to the jury because embraced within the court's preliminary statement of the contentions of the parties.

Persia Bk. v Wilson, 214-993; 243 NW 581

Submission of unsupported issue. The submission of a material but wholly unsupported issue constitutes reversible error.

Parrack v McGaffey, 217-368; 251 NW 871
Winter v Davis, 217-424; 251 NW 770
Shaw v Carson, 218-1251; 257 NW 194; 38 NCCA 192
Deweese v Transit Lines, 218-1327; 256 NW 428
Bebensee v Blumer, 219-261; 257 NW 768
Orr v Hart, 219-408; 258 NW 84
Lukin v Marvel, 219-773; 259 NW 782
Miller v Mutual Assn., 219-689; 259 NW 572
Dougherty v McFee, 221-391; 265 NW 176
State v Johnston, 221-933; 267 NW 698
Porter v Decker, 222-1109; 270 NW 897

Unsupported issue. Nonsupported issues must not be submitted to the jury.

Seddon v Richardson, 200-763; 205 NW 307
State v Wright, 200-772; 205 NW 325
Millard v Mfg. Co., 200-1063; 205 NW 979
Veith v Cassidy, 201-376; 207 NW 328
Graves v Ry. Co., 207-30; 222 NW 344
Dickeson v Lzicar, 208-275; 225 NW 406
Balik v Flacker, 212-1381; 238 NW 467
Kuhn v Kjose, 216-36; 248 NW 230
Mitchell v Burgher, 216-869; 249 NW 357
Engle v Nelson, 220-771; 263 NW 505

Supported issue—failure to submit. Error results from a refusal, especially on a request, to submit a material issue having substantial support in the record.

Gibson v Miller, 215-631; 246 NW 606

In re unsupported or immaterial issues. Reversible error results from the giving of instructions on a wholly unsupported issue, or on a supported immaterial issue.

Chismore v Bank, 221-1256; 268 NW 137

Unsupported charge of negligence. Unsupported charges of negligence should not be submitted to the jury.

Wilkinson v Lbr. Co., 203-476; 212 NW 682

Unsupported theory. The court must not instruct on a theory which the record affirmatively shows has no support whatever.

Klinkel v Saddler, 211-368; 233 NW 538

Submission of unsupported issue. Error results in stating in instructions to the jury a material, unsupported claim of one of the parties, without stating that such claim is unsupported.

Miller v Fire Assn., 219-689; 259 NW 572

Unsupported issue of permanent injury. Instructions reviewed, and held not subject to the vice of submitting an unsupported issue of permanent injury.

Groshens v Lund, 222-49; 268 NW 496

Withdrawn issue. The court having once withdrawn from the jury an unsupported issue by sustaining a motion to that effect, need not in its instructions repeat the withdrawal.

Sutton v Moreland, 214-337; 242 NW 75

Taking case from jury—failure to present objection. Error may not be predicated on the submission to the jury of a supported issue when complainant failed to request the withdrawal of said issue.

Rosenstein v Smith, 218-1381; 257 NW 397

Eminent domain—necessity for condemnation. In the absence of an issue thereon, there is no occasion whatever for the court, in eminent domain proceedings, to instruct on the subject of the necessity for such condemnation.

Hoeft v State, 221-694; 266 NW 571; 104 ALR 1008

Instructions in re benefits in eminent domain. In eminent domain proceedings, an instruction that the compensation allowed should not leave the landowner "poorer or worse off or better off" because of the taking, is not subject to the vice of leading the jury to understand that in computing compensation, benefits accruing to the landowner because of the taking should be deducted, when the jury is repeatedly and explicitly told elsewhere in the instructions that they should not consider benefits.

Witt v State, 223-156; 272 NW 419

Failure to submit all issues. Reversible error results in the submission of only part of several pleaded and issuable fact questions, any one of which, if affirmatively found to exist, would justify a landlord in re-entering leased land.

Durflinger v Heaton, 219-528; 258 NW 543

Unpleaded and unsupported issue. On the narrow issue whether a defendant personally signed the promissory note sued upon, it is error for the court to submit the additional and unsupported issue whether the note was signed by someone other than the defendant, but under authority from him.

Conner v Henry, 201-253; 207 NW 119

Instructing on immaterial, nonprejudicial evidence. A will contestant's contention that it was error to instruct regarding a nonmaterial exhibit—a memorandum by a deceased attorney, who drew the will—although well founded, held to be error without prejudice when the paper and the conversation connected therewith were not necessary for proponents to make a prima facie case of the due and legal execution of the will and the genuineness of the signatures.

In re Iwers, 225-389; 280 NW 579

Requested instructions—will contestants bound by own theory. Contestants alleging that a will was not duly and legally executed may not amplify their claim thereunder after requesting instructions proceeding solely on the theory that their construction of their claim was that the signatures of the testator and one witness, now deceased, were not genuine. In such case it is not error, when otherwise unobjected to, for the court on its own motion to add an instruction which in effect limits the case to the theory propounded in contestants' requested instructions.

In re Iwers, 225-389; 280 NW 579

Submission of withdrawn issue. The submission to the jury in a will contest of the issue of testamentary capacity, when said issue had been wholly withdrawn by the contestant, (even tho in the presence of the jury) is necessarily erroneous and prejudicial.

In re Narber, 211-713; 234 NW 185

Nonissuable matters. In an action by an attorney for services based on an express contract to assist in the settlement of an appeal, the court, in its instructions, should not make plaintiff's recovery dependent on proof that defendant was apprised of just what efforts plaintiff was making to effect a settlement.

Graeser v Jones, 220-354; 261 NW 439

Attorney—contract of employment. Instructions reviewed, in an action by an attorney on a contract of employment, and held to adequately protect every right of the defendant.

Coughlon v Pedelty, 211-138; 233 NW 63

Establishing agency. The thought that a plaintiff must establish the authority of an alleged agent of the defendant's before the de-

III APPLICABILITY TO PLEADINGS AND EVIDENCE—continued

fendant can be bound by what the alleged agent says and does is sufficiently expressed in an instruction which requires the jury to find that defendant acted "by their duly authorized agent."

Farmers Bank v Planters Elev., 200-434; 204 NW 298

(b) APPLICABILITY TO EVIDENCE

Applicability to evidence. An instruction applicable to no evidence in the record is erroneous.

Millard v Mfg. Co., 200-1063; 205 NW 979

Presumption of supporting evidence. Presumptively an instruction has support in testimony not abstracted to the appellate court.

State v Metcalfe, 203-155; 212 NW 382

Unsupported issue of negligence. Reversible error results from submitting several different allegations of negligence, one of which is without support in the evidence.

Graves v Ry. Co., 207-30; 222 NW 344

Unsupported negligence. Reversible error results from so instructing that the jury may base negligence not on proof of an ultimate fact, but on proof of a simple item of evidence bearing on such ultimate fact.

Graves v Ry. Co., 207-30; 222 NW 344

Contributory negligence — lack of evidence —effect. An instruction which properly directs the jury, in determining the issue of contributory negligence of an injured party, to take into consideration certain enumerated matters as shown by the evidence, is not necessarily erroneous because it makes no reference to the effect of a lack of evidence on the subject.

Engle v Nelson, 220-771; 263 NW 505

Non-issue as to signature. When it is practically conceded, under the evidence, that a party did not himself sign a promissory note (tho his name is signed thereto), the fact that the record contains an admitted signature of the party imposes no obligation on the court to permit the jury, by a comparison of signatures, to find that the party did, himself, sign the note.

West Chester Bank v Dayton, 217-64; 250 NW 695

Performance of contract—burden of proof. The defendant in an action to recover for materials furnished under a building contract may not complain of instructions which clearly impose on plaintiff the burden to show that he has complied with the contract.

Granette v Neumann, 208-24; 221 NW 197

Nonapplicability to evidence—nonsupport. An instruction to the effect that a husband would not be guilty of failure to support his wife if he procured a home at a named place and if the wife without good cause refused to live at said place is erroneous when the applicable evidence was solely to the effect that the husband offered to procure such home and that the wife refused such offer.

State v Wright, 200-772; 205 NW 325

Nonapplicability to evidence—horse worried by dog. Reversible error results from so instructing that the jury may wander afield and base its verdict on a fact of which there is no evidence. So held where, in an action for being thrown from a horse because of its fright from the barking of a dog, the evidence was confined solely to the act of the dog in worrying the horse, but the instructions permitted a verdict for plaintiff if the dog did anything that would justify the killing of the dog.

Luick v Sondrol, 200-728; 205 NW 331

Recovery on unsupported condition. Instructions which permit a recovery on a condition which the evidence affirmatively shows never existed, constitute error, and the error must be deemed prejudicial when numerous items are in dispute and it is quite impossible to determine what various items were allowed by the jury.

Tabler v Evans, 202-1386; 212 NW 161

Unsupported ratification. Instruction authorizing a finding of ratification by partners of a nonpartnership obligation, is fundamentally erroneous when there is no sufficient evidence to support a finding of ratification.

Maxfield v Heishman, 209-1061; 229 NW 681

Unsupported issue of partnership. In an action of replevin for two articles, of which plaintiff was the absolute owner of one and the holder of a chattel mortgage on the other, defendant's issue of partnership is properly rejected when supported only by a showing that the parties had temporarily shared equally in the net earnings of the two articles.

Dieter v Coyne, 201-823; 208 NW 359

Permitting recovery not shown by evidence. Instructions which permit a recovery in excess of that shown by the evidence are erroneous.

Looney v Parker, 210-85; 230 NW 570

Failure of court to limit return of damages. Reversible error results from the failure of the court in its instructions to limit the jury in its return of damages, on various items of claimed damages, to the amount claimed in the pleadings; and limiting damages "as shown by the evidence" does not necessarily cure the error.

Desmond v Smith, 219-83; 257 NW 543

Unsupported issues of permanent injuries. Instructions relative to damages for permanent injuries are improper where there is no testimony tending to show permanent injuries.

Wilkinson v Lbr. Co., 203-476; 212 NW 682
Shuck v Keefe, 205-365; 218 NW 31

Permitting return of unproven damages. Reversible error results from so instructing as to allow the jury to find damages on account of a loss not shown by the evidence, when the amount of the verdict, viewed in the light of the evidence, quite clearly shows that the jury made allowance for such unproven loss.

Herring Motor v Myerly, 207-990; 222 NW 1

Unsupported matters of illustration. An instruction which is couched in the form of an illustration to the jury is not prejudicially erroneous because there is no evidence bearing on the subject-matter of the illustration.

Eves v Littig Co., 202-1338; 212 NW 154

Measure of damages—unsupported element. Instructions to the effect that a measure of damages would be the difference between the value of property as it actually was when a party received it, and its value had it been as represented, are manifestly erroneous when the record contains no testimony of the latter value.

Vanarsdol v Farlow, 200-495; 203 NW 794

Submitting earning capacity of child. Elements of damage not sustained by evidence should not be submitted, which applies to the earning capacity of a 10-year-old school girl in the absence of supporting evidence, but, in the instant case, the error was harmless, as the jury's possibility of considering such element was very remote.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Fatal contradiction. An instruction which directs the jury, (1) to determine the value of land solely on the testimony introduced, and (2) to determine said value in the light of "your experience and knowledge concerning such valuation", is fundamentally erroneous, (1) because authorizing the jurors to become silent witnesses in the case, and (2) because of the fatal contradiction therein contained.

Hoeft v State, 221-694; 266 NW 571; 104 ALR 1008

Damages limited by evidence. Instructions which permit the jury to find damages in the form of profits lost, without limiting such findings "as shown by the evidence", are prejudicially erroneous.

Smith v Standard Oil, 218-709; 255 NW 674

Direct damages only recoverable. It is mandatory on the court to instruct that damages recoverable because of a defendant's negligence are limited to those damages which the evidence shows directly resulted from such negligence.

Schelldorf v Cherry, 220-1101; 264 NW 54

Exemplary damages — malice as essential basis. The submission of the question of exemplary damages, without supporting evidence of malice, is prejudicially erroneous. (See also under §11216.)

Sokolowske v Wilson, 211-1112; 235 NW 80

Nonapplicability to pleading or evidence. Reversible error results from instructing a jury that plaintiff, in an action against a city for damages consequent on a defect in a sidewalk, need not show that the city had actual knowledge of the defect if the defect resulted from the original defective construction of the walk, when neither pleading nor evidence presented such issue.

Ritter v City, 212-564; 234 NW 814

Unsafe place in partially opened street. Reversible error results from submitting whether a city was negligent in not filling depressions and tamping soft places in a street (1) when, owing to an unusual unfitness of the street for travel, the city had opened it only to the extent of a narrow roadway and there is no evidence that the failure to fill and tamp said opened roadway was the cause of the injury and (2) when, under the evidence, the injury may have occurred at a place in the street where the city was under no duty to fill and tamp—at a place which the city had never assumed to put in condition for use.

McKeehan v City, 213-1351; 242 NW 42

Submission of pleaded but unsupported amount. In condemnation proceeding for highway purposes, instruction that verdict could not be more than the amount claimed in petition which was over $5,000 whereas the plaintiff's witnesses fixed damage at $4,455, was not prejudicial, since verdict was for only $2,000.

Stoner v Hy. Comm., 227-115; 287 NW 269

Undue burden—estoppel. A litigant may not claim that instructions place an undue burden upon him when the instructions are strictly in harmony with his pleadings and evidence.

Nigut v Hill, 200-748; 205 NW 312

Belated and unsupported amendment. It is doubly erroneous for the court, after argument has closed, (1) to permit an amendment assigning a new ground of negligence which is without support in the evidence, and (2) to submit such alleged negligence to the jury.

Peckinpaugh v Engelke, 215-1248; 247 NW 822

Emergency as legal excuse — evidentiary support. Question of emergency as being legal excuse should not be submitted to the jury without competent evidence to support it.

III APPLICABILITY TO PLEADINGS AND EVIDENCE—concluded

(b) APPLICABILITY TO EVIDENCE—concluded

Held, instruction amply supported in instant case.

Edwards v Perley, 223-1119; 274 NW 910

Sustaining verdict for either party. Where, under proper instructions and supporting testimony, the jury may properly find for either party, the supreme court will not disturb the verdict.

Reardon v Hermansen, 223-1207; 275 NW 6; 3 NCCA(NS) 184

Photographs — essentials for admission. Within the sound discretion of the court, a photograph is admissible in evidence when taken under conditions similar to those material to the inquiry to which it relates, and an instruction may call the jury's attention to the difference in lighting conditions at time an injury occurred, and at the time the picture was taken.

Riggs v Pan-American Co., 225-1051; 283 NW 250

In re "inevitable accident". Instructions with reference to an "inevitable" accident and defendant's nonliability therefor are wholly out of place when there is no applicable evidence in the record.

Keller v Gartin, 220-78; 261 NW 776

(c) ABSTRACT INSTRUCTIONS

Abstract statements of law. The inclusion in instructions of abstract statements of the law does not necessarily constitute material error.

Birmingham Bank v Keller, 205-271; 215 NW 649

IV CONSTRUCTION AND OPERATION

Reasonable construction of phraseology. Phraseology of instructions must receive, not a strained or forced construction, but a reasonable construction, in view of all the circumstances.

Henriott v Main, 225-20; 279 NW 110

Construction of single instruction. An instruction which contains a statement which, standing alone, would be incorrect may be rendered perfectly proper by a subsequent limiting statement in the same instruction.

Blakely v Cabelka, 203-5; 212 NW 348
Siesseger v Puth, 216-916; 248 NW 352

Construction as a whole. Instructions are all-sufficient if, when construed as a whole, they fairly present the issues to the jury.

Cuthbertson v Hoffa, 205-666; 216 NW 733
Cox v Const. Co., 208-458; 223 NW 521

Complete as a whole. It is not required that each and every paragraph of instructions be complete in itself. They are all-sufficient if they are complete as a whole.

Elmore v Railway, 207-862; 224 NW 28
Siesseger v Puth, 216-916; 248 NW 352

Construction as a whole — technical errors inconsequential. Technical errors, in single paragraphs of instructions, which lose any prejudicial significance when the instructions are construed as a whole, will not justify a reversal.

Olson v Cushman, 224-974; 276 NW 777

Instructions construed as a whole. Instructions will be considered in their entirety.

State v Ferguson, 226-361; 283 NW 917

Instructions construed together when reviewed. Supreme court in construing an instruction will consider the other instructions given.

Tallmon v Larson, 226-564; 284 NW 367

Confusing instructions not cured. An instruction may be so manifestly erroneous and confusing as to be incurable under the rule that the instructions must be construed as a whole.

McAdams v Railway, 200-732; 205 NW 310

Error cured by instructions as a whole. Different instructions may, when construed together, so fairly present the real issue to the jury as to cure a material inaccuracy which exists in one of the instructions when viewed by itself.

Dahna v Fun House, 204-922; 216 NW 262

Omitting reference to defendant's omission to act. An instruction that the jury, in determining an issue of negligence, should take into consideration "what the defendant did", need not be accompanied by any instruction for the jury to consider what the defendant omitted to do, when the jury is fully instructed to consider all the facts and circumstances bearing on the issue.

Leete v Hays, 211-379; 233 NW 481

Negligence directly contributing to injury. Instructions are correct which, as a whole, direct the jury that plaintiff must show that he did not by any negligence on his part directly contribute in any degree to his injury, even tho one of the instructions does not carry the limiting clause, "in any degree".

O'Hara v Chaplin, 211-404; 233 NW 516

Covering different elements in separate instructions. An instruction relative to a master's plea of assumption of risk by his servant will not be deemed to deprive the master of his plea of contributory negligence on the part of the servant when the latter element is correctly covered by a separate instruction.

Oestereich v Leslie, 212-105; 234 NW 229

Correct as a whole. On defendant's issue that plaintiff was working on an agreed salary and not on quantum meruit, as contended by plaintiff, the court commits no error against defendant by instructing, in effect, that if plaintiff in cashing checks did not know, as the memorandum thereon indicated, that they were tendered in full payment to date, then such checks might be treated as payment on account, the other instructions fully protecting the defendant.

Olson v Shuler, 208-70; 221 NW 941

Inaccurate use of words corrected. The inaccurate use of a word or term in one instruction may wholly disappear when the instructions are viewed as a whole. So held as to the terms "value" and "fair and reasonable market value".

Hoeft v State, 221-694; 266 NW 571; 104 ALR 1008

"Assault" admitted in pleadings—use of term permitted. In an action for damages in which the defendant's answer admitted an assault and battery but attempted to justify the act, he could not complain that the court, in its statement of the issues, said that he admitted the assault, as the word "assault" did not admit all that the plaintiff contended, but only the same act upon which the action was based.

Wessman v Sundholm, 228- ; 291 NW 137

Presumption that jury obeyed. It will be presumed, nothing appearing to the contrary, that the jury obeyed an explicit instruction not to allow on an item of damages more than was claimed by plaintiff.

Lukin v Marvel, 219-773; 259 NW 782

Separating personal injury damage claims. Instructions limiting the amount of total recovery which could be allowed the plaintiff, but not advising how much was claimed for pain and suffering and for permanent disability, were erroneous, and, being erroneous, prejudice is presumed unless the record is such as to overcome the presumption.

Remer v Takin Bros., 227-903; 289 NW 477

Assault and battery—excessive force used to eject—instructions limiting recovery. When the jury was told that if it found that the defendant used more force than was reasonably necessary to eject the plaintiff from his home, they must find the defendant liable for the injuries caused by the excessive force, the instructions, when considered as a whole, were not subject to the objection that the right of recovery was not limited in the event that the injuries were due to the excessive force.

Wessman v Sundholm, 228- ; 291 NW 137

Compensation in eminent domain—abutting tract. In a condemnation action where an 80-acre tract abutting and farmed in connection with, but only partly owned by the owner of the farm involved in condemnation, an instruction that no damage to the abutting 80 acres could be assessed, but that the jury could consider the farming control advantage of the two tracts, while not approved, held not prejudicial.

Cutler v State, 224-686; 278 NW 327

V QUESTIONS PRESENTABLE BY INSTRUCTIONS

Validity of release—avoidance for fraud—burden of proof. The burden of proof to avoid a written release of damages, on the ground that said release was obtained by fraud, rests on the party who alleges the fraud. Instructions reviewed and held adequately to impose such burden in substance tho not in words, assuming ordinary intelligence on the part of the jury.

Engle v Ungles, 223-780; 273 NW 879

VI CURING ERROR BY ORAL OR WRITTEN INSTRUCTIONS

(a) IN RE MISCONDUCT OR ERROR GENERALLY

Conduct of counsel in argument. A reference in argument to the corporate capacity of one of the parties to the action tho manifestly improper may not be reversible error when objection is promptly sustained, when the error is not repeated, and when the jury is promptly instructed to wholly disregard the reference.

Henriksen v Stages, Inc., 216-643; 246 NW 913

Misleading statement of fact cured by clearly stated issues. The erroneous insertion into the court's preliminary statement of the issues, of a statement (copied from the pleadings) which conceivably might confuse and mislead the jury, may be quite fully effaced by the subsequent very concise statement of the real issues.

Forrest v Sovereign Camp, 220-478; 261 NW 802

Arguments and conduct of counsel—curing error by instruction. Argument and ruling thereon briefly reviewed and held to reveal no error, but, if error, that the same was effectively cured by an instruction to disregard the matter referred to by counsel.

West Branch Bank v Farmers Exc., 221-1382; 268 NW 155

Improper argument cured by instructions. A quite pointed and positive instruction to the jury to the effect that it must take and act solely on the law given by the court, cures, ordinarily, any error of counsel in argument in asserting what is the applicable law of the case.

Wolfson v Lumber Co., 210-244; 227 NW 608

Curing error in argument. An oral admonition by the court to the jury, during argument

VI CURING ERROR BY ORAL OR WRITTEN INSTRUCTIONS—continued

(a) IN RE MISCONDUCT OR ERROR GENERALLY—concluded

not to consider a certain statement by counsel, ordinarily cures any error resulting from the making of the statement.

Stingley v Crawford, 219-509; 258 NW 316
West Branch Bank v Farmers Exc., 221-1382; 268 NW 155

Curing error. Error consequent on improper argument is ordinarily cured or negatived by a ruling striking the improper remarks and directing the jury to disregard them.

State v Dobry, 217-858; 250 NW 702

Curing error by remittitur.

Shockley v Davis Co., 200-1094; 205 NW 966
Starry v Hanold, 202-1180; 211 NW 696
In re Anderson, 203-985; 213 NW 567
In re Willmott, 215-546; 243 NW 634

Remittitur of nonrecoverable damages. Error in including nonrecoverable damages in a verdict is not cured by the subsequent filing of a remittitur in a named sum, when the instructions are framed in such form that no one can determine what amount the jury allowed for nonrecoverable damages.

Gardner v Boland, 209-362; 227 NW 902
See Cocklin v Ins. Assn., 207-4; 222 NW 368

Subjects of damages — elements in mental anguish — curing by remittitur. Humiliation and mortification being included in mental anguish, an instruction in an assault and battery case allowing one recovery for mental anguish and another recovery for humiliation and mortification is erroneous as allowing for double damages for the element of mental anguish; however, the defect is cured by requiring the plaintiff to remit the entire amount allowed for humiliation and mortification.

Hauser v Boever, 225-1; 279 NW 137

Remittitur—entry on combination docket—effect. The indorsement and signing on the combination docket of the court of a remittitur constitutes a "filing" of a remittitur within the meaning of a court order to the effect that a new trial would automatically follow the failure "to file" such remittitur.

Fox v McCurnin, 210-429; 228 NW 582

Striking supported issue. Error in striking, at the close of all the evidence, an adequate and supported allegation of negligence, is cured by adequately submitting the issue notwithstanding the striking order.

Townsend v Armstrong, 220-396; 260 NW 17

Contributory negligence — incurable error. An instruction which summarizes all the elements that plaintiff must prove to make a case, and directs the jury that if these elements and conditions existed, the plaintiff is entitled to recover, is fatally defective when no reference whatever is made to plaintiff's freedom from contributory negligence. And, in such case, the error is not cured by the fact that in other instructions the jury is instructed that plaintiff must be free from contributory negligence.

Bobst v Hoxie Line, 221-823; 267 NW 673

Error cured by verdict. Instructions which, in stating the issues, give the plaintiff a chance for a recovery to which he was not entitled are harmless when the jury finds that plaintiff was not entitled to recover in any event.

Ferber v Ry. Co., 205-291; 217 NW 880

Inaccurate remark by court cured by instructions. A remark by the court in the presence of the jury and during the argument as to the issues involved, even tho somewhat inaccurate, is rendered inconsequential by the subsequent giving of full and explicit instructions as to the issues.

State v Heeron, 208-1151; 226 NW 30

Unpleaded element of damages. The submission of a nonpleaded element of damages is erroneous, but the error will be cured by deducting from the amount of the verdict the highest amount which the jury could have allowed, under the record, on such element.

Hepker v Schmickle, 209-744; 229 NW 177

Undue burden. An error in imposing an undue burden on a litigant may become inconsequential in view of the record and in view of the fact that the instruction is unduly favorable to complainant.

Ryan v Cooper, 201-220; 205 NW 302

Curing error in later instruction. Error in failing, in one instruction, to impose on plaintiff the necessity of proving a certain all-essential fact, before he will be entitled to a verdict, may be wholly effaced by other instructions which definitely supply the former erroneous omission.

Foy v Metropolitan Life, 220-628; 263 NW 14

Estoppel to question. A party may not question an instruction which gives him a chance for a verdict to which he is not entitled; and especially when such instruction was not excepted to in the trial court.

Granette v Neumann, 208-24; 221 NW 197
Sergeant v Challis, 213-57; 238 NW 442

(b) IN RE RECEIPT OF TESTIMONY

Assignment of error. Error, if any, of the court, during the trial, in striking evidence or tendered issues cannot be reached by an assignment of error to the effect that the court erred in failing to instruct on said stricken matters. The assignment must be on the original alleged erroneous striking of said matters.

Reidy v Railway, 220-1386; 258 NW 675

Improper admission of testimony. An error in the reception of testimony is cured by instructions which protect the adverse party from an unauthorized recovery.

Tabler v Evans, 202-1386; 212 NW 161

Improper reception of conclusions. Error in receiving in evidence the improper conclusions of a witness may be cured by striking the same from the record and by specifically cautioning the jurors to wholly disregard the same.

State v Folger, 204-1296; 210 NW 580
McKee v Iowa Co., 204-44; 214 NW 564

Withdrawal of incompetent evidence. Error in receiving incompetent testimony which is not inherently prejudicial is rendered harmless by the subsequent withdrawal of such testimony by the court, and by the court's admonition to the jury to disregard it.

McDonald v Robinson, 207-1293; 224 NW 820; 62 ALR 1419
State v Slycord, 210-1209; 232 NW 636

Evidence res inter alios. Evidence res inter alios will ordinarily be regarded as harmless when the court specifically directs the jury to disregard it.

Olson v Shuler, 203-518; 210 NW 453

Oral admonitions. The oral admonition of the court to the jury not to consider withdrawn testimony, and the giving of later pointed instructions to the same effect, are quite effective in removing and curing any error in the original reception of the testimony.

Dewey v Ins. Co., 218-1220; 257 NW 308

Striking evidence—jury admonition—curing error. If evidence, erroneously admitted during the progress of a trial, is distinctly withdrawn by the court, the error is cured, except where it is manifest that the prejudicial effect on the jury remained despite its exclusion. Testimony by a handwriting expert, who referred to notes, which were merely the basis or reason for his opinion as to the genuineness of signatures to a will, held not within the exception.

In re Iwers, 225-389; 280 NW 579

Error in admission of evidence cured by instructions. In an action on a note given by the defendant for the purchase of lands under partition, any error in allowing the referee to testify that he did not recollect sending to the plaintiff any money received, was cured by instructions that payment to the referee would relieve the defendant from liability on the notes.

Ballard v Ballard, 226-699; 285 NW 165

Unsupported instruction—error cured by limitation. An instruction without evidence to support it may be so guarded as to remove all prejudicial error.

Ferber v Ry. Co., 205-291; 217 NW 880

Improper evidence excluded by proper submission. In an action for damages resulting solely from the "inconvenience and discomfort in the occupancy and enjoyment of property" because of a nuisance, evidence tending to show that the nuisance was unsanitary and might be injurious to health, becomes harmless when the court submits the issues strictly in accordance with the pleadings.

Chase v City, 203-1361; 214 NW 591; 37 NCCA 228

Error cured by testimony. A party's admissions and testimony may render an inaccurate instruction quite harmless.

Heflen v Brown, 208-325; 223 NW 763

Error cured by testimony. Where an indorser of a promissory note pleaded an estoppel as consisting (1) of a mere promise by the payee to collect the note from the maker and a prior indorser, and (2) of a later statement by the payee that the note had been paid, the submission of said pleaded promise in one instruction, and of said statement as to payment in another instruction, thereby inferentially indicating that there were two estoppels, will not be deemed reversible error when the record reveals the fact that the maker and prior indorser both remained solvent up to and after the statement as to payment was made.

Birmingham Sav. Bank v Keller, 205-271; 215 NW 649; 217 NW 874

Error cured by jury finding. On the issue whether total disability resulted "immediately" upon the occurrence of an accident, an instruction that "immediate" means "within twenty-four hours" is harmless (even tho it be conceded to be erroneous) when the jury has found on clearly supporting testimony that the disability was total from the very day of the accident.

Harrington v Sur. Co., 206-925; 221 NW 577

Erroneous instruction cured by verdict. The erroneous exclusion of testimony bearing on damages suffered by a party, or the giving of an erroneous instruction relative to proof of sole ownership of the injured property, is quite harmless when it is manifest that the jury found that the party in question was not entitled to recover in any event, because of his own negligence.

Wiley v Dobbins, 204-174; 214 NW 529; 62 ALR 432

VII LAW OF CASE

Inapplicable instructions. Instructions relative to a rule of law which is inapplicable to the facts of the case should not be given.

Hamilton v Boyd, 218-885; 256 NW 290

Misconduct of jury — disregarding instructions. It is the duty of the jury to follow the instructions of the court, and where it clearly appears that the jury, in arriving at its verdict, disregarded the instructions, a new trial must be granted.

Mitchell v Heaton, 227-1071; 290 NW 39

Disregard of instruction. Record reviewed, and held insufficient to show that the jury disregarded the instruction in question.

Love v Railway, 207-1278; 224 NW 815

Disregard of instructions. An instruction to the effect that no damage for the flooding of land could be recovered if such damages resulted partly from the wrongful act of the defendant in erecting an embankment and partly from the natural overflow of a natural stream, constitutes the law of the case, and a verdict for the plaintiff must be set aside if the evidence conclusively shows that the damages were caused in part by the natural overflow of the stream.

Pfannebecker v Railway, 208-752; 226 NW 161

Instructions as law of case—disregard of. A clear disregard by the jury of instructions—the law of the case whether they be right or wrong—necessitates a disregard by the court of the verdict returned. So held where a verdict was returned for plaintiff under instructions which rendered such a verdict legally impossible.

In re Stevens, 223-369; 272 NW 426

Verdict contrary to instructions — verdict illegal—setting aside. Where the court instructs the jury to base their verdict solely on the evidence and, guided by the instructions, to arrive at the very truth of the matter and base their conclusions solely on evidence and instructions and not to indulge in speculations or conjectures, and at hearing on motion for new trial it is shown that it was agreed in advance that the jury would be bound by a majority vote, such verdict was illegal and it was the duty of the court to set the verdict aside.

Mitchell v Heaton, 227-1071; 290 NW 39

Unexcepted instructions. If there be no exceptions to instructions, the verdict is final if it has support in the evidence. In such case no inquiry can be made whether the instructions are right or wrong.

Commer. Credit v Hazel, 214-213; 242 NW 47

11495 Exceptions to instructions.

ANALYSIS

Instructions in criminal cases. See under §13876
Motion for new trial. See under §11551

I FORMER STATUTE RULE

Failure to enter exceptions. Failure to enter exceptions to instructions before argument to the jury (statute now repealed) precludes review on appeal.

Beardmore v New Albin, 203-721; 211 NW 430

II NECESSITY FOR EXCEPTIONS

Failure to except. Failure to except to an instruction which submits an unsupported issue is fatal to the right of review on appeal.

Lange v Bedell, 203-1194; 212 NW 354
Chase v City, 203-1361; 214 NW 591
First Bank v Tobin, 204-456; 215 NW 767
State v Dunham, 206-354; 220 NW 77
Southhall v Berry, 207-605; 223 NW 480
State v Bamsey, 208-796; 223 NW 873
State v Bourgeois, 210-1129; 229 NW 231
State v Phillips, 212-1332; 236 NW 104
Wood v Branning, 215-59; 244 NW 658

Failure to present defect. The objection that an instruction withdrew from the jury matter which bore on the credibility of a witness is waived if not specifically raised in the trial court in the exceptions to the instructions.

Conner v Henry, 205-95; 215 NW 506

Estoppel to question. A party may not question an instruction which gives him a chance for a verdict to which he is not entitled; and especially when such instruction was not excepted to in the trial court.

Sergeant v Challis, 213-57; 238 NW 442

Instructions unexcepted to as law of case. If there be no exceptions to instructions, the verdict is final if it has support in the evidence. In such case no inquiry can be made as to whether the instructions are right or wrong.

Commer. Credit v Hazel, 214-213; 242 NW 47

Incomplete record—instructions—presumed correct. Where the record on appeal does not contain all the instructions necessary to determine the questions raised, the supreme court must presume their correctness.

Reardon v Hermansen, 223-1207; 275 NW 6

Law of case—guest—evidence—sufficiency. An instruction to the effect that claimant under the "guest statute" in order to recover must prove by a preponderance of the evidence that his decedent was a guest, when unobjected to and not appealed from, remains the law of the case, and evidence that automobile trip, like similar prior trips, with operator as host to friends for purpose of attending a school function, was sufficient to sustain jury finding that passenger was a "guest".

Claussen v Johnson's Estate, 224-990; 278 NW 297

Verdict contrary to evidence — preserving question in lower court—no review if first raised on appeal. In an action to establish a claim against an estate for serum, virus, and veterinary supplies furnished to decedent over a term of eight years, argument on appeal that the verdict denying the claim was contrary to the evidence and should be set aside, cannot be considered when not raised by appropriate procedure in the lower court.

In re Larimer, 225-1067; 283 NW 430

Question first raised on appeal. Questions as to possible errors of the trial court, not properly raised by motion for directed verdict, nor by request for instructions, nor by exceptions to instructions, cannot be considered on appeal.

In re Larimer, 225-1067; 283 NW 430

III SUFFICIENCY OF EXCEPTIONS

Exceptions—sufficiency. Exceptions to instructions must specifically and definitely point out the error complained of, and no others will be considered.

Wilson v Else, 204-857; 216 NW 33
State v Grigsby, 204-1133; 216 NW 678
Duncan v Rhomberg, 212-389; 236 NW 638

Indefinite exceptions. Objections to instructions will be disregarded unless they specify the part of the instruction objected to and the grounds of the objection.

State v Burch, 202-348; 209 NW 474
State v Derry, 202-352; 209 NW 514
Farwark v Railway, 202-1229; 211 NW 875
State v Dillard, 207-831; 221 NW 817

Fatal indefiniteness. Exceptions to instructions on ground that they are incompetent, irrelevant, and immaterial and contrary to law and prejudicial, are not sufficiently specific.

Hackley v Robinson, (NOR); 219 NW 398

Failure to specify grounds. An exception to an instruction must specify the grounds of such exception. This requirement is in no degree complied with by simply referring to the instruction by number and by asserting that "the court erred" in refusing to give it.

Oestereich v Leslie, 212-105; 234 NW 229

Grounds for exception not stated—nonreviewability. No error may be predicated on rejected proposed instructions when the grounds for the exceptions to the court's ruling are not specified.

Thomas v Charter, 224-1278; 278 NW 920

Fatal indefiniteness. An exception to the effect that instructions "are contrary to the law", or "do not clearly state the rules of law applicable to this case" presents no question to either the trial or appellate court.

State v Shearer, 206-397; 220 NW 13
Bodholdt v Townsend, 208-1350; 227 NW 404

Inadequate exceptions. Plaintiff who fails, in his exceptions to a charge as given, to point out the fact that the court has omitted a certain element of his cause of action does not raise such point by a general exception to the refusal to give a requested instruction which, inter alia, does embrace such omission.

Whitmore v Herrick, 205-621; 218 NW 334

Failure to obtain ruling. The filing of exceptions to instructions and a motion for a new trial, after the entry of judgment on the verdict, is rendered wholly abortive by the failure to call the exceptions or the motion to the attention of the court, and to obtain a ruling thereon.

Linn v Kendall, 213-33; 238 NW 547

Naked exception to refusal to give. The mere entry of a naked, unelaborated exception to the failure to give a requested instruction presents no question either to the trial or appellate court, even tho counsel argues certain grounds on appeal.

Humphrey v Muscatine, 217-795; 253 NW 57

Fatal generality. The general assertion that "The court erred in giving instruction No. 2 to the jury" is, in legal effect, no exception whatever, and presents no question to the court.

Iowa Corp. v Credit Co., 217-1243; 253 NW 23

IV TIMELY EXCEPTIONS

Belated exceptions without authorizing order. When no extension of time in which to file exceptions to instructions appears of record, the appellant may not supply such essential record by the simple expedient of alleging in his abstract that his exceptions were filed "within the time fixed by the court."

State v Ivey, 200-649; 203 NW 38

Belated filing. A motion for new trial and objections to instructions will be ignored on appeal when filed after the time fixed by the court.

Lein v Morrell & Co., 207-1271; 224 NW 576

Belated exceptions disregarded. Exceptions to instructions in criminal cases must be made within the time provided by law or they will be disregarded.

State v Kirkpatrick, 220-974; 263 NW 52

Belated motion for new trial. A motion for new trial and exceptions to instructions filed 16 days after verdict, where no extension is secured, are filed too late, and questions raised therein cannot be considered on appeal. In such case when extension of time has been granted, such fact should be shown in abstract.

Roggensack v Ahlstrom, (NOR); 209 NW 429

Nongermane amendment. An amendment to an exception to an instruction will not be considered when not filed within the time fixed by the statute or the court, and when said amendment is not germane to the original exception.

In re Dvorak, 213-250; 236 NW 66

11496 View of premises.

Unauthorized view of premises. It is reversible error for a juror on his own motion to visit the scene of an accident and to make estimates of the ability of witnesses to see the accident as they had testified, and otherwise to make measurements in order to determine how the accident happened.

Skinner v Cron, 206-338; 220 NW 341

Juror visiting accident location—misconduct not shown. It is not misconduct for a juror to stop at a gasoline station near the scene of the accident in litigation, when there is no evidence that he discussed with other jurors what he saw there.

Tharp v Rees, 224-962; 277 NW 758

View of premises—instructions. Instructions relative to the purpose for which the jury had been permitted to view the scene of an accident reviewed, and held neither contradictory nor inconsistent.

Sloan v City, 205-823; 218 NW 301

Exhibiting wounds to jury. During the final arguments in a personal injury case, the court may permit the plaintiff to seat himself alongside the jury in order that the jury may have a close-up view of wounds which, during the taking of testimony have been fully described and exhibited to the jurors while some of them were 20 feet from the witnesses.

Mizner v Lohr, 213-1182; 238 NW 584

View and inspection of object in controversy. It is proper to permit a jury, under proper supervision, to view and inspect an object which is the subject of the action, e. g., a monument.

Gibson v Miller, 215-631; 246 NW 606

View of object by jurors — instructions. *Principle reaffirmed that when jurors are permitted* to view an object which is the subject of the action, they must be instructed that they must base their verdict solely on the evidence received judged in the light of their observation of the object.

Gehlbach v McCann, 216-296; 249 NW 144

11497 Rules as to jury—deliberation —kept together.

Coercion of jury. Requiring the jury in a civil case to continue their deliberations for a period of some 46 hours, including two nights, reveals no abuse of discretion on the part of the court.

West Branch Bank v Farmers Exch., 221-1382; 268 NW 155

Custody of jury—bailiff's witticism not prejudicial. Bailiff's remark that jury might be kept for 30 days before the court would accept a verdict that they had "agreed to disagree" is not prejudicial when the jury themselves treated the remark as a joke.

Tharp v Rees, 224-962; 277 NW 758

Unauthorized communication with jurors. Statements by a bailiff to jurors to the effect that they must remain in session until they had agreed on a verdict, coupled with the refusal by the bailiff either to conduct the jury to the court, or to deliver any message to the court, constitute such misconduct as to require the granting of a new trial, it appearing that said conduct had such controlling and coercive influence on certain jurors as caused them to change their views as to the merits of the case.

State v Terpstra, 206-408; 220 NW 357

Juror advocating his belief—not misconduct. It is neither misconduct nor ground for new trial for a juror to advocate his conclusions

in the jury room, even tho he emphatically and persistently favors one party or the other.

Tharp v Rees, 224-962; 277 NW 758

Jurors substituting own knowledge for evidence—effect. In an action for injuries resulting from a collision on a bridge between a truck and an automobile, where the record discloses that one juror injected into the discussion her own observation of the fast-driving habits of the motorist with whom plaintiff was riding, and where other jurors at the scene of the accident noticed and commented on the fact that most drivers, in rounding the same curve where plaintiff approached the scene of the accident, were across the center of the highway, when coupled with the short time taken to arrive at a verdict in view of the voluminous evidence, held no abuse of discretion in granting a new trial.

Hawkins v Burton, 225-1138; 281 NW 790

Juror's affidavit of conduct while deliberating—effect. Verdicts and trials cannot be destroyed ordinarily by an affidavit of a juror as to what took place during deliberations in the jury room.

Kirchner v Dorsey, 226-283; 284 NW 171

Juror visiting accident location—misconduct not shown. It is not misconduct for a juror to stop at a gasoline station near the scene of the accident in litigation, when there is no evidence that he discussed with other jurors what he saw there.

Tharp v Rees, 224-962; 277 NW 758

Appellant's jury examination inducing insurance discussion—review. Jury room discussion of liability insurance suggested by plaintiff's examination of the jurors is not misconduct of which plaintiff can complain.

Tharp v Rees, 224-962; 277 NW 758

11499 Discharge of juror.

Illness of juror—held nonprejudicial. Evidence held to show that illness of a juror was not prejudicial to defendants.

Kirchner v Dorsey, 226-283; 284 NW 171

11500 Discharge of jury.

Deliberations of jury—coercion of. Requiring the jury in a civil case to continue their deliberations for a period of some 46 hours, including two nights, reveals no abuse of discretion on the part of the court.

West Branch Bank v Farmers Exch., 221-1382; 268 NW 155

11503 What jury may take with them.

Use of unauthorized evidence. Prejudicial error results from permitting a jury to take with them to their jury room and to consider the entire sheet of a letter when only the signature thereon was introduced in evidence, and when the unintroduced matter is materially prejudicial to complainant.

In re Merrill, 202-837; 211 NW 361

Improper reception — effect. The improper reception in evidence of a written notice to an accused to produce a written instrument or to submit to secondary evidence of its contents, and the possession of such notice by the jury, do not necessarily work prejudicial error.

State v Gardiner, 205-30; 215 NW 758

Failure to send exhibit to jury room. The fact that a duly introduced exhibit in a criminal case was not given to the jury when it first retired, but was sent to the jury some hours before the verdict was returned, reveals no prejudicial error; especially when the contents of the exhibit were fully revealed to the jury by both parties during the arguments.

State v Twine, 211-450; 233 NW 476

Taking plat to jury room. The court may permit a plat of the scene of an accident to be taken by the jury upon its retirement when the plat contains nothing that could mislead or prejudice the jury.

Waldman v Motor Co., 214-1139; 243 NW 555

11505 Further testimony to correct mistake.

Order of proof. See under §11485

Reopening cause. The court may at the close of plaintiff's testimony, and in the exercise of a fair discretion, reopen the case and permit a witness to be recalled for further examination.

State v Andrioli, 216-451; 249 NW 379

Reopening case. The trial court has a large discretion in reopening a cause for the reception of additional testimony.

Fair v Ida Co., 204-1046; 216 NW 952
Seeger v Manifold, 210-683; 231 NW 479
Lee v Ins. Assn., 214-932; 241 NW 403
State v Andrioli, 216-451; 249 NW 379
Shultz v Shultz, 224-205; 275 NW 562

Discretion in reopening—new trial for abuse. Granting or refusing a motion to reopen a case to admit further evidence is within the sound discretion of the court, but if a refusal to reopen is an abuse of discretion, a new trial should be granted on appeal.

In re Canterbury, 224-1080; 278 NW 210

Refusal to open for omitted testimony. The refusal of the court to open a cause, after submission, in order to receive omitted testimony will not be disturbed except on a showing that the court abused its discretion.

In re Fetterman, 207-252; 222 NW 872

Unjustifiable refusal to reopen case. A cause should be reopened for the reception of additional testimony which the court has throughout the trial held unnecessary, but on account

of the absence of which the court finally renders judgment against the party who was under a duty to produce such testimony.

Simpson College v Executors, 203-447; 212 NW 684

Refusal to reopen—when error. Refusal to open up a cause in order that a party to the action may be cross examined as to highly material documentary evidence in order to lay the foundation for impeachment, is reversible error when the party asking for such reopening has been persistently diligent to discover the whereabouts of such documents, and was successful only during the evening following the resting by both parties and prior to the convening of court on the next day, at which latter time the application to reopen the case was made.

Schipfer v Stone, 206-328; 218 NW 568

Wills—construction — identifying legatee — reopening for widow's testimony. In an action to construe a will to determine which of two similarly named churches the testator intended to designate as a beneficiary, the evidence being closed when discovery is made that testator's widow, though present in court but not testifying, had knowledge as to which church was intended to be designated, the trial court abuses its discretion by refusing to reopen to admit her testimony.

In re Canterbury, 224-1080; 278 NW 210

Final submission to court. When defendant's motion for a directed verdict in his favor on plaintiff's evidence is argued and submitted to the court, and the court orally and by appropriate entry on the docket sustains said motion, it is too late for plaintiff to assert that there has been no final submission of the action to the court. It necessarily follows, under such circumstances, that plaintiff has lost his right to voluntarily dismiss his action without prejudice.

Marion v Ins. Assn., 205-1300; 217 NW 803

Setting aside for retrial on new theory. After a cause has been fully tried on the theory that intervenors are entitled to recover from plaintiff the amount for which their property had been sold on execution by the sheriff, and after the resulting judgment has been entered and paid, and the proceeds accepted by intervenors, it is quite too late to reopen the case and try it anew on the theory that intervenors are entitled to recover the reasonable value of the property so sold.

Peoples Bank v McCarthy, 211-40; 231 NW 482

11506 Additional instructions.

Verdict-urging instructions. See under §11493 (I)

11508 Verdict—how signed and rendered.

ANALYSIS

Correction of sealed verdict. See under §11510, Vol. I

Directed verdicts, criminal cases. See under §13915

Directing verdict as new trial ground. See under §11550

Motor vehicle cases. See under §5037.09

I SUFFICIENCY IN GENERAL

Noninconsistent verdict. A verdict against two of three defendants may not be said to be inconsistent with itself when the record reveals the fact that the testimony against the exonerated defendant was less persuasive than that against the other two defendants.

Pullan v Struthers, 201-709; 207 NW 794

Construction in light of record. The certain and unmistakable data furnished by the trial record may quite clearly point out the intention of a jury in returning a somewhat indefinite verdict.

Reinertson v Struthers, 201-1186; 207 NW 247

Inferences drawn from record. The trier of facts is entitled to draw such legitimate inferences as the record will warrant.

In re Green, 227-702; 288 NW 881

Conflicting evidence—conclusiveness of verdict. A jury verdict on competent but conflicting testimony, relative to the consideration, if any, for a chattel mortgage, is conclusive on the appellate court.

McDonald v Webb, 222-1402; 271 NW 521

Verdict sustainable for either party—finality on appeal. Where, under proper instructions and supporting testimony, the jury may properly find for either party, the supreme court will not disturb the verdict.

Reardon v Hermansen, 223-1207; 275 NW 6; 3 NCCA(NS) 184

Jury verdict—reasonable minds differing—finality. If testimony and a fact question exist upon which reasonable minds may fairly differ, the supreme court will not review the result reached by the jury.

Finley v Lowden, 224-999; 277 NW 487

Responsive to issues—sufficiency. A verdict, in an action on promissory notes, for "$5,000 and interest dollars" is all-sufficient to authorize the court to compute the interest, add it to the principal, and enter judgment accordingly.

Grimes Bk. v McHarg, 213-969; 236 NW 418; 36 NCCA 205

Nonexcessive damages—death of 54-year-old WPA carpenter. Verdict for $21,886.50 to a 54-year-old WPA carpenter who was crushed beneath a descending elevator, and who lived thereafter for 14 months in excruciating pain and suffering, which verdict was reduced by the trial court to $15,000, held not excessive nor the result of passion and prejudice.

Andrews v Y. M. C. A., 226-374; 284 NW 186

Speculative verdict for damages. A verdict for damages consequent on the death from congestion of the lungs of stock during shipment will not be permitted to stand when, on the record, the cause of said congestion can be equally attributed either (1) to the act of the shipper in unduly exerting the hogs prior to the complete loading of the stock, or (2) to the rough handling of the train while the stock was being transported.

Wiederin v Railway, 212-1103; 237 NW 344

Causal connection with injury—conjecture and speculation. There must be causal connection between an injury caused by falling from a fire escape because of an alleged defect in the top step. When the allegation is not substantiated by the evidence, any more than by the plaintiff's testimony, stating that "something moved", that he "caught his heel on the step", it would be mere conjecture and speculation to base a verdict thereon, and verdicts must rest on something more substantial.

Gowing v Field Co., 225-729; 281 NW 281

Railway viaduct—injuries—burden of proof—causal negligence. Plaintiff has the burden to show wherein a railway was negligent in maintaining a viaduct crossing, since jury's verdict may not rest upon surmise, speculation, or guess, and this burden is not met when plaintiff fails to show that injuries received from being thrown against top of car while going over viaduct were caused by a condition of the viaduct resulting from negligence.

Harris v Railway, 224-1319; 278 NW 338

Cause of death—undue burden to establish. Expert medical opinions that an insured died from an intra-cranial, fatty embolus resulting from an external, violent and accidentally suffered injury, met by the same class of expert opinions positively to the contrary, may generate a jury question, determinable by the jury, like any other disputed question of fact, on the preponderance of testimony, the facts on which such conflicting, expert opinions are based being of such nature that the jurors could not therefrom deduce a proper opinion. So held where the court erroneously instructed that "No mere weight of evidence is sufficient to establish the cause of assured's death unless it excludes every other reasonable hypothesis as to the cause of death"—in effect requiring the theory of death by means of an embolus to be established beyond a reasonable doubt.

Aldine Trust v Acc. Assn., 222-20; 268 NW 507

Action for causing death—evidence—sufficiency. Evidence as to the cause of death reviewed and held ample to support the verdict.

Groves v Webster City, 222-849; 270 NW 329

Double recovery. The submission to the jury of duplicate counts—counts praying recovery on the same elements of damages—and permitting recovery on both such counts is clearly erroneous.

Gehlbach v McCann, 216-296; 249 NW 144

Unallowable verdicts. In a joint action for damages against the driver and owner of an automobile, based, as to the driver, on his negligence, and as to the owner, on his consent to the driving (as to which consent the proof is substantially conclusive), there cannot legally be separate verdicts, one holding the driver liable, and one holding the owner nonliable.

Hoover v Haggard, 219-1232; 260 NW 540

Verdict sustaining part of gift as establishing mental competency. In a replevin action by executor to recover property held under claim of gift inter vivos from decedent, a jury verdict validating part of the gift made on a later date, from which part of the verdict no appeal is taken, also establishes the donor's mental competency to consummate that part of the gift made on an earlier date.

Wilson v Findley, 223-1281; 275 NW 47

II QUOTIENT VERDICTS

Nonquotient verdict. The executed agreement of the jurors to each vote the amount of damages to be allowed, and to divide the sum total by twelve, with no agreement to be bound by the result, followed by further fair and open discussion, and the return of a verdict accordingly, does not constitute a quotient verdict.

Peak v Rhyno, 200-864; 205 NW 515

Conflicting evidence. A finding by the trial court on conflicting evidence that a verdict was a quotient verdict, and the entry of an

II QUOTIENT VERDICTS—concluded

order for a new trial, will not be disturbed on appeal.

Thornton v Boggs, 213-849; 239 NW 514

Insufficient evidence. The fact that a verdict is less than the amount authorized under instruction is not in itself evidence that it is a quotient or compromise verdict, or that it is result of passion or prejudice.

Jackson v Kubias, (NOR); 211 NW 245

III CORRECTION BY COURT

Unallowable reduction by court. The court has no power to reduce the verdict of a jury in an action for unliquidated damages, and to render judgment for a less amount, unless the party in whose favor the verdict was rendered consents to such reduction.

Crawford v Emerson Co., 222-378; 269 NW 334

Reckless operation of automobile—unsustainable verdict. A verdict finding, in effect, that defendant (with whom a guest was riding) was operating his automobile in a reckless manner cannot be sustained when the testimony tending to establish recklessness, when tested in the light of the admitted physical facts and verities revealed in the record, cannot be true; and this is true notwithstanding plaintiff's conceded right to the benefit of the most-favorable-view-of-evidence rule.

Bowermaster v Universal Co., 221-831; 266 NW 503

IV CORRECTION BY JURY

No annotations in this volume

V IMPEACHMENT OF VERDICT

Evidentiary support required. Verdicts will not be allowed to stand unless they have support in the evidence.

Reynolds v Oil Co., 227-163; 287 NW 823

Unallowable impeachment. A juror may not impeach his verdict by a showing that he was influenced by a calculation supported by no evidence in the case.

Conway v Alexander, 200-705; 205 NW 351

Unallowable impeachment. In a personal injury action, a verdict may not be impeached by the affidavits of jurors to the effect that a certain allowance was made for an element of damages as to which there was no evidence.

McQuillen v Meyers, 213-1366; 241 NW 442

Misconduct of jurors—facts admissible for determination. On a motion for new trial, jurors may not impeach their own verdict by evidence of jury-room discussion which influenced but inheres in their verdict. However, misconduct prejudicially affecting the result may be shown, and the court may hear all the facts to determine if misconduct exists.

Keller v Dodds, 224-935; 277 NW 467

Trucker's statutory insurance requirement—jurors' discussion not misconduct. Jurors' discussion of statutory requirement that certain truckers carry liability insurance—being a discussion of law that all were presumed to know—is neither misconduct nor justification for a new trial.

Keller v Dodds, 224-935; 277 NW 467

VI MOTION FOR DIRECTED VERDICT

Refusal to direct verdict as new trial ground. See under §11550 (I)

(a) MOTION IN GENERAL

Discussion. See 9 ILB 169—Direction of verdicts; 9 ILB 131—Statutes prohibiting directed verdicts

Motion sustained generally—showing necessary on appeal. On appeal from trial court's action in sustaining generally a motion for directed verdict predicated on several grounds, it is incumbent upon appellants to establish that the motion was not good upon any ground thereof before error can be predicated upon the sustaining of such motion.

Slippy Corp. v Grinnell, 226-1293; 286 NW 508

Motion generally sustained—reversal on appeal. The plaintiff is not entitled to a reversal on an appeal from a ruling generally sustaining the defendant's motion for directed verdict containing several grounds unless it is established that the motion was not good on any ground.

St. Peter v Theatre, 227-1391; 291 NW 164

Most favorable view. In reviewing the action of the trial court in overruling the defendant's motion for a directed verdict, the supreme court must consider the evidence, determining, not what the facts were, but what the jury was warranted in finding them to be, viewing the record in the light most favorable to the plaintiff.

Wessman v Sundholm, 228- ; 291 NW 137

Motion for—effect. The overruling of defendant's motion for a directed verdict at the close of plaintiff's evidence, in a cause tried solely to the court, is inconsequential when the final decision of the court is correct.

Pressley v Stone, 214-449; 239 NW 567

Failure to rule on motion. Error, if any, in trial court's failure in replevin action to rule on defendant's motion to direct verdict at close of plaintiff's evidence is not prejudicial where case is tried to court.

Prehn v Kindig, (NOR); 232 NW 812

Unsuccessful motion—failure to renew. When defendant at the close of plaintiff's evidence unsuccessfully moves for a directed verdict, and does not thereafter renew his motion, the state of the evidence at the close of the

entire trial is the criterion for the purpose of assignment of error.

De Bruin v Studer, 206-129; 220 NW 116

Absence of jurors—effect. When the court sustains a motion for a directed verdict, it is quite immaterial that all the jurors were not present.

Nyswander v Gonser, 218-136; 253 NW 829; 36 NCCA 1

Belated motion for directed verdict. An overruled motion to direct the jury to return a verdict for movant, filed long subsequent to the return of verdict by the jury, will be given no review on appeal.

Luther v Investment Co., 222-305; 268 NW 589

Trial by jury—waiver—hostile motions for verdict. Hostile motions for a directed verdict, made by plaintiff and defendant at the close of all the evidence, do not, in and of themselves, constitute a waiver of the jury; otherwise, when such motions are followed by a stipulation of record, by the parties, "that the court may render a decision of said case during term time or vacation".

Bukowski v Security Assn., 221-416; 265 NW 132

Appeal delayed beyond 60 days. An appeal from a directed verdict in favor of defendant cannot be considered by the supreme court where it appears that the appeal from the directed verdict was not perfected within 60 days after the entry of an order overruling a motion for new trial.

Lotz v United Food Markets, 225-1397; 283 NW 99

By court sua sponte. When a judgment rests solely on a question of law, the court may peremptorily enter it, without mandatory direction to the jury to return a formal verdict.

Dubuque Fruit Co. v Emerson, 201-129; 206 NW 672

Direction on questions of law only. Directed verdicts have no place in jury trials unless the record clearly presents controlling questions of law. Record evidence held wholly insufficient to justify a directed verdict against plaintiff on the ground that as a matter of law the contract for damages for assault—on which plaintiff sued—was based in part (1) on an agreement by plaintiff to compound or conceal the commission of a public offense, or (2) on an agreement by plaintiff as an employee to refrain from circulating scandalous information concerning his employer.

In re Cuykendall, 223-526; 273 NW 117

Law of case—directed verdict. An insurer may not have a directed verdict on the ground that the insured had, in his application, incorrectly stated his occupation, (1) when, on a former appeal, the law of the case had been settled to the effect that recovery might be had if the insurer had full knowledge of such occupation notwithstanding such incorrect statement, and (2) when the record presents a jury question on such issue of knowledge.

Murray v Ins. Co., 204-1108; 216 NW 702

Evidence overcome by physical facts and circumstances — effect. While, on defendant's motion for a directed verdict, plaintiff is entitled to have his evidence viewed in the light as favorable to his contention as reasonably possible, and while it is the province of the jury, generally speaking, to weigh the credibility of witnesses, yet, on such motion, the court must determine whether a verdict for plaintiff would be legally sustainable, and in so determining will, if necessary, pass on the question whether plaintiff's evidence is wholly overcome by the undisputed physical facts and circumstances attending the transaction.

Reid v Brooke, 221-808; 266 NW 477

Isolated testimony. In ruling on a motion for a directed verdict the court should not look alone to some isolated statement in the testimony of a witness but should treat it as a whole.

Faust v Parker, 204-297; 213 NW 794

Presumption as basis of jury question. The common-law presumption that a death was not a suicide does not necessarily create a jury question, because the presumption may be wholly negatived by the attending facts and circumstances.

Warner v Ins. Co., 219-916; 258 NW 75

Establishing "efficient and procuring cause" —rebutting presumption. In an action by a real estate broker for commission, on the theory that he was the efficient and procuring cause for a sale, his showing that he was authorized to sell and had contacted a buyer who afterwards purchased directly from the owner, raises no jury question but only a rebuttable presumption which defendant successfully rebuts by direct evidence to the contrary.

Donahoe v Denman, 223-1273; 275 NW 154

Witness' conclusion without direct testimony—no jury question. Conclusion of a lay witness, without other direct testimony, that water through percolation or washing caused damage to building is not sufficient probative evidence of the cause of the damage to create a jury question.

Covell v Sioux City, 224-1060; 277 NW 447

Sale contract—time indefinite. A contract for storage and sale of corn, "seller's option as to time", being indefinite as to what constitutes a reasonable time, the trial court's exclusion of defendants' proffered evidence on this point and direction of a verdict for the plaintiff was error.

Andreas v Hempy, 224-561; 276 NW 791

VI MOTION FOR DIRECTED VERDICT—continued

(a) MOTION IN GENERAL—continued

Consent of automobile owner—evidence—jury question. Evidence that 15-year-old son, who often drove family car, had permission to drive the car to choir practice and also to a high school pep meeting, raised a jury question as to whether or not the son was driving with his father's consent at the time of the accident which occurred after the pep meeting.

McCann v Downey, 227-1277; 290 NW 690

Sidewalk defect — city's negligence — jury question. Where a woman sustains injuries by falling on pavement at intersection, when her heel caught in crevice, between the sidewalk and curb, as she stepped off sidewalk, a jury question on the liability of the city was created under evidence showing the injuries were sustained in nighttime while plaintiff was slowly and carefully walking in a strange part of city, and when this condition of the street had been created by the city 10 years before and never remedied, altho considered so unsafe by pedestrians in neighborhood that beaten paths were formed on either side in avoiding it.

Thomas v Ft. Madison, 225-822; 281 NW 748

Negligence—res ipsa loquitur. An action for loss of an eye caused by the sudden opening of a taxicab door as plaintiff stopped on the sidewalk to engage the cab, and when plaintiff made no move toward opening the door, the exclusive control of which was lodged in the driver inside the cab, presents a case to which the doctrine of res ipsa loquitur applies. In such case defendant's motion for a verdict is properly overruled.

Peterson v De Luxe Co., 225-809; 281 NW 737

Evidence insufficient for jury. Where recovery is sought because a minute particle of metal, apparently chipped off of operator's hammer, flew into plaintiff's eye while his truck tire was being repaired by filling station operator, and where there was no showing that tools and methods used by the operator were not those ordinarily used, motion for directed verdict should have been sustained.

Reynolds v Oil Co., 227-163; 287 NW 823

Employee injured by falling derrick—evidence. Evidence that employee engaged in tearing down silo was injured when derrick fell on him did not warrant submission of case to jury on issues of employer's negligence, negligence of fellow servant, and assumption of risk, where the employee was acting on the request of fellow servant or limited vice-principal in charge of the work, where steel pins which gave way were of harder steel than that blacksmiths ordinarily use and were of a type successfully used on derrick in the past, but were not scientifically tested for tensile strength or secured from a manufacturer.

Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

Concurrent negligence — effect. If the jury might properly find that the concurrent negligence of defendant and of a third party caused the injury or death of a nonnegligent person, the court cannot properly direct a verdict for defendant on the theory that the negligence of said third party was an intervening negligence which wholly supplanted and superseded the negligence of the said defendant. So held where the concurring negligence was (1) that of defendant in operating its train over a crossing at an unlawful rate of speed, and (2) that of the operator of an automobile in driving upon said crossing.

Wright v Railway, 222-583; 268 NW 915

Negligence of different agencies—proximate cause — jury question. Where the evidence demonstrates that an injury resulted from the negligence of two agencies, the question of proximate cause is peculiarly one for the jury.

Schwind v Gibson, 220-377; 260 NW 853

Payment of rent—sufficiency of evidence. Direction of verdict in action to recover on rent note from tenant was erroneous when there was sufficient evidence of payment by tenant in turning over proceeds of crop to warrant submission of the case to jury.

McCann v McCann, (NOR); 226 NW 922

Claims against deceased. On the question whether a verdict should be directed in favor of a claimant, the record may present such circumstances that some consideration should be given to the fact that the claim is against the estate of a deceased.

In re Talbott, 204-363; 213 NW 779

Fraud in sale of stock—damages as affected by 1929 depression. In an action for damages on account of false representations inducing the purchase of stock and under an instruction giving the correct measure of damages as the difference between the actual value of the stock and its value if it had been as represented, both values as of the time of purchase which was prior to the depression of 1929, it follows that the reduction of the stock's value because of the depression did not cause plaintiff's damage, and defendant's motion for a directed verdict thereon was properly denied.

Smith v Utilities Co., 224-151; 275 NW 158

Manslaughter—elements of self-defense. In a prosecution for murder under a plea of self-defense, the accused must (1) not be the aggressor, (2) retreat as far as possible, (3) have an actual honest belief in imminent danger and (4) have reasonable grounds for such belief, in view of which a motion for a directed verdict was properly denied under evidence

enabling jury to reject a self-defense plea in arriving at a verdict of manslaughter.

State v Johnson, 223-962; 274 NW 41

Willful destruction of property. Evidence tending to show that a garnishee had, subsequent to garnishment, willfully destroyed the property in his possession belonging to the defendant in garnishment, generates a jury question as to the liability of the garnishee.

Schooley v Efnor, 202-141; 209 NW 408

(b) DEFECTIVE PLEADING

Denial of motion based on stricken pleadings—nonreviewable. Denying a directed verdict based on a general standing offer of settlement, made by posted signs to all patrons of a beauty shop in the event of injury, pleaded in answer but stricken on motion by an order not alleged as error, cannot be reviewed on appeal.

Pearson v Butts, 224-376; 276 NW 65; 2 NCCA(NS) 613

(c) FAILURE OF PROOF OF ESSENTIAL ELEMENT

Directed verdicts—constitutionality. Principle reaffirmed that the constitutional right of trial by jury is not infringed by the action of the court in directing a verdict for defendant whenever the evidence is such that the court would not hesitate to set aside a verdict against defendant.

Cashman v Railway, 217-469; 250 NW 111

Improbability of testimony. A jury question may exist even tho material portions of plaintiff's testimony strongly suggest improbability.

Ransom v McDermott, 215-594; 246 NW 266

Rescission of contract—plaintiff's burden. The failure of a party seeking to rescind a contract to plead or prove a restoration of the fruits of the contract received by him may very properly be presented by a motion for a directed verdict.

Continental Bank v Greene, 200-568; 203 NW 9

Guardianship of insane—nonjury question. In an action for the appointment of a guardian of the property of an alleged mental incompetent, the court may direct a verdict for the defendant if the evidence fails to show that the mental incompetency of defendant deprives him of the ability to care for his property, and to understand the nature and effect of what he does.

Richardson v Richardson, 217-127; 250 NW 897

Dismissal of prima facie case. The court, in trying an action, in lieu of a jury, may be fully justified in dismissing it on motion because of the inconclusive and unsatisfactory character of the evidence, even tho the plaintiff has, technically, made a prima facie case for recovery. So held in an action for money had and received.

Griffith v Arnold, 204-1216; 216 NW 728

Confession and avoidance—assault and battery. In an action for injuries inflicted upon the plaintiff when he was forcibly ejected from the home of the defendant, where the defendant's answer assumed the burden of proof by admitting the assault and battery, but by way of justification and confession and avoidance asserted that the plaintiff had been ejected after refusing to leave, the evidence was not sufficient to compel the court to direct a verdict for the defendant on the issue of whether the defendant had used more force than was necessary to accomplish the ejection.

Wessman v Sundholm, 228- ; 291 NW 137

Burden of proof—necessity to meet. Proof that a preparation was fed to animals and that immediately, or shortly thereafter, some of them died, and the others became permanently stunted in growth, does not justify a presumption that the said preparation caused the deaths or stunting.

Hildebrand v Oil Co., 205-946; 219 NW 40

Justifiable dismissal of counterclaim. An unsupported counterclaim for damages consequent on the negligent handling of a claim by an attorney who sued for fees due him, is, of course, properly dismissed by the court.

Hunt, etc. v Moore, 213-1323; 239 NW 112

Fraud—insufficiency of evidence. In an action against the incorporators of an investment company for damages for fraud in the sale of bonds, a directed verdict in favor of the incorporators was proper when the evidence, other than the outlawed printed representations on the back of the bonds, showed the fraud, if any, was committed by a bank trustee of the securities.

McGrath v Dougherty, 224-216; 275 NW 466

Fraud — evidence — insufficiency — directed verdict warranted. In a damage action arising out of fraudulent procurement of plaintiff's signature to note and conditional sale contract, where plaintiff predicates error on granting defendant a directed verdict on the ground that defendant's fraud was not proved —the evidence showing that plaintiff could read and write English language but failed to read instruments while having an opportunity to do so—and where plaintiff's reasons for not reading instruments were (1) he did not have his glasses, and (2) he thought he was signing an ordinary order for automobile, held, plaintiff's conduct precludes him from asserting fraud, and the ruling on the motion was warranted.

Griffiths v Brooks, 227-966; 289 NW 715

Malpractice—root of tooth in lung. In a malpractice action against dentist, the court erroneously directed a verdict for defendant on

VI MOTION FOR DIRECTED VERDICT—continued

(c) FAILURE OF PROOF OF ESSENTIAL ELEMENT—continued

the ground that there was no showing that the presence of the root of a tooth in plaintiff's right lung was the proximate cause of the injury to plaintiff, under evidence that plaintiff was given a general anesthetic, was completely unconscious at time six teeth were extracted, and that plaintiff lost 60 pounds between the day of the extractions and the day he expectorated, after a violent spasm of coughing, a quantity of sputum, mucus and blood containing the root of a tooth.

Whetstine v Moravec, 228- ; 291 NW 425

Plaintiff's burden—proving negligence allegations. A plaintiff's failure to carry the burden of proving at least some of his allegations of negligence properly results in a directed verdict against him.

King v Gold, 224-890; 276 NW 774

Negligence wholly unproved. In an action for personal injuries, where plaintiff fails to prove any of the grounds of negligence alleged in his petition, defendant's motion for directed verdict should be granted, but this rule is confined to cases where plaintiff fails to introduce evidence tending to show defendant's negligence; however, where there is evidence in the record sufficient to make conflict on the question, an entirely different rule applies.

Hawkins v Burton, 225-1138; 281 NW 790

Malicious prosecution — malice — want of probable cause. In action for malicious prosecution malice may be inferred from want of probable cause for the prosecution.

Bair v Schultz, 227-193; 288 NW 119

Defense—directing verdict. In action for malicious prosecution, whether the defendant acted on advice of the county attorney is generally a question for the jury, and assuming he so acted, if he failed to make a full disclosure of the facts, he did not so conclusively establish this defense as to sustain a directed verdict.

Bair v Schultz, 227-193; 288 NW 119

Foreign corporation—compliance with statutes—burden of proof. A foreign corporation for pecuniary profit, suing on an Iowa contract, has the burden to plead and prove its compliance with the statutes requiring permit to do business herein, without which a directed verdict in its favor is error.

Johnson Co. v Hamilton, 225-551; 281 NW 127

Gratuitously loaned corn shredder—injury in use of—nonliability of owner. Directing a verdict is proper against a plaintiff, a farm machinery mechanic and salesman, seeking recovery for an injury sustained when his hand was caught in a corn shredder which had been gratuitously loaned by defendant to a neighbor on whose farm plaintiff was operating the machine, the evidence showing plaintiff was an adult familiar with such machinery and in full possession of his faculties, and that there was no negligence attributable to defendant.

Davis v Sanderman, 225-1001; 282 NW 717

Public contracts under Simmer law—no general judgment for cost. Simmer law prohibits payment of construction cost of a municipal electric plant from taxation, and precludes rendering a general judgment for such cost, including a judgment for cost of engineering services in preparing plans and specifications for construction of such public utility, when such services were performed under contract, subsequent to the election and passage of the ordinance providing for construction payment from future earnings. Consequently, in an action by the engineers against a city to recover compensation for their services, a directed verdict for the city was proper.

Burns v Iowa City, 225-1241; 282 NW 708

Personal injuries — evidence reviewed—motion sustainable. Under the evidence and record in a law action for personal injuries to an independent contractor, case reversed and remanded with instructions to direct a verdict for defendant.

Gowing v Field Co., 225-729; 281 NW 281

Error which becomes inconsequential. Error in overruling a motion for a directed verdict at the close of plaintiff's evidence when certain all-essential testimony was not then in the record becomes inconsequential when, at the time of renewing the motion at the close of all the evidence, such testimony is in the record.

Newland v McClelland, 217-568; 250 NW 229

Action for compensation—purchaser obtained by real estate agent. Where the defendant had sent circular letters to real estate agents, listing farms for sale and stating the commission to be paid for any farm sold, and the plaintiff obtained a prospective buyer for a certain farm, but the sale was consummated by another real estate agent to whom the commission was paid, the defendant was entitled to a directed verdict in an action to collect the commission.

Santee v Lutheran Society, 226-1109; 285 NW 685

Contract unenforceable — directed verdict proper. In buyer's action on an oral contract for sale of a business college where there was no competent evidence taking case out of statute of frauds, a directed verdict for defendant was proper.

Patterson v Beard, 227-401; 288 NW 414

Insufficiency of evidence. In an action to recover from an oil company for injuries allegedly caused by operator of company's filling station, evidence failed to establish relation of employer and employee. Hence, company's

motion for directed verdict should have been sustained.

Reynolds v Oil Co., 227-163; 287 NW 823

Unproved master and servant relation. In a damage action arising out of a collision between the defendant's truck and a motorcycle upon which plaintiff was riding as a guest, in which action it was alleged that the corporation-defendant's truck was being driven by a person "in the course of his employment for * * * his employer"—the employer denying both this allegation and his consent to use of truck, and when the evidence showed that the corporation employed the truck driver for making deliveries during the week, excluding Sunday, on which day the collision occurred while the truck driver was assisting a personal friend tow a stalled car, held, after plaintiff alleged liability under the master and servant theory rather than under the statute making the owner of the motor vehicle liable, a directed verdict for the corporation was proper when plaintiff's evidence failed to support his theory.

Alcock v Kearney, 227-650; 288 NW 785

Directed verdict for insurer. In an action on a fraternal life insurance policy, when evidence did not show complete payment of premiums, and there was no waiver of terms of the policy providing for lapse for nonpayment of premiums, nor reinstatement after lapse of the policy, a motion for a directed verdict for the insurer should have been sustained.

Craddock v Life Assn., 226-744; 285 NW 169

Insufficiency for directed verdict. In a law action by a beneficiary to recover for the death of the insured on a policy containing additional benefits on account of accidental death, to which defendant insurer pleaded an affirmative defense of suicide and at the close of testimony moved for a directed verdict in favor of plaintiff beneficiary for amount of premiums paid, such motion was properly overruled where the question decided was that the results of insured's own actions, as reconstructed from the circumstances and surroundings, may have been intentional or may have been accidental, the evidence not being of such weight as to make it appear conclusively on the whole record that insured died by suicide.

Waddell v Ins. Co., 227-604; 288 NW 643

(d) UNDISPUTED TESTIMONY

Direction of verdict—positive testimony. A jury question is presented on the issue whether an oral contract was entered into when the record reveals: (1) positive testimony that it was entered into; (2) no direct testimony that it was not entered into; but (3) collateral circumstances justifying the inference that it was not entered into. Especially is this true when from the very nature of the transaction no direct contradictory testimony is available to the party who denies the contract.

Schulte v Ideal Co., 203-676; 213 NW 431

Nonliability per se. Unquestioned evidence that an automobile was loaned by the owner to a party for a specific purpose, and that said party wrongfully used said car for a specifically different purpose, and that the injury in question occurred in the operation of the car while it was being so wrongfully used, establishes the nonliability of the owner as a matter of law.

Heavilin v Wendell, 214-844; 241 NW 654; 83 ALR 872

Unimpeached and uncontradicted testimony. The positive and wholly uncontradicted testimony of an unimpeached and disinterested witness that he saw the purported maker of a promissory note sign it, plus the unqualified opinion of a competent and unimpeached witness to the effect that the signature to the note was genuine, justifies a directed verdict when the genuineness of the signature is the sole issue.

In re Work, 212-31; 233 NW 28

When necessarily granted. Plaintiff is necessarily entitled to verdict on motion when his claim is established by uncontradicted testimony.

Kern v Keifer, 204-490; 215 NW 607
Hunt, etc. v Moore, 213-1323; 239 NW 112

Assault and battery—directing jury to award damages to plaintiff. Undisputed evidence held to establish that plaintiff and defendant mutually consented to engage in a fight, and that defendant unlawfully committed an assault and battery on plaintiff, warranting an instruction to the jury to return a verdict for plaintiff in some amount.

Schwaller v McFarland, 228- ; 291 NW 852

Defensive plea of forfeited policy. A defendant insurance company is entitled to a directed verdict on its defensive plea that the policy sued on had, because of the nonpayment of premiums, etc., become forfeited prior to the death of the insured, when, at the close of all testimony, the record reveals clear and convincing proof of such forfeiture by competent and satisfactory testimony which is wholly uncontradicted and unimpeached, directly or indirectly, by any fact, circumstance, or condition. And this is true tho it be assumed that defendant has the burden to establish his said plea.

Baker v Life Ins. Co., 222-184; 268 NW 556

Mental competency and elements of gift inter vivos—when jury question. In a replevin action by executor against decedent's sister to recover property held under claim of gift inter vivos from decedent, where clear, cogent, definite, and convincing evidence conclusively established mental competency and all the essential elements of a completed gift inter vivos appear without conflict, no jury question is presented.

Wilson v Findley, 223-1281; 275 NW 47

VI MOTION FOR DIRECTED VERDICT—continued

(e) "SCINTILLA OF EVIDENCE" RULE

Directing verdict—amount of evidence—rule. Court in directing a verdict is guided by not whether there is literally no evidence, but whether there is any evidence which ought reasonably to satisfy the jury that the fact is established.

Wilson v Findley, 223-1281; 275 NW 47

Scintilla of evidence rule. In this state a mere scintilla of evidence will not raise a jury question and the trial court will be upheld in directing a verdict where, if the case were submitted and a verdict returned against the moving party, it would be the trial court's duty to set it aside.

Donahoe v Denman, 223-1273; 275 NW 154

Physical facts—exception to most favorable evidence rule. On appeal from an order overruling defendant's motion for directed verdict, the supreme court need not follow the most favorable evidence rule, as urged by plaintiff, to the exclusion of the physical facts and other uncontradicted matters which plaintiff not only conceded, but affirmatively and intentionally established.

Scott v Hansen, 228- ; 289 NW 710

(f) CONFLICTING TESTIMONY

Conflicting evidence. The fact that the testimony of a plaintiff in support of his cause of action is met by positive testimony to the contrary by the defendant, both witnesses being of equal credibility, does not, of itself, show that plaintiff has failed to establish his case by a preponderance of the evidence.

Reichenbach v Bank, 205-1009; 218 NW 903

Conflicting evidence. The court, manifestly, has no right to direct a verdict on an issue which is, under the evidence, a question for the jury.

Oestereich v Leslie, 212-105; 234 NW 229
Central Shoe v Kraft, 213-445; 239 NW 238
Donahoe v Gagen, 217-88; 250 NW 892

War of expert testimony. Whether a death resulted from an accident "independent of all other causes" is necessarily a jury question under a war of conflicting and contradictory expert testimony.

Martin v Life Co., 216-1022; 250 NW 220

Unjustifiable direction. A party may not have a directed verdict in his favor on the assumption that his testimony is truthful and that all testimony to the contrary is untruthful.

Olson v Shafer, 207-1001; 221 NW 949

Directed verdicts—function of court. It is not the function of the court to determine which of a series of irreconcilable theories of experts, as to the death of a person, is correct. All the court can do or is permitted to do is (1) to consider the war of testimony in the permissible light most favorable to the party on whom rests the burden of proof, and (2) to determine whether a verdict in favor of such party would be adequately supported by the testimony.

Martin v Life Co., 216-1022; 250 NW 220

Holdership in due course — jury question. The court has no right to say that the holder of a negotiable note is a holder in due course and to direct a verdict accordingly when conflicting inferences may be drawn from the facts, whether viewed individually or collectively.

Grimes Bank v McHarg, 204-322; 213 NW 798

Clear evidentiary conflict. Where a clear conflict of evidence exists as to a defendant motorist's negligence and as to plaintiff's contributory negligence, so that the jury could have found for either, the court cannot direct a verdict for either party.

Thomas v Charter, 224-1278; 278 NW 920

Positive vs. negative evidence. Positive evidence of the existence of lights in full operation on a parked automobile is in no degree detracted from by evidence of a witness that he did not see any lights at a material time when his view was obstructed by an intervening object.

Harvey v Knowles Co., 215-35; 244 NW 660

Fraudulent representations. Competent evidence of fraud in the execution of a lease and promissory notes, though not free from inconsistencies, and contradicted in part, generates a jury question.

Ottumwa Bank v Starns, 202-412; 210 NW 455

Gifts inter vivos—unallowable directed verdict. An alleged donee of bonds may not, as defendant in replevin proceedings, have a verdict directed in her favor, (1) on the strength of her claimed exclusive possession, or (2) on the strength of lack of evidence of ownership in the alleged donor, when the jury might properly find that the possession of the alleged donee was not exclusive, and when the alleged donor was manifestly the owner of the bonds if the jury found there had been no gift.

Malcor v Johnson, 223-644; 273 NW 145

Loss on fidelity bond—recovery by surety. In action against a person covered by a fidelity bond, to indemnify plaintiff, as surety, for a loss sustained because it executed the bond, a direct evidentiary conflict precludes a directed verdict for plaintiff.

Fidelity Dep. Co. v Ryan, 225-1260; 282 NW 721

Oral contract of sale—disputed facts—jury question. Disputed evidence in buyer's action against seller over oral contract to deliver corn makes a jury question requiring a motion for directed verdict to be overruled.

Willers v Flanley Co., 224-409; 275 NW 474

(g) MOTION TO DIRECT AS ADMISSION

Most-favorable-view-of-evidence rule. On motion to direct verdict, evidence must be viewed in its strongest reasonable aspect in favor of adverse party.

Robertson v Carlgren, 211-963; 234 NW 824; 35 NCCA 555
Blecher v Schmidt, 211-1063; 235 NW 34
Harvey v Knowles, 215-35; 244 NW 660
Lynch v Railway, 215-1119; 245 NW 219
White v Center, 218-1027; 254 NW 90
Schwind v Gibson, 220-377; 260 NW 853
McWilliams v Beck, 220-906; 262 NW 781
Heintz v Packing Co., 222-517; 268 NW 607
Mueller v Auto Assn., 223-888; 274 NW 106
Russell v Leschensky, 224-334; 276 NW 608
Willers v Flanley Co., 224-409; 275 NW 474
Johnston v Johnson, 225-77; 279 NW 139; 118 ALR 233
Youngman v Sloan, 225-558; 281 NW 130
Gowing v Field Co., 225-729; 281 NW 281
Hill v Rolfsema, 226-486; 284 NW 376
Crabb v Shanks, 226-589; 284 NW 446
Gipp v Lynch, 226-1020; 285 NW 659
Reynolds v Oil Co., 227-163; 287 NW 823
O'Neill v Keeling, 227-754; 288 NW 887
McCann v Downey, 227-1277; 290 NW 690
Rehard v Miles, 227-1290; 284 NW 829; 290 NW 702

Most-favorable-view-of-evidence rule. On motion for directed verdict in determining whether plaintiff was guilty of contributory negligence as a matter of law, the evidence must be considered in the light most favorable to him.

Trailer v Schelm, 227-780; 288 NW 865

Most-favorable-view-of-evidence rule — no showing of negligence. While, on a motion for directed verdict, plaintiff is entitled to the most favorable view of the evidence, yet, if the evidence and physical facts show that defendant is not guilty of any negligence which is the proximate cause of, or contributed to, plaintiff's injury, then the motion should be sustained.

McDaniel v Stitsworth, 224-289; 275 NW 572

Crossing railroad in front of oncoming train —contributory negligence. It is error to overrule a motion for a directed verdict when, after considering all the evidence in the light most favorable to the plaintiff, there is no doubt but what he drove in front of a train with the view entirely unobstructed and with the train plainly to be seen had he looked, or if he looked, he did so negligently.

Russell v Scandrett, 225-1129; 281 NW 782

(h) GENERAL RULES IN RE DIRECTION OF VERDICTS

Question first raised on appeal. Questions as to possible errors of the trial court, not properly raised by motion for directed verdict, nor by request for instructions, nor by exceptions to instructions, cannot be considered on appeal.

In re Larimer, 225-1067; 283 NW 430

Court indicating directed verdict—dismissal motion properly denied. A motion to dismiss, made after court indicated an intention to sustain defendant's motion for directed verdict, held properly denied.

Yarn v Railway, 31 F 2d, 717

Submission to court. Parties will not be permitted to deny that an action was fully submitted to the court (1) when, at the close of all the evidence, motions were made by both parties for a directed verdict; (2) when the jury was excused, but not discharged; and (3) when the court, without objection, took the motions under advisement, and at a later term, without objection, sustained one of the motions and entered judgment accordingly.

Hart v Wood, 202-58; 209 NW 430

Multifarious motion. The sustaining, generally, of a multifarious motion for a directed verdict requires the appellate court to determine whether any one of the grounds is sustainable.

Bell v Brown, 214-370; 239 NW 785

Sustainable and unsustainable grounds. Principle reaffirmed that the sustaining of a motion to direct a verdict must be upheld if one of the grounds is legally good tho other grounds may be legally unsustainable.

Phillips v Briggs, 215-461; 245 NW 720

Direction sustained on any good ground. Trial court's direction of a verdict must be sustained if any of the grounds of the motion are good.

Dodds v West Liberty, 225-506; 281 NW 476

Directing verdict generally on several grounds—appellant's burden to reverse. Before the supreme court can reverse the trial court's ruling in sustaining generally a motion for directed verdict, which contained several grounds, appellant must show that no one of such grounds was sufficient to support such ruling.

Lotz v United Markets, 225-1397; 283 NW 99

Directing verdict—motion generally sustained—reversal on appeal. The plaintiff is not entitled to a reversal on an appeal from a ruling generally sustaining the defendant's motion for directed verdict containing several grounds unless it is established that the motion was not good on any ground.

St. Peter v Theatre, 227-1391; 291 NW 164

VI MOTION FOR DIRECTED VERDICT—continued

(h) GENERAL RULES IN RE DIRECTION OF VERDICTS—continued

Mental competency and elements of gift—when jury question. In a replevin action by executor against decedent's sister to recover property held under claim of gift inter vivos from decedent, where clear, cogent, definite, and convincing evidence conclusively established mental competency, and all the essential elements of a completed gift inter vivos appear without conflict, no jury question is presented.

Wilson v Findley, 223-1281; 275 NW 47

Actions on policies—suicide. An insurer is not entitled to a directed verdict on its defensive plea of suicide unless the facts and circumstances preclude every reasonable hypothesis except that of suicide. Evidence held insufficient to overcome presumption of nonsuicide.

Wilkinson v Life Assn., 203-960; 211 NW 238

Death by accident (?) or suicide (?). In an action on a policy of insurance covering death by accident but excluding liability in case of suicide, the court, in view of the legal presumption against suicide, cannot properly direct a verdict on the theory of suicide unless the record is such as to conclusively establish the fact of suicide.

Jovich v Benefit Assn., 221-945; 265 NW 632

Direction improper when fact questions exist. In an action against an automobile insurance company to collect under the collision clause of a policy after transferring the original policy to another automobile on which a conditional sale was outstanding, a directed verdict is properly refused when fact questions exist as to the company's knowledge of the outstanding conditional sale at time of transfer.

Mougin v Ins. Assn., 224-1202; 278 NW 336

Granting after defendant's evidence. If there is sufficient evidence to take a case to a jury at the close of the plaintiff's testimony, a defendant cannot claim at the close of his evidence that there is nothing for the jury to determine, except when the testimony by the party having the burden of proof is in conflict with undisputed facts, or is such that under the circumstances it cannot be true, or shows that the witnesses must have been mistaken.

Ward v Zerzanek, 227-918; 289 NW 443

Conflicting evidence — directed verdict precluded. In an action against a railroad to recover the value of a stallion which died during transportation, conflict in evidence may preclude directing of verdict for the railroad on the ground that human agency causing stallion's death was not shown, irrespective of special finding by jury indicating that stallion died of an inherent propensity or weakness.

Vander Beek v Railway, 226-1363; 286 NW 452

Duty to direct verdict for defendant. The court should exclude the issues from the jury and direct a verdict for defendant whenever the record is such that the court would be compelled to set aside a verdict for plaintiff.

Raible v Bernstein, 209-1083; 229 NW 753

Will—directed verdict—when required. When the real issue is as to testator's mental competency, the court should sustain the will, by a directed verdict, when a contrary jury verdict would be without adequate evidentiary support, or, in other words, when contestant has failed to show that testator was so mentally deficient that he did not comprehend the nature and purpose of the instrument, the extent of his property, the distribution he wanted to make, or those who had claim on his bounty. (Directed verdict held proper.)

In re Fitzgerald, 219-988; 259 NW 455

Evidence—direct and circumstantial—record facts. Circumstantial evidence, supplemented by oral and written confessions of guilt may be such as to have the weight of direct evidence, and the court was right in overruling defendant's motion for directed verdict when, under the record, the established facts and circumstances were not only consistent with defendant's guilt but were inconsistent with any other reasonable hypothesis.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

One conclusion by all reasonable men—court question. Ordinarily the questions of proximate cause and contributory negligence are matters for the jury, and it is only where the facts are such that all reasonable men must draw the same conclusion, that these questions become of law for the court.

Gowing v Field Co., 225-729; 281 NW 281

Reasonable minds differing as to conclusions. If reasonable men may differ as to conclusions drawn from the evidence, the question is one for the jury.

Yale v Hanson, 227-813; 288 NW 905

Contributory negligence per se. Where the facts disclose contributory negligence as a matter of law, the court must direct a verdict against the plaintiff on his own proof.

Denny v Augustine, 223-1202; 275 NW 117

Contributory negligence—when evidence conclusive. Contributory negligence is for the jury, and a directed verdict should be denied except in cases where the facts are clear and undisputed and the cause and effect so apparent to every candid mind that but one conclusion may be fairly drawn.

In re Green, 224-1268; 278 NW 285

Proximate cause of injury—when jury question. Whether certain negligence was the proximate cause of a certain injury is always

a jury question when different minds might reasonably reach different conclusions.

Bell v Brown, 214-370; 239 NW 785.

Finding as to proximate cause conclusive on court. A finding by the jury, on supporting testimony, that the negligence of one of two alleged joint tort-feasors was the sole proximate cause of the injury in question, is necessarily conclusive on the court.

Hanna v Elec. Co., 210-864; 232 NW 421

Railroad crossing — motorist's contributory negligence per se. A motorist, who approaches a railroad crossing on a clear day, over a good road, with no obstructions and no diverting circumstances, and who, had he looked, must have seen but nevertheless is struck and killed by an approaching train which from a point 141 feet from the crossing was visible 2,500 feet down the track, is guilty of contributory negligence as a matter of law, and the defendant railroad is entitled to a directed verdict.

Meier v Railway, 224-295; 275 NW 139

Person thrown from one caterpillar tractor under another. Where plaintiff, standing on the endless track, filling the gas tank of one of defendant's caterpillar tractors used in road construction, was thrown, by a sudden movement of the tractor, in front of another oncoming tractor, an allegation attributing the injury sustained to the negligence of both drivers was not too general nor indefinite as to warrant a directed verdict and an instruction thereon was proper.

O'Meara v Green Const. Co., 225-1365; 282 NW 735

Errors against prevailing party. While a defendant, on an appeal from an order granting plaintiff a new trial, may not ordinarily show that he was sinned against by the adverse and erroneous rulings of the trial court, yet he may assign error on the refusal of the trial court at the close of all the evidence to sustain his motion for a directed verdict, because, if he was legally entitled to a directed verdict, such fact would ordinarily be fatal to plaintiff's motion for a new trial.

Bennett v Ryan, 206-1263; 222 NW 16

Subsequent errors harmless after refusal to direct verdict. Where the court should have directed a verdict for the defendant at the completion of testimony, subsequent errors on rulings or orders were not prejudicial and could not be relied on by the plaintiff as grounds for a new trial, after a verdict was rendered for the defendant.

Paulson v Hanson, 226-858; 285 NW 189

Erroneous denial—jury question revealed. When plaintiff, at the close of his evidence, has not made a jury question for recovery, the erroneous overruling of defendant's motion for a directed verdict will not be deemed reversible error when, at the close of all the evidence, the evidence does reveal such jury question.

Carr v Mahaska Assn., 222-411; 269 NW 494; 107 ALR 1080

Unreasonableness of contract — effect. It would require a very clear showing which would justify the court in holding as a matter of law that a contract was not entered into because some of its terms were unreasonable.

Goben v Paving Co., 214-834; 239 NW 62

Last clear chance—evidence—insufficiency. The doctrine of "last clear chance" is not applicable unless peril of injured party is actually discovered and appreciated in time to prevent his injury by the exercise of ordinary care. So where plaintiff drives his truck at a speed of four or five miles per hour onto a railroad track, and is struck by a train going four or five miles per hour, and it is shown engineer of train felt a jar and, looking out of cab, saw some object in front of locomotive and immediately applied brakes and placed locomotive in reverse, held, evidence insufficient to submit to jury, and a motion for directed verdict was rightfully sustained.

Kinney v Railway, 17 F 2d, 708

Shifting defense after denial of directed verdict. In an action on a note, when the defendant asked for a directed verdict on the grounds of lack of consideration, he was not in a position to complain of the refusal to direct the verdict when he later shifted his defense admitting the signature on the note and setting up affirmative defenses, thereby placing the burden of proof on himself.

Ballard v Ballard, 226-699; 285 NW 165

(I) WAIVER OF ERROR IN OVERRULING MOTION

Giving evidence after denial of directed verdict. Introduction of testimony by defendant after motion for directed verdict is overruled, and failure to renew motion at close of evidence, waive error in denying directed verdict.

Hackley v Robinson, (NOR); 219 NW 398

Motion for—waiver. Error in refusing a directed verdict at the close of part of the testimony is waived by the failure to renew the motion at the close of all the testimony.

Yaus v Egg Co., 204-426; 213 NW 230
Linn v Kendall, 213-33; 238 NW 547
Commercial Co. v Hazel, 214-213; 242 NW 47

Motion for—error waived by nonrenewal at close of evidence. If a defendant's motion for a directed verdict at close of plaintiff's evidence is denied and not renewed at the close of all the evidence, the error, if any, in overruling the motion is deemed waived.

Newton Bank v Strand Co., 224-536; 277 NW 491

Error not waived by requesting instruction. Where a motion for a directed verdict is erroneously overruled, the defeated party does

VI MOTION FOR DIRECTED VERDICT—concluded

(i) WAIVER OF ERROR IN OVERRULING MOTION—concluded

not waive said error by asking instructions which correctly state the law of the case as fixed by the ruling of the court on the motion. (Overruling Martens v Martens, 181-350, and McDermott v Ida County, 186-736)

Heavilin v Wendell, 214-844; 241 NW 654; 83 ALR 872

Motion based on stricken pleading of settlement—nonreview. Since a settlement must be pleaded, the overruling of a motion for directed verdict alleging a settlement of the action is not reviewable when the pleading setting forth the settlement has been ordered stricken and such order stands unchallenged.

Pearson v Butts, 224-376; 276 NW 65

Exception to rule. The rule of law (206 Iowa 1263) that the trial court should not set aside the verdict of the jury and grant a new trial, when such verdict is the verdict which the court erroneously refused to direct at the close of the evidence, is not applicable when the grounds for new trial are predicated solely on the grounds of, (1) misconduct of the jury, and (2) exceptions to the instructions.

Jordan v Schantz, 220-1251; 264 NW 259

11510 Sealed verdict.

Correction of verdict generally. See under §11508 (III, IV), Vol I

By agreement. Permitting the jury to return a sealed verdict and to separate and reassemble when the verdict is opened, is proper when the state and the defendant have agreed in writing to that effect. Nor is it erroneous for the court to read such agreement to the jury.

State v Ferro, 211-910; 232 NW 127

11511 General or special.

General verdict on multiple issues—presumption. The court will not, the rights of third parties being involved, assume that a general verdict, unaided by any special findings, was based on one of several different and permissible grounds.

Eclipse Lbr. v Davis, 201-1283; 207 NW 238

11512 "Special" defined.

Discussion. See 8 ILB 1—Special verdicts

Right to confine jury to special verdict. The court has the right to confine the jury to a special verdict when the answer to a special interrogatory will reveal the ultimate fact in accordance with the pleadings and evidence, and leave nothing for the court to do but to draw the proper conclusion of law and to enter judgment accordingly.

Bobbitt v Van Eaton, 208-404; 226 NW 79

Special finding of fact as special verdict. A special finding by a jury must be of ultimate, not evidentiary, facts which determine some issue of the case, and if the interrogatory presents to the jury all the ultimate facts or issues so that the answer is decisive of the case, it may constitute a special verdict which will be in lieu of a general verdict.

Olinger v Tiefenthaler, 226-847; 285 NW 137

11513 Findings.

ANALYSIS

I POWER OF JURY
II POWER OF COURT
III SPECIAL FINDINGS IN GENERAL
IV TIME OF REQUEST
V SUBMISSION TO COUNSEL
VI FORM OF INTERROGATORIES
VII EVIDENTIARY AND ULTIMATE FACTS AND CONCLUSIONS OF LAW
VIII ANSWERS

I POWER OF JURY

Jury verdict—reasonable minds differing—finality. If testimony and a fact question exist upon which reasonable minds may fairly differ, the supreme court will not review the result reached by the jury.

Finley v Lowden, 224-999; 277 NW 487

Inferences drawn from record. The trier of facts is entitled to draw such legitimate inferences as the record will warrant.

In re Green, 227-702; 288 NW 881

II POWER OF COURT

Inferences drawn from record. The trier of facts is entitled to draw such legitimate inferences as the record will warrant.

In re Green, 227-702; 288 NW 881

III SPECIAL FINDINGS IN GENERAL

Negligence of host—proximate cause. The submission to the jury of interrogatories bearing on the negligence of the driver of a conveyance (in an action by a guest against a third party for damages) is not erroneous when the negligence of the driver was material on, and strictly confined to, the issue of proximate cause.

Schlinkert v Skaalia, 203-672; 213 NW 219

Proximate cause of injury—inconsistent findings by jury. Findings by the jury, in response to special interrogatories, (1) that the negligence of the operator of an automobile was the proximate cause of an accident, and (2) that the recklessness of said operator was the proximate cause of the accident, are fatally inconsistent.

Stanbery v Johnson, 218-160; 254 NW 303

Special interrogatories — whether plaintiff employee. Whether plaintiff was an employee

(or guest) of defendant, when injured in defendant's automobile, held improperly refused submission to the jury.

Porter v Decker, 222-1109; 270 NW 897

Special finding of fact as special verdict. A special finding by a jury must be of ultimate, not evidentiary, facts which determine some issue of the case, and if the interrogatory presents to the jury all the ultimate facts or issues so that the answer is decisive of the case, it may constitute a special verdict which will be in lieu of a general verdict.

Olinger v Tiefenthaler, 226-847; 285 NW 137

IV TIME OF REQUEST

No annotations in this volume

V SUBMISSION TO COUNSEL

Lump sum verdict on several counts—waiver. The defendant may not predicate error on the fact that the jury returned a lump sum as the amount allowed on different counts, when he failed to avail himself of special interrogatories to the jury, and sought to accomplish the same object by requested instructions which embodied certain findings, but failed to submit his substitute for interrogatories to the opposing attorneys before argument.

Ransom v McDermott, 215-594; 246 NW 266

VI FORM OF INTERROGATORIES

Harmless error—submission of dual controlling propositions. In an action for services rendered a deceased, prejudicial error does not result from submitting to the jury the interrogatories (1) whether there was an express contract for payment, and (2) whether there was a mutual expectation between the parties to pay and receive pay for the services, even tho the express contract was established beyond doubt.

In re Willmott, 215-546; 243 NW 634

Improper submission of interrogatories. The submission to the jury, at the request of the defendant, of special interrogatories improper in form and without prior submission to counsel for plaintiff, does not constitute prejudicial error, when the jury was told to answer the interrogatories only in case it found for plaintiff, and when the jury found for defendant.

Baron v Indemnity Co., 218-305; 255 NW 496

VII EVIDENTIARY AND ULTIMATE FACTS AND CONCLUSIONS OF LAW

Submission of ineffectual question to jury—effect. No error results from submitting to the jury a question which calls for a fact already conceded by the parties, and which is answered by the jury in accordance with said concession.

Foy v Ins. Co., 220-628; 263 NW 14

Inferences drawn from record. The trier of facts is entitled to draw such legitimate inferences as the record will warrant.

In re Green, 227-702; 288 NW 881

Interrogatories—stated or agreed amount—services rendered to decedent. In probate action to establish a claim for services rendered to decedent, wherein the court submitted two interrogatories to the jury to determine (1) amount per month, if any, decedent agreed to pay claimant out of his estate at his decease, and (2) whether amount per month was to be paid for 9 or 12 months of each year, the interrogatories being submitted under an instruction to be answered in event jury found for claimant and not to be answered if verdict was for defendant, such instruction was not erroneous, since, before interrogatories could be answered, the jury must have found under the evidence that there was a stated or agreed amount, and the findings therein conformed to the verdict.

In re McKeon, 227-1050; 289 NW 915

VIII ANSWERS

Estoppel. One who causes a special interrogatory to be submitted to the jury is estopped thereafter to claim that the record contains no sufficient evidence to support the answer.

Tigue Sales v Motor Co., 207-567; 221 NW 514

11515 Assessment of recovery.

Automobile cases, damages. See under §§5037.09, 5037.10
Libel and slander cases, damages. See under §12412
Nuisances, damages. See under §12395
Sales, nonacceptance of goods, damages. See under §9933

Discussion. See 9 ILB 187—Quantity and value in damages; 14 ILR 94—Damages in cases of accession; 18 ILR 366—Liability for fright; 18 ILR 404—Damages reduced by trial court

Torts—fundamental laws govern liability. The fundamental and underlying law of torts is that he who does injury to the person or property of another is civilly liable in damages for the injuries inflicted.

Montanick v McMillin, 225-442; 280 NW 608

Action based on fraud. In an action based on a conspiracy to defraud, the issue of conspiracy is not determinative, the important factor being that in order to be granted relief, it is necessary that the plaintiff establish the necessary elements of actionable fraud, the amount of recovery being dependent upon the extent of damage resulting from the fraudulent conduct.

Community Sav. Bank v Gaughen, 228- ; 289 NW 727

Instruction as to allowable damages. Instruction specifying that damages should be such as were rendered necessary by the injuries as disclosed by the evidence and which

the evidence shows that plaintiff sustained and endured, sufficiently informed the jury that only such damages could be allowed as were caused by, and the direct result of, injuries sustained because of defendant's negligence.

Jakeway v Allen, 227-1182; 290 NW 507

Harmless error—curing erroneous submission of damages. The submission of a non-pleaded element of damages or the submission of an unproven element of damages will be deemed harmless when the instruction carries the limitation "if any".

Hepker v Schmickle, 209-744; 229 NW 177

Harmless error — erroneous submission of unsupported damages. The submission to the jury, in an action for damages, of an unsupported measure of damages constitutes error, but record reviewed and held harmless to the complaining defendant.

Carpenter v Wolfe, 223-417; 273 NW 169

$2,500 increase in damages on retrial of personal injury case—nonexcessiveness. A verdict of $10,000 on second trial of automobile accident case, altho $2,500 larger than first verdict, did not under the circumstances indicate passion or prejudice and was not excessive.

Jakeway v Allen, 227-1182; 290 NW 507

Remittitur of nonrecoverable damages—effect. Error in including nonrecoverable damages in a verdict is not cured by the subsequent filing of a remittitur in a named sum, when the instructions are framed in such form that no one can determine what amount the jury allowed for nonrecoverable damages.

Gardner v Boland, 209-362; 227 NW 902

Permitting return of unproven damages. Reversible error results from so instructing as to allow the jury to find damages on account of a loss not shown by the evidence, when the amount of the verdict, viewed in the light of the evidence, quite clearly shows that the jury made allowance for such unproven loss.

Herring Co. v Myerly, 207-990; 222 NW 1

Instructions — nonapplicability to evidence. Instructions which permit the jury to find damages in the form of profits lost, without limiting such findings "as shown by the evidence", are prejudicially erroneous.

Smith v Oil Co., 218-709; 255 NW 674

Damages—failure to limit. Reversible error results from the failure of the court in its instructions to limit the jury in its return of damages, on various items of claimed damages, to the amount claimed in the pleadings; and limiting damages "as shown by the evidence" does not necessarily cure the error.

Desmond v Smith, 219-83; 257 NW 543

Measure of damages—failure to limit findings. An instruction which directs the jury, in determining the damages to an article, "to consider" its value before the injury and its value after injury is erroneous, because it fails to confine the jury in its findings of damages.

Langham v Railway, 201-897; 208 NW 356; 26 NCCA 938

Loss of buildings. The measure of damages for the wrongful destruction of buildings is their fair, reasonable value at the time of destruction.

Walters v Iowa Co., 203-471; 212 NW 884

Measure of damages—wrongful act without profit to wrongdoer. The lessee of coal lands who seeks to recover damages consequent on the wrongful act of the owner of the land in taking coal from the land, need not show that the defendant-owner made any profit from his wrongful operations. Plaintiff need only show wherein and to what extent he was damaged.

Hartford Co. v Helsing, 220-1010; 263 NW 269

Loss of grove. The measure of damages for the wrongful destruction of a grove on a farm is the difference between the value of the farm immediately before and immediately after the destruction.

Walters v Iowa Co., 203-471; 212 NW 884

Carriage of goods—failure to deliver. In an action against a carrier for a shortage in the delivery of a shipment of coal, the value of the shortage at the point of shipment is not an improper measure of damages.

Smith v Railway, 202-292; 209 NW 465

Delay in shipment—special damages. A carrier is not liable for special damages consequent on its negligent delay in delivering a shipment unless at or before the time of shipment the carrier is notified of the special purpose for which the shipment is intended and of the necessity for prompt shipment. So held as to a shipment of cans by the consignor to itself, followed by damages to corn which the ultimate consignee was unable to can, owing to negligent delay in delivering shipment.

Percy v Railway, 207-889; 223 NW 879; 28 NCCA 717

Contracts—breach of part not destructive of whole. Generally, where contracts are severable and divisible, and the consideration justly apportioned to part of the contract, a breach of that part does not destroy the contract in toto, but the defendant may only recoup himself in damages.

Paramount Pictures v Maxon, 226-308; 284 NW 119

Measure of damages—contract basis. Where parties have contracted that contemplated damages shall not exceed a certain amount, a particular measure of damages which will

give practical effect to the agreement will be approved.

Riggs v Gish, 201-148; 205 NW 833

Loss of commissions on sales—price raised after orders taken. Where a manufacturer contracted with a dealer who was to take orders for twine at a certain price and the manufacturer later refused to fill the orders taken except at a higher price, in an action by the dealer for loss of commissions, damages were sufficiently proven by evidence that the dealer had incurred expenses in taking the orders, and that only about 25 percent of the orders were accepted by customers because of the increased price, while normally 95 percent of the orders would have been accepted.

Lee v Sundberg, 227-1375; 291 NW 146

Sale of real estate—error without prejudice under evidence. In vendee's action for damages for fraudulent representations of value in the sale of real estate, no rescission being asked, it is error to instruct that the measure of damages is the amount paid less the reasonable rental value for the time occupied, which error, however, is without reversible prejudice to the vendor, when the amount of recovery is so small that the hope for a more favorable verdict on a retrial is, under the evidence, too remote.

Neal v Miller, 225-252; 280 NW 499

Real estate without rental value—use as measure of damages. When real property has no rental value, upon dissolution of a wrongful injunction restraining erection of a municipal light plant thereon, the measure of damages is the use value, including net profits.

Corning v Iowa-Nebr. Co., 225-1380; 282 NW 791

Fraud—measure of damages. Principle reaffirmed that the measure of damages for fraudulent representations as to the condition of land sold is the difference between the reasonable value of the land at the time in question and what would have been said value had the land been as represented.

Fry Co. v Gould, 214-983; 241 NW 666

Subject matter — wholly unallowable counterclaim. The amount which a vendee of land claims to have expended on land foisted upon him because of fraudulent representations by the vendor, in order to render the land "suitable, productive, and usable," is wholly unallowable as a counterclaim because said amount as a measure of damages for the wrong suffered is unknown to the law.

Fry Co. v Gould, 214-983; 241 NW 666

Mutual assumptions on exchange of lands—repudiation — effect. When two parties exchange lands, and each assumes the mortgage of the other on the land received by him in the exchange, and one of them is sued on his assumption, he may, by proper plea and proof, reduce his liability on his assumption to the extent of the damages suffered by him consequent on the act of his co-assumptor in repudiating his assumption by obtaining a discharge therefrom in bankruptcy.

Johnston v Grimm, 209-1050; 229 NW 716

Breach of covenant—improper measure of damages. In an action for damages consequent on a breach of the covenant of warranty of title contained in a mortgage, the amount of the mortgage is not the proper measure of damages when the mortgagor received no consideration for executing the mortgage, and when the mortgagee parted with no consideration, except to forbear the enforcement of his judgment against a third party.

Churchman v Wilson, 204-1017; 216 NW 726

Indemnity bond as tantamount to covenant of seizin. An indemnity bond conditioned to hold the obligee harmless from any loss which he may sustain by reason of a defect of title to certain real estate is equivalent to a covenant of seizin and governed by the same rule, to wit: no action for substantial damages is maintainable on the bond until a hostile, paramount title is asserted.

Duke v Tyler, 209-1345; 230 NW 319

Employer paying doctor bills—negligent person still liable for damages. Payment of an injured truck driver's doctor bills, by his employer, whether the motive be philanthropy or contract, constitutes a bounty from which a negligent defendant motorist can derive no benefit in reduction of his liability, inasmuch as he owes compensation for all damages as to which his negligence was the proximate cause.

Clark v Seed Co., 225-262; 280 NW 505

Hospital expense—board and lodging—when allowable. In personal injury action, allowance of board and lodging in hospital is not error where such items are inseparably tied up with treatment.

Jakeway v Allen, 227-1182; 290 NW 507

Pain, suffering, etc. — judgment of jurors. Jurors must necessarily rely on their own fair and unbiased judgment as to the amount of damages recoverable for pain and suffering and for disability as a wife and homekeeper.

Rulison v X-ray Corp., 207-895; 223 NW 745

Future disability—submission not erroneous when permanent injury alleged. When petition, alleging that plaintiff was permanently injured, contained a general allegation for damages, an instruction on damages for future disability was not objectionable on the ground that the petition did not ask for such damages, and it was not necessary for plaintiff to specifically plead such elements of damage.

Schwaller v McFarland, 228- ; 291 NW 852

Nervous injury—evidence—sufficiency. There may be a recovery of damages consequent upon nervous injury even tho there is no medical testimony showing the connection between the injury and the nervous disturbance.

McDougal v Bormann, 211-950; 234 NW 807

Aggravation of disease—liability in general. One who is predisposed to disease which is aggravated or accelerated by negligence is entitled to recover damages necessarily and proximately resulting from such aggravation or acceleration.

Hackley v Robinson, (NOR); 219 NW 398

Humiliation, insult or indignity—proximate cause. The act of a party in proposing marriage to a married woman at a time when the husband was supposed to be on his death bed, and the act of said party in abusing the said wife, both verbally and physically, when she rejected said proposal, will not enable the husband to predicate damages on allegation and proof that when his wife recited the aforesaid occurrence to him several months later he was much distressed in mind and suffered a relapse in health.

Manning v Spees, 216-670; 246 NW 603

Mental pain and anguish. An injured plaintiff may recover for mental pain resulting from personal physical injury, even tho no special claim for such recovery is made in the petition; especially may he so recover when the petition fairly presents such claim.

Lang v Siddall, 218-263; 254 NW 783

Nominal damages—right to recover more. The court is not in error in instructing that a plaintiff is entitled to more than nominal damages ("such as one dollar or less") consequent on a wholly unjustified assault and battery resulting in admittedly substantial physical injury to plaintiff.

Ashby v Nine, 218-953; 256 NW 679

Duty to minimize damages — instructions. The duty of a physically injured person to do all those reasonable things which will reduce and minimize his damages does not require that he submit to a surgical operation which, while simple in itself, would entail large expense and be attended by possible danger. Instructions relative to such duty reviewed, and held correct.

Updegraff v Ottumwa, 210-382; 226 NW 928

Malpractice — recoverable and nonrecoverable damages. In an action for malpractice in that, after performing a successful operation except that the defendant negligently left a piece of gauze in the wound, which negligence necessitated a second operation, instructions relative to damages arising from (1) scars, (2) bodily and mental pain, and (3) expenses paid for household servants, must clearly differentiate, in view of the two operations, between such damages as are, under each heading, recoverable, and those that are not recoverable.

Forrest v Abbott, 219-664; 259 NW 238; 38 NCCA 315

Malpractice — pain incident to injury. No recovery may be had, in an action for malpractice, for pain (1) incident to an injury, or (2) incident to the usual and ordinary treatment of an injury; and, on request, the court must clearly differentiate, in its instructions, between such pain and pain caused by the negligence of the physician.

Lemon v Kessel, 202-273; 209 NW 393

Permanent cripple—future pain. In a personal injury action arising from a motor vehicle collision, an allegation that plaintiff has been crippled for life, sustained by some evidence, justifies an instruction that the jury may allow such sum as in their judgment will fairly compensate plaintiff for future pain and for being crippled.

Clark v Berry Seed Co., 225-262; 280 NW 505

Employment — wrongful discharge — prima facie measure of damages. The prima facie measure of damages for the wrongful discharge of a servant is the contract wage. The master has the burden to show the extent to which this prima facie measure should be reduced.

Breen v Power Co., 207-1161; 224 NW 562

Separate occupation of wife — decreased earning capacity. In an action by an injured married woman to recover for decreased earning capacity in her separate occupation, it is of no consequence that, after she was injured, she removed from the place where she was employed when injured, to another locality.

Rulison v X-ray Corp., 207-895; 223 NW 745

Wrongful discharge—duty to seek employment. A teacher wrongfully discharged is under obligation to exercise reasonable diligence to secure like employment in the same locality,—not like employment at distant places, or similar employment of a lower or different grade.

Shill v School Twp., 209-1020; 227 NW 412

Insurance—negligence in passing on application. In an action for damages consequent on the alleged negligence of an insurer in passing on an application for insurance, the plaintiff must fail, irrespective of his evidence of negligence, unless he establishes, to the extent of furnishing a measure for his damages, the substance of the contract which he was prevented from entering into.

Winn v Ins. Co., 216-1249; 250 NW 459

Insurance—collision damage to automobile. In an action on an automobile collision insurance policy, the measure of damages is (1) the reasonable cost to repair or replace the dam-

aged parts with others of like kind and quality, if the evidence shows it can be so repaired, or (2) if the evidence shows it cannot be repaired, then the difference between the fair and reasonable market value before and such value after the collision—and fact that insured advantageously traded the wrecked automobile to a dealer on a new automobile does not affect the measure of damage.

Kellogg v National Ins., 225-230; 280 NW 485

Fully reparable injury. If the injury to an article is fully reparable, then the measure of damages is the reasonable cost of the repairs, not the difference between the reasonable value of the article before and after the injury.

Looney v Parker, 210-85; 230 NW 570

Reparable injury to article. The measure of damages for negligent injury to an article is the reasonable cost of restoring the article to the condition it was in immediately before the injury, not exceeding in any case the reasonable value of the article at the time of injury.

Laizure v Railway, 214-918; 241 NW 480

Article of personalty—reparable and irreparable injury. The measure of damages for injury to an article is: (1) for total destruction, the reasonable value at the time of destruction; (2) for a fully reparable injury, the reasonable cost of the repairs, plus the reasonable value of the use of the article during a reasonable time for repair; (3) for a partially reparable injury, the difference in the reasonable value of the article before and after the injury.

Langham v Railway, 201-897; 208 NW 356; 26 NCCA 938

Failure to make repairs. The measure of damages for breach of a contract to make all necessary repairs to a pavement is the fair and reasonable cost of such repairs, and not the difference in value of the real estate with and without said repairs.

Armstrong Inc. v Nielsen, 215-238; 245 NW 278

Bank collections — negligence — measure of damages. The measure of damages consequent on the negligent failure of a collecting bank to notify the payee of deposited checks of their nonpayment, is not, prima facie, the amount of the checks, but such sum or amount as the payee-plaintiff may be able to prove to a reasonable degree of probability he has lost because he was not promptly notified of the nonpayment—not exceeding the amount of said checks. Substantial but conflicting testimony reviewed and held to present a jury question.

Schooler Motor Co. v Trust Co., 216-1147; 247 NW 628; 38 NCCA 361

Corporate stock—no market value—net value of assets. If there is no evidence of the market value of corporate stock, in an action for damages consequent on a fraudulently induced sale, said value must be determined by ascertaining the net value of the assets of the corporation.

Humphrey v Baron, 223-735; 273 NW 856

Municipal light plant earnings—anticipated profits neither nominal nor speculative. In a city's action on a public utility's injunction bond indemnifying city's loss on account of delayed construction of a municipal light plant, even tho plant had not been in operation, loss of profits and loss of use of the plant not in being, are not too speculative nor nominal, and anticipated profits, if established with reasonable certainty, may be recovered as damages.

Corning v Iowa-Nebr. Co., 225-1380; 282 NW 791

Sick and unhealthy animals. Evidence of the fair, reasonable value of sound, healthy, marketable hogs is not admissible to prove the value of admittedly unhealthy and sick hogs.

Tracy v Oil Co., 208-882; 226 NW 178

Thoroughbred cow served by nonthoroughbred bull. Principle reaffirmed that the measure of damages resulting from the serving of a thoroughbred cow by a nonthoroughbred bull is the difference between the value of said cow for breeding purposes before and after such serving.

Madison v Hood, 207-495; 223 NW 178

Surface water damages—flowage increased by tile. Surface water collected by one landowner and drained by tile to the land of another's servient estate, where it is there conveyed by the latter's tile to the lands of a second servient estate, all through the natural course of drainage, is not such subject of damages as to entitle the third estate owner to equitable relief, especially when it is not shown that he was substantially damaged thereby.

Johannsen v Otto, 225-976; 282 NW 334

Exemplary damages—purpose. Punishment of the defendant is one of the purposes in permitting an allowance of exemplary damages in a proper case; and it is proper for the court so to instruct the jury.

Gregory v Sorenson, 214-1374; 242 NW 91

Exemplary damages — recovery permissive only. Reversible error results from instructing, in substance and in effect, that the jury is under obligation to return a verdict for exemplary damages in case it finds that plaintiff has suffered actual damages.

Boom v Boom, 206-70; 220 NW 17

Exemplary damages — nonexcessive verdict. A verdict for exemplary damages which is fairly in proportion to the actual damages will not be disturbed by the court.

Gregory v Sorenson, 214-1374; 242 NW 91

Exemplary damages—malice as essential basis. The submission of the question of exemplary damages without supporting evidence of malice is prejudicially erroneous.

Sokolowske v Wilson, 211-1112; 235 NW 80

Exemplary damages — failure to submit—effect. Failure of the court to submit to the jury the question of exemplary damages is not error, even tho plaintiff's pleading was broad enough to embrace such damages, when the plaintiff neither claimed such damages in the pleadings nor requested the court to submit such issue.

Morris v Scoville, 206-1134; 221 NW 802

Assault and battery—nonexcessive damages —exemplary damages. In an assault and battery case verdict for $1,680, reduced by remittitur to $1,180, held not so excessive as to evince passion and prejudice, when verdict included exemplary damages.

Hauser v Boever, 225-1; 279 NW 137

Assault—loss of earnings. In an action for injuries received in an assault and battery, evidence that the plaintiff had been incapacitated for 41 days and that his earnings prior to the injury were about $10 per day, was sufficient to submit to the jury an issue of loss of earnings.

Wessman v Sundholm, 228- ; 291 NW 137

Instructions—assault and battery—directing jury to award damages to plaintiff. Undisputed evidence held to establish that plaintiff and defendant mutually consented to engage in a fight, and that defendant unlawfully committed an assault and battery on plaintiff, warranting an instruction to the jury to return a verdict for plaintiff in some amount.

Schwaller v McFarland, 228- ; 291 NW 852

Taxation of attorney fees as matter of right. A defendant in attachment who counterclaims on the bond and recovers both actual and exemplary damages is entitled to a taxation of reasonable attorney fees as a matter of right, even tho the sureties on the bond are not made parties to the counterclaim.

Mogler v Nelson, 211-1288; 234 NW 480

11516 Joint or several verdicts.

Allowable joint verdict. A joint verdict in an action for an unlawful arrest and false imprisonment is allowable against those shown to be acting in concert.

Schultz v Enlow, 201-1083; 205 NW 972

Justifiable submission. The submission to the jury of a joint verdict against joint defendants is proper when the evidence supports such submission.

Sokolowske v Wilson, 211-1112; 235 NW 80

Unallowable joint verdict. In a joint action against the driver of an automobile and the owner of the vehicle, wherein necessity arises so to instruct as to limit the effect of the driver's admissions to the question of his liability, and the effect of the owner's admissions to the question of his liability, separate forms of verdict must be submitted, if requested.

Broderick v Barry, 212-672; 237 NW 481

Jarvis v Stone, 216-27; 247 NW 393; 75 ALR 1530

Submission of separate forms. In an action against the driver and owner of a truck, held, the omission to submit separate forms of verdict for each defendant was not prejudicial error, the court having specifically and correctly instructed the jury as to separate liability of each defendant.

Carlson v Decker, 218-54; 253 NW 923

11517 Form.

Correction of verdict. See under §§11508, 11510, Vol I

Form on single issue. One form of verdict only need be submitted when but one question is at issue: i. e., damages.

Millard v Mfg. Co., 200-1063; 205 NW 979

Improper form. A form of verdict submitted to the jury is seriously defective when framed in such a manner as to lead the jury to understand that, if such form were returned, it would absolve a party who was not contesting his liability.

Starry v Starry, 208-228; 225 NW 268

Adoption of trial theory. One of two defendants may not complain that the court, in the submission of various forms of verdicts, adopted his trial theory of nonjoint liability.

Zieman v Amusement Assn., 209-1298; 228 NW 48

11518 Entered of record.

Sufficiency of verdicts and correction thereof. See under §11508

11519 Waiver of jury trial.

Waiver of jury trial. See also Const Art I, §9; §§11435, 11581

Deprivation of jury—constitutionality. An action by the receiver of an insolvent bank against stockholders for the purpose of determining the necessity for an assessment on stock holdings, and adjudicating the amount of such assessment, is not inherently a law action and, therefore, the legislature may provide that the action shall be brought in equity.

Broulik v Henderson, 218-640; 254 NW 63

Party in default. A party in default may not complain that he was deprived of a jury trial.

State v Murray, 219-108; 257 NW 553

Default as jury waiver. Failure to appear for trial is a waiver of the right to trial by jury and a consent to trial by the court.

Vaux v Hensal, 224-1055; 277 NW 718

Waiver by agreement of attorneys—validity. A written agreement or stipulation, duly signed and filed by opposing attorneys in a law action and approved of record by the court, agreeing to waive a jury and to try the action to the court is, in the absence of fraud or proof that an attorney had no authority so to agree, binding on the parties to the action for at least one trial to the court, even tho, after the stipulation was entered into, the pleadings be amended and the cause be continued to a later term.

Shores Co. v Chemical Co., 222-347; 268 NW 581; 106 ALR 198

Hostile motions for verdict — nonwaiver. Hostile motions for a directed verdict, made by plaintiff and defendant at the close of all the evidence, do not, in and of themselves, constitute a waiver of the jury; otherwise, when such motions are followed by a stipulation of record, by the parties, "that the court may render a decision of said case during term time or vacation".

Bukowski v Security Assn., 221-416; 265 NW 132

Inferences drawn from record. The trier of facts is entitled to draw such legitimate inferences as the record will warrant.

In re Green, 227-702; 288 NW 881

Submission to court. Parties will not be permitted to deny that an action was fully submitted to the court (1) when, at the close of all the evidence, motions were made by both parties for a directed verdict; (2) when the jury was excused, but not discharged; and (3) when the court, without objection, took the motions under advisement, and at a later term, without objection, sustained one of the motions and entered judgment accordingly.

Hart v Wood, 202-58; 209 NW 430

Finding equivalent to jury verdict—conclusiveness on appeal. In a law action tried to the court without a jury, its finding on the fact question as to whether a check was accepted for collection or as payment has the same effect as a verdict of the jury, and cannot be disturbed on appeal if there is evidence to support it.

Hockert v Ins. Co., 224-789; 276 NW 422

Findings of trial court in law action. The finding and judgment of trial court on claim against decedent's estate has the effect of a jury verdict and may not be set aside if it finds any substantial support in the record.

In re Green, 227-702; 288 NW 881

11520 Reference—by consent.

Inaccurate judgment — correction without new trial. When parties to an action voluntarily (tho irregularly) submit to a referee certain counts only of the petition, and later judgment is entered on the report of the referee in such form as to indicate that all counts of the petition had been so submitted, the court, on proper proof, is under mandatory duty, during the term at which the judgment was entered, to exercise its statutory and inherent power and, itself, correct said inaccuracy.

Watters v Knutsen, 223-225; 272 NW 420

11521 Without consent.

Condition precedent. A party may not have an accounting unless he first pleads and proves that something is due him.

Oskaloosa Bk. v Bank, 205-1351; 219 NW 530; 60 ALR 1204

Unavoidable preliminary issue. The court has no authority, in an action for an accounting, to appoint, without the consent of the defendant, a referee to take the accounting, until defendant's plea that he is under no legal duty to account is first determined adversely to the defendant.

Benson v Weitz, 211-489; 231 NW 431

Accounting—appealable order. An order appointing a referee to take an accounting without first determining defendant's plea that he was under no legal duty to account, is appealable.

Benson v Weitz, 211-489; 231 NW 431

11526 Report—judgment.

ANALYSIS

I Referees and Proceedings
II Report and Findings

I REFEREES AND PROCEEDINGS

Stipulations—indefiniteness as to time—effect accorded. An oral agreement or understanding between opposing counsel that one of them should have time, additional to that specified by statute, in which to file exceptions to the report of a referee, tho the extent of such additional time is quite indefinite, will be construed and recognized by the court in the spirit and to the extent reasonably contemplated by the parties.

Holdorf et al. v Miller, 220-1380; 264 NW 602

II REPORT AND FINDINGS

Failure to except to report. The filing of exceptions to the report of a referee within the time permitted by statute, or by order of

II REPORT AND FINDINGS—concluded

the trial court, is a condition precedent to the right to an appellate review of said report.

State v Cas. Co., 213-200; 238 NW 726

Equity cause tried on exceptions to referee's report. When a cause in equity is tried on exceptions to the report of a referee, and the appeal is from the judgment rendered on said exceptions, the review on appeal is limited to the exceptions presented to the trial court and to the record there made.

Hogan v Perkins Co., 213-1175; 238 NW 608

11534 Acceptance by referee.

Reference—procedure—justifiable findings. Whether a referee in probate must accept the appointment, qualify, hold hearings, make a timely report and accompany the same by affidavit as required of referees appointed in ordinary civil cases (§11530, et seq. C., '31), quaere; but the court may well find that such requirements (if they are such) were complied with when an unquestioned amended report of the referee recites such compliance.

In re Cochran, 220-33; 261 NW 514

11535 Proceed as court.

Accounting—trial de novo—limitation. An appeal from a ruling on objections to a referee's report must be tried de novo on the objections specified to such report.

Fleming v Fleming, 211-1251; 230 NW 359

Equity cause tried on exceptions to referee's report. When a cause in equity is tried on exceptions to the report of a referee, and the appeal is from the judgment rendered on said exceptions, the review on appeal is limited to the exceptions presented to the trial court and to the record there made.

Hogan v Perkins Bros., 213-1175; 238 NW 608

11536 "Exception" defined.

Discussion. See 22 ILR 609—Trial technique

ANALYSIS

Exceptions generally. See under §11548

I NECESSITY FOR EXCEPTIONS

(a) IN GENERAL

Assenting to action complained of. A party who, in one part of the record, permits the introduction of testimony without objection, may not predicate error on the reception in another part of the record, over his objection, of testimony of substantially the same nature.

Lewis v Grain Co., 214-143; 241 NW 469

Necessity for. Error (if it be error) in dismissing an action (1) without prejudice, (2) in the absence of the defendant, (3) without notice to him, and (4) without taking evidence thereon, will not be considered on appeal when the record shows that no exception was entered to the ruling in the trial court.

Gotsch v Schoenjahn, 201-1317; 207 NW 567

Necessity for. Failure to except to an adverse ruling on a motion for new trial precludes appellate review of exception embodied in the motion.

Pullan v Struthers, 201-709; 207 NW 794

Exception necessary. Rulings relative to the transfer of a cause from law to equity, or vice versa, will not be reviewed in the absence of exceptions to the rulings.

Hogan v Perkins Bros., 213-1175; 238 NW 608

Van Dyck v Abramsohn, 214-87; 241 NW 461

Failure to reserve error. The appellate court may not review the reception of testimony which is admissible against a part of the defendants only, when the testimony was received without objection, and no instruction limiting the application of the testimony was requested.

Weyer v Vollbrecht, 208-914; 224 NW 568

Belated filings. A party, on appeal, may not predicate error on the belated filing of a pleading to which he interposes no exception.

Royal Ins. v Hughes, 205-563; 218 NW 251

Failure to except to report of referee. The filing of exceptions to the report of a referee within the time permitted by statute, or by order of the trial court, is a condition precedent to the right to an appellate review of said report.

State v Cas. Co., 213-200; 238 NW 726

Failure to except. Failure to except to rulings on the introduction of evidence and to the giving of instructions precludes review on appeal.

State v Jackson, 205-592; 218 NW 273
State v Slycord, 210-1209; 232 NW 636
Wood v Branning, 215-59; 244 NW 658

Unexcepted instructions as law of case. If there be no exceptions to instructions, the verdict is final if it has support in the evidence. In such case no inquiry can be made whether the instructions are right or wrong.

Commer. Credit v Hazel, 214-213; 242 NW 47

Failure to give promised instruction. Failure of the court to instruct as promised during the course of the trial will not be reviewed in the absence of an exception to such failure.

Lee v Ins. Assn., 214-932; 241 NW 403

Exception by noncomplainant. Defendant may not predicate error on an exception entered by the plaintiff.

Mizner v Lohr, 213-1182; 238 NW 584

Dead man statute—failure to object. Failure to object to testimony as to a personal transaction between an interested party and a deceased precludes assignment of error, on appeal, in receiving such testimony.

In re Willmott, 215-546; 243 NW 634

Total absence of exceptions — necessary affirmance. If the record on appeal is barren of any exception to the rulings complained of, the appellate court will affirm the judgment of the lower court.

Garner v Cherokee County, 223-712; 273 NW 842

Constitutionality of statute not raised in lower court. When a district court order, granting an extension of the time for redemption of land on which a mortgage had been foreclosed, contained a provision that if the statute under which the extension was granted were repealed or held invalid the order would be terminated, such provision did not warrant an appeal challenging the constitutionality of the statute when the question of constitutionality was not raised in the lower court.

N. Y. Ins. v Breen, 227-738; 289 NW 16

(b) IN RE MISCONDUCT

Misconduct of court. Failure to except to alleged misconduct of court precludes review on appeal.

State v Johnson, 210-167; 230 NW 513

Extension of time for new trial motion—canvass of jury as to misconduct of court. An extension of time for filing a motion for new trial to enable counsel to canvass the jury and learn the prejudicial effect of remarks made by the court during the trial was properly refused when there was attached to the motion an affidavit by a juror that the remarks of the court had led the jury to disbelieve a witness, the affidavit not supporting its conclusion, and when no exceptions were taken to the remarks by the court.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Error waived by failure to object. Where an attorney testified that he had talked with the defendant with reference to a certain car before preparing a mortgage on the car, and the court questioned him in order to decide whether there had been an attorney-client relationship on which the testimony should be excluded, when no objections were made or exceptions taken to the examination by the court, it was proper to refuse a new trial on the ground that the court had made misleading statements of the law and was guilty of misconduct in discrediting the testimony.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Misconduct in argument. Misconduct in argument is waived by a failure to except thereto.

Pullan v Struthers, 201-709; 207 NW 794
State v Myers, 207-555; 223 NW 166

Objections—sufficiency. An objection to a flagrantly improper argument by the county attorney may be all-sufficient even tho not couched in specific language; a priori, when the attorney and court cannot but know the very subject matter to which reference is made.

State v Voelpel, 213-702; 239 NW 677

Arguments and conduct of counsel—curing error by instruction. Argument and ruling thereon briefly reviewed and held to reveal no error, but, if error, that the same was effectively cured by an instruction to disregard the matter referred to by counsel.

West Branch Bank v Farmers Exch., 221-1382; 268 NW 155

(c) EXCEPTION TO JUDGMENT

Failure to except. Failure to have exception to a judgment properly noted precludes review on appeal.

Des M. Marble v Seevers, 201-642; 207 NW 743
Leach v Bank, 201-1323; 207 NW 326
Stork v Stork, 202-196; 209 NW 276
Continental Bk. v Railway, 202-579; 210 NW 787; 50 ALR 139
Campfield v Rutt, 211-1077; 235 NW 59
State v Phillips, 212-1332; 236 NW 104

Judgment record clarified by later entry. When the court stated in its entry of judgment: "The defendant excepts to said judgment. Exceptions allowed and granted.", and in ruling on a motion for a new trial, made an entry that the above-quoted was intended to save an exception for the defendant, the court was correct in its action to clarify the record, and on appeal the defendant could not contend that the entry could only be interpreted to mean that the exception to the judgment was sustained.

Wessman v Sundholm, 228- ; 291 NW 137

(d) EXCEPTIONS IN EQUITY

No annotations in this volume

(e) WAIVER OF EXCEPTIONS

Requested instruction nonwaiver of objections. A party whose objections to the submission of a subject matter to the jury have been erroneously overruled by the court does not waive his objections by asking an instruction which is in harmony with his objections as to said subject matter.

Ballinger v Democrat Co., 207-576; 223 NW 375

Reservation of grounds—objectionable argument. Failure to have an objectionable argument made of record and to except thereto constitutes a waiver of the error, if any.

Schram v Johnson, 208-222; 225 NW 369

11537 Time to except.

Discussion. See 22 ILR 609—Trial technique

ANALYSIS

I TIMELY EXCEPTIONS
II TIME FOR OBJECTIONS IN GENERAL

I TIMELY EXCEPTIONS

Presentation of grounds of review—prerequisite for appeal. A ruling and exception thereto in the lower court, or a showing of a request for a ruling and a refusal, are necessary prerequisites to a review in the appellate court.

In re Scholbrock, 224-593; 277 NW 5

Argument not made of record. Error may not be based on alleged misconduct of counsel in argument unless the specific misconduct is made of record, and exceptions entered thereto.

State v Harrington, 220-1116; 264 NW 24

Stipulation indefinite as to time—effect accorded. An oral agreement or understanding between opposing counsel that one of them should have time, additional to that specified by statute, in which to file exceptions to the report of a referee, tho the extent of such additional time is quite indefinite, will be construed and recognized by the court in the spirit and to the extent reasonably contemplated by the parties.

Holdorf v Miller, 220-1380; 264 NW 602

II TIME FOR OBJECTIONS IN GENERAL

Objections first made on appeal. Objections to evidence must be made when it is offered, not for the first time on appeal.

State v Harrington, 220-1116; 264 NW 24

Belated objections to evidence. A party may not, on a motion for a new trial, interpose objections to testimony, other than the objections interposed at the trial.

State v Ostby, 203-333; 210 NW 934; 212 NW 550

Larceny — value — competency of witness — fatal delay in objecting. Objections to the competency of a witness to testify to the value of stolen articles must be made when the witness is asked as to said values, not later when the articles are offered in evidence.

State v Endorf, 219-1321; 260 NW 678

Fatal delay. The court may very properly refuse to strike testimony when it has been received without objection, and when the motion to strike is delayed until after the entire testimony is in the record.

Greco v Ins. Co., 219-150; 257 NW 201

Belated objections. The objection that a petition does not state a cause of action may be deemed waived when made for the first time in a motion for a new trial.

Clarkson v Cas. Co., 201-1249; 207 NW 132

Gambling on answer. A party will not be permitted to withhold his objection to a question until he discovers that the answer is unfavorable to him.

State v Plew, 207-624; 223 NW 362
State v Slycord, 210-1209; 232 NW 636
State v Woodmansee, 212-596; 233 NW 725
Lewis v Grain Co., 214-143; 241 NW 469

Stipulations in re evidence and objections thereto. Litigants may validly agree of record (at least with the consent of the court) that, in the taking of testimony, objections thereto need not be made at the time of offer, but that such testimony shall be deemed objected to on "all grounds known to the law".

Lindburg v Engster, 220-1073; 264 NW 31; 116 ALR 591

Performance of contract—merchantable title—belated objections. Objections to a land title as shown by the abstract introduced at the trial, not made until after the entry of the decree, will be ignored.

Vanderwilt v Broerman, 201-1107; 206 NW 959

11538 Bill of exceptions.

Report of trial and certification. See under §§11456, 11457

Absence of time limit. Evidence taken in an equitable action need not be certified by the trial judge and reporter until there exists a necessity for such certification. Conceding, arguendo, that the certification should be made within a reasonable time after such necessity arises, then the presence or absence of prejudice will materially control the question as to what is such reasonable time.

Andrew v Bank, 206-1368; 222 NW 553

Ex-judge's affidavit—no part of record. A judge's affidavit made after termination of his office, and three months after perfection of the appeal, is no part of the record and cannot be considered against the appellant as a basis for an alleged waiver.

In re Metcalf, 227-985; 289 NW 739

Improper argument. Improper argument by the county attorney, which argument has not been taken down by the reporter as part of the record, but as to which proper exception has been entered, may be made part of the record by a bill of exceptions signed by the judge.

State v Voelpel, 213-702; 239 NW 677

Unreported trial to court—bill of exceptions—belated filing—effect. Where a law action is tried to the court without a reporter's record being made—appellant electing to preserve the necessary record in the form of a bill of exceptions, but failing to file exceptions within statutory time—errors relating to rulings on and as to sufficiency of the evidence cannot be considered on appeal. The lack of

an extension of time and the failure to properly preserve the record leave nothing for consideration, and an affirmance necessarily follows.

Berner v Jordan, 227-1106; 290 NW 53

11539 When bill unnecessary.

Failure to preserve record. Tho a motion to vacate a final decree for erroneous proceedings which preceded the decree be treated in the appellate court as a motion for a new trial, yet movant cannot prevail when he deliberately permitted such proceedings to take place in the trial court without any record preservation, and seeks in his motion proceedings to establish them by mere affidavit and extraneous testimony.

Radle v Radle, 204-82; 214 NW 602

Nonnecessity in equity. The fact that the record on appeal in an equitable action fails to disclose any exception by the appellant is not grounds for dismissing the appeal.

Roeper v Danese, 206-964; 221 NW 506

Necessary corrections in trial court. An attack on the record as duly certified to the supreme court on appeal cannot be originated in the supreme court. If the record in the trial court is incorrect it must be there corrected by amendment on proper application.

Melman Fruit v Melman, 216-45; 245 NW 743

Correction of certificate to shorthand notes. A purported certificate of the trial reporter to the correctness of the shorthand notes, which certificate is fatally defective because not signed by the reporter, may be corrected by said reporter by the subsequent execution of a new and duly signed certificate.

Melman Fruit v Melman, 216-45; 245 NW 743

Abstract—filing when notes and transcript not with clerk. An abstract filed with the clerk of the supreme court within the time provided by statute (§12847, C., '31) is a proper and valid abstract notwithstanding the fact that, at the time of said filing, the shorthand notes had not been returned to, nor had the transcript been filed with, the clerk of the trial court.

Melman Fruit v Melman, 216-45; 245 NW 743

11541 Certification by successor.

Time for certification.

Andrew v Bank, 206-1368; 222 NW 553

11542 Form and grounds of exception.

Discussion. See 22 ILR 609—Trial technique

ANALYSIS

I EXCLUSIVENESS OF OBJECTION

Evidence—motorcycle automobile collision—speed remote from accident—admissibility. Where a motorcycle coming over a viaduct at high speed collides with an automobile leaving and making a left-hand turn at the foot of the viaduct, speed of the motorcycle at the instant of or immediately before the collision is admissible, but, with nothing to indicate to the trial court the materiality of speed some distance away, the exclusion of such evidence will not be disturbed.

Thomas v Charter, 224-1278; 278 NW 920

Waiver by introducing exhibit. Objections made by the defendant to testimony given by the plaintiff's witness on direct examination were not waived when the defendant introduced an exhibit containing written statements made by the witness which tended to weaken his oral testimony. But objections by the defendant to other testimony in the direct examination were waived by statements in the exhibit supporting the testimony to which objections had been made.

Goodale v Murray, 227-843; 289 NW 450

II OBJECTIONS—SUFFICIENCY

(a) GENERAL GROUNDS—INCOMPETENT, IRRELEVANT, IMMATERIAL

Withholding objection—effect. An objection to the reception of hearsay evidence will be given scant consideration when made for the first time at the conclusion of the testimony and then in the form of a motion so couched as to be practically impossible of application by the court.

Walker v Speeder Corp., 213-1134; 240 NW 725

Dragnet objection. An overruled objection in the trial court to the effect that certain expert testimony was "incompetent, irrelevant, and immaterial" does not raise on appeal the point that the qualification of the witness was not shown.

McColl v Jordan, 200-961; 205 NW 838

Dragnet objection. The all-inclusive objection that a question is "incompetent, immaterial, and irrelevant" is insufficient to present the point that the question invades the province of the jury.

Crouch v Remedy Co., 205-51; 217 NW 557

Dragnet objection. A dragnet objection to an exhibit is properly overruled when the exhibit is clearly admissible in part, and when the objector makes no effort to separate the admissible from the inadmissible or to expunge from the record the inadmissible part.

State v Bevins, 210-1031; 230 NW 865

Presentation and reservation of grounds of review—motion to strike—omnibus motion. A blanket motion to strike intermingled compe-

II OBJECTIONS—SUFFICIENCY—concluded

(a) GENERAL GROUNDS—INCOMPETENT, IRRELEVANT, IMMATERIAL—concluded

tent and incompetent testimony is improper, and will not be reviewed on appeal.

Koopman v Ins. Assn., 209-958; 229 NW 221

General reputation—sufficiency. The point that a question calls for testimony of the "reputation" of a witness, instead of testimony of the general reputation, is not raised by the objection of incompetency and immateriality.

State v Dillard, 205-430; 216 NW 610

Fraudulent banking—insolvency—evidence—other deposits. Upon a prosecution for receiving deposits while insolvent, testimony of deposits other than that alleged in the indictment is admissible, over the objection of incompetency, irrelevancy, immateriality, and failure to lay proper foundation.

State v Ostby, 203-333; 210 NW 934; 212 NW 550

Relevancy, materiality, and competency—quantum meruit. On the issue of quantum meruit for services rendered, a former contract between the same parties for similar services performed under like conditions, and specifying the compensation, is admissible as a circumstance for the jury's consideration.

Olson v Shuler, 203-518; 210 NW 453

Reception of evidence—waiver of incompetency. Error may not be predicated on the reception of irrelevant and incompetent testimony relative to the condition of a nuisance at a place remote from the place in controversy when the complainant fails to avail himself of a later indicated willingness on the part of the court to strike such testimony.

Chase v Winterset, 203-1361; 214 NW 591

Cancellation of indorsements. On the issue whether indorsements of payments on a note had been improperly canceled, evidence by the maker of the payments to the effect that he had never authorized such cancellation is manifestly relevant, competent, and material.

First St Bank v Tobin, 204-456; 215 NW 767

"Incompetent and immaterial". The objection that evidence is "incompetent and immaterial" is all-sufficient when such grounds are perfectly obvious, and especially so when the objector specifically calls the attention of the court to the fact that the offered testimony "does not tend to prove any issue in the case".

State v Cordaro, 211-224; 233 NW 51

Triple objection—sufficiency. Ordinarily an objection to the introduction of testimony on ground that it is incompetent, irrelevant, and immaterial does not constitute a proper basis for reversal unless objectionable nature of the evidence is also specified. However, such general objection is sufficient where grounds of the objection are discernible or where the evidence could not have been made competent.

Floy v Hibbard, 227-149; 287 NW 829

Objections to evidence—immateriality apparent. Where the immateriality of evidence objected to is plainly discernible and no further particularity is required to apprise the trial court of grounds of objections, it is not necessary that these same identical matters be again presented to trial court by way of motion for new trial before they may be considered by supreme court.

Floy v Hibbard, 227-149; 287 NW 829

Poor practice—admitting evidence on promise to amend. In a law case, especially, it is poor practice to permit evidence, objected to as incompetent, to be admitted on the promise that amendments would later be filed to meet the proof. Such objections coming after the witness has answered should be followed by motions to strike.

Osceola v Gjellefald Co., 225-215; 279 NW 590

(b) SPECIFIC GROUNDS

Specific objections. Objections to testimony in criminal cases must be as specific as is required in civil cases, in order to receive review on appeal.

State v Vandewater, 203-94; 212 NW 339

Correct ruling on faulty objection. The exclusion of incompetent evidence on an insufficient objection will not be deemed error.

Kent Bank v Campbell, 208-341; 223 NW 403

Scope of objection. The objection that a question calls for an unallowable conclusion of the witness is quite different than the objection that no foundation had been laid for the testimony in question.

Lane v Varlamos, 213-795; 239 NW 689

Minutes of testimony—nonimpeachable. The minutes of testimony taken before grand jury and filed with indictment constitute the record basis for finding of the indictment, and this record may not be added to by calling on the grand jurors in the trial of a case to give additional testimony tending to impeach the indictment, such as that given in false arrest case where grand jurors testified in effect that plaintiff was in truth and in fact the person indicted. Any rule permitting grand jurors to impeach their own record would be contrary to public policy.

O'Neill v Keeling, 227-754; 288 NW 887

11545 Signing by judge or bystanders.

Bystanders' bill. Misconduct in argument may not be made of record by a writing which is not presented to or signed by the judge, and which is signed solely by the counsel for the complaining party.

Rudd v Jackson, 203-661; 213 NW 428

Affidavit (?) or bill of exceptions (?). Misconduct of an attorney in argument (not taken down and made of record) must be presented by bill of exceptions and not by affidavit attached to the motion for new trial.

Hornish v Overton, 206-780; 221 NW 483

Appellant not "bystander". A bill of exceptions signed by appellant as a "bystander" is a nullity.

Music v DeLong, 209-1068; 229 NW 673

11548 Must be on material point.

Discussion. See 22 ILR 609—Trial technique

ANALYSIS

Assignment of error. See under §12869
Necessity of exceptions. See under §11536
Variance between allegation and proof. See under §11177 et seq.

I PRESUMPTION OF REGULARITY AND CORRECTNESS

Presumption as to sustaining facts. On appeal in an action involving the title to real estate, it will be assumed, in support of the judgment, that the plaintiffs were the proper parties in interest, though the record is indefinite, when they were so treated without objection in the trial below.

Bullock v Smith, 201-247; 207 NW 241

Executors and administrators—attorney fee allowance—evidentiary support required. Tho a presumption of correctness exists in favor of trial court's decision fixing compensation for administrator's attorney, yet, where objection is made to application for allowance, and no evidence is introduced as to the services other than a bare statement in the applicant's affidavit, the trial court is not warranted in making a finding involving both nature and value of services.

Glynn v Bank, 227-932; 289 NW 722

Attorney fee for extraordinary probate services. Tho a presumption of regularity exists as to an unassailed allowance of attorney fees for extraordinary services, and tho ex parte orders fixing such fees without introduction of evidence are not uncommon, yet such orders are always open to review on final settlement.

In re Metcalf, 227-985; 289 NW 739

II AFFIRMATIVE SHOWING OF PREJUDICIAL ERROR

(a) IN GENERAL

Discussion. See 18 ILR 304—Offer of testimony

Presentation of grounds of review—prerequisite for appeal. A ruling and exception thereto in the lower court, or a showing of a request for a ruling and a refusal, are necessary prerequisites to a review in the appellate court.

In re Scholbrock, 224-593; 277 NW 5

Dead man statute—failure to object. Failure to object to testimony as to a personal transaction between an interested party and a deceased precludes assignment of error on appeal in receiving such testimony.

In re Willmott, 215-546; 243 NW 634

Persistent objections. The act of counsel in persistently but unsuccessfully objecting to the cross-examination of an expert witness (who has testified to the genuineness of a signature) to the effect that what was being called for by the examination was as evident to the jury as to the witness, does not, in and of itself, constitute prejudicial misconduct.

Keeney v Arp, 212-45; 235 NW 745

Cross-examination—unallowable scope. Reversible error results in permitting a cross-examination to develop testimony which is highly prejudicial to the party calling the witness, and which has no relation to the testimony developed on the direct examination. So held where a direct examination was strictly confined to that which the witness observed at the time and place of an accident, while the cross-examination developed the fact that the witness declared at the time of the accident that the defendant was not to blame for the accident.

McNeely v Conlon, 216-796; 248 NW 17

Repetition of misconduct. Repeated attempts in the cross-examination of a defendant in a personal injury action to show that he had, on prior occasions, run over people constitute prejudicial error.

Shuck v Keefe, 205-365; 218 NW 31

Refusal to strike testimony. Failure to strike testimony which has been received with

II AFFIRMATIVE SHOWING OF PREJUDICIAL ERROR—continued

(a) IN GENERAL—concluded

out objection does not constitute reversible error when ruling on the motion to strike was reserved, when no ruling was subsequently requested, and when the said testimony was so similar to other properly received testimony as to negative prejudice.

State v Hughey, 208-842; 226 NW 371

Dismissal of issue—striking evidence. The court should not permit testimony bearing on a dismissed issue to remain in the record when it has no material bearing on any remaining issue.

In re Muhr, 218-867; 256 NW 305

Allowable and unallowable services. Affirmative prejudicial error appears from a record which shows that the trial court, acting without a jury in a law action involving the allowance of attorney fees, received evidence of both allowable and unallowable services.

Iowa Co. v Scott, 206-1217; 220 NW 333

Abstract statements of law. The inclusion in instructions of abstract statements of the law does not necessarily constitute material error.

Birmingham Sav. Bank v Keller, 205-271; 215 NW 649; 217 NW 874

Failure to send exhibit to jury room. The fact that a duly introduced exhibit in a criminal case was not given to the jury when it first retired, but was sent to the jury some hours before the verdict was returned, reveals no prejudicial error.

State v Twine, 211-450; 233 NW 476

Assessment under repealed statute. An apportionment or assessment of drainage improvement costs under a statute which fixed "volume of water discharged" as a basis, but which, before the improvement in question had been initiated, had been repealed and supplanted by a statute which fixed "benefits" as a basis, is prejudicially erroneous unless the prejudice is obviated by a showing that an apportionment or assessment on either basis would be the same.

Board v Board, 214-655; 241 NW 14

Facts provable by witness—absence—prejudice not presumed. Where the record fails to show the facts to be proved by a witness and prejudice resulting therefrom, none will be presumed and no reviewable error is preserved.

Pearson v Butts, 224-376; 276 NW 65

(b) EXCLUSION OF QUESTIONS AND ANSWERS

Exclusion of nonexplanatory question. No reviewable error results from excluding a question which does not, in and of itself, reveal that which the questioner is seeking to show, and the court is not, by proper offer, otherwise enlightened.

Schooley v Efnor, 202-141; 209 NW 408
Antes v Coal Co., 203-485; 210 NW 767
First Bank v Tobin, 204-456; 215 NW 767
Fox v McCurnin, 205-752; 218 NW 499
Anderson v Railway, 208-369; 226 NW 151
In re Johnson, 210-891; 232 NW 282
Morrow v Downing, 210-1195; 232 NW 483
Thielen v Schechinger, 211-470; 233 NW 750
Campfield v Rutt, 211-1077; 235 NW 59
Birum-Olson v Johnson, 213-439; 239 NW 123

No review without proffer of testimony. Sustaining objection to a question creates no reviewable error when no proffer of testimony was made and the record is bare as to what the answers would have been.

Mitchell v Underwriters, 225-906; 281 NW 832

Failure to make offer of proof. Where objection to the offer of testimony was sustained, the court is unable to say whether such ruling is prejudicial error when no offer of proof was made indicating what was expected to be proved.

In re Wagner, 226-667; 284 NW 485

Exception to rule. The rule that the exclusion of questions which in no manner indicate the prospective answer is presumptively without prejudice has little, if any, application to the cross-examination of a witness.

Schulte v Ideal Co., 203-676; 213 NW 431

Exception to rule. The rule that the appellate court will not review the exclusion of questions which do not reveal what is proposed to be proven, has no application to a question and answer appearing in a deposition.

Jensen v Sorenson, 211-354; 233 NW 717

Appeal—hopelessly deficient record. Errors predicated on the exclusion of evidence tending to prove nonperformance of the contract sued on cannot be considered on appeal when appellant has not included in the abstract any part of such proffered evidence or the objections or rulings thereon.

McManus v Kucharo, 219-865; 259 NW 926

Authority of agent — evidence — refusal. Prejudicial error results from the exclusion of evidence tending to show the authority of an agent to sell a promissory note under a qualified indorsement only, such authority being material under the issues.

Falcon v Falcon, 208-8; 222 NW 869

Reservation of grounds—insufficient record. The exclusion of a transcript of the testimony of a witness on a former trial may not be reviewed on a record which fails to show affirmatively that the transcript was offered in evidence, or what matter was contained therein.

Blakely v Cabelka, 203-5; 212 NW 348

Nonprejudicial exclusion of question. A witness who is incompetent to testify to material conversations with a deceased person may be asked and permitted to answer the general question whether he had a conversation with the deceased on a certain occasion on the subject matter in issue; but the exclusion of such question is nonprejudicial.

Southhall v Berry, 207-605; 223 NW 480

Self-illuminating questions. The rule has no application when the questions themselves manifestly indicate what the witness would have testified to, had he been permitted to answer.

Falcon v Falcon, 208-8; 222 NW 869

III PRESUMPTION OF PREJUDICE

Conflicting and unfair rulings. Reversible error results from (1) receiving incompetent testimony over plaintiff's objection, (2) striking such testimony at the close of defendant's testimony, and (3) reinstating such testimony, without warning to plaintiff, after plaintiff had dismissed his witnesses and made his opening argument.

Braverman v Naso, 203-1297; 214 NW 574

Presumption as to action of court. The exclusion by the court in an action tried solely to the court, of material testimony, on the ground that it was wholly inadmissible, generates the presumption that the court must have disregarded other identical testimony received without objection.

Jensen v Sorenson, 211-354; 233 NW 717

Allowable and unallowable recovery. Instructions which permit a recovery of an allowable and an unallowable element of damages cannot be said to be harmless as to the unallowable part when the court cannot determine whether the jury did or did not return anything on the unallowable element.

Cocklin v Ins. Assn., 207-4; 222 NW 368
See Gardner v Boland, 209-362; 227 NW 902

Error both prejudicial and harmless—procedure on appeal. It may happen that an error by the court in the rejection of evidence is presumptively prejudicial as to one subject matter, and quite harmless as to another subject matter; and if the record reveals the amount of the presumptive prejudice, the appellate court may give the prevailing party the option to omit the amount of presumptive prejudice or suffer a reversal.

Lantz v Goodwin, 210-605; 231 NW 331

Exclusion of nonexplanatory question. The erroneous refusal of the court, in a prosecution for assault to rape, to permit a witness, proffered by the defendant, to answer a question whether the witness knew the general reputation of the prosecutrix as to truth and veracity in the community where she lived, cannot be deemed harmless error on the ground that the question did not reveal whether the witness would answer "yes" or "no", when, in connection with the proffer of the witness, defendant offered to show that said prosecutrix was "wholly unreliable in her word and statements".

State v Teager, 222-392; 269 NW 348

Facts provable by witness—absence—prejudice not presumed. Where the record fails to show the facts to be proved by a witness and prejudice resulting therefrom, none will be presumed and no reviewable error is preserved.

Pearson v Butts, 224-376; 276 NW 65

IV HARMLESS ERROR

(a) IN GENERAL

Striking legal conclusion only.

Merchants Bk. v Roline, 200-1059; 205 NW 863

Refusal to compel election. Record reviewed, and held that the refusal to compel a defendant to elect whether he would proceed on tort or on contract was quite harmless.

Riggs v Gish, 201-148; 205 NW 833

Misconduct of jury. Misconduct of the jury is not ground for a new trial when the prevailing party is entitled, as a matter of law, to the judgment accorded to him.

Butler Co. v Elliott, 211-1068; 233 NW 669

Slightly excessive recovery. The reception in evidence in a personal injury action of a hospital bill which includes a charge for "board" for the patient, is not reversible error when the amount of the nonrecoverable item is not shown, and when, apparently, the matter was not called to the attention of the trial court.

Sutton v Moreland, 214-337; 242 NW 75

(b) ERRORS NOT AFFECTING RESULT

Improper fixing of value in replevin. The fact that in replevin the court fixes the value of the property, instead of submitting such issue to the jury, becomes of no consequence when the plaintiff avails himself of the right to take the actual property.

Schmoller Co. v Smith, 204-661; 215 NW 628

Incompetent evidence—effect. In an equitable proceeding for the revocation of the license of a physician, the reception of immaterial or incompetent evidence will be deemed harmless, because it will be presumed that all such testimony was rejected in arriving at the final decision.

State v Knight, 204-819; 216 NW 104

Failure to submit issue. Failure to submit an issue of partnership is harmless when such failure does not change the result, especially

IV HARMLESS ERROR—continued
(b) ERRORS NOT AFFECTING RESULT—concluded

when the evidence supporting the issue is indefinite.

First N. Bank v Schram, 202-791; 211 NW 406

Failure to enter formal judgment on collateral order. The failure of the court, following a dismissal of a quantum meruit count by plaintiff, to enter a formal judgment of dismissal of the said count cannot possibly detrimentally affect the defendant on his appeal from a judgment against him on the remaining count.

Hunt, etc. v Moore, 213-1323; 239 NW 112

Failure to enter formal judgment of dismissal. Failure of the court, following its order dismissing a counterclaim, to enter a formal judgment of dismissal of said counterclaim, cannot possibly prejudice the appellant in his appeal from the final judgment on the merits.

Hunt, etc. v Moore, 213-1323; 239 NW 112

Subsequent errors harmless after refusal to direct verdict. Where the court should have directed a verdict for the defendant at the completion of testimony, subsequent errors on rulings or orders were not prejudicial and could not be relied on by the plaintiff as grounds for a new trial, after a verdict was rendered for the defendant.

Paulson v Hanson, 226-858; 285 NW 189

Striking of material allegation. No injury results from striking a material allegation from a pleading when the record shows that in the trial the matter stricken was treated as at issue, was duly tried out, and was properly submitted to the jury.

Insull v McDaniels, 201-533; 207 NW 533
Main v Brown, 202-924; 211 NW 232
Rudd v Jackson, 203-661; 213 NW 428

Fraud—instruction following rescission theory. In vendee's action for damages for fraudulent representations of value in the sale of real estate, no rescission being asked, it is error to instruct that the measure of damages is the amount paid less the reasonable rental value for the time occupied, which error, however, is without reversible prejudice to the vendor, when the amount of recovery is so small that the hope for a more favorable verdict on a retrial is, under the evidence, too remote.

Neal v Miller, 225-252; 280 NW 499

Remarks of court. Remarks of the trial court during examination of a witness, which the court might well have refrained from making, are not prejudicially erroneous, when the subject matter appearing in the record at this point would not change the result.

King v Gold, 224-890; 276 NW 774

(c) ERROR AFFECTING PARTY NOT ENTITLED TO RECOVER

Error against party not entitled to recover.

Dye Co. v Davis, 202-1008; 209 NW 744
Wiley v Dobbins, 204-174; 214 NW 529; 62 ALR 432
Anderson Co. v Reinking, 204-239; 213 NW 775
Whitmore v Herrick, 205-621; 218 NW 334
McLain v Risser, 207-490; 223 NW 162
Blakely v Cabelka, 207-959; 221 NW 451
Foley v Mathias, 211-160; 233 NW 106; 71 ALR 696
Butler v Elliott, 211-1068; 233 NW 669

Unjustifiable chance for recovery. Instructions which, in stating the issues, give the plaintiff a chance for a recovery to which he was not entitled are harmless when the jury finds that plaintiff was not entitled to recover in any event.

Ferber v Railway, 205-291; 217 NW 880

Error against noncomplainant.

Klass v Ins. Co., 210-78; 230 NW 314

Unnecessary proof of a negative. Incompetent proof of the negative of a proposition cannot be deemed prejudicial to a party who cannot recover under any circumstances unless he proves the affirmative of the same proposition, and proffers no such proof.

Range v Ins. Co., 216-410; 249 NW 268

Nonright to recover — inadequate instructions. A plaintiff who has failed to establish the material allegations of his petition, and is therefore not entitled to recover in any event, cannot be deemed harmed by the failure of the court adequately to present to the jury his pleaded cause of action; nor may he be deemed harmed by an inadequate verdict.

Comparet v Metz Co., 222-1328; 271 NW 847

Erroneous instructions cured where directed verdict proper. Errors in instructions made by the trial court are not prejudicial to the appellant when appellee is entitled to a directed verdict.

Young v Clark, 226-1066; 285 NW 633

(d) ERRORS FAVORABLE TO PARTY COMPLAINING

Unprayed-for relief.

Conn v Heaps, 205-248; 216 NW 73

Error in favor of complainant.

Morrow v Scoville, 206-1134; 221 NW 802
Judd v Rudolph, 207-113; 222 NW 416; 62 ALR 1174

Striking proper testimony. A party who seeks, on cross-examination, to secure from the witness an admission of facts derogatory to the credibility of the witness, and is met by a positive denial, may not be deemed prejudiced by the striking out of such denials, tho the cross-examination was proper.

Glass v Hutchinson Co., 214-825; 243 NW 352

Exclusion of unnecessary evidence. An appellant cannot be deemed harmed by the rejection of proof of a fact which the instructions relieve appellant from proving.

Faber v Ins. Co., 221-740; 265 NW 305

Instructions favorable to complainant. Error may not be predicated on the giving of an instruction which is favorable to the complainant.

Rosenstein v Smith, 218-1381; 257 NW 397

Appellant not adversely affected by error. If the appellant is not adversely affected by the lower court's decision, even if erroneous, nothing is left for review by the appellate court on that appeal.

In re Keeler, 225-1349; 282 NW 362

(e) NATURE OR FORM OF REMEDY

Equity (?) or law (?)—refusal to transfer.

Westerman v Raid, 203-1270; 212 NW 134

Refusal to transfer action.

Lex v Selway Corp., 203-792; 206 NW 586

Premature consolidation of actions.

Lex v Selway Corp., 203-792; 206 NW 586

Premature appointment of receiver.

Farmers Bk. v Miller, 203-1380; 214 NW 546

Irregular but manifestly correct adjudication. Where the record reveals that a judgment creditor legally acquired a landlord's lien through garnishment proceedings against a tenant, the appellate court will not be inclined to inquire into the strict regularity of the proceedings whereby such adjudication was had.

Kinart v Churchill, 210-72; 230 NW 349

(f) PLEADING

Refusal to strike pleading.

Dean v Atkinson, 201-818; 208 NW 301

Overruling plea.

Gotsch v Schoenjahn, 201-1317; 207 NW 567

Denial of right to implead.

Bookhart v Younglove, 207-800; 218 NW 533

Establishing immaterial reply.

Hiller v Felton, 208-291; 225 NW 452

Receiving pleadings in evidence.

Kemmerer v Highway Com., 214-136; 241 NW 693

Belated reply. A reply filed without leave of court and after the trial is concluded, and purporting to conform the pleadings to the evidence, may be considered, notwithstanding its untimeliness, when neither party is deprived thereby of any testimony.

McDonald Co. v Morrison, 211-882; 228 NW 878

Technical inaccuracy in plea.

Cochran v Sch. Dist., 207-1385; 224 NW 809

Striking of superfluous count. The striking by the court of one of several counts of a petition must be deemed quite harmless when the matter stricken is substantially repeated in an unstricken count.

McGlothlen v Mills, 221-204; 265 NW 117

Striking plea under which pleader could not recover.

Johnson Co. Bank v Creston, 212-929; 231 NW 705; 237 NW 507; 84 ALR 926

(g) SELECTION AND IMPANELING OF JURORS

Challenges overruled—waiver. A party may not predicate error on the overruling of his challenge for cause to a juror when he fails to utilize his unused peremptory challenges.

Tobin v Budd, 217-904; 251 NW 720

(h) CONDUCT OF TRIAL OR HEARING IN GENERAL

Refusal of postponement of trial.

Farmers Bank v Bunge, 211-1357; 231 NW 651

Error which becomes inconsequential. Error in overruling a motion for a directed verdict at the close of plaintiff's evidence when certain all-essential testimony was not then in the record, becomes inconsequential when, at the time of renewing the motion at the close of all the evidence, such testimony is in the record.

Newland v McClelland, 217-568; 250 NW 229

Custody of jury. Bailiff's remark, that jury might be kept for 30 days before the court would accept a verdict that they had "agreed to disagree", is not prejudicial when the jury themselves treated the remark as a joke.

Tharp v Rees, 224-962; 277 NW 758

(i) RULINGS AS TO EVIDENCE IN GENERAL

Reception of non res gestae statement.

State v Ayles, 205-1024; 219 NW 41

Inconsequential testimony. The reception of immaterial and inconsequential testimony is not ground for reversal.

Graeser v Jones, 217-499; 251 NW 162

Refusal to exclude testimony otherwise in record.

Eilers v Frieling, 211-841; 234 NW 275

Conclusion of witness.

State v Thomlinson, 209-555; 228 NW 80

Erroneous striking of counterclaim.

Harriman v Roberts, 211-1372; 235 NW 751

Error as to abandoned pleading.

Butler Co. v Elliott, 211-1068; 233 NW 669

Exclusion of inconsequential photographs.

State v Smith, 215-374; 245 NW 309

IV HARMLESS ERROR—continued

(i) RULINGS AS TO EVIDENCE IN GENERAL—concluded

Striking paragraph of pleading without change of issues.

Cleophas v Walker, 211-122; 233 NW 257

Withdrawal of specific ground of negligence. The withdrawal by the court from the jury of an allegation of a specific act of negligence cannot be deemed harmful when the court submits the case to the jury under the "res ipsa loquitur" rule.

Anderson v Railway, 208-369; 226 NW 151

Offer of evidence—discrimination. Permitting one party to introduce opinion evidence on a certain point and denying to the opposing party the right to counter with like evidence do not necessarily constitute reversible error.

Slinger v Ins. Assn., 219-329; 258 NW 101

(j) RULINGS ON QUESTIONS TO WITNESSES

Mathematical calculation.

Zabawa v Osman, 202-561; 210 NW 602

Striking hypothetical question.

Blakely v Cabelka, 203-5; 212 NW 348

Striking preliminary question.

Blakely v Cabelka, 203-5; 212 NW 348

Excluding question — record demonstrating nonerror. No error results from excluding a question as to what a party to the action said during a named conversation, when the record otherwise shows that said party was not present at said conversation.

Nortman v Lally, 204-638; 215 NW 713

Competency — probate claimant's wife. In proceeding on claim against a decedent's estate for an alleged loan, trial court erred in holding that claimant's wife was an incompetent witness as to conversation with decedent wherein he stated that "they should get around to make a note for the $500 he gave him". However, since court also found in effect that such evidence would not have been sufficiently definite to establish the claim, such error was not prejudicial.

In re Green, 227-702; 288 NW 881

Unanswered question.

State v Slycord, 210-1209; 232 NW 636

(k) ADMISSION OF EVIDENCE

Undue license as to evidence.

State v Speck, 202-732; 210 NW 913

Conclusion answers. Error may not be predicated on the fact that a witness was permitted to give a conclusion answer when the witness had, prior thereto, without objection, stated the facts relative to said matter.

First St. Bank v Tobin, 204-456; 215 NW 767

Conclusions—nonfatal admission. Admission of conclusions of witnesses that they sawed lumber according to instructions, that the logs of appellee were better than others, and other similar conclusions held not prejudicial when the same testimony was elicited by proper questions and answers.

Waterman v Gaynor, (NOR); 215 NW 641

Exclusion of exhibits but not of related testimony. The action of the court in withdrawing from the record certain exhibits, but refusing to withdraw the oral testimony relating thereto, does not necessarily constitute reversible error.

Githens v Ins. Co., 201-266; 207 NW 243; 44 ALR 863

Erroneous but harmless evidence. Tho the cause of death of a deceased was a question for the jury to decide, yet permitting a physician to testify that death resulted from certain injuries must be deemed harmless when the cause of death never was in issue,—when the jury would necessarily have found in accordance with said testimony had it not been received.

Lukin v Marvel, 219-773; 259 NW 782

Reception of immaterial evidence. In an action for damages consequent on a nuisance, evidence to the effect that a septic tank has the power to destroy disease germs reviewed and, in view of the record, held immaterial, but nonprejudicial.

Hill v Winterset, 203-1392; 214 NW 592

Reception of improper evidence.

Kness v Kommes, 207-137; 222 NW 436
O'Hara v Chaplin, 211-404; 233 NW 516

Proper question with improper answer — effect. A properly framed question on a relevant and material matter is not rendered improper by the contents of the answer which is in no manner attacked, and as to which no relief is asked.

Rulison v X-ray Corp., 207-895; 223 NW 745

Incompetent testimony harmless.

Nortman v Lally, 204-638; 215 NW 713

Incompetent evidence of value. Conceding, arguendo, that certain received evidence of value was incompetent, yet the error becomes inconsequential when the parties stipulate as to the value and the court adopts the stipulation.

In re Manning, 215-746; 244 NW 860

Competent and incompetent evidence.

Olson v Shuler, 208-70; 221 NW 941

Incompetent testimony on otherwise competently proven fact. The reception of incompetent testimony in proof of a fact becomes quite harmless when the said fact is otherwise

unquestionably established by competent testimony.

School District v Sass, 220-1; 261 NW 30
Crawford v Emerson, 222-378; 269 NW 334

Professional memorandum by deceased—incompetent when stating no fact. Brief notations on a slip of paper, identified by a deceased attorney's stenographer as made by him at the time a testator conferred with him about the drawing of the will, are incompetent as evidence when the notes do not state any fact. However, their admission in evidence is harmless when the witness had previously testified without objection to the whole of the conversation.

In re Iwers, 225-389; 280 NW 579

Incidentally received matter. Incidentally received testimony relative to the scattering of salt on an icy sidewalk after an accident does not constitute reversible error.

Burke v Lawton (Town), 207-585; 223 NW 397

Inconsequential testimony. Error in receiving wholly inconsequential testimony must be treated as harmless.

Diesing v Spencer, 221-1143; 266 NW 567

Reception of nonprejudicial testimony.

Comparet v Coal Co., 200-922; 205 NW 779

Unapplied evidence. Evidence tending to prove that a defendant-sheriff was attempting to make an arrest for an offense committed in his presence is harmless when no such issue was presented to the jury.

Lawyer v Stansell, 217-111; 250 NW 887

Reception of evidence already in record.

State v Plew, 207-624; 223 NW 362

Evidence received with and without objection.

Legler v Clinic, 207-720; 223 NW 405

Procedure in governmental office.

Farmers Bk. v Bunge, 211-1357; 231 NW 651

Reception of belated nonrebuttal testimony. The reception of nonrebuttal testimony after parties have rested will not be deemed reversible error unless it affirmatively appears that the court abused its discretion.

Hoegh v See, 215-733; 246 NW 787

Undue particularity of proof. Needless or unjustifiable particularity in proving just when a public sale took place—said date being material—does not necessarily constitute error.

Moen v Fry, 215-344; 245 NW 297

(l) EXCLUSION OF EVIDENCE

Correct decision notwithstanding excluded evidence.

In re Work, 212-31; 233 NW 28

Loss of business—nonprejudicial exclusion. Exclusion of testimony that plaintiff's business fell off after his injury, if improper, was not prejudicial when favorable answer would not have permitted plaintiff's recovery.

Rauch v Dengle, (NOR); 218 NW 470

Exclusion of relevant and material evidence.

Butler Co. v Elliott, 211-1068; 233 NW 669

Exclusion of material evidence. The exclusion of a part of the testimony offered to show a material fact will not constitute error when in the further progress of the case the fact in question is treated as fully established.

Van Gorden v City, 216-209; 245 NW 736

Rejection of inconsequential testimony.

Insell v McDaniels, 201-533; 207 NW 533
In re Newson, 206-514; 219 NW 305
State v Smith, 207-1345; 224 NW 594
Darden v Railway, 213-583; 239 NW 531
Glessner v Railway, 216-850; 249 NW 138

Exclusion of noncontrolling testimony. The exclusion of noncontrolling testimony held harmless.

Valentine v Morgan, 207-232; 222 NW 412

Refusing cumulative evidence. Refusal to admit testimony, which at the best is merely cumulative, is not prejudicially erroneous.

Hawkins v Burton, 225-707; 281 NW 342

Exclusion of evidence on established fact.

State v Troy, 206-859; 220 NW 95
Ankeney v Brenton, 214-357; 238 NW 71
Rodskier v Ins. Co., 216-121; 248 NW 295

Striking defensive matter.

In re Carpenter, 210-553; 231 NW 376

Withdrawal of incompetent evidence.

McDonald v Robinson, 207-1293; 224 NW 820; 62 ALR 1419

Remote speed—materiality first presented on appeal. Defendant's claim that plaintiff's speed remote from the collision was material as showing that at the time defendant looked back before making a left turn, plaintiff was too distant to be seen over a viaduct, may not, when such evidence is excluded, be urged first on appeal as ground for reversal when such purpose for introducing such evidence was not stated to the trial court.

Thomas v Charter, 224-1278; 278 NW 920

(m) SAME OR SIMILAR EVIDENCE OTHERWISE ADMITTED

Unallowable opinion on otherwise established fact.

Walters v Elec. Co., 203-467; 212 NW 886

Opinion evidence—harmless exclusion—evidence otherwise in record making jury question. Error in striking testimony is harmless when

IV HARMLESS ERROR—continued

(m) SAME OR SIMILAR EVIDENCE OTHERWISE ADMITTED—concluded

the facts sought are otherwise in the record, and when if admitted the record would still present a jury question.

In re Willer, 225-606; 281 NW 155

Exclusion of evidence otherwise received.

First Bank v Tobin, 204-456; 215 NW 767

Amick v Montross, 206-51; 220 NW 51; 58 ALR 1147

Ankeney v Brenton, 214-357; 238 NW 71

Excluded testimony otherwise received. Parties charged with conspiracy may not predicate error on the exclusion of documentary evidence tending to show the lawfulness of their purposes when the essential facts revealed in the excluded evidence are otherwise shown in their testimony.

State v Moore, 217-872; 251 NW 737

Rejection and reception of same evidence.

Handlon v Henshaw, 206-771; 221 NW 489

Exclusion and subsequent reception of evidence.

Norton v Lally, 204-638; 215 NW 713

State v McCook, 206-629; 221 NW 59

Olson v Shafer, 207-1001; 221 NW 949

Morrow v Downing, 210-1195; 232 NW 483

West Chester Bank v Dayton, 217-64; 250 NW 695

Excluding facts otherwise shown. Sustaining an objection to a question is harmless and nonreviewable when the matter involved is otherwise in evidence from the same witness.

Mosher v Snyder, 224-896; 276 NW 582

Other competent proof. The supreme court was not required to pass on the soundness of sustained objections to evidence that a certain road was a county trunk highway when there was other competent proof of the point, and no offer of controverting testimony was made.

Davis v Hoskinson, 228- ; 290 NW 497

Cross-examination—evidence previously covered. Where an offer of evidence was made during cross-examination, and was covered by other testimony, there was no prejudice in sustaining an objection to the offer.

Maddy v City Council, 226-941; 285 NW 208

Refusal to admit all of conversation. Error in refusing to permit a witness to fully detail a conversation with another party is harmless when the excluded part is otherwise brought out by other witnesses.

Baehr-Shive Co. v Stoner-McCray, 221-1186; 268 NW 53

Curtailed cross-examination. Conceding that a cross-examination was unduly curtailed, yet no error results when the complaining party offered the witness as his own witness, and brought out the testimony excluded on cross-examination.

Goben v Pav. Co., 218-829; 252 NW 262

Oral testimony as to foreign statutes. No reversible error occurs in permitting a layman (without objection to his competency) to testify relative to the statute laws of a foreign state when such statutes, relative to the subject matter in question, were ultimately introduced in evidence.

Richmond v Whitaker, 218-606; 255 NW 681

(n) JUDGMENT OR ORDER

Refusal of proportional distribution on sale.

Hedges Co. v Holland, 203-1149; 212 NW 480

Error affecting only co-party.

Fellers v Sanders, 202-503; 210 NW 530

Form of judgment. Where a trustee under a trust agreement sues the maker of promissory notes on a series of notes the beneficial interest of which is in different parties, the defendant may not complain that a separate judgment is rendered on each count, and an aggregate judgment for the sum of all the separate judgments, the defendant being amply protected, by the terms of the judgments, from a double liability.

Iowa Co. v Clark, 215-929; 247 NW 211

Disregard of incompetent evidence. A competently supported judgment will not be reversed because of incompetent evidence.

Koht v Dean, 220-86; 261 NW 491

Schoolhouse site—permissible order of court. An order of court commanding the school board forthwith to erect a schoolhouse on a specified site is unobjectionable when such site had already been legally selected by the board.

Sanderson v Board, 211-768; 234 NW 216

Failure to enter formal order for foreclosure. In the foreclosure of a real estate mortgage and of a chattel mortgage clause embraced therein, the fact that the lower court failed to enter an order for the formal foreclosure of the chattel mortgage is quite inconsequential when the court did appoint a receiver of said mortgaged chattels and properly ruled that plaintiff's lien was superior to that of appellant's.

Equitable v Brown, 220-585; 262 NW 124

(o) ERRONEOUS SUBMISSION OF ISSUES TO JURY

Interpretation of contract by jury.

Riggs v Gish, 201-148; 205 NW 833

Submission of dual controlling propositions. In an action for services rendered a deceased, prejudicial error does not result from submitting to the jury the interrogatories, (1) whether there was an express contract for payment, and (2) whether there was a mutual

expectation between the parties to pay and receive pay for the services; even tho the express contract was established beyond doubt.

In re Willmott, 215-546; 243 NW 634

Verdicts—submission of separate forms. In an action against the driver and owner of a truck, held, the omission to submit separate forms of verdict for each defendant was not prejudicial error, the court having specifically and correctly instructed the jury as to separate liability of each defendant.

Carlson v Decker, 218-54; 253 NW 923

Submitting unpleaded issue. Slight inaccuracy in submitting a pleaded item of damages will not be deemed the submission of an unpleaded issue when the jury could not have been misled.

Siesseger v Puth, 211-775; 234 NW 540

Erroneous submission of unsupported damages. The submission to the jury, in an action for damages, of an unsupported measure of damages constitutes error, but record reviewed and held harmless to the complaining defendant.

Carpenter v Wolfe, 223-417; 273 NW 169

Improper submission of interrogatories. The submission to the jury, at the request of the defendant, of special interrogatories improper in form and without prior submission to counsel for plaintiff, does not constitute prejudicial error, when the jury was told to answer the interrogatories only in case it found for plaintiff, and when the jury found for defendant.

Baron v Indemnity Co., 218-305; 255 NW 496

Will contests—contract of settlement—fraud and undue influence. In action to set aside contract for settlement of will contest, representations that "lawyers would get all the property" and that devisee "did not need a lawyer" were not fraudulent representations, and failure of court to submit issue of undue influence and constructive fraud was not error under the evidence.

Smith v Smith, (NOR); 230 NW 401

(p) INSTRUCTIONS TO JURY

Harmless error—stating who asked instructions. Stating in instructions that certain instructions were given at the request of a named party does not constitute reversible error, but such practice should be avoided.

Johnson v McVicker, 216-654; 247 NW 488

Failure to find conclusively proven fact.

Schipfer v Stone, 206-328; 218 NW 568

Hypercritical objection.

State v Joy, 203-536; 211 NW 213

Submission of unsupported issue.

State v Lambertti, 204-670; 215 NW 752

Instructions as regards note not in issue.

Farmers Bk. v DeWolf, 212-312; 233 NW 524

Omission of conclusively established fact. The erroneous omission from an instruction of a fact element which stands conclusively established in the testimony is harmless.

State v Cordaro, 206-347; 218 NW 477
McClary v Railway, 209-67; 227 NW 646

Obviating error by construction as a whole. Inferential error in one instruction may be wholly removed by construing the instructions as a whole.

Cuthbertson v Hoffa, 205-666; 216 NW 733

Nonprejudicial instructions. An instruction to the effect that if the defendant failed to yield to another motorist one-half of the traveled way, the jury, "in the absence of justifiable excuse", might find the defendant negligent, cannot be deemed prejudicial to a defendant who established no excuse whatever.

Lukin v Marvel, 219-773; 259 NW 782

Imputed negligence. Instruction on the subject of imputed negligence held nonprejudicial.

Sutton v Moreland, 214-337; 242 NW 75

Probate claim—agreement with decedent—claimant incompetent to testify. In probate action to establish a claim based upon an express agreement of decedent that claimant's services should be paid for from decedent's estate, an instruction that claimant was not permitted to testify as to agreement between her and decedent, and that if any agreement was in fact made between the parties, it must be proved by testimony other than that of claimant, was not prejudicial to defendant in that jury would believe that it applied to the communication of the contract to claimant through her father, who had been informed by decedent as to the nature of the agreement—there being other testimony of the communication, and the trial court having excluded the testimony of the father after objection of defendant.

In re McKeon, 227-1050; 289 NW 915

Instruction on immaterial, nonprejudicial evidence. A will contestant's contention that it was error to instruct regarding a nonmaterial exhibit—a memorandum by a deceased attorney, who drew the will—although well founded, held to be error without prejudice when the paper and the conversation connected therewith were not necessary for proponents to make a prima facie case of the due and legal execution of the will and the genuineness of the signatures.

In re Iwers, 225-389; 280 NW 579

Fraud of one defendant only. An instruction to the effect that, if any of several defendants by fraudulent concealment prevented the plaintiff from discovering an original fraud

IV HARMLESS ERROR—concluded
(p) INSTRUCTIONS TO JURY—concluded

perpetrated upon him, the statute of limitation would thereby be tolled, is harmless (if erroneous) when the record quite conclusively established the wrongful connection of all of the defendants with such fraudulent concealment.

Pullan v Struthers, 201-1179; 207 NW 235

Harmless inaccuracy. Instructions relative to acquiring negotiable promissory notes by "assignment," instead of by "indorsement," are quite harmless, when complainant does not claim the rights of a holder in due course.

First St. Bank v Tobin, 204-456; 215 NW 767

Inadvertent use of words in instructions.

State v Hughey, 208-842; 226 NW 371

Undue burden on appellee.

Lange v Bedell, 203-1194; 212 NW 354

V CURING ERROR

Curing error by oral or written instructions. See under §§11491–11493, 13944 (VI)

Error cured by granting new trial. An erroneous ruling against a party necessarily becomes harmless when he is granted a new trial.

Murray v Ins. Co., 204-1108; 216 NW 702

Curing erroneous docketing. The erroneous docketing on the equity side of the calendar of an action of forcible entry and detainer becomes inconsequential when subsequent pleadings put title in issue and thereby convert the original law action into an equitable action.

Suiter v Wehde, 218-200; 254 NW 33

Error cured by verdict. Error in instructions relative to manslaughter is inconsequential when the jury convicts the accused of first degree murder.

State v Troy, 206-859; 220 NW 95

Erroneous instructions rendered harmless by verdict.

Rawleigh Co. v Moel, 215-843; 246 NW 782

Remittitur. An erroneous and manifestly inadvertent instruction as to damages may be such as to be curable by a remittitur.

Lee v Ins. Co., 214-932; 241 NW 403

Error harmless because of remittitur. Error in instructions relative to the computation of the amount of a verdict may be cured by a remittitur.

In re Willmott, 215-546; 243 NW 634

Remittitur cures error. In an action against an estate to recover a money judgment for one-third of the value thereof (tried prior to the closing of the estate), any error in submitting to the jury the question of the net value of the estate is rendered harmless by the action of the plaintiff in stipulating to remit from the judgment a proportional amount of the ultimate costs of administration.

In re Anderson, 203-985; 213 NW 567

Dual judgments—remittitur. When two separate judgments are entered in the same action —one on the return of the verdict, and one on the ruling for new trial—the formal remitting of the prior judgment removes all error.

Lynch v Railway, 215-1119; 245 NW 219

Motion to direct verdict—curing erroneous denial. When plaintiff, at the close of his evidence, has not made a jury question for recovery, the erroneous overruling of defendant's motion for a directed verdict will not be deemed reversible error when, at the close of all the evidence, the evidence does reveal such jury question.

Carr v Bankers Assn., 222-411; 269 NW 494; 107 ALR 1080

Excessive damages. Error in instructions which might authorize an excessive recovery may be conclusively negatived by special jury findings.

Rulison v X-ray Corp., 207-895; 223 NW 745

Inaccurate limitation on recovery cured by instruction. Where a plaintiff itemized his general and particular damages in a personal injury action, the failure of the court to specifically say to the jury that it must not allow more on any item than the amount as stated in the petition, nor more than the aggregate of said items, is nonprejudicial when the evidence would not support a greater verdict on any particular item than as itemized, and when the verdict was materially less than the claim for general damages, and when the court specifically instructed the jury that it could not allow any item of damages in a greater sum than "established by the evidence."

Wosoba v Kenyon, 215-226; 243 NW 569

Abstract curing error. Error of the court in improperly taking judicial notice of the pendency of another action becomes quite harmless when the appellant demonstrates by his abstract of the record that said other action was actually pending.

Benjamin v Jackson, 207-581; 223 NW 383

Inaccurate instruction cured by testimony. A party's admissions and testimony may render an inaccurate instruction quite harmless.

Heflen v Brown, 208-325; 223 NW 763

Nullifying error. The act of the court in wholly withdrawing the issue of "reckless" operation of an automobile nullifies any former error of the court in refusing to direct a verdict on the ground of absence of evidence of reckless operation.

Thompson v Farrand, 217-160; 251 NW 44

Curing error in argument. An oral admonition by the court to the jury, during argument,

not to consider a certain statement by counsel, ordinarily cures any error resulting from the making of the statement.

Stingley v Crawford, 219-509; 258 NW 316

Improper evidence excluded by proper submission. In an action for damages resulting solely from the "inconvenience and discomfort in the occupancy and enjoyment of property" because of a nuisance, evidence tending to show that the nuisance was unsanitary, and might be injurious to health, becomes harmless when the court submits the issues strictly in accordance with the pleadings.

Chase v Winterset, 203-1361; 214 NW 591; 37 NCCA 228

Reception of evidence. Error in the reception of incompetent testimony relative to the physical condition of an injured party is ordinarily nullified by striking the testimony and specifically admonishing the jury to disregard such stricken testimony.

McKee v Iowa Co., 204-44; 214 NW 564

Errors against prevailing party. While a defendant, on an appeal from an order granting plaintiff a new trial, may not ordinarily show that he was sinned against by the adverse and erroneous rulings of the trial court, yet he may assign error on the refusal of the trial court, at the close of all the evidence, to sustain his motion for a directed verdict, because, if he were legally entitled to a directed verdict, such fact would ordinarily be fatal to plaintiff's motion for a new trial.

Bennett v Ryan, 206-1263; 222 NW 16
See Jordan v Schantz, 220-1251; 264 NW 259

Death of absent witness. An order refusing a continuance which was asked for because of the absence of a witness will be sustained when it appears that the absent witness has died since the trial.

Suiter v Wehde, 218-200; 254 NW 33

Handwriting expert — jury admonition. If evidence, erroneously admitted during the progress of a trial, is distinctly withdrawn by the court, the error is cured, except where it is manifest that the prejudicial effect on the jury remained despite its exclusion. Testimony by a handwriting expert, who referred to notes, which were merely the basis or reason for his opinion as to the genuineness of signatures to a will, held not within the exception.

In re Iwers, 225-389; 280 NW 579

Points presentable by nonappellant. An appellee, without presentation of error points, may show, if he can, that he was so erred against as to entirely neutralize any errors against appellant.

Ford v Dilley, 174-243; 156 NW 513
Taylor v Sch. Dist., 181-544; 164 NW 878
State v Sch. Dist., 188-959; 176 NW 976
Finley v Thorne, 209-343; 226 NW 103
Miller v Surety Co., 209-1221; 229 NW 909
See Voorhees v Arnold, 108-77; 78 NW 795

Satisfaction of unlawfully taxed costs. Error in taxing attorney fees when the instrument sued on does not provide therefor is fully cured by a statement in the written argument on appeal by the attorney in whose favor the taxation was had to the effect that he had fully released and satisfied the judgment for such fees, such statement, tho irregularly presented, being irrevocably binding on the attorney.

Koontz v Clark Bros., 209-62; 227 NW 584

Withdrawn testimony. Testimony, in an action for malicious prosecution, relative to the return of an indictment against plaintiff but without proof that defendant was connected therewith, reveals no prejudicial error when the court ultimately withdrew said testimony in toto.

Richmond v Whitaker, 218-606; 255 NW 681

Instructions — reasonable value—admissions from pleadings. In action to recover price of corn sold to elevator, an instruction injecting element of reasonable value was erroneous where the pleading alleged express agreement on price, and a further erroneous instruction stating what defendant's answer admitted, but omitting qualification in defendant's pleadings, was not cured by instruction referring to a substituted oral agreement.

Hartwig v Elevator Co., (NOR); 226 NW 116

VI INVITED ERROR

Inviting court to err—not permitted. A litigant will not be permitted to entrap the court by an invitation to commit error.

In re Iwers, 225-389; 280 NW 579

Nonreviewable subject matter—invited rulings of court. A litigant who moves to strike a pleading or to require it to be made more specific may not have the rulings on his motion reviewed on certiorari; and this is necessarily true even tho it be conceded, arguendo, that the pleading in question was not legally on the calendar.

Holcomb v Franklin, 212-1159; 235 NW 474

Party entitled to allege error. A party may not lodge a complaint against the reception in evidence of matter which he himself caused to be introduced.

In re O'Hara, 204-1331; 217 NW 245

Estoppel to allege error. A defendant may not question the action of the court in sustaining his motion to withdraw allegations of specific negligence and to submit the cause on a general allegation of negligence.

Anderson v Railway, 208-369; 226 NW 151

Estoppel to allege error. Counsel will not be permitted to equivocate relative to proper and material questions asked him by the court and thereupon base error on the ensuing colloquy.

State v Woodmansee, 212-596; 233 NW 725

VI INVITED ERROR—concluded

Hearsay testimony—reception—inviting error. Defendant who, on cross-examination of the state's witness, first enters the forbidden field of hearsay testimony on a certain point, is not in an advantageous position to object when the state, on redirect, follows into the same field of inquiry, especially when the testimony erroneously received is not inherently prejudicial and is practically that which was brought out by defendant on cross-examination.

State v Philpott, 222-1334; 271 NW 617

Instructions inviting excess recovery.

Siesseger v Puth, 211-775; 234 NW 540
McQuillen v Meyers, 213-1366; 241 NW 442

Claims — statute of limitations — equitable avoidance by court. Whether the "peculiar circumstances" pleaded as an excuse for not presenting a claim before the expiration of the statutory one year are sufficient to justify the granting of equitable relief is a question for the court, but claimant may not acquiesce in trying the issue to the jury and then predicate error thereon.

Peterson v Johnson, 205-16; 212 NW 138

11549 "New trial" defined.

Communicating with jury. See under §11497
Curing error and misconduct. See under §§11493, 11548 (V), 13944 (VI)
Directed verdicts. See under §11508
Erroneous instructions. See under §11493
Findings inconsistent with general verdict. See under §11514, Vol. I
Necessity for objections and timeliness thereof. See under §11536
New trial after term. See under §12788
New trial in criminal cases. See under §13944
Quotient verdicts. See under §11508
Separation of jury. See under §11498, Vol. I
Verdicts contrary to instructions. See under §11493 (VII)
Verdict-urging or coercive instructions. See under §11493 (I)

Dismissal of part of defendants. Under a plea that the affections of a wife had been alienated by the joint and several acts and conduct of several defendants, the court may, on a motion for a new trial, sustain the motion as to certain defendants and dismiss the action as to such defendants.

Weyer v Vollbrecht, 208-914; 224 NW 568

Remand—right to amend. A plaintiff manifestly does not set up a new and different cause of action when, after remand on appeal in a law action based on negligence, he, by allowable pleadings, rephrases and elaborates an unadjudicated ground of negligence which was embraced in his pleadings at the time of the original trial.

Lahr v Railway, 218-1155; 252 NW 525

Remand—utilizing unadjudicated ground of negligence. Plaintiff, in an action based on negligence, who fails on appeal to sustain a verdict in his favor against an employer based solely on the doctrine of respondeat superior, may, on remand and retrial, avail himself of a ground of negligence which was alleged by him on the original trial, but which was unadjudicated, and which, if established, would render the defendant liable irrespective of the doctrine of respondeat superior.

Lahr v Railway, 218-1155; 252 NW 525

11550 Grounds for new trial.

Discussion. See 22 ILR 609—Trial technique

ANALYSIS

Appeals on orders involving new trial. See under §12823 (VII)
Coercing jury by instructions. See under §11493 (I)
Injecting insurance in motor vehicle damage case. See under §5037.09 (VII)
Motion for new trial not always necessary to obtain review. See under §12828
New trial, criminal cases. See under §13944

I NATURE AND SCOPE OF REMEDY

(a) IN GENERAL

Decisions reviewable—restricting appeal to matters in notice. A notice of appeal specifying only the overruling of a motion for a new trial restricts the appeal to such matters as were raised in the trial court on said motion.

Shultz v Shultz, 224-205; 275 NW 562

Appellant bound by election of remedies. A litigant who chooses to move for a new trial, and is granted such, and therefore allows the time for appeal from the judgment against him to elapse without action, and thereafter suffers an adverse order setting aside the order for a new trial, may not, in appealing from said latter order, so frame his appeal as to secure a review of any question except the question of the correctness of said latter order.

Selby v McDonald, 219-823; 259 NW 485

Objections to evidence—reraising unnecessary. Where the immateriality of evidence objected to is plainly discernible and no further particularity is required to apprise the trial court of grounds of objections, it is not necessary that these same identical matters be again presented to trial court by way of motion for new trial before they may be considered by supreme court.

Floy v Hibbard, 227-149; 287 NW 829

Granting on untenable grounds—appeal by appellee. Whether on appeal from an order granting a new trial on an untenable ground, appellee may save the ruling by taking a cross-appeal, and show that the trial court erred in not sustaining the motion for a new trial on grounds assigned by him that were tenable, quaere. (See State v School Dist., 188-959.)

Kessel v Hunt, 215-117; 244 NW 714

Administrator—liability on bond—existing judgment—when new trial improper. Under the general rule that a judgment against an administrator is conclusive against the surety on his bond, where a judgment against an administrator for misappropriation of funds stands unreversed, it is error to set aside judgment on a bond and give the surety a new trial, since such order would not ipso facto vitiate a former order fixing the administrator's liability.

In re Sterner, 224-605; 277 NW 366

Rendering judgment on appeal instead of new trial. Where appeal is not only from order denying new trial but from all other erroneous rulings and where evidence as to completed gift inter vivos would not change on retrial, the supreme court may render such judgment as inferior court should have done.

Wilson v Findley, 223-1281; 275 NW 47

Nonliability of city—reversible error. It is reversible error to grant a new trial because the court had omitted to submit to the jury the question whether the city was negligent in permitting an alley crossing to remain in a slightly sunken saucer-shaped condition, and in permitting water to accumulate in the depression and to freeze in a smooth condition, such acts, if done, not being such as to render the city liable in case of an accident.

Turner v Winterset, 210-458; 229 NW 229; 37 NCCA 524

(b) POWER AND DUTY OF COURT IN GENERAL

Grounds for ruling—correction of order. The trial court has power to so correct an order for a new trial as to show the grounds upon which the order was made.

Euclid Bank v Nesbit, 201-506; 207 NW 761

Record required. An order for a new trial entered on the motion of the court must (at least on the demand of the adverse party) be accompanied by a record showing of the facts which caused the court so to act.

Euclid Bank v Nesbit, 201-506; 207 NW 761

Order for new trial—effect. An order, on appeal, for a new trial on the ground of a conceded mutual mistake in entering into a written stipulation for judgment necessarily works a setting aside, not only of the judgment, but of the stipulation; and, after procedendo, the trial court does not exceed its jurisdiction in entering a formal order to said effect.

Hall v Dist. Court, 206-179; 215 NW 606

Refusal to direct verdict as ground. The rule of law (206 Iowa 1263) that the trial court should not set aside the verdict of the jury and grant a new trial, when such verdict is the verdict which the court erroneously refused to direct at the close of the evidence, is not applicable when the trial court, under the record, properly denied a directed verdict.

Jordan v Schantz, 220-1251; 264 NW 259

Verdict set aside—criminal more readily than civil. Where the verdict is clearly against the weight of evidence, a new trial should be granted, and the appellate court will interfere more readily in a criminal case than in a civil one.

State v Carlson, 224-1262; 276 NW 770

Taking case from jury—scintilla evidence rule. In this state a mere scintilla of evidence will not raise a jury question and the trial court will be upheld in directing a verdict where, if the case were submitted and a verdict returned against the moving party, it would be the trial court's duty to set it aside.

Donahoe v Denman, 223-1273; 275 NW 155

Lower court's discretion—reviewability. Action of district court in passing on motion for new trial is largely a discretionary matter, and, unless abuse of discretion is shown, such ruling will not be disturbed on appeal.

Meyer v Noel, (NOR); 206 NW 290

Court mistakenly directing verdict—new trial proper. Ordinarily the question of contributory negligence, being peculiarly for the jury, where the trial court mistakenly directs a verdict for defendant on the ground of plaintiff's negligence, the court does not err in later granting a new trial.

Williams v Kearney, 224-1006; 278 NW 180

I NATURE AND SCOPE OF REMEDY—continued

(b) POWER AND DUTY OF COURT IN GENERAL—concluded

Verdict for plaintiff allowable under evidence. A defendant truck driver's contention, in a case involving a truck and passenger automobile collision on a bridge, that under the evidence a verdict should have been directed for him and that therefore when a verdict was returned in his favor, the granting of a new trial was error, is a contention without merit, when the evidence was such that the jury could have found the defendant negligent, that his negligence was the proximate cause of the accident, and that neither plaintiff nor plaintiff's driver was contributorily negligent.

Hawkins v Burton, 225-1138; 281 NW 790

Municipal court—filing motions after verdict—extending time—jurisdiction. The municipal court has jurisdiction to enter an order extending the time to file a motion for a new trial and exceptions to instructions and judgment non obstante veredicto. Such order is reviewable by appeal, not by certiorari.

Eller v Municipal Ct., 225-501; 281 NW 441

(c) NUMEROUSLY POINTED MOTION

Numerously pointed motion. An order which grants a new trial on a numerously pointed motion therefor will not be interfered with on appeal when one of the grounds is that the verdict is contrary to the evidence, and the record shows the testimony is in serious conflict.

Lange v Nissen, 204-1080; 216 NW 697
In re Younggren, 225-348; 280 NW 556
Hawkins v Burton, 225-1138; 281 NW 790

Numerously pointed motion. A numerously pointed motion for a new trial, sustained generally by the trial court, will not be reviewed on appeal, especially when the basis of the alleged errors in sustaining the motion does not appear in the record.

Hanna v Ins. Co., 202-1351; 212 NW 114

Numerously pointed motion. The sustaining generally of a many-pointed motion for a new trial will be affirmed if any of the grounds are meritorious.

In re Richardson, 202-328; 208 NW 374
Dunnegan v Railway, 202-787; 211 NW 364

Many-pointed motion. Principle reaffirmed that the sustaining, generally, of a many-pointed motion for a new trial will not be disturbed on appeal unless it is made to appear that the motion could not have been properly sustained on any of the assigned grounds.

Jelsma v English, 210-1065; 231 NW 304
Bell v Brown, 214-370; 239 NW 785
Doty v Jamison, 214-1321; 243 NW 359

Duty to contest. Where several grounds were stated in a motion for a new trial, there could be no reversal of the order granting such new trial when the appellant made no attempt to show that none of the grounds were good.

Olinger v Tiefenthaler, 226-847; 285 NW 137

Order for new trial—when conclusive on appellate court. An order granting a new trial will not be disturbed when any one of several grounds therefor appears to be well founded, or when, conceding the insufficiency of any one ground, all the grounds when viewed collectively, fairly justify the conclusion that the party granted a new trial has not had a fair trial.

Jordan v Schantz, 220-1251; 264 NW 259

(d) DISCRETION OF COURT

False testimony. The granting of a new trial because of the false testimony of the prevailing party will not be disturbed in the absence of a strong showing of abuse of discretion by the court.

Moore v Goldberg, 205-346; 217 NW 877

Discretion of court. Principle reaffirmed that the discretion of the trial court to order a new trial is greater than that of the appellate court.

Lewellen v Haynes, 215-132; 244 NW 701

Court's inherent power to set aside verdict. Where a party has not received a fair and impartial trial, the trial court has inherent power to set aside the verdict.

Brunssen v Parker, 227-1364; 291 NW 535

Abuse of discretion needed for review. A broad discretion is lodged in the trial court in the matter of granting a new trial, which order, in the absence of abuse, will not be disturbed on appeal.

McQuillen v Meyers, 211-388; 233 NW 502
Eby v Sanford, 223-805; 273 NW 918
Williams v Kearney, 224-1006; 278 NW 180
Hawkins v Burton, 225-1138; 281 NW 790

Granting new trial—sustained unless discretion abused. It must clearly appear that there has been an abuse of the discretion lodged in the trial court before the supreme court will interfere with the ruling granting a new trial.

Mitchell v Heaton, 227-1071; 290 NW 39

Abuse of discretion necessary for reversal. Where evidence is conflicting, the granting of a new trial because the verdict is contrary to the evidence will not be reversed unless an abuse of discretion by the trial court appears.

Brunssen v Parker, 227-1364; 291 NW 535

Inconsistent and improbable evidence. A new trial was properly granted by lower court when defendant secured a verdict on evidence that abounded with inconsistencies and improbabilities, and ruling cannot be disturbed on appeal unless new trial could not have

been sustained on any of the grounds urged, or abuse of discretion by court.

Christensen v Howson, (NOR); 226 NW 34

Discretion of court. A large discretion is lodged in the trial court in determining whether a new trial should be granted on the ground of newly discovered evidence, since the trial court has a much better opportunity for seeing and judging how the testimony given, and that afterward discovered, bears upon the issues, and for determining whether the facts offered are similar or dissimilar.

Larson v Meyer, 227-512; 288 NW 663

Order for new trial—reviewability. Principles reaffirmed that:

1. A trial court order for a new trial upon a definite question of law, is reversible, if erroneous, like every other erroneous ruling at law, if prejudicial, is reversible, while,
2. A trial-court order in general terms for a new trial will be deemed discretionary and reversible only when the trial court has abused its discretion.

Kessel v Hunt, 215-117; 244 NW 714
Manders v Dallam, 215-137; 244 NW 724
Piper v Brickley, 220-1090; 264 NW 29

Refusing new trial reviewed more readily than granting. While error may arise in granting a new trial, appellate court will more readily interfere when a refusal than when a grant of new trial occurs.

White v Zell, 224-359; 276 NW 76

Order overruling motion—case scanned more closely. Supreme court scans cases on appeal from order overruling motion for new trial more closely than where such motion is sustained.

Meyer v Noel, (NOR); 206 NW 290

Granting new trial—review on appeal. A ruling by the trial court granting a new trial will be reviewed on appeal and, if erroneous, will be reversed, altho the supreme court will interfere more readily when the new trial is refused than when it is granted.

Hupp v Doolittle, 226-814; 285 NW 247

Lower court's discretion—reviewability—retrial. Unless there is an abuse of discretion by lower court in granting motion for new trial, the supreme court will not interfere with such ruling on appeal, and when new trial is granted the case stands for trial the same as it did when issues were joined.

Upp v Walker, (NOR); 212 NW 114

Deference to trial court. An order for a new trial will not be disturbed on an imperfect appellate record which, however, reveals the fact (1) that the court was not satisfied with his submission of the cause, and (2) that the instruction did not clearly present the outstanding issue.

Turner v Motor Co., 204-421; 213 NW 765

Granting new trial—noninterference without abuse of discretion. The trial court's conclusion that it erred in giving instructions and therefore grants a new trial will not, except in a clear case of abuse of its broad discretion, be disturbed on appeal.

Bletzer v Wilson, 224-884; 276 NW 836

Discretion in reopening—new trial for abuse. Granting or refusing a motion to reopen a case to admit further evidence is within the sound discretion of the court, but if a refusal to reopen is an abuse of discretion, a new trial should be granted on appeal.

In re Canterbury, 224-1080; 278 NW 210

Nonabuse of discretion. In action for forcible entry and detainer, where there was evidence of error in instructions, in that court assumed that an alleged lease was made with agent of plaintiff with authority to make an oral lease, and that court did not specifically define to jury necessary elements of an oral lease, and there was also question that verdict was not supported by evidence, granting new trial held not an abuse of discretion.

Holman v Rook, (NOR); 271 NW 612

Verdict contrary to evidence—setting aside—nonabuse of discretion. In an action for personal injuries sustained by plaintiff in a head-on automobile collision occurring at night near a crest of a hill on a narrow paved country highway, where the vehicle in which plaintiff was riding was then on the left-hand side of the highway attempting to pass another car traveling in the same direction, the setting aside of the verdict for plaintiff on the ground that verdict was contrary to the evidence, and granting a new trial, was not an abuse of discretion.

Brunssen v Parker, 227-1364; 291 NW 535

Absence of defendant at trial. When no continuance was asked, trial court held not to have abused discretion in refusing new trial on ground that defendant was not present at trial.

Bergen v Baker, (NOR); 205 NW 327

(e) NEW TRIAL AS TO PART OF ISSUES OR PARTIES

Denial of new trial—appeal—questions reviewable. A party who appeals from an adverse ruling on his motion for a new trial may have a review of the grounds specifically assigned by him in his said motion even tho he does not appeal from the main or final judgment.

Spaulding v Miller, 216-948; 249 NW 642

Granting—as to some of parties—as to one or more counts. A new trial may be granted as to some defendants and denied as to others, and may be awarded as to one or more counts and refused as to other counts where this can be done without danger of confusion of prejudice.

Olinger v Tiefenthaler, 226-847; 285 NW 137

I NATURE AND SCOPE OF REMEDY—concluded

(f) ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT

Time of application—fatal delay. A defendant is very properly denied a new trial when she had knowledge of the entry of the default judgment almost simultaneously with its entry, and negligently delayed filing her petition for a new trial until after the lapse of nine months and the passing of three terms of court, especially when her petition presents no fact coming to her knowledge since the entry of the judgment complained of.

Anderson v Anderson, 209-1143; 229 NW 694

Waiver of motion—insufficient showing. A party will not be deemed to waive his motion for a new trial by having his motion non obstante veredicto sustained when both motions were prepared, filed, and treated as one motion, and where the motion for new trial was properly sustained, and the motion non obstante veredicto was improperly sustained.

Pomerantz v Cement Corp., 212-1007; 237 NW 443

(g) SUCCESSIVE APPLICATIONS

No annotations in this volume

II GENERAL ERRORS AND IRREGULARITIES

Failure of justice in general. The broad discretion lodged in the trial court to grant a new trial embraces the right to grant a new trial because of a series of errors against the defeated party, even tho no one of said errors would, in and of itself, justify such order.

Morton v Ins. Co., 218-846; 254 NW 325; 96 ALR 315

Inconsistent and improbable evidence. A new trial was properly granted by lower court when defendant secured a verdict on evidence that abounded with inconsistencies and improbabilities, and ruling cannot be disturbed on appeal unless new trial could not have been sustained on any of the grounds urged, or abuse of discretion by court.

Christensen v Howson, (NOR); 226 NW 34

Conclusion of witness usurping jury function. Prejudicial error results from permitting the question whether a party to an action had ever "agreed" to accept a named sum in satisfaction of his claim, and permitting a negative answer, when the existence of such agreement is the sole question before the jury.

Strand v Bleakley, 214-1116; 243 NW 306

Control of car—undue degree of care. An instruction, which, in effect, imposes upon the operator of an automobile an absolute duty to have his car under such control as to avoid injury to others, under all circumstances, is fundamentally erroneous because imposing an undue degree of care, and necessarily justifies an order for new trial.

Gregory v Suhr, 221-1283; 268 NW 14

Instructions ignoring grounds of negligence. The trial court is within its legal discretion in granting a new trial to plaintiff because the instructions, in fact, ignored a material allegation by the plaintiff as to the speed of defendant's car.

Lewellen v Haynes, 215-132; 244 NW 701

Reference to speed—granting new trial. A reference in an instruction to a motor vehicle speed of 60 miles per hour when the allegation in the petition of such speed was coerced by a ruling of the court, while not in itself sufficient to warrant a reversal, still justifies the trial court in granting a new trial when considered along with other alleged errors.

White v Zell, 224-359; 276 NW 76

Conflicting and unfair rulings. Reversible error results from (1) receiving incompetent testimony over plaintiff's objection, (2) striking such testimony at the close of defendant's testimony, and (3) reinstating such testimony, without warning to the plaintiff, after plaintiff had dismissed his witnesses and made his opening argument.

Braverman v Naso, 203-1297; 214 NW 574

Errors of commission and omission. The granting of a new trial, generally, will not be disturbed on appeal, when the record reveals the giving of instructions which were erroneous, and the failure to give instructions which the court was under duty to give without request.

Flickinger v Phillips, 221-837; 267 NW 101

Failure to submit nominal damages. Grounds for a new trial may not be predicated on a failure to submit to the jury the question of nominal damages.

Whittington v Bedford, 202-442; 210 NW 460

Erroneous direction of verdict. An order for a new trial is, of course, proper when the judgment entered was ordered by the court on an erroneous theory of the law on a material point. So held where the court treated both plaintiff and defendant as joint adventurers and directed a verdict against plaintiff on the erroneous theory that defendant's negligence was imputable to the plaintiff.

Thompson v Farrand, 217-160; 251 NW 44; 34 NCCA 398

Court mistakenly directing verdict. Ordinarily the question of contributory negligence, being peculiarly for the jury, where the trial court mistakenly directs a verdict for defendant on the ground of plaintiff's negligence, the court does not err in later granting a new trial.

Williams v Kearney, 224-1006; 278 NW 180

Cross-examination—discretion of court. The discretionary power of the trial court over cross-examinations will not be interfered with by the appellate court except in cases of clear abuse.

Rawleigh Co. v Bane, 218-154; 254 NW 18

Errors against prevailing party. While a defendant, on an appeal from an order granting plaintiff a new trial, may not, ordinarily, show that he was sinned against by the adverse and erroneous rulings of the trial court, yet he may assign error on the refusal of the trial court, at the close of all the evidence, to sustain his motion for a directed verdict because, if he was legally entitled to a directed verdict, such fact would ordinarily be fatal to plaintiff's motion for a new trial.

Bennett v Ryan, 206-1263; 222 NW 16

Election bribery—electric rate reduction—fulfillment after trial immaterial. When the court, after hearing an election contest, finds that candidates to municipal office did not participate in an illegal bribe by a local electric company offering a rate reduction and a rebate of impounded charges if the municipal ownership opponents were elected, the fact that, after the trial, the council repeals the municipal ownership ordinance and the company does reduce rates and repay impounded funds to consumers, adds nothing new to the proof of participation and does not warrant a new trial.

Van Der Zee v Means, 225-871; 281 NW 460; 121 ALR 558

III CONDUCT OF PARTIES

Talking with juror. A naked showing that a party to an action was seen talking to a juror in the court room and during a recess of the court is quite insufficient on which to base an order for a new trial.

Blakely v Cabelka, 207-959; 221 NW 451

Improper remarks in presence of jurors. Misconduct of a proponent of a will in the form of improper remarks in the presence of jurors must be shown to have been heard by said jurors.

Blakely v Cabelka, 207-959; 221 NW 451

Undue association of party and juror. The fact that the defendant in an action and one of the jurors, during a noon recess in the trial, rode together to the home of the defendant and had dinner together, and looked over the defendant's premises and then returned to the court without mentioning the action then on trial, furnishes plaintiff against whom verdict was rendered absolute grounds for a new trial.

Lynch v Kleindolph, 204-762; 216 NW 2; 55 ALR 745

Intimidation of witness. Misconduct of a proponent of a will in so intimidating a witness as to cause her to forget to testify to unstated and unrevealed matters is too indefinite to justify an order for a new trial.

Blakely v Cabelka, 207-959; 221 NW 451

Eavesdropping by witness. Misconduct of a proponent of a will in that after being excluded from the courtroom during the trial he attempted to listen to the testimony through a doorway must, at the least, be accompanied by a showing that proponent was successful in his attempt.

Blakely v Cabelka, 207-959; 221 NW 451

Exhibiting wounds to jury. During the final arguments in a personal injury case, the court may permit the plaintiff to seat himself alongside the jury in order that the jury may have a close-up view of wounds which, during the taking of testimony, have been fully described and exhibited to the jurors while some of them were twenty feet from the witnesses.

Mizner v Lohr, 213-1182; 238 NW 584

Exhibition of injured body. An injured party, in an action for damages, has a right to disrobe and exhibit to the jury his actual injury and the result thereof tho they present a most pitiable sight.

Olson v Tyner, 219-251; 257 NW 538

Fraud, etc. Evidence held insufficient to set aside a decree of divorce and to grant a new trial on the grounds of fraud and unavoidable casualty and misfortune.

McAtlin v McAtlin, 205-339; 217 NW 864

Inhering fraud. A final order of discharge of an administrator may not be set aside, opened up, or otherwise questioned on a showing of fraud which inheres in said order of discharge.

Murphy v Hahn, 208-698; 223 NW 756

Perjury. Perjury as to any intrinsic matter in an action is not a ground for a new trial.

Hewitt v Blaise, 202-1114; 211 NW 481

Perjury. Perjury on a material issue in a cause will not be recognized in an equitable action as sufficient ground to vacate a judgment or decree and to grant a new trial after the expiration of one year from the entry thereof.

Abell v Partello, 202-1236; 211 NW 868

False testimony. The granting of a new trial because of the false testimony of the prevailing party will not be disturbed in the absence of a strong showing of abuse of discretion by the court.

Moore v Goldberg, 205-346; 217 NW 877

Justifiable refusal of new trial. Refusal to grant a new trial on the ground that testi-

III CONDUCT OF PARTIES—concluded

mony on behalf of the prevailing party was perjured will not be overruled on appeal on a record showing that the perjury, if any, was not committed by the prevailing party himself or with his knowledge.

Weinhart v Smith, 211-242; 233 NW 26

Offer of false testimony. The fact that a party to an action has made a statement out of court inconsistent with his statements in court does not, manifestly, justify the conclusion that his statements in court are false and perjured.

Danner v Cooper, 215-1354; 246 NW 223

IV CONDUCT OF COUNSEL

Curing errors by instructions. See under §11493.

Finding of fact by trial court conclusive. A finding of fact by the trial court on a motion for new trial that alleged misconduct on the part of an attorney did not occur is conclusive on appeal.

Kessel v Hunt, 215-117; 244 NW 714

Discretion of court. The matter of granting a new trial for alleged misconduct of counsel is peculiarly within the discretion of the trial court.

State v Wheelock, 218-178; 254 NW 313

Revealing offer of compromise. Statements by plaintiff's counsel in his opening statement to the jury to the effect that defendant had offered to compromise the claim sued on, together with testimony by plaintiff to the same effect, constitutes reversible error, even tho said testimony is stricken from the record and the jury is admonished not to consider it.

Hoover v Ins. Co., 218-559; 255 NW 705

Persistent offer of immaterial matter. Persistent and flagrant efforts to inject immaterial and inflammatory matters into the record for the purpose of prejudicing the jury may constitute reversible error.

Vanarsdol v Farlow, 200-495; 203 NW 794

Reference to corporate capacity of party. A reference in argument to the corporate capacity of one of the parties to the action tho manifestly improper may not be reversible error when objection is promptly sustained, when the error is not repeated, and when the jury is promptly instructed to wholly disregard the reference.

Henriksen v Crandic Stages, 216-643; 246 NW 913

Voir dire examination as to casualty insurance. Asking jurors, in a personal damage action, whether any of them were directly or indirectly interested in any casualty insurance company is not necessarily prejudicially erroneous.

Tissue v Durin, 216-709; 246 NW 806

Improper reference to insured liability. The rule of law, in actions for personal injuries, that reversible error results from the willful injection, by plaintiff, into the record and before the jury, of the fact that defendant is carrying insurance against the liability sued on, is not violated:

1. By asking in good faith a juror on voir dire whether he is interested in any such insurance company; or
2. By asking a witness, in good faith, for legitimate testimony, and receiving an answer which, inter alia, reveals the fact of such insurance. (And especially when defendant's cross-examination accentuates the objectionable answer.)

Bauer v Reavell, 219-1212; 260 NW 39

Injecting liability insurance. In an automobile accident case where, in argument to jury, plaintiff's counsel developed an idea that the only party interested in preventing a verdict was the insurance company, the court recognized such tactics as being misconduct on the part of counsel.

Floy v Hibbard, 227-149; 287 NW 829

Persistent improper examination. Repeated attempts in the cross-examination of a defendant in a personal injury action to show that he had, on prior occasions, run over people, constitutes prejudicial error.

Shuck v Keefe, 205-365; 218 NW 31

Argument. Parading before the jury the poverty of the plaintiff and the riches of the defendant constitutes, in and of itself, reversible error.

Vanarsdol v Farlow, 200-495; 203 NW 794

Belittling injuries—retaliatory statements. Counsel who, in argument, belittles the personal injuries of the opposing party, may not complain if opposing counsel in reply figuratively magnifies said injuries.

Hoegh v See, 215-733; 246 NW 787

Asking improper (?) questions on cross-examination. Questions asked and excluded on an unjustifiably curtailed cross-examination reviewed, and held to reveal no misconduct on the part of the counsel in merely asking the questions.

Duncan v Rhomberg, 212-389; 236 NW 638

Figure of speech. The employment in an argument of quite vivid figures of speech does not necessarily constitute prejudicial error.

Starry v Hanold, 202-1180; 211 NW 696

Responsive argument. Error may not be predicated on an argument which is responsive to the argument made by complainant, and especially so when the trial court affirmatively found that the argument was responsive.

Stilson v Ellis, 208-1157; 225 NW 346

Argument—latitude allowed. Counsel has the right to draw his own conclusions from the testimony even tho his logic may be faulty, or the opinions expressed or conclusions drawn may be unjust, so long as he keeps within the record and does not appeal to passion and prejudice rather than to reason.

Lawyer v Stansell, 217-111; 250 NW 887

Improper argument—presumptive cure. A party, whose objection to the argument of his opponent to the jury is sustained, must, in the absence of any additional demand, be presumed fully satisfied with the curative effect of the ruling of the court.

Engle v Nelson, 220-771; 263 NW 505

V CONDUCT OF COURT

Absence of judge—effect. A defendant may not predicate error on the sole fact that the judge was absent from the courtroom during defendant's argument, when it appears the judge was at all times within call, and when nothing happened detrimental to the defendant.

State v Dobry, 217-858; 250 NW 702

Unjustifiable refusal to call jurors. When jurors are present in court when a motion for a new trial comes on for hearing, it is reversible error for the court to refuse to order their personal examination as to specified misconduct which, if established, would reveal grounds for a new trial; and especially so when it appears that the jurors had refused to make their personal affidavits as to the facts.

Skinner v Cron, 206-338; 220 NW 341

Assumption of fact. It is not error for the court to refer to the testimony of a witness as a "fact" when such reference is manifestly for the purpose of correcting counsel in the assertion that the testimony was an "opinion" or "conclusion".

State v Bourgeoise, 210-1129; 229 NW 231

Examination by court. An impartial examination of a witness by the court is proper.

State v Weber, 204-137; 214 NW 531

Examination by court—error waived by failure to object. Where an attorney testified that he had talked with the defendant with reference to a certain car before preparing a mortgage on the car, and the court questioned him in order to decide whether there had been an attorney-client relationship on which the testimony should be excluded, when no objections were made or exceptions taken to the examination by the court, it was proper to refuse a new trial on the ground that the court had made misleading statements of the law and was guilty of misconduct in discrediting the testimony.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Cross-examination—fatal undue limitation. Undue limitation on the cross-examination of a witness may constitute reversible error. So held where the examining party offered to prove, on cross-examination, material matter which went to the heart of the controversy.

West Branch Bank v Farmers Exchange, 221-1382; 268 NW 155

Withdrawal of material and competent testimony. The action of the court in withdrawing from the jury material and competent testimony relative to the limited facilities of a carrier necessarily furnishes ground for a new trial.

Dunnegan v Railway, 202-787; 211 NW 364

Exclusion of relevant and material evidence. The exclusion of relevant and material evidence offered by an appellant is quite harmless when a review of the entire record, including the rejected evidence, reveals the fact that appellee was legally entitled to the judgment rendered in his favor.

Butler Co. v Elliott, 211-1068; 233 NW 669

Court's own conclusion of error. The granting of a new trial on the ground that the court was convinced that it had made error, prejudicial to the defeated party, in summarily withdrawing from the jury, without explanation, material exhibits, will not be interfered with by the appellate court.

White v Walker, 212-1100; 237 NW 499

Undue advantage to party. On the issue whether an oral contract was in fact entered into, the court must not allow one party to testify to his intention and understanding and refuse the other party the same right.

Bremhorst v Coal Co., 202-1251; 211 NW 898

Recital of unsupported issue. The inclusion, in the court's recital of the issues, of the defendant's wholly unsupported allegation that the deceased was intoxicated at the time of the collision in question, without any withdrawal of said issue, justifies the court in granting plaintiff, against whom verdict was rendered, a new trial.

Fort v Ferguson, 218-756; 255 NW 501

Confused instructions. The granting of a new trial will not be interfered with by the appellate court when probably granted by the court in the belief that its withdrawal of certain issues and its unfortunate references to these defenses at inopportune times in the instructions were prejudicial.

Christensen v Bank, 218-892; 255 NW 520

New trial—overruling order. Notwithstanding the deference due the trial court when it grants a new trial, nevertheless, if the direction of a verdict for the defendant was right as a matter of law, the action of the court in

setting aside the verdict and granting a new trial will be reversed.

Hart v Stence, 219-55; 257 NW 434; 97 ALR 535; 36 NCCA 716

V-a1 CONDUCT OF BAILIFF

Unsworn bailiff—effect. Where a jury is ordered kept together during the trial of a criminal case, the fact that the court bailiff who accompanied the jurors on the first adjournment of court was not specially sworn as required (§13861, C., '31), does not constitute reversible error when it appears the bailiff protected the jurors exactly as he would have protected them had he been so sworn and had respected his oath.

State v Miller, 217-1283; 252 NW 121

Bailiff's witticism not prejudicial. Bailiff's remark, that jury might be kept for 30 days before the court would accept a verdict that they had "agreed to disagree", is not prejudicial when the jury themselves treated the remark as a joke.

Tharp v Rees, 224-962; 277 NW 758

VI CONDUCT OF JURORS

Discussion. See 11 ILR 268—Jurors' affidavits as to misconduct

False answers on voir dire. False answers by a juror on his voir dire do not constitute grounds for new trial unless shown to be prejudicial.

Elmore v Railway, 207-862; 224 NW 28

Disregarding instructions. It is the duty of the jury to follow the instructions of the court, and where it clearly appears that the jury, in arriving at its verdict, disregarded the instructions, a new trial must be granted.

Mitchell v Heaton, 227-1071; 290 NW 39

Misconduct of jurors not appearing of record. Argument based on the alleged misconduct of jurors, when such misconduct does not appear of record, will be wholly ignored.

McDonald v Webb, 222-1402; 271 NW 521

Discretion of court. The discretion of the trial court in granting a new trial because of the conduct of a juror will not be interfered with in the absence of a showing of abuse.

Chicago JSL Bank v Eggers, 214-710; 243 NW 193

Harmless error. Misconduct of the jury is not ground for a new trial when the prevailing party is entitled, as a matter of law, to the judgment accorded to him.

Butler Co. v Elliott, 211-1068; 233 NW 669

New trial — overruling motion to strike amendment—no prejudice. Even tho the overruling of a motion to strike an amendment to plaintiff's motion for new trial was error, there was no prejudice to defendant where motion for new trial was sustained generally, and where grounds of original motion, to wit: that verdict was not sustained by evidence and that plaintiff did not receive a fair and impartial trial, were good—in which case there can be no reversal.

Mitchell v Heaton, 227-1071; 290 NW 39

Arbitrary rejection of evidence. A new trial must be granted when the jury, in a case in which plaintiff is legally entitled to recover substantial damages, arbitrarily ignores and rejects the uncontroverted evidences as to damages.

Mendenhall v Struck, 207-1094; 224 NW 95

Ignoring unquestioned evidence and instructions. Grounds for a new trial result from the action of the jury in returning a "no damage" verdict in the face of an unquestioned instruction as to the measure of damages, and in the face of definite and undisputed testimony of substantial damages.

Madison v Hood, 207-495; 223 NW 178; 39 NCCA 393

Use of unauthorized evidence. Prejudicial error results from permitting a jury to take with them to their jury room and to consider the entire sheet of a letter when only the signature thereon was introduced in evidence, and when the unintroduced matter is materially prejudicial to complainant.

In re Merrill, 202-837; 211 NW 361

Allegations stricken from motion—not supported by affidavit. There was no prejudicial error in striking on motion, from a motion for new trial in a criminal case, allegations that the jury had considered matters not in evidence, when the only affidavit in support of the allegations was by an attorney who said no more than that he believed the allegations to be true, and there was no request that the jurors be called for examination.

State v McDowell, 228- ; 290 NW 65

Juror riding with county attorney. Action of trial juror in riding with county attorney to and from place of trial, while not intentional misconduct and even tho no actual wrong resulted, casts suspicion on jury's verdict, is against public policy, and is ground for a new trial.

State v Neville, 227-329; 288 NW 83

Illness of juror—held nonprejudicial. Evidence held to show that illness of a juror was not prejudicial to defendants.

Kirchner v Dorsey, 226-283; 284 NW 171

Conflicting affidavits. The findings by the trial court on conflicting affidavits, relative to alleged misconduct of jurors, is conclusive on the appellate court.

Hoegh v See, 215-733; 246 NW 787

Juror as jury-room witness. It is not necessarily ground for a new trial that a juror proffers in the jury room a statement of fact of which there is no evidence. Complainant must show prejudice.

Conway v Alexander, 200-705; 205 NW 351

Evidence proffered by juror. The assertion by a juror during the deliberations of the jury that one of the interested litigants had "approached" him and attempted to "influence" him may constitute prejudicial error.

In re Merrill, 202-837; 211 NW 361

Assertion of prejudicial facts outside record. A defeated party is entitled to a new trial as a matter of right when he establishes that different jurors during their deliberations and for the purpose of inducing the adverse verdict gave utterance to prejudicial and inflammatory statements of fact, derogatory to said party, and wholly outside of any evidence before the jury.

Farmers Bk. v Smith, 212-529; 234 NW 798

Juror as jury-room witness. A juror who, during the deliberations of the jury, asserts statements of fact which are vitally material on the pending issues and which are wholly outside the record, and which are, in some degree, relied on by other jurors, is guilty of such misconduct as to require a new trial.

City N. Bank v Steele, 220-736; 263 NW 233

Verdict impeachable for misconduct—facts admissible for determination. On a motion for new trial, jurors may not impeach their own verdict by evidence of jury-room discussion which influenced but inheres in their verdict. However, misconduct prejudicially affecting the result may be shown, and the court may hear all the facts to determine if misconduct exists.

Keller v Dodds, 224-935; 277 NW 467

Juror advocating his belief—not misconduct. It is neither misconduct nor ground for new trial for a juror to advocate his conclusions in the jury room, even though he emphatically and persistently favors one party or the other.

Tharp v Rees, 224-962; 277 NW 758

Juror's affidavit of conduct while deliberating—effect. Verdicts and trials cannot be destroyed ordinarily by an affidavit of a juror as to what took place during deliberations in the jury room.

Kirchner v Dorsey, 226-283; 284 NW 171

Misconduct of jury—insufficiency of evidence. In prosecution for subornation of perjury, where defendant complains of the denial of his motion for new trial involving the misconduct of the jury, where evidence, by juror examined on the subject, of matters discussed by jury related to defendant's father's estate and a school controversy in which defendant had been engaged, both of which were referred to in cross-examination of certain character witnesses in the trial and which were admitted by the court, and where juror admitted she agreed to verdict and did not consider anything said by anyone which was not admitted in evidence, there was nothing to indicate any misconduct on the part of the jury, and the court's ruling was correct.

State v Hartwick, 228- ; 290 NW 523

Order for personal examination. When jurors are present in court when a motion for a new trial comes on for hearing, it is reversible error for the court to refuse to order their personal examination as to specified misconduct which, if established, would reveal grounds for a new trial; and especially so when it appears that the jurors had refused to make their personal affidavits as to the facts.

Skinner v Cron, 206-338; 220 NW 341

Visiting locus in quo. The conduct of jurors in visiting, on their own motion, the locus in quo of an accident, and in taking certain measurements therein, and in asserting in argument in the jury room opinions contrary both to the record measurements and to their own measurements, may constitute reversible error.

Johnson v Railway, 201-1044; 207 NW 984
Skinner v Cron, 206-338; 220 NW 341

Visiting scene of accident. The court on motion for new trial may properly refuse to hear testimony to the effect that a juror during the trial visited the scene of an accident, and verified a fact conceded by both parties to the litigation to be true.

Elmore v Railway, 207-862; 224 NW 28

Visiting locus in quo. The fact that during the trial of an action some of the jurors pass by the place where the accident (which is the subject of the action) occurred, constitutes no prejudicial misconduct when the jurors testified that they based their verdict solely on the introduced testimony, and when no dispute whatever existed relative to said place, its location and surroundings.

Liddle v Hyde, 216-1311; 247 NW 827

Juror visiting accident location—misconduct not shown. It is not misconduct for a juror to stop at gasoline station near the scene of the accident in litigation, when there is no evidence that he discussed with other jurors what he saw there.

Tharp v Rees, 224-962; 277 NW 758

Jurors substituting own knowledge for evidence—effect. In an action for injuries resulting from a collision on a bridge between a truck and an automobile, where the record discloses that one juror injected into the discussion her own observation of the fast-driving habits of the motorist with whom plaintiff was

riding, and where other jurors at the scene of the accident noticed and commented on the fact that most drivers, in rounding the same curve where plaintiff approached the scene of the accident, were across the center of the highway, when coupled with the short time taken to arrive at a verdict in view of the voluminous evidence, held no abuse of discretion in granting a new trial.

Hawkins v Burton, 225-1138; 281 NW 790

VII VERDICTS CONTRARY TO EVIDENCE OR LAW

Sustaining verdict for either party. Where, under proper instructions and supporting testimony, the jury may properly find for either party, the supreme court will not disturb the verdict.

Reardon v Hermansen, 223-1207; 275 NW 6; 3 NCCA(NS) 184

Directed verdict refused—findings by jury reviewed. In determining whether or not the court erred in overruling a motion for a directed verdict at the close of the testimony and in overruling a motion for a new trial on the ground that the evidence did not sustain the verdict, the supreme court is not to determine the facts, but is limited to a consideration of what the jury is warranted in finding the facts to be.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Disregard of instructions. A verdict against a common carrier for damages growing out of a shipment of animals is necessarily contrary to an instruction to the effect that the carrier would not be liable if the animals were infected with disease prior to and at the time of shipment, when the record testimony unquestionably shows that the animals were so infected.

Siegel v Railway, 201-712; 208 NW 78

Verdict contrary to instructions—verdict illegal—setting aside. Where the court instructs the jury to base their verdict solely on the evidence and, guided by the instructions, to arrive at the very truth of the matter and base their conclusions solely on evidence and instructions and not to indulge in speculations or conjectures, and at hearing on motion for new trial it is shown that it was agreed in advance that the jury would be bound by a majority vote, such verdict was illegal and it was the duty of the court to set the verdict aside.

Mitchell v Heaton, 227-1071; 290 NW 39

Instructions—law of case. An instruction to the effect that no damage for the flooding of land could be recovered if such damages resulted partly from the wrongful act of the defendant in erecting an embankment and partly from the natural overflow of a natural stream constitutes the law of the case, and a verdict for the plaintiff must be set aside if the evidence conclusively shows that the damages were caused in part by the natural overflow of the stream.

Pfannebecker v Railway, 208-752; 226 NW 161

Contradictory instructions. Contradictory and misleading instructions may be ground for new trial. So held where the court unequivocally instructed that a defense to a promissory note was waived by the act of the maker in executing a renewal with full knowledge of the defense, and later instructed, in effect, that such waiver did not occur unless the holder of the new note had changed his position by reason thereof.

Euclid Bank v Nesbit, 201-506; 207 NW 761

Inconsistent instructions. Inconsistent instructions on a material issue furnish grounds for a new trial. So held where the court instructed that the only issue submitted to the jury was the genuineness of an indorsing signature on a note, but later instructed that the jury must determine the genuineness of the signature to the note itself.

In re Richardson, 202-328; 208 NW 374

Conflicting instructions. Doubt and uncertainty consequent on conflicting instructions relative to the right of the operator of an automobile to assume that another operator would not use the highway unlawfully, presents ample justification for granting the prejudiced party a new trial.

Jelsma v English, 210-1065; 231 NW 304

Unsupported issue. Instructions on unsupported material issues constitute grounds for a new trial.

Dunnegan v Railway, 202-787; 211 NW 364

Sustaining untenable grounds. Granting a new trial on the ground that a jury question had not been presented, when the contrary is true, under the record, constitutes an abuse of discretion.

Euclid Bank v Nesbit, 201-506; 207 NW 761

Evidentiary support required. Verdicts will not be allowed to stand unless they have support in the evidence.

Reynolds v Oil Co., 227-163; 287 NW 823

Evidence—insufficiency. Evidence held such, on the issue of negligence, as to justify the court in refusing a new trial on the ground that the evidence was insufficient to sustain the verdict.

Miller v Kooker, 208-687; 224 NW 46

New trial refused. Where evidence was sufficient to take a case to the jury on the question of whether the injury of the insured came within the terms of his policy, and it was submitted under proper instructions, there was no error in overruling a motion for new trial made on the ground that the verdict was contrary to the evidence.

Dykes v Washington Co., 226-771; 285 NW 201

Affirmatively nonsupported issue. A new trial must necessarily be granted when the court refuses to direct a verdict, and the jury finds in favor of plaintiff's essential issue, and the record affirmatively shows that the contrary of such issue is true.

Pease v Bank, 204-70; 214 NW 486

Omission of defensive and supported issue. New trial is necessarily proper when based on the established ground that the court failed to submit a defensive issue as to which the testimony makes a jury question.

Goben v Paving Co., 204-466; 215 NW 508

Nonsupported issue. The court cannot be deemed to have abused its discretion in granting a new trial in an action on two promissory notes when, in the first instance, it directed a verdict for plaintiff (1) when, as to one note, there was no evidence on the duly joined issue of the genuineness of defendant's signature, and (2) when, as to the other note, the evidence on said issue was by no means conclusive, and (3) when there was evidence of want of consideration for both of said notes.

Wilhite v Sterrett, 222-770; 269 NW 860

Unjust verdict. The granting of a new trial will not be interfered with when there is reasonable ground to believe that an unjust verdict has been returned, and that the injustice may be avoided on a retrial.

Rupp v Kohn, 210-969; 232 NW 174

Unsustained verdict. Evidence reviewed and held insufficient to sustain a jury finding that defendant was a partner, and, as a consequence, that the trial court properly set aside the verdict and ordered a new trial.

Spurway v Milling Co., 207-1332; 224 NW 564

Allowance of future medical expenses without evidence. A quite modest verdict for future necessary medical expenses will not be disturbed, even tho there is no evidence bearing on the amount, when, in the nature of the case, the amount cannot but be an estimate.

Rulison v X-ray Corp., 207-895; 223 NW 745

Quotient verdict—conflicting evidence. A finding by the trial court on conflicting evidence that a verdict was a quotient verdict, and the entry of an order for a new trial will not be disturbed on appeal.

Thornton v Boggs, 213-849; 239 NW 514

Rendering judgment on appeal instead of new trial. Where appeal is not only from order denying new trial but from all other erroneous rulings and where evidence as to completed gift inter vivos would not change on retrial, the supreme court may render such judgment as inferior court should have done.

Wilson v Findley, 223-1281; 275 NW 47

VIII EXCESSIVE VERDICTS

Showing required. A quite clear showing of error, improper bias, influence, or prejudice must be made before the court will declare excessive a verdict for damages for malicious prosecution.

Kness v Kommes, 207-137; 222 NW 436

Excessiveness indicating passion and prejudice. Unless a verdict is so excessive as to indicate clearly, passion and prejudice on the part of the jury, it should not be disturbed.

Stoner v Hy. Comm., 227-115; 287 NW 269

Accident insurance. Verdict held excessive under a policy of accident insurance which guaranteed indemnity for injuries which prevented the insured from performing "each and every kind of duty" pertaining to his occupation.

Elmore v Surety Co., 207-872; 224 NW 32

Eminent domain—compensation. Evidence held to reveal a grossly excessive verdict on a condemnation for highway purposes.

Jenkins v Hy. Comm., 208-620; 224 NW 66

Conclusiveness. In condemnation proceedings, a verdict for damages which is fairly within the range of the legitimate testimony is ordinarily conclusive on the appellate court, even tho the amount is concededly larger than a court itself would have granted, and even tho it appears that the jury substantially split the difference between the witnesses in their estimate of damages.

Cory v State, 214-222; 242 NW 100

Inadequate or excessive verdicts in eminent domain—control power of court. The verdict of a common-law jury in eminent domain proceedings is subject to the same review by the court for inadequacy or excessiveness as other verdicts in other proceedings. Record in highway condemnation proceedings reviewed, and held verdict so grossly excessive as to evidence passion and prejudice.

Campbell v Hy. Comm., 222-544; 269 NW 20

Remittitur cures error. In an action against an estate to recover a money judgment for one-third of the value thereof (tried prior to the closing of the estate), any error in submitting to the jury the question of the net value of the estate is rendered harmless by the action of the plaintiff in stipulating to remit from the judgment a proportional amount of the ultimate costs of administration.

In re Anderson, 203-985; 213 NW 567

Remittitur—effect on prior judgment entry. A duly entered judgment, followed by an unexcepted order for a new trial unless a remittitur be filed, automatically becomes a judgment in the lesser amount immediately upon the due filing of the remittitur.

Fox v McCurnin, 210-429; 228 NW 582

Instructions—computation of amount. Error in instructions relative to the computation of

VIII EXCESSIVE VERDICTS—concluded

the amount of a verdict may be cured by a remittitur.

In re Willmott, 215-546; 243 NW 634

Unsupported or excessive verdict—conditional order. The court may, on the duly presented grounds that a verdict is unsupported or excessive, grant a new trial, even tho the evidence is conflicting, unless a specified amount of the verdict is remitted, such motion presenting a question peculiarly addressed to the sound discretion of the court—not a legal proposition only.

Manders v Dallam, 215-137; 244 NW 724

Option to remit excessive part of verdict. It is proper for the court to give plaintiff the option to remit that portion of a verdict which the court deems excessive, and refuse a new trial (on that ground) if the remittitur is filed.

Bobst v Hoxie Line, 221-823; 267 NW 673

Excessive and exemplary damages—remittitur or new trial. Excessive damages showing passion and prejudice vitiate the entire verdict. A remittitur will not cure the error and a new trial should be granted. Where the jury returned a verdict of $1,500 actual damages and $2,500 exemplary damages, held the total amount of damages awarded and the difference between the actual damages and punitive damages were not so excessive as to show passion and prejudice; and, the entire verdict not being vitiated, the verdict for $1,500 actual damages was not affected by the erroneous submission of the question of exemplary damages and such error was cured by remittitur of all such punitive damages.

Boyle v Bornholtz, 224-142; 275 NW 479

Wrongful death of wife. In an action for the wrongful death of a wife, the statutory power to allow "such sum as the jury may deem proportionate to the injury" is not an unbridled discretion. Evidence reviewed and held that a verdict of $10,000 was excessive to the extent of $4,000. The deceased was childless and illiterate, had accumulated no property, was a beet weeder for a small part of the year at small wages, and also operated a boarding house, but whether at a profit did not appear.

Hanna v Elec. Co., 210-864; 232 NW 421

IX VERDICTS HELD EXCESSIVE

Discussion. See 18 ILR 405—Reduction by trial court; 18 ILR 561—Prejudicial verdict—remittitur

Unallowable reduction by court. The court has no power to reduce the verdict of a jury in an action for unliquidated damages, and to render judgment for a less amount, unless the party in whose favor the verdict was rendered consents to such reduction.

Crawford v Emerson Co., 222-378; 269 NW 334

$2,130 for personal injuries. Verdict for $2,130 for personal injuries held excessive and conditionally reduced to $1,850.

Kimmel v Mitchell, 216-366; 249 NW 151

$2,500 for personal injury.

Tissue v Durin, 216-709; 246 NW 806

$3,500 for indecent assault. Verdict of $1,500 actual and $2,000 punitive damages held excessive as to the actual damages.

Ransom v McDermott, 215-594; 246 NW 266

$3,600 for personal injury.

McKee v Iowa Co., 204-44; 214 NW 564

$5,000 for libel in filing an information charging insanity.

Plecker v Knottnerus, 201-550; 207 NW 574

Aged man with small earning capacity. In a personal injury action, evidence reviewed relative to past and future pain, loss of time, and decreased earning capacity, of a 67-year old plaintiff, and held, a verdict of $5,000 was excessive and should be reduced to $4,000.

Johnson v Sioux City, 220-66; 261 NW 536

Death—excessiveness. Verdict for damages in the sum of $5,750 for the death of an eight-year-old boy held excessive, and reduced conditionally to $4,500.

Allen v Railway, 218-286; 253 NW 143

$6,000 for death of 10-year-old child. Verdict of $6,000 for death of 10-year-old school girl held excessive and conditionally reduced on appeal to $4,500.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

$7,500 for fatal personal injury. Verdict for $7,500 for fatal personal injury held excessive and conditionally reduced to $4,000.

Lorimer v Ice Cream Co., 216-384; 249 NW 220

$10,000 for death of wife.

Hanna v Elec. Co., 210-864; 232 NW 421

$15,000 fatal personal injury. Verdict for $15,000 for death of a 17-year-old boy, reduced by trial court to $10,000, held subject to a further reduction to $7,500.

Hart v Hinkley, 215-915; 247 NW 258

$16,750 in an action for criminal conversation and alienating the affections of a wife.

Peak v Rhyno, 200-864; 205 NW 515

$17,000 for wrongful death.

Cerny v Secor, 211-1232; 234 NW 193

$27,000 for wrongful death. Verdict for $27,000 for wrongful death reduced by trial court to $17,000 and by appellate court to $14,500.

Scott v Hinman, 216-1126; 249 NW 249

$30,000 conditionally reduced to $12,000. Verdict of $30,000 for wrongful death reduced by the trial court to $21,000, and by the appellate court, on condition, to $12,000.

Shutes v Weeks, 220-616; 262 NW 518

$40,000 for libel and defamation of character.

Mowry v Reinking, 203-628; 213 NW 274

X VERDICTS HELD NONEXCESSIVE

$500 for assault and battery. Verdict for $500 for assault and battery held nonexcessive.

Ashby v Nine, 218-953; 256 NW 679

$1,000 for personal injury.

Hoegh v See, 215-733; 246 NW 787

$1,000 for injury to an automobile and to the person.

Comparet v Coal Co., 200-922; 205 NW 779

$1,680 for assault and battery—exemplary damages. In an assault and battery case verdict for $1,680, reduced by remittitur to $1,180, held not so excessive as to evince passion and prejudice, when verdict included exemplary damages.

Hauser v Boever, 225-1; 279 NW 137

Nonexcessive damages. Evidence held to support a verdict of $1,500 for personal injuries.

Sutcliffe v Fort Dodge Co., 218-1386; 257 NW 406

Personal injuries—award. Verdict for $1,800 for personal injuries sustained.

Beardmore v New Albin, 203-721; 211 NW 430

$2,000 as actual damages for libel, reduced one-half by the trial court.

Taylor v Hungerford, 205-1146; 217 NW 83

Eminent domain—$2,000 for ground and ornamental trees. In a condemnation proceeding to acquire a strip of ground for highway purposes 17 feet wide on each side of an existing highway which divided an 80-acre farm, where the land appropriated comprised 1.2 acres and included 19 trees in front of plaintiff's home, some of them being very large, hardwood, slow growing, ornamental trees, planted in connection with carefully planned landscaping, held, verdict of $2,000 was not excessive.

Stoner v Hy. Comm., 227-115; 287 NW 269

$1,328 for personal injury and property loss. Verdict for $1,328 for personal injury and property loss held manifestly nonexcessive.

Wolfe v Decker, 221-600; 266 NW 4

$1,500 for assault and false imprisonment.

Schultz v Enlow, 201-1083; 205 NW 972

$1,500 for personal injury.

Stutzman v Younkerman, 204-1162; 216 NW 627

$2,175 for personal injuries. Verdict of $2,175 for personal injuries, held not excessive.

Shadduck v Railway, 218-281; 252 NW 772

$2,800 for personal injuries.

O'Hara v Chaplin, 211-404; 233 NW 516

$2,989 for personal injuries.

Burke v Town, 207-585; 223 NW 397

$3,250 for personal injuries reduced conditionally by the trial court to $2,250.

Duncan v Rhomberg, 212-389; 236 NW 638

$3,500 for personal injury.

Raines v Wilson, 213-1251; 239 NW 36

Personal injuries—$3,750 not excessive. Damages are generally within the province of the jury and an appellate court hesitates to interfere with the amount unless it is so grossly excessive as to indicate passion or prejudice, or some other reason appears, and ordinarily the trial court's granting or refusing a new trial on the ground of excessiveness of a verdict will not be disturbed on appeal unless an abuse of discretion is shown. Held, a $3,750 personal injury verdict was not excessive when based on a fracture of the skull, broken left shoulder, four broken ribs, eye and ear injuries, unconsciousness for five days, and severe headaches.

Rogers v Jefferson, 226-1047; 285 NW 701

$5,000 for personal injury.

Nederhiser v Railway, 202-285; 208 NW 856

$5,000 for personal injury. A visible and lifelong personal disfigurement is necessarily a very persuasive element of damages. Verdict held nonexcessive.

Siesseger v Puth, 216-916; 248 NW 352

Excessive damages — $5,170. Verdict of $5,170 for injury to person and property reviewed and held nonexcessive.

Winter v Davis, 217-424; 251 NW 770

$5,733 in eminent domain proceedings.

Sherwood v Reynolds, 213-539; 239 NW 137

$5,950 for personal injuries.

Mizner v Lohr, 213-1182; 238 NW 584

$7,500 for services rendered to a decedent during a series of years.

Halstead v Rohret, 212-837; 235 NW 293

$8,000 for personal injury.

Starry v Hanold, 202-1180; 211 NW 696
McCoy v Cole, 216-1320; 249 NW 213

X VERDICTS HELD NONEXCESSIVE—concluded

$10,000 for grave personal injuries, reduced to $6,500.

Wolfson v Lbr. Co., 210-244; 227 NW 608

$10,000 for personal injuries.

Elmore v Railway, 207-862; 224 NW 28

$10,000 on retrial of personal injury case. A verdict of $10,000 on second trial of automobile accident case, altho $2,500 larger than first verdict, did not under the circumstances indicate passion or prejudice and was not excessive.

Jakeway v Allen, 227-1182; 290 NW 507

$11,755 as damages for land taken for highway purposes.

Shimerda v Hy. Comm., 210-154; 230 NW 335

$12,000 for personal injury.

Henriksen v Stages, Inc., 216-643; 246 NW 913

$13,400 for personal injuries.

Dean v Koolish, 212-238; 234 NW 179

$20,000 for personal injury consequent on the malpractice of a physician.

Legler v Clinic, 207-720; 223 NW 405

$20,000 for personal injuries. A verdict of $20,000 for personal injuries of an extraordinary nature and largely permanent held nonexcessive.

Engle v Ungles, 223-780; 273 NW 879

$22,500 for death, reduced by the trial court to $14,500.

Rastede v Railway, 203-430; 212 NW 751

When court will interfere. It is not the province of a court to interfere with the amount of a verdict in a personal injury action unless it is clearly made to appear that the verdict is the result of passion or prejudice or of a palpable disregard of the evidence. Verdict of $10,000 held nonreviewable.

Engle v Nelson, 220-771; 263 NW 505

Exemplary damages. A verdict for exemplary damages which is fairly in proportion to the actual damages will not be disturbed by the court.

Gregory v Sorenson, 214-1374; 242 NW 91

XI INADEQUATE VERDICTS

Inadequacy of verdict. The court has a very large discretion in ruling on a motion for a new trial on the ground of the inadequacy of a verdict for personal injuries.

Strayer v O'Keefe, 202-643; 210 NW 761
Herrman v O'Connor, 209-1277; 227 NW 584

Inadequate verdict for wrongful death. The sustaining of plaintiff's motion for a new trial, because of a verdict of $150 for the wrongful death of an active young man of substantial earning power, is eminently proper.

Leake v Azinger, 214-927; 243 NW 196

Manifestly inadequate verdict. A manifestly inadequate verdict demands a new trial.

DeMoss v Cab Co., 218-77; 254 NW 17

Ignoring unquestioned evidence and instructions. Grounds for a new trial result from the action of the jury in returning a "no damage" verdict in the face of an unquestioned instruction as to the measure of damages, and in the face of definite and undisputed testimony of substantial damages.

Madison v Hood, 207-495; 223 NW 178; 39 NCCA 393

Arbitrary rejection of evidence. A new trial must be granted when the jury, in a case in which plaintiff is legally entitled to recover substantial damages, arbitrarily ignores and rejects the uncontroverted evidence as to damages.

Mendenhall v Struck, 207-1094; 224 NW 95

XII PASSION OR PREJUDICE

Excessive verdict—presumption. An apparently excessive verdict does not necessarily show that it is the result of passion and prejudice.

Peak v Rhyno, 200-864; 205 NW 515

$2,500 increase in damages on retrial of personal injury case. A verdict of $10,000 on second trial of automobile accident case, altho $2,500 larger than first verdict, did not under the circumstances indicate passion or prejudice and was not excessive.

Jakeway v Allen, 227-1182; 290 NW 507

Abuse of discretion. The granting of a new trial on the ground of passion and prejudice, and as contrary to law and the instructions, will not be disturbed unless the record shows an abuse of the wide discretion of the court.

Utilities Corp. v Chapman, 210-994; 232 NW 116

Moving considerations. The inconsistencies, contradictions, variations, and improbabilities of plaintiff's testimony, coupled with the amount of the verdict, may quite certainly point to the fact that the verdict was the result of passion and prejudice.

Kelley v Gardner, 213-16; 238 NW 470

Eminent domain proceedings. A verdict in eminent domain proceedings will not be disturbed, even tho the amount suggests excessiveness, if it is well within the supporting evidence.

Kemmerer v Highway Com., 214-136; 241 NW 693

XIII SURPRISE, ACCIDENT, INADVERTENCE, OR MISTAKE

Inadvertently misleading counsel. The court may grant a new trial on the ground that it inadvertently misled counsel, prior to the argument, as to the nature of the instructions which would be given to the jury.

Printy v Reimbold, 200-541; 202 NW 122; 205 NW 211

Surprise—waiver. A litigant is not entitled to a new trial because he was surprised by the testimony of his adversary when he asked for no continuance or for time in which to produce counter testimony.

Southhall v Berry, 207-605; 223 NW 480

Surprise—ruling on objection to exhibit. In action on written contract, a new trial is not justified on the ground of surprise based on a ruling as to the admissibility of an exhibit when that ruling is not shown to be erroneous.

Clare v Pearson, 227-928; 289 NW 737

XIV NEWLY DISCOVERED EVIDENCE

(a) POWER AND DUTY OF COURT IN GENERAL

Inability to discover evidence. The discretion of the court is abused in denying a new trial to a defeated party who diligently sought, during the trial, to learn the truth as to a material and issuable claim, but was prevented from so doing until after the trial.

Millard v Mfg. Co., 200-1063; 205 NW 979

Reception of evidence—discretion in reopening—new trial for abuse. Granting or refusing a motion to reopen a case to admit further evidence is within the sound discretion of the court, but if a refusal to reopen is an abuse of discretion, a new trial should be granted on appeal.

In re Canterbury, 224-1080; 278 NW 210

Amendments allowable after reversal and remand. Defendant, in an action at law, may, after reversal and remand on plaintiff's appeal, amend his answer by pleading new and additional grounds of defense.

Flood v Bank, 220-935; 263 NW 321

Discretion of court. A large discretion is lodged in the trial court in determining whether a new trial should be granted on the ground of newly discovered evidence, since the trial court has a much better opportunity for seeing and judging how the testimony given, and that afterward discovered, bears upon the issues, and for determining whether the facts offered are similar or dissimilar.

Larson v Meyer, 227-512; 288 NW 663

Defense arising or discovered since judgment entered. The fact that a claim, when judgment was entered thereon, had been discharged in bankruptcy is not a "defense which has arisen or been discovered since the judgment was rendered", and therefore within the power of a court of equity to annul or modify.

Harding v Quilan, 209-1190; 229 NW 672

(b) DILIGENCE IN PROCURING EVIDENCE

Due diligence rule. On the ground of newly discovered evidence, where due diligence has been exercised in attempting to discover the evidence before trial, a new trial should be granted, but, in the absence of due diligence, refused.

Wilbur v Iowa Co., 223-1349; 275 NW 43

Finding as to diligence. The conclusion of the trial court that due diligence was exercised in the discovery of new testimony will not ordinarily be disturbed on appeal.

Moore v Goldberg, 205-346; 217 NW 877
Utseth v Pratt, 208-1324; 227 NW 115

Finding of nonnegligence. The appellate court is very reluctant to overturn the holding of the trial court that a mover for a new trial has not been negligent in discovering or obtaining testimony and that such testimony, if produced, would have some force with the jury.

Doty v Jamieson, 214-1321; 243 NW 359

Due diligence—wholesale search unnecessary. With nothing to suggest its propriety or necessity, a party is not required to interrogate all persons living within five or six miles of an accident in order to have exercised due diligence as a prerequisite for a new trial on the ground of newly discovered evidence.

Wilbur v Iowa Co., 223-1349; 275 NW 43

Forgotten deed. A new trial will, in some instances, be granted because of newly discovered evidence even tho the applicant might have discovered such evidence before trial and decree. So held where a party in partition proceedings, soon after trial and an adverse decree, discovered a forgotten deed which apparently confirmed her title.

Mills v Hall, 202-340; 209 NW 291

Negligent discovery. A new trial will not be granted because of the discovery of testimony which the movant might readily have discovered at the trial already had, especially when such testimony does not carry any reasonable probability of bringing about a different result if the cause is retried.

Southhall v Berry, 207-605; 223 NW 480

Lack of diligence. A new trial will not be granted for newly discovered evidence when such evidence was manifestly easily obtainable during the trial, especially when such evidence is for impeaching purposes.

Elmore v Railway, 207-862; 224 NW 28

XIV NEWLY DISCOVERED EVIDENCE —continued

(b) DILIGENCE IN PROCURING EVIDENCE—concluded

Lack of diligence. Lack of diligence in the discovery of new testimony justifies the overruling of the motion.

First Bank v Tobin, 204-456; 215 NW 767
North Amer. Ins. v Holstrum, 208-722; 217 NW 239; 224 NW 492
Anderson v Railway, 216-230; 249 NW 256
Heintz v Packing Co., 222-517; 268 NW 607

Lack of diligence. An applicant for a new trial may not be held to have exercised diligence in discovering evidence which he might, in reason and from the inception of the action, have known or supposed was in existence and easily obtainable, but as to which he took no action until after the verdict had been rendered against him; especially is this true in view of the broad discretionary powers of the court in such proceedings.

Danner v Cooper, 215-1354; 246 NW 223

(c) RELEVANCY, MATERIALITY, AND COMPETENCY

Evidence bearing on nonissue. New trial because of newly discovered evidence is properly denied when there is no issue to which the newly discovered evidence could apply.

Andrew v Bank, 204-570; 215 NW 807

Immateriality. Manifestly, newly discovered evidence cannot constitute grounds for a new trial when it is not material to the controlling issue in the case.

Gilmore v Moulton, 216-618; 246 NW 601

Sagging wires on highway after storm—knowledge. In a case where a woman is burned by contacting a high tension electric line, sagging over a highway after a storm, and who testifies she had no knowledge it was there, newly discovered evidence to show that she was seen stepping over the broken poles prior to the accident, is not cumulative but tends directly to establish a material fact affecting the result of the case on retrial.

Wilbur v Iowa Co., 223-1349; 275 NW 43

(d) CUMULATIVE EVIDENCE

Cumulative evidence. Newly discovered evidence which is purely cumulative is not a ground for new trial.

Cuthbertson v Hoffa, 205-666; 216 NW 733
Rauch v Elec. Co., 206-1155; 221 NW 788
Simons v Harris, 215-479; 245 NW 875

Negligence and cumulativeness. Evidence in the form of office records, and claimed to have been newly discovered, is properly rejected as sufficient ground for new trial (1) when said records are simply cumulative to testimony already introduced by the applicant, and (2) when said records have been in the exclusive possession of the applicant and to his knowledge since the inception of the suit.

Warren v Railway, 219-723; 259 NW 115

Cumulative evidence not ground. Claimed newly discovered evidence, in the nature of statements of a highway patrolman bearing on his observation of wheel tracks of an automobile, as tending to show where the car left the highway, being merely cumulative, when the sheriff of the county had testified at the trial as to said tracks, is not ground for new trial.

Moran v Kean, 225-329; 280 NW 543

Cumulative evidence — insufficient ground. Where a jury returned a verdict in favor of payee in an action on a note executed by a partnership wherein the defense of payment was pleaded and evidence was introduced to show a tender of payment by the partnership to payee, but with payee's consent the money was retained by one partner as a personal loan from payee to such partner, defendants' motion for new trial based on newly discovered evidence consisting of other admissions at different times of the same facts presented at the trial was properly overruled, as such evidence of the same kind and to the same point was merely cumulative.

Larson v Meyer, 227-512; 288 NW 663

Well drilling — casing damage — discovery. In action on oral contract to recover for drilling well where, more than four months after judgment, defendant discovered damage to casing caused by plaintiff in digging the well, and thereupon moved for new trial, held that newly discovered evidence was not cumulative, and that under peculiar circumstances existing, the defendant was not guilty of lack of diligence in making such discovery.

Ross v Fahey, (NOR); 205 NW 855

(e) IMPEACHMENT OF WITNESS

Newly discovered impeaching evidence. Newly discovered evidence, in an action for damages for personal injury, which tends to show that the length of plaintiff's disability was much less than as claimed by plaintiff on the trial, is impeaching in character and consequently not ground for new trial.

Danner v Cooper, 215-1354; 246 NW 223

Extrinsic and collateral fraud—impeachment of witnesses. Evidence newly discovered after trial and verdict, and apparently demonstrating that the verdict was obtained by extrinsic and collateral fraud, is ground for new trial within the time limit and conditions provided by the statute; and it is no objection that said evidence also tends to impeach witnesses. So held where the newly discovered evidence tended strongly to show that the stamp "Paid", as it appeared on an obligation sued on, had been willfully fabricated.

Bates v Carter, 222-1263; 271 NW 307

Inviting perjury—improper offer of money or property. A new trial must be granted when, after a verdict adverse to proponent in a will contest, the fact is promptly discovered and shown to the court that the contestant, during said first trial, and on condition that he win the contest, had made, to divers of the witnesses testifying at the trial, offers of a substantial part of the estate as an inducement for said witnesses to testify in behalf of contestant; and this is true even tho it be conceded that said contestant in making said offers was not intending thereby actually to bribe said witnesses to commit perjury.

In re Whitehouse, 223-91; 272 NW 110

(f) SUFFICIENCY AND PROBABLE EFFECT

Affidavits—statutory denial. Affidavits relative to newly discovered evidence as grounds for new trial (on petition) are denied by operation of law. (§12789, C., '31.)

Anderson v Railway, 216-230; 249 NW 256

Newly discovered evidence—sufficiency and probable effect. If a different result is not reasonably probable on account of newly discovered evidence, a new trial should not be granted.

Larson v Meyer, 227-512; 288 NW 663

Sufficiency and probable effect. Newly discovered evidence will not be deemed sufficient to justify an order for a new trial when its competency is questionable, and when it can throw but little light on the issues joined.

Mill Owners v Petley, 210-1085; 229 NW 736

XV MAKING ERROR OR MISCONDUCT OF RECORD

Nonrecord matter. Litigants may not, on appeal, avail themselves of a nonrecord matter bearing on their motion for new trial.

Besco v Mahaska County, 200-684; 205 NW 459

Failure to preserve record. Tho a motion to vacate a final decree for erroneous proceedings which preceded the decree, be treated in the appellate court as a motion for a new trial, yet movant cannot prevail when he deliberately permitted such proceedings to take place in the trial court without any record preservation, and seeks in his motion proceedings to establish them by mere affidavit and extraneous testimony.

Radle v Radle, 204-82; 214 NW 602

Improper showing. Misconduct of the county attorney in argument cannot be presented by motion for new trial supported by affidavits.

State v Phillips, 212-1332; 236 NW 104

New trial — overruling motion to strike amendment. Even tho the overruling of a motion to strike an amendment to plaintiff's motion for new trial was error, there was no prejudice to defendant where motion for new trial was sustained generally, and where grounds of original motion, to wit: that verdict was not sustained by evidence and that plaintiff did not receive a fair and impartial trial, were good—in which case there can be no reversal.

Mitchell v Heaton, 227-1071; 290 NW 39

XVI PROCEEDINGS TO PROCURE NEW TRIAL

Fatally delayed motion. A motion for a new trial must be made within the five-day statutory period.

State v Brennan, (NOR); 215 NW 615

Failure to obtain ruling—effect. The filing of exceptions to instructions and a motion for a new trial, after the entry of judgment on the verdict, is rendered wholly abortive by the failure to call to the attention of the court, the exceptions or the motion, and to obtain a ruling thereon.

Linn v Kendall, 213-33; 238 NW 547

Lack of specification. Motions for new trial must be specific, in criminal as well as in civil cases, as to the grounds, or they will not be reviewable.

State v Vandewater, 203-94; 212 NW 339

Omnibus assignment. An omnibus assignment of error in a motion for new trial presents nothing to the trial court or to the appellate court.

Liddle v Salter, 180-840; 163 NW 447
In re Kahl, 210-903; 232 NW 133

What considered on appeal. Where an appeal is merely from an order overruling a motion for new trial, only such questions as were raised by such motion for new trial can be considered on appeal.

Lotz v United Markets, 225-1397; 283 NW 99

Belated presentation. The overruling of a motion for new trial will not be disturbed on appeal when such motion was filed after appeal and issuance of procedendo, and on the ground that the applicant inadvertently overlooked in the trial of the case certain available testimony. (See §12255, C., '24.)

Tutt v Smith, 202-1389; 212 NW 127

Fatally delayed motion. A court-directed verdict (in a jury trial) is the verdict of the jury within the meaning of the statute limiting applications for new trial to five days "after the verdict is rendered" and the court has no jurisdiction to grant an application made after said time irrespective of the time when formal judgment was entered on the verdict. (Verdict rendered in 1916; judgment entered in 1930.)

Selby v McDonald, 219-823; 259 NW 485

11551 Application—use of affidavits.

ANALYSIS

Motion for new trial not always necessary to obtain review. See under §12828

I MOTION FOR NEW TRIAL IN GENERAL

Motion—what constitutes. A motion which requests the court to reconsider a certain order theretofore made, and to enter a different order, constitutes a motion for a new trial, within the meaning of statute pertaining to the time of taking appeals. Especially is this true when the motion was so treated by the court and by the parties.

Home Bank v Klise, 205-1103; 216 NW 109

Objections to evidence—reraising in motion unnecessary. Where the immateriality of evidence objected to is plainly discernible and no further particularity is required to apprise the trial court of grounds of objections, it is not necessary that these same identical matters be again presented to trial court by way of motion for new trial before they may be considered by supreme court.

Floy v Hibbard, 227-149; 287 NW 829

Unallowable combination of motions.

Miller v Surety Co., 209-1221; 229 NW 909

Jurors as witnesses—refusal to call. On a motion for a new trial in a criminal case, the court may very properly refuse to permit the oral examination of jurymen for the purpose of establishing misconduct which the defendant induced—for which he was responsible.

State v Mutch, 218-1176; 255 NW 643

Extension of time for motion—canvass of jury as to misconduct of court. An extension of time for filing a motion for new trial to enable counsel to canvass the jury and learn the prejudicial effect of remarks made by the court during the trial was properly refused when there was attached to the motion an affidavit by a juror that the remarks of the court had led the jury to disbelieve a witness, the affidavit not supporting its conclusion, and when no exceptions were taken to the remarks by the court.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Matter of discretion—matter of law—when reviewable. An order phrased in general terms granting a new trial will be deemed discretionary and not reviewable except for an abuse of discretion, but where granted on specific legal grounds it is reviewable like any other error of law.

Thompson v Butler, 223-1085; 274 NW 110

Correct ruling on erroneous grounds—valid grounds existing—effect. An error in sustaining a motion for new trial on two particular grounds cannot be prejudicial if other grounds exist on which it should be sustained, all of which will be considered on appeal.

Thompson v Butler, 223-1085; 274 NW 110

Verdict contrary to evidence—preserving question in lower court—no review if first raised on appeal. In an action to establish a claim against an estate for serum, virus, and veterinary supplies furnished to decedent over a term of eight years, argument on appeal that the verdict denying the claim was contrary to the evidence, and should be set aside, cannot be considered when not raised by appropriate procedure in the lower court.

In re Larimer, 225-1067; 283 NW 430

II TIMELY AND UNTIMELY MOTIONS

Verdict—scope of term—fatally delayed motion. A court-directed verdict (in a jury trial) is the verdict of the jury within the meaning of the statute limiting applications for new trial to five days "after the verdict is rendered" and the court has no jurisdiction to grant an application made after said time irrespective of the time when formal judgment was entered on the verdict. (Verdict rendered in 1916; judgment entered in 1930.)

Selby v McDonald, 219-823; 259 NW 485

Setting aside default judgment—time limit five days. A motion to set aside a default judgment in the district court must be made within five days after rendition of the judgment, unless the time is extended by the court.

Vaux v Hensal, 224-1055; 277 NW 718

Belated motion and exceptions to instructions—effect. A motion for new trial and exceptions to instructions filed 16 days after verdict, where no extension is secured, are filed too late, and questions raised therein cannot be considered on appeal. In such case, when extension of time has been granted, such fact should be shown in abstract.

Roggensack v Ahlstrom, (NOR); 209 NW 429

Journal entry extending time valid. A statute requiring that an application for a new trial must be made within five days after the verdict is rendered unless the court grants an extension of time, contemplates orders which are only temporary and incidental to the case, and an order extending the time for such application was effective to extend the time beyond the five-day limit, when it was entered on the judge's calendar before the five days were up, even tho not entered on the record book until seven days after judgment was rendered.

Street v Stewart, 226-960; 285 NW 204

Waiver of belated filing. The right to object to a motion for a new trial because not filed within the time provided by statute is waived by failing to interpose such objection in the trial court.

Home Bank v Klise, 205-1103; 216 NW 109

Belated presentation. The overruling of a motion for new trial will not be disturbed on appeal when such motion was filed after appeal and issuance of procedendo, and on the ground that the applicant inadvertently overlooked in the trial of the case certain available testimony. (See §12255, C., '24.)

Tutt v Smith, 202-1389; 212 NW 127

Belated filing. A motion for a new trial and objections to instructions will be ignored on appeal when filed after the time fixed by the court.

Lein v Morrell, 207-1271; 224 NW 576

Motion delayed more than five days. A motion for new trial when not based on newly discovered evidence is properly overruled when made more than five days after the verdict.

In re Larimer, 225-1067; 283 NW 430

Belated filing—effect on appeal—waiver of lateness. The belated filing of a motion for new trial and exceptions to instructions is fatal thereto and precludes consideration on appeal, but the lateness may be waived and the matters heard on their merits.

Thompson v Butler, 223-1085; 274 NW 110

Motion not germane to non obstante veredicto. A motion for new trial is not germane to a motion for judgment notwithstanding the verdict and cannot be considered if made after a lapse of five days from the verdict.

In re Larimer, 225-1067; 283 NW 430

Nunc pro tunc order for more time—ineffective after five days from verdict. An application for a nunc pro tunc order for an extension of time to file motion for new trial is properly overruled when made more than five days after the verdict.

In re Larimer, 225-1067; 283 NW 430

III AMENDMENTS

Belated amendment to exception to an instruction. An amendment to an exception to an instruction will not be considered when not filed within the time fixed by the statute or the court, and when said amendment is not germane to the original exception.

Reif v Beese, 213-250; 236 NW 66

Amendment to motion after extended time for filing—when permitted. An amendment to a motion for a new trial may be filed after the statutory or extended time for filing the motion if it is germane to the original motion.

Mitchell v Heaton, 227-1071; 290 NW 39

Amendment to motion after extended time—majority verdict as germane matter. Where a motion for a new trial is based on the grounds, among others, that verdict was contrary to law, was not the result of due deliberation by the jury, and was contrary to court's instructions, an amendment, alleging that the verdict was illegal and was the result of an agreement made in advance that jury would be bound by a majority vote, was germane to original motion and could be considered altho filed after extended time for filing motion for new trial.

Mitchell v Heaton, 227-1071; 290 NW 39

Motion for new trial—overruling motion to strike amendment. Even tho the overruling of a motion to strike an amendment to plaintiff's motion for new trial was error, there was no prejudice to defendant where motion for new trial was sustained generally, and where grounds of original motion, to wit: that verdict was not sustained by evidence and that plaintiff did not receive a fair and impartial trial, were good—in which case there can be no reversal.

Mitchell v Heaton, 227-1071; 290 NW 39

IV AFFIDAVITS

Hearsay affidavit. An unattacked and unchallenged affidavit may be sufficient in some cases to establish such misconduct on the part of jurors as to demand a new trial, even tho the contents of the affidavit may be hearsay.

Skinner v Cron, 206-338; 220 NW 341

Optional methods of proof. The grounds for a new trial need not necessarily be established by affidavits. In proper cases, such grounds may be established by the testimony of witnesses.

Skinner v Cron, 206-338; 220 NW 341

Unjustifiable refusal to call jurors. When jurors are present in court when a motion for a new trial comes on for hearing, it is reversible error for the court to refuse to order their personal examination as to specified misconduct which, if established, would reveal grounds for a new trial; and especially so when it appears that the jurors had refused to make their personal affidavits as to the facts.

Skinner v Cron, 206-338; 220 NW 341

Ineffectual affidavits. A new trial will not be granted on the basis of affidavits by jurors relative to the consideration of extraneous and improper testimony when the affidavits signally fail to show that the jurors were in any manner influenced by such testimony.

Bauer v Reavell, 219-1212; 260 NW 39

11553 Judgment notwithstanding verdict.

Criminal law—unrecognized practice. Motions for judgment notwithstanding the ver-

dict are not recognized in our practice governing criminal cases.

State v Stennett, 220-388; 260 NW 732

Judgment notwithstanding verdict — scope of. A motion for judgment non obstante veredicto is based wholly on a defective pleading, in that it omits to aver some material fact necessary to complete a cause of action or defense, and the motion must clearly point out the omission.

In re Larimer, 225-1067; 283 NW 430

Arrest of judgment—motion goes to sufficiency of petition. A motion in arrest of judgment raises only the question of whether the petition wholly fails to state a cause of action, not whether the petition should have been more specific.

Kirchner v Dorsey, 226-283; 284 NW 171

Pleadings complete — motion overruled. Where pleadings of the successful party averred all material facts necessary to a complete cause of action or defense, a motion for judgment notwithstanding the verdict was properly overruled.

Lee v Sundberg, 227-1375; 291 NW 146

Untimely motion. A motion for judgment notwithstanding the verdict is not germane to a motion for new trial, and cannot be considered if filed as an amendment to the motion for new trial after the lapse of five days from verdict.

Miller v Surety Co., 209-1221; 229 NW 909

Motion for new trial not germane to non obstante veredicto. A motion for new trial is not germane to a motion for judgment notwithstanding the verdict, and cannot be considered if made after a lapse of five days from the verdict.

In re Larimer, 225-1067; 283 NW 430

Untenable motion. A motion for judgment non obstante veredicto will not lie to a petition which recites the facts out of which plaintiff's injury arose, and contains a general allegation of negligence on the part of the defendant.

Pomerantz v Cement Corp., 212-1007; 237 NW 443

Unallowable procedure. Plaintiff against whom a verdict has been rendered in an action on a promissory note may not so avail himself of a motion for judgment notwithstanding the adverse verdict, or of a motion in arrest of judgment, as to obtain a judgment in his favor on a theory of estoppel neither pleaded nor proven.

Millard v Herges, 213-279; 236 NW 89; 238 NW 604

Proper rejection. Plaintiff's motion for judgment notwithstanding a verdict for defendant, because defendant's answer failed to plead want of consideration for the signing of the note sued on, is properly overruled when defendant's answer impliedly pleaded want of consideration, and when plaintiff so construed the answer throughout the trial.

Persia Bk. v Wilson, 214-993; 243 NW 581

Waiver. The right of plaintiff to file a motion for judgment notwithstanding a verdict in favor of defendant, on the ground that defendant's answer fails to plead a defense, is not waived by plaintiff because of his failure to demur to said answer.

Persia Bk. v Wilson, 214-993; 243 NW 581

Verdict contrary to evidence—preserving question—when nonreviewable. In an action to establish a claim against an estate for serum, virus, and veterinary supplies furnished to decedent over a term of eight years, argument on appeal that the verdict denying the claim was contrary to the evidence, and should be set aside, cannot be considered when not raised by appropriate procedure in the lower court.

In re Larimer, 225-1067; 283 NW 430

Question first raised on appeal. Questions as to possible errors of the trial court, not properly raised by motion for directed verdict, nor by request for instructions, nor by exceptions to instructions, cannot be considered on appeal.

In re Larimer, 225-1067; 283 NW 430

11554 Arrest of judgment.

Unallowable procedure. Plaintiff against whom a verdict has been rendered in an action on a promissory note may not so avail himself of a motion for judgment notwithstanding the adverse verdict, or of a motion in arrest of judgment, as to obtain a judgment in his favor on a theory of estoppel neither pleaded nor proven.

Millard v Herges, 213-279; 236 NW 89

Facts alleged generally—arrest of judgment not tenable. A motion in arrest of judgment will not lie to a petition which recites the facts out of which plaintiff's injury arose, and which contains a general allegation of negligence on the part of the defendants.

Kirchner v Dorsey, 226-283; 284 NW 171

Motion goes to sufficiency of petition. A motion in arrest of judgment raises only the question of whether the petition wholly fails to state a cause of action, not whether the petition should have been more specific.

Kirchner v Dorsey, 226-283; 284 NW 171

11555 Filing of motion.

Waiver of motion—insufficient showing. A party will not be deemed to waive his motion for a new trial by having his motion non ob-

stante veredicto sustained when both motions were prepared, filed, and treated as one motion, and where the motion for new trial was properly sustained, and the motion non obstante veredicto was improperly sustained.

Pomerantz v Cement Corp., 212-1007; 237 NW 443

11556 Time of filing.

Untimely motion. A motion for judgment notwithstanding the verdict is not germane to a motion for new trial, and cannot be considered if filed as an amendment to the motion for new trial after the lapse of five days from verdict.

Miller v Surety Co., 209-1221; 229 NW 909

Belated nunc pro tunc order for extension. An application for a nunc pro tunc order for an extension of time to file motion for new trial is properly overruled when made more than five days after the verdict.

In re Larimer, 225-1067; 283 NW 430

Motion for new trial not germane to non obstante veredicto. A motion for new trial is not germane to a motion for judgment notwithstanding the verdict, and cannot be considered if made after a lapse of five days from the verdict.

In re Larimer, 225-1067; 283 NW 430

11557 Curative amendments—time of filing.

Conforming pleadings to proof. Amendments which conform the pleadings to the proofs are allowable.

State v Carney, 208-133; 217 NW 472
Henriott v Main, 225-20; 279 NW 110

11561 Conditions.

Conditions in re excessive verdicts. See under §11550 (VIII)

11562 Dismissal of action.

ANALYSIS

I DISMISSAL IN GENERAL
II BY PLAINTIFF BEFORE SUBMISSION
III BY THE COURT FOR NONPROSECUTION
IV DISMISSAL WITHOUT PREJUDICE
V REINSTATING DISMISSED CAUSE

I DISMISSAL IN GENERAL

Wrong venue—motion to transfer as sole remedy. An action commenced on due and proper service, and concerning a subject matter of which the court has jurisdiction, should not be dismissed because commenced in the wrong county. Motion to transfer to the proper county is the sole remedy.

Baker v Bank, 205-1259; 217 NW 621

Dismissal of prima facie case. The court, in trying an action, in lieu of a jury, may be fully justified in dismissing it on motion because of the inconclusive and unsatisfactory character of the evidence, even tho the plaintiff has technically made a prima facie case for recovery. So held in an action for money had and received.

Griffith v Arnold, 204-1216; 216 NW 728

Dismissal before court sustains motion. When, at the close of plaintiff's testimony, the court orally states that defendant's motion for a directed verdict would be sustained, and plaintiff thereupon announces in open court his dismissal of the action without prejudice, the court may treat plaintiff's announcement as a motion to dismiss without prejudice and sustain such motion over the objection of defendant.

Rush v Barnhill, 218-425; 255 NW 491

Court indicating directed verdict—dismissal motion properly denied. A motion to dismiss, made after court indicated an intention to sustain defendant's motion for directed verdict, held properly denied.

Yarn v Railway, 31 F 2d, 717

Dismissal after death of party. Where no personal representative was substituted for plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence, application made during same term to vacate the dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

Nonjurisdiction to dismiss. When a cause is assigned to, and tried by, a judge of the district court, all other judges of the same court are thereby deprived of jurisdiction to dismiss the cause while it is pending before said trial judge.

Dunkelbarger v Myers, 211-512; 233 NW 744

Dismissal because of lack of subject matter. An action is properly dismissed when by the lapse of time no issue remains for trial.

Peoples Bank v McCarthy, 210-952; 231 NW 487

Dismissal—effect. The dismissal of an action solely for injunctional relief necessarily dissolves the temporary injunction issued therein.

Peoples Bank v McCarthy, 210-952; 231 NW 487

Dismissal of issue—striking evidence. The court should not permit testimony bearing on a dismissed issue to remain in the record when it has no material bearing on any remaining issue.

In re Muhr, 218-867; 256 NW 305

I DISMISSAL IN GENERAL—concluded

Involuntary—failure of service. The dismissal of an action is proper when it appears that no defendant has been legally served with the original notice.

Thompson v Butler, 214-1123; 243 NW 164

Dismissal of partnership suit. A partnership action cannot be legally dismissed by one half of the partners against the wishes of the remaining half of the partners when such dismissal would be materially injurious to the partnership.

Lunt Co. v Hamilton, 217-22; 250 NW 698

Nonrecord dismissal. An application by the surety on the bond of an administrator wherein the prayer was (1) for the removal of the administrator or (2) for the filing of a report, may not be deemed dismissed, insofar as the prayer for removal is concerned, simply because the surety informed the administrator that he (the surety) would not insist on an order of removal, such matter not being made a matter of record.

In re Donlon, 201-1021; 206 NW 674

Motion to dismiss equitable action. There is no statutory authority for a motion to dismiss an equitable action at the close of plaintiff's testimony.

Appanoose Bureau v Board, 218-945; 256 NW 687

Motion to dismiss—operation and effect. A defendant who, at the close of plaintiff's testimony in an equitable action, makes and stands on a motion for judgment in his own favor, and for dismissal of plaintiff's petition, in effect announces that he rests his case.

Haggin v Derby, 209-939; 229 NW 257

More specific statement—order—impossible compliance. A plaintiff who is ordered to make his petition more specific in certain particulars which he is actually or reasonably unable to state, and so demonstrates in a good-faith effort to comply with the order, must be deemed to have complied with the order, and must not be disciplined by a dismissal of his action.

Lamp v Williams, 222-298; 268 NW 543

Failure to enter formal judgment of dismissal. Failure of the court, following its order dismissing a counterclaim, to enter a formal judgment of dismissal of said counterclaim, cannot possibly prejudice the appellant in his appeal from the final judgment on the merits.

Hunt v Moore, 213-1323; 239 NW 112

Failure to enter formal judgment on collateral order. The failure of the court, following a dismissal of a quantum meruit count by plaintiff, to enter a formal judgment of dismissal of the said count cannot possibly detrimentally affect the defendant on his appeal from a judgment against him on the remaining count.

Hunt v Moore, 213-1323; 239 NW 112

Certiorari—when writ lies—illegal setting aside of dismissal. Certiorari is a proper remedy to review the action of a trial court in illegally setting aside the dismissal, prior to the return day, of an action, and in proceeding with the cause as tho no dismissal had been filed.

Lyon v Craig, 213-36; 238 NW 452

Pleadings unamendable after dismissal. When the trial court abates an equitable action (e. g., mandamus) by dismissing it on the ground of misjoinder both of parties plaintiffs and of causes of action, and plaintiff makes no effort to avoid the abatement by pruning out of his pleading the objectionable misjoinders, but stands on his pleadings, and on appeal suffers an affirmance of said order of dismissal, he may not thereafter amend his pleadings in the dismissed action by then pruning out said objectionable matter. The pleadings of a finally dismissed action are, manifestly, not subject to amendment.

First N. Bank v Board, 221-348; 264 NW 281; 104 ALR 566

Neglect to file cost bond within time ordered —effect. The nonwillful neglect to file a cost bond by the time ordered by the court will not justify a dismissal of the action when the bond is filed prior to the ruling on the motion to dismiss.

Arthaud v Griffin, 205-141; 217 NW 809

Splitting action — subjecting insurance to probate claim—establishing one policy in foreign court. A claimant in probate, alleging an oral contract assigning all of decedent's insurance, may not split this single cause of action by dismissing part of his claim and attempting to establish it in a foreign state where one policy was held as security for the performance of a prior contract of decedent made therein.

In re Hazeldine, 225-369; 280 NW 568

II BY PLAINTIFF BEFORE SUBMISSION

Necessary loss of jurisdiction. The voluntary dismissal of an action by plaintiff prior to the return day, and the record entered by the clerk of such dismissal, necessarily deprives the court of all jurisdiction to proceed with said cause.

Lyon v Craig, 213-36; 238 NW 452

Dismissal—effect. Principle recognized that while a plaintiff may dismiss his own action, such dismissal cannot affect defendant's properly pleaded cross-petition.

Randolph v Ins. Co., 216-1414; 250 NW 639

Dismissal before trial—effect. The dismissal of an action by plaintiff before trial, even tho

it is an equitable action which involves the liability of a defendant city relative to various claimants for work and materials on a public improvement, deprives the court of all jurisdiction thereafter to proceed with the trial and adjudicate any right of the dismissing plaintiff, when the pleadings of the defendant are solely defensive.

Eclipse Lbr. v City, 204-278; 213 NW 804
Eclipse Lbr. v Kepler, 204-286; 213 NW 809

Final submission to court. When defendant's motion for a directed verdict in his favor on plaintiff's evidence is argued and submitted to the court, and the court orally and by appropriate entry on the docket sustains said motion, it is too late for plaintiff to assert that there has been no final submission of the action to the court. It necessarily follows, under such circumstances, that plaintiff has lost his right to voluntarily dismiss his action without prejudice.

Marion v Ins. Assn., 205-1300; 217 NW 803

Final submission withheld by order for briefs. When at the close of the evidence in an action tried to the court, time is given each party, at the request of the defendant, in which to file briefs, no final submission to the court takes place until the briefs are filed, or until the time for such filing has expired. It follows that in such circumstances a plaintiff may dismiss his action at any time before the time for filing briefs has expired.

Crane v Leclere, 204-1037; 216 NW 622

Insufficient showing to overcome. A judgment recital that a plaintiff appeared and requested the dismissal of the action will not be expunged on motion on testimony which is in equipoise on the issue whether such recital is correct.

Sullivan v Coakley, 205-225; 217 NW 820

Implied dismissal. The dropping of an action from the court calendar for some 25 years without explanation from the plaintiff, coupled with conduct on the part of the plaintiff inconsistent with the further pendency of such neglected action, clearly justifies the court in treating such action as dismissed.

Benjamin v Jackson, 207-581; 223 NW 383

III BY THE COURT FOR NONPROSECUTION

Rules in re failure to prosecute action. Rules of the district court for the dismissal of actions, for want of reasonable prosecution thereof, are proper.

Workman v Dist. Court, 222-364; 269 NW 27

Want of prosecution—court rules construed with statute. A district court rule, providing for dismissal of actions for want of prosecution if not noticed for trial within one year, must be construed in conjunction with statute requiring trial notices to be filed.

Thoreson v Elec. Co., 225-1406; 283 NW 253

Refusal to reinstate action. A dismissal of plaintiff's action is properly ordered when plaintiff fails to appear at the time the action is assigned for trial; and the refusal of the court to reinstate the action will not be disturbed in the absence of a showing of manifest abuse of discretion.

Bliss v Watson, 208-1199; 227 NW 108

Court acting on own motion contrary to agreement of counsel. Consolidated actions, dismissed by the court on its own motion in the absence of counsel, for want of prosecution, are properly reinstated on a showing of "*unavoidable casualty and misfortune*" in that there was no negligence on the part of plaintiffs or their counsel and that they were relying on an agreement between counsel that certain motions would not be made nor issues made up until convenient to all counsel.

Thoreson v Elec. Co., 225-1406; 283 NW 253

Jurisdiction to dismiss pending appeal. An appeal from the municipal court to the supreme court from an interlocutory order involving part of an answer (order striking pleaded set-offs from part of the divisions of the answer), without supersedeas bond in, or stay order by, the appellate court, does not deprive the municipal court of jurisdiction to dismiss the action, in accordance with its rules, for want of attention.

DM & CI Ry. v Powers, 215-567; 246 NW 274

Notice—sufficiency. A rule of court to the effect that the court may dismiss nonprosecuted actions after prescribed published notice of the proposed dismissal has been had is not invalid because the rule provides that the docket number only shall be stated in the publication.

Scott v Cas. Co., 217-390; 252 NW 85

Want of prosecution — negligence. Negligence of plaintiff, in prosecuting his action after commencing it, furnishes ample justification for the action of the court in refusing to set aside a dismissal of the action for want of prosecution.

Scott v Cas. Co., 217-390; 252 NW 85

Dismissal for want of prosecution. The dismissal of an action for want of prosecution is eminently proper (1) when plaintiff knew that defendant was insisting on immediate trial, (2) when the cause was twice assigned for trial at the same term, and (3) when defendant failed to appear at the time finally set for trial and filed no motion for continuance.

Pride v Kittrell, 218-1247; 257 NW 204

Justifiable dismissal. An unsupported counterclaim for damages consequent on the negligent handling of a claim by an attorney who

sued for fees due him, is, of course, properly dismissed by the court.

Hunt, etc. v Moore, 213-1323; 239 NW 112

IV DISMISSAL WITHOUT PREJUDICE

Dismissal for nonappearance—effect. The dismissal of an action by the court solely because of the nonappearance of the plaintiff at the time of trial must be deemed a dismissal without prejudice to the bringing of a new action.

Galloway v Hobson, 206-507; 220 NW 74

Nonadjudication of merits. The dismissal of an action because of a failure to comply with a rule of court respecting the filing of trial notice does not constitute an adjudication of the action.

Fryman v McCaffrey, 208-531; 222 NW 19; 224 NW 95

Dismissal with and without prejudice. A plaintiff has the unqualified right to dismiss a part of his cause of action with prejudice, and the remaining part without prejudice, and later maintain an action on the part dismissed without prejudice.

Hall v Ins. Co., 217-1005; 252 NW 763

V REINSTATING DISMISSED CAUSE

Reinstatement. The district court has jurisdiction to reinstate a cause which, under order of court, has been "dropped from the calendar" if such dropping from the calendar was not with the intent to dismiss.

Bank. Tr. Co. v Dist. Ct., 209-879; 227NW536

Voluntary dismissal—jurisdiction to set aside. The voluntary dismissal of an action may not, even during the same term, be set aside and the action reinstated when such dismissal was brought about by the negligence of the dismissing party and such negligence is wholly unexplained and unexcused. Whether the court has jurisdiction in any case to set aside a voluntary dismissal, quaere.

Ryan v Ins. Co., 204-655; 215 NW 749

Nonjurisdiction to set aside dismissal. A municipal court having entered a valid order of dismissal of an action has no jurisdiction, seven months later, to set aside said order and reinstate said action without notice to the defendant.

DM & CI Ry. v Powers, 215-567; 246NW274

Setting aside—insufficient grounds. A party who compromises and settles his claim for damages consequent on an alleged fraudulent sale, and voluntarily and under no additional fraud does so on the basis of his then knowledge of the claimed fraud, may not have the compromise set aside on the claim that he later discovered an additional element of fraud in the sale not known to him when he compromised.

Williams v Herman, 216-499; 249 NW 215

Reinstatement justified. When an action for death benefits was dismissed for failure to prosecute, reinstatement was not an abuse of discretion when it was shown that: there was a valid cause of action; witnesses were difficult to obtain; there was a change in the plaintiff's counsel; the court records erroneously showed an amended answer which might have misled the new counsel; there was no personal neglect on the part of the plaintiff; and a dismissal at that time, under the terms of the policy, prevented having any trial on the merits of the case.

Nickerson v Iowa Assn., 226-840; 285 NW 162

Refusal to reinstate—discretion.

Bliss v Watson, 208-1199; 227 NW 108

Setting aside dismissal. When an action to collect death benefits was dismissed for want of prosecution, the court was justified in setting aside the dismissal when the petition for reinstatement showed the fact of the accident resulting in death, and that witnesses had been located, and the order of the court complied with a statute in making an adjudication that the plaintiff had a valid cause of action.

Nickerson v Iowa Assn., 226-840; 285 NW 162

Justifiable setting aside. The court is, manifestly, within its discretion in setting aside the dismissal of an action when the dismissal was entered by the plaintiff's counsel at a time when he had been discharged.

Pilcher Co. v Clark, 218-150; 253 NW 907

Setting aside—time limit. The time limit for filing petition to vacate an order dismissing an action for want of prosecution, on the ground of unavoidable casualty or misfortune preventing a party from prosecuting the action, is not limited to a time on or before the second day of the term succeeding the entry of the order.

Seiders, Inc., v Adel Clay, 218-612; 255 NW 656

Judgment of dismissal—nonjurisdiction to set aside. The district court, having at one term entered a judgment of dismissal of an action for want of prosecution of the action as required by the rules of the court, has no jurisdiction at a subsequent term, tho the judgment entry remains unsigned, to set aside said judgment under §10801, C., '35, and reinstate the action. The governing procedure, under such circumstances, is provided by §12787 et seq., C., '35.

Workman v Dist. Court, 222-364; 269 NW 27

Dismissal after death of party. Where no personal representative was substituted for plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence, application made during same term

to vacate the dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

No reinstatement of nol-prossed indictment. An indictment against a corporation for maintaining a liquor nuisance, nol-prossed, without fraud at the sole instance of the county attorney, on the mistaken assumption that defendant was not a corporation and, therefore, could not be held to answer, may not later be reinstated when it is discovered that defendant is in fact a corporation. (Keokuk v Schultz, 188 Iowa 937, overruled in part.)

State v Veterans, 223-1146; 274 NW 916; 112 ALR 383

State v Moose, 223-1146; 274 NW 918

11563 Decision on the merits.

Discretion of court—trial on merits preferred. The law favors trial on merits, and the trial court exercises considerable discretion in setting aside default judgments so as to give preference to trial of causes on merits.

Lemley v Hopson, (NOR); 232 NW 811

11564 Counterclaim tried.

Effect on cross-petition. An executor who institutes an authorized action against a corporate receiver in the county of the receiver's appointment, for relief against an alleged fraud-induced contract by the deceased, and (1) is met by a cross-petition for judgment on the said contract, and (2) has his action properly consolidated with divers other actions under duly joined issues which might have been the basis of an original action against the executor in said county of suit, may not thereupon, after dismissing his action, have all proceedings against himself and the estate dismissed on the claim that the probate court which appointed him had sole jurisdiction to render a judgment against him or against the estate.

Lex v Selway Corp., 203-792; 206 NW 586

Splitting action—dismissal of part of claim—effect on cross-petition. A claimant in probate who seeks to have proceeds of life policies subjected to payment of claim does not, by dismissal as to a part of amendment to his claim, deprive the court of jurisdiction to adjudicate the rights to such proceeds as claimed by cross-petitioner.

In re Hazeldine, 225-369; 280 NW 568

11566 Dismissal in vacation.

Necessary loss of jurisdiction. The voluntary dismissal of an action by plaintiff prior to the return day, and the record entered by the clerk of such dismissal, necessarily deprives the court of all jurisdiction to proceed with said cause.

Lyon v Craig, 213-36; 238 NW 452

11567 Judgment—final adjudication.

ANALYSIS

Alimony decrees, res adjudicata effect. See under §10481 (III)
Dismissal of actions. See under §§11562, 12886
In rem judgments generally. See under §11600
Judgment against garnishee. See under §12169
Judgments entered on court records. See under §11582
Judgments on motion. See also §11608
Probate adjudications. See under §§11963, 12050 (II)
Splitting causes of action. See under §11111 (II)

I NATURE AND ESSENTIALS IN GENERAL

Discussion. See 2 ILB 142—Federal courts following state court decisions; 7 ILB 81—The declaratory judgment; 12 ILR 62—The declaratory judgment—its application to constitutional controversies

Judgment as debt. A judgment, whether based on contract or tort, is a "debt" within the meaning of the exemption statutes.

Ohio Ins. v Galvin, 222-670; 269 NW 254; 108 ALR 1036

Admissions—plea of guilty in criminal prosecution. A plea of guilty in a criminal prosecution may be admissible as an admission when the judgment entered thereon would not be admissible.

In re Johnston, 220-328; 261 NW 908; 262 NW 488

Necessary allegation and proof. In order to defeat, under §12032, C., '31, the application of a surviving widow for an allowance out of her husband's estate, the objector must distinctly allege and prove that the widow feloniously took, or feloniously caused or procured another to take, the life of her said husband, and must so do irrespective of the outcome or result of any criminal proceedings against said widow.

In re Johnston, 220-328; 261 NW 908; 262 NW 488

Amount in controversy — pleadings determinative. In determining the amount in controversy under the statute limiting supreme

I NATURE AND ESSENTIALS IN GENERAL—continued

court appeals to cases involving over $100, the allegations of the pleadings are controlling, and where the propriety of the judgment is the only issue, interest or costs will not be considered in determining the amount in controversy, but where defendant's motion attacked purported judgment of district court confirming justice's judgment in sum of $74, together with accrued interest of $35, amount of interest would be added to judgment in determining whether amount involved was sufficient to authorize appeal to supreme court.

Yost v Gadd, 227-621; 288 NW 667

General inequitableness—nonmutuality—innocent third parties. A decree awarding specific performance cannot be justified (1) when the party awarded such performance has neither tendered performance nor specifically shown his ability to perform, (2) when the decree contains mandates on parties over whom the court has no jurisdiction, (3) when the decree awards such performance both in favor of and against parties who are not and never have been parties to the contract in question, and (4) when the decree compels parties who are strangers to the contract in question to change their position to their possible financial loss.

Anders v Crown, 210-469; 229 NW 744

Judgment against insane person—validity. The validity of a judgment obtained in a law action against an insane defendant is not affected by such insanity, or by fact that a guardian had been appointed for his property.

In re Simpson, 225-1194; 282 NW 283

Findings by court. Whether a mere finding by the court as to the extent of the administrator's liability to the estate, entered on an application by the surety to remove the administrator, is an adjudication binding on the surety on the bond, quaere.

In re Donlon, 201-1021; 206 NW 674

Dismissal before trial—effect. The dismissal of an action by plaintiff before trial, even tho it is an equitable action which involves the liability of a defendant city relative to various claimants for work and materials on a public improvement, deprives the court of all jurisdiction thereafter to proceed with the trial and adjudicate any right of the dismissing plaintiff, when the pleadings of the defendant are solely defensive.

Eclipse Lbr. v City, 204-278; 213 NW 804
Eclipse Lbr. v Kepler, 204-286; 213 NW 809

Loss of right to equitable relief. A duly entered judgment against plaintiff on the merits in a law action, and affirmed on appeal, constitutes a final judgment, and §11017, C., '31, furnishes no authority to plaintiff thereafter to file in the adjudicated law action a "substituted petition in equity" (and motion to transfer to equity) involving the same subject matter, and no authority or jurisdiction to the court to entertain such attempted action.

Phoenix Ins. Co. v Fuller, 216-1201; 250 NW 499

Motion to dismiss—pleading over in equity. Plaintiff, in an action triable in equity, who has his action dismissed on motion because of defenses in point of law appearing on the face of the petition, must be accorded the right (1) to plead over, or (2) to elect to stand upon the ruling of the court.

Marcovis v Inv. Co., 223-801; 273 NW 888

Insufficient showing to overcome recital. A judgment recital that a plaintiff appeared and requested the dismissal of the action will not be expunged on motion on testimony which is in equipoise on the issue whether such recital is correct.

Sullivan v Coakley, 205-225; 217 NW 820

Collateral attack—nonpermissible impeachment. The judgment of a court having jurisdiction of the parties and of the subject matter cannot be collaterally impeached.

King City v Surety Co., 212-1230; 238 NW 93

Unallowable collateral attack. In the foreclosure of a mortgage, executed by an administrator on lands of the deceased and on due order and authorization of the court, the defending heirs, who were parties to the order and authorization for the mortgage, will not be permitted to collaterally attack the validity of the mortgage on the ground that part of the land was the homestead of the deceased and therefore descended to the heirs exempt from the debts of the deceased.

Reinsurance Life v Houser, 208-1226; 227 NW 116

Appointment of administrator — collateral attack. In an action by an administrator, an answer alleging that plaintiff is not a legal administrator because he is a nonresident and secured his appointment by concealing that fact from the court is properly stricken because (1) the plaintiff's nonresidence did not render the appointment void, and, therefore, (2) the answer is but an unallowable attempt to collaterally attack the probate order of appointment.

Reidy v Railway, 216-415; 249 NW 347

Unserved and nonappearing parties. In rendering a decree the court may very properly insert a precautionary clause to the effect that the decree is not binding on unserved and nonappearing parties.

Gunn v Gould Co., 206-172; 218 NW 895

Partition proceedings—unborn child. A statute empowering the court in partition proceedings (1) to assume, through a guardian

ad litem, jurisdiction over the contingent interest of an unborn child as a possible cotenant of the land, (2) to order a sale of the land, and (3) to exercise a continuing jurisdiction over the resulting fund insofar as such possible child may have an interest, is violative of neither the federal nor state constitution relative to depriving persons of property without due process.

Mennig v Howard, 213-936; 240 NW 473

Judgment after death of defendant. Principle recognized that the court having taken a cause under advisement, and delayed decision until after the death of the defendant, may validly render judgment as of the date of the submission.

Chariton Bk. v Taylor, 213-1206; 240 NW 740

Involved matters—broad power under general prayer for relief. A court of equity, in dealing with and adjusting involved and complicated matters of fact, has exceptionally broad power to effect equity and justice when both parties pray for general equitable relief. Illustrated where defendant, who was the owner of coal lands, and those working in conjunction with him, had wrongfully interfered with the rights of lessees, and were held liable in a reasonable amount for permanent improvements placed in the mine by lessees, even tho said improvements became worthless—it appearing that defendant's misconduct had materially contributed to said latter condition.

Hartford Coal Co. v Helsing, 220-1010; 263 NW 269

Primary jurisdiction of equity in personam —decree affecting status of bank deposit. Primarily and fundamentally, courts of equity act only in personam, and it is only by statute that they have acquired jurisdiction to act directly in rem. The fact that a decree determines the rights of parties to a bank deposit from insurance proceeds, and indirectly affects the status thereof, does not make the proceeding one in rem.

In re Hazeldine, 225-369; 280 NW 568

Collateral attack — judgment on defective notice. Principle reaffirmed that a judgment rendered on notice such as to give the court jurisdiction, tho the notice may be defective, cannot be collaterally attacked.

Bauer v Bauer, 221-782; 266 NW 531

Void decree—collateral attack. A decree of divorce, wheresoever rendered, is always open to collateral attack by proof that the court was without jurisdiction to render it.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Collateral attack—orders in bankruptcy. An order in federal bankruptcy proceedings for the sale of the bankrupt's equity of redemption in land sold under foreclosure proceedings is immune from collateral attack on the ground that the land embraced the bankrupt's homestead.

Lincoln Bank v Brown, 219-630; 258 NW 770

Void probate order. Void orders of the probate court may be attacked collaterally.

Irwin v Bank, 218-477; 255 NW 671

Ruling on motion as adjudication. An order overruling plaintiff's motion (1) to strike an answer, and (2) for judgment nil dicit (assuming the propriety of such procedure) constitutes an adjudication that plaintiff has no legal right to a judgment on the pleadings as they then stand; and plaintiff has no right later to present, to another judge of the same court, a motion for judgment on the same pleadings, and said latter judge has no right to review the rulings of the former judge by sustaining said latter motion.

Taylor v Canning Corp., 218-1281; 257 NW 353

Ruling on motion as adjudication. Whether a ruling sustaining a motion to strike a pleading on the ground that it improperly joins causes of action and party defendants constitutes (in the absence of an appeal) a final adjudication in the further progress of the cause, quaere.

Ontjes v McNider, 218-1356; 256 NW 277

Motion to dismiss—ruling as adjudication. The overruling of a motion to dismiss a petition in an equitable action does not amount to an adjudication unless the defendant stands on his motion and allows judgment to be entered against him.

Frazier v Wood, 219-36; 255 NW 647; 257 NW 768

Absence of issues. A decree quieting title in certain defendants against other defendants cannot be rendered when no issues whatever were joined between said defendants.

Grandy v Adams, 219-51; 256 NW 684

Nonlitigated issue. A judgment or decree cannot be deemed an adjudication of an issue which was not expressly or impliedly embraced in the proceedings leading up to the judgment.

Wunder v Schram, 217-920; 251 NW 762

Appeal—dismissal on technical grounds—noneffect as adjudication. The dismissal, by the supreme court, of an appeal, and the affirmance by said court of the judgment appealed from, on the technical ground that appellant had failed to make timely filing of an abstract of the record, cannot be deemed an adjudication of the jurisdictional legality of the judgment so affirmed. In other words, while the appeal has proven abortive, the said judgment is nevertheless subject to an action for its cancellation on the ground that the trial court was wholly without jurisdiction to enter it.

Dallas v Dallas, 222-42; 268 NW 516

I NATURE AND ESSENTIALS IN GENERAL—concluded

Public utility contracts under Simmer law—engineering cost—no general judgment. Simmer law prohibits payment of construction cost of a municipal electric plant from taxation, and precludes rendering a general judgment for such cost, including a judgment for cost of engineering services in preparing plans and specifications for construction of such public utility, when such services were performed under contract, subsequent to the election and passage of the ordinance providing for construction payment from future earnings. Consequently, in an action by the engineers against a city to recover compensation for their services, a directed verdict for the city was proper.

Burns Co. v Iowa City, 225-1241; 282 NW 708

Refunding erroneous tax — administrative remedies exhausted before resorting to court. Under the statute providing for refunding erroneous tax, stockholders of a national bank are not entitled to money judgment in alternative of statute. All adequate administrative remedies must be exhausted to recover tax illegally collected before resorting to the courts.

First Nat. Bk. v Harrison County, 57 F 2d, 56
Hammerstrom v Toy Nat. Bk., 81 F 2d, 628

II EVIDENCE OF JUDGMENT

Competent evidence of judgment. As a general rule, a judgment must be entered of record in order to be of any validity, but for many purposes the court's decision is effective from the time it is actually pronounced, or when the judge writes in his calendar a statement of the decision, but there is no competent evidence of the rendition until the memorandum is entered in the court record, and, after recording, the judgment may for some purposes relate back to the time when it was actually ordered.

Street v Stewart, 226-960; 285 NW 204

Parol to explain judgment. The use of ambiguous words in a judgment or decree of court may open the door to parol evidence to establish what the court actually decided.

Hawkeye Ins. v Inv. Co., 217-644; 251 NW 874

Evidence available against vouchee. In an action for breach of warranty because of an existing mortgage on the property, the foreclosure proceedings and judgment entry therein are admissible against the covenantor-defendant to prove the plaintiff's measure of damages, it appearing that the covenantor had been duly vouched into said foreclosure proceedings.

Kellar v Lindley, 203-57; 212 NW 360

Decree of dissolution. A decree of dissolution of a corporation based on the fraud of the corporation is admissible, on the issue of fraud and want of consideration, against an alleged bona fide holder of a negotiable promissory note which was given to the corporation as the purchase price for its corporate stock, even tho neither of the parties to the action on the note were parties to the dissolution suit.

Andrew v Peterson, 214-582; 243 NW 340

Admissibility against stranger. A final decree and the pleadings relating thereto may, in some cases, be admissible in a subsequent action to prove an ultimate fact, even tho the party against whom the decree is offered was not a party to the decree. So held where the decree was received to prove the judicial cancellation of a contract of sale upon which cancellation depended the validity of a promissory note sued on.

Pierce v Lichtenstein, 214-315; 242 NW 59

Divorce—former decree—effect. In a second action for divorce, evidence of events antedating the first decree and including the history of the parties and their relations is not objectionable insofar as such evidence throws light upon the conduct of the parties subsequent to the former decree.

Garside v Garside, 208-534; 224 NW 586

III ON MOTION

Additional annotations. See under §11608

Motion to strike and judgment on pleadings. A motion to strike an answer and for judgment on the pleadings manifestly cannot be properly sustained when the answer, both by general and specific denials, puts in issue the very gist of plaintiff's cause of action.

Ind. School Dist. v School Dist., 216-1013; 250 NW 192

Nonallowable. Motions for judgment on the pleadings are not allowable.

Perry-Fry Co. v Gould, 217-958; 251 NW 142

Judgment on pleadings—motion for—permissibility. The practice of entertaining motions for judgment on the pleadings will be recognized, on appeal, not as a matter of right in movant, but as a matter of mutual agreement between litigants.

McGraw v Seigel, 221-127; 263 NW 553; 106 ALR 1035

Judgment on pleadings denied. Where an unverified petition is filed in action on a written agreement, the contents of which are challenged by general and specific denials under oath, plaintiff is not entitled to judgment on pleadings, even tho genuineness of signature is not properly challenged.

Clare v Pearson, 227-928; 289 NW 737

IV FINAL JUDGMENTS

Decree after remand from appeal—finality. The decree entered by the district court in

conformity to an opinion of the supreme court is the final adjudication in the case.

Goltry v Relph, 224-692; 276 NW 614

Will — acceptance of bequest — unappealed order extending testator's limitation. Where testator directed his executors to purchase, for a daughter, good Iowa land of the value of $15,600, such daughter having refused to accept partial distribution of realty to heirs prior to testator's death, but the testator also provided such bequest should lapse if daughter failed to select land within one year from testator's death, and where within one year the daughter filed application for extension of time on the ground that estate did not have funds to purchase such land, which extension was granted after due notice to executors and heirs, held, district court had jurisdiction to grant extension of time and, no appeal having been taken therefrom, the order became "final" and the heirs were bound by the decision.

In re Holdorf, 227-977; 289 NW 756

Failure to appeal—effect. A defendant who fails to appeal from any part of a decree which (1) established certain claims for labor (as contended for by plaintiff), but (2) held that such claims were not liens on certain property (as contended for by defendant), may not question the decretal establishment of said claims on a successful appeal by the plaintiff from the latter part of the decree.

Soodhalter v Coal Co., 203-688; 213 NW 213

Decretal portion inconsistent with recital of facts. The decretal portion of a decree, when in conflict with recital of facts, takes precedence, and the decree is not void because of the inconsistency, and appeal lies only on the decretal portion of the decree that is final judgment.

Higley v Kinsman, (NOR); 216 NW 673

Conclusiveness. An order of court confirming a deed in partition, approving the final report of the referee and discharging him and his bondsman from further responsibility, coupled with a recital and finding that the referee had made full distribution of the purchase price and had fully complied with all orders of the court (one of which was to the effect that the purchase price must be paid in cash) is final and conclusive until set aside by a direct proceeding, even tho as a matter of fact no money ever actually passed from the purchaser to the referee.

State Bank v Uglow, 208-1241; 227 NW 118

Foreclosure — decree — nonjurisdiction to amend. The district court has no jurisdiction, long after a duly rendered decree in mortgage foreclosure has become final, to amend said decree by striking therefrom a provision for redemption from execution sale, and by substituting therefor a provision directing the sheriff to issue deed forthwith upon making such sale. So held where the judgment plaintiff sought such amendment on the theory that the judgment defendant had lost his right to redeem because of a stay of execution obtained by him pending ineffectual bankruptcy proceedings.

Nibbelink v DeVries, 221-581; 265 NW 913

Judgment on remand for amount confessed. A plaintiff-appellant who, on appeal, is unsuccessful in his effort to establish liability in excess of defendant's offer to confess judgment, is entitled on remand to procedendo directing the trial court to enter judgment in his favor for the amount of said offer and for costs to date of said offer.

Fenley v Ins. Co., 215-1369; 245 NW 332; 247 NW 635

Harmless error—form of judgment. Where a trustee under a trust agreement sues the maker of promissory notes on a series of notes, the beneficial interest of which is in different parties, the defendant may not complain that a separate judgment is rendered on each count, and an aggregate judgment for the sum of all the separate judgments—the defendant being amply protected, by the terms of the judgments, from a double liability.

Iowa Co. v Clark, 215-929; 247 NW 211

Permanent injunction—conditional order for —compliance—effect. When a decree provides (1) that defendant shall pay an award in condemnation proceedings, or (2) that in event defendant appeals from said award he shall give a supersedeas bond, and (3) that in event he fails to pay or appeal, injunction shall issue, enjoining defendant's use of the condemned land, then the taking of an appeal and the giving of the supersedeas bond by defendant nullifies the authority under the decree to issue an injunction. In other words, after the decree is affirmed on appeal without any provision relative to injunction, the trial court has no jurisdiction on motion to enter an injunction on the basis of the affirmed decree. (The reasoning is that the decree constituted a final decree and that the decree as drawn authorized an injunction only on condition that defendant failed to appeal and give the supersedeas bond.)

Fairfield v Dashiell, 217-474; 249 NW 236

Scope of—potentially litigated question. A duly rendered judgment of a court of bankruptcy that its trustee has no interest in or title to an article of personal property because said article belongs to one who sold it to said bankrupt under a conditional sale contract which has been duly forfeited, constitutes in legal effect, inter alia, a final adjudication that said bankrupt had no redeemable interest in said article—conceding, arguendo, that he might, under some circumstances, have had such right.

Smith v Russell, 223-123; 272 NW 121

IV FINAL JUDGMENTS—concluded

Custodial order as adjudication. An order in divorce proceedings awarding to the mother, without fraud on her part, the unconditional custody of her children, constitutes a final adjudication in her favor of each and every fact then bearing on her fitness for such custody.

Wood v Wood, 220-441; 262 NW 773

Ruling on demurrer—when an adjudication. Timely filing of an amendment to an answer by party entitled so to amend, after a demurrer to the answer was sustained, deprived the ruling on the demurrer of all effect as a final adjudication. Such ruling on demurrer in and of itself settles nothing and it becomes an adjudication only if defeated party chooses to make it such.

Schwartz v School Dist., 225-1272; 282 NW 754

V ENTRY, RECORD, AND DOCKETING

Entry all-essential.

State v Wieland, 217-887; 251 NW 757

Confession of judgment—clerk's mandatory duty. A "statement of confession", or "cognovit" oftentimes referred to as a "power of attorney" or simply as a "power", is the written authority of the debtor and his direction to the clerk of the district court, or justice of the peace, to enter judgment against him as stated therein and the statutory provision that "the clerk shall thereupon make an entry of judgment" is definite and mandatory, so the mere recording by the clerk of the debtor's admission of indebtedness, confession of judgment, and authorization to the clerk to enter judgment was not the "entry of judgment by confession" required by statute. Execution issued thereon was properly annulled and decree quieting title to land in owners as against execution levy and making permanent a temporary injunction enjoining execution sale was proper.

Blott v Blott, 227-1108; 290 NW 74

Competent evidence of judgment. As a general rule, a judgment must be entered of record in order to be of any validity, but for many purposes the court's decision is effective from the time it is actually pronounced, or when the judge writes in his calendar a statement of the decision, but there is no competent evidence of the rendition until the memorandum is entered in the court record, and, after recording, the judgment may for some purposes relate back to the time when it was actually ordered.

Street v Stewart, 226-960; 285 NW 204

Entry—calendar and record book. From a statute requiring that all judgments and orders must be entered in the record book, it may be inferred that the judge's calendar is in the nature of a memorandum book ordinarily used by the judge to guide the clerk in entering judgments and orders in the record book which is their final place of repose, and that the clerk's entry in the record book is the legal evidence of a judgment or order.

Street v Stewart, 226-960; 285 NW 204

Record of judgment clarified by later entry. When the court stated in its entry of judgment: "The defendant excepts to said judgment. Exceptions allowed and granted.", and in ruling on a motion for a new trial, made an entry that the above-quoted was intended to save an exception for the defendant, the court was correct in its action to clarify the record, and on appeal the defendant could not contend that the entry could only be interpreted to mean that the exception to the judgment was sustained.

Wessman v Sundholm, 228- ; 291 NW 137

Filing for record after term time—effect. A judgment is not rendered erroneous because signed, filed, and entered of record after the adjournment of the trial term when the decision was rendered in term time and then noted on the court calendar and on the appearance docket, with directions to the attorneys to prepare a decree in accordance with the decision.

Andrew v Bank, 209-1149; 229 NW 819

Inaccurate judgment — correction without new trial. When parties to an action voluntarily (tho irregularly) submit to a referee certain counts only of the petition, and later judgment is entered on the report of the referee in such form as to indicate that all counts of the petition had been so submitted, the court, on proper proof, is under mandatory duty, during the term at which the judgment was entered, to exercise its statutory and inherent power and, itself, correct said inaccuracy.

Watters v Knutsen, 223-225; 272 NW 420

Validity of long-delayed entry. The duty of the clerk of the district court, without any direction from the court, to enter judgment on the general verdict of the jury,—no contrary order being made by the court,—is imperative and continues without limitation as to time. So held where the judgment was entered 14 years after return of the verdict.

Selby v McDonald, 219-823; 259 NW 485

Judgment on note—entry before surrender of note. The purpose of a statute providing that the clerk shall not enter upon the records any judgment based on a note unless the note is first delivered to the clerk, being to retire the instrument from circulation so that the maker and others will not be subjected to other suits, was accomplished altho a judgment was entered eight days before the note was surrendered. When two years elapsed before an action was brought to set aside the judgment because of noncompliance with the statute,

and no defense to the note was shown, the action should be dismissed.

Jensen v Martinsen, 228- ; 291 NW 422

Judgment entry in eminent domain—insufficiency. Record entry in proceedings relative to eminent domain reviewed, and held, notwithstanding its recitals, not to constitute a judgment for damages, but to specify the conditions under which the plaintiff property owner would be entitled to a provisional injunction.

Wheatley v Fairfield, 221-66; 264 NW 906

What constitutes judgment—entry in record book essential. Neither the mental conclusion of the judge presiding at a trial, nor the oral announcement of such conclusion, nor his written memorandum entered in his calendar, nor the abstract entered in the judgment docket, constitutes a judgment. A judgment cannot be said to be entered until it is spread by the clerk upon the record book.

Lotz v United Markets, 225-1397; 283 NW 99

VI CONSTRUCTION

General verdict on multiple issues—presumption. The court will not, the rights of third parties being involved, assume that a general verdict, unaided by any special findings, was based on one of several different and permissible grounds.

Eclipse Co. v Davis, 201-1283; 207 NW 238

Conflicting findings. An unappealed decree which is sustainable only on a finding of a certain fact must prevail over a contrary finding of fact in the decree.

Leach v Bank, 202-265; 209 NW 422

Recitals accompanying decree — effect. A recital in a so-called judgment entry in real estate mortgage foreclosure that plaintiff "shall have a lien against all property kept on said premises" and that said lien shall be superior to a named chattel mortgage, when not carried into the decree which follows the recital, is no part of the decree, and is not binding on anyone, a fortiori when such recital finds no support in the pleadings or in the stipulation filed in the case.

Van Alstine v Hartnett, 210-999; 231 NW 448

Record of judgment clarified by later entry. When the court stated in its entry of judgment: "The defendant excepts to said judgment. Exceptions allowed and granted.", and in ruling on a motion for a new trial, made an entry that the above-quoted was intended to save an exception for the defendant, the court was correct in its action to clarify the record, and on appeal the defendant could not contend that the entry could only be interpreted to mean that the exception to the judgment was sustained.

Wessman v Sundholm, 228- ; 291 NW 137

Decretal portion inconsistent with recital of facts. The decretal portion of a decree, when in conflict with recital of facts, takes precedence, and the decree is not void because of the inconsistency, and appeal lies only on the decretal portion of the decree that is final judgment.

Higley v Kinsman, (NOR); 216 NW 673

Recital of facts—effect on nonparty. The recital of facts in a decree cannot have binding force on a nonparty to the proceedings.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Invalid stipulation. A stipulation in divorce proceedings, even tho carried into the decree, is a nullity in so far as it seeks to render land exempt from the claims of creditors of the fee title owner.

Putensen v Dreeszen, 206-1242; 219 NW 490

Accrued and unpaid installments of alimony unchangeable. While the court, in divorce proceedings, has ample power, on a showing of change of conditions of the parties, to modify a former order or judgment for alimony or support money, yet the court is wholly without jurisdiction to cancel installments which have accrued and which remain unpaid under said former order or judgment.

Horn v Horn, 221-190; 265 NW 148

Enjoining proceedings—unallowable venue. An action will not lie in one county to enjoin proceedings on a judgment rendered in another court in another county, even tho plaintiff's action is based on the claim that the judgment is wholly void.

Ferris v Grimes, 204-587; 215 NW 646

Inconsistent remedies—irrevocable election —effect. A judgment creditor who, instead of satisfying his judgment (1) by enforcing his lien on personal property which his judgment debtor had assigned to him as security, satisfies said judgment, (2) by buying in the same property under a general execution levy and sale under his said judgment, must be deemed to have irrevocably waived all right under his said assignment as security, it appearing that after said levy but before the sale thereunder, the said judgment creditor learned that the judgment defendant had also assigned said property to another party.

Zimmerman v Horner, 223-149; 272 NW 148

Remittitur—effect on prior judgment entry.

Fox v McCurnin, 210-429; 228 NW 582

Unauthorized contracts. A judicial holding that municipal warrants issued for the erection of a municipal waterworks are void because the erection had not been authorized by the voters, is necessarily a holding that the contract under which the warrants are issued is also void.

Roland Co. v Town, 215-82; 244 NW 707

VI CONSTRUCTION—concluded

When lien effective. A decree which establishes in plaintiff a lien on real estate "subject to the payment" of a named claim, and which provides for a sale of the land subject to said claim, cannot properly be construed as requiring plaintiff to pay and discharge said claim as a condition precedent to the attaching of plaintiff's lien.

Farber v Ritchie, 212-1396; 238 NW 436

Judgment not contract. A judgment is not a contract in the ordinary sense of said latter term.

Berg v Berg, 221-326; 264 NW 821

Reservation of unpleaded issue. In an action to enjoin a public utility company from maintaining an electric light and power plant within a city, the reservation in the final decree of the question of the right of the company to maintain a similar plant running through the city and supplying points outside the city—a plant distinct from the company's city plant—is proper when the pleadings do not fairly embrace said latter plant.

Iowa Co. v Town, 217-291; 251 NW 609

Where reasonable minds disagree—judgment affirmed. In action for damages to plaintiff's automobile, judgment will be affirmed, on appeal, where reasonable minds might reasonably disagree on the fact issues.

Schenk v Moore, 226-1313; 286 NW 445

Construction and operation—decree as entirety for res judicata. A mortgage foreclosure decree will be construed in its entirety to determine the precise matter adjudicated.

Titus Co. v Natural Gas, 223-944; 274 NW 68

Construction as entirety—resort to pleadings. A decree is construed in its entirety, and obscurity or ambiguity may be clarified by resort to the pleadings and proceedings.

Sutton v Schnack, 224-251; 275 NW 870

Approval of executor's report not construction of will. The fact that the court had approved an executor's report, wherein he had attempted to relieve an estate of inheritance tax on the ground that all devises in the will were contingent, does not mean that such holding is a construction of the will, since the construction of the will was not in issue.

Flanagan v Spalti, 225-1231; 282 NW 347

Conclusiveness—nonadjudication. It is quite captious to claim that a decree adjudicates a matter which is specifically left open for future determination.

Lehr v Switzer, 213-658; 239 NW 564

Granting unallowable relief. The court may not decree the cancellation of an unquestioned judgment or decree a reconveyance of land when the validity of the original conveyance was not properly in issue.

Benson v Sawyer, 216-841; 249 NW 424

Quieting title—relief—decree beyond issues. In a quiet title action by grantee against grantor's heir and successor in interest, a decree based on a deed containing a declaration of purpose (educational and religious use), goes beyond the issues when it finds the grantee to be the "sole and absolute owner, in fee simple", the effect being to adjudicate the rights of persons, not before the court, who may have trust interests under the terms in the deed.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

Land subjected to bank's judgment—attorney lien—belated cost modification. Where an action was instituted to set aside conveyances and to subject land to a judgment, and an attorney having a lien on such judgment intervenes, establishes and gets an adjudication of priority in the decree, which made no provision for payment of costs but later was invalidly modified under guise of a motion to retax costs, the trial court being without jurisdiction to modify the decree (1) after an appeal therefrom had been perfected and (2) because the modification was not made during the term the decree was entered, certiorari will lie to correct the lower court's excess of jurisdiction, and fact that plaintiff is a banking corporation no longer in existence will not defeat the certiorari, since corporation must be regarded as existing to the degree necessary to wind up its affairs.

Grimes Bank v Jordan, 224-28; 276 NW 71

Right of subrogation—deducting set-off. A vendor who is compelled to discharge a judgment lien on real estate after the amount of the judgment has been deducted from the purchase price is entitled to be subrogated to the rights of the judgment plaintiff against a subsequent purchaser who is not a purchaser for value and without notice, subject to any indebtedness owed by the vendor to the vendee, and growing out of the same transaction.

Home Co. v Burrows, 207-1071; 224 NW 72

Deception constituting fraud—requisites to nullify judgment. Fraud as will invalidate a duly entered decree must be perpetrated by or in some manner connected with the opposing party or his attorney.

Ware v Eckman, 224-783; 277 NW 725

Enforcement—void judgment always subject to attack. A void judgment may be attacked in any proceeding in which it is sought to be enforced.

Gohring v Koonce, 224-1186; 278 NW 283

Corporation judgment compromised—former stockholder—no authority. Stockholders who had sold their stock after the corporation had

recovered a judgment no longer had an interest in the judgment which remained the property of the corporation even when its name was changed, so a compromise settlement of the judgment had no validity when made by attorneys with consent given by one former stockholder, as only the corporation could authorize such settlement.

Glenwood Lbr. Co. v Hammers, 226-788; 285 NW 277

VII ACTIONS AND DEFENSES MERGED, BARRED, AND CONCLUDED

Splitting causes—pleading. See under §11111 (II)

Matters concluded which might have been litigated. An adjudication operates as an estoppel not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action.

In re Christensen, 227-1028; 290 NW 34

Conclusiveness—unappealed judgment. Principle reaffirmed that an unappealed judgment for fraud is conclusive on the fraud-doer as to all elements of the fraud.

Breza v Federal Soc., 200-507; 205 NW 206

Reversal as to one count—effect on adjudicated counts.

Pease v Bank, 210-331; 228 NW 83

Recitals not an adjudication. Recitals in the nondecretal portions of a foreclosure decree that the wife of the maker of the note in question was an accommodation maker are not evidence in a subsequent hearing in probate on the wife's claim against the estate that she was such accommodation maker, especially when the foreclosure order left such question open for future determination.

In re Cohen, 216-649; 246 NW 780

Bid for full amount of claim—effect on pre-existing fire loss. A mortgagee who forecloses after a fire loss, but who therein makes no claim to an insurance fund paid to the titleholder on account of said loss, and who bids in the property for the full amount of his judgment, interest, and costs, and later receives a sheriff's deed, must be deemed to have irrevocably waived all claim to said insurance fund, even though the titleholder received said fund under an agreement to rebuild the burned buildings.

Union Ins. v Bracewell, 209-802; 229 NW 185

Vendor's agreement with mortgagee adjudicated in foreclosure—no effect on purchaser. When the mortgagor of a tract of land had an agreement with the mortgagee to release a lot, which was part of the tract, after the buyer of that lot had paid a certain part of the price, and in an action to foreclose the mortgage, the agreement was adjudicated adversely to the mortgagor who had not obtained the release, in a later action to recover payments the buyer could not be affected by such agreement to which he was not a party.

Trammel v Kemler, 226-918; 285 NW 196

Matter excluded from judgment. Tho a subject matter is fully covered by pleading, yet there can be no adjudication thereof if the court specifically excludes said subject matter from its final determination—reserves said matter for future determination.

Central Bank v Herrick, 214-379; 240 NW 242

Insufficient plea. A naked showing that plaintiff had at a former time brought an action against another party on the same subject matters and that such action had been "settled", affords no basis for a plea of res judicata.

Goben v Akin, 208-1354; 227 NW 400

Plea—technical inaccuracy. The pleading of an adjudication in a reply instead of in the petition, does not necessarily constitute an error of consequence, even tho it be conceded that the technical rules of pleading are violated.

Cochran v School Dist., 207-1385; 224 NW 809

Plea—sufficiency. An informal and defective plea of a former adjudication may be sufficient, in the absence of a proper attack thereon.

Murphy v Hahn, 208-698; 223 NW 756

Special plea required. He who relies on a prior adjudication must plead it.

Andrew v Bank, 205-237; 216 NW 12

Prior adjudication—pleading prerequisite to proof. A prior adjudication must be pleaded before evidence thereof is admissible. Rule applicable to interpleaders.

Boone College v Forrest, 223-1260; 275 NW 132

Unpleaded homestead exemption. A decree to the effect that a conveyance was fraudulent as to a judgment plaintiff and that plaintiff's judgment was a lien on the land is immune from subsequent attack on the ground that the land was, at the time of the conveyance, the homestead of the grantor and grantee, such fact not being pleaded in the action.

Reining v Nevison, 203-995; 213 NW 609

Adjudication of homestead status. An unquestioned order in bankruptcy setting off to a bankrupt certain land as a homestead is, as to all parties to the proceedings, a final adjudication that said land was then a homestead.

Bracewell v Hughes, 214-241; 242 NW 66

VII ACTIONS AND DEFENSES MERGED, BARRED, AND CONCLUDED—continued

Unpleaded discharge in bankruptcy. A decree to the effect that a conveyance was fraudulent as to a judgment plaintiff is immune from subsequent attack on the ground that, when the decree was rendered, the judgment in question had been discharged in bankruptcy, such fact not having been pleaded in said action.

Reining v Nevison, 203-995; 213 NW 609

Setting aside conveyance—res judicata. An adjudication in bankruptcy trustee's action to set aside conveyance, as constituting unlawful preference in bankruptcy, bars a subsequent action for the same purpose based on lack of consideration and fraud upon creditors.

Bagley v Bates, 223-836; 273 NW 924

Ruling on motion to dismiss—res judicata. A ruling on a motion to dismiss garnishment proceedings on the grounds that the property was in custodia legis and not subject to garnishment was not premature and was res judicata even tho made before the garnishee was examined and the garnishment proceedings completed, when the court had jursidiction of the parties and subject matter.

Sioux Falls Assn. v Henry Field Co., 226-874; 285 NW 155

Matters concluded—issue raised by rejected amendment. An application to amend the petition offered after submission of the case, tho overruled by the court, makes the issue raised by the amendment res judicata when the identical issue is raised in a subsequent action, especially when no appeal is taken from the ruling on such application.

Bagley v Bates, 223-836; 273 NW 924

Title to nonlitigated lands. An adjudication in partition that a wife did not take under her husband's will, and a due accounting in that action by the widow of all sums received by her, may constitute a full adjudication of the title to property purchased with said proceeds, even tho such property was not specifically involved in said partition proceedings.

Roquette v Marr, 200-751; 205 NW 359

Preliminary and interlocutory injunctions—inevitable dissolution. A temporary injunction in an untried action in one county should be dissolved when it is made to appear that, since the commencement of the action, the right to such injunction has been determined adversely to the plaintiff by the supreme court in an action instituted in another county involving, inter alia, the same subject matter.

Bratt v Life Co., 209-881; 226 NW 724

Judgment in rem—nonmerger of debt sued on. In an action aided by attachment, the entry, on service on defendant by publication, of a judgment in rem against property of the defendant in the hands of a garnishee, does not work a merger in said judgment of the obligation sued on, and thereby deprive the holder of said obligation of the right to proceed against defendant, at a later time, for the recovery of the balance due on said obligation, —if there be such balance.

Strand v Halverson, 220-1276; 264 NW 266; 103 ALR 835

Conclusiveness—attachment proceedings. An unappealed holding in attachment proceedings that plaintiff, tho entitled to judgment against defendant, had acquired no lien on certain real estate is a finality. In other words, plaintiff may not, years afterwards, between other parties dispute said adjudication.

Nagl v Hermsen, 219-223; 257 NW 583

Actually litigated matters concluded. In proceedings on executor's application for authority to mortgage real estate for purpose of paying claims and administration expense, objections as to validity of claims which had been finally adjudicated adversely to objectors in former proceedings wherein the objectors all appeared, filed claims, and were represented by counsel, could not be relitigated, and likewise objectors' right to an accounting against executor in such proceedings could not be relitigated since it had been previously adjudicated that such matter had no proper place therein.

In re Christensen, 227-1028; 290 NW 34

Ruling on demurrer conclusive. A ruling sustaining a demurrer in mortgage foreclosure proceeding on the ground that the estate of the mortgagor is not personally liable on the mortgage because of the failure of the mortgagee to file said claim against the estate within the time provided by statute, constitutes a final adjudication of such nonliability when plaintiff neither pleads over nor appeals from the ruling.

Oates v College, 217-1059; 252 NW 783

Demurrer—ruling as adjudication. In an action at law on a money demand, aided by attachment on the ground that defendant had fraudulently conveyed his land, the overruling of defendant's demurrer based on the ground that the action was barred because not brought within five years after the recording of said deed, cannot be deemed an adjudication of the ground of said demurrer so as to prevent defendant from asserting the same ground against a later-brought action in equity to set aside said alleged fraudulent deed.

Bristow v Lange, 221-904; 266 NW 808

Inhering subject matters. A final opinion of the supreme court in an equitable action is conclusive as to all inhering subject matters

except such as the court may and does specifically except therefrom.

Globe Ins. v Cas. Co., 205-1085; 217 NW 268; 56 ALR 463

Conclusiveness—adjudication as to legal effect of contract. A final holding on appeal that a certain agreement between a corporation and a purchaser of its corporate shares constituted an absolute rescission of a contract of purchase of such shares, becomes the law of the case and precludes the after-presented contention that such agreement was a contract of indemnity only.

In re Selway Co., 211-89; 232 NW 831

Adjudication of validity of sale. An adjudication to the effect that the foreclosure sale of a railroad was valid, bars, needless to say, subsequent proceedings based on the assumption or allegation that such sale was wholly void.

Beaton v Town, 209-1254; 228 NW 109

Dual presentation of same issue in same action. A hearing on the merits of a motion to dissolve an attachment on the grounds that movant, and not the principal defendant, was the absolute owner of the property, does not necessarily preclude the movant from again presenting and trying out, in the same action, his claim of ownership, on a petition of intervention.

Citizens Bank v Haworth, 208-1100; 222 NW 428

Nondual presentation. A decree that a subscriber for corporate stock could not recover of the corporate receiver the amount already paid to the corporation on his subscription contract—such being the sole issue—does not estop the subscriber, when sued by the receiver for the unpaid amount of said contract, from pleading in defense that the purported corporation never had any corporate existence.

State v Packing Co., 216-1344; 249 NW 761; 90 ALR 1339

Judgment for installment as adjudication. A judgment for the amount of one installment and interest on a promissory note, being all that was then due on the note, is not an adjudication of an action to recover a future maturing installment and interest, the note not containing an accelerating clause maturing the entire indebtedness in case of a default.

Andrew v Stearns, 215-5; 244 NW 670

Acquittal—nonbar to injunction. A verdict of "not guilty" under an indictment charging the keeping of an intoxicating liquor nuisance on certain property is no bar to an action to enjoin the same defendant from maintaining a liquor nuisance on the same property, and based on the same transaction on which the indictment was based.

State v Osborne, 207-636; 223 NW 363

Setting aside for retrial on new theory. After a cause has been fully tried on the theory that intervenors are entitled to recover from plaintiff the amount for which their property had been sold on execution by the sheriff, and after the resulting judgment has been entered and paid and the proceeds accepted by intervenors, it is quite too late to reopen the case and try it anew on the theory that intervenors are entitled to recover the reasonable value of the property so sold.

Peoples Bk. v McCarthy, 211-40; 231 NW 482

Evidence necessary for res judicata. Without evidence as to extent and value of extraordinary services, an allowance therefor to executor and his attorney is not res judicata as to factual matters, and the attorney's statement which fails to separate time spent in courtroom from time spent in briefing and consultation will not furnish proper legal basis for any final adjudication.

In re Metcalf, 227-985; 289 NW 739

Iowa judgment for death damages under compensation act—effect in foreign state. Where a judgment fixing the compensation for a railroad employee's death, due to an accident in Iowa, was rendered by an Iowa court under the Iowa compensation act, it may be pleaded by the railroad in an action brought against it for the same cause in Minnesota under the Federal Employers' Liability Act, since both courts had jurisdiction to decide whether deceased was engaged in intrastate or interstate commerce, and that the Iowa judgment, being the earlier one rendered, was res judicata in the other action, altho the other action was brought first.

Chicago RI Ry. v Schendel, 270 US 611

Splitting actions—res judicata—persons and matters concluded. Under the doctrine of res judicata a party must try his entire cause without splitting the issues or defenses, and so a former judgment of a court of competent jurisdiction rendered on the merits between the same parties or privies and on the same cause of action estops and bars relitigation of, not only matters raised, but also matters which might properly have been raised.

Bagley v Bates, 223-836; 273 NW 924

VIII JUDGMENTS OPERATIVE AS BAR

Acquittal as bar to civil action—penalties—forfeitures. The general rule is that a defendant's acquittal in a criminal prosecution is neither a bar to a civil action against him, nor evidence in such action of his innocence; but, when the subsequent action, altho civil in form, is quasi criminal in nature, as to recovering penalties or declaring forfeitures, the second action may be barred by the former.

Bates v Carter, 225-893; 281 NW 727

Splitting action. A party to a continuing, executory contract may, notwithstanding the

VIII JUDGMENTS OPERATIVE AS BAR —continued

wrongful repudiation of the contract by the other party, insist on the contract and sue and recover the matured installments to date; and such action is no bar to a subsequent action to recover henceforth for the wrongful breach of the contract.

Collier v Rawson, 202-1159; 211 NW 704

Splitting actions—res judicata—persons and matters concluded. Under the doctrine of res judicata a party must try his entire cause without splitting the issues or defenses, and so a former judgment of a court of competent jurisdiction rendered on the merits between the same parties or privies and on the same cause of action estops and bars relitigation of, not only matters raised, but also matters which might properly have been raised.

Bagley v Bates, 223-836; 273 NW 924

Liability of bank superintendent for failure to collect claims. When there was no evidence of wrongdoing on the part of the superintendent of banking in his capacity as bank receiver, nor sufficient evidence to show negligence on the part of the bank examiner, a previous decision that the superintendent was negligent in not filing claims within the statutory time for filing in order to collect them, does not control when an objection was made because there was no accounting of these claims in the final report of the receiver when neither the issues nor parties are identical with the previously decided case.

Bates v Niles, 226-1077; 285 NW 626

Conclusiveness — bank stock assessment claim. State superintendent of banking, who in a final decree in equity was denied right of recovery on stock assessment against executor and beneficiaries under will of decedent, could not thereafter recover the same assessment by way of a claim filed in the estate, even tho in the latter instance he acted in statutory capacity as receiver. So held in reaffirming principles that one not a party to a suit, who assumes control of the litigation, employs counsel and has a right to control and conduct the same, is bound by the judgment, and that a judgment is conclusive as to all parties to a suit and all parties in privity.

In re Lyman, 227-1191; 290 NW 537

Adjudication of insured's physical condition —not binding in later action. Where an insured's claim is embodied in a series of suits, an adjudication of a plaintiff-insured's physical condition, determined in one action, does not adjudicate said condition in a subsequent independent action.

Eller v Guthrie, 226-467; 284 NW 412

Future payments—total disability. In action on life insurance policy for total disability payments, where supreme court ordered insurance company in prior case decided in 1931 to pay annual benefits up to that time, the decision of the trial court in a subsequent action on the same policy ordering payments up to 1937 and thereafter, was erroneous as to that part requiring future payments, particularly since opinion in first appeal is binding not only under the doctrine of stare decisis, but also under the rule of res adjudicata, when the first opinion held that "continuance of such disability must be established by later proofs".

Kurth v Ins. Co., 227-242; 288 NW 90

Matters subsequent to decree. A judgment is not res judicata of matters subsequent thereto.

Crow v Mtg. Co., 202-38; 209 NW 410

Adjudication of present conditions. An adjudication which goes no further than to adjudicate conditions as they exist at the date of the decree, necessarily constitutes no adjudication of subsequent conditions attending the same subject matter; and especially so when the decree retains jurisdiction in the court to review subsequent conditions.

In re Cool, 210-30; 230 NW 353

Probate claim denied—no bar in subsequent equity action. A prior judgment in a law action tried on the merits is conclusive as to a subsequent action in equity between the same parties and the same facts, but where a widow is bequeathed a life estate in realty with the right to dispose of such realty for her necessary support, a probate adjudication on the merits that her claim for widow's support could not be established against husband's estate, is not such an adjudication as bars a later equity proceeding to establish such support claim as a lien on such realty.

Hoskin v West, 226-612; 284 NW 809

Retention of jurisdiction to administer trust —effect. A decree of the trial court to the effect that a conveyance was not fraudulent as to creditors, but that the court should retain jurisdiction of the action for the sole purpose of administering a trust therein involved, all of which was duly affirmed on appeal, constitutes a final adjudication of all matters save the administration of said trust.

Central Shoe v Rashid, 210-415; 229 NW 171

Decisions involving former assessments not res judicata. Taxes do not arise out of contract and each years taxes constitute a separate cause of action. Therefore, a decision or judgment involving assessments on the same property in former years cannot be res judicata as to future assessments.

Board v Sioux City Yards, 223-1066; 274 NW 17

Former assessments not res judicata. The assessment of property for taxation is separate for each year, being based on a separate

valuation, and an adjudication for one year cannot definitely fix the value for succeeding years.

Trustees v Board, 226-1353; 286 NW 483

"Finding of fact" and "judgment" contrasted. A proceeding in which the trial court makes a finding of fact only, but in which no judgment is entered may not be deemed an adjudication of a pending proceeding between the same parties which does result in a judgment in conformity with an appellate order.

State v Beaton, 205-1139; 217 NW 255

Issues specifically withheld. The rights of a party necessarily cannot be adjudicated by a decree which specifically excludes such rights from the scope of the decree.

Parkinson v Fleming, 208-345; 223 NW 685
Central Bank v Herrick, 214-379; 240 NW 242

Issues specifically withheld. Parties, in agreeing to a compromise, may specifically withhold or exclude certain issues or questions from the adjudication. Needless to say that such issues are not adjudicated.

Jones v Surety Co., 210-61; 228 NW 98

Lack of opportunity to litigate issue.

Tutt v Smith, 201-107; 204 NW 294; 48 ALR 394

Withdrawal of intervention—effect on adjudication.

Tutt v Smith, 201-107; 204 NW 294; 48 ALR 394

Abortively tendered issue. An action by a mechanic's lien claimant against the owner of the premises to recover for the work done and for the material furnished, is necessarily not barred because the same issues were abortively tendered in a former action and not tried out.

Matthews v Quaintance, 200-736; 205 NW 361

Nonadjudicated issues. A decree which grants plaintiff's prayer for a rescission of a contract of purchase of land and fixes the terms of accounting by the vendor is not an adjudication of an issue of accounting by other prior vendors and purchasers to whom part of plaintiff's money was paid by mistake or inadvertence, said other parties having appeared only as intervenors, and tendered issues foreign to any accounting by them.

Winn v Williams, 200-905; 205 NW 541

Nonpleaded claim. The right of a purchaser of real estate to recover the purchase price paid will not, in the absence of a plea therefor, be deemed adjudicated in an action in which the vendor is seeking specific performance.

Benedict v Nielsen, 204-1373; 215 NW 658

Boundary line. A decree that a specified portion of a line between adjoining landowners is a boundary line by acquiescence is not an adjudication of the true location of the remaining portion of said boundary line.

Turner v Sandhouse, 205-1151; 216 NW 58

Scope of decree. A decree to the effect that a contract between a contractor and a city was void, and enjoining the city from in any manner making any further payment under the contract, is not an adjudication of another action then pending at law wherein the contractor was seeking to recover on the same subject matter irrespective of the contract. Especially is this true when the decree shows that the court excluded such pending action from the scope of its decree.

Hargrave v City, 208-559; 223 NW 274

Decree as to special assessment not adjudication of damages. A decree fixing the amount of special assessment on property consequent on a street improvement, cannot be deemed an adjudication of the damages suffered by the property owner consequent on the improvement's cutting off the owner's ingress to and egress from the property even tho the decree markedly reduced the assessment made by the city council.

Ashman v City, 209-1247; 228 NW 316; 229 NW 907

Equitable action—adjudication. The general equitable action authorized by section 10313, C., '31, in favor of any party interested under a public improvement contract, may be utilized for two purposes, to wit: (1) to adjudicate the rights of the various parties to the contract funds retained by the public corporation, and (2) to adjudicate the liability, to said parties, of the surety on the contractor's bond to the municipality; but a decree in such action is not an adjudication of the right of the municipality to recover on the said bond when such issue was in no manner presented in such action.

Waukon v Surety Co., 214-522; 242 NW 632

Judgment against maker of note—effect on indorser. A judgment obtained by the indorsee of a promissory note solely against the maker thereof, does not adjudicate or affect any right or obligation of the indorser.

Callaway v Hauser, 211-307; 233 NW 506

Ownership of note—effect. A judgment in an action between the payee of a promissory note and a former collateral holder to the effect that the latter had become and was the unqualified owner of the note precludes the maker of the note, when sued on the note by the adjudged owner, from readjudicating the ownership of the note on the basis of the same facts existing in the former action.

Commercial Bank v Allaway, 207-419; 223 NW 167

VIII JUDGMENTS OPERATIVE AS BAR —continued

Judgment on note alone—mortgage unaffected. A separate judgment on a note does not discharge the mortgage securing it.

Beckett v Clark, 225-1012; 282 NW 724

Different fraud in same transaction. A decree in an action for fraudulent representation in the sale of the corporate stock of one corporation is not an adjudication of an action for materially different fraudulent representations in the sale of the corporate stock of another and different corporation; and this is true tho said actions grew out of the same written contract of purchase.

Reinertson v Prod. Co., 205-417; 216 NW 68

Dismissal of temporary injunction not adjudication. Dismissal of a temporary injunction even after answer is not an adjudication of the cause, as ordinarily a plaintiff asking a permanent injunction is entitled to a trial on the merits.

McMurray v Faust, 224-50; 276 NW 95

Judgment on account stated. A judgment of dismissal rendered strictly on the issue whether there was an account stated is not res judicata of a subsequent action on open account involving the same items.

Hanson v Drug Co., 203-384; 212 NW 731

Eminent domain—compensation—fixtures on mortgaged premises—res judicata. In a proceeding to condemn right of way for a gas pipe line, the fact that the pipe was already installed under an easement which was held in a foreclosure action to be inferior to a prior mortgage, did not thereby give the mortgagee through his foreclosure decree title and ownership of the pipe and fixtures installed on the mortgaged premises, nor is such foreclosure decree res judicata as to title to such pipe and fixtures without trying the issue thereon.

Titus Co. v Natural Gas, 223-944; 274 NW 68

Reformation of deed. A decree in mortgage foreclosure that the mortgagee is not entitled to the reformation of a deed from the mortgagor to a subsequent purchaser so as to show an assumption by such purchaser of the mortgage debt is not an adjudication that the mortgagor is not entitled to such reformation, even tho the mortgagor was a party to the foreclosure, but not a party to the mortgagee's petition for reformation.

American Bank v Borcherding, 205-633; 216 NW 719

All available issues. The purchaser of mortgaged property, duly made a party to the foreclosure of the mortgage, may not afterwards relitigate any issue which was tendered in the foreclosure proceedings or which was available to the parties therein; otherwise, of course, as to nonavailable issues, e. g., whether the purchaser had been credited with all the payments made by him on his contract of purchase.

Heppe v Bank, 209-1017; 227 NW 334

Foreclosure — rents — adjudication against chattel mortgage. On the issue, in real estate mortgage foreclosure, whether an outstanding lease between the owner and his tenant (parties to the action) was superior to the mortgagee's right to a receiver for said premises and for the rents thereof, an unappealed decree which orders the appointment of such receiver works an eviction of said tenant and the consequent nullification of a chattel mortgage by the landlord on his share of the crop rent under said lease, it appearing that the real estate mortgagee had no notice or knowledge of such chattel mortgage until after the entry of his decree of foreclosure.

Keenan v Jordan, 204-1338; 217 NW 248

Failure to enforce all security—res judicata. A mortgagee who, without changing his position in any degree, receives the written agreement of a junior incumbrancer to pay the interest on the mortgage, and the taxes on the mortgaged property, simply acquires a new and additional security for his existing mortgage debt; and if he forecloses his mortgage by personal service on the mortgagor and on said junior incumbrancer (even for a sum less than is due) without asking any relief on said additional security, he will be absolutely precluded from maintaining further action on such agreement. (A fortiori is this true when it otherwise appears that the mortgagee was fully satisfied by his foreclosure.)

Schnuettgen v Mathewson, 207-294; 222 NW 893

Adjudging priority on publication service. A decree, rendered on service by publication, in the foreclosure of a second mortgage, adjudging that said second mortgage is senior and superior to a first mortgage, in accordance with a definite pleading and prayer to said effect based on a good faith but mistaken belief that said first mortgage had been paid, is binding and conclusive on the holder of said first mortgage, and may not be collaterally assailed by said first mortgagee in an action to foreclose his mortgage. (It appears that said first mortgagee had allowed the time to elapse in which to attack said decree under §11595, C., '27.)

Lyster v Brown, 210-317; 228 NW 3

Foreclosure—sale—delinquent taxes paid by mortgagee omitted from judgment—effect. A mortgagee who bids in the property at foreclosure sale, without protecting himself by adding thereto the delinquent taxes he had previously paid under a clause in the mortgage, may not, after he is appointed receiver during the redemption year, collect and apply the rents and profits to reimburse himself for such delinquent taxes. The owner when redeeming,

by paying the judgment and costs, takes title free from the lien of such taxes.

Monroe v Busick, 225-791; 281 NW 486

Appointment of receiver. An unappealed decree appointing a receiver of real estate and of the rents and profits thereof must, in a subsequent intervention in the cause, be deemed an adjudication against the owner, of all the issues involved in said appointment.

Canfield v Sec. Co., 216-747; 249 NW 646

Order fixing fiduciary's liability binding on surety. An unappealed order of court, entered on the objections of a beneficiary to the report of a fiduciary, fixing the amount of liability of the fiduciary, is conclusive (in the absence of fraud) on the surety and those claiming under said surety.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Matters litigated in prior action. In an action by heirs of intestate against a son of intestate to have property received by such son decreed to be an advancement and be deducted from the son's interest in the estate, wherein it is shown that such son had instituted a prior action in partition to have his interest in realty determined, held that such issue of advancement should have been raised as an affirmative defense and litigated in the prior partition action, and therefore is now res judicata.

Robbins v Daniel, 226-678; 284 NW 793

Enjoining action in foreign state. When a claim or cause of action has been fully and finally adjudicated between residents of this state, injunction will lie to enjoin the attempt of the defeated party to relitigate the issue in a foreign jurisdiction.

Oates v College, 217-1059; 252 NW 783; 91 ALR 563

Unappealed but erroneous order dismissing party defendant. In an action of certiorari against the state executive council, and the custodian of public buildings and grounds, to review the legality of the discharge of an employee of the latter department, an unappealed order of court dismissing said custodian as an improper party defendant, tho unqualifiedly erroneous, becomes the law of said particular action, and precludes said plaintiff from thereafter proceeding against said custodian for the relief sought.

Pittington v Herring, 220-1375; 264 NW 712

Collateral attack—immunity from. Conceding, arguendo, that the municipal court was in error in overruling defendant's motion for change of venue to the county of his conceded residence, yet the court manifestly had jurisdiction to rule on the motion, and defendant having failed to seek correction of the error by appeal or other appropriate direct proceedings, the ruling becomes a finality, and the subject matter thereof cannot properly be injected into subsequent collateral proceedings wherein the judgment entered on the merits is sought to be enforced. So held where the collateral proceeding was an action to recover on a stay bond.

Educational Film v Hansen, 221-1153; 266 NW 487

Partition sale not subject to collateral attack. A partition sale, regular on its face, cannot be collaterally attacked in a subsequent proceeding on objections to a guardian's final report.

In re Delaney, 227-1173; 290 NW 530

Identity of issues, parties, and subject matter. An adjudication that plaintiff was not entitled to an injunction restraining the condemnation of land for highway purposes, necessarily precludes the subsequent relitigation of the same issue, between the same parties, and concerning the same land.

Hoover v Highway Com., 210-1; 230 NW 561

Lack of identity in res and parties. In injunction action involving title to real estate, the rights of the parties could not be affected by decrees in previous litigation concerning other lands or other parties not connected in interest with present parties or their predecessors in title.

Arnd v Harrington, 227-43; 287 NW 292

Matters actually and potentially in issue. Two proceedings were consolidated for trial only:

1. An action for injunction, general equitable relief, and specifically enumerated damages consequent on a trespass by a city in overflowing plaintiff's land, and
2. An appeal from an award in proceedings by the city to condemn said land.

On the trial, plaintiff was awarded no judgment for the damages claimed by him in his equitable action because he made no attempt to establish them—probably on the assumption that he would be made whole by the payment of the final award in the condemnation proceedings. But the city refused to pay the final award in the condemnation proceeding and abandoned said proceeding.

Plaintiff then commenced a new action for damages, including, inter alia, the identical damages formerly claimed in said equitable action. Held, all damages which plaintiff had suffered prior to the trial of said equitable action, whether they were then in issue or not, were res judicata.

Wheatley v Fairfield, 221-66; 264 NW 906

Setting aside conveyance—res judicata. An adjudication in bankruptcy trustee's action to set aside conveyance, as constituting unlawful preference in bankruptcy, bars a subsequent

VIII JUDGMENTS OPERATIVE AS BAR —continued

action for the same purpose based on lack of consideration and fraud upon creditors.

Bagley v Bates, 223-836; 273 NW 924

Matter incidental to ruling on motion not res judicata. In a libel action brought against a newspaper and others as joint tort-feasors, when affiants testified as to the matter of agency at a hearing on a motion to strike part of the petition, a ruling by the court denying the motion was not res judicata on the question of agency, as agency question was only incidental to the question of misjoinder raised by the motion to strike and could be raised in a subsequent trial on the merits of the case.

Cooper v Gazette Co., 226-737; 285 NW 147

Decree denying injunction decisive on bond liability. A bankruptcy trustee's injunction action against a bankrupt, which action effectuated a dispossession of certain land to which the bankrupt's wife held title, and such action, after appeal, being finally determined adversely to the trustee's claimed right to possession, under which possession he had sold the crops, becomes an adjudication decisive on the issues in a subsequent action on the injunction bond for damages for wrongful issuance of the writ of injunction.

Goltry v Relph, 224-692; 276 NW 614

Necessarily involved but unpleaded issue. A vendor of real estate who seeks specific performance of a written contract without asserting any oral modification of the contract, and is decreed not entitled to such performance, may not, when sued for a return of the purchase price, plead in defense that said written contract was orally modified by the parties and that the purchaser refused to carry out such modified contract. This is true because the subject matter of this latter plea was necessarily adjudicated in the action for specific performance.

Benedict v Nielsen, 204-1373; 215 NW 658

Conclusiveness—jurisdiction of court. Where a court adjudicates the nature and scope of a bond, in an action praying (1) for a money judgment on the bond, and (2) for reformation of the bond and a money judgment thereon, it may not be said that the adjudication of the nature and scope of the bond is not res judicata because beyond the jurisdiction of the court, when the record shows that the nature and scope of said bond was the very keystone in the arch of plaintiff's alleged cause of action, and that the prayer for reformation was only incidental thereto.

King City v Sur. Co., 212-1230; 238 NW 93

Partition — conclusiveness of proceeding. Where testator devised real estate to certain wards on condition that they pay $8,000 into decedent's estate within one year after his death and where, in a partition proceeding to which the wards were parties, court found such condition was not met and that devise had lapsed and the land was sold for $7,200, the wards could not in a subsequent proceeding on objections to guardian's final report maintain position that they still owned the land and were entitled to rents and profits therefrom, since the partition proceedings constituted an adjudication as to every matter there in issue and as to all questions necessarily in issue.

In re Delaney, 227-1173; 290 NW 530

Adjudication and loss of right. The right to foreclose a mechanic's lien is wholly lost by the act of the claimant, when made a party to mortgage foreclosure, (1) in filing a cross-petition for foreclosure of his lien without service of notice of such filing and of hearing thereon; (2) in filing an answer which, in effect, repeats all the allegations of the cross-petition; (3) in allowing the proceedings to go to decree, which omitted any foreclosure of the mechanic's lien, but determined the status and priority of all parties, and which ordered a sale of the premises and foreclosed all subordinate parties of all rights after sale, except the right of redemption; and (4) in failing to appeal from said decree.

Matthews v Quaintance, 200-736; 205 NW 361

Conclusiveness of adjudication—lost junior mechanic's lien—no revivor by judgment. A junior mechanic's lien extinguished by failure to redeem from the senior mechanic's lien foreclosure action is not revived by later reducing the junior mechanic's lien to judgment.

Murray v Kelroy, 223-1331; 275 NW 21

Enjoining proceedings—proper court. An action to enjoin proceedings on a judgment rendered in a municipal court cannot be maintained in the district court, even tho both courts are located in the same county.

Keeling v Priebe, 219-155; 257 NW 199

Equitable relief—fraud—burden of proof. A judgment regular on its face must prevail when directly attacked by a stranger thereto unless the latter clearly and satisfactorily establishes his charge of fraud; and until the latter has so established the fraud, the judgment plaintiff is under no obligation to establish the validity of the indebtedness underlying the judgment.

Yungclas v Yungclas, 213-413; 239 NW 22

Mandamus to compel calling of election. A judicial holding to the effect that a petition for the calling of an election to vote on the question of granting an electric light and power franchise was in due form and substance, and that mandamus should issue to compel the calling of such election, is res

judicata of a subsequent petition by the same petitioner for the same relief.

Iowa Co. v Tourgee, 208-198; 225 NW 372

Motion to quash execution—when timely—dead judgment creditor. When innocent third parties are not involved, a motion to quash an execution for nonconformity to statutes prescribing procedure after death of judgment creditor, is not too late, though filed four months after the entry of a garnishment judgment to which only two of the eight heirs interested therein were parties. Such garnishment judgment is an incomplete adjudication and not sufficient to warrant payment by the judgment debtor to the two represented heirs.

Gohring v Koonce, 224-1186; 278 NW 283

Muniment of title. In an action by a son against a bank to recover funds which the son claimed his father had deposited for him, a previous adjudication that the funds belonged to the father and not to the son, rendered in an action by the father against the bank and the son, was not res judicata, but constituted a muniment of title showing that the son had no title to the funds, and barred the present action.

Bennett v Bank, 226-705; 285 NW 266

Pensions—findings and orders. An unquestioned, nonfraudulent order or finding by the board of trustees of the policemen's pension fund, on a due application for retirement on a pension, that the applicant was not entitled to such pension, constitutes a conclusive adjudication of the right to such pension, even tho the board did not act on the advice of a physician as required by statute, and even tho the board otherwise acted irregularly.

Riley v Board, 210-449; 228 NW 578

IX PARTIES CONCLUDED

Discussion. See 12 ILR 426—Judgment against indemnitors and persons liable over.

Substituted service—presumption. A return of service of an original notice which reveals service on defendant by service on a proper member of his family is presumed correct, and judgment rendered thereon is valid tho defendant never learned of the notice. Evidence held insufficient to overcome said presumption.

Dickerson v Utterback, 202-255; 207 NW 752

Conclusiveness as to all parties in privity—bank stock assessment claim. State superintendent of banking, who in a final decree in equity was denied right of recovery on stock assessment against executor and beneficiaries under will of decedent, could not thereafter recover the same assessment by way of a claim filed in the estate, even tho in the latter instance he acted in statutory capacity as receiver. So held in reaffirming principles that one not a party to a suit, who assumes control of the litigation, employs counsel and has a right to control and conduct the same, is bound by the judgment, and that a judgment is conclusive as to all parties to a suit and all parties in privity.

In re Lyman, 227-1191; 290 NW 537

Nonparty to action. As a general rule, a party is not bound by an adjudication to which he is not a party.

Citizens Bank v Martens, 204-1378; 215 NW 754

Conclusiveness—insurance rights—beneficiaries not parties. A decree establishing rights to insurance does not adjudicate rights of a beneficiary not a party to the action.

Jacobs v Ins. Co., 223-1157; 274 NW 879

Reversal—decree does not inure to nonappellant. Where an equitable decree adjudged (1) that one of two assignees of the same fund took priority over the other assignee, but (2) that certain mechanics and dealers had lienable claims on said fund prior to both of said assignees, and where, on appeal solely by the defeated assignee, it was adjudged not only (1) that the appellant-assignee took priority over the appellee-assignee, but (2) that said mechanics and dealers had no lienable claims on said fund, held that the judgment on appeal that the mechanics and dealers had no lienable claims on said fund did not inure to the benefit of the appellee-assignee. In other words, the appellee-assignee was still bound by the decree of the trial court because he did not appeal therefrom.

Ottumwa Works v O'Meara, 208-80; 224 NW 803

Defendant by implication. A third party who is not a party defendant in an action legally submits himself to the jurisdiction of the court by directing the actual defendant to appear for and on behalf of said third party and to protect his interest.

Davis v Agr. Soc., 208-957; 226 NW 90

Bad-faith defense by vouchee. One who is vouched by a defendant into an action and assumes exclusive charge of the defense, and in the trial pursues a course distinctly hostile to the defendant and distinctly favorable to himself, may thereby make himself, in legal effect, a codefendant, and be conclusively bound by the judgment against the defendant. So held where the vouchee, knowing that he was vouched into the action by the defendant on the theory that the negligence charged was primary as to the vouchee and secondary as to the defendant, actively attempted to establish that he (the vouchee) was not negligent and that the defendant was negligent.

Hoskins v Hotel, 203-1152; 211 NW 423; 65 ALR 1125

IX PARTIES CONCLUDED—continued

Conclusiveness on personal representative. A decree that a defendant is the absolute owner of certain personal property is conclusive on the personal representative of the plaintiff.

Howell v Howell, 211-70; 232 NW 816

Nonparty to action. A decree or order to the effect that a deposit in an insolvent bank belonged to a municipality but was not entitled to an equitable preference in the liquidation of the assets of the bank is not binding on a party who actually made the deposit, but who was in no manner made a party to, or had any control over, the proceedings which resulted in said decree or order, tho he had requested the municipality and its treasurer to apply to the court for an order granting said preference.

Leach v Bank, 206-265; 217 NW 865

Nonidentity of parties. An adjudication (in mortgage foreclosure) solely between the mortgagee and the grantee of the premises, that the grantee had not assumed the mortgage debt, is no bar to a subsequent independent action by the mortgagor-grantor against said grantee so to reform the deed to grantee as to embrace such assumption, and to recover of said grantee the deficiency which resulted from the foreclosure sale, said deficiency having been paid by said mortgagor-grantor. And this is true even tho the mortgagor-grantor was a party to said foreclosure.

Betzenderfer v Wilson, 206-879; 221 NW 497

Different parties and issues. A decree in an action between a residuary legatee and the donee of a gift, on the issues whether donor was mentally competent to make the gift, and whether he had been fraudulently imposed upon, cannot act as an adjudication of an action by the executor of the donor to set aside said gift as a fraud on the creditors of the donor.

Chamberlain v Fay, 205-662; 216 NW 700

Lack of identity in res and parties. In injunction action involving title to real estate, the rights of the parties could not be affected by decrees in previous litigation concerning other lands or other parties not connected in interest with present parties or their predecessors in title.

Arnd v Harrington, 227-43; 287 NW 292

Persons not parties or privies. A party who purchases a municipal improvement certificate, lienable on certain property, is not privy to (and therefore not bound by) a subsequently instituted action to quiet title, and the decree entered therein, when he is not made a party to said action.

Hawkeye Ins. v Valley-Des Moines Co., 220-556; 260 NW 669; 105 ALR 1018

Nonparty and nonprivy. A judgment to the effect that drainage improvement costs (designed ultimately to be apportioned among several separate districts) must be assessed in accordance with a specified statute is not conclusive in a subsequent proceeding against a district which was not a party to the first proceedings and which was not privy to any party to said first proceeding.

Board v Board, 214-655; 241 NW 14
Ward v Board, 214-1162; 241 NW 26

Appeal—effect on assignee of prematurely issued certificates. The assignee of paving assessment certificates who takes his assignment during the pendency of an appeal to the district court by the property owners (the certificates being prematurely issued) is bound, as far as the property owners are concerned, by the final decree on appeal, even though said assignee was not a party to such appeal.

Western Corp. v City, 203-1324; 214 NW 687

Conclusiveness on contractor. A decree which sustains objections of property owners to a proposed drainage assessment on the assigned ground that certain specified contracts are illegal and void is conclusive on the contractor and his assignees, even tho they are not in fact represented at such hearing, because in law the board of supervisors is, in such proceeding, made the representative, not only of the district, but of every interested party except the adversary parties.

First N. Bk. v County, 204-720; 216 NW 8

Successive actions by several beneficiaries. A recovery on a statutory bond by one beneficiary constitutes no bar to an action by another beneficiary to the extent of the unexhausted penalty of the bond.

Philip Carey v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495

Estoppel to relitigate adjudicated fact. A judgment of a court of competent jurisdiction that a bond given to a municipality inured solely to the benefit of the municipality—in other words, that the bond was not a statutory bond, and therefore, did not inure to the benefit of materialmen—works an estoppel on the defeated party to ever thereafter relitigate said issue between the same parties relative to the same bond.

King City v Sur. Co., 212-1230; 238 NW 93

Taxpayer protected by decree. An unappealed decree, in litigation between a city and its contractor, wholly invalidating a compromise agreement relative to the amount which should be paid the contractor on a public improvement, is conclusive on the contractor in subsequent litigation between the contractor and taxpayers of the city involving said compromise.

Roland Co. v Town, 215-82; 244 NW 707

Conclusiveness against rent claimant. A party who intervenes in a real estate mortgage foreclosure, after final decree and after the

appointment of a receiver of the rents, and lays claim to said rents as a trustee under an assignment and chattel mortgage thereof antedating the foreclosure, has no standing when it is made to appear that said "trustee" has no personal interest in said rents and is a "trustee" only in the sense that he is the agent of a party who was duly made a party to the foreclosure, and whose rights were fully adjudicated by the final decree.

Virtue v Teget, 209-157; 227 NW 635

Foreclosure—decree in re rents—effect on nonparty. A decree in mortgage foreclosure that the receiver therein appointed is entitled to the rents of the mortgaged premises, during the redemption period, is not an adjudication binding on one who is not a party to the foreclosure and who holds prior executed rent obligations for the same premises and for the same period.

White v Peterson, 222-720; 269 NW 878

Holding on appeal in receivership proceedings. A holding on appeal in foreclosure proceedings that a deficiency judgment debtor will be entitled to credit on the deficiency judgment in the full amount of funds realized in the receivership proceedings, is necessarily conclusive on all parties to the appeal.

Hansen v Bowers, 211-931; 234 NW 839

Order without issue joined. An order of court approving the report of the receiver of an insolvent bank as to the amount of various deposits owing by the bank does not constitute an adjudication against the receiver precluding him from later setting off against a particular deposit the amount owing by the depositor to the bank, it appearing that the approving order was entered without the joining of any issue as to the right of set-off.

Andrew v Bank, 218-489; 255 NW 871

Administrators—liabilities on bonds—existing judgment against executor—surety's new trial improper. Under the general rule that a judgment against an administrator is conclusive against the surety on his bond, where a judgment against an administrator for misappropriation of funds stands unreversed, it is error to set aside judgment on a bond and give the surety a new trial, since such order would not ipso facto vitiate a former order fixing the administrator's liability.

In re Sterner, 224-605; 277 NW 366

Amount necessary to effect tax redemption. A holding on appeal as to the amount which the owner of land must pay in order to effect redemption from tax sale is necessarily conclusive on the parties.

Fidelity Inv. v White, 212-782; 237 NW 518

Judgment against insured — conclusive against insurer. A judgment determining liability of insured for damages for death resulting from use of automobile was conclusive against liability insurance company as to its liability on policy where there was no fraud or collusion in obtaining the judgment and insurance company had timely notice of suit and elected to make no defense, in view of provision of policy and of statute permitting injured person to maintain action against insurance company for amount of judgment against insured after return of execution unsatisfied, irrespective of insured's insolvency.

International Co. v Steil, 30 F 2d, 654

Judgment of illegality of election — effect. The judgment of a contest court holding the election in question illegal is valid and conclusive upon both parties to the contest, unless appealed from and reversed.

Leslie v Barnes, 201-1159; 208 NW 725

Private bank depositors—claims against estate—property available for payment. Where an estate consists of two general classes of assets, to wit: (1) assets employed by decedent in operating his exclusively owned private bank, and (2) lands and other assets not so employed, and where, under the will, the bank is temporarily continued after the death of the decedent, an unappealed order of the probate court, entered on due notice and service, to the effect that bank depositors be paid from the general assets of the estate, precludes devisees and legatees from thereafter successfully asserting that depositors could only be paid from the assets employed in the operation of the bank, and that, as a consequence, the said lands could not be legally mortgaged in order to effect such payment. Especially should this be true when it appears that large sums of money employed in carrying on the bank have been used by the executors in paying claims not connected with the operation of the bank.

In re Griffin, 220-1028; 262 NW 473

Privity—heirs and administrator. The heirs of an intestate, as parties to an action to partition the lands of said intestate, must be deemed to stand in privity with the administrator of the estate who files a cross-petition in said action and thereon obtains a decree that an insolvent heir has no interest in said lands because of his unpaid indebtedness to said estate.

Bauer v Bauer, 221-782; 266 NW 531

Quieting title — virtual representation. All living members of a class, when properly brought into court in an action to quiet title, are deemed (under the doctrine of virtual representation) to represent all after-born persons who would belong to that class.

John Hancock Ins. v Dower, 222-1377; 271 NW 193

"Equitable representation" — limit to doctrine. The rule that in some instances a person may, on the principle of "equitable representation", be bound by an adjudication bearing

IX PARTIES CONCLUDED—concluded

on the title to realty, tho said person is not a party to the action in which the adjudication is had, cannot be extended to include persons who are in being and subject to being brought under the jurisdiction of the court, and who are entitled to notice and hearing as to the matter in question.

Skelton v Cross, 222-262; 268 NW 499; 109 ALR 129

Unborn contingent remaindermen. The contingent interest in land of the unborn children of a life tenant, arising out of the terms of a testamentary devise, is not cut off by a decree in an action to quiet title by making the life tenant a party defendant as a "representative" of such unborn children; especially so when said life tenant assumes a hostile attitude toward said unborn children.

Mennig v Graves, 211-758; 234 NW 189

Inheritance taker as "representative" of contingent remainderman. A decree setting aside the probate of a will and cancelling said will (the action being instituted in good faith and so tried by all parties thereto) is, on the principle or doctrine of representation, conclusive on remote, contingent remaindermen, even tho they are not parties to the action or are not served with notice of the action, when those persons are legally before the court who would take the first estate of inheritance under the will; especially is this true when parties of the same class to which the omitted parties belong are also legally before the court.

Harris v Randolph, 213-772; 236 NW 51

Decree for attorney fees in divorce—nonadjudication as to attorney. A decree in divorce proceedings awarding plaintiff (in addition to a divorce) a specified sum as attorney fees is not an adjudication as to the amount owing by plaintiff to her attorney for services rendered in the action,—the attorney, of course, not being a party to the action.

Duke v Park, 220-889; 262 NW 799
Maddy v Park, 220-899; 262 NW 796
Jones v Park, 220-894; 262 NW 797

Attempt by party to intervene—effect. A judgment quieting title in plaintiff on the ground that the defendant had fraudulently obtained the possession of a deed by plaintiff to defendant and had recorded the same, is not an adjudication of the right of a subsequent purchaser from said defendant because said purchaser attempted to intervene in said action, the record revealing the fact that the intervention was denied on grounds not going to the merits of said purchaser's rights.

Tutt v Smith, 201-107; 204 NW 294; 48 ALR 394

Quieting title—relief—decree beyond issues. In a quiet title action by grantee against grantor's heir and successor in interest, a decree based on a deed containing a declaration of purpose (educational and religious use), goes beyond the issues when it finds the grantee to be the "sole and absolute owner, in fee simple", the effect being to adjudicate the rights of persons, not before the court, who may have trust interests under the terms in the deed.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

X ASSIGNMENT

Double liability assessments—judgment nonassignable. An assessment against a holder of corporate bank stock in an insolvent bank, ordered by the court under the so-called "double liability" statute (§9251, C., '31), even tho said assessment is in the form of a judgment, is nonassignable by the receiver, even under an authorizing order of court, and if formally assigned, is nonenforceable by the assignee, said attempted assignment being for a purpose other than the payment of creditors.

Roe v King, 217-213; 251 NW 81

XI COMPETENT EVIDENCE AS BASIS

Evidence supporting verdict — judgment finality. Where competent evidence exists to support the verdict, the judgment is final.

State v De Kraai, 224-464; 276 NW 11

Allowance of claim in probate—calculating administrator's assets—conclusiveness. Altho based upon calculations, the finding of a probate court in a claim allowance hearing, based upon evidence that an administrator has or should have sufficient funds to pay a claim, is an adjudication conclusive against attack that the calculations were wrong.

In re Davie, 224-1177; 278 NW 616

Court findings in law action—conclusive on appeal. Findings of trial court in a law action, when supported by the evidence, are conclusive on appeal.

Younkin v Rubio Bank, 226-343; 284 NW 151

XII FOREIGN JUDGMENTS

Discussion. See 5 ILB 230—Foreign equitable decree; 22 ILR 461—Full faith and credit

Divorce—void decree—collateral attack. A decree of divorce, wheresoever rendered, is always open to collateral attack by proof that the court was without jurisdiction to render it.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Divorce—"full faith and credit"—comity. The "full faith and credit" clause of the federal constitution does not compel the courts of this state to recognize as valid a default decree of divorce against a defendant domiciled in this state, rendered in a foreign state in appropriate proceedings in rem; but such a decree, when valid on its face, will, as a matter of reciprocal comity between the states, be

recognized as valid in this state, in the absence of allegation and proof of fraud in obtaining it.

Miller v Miller, 200-1193; 206 NW 262

Custody of child—foreign decree—res judicata. A foreign decree of divorce fixing the custody of a child is not res judicata of the rights of a third party in this state to such custody. In any event, such third party may show that, by statute in such foreign state, the custodial decree is not conclusive and unalterable; or he may rest on the presumption that the foreign statute is the same as in this state, relative to such decree's being non res judicata as to subsequent changed conditions.

Barnett v Blakley, 202-1; 209 NW 412

Foreign divorce—when not recognized. A foreign decree of divorce will not be recognized in this state when it is made to appear that the defendant (1) was at all times domiciled in this state, the matrimonial domicile, (2) was never subject to the jurisdiction of such foreign court, and (3) had never consented to, or justified by misconduct, the acquisition by plaintiff of a domicile in such foreign country. Especially is this true when there is no showing that the plaintiff ever acquired a domicile in such foreign country.

Bonner v Reandrew, 203-1355; 214 NW 536

Foreign court refusing to enforce judgment. The full faith and credit clause requires the courts of one state to give to the judgment of a court of another the same effect that is accorded such judgment in the latter state, but, where an Iowa judgment has been adjudicated to be valid in Iowa, an Indiana court should have enforced such judgment, and where it refuses to do so there is no authority to support the proposition that an Iowa court must then follow the example of the Indiana court and also refuse to enforce such judgment in Iowa.

Martin Bros. v Fritz, 228- ; 292 NW 143

Foreign judgment — full faith and credit clause. An unmodified judgment in personam in a court of competent jurisdiction of a foreign state which is then the matrimonial domicile of both husband and wife, for the maintenance of the wife, payable in monthly installments, is entitled to the full faith and credit clause of the federal constitution as to all matured installments, even tho, subsequent to the entry of such judgment, the judgment defendant departs from the matrimonial domicile and obtains in this state a naked decree of divorce on service by publication.

Bennett v Tomlinson, 206-1075; 221 NW 837

Fraudulent decree—new trial. An unappealed decree of a court of competent jurisdiction of a sister state, granting separate maintenance to a wife on the ground of desertion, and dismissing the husband's cross-petition for divorce on the same ground, constitutes a final adjudication that the husband was not entitled to a divorce on any ground (the laws of the two states being the same), and is binding on the courts of this state, and a decree of divorce subsequently obtained in this state by the husband on service by publication and on the ground of desertion, and without revealing the foreign decree, will be deemed fraudulent and will be set aside on timely petition by the wife and a new trial granted on her prayer.

Bowen v Bowen, 219-550; 258 NW 882

Foreign judicial records—improper certification first raised on appeal. Admission of improperly certified judicial records of Texas and Michigan bearing on issue of defendant's sanity in trial of default action to annul marriage is not ground for reversal of court's action in refusing to set aside the default annulment when lower court was not given opportunity to pass upon the competency of the records. The rule is that a party is not to be surprised on appeal by new objections and issues, nor as to defects within his power to remedy had he been advised in the proper time and manner.

Kurtz v Kurtz, 228- ; 290 NW 686

Nonright to relitigate issue. A defendant who, when sued in a foreign state, litigates the issue that he was immune from the service of process in said state because he was then temporarily and involuntarily therein as a military officer of the federal government and on land owned and used exclusively by said government for military purposes, and who fails to appeal from a ruling denying his claimed immunity, may not relitigate said issue when sued in this state on the foreign judgment.

Northwest. Cas. Co. v Conaway, 210-126; 230 NW 548; 68 ALR 1465

Merger of note in foreclosure decree. The fact that a promissory note sued on has been merged in a foreclosure decree in a foreign state on good personal service, must be specifically pleaded.

Pfeffer v Corey, 211-203; 233 NW 126

Foreclosure—land situated wholly in foreign state. A mortgage on land situated wholly within a foreign state may not be foreclosed in this state, tho the mortgagee may maintain, in this state, an action at law on the note so secured.

Beach v Youngblood, 215-979; 247 NW 545

Matters inhering in judgment. A defendant sued in this state on a nonfraudulent judgment rendered in a foreign state, on the assumption of a mortgage on land, may not counterclaim for damages based on the plea that said assumption was fraudulently imposed upon him.

Perry Fry v Gould, 214-983; 241 NW 666

Insurance—actions on policies—submission to foreign courts—insufficient showing. An

Iowa accident insurance association which has not been licensed to transact its business in a foreign state (in which it has neither office, agent, nor property), and whose certificates of insurance are strictly Iowa contracts, cannot be deemed to have subjected itself to the jurisdiction of the courts of such foreign state (1) because a very large number of its certificate holders reside in said foreign state, or (2) because said association, from time to time and by mail from its Iowa office, requests a physician in said foreign state to there examine claimants and to report as to accidental injuries received by claimants,—it appearing that said physician was under no contract obligation to comply with said requests and to make such examinations tho he had done so for several years and had received a stated fee for each separate examination.

Held, the foreign court, in an action on a certificate, acquired no jurisdiction under process served on said physician.

Saunders v Iowa Assn., 222-969; 270 NW 407

11569 Pleading in abatement and bar.

Necessity for plea. There can be no abatement or stay of an action until another action has been determined, when there is no pleading requesting such abatement or stay.

Music v DeLong, 209-1068; 229 NW 673

Delay in pleading—effect. Defendant's right to plead in abatement is wholly lost when delayed until the plaintiff might legally have brought his action.

Larsen v Ins. Co., 212-943; 237 NW 468

Modification of judgment to avoid apparent bar. A judgment which is essentially in abatement, but which on its face purports to be in bar, will be so modified on appeal as to show that it is in abatement.

Platner v Hughes, 200-1363; 206 NW 268; 43 ALR 1141

Other action pending. A motion or proceeding for the abatement of an action of forcible entry and detainer, because an equitable action by movant is pending in the district court for relief consequent on the alleged fraud of plaintiff in the forcible detention action, is properly overruled.

Music v DeLong, 209-1068; 229 NW 673

Remand when basis of dismissal uncertain. When the appellate court is quite uncertain whether the trial court dismissed the cause on the erroneous basis of matter in bar or on the basis of insufficiency of evidence to sustain the action in any event, a remand for new trial must be entered.

Bonner v Reandrew, 203-1355; 214 NW 536

Want of demand. Replevin will not be abated for want of demand on defendants for possession prior to the institution of the action (1) when one defendant had incapacitated himself from complying with a demand, and (2) when the other defendant asserted unqualified title against the plaintiff.

Hart v Wood, 202-58; 209 NW 430

Receivership—effect. An action for specific performance is not abated by the subsequent appointment of a receiver for the defendant.

Hawkeye Ins. v Trust Co., 210-284; 227 NW 637

Nonabatement of action by receivership. The appointment of a receiver for an insolvent corporation does not abate an action by the corporation as a judgment creditor to set aside conveyances as fraudulent; and if the receiver be not substituted as plaintiff the action may be continued by the corporation in its corporate name.

Grimes Bank v McHarg, 217-636; 251 NW 51

Abatement of authorized action. A court having ordered its receiver in partnership to begin action against the partners, in order to collect funds with which to pay creditors, has discretionary power, after such action has been commenced, and on a showing that the receiver has in his possession a very large amount of unliquidated partnership assets, to abate the action until such assets are liquidated.

Day v Power, 219-138; 257 NW 187

Foreign corporations — dissolution and receivership—effect. A foreign decree of dissolution of a corporation, and an order appointing a receiver to wind up its affairs, do not abate an action aided by attachment in this state, because the claim of the receiver of a foreign corporation to its property in this state will not be recognized as against the valid claims of resident attaching creditors.

Watts v Surety Co., 216-150; 248 NW 347

Foreign corporations—dissolution—effect on pending actions. A duly rendered decree of dissolution of a foreign corporation, at the instance of the state under the laws of which said corporation was organized, is, in effect, an executed sentence of death; being such, said decree ipso facto works an abatement, (1) of an unadjudicated action in rem pending in this state against said dissolved corporation, and (2) of garnishment proceeding pending in connection with said action. Under such circumstances, the garnishee may properly move for and be granted an order of discharge.

Peoria Co. v Streater Co., 221-690; 266 NW 548

11570 Special execution—pleading.

Lien—nonwaiver by taking general judgment. The plaintiff in landlord's attachment by failing to ask for a special execution for the sale of the attached property, and by taking a general judgment against the lessee, does not thereby waive his landlord's lien. On the

contrary, the lien follows the general judgment upon which a special execution may issue notwithstanding the failure to pray therefor, and notwithstanding the failure of the judgment to provide therefor.

Wunder v Schram, 217-920; 251 NW 762

11571 Several judgment.

Judgment against vouchee. Judgment may be rendered not only against the defendant in an action, but against one who has been vouched into the action and who has assumed exclusive charge of the defense, and whose conduct of the defense has been such as to render him, in legal effect, a codefendant.

Hoskins v Hotel, 203-1152; 211 NW 423; 65 ALR 1125

11572 Judgment against one of joint defendants.

Rendition of judgment against party—effect. The fact that judgment has been rendered against one of two defendants, on the pleaded cause of action, does not render said judgment-defendant a competent witness to testify, on behalf of the remaining defendant, against an administrator as to a personal transaction with the deceased, said transaction being vital to the defensive plea of said remaining defendant.

Stookesberry v Burgher, 220-916; 262NW820

Submission of separate forms. In an action against the driver and owner of a truck, held, the omission to submit separate forms of verdict for each defendant was not prejudicial error, the court having specifically and correctly instructed the jury as to separate liability of each defendant.

Carlson v Decker, 218-54; 253 NW 923

11573 What relief granted.

ANALYSIS

I RELIEF IN GENERAL
II CONFORMITY TO PROCESS
III CONFORMITY TO PLEADING
IV CONFORMITY TO PROOF

Limitations on judgments by default. See under §11587

I RELIEF IN GENERAL

Void sale — venue. A proceeding wherein relief is sought on the theory that the petitioner bought property at a void judicial sale and received nothing for his purchase price must be brought in the court and in the proceedings out of which the execution arose.

State v Beaton, 205-1139; 217 NW 255

Defective pleading. A defendant may not ignore a suit against him and allow judgment to be entered, and then have the judgment set aside for want of jurisdiction because of merely defective pleading, as distinguished from absence of pleading and prayer.

Nelson v Higgins, 206-672; 218 NW 509

Defect of parties—effect. In mandamus to obtain an order cancelling a tax sale and the certificate issued thereunder (assuming the propriety of such action) the court manifestly cannot disturb the certificate holder when he is not a party to the action.

Wren v Berry, 214-1191; 243 NW 375

Excessive decree. A motion to set aside an award as a statutory award does not empower the court to decree the legal effect and conclusiveness of the award as a common-law award.

Bureker v County, 201-251; 207 NW 115

Accounting — proper form of judgment. Where an accounting proceeding instituted by the widow of a deceased partner in order to determine her dower interest in the partnership property is tried on the mutual theory that her interest when determined should be impressed as a trust on the entire partnership property, a judgment in rem against the partnership property should be entered, and not a personal judgment against the surviving partners.

Fleming v Fleming, 211-1251; 230 NW 359

Jurisdiction—accounting—opening de novo —exceptions. In some cases of gross fraud, mistake, or disadvantage, equity will open the whole accounting de novo, but if all items are not so affected, equity may (1) allow the account to stand except to the extent invalidated by the opposing party, who has the burden to prove errors, or (2) open the account to contest as to such items as are specified to be erroneous; otherwise the accounting is conclusive.

Clark v Iowa-D. M. Bank, 223-1176; 274 NW 919

Relief notwithstanding partial failure of recovery. A subcontractor on a public improvement who, in an equitable action, establishes a contract right of recovery against the principal contractor, is entitled to judgment accordingly, notwithstanding the fact that, because of his noncompliance with the statute, he is denied recovery either against the surety for the principal contractor, or against the municipality, or against the undistributed funds in the hands of the municipality.

Zeidler Co. v Ryan, 205-37; 215 NW 801

Recovery for partial performance. Principle reaffirmed that if the failure to fully perform a contract by one party thereto is caused by the breach of that contract by the other party thereto, the nonbreaching party may recover for his partial performance at the contract rate.

Goben v Paving Co., 214-834; 239 NW 62

I RELIEF IN GENERAL—concluded

Trust property — personal liability. Individuals who voluntarily associate themselves in a business venture in the form of a trust are each personally liable for the authorized acts of their agent.

Daries v Hart, 214-1312; 243 NW 527

Right of trustee. The decree in an action by a trustee in bankruptcy to set aside a conveyance by the bankrupt as fraudulent, should be, not that the trustee is the owner in fee of the property, but that the trustee has a superior lien on the property to the amount of the lienable claims in his hands as such trustee.

Hoskins v Johnston, 205-1333; 219 NW 541

Unallowable procedure. The probate court on entering an order, on due application, modifying a former order relative to the compensation of an executor, has no authority to recognize judicially, on its own motion, the pendency in said court of a petition to remove said executor, and peremptorily and on its own motion, to enter an order suspending or removing the executor on the basis of the testimony already received in the proceedings relative to compensation.

Gray v Mann, 208-1193; 225 NW 261

II CONFORMITY TO PROCESS

Absence of any issue. The court may not decree who is principal in a transaction and who is surety, and render a personal judgment in favor of the surety and against the principal for sums paid by the surety, when the original notice and petition are silent as to such matters, and when there is no other pleading which prays such relief.

Sutton v Rhodes, 205-227; 217 NW 626

Equivocal wording of original notice. An original notice will not justify a personal judgment on default when it is so drawn that a person would naturally and ordinarily conclude that the relief demanded was simply to establish the mortgage sued on as a lien paramount to the defendant's junior lien; much less would it justify such personal judgment if intentionally drawn to mislead.

Sutton v Rhodes, 205-227; 217 NW 626

Unallowable personal judgment. A personal judgment cannot legally be entered against a defaulting defendant (1) when no claim is made against him in the original notice, (2) when no cause of action is alleged against him in the petition, and (3) when the prayer of the petition simply asks that defendant's alleged lien be declared inferior to plaintiff's lien; and it is immaterial that defendant was present during the trial and to some extent participated therein, and that after the trial plaintiff, by a belated amendment, injected into the petition a prayer for personal judgment.

Manassa v Garland, 200-1129; 206 NW 33

III CONFORMITY TO PLEADING

Default—amount confined to averments of petition. When a defendant defaults, he is still protected by the law, and plaintiff's recovery must be confined and responsive to the averments in his petition.

Rayburn v Maher, 227-274; 288 NW 136

Failure to limit recovery to specifically pleaded amounts.

Sergeant v Challis, 213-57; 238 NW 442
Albert v Maher, 215-197; 243 NW 561
Wosoba v Kenyon, 215-226; 243 NW 569

Unpleaded theory. Appellant's demand, on appeal, for judgment on an unpleaded theory will be ignored.

Forsberg v Const. Co., 218-818; 252 NW 258

Unallowable relief. The court may not decree the cancellation of an unquestioned judgment or decree a reconveyance of land when the validity of the original conveyance was not properly in issue.

Benson v Sawyer, 216-841; 249 NW 424

Teachers' pension—employment prerequisite —no relief outside issues. A public-school teacher, after 30 years service and while lacking only six months more service to be entitled to a pension, cannot mandamus the school board to compel her re-employment and, such re-employment being the relief sought, a court may not go outside the pleaded issues and grant such a pension as the school board may have given.

Driver v School Dist., 224-393; 276 NW 37

Amendment after default. A personal judgment may not be validly entered on an amendment filed after default, of which amendment the defendant has no notice.

Chandler v Sinaiko, 201-791; 208 NW 323
Sutton v Rhodes, 205-227; 217 NW 626

Recovery dependent on pleading. In an action on a nonnegotiable promissory note, by a transferee thereof, defendant's plea that he be given a set-off in a stated sum because of an account held by defendant against the original payee will not be construed as embracing a demand for interest on said "stated sum".

Lewis v Grain Co., 214-143; 241 NW 469

Conclusiveness of one's own plea. A plaintiff who, in an action on a promissory note, specifically pleads a definite consideration, must stand or fall thereon. Having fallen, he will not be permitted to advantage himself of a consideration possibly reflected in the record, but not embraced within his own chosen plea.

Persia Bk. v Wilson, 214-993; 243 NW 581

Multifarious theories in one count. A cause of action which is not barred until 10 years after the execution and delivery of a deed is shown by a pleading which (1) pleads a contract of purchase of land by the acre, and the deed in fulfillment thereof, (2) shows payment for the acreage represented in the deed, and (3) alleges actual material shortage in the said acreage; and this is true even tho the pleading does allege "mutual mistake" of the parties as to the acreage, and asks for the reformation of a mortgage for the purchase price.

Mahrt v Mann, 203-880; 210 NW 566

Indivisible transaction. A party who is entitled to judgment for the return of a promissory note is necessarily entitled, on proper prayer, to a judgment for the return of another note which grew out of the same transaction and was attended by the same conditions.

Breza v Loan Soc., 200-507; 205 NW 206

Issues, proof, and variance—proof justifying recovery. Under a plea of (1) conspiracy to commit a wrongful act and (2) joint participation in the wrongful act, recovery may be had on proof of the latter allegation only.

De Bruin v Studer, 206-129; 220 NW 116

Decree appropriate to facts proven. A court of equity having acquired jurisdiction of an action praying the setting aside of a conveyance because actually fraudulent, may, on proof of constructive fraud only, enter a decree appropriate to said proven facts.

McFarland v Johnston, 219-1108; 260 NW 32

Scope of relief. In equitable action where pleading "was not as clear as it might have been", yet prayed for general equitable relief, court enforced express provisions of legal contract to preserve rents and profits under the rule that where general equitable relief is prayed, any relief may be granted consistent with the pleadings and the evidence.

Wagner v Securities Co., 226-568; 284 NW 461

General equitable relief prayed. In equity action seeking the appointment of a receiver, defendant's contention, that a receiver could not be appointed because no main cause of action was stated, was without merit, since plaintiff was in fact seeking to foreclose a lien on rents and had asked for general equitable relief, the rule being that "equity does not deal in technicalities, but rather it seeks to ascertain the true intent of the pleading filed".

Wagner v Securities Co., 226-568; 284 NW 461

Duty to set aside fraud-induced deed. When a deed has been manifestly obtained by the fraud of the grantee, and without consideration, a court of equity must set it aside, on a distinct prayer for such relief, and not assume to reform it, without any prayer therefor, and decree a life interest in the defrauded grantor.

Guenther v Kurtz, 204-732; 216 NW 39

Petition — statutory requirements — prayer limits relief. Statute specifies the component parts of a petition, and the relief permitted thereunder is limited by the prayer therein.

In re Collicott, 226-106; 283 NW 869

Absence of prayer — effect. No decree of injunction should be rendered against an intervenor when plaintiff answered the petition of intervention but prayed for no relief.

Red Top v McGlashing, 204-791; 213 NW 791

Insufficient prayer. A personal judgment without a specific prayer therefor is erroneous, and a prayer for "other and further relief" is not such prayer.

Richardson v Short, 201-561; 207 NW 610

Unprayed-for relief. A surviving spouse who, in a contest with an heir of the intestate, claims absolute ownership of the entire homestead, and who is decreed to own only an undivided fractional part thereof, may be decreed the right to elect to occupy the homestead for life, even tho there is no prayer for such relief.

Myrick v Bloomfield, 202-401; 210 NW 428

Relief limited by pleading. A chattel mortgagor who, in foreclosure proceedings, pleads a counterclaim against the mortgagee for conversion of one of two separate articles covered by the mortgage, with no prayer for general equitable relief, may not have like relief as to the second article, tho conversion thereof is made to appear; and especially when the mortgagor fails to prove the value of such second article.

Wetmore v Wooster, 212-1365; 237 NW 430

Judgment in equitable action. The holder of unquestioned, matured promissory notes, secured by a real estate mortgage, is entitled to judgment on the notes, on a proper prayer in an equitable proceeding, even tho the proceeding is not for the foreclosure of the mortgage.

Iowa Bank v Young, 214-1287; 244 NW 271; 84 ALR 1400

Injunction decree not justified by pleadings. When the petition asked for an injunction restraining the county treasurer from selling at tax sale, lands upon which Polk county holds tax deeds, it was error to grant an injunction restraining tax sales for special assessments regardless of who the owner of the tax deed might be, even tho other general relief was asked by the petition, the petitions of intervention, and the answer, as the court should not render a judgment which has no foundation in the pleading and is not justified by the

III CONFORMITY TO PLEADING—concluded

evidence, issues, or theory upon which the case was tried.

Bennett v Greenwalt, 226-1113; 286 NW 722

Divorce in lieu of separate maintenance. The court has no right to decree a divorce on a cross-petition which alleges cruel and inhuman treatment but specifically prays for separate maintenance only; and this is true tho there is also a prayer for general equitable relief, it appearing that cross-petitioner's attitude on the trial was in strict accord with said prayer.

Davis v Davis, 209-1186; 229 NW 855

IV CONFORMITY TO PROOF

Common-law rule for recovery — modification. Principle reaffirmed that the common-law rule that there can be no recovery on a written contract without a showing that it has been strictly performed has been modified in this state.

Gibson v Miller, 215-631; 246 NW 606

Failure to prove damages. No relief can be granted in a law action because of fraud unless there be proof of damages.

Rawleigh v Cook, 200-412; 205 NW 57

Contract price (?) or quantum meruit (?). A plaintiff who pleads that he partially performed an express contract for services, and thereupon abandoned the work because of a breach of the contract by defendant, must not be permitted to recover the contract price for the work actually performed unless he establishes his pleaded justifiable abandonment; and if he fails to establish justifiable abandonment, he may not recover on the basis of a quantum meruit which does not exceed the contract price when he neither pleads nor proves a quantum meruit.

Goben v Paving Co., 208-1113; 224 NW 785
See Goben v Pav. Co., 214-834; 239 NW 62

Conversion. Plaintiff in an action for the conversion of bonds may recover on proof of the conversion, and of the value, of the bonds. Proof that bonds found in the possession of the conversioner or of his executor are the identical bonds converted is material only in case plaintiff elects to recover the bonds in kind.

Annis v Morgan, 210-478; 231 NW 457

Fatal inadequacy of proof. The court has no legal right to enter judgment against a corporation on promissory notes purporting to be signed by the corporation by its president (1) when there is no proof as to the actual or apparent authority of the president, and (2) no evidentiary explanation as to the nature of the transaction.

Schooler v Avon Corp., 216-1419; 250 NW 629

Scope of relief. In equitable action where pleading "was not as clear as it might have been", yet prayed for general equitable relief, court enforced express provisions of legal contract to preserve rents and profits under the rule that where general equitable relief is prayed, any relief may be granted consistent with the pleadings and the evidence.

Wagner v Securities Co., 226-568; 284 NW 461

Conditional sales—unallowable foreclosure. In an action to foreclose a conditional sales contract on a specifically described article, foreclosure may not be decreed on another and different article but of the same general nature, in the absence of allegation and proof that the latter article had been mutually substituted for the former.

Des M. Music v Lindquist, 214-117; 241 NW 425

No quiet title decree on unsworn evidence—burden. In an action to quiet title against paving assessment certificate holders, an unsworn petition supported by unsworn written statements showing, as contention for invalidity of assessments, the nonconformity of plat to statutory requirements, is not the sufficient evidence as in equity will support a judgment by default and, the burden of proof thereof being on the plaintiff, the petition was properly dismissed.

Neilan v Lytle Co., 223-987; 274 NW 103

11575 Judgment on verdict.

Directed verdicts—constitutionality. Principle reaffirmed that the constitutional right of trial by jury is not infringed by the action of the court in directing a verdict for defendant whenever the evidence is such that the court would not hesitate to set aside a verdict against defendant.

Cashman v Railway, 217-469; 250 NW 111

Verdict—scope of term—fatally delayed motion. A court-directed verdict (in a jury trial) is the verdict of the jury within the meaning of the statute limiting applications for new trial to five days "after the verdict is rendered" and the court has no jurisdiction to grant an application made after said time irrespective of the time when formal judgment was entered on the verdict. (Verdict rendered in 1916; judgment entered in 1930.)

Selby v McDonald, 219-823; 259 NW 485

Duty of clerk. It is the duty of the clerk, in the absence of a court order to the contrary, to enter judgment immediately upon the return of the verdict.

Cox v Surety Co., 208-1252; 226 NW 114

Entry—validity of long delayed entry. The duty of the clerk of the district court, without any direction from the court, to enter judg-

ment on the general verdict of the jury, no contrary order being made by the court, is imperative and continues without limitation as to time. So held where the judgment was entered 14 years after return of the verdict.

Selby v McDonald, 219-823; 259 NW 485

Right to formal judgment. A verdict which denies one of several plaintiffs a right of recovery necessarily arms the defendant with right to a formal judgment dismissing the petition of such unsuccessful claimant.

Eclipse Lbr. v Davis, 201-1283; 207 NW 238

Judgment against partners only—effect. A joint, personal judgment solely against the members of a partnership, on a partnership transaction, does not constitute a judgment against the partnership itself.

Bankers Trust v Knee, 222-988; 270 NW 438

Remittitur—effect on prior judgment entry. A duly entered judgment which is followed by an unexcepted order for a new trial unless a remittitur be filed, automatically becomes a judgment in the lesser amount immediately upon the due filing of the remittitur. It is not necessary to formally cancel the old judgment entry and to enter a new one for the lesser amount.

Fox v McCurnin, 210-429; 228 NW 582

Dual judgments—remittitur. When two separate judgments are entered in the same action —one on the return of the verdict, and one on the ruling for new trial—the formal remitting of the prior judgment removes all error.

Lynch v Railway, 215-1119; 245 NW 219

11576 When verdict is special.

Judgment on inconsistent findings. See under §11514, Vol I

Reversal as to one count—effect on other adjudicated counts. While a general reversal in a law action ordinarily gives the parties a retrial on all issues, yet where plaintiff is successful as to one count and defeated as to all other counts, and does not appeal, a general reversal on defendant's appeal as to the one count on which plaintiff was successful does not give plaintiff a right to a retrial of any of the counts on which he was defeated. Plaintiff's defeats stand as a final adjudication even tho the formal judgment of dismissal of plaintiff's unsuccessful counts was not entered until after the issuance of procedendo on the reversal.

Pease v Bank, 210-331; 228 NW 88

11577 Principal and surety—order of liability.

Discussion. See 15 ILR 47—Casual and corporate sureties

ANALYSIS

Appeal bond liability. See under §10602
Contribution and subrogation. See under §11667
Executors' and administrators' bonds. See under §§11887, 11984
Guardians' bonds. See under §12577
Injunction bonds. See under §12526 (III)
Joint liability. See under §10975
Judgments on motion. See under §11608
Parties to action. See under §10975
Principal's default or removal from state imminent, surety's remedy. See under §§9457–9460
Receivers' bonds. See under §12715

I GUARANTY AND SURETYSHIP GENERALLY

Discussion. See 7 ILB 1—Notice to the guarantor

Contracts—delivery on secular day. A written guaranty executed on Sunday but delivered on a secular day under express or implied authority of the guarantor is perfectly valid.

Simmons v Simmons, 215-654; 246 NW 597

Strict construction against paid surety. A contract of suretyship will be most strongly construed against the surety who is paid a consideration for entering into the contract.

Iowa Bank v Soppe, 215-1242; 247 NW 632

Suretyship—want of consideration. A plea of want of consideration, interposed by a gratuitous surety on a promissory note may be very properly ignored in the instructions of the court when the record shows (1) that the surety signed the note without fraud imposed upon him, and (2) that there was a consideration between the principal and the payee.

Granner v Byam, 218-535; 255 NW 653

Signing guaranty in blank—effect. One who signs a guaranty in blank and entrusts it to his own agent for the purpose of filling in the amount of the guaranty, and for the purpose of making delivery, is bound by the instrument as delivered to the innocent guarantee, even tho the agent fills in a larger amount than the agent represented necessary at the time of the signing.

Simmons v Simmons, 215-654; 246 NW 597

Surety—authority of agent. A surety company will not, in an action on a bond issued in its name by its agent, be permitted to dispute the authority which it has specifically conferred on said agent in a written power of attorney filed with the clerk of the district court and relied on by said clerk in approving the bond, the obligee in the bond having no knowledge of any limitation on the authority of the agent.

State v Packing Co., 219-419; 258 NW 456

I GUARANTY AND SURETYSHIP GENERALLY—concluded

Oral guaranty by bank of payment of director's mortgage. Testimony that a bank, acting through its board of directors, orally guaranteed the payment of the personal mortgage of one of said directors, is incompetent under the statute of frauds.

Lindburg v Engster, 220-1073; 264 NW 31; 116 ALR 591

Form and sufficiency between sureties. Judgment entry as to sureties reviewed, construed, and held proper.

School Dist. v Sass, 220-1; 261 NW 30

Long-continued mutual construction. The mutual construction which parties have for years placed on a guaranty against loss on bank stock, arising from the uncollectibility of bank loans, is very, very influential with the court, especially when the definite and comprehensive terms of the guaranty support said mutual construction.

Nelson v Hamilton, 213-1231; 240 NW 738

Guaranty of described bank notes—erroneous description—effect. An officer of a bank who, on demand of the state banking department, guarantees in writing the payment of certain separately described bills receivable belonging to the bank, is not liable on a bill receivable which does not strictly correspond to that described in the guaranty. So held where the difference between the bill receivable in the bank and that described in the guaranty was (1) as to the amount, or (2) as to name of debtor, or (3) as to the aggregate amount of several bills receivable.

Andrew v Austin, 213-963; 232 NW 79

Parol as affecting writings—varying written description of notes guaranteed. In an action on a written guaranty of payment of separately and unambiguously described notes, parol evidence is inadmissible to show what notes were intended, and that they are different from those described in the guaranty.

Andrew v Austin, 213-963; 232 NW 79

Identification of instrument guaranteed. Plaintiff in an action on a guaranty of payment of a promissory note, which guaranty is separate from the note, manifestly cannot recover unless he clearly shows that the note in question is the very note that is guaranteed.

Andrew v Overbeck, 214-578; 241 NW 435

Signing—evidence. In an action on a written guaranty which plaintiff introduces in evidence, the fact that plaintiff dismisses his action, without prejudice, as to one alleged signer, does not render said dismissed defendant incompetent to testify that he never signed said guaranty.

Rawleigh Co. v Moel, 215-843; 246 NW 782

Insufficient showing—imputation of knowledge. The fact that the payee of two promissory notes signed by the same maker but by different sureties caused the maker to be consulted relative to which of the notes should be indorsed with a certain payment, and then made the indorsement in accordance with the maker's wishes, cannot have the effect of creating any agency and thereby charging said payee with knowledge of an agreement between the maker and one of the sureties for a different application of the payment.

Mitchell v Burgher, 216-869; 249 NW 357

Mortgage of director—guaranty by bank. Evidence quite exhaustively reviewed and held insufficient to establish a contract of guaranty of payment by a bank of the personal mortgage of a director.

Lindburg v Engster, 220-1073; 264 NW 31; 116 ALR 591

II CREATION AND EXISTENCE OF RELATION

Creation of relation — effect. The implied promise of a principal to reimburse his surety if the surety is compelled to pay the debt, brings into existence the relation of debtor and creditor between the principal and surety immediately upon the execution of the contract of suretyship.

Leach v Bassman, 208-1374; 227 NW 339

Immateriality of receipt under issues. On the issue whether defendant had contracted to indemnify plaintiff against liability as surety on an appeal bond in a criminal case, and whether defendant had received funds from the accused with which to perform such indemnity contract, evidence is wholly inadmissible that defendant had received funds from the father or brother of the accused for a purpose wholly foreign to said indemnity contract.

State v Cordaro, 211-224; 233 NW 51

Assumption of mortgage — recovery by mortgagor—surety. As between a mortgagor and a subsequent purchaser who assumes and agrees to pay the mortgage, the purchaser becomes the primary debtor, and the prior mortgagor the secondary debtor; but in case foreclosure and sale reveal a deficiency judgment the mortgagor may not recover the amount thereof from the assuming purchaser until he, the mortgagor, has paid such deficiency.

Thomsen v Kopp, 204-1176; 216 NW 725

Writing construed as guaranty. A dealer who transfers without recourse a note and mortgage which represents the unpaid purchase price of an automobile, nevertheless becomes a guarantor of payment of said note by agreeing in writing with the transferee that if the latter is compelled to repossess the car because of default in payment of installments thereon and delivers said repossessed

car to the dealer, the latter will repurchase the car and pay the balance due on said note.

Securities Corp. v Noltze, 222-678; 269 NW 866

Nature and extent of liability of surety. Where a creditor agrees with his debtor on two conditions to cancel and surrender a large amount of indebtedness, viz, (1) that the debtor pay a stated amount by a stated time, and (2) that the debtor then deliver certain notes signed by a stated surety, the creditor may, without affecting the surety, legally waive compliance with the first condition and cancel and surrender the specified indebtedness and receive legal delivery of the notes signed by the surety, the surety having full knowledge of all said facts and interposing no objection to delivery of the notes until sued.

North Side Bank v Schreiber, 219-380; 258 NW 690

When indorser primarily liable. A vendor of land who negotiates the purchase-price note received by him, and later either acquiesces in the abandonment of the contract by the purchaser or himself rescinds the contract and conveys the land to a new purchaser, thereby becomes primarily liable on the negotiated note, as between himself and a surety on said note.

First N. Bank v LeBarron, 201-853; 208 NW 364

Conditional signing—nonestoppel. A surety on a promissory note who signs and delivers the note on the condition that another named party also signs, is not bound because he makes no response to a later notification from the payee that other parties have been substituted as signers in lieu of the one named and specified by the surety.

Andrew v Hanson, 206-1258; 222 NW 10

Stockholders' assessment to replace impaired capital—jury question. Conflicting evidence reviewed and held to present a jury question on the issue whether an assessment on bank stockholders was for the purpose of making good the impaired capital of bank or whether it was a voluntary arrangement among the stockholders to form a pool and purchase from the bank certain assets of doubtful value and thereby to relieve, in part, the individual guarantors thereon.

Andrew v Austin, 213-963; 232 NW 79

Cross-examination—whole of writing—admissibility. A surety who denies in toto the execution, delivery, and consideration of the promissory note in question, but sees fit to cross-examine his co-defendant principal with reference to a letter written by the principal to the payee with reference to said denied matter, may not complain of the reception in evidence of said letter as a part of his own cross-examination.

Granner v Byam, 218-535; 255 NW 653

Appearance by vouchee. A vouchee who has voluntarily taken over the defense of an action may not file a special appearance to a motion for judgment against him on the judgment rendered against the defendant.

Hoskins v Hotel, 203-1152; 211 NW 423; 65 ALR 1125

Bad-faith defense by vouchee. One who is vouched by a defendant into an action, and assumes exclusive charge of the defense, and in the trial pursues a course distinctly hostile to the defendant and distinctly favorable to himself, may thereby make himself, in legal effect, a co-defendant, and be conclusively bound by the judgment against the defendant. So held where the vouchee, knowing that he was vouched into the action by the defendant on the theory that the negligence charged was primary as to the vouchee and secondary as to the defendant, actively attempted to establish that he (the vouchee) was not negligent and that the defendant was negligent.

Hoskins v Hotel, 203-1152; 211 NW 423; 65 ALR 1125

III NATURE AND EXTENT OF LIABILITY

Conditional guaranty — when absolute. A written guaranty of a loan on condition that the guarantee will renew the loan from time to time provided the borrower pays the accrued interest each six months must be construed as imposing an absolute liability on the guarantor when six months interest matures and is not paid.

In re Shangle, 222-442; 269 NW 428

Guaranty—absolute (?) or conditional (?). Guaranty of the payment of a claim construed and held conditional and not absolute.

Commercial Bank v Crissman, 214-217; 242 NW 355

Finding of fact in re suretyship. The finding of the court as to the amount of the liability of a surety on a bond, not based on a mathematical computation, but on a determination of disputed questions of fact, is conclusive on the appellate court.

Iowa Bank v Soppe, 215-1242; 247 NW 632

Surety bound by adjudication. The surety on the bond of an administrator is conclusively bound by the nonfraudulent adjudication of the amount of the administrator's liability, even tho the surety had no notice of the hearing preceding such adjudication.

In re Jackson, 217-1046; 252 NW 775; 91 ALR 937

Equitable estoppel — pleading one's own wrong. In an action on a bond given by a bank as principal and by its directors as sureties to secure a trust fund which was in the possession of the bank, the defensive plea that plaintiff was estopped from prosecuting the action by his laches in so doing, is not avail-

III NATURE AND EXTENT OF LIABILITY—continued

able to the sureties when they at all times, before the bank became insolvent, had unhampered opportunity to compel compliance with the bond, and thus protect themselves, but, on the contrary, manifestly connived at a continuous breach of the bond in order to conserve the interest of their bank.

Olin Assn. v Bank, 222-1053; 270 NW 455; 112 ALR 1205

Cross-complaint. In an action on the bonds of a public officer and his bondsmen to recover a shortage, one surety may not cross-petition against a party who he alleges wrongfully received the funds resulting in the shortage, said latter party not being a party to the bond sued on.

School District v Sass, 220-1; 261 NW 30

Indemnification of one of two sureties — effect. In an action against a public officer and his bondsmen to recover a shortage in public funds, it is quite immaterial, as far as plaintiff is concerned, that one of the sureties has received property from the public officer as partial indemnity.

School District v Sass, 220-1; 261 NW 30

Unallowable defense. It is no defense on the part of one of two sureties on the bond of a public officer that said officer, while so acting, was also acting as cashier of a bank; that, as cashier, he was short in his account with the bank; that said other surety was also surety on the private bond of the cashier; and that said other surety and said cashier conspired to use and did use the public funds with which to make good the cashier's shortage to the bank.

School District v Sass, 220-1; 261 NW 30

Liability on official bond. In an action on the bond of a school treasurer to recover a shortage in his accounts, it is no defense that the plaintiff district has a cause of action against a third party who is unlawfully in possession of the funds constituting the shortage.

School District v Sass, 220-1; 261 NW 30

Bonds—enforcement against heirs et al. The bond of a fiduciary, under the terms of which a surety purports to bind "his heirs, devisees, and personal representatives", is not revoked by the death of the surety, and binds the estate of the surety in the hands of his heirs, devisees, or personal representative.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

When enforceable against heir. A claim arising under a bond wherein the surety binds "his heirs, devisees, and personal representatives", and arising after the death of said surety and the due settlement of his estate, is enforceable:

1. Against the property received by an heir, as such, from said ancestor-surety, and
2. Against the property passing from said ancestor and owned by said heir under conveyance for which he paid nothing, and
3. Against the heir, personally, for the value of the property so received if he has consumed it. And this is true even tho, necessarily, said claim was not filed against the estate of said surety.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Nonpermissible credit. A surety is not entitled to a credit, on the penalty carried by the bond, to the extent that the contract guaranteed has been carried out. He is liable for the full delinquency which remains, not exceeding the amount of the bond.

Weitz v Guar. Co., 206-1025; 219 NW 411

Bond—statutory amount—maximum liability. The surety on the bond of a dealer in securities under the Iowa securities act (Ch 393-C1, C., '31) is not liable beyond the statutory amount of the bond—$5,000—irrespective of the number or amount of the claims sought to be enforced against it. Order impounding a bond as a trust fund for the pro rata benefit of numerous claimants affirmed.

Witter v Ins. Co., 215-1322; 247 NW 831; 89 ALR 1065

Discharge of surety—statutory bond—failure to make timely filing of claim. Under a statute making the liability of a surety on a statutory bond for the performance of a public contract dependent on the filing by the claimant of a verified statement of the goods sold within a specified time after the goods are "furnished," it is not necessarily sufficient to file such statement within the time specified by the statute after the goods are "used" by the buyer, even tho the goods were bought under a contract providing that the buyer might return such portion as he did not use.

Queal Co. v Anderson, 211-210; 229 NW 707

Discharge of surety—consideration for extension of time of payment. An express or implied agreement by the payee and principal debtor in a promissory note to the effect that the time of paying the note shall be extended for one year is supported by ample consideration, in that the payee forbears suit for one year, and in that the maker secures the benefit of the forbearance.

Eilers v Frieling, 211-841; 234 NW 275

Signature of surety obtained by fraudulent representations — nonliability. Extension of mortgage debt would be sufficient consideration to support signature of mortgagor's daughter to extension agreement if extension were granted on condition that such daughter sign, but where such signature of the daughter is obtained by fraudulent misrepresentations,

it is without consideration and void as to the daughter.

Beal v Milliron, (NOR); 267 NW 83

Extension to principal available to surety—abatement of action. An order of a court of bankruptcy granting, to a maker of a negotiable promissory note, an extension of time in which to make payment, is not personal to said maker only, but inures, under USC, title 11, §204, to the benefit of another maker of said note who in fact signed said note as surety only, but without so indicating on the face of the note; and said latter maker, when sued alone by the original payee, may, for the purpose of abating the action, establish his suretyship and consequent secondary liability.

Benson v Alleman, 220-731; 263 NW 305

Cross-defendant. In mandamus action by county treasurer to obtain salary warrant where county board of supervisors answered, alleging indebtedness on part of treasurer to county for which set-off was claimed, and where county board brought treasurer's surety into the action as a cross-defendant, held, allegation in surety's answer, indicating that shortage in treasurer's office was due to the embezzlement by a third party, was not binding on board in view of its affirmative allegation that treasurer was indebted to the county.

Briley v Board, 227-55; 287 NW 242

IV DISCHARGE

Exceeding limit on credit. A guarantor who guarantees a credit to a named amount is released from all liability if the amount of the credit is exceeded.

Dewey Works v Ryan, 206-1100; 221 NW 800

Extension of time of payment. An extension of time of payment of a promissory note will not work a release of the surety when the note contains the consent of all parties to all such extensions.

Johnson v Hollis, 205-965; 218 NW 615

Extension of time of payment. One who, in buying land, assumes a mortgage (and thereby becomes a principal debtor) and who, without the consent of the party who has become secondarily liable on the mortgage debt, assigns to the mortgagee a lease on the land, under an agreement that the mortgagee will collect the rent and apply it on the debt, does not thereby work such an extension of time of payment as will release the party secondarily liable, especially (1) when there was no consideration for such so-called extension, and (2) when there was no fixed time of extension.

Union Ins. v Mitchell, 206-45; 218 NW 40

Extension of time of payment—effect. An extension of time of payment granted to an assumptor of a note and mortgage does not release the maker of the note and mortgage, and prior assumptors, even tho the extension was granted without their knowledge or consent.

Koontz v Clark, 209-62; 227 NW 584
Royal Ins. v Wagner, 209-94; 227 NW 599

Transfer of mortgaged property—assumption by vendee of debt—extension of time—effect. The principle that the holder of an obligation releases the surety on the obligation by granting an extension of time of payment to the principal without the consent of the surety has no application to a case where the maker of a mortgage-secured promissory note sells the mortgaged property to a vendee who assumes and agrees to pay the note, and where the holder of the note subsequently grants an extension of time of payment to the assuming grantee without the consent of the original maker of the note.

Iowa Co. v Clark, 209-169; 224 NW 774
Herbold v Sheley, 209-384; 224 NW 781

Extension of time of payment. The surety on a promissory note is released from all liability whenever the payee makes a binding agreement with the principal debtor, without the consent of the surety, to extend the time of payment to a certain definite time.

Eilers v Frieling, 211-841; 234 NW 275

Disaffirmance by minor of promissory note and contract—release of surety. The disaffirmance by a minor of his contract of purchase and of his negotiable promissory note given in connection therewith, before the property is delivered to him, releases the surety on the note of all liability to the payee, even tho the surety signed the note because of the known minority of the principal. In case the note has passed to a holder in due course by indorsement by the payee, the liability of the indorser becomes primary and the liability of the surety becomes secondary.

Lagerquist v Guaranty Co., 201-430; 205 NW 977; 43 ALR 585

Discharge of surety. The repeal of a statute which gives the state, when it is a depositor in a bank, a preferential right to be paid in full if the bank passes into the hands of a receiver does not constitute a release of security in such sense as to release a surety on a bond which secures said deposit.

Leach v Bank, 205-1154; 213 NW 517

When assignment constitutes payment. One who secures title to land under foreclosure of a second mortgage may not then take an assignment of the first mortgage and enforce it against the maker thereof who has become a surety thereon. Such purchase constitutes a payment of the mortgage debt as to the maker-surety.

Hult v Temple, 201-663; 208 NW 70; 46 ALR 317

IV DISCHARGE—concluded

Discharge of surety—subsequent compromise and satisfaction—effect. The surety on a bond staying the collection of judgments is wholly released by the subsequent acts of the trustee in bankruptcy for the judgment defendant and the receiver for the insolvent judgment plaintiff entering into a legally authorized compromise settlement and satisfaction of the judgment, in order to avoid threatened and doubtful litigation growing out of the execution of said stay bond, and the subsequent insolvency of all the parties thereto.

State v Cas. Co., 213-211; 238 NW 709

Release of principal, etc. — effect. The obligee in a joint appeal bond is not entitled to judgment on the bond when, pending the appeal, and without notice to or knowledge of the surety, he (1) releases some of the principals in the bond, (2) extends the time of payment of the judgment, and (3) accepts in part the obligation of a new party as part payment of the judgment.

Warman v Ranch Co., 202-198; 207 NW 532

Nonmaterial changes—effect on surety. A surety on a bond executed by a trustee and conditioned to carry out a specified trust is not discharged by changes and alterations in the trust agreement which work no legal change in the liability of the trustee or surety.

Throp v Chaloupka, 202-360; 208 NW 299

Identity of partnership and corporation. A bona fide corporation which is engaged in one business, and a bona fide partnership which is engaged in a different business may not, even in equity, be deemed identical—one and the same entity—even tho the corporate stock of the corporation is owned entirely by the partnership entity and by the individual partners, and even tho the individual partners of the partnership constitute the board of directors of the corporation. So held on the plea that a contract of the corporation worked a change in a former contract of the partnership, and thereby released the surety.

Weitz v Guar. Co., 206-1025; 219 NW 411

Failure to sue all sureties—effect. In an action by an executor against a surety on the bond of a former executor, the failure of the executor to file a claim against the estate of a co-surety does not work a discharge of the defendant surety.

In re Carpenter, 210-553; 231 NW 376

Nonpayment — failure to notify surety. A surety may not complain that he was not notified of the nonpayment of the note by the principal when the surety had expressly waived notice of nonpayment.

Davenport v Mullins, 200-836; 205 NW 499

Failure to file claim in probate. Failure of a ward to file a claim against the estate of an embezzling guardian works no release of the surety on the bond of the guardian.

Armon v Craig, 203-1338; 214 NW 556

Violation of agreement. A surety who signs a note to a bank in order to enable his principal to obtain a loan, with the specific agreement that no part of the loan will be used to pay the principal's then existing indebtedness to the bank, is (in a suit by the bank on the note) wholly released by the action of the bank in applying part of the loan contrary to the agreement.

Lindquist v Bank, 206-1131; 221 NW 845

Nonrelease by conduct of guarantee. The guarantor of the payment of the amount due on a contract of sale of land is not relieved of his contract of guaranty because the assignee-guarantee of the contract failed to control the action of the purchaser of the land in disbursing building funds, when the assignee-guarantee had no knowledge of the wrongful disbursement.

Buser v Land Co., 211-659; 234 NW 241

Forfeiture of contract — effect on surety. The surety on a promissory note given as part of the contract price of land, ceases, as a matter of law, to be liable thereon to the original payee-vendor whenever the latter legally forfeits the contract.

Smith v Tullis, 219-712; 259 NW 202

V RIGHTS AND REMEDIES

(a) IN GENERAL

Ambiguity — intent — conduct of parties as evidence. In searching for the actual intention of both parties to an ambiguous written guaranty—in other words, in searching for the proper construction to place on such contract —the court may receive evidence of the conduct of the party to whom the guaranty was given, tending to show that said party, shortly after the time the guaranty was executed, and contrary to his present attitude, was placing the same construction thereon as contended for by the guarantor.

West Branch Bank v Farmers Exch., 221-1382; 268 NW 155

Permissible plea of counterclaim. In an action against the principal and surety on an attachment bond for damages consequent on the alleged wrongful issuance of the writ, the principal in said bond may plead a counterclaim which neither arises out of or is connected with the transaction on which plaintiff sues, nor in which the surety has any personal ownership (§11151, C., '35). A surety is not primarily liable on the bond and the principal who is primarily liable should be permitted to defeat recovery on the bond if he can so do.

Imes v Hamilton, 222-777; 269 NW 757

Decisions reviewable—order refusing judgment against vouchee. An order refusing a

judgment against a vouchee (who was, in substance, a party) is appealable.

Hoskins v Hotel, 203-1152; 211 NW 423; 65 ALR 1125

Action—condition. A bond of indemnity to hold the obligee free of any loss which he may sustain is not broken, and no right of action accrues, until a loss has been suffered against which the covenant runs.

Duke v Tyler, 209-1345; 230 NW 319

Removal of administrator—surety as applicant. A surety on the bond of an administrator has such "interest in the estate" as empowers him to make application for the removal of the administrator, even tho such surety has taken steps to terminate his future suretyship.

In re Donlon, 201-1021; 206 NW 674

(b) GUARANTOR AND SURETY

Accommodation and interested guarantors distinguished. Principle reaffirmed that guarantors, who become such solely as an accommodation, occupy a very materially different position in the law than guarantors who become such in order to protect matters in which they have a financial interest. Stockholders, for instance, in guaranteeing payment of the debts of the corporation are not favorites of the law.

West Branch Bank v Farmers Exch., 221-1382; 268 NW 155

Application of payment prejudicial to surety. The fact that the common maker of two promissory notes signed by different sureties and payable to the same payee was aided by a loan by one of the sureties in order to enable the common maker to make up the amount of a payment to the payee, with the understanding that the total payment would be applied—indorsed—on the note on which said surety was obligated, does not estop or prevent the payee long afterwards (five years) from applying said payment (in accordance with the wishes of the common maker) on the note on which said surety was not obligated, the payee having no knowledge of said agreement. And this is true tho the common maker, and the surety on the note receiving the application, had, in the meantime, become insolvent.

Mitchell v Burgher, 216-869; 249 NW 357

Notes—delivery as nonjury question. The plea of a surety (1) of want of consideration for, and (2) of improper delivery of, the notes sued on, is wholly ineffective:

1. When the surety signed and forwarded the notes for delivery on the prearranged and contracted condition that the payee would receive delivery only on condition that he—payee—would first cancel and surrender specified indebtedness held by him against the principal maker of the notes; and

2. When the surety knew that the payee had complied with said condition and had received delivery of the notes; and

3. When the surety thereafter, until sued, interposed no objection of illegality in the notes or improper delivery thereof, but on the contrary promised to pay them and negotiated for additional time in which to pay.

North Side Bank v Schreiber, 219-380; 258 NW 690

Equitable estoppel — evidence — degree of proof required. The plea of a surety on a promissory note that he, under an arrangement with the principal maker, furnished a portion of the funds with which to make full payment of the note, but that the payee wrongfully applied said payment on another note owing by said maker, and that, therefore, said payee is estopped to maintain an action against him, must be supported by clear, convincing and satisfactory evidence that said payee had full knowledge of said arrangement before he made application of said payment.

Reason: Fundamentally, estoppel is not a favorite of the law.

Stookesberry v Burgher, 220-916; 262 NW 820

Surety as beneficiary—secret change—effect. A debtor who, pursuant to an agreement with his surety, makes the surety a beneficiary in a life policy in order to indemnify the surety against loss on the suretyship, and agrees not to change such beneficiary during the life of the suretyship, may not later secretly change such beneficiary and endow such new beneficiary with right to the proceeds of the policy, when the new beneficiary knew at all times of the suretyship and of the pledging of the policy as indemnity; and it matters not that the new beneficiary actually kept the policy alive by paying the premium.

Beed v Beed, 207-954; 222 NW 442

Pledge of collateral — consideration. The naming of a surety as beneficiary in a life insurance policy, and the pledging of the policy in order to indemnify the said surety on signing a renewal note, are supported by a sufficient consideration.

Beed v Beed, 207-954; 222 NW 442

Removal of administrator — jurisdiction. Jurisdiction to remove an administrator is furnished by an application by the surety on the bond wherein he prays for an order (1) removing the administrator or (2) requiring the filing of a report and the making of distribution, when notice of the application is duly served on all interested parties and when no part of the prayer has been withdrawn of record. The filing of a report under a mutual arrangement between the parties does not exhaust the jurisdiction of the court.

In re Donlon, 201-1021; 206 NW 674

Unsigned notice to creditor to sue—effect. A written notice by a surety to a creditor re-

V RIGHTS AND REMEDIES—concluded
(b) GUARANTOR AND SURETY—concluded

quiring the creditor to sue on the obligation or to permit the surety to do so in the name of the creditor is valid and effective though wholly unsigned, (1) when it is addressed to the creditor, (2) when the context thereof suggests that it is being given by the surety, and (3) when the surety personally delivers the notice to the creditor.

Cleophas v Walker, 211-122; 233 NW 257

Income tax paid by surety. A surety whose bond was held for a compromise of corporate federal income taxes holds no lien upon the corporate assets, but has merely a right to be paid from assets held by receiver before payment to other claimants, and a receiver authorized to continue a business is not personally liable to such surety for diminishment of assets during receivership, tho such assets at the time of receiver's appointment would have been sufficient to pay the surety.

Miller Co. v Silvers Co., 227-1000; 289 NW 699

Judgment against vouchee. Judgment may be rendered not only against the defendant in an action, but against one who has been vouched into the action and who has assumed exclusive charge of the defense, and whose conduct of the defense has been such as to render him, in legal effect, a co-defendant.

Hoskins v Hotel, 203-1152; 211 NW 423; 65 ALR 1125

(c) CREDITOR

Remedies of creditors — pleading — prima facie sufficiency. A prima facie cause of action against guarantors is presented by a pleading based on an instrument which purports to reveal a principal debtor and a guaranty of the promise of such debtor and an allegation that the debtor has defaulted.

Foundation Press v Bechler, 211-1217; 233 NW 666

Application of partnership assets and assets of partners. Where partnership property and the individual property of all the partners are in the hands of the partnership receiver, a creditor whose claim is against the partnership because of a partnership transaction, and also against an individual partner because the partner has individually guaranteed the claim, may have the assets so marshaled that he will share in the partnership property along with the other partnership creditors, and then resort to the individual property of the guaranteeing partner to the exclusion of partnership creditors.

Simmons v Simmons, 215-654; 246 NW 597

11578 Judgment on counterclaim—affirmative relief.

Unquestioned establishment — proper procedure. A duly pleaded counterclaim which is unquestionably established by the evidence should not be submitted to the jury, but should be summarily allowed by the court; and in a personal injury action the court should direct the jury how to proceed if plaintiff's recovery be more than the amount of the counterclaim; likewise how to proceed if plaintiff's recovery be less than the amount of the counterclaim.

Forrest v Abbott, 219-664; 259 NW 238; 38 NCCA 315

11579 Judgment by agreement.

Consent by adversely interested party. One of two adversely interested defendants may not, as a matter of law, appear in court on behalf of such other defendant. It follows that a consent decree entered on such appearance may be set aside.

Graettinger Tile v Paine, 202-804; 211 NW 366

Consent decree — insufficient showing. The mere fact that a defendant in divorce proceedings makes, during the trial, certain concessions of fact, does not render the decree a consent decree.

Radle v Radle, 204-82; 214 NW 602

Consent decree — authority of attorney. While counsel cannot exceed their authority in making contract or settlement affecting their clients' rights, an attorney having full charge of client's action for mandatory injunction is authorized to consent to decree substantially complying with supreme court order.

Vaughan v Dist. Court, (NOR); 226 NW 49

Vacation—consent decree. Equity will not set aside a consent judgment for attorney fees for both parties in divorce proceedings, against the defeated party and his land, when no fraud is shown, and when the court had personal jurisdiction over both parties to the proceeding.

Coulter v Smith, 201-984; 206 NW 827

Written stipulation for decree—effect. The signing, by a plaintiff and defendant in an action for separate maintenance, of an agreement which specifies the amount and terms of such maintenance, and provides for the entry of decree in accordance therewith, and the filing of such stipulation in the action, constitute an appearance by the defendant to said action.

Kalde v Kalde, 207-121; 222 NW 351

Stipulation—enforceability. The court will enforce a duly filed stipulation by the parties to an action of forcible entry and detainer to the effect that if defendant fails to comply with specified conditions, judgment shall be entered against defendant for the possession of said premises.

Peak v Mulvaney, 215-1400; 245 NW 748

Judgment after death of defendant. Principle recognized that the court having taken a cause under advisement, and delayed decision until after the death of the defendant, may validly render judgment as of the date of the submission.

Chariton Bk. v Taylor, 213-1206; 240 NW 740

11581 Court acting as jury.

Discussion. See 22 ILR 609—Trial technique
Findings of court as jury verdict. See also under §11435
Jury findings, reviewability. See under §11429 (III)
Special interrogatories. See under §11513

Findings of court. The findings of the trial court, in a law action, under waiver of a jury, and on supporting but conflicting testimony, are conclusive on the appellate court.

Frum v Kueny, 201-327; 207 NW 372 (Maturing of crops)

Crail v Jones, 206-761; 221 NW 467 (Abandonment of homestead)

First N. Bank v McCartan, 206-1036; 220 NW 364 (Accommodation note—intention)

Staton v Vernon, 209-1123; 229 NW 763; 67 ALR 1200 (Exemptions)

Eilers v Frieling, 211-841; 234 NW 275 (Release of surety on note)

Barth Co. v Kelly, 211-1154; 235 NW 471 (Quality of eggs)

Miller v Hurburgh, 212-970; 235 NW 282 (Oral contract to operate hotel)

Jefferies v Prall, 215-763; 246 NW 816 (Oral contract for commission)

Law actions tried to court—when findings final on appeal. In law actions tried without a jury, supported court findings of fact have the same force and effect as like findings by the jury, and are consequently nonreviewable on appeal.

Maddy v Park, 220-899; 262 NW 796
Duke v Park, 220-889; 262 NW 799
Jones v Park, 220-894; 262 NW 797
Younkin v Bank, 226-343; 284 NW 151
Crouse v Cadwell, 226-1083; 285 NW 623

Findings of fact by court—conclusiveness. In an action at law tried to the court without a jury, the court's decision on disputed questions of fact has the same effect as jury verdict, and findings of fact may be set aside only if there is no substantial supporting evidence. In such cases the supreme court may not determine facts but merely decide what the court was warranted in finding them to be.

Federal Land Bank v Trust Co., 228- ; 290 NW 512

Weight given to findings. The finding of the lower court is a circumstance to be considered in dealing with questions of fact.

Matalone v Bank, 226-1031; 285 NW 648

Presumption as to evidence legally inadmissible. In a trial to the court, it will be presumed that testimony which is inadmissible as a matter of law was not considered by the court, tho actually admitted in evidence.

James v School Twp., 210-1059; 229 NW 750

Review of findings. On an appeal from a judgment granted by the lower court in an action tried without a jury, the evidence will not be weighed except for the purpose of determining whether the findings of fact are supported by the record.

Crouse v Cadwell, 226-1083; 285 NW 623

Conflicting testimony — scope of review. When the trial court, acting as a jury, finds, on conflicting testimony, that the truth lies with the defendant, the court, on appeal can review no further than to determine whether the judgment of the trial court has support in such testimony.

Macksburg Bank v Lillard, 206-950; 221 NW 505

Court findings—effect on trial de novo. In an equitable proceeding where there is conflict in evidence, the supreme court must give weight to findings of trial court altho case is tried de novo.

Horn v Ins. Co., 227-1045; 290 NW 8

Appeals—weight of court's findings. In the trial of an equity case where the credibility of the witnesses is in issue, great weight will be given to the findings of the trial court.

Panama Bank v Arkfeld, 228- ; 291 NW 182

Directed verdict — motion for — effect. The overruling of defendant's motion for a directed verdict at the close of plaintiff's evidence in a cause tried solely to the court is inconsequential when the final decision of the court is correct.

Pressley v Stone, 214-449; 239 NW 567

Jury — waiver — hostile motions for verdict. Hostile motions for a directed verdict, made by plaintiff and defendant at the close of all the evidence, do not, in and of themselves, constitute a waiver of the jury; otherwise, when such motions are followed by a stipulation of record, by the parties, "that the court may render a decision of said case during term time or vacation".

Bukowski v Sec. Assn., 221-416; 265 NW 132

Misconduct of attorney — finding by trial court. A finding of fact by the trial court on a motion for new trial that alleged misconduct on the part of an attorney did not occur is conclusive on appeal.

Kessel v Hunt, 215-117; 244 NW 714

Discretion and findings of court. An order setting aside the dismissal of an action for want of prosecution will be set aside by the appellate court only on a clear showing of abuse of discretion. In fact, supported legal

findings as a basis for such an order are conclusive on the appellate court.

Seiders v Adel Co., 218-612; 255 NW 656

Findings. The appellate court will not overrule a finding by the trial court that the claimant of an automobile did not know that the car was being used in the unlawful transportation of intoxicating liquors, if there is substantial testimony in the record supporting such finding.

State v Sedan, 209-791; 229 NW 173

Finding by court. A finding by the court on conflicting and supporting testimony, in a proceeding to set aside a judgment on a bail bond, that the surety had, at his own expense, caused the principal in the bond to be delivered to the sheriff, is not reviewable on appeal.

State v Robinson, 205-1055; 218 NW 918

Finding by court. A finding by the trial court on supporting testimony in an action tried to it that a nondrawee bank was not, and that the drawee bank was, negligent in cashing a check, is conclusive on the appellate court.

Bank of Pulaski v Bank, 210-817; 232 NW 124

Conclusiveness of findings. Whether the facts and circumstances attending the receipt by a creditor from a debtor of a check for an amount less than claimed by the creditor, and the cashing of the check by the creditor, constituted an accord and satisfaction, may be a question of fact, and the findings of the court thereon in a law action tried to the court, on conflicting and supporting testimony, is necessarily conclusive on the appellate court.

Barth Co. v Kelly, 211-1154; 235 NW 471

Finding by court—conclusiveness. The finding of the court in a trial to the court on supporting evidence on the issue whether an insured died "solely through external, violent, and accidental means" or from disease, is conclusive on the appellate court. And it is immaterial that the court determines its findings by sustaining a motion to dismiss at the close of all the evidence rather than by overruling such motion and later dismissing the action on its own motion.

Cherokee v Ins. Co., 215-1000; 247 NW 495

Supported findings of fact. On the issue whether the indebtedness of a municipal corporation exceeded the constitutional limit, the supported finding of the trial court that a certain indebtedness was created prior to the indebtedness in question, or that the indebtedness in question "did not precede" said other indebtedness, is not reviewable by the appellate court.

Trepp v School Dist., 213-944; 240 NW 247

Wholly inadequate evidence. In an equitable action to enforce against an estate "double" liability on bank stock, a finding and decree (based almost exclusively on the testimony of the record owner of said stock) that the deceased had actually owned said stock for some 30 years and was such owner at the time of his death, will (notwithstanding the deference accorded to the trial court in judging of the credibility of witnesses) be annulled on appeal as without adequate support in the evidence when the actions and conduct of said record owner during substantially all of said time in asserting exclusive ownership in himself, even after the death of the deceased, is wholly at war with his present testimony that he had never owned said stock and that the deceased had always owned it.

Andrew v Bank, 220-219; 261 NW 810

Eminent domain — award — conclusiveness. An award in condemnation proceedings is conclusive on the appellate court when it has support in the evidence and does not appear to be wholly unfair and unreasonable.

Wheatley v Fairfield (town), 213-1187; 240 NW 628

Paving assessments over 25 per cent—reduction. In an appeal by a city from a ruling by the trial court that an assessment for paving was more than 25 per cent of the value of the adjoining lot and from the resulting order reducing the assessment, evidence reviewed and held that the court's finding was sustained by the weight of the evidence.

Lee v Ames, 225-1061; 283 NW 427

Electric plant earnings — fact findings in trial to court—conclusive on appeal. Where an injunction wrongfully restrained and delayed, for 11 months, construction of a municipal light plant and in an action on the injunction bonds, tried without a jury, where the trial court had evidence to determine the plant's net earnings for first year of operation and there was sufficient evidence to support his findings that earnings during 11 months lost by delay would have been substantially same, damages in that amount for such period are not too speculative, remote, and uncertain, and such findings are conclusive on appeal.

Corning v Iowa-Neb. Co., 225-1380; 282 NW 791

Finding of fact in re suretyship. The finding of the court as to the amount of the liability of a surety on a bond, not based on a mathematical computation, but on a determination of disputed questions of fact, is conclusive on the appellate court.

Iowa Bank v Soppe, 215-1242; 247 NW 632

Special proceedings—findings. A finding of fact by the court, on supporting testimony, on a motion for judgment against an officer for

money in his hands, is conclusive on the appellate court.

Andresen v Andresen, 219-434; 258 NW 107

Finding equivalent to jury verdict—conclusiveness on appeal. In a law action tried to the court without a jury, its finding on the fact question as to whether a check was accepted for collection or as payment has the same effect as a verdict of the jury and cannot be disturbed on appeal if there is evidence to support it.

Hockert v Ins. Co., 224-789; 276 NW 422

Supported court findings — conclusiveness. Supported findings by the court of material facts, in a law action submitted to the court under a waiver of jury, are as conclusive as like findings by the jury. So held as to findings relative to fraud and misrepresentation in obtaining a policy of life insurance.

Bukowski v Security Assn., 221-416; 265 NW 132

Joint enterprise — accounting — oral agreement between attorney and promoter. An attorney who, in an action against a promoter for an accounting, alleges that he acted with the promoter to establish a corporation for conducting "sales contests", which corporation was later dissolved, and that the promoter alone then formed a similar second corporation from which by oral agreement the attorney was to share in the profits, properly has his petition for accounting dismissed, when he fails to establish the alleged oral agreement upon which his action was based.

Davies v Stayton, 226-79; 283 NW 436

Evidence supporting oral lease for year. In action for conversion by landlord against purchaser of tenant's buckwheat, the findings of trial court that tenant leased premises for one year rather than being a sharecropper held supported by evidence and conclusive on appeal.

Schaper v Farmers' Exch., (NOR); 239 NW 134

Divorce—appeal de novo—weight given decision of lower court. Altho a divorce action, being in equity, is triable de novo on appeal, yet the supreme court will give serious consideration to the decision of the lower court when there is a conflict in the testimony. Evidence reviewed and held to justify award of separate maintenance to the wife and to deny divorce to the husband.

Blew v Blew, 225-832; 282 NW 361

Waiver of dower interest — findings — when conclusive. A finding by the trial court on supporting testimony that a wife signed both the note and mortgage of her husband solely for the purpose of waiving her dower interest, and received no actual consideration herself, is conclusive on the appellate court.

Bates v Green, 219-136; 257 NW 198

Grounds presentable by appellee. When the lower court in an equity cause sustains plaintiff's action on one presented ground, but overrules all other presented grounds, the appellee on appeal may very properly argue the correctness of the overruled grounds.

Reason: The appellate court must affirm the decree of the lower court if it is sustainable on any ground properly presented in the lower court, irrespective of the findings of the lower court.

Wyatt v Manning, 217-929; 250 NW 141

Supported findings in probate. Supported findings of fact by the probate court have the force and effect of a verdict of a jury and will not be reviewed on appeal.

In re Fish, 220-1247; 264 NW 123
In re Fish, 220-1328; 264 NW 542

Findings of fact in probate. The findings of the probate court, on supporting testimony, as to the amount of the excess charges made by a guardian for the support and education of the ward, is conclusive on the appellate court.

In re Nolan, 216-903; 249 NW 648

Court findings as jury verdict. When jury trial is waived in action to terminate guardianship, facts found by court have same binding effect as verdict of jury.

In re Hawk, 227-232; 288 NW 114

Guardian—accounting—findings by court—conclusiveness. The hearing upon the report of a guardian is in probate, and the finding of facts of a probate judge in such case have force and effect of a jury verdict, and trial court in such case may properly exercise a degree of sound discretion in regard to the nature and extent of expenditures which may be properly approved.

McBurney v McBurney, (NOR); 210 NW 568

Findings in probate. A supported finding by the probate court that an administrator had failed to exercise ordinary care to preserve the funds of the estate is conclusive on the appellate court.

In re Foster, 218-1202; 256 NW 744

Findings in probate. The finding by the trial court, on supporting testimony, that a transfer of real property was made "in contemplation of death" will not be disturbed on appeal.

In re Mann, 219-597; 258 NW 904

Execution of will—findings of court. The supported findings of the court relative to the facts attending the formal execution of a will have the same force and effect as the verdict of a jury.

In re Droge, 216-331; 249 NW 209

Establishment of lost will. Proceedings to establish a lost will are within the jurisdiction

of the court to act without a jury, as first the court must determine whether the proof is sufficient to establish the terms of the lost instrument and, if the court finds it to be properly proved and established, then the matter stands as do all wills when offered for probate and, if contested, may be tried to a jury.

Goodale v Murray, 227-843; 289 NW 450

Court findings upheld. In proceedings to establish a lost will, the loss of the will and the search for it were proved by evidence that the will could not be found altho the home of the deceased and other places where the will might have been kept were thoroughly searched. The conclusion of the trial judge on the sufficiency of such evidence will not be disturbed unless discretion is abused.

Goodale v Murray, 227-843; 289 NW 450

Allowance of claims — conclusiveness. The allowance of a claim by the probate court on supporting testimony is conclusive on the appellate court, even tho the supporting testimony is not wholly satisfactory to the judicial mind.

Olson v Roberts, 218-410; 255 NW 461

Findings in re homestead. On an application by an executor for an order to sell real estate to pay debts, a finding by the court that certain land was not the homestead of the deceased is conclusive on appeal (1) unless such finding is without substantial support in the evidence, or (2) unless the court erroneously applied the law to conceded facts.

In re McClain, 220-638; 262 NW 666

Findings of fact in probate. A supported finding of fact by trustees that the beneficiary of a testamentary bequest had fulfilled the conditions imposed on the payment of said bequest is conclusive on the appellate court.

In re Sams, 219-374; 258 NW 682

Hearings in probate. Where the issue whether a trustee should be credited with a loss of trust funds was heard by the probate court without a jury (as a continuation of the probate proceedings out of which the trust arose), the holding of the court, granting such credit, will be sustained if the evidence pro and con would have presented a jury question had the hearing been before a jury.

In re Moylan, 219-624; 258 NW 766

11582 Judgments and orders entered.

Record entry necessary. Orders for publication of notice of hearings in probate must be entered of record.

In re Durham, 203-497; 211 NW 358

Competent evidence of judgment. As a general rule, a judgment must be entered of record in order to be of any validity, but for many purposes the court's decision is effective from the time it is actually pronounced, or when the judge writes in his calendar a statement of the decision, but there is no competent evidence of the rendition until the memorandum is entered in the court record and, after recording, the judgment may for some purposes relate back to the time when it was actually ordered.

Street v Stewart, 226-960; 285 NW 204

Calendar and record book. From a statute requiring that all judgments and orders must be entered in the record book, it may be inferred that the judge's calendar is in the nature of a memorandum book ordinarily used by the judge to guide the clerk in entering judgments and orders in the record book which is their final place of repose, and that the clerk's entry in the record book is the legal evidence of a judgment or order.

Street v Stewart, 226-960; 285 NW 204

Entry—surrender of notes as condition precedent. When a statute required that notes on which a judgment was based be delivered to the clerk of court before he entered the judgment on record, if a foreclosure of a trust deed given to secure notes was void for violation of the statute, it could not affect the validity of a previous court order appointing a receiver.

Sioux Falls Assn. v Henry Field Co., 226-874; 285 NW 155

Form and sufficiency between sureties. Judgment entry as to sureties reviewed, construed, and held proper.

School District v Sass, 220-1; 261 NW 30

Recitals accompanying decree — effect. A recital in a so-called judgment entry in real estate mortgage foreclosure that plaintiff "shall have a lien against all property kept on said premises" and that said lien shall be superior to a named chattel mortgage, when not carried into the decree which follows the recital, is no part of the decree, and is not binding on anyone, a fortiori when such recital finds no support in the pleadings or in the stipulation filed in the case.

Van Alstine v Hartnett, 210-999; 231 NW 448

Form of decree—nonassignment of error—no consideration on appeal. Form of decree, complained of in appellant's brief, will not be considered when not assigned as error.

Bredt v Franklin County, 227-1230; 290 NW 669

Extending time to file motion—journal entry valid. A statute requiring that an application for a new trial must be made within five days after the verdict is rendered unless the court grants an extension of time, contemplates orders which are only temporary and incidental to the case, and an order extending the time for such application was effective to extend

the time beyond the five-day limit, when it was entered on the judge's calendar before the five days were up, even tho not entered on the record book until seven days after judgment was rendered.

Street v Stewart, 226-960; 285 NW 204

Calendar memorandum—superseded by subsequent decree. Where trial judge made calendar memorandum of findings of fact which he did not sign, and the clerk's record thereof was not signed, the signing of the recorded entry of a subsequent decree was convincing proof that the subsequent decree and not the memorandum was the final decree.

Rance v Gaddis, 226-531; 284 NW 468

Moratorium—denial order cancels restraining order on sheriff. An order restraining the sheriff from issuing a deed, pending a hearing on a moratorium application for extension of period for redemption, is automatically dissolved when the application is denied, and a deed issued is valid when a nunc pro tunc order places the moratorium denial order on record as of a date prior to the issuance of deed.

Lincoln Bk. v Brown, 224-1256; 278 NW 294

Pleas—arbitrary right to withdraw. An accused under an indictment has an arbitrary right to withdraw a plea of guilty at any time before the oral sentence passed upon him has taken the form of a final judgment by entry in the record book of the court. This is true, irrespective of any other entries in the court records.

State v Wieland, 217-887; 251 NW 757

11582.1 Surrender of written obligations.

Atty. Gen. Opinion. See AG Op July 17, '39

Entry—surrender of note as condition precedent. The statutory direction to the clerk of the district court not to enter judgment on a promissory note, unless said note is first surrendered to him, will be presumed to have been complied with when the record shows the introduction of said note as an exhibit and that a transcript of the evidence was filed with said clerk.

Selby v McDonald, 219-823; 259 NW 485

Condition precedent to judgment entry. Evidence held to establish a surrender of notes to the clerk of the district court under the provisions of this section prior to the entry of judgment.

Grimes Bk. v McHarg, 224-644; 276 NW 781

Entry — surrender of notes as condition precedent. When a statute required that notes on which a judgment was based be delivered to the clerk of court before he entered the judgment on record, if a foreclosure of a trust deed given to secure notes was void for violation of the statute, it could not affect the validity of a previous court order appointing a receiver.

Sioux Falls Assn. v Henry Field Co., 226-874; 285 NW 155

Judgment on note—entry before surrender of note. The purpose of a statute providing that the clerk shall not enter upon the records any judgment based on a note unless the note is first delivered to the clerk, being to retire the instrument from circulation so that the maker and others will not be subjected to other suits, was accomplished altho a judgment was entered eight days before the note was surrendered. When two years elapsed before an action was brought to set aside the judgment because of noncompliance with the statute, and no defense to the note was shown, the action should be dismissed.

Jensen v Martinsen, 228- ; 291 NW 422

11583 Satisfaction of judgment.

Damages for failure to satisfy. Damages for failure to enter a record satisfaction of a paid judgment are properly denied when there is no evidence of such damages.

Taylor v Heiny, 210-1320; 232 NW 695

Irretrievable nullification of lien. The filing by an insolvent judgment defendant of his petition in bankruptcy, within four months following the entry of judgment, discharges the judgment (it not being based on fraud or willful injuries) and irretrievably nullifies an execution levy on property, whether the property be exempt or nonexempt. In other words, the judgment plaintiff may not thereafter proceed in equity in the state court and have his discharged judgment enforced against property set aside to the judgment defendant as exempt, even tho, were it not for the bankruptcy proceedings, plaintiff would be able to show that said property was not exempt from levy under plaintiff's particular judgment.

McMains v Cunningham, 214-300; 233 NW 129; 242 NW 106

11585 Discharge on motion.

Ruling on motion to set aside default. Where court entered default judgment on November 15, 1937, and overruled a motion to set aside the default on February 24, 1938, an appeal taken June 20, 1938, from the order overruling the motion was timely, since the appeal was not taken on the default judgment, but on the ruling on the motion, which was appealable.

Rayburn v Maher, 227-274; 288 NW 136

Motion to set aside default—errors in proving damages. Where appeal is taken from an order overruling a motion to set aside a default judgment, errors in the trial in determining damages are reviewable even tho no appeal is taken on the judgment itself, the situation being directly analogous to an appeal from an

order overruling a motion for a new trial based upon errors in the trial.

Rayburn v Maher, 227-274; 288 NW 136

11587 Default—when made and entered.

Discussion. See 24 ILR 146—Default—when entered

ANALYSIS

I DEFAULTS IN GENERAL
II DEFAULT IN PLEADING
III RELIEF AWARDED ON JUDGMENT BY DEFAULT

I DEFAULTS IN GENERAL

Default—definition. "Default" is a term signifying failure to appear for trial, as well as failure to answer.

Vaux v Hensal, 224-1055; 277 NW 718

Default as jury waiver. Failure to appear for trial is a waiver of the right to trial by jury and a consent to trial by the court.

Vaux v Hensal, 224-1055; 277 NW 718

Default no admission of cause of action. Principle reaffirmed that a default is not an admission of a valid cause of action where none is pleaded.

Neilan v Lytle Co., 223-987; 274 NW 103

Quiet title—equity—proof. Being in equity, a default judgment in a quiet title action must by statute be based upon both pleadings and testimony (§11592, C., '35).

Neilan v Lytle Co., 223-987; 274 NW 103

Setting aside default judgment—effect—failure to secure stay order. Fact that proceedings in district court could have been stayed pending appeal will not, on the ground that misfortune was avoidable, preclude setting aside a default judgment rendered pending appeal without customary notice between counsel.

Lunt v Van Gorden, 225-1120; 281 NW 743

Notice of taking default—attorneys' custom. Defendants may have a default judgment set aside, where two reputable attorneys, one of which resided in the county where the action was brought, were employed, and where such attorneys rely on a practice among the attorneys in that county to inform opposing counsel of intention to take default, and where a default without notice pending appeal would not have been anticipated.

Lunt v Van Gorden, 225-1120; 281 NW 743

Setting aside default—"practice of court" includes practices of attorneys. Expression "practice of this court" fairly includes more than acts of presiding judge and means practices characteristic of the proceedings when attorneys appear for litigants therein, including practice of attorneys of informing opposing counsel of intention to take default, and evidence of such practice of attorneys was admissible under a petition to set aside a default judgment, altho petition alleged practice of this court.

Lunt v Van Gorden, 225-1120; 281 NW 743

Default judgment—custom of giving notice—setting aside for failure. Practice of attorneys of informing opposing counsel of intention to take default is not repugnant nor void under this section, providing for default judgment upon failure to file or amend pleadings within required time, and such practice may be considered under petition to set aside default judgment rendered without such notice.

Lunt v Van Gorden, 225-1120; 281 NW 743

II DEFAULT IN PLEADING

Amendment after default. A personal judgment may not be validly entered on an amendment filed after default, and of which amendment the defendant has no notice.

Sutton v Rhodes, 205-227; 217 NW 626

Judgment by default—improper entry when cause at issue. When an unquestioned answer is on file, self-evidently no default can be properly entered for want of a plea, and no default can thereafter be properly entered for want of appearance until the case is regularly assigned for trial or comes on for hearing in accordance with the rules of the court.

La Forge v Cooter, 220-1258; 264 NW 268

III RELIEF AWARDED ON JUDGMENT BY DEFAULT

When fraud no defense. When fraud in obtaining a judgment is not available to have the judgment set aside (because of the lapse of time), such fraud necessarily ceases to be a defense to an auxiliary proceeding to enforce the judgment.

Wade v Swartzendruber, 206-637; 220 NW 67

Setting aside judgment—discretion of court. Refusals to set aside defaults will not be interfered with on appeal in the absence of a showing of abuse of discretion on the part of the court. So held where the entry of default, in an action for partition, and the refusal to set the default aside, appear to have been harmless to defendant.

Bleakley v Long, 222-76; 268 NW 152

Quieting title—no decree on unsworn evidence—burden. In an action to quiet title against paving assessment certificate holders, an unsworn petition supported by unsworn written statements showing, as contention for invalidity of assessments, the nonconformity of plat to statutory requirements, is not the sufficient evidence as in equity will support a judgment by default and, the burden of proof thereof being on the plaintiff, the petition was properly dismissed.

Neilan v Lytle Co., 223-987; 274 NW 103

11588 Failure to appear.

Equivocal wording of original notice. An original notice will not justify a personal judgment on default when it is so drawn that a person would naturally and ordinarily conclude that the relief demanded was simply to establish the mortgage sued on as a lien paramount to the defendant's junior lien; much less would it justify such personal judgment if intentionally drawn to mislead.

Sutton v Rhodes, 205-227; 217 NW 626

Partition — adopting pleading stating valid defense—default set aside. A default order unaccompanied by any judgment may be validly set aside at a subsequent term. So held in a partition suit where defendant, an 84-year-old mother holding a life estate, after defaulting, adopted the answer and cross-petition of the defendant children, which pleadings, if true, would effectually prevent partition—a sound reason for setting aside the default.

Redding v Redding, 226-327; 284 NW 167

11589 Setting aside default.

ANALYSIS

I NATURE AND SCOPE OF REMEDY

Inherent power of court. The district court has inherent power to set aside a judgment during the term at which it was rendered on proof that the judgment was obtained by fraud, extrinsic and collateral to the judgment, even tho there was no default.

Cedar Rapids Co. v Bowen, 211-1207; 233 NW 495

Setting aside by court sua sponte. A judge of the municipal court has no jurisdiction to set aside, on his own motion, a duly rendered and journalized order of another judge of the same court sustaining a motion to set aside a default; and equally without jurisdiction, thereupon, to overrule said motion.

Denman v Sawyer, 211-56; 232 NW 819

Errors in proving damages—reviewability. Where appeal is taken from an order overruling a motion to set aside a default judgment, errors in the trial in determining damages are reviewable even tho no appeal is taken on the judgment itself, the situation being directly analogous to an appeal from an order overruling a motion for a new trial based upon errors in the trial.

Rayburn v Maher, 227-274; 288 NW 136

Collateral attack—irregular petition for appointment of guardian. Irregularities in the form of a petition for the appointment of a guardian, while perhaps subject to direct attack, were not sufficient to justify a collateral attack in an action to set aside a default judgment obtained by the guardian.

Jensen v Martinsen, 228- ; 291 NW 422

Peremptory cancellation of judgment. Principle reaffirmed that a default judgment against a party over whom the court has no jurisdiction may be peremptorily set aside.

Dewell v Suddick, 211-1352; 232 NW 118

Personal jurisdiction assumed when unchallenged. Where the jurisdiction of the person is not challenged in an action to set aside a default judgment, it must be assumed that the court had such jurisdiction and, if it also had jurisdiction of the subject matter, it was warranted in entering judgment.

Jensen v Martinsen, 228- ; 291 NW 422

Nonjurisdiction over surety. The court acquires no jurisdiction of a surety on a bond to discharge an attachment when the bond is executed after the sheriff has levied the writ and made return thereon to the clerk, and the bond is not approved by said clerk, as required by statute. It follows that a default judgment against the surety, under such circumstances, is properly set aside, on timely motion.

Brenton v Lewiston, 204-892; 216 NW 6

Default against county treasurer. A default judgment entered against a county treasurer who had been substituted as defendant in lieu of a former treasurer, in an action to enjoin the sale of land for taxes, must be set aside when the substitution is made without the service of original notice upon him, and without knowledge on his part, even tho the former treasurer had been negligent in not entering an appearance; and especially is this true when the application to set aside is timely, and accompanied by an affidavit of merit and an apparently good answer.

Dewell v Suddick, 211-1352; 232 NW 118

II DISCRETION OF COURT

Trial on merits preferred. The law favors trial on merits, and the trial court exercises considerable discretion in setting aside default judgments so as to give preference to trial of causes on merits.

Lemley v Hopson, (NOR); 232 NW 811

Discretion of court. Ordinarily the appellate court will not interfere with the action of the trial court in refusing to set aside a default.

Standard v Marvill, 201-614; 206 NW 37

Discretion of court. The action of the municipal court, on timely motion, in vacating a judgment for irregularity in obtaining the

II DISCRETION OF COURT—concluded

judgment will not be disturbed on appeal in the absence of a clear showing of abuse on the part of the court.

Mitchell v Brennan, 213-1375; 241 NW 408

Bank receivership classification. The court in bank receivership proceedings has discretionary power to set aside an order relative to the classification of claims as general or preferential.

Leach v Bank, 207-1254; 219 NW 496; 224 NW 583

Local customs and practices. In passing upon a motion to set aside a default judgment, the court may give due consideration to the customs and practices of the local bar relative to pending actions.

Chandler Co. v Sinaiko, 201-791; 208 NW 323

Discretion of court. The action of the trial court in setting aside a default judgment and granting a new trial will not be disturbed on appeal when, on the record, the trial court could find that defendant apparently had a good defense, honestly intended to present such defense, and justifiably supposed he had arranged for such presentation.

Tate v Delli, 222-635; 269 NW 871

Setting aside default. Refusals to set aside defaults will not be interfered with on appeal in the absence of a showing of abuse of discretion on the part of the court. So held where the entry of default, in an action for partition, and the refusal to set the default aside, appear to have been harmless to defendant.

Bleakley v Long, 222-76; 268 NW 152

Nonservice of notice—disregarding bailiff's return of service—receivability. Where the defendant and his witnesses testify that he was out of the state on the day of purported service of original notice, the discretion of the trial court in setting aside a default will not be reviewed without a showing of abuse, even tho a court bailiff testified that he obtained personal service on that day.

Brunswick Co. v Dillon, 226-244; 283 NW 872

Affirmative abuse of discretion. The court abuses its discretion in refusing to set aside a calendar entry ordering judgment for plaintiff because (owing to a misunderstanding between counsel) defendant did not, after the issues were all made up, appear on the day set for trial.

Rounds v Butler, 208-1391; 227 NW 417

III TIMELY APPLICATION

Setting aside default judgment—time limit five days. A motion to set aside a default judgment in the district court must be made within five days after rendition of the judgment, unless the time is extended by the court.

Vaux v Hensal, 224-1055; 277 NW 718

Ruling on motion — timeliness of appeal. Where court entered default judgment on November 15, 1937, and overruled a motion to set aside the default on February 24, 1938, an appeal taken June 20, 1938, from the order overruling the motion was timely, since the appeal was not taken on the default judgment, but on the ruling on the motion, which was appealable.

Rayburn v Maher, 227-274; 288 NW 136

Fatal delay. A defendant is very properly denied a new trial when she had knowledge of the entry of the default judgment almost simultaneously with its entry, and negligently delayed filing her petition for a new trial until after the lapse of nine months and the passing of three terms of court, and especially when her petition presents no fact coming to her knowledge since the entry of the judgment complained of.

Anderson v Anderson, 209-1143; 229 NW 694

Right to set aside after term. An order declaring that defendant is in default for want of appearance—in other words, a "simple" or "naked" default unaccompanied by any judgment on the claim sued on—may be validly set aside at a subsequent term on proper showing.

Weinhart v Meyer, 215-1317; 247 NW 811

Adopting pleading stating valid defense—default against aged defendant. A default order unaccompanied by any judgment may be validly set aside at a subsequent term. So held in a partition suit where defendant, an 84-year-old mother holding a life estate, after defaulting, adopted the answer and cross-petition of the defendant children, which pleadings, if true, would effectually prevent partition—a sound reason for setting aside the default.

Redding v Redding, 226-327; 284 NW 167

Fatal delay. A delay of over five months in instituting proceedings to set aside a default judgment in municipal court bars relief.

Harding v Quinlan, 209-1190; 229 NW 672

Municipal courts—defaults—nonapplicable statutes. The statute requiring applications to set aside defaults in the district court, to be made "at the term" in which default is entered, is not applicable to defaults in municipal courts because said latter courts have no terms.

La Forge v Cooter, 220-1258; 264 NW 268

IV EXCUSE FOR DEFAULT

Inexcusable default. A party to a divorce proceeding who knows that an attorney consulted by him will not appear unless paid a

retainer fee, and who makes no such payment, will not be heard to assert that the resulting default worked a fraud upon him.

McNary v McNary, 206-942; 221 NW 580

Effect of neglect. In the absence of culpable neglect, a party is entitled to set aside a default on "a prima facie showing".

Hatt v McCurdy, 223-974; 274 NW 72

Unexpected withdrawal of appearance. The sudden and unexpected withdrawal by an attorney of his appearance in a case, attended by no fault or negligence on the part of the client, necessitates a setting aside, on proper showing, of the resulting default.

Ferris v Wulf, 216-289; 249 NW 156

Sickness of counsel. Default judgment in mortgage foreclosure may be set aside on a showing that it was entered without fault on the part of defendant but solely because of the sickness of his attorney.

Equitable v McNamara, 220-297; 259 NW 231; 262 NW 466

Showing—day in court. Where a case is set for trial and counsel tho notified by letter is out of the state when the case is called for trial and a default is entered, the court erred in refusing to set aside the default since reputable counsel were employed, the parties themselves were not negligent, and they should "have had their day in court".

Hatt v McCurdy, 223-974; 274 NW 72

Setting aside default—no rule obtainable. In setting aside a default judgment, each case must rest upon its own facts.

Hatt v McCurdy, 223-974; 274 NW 72

Oral agreements. Oral agreements between litigants or their attorneys when not brought to the attention of the court are entitled to little favor on hearings to set aside default judgments.

Standard Oil v Marvill, 201-614; 206 NW 37

Notice of taking default—attorneys' custom. Defendants may have a default judgment set aside where two reputable attorneys, one of which resided in the county where the action was brought, were employed, and where such attorneys rely on a practice among the attorneys in that county to inform opposing counsel of intention to take default, and where a default without notice pending appeal would not have been anticipated.

Lunt v Van Gorden, 225-1120; 281 NW 743

"Practice of court" includes practices of attorneys. Expression "practice of this court" fairly includes more than acts of presiding judge and means practices characteristic of the proceedings when attorneys appear for litigants therein, including practice of attorneys of informing opposing counsel of intention to take default, and evidence of such practice of attorneys was admissible under a petition to set aside a default judgment, altho petition alleged practice of this court.

Lunt v Van Gorden, 225-1120; 281 NW 743

Inexcusable negligence. The refusal of the trial court, in divorce proceedings, to set aside a default decree, resulting from the inexcusable negligence of the applicant, will not be interfered with.

Bossenberger v Bossenberger, 210-825; 229 NW 833

Double recovery on one claim. Even where defendant failed to plead after being thrice ordered to do so after his special appearance was overruled, and tho he had not excused his default or stayed the proceedings, defendant seeking to set aside the default was entitled to relief when the record showed that plaintiff was allowed to recover two commissions on the same 2,000 cases of 7up under duplicate averments in his petition.

Rayburn v Maher, 227-274; 288 NW 136

V MERITORIOUS CAUSE OF ACTION OR DEFENSE

Affidavit of merit necessary. Defaults will not be set aside in the absence of an affidavit of merit.

Bates v Ely Bank, 219-1356; 261 NW 614

Affidavit of merit. Defaults in municipal courts may not be set aside in the absence of an affidavit which specifically sets forth the facts relied on as a defense to the action sued on.

Boody v Sawyer, 201-496; 207 NW 589

Belated motion — absence of affidavit of merit. Judgments by default in municipal courts, after proper service, may not be set aside in the absence of an affidavit of merit, nor may such judgments be set aside on a motion filed more than ten days after the default is entered, nor are such defects remedied by renewing the motion, after the ruling of the court, with an affidavit of merit.

Borden v Voegtlin, 215-882; 245 NW 331

When affidavit of merit unnecessary. A default may be legally set aside tho the mover therefor files no affidavit of merit, when the court, in entering the default, stated that he would set aside the default if a motion so asking be filed, and when the applicant for the default then affirmatively acquiesced in such purpose of the court.

Wagoner v Ring, 213-1123; 240 NW 634

Insufficient showing. A default judgment will not be set aside on a motion and affidavit of merit which assert that the applicant will plead a specified defense when certain matters

V MERITORIOUS CAUSE OF ACTION OR DEFENSE—concluded

then pending on appeal in the supreme court have been finally determined.

Wade v Swartzendruber, 206-637; 220 NW 67

Falsity of testimony. Motion to vacate a judgment on the ground that the testimony on which the judgment was rendered was false is properly overruled.

Genco v Mfg. Co., 203-1390; 214 NW 545

Setting aside because of unauthorized amendment. A default judgment is very properly set aside on the ground that plaintiff, after the entry of default, amended his pleadings by increasing the amount of his claim, and took judgment on such amended pleadings.

Chandler Co. v Sinaiko, 201-791; 208 NW 323
See Sutton v Rhodes, 205-227; 217 NW 626

VI PLEADING ISSUABLY AND FORTHWITH

No annotations in this volume

VII TERMS

Nonappearance—trial to court. Where an action on a promissory note had been assigned for trial, continued to the next day because of defendant's nonappearance for trial, and at such time called for trial a second time with defendant still not appearing until after the jury panel had been dismissed, a default having been entered, and plaintiff being allowed to prove up his case to the court, held on defendant's belated appearance and demand for jury trial, an offer by the court to require plaintiff to reintroduce his evidence but requiring a trial to the court without a jury, otherwise, permitting default and judgment thereon to stand, was not error.

Vaux v Hensal, 224-1055; 277 NW 718

VIII REVIEW ON APPEAL

Annulment of marriage—insanity. Evidence reviewed and held sufficient to authorize default decree annulling marriage on ground of insanity at time of marriage.

Kurtz v Kurtz, 228- ; 290 NW 686

Order setting aside unappealable. An order setting aside a default judgment is inherently unappealable.

Barber v Shattuck, 207-842; 223 NW 864
Baker v Ry. Exp., 207-1350; 224 NW 513
Welty v Ins. Assn., 211-1135; 235 NW 80
Wagoner v Ring, 213-1123; 240 NW 634

Double recovery on one claim. Even where defendant failed to plead after being thrice ordered to do so after his special appearance was overruled, and tho he had not excused his default or stayed the proceedings, defendant seeking to set aside the default was entitled to relief when the record showed that plaintiff was allowed to recover two commissions on the same 2,000 cases of 7up under duplicate averments in his petition.

Rayburn v Maher, 227-274; 288 NW 136

Foreign judicial records—improper certification first raised on appeal. Admission of improperly certified judicial records of Texas and Michigan bearing on issue of defendant's sanity in trial of default action to annul marriage is not ground for reversal of court's action in refusing to set aside the default annulment when lower court was not given opportunity to pass upon the competency of the records. The rule is, that a party is not to be surprised on appeal by new objections and issues, nor as to defects within his power to remedy had he been advised in the proper time and manner.

Kurtz v Kurtz, 228- ; 290 NW 686

11590 Amount of judgment—how determined.

Amount confined to averments of petition. When a defendant defaults, he is still protected by the law, and plaintiff's recovery must be confined and responsive to the averments in his petition.

Rayburn v Maher, 227-274; 288 NW 136

Errors in proving damages—reviewability. Where appeal is taken from an order overruling a motion to set aside a default judgment, errors in the trial in determining damages are reviewable even tho no appeal is taken on the judgment itself, the situation being directly analogous to an appeal from an order overruling a motion for a new trial based upon errors in the trial.

Rayburn v Maher, 227-274; 288 NW 136

11592 Default in equitable proceeding.

Relief in default cases. See under §11587

Equivocal wording of original notice. An original notice will not justify a personal judgment on default when it is so drawn that a person would naturally and ordinarily conclude that the relief demanded was simply to establish the mortgage sued on as a lien paramount to the defendant's junior lien; much less would it justify such personal judgment if intentionally drawn to mislead.

Sutton v Rhodes, 205-227; 217 NW 626

Quieting title—proof. Being in equity, a default judgment in a quiet title action must by statute be based upon both pleadings and testimony.

Neilan v Lytle Co., 223-987; 274 NW 103

Quieting title—insufficiency of evidence—burden. In an action to quiet title against paving assessment certificate holders, an unsworn petition supported by unsworn written statements showing, as contention for invalidity of assessments, the nonconformity of plat

to statutory requirements, is not the sufficient evidence as in equity will support a judgment by default and, the burden of proof thereof being on the plaintiff, the petition was properly dismissed.

Neilan v Lytle Co., 223-987; 274 NW 103

11593 Setting aside, if on notice by publication.

Estoppel to question submission of issue. A claimant in probate who advantages himself of the very liberal rules of pleading recognized in the probate court, and who files a claim which, if established, will justify a recovery on the basis of either an express contract or implied contract, may not complain that the court submitted to the jury the issue of express contract, especially when the verdict was in his favor.

Wilson v Else, 204-857; 216 NW 33

Nonservice of notice—disregarding bailiff's return of service—receivability. Where the defendant and his witnesses testify that he was out of the state on the day of purported service of original notice, the discretion of the trial court in setting aside a default will not be reviewed without a showing of abuse, even tho a court bailiff testified that he obtained personal service on that day.

Brunswick Co. v Dillon, 226-244; 283 NW 872

11595 New trial after judgment, on publication.

Nonapplicability of statute. The statutory provision for a new trial for a defaulting defendant served by publication only does not apply to divorce proceedings.

Girdey v Girdey, 213-1; 238 NW 432

Minor served by publication only. A nonappearing, nonresident minor, defendant in partition, and served by due publication only, is entitled to a new trial on timely and sufficient application therefor, even tho, on the original trial, a guardian ad litem was duly appointed for him, and the issue of his interest in the property was fully adjudicated.

Clark v Robinson, 206-712; 221 NW 217

Computation of period. The two years within which a nonresident, nonappearing defendant served by publication may appear and have an action in partition retried, commences to run from the date of the judgment which confirms the partition and apportions the costs, and not from the date when the court approves the referee's report of distribution.

Tracy v McLaughlin, 207-793; 223 NW 475

Decree adjudging superiority of second mortgage. A decree, rendered on service by publication in the foreclosure of a second mortgage, adjudging that said second mortgage is senior and superior to a first mortgage, in accordance with a definite pleading and prayer to said effect based on a good faith but mistaken belief that said first mortgage had been paid, is binding and conclusive on the holder of said first mortgage, and may not be collaterally assailed by said first mortgagee in an action to foreclose his mortgage. (It appears that said first mortgagee had allowed the time to elapse in which to attack said decree under §11595, C., '27.)

Lyster v Brown, 210-317; 228 NW 3

Fraudulent decree — new trial. An unappealed decree of a court of competent jurisdiction of a sister state, granting separate maintenance to a wife on the ground of desertion, and dismissing the husband's cross-petition for divorce on the same ground, constitutes a final adjudication that the husband was not entitled to a divorce on any ground (the laws of the two states being the same), and is binding on the courts of this state, and a decree of divorce subsequently obtained in this state by the husband on service by publication and on the ground of desertion, and without revealing the foreign decree, will be deemed fraudulent and will be set aside on timely petition by the wife and a new trial granted on her prayer.

Bowen v Bowen, 219-550; 258 NW 882

11596 Judgment on retrial.

Default for nonappearance—trial to court. Where an action on a promissory note had been assigned for trial, continued to the next day because of defendant's nonappearance for trial, and at such time called for trial a second time with defendant still not appearing until after the jury panel had been dismissed, a default having been entered, and plaintiff being allowed to prove up his case to the court, held on defendant's belated appearance and demand for jury trial, an offer by the court to require plaintiff to reintroduce his evidence but requiring a trial to the court without a jury, otherwise, permitting default and judgment thereon to stand, was not error.

Vaux v Hensal, 224-1055; 277 NW 718

11600 Judgment on publication service.

Garnishment, in rem judgments. See under §12169

Judgment in rem as basis for creditor's bill. A judgment in rem against the real estate of a nonresident furnishes sufficient basis for the institution of an action in the nature of a creditor's bill to set aside a fraudulent transfer of the property and to subject the property to the payment of the judgment.

Porter v Wingert, 200-1371; 206 NW 295

Judgment in rem. An in rem judgment cannot affect personal property in the possession of a nonresident who is not personally served in Iowa and who is located in another state.

McGaffin v Helmts, 210-108; 230 NW 532

Garnishment—proceedings to support or enforce—judgment in rem. In an action aided by

attachment, the entry, on service on defendant by publication, of a judgment in rem against property of the defendant in the hands of a garnishee, does not work a merger in said judgment of the obligation sued on, and thereby deprive the holder of said obligation of the right to proceed against defendant, at a later time, for the recovery of the balance due on said obligation,—if there be such balance.

Strand v Halverson, 220-1276; 264 NW 266; 103 ALR 835

Deceased partner and surviving partners—accounting. Where an accounting proceeding instituted by the widow of a deceased partner, in order to determine her dower interest in the partnership property, is tried on the mutual theory that her interest, when determined, should be impressed as a trust on the entire partnership property, a judgment in rem against the partnership property should be entered, and not a personal judgment against the surviving partners.

Fleming v Fleming, 211-1251; 230 NW 359

Mortgage forclosure — deficiency judgment in rem. A receiver may, on a proper showing, be appointed to collect pledged rents, and thereby discharge a deficiency judgment, whether the deficiency arises on a judgment in personam or in rem.

Inter-State Assn. v Nichols, 213-12; 238 NW 435

Foreclosure decree—construction — application of rents. A foreclosure decree which covers a first and second mortgage, and which is in rem only, and which appoints a receiver, with direction to pay the final balance of rents "on deficiency judgment", entitles the second mortgagee to such final balance of rents in preference to the then owner of the land, the first mortgagee being fully satisfied by the foreclosure sale.

Union Bank v Lyons, 206-441; 220 NW 43

Foreclosure action in rem—state court—not stayed by bankruptcy proceedings. Where mortgagees on foreclosure did not ask personal judgment, but only a judgment in rem, and trustee in bankruptcy for mortgagors had secured an order releasing and discharging the real estate as assets in bankruptcy matter, state court was justified in proceeding with foreclosure and in not staying proceedings until adjudication of mortgagors as bankrupts, bankruptcy act, §11 [11 USC, §29], contemplating only suits in personam and from which a discharge in bankruptcy would be a release.

Mayer v Imig, (NOR); 227 NW 328

11601 Personal judgment—when authorized.

Personal judgment—insufficient prayer. A personal judgment without a specific prayer therefor is erroneous, and a prayer for "other and further relief" is not such prayer.

Richardson v Short, 201-561; 207 NW 610

Nature and essentials—nonparty to action. Personal judgment may not be rendered against one who is not a party defendant.

Tracey v Judy, 202-646; 210 NW 793

Personal judgment unallowable. A nonresident minor may, in a proper case, be made a party to litigation in this state, by service in this state on the foreign guardian, but such service will not confer jurisdiction on the court to enter a personal judgment against the minor.

Irwin v Bank, 218-474; 255 NW 670

Service outside state—effect. Jurisdiction in personam of an Iowa corporation is constitutionally obtained by proper service of a proper original notice in a foreign state on one of the last known or acting officers of the corporation, as shown by the last statutory annual report of the corporation on file with the secretary of state of this state.

Bennett v Coal Co., 201-770; 208 NW 519

Nonpermissible personal judgment on foreign service. A corporation organized under federal law, with its principal place of business or domicile in a foreign state, does not become a "resident" of this state by doing business in this state. It follows that service outside this state of an original notice on the corporation, it having no officer or agent in this state, does not authorize the entry in this state of a personal judgment against the corporation.

Fisher & Van Gilder v Bank, 210-531; 231 NW 671; 69 ALR 1340

11602 Liens of judgments.

Discussion. See 13 ILR 203—Lien of federal court judgments

Atty. Gen. Opinion. See AG Op Aug. 12, '39

ANALYSIS

Judgment creditors as nonpurchasers. See under §10105 (III), Vol I

Lien of judgment on homestead. See under §10155

I LIEN IN GENERAL

Displacement of liens. Railway companies which knowingly permit the receiver of an insolvent railway to collect interline freight charges may not, as intervenors in an action to foreclose a mortgage on the receiver's road, have their claims established as prior to judg-

ment liens on the naked showing that said freight charges were used by the receiver in operating his railway.

Continental Bk. v Railway, 202-579; 210 NW 787; 50 ALR 139

Junior mortgagee—loss of rights. A junior mortgagee who makes no redemption from the sale under senior foreclosure to which he and the common mortgagor were parties may not, after the sale under such senior decree, obtain a judgment on his junior mortgage note and enforce it against the land in the hands of the mortgagor's grantee who has redeemed, or in the hands of a party who claims under said grantee.

Stiles v Bailey, 205-1385; 219 NW 537

Superintendent of banking as receiver—extent of lien. A judgment against the superintendent of banking as receiver of a particular bank becomes a lien only on land held for that bank in the county wherein the judgment is rendered or to which transcripted and does not become a lien on land held as receiver of some other bank.

Bates v Nichols, 223-878; 274 NW 32

Guardian and ward—disposing of solvent estate—not intended by statute. The statutes providing for guardians for property of incompetents do not contemplate disposition of ward's assets, except in instances where ward's estate is insolvent, or probably will be insolvent. The statutes intend that the business of the ward shall be conducted by a guardian instead of by the ward himself.

In re Simpson, 225-1194; 282 NW 283; 119 ALR 1208

II COMMENCEMENT OF LIEN

Effective from recorded date. A judgment lien is effective from the recorded date thereof, not from the date when the court, in some subsequent proceedings, has occasion to, and does, confirm said lien.

Kramer v Hofmann, 218-1269; 257 NW 361

When lien effective. A decree which establishes in plaintiff a lien on real estate "subject to the payment" of a named claim, and which provides for a sale of the land subject to said claim, cannot properly be construed as requiring plaintiff to pay and discharge said claim as a condition precedent to the attaching of plaintiff's lien.

Farber v Ritchie, 212-1396; 238 NW 436

Levy under invalid attachment—subsequent personal judgment—effect. While plaintiff obtains no lien on realty by virtue of a levy under an invalid attachment, yet, if he obtains personal judgment on the claim sued on, he will, from the entry of such judgment, have a lien notwithstanding the futility of the attachment proceedings.

Andrew v Miller, 221-316; 263 NW 845

III DURATION OF LIEN

Voluntary payment by stranger. One who, solely on his own volition, intentionally pays and discharges a judgment as to which he is a legal stranger, may not (1) have the lien of the judgment plaintiff re-established on land and be subrogated to the rights of said lien, nor (2) may he be given a personal judgment against the judgment defendant who was benefited by such voluntary payment and discharge.

Wragg v Wragg, 208-939; 226 NW 99; 64 ALR 1292

Four months liens. A judgment lien is in no manner displaced or affected by bankruptcy proceedings instituted by the judgment defendant more than four months after the lien attached.

Kramer v Hofmann, 218-1269; 257 NW 361

Irrevocable termination. A judgment rendered on May 28, 1926, in favor of a state bank, and later assigned by the receiver of said bank, absolutely ceases to exist on January 1, 1934, for any purpose whatsoever, except as a counterclaim, unless, prior to said latter date, the holder of said judgment and the judgment debtor file in said cause a written stipulation continuing the life of said judgment. (§11033-e1, C., '35 [§11033.1, C., '39])

Johnson v Keir, 220-69; 261 NW 792

IV PROPERTY OR INTEREST AFFECTED

Judgment is debt—action thereon is ex contractu. A judgment procured upon a judgment creates a lien of the same force and effect upon the real estate of the judgment debtor as does any other judgment of the district court.

Chader v Wilkins, 226-417; 284 NW 183

Lien on real property—attaches by operation of law. A judgment on a judgment is a lien on the real property of the debtor for ten years and where debtor's father died, leaving real estate to the debtor-son's wife, who then in turn died intestate, the lien attaches to the debtor's one-third interest therein, even tho he quitclaimed his interest to his daughter within ten days after his wife's death and before execution on the judgment issued.

Chader v Wilkins, 226-417; 284 NW 183

Judgment creditor of devisee. A demurrer to objections to the probate of a will should have been overruled when it admitted as facts that the contestant held judgments against the devisee who was a son and heir of the decedent who died seized of real estate, that the judgments were liens against any real estate the son would inherit as heir, and that the decedent was of unsound mind when the will was made, as, if the decedent were incompetent, the will was void and he died intestate. So the title to the son's share in the real estate vested at the father's death, and,

IV PROPERTY OR INTEREST AFFECTED—concluded

at the same instant, the judgments became liens on his share of the real estate.

In re Duffy, 228- ; 292 NW 165

Judgment creditor of heir. Judgments held against a son and heir of the decedent and recorded where real estate owned by the decedent was located became liens upon the real estate at the time the title thereto vested in the son, and were a beneficial interest entitling the creditor to contest the probate of a will which would deprive him of that interest.

In re Duffy, 228- ; 292 NW 165

Contest of will by judgment creditor. The creditor of an heir who holds a judgment against him which would be a lien upon any real estate which he would inherit from an ancestor has an interest which entitles him to contest the ancestor's will.

In re Duffy, 228- ; 292 NW 165

Sale—motion to set aside by stranger to proceeding. The owner of land which has been levied upon and sold under execution as the property of the judgment defendant on the theory that the judgment became a lien on the land before said owner acquired the land may maintain a motion to set aside the sale on the ground that said judgment was not, and never had been, a lien on the land. (§11734, C., '27)

Dorsey v Bentzinger, 209-883; 226 NW 52

Mortgage foreclosure—decree fixing lien on other assets in different court. Court may authorize a mortgagee's foreclosure action against the receiver in a county where the property is located, tho different from county where receivership is pending and such court, after hearing the foreclosure proceeding, has the right, where such relief is proper, not only to foreclose but to impose a lien for a deficiency judgment on the other receivership assets in the other court.

Klages v Freier, 225-586; 281 NW 145

General and partnership creditors. The equity of partnership creditors is superior to the lien of a judgment against an individual partner.

Lefebure v Lefebure Sons, 202-1053; 208 NW 853

Equitable conversion precluding lien. A judgment is not a lien on real estate which has been equitably converted by a will into personalty prior to the date of the judgment.

Dever v Turner, 200-926; 205 NW 755

Reformation of mortgage against judgment creditors. A mortgage may be so reformed as to correct the mutual mistake of mortgagor and mortgagee in omitting certain lands from the mortgage, even against a judgment creditor of the mortgagor who became such since the mortgage was executed.

Davis v Bunnell, 207-1181; 225 NW 6

Quasi-judgment subsequent to death of party. An order growing out of a proceeding instituted after the death of a party, and declaring a contingent liability against the estate of the deceased party, is not a lien on the real estate of which the deceased died seized.

In re Hager, 212-851; 235 NW 563

Divorce—alimony—nonlienable decree for money. A decree (in divorce proceedings) which, inter alia, simply "orders" defendant to pay to the clerk for the use of plaintiff a stated sum each month, but renders against defendant no present judgment for money, but authorizes the clerk to enter such judgment for payments in default, neither becomes a lien on defendant's lands, nor authorizes the issuance of an execution.

Millisack v O'Brien, 223-752; 273 NW 875

Superintendent of banking as receiver—extent of lien. A judgment against the superintendent of banking as receiver of a particular bank becomes a lien only on land held for that bank in the county wherein the judgment is rendered or to which transcripted, and does not become a lien on land held as receiver of some other bank.

Bates v Nichols, 223-878; 274 NW 32

V PARTIES AFFECTED

Judgment against insane person—validity. The validity of a judgment obtained in a law action against an insane defendant is not affected by such insanity, or by fact that a guardian had been appointed for his property.

In re Simpson, 225-1194; 282 NW 283; 119 ALR 1208

VI DEATH OF JUDGMENT DEBTOR

Discussion. See 22 ILR 557—Limitations and claims against estate

Substitution of administrator—judgment—effect. A plaintiff who, upon the death of the defendant, prosecutes his claim to judgment by substituting the defendant's administrator as defendant, simply accomplishes a legal adjudication of his claim against the estate. Plaintiff, by such procedure, does not obtain any lien on the real property belonging to the estate.

Marion Bank v Smith, 205-203; 217 NW 857

Judgment against insane person—priority in estate—lien. A judgment rendered against an insane person at a time when the guardianship was entirely insolvent, with no proceedings then pending nor contemplated relative to dissolution or distribution of assets of guardianship, becomes a lien upon his realty,

and upon his death the district court could properly order administrator of his estate to pay the judgment prior to payment of claims against the estate.

In re Simpson, 225-1194; 282 NW 283; 119 ALR 1208

VII PRIORITY

Mortgage for future advancements. A mortgage on realty actually given to secure future advances of money to the mortgagor is prior in right to subsequently rendered judgments against the mortgagor as to advances made after the rendition of the judgments, it not appearing that the mortgagee had actual knowledge of said judgments.

Everist v Carter, 202-498; 210 NW 559

Priority of mortgage. One who holds an absolute deed as a mortgage and, under agreement with the mortgagor, sells the property, may not, as against a subsequent judgment lienholder, enforce priority to the proceeds of the sale, except to the amount or extent that he applies the proceeds on his mortgage debt.

Everist v Carter, 202-498; 210 NW 559

Right of subrogation—deducting set-off. A vendor who is compelled to discharge a judgment lien on real estate after the amount of the judgment has been deducted from the purchase price is entitled to be subrogated to the rights of the judgment plaintiff against a subsequent purchaser who is not a purchaser for value and without notice, subject to any indebtedness owed by the vendor to the vendee, and growing out of the same transaction.

Home Loan Co. v Burrows, 207-1071; 224 NW 72

Right to offset debt of devisee. The amount which an insolvent testamentary devisee is owing to a solvent estate may, in partition proceedings, be offset against his interest in the real estate of testator, and such right is superior to the right of a judgment creditor who obtained his judgment against the devisee subsequent to the death of the testator.

Schultz v Locke, 204-1127; 216 NW 617

Offsetting debt of insolvent heir against realty—creditors. Where an heir, as a defendant in a partition action, admits insolvency and an indebtedness to parents' estate in excess of his interest in parents' realty, decree was proper holding heir had no interest in such realty and, accordingly, heir's creditors who obtain judgments after commencement of partition action but before entry of decree, and making no claim of fraud in securing the decree, have no interest in any of funds received from sale of realty.

Petty v Hewlett, 225-797; 281 NW 731

Antagonistic judgments—priority. The lien of a judgment obtained by an executor against an insolvent devisee for sums owed by the devisee to the estate (obtained in order to avoid unfairness to other equally-sharing devisees) is superior to the lien of a prior judgment against said devisee obtained by a general creditor, on lands acquired by the estate subsequent to both judgments.

Johnson v Smith, 210-591; 231 NW 470

Liénable judgment during receivership. A judgment rendered against a debtor at a time when he is under temporary receivership for purposes other than the winding up of the affairs of the debtor (even tho the receiver is not a party to the action) is valid and lienable on the lands of the debtor in preference to other creditors, even tho, subsequent to the rendition of such judgment, the said receivership is converted into a proceeding for the winding up of the affairs of the debtor.

Britten v Oil Co., 205-147; 217 NW 800

Equitable mortgage—priority. Where one who stands in the position of a vendor of land assigns his interest in the contract of sale as security, and the court subsequently decrees a cancellation of the contract, but also decrees that such cancellation shall be without prejudice to the rights of said assignee, said assignee will be deemed to hold an equitable mortgage on the land reverting to the vendor, superior to the lien of a judgment against the vendor obtained subsequent to the original assignment.

Johnson v Smith, 210-591; 231 NW 470

Equitable ownership superior to judgment lien. An actual bona fide oral agreement between a debtor and creditor, that the debtor will convey to the creditor certain lands in part satisfaction of the debt, creates in the creditor an equitable ownership in the land (especially when the creditor is already in possession of the land) which is superior to the rights of a subsequent judgment creditor of said debtor. It follows that delay in making delivery of the deed, or even the loss of the deed, will not elevate the subsequent judgment creditor into priority.

Richardson v Estle, 214-1007; 243 NW 611

11603 When judgment lien attaches.

Nunc pro tunc entry—effect. The recital in a judgment entry of the date on which a cause came on for trial does not, in and of itself, constitute a nunc pro tunc order that a subsequently entered judgment shall be a lien from said recited date of trial.

Andrew v Winegarden, 205-1180; 219 NW 326

Special assessment—when lien or incumbrance. A special assessment for a street improvement which has been undertaken by the city without the letting of a contract does not become a lien or incumbrance on the land

from the point of time when the assessment is finally approved by the council.

Frankel v Blank, 205-1; 213 NW 597

Assignment by heir—effect. A written assignment by an heir "of all interest of every kind and nature" in the estate works a complete conveyance of the heir's interest in the real estate of the estate, as against a subsequently rendered judgment against the assignor.

Berg v Shade, 203-1352; 214 NW 513
Funk v Grulke, 204-314; 213 NW 608

Judgment in vacation. Where a cause is tried, submitted, and taken under advisement under a stipulation that judgment may be entered "during term time or vacation", a subsequently rendered judgment becomes a lien on the defendant's land from the date of its actual entry, and not from the date of actual trial and submission under said stipulation, even tho the judgment entry recites such day of trial and submission.

Andrew v Winegarden, 205-1180; 219 NW 326

Burden of proof. A judgment creditor who claims that his transcript of judgment was filed prior to the delivery of a deed of conveyance by the judgment debtor has the burden of so showing.

Richardson v Estle, 214-1007; 243 NW 611

Superintendent of banking as receiver—extent of lien. A judgment against the superintendent of banking as receiver of a particular bank becomes a lien only on land held for that bank in the county wherein the judgment is rendered or to which transcripted and does not become a lien on land held as receiver of some other bank.

Bates v Nichols, 223-878; 274 NW 32

Homestead—liabilities enforceable against—subsequent loan to pay prior debt. A judgment on a loan made to the owners of a homestead long after the acquisition of the homestead is not a lien on the homestead, because of the fact that said loan was made and used for the specific purpose of paying off a debt antedating the acquisition of said homestead.

Brauch v Freking, 219-556; 258 NW 892

11608 Judgments on motion.

Additional annotations. See under §11567 (III)
Judgments generally. See under §11567
Suretyship generally. See under §11577

Summary proceedings—non de novo hearing. A summary proceeding by a client against his attorney will be heard on appeal only on errors assigned—not de novo.

Norman v Bennett, 216-181; 246 NW 378

Summary proceedings—findings conclusive. In a summary proceeding by a client against his attorney, the finding by the trial court on conflicting testimony is conclusive on the appellate court.

Norman v Bennett, 216-181; 246 NW 378

Nonapplicability of summary remedy. The statutory remedy of summary judgments on motion against attorneys for property collected by attorneys for clients cannot be employed as the basis of an action to require performance of a contract between an attorney and a client not involving collection of property.

Bradford v Dawson, 214-130; 241 NW 420

Rights and remedies of surety—contribution—nonestoppel. A surety who unsuccessfully contends, when sued on bond, that he is not liable for any defalcation occurring prior to the bond—that said bond is a substitute for a prior bond of the same guardian—does not thereby estop himself from enforcing contribution from the sureties on said prior and contemporary bond.

Federal Co. v France, 212-1403; 238 NW 460

Findings of trial court. A finding of fact by the court, on supporting testimony, on a motion for judgment against an officer for money in his hands, is conclusive on the appellate court.

Andresen v Andresen, 219-434; 258 NW 107

Insurance contract—construction—effect of reinsurance. A contract performance bond which, in effect, binds the insured to reimburse the insurer and any reinsurer for any loss which the insurer or reinsurer may be compelled to pay is not multiplied or divided by a subsequent reinsurance contract. In other words, the liability of the original insured remains a single liability, and the risk carried by both insurers remains as one risk.

Iowa Cas. Co. v Wagner Co., 203-179; 210 NW 775

11612 No written pleadings.

Unnecessary pleadings. In summary proceedings against a clerk of the court for judgment for funds collected by the clerk, the filing of an answer by the clerk does not cast any greater burden on the plaintiff.

Prudential v Hart, 205-801; 218 NW 529

Belated presentation of defense. In summary proceedings between an attorney and a client, the defense that a contract between the parties was champertous, or against public policy, must be presented in some manner in the trial court, even tho such summary proceedings are heard by the trial court without written pleadings.

Norman v Bennett, 216-181; 246 NW 378

11613 Conveyance by commissioner.

Wrongful release of conditionally cancelled mortgage. Where, in rescission proceedings,

a decree in effect provided that a promissory note and recorded real estate mortgage given for the purchase price of goods should be null and void from and after the return of the goods by the mortgagor to the mortgagee, and where the goods were never so returned, and where the mortgage was wrongfully released of record by a court-appointed commissioner, the mortgage may be foreclosed against a purchaser of the land who innocently bought in reliance on the wrongful release. This is true because, while both the mortgagee and the subsequent purchaser were innocent, yet the purchaser had the means of knowing whether the goods had been returned to the mortgagee,—the very act which, under the decree, would work a nullification of the mortgage and note and justify a release.

Moore v Crawford, 210-632; 231 NW 363

11621 Satisfaction of judgment—penalty.

Damages for failure to satisfy. Damages for failure to enter a record satisfaction of a paid judgment are properly denied when there is no evidence of such damages.

Taylor v Heiny, 210-1320; 232 NW 695

Agreement to release judgment—costs included. Under a settlement in which a judgment debtor agreed to deed certain real estate to his judgment creditor in consideration for release and satisfaction of a judgment, where the debtor performed his part of the agreement and the creditor released the judgment, but refused to satisfy two items consisting of attorney fees and court costs, the debtor, who became primarily liable for said items upon rendition of the judgment, was, on his counterclaim in action brought by creditor, entitled to a decree compelling creditor to satisfy said fees and costs.

Cooke v Harrington, 227-145; 287 NW 837

CHAPTER 497

COSTS

11622 Recoverable by successful party.

ANALYSIS

I Costs in General
II Liability in General
III Probate Proceedings
IV Taxation Against Defendant
V Taxation Against Plaintiff

Costs, criminal cases. See under §13964

I COSTS IN GENERAL

Contempt — imprisonment for costs. Imprisonment for nonpayment of costs in contempt proceedings is unauthorized.

Hammer v Utterback, 202-50; 209 NW 552

No inherent right to tax costs. Principle reaffirmed that the court has no inherent right to tax costs.

Hensen v Hensen, 212-1226; 238 NW 83

Taxation—apportionment—showing on appeal. The discretion of the trial court in apportioning costs will not be disturbed on appeal, in the absence of some fairly definite showing of the items entering into the total taxation and the responsibility of each party therefor.

Parks & Co. v Howard Co., 200-479; 203 NW 247

Agreement to release judgment—costs included. Under a settlement in which a judgment debtor agreed to deed certain real estate to his judgment creditor in consideration for release and satisfaction of a judgment, where the debtor performed his part of the agreement and the creditor released the judgment, but refused to satisfy two items consisting of attorney fees and court costs, the debtor, who became primarily liable for said items upon rendition of the judgment, was, on his counterclaim in action brought by creditor, entitled to a decree compelling creditor to satisfy said fees and costs.

Cooke v Harrington, 227-145; 287 NW 837

Voluntary compliance with costs judgment—review. A voluntary payment of an entire judgment prior to appeal by the superintendent of banking tho such judgment be only for costs, entered against him by the court, and not merely taxed by the clerk, is such an acquiescence and submission to the judgment as precludes an appeal thereon. (Distinguishing Boone v Boone, 160 Iowa 284.)

Bates v Nichols, 223-878; 274 NW 32

II LIABILITY IN GENERAL

Persons acting officially. Costs should not be taxed against a county auditor in a matter in which he acts officially, in good faith, and on the advice of counsel.

Northwest. Bk. v Van Roekel, 202-237; 207 NW 345

Submission without action. When the issues in a controversy are made up by pleadings and the pleadings then abandoned and the matter submitted to the court on a stipulation of fact, the costs are properly taxed against the wholly unsuccessful party.

Chambers v Bank, 218-63; 254 NW 309

Agreement to release judgment—costs included. Under a settlement in which a judg-

ment debtor agreed to deed certain real estate to his judgment creditor in consideration for release and satisfaction of a judgment, where the debtor performed his part of the agreement and the creditor released the judgment, but refused to satisfy two items consisting of attorney fees and court costs, the debtor, who became primarily liable for said items upon rendition of the judgment, was, on his counterclaim in action brought by creditor, entitled to a decree compelling creditor to satisfy said fees and costs.

Cooke v Harrington, 227-145; 287 NW 837

III PROBATE PROCEEDINGS

Unsuccessful will contestant. Costs accruing in an unsuccessful contest of a will should be taxed to the contestant.

Schroeder v Cable, 211-1107; 235 NW 63

Against losing party in probate. Costs in probate consequent on objections filed to an intermediate report of an executor, and on a trial on such objections before a referee, are properly taxed to the objector if the objections be overruled.

In re Cochran, 220-33; 261 NW 514

Property in probate—equity action. There being no statutory authority therefor, costs and expenses of litigation are not allowable to a plaintiff in an equitable action to determine ownership of property involved in probate, even tho the action was begun in the interests of all persons interested in the estate.

Carpenter v Lothringer, 224-439; 275 NW 98

IV TAXATION AGAINST DEFENDANT

Successful party — statutory rule. Costs must be taxed to the defendant when the plaintiff is successful on his demand.

Burghardt v Burghardt, 209-1171; 229 NW 761

Nonparties and parties not liable. Costs cannot be taxed to a defendant against whom plaintiff has established no liability, and necessarily not to a party who is not a party to the action.

Commercial Bk. v Broadhead, 212-688; 235 NW 299

V TAXATION AGAINST PLAINTIFF

Fence-viewing proceedings. Costs in certiorari proceedings to annul the void proceedings of fence viewers are properly taxed to the party who initiated the proceedings before the fence viewers, such party being a party to the certiorari proceedings by consolidation of other actions therewith.

Sinnott v Dist. Court, 201-292; 207 NW 129

Mistrial. When a mistrial is declared for no fault of plaintiff, the accrued costs may not be taxed to plaintiff but must abide the final determination of the case.

Slinger v Ins. Assn., 219-329; 258 NW 101

11623 Witness fees—limitation.

Taxation of witness fees. See under §§11330, 13880, Vol I

11624 Apportionment generally.

Insufficient grounds. In an action by the vendor of land for the purchase price, the defendant is not entitled to an apportionment of the court costs, because the vendor had not described the land by metes and bounds, when the defendant did not, prior to suit, demand such description, and would have been furnished such description by simply asking for it.

Elliott v Horton, 205-156; 217 NW 829

Nonright to apportionment. The naked fact that defendant was awarded a general verdict, but with no recovery on his counterclaim, does not entitle plaintiff to an apportionment of the cost.

Priest v Hogan, 218-1371; 257 NW 403

Equity court's discretion—apportionment between bankruptcy trustee and heirs—renounced devise. In equity, the court has a wide discretion in taxing costs, which will not be interfered with except in case of manifest injustice; so, where a sister renounced benefits under her father's will and conveyed realty to her brother before she took bankruptcy, in action by the bankruptcy trustee to set aside renunciation and the conveyance as fraudulent, the apportionment of one half of costs against trustee and other half against sister and brother was proper.

McGarry v Mathis, 226-37; 282 NW 786

11626 Liability of successful party.

Remedies for collection—motion to retax—special proceeding. A motion by a city to retax unpaid clerk's costs against the plaintiff is a special proceeding.

Great West. Ins. v Saunders, 223-926; 274 NW 28

11630 Referee fees.

Atty. Gen. Opinion. See '28 AG Op 252

11633 Dismissal of action or abatement.

Effect on taxation of attorney fees. The action of plaintiff in divorce proceedings in dismissing his action pending defendant's application for suit money, deprives the court of jurisdiction thereafter to tax to plaintiff, as costs, any allowance to compensate defendant for attorney fees for services performed prior to said dismissal.

Dallas v Dallas, 222-42; 268 NW 516

11634 Between coparties.

Right to contribution. Principle recognized that a coparty paying all the costs taxed against coparties may enforce contribution from other coparties.

Read v Gregg, 215-792; 247 NW 199

11636 Costs taxable.

Unliquidated demand set off against court costs. On a motion by an administrator to tax court costs against a defeated claimant in probate, the latter may not have a duly filed but unliquidated claim in his favor and against the estate adjudicated and set off against said costs and a judgment rendered against the estate for the excess.

In re Nairn, 215-920; 247 NW 220

Rents — wrongful application on costs. While rents of mortgaged premises in the hands of a receiver are properly applicable solely to the discharge of a deficiency judgment, yet, manifestly, the mortgagor may validly consent to their application in discharge of the costs taxed in the foreclosure proceedings.

Wenstrand v Kiddoo, 222-284; 268 NW 574

Amount in controversy—including interest on judgment. In determining the amount in controversy under the statute limiting supreme court appeals to cases involving over $100, the allegations of the pleadings are controlling, and where the propriety of the judgment is the only issue, interest or costs will not be considered in determining the amount in controversy, but where defendant's motion attacked purported judgment of district court confirming justice's judgment in sum of $74, together with accrued interest of $35, amount of interest would be added to judgment in determining whether amount involved was sufficient to authorize appeal to supreme court.

Yost v Gadd, 227-621; 288 NW 667

11638 Retaxation.

Motions generally. See under §11229

Motion to retax—exclusive function. The exclusive function of a motion to retax costs is to reach and correct errors of the court's own officer—its clerk—in taxing costs, not to reach and correct errors of the court in adjudging the right to recover an item of costs or the amount thereof, e.g., in re attorney fees as costs. (Bankers Iowa State Bank v Jordan, 111 Iowa 324, Rogers v Crandall, 143 Iowa 249, insofar as inconsistent, overruled.) Appeal is the proper procedure for the correction of the errors of the court.

Wenstrand v Kiddoo, 222-284; 268 NW 574

Motion to retax—limited applicability. A motion to retax costs can reach only errors of the clerk and not errors inhering in a judgment.

Grimes Bank v Jordan, 224-28; 276 NW 71

Attorney fees. Error in the taxation of attorney fees may be reached by motion to retax.

Everist v Carter, 202-498; 210 NW 559

Sufficient ground. Retaxation of costs will not, manifestly, be ordered because of proceedings had as to which no costs were incurred.

Webber v King, 205-612; 218 NW 282

Motion to retax—laches as bar. A delay of some six years on the part of a defendant in moving for a retaxation of costs, held not such laches as to bar the motion, defendant having moved as soon as assured of the illegality in the taxation, and no one being materially prejudiced by the delay.

Wenstrand v Kiddoo, 222-284; 268 NW 574

Supersedeas bond — retaxation of costs — effect. The surety on a supersedeas bond by executing the bond makes himself a party to the record, and is bound by an unappealed order retaxing the costs entered by the court on motion of principal in the bond after the appeal had been dismissed by the appellate court and after said principal had paid a part of the costs.

Springer v Ins. Co., 216-1333; 249 NW 226

Land subjected to bank's judgment—attorney lien—belated cost modification—review. Where an action was instituted to set aside conveyances and to subject land to a judgment, and an attorney having a lien on such judgment intervenes, establishes and gets an adjudication of priority in the decree, which made no provision for payment of costs but later was invalidly modified under guise of a motion to retax costs, the trial court being without jurisdiction to modify the decree (1) after an appeal therefrom had been perfected and, (2) because the modification was not made during the term the decree was entered, certiorari will lie to correct the lower court's excess of jurisdiction, and fact that plaintiff is a banking corporation no longer in existence will not defeat the certiorari, since corporation must be regarded as existing to the degree necessary to wind up its affairs.

Grimes Bank v Jordan, 224-28; 276 NW 71

11641 Costs in supreme court.

Taxation of costs on appeal. See under §12874

11643 Interest.

Interest generally. See under §§9404-9409

Amount in controversy—including interest on judgment. In determining the amount in controversy under the statute limiting supreme court appeals to cases involving over

$100, the allegations of the pleadings are controlling, and where the propriety of the judgment is the only issue, interest or costs will not be considered in determining the amount in controversy, but where defendant's motion attacked purported judgment of district court confirming justice's judgment in sum of $74, together with accrued interest of $35, amount of interest would be added to judgment in determining whether amount involved was sufficient to authorize appeal to supreme court.

Yost v Gadd, 227-621; 288 NW 667

11644 Attorney's fees.

Atty. Gen. Opinion. See '25-26 AG Op 186

Nonpermissible allowance by court. The allowance by the court of attorney fees to a party not contemplated by the statute is manifestly erroneous.

Teget v Drain. Ditch, 202-747; 210 NW 954

See Nichol v Neighbour, 202-406; 210 NW 281

Harmless error—taxation of attorney fees. Error in taxing attorney fees when the instrument sued on does not provide therefor is fully cured by a statement in the written argument on appeal by the attorney in whose favor the taxation was had, to the effect that he had fully released and satisfied the judgment for such fees, such statement, tho irregularly presented, being irrevocably binding on the attorney.

Koontz v Clark Bros., 209-62; 227 NW 584

Fee recoverable only when damage shown. An attorney's fee paid by the insured could not be recovered when evidence of the value of the services rendered by the attorney was not shown as a basis for establishing the measure of damages.

Gipp v Lynch, 226-1020; 285 NW 659

Unjust enrichment not shown. In an action by the insured to recover a retainer fee paid to an attorney, the evidence was insufficient to sustain a verdict based on unjust enrichment when it was not shown that the insurer was obligated to pay such attorney fee.

Gipp v Lynch, 226-1020; 285 NW 659

Breach of covenant of warranty. Attorney fees may be a proper element of recovery in an action for breach of a covenant of warranty.

Kellar v Lindley, 203-57; 212 NW 360

Corporate notes—state's nonliability in dissolution proceeding. Where dissolution of a mining corporation is sought, a partial cost judgment against the state of Iowa including statutory attorney fees to a cross petitioner on notes secured by chattel mortgage and signed by the corporation is erroneous.

State v Fuel Co., 224-466; 276 NW 41

Action on divorce settlement stipulation—fees unallowable. A stipulation or contract of settlement in a divorce action as a basis for a money recovery is in no different category from any other contract and, unless provided for therein, attorney fees are not taxable in an action based thereon.

Johnstone v Johnstone, 226-503; 284 NW 379

Insolvency proceedings. Attorney fees are properly allowed under a chattel mortgage which stipulates for such fees and which is filed as a claim in assignment proceedings for the benefit of creditors.

In re Cutler & Horgen, 204-739; 212 NW 573; 54 ALR 527

Nonallowable attorney fees. An attorney who, under employment by a debtor whose property is under receivership, successfully defends an attempt to throw the debtor into bankruptcy, may not have his attorney fees paid from the receivership funds, when the receiver and his attorney, under order of court, also appeared and successfully contested said bankruptcy proceeding.

Cook v McHenry, 208-442; 223 NW 377

Persons liable—assignee of written lease. Attorney fees may be taxed as costs under a written lease so providing, when the action for rent is against the written assignee of the lease who orally accepted the assignment.

Central Bk. v Herrick, 214-379; 240 NW 242

Grantee of mortgaged premises. An attorney fee may not be taxed in mortgage foreclosure proceedings against a subsequent grantee who has not assumed the payment of the mortgage debt.

Cooper v Marsh, 201-1262; 207 NW 403

When not allowable. Attorney fees, tho provided in a note and mortgage, are not taxable on foreclosure on that part of the debt which the mortgagee, by bringing suit, has matured under authority of an acceleration clause in the mortgage, unless the mortgagee shows that the mortgagor had reasonable notice of the intended acceleration, and reasonable opportunity to pay the debt before suit, even tho the note is payable at a named place.

Federal Bank v Wilmarth, 218-339; 252 NW 507; 94 ALR 1338

Improper attorney fees. Tho the lien of a materialman may, in a certain case, be superior to the lien of a prior mortgage on the land, yet the court is in error in computing interest at a rate in excess of 6% and in allowing an attorney's fee and taxing it as costs and decreeing a lien for such excess interest and costs, even tho the claim of the materialman is evidenced by a promissory note calling for such excess interest and attorney fees.

Spieker v Fair Assn., 216-424; 249 NW 415

Recovery of fraudulently induced fee. Ordinarily, one who has paid an attorney for

services and seeks to recover the entire fee on the ground that payment was fraudulently induced, must show that the services were of no value, and the evidence is fatally deficient if services are performed, but their value is not shown, as the plaintiff thereby fails to establish the amount of his damage.

Gipp v Lynch, 226-1020; 285 NW 659

Land subjected to bank's judgment—attorney lien—belated cost modification—review. Where an action was instituted to set aside conveyances and to subject land to a judgment, and an attorney having a lien on such judgment intervenes, establishes and gets an adjudication of priority in the decree, which made no provision for payment of costs but later was invalidly modified under guise of a motion to retax costs, the trial court being without jurisdiction to modify the decree (1) after an appeal therefrom had been perfected and (2) because the modification was not made during the term the decree was entered, certiorari will lie to correct the lower court's excess of jurisdiction, and fact that plaintiff is a banking corporation no longer in existence will not defeat the certiorari, since corporation must be regarded as existing to the degree necessary to wind up its affairs.

Grimes Bank v Jordan, 224-28; 276 NW 71

Injunction—nonallowable attorney fees. In a successful action to enforce plaintiff's right to redeem from execution sale, the fact that plaintiff secured a temporary injunction to protect his possession (and solely as a collateral remedy) furnishes no justification for the taxation against plaintiff of an attorney fee in favor of defendant, especially when the said injunction was ordered dissolved only in event plaintiff failed to exercise his right to redeem.

Werner v Hammill, 219-314; 257 NW 792

Simultaneously executed notes — proper computation. In a single action by a trustee on several promissory notes, each containing an agreement to pay attorney fees, and all simultaneously executed as part of one transaction, to wit, the financing of a mortgage loan, the attorney fees must be computed as tho there were but one note for the total amount due on all the notes sued on. And this is true tho the different notes actually belong to different parties.

Wenstrand v Kiddoo, 222-284; 268 NW 574

Wrongful refusal to defend—attorney fees. A title insurer who wrongfully refuses to comply with his contract to defend an action hostile to the title is liable to the insured for reasonable attorney fees, whether such fees have or have not been paid by the insured.

Jones v Surety Co., 210-61; 228 NW 98

Action to recover fee. A company which had insured only civil liability was not bound to pay the attorney fees in a criminal action arising from an automobile accident of the insured because of a statement of the company's own attorney that it would pay such fees, when there was no proof to show any authority for the company's attorney to impose such obligation on the company.

Gipp v Lynch, 226-1020; 285 NW 659

Agreement to release judgment—attorney fee included. Under a settlement in which a judgment debtor agreed to deed certain real estate to his judgment creditor in consideration for release and satisfaction of a judgment, where the debtor performed his part of the agreement and the creditor released the judgment, but refused to satisfy two items consisting of attorney fees and court costs, the debtor, who became primarily liable for said items upon rendition of the judgment, was, on his counterclaim in action brought by creditor, entitled to a decree compelling creditor to satisfy said fees and costs.

Cooke v Harrington, 227-145; 287 NW 837

Dissolution of partnership—accounting—unallowable credits. In an accounting between the representative of a deceased partner and the surviving partners, who continued the partnership business as tho no dissolution had occurred, attorney fees in the accounting proceedings, and personal, family, and household expenses of the surviving partners, are properly rejected by the referee as a credit.

Fleming v Fleming, 211-1251; 230 NW 359

11646 Affidavit required.

Improper allowance. Attorney fees cannot be properly allowed in the absence of the required statutory affidavit.

Temple Lbr. v Lattner, 211-465; 233 NW 522

Affidavit subsequent to service. Right to taxation of attorney fee is not lost by filing the petition in the action and the statutory affidavit, after the service of the original notice.

Equitable v Cole, 214-235; 242 NW 58

Absence of affidavit—effect. In proceedings by an executor for an order for the sale of lands devised to an insolvent devisee, in order to effect collection of the amount owing the estate by said devisee on promissory notes, attorney fees may not be taxed (tho the notes provide for such) in the absence of the affidavit required by statute.

In re Flannery, 221-265; 264 NW 68

11647 Opportunity to pay.

Presumption. The taxation of an attorney fee under a contract provision therefor will not be disturbed on appeal unless complain-

ant presents a record which affirmatively shows facts which render the taxation unauthorized.

Fellers v Sanders, 202-503; 210 NW 530

When not allowable. Attorney fees, tho provided in a note and mortgage, are not taxable on foreclosure on that part of the debt which the mortgagee, by bringing suit, has matured under authority of an acceleration clause in the mortgage, unless the mortgagee shows that the mortgagor had reasonable notice of the intended acceleration, and reasonable opportunity to pay the debt before suit, even tho the note is payable at a named place.

Federal Bank v Wilmarth, 218-339; 252 NW 507; 94 ALR 1338

First Trust v Kruse, 219-1229; 260 NW 665

CHAPTER 498

EXECUTIONS

11648 Enforcement of judgments and orders.

Nature. Execution constitutes judicial process.

Heesel v Bank, 205-508; 218 NW 298

Execution before but sale after judgment barred—validity. If execution proceedings are instituted and levy made during the lifetime of the judgment, a sale thereunder is valid, tho held after the judgment is barred by the statute of limitations.

Deaton v Hollingshead, 225-967; 282 NW 329

Impressment of lien in equity—special execution. A court of equity upon impressing a lien on property should order the issuance of a special execution for the sale of the property and the satisfaction of the lien.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Alimony—nonlienable decree for money. A decree (in divorce proceedings) which, inter alia, simply "orders" defendant to pay to the clerk for the use of plaintiff a stated sum each month, but renders against defendant no present judgment for money, but authorizes the clerk to enter such judgment for payments in default, neither becomes a lien on defendant's lands, nor authorizes the issuance of an execution.

Millisack v O'Brien, 223-752; 273 NW 875

Mortgages—2-year limitation on foreclosure judgments—statute construed. Statutory provision that no judgment rendered in foreclosure proceedings "shall be enforced and * * * no force or vitality given thereto for any purpose" after two years from entry thereof, means that after two years, no action could be brought on judgment, no execution could issue thereon, the judgment would not be lien, no proceedings to enforce the judgment could be commenced by issuance of an execution; and, generally, the judgment would be without force or effect.

Deaton v Hollingshead, 225-967; 282 NW 329

Void judgment—subject to attack. A void judgment may be attacked in any proceeding in which it is sought to be enforced.

Gohring v Koonce, 224-1186; 278 NW 283

Specific performance—allowable relief under general prayer. In bank receiver's specific performance action to compel heirs to perform contract to purchase receiver's interest in estate property, a prayer for general equitable relief warrants a decree establishing vendor's lien, ordering a special execution sale of the receiver's interest, and a general execution for any deficiency.

Utterback v Stewart, 224-1135; 277 NW 735

Continuing jurisdiction of lower court. An appeal simply from an order appointing a receiver in auxiliary proceedings to enforce a judgment leaves all other portions of said proceedings within the jurisdiction of the district court.

Wade v Swartzendruber, 206-637; 220 NW 67

11649 Within what time—to what counties.

Nunc pro tunc entries. See under §10803

Execution before but sale after judgment barred—validity. If execution proceedings are instituted and levy made during the lifetime of the judgment, a sale thereunder is valid, tho held after the judgment is barred by the statute of limitations.

Deaton v Hollingshead, 225-967; 282 NW 329

11650 Limitation on number.

Plurality of writs prohibited. The issuance of an execution at a time when another execution on the same judgment is in existence, is unlawful, and all proceedings under such unlawfully issued execution are void.

Richardson v Rusk, 215-470; 245 NW 770

Amendment valid when nonprejudicial to third parties. Even after sale under a second execution, the return on the first execution, when third persons are not prejudiced, may be amended by the sheriff to show the true facts that the first execution had been returned and was not in existence when the second execution was issued.

Luke v Bank, 224-847; 278 NW 230

Moratorium application—waiver of sale irregularities. Mortgagor's application under

the mortgage moratorium acts to extend the period of redemption from an execution sale is a waiver of any right to attack the validity of such sale made under a second special execution the validity of which is challenged because of the alleged existence of another and prior execution.

Luke v Bank, 224-847; 278 NW 230

11659 Form of execution.

Erroneous entry of amount. The inadvertent entry on the appearance docket of the amount of a judgment, followed by the issuance of an execution in the erroneous amount, sale thereunder, and issuance of sale certificate, must, on proper motion, be corrected by expunging the erroneous entry, recalling the execution, setting aside the sale, and canceling the certificate, no rights of third parties having intervened.

Equitable v Carpenter, 202-1334; 212 NW 145

11660 Property in hands of others.

Levy on property of deceased. See under §§11736, 11753

Right to income from trust dependent on election or demand by cestui—effect. A trust which provides that the income therefrom shall be paid to a named beneficiary "from time to time as she may elect during her lifetime" effectually places said income beyond the reach of the creditors of said beneficiary so long as said beneficiary makes no such election.

Ober v Dodge, 210-643; 231 NW 444

Creditor's rights in trust proceeds. When the testator's will created a trust for his son, providing that the proceeds of the trust be paid to the son "yearly or oftener if collected for shorter periods," and contained no words showing an intent to place the trust income beyond the reach of the son's creditors, a debt due the son from the trustee was created, which was a vested right which could be assigned and was subject to claims of creditors.

Standard Chemical v Weed, 226-882; 285 NW 175

Spendthrift trusts. If the terms of a trust provide that the income be applied to the cestui at the discretion of the trustee, or the income is payable to the cestui at his demand, or the trust is for a special purpose, or in general where no debt is owed the cestui by the trustee, the creditors of the cestui cannot appropriate the benefaction.

Standard Chemical v Weed, 226-882; 285 NW 175

11663 Receipt and return.

Return—fatal insufficiency. The delivery, by plaintiff's attorney to the clerk, of an execution and the indorsement thereon, by the clerk, of the words "Returned not satisfied" does not constitute a legal return.

Richardson v Rusk, 215-470; 245 NW 770

Delayed return — intervening mortgage — priority. Even tho an officer physically performs all the acts which would constitute a valid levy on chattels if said acts were embodied at the time of the acts in a return indorsed on or attached to the execution, yet where the officer delays making said return for six days after said acts were performed, and in the meantime a chattel mortgage on said chattels is executed and recorded, the mortgage will be superior in right to the belated (and alleged) levy.

Farmers Bk. v Mallicoat, 209-335; 228 NW 272

Insolvency—preferable proof. Principle reaffirmed that in an action to set aside a conveyance as fraudulent, the preferable proof of the grantor's insolvency at the time of the conveyance is the return nulla bona on a duly issued execution.

Williams Bk. v Murphy, 219-839; 259 NW 467

Amendment valid when nonprejudicial to third parties. Even after sale under a second execution, the return on the first execution, when third persons are not prejudiced, may be amended by the sheriff to show the true facts that the first execution had been returned and was not in existence when the second execution was issued.

Luke v Bank, 224-847; 278 NW 230

Moratorium application—waiver of sale irregularities. Mortgagor's application under the mortgage moratorium acts to extend the period of redemption from an execution sale is a waiver of any right to attack the validity of such sale made under a second special execution the validity of which is challenged because of the alleged existence of another and prior execution.

Luke v Bank, 224-847; 278 NW 230

11664 Indorsement by officer.

Sales legalized. See §10383.1

Curative acts—omissions of levying officer. The failure of an officer to indorse on an execution the procedural matters required by statute may be legalized by an act of the legislature.

Francis v Todd, 219-672; 259 NW 249
Nelson v Hayes, 222-701; 269 NW 861

Sale—validity approved. Record, relative to the sale under special execution of personal property, reviewed and held to reveal no invalidating fact.

McFerrin v Grain Co., 220-1086; 264 NW 45

Indorsements—presumption. Undated but duly signed indorsements on an execution (1)

that the execution was received by the sheriff on a named date, and (2) that on a named date the sheriff levied on certain described property, carries the presumption, in the absence of contrary evidence, that the indorsement relative to the receipt was made when the execution was received, and that the indorsement relative to the levy was made when the levy was made.

Ebinger v Wahrer, 213-84; 238 NW 587
Cramer v McDonald, 213-454; 239 NW 101

Presumption—burden to overcome. A party who claims that the various entries of the acts done under an execution and constituting the officers "return" were not entered at the time the various acts were done, has the burden to so show. In the absence of such showing, it must be presumed that the officer did his duty and made the entries at the time required by statute.

Northwestern Ins. v Block, 216-401; 249 NW 395

Return—noninvalidating irregularity. The return on a real estate mortgage foreclosure execution is not, as a basis of the title conveyed, invalidated by the fact that the recital in the return (1) of the receipt of the execution, and (2) of the levy thereunder, and (3) of the date of such receipt and levy, is signed by a deputy sheriff in his own name with the added designation of "deputy sheriff" (instead of in the name of the sheriff by said deputy), when the entire return embracing a timely recital of the doing of every required act thereunder (including that recited by said deputy), is signed by the sheriff in his official capacity.

Nelson v Hayes, 222-701; 269 NW 861

Permissible amendment. The return of the levy of an attachment may be so amended as (1) to definitely locate the property levied on, and (2) to specifically describe the kind of property levied on.

Salinger v Elev. Co., 210-668; 231 NW 366

Correcting inadvertent error. An inadvertent error in the return of a mortgage foreclosure sale may be corrected by an amendment by the sheriff after the land has gone to sheriff's deed, provided the judgment plaintiff and defendant are the only persons affected. In such case oral testimony showing the error is quite unnecessary.

Equitable v Ryan, 213-603; 239 NW 695

Belated amendment. An application to amend the return on an execution, so as to show the essential facts constituting a levy, is properly denied when the application is made four months after the attempted levy, and is hostile to a stranger with a prior interest in the property sought to be levied on.

Cramer v McDonald, 213-454; 239 NW 101

Essentials of levy. An attempted levy on corporate shares of stock is, as to a stranger with a prior interest in the property, a nullity (1) unless the president of the company or other officer designated by the statute is notified in writing that the stock has been levied on, and (2) unless the return on the writ states that such notice was given. (§§11676, 12098, C., '31.)

Cramer v McDonald, 213-454; 239 NW 101

Return—fatal insufficiency. A narrative statement in the form of a return, and purporting to state what had been done under an execution, and indorsed thereon after a purported sale thereunder, and signed by the sheriff who succeeded the sheriff who made the sale, is a nullity.

Richardson v Rusk, 215-470; 245 NW 770

Return as "unsatisfied"—effect. The return of a writ of execution as wholly unsatisfied deprives the execution plaintiff of all basis for impressing a trust on the proceeds of property on the theory that the property was once validly levied on under the said returned writ.

Whitaker v Tiedemann, 200-901; 205 NW 468

11665 Principal and surety—order of liability.

Extension to principal available to surety—abatement of action. An order of a court of bankruptcy granting, to a maker of a negotiable promissory note, an extension of time in which to make payment, is not personal to said maker only, but inures, under USC, title 11, §204, to the benefit of another maker of said note who in fact signed said note as surety only, but without so indicating on the face of the note; and said latter maker, when sued alone by the original payee, may, for the purpose of abating the action, establish his suretyship and consequent secondary liability.

Benson v Alleman, 220-731; 263 NW 305

Permissible plea of counterclaim. In an action against the principal and surety on an attachment bond for damages consequent on the alleged wrongful issuance of the writ, the principal in said bond may plead a counterclaim which neither arises out of or is connected with the transaction on which plaintiff sues, nor in which the surety has any personal ownership (§11151, C., '35). A surety is not primarily liable on the bond and the principal who is primarily liable should be permitted to defeat recovery on the bond if he can so do.

Imes v Hamilton, 222-777; 269 NW 757

11667 Surety subrogated.

ANALYSIS

I SUBROGATION IN GENERAL
II SURETIES—SUBROGATION RIGHTS

Suretyship generally. See under §11577

I SUBROGATION IN GENERAL

Discussion. See 2 ILB 86—Subrogation to government claim for taxes

Origin and theory. The doctrine of subrogation is purely of equitable origin and grew out of the need, in aid of natural justice, in placing a burden where it of right ought to rest.

HOLC v Rupe, 225-1044; 283 NW 108

Creation of relation—effect. The implied promise of a principal to reimburse his surety if the surety is compelled to pay the debt, brings into existence the relation of debtor and creditor between the principal and surety immediately upon the execution of the contract of suretyship.

Leach v Bassman, 208-1374; 227 NW 339

Legal and conventional subrogation distinguished. Legal subrogation exists only in favor of one who, to protect his own rights, pays the debt of another. Conventional subrogation arises only upon agreement, between the lender and the debtor or old creditor, that the lender shall be subrogated to the old lien.

HOLC v Rupe, 225-1044; 283 NW 108

Conventional subrogation in favor of indorser.

Callaway v Hauser Bros., 211-307; 233 NW 506

Conventional subrogation. A conventional subrogation takes place when a debtor expressly or impliedly agrees that one paying a claim shall stand in the creditor's shoes.

Mains v Barnhouse, 209-963; 229 NW 218

Subrogation of paid surety. The right of a surety to be subrogated to the rights of his principal against a third party is not affected by the fact that he is a paid surety.

American Co. v Bank, 218-1; 254 NW 338

Garnishor subrogated to statutory lien.

Kinart v Churchill, 210-72; 230 NW 349

Surety on guardian's bond. The surety on a guardian's bond who is compelled to pay the amount due on a mortgage held by the guardian for his ward, because of the breach of official duty by the guardian in releasing the mortgage without payment and without authority of court so to do, is, by such payment, subrogated, as a matter of course, to all the rights of the guardian and ward in such mortgage, and may foreclose such mortgage even against purchasers of the land subsequent to the release.

Randell v Fellers, 218-1005; 252 NW 787

Fraud—tracing proceeds. The drawer of a fraud-induced check who traces the check and the proceeds thereof immediately and directly into the satisfaction of a mortgage may, against the wrongdoer and against all others who necessarily profit by the satisfaction without parting with value, be subrogated to the former right of the satisfied mortgage.

Bogle v Goldsworthy, 202-764; 211 NW 257

Wife's suretyship for husband—effect in husband's bankruptcy. Where land owned jointly by husband and wife is mortgaged and the wife signs the note and mortgage on her separate interest to secure the loan to the husband who received and used the loan for his own personal debts and later conveyed his one-half interest in the land to his wife, then, in an action by the husband's trustee in bankruptcy to set aside the conveyance as in fraud of creditors, the wife, as surety, is entitled to have the husband's interest in the land applied first to the satisfaction of the mortgage debt in preference to the claims of the trustee in bankruptcy, and the conveyance accomplishing her subrogation thereto was valid.

Clindinin v Graham, 224-142; 275 NW 475

Repeal of preferential deposit law. Sureties on a bank depositary bond conditioned to hold the state harmless on deposit of state funds in said bank, and given at a time when the state possessed a statutory preferential right, in case the bank was thrown into receivership, to be paid in full prior to the payment of general depositors, are not entitled, upon the payment of a loss, in case of such receivership, to be subrogated to such right on the part of the state when, prior to such payment, the statute giving such right has been repealed. This is on the principle that a surety is entitled to subrogation only upon payment of the principal's debt, and only to the rights then possessed by the creditor.

Leach v Bank, 205-1154; 213 NW 517

Reimbursement from co-surety. A surety who has paid a note given for the accommodation of the corporation of which he is an officer may not be defeated in his action to compel a co-surety to make proper reimbursement, by the fact that the plaintiff allowed or permitted or directed the corporate funds to be applied on other corporate obligations, and not on the accommodation note.

Brown v Conway, 201-117; 206 NW 665

Stockholder's advance of clay pit rent—extent of priority. After a clay products company has gone into receivership, neither delinquent nor accruing rent on its clay pit, advanced by a stockholder taking an assignment of the clay pit lease, is collectible in full from the receiver as expenses of administration nor as a rent obligation to which the stockholder became subrogated, when the sale price of the clay pit lease was less than the claim for rent advanced thereon, but an order allowing priority for the rent claim to the extent of the sale price of the clay pit lease and establishing the balance of the advanced rent as a general claim was correct.

Parks v Carlisle Co., 224-1024; 277 NW 731

I SUBROGATION IN GENERAL—concluded

Identification of instrument guaranteed. Plaintiff in an action on a guaranty of payment of a promissory note, which guaranty is separate from the note, manifestly cannot recover unless he clearly shows that the note in question is the very note that is guaranteed.

Andrew v Overbeck, 214-578; 241 NW 435

Application of payment prejudicial to surety. The fact that the common maker of two promissory notes signed by different sureties and payable to the same payee was aided by a loan by one of the sureties in order to enable the common maker to make up the amount of a payment to the payee, with the understanding that the total payment would be applied—indorsed—on the note on which said surety was obligated, does not estop or prevent the payee long afterwards (five years) from applying said payment (in accordance with the wishes of the common maker) on the note on which said surety was not obligated, the payee having no knowledge of said agreement. And this is true tho the common maker, and the surety on the note receiving the application, had, in the meantime, become insolvent.

Mitchell v Burgher, 216-869; 249 NW 357

Want of consideration. A plea of want of consideration, interposed by a gratuitous surety on a promissory note, may be very properly ignored in the instructions of the court when the record shows (1) that the surety signed the note without fraud imposed upon him, and (2) that there was a consideration between the principal and the payee.

Granner v Byam, 218-535; 255 NW 653

Subrogation—filing claim against estate. A surety who, in a foreclosure suit which was personal as to himself, but solely in rem as to the estate for which he was surety, pays off a deficiency judgment, must file his claim against the estate in order to render effective his right of subrogation.

In re Angerer, 202-611; 210 NW 810

Administrator's wrongful payments—right of surety. When an administrator of an estate wrongfully pays out estate funds to one who has no right whatever to receive them, and the surety for the administrator is compelled to make good the loss, the legal right of the estate to compel the wrongful recipient to repay the funds because of his primary liability is, as a matter of equity, presumed to continue in order to enable a court of equity to subrogate the said surety to the same right.

American Co. v Bank, 218-1; 254 NW 338

Assumption of mortgage—recovery by mortgagor-surety. As between a mortgagor and a subsequent purchaser who assumes and agrees to pay the mortgage, the purchaser becomes the primary debtor, and the prior mortgagor the secondary debtor; but, in case foreclosure and sale reveal a deficiency judgment, the mortgagor may not recover the amount thereof from the assuming purchaser until he, the mortgagor, has paid such deficiency.

Thomsen v Kopp, 204-1176; 216 NW 725

Protection and loss of right of subrogee. When the holder of a certificate of sale under a junior mortgage foreclosure discharges (in order to protect his interest) an interest payment falling due on the senior mortgage, by taking an assignment of said interest installment, he thereby impliedly acquires a pro tanto interest in said senior mortgage, and may foreclose it accordingly against a subsequent purchaser for value of the land; but when said certificate holder simply pays such interest installment, he wholly loses his claim as to a subsequent purchaser who purchased for value, and without notice that the interest installment had been paid by the junior certificate holder.

Miller Bank v Collis, 211-859; 234 NW 550

Mortgagee suing for delinquent taxes omitted from foreclosure judgment—splitting actions. A mortgagee who had paid delinquent taxes on the mortgaged land, according to a provision of the mortgage that if taxes were not paid the mortgagee could pay them and obtain repayment, should have taken care of his claim for taxes in the foreclosure proceedings and was not permitted by Ch 501, C., '35, to split his cause of action and bring an action for the taxes after the mortgagor had redeemed.

Monroe v Busick, 225-791; 281 NW 486

Prior sureties as party defendants. Defendant in an action on a guardian's bond has no right to demand that a surety on a prior bond of the guardian be made a party defendant on the theory that the defendant has a right to demand contribution from such prior surety.

Brooke v Bank, 207-668; 223 NW 500

Surety — recoupment. A bank, which acts as a collection agency for a trustee in bankruptcy in gathering in the funds belonging to the bankrupt's estate and in good faith accounts to the trustee for the collections, is not a "depositor" of said funds within the meaning of the federal statutes and rules of court governing depositors of bankrupt funds. So held where a surety who had paid the amount embezzled by the trustee sought recoupment from the said collecting bank on the theory that the bank had violated such federal statutes and rules.

Southern Sur. Co. v Bank, 207-910; 223 NW 865

Voluntary payment of judgment by stranger. One who, solely on his own volition, intentionally pays and discharges a judgment as to which he is a legal stranger, may not (1) have the lien of the judgment plaintiff

re-established on land and be subrogated to the rights of said lien, nor (2) may he be given a personal judgment against the judgment defendant who was benefited by such voluntary payment and discharge.

Wragg v Wragg, 208-939; 226 NW 99; 64 ALR 1292

II SURETIES—SUBROGATION RIGHTS

Discussion. See 10 ILB 249—Surety's subrogation

Subrogation of paid surety. The right of a surety to be subrogated to the rights of his principal against a third party is not affected by the fact that he is a paid surety.

American Sur. Co. v Bank, 218-1; 254 NW 338

Conditional order. An order subrogating a surety to all the rights of his principal—a trustee—in unauthorized investments of trust funds is properly conditioned on payment being first made of all sums due the trust.

In re Riordan, 216-1138; 248 NW 21

Payment of obligation. One who, in the sale of commercial paper, guarantees its payment to the extent of a named percentage of its face value becomes the owner of such paper to the extent that he subsequently discharges his guaranty.

Liscomb Bk. v Leise, 201-353; 207 NW 330

Surety holding indemnity. An officer of a corporation who as surety signs a corporate note for borrowed money which the corporation employs in its business, and in good faith receives bonds of the corporation to indemnify him in case he is compelled to pay the note, will, upon payment of the note, be accorded the same rights under a trust deed or mortgage executed to secure the payment of said bonds as will be accorded to good-faith purchasers of other portions of said bonds.

Gunn v Gould Co., 206-172; 218 NW 895; 220 NW 127

Equitable set-off by surety of insolvent. In an action by the receiver of an insolvent, the defendant may set off, against the obligation sued on, the amount which the defendant, as surety for the insolvent, has been compelled to pay on the contract of suretyship.

Leach v Bassman, 208-1374; 227 NW 339

Deducting set-off. A vendor who is compelled to discharge a judgment lien on real estate after the amount of the judgment has been deducted from the purchase price, is entitled to be subrogated to the rights of the judgment plaintiff against a subsequent purchaser who is not a purchaser for value and without notice, subject to any indebtedness owing by the vendor to the vendee and growing out of the same transaction.

Home Co. v Burrows, 207-1071; 224 NW 72

Subrogation as affecting junior mortgagee. Where tenants in common of land as principal and surety jointly mortgaged their undivided interests in order to secure the debt of the principal, the surety may, after the land is partitioned and set off in severalty, compel the satisfaction of the mortgage as far as possible out of the lands assigned in severalty to the principal, and be subrogated to all the rights of the mortgagee in case he is compelled to pay the principal's debt; and this right is enforceable against a subsequent mortgagee of the principal's undivided interest alone, when such mortgagee takes his mortgage with actual knowledge that the mortgagors in the prior mortgage occupied the relation of principal and surety.

Toll v Toll, 201-38; 206 NW 117

Right of junior mortgagee to pay interest on senior mortgage. The common-law right of a junior mortgagee, in order to protect his own lien, to pay the interest on a senior mortgage, and thereby to be subrogated by proper action to the rights of a senior mortgagee under said senior mortgage to the extent of said payment, has not been abrogated by the enactment of Ch 501.

Miller Bank v Collis, 211-859; 234 NW 550
Jones v Knutson, 212-268; 234 NW 548

Subrogation. If a second mortgagee uses his own funds in discharging a first mortgage in order to save the property, he will be subrogated to the rights of said first mortgagee; on the other hand, if funds are obtained through a new mortgage, and used in the discharge of said first mortgage, then the new mortgagee will acquire said right of subrogation, and in either case, the homestead character of part of the mortgaged property is quite immaterial.

Clark v Chapman, 213-737; 239 NW 797

Subrogation of second mortgagee. A second mortgagee whose mortgage represents money advanced for the specific purpose of discharging prior mortgages, or in redeeming from foreclosure of prior mortgages, will, in order to effect the ends of justice, be subrogated to all the rights and remedies of said former mortgagees.

Burmeister v Walz, 216-265; 249 NW 197

Loan to discharge mortgage — subsequent mortgage subrogated to former's rights. A governmental loaning agency, set up to meet an emergency, by making loans to save homes from foreclosure, is entitled to be subrogated to the rights of the original mortgagee, when it discovers that there is an heir of one of the original mortgagors who has an interest in the title and who did not join in the mortgage it holds, and when through no fault or negligence on its part, said heir's interest was not discovered and he was not prejudiced by

II SURETIES — SUBROGATION RIGHTS —continued

this latter mortgage, but was given the right to redeem in the event of foreclosure.

HOLC v Rupe, 225-1044; 283 NW 108

Grantee of mortgaged land—assumption default—effect. The grantee of land who, in the deed and as part of the consideration therefor, assumes and agrees to pay all unsatisfied mortgages theretofore placed on the land by the grantor, becomes, as between himself and said grantor, the principal debtor on said mortgages, and should the grantor be compelled as surety to pay said indebtedness, he will thereupon be entitled to be subrogated to all the prior rights of said mortgagees to enforce said mortgages against said grantee.

Monticello Bk. v Schatz, 222-335; 268 NW 602

Receiver's certificates — subrogation. The holder of certificates of indebtedness issued and sold by the receiver of an insolvent bank in order to raise funds with which to pay the debts of the bank will, in an action by the receiver to enforce an assessment on corporate stock in order to pay the certificates, be deemed to stand in the shoes of the original creditors of the bank.

Andrew v Bank, 206-869; 221 NW 668

Depositor by subrogation. In settling and adjusting the affairs of an insolvent bank, a claimant who is not a depositor in fact may not be decreed to be subrogated to the rights of certain depositors who are not parties to the controversy over the claim in question.

Leach v Bank, 207-471; 220 NW 10

Co-sureties—rights. Accommodation and nonaccommodation sureties on bonds given to secure public funds on deposit in banks are co-sureties and each, in case of payment by him, is entitled to contribution from the others, and to be subrogated to the rights of the municipality.

Andrew v Bank, 205-878; 219 NW 34
Leach v Bank, 205-975; 213 NW 612

Surety on guardian's bond. The surety on a guardian's bond who is compelled to pay the amount due on a mortgage held by the guardian for his ward, because of the breach of official duty by the guardian in releasing the mortgage without payment and without authority of court so to do, is, by such payment, subrogated, as a matter of course, to all the rights of the guardian and ward in such mortgage, and may foreclose such mortgage even against purchasers of the land subsequent to the release.

Randell v Fellers, 218-1005; 252 NW 787

Contribution—nonestoppel. A surety who unsuccessfully contends, when sued on the bond, that he is not liable for any defalcation occurring prior to the bond—that said bond is a substitute for a prior bond of the same guardian—does not thereby estop himself from enforcing contribution from the sureties on said prior and contemporary bond.

Fed. Sur. Co. v France, 212-1403; 238 NW 460

Co-sureties—obligations constituting. When an administrator gives bond on his original appointment, and later is ineffectually discharged, and at once reappointed, and gives a new bond, the two bonds will be treated as cumulative, and the sureties thereon as co-sureties, with the sole right in each to enforce proportional contribution from the other.

In re Donlon, 203-1045; 213 NW 781

Contribution enforceable against surety on separate bond. Where an executor has executed and filed two separate bonds for the faithful discharge of his duties, the surety who pays a devastavit in full may enforce contribution from the other surety; and it is immaterial that the surety enforcing contribution signed the bond for a consideration and that the other surety signed as an accommodation.

New Amst. Cas. Co. v Bookhart, 212-994; 235 NW 74; 76 ALR 897

Right of subrogation. When an administrator of an estate wrongfully pays out estate funds to one who has no right whatever to receive them, and the surety for the administrator is compelled to make good the loss, the legal right of the estate to compel the wrongful recipient to repay the funds because of his primary liability is, as a matter of equity, presumed to continue in order to enable a court of equity to subrogate the said surety to the same right.

American Sur. Co. v Bank, 218-1; 254 NW 338

Remedies of surety — attacking conveyance. The surety on an administrator's bond who has paid the shortage of the administrator consequent on the failure of the private bank in which the estate funds were deposited, may not, in an action to recoup his loss, question a conveyance by a former partner in the bank when, prior to the giving of the bond, the said partner had, in good faith and to the full knowledge of the administrator, sold his interest in the bank at a time when the bank had ample funds with which to pay the administrator's deposit.

Fidelity Co. v Bank, 218-1083; 255 NW 713

Statutory bonds — surety (?) or assignee (?). A surety who takes over the work of a defaulting public drainage contractor and proceeds to pay off claims which are statutorily lienable against the funds due under the contract acquires a right of subrogation superior to that of a prior assignee of said funds.

Ottumwa Works v O'Meara, 206-577; 218 NW 920

Statutory bond—subrogation of surety. A surety on a statutory bond for the performance of a public improvement contract who has performed his statutory contract at an expense which exceeds the balance on hand and due under the contract is ipso facto subrogated to the right of the principal contractor to such balance, in preference to subcontractors who hold claims which arise out of contract obligations which are not contemplated by the statute, but which were, nevertheless, inserted into the contract.

Monona Co. v O'Connor, 205-1119; 215 NW 803

Salary of public officer exempt. The salary—the "personal earnings"—of a public officer is exempt from liability on a judgment obtained against him and his surety, by the public body, because of the failure of the officer to account for public funds coming into his hands. The court cannot, on the plea of public policy, rule into the statute an exception which the legislature has not seen fit to declare. So held where the surety having paid the judgment, and thereby subrogated to the rights of the county, sought reimbursement from the officer's salary.

Ohio Cas. Co. v Galvin, 222-670; 269 NW 254; 108 ALR 1036

Discharge of surety. The repeal of a statute which gives the state, when it is a depositor in a bank, a preferential right to be paid in full if the bank passes into the hands of a receiver does not constitute a release of security in such sense as to release a surety on a bond which secures said deposit.

Leach v Bank, 205-1154; 213 NW 517
Andrew v Bank, 205-883; 213 NW 531

Discharge of surety—forfeiture of contract. The surety on a promissory note given as part of the contract price of land, ceases, as a matter of law, to be liable thereon to the original payee-vendor whenever the latter legally forfeits the contract.

Smith v Tullis, 219-712; 259 NW 202

Loss of right. Where on appeal in an equitable action the money judgment of the trial court against the appealing judgment defendant is ordered "superseded and set aside", and a new money judgment is entered against appellant "in lieu, place, and stead of that entered in the district court", the surety on the supersedeas bond on payment of the new judgment is not subrogated to the lien which the judgment plaintiff had under the old or first entered judgment.

Eland v Carter, 212-777; 237 NW 520; 77 ALR 448

11668 Levy—how made and indorsed.

Abuse of process.

Myers v Watson, 204-635; 215 NW 634

Contingent remainder. A contingent remainder—contingent because of the uncertainty of the person who will take the property—is not subject to attachment or execution levy and sale.

Saunders v Wilson, 207-526; 220 NW 344; 60 ALR 786

Immature crops. Immature crops are not leviable.

Rodgers v Oliver, 200-869; 205 NW 513

Crops raised during redemption period. The right of the owner of land after mortgage foreclosure to the possession of the property during the 12 months redemption period does not embrace the right to hold exempt from levy under the mortgage deficiency judgment the harvested grain which has been raised on the premises during said redemption period, and which constitutes the said owner's share as rent.

Starits v Avery, 204-401; 213 NW 769
See Goldstein v Mundon, 202-381; 210 NW 444

Rents and profits after foreclosure. The holder of a general deficiency judgment resulting from a foreclosure sale may not have a receiver appointed to take possession of the premises so sold and to apply the rents and profits thereof during the redemption period to the satisfaction of his deficiency judgment.

Howe v Briden, 201-179; 206 NW 814

Debtor's right of possession. A debtor's statutory "right of possession" of real estate during the year given for redemption from sale on execution is not, in and of itself, leviable.

Sayre v Vander Voort, 200-990; 205 NW 760; 42 ALR 880

Renounced and rejected gift.

Gottstein v Hedges, 210-272; 228 NW 93; 67 ALR 1218
Lehr v Switzer, 213-658; 239 NW 564

Renunciation of legacy. The act of a testamentary beneficiary in executing and making of record an unconditional and final renunciation of all benefits granted him under the will legally places such benefits beyond the reach of his creditors.

Berg v Shade, 203-1352; 214 NW 513
Funk v Grulke, 204-314; 213 NW 608

Right to renounce devise or bequest. The legal right of a beneficiary under a will to file an unconditional and final renunciation of all benefits granted him by the will, and thereby exclude his creditor from acquiring any right to the devised property, may be exercised even after a creditor of said beneficiary has levied upon, sold, and obtained a sheriff's deed to the land devised to said beneficiary, it appearing that the renouncing beneficiary had in no manner misled the creditor.

Lehr v Switzer, 213-658; 239 NW 564

Beneficiary's right to renounce benefits under will—effect on creditors. A beneficiary under a will has the right to renounce all benefits granted him under will, and creditors cannot complain of such renunciation; but such rule is limited to cases where no acceptance of provisions of will has been made by beneficiary.

McGarry v Mathis, 226-37; 282 NW 786

Income from trust dependent on election or demand by cestui. A trust which provides that the income therefrom shall be paid to a named beneficiary "from time to time as she may elect during her lifetime", effectually places said income beyond the reach of the creditors of said beneficiary so long as said beneficiary makes no such election. Evidence held to show an election as to one monthly payment.

Ober v Dodge, 210-643; 231 NW 444

Sale—validity approved. Record relative to the sale under special execution of personal property reviewed and held to reveal no invalidating fact.

McFerrin v Grain Co., 220-1086; 264 NW 45

Irretrievable nullification of lien. The filing by an insolvent judgment defendant of his petition in bankruptcy, within four months following the entry of judgment, discharges the judgment (it not being based on fraud or willful injuries) and irretrievably nullifies an execution levy on property, whether the property be exempt or nonexempt. In other words, the judgment plaintiff may not thereafter proceed in equity in the state court and have his discharged judgment enforced against property set aside to the judgment defendant as exempt, even tho, were it not for the bankruptcy proceedings, plaintiff would be able to show that said property was not exempt from levy under plaintiff's particular judgment.

McMains v Cunningham, 214-300; 233 NW 129; 242 NW 106

11669 Acts necessary.

Essential acts necessary. Principle reaffirmed that, to make a valid levy on personal property, the officer must do something which will amount to a change of possession, or which is equivalent to a claim of dominion over the property, coupled with the power to enforce it.

Whitaker v Tiedemann, 200-901; 205 NW 468

Sufficiency. A sufficient levy is made by the act of the officer in invoicing the property and leaving it in the possession of his agent.

First N. Bk. v Schram, 202-791; 211 NW 405

Insufficient levy. An officer makes no legal levy on a truck by simply looking it over, noting a levy on the execution, and allowing the owner to drive away with the truck under a promise to deliver it to the execution plaintiff at a future time.

City Fuel Co. v Roof. Co., 207-860; 223 NW 751

Wrongful levy—damages. One who seeks a money judgment for the value of property wrongfully levied on may not also recover for the loss of the use of the property.

Wertz v Hale, 202-305; 208 NW 859

Void sale — relief — venue. A proceeding wherein relief is sought on the theory that the petitioner bought property at a void judicial sale and received nothing for his purchase price must be brought in the court and in the proceedings out of which the execution arose.

State v Beaton, 205-1139; 217 NW 255

11670 Selection of property.

Life estate. When judgment creditor of a life tenant, by virtue of execution, levies upon a life estate and purchases the life estate on execution sale, he assumes all the duties of a life tenant and is obligated to pay delinquent taxes, or else lose the advantage of the life estate.

Rich v Allen, 226-1304; 286 NW 434

11671 Lien on personalty.

Delayed return—intervening mortgage—priority. Even tho an officer physically performs all the acts which would constitute a valid levy on chattels if said acts were embodied, at the time of the acts, in a return indorsed on or attached to the execution, yet, where the officer delays making said return for six days after said acts were performed, and in the meantime a chattel mortgage on said chattels is executed and recorded, such mortgage will be superior in right to the belated (and alleged) levy.

Farmers Bk. v Mallicoat, 209-335; 228 NW 272

11672 Choses in action.

Unadjudicated cause of action. The statute which provides for execution levy on "things in action" authorizes a levy on an unadjudicated cause of action which the judgment defendant is prosecuting against the judgment plaintiff for breach of contract.

Brenton Bros. v Dorr, 213-725; 239 NW 808

Execution sale of promissory note — purchase by maker — effect. The maker of a promissory note and mortgage may, by himself or through others, validly purchase said note and mortgage at execution sale against the payee or holder thereof, and thereby completely discharge the same.

Buter v Slattery, 212-677; 237 NW 232

Execution—action to set aside—incompetent appraisers. Where a cause of action for alleged wrongful attachment was sold under execution after an appraisement of "no value", held that the incompetency of the appraisers to justly appraise such property would not be assumed because one was an attorney of some-

what limited experience and one was the editor of a newspaper devoted to the publication of court proceedings.

Francis v Todd, 219-672; 259 NW 249

Grossly inadequate price. Where a cause of action for alleged wrongful attachment was levied on under execution and, after an appraisement of "no value", was sold for substantially $100, held that the record on appeal did not reveal a sale at such a grossly inadequate price as to warrant the setting aside of the sale.

Francis v Todd, 219-672; 259 NW 249

Stay under inherent power of court. If the sale under execution of a cause of action is liable to be inequitable to, or oppressive on, the judgment defendant, e.g., where the cause of action may be such as to practically defy a just appraisement, it is suggested that relief may be had, in a proper case, by resorting to the inherent discretionary power of the court to order a stay.

Francis v Todd, 219-672; 259 NW 249

11674 Persons indebted may pay officer.

Payment to officer by garnishee. See under §12167, Vol I

11676 Corporation stock—debts—property in hands of third persons.

Corporate shares — essentials of levy. An attempted levy on corporate shares of stock is, as to a stranger with a prior interest in the property, a nullity (1) unless the president of the company or other officer designated by the statute is notified in writing that the stock has been levied on, and (2) unless the return on the writ states that such notice was given. (§12098, C., '31.)

Cramer v McDonald, 213-454; 239 NW 101

Appeal does not vacate or affect judgment. A judgment which releases and discharges an execution levy on corporate shares of stock is a self-executing judgment, and is in full force and effect from the date thereof to the time the judgment is reversed on appeal and the execution levy reinstated, and one who purchases said stock after the entry of said judgment and before the reversal thereof, (from the owners thereof as shown by the corporate stock books) will be protected in his ownership when he purchased in good faith, for value, and without knowledge of said litigation.

Hewitt v Cas. Co., 212-316; 232 NW 835

Failure to serve notice on defendant—effect. Failure of the officer making the levy to serve notice on judgment defendant of the levy on a chose in action furnishes ample grounds for quashing the writ and staying sale thereunder.

Brenton v Dorr, 213-725; 239 NW 808

11677 Garnishment.

Garnishment carries landlord's lien. A judgment creditor, by perfecting a garnishment of the tenant of the judgment debtor, legally steps into the shoes of the latter, armed with full power, if the tenant-garnishee's debt is for rent, to enforce, by appropriate action, the landlord's lien theretofore held by the judgment debtor.

Kinart v Churchill, 210-72; 230 NW 349

Unadjudicated cause of action. The statute (§11672, C., '31) which provides for execution levy on "things in action", authorizes a levy on an unadjudicated cause of action which the judgment defendant is prosecuting against the judgment plaintiff for breach of contract.

Brenton v Dorr, 213-725; 239 NW 808

Beneficiaries' interest in estate funds. Where a casualty company secured a judgment against beneficiaries under a will, and issued an execution under which the administrator with will annexed was attached as garnishee, attorneys for the beneficiaries could properly intervene in the garnishment proceedings to assert a claim to the garnished fund for legal services rendered to beneficiaries, in connection with the action by casualty company, which claim was based on written assignment of interests of beneficiaries under said will.

New Amsterdam Co. v Bookhart, 227-1150; 290 NW 61

11679 Return of garnishment—action docketed.

Proceedings under attachment applicable. The statute providing, where parties have been garnished under an execution, the officer shall return to the next term thereafter a copy of the execution, and that thereafter the proceedings shall conform to proceedings in garnishments under attachments, permits the claimants of liens upon or interests in money or property held by garnishment on execution to intervene and proceed under statute permitting intervention in attachment proceedings.

New Amsterdam Co. v Bookhart, 227-1150; 290 NW 61

Right to docket action. A judgment creditor after perfecting a garnishment of the tenant of the judgment debtor has a right to have an action docketed, without fee, for the purpose of enforcing the landlord's lien theretofore held by said judgment debtor, and such action may not be deemed a "creditor's bill" in the ordinary sense.

Kinart v Churchill, 210-72; 230 NW 349

Beneficiaries' interest in estate funds—attorney's lien—intervention. Where a casualty company secured a judgment against beneficiaries under a will, and issued an execution under which the administrator with will an-

nexed was attached as garnishee, attorneys for the beneficiaries could properly intervene in the garnishment proceedings to assert a claim to the garnished fund for legal services rendered to beneficiaries, in connection with the action by casualty company, which claim was based on written assignment of interests of beneficiaries under said will.

New Amsterdam Co. v Bookhart, 227-1150; 290 NW 61

11680 Joint or partnership property.

Levies on partnership realty — procedure. Holding reaffirmed that this section applies solely to levies on personal property.

Bankers Tr. v Knee, 222-988; 270 NW 438

Jointly owned property. No enforceable lien can be created by levy on execution against property owned jointly, unless the property is inventoried and appraised as provided by statute with a view to determining the interest of the individual execution defendant.

Whitaker v Tiedemann, 200-901; 205 NW 468

Judgment lien on partner's interest—limitation. A judgment decreeing to a judgment-creditor a lien on the uncertain interest of the judgment-debtor in a private banking partnership in process of voluntary liquidation, must not exceed the interest which the said partner would be entitled to after final partnership accounting.

Anthony v Heiny, 215-1347; 244 NW 902

Unincorporated association. An association name may be regarded as designating the individuals which it represents, altho the members own no proportionate share of its property. Such members have joint use and enjoyment of the property, which right ceases upon termination of membership.

Lamm v Stoen, 226-622; 284 NW 465

11681 Lien—equitable proceeding—receiver.

Mortgage on rents—right to receiver to protect. A mortgagee of the rents and income of real estate is entitled to have a receiver appointed to protect his right to said rents and income when said right is jeopardized by the unauthorized acts of an impecunious mortgagor.

Equitable v McNamara, 220-297; 259 NW 231; 262 NW 466

11682 Mortgaged personal property—payment of mortgage.

Sale—validity approved. Record, relative to the sale under special execution of personal property, reviewed and held to reveal no invalidating fact.

McFerrin v Grain Co., 220-1086; 264 NW 45

11689 Sale—costs—surplus.

Sale—appraisement. A sale under execution will not be deemed invalidated because one of the appraisers did not inspect the property at the very time the appraisement was made—it appearing that he was familiar with the property and had shortly theretofore inspected it.

McFerrin v Grain Co., 220-1086; 264 NW 45

11695 Other remedies.

Order discharging levy under execution — attachment procedure inapplicable. The statutory provision for preserving a lien under attachment notwithstanding an order discharging the attachment by announcing an appeal and perfecting the same within two days (§12141) has no application to an order discharging a levy under execution.

Hewitt v Cas. Co., 212-316; 232 NW 835

11698 Duty to levy—notice of ownership or exemption.

Atty. Gen. Opinion. See '32 AG Op 270

ANALYSIS

I INDEMNITY IN GENERAL
II INDEMNIFYING BOND
III NOTICE OF OWNERSHIP
IV EXEMPT PROPERTY

I INDEMNITY IN GENERAL

Discussion. See 12 ILR 426—Judgment against indemnitors and persons liable over

Indemnification of one of two sureties—effect. In an action against a public officer and his bondsmen to recover a shortage in public funds, it is quite immaterial, as far as plaintiff is concerned, that one of the sureties has received property from the public officer as partial indemnity.

School District v Sass, 220-1; 261 NW 30

Possession by execution defendant — presumption — instructions. In an action against a sheriff for the wrongful sale of plaintiff's machinery as the property of an execution defendant, no error results from the failure to instruct that the finding of the property on the premises of the execution defendant raised a presumption of ownership in the latter when the court specifically placed the burden on plaintiff to prove his ownership of said property. (No request for the instruction was made.)

Rosander v Knee, 222-1164; 271 NW 292

II INDEMNIFYING BOND

Notice of ownership—sufficiency. The sworn, written notice of ownership, which is given an officer who has levied on the property, is sufficient in form and contents if it actually en-

ables the officer to secure an indemnifying bond.

Capital Loan Co. v Keeling, 219-969; 259 NW 194

III NOTICE OF OWNERSHIP

Defective notice of ownership—effect. The fact that the notice to an attaching officer of the interest of a chattel mortgagee in attached property is defective becomes of no consequence when it is made to appear that the mortgagee was in open and undisputed possession of the mortgaged chattels and was proceeding to foreclose the mortgage when the officer levied the attachment.

Smith Co. v Goldberg, 204-816; 215 NW 956

Chattel mortgagee—allowable procedure. A chattel mortgagee may, when the property is levied on by an attaching creditor of the mortgagor, serve notice of his interest, on the levying officer, and thereafter, if the property is not released, maintain an action for conversion against the attaching plaintiff and the levying officer.

Capital Loan Co. v Keeling, 219-969; 259 NW 194

Notice of ownership—sufficiency. Notice of ownership of machinery, wrongfully levied on, held quite sufficient and sustained by the evidence.

Rosander v Knee, 222-1164; 271 NW 292

IV EXEMPT PROPERTY

Tools employed as capital. Tools which comprise the equipment of an automobile machine shop, operated by the owner through his employed mechanics as a side line to the owner's principal business of an automobile salesman, are not exempt to the owner as a mechanic.

First N. Bk. v Larson, 213-468; 239 NW 134

11702 Indemnifying bond—sale and return.

Atty. Gen. Opinion. See '32 AG Op 270

Replevin in lieu of action for conversion. A plaintiff, it is true, may not employ an action of replevin in order to recover for a conversion, but plaintiff may maintain a good-faith action in replevin against a levying officer when the officer had possession of the property when plaintiff served his notice of ownership and when the officer received an indemnifying bond, even tho the officer had parted with possession under an order of court before the replevin action was actually commenced.

Dvorak v Avery, 208-509; 225 NW 947

11703 Failure to give bond.

Atty. Gen. Opinion. See '32 AG Op 270

11706 Stay of execution—exceptions.

Atty. Gen. Opinion. See '28 AG Op 236

Inherent power of court to stay. The district court has inherent, discretionary power, in order to prevent injustice, to order a reasonable stay of execution, even without bond if it be made to appear that the judgment plaintiff will not be prejudiced by the order. But if said order is made because the chose or thing in action, which has been already levied on, has not been adjudicated, the order should be conditional on a reasonably prompt adjudication of said chose or thing in action.

Brenton v Dorr, 213-725; 239 NW 808

Stay bond—subsequent compromise and satisfaction—effect. The surety on a bond staying the collection of judgments is wholly released by the subsequent acts of the trustee in bankruptcy for the judgment defendant and the receiver for the insolvent judgment plaintiff entering into a legally authorized compromise settlement and satisfaction of the judgment, in order to avoid threatened and doubtful litigation growing out of the execution of said stay bond, and the subsequent insolvency of all the parties thereto.

State v Cas. Co., 213-211; 238 NW 709

Stay under inherent power of court. If the sale under execution of a cause of action is liable to be inequitable to, or oppressive on, the judgment defendant, e. g., where the cause of action may be such as to practically defy a just appraisement, it is suggested that relief may be had, in a proper case, by resorting to the inherent discretionary power of the court to order a stay.

Francis v Todd, 219-672; 259 NW 249

11712 Execution against principal and sureties.

Extension to principal available to surety — abatement of action. An order of a court of bankruptcy granting, to a maker of a negotiable promissory note, an extension of time in which to make payment, is not personal to said maker only, but inures, under USC, title 11, §204, to the benefit of another maker of said note who in fact signed said note as surety only, but without so indicating on the face of the note; and said latter maker, when sued alone by the original payee, may, for the purpose of abating the action, establish his suretyship and consequent secondary liability.

Benson v Alleman, 220-731; 263 NW 305

Permissible plea of counterclaim. In an action against the principal and surety on an attachment bond for damages consequent on the alleged wrongful issuance of the writ, the principal in said bond may plead a counterclaim which neither arises out of or is connected with the transaction on which plaintiff sues, nor in which the surety has any personal ownership (§11151, C., '35). A surety is not primarily liable on the bond and the principal who is

primarily liable should be permitted to defeat recovery on the bond if he can so do.

Imes v Hamilton, 222-777; 269 NW 757

11717 Labor claims preferred.

Atty. Gen. Opinions. See '28 AG Op 160; '30 AG Op 268

Construction — preferred labor claim act. This section does not embrace a seizure under execution at the instance of the labor claimant. In other words, the labor claimant may not base a preference on an execution seizure instigated by himself.

Heesel v Bank, 205-508; 218 NW 298

Labor claims—extent of priority. Under a voluntary assignment for the benefit of creditors, all claims for personal service rendered to the assignor within ninety days next preceding the assignment are payable in full irrespective of the amount (§12732, C., '31), and irrespective of the rights of a landlord who asserts his lien simply under his lease and not under a levy. This is true because the rights of parties to a voluntary assignment for the benefit of creditors are exclusively controlled by the chapter pertaining to such assignment, and, consequently, this section, limiting the priority of labor claims to $100 in case property is seized under proceeding not voluntary on the part of the creditor, does not apply.

In re Brady, 216-320; 249 NW 344

11722 Notice of sale.

Unnecessary recitals as to absence of right to redeem. A notice of sale of land under special foreclosure execution need not recite that the land will be sold without any right of redemption in a named defendant (because he has appealed), when the right of redemption from the sale exists in other party defendants.

Ebinger v Wahrer, 213-84; 238 NW 587

Unnecessary recital as to foreclosed rights of parties. A notice of sale of land under special foreclosure execution need not recite that the land will be sold free and clear from the "right, title, interest, liens, or claims" of party defendants.

Ebinger v Wahrer, 213-84; 238 NW 587

11727 Setting aside sale.

Venue in action to set aside sale.

Brownell v Bank, 201-781; 208 NW 210

Inadequacy of bid—estoppel to object. A debtor cannot have an execution sale set aside on the ground that the accepted bid was inadequate when such inadequacy was brought about by the conduct of the debtor, or his attorney, in reading to the assembled bidders at the time of sale a disquieting notice relative to the title which a successful bidder would receive.

Ebinger v Wahrer, 213-84; 238 NW 587

11728 Time and manner.

ANALYSIS

I Sales in General
II Mistake
III Fraud
IV Inadequacy of Price
V Opening or Vacating Sale
VI Title and Rights of Purchaser

I SALES IN GENERAL

Presumption of compliance with statute. A sheriff in making a sale under execution will be presumed, nothing appearing to the contrary, to have complied with the statutes governing such sales.

Ebinger v Wahrer, 213-84; 238 NW 587

Bid—cancellation. A bid at a sale in partition is effectually canceled by the act of the bidder in accepting a return of his required cash deposit, even tho such deposit is returned under the order of the court.

Fraizer v Fraizer, 204-724; 215 NW 946

Inconsistent remedies—irrevocable election—effect. A judgment creditor who, instead of satisfying his judgment (1) by enforcing his lien on personal property which his judgment debtor had assigned to him as security, satisfies said judgment, (2) by buying in the same property under a general execution levy and sale under his said judgment, must be deemed to have irrevocably waived all right under his said assignment as security, it appearing that after said levy but before the sale thereunder, the said judgment creditor learned that the judgment defendant had also assigned said property to another party.

Zimmerman v Horner, 223-149; 272 NW 148

II MISTAKE

Vacation—insufficient ground. A sale on execution will not be set aside solely on the plea of the purchaser that he made a mistake in the amount of his bid.

Aronson v Hoskins, 201-389; 207 NW 389

Right to withdraw bid because of mistake. A plaintiff in execution, who bids at the sale the full amount of the judgment and costs in the honest belief that he was bidding on two separate tracts of land, when only one tract was being offered, may, on the discovery of his mistake, withdraw his bid, and the levying officer has discretion, without the consent of the defendant in execution, to accede to said withdrawal and to treat the sale as a nullity, and to resell, if there be time enough, and if there be not time enough, to return the execution in accordance with said facts. And in such latter case plaintiff may order out a new execution.

Van Rheenen v Windell, 220-211; 262 NW 120

III FRAUD

Improper procedure. An execution sale will not, in a collateral proceeding, be set aside as invalid, even on a showing of inadequacy of price and fraud.

Coburn v Davis, 206-649; 221 NW 186

Cancellation of fraudulently acquired deed. A person who secretly buys up a certificate of execution sale and takes a sheriff's deed in his own name, in violation of his agreement with the judgment defendant to pay off the judgment in question and thereby satisfy his own debt to the judgment defendant, has no standing to contest an action by the latter for the cancellation of said deed.

Swearingen v Neff, 204-1167; 216 NW 621

IV INADEQUACY OF PRICE

Inadequacy of price. Record reviewed and held insufficient to show that a mortgage-secured note was sold on execution for such an inadequate amount as to equitably invalidate the sale.

Buter v Slattery, 212-677; 237 NW 232

Inadequacy of bid—effect. An execution sale of personal property will not be set aside simply because of the inadequacy of the accepted bid, when all inference of fraud is affirmatively disproven, and especially when the inadequate bid was owing to some extent to the fault of the execution defendant.

Coburn v Davis, 206-649; 221 NW 186

Inadequacy of bid—estoppel to object. A debtor cannot have an execution sale set aside on the ground that the accepted bid was inadequate when such inadequacy was brought about by the conduct of the debtor, or his attorney, in reading to the assembled bidders at the time of sale a disquieting notice relative to the title which a successful bidder would receive.

Ebinger v Wahrer, 213-84; 238 NW 587

Grossly inadequate price. Where a cause of action for alleged wrongful attachment was levied on under execution and, after an appraisement of "no value", was sold for substantially $100, held that the record on appeal did not reveal a sale at such a grossly inadequate price as to warrant the setting aside of the sale.

Francis v Todd, 219-672; 259 NW 249
See Adams v Morrison, 219-852; 259 NW 582

V OPENING OR VACATING SALE

Sale en masse—validity. The sale en masse of several tracts of land (after unsuccessfully offering the tracts separately) without adjourning the sale, furnishes no ground for setting aside the sale.

Adams v Morrison, 219-852; 259 NW 582

Sale en masse of lienable and nonlienable property. A sale en masse, under execution, of several tracts of land belonging to the execution defendant, along with other tracts in which said defendant had no interest, is illegal, and will be set aside in a proper action.

Adams v Morrison, 219-852; 259 NW 582

Setting aside. Where a cause of action for alleged wrongful attachment was levied on under execution and, after an appraisement of "no value", was sold for substantially $100, held that the record on appeal did not reveal a sale at such a grossly inadequate price as to warrant the setting aside of the sale.

Francis v Todd, 219-672; 259 NW 249
See Adams v Morrison, 219-852; 259 NW 582

Right to withdraw bid because of mistake. A plaintiff in execution, who bids at the sale the full amount of the judgment and costs in the honest belief that he is bidding on two separate tracts of land, when only one tract is being offered, may, on the discovery of his mistake, withdraw his bid, and the levying officer has discretion, without the consent of the defendant in execution, to accede to said withdrawal and to treat the sale as a nullity, and to resell, if there be time enough, and if there be not time enough, to return the execution in accordance with said facts. And in such latter case plaintiff may order out a new execution.

Van Rheenen v Windell, 220-211; 262 NW 120

VI TITLE AND RIGHTS OF PURCHASER

Highest bid—confirmation. Highest bidder at public sale is not entitled as a matter of right to have the sale confirmed by the court, and where a higher substantial bid is made, even tho tardy, a large discretion lies with the court as to which bid shall be accepted.

Criswell v Criswell, 227-212; 288 NW 130

Status of highest bidder. In partition action where property was sold at public auction in regular manner for $4,600, the court did not abuse its discretion in amending referee's report and accepting a higher bid made subsequently to the public sale, the uniform holding in Iowa being that the high bidder at judicial sales, other than at sales under execution or by a trustee under a power, acquires no absolute or vested right, since the sale must be approved by the court and is considered merely a preferred bidder until such approval is given.

Criswell v Criswell, 227-212; 288 NW 130

11729 Sale postponed.

Inadequate bid — failure to continue sale. The sheriff in conducting a levy en masse on land under an execution abuses his discretion in not continuing the sale when the bid is grossly inadequate, e.g., about one-seventh of

the value of the land. Deeds issued under such circumstances will be set aside.

McCann v McCann, 207-610; 223 NW 393

Sale en masse—validity. The sale en masse of several tracts of land (after unsuccessfully offering the tracts separately) without adjourning the sale furnishes no ground for setting aside the sale.

Adams v Morrison, 219-852; 259 NW 582

11730 Overplus.

Homestead and nonhomestead property—sale en masse—appropriation of surplus. A junior execution creditor who, at a senior mortgage foreclosure sale, buys in property which, in accordance with the mortgagor's agreement to that effect, is sold en masse, and regardless of the homestead character of part of the property, and who, in so buying, bids an amount in excess of the senior mortgage debt, on the express condition that said excess be indorsed on his junior execution (which is done), and who, with the full knowledge of the mortgagor, and without objection by him, complies with his bid, and after a year for redemption takes a deed is not thereafter liable to the mortgagor for the amount of said excess on the theory that such excess represents the mortgagor's homestead, on which the junior execution creditor admittedly had no lien.

Phoenix Co. v Vaught, 201-450; 205 NW 792

Homestead and nonhomestead property—sale en masse—apportionment of surplus. Tho it be conceded, arguendo, that, where mortgaged property is sold on foreclosure en masse, and regardless of the homestead character of part of the property, to a junior execution creditor on an indivisible bid in excess of the mortgage debt, the mortgagor would have a recoverable interest in the excess on the theory that it represented his homestead, on which the junior creditor had no lien, nevertheless the mortgagor would not be entitled to recover the entire excess, because equity would require the bid to be apportioned between the homestead and the nonhomestead property, in order that the homestead should bear its just proportion of the mortgage debt.

Phoenix Co. v Vaught, 201-450; 205 NW 792

11732 Plan of division of land.

Inadequate bid—failure to continue sale. The sheriff in conducting a levy en masse on land under an execution abuses his discretion in not continuing the sale when the bid is grossly inadequate, e. g., about one-seventh of the value of the land. Deeds issued under such circumstances will be set aside.

McCann v McCann, 207-610; 223 NW 393

Return—correcting inadvertent error. An inadvertent error in the return of a mortgage foreclosure sale may be corrected by an amendment by the sheriff after the land has gone to sheriff's deed, provided the judgment plaintiff and defendant are the only persons affected. In such case oral testimony showing the error is quite unnecessary. Especially is this true when complainant shows no injury consequent on such correcting amendment.

Equitable v Ryan, 213-603; 239 NW 695

Homestead—exhausting other property. A sheriff in selling a homestead forty, and a nonhomestead forty (under special mortgage-foreclosure execution) may very properly call for and receive, in turn, separate, substantial, and good faith bids, (1) on the nonhomestead forty, (2) on the homestead forty, and (3) on the two forties en masse, and, over the objections of the debtor, may accept the bid en masse and sell thereunder when said bid en masse is substantially in excess of the aggregate of the other two bids, tho insufficient to completely satisfy the execution.

Prudential v Westfall, 219-1119; 260 NW 344
American Bk. v Davis, 221-1183; 268 NW 9

11733 Failure of purchaser to pay—optional procedure.

Nonright to withdraw bid. The purchaser at a judicial sale in partition has no right arbitrarily to withdraw his bid prior to confirmation of the sale.

Reece v Cartwright, 209-706; 228 NW 641

Sale—right to withdraw bid because of mistake. A plaintiff in execution, who bids at the sale the full amount of the judgment and costs in the honest belief that he was bidding on two separate tracts of land, when only one tract was being offered, may, on the discovery of his mistake, withdraw his bid, and the levying officer has discretion, without the consent of the defendant in execution, to accede to said withdrawal and to treat the sale as a nullity, and to resell, if there be time enough, and if there be not time enough, to return the execution in accordance with said facts. And in such latter case plaintiff may order out a new execution.

Van Rheenen v Windell, 220-211; 262 NW 120

11734 Sales vacated for lack of lien.

Nonright to have sale set aside. A judgment plaintiff in mortgage foreclosure who levies upon the mortgaged premises after the expiration of six months, and before the expiration of nine months from a sale under a foreclosure of a prior mortgage, and bids in the property, subject to the rights of the first mortgage, for the full amount of his judgment, may not, after his right to redeem has expired, have his sale set aside and canceled and his judgment reinstated, on the mistaken claim that his judgment was not a lien on the land at the time of the levy.

Home Bk. v Klise, 205-1103; 216 NW 109

Motion to set aside by stranger to proceeding. The owner of land which has been levied upon and sold under execution as the property of the judgment defendant on the theory that the judgment became a lien on the land before said owner acquired the land, may maintain a motion to set aside the sale on the ground that said judgment was not and never had been a lien on the land.

Dorsey v Bentzinger, 209-883; 226 NW 52

11736 Real estate of deceased judgment debtor.

Quasi-judgment subsequent to death of party. An order growing out of a proceeding instituted after the death of a party, and declaring a contingent liability against the estate of a deceased party, is not a lien on the real estate of which the deceased died seized.

In re Hager, 212-851; 235 NW 563

11740 Mutual judgments—set-off.

Set-off of judgments — effect on lien of attorney. The offsetting of the larger against the smaller of two mutual judgments wholly terminates an unadjudicated attorney's lien duly noticed in the judgment docket of the smaller judgment, when the indebtedness represented by the larger judgment antedates the indebtedness represented by the smaller judgment.

McIntosh v McIntosh, 211-750; 234 NW 234

Unliquidated demand set off against court costs. On a motion by an administrator to tax court costs against a defeated claimant in probate, the latter may not have a duly filed but unliquidated claim in his favor and against the estate adjudicated and set off against said costs and a judgment rendered against the estate for the excess.

In re Nairn, 215-920; 247 NW 220

11741 Personal property and leasehold interests—appraisement.

Sale — appraisement — noninvalidating circumstance. A sale under execution will not be deemed invalidated because one of the appraisers did not inspect the property at the very time the appraisement was made, it appearing that he was familiar with the property and had shortly theretofore inspected it.

McFerrin v Grain Co., 220-1086; 264 NW 45

Incompetent appraisers. Where a cause of action for alleged wrongful attachment was sold under execution after an appraisement of "no value", held that the incompetency of the appraisers to justly appraise such property would not be assumed because one was an attorney of somewhat limited experience and one was the editor of a newspaper devoted to the publication of court proceedings.

Francis v Todd, 219-672; 259 NW 249

11743 Deed or certificate.

Atty. Gen. Opinion. See '30 AG Op 84

Life estate — interest acquired. Judgment creditor of a life tenant in purchasing a life estate at execution sale cannot acquire any greater interest than that held by the life tenant.

Rich v Allen, 226-1304; 286 NW 434

Redemption by interloper — effect. The holder of a certificate of sale under execution may not question a timely redemption made by an interloper, in the name of the person who had the right to redeem; especially is this true when the person paying the redemption money had contracted for a deed, and when the certificate holder has once surrendered his certificate and accepted the redemption money.

Dixon Lbr. v Cole, 213-554; 239 NW 131

Equitable assignment—sheriff's certificate —homestead—redemption by judgment creditor. Where judgment creditor redeemed from foreclosure sale and secured an assignment of the sheriff's certificate from the mortgagee, and appellant-owners failed to make a statutory redemption, the judgment creditor was an equitable assignee of the sheriff's certificate entitled to deed, even assuming that he had no right to redeem because of the homestead character of the land, since it made no difference to appellant-owners whether the mortgagee or judgment creditor was the holder of the certificate.

Ackerman v Bank, 228- ; 291 NW 150

Expiration of redemption—effect on nonredeeming junior lienholder—sale certificate assignment. In a mortgage foreclosure action where a defendant junior lienholder fails to redeem, an assignment by the mortgagee of his foreclosure sale certificates to the defendant mortgagor after expiration of the period of redemption, vests in the mortgagor all of mortgagee's rights unburdened by the claims of any party to the suit.

Bates v Mullins, 223-1000; 274 NW 117

Transfer—expiration of redemption—mortgagor's acquisition of sale certificates—nonmerger with fee. Where a mortgagor-defendant after the expiration of the right of redemption took by assignment the sale certificates from the mortgagee-plaintiff in foreclosure, no merger of the mortgage and the fee title occurred thereby to reinstate or give priority to junior liens, and mortgagor could sell to a third party free and clear of all claims of parties to the foreclosure.

Bates v Mullins, 223-1000; 274 NW 117

Sheriff's certificate passing as personalty. A sheriff's certificate under foreclosure proceedings, in which the period of redemption had not yet expired, was personal property and, upon the death of the certificate holder-

owner, passed to the person inheriting the personal property under the will.

In re Jensen, 225-1249; 282 NW 712

Delinquent taxes—purchaser's duty to pay. When judgment creditor of a life tenant, by virtue of execution, levies upon a life estate and purchases the life estate on execution sale, he assumes all the duties of a life tenant and is obligated to pay delinquent taxes, or else lose the advantage of the life estate.

Rich v Allen, 226-1304; 286 NW 434

11744 Deed.

Notice of homestead right. The holder of a sheriff's deed under execution sale necessarily takes the deed subject to the homestead rights of the execution defendant of which he had actual or constructive notice.

Frum v Kueny, 201-327; 207 NW 372

Deed carries unaccrued rents. Principle reaffirmed that unaccrued rents pass to the grantee in a sheriff's deed.

Wilson v Wilson, 220-878; 263 NW 830

Rent—implied obligation. Proof that the holder of a first mortgage on real estate was himself in occupancy of the premises, and continued such occupancy after the issuance of a sheriff's deed under a junior lien, generates the presumption that such occupancy was with the assent of the said occupant and the said deedholder, with consequent obligation of the occupant to pay reasonable rental to said deedholder until such time as a deed might be executed under foreclosure of the first mortgage.

Norman v Dougan, 201-923; 208 NW 366

Ownership of existing crops. On the issue whether the holder of a sheriff's deed was the owner of a crop of corn grown on the land, or whether the crop had matured, and therefore belonged to the tenant, the court will not take judicial notice that corn will mature on any particular date. The holding of the trial court on clearly competent and conflicting testimony is final.

Frum v Kueny, 201-327; 207 NW 372

Homestead—noncontiguous tracts. One-half of a double garage, situated on property used by the owner solely for rental purposes, may not be deemed an appurtenance of the said owner's homestead, composed of a nearby, separate, independent and wholly different tract, noncontiguous to the rental property. So held in an action involving the validity of a sheriff's deed based on a sale en masse—a sale without platting.

Van Law v Waud, 223-208; 272 NW 523

When deedholder deemed trustee. The original mortgagee in a third mortgage who fraudulently redeems in his own name from the foreclosure of the second mortgage and obtains a sheriff's deed, when in fact he had, long prior thereto, assigned said third mortgage, must be deemed to hold said deed as a trustee for his assignee, but he will not be deemed also to hold said deed as trustee for the first mortgagee who has suffered an adverse foreclosure of his mortgage because of the fraud of said redemptioner.

Lyster v Brown, 210-317; 228 NW 3

Judgment creditor's deed after mortgage foreclosure—insufficiency. A sheriff's deed issued under execution sale to a judgment creditor, after expiration of the judgment creditor's right of redemption as a defendant junior lienholder in a mortgage foreclosure, is a nullity and will not sustain an action to quiet title thereon.

Bates v Mullins, 223-1000; 274 NW 117

Staying deed under moratorium act—loss of right. A defendant in mortgage foreclosure may not, after execution sale, have an order under the emergency moratorium act (45 GA, Ch 179) staying the execution of sheriff's deed and extending the period for redemption, when, at the time of the application for the order, the defendant, on his own application, has been adjudged a bankrupt, and his equity of redemption in the land in question has been sold under an order issued out of the bankruptcy court.

Lincoln Bank v Brown, 219-630; 258 NW 770

Denying moratorium cancels restraining order on sheriff. An order restraining the sheriff from issuing a deed, pending a hearing on a moratorium application for extension of period for redemption, is automatically dissolved when the application is denied, and a deed issued is valid when a nunc pro tunc order places the moratorium denial order on record as of a date prior to the issuance of deed.

Lincoln Bk. v Brown, 224-1256; 278 NW 294

Execution sale of life estate—remainderman unaffected. Where a judgment creditor purchases a life estate at execution sale and then purchases tax certificates outstanding against such life estate, he is merely redeeming the taxes and cannot acquire any interest adverse to the remainderman.

Rich v Allen, 226-1304; 286 NW 434

11747 Damages for injury to property.

Subsequent damages to land. A mortgagee who purchases the land at foreclosure sale for the full amount of his judgment is entitled, after he obtains the sheriff's deed, to the proceeds of gravel wrongfully removed from the premises after the sale, and before the issuance of the deed.

LeValley v Buckles, 206-550; 221 NW 202

Waste—recovery for, when mortgage satisfied. While a mortgagee of land may maintain an action to protect his security against waste,

yet after he has foreclosed and bought in the property for the full amount of the debt, he cannot maintain an action for gravel and standing timber removed from the land during the time the mortgage was being foreclosed.

Kulp v Trustees, 217-310; 251 NW 703

Rights to unaccrued rents. The principle that one who receives a sheriff's deed is entitled to unaccrued rents under an outstanding lease, can have no application when the lease had terminated immediately prior to the issuance of said sheriff's deed.

Kerr v Horn, 211-1093; 232 NW 494

Deed carries unaccrued rents. Principle reaffirmed that unaccrued rents pass to the grantee in a sheriff's deed.

Wilson v Wilson, 220-878; 263 NW 830

11749 Death of holder of judgment.

Judgment creditor dead—when garnishment judgment void. Where, after the testate death of a judgment creditor, two of his eight beneficiaries secure an execution on the judgment, garnish the judgment debtor's interest in an estate, and take a judgment under the garnishment proceedings applying the proceeds to the original judgment, an order thereafter quashing the execution and the return thereon for nonconformity to statute also invalidates the garnishment judgment.

Gohring v Koonce, 224-1186; 278 NW 283

11752 Execution quashed.

Motion—when timely—dead judgment creditor. When innocent third parties are not involved, a motion to quash an execution for nonconformity to statutes, prescribing procedure after death of judgment creditor, is not too late, tho filed four months after the entry of a garnishment judgment to which only two of the eight heirs interested therein were parties. Such garnishment judgment is an incomplete adjudication and not sufficient to warrant payment by the judgment debtor to the two represented heirs.

Gohring v Koonce, 224-1186; 278 NW 283

Judgment creditor dead—when garnishment judgment void. Where, after the testate death of a judgment creditor, two of his eight beneficiaries secure an execution on the judgment, garnish the judgment debtor's interest in an estate, and take a judgment under the garnishment proceedings applying the proceeds to the original judgment, an order thereafter quashing the execution and the return thereon for nonconformity to statute also invalidates the garnishment judgment.

Gohring v Koonce, 224-1186; 278 NW 283

11753 Death of part of defendants.

Judgment claims against deceased. See under §§11957–11959

Judgment after death of defendant. Principle recognized that the court having taken a cause under advisement, and delayed decision until after the death of the defendant, may validly render judgment as of the date of the submission.

Chariton Bk. v Taylor, 213-1206; 240 NW 740

11754 Fee bill execution.

Atty. Gen. Opinion. See '32 AG Op 198

Costs—remedies for collection—motion to retax—special proceeding. A motion by a city to retax unpaid clerk's costs against the plaintiff is a special proceeding.

Great West. Ins. v Saunders, 223-926; 274 NW 28

Limitation of actions—clerk's costs barred after five years. Clerk's costs inuring to the general fund when collected are no part of the judgment to which they are incident, but are only a debt, not necessarily arising out of a governmental function, which costs are such debts as become outlawed at the expiration of five years and may not then be retaxed and collected.

Great West. Ins. v Saunders, 223-926; 274 NW 28

CHAPTER 499

EXEMPTIONS

11755 "Family" defined.

Persons entitled to exemptions. See under §11760

Discussion. See 23 ILR 215—Legal controls in family law

Family relation. Instructions which define a "family" as a "collection or collective body of persons who live under one roof and under one head or management" are all-sufficient.

Wilson v Else, 204-857; 216 NW 33

11756 Who deemed resident.

Atty. Gen. Opinions. See '34 AG Op 270, 442

11757 Failure to claim exemption.

Estoppel. A debtor who makes a selection of exempt property in compliance with a proper demand therefor by the levying officer may not, after the officer has acted thereon, change such selection.

Wertz v Hale, 202-305; 208 NW 859

Necessity for proof. A chattel mortgagor who pleads that the mortgage covers exempt property and that the mortgage is void because his wife did not join therein, can be given no relief in the absence of proof of the facts upon which exemption can be based.

Citizens Bank v Scott, 217-584; 250 NW 626

11758 Absconding debtor.

Right of spouse to sell. The statutory provision which, in effect, provides that if a debtor "absconds", the property exempt to him shall be exempt to his wife and children, does not deprive the debtor, who is about to be sentenced to the penitentiary, of his legal right validly to sell, in good faith, his exempt property without the consent of his wife.

Brayman v Brayman, 215-1183; 247 NW 621

11759 Purchase money.

Payment by indorser revests original rights. The payee of a promissory note who indorses with recourse, necessarily continues to be a party to the note and if he pays the note when due because of the default of the maker, he thereby re-acquires his original rights under the note. It follows that if the note was originally given for the purchase price of property, the indorser may enforce said note against such property, and it is quite immaterial that he does so under a duly assigned judgment obtained by the indorsee against the maker.

Callaway v Hauser, 211-307; 233 NW 506

Purchase of car—wife not joining in chattel mortgage—payment by employer. Where defendant was unable to meet payments on car, and employer, under an agreement with defendant, made delinquent and future payments to the finance company and took an assignment of the note and chattel mortgage, the employer was entitled to the possession of the car as against contentions that intervenor (defendant's wife) did not join in the execution of the chattel mortgage, that the assignment to employer did not create any right or lien sufficient to sustain writ of replevin, and that the payments made by the employer constituted a satisfaction and payment and not a purchase of the chattel mortgage.

Simpson v McConnell, 228- ; 291 NW 862

Exempt property—debts enforceable against —unallowable procedure. After a court of bankruptcy has adjudged a debtor to be a bankrupt and after the court has set off a homestead to said debtor, a creditor holding a duly scheduled, unliquidated, and unsecured debt has no right to proceed in equity in the state court, and have his debt adjudicated and enforced as a lien on the said homestead because said debt antedates the acquisition of said homestead. And it is immaterial that the creditor, preceding his action in the state court, obtained an order staying the final discharge of the bankrupt.

Bracewell v Hughes, 214-241; 242 NW 66

11760 General exemptions.

Atty. Gen. Opinion. See '34 AG Op 628

ANALYSIS

Homestead exempt. See under §§10135–10155
Insurance policy exemptions. See under §§8684.13, 8776, 8796, 11919
Notice of ownership. See under §11698 (III)

I NATURE IN GENERAL

Discussion. See 12 ILR 167—Set-off or counterclaim against exemptions

Purely statutory. Exemptions being purely statutory, one may not base his claim to exemption on the doctrine of public policy, but must come within the statutory requirements.

Briley v Board, 227-55; 287 NW 242

Binding on state and municipalities. Exemption statutes are binding on the state and on the municipalities thereof.

Ohio Cas. Co. v Galvin, 222-670; 269 NW 254; 108 ALR 1036

Signing chattel mortgage—effect. The mere signing of a chattel mortgage in a partnership name does not, in and of itself, estop the signer from denying that the mortgaged property is partnership property.

Citizens Bank v Scott, 217-584; 250 NW 626

II PERSONS ENTITLED

Applicability. Exemption statutes are applicable to residents and nonresidents unless the benefits thereof are confined to residents.

Stark v Stark, 203-1261; 213 NW 235

Owner of automobile not "other laborer". A person whose principal occupation is selling automobiles, and who operates for profit an automobile machine shop through employed mechanics, cannot be deemed an "other laborer" within the meaning of the statute rendering vehicles exempt in certain cases.

First N. Bk. v Larson, 213-468; 239 NW 134

Ownership of automobile. Evidence that the head of a family bought an automobile, paid for it, used it for the purpose of making a living, and has never parted with the possession, is sufficient to prove his ownership on the question of exemption.

Shepard v Findley, 204-107; 214 NW 676

Chattel mortgage—jury question. In replevin action by assignee of alleged chattel mortgage to recover possession of mortgaged property, whether mortgage had ever been executed or whether property was exempt to alleged mortgagor who claimed he was a married man, the head of a family, and that he made his living with such property, held to be jury question.

Brown v Heising, (NOR); 282 NW 345

Administrator's debt to decedent—exemptions. In proceeding on objection to administrator's final report, burden of proof was on the administrator to show why he should not be held accountable for full value of property inventoried by him, which inventory included his own debt to decedent. He was liable on such debt to the extent of his ability to pay at any time during administration, and everything above his statutory exemptions should have been so utilized, and there being no evidence in the record from which the extent of his nonexempt property or income could be ascertained, such question would be remanded to lower court for determination.

In re Windhorst, 227-808; 288 NW 892

III PROPERTY AND RIGHTS EXEMPT

Discussion. See 15 ILR 244—Radio

Radio receiving set. The statutory exemption from execution of "musical instruments" does not embrace a radio receiving set.

Dunbar v Spratt-Snyder, 208-490; 226 NW 22; 63 ALR 1016

Barber chairs as "tools". The exemption term "proper tools" of a mechanic presents always a question of fact. The term is not necessarily limited to the precise tools which the mechanic personally handles or ordinarily himself uses alone, nor does it embrace tools which are in effect capital owned and used for the purpose of profit. Held, on instant record, that more than one barber chair and a "gum" machine were not exempt, while other miscellaneous paraphernalia designed for carrying on the business and caring for customers were exempt, tho some of the separate articles were physically larger than necessary.

Hoyer v McBride, 202-1278; 211 NW 847

Automobile in addition to team and harness. A debtor, a resident of this state and the head of a family, may not hold exempt from execution an automobile in addition to a team and harness.

Wertz v Hale, 212-294; 234 NW 534

Rentals during redemption period. The rental of land for the statutory redemption period following sale on mortgage foreclosure is not exempt from attachment levy at the instance of creditors other than the foreclosing mortgagee.

Clouse v Reeves, 205-154; 217 NW 833

Tools of mechanic—conclusion affidavit. A debtor who seeks to have tools released from levy does not meet the burden of proof resting upon him by simply asserting the conclusion "that he is a mechanic" and "that said tools are exempt". The facts showing that he is, in fact, a mechanic and the facts showing consequent exemption must be stated.

First N. Bk. v Larson, 213-468; 239 NW 134

Tools employed as capital. Tools which comprise the equipment of an automobile machine shop, operated by the owner through his employed mechanics as a side line to the owner's principal business of an automobile salesman, are not exempt to the owner as a mechanic.

First N. Bk. v Larson, 213-468; 239 NW 134

IV TRANSFER OR INCUMBRANCE OF EXEMPT PROPERTY

Mortgage of exempt personal property. See under §10013

Proceeds of exempt property. Judgment may not be rendered against a garnishee for the proceeds of exempt personal property fraudulently mortgaged by the mortgagor-owner.

Northwestern Bk. v Muilenburg, 209-1223; 229 NW 813

Rent and advances—unrecorded contract lien. An unrecorded lease giving the landlord a lien on exempt property kept on the premises is not effective against a purchaser of the exempt property without notice of the written lease.

Sparks v Flesher, 217-1086; 252 NW 529

Rent and advances—purchaser of nonexempt property. Pigs farrowed on leased premises but removed from said premises before they were six months old, and not thereafter returned to said premises, are not subject to the landlord's lien for rent.

Sparks v Flesher, 217-1086; 252 NW 529

Bankruptcy — effect on existing liens. The discharge in bankruptcy of the mortgagor of exempt chattels does not discharge the lien of such mortgage.

Schwanz v Co-op. Co., 204-1273; 214 NW 491; 55 ALR 644

See McMains v Cunningham, 214-300; 233 NW 129; 242 NW 106

V PROTECTION AND ENFORCEMENT OF RIGHT

Federal jurisdiction in bankruptcy. The jurisdiction of the federal bankruptcy court over the exempt property of the bankrupt extends no further than to enter an order setting off such property to the bankrupt. Irrespective of the proceedings in such court, the right to the exempt property, as between

V PROTECTION AND ENFORCEMENT OF RIGHT—concluded

the owner and a mortgagee thereof, must be determined in the state court.

Eckhardt v Hess, 200-1308; 206 NW 291
Bracewell v Hughes, 214-241; 242 NW 66
See Drees v Armstrong, 180-29; 161 NW 40

Wrongful levy—damages. One who seeks a money judgment for the value of property wrongfully levied on may not also recover for the loss of the use of the property.

Wertz v Hale, 202-305; 208 NW 859

Duty of guardian. The guardian of a mentally incompetent is under duty to plead the exemptions of the ward.

Appanoose Co. v Henke, 207-835; 223 NW 876

Presumption as to expenditures. Presumptively a guardian in making expenditures for the ward will use nonexempt funds rather than exempt funds.

Appanoose Co. v Henke, 207-835; 223 NW 876

Automobile—insufficient showing of exemption. An automobile is not shown to be exempt to the head of a family and a resident of this state on the naked assertion "that it is necessary for the owner to use an automobile in the earning of a livelihood".

First N. Bk. v Larson, 213-468; 239 NW 134

Rent and advances—burden of proof to show lien. A landlord seeking to enforce a landlord's lien on pigs must show that they were kept on the leased premises after they became six months old.

Sparks v Flesher, 217-1086; 252 NW 529

11760.1 Motor vehicle.

Bankruptcy — irretrievable nullification of lien. The filing by an insolvent judgment defendant of his petition in bankruptcy within four months following the entry of judgment, discharges the judgment (it not being based on fraud or willful injuries) and irretrievably nullifies an execution levy on property whether the property be exempt or nonexempt. In other words, the judgment plaintiff may not thereafter proceed in equity in the state court and have his discharged judgment enforced against property set aside to the judgment defendant as exempt, even tho, were it not for the bankruptcy proceedings, plaintiff would be able to show that said property was not exempt from levy under plaintiff's particular judgment.

McMains v Cunningham, 214-300; 233 NW 129

11761 Pension money.

Atty. Gen. Opinions. See '28 AG Op 338, 340; '34 AG Op 699

Interest on pension money. The principal of pension money is exempt from seizure by creditors, but not the interest thereon when the amount of interest is determinable, notwithstanding the commingling of principal and interest.

Appanoose Co. v Henke, 207-835; 223 NW 876

Pension funds in hands of administrator. Original federal pension funds in the hands of an administrator are not exempt, under either state or federal statutes, from sequestration by the creditors of the pensioner. [Revised Statutes, §4747 (38 USC §54); 38 USC §96.]

Appanoose Co. v Carson, 210-801; 229 NW 152

Preference in payment. The fact that the subject matter of a time certificate of deposit in a bank is the depositor's pension money furnishes no legal basis for a preference in payment in settling up the affairs of the insolvent bank, even tho the federal and state statutes exempt pension money from seizure for the debts of the pensioner.

Andrew v Bank, 205-872; 219 NW 62

Compensation of guardian. Section 454, title 38, USC, providing that federal funds granted to a World War veteran "shall not be subject to the claims of creditors", does not prohibit the courts of this state from allowing the guardian of such veteran and from such funds, compensation not only for ordinary services but for extraordinary services rendered the ward,—the guardian not being a "creditor" within the meaning of said statute.

Hines v McKenzie, 216-1388; 250 NW 687

11763 Personal earnings.

"Head of family". See under §11760

Atty. Gen. Opinions. See '34 AG Op 546, 699; '36 AG Op 611

Purely statutory. Exemptions being purely statutory, one may not base his claim to exemption on the doctrine of public policy, but must come within the statutory requirements.

Briley v Board, 227-55; 287 NW 242

Fact findings of trial court. The findings of the trial court, on supporting testimony, as to the fact bearing on a question of exemptions is conclusive on the appellate court.

Staton v Vernon, 209-1123; 229 NW 763; 67 ALR 1200

Divorce — effect. A man loses his family headship, and consequently his right of exemption of personal earnings, by the rendition of a divorce decree against him which gives the wife absolute custody of all the minor children, permanent alimony, and continuing alimony through future payments.

Sparks v East, 202-718; 210 NW 969

Personal earnings represented by bank deposit. A joint bank deposit in the name of a husband and wife, which represents the

earnings of the husband for his personal services at any time within ninety days preceding a levy, is exempt from an execution against both husband and wife, the wife being made a joint depositor as a matter of convenience in the payment of bills.

Staton v Vernon, 209-1123; 229 NW 763; 67 ALR 1200

Salary of public officer. The salary—the "personal earnings"—of a public officer is exempt from liability on a judgment obtained against him and his surety, by the public body, because of the failure of the officer to account for public funds coming into his hands. The court cannot, on the plea of public policy, rule into the statute an exception which the legislature has not seen fit to declare. So held where the surety having paid the judgment, and thereby subrogated to the rights of the county, sought reimbursement from the officer's salary.

Ohio Cas. Co. v Galvin, 222-670; 269 NW 254; 108 ALR 1036

Judgment as "debt". A judgment, whether based on contract or tort, is a "debt" within the meaning of the exemption statutes.

Ohio Cas. Co. v Galvin, 222-670; 269 NW 254; 108 ALR 1036

11764 Exception under divorce decree.

Overruled case. The opinion in Schooley v Schooley, 184-835; 169 NW 56, is hereby overruled.

Malone v Moore, 212-58; 236 NW 100

11766 Workmen's compensation.

Exemption from debts of testator. Workmen's compensation, already collected as the result of a commutation settlement and in the hands of testator's attorney, is subject to the debts of the employee's estate.

Long v Northup, 225-132; 279 NW 104; 116 ALR 1475

11771 Public property.

Levy of tax to pay judgment. See under §11675. Vol I; §12440

CHAPTER 500

REDEMPTION

11773 When sale absolute.

Unity of ownership and right of redemption. Ownership of land and the right of redemption are inseparable.

Central Life v Spangler, 204-995; 216 NW 116

11774 Redemption by debtor.

ANALYSIS

I Redemption in General
II Nature of Right
III Period of Redemption
IV Rights Attending Redemption

Moratorium on issuance of sheriff's deed—mortgage foreclosures. See under §12372 (VII)
Redemption in mortgage foreclosures. See under §12376 (IV)

I REDEMPTION IN GENERAL

Voluntary conveyance—insufficient showing. A conveyance by a husband to his wife will not be deemed voluntary solely on the ground that the conveyance was (1) by quitclaim, and (2) in consideration "of $1.00 and other valuable consideration".

Tirrill v Miller, 206-426; 218 NW 303

Quieting title — judgment creditor's deed after mortgage foreclosure—insufficiency. A sheriff's deed issued under execution sale to a judgment creditor, after expiration of the judgment creditor's right of redemption as a defendant junior lienholder in a mortgage foreclosure, is a nullity and will not sustain an action to quiet title thereon.

Bates v Mullins, 223-1000; 274 NW 117

Nonallowable attorney fees. In a successful action to enforce plaintiff's right to redeem from execution sale, the fact that plaintiff secured a temporary injunction to protect his possession (and solely as a collateral remedy) furnishes no justification for the taxation against plaintiff of an attorney fee in favor of defendant, especially when the said injunction was ordered dissolved only in event plaintiff failed to exercise his right to redeem.

Werner v Hammill, 219-314; 257 NW 792

II NATURE OF RIGHT

Conclusiveness of adjudication—lost junior mechanic's lien—no revivor by judgment. A junior mechanic's lien extinguished by failure to redeem from the senior mechanic's lien foreclosure action is not revived by later reducing the junior mechanic's lien to judgment.

Murray v Kelroy, 223-1331; 275 NW 21

"Matured crops" defined. Crops are matured whenever they have reached such a stage of maturity that they no longer draw sustenance from the soil.

Goldstein v Mundon, 202-381; 210 NW 444

Receiver—unauthorized appointment. Upon a sale of land on execution under an ordinary judgment at law, the court has no authority to appoint a receiver to collect the rents and

profits of the land during the period of redemption.

Anthony v Heiny, 215-1347; 244 NW 902

III PERIOD OF REDEMPTION

Time of redemption—extension prohibited. Neither the court nor the clerk may grant an extension of time in which to redeem and thereby amend the statute.

Paulsen v Hanson, (NOR); 216 NW 762

IV RIGHTS ATTENDING REDEMPTION

Amount for redemption—taxes—deficiency judgment. The amount necessary to redeem land after sheriff's sale properly included the amount of taxes paid by the purchaser, but did not include the amount of the deficiency judgment, notwithstanding an agreement that the deficiency judgment should be included in the amount.

New York Ins. v Breen, 227-738; 289 NW 16

11775 Redemption prohibited.

Redemption in mortgage foreclosures. See under §12376 (IV)

Redemption — nonforfeiture of right. The right to redeem from an execution sale of a life interest in real estate under a judgment at law from which no appeal is taken, is not forfeited by the taking of an appeal from a decree in an equitable action which is auxiliary to and in aid of said judgment at law.

Anthony v Heiny, 215-1347; 244 NW 902

11776 Redemption by creditors.

ANALYSIS

Redemption in mortgage foreclosures. See under §12376 (IV)

I IN GENERAL

Statutory rights cannot be enlarged. Redemption from sheriff's sale under execution must meet statutory requirements to be effectual, and statutory rights cannot be enlarged.

Paulsen v Hanson, (NOR); 216 NW 762

Redemption of homestead by judgment creditor. A judgment creditor who was made a defendant in a foreclosure action against appellant's 120-acre farm is a junior lienholder under the statute, not a stranger nor interloper, and is entitled to redeem from sheriff's sale, even tho the judgment was not a lien on the 40 acres constituting appellant's homestead.

Ackerman v Bank, 228- ; 291 NW 150

Homestead—sheriff's certificate—equitable assignment to judgment creditor. Where judgment creditor redeemed from foreclosure sale and secured an assignment of the sheriff's certificate from the mortgagee, and appellant-owners failed to make a statutory redemption, the judgment creditor was an equitable assignee of the sheriff's certificate entitled to deed, even assuming that he had no right to redeem because of the homestead character of the land, since it made no difference to appellant-owners whether the mortgagee or judgment creditor was the holder of the certificate.

Ackerman v Bank, 228- ; 291 NW 150

Redemption — who may question. Whether any person other than the execution-purchaser is in a position to complain of the right of redemption exercised by a junior creditor, quaere.

Quinn v Bank, 200-1384; 206 NW 271

Mechanic's lien debtor's right of redemption. A mechanic's lien debtor's right of redemption and right of possession are not subject to levy nor to junior mechanic's lien judgments obtained more than nine months after the sale, but within the year for redemption.

Murray v Kelroy, 223-1331; 275 NW 21

Failure of junior mortgagee to redeem. The holder of a junior mortgage on both homestead and nonhomestead property of a bankrupt, who is not satisfied out of the proceeds of a "free-from-lien" sale of the nonhomestead property by the trustee in bankruptcy, does not lose his lien on the homestead property by failing to redeem from the foreclosure of senior mortgages which are satisfied out of said proceeds, because the satisfaction of said senior mortgages left nothing from which redemption could be made.

First Bank v Kleih, 201-1298; 205 NW 843

Conclusiveness of adjudication—lost junior mechanic's lien—no revivor by judgment. A junior mechanic's lien extinguished by failure to redeem from the senior mechanic's lien foreclosure action is not revived by later reducing the junior mechanic's lien to judgment.

Murray v Kelroy, 223-1331; 275 NW 21

II TIME FOR REDEMPTION

Fatal delay. The act of a junior creditor in attempting to redeem after the expiration of nine months from the sale of land on execution is a nullity especially when his lien (assuming it to be such) was acquired after the expiration of said nine months.

Pierce v White, 204-1116; 216 NW 764

"Subject to liens of record." The expression "subject to liens of record", when embraced in the habendum clause of a deed of conveyance does not have the effect of continuing the lien of a judgment after the holder thereof had failed to exercise his right to redeem.

Paulsen v Jensen, 209-453; 228 NW 357

III REDEMPTION PERMITTED

Execution — sale — redemption — appeal by junior creditor—effect. The statutory provision that "no party" who has appealed from the district court shall be entitled to redeem (§11775, C., '24), does not embrace a junior creditor in a mortgage foreclosure. Especially is this true (1) when the appeal by the junior creditor was on the issue of priority between him and another junior creditor, and (2) when the appeal was perfected after the execution sale.

Quinn v Bank, 200-1384; 206 NW 271

IV REDEMPTION DENIED

Wife joining to release dower forfeits redemption right. Redemption being purely statutory, a wife who joins in executing a note and mortgage for the sole purpose of relinquishing her dower interest, and being decreed not a debtor, is therefore not within the prescribed class of redemptioners.

Fitch v Cornelison, 224-1252; 278 NW 309

Junior mechanic's lien—loss of right—lien debtor's grantee. A person holding both senior and junior mechanics' liens, who forecloses only the senior lien, loses his junior lien when he fails to reduce his junior lien to judgment and redeem under it within the statutory nine months. The mechanic's lien debtor's quitclaim grantee, who does redeem, takes the property free from said junior liens.

Murray v Kelroy, 223-1331; 275 NW 21

11777 Mechanic's lien before judgment.

Nonright of mechanic's-lien claimant. Principle recognized that a mechanic's-lien claimant whose claim has not gone to judgment may not redeem from a mortgage foreclosure.

Magnesite Products Co. v Bensmiller, 207-1303; 224 NW 514

Cochran v Ory, 222-772; 269 NW 764

Lost junior mechanic's lien—no revivor by judgment. A junior mechanic's lien extinguished by failure to redeem from the senior mechanic's lien foreclosure action is not revived by later reducing the junior mechanic's lien to judgment.

Murray v Kelroy, 223-1331; 275 NW 21

Junior mechanic's lien—loss of right—lien debtor's grantee. A person holding both senior and junior mechanics' liens, who forecloses only the senior lien, loses his junior lien when he fails to reduce his junior lien to judgment and redeem under it within the statutory nine months. The mechanic's lien debtor's quitclaim grantee, who does redeem, takes the property free from said junior liens.

Murray v Kelroy, 223-1331; 275 NW 21

11778 Probate creditor.

Redemption by probate creditor. The holder of a legally established claim in probate need not rely on his right to be paid from the funds—if sufficient—arising from the administration of the estate, but may become a redemptioner of the real estate of the decedent which has been sold on execution and which is yet subject to redemption by creditors.

Aronson v Hoskins, 201-389; 207 NW 389

Order to sell real estate in auxiliary citation proceedings. Where an administrator after a citation proceeding instituted by an assignee of a probate claim is directed to file an application to sell real estate to pay a claim on a promissory note, long recognized and partly paid from other funds by a former administrator, the granting of the order to sell real estate held by the heirs is erroneous when the heirs were not made parties to the citation application and when, in resistance to the application, the heirs show that no timely notice of hearing on the claim was served and no excuse given for such failure.

In re Jackson, 225-359; 280 NW 563

11779 Redemption by creditors from each other.

Who entitled—holder of barred lien. The owner of a judgment which has ceased to be a lien has no right to redeem from a sale under a mortgage lien prior to his judgment.

Johnson v Leese, 223-480; 273 NW 111

11782 Terms.

Redemption under mortgage foreclosure. See under §12376

Amount for redemption — taxes—deficiency judgment. The amount necessary to redeem land after sheriff's sale properly included the amount of taxes paid by the purchaser, but did not include the amount of the deficiency judgment, notwithstanding an agreement that the deficiency judgment should be included in the amount.

New York Ins. v Breen, 227-738; 289 NW 16

11784 By holder of title.

Voluntary, unnecessary payments not recoverable back. One who acquires title to premises theretofore sold under foreclosure for the nonpayment of installments of a mortgage debt, and who, with full knowledge of all relevant fact conditions, and as a purely voluntary act on his part, redeems from said foreclosure sale (evidently with the belief that by so doing he would acquire an absolutely unincumbered title), may not, after the mortgagee has established his legal right again to foreclose on said premises for the balance of the mortgage debt, recover back from the mortgagee items of

taxes on the premises paid in effecting said redemption.

Gronstal v Van Druff, 219-1385; 261 NW 638

11789 Mode of redemption.

Statutory rights cannot be enlarged. Redemption from sheriff's sale under execution must meet statutory requirements to be effectual, and statutory rights cannot be enlarged.

Paulsen v Hanson, (NOR); 216 NW 762

Fatally defective affidavit. An attempt by a junior lienholder to redeem on an affidavit which materially and misleadingly misstates the amount of his lien claim is a nullity as to another junior lienholder who had no knowledge as to the actual amount of said first lien.

Green Bay Lbr. v Leitzen, 204-594; 215 NW 639

Redemption by creditor of one of two separate owners — apportionment of mortgage debt. Where separate owners of separate tracts of land jointly mortgage their lands for the debt of one of them, and on foreclosure, the sale is made en masse, and redemption is made by a judgment creditor of one of the owners, the other owner may, after paying to the clerk the entire amount necessary to effect redemption, maintain an equitable action to have the mortgage debt apportioned between the different tracts.

Hansen v Bank, 209-1352; 230 NW 415

Equitable assignment—sheriff's certificate—homestead—redemption by judgment creditor. Where judgment creditor redeemed from foreclosure sale and secured an assignment of the sheriff's certificate from the mortgagee, and appellant-owners failed to make a statutory redemption, the judgment creditor was an equitable assignee of the sheriff's certificate entitled to deed, even assuming that he had no right to redeem because of the homestead character of the land, since it made no difference to appellant-owners whether the mortgagee or judgment creditor was the holder of the certificate.

Ackerman v Bank, 228- ; 291 NW 150

11792 Contest determined.

Cancellation of sheriff's certificate—issuance of deed restrained. An action to enjoin issuance of sheriff's deed and to cancel certificate held properly brought in equity as against contention that this section furnished exclusive remedy.

Paulsen v Hanson, (NOR); 216 NW 762

Mortgage—amount for redemption—taxes—deficiency judgment. The amount necessary to redeem land after sheriff's sale properly included the amount of taxes paid by the purchaser, but did not include the amount of the deficiency judgment, notwithstanding an agreement that the deficiency judgment should be included in the amount.

New York Ins. v Breen, 227-738; 289 NW 16

11794 Redemption of part of property.

Unallowable partial redemption by heirs. After a mortgage which secures the debt of a husband, and which covers different tracts belonging to the husband and wife separately, is legally foreclosed, and sale made en masse (no other method being required by the debtors), and after junior lienholders on the husband's land have redeemed from the entire sale, the guardian of the wife's heirs may not redeem the lands which belonged to the wife by depositing with the clerk a proportional amount of the mortgage debt, costs, and expense on the theory that the mortgage was on an acreage basis.

Northwestern Ins. v Hansen, 205-789; 218 NW 502

11795 Interest of tenant in common.

Redemption by cotenant. One who, during the period for redemption from mortgage foreclosure and sale en masse, purchases, by quitclaim, the undivided interests in the land of a part of the personal judgment defendants, can redeem only by paying the full amount of the sheriff's certificate of purchase plus interest and costs, the remedy of such redemptioner being to enforce contribution from his cotenants.

Kupper v Schlegel, 207-1248; 224 NW 813

11796 Transfer of debtor's right.

Effect on prior judgment creditor. The grantee of premises which have been sold under mortgage foreclosure for the full amount of the judgment, even tho such grantee was a debtor in the foreclosure proceedings, may redeem, and will take the property unless redemption is made from him by a prior judgment creditor of the grantor.

Tirrill v Miller, 206-426; 218 NW 303

Failure of junior judgment holder to redeem —effect. A sale under general execution on a senior judgment frees the land in the hands of the grantee of the judgment debtor (even tho he bought "subject to liens of record") from the lien of a junior judgment, when the holder of such junior judgment fails to redeem within the nine months following the sale. The same rule would apply if the sales were under a special execution under mortgage foreclosure, and the junior judgment were obtained after the date of the foreclosure decree.

Paulsen v Jensen, 209-453; 228 NW 357

Junior mechanic's lien—loss of right—lien debtor's grantee. A person holding both senior and junior mechanics' liens, who forecloses only the senior lien, loses his junior lien when he fails to reduce his junior lien to judg-

ment and redeem under it within the statutory nine months. The mechanic's lien debtor's quitclaim grantee, who does redeem, takes the property free from said junior liens.

Murray v Kelroy, 223-1331; 275 NW 21

Redemption by vendee's quitclaim grantee from real estate forfeiture. An assignee of mechanics' liens who, after foreclosing thereon, purchases the real estate contract covering part of the land subject to the mechanics' liens, and who then forfeits the real estate contract, but fails to file the statutory proof of service, cannot prevent a redemption from the foreclosure sale by a person taking a quitclaim deed from the vendee, such quitclaim owner having neither actual nor constructive knowledge of the claimed forfeiture.

Murray v Kelroy, 223-1331; 275 NW 21

Mechanic's lien debtor's right of redemption. A mechanic's lien debtor's right of redemption and right of possession are not subject to levy nor to junior mechanic's lien judgments obtained more than nine months after the sale, but within the year for redemption.

Murray v Kelroy, 223-1331; 275 NW 21

CHAPTER 501

PROTECTION OF ADVANCEMENTS

11797 Lienholder's advancements protected—affidavit filed.

Statute remedy not exclusive. The common-law right of a junior mortgagee, in order to protect his own lien, to pay the interest on a senior mortgage, and thereby to be subrogated by proper action to the rights of a senior mortgagee under said senior mortgage to the extent of said payment, has not been abrogated by the enactment of this chapter.

Miller Bk. v Collis, 211-859; 234 NW 550
Jones v Knutson, 212-268; 234 NW 548

Second mortgagee—subrogation. If a second mortgagee uses his own funds in discharging a first mortgage in order to save the property, he will be subrogated to the rights of said first mortgagee; on the other hand, if funds are obtained through a new mortgage, and used in the discharge of said first mortgage, then the new mortgagee will acquire said right of subrogation, and in either case, the homestead character of part of the mortgaged property is quite immaterial.

Clark v Chapman, 213-737; 239 NW 797

Protection and loss of right of subrogee. When the holder of a certificate of sale under a junior mortgage foreclosure discharges (in order to protect his interest) an interest payment falling due on the senior mortgage, by taking an assignment of said interest installment, he thereby impliedly acquires a pro tanto interest in said senior mortgage, and may foreclose it accordingly against a subsequent purchaser for value of the land; but when said certificate holder simply pays such interest installment, he wholly loses his claim as to a subsequent purchaser who purchased for value, and without notice that the interest installment had been paid by the junior certificate holder.

Miller Bk. v Collis, 211-859; 234 NW 550

Mortgagee suing for delinquent taxes omitted from foreclosure judgment—splitting actions. A mortgagee who had paid delinquent taxes on the mortgaged land, according to a provision of the mortgage that if taxes were not paid the mortgagee could pay them and obtain repayment, should have taken care of his claim for taxes in the foreclosure proceedings and was not permitted by this chapter to split his cause of action and bring an action for the taxes after the mortgagor had redeemed.

Monroe v Busick, 225-791; 281 NW 486

Redemption—tacking on delinquent taxes paid. The act of the assignor of a certificate of sale, subsequent to said assignment, in paying delinquent taxes on the premises and in causing said payment to be entered on the records in the clerk's office as a part of the amount necessary to redeem, inures to the benefit of said assignee, it appearing that said procedure by the assignor was for the purpose of protecting said assigned certificate.

Gronstal v Van Druff, 219-1385; 261 NW 638

Lost junior mechanic's lien—no revivor by judgment. A junior mechanic's lien extinguished by a failure to redeem from the senior mechanic's lien foreclosure action is not revived by later reducing the junior mechanic's lien to judgment.

Murray v Kelroy, 223-1331; 275 NW 21

11798 Redemption—payment of advances.

Voluntary, unnecessary payments not recoverable back. One who acquires title to premises theretofore sold under foreclosure for the nonpayment of installments of a mortgage debt, and who, with full knowledge of all relevant fact conditions, and as a purely voluntary act on his part, redeems from said foreclosure sale (evidently with the belief that by so doing he would acquire an absolutely unincumbered title), may not, after the mortgagee has established his legal right again to foreclose on said premises for the balance of the mortgage debt, recover back from the mortgagee items of taxes on the premises paid in effecting said redemption.

Gronstal v Van Druff, 219-1385; 261 NW 638

CHAPTER 502

PROCEEDINGS AUXILIARY TO EXECUTION

11800 Debtor examined.

Order nonappealable. An order in proceedings auxiliary to execution, for the appearance and examination of the execution defendant and his wife, is not appealable, even tho the wife is not an execution defendant.

Lehigh Co. v Gjellefald, 205-778; 218 NW 475

11802 By whom order granted.

Ex parte orders. An order for the appearance and examination of an execution defendant in proceedings auxiliary to execution is ex parte.

Lehigh Co. v Gjellefald, 205-778; 218 NW 475

11805 Disposition of property.

Discovery proceedings—extent of jurisdiction. In a discovery proceeding against a person suspected of taking wrongful possession of decedent's property, where a dispute arises as to ownership of property, neither the trial nor appellate court has authority to order delivery of the property to the executor or administrator unless it appears beyond controversy that the person examined has wrongful possession of the property.

In re Hoffman, 227-973; 289 NW 720

11815 Equitable proceedings.

Atty. Gen. Opinion. See '36 AG Op 670

ANALYSIS

Also see under §10449
Action by administrator to set aside conveyances of decedent. See under §11889
Action by grantor to set aside fraudulent conveyance. See under §10084 (I)
Action by heirs to set aside conveyances of decedent. See under §11927
Attachment on fraudulently conveyed property. See under §12095
Bankruptcy. See under Ch 550, Note 1
Consideration generally. See under §9441
Contracts fraudulently induced. See Ch 420, Note 1 (I)
Damages for wrongful injunction. See under §12526 (V)
Deeds generally. See under §10084
Fictitious grantee—resulting trust. See under §10049 (II)
Undue influence, deeds. See under §10084 (I)

I TRANSFERS AND TRANSACTIONS ATTACKED

(a) IN GENERAL

Gifts — incompetency of donor — evidence. Evidence held insufficient to establish the mental incompetency of a donor.

Humphrey v Norwood, 213-912; 240 NW 232

Mental unsoundness — fraud — degree of proof. A deed of conveyance will be set aside on the ground of fraud or grantor's mental unsoundness, only on clear and convincing evidence in support of the charge. Evidence held insufficient.

Ellis v Allman, 217-483; 250 NW 172

Secret trust as badge of fraud. A secret trust for a grantor's benefit is a badge of fraud.

Grimes Bk. v McHarg, 224-644; 276 NW 781

Estoppel to dispute husband's title. A wife who permits her husband to take and record title to her lands, and for a long series of years to exercise the usual and customary indicia of ownership, is estopped to assert her title against the claims of the husband's creditors who have extended credit to him in reliance on his apparent title.

Farmers Bk. v Pugh, 204-580; 215 NW 652

Wife's deed for husband's debt—cancellation —consideration—estoppel. Wife who was not illiterate, and who deeded her land in payment of husband's notes, and who, by placing deed in husband's hands, clothed him with apparent authority to deliver the deed, thereby inducing creditors to surrender other land owned by the husband, is estopped from questioning the validity of the deed. The consideration to wife was advantage to husband and detriment to creditors.

Allen v Hume, 227-1224; 290 NW 687

Nonestoppel against wife. One who purchases a promissory note without any consultation whatever with the maker or the maker's wife, may not successfully assert that the wife is estopped to lay claim to lands which stood in the name of the husband-maker at the time of said purchase.

Jordan v Sharp, 204-11; 214 NW 572

Marriage settlements—validity. A marriage settlement, duly and in good faith executed, and confirmed by the subsequent marriage of the parties, is valid against the creditors of the husband when not grossly out of proportion to the husband's station and circumstances.

Benson v Burgess, 214-1220; 243 NW 188

Termination of property interest regardless of creditors. No present title to land passes

under a contract to the effect (1) that a daughter, so long as she outlived her father and paid certain annual rentals and other charges, should have the possession and profits of named lands, (2) that title should remain in the father, but at the death of the father she should receive an absolute deed to the land, which deed was put in escrow under the control of the father during his lifetime, (3) that if she defaulted in said payments the contract could be forfeited on notice, and (4) that all her interest terminated instantly on her death prior to that of the father. It follows that upon the insolvency of the daughter and her default on said payments, the father and daughter may voluntarily cancel said contract regardless of the creditors of the daughter.

Tilton v Klingaman, 214-67; 239 NW 83

Fraudulent claim to rents. Record reviewed and held that the claim that rents had been transferred prior to proceedings for the appointment of a receiver in mortgage foreclosure was fraudulent.

First N. Bk. v Murtha, 212-415; 236 NW 433

Fraudulent rescission of contract. A rescission of a contract of purchase of real estate between a vendor and a bankrupt vendee is voidable by the trustee in bankruptcy when the rescission is made immediately preceding the bankruptcy proceedings, and when it is in fraud of the rights of the bankrupt's creditor or works a preference to the vendor-creditor.

Wilson v Holub, 202-549; 210 NW 593; 58 ALR 646

Mortgagee's knowledge of contemplated exchange—not innocent purchaser. Where mortgagee knew that mortgagor had contracted to exchange city property for farm at time mortgage covering city property was executed, mortgagee was not "innocent purchaser", and his mortgage was subject to rights of holder of contract to city property.

Bandemer v Benson, (NOR); 270 NW 353

Priority to diligent creditor. A creditor who obtains title to land by virtue of his judgment and a creditor's bill under which an existing mortgage was decreed to be fraudulent will not, on the theory of superior diligence, be given priority over a known prior attaching creditor who levied on the land regardless of the said mortgage and because he deemed the mortgage fraudulent, and who, prior to the decree under the creditor's bill, obtained the same result obtained under the creditor's bill, by securing from the fraudulent mortgagee, not only a verbal promise to release the mortgage, but an actual release of said mortgage.

Elson v Clayton, 200-935; 205 NW 745

Creditor's right to be diligent. The act of a creditor in doing no more than to be swift, and thereby securing his claim by a conveyance from his debtor, is not deemed fraudulent.

Van Pelt v Willemsen, 208-1326; 227 NW 110

Right of insolvent partnership to prefer creditor. A partnership engaged in the operation of a private bank may, in good faith, validly pledge promissory notes belonging to it, as collateral security for its outstanding obligations, even tho the partnership is insolvent.

Second N. Bk. v Millbrandt, 211-1299; 235 NW 577

Special assignment for particular creditors. An assignment by an insolvent debtor of all his property to a trustee for the purpose of securing and paying in a named order the claims of certain named existing bona fide creditors and providing for the payment of any balance to the assignor-debtor does not constitute a general assignment for the benefit of creditors (and invalid because of the preference) when executed pursuant to an agreement with said creditors, or when ratified by said creditors prior to the acquisition of rights by others; and this is true even tho there probably will be no balance to pay to the assignor-debtor.

Eicher v Baird, 204-188; 215 NW 236

Assignments for benefit of creditors—validity — no showing of knowledge and fraud participation. A debtor may prefer creditors; and an assignment to preferred creditors is not invalid because hindering, delaying, or defeating other creditors when there is no evidence that the preferred creditors knew of and participated in a fraud in making the assignment.

Friedmeyer v Lynch, 226-251; 284 NW 160

Action by trustee—fraudulent conveyance—sufficiency of evidence. Trustee in bankruptcy who introduces testimony given on examination in bankruptcy court is bound thereby, and evidence was insufficient to sustain trustee's claim that transfer of note by bankrupt to sister was in fraud of creditors.

Cooney v Graves, (NOR); 230 NW 407

(b) FRAUDULENT CONVEYANCES GENERALLY

Actual or constructive fraud required. A court of equity is not warranted in setting aside an executed contract such as a warranty deed in the absence of actual or constructive fraud.

O'Brien v Stoneman, 227-389; 288 NW 447

Deed from parent to child—constructive fraud—presumption. The doctrine of constructive fraud arises from the existence of a fiduciary relationship, and equity raises a presumption against the validity of a transaction where the superior party obtains a possible benefit, as in a case where a parent has become the dependent person in his re-

I TRANSFERS AND TRANSACTIONS ATTACKED—continued

(b) FRAUDULENT CONVEYANCES GENERALLY—continued

lationship with a child, trusting his interests to the advice and guidance of the child, and has deeded his land to the child.

Stout v Vesely, 228- ; 290 NW 116

Evidence insufficient to show fraud. Evidence held sufficient to sustain a judgment refusing to set aside a conveyance of realty by devisee thereof to claimant against estate on ground of lack of consideration or fraud in making conveyance.

First N. Bank v Adams, (NOR); 266 NW 484

Evidence—insufficiency. Evidence reviewed, and held wholly insufficient to support a conveyance.

Ransom v Lochmiller, 207-1315; 224 NW 469

Evidence—sufficiency. Evidence held sufficient to establish the fraudulent nature of a conveyance of real estate.

Porter v Wingert, 200-1371; 206 NW 295
Hansen v Richter, 208-179; 225 NW 361

Fraud — sufficiency of evidence. Evidence held to show that conveyance by judgment debtor was with intent to hinder, delay, and defraud creditor in collection of judgment.

Phillips v McIlrath, (NOR); 237 NW 212

Indebtedness — evidence. Evidence held to show that the grantor in an alleged fraudulent conveyance was indebted at the time of the execution of the conveyance.

Scovel v Pierce, 208-776; 226 NW 133

Evidence—insufficiency. Evidence held insufficient to show that transfer of a promissory note was fraudulent.

Hoyer v Jordan, 208-1256; 224 NW 574

Transfers reviewed — fraud — insufficiency. Series of transfers reviewed, and held insufficient, in and of themselves, to justify the imputation of fraud.

Citizens Bank v Hamilton, 209-626; 227 NW 112

Fraud—evidence—sufficiency. On the issue of receivership for the rents and profits of real estate under mortgage foreclosure, evidence held to establish the fraudulent nature of a lease of said premises.

Webber v King, 205-612; 218 NW 282

Quitclaim deed to avoid judgment against grantor—effect. Evidence reviewed, and held to show that a quitclaim deed to plaintiff was a mere subterfuge to avoid defendant's judgment against the grantor.

Rogers v Rutherford, 210-1313; 232 NW 720

Transfer without advantage or injury. A deed and trust agreement may not be deemed fraudulent when the good-faith beneficiaries thereunder acquire substantially no greater advantage than formerly possessed by them, and when creditors who are not parties thereto suffer no substantial diminution in their rights.

Central Shoe v Rashid, 203-1103; 212 NW 559

Nonfraudulent conveyance. A conveyance under which the grantor neither accomplishes anything for himself, nor prejudices his general creditors, cannot be deemed fraudulent or to constitute a preference under the federal bankruptcy act.

Hoyne v Iowa T. & L. Co., 219-278; 257 NW 799

Conveyance harmless to creditors. Equity will not set aside a conveyance, irrespective of its nature as regards fraud, when it appears (1) that a 40-acre tract was the homestead of the grantor, and (2) that the remainder of the land was, at the time of the conveyance, already mortgaged beyond its value.

Hagge v Gonder, 222-954; 270 NW 371

Mutual intent. An action to set aside a conveyance as fraudulent necessitates proof of a mutual intent to defraud.

Newman v Callahan, 212-1003; 237 NW 514

Intent of grantor. A mortgage by an insolvent debtor on nonexempt real estate and on certain other real estate, on the condition that the court finds it not to constitute a homestead, does not reveal such a distinctive badge of fraud as to condemn the entire instrument as fraudulent, it not appearing that the mortgagees joined in any fraudulent intent (if any) of the mortgagor.

Corn Belt Bk. v Burnett, 203-271; 211 NW 217

Knowledge and intent of grantee. A bona fide creditor may in satisfaction of his debt, take a conveyance from his debtor at a fair valuation, even tho such creditor knows that the debtor is otherwise financially involved, and that the conveyance will work a preference against other creditors. The all-essential requisite is that the creditor participates in no fraud.

Com. Bk. v McLaughlin, 203-1368; 214 NW 542

Good-faith grantee. Principle reaffirmed that a conveyance will be sustained in favor of a grantee who in good faith paid an adequate consideration, without participating in the fraudulent purpose, if any, of the grantor.

First N. Bk. v Currier, 218-1041; 256 NW 734

Knowledge and intent of grantee. A conveyance to a creditor in payment of a bona fide debt is unassailable so long as the creditor moves solely for his own protection.

Hewitt v Blaise, 202-1109; 211 NW 479

Acquiescence of creditor — evidence. Evidence held insufficient to show that a creditor had advised and acquiesced in the execution of the very deed which he was seeking to set aside.

Dolan v Newberry, 200-511; 202 NW 545; 205 NW 205

Personal property of other partner—liability. In equity action to subject junior partner's personal property to payment of judgment against senior partner, evidence held insufficient to show that former acted fraudulently or that he was estopped as against partner's senior judgment creditors to claim such personal property.

Creston Bk. v Wessels, (NOR); 232 NW 496

Material considerations. On a charge of fraud, the fact that the alleged defrauded party himself initiated the transaction and absolutely dictated the terms thereof is influential and persuasive that no fraud existed.

Crawford v Raible, 206-732; 221 NW 474

Creditor's nonparticipation in fraud. A creditor will be protected in taking a conveyance from his debtor when the creditor acts solely for his own protection and not to aid the debtor in defrauding other creditors.

Jordan v Sharp, 204-11; 214 NW 572

Badges of fraud—effect. The inference of fraud which arises from the taking of an absolute deed as security only, and the unreasonable withholding of such deed from record, must yield to proof that the grantee was actuated by no purpose except to protect himself on a bona fide indebtedness due him from the insolvent grantor.

Hanneman v Olson, 209-372; 222 NW 566

Concealment. An heir may not predicate fraud in the sale of his share in an estate on the claim that his stepmother, the purchaser, concealed from him the amount of the estate, when the inventory was on file, when the uncertainty attending the existence of debts and a possible will was equally known to all parties, and when the heir possessed the same opportunity to learn the full amount of the estate as was possessed by the stepmother.

Ward v Ward, 207-647; 223 NW 369

Open and unconcealed transaction — effect. The fact that a conveyance is made openly and without concealment, and with the aid of those who later question the conveyance, has material bearing on the issue of fraud.

McCloud v Bates, 220-252; 261 NW 766

Wife as nonparticipant in fraud.

Malcolm Bk. v Mehlin, 200-970; 205 NW 788

Wife as noncreditor. A husband who takes title to land paid for by the wife, without any agreement to repay the wife, may not later, by a conveyance to the wife, validly prefer the wife over his creditors on the theory that the wife was a creditor.

Farmers Bk. v Pugh, 204-580; 215 NW 652

Defeating creditors as admitted purpose—debt to wife unavailing. A transfer of property from husband to wife, admittedly made to defeat a judgment creditor, even where the husband owed the wife a debt of long standing but the wife never surrendered the note nor considered it paid, fails in the two essentials necessary to avoid the badge of fraud, to wit: (1) that there was a consideration, or (2) that the wife had no notice of the fraud.

Martin v Langfitt, 224-633; 276 NW 594

Wife's suretyship for husband. Where land owned jointly by husband and wife is mortgaged and the wife signs the note and mortgage on her separate interest to secure the loan to the husband who received and used the loan for his own personal debts and later conveyed his one-half interest in the land to his wife, then, in an action by the husband's trustee in bankruptcy to set aside the conveyance as in fraud of creditors, the wife, as surety, is entitled to have the husband's interest in the land applied first to the satisfaction of the mortgage debt in preference to the claims of the trustee in bankruptcy, and the conveyance accomplishing her subrogation thereto was valid.

Clindinin v Graham, 224-142; 275 NW 475

Estoppel to question transfer. Where a judgment creditor holds, or has converted to his own use, securities to the full amount of his judgment, he may not maintain an action to set aside a conveyance by the debtor even tho the conveyance was made with the mutual intent on the part of both the debtor and the grantee to defraud said judgment creditor.

Steckel v Million, 210-1139; 231 NW 387

Original parties — right of grantor. The principle that a grantor may not question a conveyance made by him for the purpose of placing his property beyond the reach of his creditors has no application when the conveyance was made because of an unfounded fear that an action might be brought, and when there is no showing that the grantor ever had a creditor.

Warner v Tullis, 206-680; 218 NW 575

Constructive trust—secret intent not to perform condition attending conveyance. A grantee of land who receives the conveyance on the oral condition that the land will be reconveyed to grantor on the happening of a named event, e. g., on return from a trip abroad, and who secretly intends not to comply with said condition, will be deemed in equity a trustee ex maleficio.

Carlson v Smith, 213-231; 236 NW 387; 80 ALR 186

I TRANSFERS AND TRANSACTIONS ATTACKED—continued

(b) FRAUDULENT CONVEYANCES GENERALLY—continued

Equitable estoppel—fraud as essential element. If there be no fraud, actual or constructive, in the execution and delivery of a deed of conveyance, there can be no estoppel against the grantee.

McCloud v Bates, 220-252; 261 NW 766

Insolvency — evidence — insufficiency. Evidence reviewed and held insufficient to establish the insolvency of a partner in a private bank at the time of the execution of conveyances by him.

Anthony v Heiny, 215-1347; 244 NW 902

Overthrowing consideration or solvency of grantor. A judgment creditor does not prima facie establish the fraudulent character of a transfer by his judgment debtor when he fails to disprove the testimony of the grantee (called as a witness by himself) that there was a consideration, and also fails to establish the insolvency of the grantor or that the grantee participated in the fraud of the grantor.

Meredith v Schmidt, 205-841; 216 NW 634

Remedies of creditors — evidence — sufficiency. Proof (1) that the vendee of personal property did not record or file his bill of sale as required by law, (2) that there was no change of possession following the bill of sale, and (3) that the vendee actively aided the vendor in disposing of the property as the property of the vendor, furnishes ample justification for the holding that the rights of a good-faith and innocent attaching creditor of the vendor were superior to the asserted rights of the vendee.

Beno Co. v Perrin, 221-716; 266 NW 539

Burden of proof. A creditor, seeking to set aside an alleged fraudulent conveyance which recites a consideration which is apparently valid and substantial tho indefinite in amount, must carry his proof beyond showing that the grantor and grantee were husband and wife and that the grantor was insolvent when he delivered the conveyance. In other words, such proof does not cast upon grantee the burden, (1) to sustain the adequacy of the consideration, and (2) to negative bad faith in the transaction, or (3) to show that the grantor at the time retained sufficient other property to pay his creditors.

First N. Bk. v Currier, 218-1041; 256 NW 734

Burden of proof. In an action to set aside as fraudulent a deed of conveyance which recites an apparently valid, substantial consideration, tho indefinite in amount, the burden rests on plaintiff to impeach the deed.

Williams Bk. v Murphy, 219-839; 259 NW 467

Adverse party as witness—contradictory testimony—court's discretion. Where plaintiff calls adverse party as witness he vouches for his competency, credibility, and truthfulness; however, he is entitled to the benefit of any conflict, inconsistency, or incongruity which might be found in his testimony and is not precluded from calling other witnesses to contradict testimony or if the testimony of the adverse party appears to be inherently improbable or lacking in credit or made to appear so by the testimony of other witnesses, the court is not bound by the language in which the witnesses frame their answers, and may enter a decree setting aside a conveyance as fraudulent, notwithstanding that husband and wife, as adverse witnesses called by creditor, testified to sustain conveyances.

Goeb v Bush, 226-1224; 286 NW 492

Property conveyed — ownership not paramount title at issue. In an action between a creditor and a grantee to set aside a deed, ownership by the grantor being the question in issue rather than recovery by virtue of a superior title, an uncontradicted public record showing ownership in grantor at time the deeds were made is conclusive on that issue.

Bagley v Bates, 224-637; 276 NW 797

Insolvency—preferable proof. Principle reaffirmed that in an action to set aside a conveyance as fraudulent, the preferable proof of the grantor's insolvency at the time of the conveyance is the return nulla bona on a duly issued execution.

Williams Bk. v Murphy, 219-839; 259 NW 467

Discharge in bankruptcy. A decree to the effect that a conveyance was fraudulent as to a judgment plaintiff is immune from subsequent attack on the ground that, when the decree was rendered, the judgment in question had been discharged in bankruptcy, such fact not having been pleaded in said action.

Reining v Nevison, 203-995; 213 NW 609

Testator's contract to devise to son—will changed after loan relying thereon. A bank, after contracting with debtor's father to wait until father's death for payment of the son's debt from his share in father's estate, under existing devise in will, has a right to impress an equitable lien on the land when it discovers that the father had changed his will and was fraudulently, without consideration, transferring his property to others than the debtor-son.

Emerson Bk. v Cole, 225-281; 280 NW 515

Consideration—earnings of minor. The fact that a parent has received the earnings of his unemancipated minor child will not support a conveyance to the minor when the conveyance leaves the parent without property sufficient to pay his debts.

Scovel v Pierce, 208-776; 226 NW 133

Conveyance by father to son—indefinite evidence of debt to son. On application of a creditor bank, a father's conveyance of real property to his son a few days after title vested in the father by the law of descent was properly set aside when the evidence, reviewed by the supreme court, contains an abundance of vague and uncertain testimony by both father and son as to an alleged debt owed by the father to the son, but which evidence is wholly insufficient to establish such debt.

Brunskill v Wallace, 224-629; 276 NW 598

Withholding from record. The withholding of a mortgage from record until after the mortgagor became involved in litigation is not, in and of itself, sufficient to justify an inference of fraud, in the face of unquestioned evidence that the debt secured was genuine.

Citizens Bk. v Hamilton, 209-626; 227NW112

(c) CONFIDENTIAL OR FIDUCIARY RELATIONS

Fiduciary and confidential relations defined —synonymous use. Tho the terms are used synonymously, a fiduciary relation exists when one person is under a duty to act for the benefit of another as to matters within the scope of the relation, while a confidential relation may exist without a fiduciary relation and arises when one person has gained the confidence of another and purports to act or advise with the other's interest in mind.

Merritt v Easterly, 226-514; 284 NW 397

Trust—what constitutes. A person is said to receive money in a fiduciary capacity when it does not belong to him or for his benefit, but is received for the benefit of another person to whom the receiver stands in a relation implying great confidence and trust on the one part and a high degree of good faith on the other.

Vertman v Drayton, 223-380; 272 NW 438

Undue influence—evidence. Influence, to be undue, within the meaning of the law, must be such as to substitute the will of the person exercising the influence for the will of the party upon whom the influence is brought to bear.

Arndt v Lapel, 214-594; 243 NW 605

Presumption — burden of proof. The law presumes that a deed of conveyance is fraudulent and void whenever it is made to appear that, when the deed was executed, the grantee occupied a position of trust and confidence as regards the grantor, or held a dominating and controlling influence over the grantor. It follows that the grantee must overthrow the presumption by a showing of the eminent fairness and legality of the transaction. Evidence held insufficient to overthrow the presumption.

McNeer v Beck, 205-196; 217 NW 825

Fraud—confidential relationship established —grantee's failure to sustain burden. In an action to set aside a deed from a deceased mother, 83 years of age and ill at the time of execution of the deed, to her daughter, who had handled her mother's business for a number of years, who had the deed prepared by an attorney, and who was the only person present when mother signed the deed, evidence held to establish that there was a confidential relationship between mother and daughter, thus placing burden of proof on daughter to show that deed was not procured by fraud and, such burden not having been met, the deed could not be sustained.

Tiernan v Brulport, 227-1152; 290 NW 53

Deed—fiduciary relation. When a deed of conveyance is attacked because of the mental incompetency of the grantor, or because of fraud and duress, the burden rests on the grantee to sustain the deed, provided a fiduciary relation existed between grantor and grantee when the deed was executed; otherwise the burden rests on plaintiff to invalidate the deed.

Ellis v Allman, 217-483; 250 NW 172

Pleading and proof. The rule that a party who claims under an instrument executed by one to whom he occupies a fiduciary relation must establish the absolute good faith of the transaction has no application in the absence of plea and proof of such relation.

Steenhoek v Schoonover Co., 205-1379; 219 NW 492

Fraud — cancellation — grounds. When a grantee in securing a deed to land acquires an unconscionable and inequitable advantage over the grantor, equity will infer fraud; likewise when the grantee obtains the deed through a promise which he intends to breach in the future.

Bruner v Myers, 212-308; 233 NW 505; 235 NW 726

Undue influence—abuse of confidence forfeits gain. Where a confidential relationship results in one gaining an influence over another, and the one gaining the influence abuses it to the disadvantage of the other, he will not be permitted to retain the fruits of his advantage. Held, no abuse of confidence.

Reeves v Lyon, 224-659; 277 NW 749

Bona fides of transaction—shifting burden. One asserting the existence of a fiduciary relationship must prove it by (1) a reposal of confidence and (2) positions of dominance and subservience, respectively, occupied by the repository and cestui, before he can shift the burden of proving the bona fides of the transaction to the other party.

Mastain v Butschy, 224-68; 276 NW 79

Burden of proof. The mere showing that the grantor and grantee in a deed of conveyance are related by blood creates no presumption of confidential relationship such as to cast

I TRANSFERS AND TRANSACTIONS ATTACKED—continued

(c) CONFIDENTIAL OR FIDUCIARY RELATIONS—continued

upon the grantee the burden to establish the bona fides of the transaction.

Osborn v Fry, 202-129; 209 NW 303

Absence of presumption. A fiduciary relationship will not be presumed. It must be established by direct evidence or by the established circumstances and condition of the parties.

O'Neil v Morrison, 211-416; 233 NW 708

Gifts—fiduciary relation—evidence. A fiduciary relationship is not established or even presumed from the naked fact that the parties are closely related by blood, or live and reside in the same house.

Humphrey v Norwood, 213-912; 240 NW 232

Family transactions scrutinized. Transactions between members of family are not fraudulent when made in good faith and for the purpose of securing a bona fide indebtedness, but are carefully scrutinized where interests of creditors are involved.

Citizens Bk. v Arndt, (NOR); 205 NW 466

Burden of proof—fiduciary relation. A fiduciary relationship is not predicable solely on family relationship.

Scott v Seabury, 220-655; 262 NW 804

Confidential or fiduciary relationship—presumption of fraud. A gift of a deed to one who stands in a confidential or fiduciary relationship to the donor raises a presumption of constructive fraud, and the burden is on the donee to make such showing of fact as to overcome the presumption.

Jensen v Phippen, 225-302; 280 NW 528

Conveyances between relatives. A conveyance between relatives on an actual, bona fide, and adequate consideration without intent on the part of either grantor or grantee to defraud anyone, is unassailable, even tho the transaction results in giving one creditor a preference over another.

Erusha v Wisnewski, 207-1187; 224 NW 517

Conveyance — consideration — proof—sufficiency. Evidence held to establish a contract between a father and son sufficient to support a conveyance.

Williams Bk. v Murphy, 219-839; 259 NW 467

Constructive fraud not inevitable from blood relationship. As to constructive fraud arising from the gift of real property to one standing in a confidential or fiduciary relationship to the grantor, the rule placing the burden of proof on the grantee, to show the bona fides of the transaction, is of necessity applied according to the peculiar circumstances of each particular case, and not necessarily applied because mere blood relationship exists.

Jensen v Phippen, 225-302; 280 NW 528

Family relationship — effect. Principle reaffirmed that on the issue whether a conveyance is fraudulent the family relationship of the parties is a circumstance to be considered.

Schulein Co. v Lipschutz, 208-1315; 227 NW 141

Fiduciary relation between husband and wife. A fiduciary relation within the meaning of the law is not established by a showing that the parties were husband and wife and that the wife frequently aided her husband in the transaction of his business,—it appearing that the husband was physically infirm.

Arndt v Lapel, 214-594; 243 NW 605

Fiduciary relation between husband and wife. Whether in an action by an heir to set aside a conveyance by a wife to her husband on the ground of undue influence the burden of disproof of said ground shifts to the defendant-husband, quaere.

Browne v Johnson, 218-498; 255 NW 862

Confidential relations. A conveyance by a husband to his wife, executed and received for the sole purpose of paying an actual bona fide debt of the husband to the wife, is beyond the reach of other creditors provided the property conveyed is not substantially in excess of the debt.

Johnson v Warrington, 213-1216; 240 NW 668
Madison v Phillips, 216-1399; 250 NW 598

Husband and wife—knowledge of fraud. Principle reaffirmed that a wife may validly take a conveyance from her husband for the sole purpose of securing payment of her claim, even tho she knows of the fraudulent purpose of her husband.

Harris v Carlson, 201-169; 205 NW 202

Securing wife against loss on homestead mortgage. A bona fide conveyance of personal property by a husband to his wife, to secure her from liability on a mortgage on her homestead, executed for the purpose of raising money to discharge a debt of the husband, is prior in right to subsequently rendered judgments against the husband and levies thereunder on the said conveyed property; but the security will be sustained only insofar as will make the wife whole.

Sherman v Linderson, 204-532; 215 NW 501

Nonimpeachable transfer to wife. A nonexcessive conveyance by a husband to his wife in satisfaction of an actual and good-faith indebtedness owing by him to her is unimpeachable when in taking the conveyance the wife is motivated by the sole purpose of obtaining payment of her claim; and this is true

irrespective of her knowledge of the financial condition of her husband.

Steffy v Schultz, 215-837; 246 NW 910

Between husband and wife. A wife who has a bona fide claim against her husband may, when actuated by the sole and good-faith purpose of obtaining payment, take a nonexcessive conveyance of property from her husband, even tho she knows at the time that the husband is financially embarrassed and that he intends by the conveyance to circumvent another of his creditors.

Clark v Clark, 209-1179; 229 NW 816
Johnson v Warrington, 213-1216; 240 NW 668

Preference to wife. A conveyance of land by a husband to his wife for the sole purpose on his part of repaying, and for the sole purpose on her part of receiving, that which he is actually owing to her, (no question of adequacy of consideration being raised) is unassailable, even tho such conveyance works a direct preference in favor of the wife; and especially is this true when the party attacking the conveyance fails to plead and prove that the conveyance left the husband insolvent.

Bartlett v Webber, 218-632; 252 NW 892

Husband and wife—allowable preference. A wife who permits her husband to use her personal funds in payment for land purchased by him in his own name, and so permits under circumstances fairly justifying the inference that said use was as a loan and not as a gift, may thereafter (some 20 years in present case) validly take from the husband a conveyance of said land at a fair valuation and for the sole and only purpose of satisfying said loan; and this is true tho such conveyance works a preference in her favor over other creditors of the husband. (No issue of estoppel in the case.)

Bates v Maiers, 223-183; 272 NW 444

Right of wife—burden of proof. A wife as a bona fide creditor of her husband has the legal right to take from her husband a conveyance of all his real and personal property provided she is actuated by the sole purpose of obtaining payment of her claim. And if the property received is out of proportion to the debt, the party questioning the conveyance has the burden to so show.

Farmers Bank v Ringgenberg, 218-86; 253 NW 826
Andrew v Martin, 218-19; 254 NW 67

Evidence—sufficiency. Record reviewed and held that a deed from a husband to his wife was executed for the sole purpose of repaying the wife a bona fide indebtedness, and was without any intent to defraud the husband's creditors.

Farmers Bk. v Skiles, 220-462; 261 NW 643

Actual fraud—evidence. Evidence held insufficient to establish actual fraud in the execution of a deed by a father to a son.

Williams Bk. v Murphy, 219-839; 259 NW 467

Confidential relations. A conveyance between parent and child generates no presumption of fraud, but necessarily invites critical examination of the attending circumstances. Circumstances indicative of fraud reviewed, and held to outweigh positive testimony tending to show good faith.

First N. Bk. v Hartsock, 202-603; 210 NW 919

Confidential relations—presumption of fraud. The act of a mother, in causing a certificate of deposit to be changed from her own name to that of a son who, it is made to appear, occupied a very close and confidential relation with his mother, is presumptively fraudulent, and will be sustained only on proof by the son that the transfer was free from all undue influence and fraud.

Roller v Roller, 201-1077; 203 NW 41

Confidential relations of parties. A conveyance of land by an insolvent mother to her daughter for a fair and adequate consideration in hand paid is unassailable when the daughter had no knowledge of her mother's financial condition, and did not participate in any fraudulent purpose or design of the mother.

Pike v Coon, 217-1068; 252 NW 888

Fiduciary relationship—required proof. In an action to set aside a trust agreement executed to a son and attorney by plaintiff, evidence held to support decree dismissing plaintiff's petition. The existence of a confidential relationship or facts giving rise thereto must be proved before doctrine of fiduciary relationship can be applied—the mere relationship of parent and child does not create fiduciary relationship.

Hatt v Hatt, (NOR); 265 NW 640

Confidential relations. A conveyance by an insolvent son to his parent for a valid and adequate consideration will not be decreed fraudulent if the parent acted with the one intent to protect himself on his claim against the son, even tho the son was known to be insolvent, and even tho the son was actuated by a fraudulent purpose.

Hogeboom v Milliman, 202-817; 211 NW 396

Undue influence—parent and child. There was sufficient evidence to warrant setting aside a deed on the ground of undue influence when it was made by an aged, eccentric father who was not in the best of health and had a limited business experience and had a kindly feeling toward all his children, the deed to the farm, which consisted of almost all his property, being made to a son, without the

I TRANSFERS AND TRANSACTIONS ATTACKED—continued

(c) CONFIDENTIAL OR FIDUCIARY RELATIONS—continued

father having an independent adviser, seven days after the father had gone to live with the son who handled his business affairs and to whom he had at one time sold the farm, receiving a reconveyance when the payments were not kept up.

Stout v Vesely, 228- ; 290 NW 116

Undue influence — claim not supported by evidence. When two daughters had cared for their aged mother for about 20 years while the mother was in good health, neat in appearance, mentally alert, and did much reading in a foreign language altho she could not read English, and the daughters went with the mother to a lawyer's office, but remained outside while deeds were drawn up by which the mother granted property to them to be effective after her death, there was no showing of mental weakness, fraud, or undue influence upon which to base a decree setting aside the deeds.

Tedemandson v Morris, 227-774; 289 NW 1

Mother to son gift for mother's life support —donee's burden. The donee of a gift inter vivos, when holding a fiduciary relationship with the donor, has the burden to rebut the presumption that the transaction was fraudulent and voidable, but this does not apply to testamentary gifts. So held where a mother first willed, and later assigned, all her property to one son, in consideration of a contract that he should support her as long as she lived—the result being to disinherit another son.

Reed v Reed, 225-773; 281 NW 444

Right to prefer creditor. A debtor, in paying his valid, bona fide debts, may legally prefer his own child as a creditor over other creditors by conveying to the child property of a value substantially equal to the debt owing to the child.

Andrew v Nabholz, 219-75; 257 NW 587
Williams Bk. v Murphy, 219-839; 259 NW 467

Conveyance by father to son. Record reviewed at length and held that an ancient indebtedness of father to son was bona fide; that certain badges of fraud were satisfactorily negatived, and that a conveyance by the father to the son in satisfaction of the indebtedness was a valid conveyance, even tho it worked a preference over other creditors.

Jeffries v Teale, 218-582; 255 NW 636

Gift to daughter — no fiduciary relation. Where a daughter, receiving a real estate gift from her parents, did not transact, nor advise concerning, her parents' business, nor dominate nor support them but, on the contrary, was more or less dependent upon them, such gift does not present a case of fiduciary or confidential relationship sufficient to nullify the deed on the ground of constructive fraud.

Jensen v Phippen, 225-302; 280 NW 528

Burden of proof—relationship. A creditor, seeking to set aside as fraudulent a conveyance from a father to son, is not aided, from the family relationship alone, by any presumption of fraud, but, on the contrary, must clearly, satisfactorily, and convincingly establish the fraudulent character of the conveyance by proof that more than preponderates over counterproof.

Royer v Erb, 219-705; 259 NW 584

Conveyance and assignment to stepson. Where an elderly but unusually self-willed woman executed a deed to her stepson during time in which she managed her own affairs, and relationship with grantee was only that which ordinarily exists between a mother and son, evidence in action to set aside the deed did not warrant finding that confidential relationship existed so as to raise presumption of fraud, but as to the assignment of a mortgage procured by this stepson after he came to live with her and had taken over management of her affairs, evidence justified finding that such relationship did exist.

O'Brien v Stoneman, 227-389; 288 NW 447

Burden of proof. In an action to set aside a deed and an assignment of a mortgage executed by mother to stepson, burden was on plaintiff to establish the existence of confidential relationship raising presumption of fraud.

O'Brien v Stoneman, 227-389; 288 NW 447

Evidence required to establish fraud. Principle reaffirmed that fraud, actual or constructive, duress, and undue influence must be established by clear, convincing and satisfactory evidence. Evidence held wholly insufficient to show such fraud in the assignment by a grandmother to a grandson of a note and mortgage.

Scott v Seabury, 220-655; 262 NW 804

Family transaction — careful scrutiny for fraud. A transaction wherein an insolvent mortgagor, also in arrears on interest and taxes, makes an assignment to his father-in-law of a lease on his mortgaged premises, being a family transaction, will be carefully scrutinized for fraud, but without specific evidence indicating an incorrect conclusion by the lower court, its decision validating such transaction will not be disturbed on appeal.

First JSL Bk. v Ver Steeg, 223-1165; 274 NW 883

Confidential relations—brothers and sisters. It will not be presumed that a confidential relation exists between parties on the simple showing that they are brothers and sisters.

Stonewall v Danielson, 204-1367; 217 NW 456

Impeaching recited consideration. The general recital in a deed of conveyance of a valuable consideration may be impeached, in an action to cancel the deed for fraud, by showing that no consideration passed, and by showing that the only relation of grantor and grantee was that of aunt and niece.

Guenther v Kurtz, 204-732; 216 NW 39

Gifts inter vivos—joint (?) bank account. Where during her lifetime decedent permitted defendant, for years her confidential advisor, to sign with her the bank's signature card applying to decedent's personal bank account, whereupon the bank added the defendant's name thereto as a joint bank account, but decedent kept her passbook and an interest in and control over the account, then under these circumstances, defendant, whose custody of the account during decedent's lifetime was never inconsistent with decedent's sole ownership, cannot after her death claim a gift of the deposit on the sole basis of the signature card.

Taylor v Grimes, 223-821; 273 NW 898

Burden of proof. No confidential relation may be said to exist between the officers of a mortgagee and the mortgagor because of the fact that on a few occasions the officers had aided the mortgagor in closing ordinary business transactions.

Charlson v Bank, 201-120; 206 NW 812

Confidential relation — insufficient showing. The ordinary relation between a banker and a depositor affords no basis for the claim of confidential relation.

Klatt v Bank, 206-252; 220 NW 318

Fiduciary relation—burden of proof. Plaintiff, in an action to avoid a deed of conveyance, makes a prima facie case of constructive fraud by proof that, when the deed was executed, the grantor, tho mentally competent, was, in the transaction of his business and in his conduct generally, under the absolute domination of the grantee. After such proof, the grantee must take on the burden of affirmatively showing the complete bona fides of the transaction. Proof that the deed left grantor practically penniless, that grantee paid no consideration and was aggressively active in obtaining the deed, accentuates the presumption of fraud instead of overcoming it.

Ennor v Hinsch, 219-1076; 260 NW 26

(d) CONSIDERATION IN GENERAL

Transfer by solvent grantor. A conveyance of property by a solvent grantor without consideration therefor may not be questioned by creditors. A like conveyance by an insolvent grantor is presumptively fraudulent, and may be set aside in the interest of creditors.

Chamberlain v Fay, 205-662; 216 NW 700

Bona fide consideration. A conveyance by an insolvent as security for a bona fide indebtedness which is largely in excess of the value of the property conveyed is unassailable.

Anthony v Heiny, 215-1347; 244 NW 902

Agreement as to dividends—want of consideration—effect. An agreement that one of two stockholders shall draw all dividends up to a certain time, unsupported by any consideration, is properly canceled in an action in equity.

Petersen v Heywood, 212-1174; 236 NW 63

Partially valid consideration. A fraud-participating grantee will not be permitted to hold the title because a portion of the consideration was bona fide.

Leach v Edgerton, 203-512; 211 NW 538

Consideration—value of homestead. On the issue whether a creditor took a conveyance of real property at a fair valuation, the value of that part of the land which represented the debtor's homestead must be excluded from the computation.

Com. Bank v McLaughlin, 203-1368; 214 NW 542

Value of property—conflicting evidence. In determining the value of property, the court is often compelled to fix an amount which is intermediate between values which are presumptively exaggerated and presumptively overconservative.

Cover v Wyland, 205-915; 218 NW 915

Love and affection—when not consideration. A conveyance of property in consideration of love and affection is voluntary as against existing creditors.

Grimes Bk. v McHarg, 224-644; 276 NW 781

Future support—when not consideration. A conveyance of property in consideration of future support is voluntary as to existing creditors.

Grimes Bk. v McHarg, 224-644; 276 NW 781

Future promises — voluntary consideration negatived by full performance. Conveyances in consideration of future support and medical bills are purely voidable and prima facie voidable as to existing creditors, except that, to the extent the consideration has been subsequently paid, the conveyance will be upheld.

Rummel v Zeigler, 225-613; 281 NW 159

Voluntary conveyance by insolvent. Evidence reviewed and held, a conveyance by an insolvent was voluntary—without consideration—and therefore void as to creditors.

Biddle v Worthington, 216-102; 248 NW 301

Banker's conveyance — balancing sister's false entries—no consideration. Transfers of land to the superintendent of banking as receiver of an insolvent bank by a banker in order to balance false entries made by sister,

I TRANSFERS AND TRANSACTIONS ATTACKED—continued

(d) CONSIDERATION IN GENERAL—continued

as cashier, on the bank books, are, in an action by trustee in bankruptcy to set the deeds aside, fraudulent as to creditors of the banker because lacking consideration, when it is shown that the banker's sister and not the banker himself was personally indebted to the bank on account of the false entries.

Bagley v Bates, 224-637; 276 NW 797

Consideration—inadequacy at time of transfer. Inadequacy of consideration, such as will suffice to set aside a deed on the petition of an executor as in fraud of creditors, is inadequacy at the time of execution of the deed and not at some time subsequent thereto.

Rummel v Zeigler, 225-613; 281 NW 159

Inadequacy of price paid — presumption. Principle reaffirmed that a material disproportion between the price paid for, and the value of, property conveyed renders the conveyance constructively fraudulent as to existing creditors, with consequent burden on the grantee to overthrow the presumption by showing that the deed did not render the grantor-debtor insolvent.

Savings Bk. v Mehlin, 200-970; 205 NW 788

Adequate consideration. A conveyance in liquidation of the indebtedness of the grantor to the grantee, not fraudulent in fact, will not be set aside at the instance of other creditors if the consideration is adequate.

Wood Co. v Cordle, 201-593; 207 NW 576

Honest but inadequate consideration. Even tho a conveyance of land by an insolvent father to his son may not be actually fraudulent, yet it may be constructively fraudulent to the extent of the substantial difference between the actual value of the land and the lesser price paid therefor by the son; and in such case a court of equity may make such order as will protect both the grantee and the complaining creditor.

Williams Bk. v Murphy, 219-839; 259 NW 467

Inadequate consideration — constructive fraud. A creditor may be unable to prove actual fraud in a conveyance carrying substantially all of the debtor's property, but may be able to prove a constructive fraud in said conveyance, to wit: that the consideration paid by the grantee was substantially inadequate in view of the value of the property conveyed. And, on such proof, the power of a court of equity is so boundless as to justify the entry of most any decree which will equitably protect both the grantee in the conveyance, the complaining creditor, and all other parties involved.

McFarland v Johnston, 219-1108; 260 NW 32

Good-faith conveyance to daughter. Land conveyed to daughter and recorded eight months before judgment against father-grantor cannot be subjected to the payment of the judgment when the daughter paid a complete and good-faith consideration for the conveyance.

Witousek & Co. v Holt, (NOR); 224 NW 530

Conveyance by husband to wife—"$1.00 and other valuable consideration"—sufficiency. A deed from husband to wife, executed two years prior to the rendition of a judgment against the husband and which deed recites a consideration of "$1.00 and other valuable consideration", is not fraudulent as against such judgment creditor of the grantor-husband, when it is shown that the "other consideration" consisted of $3,000 actually paid by the wife.

Donovan v White, 224-138; 275 NW 889

Wages of minor as consideration—burden of proof. A deed from a father to a son of a $2,500 town property for admittedly no consideration, and a deed of a $12,000, partly encumbered farm, in fulfillment of an alleged contract that the son (at the time of contract, an unemancipated, unmarried, 19-year-old minor) should, when married, be given said farm if he remained on, and helped in the management of said farm, are, irrespective of any actual fraud, constructively fraudulent as to a prior existing creditor of the grantor, because of want of, or grossly inadequate, consideration, it appearing that the son married within a month after attaining majority; and grantee must, in order to sustain said deeds, prove that grantor still continued to retain sufficient property to pay his said creditor.

Com. Bank v Balderston, 219-1250; 260 NW 728

Assignments—consideration—adequacy. Evidence reviewed relative to an assignment of a note and mortgage for $5,000, and held that a life annuity of $200 per year to the assignor was sufficiently adequate to prevent any imputation of fraud, actual or constructive.

Scott v Seabury, 220-655; 262 NW 804

Barred claim. A conveyance by a husband to his wife will not be set aside on the sole ground that the conveyance was in satisfaction of an indebtedness against which the statute of limitations had fully run.

Cover v Wyland, 205-915; 218 NW 915

Burden on wife. In a creditor's suit, a wife, in order to sustain a conveyance to herself from her husband, must show (1) that she parted with a fair and valuable consideration, and (2) that the husband, at the time of the conveyance, had sufficient property remaining to pay his debts.

Burgess v Stinson, 207-1; 222 NW 362

Continued solvency of grantor. The grantee in a conveyance which is voluntary and without consideration has the burden to show that the conveyance in question did not render the grantor insolvent.

Hansen v Richter, 208-179; 225 NW 361

Impeachment by inconsistencies. Positive testimony tending to show that a conveyance was on a supporting consideration and not a mere gift may be effectually overthrown by the circumstances and inconsistencies attending the transaction, and by the contradictions running through the testimony as a whole.

Lietz v Grieme, 212-1305; 236 NW 395

(e) VOLUNTARY CONVEYANCES

Voluntary conveyance. Principle reaffirmed that a voluntary conveyance is constructively fraudulent as to existing creditors of the grantor unless the grantee establishes the fact that the grantor at the time of the conveyance retained sufficient property to pay his creditors.

First N. Bk. v Currier, 218-1041; 256 NW 734

Transfer of exempt property. Evidence held to show that the property in question was, at the time of a conveyance by a husband to his wife, the homestead of the grantor and grantee, and therefore not fraudulent as to creditors.

Hansen v Richter, 208-179; 225 NW 361

Validity of deed—age of grantor—insufficient to invalidate deed. Before the supreme court will set aside a deed executed by a person advanced in years, there must be evidence that such individual was not capable of carrying on his business transactions, and that he did not understand the nature of the transaction into which he was entering.

Gilligan v Jones, 226-86; 283 NW 434

Voluntary conveyance—presumption. Principle reaffirmed that a voluntary conveyance by an insolvent is presumptively fraudulent.

Browning v Kannow, 202-465; 210 NW 596

Voluntary conveyance. A conveyance by a husband to his wife will not be deemed voluntary solely on the ground that the conveyance was (1) by quitclaim, and (2) in consideration "of $1.00 and other valuable consideration".

Tirrill v Miller, 206-426; 218 NW 303

Voluntary conveyance. Voluntary conveyances between husband and wife or between parent and child are presumptively fraudulent.

Dolan v Newberry, 200-511; 202 NW 545; 205 NW 205

Evans v Evans, 202-493; 210 NW 564

See Leach v Sorenson, 202-919; 211 NW 540

Shaffer v Zubrod, 202-1062; 208 NW 294

Forfeiture of policy for breach of condition subsequent—change of title. A conveyance, without consideration, by a husband to his wife of a stock of insured goods with the intent to place the goods beyond the reach of his apprehended creditors, without any actual change of possession or use taking place, followed later by a reconveyance, without consideration, by the wife to the husband, constitutes no such change in the interest or title of the insured as will void the policy, the wife never having had any financial interest in the property.

McVay v Ins. Co., 218-402; 252 NW 548

Voluntary conveyance. A voluntary conveyance by a parent to his child which leaves the parent without property sufficient to discharge his debts is constructively fraudulent.

Scovel v Pierce, 208-776; 226 NW 133

Collection of estate—setting aside deed—future care as consideration—burial expense. In an action by administrator to set aside as voluntary a deed given by parents to their sons,—in return for certain agreed future care and expense,—burial and medical expenses furnished to parents as agreed were properly allowed by the court to the sons.

Rummel v Zeigler, 225-613; 281 NW 159

Knowledge of creditor. When land, which was part of an estate, was purchased by decedent's two sons, who paid no cash consideration, but occupied, paying rent to the other heirs, and who later, in order to protect the land from creditors, deeded it to two sisters who did not know of the indebtedness of the brothers, and when the sons made a contract with the sisters at the time of the deed protecting the other heirs in case the land were sold, a creditor of one of the brothers who knew of the rent payments and knew of the deed, but made no objection, could neither have it set aside as a fraudulent conveyance nor have the real estate subjected to a judgment against the debtor-brother, as the deed and contract conveyed the mere legal title to the sisters in trust for the heirs who were the persons entitled to the property.

Lakin v Eittreim, 227-882; 289 NW 433

Other sufficient property—debtor's burden to show. A debtor who voluntarily conveys his property to others has the burden to prove that he retained sufficient other property to pay his debts and failing this, it follows that the conveyance was fraudulent as to existing creditors.

Grimes Bk. v McHarg, 224-644; 276 NW 781

II RIGHTS AND LIABILITIES OF PARTIES

Seeker for equity must do equity. The full equitable titleholder of land held under a dry trust who asks equity to invest him with the full legal title must do equity to the extent of reimbursing the trustee for good-faith expenditures made by him at the request or with the consent and acquiescence of the equitable titleholder in improving or preserving the property, even tho the trustee's claims for such

II RIGHTS AND LIABILITIES OF PARTIES—continued

expenditures are barred at law by the statute of limitations.

Warner v Tullis, 206-680; 218 NW 575

Consideration—who may not question. A plaintiff has no standing to attack a conveyance of land for want of consideration when, if he be successful, his only interest in the land would be that of an heir of the grantor.

O'Neil v Morrison, 211-416; 233 NW 708

Naked legal titleholder as real party in interest. A judgment plaintiff may maintain an action to set aside conveyances as fraudulent even tho he has transferred the equitable title to the judgment and holds only the legal title.

Grimes Bk. v McHarg, 217-636; 251 NW 51

Attorney's lien as assignment—effect. The duly perfected lien of an attorney with reference to the judgment obtained by him for his client, is tantamount to an assignment of an interest in the judgment. It follows that the attorney has such interest in the judgment as to support an intervention by him in an action by the judgment plaintiff to set aside certain conveyances as fraudulent.

Grimes Bk. v McHarg, 217-636; 251 NW 51

Different parties and issues. A decree in an action between a residuary legatee and the donee of a gift, on the issues whether the donor was mentally competent to make the gift and whether he had been fraudulently imposed upon, cannot act as an adjudication of an action by the executor of the donor to set aside said gift as a fraud on the creditors of the donor.

Chamberlain v Fay, 205-662; 216 NW 700

Good-faith grantee for value. A good-faith grantee for value will be protected irrespective of the fraudulent purpose and intent of the grantor; and this is true even tho such grantee will thereby be given a preference over other creditors.

Cherokee Auto v Stratton, 210-1236; 232 NW 646

Oelke v Howey, 210-1296; 232 NW 666

Protection of nonfraudulent grantee. A wife who takes a deed from her husband without actual intent to defraud will, even tho the deed is constructively fraudulent, be protected to the extent to which she has become surety for her husband and has secured such debt by mortgage on the land.

Burgess v Stinson, 207-1; 222 NW 362

Credit to grantee. The grantee in a deed of conveyance which is taken on an inadequate consideration and which is voluntary because it leaves the grantor insolvent, will, in an action to subject the land to the claim of an existing creditor of the grantor, be credited with the amount in good faith paid or assumed by the grantee for the land.

Peoples Bk. v Prettyman, 209-462; 227 NW 900

Assignment pending action—right of grantee. One who becomes an assignee of a real estate mortgage after the commencement of a successful action to set aside the mortgage as fraudulent (the action being legally lis pendens by proper index), and who, during the trial of said action, to which he had been made a party, redeems the land from tax sale, must be deemed a mere volunteer payer of taxes with no right to have the amount paid by him made a lien on the land.

Clarkson v McCoy, 215-1008; 247 NW 270

Disallowance of interest. Where, in setting aside a conveyance as fraudulent, the court decrees grantee a lien for the amount which grantor was owing grantee, the failure of the court to allow interest on the claim will not be disturbed on a record showing that grantee has been in possession of the land for some two years without accounting to grantor for the rents, and that the trial court deemed said rents as ample to meet the said interest,—said interest being a matter of future adjustment on any balance remaining after satisfying the creditor's claim.

Lietz v Grieme, 212-1305; 236 NW 395

Charging vendee with exempt property. When a conveyance of real estate from a husband to his wife is sustained as nonfraudulent to the extent of the balance which the husband was owing his wife for money loaned, the wife may not complain that in arriving at such balance the court charged her with the value of exempt property received by her from her husband.

Citizens Bk. v Frank, 212-707; 235 NW 30

Setting aside fraudulent deed on condition. The grantee in a deed of conveyance executed for the primary purpose of preserving a means of support for the aged grantor (tho not so expressed in the deed) has a right, in an equitable action by grantor's executor to set aside the deed, to demand that his reasonable claim for furnishing the grantor a very substantial support be first paid as a condition precedent to any judgment setting aside the deed; and this is true tho said deed would have been declared fraudulent and invalid had it been attacked by the grantor's existing creditors.

Meyers v Schmidt, 220-370; 261 NW 502

Nongood-faith purchaser. The purchaser of land from a fraudulent grantee will not be protected as a purchaser in good faith and for a valuable consideration when, at the time notice of the fraud is brought home to him, the purchase-price note was in the hands of the grantor, and unpaid.

Reining v Nevison, 203-995; 213 NW 609

Equitable garnishment — school district as defendant. A judgment plaintiff may not, as a matter of public policy, maintain against a school district an equitable proceeding to subject to the satisfaction of the judgment funds in the hands of such corporation and belonging to the judgment defendant.

Julander v Reynolds, 206-1115; 221 NW 807

State as creditor. A plea of guilty in a criminal prosecution does not create the relation of creditor and debtor between the state and the accused, and a transfer of property by the accused after such plea and before the entry of judgment for a fine is not necessarily fraudulent as to the state.

State v Malecky, 202-307; 210 NW 121; 48 ALR 603

Stock—wrongful issuance—cancellation in equity. Where a corporation which succeeds to the business of two partners agrees to pay all outstanding debts of the partnership, a hypothecation of corporate stock of one of the two stockholders as security for one of said debts manifestly works no transfer of title to said stock to the corporation, and where the debt is paid with corporate funds, and the stock certificate is returned, the wrongful act of the nonhypothecating stockholder in causing a new stock certificate to be issued to himself for one-half of the returned shares will be canceled by proper action in equity.

Petersen v Heywood, 212-1174; 236 NW 63

Fraud—when wife not creditor. A wife does not, against her husband's creditors, become the creditor of her husband by turning over to him her money for indiscriminate use in the family, and without any agreement for or expectation of repayment.

Harris v Carlson, 201-169; 205 NW 202

Defense of noncreditorship. The grantee in a conveyance which is attacked as fraudulent by an alleged creditor of the grantor may, even tho the grantor makes no defense, defend on the ground that the attacking plaintiff is not in fact a creditor of the grantor.

Fidelity Co. v Bank, 218-1083; 255 NW 713

Nonabatement of action by receivership. The appointment of a receiver for an insolvent corporation does not abate an action by the corporation as a judgment creditor to set aside conveyances as fraudulent; and if the receiver be not substituted as plaintiff the action may be continued by the corporation in its corporate name.

Grimes Bk. v McHarg, 217-636; 251 NW 51

Discharge of bankrupt—effect on liens. The fact that a bankrupt has been discharged presents no legal obstacle to proceedings by the bankrupt's trustee to enforce lien against property which is legally a part of the bankrupt's estate but as to which the bankrupt wrongfully disclaims any interest.

Bogenrief v Law, 222-1303; 271 NW 229

Creditor—effect of securing lien. A creditor who has his claim decreed a lien on land voluntarily transferred by the debtor for an inadequate price, but subject to the amount actually paid by the transferee, does not, by operation of law, become personally obligated to pay said superior lien.

Bond v Bank, 201-1175; 207 NW 233

Fraudulent conveyances—participation with knowledge—loss of rights. A party knowing conveyances were executed to him for the purpose of hindering, delaying, and defrauding creditors, is not entitled to a lien or interest in the property involved to the extent of the value of services rendered before the debt was contracted.

Grimes Bk. v McHarg, 224-644; 276 NW 781

III REMEDIES OF CREDITORS AND PURCHASERS

Novation—substitution of new debtor—consent. A creditor may, by his actions and conduct, consent to the substitution of a new debtor.

Andrew v Trust Co., 219-1059; 258 NW 921

Decree appropriate to facts proven. A court of equity having acquired jurisdiction of an action praying the setting aside of a conveyance because actually fraudulent, may, on proof of constructive fraud only, enter a decree appropriate to said proven facts.

McFarland v Johnston, 219-1108; 260 NW 32

Equitable interest—procedure. Plaintiff does not, by alleging (under authority of §12106, C., '24), in an action on a promissory note, that the maker had fraudulently conveyed his property, and by praying for an attachment on the property and for a decree subjecting the property to plaintiff's judgment, thereby eliminate the necessity of equitable proceedings to reach said property.

Federal Bank v Geannoulis, 203-1385; 214 NW 576

Equitable ownership superior to judgment lien. An actual bona fide oral agreement between a debtor and creditor, that the debtor will convey to the creditor certain lands in part satisfaction of the debt, creates in the creditor an equitable ownership in the land (especially when the creditor is already in possession of the land) which is superior to the rights of a subsequent judgment creditor of said debtor. It follows that delay in making delivery of the deed, or even the loss of the deed, will not elevate the subsequent judgment creditor into priority.

Richardson v Estle, 214-1007; 243 NW 611

III REMEDIES OF CREDITORS AND PURCHASERS—continued

Curing misjoinder. Any claim of misjoinder of causes of action as to defendants and of misjoinder of parties-defendant because plaintiff joined an action at law on bonds against one defendant with an action in equity to set aside an alleged fraudulent conveyance against the other defendant is effectually effaced by an order of court dismissing the action as to the equitably charged defendant.

Minnesota Co. v Hannan, 215-1060; 247 NW 536

Objection first presented on appeal. In equitable proceedings supplementary to execution, the defendant may not for the first time on appeal present the objection that plaintiff has not reduced his claim to judgment.

Ober v Dodge, 210-643; 231 NW 444

Defensive matter specially pleadable. The defense that a waiver by a wife of her asserted right to a divorce constitutes a valid consideration for a conveyance by the husband to the wife must be specially pleaded.

Burgess v Stinson, 207-1; 222 NW 362

Copy of petition. In an action to subject real estate to the lien of plaintiff's personal judgment, brought against the alleged fraudulent titleholder and alleged equitable owner only, no copy of the petition need be served on the defendants in order to acquire jurisdiction.

Lawrence v Stanton, 212-949; 237 NW 512

Judgment in rem as basis. A judgment in rem against the real estate of a nonresident furnishes sufficient basis for the institution of an action in the nature of a creditor's bill, to set aside a fraudulent transfer of the property and to subject the property to the payment of the judgment.

Porter v Wingert, 200-1371; 206 NW 295

Nonnecessity for judgment.

Mallow v Walker, 115-238; 88 NW 452

Necessity for judgment. The obtaining of a judgment against a purported partner in an insolvent private bank is a condition precedent to the right of the receiver to maintain a general equitable action to set aside an alleged fraudulent conveyance by the partner.

Cooper v Erickson, 213-448; 239 NW 87

Attacking conveyance — conditions precedent. The surety on an administrator's bond who has paid the shortage of the administrator consequent on the failure of the private bank in which the estate funds were deposited, may not, in an action to recoup his loss, question a conveyance by a former partner in the bank when, prior to the giving of the bond, the said partner had, in good faith and to the full knowledge of the administrator, sold his interest in the bank at a time when the bank had ample funds with which to pay the administrator's deposit.

Fidelity Co. v Bank, 218-1083; 255 NW 713

Claims against estate—filing—right to enforce all security. The filing of a claim against the estate of the deceased debtor does not preclude claimant from maintaining an equitable action to enforce said claim against lands which were made liable for the payment of said claim by the probated will of another decedent.

Diagonal Bank v Nichols, 219-342; 258 NW 700

Diligent creditor. The creditor of an estate may not, for his own exclusive benefit, attack a fraudulent conveyance by the deceased.

Marion Bank v Smith, 205-203; 217 NW 857

Right to set aside conveyance—condition precedent—laches. The right of a creditor to have the fraudulent conveyance of his debtor judicially set aside is not a matured right—a matured cause of action—until the creditor obtains, by judgment or attachment, a lien on the land in question. But the creditor will not be permitted negligently to delay maturing his own cause of action, and if he does so delay for a period equal to or greater than the five years allowed by statute for bringing the action, he will be deemed guilty of such laches as will completely bar his action, even tho it be conceded that, strictly speaking, the action is not barred by the statute of limitation.

Bristow v Lange, 221-904; 266 NW 808

Creditor's right to follow assets. A creditor of a banking corporation may, for the satisfaction of his claim, follow the assets of the corporation into the hands of another like corporation which has bodily taken over said assets and paid therefor by an issuance of its corporate shares of stock, it appearing that the latter corporation had assumed the liabilities of the former but had become insolvent.

Andrew v Bank & Trust, 219-1059; 258 NW 921

Absence of equity—effect. A fraudulent conveyance will not be set aside at the instance of a judgment creditor of the grantor's when there is no equity in the property over and above the unquestioned incumbrances thereon.

Imholt v McCoy, 202-679; 210 NW 906
Hewitt v Blaise, 202-1109; 211 NW 479

Recovery of money against innocent third party. One who is defrauded of his money may not recover the same of an innocent third party to whom the wrongdoer paid it in discharge of the bona fide debt of the wrongdoer to the innocent third party.

Bogle v Bank, 203-203; 212 NW 547

Right of trustee in bankruptcy. A trustee in bankruptcy who, in the interest of creditors,

seeks to set aside a fraudulent conveyance by the bankrupt, is entitled to the same relief as the creditor would have been entitled to, had he (the creditor) prosecuted the action.

Crowley v Brower, 201-257; 207 NW 230

Persons entitled to assert invalidity. An actual, nonfraudulent, but voluntary conveyance may not be impeached by a trustee in bankruptcy on behalf of subsequent creditors.

Crowley v Brower, 201-257; 207 NW 230

Nonright to question. A creditor may not have his claim decreed a lien on the property of a nonfraudulent trust which the debtor has created for the specific purpose of discharging an obligation as to which the said creditor is a stranger; and especially is this true when the said creditor fails to show that he was injured by the creation of said trust.

Clark v Langerak, 205-748; 218 NW 280

Extent of relief. An actual, nonfraudulent, voluntary conveyance should not, in an action by a trustee in bankruptcy on behalf of creditors, be wholly set aside and the title vested in the trustee, but a lien on the land may be decreed in favor of antecedent creditors.

Crowley v Brower, 201-257; 207 NW 230

Form of judgment in favor of trustee. The decree in an action by a trustee in bankruptcy to set aside a conveyance by the bankrupt as fraudulent, should be, not that the trustee is the owner in fee of the property, but that the trustee has a superior lien on the property to the amount of the lienable claims in his hands as such trustee.

Hoskins v Johnston, 205-1333; 219 NW 541

Preferences by bankrupt—right to set aside. The right of a trustee in bankruptcy to set aside a fraudulent conveyance is equal to the right of a creditor of the bankrupt to set aside the same conveyance, even tho said conveyance was not made within the four months preceding the filing of the petition in bankruptcy.

Scovel v Pierce, 208-776; 226 NW 133

Remedy of trustee. Where property sold under a conditional sale contract is replevined by the vendor and thereafter bankruptcy proceedings are instituted against the vendee, the trustee in bankruptcy necessarily has notice of the rights and claims of the vendor, and occupies, as to such property, the legal position of a judgment creditor holding an execution duly returned unsatisfied.

Internat. Harv. v Poduska, 211-892; 232 NW 67; 71 ALR 973

Action by trustee to set aside—conditions. A trustee in bankruptcy may not maintain an action to set aside a fraudulent conveyance by the bankrupt unless he pleads and proves that such setting aside is necessary in order to pay claims allowed in the bankruptcy proceedings.

Newman v Callahan, 212-1003; 237 NW 514

Action by trustee—conditions. A trustee in bankruptcy has no right to maintain an action to set aside as fraudulent a conveyance by the bankrupt unless he shows that claims have been filed and allowed against the bankrupt, and that he as trustee has not sufficient funds with which to pay said claims.

Shaw v Plaine, 218-622; 255 NW 686

Unallowable action for damages. A trustee in bankruptcy cannot maintain an action at law against a grantee of the bankrupt to recover the value of property collusively and fraudulently transferred to said grantee in fraud of creditors. This is not saying that the trustee may not treat the property in the hands of the grantee as belonging to the bankrupt, or impress a trust on the proceeds of the property if grantee has disposed of it.

Lambert v Reisman, 207-711; 223 NW 541

Unallowable action for damages. A judgment plaintiff may not maintain an action at law for damages against the fraudulent grantee of land transferred by the judgment defendant, even tho the action is aided by an allegation of conspiracy to defraud plaintiff.

McKay v Barrick, 207-1091; 224 NW 84

Unallowable counterclaim. A fraudulent grantee of land may not, in an action by the judgment creditor of the grantor to set aside the conveyance, set up a counterclaim for money due to said grantee from said judgment creditor.

Evans v Evans, 202-493; 210 NW 564

Nonright to personal judgment. A judgment creditor upon securing a decree setting aside a fraudulent conveyance of the judgment defendant's interest in a partnership to the copartners, is not entitled to a personal judgment against the vendee-partners for the amount of his judgment.

Schulein Co. v Lipschutz, 208-1315; 227 NW 141

Evidence. Evidence held to establish a fraudulent transfer.

Dimick v Munsinger, 207-354; 223 NW 115
Northwest. Bank v Muilenburg, 209-1223; 229 NW 813
Schnurr v Miller, 211-439; 233 NW 699

Evidence. Evidence held insufficient to establish fraud in a conveyance.

Aldrich v Van Hemert, 205-460; 218 NW 311
Cass v Ney, 209-17; 227 NW 512
Holliday v Hepler, 213-488; 239 NW 66

Evidence — sufficiency. A showing that a conveyance by a debtor is attended by a mere suspicion of fraud is not sufficient foundation

III REMEDIES OF CREDITORS AND PURCHASERS—continued

for decreeing its invalidity. Fraud must be clearly and satisfactorily established.

First N. Bk. v Lynch, 202-795; 211 NW 381

See County Bk. v Jacobson, 202-1263; 211 NW 864

Self-impeaching evidence. The court cannot say, at least ordinarily, that wholly undisputed testimony tending to show that a conveyance was bona fide and for value, is so self-impeaching as to establish the very contrary.

Hawkins v Vermeulen, 211-1279; 231 NW 361

Evidence—failure of grantor to list indebtedness. Failure of the grantor in a conveyance to list, in an application for credit, any of the indebtedness which he claims was satisfied by the conveyance, is material on the issue of fraud.

Oelke v Howey, 210-1296; 232 NW 666

Evidence—failure to return notes for assessment. Failure of the alleged grantee in a conveyance to list for assessment the notes which he claims were satisfied by the conveyance is material on the issue of fraud.

Oelke v Howey, 210-1296; 232 NW 666

Connected transactions. Fraudulent transactions may be so related, connected, and interwoven that evidence thereof may be admissible against a party who was not present at the transaction.

Leach v Edgerton, 203-512; 211 NW 538

Conclusiveness on party calling witness. A party who calls a witness is not necessarily bound by the testimony of the witness, yet, when a party calls a witness on the issue of fraud and want of consideration in a conveyance, he will not be permitted to say that affirmative, uncontradicted, and positive testimony of the witness that there was no fraud and that there was a consideration establishes the direct contrary.

Pike v Coon, 217-1068; 252 NW 888

Evidence—consideration—disregard of testimony. A creditor who is seeking to set aside as fraudulent a conveyance by his debtor may not have testimony disregarded which he alone has introduced, and which tends to show the consideration paid by the grantee for the deed.

Savings Bk. v Mehlin, 200-970; 205 NW 788

Pro tanto cancellation. An absolute deed for which grantee parts with no consideration except to assume a mortgage indebtedness on which he was theretofore liable, but only secondarily, as between himself and the grantor, will be deemed (no actual fraud being charged) constructively fraudulent to the extent that the value of the land exceeds the amount of the said assumed mortgage, unless grantee shows that the grantor had sufficient property remaining to pay his existing creditors.

Buell v Waite, 200-1021; 205 NW 974

Disparity in values. The disparity between $2,600, at which a creditor-grantee took conveyance of real estate and $3,200, the highest value placed on the property, is not so great as to constitute a badge of fraud.

Van Pelt v Willemsen, 208-1326; 227 NW 110

Husband and wife—decree warranted allocating property to wife and creditor. In an action in equity by creditor to set aside as fraudulent husband's conveyances to wife allegedly made in satisfaction of indebtedness, a decree is warranted which, in view of court's valuations of the realty, allocated enough property to wife to compensate her for what husband was able to recall of the alleged indebtedness, and allocated enough to judgment creditor to satisfy his claim.

Goeb v Bush, 226-1224; 286 NW 492

Wife's deed for husband's debt—cancellation—consideration—estoppel. Wife who was not illiterate, and who deeded her land in payment of husband's notes, and who, by placing deed in husband's hands, clothed him with apparent authority to deliver the deed, thereby inducing creditors to surrender other land owned by the husband, is estopped from questioning the validity of the deed. The consideration to wife was advantage to husband and detriment to creditors.

Allen v Hume, 227-1224; 290 NW 687

Fraud—personal liability of grantee. A wife who, knowing that her husband intended to hinder and delay his creditors, accepts a voluntary transfer of his bank deposit is, nevertheless, not personally liable to the husband's subsequently appointed trustee in bankruptcy for that part of the deposit which is expended prior to the bankruptcy proceedings in carrying on in good faith the ordinary business of the husband.

Barks v Kleyne, 201-308; 207 NW 329

Mortgage by grantee to undo wrong. A creditor, on learning that his debtor has made a voluntary conveyance of his property, may validly secure his debt by taking mortgage security from the voluntary grantee on the voluntarily conveyed property, and will thereby secure a right which will be superior to the right of another creditor who, subsequent to the mortgage, and after the death of the common debtor, reduces his claim to a so-called judgment against the latter, and, for his own exclusive benefit, levies on the voluntarily conveyed property.

Marion Co. Bk. v Smith, 205-203; 217 NW 857

Renounced gift. The act of the life beneficiary of an annual interest charge imposed as a gift in her favor in a deed (which the

grantee duly accepted) in formally and unconditionally renouncing and rejecting all benefits "which do, may, or might accrue" to her under the deed, legally places such interest charge beyond the reach of a judgment creditor who duly institutes an equitable action to subject such interest charge to the satisfaction of his judgment, even tho the said renunciation was not made until long after the said action was duly instituted.

Gottstein v Hedges, 210-272; 228 NW 93; 67 ALR 1218

Fraudulent conveyances — termination of property interest regardless of creditors. No present title to land passes under a contract to the effect (1) that a daughter, so long as she outlived her father and paid certain annual rentals and other charges, should have the possession and profits of named lands, (2) that title should remain in the father, but at the death of the father she should receive an absolute deed to the land, which deed was put in escrow under the control of the father during his lifetime, (3) that if she defaulted in said payments the contract could be forfeited on notice, and (4) that all her interest terminated instantly on her death prior to that of the father. It follows that upon the insolvency of the daughter and her default on said payments, the father and daughter may voluntarily cancel said contract regardless of the creditors of the daughter.

Tilton v Klingaman, 214-67; 239 NW 83

Right to reach income from trust depending on cestui electing to take income.

Ober v Dodge, 210-643; 231 NW 444

Establishing trust to defeat heir's judgment creditors. When a will devised all of testatrix's property to daughter in trust, directing trustee to make a monthly payment to a third party and to transfer a one-fourth interest in the trust estate to each of two grandchildren when they reached a certain age, and providing that daughter should have a one-half interest in the estate during her life only in the event obligations to her judgment creditors were barred or satisfied, such will established a trust, and did not repose entire beneficial interest in daughter. Nor was the trust extinguished by a merger of daughter's legal and equitable estate so that property could be subjected to satisfaction of creditor's judgments, because in equity the doctrine of merger will not be invoked if it would frustrate the testatrix's expressed intentions or if there is some other reason for keeping the estates separate.

Freier v Longnecker, 227-366; 288 NW 444

Voluntary, nonfraudulent conveyance—valid against judgment on subsequent bank stock assessment. Altho wholly voluntary, a conveyance executed when the grantor has no fraudulent intent cannot be impeached by a subsequent creditor, so a real estate conveyance by a husband to his wife many years before he becomes a bank stockholder cannot be invalidated by the creditors of the bank, seeking to collect a judgment on stock liability assessment.

Bates v Kleve, 225-255; 280 NW 501

Withholding deed from record. Principle reaffirmed that the mere withholding of a deed from record is not in itself evidence of a fraudulent intent, and that a creditor who has not been misled thereby to his damage cannot complain.

Crowley v Brower, 201-257; 207 NW 230

Will—necessity to construe. In an equitable proceeding by a judgment creditor to discover property belonging to the judgment defendant, and to subject said property to the satisfaction of said judgment, the court, on the issue of ownership of property in question, may be called upon, and properly so, to construe a will —all necessary parties being before the court.

Bankers Tr. v Garver, 222-196; 268 NW 568

Debt-encumbered remainder—equitable action to enforce. Where a testator devises to his wife a life estate in all his property (which estate she accepts), with remainder to his children, a provision of the will to the specific effect that "all just debts and funeral expenses" of said wife shall be paid out of testator's estate, will enable the wife's creditor, who became such subsequent to the probating of the will and the closing of the estate, and shortly prior to the death of the wife some 30 years later, to maintain an action in equity to establish the debt, and to subject the lands, passing under the will and in the hands of remaindermen, to the satisfaction of said debt.

Diagonal Bank v Nichols, 219-342; 258 NW 700

Intestate property—void remainders. Property embraced in a void, testamentary limitation—void because prohibited by the statute relating to perpetuities—passes to those persons who would have been entitled thereto under the laws of intestacy had the limitation been omitted from the will, and a judgment creditor may, by proper procedure, have a lien established thereon.

Bankers Tr. v Garver, 222-196; 268 NW 568

11817 Lien created.

Lis pendens—service of action. The filing and due indexing of a petition to subject real estate to the lien of a personal judgment creates a lis pendens, and personal service of the action on the defendants outside the state establishes jurisdiction in rem, even tho the petition may be subject to a corrective motion or to a demurrer.

Lawrence v Stanton, 212-949; 237 NW 512

Remedies of creditors and purchasers—jurisdiction—copy of petition. In an action to subject real estate to the lien of plaintiff's person-

al judgment, brought against the alleged fraudulent titleholder and alleged equitable owner only, no copy of the petition need be served on the defendants in order to acquire jurisdiction.

Lawrence v Stanton, 212-949; 237 NW 512

Impressment of lien—special execution. A court of equity upon impressing a lien on property should order the issuance of a special execution for the sale of the property and the satisfaction of the lien.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Effect of securing lien. A creditor who has his claim decreed a lien on land voluntarily transferred by the debtor for an inadequate price, but subject to the amount actually paid by the transferee, does not, by operation of law, become personally obligated to pay said superior lien.

Bond v Bank, 201-1175; 207 NW 233

11818 Surrender of property enforced.

Scope of inquisitorial proceedings. In strictly inquisitorial proceedings for the discovery of assets belonging to an estate, the court has no authority to order property turned over to the administrator when the title to such property is in dispute; especially is this true when the property apparently does not belong to the estate.

In re Brown, 212-1295; 235 NW 754

Collection of estate—discovery of assets—scope of jurisdiction. In inquisitorial proceedings for the discovery of assets belonging to an estate, the jurisdiction of the court to continue said proceedings abruptly terminates at the point of time when it is actually made to appear that an actual controversy exists as to the title to the property in question.

Findley v Jordan, 222-46; 268 NW 515

Title dispute—extent of jurisdiction. In a discovery proceeding against a person suspected of taking wrongful possession of decedent's property, where a dispute arises as to ownership of property, neither the trial nor appellate court has authority to order delivery of the property to the executor or administrator unless it appears beyond controversy that the person examined has wrongful possession of the property.

In re Hoffman, 227-973; 289 NW 720

TITLE XXXII

PROBATE

CHAPTER 503

PROBATE COURT

11819 Probate court always open.

Findings by probate court—conclusiveness. Findings of fact by a probate court are conclusive on the appellate court when they are fairly supported by competent testimony.

In re Fish, 220-1247; 264 NW 123

Findings on objections to administrator's final report. Trial court's ruling on objection to administrator's final report will not be disturbed on appeal where fact question was involved, as supreme court would not substitute its judgment for that of court below.

In re Windhorst, 227-808; 288 NW 892

Lost will—probate jurisdiction exclusive. An action to establish a lost will must be brought in the probate court.

Coulter v Petersen, 218-512; 255 NW 684

Ordinary probate proceedings—noninterference by equity court. An equity court may not interfere with the ordinary proceedings of the probate court in exercising its exclusive jurisdiction in the administration of estates. Rule applies when probate court is following the manner and the method provided by the testator in the will.

First Methodist Church v Hull, 225-306; 280 NW 531

Calendars—application for order. Applications for orders in probate which necessitate a construction of a will have no place on the jury calendar, and reversible error results from a refusal to exclude them from such calendar on application of an interested litigant.

In re Watters, 201-884; 208 NW 281

Proceedings — continuance and dismissal — legality. An order in partition proceedings brought by the guardian of an incompetent to the effect that the cause "be continued until certain conditions are complied with, which being fulfilled the cause should be dismissed", and a later order dismissing said cause on a recital that said "conditions" had been fulfilled, cannot be said to be illegal, and beyond the jurisdiction of the court, even tho such "conditions" were not recited in the record, it appearing that the court had personal knowledge of them.

Salomon v Newby, 210-1023; 228 NW 661

Supported findings in probate. Supported findings of fact by the probate court have the force and effect of a verdict of a jury and will not be reviewed on appeal.

In re Fish, 220-1328; 264 NW 542

11820 Time and place of hearings.

Notice—essential requirements. Notices of hearings in probate must specify both the time and the place of hearings, in order to confer jurisdiction.

In re Durham, 203-497; 211 NW 358

Orders—record entry necessary. Orders for publication of notice of hearings in probate must be entered of record.

In re Durham, 203-497; 211 NW 358

11822 Notice.

Collateral attack. The sufficiency of a notice of hearing on an application for the appointment of an administrator de bonis non (assuming the necessity for such notice) cannot be questioned in a purely collateral proceeding.

Giberson v Henness, 219-359; 258 NW 708

Appointment without notice. When a probate record simply shows that the final report of an executor "was approved and the executor discharged", the court may, at a later time, and irrespective of the statutory limitation of five years for appointment for original administration, appoint, without notice to interested parties, an administrator de bonis non for the purpose of selling property of the estate and purchasing and erecting a monument which was required by the will and not provided and erected by the original executor.

Giberson v Henness, 219-359; 258 NW 708

Guardianship — nonadversary proceedings. The good-faith compromise by a guardian with the approval of the court, of pending litigation to which the minor is a party, is not a proceeding adversary to the minor.

Kreamer v Wendel, 204-20; 214 NW 712

Proceedings by guardian—legality. The dismissal of an action in partition brought by the permanent guardian of an incompetent, in accordance with a compromise and settlement at which neither the guardian ad litem nor his attorney was present, may not be said to be illegal.

Salomon v Newby, 210-1023; 228 NW 661

11825 Extent of jurisdiction.

Jurisdiction in probate. See under §10763

Presumption. Orders in probate appointing guardians are presumptively regular.

Marsh v Hanna, 219-682; 259 NW 225

Exclusive jurisdiction to first court acquiring. The first court of competent jurisdiction to acquire jurisdiction of the subject matter of a case does so to the exclusion of all other courts of coordinate authority.

First Methodist Church v Hull, 225-306; 280 NW 531

Probate application by trustee—transfer to equity. Where an application in probate brought by a trustee under a will asking for directions of the court was transferred to equity on a motion by intervenors after a hearing at which all parties appeared and submitted arguments but did not except to the transfer, it was proper for the court to refuse a motion made eight months later asking that the transfer be canceled, when it was not shown that the rights of the parties could be better determined in probate than in equity, the question being a matter of forum rather than of jurisdiction.

In re Proestler, 227-895; 289 NW 436

Nature of probate proceedings. Probate proceedings by which jurisdiction of a probate court is asserted over the estate of a decedent for the purpose of administering the same is in the nature of a proceeding in rem, and is one as to which all the world is charged with notice.

In re Harsh, 207-84; 218 NW 537

Jurisdiction when will exists. The appointment of an administrator cannot be said to be without jurisdiction even tho a will existed.

Murphy v Hahn, 208-698; 223 NW 756

Presumption—collateral attack. The record of the appointment in a county of an administrator and his due qualification is a finality and beyond collateral attack, even tho the record fails affirmatively to show the existence of the facts upon which the jurisdiction of the court depends; otherwise if the record affirmatively reveals want of jurisdiction.

Ferguson v Connell, 210-419; 230 NW 859

Ordinary probate proceedings—noninterference by equity court. An equity court may not interfere with the ordinary proceedings of the probate court in exercising its exclusive jurisdiction in the administration of estates. Rule applies when probate court is following the manner and the method provided by the testator in the will.

First Methodist Church v Hull, 225-306; 280 NW 531

Jurisdiction of nonprobate court. An executor who institutes an authorized action against a corporate receiver in the county of the receiver's appointment, for relief against an alleged fraud-induced contract by the deceased, and (1) is met by a cross-petition for judgment on the said contract, and (2) has his action properly consolidated with divers other actions under duly joined issues which might have been the basis of an original action against the executor in said county of suit, may not thereupon, after dismissing his action,

have all proceedings against himself and the estate dismissed on the claim that the probate court which appointed him had sole jurisdiction to render a judgment against him or against the estate.

Lex v Selway Corp., 203-792; 206 NW 586

Application to continue business—jurisdiction. A lessor who voluntarily appears in probate and successfully objects to the application of the lessee's administrators for an order authorizing the continuation of the business covered by the lease may not thereafter assert that the refusal of the court to grant the application was discretionary with the probate court, and that, in any view, the court had no jurisdiction to grant the application.

In re Grooms, 204-746; 216 NW 78

Unauthorized satisfaction of bequest. An order of the probate court authorizing an executor to discharge a cash bequest to a minor by transferring to the father of the minor as natural guardian a note and mortgage, belonging to the estate, is wholly void when said order is entered without the appearance of any guardian, regular or ad litem, for the minor.

Irwin v Bank & Trust, 218-477; 255 NW 671

Title — nonpermissible adjudication. When, in the settlement of an estate in probate, a contract of sale of land belonging to the estate is fully consummated by payment and deed, and the sale and conveyance duly approved by the court as by contract required, the purchaser, who is an entire stranger to the estate except as such purchaser, is not a proper, necessary or permissible party to a proceeding in said probate court, instituted by the residuary legatee, to set aside the probate order approving said sale and conveyance.

Reason: The probate court cannot, even in piecemeal, adjudicate the validity of the title of said purchaser.

In re Doherty, 222-1352; 271 NW 609

Objections to executrix's report—real estate title issue not misjoinder—statewide jurisdiction. Where an executrix after resigning files her reports, objections thereto asking that she account for land in another county allegedly purchased with estate money does not misjoin equitable action to impose trust on or establish title in land, but is special probate proceeding to compel executrix to account for assets over which probate court has statutory jurisdiction coextensive with the state.

In re Rinard, 224-100; 275 NW 485

11828 Bonds filed—approval.

Atty. Gen. Opinion. See '28 AG Op 47

CHAPTER 504

CLERK OF PROBATE COURT

11832 Probate powers of clerk.

Atty. Gen. Opinion. See '28 AG Op 47

Jurisdiction to appoint nonresident. The clerk of the district court has ample power to appoint a nonresident as administrator.

Finnerty v Shade, 210-1338; 228 NW 886
Reidy v Railway, 216-415; 249 NW 347

Presumption—collateral attack. The record of the appointment in a county of an administrator and his due qualification is a finality and beyond collateral attack, even tho the record fails affirmatively to show the existence of the facts upon which the jurisdiction of the court depends; otherwise if the record affirmatively reveals want of jurisdiction.

Ferguson v Connell, 210-419; 230 NW 859
Reidy v Railway, 216-415; 249 NW 347

Allowance and payment of claims—clerk's or executor's allowance not final adjudication. The allowance of a claim against an estate by the clerk of the probate court does not result in a final adjudication at the end of a year under a statute permitting objections to the clerk's orders to be filed within a year, as there is no adjudication of a claim against an estate allowed by the clerk or an executor or administrator until it has been passed upon by the court.

In re Baker, 226-1071; 285 NW 641

11834 Clerk's actions reviewed.

Administrator—appointment by clerk—review—burden of proof. When the appointment of an administrator by the clerk is attacked by motion under the statute, the appointee has the burden to sustain his appointment.

Moreland v Lowry, 213-1096; 241 NW 31

Attacking allowance of probate claim—assignment of error necessary. An application by an executor to set aside the clerk's allowance of a claim against an estate is a law case requiring assignments of error upon appeal.

In re Baker, 226-690; 285 NW 143

Clerk's or executor's allowance not final adjudication. The allowance of a claim against an estate by the clerk of the probate court does not result in a final adjudication at the end of a year under a statute permitting objections to the clerk's orders to be filed within a year, as there is no adjudication of a claim against an estate allowed by the clerk or an

executor or administrator until it has been passed upon by the court.

In re Baker, 226-1071; 285 NW 641

11835 Docketing and hearing.

Appointment by clerk — burden of proof. When the appointment of an administrator by the clerk is attacked by motion under the statute, the appointee has the burden to sustain his appointment.

Moreland v Lowry, 213-1096; 241 NW 31

Collateral attack. Probate proceedings cannot be collaterally attacked until it is shown that fraud was perpetrated on the court inducing it to take jurisdiction.

Ferguson v Connell, 212-1155; 237 NW 354

11842 Probate record.

Record as evidence. Where a will provides that the residue of the estate shall pass to an educational institution of this state as a part of its endowment fund, exemption from taxation on lands will not be granted except on the production in evidence of the probate records showing judicially (1) that the estate has been fully settled, and (2) that the lands in question constitute part of the residue of said estate, and, as a consequence, belong, legally or equitably, to said institution.

Wapello Bank v County, 209-1127; 229 NW 721

Constructive knowledge of record. One who takes a mortgage from a mortgagor who, under the recording acts, appears to be the sole owner of the fee is not charged with constructive knowledge of matter which appears in the "probate record" and which suggests or implies that some person other than the apparent fee owner has an interest in the property.

Booth v Cady, 219-439; 257 NW 802

Private bank depositors—property available for payment of estate claims. Where an estate consists of two general classes of assets, to wit: (1) assets employed by decedent in operating his exclusively owned private bank, and (2) lands and other assets not so employed, and where, under the will, the bank is temporarily continued after the death of the decedent, an unappealed order of the probate court, entered on due notice and service, to the effect that bank depositors be paid from the general assets of the estate, precludes devisees and legatees from thereafter successfully asserting that depositors could only be paid from the assets employed in the operation of the bank, and that, as a consequence, the said lands could not be legally mortgaged in order to effect such payment. Especially should this be true when it appears that large sums of money employed in carrying on the bank have been used by the executors in paying claims not connected with the operation of the bank.

In re Griffin, 220-1028; 262 NW 473

CHAPTER 505

WILLS AND LETTERS OF ADMINISTRATION

GENERAL PROVISIONS

11846 Disposal of property by will.

ANALYSIS

Confidential communications. See §11263
Dower right unaffected by will. See under §12006
Joint and mutual wills. See under §11852 (II)
Lost wills. See under §11863 (I)
Merger of realty interests generally. See under §10084 (II)
Probate of will. See under §11863
Revocation and cancellation. See under §11855

Specific legacies. See under §11978
Testamentary guardianships. See under §12574
Testamentary trusts. See under §11876
Validity and sufficiency generally. See under §11852
Will contests. See also under §11864

I TESTAMENTARY POWER IN GENERAL

Discussion. See 3 ILB 170—Conveyances to take effect on death of grantor; 14 ILR 1, 172, 283, 428—Statute law of wills

Owner's right of disposal. Under ordinary circumstances one has the absolute right to dispose of his property as he pleases.

O'Brien v Stoneman, 227-389; 288 NW 447

When will speaks. Principle reaffirmed that a will speaks only from the time of the death of testator and that if, at said time, testator owns no property—because the descent of his property has been fixed and determined by prior contract—there will be nothing to which the will can be applied.

Conlee v Conlee, 222-561; 269 NW 259

Devise and bequest identical with statute of descent—effect. A will is a nullity which devises and bequeaths to a devisee and legatee the same quantity and quality of real and personal property which the devisee and legatee would take under the law of descent. So held where a spouseless and childless son devised all his property to his sole surviving parent.

In re Warren, 211-940; 234 NW 835

Authority to sell real estate. A testator may unconditionally authorize and empower his executor to make full conveyances of testator's real estate.

In re Wicks. 207-264: 222 NW 843

Conversion under will—effect. In probate proceedings where testator directs the executor of his estate to sell all of the property of the estate, including realty, as soon as convenient after his death and distribute proceeds, while the executor has some discretion as to the time and manner of the sale, the direction is mandatory, and effects an equitable conversion of the real estate into personalty at the instant of testator's death, and thereafter the real estate is to be treated as personalty, and be subject to the rules governing personal property.

In re Sheeler, 226-650; 284 NW 799

Agreement—effect. An agreement between an aged mother and her heirs that a named person should act as attorney in fact for the mother, coupled with an agreement between the heirs that none of them should borrow from or obtain advancements from the mother, presents no impediment to the mother's conveying her property to certain of her heirs in order to equalize the distribution of her property.

Rollins v Jarrett, 207-183; 222 NW 365

Descent — when determinable by contract. Tenants in common of real estate who embark their holdings, and the personal property used in connection therewith, in a partnership violate no rights of heirship or testamentary rights of their brothers and sisters by including in their partnership contract an agreement that upon the death of one of the partners the survivor shall become the absolute owner of all the partnership property.

Conlee v Conlee, 222-561; 269 NW 259

Appointment of nominated executor required unless disqualified. Altho a certain discretion lies with the probate court in the appointment of personal representatives, nevertheless an executor named in a will as the one in testator's judgment best fitted to administer his estate should be appointed by the court in the absence of disqualification, which must be more than the objections of collateral relatives.

In re Schneider, 224-598; 277 NW 567

Proceeds of life insurance. The proceeds of life insurance payable to the estate of the insured or to his executors or administrators may be disposed of by will. Section 8776, C., '24, which in substance provides that insurance so payable "shall inure to the separate use" of the surviving spouse and children, supplements said right, because said section simply directs in legal effect who shall take the avails of life insurance so payable when there is no will.

Miller v Miller, 200-1070; 205 NW 870; 43 ALR 567

Proceeds of life insurance. A testator may validly dispose by will of the proceeds of life insurance payable to his estate, and make such proceeds subject to the payment of his debts. Such result is effected by a will (1) which provides for the payment of testator's debts, and (2) which devises the life insurance proceeds subject to such debt proviso.

In re Caldwell, 204-606; 215 NW 615

Prohibiting incumbrance — legality. A testator who makes an absolute devise, of a certain interest in property, may not validly prohibit the devisee from thereafter incumbering the property.

Bogenrief v Law, 222-1303; 271 NW 229

Intention to render homestead subject to debts. A testator in devising a homestead will not be deemed to have intended to render it subject to his debts—even to his funeral expenses—unless such intention is clearly and unequivocally expressed in the will.

Buck v MacEachron, 209-1168; 229 NW 693

Inheritance tax on bequest—right of testator to pay. A testator may validly provide that the inheritance tax on a specific devise or bequest made by him in his will shall be paid

from the residuary part of his estate, provided he clearly expresses his intention to that effect. Will construed and held clearly so to provide.

In re Johnson, 220-424; 262 NW 811

Payment of taxes. Will construed, and held properly to justify an order directing the testamentary trustee to pay certain taxes on the trust property.

Turner v Ryan, 223-191; 272 NW 60; 110 ALR 554

Limitations void ab initio. Testamentary attempts by means of limitations to create in property contingent interests or estates, which will not necessarily become vested within the period of time prescribed by the statute prohibiting perpetuities, are futile, all such limitations being void ab initio. (§10127, C., '35.)

Bankers Tr. v Garver, 222-196; 268 NW 568

Repugnant limitation following devise of property in fee—void. Principle reaffirmed that a testator cannot make an absolute devise of his property in fee and in a subsequent clause destroy or place a limitation on such title. The subsequent limitation is void for repugnancy.

In re Bigham, 227-1023; 290 NW 11

Bequest for paving roads. In an action by a taxpayer to obtain an injunction restraining a county from accepting a bequest to be used for paving roads, the injunction was refused where a will and two codicils provided for the bequest, as when all papers were construed together a valid gift to the county was found to have been created which the county had the authority to accept.

Anderson v Board, 226-1177; 286 NW 735

Lack of education. In an action to contest a will under which a son receives eight times as much property as the children of a deceased son and the evidence is disputed as to whether testator had sufficient understanding of English that when will was read over to her in English, unexplained, she fully understood its contents, a jury question is presented.

In re Younggren, 226-1377; 286 NW 467

II CONTRACTS TO DEVISE OR BEQUEATH

General principles. A parol contract on due consideration to devise or leave property to another, if shown by clear and convincing testimony, is enforceable, especially when the contract is corroborated by declarations of the alleged grantor against his own interest, and when the equities are strongly in favor of the alleged grantee.

Kisor v Litzenberg, 203-1183; 212 NW 343

Mutual wills enforced as contract. Clear and satisfactory evidence that husband and wife entered into a mutual contract, and in accordance therewith executed mutual and reciprocal wills providing for the disposition of all their property to each other and to certain named beneficiaries upon the death of survivor, entitles beneficiaries to specific performance thereof and to restrain probating of another will, executed by husband after the wife's death, making provision contrary thereto.

Child v Smith, 225-1205; 282 NW 316

Mutual wills—enforcement in equity. Mutual wills are those made as separate wills of two people which are reciprocal in provision. Such wills may be enforced in equity.

Child v Smith, 225-1205; 282 NW 316

Antenuptial contract. An antenuptial contract under which the wife agrees to accept a named fractional part of the husband's property in case she survives does not have the legal effect of depriving her of her statutory right to occupy the homestead, free of all rent, until her share is actually set off to her or otherwise actually disposed of.

Fraizer v Fraizer, 201-1311; 207 NW 772

Irrevocability of contract. A will in the form of a contract to devise property in return for care and support of the testator during his lifetime is irrevocable except by the mutual action of the parties.

Burmeister v Hamann, 208-412; 226 NW 10

Irrevocableness of will based on contract. A will is irrevocable when executed in compliance with a contract which is (1) in writing, and (2) contains mutual promises then and there executed by the parties; nor is such a will rendered revocable by the death of the beneficiary therein prior to the death of the testator.

Powell v McBlain, 222-799; 269 NW 883

Evidence — sufficiency. Proof of an oral contract to will property must be so clear and convincing as to leave nothing to be supplied by the court.

In re Shinn, 207-103; 222 NW 569

Requisites and degree of proof. An oral contract to leave, devise, or bequeath property must, in the first place, be so certain and definite as to leave nothing to conjecture or to be supplied by the court, and, in the second place, must be supported by such clear, satisfactory, and convincing testimony as establishes such contract, for all practical purposes, beyond a reasonable doubt.

Brewer v King, 212-665; 237 NW 508

Evidence — sufficiency. Evidence reviewed and held wholly insufficient to establish the genuineness of an alleged written contract to will property.

Shisler v Cemetery Assn., 207-306; 222 NW 838

II CONTRACTS TO DEVISE OR BEQUEATH—continued

Failure of proof of material allegation. A fatal failure of proof results from a failure to prove an allegation to the effect that services were to be paid for at the time of the death of the promisor, and where the court instructs to such effect.

Ballard v Miller, 210-1144; 229 NW 159

Condition precedent—general allegation of performance — denial — effect. The statutory rule that a general allegation of performance of a condition precedent is not put in issue by a general denial (§11208, C., '27), has no application to a general allegation of performance of a promise or agreement which was the consideration for the promise or agreement sued on. So held where plaintiff's promise was to discharge a certain promissory note, and in return the promisee agreed to make a will in favor of plaintiff.

In re Fetterman, 207-252; 222 NW 872

Ownership of property. A contract which provides, in effect, that a child shall become owner of all the property possessed by its foster parents at the time of their death is necessarily not confined to the property possessed by the foster parents at the time the contract was entered into.

Kisor v Litzenberg, 203-1183; 212 NW 343

Oral contract to devise or convey. An oral offer to convey or devise land in consideration of services to be performed for the offerer, and an oral acceptance thereof by the offeree, are specifically enforceable when both the execution of the contract and the performance thereof are established by clear, convincing, and satisfactory evidence, and when the acts of performance are referable exclusively to such contract.

Houlette v Johnson, 205-687; 216 NW 679

Oral agreement to devise realty—insufficiency of evidence to set aside. In an equity action to recover a sum of money alleged to be the share of plaintiff's intestate in the estate of his father, where evidence shows the mother of plaintiff's intestate was left with five minor children, and that she filed a partition proceeding involving 400 acres of land owned by her husband, who died intestate, and she thereafter was the successful purchaser at a sale of the land, and that, as a part of the purchase price, she executed a note and mortgage on the land to a guardian appointed for the minor children to secure their respective shares in the father's estate, and that, as the children became of age, there were no guardianship funds to pay their respective shares and that it was orally agreed that the children would receipt for their respective shares, in cash, to the guardian (altho no cash was received), and the mother agreed to, and did, execute a will leaving the land to the children in equal shares, the plaintiff's evidence was insufficient to set aside the agreement, and the trial court's order, affirming the agreement and impounding the mother's will until her death, was affirmed.

Baumann v Willemssen, 228- ; 292 NW 77

Compensation through bequest — breach — effect. An agreement that compensation for services shall, in part, be made through or by means of a testamentary bequest implies that the bequest shall be in an amount which will afford reasonable compensation for the services rendered.

In re Newson, 206-514: 219 NW 305

Measure of damages—contract to give, deed, or will personal property. The measure of damages for breach of a contract to give, deed, or will all of the personal property of the promisor in payment of services must be computed on the basis of the gross personal property in kind, as of the death of the promisor.

Ballard v Miller, 210-1144; 229 NW 159

Parol contract to will or deed land. A parol contract to will or deed land, followed by possession of the land by the contemplated devisee or grantee, and by the making of valuable improvements on the land by the latter, in reliance on the contract, is specifically enforceable if the proof is sufficient, in the light of all the circumstances, to carry conviction to the mind of its essential credibility.

Ozias v Scarcliff, 200-1078; 205 NW 986

Acceptance — conclusive presumption. It must be presumed that an advantageous contract, entered into by an uncle for and on behalf of his motherless and paternally abandoned infant nephew and niece, has been accepted by the beneficiaries, when for some 40 years they have been fulfilling their part of the contract.

Kisor v Litzenberg, 203-1183; 212 NW 343

Abandonment—presumption. The abandonment of a contract which is, in effect, a contract to devise property, and which is highly advantageous to the party who is alleged to have done the abandonment, must be established by very clear and cogent testimony.

Kisor v Litzenberg, 203-1183; 212 NW 343

Agreement to give, deed or will property—constructive breach. One who orally contracts that upon his death he will pay for certain services by "giving, deeding or willing" certain real property to the promisee, constructively breaches his contract by failing to either give, deed or will the property as promised, and thereby opens the door to the promisee to maintain an action at law for damages; and especially is this true when the promisee establishes the contract by the same degree of proof as would be required in equity, and

moreover, offers to accept a deed to the property in lieu of damages allowed for the breach.

Ballard v Miller, 210-1144; 229 NW 159

Agreement as to right to inherit. A provision in an antenuptial contract to the effect that the children of the husband shall have the same right of inheritance in the property of the wife as they would have if they were her own children is effective as a contract of inheritance.

Kalsem v Froland, 207-994; 222 NW 3

Testator's contract to devise to son—will changed after loan relying thereon. A bank, after contracting with debtor's father to wait until father's death for payment of the son's debt from his share in father's estate, under existing devise in will, has a right to impress an equitable lien on the land when it discovers that the father had changed his will and was fraudulently, without consideration, transferring his property to others than the debtor son.

Emerson Bank v Cole, 225-281; 280 NW 515

Contract not to change will—not guaranty of son's debt. A son being indebted to a bank in the sum of $10,000, the father entered into a contract with the bank, that he would not alter his will wherein said son was bequeathed that sum, in consideration of which the bank would not press payment while the father lived. Held that such contract was not an absolute guarantee that the son was to have $10,000 from his father's estate regardless of its condition at the father's death, nor an undertaking that would nullify other provisions of the will.

Evans v Cole, 225-756; 281 NW 230

Love and affection — consideration — sufficiency. In an action to enforce grandfather's oral promise to will property to grandson in return for naming grandson after him, court held that love and affection, while being a "good" consideration, was not a sufficient consideration when unsupported by a pecuniary or material benefit, and created, at most, a bare moral obligation.

Lanfier v Lanfier, 227-258; 288 NW 104

Assignment of property—will—contract to support. The donee of a gift inter vivos, when holding a fiduciary relationship with the donor, has the burden to rebut the presumption that the transaction was fraudulent and voidable, but this does not apply to testamentary gifts. So held where a mother first willed, and later assigned, all her property to one son, in consideration of a contract that he should support her as long as she lived—the result being to disinherit another son.

Reed v Reed, 225-773; 281 NW 444

Survivor of dual beneficiaries. An executed contract which provides, in effect, that two infant children shall enter the home of foster parents and there remain as tho they were the natural-born children of such parents, and in return shall become the owners of the property of such parents at the death of the latter, casts upon the survivor of said beneficiaries the entire property in case one beneficiary dies prior to the death of the foster parents.

Kisor v Litzenberg, 203-1183; 212 NW 343

Allowance of claims—partnership checks not showing payment. In proving a claim against an estate, by showing an oral contract to pay for services extending over a period of many years, neither the lapse of time nor checks payable to claimant drawn by decedent during the fourteen years just preceding his death, when a partnership existed between them for those years, raises a presumption of payment in view of decedent's admission of the debt shortly before his death.

Gardner v Marquis, 224-458; 275 NW 493

Settlement of claim—adding additional burden. An unambiguous written stipulation and agreement, duly filed in a will contest, providing in effect that defendant will pay, and plaintiff will accept, a named sum of money in full settlement of any and all claims which plaintiff may have against the estate cannot be added to by proof of an oral contemporaneous agreement to the effect that defendant would also execute a will devising and bequeathing all his property to plaintiff.

In re Simplot, 215-578; 246 NW 396

Codicil as deed. A duly signed, acknowledged, and recorded contract to the effect that a specified devise in the will of one of the parties to the contract should act as a deed to the other party to the contract will prevail over a subsequent conveyance of the property by the testator, especially when the grantee had actual notice of the contents of the will and of the contract in reference thereto.

Kremar v Kremar, 202-1166; 211 NW 699

Disposal during lifetime—validity. A contract that one will make a will and devise and bequeath to the promisee "all property which I may own at the time of my death" and the due execution of a will of the same scope, leaves the promisor (testator) free to use, control and dispose of his property in his lifetime, and nonfraudulent transfers and conveyances by him before his death are valid.

Powell v McBlain, 222-799; 269 NW 883

III TESTAMENTARY CAPACITY

(a) DEGREE OF MENTAL CAPACITY REQUIRED

General standard of competency. One who has an intelligent knowledge and understanding (1) of the act of executing a will, (2) of the property he possesses, (3) of the disposition which he desires to make of his property, and (4) of those who are the natural objects of his bounty, is competent to execute

III TESTAMENTARY CAPACITY—cont.
(a) DEGREE OF MENTAL CAPACITY REQUIRED—concluded

a will, even tho he is physically and mentally weak.

Cookman v Bateman, 210-503; 231 NW 301

Validity of deeds—mental incompetency. Courts must be zealous to guard the right of every man to dispose of his own property as he sees fit, so long as he has the mental capacity (1) to know what property he possesses, (2) to know what he desires to do with it, and (3) to exercise his free and voluntary will in such disposition.

Coughlin v Church, 201-1268; 203 NW 812

Physical and mental deterioration. Mere old age or some deterioration in physical or mental power or peevishness, childishness, and eccentricity are not sufficient to carry to the jury the issue of mental unsoundness.

In re Koll, 200-1122; 206 NW 40
In re Johnson, 201-687; 207 NW 748
Albright v Moeckly, 202-565; 210 NW 813
In re Paczoch, 202-849; 211 NW 500
In re Ramsdell, 215-1374; 244 NW 744

Mere mental weakness. Mere weakness of the mental faculties is insufficient to invalidate a will if the testator knew and comprehended the natural objects of his bounty, the nature and extent of his property, and the disposition he desired to make of it.

In re Shields, 208-607; 224 NW 69

Mental capacity to contract—existence—burden to disprove. Mental weakness from disease does not deprive a person of capacity to dispose of property until the power of intelligent action is destroyed, and executor relying thereon to recover gift made by decedent to sister has burden of proof.

Wilson v Findley, 223-1281; 275 NW 47

Demurrer to will contest—fatal admission. A demurrer to objections to the probate of a will should have been overruled when it admitted as facts that the contestant held judgments against the devisee who was a son and heir of the decedent who died seized of real estate, that the judgments were liens against any real estate the son would inherit as heir, and that the decedent was of unsound mind when the will was made, as, if the decedent were incompetent, the will was void and he died intestate. So the title to the son's share in the real estate vested at the father's death, and, at the same instant, the judgments became liens on his share of the real estate.

In re Duffy, 228- ; 292 NW 165

***Monomania*—essential requirements.** Monomania in the form of a belief on the part of a testator that his child was immoral, in order to be a sufficient basis on which to set aside a will, must be shown to have been without any evidence to support it. In a case where the testator asserted that he possesed such evidence, but never revealed it, held that no jury question was created.

Firestine v Atkinson, 206-151; 218 NW 293

Insane delusion—evidence—sufficiency. An insane delusion sufficient to overthrow and invalidate a will, is, generally speaking, a wholly unfounded belief to which testator clings in spite of all disproving evidence, and which controls the making of the will.

Lockie v Baker, 208-1293; 227 NW 160
Hult v Ins. Co., 213-890; 240 NW 218

(b) PRESUMPTION AND BURDEN OF PROOF

Burden of proof. Evidence held insufficient to cast upon proponents of a will the burden of establishing testamentary capacity.

In re Shields, 208-607; 224 NW 69

Mental incapacity* — *evidence* — *sufficiency. Principle reaffirmed that the courts will zealously guard the right of every person to make such legal disposition of his property as he sees fit, and to that end will demand the production of very convincing evidence in support of the plea of mental incapacity interposed by strangers to the transaction.

Keating v Augustine, 213-1336; 241 NW 429

Guardianship—presumption. One who is under guardianship because of mental defect is presumptively incapable of executing a valid will. Evidence pro and con held to sustain the presumption.

Brogan v Lynch, 204-260; 214 NW 514

Drunkard guardianship—incapacity not presumed—fact question. One under guardianship is not necessarily incompetent to make a will; for instance, as to a drunkard under guardianship incapacity is not presumed. Evidence failed to establish that testator was intoxicated when he made his will, and his competency, being a fact question when decided in his favor by the court after waiver of a jury, will not be disturbed on appeal.

In re Willer, 225-606; 281 NW 155

Negativing presumption of continued insanity. A testator will not be presumed insane at the time he executed his will because of the production of a finding some 26 years prior thereto by the commissioners of insanity that he was insane and "a fit subject for treatment in the hospital for the insane", (1) when there is no showing that his condition at said remote time was one of general and settled unsoundness of mind, and (2) when it appears that he was then confined in a private hospital for some seven months, and left the hospital in a state of mental soundness, and thereafter at all times managed his business as a normal man.

Waters v Waters, 201-586; 207 NW 598

Burden of proof—failure to meet. In an action to set aside the probate of a will, and to cancel a deed (1) on the ground of the mental

incapacity of the testator-grantor, and (2) on the ground of the undue influence of the devisee-grantee, the burden rests on plaintiff to establish at least one of said grounds. Evidence quite elaborately reviewed and held, plaintiff had failed to meet the burden of proof resting upon him.

Walters v Heaton, 223-405; 271 NW 310

Will contest—burden of proof—testamentary capacity—how determined. In a will contest, after proponent's formal proofs, the burden of showing lack of mental capacity of testatrix is on contestant. Mere deterioration in physical or mental powers does not destroy testamentary capacity until the mental decline reaches such stage that the person is unable to intelligently comprehend the estate of which he is possessed and the natural objects of his bounty and to intelligently exercise judgment and discretion in the disposition of his property.

In re Behrend, 227-1099; 290 NW 78

Assignment of property and will—mother to son transfer—burden of proof. In an action by one son to set aside an assignment of his mother's property, based on a contract for her support made with another son, which assignment was paralleled by a similar provision in her will, duly probated, an answer and general denial of the donee son, to the effect that the disinherited son had no rights thereto under the will, placed on the disinherited son, in order to establish his right to relief, the burden of showing the invalidity of the will on account of mental incapacity or undue influence.

Reed v Reed, 225-773; 281 NW 444

Lack of education—proponents' burden. In an action to contest a will under which one son receives over eight times as much property as the children of his deceased brother and evidence discloses dispute as to testator's understanding of English language in which the will is written, and such circumstances lead the court to suspect testator may have been imposed upon, an additional burden is imposed upon proponents of will to show testator was acquainted with the provisions of the will.

In re Younggren, 226-1377; 286 NW 467

(c) EVIDENCE—ADMISSIBILITY, WEIGHT, AND SUFFICIENCY

1 Mental Capacity in General

Distribution of property—mental weakness. Mere weakness of mental power will not constitute mental incapacity if the person retains mind enough to know and comprehend in a general way the nature and extent of his estate, the natural objects of his bounty, and the distribution he desires to make of his property.

Penn Ins. v Mulvaney, 221-925; 265 NW 889

Jury question. Evidence held to present a jury question on the issue of testamentary capacity.

In re Shields, 208-607; 224 NW 69

Lack of education. In an action to contest a will under which a son receives eight times as much property as the children of a deceased son and the evidence is disputed as to whether testator had sufficient understanding of English that when will was read over to her in English, unexplained, she fully understood its contents, a jury question is presented.

In re Younggren, 226-1377; 286 NW 467

Mental competency and undue influence. Evidence held to present no jury question in a will contest as to the mental competency of the testator, or as to any undue influence in the execution of the will.

Woodman v Morgan, 200-500; 203 NW 298

Evidence — insufficiency. Evidence reviewed and held insufficient to make a jury question on the issue of testamentary capacity.

Green v Ellsworth, 221-1098; 267 NW 714

Evidence — sufficiency — jury question. Record reviewed and held to present a jury question on the issue of mental competency to execute a will.

Diesing v Spencer, 221-1143; 266 NW 567

Jury question. The mere fact that there is some testimony of mental unsoundness does not necessarily require the question to be submitted to the jury.

In re Diver, 214-497; 240 NW 622

Evidence—sufficiency. Evidence held insufficient per se to establish testamentary incapacity.

Walkington v Ide, 206-645; 220 NW 5
In re Kenney, 213-360; 239 NW 44; 78 ALR 1189
White v White, 213-1244; 241 NW 1
Bishop v Scharf, 214-644; 241 NW 3

Unsound mind and undue influence. In proceeding to probate a will, where the will was set aside on ground testatrix was of unsound mind and acted under undue influence, and proponent did not seek to withdraw issue of undue influence from jury, verdict could not be set aside, tho evidence was insufficient to sustain verdict on ground of undue influence alone.

In re Hepp, (NOR); 249 NW 129

Instructions. Instructions reviewed generally, and held to properly present the rules for weighing the testimony on the issue of testamentary capacity.

In re Shields, 208-607; 224 NW 69

Directed verdict. When the real issue is as to testator's mental competency, the court

III TESTAMENTARY CAPACITY—cont.
(c) EVIDENCE — ADMISSIBILITY, WEIGHT, AND SUFFICIENCY—continued
1. Mental capacity in general—concluded

should sustain the will, by a directed verdict, when a contrary jury verdict would be without adequate evidentiary support.

In re Fitzgerald, 219-988; 259 NW 455

Evidence of unsound mind — jury question. Evidence tending to show a lessening of testator's physical and mental powers, eccentricities, childishness, forgetfulness, unclean personal habits, and inability to transact business generally, is not necessarily sufficient to generate a jury question on the issue of a testator's mental competency to execute a will. Evidence reviewed at length and held insufficient.

In re Johnson, 222-787; 269 NW 792

Lack of testamentary capacity—evidence sufficiency—jury question. On appeal from directed verdict against contestant in a will contest where the evidence shows, by testimony of physician who attended testatrix over a period of years, that testatrix was a woman prematurely old at 66, suffering from toxic goiter and other ailments which prevented proper nutrition of her organs and kept her body poisoned, that such ailments were of progressive nature resulting in rapid increase of her apparent age and accelerated physical and mental decline and that in his opinion testatrix's mentality was impaired to such extent at time of execution of will she was of unsound mind, held, that evidence of lack of testamentary capacity was sufficient to support a verdict for contestant, if jury so found, and refusal to submit case to the jury was erroneous.

In re Behrend, 227-1099; 290 NW 78

Drunkenness. Evidence held insufficient to establish mental incompetency owing to drunkenness.

Matthewson v Fahnestock, 217-348; 251 NW 643

Assumption of capacity. When the sole issue in a will contest is that of undue influence, the court is not in error in instructing that the jury should consider as an established fact that the testator was possessed of testamentary capacity at the time of the execution of the will.

In re Muhr, 218-867; 256 NW 305

Mental incapacity and undue influence—evidence insufficient. Evidence reviewed, as to the mental capacity of a 90-year-old mother who, to the exclusion of one son, willed and assigned her property to another son, in exchange for life support and care, and held that she still was sane and that the charge of undue influence was not substantiated.

Reed v Reed, 225-773; 281 NW 444

Will contest—burden of proof—testamentary capacity—how determined. In a will contest, after proponent's formal proofs, the burden of showing lack of mental capacity of testatrix is on contestant. Mere deterioration in physical or mental powers does not destroy testamentary capacity until the mental decline reaches such stage that the person is unable to intelligently comprehend the estate of which he is possessed and the natural objects of his bounty and to intelligently exercise judgment and discretion in the disposition of his property.

In re Behrend, 227-1099; 290 NW 78

Mental capacity to contract—existence—burden to disprove. Mental weakness from disease does not deprive a person of capacity to dispose of property until the power of intelligent action is destroyed, and executor relying thereon to recover gift made by decedent to sister has burden of proof.

Wilson v Findley, 223-1281; 275 NW 47

Adjudication of insanity. An adjudication or finding by the commissioners of insanity is admissible on the issue of testator's testamentary capacity, but is subject to explanation.

Waters v Waters, 201-586; 207 NW 598

Instructions — "comprehending legal form". The court should not say to a jury that "testator need not be able to comprehend the provisions of his will in their legal form".

Blakely v Cabelka, 203-5; 212 NW 348

Neutralizing effect of immaterial testimony —refusal—effect. Letters written by the son of a testator 20 years prior to a will contest, and requesting financial help from the parent, (while admissible as bearing on the issue of unequal distribution of the estate) are wholly immaterial to the issue of want of testamentary capacity and undue influence, and a refusal to so instruct constitutes error.

In re Thompson, 211-935; 234 NW 841

2 Opinion Evidence

Opinion evidence—usurping jury function. No witness, expert or otherwise, in testifying to matters bearing on the soundness or unsoundness of mind of the testator, must be permitted to testify to the existence or nonexistence of the very facts which the jury must determine.

Hann v Hann, 202-807; 211 NW 495

Nonexpert opinion. A nonexpert may base his opinion that a testator is sane on a recital of his acquaintance and knowledge of the testator. A nonexpert must base his opinion of insanity on a recital of facts which indicate insanity.

In re Mott, 200-948; 205 NW 770
Zander v Cahow, 200-1258; 206 NW 90
In re Diver, 214-497; 240 NW 622

Nonexpert opinion — insufficient basis. A nonexpert witness may not express an opinion that a testator was of unsound mind on a recital of facts which pertain solely to his physical condition.

Hann v Hann, 202-807; 211 NW 495
In re Paczoch, 202-849; 211 NW 500

Nonexpert opinions—credibility. The opinion of a nonexpert witness that a testator was of unsound mind is no stronger than the facts testified to by the witness as a basis for such opinion.

Bailey v Bank, 208-1265; 227 NW 129

Nonexpert opinion as to insanity—necessary foundation. Nonexpert opinion as to unsoundness of mind is inadmissible unless the nonexpert witness first details such facts as tend, in the judgment of the court, to show an abnormal state of mind of the person whose mentality is under investigation; and the discretion of the court will not be interfered with unless there is a clear showing of abuse of such discretion.

Campfield v Rutt, 211-1077; 235 NW 59

Unqualified expert. A physician may not testify that a person was, in his opinion, mentally unsound, on the sole basis that he had at times casually noticed the person on the street, but had paid no attention to, or ever made any examination of, his mental condition.

In re Cooper, 200-1180; 206 NW 95

Hypothetical question — fundamentally required instructions. Expert testimony tending to show that a party is of unsound mind, based solely on a hypothetical state of fact, is wholly without value unless the jury finds that the assumed state of fact is true, and fundamental error results in failure so to instruct.

Anspach v Littler, 215-873; 245 NW 304

Harmless error—noninjurious ruling. In an attempt to prove the unsoundness of mind of a testator, the striking of portions of a hypothetical question becomes inconsequential when the witness answers that, in his opinion, the testator was of unsound mind.

Blakely v Cabelka, 203-5; 212 NW 348

Examination of expert — questions — form and sufficiency. On the trial of the issue whether a deceased was mentally competent to execute a will, counsel has the right to shape his hypothetical questions to his expert witnesses in accordance with his (counsel's) theory of the case,—the right to embrace in said questions such proven facts as he deems relevant and material to said theory and the right to omit all other facts, provided his questions as finally framed furnish adequate basis for an expert opinion as to mental soundness.

Diesing v Spencer, 221-1143; 266 NW 567

Evidence—erroneous exclusion. On the contest of a will, it is error, on the issue of testamentary capacity, to exclude the opinions of qualified witnesses as to the mental soundness of testator and testimony tending to show increasing feebleness and childishness with advancing years; but such error becomes quite immaterial when the testimony admitted and rejected fails to warrant a finding that testator was so lacking in mental capacity when the will was executed that he did not (1) intelligently know the property possessed by him, (2) intelligently know the natural objects of his bounty, and (3) intelligently exercise judgment and discretion in the disposition of his said property.

In re Cooper, 200-1180; 206 NW 95

Harmless exclusion—evidence otherwise in record making jury question. Error in striking testimony is harmless when the facts sought are otherwise in the record, and when if admitted the record would still present a jury question.

In re Willer, 225-606; 281 NW 155

3 Mental Condition Prior or Subsequent to Execution of Will

Unusual life history — contest. Testimony relative to testator's unusual life history, involving inter alia two commitments to and discharges from an asylum for the insane, and events subsequent thereto, held insufficient to show that testator was lacking in capacity to execute a valid will.

In re Haga, 222-1313; 271 NW 296

Adjudication of insanity—parol explanation. An adjudication of insanity on the part of a testator which is silent as to the character of the insanity may not, of course, be contradicted, but may be explained by showing the nature and extent of testator's affliction at the time of such adjudication.

Waters v Waters, 201-586; 207 NW 598

Insufficient evidence. When two daughters had cared for their aged mother for about 20 years while the mother was in good health, neat in appearance, mentally alert, and did much reading in a foreign language altho she could not read English, and the daughters went with the mother to a lawyer's office, but remained outside while deeds were drawn up by which the mother granted property to them to be effective after her death, there was no showing of mental weakness, fraud, or undue influence upon which to base a decree setting aside the deeds.

Tedemandson v Morris, 227-774; 289 NW 1

4 Unjust, Unnatural, or Unreasonable Disposition

Unreasonableness of will. On the issue whether a deceased was mentally competent to execute the will in question, evidence of the property owned by the principal beneficiaries under said alleged will may be admissible as

III TESTAMENTARY CAPACITY—cont.

(c) EVIDENCE — ADMISSIBILITY, WEIGHT, AND SUFFICIENCY—concluded

an item of evidence having some bearing on the allowable query whether the deceased had failed (and if so, why she had failed) to distinguish between the relative needs of those having claims on her bounty.

Diesing v Spencer, 221-1143; 266 NW 567

5 Declarations of Testator

Declarations — rejection. Written memoranda made by a witness which it is claimed were dictated by the testatrix and which pertained to her expressions concerning the making of a will are properly rejected.

Bailey v Bank, 208-1265; 227 NW 129

Declarations by testator — general admissibility. Great latitude is permitted in will contests in the introduction of statements made by a testator, and they are admissible, not as proof of the facts alleged therein, but as tending to throw light on the condition and attitude of mind of the person making them and as bearing on the question of the mental capacity of such person to execute a valid will.

Diesing v Spencer, 221-1143; 266 NW 567

6 Declarations of Proponents, Devisees, Legatees, and Contestants

Exclusion of hearsay. Testimony by a will contestant to the effect that a subscribing witness to the will had told him that testator had stated to the subscribing witness that she (testator) did not want contestant about her premises is properly excluded.

Bailey v Bank, 208-1265; 227 NW 129

IV UNDUE INFLUENCE

(a) UNDUE INFLUENCE IN GENERAL

Discussion. See 12 ILR 430—Proof and presumptions of undue influence

Definition. Influence, to be "undue", within the meaning of the law of wills, must be equivalent to moral coercion, must operate at the very time the will is made, and must dominate and control the making of it.

Wackman v Wiegold, 202-1391; 212 NW 122

Rule of sufficiency. Undue influence, in order to be sufficient to overthrow a will, must take such form and be of such nature that the will of the wrongdoer is substituted for the will of the testator. The mere presence of the devisee (a husband) in the room when the will was executed, and the fact that the testator had made a former will, more advantageous to the contestant, are not sufficient to establish undue influence.

Hann v Hann, 202-807; 211 NW 495
Wolfe v Shroyer, 206-1021; 221 NW 546
Worth v Pierson, 208-353; 223 NW 752
Cookman v Bateman, 210-503; 231 NW 301
In re Diver, 214-497; 240 NW 622
In re Ramsdell, 215-1374; 244 NW 744

Mental competency and undue influence—evidence. Evidence held to present no jury question in a will contest as to the mental competency of the testator, or as to any undue influence in the execution of the will.

Woodman v Morgan, 200-500; 203 NW 298

Free agency destroyed. Influence, to become "undue", must in some degree destroy testator's free agency. Opportunity and disposition to employ undue influence, and mere persuasion and importunity, are insufficient.

In re Mott, 200-948; 205 NW 770

Insufficient proof. Principle reaffirmed that opportunity and disposition to exercise undue influence, plus persuasion and importunity as to the disposition of testator's property, are not sufficient, in and of themselves, to establish undue influence.

In re Muhr, 218-867; 256 NW 305

Insufficient evidence. When two daughters had cared for their aged mother for about 20 years while the mother was in good health, neat in appearance, mentally alert, and did much reading in a foreign language altho she could not read English, and the daughters went with the mother to a lawyer's office, but remained outside while deeds were drawn up by which the mother granted property to them to be effective after her death, there was no showing of mental weakness, fraud, or undue influence upon which to base a decree setting aside the deeds.

Tedemandson v Morris, 227-774; 289 NW 1

Solicitation, etc. Mere solicitation, request, or importunity is not sufficient to invalidate a will unless it takes such form that the will of the wrongdoer is substituted for the will of the testator.

In re Paczoch, 202-849; 211 NW 500

Undue influence as phase of fraud. Undue influence, a phase of actual fraud, will invalidate a transaction between persons in a confidential relationship.

Merritt v Easterly, 226-514; 284 NW 397

Abuse of confidence forfeits gain. Where a confidential relationship results in one gaining an influence over another, and the one gaining the influence abuses it to the disadvantage of the other, he will not be permitted to retain the fruits of his advantage. Held, no abuse of confidence.

Reeves v Lyon, 224-659; 277 NW 749

(b) PRESUMPTION AND BURDEN OF PROOF

Burden of proof. Burden of proving undue influence, and its invalidating effect on a transaction, rests on him who makes the allegation.

Penn Ins. v Mulvaney, 221-925; 265 NW 889

Burden of proof. He who alleges that a will was the result of undue influence must establish (1) the undue influence, and (2) that

the undue influence operated on the mind of the testator at the very time the will was executed,—in fact, that the will was the will of the undue influencer, and not the will of testator.

In re Cooper, 200-1180; 206 NW 95
Hult v Ins. Co., 213-890; 240 NW 218

Burden of proof. A party alleging undue influence in the execution of a will must not only establish it, but must show that it operated on the mind of the testator at the very time the will was executed, and to such an extent that the will was the result thereof.

Bailey v Bank, 208-1265; 227 NW 129

Assignment of property and will—mother to son transfer—burden of proof. In an action by one son to set aside an assignment of his mother's property, based on a contract for her support made with another son, which assignment was paralleled by a similar provision in her will, duly probated, an answer and general denial of the donee son, to the effect that the disinherited son had no rights thereto under the will, placed on the disinherited son, in order to establish his right to relief, the burden of showing the invalidity of the will on account of mental incapacity or undue influence.

Reed v Reed, 225-773; 281 NW 444

Proponents' burden. In an action to contest a will under which one son receives over eight times as much property as the children of his deceased brother and evidence discloses dispute as to testator's understanding of English language in which the will is written and such circumstances lead the court to suspect testator may have been imposed upon, an additional burden is imposed upon proponents of will to show testator was acquainted with the provisions of the will.

In re Younggren, 226-1377; 286 NW 467

(c) EVIDENCE—ADMISSIBILITY, WEIGHT, AND SUFFICIENCY

1 In General

Insufficient evidence.

In re Wientjes, 206-1314; 221 NW 935
In re Shields, 208-607; 224 NW 69
White v White, 213-1244; 241 NW 1
In re Diver, 214-497; 240 NW 622

Unsound mind and undue influence. In proceeding to probate a will, where the will was set aside on ground testatrix was of unsound mind and acted under undue influence, and proponent did not seek to withdraw issue of undue influence from jury, verdict could not be set aside, tho evidence was insufficient to sustain verdict on ground of undue influence alone.

In re Hepp, (NOR); 249 NW 129

Opportunity, etc. Neither disposition and opportunity to exercise undue influence nor persuasion and importunity will generate a jury question on the issue of undue influence in the execution of a will.

In re Johnson, 201-687; 207 NW 748

Fraud constituting undue influence. Whether a will induced by fraudulent representations may be set aside because of fraud, altho the evidence is insufficient to constitute undue influence, quaere. Conceding the affirmative, evidence held insufficient to show such fraud.

Worth v Pierson, 208-353; 223 NW 752

Duress. The fact that a devisee furnished a home to testator, and at times counseled with him in a general way, is quite insufficient to justify the court in submitting the issue of duress.

In re Haga, 222-1313; 271 NW 296

Age of grantor. In an action contesting deeds on the ground of undue influence, the age of the grantor is an important consideration, but it is not conclusive.

Tedemandson v Morris, 227-774; 289 NW 1

2 Unequal, Unreasonable, or Unnatural Disposition

Lack of education or physical defects. In an action to contest a will under which one son receives over eight times as much property as the children of his deceased brother and evidence discloses dispute as to testator's understanding of English language in which the will is written and such circumstances lead the court to suspect testator may have been imposed upon, an additional burden is imposed upon proponents of will to show testator was acquainted with the provisions of the will.

In re Younggren, 226-1377; 286 NW 467

3 Declarations of Testator

Declarations of testator. Declarations of a testator that he intended to make disposition of his property in a manner different than that provided in the subsequently executed will are inadmissible on the issue of undue influence.

In re Diver, 214-497; 240 NW 622

Statements of intention to devise to others. Statements by a person of his intention to leave his property to persons other than to the beneficiaries named in his will, are not admissible, as tending to establish undue influence in the execution of the will, but, undue influence being established, prima facie, such statements may be admissible as tending to show testator's susceptibility to such influence and his capacity to resist it.

In re Johnson, 222-787; 269 NW 792

4 Declarations of Proponents, Devisees, Legatees, and Contestants

Declarations of beneficiary. Declarations of a testamentary beneficiary which tend to show that he employed undue influence on testator in order to secure the execution of the will are inadmissible when the will carries separate

IV UNDUE INFLUENCE—concluded

(c) EVIDENCE — ADMISSIBILITY, WEIGHT, AND SUFFICIENCY—concluded

4 Declarations of Proponents, et al.—concluded

and independent bequests to beneficiaries other than the declarant.

Albright v Moeckly, 202-565; 210 NW 813
Wackman v Wiegold, 202-1391; 212 NW 122

Insufficient showing. The fact that prior to the execution of a manifestly inequitable will the chief beneficiary thereof was a chronic complainer to the effect that testator had done nothing for her, but had done much for her brother, and that she would see to it that she got all of testator's property, is not, in and of itself (in view of the provisions of the will), sufficient to make a prima facie case of undue influence in the execution of the will.

McCollister v Showers, 216-108; 248 NW 363

(d) JOINT SUBMISSION OF MENTAL INCAPACITY AND UNDUE INFLUENCE

Submission of dual issues. Testimony which supports the issue of undue influence necessarily has material bearing on the supported issue of the testamentary capacity of an aged and infirm person, but both issues are properly submitted on supporting testimony.

Brogan v Lynch, 204-260; 214 NW 514

Burden of proof—failure to meet. In an action to set aside the probate of a will, and to cancel a deed (1) on the ground of the mental incapacity of the testator-grantor, and (2) on the ground of the undue influence of the devisee-grantee, the burden rests on plaintiff to establish at least one of said grounds.

Walters v Heaton, 223-405; 271 NW 310

V CONSTRUCTION OF WILLS

(a) CONSTRUCTION IN GENERAL

Discussion. See 15 ILR 361—"Die without issue"; 16 ILR 195—Decree determining heirs, distribution; 21 ILR 552—Equity jurisdiction; 22 ILR 543—Renunciation of life estate

Probate court—jurisdiction. Where a clear and unambiguous will is admitted to probate and administration is being had thereon in probate court, the jurisdiction of such court to determine any rights thereunder, and to administer and direct the disposition of the property involved, cannot be interfered with by a court of equity.

Anderson v Meier, 227-38; 287 NW 250

Nonecessity to construe. In equitable action for construction of wills of deceased husband and wife, where husband's will provided for payment of debts and funeral expenses and devised to his wife all his estate, and where wife's will contained certain specific bequests and directed that remainder and after-acquired property be divided into equal shares for distribution, held, both wills to be clear and unambiguous and therefore not open to construction. Actions for that purpose are entertained by a court of equity or probate only when there is uncertainty or ambiguity.

Anderson v Meier, 227-38; 287 NW 250

Absence of necessary parties bar to construction.

Windsor v Barnett, 201-1226; 207 NW 362

Disinterested party without standing. One who is adjudged to have no interest under a will may not object to a construction placed thereon by the court.

Schroeder v Cable, 211-1107; 235 NW 63

Lex rei sitae. The title to real estate in this state under a will must be determined by the courts of this state, and under the law of this state.

Scofield v Hadden, 206-597; 220 NW 1

What law governs—lex rei sitae. Whether a legatee has the legal right to elect to take real estate instead of the proceeds of said real estate will be determined by the lex rei sitae.

In re Warner, 209-948; 229 NW 241

Conflict of laws—reaching majority—law of testator's domicile controls. When the property is situated and the testator was domiciled in Iowa, provisions of the will as to real and personal property and question as to named devisee attaining majority are to be determined according to the law of testator's domicile.

Boehm v Rohlfs, 224-226; 276 NW 105

Time from which will speaks—value of realty bequest determined as of date of testator's death. Where, prior to his death, testator had given land of the value of $15,600 to 4 of his 5 children and directed his executors to purchase, for a daughter who had rejected partial distribution before his death, good Iowa land of the value of $15,600, the will, which was clear and definite as to the intention of testator, spoke as of date of testator's death, and the value of $15,600 fixed for land to be purchased for daughter was required to be determined as of the date of testator's death.

In re Holdorf, 227-977; 289 NW 756

Devise identical with statute of descent—effect. A testamentary devise is inoperative when the property devised is exactly identical with the property which the statute law of descent grants in the absence of a will. If there be not such identity, the devise is operative.

Wehrman v Farmers & M. Bank, 221-249; 259 NW 564; 266 NW 290

Survivorship and substitution. The heirs of a devisee cannot be deemed to be substituted for the devisee (§11861, C., '24) when it appears that the testator and the devisee perished in a common disaster, and that there is no evi-

dence that the devisee died before the testator died.

Carpenter v Severin, 201-969; 204 NW 448; 43 ALR 1340

Devise to class individually named. A devise to a class, the members of which are individually named, is presumptively a separate devise to each separate individual.

Friederichs v Friederichs, 205-505; 218 NW 271

Named beneficiaries—not "gift to a class". Where a will makes a gift to beneficiaries by name, the gift is not one to a class, even though the individuals named possess some quality or characteristic in common.

Anderson v Anderson, 227-25; 286 NW 446

Disinheriting not favored by court. In construing wills the court will not look favorably upon a construction tending to disinherit those who would take under the law had there been no will.

Hudnutt v Ins. Co., 224-430; 275 NW 581

Intestacy avoided when possible. Courts will construe wills so as to avoid intestacy if possible. However, where the will is plain and the meaning of the testator free from doubt, and property is conveyed for lifetime only, without any gift over, the will can be construed only so as to make the remainder over intestate property.

Anderson v Anderson, 227-25; 286 NW 446

Intestacy because of erroneous adjudication. An unappealed adjudication, tho erroneous, that one clause of a will conveyed no personal property except the "household goods and effects" of testator necessarily results in intestacy as to all other forms of personal property when the residuary clause is specifically confined to a conveyance of testator's "real or mixed" property.

In re Scheiner, 215-1101; 247 NW 532

Failure of specific legacy. The general rule is that the failure of a specific legacy to vest or become effective causes the amount so released to fail.

Anderson v Anderson, 227-25; 286 NW 446

Construction. In a will where father devised realty to surviving spouse for life, then to three named children for life with remainder over in fee per stirpes to their lawful issue, and one of such children died without lawful issue, after mother's death, remainder over of her share, being a one-third of said realty, became intestate property and through the father passed to the two remaining children in fee, subject to payment of taxes and debts against estate of deceased child to the extent of one-third interest in the lapsed estate.

Anderson v Anderson, 227-25; 286 NW 446

Rule as to vesting. The use of the word "surviving" or an expression akin to it, in a will, to describe a class who are to take after an intervening life estate, refers to the termination of such life estate and not to the death of the testator. Such use indicates the testator intended to postpone the vesting of the gift over to the time when the life estate would end. However, this is not a rule of substantive law but one of interpretation and therefore will never be used to defeat a contrary intention where one appears with reasonable certainty.

Smith v Harris, 227-127; 287 NW 255

Title under will (?) or law of descent (?)—attending rights. Devisees whose shares under a will are, both in quantity and quality, exactly the shares which they, in the absence of a will, would take under the statute law of descent, are deemed to take title, not under the will, but under the said statutes of descent—the worthier title—and so taking they necessarily take the statutory exemptions, if any, attending the property.

Luckenbill v Bates, 220-871; 263 NW 811; 103 ALR 252

Issue of ownership—will—necessity to construe. In an equitable proceeding by a judgment creditor to discover property belonging to the judgment defendant, and to subject said property to the satisfaction of said judgment, the court, on the issue of ownership of property in question, may be called upon, and properly so, to construe a will—all necessary parties being before the court.

Bankers Tr. v Garver, 222-196; 268 NW 568

Devises—uncertainty—how cured. A devise for charitable purposes though apparently uncertain will be enforced if the court can from extrinsic evidence discover the testator's meaning.

In re Durham, 203-497; 211 NW 358

Uncertainty of titles not favored. Uncertainty as to titles to property is not favored and, when not in violation of the manifest intention of a testator, the court will construe a remainder to be vested rather than contingent, and will hold a lesser estate to be merged with the larger, or an estate for years to be merged with a remainder.

Hudnutt v Ins. Co., 224-430; 275 NW 581

Devisees' or legatees' title under will—non-necessity to file claim. A controversy over the ownership of property devised or bequeathed in a will is properly determinable in equity, and devisees or legatees of such property need not file claims against the estate therefor.

Carpenter v Lothringer, 224-439; 275 NW 98

Fee devised but alienation restricted—co-existence impossible. The fee simple title to real property cannot be devised coupled

V CONSTRUCTION OF WILLS—continued
(a) CONSTRUCTION IN GENERAL—concluded

with a restriction on alienation of said property.

Hudnutt v Ins. Co., 224-430; 275 NW 581

Probate—what adjudicated—nonestoppel to construe will after final report. Probate of a will being conclusive only as to its due execution and publication, a petition to construe a will is not a collateral attack on the order of probate; and such petition may be filed after the executor's final report, before which the petitioners were not aware of the construction which the executor would place on the will and therefore no estoppel arises from permitting executor to proceed with administration of the estate.

Maloney v Rose, 224-1071; 277 NW 572

Subscribing witnesses—sufficiency of request to sign. A will, to be valid, must be witnessed at the request of testator; however, the request need not be spoken but may be by acquiescence, by act or motion, or even by his silence when he knows that the witnesses are signing, though at the request of another, and he makes no objections, but the question of due execution should be left to the jury when it develops from testimony that one witness signed at the request of a beneficiary and that testator may not have, in any manner, requested the witnesses to sign.

Burgan v Kinnick, 225-804; 281 NW 734

Property and rights exempt—life insurance. The formal statement in a will that testator's debts shall be paid out of his estate is wholly insufficient to justify the conclusion that testator intended to appropriate to the payment of his debts the avails of life insurance payable to his personal representatives or to his estate, even tho, as a matter of law, such avails do become a part of his estate.

In re Grilk, 210-587; 231 NW 327

Disposal of insurance payable to estate—specific legacy. When life insurance is payable to an insured's estate, he may specifically dispose of the proceeds other than as provided by statute, but there must be an agreement or assignment to contrary; however, a specific disposition of insurance proceeds by terms of a will satisfies such requirement. (§8776, C., '35.)

In re Clemens, 226-31; 282 NW 730

When annuity vests. A testamentary life annuity becomes vested on the date when the annuity becomes due.

In re Hekel, 205-521; 218 NW 297

Testamentary provision in re guardianship. A testamentary request that "the court" appoint a guardian of the property devised to minors does not give the presiding judge a personal power to appoint, but contemplates an appointment by the court acting as a judicial tribunal.

Hodgen's Executors v Sproul, 221-1104; 267 NW 692

Establishing claim against deceased's realty—not action to construe will. In an equity action to establish a claim against deceased's real estate for services rendered deceased's widow to whom deceased devised such realty for life, with right to dispose of real estate for her necessary support, held, such action was not a "suit for construction" of will, merely because trial court's opinion mentioned word "construction", but not in such manner as to indicate that trial court held action to be for that purpose. A will which in plain and uncertain terms makes disposition of property is one which needs no construction.

Hoskin v West, 226-612; 284 NW 809

Codicil—improper delegation of duties to executor. A first codicil devising an estate to trustees to be administered under county supervision in building roads, and a second codicil appointing one executor to aid the county in building roads, created a lawful charitable trust with the county as trustee and taxpayers as beneficiaries which was not necessarily invalid because the executor was given administrative duties in the road construction in violation of statute.

Blackford v Anderson, 226-1138; 286 NW 735

Approval of executor's report not construction of will. The fact that the court had approved an executor's report, wherein he had attempted to relieve an estate of inheritance tax on the ground that all devises in the will were contingent, does not mean that such holding is a construction of the will, since the construction of the will was not in issue.

Flanagan v Spalti, 225-1231; 282 NW 347

(b) GENERAL PRINCIPLES OF CONSTRUCTION

Discussion. See 13 ILR 90—Individuals named in class gifts

Intention of testator. Intention of testator governs construction of will when not in contravention of some established rule of law or public policy.

Bell v Bell, 223-874; 273 NW 906
Smith v Harris, 227-127; 287 NW 255

General rule. In the construction of a will every provision thereof must be given effect, if possible, in order that the actual intention of the testator—the pole star of all construction—may govern.

In re Dodge, 207-374; 223 NW 106

Intention of testator. In construing provisions of a will, precedents and principles of interpretation are nothing more than aids employed as a means of ascertaining the expressed intent of the testator.

Smith v Harris, 227-127; 287 NW 255

Testator's intention. In construing a will the principal concern will be to ascertain and determine the intention of the testator, and it is the duty of the court, if it be reasonably possible, to give effect to all of the will's provisions.

Anderson v Anderson, 227-25; 286 NW 446

Construction—when unnecessary. It is not necessary to construe a will where the intention of the testator is expressed in clear and unequivocal language.

Anderson v Anderson, 227-25; 286 NW 446

Court's duty — testator's plain intention — technical words. Where the plain meaning of a will is to devise a life estate only, the supreme court will be bound by the plainly expressed intention of the testator—technical words being used in their technical sense.

Anderson v Anderson, 227-25; 286 NW 446

Testator's intention. When the language of a will specifically devises a life estate to three named children of the testator as tenants in common, and the intention of the testator is clearly and unequivocally expressed that each of said children was entitled under the will to an undivided one-third interest for life only, it is unnecessary to resort to other parts of the will for further construction of such provision.

Anderson v Anderson, 227-25; 286 NW 446

Testator's intention—ascertainment. The intentions of a testator must be ascertained from the terms of the will and such intentions must prevail. In a matter of doubtful construction, circumstances surrounding the execution of the will may be shown to aid in determining what the testator meant by the language used. The conduct of a testamentary trustee is not such a circumstance and is therefore not a material, evidential matter in determining testator's intention.

Freier v Longnecker, 227-366; 288 NW 444

Language plain and unequivocal—rules of construction inapplicable. It is a fundamental doctrine in the construction of wills that where language is plain and unequivocal, both in expression and meaning, there is no reason for construction and the rules of construction are inapplicable.

In re Holdorf, 227-977; 289 NW 756

Testator's intention—rules of construction—when used. Intention of testator will be determined from the actual language of the entire will, but if this is not possible, then rules of construction will be employed, not including rule in Shelley's case abrogated by statute.

Hudnutt v Ins. Co., 224-430; 275 NW 581

Intention of testator—derived from entire instrument. The provisions of a will should be construed, not as standing alone, but as related to all other provisions of the will, so that the intent of the testator may be gathered from the entire instrument.

Smith v Harris, 227-127; 287 NW 255

Unqualified provision needs no construction. A testatrix who, in her original will devises:

1. Separate specific bequests to named nephews and nieces, and
2. The remainder of her estate to nine named nephews and nieces,

And later, by codicil, not only names four additional nephews and nieces as residuary legatees, but declares "it being my intention to divide my estate among all my nephews and nieces", must be deemed to have intended that nephews and nieces not named in the will or codicil should share in the residuary estate along with those named in the will or codicil as residuary legatees.

Reason: A will and a codicil constitute but one instrument. Every clause in a will must be given a meaning. No construction is necessary as to clause which is perfectly clear in expression and meaning.

In re Thomas, 220-50; 261 NW 622

Unambiguous will. Parol evidence bearing on the intent of a testator in an unambiguous will is wholly inadmissible.

Mann v Seiber, 209-76; 227 NW 614

Unambiguous will needs no construction. There is no occasion for an equity court to construe a will unless it appears that the will is ambiguous or uncertain in its terms.

First Methodist Church v Hull, 225-306; 280 NW 531

Nonnecessity to construe. In equitable action for construction of wills of deceased husband and wife, where husband's will provided for payment of debts and funeral expenses and devised to his wife all his estate, and where wife's will contained certain specific bequests and directed that remainder and after-acquired property be divided into equal shares for distribution, held, both wills to be clear and unambiguous and therefore not open to construction. Actions for that purpose are entertained by a court of equity or probate only when there is uncertainty or ambiguity.

Anderson v Meier, 227-38; 287 NW 250

Unambiguous terms—residuary legacy. The words "rest, residue, and remainder" are plain, unambiguous terms in a will providing a residuary legacy and need no construction.

Carpenter v Lothringer, 224-439; 275 NW 98

Punctuation as evincing intention. A comma may be so employed in a will as to be the fair equivalent of the words, "and also".

Buck v MacEachron, 209-1168; 229 NW 693

Informal will revealing animus testandi. An instrument, duly signed and witnessed, which

V CONSTRUCTION OF WILLS—continued
(b) GENERAL PRINCIPLES OF CONSTRUCTION—continued

is ambulatory in character and revocable at pleasure, and passes an interest only upon the death of the maker, is a valid will.

In re White, 209-1210; 229 NW 705

Intention controlling as of time will is made. The rule of intention in construing wills has reference to intention at time of execution of will, interpreted in light of facts and circumstances existing at time will is made.

In re Keeler, 225-1349; 282 NW 362

Death—presumption as to time. A provision in a will as to how property shall pass in case of the death of a devisee or legatee, presumptively refers to a death which occurs prior to the death of the testator.

Moore v Dick, 208-693; 225 NW 845

Daughter's interest under will — intent of testator considered. In a suit in equitable attachment against the interest of a daughter under her father's will, the intent of the testator is to be considered in determining whether he intended the daughter to have any right other than to part of the income.

Friedmeyer v Lynch, 226-251; 284 NW 160

Surrounding circumstances—when used. In construing a will, the intention of the testator as it appears from the will must control and, if the language be doubtful, surrounding circumstances may be shown to aid in determining what the testator intended by the language used.

Starr v Newman, 225-901; 281 NW 830

Parol or extrinsic evidence—children, grandchildren, nephews—testator's meaning admissible. Where such terms as children, grandchildren, or nephews are used in a will or a deed, and there are both legitimates and illegitimates and the testator has full knowledge of such fact, and the intention of the testator is not clearly expressed in the will, the use of such words creates no presumption, but the word is a neutral one and an ambiguity exists, and the intention of the testator or grantor must be determined not only from the provisions of will, but also in the light of the circumstances surrounding the execution of the will, and parol evidence is admissible to prove the intent of the testator or grantor.

In re Ellis, 225-1279; 282 NW 758; 120 ALR 975

Misdescription of church as legatee—evidence supporting judgment. In probate proceedings where testator made bequests to the "First Adventis Church located on Bigley avenue in Charleston, West Virginia", whereas such church was located on Randolph street in Charleston, and Elmore Memorial Adventist Church was located on Bigley avenue, evidence sustained judgment that testator designated the First Adventis Church as legatee.

In re Canterbury, 226-586; 284 NW 807

Transposing clauses in order to ascertain intent. Where the residuary clause of a will grants a fee title, and is later followed by a clause empowering a third party to buy, on named terms, certain corporate shares of stock belonging to the deceased, the court will construe the will as tho the residuary clause were transferred to the end of the will, when such transposition clearly reflects the intent of the testator, and will avoid the claim that testator has granted an absolute fee and then, later, attempted the unallowable thing of controlling or clogging such fee.

In re Richter, 212-38; 234 NW 285

Partial invalidity—effect on valid part. The invalidity of a testamentary limitation—invalid because prohibited by the statute against perpetuities—will not affect the validity of preceding limitations which are otherwise valid, when it is manifest from the will that testator had no intent to make said preceding limitations dependent on said subsequent limitations—ultimately rejected as void.

Bankers Tr. v Garver, 222-196; 268 NW 568

Partial intestacy avoided. Will is to be construed if possible to avoid partial intestacy when language is uncertain or ambiguous, but where there is no ambiguity there is no room for construction.

Starr v Newman, 225-901; 281 NW 830

Intestacy avoided when possible. Courts will construe wills so as to avoid intestacy if possible. However, where the will is plain and the meaning of the testator free from doubt, and property is conveyed for lifetime only, without any gift over, the will can be construed only so as to make the remainder over intestate property.

Anderson v Anderson, 227-25; 286 NW 446

Failure of specific legacy. The general rule is that the failure of a specific legacy to vest or become effective causes the amount so released to fail.

Anderson v Anderson, 227-25; 286 NW 446

Identifying legatee—reopening for widow's testimony. In an action to construe a will to determine which of two similarly named churches the testator intended to designate as a beneficiary, the evidence being closed when discovery is made that testator's widow, who though present in court but not testifying, had knowledge as to which church was intended to be designated, the trial court abuses its discretion by refusing to reopen to admit her testimony.

In re Canterbury, 224-1080; 278 NW 210

Devise to class—predeceased children—intention from antenuptial contract. A testa-

tor's intention, when ascertainable is controlling, and the general rule which limits a devise to a class to only such devisees as are alive at testator's death, is not applicable where a contrary intent appears. So held in construing a will dividing the residue "among my children" where an antenuptial contract mentioned in the will, altho an extrinsic matter, was admitted to show testator's intention to include the heirs of his predeceased children among his children.

In re Huston, 224-420; 275 NW 149

Remainder to class — rule as to vesting. When there is an immediate gift to a class of persons, the gift vests in the members of that class who are existent at the time testator dies, unless a different intention appears from the context of the will. So held where the gift was "to the children living of my brothers and sisters living or dead".

In re Gordon, 213-6; 236 NW 37

Gift to a class. Where testator devised property to his wife and provided that "after the death of my said wife * * * I hereby give * * * said remaining property to my surviving children, but if there be no surviving children then said property shall go to my heirs at law * * *" and where the widow of testator's son, who predeceased the testator's wife, brought partition action and claimed interest in property through testator's son under said provision of testator's will, held, that the remainder "to my surviving children" constituted a gift to a class and did not refer to those children surviving the testator but instead referred only to those children surviving his wife, hence it followed that the son, who outlived the testator but predeceased testator's wife, took no part of the remainder and that upon the son's death intestate no interest therein passed to his widow.

Smith v Harris, 227-127; 287 NW 255

Named beneficiaries. Where a will makes a gift to beneficiaries by name, the gift is not to a class, even though the individuals named possess some quality or characteristic in common.

Anderson v Anderson, 227-25; 286 NW 446

Intention of testator—remainders—"surviving grandchildren" interpreted. Where a will giving life estates to testatrix's surviving spouse and children provides on termination of the life estates that fee title shall pass "to the surviving grandchildren", this means surviving grandchildren of testatrix as a class and does not mean that in each separate tract the surviving children of that respective life tenant take the remainder, nor do testatrix's heirs take as a whole under rules of descent as in cases of intestacy.

Bell v Bell, 223-874; 273 NW 906

Construction—joint life tenants. In a will where father devised realty to surviving spouse for life, then to three named children for life with remainder over in fee per stirpes to their lawful issue, and one of such children died without lawful issue, after mother's death, remainder over of her share, being a one-third of said realty, became intestate property and through the father passed to the two remaining children in fee, subject to payment of taxes and debts against estate of deceased child to the extent of one-third interest in the lapsed estate.

Anderson v Anderson, 227-25; 286 NW 446

Demurrer admitting paternity of illegitimate child. In an application in probate to construe the word "grandchild" in a will which left the residuary estate to children and grandchildren of testatrix's deceased brother-in-law, and a contention that an illegitimate child of brother-in-law's son was included in such word "grandchild", a demurrer to the petition admitted allegations that brother-in-law's son was father of such illegitimate, and that testatrix knew of such relationship at time will was executed.

In re Ellis, 225-1279; 282 NW 758; 120 ALR 975

Named legatees surviving testator—legatee dead when will executed—heirs excluded. A will giving the residuary estate "unto those of the following named persons who are living at my death" will not be construed to include the heirs of one of those named persons on the ground that such particular named person was known by the testator to be dead at the time he made the will. This situation is not such a latent ambiguity as will warrant court in disregarding plainly expressed intent of testator to bequeath to named persons surviving testator.

In re Kubbernus, 224-1077; 277 NW 717

"Heirs" not synonymous with "children"—intention controlling. The word "heirs" when used in a will cannot be construed to mean "children" unless that was the manifest intention of testator gathered from a reading of the will as a whole.

Hudnutt v Ins. Co., 224-430; 275 NW 581

"Heirs" — inaccurate use of term — intent controls. A testamentary provision that testator's "heirs" shall participate in a specified trust fund will be deemed to include a granddaughter, even tho under the then existing circumstances she is not, technically, an heir, it appearing that testator had in other parts of his will listed his heirs and had therein included his said granddaughter.

Slavens v Bailey, 222-1091; 270 NW 367

Limitation on term "lawful heirs". A devise to "my lawful heirs", followed immediately by a specific enumeration of named children of testator, may, in view of the circumstances surrounding testator, necessitate a construc-

V CONSTRUCTION OF WILLS—continued
(b) GENERAL PRINCIPLES OF CONSTRUCTION—continued

tion that testator intended to exclude all his children except those specifically named.

Westerfelt v Smith, 202-966; 211 NW 380

"Death without heirs". Will construed and, in view of the environment of the testator and of the facts concededly known to him, held (1) that a provision to the effect that, if the beneficiary of a trust "dies without leaving any heirs", the remainder shall go to some old ladies' home, embraced a death either before or after the death of testator; and (2) that the term "heirs" must be construed as tho followed by the words "of his body".

In re Clifton, 207-71; 218 NW 926

Adopted child not direct heir. A devise to "my heirs", naming two sons and a daughter, with proviso that if the daughter die "without direct heirs", the property should be divided between the two named sons, carries no interest to an adopted daughter of the deceased daughter, the will clearly evincing testator's intention to devise his property to his own blood.

Cook v Underwood, 209-641; 228 NW 629

Residuary devise to "estate" of another. A clause in a will devising the residuary part of testator's estate "to the estate of my mother" passes nothing to the heirs of the mother.

Cookman v Lindsay, 215-564; 246 NW 268

Deed (?) or will (?). A warranty deed subject to a life estate in grantor's surviving spouse will not be deemed testamentary because of a clause wherein grantor ineffectually attempted to restrain the alienation of the land by the grantee.

Goodman v Andrews, 203-979; 213 NW 605

Deed (?) or will (?). An executed and delivered deed of conveyance in the ordinary form conveys an interest in praesenti—is not testamentary—even tho it provides (1) that "it shall not take effect until after the death" of the grantor, and (2) that the grantor does not "give up possession" to the grantee during the life of the grantor, and (3) that the grantor "reserves the use and income of the premises as long as he lives".

Hall v Hall, 206-1; 218 NW 35
Bardsley v Spencer, 215-616; 244 NW 275

"May"—"must". "May" cannot, manifestly, be given the imperative meaning of "must", unless there be substantial warrant for such construction.

Brickson v Schwebach, 219-1368; 261 NW 518

Precatory words. The provision of a will to the effect that the executor shall "see" that a named legacy is invested in a home for the legatee at a named place creates no trust, and must be deemed precatory only.

Davenport v Sandeman, 204-927; 216 NW 55

Precatory words—ineffectiveness and repugnancy. When property, real and personal, is absolutely and unconditionally devised, the subsequent expression by the testator of a naked "wish" that the devisee will make a named disposition of certain of the property will be treated as nugatory, both because the expression is a mere wish, binding on no one, and because, if it be deemed more than a mere wish it is repugnant to the absolute devise.

In re Campbell, 209-954; 229 NW 247

Trusts—precatory statements—legal effect. The construction of a testamentary trust cannot be controlled by a written, precatory statement made by the testatrix subsequent to the execution of the will and not even made a part thereof.

In re Whitman, 221-1114; 266 NW 28

Trust—precatory words as basis. Expression in a will, following an absolute devise of property, of an apparent wish that said devisee will, on his death, distribute said property among named persons, cannot be deemed to create a trust on behalf of said persons unless it is clear from the will as a whole that said so-called wish was not, in fact, a wish, but a mandatory direction.

In re Hellman, 221-552; 266 NW 36

Trusts—rent-free occupancy by beneficiary. A testamentary trust manifestly cannot be construed to authorize one of the beneficiaries to occupy a portion of the trust estate free of rent when the trust instrument contains no such authorization, but clearly provides that the net income of the entire trust estate shall be divided in a stated manner among named beneficiaries.

In re Whitman, 221-1114; 266 NW 28

Trusts—"net income" defined. "Net income" does not mean the general income of the estate without provision for the payment of just charges, taxes, and reasonable repair and upkeep. On the contrary, it means the income remaining, if any, after such charges and expenses are taken care of. (So held as to a testamentary trust which provided for the keeping of the trust estate intact and for the annual distribution of the net income.)

In re Whitman, 221-1114; 266 NW 28

Power of sale—repugnancy. There is no repugnancy between a testamentary provision to the effect that the executor may freely sell the testator's real estate and a provision to the effect that testator's wife shall be given the balance of the estate after certain charges are paid.

In re Wicks, 207-264; 222 NW 843

Equitable conversion and right to reconvert. When a testator directs that named real estate be sold by his executor and the entire proceeds be paid to a legatee, said legatee may make and enforce an election to take the real estate, instead of the proceeds, especially when such election does not interfere with the rights and duties imposed on the executor.

In re Warner, 209-948; 229 NW 241

Absolute devise with subsequent limitation —nonapplicability of rule. The rule of construction to the effect that a devise of property in fee is unaffected by a subsequent clause which seeks to limit the fee, has no application to a will which in one clause devises property without specifying any particular estate which the devisee shall take, and in a subsequent clause provides that the devised property shall be placed in trust for the benefit of the devisee and pass to named remaindermen on the death of the devisee.

In re McCauley, 213-262; 235 NW 738

Contradictory devises. An unconditional devise and bequest by testator to his wife of all of testator's property "in case she survives" testator necessarily renders nugatory all subsequent contrary devises and bequests in said will, when the wife survives testator.

Phillips v Phillips, 217-374; 251 NW 511

Absolute bequest—later repugnant provision disregarded. Where a codicil made an absolute bequest of a residuary estate to a county to be used in paving a highway, and a later provision in the codicil gave certain directions to the executor and imposed conditions for acceptance of the bequest by the county, such later conditions were repugnant and would defeat the purpose of the testator and must be disregarded when void in delegating power to the executor in violation of statute, and the intention of the testator as expressed in the first provision must be given effect to prevent intestacy.

Blackford v Anderson, 226-1138; 286 NW 735

Repugnant limitation following devise of property in fee—void. Principle reaffirmed that a testator cannot make an absolute devise of his property in fee and in a subsequent clause destroy or place a limitation on such title. The subsequent limitation is void for repugnancy.

In re Bigham, 227-1023; 290 NW 11

Irreconcilable provisions — controlling force of codicil. As between two irreconcilable provisions,—one in the will as originally executed, and the other in a codicil to said will,—the provision in the codicil must control as the last expression of the intent of the testator. So held where the irreconcilable provisions related to the right of a legatee and devisee to take his legacy and devise free from his debts to the estate.

In re Flannery, 221-265; 264 NW 68

Will and two codicils construed together—equivocal expressions of revocation. A will and first codicil were not revoked by a second codicil providing that it should prevail in case of conflict between it and the two previous instruments, and the three instruments stood as the final testamentary disposition of the testator with the second codicil displacing the others only insofar as it was clearly inconsistent with them, altho the second codicil was referred to as a "last will and testament" and declared the previous will and codicil to be revoked, as the revocation of a will depends on intent to be gathered from all the papers and attending circumstances and cannot be overridden by equivocal expressions of revocation.

Blackford v Anderson, 226-1138; 286 NW 735

Dependent relative revocation. Where a conflict exists between a second codicil and the will and first codicil, the second codicil prevails, but under the doctrine of dependent relative revocation, if the later codicil contains an invalid provision, such provision does not revoke the provisions with which it conflicts in the earlier will and codicil. Where a will and two codicils left property to a county for use in building roads, even if a provision in the second codicil was invalid in improperly delegating county powers to the executor, the doctrine prevented a complete revocation of the previous documents, but they were revoked only to give effect to the second codicil, as there was no change in the purpose of the will, but only a change in the manner of effectuating the gift.

Blackford v Anderson, 226-1138; 286 NW 735

Devise subject to unenforceable debts — requirements. The will of a spouseless testator will not be held to devise testator's homestead to his children subject to debts which could not be otherwise enforced against said homestead, unless the intent so to do is evidenced by testamentary language which is unequivocal and imperative. The usual and formal paragraph in the preliminary part of a will directing the payment of "all my just debts" is quite insufficient to evince such intent.

Luckenbill v Bates, 220-871; 263 NW 811; 103 ALR 252

Devise of unidentified property — effect on residuary clause. A definite residuary clause in a will must be given effect as testator wrote it, even tho other paragraphs of the will make bequests of property which cannot be identified, and thereby the residuary legatee is unintentionally enriched.

In re Spahr, 210-17; 230 NW 434

Equitable conversion — reconversion. Real estate which has once been theoretically converted into personal property ipso facto by the terms of a will (which directed that the property be sold and the proceeds divided) is not necessarily reconverted into real estate by

V CONSTRUCTION OF WILLS—continued
(b) GENERAL PRINCIPLES OF CONSTRUCTION—concluded

the institution of partition proceedings for a sale of the land and a division of the proceeds, nor by an agreement in such proceedings, signed by the attorney of an heir whose interest was involved, to the effect that the land should be sold and the "interest" of such heir be held to abide the determination of such interest.

Dever v Turner, 200-926; 205 NW 755

Equitable conversion — nonapplicability of doctrine. The doctrine of "equitable conversion" will not be applied to a will (1) from a naked, nonmandatory power to sell the real estate; (2) when no absolute necessity to sell exists in order to execute the will; (3) when there is no such blending in the will of realty and personalty as to evince an intention by testator to create a fund out of both realty and personalty and to bequeath the same as money; and (4) when residuary beneficiaries will be detrimentally affected by the application of such doctrine, contrary to the intent of the testator.

In re Dodge, 207-374; 223 NW 106

Equitable conversion as necessity. The distribution provided in a will may conclusively imply a purpose on the part of testator to convert his real estate into money.

Emmack v Tish, 214-794; 243 NW 517

Equitable conversion under will. The proceeds of foreign real estate sold by an administrator with the will annexed, under explicit direction of the will, and for the purpose of making distribution under the will, must be deemed personalty with resulting consequence that the administrator is responsible therefor; and it is quite immaterial that he did not probate the will in said foreign state.

In re Jackson, 217-1046; 252 NW 775; 91 ALR 937

Equitable conversion—when doctrine applicable. A will which provides that "all (my) real estate * * * shall be divided as follows: $1,000 shall go to my son John, and the balance shall be divided equally among my other nine children" (naming them) works no equitable conversion of said real estate into personalty. Said provision in favor of John creates no absolute necessity to sell said real estate in order to execute the will.

Grady v Grady, 221-561; 266 NW 285

Equitable conversion—deduction from share. Tho testator's lands are, from the moment of testator's death, deemed equitably converted into personalty by a mandatory, testamentary direction to the executor to sell and divide the proceeds among testator's children, yet the rentals of said lands, accruing prior to an actual sale of the lands, belong to the estate, and in case the lessee be a legatee and fails to pay said rentals, the amount thereof may be deducted by the executor from the share of said legatee, a right which is superior to the right of one who, with knowledge of said rental proceedings, acquires an equitable lien of said legatee's share in the estate.

Ihle v Ihle, 222-1086; 270 NW 452

Equitable conversion—absolute necessity for required. A testator may, in his will, effect an equitable conversion as to his realty, or personalty, or both, (1) by explicitly directing the sale of the property and a division of the money thus and so, or (2) by so blending and treating both classes of property as to reveal an intention to effect such conversion, but if he does neither, no equitable conversion will be implied unless absolutely necessary in order to execute the will.

Brickson v Schwebach, 219-1368; 261 NW 518

Shares—mathematical formula for computing. When a will provides that twenty devisees shall share equally in the residue of the estate except that a named devisee shall have "a share and a half", the said residue must be divided by twenty and one-half. The quotient will represent the share of each of nineteen devisees, and the balance of the total residue will represent the share of the favored devisee.

In re Thomas, 220-50; 261 NW 622

Nondisposition of property—effect. An instrument which purports to be a will, but which not only neglects to make any disposition of property but specifically disclaims any intent to make such disposition, is not a valid will.

In re Manatt, 214-432; 239 NW 524

Nontestamentary instrument. A declaration of trust in and over real estate for the benefit of the trustor and named beneficiaries and a contemporaneously executed and delivered warranty deed to the same property to the trustee cannot be deemed a will even tho the trustor-grantor reserves in the declaration of trust complete control, management, and dominion over the property during his lifetime, even to the power to revoke the trust and to demand a reconveyance, or to dispose of the property by testament.

Keck v McKinstry, 206-1121; 221 NW 851

Joint and mutual wills. Will construed and held to be an individual will.

Mann v Seiber, 209-76; 227 NW 614

(c) NATURE OF ESTATE OR INTEREST CREATED

1 Estates in General

Discussion. See 1 ILB 87—Power of disposal

Perpetuities—limitations void ab initio. Testamentary attempts by means of limitations to create in property contingent interests or estates, which will not necessarily become vested within the period of time prescribed by the

statute prohibiting perpetuities, are futile, all such limitations being void ab initio. (§10127, C., '35.)

Bankers Tr. v Garver, 222-196; 268 NW 568

Share of devisee—per capita (?) or per stirpes (?). A devise which makes provision in a named amount for all the heirs of a known deceased daughter of testator's, and an identical provision in the same amount for each of several named living children, and then provides that the remainder of the estate shall be "equally divided between my above named children, their heirs or assigns share and share alike", precludes the heirs of the deceased daughter from taking per capita.

Canfield v Jameson, 201-784; 208 NW 369

Devise requiring taking per stirpes. A devise to testator's unnamed grandchildren by a living son; also to testator's unnamed grandchildren by a deceased son; and also to certain other of testator's individually named and living children, "share and share alike", will be deemed to devise to each set of grandchildren one child's share or portion. In other words, each set of grandchildren takes per stirpes and not per capita, such being the general indicated intent of the will as a whole; especially is this true in view of the law's favor for such result in case of doubt.

Claude v Schutt, 211-117; 233 NW 41; 78 ALR 1375

Conveyance and devise of same property. A deed of conveyance in the ordinary form and placed in proper escrow for delivery immediately after the death of grantor conveys full title even tho the grantor a few days after the execution of the deed devises the same property to the same grantee.

In re Champion, 206-6; 218 NW 37

Life estate (?) or fee (?). A devise of testator's entire estate to his wife, "for and during all the term of her natural life in fee simple", conveys an absolute estate—one in fee simple. (It is noted that the will makes no mention of a "remainder", and that no children had been born to the parties.)

Luitjens v Larson, 222-1320; 271 NW 239

Fee (?) or life (?). A testamentary devise, to testator's wife of specified real estate "to be and become the absolute property" of said wife, must be deemed to convey a fee simple estate unless accompanied by some other valid and enforceable provision manifesting a contrary intent. So held where the contrary intent was sought to be drawn from other provisions of the will which were either (1) precatory, or (2) repugnant to the granted fee.

Baker v Elder, 223-395; 272 NW 153

Equal standing of specific devises. Neither of two different, specific devises of real estate, irrespective of their particular location or position in the will, can be deemed junior or inferior to the other when neither is made subject to the other.

In re Glandon, 219-1094; 260 NW 12

Specific devise—liability for debts. A specific devise of real estate which not only devises the property, but requires the testator's estate to discharge the mortgage thereon, cannot, in case the estate and all nonspecific devises are insufficient to pay said mortgage and other debts, be construed as casting upon another specific devise of real estate which is not made subject to the former devise, the entire burden of discharging said mortgage and other debts. Each of said specific devises must bear said burden in the ratio of their separate value to their combined value.

In re Glandon, 219-1094; 260 NW 12

Particular estate. A "particular estate" is an estate for life or for years for the reason that it is only a small part or portion of the inheritance.

Anderson v Anderson, 227-25; 286 NW 446

Words "to own"—conveying absolute title. A devise of "one-half of all property I may own at the time of my death" to testator's wife "to own, hold and enjoy as her own", conveys an absolute title to one half of testator's estate.

In re Bigham, 227-1023; 290 NW 11

Prohibiting incumbrance. A testator who makes an absolute devise, of a certain interest in property, may not validly prohibit the devisee from thereafter incumbering the property.

Bogenrief v Law, 222-1303; 271 NW 229

Devise for charity—power of municipality to take. Devises and bequests for charitable purposes are such favorites of the law that "they will not be construed void if, by law, they can be made good". Will construed and held that the conditions attending a devise and bequest to a municipality of a charitable trust in the form of a free public library were conditions subsequent and not conditions precedent to the vesting of said trust, and that said conditions were within the legal power of the municipality to accept—under prescribed statutory procedure—and perform.

In re Nugen, 223-428; 272 NW 638

Estate "to heirs of father at death of husband"—vested interest. A will devising a portion of an estate "to the legal heirs of my father to be distributed * * * at the death of my husband" vests this portion in such heirs of the father as were living at the time of testatrix's death—the father being dead at that time.

Flanagan v Spalti, 225-1231; 282 NW 347

Devisee predeceasing testator—rights of devisee's heirs. Where testator devised to his wife one half of all the property he should

V CONSTRUCTION OF WILLS—continued
(c) NATURE OF ESTATE OR INTEREST CREATED—continued
1. Estates in General—concluded

own at time of his death, "to own, hold and enjoy as her own", and when the wife predeceased him, her heirs inherited one half of all the property of the testator in fee simple, under the anti-lapse statute.

In re Bigham, 227-1023; 290 NW 11

Paragraph limiting devise to specific heirs—noneffect on devise to wife in preceding paragraph. Where, in a will, a testator devised to his wife one half of all the property owned at the time of his death, "to own, hold and enjoy as her own", and when, in subsequent paragraph "subject to clauses one and two of this will", he devised all of his property to named devisees or their children "in case of the death of any of the beneficiaries named herein" and, if no children, then to the other beneficiaries "named in this clause of the will equally", then, even tho devise to wife was not absolute, it was neither limited nor modified by the language bequeathing estate to named devisees, since the wife was excluded from such paragraph.

In re Bigham, 227-1023; 290 NW 11

Selling homestead for debts—necessity of election between will and dower. An order of court to an executrix to sell real estate, to pay claims, is erroneous where the only real estate was the homestead, and the surviving husband, who was willed one third of the estate, had never been required to make an election as to whether or not he took under the will. In such case the presumption remains that he took his distributive share.

In re Dyer, 225-1238; 282 NW 359

Trusts which vest no inheritable interest in beneficiary. A testator who bequeaths directly to his wife a specific fund in trust, with directions to the wife to pay to their daughter for the latter's "care and support" such part of the accruing interest on said fund as the wife "shall deem advisable", and such part of the principal of said fund as the wife "shall deem advisable", will not be deemed to have intended to vest in the daughter any interest in said fund which would survive her death, it appearing as side lights that the daughter was debt-ridden, was possessed of an impecunious, inefficient, and likewise debt-ridden husband, and that the testator, prior to his death, had supported said daughter.

In re Bunting, 220-186; 261 NW 922

Unambiguous life income trust—annuity policy substitution nonpermissible. Under a clear, unambiguous will setting up a trust fund and providing for a $30-per-month bequest to be paid therefrom to a beneficiary as long as she lived, a different method of paying said bequest, by purchase of an annuity for said beneficiary, not permitted.

First Methodist Church v Hull, 225-306; 280 NW 531

Establishing trust to defeat heir's judgment creditors. When a will devised all of testatrix's property to daughter in trust, directing trustee to make a monthly payment to a third party and to transfer a one-fourth interest in the trust estate to each of two grandchildren when they reached a certain age, and providing that daughter should have a one-half interest in the estate during her life only in the event obligations to her judgment creditors were barred or satisfied, such will established a trust, and did not repose entire beneficial interest in daughter. Nor was the trust extinguished by a merger of daughter's legal and equitable estate so that property could be subjected to satisfaction of creditor's judgments, because in equity the doctrine of merger will not be invoked if it would frustrate the testatrix's expressed intentions or if there is some other reason for keeping the estates separate.

Freier v Longnecker, 227-366; 288 NW 444

2 Qualified, Defeasible, or Conditional Fee

Distinction between a vested and a contingent interest. In an action to partition land, it is not uncertainty of time of enjoyment in the future, but the uncertainty of the right to that enjoyment, which marks difference between a vested and a contingent interest.

Flanagan v Spalti, 225-1231; 282 NW 347

Restraint of marriage. That part of a devise to a testator's widowed daughter-in-law which provides that the property shall pass to her children upon her remarriage is not void because in undue restraint of marriage.

Anderson v Crawford, 202-207; 207 NW 571; 45 ALR 1216

Devise of conditional ownership. Where a will created a trust, and provided, in legal effect, that, if the beneficiary died without heirs of his body, the corpus of the trust should pass in trust to another designated beneficiary, the interest which the first beneficiary takes is a conditional or determinable ownership, and is wholly terminated by the death of the said first beneficiary unsurvived by any heir of his body.

In re Clifton, 207-71; 218 NW 926

Conditional limitation — obligation to pay taxes. A testamentary proviso which provides that if the life tenant "neglects to pay the taxes on said real estate within six months after they become delinquent", the life estate shall automatically terminate, must be deemed to refer to all the taxes payable during a given year, and not to an installment thereof. It follows that a six months delinquency on

the first yearly installment of taxes works no forfeiture.

Churchill v Bank, 211-1168; 235 NW 480

Conditional designation of beneficiaries. A will which is executed when the testator is an unmarried man and which, in one paragraph, appoints as his beneficiaries (1) testator's mother if she be living at the time of his death, (2) testator's nephews and nieces, if the mother be not living at the time of his death, and (3) testator's wife if testator be married at the time of his death,—carries the entire estate to testator's wife even tho testator's mother survives him.

In re Pottorff, 216-1370; 250 NW 463

Conditional bequest. A testamentary bequest payable on condition that the beneficiary shall "abstain from all those things that lead him into a dissipated life and make him an undesirable citizen" and that at a named age he shall be "a reasonable good citizen" must be construed as vesting the trustees with a fair and good-faith discretion in determining whether the conditions have been complied with. Evidence held not to show an abuse of such discretion.

In re Sams' Est., 219-374; 258 NW 682

Conditional bequest. A testamentary bequest payable on condition that the beneficiary "go on and complete his education through the high school and four years of college course", coupled with a provision that the "substantial" fulfillment of such condition is left to the "fair judgment and opinion" of the trustees, must be construed as authorizing the trustees, in good faith, to find a fulfillment on the basis of an acquired education other than that acquired under a regular and established high school and college curriculum, but, in their fair judgment, equal thereto.

In re Sams' Est., 219-374; 258 NW 682

Nature of estate—conditional fee. Altho a person has, under a bequest, only a conditional fee in certain property, it is nonetheless a fee which gives complete right of ownership to the grantee until the condition arises under which the fee is broken. It follows that, if there is a reverter, only the original sum received is returnable to the estate of the testator.

Frazier v Wood, 219-36; 255 NW 647; 257 NW 768

Remainder over—absence of issue—no lapse. In a will where father devised realty to surviving spouse for life, then to three named children for life with remainder over in fee per stirpes to their lawful issue, the fact that there were no grandchildren in being at the time of mother's death did not lapse the remainder so as to cause it to descend intestate and merge with life estate in children, since, at mother's death, the life estate in children was a "particular estate" supporting the contingent remainder, which was not required to vest until termination of such life estate.

Anderson v Anderson, 227-25; 286 NW 446

3 Life Estates

Shelley's case—intent of testator to nullify rule. While the rule in Shelley's case applied to wills as well as deeds, yet, wills being construed more liberally than deeds, if the intent of the testator appears to create a life estate, the rule did not apply.

Friedmeyer v Lynch, 226-251; 284 NW 160

Life estate (?) or fee (?). An unambiguous will of property for the devisee's "perfectly free use during his lifetime", without any gift over, conveys a life estate only. It is not permissible to construe such a will as conveying the fee simply to avoid intestacy.

Horak v Stanley, 216-318; 249 NW 166

Life estate (?) or fee, in effect (?). A bequest of "the annual income from $7,000 invested in securities and held by my executor for this purpose", construed and, in view of the entire will, and the various bequests therein contained, held, to grant a life estate only of the income, and not an absolute grant of the $7,000.

In re Vail, 223-551; 273 NW 107

Life estate (?) or fee (?). A clear grant of a life estate, with remainder over, is not converted into a fee because of the addition of a power in the life tenant to dispose of the property.

Carpenter v Lothringer, 224-439; 275 NW 98

Life estates — remainder over in fee per stirpes to lawful issue. When a will provides for a devise of realty to wife for life, then to three named children for life as tenants in common and remainder over in fee per stirpes to their lawful issue, held, life estate vested in children after wife's death with contingent remainder over in fee, as provided by statute —the life estates being the particular estate supporting the contingent estate which would vest, upon death of each of testator's named children, in that child's lawful issue, if any.

Anderson v Anderson, 227-25; 286 NW 446

Life estate with remainder over—absence of issue. In a will where father devised realty to surviving spouse for life, then to three named children for life with remainder over in fee per stirpes to their lawful issue, the fact that there were no grandchildren in being at the time of mother's death did not lapse the remainder so as to cause it to descend intestate and merge with life estate in children, since, at mother's death, the life estate in children was a "particular estate" supporting the contingent remainder, which was not required to vest until termination of such life estate.

Anderson v Anderson, 227-25; 286 NW 446

V CONSTRUCTION OF WILLS—continued
(c) NATURE OF ESTATE OR INTEREST CREATED—continued
3. Life Estates—concluded

Power to dispose of during lifetime only. A will, giving a widow a life estate and in the same clause giving her "full power to dispose of any and all property," and containing other bequests to remaindermen, does not authorize widow as life tenant to dispose of the property by her will.

Carpenter v Lothringer, 224-439; 275 NW 98

Life estate with power of disposal. A devise of property to a wife "for * * * life with power to dispose of and pass clear title to * * * said property during her lifetime, if she so elects", with remainder over, does not create an estate in fee, but creates a life estate, with unqualified power in the wife, during her lifetime, to dispose of said property for any purpose, even without receiving value therefor.

In re Cooksey, 203-754; 208 NW 337

Power to convey. A will which couples a life estate with substantially unlimited power in the life tenant to dispose of the corpus of the estate for the support of testator's daughter arms the life tenant with power to execute a legal conveyance of the entire estate to the daughter.

Karolusson v Paonessa, 207-127; 222 NW 431

Life estate with power to sell. A life estate coupled with a superadded power to sell, and to reinvest, and to use any of the property or income, construed and held to authorize the life tenant to sell only for the purpose of her maintenance, and that any unconsumed income remained in the estate of the testator and passed to the remainderman.

Brown v Brown, 213-998; 240 NW 910

Life use with power to convey — scope of power. A devise by a husband to his wife of the "absolute use and control" of all his property, with power to "dispose of the same in such manner as she may see fit", with devise to his children of "whatever of my property may be left", at the wife's death, arms the wife with power absolutely to convey the property for purposes other than her support and maintenance.

Volz v Kaemmerle, 211-995; 234 NW 805

Life estate with power to sell not devise in fee. The devise of a life estate with broad power in the devisee to sell any or all the property as he may see fit, free from any duty to account for the proceeds, does not constitute a devise of a fee simple estate when the testator clearly manifests in her will an intent to devise, and does devise, as a remainder that part of the property which the life devisee does not sell.

Mann v Seibert, 209-76; 227 NW 614

Power to dispose of property—transfer to self. A widow as life tenant, under a will permitting her to "dispose" of property, may not transfer to herself, as such transaction would be receiving instead of disposing of such property.

Carpenter v Lothringer, 224-439; 275 NW 98

Life estate—right to rents and profits. A devise of real estate to testator's wife "she to have the use, benefit and rents from the same during her lifetime, it being my intention to give her a life estate in all of my property only", conveys to the remaindermen no right to the rents and profits of the land accruing after the death of testator and before the death of the wife.

Whitehill v Whitehill, 211-475; 233 NW 748

Right of possession—lease. A will (1) containing the usual provisions relative to debts, funeral expenses, etc., (2) devising the "revenue" derived from the remainder of the property, partly real estate, to a named beneficiary, and (3) appointing an executor and delegating to him full power to administer the estate "in the best manner that his judgment shall dictate in the interest of my beneficiary", gives to the executor, and not to the beneficiary, the right to the possession of the property. It follows that a lease of the real estate, executed by the executor, is valid.

In re Jensen, 216-15; 247 NW 392

Life tenant as remainderman. A devise of land for life, and of the remainder under a condition which may wholly fail, may very clearly evince an intent that, in case the devise of the remainder does fail, the life tenant shall take not only the life estate, but the remainder, as well; and under such circumstances, it is quite immaterial whether this result be deemed to come about through devise by implication or by descent of an intestate estate, the life tenant being testator's sole heir.

Harvey v Clayton, 206-187; 220 NW 25

4 Remainders

Discussion. See 7 ILB 111—Remainder created by direction to divide on death of life tenant; 9 ILB 313—Acceleration of vested remainders by renunciation

Void remainders. Property embraced in a void, testamentary limitation—void because prohibited by the statute relating to perpetuities—passes to those persons who would have been entitled thereto under the laws of intestacy had the limitation been omitted from the will, and a judgment creditor may, by proper procedure, have a lien established thereon.

Bankers Tr. v Garver, 222-196; 268 NW 568

Vested remainder—transfer and alienation. Remainders, whether vested or contingent, may be transferred, alienated, or incumbered.

Bogenrief v Law, 222-1303; 271 NW 229

Rights of children — devise of remainder. Homestead property passing by will to testator's children by way of remainder after the termination of a life estate in the surviving spouse is not exempt from the antecedent debts of such children.

Arispe Bank v Werner, 201-484; 207 NW 578

Will subjecting homestead to debts of life tenant. A provision in a will, setting up a life estate with remainder over to certain devisees, after all indebtedness and funeral expenses of the life tenant are paid, subjects the estate to a claim for funeral expenses of the life tenant, even if it was his homestead, such provision being a condition upon the devise to the remaindermen.

De Cook v Johnson, 226-246; 284 NW 118

Vested or contingent estates. The estate of a remainderman must be deemed vested upon the probate of a will devising a life estate to testator's wife with remainder to testator's children.

Diagonal Bank v Nichols, 219-342; 258 NW 700

Remainders—vested (?) or contingent (?) —general rule. A remainder must be deemed vested, generally speaking, when a designated taker is living and ready to go into possession instantly upon the termination of the preceding estate, even tho such person may, in the course of time, die prior to the preceding life tenant.

Bogenrief v Law, 222-1303; 271 NW 229

Remainders—vested (?) or contingent (?). A vested remainder is an estate which passes by will or other conveyance with possession and enjoyment postponed until a particular preceding estate terminates—an estate which is invariably fixed by the will or other conveyance "to remain to certain determinate persons". A remainder is not vested when it is dependent on the grantee being alive when the preceding life tenant dies or remarries.

Skelton v Cross, 222-262; 268 NW 499; 109 ALR 129

Intention of testator—remainders—"surviving grandchildren" interpreted. Where a will giving life estates to testatrix's surviving spouse and children provides on termination of the life estates that fee title shall pass "to the surviving grandchildren", this means surviving grandchildren of testatrix as a class and does not mean that in each separate tract the surviving children of that respective life tenant take the remainder, nor do testatrix's heirs take as a whole under rules of descent as in cases of intestacy.

Bell v Bell, 223-874; 273 NW 906

Gift to a class. Where testator devised property to his wife and provided that "after the death of my said wife * * * I hereby give * * * said remaining property to my surviving children, but if there be no surviving children then said property shall go to my heirs at law * * *" and where the widow of testator's son, who predeceased the testator's wife, brought partition action and claimed interest in property through testator's son under said provision of testator's will, held, that the remainder "to my surviving children" constituted a gift to a class and did not refer to those children surviving the testator but instead referred only to those children surviving his wife, hence it followed that the son, who outlived the testator but predeceased testator's wife, took no part of the remainder and that upon the son's death intestate no interest therein passed to his widow.

Smith v Harris, 227-127; 287 NW 255

Remainder to class—rule as to vesting. The use of the word "surviving" or an expression akin to it, in a will, to describe a class who are to take after an intervening life estate, refers to the termination of such life estate and not to the death of the testator. Such use indicates the testator intended to postpone the vesting of the gift over to the time when the life estate would end. However, this is not a rule of substantive law but one of interpretation and therefore will never be used to defeat a contrary intention where one appears with reasonable certainty.

Smith v Harris, 227-127; 287 NW 255

Equalizing devises. Will construed and held to devise a remainder to devisees equally, and to require one devisee to take a designated property at a stated price.

In re Bowman, 209-49; 227 NW 510

Remainder—contingent (?) or vested (?). The remainder is contingent in a devise of a life estate to a daughter with the remainder to the "surviving children", if any, of the life tenant at the time of her death; otherwise to certain designated devisees.

Saunders v Wilson, 207-526; 220 NW 344; 60 ALR 786

Vested (?) or contingent (?) remainder—postponement of enjoyment. A will which provides that "At the death of my said wife I devise and bequeath" to a named person "the balance of my estate", creates a remainder which vests absolutely upon the death of the testator.

In re Phearman, 211-1137; 232 NW 826; 82 ALR 674

Remainder to nephew—death after majority by marriage—vested (?) or contingent (?) estate. A will giving a life estate to a sister and the remainder to a nephew receivable immediately upon sister's death if nephew had reached majority, or if he had not attained majority, providing for a guardianship during minority, creates not a contingent but a vested

V CONSTRUCTION OF WILLS—continued
(c) NATURE OF ESTATE OR INTEREST CREATED—continued
4. Remainders—continued

remainder with only the enjoyment postponed, and as such, on the death of the nephew after reaching majority by marriage, goes to his widow rather than as residuary property in the estate.

Boehm v Rohlfs, 224-226; 276 NW 105

Right to possession on expiration of life estate—vested remainder. A person in being who, under a will, would have an immediate right to possession of the lands devised upon the termination of a life tenancy therein provided, has a vested remainder.

Flanagan v Spalti, 225-1231; 282 NW 347

Devise with remainder over—remaindermen eligible. The rule that survivorship refers to the death of the testator is confined to those cases in which there is no other period to which survivorship can be referred, and where a devise is preceded by a life estate or other prior interest it takes effect in favor of only those who survive the period of distribution.

Smith v Harris, 227-127; 287 NW 255

Remainders—absurd results. A testator who has, in one clause of his will, clearly devised a vested remainder will not, by a later clause, be deemed to have devised a contingent remainder only, when such construction would lead to absurd results.

Moore v Dick, 208-693; 225 NW 845

Devise of remainder "at", "upon", or "from" named event. The rule that, when a devise is to a remainderman "at", "upon", or "from" the death of the life tenant, such words ordinarily are employed as indicating the time when the estate is to be enjoyed, and not to the time of the vesting of the estate, cannot have application in the construction of a will which manifestly indicates that such terms are used for the purpose of fixing the time when the estate shall vest.

Scofield v Hadden, 206-597; 220 NW 1

Devise of remainder "at time of death" of life tenant. A will which provides that "at the time of the death" of a life tenant, the property shall pass in fee to the children of the life tenant, but if the life tenant "shall die without issue", the property shall descend to specified devisees, conveys to the children of the life tenant a contingent remainder which will ripen into a vested remainder only in the event they outlive their parent, the life tenant.

Scofield v Hadden, 206-597; 220 NW 1

Life estate—title vests on termination. Will bequeathing income of property to widow for life with remainder equally to (1) his then living brothers and sisters, (2) a woman not related to testator, and (3) a business associate also not related, construed to vest title at widow's death rather than at death of testator so as to entitle unrelated legatees to take entire remainder as against heirs of brothers and sisters all of whom predeceased widow.

Rice v Yockey-Klein, 227-175; 288 NW 63

Devise to son—termination—no contingent remainder. A devise of land to a son for his use until son's youngest child becomes 20 years old, or if such child dies before such age, then until January 1, 1940, is neither uncertain as to time nor persons so as to make the remainder contingent.

Hudnutt v Ins. Co., 224-430; 275 NW 581

Devise to class—equal taking. Where testator devised a trust fund to an incompetent daughter for life, with remainder over to his heirs "having the care and actual keeping" of said daughter, held, that the remainder would be taken by said heirs in equal shares and not in proportion to the number of weeks which each had cared for said daughter,—it appearing that compensation for such care had been paid to said heirs prior to the death of said life tenant.

Slavens v Bailey, 222-1091; 270 NW 367

Remainder over in fee per stirpes to lawful issue. When a will provides for a devise of realty to wife for life, then to three named children for life as tenants in common and remainder over in fee per stirpes to their lawful issue, held, life estate vested in children after wife's death with contingent remainder over in fee, as provided by statute—the life estates being the particular estate supporting the contingent estate which would vest, upon death of each of testator's named children, in that child's lawful issue, if any.

Anderson v Anderson, 227-25; 286 NW 446

Death of joint life tenant without issue—remainder over in fee. In a will where father devised realty to surviving spouse for life, then to three named children for life with remainder over in fee per stirpes to their lawful issue, and one of such children died without lawful issue, after mother's death, remainder over of her share, being a one third of said realty, became intestate property and through the father passed to the two remaining children in fee, subject to payment of taxes and debts against estate of deceased child to the extent of one-third interest in the lapsed estate.

Anderson v Anderson, 227-25; 286 NW 446

Remainder over—absence of issue. In a will where father devised realty to surviving spouse for life, then to three named children for life with remainder over in fee per stirpes to their lawful issue, the fact that there were no grandchildren in being at the time of mother's death did not lapse the remainder so as to cause it to descend intestate and merge with life estate in

children, since, at mother's death, the life estate in children was a "particular estate" supporting the contingent remainder, which was not required to vest until termination of such life estate.

Anderson v Anderson, 227-25; 286 NW 446

Inheritance taker as representative of contingent remaindermen. A decree setting aside the probate of a will and canceling said will (the action being instituted in good faith and so tried by all parties thereto) is, on the principle or doctrine of representation, conclusive on remote, contingent remaindermen, even tho they are not parties to the action or are not served with notice of the action, when those persons are legally before the court who would take the first estate of inheritance under the will; especially is this true when parties of the same class to which the omitted parties belong are also legally before the court.

Harris v Randolph, 213-772; 236 NW 51

Quieting title—virtual representation. All living members of a class, when properly brought into court in an action to quiet title, are deemed (under the doctrine of virtual representation) to represent all after-born persons who would belong to that class.

John Hancock Ins. v Dower, 222-1377; 271 NW 193

Renunciation of devise. The devisee of a cash remainder does not per se renounce said remainder by executing, with other devisees, a writing under which the signers severally contribute to the augmentation of said life devise and explain their action by stating their belief that the life beneficiary (an incompetent) should have said augmented sum "as his own".

Bare v Cole, 220-338; 260 NW 338

(d) LAPSING OF DEVISES AND BEQUESTS

1 In General

Prohibited devise as intestate property. Property devised to one who is prohibited by law from taking becomes intestate property when the will provides no remainderman or provision for reversion.

Karolusson v Paonessa, 207-127; 222 NW 431

Death of legatee. A bequest, even tho in terms directly to an infant legatee, "to be used to further his education, said amount to be placed in a savings account and be allowed to run until he has arrived at the age of 18 years when it shall be used for that purpose," reveals an intention to let the bequest lapse in case the legatee dies before the testator dies.

In re Best, 206-786; 221 NW 369

Nonlapse of devise. A devise to one whom the testator knows to be dead when the will is executed does not lapse on the death of the testator, the will not manifesting a contrary intent.

Friederichs v Friederichs, 205-505; 218 NW 271

Legacy lapsing by death of legatee. A contingent legacy in favor of a daughter is created by a will which, after devising a life estate to testator's wife, devises certain land to a son on condition that "within one year" after the death of the wife the son shall pay his sister a named sum of money. In other words, the legacy to the daughter lapses by her death prior to the death of the mother.

In re Phearman, 211-1137; 232 NW 826; 82 ALR 674

Residuary clause — effect. The naked expression or clause in a will, viz: "the remaining land to" (a named person) may not be sufficient to create a residuary estate within the meaning of the rule that lapsed devises fall into the residuary estate.

Nichols v Swickard, 211-957; 234 NW 846

Offsetting debt against devisee. When a devisee dies in the lifetime of the testator, and is then indebted to the testator, the executor may retain the devise, to apply on the indebtedness.

In re Mikkelsen, 202-842; 211 NW 254

Lapsing of legacy. A condition in a charitable bequest, that if the legatee takes no steps within a named time to augment said bequest the same shall revert to testator's estate, must be deemed a condition precedent and not a condition subsequent. It follows that said bequest lapses upon the expiration of said time if the legatee, with actual knowledge of the bequest, fails to signify any acceptance of the bequest, and fails to take any steps to augment said bequest.

In re Hillis, 215-1015; 247 NW 499

Action to determine ownership. When property fails to pass under a will to nonpecuniary corporations because the devise is in excess of the amount permitted by statute, any person may maintain an action to establish his claimed interest therein.

Karolusson v Paonessa, 207-127; 222 NW 431

Life estate—remainder over—fee per stirpes —absence of issue—nonlapse. In a will where father devised realty to surviving spouse for life, then to three named children for life with remainder over in fee per stirpes to their lawful issue, the fact that there were no grandchildren in being at the time of mother's death did not lapse the remainder so as to cause it to descend intestate and merge with life estate in children, since, at mother's death, the life estate in children was a "particular estate" supporting the contingent remainder,

V CONSTRUCTION OF WILLS—concluded
(d) LAPSING OF DEVISES AND BEQUESTS—concluded
1. In General—concluded

which was not required to vest until termination of such life estate.

Anderson v Anderson, 227-25; 286 NW 446

Acceptance of bequest—court's extension of testator's time limitation—effect of unappealed order. Where testator directed his executors to purchase, for a daughter, good Iowa land of the value of $15,600, such daughter having refused to accept partial distribution of realty to heirs prior to testator's death, but the testator also provided such bequest should lapse if daughter failed to select land within one year from testator's death, and where within one year the daughter filed application for extension of time on the ground that estate did not have funds to purchase such land, which extension was granted after due notice to executors and heirs, held, district court had jurisdiction to grant extension of time and, no appeal having been taken therefrom, the order became "final" and the heirs were bound by the decision.

In re Holdorf, 227-977; 289 NW 756

2 Ademption

Discussion. See 25 ILR 290—Ademption—history

"Ademption" and "satisfaction" distinguished. Where a thing or fund which is the subject of a specific legacy has been extinguished, an "ademption" has occurred, whereas doctrine of "satisfaction" applies when the legacy is general, and depends largely, if not entirely, on the intent of the testator.

In re Keeler, 225-1349; 282 NW 362

Ademption. A testator who, subsequent to the execution of his will, turns over to a devisee property of the same general nature as that devised to the devisee in the will, thereby works an ademption or pro tanto satisfaction of the testamentary devise, provided such was the intention of the testator.

Rodgers v Reinking, 205-1311; 217 NW 441
Heileman v Dakan, 211-344; 233 NW 542

Testator—payment of debt of legatee. A testator who bequeaths his property in equal shares to his children will be presumed to have intended to effect an ademption by voluntarily and on his own motion paying off, subsequent to the execution of his will, a debt owed wholly by one of the legatees; and in a proper proceeding, the amount of such payment may be ordered set off against the share of said legatee.

Russell v Smith, 210-563; 231 NW 468

Ademption—real estate for note and mortgage. A bequest is specific in a will where a note and real estate mortgage securing it were bequeathed to a son of testatrix, and the residuary estate was bequeathed to such son and her grandson; and cancellation by testatrix of the note and mortgage and the taking of title to such real estate in lieu thereof adeems the bequest as respects son's claim that subject matter of bequest still existed but was only changed in form.

In re Keeler, 225-1349; 282 NW 362

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Discussion. See 5 ILB 253—Bequests for masses

Survivorship—absence of presumption. When a testator and his devisee die in a common disaster, there is no presumption at common law either (1) that one died before the other, or (2) that they died simultaneously.

Carpenter v Severin, 201-969; 204 NW 448; 43 ALR 1340

Owner. The term "owner" may be used in a sense other than absolute and unconditional title.

Bare v Cole, 220-338; 260 NW 338

Words "to own"—conveying absolute title. A devise of "one-half of all property I may own at the time of my death" to testator's wife "to own, hold and enjoy as her own", conveys an absolute title to one half of testator's estate.

In re Bigham, 227-1023; 290 NW 11

Rights of devisees—statutes controlling. The rights of devisees are controlled by the statutes which exist at the time the will is probated.

In re Culbertson, 204-473; 215 NW 761

Devise with remainder over—remaindermen eligible. The rule that survivorship refers to the death of the testator is confined to those cases in which there is no other period to which survivorship can be referred, and where a devise is preceded by a life estate or other prior interest it takes effect in favor of only those who survive the period of distribution.

Smith v Harris, 227-127; 287 NW 255

Named legatees surviving testator—legatee dead when will executed—heirs excluded. A will giving the residuary estate "unto those of the following named persons who are living at my death" will not be construed to include the heirs of one of those named persons on the ground that such particular named person was known by the testator to be dead at the time he made the will. This situation is not such a latent ambiguity as will warrant court in disregarding plainly expressed intent of testator to bequeath to named persons surviving testator.

In re Kubbernus, 224-1077; 277 NW 717

When annuity vests. A testamentary life annuity becomes vested on the date when the annuity becomes due.

In re Hekel, 205-521; 218 NW 297

Dower — nonforfeiture by taking foreign homestead. A wife, who is legally disinherited by her husband's will executed in a foreign state where the parties had their domicile, is not deprived of her dower or distributive share in the husband's Iowa real estate because of the fact that in said foreign state the homestead there situated was set off to her by the probate court or her application. In other words, the Iowa statute according to a wife the right to take the homestead in lieu of dower applies solely to an Iowa homestead.

Ehler v Ehler, 214-789; 243 NW 591

Election by spouse—nonestoppel. The heirs of a surviving wife are not estopped to insist that the wife took her dower interest, and did not take under the will, by the fact that, separately and apart from the will, and prior to its execution, the husband had turned over certain funds to a society, under an agreement that the society should pay interest on the funds to him and to the wife during their lifetime, and that the wife received such interest after the death of the husband.

In re Culbertson, 204-473; 215 NW 761

Rights of surviving spouse—homestead or distributive share—election. The distributive share being the primary and more worthy right of the surviving spouse, evidence that the survivor elected to take the homestead right in lieu thereof should be clear and satisfactory.

Prichard v Anderson, 224-1152; 278 NW 348

Probate claim—no bar to subsequent equity action. A prior judgment in a law action tried on the merits is conclusive as to a subsequent action in equity between the same parties and the same facts, but where a widow is bequeathed a life estate in realty with the right to dispose of such realty for her necessary support, a probate adjudication on the merits that her claim for widow's support could not be established against husband's estate, is not such an adjudication as bars a later equity proceeding to establish such support claim as a lien on such realty.

Hoskin v West, 226-612; 284 NW 809

Settlement between devisees. An alleged oral agreement between widow and other devisees, vesting in widow the right to certain personalty, was superseded by a subsequent written agreement between the same parties for partition and settlement of the estate providing that it should not affect the personalty which should remain in the hands of the executrix until final settlement.

In re David, 227-352; 288 NW 418

Right of devisee—estoppel. An heir who, upon the death of his mother, becomes entitled to a fractional part of a promissory note in which the mother and father are joint payees does not estop himself from asserting such right by subsequently taking, under the father's will, a portion of the father's interest in said note.

Hoffman v Hoffman, 205-1194; 219 NW 311

Declarations and admissions of heirs and devisees. Where there are several devisees or legatees whose interests are several and not joint, the declarations of one are not admissible for the reason that they might operate to the prejudice of the others. In general, the admissions of an heir are not admissible to prove a claim against an estate unless he is the only heir interested upon that side of the action.

In re Green, 227-702; 288 NW 881

Devisees and heirs joining in deed. A conveyance of land carries the entire fee when properly joined in (1) by all those who could take under the probated will of the fee owner, and (2) by all those who would take the property under the laws of inheritance in case said property proved to be intestate property.

Bahls v Dean, 222-1291; 270 NW 861

Consideration—benefit to third person. A written agreement between devisees to divide the devised property in such proportions that certain nondevisees will also share in the property is supported by a sufficient consideration in that the agreeing devisees suffer a detriment by relinquishing part of the devise and the nondevisees acquire a benefit.

Clayman v Bibler, 210-497; 231 NW 334

Settlement without administration—agreement of heirs binding. An agreement by heirs to settle estate without administration and providing for payment of legacies is legal and binding, and a widow of one of such heirs in a subsequent partition action cannot complain of denial of legacy to deceased heir where legacies due to other heirs were larger and such heirs received no part of their legacies.

Meeker v Meeker, (NOR); 283 NW 873

Renunciation of devise. The devisee of a cash remainder does not per se renounce said remainder by executing, with other devisees, a writing under which the signers severally contribute to the augmentation of said life devise and explain their action by stating their belief that the life beneficiary (an incompetent) should have said augmented sum "as his own".

Bare v Cole, 220-338; 260 NW 338

Devise and bequest—consideration unnecessary—resulting trust not created. Heirs and devisees are not required to give a consideration for devises and bequests to them; consequently, a resulting trust cannot be impressed on property conveyed to them, on the theory that they are not bona fide purchasers, when

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the property was not subject to the lien before conveyed.

Evans v Cole, 225-756; 281 NW 230

Establishing trust to defeat heir's judgment creditors. When a will devised all of testatrix's property to daughter in trust, directing trustee to make a monthly payment to a third party and to transfer a one-fourth interest in the trust estate to each of two grandchildren when they reached a certain age, and providing that daughter should have a one-half interest in the estate during her life only in the event obligations to her judgment creditors were barred or satisfied, such will established a trust, and did not repose entire beneficial interest in daughter. Nor was the trust extinguished by a merger of daughter's legal and equitable estate so that property could be subjected to satisfaction of creditor's judgments, because in equity the doctrine of merger will not be invoked if it would frustrate the testatrix's expressed intentions or if there is some other reason for keeping the estates separate.

Freier v Longnecker, 227-366; 288 NW 444

Truthful answer to inquiry. The holder of a mortgage on the individual share of an heir does not estop himself from insisting on his mortgage because, upon receiving a subsequent inquiry whether there was any incumbrance on the estate, he truthfully answered in the negative.

Halbert v Halbert, 204-1227; 214 NW 535

Establishing claim against realty—not action to construe will. In an equity action to establish a claim against deceased's real estate for services rendered deceased's widow to whom deceased devised such realty for life, with right to dispose of real estate for her necessary support, held, such action was not a "suit for construction" of will, merely because trial court's opinion mentioned word "construction", but not in such manner as to indicate that trial court held action to be for that purpose. A will which in plain and uncertain terms makes disposition of property is one which needs no construction.

Hoskin v West, 226-612; 284 NW 809

Devisee takes homestead exempt from testator's debts. Homestead may be devised exempt from the debts of the testator contracted subsequent to its acquisition. (See In re Schultz, 192 Iowa 436.)

Long v Northup, 225-132; 279 NW 104; 116 ALR 1475

Payment of claims—specific devises—when resorted to. Specific devises cannot be resorted to for the payment of debts, in the settlement of an estate, until all other property of the estate has been resorted to and exhausted.

In re Glandon, 219-1094; 260 NW 12

Homestead—liability for debts of children. Children who take a homestead under the will of their spouseless parent, take it subject to their own debts created subsequent to the acquisition of the homestead by their parent.

Luglan v Lenning, 214-439; 239 NW 692

Homestead—purchase (?) or descent (?). A homestead cannot be deemed to descend under the laws of descent to the children of a spouseless parent when the parent leaves a will which provides that no child contesting the will shall take anything under the will, altho the will otherwise gives to the children the identical shares which the laws of descent would give.

Luglan v Lenning, 214-439; 239 NW 692

Satisfaction of legacy prior to death of testator. A general legacy provided for in a will is satisfied in toto when the testator, subsequent to the making of the will, pays to the legatee a lesser sum with intent to effect such satisfaction; and such payment and satisfaction may be established by extrinsic evidence.

Rodgers v Reinking, 205-1311; 217 NW 441
Heileman v Dakan, 211-344; 233 NW 542

Advancement (?) or gift (?). The cancellation by a testator, after making his will, of notes held by him against a legatee, and the surrender of said notes to the legatee (after carefully computing the amount due thereon), are not sufficient to overcome the presumption of an advancement, in view of the declaration in the will (1) that testator intended an equal division between his legatees, and (2) that all loans to legatees, as shown by testator's account book (made part of the will) should be deemed part of his estate, and in view of the fact that said account book listed the notes in question as loans, and not as gifts.

In re Francis, 204-1237; 212 NW 306

Contesting will and claiming property as gift. The fact that a daughter contests the probate of her father's will does not estop her from later claiming as a gift a portion of the devised property; nor does the judgment admitting the will to probate constitute an adjudication against her of her claim of gift.

Rapp v Losee, 215-356; 245 NW 317

Advancements—nonapplicability of doctrine. The doctrine of advancements applies only in cases where the decedent dies intestate, unless specifically provided for by language in the will.

In re Manatt, 214-432; 239 NW 524
In re Morgan, 225-746; 281 NW 346

Advancements to part of residuary legatees —deduction—when improper. Without special provision in the will therefor, an executor is in error in paying to himself, as a residuary legatee, $1,000 on the theory that the four other such legatees had each received advance-

ments in that sum and that such payment was equivalent to charging off such advancements against the shares of the other legatees.

In re Morgan, 225-746; 281 NW 346

Rights of legatees—sheriff's certificate passing as personalty. A sheriff's certificate under foreclosure proceedings, in which the period of redemption had not yet expired, was personal property and, upon the death of the certificate holder-owner, passed to the person inheriting the personal property under the will.

In re Jensen, 225-1249; 282 NW 712

Rights of beneficiaries—contingent legacy—effect. Where a will provided that testator's niece should receive $1,000 (1) if the wife survived and did not take under will, or (2) if wife did not survive, and when the widow accepted the provisions of will giving her the personal property and a life estate in real estate, niece took nothing thereunder, since neither contingency arose.

Starr v Newman, 225-901; 281 NW 830

Right to offset debt of devisee. The amount which an insolvent testamentary devisee is owing to a solvent estate may, in partition proceedings, be offset against his interest in the real estate of testator, and such right is superior to the right of a judgment creditor who obtained his judgment against the devisee subsequent to the death of the testator.

Schultz v Locke, 204-1127; 216 NW 617

Substituted legatees—offsetting debts. Unless a will provides otherwise, a legacy to one who predeceases the testator passes to the heirs of the deceased legatee subject to the right of the executor to apply the legacy on the unpaid debt of the deceased legatee to the estate. It follows that if the debt equals or exceeds the legacy the heirs take nothing.

In re Rueschenberg, 213-639; 239 NW 529

Lien for debts of devisee. A mortgage on real estate executed during the settlement of an estate, by the insolvent devisee of the land, is subject to the prior lien of the estate for the debts owing by the devisee to testator and contracted subsequent to the execution of the will.

Bell v Bell, 216-837; 249 NW 137

Refund to pay debts. The heirs of an estate who unconditionally purchase the interest of their mother in the estate have no legal right, thereafter, to compel the mother to contribute any sum toward the discharge of unpaid debts of the estate, unpaid taxes against the estate, or unpaid probate costs and fees.

In re Jones, 217-288; 251 NW 651

Debt-encumbered remainder—equitable action to enforce. Where a testator devises to his wife a life estate in all his property (which estate she accepts), with remainder to his children, a provision of the will to the specific effect that "all just debts and funeral expenses" of said wife shall be paid out of testator's estate, will enable the wife's creditor, who became such subsequent to the probating of the will and the closing of the estate, and shortly prior to the death of the wife some 30 years later, to maintain an action in equity to establish the debt, and to subject the lands, passing under the will and in the hands of remaindermen, to the satisfaction of said debt.

Diagonal Bank v Nichols, 219-342; 258 NW 700

Formal direction to "pay debts"—no priority over other testamentary dispositions. The usual, formal, first paragraph of a will directing the payment of "all my just debts", held, being a mere recitation of an executor's duty, does not alone give priority and subject the property of the estate to all claims allowed irrespective of other provisions directing the disposition of the corpus of the estate.

Long v Northup, 225-132; 279 NW 104; 116 ALR 1475

Bequests payable from "cash assets"—not charge on realty. Bequests payable from "cash assets", in the absence of a statement or implication in the will to the contrary, are payable from personal estate only and are no charge on the realty.

Boehm v Rohlfs, 224-226; 276 NW 105

Interest of remainderman passes to trustee in bankruptcy.

Noonan v Bank, 211-401; 233 NW 487

Accounting by life tenant. A life tenant with testamentary power to encroach upon the principal, with remainder over, may be compelled to make full disclosure to a trustee in bankruptcy of a possible remainderman, of the property reeeived by her under the will (the probate records not revealing such fact), but may not be compelled to account to such trustee as to her use of the property, in the absence of any allegation and proof of waste, fraud, or improper use or disposal.

Nelson v Horsford, 201-918; 208 NW 341; 45 ALR 515

Income—gradual increase in value of corporate assets. A legatee who is unconditionally given for life the income arising from corporate stock is not entitled to receive, as income, any part of the principal of a liquidating dividend arising from the final dissolution of the corporation and sale of its assets, when said liquidating dividend reveals a very material increase in value of the original stock investment due to the gradual increase in value of corporate assets during the life of the corporation. Such liquidating dividend constitutes a part of the corpus of the estate, and passes to the remainderman, subject to the right of the life tenant to receive the income

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thereon—such being the manifest intent of the testator.

In re Etzel, 211-700; 234 NW 210

Allowable failure to collect rents. A widow who is entitled to receive during life from the executor the annual rents accruing on lands belonging to residuary devisees may allow such devisee to occupy the land free of rent, and objections to the executor's final report will not lie because of such action.

In re Murphy, 209-679; 228 NW 658

Rent—incident to land — passes to heirs. General rule is that rents accruing after the owner's death belong to the heirs or devisees, as an incident to the ownership of the land which descends to them.

In re Jensen, 225-1249; 282 NW 712

Withholding distribution. Where certain devisees were holding rents belonging to estate, trial court properly ordered that no distribution be made to them until such rents were turned over to the executrix.

In re David, 227-352; 288 NW 418

Trusts—nontermination by beneficiaries. The beneficiaries of a testamentary trust may not, by mutual agreement, even tho approved and confirmed by the court, terminate the trust and accelerate the final vesting of the corpus of the trust, when the testator has clearly demonstrated a contrary intent.

Windsor v Barnett, 201-1226; 207 NW 362

Trust estate—nonvested interest. Lands which are under testamentary trusteeship for a stated or discretionary time are not subject to partition by the ultimate beneficiary until his interest becomes vested. Trust construed, and held to clearly empower the trustee to continue the trust.

Schaal v Schaal, 203-667; 213 NW 207

Devise in fee in connection with trusteeship —effect. An unqualified devise in fee arms the devisee with power and right to mortgage the premises even tho the testator sees fit to embody in his will a provision for a trustee and to grant power in such trustee to execute mortgages.

First N. Bk. v Torkelson, 209-659; 228 NW 655

Trustee and beneficiary as same person—conveyance to self-quieting title. A sister, as the only heir in her brother's estate, who conveys by a trust instrument to a nonrelated person her entire interest in such estate, in exchange for the trustee providing her life support, and upon fulfillment of which the trustee became the beneficiary and was directed to convey the balance of the property from himself, as a trustee, to himself, individually, evidence, in trustee-beneficiary's quieting title action against settlor's heirs, held to establish soundness of mind and freedom of action by settlor in executing the trust instrument.

Goodman v Bauer, 225-1086; 281 NW 448

Renunciation of trust by one beneficiary—effect.

Windsor v Barnett, 201-1226; 207 NW 362

Renunciation of legacy. The act of a testamentary beneficiary in executing and making of record an unconditional and final renunciation of all benefits granted him under the will legally places such benefits beyond the reach of his creditors.

Funk v Grulke, 204-314; 213 NW 608

Right to renounce devise or bequest. The legal right of a beneficiary under a will to file an unconditional and final renunciation of all benefits granted him by the will, and thereby exclude his creditor from acquiring any right to the devised property, may be exercised even after a creditor of said beneficiary has levied upon, sold, and obtained a sheriff's deed to, the land devised to said beneficiary, it appearing that the renouncing beneficiary had in no manner misled the creditor.

Lehr v Switzer, 213-658; 239 NW 564

Renounced devise as intestate property. Where one of several residuary devisees wholly renounces his interest under the will, the portion so renounced becomes intestate property, and necessarily descends under the statutory rules of descent. In other words, the nonrenouncing residuary devisees do not necessarily take said renounced portion.

Lehr v Switzer, 213-658; 239 NW 564

Renunciation of devise—loss of right. A devisee or legatee who, by unequivocal conduct, has once accepted the devise or bequest, may not thereafter renounce it to the detriment of his creditors. So held where the devisee had mortgaged or pledged the devise as security for his debts.

Bogenrief v Law, 222-1303; 271 NW 229

Renunciation of gift—no control by creditors —not a conveyance. A creditor has no control over a beneficiary's right to refuse or accept a gift, as a renunciation is not equivalent to a conveyance.

McGarry v Mathis, 226-37; 282 NW 786

Beneficiary's right to renounce benefits under will—creditors—no complaint. A beneficiary under a will has the right to renounce all benefits granted him under will and creditors cannot complain of such renunciation; but such rule is limited to cases where no acceptance of provisions of will has been made by beneficiary.

McGarry v Mathis, 226-37; 282 NW 786

Costs—equity court's discretion—renounced devise. In equity, the court has a wide discretion in taxing costs, which will not be interfered with except in case of manifest injustice; so, where a sister renounced benefits under her father's will and conveyed realty to her brother before she took bankruptcy, in action by the bankruptcy trustee to set aside renunciation and the conveyance as fraudulent, the apportionment of one half of costs against trustee and other half against sister and brother was proper.

McGarry v Mathis, 226-37; 282 NW 786

Distribution of estate—erroneous payments—recovery. Funds paid to legatees under an interlocutory but erroneous order for distribution may be recovered from the legatees to whom paid.

Dillinger v Steele, 207-20; 222 NW 564

Recovery of unpaid legacy — bringing in parties. In an action by a testamentary legatee against an executor to recover an unpaid legacy, the executor, who has already distributed the estate and wishes to bring a third party into the action for recoupment purposes, must, at least, allege that said third party has received some portion of the estate in question.

Irwin v Bank, 218-961; 256 NW 681

Settlement of estate—estoppel. A residuary legatee who causes the executor to obtain a new mortgage as security for an indebtedness due the estate, and thereupon to cancel a preexisting mortgage which secured the same debt, is necessarily precluded from holding the executor personally liable in case the new mortgage proves inadequate as a security.

Wilson v Norris, 204-867; 216 NW 46

Objections—compromise and settlement—conclusiveness. A residuary devisee may not object to an accounting by an executor on a ground theretofore fully compromised and settled by such devisee.

In re Murphy, 209-679; 228 NW 658

Irretrievably abandoned contract. An irretrievably abandoned contract necessarily cannot be specifically enforced. So held where the heirs of an estate sought specific performance of an alleged contract by the donee of a deceased donor to reconvey the gift to the donor's estate and to take the share of a general heir, and where it developed that said heirs had, regardless of said alleged contract, fully settled the estate among themselves to the exclusion of the said donee.

McGaffin v Helmts, 210-108; 230 NW 532

Delay in closing estate. Devisees could not complain of delay in closing estate where no loss resulted and delay was due in part to their own failure to pay inheritance taxes and their share of administration costs and rental moneys due the estate, and where they took no action to require executrix to close the estate altho their attorney, who was also a devisee, was aware of the facts.

In re David, 227-352; 288 NW 418

Sale and conveyance—compromise of litigation. The statutory provision (§12587, C., '24) that the real property of a minor may be mortgaged or sold "when not in violation of the terms of a will by which the minor holds" it, has no application to a compromise by the guardian in a will contest, under which compromise the minor receives incumbered real property in lieu of unincumbered real property devised by the will.

Kreamer v Wendel, 204-20; 214 NW 712

Assignment of expectancy—effect. An assignment by a debtor to his creditor of the debtor's expectancy in an estate, as collateral security to the debt, with a proviso that, if the debtor does not pay within a stated time, the assignment shall operate as a "full receipt" against said expectancy, simply extends to the creditor an option to so treat the proviso. The creditor may ignore the proviso and maintain an action on his claim.

Smoley v Smoley, 203-685; 213 NW 229

Assignment of share—construction. A written assignment by an heir "of all interest of every kind and nature" in the estate works a complete conveyance of the heir's interest in the real estate of the estate, as against a subsequently rendered judgment against the assignor. (See Funk v Grulke, 204-314.)

Berg v Shade, 203-1352; 214 NW 513

Assignment of testamentary interest—ratification by certain creditors—no general assignment. An assignment of the interest of beneficiary of a testamentary trust for the benefit of certain creditors, ratified by the creditors benefited, is not a general assignment and need not be for the benefit of all creditors.

Friedmeyer v Lynch, 226-251; 284 NW 160

Assignments for benefit of creditors—requisites. Where the interest of a beneficiary of a testamentary trust is assigned for the benefit of creditors, such assignment need not be recorded to be valid against existing creditors without notice.

Friedmeyer v Lynch, 226-251; 284 NW 160

Father promising son's creditor not to change son's legacy—property transfers—other legatees. Simply because a testator contracts with a bank not to change his will bequeathing $10,000 to a son who was indebted to the bank, and when the father did not contract to pay the son's debt, there is no "unjust enrichment" of devisees and legatees who accept property willed to them, altho father during his lifetime had depleted his estate by

VI RIGHTS AND LIABILITIES OF LEGATEES AND DEVISEES—continued

property transfers and conveyances to his other children.

Evans v Cole, 225-756; 281 NW 230

Agreement not to probate. Beneficiaries under a will may validly agree, and have their agreement confirmed by an order of court, that the will shall not be probated, and that the property shall be shared on a basis different than that provided by the rejected instrument —no question as to the right of trust beneficiaries or of estate creditors being involved.

In re Murphy, 217-1291; 252 NW 523

Contract not to change son's legacy—creditor-bank estopped as to other legacies. Where a son is indebted to a bank, and his father contracts with the bank to make no change in his will respecting a $10,000 bequest to the son, and bank seeks liability against all of father's property, there is no estoppel against the other heirs claiming the son's indebtedness be deducted from any bequest payable to him.

Evans v Cole, 225-756; 281 NW 230

Father-son partnership—probate of father's estate—son's partnership rights. A son's rights as a partner in a partnership with his father and mother, which partnership was continued with mother after father's death, were not adjudicated by the probate of his father's will and mother's discharge as executrix, since son was not a party to such proceeding as a partner, and since the probate court administered only the property owned by the father at the time of his death.

Eggleston v Eggleston, 225-920; 281 NW 844

Exemption to educational institution—essential proof. Where a will provides that the residue of the estate shall pass to an educational institution of this state as a part of its endowment fund, exemption from taxation on lands will not be granted except on the production in evidence of the probate records, showing judicially (1) that the estate has been fully settled, and (2) that the lands in question constitute part of the residue of said estate, and, as a consequence, belong, legally or equitably, to said institution.

Wapello Bank v Keokuk Co., 209-1127; 229 NW 721

Indefinitely named charitable beneficary. A testamentary devise in trust to "some old ladies' home" in a named locality necessarily implies a substantial institution devoted to said purposes, and manifestly the court will not be compelled to bestow such bounty only on one of those who apply for such bounty.

In re Clifton, 207-71; 218 NW 926

Indefinite description of devise—devisee's right to select. A devise by a testator of "160 acres" of land, without other designation or description, by a testator who was seized of some 2,000 acres, may impliedly authorize the devisee to make a selection of the land. Held, certain acts of the devisee constituted such selection.

Nichols v Swickard, 211-957; 234 NW 846

Equitable conversion—right to reconvert—consent of spouse. The right of a legatee to make and enforce an election to take real estate in lieu of a devise of the proceeds thereof does not depend in any degree on the consent of the spouse of such legatee.

In re Warner, 209-948; 229 NW 241

Equitable conversion — nonapplicability of doctrine. An assignment by an heir of all his interest in the "personal property" of an estate carries to the assignee the assignor's interest in funds derived from the sale of real estate for the purpose of paying debts and remaining in the hands of the administrator as an unused balance. The doctrine of equitable conversion has no application to such a state of facts.

In re Wilson, 218-368; 255 NW 489

Treating realty as personalty—sale required. Land acquired by an executor through foreclosure on a note and mortgage coming into his hands as part of the estate, will be treated as personalty for the purpose of making a final division of the estate; and the court is in error in refusing to order a sale for said purpose—especially when all existing testamentary beneficiaries so request.

Langfitt v Langfitt, 223-702; 273 NW 93; 110 ALR 1390

"Worthier title" rule nonapplicable. In probate proceedings, before the "worthier title" rule can be applied where property is left to testator's heirs by will in the same manner and proportion in which they would have taken were there no will, it must definitely appear that there is exact identity in every way, and where testator definitely directs that real estate be converted into personalty and then divided equally among his children, each beneficiary receiving all personalty and no real estate, held, a beneficiary of such estate did not take her interest by "worthier title" so as to preclude executor from exercising the right of retainer against the beneficiary's interest which is assigned as security for a note for purchase of real estate by beneficiary—it being immaterial whether beneficiary is solvent or insolvent.

In re Sheeler, 226-650; 284 NW 799

"Worthier title" rule.

In re Davis, 204-1231; 213 NW 395
In re Warren, 211-940; 234 NW 835

Mutual wills in nature of contract—survivor and third-party rights fixed. In joint or mutual wills for benefit of survivor or third parties, there is an element of contract, and if there be no revocation before death of one of testators, the rights of the survivor or third

parties are thereby fixed and determined according to terms of the mutual will.

Child v Smith, 225-1205; 282 NW 316

Partition (?) or sale and division under will (?). One of several devisees in common of real property (the estate being fully settled) may maintain partition, even tho the will specifically authorizes the executor to sell the property and divide the proceeds.

Ruggles v Powers, 201-284; 207 NW 116

Stock dividend issued on previously earned surplus—conflicting claims. A legacy of "one thousand dollars par value of the capital stock" of a named corporation (being a part of the stock holding of the estate) entitles the legatee to a stock dividend declared and issued by the corporation subsequent to the death of testator on surplus earnings accumulated by the corporation prior to the death of testator; also to an ordinary cash dividend declared on the stock subsequent to testator's death and subsequent to the formal transfer of said stock to the legatee.

In re Etzel, 211-700; 234 NW 210

Father-son partnership—no claim in father's estate—no estoppel. Estoppel would not prevent a son from maintaining an action against his mother for an accounting and dissolution of a partnership which was established between son and father and mother and upon father's death was continued with mother, theory being that estoppel arose on account of son's acquiescence in mother's taking possession of and disposing of certain partnership assets as executrix and sole beneficiary of her husband's estate under his will. Son, having no claim against estate of his father, and not knowing of mother's claim that she was sole partner with her husband, could not be estopped thereby.

Eggleston v Eggleston, 225-920; 281 NW 844

11847 Presumption attending devise to spouse.

Election between will and dower. See under §12007

Presumption negatived. No election by a surviving spouse between the will and the dower right is required when the will shows on its face that its provisions for the surviving spouse were not intended to be in lieu of dower rights. So held where the will devised to the wife the sum of one dollar.

Fay v Smiley, 201-1290; 207 NW 369

Widow as devisee—nonallowance. Since widow of decedent was a devisee under his will, an order allowing her exempt property of decedent under §11918, C., '39, was improper in view of this §11847, C., '39, providing that a devise to a spouse is presumed to be in lieu of exemptions unless contrary intention is clearly and explicitly shown.

In re David, 227-352; 288 NW 418

Lapse of devise to spouse. A devise by a husband to his wife is deemed to lapse upon his death when the devise is identical in quality and quantity with what the wife would have taken under the statute, had there been no will; but not so of a devise which gives the wife one-third of his entire estate (1) after converting all real estate, including homestead, into personalty and (2) after paying all debts.

In re Davis, 204-1231; 213 NW 395
See In re Warren, 211-940; 234 NW 835

Total failure of surviving spouse to elect—effect. A surviving wife who is willed by her deceased husband all his property, real and personal, after the payment of all his debts, including the expense of his last sickness and burial, and who dies some three days later without doing anything affirmatively indicating her acceptance of the terms of said will, must be held to have taken her distributive one-third share only.

Hahn v Dunn, 211-678; 234 NW 247; 82 ALR 1503

Renunciation by daughter as beneficiary—effect on rights in intestate property. Where a father's will left property in equal shares to a son and daughter, subject to a life estate in their mother, and where the daughter renounced all benefits under the will, as heir she took undivided one half of one-half portion of estate that became intestate property as result of renunciation, subject to life estate.

McGarry v Mathis, 226-37; 282 NW 786

11848 Limitation on disposal by will.

Law governing. The right of a surviving spouse to take under the will of the deceased spouse, or to take a distributive one-third share, is governed by the statutes existing at the time of the death of the testate spouse; likewise, the right of a corporation to take under a will.

Ross v Seminary, 204-648; 215 NW 710

Restriction on corporations. A statute which limits the power of corporations which are organized under the laws of this state to take a testamentary devise will not be extended by the courts to include foreign corporations.

Ross v Seminary, 204-648; 215 NW 710

Devise or bequest to corporation—limitation. A bequest to trustees for the perpetual maintenance of testator's burial lot is not violative of the statute limiting devises and bequests to a nonpecuniary corporation tho the lot in question is located in a cemetery owned by such a corporation.

Hipp v Hibbs, 215-253; 245 NW 247

Prohibited devise as intestate property. Property devised to one who is prohibited by law from taking becomes intestate property

when the will provides no remainderman or provision for reversion.

Karolusson v Paonessa, 207-127; 222 NW 431

Who may question. No one can question the validity of a devise to a nonpecuniary corporation in excess of one-fourth of testator's property except testator's surviving spouse, child, child of a deceased child, or parent.

Karolusson v Paonessa, 207-127; 222 NW 431

Action to determine ownership. When property fails to pass under a will to nonpecuniary corporations because the devise is in excess of the amount permitted by statute, any person may maintain an action to establish his claimed interest therein.

Karolusson v Paonessa, 207-127; 222 NW 431

11849 After-acquired property.

Discussion. See 23 ILR 380—After-acquired property

11850 Verbal wills.

Gift—causa mortis—essential elements. A gift causa mortis is a gift of personal property, intentionally made, even orally, by the mentally competent owner of said property, in expectation of his or her imminent death from an impending disorder or peril (tho not necessarily so imminent as to exclude the opportunity to execute a will), and made and delivered by the donor to the donee on the essential condition that, if the gift be not in the meantime revoked, the property shall belong to the donee in case the donor dies, as anticipated, of the disorder or peril, leaving said donee surviving.

Flint v Varney, 220-1241; 264 NW 277

11852 Formal execution.

ANALYSIS

I VALIDITY AND SUFFICIENCY IN GENERAL

Findings of court. The supported findings of the court relative to the facts attending the formal execution of a will have the same force and effect as the verdict of a jury.

In re Droge, 216-331; 249 NW 209

Waiver of right to dispute. A contestant may not question the admissibility or sufficiency of testimony tending to show the due execution of a will when he proffers no issue as to such execution.

In re Mott, 200-948; 205 NW 770

Revival and reinstatement of revoked will. Even tho a second will unquestionably revokes a first will, nevertheless said first will is revived and reinstated by the due and formal testamentary execution of a later instrument wherein testator declares that "my will and wish as expressed in my will and testament under date of January 29, 1914" (the first will) "is the only will and testament I have ever knowingly and willingly made, and I wish it to be so considered after my death," said last instrument being, in itself, a will.

In re Cameron, 215-63; 241 NW 458

Evidence — sufficiency. Evidence reviewed and held not to establish per se the legal execution of a will.

In re Wood, 213-254; 237 NW 237

What adjudicated—nonestoppel to construe will after final report. Probate of a will being conclusive only as to its due execution and publication, a petition to construe a will is not a collateral attack on the order of probate; and such petition may be filed after the executor's final report, before which the petitioners were not aware of the construction which the executor would place on the will and therefore no estoppel arises from permitting executor to proceed with administration of the estate.

Maloney v Rose, 224-1071; 277 NW 572

Requested instructions — will contestants bound by own theory. Contestants alleging that a will was not duly and legally executed may not amplify their claim thereunder after requesting instructions proceeding solely on the theory that their construction of their claim was that the signatures of the testator and one witness, now deceased, were not genuine. In such case it is not error, when otherwise unobjected to, for the court on its own motion to add an instruction which in effect limits the case to the theory propounded in contestants' requested instructions.

In re Iwers, 225-389; 280 NW 579

Professional memorandum by deceased—incompetent when stating no fact. Brief notations on a slip of paper, identified by a deceased attorney's stenographer as made by him at the time a testator conferred with him about the drawing of the will, are incompetent as evidence when the notes do not state any fact. However, their admission in evidence is harmless when the witness had previously testified without objection to the whole of the conversation.

In re Iwers, 225-389; 280 NW 579

Harmless error—instructing on immaterial, nonprejudicial evidence. A will contestant's contention that it was error to instruct re-

garding a nonmaterial exhibit—a memorandum by a deceased attorney, who drew the will—altho well founded, held to be error without prejudice when the paper and the conversation connected therewith were not necessary for proponents to make a prima facie case of the due and legal execution of the will and the genuineness of the signatures.

In re Iwers, 225-389; 280 NW 579

II FORM AND CONTENTS OF INSTRUMENT

(a) WILL DISTINGUISHED FROM OTHER DISPOSITIONS OF PROPERTY

Deed—requisites and validity—delivery—evidence—sufficiency. On the issue of delivery of a deed, the recitals in the will of the grantor that he was then deeding the property to said grantee, and other oral statements of the purported grantor to the same effect, may have material and influential bearing.

Arndt v Lapel, 214-594; 243 NW 605

Deed (?) or will (?). A warranty deed subject to a life estate in grantor's surviving spouse will not be deemed testamentary because of a clause wherein grantor ineffectually attempted to restrain the alienation of the land by the grantee.

Goodman v Andrews, 203-979; 213 NW 605

Deed (?) or will (?). An executed and delivered deed of conveyance in the ordinary form conveys an interest in praesenti—is not testamentary—even tho it provides (1) that "it shall not take effect until after the death" of the grantor, and (2) that the grantor does not "give up possession" to the grantee during the life of the grantor, and (3) that the grantor "reserves the use and income of the premises as long as he lives".

Hall v Hall, 206-1; 218 NW 35

Deed (?) or will (?). An instrument which passes the title to real estate in praesenti, tho the right to its possession and enjoyment is deferred to a future time, is a deed of conveyance and not a testamentary instrument.

Bardsley v Spencer, 215-616; 244 NW 275

Trust — construction — nontestamentary instrument. A declaration of trust in and over real estate for the benefit of the trustor and named beneficiaries, and a contemporaneously executed and delivered warranty deed to the same property to the trustee, cannot be deemed a will, even tho the trustor-grantor reserves in the declaration of trust complete control, management, and dominion over the property during his lifetime, even to the power to revoke the trust and to demand a reconveyance, or to dispose of the property by testament.

Keck v McKinstry, 206-1121; 221 NW 851

(b) JOINT WILLS

Discussion. See 4 ILB 189—Right to revoke mutual wills

Joint and mutual wills. Will construed, and held to be an individual will.

Mann v Seibert, 209-76; 227 NW 614

Mutual wills defined. Mutual wills are those executed pursuant to an agreement between two or more persons to dispose of their property in a particular manner, each in consideration of the other. Such wills, if they contain no provisions for third persons, constitute a single will, and is the will of the first to die, and have no further existence as the will of the survivor.

Maurer v Johansson, 223-1102; 274 NW 99
Maloney v Rose, 224-1071; 277 NW 572

Separate or same instrument—revocation. Principle reaffirmed that mutual wills may be in the same or separate instruments, and either party, while both are living, may validly revoke the will by giving notice of the revocation to the other party.

Maurer v Johansson, 223-1102; 274 NW 99

Mutual wills ipso facto establish prior contract—other evidence unnecessary. Where wills of husband and wife, each acting with knowledge of other, are drawn at substantially same time, at their joint request, and each contains reciprocal provisions, such wills and circumstances are sufficient to establish prior contract to make mutual wills, even when the wills contain no memorandum of the agreement.

Maurer v Johansson, 223-1102; 274 NW 99
Child v Smith, 225-1205; 282 NW 316

III SIGNATURE OR SUBSCRIPTION BY OR FOR TESTATOR

Discussion. See 14 ILR 323—Location of signature

Signing by "mark". A mentally competent testator may validly sign his will by "his mark".

In re Burcham, 211-1395; 235 NW 764

Place of signature immaterial. A testator signs his will if he places his signature at any place thereon with the intention of authenticating the writing as his last will and testament. Will held properly signed.

In re Johnson, 209-757; 229 NW 261

Fatal defect. A written instrument purporting to be a last will and testament is not admissible to probate when it appears that the purported testator, (1) did not sign the instrument in the presence of the subscribing witnesses, and (2) did not in any manner adopt or confirm said signature in the presence of said witnesses.

In re McElderry, 217-268; 251 NW 610

III SIGNATURE OR SUBSCRIPTION BY OR FOR TESTATOR—concluded

Handwriting expert — striking evidence — jury admonition—curing error. If evidence, erroneously admitted during the progress of a trial, is distinctly withdrawn by the court, the error is cured, except where it is manifest that the prejudicial effect on the jury remained despite its exclusion. Testimony by a handwriting expert, who referred to notes, which were merely the basis or reason for his opinion as to the genuineness of signatures to a will, held not within the exception.

In re Iwers, 225-389; 280 NW 579

IV ATTESTATION AND SUBSCRIPTION BY WITNESSES

Attestation by witnesses. An attestation of a will by competent witnesses with the full knowledge and approval of the testator is all-sufficient.

In re Burcham, 211-1395; 235 NW 764

Execution—sufficiency. Proof that a will was signed by the testatrix in the presence of one of the subscribing witnesses who thereupon, in her presence, signed as a witness, and that the other witness signed as a witness in the presence of both the testatrix and the first witness under circumstances clearly justifying the implication that testatrix was acknowledging her signature and requesting the second witness so to sign, establishes the due execution of the will.

In re Droge, 216-331; 249 NW 209

Witnessing—fatal defect. A will is not "witnessed by two competent persons" when one of the two persons signing as witnesses has no personal knowledge that the instrument was signed by testator.

In re Pike, 221-1102; 267 NW 680

Sufficiency of request to sign. A will, to be valid, must be witnessed at the request of testator; however, the request need not be spoken but may be by acquiescence, by act or motion, or even by his silence when he knows that the witnesses are signing, tho at the request of another, and he makes no objections, but the question of due execution should be left to the jury when it develops from testimony that one witness signed at the request of a beneficiary and that testator may not have, in any manner, requested the witnesses to sign.

Burgan v Kinnick, 225-804; 281 NW 734

Witnesses signing in testator's presence—quaere. Whether attesting witnesses must sign will in testator's presence, quaere.

Burgan v Kinnick, 225-804; 281 NW 734

11853 Defect cured by codicil.

Will and codicil as one instrument. A testatrix who, in her original will devises:

1. Separate specific bequests to named nephews and nieces, and

2. The remainder of her estate to nine named nephews and nieces,

And later, by codicil, not only names four additional nephews and nieces as residuary legatees, but declares "it being my intention to divide my estate among all my nephews and nieces", must be deemed to have intended that nephews and nieces not named in the will or codicil should share in the residuary estate along with those named in the will or codicil as residuary legatees.

Reasons: A will and a codicil constitute but one instrument. Every clause in a will must be given a meaning. No construction is necessary as to a clause which is perfectly clear in expression and meaning.

In re Thomas, 220-50; 261 NW 622

Dependent relative revocation—codicil with invalid provision. Where a conflict exists between a second codicil and the will and first codicil, the second codicil prevails, but under the doctrine of dependent relative revocation, if the later codicil contains an invalid provision, such provision does not revoke the provisions with which it conflicts in the earlier will and codicil. Where a will and two codicils left property to a county for use in building roads, even if a provision in the second codicil was invalid in improperly delegating county powers to the executor, the doctrine prevented a complete revocation of the previous documents, but they were revoked only to give effect to the second codicil, as there was no change in the purpose of the will, but only a change in the manner of effectuating the gift.

Blackford v Anderson, 226-1138; 286 NW 735

Absolute bequest—later repugnant provision disregarded. Where a codicil made an absolute bequest of a residuary estate to a county to be used in paving a highway, and a later provision in the codicil gave certain directions to the executor and imposed conditions for acceptance of the bequest by the county, such later conditions were repugnant and would defeat the purpose of the testator and must be disregarded when void in delegating power to the executor in violation of statute, and the intention of the testator as expressed in the first provision must be given effect to prevent intestacy.

Blackford v Anderson, 226-1138; 286 NW 735

Codicil creating charitable trust. A first codicil devising an estate to trustees to be administered under county supervision in building roads, and a second codicil appointing one executor to aid the county in building roads, created a lawful charitable trust with the county as trustee and taxpayers as beneficiaries which was not necessarily invalid because the executor was given administrative duties in the road construction in violation of statute.

Blackford v Anderson, 226-1138; 286 NW 735

Equivocal expressions of revocation. A will and first codicil were not revoked by a second codicil providing that it should prevail in case of conflict between it and the two previous instruments, and the three instruments stood as the final testamentary disposition of the testator with the second codicil displacing the others only insofar as it was clearly inconsistent with them, altho the second codicil was referred to as a "last will and testament" and declared the previous will and codicil to be revoked, as the revocation of a will depends on intent to be gathered from all the papers and attending circumstances and cannot be overridden by equivocal expressions of revocation.

Blackford v Anderson, 226-1138; 286 NW 735

Bequest for paving roads. In an action by a taxpayer to obtain an injunction restraining a county from accepting a bequest to be used for paving roads, the injunction was refused where a will and two codicils provided for the bequest, as when all papers were construed together a valid gift to the county was found to have been created which the county had the authority to accept.

Anderson v Board, 226-1177; 286 NW 735

Revocation of codicil by tearing. A codicil to a will is completely revoked when the testator, with the intent to revoke it, directs the custodian thereof to destroy it, and when said custodian, in the absence of testator, complies with said direction by tearing said codicil into many pieces, of which act the testator had knowledge before her death; and this is true tho the custodian preserves said pieces and later physically reconstructs said instrument by pasting the same on another piece of paper.

In re Nish, 220-45; 261 NW 521; 100 ALR 1516

11855 Revocation—cancellation.

ANALYSIS

I REVOCATION BY SUBSEQUENT WILL OR CODICIL
II REVOCATION BY OPERATION OF LAW
III DESTRUCTION, CANCELLATION, OBLITERATION, OR ALTERATION

Birth of child after execution of will. See under §11858, Vol I

I REVOCATION BY SUBSEQUENT WILL OR CODICIL

Cancellation by subsequent, lost will—evidence required. A prior will is not shown to be revoked by evidence which tends to prove the execution of a subsequent will containing a clause revoking the prior will, but which is, otherwise, wholly indefinite as to the contents of such subsequent will and as to the witnesses thereto, and as to its whereabouts.

In re Rutledge, 210-1256; 232 NW 674

Revival and reinstatement of revoked will. Even tho a second will unquestionably revokes a first will, nevertheless said first will is revived and reinstated by the due and formal testamentary execution of a later instrument wherein testator declares that "my will and wish as expressed in my will and testament under date of January 29, 1914" (the first will) "is the only will and testament I have ever knowingly and willingly made, and I wish it to be so considered after my death," said last instrument being, in itself, a will.

In re Cameron, 215-63; 241 NW 458

Equivocal expressions of revocation. A will and first codicil were not revoked by a second codicil providing that it should prevail in case of conflict between it and the two previous instruments, and the three instruments stood as the final testamentary disposition of the testator with the second codicil displacing the others only insofar as it was clearly inconsistent with them, altho the second codicil was referred to as a "last will and testament" and declared the previous will and codicil to be revoked, as the revocation of a will depends on intent to be gathered from all the papers and attending circumstances and cannot be overridden by equivocal expressions of revocation.

Blackford v Anderson, 226-1138; 286 NW 735

Dependent relative revocation—codicil with invalid provision. Where a conflict exists between a second codicil and the will and first codicil, the second codicil prevails, but under the doctrine of dependent relative revocation, if the later codicil contains an invalid provision, such provision does not revoke the provisions with which it conflicts in the earlier will and codicil. Where a will and two codicils left property to a county for use in building roads, even if a provision in the second codicil was invalid in improperly delegating county powers to the executor, the doctrine prevented a complete revocation of the previous documents, but they were revoked only to give effect to the second codicil, as there was no change in the purpose of the will, but only a change in the manner of effectuating the gift.

Blackford v Anderson, 226-1138; 286 NW 735

Codicil creating charitable trust. A first codicil devising an estate to trustees to be administered under county supervision in building roads, and a second codicil appointing one executor to aid the county in building roads, created a lawful charitable trust with the county as trustee and taxpayers as beneficiaries which was not necessarily invalid because the executor was given administrative duties in the road construction in violation of statute.

Blackford v Anderson, 226-1138; 286 NW 735

Mutual will of surviving spouse—failure to revoke—anti-lapse statute. Inasmuch as mu-

tual wills constitute in law but one will, the will of the first to die, and the will of the survivor, being a nullity, has no existence such as to require revocation by the surviving spouse under this section, nor as to permit the heirs of the surviving spouse to inherit under §11861, C., '35.

Maurer v Johansson, 223-1102; 274 NW 99

II REVOCATION BY OPERATION OF LAW

Mutual wills ipso facto establish prior contract—other evidence unnecessary. Where wills of husband and wife, each acting with knowledge of other, are drawn at substantially same time, at their joint request, and each contains reciprocal provisions, such wills and circumstances are sufficient to establish prior contract to make mutual wills, even when the wills contain no memorandum of the agreement.

Child v Smith, 225-1205; 282 NW 316

Mutual wills defined. Mutual wills are those executed pursuant to an agreement between two or more persons to dispose of their property in a particular manner, each in consideration of the other. Such wills, if they contain no provisions for third persons, constitute a single will, and is the will of the first to die, and have no further existence as the will of the survivor.

Maurer v Johansson, 223-1102; 274 NW 99
Maloney v Rose, 224-1071; 277 NW 572

Mutual—separate or same instrument—revocation. Principle reaffirmed that mutual wills may be in the same or separate instruments, and either party, while both are living, may validly revoke the will by giving notice of the revocation to the other party.

Maurer v Johansson, 223-1102; 274 NW 99

III DESTRUCTION, CANCELLATION, OBLITERATION, OR ALTERATION

Discussion. See 8 ILB 52—Later will destroyed —first will revived

Revocation of codicil by tearing—reconstructing pieces—effect. A codicil to a will is completely revoked when the testator, with the intent to revoke it, directs the custodian thereof to destroy it, and when said custodian, in the absence of testator, complies with said direction by tearing said codicil into many pieces, of which act the testator had knowledge before her death; and this is true tho the custodian preserves said pieces and later physically reconstructs said instrument by pasting the same on another piece of paper.

In re Nish, 220-45; 261 NW 521; 100 ALR 1516

Lost will—required proof. In proceedings to establish a lost will, the proponent must prove (1) the due execution and existence of the instrument; (2) that it has been lost and could not be found through diligent search; (3) that the presumption of its destruction by the testator with intention to revoke it, arising from its absence on his death, has been rebutted, and (4) the contents or provisions of the will.

Goodale v Murray, 227-843; 289 NW 450

Lost will—presumption of revocation rebutted. In the establishment of a lost will, there is a presumption that a will which was in the custody of the testator at his death, and which cannot be found, was destroyed by him with the intention of revoking it. The presumption may be rebutted or strengthened by proof of declarations of the testator, his circumstances, or his relations to the persons involved.

Goodale v Murray, 227-843; 289 NW 450

11857 Executors.

Supplanting resident appointee. A duly appointed foreign executor, even tho nominated as such in the will, has no arbitrary right to supplant an executor appointed in this state, where part of the estate is situated.

In re Gray, 201-876; 208 NW 358

Appointment of nominated executor required unless disqualified. Altho a certain discretion lies with the probate court in the appointment of personal representatives, nevertheless an executor named in a will as the one in testator's judgment best fitted to administer his estate should be appointed by the court in the absence of disqualification, which must be more than the objections of collateral relatives.

In re Schneider, 224-598; 277 NW 567

Codicil giving executor highway construction powers. Where a conflict exists between a second codicil and the will and first codicil, the second codicil prevails, but under the doctrine of dependent relative revocation, if the later codicil contains an invalid provision, such provision does not revoke the provisions with which it conflicts in the earlier will and codicil. Where a will and two codicils left property to a county for use in building roads, even if a provision in the second codicil was invalid in improperly delegating county powers to the executor, the doctrine prevented a complete revocation of the previous documents, but they were revoked only to give effect to the second codicil, as there was no change in the purpose of the will, but only a change in the manner of effectuating the gift.

Blackford v Anderson, 226-1138; 286 NW 735

11858 After-born children.

Discussion. See 3 ILB 128—Rights of unborn infants

11859 Claims in disregard of will.

Specific devise — liability for debts. A specific devise of real estate which not only de-

vises the property, but requires the testator's estate to discharge the mortgage thereon, cannot, in case the estate and all nonspecific devises are insufficient to pay said mortgage and other debts, be construed as casting upon another specific devise of real estate which is not made subject to the former devise, the entire burden of discharging said mortgage and other debts. Each of said specific devises must bear said burden in the ratio of their separate value to their combined value.

In re Glandon, 219-1094; 260 NW 12

11860 Devise—legacy—bequest.

Designation of devisee. The fact that the name of the beneficiary of a religious or charitable trust as specified in the will is different than the name of the claimant of the devise becomes unimportant, in the face of ample testimony that the designated beneficiary and the claimant are one and the same institution.

Ross v Seminary, 204-648; 215 NW 710

Equal standing of specific devises. Neither of two different, specific devises of real estate, irrespective of their particular location or position in the will, can be deemed junior or inferior to the other when neither is made subject to the other.

In re Glandon, 219-1094; 260 NW 12

11861 Heirs of devisee.

Discussion. See 19 ILR 1—Anti-lapse problems

"Death without heirs." Will construed and, in view of the environment of the testator and of the facts concededly known to him, held (1) that a provision to the effect that, if the beneficiary of a trust "dies without leaving any heirs," the remainder shall go to some old ladies' home, embraced a death either before or after the death of testator; and (2) that the term "heirs" must be construed as though followed by the words "of his body."

In re Clifton, 207-71; 218 NW 926

Death in common disaster. The heirs of a devisee cannot be deemed to be substituted for the devisee when it appears that both the testator and devisee perished in a common disaster and there is no evidence that the devisee died before the testator died.

Carpenter v Severin, 201-969; 204 NW 448; 43 ALR 1340

Lapse of devise to spouse. A devise by a husband to his wife is deemed to lapse upon his death when the devise is identical in quality and quantity with what the wife would have taken under the statute, had there been no will; but not so of a devise which gives the wife one third of his entire estate (1) after converting all real estate, including homestead, into personalty and (2) after paying all debts.

In re Davis, 204-1231; 213 NW 395

Devise and bequest identical with statute of descent. A will is a nullity which devises and bequeaths to a devisee and legatee the same quantity and quality of real and personal property which the devisee and legatee would take under the law of descent. So held where a spouseless and childless son devised all his property to his sole surviving parent.

In re Warren, 211-940; 234 NW 835

Prior death of devisee. A devise to a devisee who dies prior to the testator passes to the heirs of the deceased devisee, in the absence of a contrary intent, as expressed in the will.

Rodgers v Reinking, 205-1311; 217 NW 441

Devisee predeceasing testator—rights of devisee's heirs. Where testator devised to his wife one-half of all the property he should own at time of his death, "to own, hold and enjoy as her own", and when the wife predeceased him, her heirs inherited one half of all the property of the testator in fee simple, under the anti-lapse statute.

In re Bigham, 227-1023; 290 NW 11

Nonlapse of devise. A devise to one whom the testator knows to be dead when the will is executed does not lapse on the death of the testator, the will not manifesting a contrary intent.

Friederichs v Friederichs, 205-505; 218 NW 271

Intended lapse. A bequest, even tho in terms directly to an infant legatee, "to be used to further his education, said amount to be placed in a savings account and be allowed to run until he has arrived at the age of 18 years when it shall be used for that purpose", reveals an intention to let the bequest lapse in case the legatee dies before the testator dies.

In re Best, 206-786; 221 NW 369

Substituted legatees — offsetting debts. Unless a will provides otherwise, a legacy to one who predeceases the testator passes to the heirs of the deceased legatee subject to the right of the executor to apply the legacy on the unpaid debt of the deceased legatee to the estate. It follows that if the debt equals or exceeds the legacy the heirs take nothing.

In re Mikkelsen, 202-842; 211 NW 254
In re Rueschenberg, 213-639; 239 NW 529

Collateral heirs — burden of proof. Collateral heirs, belonging as they do under the law of inheritance to a deferred class, must, in order to inherit, affirmatively negative by the greater weight of evidence, the existence, at the time the inheritance was cast, of any other heir belonging to a more favored class. Held that collateral heirs had failed to negative the independent existence of twins after they had

been taken, by a Caesarean operation, from the womb of a dead mother.

Wehrman v Farmers Bank, 221-249; 259 NW 564; 266 NW 290

Devise to class and individuals thereof. A devise to a class of persons lapses as to all devisees who die prior to the testator; but when the devise is to a class and the persons in that class are individually named, the devise is presumptively a devise to each individual, and the death of a devisee prior to the death of testator does not cause that devise to lapse; and a proviso that the devise shall be held jointly does not overthrow said presumption.

In re Carter, 203-603; 213 NW 392

Devise to class individually named. A devise to a class, the members of which are individually named, is presumptively a separate devise to each separate individual.

Friederichs v Friederichs, 205-505; 218 NW 271

Devise to class—predeceased children—intention from antenuptial contract. A testator's intention when ascertainable is controlling and the general rule which limits a devise to a class to only such devisees as are alive at testator's death, is not applicable where a contrary intent appears. So held in construing a will dividing the residue "among my children" where an antenuptial contract mentioned in the will, altho an extrinsic matter, was admitted to show testator's intention to include the heirs of his predeceased children among his children.

In re Huston, 224-420; 275 NW 149

Mutual will of surviving spouse—failure to revoke—anti-lapse statute. Inasmuch as mutual wills constitute in law but one will, the will of the first to die, and the will of the survivor, being a nullity, has no existence such as to require revocation by the surviving spouse under §11855, C., '35, nor as to permit the heirs of the surviving spouse to inherit under §11861, C., '35.

Maurer v Johansson, 223-1102; 274 NW 99

Settlement without administration—agreement of heirs binding. An agreement by heirs to settle estate without administration and providing for payment of legacies is legal and binding, and a widow of one of such heirs in a subsequent partition action cannot complain of denial of legacy to deceased heir where legacies due to other heirs were larger and such heirs received no part of their legacies.

Meeker v Meeker, (NOR); 283 NW 873

11862 Custodian—filing—penalty.

Lost will—evidence—sufficiency. Evidence to establish a lost will and the contents thereof must be very clear and satisfactory.

In re Delaney, 207-448; 223 NW 484

Petition to probate unnecessary. A person having the custody of a will must file it with the clerk, and a petition to probate the will is no part of our probate practice.

In re Young, 224-419; 275 NW 558

11863 Probate.

ANALYSIS

I PROBATE IN GENERAL
II NECESSITY OF PROBATE
III PLEADINGS, EVIDENCE, AND TRIAL

I PROBATE IN GENERAL

Remand with order to dismiss. A holding on appeal that an instrument is not admissible to probate as a last will and testament necessitates a remand to the trial court with direction to dismiss the petition for probate.

In re McElderry, 217-268; 251 NW 610

Lost will. An action to establish a lost will must be brought in the probate court.

Coulter v Petersen, 218-512; 255 NW 684

Lost will—required evidence. Evidence sufficient to probate a lost will must clearly and satisfactorily establish (1) the due execution, and (2) the contents, of such will; and such rule is not relaxed by the fact that such will was last seen in the possession of the testator's wife. Evidence held insufficient.

Miller v Miller, 203-888; 210 NW 537
In re Delaney, 207-448; 223 NW 484

Cancellation by subsequent, lost will—clear and convincing evidence required. A prior will is not shown to be revoked by evidence which tends to prove the execution of a subsequent will containing a clause revoking the prior will, but which is otherwise wholly indefinite as to the contents of such subsequent will and as to the witnesses thereto and as to its whereabouts.

In re Rutledge, 210-1256; 232 NW 674

Mutual wills—probating one nullifies second—evidence—no jury question. Where mutual wills have been executed and one previously admitted to probate, the remaining will being a nullity, an order denying it to probate is proper, and indefinite evidence of testator's statements offered in an attempt to create validity was speculative, properly stricken, and raised no jury question.

Maurer v Johansson, 223-1102; 274 NW 99

Approval of executor's report not construction of will. The fact that the court had approved an executor's report, wherein he had attempted to relieve an estate of inheritance tax on the ground that all devises in the will were contingent, does not mean that such holding is a construction of the will, since the construction of the will was not in issue.

Flanagan v Spalti, 225-1231; 282 NW 347

II NECESSITY OF PROBATE

Agreement not to probate. Beneficiaries under a will may validly agree, and have their agreement confirmed by an order of court, that the will shall not be probated, and that the property shall be shared on a basis different than that provided by the rejected instrument —no question as to the right of trust beneficiaries or of estate creditors being involved.

In re Murphy, 217-1291; 252 NW 523

III PLEADINGS, EVIDENCE, AND TRIAL

Petition to probate unnecessary. A person having the custody of a will must file it with the clerk, and a petition to probate the will is no part of our probate practice.

In re Young, 224-419; 275 NW 558

Lost will. Evidence sufficient to probate a lost will must clearly and satisfactorily establish (1) the due execution, and (2) the contents, of such will; and such rule is not relaxed by the fact that such will was last seen in the possession of the testator's wife.

Miller v Miller, 203-888; 210 NW 537
In re Delaney, 207-448; 223 NW 484

Lost will—required proof. In proceedings to establish a lost will, the proponent must prove (1) the due execution and existence of the instrument; (2) that it has been lost and could not be found through diligent search; (3) that the presumption of its destruction by the testator with intention to revoke it, arising from its absence on his death, has been rebutted, and (4) the contents or provisions of the will.

Goodale v Murray, 227-843; 289 NW 450

Establishment of lost will. Proceedings to establish a lost will are within the jurisdiction of the court to act without a jury, as first the court must determine whether the proof is sufficient to establish the terms of the lost instrument, and, if the court finds it to be properly proved and established, then the matter stands as do all wills when offered for probate, and, if contested, may be tried to a jury.

Goodale v Murray, 227-843; 289 NW 450

Hostile petitions—refusal to consolidate. Possibly the hearing on different petitions for the probate of hostile wills might be consolidated and the validity of said wills tried out in one action, yet an order which refuses such consolidation is not erroneous when the rights of all parties are fully protected by the order.

In re Fitzgerald, 219-988; 259 NW 455

Undue influence—insufficient proof. Principle reaffirmed that opportunity and disposition to exercise undue influence, plus persuasion and importunity as to the disposition of testator's property, are not sufficient, in and of themselves, to establish undue influence. Record reviewed and held wholly insufficient to support the submission of the issue.

In re Muhr, 218-867; 256 NW 305

Directed verdict—when required. When the real issue is as to testator's mental competency, the court should sustain the will, by a directed verdict, when a contrary jury verdict would be without adequate evidentiary support, or, in other words, when contestant has failed to show that testator was so mentally deficient that he did not comprehend the nature and purpose of the instrument, the extent of his property, the distribution he wanted to make, or those who had claim on his bounty. (Directed verdict held proper.)

In re Fitzgerald, 219-988; 259 NW 455

Grounds—verdict contrary to evidence. Where proponents of a will move for a new trial, setting up five specific grounds, one being that the verdict is contrary to the evidence, as to which ground the record shows a conflict in the testimony, an order granting a new trial will not be disturbed on appeal.

In re Younggren, 225-348; 280 NW 556

11864 Contest—jury trial.

ANALYSIS

I CONTESTS IN GENERAL
II COSTS

I CONTESTS IN GENERAL

Burden of proof—testamentary capacity—how determined. In a will contest, after proponent's formal proofs, the burden of showing lack of mental capacity of the testatrix is on contestant. Mere deterioration in physical or mental powers does not destroy testamentary capacity until the mental decline reaches such stage that the person is unable to intelligently comprehend the estate of which he is possessed and the natural objects of his bounty and to intelligently exercise judgment and discretion in the disposition of his property.

In re Behrend, 227-1099; 290 NW 78

Lack of testamentary capacity—evidence sufficiency—jury question. On appeal from directed verdict against contestant in a will contest where the evidence shows, by testimony of physician who attended testatrix over a period of years, that testatrix was a woman prematurely old at 66, suffering from toxic goiter and other ailments which prevented proper nutrition of her organs and kept her body poisoned, that such ailments were of progressive nature resulting in rapid increase of her apparent age and accelerated physical and mental decline and that in his opinion testatrix's mentality was impaired to such extent at time of execution of will she was of unsound mind, held, that evidence of lack of testamentary capacity was sufficient to support a ver-

I CONTESTS IN GENERAL—continued

dict for contestant, if jury so found, and refusal to submit case to the jury was erroneous.

In re Behrend, 227-1099; 290 NW 78

Administration in general — irregular and improper. The fact that, in a will contest, verdict has been returned and judgment entered thereon to the effect that the alleged will in question is not a valid will, does not, in and of itself, legally justify the court in terminating an existing special administratorship and in appointing a general administrator. Said latter appointment would probably be void.

In re Whitehouse, 223-91; 272 NW 110

Establishment of lost will. Proceedings to establish a lost will are within the jurisdiction of the court to act without a jury, as first the court must determine whether the proof is sufficient to establish the terms of the lost instrument, and, if the court finds it to be properly proved and established, then the matter stands as do all wills when offered for probate, and, if contested, may be tried to a jury.

Goodale v Murray, 227-843; 289 NW 450

False representations. A representation to the effect that if a will is contested the property of the estate must be divided equally among the heirs, interwoven inter alia with the statement that the testator "had no business (right)" to will all the property to a particular heir, and a false statement as to the expense attending such contest, constitute a legal fraud if made for the purpose of inducing action, and if justifiably believed and justifiably relied on by the party to whom made to his detriment.

Smith v Smith, 206-606; 219 NW 512

Contract of settlement—fraud and undue influence. In action to set aside contract for settlement of will contest, representations that "lawyers would get all the property" and that devisee "did not need a lawyer" were not fraudulent representations, and failure of court to submit issue of undue influence and constructive fraud was not error under the evidence.

Smith v Smith, (NOR); 230 NW 401

Copying censorious and inflammatory pleading. A censorious and somewhat inflammatory pleading of grounds of contest of a will should, if the context presents support for such action, be so paraphrased in the instructions as to present the simple issues of (1) want of testamentary capacity and (2) undue influence. To copy the entire pleading into the instructions constitutes reversible error.

In re Thompson, 211-935; 234 NW 841

Submission of withdrawn issue. The submission to the jury in a will contest of the issue of testamentary capacity, when said issue had been wholly withdrawn by the contestant (even tho in the presence of the jury), is necessarily erroneous and prejudicial.

In re Narber, 211-713; 234 NW 185

Unallowable contestant — assignee of expectancy. An assignee—even for value—of the interest which an heir expects to inherit in the property of his parent, may not contest the will of the parent in case the assignor-heir be disinherited by the last will and testament of the parent.

Burk v Morain, 223-399; 272 NW 441; 112 ALR 79

Judgment creditor of devisee-heir. When a father's will left property to a son and heir in trust so that it could not be subjected to the son's debts, a judgment creditor of the son was an interested person who had a beneficial and pecuniary interest in the estate of the deceased and in the son's share therein, of which he would be deprived to his prejudice if the will were probated.

In re Duffy, 228- ; 292 NW 165

Judgment creditor of heir. The creditor of an heir who holds a judgment against him which would be a lien upon any real estate which he would inherit from an ancestor has an interest which entitles him to contest the ancestor's will.

In re Duffy, 228- ; 292 NW 165

Judgment creditor of heir. Judgments held against a son and heir of the decedent and recorded where real estate owned by the decedent was located became liens upon the real estate at the time the title thereto vested in the son, and were a beneficial interest entitling the creditor to contest the probate of a will which would deprive him of that interest.

In re Duffy, 228- ; 292 NW 165

Mutual wills—probating one nullifies second —evidence—no jury question. Where mutual wills have been executed and one previously admitted to probate, the remaining will being a nullity, an order denying it to probate is proper, and indefinite evidence of testator's statements offered in an attempt to create validity was speculative, properly stricken, and raised no jury question.

Maurer v Johansson, 223-1102; 274 NW 99

Nonconfusing instruction. Instructions reviewed in a will contest and held not subject to the vice of being inconsistent or confusing.

In re Wood, 213-254; 237 NW 237

Harmless error—instructing on immaterial, nonprejudicial evidence. A will contestant's contention that it was error to instruct regarding a nonmaterial exhibit—a memorandum by a deceased attorney, who drew the will—although well founded, held to be error without prejudice when the paper and the conversation connected therewith were not necessary for proponents to make a prima facie case of the

due and legal execution of the will and the genuineness of the signatures.

In re Iwers, 225-389; 280 NW 579

Will contest—immaterial and prejudicial matter. In a will contest, evidence that the wife of a witness gave birth to a child materially earlier than the ordinary period of gestation is quite improper and immaterial.

In re Thompson, 211-935; 234 NW 841

Newly discovered evidence—inviting perjury—improper offer of money or property. A new trial must be granted when, after a verdict adverse to proponent in a will contest, the fact is promptly discovered and shown to the court that the contestant, during said first trial, and on condition that he win the contest, had made, to divers of the witnesses testifying at the trial, offers of a substantial part of the estate as an inducement for said witnesses to testify in behalf of contestant; and this is true even tho it be conceded that said contestant in making said offers was not intending thereby actually to bribe said witnesses to commit perjury.

In re Whitehouse, 223-91; 272 NW 110

Instituting noninconsistent action. The commencement by the proponents of a will of an action in partition after the return of a verdict holding the will invalid is not a waiver of the right to appeal from the adverse verdict denying probate of the will, when the petition in partition definitely asserted the intent and right to appeal, and assumed to make the outcome of the partition proceedings dependent on the outcome of said appeal.

In re Narber, 211-713; 234 NW 185

II COSTS

Taxation — unsuccessful will contestant. Costs accruing in an unsuccessful contest of a will should be taxed to the contestant.

Schroeder v Cable, 211-1107; 235 NW 63

11865 Notice of hearing.

Sufficiency. The probate clerk, under his discretionary statutory powers, may order less than ten days notice of the probate of a will, and may also vary the ordinary statutory method of giving the notice.

In re McKinstry, 204-487; 215 NW 497

11866 Proof—depositions.

Lost will—proof necessary to establish. To establish a lost will, the evidence must be clear, satisfactory and convincing, but need not be free from doubt.

Goodale v Murray, 227-843; 289 NW 450

Lost will—required proof. In proceedings to establish a lost will, the proponent must prove (1) the due execution and existence of the instrument; (2) that it has been lost and could not be found through diligent search; (3) that the presumption of its destruction by the testator with intention to revoke it, arising from its absence on his death, has been rebutted, and (4) the contents or provisions of the will.

Goodale v Murray, 227-843; 289 NW 450

Proof of state of mind. Decedent's statements, made to the person who drew a will for him, that he wished to make a will and that he wished a certain person to have all his property, were admissible after his death as an exception to the hearsay rule to prove his existing state of mind at the time and to show that his plan was put into effect by making such a will.

Goodale v Murray, 227-843; 289 NW 450

State of mind. When a person who had talked with the decedent shortly before decedent's death testified that the decedent told him that he had made a will, where it was made, and who were witnesses to the will, the testimony, when not objected to, could be given its full probative effect, and came under an exception to the hearsay rule to show the then state of mind of the decedent, tending to prove the prior execution of the will.

Goodale v Murray, 227-843; 289 NW 450

Court findings upheld. In proceedings to establish a lost will, the loss of the will and the search for it were proved by evidence that the will could not be found altho the home of the deceased and other places where the will might have been kept were thoroughly searched. The conclusion of the trial judge on the sufficiency of such evidence will not be disturbed unless discretion is abused.

Goodale v Murray, 227-843; 289 NW 450

Lost will—presumption of revocation rebutted. In the establishment of a lost will, there is a presumption that a will which was in the custody of the testator at his death, and which cannot be found, was destroyed by him with the intention of revoking it. The presumption may be rebutted or strengthened by proof of declarations of the testator, his circumstances, or his relations to the persons involved.

Goodale v Murray, 227-843; 289 NW 450

Lost will—contents shown by subscribing witness. The contents of a lost will were sufficiently established by testimony of a subscribing witness who heard the testator tell the scrivener how he wanted to dispose of his property, and heard the will read aloud to the testator who signed it without suggesting any change in the contents, when the testimony met all the requirements justifying an exception to the hearsay rule.

Goodale v Murray, 227-843; 289 NW 450

Proof of testamentary intentions. Testimony by a witness to a will that the will was read

aloud in the presence of himself and the testator, and that the testator signed it and did not object to the contents, was proper to show that the instrument was executed with the belief that it disposed of the testator's property in accordance with his intentions.

Goodale v Murray, 227-843; 289 NW 450

11876 Trustees to give bond.

Trusts generally. See under §10049

Discussion. See 21 ILR 651—Relation of resulting trusts to partial intestacy

Atty. Gen. Opinion. See '30 AG Op 225

Successive bonds. Principle reaffirmed that successive, unreleased bonds of the same administrator for the same estate remain in force.

Varga v Guar. Co., 215-499; 245 NW 765

Bonds—necessary conditions. It seems that the official bonds of executors, administrators, court-appointed trustees, and similar officers are necessarily conditioned as the bonds of public officers are conditioned. (§1059, C., '31.)

Whisler v Estes, 216-491; 249 NW 264

Powers of trustee. Principle reaffirmed that the power of a trustee to dispose of trust property is limited to the powers granted in the trust agreement.

In re Barnett, 217-187; 251 NW 59

Trustees — powers — execution of notes. Power in a testamentary trustee to invest and reinvest the subject matter of the trust and generally to do substantially whatever the testator might do, were he alive, necessarily embraces the power to purchase lands and to execute promissory notes therefor.

Arnette v Watson, 203-552; 213 NW 270

Devise in fee in connection with trusteeship —effect. An unqualified devise in fee arms the devisee with power and right to mortgage the premises even tho the testator sees fit to embody in his will a provision for a trustee and to grant power in such trustee to execute mortgages.

First Bank v Torkelson, 209-659; 228 NW 655

No failure of trust for want of trustee. A trust estate will not fail for want of a trustee. So held where the bank, named as trustee in a will, failed.

First Methodist Church v Hull, 225-306; 280 NW 531

Death of trustee—revesting of title. Upon the death of a trustee, the title to the trust property vests in the beneficiary of the trust.

Copple v Morrison, 221-183; 264 NW 113

Trusts — property held by administrator. Where trust property in the possession of an administrator is identifiable and not affected by rights of innocent third parties, equity may impress a trust therein.

Carpenter v Lothringer, 224-439; 275 NW 98

Testamentary trustee's conduct. The intentions of a testator must be ascertained from the terms of the will and such intentions must prevail. In a matter of doubtful construction, circumstances surrounding the execution of the will may be shown to aid in determining what the testator meant by the language used. The conduct of a testamentary trustee is not such a circumstance and is therefore not a material, evidential matter in determining testator's intention.

Freier v Longnecker, 227-366; 288 NW 444

Validity. A testamentary trust will be sustained when the intent of testator is evident, even tho the bequest runs to an unincorporated entity.

Meeker v Lawrence, 203-409; 212 NW 688

Trustee by contract—jurisdiction of court. A trustee who is such by contract between himself and the beneficiaries, but who applies to the district court for formal appointment, who is so appointed, who qualifies as such trustee under order of court, and who, in compliance with a prayer therefor, is authorized to take possession of, and manage the property in question under "orders of court", is subject to the jurisdiction of the court in the matter of reports, the rejection thereof, and final accounting.

In re Skinner, 215-1021; 247 NW 484

Establishing trust to defeat heir's judgment creditors. When a will devised all of testatrix's property to daughter in trust, directing trustee to make a monthly payment to a third party and to transfer a one-fourth interest in the trust estate to each of two grandchildren when they reached a certain age, and providing that daughter should have a one-half interest in the estate during her life only in the event obligations to her judgment creditors were barred or satisfied, such will established a trust, and did not repose entire beneficial interest in daughter. Nor was the trust extinguished by a merger of daughter's legal and equitable estate so that property could be subjected to satisfaction of creditor's judgments, because in equity the doctrine of merger will not be invoked if it would frustrate the testatrix's expressed intentions or if there is some other reason for keeping the estates separate.

Freier v Longnecker, 227-366; 288 NW 444

Findings of fact in probate—conclusiveness. A supported finding of fact by trustees that the beneficiary of a testamentary bequest had fulfilled the conditions imposed on the payment of said bequest is conclusive on the appellate court.

In re Sams, 219-374; 258 NW 682

Execution of trust. The discretion of a trustee in carrying out the purposes of the trust is always subject to review by the court.

In re Cool, 210-30; 230 NW 353

Conditional bequest—fulfillment—discretion of trustees. A testamentary bequest payable on condition that the beneficiary shall "abstain from all those things that lead him into a dissipated life and make him an undesirable citizen" and that at a named age he shall be "a reasonable good citizen" must be construed as vesting the trustees with a fair and good-faith discretion in determining whether the conditions have been complied with. Evidence held not to show an abuse of such discretion.

In re Sams, 219-374; 258 NW 682

Conditional bequest—fulfillment—discretion of trustees. A testamentary bequest payable on condition that the beneficiary "go on and complete his education through the high school and four years of college course", coupled with a provision that the "substantial" fulfillment of such condition is left to the "fair judgment and opinion" of the trustees, must be construed as authorizing the trustees, in good faith, to find a fulfillment on the basis of an acquired education other than that acquired under a regular and established high school and college curriculum, but, in their fair judgment, equal thereto.

In re Sams, 219-374; 258 NW 682

Execution of trust — trustees (?) or receiver (?). A court of equity may not terminate or violate a trust agreement between the issuer of bonds and trustees to the effect that the former will transfer to the latter securities for the benefit of bondholders, and that if the issuer defaults in the payment of interest on, or principal of, the bonds, the trustees, on notice from the unpaid bondholders, shall liquidate said securities and apply the proceeds to the payment of the bonds. It follows that, if the issuer of the bonds becomes insolvent, the trustees, in the absence of any counterwish of the bondholders, have a right, superior to that of the receiver, to liquidate the securities, the securities being less than the outstanding bonds; and this is true even tho the securities in question are not actually transferred to the trustees but only delivered to them.

In re Trusteeship, 214-884; 241 NW 308

Action against joint parties. Two or more persons acting jointly in a fiduciary capacity in relation to the same property for the same beneficiary, are properly made joint defendants in an action to enforce the trust.

Burger v Krall, 211-1160; 235 NW 318

Reports—burden of proof. A trustee has the burden to justify his own reports.

In re Bartholomew, 207-109; 222 NW 356

Reports—disapproval. A trustee who, in his acceptance of a nontestamentary trust, agrees to report annually to the district court, and does so report, and who invokes the jurisdiction of the probate court to pass upon his reports, may not thereafter question the power and right of such court to act upon such reports.

In re Bartholomew, 207-109; 222 NW 356

Preservation of property by administrator. In proceeding to recover from surety on administrator's bond, principle held applicable that a trustee is presumed to have preserved the property and that such presumption stands until overcome by evidence. Fact that such proceeding is at law does not preclude application of equitable principles.

In re Willenbrock, 228- ; 290 NW 503

Loss of trust funds. Where the issue whether a trustee should be credited with a loss of trust funds was heard by the probate court without a jury (as a continuation of the probate proceedings out of which the trust arose), the holding of the court, granting such credit, will be sustained if the evidence pro and con would have presented a jury question had the hearing been before a jury.

In re Moylan, 219-624; 258 NW 766

Credit for overpayment of income. On final accounting, a trustee will be credited with an overpayment to the beneficiary of income even tho such payment was made in advance of the actual receipt of the income.

In re Siberts, 216-336; 249 NW 196

Receipt of funds. Where a party was guardian of minors and also trustee for said minors (bond in each case having been given), his written receipt showing the receipt of funds as guardian is not necessarily conclusive on the issue whether he received said funds as trustee.

In re Baldwin, 217-279; 251 NW 696

Self-enrichment of trustee. A testamentary trustee of a coal mining company who, personally or in connection with employees of the company, with their own funds, buys up lands or mining rights in lands, and leases to the company the right to mine coal from said lands under a royalty, will not be compelled, long afterward, to account to the legatees and devisees for the royalties so received and for salary drawn during said time, (1) when the trustee had been vested under the will with substantially the same power over the business as the deceased possessed when living, (2) when the policy of operating on leases was but a continuance of the life-long policy of the deceased, (3) when the royalties paid were the royalties ordinarily and customarily paid in said locality, and (4) when the existence and history of said transactions were carried openly on the books of the company, and were

either personally known or capable of being easily known by all the legatees and devisees.

In re Evans, 212-1; 232 NW 72

Investments without authorizing order — subsequent confirmation. Assuming, arguendo, that an authorizing order of court is absolutely necessary in order to render legal an investment of trust funds, yet a trustee, who, without such order, has made an investment in good faith, and without loss to the estate, may, subsequently, on a full showing of the controlling facts, and at a time when the estate has suffered no loss, be granted a valid order confirming said investment. (But see §12772, C., '31.)

In re Lawson, 215-752; 244 NW 739; 88 ALR 316

Adjudication of liability. An unappealed order of court adjudicating the amount of the liability of a trustee to the beneficiary is conclusive on the trustee and ipso facto on his surety.

Dodds v Cartwright, 209-835; 226 NW 918

Fraud of trustee. It is of no concern to a surety on the bond of a trustee whether the beneficiary affirms or disaffirms the fraudulent conduct of the trustee.

Dodds v Cartwright, 209-835; 226 NW 918

Liability on trustee's bond. A court-appointed trustee of cemetery funds and the sureties on his bond are liable for said funds deposited, without authority of court, in a bank of which both the trustee and the sureties were officers, and lost because of the insolvency of said bank.

Belmond Assn. v Luick, 217-805; 253 NW 521

Voluntarily augmented funds. A court-appointed, testamentary trustee and the surety on his official, statutory bond are liable not only for the money which comes into his hands as specifically required by the will, but for additional amounts of the testamentary funds which come into the hands of the trustee, as such, consequent on the generous action of the devisees, generally, in voluntarily augmenting said trust funds from the testamentary funds.

Whisler v Estes, 216-491; 249 NW 264

Commingling funds. Where trust funds are deposited in the individual account of the trustee, the cestui que trust has the right to elect to sue the trustee for the conversion, or he may pursue the trust funds and establish a preference thereto if they can be traced.

In re Riordan, 216-1138; 248 NW 21

Trustee borrowing from himself—accounting in cash (?) or in investments (?). A trustee, duly appointed by the court to execute a contract trusteeship, who loans the trust funds to himself, and uses the same in the purchase and improvement of various properties, without any authorizing order of court and without the knowledge or consent of the beneficiaries of the trust, will, on final report, be ordered to account in cash for said funds, and not in the physical properties bought by him, especially when said properties are inferior to the standard of investments required by said contract.

In re Skinner, 215-1021; 247 NW 484

Trustee buying property from himself. The act of a trustee in transferring his individually owned bonds and mortgages to himself as trustee and charging the trust funds with the amount thereof is wholly void even when authorized by an order of court. A fortiori is this true when the order was not obtained in good faith.

In re Riordan, 216-1138; 248 NW 21

Nonpermissible purchase by trustee. A trustee of property may not sell trust property to himself, nor to a co-trustee, nor to his or her spouse, without the consent of all beneficiaries of the trust, nor may the court authorize or approve such a sale without the consent of said beneficiaries.

In re Holley, 211-77; 232 NW 807

Negligence—evidence. Evidence held to support a finding that a trustee had failed to exercise a fair and sound discretion in investing trust funds.

In re Bartholomew, 207-109; 222 NW 356

Unauthorized investments. Trust funds invested by a trustee in questionable or worthless securities without an authorizing order of court must, on settlement, be accounted for in cash, such securities not being "securities approved" as provided by section 12772, C., '31.

Whisler v Estes, 216-491; 249 NW 264

Unauthorized investment—advice of counsel. An illegal and unauthorized investment by a trustee will not, on an accounting, be treated as legal and authorized on a showing that the investment was made on the advice of an attorney.

In re Skinner, 215-1021; 247 NW 484

Unallowable investments. The court may charge a court-appointed trustee with the amount of an investment purchased by the trustee from himself at a profit and without an authorizing order of court.

In re Siberts, 216-336; 249 NW 196

Right to impeach action of trustee. The act of a trustee in individually buying in property at tax sale and in receiving a tax sale certificate when a mortgage on the property constituted part of the trust fund is unimpeachable except by the cestui que trust; in other words, the subsequent purchaser of said property at foreclosure sale may not impeach such act, especially when such purchaser had

both actual and constructive knowledge when he purchased that the taxes had not been paid.

Eyres v Koehler, 212-1290; 237 NW 351

Redemption from tax sale. The act of a testamentary trustee in individually buying in property at tax sale and receiving a tax sale certificate when a mortgage on the property constituted a part of the trust funds cannot be deemed a redemption of the property from the taxes for the benefit of a subsequent purchaser of the property at mortgage foreclosure sale.

Eyres v Koehler, 212-1290; 237 NW 351

Improper allowance of attorney fees. A trust created by a legislative appropriation act, solely for the "education, care, and keep" of a designated person, may not be depleted by the allowance by the court of attorney fees for services rendered, not in the administration of the trust, but in inducing the legislature to make the appropriation.

In re Gage, 208-603; 226 NW 64

Receivership for insolvent trustee creates vacancy — power to fill. A judicial finding that a banking institution is insolvent and the appointment of a receiver to liquidate its affairs, ipso facto, (1) transfers, to the custody of the law, trust property held by said insolvent as a duly appointed testamentary trustee, (2) deprives said insolvent trustee of power further to act in said trusteeship, and (3) necessarily creates a vacancy in the office of said trust,—which vacancy the probate court has legal power to fill by appointing a successor in trust, (1) on the sworn application therefor supplemented by the professional statement of counsel, (2) at an ex parte hearing and without notice to interested parties, and (3) without any formal proceedings whatever for the termination of said former trusteeship; and especially is this true when said former trustee, formally and by its conduct, abandons its said trusteeship and all right and interest therein.

In re Strasser, 220-194; 262 NW 137; 102 ALR 117

In re Carson, 221-367; 265 NW 648

Trustee — disqualification — effect. Equity will not permit a trust to fail simply because a particular trustee is disqualified from acting.

State v Cas. Co., 206-988; 221 NW 585

Trustees — control and removal by court. Trustees are subject to control or removal by the court.

In re Sexauer's Trust, (NOR); 287 NW 247

Termination or removal of trustee by court. Evidence sustained trial court's refusal to terminate a spendthrift trust, or discharge trustees, upon application of beneficiary who alleged mismanagement and lack of cooperation on part of trustees, and also that beneficiary was not a spendthrift and that trust was not accomplishing purpose intended.

In re Sexauer's Trust, (NOR); 287 NW 247

11878 Foreign wills—procedure.

Jurisdiction to appoint nonresident administrator. The clerk of the district court has ample power to appoint a nonresident as administrator.

Finnerty v Shade, 210-1338; 228 NW 886

11882 Probate conclusive—setting aside.

ANALYSIS

I EFFECT OF PROBATE
II SETTING ASIDE PROBATE BY APPELLATE OR ORIGINAL PROCEEDINGS

Setting aside probate, limitation of action. See under §11007 (XIX)

I EFFECT OF PROBATE

Discussion. See 16 ILR 195—Decree determining heirs, distribution

Findings by probate court—conclusiveness. Findings of fact by a probate court are conclusive on the appellate court when they are fairly supported by competent testimony.

In re Fish, 220-1247; 264 NW 123

What adjudicated—nonestoppel to construe will after final report. Probate of a will being conclusive only as to its due execution and publication, a petition to construe a will is not a collateral attack on the order of probate; and such petition may be filed after the executor's final report, before which the petitioners were not aware of the construction which the executor would place on the will and therefore no estoppel arises from permitting executor to proceed with administration of the estate.

Maloney v Rose, 224-1071; 277 NW 572

Father-son partnership—probate of father's estate—son's partnership rights not adjudicated. A son's rights as a partner in a partnership with his father and mother, which partnership was continued with mother after father's death, were not adjudicated by the probate of his father's will and mother's discharge as executrix, since son was not a party to such proceeding as a partner, and since the probate court administered only the property owned by the father at the time of his death.

Eggleston v Eggleston, 225-920; 281 NW 844

II SETTING ASIDE PROBATE BY APPELLATE OR ORIGINAL PROCEEDINGS

Inheritance taker as representative of contingent remainderman. A decree setting aside the probate of a will and canceling said will (the action being instituted in good faith and so tried by all parties thereto) is, on the prin-

II SETTING ASIDE PROBATE BY APPELLATE OR ORIGINAL PROCEEDINGS—concluded

ciple or doctrine of representation, conclusive on remote, contingent remaindermen, even tho they are not parties to the action or are not served with notice of the action, when those persons are legally before the court who would take the first estate of inheritance under the will; especially is this true when parties of the same class to which the omitted parties belong are also legally before the court.

Harris v Randolph, 213-772; 236 NW 51

Statute of limitation — creditor's suit. Record involving an equitable proceeding to discover property belonging to a judgment defendant, and to subject said discovered property to the satisfaction of said judgment, reviewed, and held not barred by §§10378, 11007, C., '35, nor by this section.

Bankers Tr. v Garver, 222-196; 268 NW 568

Management in general — employment of counsel—extraordinary expense. An executor is under duty to defend a will after it is duly probated, and may employ counsel at the expense of the estate to contest an action to set aside the probate and to contest the will, even tho he has already employed counsel to advise him in his ordinary duties, and even tho he is personally interested in sustaining the will; and the court should, irrespective of the amount which the executor has agreed to pay, make a reasonable allowance to the executor for such expense when it is extraordinary.

In re Jewe, 201-1154; 208 NW 723

Burden of proof — failure to meet. In an action to set aside the probate of a will and to cancel a deed on the grounds (1) of the mental incapacity of the testator-grantor, and (2) of the undue influence of the devisee-grantee, the burden rests on plaintiff to establish at least one of said grounds. Evidence quite elaborately reviewed and held, plaintiff had failed to meet the burden of proof resting upon him.

Walters v Heaton, 223-405; 271 NW 310

11883 Administration granted.

ANALYSIS

Right of testamentary nominee. See under §11857

I GRANTING OF ADMINISTRATION IN GENERAL

Jurisdiction—appointment—recital of residence in petition. The district court of the county in which deceased resided at time of his death has exclusive jurisdiction to appoint an administrator and petition for appointment need not recite the place of residence of the deceased.

Crawford County v Kock, 227-1235; 290 NW 682

Jurisdiction—domicile of deceased—evidence. Evidence reviewed and held to warrant finding that deceased was resident of Boone county at time of death, giving the district court of that county exclusive jurisdiction to appoint an administrator for his estate.

Crawford County v Kock, 227-1235; 290 NW 682

Appointment—jurisdiction. The district court of the county in which an unsatisfied judgment was rendered has jurisdiction to appoint administration upon the estate of the nonresident judgment plaintiff.

Edwards v Popham, 206-149; 220 NW 16

Appointment—petitioning creditor indebted to estate—effect. A county asserting a claim and an individual claimant were "creditors" of the estate, and appointment of an administrator on their petition was valid even tho the individual might owe the estate more than the amount of his claim, since the validity of claims was not before the court.

Crawford County v Kock, 227-1235; 290 NW 682

Presumption. The record of the appointment in a county of an administrator and his due qualification is a finality and beyond collateral attack, even tho the record fails affirmatively to show the existence of the facts upon which the jurisdiction of the court depends; otherwise if the record affirmatively reveals want of jurisdiction.

Ferguson v Connell, 210-419; 230 NW 859

Collateral attack. Probate proceedings cannot be collaterally attacked until it is shown that fraud was perpetrated on the court inducing it to take jurisdiction.

Ferguson v Connell, 212-1155; 237 NW 354

Settlement without administrator. The act of those legally entitled to an estate, consisting solely of personal property, in paying all debts of the deceased and claims against the estate, and dividing the balance among themselves, all without the appointment of an administrator, renders improper the subsequent appointment of an administrator; and if such be appointed he will be without legal power because he will have nothing on which to administer.

Heinz v Vawter, 221-714; 266 NW 486

II PREFERENCE AND QUALIFICATION OF APPOINTEES

Application—sufficient showing. Application for appointment of administrator de bonis non held sufficient in form and contents.

Giberson v Henness, 219-359; 258 NW 708

Discretion as to appointee. The court may, in view of the relation which a nominee as executor holds to the estate and to the heirs, refuse to appoint him, even tho personally highly qualified, and appoint some other fit, proper and qualified person.

In re Tracey, 214-881; 243 NW 309

Next of kin—no degrees of nearness. "Next of kin" within the meaning of this statute, embraces those persons who take the personal property of the deceased, and there are no degrees of nearness in said class. For instance, a sister of the deceased has no necessarily preferential right over a niece of the deceased.

In re Wright, 210-25; 230 NW 552

Qualification—effect of adoption of deceased. Adopting parent's second wife held to be a proper administratrix in contest between the heirs of adopting parents and the natural parents.

In re Smith, 223-817; 273 NW 891

Collateral attack. In an action by an administrator, an answer alleging that plaintiff is not a legal administrator because he is a nonresident and secured his appointment by concealing that fact from the court is properly stricken because (1) the plaintiff's nonresidence did not render the appointment void, and, therefore, (2) the answer is but an unallowable attempt to collaterally attack the probate order of appointment.

Reidy v Railway, 216-415; 249 NW 347

Nonresident alien. A nonresident alien is not necessarily disqualified from acting as an administrator.

In re Rugh, 211-722; 234 NW 278
Reidy v Railway, 216-415; 249 NW 347

Superior right to make application and receive appointment. An alien, nonresident halfsister of a deceased, as next of kin, has the statutory right, superior to that of the resident paternal grandmother, during the 20 days following the burial of the deceased, to make application for the appointment (1) of herself, or (2) of any other suitable person as administrator, and an order of the probate court appointing a suitable person on the halfsister's application, and discharging the paternal grandmother who has in the meantime caused herself to be appointed, will not be disturbed.

In re Rugh, 211-722; 234 NW 278

Judgment creditor of heir. A judgment creditor of an heir of an intestate is a proper person to make application for the appointment of an administrator even tho the judgment is pending on appeal under a supersedeas bond, it appearing that the deceased left several heirs and a small quantity of real and personal property.

Moreland v Lowry, 213-1096; 241 NW 31

Application by agent—estoppel to object. An application for the appointment of an administrator made by a proper party, but made apparently by or through an agent or representative, must be deemed the application of said proper party and not by the agent or representative, when the latter claim is manifestly a belated afterthought of those hostile to the application.

Moreland v Lowry, 213-1096; 241 NW 31

Ex parte revocation. A peremptory, ex parte court order to the effect that the appointment of an administrator is revoked and the simultaneous reappointment of the same administrator and the execution of another bond, does not effect a legal revocation, and consequently does not operate as a discharge of the bond given pursuant to the original appointment.

In re Donlon, 203-1045; 213 NW 781

11884 Time allowed.

Right of heirs—absence of administration. When administration is not granted during the five years following the death, in this state, of an intestate, an heir may maintain an action to foreclose a mortgage to the extent of his vested interest therein as an heir; and especially so when the absence of any debts is made to appear.

Hoffman v Hoffman, 205-1194; 219 NW 311

Nonpremature application. When there is no surviving spouse (class No. 1), and when the "next of kin" (class No. 2) have made no application for the appointment of an administrator within the preferred time given them by statute, and when there are no creditors of the estate (class No. 3), a creditor of an heir of the intestate (class No. 4) has the legal right immediately to make said application.

Moreland v Lowry, 213-1096; 241 NW 31

11885 Special administrators.

Administration in general—irregular and improper. The fact that, in a will contest, verdict has been returned and judgment entered thereon to the effect that the alleged will in question is not a valid will, does not, in and of itself, legally justify the court in terminating an existing special administratorship and in appointing a general administrator. Said latter appointment would probably be void.

In re Whitehouse, 223-91; 272 NW 110

Administrator de bonis non—when authorized. When a probate record simply shows that the final report of an executor "was approved and the executor discharged", the court may, at a later time, and irrespective of the statutory limitation of five years for appointment for original administration, appoint, without notice to interested parties, an administrator de bonis non for the purpose of

selling property of the estate and purchasing and erecting a monument which was required by the will and not provided and erected by the original executor.

Giberson v Henness, 219-359; 258 NW 708

Appointment—constructive notice—peculiar circumstances—equitable relief. When an administrator gives proper notice of his appointment, claimants are held to have constructive notice thereof, and a claim filed nearly two years after notice of publication may be properly dismissed in the absence of any showing of peculiar circumstances entitling claimant to equitable relief.

Joy v Bank, 226-1251; 286 NW 443

Appointment—lack of actual knowledge not peculiar circumstances. When a claim in probate is not filed until two years after notice of appointment of administrator has been published, the fact that claimant did not have actual knowledge of the appointment of the administrator is not a peculiar circumstance entitling claimant to equitable relief under the statute barring claims not filed within the required time.

Joy v Bank, 226-1251; 286 NW 443

11886 Inventory—preservation of property.

Special administrators. The authority to proceed further under an order granted under special administration ceases upon the appointment of a general executor.

Malone v Moore, 208-1300; 227 NW 169

Corporate shares of stock. The heirs of an intestate may not be said to own the corporate shares of stock of the intestate, and may not, therefore, be said to be stockholders, (1) when they have never held themselves out as such owners, (2) when there has been no administration on the estate, and (3) when there is no showing as to the extent or distribution of the estate, or as to the debts and the discharge thereof.

Andrew v Dunn, 202-364; 210 NW 425

Improper order to turn over funds. A special administrator cannot be legally ordered to turn over the funds in his hands to a subsequently appointed general executor of the estate, when the said special administrator is a party to an unadjudicated action in equity by the administrator de bonis non of another and different estate, in which action claim is made to all the funds in the hands of said special administrator.

In re Wood, 214-867; 243 NW 347

11887 Bond—oath.

Atty. Gen. Opinions. See '28 AG Op 47; '30 AG Op 198

Suretyship generally. See under §11577

ANALYSIS

I LIABILITY OF ADMINISTRATORS AND EXECUTORS

II NECESSITY, REQUISITES, AND VALIDITY OF BONDS

III ACTIONS ON THE BOND

I LIABILITY OF ADMINISTRATORS AND EXECUTORS

Preservation of property by administrator. In proceeding to recover from surety on administrator's bond, principle held applicable that a trustee is presumed to have preserved the property and that such presumption stands until overcome by evidence. Fact that such proceeding is at law does not preclude application of equitable principles.

In re Willenbrock, 228- ; 290 NW 503

Execution of unauthorized contract—effect. An executor or administrator who signs a contract of subscription in the name of the estate and by himself as such officer, without authority so to do, thereby personally binds and obligates himself.

Y. M. C. A. v Caward, 213-408; 239 NW 41

Liability—devastavit. A claim of devastavit will not be deemed established on the mere showing that an administrator upon making a collection on behalf of the estate gave the estate his promissory note therefor.

In re Donlon, 203-1045; 213 NW 781

Deposits in banks—negligence.

In re Enfield, 217-273; 251 NW 637
In re Rorick, 218-107; 253 NW 916
In re Foster, 218-1202; 256 NW 744

Liability—lost bank deposits. The principle that an administrator is not liable for estate funds which have been lost because of the failure of a bank in which he has in good faith and without negligence deposited them has no application to deposits made by an administrator in his own private bank.

Bookhart v Younglove, 207-800; 218 NW 533

Disobeying order of court. An administrator and the surety on his bond are liable for a shortage in estate funds occasioned by the failure of the administrator's own private bank in which the funds were deposited, the administrator having been ordered by the court prior to the insolvency of said bank to remove the funds to another depository, and, while able to comply with said order, had neglected so to do.

In re Kendrick, 214-873; 243 NW 168

Disobeying order of court—unallowable defense. An administrator who disobeys an order of court as to the bank in which he should deposit estate funds, may not, in case of loss, plead in defense that, had he complied with the order, his own private bank in which the funds in fact were on deposit, would have been rendered insolvent.

In re Kendrick, 214-873; 243 NW 168

Disbursement by administrator for bond. An administrator is properly given credit for the reasonable amount paid by him to a surety company for his official bond even tho he is agent for the company signing the bond.

In re Atkinson, 210-1245; 232 NW 640

Expenditures—premium on bond. The reasonable premium paid by an executor or administrator for his official bond is a proper charge against the estate, even tho the settlement of the estate be delayed but without willful or fraudulent purpose on the part of said officer.

In re Paulson, 221-706; 266 NW 563

Father-administrator not accounting to daughter—effect of inheritance from father. Where administrator for his deceased spouse died without accounting for funds belonging to their daughter, an only child, who nevertheless received through the administration of her father's estate an amount larger than the amount she was entitled to in her mother's estate, held, in a proceeding brought by an administrator de bonis non against the sureties on bond of the deceased administrator, that there could be no recovery for the daughter's share in the mother's estate since that obligation had been satisfied.

In re Willenbrock, 228- ; 290 NW 503

Voluntarily augmented funds. A court-appointed, testamentary trustee and the surety on his official, statutory bond are liable not only for the money which comes into his hands as specifically required by the will, but for additional amounts of the testamentary funds which come into the hands of the trustee, as such, consequent on the generous action of the devisees, generally, in voluntarily augmenting said trust funds from the testamentary funds.

Whisler v Estes, 216-491; 249 NW 264

Equitable conversion under will. The proceeds of foreign real estate sold by an administrator with the will annexed, under explicit direction of the will, and for the purpose of making distribution under the will, must be deemed personalty with resulting consequence that the administrator is responsible therefor; and it is quite immaterial that he did not probate the will in said foreign state.

In re Jackson, 217-1046; 252 NW 775; 91 ALR 937

Receipt of funds. Where a party was guardian of minors and also trustee for said minors (bond in each case having been given), his written receipt showing the receipt of funds as guardian is not necessarily conclusive on the issue whether he received said funds as trustee.

In re Baldwin, 217-279; 251 NW 696

Probate findings. The supported finding of the court in probate on the issue whether funds received by a person were received by him as guardian or as trustee (bond in each case having been given) is conclusive on the appellate court.

In re Baldwin, 217-279; 251 NW 696

Findings in probate. A supported finding by the probate court that an administrator had failed to exercise ordinary care to preserve the funds of the estate is conclusive on the appellate court.

In re Foster, 218-1202; 256 NW 744

Finding as to executor's shortage. A finding by the probate court in the settlement of the estate of a deceased executor that said deceased executor had failed to account in a named sum to the estate of which he was executor, is binding on the sureties of the deceased executor in the absence of fraud or mistake, even tho the sureties are not parties to the proceedings in which the court makes the finding.

In re Carpenter, 210-553; 231 NW 376

Adjudicating shortage without notice to surety. The sureties on the bond of an administrator are not entitled to notice of the proceedings wherein the probate court determines the amount the administrator is short in his accounts.

In re Kessler, 213-633; 239 NW 555
In re Holman, 216-1186; 250 NW 498; 93 ALR 1363

Surety bound by adjudication. The surety on the bond of an administrator is conclusively bound by the nonfraudulent adjudication of the amount of the administrator's liability, even tho the surety had no notice of the hearing preceding such adjudication.

In re Jackson, 217-1046; 252 NW 775; 91 ALR 937

Adjudicating administrator's liability—surety not necessary party. A surety on an administrator's bond, neither being entitled to notice nor being a necessary party in the probate proceeding to determine the administrator's shortage and liability, the adjudication thereon determining the administrator's liability, in the absence of fraud or mistake, is binding on the surety.

In re Davie, 224-1177; 278 NW 616

Removal of executor — surety as applicant. A surety on the bond of an administrator has such "interest in the estate" as empowers

I LIABILITY OF ADMINISTRATORS AND EXECUTORS—concluded

him to make application for the removal of the administrator, even tho such surety has taken steps to terminate his future suretyship.

In re Donlon, 201-1021; 206 NW 674

Removal of administrator — jurisdiction. Jurisdiction to remove an administrator is furnished by an application by the surety on the bond wherein he prays for an order (1) removing the administrator or (2) requiring the filing of a report and the making of distribution, when notice of the application is duly served on all interested parties and when no part of the prayer has been withdrawn of record. The filing of a report under a mutual arrangement between the parties does not exhaust the jurisdiction of the court.

In re Donlon, 201-1021; 206 NW 674

Liability on bond—improvident order not adjudication. An order of court, in an insolvent estate, authorizing, without notice to creditors, the executrix (she being the surviving widow) to pay to herself the proceeds of a sale of the exempt property of the deceased, based solely on an agreement to that effect between the widow and heirs, is a mistake, an improvident act, and therefore a nullity and not an adjudication binding on creditors, when the testator made his exempt property liable for the payment of his debts and the widow elected to take under the will.

In re Durey, 215-257; 245 NW 236

II NECESSITY, REQUISITES, AND VALIDITY OF BONDS

Successive bonds by administrator. Principle reaffirmed that successive, unreleased bonds of the same administrator for the same estate remain in force.

Varga v Guar. Co., 215-499; 245 NW 765

Necessary conditions. It seems that the official bonds of executors, administrators, court-appointed trustees, and similar officers are necessarily conditioned as the bonds of public officers are conditioned. (§1059, C., '31.)

Whisler v Estes, 216-491; 249 NW 264

Executor's bond as statutory bond. Sureties who sign the bond of an executor in order to save the expense of a surety company bond, necessarily execute a statutory bond.

New Amst. Cas. Co. v Bookhart, 212-994; 235 NW 74; 76 ALR 897

Illegal release of surety. Where the court without jurisdiction assumed to release the surety on the bond of an executor, and to substitute a newly filed bond in lieu of such former bond, the formal cancellation of such illegal order of release does not affect the liability of the so-called substituted surety.

New Amst. Cas. Co. v Bookhart, 212-994; 235 NW 74; 76 ALR 897

III ACTIONS ON THE BOND

Pleadings in probate—informality. Pleadings in probate do not require the particularity and formality of pleadings in actions generally.

In re Willenbrock, 228- ; 290 NW 503

Liability on bond—reduction of widow's allowance—effect. Where the amount allowed a widow for her support for the year following the death of the husband is taken by her from the funds of the estate (she being executrix) and spent, a subsequent order, in an adversary proceeding, reducing said former amount is conclusive on the surety—and, of course, on the executrix—and in an action against the principal and surety the reduced amount is the limit of the allowable credit.

In re Durey, 215-257; 245 NW 236

Void release of surety. The release of a surety on the bond of an executor or administrator is a nullity unless made in strict compliance with the statute governing such release. So held where the release was entered on the ex parte application of the executor, instead of the surety.

Bookhart v Younglove, 207-800; 218 NW 533
Brooke v Bank, 207-668; 223 NW 500

Ordering accounting and suit on bond. Where an executor of an executor filed in the first estate a final report, as the deceased executor ought to have done, the court, on hearing on such report, may fix the amount for which the deceased executor should have accounted, and require accounting from his estate, and provide, in case of default, that action shall be brought against his estate, and on his bond.

In re Mowrey, 210-923; 232 NW 82

Liability—insufficient proof. No liability is shown in an action on the bond of an administrator by evidence (1) that the petition for the appointment of the administrator alleged the value of the estate in a named amount, and (2) that while the deceased was under guardianship certain of his property was sold for a definite amount which had been embezzled by the custodian thereof.

Sheridan v Guar. Co., 204-397; 213 NW 784

Liability—presentable issues. In a controversy solely between an administrator and his bondsmen, the court will not, on the issue of a bondsman's liability, determine whether there has been a binding settlement between the administrator and an heir.

In re Donlon, 203-1045; 213 NW 781

Liability for prior defalcation. The surety on a guardian's bond, conditioned as provided by statute, is liable for the defalcation of the guardian occurring prior to the execution of the bond, whether the bond be a "substitute"

bond or simply security in addition to a prior existing bond.

Brooke v Bank, 207-668; 223 NW 500

Liability on bond—existing judgment against executor—surety's new trial improper. Under the general rule that a judgment against an administrator is conclusive against the surety on his bond, where a judgment against an administrator for misappropriation of funds stands unreversed, it is error to set aside judgment on a bond and give the surety a new trial, since such order would not ipso facto vitiate a former order fixing the administrator's liability.

In re Sterner, 224-605; 277 NW 366

Adjudication of liability — avoidance by fraud. Sureties on the bond of a deceased executor are liable for a shortage in the latter's accounts, even tho no claim for said shortage is made against the estate of said deceased executor. It follows that if claim is made against the estate of the deceased executor, and the amount of the shortage is adjudicated (but not paid), the sureties are bound thereby, even tho the administrator of the deceased executor's estate failed to plead that the claim was barred by the statute of limitation, such failure to so plead not being a fraud as to said sureties.

In re Kessler, 213-633; 239 NW 555

Failure to file claim—when enforceable against heir. A claim arising under a bond wherein the surety binds "his heirs, devisees, and personal representatives", and arising after the death of said surety and the due settlement of his estate, is enforceable:

1. Against the property received by an heir, as such, from said ancestor-surety, and

2. Against the property passing from said ancestor and owned by said heir under conveyance for which he paid nothing, and

3. Against the heir, personally, for the value of the property so received if he has consumed it. And this is true even tho, necessarily, said claim was not filed against the estate of said surety.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Enforcement against heirs et al. The bond of a fiduciary, under the terms of which a surety purports to bind "his heirs, devisees, and personal representatives", is not revoked by the death of the surety, and binds the estate of the surety in the hands of his heirs, devisees, or personal representative.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Co-sureties. When an administrator gives bond on his original appointment, and later is ineffectually discharged and at once reappointed and gives a new bond, the two bonds will be treated as cumulative, and the sureties thereon as co-sureties with the sole right in each to enforce proportional contribution from the other.

In re Donlon, 203-1045; 213 NW 781

Contribution enforceable against surety on separate bond. Where an executor has executed and filed two separate bonds for the faithful discharge of his duties, the surety who pays a devastavit in full may enforce contribution from the other surety; and it is immaterial that the surety enforcing contribution signed the bond for a consideration and that the other surety signed as an accommodation.

New Amst. Cas. Co. v Bookhart, 212-994; 235 NW 74; 76 ALR 897

Right of surety. When an administrator of an estate wrongfully pays out estate funds to one who has no right whatever to receive them, and the surety for the administrator is compelled to make good the loss, the legal right of the estate to compel the wrongful recipient to repay the funds because of his primary liability, is, as a matter of equity, presumed to continue in order to enable a court of equity to subrogate the said surety to the same right.

American Sur. Co. v Bank, 218-1; 254 NW 338

11889 Letters.

ANALYSIS

Court findings as jury verdict generally. See under §§11435, 11581

I LETTERS TESTAMENTARY OR OF ADMINISTRATION IN GENERAL

Conflicting appointments—domestic and foreign administrators. As between a domestic and a foreign administrator of the same estate, an asset will (without passing on the question of principal administratorship) be ordered paid to the domestic administrator when the only claims against the estate are on file with the Iowa administrator, when the latter has funds to pay them, when some of the distributees reside in this state, and when the general convenience of all parties will be subserved by such order.

Andrew v Bank, 205-237; 216 NW 12

II ASSETS OF ESTATE

Administrator holds estate as trustee. An administrator of an intestate estate takes possession of and holds the same, as an express trustee thereof, for the claimant creditors of

II ASSETS OF ESTATE—concluded

the decedent and of the estate, the heirs, the surviving spouse, and any others who may have a proper interest in the property.

In re Willenbrock, 228- ; 290 NW 503

Collections—presumptions. All funds coming into the hands of an administrator will, in the absence of a counter showing, be presumed to be in the form of cash.

Leach v Bank, 205-114; 213 NW 414; 217 NW 437; 56 ALR 801

Conflicting appointments. As between a domestic and a foreign administrator of the same estate, an asset will (without passing on the question of principal administratorship), be ordered paid to the domestic administrator when the only claims against the estate are on file with the Iowa administrator, when the latter has funds to pay them, when some of the distributees reside in this state, and when the general convenience of all parties will be subserved by such order. (See annos. under §11894.)

Andrew v Bank, 205-237; 216 NW 12

Administrator's bank account—decedent's debt—no offset. Receiver of insolvent bank held unauthorized to set off amount of checking account standing in name of administrator against indebtedness owing to bank by intestate where, immediately on appointment of administrator, checking account passed to administrator who added to account by deposits at various times and drew checks against account until closing of bank.

In re Schwarting, (NOR); 257 NW 189

III MANAGEMENT OF ESTATE

(a) AUTHORITY IN GENERAL

Discussion. See 3 ILB 175—Power of representative to bind estates to creditors

Trustee for beneficiaries. The administrator is a trustee for the benefit of persons interested in the estate.

Goodman v Bauer, 225-1086; 281 NW 448

Personal property—right of heirs to protect. Tho the title to the personal property of a deceased does not pass directly to his heirs, they may, in the absence of any administration, maintain an action to protect or recover such property.

Powell v McBlain, 222-799; 269 NW 883

Accounting and settlement—credits—disbursements to protect assets of estate. An administrator who, in good faith, pays a valid debt owed by the estate in order to redeem valuable securities belonging to the estate and held by the creditor as collateral in an amount far in excess of the debt, will be credited as for a prudent expenditure, irrespective of the subsequent claims of general creditors, and irrespective of the fact that the administrator did not wait for the filing of the claim or secure the authority of the court to make such payment.

Elliott v Bank, 209-1258; 228 NW 274

Payment of unfiled claims. Principle reaffirmed that an executor may voluntarily pay valid claims against the estate tho they are not filed.

In re Plendl, 218-103; 253 NW 819

Investments without authorizing order—subsequent confirmation. Assuming, arguendo, that an authorizing order of court is absolutely necessary in order to render legal an investment of trust funds, yet a trustee, who, without such order, has made an investment in good faith, and without loss to the estate, may, subsequently, on a full showing of the controlling facts, and at a time when the estate has suffered no loss, be granted a valid order confirming said investment.

In re Lawson, 215-752; 244 NW 739; 88 ALR 316

Execution of unauthorized contract. An executor or administrator who signs a contract of subscription in the name of the estate and by himself as such officer, without authority so to do, thereby personally binds and obligates himself.

Y. M. C. A. v Caward, 213-408; 239 NW 41

Sales and conveyances—application and order—implied authority to pay debt. An order of court granting an application by an administrator to borrow money on real estate mortgage security in order to pay a specified debt owed by the estate impliedly carries authority and direction to use the money in the payment of said debt.

Elliott v Bank, 209-1258; 228 NW 274

Releasing mortgage without order. An executor, upon receiving payment of a note and mortgage belonging to the estate, has authority, without an authorizing order of court, to release the mortgage even tho the payment is in the form of a new note and mortgage executed by new parties.

Steffy v Schultz, 215-831; 246 NW 907

Unauthorized bank deposit. An executor who, on his own motion and without any authorizing order of court, deposits the funds of the estate in a financially embarrassed bank of which he was president and in which he was heavily interested, and which later failed, must account to the estate in cash for the loss. The president of a bank must be held to have knowledge of the general financial condition of the bank.

In re Rorick, 218-107; 253 NW 916

Depositor's agreement—conditions. An order of the probate court, authorizing a national bank acting as executor of an estate to execute a depositor's agreement relative to the estate funds, should specifically provide that said

order is entered on the condition that the same shall not prejudice the right of the heirs, (1) to a lien upon any securities in possession of the executor, (2) to the right of action against the executor to recover the amount due, and (3) to any existing rights under federal law.

In re McElfresh, 218-97; 254 NW 84

Death of guardian—duty of personal representative. The surety on the bond of a guardian has no right, on the death of the guardian, to take possession of the ward's estate and administer it. Such property passes in trust to the guardian's personal representative who should report the situation to the probate court and await instructions.

Kies v Brown, 222-54; 268 NW 910

Property in controversy—refusal of receivership—presumption. The refusal of a receivership for property in controversy in the probate court, even tho the petition for said appointment is strictly in compliance with the statute and is supported by affidavits, and is resisted only orally and informally, is presumptively correct. Appellant must negative the presumption.

Frazier v Wood, 214-237; 242 NW 78

(b) AUTHORITY AS TO REAL PROPERTY

Testamentary capacity. Principle reaffirmed that a testator may unconditionally authorize and empower his executor to make full conveyances of testator's real estate. Will held to grant such authority.

In re Wicks, 207-264; 222 NW 843

Unlawful delivery of deed. An administrator who has in his possession a deed of conveyance purporting to have been executed by the deceased, has no authority to deliver said deed to the grantee in said deed without an authorizing order of court.

Blain v Blain, 215-69; 244 NW 827

Power to sell passes to subsequent appointee. The power of an executor to convert real estate into money for the purpose of making testamentary distribution, arising under explicit testamentary direction so to do, passes to an administrator with will annexed.

In re Jackson, 217-1046; 252 NW 775; 91 ALR 937

IV ACTIONS

(a) ACTIONS BY ADMINISTRATORS

Actions by heirs to set aside conveyances of decedent. See under §11927
Fraudulent conveyances generally. See under §11815

Pleadings in probate—informality. Pleadings in probate do not require the particularity and formality of pleadings in actions generally.

In re Willenbrock, 228- ; 290 NW 503

Pleading—verification. Plaintiff suing as an administrator need not verify his pleadings.

Markworth v Bank, 217-341; 251 NW 857

Who may appeal—executors. An executor or administrator may very properly maintain an appeal from an order for the payment of legacies, such order directly affecting residuary legatees.

Packer v Overton, 200-620; 203 NW 307

Defect not remedied by appearance. Lack of capacity to act as party plaintiff cannot be remedied by the appearance of the defendant in the action.

Pearson v Anthony, 218-697; 254 NW 10

Unauthorized action. An action by a plaintiff, as administrator of the estate of a deceased, to recover damages for the wrongful death of the deceased, when plaintiff was not such administrator, is a nullity, and, therefore, does not toll the statute of limitation on the said cause of action. And in case plaintiff is appointed administrator after the statute has fully run, an ex parte order of the probate court assuming to ratify, confirm, and adopt such former proceeding is likewise a nullity.

Pearson v Anthony, 218-697; 254 NW 10

Father-administrator not accounting to daughter—effect of inheritance from father. Where administrator for his deceased spouse died without accounting for funds belonging to their daughter, an only child, who nevertheless received through the administration of her father's estate an amount larger than the amount she was entitled to in her mother's estate, held, in a proceeding brought by an administrator de bonis non against the sureties on bond of the deceased administrator, that there could be no recovery for the daughter's share in the mother's estate since that obligation had been satisfied.

In re Willenbrock, 228- ; 290 NW 503

Death of party without substitution. Where no personal representative was substituted for plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence, application made during same term to vacate the dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

Appeal in name of deceased party. Altho plaintiff died during pendency of action below, supreme court took jurisdiction of appeal taken in name of such decedent, because parties treated cause as one properly before the court

IV ACTIONS—continued
(a) ACTIONS BY ADMINISTRATORS—concluded

and because it was a case where court's constitutional authority could be invoked.

Bingaman v Rosenbohm, 227-655; 288 NW 900

Collection and management — inconsistent attitude. One who is administrator of different estates should not be permitted to appear in the dual and inconsistent capacity as administrator of both estates in a matter wherein the interests of the separate estates are absolutely hostile.

In re Clark, 203-224; 212 NW 481

Setting aside fraudulent conveyance — authority. Authority to an administrator to institute an action to set aside a fraudulent conveyance need not also contain authority to sell the land in order to pay the debts of the estate, when the record clearly shows the existence of the debts, and insufficient property with which to pay them.

Level v Church, 217-317; 251 NW 709

Fraudulent conveyance—sufficient showing. A deed from a mother to her son will be set aside as fraudulent, in a proper action by the administrator of the mother, on a showing that the mother, when the deed was executed, was in serious financial embarrassment, of which the son had full knowledge, and that the son, who then occupied a close fiduciary relation to his mother, presented no competent evidence of any consideration for the deed, or evidence overcoming the presumption of fraud and bad faith.

Howell v Howell, 211-70; 232 NW 816

Fraudulent conveyance—insufficient showing. An action by an administrator to set aside an alleged fraudulent conveyance by the testate must be dismissed (1) when the property conveyed was grantor's homestead, and the accrual date of the unpaid claim against the estate is not shown; (2) when the grantor is not shown to have been insolvent when the deed was executed; and (3) when there is no showing that the probate court has either authorized the action or judicially ordered the sale of real estate to pay debts.

Richman v Ady, 211-101; 232 NW 813

Transfers and transactions invalid—homestead. Evidence held to show that a residence was not the homestead of a deceased at the time of a fraudulent conveyance thereof.

Level v Church, 217-317; 251 NW 709

Deed—fiduciary relation. When a deed of conveyance is attacked because of the mental incompetency of the grantor, or because of fraud and duress, the burden rests on the grantee to sustain the deed, provided a fiduciary relation existed between grantor and grantee when the deed was executed; otherwise the burden rests on plaintiff to invalidate the deed.

Ellis v Allman, 217-483; 250 NW 172

Deeds—fiduciary relation—burden of proof. Executor, in an action to avoid a deed of conveyance, makes a prima facie case of constructive fraud by proof that, when the deed was executed, the grantor, tho mentally competent, was, in the transaction of his business and in his conduct generally, under the absolute domination of the grantee. After such proof, the grantee must take on the burden of affirmatively showing the complete bona fides of the transaction. Proof that the deed left grantor practically penniless, that grantee paid no consideration and was aggressively active in obtaining the deed, accentuates the presumption of fraud instead of overcoming it.

Ennor v Hinsch, 219-1076; 260 NW 26

Corporations—right to examine books and records. An administrator and the heirs at law of a deceased stockholder in a corporation, when refused an examination by the corporation, have the right, without any plea of good faith, to an order of court, in an appropriate proceeding, permitting them and their necessary assistants to examine the books and records of the corporation in order to determine the financial condition of the corporation and the value of its stock.

Becker v Trust Co., 217-17; 250 NW 644

Enforcement of legacy—laches. The fact that a legatee deferred the enforcement of the legacy pending the outcome of pending litigation over other identical claims is material on the issue of laches.

Packer v Overton, 200-620; 203 NW 307

Insurance policy—recovery on. Under a policy providing for the payment, (1) of total disability benefits to the insured himself, and (2) of death benefits to another, the disability benefits alleged to have accrued to the insured prior to his death may not be recovered by the executrix of the insured when the insured, tho physically and mentally able so to do, failed to furnish during his lifetime, to the insurer, proofs of such disability, the furnishing of such proofs being clearly contemplated and required by the policy as a condition precedent to the attaching of liability on the part of the insurer.

Kantor v Ins. Co., 219-1005; 258 NW 759

(b) ACTIONS AGAINST ADMINISTRATORS

Pleadings in probate—informality. Pleadings in probate do not require the particularity and formality of pleadings in actions generally.

In re Willenbrock, 228- ; 290 NW 503

Change of venue—action against executor as such. An action at law against an executor as such, in the county in which he was appointed such officer, for damages for personal

injuries inflicted by the deceased, is, in legal effect, but an action in rem against the assets of the estate. It follows that the executor is not entitled to demand a change of place of trial to another county of which he is a legal resident.

Van Iperen v Hays, 219-715; 259 NW 448

Management in general — employment of counsel—extraordinary expense. An executor is under duty to defend a will after it is duly probated, and may employ counsel at the expense of the estate to contest an action to set aside the probate and to contest the will, even tho he has already employed counsel to advise him in his ordinary duties, and even tho he is personally interested in sustaining the will; and the court should, irrespective of the amount which the executor has agreed to pay, make a reasonable allowance to the executor for such expense when it is extraordinary.

In re Jewe, 201-1154; 208 NW 723

Recovery of unpaid legacy—bringing in parties. In an action by a testamentary legatee against an executor to recover an unpaid legacy, the executor, who has already distributed the estate and wishes to bring a third party into the action for recoupment purposes, must, at least, allege that said third party has received some portion of the estate in question.

Irwin v Bank, 218-961; 256 NW 681

Special administrator — improper order to turn over funds. A special administrator cannot be legally ordered to turn over the funds in his hands to a subsequently appointed general executor of the estate when the said special administrator is a party to an unadjudicated action in equity by the administrator de bonis non of another and different estate in which action claim is made to all the funds in the hands of said special administrator.

In re Wood, 214-867; 243 NW 347

(c) COUNTERCLAIMS

Cross-complaint — when allowable. In an action by an administrator for damages consequent on the alleged negligent killing by defendant of the intestate in a collision between automobiles, the defendant may cross-petition for damages against the administrator personally under the allegation that the deceased at the time of said collision was negligently operating an automobile which was personally owned by said administrator and was so doing with the consent of said owner. And this is true irrespective of the personal residence of the administrator.

Ryan v Amodeo, 216-752; 249 NW 656

Debts due decedent from heir—retainer or offset against realty. General rule recognized that real estate passes to devisee direct from testator, and not through executor, and that title vests in devisee immediately upon death of testator, and as a general rule, there is no right of retainer or offset for debt of devisee to estate, as against devisee of real estate; but there may be cases where, on account of the insolvency of the debtor, or other cause, equity will interfere for protection of the estate.

Petty v Hewlett, 225-797; 281 NW 731

Administrator's funds set off against insolvent bank holding secured note. An estate's deposit in an insolvent bank may be set off against a secured note held by bank, and contention that debts lacked mutuality was ineffective.

First Natl. Bk. v Malone, 76 F 2d, 251

11890 Notice of appointment.

Failure to give notice—effect.

Spicer v Administrator, 201-99; 202 NW 604

Notice—effect. After an executor has given due notice of his appointment, all parties interested in the settlement of the estate must be deemed in court for all purposes incident to such settlement.

Dillinger v Steele, 207-20; 222 NW 564

Constructive notice. When an administrator gives proper notice of its appointment, claimants are held to have constructive notice thereof, and a claim filed nearly two years after notice of publication may be properly dismissed in the absence of any showing of peculiar circumstances entitling claimant to equitable relief.

Joy v Bank, 226-1251; 286 NW 443

Proof of service. Parol evidence of the posting, as officially directed, of a notice of the appointment of an executor is admissible, and positive evidence to such effect will not be overcome by evidence of witnesses to the effect that they had not "observed" such posted notice.

Peterson v Johnson, 205-16; 212 NW 138

Notice to creditors—order—record required. An order or direction of the probate clerk as to the manner in which an administrator or executor shall give notice of his appointment, after being entered at length on the letters testamentary or letters of administration, need not also be entered at length on the probate docket. An abstract or notation of such order on said docket is all-sufficient.

Anthony v Wagner, 216-571; 246 NW 748

Lack of actual knowledge not peculiar circumstances. When a claim in probate is not filed until two years after notice of appointment of administrator has been published, the fact that claimant did not have actual knowledge of the appointment of the administrator is not a peculiar circumstance entitling claimant to equitable relief under the statute barring claims not filed within the required time.

Joy v Bank, 226-1251; 286 NW 443

Filing "within twelve months". Conceding, arguendo, that in the settlement of an estate, the statute of limitation commences to run from the date of the last newspaper publication, yet, when the last publication was on April 16, 1931, a claim filed April 16, 1932, is not filed "within 12 months from the giving of the notice" as provided by §11972, C., '31.

First JSL Bank v Terbell, 217-624; 252 NW 769

11891 Limitation on administration.

Right of heirs. When administration is not granted during the five years following the death, in this state, of an intestate, an heir may maintain an action to foreclose a mortgage to the extent of his vested interest therein as an heir; and especially so when the absence of any debts is made to appear.

Hoffman v Hoffman, 205-1194; 219 NW 311

Administrator de bonis non—when authorized. When a probate record simply shows that the final report of an executor "was approved and the executor discharged", the court may, at a later time, and irrespective of the statutory limitation of five years for appointment for original administration, appoint, without notice to interested parties, an administrator de bonis non for the purpose of selling property of the estate and purchasing and erecting a monument which was required by the will and not provided and erected by the original executor.

Giberson v Henness, 219-359; 258 NW 708

11892 Exception—newly discovered personalty.

Unallowable opening of settled estate. The holder of a court-established claim which is legally enforceable against property which passed to an heir, on the settlement of the estate of the person primarily liable on said claim, has no occasion, and no right, in the absence of any showing of fraud or mistake, to have the settlement of said estate opened up for the re-establishment in probate of said claim.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

APPOINTMENT OF FOREIGN ADMINISTRATOR

11894 Authorization.

Supplanting resident appointee. A duly appointed foreign executor, even tho nominated as such in the will, has no arbitrary right to supplant an executor appointed in this state, where part of the estate is situated.

In re Gray, 201-876; 208 NW 358

Conflicting domestic and foreign appointments.

Andrew v Bank, 205-237; 216 NW 12

CHAPTER 506

ESTATES OF ABSENTEES

11901 Administration authorized—petition.

Discussion. See 6 ILB 236—Waiver of presumption of death

Unexplained absence—presumption. A rebuttable presumption of death arises from the unexplained disappearance of a person for seven years from his usual place of living.

McCoid v Norton, 207-1145; 222 NW 390

Presumption—evidence. Evidence that an insured, thirty years of age, and in fair health, went to a distant part of the country and obtained employment, and corresponded solely with his mother, of whom he was especially fond, but made no response to a message informing him of her death, is, in and of itself, insufficient to create a presumption of death at any particular time short of seven years.

Hicks v Woodmen, 203-596; 213 NW 236

Presumption—fugitive from justice. Seven years of continued and unexplained absence of an insured, notwithstanding efforts of relatives to locate him, create a jury question on the issue of death, even tho the original disappearance was at a time when the insured was a defaulter to a large amount.

Axen v Ins. Co., 203-555; 213 NW 247
Rodskier v Ins. Co., 216-121; 248 NW 295

Mutual benefit insurance—contract in re evidentiary effect of disappearance—validity. An agreement in a mutual benefit insurance certificate to the effect that the unexplained disappearance or long-continued absence of the insured from his family or place of residence shall not be regarded as evidence of the death of the insured or of any right to recover under the certificate until after the expiration of the life expectancy of the insured is reasonable, valid, and binding on the beneficiary.

Lunt v Grand Lodge, 209-1138; 229 NW 323

Residence—presumption. The fact that an adult person had been a resident, from birth, of a county in this state and had there accumulated property of substantial value and left it and gone on a visit to a distant state, and was not thereafter heard from or heard of for seven years, justifies the presumption that he remained a resident of the county aforesaid.

In re Schlicht, 218-114; 253 NW 847

11909 Decree as to heirs.

Heirs of absentee. The heirs of an absentee who, without known cause, has absented himself from his usual place of residence for a period of seven years, are those persons who are his heirs on the day when the law first indulges the presumption that said absentee is dead, to wit, on the day which marks the end of said absence of seven years.

In re Schlicht, 221-889; 266 NW 556

CHAPTER 507

SETTLEMENT OF ESTATES

11913 Inventory and report.

Fraud in concealing personal liability of executrix. An executrix, in inventorying a promissory note and mortgage as assets of the estate, is guilty of no fraud in failing to mention or indicate the fact that she personally signed said instruments, when such signing was for the sole purpose of waiving her dower interest.

Albright v Albright, 209-409; 227 NW 913

Administrator's debt to decedent—extent of liability. In proceeding on objection to administrator's final report, burden of proof was on the administrator to show why he should not be held accountable for full value of property inventoried by him, which inventory included his own debt to decedent. He was liable on such debt to the extent of his ability to pay at any time during administration, and everything above his statutory exemptions should have been so utilized, and there being no evidence in the record from which the extent of his nonexempt property or income could be ascertained, such question would be remanded to lower court for determination.

In re Windhorst, 227-808; 288 NW 892

Reports as evidence against administrator. Statements in the various interlocutory reports of an administrator, relative to the items of assets belonging to the estate, may be persuasive evidence against the administrator on the final accounting.

In re Manning, 215-746; 244 NW 860

Joint payees—rebuttable presumption of equal ownership. The presumption, that joint payees of a promissory note and of a mortgage securing the same are equal, must yield to evidence establishing the actual interest of each. So held in the settlement of an estate.

In re Morrison, 220-42; 261 NW 436

Fact findings in probate not triable de novo on appeal. Findings of fact by the trial court in a probate proceeding involving objections to an executor's report and payment of certain claims cannot be reviewed on appeal, such not being triable de novo.

In re Scholbrock, 224-593; 277 NW 5

Rights of legatees—sheriff's certificate passing as personalty. A sheriff's certificate under foreclosure proceedings, in which the period of redemption had not yet expired, was personal property and, upon the death of the certificate holder-owner, passed to the person inheriting the personal property under the will.

In re Jensen, 225-1249; 282 NW 712

Rent—incident to land—passes to heirs. General rule is that rents accruing after the owner's death belong to the heirs or devisees, as an incident to the ownership of the land which descends to them.

In re Jensen, 225-1249; 282 NW 712

Proceeds payable to estate—trusteed for statutory beneficiaries—exemption. Where a testator willed to his second wife all of his property requiring legal transmission, but made no mention of his life insurance, payable to his second wife if she survived him, otherwise to his estate, and, when testator's second wife predeceased him, then upon his death, his surviving children, being a daughter by his first marriage and a son by his second marriage, became entitled under the statute, to the proceeds of the insurance, and such proceeds passed into the hands of his personal representative or estate, only as a trust fund, to be distributed equally to such daughter and son. (§8776, C., '35.)

In re Clemens, 226-31; 282 NW 730

11917 Qualification—duties.

Atty. Gen. Opinion. See '30 AG Op 268

11918 Exempt personal property.

Pension funds in hands of administrator. Original federal pension funds in the hands of an administrator are not exempt, under either state or federal statutes, from sequestration by the creditors of the pensioner. [Revised Statutes, §4747 (38 USC §54); 38 USC §96.]

Appanoose Co. v Carson, 210-801; 229 NW 152

Waiver by surviving spouse. A surviving spouse waives her right to her husband's exempt property when she, apparently in furtherance of her own personal interest, allows the property to be sold and the proceeds applied on the debts of the deceased.

In re Angerer, 202-611; 210 NW 810

Widow as devisee—nonallowance. Since widow of decedent was a devisee under his

will, an order allowing her exempt property of decedent under this section was improper in view of §11847, C., '39, providing that a devise to a spouse is presumed to be in lieu of exemptions unless contrary intention is clearly and explicitly shown.

In re David, 227-352; 288 NW 418

Improvident order not adjudication. An order of court, in an insolvent estate, authorizing, without notice to creditors, the executrix (she being the surviving widow) to pay to herself the proceeds of a sale of the exempt property of the deceased, based solely on an agreement to that effect between the widow and heirs, is a mistake, an improvident act, and, therefore, a nullity and not an adjudication binding on creditors, when the testator made his exempt property liable for the payment of his debts and the widow elected to take under the will.

In re Durey, 215-257; 245 NW 236

Cemetery lot. The interest of an intestate in a burial lot in a cemetery (he dying without issue and survived only by his widow and mother) may not be set aside as exempt property to the widow. The interest,—the right to use said lot for burial purposes,—passes in such a case in equal shares to the widow and mother.

In re Paulson, 221-706; 266 NW 563

Refund to pay debts. The heirs of an estate who unconditionally purchase the interest of their mother in the estate have no legal right, thereafter, to compel the mother to contribute any sum toward the discharge of unpaid debts of the estate, unpaid taxes against the estate, or unpaid probate costs and fees.

In re Jones, 217-288; 251 NW 651

Workmen's compensation—nonexempt from debts of testator. Workmen's compensation, already collected as the result of a commutation settlement and in the hands of testator's attorney, is subject to the debts of the employee's estate.

Long v Northup, 225-132; 279 NW 104; 116 ALR 1475

11919 Proceeds of insurance.

Discussion. See 21 ILR 153—Property purchased with proceeds

Exemption statutes—applicability. Exemption statutes are applicable to residents and nonresidents unless the benefits thereof are confined to residents.

Stark v Stark, 203-1261; 213 NW 235

Receiver—solvency of mortgagor. In mortgage receivership proceedings, and on the issue whether a wife, one of the obligated mortgagors, is solvent, no consideration can be given to the proceeds of life insurance (up to $5,000) on the life of the husband, and in the hands of the wife as a beneficiary, the mortgage debt antedating the death of the husband.

Interstate Assn. v Nichols, 213-12; 238 NW 435

Life insurance to widow—termination of exemption by death. The unexpended proceeds of a policy of life insurance payable to a surviving widow are not exempt, after her death, from liability for debts contracted by her prior to the death of the insured husband. In other words, the exemption accorded to her does not survive her death.

In re Tellier, 210-20; 230 NW 545

Proceeds of life insurance. A testator may validly dispose by will of the proceeds of life insurance payable to his estate, and make such proceeds subject to the payment of his debts. Such result is effected by a will (1) which provides for the payment of testator's debts, and (2) which devises the life insurance proceeds subject to such debt proviso.

In re Caldwell, 204-606; 215 NW 615

Testamentary subjects. The proceeds of life insurance payable to the estate of the insured or to his executors or administrators may be disposed of by will. Section 8776, C., '24, which in substance provides that insurance so payable "shall inure to the separate use" of the surviving spouse and children, supplements said right, because said section simply directs in legal effect who shall take the avails of life insurance so payable when there is no will.

Miller v Miller, 200-1070; 205 NW 870; 43 ALR 567

Life insurance. The formal statement in a will that testator's debts shall be paid out of his estate, is wholly insufficient to justify the conclusion that testator intended to appropriate to the payment of his debts the avails of life insurance payable to his personal representatives or to his estate, even tho as a matter of law such avails do become a part of his estate.

In re Grilk, 210-587; 231 NW 327

See Buck v MacEachron, 209-1168; 229 NW 693

Estate as beneficiary—exemption. Policies of life insurance made payable to insured's estate, or to the administrator thereof, are not subject to the claims of creditors, unless the insured during his lifetime agreed, orally or in writing, to the contrary.

In re Hazeldine, 225-369; 280 NW 568

Assignment by deceased — convincing evidence necessary. An oral contract assigning insurance, made with a deceased, must be established by clear, satisfactory, and convincing evidence and leave no doubt as to the sufficiency of the consideration.

In re Hazeldine, 225-369; 280 NW 568

Deceased's insurance as security—oral contract—original holder incompetent witness tho debt assigned. Altho having assigned his claim and altho the claim is duly allowed in probate, the original party to an oral contract with a deceased is incompetent as a witness, when the assignee of such contract seeks to subject the proceeds of the deceased's life insurance to payment thereof by reason of an oral contract claimed to have been entered into with the deceased.

In re Hazeldine, 225-369; 280 NW 568

Dead man statute—failure to prosecute claim or disclaimer of interest ineffective. A divorced wife of a deceased may not become a competent witness to an oral contract made jointly between herself, her mother, and the deceased, in order to subject his insurance to payment of her mother's valid probate claim, merely by failing to prosecute a similar claim of her own and disclaiming any interest in the claim in litigation, since she still has her claim and may enforce payment if the contract is established.

In re Hazeldine, 225-369; 280 NW 568

Proceeds payable to estate — trusteed for statutory beneficiaries. Where a testator willed to his second wife, all of his property requiring legal transmission but made no mention of his life insurance, payable to his second wife if she survived him, otherwise to his estate; and, when testator's second wife predeceased him, then upon his death, his surviving children, being a daughter by his first marriage and a son by his second marriage, became entitled under the statute to the proceeds of the insurance, and such proceeds passed into the hands of his personal representative or estate only as a trust fund, to be distributed equally to such daughter and son. (§8776, C., '35.)

In re Clemens, 226-31; 282 NW 730

Life policy payable in Iowa pledged in another state—jurisdiction. Tho a life policy payable to the estate of a deceased Iowa resident is deposited in a foreign state, as security for a debt, the proceeds are not beyond the jurisdiction of the Iowa probate court, inasmuch as the right to such proceeds depends, not upon their location, but upon the terms of the policy, supplemented by any contract relating thereto.

In re Hazeldine, 225-369; 280 NW 568

Subjecting insurance to probate claim — splitting action. A claimant in probate, alleging an oral contract assigning all of decedent's insurance, may not split this single cause of action by dismissing part of his claim and attempting to establish it in a foreign state where one policy was held as security for the performance of a prior contract of decedent made therein.

In re Hazeldine, 225-369; 280 NW 568

Computation of amount of exemption. Where a widow as beneficiary in life insurance policies on her husband received some $11,200 and disposed of some $7,300 before any proceedings were commenced to subject said fund in excess of the $5,000 statutory exemption to the payment of a debt of the widow antedating the death of the husband (§8776, C., '31), the said statutory exemption of $5,000 must be computed on the basis of the unexpended fund. In other words, her exemption cannot be deemed to be embraced within the $7,300 expenditure.

Booth v Propp, 214-208; 242 NW 60; 81 ALR 919

Funeral expenses nonallowable against insurance proceeds. Claims for funeral expenses consequent on the burial of the intestate deceased are not allowable against funds in the hands of the administrator when said funds constitute the proceeds of insurance on the life of deceased, the latter being survived by a minor son. (§8776, C., '35.)

In re Galloway, 222-159; 269 NW 7

11920 Damages for wrongful death.

Administrator as real party in interest. In an action by an administrator for damages consequent on the wrongful death of the deceased, the defendant may not raise the issue whether the plaintiff is the real party in interest.

Reidy v Railway, 216-415; 249 NW 347

Measure of damages. The measure of damages for death is the reasonable present value of the life of the deceased to his estate.

Droullard v Rudolph, 207-367; 223 NW 100

Damages for death—evidence. In an action for damages for wrongful death, evidence is admissible of the recent purchase, solely on credit, by decedent, of a business, and of the marked reduction by decedent of his indebtedness subsequent to such purchase, together with evidence of his ability, health, and other kindred matters.

Scott v Hinman, 216-1126; 249 NW 249

Submitting earning capacity of child—no evidence introduced. Elements of damage not sustained by evidence should not be submitted, which applies to the earning capacity of a 10-year-old school girl in the absence of supporting evidence, but, in the instant case, the error was harmless, as the jury's possibility of considering such element was very remote.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

Intemperate habits bearing on damages. In an action for damages consequent on wrongful death, evidence is admissible tending to show the intemperate habits of the deceased.

Townsend v Armstrong, 220-396; 260 NW 17

Verdicts—amount—when court will interfere. It is not the province of a court to interfere with the amount of a verdict in a personal injury action unless it is clearly made to appear that the verdict is the result of passion or prejudice or of a palpable disregard of the evidence. Verdict of $10,000 held nonreviewable.

Engle v Nelson, 220-771; 263 NW 505

Verdict—excessiveness. Verdict of $30,000 for wrongful death reduced by the trial court to $21,000, and by the appellate court, on condition, to $12,000.

Shutes v Weeks, 220-616; 262 NW 518

Occupation and earnings of parent. The occupation and earnings of the father of a minor child may be shown in an action for the wrongful death of the child, as an element to be considered by the jury on the issue of damages to the child's estate.

McDowell v Oil Co., 212-1314; 237 NW 456

Interest on funeral expenses. The measure of damages for wrongful death, while not including reasonable funeral expenses, does include simple interest at a legal rate on such expenses for the time intervening between the premature death and the time when, in the ordinary course of events, the deceased would have died.

Lukin v Marvel, 219-773; 259 NW 782

Measure of damages—before and after death—exemplary damages. The measure of damages in an action commenced during the lifetime of an injured person is what will right the wrong done, including exemplary damages, which are still recoverable if he dies during the pendency of the action; but if commenced by the administrator after death, the measure is the reasonable present value of his life without recovery for pain and suffering or exemplary damages.

Boyle v Bornholtz, 224-90; 275 NW 479

Excessive and exemplary damages—remittitur. Excessive damages showing passion and prejudice vitiate the entire verdict. A remittitur will not cure the error and a new trial should be granted. Where the jury returned a verdict of $1,500 actual damages and $2,500 exemplary damages, held the total amount of damages awarded and the difference between the actual damages and punitive damages were not so excessive as to show passion and prejudice; and, the entire verdict not being vitiated, the verdict for $1,500 actual damages was not affected by the erroneous submission of the question of exemplary damages and such error was cured by remittitur of all such punitive damages.

Boyle v Bornholtz, 224-90; 275 NW 479

Workmen's compensation — nonexemption from testator's debts. Workmen's compensation, already collected as the result of a commutation settlement and in the hands of testator's attorney, is subject to the debts of the employee's estate.

Long v Northup, 225-132; 279 NW 104; 116 ALR 1475

Bastards—rights of inheritance. In Iowa, illegitimate children have inheritable blood.

In re Ellis, 225-1279; 282 NW 758; 120 ALR 975

11923 Allowance to widow and children.

Additional allowance. The court may, in a proper case, increase an allowance already made to a surviving spouse.

Crouse v Ashford, 208-333; 223 NW 510

Reduction of widow's allowance—effect. Where the amount allowed a widow for her support for the year following the death of the husband is taken by her from the funds of the estate (she being executrix) and spent, a subsequent order, in an adversary proceeding, reducing said former amount is conclusive on the surety—and, of course, on the executrix—and in an action against the principal and surety the reduced amount is the limit of the allowable credit.

In re Durey, 215-257; 245 NW 236

Widow's groceries—nonliability of administrator. Administrator, who has paid testator's widow more than amount to which she was entitled prior to alleged promise to pay for groceries furnished to widow, held not authorized to make payment out of estate for such groceries.

Yoss v Sampson, (NOR); 269 NW 22

Interest on security. A widow to whom support allowance is awarded in the form of a bond or security, belonging to the estate, is under no duty as administratix to account for the interest subsequently accruing on said bond.

In re Paulson, 221-706; 266 NW 563

Fatally delayed application. A widow may not be granted an allowance from her husband's estate for her support during the year following the death of her husband when application for such allowance is not made until after the estate is duly closed.

In re Weidman, 209-603; 228 NW 571

Antenuptial contract—effect on homestead occupancy. An antenuptial contract under which the wife agrees to accept a named fractional part of the husband's property in case she survives, does not have the legal effect of depriving her of her statutory right to occupy the homestead, free of all rent, until her share is actually set off to her or otherwise actually disposed of.

Fraizer v Fraizer, 201-1311; 207 NW 772

Expense attending hostile litigation. A surviving spouse is not, especially on the theory of necessities, entitled to an allowance from the estate to reimburse her for expenses suffered by her (because of the hostile litigation of the heirs) in defending her rights as a surviving spouse.

Crouse v Crouse, 219-736; 259 NW 443

Death of bankrupt after adjudication—widow's rights. On the death of a bankrupt after adjudication and qualification of trustee, surviving wife is held entitled to distributive share in his realty under state statute providing dower rights, and also entitled to sufficient of bankrupt's property of such kind as is appropriate to her support for 12 months from bankrupt's death under state statute providing allowance to widow.

In re Payne, 20 F 2d, 665

Death of bankrupt—widow's rights—allowance and dower. Where a husband secures a receiver for his property in a state court and, with his wife, makes a conveyance of property to such receiver, and thereafter is adjudged an involuntary bankrupt, but dies before the disposition of his property by the trustee, and application is made for widow's allowance in the bankruptcy proceeding, held, that the bankruptcy adjudication and vesting of realty was not such "other judicial sale" as will defeat her right of dower, and her relinquishment by deed to husband's receiver of her contingent rights in his property became void by bankruptcy proceedings. In construing statutes for allowance to widows and children, equity court should be careful to do them no injustice.

Johnson v Payne, 26 F 2d, 450

Defeating because of felonious homicide—necessary allegation and proof. In order to defeat, under §12032, C., '31, the application of a surviving widow for an allowance out of her husband's estate, the objector must distinctly allege and prove that the widow feloniously took, or feloniously caused or procured another to take, the life of her said husband, and must so do irrespective of any previous conviction of said widow of manslaughter.

In re Johnston, 220-328; 261 NW 908

11925 Discovery of assets.

Scope of inquisitorial proceeding. In strictly inquisitorial proceedings for the discovery of assets belonging to an estate, the court has no authority to order property turned over to the administrator when the title to such property is in dispute, especially when the property apparently does not belong to the estate.

In re Brown, 212-1295; 235 NW 754

Collection of estate—scope of jurisdiction. In inquisitorial proceedings for the discovery of assets belonging to an estate, the jurisdiction of the court to continue said proceedings abruptly terminates at the point of time when it is actually made to appear that an actual controversy exists as to the title to the property in question.

Findley v Jordan, 222-46; 268 NW 515

Jurisdiction terminated by title dispute. When in the statutory summary proceedings in probate for discovery of estate assets it appears that title to the property sought is in dispute, the probate court is without jurisdiction to order the delivery of the property to the estate.

In re Enright, 224-603; 276 NW 839

Discovery proceedings—extent of jurisdiction. In a discovery proceeding against a person suspected of taking wrongful possession of decedent's property, where a dispute arises as to ownership of property, neither the trial nor appellate court has authority to order delivery of the property to the executor or administrator unless it appears beyond controversy that the person examined has wrongful possession of the property.

In re Hoffman, 227-973; 289 NW 720

Failure of discovery proceedings. In probate discovery proceedings where controversy arose as to ownership of property involved, the court rightly denied relief because of insufficiency of evidence to establish ownership in the estate, such denial being without prejudice to administrator's right to bring other appropriate proceeding to determine ownership.

In re Hoffman, 227-973; 289 NW 720

Bills and notes—requisites and validity—joint payees—rebuttable presumption of equal ownership. The presumption, that joint payees of a promissory note and of a mortgage securing the same are equal, must yield to evidence establishing the actual interest of each. So held in the settlement of an estate.

In re Morrison, 220-42; 261 NW 436

Setting aside fraudulent deed on condition. The grantee in a deed of conveyance executed for the primary purpose of preserving a means of support for the aged grantor (tho not so expressed in the deed) has a right, in an equitable action by grantor's executor to set aside the deed, to demand that his reasonable claim for furnishing the grantor a very substantial support be first paid as a condition precedent to any judgment setting aside the deed; and this is true tho said deed would have been declared fraudulent and invalid had it been attacked by the grantor's existing creditors.

Meyers v Schmidt, 220-370; 261 NW 502

Rights of legatees—sheriff's certificate passing as personalty. A sheriff's certificate under foreclosure proceedings, in which the period of redemption had not yet expired, was personal property and, upon the death of the certificate

holder-owner, passed to the person inheriting the personal property under the will.

In re Jensen, 225-1249; 282 NW 712

Rent — incident to land — passes to heirs. General rule is that rents accruing after the owner's death belong to the heirs or devisees, as an incident to the ownership of the land which descends to them.

In re Jensen, 225-1249; 282 NW 712

Collection of estate—discovery—automobile replevied after testator's death. An automobile finance company, as conditional seller, may not replevy automobiles immediately after the death of conditional buyer having absolute ownership and possession at the time of his death, since the right to possession of all personal property for administration purposes passed to executor, who in a proceeding to discover probate assets may recover the automobiles or their value from such conditional seller, whose proper remedy should have been the filing of a claim against the administrator.

In re Sweet, 224-589; 277 NW 712

11927 Recovering transferred real estate.

Actions by administrators. See under §11889
Fraudulent conveyances generally. See under §11815

Setting aside deed—when action will not lie. A nonfraudulent deed, even tho without consideration, executed and delivered by a mentally competent grantor, cannot be set aside either by the grantor or, after his death, by an heir.

Stauffer v Milner, 207-776; 223 NW 686

Title not impeached by subsequent declarations of grantor. The title conveyed by a warranty deed could not be impeached by testimony of sisters of the grantee that after the execution of the deed the wife of the grantor had said that she intended that all the children should share in the land, especially when the declarations were not made in the presence of the grantee.

Huxley v Liess, 226-819; 285 NW 216

Warranty deed and contemporaneous trust. A warranty deed which absolutely and unconditionally conveys real estate to the grantee and to "his heirs and assigns forever" will, in equity, be restricted, in its apparently limitless legal effect and operation, to such extent as will bring it into harmony with the terms of a contemporaneously executed instrument of trust covering the same property, which trust the grantee has acquiesced in and agreed to carry out as trustee.

Keck v McKinstry, 206-1121; 221 NW 851

Deed (?) or will (?). A warranty deed subject to a life estate in grantor's surviving spouse will not be deemed testamentary because of a clause wherein grantor ineffectually attempted to restrain the alienation of the land by the grantee.

Goodman v Andrews, 203-979; 213 NW 605

Deed of conveyance (?) or will (?). An executed and delivered deed of conveyance in the ordinary form conveys an interest in praesenti —is not testamentary—even tho it provides (1) that "it shall not take effect until after the death" of the grantor, and (2) that the grantor does not "give up possession" to the grantee during the life of the grantor, and (3) that the grantor "reserves the use and income of the premises as long as he lives".

Hall v Hall, 206-1; 218 NW 35

Deed (?) or will (?). An instrument which passes the title to real estate in praesenti, tho the right to its possession and enjoyment is deferred to a future time, is a deed of conveyance and not a testamentary instrument.

Bardsley v Spencer, 215-616; 244 NW 275

Creation of vested interest—inviolability. A deed, (1) which is conditioned on grantee paying, after the death of grantor, named sums to each of grantee's two sisters, and (2) which is executed and delivered by grantor and accepted by grantee in accordance with a plan entered into by all of said parties for the settlement of their inherited interests in said land, creates, instanter, in said sisters a vested landed interest which is immune from change without their consent. So held where the grantor, later, erroneously assumed the right to treat the deed as testamentary and, by a new deed, to reduce the payments to the sisters.

Carlson v Hamilton, 221-529; 265 NW 906

Delivery—presumption attending acceptance. Principle reaffirmed that the acceptance of a deed of conveyance implies an agreement by the grantee to perform legal conditions imposed on him by the deed, e. g., the payment of stated sums to named persons.

Carlson v Hamilton, 221-529; 265 NW 906

Homestead. Evidence held to show that a residence was not the homestead of a deceased at the time of a fraudulent conveyance thereof.

Level v Church, 217-317; 251 NW 709

Fraudulent assignment—evidence—failure of proof. In an action by heirs of an intestate against a son and heir of intestate to set aside a transfer of a note and mortgage from intestate to said son, evidence held insufficient to show signatures of aged mother are not the genuine signatures of intestate on assignments.

Robbins v Daniel, 226-678; 284 NW 793

Diligent creditor. The creditor of an estate may not, for his own exclusive benefit, attack a fraudulent conveyance of the deceased.

Marion Bk. v Smith, 205-203; 217 NW 857

Undue influence—degree of proof. A deed to land is not to be disturbed on the ground of undue influence unless the proof clearly and convincingly establishes that the said instrument is not the free and voluntary act of the grantor, but is the will and purpose of the grantee.

Hess v Pittman, 214-269; 242 NW 113

Undue influence—evidence to negative. On the issue of undue influence in the execution of a deed to land, it seems that the grantee may show that the grantor, subsequent to the execution of the deed, repeatedly expressed his full satisfaction with, and approval of, said deed.

Hess v Pittman, 214-269; 242 NW 113

Gift—fiduciary relation—constructive fraud not inevitable from blood relationship. As to constructive fraud arising from the gift of real property to one standing in a confidential or fiduciary relationship to the grantor, the rule placing the burden of proof on the grantee, to show the bona fides of the transaction, is of necessity applied according to the peculiar circumstances of each particular case, and not necessarily applied because mere blood relationship exists.

Jensen v Phippen, 225-302; 280 NW 528

Gift to daughter—no fiduciary relation—no fraud. Where a daughter, receiving a real estate gift from her parents, did not transact, nor advise concerning, her parents' business, nor dominate nor support them but, on the contrary, was more or less dependent upon them, such gift does not present a case of fiduciary or confidential relationship sufficient to nullify the deed on the ground of constructive fraud.

Jensen v Phippen, 225-302; 280 NW 528

Gift inter vivos—confidential or fiduciary relationship—presumption of fraud. A gift of a deed to one who stands in a confidential or fiduciary relationship to the donor raises a presumption of constructive fraud, and the burden is on the donee to make such showing of fact as to overcome the presumption.

Jensen v Phippen, 225-302; 280 NW 528

Devise and bequest—consideration unnecessary—resulting trust not created. Heirs and devisees are not required to give a consideration for devises and bequests to them; consequently, a resulting trust cannot be impressed on property conveyed to them, on the theory that they are not bona fide purchasers, when the property was not subject to the lien before conveyed.

Evans v Cole, 225-756; 281 NW 230

11928 Compounding claims.

Compounding claim. An application in probate by a national bank as executor of an estate for authority to execute a depositor's agreement on behalf of the estate presents no question of the compounding of a claim against a debtor of the estate within the meaning of this section.

In re McElfresh, 218-97; 254 NW 84

11929 Mortgage as assets—satisfaction.

Real estate and personalty distinguished. Principle reaffirmed that upon the sale of land through the medium of a contract for a deed, the purchaser acquires "land" while the vendor acquires "personal property".

Wood v Schwartz, 212-462; 236 NW 491

Treating realty as personalty—sale required. Land acquired by an executor through foreclosure on a note and mortgage coming into his hands as part of the estate will be treated as personalty for the purpose of making a final division of the estate; and the court is in error in refusing to order a sale for said purpose—especially when all existing testamentary beneficiaries so request.

Langfitt v Langfitt, 223-702; 273 NW 93; 110 ALR 1390

Authority to release without order. An executor, upon receiving payment of a note and mortgage belonging to the estate, has authority, without an authorizing order of court, to release the mortgage even tho the payment is in the form of a new note and mortgage executed by new parties.

Steffy v Schultz, 215-831; 246 NW 907

11931 Funds collected—paid out.

Collections—presumptions. All funds coming into the hands of an administrator will, in the absence of a counter showing, be presumed to be in the form of cash.

Leach v Bank, 204-1083; 216 NW 748; 65 ALR 679

Leach v Bank, 205-114; 213 NW 414; 217 NW 437; 56 ALR 801

Pension funds in hands of administrator. Original federal pension funds in the hands of an administrator are not exempt, under either state or federal statutes, from sequestration by the creditors of the pensioner. [§11761, C., '27; Revised Statutes, §4747 (38 USC §54); 38 USC §96.]

Appanoose Co. v Carson, 210-801; 229 NW 152

Joint payees—rebuttable presumption of equal ownership. The presumption that joint payees of a promissory note and of a mortgage securing the same are equal must yield to evidence establishing the actual interest of each. So held in the settlement of an estate.

In re Morrison, 220-42; 261 NW 436

Replevin—testator's gift inter vivos to sister—object of bounty. In a case where decedent,

an unmarried man 60 years of age, a physician and capable business man, high in public affairs, is starting on a vacation trip, his gift of all his property to his mother and sister, they being the natural objects of his bounty, cannot be said to be unreasonable or contrary to public policy when in a replevin action the validity of the gift is challenged by decedent's executor at the instance of decedent's second wife whom he married during the vacation trip and just ten days before his death.

Wilson v Findley, 223-1281; 275 NW 47

Action to recover. An executor is the proper party to maintain an action against his predecessor and his bondsmen to recover the funds of the estate, even tho such funds ultimately belong to testamentary devisees.

Bookhart v Younglove, 207-800; 218 NW 533

Death of annuitant—balance due. The executor of a deceased annuitant is entitled to recover the balance of the annuity due at the time of the annuitant's death.

Peterson v Floberg, 214-1398; 242 NW 18

Nonestoppel to enforce claim. An executor is not estopped to enforce a liability against a surety on the bond of a former executor by reason of the fact that his attorney has represented to such surety that the estate intends to enforce said liability solely against the estate of another surety, even tho said surety acted on such representation and did not file any contingent claim against the estate of the other surety.

In re Carpenter, 210-553; 231 NW 376

Breach of contract. An executor may maintain an action for the breach of a contract between the deceased and an heir of deceased by which the latter agreed to pay, as part of the estate, a named sum to another heir.

Rodgers v Reinking, 205-1311; 217 NW 441

Election of remedy. An administrator who has credible information for the belief and does believe that a wrongdoer has caused bank certificates of deposit belonging to the deceased to be paid by the bank on forged indorsements, and who, in an action between said wrongdoer and himself involving the estate, cross-petitions for judgment for the amount of the proceeds of said certificates, and who successfully prosecutes said cross-petition to judgment against the wrongdoer, thereby makes an election of remedies which precludes said administrator from subsequently maintaining an action against the bank on said certificates.

Sackett v Bank, 209-487; 228 NW 51

Failure to compel contribution—effect. An administrator is properly given credit for payments made by him on promissory obligations on which the deceased was a guarantor, even tho he has not yet compelled co-guarantors to make their proper contribution to such payment.

In re Atkinson, 210-1245; 232 NW 640

Erroneous payments—recovery. Funds paid to legatees under an interlocutory but erroneous order for distribution may be recovered from the legatees to whom paid.

Dillinger v Steele, 207-20; 222 NW 564

Indorsement of note. An executor may, for a proper consideration, and under a duly authorized permissive order by the court, indorse a promissory note belonging to the estate, and bind the estate to liability on the indorsement.

University Bank v Johnson, 202-654; 210 NW 785

Authority to release mortgage without order. An executor, upon receiving payment of a note and mortgage belonging to the estate, has authority, without an authorizing order of court, to release the mortgage even tho the payment is in the form of a new note and mortgage executed by new parties.

Steffy v Schultz, 215-831; 246 NW 907

Unauthorized action. An action by a plaintiff, as administrator of the estate of a deceased, to recover damages for the wrongful death of the deceased, when plaintiff was not such administrator, is a nullity, and, therefore, does not toll the statute of limitation on the said cause of action. And in case plaintiff is appointed administrator after the statute has fully run, an ex parte order of the probate court assuming to ratify, confirm, and adopt such former proceeding is likewise a nullity.

Pearson v Anthony, 218-697; 254 NW 10

Inconsistent attitude. One who is administrator of different estates should not be permitted to appear in the dual and inconsistent capacity as administrator of both estates in a matter wherein the interests of the separate estates are absolutely hostile.

In re Clark, 203-224; 212 NW 481

Preference to protect estate. A president or director of an insolvent banking corporation will not be permitted to surrender his personal deposits in the bank and to take the good assets of the bank in payment therefor; otherwise if the deposits represent the funds of an estate of which the bank official is administrator, and the exchange involves no element of personal gain to the administrator.

Leach v Beazley, 201-337; 207 NW 374

Right to offset debt of devisee. The amount which an insolvent testamentary devisee is owing to a solvent estate may be set off against the testamentary devise to said devisee.

Rodgers v Reinking, 205-1311; 217 NW 441

Insolvent heir's debts offset against share in real estate. The right to offset debts of an heir against his share of real estate exists only when the heir is insolvent. Evidence held insufficient to show heirs were insolvent.

Wilson v Wilson, 226-199; 283 NW 893

Lien for debts of devisee. A mortgage on real estate executed during the settlement of an estate by the insolvent devisee of the land is subject to the prior lien of the estate for the debts owing by the devisee to testator and contracted subsequent to the execution of the will.

Bell v Bell, 216-837; 249 NW 137

Insolvent heir's unpaid debt to estate—jurisdiction of court to offset. The court has jurisdiction, in an equitable action to partition the lands of an intestate (to which action all heirs are parties), to entertain a cross-petition by one of the heirs as administrator of said estate, and, under proper pleading and proof:

1. To decree that a certain insolvent heir has no interest in said land because his unpaid indebtedness to said estate equals or exceeds the value of the share in said lands which he would take were he not so indebted, and

2. To decree that said lands belong solely to the other heirs who are not so indebted, and to the surviving widow, if any.

Bauer v Bauer, 221-782; 266 NW 531

Offsetting debts of devisee or legatee. A legacy due an insolvent legatee, and the proceeds of lands devised to an insolvent devisee may, in the settlement of the estate, be retained by the executor to the extent that the insolvent legatee or devisee is indebted to the estate; and, if necessary, the devised lands may, under appropriate application, be sold and the proceeds applied on said indebtedness, on the resulting costs, and on the inheritance tax, if any, due the state from the insolvent.

In re Flannery, 221-265; 264 NW 68

Bankruptcy of heir—debt to estate remains —offset. A discharge in bankruptcy of a legatee puts an end to the remedy on the debt of said heir to the estate and affords a complete defense to an action on the debt; however, the debt remains an asset of the estate and the discharge does not affect the right of retainer or offset.

In re Morgan, 226-68; 283 NW 267

Distributees—offsetting debts against share in estate. The amount of the indebtedness of a distributee, solvent or insolvent, to an estate, may be set off against his share in the personal property. If the personal property is insufficient, his share of the real estate may be set off against the debt, if the heir is insolvent.

In re Morgan, 226-68; 283 NW 267

Allowable payment by administrator to himself. An administrator is properly given credit for a just claim paid to himself with the approval and at the request of all adversely interested parties, and after due consultation with a co-administrator, even tho no formal written claim was ever filed.

In re Atkinson, 210-1245; 232 NW 640

Payment of voluntary assessment on bank stock owned by estate. An administrator is properly given credit for paying a voluntary assessment on bank stock owned by the estate when such payment was in the interest of the estate and was necessary in order to reorganize the bank and to maintain it as a going concern.

In re Atkinson, 210-1245; 232 NW 640

Widow's support denied—no bar to subsequent equity action. A prior judgment in a law action tried on the merits is conclusive as to a subsequent action in equity between the same parties and the same facts, but where a widow is bequeathed a life estate in realty with the right to dispose of such realty for her necessary support, a probate adjudication on the merits that her claim for widow's support could not be established against husband's estate, is not such an adjudication as bars a later equity proceeding to establish such support claim as a lien on such realty.

Hoskin v West, 226-612; 284 NW 809

11932 Sale of personal property.

Sale of lease which prohibits sale. The probate court may validly order the administrator of an insolvent estate to sell and assign a lease of realty of which the deceased was lessee, notwithstanding the fact that the lease prohibits the lessee from assigning the lease without the lessor's consent, and provides that the terms of the lease are binding on the heirs, executors, and administrators of the parties, but contains no provision specifically applicable to a sale or assignment by operation of law.

In re Owen, 219-750; 259 NW 474

11933 Sale or mortgage of real estate —application.

ANALYSIS

I SALES OF REAL ESTATE IN GENERAL

Authority to sell real estate. A testator may unconditionally authorize and empower his executor to make full conveyances of testator's real estate.

In re Wicks, 207-264; 222 NW 843

I SALES OF REAL ESTATE IN GENERAL —concluded

Mortgage — noninvalidating effect. A provision to the effect that a policy of insurance shall be invalidated by the creation of a lien on the insured property without the consent of the insurer is not violated by the execution of a mortgage as security for claims which are already liens on the property by operation of statutory law.

Jack v Ins. Assn., 205-1294; 217 NW 816

Power to sell passes to subsequent appointee. The power of an executor to convert real estate into money for the purpose of making testamentary distribution, arising under explicit testamentary direction so to do, passes to an administrator with will annexed.

In re Jackson, 217-1046; 252 NW 775; 91 ALR 937

Bid—cancellation. A bid at a sale in partition is effectually canceled by the act of the bidder in accepting a return of his required cash deposit, even tho such deposit is returned under the order of the court.

Fraizer v Fraizer, 204-724; 215 NW 946

Voluntary conveyance to persons entitled to property. When land which was part of an estate was purchased by decedent's two sons who paid no cash consideration, but occupied, paying rent to the other heirs, and who later, in order to protect the land from creditors, deeded it to two sisters who did not know of the indebtedness of the brothers, and when the sons made a contract with the sisters at the time of the deed protecting the other heirs in case the land were sold, a creditor of one of the brothers who knew of the rent payments and knew of the deed, but made no objection, could neither have it set aside as a fraudulent conveyance nor have the real estate subjected to a judgment against the debtor-brother, as the deed and contract conveyed the mere legal title to the sisters in trust for the heirs who were the persons entitled to the property.

Lakin v Eittreim, 227-882; 289 NW 433

Sale of mortgaged lands—basis for computing compensation. Compensation to an administrator for the sale of incumbered land is properly computed by figuring the statutory percentage on the expressed consideration less the amount of the existing incumbrance.

In re Lindell, 220-431; 262 NW 819

II APPLICATION AND ORDER OF SALE

Sales and conveyances—approval as interlocutory order. The approval by the probate court of a sale and conveyance of land belonging to an estate, must be deemed an interlocutory order.

In re Doherty, 222-1352; 271 NW 609

Order to sell real estate in auxiliary citation proceedings. Where an administrator after a citation proceeding instituted by an assignee of a probate claim is directed to file an application to sell real estate to pay a claim on a promissory note, long recognized and partly paid from other funds by a former administrator, the granting of the order to sell real estate held by the heirs is erroneous when the heirs were not made parties to the citation application and when, in resistance to the application, the heirs show that no timely notice of hearing on the claim was served and no excuse given for such failure.

In re Jackson, 225-359; 280 NW 563

III TIME FOR MAKING APPLICATION FOR SALE

Timely application. An application for the sale of the real estate of a deceased in order to pay debts is timely if presented within a reasonable time after the necessity for such action is apparent. Especially is this true when the necessity for such action has been long delayed by the litigation carried on by the party who objects to the sale.

In re Spicer, 203-393; 212 NW 689

IV DETERMINATION OF NECESSITY FOR SALE

Inaccurate listing of debts—effect. An order for the sale by an administrator of lands belonging to the estate is not rendered illegal because the petition for the order listed as debts of the estate not only debts for which the estate was personally liable, but unpaid special assessments for street improvements for which the estate was not personally liable.

In re Oelwein, 217-1137; 251 NW 694

Setting aside fraudulent conveyance — authority. Authority to an administrator to institute an action to set aside a fraudulent conveyance need not also contain authority to sell the land in order to pay the debts of the estate, when the record clearly shows the existence of the debts, and insufficient property with which to pay them.

Level v Church, 217-317; 251 NW 709

V PROPERTY OR INTEREST SUBJECT TO SALE

Property subject to levy. Lands which belong to an estate and which have been ordered sold in probate in order to pay debts, are not subject to attachment in actions against heirs.

In re Collins, 207-1074; 224 NW 82

Specific devise—liability for debts. A specific devise of real estate which not only devises the property, but requires the testator's estate to discharge the mortgage thereon, cannot, in case the estate and all nonspecific devises are insufficient to pay said mortgage and other debts, be construed as casting upon another specific devise of real estate which is not made subject to the former devise, the entire burden of discharging said mortgage and

other debts. Each of said specific devises must bear said burden in the ratio of their separate value to their combined value.

In re Glandon, 219-1094; 260 NW 12

Findings in re homestead — conclusiveness. On an application by an executor for an order to sell real estate to pay debts, a finding by the court that certain land was not the homestead of the deceased is conclusive on appeal (1) unless such finding is without substantial support in the evidence, or (2) unless the court erroneously applied the law to conceded facts.

In re McClain, 220-638; 262 NW 666

Private bank depositors—property available for payment. Where an estate consists of two general classes of assets, to wit: (1) assets employed by decedent in operating his exclusively owned private bank, and (2) lands and other assets not so employed, and where, under the will, the bank is temporarily continued after the death of the decedent, an unappealed order of the probate court, entered on due notice and service, to the effect that bank depositors be paid from the general assets of the estate, precludes devisees and legatees from thereafter successfully asserting that depositors could only be paid from the assets employed in the operation of the bank, and that, as a consequence, the said lands could not be legally mortgaged in order to effect such payment. Especially should this be true when it appears that large sums of money employed in carrying on the bank have been used by the executors in paying claims not connected with the operation of the bank.

In re Griffin, 220-1028; 262 NW 473

Rights of legatees—sheriff's certificate passing as personalty. A sheriff's certificate under foreclosure proceedings, in which the period of redemption had not yet expired, was personal property and, upon the death of the certificate holder-owner, passed to the person inheriting the personal property under the will.

In re Jensen, 225-1249; 282 NW 712

Treating realty as personalty—sale required. Land acquired by an executor through foreclosure on a note and mortgage coming into his hands as part of the estate, will be treated as personalty for the purpose of making a final division of the estate; and the court is in error in refusing to order a sale for said purpose—especially when all existing testamentary beneficiaries so request.

Langfitt v Langfitt, 223-702; 273 NW 93; 110 ALR 1390

Rent — incident to land — passes to heirs. General rule is that rents accruing after the owner's death belong to the heirs or devisees, as an incident to the ownership of the land which descends to them.

In re Jensen, 225-1249; 282 NW 712

11935 Time, place of hearing, and service.

Order to sell real estate in auxiliary citation proceedings. Where an administrator after a citation proceeding instituted by an assignee of a probate claim is directed to file an application to sell real estate to pay a claim on a promissory note, long recognized and partly paid from other funds by a former administrator, the granting of the order to sell real estate held by the heirs is erroneous when the heirs were not made parties to the citation application and when, in resistance to the application, the heirs show that no timely notice of hearing on the claim was served and no excuse given for such failure.

In re Jackson, 225-359; 280 NW 563

11937 Method of sale.

Shortage in acreage—evidence. Where lands of an estate are ordered sold for a lump sum, parol evidence is admissible to show that the land was, in realty, sold at a certain price per acre and that the acreage fell short of what was supposed to be the acreage, and that the administrator properly made a deduction for said shortage.

In re Oelwein, 217-1137; 251 NW 694

Order to sell real estate in auxiliary citation proceedings. Where an administrator after a citation proceeding instituted by an assignee of a probate claim is directed to file an application to sell real estate to pay a claim on a promissory note, long recognized and partly paid from other funds by a former administrator, the granting of the order to sell real estate held by the heirs is erroneous when the heirs were not made parties to the citation application and when, in resistance to the application, the heirs show that no timely notice of hearing on the claim was served and no excuse given for such failure.

In re Jackson, 225-359; 280 NW 563

Realty values—evidence. In probate proceedings on objections to executor's final report, evidence supported trial court's fixing value of farm land at $125 per acre for the purpose of accounting.

In re Sheeler, 226-650; 284 NW 799

11940 Borrowing money.

Court's discretion in authorizing mortgage to pay claims. The granting of authority to an executor to mortgage real estate to pay claims is discretionary with district court.

In re Christensen, 227-1028; 290 NW 34

Previously litigated matters concluded. In proceedings on executor's application for authority to mortgage real estate for purpose of paying claims and administration expense, objections as to validity of claims which had

been finally adjudicated adversely to objectors in former proceedings wherein the objectors all appeared, filed claims, and were represented by counsel, could not be relitigated, and likewise objectors' right to an accounting against executor in such proceedings could not be relitigated since it had been previously adjudicated that such matter had no proper place therein.

In re Christensen, 227-1028; 290 NW 34

Unallowable collateral attack. In the foreclosure of a mortgage, executed by an administrator on lands of the deceased and on due order and authorization of the court, the defending heirs, who were parties to the order and authorization for the mortgage, will not be permitted to collaterally attack the validity of the mortgage on the ground that part of the land was the homestead of the deceased and therefore descended to the heirs exempt from the debts of the deceased.

Reinsurance Life v Houser, 208-1226; 227 NW 116

Implied authority to pay debt. An order of court granting an application by an administrator to borrow money on real estate mortgage security in order to pay a specified debt owed by the estate, impliedly carries authority and direction to use the money in the payment of said debt.

Elliott v Bank, 209-1258; 228 NW 274

11946 Approval by court required.

Approval as interlocutory order. The approval by the probate court of a sale and conveyance of land belonging to an estate, must be deemed an interlocutory order.

In re Doherty, 222-1352; 271 NW 609

Approval by court—estoppel. A vendee who contracts for the purchase of the real estate of an estate "subject to the approval of the court" may not deny the power of the court to reject such contract, even tho the executor was vested by the will with ample power to make a sale without the approval of the court.

In re Wicks, 207-264; 222 NW 843

Title—nonpermissible adjudication. When, in the settlement of an estate in probate, a contract of sale of land belonging to the estate is fully consummated by payment and deed, and the sale and conveyance duly approved by the court as by contract required, the purchaser, who is an entire stranger to the estate except as such purchaser, is not a proper, necessary or permissible party to a proceeding in said probate court, instituted by the residuary legatee, to set aside the probate order approving said sale and conveyance.

Reason: The probate court cannot, even in piecemeal, adjudicate the validity of the title of said purchaser.

In re Doherty, 222-1352; 271 NW 609

Bidder at sale of trust property—nonaggrieved party. In the sale of the personal property assets of an insolvent bank by the liquidating receiver, a bidder who is not a creditor of the bank, or interested in any manner in the trust property except as a proposed buyer, has no such standing or interest as authorizes him to appeal from an order of the court rejecting his bid for an item of said assets, and approving a lesser bid of another party for the same item. Nor will the court, under such circumstances, order a remand when the difference between the two bids is slight. (This is not suggesting (1) that the unsuccessful bidder may not very properly call the attention of the court to the disparity in bids, or (2) that the court has unbridled discretion to reject high bids and to approve low bids.)

Dean v Clapp, 221-1270; 268 NW 56

11951 Limitation of action.

Similar provision in re guardianship. See §12596, Vol I

11952 Possession of real property.

Real estate—custodia legis. Lands and the rents and profits thereof may not be said to be in the custody of the executor of the deceased owner (1) when the will does not so provide, (2) when the executor has never taken possession, and (3) when the rents have never been treated as belonging to the estate.

First N. Bk. v Murtha, 212-415; 236 NW 433

Rent—incident to land—passes to heirs. General rule is that rents accruing after the owner's death belong to the heirs or devisees, as an incident to the ownership of the land which descends to them.

In re Jensen, 225-1249; 282 NW 712

Fire insurance premiums—proper allowance. An administrator is properly given credit for fire insurance premiums paid out by him, in proper amount, for insurance on farm buildings, there being no heirs or devisees present to take possession.

In re Atkinson, 210-1245; 232 NW 640

Rights of legatees—sheriff's certificate passing as personalty. A sheriff's certificate under foreclosure proceedings, in which the period of redemption had not yet expired, was personal property and, upon the death of the certificate holder-owner, passed to the person inheriting the personal property under the will.

In re Jensen, 225-1249; 282 NW 712

11953 Proceeds—account.

Taxes—duty to pay. Taxes are a charge against an estate and must be paid by the administrator.

In re Oelwein, 217-1137; 251 NW 694

Division of rents. A surviving wife is not entitled to one third of the gross rents accumulating in the estate prior to the setting off of her distributive share, but to one third after deducting taxes, proper charges for upkeep and receivership charges, if any.

Crouse v Crouse, 219-736; 259 NW 443

11954 Minor heirs—payment of taxes.

Inheritance tax on bequest—right of testator to pay. A testator may validly provide that the inheritance tax on a specific devise or bequest made by him in his will shall be paid from the residuary part of his estate, provided he clearly expresses his intention to that effect. Will construed and held clearly so to provide.

In re Johnson, 220-424; 262 NW 811

11955 Procedure prescribed by will.

Whether will or statute controls. A statute which specifies the securities and the nature thereof in which trust funds may be invested (§12772, C., '27) does not control the investment of testamentary trust funds created under a will which—no rights of creditors being involved—clearly directs investments to be made in more lucrative securities.

In re Lawson, 215-752; 244 NW 739; 88 ALR 316

Testator's intention. In construing a will the principal concern will be to ascertain and determine the intention of the testator, and it is the duty of the court, if it be reasonably possible, to give effect to all of the will's provisions.

Anderson v Anderson, 227-25; 286 NW 446

Ordinary probate proceedings—noninterference by equity court. An equity court may not interfere with the ordinary proceedings of the probate court in exercising its exclusive jurisdiction in the administration of estates. Rule applies when probate court is following the manner and the method provided by the testator in the will.

First Methodist Church v Hull, 225-306; 280 NW 531

Acceptance of bequest—extension of testator's limitation—effect. Where testator directed his executors to purchase, for a daughter, good Iowa land of the value of $15,600, such daughter having refused to accept partial distribution of realty to heirs prior to testator's death, but the testator also provided such bequest should lapse if daughter failed to select land within one year from testator's death, and where within one year the daughter filed application for extension of time on the ground that estate did not have funds to purchase such land, which extension was granted after due notice to executors and heirs, held, district court had jurisdiction to grant extension of time and, no appeal having been taken therefrom, the order became "final" and the heirs were bound by the decision.

In re Holdorf, 227-977; 289 NW 756

Equitable conversion under will. In probate proceedings where testator directs the executor of his estate to sell all of the property of the estate, including realty, as soon as convenient after his death and distribute proceeds, while the executor has some discretion as to the time and manner of the sale, the direction is mandatory, and effects an equitable conversion of the real estate into personalty at the instant of testator's death, and thereafter the real estate is to be treated as personalty, and be subject to the rules governing personal property.

In re Sheeler, 226-650; 284 NW 799

Absolute bequest—later repugnant provision disregarded. Where a codicil made an absolute bequest of a residuary estate to a county to be used in paving a highway, and a later provision in the codicil gave certain directions to the executor and imposed conditions for acceptance of the bequest by the county, such later conditions were repugnant and would defeat the purpose of the testator and must be disregarded when void in delegating power to the executor in violation of statute, and the intention of the testator as expressed in the first provision must be given effect to prevent intestacy.

Blackford v Anderson, 226-1138; 286 NW 735

Appointment of nominated executor required unless disqualified. Altho a certain discretion lies with the probate court in the appointment of personal representatives, nevertheless an executor named in a will as the one in testator's judgment best fitted to administer his estate should be appointed by the court in the absence of disqualification, which must be more than the objections of collateral relatives.

In re Schneider, 224-598; 277 NW 567

11956 Business continued—inventory.

Order—validity. An order in probate authorizing an administrator to continue the private banking business of the deceased is not void because entered without notice to creditors.

In re Harsh, 207-84; 218 NW 537

Continuing partnership. An administrator, without an authorizing order of court, has no power to bind the estate by continuing a partnership of which the deceased was a member or by creating a new partnership. And under such circumstances the ex parte statements or pretenses of the surviving partners are quite inconsequential.

Williams v Schee, 214-1181; 243 NW 529

Implied authority to continue partnership. Where a deceased had been a member of a

banking partnership, an order in probate allowing a claim against the estate, consequent on a defalcation of a former employee of the bank, cannot be deemed an implied authorization to the administrator to continue the partnership after the death of the deceased.

Williams v Schee, 214-1181; 243 NW 529

11957 Claims against estate—form.

Discussion. See 22 ILR 557—Limitations and claims against estate

ANALYSIS

Funeral expenses. See under §11969

I PRESENTATION AND PRESERVATION OF CLAIMS—PLEADINGS

Executor may file own claim. Executrix of estate may file her own claim against the estate, or proceed for the appointment of a temporary administrator, as provided by statute.

In re Dunn, (NOR); 224 NW 38

Substitution of administrator—judgment—effect. A plaintiff who, upon the death of the defendant, prosecutes his claim to judgment by substituting the defendant's administrator as defendant, simply accomplishes a legal adjudication of his claim against the estate. Plaintiff, by such procedure, does not obtain any lien on the real property belonging to the estate.

Marion Bank v Smith, 205-203; 217 NW 857

Findings—conclusiveness. A supported finding in probate that a claim should be disallowed is conclusive on appeal.

Chamberlain v Fay, 205-662; 216 NW 700

Appeal—non de novo hearing. Claims against an estate are triable at law. Consequently, on appeal, an allowance by the probate court will not be disturbed if it is not excessive and has support in the evidence.

In re Anderson, 216-1017; 250 NW 183

Fact findings in probate not triable de novo on appeal. Findings of fact by the trial court in a probate proceeding involving objections to an executor's report and payment of certain claims cannot be reviewed on appeal, such not being triable de novo.

In re Scholbrock, 224-593; 277 NW 5

Probate claims—not triable de novo. Probate claims are not triable de novo in the supreme court, as credibility of witnesses and weight of testimony are involved.

In re Martens, 226-162; 283 NW 885

Claims—strict pleading unnecessary—prayer not required. Claims in probate, not being subject to strict rules of pleading, require no specific form or prayer.

In re Davie, 224-1177; 278 NW 616

Presentation form — technicalities not required. Technical accuracy and fullness of allegation, or that degree of particularity of pleading and conformity of pleading to proof required in ordinary actions, are not required in the presentation of claims in probate.

In re Newson, 206-514; 219 NW 305
In re Onstot, 224-520; 277 NW 563
In re McKeon, 227-1050; 289 NW 915

Contract binding "heirs" — claim in estate necessary. A contract with a decedent, altho binding on his heirs, executors, and administrators, must be enforced by filing a claim in the estate as provided by law.

In re Sterner, 224-617; 278 NW 216

Filing excused. One who holds a promissory note under the authorized indorsement of the executor of the estate to which the note once belonged, need not file his claim against the estate.

University Bank v Johnson, 202-654; 210 NW 785

Dual filing of same claim unnecessary. When a collaterally secured promissory note against an estate is duly filed with and approved by the administrator and by the court and, with the approval of the court, is taken up and merged into a new note signed by the administrator and accompanied by the same collateral, no necessity exists for the filing of the new note as a claim against the estate.

Elliott v Bank, 209-1258; 228 NW 274

Notes of deceased—prima facie case. In an action in probate by payees of notes to establish notes as claims against maker's estate, the conceded signature of deceased and admission of the notes in evidence establish a prima facie case for claimants.

In re Humphrey, 226-1230; 286 NW 488

Execution and delivery of notes—consideration presumed. In an action in probate to establish notes of deceased as claims, proof of the execution and delivery being established, it is presumed that notes were issued for a valuable consideration and the burden of showing lack of consideration is on the defense.

In re Humphrey, 226-1230; 286 NW 488

Premature filing. The filing of a claim against an estate prior to the doing of some act which is necessary to fully mature the claim, i.e., a demand for payment, will not render the filing premature when such act is done prior to the hearing.

In re Prunty, 201-670; 207 NW 785

Bank officers' duty to protect assets—filing probate claim. A duty is imposed on bank

officers and directors to file a claim against the estate of a deceased bank director when the bank's bills receivable are covered by a guaranty agreement executed by such deceased director.

In re Sterner, 224-617; 278 NW 216

Belated filing—equitable proceeding. While establishing a probate claim is a law proceeding, the determination of the existence of peculiar circumstances relieving the failure to file a probate claim within the statutory period is an equitable proceeding.

Ontjes v McNider, 224-115; 275 NW 328

Peculiar circumstances relieving limitation on filing claim. Statute being liberally construed, peculiar circumstances to afford relief from the one-year limitation on filing probate claims, and to permit thereafter the superintendent of banking to file a claim on decedent's guaranty of bank's bills receivable, exist when decedent was a director in the bank, when his son and executor had been a bookkeeper and cashier in the bank, knowing bank's financial condition, and as such officer had a duty to file a claim on the guaranty against the estate, and when the financial condition of the bank at the time the receiver took control was so concealed in the books and records that the receiver was unable to learn at once the necessity for filing such claim.

In re Sterner, 224-617; 278 NW 216

Fatally belated claim to estate. A surviving widow (who is administratrix of her husband's estate) may not, in her final report and on the hearing thereof, present for the first time, and litigate, the claim that the estate left by her husband was the result of the joint earnings of herself and her husband during his lifetime, and that she is entitled to half of the estate either as earnings or as joint owner.

In re Paulson, 221-706; 266 NW 563

Action in lieu of filing in probate. Principle reaffirmed that the bringing of an action at law against an estate is equivalent to filing the claim in probate.

Van Iperen v Hays, 219-715; 259 NW 448

Claims overlooked. A claim against an estate, duly verified and filed, and not allowed or disallowed by the administrator, cannot be deemed adjudicated by an order approving the final report of the administrator when the claim, the claimant and his representative were, by mistake and oversight, wholly overlooked both in said final report and in the notice of hearing thereon. It follows that an equitable action will lie, subsequent to said approval, to open up the estate and to allow the claim.

Harding v Troy, 217-775; 252 NW 521

Conversion by guardian—failure to file claim. Failure of a ward to file a claim against the estate of an embezzling guardian works no release of the surety on the bond of the guardian.

Armon v Craig, 203-1338; 214 NW 556

Subrogation. A surety who, in a foreclosure suit which was personal as to himself, but solely in rem as to the estate for which he was surety, pays off a deficiency judgment, must file his claim against the estate in order to render effective his right of subrogation.

In re Angerer, 202-611; 210 NW 810

Defect of parties in re objections to accounting. A guardian, after purchasing a residence property for his ward at a price authorized by the court, paid the vendor a trifling part of the contract price and obtained a deed from the vendor to the ward who thereafter for years remained in undisturbed possession of the property. The guardian in a later report credited himself with the full amount of the contract price. Later, the deception being discovered, the ward filed objections to the report. The guardian dying, his administrator appeared in re said objections.

Held, the court was in error in establishing a claim in favor of the ward and against the guardian's estate in the amount of the credit improperly taken by the guardian, on condition that the ward reconvey the property to the unpaid vendor,—that the court was per se without jurisdiction to adjudicate said controversy in the absence of said unpaid vendor as a party to said proceedings.

In re Bennett, 221-518; 266 NW 6

Right to enforce all security. The filing of a claim against the estate of the deceased debtor does not preclude claimant from maintaining an equitable action to enforce said claim against lands which were made liable for the payment of said claim by the probated will of another decedent.

Diagonal Bank v Nichols, 219-342; 258 NW 700

Probate claim denied—no bar to subsequent equity action. A prior judgment in a law action tried on the merits is conclusive as to a subsequent action in equity between the same parties and the same facts, but where a widow is bequeathed a life estate in realty with the right to dispose of such realty for her necessary support, a probate adjudication on the merits that her claim for widow's support could not be established against husband's estate, is not such an adjudication as bars a later equity proceeding to establish such support claim as a lien on such realty.

Hoskin v West, 226-612; 284 NW 809

Widow's support—equity allowing more than probate claim. In an equity action to establish a claim for support of testator's widow, the increasing of amount of such claim in excess of a claim for the same services filed in testator's estate, which was disallowed, held, not important or showing of bad faith, where

I PRESENTATION AND PRESERVATION OF CLAIMS—PLEADINGS—continued

evidence of witnesses is uncontradicted and claim is reasonable. It is not unusual in actions at law or in equity to increase the amount claimed by amendment or on a second trial.

Hoskin v West, 226-612; 284 NW 809

Equitable set-off. Where an insolvent bank in the hands of a receiver owes an estate on a deposit, an heir who owes the bank, tho he is the executor of the estate, may have his interest in the deposit set off against his indebtedness to the bank, subject, of course, to claims which may be filed against the estate.

Andrew v Bank, 216-240; 249 NW 154; 93 ALR 1156

Debt-encumbered remainder — equitable action to enforce. Where a testator devises to his wife a life estate in all his property (which estate she accepts), with remainder to his children, a provision of the will to the specific effect that "all just debts and funeral expenses" of said wife shall be paid out of testator's estate, will enable the wife's creditor, who became such subsequent to the probating of the will and the closing of the estate, and shortly prior to the death of the wife some 30 years later, to maintain an action in equity to establish the debt, and to subject the lands, passing under the will and in the hands of remaindermen, to the satisfaction of said debt.

Diagonal Bank v Nichols, 219-342; 258 NW 700

Probate — claim payable "on or before" death. An oral contract to pay for services, payable "on or before" the death of the promisor, matures at his death and therefore is not barred by the statute of limitations, even tho the claim was running for over 20 years.

Gardner v Marquis, 224-458; 275 NW 493

Mutual expectation. One suing for the value of services rendered need not show that he expected to receive payment and that the decedent expected to make payment, when the claimant was not a member of the decedent's family.

Nortman v Lally, 204-638; 215 NW 713

Pleading express contract and proving quantum meruit. A claim in probate "for personal services performed by claimant for and in behalf of decedent at her special instance and request" is sufficiently supported by proof that personal services of a certain value were rendered by claimant for decedent and accepted by decedent, without any proof of an express oral or written contract.

In re Walton, 213-104; 238 NW 577

Evidence—competency. On a claim for services rendered to a deceased during his lifetime, evidence is inadmissible as to what claimant did relative to the funeral of decedent.

In re Walton, 213-104; 238 NW 577

Presumptive credits. In an action against an estate on a contract by deceased to pay for services rendered to her, payments of money by deceased to claimant are, presumptively, credits on the contract.

In re Willmott, 211-34; 230 NW 330; 71 ALR 1018

Defense of payment—burden on defendant. In an action in probate to establish claim based on promissory note, the burden of proving payment is upon defense.

In re Humphrey, 226-1230; 286 NW 488

Admissions of wife against husband. Admissions by a wife in the absence of the husband, tending to show that a claimant in probate had been employed in the business and had not been paid, are admissible against the estate of the husband when it appears that the wife was both the general manager of the business in question, and a partner therein with her husband.

Nortman v Lally, 204-638; 215 NW 713

Contracts—consideration—claim in probate. On a wife's claim against her deceased, divorced husband's estate, a promissory note expressly stating a consideration, which, however, is invalid to support the claim, will not, under §9440, C., '35, import a valid consideration, so as to generate a jury question. Section 9440, C., '35, was not intended to furnish the consideration but only import it when not stated, which in any event could not be different than that stated in the contract.

In re Straka, 224-109; 275 NW 490

Defense—lack of consideration. In probate action to establish as claims notes signed by deceased, evidence submitted by defense to show lack of consideration, was properly held to be insufficient to present a jury question.

In re Humphrey, 226-1230; 286 NW 488

Self-serving declarations. Self-serving declarations of a husband or wife during their lifetime are inadmissible to negative a claim in probate against the estate of the husband.

Nortman v Lally, 204-638; 215 NW 713

Oral contract to convey land at death—absence of strong equities. Absence of strong equities in favor of the plaintiff, a son trying to establish an oral contract with his father, since deceased, does not tend to weaken his corroborating testimony.

Blezek v Blezek, 226-237; 284 NW 180

Oral contract to devise—evidence to establish—duty of court. Evidence to establish an alleged oral contract between a father and son, that the father would leave to the son a farm when he died, must be established by clear, satisfactory, and convincing evidence, and it is the duty of the court to subject the evidence

to every fair test which may tend to weaken its credibility.

Blezek v Blezek, 226-237; 284 NW 180

Oral contract to devise—convincing evidence necessary. An alleged oral contract between a childless couple and a neighbor, that such couple would leave all their property to the neighbor's minor son when he became of age, if he would live with them until that time, must be established by clear, satisfactory, and convincing evidence, and when so established, along with proof of compliance by the son, entitles the son to specific performance of the contract.

Ford v Young, 225-956; 282 NW 324

Partnership checks not showing payment. In proving a claim against an estate, by showing an oral contract to pay for services extending over a period of many years, neither the lapse of time nor checks payable to claimant drawn by decedent during the 14 years just preceding his death, when a partnership existed between them for those years, raises a presumption of payment in view of decedent's admission of the debt shortly before his death.

Gardner v Marquis, 224-458; 275 NW 493

Transactions with deceased. A claimant in probate must not be permitted to testify that he relied and acted on statements made by the deceased to a third party in a conversation in which claimant took part; otherwise as to statements made by deceased in conversation in which claimant did not take part.

In re Newson, 206-514; 219 NW 305

Collection of estate—discovery—automobile replevied after testator's death. An automobile finance company, as conditional seller, may not replevy automobiles immediately after the death of conditional buyer having absolute ownership and possession at the time of his death, since the right to possession of all personal property for administration purposes passed to executor, who in a proceeding to discover probate assets may recover the automobiles or their value from such conditional seller, whose proper remedy should have been the filing of a claim against the administrator.

In re Sweet, 224-589; 277 NW 712

Redemption in lieu of payment from estate. The holder of a legally established claim in probate need not rely on his right to be paid from the funds—if sufficient—arising from the administration of the estate, but may become a redemptioner of the real estate of the decedent which has been sold on execution and which is yet subject to redemption by creditors, (1) by pursuing, within the statutory period, the course prescribed for redemption by creditors in general, and (2) by applying during said period to the district court (or to a judge thereof) of the county wherein the land is situated, for an order, on due notice and hearing, permitting and confirming such right of redemption.

Aronson v Hoskins, 201-389; 207 NW 389

Action against executor as such. An action at law against an executor as such, in the county in which he was appointed such officer, for damages for personal injuries inflicted by the deceased, is, in legal effect, but an action in rem against the assets of the estate. It follows that the executor is not entitled to demand a change of place of trial to another county of which he is a legal resident.

Van Iperen v Hays, 219-715; 259 NW 448

Appearance and continuance in state court—nonwaiver of federal jurisdiction. Agreed postponements of a probate hearing in the state court will not prevent the Reconstruction Finance Corporation, a party authorized by act of Congress to sue in the federal courts, from thereafter commencing action thereon in the federal courts.

RFC v Dingwell, 224-1172; 278 NW 281

Federal courts—probate claims—jurisdiction from diversity of citizenship. Tho proceedings for settlement of an estate may be pending in a state court, the federal courts may on account of diversity of citizenship assume jurisdiction to determine the validity of claims against the estate.

RFC v Dingwell, 224-1172; 278 NW 281

State and federal courts—comity—certiorari coercing state court's release of jurisdiction. The necessity for comity between state and federal courts demands that controversies shall not arise concerning their respective jurisdictional powers on account of unsubstantial considerations, and certiorari from the supreme court of Iowa will lie to require a district court of the state to relinquish jurisdiction over a probate matter after the federal court, through diversity of citizenship, has assumed jurisdiction.

RFC v Dingwell, 224-1172; 278 NW 281

II CLAIMS CHARGEABLE AGAINST THE ESTATE

Rebutting presumption of gratuity.

Spicer v Administrator, 201-99; 202 NW 604

Contract for repayment—burden of proof. One seeking to recover money loaned must prove a contract express or implied for its repayment.

In re Green, 227-702; 288 NW 881

Transaction with deceased—expectation of payment. A claimant for services rendered as a member of the family of a decedent is incompetent to testify against the executor that she expected to receive compensation for the services performed.

In re Docius, 215-1193; 247 NW 796

II CLAIMS CHARGEABLE AGAINST THE ESTATE—continued

"Family" defined. Instructions which define a "family" as "a collection or collective body of persons who live under one roof and under one head or management" are all-sufficient.

Wilson v Else, 204-857; 216 NW 33

Persons in family relation. The existence of a family relation in a legal sense creates a presumption that services performed in the family by the members thereof were gratuitous; but the fact that a mother "lived in the house" occupied by a daughter and "ate at the same table" does not per se establish such family relation.

In re Butterbrodt, 201-871; 208 NW 297

Family relation — presumption. Services rendered in a family by one member thereof to another member are presumptively gratuitous; but claimant may overthrow the presumption by proof of an express contract to pay for such services, or by proof of such circumstances as will justify a finding that the member rendering the services expected to be paid therefor, and that the member receiving the services expected to pay therefor.

Wilson v Else, 204-857; 216 NW 33

Persons in family relation. The rendition on one hand and the acceptance on the other of valuable services (board and lodging) for a series of years generates a presumption that the one rendering was to receive pay and that the one receiving was to pay; and this is true tho the receiver and the giver were lifelong associates and related, but were not members of the same family.

Peterson v Johnson, 205-16; 212 NW 138

Services rendered for decedent—evidence—sufficiency. Evidence held sufficient to support a verdict of $7,500 for services rendered to a decedent during a series of years.

Halstead v Rohret, 212-837; 235 NW 293

Services in family—presumption. There can be no presumption that services performed for a deceased were gratuitous when claimant and deceased were not related and not members of the same family.

In re Walton, 213-104; 238 NW 577

Persons in family relation. A daughter-in-law who enters the home of her father-in-law and cares for him for many years while performing the duties of a housewife, as had formerly been done by other relatives, cannot recover from the estate of the father-in-law for said services in the absence of an express or implied contract; and an implied contract is not established by proof that on occasions the father-in-law expressed appreciation for the personal care rendered him, and a purpose to pay therefor.

In re Unangst, 213-1064; 240 NW 618

Wife's claim for services—public policy. When necessarily including compensation for purely domestic duties, a wife's claim against the estate of her deceased, divorced husband, furnishes in itself sufficient ground for denying it, under the rule that agreements that a wife be compensated for the performance of obligations incident to the marital relation violate public policy and are void.

In re Straka, 224-109; 275 NW 490

Widow's groceries—nonliability of administrator. Administrator, who has paid testator's widow more than amount to which she was entitled prior to alleged promise to pay for groceries furnished to widow, held not authorized to make payment out of estate for such groceries.

Yoss v Sampson, (NOR); 269 NW 22

Probate claim—nonfraudulent allowance—conclusiveness. A daughter's claim on promissory notes against her father's estate upon which there was a hearing to the court, at which hearing the administrator, her brother, appeared personally and by counsel, and at the conclusion of which judgment was entered allowing the claim, altho it was apparent to the court from the face of the notes that the statute of limitations had run, is a situation where the allowance will not be disturbed on appeal without a showing of fraud upon the court. Held, fraud not shown.

In re Sterner, 224-605; 277 NW 366

Living with and caring for parents at their request — nongratuitous services. Reciprocal services rendered by and between members of a family are presumed to be gratuitous, yet, the court, a jury being waived, may find that a married daughter, who with her family, returns to the home of her aged parents at their request to care for them, for which she expected to receive and the parents expected to pay remuneration, did not reestablish a family relationship with her parents so as to raise the presumption of gratuitous services. Such finding will be binding on the appellate court.

Clark v Krogh, 225-479; 280 NW 635

Note found in decedent's safe—no delivery. In spite of a mother's declarations as to the existence of a note and her instructions to her daughter to get it after the mother's death, a promissory note executed by a mother, with her daughter as payee, in repayment of money allegedly borrowed from the daughter, and found by said daughter in the mother's safe after her death, is not a valid claim against the estate of the mother—there having been no sufficient delivery thereof to payee. Quaere, as to validity of claim if based on the debt independent of the note.

In re Martens, 226-162; 283 NW 885

Rents from dower interest — nonliability. Rents arising from the distributive share of a surviving spouse, during the time when such

share is being held in common with the shares of other owners, are not liable for the debts of the estate or of the costs of administration.

Crouse v Crouse, 219-736; 259 NW 443

Share of heir as mere contract claim—how paid. Where the share or interest of a child in the estate of his or her alleged parent takes the form of a mere contract obligation against the estate, the child becomes a mere claimant against the estate and is payable as such, and not from the mere residue of the estate. So held where the parentage was in issue and was compromised by a court-approved agreement wherein the executor agreed, on behalf of the estate, (1) to set up a specified trust fund, the annuity of which was to be payable to said child during its lifetime, and (2) annually to pay said annuity to said child until the trust fund was actually set up.

In re Griffin, 220-1028; 262 NW 473

Premium on bond—refusal to allow. The probate court is clearly within its discretion in refusing to allow against an estate and to the surety on an executor's bond (the executor being deceased and his estate insolvent) the amount of unpaid premiums on the bond, especially when such allowance would burden the estate with a double charge for premiums consequent on the mismanagement of the estate by the executor.

In re Mowrey, 218-992; 255 NW 511

Allowable payment by administrator to himself. An administrator is properly given credit for a just claim paid to himself with the approval and at the request of all adversely interested parties, and after due consultation with a co-administrator, even tho no formal written claim was ever filed.

In re Atkinson, 210-1245; 232 NW 640

Allowance of credit—review on appeal. An order of the probate court granting an executor credit on his final report for the amount paid by him on his own motion, on a claim against the estate, is conclusive on the appellate court if the record reveals supporting testimony as to the genuineness of the claim.

In re Plendl, 218-103; 253 NW 819

Payment of unfiled claims. Principle reaffirmed that an executor may voluntarily pay valid claims against the estate tho they are not filed.

In re Plendl, 218-103; 253 NW 819

Administrator's claim—ex parte allowance—correction before final settlement. A personal claim of an administrator allowed on an ex parte hearing without a special administrator, without a hearing, without notice, and containing a joint obligation of administrator and decedent, is subject to correction any time before final settlement and should be disallowed until it appears sufficient funds exist to pay all other claims and costs of administration.

In re Sterner, 224-605; 277 NW 366

Conditional rejection of item in interlocutory report. The court may, very properly, in ruling upon an item in an interlocutory report, allow part of the item and continue the remainder for more adequate showing in the administrator's final report.

In re Atkinson, 210-1245; 232 NW 640

Interest on antenuptial-contract allowance. A provision in an antenuptial contract that the wife shall be paid a named sum within a named time after the death of the husband contemplates interest on said sum from the maturity date, even tho said contract also provides that the widow shall be paid a monthly sum until the former main sum is paid.

In re Shepherd, 220-12; 261 NW 35

Husband's breach of antenuptial contract—wife's heirs' claim against husband's estate. An antenuptial contract preserving the respective property rights of the parties will support a claim in favor of the wife's collateral heirs against the estate of the husband who appropriated his deceased wife's separate property that otherwise and rightfully should have gone to such collateral heirs.

In re Onstot, 224-520; 277 NW 563

Harmless error. In proceeding on claim against a decedent's estate for an alleged loan, trial court erred in holding that claimant's wife was an incompetent witness as to conversation with decedent wherein he stated that "they should get around to make a note for the $500 he gave him". However, since court also found in effect that such evidence would not have been sufficiently definite to establish the claim, such error was not prejudicial.

In re Green, 227-702; 288 NW 881

Instruction on "stated" amount for alleged services rendered to decedent. In probate claimant's action reciting decedent's agreement to pay to claimant for services from decedent's estate an amount more than claimant could expect to make teaching school, a reference by trial court in its instructions to decedent's agreement to pay a "stated amount per month" was not objectionable where, under allegations of claim there could be no recovery unless jury found that there was an agreement to pay a stated amount, and where there was evidence as to amount stated or fixed by decedent. The word "stated" means no more than determined, fixed, or settled, and was properly used in the instruction.

In re McKeon, 227-1050; 289 NW 915

Finding of duplication in claims. Since appellant-claimant failed to challenge finding of trial court that two claims against a decedent's

II CLAIMS CHARGEABLE AGAINST THE ESTATE—concluded

estate based on a note and a loan were a duplication, the sufficiency of other grounds of judgment disallowing claim for the loan was immaterial.

In re Green, 227-702; 288 NW 881

Setting aside fraudulent deed on condition. The grantee in a deed of conveyance executed for the primary purpose of preserving a means of support for the aged grantor (tho not so expressed in the deed) has a right, in an equitable action by grantor's executor to set aside the deed, to demand that his reasonable claim for furnishing the grantor a very substantial support be first paid as a condition precedent to any judgment setting aside the deed; and this is true tho said deed would have been declared fraudulent and invalid had it been attacked by the grantor's existing creditors.

Meyers v Schmidt, 220-370; 261 NW 502

Declarations and admissions of heirs and devisees. Where there are several devisees or legatees whose interests are several and not joint, the declarations of one are not admissible for the reason that they might operate to the prejudice of the others. In general, the admissions of an heir are not admissible to prove a claim against an estate unless he is the only heir interested upon that side of the action.

In re Green, 227-702; 288 NW 881

Heir's assignment of interest subject to estate claims—rights of assignee. In a probate proceeding where one of the heirs, who is indebted to the estate, purchases a farm from the executor and assigns her one-tenth interest in the estate as security for a purchase note to the executor, who in turn assigns the note to a third party, held, that such assignment of interest is taken subject to the estate claims, and whatever interest remains should be paid to the holder of the note irrespective of the fact the executor is also indebted to the estate on his final account.

In re Sheeler, 226-650; 284 NW 799

Refund to pay debts. The heirs of an estate who unconditionally purchase the interest of their mother in the estate have no legal right, thereafter, to compel the mother to contribute any sum toward the discharge of unpaid debts of the estate, unpaid taxes against the estate, or unpaid probate costs and fees.

In re Jones, 217-288; 251 NW 651

Formal direction in will to "pay debts"—no priority over other testamentary dispositions. The usual, formal, first paragraph of a will directing the payment of "all my just debts", held, being a mere recitation of an executor's duty, does not alone give priority and subject the property of the estate to all claims allowed irrespective of other provisions directing the disposition of the corpus of the estate.

Long v Northup, 225-132; 279 NW 104; 116 ALR 1475

Administrator's funds set off against insolvent bank holding secured note. An estate's deposit in an insolvent bank may be set off against a secured note held by bank, and contention that debts lacked mutuality was ineffective.

First Natl. Bk. v Malone, 76 F 2d, 251

Bank stockholder — double liability — how enforced against estate. A claim by the receiver of an insolvent state bank for the statutory, superadded, contingent liability on capital stock (§9251, C., '35) need not, as to the liability of a stockholder who has died prior to the insolvency of the bank, be filed as a claim against the stockholder's estate. Such claim may be enforced by action against the executor or administrator as such.

Bates v McGill, 223-62; 272 NW 535

Loss of improperly created trust fund—reimbursement. Where an executor is devised a named sum of money in trust for a named person, and where the executor assumes to set aside or hold certain bank stock as said trust fund, which stock becomes worthless by the failure of the bank, the estate must make good the resulting loss (or pro rata if the estate is insufficient to pay all legacies) less any payments made to the cestui que trust.

Mills v Manchester, 213-95; 237 NW 228; 238 NW 718

Monument ordered by heirs. The court may allow the purchase price of a monument against a solvent estate even tho the contract therefor was entered into by one heir with the approval of all other heirs, and not by the administrator.

In re McMath, 209-414; 228 NW 11

Trust property held by ward. A contract by the guardian of an incompetent, for the sale of land owned by the ward solely as trustee, tho approved by the court, cannot, in any sense, be deemed the contract of the ward; therefore, such contract cannot, in the event of the death of the ward, be deemed to create any indebtedness against the estate of the ward.

Copple v Morrison, 221-183; 264 NW 113

11958 Verification and filing.

Payment of unfiled claims. Principle reaffirmed that an executor may voluntarily pay valid claims against the estate tho they are not filed.

In re Plendl, 218-103; 253 NW 819

Payment of unfiled but valid claims. An executor will be credited with the amount of valid, enforceable claims paid by him even

tho such claims were not formally filed against the estate.

In re Bourne, 210-883; 232 NW 169

Payment of valid unfiled claim without court authorization. The administrator of an apparently large estate (of which he is the sole beneficiary) has the right, without waiting for the formal filing of a claim, and without obtaining authority from the court, to forthwith make a partial payment on the only debt then existing against the estate, when such payment effects (1) a pro tanto reduction in interest on the debt, and (2) a pro tanto redemption of apparently valuable securities belonging to the estate, and held by the creditor in an amount far in excess of the debt. The administrator having the right to pay, the creditor has the right to receive.

Elliott v Bank, 209-1258; 228 NW 274

"Equitable" filing and allowance. Equity will treat and regard a valid claim against an estate as having been presented to, and approved and allowed by, the administrator, as of the date when the administrator paid said claim, even tho there has been no formal statutory filing and approval.

Elliott v Bank, 209-1258; 228 NW 274

Bank depositors—nonnecessity to file claims. A probate order which authorizes, generally, an administrator to continue the private banking business of the deceased in the same manner in which deceased carried on the business ipso facto constitutes (1) an approval by the court of the claims of depositors as they, on the bank records, ostensibly or indisputably exist, from time to time, and (2) an authority to pay such claims, and renders the formal filing of such claims with the administrator wholly unnecessary.

In re Harsh, 207-84; 218 NW 537

Mistake—effect. The filing of a claim against an estate will not estop the party from abandoning such claim and instituting an action for a partnership accounting with deceased when such latter proceeding was his sole allowable remedy.

Hull v Padgett, 207-430; 223 NW 154

11959 Notice of hearing—exceptions.

ANALYSIS

I NOTICE

Service by attorney. Notice of hearing of claims against an estate may be served by the attorney for claimants.

Schroeder v Dist. Court, 213-814; 239 NW 806

Unauthorized acceptance of notice. An unauthorized but good-faith acceptance by an attorney of notice of hearing on a claim in probate, is ratified by the conduct of the administratrix (1) in making no objection to said acceptance when informed thereof, (2) in negotiating for a settlement of the claim, and (3) in causing the hearing to be twice continued.

Story Co. Bk. v Youtz, 199-444; 200 NW 700

Insufficient notice. A notice of hearing on a duly filed claim in probate is insufficient when no copy of the claim accompanies the said notice.

Lucas v Ruden, 220-494; 260 NW 60

County's claim for insane support—notice of hearing. County's maintenance claim against estate of deceased who was inmate of state insane hospital is a general claim, and notice of hearing thereon must be served on the administrator within 12 months after notice of his appointment as provided by statute.

In re Wagner, 226-667; 284 NW 485

Barred claim—negligence precludes equitable relief. Negligence of a fourth-class claimant in probate in filing his claim and serving notice of hearing thereon bars all equitable relief even tho no element of estoppel accompanies such negligence.

Lucas v Ruden, 220-494; 260 NW 60

Fatal delay. Failure of a claimant against an estate to offer any evidence of any peculiar circumstance equitably excusing his failure to serve timely and legal notice of hearing on his duly filed but unallowed fourth class claim, deprives him of all right to be relieved from the resulting bar of the statute of limitation.

Meier v Briggs' Est., 221-482; 265 NW 189

Death of claimant's attorney—peculiar circumstances relieving barred claim. Where an attorney files a probate claim for a nonresident claimant, but dies one day before the expiration of the year and without serving a notice of hearing on such claim—claimant not learning of his attorney's death until later, and tho then delaying several months while his new attorney negotiated with the estate, held to have shown peculiar circumstances entitling him to equitable relief considering the estate was still unsettled and solvent.

Hagen v Nielsen, 225-127; 279 NW 94; 281 NW 356

II ALLOWANCE OF CLAIMS BY ADMINISTRATOR

Payment of valid unfiled claim without court authorization—effect. The administrator of an apparently large estate (of which he is the sole beneficiary) has the right, without waiting for the formal filing of a claim, and without obtaining authority from the court, to forthwith make a partial payment on the only debt then existing against the estate, when such payment effects (1) a pro tanto reduction in in-

II ALLOWANCE OF CLAIMS BY ADMINISTRATOR—concluded

terest on the debt and (2) a pro tanto redemption of apparently valuable securities belonging to the estate and held by the creditor in an amount far in excess of the debt. The administrator having the right to pay, the creditor has the right to receive.

Elliott v Bank, 209-1258; 228 NW 274

Advance by executor—repayment and interest. An executor who, because of a temporary shortage in estate funds, advances sums from his own private funds and therewith pays legal claims against the estate, rather than to sell, on a poor market, assets of the estate, is properly allowed interest on the amount so advanced.

In re Shepherd, 220-12; 261 NW 35

Personal advancements by executor—preference. When an executor, owing to a temporary shortage of estate funds, advances from his personal funds and pays to a widow sums of money in the nature of monthly support (provided for in an antenuptial contract), he will not only be reimbursed but will be given a preference in repayment over payment to the widow of other sums due her under said contract.

In re Shepherd, 220-12; 261 NW 35

Insolvent estates—unallowable payment in full. The act of the administratrix of an insolvent estate in applying estate funds to the full payment of a debt, which is the personal obligation of both the deceased and the administratrix, is fundamentally unallowable. It follows that the creditor, by receiving such payment, becomes a trustee of the fund for the use and benefit of the estate, especially when he knew that the estate was insolvent.

Reason: The administratrix could not legally make such payment, even on an authorizing order of the court.

Andrew v Bank, 217-69; 251 NW 23

Pleading fraud. An allegation that an administrator "fraudulently and collusively" caused the allowance of a claim against the estate is wholly insufficient to constitute a good plea of fraud.

In re Kessler, 213-633; 239 NW 555

Administrator's settlement of unenforceable lien—homestead's nonliability. Although a settlement agreement was made between a claimant and an administrator, a decedent's homestead may not be subjected to a mortgage or judgment which has never become a lien thereon, which was not filed or allowed against the estate, which was not enforced within two years after judgment entry, and when such settlement was never approved by the probate court.

Finn v Grant, 224-527; 278 NW 225

11961 Claims deemed denied.

Nonnecessity for administrator to deny claims. Failure of the court to sustain a motion non obstante veredicto made on the ground that administrator failed to plead any defense to a claim against the estate was not error, since under the statute the administrator was not required to plead any defense.

In re Larimer, 225-1067; 283 NW 430

Delivery of note by decedent—validity—dead man statute. In the absence of contrary evidence, a valid delivery was proved by the statutory presumption of delivery arising from possession of a note, aided by evidence, secured without violating the dead man statute, to the effect that the note was in decedent maker's hands while visiting payee during an illness and after decedent left, the note was reposing on payee's bed.

In re Cheney, 223-1076; 274 NW 5

Consideration and delivery of note—proof by presumptions—instructions. The questions of want of consideration and nondelivery of a note, supported only by presumptions, need not be submitted to the jury when such presumptions are not overcome by evidence, and when the only conflict arises over the genuineness of the signature, the submission of this single question was proper.

In re Cheney, 223-1076; 274 NW 5

Defense of payment—burden on defendant. In an action in probate to establish claim based on promissory note, the burden of proving payment is upon defense.

In re Humphrey, 226-1230; 286 NW 488

Plea of payment. In an action in probate to establish a claim based upon a promissory note, a plea of payment must be based upon something done after the execution of the instrument, and a note being merely evidence of indebtedness cannot be paid prior to its execution. Evidence submitted held insufficient for jury's consideration.

In re Humphrey, 226-1230; 286 NW 488

Gifts inter vivos—consideration—note as future gift—presumption—burden. Altho a promissory note for which there is no consideration is an unenforceable promise to make a future gift, nevertheless in an action against an executor on a note, the presumption that the note imports a consideration, if negatived, must be overcome by evidence and this burden is on the maker or his representatives.

In re Cheney, 223-1076; 274 NW 5

11962 Burden of proof.

Burden of proof. An executor must sustain his plea of payment of a claim filed in probate.

Wilson v Else, 204-857; 216 NW 33

Defense of payment—burden on defendant. In an action in probate to establish claim based on promissory note, the burden of proving payment is upon defense.

In re Humphrey, 226-1230; 286 NW 488

Payments applied on debts due—presumption. In a probate action to establish claim for housekeeping services rendered to decedent, where decedent promised to pay claimant small amounts from time to time to cover cost of her clothing and personal expenses, with an additional amount upon his death out of his estate, it would be presumed that small payments made by decedent in his lifetime were to be applied on debts which were due for such expenses, no showing having been made to the contrary.

In re McKeon, 227-1050; 289 NW 915

Burden to prove payment. A claimant in probate who prima facie establishes his claim is entitled to judgment, in the absence of proof by the administrator of payment.

Kern v Kiefer, 204-490; 215 NW 607

Payment. The burden of proof to establish payment of an obligation is not met by testimony which goes no further than to create an inference of payment.

Slezak v Krisinger, 202-422; 210 NW 436

Plea of payment. In an action in probate to establish a claim based upon a promissory note, a plea of payment must be based upon something done after the execution of the instrument, and a note being merely evidence of indebtedness cannot be paid prior to its execution. Evidence submitted held insufficient for jury's consideration.

In re Humphrey, 226-1230; 286 NW 488

Contract for repayment—burden of proof. One seeking to recover money loaned must prove a contract express or implied for its repayment.

In re Green, 227-702; 288 NW 881

Notes of deceased—prima facie case. In an action in probate by payees of notes to establish notes as claims against maker's estate, the conceded signature of deceased and admission of the notes in evidence establish a prima facie case for claimants.

In re Humphrey, 226-1230; 286 NW 488

Plea of mutual mistake in execution of notes. In an action in probate to establish as claims against estate two notes signed by deceased, a plea that notes were executed as result of mutual mistake is held to be insufficient for jury's consideration, where the maker does not dispute the validity of the notes and pays interest on them for a long period of time.

In re Humphrey, 226-1230; 286 NW 488

Defense—lack of consideration. In probate action to establish as claims notes signed by deceased, evidence submitted by defense to show lack of consideration was properly held to be insufficient to present a jury question.

In re Humphrey, 226-1230; 286 NW 488

Sufficient consideration. In an action in probate to establish a claim against the estate based upon a note which was the third renewal of a note originally given as the result of an accounting and settlement between deceased and claimants in 1913, such note is supported by consideration.

In re Humphrey, 226-1230; 286 NW 488

Payment of claim—erroneous instructions. In an action against an estate on a claim for services, reversible error results from instructing that the defendant has the burden to establish payment of the claim when there is no issue of payment.

In re Stencil, 215-1195; 248 NW 18

Allowance of claims—conclusiveness. The allowance of a claim by the probate court on supporting testimony is conclusive on the appellate court, even tho the supporting testimony is not wholly satisfactory to the judicial mind.

Olson v Roberts, 218-410; 255 NW 461

Examination of claimant. No error can result to a claimant in probate by an instruction which simply recites the statutory right of an administrator to examine a claimant on the subject of payment of the claim.

Wilson v Else, 204-857; 216 NW 33

Partnership checks not showing payment. In proving a claim against an estate, by showing an oral contract to pay for services extending over a period of many years, neither the lapse of time nor checks payable to claimant drawn by decedent during the 14 years just preceding his death, when a partnership existed between them for those years, raises a presumption of payment in view of decedent's admission of the debt shortly before his death.

Gardner v Marquis, 224-458; 275 NW 493

Administrator supporting sister's claim—not fraud. Testimony by an administrator in support of a sister's claim against estate does not amount to fraud.

In re Sterner, 224-605; 277 NW 366

Improper joinder of claims. One who files a claim for a simple money demand against the estate of a deceased may not join in the probate proceedings actions against other parties for the same claim for which the estate is alleged to be liable.

Ontjes v McNider, 218-1356; 256 NW 277

11963 Hearing—trial by jury.

Discussion. See 22 ILR 557—Limitations and claims against estate

ANALYSIS

I JURISDICTION OF CLAIMS
II TRIAL AND ALLOWANCE BY COURT

Counterclaims. See under §11889, Vol I
Court findings as jury verdict generally. See under §§11435, 11581

I JURISDICTION OF CLAIMS

Proper transfer to equity. A claim in probate is properly transferred to the equity docket for trial on a showing that a confidential relation existed between claimant and the deceased, and that deceased had fraudulently concealed from claimant the existence of certain trust funds belonging to claimant, and had failed to account therefor.

In re Sibert, 220-971; 263 NW 5

Nontransferability to equity. A simple, unsecured claim for money, filed against an estate by the surviving widow, is not, against the objections of the administrator, transferable to equity for trial. So held as to a claim due the widow under an alleged antenuptial contract.

In re Mason, 223-179; 272 NW 88

Belated filing—equitable proceeding. While establishing a probate claim is a law proceeding, the determination of the existence of peculiar circumstances relieving the failure to file a probate claim within the statutory period is an equitable proceeding.

Ontjes v McNider, 224-115; 275 NW 328

Federal courts—probate claims—jurisdiction from diversity of citizenship. Tho proceedings for settlement of an estate may be pending in a state court, the federal courts may on account of diversity of citizenship assume jurisdiction to determine the validity of claims against the estate.

RFC v Dingwell, 224-1172; 278 NW 281

II TRIAL AND ALLOWANCE BY COURT

Claims—form and contents—technical rules of pleading nonapplicable. Probate claims need not be stated with the same degree of care required in ordinary pleading, nor conform to the technical rules of pleading.

In re McKeon, 227-1050; 289 NW 915

Weight and sufficiency—testimony incapable of direct contradiction—credibility tested. Where the only person who can deny the testimony of a witness is dead, it is incumbent on the court to look upon such testimony with great jealousy and to weigh it in the most scrupulous manner to see what is the character and position of the witness generally, and whether he is corroborated to such an extent as to secure confidence that he is telling the truth.

Peterson v Citizens Bank, 228- ; 290 NW 546

Pleading—burden of proof. An executor must sustain his plea of payment of a claim filed in probate.

Wilson v Else, 204-857; 216 NW 33

Amount of proof. A claim against an estate triable at law is established by a fair preponderance of the testimony, and reversible error results from instructing that such claim must be established only by "strict and satisfactory" proof.

In re Dolmage, 204-231; 213 NW 380
In re Newson, 206-514; 219 NW 305

Appeal — non de novo hearing. Claims against an estate are triable at law. Consequently, on appeal, an allowance by the probate court will not be disturbed if it is not excessive and has support in the evidence.

Anderson Est. v Stason, 216-1017; 250 NW 183

Equity proceeding to establish heirs—triable de novo. In a probate proceeding to assist administrator to determine heirs of intestate, it being determined upon appeal from (1) the form of the pleadings as prescribed in equity (2) the record of proceedings indicating use of equitable powers, (3) the reception of evidence under equitable procedure, and (4) rulings of the court reserved as in equity, that such proceeding, having been conducted in a manner wholly foreign to procedure at law, was tried in equity and therefore was triable de novo on appeal.

In re Clark, 228- ; 290 NW 13

Allowance of claims—conclusiveness. The allowance of a claim by the probate court on supporting testimony is conclusive on the appellate court, even tho the supporting testimony is not wholly satisfactory to the judicial mind.

Olson v Roberts, 218-410; 255 NW 461

Supported findings of trial court. The finding and judgment of trial court on claim against decedent's estate has the effect of a jury verdict and may not be set aside if it finds any substantial support in the record.

In re Green, 227-702; 288 NW 881

Payments applied on debts due—presumption. In a probate action to establish claim for housekeeping services rendered to decedent, where decedent promised to pay claimant small amounts from time to time to cover cost of her clothing and personal expenses, with an additional amount upon his death out of his estate, it would be presumed that small payments made by decedent in his lifetime were to be applied on debts which were due for such expenses, no showing having been made to the contrary.

In re McKeon, 227-1050; 289 NW 915

Payment specially pleaded—burden of proof —jury question. In probate action to establish

claim for services rendered to decedent under an express agreement, where defendant specially pleaded a defense of payment as a part of a different contract of employment, the burden rested upon defendant to establish such different contract, including payment, and, if evidence justified, it was the duty of the court to submit the issue to the jury, but, where defendant's evidence is also consistent with and does not negative plaintiff's claim as to her express contract, it is admissible and proper to be considered by the jury as tending to show that the present claim was an afterthought, or that claimant had failed under suitable circumstances to advance the demand now relied upon, and as tending to support defendant's theory of the nature of her employment. However, such evidence failed to establish the specially pleaded defense of payment, and the court's failure to submit the question of payment to the jury was not erroneous.

In re McKeon, 227-1050; 289 NW 915

Services rendered to decedent—evidence of agreement admissible—jury question. In probate action where a claimant seeks to recover for services rendered to decedent under an express contract, the performance of such services must have been induced by a proposal and must have been in accordance therewith. Testimony by a witness to a conversation with decedent, who stated that he intended to see that claimant was properly cared for, that he would give her spending money (the little she would need), and at the end of his life he would leave her a home, was admissible and proper evidence for the jury to consider on question of whether or not there was any such arrangement or agreement. What the parties agreed to must be determined by the jury.

In re McKeon, 227-1050; 289 NW 915

Substitution of administrator—judgment—effect. A plaintiff who, upon the death of the defendant, prosecutes his claim to judgment by substituting the defendant's administrator as defendant, simply accomplishes a legal adjudication of his claim against the estate. Plaintiff, by such procedure, does not obtain any lien on the real property belonging to the estate.

Marion Bank v Smith, 205-203; 217 NW 857

Judgment—recitals not an adjudication. Recitals in the nondecretal portions of a foreclosure decree that the wife of the maker of the note in question was an accommodation maker are not evidence in a subsequent hearing in probate on the wife's claim against the estate that she was such accommodation maker, especially when the foreclosure order left such question open for future determination.

In re Cohen, 216-649; 246 NW 780

Clerk's or executor's allowance not final adjudication. The allowance of a claim against an estate by the clerk of the probate court does not result in a final adjudication at the end of a year under a statute permitting objections to the clerk's orders to be filed within a year, as there is no adjudication of a claim against an estate allowed by the clerk or an executor or administrator until it has been passed upon by the court.

In re Baker, 226-1071; 285 NW 641

Final report—claims overlooked. A claim against an estate, duly verified and filed, and not allowed or disallowed by the administrator, cannot be deemed adjudicated by an order approving the final report of the administrator when the claim, the claimant and his representative were, by mistake and oversight, wholly overlooked both in said final report and in the notice of hearing thereon. It follows that an equitable action will lie, subsequent to said approval, to open up the estate and to allow the claim.

Harding v Troy, 217-775; 252 NW 521

Unimpeached and uncontradicted testimony. The positive and wholly uncontradicted testimony of an unimpeached and disinterested witness that he saw the purported maker of a promissory note sign it, plus the unqualified opinion of a competent and unimpeached witness to the effect that the signature to the note was genuine, justifies a directed verdict when the genuineness of the signature is the sole issue.

In re Work, 212-31; 233 NW 28

Directed verdict. On the question whether a verdict should be directed in favor of a claimant, the record may present such circumstances that some consideration should be given to the fact that the claim is against the estate of a deceased.

In re Talbott, 204-363; 213 NW 779

Evidence of express contract for services—jury question. In probate action to establish claim against estate based on express contract, where evidence that claimant acted as housekeeper, assisted with clerical work, and performed other duties about the farm for decedent, pursuant to his agreement to pay her a small amount sufficient to cover cost of her clothing and other personal expenses, and in addition thereto to compensate her out of his estate at his decease in such amount as would be in excess of any amount she could earn teaching school, a jury question was presented as to the existence of an enforceable contract and as to its nature.

In re McKeon, 227-1050; 289 NW 915

Submission of issue. The issue of the "net value" of an estate is properly submitted on evidence showing the gross value, all contested and pending claims and the facts attending the same, and the amount of the debts.

In re Anderson, 203-985, 213 NW 567

Assets sufficient tho dissipated—immediate payment order proper. Probate hearing dis-

II TRIAL AND ALLOWANCE BY COURT—continued

closing that administrator should possess funds sufficient to pay, among other things, all third-class claims justifies not only allowance of a bona fide third-class claim, but an order for its immediate payment.

In re Davie, 224-1177; 278 NW 616

Valid probate claim—no duty to interpose limitation statute. An administrator is not required to resist a valid existing claim nor interpose the statute of limitations against a claim he believes is just.

In re Sterner, 224-605; 277 NW 366

Claim based on book of accounts. Where claimant's evidence of loan of $1,000 based on book of accounts is held inadmissible, testimony of payment of interest and admission of existence of loan by decedent standing alone, held insufficient to prove all facts necessary to establish claim against estate of decedent, as required by statute.

In re Cummins, 226-1207; 286 NW 409

Finding of duplication in claims. Since appellant-claimant failed to challenge finding of trial court that two claims against a decedent's estate based on a note and a loan were a duplication, the sufficiency of other grounds of judgment disallowing claim for the loan was immaterial.

In re Green, 227-702; 288 NW 881

Probate claimant for services—incompetency as witness. In probate action to establish a claim against an estate based on an express contract for services rendered to decedent, claimant could not testify as to existence of contract.

In re McKeon, 227-1050; 289 NW 915

Instruction — agreement with decedent — claimant incompetent to testify. In probate action to establish a claim based upon an express agreement of decedent that claimant's services should be paid for from decedent's estate, an instruction that claimant was not permitted to testify as to agreement between her and decedent, and that if any agreement was in fact made between the parties, it must be proved by testimony other than that of claimant, was not prejudicial to defendant in that jury would believe that it applied to the communication of the contract to claimant through her father, who had been informed by decedent as to the nature of the agreement —there being other testimony of the communication, and the trial court having excluded the testimony of the father after objection of defendant.

In re McKeon, 227-1050; 289 NW 915

Instruction on "stated" amount for alleged services rendered to decedent. In probate claimant's action reciting decedent's agreement to pay to claimant for services from decedent's estate an amount more than claimant could expect to make teaching school, a reference by trial court in its instructions to decedent's agreement to pay a "stated amount per month" was not objectionable where, under allegations of claim there could be no recovery unless jury found that there was an agreement to pay a stated amount, and where there was evidence as to amount stated or fixed by decedent. The word "stated" means no more than determined, fixed, or settled, and was properly used in the instruction.

In re McKeon, 227-1050; 289 NW 915

Harmless error. In proceeding on claim against a decedent's estate for an alleged loan, trial court erred in holding that claimant's wife was an incompetent witness as to conversation with decedent wherein he stated that "they should get around to make a note for the $500 he gave him". However, since court also found in effect that such evidence would not have been sufficiently definite to establish the claim, such error was not prejudicial.

In re Green, 227-702; 288 NW 881

Harmless error—submission of dual controlling propositions. In an action for services rendered a deceased, prejudicial error does not result from submitting to the jury the interrogatories (1) whether there was an express contract for payment, and (2) whether there was a mutual expectation between the parties to pay and receive pay for the services, even tho the express contract was established beyond doubt.

In re Willmott, 215-546; 243 NW 634

Interrogatories—stated or agreed amount—services rendered to decedent. In probate action to establish a claim for services rendered to decedent, wherein the court submitted two interrogatories to the jury to determine (1) amount per month, if any, decedent agreed to pay claimant out of his estate at his decease, and (2) whether amount per month was to be paid for 9 or 12 months of each year, the interrogatories being submitted under an instruction to be answered in event jury found for claimant and not to be answered if verdict was for defendant, such instruction was not erroneous, since, before interrogatories could be answered, the jury must have found under the evidence that there was a stated or agreed amount, and the findings therein conformed to the verdict.

In re McKeon, 227-1050; 289 NW 915

Improper joinder in probate. One who files a claim for a simple money demand against the estate of a deceased may not join in the probate proceedings actions against other parties for the same claim for which the estate is alleged to be liable.

Ontjes v McNider, 218-1356; 256 NW 277

Administrator supporting sister's claim—not fraud. Testimony by an administrator in

support of a sister's claim against estate does not amount to fraud.

In re Sterner, 224-605; 277 NW 366

Nonfraudulent allowance — conclusiveness. A daughter's claim on promissory notes against her father's estate upon which there was a hearing to the court, at which hearing the administrator, her brother, appeared personally and by counsel, and at the conclusion of which judgment was entered allowing the claim, altho it was apparent to the court from the face of the notes that the statute of limitations had run, is a situation where the allowance will not be disturbed on appeal without a showing of fraud upon the court. Held, fraud not shown.

In re Sterner, 224-605; 277 NW 366

Proof—legal conclusion of fraud—no defense. In an action on an administrator's bond, the surety's pleading of a legal conclusion of fraud between administrator and a claimant will not constitute a defense.

In re Davie, 224-1177; 278 NW 616

Peculiar circumstances excusing service of notice of hearing. Altho claimant is executor's wife, peculiar circumstances excusing a claimant's failure to serve notice of hearing may be found in evidence showing that the claim was filed within six months from executor's appointment, that executor told claimant he had knowledge of the matters upon which the claim was based, and that it would be unnecessary to serve notice. Suspicious circumstances surrounding the claim are to be considered in the trial of the claim on its merits.

In re Hill, 225-527; 281 NW 500

Consideration—claim in probate. On a wife's claim against her deceased, divorced husband's estate, a promissory note expressly stating a consideration, which, however, is invalid to support the claim, will not under §9440, C., '35, import a valid consideration, so as to generate a jury question. Section 9440, C., '35, was not intended to furnish the consideration but only import it when not stated, which in any event could not be different than that stated in the contract.

In re Straka, 224-109; 275 NW 490

Allowance — unallowable setting aside. An allowance by the court of a claim in probate, after issue is joined thereon and after due hearing, becomes a final adjudication in the absence of fraud or collusion and may not thereafter be set aside without hearing or evidence.

In re Kinnan, 218-572; 255 NW 632

Collateral attack—void probate order. Void orders of the probate court may be attacked collaterally.

Irwin v Bank, 218-477; 255 NW 671

Distribution of estate — disaffirmance by minor. A void order of the probate court authorizing the executor to satisfy a cash bequest to a minor by transferring a note and mortgage to the father of the minor as the latter's natural guardian may be disaffirmed and repudiated by the minor on reaching his majority.

Irwin v Bank, 218-477; 255 NW 671

Payment of claim after final report. Instead of opening up an estate, after final report and discharge, for the allowance and payment of an overlooked claim, the court may accomplish the same result by allowing the claim and ordering it paid from funds derived from the sale of lands under pending partition proceedings.

Harding v Troy, 217-775; 252 NW 521

Calculating administrator's assets—conclusiveness. Altho based upon calculations, the finding of a probate court in a claim allowance hearing, based upon evidence, that an administrator has or should have sufficient funds to pay a claim, is an adjudication conclusive against attack that the calculations were wrong.

In re Davie, 224-1177; 278 NW 616

Verdict contrary to evidence—no review if first raised on appeal. In an action to establish a claim against an estate for serum, virus, and veterinary supplies furnished to decedent over a term of eight years, argument on appeal that the verdict denying the claim was contrary to the evidence and should be set aside cannot be considered when not raised by appropriate procedure in the lower court.

In re Larimer, 225-1067; 283 NW 430

Unliquidated demand set off against court costs. On a motion by an administrator to tax court costs against a defeated claimant in probate, the latter may not have a duly filed but unliquidated claim in his favor and against the estate adjudicated and set off against said costs and a judgment rendered against the estate for the excess.

In re Nairn, 215-920; 247 NW 220

Administrator's funds set off against insolvent bank holding secured note. An estate's deposit in an insolvent bank may be set off against a secured note held by bank, and contention that debts lacked mutuality was ineffective.

First Natl. Bk. v Malone, 76 F 2d, 251

Declarations of heirs and devisees—admissibility. Where there are several devisees or legatees whose interests are several and not joint, the declarations of one are not admissible for the reason that they might operate to the prejudice of the others. In general, the admissions of an heir are not admissible to prove a claim against an estate unless he is

II TRIAL AND ALLOWANCE BY COURT—concluded

the only heir interested upon that side of the action.

In re Green, 227-702; 288 NW 881

Heir's assignment of interest subject to estate claims—rights of assignee. In a probate proceeding where one of the heirs, who is indebted to the estate, purchases a farm from the executor and assigns her one-tenth interest in the estate as security for a purchase note to the executor, who in turn assigns the note to a third party, held, that such assignment of interest is taken subject to the estate claims, and whatever interest remains should be paid to the holder of the note irrespective of the fact the executor is also indebted to the estate on his final account.

In re Sheeler, 226-650; 284 NW 799

11964 Demands not due.

Contract binding "heirs" — claim in estate necessary. A contract with a decedent, altho binding on his heirs, executors, and administrators, must be enforced by filing a claim in the estate as provided by law.

In re Sterner, 224-617; 278 NW 216

11965 Contingent liabilities.

When barred. A contingent claim based on a guaranty by a deceased of payment of an unmatured promissory note is barred if not filed against the estate within 12 months from the giving of notice of the appointment of administrator.

Nichols v Harsh, 202-117; 209 NW 297

Foreclosure against estate. In an equity foreclosure action on a realty note and mortgage, where administrators were defendants and the petition prayed for judgment and for general equitable relief, and where the foreclosure decree established a claim against administrators of the estate of deceased owner, to which decree objection was made that the relief granted in establishing such claim was greater than the prayer of petition, held, judgment against the administrators, if proper, could have been in no other form than as a claim established against the estate, and could not be enforced by execution.

Federal Bank v Ditto, 227-475; 288 NW 618

11966 Referees.

Set-off or retainer against beneficiary. In probate proceedings wherein a beneficiary is indebted to the estate, the right of set-off or retainer is not restricted to a court of equity, but rests upon wholesome principles of right and justice which can be administered in probate courts without the aid of a court of conscience.

In re Sheeler, 226-650; 284 NW 799

Set-off or retainer—executor's equitable right—nonstatutory. In probate proceedings the right which the executor or an administrator has, in the nature of a right of retainer, to set off debts owing by a beneficiary of an estate against his share therein, is an equitable right of its own nature, and not at all dependent upon any statute.

In re Sheeler, 226-650; 284 NW 799

"Worthier title" rule re executor's set-off or retainer. In probate proceedings, before the "worthier title" rule can be applied where property is left to testator's heirs by will in the same manner and proportion in which they would have taken were there no will, it must definitely appear that there is exact identity in every way, and where testator definitely directs that real estate be converted into personalty and then divided equally among his children, each beneficiary receiving all personalty and no real estate, held, a beneficiary of such estate did not take her interest by "worthier title" so as to preclude executor from exercising the right of retainer against the beneficiary's interest which is assigned as security for a note for purchase of real estate by beneficiary—it being immaterial whether beneficiary is solvent or insolvent.

In re Sheeler, 226-650; 284 NW 799

11967 Actions pending.

Judgment—effect. A plaintiff who, upon the death of the defendant, prosecutes his claim to judgment by substituting the defendant's administrator as defendant simply accomplishes a legal adjudication of his claim against the estate. Plaintiff by such procedure does not obtain any lien on the real property belonging to the estate.

Marion Bk. v Smith, 205-203; 217 NW 857

Foreclosure against estate. In an equity foreclosure action on a realty note and mortgage, where administrators were defendants and the petition prayed for judgment and for general equitable relief, and where the foreclosure decree established a claim against administrators of the estate of deceased owner, to which decree objection was made that the relief granted in establishing such claim was greater than the prayer of petition, held, judgment against the administrators, if proper, could have been in no other form than as a claim established against the estate, and could not be enforced by execution.

Federal Bank v Ditto, 227-475; 288 NW 618

11968 Executor interested.

Executor may file own claim. Executrix of estate may file her own claim against the estate, or proceed for the appointment of a temporary administrator, as provided by statute.

In re Dunn, (NOR); 224 NW 38

Enforcement of claim against executor on final report.

In re Parker, 189-1131; 179 NW 525
In re Bourne, 210-883; 232 NW 169

Administrator's claim—ex parte allowance—correction before final settlement. A personal claim of an administrator allowed on an ex parte hearing without a special administrator, without a hearing, without notice, and containing a joint obligation of administrator and decedent, is subject to correction any time before final settlement and should be disallowed until it appears sufficient funds exist to pay all other claims and costs of administration.

In re Sterner, 224-605; 277 NW 366

Allowable payment by administrator to himself. An administrator is properly given credit for a just claim paid to himself with the approval and at the request of all adversely interested parties, and after due consultation with a co-administrator, even tho no formal written claim was ever filed.

In re Atkinson, 210-1245; 232 NW 640

Justifiable advance by executor—repayment and interest. An executor who, because of a temporary shortage in estate funds, advances sums from his own private funds and therewith pays legal claims against the estate, rather than to sell, on a poor market, assets of the estate, is properly allowed interest on the amount so advanced.

In re Shepherd, 220-12; 261 NW 35

Personal advancements by executor—preference in repayment. When an executor, owing to a temporary shortage of estate funds, advances from his personal funds and pays to a widow sums of money in the nature of monthly support (provided for in an antenuptial contract), he will not only be reimbursed but will be given a preference in repayment over payment to the widow of other sums due her under said contract.

In re Shepherd, 220-12; 261 NW 35

Nonfraudulent allowance—conclusiveness. A daughter's claim on promissory notes against her father's estate upon which there was a hearing to the court, at which hearing the administrator, her brother, appeared personally and by counsel, and at the conclusion of which judgment was entered allowing the claim, altho it was apparent to the court from the face of the notes that the statute of limitations had run, is a situation where the allowance will not be disturbed on appeal without a showing of fraud upon the court. Held, fraud not shown.

In re Sterner, 224-605; 277 NW 366

Claims—peculiar circumstances excusing service of notice of hearing. Altho claimant is executor's wife, peculiar circumstances excusing a claimant's failure to serve notice of hearing may be found in evidence showing that the claim was filed within six months from executor's appointment, that executor told claimant he had knowledge of the matters upon which the claim was based, and that it would be unnecessary to serve notice. Suspicious circumstances surrounding the claim are to be considered in the trial of the claim on its merits.

In re Hill, 225-527; 281 NW 500

11969 Expenses of funeral—allowance to widow.

Funeral expenses—priority. Funeral expenses of a deceased are accorded a preference in payment from the estate of the deceased over all other claims except the expense of administering the estate. No such preference is accorded to the funeral expenses of other members of the family.

In re Porter, 212-29; 236 NW 108

Nonallowable against insurance proceeds. Claims for funeral expenses consequent on the burial of the intestate deceased are not allowable against funds in the hands of the administrator when said funds constitute the proceeds of insurance on the life of deceased, the latter being survived by a minor son. (§8776, C., '35.)

In re Galloway, 222-159; 269 NW 7

Priority of widow. In the distribution of the proceeds of real estate sold in order to pay the debts and charges against an estate, the widow must be first paid (1) the amount personally advanced by her as expenses of administration (she being executrix), (2) the amount of her distributive share in the land sold, and (3) the amount allowed by the court for the maintenance of herself and children for the statutory year.

Carlson v Layman, 214-114; 241 NW 457

Will subjecting homestead to debts of life tenant. A provision in a will, setting up a life estate with remainder over to certain devisees, after all indebtedness and funeral expenses of the life tenant are paid, subjects the estate to a claim for funeral expenses of the life tenant, even if it was his homestead, such provision being a condition upon the devise to the remaindermen.

De Cook v Johnson, 226-246; 284 NW 118

Last sickness—excludes treatments ending three months before death. Money loaned to pay for medical treatments, which terminated three months before the patient died, is not an expense of the last sickness and not entitled to a preferential claim.

Long v Northup, 225-132; 279 NW 104; 116 ALR 1475

11970 Other demands—order of payment.

Atty. Gen. Opinions. See '30 AG Op 188; '34 AG Op 410

Property available for payment. Personal property of an estate will be first resorted to for the payment of the cost of administration; specific devises will be last resorted to.

In re Engels, 210-36; 230 NW 519

Taxes—duty to pay. Taxes are a charge against an estate and must be paid by the administrator.

In re Oelwein, 217-1137; 251 NW 694

Recording after death of mortgagor. The recording of a chattel mortgage after the death of an insolvent mortgagor does not, as between the mortgagee and other creditors of the estate, give the mortgage any preferential standing over what it had prior to the recording.

Raybourn v Creger, 204-961; 216 NW 272

County's claim for insane support. County's maintenance claim against estate of deceased who was inmate of state insane hospital is not a public rate or tax so as to make the filing of the claim against the estate unnecessary.

In re Wagner, 226-667; 284 NW 485

Priority of third-class claims. Depositors in a private bank, the business of which has been continued by the administrator of the deceased owner under an order of court which in effect established said claims as claims of the third class, must be paid in full prior to the payment of fourth-class claims which, by grace of the court, were filed and proven after the expiration of one year from the notice of administration.

In re Harsh, 207-84; 218 NW 537

Marriage settlements—sum payable not a preferred claim. The parties to an antenuptial contract which simply and generally provides that the wife shall, on the death of the husband, "be paid" a named sum by the latter's personal representative, will not be deemed to have intended that in the settlement of the estate of the husband, the said sum to be paid the wife should have priority over third and fourth class claims. (Holding based on the intent of the parties as reflected in the contract and surrounding circumstances.)

In re Shepherd, 220-12; 261 NW 35

Personal advancements by executor—preference. When an executor, owing to a temporary shortage of estate funds, advances from his personal funds and pays to a widow sums of money in the nature of monthly support (provided for in an antenuptial contract), he will not only be reimbursed but will be given a preference in repayment over payment to the widow of other sums due her under said contract.

In re Shepherd, 220-12; 261 NW 35

Claim under antenuptial contract—preference—"existing creditors". On the issue whether a widow has the right in the settlement of her husband's estate to be paid, prior to all third and fourth class claimants, a sum provided for her in an unrecorded, antenuptial contract, said third and fourth class claimants will be deemed "existing creditors" within the meaning of section 10015, C., '31 (relating to sales or mortgages of personal property), there being no evidence that said third and fourth class claimants had any knowledge of said antenuptial contract until after the death of the husband.

In re Shepherd, 220-12; 261 NW 35

Share of heir as mere contract claim—how paid. Where the share or interest of a child in the estate of his or her alleged parent takes the form of a mere contract obligation against the estate, the child becomes a mere claimant against the estate and is payable as such, and not from the mere residue of the estate. So held where the parentage was in issue and was compromised by a court-approved agreement wherein the executor agreed, on behalf of the estate, (1) to set up a specified trust fund, the annuity of which was to be payable to said child during its lifetime, and (2) annually to pay said annuity to said child until the trust fund was actually set up.

In re Griffin, 220-1028; 262 NW 473

Noticing claim for hearing—fatal delay. Failure of a claimant against an estate to offer any evidence of any peculiar circumstance equitably excusing his failure to serve timely and legal notice of hearing on his duly filed but unallowed fourth-class claim deprives him of all right to be relieved from the resulting bar of the statute of limitation.

Meier v Briggs, 221-482; 265 NW 189

11971 Labor as preferred claim.

Atty. Gen. Opinion. See '30 AG Op 268

11972 When claims of fourth class barred.

Discussion. See 21 ILR 152—Criticism of statute; 21 ILR 648—Nonclaim statute—surety's liability; 22 ILR 557—Limitations and claims against estate; 22 ILR 704—Fraud tolling statute of limitations

ANALYSIS

I Scope and Nature of Limitation
II Equitable Relief Against Statutory Bar

Claims against estate generally. See under §11957

I SCOPE AND NATURE OF LIMITATION

Trial—proper transfer to equity. A claim in probate is properly transferred to the equity docket for trial on a showing that a confidential relation existed between claimant and the deceased, and that deceased had fraudulently concealed from claimant the existence of certain trust funds belonging to claimant, and had failed to account therefor.

In re Sibert, 220-971; 263 NW 5

Belated filing—equitable proceeding. While establishing a probate claim is a law proceeding, the determination of the existence of peculiar circumstances relieving the failure to file a probate claim within the statutory period is an equitable proceeding.

Ontjes v McNider, 224-115; 275 NW 328

Ruling on equitable circumstances—not appealable. In probate on a hearing to determine whether or not peculiar circumstances exist to relieve claimant of the bar of the statute for failure to file claim within statutory period, an order finding the existence of such circumstances and entitling claimant to a trial on the merits of such claim is not appealable as a "final order" nor "an intermediate order involving the merits or materially affecting the final decision."

Ontjes v McNider, 224-115; 275 NW 328

Filing—when unnecessary. A specific direction by a testator that his estate pay a mortgage on property devised by him works a dual result, to wit: first, that the mortgage becomes a claim against the estate, and second, renders unnecessary a filing of a claim by the mortgagee.

In re Glandon, 219-1094; 260 NW 12

Heirs' title under will—nonnecessity to file claim. A controversy over the ownership of property devised or bequeathed in a will is properly determinable in equity, and devisees or legatees of such property need not file claims against the estate therefor.

Carpenter v Lothringer, 224-439; 275 NW 98

Failure to file — when enforceable against heir. A claim arising under a bond wherein the surety binds "his heirs, devisees, and personal representatives", and arising after the death of said surety and the due settlement of his estate, is enforceable:

1. Against the property received by an heir, as such, from said ancestor-surety, and
2. Against the property passing from said ancestor and owned by said heir under conveyance for which he paid nothing, and
3. Against the heir, personally, for the value of the property so received if he has consumed it. And this is true even tho, necessarily, said claim was not filed against the estate of said surety.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Premature filing—curing defect.

In re Prunty, 201-670; 207 NW 785

Belated filing—neglect. A claim against a solvent and unsettled estate is absolutely barred when not filed, because of the mere neglect of the claimant or his attorney, until after the lapse of the statutory 12 months.

Simpson v Burnham, 209-1108; 229 NW 679

New London Bk. v McKee, 213-1248; 238 NW 464

Fatally delayed presentation. A claim arising out of a partnership is wholly barred against the solvent and unsettled estate of one of the partners when in no manner presented against said estate until several years after the expiration of the year for the presentation of such claims, and no explanation or reason is given for such delay.

Williams v Schee, 214-1181; 243 NW 529

Filing "within 12 months". Conceding, arguendo, that in the settlement of an estate, the statute of limitation commences to run from the date of the last newspaper publication, yet, when the last publication was on April 16, 1931, a claim filed April 16, 1932, is not filed "within 12 months from the giving of the notice" as provided by this section.

First JSL Bank v Terbell, 217-624; 252 NW 769

County's claim for insane support. County's maintenance claim against estate of deceased who was inmate of state insane hospital is a general claim, and notice of hearing thereon must be served on the administrator within 12 months after notice of his appointment as provided by statute.

In re Wagner, 226-667; 284 NW 485

Amendment setting up new cause of action —statute of limitation. A claim in probate bottomed on a judgment on a bond, and a so-called amendment thereto bottomed on the bond itself, present different causes of action, and if the amended claim is filed after the statute of limitation has run it is barred notwithstanding the original filing.

In re Skiles, 210-935; 229 NW 235

Contingent liabilities. A contingent claim based on a guaranty by a deceased of payment of an unmatured promissory note is barred if not filed against the estate within 12 months from the giving of notice of the appointment of administrator.

Nichols v Harsh, 202-117; 209 NW 297

Escheat proceedings—notice to claimants—nonwaiver of required filing time. Administrator's notice to possible claimants and heirs in escheat proceedings given in pursuance to court order did not, in effect, amount to a waiver of statute of limitations as to filing claims in probate nor constitute a new invitation to creditors to file claims.

Joy v Bank, 226-1251; 286 NW 443

Independent action reopening estate—judgment appealable. A judgment for plaintiff in a separate, independent action in equity brought, not against an administrator but against the surviving spouse and heir, seeking to set aside the order in probate approving the final report and closing the estate, is such final judgment as will entitle the defendant to appeal.

Federal Bk. v Bonnett, 226-112; 284 NW 97

I SCOPE AND NATURE OF LIMITATION —concluded

Erroneously reopened estate—belated claim allowed — reversal. A judgment allowing a claim against a reopened estate must be reversed on appeal when it develops that the court was in error in reopening the estate and allowing the claim to be filed after it was barred by the statute. The defendant-administratrix was not a party to the action reopening the estate.

Federal Bk. v Bonnett, 226-126; 284 NW 105

Demurrer conclusive as to liability. A ruling sustaining a demurrer in mortgage foreclosure proceeding on the ground that the estate of the mortgagor is not personally liable on the mortgage because of the failure of the mortgagee to file said claim against the estate within the time provided by statute, constitutes a final adjudication of such nonliability when plaintiff neither pleads over nor appeals from the ruling.

Oates v College, 217-1059; 252 NW 783; 91 ALR 563

Discrediting own witness—claimant against estate. A claimant against an estate who puts the administratrix on the stand as his witness may not discredit her by attempting to show that she tried to deceive him as to the fact of decedent's death so that his claim against the estate would be barred.

Federal Bk. v Bonnett, 226-112; 284 NW 97

Liabilities on bonds — avoidance by fraud. Sureties on the bond of a deceased executor are liable for a shortage in the latter's accounts, even tho no claim for said shortage is made against the estate of said deceased executor. It follows that if claim is made against the estate of the deceased executor, and the amount of the shortage is adjudicated (but not paid) the sureties are bound thereby, even tho the administrator of the deceased executor's estate failed to plead that the claim was barred by the statute of limitation, such failure to so plead not being a fraud as to said sureties.

In re Kessler, 213-633; 239 NW 555

Notice of hearing when claimant dies. When service of notice of hearing of a fourth-class claim in probate is not had within the required 12 months because of the death of claimant, then claimant's estate may cause said service to be made but must do so within a reasonable time after it has an executor or administrator who can act; and such reasonable time will, ordinarily, be limited to a time not longer than that which claimant had when he died.

Lucas v Ruden, 220-494; 260 NW 60

Order to sell real estate in auxiliary citation proceedings. Where an administrator after a citation proceeding instituted by an assignee of a probate claim is directed to file an application to sell real estate to pay a claim on a promissory note, long recognized and partly paid from other funds by a former administrator, the granting of the order to sell real estate held by the heirs is erroneous when the heirs were not made parties to the citation application and when, in resistance to the application, the heirs show that no timely notice of hearing on the claim was served and no excuse given for such failure.

In re Jackson, 225-359; 280 NW 563

Stockholder in bank—double liability—how enforced. A claim by the receiver of an insolvent state bank for the statutory, superadded, contingent liability on capital stock (§9251, C., '35) need not, as to the liability of a stockholder who has died prior to the insolvency of the bank, be filed as a claim against the stockholder's estate. Such claim may be enforced by action against the executor or administrator as such.

Bates v McGill, 223-62; 272 NW 535

II EQUITABLE RELIEF AGAINST STATUTORY BAR

Equitable relief. Whether equitable relief will be granted is a question for the court.

Peterson v Johnson, 205-16; 212 NW 138

Failure to give notice of appointment of administrator—effect.

Spicer v Administrator, 201-99; 202 NW 604

Constructive notice—peculiar circumstances. When an administrator gives proper notice of its appointment, claimants are held to have constructive notice thereof, and a claim filed nearly two years after notice of publication may be properly dismissed in the absence of any showing of peculiar circumstances entitling claimant to equitable relief.

Joy v Bank, 226-1251; 286 NW 443

Ex parte hearing—jurisdiction. The probate court has no jurisdiction, on an ex parte hearing, to find and order that a belated claimant against an estate has an equitable excuse for not having filed the claim until long after the year for filing claims has expired, and that the executor is estopped to question such belated filing.

Storie v Dist. Court, 204-847; 216 NW 25

Statute liberally construed. The statute bars claims filed against an estate more than one year after the administrator serves notice of appointment, but being remedial, and liberally construed to effectuate justice, belated filing of claims is permitted on a showing of peculiar circumstances.

Federal Bk. v Bonnett, 226-112; 284 NW 97

Noticing claim for hearing—fatal delay. Failure of a claimant against an estate to offer any evidence of any peculiar circumstance

equitably excusing his failure to serve timely and legal notice of hearing on his duly filed but unallowed fourth-class claim, deprives him of all right to be relieved from the resulting bar of the statute of limitation.

Meier v Briggs' Est., 221-482; 265 NW 189

Negligence precludes equitable relief. Negligence of a fourth-class claimant in probate in filing his claim and serving notice of hearing thereon bars all equitable relief even tho no element of estoppel accompanies such negligence.

Lucas v Ruden, 220-494; 260 NW 60

Claimant's excuse for want of diligence. Claimant, on failure to file claim in probate within the limited period prescribed by statute, can only be granted equitable relief by pleading and showing adequate excuse for want of diligence.

Joy v Bank, 226-1251; 286 NW 443

Equitable relief denied. A claim not filed against an estate within 12 months as provided by statute is wholly barred notwithstanding the fact (1) that the estate is solvent, and (2) that the estate will suffer no legal prejudice because of the belated filing, when claimant had actual knowledge of the administration some three months prior to the expiration of the year provided for the filing of claims.

First JSL Bk. v Terbell, 217-624; 252 NW 769

Allowance and payment of claims—solvent and unsettled condition as factor. Where a claim is sought to be filed against an estate after the lapse of one year after the administrator gives notice of his appointment, the fact that the estate is then solvent and unsettled is material to show that no one will be injured provided claimant can establish the statutory special circumstances justifying the belated filing.

Chicago NW Ry. v Moss, 210-491; 231 NW 344; 71 ALR 936

Belated filing of claim. Fact that estate is solvent and not yet closed does not constitute such peculiar circumstances as to entitle claimant to equitable relief for failure to file claim within 12 months as required by statute.

In re Wagner, 226-667; 284 NW 485

Peculiar circumstances. That an estate is open and solvent, and that the claim is just, are not "peculiar circumstances" within the meaning of the statute prescribing the time within which probate claims must be filed.

Joy v Bank, 226-1251; 286 NW 443

Equitable circumstances—solvency of estate. The peculiar circumstances which will entitle a claimant against an estate to the equitable relief of filing and prosecuting his claim after the year for settling the estate has expired, must be something more than the circumstance that the estate is solvent and unsettled tho said latter fact is material as showing that other creditors will not be prejudiced by the belated filing.

Anthony v Wagner, 216-571; 246 NW 748

Unsettled estate. The fact that an estate is solvent and unsettled does not constitute, in and of itself, such peculiar circumstances as will entitle a creditor to file his claim against the estate after the expiration of the statutory 12 months period for filing claims in probate. There must be a showing of diligence in the matter or a showing of permissible excuse for the want of such diligence.

Anderson v Storie, 208-1172; 227 NW 93; 66 ALR 1410

Claim barred tho estate solvent. The fact that an estate is closed and solvent, while entitled to consideration, is not of itself sufficient to warrant the court in allowing a claim barred for want of timely notice of hearing on the claim; diligence must appear.

In re Jackson, 225-359; 280 NW 563

Fatally delayed filing. The fact that the holder of an unpaid draft, voluntarily and on his own motion, first files his claim with the receiver of the insolvent drawer-bank (commendably but secretly intending thereby to lessen the damages to a guarantor of the payment of the draft), presents no statutory special circumstance justifying claimant in filing his claim against the estate of said guarantor four years after the administrator had given due notice of his appointment, even tho the estate is then unsettled and solvent.

Chicago NW Ry. v Moss, 210-491; 231 NW 344; 71 ALR 936

Equitable relief — insufficient showing. The fact that a claimant in probate neglected or failed to discover the requirements of the law of this state relative to the time of filing claims until the statutory time had expired is wholly insufficient as a basis for equitable relief,—said claimant not being misled in any manner by those managing the estate.

In re Palmer, 212-21; 236 NW 58

Belated filing — insufficient justification. A claimant in probate must justify his neglect to file and serve notice of his claim within the statutory one year. He signally fails by showing (1) that his claim is just, (2) that the estate is solvent and unsettled, (3) that he expected the deceased to satisfy his claim by a testamentary provision and consequently was searching for a will, and (4) that he also relied on an indefinite talk with the administrator as to when the year expired and as to the administrator formally preparing the claim.

Taylor v Jackson, 213-844; 239 NW 519

Belated filing as afterthought. A showing that the filing of a claim against an estate

II EQUITABLE RELIEF AGAINST STATUTORY BAR—continued

long after the time fixed by statute is an afterthought based on a change of attitude by claimant as to the adequacy of the security held by him, is quite conclusive against his right to make such belated filing; and it is quite immaterial that the claim is just and the estate solvent.

Doyle v Jennings, 210-853; 229 NW 853

Belated presentation. An application to file a claim against an estate long after the expiration of the time provided by statute is properly denied (1) when claimant at all times knew that the estate was being settled, and (2) when claimant manifestly intended, at one time, to rely solely on his security, and sought to file his claim as the result of a belated afterthought.

Schram v Kissinger, 201-324; 207 NW 355

Barred claim — death of claimant — effect. Where claimant duly filed his fourth-class claim in probate, and, without having served any notice of hearing, died shortly before the expiration of the year in which said notice should have been served, and where said year expired shortly before claimant's executor was appointed, held, that whatever force and effect the death of claimant might otherwise have had as a peculiar circumstance entitling claimant to equitable relief on his barred claim, was wholly lost by the negligence of claimant's executor, for at least 10 months, in failing to serve the omitted notice of hearing or to take any action relative to the claim.

Lucas v Ruden, 220-494; 260 NW 60

Belated filing—insufficient excuse for delay. A depositor in a private bank will not be permitted to file and prosecute his claim against the estate of a deceased partner, after the lapse of four years after notice of administration was given, on a showing that the executor soon after his appointment believed the bank as continued by the surviving partners was insolvent, and stipulated for the possible filing, at a later period, by the surviving partners, of a contingent claim against the estate, said stipulation not being shown to be fraudulent and not deceiving said depositor; especially is this true when the attempt of the depositor to file his claim was evidently an afterthought.

Anthony v Wagner, 216-571; 246 NW 748

Delayed filing—relief—insufficient showing. The liquidating receiver of an insolvent bank who makes no timely filing of a claim against the estate of a deceased debtor of the bank, presents no peculiar circumstances entitling him to equitable relief from said delay, by proof (1) that the property of said debtor had for years been under guardianship, (2) that he, the receiver, did not actually know that said debtor had died, and that said former guardian had been appointed administrator and had given due notice of his appointment and was settling the estate of his former ward, but, on the contrary, (3) that said receiver supposed that said debtor was alive, and supposed that said guardian was continuing to act as guardian, it appearing that the receiver was in no manner misled by the administrator—that the predicament of the receiver was due to his own lack of due diligence.

Bates v Remley, 223-654; 273 NW 180

Tardy claimant—insufficient showing. Peculiar circumstances entitling a tardy claimant to have a closed estate reopened are not found in (1) solvency of the estate, (2) traceability of assets, (3) diligence after receiving notice of decedent's death, (4) lack of knowledge of the death, (5) validity and justness of the claim when claimant had an agent living in the same small town with decedent and who had known him intimately for 40 years.

Federal Bk. v Bonnett, 226-112; 284 NW 97

Lack of actual knowledge not peculiar circumstances. When a claim in probate is not filed until two years after notice of appointment of administrator has been published, the fact that claimant did not have actual knowledge of the appointment of the administrator is not a peculiar circumstance entitling claimant to equitable relief under the statute barring claims not filed within the required time.

Joy v Bank, 226-1251; 286 NW 443

County's claim for insane support—negligence in filing. Where county officials opened estate as creditor to collect county's claim against estate for maintenance of deceased in state insane hospital, and the county auditor was appointed administrator, the county's negligence in not filing the claim for more than four and one-half years did not constitute such peculiar circumstances as to entitle county to equitable relief for failure to file claim within 12 months under statute requiring filing within such time, in absence of peculiar circumstances excusing it.

In re Wagner, 226-667; 284 NW 485

Improper setting aside of bar. The peculiar circumstances which will justify the probate court in setting aside the one-year bar of the statute of limitation, on a claim in probate, must be such as to establish a preponderating equity in favor of the claimant. In other words, the equities of the estate of deceased must be considered as well as the equities of the claimant. So held where the claim was one secured by mortgage on property which, during the period of claimant's delay, had markedly decreased in value.

Berends v Brady, 219-522; 258 NW 752

Not entitled to hotchpot. A claimant against an estate who, by grace of the statute and by grace of the court, is permitted because

of peculiar circumstances to file and prove his claim after the expiration of the 12 months given for the filing of claims, has no right, when the estate is found to be insolvent, to pursue other fourth-class claimants who have filed and had their claims allowed within said 12 months, and to recapture and to put in hotchpot the payments legally made to them in order that a new distribution may be made.

Elliott v Bank, 209-1258; 228 NW 274

Assessment on bank stock—liability of assets of settled estate. An assessment on corporate bank stock standing on the corporate bank books in the name of a deceased stockholder may, by an action in equity, be enforced against the assets comprising the estate of the deceased stockholder, tho the estate has been legally settled and closed, and the said assets have passed into the hands of a testamentary devisee, when the necessity for, and right to said assessment arose, and the assessment was made, long after the settlement of said estate.

Andrew v Bank, 219-1244; 260 NW 849

Operation of limitation bar—continuing liability accruing after death. For the liability of a decedent accruing against his estate on account of ownership of a bank, an action thereon, commenced within 5 years after the closing of the bank and appointment of a receiver, is neither barred by the general statute of limitation nor by the one-year limitation on filing claims against an estate, when peculiar circumstances concealed the estate's liability thereon.

Daniel v Best, 224-1348; 279 NW 374

Death of claimant's attorney—peculiar circumstances relieving barred claim. Where an attorney files a probate claim for a nonresident claimant, but dies one day before the expiration of the year and without serving a notice of hearing on such claim—claimant not learning of his attorney's death until later, and tho then delaying several months while his new attorney negotiated with the estate, held to have shown peculiar circumstances entitling him to equitable relief considering the estate was still unsettled and solvent.

Hagen v Nielsen, 225-127; 279 NW 94; 281 NW 356

False promise of payment. Failure to file a claim against a solvent and unsettled estate within the statutory one year is amply excused on a showing that the executor paid part of the claim and stated to claimant that the filing of the claim was unnecessary because the balance of the claim would be paid.

Smallwood v O'Bryan, 208-785; 225 NW 848

Misconduct of administrator—promise to pay. Failure to serve notice of hearing on a fourth-class claim on an administrator, within the 12 months period, bars the claim unless peculiar circumstances exist tending to excuse the failure. Alleged, but unproven fraud, collusion, and misconduct of the administrator and heirs do not constitute such peculiar circumstances, nor does a mere promise by the administrator to pay excuse the failure to serve the notice of hearing on the claim.

In re Jackson, 225-359; 280 NW 563

Ignorance of death. The fact that a claimant against an unsettled and solvent estate does not know, and has no reason to know, that the debtor has died, is such peculiar statutory circumstance as justifies (1) the prompt filing of the claim after learning of the death, and (2) the granting of equitable relief.

In re Helmts, 203-503; 211 NW 234

Ill health. Ill health will not necessarily constitute such peculiar circumstances as will justify the granting of equitable relief from failure to file claims within the statutory one-year period.

Peterson v Johnson, 205-16; 212 NW 138

Misleading circumstances. The holder of a claim against an unsettled and solvent estate will be permitted to file and prove his claim after the expiration of 12 months from the giving of notice by the administrator (1) when he had never visited the place where the deceased did business, and lived a great distance therefrom, (2) when his claim is "contingent", (3) when he justifiably believed, and was led to believe, that his claim was against a banking corporation, and (4) when he finally discovered that the assumed bank was only a "trade name", and that the deceased was the sole owner of the business, and the real contingent debtor.

Nichols v Harsh, 202-117; 209 NW 297

Supported allowance conclusive. Support for an order allowing, against an estate, a fourth-class claim filed after the expiration of the year for such filing, is found in a showing that, until shortly prior to said filing, the creditor was laboring under an apparently excusable mistake as to the identity of his debtor. Therefore, said allowance, being in a proceeding at law and having support in the record, cannot be set aside by the appellate court.

In re Turner, 219-30; 257 NW 443

Peculiar circumstances excusing service of notice of hearing. Altho claimant is executor's wife, peculiar circumstances excusing a claimant's failure to serve notice of hearing may be found in evidence showing that the claim was filed within six months from executor's appointment, that executor told claimant he had knowledge of the matters upon which the claim was based, and that it would be unnecessary to serve notice. Suspicious circumstances surrounding the claim are to be considered in the trial of the claim on its merits.

In re Hill, 225-527; 281 NW 500

II EQUITABLE RELIEF AGAINST STATUTORY BAR—concluded

Claim against proceeds of realty. An equity petition which alleged that widow elected to take under will devising to her a life estate, with the right to dispose of realty for her necessary support, and which prayed that a claim for support of widow, pursuant to a contract with her, be established and declared a lien against the realty, was held to plead sufficient facts, and, together with the evidence in the case, was sufficient to warrant its submission.

Hoskin v West, 226-612; 284 NW 809

Escheat proceedings—notice to claimants—nonwaiver of required filing time for claims. Administrator's notice to possible claimants and heirs in escheat proceedings given in pursuance to court order did not, in effect, amount to a waiver of statute of limitations as to filing claims in probate nor constitute a new invitation to creditors to file claims.

Joy v Bank, 226-1251; 286 NW 443

11973 Payment of claims—classes.

Payment to clerk—effect. Payment by an administrator to the clerk of the district court of the amount of an allowed claim is an authorized and legal payment and discharges the estate from further liability.

In re Nairn, 209-52; 227 NW 585

Specific devises—when resorted to. Specific devises cannot be resorted to for the payment of debts, in the settlement of an estate until all other property of the estate has been resorted to and exhausted.

In re Glandon, 219-1094; 260 NW 12

Payment of unfiled but valid claims. An executor will be credited with the amount of valid, enforceable claims paid by him, even tho such claims were not formally filed against the estate.

In re Bourne, 210-883; 232 NW 169

11976 Order of payment—dividends.

Unallowable payment in full. The act of the administratrix of an insolvent estate in applying estate funds to the full payment of a debt which is the personal obligation of both the deceased and the administratrix, is fundamentally unallowable. It follows that the creditor, by receiving such payment, becomes a trustee of the fund for the use and benefit of the estate, especially when he knew that the estate was insolvent.

Andrew v Bank, 217-69; 251 NW 23

Delivery of note an essential element—restatement of common law. Section 9476, C., '35, providing that every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto, is a restatement of the common-law rule.

In re Martens, 226-162; 283 NW 885

11978 Delivery of specific legacies—security.

Property available for payment. Personal property of an estate will be first resorted to for the payment of the cost of administration; specific devises will be last resorted to.

In re Engels, 210-36; 230 NW 519

Specific devises. Specific devises cannot be resorted to for the payment of debts, in the settlement of an estate, until all other property of the estate has been resorted to and exhausted.

In re Glandon, 219-1094; 260 NW 12

Equal standing of specific devises. Neither of two different, specific devises of real estate, irrespective of their particular location or position in the will, can be deemed junior or inferior to the other when neither is made subject to the other.

In re Glandon, 219-1094; 260 NW 12

"Ademption" and "satisfaction" distinguished. Where a thing or fund which is the subject of a specific legacy has been extinguished, an "ademption" has occurred, whereas doctrine of "satisfaction" applies when the legacy is general, and depends largely, if not entirely, on the intent of the testator.

In re Keeler, 225-1349; 282 NW 362

Ademption—real estate for note and mortgage. A bequest is specific in a will where a note and real estate mortgage securing it were bequeathed to a son of testatrix, and the residuary estate was bequeathed to such son and her grandson; and cancellation by testatrix of the note and mortgage and the taking of title to such real estate in lieu thereof adeems the bequest as respects son's claim that subject matter of bequest still existed but was only changed in form.

In re Keeler, 225-1349; 282 NW 362

Contingent legacy—effect. Where a will provided that testator's niece should receive $1,000 (1) if the wife survived and did not take under will, or (2) if wife did not survive, and when the widow accepted the provisions of will giving her the personal property and a life estate in real estate, niece took nothing thereunder, since neither contingency arose.

Starr v Newman, 225-901; 281 NW 830

Trusts—construction—gift "when funds are available"—when due. Where a will and trust instrument, designed to support two trustors as long as either one of them lived, contains also a $5,000 gift for each of two named beneficiaries, payable as soon as funds are avail-

able, such gifts may not be paid until after the death of last trustor, when it appears uncertain from the encumbered status of the trusted property whether or not the property is adequate to provide the required support for last surviving trustor, and even then the gifts or legacies with interest thereon are not due until one year after death of the last trustor.

In re Jeffrey, 225-316; 280 NW 536

Realty bequest—value determined as of date of testator's death. Where, prior to his death, testator had given land of the value of $15,600 to four of his five children and directed his executors to purchase, for a daughter who had rejected partial distribution before his death, good Iowa land of the value of $15,600, the will, which was clear and definite as to the intention of testator, spoke as of date of testator's death, and the value of $15,600 fixed for land to be purchased for daughter was required to be determined as of the date of testator's death.

In re Holdorf, 227-977; 289 NW 756

Bequest—acceptance—district court's power to extend testator's limitation—effect. Where testator directed his executors to purchase, for a daughter, good Iowa land of the value of $15,600, such daughter having refused to accept partial distribution of realty to heirs prior to testator's death, but the testator also provided such bequest should lapse if daughter failed to select land within one year from testator's death, and where within one year the daughter filed application for extension of time on the ground that estate did not have funds to purchase such land, which extension was granted after due notice to executors and heirs, held, district court had jurisdiction to grant extension of time and, no appeal having been taken therefrom, the order became "final" and the heirs were bound by the decision.

In re Holdorf, 227-977; 289 NW 756

Offsetting debts of devisee or legatee. A legacy due an insolvent legatee, and the proceeds of lands devised to an insolvent devisee may, in the settlement of the estate, be retained by the executor to the extent that the insolvent legatee or devisee is indebted to the estate; and if necessary, the devised lands may, under appropriate application, be sold and the proceeds applied on said indebtedness, on the resulting costs, and on the inheritance tax, if any, due the state from the insolvent.

In re Flannery, 221-265; 264 NW 68

Withholding distribution. Where certain devisees were holding rents belonging to estate, trial court properly ordered that no distribution be made to them until such rents were turned over to the executrix.

In re David, 227-352; 288 NW 418

Bankruptcy of heir—remedy extinguished—debt to estate—offset. A discharge in bankruptcy of a legatee puts an end to the remedy on the debt of said heir to the estate and affords a complete defense to an action on the debt; however, the debt remains an asset of the estate and the discharge does not affect the right of retainer or offset.

In re Morgan, 226-68; 283 NW 267

11979 Money.

Legacy lapsing by death of legatee. A contingent legacy in favor of a daughter is created by a will which, after devising a life estate to testator's wife, devises certain land to a son on condition that "within one year" after the death of the wife the son shall pay his sister a named sum of money. In other words, the legacy to the daughter lapses by her death prior to the death of the mother.

In re Phearman, 211-1137; 232 NW 826; 82 ALR 674

Lapsing of legacy. A condition in a charitable bequest, that if the legatee takes no steps within a named time to augment said bequest the same shall revert to testator's estate, must be deemed a condition precedent and not a condition subsequent. It follows that said bequest lapses upon the expiration of said time if the legatee, with actual knowledge of the bequest, fails to signify any acceptance of the bequest, and fails to take any steps to augment said bequest.

In re Hillis, 215-1015; 247 NW 499

Ademption — presumption. A testator who bequeaths his property in equal shares to his children will be presumed to have intended to effect an ademption by voluntarily and on his own motion paying off, subsequent to the execution of his will, a debt owed wholly by one of the legatees, and in a proper proceeding the amount of such payment may be ordered set off against the share of said legatee.

In re Smith, 210-563; 231 NW 468

Satisfaction of legacy prior to death of testator. A general legacy provided for in a will is satisfied in toto when the testator, subsequent to the making of the will, pays to the legatee a lesser sum with intent to effect such satisfaction; and such payment and satisfaction may be established by extrinsic evidence.

Heileman v Dakan, 211-344; 233 NW 542

Equitable conversion and right to reconvert. When a testator directs that named real estate be sold by his executor and the entire proceeds be paid to a legatee, said legatee may make and enforce an election to take the real estate instead of the proceeds, especially when such election does not interfere with the rights and duties imposed on the executor.

In re Warner, 209-948; 229 NW 241

Stock dividend issued on previously earned surplus—conflicting claims. A legacy of "one

thousand dollars par value of the capital stock" of a named corporation (being a part of the stock holding of the estate) entitles the legatee to a stock dividend declared and issued by the corporation subsequent to the death of testator on surplus earnings accumulated by the corporation prior to the death of testator; also to an ordinary cash dividend declared on the stock subsequent to testator's death and subsequent to the formal transfer of said stock to the legatee.

In re Etzel, 211-700; 234 NW 210

Gradual increase in value of corporate assets. A legatee who is unconditionally given for life the income arising from corporate stock is not entitled to receive, as income, any part of the principal of a liquidating dividend arising from the final dissolution of the corporation and sale of its assets, when said liquidating dividend reveals a very material increase in value of the original stock investment due to the gradual increase in value of corporate assets during the life of the corporation. Such liquidating dividend constitutes a part of the corpus of the estate, and passes to the remainderman, subject to the right of the life tenant to receive the income thereon—such being the manifest intent of the testator.

In re Etzel, 211-700; 234 NW 210

Right to offset debt of devisee. The amount which an insolvent testamentary devisee is owing to a solvent estate may, in partition proceedings, be offset against his interest in the real estate of testator, and such right is superior to the right of a judgment creditor who obtained his judgment against the devisee subsequent to the death of the testator.

Schultz v Locke, 204-1127; 216 NW 617

Right to offset debt of devisee. The amount which an insolvent testamentary devisee is owing to a solvent estate may be set off against the testamentary devise to said devisee.

In re Mikkelsen, 202-842; 211 NW 254
Rodgers v Reinking, 205-1311; 217 NW 441
See Lusby v Wing, 207-1287; 224 NW 554
In re Rueschenberg, 213-639; 239 NW 529

Offsetting debts of insolvent heirs. The right to have the debts of an insolvent heir to an estate set off against his share in the estate is available against the insolvent's share of real estate as well as against his share of personal property.

Yungclas v Yungclas, 213-413; 239 NW 22

Setting off debt against heir's share. The right to have the debts of an insolvent heir to an estate set off against his share in the estate is available against the insolvent's share in real estate as well as against his share of personal property, when the share of the insolvent in the personal property of the estate is insufficient to discharge said debt.

Kramer v Hofmann, 218-1269; 257 NW 361

Distributees—offsetting debts against share in estate. The amount of the indebtedness of a distributee, solvent or insolvent, to an estate, may be set off against his share in the personal property. If the personal property is insufficient, his share of the real estate may be set off against the debt, if the heir is insolvent.

In re Morgan, 226-68; 283 NW 267

Insolvent heir's debts offset against share in realty. The right to offset debts of an heir against his share of real estate exists only when the heir is insolvent. Evidence held insufficient to show heirs were insolvent.

Wilson v Wilson, 226-199; 283 NW 893

Lien for debts of devisee. A mortgage on real estate executed during the settlement of an estate, by the insolvent devisee of the land, is subject to the prior lien of the estate for the debts owing by the devisee to testator and contracted subsequent to the execution of the will.

Bell v Bell, 216-837; 249 NW 137

Liability of devisee to estate—antagonistic judgments—priority. The lien of a judgment obtained by an executor against an insolvent devisee for sums owing by the devisee to the estate (obtained in order to avoid unfairness to other equally-sharing devisees) is superior to the lien of a prior judgment against said devisee obtained by a general creditor, on lands acquired by the estate subsequent to both judgments.

Johnson v Smith, 210-591; 231 NW 470

Advancements to part of residuary legatees —deduction. Without special provision in the will therefor, an executor is in error in paying to himself, as a residuary legatee, $1,000 on the theory that the four other such legatees had each received advancements in that sum and that such payment was equivalent to charging off such advancements against the shares of the other legatees.

In re Morgan, 225-746; 281 NW 346

Loss of improperly created trust fund—reimbursement. Where an executor is devised a named sum of money in trust for a named person, and where the executor assumes to set aside or hold certain bank stock as said trust fund, which stock becomes worthless by the failure of the bank, the estate must make good the resulting loss (or pro rata if the estate is insufficient to pay all legacies) less any payments made to the cestui que trust.

In re Moe, 213-95; 237 NW 228; 238 NW 718

Interest on unpaid legacy. An executor may be chargeable with interest on an unpaid cash legacy to a minor, even tho his actions have been in perfect good faith.

Irwin v Bank, 218-477; 255 NW 671

Renunciation of devise. The devisee of a cash remainder does not per se renounce said remainder by executing, with other devisees, a writing under which the signers severally contributed to the augmentation of said life devise and explain their action by stating their belief that the life beneficiary (an incompetent) should have said augmented sum "as his own".

Bare v Cole, 220-338; 260 NW 338

Unauthorized satisfaction of bequest. An order of the probate court authorizing an executor to discharge a cash bequest to a minor by transferring to the father of the minor as natural guardian a note and mortgage, belonging to the estate, is wholly void when said order is entered without the appearance of any guardian, regular or ad litem, for the minor.

Irwin v Bank, 218-477; 255 NW 671

Disaffirmance by minor. A void order of the probate court authorizing the executor to satisfy a cash bequest to a minor by transferring a note and mortgage to the father of the minor as the latter's natural guardian, may be disaffirmed and repudiated by the minor on reaching his majority.

Irwin v Bank, 218-477; 255 NW 671

Recovery of unpaid legacy. In an action by a testamentary legatee against an executor to recover an unpaid legacy, the executor, who has already distributed the estate and wishes to bring a third party into the action for recoupment purposes, must, at least, allege that said third party has received some portion of the estate in question.

Irwin v Bank, 218-961; 256 NW 681

Erroneous payments — recovery. Funds paid to legatees under an interlocutory but erroneous order for distribution may be recovered from the legatees to whom paid.

Dillinger v Steele, 207-20; 222 NW 564

Accrual of action. An action to recover estate funds paid out by an executor under an interlocutory but erroneous order for distribution accrues when the erroneous order is set aside and the executor is ordered to proceed to recover the erroneous payments.

Dillinger v Steele, 207-20; 222 NW 564

11980 Legacies—payment after twelve months.

Interest on unpaid legacy. Interest, but not compound interest, should be allowed on a legacy not paid when due.

In re Mann, 212-17; 235 NW 733

Interest. An estate is not liable to interest on a legacy when the legatee acquiesces in an agreed long delay in probating the will and accepts a collateral agreement for the payment of his legacy, and when no undue delay in probating the will under the agreement is made to appear.

In re Sharpless, 202-386; 210 NW 528

Designation of devisee. The fact that the name of the beneficiary of a religious or charitable trust as specified in a will is different from the name of the claimant of the devise becomes unimportant in the face of ample testimony that the designated beneficiary and the claimant are one and the same institution.

Ross v Seminary, 204-648; 215 NW 710

Renounced devise as intestate property. Where one of several residuary devisees wholly renounces his interest under the will, the portion so renounced becomes intestate property and necessarily descends under the statutory rules of descent. In other words, the nonrenouncing residuary devisees do not necessarily take said renounced portion.

Lehr v Switzer, 213-658; 239 NW 564

Trusts—construction—trustor's life support—gift "when funds are available"—when due. Where a will and trust instrument, designed to support two trustors as long as either one of them lived, contains also a $5,000 gift for each of two named beneficiaries, payable as soon as funds are available, such gifts may not be paid until after the death of last trustor, when it appears uncertain from the encumbered status of the trusted property whether or not the property is adequate to provide the required support for last surviving trustor, and even then the gifts or legacies with interest thereon are not due until one year after death of the last trustor.

In re Jeffrey, 225-316; 280 NW 536

11981 Order of paying legacies.

Pro rata distribution—procedure. In determining the pro rata payments to be made on legacies in an estate which proves insufficient to pay all legacies in full, the amounts owing by legatees to testator at the time of the death of testator, and deducted by the executor in paying legacies, must be taken into consideration.

In re Moe, 213-95; 237 NW 228; 238 NW 718

Legacy paid out of order. Interest on an unpaid legacy should not be ordered paid out of its legal order.

In re Mann, 212-17; 235 NW 733

11983 Estate insufficient.

Overpayment on legacy—refund. The appellate court may, it seems, authorize and direct an executor to proceed to recover an overpayment on a legacy.

In re Moe, 213-95; 237 NW 228; 238 NW 718

11984 Failure to pay claims.

Suretyship generally. See under §11577

Summary judgment. Summary judgment (on 10 days notice) may be rendered against sureties on the bond of an executor after the probate court, in a proper proceeding, has determined the amount of the executor's shortage.

In re Carpenter, 210-553; 231 NW 376

Administrator's failure to pay claim—summary judgment against surety. After administrator's noncompliance with an order for immediate payment of a probate claim based on a finding that the administrator should have sufficient assets to pay the same, a summary judgment may be entered against his bond under this section and section 11985, C., '35.

In re Davie, 224-1177; 278 NW 616

Adjudicating administrator's liability—surety not necessary party. A surety on an administrator's bond, neither being entitled to notice nor being a necessary party in the probate proceeding to determine the administrator's shortage and liability, the adjudication thereon determining the administrator's liability, in the absence of fraud or mistake, is binding on the surety.

In re Carpenter, 210-553; 231 NW 376
In re Kessler, 213-633; 239 NW 555
In re Davie, 224-1177; 278 NW 616

11985 Hearing and judgment.

Court findings as jury verdict generally. See under §§11435, 11581

Administrator's failure to pay claim—summary judgment against surety. After administrator's noncompliance with an order for immediate payment of a probate claim based on a finding that the administrator should have sufficient assets to pay the same, a summary judgment may be entered against his bond under section 11984 and this section C., '35.

In re Davie, 224-1177; 278 NW 616

CHAPTER 508

DESCENT AND DISTRIBUTION OF INTESTATE'S PROPERTY

11986 Personal property.

ANALYSIS

Advancements. See under §12029

I PERSONAL ESTATE IN GENERAL

Rents. Principle reaffirmed that rents accruing on land after the death of the owner are chattels real and distributable as land is distributed.

Crouse v Crouse, 219-736; 259 NW 443

Setting off debt against heir's share. The right to have the debts of an insolvent heir to an estate set off against his share in the estate is available against the insolvent's share in real estate as well as against his share of personal property, when the share of the insolvent in the personal property of the estate is insufficient to discharge said debt.

Kramer v Hofmann, 218-1269; 257 NW 361

Insolvency of bank—assessment—when heir not liable. An heir is not liable to a statutory assessment on state bank stock owned by his deceased, intestate ancestor when, in the final settlement of the ancestor's estate, said heir, under contract with other heirs, receives his share solely in property other than said stock.

Bates v Bank, 218-1320; 256 NW 286

Insolvency of bank—assessment—when estate beneficiary liable. One who, in the final settlement of an estate, receives the corporate bank stock of the deceased intestate as his or her share of the estate, becomes a "stockholder", and is subject to assessment like other stockholders, even tho the stock has not been transferred on the stock books of the bank.

Bates v Bank, 218-1320; 256 NW 286

II LAW GOVERNING DISTRIBUTION OF PERSONALTY

Inheritance—creature of statute. The right to take property by descent or inheritance is strictly a statutory right.

In re Fitzgerald, 223-141; 272 NW 117

Advancements as rule of intestate descent. The doctrine of advancements applies only in cases where the decedent dies intestate, unless specifically provided for by language in the will.

In re Morgan, 225-746; 281 NW 346

Simultaneous death of spouses—effect.

Carpenter v Severin, 201-969; 204 NW 448; 43 ALR 1340

War-risk insurance. Unaccumulated installments of war-risk insurance which exist at the time of the death of the beneficiary and which, under congressional act, are payable

to the estate of the soldier, must be distributed, in case of intestacy, to the soldier's heirs who exist at the time the soldier dies.

In re Pivonka, 202-855; 211 NW 246; 55 ALR 570

III INTEREST OF SURVIVING SPOUSE

Right of surviving spouse. The right of the surviving spouse of an intestate deceased to a balance of rentals accruing during redemption period and remaining after satisfaction of mortgage foreclosure judgment cannot exceed one third of such balance.

In re Angerer, 202-611; 210 NW 810

Lapse of devise to spouse. A devise by a husband to his wife is deemed to lapse upon his death when the devise is identical in quality and quantity with what the wife would have taken under the statute had there been no will; but not so of a devise which gives the wife one-third of his entire estate (1) after converting all real estate, including homestead, into personalty and (2) after paying all debts.

In re Davis, 204-1231; 213 NW 395

IV INTEREST OF HEIRS

(a) RIGHT TO POSSESSION

Administrator holds estate as trustee. An administrator of an intestate estate takes possession of and holds the same as an express trustee thereof for the claimant creditors of the decedent and of the estate, the heirs, the surviving spouse, and any others who may have a proper interest in the property.

In re Willenbrock, 228- ; 290 NW 503

Instant vesting of realty at death—possession and disposal by heirs. The title to real estate of which a decedent dies seized, upon his death, descends to and vests immediately in his heirs with the quantity to each definitely ascertained, and from that instant, subject to the debts of the deceased, they may dispose of the property as owners and are entitled to the possession and to the rents and profits.

In re Duffy, 228- ; 292 NW 165

Debts due decedent from heir—retainer or offset against realty. General rule recognized that real estate passes to devisee direct from testator, and not through executor, and that title vests in devisee immediately upon death of testator and, as a general rule, there is no right of retainer or offset for debt of devisee to estate, as against devisee of real estate; but there may be cases where, on account of the insolvency of the debtor, or other cause, equity will interfere for protection of the estate.

Petty v Hewlett, 225-797; 281 NW 731

(b) SETTLEMENT OF ESTATE WITHOUT ADMINISTRATION

Agreement—effect. An agreement between an aged mother and her heirs that a named person should act as attorney in fact for the mother, coupled with an agreement between the heirs that none of them should borrow from or obtain advancements from the mother, presents no impediment to the mother's conveying her property to certain of her heirs in order to equalize the distribution of her property.

Rollins v Jarrett, 207-183; 222 NW 365

Agreement of heirs binding. An agreement by heirs to settle estate without administration and providing for payment of legacies is legal and binding, and a widow of one of such heirs in a subsequent partition action cannot complain of denial of legacy to deceased heir where legacies due to other heirs were larger and such heirs received no part of their legacies.

Meeker v Meeker, (NOR); 283 NW 873

Right of heirs to protect. Tho the title to the personal property of a deceased does not pass directly to his heirs, they may, in the absence of any administration, maintain an action to protect or recover such property.

Powell v McBlain, 222-799; 269 NW 883

11987 Payment of shares.

Withholding distribution. Where certain devisees were holding rents belonging to estate, trial court properly ordered that no distribution be made to them until such rents were turned over to the executrix.

In re David, 227-352; 288 NW 418

Acceptance of bequest—extension of testator's limitation—effect. Where testator directed his executors to purchase, for a daughter, good Iowa land of the value of $15,600, such daughter having refused to accept partial distribution of realty to heirs prior to testator's death, but the testator also provided such bequest should lapse if daughter failed to select land within one year from testator's death, and where within one year the daughter filed application for extension of time on the ground that estate did not have funds to purchase such land, which extension was granted after due notice to executors and heirs, held, district court had jurisdiction to grant extension of time and, no appeal having been taken therefrom, the order became "final" and the heirs were bound by the decision.

In re Holdorf, 227-977; 289 NW 756

11988 In kind—proceeds distributed.

Heirs' rights—evidence of shares. Where a farm, comprising a part of an estate which is settled without administration by vesting con-

trol in one of the heirs under a trust agreement, is sold, and several first and second mortgages are taken in part payment and divided among the heirs, and title subsequently reverts to trustee without foreclosure, the mortgages, altho losing their effect as liens, serve as evidencing respective share of each heir.

Meeker v Meeker, (NOR); 283 NW 873

Withholding distribution. Where certain devisees were holding rents belonging to estate, trial court properly ordered that no distribution be made to them until such rents were turned over to the executrix.

In re David, 227-352; 288 NW 418

11990 Dower.

ANALYSIS

Election between will and dower. See under §§12007–12012
Evidence of antenuptial agreements. See under §11285 (III)
Postnuptial agreements. See under §10447
Separation agreements. See under §10447

I POWER OF LEGISLATURE TO ALTER DOWER RIGHT

Dower interest determined by law at time of spouse's death. The dower interest of a widow is determined by the law in force at the time of the husband's death.

Bullock v Smith, 201-247; 207 NW 241

II EXTENT AND NATURE OF THE DOWER INTEREST

Discussion. See 11 ILR 97—Specific performance and dower rights

Law governing. The right of dower, or what under our law is designated as "distributive share" in Iowa real estate, is not governed by a marriage contract entered into in a foreign state where the parties have their domicile, but is governed by the law of this state.

Ehler v Ehler, 214-789; 243 NW 591

Law governing. The distributive share or dower interest of a widow in the estate of her deceased husband is determined by the law in force at the time of his death.

Bullock v Smith, 201-247; 207 NW 241

Property rights determinable after death. Principle reaffirmed that the mutual property rights of a husband and wife may be determined after the death of one of the parties.

Melvin v Lawrence, 203-619; 213 NW 420

Fraudulent conveyance—inchoate right of dower nonexistent. Where a debtor, as grantor, made a conveyance to sister-in-law without consideration in order to escape payment of judgment which he feared would be rendered against him, and where 25 days after settlement of claim for which grantor was being sued she reconveyed without consideration, sister-in-law obtained no beneficial interest in the property. Hence, her husband could not claim a one-third interest in property upon her death, altho he signed deed of reconveyance only as a witness.

Renne v Tumbleson, 227-159; 287 NW 839

Tenants in common—surviving spouse and children. Upon the death of the owner of land, the surviving spouse and children become tenants in common of said land.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718
Prichard v Anderson, 224-1152; 278 NW 348

Vesting and divesting. Principle reaffirmed that instantly upon the death of the intestate owner of land the surviving spouse and children, as tenants in common, become vested with the title to said land in the proportion of one third in the spouse and two thirds in the children, which vesting may later be divested by the action of the spouse in the exercise of his or her optional rights.

Crouse v Crouse, 219-736; 259 NW 443
Jackson v Grant, 224-579; 278 NW 190

Interest of surviving spouse—time of vesting—divesting. Principle reaffirmed that interest of surviving spouse in property vests immediately upon death of other spouse altho subsequently defeasible by an election to take under the will, if any, or to take a homestead right.

Prichard v Anderson, 224-1152; 278 NW 348

Homestead—no presumption of election from mere occupancy. Surviving spouse's occupancy of the homestead will not alone, unless inconsistent with every other right, raise a presumption of an election to occupy the homestead for life.

Prichard v Anderson, 224-1152; 278 NW 348

Surviving spouse's occupancy not conclusive on taking homestead. Inasmuch as the surviving spouse's occupancy of the homestead may be as a tenant in common, as a life tenant, or under the statute pending administration, such occupancy, altho being evidence, is not conclusive of her election to take the homestead right, but the true character of the oc-

cupancy is determinable from all the surrounding facts and circumstances.

Jackson v Grant, 224-579; 278 NW 190
Prichard v Anderson, 224-1152; 278 NW 348

Rents—proper charges against surviving spouse. A surviving wife is not entitled to one third of the gross rents accumulating in the estate prior to the setting off of her distributive share, but to one third after deducting taxes, proper charges for upkeep and receivership charges, if any.

Crouse v Crouse, 219-736; 259 NW 443

Rents from dower. Rents arising from the distributive share of a surviving spouse, during the time when such share is being held in common with the shares of other owners, are not liable for the debts of the estate or of the costs of administration.

Crouse v Crouse, 219-736; 259 NW 443

Homestead—right to free occupancy. In case rents accumulate in an estate prior to the setting off of the wife's distributive share, the wife, in the division of said rents with the other tenants in common, cannot be charged with the rental value of the homestead occupied by her. Moreover, if the other tenants have wrongfully ousted the wife for a time from her said occupancy, they must account to her for the rentals received. Reason: The right of the wife to the free occupancy of the homestead until otherwise disposed of, is independent of, and is in addition to, her right to a distributive share.

Crouse v Crouse, 219-736; 259 NW 443

Exemption from debt. Principle reaffirmed that a homestead, set aside to the widow as her dower or distributive share, passes to her free from the debts of the husband-owner.

Southwick v Strong, 218-435; 255 NW 523
Crouse v Crouse, 219-736; 259 NW 443

Selling homestead for debts—necessity of election between will and dower. An order of court to an executor to sell real estate, to pay claims, is erroneous where the only real estate was the homestead, and the surviving husband, who was willed one third of the estate, had never been required to make an election as to whether or not he took under the will. In such case the presumption remains that he took his distributive share.

In re Dyer, 225-1238; 282 NW 359

Not subject to mechanic's lien. A mechanic's lien filed after the death of the title holder is not a lien on the unassigned dower, of the surviving spouse, in the property in question.

Fullerton Lbr. Co. v Miller, 217-630; 252 NW 760

III PROPERTY SUBJECT TO DOWER RIGHT

Death of bankrupt after adjudication—widow's rights. On the death of a bankrupt after adjudication and qualification of trustee, surviving wife is held entitled to distributive share in his realty under state statute providing dower rights, and also entitled to sufficient of bankrupt's property of such kind as is appropriate to her support for 12 months from bankrupt's death under state statute providing allowance to widow.

In re Payne, 20 F 2d, 665

Nonforfeiture by taking foreign homestead. A wife, who is legally disinherited by her husband's will executed in a foreign state where the parties had their domicile, is not deprived of her dower or distributive share in the husband's Iowa real estate because of the fact that in said foreign state the homestead there situated was set off to her by the probate court on her application. In other words, the Iowa statute according to a wife the right to take the homestead in lieu of dower applies solely to an Iowa homestead.

Ehler v Ehler, 214-789; 243 NW 591

Lands subject to — gifts. A surviving wife has no interest in lands which the husband bought and paid for, and which he, without working any fraud upon the wife and without intending such fraud, caused to be conveyed directly by his vendor to grantees other than himself, as a gift.

Grout v Fairbairn, 204-727; 215 NW 963

Devise identical with statute of descent. A testamentary devise is inoperative when the property devised is exactly identical with the property which the statute law of descent grants in the absence of a will.

Wehrman v Bank, 221-249; 259 NW 564; 266 NW 290

IV BAR, WAIVER, OR RELINQUISHMENT OF DOWER

(a) ANTENUPTIAL AGREEMENTS

Antenuptial contract—proof. Record held to establish, by copy, an antenuptial contract, the original being lost.

Fraizer v Fraizer, 201-1311; 207 NW 772

Antenuptial contract — consideration. The consideration for an antenuptial contract necessarily inheres in the resulting marriage.

Kalsem v Froland, 207-994; 222 NW 3

Validity. Antenuptial contracts, the same as other contracts, if fair and free from fraud, are valid, binding, and enforceable, being based upon the consideration of marriage which is of the very highest known to the law.

In re Onstot, 224-520; 277 NW 563

Sufficiency of evidence. Evidence held sufficient to show execution of antenuptial agreement precluding widow from dower share.

In re Dunn, (NOR); 224 NW 38

IV BAR, WAIVER, OR RELINQUISHMENT OF DOWER—continued

(a) ANTENUPTIAL AGREEMENTS—concluded

Antenuptial contract—validity. When from the evidence it is found that an antenuptial contract was in fact entered into before the marriage, it is valid and binding on the parties.

Finn v Grant, 224-527; 278 NW 225

Acknowledgment — when unnecessary. A simple antenuptial contract, not involving the conveyance of real property, needs no acknowledgment to be valid.

Finn v Grant, 224-527; 278 NW 225

Antenuptial contract—homestead rights. An antenuptial contract will not be construed to embrace a waiver of homestead rights in the absence of plain and unmistakable language to that effect. Such waiver must have a more secure basis than a mere inference from broad and sweeping language referable to waiver of right to dower or distributive share.

Mill Owners Ins. v Petley, 210-1085; 229 NW 736

Antenuptial contract. A written instrument purporting to be an antenuptial contract waiving all interest which each of the contracting parties would have after marriage in the property of the other, but shown to have been actually signed after marriage, will not bar such property interest when the instrument neither recites (1) that it was executed for the purpose of furnishing evidence of a previous antenuptial oral contract nor (2) that it was executed in consideration of a previous oral antenuptial contract.

Battin v Bank, 202-976; 208 NW 343

Antenuptial contract—validity. Antenuptial contract reviewed and held not invalid on the grounds of unfairness, unconscionableness, and nonmutuality or because it contained an invalid provision in relation to property interest and the right to children which in no manner affected the consideration actually received by the wife.

Kalsem v Froland, 207-994; 222 NW 3

Marriage settlements — sum payable to wife not preferred claim. The parties to an antenuptial contract which simply and generally provides that the wife shall, on the death of the husband, "be paid" a named sum by the latter's personal representative, will not be deemed to have intended that in the settlement of the estate of the husband, the said sum to be paid the wife should have priority over third and fourth class claims. (Holding based on the intent of the parties as reflected in the contract and surrounding circumstances.)

In re Shepherd, 220-12; 261 NW 35

Husband's breach of antenuptial contract—wife's heirs' claim against husband's estate. An antenuptial contract preserving the respective property rights of the parties will support a claim in favor of the wife's collateral heirs against the estate of the husband who appropriated his deceased wife's separate property that otherwise and rightfully should have gone to such collateral heirs.

In re Onstot, 224-520; 277 NW 563

(b) GRANT OR CONVEYANCE

Discussion. See 17 ILR 245—Note signed with husband

Warranty deed—effect. A warranty deed duly signed by both husband and wife necessarily constitutes a complete subordination and waiver of all the rights of both husband and wife, including homestead and dower.

Clark v Chapman, 213-737; 239 NW 797

Signing to release. A promissory note and mortgage for the pre-existing debt of a husband are without consideration as to the wife who signs the same for the sole purpose of releasing her dower interest.

Gorman v Sampica, 202-802; 211 NW 429

Fraudulent antenuptial conveyance. A wife who pleads that her deceased husband fraudulently disposed of his property prior to marriage in order to deprive her of the interest which she would take as a wife must establish (1) an existing contract of marriage between herself and the deceased at the time of the conveyance by the deceased, and (2) that she had no knowledge of such conveyance prior to her marriage.

In re Mann, 201-878; 208 NW 310

Lien of mortgage executed by husband only. A real estate mortgage executed by the husband, but not by the wife, becomes a lien upon the entire mortgaged premises instantly upon the subsequent execution by the husband and wife of a conveyance of the property to a third party.

Louisa County v Grimm, 203-23; 212 NW 324

Refund to pay debts. The heirs of an estate who unconditionally purchase the interest of their mother in the estate have no legal right, thereafter, to compel the mother to contribute any sum toward the discharge of unpaid debts of the estate, unpaid taxes against the estate, or unpaid probate costs and fees.

In re Jones, 217-288; 251 NW 651

Fraudulent conveyance — inchoate right of dower nonexistent. Where a debtor, as grantor, made a conveyance to sister-in-law without consideration in order to escape payment of judgment which he feared would be rendered against him, and where 25 days after settlement of claim for which grantor was being sued she reconveyed without consideration, sister-in-law obtained no beneficial interest in the property. Hence, her husband could not claim a one-third interest in property upon

her death, altho he signed deed of reconveyance only as a witness.

Renne v Tumbleson, 227-159; 287 NW 839

(c) DIVORCE

No annotations in this volume

(d) FORECLOSURE AND PAYMENT OF MORTGAGES

Wife signing mortgage and note to release dower. Evidence to the effect that a wife signed not only the mortgage of her husband, but also the promissory note, and did so in order to enable the husband to obtain the loan and complete the deal, does not establish that the note was without consideration as to her, even tho she asserts that she signed solely to release her dower interest.

Des Moines JSL Bank v Allen, 220-448; 261 NW 912

Mortgage on unadmeasured dower. A mortgage executed by a surviving wife on her unadmeasured distributive share attaches to the subsequently admeasured lands.

In re Caylor, 208-1208; 227 NW 103

Setting off free from existing joint mortgage. A distributive share cannot be set off to a surviving wife free from a mortgage on the land when the evidence indicates that the mortgage debt was the debt of the wife equally with that of the deceased husband who owned the land.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

Existing liens. The distributive share of a surviving husband or wife in lands must bear its pro rata amount of a mortgage executed by the deceased and the survivor.

In re Caylor, 208-1208; 227 NW 103

(e) JUDICIAL SALE

Death of bankrupt—widow's rights—allowance and dower. Where a husband secures a receiver for his property in a state court and, with his wife, makes a conveyance of property to such receiver, and thereafter is adjudged an involuntary bankrupt, but dies before the disposition of his property by the trustee, and application is made for widow's allowance in the bankruptcy proceeding, held, that the bankruptcy adjudication and vesting of realty was not such "other judicial sale" as will defeat her right of dower, and her relinquishment by deed to husband's receiver of her contingent rights in his property became void by bankruptcy proceedings. In construing statutes for allowance to widows and children, equity court should be careful to do them no injustice.

Johnson v Payne, 26 F 2d, 450

(f) ESTOPPEL

Election of spouse under Code of 1873. The fact that a surviving husband to whom the wife had devised a life estate in lands which had long been their home accepted the administratorship of his wife's estate and for a long series of years continued his possession of the lands and paid taxes and repairs on the land, without being called upon to account to anyone, is not sufficient, under §2452, C., '73, to estop the husband from asserting a one-third distributive share interest in the property, in lieu of said life interest.

Ross v Seminary, 204-648; 215 NW 710

Vesting and divesting. The unadmeasured distributive share (dower) of a surviving spouse vests immediately upon the death of the other spouse, subject to being divested by the subsequent election of the surviving spouse to take under the will, if there be one, or to take homestead rights in lieu of distributive share.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

Mortgage on life estate changed to cover "undivided one-third" interest—effect on lien. Where a bank has knowledge of an arrangement whereby a mother had a life estate in the entire property and makes a mortgage accordingly, but in a later mortgage attempts to change its position by a mortgage on her interest as an "undivided one-third", its answer, admitting this allegation in the petition, estops the bank from claiming the mother had a greater interest, and, when her interest develops to be a life estate, the bank's mortgage attaches only to an undivided one third of this life estate.

Redding v Redding, 226-327; 284 NW 167

Surviving spouse—failing to plead and prove election. An adopted son, defending a contribution action growing out of expenditures made by his mother as tenant in common in inherited real estate, and in his answer admitting that his mother possessed by right of dower, but nowhere claiming or assuming his burden to prove that the widow elected to take a life estate in lieu of other dower rights, is estopped to raise such point on appeal or matters corollary thereto.

Yagge v Tyler, 225-352; 280 NW 559

Election—dower (?) or will (?). A widow who, with full knowledge of every material fact affecting the extent of her husband's estate, freely and voluntarily accepts the provisions of her husband's will in her behalf is estopped to change her election. So held where the material fact was that the husband had, prior to marriage, incorporated his landed holdings and distributed his corporate stock to his children.

In re Mann, 201-878; 208 NW 310

Estoppel to dispute election. A widow who is given a life estate, subject to the payment of debts, and whose conduct for some three years following the probate of the will is unmistakably on the theory that she was taking under

IV BAR, WAIVER, OR RELINQUISHMENT OF DOWER—concluded

the will, is estopped to then shift her position to the prejudice of creditors and deny the effect of her acts; and this is true tho she made no formal election under the statute.

Phillips v Phillips, 204-78; 214 NW 548

(g) MISCELLANEOUS BARS AND WAIVERS

Rights of devisees—election between will and dower. A widow will not be held, under §2452, C., '73, to have elected to accept a life estate devised to her in her husband's will, in lieu of her statutory dower or distributive share, from the naked fact (1) that, for some 26 years following the death of her husband, and until her death, she occupied, took charge of, and managed the real estate in which the said will gave her a life interest, and (2) that, shortly after her husband's death, she released all possible dower or testamentary right in a portion of the property.

Bullock v Smith, 201-247; 207 NW 241

Admeasurement—nonestoppel. A widow is not estopped to demand the admeasurement of her distributive share by the fact (1) that she, as executrix, procures an order for the sale of an "undivided two thirds" of the land in question in order to pay the debts of the estate, or (2) that she individually mortgages an "undivided one third" of the land and that said mortgage has not been foreclosed.

In re Caylor, 208-1208; 227 NW 103

Wife signing husband's notes—unallowable defense. Assuming that a wife was advised, when she signed promissory notes evidencing the husband's sole indebtedness, that her signature would have no other effect than to release her dower interest in the husband's land (which was embraced in the accompanying mortgage which she signed), yet that constitutes no defense to a personal judgment against her on the notes when there is no issue or proof of fraud or conditional delivery, no prayer for reformation or proof supporting such prayer, and when the notes are wholly bare of any reference to dower interest.

Reason: The application of such theory would nullify the notes for any purpose.

First N. Bk. v Mether, 217-695; 251 NW 505

Life estate—proof—mortgage recitals—sufficiency. A series of mortgages accepted by a bank describing the undivided third interest of a son subject to the life estate of the mother, together with other evidence, held to establish an alleged oral contract of the heirs and their mother to create such life estate in the property of a deceased intestate husband and father; consequently, partition of the realty was properly denied against the mother.

Redding v Redding, 226-327; 284 NW 167

11991 Coextensive right of husband.

Nonright of husband to exempt personalty. See under §11918

Husband of title holder as improper plaintiff in partition. A husband may not maintain an action to partition lands of which his wife holds the legal title, and in which he has no interest except the contingent interest of a husband.

Jones et al. v Park, 220-903; 262 NW 801

Selling homestead for debts—necessity of election between will and dower. An order of court to an executrix to sell real estate to pay claims is erroneous where the only real estate was the homestead, and the surviving husband, who was willed one third of the estate, had never been required to make an election as to whether or not he took under the will. In such case the presumption remains that he took his distributive share.

In re Dyer, 225-1238; 282 NW 359

11992 Dower to embrace homestead.

Additional citations. See under §§10145, 10146

Nonright to claim particular lands. The surviving husband or wife has no right, in an application to have a distributive share admeasured, to demand that certain nonhomestead lands be included in the admeasurement.

In re Caylor, 208-1208; 227 NW 103

Impossibility of including homestead. The distributive share cannot be so set off as to include the dwelling house and other buildings used in connection therewith and the land which is appurtenant to such buildings, when the value of such buildings and land exceeds the value of the allowable distributive share.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

Reservation of homestead right—evidence. Where a form book used for the recordation of warranty deeds in the office of the recorder of deeds contained a printed relinquishment by a spouse of "dower and homestead", the fact that in a certain instance the word "homestead" has been erased furnishes no evidence that the grantors had orally reserved a homestead right in the conveyed property.

Clark v Chapman, 213-737; 239 NW 797

Antenuptial contract specifying manner of property descent—dower lost. An antenuptial contract, preserving the property of each party for the benefit of their respective heirs, operates to extinguish the homestead right, and, in the absence of children to the union, the property of each descends to his heirs as though no marriage existed.

Finn v Grant, 224-527; 278 NW 225

11994 Setting off dower—time limit.

ANALYSIS

I ADMEASUREMENT IN GENERAL
II PROCEEDINGS FOR ADMEASUREMENT OF DOWER
III APPORTIONMENT OF LIENS

I ADMEASUREMENT IN GENERAL

Nonestoppel. A widow is not estopped to demand the admeasurement of her distributive share by the fact (1) that she, as executrix, procures an order for the sale of an "undivided two thirds" of the land in question in order to pay the debts of the estate, or (2) that she, individually, mortgages an "undivided one third" of the land and that said mortgage has not been foreclosed.

In re Caylor, 208-1208; 227 NW 103

Homestead — undue length of occupation. The heirs of an intestate will not be heard to complain of the extreme length of time the surviving spouse has maintained the free occupancy of the homestead when they were the direct cause of delaying the admeasurement of the spouse's distributive share.

Crouse v Crouse, 219-736; 259 NW 443

II PROCEEDINGS FOR ADMEASUREMENT OF DOWER

Recognized methods. The statutory provisions for admeasurement of dower do not exclude the setting off of dower by an action in equity, by partition, or by any other appropriate action.

Ehler v Ehler, 214-789; 243 NW 591

Conclusive bar to admeasurement. A final order in probate, entered on due notice, including notice to the wife of the deceased, wherein, inter alia, provision is made for carrying out the terms of an antenuptial contract in favor of the wife (wherein she waived her distributive share) is a complete bar to a subsequent action by the wife to recover said distributive share.

Weidman v Money, 205-1062; 219 NW 39

Antenuptial agreement precluding dower. Evidence held sufficient to show execution of antenuptial agreement precluding widow from dower share.

In re Dunn, (NOR); 224 NW 38

III APPORTIONMENT OF LIENS

Setting off free from existing joint mortgage. A distributive share cannot be set off to a surviving wife free from a mortgage on the land when the evidence indicates that the mortgage debt was the debt of the wife equally with that of the deceased husband who owned the land.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

12001 Sale—division of proceeds.

Dower — impossibility of including homestead. The distributive share cannot be so set off as to include the dwelling house and other buildings used in connection therewith and the land which is appurtenant to such buildings, when the value of such buildings and land exceeds the value of the allowable distributive share.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

12006 Dower right unaffected by will.

Law governing. The right of a surviving spouse to take under the will of the deceased spouse, or to take a distributive one-third share, is governed by the statutes existing at the time of the death of the testate spouse; likewise the right of a corporation to take under a will.

Ross v Seminary, 204-648; 215 NW 710

Devise in lieu of dower—acceptance from conduct. A surviving spouse, tho she has made no formal, record acceptance of a devise to her by her husband of a life estate in real and personal property in lieu of distributive share (dower), must be deemed to have accepted said devise when, for some 16 years following the probate of her husband's will, she has, without question, accepted the full benefit of said devise of a life estate.

Kinnett v Ritchie, 223-543; 273 NW 175

12007 Election between will and dower—notice.

Discussion. See 22 ILR 543—Renunciation of life estate

ANALYSIS

I RIGHT OF ELECTION IN GENERAL
II NOTICE AND RECORD
III PROOF OF ELECTION
IV DEVISE IN LIEU OF DOWER
V EFFECT OF ELECTION

Devise presumed to be in lieu of dower, homestead, and exemption. See under §11847

I RIGHT OF ELECTION IN GENERAL

Nonstatutory election. The statutory method for a surviving wife to elect to take under her husband's will does not prevent her from so electing by some other method. A wife may, by the act of making a will during the two days intervening between the death of her husband and her own death, and by the circumstances and incidents attending the making of such will, clearly effect an election, even tho she did not know that an election was necessary.

Hahn v Dunn, 216-637; 247 NW 672

Vesting and divesting. The unadmeasured distributive share (dower) of a surviving spouse vests immediately upon the death of

I RIGHT OF ELECTION IN GENERAL—concluded

the other spouse, subject to being divested by the subsequent election of the surviving spouse to take under the will, if there be one, or to take homestead rights in lieu of distributive share.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

Dower—when vested—divesting by choosing homestead. Instantly on the death of a married intestate, an undivided one-third interest and estate in his real estate vests in the surviving spouse as tenant in common, which vested estate is subject to being divested by a later election to take the homestead for life in lieu of such distributive share.

Jackson v Grant, 224-579; 278 NW 190

Interest of surviving spouse—time of vesting—divesting. Principle reaffirmed that interest of surviving spouse in property vests immediately upon death of other spouse altho subsequently defeasible by an election to take under the will, if any, or to take a homestead right.

Prichard v Anderson, 224-1152; 278 NW 348

Selling homestead for debts—necessity of election between will and dower. An order of court to an executrix to sell real estate to pay claims is erroneous where the only real estate was the homestead, and the surviving husband, who was willed one third of the estate, had never been required to make an election as to whether or not he took under the will. In such case the presumption remains that he took his distributive share.

In re Dyer, 225-1238; 282 NW 359

Total failure to elect. A surviving wife who dies prior to the probate of her husband's will without having made, or been notified to make, any election either (1) to take the life estate devised to her "in lieu of dower and statutory right", or (2) to take her distributive share under the statute, will be deemed to have taken her primary right, to wit, her distributive share.

Peckenschneider v Schnede, 210-656; 227 NW 335

Total failure of surviving spouse to elect. A surviving wife who is willed by her deceased husband all his property, real and personal, after the payment of all his debts, including the expense of his last sickness and burial, and who dies some three days later without doing anything affirmatively indicating her acceptance of the terms of said will, must be held to have taken her distributive one-third share only.

Hahn v Dunn, 211-678; 234 NW 247; 82 ALR 1503

Failure to elect during lifetime. In a probate proceeding where husband's will gives the widow a life estate in property with a right to dispose of property for her necessary support, and where widow takes charge of estate as administratrix, without closing the estate during her lifetime and without making an election to take under such will, held, she elected to take under the will.

Hoskin v West, 226-612; 284 NW 809

II NOTICE AND RECORD

Election by spouse. A surviving wife who, for two years following the death of her testate husband, and until her death, actively participates as executor in the settlement of the estate, who has full knowledge of the provisions of the will in her behalf, who expresses a desire and intention to abide by the will, and who treats herself as a beneficiary under the will, must be deemed to have elected to take under the will and not her distributive share, even tho no notice to elect is ever served on her.

In re Culbertson, 204-473; 215 NW 761

III PROOF OF ELECTION

Code, '73—election between will and dower. A widow will not be held, under §2452, C., '73, to have elected to accept a life estate devised to her in her husband's will, in lieu of her statutory dower or distributive share, from the naked fact (1) that, for some 26 years following the death of her husband, and until her death, she occupied, took charge of, and managed the real estate in which the said will gave her a life interest, and (2) that, shortly after her husband's death, she released all possible dower or testamentary right in a portion of the property.

Bullock v Smith, 201-247; 207 NW 241

Election of spouse under C., '73. The fact that a surviving husband to whom the wife had devised a life estate in lands which had long been their home, accepted the administratorship of his wife's estate and for a long series of years continued his possession of the lands and paid taxes and repairs on the land, without being called upon to account to anyone, is not sufficient, under §2452, C., '73, to estop the husband from asserting a one-third distributive share interest in the property, in lieu of said life interest.

Ross v Seminary, 204-648; 215 NW 710

Homestead or distributive share—election—evidence necessary. The distributive share being the primary and more worthy right of the surviving spouse, evidence that the survivor elected to take the homestead right in lieu thereof should be clear and satisfactory.

Prichard v Anderson, 224-1152; 278 NW 348

Surviving spouse's occupancy not conclusive on taking homestead. Inasmuch as the surviv-

ing spouse's occupancy of the homestead may be as a tenant in common, as a life tenant, or under the statute pending administration, such occupancy, although being evidence, is not conclusive of her election to take the homestead right, but the true character of the occupancy is determinable from all the surrounding facts and circumstances.

Jackson v Grant, 224-579; 278 NW 190
Prichard v Anderson, 224-1152; 278 NW 348

No presumption of election from mere occupancy by spouse. Surviving spouse's occupancy of the homestead will not alone, unless inconsistent with every other right, raise a presumption of an election to occupy the homestead for life.

Prichard v Anderson, 224-1152; 278 NW 348

Election by spouse—nonestoppel. The heirs of a surviving wife are not estopped to insist that the wife took her dower interest, and did not take under the will, by the fact that, separate and apart from the will, and prior to its execution, the husband had turned over certain funds to a society, under an agreement that the society should pay interest on the funds to him and to the wife during their lifetime, and that the wife received such interest after the death of the husband.

In re Culbertson, 204-473; 215 NW 761

Release of dower for annuity—fraud—evidence. Evidence held insufficient to show that a contract by which a surviving spouse accepted an annuity in lieu of distributive share was fraudulently obtained.

Silkett v Silkett, 209-417; 227 NW 905

Surviving spouse—failing to plead and prove election. An adopted son, defending a contribution action growing out of expenditures made by his mother as tenant in common in inherited real estate, and in his answer admitting that his mother possessed by right of dower, but nowhere claiming or assuming his burden to prove that the widow elected to take a life estate in lieu of other dower rights, is estopped to raise such point on appeal or matters corollary thereto.

Yagge v Tyler, 225-352; 280 NW 559

IV DEVISE IN LIEU OF DOWER

When election not required. No election by a surviving spouse between the will and the dower right is required when the will shows on its face that its provisions for the surviving spouse were not intended to be in lieu of dower rights. So held where the will devised to the wife the sum of one dollar.

Fay v Smiley, 201-1290; 207 NW 369

V EFFECT OF ELECTION

Discussion. *See 24 ILR 714—Effect of election*

Claims — attorney fees — employment for partisan purpose. An executrix who, as widow, has renounced the will and elected to take her statutory distributive share may not, at the expense of the estate, employ attorneys to take a partisan attitude in a rival contest as to heirship.

In re Leighton, 210-913; 224 NW 543

Devise (?) or dower (?). Long acquiescence by a surviving spouse in the testamentary provisions made for her may constitute an irrevocable election to waive her statutory distributive share.

Pabbeldt v Schroeder, 202-689; 210 NW 958

Dower (?) or will (?). A widow who, with full knowledge of every material fact affecting the extent of her husband's estate, freely and voluntarily accepts the provisions of her husband's will in her behalf, is estopped to change her election. So held where the material fact was that the husband had, prior to marriage, incorporated his landed holdings and distributed his corporate stock to his children.

In re Mann, 201-878; 208 NW 310

Estoppel to dispute election. A widow who is given a life estate subject to the payment of debts, and whose conduct for some three years following the probate of the will is unmistakably on the theory that she was taking under the will, is estopped to then shift her position to the prejudice of creditors and deny the effect of her acts; and this is true tho she made no formal election under the statute.

Phillips v Phillips, 204-78; 214 NW 548

Renunciation of trust by wife—effect. A testamentary trust embracing all of testator's property, and for the benefit of the testator's wife and other named beneficiaries in named proportions, is not terminated by the renunciation of the will by the wife. The trust will proceed as to two thirds of the property, for the benefit of the remaining beneficiaries.

Windsor v Barnett, 201-1226; 207 NW 362

12010 Election by law—exception.

Election by spouse—inapplicability of statute. The statutory provision to the effect that a surviving spouse of a deceased testator, when executor of the estate, shall be conclusively presumed to consent to the provisions of the will in his or her behalf unless a refusal so to consent is filed within six months after the will is probated, has no application under a will which was probated before the enactment of such statutory provision.

In re Culbertson, 204-473; 215 NW 761

Homestead or distributive share—election—evidence necessary. The distributive share being the primary and more worthy right of the surviving spouse, evidence that the survivor elected to take the homestead right in lieu thereof should be clear and satisfactory.

Prichard v Anderson, 224-1152; 278 NW 348

Total failure of surviving spouse to elect—effect. A surviving wife who is willed by her deceased husband all his property real and personal after the payment of all his debts, including the expense of his last sickness and burial, and who dies some three days later, without doing anything affirmatively indicating her acceptance of the terms of said will, must be held to have taken her distributive one-third share only.

Hahn v Dunn, 211-678; 234 NW 247; 82 ALR 1503

Failure to elect during lifetime. In a probate proceeding where husband's will gives the widow a life estate in property with a right to dispose of property for her necessary support, and where widow takes charge of estate as administratrix, without closing the estate during her lifetime and without making an election to take under such will, held, she elected to take under the will.

Hoskin v West, 226-612; 284 NW 809

Notice—right of wife as cestui to ignore. A wife who ignores a notice requiring her to elect whether she would take under her husband's will, does not estop herself from alleging and proving that the property which the husband assumed to devise was held by him in trust for her.

Spring v Spring, 210-1124; 229 NW 147

12012 Election between dower and homestead occupancy—notice.

Election between homestead and dower. See under §10146

Life occupancy—unprayed-for relief. A surviving spouse who, in a contest with an heir of the intestate's, claims absolute ownership of the entire homestead, and who is decreed to own only an undivided fractional part thereof, may be decreed the right to elect to occupy the homestead for life, even tho there is no prayer for such relief.

Myrick v Bloomfield, 202-401; 210 NW 428

Antenuptial contract specifying manner of property descent—dower lost. An antenuptial contract, preserving the property of each party for the benefit of their respective heirs, operates to extinguish the homestead right and, in the absence of children to the union, the property of each descends to his heirs as tho no marriage existed.

Finn v Grant, 224-527; 278 NW 225

12015 Setting off dower.

Exemption from debt. Principle reaffirmed that a homestead, set aside to the widow as her dower or distributive share, passes to her free from the debts of the husband-owner.

Southwick v Strong, 218-435; 255 NW 523

12016 Descent to children.

Fiduciary relations, wills. See under §11846
Gifts causa mortis. See under Ch 445, Note 1

Discussion. See 4 ILB 280—Rights of widow as heir; 7 ILB 251—Breaking descent; 16 ILR 244—Child born prior to execution; 20 ILR 626—Descent and distribution

Inheritable existence—criterion. An infant acquires existence capable of taking an inheritance only when it acquires an independent circulation of its blood after being fully separated from the body of the mother.

Wehrman v Bank, 221-249; 259 NW 564; 266 NW 290

Purchase (?) or descent (?). A homestead cannot be deemed to descend under the laws of descent to the children of a spouseless parent when the parent leaves a will which provides that no child contesting the will shall take anything under the will, altho the will otherwise gives to the children the identical shares which the laws of descent would give.

Luglan v Lenning, 214-439; 239 NW 692

Title under will (?) or law of descent (?)—attending rights. Devisees whose shares under a will are, both in quantity and quality, exactly the shares which they, in the absence of a will, would take under the statute law of descent, are deemed to take title, not under the will, but under the said statutes of descent—the worthier title—and so taking they necessarily take the statutory exemptions, if any, attending the property.

Luckenbill v Bates, 220-871; 263 NW 811; 103 ALR 252

Instant vesting of realty at death—possession and disposal by heirs. The title to real estate of which a decedent dies seized, upon his death, descends to and vests immediately in his heirs with the quantity to each definitely ascertained, and from that instant, subject to the debts of the deceased, they may dispose of the property as owners and are entitled to the possession and to the rents and profits.

In re Duffy, 228- ; 292 NW 165

Tenants in common—surviving spouse and children. Upon the death of the owner of land, the surviving spouse and children become tenants in common of said land.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

Prichard v Anderson, 224-1152; 278 NW 348

Dower or distributive share—vesting and divesting. Principle reaffirmed that instantly upon the death of the intestate owner of land the surviving spouse and children, as tenants in common, become vested with the title to said land in the proportion of one third in the spouse and two thirds in the children, which vesting may later be divested by the action of the spouse in the exercise of his or her optional rights.

Crouse v Crouse, 219-736; 259 NW 443

Substitution of heirs. Upon the death of an intestate parent subsequent to the death of his child, the law, for the purpose of descent, substitutes the heirs of the predeceased child in lieu of such child. It necessarily follows that the property descending to these substituted heirs never in any sense becomes a part of the estate of said predeceased child.

In re Rees, 204-610; 215 NW 726

Agreement as to right to inherit. A provision in an antenuptial contract to the effect that the children of the husband shall have the same right of inheritance in the property of the wife as they would have if they were her own children is effective as a contract of inheritance.

Kalsem v Froland, 207-994; 222 NW 3

Antenuptial contract specifying manner of property descent. An antenuptial contract, preserving the property of each party for the benefit of their respective heirs, operates to extinguish the homestead right and, in the absence of children to the union, the property of each descends to his heirs as tho no marriage existed.

Finn v Grant, 224-527; 278 NW 225

Heirs of absentee. The heirs of an absentee who, without known cause, has absented himself from his usual place of residence for a period of seven years, are those persons who are his heirs on the day when the law first indulges the presumption that said absentee is dead, to wit, on the day which marks the end of said absence of seven years.

In re Schlicht, 221-889; 266 NW 556

Declarations and letters as to paternity. Ante litem motam declarations and letters of deceased parties relating to the parentage of a certain person, even tho they are not related to such person by blood or marriage, are admissible on the issue of parentage when such declarants and writers stood in such relation to the person in question as to give assurance that they would know the real truth as to such parentage and could not be mistaken. For a stronger reason, similar declarations and letters of those related by blood or marriage to the person in question are admissible.

In re Frey, 207-1229; 224 NW 597

Creation of vested interest—inviolability. A deed, (1) which is conditioned on grantee paying, after the death of grantor, named sums to each of grantee's two sisters, and (2) which is executed and delivered by grantor and accepted by grantee in accordance with a plan entered into by all of said parties for the settlement of their inherited interests in said land, creates, instanter, in said sisters a vested landed interest which is immune from change without their consent. So held where the grantor, later, erroneously assumed the right to treat the deed as testamentary and, by a new deed, to reduce the payments to the sisters.

Carlson v Hamilton, 221-529; 265 NW 906

Heirs' rights—evidence of shares. Where a farm, comprising a part of an estate which is settled without administration by vesting control in one of the heirs under a trust agreement, is sold, and several first and second mortgages are taken in part payment and divided among the heirs, and title subsequently reverts to trustee without foreclosure, the mortgages, altho losing their effect as liens, serve as evidencing respective share of each heir.

Meeker v Meeker, (NOR); 283 NW 873

Share of heir as mere contract claim—how paid. Where the share or interest of a child in the estate of his or her alleged parent takes the form of a mere contract obligation against the estate, the child becomes a mere claimant against the estate and is payable as such, and not from the mere residue of the estate. So held where the parentage was in issue and was compromised by a court-approved agreement wherein the executor agreed, on behalf of the estate, (1) to set up a specified trust fund, the annuity of which was to be payable to said child during its lifetime, and (2) annually to pay said annuity to said child until the trust fund was actually set up.

In re Griffin, 220-1028; 262 NW 473

Prohibited devise as intestate property. Property devised to one who is prohibited by law from taking becomes intestate property when the will provides no remainderman or provision for reversion.

Karolusson v Paonessa, 207-127; 222 NW 431

Renounced devise as intestate property. Where one of several residuary devisees wholly renounces his interest under the will, the portion so renounced becomes intestate property, and necessarily descends under the statutory rules of descent. In other words, the nonrenouncing residuary devisees do not necessarily take said renounced portion.

Lehr v Switzer, 213-658; 239 NW 564

Will — renunciation by daughter — effect. Where a father's will left property in equal shares to a son and daughter, subject to a life estate in their mother, and where the daughter renounced all benefits under the will, as heir she took undivided one half of one-half portion of estate that became intestate property as result of renunciation, subject to life estate.

McGarry v Mathis, 226-37; 282 NW 786

Assignment of expectancy.

Jones v Jones, 46-466
Mally v Mally, 121-169; 96 NW 735
Richey v Rowland, 130-523; 107 NW 423
Betts v Harding, 133-7; 109 NW 1074

Assignment of expectancy as security. An assignment of an expectancy in a contemplated estate as security for a debt is supported by adequate consideration.

Gannon v Graham, 211-516; 231 NW 675; 73 ALR 1050

Assignment of expectancy. Principle reaffirmed that while an assignment of an expectancy is not a favorite of the law, yet if, after careful scrutiny, it appears to have been made in good faith, for an adequate consideration, without fraud, and is not unconscionable or otherwise invalid, equity will sustain and enforce it.

Gannon v Graham, 211-516; 231 NW 675; 73 ALR 1050

Burk v Morain, 223-399; 272 NW 441

Assignment of expectancy as collateral security. An assignment by a debtor to his creditor of the debtor's expectancy in an estate, as collateral security to the debt, with a proviso that, if the debtor does not pay within a stated time, the assignment shall operate as a "full receipt" against said expectancy, simply extends to the creditor an option to so treat the proviso. The creditor may ignore the proviso and maintain an action on his claim. (See Funk v Grulke, 204-314.)

Smoley v Smoley, 203-685; 213 NW 229

Assignment of expectancy—construction. A written assignment by an heir "of all interest of every kind and nature" in the estate works a complete conveyance of the heir's interest in the real estate of the estate, as against a subsequently rendered judgment against the assignor. (See Funk v Grulke, 204-314.)

Berg v Shade, 203-1352; 214 NW 513

Discharge of bankrupt—effect on assignment. When a debtor assigns his expectancy in an estate as security for the payment of the debt, a subsequent discharge of the debt in bankruptcy ipso facto discharges said assignment and all unadjudicated equitable rights thereunder, even tho the ancestor creates a legacy for the debtor, and dies after the debtor is adjudged a bankrupt, and before the debtor is decreed a final discharge.

Gannon v Graham, 211-516; 231 NW 675; 73 ALR 1050

Burk v Morain, 223-399; 272 NW 441

Ineffectual assignment. A mortgage which recites that the mortgagor "sells and conveys her undivided interest and all future rents, issues and profits" in named lands (in which the mortgagor then has no interest whatever) speaks solely in the present tense, and is wholly ineffectual to convey the mortgagor's future expectant interest in the land as an heir.

Lee v Lee, 207-882; 223 NW 888

Fraudulent assignment. In an action by heirs of an intestate against a son and heir of intestate to set aside a transfer of a note and mortgage from intestate to said son, evidence held insufficient to show signatures of aged mother are not the genuine signatures of intestate on assignments.

Robbins v Daniel, 226-678; 284 NW 793

Action to set aside conveyance. In an action by heirs to set aside an assignment of note and mortgage and transfer of realty by an intestate to a son, who had lived with and cared for her a number of years, on ground of mother's mental incapacity, evidence which tended to show preference to son is insufficient to support claim of mental incapacity.

Robbins v Daniel, 226-678; 284 NW 793

Advancements. In an action by heirs of intestate against a son of intestate to have property received by such son decreed to be an advancement and be deducted from the son's interest in the estate, wherein it is shown that such son had instituted a prior action in partition to have his interest in realty determined, held that such issue of advancement should have been raised as an affirmative defense and litigated in the prior partition action, and therefore is now res judicata.

Robbins v Daniel, 226-678; 284 NW 793

Advancements—deduction—when improper. Without special provision in the will therefor, an executor is in error in paying to himself, as a residuary legatee, $1,000 on the theory that the four other such legatees had each received advancements in that sum and that such payment was equivalent to charging off such advancements against the shares of the other legatees.

In re Morgan, 225-746; 281 NW 346

Insolvency of bank—assessment—when heir not liable. An heir is not liable to a statutory assessment on state bank stock owned by his deceased, intestate ancestor when, in the final settlement of the ancestor's estate, said heir, under contract with other heirs, receives his share solely in property other than said stock.

Bates v Bank, 218-1320; 256 NW 286

Offsetting debts of insolvent heir.

Townsley v Townsley, 167-226; 149 NW 262
Lohman v Mockler, 190-578; 180 NW 644
Woods v Knotts, 196-544; 194 NW 953
In re Mikkelsen, 202-842; 211 NW 254
Schultz v Locke, 204-1127; 216 NW 617
Rodgers v Reinking, 205-1311; 217 NW 441
Lusby v Wing, 207-1287; 224 NW 554
Johnson v Smith, 210-591; 231 NW 470
Yungclas v Yungclas, 213-413; 239 NW 22

Insolvent heir's debts offset against share in real estate. The right to offset debts of an heir against his share of real estate exists only when the heir is insolvent. Evidence held insufficient to show heirs were insolvent.

Wilson v Wilson, 226-199; 283 NW 893

Setting off debt against heir's share. The right to have the debts of an insolvent heir to an estate set off against his share in the estate is available against the insolvent's share in real estate as well as against his share of personal property, when the share of the insolvent in the personal property of the estate is insufficient to discharge said debt.

Kramer v Hofmann, 218-1269; 257 NW 361

Offsetting debts against share in estate. The amount of the indebtedness of a distributee, solvent or insolvent, to an estate, may be set off against his share in the personal property. If the personal property is insufficient, his share of the real estate may be set off against the debt, if the heir is insolvent.

In re Morgan, 226-68; 283 NW 267

Insolvent heir's unpaid debt to estate—jurisdiction of court to offset. The court has jurisdiction, in an equitable action to partition the lands of an intestate (to which action all heirs are parties), to entertain a cross-petition by one of the heirs as administrator of said estate, and, under proper pleading and proof:

1. To decree that a certain insolvent heir has no interest in said land because his unpaid indebtedness to said estate equals or exceeds the value of the share in said lands which he would take were he not so indebted, and

2. To decree that said lands belong solely to the other heirs who are not so indebted, and to the surviving widow, if any.

Bauer v Bauer, 221-782; 266 NW 531

Offsetting debt of insolvent heir against realty—creditors—judgments. Where an heir, as a defendant in a partition action, admits insolvency and an indebtedness to parents' estate in excess of his interest in parents' realty, decree was proper holding heir had no interest in such realty and, accordingly, heir's creditors who obtain judgments after commencement of partition action but before entry of decree, and making no claim of fraud in securing the decree, have no interest in any of funds received from sale of realty.

Petty v Hewlett, 225-797; 281 NW 731

Fiduciary relationship—intestate and heir receiving property. In an action by heirs of intestate to set aside a conveyance of realty made by intestate to son, on the ground of an alleged fiduciary relationship existing between aged intestate and son, held, that evidence was insufficient to establish such relationship, and even tho such relationship existed, whatever property the son received from his mother was by her voluntary and intelligent act, and without duress, dominance, or overreaching on his part.

Robbins v Daniel, 226-678; 284 NW 793

Fiduciary or confidential relationship. In an action by heirs of an intestate against a son and heir of intestate, to recover money allegedly wrongfully obtained while acting in a fiduciary and confidential capacity, evidence held insufficient to show such relationship or that son wrongfully withdrew money from testate's bank account and misappropriated the same, together with rentals obtained from farm land, where the son lived with his aged mother and attended to her business and property affairs.

Robbins v Daniel, 226-678; 284 NW 793

12017 Absence of issue.

Discussion. See 22 ILR 145—Inheritance by adopted children

Infants—inheritable existence—criterion. An infant acquires existence capable of taking an inheritance only when it acquires an independent circulation of its blood after being fully separated from the body of the mother.

Wehrman v Bank, 221-249; 259 NW 564; 266 NW 290

Collateral heirs. Collateral heirs, belonging as they do under the law of inheritance to a deferred class, must, in order to inherit, affirmatively negative by the greater weight of evidence, the existence, at the time the inheritance was cast, of any other heir belonging to a more favored class. Held that collateral heirs had failed to negative the independent existence of twins after they had been taken, by a Caesarean operation, from the womb of a dead mother.

Wehrman v Bank, 221-249; 259 NW 564; 266 NW 290

Status of children of adopted child. The legal status of children of an adopted child is, inter alia, that of grandchildren of their foster grandparents.

Shaw v Scott, 217-1259; 252 NW 237

Articles of adoption — liberal construction against collateral heirs. Articles of adoption, executed under §3251, C., '97, will not, in an action involving the right of the alleged adopted child to inherit from the alleged foster parents in preference to collateral heirs, be held invalid simply because the name of the father of said child is not stated in said articles, tho said section literally requires such statement.

Eggimann-Eckard v Evans, 220-762; 263 NW 328

Adoption—collateral heirs over natural parents. The estate of a legally adopted, intestate, spouseless and issueless person whose adopting parents are both dead leaving surviving collateral heirs only, descends to said collateral heirs and not to the surviving natural parents or parent of said adopted person. (See also §10501-b6 [§10501.6, C., '39], §12027, C., '35.)

In re Fitzgerald, 223-141; 272 NW 117

Devise identical with statute of descent—effect. A testamentary devise is inoperative when the property devised is exactly identical with the property which the statute law of descent grants in the absence of a will.

Wehrman v Bank, 221-249; 259 NW 564; 266 NW 290

Descent — when determinable by contract. Tenants in common of real estate who embark their holdings, and the personal property used in connection therewith, in a partnership violate no rights of heirship or testamentary rights of their brothers and sisters by including in their partnership contract an agreement that upon the death of one of the partners the survivor shall become the absolute owner of all the partnership property.

Conlee v Conlee, 222-561; 269 NW 259

Assignees. An assignment by an heir of all his interest in the "personal property" of an estate carries to the assignee the assignor's interest in funds derived from the sale of real estate for the purpose of paying debts and remaining in the hands of the administrator as an unused balance. The doctrine of equitable conversion has no application to such a state of facts.

In re Wilson, 218-368; 255 NW 489

War-risk insurance. Congress has power, after the issuance of war-risk insurance, to provide that unaccumulated installments which exist at the time of the death of the beneficiary shall be paid to the estate of the insured soldier.

In re Pivonka, 202-855; 211 NW 246; 55 ALR 570

War-risk insurance. Unaccumulated installments of war-risk insurance which exist at the time of the death of the beneficiary and which, under congressional act, are payable to the estate of the soldier, must be distributed, in case of intestacy, to the soldier's heirs who exist at the time the soldier dies.

In re Pivonka, 202-855; 211 NW 246; 55 ALR 570

12025 Heirs of parents.

Heirs of spouseless, childless, and parentless intestate. In the search for an heir of a spouseless, childless, and parentless intestate, the quest along any line of ascending ancestors and their issue must necessarily terminate at the place where inheritable blood disappears.

In re Bradley, 210-1013; 231 NW 661

Collateral heirs. Collateral heirs, belonging as they do under the law of inheritance to a deferred class, must, in order to inherit, affirmatively negative by the greater weight of evidence, the existence, at the time the inheritance was cast, of any other heir belonging to a more favored class. Held that collateral heirs had failed to negative the independent existence of twins after they had been taken, by a Caesarean operation, from the womb of a dead mother.

Wehrman v Bank, 221-249; 259 NW 564; 266 NW 290

Status of children of adopted child. The legal status of children of an adopted child is, inter alia, that of grandchildren of their foster grandparents.

Shaw v Scott, 217-1259; 252 NW 237

Adopting or natural parents—widow. The heirs as a class of each adopting parent, each class receiving one half, rather than the natural parents or their heirs, inherit the estate of an adopted child dying intestate to the exclusion of adopting father's surviving second wife who was decreed no part of the estate and did not appeal—but, quaere, if surviving second wife had claimed a dower interest.

In re Smith, 223-817; 273 NW 891

Adoption—right of inheritance. The legally adopted child of the deceased brother of an intestate, parentless, spouseless and childless sister inherits from said sister just as he would were he the actual child of his adopting parent.

McCune v Oldham, 213-1221; 240 NW 678

"Surviving grandchildren" interpreted. Where a will giving life estates to testatrix's surviving spouse and children provides on termination of the life estates that fee title shall pass "to the surviving grandchildren", this means surviving grandchildren of testatrix as a class and does not mean that in each separate tract the surviving children of that respective life tenant take the remainder, nor do testatrix's heirs take as a whole under rules of descent as in cases of intestacy.

Bell v Bell, 223-874; 273 NW 906

Surviving spouse. No part of the property of an unmarried and issueless deceased who survived both his parents and his issueless and only sister passes to the surviving spouse of such sister.

In re Farrell, 205-331; 217 NW 876

12026 Spouse and heirs.

Equity proceeding to establish heirs—triable de novo. In a probate proceeding to assist administrator to determine heirs of intestate, it being determined upon appeal from (1) the form of the pleadings as prescribed in equity, (2) the record of proceedings indicating use of equitable powers, (3) the reception of evidence under equitable procedure, and (4) rulings of the court reserved as in equity, that such proceeding, having been conducted in a manner wholly foreign to procedure at law, was tried in equity and therefore was triable de novo on appeal.

In re Clark, 228- ; 290 NW 13

Heirs of spouse—evidence to establish. In probate proceeding, certain heirs, who are claiming under statute providing "If heirs are not thus found, the portion uninherited shall go to the spouse of the intestate, or heirs of such spouse if dead, according to like rules * * *.", having established they were heirs of deceased spouse of intestate, cannot be required to go further and establish by proof that no heirs of such intestate exist, since the statute places no such burden upon them, nor is it reasonable to suppose that the legislature so intended. The degrees of heirship are without limit in Iowa.

In re Clark, 228- ; 290 NW 13

Census report—evidence of heirs. In probate proceedings to establish heirship of certain claimants through the deceased spouse of an intestate (who died without issue), the trial court erroneously disregarded a census enumerator's report which showed that intestate was married and that she had no children. While such record was a hearsay statement, yet because of circumstances under which it was made, and because it is a part of a public record, it would have been admissible as an exception to the hearsay rule.

In re Clark, 228- ; 290 NW 13

Evidence of marriage—heirs claiming estate. In probate proceedings by heirs claiming under the deceased spouse of intestate, the evidence was sufficient to establish the marriage between the intestate and deceased spouse, tho the trial court found that there was insufficient evidence to establish heirship and rendered judgment that the property escheat to the state as uninherited property.

In re Clark, 228- ; 290 NW 13

Unmarried and issueless deceased. No part of the property of an unmarried and issueless deceased who survives both his parents and his issueless and only sister passes to the surviving spouse of such sister.

In re Farrell, 205-331; 217 NW 876

Denial of escheat—distribution to heirs. In probate proceeding, tried as in equity, wherein the trial court wholly disregarded the finding of fact by a refereee, who was also administrator, that no heirs of intestate had been found, and wherein judgment was rendered for the property to escheat to the state, as against certain heirs claiming heirship through the deceased spouse of intestate, upon trial de novo on appeal, the findings of the trial court were found to be without support in the evidence, and judgment was reversed with instructions to enter a decree for a division of the property among the heirs as their interests may appear in the record.

In re Clark, 228- ; 290 NW 13

Heirship under spouse—denial of escheat. In probate proceedings where judgment was rendered for property to escheat to state, findings of the trial court that intestate might have left a husband from whom she had not been divorced, and if she left a daughter a point was raised whether the daughter might have children of her own who would inherit under our laws, on trial de novo on appeal, were determined to be mere speculations of the court, without any factual or evidential basis, and the evidence of the heirs claiming under a deceased spouse of intestate definitely established that heirs of the intestate's own family and lineage, either through blood or marriage, had not been found.

In re Clark, 228- ; 290 NW 13

Persons entitled and their respective shares—cemetery lot. The interest of an intestate in a burial lot in a cemetery (he dying without issue and survived only by his widow and mother) may not be set aside as exempt property to the widow. The interest, the right to use said lot for burial purposes, passes in such a case in equal shares to the widow and mother.

In re Paulson, 221-706; 266 NW 563

12027 Heirs of parents by adoption.

Discussion. See 22 ILR 144—Inheritance by adopted children

Collateral heirs over natural parents. The estate of a legally adopted, intestate, spouseless and issueless person whose adopting parents are both dead leaving surviving collateral heirs only, descends to said collateral heirs and not to the surviving natural parents or parent of said adopted person. (See also §10501-b6 [§10501.6, C., '39], §12017, C., '35.)

In re Fitzgerald, 223-141; 272 NW 117

Adopting or natural parents—widow. The heirs as a class of each adopting parent, each class receiving one half, rather than the natural parents or their heirs, inherit the estate of an adopted child dying intestate to the exclusion of adopting father's surviving second wife who was decreed no part of the estate and did not appeal—but, quaere, if surviving second wife had claimed a dower interest.

In re Smith, 223-817; 273 NW 891

Status of children of adopted child. The legal status of children of an adopted child is, inter alia, that of grandchildren of their foster grandparents.

Shaw v Scott, 217-1259; 252 NW 237

12029 Advancements.

ANALYSIS

I Character and Proof of Advancements
II What Constitutes an Advancement

Gifts inter vivos generally. See under Ch 445
Wills—fiduciary relations—burden of proof. See under §11846

I CHARACTER AND PROOF OF ADVANCEMENTS

How issue tried. A proceeding in probate on the issue whether a conveyance by a father

I CHARACTER AND PROOF OF ADVANCEMENTS—concluded

to his son constituted an advancement is triable, both in the trial and appellate court, as an action at law. It follows that a supported finding by the trial court is conclusive on the appellate court.

In re O'Hara, 204-1331; 217 NW 245

Advancements—nonapplicability of doctrine. Principle reaffirmed that the doctrine of "advancements" has no application to the settlement of an estate under a will.

In re Manatt, 214-432; 239 NW 524

Advancements as rule of intestate descent. The doctrine of advancements applies only in cases where the decedent dies intestate, unless specifically provided for by language in the will.

In re Morgan, 225-746; 281 NW 346

Set-off or retainer — executor's equitable right—nonstatutory. In probate proceedings the right which the executor or an administrator has, in the nature of a right of retainer, to set off debts owing by a beneficiary of an estate against his share therein, is an equitable right of its own nature, and not at all dependent upon any statute.

In re Sheeler, 226-650; 284 NW 799

Set-off or retainer against beneficiary. In probate proceedings wherein a beneficiary is indebted to the estate, the right of set-off or retainer is not restricted to a court of equity, but rests upon wholesome principles of right and justice which can be administered in probate courts without the aid of a court of conscience.

In re Sheeler, 226-650; 284 NW 799

Presumption—weakness of. Substantial gifts of money, made by a parent during his lifetime to his children, are presumed to be advancements, but the presumption is not strong and must yield to slight evidence of a contrary intent.

In re Wiese, 222-935; 270 NW 380

Advancements to child—when gift—intestacy rule. In cases of intestacy where a parent advances money or property to a child, or pays debts for the child, the law presumes it is a gift by advancement, unless otherwise competently shown as intended to be held as a debt against the child.

Yagge v Tyler, 225-352; 280 NW 559

Heir's assignment of interest subject to estate claims—rights of assignee. In a probate proceeding where one of the heirs, who is indebted to the estate, purchases a farm from the executor and assigns her one-tenth interest in the estate as security for a purchase note to the executor, who in turn assigns the note to a third party, held that such assignment of interest is taken subject to the estate claims, and whatever interest remains should be paid to the holder of the note irrespective of the fact the executor is also indebted to the estate on his final account.

In re Sheeler, 226-650; 284 NW 799

"Worthier title" rule nonapplicable to prevent executor's set-off or retainer. In probate proceedings, before the "worthier title" rule can be applied where property is left to testator's heirs by will in the same manner and proportion in which they would have taken were there no will, it must definitely appear that there is exact identity in every way, and where testator definitely directs that real estate be converted into personalty and then divided equally among his children, each beneficiary receiving all personalty and no real estate, held, a beneficiary of such estate did not take her interest by "worthier title" so as to preclude executor from exercising the right of retainer against the beneficiary's interest which is assigned as security for a note for purchase of real estate by beneficiary—it being immaterial whether beneficiary is solvent or insolvent.

In re Sheeler, 226-650; 284 NW 799

Gift—renunciation—no control by creditors —not a conveyance. A creditor has no control over a beneficiary's right to refuse or accept a gift, as a renunciation is not equivalent to a conveyance.

McGarry v Mathis, 226-37; 282 NW 786

Verdict sustaining part of gift as establishing mental competency. In a replevin action by executor to recover property held under claim of gift inter vivos from decedent, a jury verdict validating part of the gift made on a later date, from which part of the verdict no appeal is taken also establishes the donor's mental competency to consummate that part of the gift made on an earlier date.

Wilson v Findley, 223-1281; 275 NW 47

II WHAT CONSTITUTES AN ADVANCEMENT

Advancement (?) or gift (?).

In re Francis, 204-1237; 212 NW 306

Advancement (?) or debt (?)—interest. An ordinary promissory note executed by an heir to his ancestor, and representing money received by the heir from the ancestor, must, in the settlement of the estate, be deemed, presumptively, a debt and not an advancement; consequently, interest is chargeable as provided in the note.

In re Manatt, 214-432; 239 NW 524

Essential elements of gift. A gift causa mortis is a gift of personal property, intentionally made, even orally, by the mentally competent owner of said property, in expecta-

tion of his or her imminent death from an impending disorder or peril (tho not necessarily so imminent as to exclude the opportunity to execute a will), and made and delivered by the donor to the donee on the essential condition that, if the gift be not in the meantime revoked, the property shall belong to the donee in case the donor dies, as anticipated, of the disorder or peril, leaving said donee surviving.

Flint v Varney, 220-1241; 264 NW 277

Burden of proof. An irrevocable gift by a parent to a child is presumptively an advancement, but the child may show, by any competent evidence, that the parent did not intend the gift to be an advancement. Evidence held to overthrow the presumption.

Fell v Bradshaw, 205-100; 215 NW 595

Difference between value of property and amount paid. An advancement to an heir may consist of the substantial difference which may exist between the actual money consideration paid by the heir for property and its actual value at the time of the conveyance, but not necessarily so when, as part of the consideration, the grantor-ancestor reserves a room on the premises for life, and when the grantee-heir agrees to pay the funeral expenses of said grantor and adequately to support him for life.

In re O'Hara, 204-1331; 217 NW 245

Tenant in common paying mortgage to protect undivided interest—not gift to cotenant. Payment, by a mother, of a mortgage on property she holds as a tenant in common with her adopted son, held to be for the preservation and protection of her share in the property, when otherwise unexplained.

Yagge v Tyler, 225-352; 280 NW 559

Debts due decedent from heir—retainer or offset against realty. General rule recognized that real estate passes to devisee direct from testator, and not through executor, and that title vests in devisee immediately upon death of testator and, as a general rule, there is no right of retainer or offset for debt of devisee to estate, as against devisee of real estate; but there may be cases where, on account of the insolvency of the debtor, or other cause, equity will interfere for protection of the estate.

Petty v Hewlett, 225-797; 281 NW 731

Setting off debt against heir's share. The right to have the debts of an insolvent heir to an estate set off against his share in the estate is available against the insolvent's share in real estate as well as against his share of personal property, when the share of the insolvent in the personal property of the estate is insufficient to discharge said debt.

Kramer v Hofmann, 218-1269; 257 NW 361

Pro rata distribution—procedure. In determining the pro rata payments to be made on legacies in an estate which proves insufficient to pay all legacies in full, the amounts owing by legatees to testator at the time of the death of testator, and deducted by the executor in paying legacies, must be taken into consideration.

Mills v Manchester, 213-95; 237 NW 228; 238 NW 718

Mental competency and elements of gift—when jury question. In a replevin action by executor against decedent's sister to recover property held under claim of gift inter vivos from decedent, where clear, cogent, definite, and convincing evidence conclusively established mental competency and all the essential elements of a completed gift inter vivos appear without conflict, no jury question is presented.

Wilson v Findley, 223-1281; 275 NW 47

Equitable conversion—deduction from share. Tho testator's lands are, from the moment of testator's death, deemed equitably converted into personalty by a mandatory, testamentary direction to the executor to sell and divide the proceeds among testator's children, yet the rentals of said lands, accruing prior to an actual sale of the lands, belong to the estate, and in case the lessee be a legatee and fails to pay said rentals, the amount thereof may be deducted by the executor from the share of said legatee, a right which is superior to the right of one who, with knowledge of said rental proceedings, acquires an equitable lien on said legatee's share in the estate.

Ihle v Ihle, 222-1086; 270 NW 452

Offsetting executor's debt against compensation. A debt due from an executor to the estate may not be set off against the amount allowed the executor for services as such executor when the will provides that such debt shall be treated as an advancement. So held where assignees of the compensation were making claim thereto.

In re Bourne, 210-883; 232 NW 169

Advancements—deduction—when improper. Without special provision in the will therefor, an executor is in error in paying to himself, as a residuary legatee, $1,000 on the theory that the four other such legatees had each received advancements in that sum and that such payment was equivalent to charging off such advancements against the shares of the other legatees.

In re Morgan, 225-746; 281 NW 346

Insolvent heir's debts offset against share in real estate. The right to offset debts of an heir against his share of real estate exists only when the heir is insolvent. Evidence held insufficient to show heirs were insolvent.

Wilson v Wilson, 226-199; 283 NW 893

Matters which may have been litigated in prior action—res judicata. In an action by

heirs of intestate against a son of intestate to have property received by such son decreed to be an advancement and be deducted from the son's interest in the estate, wherein it is shown that such son had instituted a prior action in partition to have his interest in realty determined, held that such issue of advancement should have been raised as an affirmative defense and litigated in the prior partition action, and therefore is now res judicata.

Robbins v Daniel, 226-678; 284 NW 793

12030 Illegitimate children—inherit from mother.

Bastards—rights of inheritance. In Iowa, illegitimate children have inheritable blood.

In re Ellis, 225-1279; 282 NW 758; 120 ALR 975

Illegitimate children. Tho at common law an illegitimate child, or filius nullius, could not inherit because he was son of nobody, the statutes permitting illegitimate to inherit from mother and father abrogate common-law concept that child born out of wedlock is child of nobody, and without inheritable blood.

In re Ellis, 225-1279; 282 NW 758; 120 ALR 975

Rights of recognized illegitimate child. Under the statutes, a duly recognized illegitimate child has all the rights of inheritance of a legitimate child. The reason for denying inheritable blood is gone and remains a fiction only.

In re Clark, 228- ; 290 NW 13

Meaning of "children"—legitimate or illegitimate—rule. At common law, the word "children", when used in wills, deeds, or other conveyances, means legitimate children unless will reveals a clear intention to use the generic term "children" so as to include an illegitimate child, or it is impossible under the circumstances that legitimate children could take.

In re Ellis, 225-1279; 282 NW 758; 120 ALR 975

Legitimate children of illegitimate child. In probate proceedings, where it is shown that intestate died without issue and the intestate's deceased husband was an illegitimate child of the same mother through whom claimants seek to establish heirship, the evidence was sufficient to definitely establish the relationship as to both intestate's deceased husband and intestate.

In re Clark, 228- ; 290 NW 13

Children, grandchildren, nephews—parol evidence to determine meaning. Where such terms as children, grandchildren, or nephews are used in a will or a deed, and there are both legitimates and illegitimates and the testator has full knowledge of such fact, and the intention of the testator is not clearly expressed in the will, the use of such words creates no presumption, but the word is a neutral one and an ambiguity exists, and the intention of the testator or grantor must be determined not only from the provisions of will, but also in the light of the circumstances surrounding the execution of the will, and parol evidence is admissible to prove the intent of the testator or grantor.

In re Ellis, 225-1279; 282 NW 758; 120 ALR 975

12031 From father.

Recognition—sufficiency. Evidence held to show such recognition of the paternity of an illegitimate child as to entitle the child to inherit.

Schermerhorn v Snell, 206-939; 221 NW 567

Birth during lawful wedlock—presumption. The presumption of legitimacy of a child born in lawful wedlock is so strong that it will yield only to clear, satisfactory and practically conclusive proof that the husband was:

1. Impotent, or
2. Entirely absent so as to have no access to the mother, or
3. Entirely absent from the mother at the period during which the child must have been begotten, or
4. Present with the mother under circumstances negativing sexual intercourse with her.

Craven v Selway, 216-505; 246 NW 821

Unknown pregnancy — evidence. Evidence reviewed and held insufficient to rebut the presumption of legitimacy which attends a child born in lawful wedlock.

Heath v Heath, 222-660; 269 NW 761

Child begotten out of, but born in, wedlock. A child manifestly begotten out of wedlock but born during wedlock is presumed to be the child of such intermarried persons.

Ryke v Ream, 212-126; 234 NW 196

Adjudication of bastardy—effect on child. That part of a decree of divorce which adjudges that a child of the wife is not the child of the husband is a nullity as far as the child is concerned.

Ryke v Ream, 212-126; 234 NW 196

Nonallowable evidence. The illegitimacy of a child born in lawful wedlock, without proof that the husband was impotent or had no sexual access to the mother, cannot be established by the declarations of the mother, or of the putative father, or of said child, nor by proof of the mother's adultery.

(This does not imply that after illegitimacy has been made to appear, by competent proof, the declarations of the putative father and of the mother are not admissible to identify the actual father.)

Craven v Selway, 216-505; 246 NW 821

Declarations of mother admissible. Declarations of the deceased mother of a child born out of lawful wedlock, as to who was the father of said child, are admissible on the issue of paternity; also like declarations of other members of the family as a matter of family history. Evidence reviewed and held insufficient to establish plaintiff's paternity.

Hopp v Petkin, 222-609; 269 NW 758

Recognition by father—heirs of child's spouse. In probate proceedings by claimants to establish heirship through the father of an illegitimate son, the evidence established such mutual recognition between the father and such son, during their lifetime, that entitled the heirs, as grandchildren of the father, to inherit from the illegitimate son's deceased widow, who died intestate and without issue.

In re Clark, 228- ; 290 NW 13

Illegitimate children — common-law rule. Tho at common law an illegitimate child, or filius nullius, could not inherit because he was son of nobody, the statutes permitting illegitimate to inherit from mother and father abrogate common-law concept that child born out of wedlock is child of nobody, and without inheritable blood.

In re Ellis, 225-1279; 282 NW 758; 120 ALR 975

Bastards—rights of inheritance. In Iowa, illegitimate children have inheritable blood.

In re Ellis, 225-1279; 282 NW 758; 120 ALR 975

Rights of recognized illegitimate child. Under the statutes, a duly recognized illegitimate child has all the rights of inheritance of a legitimate child. The reason for denying inheritable blood is gone and remains a fiction only.

In re Clark, 228- ; 290 NW 13

Share of heir as mere contract claim—how paid. Where the share or interest of a child in the estate of his or her alleged parent takes the form of a mere contract obligation against the estate, the child becomes a mere claimant against the estate and is payable as such, and not from the mere residue of the estate. So held where the parentage was in issue and was compromised by a court-approved agreement wherein the executor agreed, on behalf of the estate, (1) to set up a specified trust fund, the annuity of which was to be payable to said child during its lifetime, and (2) annually to pay said annuity to said child until the trust fund was actually set up.

In re Griffin, 220-1028; 262 NW 473

12032 Feloniously causing death.

Discussion. See 7 ILB 111—Profiting through murder

Forfeiture by causing death. Evidence which is insufficient to show, even by a preponderance, that a wife caused the death of her husband by involuntary manslaughter, manifestly, is insufficient to exclude her from participating in his estate.

Crouse v Crouse, 214-725; 240 NW 213

Homestead occupancy—duty of court to protect. The court is under an affirmative duty to protect a widow, especially when she is insolvent, in her presumptive right to occupy the homestead until her distributive share is set aside to her, and until a charge that she feloniously killed her husband has been established.

Crouse v Crouse, 210-508; 229 NW 850

Forfeiture of right by surviving spouse. Evidence reviewed, in an action to quiet title to real estate, and held insufficient to establish the guilt of a surviving wife of manslaughter in the death of her husband.

Crouse v Crouse, 217-814; 253 NW 122

Allowance to surviving spouse — defeating because of felonious homicide. In order to defeat, under this section, the application of a surviving widow for an allowance out of her husband's estate, the objector must distinctly allege and prove that the widow feloniously took, or feloniously caused or procured another to take, the life of her said husband, and must so do irrespective of any previous conviction of said widow of manslaughter.

In re Johnston, 220-328; 261 NW 908

12035 Escheat.

Escheat proceeding — striking allegations asking for new administrator—not appealable. Where the state of Iowa in an estate proceeding files an application for the escheat to the state of the property in the estate and includes in its application extensive allegations dealing with the selection of a new administrator, a motion to strike those portions of the pleading dealing with the new administrator, when sustained, does not present an interlocutory order from which an appeal will lie, and, if taken, the appeal will be dismissed on motion.

In re Bannon, 225-839; 282 NW 287

Possibility of heirs — speculation — escheat denied. In probate proceedings where judgment was rendered for property to escheat to state, findings of the trial court that intestate might have left a husband from whom she had not been divorced, and if she left a daughter a point was raised whether the daughter might have children of her own who would inherit under our laws, on trial de novo on appeal, were determined to be mere speculations of the court, without any factual or evidential basis, and the evidence of the heirs claiming under a deceased spouse of intestate definitely established that heirs of the intestate's own family and lineage, either through blood or marriage, had not been found.

In re Clark, 228- ; 290 NW 13

Heirship established—proof of marriage. In probate proceedings by heirs claiming under the deceased spouse of intestate, the evidence was sufficient to establish the marriage between the intestate and deceased spouse, tho the trial court found that there was insufficient evidence to establish heirship and rendered judgment that the property escheat to the state as uninherited property.

In re Clark, 228- ; 290 NW 13

12036 Proceedings for escheat.

Notice to claimants—nonwaiver of required filing time for claims. Administrator's notice to possible claimants and heirs in escheat proceedings given in pursuance to court order did not, in effect, amount to a waiver of statute of limitations as to filing claims in probate nor constitute a new invitation to creditors to file claims.

Joy v Bank, 226-1251; 286 NW 443

Denial of escheat—distribution to heirs. In probate proceeding, tried as in equity, wherein the trial court wholly disregarded the finding of fact by a referee, who was also administrator, that no heirs of intestate had been found, and wherein judgment was rendered for the property to escheat to the state, as against certain heirs claiming heirship through the deceased spouse of intestate, upon trial de novo on appeal, the findings of the trial court were found to be without support in the evidence, and judgment was reversed with instructions to enter a decree for a division of the property among the heirs as their interests may appear in the record.

In re Clark, 228- ; 290 NW 13

12037 Notice to persons interested.

Notice to claimants—nonwaiver of required filing time for claims. Administrator's notice to possible claimants and heirs in escheat proceedings given in pursuance to court order did not, in effect, amount to a waiver of statute of limitations as to filing claims in probate nor constitute a new invitation to creditors to file claims.

Joy v Bank, 226-1251; 286 NW 443

CHAPTER 509

ACCOUNTING OF EXECUTORS AND ADMINISTRATORS

12041 Reference—examination of accounts—fees.

Atty. Gen. Opinions. See '28 AG Op 252; '34 AG Op 308; '38 AG Op 208; AG Op Jan. 10, '39

Reference—procedure—justifiable findings. Whether a referee in probate must accept the appointment, qualify, hold hearings, make a timely report and accompany the same by affidavit as required of referees appointed in ordinary civil cases (§11530, et seq. C., '31), quaere; but the court may well find that such requirements (if they are such) were complied with when an unquestioned amended report of the referee recites such compliance.

In re Cochran, 220-33; 261 NW 514

Costs. Costs in probate consequent on objections filed to an intermediate report of an executor, and on a trial on such objections before a referee, are properly taxed to the objector if the objections be overruled.

In re Cochran, 220-33; 261 NW 514

Excessive allowance to referee. Allowance to referee in probate reviewed and held excessive to the extent of fifty per cent thereof.

In re Cochran, 220-33; 261 NW 514

12043 Additional reports.

Accounting by life tenant. A life tenant with testamentary power to encroach upon the principal, with remainder over, may be compelled to make full disclosure to a trustee in bankruptcy of a possible remainderman, of the property received by her under the will (the probate records not revealing such fact), but may not be compelled to account to such trustee as to her use of the property, in the absence of any allegation and proof of waste, fraud, or improper use or disposal.

Nelson v Horsford, 201-918; 208 NW 341; 45 ALR 515

Conditional rejection of item. The court may, very properly, in ruling upon an item in an interlocutory report, allow part of the item and continue the remainder for more adequate showing in the administrator's final report.

In re Atkinson, 210-1245; 232 NW 640

Evidence against administrator. Statements in the various interlocutory reports of an administrator, relative to the items of assets belonging to the estate, may be persuasive evidence against the administrator on the final accounting.

In re Manning, 215-746; 244 NW 860

Executor trust company in receivership—court accountable to. Failure of the probate court to appoint a successor-executor for an insolvent trust company which had been a co-executor in a pending estate and which trust company had been placed in receivership, does not cause the receiver of such insolvent trust company to be accountable to probate court—a court not appointing him.

Bates v Evans, 226-438; 284 NW 385

Receiver of insolvent executor bank—not accountable to probate court—duty. Where the Scott county district court appoints a receiver to take charge of an insolvent trust company, which company had been previously appointed by the Johnson county district court as co-executor in an estate pending in the Johnson county district court, such receiver did not become an officer accountable to the Johnson county district court but was an officer of the Scott county district court having possession of the property and his duty was only to deliver such property under direction of the Scott county district court to the person entitled thereto.

Bates v Evans, 226-438; 284 NW 385

Reference—procedure—justifiable findings. Whether a referee in probate must accept the appointment, qualify, hold hearings, make a timely report and accompany the same by affidavit as required of referees appointed in ordinary civil cases (§11530 et seq., C., '31), quaere; but the court may well find that such requirements (if they are such) were complied with when an unquestioned amended report of the referee recites such compliance.

In re Cochran, 220-33; 261 NW 514

Costs—against losing party. Costs in probate consequent on objections filed to an intermediate report of an executor, and on a trial on such objections before a referee, are properly taxed to the objector if the objections be overrruled.

In re Cochran, 220-33; 261 NW 514

12044 Final settlement—time limit.

Atty. Gen. Opinion. See '28 AG Op 310

Long continued delay—effect. Objections by a devisee on final report that an estate was not closed within the statutory three years are quite futile when made for the first time long subsequent to the expiration of said period; and it is immaterial that the estate has been held open for a materially longer period without an authorizing court order when the court finds on final report that such delayed settlement was advisable.

In re Bourne, 210-883; 232 NW 169

Compensation—wrongful conduct—effect. An executor who not only inexcusably fails to close an estate at the end of the statutory three-year period, and to turn the unexpended funds over to a designated testamentary trustee, but continues wrongfully, for a series of years, to act as executor, is very properly denied a right to the compensation which the testamentary trustee would have been entitled to during said years.

In re Mowrey, 210-923; 232 NW 82

Indefinite maturity. A promissory note which is payable "on settlement of William Dagel estate after date" is nonnegotiable because the final settlement of estates within three years is not a certainty.

Scott v Dagel, 200-1090; 205 NW 859

Delay in closing estate. Devisees could not complain of delay in closing estate where no loss resulted and delay was due in part to their own failure to pay inheritance taxes and their share of administration costs and rental moneys due the estate, and where they took no action to require executrix to close the estate altho their attorney, who was also a devisee, was aware of the facts.

In re David, 227-352; 288 NW 418

12045 Examination of executor.

Expert audit—expense not chargeable to trustee. A testamentary trustee of a going concern will not, on hearing on his final report, be charged with the expense of an expert audit of the books of the concern when such books are in the exclusive possession of the objectors together with expert annual audits thereof, the correctness of which is not questioned.

In re Evans, 212-1; 232 NW 72

12046 Accounting at inventoried value.

Atty. Gen. Opinion. See '28 AG Op 310

Sale price of property. The court cannot do less than to charge an executor with the amount which he admits he received on a sale of estate property.

In re Mowrey, 210-923; 232 NW 82

Realty values. In probate proceedings on objections to executor's final report, evidence supported trial court's fixing value of farm land at $125 per acre for the purpose of accounting.

In re Sheeler, 226-650; 284 NW 799

Surety bound by adjudication. The surety on the bond of an administrator is conclusively bound by the nonfraudulent adjudication of the amount of the administrator's liability, even tho the surety had no notice of the hearing preceding such adjudication.

In re Jackson, 217-1046; 252 NW 775; 91 ALR 937

Objections to report—conversion issue not misjoinder. Where an executrix after resigning files her reports, objections thereto asking that she report and account for certain alleged estate assets claimed by executrix as individual property do not misjoin in probate an action against executrix for conversion, and such objections are not subject to motion to strike.

In re Rinard, 224-100; 275 NW 485

Fact findings in probate not triable de novo. Findings of fact by the trial court in a probate proceeding involving objections to an executor's report and payment of certain claims

cannot be reviewed on appeal, such not being triable de novo.

In re Scholbrock, 224-593; 277 NW 5

Liability on bond—existing judgment against executor. Under the general rule that a judgment against an administrator is conclusive against the surety on his bond, where a judgment against an administrator for misappropriation of funds stands unreversed, it is error to set aside judgment on a bond and give the surety a new trial, since such order would not ipso facto vitiate a former order fixing the administrator's liability.

In re Sterner, 224-605; 277 NW 366

Executor's indebtedness to estate—interest charged. In probate proceedings on objections to executor's final report, where the executor owed a note to the estate bearing interest which was not added to principal, held, interest should be charged in the absence of any evidence to warrant a finding for the principal only.

In re Sheeler, 226-650; 284 NW 799

Administrator's debt to decedent—extent of liability. In proceeding on objection to administrator's final report, burden of proof was on the administrator to show why he should not be held accountable for full value of property inventoried by him, which inventory included his own debt to decedent. He was liable on such debt to the extent of his ability to pay at any time during administration, and everything above his statutory exemptions should have been so utilized, and there being no evidence in the record from which the extent of his nonexempt property or income could be ascertained, such question would be remanded to lower court for determination.

In re Windhorst, 227-808; 288 NW 892

12047 Presumption from appraisement.

Realty values—sufficiency of evidence. In probate proceedings on objections to executor's final report, evidence supported trial court's fixing value of farm land at $125 per acre for the purpose of accounting.

In re Sheeler, 226-650; 284 NW 799

12048 Profit and loss.

Self-enrichment of trustee—insufficient evidence.

In re Evans, 212-1; 232 NW 72

Nonchargeable with interest. Evidence reviewed and held that a testamentary trustee, vested with unusually broad managerial powers, was not chargeable with interest on bank deposits, even tho he was a stockholder in the bank.

In re Evans, 212-1; 232 NW 72

Distribution of estate—interest on unpaid legacy. An executor may be chargeable with interest on an unpaid cash legacy to a minor, even tho his actions have been in perfect good faith.

Irwin v Bank, 218-477; 255 NW 671

Executor's indebtedness to estate—interest charged. In probate proceedings on objections to executor's final report, where the executor owed a note to the estate bearing interest which was not added to principal, held, interest should be charged in the absence of any evidence to warrant a finding for the principal only.

In re Sheeler, 226-650; 284 NW 799

Losses—when not liable. A testamentary trustee of a business, especially when it is a hazardous one, is not chargeable with a loss attending operations which were in keeping with the general practices of the business.

In re Evans, 212-1; 232 NW 72

Funds lost in bank closing. Evidence sustained finding of trial court that executrix was not negligent and therefore exonerated from personal liability for estate funds lost by closing of bank in which decedent had also kept funds during his lifetime, where there was no showing as to bank's insolvency prior to receivership, nor that executrix had any knowledge of its failing condition.

In re David, 227-352; 288 NW 418

Estoppel. The devisees of an estate who cause the executor to withdraw estate funds from the bank in which the deceased had them on deposit are estopped thereafter to complain of a loss of said funds resulting from the subsequent insolvency of the new depository, the executor having acted in good faith and with due prudence.

In re Olson, 206-706; 219 NW 401

Shortage in acreage. Where lands of an estate are ordered sold for a lump sum, parol evidence is admissible to show that the land was, in reality, sold at a certain price per acre and that the acreage fell short of what was supposed to be the acreage, and that the administrator properly made a deduction for said shortage.

In re Oelwein, 217-1137; 251 NW 694

Non de novo hearing. An appeal from an order adjudging the final liability of an administrator is not heard de novo. In other words, the supported findings of the trial court are conclusive on the appellate court.

In re Enfield, 217-273; 251 NW 637

Findings in probate. A supported finding by the probate court that an administrator had failed to exercise ordinary care to preserve the funds of the estate is conclusive on the appellate court.

In re Foster, 218-1202; 256 NW 744

Chargeable with compound interest. An executor who wrongfully fails to close an estate within the statutory 3-year period and uses the estate funds for his personal enrichment, is properly charged with interest at 6 percent with annual rests from the expiration of said 3 years, even tho the net interest would only have been 4 percent had the executor closed the estate within the time required by statute and turned the remaining assets over to a trustee, as directed by the will.

In re Mowrey, 210-923; 232 NW 82

Reduction of widow's allowance — effect. Where the amount allowed a widow for her support for the year following the death of the husband is taken by her from the funds of the estate (she being executrix) and spent, a subsequent order, in an adversary proceeding, reducing said former amount is conclusive on the surety—and, of course, on the executrix—and in an action against the principal and surety the reduced amount is the limit of the allowable credit.

In re Durey, 215-257; 245 NW 236

Keeping funds in insolvent bank. An executor or administrator who, on his own motion and authority, deposits and keeps estate funds in an insolvent bank of which he is cashier, must account for the resulting loss.

In re Foster, 218-1202; 256 NW 744

Unauthorized bank deposit. An executor who, on his own motion and without any authorizing order of court, deposits the funds of the estate in a financially embarrassed bank of which he was president, and in which he was heavily interested, and which later failed, must account to the estate in cash for the loss. The president of a bank must be held to have knowledge of the general financial condition of the bank.

In re Rorick, 218-107; 253 NW 916

Funds used by executor—interest. In probate proceedings on objections to executor's final report where it is shown that the estate funds were intermingled with executor's funds and used by him with no attempt being made to reinvest such funds, executor is held chargeable with interest at 6 percent a year with annual rests.

In re Sheeler, 226-650; 284 NW 799

12049 Mistakes corrected.

Intermediate accounts. Mistakes in ex parte orders, made during settlement of an estate, are subject to correction at any time before final settlement of the estate.

In re Metcalf, 227-985; 289 NW 739

Finding as to executor's shortage—conclusiveness.

In re Carpenter, 210-553; 231 NW 376

Adjudicating shortage without notice to surety. The sureties on the bond of an administrator are not entitled to notice of the proceedings wherein the probate court determines the amount the administrator is short in his accounts. It follows that such adjudication, in the absence of fraud or mistake, is final as to said sureties.

In re Kessler, 213-633; 239 NW 555

Accounting—burden of proof. One who demands an accounting of a finally discharged administrator must assume the burden of establishing his claim.

Murphy v Hahn, 208-698; 223 NW 756

Burden of proof. Principle reaffirmed that when there are inconsistencies between the final report of an administrator and his previous reports he has the burden of proof to sustain his final report.

In re Manning, 215-746; 244 NW 860

Setting aside final report. The final report of an executor or administrator, after due approval and discharge, will be set aside only on a clear and satisfactory showing of fraud, mistake, or other equitable grounds.

Becker v Becker, 202-7; 209 NW 447

Inhering fraud. A final order of discharge of an administrator may not be set aside, opened, or otherwise questioned on a showing of fraud which inheres in said order of discharge.

Murphy v Hahn, 208-698; 223 NW 756

Reports—self-impeachment by administrator. An administrator will not be heard to say that he did not have notice of his own verified reports. It follows that he has frail ground upon which to impeach his own reports, especially when all other heirs and interested parties acquiesce therein.

In re Olson, 213-784; 239 NW 527

Final discharge—effect. A final order of discharge of an administrator is not conclusive as to property fraudulently omitted by him from his accounts.

Murphy v Hahn, 208-698; 223 NW 756

Fraudulent allowance — annulment. The fraudulent allowance of the claim that certain property belongs to claimant, and not to the estate, may be set aside on proper application at any time before the estate is finally settled, and especially so when the applicant was not a party to the original allowance.

In re Sarvey, 206-527; 219 NW 318

Correction—erroneous advice of attorney. The fact that the attorney for an administrator, without fraud, erroneously advised the widow of the deceased that she was not entitled to an allowance for her support owing to the fact that an antenuptial agreement ex-

isted, and the fact that the widow relied on such advice, does not constitute a "mistake in settlement" such as will allow the widow, after the estate is closed, to make application for such allowance.

In re Weidman, 209-603; 228 NW 571

Mistakes—right of heirs to disregard administration. Notwithstanding the fact that in the administration of an estate the tangible interest of the deceased in a partnership has been sold to the surviving partners under order of court, and the proceeds accounted for, and the administrator discharged, the heirs may maintain, against the surviving partners, an action for an accounting as to the share of said deceased in elements of partnership property other than the tangible property, such, for instance, as profits, and going concern and good-will values. And especially is this true when the surviving partners fraudulently concealed said latter elements of value at the time of the administration aforesaid.

Anderson v Droge, 216-159; 248 NW 344

Improvident order not adjudication. An order of court, in an insolvent estate, authorizing, without notice to creditors, the executrix (she being the surviving widow) to pay to herself the proceeds of a sale of the exempt property of the deceased, based solely on an agreement to that effect between the widow and heirs, is a mistake, an improvident act, and, therefore, a nullity and not an adjudication binding on creditors, when the testator made his exempt property liable for the payment of his debts and the widow elected to take under the will.

In re Durey, 215-257; 245 NW 236

Claims overlooked. A claim against an estate, duly verified and filed, and not allowed or disallowed by the administrator, cannot be deemed adjudicated by an order approving the final report of the administrator when the claim, the claimant and his representative were, by mistake and oversight, wholly overlooked both in said final report and in the notice of hearing thereon. It follows that an equitable action will lie, subsequent to said approval, to open up the estate and to allow the claim.

Harding v Troy, 217-775; 252 NW 521

Failure to list debt owed. When two sons, as executors of their deceased father's estate, in their final report failed to list as an asset of the estate a note and mortgage owed by one son to the father, altho both sons knew of the debt, in an action in which the other son as heir to half the estate sought to collect the note and foreclose the mortgage, the court's adjudication that all property in the estate had been administered estopped him from obtaining relief when the final settlement was not attacked on the grounds of fraud or mistake.

Joor v Joor, 227-870; 289 NW 463

Payment of claim after final report. Instead of opening up an estate, after final report and discharge, for the allowance and payment of an overlooked claim, the court may accomplish the same result by allowing the claim and ordering it paid from funds derived from the sale of lands under pending partition proceedings.

Harding v Troy, 217-775; 252 NW 521

Unallowable setting aside. An allowance by the court of a claim in probate, after issue is joined thereon and after due hearing, becomes a final adjudication in the absence of fraud or collusion and may not thereafter be set aside without hearing or evidence.

In re Kinnan, 218-572; 255 NW 632

12050 Settlement contested.

Atty. Gen. Opinion. See '28 AG Op 310

ANALYSIS

I CONTESTING SETTLEMENT OF ACCOUNTS
II FINAL SETTLEMENT AND DISCHARGE

I CONTESTING SETTLEMENT OF ACCOUNTS

Burden of proof. One who demands an accounting of a finally discharged administrator must assume the burden of establishing his claim.

Murphy v Hahn, 208-698; 223 NW 756

Administrator—fraudulent omission. A final order of discharge of an administrator is not conclusive as to property fraudulently omitted by him from his accounts.

Murphy v Hahn, 208-698; 223 NW 756

Burden of proof. An administrator has the burden of proof to establish the nonprejudicial nature of his irregular report.

In re Eschweiler, 202-259; 209 NW 273

Inconsistent reports. Principle reaffirmed that when there are inconsistencies between the final report of an administrator and his previous reports, he has the burden of proof to sustain his final report.

In re Manning, 215-746; 244 NW 860

Evidence against administrator. Statements in the various interlocutory reports of an administrator, relative to the items of assets belonging to the estate, may be persuasive evidence against the administrator on the final accounting.

In re Manning, 215-746; 244 NW 860

Irregular expenditures. Irregular but nonfraudulent disbursements by an administrator may be sustained on a showing that neither the estate nor the creditors thereof have been prejudiced.

In re Eschweiler, 202-259; 209 NW 273

Trustee borrowing from himself—accounting in cash (?) or in investments (?). A trustee, duly appointed by the court to execute a contract trusteeship, who loans the trust funds to himself, and uses the same in the purchase and improvement of various properties, without any authorizing order of court and without the knowledge or consent of the beneficiaries of the trust, will, on final report, be ordered to account in cash for said funds, and not in the physical properties bought by him, especially when said properties are inferior to the standard of investments required by said contract.

In re Skinner, 215-1021; 247 NW 484

Improper payments — assessment on bank stock. An executor will not be given credit for estate funds voluntarily used by him in discharging an assessment on bank stock which is held by the estate solely as collateral security.

In re Moe, 213-95; 237 NW 228; 238 NW 718

Executor's indebtedness to estate—interest charged. In probate proceedings on objections to executor's final report, where the executor owed a note to the estate bearing interest which was not added to principal, held, interest should be charged in the absence of any evidence to warrant a finding for the principal only.

In re Sheeler, 226-650; 284 NW 799

Funds used by executor — interest chargeable. In probate proceedings on objections to executor's final report where it is shown that the estate funds were intermingled with executor's funds and used by him with no attempt being made to reinvest such funds, executor is held chargeable with interest at 6 percent a year with annual rests.

In re Sheeler, 226-650; 284 NW 799

Collection and management of estate—depositing funds in bank—negligence. An executor or administrator, while not an insurer of the safety of estate funds, must exercise ordinary care and prudence in preserving such funds. Evidence reviewed in detail, and held to support a finding and order that the administrator had been negligent in depositing and keeping the estate funds in a bank of which he was cashier.

In re Enfield, 217-273; 251 NW 637

Compromise and settlement. A residuary devisee may not object to an accounting by an executor on a ground theretofore fully compromised and settled by such devisee.

In re Murphy, 209-679; 228 NW 658

Estoppel. A residuary legatee who causes the executor to obtain a new mortgage as security for an indebtedness due the estate, and thereupon to cancel a pre-existing mortgage which secured the same debt, is necessarily precluded from holding the executor personally liable in case the new mortgage proves inadequate as a security.

Wilson v Norris, 204-867; 216 NW 46

Attorney fee for extraordinary services—review. Tho a presumption of regularity exists as to an unassailed allowance of attorney fees for extraordinary services, and tho ex parte orders fixing such fees without introduction of evidence are not uncommon, yet such orders are always open to review on final settlement.

In re Metcalf, 227-985; 289 NW 739

Objections in probate—securities ownership issue. The probate court having jurisdiction to compel executrix to account for all assets, and the burden to sustain her accounts being on executrix, objections to her accounts raising the issue of ownership of certain securities are triable in probate without a jury.

In re Rinard, 224-100; 275 NW 485

Striking objections in probate — affidavits improper. A motion to strike objections to probate accounts on the grounds of misjoinder of actions is determinable only on the contents of the pleading attacked without aid of affidavits.

In re Rinard, 224-100; 275 NW 485

Objections—conversion issue not misjoinder. Where an executrix after resigning files her reports, objections thereto asking that she report and account for certain alleged estate assets claimed by executrix as individual property do not misjoin in probate an action against executrix for conversion, and such objections are not subject to motion to strike.

In re Rinard, 224-100; 275 NW 485

II FINAL SETTLEMENT AND DISCHARGE

Burden of proof. An executor carries the burden to sustain his final report.

In re Mowrey, 210-923; 232 NW 82
In re Moe, 213-95; 237 NW 228; 238 NW 718

Final report of administrator — hearing. Hearings on final reports of administrators are not reviewed de novo in the appellate court.

In re Manning, 215-746; 244 NW 860

Reports not reviewed de novo on appeal. The trial court's findings in probate proceedings relating to executor's reports are not triable or reviewable de novo on appeal to the supreme court. If the findings have support in the record, they cannot be disturbed.

In re Sheeler, 226-650; 284 NW 799
In re Smith, 228- ; 289 NW 694

Enforcing claim against executor on final report. A claim in favor of the estate and against an executor may be enforced on hearing on the executor's final report.

In re Bourne, 210-883; 232 NW 169

II FINAL SETTLEMENT AND DISCHARGE—continued

Final order—conclusiveness. A final order in probate, entered on due notice, including notice to the wife of the deceased, wherein, inter alia, provision is made for carrying out the terms of an antenuptial contract in favor of the wife (wherein she waived her distributive share) is a complete bar to a subsequent action by the wife to recover said distributive share.

Weidman v Money, 205-1062; 219 NW 39

Decisions—conclusiveness. The decision of the probate court is conclusive on the appellate court when the record reveals evidentiary support for such decision. So held where the court on objections to the final report of an executor held that a certain promissory note was not an asset of the estate because testatrix came into possession thereof by payment and not by purchase.

In re Finarty, 219-678; 259 NW 112

Improper vacation of order. An order approving the final report of an executor and discharging him, on due notice to all parties interested, cannot be later set aside on the ex parte application of the former executor.

In re Brockmann, 207-707; 223 NW 473

Payment of claim after final report. Instead of opening up an estate, after final report and discharge, for the allowance and payment of an overlooked claim, the court may accomplish the same result by allowing the claim and ordering it paid from funds derived from the sale of lands under pending partition proceedings.

Harding v Troy, 217-775; 252 NW 521

Unallowable credit. An administrator is properly refused credit for a claim due the administrator when the claim has never been filed against the estate, and when there is no evidence sustaining the claim.

In re Manning, 215-746; 244 NW 860

Credit for unauthorized expenditures. An executor who is sole testamentary devisee (the widow having ultimately elected to claim her statutory distributive share) should be given credit on his final report for proper sums in good faith paid by him as repairs, taxes, and interest on incumbrances on the real estate of the deceased, in order to protect and preserve such real estate, even tho such payments were not authorized by the court; and this is true even tho the mortgages ultimately absorbed all of said real estate.

In re Clark, 203-224; 212 NW 481

Co-executors—failure to list debt owed by one—other estopped. When two sons, as executors of their deceased father's estate, in their final report failed to list as an asset of the estate a note and mortgage owed by one son to the father, altho both sons knew of the debt, in an action in which the other son as heir to half the estate sought to collect the note and foreclose the mortgage, the court's adjudication that all property in the estate had been administered estopped him from obtaining relief when the final settlement was not attacked on the grounds of fraud or mistake.

Joor v Joor, 227-870; 289 NW 463

Accounting and settlement—compensation—supported allowances. Allowances made by the court as compensation to the executor and to his assistants and attorney, which have ample support in the evidence, will not be disturbed on appeal.

In re Mann, 217-1134; 251 NW 83

Fees for extraordinary services. An executor has the burden to prove the extraordinary services and the reasonableness of additional compensation.

In re Metcalf, 227-985; 289 NW 739

Disbursements to protect assets of estate. An administrator who in good faith pays a valid debt owing by the estate in order to redeem valuable securities belonging to the estate, and held by the creditor as collateral in an amount far in excess of the debt, will be credited as for a prudent expenditure irrespective of the subsequent claims of general creditors, and irrespective of the fact that the administrator did not wait for the filing of the claim, or secure the authority of the court to make such payment.

Elliott v Bank, 209-1258; 228 NW 274

Payment of unfiled but valid claims. An executor will be credited with the amount of valid, enforceable claims paid by him even tho such claims were not formally filed against the estate.

In re Bourne, 210-883; 232 NW 169

Allowance of credit. An order of the probate court granting an executor credit on his final report for the amount paid by him on his own motion, on a claim against the estate, is conclusive on the appellate court if the record reveals supporting testimony as to the genuineness of the claim.

In re Plendl, 218-103; 253 NW 819

Allowable failure to collect rents. A widow who is entitled to receive during life from the executor the annual rents accruing on lands belonging to residuary devisees, may allow such devisee to occupy the land free of rent, and objections to the executor's final report will not lie because of such action.

In re Murphy, 209-679; 228 NW 658

Certificate of deposit not collected from insolvent bank—executor a bank director. A finding by the trial court that loss to an estate through the failure to collect on a

certificate of deposit belonging to the estate was not caused by the fault of the executor was sustained by evidence that the executor who was a director of the bank on which the certificate was drawn, but took no active part in the management of the bank and did not know it was insolvent, had properly presented the certificate for payment and had been refused because of the insolvency of the bank.

In re Smith, 228- ; 289 NW 694

Delay in closing estate. Devisees could not complain of delay in closing estate where no loss resulted and delay was due in part to their own failure to pay inheritance taxes and their share of administration costs and rental moneys due the estate, and where they took no action to require executrix to close the estate altho their attorney, who was also a devisee, was aware of the facts.

In re David, 227-352; 288 NW 418

Withholding distribution until devisee's debt to estate paid. Where certain devisees were holding rents belonging to estate, trial court properly ordered that no distribution be made to them until such rents were turned over to the executrix.

In re David, 227-352; 288 NW 418

Justifiable refusal to discharge. The surety on the bond of an executor may not complain of an order of court which simply refuses a discharge of the executor and his bond because of the possession by the executor of a sum of money received by him for one who is not a party to the proceeding.

In re Clark, 203-224; 212 NW 481

Taxation—exemption to educational institution—essential proof. Where a will provides that the residue of the estate shall pass to an educational institution of this state as a part of its endowment fund, exemption from taxation on lands will not be granted except on the production in evidence of the probate records, showing judicially (1) that the estate has been fully settled, and (2) that the lands in question constitute part of the residue of said estate, and, as a consequence, belong, legally or equitably, to said institution.

Wapello Bank v Keokuk Co., 209-1127; 229 NW 721

12051 Opening settlement.

Atty. Gen. Opinion. See '28 AG Op 310

Absence of adverse party. An order approving the final report of an executor may be set aside on application of a party adversely interested when such party was never made a party to the hearing on said order.

In re Durham, 203-497; 211 NW 358

Failure of state to observe statute—effect. When the state allows an estate to be fully settled, and the executor to be duly and finally discharged without the payment of an inheritance tax, and makes no application to open up the accounts of the executor, it may not thereafter enforce the statutory personal liability of the executor to pay said tax.

In re Meinert, 204-355; 213 NW 938

Negligence. A delay of some three years after entry of an order discharging an administrator before instituting an action to open up an estate, for the correction of a mistake, does not necessarily constitute such negligence as to bar the action.

Harding v Troy, 217-775; 252 NW 521

Adjudication of liability — conclusiveness. An unappealed order of court adjudicating the amount of the liability of a trustee to the beneficiary is conclusive on the trustee and ipso facto on his surety.

Dodds v Cartwright, 209-835; 226 NW 918

Surety bound by adjudication. The surety on the bond of an executrix is not entitled to notice of the hearing on the final report of the executrix. It follows that said surety is not necessarily entitled to have the final order adjudging the liability of the executrix set aside "within 3 months" of its entry, and to have said liability readjudicated, especially when no fraud or mistake is charged.

Reason: The surety is in privity with the executrix and is legally in the probate court when the liability of the executrix is determined.

In re Holman, 216-1186; 250 NW 498; 93 ALR 1363

Ex parte order—review. A ruling on a motion to vacate ex parte order allowing executor's and attorney's fees for extraordinary services does not constitute res judicata and, on objections to final report, is not a bar to a review of question of reasonableness of charges for such services.

In re Metcalf, 227-985; 289 NW 739

Unallowable opening of settled estate. The holder of a court-established claim which is legally enforceable against property which passed to an heir, on the settlement of the estate of the person primarily liable on said claim, has no occasion, and no right, in the absence of any showing of fraud or mistake, to have the settlement of said estate opened up for the re-establishment in probate of said claim.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

12052 Discharge.

Atty. Gen. Opinion. See '28 AG Op 310

Probate orders. An order approving the final report of an administrator is not, on appeal, reviewable de novo.

In re Oelwein, 217-1137; 251 NW 694
In re Mann, 217-1134; 251 NW 83
In re Fish, 220-1328; 264 NW 542

Setting aside — conditions. Principle reaffirmed that an order discharging an executor may be impeached only for fraud or mistake extrinsic or collateral to the questions tried and inhering in the order or judgment assailed.

In re Holman, 216-1186; 250 NW 498; 93 ALR 1363

Failure of executor to pay tax. When the state allows an estate to be fully settled and the executor to be duly and finally discharged without the payment of an inheritance tax, and makes no application to open up the accounts of the executor, it may not thereafter enforce the statutory personal liability of the executor to pay said tax. This is true on two fundamental propositions, to wit: (1) that the court, being prohibited by statute from discharging the executor until the tax is paid, must be presumed, in entering such discharge, to have found that no tax was due; and (2) that the state, by designating the court as its special statutory representative, will not be permitted to deny such presumption.

In re Meinert, 204-355; 213 NW 938

Subsequent demand for accounting. An administrator may not, after the lapse of more than 5 years from his final discharge, be compelled to account for funds claimed to have been fraudulently withheld by him, when the evidence of such withholding was accessible to the complainant at and prior to the time the order of discharge was entered.

Murphy v Hahn, 208-698; 223 NW 756

12057 Failure to account.

Funds lost in bank closing. Evidence sustained finding of trial court that executrix was not negligent and therefore exonerated from personal liability for estate funds lost by closing of bank in which decedent had also kept funds during his lifetime, where there was no showing as to bank's insolvency prior to receivership, nor that executrix had any knowledge of its failing condition.

In re David, 227-352; 288 NW 418

12058 Executor of executor.

Ordering accounting and suit on bond. Where an executor of an executor filed in the first estate a final report as the deceased executor ought to have done, the court, on hearing on such report, may fix the amount for which the deceased executor should have accounted, and require accounting from his estate, and provide, in case of default, that action shall be brought against his estate, and on his bond.

In re Mowrey, 210-923; 232 NW 82

Trust property held by ward. A contract by the guardian of an incompetent, for the sale of land owned by the ward solely as trustee, tho approved by the court, cannot, in any sense, be deemed the contract of the ward; therefore, such contract cannot, in the event of the death of the ward, be deemed to create any indebtedness against the estate of the ward.

Copple v Morrison, 221-183; 264 NW 113

12059 Executors in their own wrong.

Discussion. See 6 ILB 65, 7 ILB 40—Executor of his own wrong

Wrongfully acting executor chargeable with interest. An executor who wrongfully fails to close an estate within the statutory three-year period, and uses the estate funds for his personal enrichment, is properly charged with interest at 6 percent, with annual rests, from the expiration of said three years, even tho the net interest would only have been 4 percent, had the executor closed the estate within the time required by statute and turned the remaining assets over to a trustee, as directed by the will.

In re Mowrey, 210-923; 232 NW 82

Improper handling of estate—action to recover loss. In an action to recover against the estate of a deceased executor for losses caused by improper handling of an estate, the plaintiffs had no right to appeal from a ruling sustaining a demurrer filed by the defendants when the plaintiffs did not elect to stand on the pleadings nor suffer final judgment to be entered against them.

Hayes v Selzer, 227-693; 289 NW 25

Executors de son tort—liability. A legatee of a strictly personal-property, debt-free estate who, with the approval of all other legatees, distributes the entire estate in strict accord with the will of the testator is thereafter under no obligation to account to a subsequently appointed executor who does not question the correctness of her distribution. Especially is this true when such legatee offers to pay the cost of such unnecessary administration.

Davenport v Sandeman, 204-927; 216 NW 55

Heirs as trustees—nonliability. Heirs who held property of deceased as trustees under an agreement by heirs to settle estate without administration could not be held administrators de son tort, in absence of any misconduct toward trust.

Meeker v Meeker, (NOR); 283 NW 873

Right to appoint successor. An order of the probate court appointing an executor in place of an executor ordered removed, is perfectly valid and such new appointee after qualifying is not an intermeddler even tho the order of removal is subsequently reversed on appeal, when the order of removal was in no manner stayed pending the appeal.

In re Mann, 217-1134; 251 NW 83

12061 Specific performance—how enforced.

Specific performance generally. See under Ch 420, Note 1 (X)

Conditions precedent. Principle reaffirmed that a contract may not be specifically enforced (1) unless the execution is established by very clear and definite proof, and (2) unless the terms of the contract as established are equally clear and definite.

Lockie v Baker, 206-21; 218 NW 483

Oral contract to devise or convey lands. An oral offer to convey or devise land in consideration of services to be performed for the offerer, and an oral acceptance thereof by the offeree, are specifically enforceable when both the execution of the contract and the performance thereof are established by clear, convincing, and satisfactory evidence, and when the acts of performance are referable exclusively to such contract. Evidence held ample to establish such a contract and the performance thereof.

Houlette v Johnson, 205-687; 216 NW 679

Compulsory deed. The court will order an executor to execute a deed to real property, and to the proper person, on proof that the deceased personally owned no interest in the property and was holding the legal title in consequence of a resulting trust; but the evidence must be so explicit and decisive as to leave the existence of no essential fact to conjecture, or to remote and uncertain inference.

In re Moore, 211-804; 232 NW 729

Contracts enforceable. The fractional owner of property who quitclaims his interest to his co-owner in order to enable the co-owner to mortgage the entire property for his own purpose, and who receives from the co-owner an agreement to reconvey, free of incumbrance, within a named time or to pay a named sum, may not, after the mortgage is executed, and after the mortgagee has in good faith agreed to take over the property in satisfaction of the mortgage debt, obtain specific performance of the agreement to reconvey, even tho the mortgagee, before the deal was fully closed, had notice of the agreement to reconvey.

Clarkson v Bank, 218-326; 253 NW 25

Past consideration for contract to will property. Altho past services or past indebtedness may be a lawful consideration for an agreement, the parol evidence of such past services or indebtedness will not establish a contract by which the debtor agrees to sell or transfer his property by will in satisfaction of such services or debt.

Fairall v Arnold, 226-977; 285 NW 664

Oral contract to will property. Where the plaintiff had done work for a woman who was ill, and had been promised that she would give him certain property in her will in return for the services, and plaintiff seeks specific performance of the agreement, claiming as consideration his oral agreement not to file a claim against the estate for the services until after such claim had been barred by the statute of limitations, such oral agreement was only the manner adopted for extinguishing the claim for the past services and the consideration for the oral agreement was the cancellation of the claim for the services and the discharge and compromise of the obligation which had accrued.

Fairall v Arnold, 226-977; 285 NW 664

12063 Compensation.

Compensation and attorney fees. The court has a discretion to allow attorney fees and compensation to an executor in a less sum than the statutory maximum.

Albright v Albright, 209-409; 227 NW 913

Traveling expenses. An administrator is properly given credit for his reasonable traveling expenses necessitated by the discharge of his official duties.

In re Atkinson, 210-1245; 232 NW 640

Maximum percentage allowable for ordinary services. An administrator is not necessarily entitled, for ordinary services, to the maximum percentage provided by the statute.

In re Lindell, 220-431; 262 NW 819

Statutory fees as limit. Record held to support the action of the trial court in confining the compensation of an executor to the statutory percentage, he having rendered no extraordinary services.

In re Moe, 213-95; 237 NW 228; 238 NW 718

Excessive allowance to referee. Allowance to referee in probate reviewed and held excessive to the extent of fifty percent thereof.

In re Cochran, 220-33; 261 NW 514

Supported allowances. Allowances made by the court as compensation to the executor and to his assistants and attorney, which have ample support in the evidence, will not be disturbed on appeal.

In re Mann, 217-1134; 251 NW 83

Evidence supporting allowance. In probate proceedings on objections to executor's report, evidence held sufficient to support allowance of fee of $750 where executor was required to look after several hundred acres of land, collecting rents, attending to the digging of two wells, making repairs, and attempting to find purchasers for land at a time when it was almost impossible to sell land or collect rents.

In re Sheeler, 226-650; 284 NW 799

Ex parte allowance of executor's and attorney's fees. Tho unsupported by affidavits, every material allegation in a verified motion

attacking an ex parte order allowing executor's and attorney's fees for extraordinary services will, in the absence of attack thereon or resistance thereto, be taken as true.

In re Metcalf, 227-985; 289 NW 739

Offsetting executor's debt against compensation. A debt due from an executor to the estate may not be set off against the amount allowed the executor for services as such executor, when the will provides that such debt shall be treated as an advancement. So held where assignees of the compensation were making claim thereto.

In re Bourne, 210-883; 232 NW 169

Drawing fees in partial payments. It is not improper for an administrator to draw a portion of the fees due him and to use the same in retiring an obligation due from himself to the estate.

In re Atkinson, 210-1245; 232 NW 640

Forfeiture of compensation. An executor who not only inexcusably fails to close an estate at the end of the statutory three-year period, and to turn the unexpended funds over to a designated testamentary trustee, but continues wrongfully, for a series of years, to act as executor, is very properly denied a right to the compensation which the testamentary trustee would have been entitled to during said years.

In re Mowrey, 210-923; 232 NW 82

Forfeiture of compensation. The failure of an executor to keep the estate funds separate from his personal funds, and the failure to keep reasonably complete and accurate accounts, may justify the court in denying the executor any compensation.

In re Mowrey, 210-923; 232 NW 82

Sale of mortgaged lands—basis for computing compensation. Compensation to an administrator for the sale of incumbered land is properly computed by figuring the statutory percentage on the expressed consideration less the amount of the existing incumbrance.

In re Lindell, 220-431; 262 NW 819

12064 Attorney fee.

Permissible employment. The good-faith employment by an executor of two firms to handle, in a large estate, proceedings for the construction of a cumbersome and involved will is not necessarily improper.

In re Leighton, 210-913; 224 NW 543

Burden of proof. The burden of proof is on attorney claiming fees for services, whether ordinary or extraordinary, and, while court may to a certain extent use its own judgment, claim should be based on evidence.

Glynn v Bank, 227-932; 289 NW 722

Determining factors. The court's allowance of administrator's attorney fees is largely discretionary, yet discretion must be reasonable, and the allowance should represent the fair and reasonable value of services rendered, taking into consideration the character of the services, the amount and extent of estate, and other pertinent matters.

Glynn v Bank, 227-932; 289 NW 722

Evidentiary support required. Tho a presumption of correctness exists in favor of trial court's decision fixing compensation for administrator's attorney, yet, where objection is made to application for allowance, and no evidence is introduced as to the services other than a bare statement in the applicant's affidavit, the trial court is not warranted in making a finding involving both nature and value of services.

Glynn v Bank, 227-932; 289 NW 722

Review. The appellate court will review an attorney's allowance for ordinary or extraordinary services to an estate where it appears from the record that the allowance is excessive or the claim therefor is not supported by sufficient evidence.

Glynn v Bank, 227-932; 289 NW 722

Review of order on appeal. On appeal from an order approving a referee's report in probate, the appellate court will not review an ex parte order of the probate court made two days after the making of the order appealed from, and pertaining to the amount of attorney fees allowed to the attorneys for the executor in said reference proceedings.

In re Cochran, 220-33; 261 NW 514

Employment for partisan purpose. An executrix who, as widow, has renounced the will, and elected to take her statutory distributive share, may not, at the expense of the estate, employ attorneys to take a partisan attitude in a rival contest as to heirship.

In re Leighton, 210-913; 224 NW 543

Allowable practice. An attorney may present his claim for services rendered to an administrator directly to the court.

In re Leighton, 210-913; 224 NW 543

Attorney fees charge against estate. An attorney who, in good faith, performs services in the probate of a will and in the appointment of the executrix with the knowledge and active assistance of the widow who was nominated executrix by the will and appointed by the court, has a claim against the estate for the value of said services.

In re Anderson, 216-1017; 250 NW 183

Services to trustee. While the statute seems to make no provision for the allowance of attorney fees for services rendered to trustees, yet such allowance is proper when the settle-

ment of the estate and the carrying on of the trust is one integral and interwoven matter.

In re Leighton, 210-913; 224 NW 543

Improper allowance of attorney fees. A trust created by a legislative appropriation act solely for the "education, care, and keep" of a designated person may not be depleted by the allowance by the court of attorney fees for services rendered not in the administration of the trust, but in inducing the legislature to make the appropriation.

In re Gage, 208-603; 226 NW 64

Partial payment. An administrator is properly given credit for an apparently reasonable sum advanced to the attorney for the estate as partial payment for services rendered.

In re Atkinson, 210-1245; 232 NW 640

Irregular payment—approval. Fees to an attorney for an administrator may, within safe limits, be allowed under interlocutory orders pending the administration; but if such fees are irregularly paid, e. g., paid without the advance approval of the court, nevertheless the court will, on a proper application, approve such payments if they are shown to be reasonable and legally authorizable.

In re Olson, 213-784; 239 NW 527

Fee fixed by agreement of heirs—when conclusive. The fee of an administrator's attorney may be fixed by agreement of the heirs and the amount is of no concern to anyone else, where no rights of creditors are involved.

In re Schropfer, 225-576; 281 NW 139

Revoking allowance — material evidence withheld from court. An executor being an officer of the court, the matter of his expenses is at all times subject to revision, so an order fixing his attorney's fees should be set aside when it appears that material matters were not before the court at the hearing.

In re Schropfer, 225-576; 281 NW 139

12065 Expenses and extraordinary services.

Burden of proof. An executor has the burden to prove the extraordinary services and the reasonableness of additional compensation.

In re Metcalf, 227-985; 289 NW 739

Extraordinary services—burden. The court may not in probate proceedings make an allowance to attorneys for "extraordinary" services in the absence of allegation and proof that they were such.

In re Murphy, 209-679; 228 NW 658

Extra fees—substantial showing required. An indefinite and unsubstantial showing of extraordinary services rendered by an executor will not permit an award of additional compensation.

In re Morgan, 225-746; 281 NW 346

Fees for extraordinary services. Without evidence as to extent and value of extraordinary services, an allowance therefor to executor and his attorney is not res judicata as to factual matters, and the attorney's statement which fails to separate time spent in court room from time spent in briefing and consultation will not furnish proper legal basis for any final adjudication.

In re Metcalf, 227-985; 289 NW 739

Extraordinary services. While court may take judicial notice of its own records in same case, this does not obviate necessity for proof of services and the reasonable value as to an attorney fee claim for extraordinary services to estate.

Glynn v Bank, 227-932; 289 NW 722

Evidence supporting allowance. In probate proceedings on objections to executor's report, evidence held sufficient to support allowance of fee of $750 where executor was required to look after several hundred acres of land, collecting rents, attending to the digging of two wells, making repairs, and attempting to find purchasers for land at a time when it was almost impossible to sell land or collect rents.

In re Sheeler, 226-650; 284 NW 799

Statutory fees as limit. Record held to support the action of the trial court in confining the compensation of an executor to the statutory percentage, he having rendered no extraordinary services.

Mills v Manchester, 213-95; 237 NW 228; 238 NW 718

Attorney fees—extraordinary services. It was not error to allow attorneys for executrix twice the statutory fee where record showed that substantial extraordinary legal services were rendered and that the allowance was reasonable and proper.

In re David, 227-352; 288 NW 418

Allowance by court—conclusiveness. An allowance by the court to an executor for ordinary and extraordinary services is conclusive on the appellate court when supported by competent and sufficient testimony.

In re Conkling, 221-1332; 268 NW 67

Ex parte allowance—proper attack by motion. While an estate is being administered, an ex parte order allowing executor's and attorney's fees for ordinary and extraordinary services is properly attacked by motion.

In re Metcalf, 227-985; 289 NW 739

Extraordinary services. Proceedings (1) for the construction of a will, (2) for the determination of a contested heirship, and (3) for the adjustment of the federal inheritance tax, are all in the nature of extraordinary matters within the meaning of this statute.

In re Leighton, 210-913; 224 NW 543

Appeal from the construction of a will. A reasonable allowance of attorney fees for services rendered on a good-faith appeal by the executor from an order of the trial court construing a cumbersome and involved will, is proper.

In re Leighton, 210-913; 224 NW 543

Extraordinary expense. An executor is under duty to defend a will after it is duly probated, and may employ counsel at the expense of the estate to contest an action to set aside the probate and to contest the will, even tho he has already employed counsel to advise him in his ordinary duties, and even tho he is personally interested in sustaining the will; and the court should, irrespective of the amount which the executor has agreed to pay, make a reasonable allowance to the executor for such expense when it is extraordinary.

In re Jewe, 201-1154; 208 NW 723

Inheritance tax claim—extraordinary services. *Ordinarily, service rendered by attorney* in settlement of inheritance tax claim is part of usual service in settlement of estate, but where litigation arises, or is likely to arise, apart from ordinary computation of tax, payment for extraordinary services may be allowed.

Glynn v Bank, 227-932; 289 NW 722

Traveling expenses. An administrator is properly given credit for his reasonable traveling expenses necessitated by the discharge of his official duties.

In re Atkinson, 210-1245; 232 NW 640

Disbursement for protection of interest in failing bank. An administrator may be given credit for estate funds paid out by him for notes purchased of a bank in which the estate was materially interested, in order to enable the bank to realize sufficient cash successfully to overcome a run on the bank, it appearing that the estate had reimbursed or could reimburse itself by collecting the notes so purchased.

In re Atkinson, 210-1245; 232 NW 640

Payment of voluntary assessment on bank stock. An administrator is properly given credit for paying a voluntary assessment on bank stock owned by the estate, when such payment was in the interest of the estate, and necessary in order to reorganize the bank and to maintain it as a going concern.

In re Atkinson, 210-1245; 232 NW 640

Justifiable advance by executor of his own funds. An executor who, because of a temporary shortage in estate funds, advances sums from his own private funds and therewith pays legal claims against the estate, rather than to sell, on a poor market, assets of the estate, is properly allowed interest on the amount so advanced.

In re Shepherd, 220-12; 261 NW 35

Compensation — attorney fees — temporary guardianship. An allowance of reasonable compensation to a temporary guardian and to his attorney in conserving and caring for the estate of the ward is proper, even tho no permanent guardian is appointed.

In re Barner, 201-525; 207 NW 613

Premium on bond—refusal to allow. The probate court is clearly within its discretion in refusing to allow against an estate and to the surety on an executor's bond (the executor being deceased and his estate insolvent) the amount of unpaid premiums on the bond, especially when such allowance would burden the estate with a double charge for premiums consequent on the mismanagement of the estate by the executor.

In re Mowrey, 218-992; 255 NW 511

12066 Removal of executor.

Surety as applicant. A surety on the bond of an administrator has such "interest in the estate" as empowers him to make application for the removal of the administrator, even though such surety has taken steps to terminate his future suretyship.

In re Donlon, 201-1021; 206 NW 674

Grounds. Jurisdiction to remove an administrator is furnished by an application by the surety on the bond wherein he prays for an order (1) removing the administrator, or (2) requiring the filing of a report and the making of distribution, when notice of the application is duly served on all interested parties, and when no part of the prayer has been withdrawn of record. The filing of a report under a mutual arrangement between the parties does not exhaust the jurisdiction of the court.

In re Donlon, 201-1021; 206 NW 674

Removal discretionary—inadvertency insufficient grounds. The removal of an executor being, under the statute, discretionary with the court, no abuse in refusing is shown where the evidence is entirely lacking in proof of waste, maladministration, disobedience of court orders, or misappropriation of funds by an executrix, a housewife, not familiar with the statutory requirements, and where her inadvertent failure to list certain assets and sell certain property caused no loss to estate.

In re Amick, 225-829; 281 NW 786

Removal for neglect—burden of proof. In an action by a testamentary beneficiary to remove an executor from office on the alleged ground of neglect to fully collect the assets of the estate, the plaintiff has the burden to establish (1) negligence on the part of the execu-

tor, and (2) resulting damage to the estate,—it appearing that the executor's purported final report is then on file and undisposed of.

In re Smith, 223-172; 271 NW 888

Petition to remove — nonpermissible adjudication. In an action in probate for the purpose, primarily, of removing an executor from office, substantially on the ground of alleged neglect to fully collect the amount of a bank certificate of deposit belonging to the estate, the court may not, after refusing an order of removal, properly enter an order releasing said executor from the duty further to account for said certificate.

In re Smith, 223-172; 271 NW 888

Future conduct (?) or invalidating former acts (?) as removal ground. A proper petition for removal of an administrator pursuant to the provisions of this section contemplates action incident to the future handling of the estate and future accounting as to past transactions. It does not contemplate an invalidation of previous handling of the estate, and, such relief being improper in a petition under this section, such petition is properly stricken on motion.

In re Collicott, 226-106; 283 NW 869

Superior right to make application and receive appointment. An alien, nonresident half-sister of a deceased, as next of kin, has the statutory right, superior to that of the resident paternal grandmother, during the 20 days following the burial of the deceased, to make application for the appointment (1) of herself, or (2) of any other suitable person as administrator, and an order of the probate court appointing a suitable person on the half-sister's application, and discharging the paternal grandmother who has in the meantime caused herself to be appointed, will not be disturbed.

In re Rugh, 211-722; 234 NW 278

Right to appoint successor. An order of the probate court appointing an executor, in place of an executor ordered removed, is perfectly valid and such new appointee after qualifying is not an intermeddler, even tho the order of removal is subsequently reversed on appeal, when the order of removal was in no manner stayed pending the appeal.

In re Mann, 217-1134; 251 NW 83

Unallowable procedure. The probate court on entering an order, on due application, modifying a former order relative to the compensation of an executor, has no authority to recognize judicially, on its own motion, the pendency in said court of a petition to remove said executor, and peremptorily, and on its own motion, to enter an order suspending or removing the executor on the basis of the testimony already received in the proceedings relative to compensation.

Gray v Mann, 208-1193; 225 NW 261

Ex parte revocation—effect. A peremptory, ex parte court order to the effect that the appointment of an administrator is revoked, and the simultaneous reappointment of the same administrator and the execution of another bond, does not effect a legal revocation, and consequently does not operate as a discharge of the bond given pursuant to the original appointment.

In re Donlon, 203-1045; 213 NW 781

Vacation of removal order. An order removing an administrator will not be vacated (1) when there is no showing that the administrator has any defense to the order, (2) when the extent of his liability to the estate as found by the court is admitted to be correct, (3) when he has held the estate open beyond the time contemplated by law, and (4) when he is largely indebted to the estate and is financially embarrassed.

In re Donlon, 201-1021; 206 NW 674

Failure to hear evidence. An order by the court removing an administrator will not necessarily be deemed invalid because the court did not formally receive any testimony.

In re Donlon, 201-1021; 206 NW 674

Petition for removal—when not demurrable. When the allegations of a petition for removal of an administrator are sufficient to warrant a hearing on the application because of a showing of a tangible and substantial reason to believe that damage will accrue to the estate, the petition is not vulnerable to a demurrer.

In re Arduser, 226-103; 283 NW 879

Receivership for insolvent trustee creates vacancy—power to fill. A judicial finding that a banking institution is insolvent and the appointment of a receiver to liquidate its affairs, ipso facto, (1) transfers, to the custody of the law, trust property held by said insolvent as a duly appointed testamentary trustee, (2) deprives said insolvent trustee of power further to act in said trusteeship, and (3) necessarily creates a vacancy in the office of said trust,—which vacancy the probate court has legal power to fill by appointing a successor in trust, (1) on the sworn application therefor supplemented by the professional statement of counsel, (2) at an ex parte hearing and without notice to interested parties, and (3) without any formal proceedings whatever for the termination of said former trusteeship; and especially is this true when said former trustee, formally and by its conduct, abandons its said trusteeship and all right and interest therein.

In re Strasser, 220-194; 262 NW 137; 102 ALR 117

In re Carson, 221-367; 265 NW 648

Final report by trustee after receivership. The filing of a final report by a trust company as trustee of an estate after the company had gone into receivership and could no longer

perform any duty as active trustee was not an act in administering the trust, but was the performance of its duty to make such final report upon its removal as trustee.

In re Carson, 227-941; 289 NW 30

Findings as to liability. Whether a mere finding by the court as to the extent of the administrator's liability to the estate, entered on an application by the surety to remove the administrator, is an adjudication binding on the surety on the bond, quaere.

In re Donlon, 201-1021; 206 NW 674
See In re Carpenter, 210-553; 231 NW 376

12067 Petition.

Petition failing to state grounds. A petition, challenging the appointment of an administrator with will annexed and the correctness of the report filed on behalf of the deceased executrix, concluding with a prayer that the letters of administration be set aside, is insufficient inasmuch as it fails to state any ground for such removal as contemplated by §12066, C., '35.

In re Collicott, 226-106; 283 NW 869

12070 Probate reports—accounts.

Burden of proof. An administrator has the burden of proof to establish the nonprejudicial nature of his irregular report.

In re Eschweiler, 202-259; 209 NW 273

Self-impeachment by administrator. An administrator will not be heard to say that he did not have notice of his own verified reports. It follows that he has frail ground upon which to impeach his own reports, especially when all other heirs and interested parties acquiesce therein.

In re Olson, 213-784; 239 NW 527

Findings by court — conclusiveness. The hearing upon the report of a guardian is in probate, and the finding of facts of a probate judge in such case has force and effect of a jury verdict, and trial court in such case may properly exercise a degree of sound discretion in regard to the nature and extent of expenditures which may be properly approved.

McBurney v McBurney, (NOR); 210 NW 568

Care of property — standard required — accounting methods. A property guardian must exercise degree of care commensurate with responsibilities of the position and, while infallibility of judgment is not required, accurate accounts and self-explanatory vouchers should be kept.

McBurney v McBurney, (NOR); 210 NW 568

Order fixing fiduciary's liability. An unappealed order of court, entered on the objections of a beneficiary to the report of a fiduciary, fixing the amount of liability of the fiduciary, is conclusive (in the absence of fraud) on the surety and those claiming under said surety.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

12071 Final report.

Hearings in probate. Hearings on the final reports of executors are at law and on appeal are reviewed as at law.

In re Mann, 217-1134; 251 NW 83
In re Oelwein, 217-1137; 251 NW 694

Notice of appeal—administrator failing to serve all objectors—effect. Notice of appeal from a judgment sustaining objections to an administrator's final report must be served on all heirs objecting to the report, and a failure will result in a dismissal of the appeal.

Kelley's Est. v Kelley, 226-156; 284 NW 133

Lien—unauthorized order. An order establishing the heirship of persons to an estate and, without notice, decreeing a lien in favor of the attorney on the cash shares of certain heirs for whom the attorney has never appeared, is a nullity, insofar as the order establishing the lien and the amount thereof is concerned.

In re Lear, 204-346; 213 NW 240

Reports not reviewed de novo on appeal. The trial court's findings in probate proceedings relating to executor's reports are not triable or reviewable de novo on appeal to the supreme court. If the findings have support in the record, they cannot be disturbed.

In re Sheeler, 226-650; 284 NW 799
In re Smith, 228- ; 289 NW 694

Presumption of regularity—review. Tho a presumption of regularity exists as to an unassailed allowance of attorney fees for extraordinary services, and tho ex parte orders fixing such fees without introduction of evidence are not uncommon, yet such orders are always open to review on final settlement.

In re Metcalf, 227-985; 289 NW 739

Findings on objections to final report. Trial court's ruling on objection to administrator's final report will not be disturbed on appeal where fact question was involved, as supreme court would not substitute its judgment for that of court below.

In re Windhorst, 227-808; 288 NW 892

Final report—effect—not decree of heirship or adjudication of interests. Altho a final report indicated names of devisees and legatees, the order approving it did not determine anything except that the executor had made a proper accounting and was entitled to be discharged; and, moreover, it did not establish rights and interests of all persons in estate's property.

McGarry v Mathis, 226-37; 282 NW 786

Administrator's debt to decedent—extent of liability. In proceeding on objection to administrator's final report, burden of proof was on the administrator to show why he should not be held accountable for full value of property inventoried by him, which inventory included his own debt to decedent. He was liable on such debt to the extent of his ability to pay at any time during administration, and everything above his statutory exemptions should have been so utilized, and there being no evidence in the record from which the extent of his nonexempt property or income could be ascertained, such question would be remanded to lower court for determination.

In re Windhorst, 227-808; 288 NW 892

Renunciation by beneficiary — receipt and waiver of notice—no estoppel. A daughter was not estopped from renouncing benefits under father's will, even after approval of the final report in father's estate, merely because she signed an instrument called "receipt and waiver of notice" of the hearing on the final report, altho such instrument acknowledged receipt of all money and property due her as her father's heir, when she actually had received nothing and when creditors were not shown to have been misled to their injury.

McGarry v Mathis, 226-37; 282 NW 786

Executor trust company in receivership—court accountable to. Failure of the probate court to appoint a successor-executor for an insolvent trust company which had been a co-executor in a pending estate and which trust company had been placed in receivership, does not cause the receiver of such insolvent trust company to be accountable to probate court —a court not appointing him.

Bates v Evans, 226-438; 284 NW 385

Final report by trustee after receivership. The filing of a final report by a trust company as trustee of an estate after the company had gone into receivership and could no longer perform any duty as active trustee, was not an act in administering the trust, but was the performance of its duty to make such final report upon its removal as trustee.

In re Carson, 227-941; 289 NW 30

Maladministration by executor or trustee—definiteness of allegation. When the final report of an executor and trustee of an estate was objected to on the ground of maladministration, the objection was sufficient tho it did not state whether the alleged wrongful acts were performed while the trustee was acting in its official capacity as executor or trustee.

In re Carson, 227-941; 289 NW 30

Objections to final report—failure to dispose of securities. Objections to the final report of a trust company are not subject to a motion for more specific statement when officers of the trust company have equal or better knowledge of the facts called for by the motion, especially where the motion calls for evidentiary facts. Held, also, that trustee was charged with maladministration and not fraud.

In re Carson, 227-941; 289 NW 30

Wrongful retention of securities by executor or trustee. An objection to the final report of a trust company acting as trustee and executor of an estate is sufficient in alleging generally that the trust company wrongfully retained securities which it should have disposed of altho it does not state on what dates the securities should have been sold and what their values were on those dates.

In re Carson, 227-941; 289 NW 30

Wrongful purchase of securities by executor or trustee. An objection to the final report of a trust company acting as trustee and executor was sufficient in alleging that securities were purchased without the approval of the court, altho the date of each purchase was not stated, and it was not stated whether the purchases were made as executor or trustee.

In re Carson, 227-941; 289 NW 30

12072 Orders in probate—applications.

Removal of executor—unallowable procedure. The probate court, on entering an order, on due application, modifying a former order relative to the compensation of an executor, has no authority to recognize judicially, on its own motion, the pendency in said court of a petition to remove said executor and peremptorily and on its own motion to enter an order suspending or removing the executor on the basis of the testimony already received in the proceedings relative to compensation.

In re Mann, 208-1193; 225 NW 261

Notice of appeal—sufficiency of recitals. A notice of appeal which describes the proceeding by proper title and the order appealed from by proper date of rendition is all-sufficient, and brings up for review each and every feature of the order. So held where the final determination of the court embraced two orders, one germane to the proceeding before the court and one wholly non-germane.

In re Mann, 208-1193; 225 NW 261

12073 Notice of application for discharge.

Atty. Gen. Opinions. See '28 AG Op 310; '38 AG Op 273

Final report of administrator—review. Hearings on final reports of administrators are not reviewed de novo in the appellate court.

In re Manning, 215-746; 244 NW 860

No abstract, no review. An order of probate court, entered on testimony duly taken, sustaining objections to the final report of executors, cannot be reviewed on appeal in the absence of the presentation of said testimony in

accordance with the statutes, and rules of the appellate court.

In re Andrews, 221-818; 265 NW 187

Improper vacation of order. An order approving the final report of an executor and discharging him, on due notice to all parties interested, cannot be later set aside on the ex parte application of the former executor.

In re Brockmann, 207-707; 223 NW 473

Discharge—setting aside—conditions. Principle reaffirmed that an order discharging an executor may be impeached only for fraud or mistake extrinsic or collateral to the questions tried and inhering in the order or judgment assailed.

In re Holman, 216-1186; 250 NW 498; 93 ALR 1363

Burden of proof. Principle reaffirmed that when there are inconsistencies between the final report of an administrator and his previous reports he has the burden of proof to sustain his final report.

In re Manning, 215-746; 244 NW 860

Absence of notice. The approval of the final report of a receiver in foreclosure proceedings and the discharge of the receiver, when entered without prior notice to the mortgagee, may be set aside on a showing that the receiver made an unauthorized distribution of the funds in his hands; and a delay of some four years by the mortgagee will not necessarily bar relief, especially when no one has changed his position because of the delay.

Farmers Bank v Pomeroy, 211-337; 233 NW 488

Absence of notice. Notice to the beneficiary of a trust, of the hearing on an application by the trustee for an order of court confirming an investment already made by the trustee, is not necessary, such application not being an adversary proceeding, and the record revealing the perfect good faith of the trustee.

In re Lawson, 215-752; 244 NW 739; 88 ALR 316

Surety bound by adjudication. The surety on the bond of an executrix is not entitled to notice of the hearing on the final report of the executrix. It follows that said surety is not necessarily entitled to have the final order adjudging the liability of the executrix set aside "within three months" of its entry (§12051, C., '31) and to have said liability readjudicated, especially when no fraud or mistake is charged.

Reason: The surety is in privity with the executrix and is legally in the probate court when the liability of the executrix is determined.

In re Holman, 216-1186; 250 NW 498; 93 ALR 1363

Excluding reports as evidence. Reports of an administrator are properly excluded in toto as evidence in his behalf when they contain self-serving declarations and recitals of personal transactions with the deceased as to which the administrator would be incompetent to testify, and when there is no offer to separate the competent matter from the incompetent matter.

In re Manning, 215-746; 244 NW 860

Incompetent ex parte statements. On hearing on final report of an administrator, an ex parte statement of a claim against the estate is properly excluded when the statement is apparently wholly immaterial, and when no effort is made to enlighten the court as to its materiality.

In re Manning, 215-746; 244 NW 860

Unallowable credit. An administrator is properly refused credit for a claim due the administrator when the claim has never been filed against the estate, and when there is no evidence sustaining the claim.

In re Manning, 215-746; 244 NW 860

12077.1 Small legacies to minors—payment.

Atty. Gen. Opinion. See AG Op June 5, '40

TITLE XXXIII

PARTICULAR ACTIONS AND SPECIAL PROCEEDINGS

CHAPTER 510

ATTACHMENT

12078 Method.

Statutory origin. Principle reaffirmed that proceedings in attachment are of statutory origin only, and in derogation of the common law.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Equity jurisdiction. A court of equity has no general jurisdiction to order an attachment without bond.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Unallowable attachment. An attachment cannot be legally issued in an action against a ward and his property guardian. Not being legally issuable, the writ cannot be legally levied on the property of the ward, and must be discharged on proper motion.

Reason: The ward's property is in custodia legis.

Shumaker v Bohrofen, 217-34; 250 NW 683; 92 ALR 914

Federal conservator—authority. The federal statute that the conservator of a national bank shall act "under the direction" of the comptroller of the currency does not require the conservator to secure specific authority from the comptroller for the bringing of an attachment and the execution of a bond on behalf of the bank.

Ross v Long, 219-471; 258 NW 94

12079 Proceedings auxiliary.

Levy under invalid attachment—subsequent personal judgment — effect. While plaintiff obtains no lien on realty by virtue of a levy under an invalid attachment, yet, if he obtains personal judgment on the claim sued on, he will, from the entry of such judgment, have a lien notwithstanding the futility of the attachment proceedings.

Andrew v Miller, 221-316; 263 NW 845

Separate petition—when required. In order to convert an action which is unaided by attachment into an action which is aided by attachment, the filing of a separate petition is mandatorily required in order to furnish a jurisdictional basis for the attachment.

Fletcher v Gordon, 219-661; 259 NW 204

12080 Grounds.

ANALYSIS

I PETITION IN GENERAL
II STATEMENT OF GROUNDS

I PETITION IN GENERAL

Daughter's interest under will—intent of testator considered. In a suit in equitable attachment against the interest of a daughter under her father's will, the intent of the testator is to be considered in determining whether he intended the daughter to have any right other than to part of the income.

Friedmeyer v Lynch, 226-251; 284 NW 160

II STATEMENT OF GROUNDS

Remedies of creditors—evidence—sufficiency. Proof (1) that the vendee of personal property did not record or file his bill of sale as required by law, (2) that there was no change of possession following the bill of sale, and (3) that the vendee actively aided the vendor in disposing of the property as the property of the vendor, furnishes ample justification for the holding that the rights of a good-faith and innocent attaching creditor of the vendor were superior to the asserted rights of the vendee.

Beno Co. v Perrin, 221-716; 266 NW 539

12083 On contract—amount due.

Nonwaiver of unknown right to equitable lien. Where a father had orally contracted with a bank to pledge his son's share in his estate as security for a note executed by his son, later a bankrupt, on the understanding that payment from the father would not be sought while he lived, and where the father's copy of the contract contained an additional notation, made by a bank officer, that the bank would seek payment only from the son's share in the estate, which notation was unknown to the succeeding officers of the bank at the time of commencing an attachment action based on the father's attempted disposal of the pledged real estate, the bank's equitable lien on the real estate was not waived by the proceeding in attachment.

Emerson Bank v Cole, 225-281; 280 NW 515

12085 Allowance of value in other cases.

Unauthorized attachment. The statutory power of a judge of the district court in action for divorce to order an attachment, with or without bond, does not authorize him to enter such order in an action for separate maintenance.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

12086 For debts not due—grounds.

Nonwaiver of unknown right to equitable lien. Where a father had orally contracted with a bank to pledge his son's share in his estate as security for a note executed by his son, later a bankrupt, on the understanding that payment from the father would not be sought while he lived, and where the father's copy of the contract contained an additional notation, made by a bank officer, that the bank would seek payment only from the son's share in the estate, which notation was unknown to the succeeding officers of the bank at the time of commencing an attachment action based on the father's attempted disposal of the pledged real estate, the bank's equitable lien on the real estate was not waived by the proceeding in attachment.

Emerson Bank v Cole, 225-281; 280 NW 515

Testator's contract to devise to son—will changed after loan relying thereon—lien impressed. A bank, after contracting with debtor's father to wait until father's death for payment of the son's debt from his share in father's estate, under existing devise in will, has a right to impress an equitable lien on the land when it discovers that the father had changed his will and was fraudulently, without consideration, transferring his property to others than the debtor-son.

Emerson Bank v Cole, 225-281; 280 NW 515

12088 Bond.

Equity jurisdiction. A court of equity has no general jurisdiction to order an attachment without bond.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Substituting new bond. A new bond, sufficient in amount, may, after levy, be substituted for an original bond which was insufficient in amount.

Carson & Co. v Long, 219-444; 257 NW 815

Presumption. A bond executed in the name of a plaintiff in attachment, by the attorney appearing for such plaintiff, is presumptively valid.

Carson & Co. v Long, 219-444; 257 NW 815

12089 Additional security.

Substituting new bond. A new bond, sufficient in amount, may, after levy, be substituted for an original bond which was insufficient in amount.

Carson & Co. v Long, 219-444; 257 NW 815

12090 Action on bond.

Attorney fee—improper allowance. Attorney fees may not be allowed both by the jury and by the court.

Siegel Mkt. v Billings, 203-190; 210 NW 749

Attorney fees as matter of right. A defendant in an attachment who counterclaims on the bond and recovers both actual and exemplary damages is entitled to a taxation of reasonable attorney fees as a matter of right, even tho the sureties on the bond are not made parties to the counterclaim.

Mogler v Nelson, 211-1288; 234 NW 480

Counterclaim on deficiency judgment. In suit on attachment bond for damages, principal on bond could file counterclaim based on deficiency judgment obtained in foreclosure action although counterclaim was not in favor of surety on bond, since principal was primarily liable.

Imes v Hamilton, 222-777; 269 NW 757

Liability on bond—attorney's fee as costs. In an action for money due on a written instrument aided by attachment, to which a counterclaim on the bond was filed, and under an instruction providing that both plaintiff and defendant could recover, one against the other in equal amounts, the jury found for the defendant and of necessity that the attachment was wrongful thereby as a matter of law entitling defendant to a reasonable attorney's fee taxable as part of the costs.

Rodman v Ladwig, 223-884; 274 NW 1

Unallowable damages. A defendant in attachment who does not question plaintiff's claim, and who has never been disturbed or injured by the levy on his land, or sought to have the attachment levy discharged, may not, in an action on the bond, recover for loss of time and expense in securing attorneys to bring suit on the bond; neither may he recover such attorney fees.

Thielen v Schechinger, 211-470; 233 NW 750

12091 Remedy for falsely suing out—counterclaim.

Nonright to question grounds of attachment. An intervenor in attachment proceedings may not question the truthfulness of the grounds on which the attachment was issued. His statutory right to question the "validity" of the attachment (§12136) extends no further than to show that it is invalid as to him because he has an interest in the property superior to the attachment.

Thielen v Schechinger, 210-224; 230 NW 516

Incompetent testimony as to damage. In an action on an attachment bond, plaintiff will not be permitted to testify to his opinion as to the effect which the attachment had on a possible sale of the land upon which levy was made, there having been theretofore no negotiations whatever for such sale.

Thielen v Schechinger, 211-470; 233 NW 750

12092 Writ to sheriff.

Change in writ. A change in a writ of attachment as to the county in which it may be served, made at the direction of the clerk issuing the writ and prior to levy, is valid.

Carson & Co. v Long, 219-444; 257 NW 815

12093 Several writs to different counties.

Subsequent writs authorized. When a landlord's attachment is timely in that it was commenced within six months after the expiration of the lease, and the writ is improperly levied on property in a foreign county, a new writ may issue, even after the six months has expired, and a valid levy made thereunder on the same property if it has, in the meantime, been brought into the county of suit.

Welch v Welch, 212-1245; 238 NW 81

12094 Surplus levy.

Burden of proof. Burden to show that a levy is excessive rests on complainant.

Carson & Co. v Long, 219-444; 257 NW 815

12095 Property attached.

ANALYSIS

Sufficiency of levy. See under §12102, Vol I

I LEVY IN GENERAL

Abuse of process. The fact that a tenant's creditor is present at a public sale of the tenant's property and threatens to levy an attachment on said property does not constitute such abuse of process as will invalidate a check given by the landlord to the creditor in payment of his claim and to prevent such levy.

Myers v Watson, 204-635; 215 NW 634

II PROPERTY SUBJECT TO LEVY

Property under administration. Lands which belong to an estate and which have been ordered sold in probate in order to pay debts, are not subject to attachment in actions against heirs.

In re Collins, 207-1074; 224 NW 82

Custodia legis—burden of proof. If property is not subject to attachment or garnishment because undergoing partition, and, therefore, in the custody of the law, the mover for dissolution must show that no order for distribution has been entered in the partition proceedings.

Carson & Co. v Long, 219-444; 257 NW 815

Guardian and ward — unallowable attachment. An attachment cannot be legally issued in an action against a ward and his property guardian. Not being legally issuable, the writ cannot be legally levied on the property of the ward, and must be discharged on proper motion.

Reason: The ward's property is in custodia legis.

Shumaker v Bohrofen, 217-34; 250 NW 683; 92 ALR 914

Trust funds—exempt from trustee's creditors. In an attachment action against a defendant, engaged in business of selling grain on commission, funds received by defendant from sale of such third parties' grain and deposited in a bank are held in trust for payment to seller and not subject to garnishment by depositor's creditors.

Fidelity & Dep. Co. v Seward, 226-1216; 286 NW 528

Rentals—lease assignment—father-in-law's loan as consideration. Where an assignment of a lease on mortgaged lands is given to mortgagor's father-in-law as payment on a pre-existing, bona fide, unpaid loan, altho the notes evidencing such loan had been returned by the father to the daughter with the understanding that the debt would, if possible, be paid during his lifetime, such an assignment is a payment on the debt to the extent of the rentals and is supported by ample consideration.

First JSL Bank v Ver Steeg, 223-1165; 274 NW 883

III VALIDITY OF LEVY

Levy—sufficiency. A sufficient levy is made by the act of the officer in invoicing the property and leaving it in the possession of his agent.

First N. Bk. v Schram, 202-791; 211 NW 405

Return—belated amendment. An application to amend the return on an execution, so as to show the essential facts constituting a levy, is properly denied when the application is made four months after the attempted levy, and is hostile to a stranger with a prior interest in the property sought to be levied on.

Cramer v McDonald, 213-454; 239 NW 101

Jurisdiction as sole question. Jurisdiction of the court is the only question which can be tried out on special appearance. So held where attempt was made, on such appearance,

to try out the question whether attached property was exempt from attachment or execution levy.

Scott v Wamsley, 215-1409; 245 NW 214

IV RIGHTS AND PRIORITIES

Priority to diligent creditor. A creditor who obtains title to land by virtue of his judgment and a creditor's bill under which an existing mortgage was decreed to be fraudulent will not, on the theory of superior diligence, be given priority over a known prior attaching creditor who levied on the land regardless of the said mortgage, and because he deemed the mortgage fraudulent, and who, prior to the decree under the creditor's bill, obtained the same result obtained under the creditor's bill, by securing from the fraudulent mortgagee, not only a verbal promise to release the mortgage, but an actual release of said mortgage.

Elson v Clayton, 200-935; 205 NW 745

Mortgage by grantee. A creditor, on learning that his debtor has made a voluntary conveyance of his property, may validly secure his debt by taking mortgage security from the voluntary grantee on the voluntarily conveyed property, and will thereby secure a right which will be superior to the right of another creditor who, subsequent to the mortgage, and after the death of the common debtor, reduces his claim to a so-called judgment against the latter, and, for his own exclusive benefit, levies on the voluntarily conveyed property.

Marion Bank v Smith, 205-203; 217 NW 857

V WRONGFUL LEVY

Liability on bond—instruction—attorney's fee as costs. In an action for money due on a written instrument aided by attachment, to which a counterclaim on the bond was filed, and under an instruction providing that both plaintiff and defendant could recover, one against the other in equal amounts, the jury found for the defendant and of necessity that the attachment was wrongful, thereby as a matter of law entitling defendant to a reasonable attorney's fee taxable as part of the costs.

Rodman v Ladwig, 223-884; 274 NW 1

12098 Corporation stock.

Appeal does not vacate or affect judgment. A judgment which releases and discharges an execution levy on corporate shares of stock is a self-executing judgment, and is in full force and effect from the date thereof to the time the judgment is reversed on appeal and the execution levy reinstated, and one who purchases said stock after the entry of said judgment and before the reversal thereof, from the owners thereof as shown by the corporate stock books, will be protected in his ownership when he purchased in good faith, for value, and without knowledge of said litigation.

Hewitt v Cas. Co., 212-316; 232 NW 835

Essentials of levy. An attempted levy on corporate shares of stock is, as to a stranger with a prior interest in the property, a nullity (1) unless the president of the company or other officer designated by the statute is notified in writing that the stock has been levied on, and (2) unless the return on the writ states that such notice was given. (§11676, C., '31.)

Cramer v McDonald, 213-454; 239 NW 101

12099 Judgments—money—things in action.

Unadjudicated cause of action. The statute (§11672, C., '31) which provides for execution levy on "things in action" authorizes a levy on an unadjudicated cause of action which the judgment defendant is prosecuting against the judgment plaintiff for breach of contract.

Brenton v Dorr, 213-725; 239 NW 808

Failure to serve notice on defendant. Failure of the officer making the levy to serve notice on judgment defendant of the levy, on a chose in action, furnishes ample grounds for quashing the writ and staying sale thereunder.

Brenton v Dorr, 213-725; 239 NW 808

12100 Property in possession of another.

Property in possession of another. See under §12095

Right to income from trust dependent on election or demand by cestui—effect. A trust which provides that the income therefrom shall be paid to a named beneficiary "from time to time as she may elect during her lifetime", effectually places said income beyond the reach of the creditors of said beneficiary so long as said beneficiary makes no such election.

Ober v Dodge, 210-643; 231 NW 444

Spendthrift trust. If the terms of a trust provide that the income be applied to the cestui at the discretion of the trustee, or the income is payable to the cestui at his demand, or the trust is for a special purpose, or in general where no debt is owed the cestui by the trustee, the creditors of the cestui cannot appropriate the benefaction.

Standard Chemical v Weed, 226-882; 285 NW 175

Spendthrift trust—creditor's rights. When the testator's will created a trust for his son, providing that the proceeds of the trust be paid to the son "yearly or oftener if collected for shorter periods," and contained no words showing an intent to place the trust income beyond the reach of the son's creditors, a debt due the son from the trustee was created, which was a vested right which could be assigned and was subject to claims of creditors.

Standard Chemical v Weed, 226-882; 285 NW 175

12101 Garnishment.

Garnishment. See under Ch 513

Unadjudicated cause of action. The statute (§11672, C., '31) which provides for execution levy on "things in action" authorizes a levy on an unadjudicated cause of action which the judgment defendant is prosecuting against the judgment plaintiff for breach of contract.

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Standard Chemical v Weed, 226-882; 285 NW 175

Trust funds—exempt from trustee's creditors. In an attachment action against a defendant, engaged in business of selling grain on commission, funds received by defendant from sale of such third parties' grain and deposited in a bank are held in trust for payment to seller and not subject to garnishment by depositor's creditors.

Fidelity & Dep. Co. v Seward, 226-1216; 286 NW 528

Discharge on motion. The statute authorizing the discharge of an attachment upon motion before trial is summary in character and the showing in support of a motion filed thereunder should be made clear and entirely satisfactory, but the legislative intent in providing proceedings under attachment that will be expeditious should not be overlooked nor in any casual manner thwarted.

Fidelity & Dep. Co. v Seward, 226-1216; 286 NW 528

12102 When property bound.

Levy in general. See under §12095

Atty. Gen. Opinion. See AG Op Feb. 28, '39

12103 Real estate.

Execution debtor's "right of possession". A debtor's statutory "right of possession" of real estate during the year given for redemption from sale on execution is not, in and of itself, leviable.

Sayre v Vander Voort, 200-990; 205 NW 760; 42 ALR 880

Contingent remainder. A contingent remainder—contingent because of the uncertainty of the person who will take the property—is not subject to attachment or execution levy and sale.

Saunders v Wilson, 207-526; 220 NW 344; 60 ALR 786

Crops raised during redemption period.

Howe v Briden, 201-179; 206 NW 814
Goldstein v Mundon, 202-381; 210 NW 444
Starits v Avery, 204-401; 213 NW 769

Immature crops.

Rodgers v Oliver, 200-869; 205 NW 513

Renunciation of legacy—effect.

Funk v Grulke, 204-314; 213 NW 608

Right to renounce devise or bequest. The legal right of a beneficiary under a will to file an unconditional and final renunciation of all benefits granted him by the will, and thereby exclude his creditor from acquiring any right to the devised property, may be exercised even after a creditor of said beneficiary has levied upon, sold, and obtained a sheriff's deed to, the land devised to said beneficiary, it appearing that the renouncing beneficiary had in no manner misled the creditor.

Lehr v Switzer, 213-658; 239 NW 564

Attachment—nonwaiver of unknown right to equitable lien. Where a father had orally contracted with a bank to pledge his son's share in his estate as security for a note executed by his son, later a bankrupt, on the understanding that payment from the father would not be sought while he lived, and where the father's copy of the contract contained an additional notation, made by a bank officer, that the bank would seek payment only from the son's share in the estate, which notation was unknown to the succeeding officers of the bank at the time of commencing an attachment action based on the father's attempted disposal of the pledged real estate, the bank's equitable lien on the real estate was not waived by the proceeding in attachment.

Emerson Bank v Cole, 225-281; 280 NW 515

Testator's contract to devise to son—will changed after loan relying thereon—lien impressed. A bank, after contracting with debtor's father to wait until father's death for payment of the son's debt from his share in father's estate, under existing devise in will, has a right to impress an equitable lien on the land when it discovers that the father had changed his will and was fraudulently, without consideration, transferring his property to others than the debtor-son.

Emerson Bank v Cole, 225-281; 280 NW 515

12104 Lien.

When levy, lien, and notice effected. A levy on real estate under a writ of attachment is made and a lien is created and notice to third parties effected by the proper signed entry of the sheriff on the incumbrance book in the office of the clerk of the district court.

(Prior to the Code of 1897, the levy was made and lien was created by the proper signed return of the sheriff on the writ of attachment, and notice to third parties was effected by the proper signed entry of the sheriff on the incumbrance book. §§3010, 3022, C., '73.)

First N. Bk. v Kindwall, 201-82; 206 NW 241

Sufficiency of entry. A lien on real estate is effected under a writ of attachment by a duly signed entry in the incumbrance book wherein the land is described as "SE¼, Sec. 8-91-38 in Buena Vista County, Iowa."

First N. Bk. v Kindwall, 201-82; 206 NW 241

Denial of lien—conclusiveness. An unappealed holding in attachment proceedings that plaintiff, tho entitled to judgment against defendant, had acquired no lien on certain real estate is a finality. In other words, plaintiff may not, years afterwards, between other parties dispute said adjudication.

Nagl v Hermsen, 219-223; 257 NW 583

12105 Levy on equitable interest.

Life estate—delinquent taxes. When judgment creditor of a life tenant, by virtue of execution, levies upon a life estate and purchases the life estate on execution sale, he assumes all the duties of a life tenant and is obligated to pay delinquent taxes, or else lose the advantage of the life estate.

Rich v Allen, 226-1304; 286 NW 434

Daughter's interest under will—intent of testator considered. In a suit in equitable attachment against the interest of a daughter under her father's will, the intent of the testator is to be considered in determining whether he intended the daughter to have any right other than to part of the income.

Friedmeyer v Lynch, 226-251; 284 NW 160

12106 Lands fraudulently conveyed.

Fraudulently conveyed property. See under §§11815, 12095

Mutual intent. An action to set aside a conveyance as fraudulent necessitates proof of a mutual intent to defraud.

Newman v Callahan, 212-1003; 237 NW 514

Equitable interest—procedure. Plaintiff by alleging under this section in an action on a promissory note that the maker had fraudulently conveyed his property, and by praying for an attachment on the property, and for a decree subjecting the property to plaintiff's judgment, does not thereby eliminate the necessity of equitable proceedings to reach said property.

Fed. Res. Bank v Geannoulis, 203-1385; 214 NW 576

Right to set aside conveyance—condition precedent—laches. The right of a creditor to have the fraudulent conveyance of his debtor judicially set aside is not a matured right—a matured cause of action—until the creditor obtains, by judgment or attachment, a lien on the land in question. But the creditor will not be permitted negligently to delay maturing his own cause of action, and if he does so delay for a period equal to or greater than the 5 years allowed by statute for bringing the action, he will be deemed guilty of such laches as will completely bar his action, even tho it be conceded that, strictly speaking, the action is not barred by the statute of limitation.

Bristow v Lange, 221-904; 266 NW 808

Setting aside—limitation of actions—laches. A suit in equity by trustee in bankruptcy to set aside deed by bankrupt to husband on grounds of want of consideration, fraud, and failure to take possession of land, brought more than 6 years after recording of deed, is barred by laches under statute of limitations where only one creditor secured allowance of claim, which claim was based on note past due when deed was recorded.

Monroe v Ordway, 103 F 2d, 813

Fraudulent conveyance—action by trustee to set aside. A trustee in bankruptcy may not maintain an action to set aside a fraudulent conveyance by the bankrupt unless he pleads and proves that such setting aside is necessary in order to pay claims allowed in the bankruptcy proceedings.

Newman v Callahan, 212-1003; 237 NW 514

Void remainders created by will. Property embraced in a void, testamentary limitation—void because prohibited by the statute relating to perpetuities—passes to those persons who would have been entitled thereto under the laws of intestacy had the limitation been omitted from the will, and a judgment creditor may, by proper procedure, have a lien established thereon.

Bankers Tr. v Garver, 222-196; 268 NW 568

Voluntary, nonfraudulent conveyance—valid against judgment on subsequent bank stock assessment. Altho wholly voluntary, a conveyance executed when the grantor has no fraudulent intent cannot be impeached by a subsequent creditor, so a real estate conveyance by a husband to his wife many years before he becomes a bank stockholder cannot be invalidated by the creditors of the bank, seeking to collect a judgment on stock liability assessment.

Bates v Kleve, 225-255; 280 NW 501

Testator's contract to devise to son—will changed after loan relying thereon—lien impressed. A bank, after contracting with debtor's father to wait until father's death for payment of the son's debt from his share in father's estate, under existing devise in will, has a right to impress an equitable lien on the land when it discovers that the father had changed his will and was fraudulently, without consideration, transferring his property to others than the debtor-son.

Emerson Bank v Cole, 225-281; 280 NW 515

12107 Notice to defendant—return.

Failure to serve notice. Failure of the officer making the levy to serve notice on judgment defendant of the levy, on a chose in action, furnishes ample grounds for quashing the writ and staying sale thereunder.

Brenton v Dorr, 213-725; 239 NW 808

Failure to give notice. The failure of the levying officer to give the defendant in attachment notice of the levy on a judgment does not necessarily work any invalidating effect on the levy.

Edwards v Tracy, 203-1083; 212 NW 317

Waiver of notice. The failure of the levying officer to notify the defendant in attachment of a levy on a judgment is waived when the duly served original notice gave defendant such notice and he did not question such levy until some two months thereafter.

Edwards v Tracy, 203-1083; 212 NW 317

12108 Notice to party in possession.

Notice to clerk. The clerk of the court is not in possession of a judgment in such sense that notice of a levy thereon need be served on such clerk.

Edwards v Tracy, 203-1083; 212 NW 317

12110 Examination of defendant.

Discovery proceedings—extent of jurisdiction. In a discovery proceeding against a person suspected of taking wrongful possession of decedent's property, where a dispute arises as to ownership of property, neither the trial nor appellate court has authority to order delivery of the property to the executor or administrator unless it appears beyond controversy that the person examined has wrongful possession of the property.

In re Hoffman, 227-973; 289 NW 720

12114 Lien acquired—action to determine interest.

Right to set aside conveyance—condition precedent—laches. The right of a creditor to have the fraudulent conveyance of his debtor judicially set aside is not a matured right—a matured cause of action—until the creditor obtains, by judgment or attachment, a lien on the land in question. But the creditor will not be permitted negligently to delay maturing his own cause of action, and if he does so delay for a period equal to or greater than the 5 years allowed by statute for bringing the action, he will be deemed guilty of such laches as will completely bar his action, even tho it be conceded that, strictly speaking, the action is not barred by the statute of limitation.

Bristow v Lange, 221-904; 266 NW 808

12116 Mortgaged personal property.

Levies on mortgaged personalty. See §11682, Vol. I

12117 Indemnifying bond.

Indemnifying bonds. See under §11702
Atty. Gen. Opinion. See '32 AG Op 270

Notice of ownership—sufficiency. The sworn, written notice of ownership, which is given an officer who has levied on the property, is sufficient in form and contents if it actually enables the officer to secure an indemnifying bond.

Capital Loan Co. v Keeling, 219-969; 259 NW 194

Defective notice of ownership. The fact that the notice to an attaching officer of the interest of a chattel mortgagee in attached property is defective becomes of no consequence when it is made to appear that the mortgagee was in open and undisputed possession of the mortgaged chattels and was proceeding to foreclose the mortgage when the officer levied the attachment.

Smith v Goldberg, 204-816; 215 NW 956

Chattel mortgagee—allowable procedure. A chattel mortgagee may, when the property is levied on by an attaching creditor of the mortgagor, serve notice of his interest, on the levying officer, and thereafter, if the property is not released, maintain an action for conversion against the attaching plaintiff and the levying officer.

Capital Loan Co. v Keeling, 219-969; 259 NW 194

12118 Bond to discharge.

Failure of clerk to approve—effect. The court acquires no jurisdiction of a surety on a bond to discharge an attachment when the bond is executed after the sheriff has levied the writ and made return thereon to the clerk, and the bond is not approved by said clerk, as required by statute. It follows that a default judgment against the surety, under such circumstances, is properly set aside on timely motion.

Brenton v Lewiston, 204-892; 216 NW 6

12121 Delivery bond.

Breach. A statutory delivery bond is breached by the failure to redeliver the at-

tached property or its appraised value to the sheriff within 20 days after the entry of the judgment upon the verdict, irrespective of the subsequent entry of orders denying a new trial.

Cox v Surety Co., 208-1252; 226 NW 114

12122 Appraisement.

Bond—measure of damages. The measure of recovery on a delivery bond is the appraised value of the property, not exceeding, however, the amount of the judgment recovered in the main action.

Cox v Surety Co., 208-1252; 226 NW 114

12127 Sheriff's return.

Amendment of return. See under §12143

Permissible amendment. The return of the levy of an attachment may be so amended as (1) to definitely locate the property levied on and (2) to specifically describe the kind of property levied on.

Salinger v Elev. Co., 210-668; 231 NW 366

Fatal insufficiency. The delivery, by plaintiff's attorney to the clerk, of an execution and the indorsement thereon, by the clerk, of the words "Returned not satisfied" does not constitute a legal return.

Richardson v Rusk, 215-470; 245 NW 770

12132 Judgment—satisfaction—special execution.

Execution sale of promissory note—purchase by maker. The maker of a promissory note and mortgage may, by himself or through others, validly purchase said note and mortgage at execution sale against the payee or holder thereof, and thereby completely discharge the same.

Buter v Slattery, 212-677; 237 NW 232

Lien—nonwaiver by taking general judgment. The plaintiff in landlord's attachment by failing to ask for a special execution for the sale of the attached property, and by taking a general judgment against the lessee, does not thereby waive his landlord's lien. On the contrary, the lien follows the general judgment upon which a special execution may issue notwithstanding the failure to pray therefor, and notwithstanding the failure of the judgment to provide therefor.

Wunder v Schram, 217-920; 251 NW 762

Voluntary conveyance—knowledge of creditor. When land, which was part of an estate, was purchased by decedent's two sons, who paid no cash consideration, but occupied, paying rent to the other heirs, and who later, in order to protect the land from creditors, deeded it to two sisters who did not know of the indebtedness of the brothers, and when the sons made a contract with the sisters at the time of the deed protecting the other heirs in case the land were sold, a creditor of one of the brothers who knew of the rent payments and knew of the deed, but made no objection, could neither have it set aside as a fraudulent conveyance nor have the real estate subjected to a judgment against the debtor-brother, as the deed and contract conveyed the mere legal title to the sisters in trust for the heirs who were the persons entitled to the property.

Lakin v Eittreim, 227-882; 289 NW 433

Sale—right to withdraw bid because of mistake. A plaintiff in execution, who bids at the sale the full amount of the judgment and costs in the honest belief that he was bidding on two separate tracts of land, when only one tract was being offered, may, on the discovery of his mistake, withdraw his bid, and the levying officer has discretion, without the consent of the defendant in execution, to accede to said withdrawal and to treat the sale as a nullity, and to resell, if there be time enough, and if there be not time enough, to return the execution in accordance with said facts. And in such latter case plaintiff may order out a new execution.

Van Rheenen v Windell, 220-211; 262 NW 120

12135 Surplus.

Excessive levy—burden of proof. Burden to show that a levy is excessive rests on complainant.

Carson & Co. v Long, 219-444; 257 NW 815

12136 Intervention—petition.

Proceedings applicable to garnishment on execution. The statute providing, where parties have been garnished under an execution, the officer shall return to the next term thereafter a copy of the execution, and that thereafter the proceedings shall conform to proceedings in garnishments under attachments, permits the claimants of liens upon or interests in money or property held by garnishment on execution to intervene and proceed under statute permitting intervention in attachment proceedings.

New Amsterdam Co. v Bookhart, 227-1150; 290 NW 61

When allowable. In an equitable action aided by attachment, a party claiming the attached property may present his claim by petition of intervention, even tho he has been made a defendant in the main action.

Citizens Bank v Haworth, 208-1100; 222 NW 428

Unallowable plea. An intervenor who claims recovery for property seized by plaintiff on an attachment, may not, after so recovering, inject into his intervention another and separate demand for property wholly disconnected with said attachment.

Peoples Bk. v McCarthy, 211-40; 231 NW 482

Nonright to question grounds of attachment. An intervenor in attachment proceedings may not question the truthfulness of the grounds on which the attachment was issued. His statutory right to question the "validity" of the attachment extends no further than to show that it is invalid as to him because he has an interest in the property superior to the attachment.

Thielen v Schechinger, 210-224; 230 NW 516

Irrevocable abandonment of action. An intervenor who pleads a personal claim to specific attached property but later joins with other intervenors in a joint demand for judgment for all the property seized on the attachment belonging to all the intervenors, and receives a part of the resulting judgment when it is paid, must be held to have irrevocably abandoned her formerly pleaded personal claim.

Peoples Bk. v McCarthy, 211-40; 231 NW 482

Motion to discharge attachment—rights asserted by fiduciary of funds. Defendant engaged in business of selling grain on commission for his customers and depositing money in a bank, properly files a motion to discharge attachment by garnishment of such funds as against contention that such motion urged third parties' claims which should have been raised by them in intervening petitions, where defendant asserts his rights, duties, and liabilities as trustee or custodian of funds garnished.

Fidelity & Dep. Co. v Seward, 226-1216; 286 NW 528

Garnishment—attorney's lien against estate funds. Where a casualty company secured a judgment against beneficiaries under a will, and issued an execution under which the administrator with will annexed was attached as garnishee, attorneys for the beneficiaries could properly intervene in the garnishment proceedings to assert a claim to the garnished fund for legal services rendered to beneficiaries, in connection with the action by casualty company, which claim was based on written assignment of interests of beneficiaries under said will.

New Amsterdam Co. v Bookhart, 227-1150; 290 NW 61

12137 Hearing and orders.

Proceedings applicable to garnishment on execution. The statute providing, where parties have been garnished under an execution, the officer shall return to the next term thereafter a copy of the execution, and that thereafter the proceedings shall conform to proceedings in garnishments under attachments, permits the claimants of liens upon or interests in money or property held by garnishment on execution to intervene and proceed under statute permitting intervention in attachment proceedings.

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New Amsterdam Co. v Bookhart, 227-1150; 290 NW 61

12138 Costs.

Attorney's fee as costs. In an action for money due on a written instrument aided by attachment, to which a counterclaim on the bond was filed, and under an instruction providing that both plaintiff and defendant could recover, one against the other in equal amounts, the jury found for the defendant and of necessity that the attachment was wrongful thereby as a matter of law entitling defendant to a reasonable attorney's fee taxable as part of the costs.

Rodman v Ladwig, 223-884; 274 NW 1

12139 Discharge on motion.

ANALYSIS

I MOTION TO DISCHARGE IN GENERAL
II AVAILABILITY OF MOTION
III NONAVAILABILITY OF MOTION

I MOTION TO DISCHARGE IN GENERAL

Motion—fatally delayed presentation. The objection that a motion to discharge an attachment was not timely may not be raised for the first time on appeal.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Statute construed. The statute authorizing the discharge of an attachment upon motion before trial is summary in character and the showing in support of a motion filed thereunder should be made clear and entirely satisfactory, but the legislative intent in providing proceedings under attachment that will be expeditious should not be overlooked nor in any casual manner thwarted.

Fidelity & Dep. Co. v Seward, 226-1216; 286 NW 528

Motion confesses petition. Defendant who moves to dissolve an attachment, because of want of authority in plaintiff to maintain the action, must be deemed to confess the truth of the well-pleaded allegations of the petition.

Ross v Long, 219-471; 258 NW 94

Motion — adjudication. A hearing on the merits of a motion to dissolve an attachment

I MOTION TO DISCHARGE IN GENERAL —concluded

on the grounds that movant, and not the principal defendant, was the absolute owner of the property does not necessarily preclude the movant from again presenting and trying out, in the same action, his claim of ownership, on a petition of intervention.

Citizens Bank v Haworth, 208-1100; 222 NW 428

Conclusion affidavit. A debtor who seeks to have tools released from levy does not meet the burden of proof resting upon him by simply asserting the conclusion "that he is a mechanic" and "that said tools are exempt". The facts showing that he is, in fact, a mechanic and the facts showing consequent exemption must be stated.

First N. Bk. v Larson, 213-468; 239 NW 134

Insufficient showing of exemption. An automobile is not shown to be exempt to the head of a family and a resident of this state on the naked assertion "that it is necessary for the owner to use an automobile in the earning of a livelihood".

First N. Bk. v Larson, 213-468; 239 NW 134

Loss of appeal. No appeal will lie from an order discharging a garnishee unless the purpose or intent to appeal is announced at the time of the discharge, even tho the motion to discharge has been taken under advisement by the court, and even tho the garnishing creditor is not present when the order is made; and especially is this true when the garnishing creditor had fair warning of the adverse ruling.

Woods v Brown, 207-944; 223 NW 868

Time to perfect appeal—procedure. Under mandatory statute, a garnishing creditor whose levy is discharged by court order must, when such order is made, announce his intention to appeal therefrom followed by perfection of the appeal within two days, and his noncompliance therewith is fatal.

Sioux Falls Assn. v Henry Field Co., 224-655; 277 NW 284

Motion to dismiss garnishee—burden of sustaining on appeal. On an appeal from an order overruling a motion to dismiss a garnishee, the burden of sustaining the motion was on the garnishee.

Sioux Falls Assn. v Henry Field Co., 226-874; 285 NW 155

Foreign corporations—dissolution and receivership—effect. A foreign decree of dissolution of a corporation, and an order appointing a receiver to wind up its affairs, do not abate an action aided by attachment in this state, because the claim of the receiver of a foreign corporation to its property in this state will not be recognized as against the valid claims of resident attaching creditors.

Watts v Surety Co., 216-150; 248 NW 347

Foreign corporations — dissolution — effect on pending actions. A duly rendered decree of dissolution of a foreign corporation, at the instance of the state under the laws of which said corporation was organized, is, in effect, an executed sentence of death; being such, said decree ipso facto works an abatement, (1) of an unadjudicated action in rem pending in this state against said dissolved corporation, and (2) of garnishment proceeding pending in connection with said action. Under such circumstances, the garnishee may properly move for and be granted an order of discharge.

Peoria Co. v Streator Co., 221-690; 266 NW 548

II AVAILABILITY OF MOTION

Ruling on motion to dismiss—res judicata. A ruling on a motion to dismiss garnishment proceedings on the grounds that the property was in custodia legis and not subject to garnishment was not premature and was res judicata even tho made before the garnishee was examined and the garnishment proceedings completed, when the court had jurisdiction of the parties and subject matter.

Sioux Falls Assn. v Henry Field Co., 226-874; 285 NW 155

Rights asserted by fiduciary of funds. Defendant engaged in business of selling grain on commission for his customers and depositing money in a bank, properly files a motion to discharge attachment by garnishment of such funds as against contention that such motion urged third parties' claims which should have been raised by them in intervening petitions, where defendant asserts his rights, duties, and liabilities as trustee or custodian of funds garnished.

Fidelity & Dep. Co. v Seward, 226-1216; 286 NW 528

Rents and profits not garnishable. A motion to dismiss a garnishment against a receiver should have been sustained on the ground that the receiver was not subject to garnishment for rents and profits when the record showed that the receiver acted under court order in renting property for the benefit of holders of notes against the company in receivership.

Sioux Falls Assn. v Henry Field Co., 226-874; 285 NW 155

Unallowable attachment. An attachment cannot be legally issued in an action against a ward and his property guardian. Not being legally issuable, the writ cannot be legally

levied on the property of the ward, and must be discharged on proper motion.

Reason: The ward's property is in custodia legis.

Shumaker v Bohrofen, 217-34; 250 NW 683; 92 ALR 914

III NONAVAILABILITY OF MOTION

Oral motion at close of testimony. Oral motion to dismiss attachment at close of testimony held properly overruled where no motion to discharge was made as provided in this section.

Collings v Gibson, (NOR); 220 NW 338

12141 Perfecting appeal from order of discharge.

Loss of appeal. No appeal will lie from an order discharging a garnishee unless the purpose or intent to appeal is announced at the time of the discharge, even tho the motion to discharge has been taken under advisement by the court, and even tho the garnishing creditor is not present when the order is made; and especially is this true when the garnishing creditor had fair warning of the adverse ruling.

Woods v Brown, 207-944; 223 NW 868

Timely appeal. Where, under stipulation, a garnishment proceeding is transferred to equity along with the controversy between different parties as to the ownership of the money sought to be condemned, and the entire matter there tried as an equity cause, an appeal from the final decree need not be perfected within two days as provided by statute in attachment proceedings.

Hoyer v Jordan, 208-1256; 224 NW 574

Execution—attachment procedure inapplicable. The statutory provision for preserving a lien under attachment notwithstanding an order discharging the attachment by announcing an appeal and perfecting the same within two days, has no application to an order discharging a levy under execution.

Hewitt v Cas. Co., 212-316; 232 NW 835

Garnishment — uncontested order — appeal requirements not waived. The fact that a receiver in a foreclosure proceeding does not resist an order, directing him to withhold sufficient funds to satisfy a judgment creditor, will not amount to an adjudication of creditors' rights in the funds nor constitute a waiver of the statute regulating time to appeal from a release of a garnishment, nor confer jurisdiction on the appellate court to review the dismissal of the garnishment proceedings, since such jurisdiction cannot be conferred by consent of the parties.

Sioux Falls Assn. v Field Co., 224-655; 277 NW 284

Garnishment—dissolution—perfection of appeal. Under mandatory statute, a garnishing creditor whose levy is discharged by court order must, when such order is made, announce his intention to appeal therefrom followed by perfection of the appeal within two days, and his noncompliance therewith is fatal.

Sioux Falls Assn. v Field Co., 224-655; 277 NW 284

12143 Liberal construction—amendments.

Statutory origin—common law. Principle reaffirmed that proceedings in attachment are of statutory origin only, and in derogation of the common law.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Substituting new bond. A new bond, sufficient in amount, may, after levy, be substituted for an original bond which was insufficient in amount.

Carson & Co. v Long, 219-444; 257 NW 815

CHAPTER 513

GARNISHMENT

12157 How effected—notice.

ANALYSIS

I JURISDICTION

Special appearance—jurisdiction as sole question. Jurisdiction of the court is the only question which can be tried out on special appearance. So held where attempt was made, on such appearance, to try out the question whether attached property was exempt from attachment or execution levy.

Scott v Wamsley, 215-1409; 245 NW 214

Judgment—equitable relief—erroneous finding against garnishee. Concede that a finding by the court that the garnishee was indebted to the defendant in attachment was erroneous,

nevertheless such fact furnishes no basis for enjoining the enforcement of the judgment entered on such finding, when the court was proceeding under fully acquired jurisdiction.

Farmers Union Exch. v Iowa Adj. Co., 201-78; 203 NW 283

II PERSONS AND PROPERTY SUBJECT TO GARNISHMENT

Discussion. See 13 ILR 164—Garnishment of alimony

Unmatured and contingent debt. Principle reaffirmed that a person is not garnishable on a debt which is not due and payable and which, under a certain contingency, will never be payable.

Malone v Moore, 208-1300; 227 NW 169

Alimony not debt "to become due". The defendant in a decree for alimony (assuming such decree to create a "debt") is not garnishable on an installment which is unmatured on the date of the garnishment, and the maturity of which will be wholly defeated by the death of the plaintiff in alimony before the maturity date as provided by the decree.

Malone v Moore, 204-625; 215 NW 625; 55 ALR 356

Decree for alimony. A decree for alimony in fixed monthly payments does not create a "debt". It follows that the defendant in alimony cannot be legally garnished for unpaid installments as a debtor of the plaintiff in alimony, even tho the claim on which the garnishment is based is for necessaries sold to the plaintiff in alimony since the entry of the decree and in reliance on said decree.

Malone v Moore, 212-58; 236 NW 100

Allowance for children. Money awarded to a mother in a decree of divorce "for the support and maintenance" of her minor children, is not subject to process of garnishment under a personal judgment against the mother.

Peck v Peck, 207-1008; 222 NW 534

Special deposit superior to garnishment. Money deposited or caused to be deposited by a depositor in a bank for the sole use and benefit of a bona fide creditor of the depositor, and under an agreement to that effect between the depositor and said creditor, of which arrangement the bank had full knowledge, constitutes a special deposit. It follows that a subsequent garnishment of the fund is subject to the prior rights of the creditor for whom the deposit was made.

Hamilton v Imes, 216-855; 249 NW 135

Deposits—changing into special trust deposit. A seizure by garnishment proceedings of a general bank deposit, followed (1) by a direction by the garnishing plaintiff to the garnishee bank to hold said deposit in a named amount (which was 150% of the amount sued for), and (2) by an answer by the garnishee in accordance with said direction, does not have the legal effect of changing said sum from the status of a general deposit to the status of a special deposit—to the status of a trust fund—with consequent right to preferential payment in case the bank becomes insolvent.

Andrew v Bank, 220-712; 263 NW 495

Property in custodia legis. Property in custodia legis is not garnishable in the absence of an authorizing statute.

Malone v Moore, 208-1300; 227 NW 169

Custodia legis. A ruling on a motion to dismiss garnishment proceedings on the grounds that the property was in custodia legis and not subject to garnishment was not premature and was res judicata even tho made before the garnishee was examined and the garnishment proceedings completed, when the court had jurisdiction of the parties and subject matter.

Sioux Falls Assn. v Henry Field Co., 226-874; 285 NW 155

Garnishment of receivers. A receiver is ordinarily exempt from garnishment because the funds in his possession are in custodia legis, but if he has funds which he is not authorized to possess under the order appointing him or which are not the property of the estate for the preservation of which he was appointed, such property is subject to garnishment.

Sioux Falls Assn. v Henry Field Co., 226-874; 285 NW 155

Creditor's rights against receiver. When a company in receivership had no right to property in the possession of the receiver at the time of a garnishment, the rights of the garnishing creditor against the receiver-garnishee could be no greater than the rights of the company.

Sioux Falls Assn. v Henry Field Co., 226-874; 285 NW 155

Rents and profits. A motion to dismiss a garnishment against a receiver should have been sustained on the ground that the receiver was not subject to garnishment for rents and profits when the record showed that the receiver acted under court order in renting property for the benefit of holders of notes against the company in receivership.

Sioux Falls Assn. v Henry Field Co., 226-874; 285 NW 155

Trustees and trust funds. A trustee cannot be made a garnishee by a creditor of the cestui que trust when, at the time of garnishment, the net income only of the trust is (under the terms of the trust) payable to the cestui, and then only on his optional demand, and when such net income was not only then

undeterminable, but the cestui had not exercised his option to demand it.

Darling v Dodge, 200-1303; 206 NW 266

Trustee without funds. Where an estate was, under a decree of divorce, owing a divorcee on the last day of a month an installment of alimony payable through a trustee, and where the executor failed to make a deposit with the trustee to meet said payment, held, that the trustee was not garnishable as a debtor of the divorcee, even tho such trustee had on hand estate funds which had been deposited for another purpose, but out of which the trustee had no right to make such payment of alimony.

Malone v Moore, 208-1300; 227 NW 169

Wrongful payment by trustee — effect. Where an estate was, under a decree of divorce, owing a divorcee on the last of a month an installment of alimony payable through a trustee, and where the executor failed to make a deposit with the trustee to meet said payment, nevertheless the executor is not garnishable as a debtor of the divorcee when the trustee, without authority, had, prior to the garnishment of the executor, paid the divorcee in full out of other estate funds in his possession, such wrongful payment having been ratified by the executor.

Malone v Moore, 208-1300; 227 NW 169

Matured debt due from trustee. Where an order of court directed a special administrator to deposit with a trustee on the last day of each month, a stated sum and directed the trustee to pay said sum forthwith to the former wife of the deceased if she be then living, held that the trustee was garnishable on the last day of a month as a debtor of the wife, she being then alive; and in such case it is of no consequence that the special administrator had made a premature and excessive deposit with the trustee, for the purpose of complying with the order.

Malone v Moore, 208-1300; 227 NW 169

Right to income from trust dependent on election or demand by cestui. A trust which provides that the income therefrom shall be paid to a named beneficiary "from time to time as she may elect during her lifetime" effectually places said income beyond the reach of the creditors of said beneficiary so long as said beneficiary makes no such election. Evidence held to show an election as to one monthly payment.

Ober v Dodge, 210-643; 231 NW 444

Spendthrift trusts. If the terms of a trust provide that the income be applied to the cestui at the discretion of the trustee, or the income is payable to the cestui at his demand, or the trust is for a special purpose, or in general where no debt is owed the cestui by the trustee, the creditors of the cestui cannot appropriate the benefaction.

Standard Chemical v Weed, 226-882; 285 NW 175

Spendthrift trust — creditor's rights in. When the testator's will created a trust for his son, providing that the proceeds of the trust be paid to the son "yearly or oftener if collected for shorter periods," and contained no words showing an intent to place the trust income beyond the reach of the son's creditors, a debt due the son from the trustee was created, which was a vested right which could be assigned and was subject to claims of creditors.

Standard Chemical v Weed, 226-882; 285 NW 175

Renounced legacy. The act of a testamentary beneficiary in executing and making of record an unconditional and final renunciation of all benefits granted him under the will legally places such benefits beyond the reach of his creditors.

Funk v Grulke, 204-314; 213 NW 608

Special administrator. A special administrator is not subject to garnishment on a general claim due from the estate to the defendant in garnishment.

Malone v Moore, 208-1300; 227 NW 169

Administrator—income from life estate. Administrator who was garnished by judgment creditor of decedent's widow, who was life tenant, held liable only for property constituting income of life estate which was in his hands at time of service of notice of garnishment, and not for such income that might come into his hands thereafter.

Yoss v Sampson, (NOR); 269 NW 22

Judgment creditor dead—when garnishment judgment void. Where, after the testate death of a judgment creditor, two of his eight beneficiaries secure an execution on the judgment, garnish the judgment debtor's interest in an estate, and take a judgment under the garnishment proceedings applying the proceeds to the original judgment, an order thereafter quashing the execution and the return thereon for nonconformity to statute also invalidates the garnishment judgment.

Gohring v Koonce, 224-1186; 278 NW 283

III WRIT

No annotations in this volume

IV NOTICE

Insufficiency cured by appearance. The appearance of a garnishee in response to a pleading controverting his answer renders the sufficiency of the notice of garnishment quite immaterial.

Farmers Exch. v Iowa Adj. Co., 201-78; 203 NW 283

V SERVICE

No annotations in this volume

VI RETURN

Return of answer—jurisdiction—notice unnecessary. A garnishee who makes answer to the garnishing officer, even tho all indebtedness is unequivocally denied, is in court, on due return of said answer, and is not entitled to notice of the controverting of said answer by the execution plaintiff and of the hearing on said controverting pleading.

Iowa Stock Remedy Co. v Broderson, 201-1039; 203 NW 386

VII LIEN OF GARNISHMENT

Unmatured crops. A judgment creditor of a landlord by garnishing the tenant acquires no lien on the crop share which, after the maturity of the crop, will belong to the landlord.

Rodgers v Oliver, 200-869; 205 NW 513

Garnishment carries statutory lien. A judgment creditor, by perfecting a garnishment of the tenant of the judgment debtor, legally steps into the shoes of the latter, armed with full power, if the tenant-garnishee's debt is for rent, to enforce, by appropriate action, the landlord's lien theretofore held by the judgment debtor.

Kinart v Churchill, 210-72; 230 NW 349

Mortgage on crop-share rent superior to garnishment of tenant. The lien of a chattel mortgage on a landlord's share of crops reserved as rent, but in the possession of the tenant, is, as to matured crops actually set aside to the landlord or otherwise actually determined as belonging to the landlord, superior to a subsequent garnishment of the tenant by a judgment creditor of the landlord.

Pierre v Pierre, 210-1304; 232 NW 633

No lien acquired. No lien is acquired by a garnishment.

Pierre v Pierre, 210-1304; 232 NW 633

Priority over receivership. The receiver of a defunct corporation takes the property of the corporation subject to the prior positive rights acquired by a creditor under a duly perfected garnishment of the admitted debtors of the corporation.

Watts v Surety Co., 216-150; 248 NW 347

Proceeds from sale under chattel mortgage. A chattel mortgagee who consents to a sale of the mortgaged property on condition that the proceeds be paid to him acquires a right to such proceeds superior to the rights of the garnishing creditor of the mortgagor.

Scurry v Quaker Oats Co., 201-1171; 208 NW 860

VIII LIABILITY OF GARNISHEE

No presumption of liability. The liability of a garnishee must not be presumed, and the right of the garnishing creditor cannot be superior to those of the principal defendant.

Davis v Paul, 205-491; 218 NW 276

Corporation as garnishee—procedure. A corporation may be validly garnished by serving the notice of garnishment on an agent employed in the office of the corporation in the general management of the corporation's business, e. g., on one employed as a bookkeeper and for general office work, and who looks after the office when the manager is absent, who signs as "cashier" checks issued by the corporation, and who has on occasions, to the knowledge of, and without objection by, the corporation, accepted notice of garnishment on the corporation.

Waterloo Co. v Court, 214-1169; 243 NW 287

Unharvested crop—evidence. On the theory, unquestioned in the trial court, that a tenant-garnishee was liable as garnishee for the value of crops which he willfully refused to harvest in accordance with his contract obligation, no error results from permitting witnesses to testify to the value of the crops if harvested.

Schooley v Efnor, 202-141; 209 NW 408

Rental value—evidence. On the issue whether a tenant-garnishee was liable for the reasonable rental value of land, the reception of evidence of such value will not constitute prejudicial error even tho the record reveals the fact that the rent was fixed by written lease, when the reasonable rental value was fixed at a sum less than that fixed by the lease.

Schooley v Efnor, 202-141; 209 NW 408

IX CLAIMS BY THIRD PERSONS

Beneficiaries' interests in estate funds—attorney's lien—intervention. Where a casualty company secured a judgment against beneficiaries under a will, and issued an execution under which the administrator with will annexed was attached as garnishee, attorneys for the beneficiaries could properly intervene in the garnishment proceedings to assert a claim to the garnished fund for legal services rendered to beneficiaries, in connection with the action by casualty company, which claim was based on written assignment of interests of beneficiaries under said will.

New Amsterdam Co. v Bookhart, 227-1150; 290 NW 61

Mortgagee's right to proceeds. The sale and converting into money of incumbered chattels under agreement between the lienholder, the debtor, and a third party, under which the third party agrees to collect the proceeds and

apply the same on the existing lien, create in the lienholder a right to said proceeds which is superior to garnishments of said third party by the creditors of the debtor.

Korner v McKirgan, 202-515; 210 NW 562

Assignee of claim—priority. An assignment of a bank deposit in an insolvent bank, with notice thereof to the receiver, is prior in right to a subsequent garnishment of the receiver, assuming that the receiver is subject to garnishment.

Newell v Edwards, 208-1214; 227 NW 151

X OPERATION AND EFFECT OF GARNISHMENT, JUDGMENT, OR PAYMENT

Sale under chattel mortgage—proceeds—lien. An agreement between chattel mortgagees and the chattel mortgagor that the mortgaged property shall be sold at public sale and the proceeds turned over to the mortgagees in the order of their liens is valid and enforceable in equity. In other words equity, in order to enforce the agreement, will impress a trust on said proceeds in favor of said mortgagees, even tho the occasion so to do arises in a proceeding at law, to wit, a garnishment.

Jasper Bank v Klauenberg, 218-578; 255 NW 884

Quashing execution—motion—when timely. When innocent third parties are not involved, a motion to quash an execution for nonconformity to statutes, prescribing procedure after death of judgment creditor, is not too late, tho filed four months after the entry of a garnishment judgment to which only two of the eight heirs interested therein were parties. Such garnishment judgment is an incomplete adjudication and not sufficient to warrant payment by the judgment debtor to the two represented heirs.

Gohring v Koonce, 224-1186; 278 NW 283

12158 Who may be garnished.

See annotations under §12157 (II)

Discussion. See 21 ILR 641—Safety deposit boxes

12159 Municipal corporations.

Equitable garnishment against municipality—school district as defendant. A judgment plaintiff may not, as a matter of public policy, maintain against a school district an equitable proceeding to subject to the satisfaction of the judgment funds in the hands of such corporation and belonging to the judgment defendant.

Julander v Reynolds, 206-1115; 221 NW 807

12160 Fund in court.

Custodia legis — burden of proof. If property is not subject to attachment or garnishment because undergoing partition, and, therefore, in the custody of the law, the mover for dissolution must show that no order for distribution has been entered in the partition proceedings.

Carson v Long, 219-444; 257 NW 815

12168 Answer controverted.

Unknown ownership of property. A garnishee who does not know whether the property held by him belongs to the attachment or execution debtor has a right to deny ownership in such debtor and thereby force the garnishing creditor to prima facie proof of such ownership. So held where the property held by the garnishee was cash bail.

Simmons v Beeson, 201-144; 206 NW 667

Declarations of defendant in garnishment. Declarations made by the attachment defendant after the garnishee has been duly served, are not admissible in favor of the garnishee and against the attaching plaintiff.

Schooley v Efnor, 202-141; 209 NW 408

12168.1 Notice of controverting pleadings.

Contrary holding under prior statute.

Iowa Rem. Co. v Broderson, 201-1039; 203 NW 386

Insufficient notice cured by appearance. The appearance of a garnishee in response to a pleading controverting his answer renders the sufficiency of the notice of garnishment quite immaterial.

Farmers Exch. v Iowa Co., 201-78; 203 NW 283

12169 Judgment against garnishee.

Liability of garnishee. See under §12157 (VIII)

Erroneous finding that garnishee was indebted—effect.

Farmers Exch. v Iowa Co., 201-78; 203 NW 283

Fraudulent conveyance—effect. Judgment may not be rendered against a garnishee for the proceeds of exempt personal property fraudulently mortgaged by the mortgagor-owner.

Northwest. Bk. v Muilenburg, 209-1223; 229 NW 813

Judgment in rem—nonmerger of debt sued on. In an action aided by attachment, the entry, on service on defendant by publication, of a judgment in rem against property of the defendant in the hands of a garnishee, does not work a merger in said judgment of the obligation sued on, and thereby deprive the holder of said obligation of the right to proceed against defendant, at a later time, for the recovery of the balance due on said obligation, if there be such balance.

Strand v Halverson, 220-1276; 264 NW 266; 103 ALR 835

Foreign corporations — dissolution — effect on pending actions. A duly rendered decree of dissolution of a foreign corporation, at the instance of the state under the laws of which said corporation was organized, is, in effect, an executed sentence of death; being such, said decree ipso facto works an abatement (1) of an unadjudicated action in rem pending in this state against said dissolved corporation, and (2) of garnishment proceeding pending in connection with said action. Under such circumstances, the garnishee may properly move for and be granted an order of discharge.

Peoria Co. v Streator Co., 221-690; 266 NW 548

Willful destruction of property. Evidence tending to show that a garnishee had, subsequent to garnishment, willfully destroyed the property in his possession belonging to the defendant in garnishment, generates a jury question as to the liability of the garnishee.

Schooley v Efnor, 202-141; 209 NW 408

12170 Notice.

Waiver of notice. When judgment debtors appear in garnishment proceeding and file pleadings, voluntary appearance invoking jurisdiction renders it unnecessary to serve statutory notice of garnishment.

Bookhart v New Amsterdam Co., 226-1186; 286 NW 417

12171 Pleading by defendant—discharge of garnishee.

Foreign corporations — dissolution — effect on pending actions. A duly rendered decree of dissolution of a foreign corporation, at the instance of the state under the laws of which said corporation was organized, is, in effect, an executed sentence of death; being such, said decree ipso facto works an abatement (1) of an unadjudicated action in rem pending in this state against said dissolved corporation, and (2) of garnishment proceeding pending in connection with said action. Under such circumstances, the garnishee may properly move for and be granted an order of discharge.

Peoria Co. v Streator Co., 221-690; 266 NW 548

Rents and profits not garnishable. A motion to dismiss a garnishment against a receiver should have been sustained on the ground that the receiver was not subject to garnishment for rents and profits when the record showed that the receiver acted under court order in renting property for the benefit of holders of notes against the company in receivership.

Sioux Falls Assn. v Henry Field Co., 226-874; 285 NW 155

12172 When debt not due.

Contingent debt. A garnishee is properly discharged when he is a trustee holding funds for the payment of a debt which has not matured at the time of garnishment, and which, under a certain contingency will never mature and be payable to the defendant in execution.

Malone v Moore, 208-1300; 227 NW 169

Nonmatured debt — liability of garnishee. On a judgment against a garnishee on a debt not yet due, execution must be suspended until the debt is due.

Popofsky v Wearmouth, 216-114; 248 NW 358

12174 Judgment conclusive.

Judgment conclusive. See under §12157

12175 Docket to show garnishments.

Judgment in rem—nonmerger of debt sued on. In an action aided by attachment, the entry, on service on defendant by publication, of a judgment in rem against property of the defendant in the hands of a garnishee, does not work a merger in said judgment of the obligation sued on, and thereby deprive the holder of said obligation of the right to proceed against defendant, at a later time, for the recovery of the balance due on said obligation, if there be such balance.

Strand v Halverson, 220-1276; 264 NW 266; 103 ALR 835

12176 Appeal.

Loss of right to appeal. No appeal will lie from an order discharging a garnishee unless the purpose or intent to appeal is announced at the time of the discharge, even tho the motion to discharge has been taken under advisement by the court, and even tho the garnishing creditor is not present when the order is made; and especially is this true when the garnishing creditor had fair warning of the adverse ruling.

Woods v Brown, 207-944; 223 NW 868

Dissolution—time to perfect appeal—procedure. Under mandatory statute, a garnishing creditor whose levy is discharged by court order must, when such order is made, announce his intent to appeal therefrom followed by perfection of the appeal within two days, and his noncompliance therewith is fatal.

Sioux Falls Assn. v Field Co., 224-655; 277 NW 284

Motion to dismiss garnishee—burden on appeal. On an appeal from an order overruling a motion to dismiss a garnishee, the burden of sustaining the motion was on the garnishee.

Sioux Falls Assn. v Field Co., 226-874; 285 NW 155

Estate funds—attorney's lien—intervention. Where a casualty company secured a judgment against beneficiaries under a will, and issued an execution under which the administrator

with will annexed was attached as garnishee, attorneys for the beneficiaries could properly intervene in the garnishment proceedings to assert a claim to the garnished fund for legal services rendered to beneficiaries, in connection with the action by casualty company, which claim was based on written assignment of interests of beneficiaries under said will.

New Amsterdam Co. v Bookhart, 227-1150; 290 NW 61

CHAPTER 514

REPLEVIN

12177 Where brought—petition.

ANALYSIS

Replevin conditioned on notice. See under §§11698, 12117, Vol I

I REPLEVIN IN GENERAL

Replevin in lieu of action for conversion. A plaintiff, it is true, may not employ an action of replevin in order to recover for a conversion, but plaintiff may maintain a good-faith action in replevin against a levying officer when the officer had possession of the property when plaintiff served his notice of ownership, and when the officer received an indemnifying bond, even tho the officer had parted with possession under an order of court before the replevin action was actually commenced.

Dvorak v Avery, 208-509; 225 NW 947

Noninconsistent remedies. The commencement of an action of replevin to recover the possession of promissory notes does not constitute the election of a remedy which will preclude the subsequent filing of a substituted petition presenting the controversy in the form of an action in equity.

Pickford v Smith, 215-1080; 247 NW 256

Foreclosure—replevin pending. The right of a mortgagee to foreclose a chattel mortgage by notice and sale (1) under the statute (Ch 523, C., '31), or (2) under the terms of the mortgage itself, may not be transferred to the district court on the application of the mortgagor on the ground of fraud and want of consideration in obtaining the mortgage, when an action of replevin involving the mortgaged chattels, and pending against the mortgagor furnishes him ample opportunity to test the mortgagee's right to foreclose by interposing said plea of fraud and want of consideration.

McDonald v Johnston, 218-1352; 256 NW 676

II PROPERTY SUBJECT TO REPLEVIN

Sale of goods—unenforceable contracts. Replevin for the possession of an existing article of personal property cannot be maintained when the action is based solely on an oral contract of purchase which is clearly within the statute of frauds, and under which contract title necessarily did not pass.

Lockie v McKee, 221-95; 264 NW 918

Absence of annexation or connection of fixtures—effect. An oil tank buried entirely in the parking of a public street and covered with cement, and a pump connected with said tank and bolted into said cement, tho wholly used in connection with the operation of an automobile service garage on a lot abutting said street and adjacent to said tank and pump, do not become fixtures to said lot (1) when said tank and pump are in no manner in contact with said lot or with any building thereon or fixture thereof, and (2) when the parties to the original installation distinctly intended that the title to said tank and pump should remain in the party installing them, the latter not being the owner of said lot.

McCoun v Drews, 221-227; 265 NW 160

Collection of estate—discovery—automobile replevied after testator's death. An automobile finance company, as conditional seller, may not replevy automobiles immediately after the death of conditional buyer having absolute ownership and possession at the time of his death, since the right to possession of all personal property for administration purposes passed to executor, who, in a proceeding to discover probate assets, may recover the automobiles or their value from such conditional seller, whose proper remedy should have been the filing of a claim against the administrator.

In re Sweet, 224-589; 277 NW 712

Deed deliverable after death. Whether replevin is the proper remedy to recover a deed executed but not deliverable until after grantor's death, quaere.

Orris v Whipple, 224-1157; 280 NW 617

Constructive severance doctrine inapplicable to movable chattel. When a tenant purchases an electric lighting plant on agreement with the landlord that he may take it with him upon termination of the tenancy, and when, at the termination of such tenancy, the tenant

II PROPERTY SUBJECT TO REPLEVIN—concluded

purchases the reversion, there is no occasion to apply the doctrine of constructive severance, because the plant maintained at all times its character as a movable chattel.

Equitable v Chapman, 225-988; 282 NW 355

Fixtures—farm light plant—not part of realty. In a replevin action for a lighting plant placed on a concrete block in the basement of a farm house, such electric plant is not essential to the main business of operating the farm, but is a mere convenience, and is not a part of the realty when it is easily removable, along with the batteries resting on a shelf, and without damage to the house, the wiring being capable of use with any other electrical installation, and when there is no evidence of an intent that it be permanently fixed.

Equitable v Chapman, 225-988; 282 NW 355

Purchase of car—wife not joining in chattel mortgage—payment by employer. Where defendant was unable to meet payments on car, and employer, under an agreement with defendant, made delinquent and future payments to the finance company and took an assignment of the note and chattel mortgage, the employer was entitled to the possession of the car as against contentions that intervenor (defendant's wife) did not join in the execution of the chattel mortgage, that the assignment to employer did not create any right or lien sufficient to sustain writ of replevin, and that the payments made by the employer constituted a satisfaction and payment and not a purchase of the chattel mortgage.

Simpson v McConnell, 228- ; 291 NW 862

Repossessed motor vehicles—no retaking on ground that conditional sale usurious. A replevin action to retake a motor vehicle covered by, and repossessed under, a conditional bill of sale, is not maintainable on the ground that the conditional bill of sale was allegedly usurious. The debt in the conditional bill of sale is valid and still exists even tho a usury penalty attaches.

Hill v Rolfsema, 226-486; 284 NW 376

III DEMAND, PAYMENT, OR TENDER

Want of demand. Replevin will not be abated for want of demand on defendants for possession prior to the institution of the action (1) when one defendant had incapacitated himself from complying with a demand, and (2) when the other defendant asserted unqualified title against the plaintiff.

Hart v Wood, 202-58; 209 NW 430

When tender unnecessary. In an action of replevin based on a conditional sale contract which provides for possession by the vendor in case of condition broken, tender of payments already made is not a condition precedent to the institution of the action.

Schmoller Piano v Smith, 204-661; 215 NW 628

Continued tender—materiality. Plaintiff in replevin action may elect to take money judgment in lieu of return of property. A continued tender of defendant can be material only on question of cost or right to judgment for value of property.

Prehn v Kindig, (NOR); 232 NW 812

IV JURISDICTION, VENUE, AND PARTIES

Collection of estate—discovery—automobile replevied after testator's death. An automobile finance company, as conditional seller, may not replevy automobiles immediately after the death of conditional buyer having absolute ownership and possession at the time of his death, since the right to possession of all personal property for administration purposes passed to executor, who in a proceeding to discover probate assets may recover the automobiles or their value from such conditional seller, whose proper remedy should have been the filing of a claim against the administrator.

In re Sweet, 224-589; 277 NW 712

Justices of the peace—exceeding amount—replevin a nullity. Under the statute allowing an enlarged jurisdiction for a justice of the peace up to $300 by written agreement, he is without authority to issue a writ of replevin for automobiles whose value exceeds such amount limiting his jurisdiction.

In re Sweet, 224-589; 277 NW 712

V PETITION

Replevin—substituted petition in equity—mandatory transfer. A plaintiff who, as the maker of promissory notes, brings an action of replevin against the holder, and obtains possession of the notes on the ground of fraudulent representations and want and failure of consideration in the inception of the notes, and who, without his legal right so to do being questioned, thereupon files an amended and substituted petition in equity praying the cancellation of the notes on the grounds pleaded in the replevin action, is entitled to a transfer to the equity docket and to a trial in equity. This is true because of the favorable rule in equity that fraudulent representations may be established without proof of scienter.

Pickford v Smith, 215-1080; 247 NW 256

VI ANSWER

General denial—chattel mortgage not admissible thereunder in replevin action. General denial puts in issue only facts pleaded in the petition. So, under a general denial to a replevin action for an automobile, evidence of a prior mortgage is properly excluded, when

not pleaded, inasmuch as, under a general denial, the court is not called upon to decide which lien is first but only the question of whether plaintiff is entitled to possession.

General Motors v Koch, 225-897; 281 NW 728

VII ISSUE, PROOF, AND VARIANCE

Unsupported issue of partnership. In an action of replevin for two articles, of which plaintiff was the absolute owner of one and the holder of a chattel mortgage on the other, defendant's issue of partnership is properly rejected when supported only by a showing that the parties had temporarily shared equally in the net earnings of the two articles.

Dieter v Coyne, 201-823; 208 NW 359

Pleading and evidence. Plaintiff in replevin, in order to recover, must show, by the strength of his own title, that, when the writ was issued, he was entitled to the possession of the property in question. Evidence held quite insufficient so to show.

Chorpening v Nickerson, 223-791; 273 NW 843

Decedent's gift to sister—executor's burden. In a replevin action for property held under claim of gift, plaintiff has the burden throughout the trial to establish right to immediate possession.

Wilson v Findley, 223-1281; 275 NW 47

VIII EVIDENCE

Allegation of ownership. Evidence reviewed, and held, plaintiff's allegation of unqualified ownership in himself of the property involved in an action of replevin was sufficiently proven.

Luther v Inv. Co., 222-305; 268 NW 589

Mental competency and elements of gift—when jury question. In a replevin action by executor against decedent's sister to recover property held under claim of gift inter vivos from decedent, where clear, cogent, definite, and convincing evidence conclusively established mental competency and all the essential elements of a completed gift inter vivos appear without conflict, no jury question is presented.

Wilson v Findley, 223-1281; 275 NW 47

Conditional sales — replevin of automobile conditionally sold under "trust receipt". Trust receipt for automobile delivered by a finance company was in effect conditional sale when accompanied by promissory note and agreement to return the automobile on demand. Held, in a replevin action the finance company sustained its burden to prove its right to immediate possession by a showing of default in payment, which gave the right to possession.

General Motors v Koch, 225-897; 281 NW 728

Election to take money judgment or property —tender by defendant. Plaintiff in replevin action may elect to take money judgment in lieu of return of property. A continued tender of defendant can be material only on question of cost or right to judgment for value of property.

Prehn v Kindig, (NOR); 232 NW 812

IX TRIAL

Nonright to directed verdict. A plaintiff in replevin claiming possession under a chattel mortgage and met by the mortgagor defendant with a plea of (1) general denial and (2) fraud in the execution of the mortgage is not entitled to a directed verdict upon the withdrawal by the court of the plea of fraud, the record revealing evidence that the defendant never had title to the property. Plaintiff must proceed and recover on the strength of his own title.

Conway v Alexander, 200-705; 205 NW 351

Instructing on basis of counsel's admissions. The court is not in error in peremptorily instructing in an action of replevin that plaintiff is entitled to the immediate possession of all property claimed by him (except specifically enumerated articles) when said instruction is in strict accord with the explicit admission in court of defendant's counsel, tho no such admission appears in defendant's answer.

Luther v Inv. Co., 222-305; 268 NW 589

Decedent's gift to sister—executor's burden to recover. In a replevin action for property held under claim of gift, plaintiff has the burden throughout the trial to establish right to immediate possession.

Wilson v Findley, 223-1281; 275 NW 47

Limiting damages—issue not raised in trial. Where an action in replevin by one claiming an automobile under a conditional sales contract was brought against a chattel mortgagee who had given some cash and extended credit in return for his mortgage, the plaintiff, having permitted the trial to be concluded on the issue of possession without raising any other issue or requesting instructions on any other issue, could not complain that the mortgagee's recovery should have been limited to the amount of actual cash given for the mortgage.

C. I. T. Corp. v Furrow, 227-961; 289 NW 697

Res judicata—acquittal of crime—nonconclusive as to payment in civil action. Where a contract for bailment of cattle provided for their purchase at a stipulated price and also provided for their surrender on demand if not paid for, and where defendant had been acquitted of a forgery charge based on a forged "Paid" stamp giving the appearance the contract price had been paid, his acquittal, when interposed in a replevin action for the cattle, was not res judicata on the issue of payment and did not bar the replevin action.

Bates v Carter, 225-893; 281 NW 727

12178 Ordinary proceedings—joinder or counterclaim.

Replevin nontransferable. An action in replevin, insofar as plaintiff claims a lien on the property replevied may not be transferred to equity.

Commer. Credit v Hazel, 214-213; 242 NW 47

Replevin—unallowable transfer to equity. An action of replevin involving mortgaged chattels, and wherein the only issue joined is that of fraud and want of consideration in the execution of the mortgage, cannot be legally transferred to equity for the equitable foreclosure of the mortgage.

McDonald v Johnston, 218-1352; 256 NW 676

12183 Writ issued.

Abuse of process.

Myers v Watson, 204-635; 215 NW 634

Justices of the peace—exceeding amount—replevin a nullity. Under the statute allowing an enlarged jurisdiction for a justice of the peace up to $300 by written agreement, he is without authority to issue a writ of replevin for automobiles whose value exceeds such amount limiting his jurisdiction.

In re Sweet, 224-589; 277 NW 712

12191 Return of writ.

Belated return. Failure to make timely return does not invalidate the writ.

Gibson v Collings, 200-721; 205 NW 304

12192 Assessment of value and damages—right of possession.

Demand and refusal—evidence—jury question. The innocent possessor of personal property is not, because of such possession, liable in damages to one who is entitled to the immediate possession of said property unless he refuses, on demand of the latter, to surrender the property. Evidence reviewed and held to present a jury question on the issue of demand and refusal.

Luther v Inv. Co., 222-305; 268 NW 589

Verdict—forms on submission. Forms of verdict reviewed and held unobjectionable.

Luther v Inv. Co., 222-305; 268 NW 589

12193 Judgment.

Failure to fix value. An unsuccessful defendant in replevin who, under a delivery bond, has retained the property in his possession, may insist that the judgment show the value of the property, provided that he is prejudiced by the failure of the judgment to so show.

Hart v Wood, 202-58; 209 NW 430

Officers and agents—liability for corporate tort. The managing officer of a corporation who causes the corporation of which he is such officer wrongfully to withhold personal property from a person who is entitled to the immediate possession of said property, is guilty of a tort, and is personally liable for said tort along with his said corporation.

Luther v Inv. Co., 222-305; 268 NW 589

12195 Plaintiff's option.

When money judgment effective. That part of a judgment in replevin which provides a money judgment in event that the possession of the property cannot be obtained, becomes immediately effective (or at least authorizes the judgment plaintiff to so treat it) (1) when a demand for possession is made and refused, or (2) when the judgment defendant has by his own acts incapacitated himself from returning the property in a substantially undepreciated condition, compared with the condition when he took it.

Brown Co. v Motor Co., 200-913; 205 NW 841

Election to take money judgment or property—tender by defendant. Plaintiff in replevin action may elect to take money judgment in lieu of return of property. A continued tender of defendant can be material only on question of cost or right to judgment for value of property.

Prehn v Kindig, (NOR); 232 NW 812

Improper fixing of value. The fact that in replevin the court fixes the value of the property, instead of submitting such issue to the jury, becomes of no consequence when the plaintiff availed himself of the right to take the actual property.

Schmoller Piano v Smith, 204-661; 215 NW 628

Absence of annexation or connection of fixtures—effect. An oil tank buried entirely in the parking of a public street and covered with cement, and a pump connected with said tank and bolted into said cement, tho wholly used in connection with the operation of an automobile service garage on a lot abutting said street and adjacent to said tank and pump, do not become fixtures to said lot (1) when said tank and pump are in no manner in contact with said lot or with any building thereon or fixture thereof, and (2) when the parties to the original installation distinctly intended that the title to said tank and pump should remain in the party installing them, the latter not being the owner of said lot.

McCoun v Drews, 221-227; 265 NW 160

CHAPTER 515
LOST PROPERTY

12204 Lost goods or money.

Noninconsistent statutes. The statutory provision that the finder of lost goods shall make restitution to the owner if known is not inconsistent with the statutory provision that the finder shall be paid a stated compensation for making restitution. (§12211, C., '31)

Flood v Bank, 218-898; 253 NW 509; 95 ALR 1168

Buried money—unknown ownership. Money found buried on land of another is not "lost property" within the meaning of this chapter, when the true owner cannot be found, but comes within the doctrine of "treasure-trove", which doctrine is not merged into our statutes, and the finder is entitled to possession as against everyone except the true owner.

Zornes v Bowen, 223-1141; 274 NW 877

12205 When owner unknown.

Buried money—finder entitled. Money found buried on land of another is not "lost property" within the meaning of this chapter, when the true owner cannot be found, but comes within the doctrine of "treasure-trove", which doctrine is not merged into our statutes, and the finder is entitled to possession as against everyone except the true owner.

Zornes v Bowen, 223-1141; 274 NW 877

12206 Advertisement.

Buried money—unknown ownership. Money found buried on land of another is not "lost property" within the meaning of this chapter, when the true owner cannot be found, but comes within the doctrine of "treasure-trove", which doctrine is not merged into our statutes, and the finder is entitled to possession as against everyone except the true owner.

Zornes v Bowen, 223-1141; 274 NW 877

12211 Compensation.

Compensation for finding lost property. The statutory provision that the finder of lost goods shall be paid a named compensation is not violative of the due process clause of the constitution.

Flood v Bank, 218-898; 253 NW 509; 95 ALR 1168

"Lost" goods defined. Money taken from the owner thereof by robbery, and the whereabouts of which money is thereafter unknown to said owner until it is returned to him by one who found it, where the robber had hidden it, constitutes "lost" money within the meaning of the statute which provides compensation to the finder of "lost" money and other property.

Flood v Bank, 218-898; 253 NW 509; 95 ALR 1168

Noninconsistent statutes. The statutory provision that the finder of lost goods shall make restitution to the owner if known (§12204, C., '31) is not inconsistent with the statutory provision that the finder shall be paid a stated compensation for making restitution.

Flood v Bank, 218-898; 253 NW 509; 95 ALR 1168

Noninconsistent statutes. The statutory provision that the finder of lost goods shall be paid a named compensation when he makes restitution to the owner is not inconsistent with the statutory provision that he who unlawfully converts found property to his own use is guilty of larceny. (§13018, C., '31.)

Flood v Bank, 218-898; 253 NW 509; 95 ALR 1168

Statutory reward applicable to national banks. The statute which obligates the owner of lost goods, money, etc., to compensate the finder of such property, is applicable to a national bank as owner, even tho the federal statutes are silent on the subject, as said statute does not impair the efficiency of said bank as a federal, governmental agency.

Flood v Bank, 220-935; 263 NW 321

Offer of reward — insufficient revocation. Where an unincorporated bankers association offered, in the form of a printed poster, a reward for facts leading to the conviction of bank robbers, the act of the cashier of a member bank in removing said poster from his bank and destroying it, and in declining, for his bank, to pay further dues to the association, will not, in and of itself, constitute a revocation of the offered reward, the evident intent of the offerer being to continue the offer for a reasonable time, and the offer being acted on within such time.

Carr v Mahaska Assn., 222-411; 269 NW 494; 107 ALR 1080

Offer by nonlegal entity — liability of members. An incorporated bank which, in effect, represents that it is a member of an association which is offering a reward for information leading to the conviction of bank robbers, thereby obligates itself to pay the reward when, in truth, the association is but a voluntary, unincorporated association.

Carr v Mahaska Assn., 222-411; 269 NW 494; 107 ALR 1080

CHAPTER 516

PROPERTY STOLEN OR EMBEZZLED

12219 Proof of title.

Atty. Gen. Opinion. See '28 AG Op 377

CHAPTER 517

RECOVERY OF REAL PROPERTY

12230 Ordinary proceedings—joinder—counterclaim.

Fraudulent representations—unavailing inspection—effect. The plea that the party complaining of false and fraudulent representations in an exchange of land had inspected the land prior to accepting it, and had full opportunity to learn all relevant facts, must necessarily fall when it is shown that an inspection at said time would not reveal the falsity of the particular representations relied on.

Baumhover v Gerken, 200-551; 203 NW 15

Unallowable counterclaim. A defendant in an action for the recovery of real property whose possession originated in a contract of purchase which has been formally and legally forfeited may not counterclaim for rescission of the contract and for judgment against plaintiff for the amount paid on the contract, and for the value of improvements placed on the property; especially when plaintiff was never a party to said contract.

Detmers v Russell, 212-767; 237 NW 494

Trust in real estate — jurisdictional venue. An action by the beneficiaries of a trust in real estate (located in this state) to compel the trustee holding title to convey the land, in accordance with the terms of the trust agreement, to a newly designated trustee, must be brought and litigated in the county in which the land, or some part thereof, is located. If not so brought, the court is under mandatory duty, on motion for change of venue, to transfer the action to a proper county.

Titus Co. v Kelsey, 221-1368; 268 NW 23

Deed deliverable after death. Whether replevin is the proper remedy to recover a deed executed but not deliverable until after grantor's death, quaere.

Orris v Whipple, 224-1157; 280 NW 617

Deed to ancestor—previous and subsequent chain of title lacking—title not established as against tax deed. In a quiet title action, stipulated evidence that an ancestor of defendant received and recorded a deed to the land from another is insufficient to overthrow plaintiff's tax deed without a further showing of the previous and subsequent chain of title.

Inter-Ocean v Morrison, 225-1336; 283 NW 909

Secondary evidence. Where title to real estate is not in issue, secondary evidence of title is admissible when proper foundation for its introduction has been laid; otherwise, if title is in issue.

Inter-Ocean v Morrison, 225-1336; 283 NW 909

12231 Parties.

Quieting title (?) or action for possession (?). The vendor of lands who has effected a complete forfeiture of a contract of sale may institute action in equity to quiet title, even tho he might have instituted an action at law for possession.

Westerman v Raid, 203-1270; 212 NW 134

Right of possession. A religious organization is not entitled to the unconditional possession of real property of which it is the equitable owner, but the legal title of which is vested in trustees, when the property and the income therefrom are being used and employed, and the property improved, by a duly organized federation of different churches, all with the knowledge, approval, and express authorization of the said equitable owner.

Church v Gardner, 204-907; 215 NW 970

Injunction nonavailable in lieu of possessory action at law. One who claims the possession of realty against another who is in actual possession as a tenant at will may not resort to injunction proceedings to adjudicate his claimed right of possession.

Austin v Perry, 219-1344; 261 NW 615

12232 Title.

Title—nonnecessity to plead. The vendor in an executory contract of sale of land in an action against the vendee to recover possession of the land after the contract has been forfeited need not plead or prove that he has good title to the land.

O'Connor v Hassett, 207-155; 222 NW 530

Right of action and defenses — estoppel. A recorded titleholder who learns that his grantor, without authority, has contracted to sell the property, and thereupon consents that the contract may be consummated provided he —the titleholder—receives the purchase price, is not estopped to insist on his title and right to possession thereunder, by receiving part of said sale price, it appearing that the contract-

ing purchaser had no knowledge of such consent and made no payment in reliance on such consent.

Fitch v Stephenson, 217-458; 252 NW 130

12233 Tenant in common.

Purchase of outstanding lease, etc. One of several tenants in common of the fee to land who, on his own behalf, purchases of a lessee both an outstanding long-time lease on the said land and the building thereon, erected and owned by the lessee under said lease, may not enforce contribution from his co-tenants for his outlay; nor may said co-tenants legally demand the right to make contribution to the purchasing tenant and become tenants in common of the building.

Fleming v Casady, 202-1094; 211 NW 488

12236 Abstract of title.

Abstract of title. The holder of a tax deed need not, in an action to recover the property, attach to his petition an abstract of title showing the chain of title which antedated the tax deed.

Shaffer v Marshall, 206-336; 218 NW 292

12239 Answer.

Burden of proof. A defendant in an action to recover real estate who claims an interest in the land derived from a source other than the plaintiff must plead and prove such interest.

O'Connor v Hassett, 207-155; 222 NW 530

12242 Purchase pending suit.

Lis pendens. See under §11093

12243 Order to enter and survey.

Official survey on court order—evidence sufficient to support confirming report. In an action for reformation of description by metes and bounds in realty mortgages and for their foreclosure, evidence held sufficient to support judgment confirming surveyor's report, where surveyor is permitted to testify, without objection, that he was qualified to make the survey and that the plat of survey prepared by him is a true and correct survey showing the property in question and made in accordance with a previous order of court and such plat, after identification, was introduced in evidence without objection.

State Bank v Mapel, 226-1328; 286 NW 517

12247 Judgment for damages.

Torts — fundamental laws govern liability. The fundamental and underlying law of torts is that he who does injury to the person or property of another is civilly liable in damages for the injuries inflicted.

Montanick v McMillin, 225-442; 280 NW 608

12248 Use and occupation.

Rents as set-off. See under §10128

12249 Improvements set off.

Occupying claimant—loss of remedy. An unsuccessful defendant in an action for the recovery of real property who is afforded no opportunity therein to interpose a claim for permanent improvements (§§12235, 12249, C., '27), must necessarily resort to the occupying claimants' act (§10128 et seq., C., '27) for relief, and when he fails to resort to such remaining and exclusive remedy, and quits and surrenders the premises, he will not be permitted, when subsequently sued on a supersedeas bond growing out of the litigation, to interpose a claim for such improvements as a set-off.

Bigelow v Ins. Co., 206-884; 221 NW 661

12252 Growing crops—bond.

"Matured crops" defined. Crops are matured whenever they have reached such a stage of maturity that they no longer draw sustenance from the soil.

Goldstein v Mundon, 202-381; 210 NW 444

12255 New trial.

New trial generally. See under §11550

Belated presentation. The overruling of a motion for new trial will not be disturbed on appeal when such motion was filed after appeal and issuance of procedendo, and on the ground that the applicant inadvertently overlooked in the trial of the case certain available testimony.

Tutt v Smith, 202-1389; 212 NW 127

Nonapplicability of statute. The statutory provision for new trial in actions for the recovery of real property by ordinary proceedings can have no application to an equitable proceeding to have a deed decreed a mortgage and for an accounting of rents and profits.

Hinman v Sage, 213-1320; 241 NW 406

CHAPTER 519

FORCIBLE ENTRY OR DETENTION OF REAL PROPERTY

12263 Grounds.

ANALYSIS

I FORCIBLE ENTRY AND DETAINER IN GENERAL

Dual forfeitures. A vendor who has initiated a forfeiture of his vendee's contract for an existing default, and commenced an action of forcible entry and detainer, may, pending such proceedings, initiate a forfeiture of the contract for a new and subsequently accruing default, and proceed thereon if he is unsuccessful in the first proceeding.

Cassiday v Adamson, 208-417; 224 NW 508

Vendor and vendee. A vendee who has agreed (1) to pay for the property in monthly installments, and (2) to have the paid installments treated as payment for the use of the property in case the contract is forfeited, becomes, in case of forfeiture, the tenant of the vendor, and may be removed through an action of forcible entry and detainer.

Cassiday v Adamson, 208-417; 224 NW 508
Music v De Long, 209-1068; 229 NW 673

Enjoining action. Injunction will lie to enjoin an action of forcible entry and detention only on a very clear showing that a certain and manifestly irreparable injury will result unless the writ is issued.

Farber v Ritchie, 212-1396; 238 NW 436

Foreclosure (?) or forcible entry and detainer (?). Tho a mortgage extension agreement provides for the execution by the mortgagor to the mortgagee of an absolute deed to the mortgaged premises and for the delivery of the deed and the possession of the premises to the grantee in case of default, yet if the agreement as a whole reveals the intent simply to furnish additional security, it must follow that the relation of landlord and tenant is not created, and that the relation of mortgagor and mortgagee is continued. It follows that, at the expiration of the extension time, forcible entry and detainer will not lie to obtain possession of the premises.

Mickelson v Rehnstrom, 215-1056; 247 NW 275

Appeal—nonright to maintain. Defendant in an action involving the sole question whether he was wrongfully detaining possession of premises after a refusal to pay rent, may not, after voluntarily surrendering possession in compliance with an order of removal, maintain an appeal from said order.

Sherman v Moore, 222-1359; 271 NW 606

Landlord's title—estoppel to dispute. A tenant who remains in undisturbed possession of realty under a lease with an executor, and refuses to quit and surrender said premises at the termination of said lease, may not defend his wrongful possession by or under the plea that the executor had no legal right to lease the land.

Wright v Zachgo, 222-1368; 271 NW 512

Tenancies at will—termination. In a forcible entry and detainer action where the petition alleged a notice dated January 12th terminating a tenancy at will "within 30 days from the date of this notice", such notice being served on January 13th, a demurrer should have been sustained, as only 29 and not the statutory 30 days written notice was given.

Murphy v Hilton, 224-199; 275 NW 497

Lease—husband's oral termination invalid. An oral agreement between the landlord and the tenant-husband, to terminate a joint lease of the husband and wife will not terminate their homestead rights in 40 acres of the land, so as to permit a forcible entry and detainer action, since a homestead can be terminated only in writing by both husband and wife signing the same joint instrument containing a legal description of the homestead.

Wright v Flatterich, 225-750; 281 NW 221

Nonabuse of discretion. In action for forcible entry and detainer, where there was evidence of error in instructions, in that court assumed that an alleged lease was made with agent of plaintiff with authority to make an oral lease, and that court did not specifically define to jury necessary elements of an oral lease, and there was also question that verdict was not supported by evidence, granting new trial held not an abuse of discretion.

Holman v Rook, (NOR); 271 NW 612

Involuntary surrender preserves right of appeal. An involuntary surrender of premises by execution or to avoid forcible removal does not constitute an acquiescence in, and performance of, the judgment such as to waive the right of appeal; however, a voluntary surrender would constitute a voluntary performance of the judgment so that there would be no detainer; the case would be moot; and an appeal would be dismissed.

Schuldt v Lee, 226-189; 284 NW 89

Remedy statutory—injunctive interference by equity limited. The summary remedy of

forcible entry and detainer, and an appeal from a decision therein, are statutory and a court of equity will not interfere in the absence of fraud or mistake or a showing of manifest irreparable injury.

Schuldt v Lee, 226-189; 284 NW 89

Title involved—waiver of right to transfer. A defendant in an action of forcible entry and detainer waives his right to have said action transferred to the district court, on the ground that title to real estate is involved, when, after the commencement of the action and before answer, he enters into a stipulation, as a part of the files in the case, to the effect that if he fails to make specified payments on the real estate in question judgment shall be entered against him for the possession of said premises; likewise he waives such right when, after answer, he moves for such transfer but obtains no ruling on the motion.

Peak v Mulvaney, 215-1400; 245 NW 748

Review—scope and extent—moot case. An appeal from a judgment in forcible entry and detainer proceedings will be dismissed when it is manifest on the record that the lease under which appellant claims has expired, and that he has no further interest in the premises, and that nothing is involved except a matter of costs.

Manning v Heath, 206-952; 221 NW 560

Striking definitely pleaded defense. Definitely pleaded defensive matter should not, manifestly, be stricken from an answer. So held where defendant in forcible entry and detainer definitely pleaded that nothing was due under the contract which plaintiff had assumed to forfeit on the alleged ground that defendant was in arrears on payments.

Meredith v Miller, 209-849; 228 NW 14

II PRIOR POSSESSION BY PLAINTIFF

Injunction nonavailable in lieu of possessory action at law. One who claims the possession of realty against another who is in actual possession as a tenant at will may not resort to injunction proceedings to adjudicate his claimed right of possession.

Austin v Perry, 219-1344; 261 NW 615

III HOLDING OVER

Oral agreement to surrender. A so-called demurrer, to a defendant-lessee's answer of lack of consideration for an oral agreement to surrender the premises, which does not admit the truth of the answer, but in effect denies it, is properly overruled. Such application is not the function of demurrer.

Wright v Flatterich, 225-750; 281 NW 221

IV POSSESSION AFTER EXECUTION SALE

Repurchase option after foreclosure—no defense in forcible entry action. After foreclosure of a mortgage and just prior to the expiration of the period of redemption, a lease and contract giving the mortgagor's heirs then in possession an option to buy the property but providing for monthly rentals to be applied on the purchase price in the event the option is exercised, being neither in the nature of a new mortgage nor re-establishment of the foreclosed mortgage, is subject to demurrer when interposed as a defense to a forcible entry and detainer action.

Wallerstein v Palmer, 224-260; 276 NW 605

V NONPAYMENT OF RENT

Landlord and tenant—rent—writ of attachment—legality. The issuance of a landlord's writ of attachment for rent admittedly due is not rendered unlawful because the tenant subsequently pleads and establishes a counterclaim which cancels the landlord's admitted claim for rent.

Kelp v McManus, 218-226; 253 NW 813

12265 Notice to quit.

Sufficiency. A notice by a landlord to his tenant (whose tenancy has expired) to vacate and surrender the premises forthwith is a sufficient preliminary notice on which to base an action of forcible entry and detainer.

Ashpole v Delaney, 217-792; 253 NW 30

Undue length of service — effect. The written notice to the tenant, to quit and surrender the premises at the expiration of the lease, is not rendered invalid because served on the tenant some seven months prior to the expiration of said lease.

Wright v Zachgo, 222-1368; 271 NW 512

12267 Jurisdiction—transfer—appeal.

Justice assuming jurisdiction. A justice of the peace who, after an action of forcible entry and detainer has been returned to him on a writ of error, enters an authorized order of dismissal, has no jurisdiction, so long as said order of dismissal remains on the docket, to enter in said assumed proceedings "The decision of Justice Jones reversed. Order of removal cancelled."; moreover, assuming jurisdiction, the form of such entry is quite nugatory.

Rasmussen v Alberts, 215-644; 246 NW 620

Involuntary surrender preserves right of appeal. An involuntary surrender of premises by execution or to avoid forcible removal does not constitute an acquiescence in, and performance of, the judgment such as to waive the right of appeal; however, a voluntary sur-

render would constitute a voluntary performance of the judgment so that there would be no detainer; the case would be moot; and an appeal would be dismissed.

Schuldt v Lee, 226-189; 284 NW 89

Remedy statutory — injunctive interference by equity limited. The summary remedy of forcible entry and detainer, and an appeal from a decision therein, are statutory, and a court of equity will not interfere in the absence of fraud or mistake or a showing of manifest irreparable injury.

Schuldt v Lee, 226-189; 284 NW 89

12268 Petition.

Former conflict with municipal court act.

Owens v Smith, 200-261; 204 NW 439

Necessity for plea. There can be no abatement or stay of an action until another action has been determined, when there is no pleading requesting such abatement or stay.

Music v De Long, 209-1068; 229 NW 673

Other action pending. A motion or proceeding for the abatement of an action of forcible entry and detainer, because an equitable action by movant is pending in the district court for relief consequent on the alleged fraud of plaintiff in the forcible detention action, is properly overruled.

Music v De Long, 209-1068; 229 NW 673

12274 Title in issue.

Necessity for issue. A defendant in forcible entry and detainer who tenders therein no issue of title to the property may not contend that title is nevertheless involved because of the pendency of another action separate and different than the action of forcible entry and detainer.

Music v De Long, 209-1068; 229 NW 673

Title—when not in issue. The issue of title is not involved in an action of forcible entry and detainer when admittedly the plaintiff held the legal title, and when the sole controversy centered around the question whether plaintiff had legally forfeited the contract under which defendant was in possession.

Cassiday v Adamson, 208-417; 224 NW 508

Waiver of right to transfer. A defendant in an action of forcible entry and detainer waives his right to have said action transferred to the district court, on the ground that title to real estate is involved, when, after the commencement of the action and before answer, he enters into a stipulation, as a part of the files in the case, to the effect that if he fails to make specified payments on the real estate in question judgment shall be entered against him for the possession of said premises; likewise he waives such right when, after answer, he moves for such transfer but obtains no ruling on the motion.

Peak v Mulvaney, 215-1400; 245 NW 748

12275 Transfer to district court.

Improper transfer from municipal court. In an action in the municipal court to obtain possession of premises after the expiration of the lease between plaintiff as landlord and defendants as tenants, title to the premises cannot properly be injected into the case, as a basis for transfer of the action to the district court, by a plea by an intervenor to the effect that he owns said premises and has an action then pending in the district court to quiet his title.

Braga v Stowell, 219-855; 259 NW 767

Unexercised option to buy real property—title issue unavailable. After foreclosure, a lease and an unexercised repurchase contract option providing for rentals to be applied on the purchase price in the event the option is exercised do not as a defense to a forcible entry and detainer action put title in issue, nor necessitate transfer of the cause to the district court.

Wallerstein v Palmer, 224-260; 276 NW 605

12276 How title tried.

Curing erroneous docketing. The erroneous docketing on the equity side of the calendar of an action of forcible entry and detainer becomes inconsequential when subsequent pleadings put title in issue and thereby convert the original law action into an equitable action.

Suiter v Wehde, 218-200; 254 NW 33

Borrowed defense. It is no defense to an action of forcible entry and detainer that the defendant was holding under a contract for the purchase of the real estate, and that the plaintiff, in assuming to forfeit the contract, had not served notice of the forfeiture on a third party who held an assignment from defendant of the contract as security.

Votruba v Hanke, 202-658; 210 NW 753

12280 No joinder or counterclaim.

Non-allowable counterclaim. A counterclaim has no place in an action of forcible entry and detainer.

Votruba v Hanke, 202-658; 210 NW 753

12282 Appeal or writ of error.

Futility when possession surrendered. It is futile for defendant in an action of forcible entry and detainer to sue out a writ of error after he has been found guilty, and after he has surrendered possession of the premises in controversy.

Rasmussen v Alberts, 215-644; 246 NW 620

Involuntary surrender preserves right of appeal. An involuntary surrender of premises by execution or to avoid forcible removal does not constitute an acquiescence in, and performance of, the judgment such as to waive the right of appeal; however, a voluntary surrender would constitute a voluntary performance of the judgment so that there would be no detainer; the case would be moot; and an appeal would be dismissed.

Schuldt v Lee, 226-189; 284 NW 89

Remedy statutory—injunctive interference by equity limited. The summary remedy of forcible entry and detainer, and an appeal from a decision therein, are statutory, and a court of equity will not interfere in the absence of fraud or mistake or a showing of manifest irreparable injury.

Schuldt v Lee, 226-189; 284 NW 89

12283 Judgment.

Dismissal—effect. A justice of the peace who, after an action of forcible entry and detainer has been returned to him on a writ of error, enters an authorized order of dismissal, has no jurisdiction, so long as said order of dismissal remains on the docket, to enter in said assumed proceedings "The decision of Justice Jones reversed. Order of removal canceled."; moreover, assuming jurisdiction, the form of such entry is quite nugatory.

Rasmussen v Alberts, 215-644; 246 NW 620

Stipulations—enforceability. The court will enforce a duly filed stipulation by the parties to an action of forcible entry and detainer to the effect that if defendant fails to comply with specified conditions judgment shall be entered against defendant for the possession of said premises.

Peak v Mulvaney, 215-1400; 245 NW 748

Appeal—nonright to maintain. Defendant in an action involving the sole question whether he was wrongfully detaining possession of premises after a refusal to pay rent, may not, after voluntarily surrendering possession in compliance with an order of removal, maintain an appeal from said order.

Sherman v Moore, 222-1359; 271 NW 606

Order of removal—when completely executed. An order of removal issued on a judgment rendered in forcible entry and detainer proceedings cannot be deemed fully executed so long as the officer has in his possession on the premises in question personal property of the defendant upon which the officer has levied in order to collect the costs. And this is true tho the defendant has personally been removed from the premises. So held on the question whether the perfecting of an appeal and the obtaining of a stay order by the defendant were timely.

Usailis v Jasper, 222-1360; 271 NW 524

Repeated trespasses on realty—dissolution of injunction. Injunction will lie to restrain a party from trespassing upon and wrongfully resuming possession of real estate from which he has been removed under and by virtue of an order of removal duly issued in forcible entry and detainer proceedings; but if appeal be perfected from said order of removal and stay order obtained, before the said order has been completely executed, the court may properly dissolve the temporary writ.

Usailis v Jasper, 222-1360; 271 NW 524

12284 Restitution.

Writ of error—order of restitution. The district court has no jurisdiction, on writ of error, in an action of forcible entry and detainer, to enter an order restoring the defendant to the possession of the premises in question.

Rasmussen v Alberts, 215-644; 246 NW 620

CHAPTER 520

QUIETING TITLE

12285 Who may bring action.

Discussion. See 23 ILR 233—Action to quiet title

ANALYSIS

Adverse possession. See also under §11007 (XXVIII)

Equitable proceedings applicable. See under §12290

I REMEDY IN GENERAL

Government ownership. Government lands lose by erosion and gain by accretion.

Bigelow v Herrink, 200-830; 205 NW 531

When possession not notice of adverse claim.

Tutt v Smith, 201-107; 204 NW 294; 48 ALR 394

Dual grounds. A party in an action to quiet title may rely both on a will and on an executed oral contract for the land.

Kisor v Litzenberg, 203-1183; 212 NW 343

Broad scope of remedy. An action in equity to quiet title to real estate and for an order ousting defendant from the possession, may be

I REMEDY IN GENERAL—concluded

maintained tho the defendants claim no right, title or interest adverse to plaintiff other than possession as tenants.

Davis v Niemann, 219-620; 258 NW 761

Accretions. The owner of land along the bank of a navigable stream is entitled to accretions to the land even tho such accretions extend over the exact spot where another person formerly owned land eroded by the river, because the complete erosion of land works a complete destruction of the title and of all governmental descriptions pertaining thereto.

Bone v May, 208-1094; 225 NW 367

Accretion — apportionment — estoppel. Riparian land owners interested in accretions to their lands may by agreement, acquiescence, or other conduct, apportion the accretion in a manner and way different than the law would apportion it, and thereby estop themselves, in an action to quiet title, from asserting that land did not pass under their deed because it was not accretion land.

Haynie v May, 217-1233; 252 NW 749

Action to cancel trust deed. An action to cancel a trust deed (which in legal effect is a mortgage), and the lien thereof, and to quiet plaintiff's title to the land is strictly local, and is properly brought in the county in which the land is situated, even tho plaintiff also prays for the cancellation of the promissory notes—a proceeding which would be transitory if separately brought.

Eckhardt v Trust Co., 218-983; 249 NW 244; 252 NW 373

Recovery of realty — jurisdictional venue. An action by the beneficiaries of a trust in real estate (located in this state) to compel the trustee holding title to convey the land, in accordance with the terms of the trust agreement, to a newly designated trustee, must be brought and litigated in the county in which the land, or some part thereof, is located. If not so brought, the court is under mandatory duty, on motion for change of venue, to transfer the action to a proper county.

Titus Co. v Kelsey, 221-1368; 268 NW 23

Strength of plaintiff's title. Principle reaffirmed that plaintiff in an action to quiet title to realty must assume the burden of proof and must recover on the strength of his own title and not on the weakness of that of the defendant.

Lockie v White, 221-1044; 267 NW 671
Bohle v Brooks, 225-980; 282 NW 351

Statutes of limitations—nonapplicability to nonaccepted street. In a quiet title action where land was dedicated but never accepted as street in unincorporated village, the rule that statute of limitations will not run against a municipality exercising a governmental function, does not apply.

Brewer v Claypool, 223-1235; 275 NW 34

Admission by nominal defendant not binding on principal defendant—guardianship. A wife seeking to quiet title in herself by virtue of a deed from her deceased husband, recorded by a trustee after the husband's death, must prevail on the strength of her own title as opposed by her insane son's title, obtained through a deed from her, also in the hands of the trustee, the two deeds being executed at the same time; but she gains nothing because the trustee concedes her title, when the real party in interest, the son, through his guardian, made no such admission in his separate answer.

Bohle v Brooks, 225-980; 282 NW 351

Statutory presumption of validity to tax deeds—no abandonment by pleading later corrective deeds. A defendant in a quiet title action may not claim that the plaintiff by first pleading title by invalid tax deeds, and then amending by pleading second corrective tax deeds, had abandoned the statutory presumption of their validity, nor must he, therefore, resort to the common law to prove his title.

Inter-Ocean v Morrison, 225-1336; 283 NW 909

II WHO MAY MAINTAIN ACTION

Right of election. The vendor of lands who has effected a complete forfeiture of a contract of sale may institute action in equity to quiet title, even tho he might have instituted an action at law for possession.

Westerman v Raid, 203-1270; 212 NW 134

Protection of remainder from execution sale. Principle reaffirmed that a contingent remainderman may maintain an action to protect his contingent interest from execution sale.

Skelton v Cross, 222-262; 268 NW 499; 109 ALR 129

Deed to trustees—grantor's subsequent land contract invalid. An absolute warranty deed subject only to a trust created therein precludes the grantor from later contracting to sell the property to another and will support an action to quiet title in the trustees.

Beemer v Challas, 224-411; 276 NW 60

Supplemental petition after answer—pleading valid second tax deed—first deed defective. Even after answer, a plaintiff relying on tax deeds in a quiet title action, may, after discovering the deeds are invalid, obtain and plead second tax deeds without reserving notice of expiration of redemption, especially when the answer contained, at most, only a conditional offer to pay the taxes and redeem.

Inter-Ocean v Morrison, 225-1336; 283 NW 909

III WHO MAY NOT MAINTAIN ACTION

Bona fide purchaser—who is not. A grantee of land who buys, receives, and goes into possession of the exact land and acreage which he intended to buy cannot be deemed a bona fide purchaser of another tract of which he has never been in possession even tho such other tract was originally an integral part of the land actually purchased.

Taylor v Lindenmann, 211-1122; 235 NW 310

Judgment creditor's deed after mortgage foreclosure. A sheriff's deed issued under execution sale to a judgment creditor, after expiration of the judgment creditor's right of redemption as a defendant junior lienholder in a mortgage foreclosure, is a nullity and will not sustain an action to quiet title thereon.

Bates v Mullins, 223-1000; 274 NW 117

Purchase by drainage district bondholder—validity. The statute relating to fraudulent tax sales does not entitle the owner of the property to quiet title against holders of tax deeds on the grounds that tax deeds are void because purchasers are owners and holders of drainage bonds issued by drainage district in which land is situated without tender of taxes paid, when no claim is asserted that there is any fraud or collusion or conspiracy to defraud, and the question submitted is purely a legal question as to whether bondholders are under a legal disability to acquire title.

Teget v Lambach, 226-1346; 286 NW 522

IV PARTIES

Substitution—irregular practice. A plaintiff who permits his action to quiet title to lie dormant until the defendants are all dead is guilty of very irregular practice in his attempt to obtain a substitution of defendants by filing a purported amendment, not under the title of his pending action, but under a new title, in which the heirs of the deceased defendants are for the first time enumerated and named as the defendants, and, under such title, moving for a substitution of defendants in the old action.

Benjamin v Jackson, 207-581; 223 NW 383

Inheritance taker as "representative" of contingent remainderman. A decree setting aside the probate of a will and canceling said will (the action being instituted in good faith and so tried by all parties thereto) is, on the principle or doctrine of representation, conclusive on remote, contingent remaindermen, even tho they are not parties to the action, or are not served with notice of the action, when those persons are legally before the court who would take the first estate of inheritance under the will; especially is this true when parties of the same class to which the omitted parties belong are also legally before the court.

Harris v Randolph, 213-772; 236 NW 51

See Mennig v Graves, 211-758; 234 NW 189

Separate owners of separate tracts. Various parties, each of whom claims exclusive ownership in separate and different tracts of land formerly held by a railway company as right of way, may join as plaintiffs in an equitable action against said railway company to quiet title in each separate party to the particular tract owned by him.

Duggleby v Railway, 214-776; 243 NW 198

Creditor of estate as intervenor. In an action by an heir against an executor to quiet title in himself to land which the testator purported to devise, a general creditor of the estate has no standing as an intervenor.

Rapp v Losee, 215-356; 245 NW 317

Municipal improvement certificate holder. A party who purchases a municipal improvement certificate, lienable on certain property is not privy to (and therefore not bound by) a subsequently instituted action to quiet title, and the decree entered therein, when he is not made a party to said action.

Hawkeye Ins. v Valley-Des Moines Co., 220-556; 260 NW 669; 105 ALR 1018

Purchaser from estate. When, in the settlement of an estate in probate, a contract of sale of land belonging to the estate is fully consummated by payment and deed, and the sale and conveyance duly approved by the court as by contract required, the purchaser, who is an entire stranger to the estate except as such purchaser, is not a proper, necessary or permissible party to a proceeding in said probate court, instituted by the residuary legatee, to set aside the probate order approving said sale and conveyance.

Reason: The probate court cannot, even in piecemeal, adjudicate the validity of the title of said purchaser.

In re Doherty, 222-1352; 271 NW 609

V DEFENSES

Avoidance of matter first appearing in reply. An answer to a reply seems to be unknown to our practice. But when the defendant in an action to quiet title answers that he is the owner of the property, and is met by a reply that defendant is estopped by his own contract from claiming title, and defendant wishes to plead that said contract was obtained from him by fraud and without consideration, quaere: must defendant plead his said defense (a) by way of amendment to his answer, or (b) does the law impliedly supply such plea?

Carr v McCauley, 215-298; 245 NW 290

Tax sale—notice to redeem—necessity of service on wife of tenant. In action to quiet title acquired under tax deed, statute requiring that notice of expiration of right to redeem from tax sale must be served on the "person in possession" of such real estate before tax deed can issue is not complied with by serving the husband only, where husband

V DEFENSES—concluded

and wife are tenants, the evidence disclosing that wife was also working and that she paid the rent out of her separate wages.

Murphy v Hatter, 227-1286; 290 NW 695

Nonpermissible plea by tenant. In an action to quiet title to lands, a defendant who is in peaceable possession of the premises under a lease from plaintiff will not be permitted to assert that plaintiff had no title when the lease was executed.

McKenney & Seabury v Nelson, 220-504; 262 NW 101

Action against state. Allegations in a petition to quiet title to land and to obtain a writ of possession for said land, (1) that defendants constitute the entire membership of the state board of control—an agency of the state—and (2) that said defendants are wrongfully withholding said possession from plaintiff, furnish no sufficient basis for the holding that said action, in truth and fact, is against the state in its sovereign capacity.

Ia. Elec. Co. v Board, 221-1050; 266 NW 543

Issues under general denial—question of delivery. In an action to quiet title where plaintiff's claim of ownership arose out of a deed deposited with a bank for delivery, and delivered to plaintiff after grantor's death, a general denial puts in issue both the execution and the delivery of the deed.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

VI EVIDENCE

Uncontroverted evidence may be insufficient unless corroborated. Positive evidence of the truth of an all-controlling fact may be insufficient to establish such fact when such evidence is, from its very nature, incapable of contradiction by any other witness, and when, if the evidence be true, corroborative facts necessarily exist, and are not shown. So held where it was sought to trace title through a secret trust.

Nehring v Hamilton, 210-1292; 232 NW 655

Dead man statute—contract with deceased. In an action against an administrator and against a devisee, to quiet title to real estate, plaintiff is wholly incompetent to testify with respect to a contract between the plaintiff and the deceased.

Black v Nichols, 213-976; 240 NW 261

Failure to prove title—effect. A plaintiff in an action to quiet title must necessarily fail when he bases his title both on (1) accretion, and (2) adverse possession and establishes neither; and this, too, irrespective of the weakness of defendant's title.

McFerrin v Wiltse, 210-627; 231 NW 438

See Dubuque v Fischer, 215-433; 245 NW 758

Tax deed—prima facie case. Plaintiff in quiet title action, claiming under tax deed issued by county treasurer, establishes a prima facie case when the tax deed is received in evidence.

Tesdell v Greenwalt, 228- ; 290 NW 676

Deed to ancestor—chain of title lacking—title not established as against tax deed. In a quiet title action, stipulated evidence that an ancestor of defendant received and recorded a deed to the land from another is insufficient to overthrow plaintiff's tax deed without a further showing of the previous and subsequent chain of title.

Inter-Ocean v Morrison, 225-1336; 283 NW 909

Trustee and beneficiary as same person—conveyance to self. A sister, as the only heir in her brother's estate, who conveys by a trust instrument to a nonrelated person her entire interest in such estate, in exchange for the trustee providing her life support, and upon fulfillment of which the trustee became the beneficiary and was directed to convey the balance of the property from himself, as a trustee, to himself, individually, evidence, in trustee-beneficiary's quieting title action against settlor's heirs, held to establish soundness of mind and freedom of action by settlor in executing the trust instrument.

Goodman v Bauer, 225-1086; 281 NW 448

Acquiescence in title by grantor. When the grantor of a warranty deed had acquiesced for five years in the title of the grantee, he could not set aside the deed and quiet title in himself without establishing a plain, clear, and decisive case.

Huxley v Liess, 226-819; 285 NW 216

Permissible cross-examination. In quiet title action brought by the husband of the former owner of land who had continued in possession after her mother had obtained the tax deed under an agreement with the daughter, it was proper to cross-examine the plaintiff as to whether he recalled the time the mother-in-law gave him certain bonds, because of the inference which might be drawn from such testimony as to the purpose for which the mother-in-law acquired the tax deed.

McCormick v Anderson, 227-888; 289 NW 440

Conclusion—material covered in other testimony. In a quiet title action it was not prejudicial to sustain an objection to a question asking the plaintiff if the defendant had made any claim to land at, or prior to, a certain time, when the question asked for a conclusion of the witness, and the witness had answered the question in other testimony.

McCormick v Anderson, 227-888; 289 NW 440

Overcoming presumption from possession—amount of proof. A mere preponderance of the evidence is not sufficient to overcome the

presumption arising from the possession of the legal title to real property. The evidence for that purpose must be clear, convincing, and satisfactory.

Wagner v Wagner, (NOR); 224 NW 583

VII SCOPE AND EXTENT OF RELIEF

Appointment of receiver pending action to quiet title.

Korf v Howerton, 201-428; 205 NW 323

Mere inference of invalidity. A mere alleged inference of fraud or illegality cannot overthrow a deed of conveyance.

Carr v McCauley, 215-298; 245 NW 290

Undecided issue. When plaintiff in an action to quiet title is unable to establish the deed of conveyance and the delivery thereof under which he claims, it is quite immaterial that the court did not decide plaintiff's tendered issue whether defendant was the wife of the alleged grantor.

Blain v Blain, 215-69; 244 NW 827

Parties—fatal defect in parties. In an action by the purchaser of land to quiet title against certain claims for mechanics' liens, the decree confirmed the claims as liens on the land, and ordered said land sold for the payment—at least pro tanto—of said liens, and, in addition, entered personal judgments against a former owner of the land for the amount of each of said claims. Plaintiff appealed from the decree insofar as it established said claims as liens.

Held, the appeal could not be maintained without service of notice of appeal on said former owner.

Gordon-Van Tine Co. v Ideal Co., 223-313; 271 NW 523

Judgment—illegal confession—execution lien—rights of property owners. A "statement of confession", or "cognovit" oftentimes referred to as a "power of attorney" or simply as a "power", is the written authority of the debtor and his direction to the clerk of the district court, or justice of the peace, to enter judgment against him as stated therein and the statutory provision that "the clerk shall thereupon make an entry of judgment" is definite and mandatory, so the mere recording by the clerk of the debtor's admission of indebtedness, confession of judgment, and authorization to the clerk to enter judgment was not the "entry of judgment by confession" required by statute. Execution issued thereon was properly annulled and decree quieting title to land in owners as against execution levy and making permanent a temporary injunction enjoining execution sale was proper.

Blott v Blott, 227-1108; 290 NW 74

VIII DECREE AND ENFORCEMENT THEREOF

Reformation of deed—refusal to surrender advantage. The grantee in a deed of conveyance who has obtained a decree quieting his title on the plea that the deed was in satisfaction of the grantor's prior mortgage on the land may not, while insisting on all the advantages accruing to him under the decree, have the deed so reformed as to include the grantor's homestead, on the claim that the homestead was mistakenly or fraudulently omitted from the deed.

Galvin v Taylor, 203-1139; 212 NW 709

Pendency of another action. Indefinite evidence of the pendency of an action by the defendant as an occupying claimant presents no obstacle to the entry of a decree quieting title in the plaintiff.

Korf v Howerton, 205-534; 218 NW 274

Improvements. In an action to quiet title the court may, on proper pleading and proof, decree a lien on the land in defendant's favor for improvements made in good faith on the property.

Rainsbarger v Rainsbarger, 208-764; 224 NW 45

Persons concluded by decree — unborn contingent remaindermen. The contingent interest in land of the unborn children of a life tenant, arising out of the terms of a testamentary devise, is not cut off by a decree in an action to quiet title by making the life tenant a party defendant as a "representative" of such unborn children; especially so when said life tenant assumes a hostile attitude toward said unborn children.

Mennig v Graves, 211-758; 234 NW 189
See Harris v Randolph, 213-772; 236 NW 51
Mennig v Howard, 213-936; 240 NW 473

Ineffectual reversal. On an appeal from a decree quieting title, the appellant has no standing to ask a reversal when the record reveals the fact that the decree deprived the appellant of nothing, and that a reversal could award him nothing.

Duggleby v Railway, 214-776; 243 NW 198

Absence of issues. A decree quieting title in certain defendants against other defendants cannot be rendered when no issues whatever were joined between said defendants.

Grandy v Adams, 219-51; 256 NW 684

Accretions — construction of decree. A decree quieting title to accretions, and based on adverse possession, will be deemed to quiet title up to the high-water mark of the river in question, even tho when literally and hypercritically construed it seemingly quiets title only to the high-water mark as it existed when

VIII DECREE AND ENFORCEMENT THEREOF—concluded

the action to quiet title was commenced. So held where, pending the action, trial and entry of decree, the river continued to recede.

Harrington v Foster, 220-1066; 264 NW 51

Inadequate pleadings — effect. Title to realty cannot be quieted in a party litigant in the absence of adequate pleadings as a basis for such decree.

Foote v Soukup, 221-1218; 266 NW 904

Reversal — fact theory controlling. On reversal in the supreme court of an equitable action to quiet title, the successful appellant will not be permitted to take decree other than in strict accord with the fact theory on which the action was commenced and prosecuted by appellant, and reversed by the appellate court. This may require the withholding of final decree until appellant returns property which he has received and in which he admittedly has no interest under the fact theory of his action.

McCloud v Bates, 222-1047; 270 NW 373

Virtual representation. All living members of a class, when properly brought into court in an action to quiet title, are deemed (under the doctrine of virtual representation) to represent all after-born persons who would belong to that class.

John Hancock Ins. v Dower, 222-1377; 271 NW 193

Relief—decree beyond issues. In a quiet title action by grantee against grantor's heir and successor in interest, a decree based on a deed containing a declaration of purpose (educational and religious use), goes beyond the issues when it finds the grantee to be the "sole and absolute owner, in fee simple"; the effect being to adjudicate the rights of persons, not before the court, who may have trust interests under the terms in the deed.

Boone College v Forrest, 223-1260; 275 NW 132; 116 ALR 67

Defaulted contract—vendee's deed before decree—invalidity. In a quieting title action against a real estate contract vendee, the decree ends all rights of the vendee under a defaulted contract, and if he deeds to another before the decree, the grantee takes nothing.

Forrest v Otis, 224-63; 276 NW 102

Decree should describe real estate. A description of the real estate should appear in a decree quieting title.

Rance v Gaddis, 226-531; 284 NW 468

IX FACT CASES

Navigable waters—ownership of lands—accretions. The owner of land along the bank of a navigable stream is entitled to accretions to the land even tho such accretions extend over the exact spot where another person formerly owned land eroded by the river, because the complete erosion of land works a complete destruction of the title and of all governmental descriptions pertaining thereto.

Bone v May, 208-1094; 225 NW 367

Riparian rights — islands — accretion. An island in a navigable stream cannot be deemed an accretion to another island when the surface of said islands at the point where they connect is not visible even at ordinary stage of the water, let alone being visible when the water is at its high-water mark.

Meeker v Kautz, 213-370; 239 NW 27

X ADVERSE POSSESSION

Boundary dispute on fenced land—adverse possession. In a dispute involving title to a strip of land between two town lots which were separated by a fence, where there was no acquiescence in the fence as the true boundary line, and one party had no intent to claim beyond the true boundary line, held that title was acquired by the other party by adverse possession when he claimed both title and possession to the strip irrespective of the location of the fence.

Patrick v Cheney, 226-853; 285 NW 184

Possession which will bar action. Under a statute limiting the time in which an action may be brought for the recovery of real estate sold for taxes, the possession by the owner necessary to bar an action by the tax title holder is ordinarily not the possession required under the general statute of limitations and need not be adverse, but need be only such possession as would entitle the tax titleholder to maintain an action against the owner.

McCormick v Anderson, 227-888; 289 NW 440

Presumption in favor of tax deed holder. When land belonging to a daughter was sold for taxes and the tax deed was issued to her mother under an agreement between them, there was a presumption that the continuing possession of the land by the daughter was subordinate to the mother's tax deed, and to defeat the tax title, the presumption had to be overcome and the daughter's possession proven to be adverse. Adverse possession was not established by the continued possession of the daughter under a lease to a tenant, from whom the daughter collected rents and paid taxes, when she made no open claim that the land was her own and that she was asserting her title in hostility to the title under the tax deed.

McCormick v Anderson, 227-888; 289 NW 440

12286 Petition.

See annotations under §12285

12288 Disclaimer—costs.

Belated disclaimer. A belated and long delayed disclaimer by a defendant of any interest

in the subject matter of an action to quiet title may not absolve him from liability for the costs of the action.

Korf v Howerton, 205-534; 218 NW 274

Disclaimer filed—confused description. In an action foreclosing a mortgage and also asking for the reformation of the description of land in said mortgage in which one of the defendants by way of answer denies that plaintiff is entitled to reformation of description because of confusion as to the property covered by said mortgage as a result of a shifting river channel between the mortgaged land and the defendant's adjoining land, and alleging the plaintiff is estopped from asserting any interest in such adjoining land on account of a disclaimer filed by plaintiff's predecessor in a prior foreclosure action involving said adjoining land, held that such estoppel and disclaimer in the present action is ineffective in the absence of any evidence of any confusion or encroachment upon the adjoining land.

State Bank v Mapel, 226-1328; 286 NW 517

12289 Demand for quitclaim—attorney's fees.

Atty. Gen. Opinion. See '25-26 AG Op 125

Banking superintendent as good-faith plaintiff. The superintendent of banking as a good-faith, tho unsuccessful, plaintiff in a quiet title action is not liable to the defendant for attorney fees.

Bates v Mullins, 223-1000; 274 NW 117

12290 Equitable proceedings.

See also annotations under §12285

Guiding principles. In an action to quiet title, the court of equity will view the case in the broad aspect of the equitable rights of the parties, rather than upon narrow and technical legal grounds.

Eckert v Sloan, 209-1040; 229 NW 714

Seeker for equity must do equity. The full equitable titleholder of land held under a dry trust who asks equity to invest him with the full legal title must do equity to the extent of reimbursing the trustee for good-faith expenditures made by him at the request, or with the consent and acquiescence of the equitable titleholder, in improving or preserving the property, even tho the trustee's claims for such expenditures are barred at law by the statute of limitations.

Warner v Tullis, 206-680; 218 NW 575

Mortgage without exceptions — effect. A municipality which mortgages an integral body of land owned by it without excepting any part thereof, necessarily loses all interest in all the land under a proper foreclosure without redemption, even tho in conveyances subsequent to the mortgage certain reservations were made.

Dubuque v Fischer, 215-433; 245 NW 758

Repudiating one's own chain of title. A titleholder who, by contract, repudiates the deeds under which he claims title and agrees that they shall be deemed null and void, thereby estops himself from asserting said deeds against parties who subsequently acquire title in reliance on said repudiation.

Carr v McCauley, 215-298; 245 NW 290

Prayer for writ of possession. An equitable action (1) to quiet title, and (2) in addition, to obtain a writ ousting defendant from the premises is proper.

McKenney & Seabury v Nelson, 220-504; 262 NW 101

Transaction with deceased — intervenor — competency. In equity action to quiet title and to declare a trust in realty, an intervenor who claims same relief as plaintiff may not testify to alleged oral agreement between parties, some of whom are deceased.

Wagner v Wagner, (NOR); 224 NW 583

Dismissal—improper notice of appeal. In appeal from decree quieting title in city to streets and alleys, but continuing hearing as to park, it was necessary to serve notice of appeal on city's attorney, and notice of appeal served on attorneys for cross-petitioners joining in prayer of appellee's petition was not binding on the city and entitled city to a dismissal.

Iowa City v Balluff, (NOR); 225 NW 942

CHAPTER 521

DISPUTED CORNERS AND BOUNDARIES

12298 Specific issues—acquiescence.

Burden of proof — hearsay. A property owner who repudiates the line of a division fence as the true boundary line has the burden to prove the true line to be other than the division line of the fence; and he may not make such proof by a recital of what a surveyor told him.

Sorenson v Mosbacher, 210-156; 230 NW 656

12299 Commission.

Disqualification. An engineer who, unbeknown to one of the parties to a boundary line controversy, has already surveyed and located the line for the other party under private employment, is disqualified to act as a commissioner under an order of the court for the purpose of surveying and locating said line.

Kraft v Tennigkeit, 204-15; 214 NW 562

12301 Hearing.

Government monuments. Duly identified government survey monuments are controlling, and will override every call of the field notes for measurements.

Cooper v Horridge, 200-711; 205 NW 454

Burden to show government line. A landowner who concedes that a long existing highway was by agreement to be located equally upon both sides of the government line between adjoining tracts, but who disputes the accuracy of the location, has the burden to show the actual location of the government line.

Sedore v Turner, 202-1373; 212 NW 61

Federal survey conclusive. A section corner established by a government survey is conclusive.

Fair v Ida Co., 204-1046; 216 NW 952

Testimony without notice. A commissioner appointed to survey and locate a disputed boundary line and to report thereon to the court may not legally take the testimony of one of the parties to the controversy without notice to the other party.

Kraft v Tennigkeit, 204-15; 214 NW 562

12302 Finding as to acquiescence.

Elements. On the issue of acquiescence by both parties to a boundary line, the intention of the parties is important. Acquiescence is consent inferred from silence, involving notice or knowledge of the claim of the other party, and occurs where one who is entitled to impeach a transaction or enforce a right neglects to do so, from which the other party may infer that he has abandoned such right.

Patrick v Cheney, 226-853; 285 NW 184

Boundary dispute on fenced land. In a dispute involving title to a strip of land between two town lots which were separated by a fence, where there was no acquiescence in the fence as the true boundary line, and one party had no intent to claim beyond the true boundary line, held that title was acquired by the other party by adverse possession when he claimed both title and possession to the strip irrespective of the location of the fence.

Patrick v Cheney, 226-853; 285 NW 184

12304 Exceptions—hearing in court.

Official surveys—manner of making. In an action for reformation of description in realty mortgage and for foreclosure, wherein a surveyor or civil engineer is appointed by the court to make a survey of property covered by mortgages, and no objections are made to his appointment nor exceptions taken thereto, objection to the surveyor's report on appeal cannot be predicated on alleged failure to strictly follow the statutory provisions applicable to the reference of an equity case to a referee when the parties have agreed to procedure.

State Bank v Mapel, 226-1328; 286 NW 517

12305 Decree conclusive.

Decree based on acquiescence — conclusiveness. A decree that a specified portion of a line between adjoining landowners is a boundary line by acquiescence is not an adjudication of the true location of the remaining portion of said boundary line.

Turner v Sandhouse, 205-1151; 216 NW 58

Official survey on court order—evidence sufficient to support confirming report. In an action for reformation of description by metes and bounds in realty mortgages and for their foreclosure, evidence held sufficient to support judgment confirming surveyor's report, where surveyor is permitted to testify, without objection, that he was qualified to make the survey and that the plat of survey prepared by him is a true and correct survey showing the property in question and made in accordance with a previous order of court and such plat, after identification, was introduced in evidence without objection.

State Bank v Mapel, 226-1328; 286 NW 517

Official surveys—objections. In an action for reformation of description in realty mortgage and for foreclosure, wherein a surveyor or civil engineer is appointed by the court to make a survey of property covered by mortgages, and no objections are made to his appointment nor exceptions taken thereto, objection to the surveyor's report on appeal cannot be predicated on alleged failure to strictly follow the statutory provisions applicable to the reference of an equity case to a referee when the parties have agreed to procedure.

State Bank v Mapel, 226-1328; 286 NW 517

12306 Boundaries by acquiescence established.

ANALYSIS

I BOUNDARY LINES IN GENERAL
II ACQUIESCENCE
III ADVERSE POSSESSION AND ACQUIESCENCE
IV MISTAKE

Adverse possession generally. See under §11007 (XXVIII)

I BOUNDARY LINES IN GENERAL

Part of single ownership conveyed—implied easement or reservation—clear intent of parties necessary. Principle reaffirmed that, where real estate has been used under single ownership and as a unity, one part of it may be burdened with a use which is largely or entirely for the benefit of another part of it, and when divided by devise, descent or sale, one part may be burdened or benefited by an implied reservation or granting of an easement

right if it is apparent and necessary, but such implied grant or reservation must be clearly within the intention of the parties.

Dyer v Knowles, 227-1038; 289 NW 911

Recorded plat—conclusiveness. The recorded plat of an addition must be held to control boundary lines, in the absence of evidence sufficient to establish the acquiescence of the interested parties in other boundary lines.

Jackson v Snyder, 202-262; 208 NW 321

Lands under water—high watermark. The high watermark of a navigable river is that upper line which ordinary floods permanently mark along the course of the river.

Curtis v Schmidt, 212-1279; 237 NW 463

Homestead—noncontiguous tracts. One-half of a double garage, situated on property used by the owner solely for rental purposes, may not be deemed an appurtenance of the said owner's homestead, composed of a nearby, separate, independent and wholly different tract, noncontiguous to the rental property. So held in an action involving the validity of a sheriff's deed based on a sale en masse—a sale without platting.

Van Law v Waud, 223-208; 272 NW 523

Evidence insufficient to establish boundary by agreement. In special action, tried as in equity, to determine boundaries, evidence was insufficient to support a finding that grantor and grantee had agreed that a line just north of buildings should be taken and established as the south boundary line of land being conveyed.

Dyer v Knowles, 227-1038; 289 NW 911

Boundary line between farm buildings—grantor's alleged use and occupancy of buildings denied. In a special action to determine the true location of an east and west half-section line, where the grantor, owning the entire west half of the section, sells the northwest quarter, thinking his barn and corncrib were situated south of the half-section line, whereas a survey showed the buildings to be situated north of the half-section line, grantor's claim of a reservation of the use and occupancy of the barn and corncrib and ground appurtenant thereto under an implied easement on the theory that the barn and corncrib were necessary to the use and enjoyment of the land retained by grantor, could not be sustained, since the use of such buildings was just as essential, to the part sold, in proportion to the acreage, as it was to the part retained.

Dyer v Knowles, 227-1038; 289 NW 911

Estoppel—disclaimer filed—foreclosure of adjoining property in prior action. In an action foreclosing a mortgage and also asking for the reformation of the description of land in said mortgage in which one of the defendants by way of answer denies that plaintiff is entitled to reformation of description because of confusion as to the property covered by said mortgage as a result of a shifting river channel between the mortgaged land and the defendant's adjoining land, and alleging the plaintiff is estopped from asserting any interest in such adjoining land on account of a disclaimer filed by plaintiff's predecessor in a prior foreclosure action involving said adjoining land, held that such estoppel and disclaimer in the present action is ineffective in the absence of any evidence of any confusion or encroachment upon the adjoining land.

State Bank v Mapel, 226-1328; 286 NW 517

II ACQUIESCENCE

Discussion. See 16 ILR 409—Doctrine of acquiescence

Acquiescence for ten years. A boundary line marked by a fence and mutually acquiesced in by the property owners for more than ten years becomes irrevocable.

Downing v Glassburner, 200-715; 205 NW 354

Taylor v Olmstead, 201-760; 206 NW 88

Norton v Ferguson, 203-317; 211 NW 417

Pleading governmental descriptions—effect. A landowner who seeks to enjoin interference with a boundary line by acquiescence, irrespective of the true governmental line, will not be held to abandon his claim to a line by acquiescence from the mere fact that in his petition for injunction he describes the different tracts of land involved by their governmental descriptions.

Norton v Ferguson, 203-317; 211 NW 417

Acquiescence—immaterial matters. If landowners have, in truth and in fact, acquiesced for more than ten years in a fence as the boundary line between their adjoining lands, it becomes quite immaterial (1) who built the fence, or (2) to what extent the parties are assessed on their lands, or (3) whether, on a government survey, one of the parties would have more acreage and the other less acreage.

Brown v Bergman, 204-1006; 216 NW 731

Acquiescence in erroneous line. A fence which is acquiesced in as the true boundary line for the proper period of time and accompanied by possession of the land in accordance therewith becomes the true boundary line, even tho time reveals the fact that an error occurred in the original location of the fence.

Stone v Richardson, 206-419; 218 NW 332

Recognition and acquiescence. Adjoining owners of land who, for ten years or more, recognize and acquiesce in a line as marking the boundary between the two tracts, are bound thereby, notwithstanding such line is not the line fixed by government survey.

Kotze v Sullivan, 210-600; 231 NW 339

Acquiesced-in line. A line between adjoining tracts of land, definitely marked by a fence

II ACQUIESCENCE—concluded

which, for ten years, has been acquiesced in and recognized by the owners of the tracts as the division line, becomes, as between the parties, the conclusive line irrespective of the true line in fact; and this is true altho neither party intended to claim more than his deed calls for. It follows that either party has a legal right to build in reliance on said acquiesced-in line.

Minear v Furnace Co., 213-663; 239 NW 584

Effect after ten years. Adjoining landowners who, for ten years, acquiesced in a fence as marking the boundary line between their lands, are bound thereby and the claim of a subsequent owner of one of the properties that, when he bought, the fence had largely disappeared, is not of controlling importance, especially when the fact is manifest that the two properties had been improved with reference to said acquiesced-in line.

Mullahey v Serra, 220-1177; 264 NW 63

Acquiescence in line—effect. Where plaintiffs for over 10 years and plaintiffs and their grantors for over 20 years acquiesced in a certain fence as the boundary of defendant's property and acquiesced in the use of the land south of the fence as a traveled highway, the fence becomes the boundary altho it may not be the true line.

Brewer v Claypool, 223-1235; 275 NW 34

Street between properties. In controversies between private owners over boundaries, the fact that a highway is between their respective properties does not affect the doctrine of acquiescence.

Brewer v Claypool, 223-1235; 275 NW 34

Elements. On the issue of acquiescence by both parties to a boundary line, the intention of the parties is important. Acquiescence is consent inferred from silence, involving notice or knowledge of the claim of the other party and occurs where one, who is entitled to impeach a transaction or enforce a right, neglects to do so, from which the other party may infer that he has abandoned such right.

Patrick v Cheney, 226-853; 285 NW 184

III ADVERSE POSSESSION AND ACQUIESCENCE

Time of adverse possession. A division line between adjoining lands becomes the true line when maintained adversely for ten years, or when acquiesced in by the parties for the same period.

Kraft v Tennigkeit, 210-81; 230 NW 333

Failure to object to erection. A real estate property owner who, in erecting a valuable and expensive improvement on his property, places it on a line which he in good faith believes to be the true boundary line, cannot be thereafter disturbed in his improvement by an adjoining property owner who, during all the time of the erection, stood by and made no objection tho he knew the improvement maker was acting in perfectly good faith.

Minear v Furnace Co., 213-663; 239 NW 584

Accretions. A decree quieting title to accretions, and based on adverse possession, will be deemed to quiet title up to the high watermark of the river in question, even tho when literally and hypercritically construed it seemingly quiets title only to the high watermark as it existed when the action to quiet title was commenced. So held where, pending the action, trial and entry of decree, the river continued to recede.

Harrington v Foster, 220-1066; 264 NW 51

Boundary dispute on fenced land. In a dispute involving title to a strip of land between two town lots which were separated by a fence, where there was no acquiescence in the fence as the true boundary line, and one party had no intent to claim beyond the true boundary line, held that title was acquired by the other party by adverse possession when he claimed both title and possession to the strip irrespective of the location of the fence.

Patrick v Cheney, 226-853; 285 NW 184

IV MISTAKE

Adverse possession—nature and requisites—hostile character of possession—mistake—effect. One may not be said to be in the adverse possession of land beyond the governmental line when, during his entire possession, he never intended to claim beyond the true line. Evidence reviewed, and principle held inapplicable in the instant case.

Kotze v Sullivan, 210-600; 231 NW 339

12309 Boundaries by agreement.

Oral agreement—statute of frauds. An oral agreement to change a long established boundary fence is enforceable when taken out of the statute of frauds (1) by the mutual taking of a new survey, (2) by the building of a new fence in accordance with the said survey, and (3) by taking possession of the lands inclosed by such new fence.

Cheshire v McCoy, 205-474; 218 NW 329

Oral agreement to change. A naked oral agreement to change an established boundary line is unenforceable.

Stone v Richardson, 206-419; 218 NW 332

Estoppel to dispute. A naked oral agreement to resurvey an established boundary line will not work an estoppel to insist on the old established boundary.

Stone v Richardson, 206-419; 218 NW 332

CHAPTER 522
PARTITION

12310 Nature of action.

ANALYSIS

I PARTITION IN GENERAL
II PROPERTY SUBJECT TO PARTITION
III PERSONS ENTITLED TO SUE
IV TIME TO SUE

I PARTITION IN GENERAL

Proceedings strictly statutory. A proceeding to partition real estate in Iowa is strictly statutory.

Criswell v Criswell, 227-212; 288 NW 130

Scope of proceeding. Where all the parties are before the court in a partition proceeding, equity has jurisdiction to adjudicate all matters and rights of the respective parties.

In re Delaney, 227-1173; 290 NW 530

Conclusiveness of proceeding. Where testator devised real estate to certain wards on condition that they pay $8,000 into decedent's estate within one year after his death and where, in a partition proceeding to which the wards were parties, court found such condition was not met and that devise had lapsed and the land was sold for $7,200, the wards could not in a subsequent proceeding on objections to guardian's final report maintain position that they still owned the land and were entitled to rents and profits therefrom, since the partition proceedings constituted an adjudication as to every matter there in issue and as to all questions necessarily in issue.

In re Delaney, 227-1173; 290 NW 530

Recovery of real property (?) or partition (?). An action for the partition of real property by parties who are in possession of the property, and who claim to be co-owners thereof, may not be deemed an action for the recovery of real property, within the meaning of the statute of limitation, because an intervenor pleads a recorded deed which would deprive plaintiffs of all title, but which deed plaintiffs by reply claim was never delivered.

Gibson v Gibson, 205-1285; 217 NW 852

Dower—assignment or setting off—recognized methods. The statutory provisions for admeasurement of dower do not exclude the setting off of dower by an action in equity, by partition, or by any other appropriate action.

Ehler v Ehler, 214-789; 243 NW 591

Resulting trust denied—deed from father to son—conduct of parties. In a partition action involving a decedent's property, tried on issues raised by defendant's cross-petition, alleging that another property of decedent, which had been deeded by decedent to one of his sons, should be included in the partition action—in the absence of fraud—such deed therefor will not be set aside on the theory of a resulting trust in favor of the decedent's estate, when there is no evidence that either the grantor or grantee so considered it altho they both lived several years after the deed was made.

Gilligan v Jones, 226-86; 283 NW 434

Joint tenancies not favored—strict construction. The rule of joint tenancy with right of survivorship is not favored in public policy, and the mere inclusion of the words in a deed "said real estate being taken jointly" will not be sufficient to establish a joint tenancy, especially when followed by words tending to negative such assumption, such as, "to the grantees, their assigns, heirs, and devisees forever".

Albright v Winey, 226-222; 284 NW 86

Parol partition of common interest. Parol partition by persons competent so to do, holding land in common, may effect a partition of the same so as to enjoy their respective shares in severalty, but this cannot be done where other interests intervene.

Anderson v Anderson, 227-25; 286 NW 446

II PROPERTY SUBJECT TO PARTITION

Trust estate — nonvested interest. Lands which are under testamentary trusteeship for a stated or discretionary time are not subject to partition by the ultimate beneficiary until his interest becomes vested. Trust construed, and held to clearly empower the trustee to continue the trust.

Schaal v Schaal, 203-667; 213 NW 207

Co-existing estates in fee. In an action in partition of realty in which two brothers each own an undivided one-third for life and an undivided one-sixth in fee, partition will not be allowed when it involves interests in remainder over after termination of life estates.

Anderson v Anderson, 227-25; 286 NW 446

Realty in probate. In rare instances on a showing of extreme necessity the right of partition of realty may be allowed where the preservation of an estate of a decedent depends upon it.

Anderson v Anderson, 227-25; 286 NW 446

Parol partition of common interest. Parol partition by persons competent so to do, holding land in common, may effect a partition of the same so as to enjoy their respective shares in severalty; but this cannot be done where other interests intervene.

Anderson v Anderson, 227-25; 286 NW 446

III PERSONS ENTITLED TO SUE

Devisees of estate. One of several devisees in common of real property (the estate being

III PERSONS ENTITLED TO SUE—concluded

fully settled) may maintain partition, even tho the will specifically authorizes the executor to sell the property and divide the proceeds.

Ruggles v Powers, 201-284; 207 NW 116

Life tenant. A life tenant is not entitled to partition against a nonconsenting minor reversioner of the fee (even tho he has also acquired the interest of a like reversioner) in the absence of pleading and proof that such partition will not be to the detriment of such minor.

Farmers Mtg. Co. v Walker, 207-696; 223 NW 497

Duplicate actions—priority. When two actions involving the same subject matter are commenced by different parties (e. g., partition of land), the action in which completed service is first made on all necessary parties must be deemed first commenced even tho the other action was first formally filed with the clerk, unless said first action was commenced by an unauthorized plaintiff.

Jones v Park, 220-903; 262 NW 801

Husband of titleholder as improper plaintiff. A husband may not maintain an action to partition lands of which his wife holds the legal title, and in which he has no interest except the contingent interest of a husband.

Jones v Park, 220-903; 262 NW 801

Administrator and heirs as plaintiffs. Tho an administrator may have no authority, as such, to maintain an action for the partition of the lands of his intestate, yet the fact that he joins as plaintiff, along with some of the actual owners of the land as plaintiffs, is quite harmless.

Bleakley v Long, 222-76; 268 NW 152

Several interests. Partition may be maintained only when the parties plaintiff and defendant are entitled to the present possession of their several interests.

Anderson v Anderson, 227-25; 286 NW 446

Death of party without substitution. Where no personal representative was substituted for plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence, application made during same term to vacate the dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

IV TIME TO SUE

Right of action when interest becomes vested. Lands which are under testamentary trusteeship for a stated or discretionary time are not subject to partition by the ultimate beneficiary until his interest becomes vested. Trust construed, and held to clearly empower the trustee to continue the trust.

Schaal v Schaal, 203-667; 213 NW 207

12311 Joinder and counterclaims.

Adjustments of all rights. In the equitable action of partition the court has ample power to adjust and settle the rights of the various parties pertaining to and growing out of the subject matter of the action, and thereby avoid a multiplicity of suits. In other words, the general rule as to separate actions does not apply.

Creger v Fenimore, 216-273; 249 NW 147

Duplicate actions—which abatable. While an action in partition in which service of the original notice is incomplete in whole or in part is deemed pending in the sense that said action constitutes a lis pendens from the time the clerk properly indexes it as a lis pendens, yet, until completed service of the original notice of said action is made, said action cannot be deemed "commenced" or "pending" in the sense that it bars another subsequently instituted action in partition between the same parties and involving the same real estate.

It follows that when duplicate actions in partition, involving the same parties and the same real estate, are brought, that action only is abatable in which said service was last completed.

Ohden v Abels, 221-544; 266 NW 24

Insolvent heir's unpaid debt to estate—jurisdiction of court to offset. The court has jurisdiction, in an equitable action to partition the lands of an intestate (to which action all heirs are parties), to entertain a cross-petition by one of the heirs as administrator of said estate, and, under proper pleading and proof:

1. To decree that a certain insolvent heir has no interest in said land because his unpaid indebtedness to said estate equals or exceeds the value of the share in said lands which he would take were he not so indebted, and
2. To decree that said lands belong solely to the other heirs who are not so indebted, and to the surviving widow, if any.

Bauer v Bauer, 221-782; 266 NW 531

Claim for widow's support—lien on proceeds of partition. In an equity action to establish claim for the support of a widow as lien against real estate devised to the widow for life with right of disposal of realty for her necessary support, held, plaintiff entitled to decree establishing claim as a lien against net proceeds of such realty, which had been partitioned and sold under contract, but not to decree establishing claim as a lien against proceeds of realty before payment of costs and expenses of partition proceeding.

Hoskin v West, 226-612; 284 NW 809

12312 Petition.

Unrecorded conveyance — burden of proof. Where children, holding undivided interests in lands as heirs, vest their mother, by an unrecorded instrument, with actual possession of the lands during her widowhood, a subsequent deedholder of the interest of one of the children may not have partition of the land, unless he pleads and proves (1) his subsequent purchase, (2) that he paid value therefor, and (3) that he had no notice of said unrecorded instrument.

Young v Hamilton, 213-1163; 240 NW 705

Substituted petition constituting new action. The filing, by plaintiff in partition, of an amended and substituted petition, in which the name of his wife is omitted as a defendant and appears as a joint plaintiff, must be deemed the commencement of an entirely new action.

Jones v Park, 220-903; 262 NW 801

Cross-petition — notice of — sufficiency. In an action for the partition of lands, a notice by one co-defendant to another co-defendant of the filing by the former of a cross-petition, denying all interest of the latter in the lands in question, is not a nullity because said notice fails to specifically describe or identify said lands, when said notice makes proper reference to the original petition in the action for a correct description of said lands.

Bauer v Bauer, 221-782; 266 NW 531

Explanatory allegations—nonappealable motion to strike. In a partition action the overruling of a motion to strike various explanatory allegations of a petition, being interlocutory and not going to the merits, is not appealable.

Lunt v Van Gorden, 224-4; 275 NW 579

12314 Lien creditors.

Failure to distribute funds to lienholders. Assuming that the failure of a referee in partition to make distribution to claimants of funds in his possession, as ordered by the court, may be excused as to claimants whose shares are encumbered by liens or garnishments, yet such excuse manifestly cannot be recognized as to claimants whose shares are not so encumbered.

Peterson v Younker, 219-32; 257 NW 442
Hoskin v West, 226-612; 284 NW 809

Offsetting debt of insolvent heir against realty—creditors—judgments. Where an heir, as a defendant in a partition action, admits insolvency and an indebtedness to parents' estate in excess of his interest in parents' realty, decree was proper holding heir had no interest in such realty and, accordingly, heir's creditors who obtain judgments after commencement of partition action but before entry of decree, and making no claim of fraud in securing the decree, have no interest in any of funds received from sale of realty.

Petty v Hewlett, 225-797; 281 NW 731

12315 Party defendants.

"Necessary parties"—failure to join. In a partition action, on appeal from a decree fixing parties' interest in a cemetery lot, the widow and children of one of the original grantees are "necessary parties" in whose absence the supreme court cannot consider such appeal.

Paulson v Paulson, 226-1290; 286 NW 431

12316 Jurisdiction over property.

Custodia legis—burden of proof. If property is not subject to attachment or garnishment because undergoing partition, and, therefore, in the custody of the law, the mover for dissolution must show that no order for distribution has been entered in the partition proceedings.

Carson v Long, 219-444; 257 NW 815

Lien on proceeds of partition subject to costs. In an equity action to establish claim for the support of a widow as lien against real estate devised to the widow for life with right of disposal of realty for her necessary support, held, plaintiff entitled to decree establishing claim as a lien against net proceeds of such realty, which had been partitioned and sold under contract, but not to decree establishing claim as a lien against proceeds of realty before payment of costs and expenses of partition proceeding.

Hoskin v West, 226-612; 284 NW 809

Service by publication—jurisdiction. In partition proceedings, service by publication only, on a nonresident, nonappearing defendant, arms the court with jurisdiction to adjudicate the title to the property.

Clark v Robinson, 206-712; 221 NW 217

12319 Issues—trial—costs.

Mortgage reciting life estates. A series of mortgages accepted by a bank describing the undivided third interest of a son subject to the life estate of the mother, together with other evidence, held to establish an alleged oral contract of the heirs and their mother to create such life estate in the property of a deceased intestate husband and father; consequently, partition of the realty was properly denied against the mother.

Redding v Redding, 226-327; 284 NW 167

Lien on proceeds of partition subject to costs. In an equity action to establish claim for the support of a widow as lien against real estate devised to the widow for life with right of disposal of realty for her necessary support, held, plaintiff entitled to decree establishing claim as a lien against net proceeds of such

realty, which had been partitioned and sold under contract, but not to decree establishing claim as a lien against proceeds of realty before payment of costs and expenses of partition proceeding.

Hoskin v West, 226-612; 284 NW 809

12320 Reference to ascertain incumbrances.

Belated filing of judgment transcript. A referee in partition who, after sale, reports, in accordance with an order of court, all incumbrances then appearing against the share of a party to the proceeding, is under no legal obligation to withhold distribution of the proceeds of sale in favor of the holder of a subsequently filed transcript of judgment of which said referee has no notice or knowledge.

Ferguson v Hamilton, 206-1285; 221 NW 947

12323 Lien on undivided interests.

Subrogation as affecting junior mortgagee. Where tenants in common of land as principal and surety jointly mortgage their undivided interests in order to secure the debt of the principal, the surety may, after the land is partitioned and set off in severalty, compel the satisfaction of the mortgage as far as possible out of the lands assigned in severalty to the principal, and be subrogated to all the rights of the mortgagee in case he is compelled to pay the principal's debt; and this right is enforceable against a subsequent mortgagee of the principal's undivided interest alone, when such mortgagee takes his mortgage with actual knowledge that the mortgagors in the prior mortgage occupied the relation of principal and surety.

Toll v Toll, 201-38; 206 NW 117

Tenants in common—accounting. Between tenants in common, the statute of limitation does not commence to run on a claim of one of the tenants for the amount individually paid by him on a mortgage on the common property, until there has been a demand for an accounting.

Creger v Fenimore, 216-273; 249 NW 147

Offsetting debt of insolvent heir against realty. Where an heir, as a defendant in a partition action, admits insolvency and an indebtedness to parents' estate in excess of his interest in parents' realty, decree was proper holding heir had no interest in such realty and, accordingly, heir's creditors who obtain judgments after commencement of partition action but before entry of decree, and making no claim of fraud in securing the decree, have no interest in any of funds received from sale of realty.

Petty v Hewlett, 225-797; 281 NW 731

Lien on proceeds of partition subject to costs. In an equity action to establish claim for the support of a widow as lien against real estate devised to the widow for life with right of disposal of realty for her necessary support, held, plaintiff entitled to decree establishing claim as a lien against net proceeds of such realty, which had been partitioned and sold under contract, but not to decree establishing claim as a lien against proceeds of realty before payment of costs and expenses of partition proceeding.

Hoskin v West, 226-612; 284 NW 809

12324 Not to delay distribution.

Failure to distribute funds—excuse. Assuming that the failure of a referee in partition to make distribution to claimants of funds in his possession, as ordered by the court, may be excused as to claimants whose shares are encumbered by liens or garnishments, yet such excuse manifestly cannot be recognized as to claimants whose shares are not so encumbered.

Peterson v Younker, 219-32; 257 NW 442

12325 Confirmation.

ANALYSIS

I ADJUSTING EQUITIES
II DECREE

I ADJUSTING EQUITIES

Contribution for taxes, interest, repairs, and tiling. A surviving mother, in partition of lands left by the deceased husband, is entitled to proper contribution from the children for money paid by her for taxes, interest on mortgages, and necessary repairs, but not (under certain facts) for tiling of the land.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

II DECREE

Allowance to co-tenant for improvements. A co-tenant who, in good faith, makes valuable and beneficial improvements upon the common property, even without the knowledge or consent of the other co-tenant, will, on final decree in partition, be protected to the extent which the improvements have enhanced the sale value of the land.

Nelson v Pratt, 212-441; 230 NW 324; 236 NW 386

Co-tenants—nonduty to account for rents. A surviving wife is under no legal obligation, in partition proceedings, to account to her children for the rent of their shares of the land left by the deceased husband and father, when, upon the death of the latter, the wife and children continued to jointly occupy and farm the land in the usual way, and to apply the resulting profits and products to their joint maintenance and education.

Van Veen v Van Veen, 213-323; 236 NW 1; 238 NW 718

12326 Referees to partition—sale.

Appointing referees—division in kind inequitable. Proper and better practice in partition is to appoint referees following a showing and judicial determination that a division of the property in kind cannot be equitably made.

Murphy v Bates, 224-389; 276 NW 29

Sale (?) or division in kind (?). On the question whether certain property should be in part divided in kind and in part sold, due weight must be given to the judgment of disinterested referees, especially when the testimony is in hopeless conflict.

Town v Town, 203-254; 212 NW 471

Division in kind depreciating value—sale justified. Uncontradicted evidence in partition tending to establish that land, if divided, will have a less aggregate value, justifies the court in ordering the property sold as a unit.

Murphy v Bates, 224-389; 276 NW 29

Impracticable and ill-advised division. A tract of land will not, in partition proceedings, be divided into small tracts when such division will substantially depreciate the value of the shares of the several owners.

Snyder v Snyder, 211-445; 233 NW 498

Setting off in kind—burden of proof. A plaintiff in partition who owns a small fractional unincumbered interest in land while the major interest is owned by heirs whose interest has been ordered sold in probate to pay the debts of the estate, may not successfully complain that his fractional interest is not set off to him in kind when he fails to show that such setting off would not unduly impair the value of the remaining land.

Nehls v Walker, 215-167; 244 NW 850

Rights and obligations of bidder and court. Highest bidder at partition sale makes proposed contract from which he cannot arbitrarily withdraw, and is obligated to complete the contract if sale is approved, nor can the court arbitrarily refuse confirmation, the bidder having become possessed of a right which can be extinguished only by refusing confirmation in the exercise of a sound judicial discretion.

Criswell v Criswell, 227-212; 288 NW 130

Public auction—status of highest bidder. In partition action where property was sold at public auction in regular manner for $4,600, the court did not abuse its discretion in amending referee's report and accepting a higher bid made subsequently to the public sale, the uniform holding in Iowa being that the high bidder at judicial sales, other than at sales under execution or by a trustee under a power, acquires no absolute or vested right, since the sale must be approved by the court and is considered merely a preferred bidder until such approval is given.

Criswell v Criswell, 227-212; 288 NW 130

Public sale—highest bid. Highest bidder at public sale is not entitled as a matter of right to have the sale confirmed by the court, and where a higher substantial bid is made, even tho tardy, a large discretion lies with the court as to which bid shall be accepted.

Criswell v Criswell, 227-212; 288 NW 130

Reopening sale for further bids. Where $4,600 was bid at public sale in partition, the trial court was within its jurisdiction in opening the sale for further offers when a subsequent higher bid was made, provided all active and present bidders were treated fairly and without discrimination, particularly when one of the bidders was an owner of the property, part of which was his homestead.

Criswell v Criswell, 227-212; 288 NW 130

Partition deed—assuming mortgage. Where a referee in partition sells at private sale for an amount in excess of an only existing mortgage, and the deed, referring to the report of sale, recites an assumption and agreement to pay the mortgage, the purchaser is prima facie liable.

First Tr. JSL Bank v Thomas, 223-1018; 274 NW 11, 275 NW 392

Referees—removal. The court, in partition proceedings, has wide discretionary power to discharge a referee for cause and to appoint his successor.

Humphrey v Ralls, 223-770; 273 NW 865

Proceeds — distribution — improper form of check. A referee in partition who, in making distribution of the proceeds of a sale, makes a check payable to an "estate" must account for such share in case the money never reaches said estate. Payment should be made to the administrator.

Albright v Moeckley, 209-1304; 230 NW 351

12330 Report of referees.

Unallowable procedure. A hearing on objections to the report of a referee in partition, without any reference to the question of approving or disapproving said report, seems to be a procedure unknown to our practice.

Peterson v Younker, 219-32; 257 NW 442

Partition deed—assuming mortgage. Where a referee in partition sells at private sale for an amount in excess of an only existing mortgage, and the deed, referring to the report of sale, recites an assumption and agreement to pay the mortgage, the purchaser is prima facie liable.

First Tr. JSL Bank v Thomas, 223-1018; 274 NW 11; 275 NW 392

12332 Partition of part.

Partition in kind (?) or by sale (?). A partition partly in kind and partly by sale will not be permitted when some of the parties would be prejudiced thereby.

Clayman v Bibler, 210-497; 231 NW 334

12333 Report set aside.

Vacating order. An order approving the distribution made by a referee in partition must be set aside, on timely and proper application, when it is made to appear that distribution was made to the wrong party, and it is quite immaterial that the applicant may have an action against the bank for the improper payment of the check by means of which distribution was attempted.

Albright v Moeckley, 209-1304; 230 NW 351

New report releasing purchaser's assumption of mortgage—validity. After foreclosure has been started on land previously partitioned, it is improper to re-open the partition and file a new report relieving the purchaser of an assumption and agreement to pay the mortgage on the land partitioned, therefore any order granting such release is void as against the rights of a foreclosure plaintiff relying on such assumption and agreement to pay.

First Tr. JSL Bank v Thomas, 223-1018; 274 NW 11; 275 NW 392

Order overruling objections to referee's report. An order overruling objections to the report of a referee in partition seems to be appealable.

Peterson v Younker, 219-32; 257 NW 442

Questions first raised on appeal. Whether an action to set aside an order of approval of the distribution report of a referee in partition is proper in form or timely cannot be raised for the first time on appeal.

Albright v Moeckley, 209-1304; 230 NW 351

12334 Decree.

Retrial—computation of period. The two years within which a nonresident, nonappearing defendant served by publication may appear and have an action in partition retried commences to run from the date of the judgment which confirms the partition and apportions the costs, and not from the date when the court approves the referee's report of distribution.

Tracy v McLaughlin, 207-793; 223 NW 475

Objections to referee's report—unallowable procedure. A hearing on objections to the report of a referee in partition, without any reference to the question of approving or disapproving said report, seems to be a procedure unknown to our practice.

Peterson v Younker, 219-32; 257 NW 442

Incidental relief—unallowable claim. In an action to partition the remainder in real estate after the termination of a preceding testamentary life estate—which had existed for some 16 years—the court may not allow and decree as payable out of the proceeds of the partition sale, a claim against the former estate in probate out of which the life estate arose when there is no proof of said claim (1) either in the former probate proceedings, or (2) in said partition proceedings.

Kinnett v Ritchie, 223-543; 273 NW 175

Adjustment of equities—paving assessments — fatally indefinite proof. On the issue whether certain parties to an action to partition land should be equitably reimbursed for paving assessments paid for the common betterment of the common property, record evidence reviewed and held entirely too indefinite and uncertain to justify the allowance of the claimed reimbursement.

Kinnett v Ritchie, 223-543; 273 NW 175

Conclusiveness of proceeding. Where testator devised real estate to certain wards on condition that they pay $8,000 into decedent's estate within one year after his death and where, in a partition proceeding to which the wards were parties, court found such condition was not met and that devise had lapsed and the land was sold for $7,200, the wards could not in a subsequent proceeding on objections to guardian's final report maintain position that they still owned the land and were entitled to rents and profits therefrom, since the partition proceedings constituted an adjudication as to every matter there in issue and as to all questions necessarily in issue.

In re Delaney, 227-1173; 290 NW 530

12339 Costs generally.

Lien on proceeds of partition subject to costs. In an equity action to establish claim for the support of a widow as lien against real estate devised to the widow for life with right of disposal of realty for her necessary support, held, plaintiff entitled to decree establishing claim as a lien against net proceeds of such realty, which had been partitioned and sold under contract, but not to decree establishing claim as a lien against proceeds of realty before payment of costs and expenses of partition proceeding.

Hoskin v West, 226-612; 284 NW 809

12340 Attorney's fees.

Attorney fees—when unallowable. Principle reaffirmed that when the title of property involved in partition proceedings is put in issue, and all parties are represented by counsel, neither may have attorney fees taxed at the expense of the common property.

Kinnett v Ritchie, 223-543; 273 NW 175

12341 Sale—referees to give bond—removal.

Referees—liability. A referee in partition may place himself in a very precarious position by depositing and retaining partition funds in his own bank which is in a failing condition.

Peterson v Younker, 219-32; 257 NW 442

Surety—agreement to indemnify—joint and several liability. A written agreement in an application for a surety bond by two duly appointed referees in partition to the effect and in the language of "we hereby agree" to indemnify said surety for any damage suffered by him because of said bond, is jointly and severally binding on both principals even tho one of them received no part of the funds covered by the bond and was guilty of no personal failure to account.

Ind. Co. v Opdycke, 223-502; 273 NW 373

Validity of bond—estoppel to question. A duly appointed referee in partition will not be permitted to question the authorized execution in his name of a bond as such referee, when, subsequent to the said execution and filing of said bond, he reports to the court and under oath, that he had given said bond and had effected a sale of said property.

Ind. Co. v Opdycke, 223-502; 273 NW 373

12343 Private sale—appraisement.

Failure to file appraisal report—effect. When partition proceedings have progressed through all the various steps up to and including the surrender of possession of the land to the purchaser, the sale will not be set aside on the sole ground that, while the land was appraised and report thereof made before the sale, the said report was not formally filed before said sale.

Dickson v Dickson, 220-882; 262 NW 803

Partition deed—assuming mortgage. Where a referee in partition sells at private sale for an amount in excess of an only existing mortgage, and the deed, referring to the report of sale, recites an assumption and agreement to pay the mortgage, the purchaser is prima facie liable.

First Tr. JSL Bk. v Thomas, 223-1018; 274 NW 11; 275 NW 392

Consideration and acceptance. Where a note was sent for the purchase price of land in partition, and tho objections were made to it because the signature was not in ink, a judgment for the plaintiff on the note was warranted when there was evidence on which the jury could have found consideration for the note and that it was later accepted by the plaintiff after learning that the penciled signature was valid.

Ballard v Ballard, 226-699; 285 NW 165

12344 Report of sale.

Discretion to reject report and re-offer property. The court has a legal discretion, in partition proceedings, to reject the referee's report of sale to the highest bidder, and, in open court, to call for and accept and confirm a materially larger bid than that received by the referee.

Dyer v Dyer, 220-405; 262 NW 671

Approval—refusal to set aside—discretion. The refusal of the court to set aside the referee's report of sale and the court's approval thereof will not be disturbed on appeal in the absence of a showing that the court abused its discretion.

Bleakley v Long, 222-76; 268 NW 152

Amending report to accept higher bid. In partition action where property was sold at public auction in regular manner for $4,600, the court did not abuse its discretion in amending referee's report and accepting a higher bid made subsequently to the public sale, the uniform holding in Iowa being that the high bidder at judicial sales, other than at sales under execution or by a trustee under a power, acquires no absolute or vested right, since the sale must be approved by the court and is considered merely a preferred bidder until such approval is given.

Criswell v Criswell, 227-212; 288 NW 130

Increased bids for small amounts not accepted after sale. While the general rule is that the court will not approve acceptance of a bid which has been increased by only a small, proportionate amount over a previously accepted bid, yet where a tardy bidder had lived on the tract for many years as a homesteader, and where the money involved was of secondary importance, the court exceeded its jurisdiction in not accepting the higher bid, altho the trial court would have been affirmed if the bidder had been anyone other than the owner, and under the latter circumstance this case is not to be considered as a precedent.

Criswell v Criswell, 227-212; 288 NW 130

New report releasing purchaser's assumption of mortgage—validity. After foreclosure has been started on land previously partitioned, it is improper to re-open the partition and file a new report relieving the purchaser of an assumption and agreement to pay the mortgage on the land partitioned, therefore any order granting such release is void as against the rights of a foreclosure plaintiff relying on such assumption and agreement to pay.

First Tr. JSL Bk. v Thomas, 223-1018; 274 NW 11; 275 NW 392

Partition plaintiff as purchaser assuming mortgage—parol evidence. A plaintiff in a partition action, becoming the purchaser, who

accepts, from the referee with knowledge of its contents, a deed reciting an assumption of a mortgage together with a reference to the referee's report of sale, and who also retains an amount equal to the mortgage, does thereby assume and agree to pay such mortgage. Such a reference incorporates the report into the deed and the actual consideration may be shown by parol evidence.

First Tr. JSL Bk. v Thomas, 223-1018; 274 NW 11; 275 NW 392

Sale—bid—cancellation. A bid at a sale in partition is effectually canceled by the act of the bidder in accepting a return of his required cash deposit, even tho such deposit is returned under an order of the court.

Fraizer v Fraizer, 204-724; 215 NW 946

Distribution—improper form of check. A referee in partition who, in making distribution of the proceeds of a sale, makes a check payable to an "estate" must account for such share in case the money never reaches said estate. Payment should be made to the administrator.

Albright v Moeckley, 209-1304; 230 NW 351

Appeal—inadequacy of bid. The approval by the trial court of a referee's sale in partition will not be disturbed on appeal on the ground of inadequacy of bid, even tho the bid is substantially lower than the bid made at a former, rejected sale, when only a minority of the interested parties (all of whom are adults) object to confirmation, and when there is no prospect that a more advantageous bid can be received.

Fallers v Latimer, 217-261; 251 NW 612

Questions first raised on appeal. Whether an action to set aside an order of approval of the distribution report of a referee in partition is proper in form or timely cannot be raised for the first time on appeal.

Albright v Moeckley, 209-1304; 230 NW 351

12345 Conveyance.

Deed pending appeal—effect. The vendee in a referee's deed in partition who takes his deed pending an appeal from the order for the deed takes at his peril.

Fraizer v Fraizer, 204-724; 215 NW 946

Approval of deed—conclusiveness. An order of court confirming a deed in partition, approving the final report of the referee and discharging him and his bondsman from further responsibility, coupled with a recital and finding that the referee had made full distribution of the purchase price and had fully complied with all orders of the court (one of which was to the effect that the purchase price must be paid in cash) is final and conclusive until set aside by a direct proceeding, even tho as a matter of fact no money ever actually passed from the purchaser to the referee.

State Bank v Uglow, 208-1241; 227 NW 118

Foreclosure — deficiency judgment — purchaser from partition referee. Where the referee's deed and report of sale recite an assumption of a mortgage, a deficiency judgment may in a proper case be rendered against one who purchases from a referee in partition.

First Tr. JSL Bank v Thomas, 223-1018; 274 NW 11; 275 NW 392

Partition deed—assuming mortgage. Where a referee in partition sells at private sale for an amount in excess of an only existing mortgage, and the deed, referring to the report of sale, recites an assumption and agreement to pay the mortgage, the purchaser is prima facie liable.

First Tr. JSL Bank v Thomas, 223-1018; 274 NW 11; 275 NW 392

Sale not subject to collateral attack. A partition sale, regular on its face, cannot be collaterally attacked in a subsequent proceeding on objections to a guardian's final report.

In re Delaney, 227-1173; 290 NW 530

12348 Sales disapproved.

Right to impose additional terms. An order of court to the effect that a very belated bidder at a referee's sale in partition make a deposit or down payment greater than was required of regular bidders is presumptively within the discretion of the court.

Fraizer v Fraizer, 204-724; 215 NW 946

Bid—cancellation. A bid at a sale in partition is effectually canceled by the act of the bidder in accepting a return of his required cash deposit, even tho such deposit is returned under the order of the court.

Fraizer v Fraizer, 204-724; 215 NW 946

12350 Life estates.

Life estates created by will. See under §11846 (V)
Life estates, enlargement into fee. See under §10060
Life estates generally. See under §10042 (II)

When action lies—life tenant. A life tenant is not entitled to partition against a nonconsenting minor reversioner of the fee (even tho he has also acquired the interest of a like reversioner) in the absence of pleading and proof that such partition will not be to the detriment of such minor.

Farmers Mtg. Co. v Walker, 207-696; 223 NW 497

Valuable improvements—nonliability of remainderman. Principle recognized that a life tenant of realty may not, on his own initiative, place valuable improvements on the property,

and legally hold the remainderman liable for the value of such improvements.

Kinnett v Ritchie, 223-543; 273 NW 175

Adopting pleading stating valid defense—default against aged defendant set aside. A default order unaccompanied by any judgment may be validly set aside at a subsequent term. So held in a partition suit where defendant, an 84-year-old mother holding a life estate, after defaulting, adopted the answer and cross-petition of the defendant children, which pleadings, if true, would effectually prevent partition—a sound reason for setting aside the default.

Redding v Redding, 226-327; 284 NW 167

12351.1 Unborn parties.

Constitutionality. This section is violative of neither the federal nor state constitution relative to depriving persons of property without due process.

Mennig v Howard, 213-936; 240 NW 473

Inheritance taker as "representative" of contingent remainderman. A decree setting aside the probate of a will and canceling said will (the action being instituted in good faith and so tried by all parties thereto) is, on the principle or doctrine of representation, conclusive on remote, contingent remaindermen, even tho they are not parties to the action or are not served with notice of the action, when those persons are legally before the court who would take the first estate of inheritance under the will; especially is this true when parties of the same class to which the omitted parties belong are also legally before the court.

Harris v Randolph, 213-772; 236 NW 51

See Mennig v Graves, 211-758; 234 NW 189

Unborn contingent remaindermen. The contingent interest in land of the unborn children of a life tenant, arising out of the terms of a testamentary devise, is not cut off by a decree in an action to quiet title by making the life tenant a party defendant as a "representative" of such unborn children; especially so when said life tenant assumes a hostile attitude toward said unborn children.

Mennig v Graves, 211-758; 234 NW 189

CHAPTER 523

FORECLOSURE OF CHATTEL MORTGAGES

12352 Notice and sale.

Atty. Gen. Opinion. See '30 AG Op 100

ANALYSIS

I FORECLOSURE IN GENERAL
II FORECLOSURE UNDER CONTRACT
III FORECLOSURE IN COURT

I FORECLOSURE IN GENERAL

Pledge and mortgage distinguished. The deposit of collateral securities with a trustee, in order to secure the payment of bonds issued by the depositor, constitutes a pledge and not a mortgage.

Central Bk. v Secur. Co., 206-75; 218 NW 622

Election between securities. The holder of both a chattel and real estate mortgage securing the same debt has the right to elect to proceed to the foreclosure of his mortgages and to abandon all interest in a block of trust bonds secured by trust deed on other real estate and held by him as collateral security for said debt, and in such case the foreclosure by the trustee of the trust deed and the buying in of the trust property by the trustee in the interest of the bondholders will not be deemed a payment to any extent of the chattel and real estate mortgage secured debt.

Silver v Farms, Inc., 209-856; 227 NW 97

Combined real estate and chattel mortgage—independent foreclosure of latter. When a mortgage on real estate, and a chattel mortgage on the rents of said real estate, are combined in the same instrument as security for the same debt, the chattel mortgage is foreclosable without regard to the real estate mortgage except, of course, as to the proper application of payments realized.

Equitable v McNamara, 220-297; 259 NW 231; 262 NW 466

Liabilities of parties. A senior chattel mortgagee who, without foreclosure, takes possession of the mortgaged property and sells it at private sale must account to a junior mortgagee for such part of the proceeds as he applies to unsecured claims due him.

Money v Bank, 202-106; 209 NW 275

Foreclosure subsequent to judgment at law. A chattel mortgagee may obtain a judgment at law on the promissory notes secured by the mortgage, and later maintain an action in equity to establish his lien on the mortgaged chattels and to subject said chattels to the satisfaction of his judgment, even tho there are junior liens on the same property.

Hamilton v Henderson, 211-29; 230 NW 347

Mortgage on rents—exclusive power of mortgagee to collect. A chattel mortgage on the rents and income of real estate, tho combined in a real estate mortgage as dual security for the same debt, vests the mortgagee with full and exclusive power to collect said rents and income.

Equitable v McNamara, 220-297; 259 NW 231; 262 NW 466

I FORECLOSURE IN GENERAL—concluded

Mortgage on rents—right to receiver to protect. A mortgagee of the rents and income of real estate is entitled to have a receiver appointed to protect his right to said rents and income when said right is jeopardized by the unauthorized acts of an impecunious mortgagor.

Equitable v McNamara, 220-297; 259 NW 231; 262 NW 466

Dissolution by state—corporate officer's lien denied—mining property. In an action by the state for dissolution of a mining corporation, a chattel mortgage and conditional sale contract covering the mine property are fraudulently invalid and may not be established as first liens when held and asserted by a defendant who, among other things, as an incorporator, director, president, and general manager of the corporation, secured such instruments while acting in his fiduciary capacity for the purpose of insuring payment to himself of debts previously created, thus serving his personal interests, rather than as fiduciary, preserving the assets for the creditors and stockholders.

State v Fuel Co., 224-466; 276 NW 41

Breach of warranty as defense. In action by seller to foreclose a chattel mortgage on a tractor, the trial court's finding that the tractor would not operate properly as warranted was sustained by the evidence.

Cunningham v Drake, (NOR); 224 NW 48

II FORECLOSURE UNDER CONTRACT

Conditional sales contract. A conditional sales contract which provides that on default the vendor may seize the property and sell at public or private sale and credit the vendee with the net proceeds may be foreclosed by judicial proceedings.

Central Motors v Clancy, 206-1090; 221 NW 774

Conditional sales—unallowable foreclosure. In an action to foreclose a conditional sales contract on a specifically described article, foreclosure may not be decreed on another and different article but of the same general nature, in the absence of allegation and proof that the latter article had been mutually substituted for the former.

D. M. Co. v Lindquist, 214-117; 241 NW 425

III FORECLOSURE IN COURT

Agreed public sale—lien on proceeds. An agreement between chattel mortgagees and the chattel mortgagor that the mortgaged property shall be sold at public sale and the proceeds turned over to the mortgagees in the order of their liens, is valid and enforceable in equity. In other words equity, in order to enforce the agreement, will impress a trust on said proceeds in favor of said mortgagees, even tho the occasion so to do arises in a proceeding at law, to wit, a garnishment.

Jasper Co. Bank v Klauenberg, 218-578; 255 NW 884

Conditional sale contract. A conditional sale contract which retains title in the vendor but which binds the vendee to pay the entire price, and provides for foreclosure in case of default of payment, arms the vendor, in case of such default, to proceed in equity for the foreclosure of his lien.

Jensen v Kissick, 204-756; 215 NW 962

Co-executors—failure to list debt owed by one—other estopped to foreclose. When two sons, as executors of their deceased father's estate, in their final report failed to list as an asset of the estate a note and mortgage owed by one son to the father, altho both sons knew of the debt, in an action in which the other son as heir to half the estate sought to collect the note and foreclose the mortgage, the court's adjudication that all property in the estate had been administered estopped him from obtaining relief when the final settlement was not attacked on the grounds of fraud or mistake.

Joor v Joor, 227-870; 289 NW 463

Review, scope of. In the foreclosure of a real estate mortgage and of a chattel mortgage clause embraced therein, the fact that the lower court failed to enter an order for the formal foreclosure of the chattel mortgage is quite inconsequential when the court did appoint a receiver of said mortgaged chattels and properly ruled that plaintiff's lien was superior to that of appellant's.

Equitable v Brown, 220-585; 262 NW 124

12358 Attorneys' fees.

Fees on corporate notes—state's nonliability. Where dissolution of a mining corporation is sought, a partial cost judgment against the state of Iowa including statutory attorney fees to a cross-petitioner on notes secured by chattel mortgage and signed by the corporation is erroneous.

State v Fuel Co., 224-466; 276 NW 41

12360 Evidence of service perpetuated.

Nunc pro tunc correction of manifest error. A decree in chattel mortgage foreclosure may be so corrected by nunc pro tunc entry that the detailed enumeration of the mortgaged property will appear in the corrected decree exactly as the court unquestionably intended such enumeration to appear in the original judgment entry.

Chariton Bk. v Taylor, 213-1206; 240 NW 740

12361 Validity of sales.

Treating collateral security as one's own. The collateral holder of mortgage-secured

bonds is guilty of conversion if, when the mortgage is foreclosed, he so treats said bonds as his individual property that they pass beyond the control of himself and of the real owner, without the knowledge or consent of said real owner.

Leonard v Sehman, 206-277; 220 NW 77

Mechanic's lien release thru fraud—insufficient evidence. Where a landowner desiring to refinance a mortgage on his land is unable to do so, unless he also satisfies a mechanic's lien thereon, and when the landowner's son, seeking to aid his father by securing a release of the mechanic's lien, executes to a bank a chattel mortgage, after which the mechanic's lien is released because of a special account set up by the bank for the mechanic's lienholder, but which account is available, however, only in such amounts and at such times as the son paid off the chattel mortgage to the bank, and when the same bank later took another chattel mortgage from both the landowner and son, which it later foreclosed, and in the sale disposed of the property, previously mortgaged for the benefit of the mechanic's lienholder, without crediting to the mechanic's lienholder's benefit the proceeds therefrom, a fraud action by the mechanic's lienholder against the bank held not to have been proven.

Shimp Bros. v Place, 225-1098; 281 NW 471

12362 How contested.

Foreclosure — transfer to court. The right of a mortgagee to foreclose a chattel mortgage by notice and sale (1) under the statute, or (2) under the terms of the mortgage itself, may not be transferred to the district court on the application of the mortgagor on the ground of fraud and want of consideration in obtaining the mortgage, when an action of replevin involving the mortgaged chattels, and pending against the mortgagor furnishes him ample opportunity to test the mortgagee's right to foreclose by interposing said plea of fraud and want of consideration.

McDonald v Johnston, 218-1352; 256 NW 676

Sale of horses covered by prior mortgage—misdescription. In an action against a bank for conversion of horses sold in a chattel mortgage foreclosure and allegedly being the same horses mortgaged previously to induce the release of a mechanic's lien, held, evidence failed to establish that the horses sold were the same ones described in the prior chattel mortgage.

Shimp Bros. v Place, 225-1098; 281 NW 471

12363 Deeds of trust.

Right to collect collateral. Trust deed held to authorize unequivocally the pledgor of collateral as security for a bond issue to collect the principal and interest maturing on the collateral so long as the pledgor was not 60 days in default in himself paying the maturing principal and interest of the bonds, in which latter case the right and duty to collect devolved on the trustee.

Walker v Howell, 209-823; 226 NW 85

Unauthorized transfer of collateral. The act of a trustee, holding collateral as security for a particular bond issue, in transferring, without authority, the collateral so held to another and different series of bonds in order that the said latter bonds may be better secured or the transfer of such collateral to any other foreign purpose, constitutes a conversion, and renders the trustee and the corporate officers who connive thereat personally responsible to the bondholders for the loss suffered by them.

Walker v Howell, 209-823; 226 NW 85

Right to withdraw and substitute. Where the pledgor of collateral as security for a bond issue had the right under the trust deed to withdraw matured collateral and collect the amount due thereon so long as the pledgor was not 60 days in default in himself paying the matured bonds, held that the power to substitute collateral in lieu of those withdrawn for collection was necessarily implied.

Walker v Howell, 209-823; 226 NW 85

CHAPTER 524

FORECLOSURE OF PLEDGES

12364 Notice and sale.

Pledge and mortgage distinguished. The deposit of collateral securities with a trustee in order to secure the payment of bonds issued by the depositor constitutes a pledge and not a mortgage.

Central Bk. v Secur. Co., 206-75; 218 NW 622

Non-possession of subject matter. A party may not be deemed a pledgee of a note and mortgage which has never been in his possession.

Reyelts v Feucht, 206-1326; 221 NW 937

Pledgee as purchaser—non-allowable lien on sale price. An assignee of a promissory note as collateral security who takes his assignment without delivery to him of the note may not have a lien for the amount of his claim established on the sum paid for the note by a subsequent pledgee of the note at a judicial foreclosure sale of said pledged note, it appearing that said pledgee acted in perfect good faith and without notice of the assignee's equity in said note.

Reyelts v Feucht, 206-1326; 221 NW 937

Assignment—recording—scope of constructive notice. The recording of an assignment

of a promissory note and of a real estate mortgage securing the note charges the world with no constructive notice except of the assignee's interest in the land. Such record does not charge a subsequent pledgee of the note and mortgage with constructive notice of the assignee's equity in the note as personal property.

Reyelts v Feucht, 206-1326; 221 NW 937

Duty to protect collateral—burden of proof. A pledgee of a note and mortgage, as collateral security, must exercise ordinary diligence to protect the rights of the pledgor in the property pledged, but, under an allegation that the pledgee has failed in his said duty, the pledgor must establish the value of the collateral—what he has lost because of the neglect of the pledgee.

Carter v McClain, 215-19; 244 NW 671

Sale—burden of proof. Merely showing that the relation of pledgor and pledgee existed does not cast on the pledgee the burden of proving that his sale of the pledge was bona fide.

Williams v Herman, 216-499; 249 NW 215

Pledge for pre-existing debt—effect. Principle recognized that one who acquires property as security for antecedent debts only is not a bona fide holder for value as against pre-existing equities.

Aetna Ins. v Morlan, 221-110; 264 NW 58

12369 Sale—pledgee as bidder.

Sale—legality. A good-faith sale by a pledgee to his son of corporate stock pledged as collateral security for a debt is valid, no relation of principal and agent existing.

Williams v Herman, 216-499; 249 NW 215

Accounting. A pledgee who sells the pledge for the full amount of the secured note makes a sufficient accounting by marking the note "paid" and returning it to the pledgor.

Williams v Herman, 216-499; 249 NW 215

Title acquired. The purchaser of a municipal electric light and power plant, under a foreclosure of a pledge thereof, does not automatically acquire a franchise to operate the plant.

Greaves v Villisca, 217-590; 251 NW 766

12371 Equitable action.

Plaintiffs—bondholders (?) or trustees (?). When trustees for a bondholder have, under the terms of the bonds, the exclusive right to maintain an action for the protection of the bondholder, the latter may not maintain such action and thereby convert himself into a trustee, on the naked allegation, in substance, that the trustees will, because of partiality, be less aggressive in prosecuting such action than the bondholder.

McPherson v Sec. Co., 206-562; 218 NW 306

CHAPTER 525

FORECLOSURE OF REAL ESTATE MORTGAGES

12372 Equitable proceedings.

ANALYSIS

Adverse possession, effect on mortgage. See under §11007 (XXVIII)
Cancellation of mortgages. See under §10941 (XI)
Deeds in general. See under §10084 (I)
Deficiency judgments. See under §§11033.1 and 12377
Estate property mortgaged. See under §11933
Extension of promissory notes. See also under §§9581, 9586
Fraudulent conveyances to defeat creditors. See under §11815
Homestead mortgaged. See under §§10147, 10155 (II)
Judgment and decree. See under §12376
Merger in conveyances. See under §10084 (II)
Recording laws. See under §10105 et seq.
Redemption. See under §12376
Removal of fixtures. See under §10042 (III)
Sale under special execution. See under §12376
Satisfaction of mortgages. See under §12364
Wife signing to release dower. See under §12376 (II)

I REQUISITES AND VALIDITY

(a) NATURE AND ESSENTIALS OF CONVEYANCES AS SECURITY

1 Generally

"Mortgagor" defined. A "mortgagor" is he who holds title to the premises mortgaged. A wife who joins in a mortgage of the husband's land for the purpose of releasing her distributive share is not a mortgagor.

Wood v Schwartz, 212-462; 236 NW 491

Purchase money mortgage — indispensable element.

Ely Bank v Graham, 201-840; 208 NW 312

Equitable mortgages. Equity will treat any written instrument as a mortgage when from the instrument itself, or when aided by attending circumstances, it resolves itself into an intended security.

Parry v Reinertson, 208-739; 224 NW 409; 63 ALR 1051

Equitable mortgage—priority. Where one who stands in the position of a vendor of land assigns his interest in the contract of sale as security, and the court subsequently decrees a cancellation of the contract, but also decrees that such cancellation shall be without prejudice to the rights of said assignee, said assignee will be deemed to hold an equitable mortgage on the land reverting to the vendor, superior to the lien of a judgment against the vendor obtained subsequent to the original assignment.

Johnson v Smith, 210-591; 231 NW 470

Reservation of right to repurchase—effect. A recital in a conveyance that the grantor "reserves the right to repurchase said premises under his contract with said grantee" does not, in and of itself, show that said deed was intended as a mortgage.

Sheley v Engle, 204-1283; 213 NW 617

Surrender of equity of redemption. Evidence held insufficient to show that mortgage security had, by a subsequent agreement, been converted into an absolute deed.

Central Tr. Co. v Estes, 206-83; 218 NW 480

2 Other Instruments as Mortgages

Discussion. See 15 ILR 192—Conveyance as equitable mortgage

Deed as mortgage. Oral testimony is admissible to show that a deed of conveyance was intended as a mortgage, especially against one who is a stranger thereto and who has never acted thereon.

Morton Ins. v Farquhar, 200-1206; 206 NW 123

Deed as mortgage. A warranty deed will be deemed a mortgage (1) when the transaction had its inception in an application by the grantor for a loan; (2) when redemption by the grantor was mutually contemplated; (3) when the value of the land exceeded the amount advanced by the grantee; (4) when the evidence justifies a finding that the deed was exacted as a means of avoiding the foreclosure statutes; and (5) when, in its last analysis, the grantor and grantee occupied the relation of creditor and debtor, even tho they did not always consistently maintain such relation.

Tansil v McCumber, 201-20; 206 NW 680

Warranty deed as mortgage—rule of evidence. On the issue whether a warranty deed was in fact a mortgage, the pleader must prove, by clear and satisfactory evidence, (1) that the consideration for said deed was a definite and existing debt, and (2) that said debt was not extinguished by the deed.

Clark v Chapman, 213-737; 239 NW 797

Absolute deed as mortgage — evidence — sufficiency. Evidence reviewed at length and held that a deed of conveyance, absolute in form, was intended to be such, and not a mortgage.

Shanda v Bank, 220-290; 260 NW 841

Absolute deed as mortgage. Proof that an absolute deed was intended as a mortgage must be clear, satisfactory and convincing.

I REQUISITES AND VALIDITY—continued

(a) NATURE AND ESSENTIALS OF CONVEYANCES AS SECURITY—concluded

2 Other Instruments as Mortgages—concluded

Evidence reviewed and held wholly inconsistent with the plea of mortgage.

McKenney v Nelson, 220-504; 262 NW 101

Wife's deed to husband's creditors as mortgage. Wife's deed to creditors in payment of husband's notes, under circumstances, construed as mortgage with right to creditors to foreclose.

Allen v Hume, 227-1224; 290 NW 687

Degree of required proof. An absolute deed of conveyance may be shown to have been intended as a mortgage only, but such intent must be established beyond all reasonable doubt.

Maytag v Morgan, 208-658; 226 NW 93

Deed as mortgage—consideration. A warranty deed may not be decreed to be a mortgage when the daughter-grantee pays a good-faith and complete consideration to her father, the grantor.

Witousek v Holt, (NOR); 224 NW 530

Nonapplicability of statute. The statutory provision for new trial in actions for the recovery of real property by ordinary proceedings (§12255, C., '31) can have no application to an equitable proceeding to have a deed decreed a mortgage and for an accounting of rents and profits.

Hinman v Sage, 213-1320; 241 NW 406

Foreign deed as mortgage. The district court, when it has jurisdiction of all parties to a controversy, has jurisdiction to determine their contract relations to lands situated in a foreign state: e. g., whether an absolute deed to such lands was an absolute conveyance or a mortgage.

Tansil v McCumber, 201-20; 206 NW 680

Contract for deed as mortgage. Contract for deed, and attendant circumstances, and interpretation placed on such contract by the parties, reviewed, and held actually to convey the equitable title to one party and to leave the legal title in the other as security for the purchase price.

First JSL Bank v Galagan, 220-173; 261 NW 920

Chattel clause in real estate mortgage. A real estate mortgage which, in addition to the land, conveys the crops raised on the land "from now until the debt secured is paid," is also a chattel mortgage, to the extent of the crops.

Farmers Bk. v Miller, 203-1380; 214 NW 546

Expectancies — ineffectual instrument. A mortgage which recites that the mortgagor "sells and conveys her undivided interest and all future rents, issues, and profits" in named lands (in which the mortgagor then has no interest whatever) speaks solely in the present tense, and is wholly ineffectual to convey the mortgagor's future expectant interest in the land as an heir.

Lee v Lee, 207-882; 223 NW 888

Showing of debt essential. An absolute deed may not be decreed to be a mortgage unless it be made to appear, inter alia, that a debt existed between the grantor and grantee.

Hinman v Sage, 208-982; 221 NW 472

3 Consideration Generally

Consideration — pre-existing debt. A pre-existing indebtedness is ample consideration, as between the debtor and creditor, for the execution of a mortgage securing its payment.

Charlson v Bank, 201-120; 206 NW 812

Consideration—surrender of old obligations. A showing that a mortgagee surrendered outstanding notes and mortgages of the mortgagor and took from the mortgagor a new note and mortgage necessarily shows full consideration for the latter obligations.

Winterset Bk. v Iiams, 211-1226; 233 NW 749

Consideration—absence of—burden of proof. The beneficiaries of a trust, defendants in an action on a note and mortgage executed by their authorized agent, have the burden to show want of consideration.

Daries v Hart, 214-1312; 243 NW 527

Consideration—burden of proof. A husband who signs a note and mortgage along with his wife has the burden to show failure of consideration for his signature, and he does not meet such burden by proof that his wife received all of the money borrowed and that he signed the mortgage in order to waive his dower interest.

Penn Ins. v Orr, 217-1022; 252 NW 745

(b) FORM AND CONTENTS OF INSTRUMENTS

Change in name of mortgagee—presumption.

Vanderwilt v Broerman, 201-1107; 206 NW 959

Mistake—omission of lands from mortgage. A mortgage may be so reformed as to correct the mutual mistake of mortgagor and mortgagee in omitting certain lands from the mortgage, even against a judgment creditor of the mortgagor's who became such after the mortgage was executed.

Davis v Bunnell, 207-1181; 225 NW 6

Discrepancy in names—effect. The fact that in the body of a mortgage, and in the certificate of acknowledgment of said mortgage, the name of the wife of the mortgagor-owner appears as "Mary F. McNeff" instead of "Mary T. McNeff" (her correct name) is not of controlling importance on the issue as to the

validity of the mortgage as to the wife, it appearing that she was correctly identified in said certificate of acknowledgment "as the wife" of said mortgagor-owner.

First JSL Bank v McNeff, 220-1225; 264 NW 105

(c) EXECUTION AND DELIVERY

Signature — genuineness — evidence — sufficiency. Evidence held to support finding that signatures to note and mortgage were genuine.

Rieper v Berner, 222-1399; 271 NW 519

Execution—evidence—sufficiency. Evidence that the signature to a mortgage is the genuine signature of the mortgagor and that the mortgage is in the possession of the mortgagee is prima facie evidence of the due execution of the mortgage.

Citizens Bk. v Hamilton, 209-626; 227 NW 112

Signing without reading. A party will not be permitted to say that he was defrauded into signing an instrument without knowing its contents when he could read, did not read, and was in no manner prevented from reading.

Legler v Ins. Assn., 214-937; 243 NW 157

Apparent authority to execute mortgage. Evidence reviewed and held quite insufficient to support the contention that an agent, in executing a mortgage in the name of his principal, was acting within the scope of his apparent authority.

Hagensick v Koch, 220-1055; 264 NW 13

Mortgage of life estate and remainder. A court of equity, in an emergency, has inherent power, on the application of life tenants and remaindermen—tho some of the latter be minors—to authorize the execution of a mortgage on the entire fee title in the property in question regardless of the respective interest of the parties among themselves, when such order or authorization is necessary to preserve the property for all said parties and prevent loss to any of them. And this is true tho the creator of the two estates did not contemplate such emergency.

John Hancock Ins. v Dower, 222-1377; 271 NW 193

Failure to sign note—effect. A duly executed mortgage is valid and enforceable even tho the promissory note purporting to be secured was never signed by the mortgagors, when a debt actually exists and when the parties intended to secure that debt.

Finken v Schram, 212-406; 236 NW 408

Conditional delivery. The plea that a mortgage was conditionally delivered must fall in the face of evidence that the condition contended for was not to precede delivery, but had relation to the enforcement of the instrument after delivery.

Farmers Bk. v Weeks, 209-26; 227 NW 508

Authority of trustee. Trust agreement construed and held to authorize the trustee to execute mortgages and to bind the beneficiaries of the trust for the payment thereof.

Daries v Hart, 214-1312; 243 NW 527

(d) VALIDITY

1 Generally

Insane maker. Neither a negotiable promissory note nor a mortgage given by the makers to secure the same, even tho the mortgage is on a homestead, is subject, when in the hands of a holder in due course, to the plea that the maker was insane at the time of the execution of such note and mortgage.

Farmers Ins. v Ryg, 209-330; 228 NW 63

Fictitious mortgagee. A mortgage which is executed to a fictitious mortgagee with the acquiescence of the mortgagor, but which is wholly free from fraud, is valid between the mortgagor and the actual mortgagee and likewise valid between the mortgagor and one who has acquired all the interest of the actual mortgagee. And this is true tho it be conceded, arguendo, that the note was nonnegotiable, and that the mortgage was not entitled to recordation.

Richardson v Stewart, 216-683; 247 NW 273

Defaulting plaintiff—equitable relief denied. Plaintiff vendee, after first defaulting under a contract for the sale of real estate, may not in equity, while still in default, rescind the contract because defendant vendor had later allowed a prior mortgage on the real estate to be foreclosed, and, therefore, had no title to deliver if plaintiff fully performed.

Fitchner v Walling, 225-8; 279 NW 417

Forgery—insufficient evidence. Evidence held insufficient to show forgery of a mortgage.

McDaniel v Life Co., 210-1279; 232 NW 649
McDaniel v Bank, 210-1287; 232 NW 653

Alteration of instruments after delivery. Alteration apparent on face of instrument does not raise presumption alteration was made after delivery. Evidence held insufficient to carry burden of showing mortgage was altered after delivery.

Durr v Pratt, (NOR); 240 NW 681

2 Dragnet Mortgages

Dragnet mortgage. A mortgage clause providing in effect that the mortgage shall stand as security for all debts which the mortgagee holds or may acquire against the mortgagor, while suggestive of fraud, is nevertheless enforceable in the absence of an affirmative showing of fraud.

Corn Belt Bk. v Kriz, 207-11; 219 NW 503

Oppressive and unconscionable dragnet mortgage as violative of public policy.

Sullivan v Murphy, 212-159; 232 NW 267

I REQUISITES AND VALIDITY — concluded
(d) VALIDITY—concluded
2 Dragnet Mortgages—concluded

Dragnet mortgage—reformation. A dragnet clause in a mortgage to the effect that the mortgage shall stand as security for any other debt which the mortgagee may hold or acquire against the mortgagor will be stricken from the mortgage on proper plea for reformation, and on proof that by the use of a printed form the said clause was inadvertently embraced in the mortgage by both parties.

Pospishil v Jensen, 205-1360; 219 NW 507

Dragnet clause securing multiple debts—reformation. A general clause in a mortgage to the effect that the mortgage shall stand as security for any debt in addition to the debt specifically secured which the mortgagee may hold or acquire against the mortgagors or either of them, will be wholly eliminated on a prayer for reformation on proof that said clause was contrary to the mutual intent of the mortgagors and mortgagee when the mortgage was executed, because to hold that said clause was enforceable under such circumstances would be to countenance a legal fraud. And all this is true tho the mortgagors did not read and were not prevented from reading the mortgage when it was executed.

Comm. Bk. v Ireland, 215-241; 245 NW 224

3 Mortgagor Estopped to Deny Title

Mortgageable interest — presumption. A mortgagor is presumed to have a mortgageable interest in the property mortgaged, and is estopped to assert the contrary.

Watts v Wright, 201-1118; 206 NW 668
Gotsch v Schoenjahn, 201-1317; 207 NW 567

Mortgagors estopped to deny title in re estate mortgaged. Mortgagors will not be permitted to deny that they own the quality of title which they have assumed to mortgage.

John Hancock Ins. v Dower, 222-1377; 271 NW 193

Personal liability—estoppel to deny. An officer of a national bank who, being unable to obtain a loan for his bank on the bank's own real estate, from a first trust joint stock land bank, because such land banks are prohibited by federal statutes from making loans to a corporation such as a national bank, enters into a plan, without the knowledge of the land bank, to circumvent the federal statutes and obtain the loan for his bank by falsely representing to the land bank that he personally owns the land in question, and who successfully consummates said fraudulent scheme and obtains the loan on his personal note and mortgage, is estopped to deny his personal responsibility on said note and mortgage.

First JSL Bk. v Diercks, 222-534; 267 NW 708

Estoppel. Bank directors may not question the legality of individual mortgages executed by them when through such execution they obtain (1) the surrender of their formerly executed guaranty in behalf of their bank, (2) an extension of time in which to pay the guaranteed obligations, and (3) the surrender by the mortgagee of assets of which the director-mortgagors individually avail themselves.

Live Stock Bk. v Irwin, 207-1083; 224 NW 76

Invalidity—estoppel. A husband, by accepting from his wife a conveyance of homestead property subject to a named existing mortgage thereon, thereby estops himself from questioning the validity of said mortgage on the ground that he never joined in the execution thereof.

Truro Bank v Foster, 206-432; 220 NW 20

Bank's mortgage on life estate changed to cover "undivided one-third" interest—effect on lien. Where a bank had knowledge of an arrangement whereby a mother had a life estate in the entire property and made a mortgage accordingly, but in a later mortgage attempts to change its position by a mortgage on her interest as an "undivided one-third", its answer, admitting this allegation in the petition, estops the bank from claiming the mother had a greater interest and, when her interest develops to be a life estate, the bank's mortgage attaches only to an undivided one-third of this life estate.

Redding v Redding, 226-327; 284 NW 167

II CONSTRUCTION AND OPERATION

(a) GENERAL RULES OF CONSTRUCTION

Discussion. See 15 ILR 192—Conveyance as equitable mortgage

Conflict between note and mortgage. In case of a conflict between the note and the mortgage securing it, as to the conditions under which the mortgagee may treat the entire debt as due for the nonpayment of interest, the note will prevail.

Wilson v Tolles, 210-1218; 229 NW 724

Right to insurance. A second mortgagee who forecloses and, after redeeming from a first-mortgage foreclosure, takes a sheriff's deed, is entitled to the proceeds of a fire insurance policy taken out by the mortgagor for the benefit of the first mortgagee; and this is true even tho the fire occurred during the period for redemption from the second mortgage.

In re Hackbart, 203-763; 210 NW 544; 52 ALR 895

Discharge as affecting assignment of expectancy as security. When a debtor assigns his expectancy in an estate as security for the payment of the debt, a subsequent discharge of the debt in bankruptcy ipso facto discharges said assignment and all unadjudicated equitable rights thereunder, even tho the ancestor creates a legacy for the debtor, and dies

after the debtor is adjudged a bankrupt, and before the debtor is decreed a final discharge.

Gannon v Graham, 211-516; 231 NW 675; 73 ALR 1050

Burk v Morain, 223-399; 272 NW 441

Option to pay proportionate amount—effect. In a mortgage on several lots, a clause giving the mortgagor the option to pay a "proportionate amount" of the principal debt at any time and have any lot released from the mortgage, does not have the effect of distributing the debt into component parts over the entire number of lots and giving the mortgagee a lien on each lot to the extent of the value thereof only.

Marker v Davis, 200-446; 204 NW 287

Negotiability—provisions not incorporated in note. The provisions of a mortgage will not be deemed incorporated into the mortgage-secured promissory note by a statement in such note to the effect that the note is secured by a first mortgage on real estate in a named county.

D. M. Bank v Stanley, 206-134; 220 NW 80

Mortgage embraces conveyance. A valid prohibition against the "conveyance" of real property embraces a mortgage.

Iowa F. C. Corp. v Halligan, 214-903; 241 NW 475

Increased rate after default. Interest on a note and mortgage is necessarily computable, after default in payment, at the increased rate provided by the mortgage for such a contingency, provided said rate does not exceed the maximum legal rate.

Penn Ins. v Orr, 217-1022; 252 NW 745

Interest on accelerated debt. Where a mortgage provides for an increased but legal rate of interest on all sums due and unpaid, and foreclosure is instituted (1) on sums due and in default, and (2) because of an acceleration clause, on the balance called for by the mortgage, interest on the accelerated part of the debt can only be computed from the date when foreclosure was commenced.

Federal Bank v Wilmarth, 218-339; 252 NW 507; 94 ALR 1338

Real estate contract—merging unpaid payments into mortgage. Provision in contract of purchase reviewed and held simply to contemplate the merging of unpaid payments into a mortgage, and not to authorize the vendor to execute a mortgage on the property sold.

Ely Bank v Graham, 201-840; 208 NW 312

Life estate—proof—mortgage recitals. A series of mortgages accepted by a bank describing the undivided third interest of a son subject to the life estate of the mother, together with other evidence, held to establish an alleged oral contract of the heirs and their mother to create such life estate in the property of a deceased intestate husband and father; consequently, partition of the realty was properly denied against the mother.

Redding v Redding, 226-327; 284 NW 167

(b) PARTIES AND DEBTS OR LIABILITIES SECURED

1 Generally

For part of debt—preserving lien for balance. Where a mortgagee is entitled to foreclose for only a part of the secured indebtedness, the lien of the mortgage for the remaining indebtedness should be preserved.

Wilson v Tolles, 210-1218; 229 NW 724

Different obligations secured by same mortgage. If, before the execution of a mortgage, the mortgagee and the broker who negotiated the loan agree that the proceeds of a named fractional part of the interest rate to be inserted in the mortgage shall belong to the broker as his commission for negotiating the loan, the broker thereby acquires a vested interest or right to participate, on foreclosure, in the total mortgage debt, insofar as is necessary to protect his fractional part of the matured interest.

Metropolitan v Steiner, 219-785; 259 NW 234

2 Taxes

Mortgagee reimbursed for taxes. The court, in the disposition of rents in mortgage foreclosure, manifestly may order the mortgagee reimbursed for interest advanced on a prior mortgage and for taxes when all the parties to the foreclosure had so stipulated.

Olson v Abrahamson, 214-150; 241 NW 454

Taxes—nonduty of wife to pay. A wife who, for the purpose of releasing her distributive share, joins with her husband in a mortgage of the husband's lands is not bound by the husband's covenants or legal obligation to pay future accruing taxes on the land.

Wood v Schwartz, 212-462; 236 NW 491

Usurious transactions—agreement to pay lender's taxes. A note and mortgage which calls for less than the maximum legal rate of interest, but requires the mortgagor to pay in addition certain known charges, and taxes assessable to the mortgagee, will not be deemed usurious in the absence of proof that the interest contracted for, plus the added exactions, when computed over the full term of the note and mortgage, will exceed the said maximum legal rate.

Penn Ins. v Orr, 217-1022; 252 NW 745

When taxes "due". An obligation on the part of a receiver to pay taxes on mortgaged property "as they become due" embraces taxes which are owing on and after the first Monday in January following the levy, even tho they are not delinquent. In other words, nondelinquent taxes are due in the sense that they are owing.

Hawkeye Ins. v Inv. Co., 217-644; 251 NW 874

II CONSTRUCTION AND OPERATION—continued

(b) PARTIES AND DEBTS OR LIABILITIES SECURED—concluded

2. Taxes—concluded

Protection of mortgagee against taxes. A mortgagee who bids in the property under a deficiency bid at foreclosure sale without at any time protecting himself against delinquent taxes as he might have done under the mortgage and foreclosure decree, and later takes a sheriff's deed to the property, may not have the rents collected during the redemption period applied to the discharge of said taxes.

Hartford Ins. v Alexander, 215-573; 246 NW 404

Sale—inclusion of taxes—effect. A mortgagee who, on foreclosure, takes judgment for the taxes paid by him and, on sale, bids the full amount of his judgment, thereby fully satisfies the claim for said taxes; and neither he nor one claiming under him can collect said taxes a second time, even from a grantee obligated to pay them.

Marx v Clark, 201-1219; 207 NW 357

Mortgagee suing for delinquent taxes omitted from foreclosure judgment—splitting actions. A mortgagee who had paid delinquent taxes on the mortgaged land, according to a provision of the mortgage that if taxes were not paid the mortgagee could pay them and obtain repayment, should have taken care of his claim for taxes in the foreclosure proceedings and was not permitted by Ch. 501, C., '35, to split his cause of action and bring an action for the taxes after the mortgagor had redeemed.

Monroe v Busick, 225-791; 281 NW 486

Recovery of payments—voluntary, unnecessary payments not recoverable back. One who acquires title to premises theretofore sold under foreclosure for the nonpayment of installments of a mortgage debt, and who, with full knowledge of all relevant fact conditions, and as a purely voluntary act on his part, redeems from said foreclosure sale (evidently with the belief that by so doing he would acquire an absolutely unincumbered title), may not, after the mortgagee has established his legal right again to foreclose on said premises for the balance of the mortgage debt, recover back from the mortgagee items of taxes on the premises paid in effecting said redemption.

Gronstal v Van Druff, 219-1385; 261 NW 638

(c) PROPERTY COVERED BY MORTGAGE

Contingent remainders—sale under execution. A contingent remainder, being legally mortgageable, is necessarily subject to sale on mortgage foreclosure execution.

John Hancock Ins. v Dower, 222-1377; 271 NW 193

Fixtures—removal against mortgagee. A steam boiler and a bake oven so erected on mortgaged real estate that they become fixtures, in lieu of former articles of the same kind, cannot be legally removed, even tho sold under a contract providing for retention of title in the vendor until paid for, when such removal would materially diminish the security of the said mortgagee.

Comly v Lehmann, 218-644; 253 NW 501

Parol or extrinsic evidence affecting writings—oral addition to mortgage. Evidence is inadmissible that, at the time of the execution of a purchase-money mortgage, an oral contemporaneous agreement was entered into to the effect that, if the mortgagor was unable to finance (pay) the mortgage, the mortgagee would pay to the mortgagor the value of any improvements placed on the land by the mortgagor.

Felton v Thompson, 209-29; 227 NW 529

(d) LIEN AND PRIORITY

Several mortgages, priority of right to rents. See under §12383.1

1 Lien and Priority Generally

A Lien Generally

Duration of lien. Principle reaffirmed that the lien of a mortgage continues until the debt is paid, irrespective of the form in which the debt is evidenced.

Equitable v Rood, 205-1273; 218 NW 42

Ancient mortgage—debt extended—effect on lien. An admission of an old indebtedness, extending the debt another ten years, starts the running of the statute of limitations anew, and the lien of a mortgage securing the debt is thereby extended for 20 years from its execution date, but as to whether the lien continues thereafter until the indebtedness secured by it would be barred, quaere.

Lackey v Melcher, 225-698; 281 NW 225

Bankruptcy—discharge—effect on lien. The discharge in bankruptcy of a mortgagor does not affect the lien of the mortgage.

Webber v King, 205-612; 218 NW 282

Vested interest—curtailing right of mortgagee. Whether a mortgagee of unimproved land may constitutionally be deprived of a lien on future-erected and permanent improvements on the land, quaere.

Crawford v Mann, 203-748; 211 NW 225

Mortgage on partner's undivided interest. The mortgagee of an undivided interest in land taken on the supposition or assumption that the mortgagor's interest was absolute, is subject to a showing that the owners of the land were partners and that the land was the property of the partnership, and needed for the payment of partnership obligations, when the fact of such partnership and its ownership of the property in question could readily have

been discovered by the mortgagee by the exercise of reasonable diligence before he accepted the mortgage.

Norwood v Parker, 208-62; 224 NW 831

Recitals — effect. One who in good faith and for value purchases a note and a mortgage which from its face and recording date is a first lien, is not charged with notice that another mortgage of later date and recordation is in fact the first lien on the same land because the latter mortgage runs to a Federal Land Bank (which is prohibited from taking second mortgages) and recites that the land is free from incumbrance.

Federal Bank v Sherburne, 213-612; 239 NW 778

Chattel mortgage clause—reference to realty mortgage provisions for interpretation. In a realty mortgage, a chattel mortgage clause conveying all the rents, issues, uses, profits and income therefrom and crops raised thereon "from date of this agreement until the terms of this instrument are complied with and fulfilled" was not invalid on ground that such provision required reference to realty mortgage provisions for interpretation or effect.

Bankers Life v Garlock, 227-1335; 291 NW 536

Lien for debts of devisee. A mortgage on real estate executed during the settlement of an estate by the insolvent devisee of the land is subject to the prior lien of the estate for the debts owing by the devisee to testator and contracted subsequent to the execution of the will. Evidence held to establish the debt in question and the insolvency of the devisee.

Bell v Bell, 216-837; 249 NW 137

Mortgage on interest of joint adventurer. Lands belonging to a joint adventure become individually owned land when the joint adventurers execute and place of record an instrument which specifically states the fractional individual ownership of each in the land. It follows that a subsequent mortgagee who in good faith relies on such record cannot be detrimentally affected by equities arising out of the joint adventure and existing between the joint adventurers.

State Bank v Calvert, 219-539; 258 NW 713

Injunction against lien claimant—dissolution. An injunction restraining the owner of land from interfering with the possession by a trustee in bankruptcy should be forthwith dissolved when it appears that said trustee has substantially no interest in the land—that his lien is valueless because of the foreclosure of a superior lien, and that he has no purpose to redeem.

Relph v Goltry, 213-1118; 240 NW 646

B Priority Generally

Priority—mortgages executed on same day on same property. As between mortgages executed and delivered on the same day on the same property, it will be presumed, nothing appearing to the contrary, that the mortgage first recorded was first executed and delivered, and consequently entitled to priority.

Miller v Miller, 211-901; 232 NW 498

Priority—failure to record. The failure of the assignee of a duly recorded first mortgage on real estate to record his assignment does not deprive him of his position of priority over the assignee of subsequently executed mortgages on the same property.

Kuhn v Larson, 220-365; 259 NW 765

Priority as between equally dated and maturing notes. Neither of two promissory notes secured by the same mortgage has priority over the other when they carry the same date of execution and maturity.

Templeton v Stephens, 212-1064; 233 NW 704

Series of equally maturing notes. A series of promissory notes secured by the same mortgage and all falling due on the same day, and in the hands of different holders, are each entitled to share pro rata in the proceeds of a mortgage foreclosure.

Whitney v Eichner, 204-1178; 216 NW 625

Chattel mortgage clause—effective date—priority over subsequent assignee of rents and profits. A clause in realty mortgage duly recorded and indexed, providing that mortgagor conveyed in addition to realty "also all the rents, issues, uses, profits and income therefrom, and all the crops raised thereon from the date of this agreement until the terms of this instrument are complied with and fulfilled", created a valid chattel mortgage, effective from date of execution of the mortgage and not from date of filing the foreclosure petition in which appointment of receiver is asked, and subsequent assignee of property, described in instrument, took subject to lien provided in such chattel mortgage clause.

Bankers Life v Garlock, 227-1335; 291 NW 536

Landlord mortgagor's assignment of lease —no effect on chattel clause of realty mortgage. A lien on rents and profits created by chattel mortgage clause in realty mortgage duly recorded and indexed was not invalid as to mortgagor's share of crops produced under 2-year lease, because such crops did not belong to mortgagor at time they came into existence and, the landlord having assigned the lease, the subsequent assignee of property described in mortgage would take subject to the lien provided therein.

Bankers Life v Garlock, 227-1335; 291 NW 536

Equitable mortgage—priority. Where one who stands in the position of a vendor of land assigns his interest in the contract of sale as security, and the court subsequently decrees a

II CONSTRUCTION AND OPERATION—continued
(d) LIEN AND PRIORITY—continued
1. Lien and Priority Generally—concluded

cancellation of the contract, but also decrees that such cancellation shall be without prejudice to the rights of said assignee, said assignee will be deemed to hold an equitable mortgage on the land reverting to the vendor superior to the lien of a judgment against the vendor obtained subsequent to the original assignment.

Johnson v Smith, 210-591; 231 NW 470

Adjustment of equities. A party may not complain of the adjustment of equities between parties over neither of whom he has priority.

Templeton v Stephens, 212-1064; 233 NW 704

Purchase-money mortgage. A mortgage on land, given to secure a balance due the mortgagee from the mortgagor on a transaction disconnected with the land, is not a purchase-money mortgage in such sense as to give the mortgagee priority over pre-existing liens.

Miller v Miller, 211-901; 232 NW 498

Lien of miner—priority over mortgage. A miner who opens and works a coal mine for a lessee has a lien on the leasehold prior to a mortgage on the entire tract of land, the mortgage not assuming to cover such leasehold.

Ford v Dayton, 201-513; 207 NW 565

Estoppel to assert lien. Naked proof that, during the time the mortgagee of land neglected to record his mortgage, the mortgagor obtained credit from another, who placed his claim in judgment, is wholly insufficient to estop the mortgagee from insisting on the priority of his mortgage lien. Additional proof of fraud or deception in some form is indispensable.

Brauch v Freking, 219-556; 258 NW 892

Marshaling assets. An assignee of property subject to a prior judgment is not entitled to the benefit of the doctrine of marshaling of assets by simply alleging and proving the naked fact that the judgment holder has mortgage security on other property for his judgment debt.

Iowa Co. v Clark, 213-875; 237 NW 336

Marshaling of assets. In the foreclosure of a valid and good-faith real estate mortgage by a mortgagee who also holds chattel security for the same debt, a judgment creditor and a junior lienholder may not have a marshaling of assets in the absence of any duly joined issue relating thereto, and when the real estate is of a value sufficient to satisfy all liens against it; neither may the court arbitrarily decree that the plaintiff's mortgage shall have priority over the junior lien to an amount less than the full amount due on the mortgage.

White v Smith, 210-787; 231 NW 309

2 Agreements as to Priority

Priority—agreement to reverse. The different holders of different mortgages may, in good faith and on a proper consideration, agree to reverse the legal order of priority of said mortgages, and such agreement is enforceable against the receiver of one of the parties.

James v Allen, 205-962; 218 NW 916

Oral agreement for priority. Oral evidence that when a promissory note and the mortgage securing it were assigned, it was agreed that the indorsee should have priority over other prior maturing notes secured by the same mortgage and then held by the assignor, is not violative of the "parol evidence rule".

White v Gutshall, 213-401; 238 NW 909

Oral agreement of parties. The assignee of one of two simultaneously executed mortgages on the same property to different parties may show, in an action wherein the foreclosure of each mortgage is asked, that just prior to the execution of said mortgages it was orally agreed by all parties to both mortgages that a certain one of said mortgages should be the first lien on the property.

Wuennecke v Hausman, 216-725; 247 NW 531

Series of notes—agreement for priority. Where a mortgage is given to secure a series of notes which mature on different dates, and the notes are disposed of to different parties, the notes first maturing have priority over those subsequently maturing; otherwise, if the indorsee of subsequently maturing notes has an agreement for priority, and the holder or indorsee of prior maturing notes has knowledge of such agreement when he buys.

White v Gutshall, 213-401; 238 NW 909

Representations as to priority of mortgages—owner's liability. Where owner of property represented to bank from which he was borrowing money that only specified mortgages were superior to those offered to bank as security for loans, and bank relied thereon, law of estoppel will not permit owner to acquire mortgage and assert its priority contrary to representation and agreement, since to allow such mortgage priority would constitute fraud, and equity requires owner to make his promises and representations good.

Stoner v Cook, (NOR); 229 NW 696

Consideration—detriment to promisee. The holder of tax-sale certificates covering mortgaged real estate who, in writing, waives the priority of said certificates over the lien of said mortgage, in order to enable the mortgagor to ward off foreclosure by obtaining an extension of time in which to pay the mortgage debt, may not, after the mortgagor has obtained said extension on the strength of the waiver, successfully assert that said waiver was without consideration.

Goff v Milliron, 221-998; 266 NW 526

Tax certificate priority waived—extension of time of payment of mortgage—consideration. Extension of the time of payment on bonds secured by mortgage held sufficient consideration to support waiver of priority of tax certificate owned by mortgagor's daughter.

Beal v Milliron, (NOR); 267 NW 83

3 Notice Generally

Imputation of notice or knowledge. A party who, as managing officer of a company, transfers the company's mortgage-secured promissory notes, and orally agrees that the indorsee shall have priority over other prior maturing notes secured by the same mortgage, must be held to have knowledge of said agreement when said prior maturing notes are subsequently transferred by the company to him as trustee of an estate.

White v Gutshall, 213-401; 238 NW 909

Probate record — constructive knowledge. One who takes a mortgage from a mortgagor who, under the recording acts, appears to be the sole owner of the fee is not charged with constructive knowledge of matter which appears in the "probate record" (§11842, C., '31) and which suggests or implies that some person other than the apparent fee owner has an interest in the property.

Booth v Cady, 219-439; 257 NW 802

Omitted tract—reformation against noninnocent incumbrancers. A plaintiff mortgagee, after having foreclosed his purchase-money mortgage and purchased the land at execution sale, discovering that one 80-acre tract was erroneously omitted from the mortgage and sale, and that mortgagor, having discovered the error, had executed another mortgage thereon as security for an old loan to parties with notice and knowledge of plaintiff's equitable right in the land, is entitled to a reformation of his mortgage, since later mortgagees were not innocent incumbrancers.

Winker v Tiefenthaler, 225-180; 279 NW 436

Tract omitted from mortgage—subsequent mortgage—reformation. Equity will not only reform a mortgage between the parties by including an omitted tract so as to carry out their intentions but also against subsequent purchasers with notice.

Winker v Tiefenthaler, 225-180; 279 NW 436

Reconveyance of property—estoppel. The fractional owner of property who quitclaims his interest to his co-owner in order to enable the co-owner to mortgage the entire property for his own purpose, and who receives from the co-owner an agreement to reconvey, free of incumbrance, within a named time or to pay a named sum, may not, after the mortgage is executed, and after the mortgagee has in good faith agreed to take over the property in satisfaction of the mortgage debt, obtain specific performance of the agreement to reconvey, even tho the mortgagee, before the deal was fully closed, had notice of the agreement to reconvey.

Clarkson v Bank, 218-326; 253 NW 25

Senior lienholder jeopardizing junior lienholder. The holder of a senior lien will not be permitted to jeopardize the rights of a junior lienholder in the security where the senior lienholder had actual notice of the rights of the junior lienholder.

Perpetual Assn. v Van Atten, 211-435; 233 NW 746

Unrecorded conveyance of interest of cotenant. A tenant in common who, while in possession under a deed granting such tenancy, orally purchases his co-tenant's interest, may not thereafter claim that his continued possession is notice to the world of his newly acquired right to his co-tenant's share. It follows that, if the co-tenant who has sold his interest subsequently mortgages his apparent record interest to a good faith mortgagee without notice of the oral purchase, the mortgage will take priority over the said purchase.

Oxford Jct. Bk. v Hall, 203-320; 211 NW 389

Priority over second mortgage. A mortgagee who takes a first mortgage with knowledge (apparently) that a former owner of the premises has sold the premises to the mortgagor and accepted a second mortgage for the purchase price in order to enable the mortgagor-purchaser to execute the first mortgage and secure funds to improve the property is not a trustee charged with the duty to know that every advancement of funds made by him under the first mortgage is actually applied on the improvements.

Iowa Co. v Plewe, 202-79; 209 NW 399

Mortgagee's knowledge of contemplated exchange — not "innocent purchaser". Where mortgagee knew that mortgagor had contracted to exchange city property for farm at time mortgage covering city property was executed, mortgagee was not "innocent purchaser", and his mortgage was subject to rights of holder of contract to city property.

Bandemer v Benson, (NOR); 270 NW 353

4 Parties in Possession

Right of parties in possession. Assuming, arguendo, that a person who is negotiating with the record grantee of land for an interest in the land (e. g., as mortgagee), is under duty to make inquiry as to the rights of the former warranty-deed grantor who has remained in actual possession, yet said duty is fully performed when the negotiator is assured by said former grantor that said grantee is the absolute owner of the land. It follows that said grantor will not thereafter be permitted to assert that when he conveyed the land by warranty deed he orally reserved an equitable interest in the land.

Clark v Chapman, 213-737; 239 NW 797

II CONSTRUCTION AND OPERATION—continued

(d) LIENS AND PRIORITY—continued

4. Parties in Possession—concluded

Rights of grantor in possession. One who acquires a mortgage from the record warranty-deed grantee is not chargeable with notice of the rights of the warranty-deed grantor who continues in possession of the property, when said grantor wholly fails to overthrow the legal presumption that his possession is in subordination to the said deed—that his possession is without claim of right, and by sufferance of his grantee.

Clark v Chapman, 213-737; 239 NW 797

Rights of person in possession. A mortgagee is not chargeable with notice that one of the members of the mortgagor's family residing upon the mortgaged property is a lessee of the land, when to all appearances the possession of said person is the possession of the mortgagor.

Ferguson v White, 213-1053; 240 NW 700

Party in possession. A party who in good faith takes a mortgage of land from the record owner thereof, who was then and had been for years in the unrestricted possession, control, and management of the land, is not chargeable with notice of the rights of a nonrecord owner from the simple fact that said nonrecord owner had moved some household goods into a small building on the land and had lived there "part of the time".

Burmeister v Walz, 216-265; 249 NW 197

Mortgagee in possession. A mortgagee who, under an agreement with the mortgagor, takes possession of the mortgaged premises, and rents the land and applies the rents in accordance with the agreement, must be deemed a mortgagee in possession.

Richardson v Rusk, 215-470; 245 NW 770

5 Second Mortgage to Discharge First

Second mortgage to discharge first mortgage. A mortgage remains subject to a valid prior mortgage until the prior mortgage is satisfied, even tho the subsequent mortgage was negotiated for the very purpose of obtaining funds with which to discharge the prior mortgage.

Mandel v Siverly, 213-109; 238 NW 596

Second mortgage to secure items secured by first mortgage—effect. Even tho a first mortgage on land is, by its terms, security for both accruing interest and taxes, nevertheless where the owner of the land, after the first mortgage-secured notes had passed into the hands of holders in due course, executes to the mortgagee additional promissory notes in the amount of the then accrued interest and taxes and secures such notes by an additional mortgage which is distinctly made subject to the first mortgage, the holders of such latter notes may not, as against said holders in due course, claim that such notes are secured by the first mortgage.

Des M. Bank v Stanley, 206-134; 220 NW 80

6 Other Liens—Priorities as to Mortgage

A Generally

Priority—subsequent easement in land. A permanent easement in land, granted subsequent to the recording of a mortgage on the land, is subsequent in right to said mortgage.

Kellogg v Railway, 204-368; 213 NW 253; 215 NW 258

Displacement of liens. Railway companies which knowingly permit the receiver of an insolvent railway to collect inter-line freight charges may not, as intervenors in an action to foreclose a mortgage on the receiver's road, have their claims established as prior to judgment liens on the naked showing that said freight charges were used by the receiver in operating his railway.

Continental Bank v Railway, 202-579; 210 NW 787; 50 ALR 139

Mortgage prior to judgment. A creditor, on learning that his debtor has made a voluntary conveyance of his property, may validly secure his debt by taking mortgage security from the voluntary grantee on the voluntarily conveyed property, and will thereby secure a right which will be superior to the right of another creditor who, subsequent to the mortgage, and after the death of the common debtor, reduces his claim to a so-called judgment against the latter, and, for his own exclusive benefit, levies on the voluntarily conveyed property.

Marion Bank v Smith, 205-203; 217 NW 857

Unknown lessee — estoppel. A lessee of mortgaged land, whose rights are such that the mortgagee is not chargeable with notice thereof, will not be permitted to assert his rights when he deliberately withholds such assertion until after the court enters a decree making permanent the receivership over the rents.

Ferguson v White, 213-1053; 240 NW 700

B Chattel Mortgages

Chattel mortgage clause — lien — when acquired. Under a combined real estate and chattel mortgage of the rents, the mortgagee, as against parties not subsequent purchasers for value and without notice, acquires a lien from the date of the execution of the mortgage.

Soehren v Hein, 214-1060; 243 NW 330

Chattel mortgage clause—failure to index—effect. A recorded real estate mortgage containing a mortgage on the rents of the mortgaged real estate, but not indexed in the chattel mortgage index, is, as regards the rents, subject to a subsequent like mortgage taken by one for value and without notice of the former chattel mortgage clause, even tho

the latter mortgage is not indexed in the chattel mortgage index.

Soehren v Hein, 214-1060, 243 NW 330

Future grown crops—death of mortgagor—effect. A chattel mortgage on crops to be grown in the future (combined in a real estate mortgage as additional security) does not become a lien on crops grown subsequent to the death of the mortgagor.

Fawcett Co. v Rullestad, 218-654; 253 NW 131; 94 ALR 800

C Mechanics' Liens

Enforcement—sale en masse and division of proceeds. Where land with a residence thereon was mortgaged and the residence burned and was replaced by a new one, the court cannot order a sale of the land and so divide the proceeds as to give the mortgagee priority on the land, and the mechanic's lien claimant priority on the new residence, when there is no evidence demonstrating how the division should be made; and especially when the mortgagee has surrendered the insurance on the old residence and allowed it to be expended on the new residence.

First Bk. v Westendorf, 213-475; 239 NW 73

Waiver—obligation of mortgagee. A mortgagee who consents that insurance money collected by him on a destroyed building on the mortgaged premises may be used by the mortgagor in the construction of a new building on the premises, tho said consent is communicated to a materialman, does not thereby obligate himself to pay the deficiency in the cost of said new building after applying the insurance money, nor does the mortgagee thereby waive the priority of his mortgage in favor of the materialman; and this is true tho the mortgagee knew that the insurance money would not be sufficient to pay the cost of the new building.

First Bk. v Westendorf, 213-475; 239 NW 73

Priority—estoppel. A mortgagee cannot be held estopped to insist on the priority of his mortgage over the mechanic's lien of a materialman on an indefinite showing of the conduct of the mortgagee on which the materialman never relied.

First Bk. v Westendorf, 213-475; 239 NW 73

Waiver—mortgage to secure funds. Proof, provided it is clear, satisfactory, and convincing, that a materialman agreed that the owner of land should, by a mortgage on the land, raise the funds with which to pay for the materials going into an improvement, and that such mortgage was so executed during the period of construction, subordinates the lien of said materialman to the lien of the mortgage.

Eclipse Co. v Bitler, 213-1313; 241 NW 696

Belated filing. A mechanic's lien, tho not filed within the statutory limit of time, is prior in right to a mortgage on the premises executed during the construction of the improvement in question.

American Bk. v West, 214-568; 243 NW 297

Mortgage to finance improvement. A mortgage on unimproved land in an amount much in excess of the value of the land, made for the specific purpose of enabling the owner to obtain funds with which to erect, and with which he does erect, an improvement on the land, (1) carries in equity a lien on the entire property, as improved, superior to the mechanic's lien of a claimant who at all times had full knowledge of the purpose of the mortgage, and (2) carries, under the statute (§3095, C., '97), a superior right to the entire proceeds of a sale of the improved property.

Crawford v Mann, 203-748; 211 NW 225

7 Loss of Lien—Release—Merger

Subordination in favor of other mortgages. The act of a corporation in waiving its priority and subordinating its mortgage to a mortgage held by another party, finds ample consideration in the fact that such waiver and subordination enabled the creditor of the corporation to obtain a new loan and to so refinance his obligations as to avoid foreclosures, and thereby protect the corporation from the necessity of paying off prior mortgages in order to protect its own mortgage.

Homesteaders Life v Salinger, 212-251; 235 NW 485

Subordination of first mortgage by release. A first mortgagee of record who, on the maturity of his mortgage, renews the same by accepting a new note and mortgage, and thereupon unconditionally enters of record a release of the original mortgage, thereby subordinates his new mortgage to an existing duly recorded second mortgage of which he had no actual knowledge—it appearing that the promissory notes secured by the latter mortgage were acquired by the holders thereof (1) for value, (2) after the aforesaid release was entered, (3) before said notes were due, (4) without notice of any prior equity, and (5) in the bona fide belief that said latter mortgage was a first lien.

Long v Taggart, 214-941; 243 NW 200

Sale for installment—lien wholly exhausted. The holder of a claim payable in monthly installments during the lifetime of the claimant, and secured by record lien on land which is owned by a grantee who is not personally obligated to pay said claim, completely exhausts his lien on the land by foreclosing and selling the land for matured installments, without obtaining in said foreclosure decree, under proper allegation and prayer, the preservation of said lien against said land for future maturing installments.

Cadd v Snell, 219-728; 259 NW 590

Collateral security—waiver—effect. A creditor who holds the agreement of the debtor to

II CONSTRUCTION AND OPERATION—continued

(d) LIENS AND PRIORITY—concluded

7. Loss of Lien—Release—Merger—concluded

convey lands as collateral security, but, knowing that the debtor has quitclaimed the land to his wife in lieu of alimony, accepts new collateral in substitution of the old collateral, may not have his judgment made a lien on the lands standing in the name of the wife.

First N. Bk. v Ramsey, 200-790; 205 NW 464

Release or subordination of mortgage. A corporation is bound by the act of its president in subordinating its mortgage to another mortgage (1) when the president is expressly authorized by the articles of incorporation to release and satisfy such mortgages, (2) when the president first executed, on adequate consideration, a written release and subordination without the corporate seal being attached, and later confirmed said act by a new release and subordination with said seal attached, and (3) when the corporation at all times intended so to subordinate its mortgage.

Homesteaders Life v Salinger, 212-251; 235 NW 485

Merger and cancellation. The fact that the holder of trust or mortgage-secured bonds later acquired an incomplete title to the mortgaged premises, and later conveys both the premises and bonds in trust, as security to a creditor, and yet later has his title to the premises fully completed, does not work a merger and cancellation of the bonds, it appearing that such merger and cancellation would have been to the disadvantage of said title holder and his transferee in trust.

Sunset Park Co. v Eddy, 205-432; 216 NW 93

Nonmerger of lien. A mortgagee who, subsequent to the execution of his mortgage, acquires the fee title to the mortgaged land does not thereby merge the lien of the mortgage into the fee when such was not his intention and when such merger would be detrimental to his interest.

Andrew v Woods, 217-453; 252 NW 112

Fee holder acquiring mortgage—nonmerger. Where a trust company secures a first mortgage by assignment from one bank and later from another bank secures blank deeds together with a contract for the sale of the mortgaged realty, upon default of which an action was started to foreclose the first mortgage, there was no merger of the first mortgage lien with the fee so as to advance a second mortgage to a position of priority.

Bankers Trust v Stallcop, 223-1344; 275 NW 120

Transfer of property mortgaged—merger—general rule. Where a title holder of real estate pays off a prior existing mortgage thereon, the mortgage lien merges in the fee, but where a mortgagee acquires the fee to the mortgaged premises his mortgage lien does not thereby merge therewith if this would be detrimental to his interest unless he intends such merger.

Bankers Trust v Stallcop, 223-1344; 275 NW 120

Quitclaim to avoid foreclosure—effect of existing junior liens—insurance unaffected. A mortgagee's status as such, as affecting his rights under a fire insurance policy, is not lost by merger when he takes a quitclaim deed from mortgagor, agreeing not to foreclose if no junior liens exist against the property, when thereafter it is found that such liens do exist, the presence of which would cause a merger to be against the interest of and inconsistent with the intention of the mortgagee.

Guaranty Ins. v Farmers Assn., 224-1207; 278 NW 913

(e) MISTAKES—REFORMATION

Reformation — complainant's burden. An instrument will not be reformed on the ground of mutual mistake unless the supporting testimony is clear, satisfactory, and convincing beyond a mere preponderance of the evidence, nor will such reformation be granted if the complainant has been guilty of inexcusable neglect in not having the instrument read; and especially is this true when a reformation will detrimentally affect the intervening rights of innocent third parties.

Galva Bank v Reed, 205-7; 215 NW 732

Reformation of deed. A decree in mortgage foreclosure that the mortgagee is not entitled to the reformation of a deed from the mortgagor to a subsequent purchaser so as to show an assumption by such purchaser of the mortgage debt is not an adjudication that the mortgagor is not entitled to such reformation, even tho the mortgagor was a party to the foreclosure, but not a party to the mortgagee's petition for reformation.

American Bank v Borcherding, 205-633; 216 NW 719

Evidence of mistake—sufficiency. Evidence reviewed and held to clearly, satisfactorily, and convincingly establish a mutual mistake in the execution of a mortgage, whereby a portion of the homestead of the mortgagors was omitted from the mortgage.

Rankin v Taylor, 204-384; 214 NW 725

Ineffectual reformation. A contract between a mortgagor of real estate and a purchaser of the land, wherein the purchaser assumes the payment of the mortgage, will not be reformed in proceedings to foreclose the mortgage, by inserting in the contract a maturity date which is different from the admittedly true maturity date as specified in the mortgage, because such

reformation could not possibly affect the mortgagee.

Richardson v Short, 201-561; 207 NW 610

Adopting wrong instrument to accomplish purpose. The execution of an ordinary, unconditional promissory note and mortgage on the mutual supposition of the parties thereto that said instruments would exactly carry out their agreement that one of them would pay the other a life annuity only, is not such mistake of law as will prevent reformation of the note and mortgage to meet the mutual purpose of the parties; but, of course, the proof of mutual mistake must be clear, satisfactory, and convincing.

Floberg v Peterson, 214-1364; 242 NW 13

Reformation—belated claim of mutual mistake. Long-delayed objection by a purchaser of land to a known clause in his deed which provided that he assumed the payment of an existing mortgage militates very strongly against his belated claim for a reformation on the ground that the clause in question was the result of a mutual mistake.

Smith v Godfrey, 201-768; 205 NW 366

Assumption of mortgage debt—no consideration. Where an instrument is executed without consideration on the part of a grantee to assume and pay the mortgage debt, the contract is not binding upon him, or if the deed is delivered in blank, or the conveyance made as security only, or if the clause is inserted by fraud, inadvertence, or mistake, without the knowledge or acquiescence of the grantee, he may have the instrument reformed in equity so as to make it express the true intent and understanding of the parties.

Guarantee Co. v Cox, 201-598; 206 NW 278

Receiver's lease not conclusive of mutual rescission. In vendee's action to cancel a real estate contract and note, a mutual rescission is not established by showing that the receiver in a mortgage foreclosure proceeding against the real estate had leased the premises to vendee, when the lease, by its very terms, was not to become effective unless vendee paid all obligations to vendor.

Fitchner v Walling, 225-8; 279 NW 417

III RIGHTS AND LIABILITIES OF PARTIES

(a) IN GENERAL

Agency—nonrelation. The act of the owner of a note and mortgage in selling them and the act of the purchaser in purchasing said note and mortgage do not, in and of themselves, create the relation of principal and agent.

Fed. Bk. v Sherburne, 213-612; 239 NW 778

Insurable interest of mortgagee. Principle recognized that a mortgagee has an insurable interest in the mortgaged property.

Boyce v Ins. Assn., 209-11; 227 NW 523

Waste—recovery for, when mortgage fully satisfied. While a mortgagee of land may maintain an action to protect his security against waste, yet after he has foreclosed and bought in the property for the full amount of the debt, he cannot maintain an action for gravel and standing timber removed from the land during the time the mortgage was being foreclosed.

Kulp v Trustees, 217-310; 251 NW 703

Recovery of realty—jurisdictional venue. An action by the beneficiaries of a trust in real estate (located in this state) to compel the trustee holding title to convey the land, in accordance with the terms of the trust agreement, to a newly designated trustee, must be brought and litigated in the county in which the land, or some part thereof, is located. If not so brought, the court is under mandatory duty, on motion for change of venue, to transfer the action to a proper county.

Titus Co. v Kelsey, 221-1368; 268 NW 23

Subsequent tax deed—purchase by wife who joined in mortgage—effect. A wife who joins with her husband in a mortgage on the husband's land, but who assumes no obligation, contractual or otherwise, to pay subsequently accruing taxes on the land, may, after the land has gone to tax deed to a stranger without collusion with her and while she was not in possession, purchase the land of the tax deed holder and acquire his title, viz, a fee simple indefeasible title—a title free from the lien of said mortgage.

Wood v Schwartz, 212-462; 236 NW 491

Legatee requesting executor to secure new mortgage. A residuary legatee who causes the executor to obtain a new mortgage as security for an indebtedness due the estate, and thereupon to cancel a pre-existing mortgage which secured the same debt, is necessarily precluded from holding the executor personally liable in case the new mortgage proves inadequate as a security.

Wilson v Norris, 204-867; 216 NW 46

Judgment—collateral attack—orders in bankruptcy. An order in federal bankruptcy proceedings for the sale of the bankrupt's equity of redemption in land sold under foreclosure proceedings is immune from collateral attack on the ground that the land embraced the bankrupt's homestead.

Lincoln JSL Bank v Brown, 219-630; 258 NW 770

Redemption by creditor of one of separate owners—apportionment of mortgage debt. Where separate owners of separate tracts of land jointly mortgage their lands for the debt of one of them and, on foreclosure, the sale is made en masse, and redemption is made by the judgment creditor of one of the owners, the other owner may, after paying to the

III RIGHTS AND LIABILITIES OF PARTIES—continued

(a) IN GENERAL—concluded

clerk the entire amount necessary to effect redemption, maintain an equitable action to have the mortgage debt apportioned between the different tracts.

Hansen v Bank, 209-1352; 230 NW 415

Joint defendants—right of contribution. The doctrine of contribution between joint defendants recognized.

Creger v Fenimore, 216-273; 249 NW 147

Carrying charges—apportionment. Bank president who purchased foreclosed premises was required to contribute to bank which advanced carrying charges an amount in proportion to his interest in the property.

National Ins. v Michelwait, (NOR); 255 NW 455

Tenants in common—right to accounting. Between tenants in common, the statute of limitation does not commence to run on a claim of one of the tenants for the amount individually paid by him on a mortgage on the common property until there has been a demand for an accounting.

Creger v Fenimore, 216-273; 249 NW 147

Insurance to protect mortgagee. When a mortgagor complied with the terms of a mortgage and obtained insurance on property to protect the mortgagee, and then procured another policy, in the absence of a provision in the mortgage or in the second policy making its proceeds payable to the mortgagee, the mortgagee had no interest in funds paid into court as a compromise payment of a fire loss on the second policy. So an assignee from the mortgagee could not collect from the fund the amount paid in obtaining the assignment, as the assignee's rights could rise no higher than those of the assignor.

Calendro v Ins. Co., 227-829; 289 NW 485

(b) RENTS AND PROFITS—LEASES

Discussion. See 18 ILR 251—Mortgagee's right to rents

1 In General

Synonymous terms for "rent". A sale and conveyance in a real estate mortgage of "all the rents, issues, uses, profits and income therefrom and all crops raised thereon" as security additional to that afforded by the land, and in connection with a receivership clause, simply constitutes a chattel mortgage on "all the rents" (in whatever represented), said various terms in such case being deemed synonymous.

Equitable v Brown, 220-585; 262 NW 124

Failure of consideration. Tho a lease of mortgaged premises for the redemption year is entered into prior to the commencement of foreclosure proceedings, yet a decree in said proceedings that the plaintiff-mortgagee is entitled to the rents for said year, and the appointment of a receiver therefor (1) constructively evicts the tenant (party to the action) from said premises, (2) nullifies the tenant's then lease because of failure of consideration, and (3) invests the receiver, under a new lease with said tenant, with right to said rents, even tho the holder of said former lease and the rent notes thereunder is not a party to the foreclosure.

Equitable v Leaven, 214-121; 241 NW 446

Failure of consideration. The consideration for a lease of mortgaged premises (which mortgage pledges the rents) and for the promissory note given for the rent, wholly fails when the assignee in an unrecorded assignment of the lease and note stands by, during foreclosure, and, without asserting his claim by intervention or otherwise, knowingly permits the mortgagee to foreclose and oust the mortgagor and his tenant, and obtain a decree against the rents and a receiver therefor, in order to discharge a deficiency judgment.

Miller v Sievers, 213-45; 238 NW 469

Rents and profits not garnishable. A motion to dismiss a garnishment against a receiver should have been sustained on the ground that the receiver was not subject to garnishment for rents and profits when the record showed that the receiver acted under court order in renting property for the benefit of holders of notes against the company in receivership.

Sioux Falls Assn. v Field Co., 226-874; 285 NW 155

Grantee of mortgaged lands must account for rents. The grantee of mortgaged lands who has in his hands rents, on which the mortgagee has a lien, must account to the mortgagee therefor.

Des M. Bank v Allen, 220-448; 261 NW 912

Mortgagee reimbursed from rents for advances. The court, in the disposition of rents in mortgage foreclosure, manifestly may order the mortgagee reimbursed for interest advanced on a prior mortgage and for taxes when all the parties to the foreclosure had so stipulated.

Olson v Abrahamson, 214-150; 241 NW 454

Agreement in re rents. An agreement between a mortgagee and the president of the titleholder (1) that the mortgagee will, at foreclosure sale, bid the full amount of the judgment, and will consent to the appointment of the president as receiver of the rents, and (2) that said president as receiver will keep the property in repair and deliver it to the mortgagee at the close of the redemption period free of all taxes, is enforceable when the president is so appointed, the property so bid in, and the provision for the payment of taxes by the receiver is embraced in the final decree.

And this is true tho the mortgage neither pledges the rents nor provides for a receiver.

Hawkeye Ins. v Inv. Co., 217-644; 251 NW 874

Surplus of rental—right of surviving spouse. The right of the surviving spouse of an intestate deceased to a balance of rentals accruing during redemption period and remaining after satisfaction of mortgage foreclosure judgment cannot exceed one third of such balance.

In re Angerer, 202-611; 210 NW 810

Rent during redemption. A decree, which recites that a real estate mortgage is also foreclosed as a chattel mortgage and that the receiver shall collect the rents "during the period of redemption", will, when construed as a whole—resort being taken to the pleadings—be taken to mean that the receiver collect the rents, "pending foreclosure, sale, and redemption"—the petition neither alleging nor asking for such foreclosure but instead praying for a receiver from the date of the petition.

Sutton v Schnack, 224-251; 275 NW 870

2 Accrual of Rents-Pledge Lien

Pledge of rents. A provision in a mortgage to the effect that, in case of foreclosure, a receiver may be appointed to collect the rents and to apply the same to the payment of taxes, and principal and interest, constitutes a pledge of the rents.

Wilson v Tolles, 210-1218; 229 NW 724

Pledge of possession—effect. A pledge in a real estate mortgage of the right of possession of the premises is in substance a pledge of the rents and profits of the premises.

Mickelson v Rehnstrom, 215-1056; 247 NW 275

Mortgagor's right to enforce pledge. In mortgage foreclosure, strictly in rem and solely against the owner of the premises who bought subject to the mortgage, the mortgagor-debtor may intervene and, whether solvent or insolvent, enforce, in conjunction with the plaintiff, and through receivership proceedings, a mortgage-pledge of the rents, issues, and profits in order to discharge a deficiency judgment; and this is true notwithstanding the fact that the foreclosure sale terminated the foreclosure judgment and the lien thereof.

American Bk. v McCammond, 213-957; 238 NW 77; 78 ALR 866

Mortgage on rents — exclusive power of mortgagee to collect. A chattel mortgage on the rents and income of real estate, tho combined in a real estate mortgage as dual security for the same debt, vests the mortgagee with full and exclusive power to collect said rents and income.

Equitable v McNamara, 220-297; 259 NW 231; 262 NW 466

General pledge of rents—accrual of lien. A general pledge of the rents of mortgaged real property gives the mortgagee a lien thereon only from the point of time when the appointment of a receiver of such rents is prayed for in foreclosure proceedings.

Kooistra v Gibford, 201-275; 207 NW 399
Young v Stewart, 201-301; 207 NW 401
Cooper v Marsh, 201-1262; 207 NW 403
Webber v King, 205-612; 218 NW 282
Andrew v Haag, 215-282; 245 NW 436
Andrew v Bank, 215-401; 246 NW 48
First Tr. Bk. v Conway, 215-1031; 247 NW 253
First Tr. Bk. v Stevenson, 215-1114; 245 NW 434

General pledge of rents. A mortgage pledge of rents creates no lien on the rents until foreclosure action is commenced and a receiver is prayed for, even tho it provides that, after default in payment, etc., said rents shall be payable solely to the mortgagee.

John Hancock Ins. v Linnan, 205-176; 218 NW 46

Perfecting right to rents. A mortgagee, whose mortgage contains a receivership clause covering the rents during the redemption period, perfects his right to such remedy (1) by duly filing his petition for foreclosure, (2) by praying for the appointment of such receiver, and (3) by causing his action to be indexed as a lis pendens. And this is true even tho the original notice filed with the petition is a nullity. It follows that his right to such remedy is prior to all other mortgagees subsequently foreclosing mortgages which embrace like clauses.

Union Trust v Carter, 214-1131; 243 NW 523

Indirect pledge. The rents of mortgaged premises are sufficiently pledged to the payment of the mortgage debt by a provision to the effect that a receiver shall be appointed for the rents if the mortgagee or his assignee bids in the property at foreclosure sale for less than the foreclosure judgment.

Security Inv. v Ose, 205-1013; 219 NW 36

Rents—lis pendens—effect. The filing of a petition for the foreclosure of a real estate mortgage, with prayer for the appointment of a receiver of the rents pledged by said mortgage, and the due indexing of said petition as a lis pendens, matures the mortgagee's lien on the pledged rents, even tho at said time the original notice of the action has not been served on the mortgagor. It necessarily follows that said matured lien has priority over a subsequent assignment of the said rents.

First JSL Bk. v Jansen, 217-439; 251 NW 711

Secondary security after exhausting land. A pledge of rents and profits in a real estate mortgage, being secondary and unavailable until the land as primary security is exhausted, the filing of a petition in foreclosure does not

III RIGHTS AND LIABILITIES OF PARTIES—continued

(b) RENTS AND PROFITS—LEASES—continued

2. Accrual of Rents—Pledge Lien—concluded

immediately entitle mortgagee to a receiver prior to the sale, without a showing both of mortgagor's insolvency and the insufficiency of the land alone to pay the mortgage indebtedness.

First JSL Bk. v Blount, 223-1339; 275 NW 64

Rent pledge effective when mortgage executed. The lien on the rents and profits created by a chattel mortgage clause in a real estate mortgage is effective from the date of the execution of the mortgage, and not from the date when petition for foreclosure and for the appointment of a receiver is filed.

Equitable v Brown, 220-585; 262 NW 124

3 Leased Mortgaged Premises and Rent Assignments

Leases

Lease—assignment—recordation—effect. A lease of real estate and the assignment thereof are recordable for the purpose of conveying constructive notice to a mortgagee and his subsequently appointed receiver under a mortgage which contains a pledge of the rents, even tho said parties are not entitled, as a matter of right, to such notice.

King v Good, 205-1203; 219 NW 517

Lease—assigned rent note. A mortgagor may, in the absence of fraud, deed his land to another who, as owner, may lease for an ensuing term within the period of redemption and assign to a bank his lease and rent note, which assignment made prior to any foreclosure action will be superior to the lien of the chattel mortgage clause and entitle the bank to the rent as against the receiver in the foreclosure action claiming under such chattel mortgage clause.

Equitable v Hastings, 223-808; 273 NW 908

Nonfraudulent lease to son—assignment to creditor. When executed prior to a foreclosure action asking appointment of a receiver, fraud did not inhere in a lease from a father on his mortgaged lands to a mature tho unmarried son, followed on the next day by an assignment of the lease to a bona fide creditor of the father.

First JSL Bk. v Ver Steeg, 223-1165; 274 NW 883

Rentals—lease assignment—father-in-law's loan as consideration. Where an assignment of a lease on mortgaged lands is given to mortgagor's father-in-law as payment on a pre-existing, bona fide, unpaid loan, altho the notes evidencing such loan had been returned by the father to the daughter with the understanding that the debt would, if possible, be paid during his lifetime, such an assignment is a payment on the debt to the extent of the rentals and is supported by ample consideration.

First JSL Bk. v Ver Steeg, 223-1165; 274 NW 883

Fraud—evidence—sufficiency. On the issue of receivership for the rents and profits of real estate under mortgage foreclosure, evidence held to establish the fraudulent nature of a lease of said premises.

Webber v King, 205-612; 218 NW 282

Renting on shares—three-year lease—six-months lien limitation. The term of a three-year lease (March 1, 1934, to March 1, 1937) cannot, as to the 1935 crops, be said to expire on March 1, 1936, under the provisions of section 10262, C., '35, giving the landlord a lien on the crops for six months after "the expiration of the term".

Sutton v Schnack, 224-251; 275 NW 870

Order approving lease — nonappealability. An order approving a lease in accordance with a foreclosure decree appointing a receiver is not reviewable on a purported appeal from the order itself. The validity of such order necessarily depends on the validity of the decree from which it springs.

Union Life v Eggers, 212-1355; 237 NW 240

Treating lease as cash. When the mortgagee in foreclosure is entitled to all the rents accruing during the redemption period, the court may order that the lease be assigned to the mortgagee at face value and terminate the receivership.

Olson v Abrahamson, 214-150; 241 NW 454

Deed—rights to unaccrued rents. The principle that one who receives a sheriff's deed is entitled to unaccrued rents under an outstanding lease can have no application when the lease had terminated immediately prior to the issuance of said sheriff's deed.

Kerr v Horn, 211-1093; 232 NW 494

Assignments

Assignee of lease—rights limited to interest of mortgagor-landlord. The assignee of a lease from a landlord-mortgagor cannot take, as against mortgagee, any greater interest than held by the landlord-mortgagor.

Bankers Life v Garlock, 227-1335; 291 NW 536

Right to assign rents prior to foreclosure. An owner of premises which are under mortgage pledging the rents may, before the commencement of foreclosure, validly assign the accruing rents (not beyond the redemption period) and the rights of the good-faith assignee will be superior to the mortgage even as to installments of rent actually maturing

after the appointment of a receiver for the rents.

Ransier v Worrell, 211-606; 229 NW 663
First JSL Bk. v Cuthbert, 215-718; 246 NW 810

Right to assign rents. A receivership pending mortgage foreclosure cannot reach rents in good faith transferred by the mortgagor prior to the foreclosure suit.

Parker v Coe, 200-862; 205 NW 505

Rents—right to transfer. Rents transferred by the owner of mortgaged premises to a good-faith holder prior to the commencement of foreclosure proceeding are beyond the reach of the mortgagee when the mortgage carries simply a pledge of the rents.

First JSL Bk. v Cuthbert, 215-718; 246 NW 810

Rents—transfer. Under a mortgage which carries a simple pledge of the rents, an unconditional transfer, by the mortgagor prior to foreclosure proceedings, of rent notes for the redemption period passes the rents beyond the reach of the mortgagee, the transferee being a good-faith holder for consideration.

First JSL Bk. v Conway, 215-1031; 247 NW 253

Pre-existing debt as consideration. A pre-existing indebtedness furnishes ample consideration for a transfer by a mortgagor of rent notes.

First JSL Bk. v Conway, 215-1031; 247 NW 253

Receiver for rents which have been assigned. A receiver for the rents and profits which may accrue during the redemption period on mortgaged premises will not be appointed under a mortgage which simply pledges the possession during said period, and when it is made to appear that the rents for said period have been contracted for and in good faith assigned prior to the commencement of foreclosure proceedings.

Keokuk Co. v Campbell, 205-414; 215 NW 960

Subsequent assignment of rents. A mortgage providing, in case of foreclosure, for the appointment of a receiver to take charge of the rents up to and until the expiration of the redemption period, and to apply them on the mortgage indebtedness, incapacitates the mortgagor, after the petition in foreclosure is filed, from conveying a title to after-accruing rents which will be superior to the rights of the receiver.

Hakes v North, 202-324; 208 NW 305

Agent of party claiming rent. A party who intervenes in a real estate mortgage foreclosure after final decree and after the appointment of a receiver of the rents, and lays claim to said rents as a trustee, under an assignment and chattel mortgage thereof, antedating the foreclosure, has no standing when it is made to appear that said "trustee" has no personal interest in said rents and is a "trustee" only in the sense that he is the agent of a party who was duly made a party to the foreclosure and whose rights were fully adjudicated by the final decree.

Virtue v Teget, 209-157; 227 NW 635

Prior assignment—effect. Even tho a real estate mortgage pledges the rents of the mortgaged premises, nevertheless the rights of a good-faith assignee of said rents, for value, prior to the institution of foreclosure proceedings are superior to said pledge.

King v Good, 205-1203; 219 NW 517

Receiver denied when rent note transferred. The appointment of a receiver in real estate mortgage foreclosure to take charge of pledged rents is properly refused when it is made to appear that, prior to foreclosure proceedings, the legal titleholder has made a bona fide transfer of the promissory note representing the rents in question. Especially is this true when neither the tenant note-maker nor the assignee of the note is a party to the foreclosure.

Hatcher v Forbes, 202-64; 209 NW 305

Fraudulent claim to rents. Record reviewed and held that the claim that rents had been transferred prior to proceedings for the appointment of a receiver in mortgage foreclosure was fraudulent.

First N. Bk. v Murtha, 212-415; 236 NW 433

Subsequent sale of rent notes. A mortgagee of land who institutes foreclosure proceeding and prays for a receiver under a pledge of the rents acquires a right to the accruing rents superior to a subsequent purchaser of the rent notes.

Ferguson v White, 213-1053; 240 NW 700

Rents — "pledge" and "chattel mortgage" contrasted—priority. A mere pledge of rents written into a real estate mortgage remote from the granting clause of the mortgage cannot be deemed a chattel mortgage. It follows that such pledge is inferior to the rights of the good-faith assignee of a lease and rent notes executed subsequent to the real estate mortgage and prior to an action to foreclose such mortgage, and accompanying pledge.

Owen v Fink, 218-412; 255 NW 459

Rents — assignee (?) or mortgagee (?). Rents accruing during the year in which a mortgage is foreclosed, and based on crops harvested or matured by the time the period starts to run, belong to the assignee of such rents who (1) became such assignee prior to the commencement of foreclosure, (2) was not made a party to the foreclosure, and (3) had no knowledge of the foreclosure.

Bain v Washburn, 214-609; 243 NW 286

III RIGHTS AND LIABILITIES OF PARTIES—continued

(b) RENTS AND PROFITS—LEASES—continued

3. Leased Mortgaged Premises and Rent Assignments—concluded

Ineffectual assignment. Rent notes payable to the mortgagor-owner and given for the rent of the mortgaged premises for the year of redemption, and transferred in good faith by said payee to his wife, and held by her in her own right when foreclosure is instituted, are subject to the lien of said mortgage, and a subsequent good-faith transfer of the notes by the wife does not displace said lien, it appearing that the secured note and mortgage were executed by both husband and wife, and that the mortgage contained a pledge of said rents.

John Hancock Ins. v Stowe, 215-324; 245 NW 295

When lien perfected. A mortgagee's lien on the rents of the mortgaged premises under a pledge of the rents, accrues only when the mortgagee makes proper prayer or request, in his duly commenced foreclosure suit, for the appointment of a receiver. It follows that, if prior to such prayer or request said rents have been unconditionally transferred, the good-faith transferee thereof has an unassailable title thereto.

First Tr. Bank v Stevenson, 215-1114; 245 NW 434

Rents—assignment. The simple delivery by a landlord to his creditor of his real estate lease and rent notes, with the intent thereby to effect an assignment to his creditor as collateral security, is valid against a mortgagee who subsequently institutes foreclosure action on a mortgage pledging the rents.

First JSL Bk. v Bank, 217-620; 252 NW 519

Right to rents after sheriff's deed. Upon the execution and delivery of a deed by the sheriff in real estate mortgage foreclosure, the grantee becomes vested eo instanti with the right to future-maturing rents—no contract or stipulation to the contrary appearing—even tho such rents accrued in part during the period of redemption and in part afterward. In other words, the right of the grantee to such rents may be superior to that of the assignee of the lease and of the rent notes executed thereunder.

First JSL Bk. v Ingels, 217-705; 251 NW 630

Transfer of rents—consideration. Record reviewed and held that a written transfer of the right to the use and occupancy of mortgaged premises during the period of redemption was supported by adequate consideration and was free from fraud.

Andrew v Miller, 218-301; 255 NW 492

Assignment of rents by dummy corporation. On the issue, in mortgage foreclosure, whether an assignment of the rents of the mortgaged premises placed the rents beyond the power of the receiver, if one were appointed, evidence reviewed and held insufficient, in the absence of any showing of fraud, to justify the court in holding that the assignor corporation and the assignee corporation were in fact one corporation,—that the assignor corporation was a mere dummy.

First JSL Bank v Galagan, 220-173; 261 NW 920

Chattel mortgage as part of real estate mortgage—lien and priority. A clause (inserted in a mortgage of real estate) which sells and conveys to the mortgagee "all the rents" of the mortgaged land, as security for the payment of the debt in question, constitutes a legal chattel mortgage which, inter alia, (1) gives to the mortgagee, as against the mortgagor and others having actual knowledge thereof, a first lien on all subsequently executed leases of said land and on the promissory notes which represent the rental under said leases, and (2) gives to the mortgagee a first lien on such leases and notes against all assignees thereof provided that when the assignees became such the real estate mortgage had been duly recorded as such, and the record thereof had been duly indexed in the chattel-mortgage index book. (No plea in this case of holdership in due course.)

Equitable v Brown, 220-585; 262 NW 124

Chattel mortgage clause—effective date—priority over subsequent assignee of rents and profits. A clause in realty mortgage, duly recorded and indexed, providing that mortgagor conveyed in addition to realty "also all the rents, issues, uses, profits and income therefrom, and all the crops raised thereon from the date of this agreement until the terms of this instrument are complied with and fulfilled," created a valid chattel mortgage, effective from date of execution of the mortgage and not from date of filing the foreclosure petition in which appointment of receiver is asked, and subsequent assignee of property, described in instrument, took subject to lien provided in such chattel mortgage clause.

Bankers Life v Garlock, 227-1335; 291 NW 536

4 Conflicting Rent Claimants

Rents and profits pledged—priority as of date of filing petition. In foreclosing a mortgage with a pledge of rents and profits and asking appointment of a receiver, questions of priority between mortgagee and others as to rents and profits are fixed as of date of filing petition with request for receiver, provided receiver is actually appointed.

Union Tr. v Carter, 214-1131; 243 NW 523
First JSL Bk. v Blount, 223-1339; 275 NW 64
Sutton v Schnack, 224-251; 275 NW 870

Superior rights to rents. When land is subject to several mortgages, each of which pledges the rents and profits to the payment

of the debt secured and provides for a receiver, the superior right to said rents and profits vests in the mortgagee who first files his petition in foreclosure and first prays for a receiver. (But now see §12383-e1, C., '35 [§12383.1, C., '39]).

Andrew v Haag, 215-282; 245 NW 436
First JSL Bk. v Smith, 219-658; 259 NW 192

Conflicting claims of receiver and chattel mortgagee. The rights of a receiver duly appointed for the rents of land under mortgage foreclosure is superior to the rights of a chattel mortgagee of crops which were not in existence when the foreclosure was commenced.

Virtue v Teget, 209-157; 227 NW 635

Conflicting pledges. Proof that a bank had in its possession a duly executed deed to mortgaged lands, except that no grantee was named therein, together with proof that the bank had rented the land after the commencement of foreclosure proceedings and after prayer had been entered for a receiver for the rents, is not sufficient to establish such assignment of the rents as will take priority over the mortgage pledge of the rents.

First JSL Bk. v Beall, 208-1107; 225 NW 943

Rents—application of. A foreclosure decree covering a first and second mortgage, which is in rem only, and which appoints a receiver with direction to pay the final balance of rents "on deficiency judgment", entitles the second mortgagee to such final balance of rents in preference to the then owner of the land, the first mortgagee being fully satisfied by the foreclosure sale.

Union Bk. v Lyons, 206-441; 220 NW 43

Rents pledged to both senior and junior mortgagees—priority. A junior mortgagee whose mortgage carries a mere pledge of the rents, and who makes such pledge effective by first commencing an action to foreclose, is entitled, in case of a deficiency judgment, to such rents in preference to a senior mortgagee whose mortgage likewise carries the same pledge, but whose action to foreclose was subsequent to the junior mortgagee's action.

Lynch v Donohoe, 205-537; 215 NW 736; 218 NW 144

Rents pledged to both senior and junior mortgagee. The lien on matured crops, acquired by virtue of the commencement of foreclosure proceedings on a second mortgage carrying simply a pledge of the rents, is inferior to the lien acquired under the first mortgage, which is a duly recorded, combined real estate and chattel mortgage on the land and on the rents and crops thereof. This is true because the lien under the first mortgage necessarily attaches ahead of the lien of the second mortgage. Likewise the lien acquired by such second mortgage on unmatured rents is inferior to the lien of the first mortgage because, while both liens attach at the same instant of time, the first mortgage lien is first in time of origin.

Equitable v Read, 215-700; 246 NW 779

Chattel mortgage clause—effect on landlord's agreement to rent to third party. Where a valid chattel mortgage clause is contained in a realty mortgage, duly recorded and indexed, providing that mortgagor conveyed, in addition to realty, all the rents, issues, uses, profits and income therefrom and all crops raised thereon from date of instrument until payment of debt, an agreement by mortgagor to rent land to a third party was subject to such chattel mortgage clause, as against contention that agreement to rent was not the same as rents, issues, income, profit, or crops.

Bankers Life v Garlock, 227-1335; 291 NW 536

Trustee in bankruptcy (?) or mortgagee (?)—priority. The right of a receiver in mortgage foreclosure proceedings to the rents and profits reserved in the mortgage is superior to the rights of a subsequently appointed trustee in bankruptcy of the then owner of the land.

Robertson v Roe, 203-654; 213 NW 422

Trustee in bankruptcy (?) or mortgagee (?)—priority. The title of a bankrupt mortgagor to the rents and profits of the mortgaged land passes to his trustee in bankruptcy as of the date of the adjudication in bankruptcy, even tho the mortgagor has previously pledged such rents and profits for the mortgage debt, and such title in the trustee is superior to any after-instituted proceeding in foreclosure for the appointment of a receiver for such rents and profits.

Des M. JSL Bank v Danson, 206-897; 220 NW 102; 221 NW 542

Pledge of rents and subsequent chattel mortgage. A pledge, in a duly recorded real estate mortgage, of the rents of the mortgaged premises is superior to a subsequently executed and duly recorded chattel mortgage on crops which the chattel mortgagee was obligated to grow on said premises, but which crops were not in existence when the real estate mortgagee instituted his foreclosure proceedings.

Bunting v Berns, 212-1127; 237 NW 220

Receiver and chattel mortgagee — priority. A chattel mortgage on a landlord's crop-rental share of growing crops is prior in right to the claim of a receiver appointed in real estate mortgage foreclosure proceedings instituted subsequent to the execution of the chattel mortgage even tho the real estate mortgage was executed prior to the chattel mortgage, and pledged the rents to the payment of the real estate mortgage debt.

Hansen v Sheffer, 205-1191; 219 NW 529

Pledge for pre-existing debt. A pledge of rents contained in a real estate mortgage and

III RIGHTS AND LIABILITIES OF PARTIES—continued
(b) RENTS AND PROFITS—LEASES—continued
4. Conflicting Rent Claimants—continued

taken as security for a pre-existing indebtedness is not entitled to priority over chattel mortgage clauses in prior real estate mortgages for value on the same land even tho said prior mortgages are not indexed in the chattel mortgage index.

Soehren v Hein, 214-1060; 243 NW 330

Mortgagee (?) or assignee (?). The right of the receiver under mortgage foreclosure to the pledged rents during the redemption period is superior to the right of an assignee of such rents (tho the assignee became such prior to the commencement of foreclosure proceedings) when the foreclosing mortgagee had no knowledge of such assignment, and when the assignee, with full knowledge of the mortgage and its contents permitted the foreclosure decree to be entered, and thereafter brought action against the tenant for the rent.

Hoogestraat v Danner, 209-672; 228 NW 632

Mortgagee (?) or assignee (?). A receiver who, under real estate mortgage foreclosure (to which the owner and his occupying tenant are parties) is awarded immediate possession of the premises and the right to the rents during the redemption period, and who thereupon rents the premises to said evicted tenant, is entitled to the rent money in preference to the assignee of rent obligations executed to the owner prior to said foreclosure by the same tenant and for the same period of time.

White v Peterson, 222-720; 269 NW 878

Rent notes subject to prior chattel mortgage. The receiver of an insolvent takes the land of said insolvent subject to the lien of a prior unsatisfied, combined real estate and chattel mortgage covering both the said real estate and the "rents, issues, use and profits" thereof. It necessarily follows that notes taken by the receiver for the rent of said mortgaged premises for the year embracing foreclosure proceedings and the redemption period are subject to said chattel mortgage lien.

Capital Bank v Riser, 215-680; 246 NW 763

Senior mortgagee without pledge—junior with pledge. A senior mortgagee whose mortgage contains no pledge of the rents and no receivership clause is subordinate in right, as to the rents, to a junior mortgagee whose mortgage does contain such pledge and receivership clause; and this is true tho the senior mortgagee shows that the mortgagor is at the time insolvent.

McBride v Comley, 204-622; 215 NW 613

Prior right of bank receiver. The superintendent of banking, upon being appointed receiver of an insolvent bank, takes over a lease of the bank's mortgaged real estate, with the same rights as a creditor of the bank would take were the creditor an assignee of the lease, as payment or security for his debt. It follows that said superintendent is entitled to the rent money in preference to the mortgagee who subsequently institutes foreclosure action and therein seeks to enforce the receivership clause in his mortgage. (Overruled. See 215-963.)

Schlesselman v Martin, 207-907; 223 NW 762

Rents—priority over receiver. The receiver of an insolvent bank who forecloses a second mortgage belonging to the insolvent and receives a sheriff's deed, acquires by said deed simply the rights formerly possessed by the mortgagor-owner. It follows that the receiver holds said land subject to the right of the first mortgagee subsequently to perfect and enforce a pledge of the undisposed of rents, in order to satisfy a deficiency judgment, as provided in the first mortgage. (Schlesselman v Martin, 207-907, overruled)

Northwestern Ins. v Gross, 215-963; 247 NW 286
Metropolitan v Smith, 215-1052; 247 NW 503
Lincoln Bank v Barlow, 217-323; 251 NW 501
See §12383.1, C., '39

Rents—priority over receiver. The receiver of an insolvent bank must be deemed to hold the insolvent's mortgaged land subject to the right of the mortgagee, in order to satisfy a deficiency judgment, to perfect and enforce a pledge of the undisposed of rents as provided in the mortgage. In other words, the receiver may no more deny the mortgagee's right to said rents than might the insolvent deny such right.

Metropolitan v Sheldon, 215-955; 247 NW 291
Willey v Andrew, 215-1104; 247 NW 501
Lincoln Bank v Barlow, 217-323; 251 NW 501

Priority over receiver. The receiver of an insolvent bank who, pending receivership, acquires, on behalf of the insolvent, a deed to real estate "subject to" a specified first mortgage, holds the rent notes and the proceeds thereof, covering the redemption period, subject to the said mortgagee's right thereto under his mortgage pledge thereof.

Connecticut Ins. v Stahle, 215-1188; 247 NW 648
Lincoln Bank v Barlow, 217-323; 251 NW 501

Judgment creditor holding deed. A mortgage pledge of rents becomes vested upon the commencement of foreclosure proceedings with prayer for the appointment of a receiver, and a judgment creditor who subsequently obtains a deed to the mortgaged premises is not entitled to the rents accruing during the redemption period, especially when his judgment lien was decreed inferior to the mortgage.

Olson v Abrahamson, 214-150; 241 NW 454

Grantee not entitled to retain. The grantee under quitclaim deed of premises which are subject to a duly recorded mortgage pledging the rents and profits, even tho he does not assume the payment of said mortgage, is not entitled to collect and retain the rents accruing during the redemption period following foreclosure of the mortgage with a deficiency judgment. This is true because the grantee takes the premises subject to the same burdens under which the mortgagor held them.

Equitable v Jeffers, 215-696; 246 NW 784

Tenant's right of offset against pledge to mortgagee. The right which a mortgagee has as pledgee of the rents, and as assignee of a lease executed by the mortgagor-owner, is subordinate to the right of the tenant under said lease to offset against the rents owing by him to the insolvent landlord-mortgagor, an unpaid indebtedness which was due to the tenant from said landlord-mortgagor prior to the time when the mortgage and lease were executed.

Loots v Clancey, 209-442; 228 NW 77

Decree in re rents—effect on nonparty. A decree in mortgage foreclosure that the receiver therein appointed is entitled to the rents of the mortgaged premises, during the redemption period, is not an adjudication binding on one who is not a party to the foreclosure and who holds prior executed rent obligations for the same premises and for the same period.

White v Peterson, 222-720; 269 NW 878

Enforcement of rent pledge against so-called lessee. The commencement of foreclosure proceedings on a mortgage which pledges the rents as security entitles the plaintiff to the appointment of a receiver for all then unpaid rents, notwithstanding an outstanding subsequently executed instrument, in the nature of a lease, for a specified consideration, giving to grantee the "right to the use, possession, occupancy, and income of said premises" until all sums due the grantee have been paid.

Union Ins. v Goode, 222-716; 269 NW 762

Assignments by partnership and partners—priority. An unrecorded assignment by a partnership to a partnership creditor of a lease of real estate and of the rents accruing thereunder is superior in right to a subsequent recorded assignment by one of the partners to his individual creditor of the individual partner's one-half interest in said rents; and especially is this true when the partnership creditor holds a mortgage which pledges the rents of said land.

Phelps v Kroll, 211-1097; 235 NW 67

Misapplication of rents.

Hansen v Bowers, 211-931; 234 NW 839

Rents during redemption. The holder of a general deficiency judgment resulting from a foreclosure sale may not have a receiver appointed to take possession of the premises so sold and to apply the rents and profits thereof, during the redemption period, to the satisfaction of his deficiency judgment.

Howe v Briden, 201-179; 206 NW 814

Improper disposal of rents. A receiver under mortgage foreclosure who collects rents which he actually and constructively knows are claimed by an assignee thereof, and who pays out said funds under an order which he obtains without notice to the court of such claim, and without notice to said assignee, must account to such assignee for such funds when such assignee promptly intervenes in the receivership proceeding prior to its termination and legally establishes his prior claim to said funds.

King v Good, 205-1203; 219 NW 517

Rents prior to deed—exception to general rule. Ordinarily the owner of mortgaged real estate is entitled to the rents until the issuance of the sheriff's deed on foreclosure sale, but where substantially at the close of the redemption period litigation arose over the right to redeem, and where it was agreed that the rights of the parties should remain in statu quo without the issuance of a deed until the litigation was determined, and where the court later decreed the ownership of the property as of the date when redemption expired, held that the rents accruing subsequent to the expiration of the period of redemption belonged to the parties so decreed to be the owners, even tho the sheriff's deed was executed long subsequent to said expiration.

People's Bank v McCarthy, 209-1283; 228 NW 7

Rents subsequent to deed. Upon the execution and delivery of a deed by the sheriff in mortgage foreclosure, the grantee becomes vested eo instanti with the right to future maturing rents, even tho such rents accrued in part during the redemption period and in part afterwards, nothing to the contrary appearing in the mortgage, or in the lease, or in any contract or stipulation relative thereto.

First JSL Bk. v Ogle, 208-15; 221 NW 537

Nonpledge of rents. A receiver will not be appointed in real estate foreclosure to take charge of the rents during redemption period when the mortgage contains no provision for such appointment and does not pledge the rents.

Huber v Gaines, 202-69; 209 NW 412

Pledge of rents—priority reversed by statute. A second mortgagee who, under a naked pledge of rents, fully matures a chattel mortgage lien on existing rents and a right to future-accruing rents, by first commencing foreclosure and praying for a receiver, even tho the first mortgagee is not made a party defendant, is not affected by the later enacted statute (§12383-e1, C., '35 [§12383.1, C., '39]) which

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reverses the order of priority under such pledges.

Reason: Said statute is specifically made nonapplicable to pending litigation.

First JSL Bk. v Armstrong, 220-416; 262 NW 815

Rents pledge attaching to crops. A clause in a real estate mortgage pledging rents and profits in the future is a valid chattel mortgage but the lien will not attach until the crops come into being.

Equitable v Hastings, 223-808; 273 NW 908

5 Crops

Immature crops. The commencement of foreclosure proceedings on a real estate mortgage which pledges the rents as security gives the mortgagee a lien on the crop rent of the legal titleholder superior to a prior attempted levy on the immature crops; and this is true even tho the mortgage is not indexed in the chattel mortgage record.

Rodgers v Oliver, 200-869; 205 NW 513

Chattel mortgage on rents covers crops. A real estate mortgage which, in addition to the land, conveys the crops raised on the land "from now until the debt secured is paid", is also a chattel mortgage to the extent of the crops.

Farmers Bk. v Miller, 203-1380; 214 NW 546

Landlord mortgagor's assignment of lease —no effect on chattel clause of realty mortgage. A lien on rents and profits created by chattel mortgage clause in realty mortgage, duly recorded and indexed, was not invalid as to mortgagor's share of crops produced under 2-year lease, because such crops did not belong to mortgagor at time they came into existence and, the landlord having assigned the lease, the subsequent assignee of property described in mortgage would take subject to the lien provided therein.

Bankers Life v Garlock, 227-1335; 291 NW 536

Lien on crops pending foreclosure. The remedial provisions of a mortgage, including a pledge of the rents and profits, are such a part of the subject matter of a foreclosure action that indexing in lis pendens imparts to a purchaser of the mortgagor-landlord's share of the corn constructive notice of the mortgagee's lien on the corn.

Sutton v Schnack, 224-251; 275 NW 870

Crop rents. Receiver of mortgaged premises held not entitled to recover landlord's share of crop rents where evidence showed that landlord's share had been delivered to him and sold prior to filing of petition for foreclosure.

Shaum v Bank, (NOR); 263 NW 815

Crops raised during redemption period. The right of the owner of land, after mortgage foreclosure, to the possession of the property during the 12 months redemption period does not embrace the right to hold exempt from levy under the mortgage deficiency judgment the harvested grain which has been raised on the premises during said redemption period, and which constitutes the said owner's share as rent.

Starits v Avery, 204-401; 213 NW 769

Rents pledged—intervening chattel mortgage on crops. The right to the appointment of a receiver under a receivership clause in a real estate mortgage, and the right to have the rents accruing during the redemption year applied to discharge a foreclosure deficiency, are superior to a chattel mortgage executed subsequent to the real estate mortgage, on crop to be grown by the mortgagor on said land during said year, said crop not being yet in existence when the real estate foreclosure was commenced.

Phelps v Taggart, 207-164; 219 NW 528

Crops wasting. Under a mortgage on lands and on the crops and rentals thereafter accruing, without a receivership clause, the appointment of a receiver is proper after the land has been sold under foreclosure, when it has been made to appear (1) that all parties personally liable are insolvent, (2) that the land has proved inadequate to satisfy the debt, and (3) that the crops are going to waste.

Robertson v Roe, 203-654; 213 NW 422

Conversion of corn—liabilities. After indexing in lis pendens an action asking foreclosure of a real estate mortgage containing a pledge of rents and profits, a person, altho prior to appointment of a receiver and decree of foreclosure, who without consent of the mortgagee purchases corn harvested during pendency of the foreclosure, may nevertheless be liable to the receiver for conversion of the corn.

Sutton v Schnack, 224-251; 275 NW 870

6 Rents Accrued or Paid Before Foreclosure

Rents paid prior to foreclosure. A general pledge of the rents of mortgaged real property gives the mortgagee no right to rents which have accrued, and which have been paid or delivered by the tenant, prior to the commencement of foreclosure proceedings, to a subsequent grantee-landlord who had not assumed payment of the mortgage debt. Necessarily the mortgagee is not entitled to a receiver for such rents.

Cooper v Marsh, 201-1262; 207 NW 403

Owner's right to collect rent in advance. An owner of real estate which is under a mort-

gage pledging the rents, but which mortgage the said owner is under no obligation to pay, has a legal right, prior to the institution of a foreclosure action, to rent the land and collect the rent in advance, and thus place said rents effectually beyond the reach of the mortgagee.

Andrew v Bank, 215-401; 246 NW 48

Payment in advance—ouster—right to recover. A tenant who pays the rent in advance to the landlord and is legally evicted by foreclosure proceedings before the commencement of the term may recover of the landlord the sum so paid as for a total failure of consideration.

Ransier v Worrell, 211-606; 229 NW 663

Accrued rents. A mortgagee of real estate has, under his mortgage, no lien or claim on rents which have fully accrued prior to the commencement of foreclosure. Especially is this true when such rents have been fully sequestered in prior foreclosure proceedings.

Haning v Dunlop, 203-48; 212 NW 351

Dual accounting not required. A mortgagee whose mortgage pledges the rents of the mortgaged premises for the payment of the mortgage debt, may not, in equity and good conscience, require a nonmortgagor-owner of the premises to account for that portion of said rents which has already been applied (1) on the interest accruing on said mortgage debt, or (2) on the taxes due on said premises.

Greenleaf v Bates, 223-274; 271 NW 614

Rents during redemption. The tenant of a mortgagor of real estate for the year for redemption from foreclosure sale who has paid his rent in advance is entitled to (1) all crops raised by him on the premises and matured by the time foreclosure deed is issued, and (2) all crop shares due him from his subtenants and likewise matured by the time said deed is issued.

Goldstein v Mundon, 202-381; 210 NW 444

See Rodgers v Oliver, 200-869; 205 NW 513

7 Loss of Right to Rents

Loss of right to rents. A mortgagor who, knowing that a receiver is being asked for in the foreclosure of a second mortgage, consents to and acquiesces in a decree which, inter alia, appoints a receiver with direction (1) to lease the premises during the redemption year, (2) to pay the taxes on the premises, and the interest on a first mortgage, and (3) to hold the balance subject to the orders of court, loses all claim to the rents, even tho the second mortgagee bid in the property for the full amount of his judgment, it appearing that the receiver will hold no balance after complying with the orders of the court.

Hakes v Phillips, 204-603; 215 NW 645

Surplus rent money—waiver of pledge. Rent money in the hands of a receiver in senior mortgage foreclosure after said mortgage is satisfied in full is payable to the mortgagor or his assignee, in preference to a junior mortgagee who, while his mortgage contained a pledge of the rents, foreclosed his mortgage on cross-petition, without in any manner perfecting any lien on said rents by the appointment of a receiver for such rents.

Stamp v Eckhardt, 204-541; 215 NW 609

Loss of pledge of rents. A general pledge of the rents of mortgaged real property gives the mortgagee no right to rents which have accrued, and which have been paid or delivered by the tenant, prior to the commencement of foreclosure proceedings, to a subsequent grantee-landlord who had not assumed payment of the mortgage debt. Necessarily the mortgagee is not entitled to a receiver for such rents.

Cooper v Marsh, 201-1262; 207 NW 403

Failure to redeem. A second mortgagee who has wholly lost his lien on the land because of his failure to redeem from the first mortgage foreclosure acquires no lien on the matured rents which have accrued during the redemption year following such foreclosure, (1) by instituting foreclosure on his second mortgage, (2) by praying for the establishment of a lien on said rents, and (3) by resting such proceeding on a prior receivership which was legally nonexistent.

Le Valley v Buckles, 206-550; 221 NW 202

Delayed receivership—nonwaiver of rents. A mortgagee after perfecting his contract lien on accrued and future accruing rents (by instituting foreclosure with prayer for receiver) may not be held to have waived his right to any part of said rents by the fact that the receiver, appointed in his behalf, long delayed qualifying as such receiver, it appearing that there was no intention to waive, and that no one had been harmed by said delay.

Greenleaf v Bates, 223-274; 271 NW 614

IV ASSIGNMENT OF MORTGAGE OR DEBT

Payment by taking assignment. One who secures title to land under foreclosure of a second mortgage may not then take an assignment of the first mortgage and enforce it against the maker thereof who has become a surety thereon. Such purchase constitutes a payment of the mortgage debt as to the maker-surety.

Hult v Temple, 201-663; 208 NW 70; 46 ALR 317

Transfer of part of debt. A transfer of part of a mortgage-secured debt operates ipso facto as a pro tanto assignment of the mortgage security.

Miller Bk. v Collis, 211-859; 234 NW 550

Assignment of mortgage debt. The rights acquired by a holder in due course of a nego-

IV ASSIGNMENT OF MORTGAGE OR DEBT—concluded

tiable promissory note attach to and accompany the mortgage securing said note, even tho the mortgage is simply "assigned" to said holder.

Fed. Bk. v Sherburne, 213-612; 239 NW 778

Assignment to titleholder — irrevocable merger. The legal titleholder of real estate who acquires or pays off a first and a second mortgage on the land, and records releases thereof with the deliberate intent thereby to show a complete satisfaction of said liens, and does so with the knowledge (which he has negligently forgotten) that there was a third mortgage outstanding on the land, will not, in the foreclosure of said third mortgage, be subrogated to the rights of said former first and second mortgagees; especially is this true when said titleholder had sold said third mortgage to the foreclosing plaintiff under the implied representation that it was a first mortgage.

Iowa Convention v Howell, 218-1143; 254 NW 848

Assignment reserving interest. A broker who, in negotiating a loan, takes the note and mortgage in his own name and, pursuant to an agreement, adds to the rate of interest due the actual mortgagee a fractional percent to cover his commission, and who, in assigning the note and mortgage to said actual mortgagee, reserves to himself said fractional percent of the interest "when and as the interest matures and is paid, without right of priority or interest in the mortgage," thereby deprives himself of all interest in the mortgage in case the mortgagor voluntarily, or involuntarily because of foreclosure, ceases to pay interest.

Metropolitan v Sutton, 219-879; 259 NW 788

Mortgage assignment to insurer when policy voided by insured. When an insurance company, in addition to insuring property mortgaged to a certain mortgagee, agreed that if any property owner should by any act void the insurance as to himself, the insurance company would purchase from the mortgagee the note and mortgage on the property and obtain an assignment of the mortgagee's rights against the property owner, the company's payment of the amount of a note and mortgage to the mortgagee to obtain an assignment according to the agreement did not extinguish the note and mortgage.

Calendro v Ins. Co., 227-829; 289 NW 485

Fire policy—validity as to mortgagee's assignee. Where property was covered by fire insurance policy containing a clause that the policy would be void if other insurance on the property was procured, and where, after obtaining a second policy, the insured sustained a fire loss which the second company compromised and paid the amount thereof into court, the second policy was valid as to the insured to the extent of the amount paid into court, and the first policy which had been obtained to protect a mortgagee was valid as to an assignee of the mortgagee to the extent of the amount paid to obtain an assignment of the mortgage.

Calendro v Ins. Co., 227-829; 289 NW 485

V PROPERTY TRANSFER—ASSUMPTION OF MORTGAGE

Discussion. See 15 ILR 79—Extension of time after assumption

Scope and effect of assumption. A purchaser of land who contracts, both in his contract of purchase and in the deed of conveyance accepted by him, to assume and agree to pay an existing mortgage on the land, thereby becomes the principal debtor on such obligation, both as to the holder of the obligation and as to all prior parties obligated thereon.

Grimes v Kelloway, 204-1220; 216 NW 953

Assumption of mortgage—sufficiency. An inartistically framed assumption of "mortgages now of record" may be amply sufficient to impose personal liability on the assumptor. Moreover, the term "assume", in such a transaction, imports personal liability.

Northwest. Academy v Edmonds, 214-310; 242 NW 49

Assumption and agreement to pay—evidence. Evidence held to constitute a prima facie showing of assumption and agreement to pay an existing mortgage.

Bridges v Sams, 202-310; 202 NW 558

Assumption of mortgage debt—insufficiency. An agreement between partners in their contract of partnership to pay mortgages on land to which they have taken title "subject" to existing mortgages, will be deemed an agreement solely for their own mutual benefit, and not for the benefit of third parties, to wit, said mortgagees.

Bankers Tr. v Knee, 222-988; 270 NW 438

Assumption—primary debtorship. As between a mortgagor and a subsequent purchaser who assumes and agrees to pay the mortgage, the purchaser becomes the primary debtor and the prior mortgagor the secondary debtor; but in case foreclosure and sale reveal a deficiency judgment, the mortgagor may not recover the amount thereof from the assuming purchaser until he (the morgagor) has paid such deficiency.

Thomsen v Kopp, 204-1176; 216 NW 725

Conveyance with assumption of mortgage—liability of grantee and maker. A grantee assuming and agreeing to pay a mortgage becomes thereby the primary debtor even tho his immediate grantor was not personally liable. The maker of the mortgage becomes secondarily liable.

First JSL Bank v Thomas, 223-1018; 274 NW 11; 275 NW 392

Successive assumptions—effect on primary liability. The maker of a promissory note secured by mortgage remains, in the absence of a novation, primarily liable to the mortgagee notwithstanding subsequent assumptions of the mortgage debt by other parties; likewise an assumptor of the mortgage debt remains primarily liable to the mortgagee notwithstanding still later assumptions by other parties.

Hakes v Franke, 210-1169; 231 NW 1

Evidence of assumption—discharge of maker—insufficient. Evidence held insufficient to establish oral agreement discharging makers from liability on note and substituting purchaser of property for maker.

Citizens Bank v Probasco, (NOR); 233 NW 510

Joint assumption. A joint agreement by joint purchasers of mortgaged property that they will pay the mortgage will not admit of the construction that each purchaser binds himself to pay one half of the mortgage and no more.

Royal Ins. v Wagner, 209-94; 227 NW 599

Assumption not conclusive. The purchaser of a promissory note secured by mortgage will not be permitted to base an estoppel on the fact that, before he purchased, he examined the records and found recorded a subsequent deed wherein the grantee (a stranger to the mortgage) assumed and agreed to pay said note and mortgage, and bought in sole reliance on such record. On the contrary, such purchaser is bound to know that such assumption is not conclusive—is subject to oral explanation, i. e., (1) that the grantee accepted the deed solely as collateral security; (2) that neither the grantee nor his grantor ever contemplated that the grantee would assume such an obligation; and (3) that there was no consideration for such assumption and agreement to pay.

Guar. Fin. Co. v Cox, 201-598; 206 NW 278

Assumption of mortgage not necessarily absolute. An agreement between a vendor and purchaser of land that the purchaser will assume and pay an existing mortgage on the land, must be taken by the mortgagee subject to the inherent equities arising out of the transaction between the vendor and purchaser.

Johnston v Grimm, 209-1050; 229 NW 716

Nonimplied assumption. Recitals in a land contract that one party sells and the other buys on a fixed consideration payable in a prescribed manner cannot furnish basis for an implied assumption of an existing mortgage by the grantee in the face of definite proof that the parties were in fact trading equity for equity, and mutually refusing to assume existing mortgages.

Lockin v Welty, 207-142; 222 NW 354

Nonimplied assumption of mortgage. The grantee of mortgaged lands cannot be deemed to have impliedly assumed said mortgage because of the fact that the grantee accepted the deed in partial satisfaction of an indebtedness due from grantor to grantee, and that to determine said credit grantor and grantee agreed on the value of the land per acre, and deducted from the total agreed value the amount of the mortgage, it clearly appearing that there was no actual intent to assume said mortgage.

Des M. Bank v Allen, 220-448; 261 NW 912

Deed recitals of assumption. The recital in a deed to real estate that the grantee assumed and agreed to pay an existing mortgage is conclusive unless the grantee overcomes the presumption that the deed correctly expresses the final contract of the parties, even tho the original contract of sale is silent as to such agreement to pay.

Royal Ins. v Hughes, 205-563; 218 NW 251

Assumption contrary to original intent. A grantee of land who, in buying the land, does not agree or intend to agree to assume an existing mortgage on the land, yet accepts a deed which provides for such assumption, and subsequently discovers such fact, and thereupon recognizes and accepts such obligation as binding upon him, is bound thereby; and it is not prejudicially erroneous for the court in instructions to refer to such "recognition and acceptance" as a ratification.

Carney v Jacobson, 210-485; 231 NW 436

Unauthorized assumption—ratification. Conceding that land was conveyed to a grantee without his knowledge or authority, and that he did not learn for several years of said conveyance and of the fact that it contained an assumption by him of existing mortgages of record, yet his plea must fall when, after actually learning said facts, he clearly ratifies the transaction.

Northwest. Academy v Edmonds, 214-310; 242 NW 49

Consideration. When mortgaged premises have been conveyed, and the grantee has agreed in the deed to pay the mortgage, the foreclosing plaintiff may, under proper pleading, prove that such agreement was because of a consideration which passed from himself to said grantee. Held that an unquestioned allegation to the effect that said agreement to pay was "as a part consideration of said conveyance and of said transaction" was sufficient to justify such proof.

Sheley v Engle, 204-1283; 213 NW 617

Absence of consideration. An oral agreement by the grantee of land to assume and pay an existing mortgage on the land whether made before or after the execution of a written contract of sale which was silent as to such assumption is without consideration when in the final closing of the sale the grantor was paid not only the full and conceded value of

V PROPERTY TRANSFER—ASSUMPTION OF MORTGAGE—continued

his equity in the land but the amount of said mortgage.

Crane v Leclere, 206-1270; 221 NW 925

Consideration—sufficiency. Consideration for an agreement to pay an existing mortgage on land is prima facie shown by proof (1) that the grantee accepted a deed which recited such agreement to pay "as part of the consideration" for the land, and (2) that he went into full possession under such deed.

First N. Bank v McDonough, 205-1329; 219 NW 329

First N. Bank v Gurnett, 206-1290; 221 NW 958

Consideration necessary. The grantee of mortgage-incumbered land by absolute deed of conveyance but for the purpose of effecting security only, is not liable on his agreement to assume and pay the existing mortgage unless a consideration for such assumption and agreement is made to appear.

Herbold v Sheley, 209-384; 224 NW 781

Consideration—burden of proof. A mortgagee who, in foreclosure proceedings, asks for judgment on an assumption clause in a subsequent deed of conveyance not signed by the assumptor, and pleads a specified consideration for said assumption, must, if met by a denial, establish said consideration by a preponderance of the evidence.

Peilecke v Cartwright, 213-144; 238 NW 621

Reformation to show assumption. The holder of a mortgage on land may not have a deed to a subsequent purchaser so reformed as to embrace an assumption by the purchaser of the payment of the mortgage, on the naked plea that the purchaser, in buying the land, contracted to pay such mortgage. This is true because such contract assumption was subject to cancellation by the vendor and purchaser at any time before the mortgagee had assented to the assumption, and the passing of a deed without the incorporation therein of such assumption generates a presumption that the contract assumption had been abrogated or in some manner canceled.

Amer. Bank v Borcherding, 201-765; 208 NW 518

Reformation — nonadjudication. An adjudication (in mortgage foreclosure) solely between the mortgagee and the grantee of the premises, that the grantee had not assumed the mortgage debt, is no bar to a subsequent independent action by the mortgagor-grantor against said grantee so to reform the deed to grantee as to embrace such assumption, and to recover of said grantee the deficiency which resulted from the foreclosure sale, said deficiency having been paid by said mortgagor-grantor. And this is true even tho the mortgagor-grantor was a party to said foreclosure.

Betzenderfer v Wilson, 206-879; 221 NW 497

Reformation of deed — evidence—sufficiency. A deed will not be reformed by striking therefrom a clause wherein grantee assumes an existing mortgage when the testimony of mutual mistake consists wholly of the conclusions of the witness, and is otherwise uncertain.

Peilecke v Cartwright, 213-144; 238 NW 621

Parol nullification. A written clause in a deed to mortgaged premises purporting to bind the grantee to pay the mortgage debt may be nullified by parol evidence—the mortgagee not being a party to the deed or to the contract of sale preceding the deed.

Andrew v Naglestad, 216-248; 249 NW 131

Available defenses. A mortgagee in an action to recover on an assumption of the mortgage is subject to any defense which would be good against the mortgagor.

Crane v Leclere, 206-1270; 221 NW 925

Debts included — plain and literal meaning controlling. In construing an "assumption-and-agreement-to-pay" clause in a deed of conveyance which, concededly, was executed and delivered in connection with a compromise and settlement agreement between a creditor and debtor, the court has no choice but to give effect to the plain and literal meaning of the words employed in said clause, there being no competent evidence dehors the written clause reflecting a different intention.

Monticello Bank v Schatz, 222-335; 268 NW 602

Ineffectual avoidance. A purchaser who goes into and retains undisputed possession of the purchased premises may not, because of some defect in the title, defeat an action to recover on his agreement to pay an existing incumbrance.

Richardson v Short, 201-561; 207 NW 610

Nonright of mortgagee to enforce. The fact that purchasers of land contract with their grantors to assume and pay an existing mortgage on the land (to which mortgage the grantees are strangers) does not necessarily arm the holder of the mortgage with legal right to enforce such contracts. The immediate parties to a conveyance may by their conduct, and in good faith, so consummate their deal as to deprive the mortgage holder of a right for which he has paid nothing.

Scovel v Gauley, 209-1100; 229 NW 684

Oral contradiction. One who contracts for and receives a deed to land, and in both instances assumes payment of an existing mortgage on the land, may wholly avoid such apparent obligation, as regards the mortgagee, by oral testimony—the rule against contradicting written instruments by parol evidence

to the contrary notwithstanding—to the effect that he never had any interest in the land, and without consideration therefor contracted for and received a deed, and conveyed the land simply as a matter of convenience for the real owner.

Nissen v Sabin, 202-1362; 212 NW 125; 50 ALR 1216

Including mortgage as credit. The fact that the owner of land of an agreed or proven value in exchanging it for other land of an agreed or proven value receives a credit for the full value of his equity in his land plus the amount of the mortgage thereon is pointedly corroborative (and ordinarily conclusively confirmatory) of the grantee's contention that he did not assume said mortgage.

Crane v Leclere, 206-1270; 221 NW 925

Construction in view of punctuation. A contract to the effect that certain land is taken subject to two described mortgages, followed by the clause "which second parties assume and agree to pay", will not, so far as the assumption clause is concerned, be construed to apply to the last described mortgage only, simply because the descriptions of the two mortgages are separated by a semicolon.

Seeger v Manifold, 210-683; 231 NW 479

Reacquisition of title by mortgagor-grantor —effect. An owner of land who, after mortgaging it, conveys and receives from his grantee a second mortgage, has no right, after reacquiring title under foreclosure of the second mortgage (subject to the first mortgage) and after paying off the said first mortgage, to recover said latter payment from said grantee even tho said grantee when he received said land, assumed said first mortgage.

McCrum v Rubbert, 219-454; 257 NW 766; 97 ALR 1073

Assumption of forged mortgage. A grantee who buys land for a nominal consideration, and agrees to pay, as part of the purchase price, an existing mortgage, but with the secret intention of defeating the mortgage on the plea that it was a forgery, may not complain that the court, in foreclosure proceeding, accepted his plea of forgery, but subrogated the foreclosing plaintiff to the rights of a former mortgage which was discharged with the proceeds of the forged mortgage, and of which said grantee had knowledge; nor might said grantee have complained had the court enforced the forged mortgage, in view of proof that the forgery had been fully ratified by the injured party before grantee bought the land.

Union-Dav. Bank v Lyons, 203-104; 212 NW 380

Novation—insufficient showing. A purchaser of real estate who has assumed the payment of existing incumbrances may not base a novation of his obligation on the simple expedient of causing the deed to be made to his wife as grantee.

Richardson v Short, 201-561; 207 NW 610

Breach of assumption as offset. When two parties exchange lands and each assumes the mortgage of the other on the land received by him in the exchange, and one of them is sued on his assumption, he may, by proper plea and proof, reduce his liability on his assumption to the extent of the damages suffered by him consequent on the act of his co-assumptor in repudiating his assumption by obtaining a discharge therefrom in bankruptcy.

Johnston v Grimm, 209-1050; 229 NW 716

Repudiation of assumption. A vendee of land who has never agreed to assume and pay a mortgage on the land cannot be made so liable by the act of the vendor in executing and recording, without the knowledge or consent of the vendee, a deed containing such assumption and agreement to pay, it appearing that the vendee promptly repudiated and rejected said deed.

Steffes v Hale, 204-226; 215 NW 248

Conveyance to junior mortgagee. In an equity action for foreclosure of realty mortgage, where it is shown mortgagor made a conveyance of land to junior mortgagee who surrendered note and mortgage and accepted land in payment, and who, at the same time, assumed payment of first mortgage and thereafter took possession and rented the land, held, sufficient consideration to bind junior mortgagee on his assumption agreement as to first mortgage.

Federal Bank v Ditto, 227-475; 288 NW 618

Agreement to defer — consideration. An owner of mortgaged premises who has not assumed the mortgage, but who makes a payment thereon on the express or implied agreement that the mortgagee will defer foreclosure for a stated time, may recover back the payment from the mortgagee if the latter breaches the agreement.

First JSL Bank v Cuthbert, 215-718; 246 NW 810

VI PAYMENT, PERFORMANCE AND RELEASE

(a) IN GENERAL

Assumed purchase by agent—effect. Where a note and mortgage on land were executed by a principal to his agent and sold by the agent in order to acquire funds with which to discharge a pre-existing note and mortgage on the same land, and where the agent embezzled the funds so acquired, the subsequent act of the agent in assuming to purchase said pre-existing note and mortgage by taking from the holder (who acted in good faith) both an assignment in blank, and also a satisfaction piece, cannot be deemed a satisfaction and discharge of said pre-existing note and mort-

VI PAYMENT, PERFORMANCE AND RELEASE—continued

(a) IN GENERAL—concluded

gage (1) when no satisfaction was, in fact, intended, (2) when the agent wholly discarded the satisfaction piece and consummated the assumed purchase by means of funds belonging solely to an innocent and good-faith re-transferee, and by forthwith delivering said pre-existing note and mortgage to said re-transferee together with said blank assignment properly made out in the latter's favor; and it is immaterial that the re-transferee took said note and mortgage when they were overdue.

Mandel v Siverly, 213-109; 238 NW 596

Release—consideration—presumption. Presumptively, a written release by a mortgagee of a mortgage is supported by a sufficient consideration.

Shaffer v Zubrod, 202-1062; 208 NW 294

Conclusiveness of settlement. A mortgagee who, with full knowledge of all items of his claim, settles with a party who has assumed and agreed to pay the mortgage, is absolutely bound thereby, in the absence of fraud, mistake, or other invalidating circumstance.

Gilmore v Geiger, 206-161; 220 NW 7

Mortgage assignment to insurer when policy voided by insured—effect. When an insurance company, in addition to insuring property mortgaged to a certain mortgagee, agreed that if any property owner should by any act void the insurance as to himself, the insurance company would purchase from the mortgagee the note and mortgage on the property and obtain an assignment of the mortgagee's rights against the property owner, the company's payment of the amount of a note and mortgage to the mortgagee to obtain an assignment according to the agreement, did not extinguish the note and mortgage.

Calendro v Ins. Co., 227-829; 289 NW 485

(b) PAYMENT AND PERFORMANCE GENERALLY

Payment—burden of proof. A plaintiff who alleges the nonpayment of the note and mortgage which he is seeking to foreclose must prove such nonpayment, even tho defendant pleads payment.

Larson v Church, 213-930; 239 NW 921

Payment — receipt of proceeds by mutual agent. Where the mortgagor of an unmatured mortgage authorizes his agent to negotiate a new mortgage and with the proceeds pay off the unmatured mortgage, and where the holder of the unmatured mortgage authorizes the same agent to collect and release his unmatured mortgage, the mere receipt by the mutual agent of the proceeds of the new mortgage, in the form of checks, etc., does not ipso facto constitute a payment of the unmatured mortgage, and especially so when the mutual agent, on receipt of said proceeds, and pending the final approval of the new mortgage, deposits the said proceeds in his overdrawn general bank account and credits the mortgagor of the unmatured mortgage with the amount thereof. Payment of the unmatured mortgage can only result when the agent has, expressly or impliedly, appropriated the proceeds to said unmatured mortgage.

In re Schanke & Co., 201-678; 207 NW 756

Note as payment. A mortgagee who accepts from the mortgagor the latter's promissory note for an item of interest and in his then and subsequent conduct treats such note as payment of said interest will not be permitted to enforce payment of such interest against one who has assumed and agreed to pay said mortgage.

Gilmore v Geiger, 206-161; 220 NW 7

Application of payments. A mortgagor who executes the mortgage for the mutually understood purpose of securing funds with which to pay off existing mortgages on the premises may not complain if the mortgagee pays off said existing mortgages from the proceeds of the new loan and accounts to him—the mortgagor—for the balance.

Williamson v Craig, 204-555; 215 NW 664

Application of funds—unallowable change. A mortgagee who, with the acquiescence of the mortgagor, applies funds coming into his hands and belonging to the mortgagor, to the payment of future accruing installments, may not thereafter change the application and foreclose, under an acceleration clause, on the claim that default has been made in the payment of said installments.

First JSL Bk. v Poor, 216-1181; 250 NW 474

Application of funds. A creditor who has come into the possession of funds belonging to his debtor, but originally without the consent of the debtor, express or implied, must, at the least, obey the direction of the debtor as to the particular debt upon which the said funds shall be applied.

First B. & T. Co. v Welch, 219-318; 258 NW 96

Release and satisfaction—presumption. A marginal release of a mortgage, executed by the agent of the holder, constitutes prima facie evidence of payment and discharge of both the note and the mortgage securing the note.

Larson v Church, 213-930; 239 NW 921

Wrongful release of conditionally canceled mortgage. Where, in rescission proceedings, a decree in effect provided that a promissory note and recorded real estate mortgage given for the purchase price of goods should be null and void from and after the return of the goods by the mortgagor to the mortgagee, and where the goods were never so returned, and where the mortgage was wrongfully released of record by a court-appointed commissioner,

the mortgage may be foreclosed against a purchaser of the land who innocently bought in reliance on the wrongful release. This is true because, while both the mortgagee and the subsequent purchaser were innocent, yet the purchaser had the means of knowing whether the goods had been returned to the mortgagee.

Moore v Crawford, 210-632; 231 NW 363

Purchase in reliance on ineffective release. The purchaser of real estate pending foreclosure of a mortgage may not avoid the effect of the constructive notice imparted by such proceedings by the claim that he purchased in reliance on a release of the mortgage by the mortgagee, (1) when he knew that the consideration for the release had wholly failed, and (2) when neither he nor the mortgagor acted in good faith in the transaction.

Eckert v Sloan, 209-1040; 229 NW 714

Novation—estoppel. A mortgagee who, at a time when the real estate security is ample, releases his mortgage and surrenders the evidence thereof to the mortgagor, and in return receives from the mortgagor's grantee a new mortgage and note for the balance due on the former mortgage, and retains said new mortgage and note until the real estate has so materially depreciated in value that the security is at least questionable, will not be permitted to say that the new mortgage was not taken in payment of the old or original mortgage.

Steffy v Schultz, 215-831; 246 NW 907

Time as essence of contract. Time will not, in equity, be deemed of the essence of a contract when the parties thereto have neither expressly so stipulated nor, by their conduct, revealed that such was their understanding of the contract. So held as to the time of performance of a compromise settlement of mortgage indebtedness.

First JSL Bk. v Hanlon, 223-440; 273 NW 114

Implied agency—insufficient "holding out". The holder of notes and mortgage who accepts payment of one of the notes from a maker thereof, in form of part cash and part check payable to the holder, from one who had bought the property subject to the mortgage, cannot be held thereby to have held out the said maker as his agent to receive payment of the remaining note; nor will the added fact that, on two occasions subsequent to the payment in question and on one occasion prior thereto, the said holder had authorized the said maker to receive payments on wholly different transactions, constitute such "holding out".

Ritter v Plumb, 203-1001; 213 NW 571

Assumed agency—ratification. The holder of a note and mortgage was informed by one who had subsequently bought the mortgaged property that he had, without requiring the production of the note, paid the note to one of the original makers of the note. Thereupon, the holder admitted that he had received part payment from the said maker, and exhibited the mortgage papers to the informant. Held insufficient to show ratification of the payment to the said maker.

Ritter v Plumb, 203-1001; 213 NW 571

Payment—authority of corporate president. Principle reaffirmed that the president of an investment corporation has no implied authority to agree on behalf of the company that a real estate mortgage held by the company shall be considered as an absolute deed, and that the company will accept the equity of redemption of the mortgagors as full payment of the mortgage debt.

Central Co. v Estes, 206-83; 218 NW 480

(c) CANCELLATION GENERALLY

Satisfaction of mortgages. See under §12364

Contract to reconvey on default—effect. An agreement by a purchase-money mortgagor that if he fails to pay maturing installments he will reconvey the property to the mortgagee carries no implied obligation that the mortgagee will accept such reconveyance in satisfaction of the mortgage debt. Such provision being for the sole benefit of the mortgagee, he may accept or reject as he sees fit.

Satchell v Alsop, 215-161; 244 NW 838

Quitclaim—prior claims — nonapplicability of rule. The principle that one who acquires title by quitclaim takes with notice of prior bona fide claims has no application to a case where a mortgagee receives his mortgage for a valuable consideration and without notice of any infirmity, and later, in order to avoid the expense of a foreclosure, receives a quitclaim deed to the land in satisfaction of the mortgage.

Brenton v Bissell, 214-175; 239 NW 14

Offer to cancel mortgage—ineffectual acceptance. An offer by a mortgagor to deed the mortgaged land to the mortgagee on condition that the mortgage notes would be deemed canceled from the time the deed was received is not accepted by the act of the mortgagee in forwarding for execution a blank deed on condition that the mortgage notes would be deemed canceled from the time the deed was recorded.

O'Brien v Fitzhugh, 204-787; 215 NW 944

Cancellation—relief barred by fraud. A mortgagor's prayer for cancellation of a mortgage on the plea of payment will be denied when, in connection with the transaction on which the claim of payment is based, he dishonestly obtained from the mortgagee, and without the knowledge of the latter, a sum exactly equal to the claimed payment.

Strahan v Strahan, 205-92; 217 NW 436

Guardian's unauthorized release of mortgage. The act of a guardian in releasing,

VI PAYMENT, PERFORMANCE AND RELEASE—continued

(c) CANCELLATION GENERALLY—concluded

without an order of court, a mortgage which represented an investment of funds derived from a sale of the ward's real estate, constitutes a breach of the bond specially given by the guardian in order to effect said sale, it appearing that the guardian was, by said release, rendered incapable of personally accounting to the ward for the amount of said mortgage.

In re Brubaker, 214-413; 239 NW 536

Executor—authority to release mortgage without order. An executor, upon receiving payment of a note and mortgage belonging to the estate, has authority, without an authorizing order of court, to release the mortgage even tho the payment is in the form of a new note and mortgage executed by new parties.

Steffy v Schultz, 215-831; 246 NW 907

(d) SUBROGATION TO SUBSEQUENT MORTGAGEE

Subrogation defined.

Millowners Co. v Goff, 210-1188; 232 NW 504

Origin and theory of subrogation. The doctrine of subrogation is purely of equitable origin and grew out of the need, in aid of natural justice, in placing a burden where it of right ought to rest.

HOLC v Rupe, 225-1044; 283 NW 108

Subrogation. If a second mortgagee uses his own funds in discharging a first mortgage in order to save the property, he will be subrogated to the rights of said first mortgagee; on the other hand, if funds are obtained through a new mortgage, and used in the discharge of said first mortgage, then the new mortgagee will acquire said right of subrogation, and in either case, the homestead character of part of the mortgaged property is quite immaterial.

Clark v Chapman, 213-737; 239 NW 797

Subrogation of second mortgage. A second mortgagee whose mortgage represents money advanced for the specific purpose of discharging prior mortgages, or in redeeming from foreclosure of prior mortgages, will, in order to effect the ends of justice, be subrogated to all the rights and remedies of said former mortgagees.

Burmeister v Walz, 216-265; 249 NW 197

Mortgagee paying first mortgage. Mortgagee was entitled to subrogation to extent of amount expended by it in payment of first mortgage.

Templeton v Stephens, 212-1064; 233 NW 704

Subrogation of grantor to assuming grantee in default. The grantee of land who, in the deed and as part of the consideration therefor, assumes and agrees to pay all unsatisfied mortgages theretofore placed on the land by the grantor, becomes, as between himself and said grantor, the principal debtor on said mortgages, and should the grantor be compelled as surety to pay said indebtedness, he will thereupon be entitled to be subrogated to all the prior rights of said mortgagees to enforce said mortgages against said grantee.

Monticello Bk. v Schatz, 222-335; 268 NW 602

Loan to discharge mortgage—subsequent mortgagee subrogated to former's rights. A governmental loaning agency, set up to meet an emergency, by making loans to save homes from foreclosure, is entitled to be subrogated to the rights of the original mortgagee, when it discovers that there is an heir of one of the original mortgagors who has an interest in the title and who did not join in the mortgage it holds, and when through no fault or negligence on its part, said heir's interest was not discovered and he was not prejudiced by this latter mortgage, but was given the right to redeem in the event of foreclosure.

HOLC v Rupe, 225-1044; 283 NW 108

Legal and conventional subrogation distinguished. Legal subrogation exists only in favor of one who, to protect his own rights, pays the debt of another. Conventional subrogation arises only upon agreement, between the lender and the debtor or old creditor, that the lender shall be subrogated to the old lien.

HOLC v Rupe, 225-1044; 283 NW 108

Subrogation as affecting junior mortgagee. Where tenants in common of land as principal and surety jointly mortgage their undivided interests in order to secure the debt of the principal, the surety may, after the land is partitioned and set off in severalty, compel the satisfaction of the mortgage as far as possible out of the lands assigned in severalty to the principal, and be subrogated to all the rights of the mortgagee in case he is compelled to pay the principal's debt; and this right is enforceable against a subsequent mortgagee of the principal's undivided interest alone, when such mortgagee takes his mortgage with actual knowledge that the mortgagors in the prior mortgage occupied the relation of principal and surety.

Toll v Toll, 201-38; 206 NW 117

Junior mortgagee—right to pay interest on senior mortgage. The common-law right of a junior mortgagee, in order to protect his own lien, to pay the interest on a senior mortgage, and thereby to be subrogated by proper action to the rights of a senior mortgagee under said senior mortgage to the extent of said payment, has not been abrogated by the enactment of Ch 501, C., '27.

Jones v Knutson, 212-268; 234 NW 548

Assignment to titleholder—no subrogation. The legal titleholder of real estate who acquires or pays off a first and a second mortgage on the land, and records releases thereof with the deliberate intent thereby to show a complete satisfaction of said liens, and does so with the knowledge (which he has negligently forgotten) that there was a third mortgage outstanding on the land, will not, in the foreclosure of said third mortgage, be subrogated to the rights of said former first and second mortgagees; especially is this true when said titleholder had sold said third mortgage to the foreclosing plaintiff under the implied representation that it was a first mortgage.

Iowa Convention v Howell, 218-1143; 254 NW 848

(e) EXTENSIONS

Discharge of surety—extension of time of payment. One who, in buying land, assumes a mortgage (and thereby becomes a principal debtor) and who, without the consent of the party who has become secondarily liable on the mortgage debt, assigns to the mortgagee a lease on the land, under an agreement that the mortgagee will collect the rent and apply it on the debt, does not thereby work such an extension of time of payment as will release the party secondarily liable, especially (1) when there was no consideration for such so-called extension, and (2) when there was no fixed time of extension.

Union Ins. v Mitchell, 206-45; 218 NW 40

Assumptor of mortgage-secured note—extension of time—effect. Principle reaffirmed that the maker of a mortgage-secured promissory note is not released by the act of the mortgagee in granting an extension of time of payment to an assumptor of the note without the consent of the said maker.

Koontz v Clark, 209-62; 227 NW 584

Extension of time of payment—effect. An extension of time of payment granted to an assumptor of a note and mortgage does not release the maker of the note and mortgage and prior assumptors, even tho the extension was granted without their knowledge or consent.

Royal Ins. v Wagner, 209-94; 227 NW 599

Extension of mortgage. An agreement between a mortgagee and an assumptor of the mortgage for an extension of time of payment does not constitute a novation when the prior existing obligations for the same debt are not referred to and when such extension agreement was entered into without the knowledge or consent of prior existing obligors.

Royal Ins. v Wagner, 209-94; 227 NW 599

Extension of time — effect. The principle that the holder of an obligation releases the surety on the obligation by granting an extension of time of payment to the principal without the consent of the surety, has no application to a case where the maker of a mortgage-secured promissory note sells the mortgaged property to a vendee who assumes and agrees to pay the note, and where the holder of the note subsequently grants an extension of time of payment to the assuming grantee without the consent of the original maker of the note.

Blank v Michael, 208-402; 226 NW 12
Iowa Co. v Clark, 209-169; 224 NW 774
Herbold v Sheley, **209-384; 224 NW 781**

Mortgage extension by mortgagor's grantee —no assumption. A note and mortgage extension agreement between mortgagee and mortgagor's grantees, with no assumption of the mortgage, and for the sole purpose of preserving a foreclosure cause of action about to be barred by statute, which extension continues the note and mortgage in force and effect as per their original terms, will justify a foreclosure decree but is not an assumption of the debt on which a personal judgment against mortgagor's grantees may be rendered.

Woollums v Anderson, 224-264; 275 NW 472

Agreement extending time. The extension of the time for the payment of the debt was sufficient consideration for an agreement extending a mortgage, even tho the holder reserved the right to sue at any time any person who did not consent in writing to the extension.

Lincoln Ins. v McKenney, 227-727; 289 NW 4

Mortgage assumed by grantee. When grantees of property accepted a deed by which they assumed a mortgage debt on the property, the statute of limitations began to run from the time of the acceptance of the deed, but the grantees were still liable after the 10 years when they had extended the time of maturity.

Lincoln Ins. v McKenney, 227-727; 289 NW 4

Signature of surety obtained by fraudulent representations — nonliability. Extension of mortgage debt would be sufficient consideration to support signature of mortgagor's daughter to extension agreement if extension were granted on condition that such daughter sign, but where such signature of the daughter is obtained by fraudulent representations, it is without consideration and void as to the daughter.

Beal v Milliron, (NOR); 267 NW 83

Novation—mere extension of note at reduced interest. An agreement to extend the time of payment of a promissory note and mortgage securing it, at a reduced rate of interest does not constitute a novation.

Des Moines JSL Bank v Allen, 220-448; 261 NW 912

Extension agreement—foreclosure notwithstanding. Even tho, to ward off foreclosure, there be executed a valid extension to a future definite date for the payment of a mortgage

VI PAYMENT, PERFORMANCE AND RELEASE—concluded

(e) EXTENSIONS—concluded

debt, yet, if the mortgage so provides, the right to foreclose prior to said extended date will be reinstated by the nonpayment of interest accruing subsequent to said extension agreement.

Goff v Milliron, 221-998; 266 NW 526

Estoppel to deny. A grantee of land who accepts a deed in which he agrees to pay an existing mortgage is bound thereby even tho, prior to recording the deed, he causes his name to be erased and another name to be inserted as grantee.

Royal Ins. v Hughes, 205-563; 218 NW 251

Estoppel to deny assumption. A grantee of mortgaged property cannot be held estopped to deny liability on an assumption clause in the deed when, owing to the peculiar circumstances attending the transfer, he never saw the deed; especially is this true when there was no plea of estoppel.

Peilecke v Cartwright, 213-144; 238 NW 621

Estoppel to dispute. The grantee of mortgaged premises by paying interest on the mortgage debt does not necessarily estop himself from disputing the validity of a clause in his deed purporting to bind him for the payment of said debt.

Andrew v Naglestad, 216-248; 249 NW 131

VII FORECLOSURE

(a) IN GENERAL

Title of mortgagor. It cannot be said that a mortgagee, by bringing an action to foreclose, is questioning the title of the mortgagor.

Hoffman v Hoffman, 205-1194; 219 NW 311

Right of mortgagee to possession. A general provision in a real estate mortgage empowering the mortgagee to take possession of the premises when there is a default by the mortgagor does not contemplate or authorize a possession of the premises by the mortgagee except a possession obtained by a foreclosure and by the appointment of a receiver thereunder.

Andrew v Haag, 215-282; 245 NW 436

First JSL Bank v Stevenson, 215-1114; 245 NW 434

Foreclosure (?) or forcible entry and detainer (?). Tho a mortgage extension agreement provides for the execution by the mortgagor to the mortgagee of an absolute deed to the mortgaged premises and for the delivery of the deed and the possession of the premises to the grantee in case of default, yet, if the agreement as a whole reveals the intent simply to furnish additional security, it must follow that the relation of landlord and tenant is not created, and that the relation of mortgagor and mortgagee is continued. It follows that, at the expiration of the extension time, forcible entry and detainer will not lie to obtain possession of the premises.

Mickelson v Rehnstrom, 215-1056; 247 NW 275

Presumption attending foreign foreclosure. In an action in this state on a foreign, mortgage-secured promissory note, the court will not presume that a foreclosure of the mortgage was on personal service within the jurisdiction of the foreclosing court on the makers of the note (residents of Iowa), and that, therefore, the note sued on was merged in the foreclosure decree.

Pfeffer v Corey, 211-203; 233 NW 126

State control over federal agencies. In proceedings instituted by a federal agency for the foreclosure of a mortgage, the state court, manifestly, cannot compel such agency to come to the relief of the debtor, even tho the federal government has advanced funds to the said agency for the primary purpose of relieving debtors.

Federal Bank v Wilmarth, 218-339; 252 NW 507; 94 ALR 1338

Economic conditions and fluctuations in values. Equity cannot refuse to foreclose a mortgage because of a depressed economic condition existing throughout the country, nor, in foreclosing, may it assume to adjust the judgment to the fluctuating value of the legal tender as declared by the federal government.

Federal Bank v Wilmarth, 218-339; 252 NW 507; 94 ALR 1338

Combined real estate and chattel mortgage—independent foreclosure of latter. When a mortgage on real estate, and a chattel mortgage on the rents of said real estate, are combined in the same instrument as security for the same debt, the chattel mortgage is foreclosable without regard to the real estate mortgage except, of course, as to the proper application of payments realized.

Equitable v McNamara, 220-297; 259 NW 231; 262 NW 466

Failure to enforce all security—res judicata. A mortgagee who, without changing his position in any degree, receives the written agreement of a junior incumbrancer to pay the interest on the mortgage, and the taxes on the mortgaged property, simply acquires a new and additional security for his existing mortgage debt, and if he forecloses his mortgage by personal service on the mortgagor and on said junior incumbrancer (even for a sum less than is due) without asking any relief on said additional security, he will be absolutely precluded from maintaining further action on such agreement. (A fortiori is this true when it otherwise appears that the mortgagee was fully satisfied by his foreclosure.)

Schnuettgen v Mathewson, 207-294; 222 NW 893

Lands subject to mortgage—contingent interest. Lands devised by will are mortgageable by the devisee tho the devise be subject (1) to a preceding life estate in another, and (2) to the payment, after the death of the life tenant, of a named legacy; being thus legally mortgageable, the mortgage is legally foreclosable during the life of the life tenant, but subject, of course, to all outstanding superior equities.

State Bank v Bolton; 223-685; 273 NW 121

Restoration of status quo. An incompetent, through his guardian, may, on proper grounds, maintain an action to set aside and annul a judgment in foreclosure without offering to restore the status quo when the incompetent received no part of the money secured by the mortgage.

Engelbercht v Davison, 204-1394; 213 NW 225

Fraud — evidence — insufficiency. Evidence held quite insufficient to establish a charge to the effect that a plaintiff was fraudulently induced to withhold mortgage foreclosure proceeding.

Andrew v Bank, 215-401; 246 NW 48

Perfecting appeal—notice—necessary parties. An appeal by a cross-petitioner in mortgage foreclosure because of the denial of his plea to have title quieted in himself and against the mortgagor-defendant, cannot be maintained unless notice of the appeal is duly served on said mortgagor-defendant; and it is quite immaterial that the record indicates that said mortgagor-defendant was manifestly friendly to the plea of said cross-petitioner.

Crawford Bank v Butler, 201-1281; 208 NW 284

Requisites and proceedings for transfer of cause—failure to serve coparty. On an appeal by an intervenor in foreclosure proceedings from a decree awarding rent notes to plaintiff because intervenor was a fraudulent indorsee thereof, and taxing costs against intervenor and the landlord-indorser, the failure to serve notice of appeal on the nonappealing landlord-indorser and tenant-maker of the notes constitutes a fatal defect of parties because a reversal—a decree that intervenor was a bona fide indorsee—(1) would restore the liability of the landlord-indorser on his indorsement, (2) would leave the landlord-indorser liable for all the costs without right to contribution from intervenor, and (3) would subject the tenant to a double liability for the rent.

Read v Gregg, 215-792; 247 NW 199

Co-parties—failure to serve. Failure of an intervenor in mortgage foreclosure to serve defendants with notice of his appeal is fatal to the appeal if a decision on appeal in favor of intervenor would prejudice the nonserved parties.

First JSL Bk. v Yarcho, 217-95; 250 NW 903

(b) RIGHT TO FORECLOSE—DEFENSES

1 In General

Statute of limitations. The right to foreclose a mortgage is not barred so long as the secured debt is not barred.

Randell v Fellers, 218-1005; 252 NW 787

Real party in interest. A mortgagee may enforce the mortgage in his own name, even tho the mortgage is for the benefit of a third party.

Turnis v Ballou, 201-468; 205 NW 746

Party to contract but without beneficial interest. A party may maintain foreclosure proceedings on a mortgage in which he is named as mortgagee, tho he has no beneficial interest in the mortgage.

Brauch v Freking, 219-556; 258 NW 892

Assignee may foreclose. A mortgage which provides that it "shall stand as security for any other indebtedness the mortgagee may hold or acquire against the mortgagor", secures not only (1) the debt which is specifically described and secured by the mortgage, but also (2) a pre-existing, unsecured debt then owed by the mortgagor to the mortgagee, even tho, unbeknown to the mortgagor when he executed the mortgage, the debt specifically described and secured by the mortgage did not belong to the mortgagee, but belonged to a third party. It follows that an assignment by the mortgagee to said third party of the mortgage and the specifically described notes, and an assignment of the notes representing the pre-existing debt, arm the assignee with right to foreclose the mortgage for all the debts secured thereby.

Turnis v Ballou, 201-468; 205 NW 746

Second mortgagee may foreclose. The fact that a second mortgage provides, following the description of the mortgaged lands, that it is "subject to" a described first mortgage does not estop said second mortgagee (1) from availing himself of that part of his mortgage which contains a naked pledge of the rents, (2) from first perfecting and maturing, by proper foreclosure proceedings, his potential rights under said pledge, and (3) from thereby acquiring a right in and to said rents superior to the potential rights of the first mortgagee under a like pledge, in his mortgage, of said rents. (But now see §12383-e1, C., '35 [§12383.1, C., '39].)

First JSL Bank v Armstrong, 220-416; 262 NW 815

Trust deed foreclosed by trustee. An owner of land under trust deed to secure a bond issue, who unqualifiedly consents to a change of trustee, may not thereafter claim that the new trustee is not the proper party to foreclose the trust deed, especially when the bondholders unanimously approve of such change.

Central Bk. v Benson, 209-1176; 229 NW 691

VII FORECLOSURE—continued
(b) RIGHT TO FORECLOSURE—DEFENSES—continued
1. In General—concluded

Optional remedies to enforce payment. The trustee in a deed of trust securing bonds cannot be deemed to be limited simply to a foreclosure of the deed—cannot be deemed to be excluded from maintaining an action at law against the maker—when the deed confers upon the trustee the widest discretion as to the remedy which he may choose to enforce collection.

Minn. Co. v Hannan, 215-1060; 247 NW 536

Election between securities. The holder of both a chattel and a real estate mortgage securing the same debt has the right to elect to proceed to the foreclosure of his mortgages and to abandon all interest in a block of trust bonds secured by trust deed on other real estate and held by him as collateral security for said debt, and in such case the foreclosure by the trustee of the trust deed and the buying in of the trust property by the trustee in the interest of the bondholders will not be deemed a payment to any extent of the chattel and real estate mortgage-secured debt.

Silver v Farms, Inc., 209-856; 227 NW 97

Allowable successive foreclosures. The foreclosure of a recorded real estate mortgage for the installments first falling due, and a sale, and redemption therefrom by the assignee of the mortgagor, does not destroy the lien of the mortgage for future maturing installments and principal when the mortgage specifically provides for successive foreclosures, and when the lien of said mortgage for future maturing installments and principal was distinctly preserved, as a matter of record, at every material step in said first foreclosure.

Fremont JSL Bank v Foster, 215-1209; 247 NW 815

Lincoln JSL Bank v Williams, 216-659; 246 NW 841

Unconscionable mortgage. Equity will not foreclose an unconscionable mortgage,—i. e., a mortgage pyramided with usury and given as additional security for part of a debt already secured by mortgage; and especially is this true when the mortgagee is manifestly seeking to sequester the property situated in a foreign state and covered by the original security without accounting for the value thereof.

Tansil v McCumber, 201-20; 206 NW 680

Pendency of foreclosure in foreign state—effect. The right of a party to maintain in this state an action at law to recover of the maker of bonds the balance due after foreclosure, in a foreign state, of the securing mortgage, will not be denied on the plea that the foreclosed property is yet in the hands of the foreclosing receiver and that the amount of rents which will be derived thereunder is not made to appear, when the evidence demonstrates that the utmost that can be realized will not pay taxes and other expenses.

Minn. Co. v Hannan, 215-1060; 247 NW 536

Who may determine right. When, in the execution of a mortgage, and solely as a means of paying to the broker his commission for negotiating the loan, a small fractional percent is added to the interest rate due the mortgagee, the interest or right in the mortgage so acquired by the broker cannot be deemed such as to prevent the mortgagee, without the consent of the broker, from accelerating the maturity of the mortgage according to its terms.

Metropolitan v Sutton, 219-879; 259 NW 788

Recovery of payments—voluntary, unnecessary payments not recoverable back. One who acquires title to premises theretofore sold under foreclosure for the nonpayment of installments of a mortgage debt and who, with full knowledge of all relevant fact conditions, and as a purely voluntary act on his part, redeems from said foreclosure sale (evidently with the belief that by so doing he would acquire an absolutely unincumbered title), may not, after the mortgagee has established his legal right again to foreclose on said premises for the balance of the mortgage debt, recover back from the mortgagee items of taxes on the premises paid in effecting said redemption.

Gronstal v Van Druff, 219-1385; 261 NW 638

2 Acceleration of Maturity

Option under acceleration clause. Principle reaffirmed that a mortgagee may avail himself of the contract option to declare the debt due for breach of conditions.

Corn Belt Bk. v Kriz, 207-11; 219 NW 503

Accelerating clause—presentment and demand.

Johnson v Ballou, 201-202; 204 NW 427

Maturity—accelerating clause—presentment and demand A mortgagee who has the option to declare the secured debt due for nonpayment of interest is under no obligation to present the note and demand payment of the interest, when the note is payable at a named town, without other specific designation of place. Especially is this true when the debtor well knows where the note is kept and makes no tender.

Collins v Nagel, 200-562; 203 NW 702

Acceleration — sole right to determine. A party who, tho unnamed in a mortgage, has, because of a contract with the mortgagee, a right to participate, on foreclosure, in the total mortgage debt to the extent of a small fractional part of the interest will not be deemed to have such interest as to have a voice in determining whether the maturity of the mortgage debt shall be accelerated because of a default of the mortgagor.

Metropolitan v Steiner, 219-785; 259 NW 234

Acceleration of maturity. A mortgage provision for foreclosure in case the matured interest be not paid is not waived per se by the acceptance by the mortgagee of part of such interest.

Jewell v Logsdon, 200-1327; 206 NW 136

Maturity—accelerating clause—nonwaiver by accepting part of interest. The right of a mortgagee to declare a mortgage-secured debt due for nonpayment of interest, as provided in an accelerating clause, is not waived by accepting a part of said matured interest.

Collins v Nagel, 200-562; 203 NW 702

Acceleration clause. A mortgage provision empowering the mortgagee to declare the entire debt due and payable in case of nonpayment of an installment of principal, or of interest, taxes, etc., imposes no penalty on the mortgagor; likewise a provision fixing one rate of interest on unmatured sums, and a different and higher rate on matured and unpaid sums, provided the legal rate is not exceeded.

Federal Bank v Wilmarth, 218-339; 252 NW 507; 94 ALR 1338

Exercising option under accelerating clause —subsequent tender—effect. A tender of overdue interest after the mortgagee has exercised his option to declare the entire debt due for nonpayment of interest, as provided in a clause accelerating payment, is not effective.

Collins v Nagel, 200-562; 203 NW 702

Maturity — accelerating clause — notice. A mortgagor is not entitled, under a clause accelerating maturity, to notice, prior to suit, that the mortgagee elects to declare the entire debt due for the nonpayment of interest.

Collins v Nagel, 200-562; 203 NW 702

Uncertainty of maturity date. A mortgagee will not be permitted to avail himself of an accelerating clause and foreclosure in toto, because of the failure to pay interest in accordance with this theory of the maturity thereof, when the mortgagor promptly and in good faith pays the interest on the date which the indefinite and uncertain language of the note reasonably justified him in believing was the proper maturity date. So held where the uncertainty arose from the loose use of the word "after".

McKee v Stewart, 211-1185; 235 NW 286

Nonpayment of delinquent taxes. The contract option in a mortgage to treat the entire debt as due, and to foreclose for the nonpayment of taxes, will not be deemed to apply to taxes which are delinquent and unpaid when the mortgage is executed.

Wilson v Tolles, 210-1218; 229 NW 724

3 Defenses

Default of loan agent—no defense. A mortgagor may not assert failure of consideration for the mortgage because his own duly authorized agent to procure the loan and receipt for the proceeds did not remit the proceeds to him.

Hedges v Holland, 203-1149; 212 NW 480

Extension agreement—foreclosure notwithstanding. Even tho, to ward off foreclosure, there be executed a valid extension to a future definite date for the payment of a mortgage debt, yet, if the mortgage so provides, the right to foreclose prior to said extended date will be reinstated by the nonpayment of interest accruing subsequent to said extension agreement.

Goff v Milliron, 221-998; 266 NW 526

Unallowable collateral attack. In the foreclosure of a mortgage executed by an administrator on lands of the deceased on due order and authorization of the court, the defending heirs, who were parties to the order and authorization for the mortgage, will not be permitted to collaterally attack the validity of the mortgage on the ground that part of the land was the homestead of the deceased and therefore descended to the heirs exempt from the debts of the deceased.

Reinsurance Co. v Houser, 208-1226; 227 NW 116

Judgment on note—no defense. A mortgage foreclosure action is maintainable after securing judgment on the note secured thereby.

Hamilton v Henderson, 211-29; 230 NW 347

Beckett v Clark, 225-1012; 282 NW 724; 121 ALR 912

(c) JURISDICTION—VENUE

Land situated wholly in foreign state. A mortgage on land situated wholly within a foreign state may not be foreclosed in this state, tho the mortgagee may maintain, in this state, an action at law on the note so secured.

Beach v Youngblood, 215-979; 247 NW 545

Foreclosure in state court—bankruptcy proceedings. Where mortgagees on foreclosure did not ask personal judgment, but only a judgment in rem, and trustee in bankruptcy for mortgagors had secured an order releasing and discharging the real estate as assets in bankruptcy matter, state court was justified in proceeding with foreclosure and in not staying proceedings until adjudication of mortgagors as bankrupts—bankruptcy act, §11 [11 USC 29], contemplating only suits in personam, and from which a discharge in bankruptcy would be a release.

Mayer v Imig, (NOR); 227 NW 328

(d) PARTIES—PROCESS

Land banks nonpreferential litigants in state courts. There is nothing to show that congress contemplated that land banks should occupy a preferential status as litigants in the state courts.

First JSL Bank v Lehman, 225-1309; 283 NW 96

VII FORECLOSURE—continued

(d) PARTIES—PROCESS—concluded

Inadvertently omitted party—opening proceeding to supply. A court of equity, in the exercise of a sound discretion, may reopen a foreclosure proceeding on application of the purchaser at, and deed holder under, execution sale in order to bring in a party who was inadvertently omitted as a party defendant in the original institution of the action, and whose claim is manifestly barred by the statute of limitation.

Johnson v Leese, 223-480; 273 NW 111

Process — foreclosure — establishing claim against estate. In an equity foreclosure action on a realty note and mortgage, where administrators were defendants and the petition prayed for judgment and for general equitable relief, and where the foreclosure decree established a claim against administrators of the estate of deceased owner, to which decree objection was made that the relief granted in establishing such claim was greater than the prayer of petition, held, judgment against the administrators, if proper, could have been in no other form than as a claim established against the estate, and could not be enforced by execution.

Federal Bank v Ditto, 227-475; 288 NW 618

(e) PLEADING

Irrelevant matter on foreclosure. An allegation by a mortgagor in mortgage foreclosure that he had sold the property to one who had not been brought into the foreclosure, and was holding the property as a tenant of said grantee, is irrelevant to any issue in the foreclosure, and is properly stricken on motion.

Kaeser v Manderschied, 203-773; 211 NW 379

Superfluous allegation—effect. An allegation in mortgage foreclosure that the mortgagor was, when the mortgage was executed, a fee simple owner of the property need not be proven.

Colby v Forbes, 207-9; 216 NW 722

Insufficient prayer. A personal judgment without a specific prayer therefor is erroneous, and a prayer for "other and further relief" is not such prayer.

Richardson v Short, 201-561; 207 NW 610

Wife as party—plea of want of consideration. Even tho a wife who had joined with her husband in the execution of rent obligations was not made a party to subsequent mortgage foreclosure wherein her husband and the landlord were evicted by the appointment of a receiver, yet she may, when sued on the rent obligations by the landlord or by his assignee, plead the foreclosure decree as establishing a total failure of consideration.

Miller v Laing, 212-437; 236 NW 378

Amendment unnecessary for claim acquired during foreclosure. Where, pending foreclosure action, plaintiff acquires an additional claim against the defendant, he is not bound to amend and assert said claim in the foreclosure proceedings, but may maintain a subsequent and independent action on the newly acquired claim, even tho it pertains to the subject matter of the foreclosure.

Central Bk. v Herrick, 214-379; 240 NW 242

Unpleaded usury—evidence. A court of equity will not reject testimony before it showing the unconscionable nature of the transaction upon which action is brought (i. e., that a contract is pyramided with unconscionable usury), simply because the pleadings are general and indefinite, and do not specifically plead such usury. Especially is this true when the parties have treated the pleadings as all-sufficient.

Tansil v McCumber, 201-20; 206 NW 680

(f) RECEIVER

Receivership generally. See under §§12713, 12716

Discussion. See 11 ILR 174—Receivership clause

1 In General

Court's jurisdiction of entire controversy. In action for a money judgment, foreclosure of a mortgage and appointment of a receiver, the equity court had jurisdiction of the controversy and parties. The action having been properly brought in equity, all issues, legal and equitable, are triable therein.

Deaton v Hollingshead, 225-967; 282 NW 329

Freight charges to pay operating expenses. Railway companies which knowingly permit the receiver of an insolvent railway to collect inter-line freight charges may not, as intervenors in an action to foreclose a mortgage on the receiver's road, have their claims established as prior to judgment liens on the naked showing that said freight charges were used by the receiver in operating his railway.

Continental Bank v Railway, 202-579; 210 NW 787; 50 ALR 139

Mortgagee suing receiver—decree fixing lien on other assets in different court. Court may authorize a mortgagee's foreclosure action against the receiver in a county where the property is located, tho different from county where receivership is pending, and such court, after hearing the foreclosure proceeding, has the right, where such relief is proper, not only to foreclose but to impose a lien for a deficiency judgment on the other receivership assets in the other court.

Klages v Freier, 225-586; 281 NW 145

Federal income tax on operating receiverships. The federal statute requiring operating receiverships to pay income tax applies to a receiver where a substantial part of business both before and after the appointment was

the investment of corporation funds in securities and the collection of rents and profits, even tho the receiver was appointed to liquidate the business.

State v American B. & C. Co., 225-638; 281 NW 172

Agreement in re rents. An agreement between a mortgagee and the president of the titleholder (1) that the mortgagee will, at foreclosure sale, bid the full amount of the judgment, and will consent to the appointment of the president as receiver of the rents, and (2) that said president as receiver will keep the property in repair and deliver it to the mortgagee at the close of the redemption period free of all taxes, is enforceable when the president is so appointed, the property so bid in, and the provision for the payment of taxes by the receiver is embraced in the final decree. And this is true tho the mortgage neither pledges the rents nor provides for a receiver.

Hawkeye Ins. v Inv. Co., 217-644; 251 NW 874

Crops planted subsequent to receiver's appointment—payment from receivership. Claimant who, before institution of foreclosure suit in which receiver for mortgagor was appointed, had furnished and planted seed under oral agreement with mortgagor's heirs held entitled to reasonable value of labor and material from receivership fund.

Chicago JSL Bank v Hargrove, (NOR); 234 NW 801

New mortgage and loan as benefit to receivership. A receiver, being granted authority to pay off an old mortgage, who executes new notes and a mortgage therefor, and after selling the property and collecting a substantial part payment which the receivership retains upon default of the buyer, is precluded from claiming that the receivership was in no way benefited by the new mortgage as a new loan.

Klages v Freier, 225-586; 281 NW 145

Estoppel—benefits accepted under unconstitutional statute. No objection could be made to the constitutionality of a law extending the period of redemption after mortgage foreclosures by parties who accepted benefits under a court order extending the period and appointing a receiver whose acts benefited both parties.

New York Ins. v Breen, 227-738; 289 NW 16

Sale—delinquent taxes paid by mortgagee omitted from judgment—effect. A mortgagee who bids in the property at foreclosure sale, without protecting himself by adding thereto the delinquent taxes he had previously paid under a clause in the mortgage, may not, after he is appointed receiver during the redemption year, collect and apply the rents and profits to reimburse himself for such delinquent taxes. The owner when redeeming, by paying the judgment and costs, takes title free from the lien of such taxes.

Monroe v Busick, 225-791; 281 NW 486

Receiver of unpledged rents—effect. The appointment in mortgage foreclosure of a receiver of the rents solely on the ground that the rents are being wasted will not enable the foreclosing plaintiff to have the rents applied to the extinguishment of the mortgage debt.

Des M. JSL Bank v Danson, 206-897; 220 NW 102; 221 NW 542

Receiver for assigned rents. A receiver for the rents and profits which may accrue during the redemption period on mortgaged premises will not be appointed under a mortgage which simply pledges the possession during said period, and when it is made to appear that the rents for said period have been contracted for and in good faith assigned prior to the commencement of foreclosure proceedings.

Keokuk Co. v Campbell, 205-414; 215 NW 960

Appointment of receiver—subsequent intervenor. An unappealed decree appointing a receiver of real estate and of the rents and profits thereof must, in a subsequent intervention in the cause, be deemed an adjudication against the owner, of all the issues involved in said appointment.

Canfield v Sec. Co., 216-747; 249 NW 646

2 Appointment and Scope of Receivership

General grounds. Justification for the appointment of a receiver in mortgage foreclosure is found in proof (1) that the owner of the land, who has assumed the mortgage, is insolvent, (2) that the security is inadequate to pay the debt, and (3) that the taxes are overdue.

Bogenrief v Leaming, 205-48; 217 NW 428

Naked statutory authority. The court will not, in mortgage foreclosure proceedings, appoint a receiver (1) when the mortgage neither provides for such receiver nor pledges the rents, and (2) when there is no showing of waste, or of impairment or destruction of the security actually pledged.

Huber v Gaines, 202-69; 209 NW 412
Iowa Bk. v Rons, 203-51; 212 NW 362

All-essential showing required. Assuming, arguendo, that a naked stipulation in a mortgage authorizing the mortgagee to take possession of the premises on default and to rent the premises is equivalent to a pledge of the rents, and might authorize the appointment of a receiver, yet no such appointment can be legally made in the absence of proof of the insolvency of the mortgagors, in addition to a showing of inadequacy of security.

First N. Bk. v Witte, 216-17; 245 NW 762

Adequate showing. The appointment of a receiver in mortgage foreclosure is proper

VII FORECLOSURE—continued
(f) RECEIVER—continued
2. Appointment and Scope of Receivership—continued

when it appears (1) that the rents were pledged up to the close of the redemption period, (2) that the lands afford inadequate security, (3) that waste is impending, and (4) that the mortgagors are nonresidents and are presenting no defense.

Equitable v Carpenter, 203-1377; 214 NW 485

Appointment clause in mortgage. In an equity action for foreclosure of realty mortgage also asking appointment of receiver, where inadequacy of security is shown and mortgage provided for appointment of receiver, court is authorized to appoint a receiver without proof of insolvency.

Federal Bank v Ditto, 227-475; 288 NW 618

Showing required when rents pledged. A receiver of the rents and profits of mortgaged premises, even tho the mortgage stipulates therefor, will not be appointed in the absence of a showing that (1) the mortgagor is insolvent, and (2) the security is inadequate; and insolvency is not established by an offer by plaintiff to accept less than the amount of his mortgage.

Des M. JSL Bank v Danson, 206-897; 220 NW 102; 221 NW 542

Deficiency after sale. Appointment of a receiver in foreclosure proceeding is proper (1) when the mortgage pledges the rents, (2) when the property on sale has proved inadequate to satisfy the debt, and is going to waste, and (3) when the parties personally obligated to pay are insolvent.

Fellers v Sanders, 202-503; 210 NW 530

Deficiency after sale. A receiver to take charge of mortgage-pledged and unassigned rents should be appointed when, after foreclosure and sale, a deficiency judgment remains against an insolvent mortgagor.

First JSL Bk. v Beall, 208-1107; 225 NW 943

Deficiency after sale. Under a mortgage on lands and on the crops and rentals thereafter accruing, without a receivership clause, the appointment of a receiver is proper after the land has been sold under foreclosure, when it has been made to appear (1) that all parties personally liable are insolvent, (2) that the land has proved inadequate to satisfy the debt, and (3) that the crops are going to waste.

Robertson v Roe, 203-654; 213 NW 422

Deficiency judgment in rem. A receiver may, on a proper showing, be appointed to collect pledged rents, and thereby discharge a deficiency judgment, whether the deficiency arises on a judgment in personam or in rem.

Interstate Assn. v Nichols, 213-12; 238 NW 435

Deficiency—insolvent mortgagor. A receiver to take charge of mortgage-pledged rents should be appointed when, after foreclosure and sale, a deficiency judgment remains against an insolvent mortgagor.

Prudential v Strong, 219-816; 259 NW 491

Belated application after deficiency. A plaintiff in mortgage foreclosure who has been denied the appointment of a receiver for the rents may not, after the execution sale has revealed a deficiency judgment, institute new proceedings for such appointment (assuming the same to be proper) when, at the time of filing such new proceeding, the right, title, and interest of the mortgagor in said rents have passed to the mortgagor's trustee in bankruptcy.

Des M. JSL Bank v Danson, 206-897; 220 NW 102; 221 NW 542

Inadequate security. Record reviewed, and held that the appointment of a receiver in mortgage foreclosure was not erroneous, when the property was but slightly in excess of the incumbrance.

Harlow v Larson, 204-328; 213 NW 417

Inadequate security. A receiver of the rents and profits of mortgaged premises must be appointed when the mortgage pledges the rents and profits and provides for such receiver, and when it is made to appear that the security has proven substantially inadequate to satisfy the obligations called for by the mortgage, and that the judgment debtor is insolvent.

N. W. Ins. v Block, 216-401; 249 NW 395

Inadequate security. Principle reaffirmed that a real estate mortgagee is entitled to the appointment of a receiver when the mortgage pledges the rents, provides for a receiver, and when the real estate itself is inadequate security, irrespective of the insolvency of the mortgagor.

First Tr. Bk. v Jansen, 217-439; 251 NW 711
Des M. Bank v Allen, 220-448; 261 NW 912

Security slightly exceeding incumbrance. Record reviewed, and held that the appointment of a receiver in mortgage foreclosure was not erroneous when the property was but slightly in excess of the incumbrance.

Harlow v Larson, 204-328; 213 NW 417

Absconding mortgagor. A receiver may be appointed, without notice, in mortgage foreclosure against an absconding mortgagor.

Davenport v Thompson, 206-746; 221 NW 347

Conditions—evidence—sufficiency. Evidence held sufficient to show (1) the inadequacy of mortgage security and (2) the insolvency of the mortgagor, as a basis for the appointment

of a receiver in the foreclosure of a mortgage which pledged the rents.

Davenport v Thompson, 206-746; 221 NW 347

On homestead—right to receiver. In the foreclosure of a mortgage solely on a homestead and for the purchase price thereof, the mortgagee is entitled (except under exceptional circumstances) to the appointment of a receiver without proof of the insolvency of the debtor, (1) when the mortgage pledges a lien on the rents in case of default in payment, and provides for a receiver in case of foreclosure, and (2) when the inadequacy of the security is clearly made to appear.

Ia. D.M. Bk. v Crawford, 217-609; 252 NW 97

Homestead. On the issue whether a receiver for pledged rents should be appointed in the foreclosure of a mortgage solely on a homestead, the court cannot give consideration to the plea that extensive improvements have been made on the property since the mortgage was given when there is no proof that the mortgagee is the grantor of the defendant-homestead owner.

Ia. D.M. Bk. v Crawford, 217-609; 252 NW 97

Homestead. The purchaser of property who, simultaneously with the purchase, mortgages the property for the purchase price, and therein pledges the rents in case of default, and agrees to a receivership in case of foreclosure, does not, by subsequently occupying the property as a homestead, acquire a homestead right which will be superior to the right of the mortgagee to enforce, by receivership, the pledge of rents in order to pay a deficiency judgment.

Ia. D.M. Bk. v Crawford, 217-609; 252 NW 97

Premature appointment. Harmless error results from appointing, prior to sale under foreclosure proceedings, a receiver for the entire mortgaged property including the homestead when the record reveals a sale of the entire mortgaged premises for less than the mortgage debt.

Farmers Bk. v Miller, 203-1380; 214 NW 546

Superfluous appointment. No necessity exists in foreclosure proceedings for the appointment of a receiver, tho plaintiff is entitled to such appointment, when the property is already in the hands of a duly appointed receiver who is a party to the proceeding.

N. W. Ins. v Gross, 215-963; 247 NW 286

Court's discretion. Whether, on mortgage foreclosure, the court will, before or after final judgment and sale under execution, determine the question as to the appointment of a receiver, rests largely if not wholly in the discretion of the court.

First JSL Bank v Schmidt, 215-103; 244 NW 866

Discretion of court uncontrolled—necessary showing. The discretion of the court in appointing receivers or granting injunctions cannot be controlled by a provision in a mortgage; consequently, by filing a motion for a temporary receiver under a mortgage pledging rents and profits the mortgagee undertook to show both the mortgagor's insolvency and insufficiency of the security.

First JSL Bk. v Blount, 223-1339; 275 NW 64

Absence of agreement therefor. A receiver should be appointed in foreclosure proceedings on a proper showing of necessity when the rents are pledged by the mortgage, even tho the mortgage is silent as to such appointment.

Cooley v Will, 212-701; 237 NW 315

Unquestioned appointment of receiver. The court will, on appeal, treat the appointment of a receiver in mortgage foreclosure as a verity, even tho the mortgage does not provide for such receiver, when such appointment is unquestioned in either the trial or appellate court.

Whitney v Eichner, 204-1178; 216 NW 625

Receiver without proof of insolvency. Where a mortgage pledges the rents and profits, and provides for the appointment of a receiver, and the proof shows inadequacy of the security, a receiver should be appointed without proof of insolvency of the mortgagors. But proof that the mortgagor is a nonresident and has no property in this state other than the mortgaged real estate would be sufficient to show insolvency.

Prudential v Puckett, 216-406; 249 NW 142

Insolvency of mortgagor—exception to rule. The rule that where the title of property under foreclosure is in the original mortgagor it is necessary to show his insolvency before a receiver of the rents may be appointed does not apply when the original mortgagor has sold the property and is no longer in possession thereof and not even a party to the action.

Metropolitan v Smith, 215-1052; 247 NW 503

Solvency of mortgagor—proceeds of insurance. In mortgage receivership proceedings, and on the issue whether a wife, one of the obligated mortgagors, is solvent, no consideration can be given to the proceeds of life insurance (up to $5000) on the life of the husband, and in the hands of the wife as a beneficiary, the mortgage debt antedating the death of the husband.

Interstate Assn. v Nichols, 213-12; 238 NW 435

Secondary security after exhausting land—showing for immediate receiver. A pledge of rents and profits in a real estate mortgage, being secondary and unavailable until the land as primary security is exhausted, the filing of a petition in foreclosure does not immediate-

VII FORECLOSURE—continued
(f) RECEIVER—continued
2. Appointment and Scope of Receivership—continued

ly entitle mortgagee to a receiver prior to the sale, without a showing both of mortgagor's insolvency and the insufficiency of the land alone to pay the mortgage indebtedness.

First JSL Bk. v Blount, 223-1339; 275 NW 64

Value of land uncertain. On the issue whether the appointment of a receiver for the rents of mortgaged premises is proper, the court, in addition to the conflicting evidence as to value, may be materially influenced by the fact that the pledge of the rents is quite conditional.

Security Inv. v Ose, 205-1013; 219 NW 36

Unmatured crops under foreclosure. A receiver is properly appointed, in foreclosure proceedings, to care for unmatured crops which are in litigation.

Farmers Bk. v Miller, 203-1380; 214 NW 546

Insolvency of assuming grantees. A grantee who has assumed payment of a mortgage on the land may not, in mortgage foreclosure, defeat the appointment of a receiver on the ground that there is no proof of insolvency on the part of prior grantees who likewise had assumed said mortgage.

Bogenrief v Leaming, 205-48; 217 NW 428

Authorized receivership. Under a mortgage on lands and on the crops and rentals thereafter accruing, without a receivership clause, the appointment of a receiver is proper after the land has been sold under foreclosure, when it has been made to appear (1) that all parties personally liable are insolvent, (2) that the land has proved inadequate to satisfy the debt, and (3) that the crops are going to waste.

Robertson v Roe, 203-654; 213 NW 422

Mortgage on rents—right to receiver to protect. A mortgagee of the rents and income of real estate is entitled to have a receiver appointed to protect his right to said rents and income when said right is jeopardized by the unauthorized acts of an impecunious mortgagor.

Equitable v McNamara, 220-297; 259 NW 231; 262 NW 466

Right to continue application. A mortgagee whose mortgage pledges the rents of the mortgaged land may, in foreclosure, very properly continue his application for the appointment of a receiver for the rents until after decree and sale, and then demand a hearing on such application. Held that the dismissal without prejudice of such application simply worked, in legal effect, a continuance.

Equitable v Rood, 205-1273; 218 NW 42

Expiration of redemption period. A pledge of rents in a real estate mortgage entitles the mortgagee, even tho the redemption period has expired, (a deficiency judgment existing) to the appointment of a receiver to collect unpaid rents which had accrued when the lien on the rents attached, and rents which accrued thereafter prior to the expiration of the redemption period. And this is true tho the rent be in the form of an agreement by lessee to support and maintain the mortgagor- lessors during their lifetime, and to pay said lessors such sums as they might request.

Metropolitan v Andrews, 215-1049; 247 NW 551

Receiver appointed before return day—notice necessary—sufficiency. Where application for receiver in foreclosure action was presented to judge before return day, notice to mortgagor would be required, and where such notice is given and the return of service is merely defective, court's finding that it was sufficient could not be collaterally attacked.

Salinger v McNeill, (NOR); 239 NW 548

Priority of right between senior and junior mortgagees. The recital in a junior mortgage that the land is free of incumbrance except a named first mortgage, is not sufficient to make the junior mortgage inferior to the first in the matter of right to a receiver to collect pledged rents.

Lynch v Donahoe, 205-537; 215 NW 736; 218 NW 144

Appointment — effect between landlord and tenant. On the issue, in real estate mortgage foreclosure, whether an outstanding lease between the owner and his tenant (parties to the action) was superior to the mortgagee's right to a receiver for said premises and for the rents thereof, an unappealed decree which orders the appointment of such receiver works an eviction of said tenant and the consequent nullification of a chattel mortgage by the landlord on his share of the crop rent under said lease, it appearing that the real estate mortgagee had no notice or knowledge of such chattel mortgage until after the entry of his decree of foreclosure.

Keenan v Jordan, 204-1338; 217 NW 248

Right to receiver superior to mortgage on crops. The right to the appointment of a receiver under a receivership clause in a real estate mortgage, and the right to have the rents accruing during the redemption year applied to discharge a foreclosure deficiency, are superior to a chattel mortgage executed subsequent to the real estate mortgage on crop to be grown by the mortgagor on said land during said year, said crop not being yet in existence when the real estate foreclosure was commenced.

Louis v Hansen, 205-1216; 219 NW 523
Phelps v Taggart, 207-1f4; 219 NW 528
Finken v Schram, 212-406; 236 NW 408

Prior mortgages—effect. A mortgagee who is otherwise entitled to the appointment of a receiver of the rents during the redemption period following foreclosure is not deprived of such right because of the mere existence of other prior mortgages on the land.

Finken v Schram, 212-406; 236 NW 408

Right of subsequent purchaser. Under an enabling clause in a mortgage, a subsequent purchaser of the property who has agreed to pay the mortgage debt, and who has resold the property to a grantee who has likewise agreed to pay, may have a receiver of the rents appointed against his grantee,—a defendant in foreclosure,—on a showing that the security is inadequate and that said last grantee is insolvent.

Grimes v Kelloway, 204-1220; 216 NW 953

Application for appointment not splitting action. A mortgagee who, in foreclosure, continues, until after decree and sale, his application for the appointment of a receiver for the pledged rents does not thereby "split" his cause of action.

Equitable v Rood, 205-1273; 218 NW 42

Effect of appointment on subsequent relief. A plaintiff in mortgage foreclosure who enters upon the hearing of his application for the appointment of a receiver may very properly be denied (1) a continuance in order to enable him to secure the note and mortgage as evidence, (2) the right to dismiss his application, with the option to refile the same after execution sale, and (3) the right so to withdraw the application that the court would retain jurisdiction thereover and act thereon after the result of the execution sale became known.

Des M. JSL Bank v Danson, 206-897; 220 NW 102; 221 NW 542

Unallowable dual hearing. A plaintiff in mortgage foreclosure, who has had full hearing on the merits of his application for the appointment of a receiver, may not have a rehearing on the same issue after the execution sale has revealed a deficiency judgment.

Des M. JSL Bank v Danson, 206-897; 220 NW 102; 221 NW 542

Estoppel. A mortgagee who consents to the appointment of a receiver in foreclosure proceedings, in which the court would not otherwise have made the appointment, may not, on change of mind, recover of the receiver funds properly applied by him.

Malvern Bk. v Swain, 203-616; 213 NW 216

Estoppel to question. A mortgagor is estopped, in foreclosure proceedings, to question the appointment of a receiver for the rents of the mortgaged premises when it was made with his consent, and for his benefit, and recognized by him without objection throughout some three years of protracted proceedings.

Wenstrand v Kiddoo, 222-284; 268 NW 574

Title taken by receiver.

Capital Bank v Riser, 215-680; 246 NW 763
Metropolitan v Sheldon, 215-955; 247 NW 291
N. W. Ins. v Gross, 215-963; 247 NW 286
Metropolitan v Smith, 215-1052; 247 NW 503
Willey v Andrew, 215-1104; 247 NW 501
Conn. Ins. v Stahle, 215-1188; 247 NW 648

Prior right of bank receiver. The superintendent of banking, upon being appointed receiver of an insolvent bank, takes over a lease of the bank's mortgaged real estate with the same rights as a creditor of the bank's would take, were the creditor an assignee of the lease as payment or security for his debt. It follows that said superintendent is entitled to the rent money, in preference to the mortgagee who subsequently institutes foreclosure action, and therein seeks to enforce the receivership clause in his mortgage.

Schlesselman v Martin, 207-907; 223 NW 762

Pledge of rents not a chattel mortgage. A decree, which recites that a real estate mortgage is also foreclosed as a chattel mortgage and that the receiver shall collect the rents "during the period of redemption", will, when construed as a whole—resort being taken to the pleadings—be taken to mean that the receiver collect the rents "pending foreclosure, sale, and redemption"—the petition neither alleging nor asking for such foreclosure but instead praying for a receiver from the date of the petition.

Sutton v Schnack, 224-251; 275 NW 870

Misapplication of rents. A receiver of the rents and profits of property under foreclosure cannot, to the detriment of a deficiency judgment debtor, legally apply any portion of said funds to the discharge of obligations not authorized by the mortgage in question.

Hansen v Bowers, 211-931; 234 NW 839

Rents — wrongful application on costs. Where rents of mortgaged premises in the hands of a receiver are properly applicable solely to the discharge of a deficiency judgment, yet, manifestly, the mortgagor may validly consent to their application in discharge of the costs taxed in the foreclosure proceedings.

Wenstrand v Kiddoo, 222-284; 268 NW 574

3 Postponing and Denying Receivership

Postponing appointment. The order of the court in mortgage foreclosure, postponing until after execution sale the hearing on the appointment of a receiver, will not be disturbed except on a showing of prejudice.

Prudential v Puckett, 216-406; 249 NW 142

VII FORECLOSURE—continued
(f) RECEIVER—continued
3. Postponing and Denying Receivership—concluded

Withholding appointment. The right of a homestead to be protected from receivership in mortgage foreclosure is fully protected by delaying the appointment of a receiver until after the sale of all the mortgaged lands under foreclosure has revealed a deficiency judgment.

Finken v Schram, 212-406; 236 NW 408

Withholding appointment. The court will, under some circumstances arising under mortgage foreclosure, hold in abeyance until after sale on execution a contract provision for the appointment of a receiver, and will then make the appointment if the sale reveals a deficiency. So held where the testimony as to the value of the property was quite conflicting.

Jewell v Logsdon, 200-1327; 206 NW 136
John Hancock Ins. v Linnan, 205-176; 218 NW 46

Refusing receivership. The appointment of a receiver to collect past, and future maturing, installments on a claim, secured as a lien on lands, is properly refused when the lien for matured installments has been foreclosed and the land sold, when no judgment for other installments has been obtained, and when there is no showing of waste.

Cadd v Snell, 219-728; 259 NW 590

Rents during redemption period. The holder of a general deficiency judgment resulting from a foreclosure sale may not have a receiver appointed to take possession of the premises so sold and to apply the rents and profits thereof during the redemption period to the satisfaction of his deficiency judgment.

Howe v Briden, 201-179; 206 NW 814

Denial when rent note transferred. The appointment of a receiver in real estate mortgage foreclosure, to take charge of pledged rents, is properly refused when it is made to appear that, prior to foreclosure proceedings, the legal titleholder has made a bona fide transfer of the promissory note representing the rents in question. Especially is this true when neither the tenant note-maker nor the assignee of the note is a party to the foreclosure.

Hatcher v Forbes, 202-64; 209 NW 305

No receiver—conditional pledge of rents. A mortgage provision to the effect that, (1) in case of foreclosure, a receiver may be appointed, and (2) that all rents derived from the premises shall be applied on the mortgage debt, does not embrace rents which have accrued and which have been paid to a landlord-owner prior to the commencement of foreclosure proceedings. Necessarily the mortgagee is not entitled to a receiver for such rents.

Cooper v Marsh, 201-1262; 207 NW 403

Receiver when rents not pledged. A receiver of the rents of mortgaged premises may not be appointed in foreclosure proceedings when the mortgage is silent as to the rents and a receiver therefor, and when the premises are held by a subsequent grantee who has not assumed payment of the mortgage. An appointment in such a case must be for the sole purpose of preserving the security specified in the mortgage, and then only on a very persuasive showing of necessity.

Young v Stewart, 201-301; 207 NW 401

Proper denial. A real estate mortgagee is, manifestly, not entitled to the appointment of a receiver (1) when his mortgage contains no provision for such appointment, (2) when he is not a mortgagee in possession, and (3) when he furnishes no proof that the security is inadequate and that the mortgagor is insolvent.

Jacobson v Cooper, 216-1375; 250 NW 501

When land adequate security. A receivership for the rents and profits pending mortgage foreclosure is improper when the land itself is adequate security.

Parker v Coe, 200-862; 205 NW 505
John Hancock Ins. v Linnan, 205-176; 218 NW 46

When appointment improper. When mortgage does not pledge rents and profits of mortgaged premises as security for mortgaged debt or does not contain any provision for appointment of receiver and no waste or impairment of security is shown, the appointment of a receiver is improper.

Jeffers v Leeson, (NOR); 213 NW 210

Appointment—loss of right. Plaintiff in foreclosure who takes a decree which is silent as to a receiver for the rents, he having neither prayed for the appointment of such receiver nor established a lien on said rents, bars himself from thereafter applying for such receiver.

Wenstrand v Kiddoo, 222-284; 268 NW 574

Waste—showing required. Plaintiff in mortgage foreclosure may not have a receiver of the rents appointed on the theory of improper care of the crops in the absence of a showing that the ruin of the crops would leave the security inadequate.

Des M. JSL Bank v Danson, 206-897; 220 NW 102; 221 NW 542

Waste—insufficient showing. The act of a mortgagor in obtaining the rents of the mortgaged premises and in not paying the taxes on the premises does not constitute legal waste.

Security Inv. v Ose, 205-1013; 219 NW 36

4 Discharge

Discharge—insufficient reasons. The fact that mortgaged property is sold at foreclosure sale for the full amount of the mortgage

debt and costs is no reason for the discharge of a receivership which has been stipulated for in the foreclosure decree for the purpose of discharging an indebtedness other than the mortgage debt.

Van Alstine v Hartnett, 207-236; 222 NW 363

Discharge without notice. The approval of the final report of a receiver in foreclosure proceedings and the discharge of the receiver, when entered without prior notice to the mortgagee, may be set aside on a showing that the receiver made an unauthorized distribution of the funds in his hands; and a delay of some four years by the mortgagee will not necessarily bar relief, especially when no one has changed his position because of the delay.

Farmers Bk. v Pomeroy, 211-337; 233 NW 488

Treating lease as cash to end receivership. When the mortgagee in foreclosure is entitled to all the rents accruing during the redemption period, the court may order that the lease be assigned to the mortgagee at face value and terminate the receivership.

Olson v Abrahamson, 214-150; 241 NW 454

5 Review

Appointment as appealable order. A provisional remedy is one which is provided for present needs, or for the occasion: that is, one adapted to meet a particular exigency,—e. g., the appointment of a receiver in mortgage foreclosure. It follows that an order granting such remedy is appealable.

Davenport v Thompson, 206-746; 221 NW 347

Scope of review. In the foreclosure of a real estate mortgage and of a chattel mortgage clause embraced therein, the fact that the lower court failed to enter an order for the formal foreclosure of the chattel mortgage is quite inconsequential when the court did appoint a receiver of said mortgaged chattels and properly ruled that plaintiff's lien was superior to that of appellant.

Equitable v Brown, 220-585; 262 NW 124

Waste — moot case. The issue whether in mortgage foreclosure a receiver should be appointed in order to insure the proper handling and harvesting of the crops becomes moot whenever such improper handling has already fully and completely taken place.

Des M. JSL Bank v Danson, 206-897; 220 NW 102; 221 NW 542

Dismissal of appeal—moot case. An appeal from an order denying a writ to place a receiver in possession of premises under mortgage foreclosure will be dismissed when it appears that sale has been had, that the period for redemption has expired, and that the defendant has surrendered possession of the premises to plaintiff.

Upton v Gephart, 205-235; 217 NW 630

When question moot. An issue whether a mortgagee in real estate foreclosure is entitled, under a pledge of the rents, to a receiver to take possession of the mortgaged premises becomes moot when the period for redemption expires.

Metropolitan v Andrews, 215-1049; 247 NW 551

(g) TRIAL—EVIDENCE

Useless amendment — no continuance. An amendment to a petition in a real estate mortgage foreclosure to the effect that "the mortgagor was the owner of the land when the mortgage was executed" is unnecessary and, if made, furnishes no basis for a continuance on the ground of surprise.

Fitz v Forbes, 208-970; 226 NW 117

Unallowable intervention. An intervention involving the right to rents in foreclosure proceedings is unallowable, after decree has been entered, as to all issues pending at the time of such decree.

First JSL Bank v Cuthbert, 215-718; 246 NW 810

Burden of proof—fraud—extending time on debt as consideration. In an action by a bank to foreclose a mortgage on land, the defendants had the burden of proving their defenses of fraud and want of consideration and, altho there was testimony that the mortgage was given to enable the bank to make a good showing to bank examiners and that there had been a promise that it would never be foreclosed, the court was justified in finding from other evidence that there was no fraud and that the consideration was the granting of an extension of time on a past-due mortgage on other land.

Panama Bank v Arkfeld, 228- ; 291 NW 182

Adverse interest of witness. Self-evident principle applied that the most positive assertion of fact by a witness may be wholly overcome by the adverse interest of the witness, and by impeaching circumstances and sidelights. So held as to testimony relative to the signing and acknowledgment of a mortgage.

Hagensick v Koch, 220-1055; 264 NW 13

Setting aside default—sickness of counsel. Default judgment in mortgage foreclosure may be set aside on a showing that it was entered without fault on the part of defendant but solely because of the sickness of his attorney.

Equitable v McNamara, 220-297; 259 NW 231; 262 NW 466

Signatures—burden to establish genuineness. Principle reaffirmed that plaintiff in foreclosure has the burden to establish the genuineness of

VII FORECLOSURE—continued
(g) TRIAL—EVIDENCE—concluded

the signatures to the mortgage and accompanying promissory notes when the genuineness of said signatures is specifically denied under oath by the purported maker. Evidence reviewed in detail and held that plaintiff had not successfully carried said burden.

Hagensick v Koch, 220-1055; 264 NW 13

Spurious mortgage—insufficient ratification. Evidence held quite insufficient to show that a purported mortgagor had ratified a spurious mortgage on his property.

Hagensick v Koch, 220-1055; 264 NW 13

Parol evidence — contradicting mortgage. Parol evidence to the effect that, at the time of the delivery of a mortgage, the mortgagee agreed that he would extend the mortgage indefinitely, and that in no event would a certain portion of the mortgaged property be taken under the mortgage, is wholly inadmissible.

Farmers Bank v Weeks, 209-26; 227 NW 508

(h) PROCEEDS—SURPLUS

Additions, repairs, and betterments—refusal of proportional distribution on sale. Failure of the court to decree a proportional part of the proceeds of a mortgage foreclosure sale to the prior mortgagee and a proportional part to the subsequent mechanic's lienholder for additions, repairs, and betterments is harmless error when the property sold simply for the amount of the mortgage and the mechanic's lienholder did not redeem.

Hedges Co. v Holland, 203-1149; 212 NW 480

(i) OPERATION AND EFFECT

Eviction of husband—effect. The eviction of a husband, by foreclosure decree, of lands of which he and his wife are both tenants is, to all practical purposes, an eviction of the wife.

Miller v Laing, 212-437; 236 NW 378

Ouster effected. A mortgage foreclosure decree which condemns the rents and appoints a receiver therefor, in order to discharge a deficiency judgment, works a constructive ouster of the titleholder and of his tenant.

Miller v Sievers, 213-45; 238 NW 469

Claim acquired during foreclosure. A junior mortgagee who, pending the foreclosure of his mortgage, pays the interest on a senior mortgage, is under no legal duty to include said payment in his foreclosure proceedings. He may subsequently assert such claim in an independent proceeding.

Jones v Knutson, 212-268; 234 NW 548
Cent. Bank v Herrick, 214-379; 240 NW 242

Repurchase option after foreclosure—no defense in forcible entry action. After foreclosure of a mortgage and just prior to the expiration of the period of redemption, a lease and contract giving the mortgagor's heirs then in possession an option to buy the property but providing for monthly rentals to be applied on the purchase price in the event the option is exercised, being neither in the nature of a new mortgage nor re-establishment of the foreclosed mortgage, is subject to demurrer when interposed as a defense to a forcible entry and detainer action.

Wallerstein v Palmer, 224-260; 276 NW 605

Sale—subsequent damages to land. A mortgagee who purchases the land at foreclosure sale for the full amount of his judgment is entitled, after he obtains the sheriff's deed, to the proceeds of gravel wrongfully removed from the premises after the sale and before the issuance of the deed.

LeValley v Buckles, 206-550; 221 NW 202

Decree adjudging superiority of second mortgage—conclusiveness. A decree rendered on service by publication in the foreclosure of a second mortgage, adjudging that said second mortgage is senior and superior to a first mortgage, in accordance with a definite pleading and prayer to said effect, based on a good-faith but mistaken belief that said first mortgage had been paid, is binding and conclusive on the holder of said first mortgage, and may not be collaterally assailed by said first mortgagee in an action to foreclose his mortgage. (It appears that said first mortgagee had allowed the time to elapse in which to attack said decree under §11595, C., '27.)

Lyster v Brown, 210-317; 228 NW 3

Inconsistent remedies. A creditor who is faced by the dilemma (1) of foreclosing his mortgage and treating the mortgagor as the sole debtor, or (2) of proceeding against a third party on the theory that said third party actually received the money in question under circumstances giving rise to an implied promise to return said money, and who chooses the former procedure, is irrevocably bound by his election. In other words, after taking personal judgment against the mortgagor and foreclosing against and selling the land with unfavorable results, he will not be permitted to proceed against said third party on the remaining, inconsistent theory.

Lindburg v Engster, 220-1073; 264 NW 31; 116 ALR 591

Tax sale—mortgagee as redemptioner. The holder of a mortgage on land has a legal right to redeem from tax sale; and if tax deed be improperly issued, he may maintain the equitable action to redeem provided by §7278, C., '35.

Bates v Pabst, 223-534; 273 NW 151

(j) MORATORIUM ACTS

Discussion. See 19 ILR 108—Constitutionality; 19 ILR 334—Minnesota statute; 19 ILR 560—After the moratorium; 21 ILR 639—Factors determining right to extension; 21 ILR 646—Effect on receivership clauses

1 Redemption Period Extended

Constitutionality of statute. The emergency act extending the time for redemption from mortgage foreclosure is constitutional.

Conn. Ins. v Roth, 218-251; 254 NW 918
Hawkeye Ins. v Ogg, 218-261; 254 NW 847
Conn. Ins. v Clingan, 218-1213; 257 NW 213

Police power—extending redemption period. Neither the federal nor state constitutional prohibitions against (a) the impairment of the obligations of contracts, or (b) the deprivation of vested property rights without due process of law, are violated by a statute (1) which is enacted during, and for the purpose of ameliorating, an existing public financial emergency, (2) which grants to the owner of real estate during the existence of said emergency the right to possession and a time, very materially in excess of that otherwise granted by law, in which to redeem from mortgage foreclosure sale—even tho the sale precedes the passage of the emergency act—and (3) which sequesters the rents during said extended time and fairly and reasonably applies them to the protection of the mortgagee and his security. (45 GA, Ch 179)

Reason: Contract rights and vested interests must reasonably yield to the paramount right of the state, through the reservoir of its reserved police power, to protect, by appropriate legislation, its sovereignty, its government, its people and their general welfare, against exigencies arising out of a great emergency.

D. M. Bk. v Nordholm, 217-1319; 253 NW 701
Connecticut Ins. v Roth, 218-251; 254 NW 918
Hawkeye Ins. v Ogg, 218-261; 254 NW 847
Conn. Life v Clingan, 218-1213; 257 NW 213

Purpose of act—insolvency and inadequacy of security—limitation on court. Moratorium act of the 47th GA was designed to afford landowners an opportunity, by refinancing or paying up their indebtedness, to save their lands within moratorium period, but, merely because insolvency of mortgagor and inadequacy of security are not of themselves good cause for refusing a continuance, a court is not mandatorially required to grant a continuance regardless of mortgagor's ability or probability of refinancing his indebtedness within period of moratorium act. (47 GA, Ch 78.)

Prudential v Hinton, 225-1008; 282 NW 722

Nugatory or ineffective amendments to statute. The mortgage foreclosure redemption act of the 45th GA, Ch 179, which became a law March 19, 1933, and which provided that "In any action * * * which has been commenced" for the foreclosure of a real estate mortgage, the court should, under named conditions, grant an extension of time in which to redeem from sale, manifestly ex vi termini, had no application to mortgages executed on or after January 1, 1934. It follows that the later amendment of the 45th Ex. GA, Ch 137, which specifically declared the inapplicability of said moratorium act to mortgages executed "on or after January 1, 1934" was nugatory—took naught from and added naught to said original moratorium act.

Metropolitan v Reeve, 222-255; 268 NW 531

Limitation on moratorium act. The moratorium statute (45 GA, Ch 179) which provides that "In any action * * * which has been commenced" for the foreclosure of a mortgage, an extension of time in which to redeem from the sale may, under named conditions, be granted by the court, applies solely to actions which had been commenced prior to the taking effect of said act.

Metropolitan v Reimer, 220-1162; 263 NW 826
Conn. Ins. v Crozier, 221-38; 265 NW 166
Metropolitan v Gullord, 221-768; 266 NW 497

Independent action unallowable. An independent action in equity to secure, under the moratorium act, an extension of time in which to redeem from mortgage foreclosure sale, and to enjoin the plaintiff in foreclosure from procuring a writ of possession, is not maintainable, all such matters of relief being determinable in said foreclosure proceedings.

Brown v Bank, 221-42; 265 NW 115

Nonright under emergency act. No one other than the owner of real estate under mortgage foreclosure has the right to an extension of time in which to redeem under the emergency mortgage redemption act. (45 GA, Ch 179.)

Prudential v Claassen, 217-1076; 252 NW 553

Receiver as "owner". The duly qualified and acting receiver of an insolvent private bank is the "owner" of the mortgaged real estate of said bank within the meaning of the moratorium statute (46 GA, Ch 110) relative to extension of time in which to redeem from foreclosure sale.

Metropolitan v Van Alstine, 221-763; 266 NW 514

"Immediately" construed. Moratorium act provision requiring court, on filing of motion for further extension, to "immediately" fix time for hearing and prescribe notice thereof, should be construed as meaning within a reasonable time.

Prudential v Lowry, 225-60; 279 NW 132

Notice of hearing jurisidictional. Provisions of the moratorium acts requiring notice of the hearing are jurisdictional, and where mortgagor-defendant filed his application and secured his order for hearing within the year of redemption but failed to serve on plaintiff the notice of such hearing, he was not entitled to an order of extension under Ch 78, Acts 47th GA.

Ditto v Edwards, 224-243; 276 NW 20

VII FORECLOSURE—continued
(j) MORATORIUM ACTS—continued
1. Redemption Period Extended—continued

Fixing all pending moratorium hearings by general order—validity. A general order fixing time and place for hearing and providing for notice on all pending applications for extensions of the period of redemption under the moratorium act of the 47th GA is a sufficient compliance with §6 of that act.

First JSL Bk. v Albers, 224-865; 277 NW 451

Moratorium act—inapplicability to lands in severalty. The moratorium act (45 GA, Ch 179) relative to granting to landowners extension of time in which to redeem from mortgage foreclosure sale, cannot be made applicable to a condition where a mortgage on land consisting of two different tracts owned in severalty by two different parties is foreclosed and the land sold en masse, and where one of said parties, by delay, has wholly lost his right to such extension.

Reason: The nondelaying landowner could avail himself of an extension of time only by redeeming the entire land. By so doing he would be redeeming for another owner. Such latter redemption is not permitted by said legislative act.

Metropolitan v Hodapp, 220-1159; 263 NW 829

Redemption of part of land. The court in mortgage foreclosure proceedings under which land was sold en masse has no power, under the emergency act known as 45 GA, Ch 179, to grant to a junior creditor, who was a party to the foreclosure and who holds a sheriff's deed to a part of said land, an extension of time in which to redeem a part of the land from the foreclosure sale.

Co. Bluffs Inv. v Kay, 218-515; 255 NW 721

Loss of right by proceedings in bankruptcy. A mortgagor who, subsequent to a sale under foreclosure, makes application for a discharge in bankruptcy and is adjudged a bankrupt, thereby deprives himself of all right to an extension of time in which to redeem from said foreclosure and sale, because, upon being adjudged a bankrupt, the title to his equity of redemption ipso facto passed to his trustee in bankruptcy.

Prudential v Lininger 220-1212; 263 NW 534

Staying deed under moratorium act. A defendant in mortgage foreclosure may not, after execution sale, have an order under the emergency moratorium act of the 45th GA, Ch 179, staying the execution of sheriff's deed and extending the period for redemption, when, at the time of application for the order, the defendant, on his own application, has been adjudged a bankrupt, and his equity of redemption in the land in question has been sold under an order issued out of the bankruptcy court.

Lincoln Bank v Brown, 219-630; 258 NW 770

Denying moratorium cancels restraining order on sheriff. An order restraining the sheriff from issuing a deed, pending a hearing on a moratorium application for extension of period for redemption, is automatically dissolved when the application is denied, and a deed issued is valid when a nunc pro tunc order places the moratorium denial order on record as of a date prior to the issuance of deed.

Lincoln Bank v Brown, 224-1256; 278 NW 294

Mortgagor's administrator not bound by heir's moratorium waiver. Where a will providing for equitable conversion of the realty is ignored by deceased mortgagor's children who quitclaim their interest in real estate to one of them who, then as titleholder in a mortgage foreclosure, stipulates to waive all rights under the moratorium statutes, such stipulation will not estop one of the same children, after being appointed administrator with will annexed of the mortgagor's estate, from securing an extension of the period of redemption under the moratorium act of the 47th GA, inasmuch as title passed to the administrator and not to the heirs, who could make no agreement binding on such administrator.

Baurer v Myers, 224-854; 278 NW 302

Unallowable extension of period. A junior mortgagee who has foreclosed and received a sheriff's deed is not entitled to an order extending the time in which redemption may be made from a foreclosure sale under the senior mortgage (45 GA, Ch 179), it appearing that both mortgagees were before the court, primarily, as creditors and lienholders, and not as debtors or owners.

Equitable v Kramer, 218-80; 253 NW 809

Fraudulent prevention—immateriality. The fact, if it be a fact, that defendant in mortgage foreclosure action was fraudulently induced not to make application under either of our moratorium acts for extension of time in which to redeem from sale, is quite immaterial when such application, if made, would have been futile because neither of said acts had any application to the foreclosure proceedings in question. So held where the action was commenced after the first act (45 GA, Ch 179) took effect and where the time for redemption had wholly expired before the second act (46 GA, Ch 110) took effect.

John Hancock Ins. v Roeder, 221-1375; 268 NW 64

Loss of right by delay. The court has no jurisdiction under the moratorium act to grant an extension of time in which to redeem from mortgage foreclosure sale, when the application for such extension is filed on the last day allowed for effecting ordinary redemption, and is not, by the court, made the basis for an order for hearing thereon until the following

day—when the ordinary time for redemption had wholly expired.

Iowa Bank v Alta Casa, 222-712; 269 NW 798

Fatally delayed application. Application under the moratorium act (45 GA, Ch 179) for an extension of time in which to redeem from mortgage foreclosure sale is without legal effect when delayed until after execution and delivery of sheriff's deed.

Metropolitan v Reimer, 220-1162; 263 NW 826

Moratorium — fatally delayed application. Application under the moratorium acts for an extension of time in which to redeem from mortgage foreclosure sale is wholly without legal effect when delayed until the ordinary period for redemption has fully expired.

Metropolitan v Hodapp, 220-1159; 263 NW 829

Metropolitan v Reimer, 220-1162; 263 NW 826

Conn. Ins. v Crozier, 221-38; 265 NW 166

Iowa Bank v Alta Casa, 222-712; 269 NW 798

See Mohns v Kasperbauer, 220-1168; 263 NW 833

Loss of right. The mere filing, under the first moratorium act (45 GA, Ch 179), of an application for an extension of time in which to redeem from mortgage-foreclosure sale of realty does not, in and of itself, either give the court jurisdiction to grant such extension, or stop the running of the one-year period granted, generally, for redemption; and if said latter period is allowed to elapse under such naked filing, the applicant cannot legally be given an extension under the succeeding moratorium act (46 GA, Ch 110).

Mohns v Kasperbauer, 220-1168; 263 NW 833

Application—waiver of sale irregularities. Mortgagor's application under the mortgage moratorium acts to extend the period of redemption from an execution sale is a waiver of any right to attack the validity of such sale made under a second special execution the validity of which is challenged because of the alleged existence of another and prior execution.

Luke v Bank, 224-847; 278 NW 230

Nondeprivation of right—no application for continuance. The owner of mortgaged premises by failing, when foreclosure suit is instituted, to apply for and obtain a continuance under the moratorium continuance act (45 GA, Ch 182) does not thereby deprive himself of the right, after foreclosure and sale, to apply for and obtain, under the moratorium redemption act (45 GA, Ch 179), an order for extension of time in which to redeem from said sale.

First JSL Bk. v Merrick, 221-585; 266 NW 279

Emergency act—disposition of rents. Rent money deposited with the clerk under order of court for the payment of current taxes and insurance should be applied on the principal indebtedness insofar as it exceeds said taxes and insurance.

Hawkeye Ins. v Ogg, 218-261; 254 NW 847

Rentals — unallowable condition. The court, having fixed the monthly rental which a mortgagor in possession of residence property should pay during the extended time for redemption from foreclosure sale, is wholly without authority to penalize the mortgagee by providing that if the latter appeals from the order of the court, the mortgagor need not pay any rental.

Union Ins. v Waddell, 221-1373; 268 NW 149

Rentals—discretion of court. The court in fixing the monthly rental of residence property for the period covered by an extension of time in which to redeem from foreclosure sale, may be amply justified in rejecting a conditional offer of rent and in accepting instead a materially less but unconditional offer.

Union Ins. v Waddell, 221-1373; 268 NW 149

Extension under emergency act—conditions. An order under the emergency act (45 GA, Ch 179) granting an extension of time in which to redeem from mortgage foreclosure sale, and fixing the monthly rental to be paid by the mortgagor to the mortgagee during the extension period, should be made conditional on the payment of said monthly rental as it falls due.

Union Ins. v Waddell, 218-1367; 257 NW 319

Extension of time—reasonableness. An order fixing the rent to be paid by the mortgagor to the mortgagee during a granted extension of time in which to redeem may be conclusive on the appellate court in view of the nature of the very meager testimony presented.

Union Ins. v Waddell, 218-1367; 257 NW 319

Nondeprivation of right by assignment of rents. The mere fact that the owner of mortgaged realty, shortly prior to the commencement of foreclosure proceedings, assigned the rents accruing during the year for redemption, tho such rents were pledged in the mortgage, does not deprive said owner of the right to avail himself of the moratorium statute relative to an extension of time in which to redeem.

First JSL Bk. v Merrick, 221-585; 266 NW 279

Extension under moratorium act approved. Order granting an extension of time in which to redeem from mortgage foreclosure reviewed and affirmed, it appearing that the farm and improvements thereon were in part the homestead of the owners, some being minors; were of exceptional quality; were of a value substantially in excess of the mortgage debt; that the mortgagor had reasonable prospects of redeeming or refinancing his obligations during the extended time, and that said

VII FORECLOSURE—continued
(j) MORATORIUM ACTS—continued
1. Redemption Period Extended—continued

order was, by its terms, subject to modification to meet future contingencies.

Augustana Fund v Nagle, 219-1337; 261 NW 771

Extension under emergency act. An order granting an extension of time to a defendant in mortgage foreclosure (moratorium act, 45 GA, Ch 179) will not be disturbed when the record reveals the fact that, with the aid of the extension, defendant will probably be able to effect a redemption.

Conn. Ins. v Roth, 218-251; 254 NW 918

Extension under moratorium act sustained (apparent border-line case). Order granting an extension of time for redemption from mortgage foreclosure sale sustained in view of (1) the improvement in economic conditions, (2) the large equity in the property, (3) the apparently good-faith effort of the landowner (who had neither executed nor assumed said mortgage) to refinance the debt, and (4) the superior facilities of the trial court to correctly weigh the facts,—even tho the mortgagee had, prior to instituting foreclosure, offered to extend the mortgage on seemingly equitable terms, and even tho the record somewhat suggests that the extension was sought as a means of forcing the granting of more favorable financing terms.

Prudential v Brown, 221-31; 265 NW 153

Facts warranting extension. Where the real estate is fertile and productive, the improvements in good repair, the mortgagor having a substantial amount of farm equipment and livestock, and almost half of the deficiency judgment paid out of the farm receivership, it cannot be said that mortgagor could not meet the carrying charges and taxes, nor that he is without prospects of redeeming the property so as to deny to him a further extension of the redemption period.

First JSL Bk. v Albers, 224-865; 277 NW 451

Good cause to refuse moratorium not shown. The moratorium act of the 47th GA requires that extensions of the period of redemption be granted unless good cause is shown to the contrary; so, where land bearing about $120 an acre incumbrance and probably worth about $150 per acre has been kept in excellent repair, together with the addition of several new buildings by mortgagors, who are hard working, industrious people having great probability of refinancing their indebtedness, an extension is properly granted.

First JSL Bk. v Spencer, 224-1224; 278 NW 333

Hopeless insolvency. An order, under the moratorium statute, granting an extension of time in which to redeem from mortgage foreclosure sale will not be disturbed on appeal on the plea that the owner of the land is hopelessly insolvent, when the record is such that the appellate court cannot say that there is no reasonable probability that the owner can save the land.

First JSL Bk. v Merrick, 221-585; 266 NW 279

Extension to receiver—hopeless insolvency not presumed. Where the receiver of a private bank has been granted an extension of time in which to redeem lands sold under foreclosure proceedings against the individual members of the bank and against the receiver, it will not be presumed, in the absence of any evidence pertaining thereto, that the receiver is, in his official capacity, so hopelessly insolvent that he will not be able to effect redemption.

Metropolitan v Van Alstine, 221-763; 266 NW 514

Mortgagee's burden—failure of proof. Trial court did not abuse its discretion in granting an extension of period for redemption, under the moratorium act of the 47th GA, where the mortgagee did not prove mortgagor's lack of possibility and good-faith efforts to refinance, nor insolvency, nor inadequacy of the security, thereby failing to maintain his burden of showing good cause for denying the extension.

Ronan v Larson, 224-1248; 278 NW 641

Showing efforts to refinance not mortgagor's burden. The moratorium act of the 47th GA places no burden on a mortgagor seeking its benefits to show his good-faith efforts to refinance or redeem before being entitled to the extended period of redemption.

First JSL Bk. v Albers, 224-865; 277 NW 451

Failure to do equity—insufficient proof. The owner of mortgaged land cannot, in foreclosure proceedings, be said to have failed to do equity, and thereby deprived himself of the benefits of the moratorium acts, on the simple showing that he failed to pay either the interest on the mortgage or the taxes on the land. To temporarily relieve the owner from such failure is the very purpose of said moratorium acts.

First JSL Bk. v Merrick, 221-585; 266 NW 279

Redemption—bad faith necessary for refusal. In the absence of bad faith on the part of a mortgagor, coupled with insolvency and inadequacy of the security, a moratorium extension should be granted.

First JSL Bank v Burke, 225-55; 280 NW 467

Moratorium refusal—lack of good faith—property depreciation. Good cause for refusing a third moratorium redemption extension is shown by a lack of good faith and willingness of mortgagors to refinance a steadily increasing and already excessive mortgage debt, by a

lack of repair and upkeep on buildings and fences, and by the fact that the mortgagee had been paying the taxes.

Fed. Bk. v Sutherlin, 224-1219; 278 NW 323

Chance to redeem hopeless—lack of good faith. Where there was not the remotest chance of mortgagor ever paying amount necessary to redeem, and an extension of time would only result in additional loss to the mortgagee, an application for extension of redemption period under the moratorium act of the 47th GA was not made in good faith within requirement of moratorium statute, and furnishes good cause to deny the extension.

First JSL Bk. v Closner, 225-851; 283 NW 79

Waste precludes moratorium extension. Waste of the premises coupled with insolvency of the mortgagors, and the further fact that there is no indication that they will ever be able to redeem, warrants the court in holding that the period of redemption should not be extended under the moratorium act.

First JSL Bk. v Abkes, 224-877; 278 NW 183

Speculators and rent scalpers. "Good cause" for refusing an extension of time in which to redeem from sale under mortgage foreclosure is established per se by affirmative proof that the applicant for the extension acquired the legal title to the land, (1) from the mortgagor, (2) after the moratorium statute was enacted, (3) before foreclosure proceedings were commenced, and (4) solely for speculative purposes, chief of which was to lease the land for a future period and simultaneously to collect thereunder in advance, thus effectively placing said rents beyond the mortgage pledge thereof.

Equitable v Kirby, 221-1150; 266 NW 520

No moratorium continuance to land speculator. The moratorium act of the 47th GA was not enacted as an aid to land speculators. One who acquires land after foreclosure in the hope that, by obtaining a continuance, he may settle the mortgage for a fraction of its face value, is not entitled to such continuance when, at all times, he is financially able to redeem in full.

Fed. Corp. v Murdock, 225-1306; 283 NW 95

Insolvency or inadequacy of security. "Good cause" for denying an extended period of redemption under the moratorium law must be more than a showing of present insolvency and present inadequacy of the security.

First JSL Bk. v Abkes, 224-877; 278 NW 183

Showing of cause to contrary. Where evidence indicated land was worth not over $14,500 altho total indebtedness exceeded $26,000, and that mortgagor did not own any other property, nor had he lived on the land since before the foreclosure action was started, nor did any basis exist on which to allow for any substantial increase in the land value, nor was there any other source from which mortgagor could hope to pay indebtedness, nor was there prospect that it would be paid within period of moratorium, trial court erred in granting a continuance under the moratorium act of the 47th GA.

Prudential v Hinton, 225-1008; 282 NW 722

Pending actions — jurisdiction under later moratorium. Where an application for a continuance under the moratorium act of the 46th GA was filed before, and a decision thereon was not made until after, the effective date of the later moratorium act of the 47th GA, the application was "pending" under the provisions of the moratorium, keeping pending applications in full force and effect, so as to invest the court with jurisdiction to hear the same, and its finding that it lacked jurisdiction was erroneous.

Equitable v McNamara, 224-859; 278 NW 910

Subsequent extension — timely application preserving jurisdiction. Trial court has jurisdiction to hear an application for further extension of the redemption period under the moratorium act of the 47th GA, where the application made before expiration of the prior extension was followed by a hearing in due course, altho several months later.

Prudential v Lowry, 225-60; 279 NW 132
Prudential v Soloth, 225-172; 279 NW 399
Prudential v Kelley, 225-175; 279 NW 416
First JSL Bank v Burke, 225-55; 280 NW 467

Subsequent moratorium extending previous extension. Under the moratorium act of the 47th GA, in those cases where a previous extension had been granted and the application for a further extension was filed before March 1, 1937, the period of redemption was specifically extended to the time of the hearing thereon, and being so extended beyond the time previously granted, the court retained and possessed jurisdiction to hear such application.

First JSL Bk. v Albers, 224-865; 277 NW 451

Previous extensions prolonged to hearing. The court has jurisdiction to hear an application for additional moratorium redemption extension, under the act of the 47th GA, in all cases wherein an order had previously been so granted, and wherein the application was filed before March 1, 1937, in which cases the moratorium act further extended the period until after the hearing on the application.

First JSL Bank v Spencer, 224-1224; 278 NW 333

Nonapplicability—unsuccessful prior moratorium applicants. The terms of the redemption moratorium of the 47th GA exclude from its benefits a mortgagor who was denied an extension under either of the two previous moratorium acts, the period of redemption of

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which had expired, and when the sheriff's deed had already issued.

Lincoln Bank v Brown, 224-1256; 278 NW 294

Sheriff's deed withheld—previous extension. Under the moratorium act passed by 47th GA, provision prohibiting issuance of sheriff's deed after filing of application and before hearing thereon, held applicable only to cases where previous extensions have been granted.

Ditto v Edwards, 224-243; 276 NW 20

New moratorium hearing on previous record —no review of new nonrecord matters. The supreme court will not consider, in a resistance to a moratorium extension, claims that the act was unconstitutional and did not apply to a federal government agency, when the record of a former hearing, stipulated as constituting the evidence to be considered by the court, contains neither contention.

First JSL Bank v Burke, 225-55; 280 NW 467

Moratorium act of 47th GA—amendment by same session—effect. Where the moratorium act of the 47th GA after taking effect is amended during the same session, such amendment, not being in effect at the time a particular application for extension thereunder was ruled upon, will not be construed as part of the original act in reviewing such ruling.

Ditto v Edwards, 224-243; 276 NW 20

Statutes in pari materia — amendment to clear ambiguity. Statutes in pari materia being construed together, a later statute may be used to clear up an ambiguity, such as in the moratorium statutes where an amending act was passed at the same session of the legislature.

Prudential v Lowry, 225-60; 279 NW 132

Moratorium acts of 47th GA — emergency must be temporary—judicial notice. An emergency, in order to justify legislation in contravention of the constitution on the theory of an exercise of the reserve police power, must be temporary or it cannot be called an emergency, but becomes an established status. In determining this question, the supreme court may take judicial notice of conditions existing at the time of enactment and whether or not they constitute an emergency.

First JSL Bank v Arp, 225-1331; 283 NW 441; 120 ALR 932

John Hancock Ins. v Eggland, 225-1073; 283 NW 444

Metropolitan v McDonald, 225-1075; 283 NW 445

Moratorium acts of 47th GA — unconstitutionality. Moratorium acts of the 47th GA extending foreclosure of mortgages, and extending time in which to redeem, are unconstitutional as an impairment of the obligation of contract, when such acts are not based on an actual existing emergency calling for an exercise of the reserve police power of the state.

First JSL Bank v Arp, 225-1331; 283 NW 441; 120 ALR 932

John Hancock Ins. v Eggland, 225-1073; 283 NW 444

Metropolitan v McDonald, 225-1075; 283 NW 445

Court order based on unconstitutional statute—voidability by appeal. When the district court made an order extending the period for redemption of land on which a mortgage had been foreclosed, and the supreme court later declared the statute under which the extension was granted to be unconstitutional, the order granting such extension was not void, but was voidable by reversal on appeal, and when no appeal was taken, the order could not be attacked.

New York Ins. v Breen, 227-738; 289 NW 16

Order to be terminated if statute invalid—not automatic termination. A court order extending the time of redemption of land on which a mortgage had been foreclosed, providing that, if the statute under which the order was entered be held invalid, the order "shall be terminated", did not automatically revoke the order when the statute was declared unconstitutional, but could be terminated only by action of the court.

New York Ins. v Breen, 227-738; 289 NW 16

Court order to be terminated if statute invalid—issue of constitutionality not raised. When a district court order, granting an extension of the time for redemption of land on which a mortgage had been foreclosed, contained a provision that if the statute under which the extension was granted were repealed or held invalid the order would be terminated, such provision did not warrant an appeal challenging the constitutionality of the statute when the question of constitutionality was not raised in the lower court.

New York Ins. v Breen, 227-738; 289 NW 16

Constitutionality—first raised on appeal. When the constitutionality of a statute permitting the extension of the time for redemption of land upon which a mortgage had been foreclosed was not put in issue at a hearing at which the district court granted an extension, the order granting the extension became the law of the case, and the question of constitutionality could not first be raised in the supreme court in another action after the redemption had been made.

New York Ins. v Breen, 227-738; 289 NW 16

Benefits accepted under unconstitutional statute. No objection could be made to the constitutionality of a law extending the period of redemption after mortgage foreclosures by

parties who accepted benefits under a court order extending the period and appointing a receiver whose acts benefited both parties.

New York Ins. v Breen, 227-738; 289 NW 16

2 Continuance of Action

Continuance under financial emergency—constitutionality. The legislative power of the state may, for the purpose of ameliorating an existing, public, financial emergency, constitutionally grant to a mortgagor, on equitable conditions, the right, in an action to foreclose the mortgage, to a continuance which is very materially in excess of that ordinarily permitted or sanctioned by law. (For fundamental reason see Des Moines Bank v Nordholm, 217-1319.)

Craig v Waggoner, 218-876; 256 NW 285
Tusha v Eberhart, 218-1065; 256 NW 740

Judicial notice—purpose of act. Tho the moratorium act makes no distinction between individual and corporate debtors, supreme court may take judicial notice of fact that Iowa, being an agricultural state, moratorium acts were passed primarily for purpose of preserving farm and other homes of distressed debtors.

Mass. Ins. Co. v Schenkberg, 225-1148; 281 NW 825

Noninterference with federal land bank as governmental agency. There was no substantial or direct interference with accomplishment of purposes for which congress created joint stock land banks, by reason of the moratorium act of the 47th GA providing for continuance of foreclosure of real estate mortgage actions.

First JSL Bk.v Lehman, 225-1309;283 NW 96

Land banks as nonpreferential litigants in state courts. There is nothing to show that congress contemplated that land banks should occupy a preferential status as litigants in the state courts.

First JSL Bk.v Lehman, 225-1309;283 NW 96

Plainness of meaning excluding construction. There can be no construction of a statute which is expressed in such plain and simple language that he who runs may read and understand it. So held as to that clause of the moratorium act which declares: "The provisions of this act shall not apply to any mortgage * * * executed subsequent to January 1, 1934 * * *."

HOLC v Dist. Court, 223-269; 272 NW 416

"Owner" defined. An "owner" within the meaning of the moratorium foreclosure act may be such tho his interest is less than a fee ownership.

Prudential v Kraschel, 222-128; 266 NW 550

Requirement as to owners. Applications, under the moratorium act, for a continuance of mortgage foreclosure proceedings, should be joined in by all owners of the mortgaged premises; and if an owner is legally such in more than one capacity, he should join in each and every capacity in which he is such owner.

Prudential v Kraschel, 222-128; 266 NW 550

Bank receiver not "owner". The duly appointed and acting receiver of an insolvent state bank is not such "owner" of the bank's undivided, fractional interest in mortgage-incumbered land as entitles him, in case action is brought to foreclose said mortgage, to apply for and be granted a continuance under the moratorium act (46 GA, Ch 115).

Metropolitan v Laufersweiler, 221-1008; 267 NW 74

Dependency on factual situation. Every application for continuance under moratorium act of the 47th GA must be determined on its own peculiar facts.

Mass. Ins. Co. v Schenkberg, 225-1148; 281 NW 825

Present insolvency or inadequacy of security. In the moratorium act, a new section removing insolvency or inadequacy of security as good cause for refusing a continuance, held to add little if anything to the existing decisions thereon, which have never denied a continuance for present insolvency or inadequacy of security alone.

Replogle v Ebert, 223-1007; 274 NW 37

Nonliberal construction as to corporation-mortgagor. Where the receiver of a defunct corporation sought the benefit of the moratorium act of the 47th GA against another corporation, as mortgagee, held that altho the act applied to corporations, yet in view of the rapidly mounting debt, with no outlook for a material reduction in the mortgage, the acting receiver should be discharged and the mortgagee should be substituted as receiver during the period of the extension.

Mass. Ins. Co. v Schenkberg, 225-1148; 281 NW 825

Burden of proof. A mortgage debtor, on proper application in foreclosure proceedings, is entitled to a continuance under the emergency moratorium act unless the mortgagee establishes the impropriety of such continuance.

Mudra v Brown, 219-867; 259 NW 773
Anderson v Fall, 221-24; 265 NW 165
Mutual Ins. v Dean, 221-591; 266 NW 282

Burden to prevent. Mortgagors, as a matter of law and equity, are entitled to moratorium continuances unless good cause is shown to the contrary, the burden of which showing is upon the mortgagee.

Prudential v Schaefer, 224-1243; 278 NW 602

Redemption—crop outlook—judicial notice. Tho at present hopelessly insolvent yet when

VII FORECLOSURE—continued
(j) MORATORIUM ACTS—continued
2. Continuance of Action—continued

operating on shares an 840-acre farm with the pledge from a neighbor of financial aid for farm operating expenses, together with the outlook for a favorable crop season, which the court must judicially notice, it cannot be held that a mortgagor is without probability of saving at least part of his holdings and a ruling based thereon granting a continuance under the moratorium act is not erroneous. (47 GA, Ch 80.)

Replogle v Ebert, 223-1007; 274 NW 37

Good cause for refusal not shown. Where 180 acres purchased for over $41,000, having been depressed in value to $15,300, carry an incumbrance of $16,320, where mortgagor paid insurance on the property in addition to rentals to mortgagee, where a reasonable expectation exists as to increased crops and prices, and mortgagor is not shown to be insolvent, there is no hopeless impossibility of mortgagor's redeeming, nor evidence of mortgagor's bad faith, so as to constitute good cause for refusing a continuance under the moratorium act of the 47th GA.

Metropolitan v Henderson, 224-1238; 278 NW 621

First JSL Bank v Burke, 225-55; 280 NW 467

Continuance—"good cause" to defeat—insufficiency. A mortgagee does not, under the moratorium act (46 GA, Ch 115) show "good cause" justifying the rejection of mortgagor's prayer for a continuance of foreclosure suit by simply showing:

1. That the mortgagor had not applied the rents for the preceding year on the interest due on the mortgage or in payment of taxes on the mortgaged premises.
2. That the mortgagor had just recently disposed of real estate not covered by said mortgage.
3. That, when the mortgagor applied for a continuance, he was in default.

First JSL Bank v Kilpatrick, 221-993; 267 NW 688

Continuance—"good cause to reject"—insufficiency. A mortgagee does not, under the moratorium act, establish "good cause" justifying the refusal of a continuance of mortgage foreclosure proceedings:

1. By proof that the mortgagor does not reside upon, or operate the land in question, especially when the land is in possession of a receiver appointed under a continuance granted under a prior moratorium act, or
2. By proof that the mortgagor had not refinanced the loan, the court taking judicial notice of the fact that during the period in question the financial condition of the country was such that it was substantially impossible to refinance farm loans, or
3. By equivocal or questionable evidence as to the applicant's solvency.

First JSL Bk. v Jelsma, 221-1191; 268 NW 76

Continuance—"good cause"—insufficient evidence. "Good cause" justifying the rejection of an application, under the moratorium act, for continuance of foreclosure suit, is not shown per se by proof that the applicant, owner of the land, (1) did not occupy the land as a homestead, or (2) did not personally farm the premises, or (3) was not personally obligated to pay the mortgage debt.

First JSL Bk. v Riddle, 221-1313; 268 NW 45

Court's duty—showing to avoid continuance. Without an affirmative showing of good cause, which cannot be limited to showing of present insolvency and present inadequacy of security, there is no warrant for any court to deny an application for continuance under the moratorium act of the 47th GA.

Mass. Ins. Co. v Schenkberg, 225-1148; 281 NW 825

Inadequacy of security insufficient for refusal. Present insolvency and inadequacy of security are not alone "good cause" for refusing a mortgage continuance under the moratorium act of the 47th GA, and, therefore, if inadequacy of security alone is shown, the continuance should be granted.

Prudential v Redmond, 225-166; 279 NW 392

Discretion of court. Evidence reviewed on the issue whether the owner of mortgaged land had an equity in the land over and above the amount of the mortgage and held, the court did not abuse its discretion in granting a continuance under the moratorium act.

First JSL Bk. v Riddle, 221-1313; 268 NW 45

Working capital not applied to mortgage delinquencies—not bad faith. A mortgagor, admittedly solvent, does not show bad faith to the extent necessary to deny a moratorium continuance because of his failure to pay mortgage delinquencies, when by so doing he would impair his capital so that he would be unable to continue his farming operations.

Prudential v Schaefer, 224-1243; 278 NW 602

Third moratorium continuance — $8 delinquency not "good cause" to refuse. Mortgagee's contention, in an action for a third continuance under the moratorium act of the 47th GA, that mortgagor has not done equity in that he was $8 delinquent in his rent on a 154-acre farm, cannot be seriously considered as "good cause" for refusing the continuance.

Prudential v Redmond, 225-166; 279 NW 392

Insufficient showing of "good cause" to deny. "Good cause" for refusing a continuance of mortgage foreclosure proceedings under the moratorium act (46 GA, Ch 115) is not shown by proof that the applicant for continuance

had, before the commencement of the action, fully disposed of the rents for the year in which the action was commenced, he otherwise doing full equity.

First JSL Bk. v Bridson, 221-1302; 268 NW 25

Rents — failure to account for. A mortgagor will not, under 46 GA, Ch 115, be denied a moratorium continuance because of the fact that, prior to the commencement of foreclosure proceedings, he, without fraud, rents the land for the current year for cash, and does not, in his application for the continuance, account for or offer to account for the cash rent so collected.

First JSL Bk. v Wood, 222-1395; 271 NW 606

Duty to determine occupancy and rents. The imperative duty of the court under the moratorium act to grant, on a proper showing, a continuance of foreclosure proceedings, is no more imperative than is the duty of the court, in such case, to fix and determine the right of occupancy of the premises (even tho they constitute a homestead), and the reasonable rental to be paid for such occupancy, during said continuance; and especially is this true when the mortgagors have, in the mortgage, waived all homestead rights.

Rhoades v Allyn, 220-474; 262 NW 788

Accounting for rents as condition precedent. The right of a titleholder to have a continuance, under the second moratorium act, of mortgage foreclosure suit is not dependent on an accounting by him of rents which have been legally disposed of prior to the commencement of foreclosure suit. (46 GA, Ch 115, §§3, 6.)

First JSL Bk. v Wood, 222-985; 270 NW 416

Unallowable apportionment of rent. When the security for a debt is a combination (1) of a mortgage on the land, and (2) of a chattel mortgage on the rents and crops of the said land, the court, on granting under the moratorium act a continuation of foreclosure proceedings, has no authority under said act (nor could it constitutionally be given such authority) to apportion or set off to the mortgagor any portion of said rents.

Equitable v McNamara, 220-297; 259 NW 231; 262 NW 466

Rents assigned — effect. The fact that a portion of the future accruing rents of mortgaged premises has, by assignment, been placed beyond the reach of the mortgagee does not prevent the court from continuing the foreclosure, under the mortgage emergency act (45 GA, Ch 182), and equitably applying the remaining rents accruing during the period of the continuance.

Prudential v Brennan, 218-666; 252 NW 497

Pledge of rents — receiver — refusal to appoint — justification. The refusal of the court, in foreclosure proceedings, to appoint a temporary receiver to conserve the rents pledged in the mortgage for the payment of the debt, cannot be deemed erroneous (1) when a continuance is granted under the moratorium act, (2) when there is no showing of waste, (3) when the all-important question is as to what equitable portion of the accruing rents should be paid to the clerk for application on the mortgage, and (4) when such portion is determined by the court in its order granting a continuance.

First JSL Bank v Ferguson, 221-987; 267 NW 103

Moratorium denial due to misinterpretation of supreme court opinion. Where the trial court under a misinterpretation of a supreme court opinion orders a mortgagor to account for rents and profits collected prior to foreclosure proceedings, or suffer a denial of a continuance sought under the moratorium act of the 45th GA, and the mortgagor fails to so account within the time limit set by the order, such erroneous order and subsequent judgment cannot be an adverse prior adjudication, nor terminate jurisdiction to determine the merits of the mortgagor's rights to a continuance under the later moratorium act of the 46th GA.

Equitable v McNamara, 224-859; 278 NW 910

Unauthorized continuance. A continuance of mortgage foreclosure proceedings, under the emergency act known as 45 GA, Ch 182, without any provision being made as to the rents and the application thereof, is wholly unauthorized.

McDonald v Ferring, 218-593; 255 NW 719

Unauthorized continuance. A continuance of mortgage foreclosure proceedings, under the emergency moratorium act (46 GA, Ch 115), without any provision being made relative to the possession of the real estate, the rental terms to be paid, and the application and distribution of said rents, is wholly unauthorized.

First JSL Bank v Dennison, 221-984; 267 NW 681

Discretion to refuse. The discretion of the trial court to refuse a second continuance of mortgage foreclosure proceedings will not be disturbed in the absence of a record showing abuse of such discretion. So held where it appeared that the owner was, aside from the property in question, financially able to refinance the mortgage debt, but unwilling so to do.

Prudential v Kraschel, 222-128; 266 NW 550

Solvent estate—continuance denied executor. Where a claim was filed against an estate, based on a note signed by decedent and secured by mortgage on realty, a continuance under the moratorium statute was properly refused where estate was solvent and, at time of her

VII FORECLOSURE—continued
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death, decedent owned 1,440 acres of land of which 1,120 acres were unencumbered.

Equitable v Christensen, 225-1258; 282 NW 721

Continuance denied—showing. In an action to foreclose a mortgage, held court's refusal to grant a moratorium continuance was proper in view of the facts that (1) conflict in equities was not between owner and mortgagee but between mortgagee and bank depositors holding trust certificates, (2) the bank was not person in possession as a home whom the statute was designed to protect, (3) the foreclosure was merely a contest between creditors, the bank and the mortgagee, and (4) none of the parties offered or promised to make any attempt to redeem.

Service Ins. v Sutton, 223-1013; 274 NW 57

Hopeless insolvency—effect. A continuance, under the moratorium act, of mortgage foreclosure proceedings is properly denied when the mortgagor has long been in default in payment of interest and taxes and is hopelessly insolvent.

Mudra v Brown, 222-709; 269 NW 753

Continuance under emergency act. The emergency act for the continuance of mortgage foreclosure proceedings (45 GA, Ch 182) was not designed to grant a continuance to a mortgagor of nonhomestead property who is so hopelessly insolvent that a continuance would, manifestly, work no benefit to him but would work material harm to the mortgagee.

Reed v Snow, 218-1165; 254 NW 800

Continuance—avoidance. Under the mortgage emergency act (45 GA, Ch 182) a continuance should be granted, unless the mortgagee shows good cause why such continuance should not be granted. Held that the court did not abuse its limited discretion in refusing such continuance to a debtor who had substantially abandoned the mortgaged premises, had for a material time failed to apply any part of the rents and profits to the protection of the land, was hopelessly insolvent, and wholly without prospect to redeem the property.

Federal Bank v Wilmarth, 218-339; 252 NW 507; 94 ALR 1338

Unauthorized continuance. The mortgage moratorium act does not, and constitutionally could not, authorize a continuance thereunder to a mortgagor when the record affirmatively shows (1) that the mortgaged land is of a value substantially less than the mortgage debt, and (2) that, irrespective of the foregoing fact, the mortgagor-owner is in such financial condition as to exclude any possible redemption by him.

John Hancock Ins. v Schlosser, 222-447; 269 NW 435

Denial—redemption not possible. A continuance of mortgage foreclosure should not be granted where a titleholder has no property and would not be able to redeem, where the incumbrance is increasing each year and where there is little, if any, income from mortgaged premises.

Prudential v Mathis, 225-1314; 283 NW 265

Moratorium denial—no hope of refinancing. The purpose of the moratorium statutes is to afford the owner an opportunity to refinance or pay up the indebtedness and save the farm within the moratorium period. When from the evidence there is nothing to indicate the remotest possibility that this can be done, the continuance should be denied.

First JSL Bk. v Baxter, 224-1229; 279 NW 125

Unallowable continuance. A mortgagor is not entitled, under the moratorium act, to a continuance of foreclosure suit (1) when the land is worth far less than the amount due on the mortgage, (2) when the income from the land will scarcely pay the taxes, and (3) when the mortgagor admits he has no intent to redeem from the mortgage, and would not so do were he financially able.

First JSL Bk. v Runde, 221-995; 267 NW 691

Nonright to continuance. A mortgagor is not entitled, under the emergency moratorium act, to have foreclosure proceedings continued:

1. When, since the date of the mortgage, he has paid practically nothing on the principal debt,—originally $20,000,
2. When, in addition, he is in default for the nonpayment of interest, taxes and other legal charges,
3. When, manifestly, the mortgaged land will fall far short of paying the accumulated debt,—some $35,000,
4. When the said mortgagor is hopelessly insolvent,
5. When refinancing the accumulated debt to save the land is out of the question, and finally and quite pertinently,
6. When said mortgagor has never been willing to do equity, but, on the contrary, has clearly evinced a purpose to oppress the mortgagee who is also in financial distress.

Miller v Ellison, 221-1174; 265 NW 908

Continuance—justifiable refusal. Refusal of the trial court, under the moratorium act, to grant a continuation of mortgage foreclosure proceeding, finds ample justification in the facts (1) that the mortgaged premises are insufficient to satisfy the amount due on the mortgage, (2) that the mortgagor is hopelessly insolvent, (3) that the mortgagor evinces no disposition to "do equity", and (4) that the application for continuance was not made in good faith.

First JSL Bk. v Lewis, 221-437; 265 NW 141

Continuance—justifiable refusal. A mortgagor is not entitled, under the mortgage mor-

atorium act, to a continuance of foreclosure proceedings when it is made to appear that he has been offered by the mortgagee a reasonable refinancing of the mortgage debt and that he has refused such offer, tho possessed of very ample nonexempt and unincumbered property which he could employ for such refinancing. Especially is this true when the mortgagor's conduct quite strongly suggests that he is attempting to employ said act as a club with which to bludgeon the mortgagee into an involuntary reduction of a manifestly just debt.

Decorah Bk. v Sexton, 220-1047; 264 NW 41

Proper denial of continuance. A defendant in mortgage foreclosure proceedings is very properly denied a continuance under the emergency moratorium act (45 GA, Ch 182) when it is made to appear that he is not in financial distress, and even refuses to do equity.

Butenschoen v Frye, 219-570; 258 NW 769

Continuance — "good cause" for refusal. "Good cause" for refusing a moratorium continuance of mortgage foreclosure suit is necessarily found—a border-line case—on a record showing (1) that the mortgage represents a loan of actual money, has been twice renewed by the mortgagee at reduced rates of interest, and constitutes a material and necessary part of the mortgagee's personal support, and (2) that the mortgagor, applicant for continuance, does not reside on the land, bought and holds the land solely for speculative purposes, has no equity in said land because of the incumbrances thereon, owns substantial properties in addition to said land, and has manifested a disposition to force the mortgagee to consent to a reduction of the admitted debt.

Fossler v Breniman, 222-124; 268 NW 521

Proper denial of continuance. A continuance, under the moratorium act, of mortgage foreclosure proceedings, is very properly denied when the farm in question (1) has been practically abandoned by the several owners thereof, (2) is in a shocking state of disrepair which the owners refuse to correct (tho some of them are financially able), and (3) is of a value less than half the incumbrance,—when, in short, the continuance is sought in the hope that the owners may speculate by the delay.

First JSL Bk. v Wylie, 221-27; 265 NW 181

No moratorium continuance to land speculator. The moratorium act of the 47th GA was not enacted as an aid to land speculators. One who acquires land after foreclosure in the hope that, by obtaining a continuance, he may settle the mortgage for a fraction of its face value, is not entitled to such continuance when, at all times, he is financially able to redeem in full.

Fed. Corp. v Murdock, 225-1306; 283 NW 95

Continuance — cancellation — justifiable grounds. An order, under the moratorium act, granting a continuance in mortgage foreclosure suit, may be set aside at any time during the life of the continuance on a showing that the applicant for the order has substantially failed to comply with the conditions imposed by the court in the granting of the order, even tho, in granting the order, the court did not specifically retain jurisdiction over the order for a possible future cancellation thereof.

John Hancock Ins. v McFee, 222-403; 269 NW 332

Unallowable continuance. The court has no jurisdiction (46 GA, Ch 115) to grant a moratorium continuance of mortgage foreclosure proceedings on a mortgage executed subsequent to January 1, 1934, there being no claim that any continuance had theretofore been granted under the preceding moratorium act (45 GA, Ch 182).

HOLC v Dist. Court, 223-269; 272 NW 416

Moratorium acts of 47th GA — emergency must be temporary—judicial notice. An emergency, in order to justify legislation in contravention of the constitution on the theory of an exercise of the reserve police power, must be temporary or it cannot be called an emergency, but becomes an established status. In determining this question, the supreme court may take judicial notice of conditions existing at the time of enactment and whether or not they constitute an emergency.

First JSL Bank v Arp, 225-1331; 283 NW 441; 120 ALR 932

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Metropolitan v McDonald, 225-1075; 283 NW445

Moratorium acts of 47th GA—unconstitutionality. Moratorium acts of the 47th GA extending foreclosure of mortgages, and extending time in which to redeem, are unconstitutional as an impairment of the obligation of contract, when such acts are not based on an actual existing emergency calling for an exercise of the reserve police power of the state.

First JSL Bank v Arp, 225-1331; 283 NW 441; 120 ALR 932

John Hancock Ins. v Eggland, 225-1073; 283 NW 444

Metropolitan v McDonald, 225-1075; 283 NW 445

12373 Deeds of trust.

When life estate not subject to sale. A trust agreement and a deed of conveyance accompanying it, executed as security for a named debt, and granting the trustee immediate possession with right and duty to apply the rents to the secured debt, may not be foreclosed and the grantor's life estate sold, when the trust agreement and conveyance recite (1) the grantor's interest as a life estate only, but (2)

contain no agreement or inference that the trustee may alienate said life estate.

In re Barnett, 217-187; 251 NW 59

Fraudulent trust deed. Trustees were not entitled to foreclose bridge company's trust deed securing bonds, most of which were issued to corporation controlled by bridge company's president, inasmuch as trust deed and bonds, with certain exceptions, were tainted with fraud, and, as to nonfraudulent bonds, equity could be done by sequestering company's revenues in excess of necessary operating expenses and taxes, and retaining property in receivership until valid bonds, with interest, were paid.

First Tr. Bank v Bridge Co., 98 F 2d, 416

12374 Venue.

Action in county where realty located. As to an equity action to foreclose a realty mortgage in one county against mortgagor and administrators of deceased junior mortgagee, where probate proceedings are pending in another county, and the jurisdiction of the court in foreclosure proceedings is challenged, the statute providing that foreclosure of mortgages of real property shall be brought in the county where the property is located is mandatory and jurisdictional.

Federal Bank v Ditto, 227-475; 288 NW 618

12375 Separate suits on note and mortgage.

Allowable legal and equitable actions at same time. Where each of a series of matured, mortgage-secured, promissory notes of the same maker possesses the same grade of lien, and is by a trust agreement executed by the various noteholders, placed in the hands of a trustee with power to institute such actions as he may deem fit in order to effect collection, the trustee may maintain and carry on at the same time an action at law on a portion of said notes, and an action in equity to foreclose the mortgage for the remainder of the notes.

Iowa Co. v Clark, 215-929; 247 NW 211

Judgment on note alone—mortgage unaffected. A separate judgment on a note does not discharge the mortgage securing it.

Beckett v Clark, 225-1012; 282 NW 724; 121 ALR 912

Nonsplitting of action. A mortgagee is not guilty of splitting his cause of action (1) by suing at law on his secured note and proceeding against property of the mortgagor other than the mortgaged property, and (2) by instituting foreclosure proceeding as trustee for other secured noteholders without making any claim therein on his own note.

Iowa Co. v Clark, 213-875; 237 NW 336

Notice of appeal—mortgagor as adverse and necessary party. A titleholder who did not assume a prior mortgage on the property and who appeals from an order in foreclosure appointing a receiver must serve notice of appeal on the mortgagor as an adverse and necessary party, inasmuch as a personal judgment was rendered against mortgagor in the foreclosure.

Hoffman v Bauhard, 226-133; 284 NW 131

Optional remedies to enforce payment. The trustee in a deed of trust securing bonds cannot be deemed to be limited simply to a foreclosure of the deed—cannot be deemed to be excluded from maintaining an action at law against the maker—when the deed confers upon the trustee the widest discretion as to the remedy which he may choose to enforce collection.

Minn. Co. v Hannan, 215-1060; 247 NW 536

Pendency of foreclosure in foreign state—effect. The right of a party to maintain in this state an action at law to recover of the maker of bonds the balance due after foreclosure, in a foreign state, of the securing mortgage will not be denied on the plea that the foreclosed property is yet in the hands of the foreclosing receiver and that the amount of rents which will be derived thereunder is not made to appear, when the evidence demonstrates that the utmost that can be realized will not pay taxes and other expenses.

Minn. Co. v Hannan, 215-1060; 247 NW 536

Prima facie showing for recovery. In an action on a promissory note, the introduction of the note with proof of the genuineness of the signature thereto makes a prima facie case for the plaintiff.

Pfeffer v Corey, 211-203; 233 NW 126

Right of mortgagee to sue at law. A mortgagee has a legal right to sue at law on his mortgage-secured note, and to enforce the resulting judgment against leviable property of the mortgagor other than the mortgaged property.

Iowa Co. v Clark, 213-875; 237 NW 336

Splitting actions — mortgage foreclosure after judgment on note. A mortgage foreclosure action is maintainable after securing judgment on the note secured thereby.

Beckett v Clark, 225-1012; 282 NW 724; 121 ALR 912

12376 Judgment—sale and redemption.

ANALYSIS

I JUDGMENT OR DECREE IN GENERAL
II PERSONAL JUDGMENT
III SALE
IV REDEMPTION

Moratorium—redemption period extended. See under §12372 (VII)

I JUDGMENT OR DECREE IN GENERAL

Conclusiveness against rent claimant. A party who intervenes in a real estate mortgage foreclosure, after final decree and after the appointment of a receiver of the rents, and lays claim to said rents as a trustee under an assignment and chattel mortgage thereof antedating the foreclosure, has no standing when it is made to appear that said "trustee" has no personal interest in said rents and is a "trustee" only in the sense that he is the agent of a party who was duly made a party to the foreclosure and whose rights were fully adjudicated by the final decree.

Virtue v Teget, 209-157; 227 NW 635

Conclusiveness of judgment. The purchaser of mortgaged property, duly made a party to the foreclosure of the mortgage, may not afterwards relitigate any issue which was tendered in the foreclosure proceedings or which was available to the parties therein; otherwise, of course, as to nonavailable issues, e. g., whether the purchaser had been credited with all the payments made by him on his contract of purchase.

Heppe v Bank, 209-1017; 227 NW 334

Construction—application of rents. A foreclosure decree which covers a first and second mortgage, and which is in rem only, and which appoints a receiver, with direction to pay the final balance of rents "on deficiency judgment", entitles the second mortgagee to such final balance of rents in preference to the then owner of the land, the first mortgagee being fully satisfied by the foreclosure sale.

Union Bank v Lyons, 206-441; 220 NW 43

Foreclosure—effect of decree on pipe-line fixtures. A mortgagee having foreclosed and taken a sheriff's deed may not require a gas pipe-line company to pay for its pipe and fixtures previously installed across the mortgaged premises in addition to the damages for right of way on the theory that the foreclosure decree vested in mortgagee the title to such pipe and fixtures.

Titus Co. v Natural Gas, 223-944; 274 NW 68

Allowable successive foreclosures. The foreclosure of a recorded real estate mortgage for the installments first falling due, and a sale and redemption therefrom by the assignee of the mortgagor, does not destroy the lien of the mortgage for future maturing installments and principal when the mortgage specifically provides for successive foreclosures, and when the lien of said mortgage for future maturing installments and principal was distinctly preserved, as a matter of record, at every material step in said first foreclosure.

Lincoln JSL Bank v Williams, 216-659; 246 NW 841

Increased rate of interest—when effective. A mortgage clause to the effect that, upon the exercise by the mortgagee of his right to declare the entire debt due because of default in payment of any part of the matured debt, the mortgage debt shall bear an increased rate of interest, is valid, and such increased rate commences to run from the date of action to foreclose.

Whitney v Krasne, 209-236; 225 NW 245

Issue in re assumption of mortgage—nonidentity of parties. An adjudication (in mortgage foreclosure) solely between the mortgagee and the grantee of the premises that the grantee had not assumed the mortgage debt is no bar to a subsequent independent action by the mortgagor-grantor against said grantee so to reform the deed to grantee as to embrace such assumption and to recover of said grantee the deficiency which resulted from the foreclosure sale, said deficiency having been paid by said mortgagor-grantor. And this is true even tho the mortgagor-grantor was a party to said foreclosure.

Betzenderfer v Wilson, 206-879; 221 NW 497

Land banks as nonpreferential litigants in state courts. There is nothing to show that congress contemplated that land banks should occupy a preferential status as litigants in the state courts.

First JSL Bk. v Lehman, 225-1309; 283 NW 96

Matter excluded from judgment. Tho a subject matter is fully covered by pleading, yet there can be no adjudication thereof if the court specifically excludes said subject matter from its final determination—reserves said matter for future determination.

Central Bk. v Herrick, 214-379; 240 NW 242

Mortgagee suing receiver—decree fixing lien on other assets in different court. Court may authorize a mortgagee's foreclosure action against the receiver in a county where the property is located, tho different from county where receivership is pending and such court, after hearing the foreclosure proceeding, has the right, where such relief is proper, not only to foreclose but to impose a lien for a deficiency judgment on the other receivership assets in the other court.

Klages v Freier, 225-586; 281 NW 145

Nonprejudicial judgment. In the foreclosure of a second mortgage, a defendant who is personally liable for taxes paid and interest advanced by plaintiff, to protect the property and to prevent a foreclosure of the prior mortgage, may not complain that the court rendered judgment in rem for the amount of said interest and taxes, instead of entering a personal judgment therefor against complainant.

Collentine v Johnson, 203-109; 202 NW 535; 208 NW 318

I JUDGMENT OR DECREE IN GENERAL —concluded

Order as to rents—conclusiveness. In mortgage foreclosure proceedings, an unappealed order to the receiver to rent the property during the redemption period and to pay the taxes from the rentals is conclusive on all party defendants.

In re Angerer, 202-611; 210 NW 810

Presumption attending foreign foreclosure. In an action in this state on a foreign, mortgage-secured promissory note, the court will not presume that a foreclosure of the mortgage was on personal service within the jurisdiction of the foreclosing court, on the makers of the note (residents of Iowa), and that, therefore, the note sued on was merged in the foreclosure decree.

Pfeffer v Corey, 211-203; 233 NW 126

Recitals accompanying decree. A recital in a so-called judgment entry in real estate mortgage foreclosure that plaintiff "shall have a lien against all property kept on said premises," and that said lien shall be superior to a named chattel mortgage, when not carried into the decree which follows the recital, is no part of the decree, and is not binding on anyone, a fortiori when such recital finds no support in the pleadings or in the stipulation filed in the case.

Van Alstine v Hartnett, 210-999; 231 NW 448

Requisites and proceedings for transfer of cause—failure to serve coparty. On an appeal by an intervenor in foreclosure proceedings from a decree awarding rent notes to plaintiff because intervenor was a fraudulent indorsee thereof, and taxing costs against intervenor and the landlord-indorser, the failure to serve notice of appeal on the nonappealing landlord-indorser and tenant-maker of the notes constitutes a fatal defect of parties because a reversal—a decree that intervenor was a bona fide indorsee—(1) would restore the liability of the landlord-indorser on his indorsement, (2) would leave the landlord-indorser liable for all the costs without right to contribution from intervenor, and (3) would subject the tenant to a double liability for the rent.

Read v Gregg, 215-792; 247 NW 199

Return—noninvalidating irregularity. The return on a real estate mortgage foreclosure execution is not, as a basis of the title conveyed, invalidated by the fact that the recital in the return (1) of the receipt of the execution, and (2) of the levy thereunder, and (3) of the date of such receipt and levy, is signed by a deputy sheriff in his own name with the added designation of "deputy sheriff" (instead of in the name of the sheriff by said deputy) when the entire return embracing a timely recital of the doing of every required act thereunder (including that recited by said deputy) is signed by the sheriff in his official capacity.

Nelson v Hayes, 222-701; 269 NW 861

Technically incorrect decree. A decree arising out of foreclosure proceedings which is fair and equitable to appellant will not be disturbed even tho appellee was given a lien on the land to which he was not strictly entitled.

Iowa Corp. v Halligan, 214-903; 241 NW 475

Vacating decree in foreclosure after lapse of year—insufficient showing. A mortgagor is not entitled to have a decree in foreclosure set aside on the ground of misunderstanding and inefficiency of his attorney, when he applies more than a year after entry of the decree, and it appears that the proceedings were regular in every way, and it further appears that his attorney did everything possible in his behalf.

Snyder v Bank, 226-341; 284 NW 157

II PERSONAL JUDGMENT

Assumption of mortgage—scope and effect. A purchaser of land who contracts, both in his contract of purchase and in the deed of conveyance accepted by him, to assume and agree to pay an existing mortgage on the land, thereby becomes the principal debtor on such obligation and as to all prior parties obligated thereon.

Grimes v Kelloway, 204-1220; 216 NW 953

Assumption by subsequent vendee—right to cancel. Principle reaffirmed that the assumption by a vendee of payment of an outstanding mortgage on the land may be canceled prior to the time the holder of the mortgage has knowledge of such assumption.

Collentine v Johnson, 203-109; 202 NW 535; 208 NW 318

Consideration—failure of, as to wife. Parol evidence is admissible between the original parties to a note and mortgage to show that the wife signed the obligations without any consideration flowing to her, and solely for the purpose of releasing her possible dower interest, and without any knowledge that her signature was being required or demanded by the payee.

Cooley v Will, 212-701; 237 NW 315

Expectancies—ineffectual instrument. A mortgage which recites that the mortgagor "sells and conveys her undivided interest and all future rents, issues, and profits" in named lands (in which the mortgagor then has no interest whatever) speaks solely in the present tense, and is wholly ineffectual to convey the mortgagor's future expectant interest in the land as an heir.

Lee v Lee, 207-882; 223 NW 888

Indorsee "without recourse". The indorsee of a mortgage-secured note is not entitled to a personal judgment against the indorser for the amount due on the note when such indorsee is holding the note (1) under an indorsement "without recourse" and (2) under an

agreement by the indorser to repurchase the note in case of nonpayment by the maker at maturity, and when, after the indorser refuses to repurchase, the indorsee continues to treat the note and mortgage as his own property and sues in foreclosure as such owner.

Hawkeye Ins. v Trust Co., 208-573; 221 NW 486

Interest on mortgage. When foreclosure of a mortgage is refused in toto because of the fact that unconscionable usury permeated the entire debt except as to one item, and when the court separates such item from the rest of the contract and, without objection, renders personal judgment against the mortgagor therefor, it should grant the plaintiff legal interest thereon. In other words it is not justified in rendering judgment for interest on such item in favor of the school fund.

Tansil v McCumber, 201-20; 206 NW 680

Mortgage extension by mortgagor's grantee —no assumption. A note and mortgage extension agreement between mortgagee and mortgagor's grantees, with no assumption of the mortgage, and for the sole purpose of preserving a foreclosure cause of action about to be barred by statute, which extension continues the note and mortgage in force and effect as per their original terms, will justify a foreclosure decree but is not an assumption of the debt on which a personal judgment against mortgagor's grantees may be rendered.

Woollums v Anderson, 224-264; 275 NW 472

Signature of spouse to mortgage only—effect. The defeasance clause in a real estate mortgage on the lands of a husband, to the effect that the mortgage shall be void if the signers shall "pay or cause to be paid" the secured notes, does not, in and of itself, impose personal liability on the wife who is one of the signers to the mortgage.

Fairfax Bk. v Coligan, 211-670; 234 NW 537

Undisclosed principal—liability. One who, through a broker with whom land is listed for sale, and without the knowledge of the owner of the land, secretly arranges to buy the land, and obligates himself to pay the purchase price thereof, and who, through said broker, causes an impecunious and fictitious buyer to enter into the contract of purchase and to execute the notes and mortgage and to become the grantee in the deed of conveyance, and who receives from the said fictitious buyer an assignment of the said contract and a deed under which he assumes no personal liability on the mortgage debt, will, nevertheless, be held personally liable to the actual vendor for the full purchase price as an undisclosed principal; and if the agent goes beyond the scope of his authority in negotiating the said contract, the undisclosed principal may not complain, if, with full knowledge of the terms of said contract, and before parting with anything of value, he appropriates to himself the full benefits of the contract.

Collentine v Johnson, 203-109; 202 NW 535; 208 NW 318

Wife signing to release dower. A finding by the trial court on supporting testimony that a wife signed both the note and mortgage of her husband solely for the purpose of waiving her dower interest, and received no actual consideration herself, is conclusive on the appellate court.

Bates v Green, 219-136; 257 NW 198

Signing note to release dower—effect. A wife is not personally liable to the original payee of a promissory note which grew out of her husband's real estate transaction to which she was an entire stranger, except that she signed said note (and mortgage) for the sole and only purpose of releasing her possible dower interest.

Jones v Wilson, 219-324; 258 NW 82

Wife as party—plea of want of consideration. Even tho a wife who had joined with her husband in the execution of rent obligations was not made a party to subsequent mortgage foreclosure wherein her husband and the landlord were evicted by the appointment of a receiver, yet she may, when sued on the rent obligations by the landlord or by his assignee, plead the foreclosure decree as establishing a total failure of consideration.

Miller v Laing, 212-437; 236 NW 378

Consideration — wife signing mortgage and note to release dower. Evidence to the effect that a wife signed not only the mortgage of her husband but also the promissory note, and did so in order to enable the husband to obtain the loan and complete the deal, does not establish that the note was without consideration as to her, even tho she asserts that she signed solely to release her dower interest.

D. M. JSL Bk. v Allen, 220-448; 261 NW 912

Debts secured — future advances, etc. A mortgage securing a specified indebtedness will not be enforced insofar as it contains an indefinite clause providing that it shall stand as security for future advances and after-contracted indebtedness, (1) when the present owner acquired the land before the advances were made and (2) when the wife of the mortgagor signed solely to release her possible dower interest and was a stranger to the said advances.

First Bk. v Welch, 219-318; 258 NW 96

Impeaching signature but not acknowledgment — effect. Even tho it appears that the purported signature of a wife to a promissory note and mortgage (admittedly executed by the husband on his own land) was affixed by someone other than the wife, yet if the mortgage carries a certificate of acknowledgment in due and proper form as required by law and re-

II PERSONAL JUDGMENT—concluded

citing an acknowledgment by said wife of said mortgage as her voluntary act and deed, the wife must, in order to avoid the mortgage as to herself, overcome, by clear, satisfactory and convincing evidence, the facts affirmed in said certificate.

First Tr. JSL Bank v McNeff, 220-1225; 264 NW 105

Wife signing husband's notes—unallowable defense. Assuming that a wife was advised, when she signed promissory notes evidencing the husband's sole indebtedness that her signature would have no other effect than to release her dower interest in the husband's land (which was embraced in the accompanying mortgage which she signed), yet that constitutes no defense to a personal judgment against her on the notes when there is no issue or proof of fraud or conditional delivery, no prayer for reformation or proof supporting such prayer, and when the notes are wholly bare of any reference to dower interest.

Reason: The application of such theory would nullify the notes for any purpose.

First N. Bk. v Mether, 217-695; 251 NW 505

Signing to release dower—effect. Principle recognized that a wife who is an entire stranger to her husband's note and mortgage, except to sign the same solely for the purpose of releasing her possible dower interest, is not personally liable thereon.

First Bk. v Welch, 219-318; 258 NW 96
See Bank v Mether, 217-695; 251 NW 505

Personal liability — wife signing husband's note. A wife who signs the note and mortgage of her husband cannot escape personal liability thereon on the ground of want of consideration as to her—because she signed simply to release her dower interest—when, without her signature, the husband would be unable to obtain the loan.

First Tr. JSL Bk. v Diercks, 222-534; 267 NW 708

Wife signing to release dower—inadequate evidence to show lack of consideration. The presumption of consideration for a promissory note and mortgage, signed jointly by a husband and wife but evidencing and securing an originally created debt of the husband only, is not overcome, as to the wife, by evidence that she was a stranger to the negotiations for the loan, received no part of the loan, had no interest in the mortgaged lands except a contingent dower interest, signed the instruments without reading them and solely at the request of the husband and solely to release said contingent interest. The fatal defect in such evidence is its failure to establish the fact that the loan would have been made without the wife's signature—that the payee-mortgagee did not part with the money in reliance on the wife's signature.

Northern Trust v Anderson, 222-590; 262 NW 529

III SALE

Bidding full amount. A mortgagee by bidding in the mortgaged property at foreclosure sale for the full amount of his judgment thereby satisfies his debt, even tho the property is subject to a prior lien of which he has constructive notice only.

Leach v Bank, 200-954; 205 NW 790
Iowa Co. v Bank, 200-952; 205 NW 744

Bidding full amount. A mortgagee who, after instituting foreclosure, discovers that his mortgagor has granted to a railway company a permanent easement to overflow the land and to construct additional structures thereon may make the company a party, foreclose as to all other parties, sell the property, and take deed, and thereafter, under the continued proceedings against the company, foreclose the rights of such company, even tho at the foreclosure sale he bid the full amount of his judgment.

Kellogg v Railway, 204-368; 213 NW 253; 215 NW 258

Bidding full amount. A second mortgagee who has not paid the taxes on the land or the interest on the first mortgage, but who buys the property in for the amount of his foreclosure judgment, may not afterwards and during the period of redemption recover the amount of said unpaid taxes and interest from a junior incumbrancer who has agreed, generally, to pay them.

Schnuettgen v Mathewson, 207-294; 222 NW 893

Bidding full amount. A judgment plaintiff in mortgage foreclosure who levies upon the mortgaged premises after the expiration of six months and before the expiration of nine months from a sale under a foreclosure of a prior mortgage, and bids in the property, subject to the rights of the first mortgage, for the full amount of his judgment, may not, after his right to redeem has expired, have his sale set aside and canceled and his judgment reinstated, on the mistaken claim that his judgment was not a lien on the land at the time of the levy. (§11734, C., '27.)

Home Bk. v Klise, 205-1103; 216 NW 109

Bidding full amount. A mortgagee who, on foreclosure, takes judgment for the taxes paid by him, and, on sale, bids the full amount of his judgment, thereby fully satisfies the claim for said taxes; and neither he nor one claiming under him can collect said taxes a second time, even from a grantee obligated to pay them.

Marx v Clark, 201-1219; 207 NW 357

Bidding full amount. A mortgagee who forecloses after a fire loss, but who therein makes no claim to an insurance fund paid to the titleholder on account of said loss, and who bids in the property for the full amount of his judgment, interest and costs and later receives a sheriff's deed, must be deemed to have irrevocably waived all claim to said insurance fund, even tho the titleholder received said fund under an agreement to rebuild the burned buildings.

Union Ins. v Bracewell, 209-802; 229 NW 185

Deed carries unaccrued rents. Principle reaffirmed that unaccrued rents pass to the grantee in a sheriff's deed.

Wilson v Wilson, 220-878; 263 NW 830

Dismissal of appeal—moot case. An appeal from an order denying a writ to place a receiver in possession of premises under mortgage foreclosure will be dismissed when it appears that sale has been had, that the redemption has expired, and that the defendant has surrendered possession of the premises to plaintiff.

Upton v Gephart, 205-235; 217 NW 630

Lands in different counties. Under an ordinary mortgage foreclosure decree covering land both in the county in which the decree is rendered and in an adjoining county, the clerk has authority to issue a special execution embracing the lands in both counties, and the sheriff of the county in which the execution is issued has authority to make a valid sale in his county of all said lands.

Tice v Tice, 208-145; 224 NW 571

Nonenforceable judgment. A junior mortgagee who makes no redemption from the sale under senior foreclosure to which he and the common mortgagor were parties may not, after sale under such senior decree, obtain a judgment on his junior mortgage note and enforce it against the land in the hands of the mortgagor's grantee who has redeemed, or in the hands of a party who claims under said grantee.

Stiles v Bailey, 205-1385; 219 NW 537

Notice of mechanic's lien—evidence. Evidence held insufficient to show that a purchaser at mortgage foreclosure had notice of the claim to a mechanic's lien.

Magnesite Co. v Bensmiller, 207-1303; 224 NW 514

Recitals as to absence of right to redeem. A notice of sale of land under special foreclosure execution need not recite that the land will be sold without any right of redemption in a named defendant (because he has appealed), when the right of redemption from the sale exists in other party defendants.

Ebinger v Wahrer, 213-84; 238 NW 587

Recital as to foreclosed rights of parties. A notice of sale of land under special foreclosure execution need not recite that the land will be sold free and clear from the "right, title, interest, liens, or claims" of party defendants.

Ebinger v Wahrer, 213-84; 238 NW 587

Redemption—unallowable extension of period. A junior mortgagee who has foreclosed and received a sheriff's deed is not entitled to an order extending the time in which redemption may be made from a foreclosure sale under the senior mortgage (45 GA, Ch 179), it appearing that both mortgagees were before the court, primarily, as creditors and lienholders, and not as debtors or owners.

Equitable v Kramer, 218-80; 253 NW 809

Return—correcting inadvertent error. An inadvertent error in the return of a mortgage foreclosure sale may be corrected by an amendment by the sheriff after the land has gone to sheriff's deed, provided the judgment plaintiff and defendant are the only persons affected. In such case oral testimony showing the error is quite unnecessary.

Equitable v Ryan, 213-603; 239 NW 695

Sale—delinquent taxes paid by mortgagee omitted from judgment—effect. A mortgagee who bids in the property at foreclosure sale, without protecting himself by adding thereto the delinquent taxes he had previously paid under a clause in the mortgage, may not, after he is appointed receiver during the redemption year, collect and apply the rents and profits to reimburse himself for such delinquent taxes. The owner when redeeming, by paying the judgment and costs, takes title free from the lien of such taxes.

Monroe v Busick, 225-791; 281 NW 486

Title acquired by purchaser. The purchaser at a mortgage foreclosure sale takes, through the sheriff's deed, the full title to the land which the mortgagor had at the time of the execution and recording of the mortgage.

Kellogg v Railway, 204-368; 213 NW 253; 215 NW 258

Sale for installment—lien exhausted. The holder of a claim payable in monthly installments during the lifetime of the claimant, and secured by record lien on land which is owned by a grantee who is not personally obligated to pay said claim, completely exhausts his lien on the land by foreclosing and selling the land for matured installments, without obtaining in said foreclosure decree, under proper allegation and prayer, the preservation of said lien against said land for future maturing installments.

Cadd v Snell, 219-728; 259 NW 590

IV REDEMPTION

Unenforceable judgment. A junior mortgagee who makes no redemption from the sale

IV REDEMPTION—continued

under senior foreclosure to which he and the common mortgagor were parties may not, after sale under such senior decree, obtain a judgment on his junior mortgage note and enforce it against the land in the hands of the mortgagor's grantee who has redeemed, or in the hands of a party who claims under said grantee.

Stiles v Bailey, 205-1385; 218 NW 537

Appeal by junior creditor—effect. The statutory provision that "no party" who has appealed shall be entitled to redeem, does not embrace a junior creditor in a mortgage foreclosure. Especially is this true (1) when the appeal by the junior creditor was on the issue of priority between him and another junior creditor, and (2) when the appeal was perfected after the execution sale.

Quinn v Bank, 200-1384; 206 NW 271

Apportionment of mortgage debt. Where separate owners of separate tracts of land jointly mortgage their lands for the debt of one of them, and on foreclosure, the sale is made en masse, and redemption is made by a judgment creditor of one of the owners, the other owner may, after paying to the clerk the entire amount necessary to effect redemption, maintain an equitable action to have the mortgage debt apportioned between the different tracts.

Hansen v Bank, 209-1352; 230 NW 415

"Debtor" defined. The grantee of land who buys subject to an existing mortgage is a "debtor", within the meaning of the redemption statutes; and the original mortgagor is not entitled to the possession of the land or to the value of such possession during the redemption period following foreclosure, even tho such mortgagor is the only "debtor" who is personally liable for the mortgage debt.

Marx v Clark, 201-1219; 207 NW 357

Decree—nonjurisdiction to amend. The district court has no jurisdiction, long after a duly rendered decree in mortgage foreclosure has become final, to amend said decree by striking therefrom a provision for redemption from execution sale, and by substituting therefor a provision directing the sheriff to issue deed forthwith upon making such sale. So held where the judgment plaintiff sought such amendment on the theory that the judgment defendant had lost his right to redeem because of a stay of execution obtained by him pending ineffectual bankruptcy proceedings.

Nibbelink v De Vries, 221-581; 265 NW 913

Dismissal when question becomes moot. An appeal by a surviving mortgagor from an order which grants to a probate claimant a right to redeem from a sale under foreclosure will be dismissed when it is made to appear that appellant has allowed his time for redemption to elapse without any attempt by him to redeem.

Central Bank v Lord, 204-439; 215 NW 716

Execution debtor's "right of possession". A debtor's statutory "right of possession" of real estate during the year given for redemption from sale on execution is not, in and of itself, leviable.

Sayre v Vander Voort, 200-990; 205 NW 760; 42 ALR 880

Fraudulent redemption and deed. The original mortgagee in a third mortgage who fraudulently redeems in his own name from the foreclosure of the second mortgage and obtains a sheriff's deed, when in fact he had, long prior thereto, assigned said third mortgage, must be deemed to hold said deed as a trustee for his assignee, but he will not be deemed also to hold said deed as trustee for the first mortgagee who has suffered an adverse foreclosure of his mortgage because of the fraud of said redemptioner.

Lyster v Brown, 210-317; 228 NW 3

Loss of right by appeal. Mortgagors and subsequent mortgagees forfeit their statutory right to redeem from first mortgage foreclosure sale by appealing in the latter proceedings from an interlocutory order, even tho appellants obtain a reversal on their appeal.

First JSL Bank v Armstrong, 222-425; 269 NW 502; 107 ALR 873

"Ownership" sufficient to redeem. A deed of conveyance which purports to be a warranty deed carries such ownership of the land as will enable the grantee to redeem from a mortgage foreclosure sale, when the habendum clause clearly evinces an intention to transfer an estate of inheritance, even tho the granting clause seems to limit the conveyance to the "right to redeem".

Central Life v Spangler, 204-995; 216 NW 116

Redemption by co-tenant. One who, during the period for redemption from mortgage foreclosure and sale en masse, purchases by quitclaim the undivided interests in the land of a part of the personal judgment defendants, can redeem only by paying the full amount of the sheriff's certificate of purchase, plus interest and costs, the remedy of such redemptioner being to enforce contribution from his co-tenants.

Kupper v Schlegel, 207-1248; 224 NW 813

Expiration of redemption—effect on non-redeeming junior lienholder—sale certificate assignment. In a mortgage foreclosure action where a defendant junior lienholder fails to redeem, an assignment by the mortgagee of his foreclosure sale certificates to the defendant mortgagor after expiration of the

period of redemption, vests in the mortgagor all of mortgagee's rights unburdened by the claims of any party to the suit.

Bates v Mullins, 223-1000; 274 NW 117

Equitable assignment—sheriff's certificate—homestead—redemption by judgment creditor. Where judgment creditor redeemed from foreclosure sale and secured an assignment of the sheriff's certificate from the mortgagee, and appellant-owners failed to make a statutory redemption, the judgment creditor was an equitable assignee of the sheriff's certificate entitled to deed, even assuming that he had no right to redeem because of the homestead character of the land, since it made no difference to appellant-owners whether the mortgagee or judgment creditor was the holder of the certificate.

Ackerman v Bank, 228- ; 291 NW 150

Redemption by interloper—effect. The holder of a certificate of sale under execution may not question a timely redemption made by an interloper, in the name of the person who had the right to redeem; especially is this true when the person paying the redemption money had contracted for a deed, and when the certificate holder has once surrendered his certificate and accepted the redemption money.

Dixon Lbr. v Cole, 213-554; 239 NW 131

Redemption by grantee—fraud. Redemption by a grantee of premises which have been sold under mortgage foreclosure for the full amount of the judgment may not be declared fraudulent simply on the showing that the grantee and her husband, the grantor (both debtors in the foreclosure proceedings), raised the money with which to effect redemption through a joint mortgage on the property.

Tirrill v Miller, 206-426; 218 NW 303

Failure of junior judgment holder to redeem. A sale under general execution on a senior judgment frees the land in the hands of the grantee of the judgment debtor (even tho he bought "subject to liens of record") from the lien of a junior judgment, when the holder of such junior judgment fails to redeem within the nine months following the sale. The same rule would apply if the sale were under a special execution under mortgage foreclosure, and the junior judgment were obtained after the date of the foreclosure decree.

Paulsen v Jensen, 209-453; 228 NW 357

Judgment creditor as junior lienholder—time to redeem—extent of protection. A judgment creditor becoming a junior lienholder on land loses his lien on account of a mortgage foreclosure by a senior lienholder, unless redeemed within 12 months after the foreclosure sale therein, and the statutory right to redeem is his only protection.

Bates v Mullins, 223-1000; 274 NW 117

Redemption of homestead by judgment creditor. A judgment creditor who was made a defendant in a foreclosure action against appellant's 120-acre farm is a junior lienholder under the statute, not a stranger nor interloper, and is entitled to redeem from sheriff's sale, even tho the judgment was not a lien on the 40 acres constituting appellant's homestead.

Ackerman v Bank, 228- ; 291 NW 150

Quieting title—judgment creditor's deed after mortgage foreclosure — insufficiency. A sheriff's deed issued under execution sale to a judgment creditor, after expiration of the judgment creditor's right of redemption as a defendant junior lienholder in a mortgage foreclosure, is a nullity and will not sustain an action to quiet title thereon.

Bates v Mullins, 223-1000; 274 NW 117

Mechanic's lien claimant without judgment. A mechanic's lien claimant may not redeem from mortgage foreclosure when his claim has not been reduced to judgment.

Magnesite Co. v Bensmiller, 207-1303; 224 NW 514

Cochran v Ory, 222-772; 269 NW 764

Redemption by omitted party. A plaintiff who, subsequent to mortgage foreclosure sale, brings a supplementary action to foreclose against a purchaser of the mortgaged premises (because plaintiff after knowledge of such purchase had failed to make such purchaser a party to the original foreclosure) may not, in the absence of some showing of inequitableness, complain that the court gave said purchaser a year in which to redeem.

White v Melchert, 208-1404; 227 NW 347; 73 ALR 595

Unallowable partial redemption by heirs. After a mortgage which secures the debt of a husband and which covers different tracts belonging to the husband and wife separately is legally foreclosed, and sale made en masse (no other method being required by the debtors), and after junior lienholders on the husband's land have redeemed from the entire sale, the guardian of the wife's heirs may not redeem the lands which belonged to the wife by depositing with the clerk a proportional amount of the mortgage debt, costs, and expense on the theory that the mortgage was on an acreage basis.

Northwestern Ins. v Hansen, 205-789; 218 NW 502

Crops raised during redemption period. The right of the owner of land after mortgage foreclosure to the possession of the property during the 12 months redemption period, does not embrace the right to hold exempt from levy under the mortgage deficiency judgment the harvested grain which has been raised on the premises during said redemption period,

IV REDEMPTION—continued

and which constitutes the said owner's share as rent.

Starits v Avery, 204-401; 213 NW 769

Failure of vendor to redeem—recovery of payments by vendee. An action to recover payments made on the purchase of a lot was not barred by a quitclaim deed given by the purchaser to one who had bought the land at a foreclosure sale, when it was given for the purpose of transferring possession during the period of redemption and in order to reduce the loss to the purchaser, after the vendor had failed to obtain a release of the lot from a mortgage and had no intention of redeeming after the mortgage was foreclosed.

Trammel v Kemler, 226-918; 285 NW 196

Rents during redemption period. The holder of a general deficiency judgment resulting from a foreclosure sale may not have a receiver appointed to take possession of the premises so sold and to apply the rents and profits thereof during the redemption period to the satisfaction of his deficiency judgment.

Howe v Briden, 201-179; 206 NW 814

Rents and profits during redemption. The tenant of a mortgagor of real estate for the year for redemption from foreclosure sale who has paid his rent in advance is entitled to (1) all crops raised by him on the premises and matured by the time foreclosure deed is issued, and (2) all crop shares due him from his subtenants and likewise matured by the time said deed is issued.

Goldstein v Mundon, 202-381; 210 NW 444

Rental during redemption period. The rental of land for the statutory redemption period following sale on mortgage foreclosure is not exempt from attachment levy at the instance of creditors other than the foreclosing mortgagee.

Clouse v Reeves, 205-154; 217 NW 833

Receiver for rents which have been assigned. A receiver for the rents and profits which may accrue during the redemption period on mortgaged premises will not be appointed under a mortgage which simply pledges the possession during said period, when it is made to appear that the rents for said period have been contracted for and in good faith assigned prior to the commencement of foreclosure proceedings.

Keokuk Co. v Campbell, 205-414; 215 NW 960

Right to rents prior to sheriff's deed—exception to general rule. Ordinarily, the owner of mortgaged real estate is entitled to the rents until the issuance of the sheriff's deed on foreclosure sale; but where, substantially at the close of the redemption period, litigation arose over the right to redeem, and where it was agreed that the rights of the parties should remain in statu quo without the issuance of a deed until the litigation was determined, and where the court later decreed the ownership of the property as of the date when redemption expired, held that the rents accruing subsequent to the expiration of the period of redemption belonged to the parties so decreed to be the owners, even tho the sheriff's deed was executed long subsequent to said expiration.

Peoples Bk. v McCarthy, 209-1283; 228 NW 7

Effect on mortgage—pledge of rent. The redemption of land from foreclosure sale by a quitclaim grantee, who became such after said sale, does not extinguish the right of the mortgagee to enforce his decreed mortgage right to subject the rents and profits of the land to the satisfaction of his deficiency judgment.

Union Life v Eggers, 212-1355; 237 NW 240

Order as to rents—conclusiveness. In mortgage foreclosure proceedings, an unappealed order to the receiver to rent the property during the redemption period and to pay the taxes from the rentals is conclusive on all party defendants.

In re Angerer, 202-611; 210 NW 810

Right to proceeds—sheriff's deed holder. A second mortgagee who forecloses and, after redeeming from a first mortgage foreclosure, takes a sheriff's deed, is entitled to the proceeds of a fire insurance policy taken out by the mortgagor for the benefit of the first mortgagee; and this is true even tho the fire occurred during the period for redemption from the second mortgage.

In re Hackbart, 203-763; 210 NW 544; 53 ALR 895

Sale—delinquent taxes paid by mortgagee omitted from judgment—effect. A mortgagee who bids in the property at foreclosure sale, without protecting himself by adding thereto the delinquent taxes he had previously paid under a clause in the mortgage, may not, after he is appointed receiver during the redemption year, collect and apply the rents and profits to reimburse himself for such delinquent taxes. The owner when redeeming, by paying the judgment and costs, takes title free from the lien of such taxes.

Monroe v Busick, 225-791; 281 NW 486

Statutory redemption supplants equitable redemption. One who is duly made a party to mortgage foreclosure proceedings and against whom foreclosure decree is duly entered, may not resort to equity for an equitable redemption. Statutory redemption supplants equitable redemption under said circumstances.

John Hancock Ins. v Roeder, 221-1375; 268 NW 64

Stay or appeal forfeits right to redeem. By a stay of execution or an appeal from a foreclosure judgment, whether in the state or fed-

eral courts, a mortgagor thereafter forfeits his right of redemption.

Fitch v Cornelison, 224-1252; 278 NW 309

Unauthorized redemption by stranger to title—effect. One who redeems from a mortgage foreclosure sale on a false affidavit that he is a junior lienholder, and who receives a deed on the expiration of the year for redemption by the owner, will not be held to hold the land in trust for said owner who was in no manner impeded by said unauthorized redemption from making redemption, and who allowed his year for redemption to expire without taking any steps whatever to redeem. This is true because the conduct of said owner must be deemed either an acquiescence in the unauthorized redemption or inexcusable negligence.

Eliason v Stephens, 216-601; 246 NW 771

Vendor and purchaser both defaulting—equity directing performance, rescission, and redemption. In a vendee's action to rescind a real estate contract and promissory note, supreme court may invoke broad equitable power to protect both vendor and vendee by allowing vendor, after his mortgage on the real estate had been foreclosed, to negotiate vendee's note to provide funds with which to redeem, on the condition that he apply the proceeds to the mortgage indebtedness and then pay the remaining mortgage indebtedness so as to deliver a clear title to vendees at the time fixed in the contract, or suffer a cancellation of the real estate contract and note.

Fitchner v Walling, 225-8; 279 NW 417

Voluntary, unnnecessary payments not recoverable back. One who acquires title to premises theretofore sold under foreclosure for the nonpayment of installments of a mortgage debt, and who, with full knowledge of all relevant fact conditions, and as a purely voluntary act on his part, redeems from said foreclosure sale (evidently with the belief that by so doing he would acquire an absolutely unincumbered title), may not, after the mortgagee has established his legal right again to foreclose on said premises for the balance of the mortgage debt, recover back from the mortgagee items of taxes on the premises paid in effecting said redemption.

Gronstal v Van Druff, 219-1385; 261 NW 638

Who entitled—holder of barred lien. The owner of a judgment which has ceased to be a lien has no right to redeem from a sale under a mortgage lien prior to his judgment.

Johnson v Leese, 223-480; 273 NW 111

Wife joining to release dower forfeits redemption right. Redemption being purely statutory, a wife who joins in executing a note and mortgage for the sole purpose of relinquishing her dower interest, and being decreed not a debtor, is therefore not within the prescribed class of redemptioners.

Fitch v Cornelison, 224-1252; 278 NW 309

12377 Deficiency—general execution.

Deficiency judgment as basis for receivership. See under §12372 (VII)

Deficiency, two-year limitations. See under §11033.1 et seq.

Amount for redemption—taxes—deficiency judgment. The amount necessary to redeem land after sheriff's sale properly included the amount of taxes paid by the purchaser, but did not include the amount of the deficiency judgment, notwithstanding an agreement that the deficiency judgment should be included in the amount.

New York Ins. v Breen, 227-738; 289 NW 16

Deficiency after foreclosure—action to recover—lex loci contractus. In an action in this state on promissory notes executed in Nebraska, and secured by mortgage on Nebraska land, to recover the balance due after foreclosure of said mortgage, the substantive rights of the parties must be determined by the lex loci contractus.

Federal Trust v Nelson, 221-759; 266 NW 509

Foreclosure—deficiency judgment—purchaser from partition referee. Where the referee's deed and report of sale recite an assumption of a mortgage, a deficiency judgment may in a proper case be rendered against one who purchases from a referee in partition.

First JSL Bank v Thomas, 223-1018; 274 NW 11; 275 NW 392

Receiver—deficiency judgment in rem. A receiver may, on a proper showing, be appointed to collect pledged rents, and thereby discharge a deficiency judgment, whether the deficiency arises on a judgment in personam or in rem.

Interstate Assn. v Nichols, 213-12; 238 NW 435

Receiver—insolvent mortgagor. A receiver to take charge of mortgage-pledged rents should be appointed when, after foreclosure and sale, a deficiency judgment remains against an insolvent mortgagor.

Prudential v Strong, 219-816; 259 NW 491

Rents and profits—mortgagor's right to enforce pledge. In mortgage foreclosure, strictly in rem and solely against the owner of the premises who bought subject to the mortgage, the mortgagor-debtor may intervene and, whether solvent or insolvent, enforce, in conjunction with the plaintiff, and through receivership proceedings, a mortgage-pledge of the rents, issues and profits, in order to discharge a deficiency judgment; and this is true notwithstanding the fact that the foreclosure

sale terminated the foreclosure judgment and the lien thereof.

American Bk. v McCammond, 213-957; 238 NW 77; 78 ALR 866

Rents during redemption period. The holder of a general deficiency judgment resulting from a foreclosure sale may not have a receiver appointed to take possession of the premises so sold and to apply the rents and profits thereof, during the redemption period, to the satisfaction of his deficiency judgment.

Howe v Briden, 201-179; 206 NW 814

12378 Overplus.

Right of second mortgagee. A foreclosure decree covering a first and a second mortgage, which is in rem only, and which appoints a receiver with direction to pay the final balance of rents "on deficiency judgment", entitles the second mortgagee to such final balance of rents in preference to the then owner of the land, the first mortgagee being fully satisfied by the foreclosure sale.

Union Bank v Lyons, 206-441; 220 NW 43

12379 Junior incumbrancer entitled to assignment.

Mortgagee suing for delinquent taxes omitted from foreclosure judgment—splitting action. A mortgagee who had paid delinquent taxes on the mortgaged land, according to a provision of the mortgage that if taxes were not paid the mortgagee could pay them and obtain repayment, should have taken care of his claim for taxes in the foreclosure proceedings and was not permitted by Ch 501, C., '35, to split his cause of action and bring an action for the taxes after the mortgagor had redeemed.

Monroe v Busick, 225-791; 281 NW 486

Protection and loss of right of subrogee. When the holder of a certificate of sale under a junior mortgage foreclosure discharges (in order to protect his interest) an interest payment falling due on the senior mortgage, by taking an assignment of said interest installment, he thereby impliedly acquires a pro tanto interest in said senior mortgage, and may foreclose it accordingly against a subsequent purchaser for value of the land; but when said certificate holder simply pays such interest installment, he wholly loses his claim as to a subsequent purchaser who purchased for value, and without notice that the interest installment had been paid by the junior certificate holder.

Miller Bk. v Collis, 211-859; 234 NW 550

Right to pay interest on senior mortgage. The common-law right of a junior mortgagee, in order to protect his own lien, to pay the interest on a senior mortgage, and thereby to be subrogated by proper action to the rights of a senior mortgagee under said senior mortgage to the extent of said payment, has not been abrogated by the enactment of Ch. 501, C., '27.

Miller Bk. v Collis, 211-859; 234 NW 550
Jones v Knutson, 212-268; 234 NW 548

12380 Payment of other liens—rebate of interest.

Insurance to protect mortgagee—no rights under second policy. When a mortgagor complied with the terms of a mortgage and obtained insurance on property to protect the mortgagee, and then procured another policy, in the absence of a provision in the mortgage or in the second policy making its proceeds payable to the mortgagee, the mortgagee had no interest in funds paid into court as a compromise payment of a fire loss on the second policy. So an assignee from the mortgagee could not collect from the fund the amount paid in obtaining the assignment, as the assignee's rights could rise no higher than those of the assignor.

Calendro v Ins. Co., 227-829; 289 NW 485

12382 Foreclosure of title bond.

Discussion. See 1 ILB 53—Specific performance for the purchase price; 11 ILR 97—Specific performance and dower rights

Action against estate—evidence—sufficiency. The rule of law, that he who asks the specific performance of a contract must establish said contract by clear, satisfactory, and convincing evidence, is pre-eminently and with added force applicable to prayers for the specific performance of oral contracts against the estates of deceased persons. Alleged contract to convey property, in return for privilege of naming a child, held unproven.

Baker v Fowler, 215-1157; 247 NW 676

Avoidance of technical remand. The claim on appeal that an equitable action for the foreclosure of a contract for the sale of real estate is premature, and that judgment was rendered for the entire amount prior to its full maturity, will be disregarded on the de novo review on appeal, when it then appears that the entire amount is due and unpaid, and that no plea in abatement of the action, or other objection because of prematurity, was made in the trial court.

Vanderwilt v Broerman, 201-1107; 206 NW 959

Breach justifying rescission. One who agrees to convey certain real estate, and tenders a deed in which he wrongfully reserves a portion of the land which he has contracted to convey, thereby breaches his contract and arms the other party with the right to rescind.

Pickett v Comstock, 209-968; 229 NW 249

Contracts enforceable — writing repudiated before fully signed. Specific performance of a contract of purchase of real estate will not

be decreed when the purchaser, prior to the actual signing of the contract by the actual titleholder, rejected the title except on a condition which the said owner never complied with after he did sign the writing.

Jones v Anderson, 213-788; 239 NW 522

Contracts enforceable—fatal indefiniteness. A written contract for the sale of real estate is not specifically enforceable when it is silent as to (1) the date of final settlement, (2) when possession is to be given, and (3) what kind of conveyance shall be executed.

Donovan v Murphy, 203-214; 212 NW 466

Performance of contract—waiver of time element—effect. When the vendee in a contract of sale of real estate waives the time element for the performance of the contract, he, in legal effect, arms the vendor with right to perform within a reasonable time, and to enforce specific performance if vendee then refuses to perform.

Andrew v Miller, 216-1378; 250 NW 711

Contract procured by misrepresentation. Where purchaser of grain elevator falsely represented to vendor that another person would furnish necessary financial assistance to perform the contract, and vendor relied thereon, held, purchaser was not entitled to specific performance of the contract.

Dunkelbarger v Brasted, (NOR); 212 NW 676

Contract of sale in lease. An option reserved in an ordinary lease of real estate for the purchase of the described property by the lessee at a fixed price, and on specified time and methods of payment (among which was an agreement that the rent paid should be credited on the purchase price), is specifically enforceable, even tho no provision is embodied therein as to (1) formal possession, or (2) title, or (3) conveyance, and even tho the parties thereto unnecessarily reserved the right generally to enter into additional agreements relative to such option.

Carter v Bair, 201-788; 208 NW 283

Deed to trustees—grantor's subsequent land contract invalid. An absolute warranty deed subject only to a trust created therein precludes the grantor from later contracting to sell the property to another and will support an action to quiet title in the trustees.

Beemer v Challas, 224-411; 276 NW 60

Delay in rescinding induced by promises of other party. When the purchaser's delay in rescinding a contract to buy real estate was induced by promises and representations of the vendor, there could be no complaint because rescission was not made within a reasonable time.

Trammel v Kemler, 226-918; 285 NW 196

Failure of vendor to redeem—recovery of payments by vendee. An action to recover payments made on the purchase of a lot was not barred by a quitclaim deed given by the purchaser to one who had bought the land at a foreclosure sale, when it was given for the purpose of transferring possession during the period of redemption and in order to reduce the loss to the purchaser, after the vendor had failed to obtain a release of the lot from a mortgage and had no intention of redeeming after the mortgage was foreclosed.

Trammel v Kemler, 226-918; 285 NW 196

Foreclosure. A contract for the purchase of real estate may be foreclosed upon breach of the contract by vendee.

Montgomery v Beller, 207-278; 222 NW 846

Foreclosure for installments. A vendor of real estate in foreclosure of the contract is not entitled to judgment and special execution except for installments due and unpaid, when the decree is rendered, (the contract containing no acceleration clause) but is entitled to have the court retain jurisdiction of the proceeding in order to protect him by the application of any surplus to future maturing installments.

Witmer v Fitzgerald, 209-997; 229 NW 239

Liability of assignee. One who receives, from a purchaser, an assignment of a contract for a deed, which assignment binds the said assignee to perform fully the assigned contract, must be deemed to have ratified the terms of said assignment and be bound thereby when, henceforth, he treats said land as his land and said contract as his obligation, even tho the assignee did not sign said instrument of assignment.

Gables v Kleaveland, 220-1280; 263 NW 339

Nonformal tender of deed. A contract of sale of lands may be foreclosed without any prior formal tender of a deed when the contract calls for a deed only when the purchase price is paid; and especially is the absence of such tender inconsequential when tender of deed is made in the pleadings.

Bortz v Wright, 206-698; 214 NW 552

Nontender of abstract and deed. In an action against a defaulting vendee to foreclose a contract of sale of real estate for matured and unpaid installments, no tender of abstract and deed is necessary as a condition precedent to maintaining the action when the right to said abstract and deed has not yet matured under the contract.

Dimon v Wright, 206-693; 214 NW 673

Payments induced by vendor not waiver of vendor's default. Payments made by the purchaser of land, after the vendor had defaulted by failing to obtain a release of a mortgage on the land, did not waive the default when such continued payments were induced by the

vendor's promises to perform and when the purchaser was not bound to require timely performance by the vendor.

Trammel v Kemler, 226-918; 285 NW 196

Power of city to acquire property—burden of proof. A municipality as defendant in an action for specific performance of its alleged contract for the purchase of land, has the burden to establish its plea that its attempted purchase of said land was for a purpose not authorized by law. Record reviewed and held said burden had not been met.

Golf View Co. v Sioux City, 222-433; 269 NW 451

Remedies of purchaser—ceasing payments when mortgage release not obtained by vendor. Where the vendor of property agreed to use payments received to obtain the release of a mortgage on the property, and the amount unpaid was less than the amount of the mortgage, the failure to obtain the release was a default by the vendor, and even tho the vendor claimed that in obtaining the release time was not of the essence, the purchaser was entitled to cease payments, since he was not protected as he would have been had the amount unpaid on the price been greater than the amount of the mortgage.

Trammel v Kemler, 226-918; 285 NW 196

Real estate and personalty distinguished. Principle reaffirmed that upon the sale of land through the medium of a contract for a deed, the purchaser acquires "land" while the vendor acquires "personal property".

Wood v Schwartz, 212-462; 236 NW 491

Recovery of payment by defaulting purchaser. A defaulting purchaser may not recover payment made by him to the nondefaulting vendor.

Dimon v Wright, 206-693; 214 NW 673

Rents—agreed lien on—transfers—validity. A contract for a deed, tho specifically providing that the vendor shall have a first lien on the accruing rents of the premises for all sums payable under the contract, will be construed as creating no lien on such rents until from and after the filing of a petition for foreclosure and for the appointment of a receiver for said rents. It follows that all good-faith transfers by the purchaser and prior to the attaching of said lien—not extending, of course, beyond the period of redemption—are valid and, consequently, place such transferred rents beyond the reach of the vendor.

Junkin v McClain, 221-1084; 265 NW 362

Requirements for relief. Specific performance of a contract to sell real estate is not a matter of absolute right, but is an equitable remedy which may be granted by the court in the exercise of sound discretion to one who has performed all the conditions of the contract, or is ready, willing, and able to perform, and has tendered performance and kept the tender good pending the litigation.

First Tr. JSL Bk. v Resh, 226-780; 285 NW 192

Rights and liabilities—destruction of buildings—justifiable refusal to perform. A purchaser of real estate may validly decline to specifically perform his contract of purchase, even tho he be deemed the holder of the equitable title, (1) when the buildings on the land were totally destroyed prior to the contract day for performance, and (2) when the vendor had contracted to deliver such buildings to the purchaser "in as good condition as they are at the date of the contract."

Rhomberg v Zapf, 201-928; 208 NW 276; 46 ALR 1124

Specific performance—in personam (?) or in rem (?). Principle recognized that an action for the specific performance of a contract, for the sale of real estate, is an action in personam—at least when service of notice of the action is made on the defendant in this state.

Dunlop v Bank, 222-887; 270 NW 362

Specific performance of real estate sale contract. In an action to recover rent a counterclaim for specific performance of a contract to sell the property was properly prepared when it contained allegations that the purchaser was at that time, and at all times had been, ready, willing, and able to perform, and had made a tender of performance which was refused, and a copy of the letter constituting such tender was attached to the counterclaim.

First Tr. JSL Bank v Resh, 226-780; 285 NW 192

Specific performance—real estate purchase contract. One who had agreed to obtain a loan to be used for the purchase of land did not make a sufficient showing that he was ready, willing, and able to perform the alleged contract to buy the land so as to entitle him to specific performance when it was never shown that he had the purchase money, when an attempted loan of the money was never completed, when there was no application on file for the loan at the time of trial, and when it was not shown that the loan would have been granted had the application been made.

First Tr. JSL Bk. v Resh, 226-780; 285 NW 192

Specific performance — good intention not sufficient. Good intention alone is not the equivalent of the ability to perform, which is necessary to entitle the purchaser to specific performance of a contract to convey real estate.

First Tr. JSL Bk. v Resh, 226-780; 285 NW 192

Damages in lieu of specific performance. A party who has failed to establish his right to specific performance may not complain that the court of equity refused to allow damages in lieu of specific performance and relegated him to an action at law as to such damages.

Dunlop v Wever, 209-590; 228 NW 562

Tender of abstract. The plea, in an action to foreclose a land sale contract, that the vendor has made no tender of abstract of title will be disregarded (the necessity for such tender being assumed) when the record shows a possibly defective tender at the proper time, and when the vendor tendered full performance in his pleadings.

Bortz v Wright, 206-698; 214 NW 552

Tender of conveyance. Tender of a deed is not a condition precedent to the beginning of an equitable action by a vendor to enforce a contract for the sale of land. A tender in the petition is all-sufficient.

Vanderwilt v Broerman, 201-1107; 206 NW 959

Tender of performance. A vendor of real estate is under no obligation, prior to instituting an action to foreclose the contract, to tender performance, in order to place the vendee in default, when said vendee is already in defiant default.

Bortz v Wright, 206-698; 214 NW 552

Title—sufficiency of showing. A vendor in an action to foreclose a land sale contract need not do more than show prima facie title in himself. (See under §12372.)

Bortz v Wright, 206-698; 214 NW 552

Unjust enrichment—vendor not conveying property but retaining payments. Where the purchaser of land was at no time delinquent in his payments or other conditions to be performed on his part, it would be unjust and inequitable to allow the vendor to retain the payments when, through his own fault, he failed to perform his part of the contract.

Trammel v Kemler, 226-918; 285 NW 196

Vendor's agreement with mortgagee adjudicated in foreclosure—effect on purchaser. When the mortgagor of a tract of land had an agreement with the mortgagee to release a lot, which was part of the tract, after the buyer of that lot had paid a certain part of the price, and in an action to foreclose the mortgage, the agreement was adjudicated adversely to the mortgagor who had not obtained the release, in a later action to recover payments the buyer could not be affected by such agreement to which he was not a party.

Trammel v Kemler, 226-918; 285 NW 196

When not necessary to plead. The purchaser of real estate when defendant in an action for the specific performance of the contract need not plead for a recovery of the purchase money paid by him.

Benedict v Nielsen, 204-1373; 215 NW 658

12383 Vendee deemed mortgagor.

Action to cancel trust deed. An action to cancel a trust deed (which in legal effect is a mortgage), and the lien thereof, and to quiet plaintiff's title to the land is strictly local, and is properly brought in the county in which the land is situated, even tho plaintiff also prays for the cancellation of the promissory notes—a proceeding which would be transitory if separately brought.

Eckhardt v Trust Co., 218-983; 249 NW 244; 252 NW 373

Contract for deed as mortgage. Contract for deed, and attendant circumstances, and interpretation placed on such contract by the parties, reviewed, and held actually to convey the equitable title to one party and to leave the legal title in the other as security for the purchase price.

First Tr. JSL Bk. v Galagan, 220-173; 261 NW 920

Enforcement of vendee's lien — burden of proof. A vendee who rescinds, and seeks to establish a lien on the land for his proper advancements, need not show that a subsequent titleholder had knowledge of his (vendee's) rights. The subsequent titleholder must show his want of knowledge.

Larson v Metcalf, 201-1208; 207 NW 382; 45 ALR 344

Remedies of purchaser. A purchaser of land who rescinds, and obtains against the vendor judgment at law for the amount advanced as purchase price and for other proper expenditures, does not thereby waive his right to bring an action in equity to have the judgment declared a lien on the land.

Larson v Metcalf, 201-1208; 207 NW 382; 45 ALR 344

Title and status of parties. Principles reaffirmed that under a contract for a deed:

1. The purchaser acquires the full equitable title to the land, while the vendor continues to hold the legal title as security for the performance of the contract, and
2. That, for the purpose of foreclosure, the purchaser will be deemed a mortgagor and the vendor a mortgagee.

Junkin v McClain, 221-1084; 265 NW 362

Vendee's right to lien. A vendee of land is entitled in equity, on proper rescission by him of the contract of purchase, to a lien on the land (1) for the amount of the purchase price advanced by him, (2) for the reasonable value of all proper improvements made on the land by him, and (3) for any other proper expenditure suffered by him and growing out

of the contract—a right enforceable against all parties who take rights in the land with knowledge, actual or constructive, of vendee's rights.

Larson v Metcalf, 201-1208; 207 NW 382; 45 ALR 344

Warranty deed as mortgage—rule of evidence. On the issue whether a warranty deed was in fact a mortgage, the pleader must prove, by clear and satisfactory evidence (1) that the consideration for said deed was a definite and existing debt, and (2) that said debt was not extinguished by the deed. Evidence held signally insufficient to satisfy said rule.

Clark v Chapman, 213-737; 239 NW 797

RENTALS AND RECEIVERSHIP

12383.1 Pledge of rents—priority.

Receivers in mortgage foreclosures generally. See under §12372 (VII)

Rents and profits, mortgage foreclosures. See under §12372 (III)

Agreed lien on rents—transfers—validity. A contract for a deed, tho specifically providing that the vendor shall have a first lien on the accruing rents of the premises for all sums payable under the contract, will be construed as creating no lien on such rents until from and after the filing of a petition for foreclosure and for the appointment of a receiver for said rents. It follows that all good-faith transfers by the purchaser and prior to the attaching of said lien—not extending, of course, beyond the period of redemption—are valid and, consequently, place such transferred rents beyond the reach of the vendor.

Junkin v McClain, 221-1084; 265 NW 362

Holding under prior statute. When land is subject to several mortgages, each of which pledges the rents and profits to the payment of the debt secured and provides for a receiver, the superior right to said rents and profits vests in the mortgagee who first files his petition in foreclosure and first prays for a receiver.

First Tr. JSL Bk. v Smith, 219-658; 259 NW 192

Naked pledge of rents—finality of matured and perfected lien. A second mortgagee who, under a naked pledge of rents, fully matures a chattel mortgage lien on existing rents and a right to future-accruing rents, by first commencing foreclosure and praying for a receiver, even tho the first mortgagee is not made a party defendant, is not affected by the later enacted statute which reverses the order of priority under such pledges.

Reason: Said statute is specifically made nonapplicable to pending litigation.

First JSL Bank v Armstrong, 220-416; 262 NW 815

Receiver for rents which have been assigned. A receiver for the rents and profits which may accrue during the redemption period on mortgaged premises will not be appointed under a mortgage which simply pledges the possession during said period, when it is made to appear that the rents for said period have been contracted for and in good faith assigned prior to the commencement of foreclosure proceedings.

Keokuk Co. v Campbell, 205-414; 215 NW 960

Second mortgagees—nonestoppel to perfect pledge of rents. The fact that a second mortgage provides, following the description of the mortgaged lands, that it is "subject to" a described first mortgage does not estop said second mortgagee (1) from availing himself of that part of his mortgage which contains a naked pledge of the rents, (2) from first perfecting and maturing, by proper foreclosure proceedings, his potential rights under said pledge, and (3) from thereby acquiring a right in and to said rents superior to the potential rights of the first mortgagee under a like pledge, in his mortgage, of said rents.

First JSL Bank v Armstrong, 220-416; 262 NW 815

Vested rights—right to rents in mortgage foreclosure. The statutory provision, which provides, in substance, that a pledge in a mortgage of the rents of the land shall carry the same priority of right over said rents as the mortgage carries over the land itself, cannot constitutionally apply to a mortgagee who, prior to the enactment of the statute, had fully acquired priority of right to the rents under the law then prevailing, to wit, the law which granted priority to the mortgagee who first filed petition for foreclosure and first prayed for a receiver.

First Tr. JSL Bank v Smith, 219-658; 259 NW 192

Chattel clause in realty mortgage—priority over subsequent assignee of rents and profits. A clause in realty mortgage duly recorded and indexed, providing that mortgagor conveyed, in addition to realty, "also all the rents, issues, uses, profits and income therefrom, and all the crops raised thereon from the date of this agreement until the terms of this instrument are complied with and fulfilled", created a valid chattel mortgage, effective from date of execution of the mortgage and not from date of filing the foreclosure petition in which appointment of receiver is asked, and subsequent assignee of property, described in instrument, took subject to lien provided in such chattel mortgage clause.

Bankers Life v Garlock, 227-1335; 291 NW 536

Landlord mortgagor's assignment of lease—no effect on chattel clause of realty mortgage. A lien on rents and profits created by chattel mortgage clause in realty mortgage duly re-

corded and indexed was not invalid as to mortgagor's share of crops produced under 2-year lease, because such crops did not belong to mortgagor at time they came into existence, and, the landlord having assigned the lease, the subsequent assignee of property described in mortgage would take subject to the lien provided therein.

Bankers Life v Garlock, 227-1335; 291 NW 536

Chattel mortgage clause—effect on landlord's agreement to rent to third party. Where a valid chattel mortgage clause is contained in a realty mortgage duly recorded and indexed, providing that mortgagor conveyed, in addition to realty, all the rents, issues, uses, profits and income therefrom and all crops raised thereon from date of instrument until payment of debt, an agreement by mortgagor to rent land to a third party was subject to such chattel mortgage clause, as against contention that agreement to rent was not the same as rents, issues, income, profit, or crops.

Bankers Life v Garlock, 227-1335; 291 NW 536

12383.2 Preference in receivership—application of rents.

Atty. Gen. Opinion. See AG Op Jan. 24, '40

Pledge of rents—what constitutes. A provision in a mortgage to the effect that, in case of foreclosure, a receiver may be appointed to collect the rents and to apply the same to the payment of taxes and principal and interest constitutes a pledge of the rents.

Wilson v Tolles, 210-1218; 229 NW 724

Rents and profits not garnishable. A motion to dismiss a garnishment against a receiver should have been sustained on the ground that the receiver was not subject to garnishment for rents and profits when the record showed that the receiver acted under court order in renting property for the benefit of holders of notes against the company in receivership.

Sioux Falls Assn. v Henry Field Co., 226-874; 285 NW 155

CHAPTER 526

SATISFACTION OF MORTGAGES

12384 Dual methods.

Assignment to titleholder — irrevocable merger. The legal titleholder of real estate who acquires or pays off a first and a second mortgage on the land, and records releases thereof with the deliberate intent thereby to show a complete satisfaction of said liens, and does so with the knowledge (which he has negligently forgotten) that there was a third mortgage outstanding on the land, will not, in the foreclosure of said third mortgage, be subrogated to the rights of said former first and second mortgagees; especially is this true when said titleholder had sold said third mortgage to the foreclosing plaintiff under the implied representation that it was a first mortgage.

Iowa Convention v Howell, 218-1143; 254 NW 848

Change in name of mortgagee—presumption. A recital in a formal release of a mortgage, to the effect that the mortgagee has by proper amendment to its articles of incorporation, changed its name to the name indicated by the one executing the release, will be deemed presumptively true.

Vanderwilt v Broerman, 201-1107; 206 NW 959

Conditional sale contract not mortgage. An ordinary conditional sale contract — one in which the seller retains title until the purchase price is fully paid—is not a "mortgage" within the meaning of this and the following section.

Stull v Davidson, 211-239; 233 NW 114

Insurance obtained by mortgagee—assignment to insurer when policy voided by insured—mortgage not extinguished. When an insurance company, in addition to insuring property mortgaged to a certain mortgagee, agreed that if any property owner should by any act void the insurance as to himself, the insurance company would purchase from the mortgagee the note and mortgage on the property and obtain an assignment of the mortgagee's rights against the property owner, the company's payment of the amount of a note and mortgage to the mortgagee to obtain an assignment according to the agreement did not extinguish the note and mortgage.

Calendro v Ins. Co., 227-829; 289 NW 485

Marginal release—presumption. A marginal release of a mortgage, executed by the agent of the holder, constitutes prima facie evidence of payment and discharge of both the note and the mortgage securing the note.

Larson v Church, 213-930; 239 NW 921

Mortgage—purchase by wife who joined in—effect. A wife who joins with her husband in a mortgage on the husband's land, but who assumes no obligation, contractual or otherwise, to pay subsequently accruing taxes on the land, may, after the land has gone to tax deed to a stranger without collusion with her

and while she was not in possession, purchase the land of the tax deed holder and acquire his title, viz, a fee simple indefeasible title—a title free from the lien of said mortgage.

Wood v Schwartz, 212-462; 236 NW 491

Power of corporate president. Authority granted to the president of a corporation in articles of incorporation to "release and satisfy" mortgages, embraces the power in the president to subordinate a mortgage owned by the corporation to another mortgage not owned by it, when such subordination is to the financial advantage of the corporation.

Homesteaders Life v Salinger, 212-251; 235 NW 485

Satisfaction under mistake of law—effect. A mortgagee who, without being mistaken as to any matter of fact, or the victim of any fraud, accepts from the mortgagor a conveyance of the mortgaged land in full satisfaction of the mortgaged debt, and thereupon releases and satisfies his mortgage of record,—and so acts solely on the mistaken belief that a discharge of the mortgagor in bankruptcy ipso facto worked a cancellation of a junior judgment against the mortgagor and the lien of said judgment against the mortgaged land,—may not, after discovering his mistake as to the legal effect of said discharge in bankruptcy, successfully ask a court of equity to re-establish his canceled mortgage.

Connecticut Ins. v Endorf, 220-1301; 263 NW 284

Release and satisfaction — assumed purchase by agent — effect. Where a note and mortgage on land were executed by a principal to his agent and sold by the agent in order to acquire funds with which to discharge a pre-existing note and mortgage on the same land, and where the agent embezzled the funds so acquired, the subsequent act of the agent in assuming to purchase said pre-existing note and mortgage by taking from the holder (who acted in good faith) both an assignment in blank, and also a satisfaction piece, cannot be deemed a satisfaction and discharge of said pre-existing note and mortgage (1) when no satisfaction was, in fact, intended, (2) when the agent wholly discarded the satisfaction piece and consummated the assumed purchase by means of funds belonging solely to an innocent and good faith re-transferee, and by forthwith delivering said pre-existing note and mortgage to said re-transferee together with said blank assignment properly made out in the latter's favor; and it is immaterial that the re-transferee took said note and mortgage when they were overdue.

Mandel v Siverly, 213-109; 238 NW 596

Release of mortgage without court authorization. A guardian has no legal right, except under court authorization, to release, without payment, a court-authorized, real estate mortgage executed to, and held by, him as such guardian; and subsequent purchasers of the land are chargeable with knowledge of the statute invalidating such release. (§12773, C., '31.)

Randell v Fellers, 218-1005; 252 NW 787

Subordination of first mortgage by release. A first mortgagee of record who, on the maturity of his mortgage, renews the same by accepting a new note and mortgage, and thereupon unconditionally enters of record a release of the original mortgage, thereby subordinates his new mortgage to an existing duly recorded second mortgage of which he had no actual knowledge—it appearing that the promissory notes secured by the latter mortgage were acquired by the holders thereof (1) for value, (2) after the aforesaid release was entered, (3) before said notes were due, (4) without notice of any prior equity, and (5) in the bona fide belief that said latter mortgage was a first lien.

Long v Taggart, 214-941; 243 NW 200

12387 Entry of foreclosure.

Atty. Gen. Opinion. See '32 AG Op 222

CHAPTER 527

FORFEITURE OF REAL ESTATE CONTRACTS

12389 Conditions prescribed.

Discussion. See 21 ILR 158—Caveat emptor

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I SCOPE OF SECTION IN GENERAL

Contract—foreclosure. A contract for the purchase of real estate may be foreclosed upon breach of the contract by vendee.

Montgomery v Beller, 207-278; 222 NW 846

Default on payments — nonright to forfeit contract. A contract for a deed is not legally forfeitable on notice by the vendor on the ground that the purchaser is in default on his contract payments, when, at the time of the attempted forfeiture, the purchaser, consequent on the vendor's fraudulent representations, has a valid unpaid claim for damages against the vendor in excess of the amount of said defaulted payments.

Holman v Wahner, 221-1318; 268 NW 168

Defaulting vendor. A vendor of land may not forfeit the contract at a time when he himself is in default.

Keifer v Dreier, 200-798; 205 NW 472

Effect on surety. The surety on a promissory note given as part of the contract price of land, ceases, as a matter of law, to be liable thereon to the original payee-vendor whenever the latter legally forfeits the contract.

Smith v Tullis, 219-712; 259 NW 202

Justifiable forfeiture. Record held legally to justify the forfeiture of contract of purchase of real estate.

Darragh v Knolk, 218-686; 254 NW 22

Nonright of defaulting purchaser to recover amount paid. Purchaser in default, when vendor, failing to apply proper credits on price of realty, serves notice of forfeiture, cannot recover amount paid.

Martin v Harvey, (NOR); 245 NW 432

II VENDOR AND PURCHASER GENERALLY

(a) REQUISITES AND VALIDITY OF CONTRACT

Absence of provision for forfeiture—effect. A contract for a deed is not legally forfeitable on notice when the contract makes no provision for forfeiture, and fails to provide that time is the essence of the contract.

Holman v Wahner, 221-1318; 268 NW 168

Exchange of property — consideration. Instruments duly executed in exchange of property cannot be impeached without convincing proof of fraud, and values of exchanged properties are liberally regarded in determining adequacy of consideration.

Ragan v Lehman, (NOR); 216 NW 717

Exchange of property—fraudulent representations — unavailing inspection — effect. The plea that the party complaining of false and fraudulent representations in an exchange of land had inspected the land prior to accepting it, and had full opportunity to learn all relevant facts, must necessarily fall when it is shown that an inspection at said time would not reveal the falsity of the particular representations relied on.

Baumhover v Gerken, 200-551; 203 NW 15

Exchange of property—fraud—nonwaiver by exercising acts of ownership. Fraud in an exchange of properties is not waived by the victim of the fraud by exercising acts of ownership over the land received, at a time when he had not fully discovered the fraud practiced on him, and at a time when the other party was asserting that the contract was not fraudulent, and that the deal, if not satisfactory, would be mutually rescinded.

Baumhover v Gerken, 200-551; 203 NW 15

Mutuality—evidence. Evidence relative to an exchange of lands reviewed, and held to show that there was no meeting of the minds, and therefore no contract.

Cloud v Burnett, 201-733; 206 NW 283

Nonforfeitable contracts. A contract of sale of real estate located in this state, containing no provision for the forfeiture of the contract, and not stipulating that time is the essence of the contract, is not subject to statutory forfeiture.

Lake v Bernstein, 215-777; 246 NW 790; 102 ALR 846

Parol contract—nature of proof. A parol contract for the purchase of real estate may not be deemed established unless the sustaining testimony is clear, definite, unequivocal, satisfactory, and convincing, nor unless the acts which are claimed to have been done under such contract are clearly referable to such contract. Evidence held insufficient to meet this rule of law.

Lane v Bank, 209-437; 227 NW 911

Proposal and acceptance—belated and unallowable withdrawal. An offerer may not withdraw his offer after having received an acceptance thereof, even tho the offerer imposed as a condition that the deal should be closed "at once", it appearing that the parties manifestly intended that "at once" meant a reasonable time, in view of the circumstances.

Harris v Bills, 203-1034; 213 NW 929

Proposal and acceptance—imposing implied law condition. An offer by mail of certain lands and of a certain sum of money in exchange for certain corporate stock, followed by a timely acceptance by mail if the land was free of incumbrance, constitutes a binding contract, as the condition imposed exactly what the law would impose; and it is quite immaterial that, in the subsequent dealings between the parties, the party ultimately denying the existence of a contract injected conditions to which the other party did not object.

Harris v Bills, 203-1034; 213 NW 929

II VENDOR AND PURCHASER GENERALLY—continued

(a) REQUISITES AND VALIDITY OF CONTRACT—concluded

Requisites of contract — indispensable elements. An obligation on the part of the owner of real estate to sell, and of another party to buy, are all-essential elements of an executory contract of purchase of said land. Writing reviewed and held to constitute a mere option to buy which became a nullity on failure of optionee to exercise the option.

Burmeister v Council Bluffs Co., 222-66; 268 NW 188

Statute of frauds—inapplicability—part performance. An oral contract for the sale of land is not within the statute of frauds when the owner of the land executes and delivers to the buyer a deed of conveyance even tho said deed is blank as to grantee.

Gilbert v Plowman, 218-1345; 256 NW 746

(b) CONSTRUCTION AND OPERATION OF CONTRACT

Discussion. See 3 ILB 168—Conversion in option contracts

Agreed lien on rents—transfers—validity. A contract for a deed, tho specifically providing that the vendor shall have a first lien on the accruing rents of the premises for all sums payable under the contract, will be construed as creating no lien on such rents until from and after the filing of a petition for foreclosure and for the appointment of a receiver for said rents. It follows that all good-faith transfers by the purchaser and prior to the attaching of said lien—not extending, of course, beyond the period of redemption—are valid and, consequently, place such transferred rents beyond the reach of the vendor.

Junkin v McClain, 221-1084; 265 NW 362

Assumption of mortgage—scope and effect. A purchaser of land who contracts, both in his contract of purchase and in the deed of conveyance accepted by him, to assume and agree to pay an existing mortgage on the land, thereby becomes the principal debtor on such obligation and as to all prior parties obligated thereon.

Grimes v Kelloway, 204-1220; 216 NW 953

Change in form of debt guaranteed—scope of guaranty. A vendor who, upon assigning his contract for the sale of land, guarantees the payment of the amount due on the contract, must be held to guarantee the payment of a mortgage for said amount subsequently accepted by the assignee, when the converting of the amount due on the contract into a mortgage was of the very essence of the contract of sale.

Buser v Land Co., 211-659; 234 NW 241

Construction against party using words. Principle reaffirmed that, speaking generally, a contract will be construed most strongly against the author of the words employed in the contract.

Buser v Land Co., 211-659; 234 NW 241

Contract for deed as mortgage. Contract for deed, and attendant circumstances, and interpretation placed on such contract by the parties, reviewed, and held actually to convey the equitable title to one party and to leave the legal title in the other as security for the purchase price.

First Tr. Bank v Galagan, 220-173; 261 NW 920

Contract of sale in lease. An option reserved in an ordinary lease of real estate for the purchase of the described property by the lessee at a fixed price, and on specified time and methods of payment (among which was an agreement that the rent paid should be credited on the purchase price), is specifically enforceable, even tho no provision is embodied therein as to (1) formal possession, or (2) title, or (3) conveyance, and even tho the parties thereto unnecessarily reserved the right generally to enter into additional agreements relative to such option.

Carter v Bair, 201-788; 208 NW 283

Forfeitable contracts. A time-of-the-essence contract of purchase which provides that it shall be "null and void" on failure to perform its conditions is forfeitable under the statute, no express provision for forfeiture being necessary.

Westerman v Raid, 203-1270; 212 NW 134

Forfeiture of payments—effect. A provision in a contract of sale of land that, in case of default by the purchaser, the initial payment shall be retained by the vendor as liquidated damages, is no impediment to the foreclosure of the contract.

Ettinger v Malcolm, 208-311; 223 NW 247

Forfeiture notwithstanding supplemental contracts. That part of a land sale contract which provides for the forfeiture of the contract, in case of nonpayment of stipulated sums applies to supplemental contracts (1) which simply extend the time of payments, or (2) which simply make a new division and new time of payment of former agreed payments, and in addition specifically provide that the provisions of the original contract shall not be deemed otherwise changed.

Schwab v Roberts, 220-958; 263 NW 19

"Fractional" forty—scope. A contract to convey the "fractional NW¼ of the SE¼" embraces a tract carved therefrom for highway purposes and later redeeded by the county to the vendor.

Pickett v Comstock, 209-968; 229 NW 249

Future (?) or past (?) damages. A bond of indemnity conditioned to hold the obligee

harmless from any damages which he may suffer because of failure of title contemplates future damage only.

Duke v Tyler, 209-1345; 230 NW 319

Merger of contract and deed. One who acquires a warranty deed to land, and also an assignment of the vendor's interest in an existing bond-for-a-deed contract covering the same land, does not thereby merge the said contract into the deed, and may proceed to foreclose said contract, even tho he has also acquired, for the purpose of security, an imperfect assignment of the purchaser's interest in said contract.

Harrington v Feddersen, 208-564; 226 NW 110; 66 ALR 59

Merger of general into specific. A contract of sale, couched in general terms, and contemplating and providing for a definite and specific contract at a later date, is necessarily supplanted by the execution and delivery of such later contract.

Westerman v Raid, 203-1270; 212 NW 134

Merging unpaid payments into mortgage. Provision in contract of purchase reviewed, and held simply to contemplate the merging of unpaid payments into a mortgage, and not to authorize the vendor to execute a mortgage on the property sold.

Ely Bank v Graham, 201-840; 208 NW 312

Nonmutuality. Record reviewed, and held that a contract was not nonmutual because of the existence of a mortgage on the land.

Vanderwilt v Broerman, 201-1107; 206 NW 959

Noninvalidating uncertainty. An agreement by a vendor (especially when prepared by himself) to accept, under named conditions, a second mortgage for the balance due him, in order to enable the purchaser to raise building funds by a first mortgage in an unnamed amount, will not be construed as void for uncertainty in the amount of the first mortgage when the contract as a whole and the attending circumstances fairly and reasonably indicate the approximate amount contemplated by the parties.

Buser v Land Co., 211-659; 234 NW 241

Part of single ownership conveyed—implied easement—clear intent of parties necessary. Principle reaffirmed that, where real estate has been used under single ownership and as a unity, one part of it may be burdened with a use which is largely or entirely for the benefit of another part of it, and when divided by devise, descent or sale, one part may be burdened or benefited by an implied reservation or granting of an easement right if it is apparent and necessary, but such implied grant or reservation must be clearly within the intention of the parties.

Dyer v Knowles, 227-1038; 289 NW 911

Boundary line—grantor's alleged use and occupancy of buildings denied. In a special action to determine the true location of an east and west half-section line, where the grantor, owning the entire west half of the section, sells the northwest quarter, thinking his barn and corncrib were situated south of the half-section line, whereas a survey showed the buildings to be situated north of the half-section line, grantor's claim of a reservation of the use and occupancy of the barn and corncrib and ground appurtenant thereto under an implied easement on the theory that the barn and corncrib were necessary to the use and enjoyment of the land retained by grantor, could not be sustained, since the use of such buildings was just as essential, to the part sold, in proportion to the acreage, as it was to the part retained.

Dyer v Knowles, 227-1038; 289 NW 911

Oral sale with part payment. An oral agreement to sell land, accompanied at the time by part payment, constitutes a "sale," within the terms of a lease which provides that, in case of a sale of the premises, the tenancy may be terminated.

Luse v Elliott, 204-378; 213 NW 410

Purchase from nontitleholder — equitable ownership. A contract purchaser of real estate becomes the equitable owner, and his actual possession is notice to the world of his rights, even tho he purchases from a person who has no title whatever, but who assumed equitable ownership, and who later had such assumption ratified and confirmed in himself by a contract of purchase and by a deed of conveyance from the legal titleholder.

Ely Bank v Graham, 201-840; 208 NW 312

Purchase price—who entitled to payment. The act of successive owners of land in conveying it subject to a prior and outstanding contract to sell, executed by a former grantor-owner, carries the right to each grantee to receive the amount due on said outstanding contract, even tho said contract was not formally delivered to him, in preference to one who bases his right on an assignment of said contract by one who had parted with all interest in the land.

Jansen v Clark, 201-333; 207 NW 338

Real estate and personalty distinguished. Principle reaffirmed that, upon the sale of land through the medium of a contract for a deed, the purchaser acquires "land" while the vendor acquires "personal property".

Wood v Schwartz, 212-462; 236 NW 491

Rights to possession and rents. A grantee of land who takes possession under his deed at a time when the purchaser under an outstanding, unforfeited bond-for-a-deed contract of sale of the land is entitled to possession, cannot be deemed a "mortgagee in possession,"

II VENDOR AND PURCHASER GENERALLY—continued

(b) CONSTRUCTION AND OPERATION OF CONTRACT—concluded

and must account to said purchaser or to his grantees for rents.

Harrington v Feddersen, 208-564; 226 NW 110; 660 ALR 59

Right to lien—vendee's contract to keep in repair. An executory contract by a vendee of premises that he will keep the premises in reasonably good repair cannot be construed as authorizing the vendee to install entirely new bathroom equipment, and to bind the vendor's interest therefor.

Darragh v Knolk, 218-686; 254 NW 22

Time of performance—relative rights of parties. The vendor in a contract specifically requiring the vendee to pay first before getting the deed need only get himself in readiness to perform, and need make no tender until payment is made or offered by vendee, and the vendor is not in default until this is done.

Foft v Page, 215-387; 245 NW 312

Title and status of parties. Principles reaffirmed that under a contract for a deed:

1. The purchaser acquires the full equitable title to the land, while the vendor continues to hold the legal title as security for the performance of the contract, and

2. That, for the purpose of foreclosure, the purchaser will be deemed a mortgagor and the vendor a mortgagee.

Junkin v McClain, 221-1084; 265 NW 362

(c) MODIFICATION OR RESCISSION OF CONTRACT

Amendments—conforming pleading to proof. One who pleads fraud in the inception of a contract and prays for rescission on that ground may, at any proper time, and in order to conform the pleadings to the proof, amend by pleading that no contract ever existed, because of the failure of the minds of the parties to meet on the terms of the contract.

Cloud v Burnett, 201-733; 206 NW 283

Breach by vendor—effect. A purchaser of real estate may not rescind for breach of contract by the vendor unless the vendor has abandoned the contract, or his acts and conduct are such as to show that he intends to be no longer bound by the contract.

Shupe v Thede, 205-1019; 218 NW 611

Essential requirements. A vendee may not rescind a contract of sale of land and recover the payments made when he not only fails to tender performance, but is unable to perform, and makes no effort to restore the status quo.

Messenbrink v Bliesman, 204-223; 215 NW 232

Forfeiture (?) or rescission (?). A contract which provides for the forfeiture of the entire amount paid by a purchaser on a land deal will be enforced—even tho forfeitures are in disfavor in the law—when the contract and the attending facts and circumstances show that a forfeiture was intended, and not a rescission of the original contract of purchase.

Converse v Elliott, 200-1023; 205 NW 867

Forfeitable contracts. A time-of-the-essence contract of purchase which provides that it shall be "null and void" on failure to perform its conditions is forfeitable under the statute (§12389 et seq., C., '24), no express provision for forfeiture being necessary.

Westerman v Raid, 203-1270; 212 NW 134

Forfeiture—tenable and untenable grounds. A forfeiture of a contract of sale on one valid ground is effective even if the vendor assigns other untenable grounds.

Westerman v Raid, 203-1270; 212 NW 134

Forfeiture by assignee of contract. The assignee of a contract of sale of real estate has the same right to forfeit the contract as the assignor had.

Moore v Elliott, 213-374; 239 NW 32

Innocent false representations. False representations, when material and justifiably relied on, furnish ample grounds for an equitable decree of rescission, even tho it be conceded that the representations were innocently made.

Cahail v Langman, 204-1011; 216 NW 765

Intervening liens—protection of vendor. Rescission may be granted notwithstanding the fact that judgments have been rendered in the meantime against the vendee, when the court adequately protects the vendor against harm therefrom.

Dickerson v Morse, 203-480; 212 NW 933

Justifiable refusal. The rescission of an executed contract of purchase of real estate is properly refused when it is made to appear that the prayer for rescission was made for the first time after the purchaser had been in unrestricted possession and control of the land for some three years, with knowledge of the fraud pleaded, or with the means to know of such fraud, and after the land had very materially decreased in value.

Hogan v Ross, 200-519; 205 NW 208

Mental incompetency of purchaser. Evidence reviewed and held insufficient to justify the rescission and cancellation of a contract of purchase of real estate on the ground of the mental incompetency of the purchaser.

Ridenour v Jamison, 218-277; 254 NW 802

Realty exchange — mental incompetency — duty to restore status quo. Where one of the parties to an exchange contract of realty is mentally incompetent, such contract is only voidable, not void, being valid until disaffirmed, and it can only be disaffirmed as a whole, not

in part, and when party seeks to avoid such contract it is necessary to restore, or offer to restore, status quo.

In re Gensicke, (NOR); 237 NW 333

Mutual mistake. Mutual mistake of a vendor and a purchaser of land as to the description thereof, its quantity, location, and title, furnishes ample grounds for an equitable decree of rescission, and it is no answer that the vendor offers the purchaser something else "just as good."

Lorenzen v Langman, 204-1096; 216 NW 768

Mutual rescission by both defaulting parties—recovery of consideration. Mutual default of a vendor and a purchaser in the performance of a contract of purchase is no impediment to a mutual rescission; and the purchase price already advanced may be recovered, in the absence of an agreement to the contrary. Evidence held insufficient to show such mutual rescission.

McLain v Smith, 201-89; 202 NW 239

Novation — evidence — sufficiency. Evidence held ample to establish a novation under a contract for the purchase of real estate.

Montgomery v Beller, 207-278; 222 NW 846

Offer to reconvey at discount—effect. After failure to complete abstracts because of attorney's objections thereto, purchaser's offer to reconvey property to vendor at stated discount below original purchase price held not a rescission of contract.

Gripp v Scherer, (NOR); 212 NW 113

Possession under lease — effect. The fact that a contracting purchaser of land was in possession of the land under a lease with the consent of the vendor, held, under recited facts, not to affect said purchaser's right to rescind the contract of purchase.

Dolliver v Elmer, 220-348; 260 NW 85

Receiver's lease not conclusive of mutual rescission. In vendee's action to cancel a real estate contract and note, a mutual rescission is not established by showing that the receiver in a mortgage foreclosure proceeding against the real estate had leased the premises to vendee, when the lease, by its very terms, was not to become effective unless vendee paid all obligations to vendor.

Fitchner v Walling, 225-8; 279 NW 417

Remedies of purchaser—surrender of possession. A purchaser in possession who attempts to rescind his contract must offer to surrender the premises, and if he has rented the property, must establish the tenant's consent to surrender his possession.

Gutz v Holahan, 209-839; 227 NW 504

Repudiation — effect — rights of parties. Where a vendor and purchaser of real estate mutually agree to an extension of time for the final performance of the contract, the purchaser may not put the vendor in default by a tender and demand during said extension of time. But, nevertheless, the vendor may acquiesce in the act of the purchaser in repudiating the extension agreement, and, within a reasonable time, put himself in a position to fulfill his contract to sell, and make tender and demand accordingly.

Foft v Page, 215-387; 245 NW 312

Rescission and forfeiture contrasted. Principle recognized that there is a broad distinction between the rescission and the forfeiture of a contract.

McLain v Smith, 201-89; 202 NW 239

Rescission by purchaser. Mere shortage in the acreage of land contracted for does not constitute grounds for rescission of the contract.

Golly v College, 204-319; 213 NW 252

Rescission — defaulting plaintiff — equitable relief denied. Plaintiff vendee, after first defaulting under a contract for the sale of real estate, may not in equity, while still in default, rescind the contract because defendant vendor had later allowed a prior mortgage on the real estate to be foreclosed, and, therefore, had no title to deliver if plaintiff fully performed.

Fitchner v Walling, 225-8; 279 NW 417

Rescission—failure to furnish abstract. The failure of the vendor in a contract for the sale of real estate to furnish abstract of title of the kind and within the time required by the contract, necessarily furnishes the nondefaulting purchaser with ground for rescission of the contract.

Hardin v Ins. Co., 222-1283; 271 NW 176

Rescission in entirety. When land is sold in its entirety, the contract, in a proper case, may be rescinded in its entirety.

Dickerson v Morse, 203-480; 212 NW 933

Rescission by vendor in default—not valid. In an action in equity to cancel and avoid an attempted forfeiture of a real estate contract, where it is shown that the vendor did not have clear title to the realty because of a sheriff's certificate against the property for an unpaid judgment, and vendor quitclaims the property and the assignee's wife purchases the tax certificate during the 30-day period for notice of cancellation of said contract, vendor must himself be able to perform his undertaking before declaring default against purchaser.

Sarazin v Kunz, 226-1309; 286 NW 471

Specific performance and rescission—justifiable denial. Antagonistic prayers (1) for the rescission of a contract of exchange of lands,

II VENDOR AND PURCHASER GENERALLY—continued

(c) MODIFICATION OR RESCISSION OF CONTRACT —concluded

and (2) for the specific performance of the contract, are both properly denied when, on the one hand, the proof of the plea of mental incompetency as a basis for rescission simply shows a degree of mental weakness, but not inability to enter into a contract, and when, on the other hand, the pleader for specific performance is confronted with the fact that his land was actually worth substantially less than the land of the other party, that it was attended with an uncertainty in the title, and that the other party was mentally weak.

Dunlop v Wever, 209-590; 228 NW 562

Status quo—market depreciation. The general market depreciation of land after the making of a contract of sale is not a matter that affects the right of rescission.

Dickerson v Morse, 203-480; 212 NW 933

Status quo—rents—permanent improvements. A decree confirmatory of a rescission of a real estate contract of purchase should, inter alia, charge the rescinding purchaser with the fair and reasonable rental of the property during the time he was in possession, and credit said purchaser with the reasonable value of permanent improvements placed on the property.

Kunde v O'Brian, 214-921; 243 NW 594

Technical breach. Principle reaffirmed that a purely technical and nonsubstantial breach of a contract affords no proper grounds for a rescission.

White v Massee, 202-1304; 211 NW 839; 66 ALR 1434

Tender of performance to trustee. The guardian of an incompetent has no authority, even with the approval of the court, to contract for the sale of lands held by the ward as trustee only, yet the purchaser under such a contract may not base a rescission of the contract on such a lack of authority only, and recover payments already made, if, on the death of the trustee-ward, and before full performance of the contract is due, the guardian is also appointed successor-trustee, thereby enabling said purchaser to tender performance to the trustee.

Copple v Morrison, 221-183; 264 NW 113

Title defects cured—nonrestoration of status quo. Where objections to title were cured by legislative act and purchaser exercised full dominion over premises without attempting to restore status quo, held, purchaser was not entitled to rescission of contract of sale.

Gripp v Scherer, (NOR); 212 NW 113

Vendor and purchaser both defaulting—equity directing performance, rescission, and redemption. In a vendee's action to rescind a real estate contract and promissory note, supreme court may invoke broad equitable power to protect both vendor and vendee by allowing vendor, after his mortgage on the real estate had been foreclosed, to negotiate vendee's note to provide funds with which to redeem, on the condition that he apply the proceeds to the mortgage indebtedness and then pay the remaining mortgage indebtedness so as to deliver a clear title to vendee at the time fixed in the contract, or suffer a cancellation of the real estate contract and note.

Fitchner v Walling, 225-8; 279 NW 417

Vendor repossessing himself of land. The act of a vendor in repossessing himself of the land which he has turned over to the purchaser does not necessarily constitute a rescission of the contract of sale.

McLain v Smith, 201-89; 202 NW 239

When indorser primarily liable. A vendor of land who negotiates the purchase-price note received by him, and later either acquiesces in the abandonment of the contract by the purchaser or himself rescinds the contract and conveys the land to a new purchaser, thereby becomes primarily liable on the negotiated note, as between himself and a surety on said note.

First N. Bank v LeBarron, 201-853; 208 NW 364

Wife denying husband's agency but accepting benefits not permitted. A wife, owning a rooming house, sold on the fraudulent representation of her husband, made in response to purchaser's direct question, that the furnace heated the upstairs rooms, will not, in purchaser's action to rescind and recover the down payment, be permitted to deny her husband's authority to represent her and at the same time retain the down payment as fruits of the deceit.

Smith v Miller, 225-241; 280 NW 493

Waiver—payment of interest and taxes. The right to rescind will not be deemed to be waived by the act of the vendee in paying interest on the mortgage when such payment was made by vendee under protest and to protect himself in case he failed to establish grounds for rescission.

Dickerson v Morse, 203-480; 212 NW 933

(d) PERFORMANCE OF CONTRACT GENERALLY

Discussion. See 13 ILR 93—Time of the essence and forfeiture

Acreage—representations in deed—effect. Principle reaffirmed that a deed covenant which specifies the acreage, "be it more or less," constitutes a representation that the specified acreage is approximately correct.

Mahrt v Mann, 203-880; 210 NW 566

Affirmative action to avoid default. A contract for a deed which (1) provides for a

forfeiture of vendee's right in case of nonpayment of the purchase price, (2) makes time the essence of the contract, and (3) provides that, if the vendee makes a specified payment at a specified time, the vendor will then furnish the proper abstract and deliver a specified deed, imposes no obligation on the vendor to tender the deed and abstract at the said specified time. On the contrary, under such a contract vendee must make or tender his payment at the specified time and demand the proper transfer papers, or he will be in default and the contract subject to forfeiture.

Martin v Work, 201-444; 206 NW 288

Bona fide purchaser—who is not. A grantee of land who buys, receives, and goes into possession of, the exact land and acreage which he intended to buy, cannot be deemed a bona fide purchaser of another tract of which he has never been in possession, even tho such other tract was originally an integral part of the land actually purchased.

Taylor v Lindenmann, 211-1122; 235 NW 310

Breach justifying rescission. One who agrees to convey certain real estate, and tenders a deed in which he wrongfully reserves a portion of the land which he has contracted to convey, thereby breaches his contract and arms the other party with the right to rescind.

Pickett v Comstock, 209-968; 229 NW 249

Executed (?) or executory (?). It may not be said that a contract has been executed, when the testimony demonstrates that no contract ever existed, because of the failure of the minds of the parties to meet.

Cloud v Burnett, 201-733; 206 NW 283

Interest on purchase price—proper allowance. Interest on the purchase price is properly decreed from the time the purchase price was due and payable.

In re Hager, 212-851; 235 NW 563

Material mistake—effect. A vendor's action for specific performance of a contract is properly dismissed when, subsequent to the execution of the contract, it is discovered that the building on the land sold is situated very materially farther on an adjoining lot than the parties understood when they contracted.

Finch v Gates, 210-859; 229 NW 832

Merchantable title defined. A merchantable title is one which a reasonably prudent man would accept in the ordinary course of business after being apprised of the facts and law applicable thereto.

In re Hager, 212-851; 235 NW 563

Mortgage foreclosure—nonconclusive against vendor's future clear title. Fact that a real estate vendor has lost his title by foreclosure of a prior mortgage is not conclusive as to his inability to perform and furnish a clear title at the proper time—it appearing he has specially contracted with the mortgagee to redeem before arrival of his time to perform under the real estate contract. A vendor may perfect his title at any time before the time fixed to furnish clear title.

Fitchner v Walling, 225-8; 279 NW 417

Mutual inability to perform—effect. So long as a vendor and a purchaser of real estate are mutually unable to perform, each is incapacitated from putting the other in default; and the contract necessarily continues in full force, without right in either party to maintain an action against the other. So held where a defaulting purchaser attempted to recover the purchase price paid, and where a defaulting vendor attempted to forfeit the contract.

McLain v Smith, 201-89; 202 NW 239

Noneffectual novation. A purchaser of land wholly fails to establish a release from his obligation to the vendor by a mere showing that he assigned the contract to another, who assumed and agreed to carry out the obligation of the original contract.

Vanderwilt v Broerman, 201-1107; 206 NW 959

Oral contract to devise or convey lands. An oral offer to convey or devise land in consideration of services to be performed for the offerer, and an oral acceptance thereof by the offeree, are specifically enforceable when both the execution of the contract and the performance thereof are established by clear, convincing, and satisfactory evidence, and when the acts of performance are referable exclusively to such contract. Evidence held ample to establish such a contract and the performance thereof.

Houlette v Johnson, 205-687; 216 NW 679

Partial failure of title—alley as nonincumbrance. A vendor who seeks to recover the entire contract price of land which he had contracted to convey, even tho a portion thereof proves to be a public alley, cannot support his claim on the theory that the public alley was a benefit to that portion of the land to which he had good title, and was not an incumbrance.

Van Duzer v Engeldinger, 209-150; 227 NW 591

Payment of price—deduction for deficiency in case of sale in gross. A purchaser of land at a stated price and not according to some superficial unit of measurement—in other words, a purchase in gross—is not, in the absence of fraud, entitled to an abatement on the purchase price because of an unexpected shortage in quantity, unless such shortage is gross, or of such a character that the court can say that the purchase would not have been made had the facts been known.

In re Hager, 212-851; 235 NW 563

II VENDOR AND PURCHASER GENERALLY—continued

(d) PERFORMANCE OF CONTRACT GENERALLY—concluded

Performance of contract—foreclosure—nontender of abstract and deed. In an action against a defaulting vendee, to foreclose a contract of sale of real estate for matured and unpaid installments, no tender of abstract and deed is necessary as a condition precedent to maintaining the action, when the right to said abstract and deed has not yet matured under the contract.

Dimon v Wright, 206-693; 214 NW 673

Provision for abstract of title. Contract construed and held not to require the purchaser of land to make full payment therefor before being entitled to an abstract of marketable title.

Hardin v Ins. Co., 222-1283; 271 NW 176

Reasonable time. Principle reaffirmed that a clause in a contract of sale of real estate giving the vendor "whatever time he finds necessary" to perfect his title, must be construed as giving to the vendor a reasonable time only, in view of the circumstances.

Martinsen v Ins. Assn., 217-335; 251 NW 503

Shortage in acreage — effect. A vendor of land is not in default under his contract of sale simply because he declines to make any allowance for a shortage in acreage, even tho subsequent examination revealed the fact that there was such shortage.

Golly v Grinnell, 204-319; 213 NW 252

Specific performance—tender of deeds before suit. In an equity action for specific performance of a land contract, a vendor need not formally tender the deeds before starting suit, and when vendee specifically contracts to first pay the purchase price before getting the deed, the vendor need only get himself in readiness to perform.

Utterback v Stewart, 224-1135; 277 NW 735

Tender of performance — nonnecessity. A vendor of real estate is under no obligation, prior to instituting an action to foreclose the contract, to tender performance in order to place the vendee in default, when said vendee is already in defiant default.

Bortz v Wright, 206-698; 214 NW 542

Title—essential elements. Open, continuous, and good-faith possession of land under claim of right and with the knowledge of the record titleholder, by virtue of an oral contract of purchase, matures in the possessor an absolute title by adverse possession, even tho the contract price has never been paid.

Burch v Wickliff, 209-582; 227 NW 133

Transfers and transactions invalid — nonexecutory contract. Manifestly, a substantially executed contract accompanying a conveyance cannot be treated as executory.

Cherokee Co. v Stratton, 210-1236; 232 NW 646

Variance between contract and deed—estoppel. A purchaser of land will not be heard to complain of a variance between the contract and deed which was inserted in the deed with his full knowledge and approval.

In re Hager, 212-851; 235 NW 563

(e) MERCHANTABLE TITLE—ABSTRACTS

Discussion. See 12 ILR 295—Liability of abstracter to one other than his employer

Construction and operation of contract—inconsistent provisions as to title. A purchaser may not insist on a "marketable" title, in accordance with the printed provisions of a blank form of contract, when the typewritten provisions very clearly provide for a title of lesser quality.

Herman v Engstrom, 204-341; 214 NW 588

Definition. A merchantable title is one which a reasonably prudent man would accept in the ordinary course of business after being apprised of the facts and law applicable thereto.

In re Hager, 212-851; 235 NW 563

Indemnity bond as tantamount to covenant of seizin. An indemnity bond conditioned to hold the obligee harmless from any loss which he may sustain by reason of a defect of title to certain real estate is equivalent to a covenant of seizin and governed by the same rule, to wit: no action for substantial damages is maintainable on the bond until a hostile, paramount title is asserted.

Duke v Tyler, 209-1345; 230 NW 319

Merchantability test—tax deed on invalid redemption notice—abstract insufficient. The test as to whether an abstract shows a good, merchantable title depends upon whether or not a reasonably prudent person, familiar with the facts and apprised of the question of law involved, would accept such title in the ordinary course of business; and a tax title upon an invalid redemption notice is not such a title.

Smith v Huber, 224-817; 277 NW 557; 115 ALR 131

Mortgage foreclosure—nonconclusive against vendor's future clear title. Fact that a real estate vendor has lost his title by foreclosure of a prior mortgage is not conclusive as to his inability to perform and furnish a clear title at the proper time—it appearing he has specially contracted with the mortgagee to redeem before arrival of his time to perform under the real estate contract. A vendor may perfect his title at any time before the time fixed to furnish clear title.

Fitchner v Walling, 225-8; 279 NW 417

Performance of contract—belated objections. Objections to a land title as shown by the abstract introduced at the trial, not made until after the entry of the decree, will be ignored.

Vanderwilt v Broerman, 201-1107; 206 NW 959

Performance of contract—abstract of title. A purchaser who refuses to examine an abstract of title when tendered may not later assert objections which are based solely on an inadvertent oversight on the part of the abstracter.

Carson v Mikel, 205-657; 216 NW 60

Reasonable time to perfect title. Principle reaffirmed that a clause in a contract of sale of real estate giving the vendor "whatever time he finds necessary" to perfect his title, must be construed as giving to the vendor a reasonable time only, in view of the circumstances.

Martinsen v Ins. Assn., 217-335; 251 NW 503

Remedies of purchaser—nonmerger by deed—rescission. A vendee of land by accepting a deed with the mutual understanding that the delayed abstract of title will be furnished as per the original contract does not thereby merge the contract in the deed, and may rescind the contract when the vendor fails to deliver the required abstract.

Dickerson v Morse, 203-480; 212 NW 933

Rescission of contract—breach of contract—abstract—failure to furnish. The failure of the vendor in a contract for the sale of real estate to furnish abstract of title of the kind and within the time required by the contract, necessarily furnishes the nondefaulting purchaser with ground for rescission of the contract.

Hardin v Ins. Co., 222-1283; 271 NW 176

Rescission—untenable grounds. A vendee of land may not rescind on the ground that the abstract of title is defective when the defects arise from judgments rendered against himself.

Messenbrink v Bliesman, 204-223; 215 NW 232

Specific performance—contract of sale in lease. An option reserved in an ordinary lease of real estate for the purchase of the described property by the lessee at a fixed price, and on specified time and methods of payment (among which was an agreement that the rent paid should be credited on the purchase price), is specifically enforceable, even tho no provision is embodied therein as to (1) formal possession or (2) title or (3) conveyance, and even tho the parties thereto unnecessarily reserved the right generally to enter into additional agreements relative to such option.

Carter v Bair, 201-788; 208 NW 283

Tender of abstract. The plea in an action to foreclose a land sale contract that the vendor had made no tender of abstract of title will be disregarded (the necessity for such tender being assumed) when the record shows a possibly defective tender at the proper time, and when the vendor tendered full performance in his pleadings.

Bortz v Wright, 206-698; 214 NW 542

Waiver of timely delivery. Timely delivery of an abstract of title in accordance with the terms of the contract is waived (1) by not taking the abstract when tendered, (2) by going into and remaining in undisturbed possession of the land, and (3) by so using the land that the status quo cannot be restored.

Vanderwilt v Broerman, 201-1107; 206 NW 959

(f) RIGHTS AND LIABILITIES OF PARTIES GENERALLY

Discussion. See 12 ILR 179—Rights and liabilities to executory contract; 13 ILR 87—Liability of intended purchaser for occupancy; 25 ILR 340—Liability to remote grantee

Bona fide purchaser—quitclaim claimant. Principle reaffirmed that a quitclaim deedholder is not entitled to be considerd a bona fide purchaser and does not acquire priority over equities which are valid against the grantor.

Howell v Howell, 211-70; 232 NW 816

Bona fide purchaser—recital in deed—effect. A grantee of real estate is bound by a recital in his deed that the land is taken subject to all recorded mortgages.

Citizens Bank v Hamilton, 209-626; 227 NW 112

Construction and operation of contract—reservation as to title. A purchaser of land who buys under explicit contract provision and notice that his vendor has no right to the "coal, oil, and minerals underlying said premises," because the same were reserved in the deed of a former specifically named grantor, is, in the absence of fraud, charged with notice of the full details of such former reservation.

Herman v Engstrom, 204-341; 214 NW 588

Construction and operation of contract—time of performance. The vendor in a contract specifically requiring the vendee to pay before getting the deed need only get himself in readiness to perform, and need make no tender until payment is made or offered by vendee, and the vendor is not in default until this is done.

Foft v Page, 215-387; 245 NW 312

Custody and care of ward's estate—release of mortgage without court authorization. A guardian has no legal right, except under court authorization, to release, without payment, a court-authorized, real estate mortgage executed to, and held by, him as such guardian; and subsequent purchasers of the land are charge-

II VENDOR AND PURCHASER GENERALLY—continued

(f) RIGHTS AND LIABILITIES OF PARTIES GENERALLY—continued

able with knowledge of the statute invalidating such release. (§12773, C., '31.)

Randell v Fellers, 218-1005; 252 NW 787

Defaulting purchaser may not recover payments. The purchaser of real estate who, after making a payment on the contract, and when the vendor is in no manner in default, abandons and refuses further to perform the contract, may not take advantage of his own wrong and recover of the vendor the payment made, on the ground that the vendor resold the property after the said abandonment and refusal to perform.

Lake v Bernstein, 215-777; 246 NW 790; 102 ALR 846

Debt of another—original promise. An agreement by a vendor of real property with his purchaser to pay for the making of certain improvements on the property is an original promise, and not within the statute of frauds.

Madden Co. v Becker Co., 205-783; 218 NW 466

Destruction of buildings—justifiable refusal to perform. A purchaser of real estate may validly decline to specifically perform his contract of purchase, even tho he be deemed the holder of the equitable title, (1) when the buildings on the land were totally destroyed prior to the contract day for performance, and (2) when the vendor had contracted to deliver such buildings to the purchaser "in as good condition as they are at the date of the contract."

Rhomberg v Zapf, 201-928; 208 NW 276; 46 ALR 1124

Discharge of guarantor—nonrelease by conduct of guarantee. The guarantor of the payment of the amount due on a contract of sale of land is not relieved of his contract of guaranty because the assignee-guarantee of the contract failed to control the action of the purchaser of the land in disbursing building funds, when the assignee-guarantee had no knowledge of the wrongful disbursement.

Buser v Land Co., 211-659; 234 NW 241

Fraudulent conveyances — termination of property interest regardless of creditors. No present title to land passes under a contract to the effect (1) that a daughter, so long as she outlived her father and paid certain annual rentals and other charges, should have the possession and profits of named lands, (2) that title should remain in the father, but at the death of the father she should receive an absolute deed to the land, which deed was put in escrow under the control of the father during his lifetime, (3) that if she defaulted in said payments the contract could be forfeited on notice, and (4) that all her interest terminated instantly on her death prior to that of the father. It follows that upon the insolvency of the daughter and her default on said payments, the father and daughter may voluntarily cancel said contract regardless of the creditors of the daughter.

Tilton v Klingaman, 214-67; 239 NW 83

Homestead rights subordinate to contract under which acquired. Homestead rights which are acquired under a contract of sale are necessarily subordinate to the contract under which they are acquired.

Westerman v Raid, 203-1270; 212 NW 134

Improvident contract. Equity cannot relieve a person of the duty to perform his contract simply because the contract turns out to be ill-advised, unprofitable, or disadvantageous.

Carson v Mikel, 205-657; 216 NW 60

Inquiry and constructive notice. A purchaser of real estate must be charged with actual notice of such facts as he would have ascertained had he made such inquiries as ordinary prudence reasonably suggested.

Young v Hamilton, 213-1163; 240 NW 705

Insurance—application of proceeds. The proceeds of fire insurance under a policy payable to the vendor and purchaser of real estate, "as their interests may appear", is not payable to the vendor when, at the time of the loss, the purchaser is in no manner in default on his contract. Such proceeds may be impounded and utilized, on the application of the purchaser, in the rebuilding of the burned structure.

Hatch v Ins. Co., 216-860; 249 NW 164

Joint purchase—liability. Parties entering into a joint mutual agreement to purchase land, and inducing the vendor to accept the note and mortgage of one of them, with the assurance that the financial responsibility of all is behind the deal, all become personally liable for the indebtedness, and especially so when such has been the interpretation of the transaction by all the parties.

Bond v O'Donnell, 205-902; 218 NW 898; 63 ALR 901

Landlord and tenant—change of relation—effect. Manifestly a landlord and his tenant may, at the close of the tenancy, take on and assume the relationship of vendor and purchaser, and thereby enable the former tenant to hold the premises in question adversely to the former landlord.

Burch v Wickliff, 209-582; 227 NW 133

Modification of contract—repudiation—effect. Where a vendor and purchaser of real estate mutually agree to an extension of time for the final performance of the contract, the

purchaser may not put the vendor in default by a tender and demand during said extension of time. But, nevertheless, the vendor may acquiesce in the act of the purchaser in repudiating the extension agreement, and, within a reasonable time, put himself in a position to fulfill his contract to sell, and make tender and demand accordingly.

Foft v Page, 215-387; 245 NW 312

Mortgagee's knowledge of contemplated exchange—not innocent purchaser. Where mortgagee knew that mortgagor had contracted to exchange city property for farm at time mortgage covering city property was executed, mortgagee was not "innocent purchaser", and his mortgage was subject to rights of holder of contract to city property.

Bandemer v Benson, (NOR); 270 NW 353

Mutual inability to perform—effect. So long as a vendor and a purchaser of real estate are mutually unable to perform, each is incapacitated from putting the other in default; and the contract necessarily continues in full force, without right in either party to maintain an action against the other. So held where a defaulting purchaser attempted to recover the purchase price paid, and where a defaulting vendor attempted to forfeit the contract.

McLain v Smith, 201-89; 202 NW 239

Nonformal tender of deed. A contract of sale of lands may be foreclosed without any prior formal tender of a deed when the contract calls for a deed only when the purchase price is paid; and especially is the absence of such tender inconsequential when tender of deed is made in the pleadings.

Bortz v Wright, 206-698; 214 NW 542

Nonright of defaulting purchaser to recover amount paid. Purchaser in default, when vendor, failing to apply proper credits on price of realty, serves notice of forfeiture, cannot recover amount paid.

Martin v Harvey, (NOR); 245 NW 432

Payment—check in escrow—effect. A vendor who causes the vendee to make payment of matured interest in the form of an interest-bearing certificate of deposit payable to himself, which certificate is placed in escrow with the issuing bank, pending the vendor's effort to make the title merchantable, must bear the loss resulting from the subsequent failure of the issuing bank.

Downey v Gifford, 206-848; 218 NW 488

Purchase price—deposit in bank—ownership. The purchaser of land who, on the day of performance, and with the knowledge and acquiescence of the vendor, and pending the perfecting and delivering of the deed, goes into possession, and deposits the purchase money in a bank, on condition that it be paid to the vendor when the deed is perfected and delivered, and himself retains the evidence of such deposit until he receives the deed, must be held to be the owner of the deposit and to suffer the loss which results from the subsequently discovered fact that the bank, immediately after receiving the deposit, dissipated it, the bank being then, without the knowledge of both parties, insolvent.

Bolte v Schenk, 205-834; 210 NW 797

Quitclaim grantees. The grantee of land under a quitclaim deed is conclusively presumed to have known of all prior equities in and to the land, and will be held to have taken and to hold said land subject to said equities.

Junkin v McClain, 221-1084; 265 NW 362

Rights and liabilities as to third persons—impossible ratification. A vendor of land who, upon discovering that his vendee has placed repairs and improvements upon the property, does nothing in the way of repudiating the actions of the vendee, cannot be held thereby to have ratified the actions of the vendee and constituted the vendee his agent to make the improvements, when the vendee in making said repairs and improvements never assumed to act for the vendor.

Knapp v Baldwin, 213-24; 238 NW 542

Self-imposed knowledge of vendor. A vendor of land will not be heard to claim that he did not know that his purchaser was holding adversely to him.

Burch v Wickliff, 209-582; 227 NW 133

Slander of title—loss of sale. Plaintiff in an action for damages consequent on the loss of a sale of his property because of a slander of his title by defendant may not recover when it appears that the ability of the prospective purchaser to buy the property on the terms proposed is a mere conjecture or guess.

Farmers Bank v Hintz, 206-911; 221 NW 540

Taxes maturing December 31st—obligation to pay. A vendor who, prior to December 31st, sells real estate "free of all incumbrances to day of sale" must, as between himself and the vendee, pay the taxes falling due on December 31st of said year.

Moore v Bank, 210-1020; 229 NW 666

Title—sufficiency of showing. A vendor in an action to foreclose a land sale contract need not do more than show prima facie title in himself.

Bortz v Wright, 206-698; 214 NW 542

Title—when not in issue. The issue of title is not involved in an action of forcible entry and detainer when admittedly the plaintiff held the legal title, and when the sole controversy centered around the question whether plaintiff had legally forfeited the contract under which defendant was in possession.

Cassiday v Adamson, 208-417; 224 NW 508

II VENDOR AND PURCHASER GENERALLY—continued

(f) RIGHTS AND LIABILITIES OF PARTIES GENERALLY—concluded

Transfer—assumption of mortgage not necessarily absolute. Principle reaffirmed that an agreement between a vendor and a purchaser of land that the purchaser will assume and pay an existing mortgage on the land must be taken by the mortgagee subject to the inherent equities arising out of the transaction between the vendor and the purchaser.

Johnston v Grimm, 209-1050; 229 NW 716

Validity of contract—fraud. On an allegation of fraud by the vendor in the sale of land, it is very material that the purchaser had the unobstructed opportunity to examine the land in the absence of the vendor and availed himself of such opportunity.

Carson v Mikel, 205-657; 216 NW 60

Vendee as owner under executory contract. The vendee of land under a contract calling for installment payments is the equitable titleholder, and therefore, the "owner" of the land within the mechanic's lien statutes, and may contract for improvements on the land and subject his interest to the resulting mechanics' liens.

Knapp v Baldwin, 213-24; 238 NW 542

Vendor's attorneys at vendee's bankruptcy—different claim involved—real estate contract unaffected. Fact that attorneys for a real estate contract vendor appeared in vendee's bankruptcy is not a submission to nor adjudication by the bankruptcy court of vendor's rights under the real estate contract, when no claim was filed thereon and purpose of appearance was to protect a different and unsecured indebtedness of the vendee to the vendor.

Blotcky v Silberman, 225-519; 281 NW 496

When possession not notice of adverse claim. The actual possession of real estate by the grantor in a duly recorded conveyance in fee during a reasonable time following the execution of such conveyance does not charge a good-faith subsequent purchaser for value of the land with notice that the one in possession continues to claim ownership of the land notwithstanding said conveyance.

Tutt v Smith, 201-107; 204 NW 294; 48 ALR 394

(g) REMEDIES OF VENDOR

Acceleration of maturity. A proviso in a contract for the purchase of real estate on installment payments, entered into without artifice or deception, to the effect that an assignment of the contract by the vendee without the written consent of the vendor will ipso facto mature the entire indebtedness, is valid, even tho our statute (§9452, C., '24) authorizes the assignment of such an instrument irrespective of the terms of any contract by the parties to the contrary.

Risser v Sec. Co., 200-987; 205 NW 648

Action for purchase price—novation—pleadings. A plaintiff-vendor who seeks to recover on a contract of sale of land, but pleads that, on performance day, he conveyed to a party other than the contract purchaser, but under an oral agreement that, by so doing, the contract purchaser would not be released, must stand or fall on his chosen theory. In other words, he must establish his own theory of non-novation.

Bobbitt v Van Eaton, 208-404; 226 NW 79

Action for price—defect in title. A purchaser who goes into and retains undisputed possession of the purchased premises may not, because of some defect in the title, defeat an action to recover on his agreement to pay an existing incumbrance.

Richardson v Short, 201-561; 207 NW 610

Action to enforce contract—tender of conveyance—sufficiency. Tender of a deed is not a condition precedent to the beginning of an equitable action by a vendor to enforce a contract for the sale of land. A tender in the petition is all-sufficient.

Vanderwilt v Broerman, 201-1107; 206 NW 959

Avoidance of forfeiture by proper payment. A tender of delinquent payments at the contract place provided for payment, especially when acquiesced in by the vendor, is manifestly adequate to prevent a forfeiture.

May v Haynie, 212-66; 236 NW 98

Contract for benefit of third party. An oral contract between the joint purchasers of land that they would surrender their rights under the contract of purchase and reconvey to their vendor, upon certain terms, to be performed by the vendor, said contract being partially performed, is enforceable by the vendor, even tho he had no knowledge of such contract at the time it was entered into in his behalf.

Durband v Nicholson, 205-1264; 216 NW 278; 219 NW 318

Contract of sale. A provision in a contract of sale of land that in case of default by the purchaser, the initial payment shall be retained by the vendor as liquidated damages is no impediment to the foreclosure of the contract.

Ettinger v Malcolm, 208-311; 223 NW 247

Execution of mortgage by vendor after suit—effect. A vendor in a contract of sale of real estate who is fully able to perform when he commences his action for specific performance and so alleges in his petition, and who is not then in default, does not deprive himself of the right to a decree by later executing a

mortgage on the land to one (a) who had full knowledge of the superior interest of the defendant-purchaser, and (b) who released said mortgage prior to the decree in plaintiff's favor, said mortgage being executed by the vendor without any intent to abandon said contract of sale. And this result is peculiarly justified when said mortgage arose from an emergency for which the purchaser of the land was directly responsible.

Foft v Page, 215-387; 245 NW 312

Forfeiture of contract. The act of the purchaser in a written, forfeitable, land-sale contract in defaulting in his agreement to make, directly to the vendor, a certain payment, arms the vendor with the right to serve a 30-day notice of forfeiture, and thereupon to demand that the purchaser avoid his default by making the payment in question strictly in accordance with the contract, notwithstanding any mere statement by the vendor prior to the maturity of the payment that it might be made to a named bank, and that a few days delay in making payment "would make no difference".

Schwab v Roberts, 220-958; 263 NW 19

Forfeiture of contract—adequate avoidance. The purchaser of land under a forfeitable contract who, upon being served with notice of forfeiture for the nonpayment of a portion of the contract price, tenders the entire amount called for by the contract necessarily prevents a forfeiture of his contract.

May v Haynie, 212-66; 236 NW 98

Forfeiture of contract—ineffectual payment to avoid. Tho the purchaser in a forfeitable, land-sale contract be authorized by the vendor to make the defaulted payment at a named bank, and thereby avoid forfeiture of the contract under the statutory 30-day notice, yet said purchaser makes no effectual payment by depositing, in his own name and in said bank, the amount of said payment, and thereupon drawing a check payable to vendor, and delivering said check to the cashier of said bank (his own agent) with direction, in effect, to deliver said check to vendor only after the amount thereof has been indorsed on a promissory note which never existed.

Schwab v Roberts, 220-958; 263 NW 19

Forfeiture—vendee as tenant. A vendee of real estate who has agreed that he will pay in installments and in case of default the contract may be forfeited and the amount paid treated as payments for the use of the property, becomes, in case of a proper forfeiture, the tenant of the vendor, and may be removed from the premises through an action of forcible entry and detainer.

Music v DeLong, 209-1068; 229 NW 673

Forfeiture—delay—effect. The fact that a vendor delays more than 30 days after forfeiting a contract of sale, before instituting an action of forcible entry and detainer to recover possession of the property, does not work a cancellation of the forfeiture.

Music v DeLong, 209-1068; 229 NW 673

Forfeiture of contract — notice—sufficiency. A statute which requires a notice of forfeiture of a contract of sale of real estate to state "the reason" for such forfeiture is not complied with by the bald assertion, in effect, that the vendee "has failed to perform the contract", but is complied with if the notice gives as a reason for the forfeiture (1) the nonpayment of principal which is not due and (2) the nonpayment of interest which is due. The stating of one good and valid reason is ample, even tho coupled with another reason which is not good and valid.

Gibson v Thode, 209-368; 228 NW 91

Forfeiture of improvements—rights of chattel mortgagee. An equitable owner of land who, while holding the land under a contract of purchase which, in case of forefeiture, unconditionally forfeits all improvements thereon to the legal titleholder, erects a dwelling house on the land with materials sold for such purpose, and on individual credit, may not, after he has forfeited or surrendered his contract of purchase, and while he is in possession of the land solely as a tenant, execute a chattel mortgage on the house to the seller of the materials, as security for the past-due purchase price of the materials, and thereby invest the mortgagee with any right against the owner of the realty.

O'Bryon v Weatherly, 201-190; 206 NW 828

Foreclosure for nonpayment of installments —limitations. A vendor of real estate, in foreclosure of the contract, is not entitled to judgment and special execution except for installments due and unpaid when the decree is rendered (the contract containing no acceleration clause), but is entitled to have the court retain jurisdiction of the proceeding in order to protect him by the application of any surplus to future-maturing installments.

Witmer v Fitzgerald, 209-997; 229 NW 239

Interest on purchase price—proper allowance. Interest on the purchase price is properly decreed from the time the purchase price was due and payable.

In re Hager, 212-851; 235 NW 563

Quieting title. The vendor of lands who has effected a complete forfeiture of a contract of sale may institute action in equity to quiet title, even tho he might have instituted an action at law for possession.

Westerman v Raid, 203-1270; 212 NW 134

Real estate contract foreclosed against bankrupt. A real estate contract may be foreclosed in the state court and vendor is real party in interest regardless of the buyer's dis-

II VENDOR AND PURCHASER GENERALLY—continued

(g) REMEDIES OF VENDOR—concluded

charge in bankruptcy when the bankruptcy court entirely ignored this property as an asset of the bankrupt, upon which land the vendor had a valid pre-existing lien.

Blotcky v Silberman, 225-519; 281 NW 496

Real party in interest—equitable owner. An equitable owner of land who effects a sale of the land through an agent, but permits the contract of sale to be made between the purchaser and the legal titleholder, in order to secure to the latter the amount due him, remains the real party in interest in an action against the agent, to compel him to account for a consideration received by him in the sale of the land and concealed from the said equitable owner.

Hiller v Betts, 204-197; 215 NW 533

Title—nonnecessity to plead. The vendor in an executory contract of sale of land, in an action against the vendee to recover possession of the land after the contract has been forfeited, need not plead or prove that he has good title to the land.

O'Connor v Hassett, 207-155; 222 NW 530

Title—sufficiency of showing. A vendor in an action to foreclose a land sale contract need not do more than show prima facie title in himself.

Bortz v Wright, 206-698; 214 NW 552

Waiver and loss of lien. The grantor in a deed of conveyance in escrow who consents to the substitution in the deed of the name of a new grantee, and to the delivery of the deed to such new grantee, and who permits such new grantee to pay taxes and interest on incumbrances and ultimately to sell and convey the land to a good-faith purchaser for value, necessarily loses the right to establish a vendor's lien on the land.

Lindberg v Younggren, 209-613; 228 NW 574

When action maintainable. A vendee who has agreed (1) to pay for the property in monthly installments and (2) to have the paid installments treated as payment for the use of the property in case the contract is forfeited, becomes, in case of forefeiture, the tenant of the vendor, and may be removed through an action of forcible entry and detainer.

Cassiday v Adamson, 208-417; 224 NW 508

(h) REMEDIES OF PURCHASER

Action to establish and foreclose vendee's lien. An action by the vendee of land for rescission of the contract, for personal judgment against the defendant, and for the establishment and foreclosure of a lien on the land for the purchase money paid under mutual mistake, is properly brought in the county in which the land is located, irrespective of the residence of the defendant.

Lee v Bank, 209-609; 228 NW 570

Breach justifying rescission. One who agrees to convey certain real estate, and tenders a deed in which he wrongfully reserves a portion of the land which he has contracted to convey, thereby breaches his contract and arms the other party with the right to rescind.

Pickett v Comstock, 209-968; 229 NW 249

Ceasing payments when mortgage release not obtained by vendor. Where the vendor of property agreed to use payments received to obtain the release of a mortgage on the property, and the amount unpaid was less than the amount of the mortgage, the failure to obtain the release was a default by the vendor, and even tho the vendor claimed that in obtaining the release time was not of the essence, the purchaser was entitled to cease payments, since he was not protected as he would have been had the amount unpaid on the price been greater than the amount of the mortgage.

Trammel v Kemler, 226-918; 285 NW 196

Contract of sale—right to conveyance. The purchaser of real estate who has fully complied with the contract is entitled to specific performance, in the absence of some fact or condition which renders such decree inequitable.

May v Haynie, 212-66; 236 NW 98

Construction of contract. Provision in contract of purchase reviewed, and held to present no obstacle to the purchaser's claiming, against a mortgagee, the benefit of payments made to the vendor.

Ely Bank v Graham, 201-840; 208 NW 312

Delay—unallowable rescission. A purchaser may not rescind his contract of purchase because of a delay which was occasioned by his own agent.

Gutz v Holahan, 209-839; 227 NW 504

Election of remedies. A purchaser of land who rescinds, and obtains against the vendor judgment at law for the amount advanced as purchase price and for other proper expenditures, does not by that fact alone waive his right to bring an action in equity to have the judgment declared a lien on the land.

Larson v Metcalf, 201-1208; 207 NW 382; 45 ALR 344

Enforcing partial performance. When a vendor has contracted to convey an entire property, but owns only a fractional part thereof, the purchaser who shows that he is entitled to specific performance may elect to take and may enforce specific performance as to the part which the vendor is able to convey;

and in such case, the purchaser will be entitled to a pro tanto abatement of the purchase price.

Anderson v Weirsmith, 209-714; 229 NW 199

Enforcement of vendee's lien — burden of proof. A vendee who rescinds, and seeks to establish a lien on the land for his proper advancements, need not show that a subsequent titleholder had knowledge of his (vendee's) rights. The subsequent titleholder must show his want of knowledge.

Larson v Metcalf, 201-1208; 207 NW 382; 45 ALR 344

Inadequate tender to avoid forfeiture. A purchaser of real estate who makes an inadequate tender in an effort to avoid a forfeiture of his contract may not successfully claim that the deficiency was supplied by the rental value of the property then in possession of parties whose right to possession was traceable to said purchaser himself.

Moore v Elliott, 213-374; 239 NW 32

Multifarious theories in one count. A cause of action which is not barred until 10 years after the execution and delivery of a deed is shown by a pleading which (1) pleads a contract of purchase of land by the acre, and the deed in fulfillment thereof, (2) shows payment for the acreage represented in the deed, and (3) alleges actual material shortage in the said acreage; and this is true even tho the pleading does allege "mutual mistake" of the parties as to the acreage, and asks for the reformation of a mortgage for the purchase price.

Mahrt v Mann, 203-880; 210 NW 566

Noncontemplated damages. The purchaser of land may not recover damages because a belated delivery of the land to him prevented him from wrecking the building and using the salvage in other building operations, when the vendor was not apprised of such purpose of the purchaser when the sale was made.

In re Hager, 212-851; 235 NW 563

Nonmerger by deed—rescission. A vendee of land by accepting a deed with the mutual understanding that the delayed abstract of title will be furnished as per the original contract does not thereby merge the contract in the deed, and may rescind the contract when the vendor fails to deliver the required abstract.

Dickerson v Morse, 203-480; 212 NW 933

Novation—insufficient showing. A purchaser of real estate who has assumed the payment of existing incumbrances may not base a novation of his obligation on the simple expedient of causing the deed to be made to his wife as grantee.

Richardson v Short, 201-561; 207 NW 610

Option to repurchase—forfeiture. An absolute deed, coupled with an agreement that the grantor shall have the right to repurchase within a named time, requires no notice of forfeiture.

Hinman v Sage, 208-982; 221 NW 472

Partial failure of title—partial conveyance and abatement of price. In case a vendor contracts to sell an entire tract of land when he has title to a portion only of the tract, the purchaser who goes into possession of that portion only to which the vendor has title may, even tho he is undisturbed in his possession, compel the vendor to convey that portion to which the vendor has title, and compel the vendor to submit to an abatement of the purchase price on account of the portion which the vendor cannot convey.

Van Duzer v Engeldinger, 209-150; 227 NW 591

Performance of contract—payment of price —deduction for deficiency in case of sale in gross. A purchaser of land at a stated price and not according to some superficial unit of measurement—in other words, a purchase in gross—is not, in the absence of fraud, entitled to an abatement on the purchase price because of an unexpected shortage in quantity, unless such shortage is gross, or of such a character that the court can say that the purchase would not have been made had the facts been known.

In re Hager, 212-851; 235 NW 563

Recovery of consideration paid. A vendee of land who is and always has been in undisturbed possession of the land, and who has never rescinded the contract of purchase, but is distinctly standing thereon, may not recover the consideration paid because the vendor is unable to convey good title.

Weech v Read, 208-1083; 226 NW 768

Recovery of payment by defaulting purchaser. A defaulting purchaser may not recover payment made by him to the nondefaulting vendor.

Dimon v Wright, 206-693; 214 NW 673

Rescission of contract. A contract purchaser of land may rescind and recover the payment made by him when, at the contract time for performance, the vendor has no title, and in such case the purchaser need make no tender of performance by himself.

Dolliver v Elmer, 220-348; 260 NW 85

Right to lien. The contracting purchaser of land who rescinds, because the contracting vendor has no title whatever, is nevertheless entitled to a lien on the land for payments advanced in case the vendor, subsequent to the rescission, acquires such title.

Dolliver v Elmer, 220-348; 260 NW 85

II VENDOR AND PURCHASER GENERALLY—concluded

(h) REMEDIES OF PURCHASER—concluded

Silence—effect. A vendor who, in answer to an inquiry by a proposed purchaser concerning a fact having material relation to the property, speaks half the truth and remains silent as to the other half, may be guilty of actionable false representation. Evidence held insufficient to apply the principle.

Foreman v Dugan, 205-929; 218 NW 912

Vendee's right to lien. A vendee of land is entitled in equity, on proper rescission by him of the contract of purchase, to a lien on the land (1) for the amount of the purchase price advanced by him, (2) for the reasonable value of all proper improvements made on the land by him, and (3) for any other proper expenditure suffered by him and growing out of the contract—a right enforceable against all parties who take rights in the land with knowledge, actual or constructive, of vendee's rights.

Larson v Metcalf, 201-1208; 207 NW 382; 45 ALR 344

Vendor not conveying property but retaining payments. Where the purchaser of land was at no time delinquent in his payments or other conditions to be performed on his part, it would be unjust and inequitable to allow the vendor to retain the payments when, through his own fault, he failed to perform his part of the contract.

Trammel v Kemler, 226-918; 285 NW 196.

Vendor's inability to perform—purchaser's tender unnecessary. When the vendor had put it out of his power to perform a contract to sell realty by permitting a mortgage on the property to be foreclosed, it was not necessary for the purchaser to tender the unpaid part of the purchase price before commencing suit for the amounts paid.

Trammel v Kemler, 226-918; 285 NW 196

Unconscionable forfeiture. The plea that the forfeiture of a contract of sale of real estate was unconscionable and should be ignored in equity cannot be sustained in behalf of one who is at fault and against those who are blameless.

Moore v Elliott, 213-374; 239 NW 32

When not necessary to plead. The purchaser of real estate when defendant in an action for the specific performance of the contract need not plead for a recovery of the purchase money paid by him.

Benedict v Nielsen, 204-1373; 215 NW 658

(i) RIGHTS OF THIRD PARTIES

Equitable ownership superior to judgment lien. An actual bona fide oral agreement between a debtor and creditor, that the debtor will convey to the creditor certain lands in part satisfaction of the debt, creates in the creditor an equitable ownership in the land (especially when the creditor is already in possession of the land) which is superior to the rights of a subsequent judgment creditor of said debtor. It follows that delay in making delivery of the deed, or even the loss of the deed, will not elevate the subsequent judgment creditor into priority.

Richardson v Estle, 214-1007; 243 NW 611

Defaulted real estate vendee's deed after decree—invalidity. In a quieting title action against a real estate contract vendee, the decree ends all rights of the vendee under a defaulted contract, and if he deeds to another before the decree, the grantee takes nothing.

Forrest v Otis, 224-63; 276 NW 102

Liability of assignee of contract. One who receives, from a purchaser, an assignment of a contract for a deed, which assignment binds the said assignee to perform fully the assigned contract, must be deemed to have ratified the terms of said assignment and be bound thereby when, henceforth, he treats said land as his land and said contract as his obligation, even tho the assignee did not sign said instrument of assignment.

Gables v Kleaveland, 220-1280; 263 NW 339

Purchase pending foreclosure proceedings. One who purchases real estate pending a properly indexed foreclosure proceeding on the property purchases at his peril.

Eckert v Sloan, 209-1040; 229 NW 714

Right to lien—vendee under contract for deed—forfeiture of contract—effect. One who erects or installs an improvement on premises under a contract with a bond-for-deed vendee may establish a mechanic's lien against the vendee's interest; but if said vendee's contract for a deed be legally forfeited and he be left without interest, said lien cannot be established against the vendor's interest unless said vendor required or authorized said improvement.

Darragh v Knolk, 218-686; 254 NW 22

Right to lien—contract with purchaser—forfeiture—effect. One who erects an improvement on land solely under a contract with the purchaser of the land is not entitled to a mechanic's lien on the land when the purchaser has lost all interest in the land because of the legal forfeiture of his contract of purchase; and this is true, even tho the legal owner had knowledge that the improvement was being erected.

Nolan v Wick, 218-660; 254 NW 80

Right to remove fixture. A dealer who permanently installs a furnace in a house for a subvendee, under a contract that he (the dealer) shall retain title to the furnace and the right to remove it in case of nonpayment, may not lawfully remove the furnace for nonpayment, as against the vendor, who did not ex-

pressly or impliedly consent to such installation, and who sold under a written forfeitable contract, which was, subsequent to the installation of the furnace, forfeited and abandoned by both the original vendee and the subvendee.

Des M. Impr. v Furnace Co., 204-274; 212 NW 551

Right to remove fixture. A dealer who, under an unrecorded conditional sale contract, permanently installs for the vendee of real estate a furnace in the house situated thereon, may not legally remove said furnace, as against the vendor of the real estate who did not authorize or know of the installation, and who has sold under a contract which he has caused to be forfeited in accordance with the terms thereof.

Holland Co. v Pope, 204-737; 215 NW 943

12390 Notice.

Cancellation of forfeiture. The fact that a vendor delays more than 30 days after forfeiting a contract of sale, before instituting an action of forcible entry and detainer to recover possession of the property, does not work a cancellation of the forfeiture.

Music v DeLong, 209-1068; 229 NW 673

Dual forfeitures. A vendor who has initiated a forfeiture of his vendee's contract for an existing default, and commenced an action of forcible entry and detainer, may, pending such proceedings, initiate a forfeiture of the contract for a new and subsequently accruing default, and proceed thereon if he is unsuccessful in the first proceeding.

Cassiday v Adamson, 208-417; 224 NW 508

Erroneous description of land. Proceedings for the forfeiture of a contract of purchase of real estate are rendered nugatory by an erroneous description of the real estate.

Montgomery v Beller, 207-278; 222 NW 846

Forcible entry and detainer — unallowable defense. It is no defense to an action of forcible entry and detainer that the defendant was holding under a contract for the purchase of the real estate, and that the plaintiff, in assuming to forfeit the contract, had not served notice of the forfeiture on a third party who held an assignment from defendant of the contract as security.

Votruba v Hanke, 202-658; 210 NW 753

Forfeiture by assignee of contract. The assignee of a contract of sale of real estate has the same right to forfeit the contract as the assignor had.

Moore v Elliott, 213-374; 239 NW 32

Forfeiture no abandonment of contract. A vendor who is able to convey, who is not legally in default, and who has at all times insisted on performance by the purchaser, does not (1) by serving the 30-day notice of forfeiture, (2) by retaking possession, and (3) by instituting an action to quiet title, breach, abandon, or repudiate the contract in such sense that the purchaser may declare a rescission, and on the basis thereof recover the payments made by him.

Mintle v Sylvester, 202-1128; 211 NW 367

Forfeiture—nonwaiver by sufferance. The failure of the vendor of real estate to avail himself promptly of a contract provision for the forfeiture of the contract on a 30-day notice for the nonpayment of matured installments, and his acts in repeatedly accepting belated partial payments, do not work a waiver of the right, in case of a default, to initiate a forfeiture in accordance with the contract and the statute.

Janes v Towne, 201-690; 207 NW 790

Forfeiture of contract—ineffectual payment to avoid. Tho the purchaser in a forfeitable, land sale contract be authorized by the vendor to make the defaulted payment at a named bank, and thereby avoid forfeiture of the contract under the statutory 30-day notice, yet said purchaser makes no effectual payment by depositing, in his own name and in said bank, the amount of said payment, and thereupon drawing a check payable to vendor, and delivering said check to the cashier of said bank (his own agent) with direction, in effect, to deliver said check to vendor only after the amount thereof has been indorsed on a promissory note which never existed.

Schwab v Roberts, 220-958; 263 NW 19

Notice necessary. A contract for the sale of real property cannot be forfeited without giving the statutory notice of intention to forfeit, whether time is or is not of the essence of the contract.

Mintle v Sylvester, 202-1128; 211 NW 367

Notice—sufficiency. A statute which requires a notice of forfeiture of a contract of sale of real estate to state "the reason" for such forfeiture is not complied with by the bald assertion, in effect, that the vendee "has failed to perform the contract", but is complied with if the notice gives as a reason for the forfeiture (1) the nonpayment of principal which is not due and (2) the nonpayment of interest which is due. The stating of one good and valid reason is ample even tho coupled with another reason which is not good and valid.

Gibson v Thode, 209-368; 228 NW 91

Notice unnecessary. An absolute deed coupled with an agreement that the grantor shall have the right to repurchase within a named time requires no notice of forfeiture.

Hinman v Sage, 208-982; 221 NW 472

Redundant notice. A notice of the forfeiture of a contract for the sale of real estate

which properly specifies one sufficient ground for forfeiture renders redundant the specifications of other grounds.

Votruba v Hanke, 202-658; 210 NW 753

Sufficient signing. Notices of forfeiture of a real estate contract are all-sufficient when signed in the name of the vendor by his duly authorized attorney.

Cassady v Mott, 203-17; 212 NW 332

Tenable and untenable grounds. A forfeiture of a contract of sale on one valid ground is effective even if the vendor assigns other untenable grounds.

Westerman v Raid, 203-1270; 212 NW 134

Unconscionable forfeiture. The plea that the forfeiture of a contract of sale of real estate was unconscionable and should be ignored in equity cannot be sustained in behalf of one who is at fault and against those who are blameless.

Moore v Elliott, 213-374; 239 NW 32

12391 Service.

Manner of service. In serving a notice of forfeiture of a contract of purchase, the original of the notice need not be delivered to the person whose contract is sought to be forfeited.

Cassady v Mott, 203-17; 212 NW 332

Rescission of contract—acts not constituting. The act of a vendor of real estate in serving on the purchaser a statutory notice of forfeiture cannot be deemed an abandonment or rescission of the contract by the vendor, even tho the contract was not forfeitable under the statute.

Lake v Bernstein, 215-777; 246 NW 790; 102 ALR 846

12392 Compliance with notice.

Adequate avoidance. The purchaser of land under a forfeitable contract who, upon being served with notice of forfeiture for the nonpayment of a portion of the contract price, tenders the entire amount called for by the contract, necessarily prevents a forfeiture of his contract.

May v Haynie, 212-66; 236 NW 98

Inadequate tender to avoid forfeiture. A purchaser of real estate who makes an inadequate tender in an effort to avoid a forfeiture of his contract may not successfully claim that the deficiency was supplied by the rental value of the property then in possession of parties whose right to possession was traceable to said purchaser himself.

Moore v Elliott, 213-374; 239 NW 32

Inadequate tender—right to increase. Tho a tender of the amount due under a contract is slightly inadequate, the court, in an equitable action involving the contract, may very properly permit the purchaser to increase his tender to the required amount.

May v Haynie, 212-66; 236 NW 98

Ineffectual payment to avoid forfeiture. Tho the purchaser in a forfeitable, land sale contract be authorized by the vendor to make the defaulted payment at a named bank, and thereby avoid forfeiture of the contract under the statutory 30-day notice, yet said purchaser makes no effectual payment by depositing, in his own name and in said bank, the amount of said payment, and thereupon drawing a check payable to vendor, and delivering said check to the cashier of said bank (his own agent) with direction, in effect, to deliver said check to vendor only after the amount thereof has been indorsed on a promissory note which never existed.

Schwab v Roberts, 220-958; 263 NW 19

Payment not in conformity. The act of the purchaser in a written, forfeitable, land sale contract in defaulting in his agreement to make, directly to the vendor, a certain payment, arms the vendor with right to serve a 30-day notice of forfeiture, and thereupon to demand that the purchaser avoid his default by making the payment in question strictly in accordance with the contract, notwithstanding any mere statement by the vendor prior to the maturity of the payment that it might be made to a named bank, and that a few days delay in making payment "would make no difference".

Schwab v Roberts, 220-958; 263 NW 19

12393 Proof and record of service.

Mechanics' liens — assignment — redemption by vendee's quitclaim grantee from real estate forfeiture. An assignee of mechanics' liens, who, after foreclosing thereon, purchases the real estate contract covering part of the land subject to the mechanics' liens, and who then forfeits the real estate contract, but fails to file the statutory proof of service, cannot prevent a redemption from the foreclosure sale by a person taking a quitclaim deed from the vendee, such quitclaim owner having neither actual nor constructive knowledge of the claimed forfeiture.

Murray v Kelroy, 223-1331; 275 NW 21

12394 Scope of chapter.

Real estate contract—nonnegotiable instrument law inapplicable—assignor not liable to assignee. Under statute, assignor of nonnegotiable instruments guarantees payment thereof to assignee, but such statute is limited to commercial paper and does not embrace bilateral real estate purchase contract and does not create a right of action in vendor's assignee against such vendor as assignor under statute.

Nash v Rehmann Bros., 53 F 2d, 624

CHAPTER 528

NUISANCES

12395 Nuisance—what constitutes—action to abate.

Atty. Gen. Opinion. See AG Op July 10, '39

ANALYSIS

I NUISANCE IN GENERAL
II ABATEMENT AND INJUNCTION
III DAMAGES
(a) IN GENERAL
(b) MEASURE OF DAMAGES
IV EVIDENCE

Attractive nuisances:
Cities. See under §§5738, 5945
Electricity. See under §8323
Generally. See under Ch 484, Note 1 (I)
Railroads. See under §8156 (III)
What constitutes nuisance. See under §12396

I NUISANCE IN GENERAL

Property—use not to injure others. The ownership of property carries with it the obligation to so use the property that injuries to others will not result therefrom.

Casteel v Afton, 227-61; 287 NW 245

Private property—subservient use. A person who lives in a city, town, or village must, of necessity, submit himself to the consequences and obligations of the occupations which may be carried on in his immediate neighborhood, which are necessary for trade and commerce, and also for the enjoyment of property and the benefits of the inhabitants of the place, and matters which, altho in themselves annoying, are in the nature of ordinary incidents of city or village life and cannot be complained of as nuisances.

Casteel v Afton, 227-61; 287 NW 245

Property — reasonable use permitted. The owner of property may always put his property to reasonable use, dependent upon the locality and other conditions.

Casteel v Afton, 227-61; 287 NW 245

II ABATEMENT AND INJUNCTION

Discussion. See 16 ILR 422—Anti-aesthetic use of property

Annoyance and discomfort must be actual. Where annoyance and discomfort are alleged as ground for injunctive relief, the injury complained of must be of such character as to be of actual discomfort to one of ordinary sensibilities.

Casteel v Afton, 227-61; 287 NW 245

Injury to relative rights—nuisance. An action for damages consequent on a nuisance is not an action for injury to "relative rights" and is not, therefore, barred in two years.

Chase v City, 203-1361; 214 NW 591
Hill v City, 203-1392; 214 NW 592

Liquor nuisance—nonright of private citizen. A private citizen has no right—since the enactment of the liquor control act, Ch 93-F1, C., '35 [Ch 93.1, C., '39]—to institute an action to enjoin the maintenance of an intoxicating liquor nuisance which affects him only as one of the general body of citizens.

Doebler v Dodge, 223-218; 272 NW 144

Playground—not nuisance. In an action to enjoin as a nuisance the maintenance of a public playground and athletic field, used both during the day and at night, and attended generally by the people of the community, resulting in incidental annoyance and inconsequential injury to plaintiff, an adjoining property owner, held, facts did not warrant issuance of an injunction to restrain such use as a nuisance.

Casteel v Afton, 227-61; 287 NW 245

Remedy of private party. Assuming, arguendo, that advertising matter on a street traffic regulator constitutes a public nuisance, yet a private party may not enjoin such nuisance, in the absence of a proper plea and affirmative proof that such party will suffer a damage distinct from that of the general public.

Lytle Co. v Gilman, 201-603; 206 NW 108

Successive actions. Separate actions may be maintained for separately accruing damages caused by an abatable nuisance, even tho plaintiff might accomplish the same end by successive amendments to the pleadings in his first action.

Stovern v Town, 207-1123; 224 NW 24

Surface waters—unlawful diversion on one's own land. The owner of a dominant estate may not legally divert material quantities of surface waters from one natural watercourse on his land to another natural watercourse on his land, and thereby ultimately cast such diverted waters upon a public highway at a point where they would not naturally flow; nor may the board of supervisors, in order to dispose of said diverted waters, legally construct and maintain a culvert in said highway at said point of diversion, and thereby cause said diverted waters to pass through the highway and upon the land of the servient estate (to its substantial damage), at places where it would not naturally flow.

Anton v Stanke, 217-166; 251 NW 153

III DAMAGES

(a) IN GENERAL

District liabilities—torts. A school district, organized, existing, and acting under the laws of the state as a governmental agency, is not liable in damages consequent on the

III DAMAGES—concluded
(a) IN GENERAL—concluded

negligence of its employees, or in consequence of the maintenance by it, through its employees, of a nuisance.

Larsen v School Dist., 223-691; 272 NW 632

Issue-changing amendment—right to reject. The court does not abuse its discretion in refusing a belated amendment which would convert an action for damages for a permanent nuisance into an action to enjoin a nonpermanent nuisance and for damages.

Cary-Platt v Elec. Co., 207-1052; 224 NW 89

Nonapplicability of statute. Chapter 133, C., '31, has no application to a controversy wherein a private property owner seeks the abatement of a private nuisance.

Higgins v Produce Co., 214-276; 242 NW 109; 81 ALR 1199

(b) MEASURE OF DAMAGES

Decrease in rental value. An owner of land may recover, as one of his elements of damages consequent on the maintenance of a nonpermanent nuisance the difference in the rental value of the premises with and without the nuisance, it appearing that the nuisance was in existence at the time the property was rented.

Stovern v Town, 204-983; 216 NW 112

IV EVIDENCE

Action for damages—evidence. Evidence that a nuisance was a "health hazard" is fairly justified by a pleading that plaintiff and his family were, by reason of the nuisance, subject to "offensive, obnoxious, and poisonous odors * * * and detrimental to the comfort, use, and enjoyment of their property."

Hill v City, 203-1392; 214 NW 592; 37 NCCA 232

Fouling of stream. Evidence held to show the complete abatement of a nuisance consequent on the fouling of a stream.

Stovern v Calmar (Town), 207-1126; 224 NW 26; 37 NCCA 239

Harmless error—reception of immaterial evidence. In an action for damages consequent on a nuisance, evidence to the effect that a septic tank has the power to destroy disease germs reviewed, and, in view of the record, held immaterial, but nonprejudicial.

Hill v Winterset, 203-1392; 214 NW 592

Playground—not nuisance on facts considered. In an action to enjoin as a nuisance the maintenance of a public playground and athletic field, used both during the day and at night, and attended generally by the people of the community, resulting in incidental annoyance and inconsequential injury to plaintiff, an adjoining property owner, held, facts did not warrant issuance of an injunction to restrain such use as a nuisance.

Casteel v Afton, 227-61; 287 NW 245

Waiver of incompetency. Error may not be predicated on the reception of irrelevant and incompetent testimony relative to the condition of a nuisance at a place remote from the place in controversy when the complainant fails to avail himself of a later indicated willingness on the part of the court to strike such testimony.

Chase v City, 203-1361; 214 NW 591

12396 What deemed nuisances.

Atty. Gen. Opinions. See '38 AG Op 802; AG Op April 14, '39

ANALYSIS

I IN GENERAL
II INDICTMENT
III EVIDENCE

I IN GENERAL

Arbitrarily vacating street to make defense to injunction. In an action to enjoin a town from maintaining a nuisance in a street or alley by allowing an adjoining owner to fence and use the street or alley, the action of the town council in arbitrarily vacating the street and the alley, without regard to the interests of the public, for the obvious purpose of creating a defense to the injunction suit, will be declared invalid.

Pederson v Radcliffe, 226-166; 284 NW 145

Enjoining maintenance of nuisance — gasoline pump. A gasoline pump erected in the parking of a public street is not only an "incumbrance" on the street, but, when erected without legal authority, is ipso facto a nuisance and, because of the mandatory duty of the municipality to keep its streets free from nuisances, is enjoinable by the city or town.

Lamoni v Smith, 217-264; 251 NW 706

Enjoining unauthorized maintenance of wires. The maintenance of electric transmission lines across the streets and alleys of a city or town without a franchise right so to do, constitutes not only a nuisance, but a trespass upon the property of the municipality, and may be enjoined by the municipality, irrespective of the fact whether it has been damaged by such maintenance.

Ackley v Elec. Co., 204-1246; 214 NW 879; 54 ALR 474

Obstruction of street. An obstruction of a street or highway is a nuisance.

Pederson v Radcliffe, 226-166; 284 NW 145

Playgrounds—not per se nuisances. Playgrounds and athletic fields are of advantage to the health and well-being of a community and are not per se nuisances, tho they can be so conducted as to become nuisances.

Casteel v Afton, 227-61; 287 NW 245

Pollution — limitation on right. Principle recognized that the right of a riparian owner to cast refuse into a natural stream may be quite materially limited after a portion of his land has been condemned for a public purpose.

Wheatley v City, 213-1187; 240 NW 628

Poultry and produce plant. While some of the incidents attending the operation of a live poultry and produce plant may be offensive to nearby residents of ordinary and reasonable sensibilities, and must be endured because of their inevitableness, yet abatement will be ordered of those acts which are not inevitable but avoidable, e. g., (1) the maintaining of offal in open containers, (2) the removal of such offal in open conveyances, and (3) the practice of using a dressing process until the contents thereof become offensive to reasonable sensibilities; and this is true tho the plant is located within an exclusively industrial district (but adjacent to a small residential district), represents a large investment, and is of great commercial importance.

Higgins v Prod. Co., 214-276; 242 NW 109; 81 ALR 1199

Practicing medicine without license. The statute authorizing injunction to restrain the practice of medicine and surgery without a license is constitutional for the reason that such practice constitutes a nuisance under the general law of the state, and chancery has, from time immemorial, possessed jurisdiction to enjoin nuisances; and this is true irrespective of the question whether the district court may be constitutionally vested with an equitable jurisdiction not possessed by chancery courts when the state constitution was adopted.

State v Howard, 214-60; 241 NW 682

Rendering plant — nuisance per se. The operation of a rendering plant in a city or town for processing the carcasses of animals dying of disease will be peremptorily and permanently enjoined when it is demonstrated that the plant cannot be operated without being a public nuisance.

State v Drayer, 218-446; 255 NW 532

Repair shop in connection with garage. A repair shop in connection with a garage situated in what is in fact a residential district may be attended with such noise, smoke, gases, and odors as to constitute an abatable private nuisance, provided such shop cannot be so operated as to avoid such objectionable conditions.

Pauly v Montgomery, 209-699; 228 NW 648

Trap door in leased coliseum—res ipsa loquitur. Trap door in leased coliseum opened only to dispose of refuse held not a nuisance. Doctrine of res ipsa loquitur held inapplicable where person fell into opening, especially in view of fact that trap door was not wholly under control of defendant-lessees.

Work v Coliseum Co., (NOR); 207 NW 679

Undertaking establishment. The operation, under formal municipal permit, of an undertaking and embalming establishment in a city, in a territory designated by a duly enacted zoning ordinance as a commercial district, will not be enjoined on the sole ground that, being adjacent to a residence, said operation will have a depressing mental effect on the occupant and owner of said residence and on the members of his family.

Kirk v Mabis, 215-769; 246 NW 759; 87 ALR 1055

Funeral home. The operating of an undertaking business or so-called funeral home in a strictly residential section of a municipality under circumstances which bring to the families in the immediate neighborhood a constant reminder of death, a resulting feeling of mental depression, an appreciable lessening of their happiness and disease-resisting powers, and an appreciable depreciation of the value of their properties, constitutes a nuisance and is enjoinable as such.

Bevington v Otte, 223-509; 273 NW 98

Use of public places—expired franchise—unexpired street light contract—poles in streets lawful. Electric company's occupancy of town streets to supply street lighting under a valid contract is not a trespass nor a nuisance merely because its franchise has expired.

Miller v Milford, 224-753; 276 NW 826

II INDICTMENT

No annotations in this volume

III EVIDENCE

Gasoline service station—evidence. A gasoline service station located in a city is not a nuisance per se. Evidence reviewed and held the station in question was not a nuisance in fact.

Yeanos v Oil Co., 220-1317; 263 NW 834

Intoxicating liquors. Evidence reviewed, and held ample to sustain a conviction for nuisance.

State v Japone, 202-450; 209 NW 468

Streets—obstructions—negligence per se. A pedestrian who, on a dark and rainy night, passes over a parking in a public street in close proximity to a pile of broken cement, with full knowledge of the presence of such obstruction and of its dangerous character, and is injured by stumbling over a detached piece of the cement, is guilty of contributory negligence per se when it appears that a very slight deviation in his course would have placed him in a zone of perfect safety.

Roppel v Mt. Pleasant, 208-117; 224 NW 579

12397 Penalty—abatement.

Abatement—evidence. Evidence held to show the complete abatement of a nuisance consequent on the fouling of a stream.

Stovern v Town, 207-1126; 224 NW 26; 37 NCCA 239

Avoidance of peremptory abatement. A sewer system which is being maintained by a municipality for sanitary purposes, but which is a nuisance, should not be peremptorily and finally abated, but the court should (while retaining jurisdiction) enter an interlocutory order of abatement and give the municipality a reasonable time in which to effect the abatement.

Stovern v Town, 204-983; 216 NW 112

12401 Expenses—how collected.

Atty. Gen. Opinion. See '38 AG Op 318

CHAPTER 529

WASTE AND TRESPASS

12402 Treble damages.

Excessive use of surface—damages. A mine owner in casting refuse upon the surface of the soil in his mining operations is liable to the owner of such surface to the extent only that he reduces the value of the surface by a use which is beyond the call of reasonable necessity.

Grell v Lumsden, 206-166; 220 NW 123

Measure of damages. Where refuse is wrongfully cast upon realty and is of such nature that it cannot be readily removed and causes permanent injury, the measure of damages is the difference between the value of the property immediately before and immediately after the injury.

Grell v Lumsden, 206-166; 220 NW 123

Restoration at nominal expense. If a ditch wrongfully dug upon the land of another is such that the soil can be restored to its former condition at a nominal or trifling expense, then such expense measures the utmost that can be recovered in the way of actual damages.

Grell v Lumsden, 206-166; 220 NW 123

12404 Who deemed to have committed.

Waste—insufficient showing. The act of a mortgagor in obtaining the rents of the mortgaged premises and in not paying the taxes on the premises does not constitute legal waste.

Security Co. v Ose, 205-1013; 219 NW 36

12405 Treble damages for injury to trees.

Wrongful cutting of trees. The measure of actual damages for the wrongful cutting of trees which are not designed for shade, beautification of the premises, or other particular use, is the fair and reasonable value of such trees when severed from the soil, and not the difference in value of the entire land immediately before and immediately after such severance.

Grell v Lumsden, 206-166; 220 NW 123

12406 Estate of remainder or reversion.

Devise—life estate (?) or fee (?)—mortgage validity. Where a will devised land to a son to use until son's youngest child became 20 years old, or if such child died before such age, then until January 1, 1940, when the land became the property of the "son and his heirs", a mortgage placed on the land by the son, altho before 1940, is a valid lien, not merely on a life estate, but on the fee, and an equitable action by son's children against the mortgagee and others to establish title in the land was properly dismissed.

Hudnutt v Ins. Co., 224-430; 275 NW 581

12408 Purchaser at execution sale.

Purchaser's right to recover damages to property. See under §11747

Recovery for, when mortgage fully satisfied. While a mortgagee of land may maintain an action to protect his security against waste, yet after he has foreclosed and bought in the property for the full amount of the debt, he cannot maintain an action for gravel and standing timber removed from the land during the time the mortgage was being foreclosed.

Kulp v Trustees, 217-310; 251 NW 703

CHAPTER 530

LIBEL AND SLANDER

12412 Pleading.

Discussion. See 12 ILR 77—Injunction against libel

ANALYSIS

Criminal liability. See under §§13256–13262
Newspapers, retraction, damages. See under §§12413, 12416

I IN GENERAL

Corporation as plaintiff. A corporation may maintain an action for libel.

Shaw Cleaners v Dress Club, 215-1130; 245 NW 231; 86 ALR 839

Effect of statute. This statute does away with the technical rules of pleading relative to "inducement", "colloquium" and "innuendo" required by the common law.

Amick v Montross, 206-51; 220 NW 51; 58 ALR 1147

Innuendo—scope. Principle reaffirmed that while an innuendo cannot extend the expressions in an alleged libel beyond their ordinary meaning, yet when the words used are ambiguous or admit of different applications an innuendo may confine or direct them.

Salinger v Capital, 206-592; 217 NW 555

Libel not avoided because published as an opinion. A published attack on a person, otherwise libelous per se, is not rendered nonlibelous because it only stated what the publisher thought.

McCuddin v Dickinson, 226-304; 283 NW 886

Libel tho party libeled is unnamed. A publication may be libelous tho plaintiff is not named therein.

Shaw Cleaners v Dress Club, 215-1130; 245 NW 231; 86 ALR 839

Motions—more specific—nonpermissible objects. Motion seeking names and addresses of persons to whom alleged slanderous statements were made held properly overruled.

Johns v Cooper, (NOR); 205 NW 791

Repeating hearsay matter. A person is liable for the publication of slanderous words in regard to another even tho he is but repeating what he has heard.

Amick v Montross, 206-51; 220 NW 51; 58 ALR 1147

Repetition of slander. Reversible error results from instructing, in an action for slander, where actual damages only were prayed for, that in determining the nature and extent of the injuries or damages the jury might take into consideration the fact, if it be a fact, that defendant had repeated the slander, such repetitions not being declared on in the petition.

Bond v Lotz, 214-683; 243 NW 586

Statutory definition—applicability. Principle reaffirmed that the statutory definition of libel is applicable to civil as well as to criminal actions.

Shaw Cleaners v Dress Club, 215-1130; 245 NW 231; 86 ALR 839

Writing identifying libeled person—inference sufficient. A writing to be libelous need not necessarily name the person libeled, but it must by inference or innuendo at least refer to him in an intelligent way.

Boardman v Gazette Co., 225-533; 281 NW 118

II PARTICULAR WORDS AND IMPUTATIONS

Accusation of crime. The defamation of a person by accusing him of having been drunk is not actionable per se because such accusation drops within the general rule that a charge of crime in order to be actionable per se must be of a crime which is indictable.

Amick v Montross, 206-51; 220 NW 51; 58 ALR 1147

Advertisement not assailing one's integrity or moral character. An advertisement to the effect that garments cleaned at half price are only half cleaned is not libelous per se as to a competitor who has been advertising the cleaning of garments at half price, said advertisement not assailing the integrity or moral character of said competitor.

Shaw Cleaners v Dress Club, 215-1130; 245 NW 231; 86 ALR 839

Charge of infidelity. A charge of infidelity on the part of a married woman necessarily charges unchastity per se.

Ballinger v Demo. Co., 203-1095; 212 NW 557

Communication not libelous per se. A written notification by a bank to the consignee of

II PARTICULAR WORDS AND IMPUTATIONS—concluded

sheep to the effect that "the bank has a chattel mortgage on said shipment of sheep and the proceeds of said sale should be held intact subject to said claim" is not libelous per se as to the consignor.

Miller v Bank, 220-1266; 264 NW 272

Defamatory attack on integrity—element of libel per se. A published attack upon the integrity and moral character of a person is defamatory, and if it tends to provoke to wrath, tends to expose to public hatred, contempt, or ridicule, or tends to deprive the person defamed of the benefits of public confidence and social intercourse, it is libelous per se.

McCuddin v Dickinson, 226-304; 283 NW 886

Intoxication in connection with profession. The defamation of a physician by accusing him of having been drunk and because thereof unable to attend a professional call is actionable per se.

Amick v Montross, 206-51; 220 NW 51; 58 ALR 1147

Libel per se. A newspaper article which characterizes a public officer as being an "ignorant" and "coarse" ruffian is defamatory and libelous per se.

Taylor v Hungerford, 205-1146; 217 NW 83

Newspaper attack on attorney—requisites for libel per se. A newspaper attack upon attorneys stating, among other things, that they were attempting "to stall off" an appeal, tho ill-natured, vexatious, and untrue, yet is not libelous per se, since it lacks one essential element as such, to wit, malicious defamation, and unless special damages are pleaded, is not actionable.

Boardman v Gazette Co., 225-533; 281 NW 118

Nonactionable words. A written publication which charges that a member of the supreme court is advocating an increase in the membership of the court is not libelous; likewise a charge that such member was accepting sleeping accommodations from the state to which he was not entitled under the law, even tho such latter charge is given the meaning, by an innuendo, of a violation of good taste and self-respect.

Salinger v Capital, 206-592; 217 NW 555

Violation of official duty. A written publication which, in reference to a named member of the supreme court, charges that the decisions of the court were the judgments of one member only is libelous when given the meaning by an innuendo, that said member was violating his duty as a member of the court.

Salinger v Capital, 206-592; 217 NW 555

Words actionable. The naked statement that a person is such a dope fiend that no one can believe a thing he says, is not actionable.

Kluender v Semann, 203-68; 212 NW 326

Words actionable—"dirty trash" as slander per se. Woman's statement that son's wife was "dirty trash" admissible as proof of slander per se when understood by hearer to mean a prostitute.

Shultz v Shultz, 224-205; 275 NW 562

III PRIVILEGED COMMUNICATIONS

Charge of unchastity—damages presumed. To call a woman a whore is slanderous per se, and, when there is no plea of justification and proof thereof, the law presumes substantial damages. Verdict of $1,000 held nonexcessive tho the record revealed no evidence relative to mental pain and suffering.

Simons v Harris, 215-479; 245 NW 875

Judicial proceedings. Defamatory matter, tho false and malicious, contained in pleadings filed according to law in a court having jurisdiction, if relevant and pertinent to the issues in the case, are absolutely privileged, even tho said matter pertains to a party who is not party to the action or suit.

Anderson v Hartley, 222-921; 270 NW 460

Nonprivileged communication. The publisher of a newspaper is not privileged to publish the grounds of divorce as "infidelity" on the part of the wife when the actual ground was "cruel and inhuman treatment".

Ballinger v Demo. Co., 203-1095; 212 NW 557

IV JUSTIFICATION, MITIGATION, AND RETRACTION

Defense—negligent signing of information. One who files an information charging another with being insane, and does not believe at the time that the charge is true, and who appears at the hearing and actively supports the charge cannot avoid the presumption of legal malice and damages by a plea that he signed the information without reading it, and under a misunderstanding as to its nature.

Plecker v Knottnerus, 201-550; 207 NW 574

Import of words. A witness may not testify that in the use of certain words he intended to express or imply a meaning which could not, as matter of fact, be reasonably inferred from such words.

Ballinger v Demo. Co., 203-1095; 212 NW 557

Mitigation of damages — evidence. Under proper plea and proof, evidence of the general bad professional reputation of the plaintiff in the place where he is practicing his profession is admissible in mitigation of damages, even tho the slander was spoken at a nearby place.

Amick v Montross, 206-51; 220 NW 51; 58 ALR 1147

V ACTIONS

(a) IN GENERAL

When question for court. Whether an unambiguous publication is libelous per se is a question for the court.

Shaw Cleaners v Dress Club, 215-1130; 245 NW 231; 86 ALR 839

(b) PARTIES, PLEADING, AND ISSUES

Demurrer — when bad. A demurrer to a petition in an action for slander will not lie solely on the ground that the petition shows on its face that defendant, at the time of speaking the words in question, was acting in a governmental capacity, because defendant's right to assert the privileged character of the spoken words is not an absolute right but a qualified right only. The demurrer—if employed under such circumstances—must point out wherein said petition fails to state a cause of action against defendant.

Brown v Cochran, 222-34; 268 NW 585

Special damages—insufficient plea. A general allegation of loss of many customers consequent on an alleged libel, and an equally general allegation of damages in a gross amount, are quite insufficient to meet the legal rule that such plea must be specific.

Shaw Cleaners v Dress Club, 215-1130; 245 NW 231; 86 ALR 839

Writing and publication when an issue—effect of "no recollection" by witness. In a libel action, mere testimony that a witness has no recollection of the writing or publication of a letter does not raise an issue as to the fact of writing; but when his testimony, which must be construed as an entirety, shows a denial thereof, a court cannot, as a matter of law, establish the writing and publication.

Thompson v Butler, 223-1085; 274 NW 110

(c) EVIDENCE, PROOF, AND TRIAL GENERALLY

Acts antedating conspiracy. In an action for damages for conspiracy to libel plaintiff and to defame his character, growing out of the World war activities, evidence is wholly inadmissible which tends to show that, long prior to the alleged conspiracy, the defendants and the community generally in which they lived sought to perpetuate and did perpetuate the military habits, customs, and practices of the foreign people and government of which the defendants were formerly a part.

Mowry v Reinking, 203-628; 213 NW 274

Damages — actual and exemplary—mitigation. In an action for libel and defamation of character, the court should clearly differentiate between the purpose and effect of evidence (1) tending to show a good-faith belief in the truth of the charges in question, and (2) tending to show the actual truth of such charges.

Mowry v Reinking, 203-628; 213 NW 274

Evidence of crime withdrawn from jury—proof beyond reasonable doubt not required. In an action for libel based on a defamatory publication that the plaintiff could not tell the truth when on the witness stand, in which action defendant offered to show that plaintiff perjured himself in a previous foreclosure hearing as to the existence of a certain fence, the court errs in withdrawing this evidence from the jury on the ground of indefiniteness, since in this civil action the defendant was not required to prove perjury beyond a reasonable doubt.

McCuddin v Dickinson, 226-304; 283 NW 886

Incompetent declarations. Declarations of alleged co-conspirators evincing hostility toward the plaintiff in an action for conspiracy to libel are wholly inadmissible when it cannot be said that they were made in furtherance of the alleged conspiracy. Especially are declarations evincing hostility to plaintiff inadmissible when made by persons who are not party defendants nor shown to be conspirators, and whose declarations spring solely from personal hostility wholly disconnected with the conspiracy in question.

Mowry v Reinking, 203-628; 213 NW 274

More specific pleading—erroneous denial. In an action for general and special damages, under general and somewhat meager pleading, based on an alleged libelous publication resulting (1) in loss of customers, (2) in being refused credit, and (3) in loss of earnings in business, plaintiff should, on motion for more specific statement of the action, be compelled to set forth the names of customers lost, the names of those who refused him credit, and the ultimate facts upon which he bases his demand for judgment on account of injury to his earnings.

Dorman v Credit Co., 213-1016; 241 NW 436

Meaning of words—exemplary and compensatory damages. Evidence that witness understood slanderous words to mean woman was a prostitute is sufficient to authorize submission to the jury the question of exemplary and compensatory damages.

Shultz v Shultz, 224-205; 275 NW 562

Words actionable—evidence admissible as alleged. In a slander action it is not error to admit in evidence the very statements that plaintiff alleged in his petition were spoken.

Shultz v Shultz, 224-205; 275 NW 562

Writing and publication—effect of "no recollection" by witness. In a libel action, mere testimony that a witness has no recollection of the writing or publication of a letter does not raise an issue as to the fact of writing, but when his testimony, which must be construed as an entirety, shows a denial thereof, a court cannot as a matter of law establish the writing and publication.

Thompson v Butler, 223-1085; 274 NW 110

V ACTIONS—concluded

(d) INSTRUCTIONS

Loss of income—causal connection to libel as prerequisite. In a libel action before damages are recoverable for loss of income it is proper to instruct as to the necessity of showing a causal connection between such libel and the loss of income.

Thompson v Butler, 223-1085; 274 NW 110

Malice. In an action for actual damages only, consequent of a slander, an instruction accurately defining legal malice is proper—no instruction being given as to actual malice—malice in fact—and the jury being told that there could be no recovery of exemplary damages.

Bond v Lotz, 214-683; 243 NW 586

(e) VERDICT, JUDGMENT, AND DAMAGES

Actual and exemplary damages—slander per se. A verdict in a slander action for $3,000 cannot be held to be excessive or resulting from passion and prejudice, when the petition alleged slander per se, and the jury might have found both actual and exemplary damages.

Shultz v Shultz, 224-205; 275 NW 562

Exemplary damages. The publication of a known false libel renders the offender liable for exemplary damages.

Plecker v Knottnerus, 201-550; 207 NW 574

Verdict—excessiveness. Record reviewed, and held that a verdict of $40,000 for libel and defamation of character was excessive and the result of passion and prejudice.

Mowry v Reinking, 203-628; 213 NW 274

(f) REVIEW

Actionable words—charge of unchastity. To call a woman a whore is slanderous per se, and, when there is no plea of justification and proof thereof, the law presumes substantial damages. Verdict of $1,000 held nonexcessive tho the record revealed no evidence relative to mental pain and suffering.

Simons v Harris, 215-479; 245 NW 875

Harmless error—exclusion of evidence otherwise received. The exclusion of testimony tending to prove certain facts is harmless when such facts have been otherwise unquestionably established.

Amick v Montross, 206-51; 220 NW 51; 58 ALR 1147

Husband and wife—enticing and alienating—sufficient pleading. An allegation that the affections of a wife were alienated by slandering the plaintiff-husband and by cultivating in the wife a dislike for plaintiff is sufficient without setting out the words uttered and the persons in whose presence they were spoken; likewise an allegation that defendants "jointly and severally" conspired to alienate the affections of the wife from the husband.

Depping v Hansmeier, 202-314; 208 NW 288

VI SLANDER OF TITLE

Evidence—competency. Plaintiff in an action for damages consequent on the loss of a sale of his property because of a slander of his title by defendant manifestly will not be permitted to establish by hearsay evidence that the prospective purchaser would have been able to procure a first mortgage loan in a certain amount, such being a condition of the contemplated sale, let alone by evidence of a less satisfactory nature.

Farmers Bank v Hintz, 206-911; 221 NW 540

Loss of sale—insufficient showing. Plaintiff in an action for damages consequent on the loss of a sale of his property because of a slander of his title by defendant may not recover when it appears that the ability of the prospective purchaser to buy the property on the terms proposed is a mere conjecture or guess.

Farmers Bank v Hintz, 206-911; 221 NW 540

Slander of property or title—essential elements—when petition demurrable. A petition in an action for damages for slander of title is demurrable unless, inter alia, it alleges, in some proper form, (1) the utterance and publication of the alleged slanderous words, and (2) the special legal damages suffered by plaintiff. Pleading reviewed and held fatally deficient in both particulars.

Witmer v Bank, 223-671; 273 NW 370

12413 Libel—retraction—actual damages.

Libel generally. See under §12412

Allowable special damages. Special damages consequent on the loss of an official position by reason of libel are allowable.

Taylor v Hungerford, 205-1146; 217 NW 83

Nonexcessive verdict. Verdict of $2,000 as actual damages for libel, reduced one-half by the trial court, held not so excessive as to indicate passion and prejudice per se.

Taylor v Hungerford, 205-1146; 217 NW 83

12416 Proof of malice.

Libel generally. See under §12412

Insufficient basis. Exemplary damages may not be allowed solely on the basis of the implication of malice which the law attaches to a libel per se.

Ballinger v Demo. Co., 207-576; 223 NW 375

Exemplary damages. The publication of a knowingly false libel renders the offender liable for exemplary damages.

Plecker v Knottnerus, 201-550; 207 NW 574

Malice—evidence to rebut. The defendant in an action for libel may, when express malice is charged, show (1) the source of the information from which the published article was written, and (2) his good faith and freedom from malice in publishing the article.

Ballinger v Demo. Co., 203-1095; 212 NW 557

Meaning of words—exemplary and compensatory damages. Evidence that witness understood slanderous words to mean woman was a prostitute is sufficient to authorize submission to the jury the question of exemplary and compensatory damages.

Shultz v Shultz, 224-205; 275 NW 562

Negligence as defense. One who files an information charging another with being insane, and does not believe at the time that the charge is true, and who appears at the hearing and actively supports the charge, cannot avoid the presumption of legal malice and damages by a plea that he signed the information without reading it, and under a misunderstanding as to its nature.

Plecker v Knottnerus, 201-550; 207 NW 574

CHAPTER 531

QUO WARRANTO

12417 For what causes.

ANALYSIS

Patents on inventions. See under §9885

I NATURE AND GROUNDS

County supervisor-elect—death before qualifying. The death of a duly elected member to the board of supervisors, before qualifying, creates a vacancy in that office, to be filled in the manner provided by subsection 5 of §1152, C., '35.

State v Best, 225-338; 280 NW 551

Nonpermissible equitable action. Quo warranto, and not an action in equity aided by injunction, is the proper procedure to determine title to a public office.

Young v Huff, 209-874; 227 NW 122

Title to office. In an action of mandamus by a duly appointed, qualified, and acting public officer to compel the legal warrant-issuing officer to issue warrants for salary due plaintiff, the court will not determine whether plaintiff was eligible to receive said appointment.

Reason: Quo warranto is the sole remedy to test title to such office.

Clark v Murtagh, 218-71; 254 NW 54

Optional remedies. When the state demands the complete ouster of a corporation, it may proceed in equity under §8402, C., '24, or at law in the form of quo warranto under this chapter.

Kosman v Thompson, 204-1254; 211 NW 878; 215 NW 261

Statute of limitations—public not barred. An action to oust an alleged franchise holder from public streets because of the invalidity of the alleged franchise, tho brought by the county attorney in quo warranto, cannot be barred by the lapse of time.

State v Munn, 216-1232; 250 NW 471

Transfer from equity to law—effect. A law action, e. g., quo warranto, commenced as an equitable action and properly transferred by the court to law, will, on appeal, be disposed of as a law action.

State v Murray, 219-108; 257 NW 553

II PROCEEDINGS AND RELIEF

Demurrer—defective form. A demurrer to a petition in quo warranto—a law action—on the ground that "the facts stated do not entitle plaintiff to the relief demanded" presents no question for the court beyond those wherein the demurrant specifically points out wherein said facts are insufficient.

State v Munn, 216-1232; 250 NW 471

Office—weakness of adversary's title—effect. It is quite elementary that a person who asserts a right to hold a public office must prevail because of the strength of his own right, and not because of the weakness of his adversary's right.

State v Claussen, 216-1079; 250 NW 195

Persons entitled to relief. One claiming right to an office must prevail solely on the strength of his own right, not on the weakness of his adversary.

State v Murray, 219-108; 257 NW 553

Title to and possession of office—estoppel and waiver. Where, on the erroneous assumption that a vacancy existed in a public office, two persons are formally nominated, by different political parties, to fill the supposed vacancy and are voted on at the ensuing election, the failure of the candidate who is already serving under a valid appointment to withdraw his nomination and legally to question the nominations made, furnishes no basis for the claim that he thereby waived his right

longer to hold the office, and estopped himself from objecting to the result of the election.

State v Claussen, 216-1079; 250 NW 195

12418 Joinder or counterclaim.

Unallowable cross-petition. In an action of quo warranto against a particular claimant to the office, brought, under authorization of the court, in the name of the state on the relation of a private party, the defendant will not be permitted to cross-petition against a third party claimant to the same office, and thereunder bring said third party into the proceeding for an adjudication of his right to the office.

State v Murray, 217-1091; 252 NW 556

12420 By private person.

Collateral attack. An order of court granting to a party the right to institute an action of quo warranto may not be collaterally attacked.

State v Bobst, 205-608; 218 NW 253

12423 Right to an office.

Quo warranto—relief—determining term of office. In quo warranto to test the right of a party to hold office under an appointment, the court should determine the term during which the successful party may legally hold the office—such matter being properly in issue.

State v Claussen, 216-1079; 250 NW 195

12424 Several claimants.

Unallowable cross-petition. In an action of quo warranto against a particular claimant to the office, brought, under authorization of the court, in the name of the state on the relation of a private party, the defendant will not be permitted to cross-petition against a third party claimant to the same office, and thereunder bring said third party into the proceeding for an adjudication of his right to the office.

State v Murray, 217-1091; 252 NW 556

Venue. The district court of one county of a judicial district, in duly authorized quo warranto proceedings in said county involving the rival claims of two parties to the office of district judge, may acquire jurisdiction of both parties even tho one of them is a nonresident of the county of suit and is sole defendant in the county of his residence in a proceeding in quo warranto involving the same office.

State v Murray, 219-108; 257 NW 553

12427 Action for damages.

Atty. Gen. Opinions. See '34 AG Op 60, 402

12428 Judgment of ouster.

Evidence—decree of dissolution. A decree of dissolution of a corporation based on the fraud of the corporation is admissible, on the issue of fraud and want of consideration, against an alleged bona fide holder of a negotiable promissory note which was given to the corporation as the purchase price for its corporate stock, even tho neither of the parties to the action on the note were parties to the dissolution suit.

Andrew v Peterson, 214-582; 243 NW 340

Foreign corporations — dissolution — effect on pending actions. A duly rendered decree of dissolution of a foreign corporation, at the instance of the state under the laws of which said corporation was organized, is, in effect, an executed sentence of death; being such, said decree ipso facto works an abatement (1) of an unadjudicated action in rem pending in this state against said dissolved corporation, and (2) of garnishment proceeding pending in connection with said action. Under such circumstances the garnishee may properly move for and be granted an order of discharge.

Peoria Co. v Streator Co., 221-690; 266 NW 548

12431 Action against officers of corporation.

Dissipation of assets—liability. The act of the directors of a financially embarrassed corporation in selling their individually owned corporate shares of stock to a third party, and in receiving pay therefor out of the partly frozen bank deposits of the corporation, under an understanding that said third party would replace said dissipated deposits with securities of equal value, is per se fraudulent, and necessarily violative of the law-imposed trust relationship of the directors to existing and future-contemplated corporate creditors; and this is true irrespective of the plea that the directors in good faith believed that said third party would carry out the said understanding. It follows that the receiver of the corporation may repudiate such transaction and recover the dissipated assets from the directors.

Hoyt v Hampe, 206-206; 214 NW 718; 220 NW 45

CHAPTER 532

MANDAMUS

12440 Definition.

Discussion. See 20 ILR 667, 835—Mandamus
Atty. Gen. Opinion. See '36 AG Op 17

ANALYSIS

I NATURE AND SCOPE OF REMEDY IN GENERAL

Soldiers preference cases. See under §1162
Discussion. See 14 ILR 218—Modern mandamus

Equitable proceeding. A mandamus proceeding, altho originally an action at law under Iowa practice, is now triable in equity and, in the determination of such action, the court must necessarily apply equitable principles.

Briley v Board, 227-55; 287 NW 242
Bredt v Franklin County, 227-1230; 290 NW 669

Ministerial and discretionary duties. Principle reaffirmed that mandamus lies to compel the performance of a purely ministerial duty, not to control a discretionary duty.

Phinney v Montgomery, 218-1240; 257 NW 208

New action after failure of former action. An action in equity to mandamus the board of supervisors to order the refund of a tax which has been illegally exacted from plaintiff may not be deemed a continuation of a former action at law by the same plaintiff against the county and its treasurer for a personal judgment for the amount of said illegally exacted tax.

Murphy v Board, 205-256; 215 NW 744

Partially void tax sale. Mandamus (assuming the propriety of the remedy) will not lie to wholly cancel a tax sale which is only partially void.

Wren v Berry, 214-1191; 243 NW 375

Question first presented on appeal. Whether an action was properly brought in mandamus may not be presented for the first time on appeal.

Employment Bur. v State Com., 209-1046; 229 NW 677

Recordation of instrument by county recorder.

Weyrauch v Johnson, 201-1197; 208 NW 706

II ACTS AND PROCEEDINGS

(a) OF COURTS, JUDGES, AND JUDICIAL OFFICERS

Indeterminate sentence—fixing maximum or minimum confinement—surplusage. That part of a sentence of confinement in the penitentiary or in the men's or women's reformatory for a felony other than treason, murder, or rape, which assumes to fix the maximum or minimum term of confinement is surplusage under the indeterminate sentence act, even tho the statute under which the conviction is had fixes both a maximum and minimum term of confinement.

Cave v Haynes, 221-1207; 268 NW 39

(b) OF PUBLIC OFFICERS, BOARDS, AND MUNICIPALITIES

Soldiers preference cases. See under §1162
Discussion. See 16 ILR 53—Review of commission orders

Aid to blind. The discretion of the board of supervisors to refuse public aid to a blind person may not be controlled by mandamus.

Addison v Loudon, 206-1358; 222 NW 406

Appropriation for farm bureau. Mandamus is the proper remedy to compel the board of supervisors to make an appropriation of public funds to a farm bureau organization, even tho the board must, as a preliminary matter, determine whether the facts exist justifying the appropriation.

Taylor County Bureau v Board, 218-937; 252 NW 498

Official newspapers — number — nondiscretionary power of supervisors. Under statute providing that county board of supervisors "shall" select three official newspapers, and there were only three applicants, the board had no discretionary power, and petitioner-applicant was entitled to maintain mandamus action to compel the selection of his newspaper.

Bredt v Franklin County, 227-1230; 290 NW 669

Arbitrary zone reductions—state board correcting local board. The state board of assessment and review has supervision over, and power to direct, the local board and the city assessor of Des Moines, Iowa, to correct an arbitrary and discriminatory practice as to cubical content and zone of assessments, and in a mandamus action may enforce its order for the correction of such discrimination as may already have resulted. Such an order is not a re-assessment nor a revision of individual assessments of individual owners, since it dealt with aggregate valuation in several zones.

State v Local Board, 225-855; 283 NW 87

II ACTS AND PROCEEDINGS—continued
(b) OF PUBLIC OFFICERS, BOARDS, AND MUNICIPALITIES—continued

Assessment for drainage—correction of description. Mandamus will lie, by one landowner within a drainage district, to compel the board of supervisors to so correct the description of other assessed lands that the latter may be sold under the assessment against them.

Plumer v Board, 203-643; 213 NW 257

Assessments — inability to meet bonds. Where a drainage district was created and a sufficient assessment to pay all bonds was levied and collected but not at all times carried in a separate account by the county treasurer, with the result that on maturity date of the bonds no sufficient balance was available to retire them, a mandamus action on the theory of an insufficient assessment (§7509, C., '35) brought by the bondholders to require the drainage district trustees to make an additional levy was properly denied.

Western Assn. v Barrett, 223-932; 274 NW 55

Attorney general's salary. A statute, altho in the code because of its general and permanent nature, which sets the salary of the attorney general, a state officer, is not a continuing appropriation for that officer, when the biennial appropriation act appropriates a different and smaller amount for such officer for the biennium and declares "all salaries provided for in this act are in lieu of all existing statutory salaries". Mandamus will not lie to require payment for the larger salary.

O'Connor v Murtagh, 225-782; 281 NW 455

Bridges—construction over ditches. The statutory duty of the board of supervisors to construct bridges over public ditches at points where such ditches intersect secondary roads is enforceable by action of mandamus, such duty being in no manner limited or controlled by the statutory powers granted the county board of approval in adopting secondary road programs.

Robinson v Board, 222-663; 269 NW 921

Certification of nomination. Mandamus will lie to compel the secretary of state to certify a legal nomination to the county auditor.

Zellmer v Smith, 206-725; 221 NW 220

Construction of drainage improvement. Mandamus will not lie to compel the board of supervisors to proceed with the construction of a drainage improvement which, in effect, the board has never established.

Eller v Board, 208-285; 225 NW 375

County supervisors—raising constitutionality of statutes not permitted. In an action in equity for mandamus to compel board of supervisors to remit taxes on capital stock of failed bank, held, board of supervisors could not raise issue of constitutionality of statute providing for such remission, either in that it contravened the state or the federal constitution, as counties and other municipal corporations are creatures of the legislature, existing by reason of statutes enacted within the power of the legislature, and the board may not question that power which brought it into existence and set the bounds of its capacities.

Brunner v Floyd County, 226-583; 284 NW 814

Denial of policemen's pension. Mandamus is not the proper remedy to test the legality of the action of the trustees of a policemen's pension fund in denying a pension to an applicant.

Riley v City, 203-1240; 212 NW 716

Drains—tax sale—nonduty of supervisors to purchase certificate. The statutory provision that the board of supervisors or the drainage trustees "may" purchase an outstanding certificate evidencing a sale of land, for the nonpayment of drainage assessments, simply invests the board or trustees with discretion so to purchase. No mandatory duty so to purchase in order to protect the bondholder is imposed, even tho the bondholder must look solely to assessments for payment of his bond.

Bechtel v Board, 217-251; 251 NW 633

Execution of teacher's contract. Principle reaffirmed that, in an action of mandamus against the president and secretary of a school board to compel the execution of a teacher's contract, the validity of the action of the directors in closing the school in question may not be inquired into.

Mulhall v Pfannkuch, 206-1139; 221 NW 833

Ex-soldier preference—refusal. On mandamus to right the alleged wrong in refusing to grant to an ex-soldier a preference in a public appointment or employment, the sole and only issue before the court is whether the appointing officer or board was justified, within the range of fair discretion, in finding on the law-required investigation, as to relative qualifications, that the qualifications of the ex-soldier were not equal to the qualifications of the non-soldier appointee.

Bender v Iowa City, 222-739; 269 NW 779

Failure to maintain pension fund. An action at law against a city for judgment consequent on the failure of the council to perform its mandatory duty to levy a tax sufficient to meet and pay pensions for firemen and policemen, will not lie either on the theory of contract or damages. Mandamus is the proper remedy.

Lage v City, 212-53; 235 NW 761

Highway construction — interference with easement. When a highway was established through a city, taking the larger part of land

over which the plaintiff had been granted an easement, a property right belonging to the plaintiff was thereby destroyed; and when she was compelled to sell the property at a loss because of its impaired value, she was entitled to a writ of mandamus against the highway commission to compel the assessment of the damages sustained.

Dawson v McKinnon, 226-756; 285 NW 258

Issuance of county warrant. Mandamus is the proper remedy to compel the county auditor to issue a warrant in payment of legal claims against the county.

Miller Tractor v Hope, 218-1235; 257 NW 312

Issuance of treasurer's salary warrant. In mandamus suit by county treasurer to obtain warrant for salary, defendant's answer alleging, in effect, that treasurer owed county money for which a right of set-off existed, that treasurer was insolvent, and that he was not the head of a family and had not offered to do equity, raised issue as to treasurer's right to equitable relief.

Briley v Board, 227-55; 287 NW 242

Levy of tax. Mandamus will lie to compel a board of school directors to levy a tax to pay a judgment, there being no money in the fund in question, and no effort having been employed to secure such funds.

Looney v Sch. Dist., 201-436; 205 NW 328

Ordinance—arbitrary action. A mayor, exercising his power under an ordinance to direct the nonissuance of a license, may not be said to act "arbitrarily" when he, in accordance with the ordinance, notifies the applicant of the time and place of hearing on the application and when the applicant ignores the notice.

Talarico v Davenport, 215-186; 244 NW 750

Presumption as to official conduct. Presumptively a public officer will perform his duties as prescribed by law.

Banta v Clarke County, 219-1195; 260 NW 329

Proper remedy to secure tax refund. A taxpayer may properly bring a mandamus action to compel a refund of taxes overpaid because of county auditor's failure to comply with budget deduction requirements of §7164, C., '35. The state board of assessment and review has no power to correct this failure.

Hewitt & Sons v Keller, 223-1372; 275 NW 94

Recovery of tax paid—mandamus as remedy—voluntary payment—effect. Taxes illegally exacted through county auditor's failure to comply with statute requiring budget deduction of moneys and credits tax may be recovered in a mandamus action against the board of supervisors, even tho paid voluntarily and without protest.

Hewitt & Sons v Keller, 223-1372; 275 NW 94

Refusal of liquor permit. The good-faith exercise of the discretion vested in a town council to refuse an application for a class "B" permit to sell beer, on the ground that the applicant is not "of good moral character and repute", is not controllable by mandamus.

Madsen v Oakland, 219-216; 257 NW 549

Refund of tax. A taxpayer may not maintain an action for a general money judgment against a county, arising out of the fact that he has paid in the same year and on the same property an illegal bridge tax levied by a city and a legal bridge tax levied by the board of supervisors. Whatever remedy he has against the county, if any, must be worked out through mandamus to compel a refund.

Murphy v Berry, 200-974; 205 NW 777

Refund of erroneously exacted tax. Mandamus is the proper remedy to compel the board of supervisors to refund to a tax certificate holder the amount paid on an illegal sale of real estate for personal taxes not entered on delinquent personal tax list.

Schoenwetter v Oxley, 213-528; 239 NW 118

School district. When a school district failed to provide transportation for a pupil as required by statute, the pupil's father, who had furnished such transportation after making a demand on the school district, could not recover for such services under quasi contract or contract implied in law, as the statute did not contemplate that the costs of transportation be paid except under an arrangement with the school board, as provided by statute. The proper remedy of the plaintiff was mandamus to compel the school district to perform its mandatory duty.

Bruggeman v Sch. Dist., 227-661; 289 NW 5

School fund estimates omitting money on hand—taxes valid. School districts, in submitting their budgets for their fiscal year beginning July 1, are not required to include money on hand derived from taxes levied and estimated two years before and collected a year later to be expended during the current school year, and taxes collected accordingly will not be refunded in a mandamus action.

Lowden v Woods, 226-425; 284 NW 155

Schoolhouse site—permissible order of court. An order of court commanding the school board forthwith to erect a schoolhouse on a specified site is unobjectionable when such site had been already legally selected by the board.

Sanderson v Board, 211-768; 234 NW 216

Statute of limitation. The statute of limitation commences to run against an action of mandamus to compel the board of supervisors to levy an additional assessment to pay drainage warrants even tho the board had not levied or otherwise provided for the additional as-

II ACTS AND PROCEEDINGS—concluded
(b) OF PUBLIC OFFICERS, BOARDS, AND MUNICIPALITIES—concluded

sessment to complete the fund from which the warrants are to be paid.

Lenehan v Drain. Dist., 219-294; 258 NW 91

Teachers — pension—employment prerequisite. A public school teacher, after 30 years service and while lacking only six months more service to be entitled to a pension, cannot mandamus the school board to compel her re-employment, and, such re-employment being the relief sought, a court may not go outside the pleaded issues and grant such a pension as the school board may have given.

Driver v School Dist., 224-393; 276 NW 37

Title to office. In an action of mandamus by a duly appointed, qualified, and acting public officer to compel the legal warrant-issuing officer to issue warrants for salary due plaintiff, the court will not determine whether plaintiff was eligible to receive said appointment.

Reason: Quo warranto is the sole remedy to test title to such office.

Clark v Murtagh, 218-71; 254 NW 54

(c) OF PRIVATE CORPORATIONS AND INDIVIDUALS

Certificates of assessment—paramount right of holder. The holder of special paving assessment certificates who obtains an assignment of a tax sale certificate, issued on a sale of the lots or land for general taxes, may be compelled by mandamus to reassign said tax sale certificate (on proper payment) to the holder of special sewer assessment certificates which affect the same lots or land and which latter certificates are legally prior in point of time and right to said paving certificates.

Inter-Ocean Co. v Dickey, 222-995; 270 NW 29

Corporation having first option to buy—no restriction on judicial sale—mandamus to transfer. Sale of assets of insolvent national bank made in obedience to an order of court is not a voluntary but a judicial sale; therefore, a corporation whose stock was sold thereunder is not entitled to notice thereof, even tho its articles of incorporation required notice of proposed sale of stock and mandamus will lie to compel the transfer of said stock on its records.

McDonald v Farley Co., 226-53; 283 NW 261

Duty enjoined from "station". Mandamus is a proper remedy to compel the holder of a tax sale certificate to assign the same to a party who has a prior, paramount, legal right to such certificate. This is true because of the "station" which said obligated party has legally taken upon himself.

Inter-Ocean Co. v Dickey, 222-995; 270 NW 29

Examination of corporate records. One who, as an attorney in fact (tho not an attorney at law), is in good faith interested on behalf of his principal in a transfer of corporate stock, and who will become entitled to a compensation if he succeeds in collecting his client's claim, has such interest as will enable him to maintain mandamus to compel the corporation to permit an examination of the stock books and transfer records of the corporation.

Drennan v Ins. Co., 200-931; 205 NW 735

Right to examine books and records. An administrator and the heirs at law of a deceased stockholder in a corporation, when refused an examination by the corporation, have the right, without any plea of good faith, to an order of court, in an appropriate proceeding, permitting them and their necessary assistants to examine the books and records of the corporation in order to determine the financial condition of the corporation and the value of its stock.

Becker v Trust Co., 217-17; 250 NW 644

III JURISDICTION, PROCEEDINGS AND RELIEF

Action relative to drainage bonds. An action against the board of supervisors relative to public drainage bonds must be brought in the county of which such supervisors are officials (§11036, C., '27) even tho such bonds provide for payment in some other county (§11040, C., '27). It follows that when not so brought a motion for change of venue to the proper county must be sustained. So held where the action sought not only a judgment at law against the supervisors for the amount due on the bonds, but sought mandamus to compel the levy of assessments.

Board v Dist. Court, 209-1030; 229 NW 711

Calling of election—adjudication. A judicial holding to the effect that a petition for the calling of an election to vote on the question of granting an electric light and power franchise was in due form and substance, and that mandamus should issue to compel the calling of such election, is res judicata of a subsequent petition by the same petitioner for the same relief.

Iowa Co. v Tourgee, 208-198; 225 NW 372

Civil service—showing required. On mandamus to compel a city to comply with an order of the civil service commission, plaintiff must, of course, establish jurisdiction in said commission to enter said order. So held where the order was entered for the reinstatement of an employee who had never taken an examination and had no civil service rights.

Larson v City, 216-42; 247 NW 38

Selection of official county newspapers—speedy and adequate remedy — jurisdiction. Mandamus to compel county supervisors to

select petitioner's newspaper as one of three official newspapers was a proper procedure where petitioner was one of three applicants and had no plain, speedy, and adequate remedy at law, since there was no contest in the selection from which an appeal would lie under §5406, C., '39.

Bredt v Franklin County, 227-1230; 290 NW 669

Official newspapers — proprietor as proper party to compel selection. The rule is now well established that the proprietor of a newspaper has such interest in the selection of official newspapers that he can maintain an action of mandamus in his own name to compel the selection by the county supervisors.

Bredt v Franklin County, 227-1230; 290 NW 669

Equitable relief. In mandamus suit by county treasurer to obtain warrant for salary, defendant's answer alleging, in effect, that treasurer owed county money for which a right of set-off existed, that treasurer was insolvent, and that he was not the head of a family and had not offered to do equity, raised issue as to treasurer's right to equitable relief.

Briley v Board, 227-55; 287 NW 242

Erection of bridge. Mandamus to compel the board of supervisors to erect a bridge on an established and existing highway at the point where the highway is crossed by a public drainage improvement is not barred by the lapse of time.

Perley v Heath, 201-1163; 208 NW 721

Formal demand—nonnecessity for. A formal demand that a public body perform a mandatory, statutory duty is not required, as a condition to maintaining an action of mandamus, when the body knows of the demand, neglects to act and does not intend to act unless commanded by the court to act.

Robinson v Board, 222-663; 269 NW 921

Highway construction — interference with easement. When a highway was established through a city, taking the larger part of land over which the plaintiff had been granted an easement, a property right belonging to the plaintiff was thereby destroyed; and when she was compelled to sell the property at a loss because of its impaired value, she was entitled to a writ of mandamus against the highway commission to compel the assessment of the damages sustained.

Dawson v McKinnon, 226-756; 285 NW 258

Public aid—sufficiency of petition. In mandamus to compel an appropriation by a board of supervisors to a farm bureau association, the failure of the petition to state the amount of aid furnished the bureau by the federal government is not fatal when the petition was not attacked in the trial court.

Appanoose Bureau v Board, 218-945; 256 NW 687

Petition—motion to dismiss as proper attack. Attack on mandamus petition should have been made by a motion to dismiss rather than by a demurrer, since statutes provide that mandamus shall be tried as an equitable action, and that a petition in equity may be attacked by motion to dismiss.

Bredt v Franklin County, 227-1230; 290 NW 669

Appeal—demurrer treated as motion to dismiss. In mandamus action, where parties treat a demurrer as a motion to dismiss, it will be so viewed on appeal.

Bredt v Franklin County, 227-1230; 290 NW 669

Submission of franchise. Upon the filing, with the mayor of a city, of a legally sufficient petition for the calling of an election to vote on the granting of a franchise to operate a public utility, under Ch 312, C., '27, and after the lapse of a reasonable time for a canvass of the legal sufficiency of the petition, a mandatory and nondiscretionary duty, enforceable by mandamus, devolves on the mayor to call the election and make the submission.

Iowa Co. v Tourgee, 208-36; 222 NW 882

12441 Discretion—exercise of.

Atty. Gen. Opinion. See '36 AG Op 17

Appointment under preference law—nonreview of discretion. The legal freedom of the board of supervisors to determine according to its own judgment—in other words, its discretion to determine—that an applicant who is not an honorably discharged soldier has qualifications for the position of steward of the county home superior to the qualifications of an applicant who is such soldier, will not be reviewed in an action of mandamus unless the record is such as to clearly show that the board abused its discretion—acted in bad faith.

Miller v Hanna, 221-56; 265 NW 127

Discretion. The directors of a school district have a fair discretion as to the method to be employed in teaching a subject which the electors have directed to be taught—a discretion not controllable by mandamus.

Neilan v Board, 200-860; 205 NW 506

Discretion—control of. Principle reaffirmed that mandamus will not lie to control the discretion vested in a public official.

Bernstein v City, 215-1168; 248 NW 26; 86 ALR 782

Dissolution of school district. When under due application for the dissolution of a consolidated school corporation (§4188, C., '27), it is made to appear that bonds have been is-

sued by the district, the county superintendent is vested with a discretion to disapprove the application, and in such case mandamus will not lie to compel approval.

Sarby v Morey, 207-521; 221 NW 492

Employment of teacher—school board's discretion. Re-employment of a teacher is a matter wholly within the discretionary power vested in the school board and may not be controlled through the courts by mandamus.

Driver v Sch. Dist., 224-393; 276 NW 37

Permit for oil station. Mandamus will not lie to compel a city council to grant a permit for the erection and maintenance of a gasoline filling station when the council, in the exercise of its legal discretion, has refused such permit.

Cecil v Toenjes, 210-407; 228 NW 874

12442 Nature of action.

Equitable proceeding. A mandamus proceeding, altho originally an action at law under Iowa practice, is now triable in equity and, in the determination of such action, the court must necessarily apply equitable principles.

Briley v Board, 227-55; 287 NW 242

Bredt v Franklin County, 227-1230; 290 NW 669

Unallowable joinder of law and mandamus. An action at law against a county for judgment for taxes illegally exacted may not be joined with an equitable action of mandamus for an order on the board of supervisors directing the county treasurer to refund such taxes.

First N. Bk. v Board, 217-702; 247 NW 617; 250 NW 887

Petition—motion to dismiss as proper attack. Attack on mandamus petition should have been made by a motion to dismiss rather than by demurrer, since statutes provide that mandamus shall be tried as an equitable action, and that a petition in equity may be attacked by motion to dismiss.

Bredt v Franklin County, 227-1230; 290 NW 669

12443 Order issued.

Proper remedy to secure tax refund. A taxpayer may properly bring a mandamus action to compel a refund of taxes overpaid because of county auditor's failure to comply with budget deduction requirements of §7164, C., '35. The state board of assessment and review has no power to correct this failure.

Hewitt & Sons v Keller, 223-1372; 275 NW 94

12445 "Enforceable duty" defined.

Proper remedy to secure tax refund. A taxpayer may properly bring a mandamus action to compel a refund of taxes overpaid because of county auditor's failure to comply with budget deduction requirements of §7164, C., '35. The state board of assessment and review has no power to correct this failure.

Hewitt & Sons v Keller, 223-1372; 275 NW 94

12446 Other plain, speedy, and adequate remedy.

Assessments—inability to meet bonds—mandamus not remedy. Where a drainage district was created and a sufficient assessment to pay all bonds was levied and collected but not at all times carried in a separate account by the county treasurer, with the result that on maturity date of the bonds no sufficient balance was available to retire them, a mandamus action on the theory of an insufficient assessment (§7509, C., '35) brought by the bondholders to require the drainage district trustees to make an additional levy was properly denied.

Western Assn. v Barrett, 223-932; 274 NW 55

12447 When order granted.

Highway construction — interference with easement. When a highway was established through a city, taking the larger part of land over which the plaintiff had been granted an easement, a property right belonging to the plaintiff was thereby destroyed; and when she was compelled to sell the property at a loss because of its impaired value, she was entitled to a writ of mandamus against the highway commission to compel the assessment of the damages sustained.

Dawson v McKinnon, 226-756; 285 NW 258

12448 Petition.

Misjoinder of causes—when noneffective. In a mandamus action against board of supervisors in which the petition originally prayed for refund of taxes already paid, as well as the remission of unpaid taxes, and no attack is made on such misjoinder by motion, and the decree recites that party, with permission of court, withdrew that portion of the prayer asking for refund of taxes already paid, no error can be predicated upon such alleged misjoinder.

Brunner v Floyd County, 226-583; 284 NW 814

12449 Other pleadings.

Nature of proceedings—jurisdiction—statutory provisions. While mandamus was originally an action at law, and a statute (now §12449, C., '39) provided that pleadings and proceedings should be the same, as nearly as may be, as ordinary actions, the proceeding was changed to an action in equity by a statute (now §12442, C., '39) which, altho it did not expressly amend the statute in question

(now §12449, C., '39), requires equity pleadings and procedure.

Bredt v Franklin County, 227-1230; 290 NW 669

Appeal—demurrer treated as motion to dismiss. In mandamus action, where parties treat a demurrer as a motion to dismiss, it will be so viewed on appeal.

Bredt v Franklin County, 227-1230; 290 NW 669

12449.1 Trial in vacation.

Vacation orders in mandamus before present statute.

Weyrauch v Johnson, 201-1197; 208 NW 706

12450 Injunction may issue—joinder.

Joinder—law and equity. Principle reaffirmed that two actions, one at law and one in equity, may not be joined.

Murphy v Board, 205-256; 215 NW 744

County supervisors—duties imposed by law. A statute requiring the board of supervisors to remit unpaid taxes on the capital stock of a bank which fails imposes a positive duty on the board of supervisors to comply with statute irrespective of any demand or notice; and the fact that the stockholders petitioned for a refund of taxes already paid, which is not contemplated by such statute, in addition to remission of unpaid taxes, does not excuse the failure of the board to remit such taxes as come within the purview of the statute, since the performance of this duty is imposed upon the board by law.

Brunner v Floyd County, 226-583; 284 NW 814

Damages. An action of mandamus to compel the board of supervisors to proceed to the assessment of damages consequent on the taking of land in order to effect a change in a highway is properly stricken on motion when joined with an action against the county for damages for the taking of said land.

Valentine v Board, 206-840; 221 NW 517

12451 Peremptory order.

Defect of parties—effect. In mandamus to obtain an order cancelling a tax sale and the certificate issued thereunder (assuming the propriety of such action) the court manifestly cannot disturb the certificate holder when he is not a party to the action.

Wren v Berry, 214-1191; 243 NW 375

CHAPTER 533

CERTIORARI

12456 When writ may issue.

Atty. Gen. Opinion. See '25-26 AG Op 435

ANALYSIS

I NATURE AND SCOPE OF REMEDY IN GENERAL
II DISCRETION AS TO GRANT OF WRIT
III WHEN WRIT LIES
IV WHEN WRIT DOES NOT LIE
V EXISTENCE OF OTHER REMEDY
VI LOSS OF RIGHT TO OTHER REMEDY

Contempt cases. See under §12550
Municipal zoning board decisions. See under §§6466, 6469
Soldier's preference cases. See under §1163

I NATURE AND SCOPE OF REMEDY IN GENERAL

Discussion. See 19 ILR 137—Common law statutes; 18 ILR 263—Judicial discretion abused; 19 ILR 366—Defect of jurisdiction of person; 19 ILR 467—Judicial process reviewed; 19 ILR 609—Nonjudicial bodies

Adequate remedy—writ annulled. Where a writ of certiorari is issued by the supreme court, based upon the contention that the lower court exceeded its jurisdiction in the interpretation of one of its rules of practice, and where the amount involved is also in dispute, and where an appeal on the same judgment is also pending before the supreme court, which, after consolidating the two causes, determines the amount involved to be appealable, the certiorari proceedings are unnecessary and the writ will be annulled, since the petitioner has a complete remedy by appeal.

Yost v Gadd, 227-621; 288 NW 667

Cancellation of mortgage as real action—venue change to land situs. Ultimate test of applicability of §11034, C., '35, is not whether proceeding is in personam or in rem but whether determination of a right in real estate is involved, and therefor an action for cancellation of mortgages involving a determination of a right in real estate, which is the subject of the action, must be brought in the county where the land is located, and granting change of venue thereto will be upheld on certiorari.

Whalen v Ring, 224-267; 276 NW 409

Competent sustaining evidence necessary—hearsay ignored on review. Where, in a proceeding before the civil service commission, incompetent hearsay evidence, in the form of minutes of testimony before a grand jury, is considered on the question of whether suspended police officers should be reinstated, the supreme court on review in certiorari must examine the record to ascertain if there is

I NATURE AND SCOPE OF REMEDY IN GENERAL—concluded

other competent evidence to support the commission's ruling.

Luke v Civil Service, 225-189; 279 NW 443

Essential purposes of writ. On certiorari to review an order of the district court relative to the production of books and papers, the sole inquiry is whether the lower court had jurisdiction to enter the order in question, not whether the lower court made errors in exercising its jurisdiction which were correctible on appeal.

Main v Ring, 219-1270; 260 NW 859
Ind. Order v Scott, 223-105; 272 NW 68

Findings of fact—when reviewed. In certiorari action by city to annul decision of civil service commission, it is not the court's duty to review findings of fact if sustained by any competent and substantial evidence, unless such lower tribunal otherwise acted illegally and there is no other plain, speedy, and adequate remedy at law. However, a lack of such evidence constitutes such illegality as would warrant a review of the findings below.

Des Moines v Board, 227-66; 287 NW 288

Foreign corporations—visitatorial power of state. A foreign corporation transacting business within this state is subject to all the remedies available against a domestic corporation. So held under an application for an order for the production of papers and documents.

Ind. Order v Scott, 223-105; 272 NW 68

Injunction violation by labor union—no trial de novo. In certiorari to review a judgment finding the defendants guilty of violating an injunction, the case was not triable de novo in the supreme court.

Carey v Dist. Court, 226-717; 285 NW 236

Judgment by default—setting aside—when affidavit of merit unnecessary. A default may be legally set aside tho the mover therefor files no affidavit of merit, when the court, in entering the default, stated that he would set aside the default if a motion so asking be filed, and when the applicant for the default then affirmatively acquiesced in such purpose of the court.

Wagoner v Ring, 213-1123; 240 NW 634

Jurisdiction—evidence—limitation on court. It is not within the province of the courts, on certiorari, to review the findings of an inferior tribunal, but to determine jurisdiction and examine the record to ascertain if there was sufficient competent evidence to sustain its findings, or if it was otherwise acting illegally.

Luke v Civil Service, 225-189; 279 NW 443

Jurisdiction—time at which essential. In certiorari to review trial court's ruling sustaining motion to set aside default, supreme court is not concerned with jurisdiction at time judgment is entered, but is concerned with the jurisdiction of court at time ruling is made on motion.

Western Grocer Co. v Glenn, 226-1374; 286 NW 441

II DISCRETION AS TO GRANT OF WRIT

District court's power to enjoin unlicensed person practicing law—certiorari thereon annulled. Whether attorneys admitted to practice law are possessed of valuable right, privilege, or franchise which may be unlawfully encroached upon by an unlicensed person, thereby causing irreparable damage and injury to such attorneys and others similarly situated, and whether they are entitled to injunctive relief in equity, were all questions determinable by the district court after hearing of evidence, so a writ of certiorari, issued by the supreme court to the district court, for want of jurisdiction of subject matter, must be quashed and annulled.

Johnson v Purcell, 225-1265; 282 NW 741

Return—other evidence admissible. In certiorari proceedings the district court is not limited to the actual return to the writ in determining whether or not the inferior tribunal acted illegally or without jurisdiction, but by statute other evidence bearing on that question is admissible.

Steeves v New Market, 225-618; 281 NW 162

Sua sponte determination by court. The court having issued a writ of certiorari will, on the final hearing, determine whether the writ is allowable even tho such question is not raised by the party litigants.

Samek v Taylor, 203-1064; 213 NW 801
Dickson Co. v Dist. Ct., 203-1028; 213 NW 803
Kommelter v Dist. Ct., 225-273; 280 NW 511

III WHEN WRIT LIES

Acts of administrative officers. Certiorari may be the proper remedy to review the action of the commissioner of insurance and attorney general (§8688, C., '35) in refusing to approve amended articles of incorporation of an assessment association.

National Ben. Assn. v Murphy, 222-98; 269 NW 15

Change of venue—unimpeached showing of prejudice. The refusal, in a criminal prosecution, to grant a change of venue to the state constitutes an abuse of discretion, and therefore an illegal action, when the state has made a prima facie showing of such prejudice and excitement in the county as will, judging it prospectively, prevent the state from receiving a fair and impartial trial, and when such showing stands substantially unimpeached by the resistance.

State v Jefferson County, 213-822; 238 NW 290

Refusal of change of venue. The refusal of a mayor to grant defendant a change of venue in a prosecution for assault and battery, on the ground "that the mayor was prejudiced against him", constitutes an illegality reviewable on certiorari, an appeal from the judgment of the mayor on the merits not being a plain, speedy, and adequate remedy.

Shearer v Sayre, 207-203; 222 NW 445

Refusal of change of venue to state. Certiorari will lie, in the form of an original action in the supreme court, to review the alleged abuse of discretion, and consequent illegal action of the district court in refusing the state a change of venue in a criminal prosecution for a felony.

State v Dist. Court, 213-822; 238 NW 290

Unallowable change of venue. Tho in an action of tort the husband and wife are sued jointly in a county other than the county of their common residence, the action of the wife in entering a general appearance and filing answer precludes the court thereafter from granting her a change of place of trial to the county of her residence. So held where the court, on the application of the husband, properly granted him a change of place of trial, and later dismissed the entire action because the plaintiff failed to pay, as ordered, the costs consequent on bringing the action in the wrong county.

Mansfield v Municipal Court, 222-61; 268 NW 908

Civil service—"hearing and determination" —what constitutes. In certiorari to determine the legality of proceedings of civil service commission in removing a city employee, the commission's statutory duty to "hear and determine" is an essential ingredient of jurisdiction, and the quoted words refer to a judicial investigation and settlement of an issue of fact, which implies the weighing of testimony by both sides, from a consideration of which the relief sought by the moving party is either granted or denied.

Sandahl v Des Moines, 227-1310; 290 NW 697

Civil service commission ruling—remedy. No appeal being allowed from a ruling of the civil service commission, and there being no other plain, speedy, and adequate remedy if the commission exceeded its proper jurisdiction, or otherwise acted illegally, a writ of certiorari will lie.

Luke v Civil Service, 225-189; 279 NW 443

Collateral attack on budget appeal board. A suit in mandamus to compel the county auditor to ignore the decision of the state board of appeal in local budget matters on the ground that such decision was made after the board had ceased to exist, is a collateral attack on the board's action, certiorari being the method for a direct attack; and if the mandamus suit is dismissed by the lower court, the supreme court on appeal will determine only if the acts of the board show on their face by their dates alone that they were illegal acts because the board had ceased to exist as such.

Woodbury Conference v Carr, 226-204; 284 NW 122

Court of contest—jurisdiction. Certiorari will lie to review the alleged unauthorized exercise of jurisdiction by a contest court selected for the purpose of deciding who had been elected to a state office, even tho it be true that the decree of said contest court is final under the statute.

Haas v Contest Court, 221-150; 265 NW 373

Criminal case—statute of limitation. Tho an invalid original entry of judgment in a criminal cause may be beyond review by certiorari because of the statute of limitation, yet certiorari will lie, if timely, to review a subsequent order of court revoking the suspended part of said former judgment and ordering the accused committed to jail.

Dayton v Bechly, 213-1305; 241 NW 416

Denial of policemen's pension. Certiorari is the proper remedy to test the legality of the action of the trustees of a policemen's pension fund in denying a pension to an applicant.

Gaffney v Young, 200-1030; 205 NW 865
Riley v City, 203-1240; 212 NW 716

Discovery of assets—scope of jurisdiction. In inquisitorial proceedings for the discovery of assets belonging to an estate, the jurisdiction of the court to continue said proceedings abruptly terminates at the point of time, when it is actually made to appear that an actual controversy exists as to the title to the property in question.

Findley v Jordan, 222-46; 268 NW 515

Excess jurisdiction — reviewable illegality. The granting by the court, in manifest opposition to the statute, of a moratorium continuance of mortgage foreclosure proceedings, is in excess of the jurisdiction of the court, and constitutes an illegality, reviewable on certiorari.

Home Owners Corp. v Dist. Court, 223-269; 272 NW 416

Illegal action of fence viewers. Certiorari will lie to review the proceedings of township trustees in acting as fence viewers without jurisdiction of the subject matter, even tho an appeal is provided for in such proceedings.

Sinnott v Dist. Court, 201-292; 207 NW 129

Illegal order—when nonparty may question. An appointee to a public position who has been deprived of said position by the action of the civil service commission may maintain in the district court certiorari to review said action,

III WHEN WRIT LIES—continued

even tho he was not a party to the proceedings which resulted in said action.

Ash v Board, 215-908; 247 NW 264

Illegal setting aside of dismissal. Certiorari is a proper remedy to review the action of a trial court in illegally setting aside the dismissal, prior to the return day, of an action, and in proceeding with the cause as tho no dismissal had been filed.

Lyon v Craig, 213-36; 238 NW 452

Improper order to produce instrument. The district court has no jurisdiction to enter an order requiring plaintiff in mortgage foreclosure action to deposit with the clerk the original note and mortgage sought to be foreclosed, for the inspection of a nonanswering defendant, when the application upon which the order is entered is unverified and contains no allegation concerning the materiality of said inspection. It follows said order is subject to review on certiorari.

Dunlop v Dist. Court, 214-389; 239 NW 541

Injunction—conditional order for—compliance—effect. When a decree provides (1) that defendant shall pay an award in condemnation proceedings, or (2) that in event defendant appeals from said award he shall give a supersedeas bond, and (3) that in event he fails to pay or appeal, injunction shall issue enjoining defendant's use of the condemned land, then the taking of an appeal and the giving of the supersedeas bond by defendant nullifies the authority under the decree to issue an injunction. In other words, after the decree is affirmed on appeal without any provision relative to injunction, the trial court has no jurisdiction on motion to enter an injunction on the basis of the affirmed decree. (The reasoning is that the decree constituted a final decree and that the decree as drawn authorized an injunction only on condition that defendant failed to appeal and give the supersedeas bond.)

Fairfield v Dashiell, 217-474; 249 NW 236

Jurisdiction—strict construction. The jurisdiction of the superintendent of public instruction over appeals from decisions and orders of a county superintendent cannot, by the conduct of a party to the appeal, be enlarged beyond the jurisdiction actually conferred by law.

School Dist. v Samuelson, 222-1063; 270 NW 434

Land subjected to bank's judgment—attorney lien—belated cost modification—review. Where an action was instituted to set aside conveyances and to subject land to a judgment, and an attorney having a lien on such judgment intervenes, establishes and gets an adjudication of priority in the decree, which made no provision for payment of costs but later was invalidly modified under guise of a motion to retax costs, the trial court being without jurisdiction to modify the decree (1) after an appeal therefrom had been perfected and (2) because the modification was not made during the term the decree was entered, certiorari will lie to correct the lower court's excess of jurisdiction, and fact that plaintiff is a banking corporation no longer in existence will not defeat the certiorari, since corporation must be regarded as existing to the degree necessary to wind up its affairs.

Grimes Bk. v Jordan, 224-28; 276 NW 71

Order for production of books. Certiorari may be proper for the review of an order for the production of evidence in the form of books.

Stagg v Bank, 203-84; 212 NW 342

Original notice—failure to state nature of cause of action. Jurisdiction is not conferred on the court by an original notice of suit which simply notifies defendant that plaintiff claims a stated sum of money—which contains no statement whatever as to the nature of the cause of action—and said notice is not aided by an inserted statement directing defendant to examine the petition, when filed, for further particulars.

Farley v Carter, 222-92; 269 NW 34

Production of books and papers—illegal rule. When an action is predicated by plaintiff on the plea that a corporation in entering into a contract with plaintiff was acting as the agent of one or both of two other corporations, and also on the plea that said contract was in furtherance of a joint adventure of said three parties, the court in granting plaintiff a rule for the production of books and papers acts illegally insofar as it fails to confine said rule to books and papers which tend to support the affirmative of either or both of said issues.

Fairbanks Morse v Dist. Court, 215-703; 247 NW 203

Pupils—attendance in foreign district—nonconsent of superintendent. Certiorari will lie to review the discretion of the county superintendent of schools in refusing to consent that a pupil, residing in one school corporation, may (at the expense of the pupil's district) attend school in an adjoining but different school corporation.

Moles v Daland, 220-1170; 264 NW 74

Review of condemnation proceedings. Certiorari will lie to review condemnation proceeding by the state highway commission.

Jenkins v Hy. Com., 205-523; 218 NW 258

Review of decision on question of facts. Certiorari will lie to review the action of the trustees of a statutory pension fund in denying relief to an applicant when the conceded

or proven facts mandatorily require the granting of such relief.

Dempsey v Alber, 212-1134; 236 NW 86; 238 NW 33

Right to take depositions. Certiorari is the proper remedy to test the legal right of the district court to order defendants in an action to submit to the taking of their depositions by plaintiff in the said action.

Bagley v Dist. Court, 218-34; 254 NW 26

State and federal courts—comity. The necessity for comity between state and federal courts demands that controversies shall not arise concerning their respective jurisdictional powers on account of unsubstantial considerations, and certiorari from the supreme court of Iowa will lie to require a district court of the state to relinquish jurisdiction over a probate matter after the federal court, through diversity of citizenship, has assumed jurisdiction.

Reconstruction F. Corp. v Dingwell, 224-1172; 278 NW 281

State commerce commission—excess of jurisdiction. The state commerce commission has no power to order the abandonment of an overpass or overhead crossing over a railroad in a city or town, which results in altering the streets thereof. Jurisdiction of its streets is a city function which may not be invaded by the state commerce commission, regardless of its good-faith motives, and certiorari will lie to prevent such invasion.

Huxley (town) v Conway, 226-268; 284 NW 136

Time of trial—mandatory discharge for delay. The court, on proper motion therefor, is under mandatory duty to dismiss an indictment which, during the first term of court following its return, was, on motion for change of venue, transferred to another county, and was not there tried during the term pending when the transfer was ordered, nor during the following term—lasting two months—because of the very large assignment of equity cases and matters local to said county.

And this is true tho the defendant during said delay made no demand for a trial.

Davison v Garfield, 221-424; 265 NW 645

Want of jurisdiction. A party may resort to certiorari whenever he is faced by a wholly unauthorized proceeding, and with court orders with reference to such proceedings which the court had no jurisdiction to enter. In other words, he is under no legal obligation to enter a general appearance in such proceedings and appeal from the final judgment.

Phoenix Ins. v Fuller, 216-1201; 250 NW 499

IV WHEN WRIT DOES NOT LIE

Adequate remedy—writ annulled. Where a writ of certiorari is issued by the supreme court, based upon the contention that the lower court exceeded its jurisdiction in the interpretation of one of its rules of practice, and where the amount involved is also in dispute, and where an appeal on the same judgment is also pending before the supreme court, which, after consolidating the two causes, determines the amount involved to be appealable, the certiorari proceedings are unnecessary and the writ will be annulled, since the petitioner has a complete remedy by appeal.

Yost v Gadd, 227-621; 288 NW 667

Appeal as remedy. Certiorari will not lie when an appeal will furnish an adequate remedy.

McCarthy Co. v Dist. Court, 201-912; 208 NW 505

Appeal excludes certiorari. An order of the district court, refusing a hearing of an application to compel the county attorney to file and enter upon the appearance docket indictments alleged to have been returned against the applicant, is appealable, and therefore certiorari will not lie.

Hoskins v Carter, 212-265; 232 NW 411

Appealable rulings on motions—certiorari not available. The sole function of certiorari is to annul illegal action and not to review mere errors arising out of rulings on motions when by appeal there is a remedy for the correction of the latter.

Kommelter v Dist. Ct., 225-273; 280 NW 511

Change of venue — fatally delayed motion. It is mandatory that a motion for a change of venue from the county of suit to the county of defendant's residence be filed before answer. Manifestly, certiorari will not lie to question the overruling of such belated motion.

Thornburg v Mershon, 216-455; 249 NW 202

Failure of proof. Writ of certiorari, to review discharge of ex-soldier from a public appointive position, cannot be sustained when plaintiff predicates his right to relief solely on the unproven allegation that he was discharged by defendant.

Johnson v Herring, 222-1126; 271 NW 175

Jurisdiction to enter judgment—remedy by appeal. Remedy to question of trial court's jurisdiction to enter judgment is by appeal and not by certiorari.

Western Grocer Co. v Glenn, 226-1374; 286 NW 441

Moot question. An order by the supreme court on appeal that the trial court enter a decree of divorce in favor of plaintiff, and all proper orders relative to the custody of the children, renders moot the legality of all prior orders of the trial court in injunctional proceedings relative to the custody of such children.

McGrath v Dist. Court, 205-191; 217 NW 823

IV WHEN WRIT DOES NOT LIE—concluded

Order for production of books. The legal discretion of the court to enter an order for the production of books and papers cannot be controlled by certiorari.

Iowa Corp. v Hutchison, 207-453; 223 NW 271

Order relative to interrogatories. The statute (§11185 et seq., C., '24) relative to the right to attach interrogatories to pleadings, and providing for answers thereto by the adversary, simply creates a rule of evidence, and an order which overrules objections to such interrogatories on the naked ground of irrelevancy, incompetency, and immateriality, and which requires the adversary to answer such interrogatories is not reviewable by certiorari.

Winneshiek Bank v Dist. Court, 203-1277; 212 NW 391

Refusing appointment of receiver. Certiorari will not lie to review the discretion of the court in refusing the appointment of a temporary receiver to close up the affairs of a corporation whose charter has expired, especially when appeal would furnish an adequate remedy for a review of every question presented.

McCarthy Co. v District Court, 201-912; 208 NW 505

Review of finding of fact. Certiorari will not lie to review a finding of the trial court that a movant for a change of venue on the ground of fraud in the inception of the contract sued on, was a resident of the very county in which the action was brought.

McEvoy v Cooper, 208-649; 226 NW 13

Right of appeal—effect. Certiorari will not lie to review an order of court, entered on its own motion, striking from the files defendant's cross-petition against a co-defendant.

Collins v Cooper, 215-99; 244 NW 858

Rulings on motions — correction—certiorari (?) or appeal (?). Certiorari will not lie to review rulings of the court on motions submitted to the court by the hostile litigants, the sole function of the writ being to annul illegal action and not to review mere errors. Appeal is the sole remedy for the correction of the latter.

Morrison v Patterson, 221-883; 267 NW 704

Rulings on pleadings. A litigant who moves to strike a pleading or to require it to be made more specific may not have the rulings on his motion reviewed on certiorari; and this is necessarily true even tho it be conceded, arguendo, that the pleading in question was not legally on the calendar.

Holcomb v Franklin, 212-1159; 235 NW 474

Searches and seizures—execution of warrant. In a certiorari proceeding a conviction for contempt in resisting the execution of a search warrant will not be reversed where the evidence indicated defendant knew purpose of search and disposed of evidence by dumping liquor before officers could seize it. Defendant's contention ineffectual that "dumping" occurred prior to execution of warrant.

Krueger v Municipal Court, 223-1363; 275 NW 122

When writ lies—suing state appeal board. Certiorari will not lie to review the action of the trial court in overruling a motion by the state appeal board for a change of venue of a trial questioning a decision of such board.

State Board v Dist. Ct., 225-296; 280 NW 525

V EXISTENCE OF OTHER REMEDY

Adequate remedy—writ annulled. Where a writ of certiorari is issued by the supreme court, based upon the contention that the lower court exceeded its jurisdiction in the interpretation of one of its rules of practice, and where the amount involved is also in dispute, and where an appeal on the same judgment is also pending before the supreme court, which, after consolidating the two causes, determines the amount involved to be appealable, the certiorari proceedings are unnecessary and the writ will be annulled, since the petitioner has a complete remedy by appeal.

Yost v Gadd, 227-621; 288 NW 667

Appeal as sole remedy. An order which sets aside a judgment some five years after its rendition, on the asserted ground that the cause had never been set for trial after issue had been joined, such order being made on motion, service, and appearance of all parties, is a finality in the absence of an appeal therefrom.

Dickson Co. v Dist. Ct., 203-1028; 213 NW 803

Appeal as sole remedy. The nunc pro tunc correction of an unsigned decree in order to make it conform to the original order of the court, such correction being made on motion, service, and appearance of all parties, is a finality in the absence of an appeal therefrom.

Samek v Taylor, 203-1064; 213 NW 801

Appeal as nonexclusive remedy. Either certiorari or appeal will lie to review the action of the board of supervisors in attempting to exclude lands from a drainage district after its establishment and construction, such attempted action being wholly beyond the jurisdiction of the board.

Estes v Board, 204-1043; 217 NW 81

Improper to review setting aside of default —appeal proper. Appeal, not certiorari, is the proper method to proceed to attack an alleged erroneous order of the municipal court in sustaining a motion to set aside a default judgment where the court had jurisdiction to enter the order.

Weston v Allen, 225-835; 282 NW 278

Jurisdiction to enter judgment—remedy by appeal. Remedy to question of trial court's jurisdiction to enter judgment is by appeal and not by certiorari.

Western Grocer Co. v Glenn, 226-1374; 286 NW 441

Jurisdiction—ruling on motion after judgment—remedy by appeal. Where a trial court has jurisdiction, and rules on a motion to set aside a default and judgment, review cannot be had by certiorari, as remedy for review is by appeal.

Western Grocer Co. v Glenn, 226-1374; 286 NW 441

Motion to dismiss—nonincriminating grand jury testimony—no resulting immunity. A person involuntarily appearing before the grand jury, tho not asked self-incriminating questions, who later is charged by county attorney's information with falsification of records, a subject connected with the grand jury investigation, may not, by certiorari, review the overruling of a motion to dismiss the information on the ground of immunity because of such grand jury appearance, when a remedy by appeal exists.

Kommelter v Dist. Ct., 225-273; 280 NW 511

Supreme court issuing writ—propriety of remedy determined subsequently. The supreme court, having issued a writ of certiorari in the first instance, may, with the record before it, determine whether certiorari is proper remedy.

Western Grocer Co. v Glenn, 226-1374; 286 NW 441

VI LOSS OF RIGHT TO OTHER REMEDY

Injunction in lieu of certiorari—procedure. It seems that when a plaintiff brings an action in equity for injunction when certiorari is the proper action, the defendant's sole remedy is to move for a transfer of the injunction proceedings into certiorari proceedings.

Zimmerman v O'Meara, 215-1140; 245 NW 715

Loss of right to equitable relief. A duly entered judgment against plaintiff on the merits in a law action, and affirmed on appeal, constitutes a final judgment, and §11017, C., '31, furnishes no authority to plaintiff thereafter to file in the adjudicated law action a "substituted petition in equity" (and motion to transfer to equity) involving the same subject matter, and no authority or jurisdiction to the court to entertain such attempted action.

Phoenix Ins. v Fuller, 216-1201; 250 NW 499

Nunc pro tunc correction—appeal as sole remedy. The nunc pro tunc correction of an unsigned decree in order to make it conform to the original order of the court, such correction being made on motion, service, and appearance of all parties, is a finality, in the absence of an appeal therefrom.

Samek v Taylor, 203-1064; 213 NW 801

Vacating judgment—appeal as sole remedy. An order which sets aside a judgment some five years after its rendition, on the asserted ground that the cause had never been set for trial after issue had been joined, such order being made on motion, service, and appearance of all parties, is a finality, in the absence of an appeal therefrom.

Dickson Fruit Co. v Dist. Court, 203-1028; 213 NW 803

12457 By whom granted.

Dismissal for want of abstract. Certiorari to a district judge will be dismissed when petitioner, having ample time to do so, fails to file an abstract as specifically ordered by the court.

Wilson v Ring, 215-511; 245 NW 761

Failure to file brief and argument. Where the supreme court issues an order for a writ of certiorari and, pursuant to such order, respondent judge makes a return of the proceedings below, and thereafter nothing further is done and no abstract or argument filed, the petitioners are presumed to have abandoned their cause, and the writ will be annulled.

Phoenix Fin. v Jordan, 226-630; 284 NW 820

Limited jurisdiction of supreme court. Neither a judge of the supreme court, nor the court itself, has jurisdiction to issue a writ of certiorari to other than an inferior judicial tribunal. So held where the writ was inadvertently issued to the superintendent of public instruction and to a county superintendent of schools.

School District v Samuelson, 220-170; 262 NW 169

12459 Petition.

Motion to dismiss in lieu of demurrer. A motion to dismiss a petition for a writ of certiorari will be treated as a demurrer when based on statutory grounds for demurrer.

Fehrman v Sioux City, 216-286; 249 NW 200

Nonnecessary party. On certiorari to review the action of fence viewers, the party who initiated the proceedings is not a necessary party.

Sinnott v Dist. Court, 201-292; 207 NW 129

12462 Service and return.

Defective service—no jurisdiction through special appearance nor return to writ. Where mandatory statute requiring service of writ of certiorari had neither been complied with nor service accepted, the supreme court acquires no jurisdiction of the inferior tribunal

and a proper special appearance will not waive defective service nor does the return to the writ constitute a pleading to the merits.

Collins v Powell, 224-1015; 277 NW 477

Mandatory statutory service—strict compliance required. Where jurisdiction of the person depends upon service of either notice or process, the mandatory provision of statutes in regard to such service must be strictly complied with.

Collins v Powell, 224-1015; 277 NW 477

12463 Defective return.

Amendment without notice. A trial court has no jurisdiction, after term time and after a proceeding for contempt has been removed to the supreme court by certiorari, to enter, without notice to the defendant (petitioner in certiorari), a nunc pro tunc amendment to the record to the effect that the defendant entered a plea of guilty in said contempt proceeding.

Sergio v Utterback, 202-713; 210 NW 907

Insertion of nonrecord matter. On certiorari to review the action of a trial court in proceedings for contempt, it is wholly unallowable to insert, in the return, matter which was not made of record by the court at the time of the entry of the order in question, and matters so inserted will be stricken on motion.

Crosby v Clock, 208-472; 225 NW 954

Permissible abstract and amended return. Where, in certiorari, the cause is ordered submitted substantially as civil cases are submitted, the respondent may, on his own motion, very properly file an amended abstract setting forth the entire proceedings, and may likewise on his own motion, amend his original return by setting forth the transcript of the shorthand notes and exhibits, together with an explanation why it was impossible to include said transcript in the original return.

Roberts v Fuller, 210-956; 229 NW 163

Return—estoppel to question. A respondent in certiorari may not complain if the court which issues the writ accepts his certified return.

Adams Co. v Maxwell, 202-1327; 212 NW 152

Striking nonrecord matter. An argument of counsel, purporting to have been made to the court on the occasion of the entry of an order by the court, embodied in the return to a writ of certiorari, tho not made of record, is properly stricken on motion.

Dunlop v Dist. Court, 214-389; 239 NW 541

12464 Trial—judgment.

Certified record conclusive. A proceeding in certiorari must be heard on the record, proceedings, and facts as certified, not on unsupported assertions of fact made by the petitioner in his brief and argument.

Hale v Ring, 215-446; 245 NW 704

Contempt — sufficiency of evidence. The court, on certiorari, will, on conflicting evidence, be reluctant to interfere with a conviction of contempt in violating an injunction; yet it does not necessarily follow that the conviction will be affirmed on such evidence. The evidence must clearly and satisfactorily show guilt.

Andreano v Utterback, 202-570; 210 NW 780

Costs. Costs in certiorari proceedings to annul the void proceedings of fence viewers are properly taxed to the party who initiated the proceedings before the fence viewers, such party being a party to the certiorari proceedings by consolidation of other actions therewith.

Sinnott v Dist. Court, 201-292; 207 NW 129

Dismissal of writ. A writ of certiorari will be dismissed when there is a total failure to comply with an order that the cause be submitted in accordance with the rules for the submission of civil causes, even tho the parties to the writ have stipulated for a submission without abstract or argument.

Touche v Franklin, 201-480; 207 NW 337

Evidence to supplement return. Certiorari to review an order by the board of adjustment in re municipal zoning is not necessarily triable de novo on the return to the writ. Plaintiff, on proper allegation, has the legal right to introduce testimony (when it is not already in the return or when the facts are in dispute) to show that the order of the board is (1) clearly arbitrary and unreasonable or (2) is contrary to the public interest and to the spirit of the zoning ordinance.

Anderson v Jester, 206-452; 221 NW 354

Exclusiveness of return. A party may not withhold from a tribunal an evidentiary fact and later, in a petition for a writ of certiorari, assert and prove such fact as a reason for sustaining the writ.

Dickey v Civil Service, 201-1135; 205 NW 961

Extent of proof. Certiorari to review contempt proceedings is not triable de novo in the supreme court, and proof of guilt need not appear beyond a reasonable doubt.

Madalozzi v Anderson, 202-104; 209 NW 274

Evidence — admissibility. On certiorari by the state to review the alleged illegal action of the district court in refusing an application by the state for a change of venue as to numerous defendants, similarly charged, a transcript of the testimony taken upon the trial of one defendant who was acquitted is admissible for the purpose of showing the circumstances and nature of the acts charged.

State v Dist. Court, 213-822; 238 NW 290

Improper form. Upon sustaining a writ of certiorari relative to the alleged illegal act of the commissioner of insurance in refusing to approve amended articles of incorporation of an insurance company, the trial court has no authority by its judgment to decree such approval, other than substantially to direct the defendant to take such action as will give full force and effect to the decision of the court.

National Ben. Assn. v Murphy, 222-98; 269 NW 15

Questions undeterminable. On certiorari to test the legality of an order denying petitioner a change of venue to the county of his residence, the supreme court cannot determine whether the respondent judge correctly determined (1) that a cause of action was pleaded against petitioner's co-defendant, or (2) that said co-defendant was, in fact, a resident of the county of suit or (3) that the cause of action pleaded in the original suit was for injury to real estate.

Reason: The lower court had jurisdiction to rule on all said matters and said rulings, tho erroneous, are not illegal acts within the law of certiorari.

Adams v Smith, 216-1365; 250 NW 466

Reinstatement of discharged employee—unallowable order. The court, in certiorari, is manifestly without authority to order the state executive council to reinstate, in a department of the state government, a discharged state employee, when said council has no legal authority to employ or discharge employees in said department.

Pittington v Herring, 220-1375; 264 NW 712

Respondent's right to appear specially. A respondent in certiorari has a right to appear specially to question jurisdiction, in the absence of a statute to the contrary, regardless of whether or not this right is conferred by §11088, C., '35.

Collins v Powell, 224-1015; 277 NW 477

Review—scope. A writ of certiorari will not be sustained when to do so would effect no change in the status of the subject matter in controversy. So held where the writ was brought to test the legality of an actual dismissal of search warrant proceedings wherein intoxicating liquors had been seized.

State v Beem, 201-373; 207 NW 361

Return—other evidence admissible. In certiorari proceedings the district court is not limited to the actual return to the writ in determining whether or not the inferior tribunal acted illegally or without jurisdiction, but by statute other evidence bearing on that question is admissible.

Steeves v New Market, 225-618; 281 NW 162

Review—scope and extent. A writ of certiorari presents only a question of law, and does not entitle the petitioner to have a review of the facts, unless the return reveals such an absence of facts as to present a law question of arbitrary action.

Dickey v Civil Service Com., 201-1135; 205 NW 961

Ruling on demurrer—no review by certiorari. Where neither the writ of certiorari nor the petition therefor encompassed a review of lower court's alleged error in overruling demurrer to indictment, and where no authorities were cited sustaining the proposition that alleged error was reviewable by certiorari, court will refuse to review the ruling on the demurrer by this writ.

Harris v District Court, 226-606; 284 NW 451

Soldiers preference — hearing before discharge—waiver. Tho the soldiers preference law requires, as grounds for and prior to discharge, a hearing on charges of misconduct against a public employee, yet, when no such hearing is held and in a certiorari action the parties join issue on misconduct, they waive this hearing provided by the soldiers preference law. Evidence held to establish such misconduct.

Butler v Curran, 224-1339; 279 NW 89

Unallowable amendment. On certiorari to test the jurisdiction of the district court to enter certain ex parte orders, the return may not be amended by a recital by the responding judge of nonrecord matters and his conclusions as to what took place at the hearing.

Storie v Dist. Court, 204-847; 216 NW 25

12466 Appeal.

Refusal to quash certiorari. An appeal will not lie from an order refusing to quash a writ of certiorari.

Riley v Board, 207-177; 222 NW 403

Abandonment in supreme court—failure to file abstract or argument. Petitioners for writ of certiorari are presumed to have abandoned their cause when no abstract or argument is filed either on their behalf or on behalf of respondents.

Sentner v Dist. Court, 226-335; 284 NW 166

Failure to file brief and argument. Where the supreme court issues an order for a writ of certiorari and, pursuant to such order, respondent judge makes a return of the proceedings below, and thereafter nothing further is done and no abstract or argument filed, the petitioners are presumed to have abandoned their cause, and the writ will be annulled.

Phoenix Fin. v Jordan, 226-630; 284 NW 820

Failure to meet printed abstract requirements—dismissal. A proceeding in certiorari before supreme court will be dismissed where

petitioner fails to comply with order or rules requiring printed abstracts.

Eller v Hunter, (NOR); 209 NW 281

Filing motions after verdict—extending time—jurisdiction. The municipal court has jurisdiction to enter an order extending the time to file a motion for a new trial and exceptions to instructions and judgment non obstante veredicto. Such order is reviewable by appeal, not by certiorari.

Eller v Municipal Ct., 225-501; 281 NW 441

Permissible abstract and amended return. Where, in certiorari, the cause is ordered submitted substantially as civil cases are submitted, the respondent may, on his own motion, very properly file an amended abstract setting forth the entire proceedings, and may likewise on his own motion amend his original return by setting forth the transcript of the shorthand notes and exhibits, together with an explanation why it was impossible to include said transcript in the original return.

Roberts v Fuller, 210-956; 229 NW 163

12467 Limitation.

Section applied.

Thornburg v Mershon, 216-455; 249 NW 202

Criminal procedure. Tho an invalid original entry of judgment in a criminal cause may be beyond review by certiorari because of the statute of limitation, yet certiorari will lie, if timely, to review a subsequent order of court revoking the suspended part of said former judgment and ordering the accused committed to jail.

Dayton v Bechly, 213-1305; 241 NW 416

Limitation of action. A decree adjudging defendant in contempt because of a violation of a former injunctional decree against the unlawful transportation of intoxicating liquors, both decrees having been entered without jurisdiction, is reviewable on certiorari even tho more than 12 months have elapsed since the entry of the injunctional decree.

Dayton v Patterson, 216-1382; 250 NW 595

Rule of timeliness. An application for, and the issuance of, a writ of certiorari within 12 months of the occurrence of the illegality complained of, is timely.

Gaffney v Young, 200-1030; 205 NW 865

CHAPTER 534

HABEAS CORPUS

12468 Petition.

Discussion. See 13 ILR 199—Antecedent errors reviewable

Appeal—de novo hearing. An appeal in habeas corpus proceedings—a law action—involving the custody and best welfare of a child necessarily and unavoidably gravitates to a review de novo.

Adair v Clure, 218-482; 255 NW 658

Appeal excludes habeas corpus. Habeas corpus will not lie to test the sufficiency of the evidence to sustain a judgment of conviction by a justice of the peace under an information which actually charges an offense the punishment for which does not exceed either a fine of $100 or imprisonment for 30 days.

Hallway v Byers, 205-936; 218 NW 905

Conclusion allegation. A petition in habeas corpus does not show on its face that the petitioner is entitled to a discharge when it simply alleges the naked conclusion that he has served the full statutory time prescribed as a penalty for "arson", the crime of arson being covered by various and different statutes and being attended by various and different terms of imprisonment.

Bailey v Hollowell, 209-729; 229 NW 189

Custody of child—appeal—trial de novo. An appeal in habeas corpus proceedings involving the custody and best welfare of a child, necessarily and unavoidably gravitates to a review de novo; obviously such review is proper when distinctly equitable issues are involved.

Jensen v Sorenson, 211-354; 233 NW 717

Defectively charged offense. A prisoner will not, on habeas corpus, be released from imprisonment on the ground that the indictment or trial information defectively and unskillfully charges the offense for which he was convicted and imprisoned; otherwise if the defect is so total that the indictment or information is a nullity.

McBain v Hollowell, 202-391; 210 NW 461

Defectively drawn information. The writ of habeas corpus will not lie to test the legality of imprisonment under an indictment or trial information of which the court has jurisdiction, even tho such indictment or information is defectively drawn.

Conkling v Hollowell, 203-1374; 214 NW 717

Erroneous proceedings on county attorney information. The act of the district court in formally approving a county attorney information, and forthwith entering judgment against the accused on a plea of guilty, is in

effect a finding that the grand jury was not then actually in session, (§13645, C., '31) and tho it be conceded that such finding was erroneous, such error furnishes no allowable basis for a writ of habeas corpus six years later to test the legality of the judgment.

Marsh v Hollowell, 215-950; 247 NW 304

Failure to determine degree of murder. A judgment of life imprisonment for murder rendered by the district court under a proper charge and on a plea of guilt of such crime, is not rendered void by the failure of the court, before imposing such judgment, to call witnesses and determine the degree of said crime, and enter said determination on the record. It follows that such failure, tho it be conceded to be error and reversible on appeal, furnishes no ground for release under a writ of habeas corpus.

McCormick v Hollowell, 215-638; 246 NW 612

Federal court's jurisdiction limited—persons detained by state. The federal court, in the absence of exceptional circumstances or emergencies, held without jurisdiction on habeas corpus action to determine constitutionality of Iowa statutes as applying to state banks on receiving deposits while insolvent and providing penalty therefor. The supreme court of Iowa has jurisdiction therein.

Ketcham v State, 41 F 2d, 38

Indeterminate sentences not made concurrent—habeas corpus not available. That defendant's imprisonment, if he is compelled to serve full time for each offense, would cover 82 years affords no legal ground for discharge from custody under indeterminate sentences in habeas corpus proceedings, even tho defendant was only 18 years of age and had not been represented by counsel at time pleas of guilty were entered.

Randall v Hollowell, (NOR); 227 NW 139

Insufficient petition. A writ of habeas corpus is properly denied when the petition therefor fails to state the matters mandatorily required by the statute.

Smith v Hollowell, 216-1219; 250 NW 646
Davis v Hollowell, 216-1178; 250 NW 647

Insufficiency of indictment. Objections to the sufficiency of an indictment of which the court has jurisdiction may not be raised in subsequent habeas corpus proceedings. Demurrer to the indictment in such case is the sole remedy.

Furey v Hollowell, 203-376; 212 NW 698

Insufficiency of indictment. Habeas corpus will not lie to question the sufficiency of an indictment or information of which the nisi prius court had jurisdiction.

Smith v Hollowell, 209-781; 229 NW 191

Invalid and valid nonconcurrent sentences. Petitioner in habeas corpus may establish his right to a discharge from custody by showing (1) that he is being confined under two nonconcurrent sentences; (2) that the first sentence is void because rendered by a court which had no jurisdiction of the subject matter; and (3) that he has served a time equal to that imposed by the second sentence.

Bennett v Hollowell, 203-352; 212 NW 701

Pre-eminent right of parent. The pre-eminent natural and statutory right of fit and proper parents to the custody of their child must prevail over those who hold no blood relation to the child, even tho the parents are in very humble financial circumstances, and even tho the parents may have temporarily yielded the custody of the child to another.

Adair v Clure, 218-482; 255 NW 658

Custody of child obtained by parent—principles. The scope of habeas corpus extends to controversies concerning the custody of children, resting on the assumption that the state has the right, paramount to any parental or other claim, to dispose of children as their best interests require, being governed not so much by the consideration of strictly legal rights of the parents as by those of expediency and equity and, above all, the interests of the child.

Allender v Selders, 227-1324; 291 NW 176

Proceeding for child custody. Habeas corpus actions involving the custody of minor children treated as equitable proceeding.

Ellison v Platts, 226-1211; 286 NW 413

The relation—evidence. Evidence reviewed, and held to establish that plaintiff, a relator in habeas corpus, is the mother of the child in question.

Tilton v Tilton, 206-998; 221 NW 552

Sufficiency of indictment. The sufficiency or validity of an indictment or information, of which the court had jurisdiction, may not be tried in habeas corpus proceedings.

Wilson v Haynes, 218-1370; 256 NW 678

Unallowable challenge to the jurisdiction of court. One who has been duly convicted of an escape from the penitentiary may not, in subsequent habeas corpus proceedings, challenge the jurisdiction of the court in which he was so convicted, on the ground that the former judgment under which he was being restrained at the time of his escape was wholly void.

Bennett v Hollowell, 203-352; 212 NW 701

Assignments of error. Where only assignment of error was to the effect that trial court erred in sustaining a writ of habeas corpus because record showed that plaintiff was a fugitive from justice, but there being several other grounds in addition to finding on this

fact question which might have justified court's order granting the writ, which order being general in nature, affirmance was necessary, even if plaintiff was a fugitive, because the sufficiency of such other grounds was not before the supreme court upon assignments of error, and therefore could not be determined, since in proceedings at law, such as habeas corpus, only matters presented for review in assignments of error are decided.

Ross v Alber, 227-408; 288 NW 406

12501 Demurrer or reply—trial.

Proceeding for child custody. Habeas corpus actions involving the custody of minor children treated as equitable proceeding.

Ellison v Platts, 226-1211; 286 NW 413

12502 Commitment questioned.

Sufficiency of evidence. The right in habeas corpus to review the sufficiency of evidence arises only in those cases in which the petitioner has been held to the grand jury.

Hallway v Byers, 205-936; 218 NW 905

12503 Nonpermissible issues.

Jurisdiction—adverse ruling on demurrer—conditions for review. Where a defendant was sentenced and imprisoned upon failing to plead after his demurrer to the indictment was overruled, an appeal will be dismissed from an adverse ruling on demurrer in a habeas corpus action to test the validity of such imprisonment, when the defendant does not (1) elect to stand upon his pleadings, or (2) suffer judgment to be entered against him in the lower court.

Besch v Haynes, 224-166; 276 NW 13

12504 Discharge.

Excessive sentence — when prisoner discharged. A prisoner will not be discharged on habeas corpus on the ground that the sentence is excessive until the expiration of that part of the sentence which the court could legally impose.

Smith v Hollowell, 209-781; 229 NW 191

Fugitive from justice. Principle reaffirmed that on habeas corpus to test the legality of extradition proceedings, the determination of the governor that the party sought to be extradited is, in fact, a fugitive from justice, is not conclusive on the court.

Drumm v Pederson, 219-642; 259 NW 208

CHAPTER 535

INJUNCTIONS

12512 Writ as independent remedy.

ANALYSIS

I NATURE AND GROUNDS IN GENERAL

Acts already performed. Rights already lost and wrongs already committed are not subject to injunctive relief, especially when there is no showing that the wrong will be repeated.

Universal Loan v Jacobson, 212-1088; 237 NW 436

Conditional order for — compliance — effect. When a decree provides (1) that defendant shall pay an award in condemnation proceedings, or (2) that in event defendant appeals from said award he shall give a supersedeas bond, and (3) that in event he fails to pay or appeal, injunction shall issue enjoining defendant's use of the condemned land, then the taking of an appeal and the giving of the supersedeas bond by defendant nullifies the authority under the decree to issue an injunction. In other words, after the decree is affirmed on appeal without any provision relative to injunction, the trial court has no jurisdiction on motion to enter an injunction on the basis of the affirmed decree. (The reasoning is that the decree constituted a final decree and that the decree as drawn authorized an injunction only on condition that defendant failed to appeal and give the supersedeas bond.)

Fairfield v Dashiell, 217-474; 249 NW 236

District court—enjoining unlicensed person practicing law. In an equity suit brought by

members of bar for injunction to restrain an unlicensed person from professing to be an attorney and from practicing law, where irreparable damage was the gist of the action, this subject matter was within the jurisdiction of the district court.

Johnson v Purcell, 225-1265; 282 NW 741

Enforcement of unconstitutional statute. Injunction will lie to enjoin the enforcement of an alleged unconstitutional statute which fixes a standard of conduct for a professional practitioner, e. g., a dentist.

Craven v Bierring, 222-613; 269 NW 801

Labor union injunction — state as party. Where a grave situation existed in the locality at the time, the state had the right to be made a party to proceedings involving an injunction violation by labor union officials, by filing a petition incorporating by reference the affidavits of the plaintiff's petition and the injunction upon which it was based, when the state did not seek different and distinct remedies from that asked by the plaintiff.

Carey v District Court, 226-717; 285 NW 236

Moot case. An appeal in an action for injunctional relief only, and from an order continuing the injunction to a named date, will be deemed to present a moot question when on presentation of the appeal it appears that the injunction has been automatically dissolved by the lapse of time.

Humble v Carter, 210-551; 231 NW 341

Moot question. Injunction to restrain the issuance and payment of warrants for certain claims, because of the alleged unconstitutionality of the statute purporting to authorize such claims, presents a moot case when it appears that a portion of the claims has been actually paid and the remaining claims are barred by a statute of limitation.

Gallarno v Long, 214-805; 243 NW 719

Municipal property owner. A property owner who owns property adjacent to a building being erected in violation of a town ordinance, relating to constructions within the fire limits of the town, has such interest as will entitle him to an injunction against the erection and maintenance of such building.

Boehner v Williams, 213-578; 239 NW 545

Optometry—corporation practicing through employee-physician. A corporation is practicing optometry when it employs a physician—a licensed optometrist—to carry on his business under the company's control, and such practice may be enjoined.

State v Ritholz, 226-70; 283 NW 268

Optometry—when not unlawful practice—physician and optical company. A reciprocal arrangement between an optical company and a physician, whereby the company sent customers to the physician for eye examinations and the physician sent patients to the company to have their prescriptions filled, does not constitute said company as practicing optometry, in the complete absence of any proof that said doctor was an employee of the company, and an injunction should not issue.

State v Ritholz, 226-70; 283 NW 268

Presumption of continuance of condition. Proof that enjoinable acts were being committed at the time of the commencement of an action carries the presumption that the condition complained of existed at the time of the trial.

State v Optical Co., 216-1157; 248 NW 332

Supreme court—no power to enjoin unlicensed person practicing law. Supreme court has no implied power, by virtue of its exclusive statutory power to admit persons to practice as attorneys, to enjoin unlicensed law practice, for it has no original jurisdiction to grant injunctive relief, and an equity action therefor by members of bar is in no way related to the matter of admission to bar or disbarment.

Johnson v Purcell, 225-1265; 282 NW 741

II SUBJECTS OF PROTECTION AND RELIEF

(a) ACTIONS AND OTHER LEGAL PROCEEDINGS

Enjoining action of forcible entry and detention. Injunction will lie to enjoin an action of forcible entry and detention only on a very clear showing that a certain and manifestly irreparable injury will result unless the writ is issued.

Farber v Ritchie, 212-1396; 238 NW 436

Enjoining action in foreign state. A defendant who is a resident of this state may, even after he has filed formal answer, enjoin a plaintiff who is a resident of this state from maintaining in a foreign state an action on a contract arising in this state, when said action is sought to be maintained for the purpose of vexatiously harassing the defendant and subjecting him to unnecessary costs, part of which are untaxable as costs.

Bankers Life v Loring, 217-534; 250 NW 8

Oates v College, 217-1059; 252 NW 783; 91 ALR 563

Forcible entry and detainer—injunctive interference by equity limited. The summary remedy of forcible entry and detainer, and an appeal from a decision therein, are statutory and a court of equity will not interfere in the absence of fraud or mistake or a showing of manifest irreparable injury.

Schuldt v Lee, 226-189; 284 NW 89

Labor union injunction violation. Where a grave situation existed in the locality at the time, the state had the right to be made a

II SUBJECTS OF PROTECTION AND RELIEF—continued

(a) ACTIONS AND OTHER LEGAL PROCEEDINGS—concluded

party to proceedings involving an injunction violation by labor union officials, by filing a petition incorporating by reference the affidavits of the plaintiff's petition and the injunction upon which it was based, when the state did not seek different and distinct remedies from that asked by the plaintiff.

Carey v Dist. Court, 226-717; 285 NW 236

Law of the case—injunction—substantial compliance. Decree of lower court on retrial reviewed by certiorari and held to be in substantial compliance with supreme court opinion requiring respondent, by mandatory injunction, to remove obstructions from bayou outlet.

Vaughan v Dist. Court, (NOR); 226 NW 49

Multifarious, vexatious, and bad faith litigation. Injunction will lie to restrain the bringing of an action, which has been adjudicated, on a clear showing (1) that the defendant intends in bad faith to institute other and repeated actions on said adjudicated cause of action, (2) that plaintiff has and will continue to suffer irreparable damage and injury in loss of credit and business, and (3) that plaintiff has no remedy for such harassment except to interpose the wholly inadequate plea of adjudication.

Benedict v Mfg. Co., 211-1312; 236 NW 92

Obstructions—mandatory removal—limitations. A mandatory injunction requiring the removal of obstructions from a watercourse should be limited to removal of what the enjoined party placed therein.

Fennema v Nolin, (NOR); 212 NW 702

Restraint of vexatious suits. Restraint by injunction of one claiming to have cause of action against another should be granted only when the purpose of it is shown clearly to have been in bad faith and for the purpose of vexation and annoyance. Rule applied where successive actions were brought by stockholders against corporation.

Strasburger v Witousek, (NOR); 211 NW 713

Right to interpleader. The pre-code, equitable action of "interpleader" is available to an insurer who is faced by different, mutually hostile claimants to the amount due under the policy, which amount the insurer admits less deduction provided by the policy. And said insurer will be entitled to an injunction restraining the institution or further prosecution against him of separate actions on the policy by said warring parties.

Equitable v Johnston, 222-687; 269 NW 767; 108 ALR 257

Void search warrant. Injunction will lie to restrain the search of premises under a void warrant, but not otherwise.

Des M. Drug v Doe, 202-1162; 211 NW 694

(b) PROPERTY, CONVEYANCES, AND INCUMBRANCES

Bequest for paving roads. In an action by a taxpayer to obtain an injunction restraining a county from accepting a bequest to be used for paving roads, the injunction was refused where a will and two codicils provided for the bequest, as when all papers were construed together a valid gift to the county was found to have been created which the county had the authority to accept.

Anderson v Board, 226-1177; 286 NW 735

Cancellation of sheriff's certificate—issuance of deed restrained. An action to enjoin issuance of sheriff's deed and to cancel certificate held properly brought in equity as against contention that §11792, C., '24, furnished exclusive remedy.

Paulsen v Hansen, (NOR); 216 NW 762

Easement—extent of right—decree—scope and extent. Where a right of way is jointly used by the fee owner, and by the owner of a duly granted easement therein, (1) the width of said easement, (2) the duty of the owner of the easement to close the gates leading thereto, (3) the duty of each party to refrain from interfering with the use by the other, (4) the mutual right to repair the way, and (5) the proper division of the expense of such repairs, should, under proper evidence, be specifically decreed, and all violations thereof enjoined.

Bina v Bina, 213-432; 239 NW 68; 78 ALR 1216

Easement—termination—violating conditions—effect. The owner of a duly established right of way easement in the land of another does not forfeit the right to said easement by inadvertently or carelessly leaving open the gates leading to said easement even tho the duty to close said gates is made mandatory by the conveyance granting said easement; but the easement owner will be enjoined from violating said mandatory duty.

Bina v Bina, 213-432; 239 NW 68; 78 ALR 1216

Nonavailable in lieu of possessory action at law. One, who claims the possession of realty against another who is in actual possession as a tenant at will, may not resort to injunction proceedings to adjudicate his claimed right of possession.

Austin v Perry, 219-1344; 261 NW 615

Right to maintain fences. In the absence of a division of a partition fence by agreement of the parties or by proper order of the fence viewers, either of the adjoining owners has the right to build and maintain all or any part of

the fence; and an injunction which curtails such right is unallowable.

Sinnott v Dist. Court, 201-292; 207 NW 129

Stipulation in sidewalk dispute—creation of easement. A stipulation disposing of litigation over use of sidewalk, and providing for joint use, creates an easement for said purpose, and injunction would lie for interference with such right.

McEachron v Schick, (NOR); 218 NW 955

Surface waters—dominant and servient estates—artificial ditch. The owner of the dominant estate has the right to have the surface waters accumulating thereon flow unobstructed in the usual and natural course of drainage upon the adjoining lower or subservient estate, but he may not create an artificial ditch on the servient estate, nor enjoin the servient owner from filling such artificial ditch.

Clark v Pierce, 224-1068; 277 NW 711

(c) CONTRACTS

Contract employing physician—future practice restraint unaffected by indefinite employment extension. When a physician is employed by a medical clinic in a locality where he is not acquainted, his contract, agreeing that at its termination he will not practice his profession for ten years within a certain locality, is not invalidated by reason of an indefinite extension of the employment period mutually acted upon by all parties, and injunctive relief was properly granted to employer.

Larsen v Burroughs, 224-740; 277 NW 463

Contract for equality in stock holdings. Equity will by injunction and other proper orders protect a stockholder of a corporation from a violation of his contract with another stockholder under which equality of stockholdings of the two stockholders was clearly intended.

Holsinger v Herring, 207-1218; 224 NW 766

Contract not to practice profession. Injunction will lie to restrain the violation of a contract wherein the defendant has agreed not to practice his profession in a named place for a stated period, the contract not being oppressive, unreasonable, or inequitable; and this is true even tho the plaintiff might have a remedy at law in the form of damages.

Proctor v Hansel, 205-542; 218 NW 255; 58 ALR 153

Contract restraining competition—liquidated damages—nonbar. Injunction is a proper remedy to restrain one physician from practicing his profession contrary to the provisions of his contract not to engage in competitive practice in the same county for a specified period. A provision in the contract for liquidated damages will not bar injunctive relief.

McMurray v Faust, 224-50; 276 NW 95

Contract not to competitively engage in guarding property—enforceability. Where a discharged employee of a company engaged in guarding business houses at night threatens to breach his contract prohibiting him from entering into competition therewith, a petition seeking injunctive relief against him and alleging these facts sets up a good cause of action for an injunction.

Sioux City Patrol v Mathwig, 224-748; 277 NW 457

Inducing breach of contract. Injunction will lie to prevent a third party from inducing parties to a contract to violate it.

Henry & Sons v Rhinesmith, 219-1088; 260 NW 9

Interference with performance of contract. One who is not in default on her contract with her father to care for him and at his death to have certain property in return for such care, may have a permanent injunction which will restrain others from interfering and preventing performance of the contract; but, to meet exceptional circumstances which arise out of an unseemly controversy over the father's property, the court may, notwithstanding the strict legal rights of the parties, impose conditions which will insure right conduct on the part of plaintiff and protect the father.

White v Massee, 202-1304; 211 NW 839; 66 ALR 1434

Partnership personnel changes after contract therewith. A physician as a party to a contract of employment with a medical clinic partnership is not in a position to question its validity on the ground that there had been a change in the members of the partnership and consequently no contract with the new entity, when his full performance of and under the contract had been with the new entity, including an extension of the contract.

Larsen v Burroughs, 224-740; 277 NW 463

Reasonable restraint on trade. An agreement by the vendor of a furniture business and its good will that he will not sell, or offer for sale, furniture "so long as the vendee is in business" in a named town, is reasonable as far as the time element is concerned—and is enforceable by injunction; and such agreement will not be held unlimited as to scope of territory (and therefore unreasonable) when the contract as a whole and the attending circumstances clearly show that the parties had in mind the town in question and the trade territory adjacent thereto.

Haggin v Derby, 209-939; 229 NW 257

Price cutting—goods purchased before notice to desist. A wholesaler who had a contract to market a trademarked product at a certain price, after he gave a retailer notice to desist from selling the product at less than the established price and was refused, was entitled to an injunction to restrain the un-

II SUBJECTS OF PROTECTION AND RELIEF—continued

(c) CONTRACTS—concluded

fair trade practice, even tho he had refused to sell the product to the retailer who had made an attempt to buy, not in good faith, but as an attempt to establish a defense in the threatened injunction suit, and altho the retailer's stock was purchased before the notice to desist was received.

Barron Motor v May's Drug Stores, 227-1344; 291 NW 152

Unilateral contract as to wage scale—enforcement. An action to enjoin the violation of a so-called wage agreement will not lie when the writing is wholly unilateral—when it purports to impose on the defendant an obligation to pay a certain scale of wages but imposes no obligation whatever on the other party or parties to the writing.

Wilson v Airline Co., 215-855; 246 NW 753

(d) PUBLIC OFFICERS AND MUNICIPALITIES

Discussion. See 18 ILR 1—Federal jurisdiction

Municipality exceeding constitutional limitation of indebtedness. Where a municipality proposes to issue emergency, bridge, and fire fund bonds under the statute authorizing cities or towns to anticipate the collection of taxes to be levied for certain purposes, such bonds would be an "indebtedness" of the municipality under the constitutional limitation of indebtedness of municipal corporations, as against the theory that special tax levies made for a certain period of years in advance became an asset of the city, and the bonds, being payable solely out of such levies, were not an indebtedness of the municipality. The amount of proposed bonds exceeding the constitutional limitation of indebtedness, the city was properly enjoined from issuing or selling the bonds.

Brunk v Des Moines, 228- ; 291 NW 395

Absence of jurisdiction. Principle reaffirmed that injunction is the proper remedy to restrain the board of supervisors from proceeding with a drainage improvement over which it has no jurisdiction.

Maasdam v Kirkpatrick, 214-1388; 243 NW 145

Allowance of attorney fees. In injunction to annul the allowance by the board of supervisors of a claim for attorney fees in drainage proceedings, the court will not, in the absence of fraud, review either the allowance of the claim or the proper amount of such allowance.

Kemble v Weaver, 200-1333; 206 NW 83

Arbitrarily vacating street to make defense to injunction. In an action to enjoin a town from maintaining a nuisance in a street or alley by allowing an adjoining owner to fence and use the street or alley, the action of the town council in arbitrarily vacating the street and the alley, without regard to the interests of the public, for the obvious purpose of creating a defense to the injunction suit, will be declared invalid.

Pederson v Radcliffe, 226-166; 284 NW 145

Citizen's right to challenge council's official acts. A citizen of a community has the right to challenge the validity of the actions of his city council in proceeding to establish a municipal electric plant and to apply for injunctive relief where by no other proceedings can public or private interests be fully protected.

Abbott v Iowa City, 224-698; 277 NW 437

City officers exceeding authority. To warrant an injunction against the officers of a city or town, there must be some present, tangible, existent infraction or threatened infraction of legal power and authority, with resultant injury and damage to the petitioners.

Keokuk Co. v Keokuk, 224-718; 277 NW 291

Electric plant under Simmer law—attack by taxpayer. An action by a taxpayer to enjoin the operation of a municipal electric plant, payable from the earnings, does not lie because such plants do not impose any additional burden on the taxpayers.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Enforcement of ordinance. A permanent injunction against a mayor and his successor to enjoin the enforcement, against plaintiff's nonresident employees, of a penal ordinance, on the theory that such employees are transient peddlers, will not be entered at a time when it does not appear that said transient employees are in the city in question, or that plaintiff's property rights will be invaded, or that plaintiff will be irreparably injured by enforcement.

Cook v Davis, 218-335; 252 NW 754

Enjoining electric plant operation — moot question. Altho the federal court on application of a taxpayer holds that it will not enjoin an act already done, to wit, to enjoin the construction of a municipal electric plant already built, such holding will not bar a citizen from bringing action to enjoin the operation of the plant.

Miller v Milford, 224-753; 276 NW 826; 114 ALR 1423

Public utility construction enjoined. The construction of a municipal light and power plant should be enjoined for failure to properly provide for competitive bidding in the making of the contract, when the contract required the contractor to accept the town bonds in payment of the contract price, to bid on the basis of doing all the work and furnishing all the material for the project, and to advance the town $8,000 in cash to cover expenses,

as such restrictions discriminated in favor of a limited class of bidders.

Weiss v Woodbine (Town), 228- ; 289 NW 469

Enjoining state highway commission. An action against the state highway commission to enjoin it from relocating a primary road, unaccompanied by any allegation of wrongful acts, is, in effect, an action against the state, and nonmaintainable.

Long v Highway Com., 204-376; 213 NW 532

Equity retaining jurisdiction on counterclaim —law issues. An action in equity by one school district to enjoin another school district and the county treasurer from transferring, to the defendant school, certain funds claimed to be due from the plaintiff school as tuition, remains in equity altho the defendant school files a cross-petition raising issues at law as to determination of the amount due, if any, and for judgment accordingly, since equity, acquiring jurisdiction, may determine all issues.

Lincoln Dist. v Redfield Dist., 226-298; 283 NW 881

Farm bureau aid appropriation. A plaintiff who seeks to enjoin the appropriation of county funds in aid of a farm bureau organization on the ground that the bureau was not organized to cooperate with stated governmental agencies, must specially plead and prove said fact.

Blume v Crawford County, 217-545; 250 NW 733; 92 ALR 757

Grounds in general. An injunction will not issue to restrain a municipality from doing an act when there is no proof that it intends to do said act.

Mote v Town, 211-392; 233 NW 695

Highways—tree removal—valid exercise of power. Injunction will not lie to restrain county authorities from removing trees along a highway when they are acting strictly within their statutory powers.

Rabiner v Humboldt Co., 224-1190; 278 NW 612; 116 ALR 89

Encroachment on highway—supervisors removing landowner's fences. Injunction by landowner will not lie to prevent county supervisors from removing landowner's fences encroaching on highway even tho such fences have existed for 70 years.

Richardson v Derry, 226-178; 284 NW 82

Road fenced less than established width. Injunction will not lie on behalf of a landowner to prevent a county from removing fences as obstructions in the highway—the fences having been built more than 50 years ago on a 40-foot width—when the road record shows not only a 66-foot road but all the mandatory prerequisites for establishment.

Davelaar v Marion Co., 224-669; 277 NW 744

Illegal modification in zoning ordinance. A detrimentally affected property owner may maintain injunction to restrain the carrying out of a wholly illegal modification of a zoning ordinance when he had no notice of such modification until after the expiration of the 30 days provided by statute (§6466, C., '31) for certiorari, especially in view of the fact that the two proceedings are both tried de novo, and that no motion was made to transfer from equity to law.

Zimmerman v O'Meara, 215-1140; 245 NW 715

Improper absent voting—inmates of county home—remedy not in equity. Absent voters' ballots from Polk County Home inmates who do not expect to be absent from the county or prevented by illness from going to the polls should be challenged for cause, and, this being a plain, speedy, and adequate remedy at law, equity will not enjoin the county auditor from doing his statutory duty in delivering the ballots to the judges of election.

Drennen v Olmstead, 224-85; 275 NW 884

Issuance of illegal bonds. A taxpayer may maintain an action to enjoin the board of supervisors from issuing county bonds for a purpose not authorized by law.

Harding v Board, 213-560; 237 NW 625

Legal discretion uncontrollable. The court cannot compel the state highway commission to expend county primary road funds in the improvement of the primary roads of the county; nor can the court control said commission in the legal expenditure of other funds under the control of the commission.

Scharnberg v Highway Com., 214-1041; 243 NW 334

Objection to assessments. When the board of supervisors exercises discretion in repairing a drainage ditch and their action in levying an assessment is not absolutely void for lack of jurisdiction, the proper remedy for one aggrieved by such action is by appeal to the district court, and not by injunction against the assessment levy.

Baldozier v Mayberry, 226-693; 285 NW 140

Perpetuation of unlawful drainage by bridge. The board of supervisors may not, by the construction and maintenance of a culvert in the public highway, supplement, continue, and perpetuate an unlawful and material diversion of surface waters by a dominant estate holder, all to the substantial damage of the servient estate holder.

Anton v Stanke, 217-166; 251 NW 153

Plaintiffs — uninjured taxpayer. A public utility corporation, operating in a city under a duly granted franchise, may not, solely as a taxpayer, maintain injunction to test the legality of an ordinance granting a franchise to a competitor, on the grounds (1) that the

II SUBJECTS OF PROTECTION AND RELIEF—continued

(d) PUBLIC OFFICERS AND MUNICIPALITIES—concluded

ordinance rates for private consumers are unreasonable, and (2) that the city has an option, under the ordinance, to take over the ownership of the plant after it has paid for itself out of its own earnings, when it appears that such possible "taking over" will be without the creation of any debt on the part of the city and without resort to any taxation—in other words, when it appears that there is no present or threatened danger to the plaintiff, except the danger of competition.

Iowa Co. v Emmetsburg, 210-300; 227 NW 514

Presumption as to official conduct. Presumptively a public officer will perform his duties as prescribed by law.

Banta v Clarke County, 219-1195; 260 NW 329

Prohibited condemnation. Injunction will lie against the members of the state highway commission to enjoin a prohibited condemnation of private property for highway purposes, even tho such commission is an arm of the state.

Hoover v Highway Com., 207-56; 222 NW 438

Real estate without rental value—use as measure of damages. When real property has no rental value, upon dissolution of a wrongful injunction restraining erection of a municipal light plant thereon, the measure of damages is the use value, including net profits.

Corning v Iowa-Nebr. Co., 225-1380; 282 NW 791

Relief granted—pleading and evidence. Decree relative to injunction against the levy of special assessments, and to the issuance of bonds, held to be in compliance with the pleadings and evidence.

Jackson v Creston, 206-244; 220 NW 92

Review of school board action. When school directors are invested by statute with control over a named subject matter, their action with reference to such subject matter must be reviewed through an appeal to the county superintendent, and not through a resort to the courts; and this is true howsoever inexpedient, improper, and ill-advised the action may appear to be. Court action is permissible only when the board steps outside the statutory zone of legal action.

Security Bank v Bagley, 202-701; 210 NW 947; 49 ALR 705

Right of taxpayer to question municipal action. A plaintiff has no standing to enjoin a city from entering into a contract for the construction of an electric lighting system to be paid for by special assessments, unless he alleges and proves that, in some specified way, he will be adversely affected by such proposed contract, e. g., (1) that he owns property which will be specially assessed, or (2) that he is a taxpayer and must contribute to the improvement fund from which payment of a deficit must be made.

Donovan Co. v City, 211-506; 231 NW 499

Streets—obstruction by wires. Injunction will lie on behalf of a town to enjoin the overhead obstruction by wires of its streets.

Ackley v Elec. Co., 206-533; 220 NW 315

(e) PERSONAL RIGHTS AND DUTIES

Injunction against labor union. An injunction against officers of a trade union was not void on its face as a denial of the right of freedom of speech and assembly because it prohibited unlawful interference with a company's business, mass picketing, intimidation, and coercion, and going upon the company's premises without consent.

Carey v Dist. Court, 226-717; 285 NW 236

(f) EMINENT DOMAIN PROCEEDINGS

Judgment in eminent domain—insufficiency. Record entry in proceedings relative to eminent domain proceedings reviewed, and held, notwithstanding its recitals, not to constitute a judgment for damages, but to specify the conditions under which the plaintiff property owner would be entitled to a provisional injunction.

Wheatley v Fairfield, 221-66; 264 NW 906

(g) HIGHWAYS

Condemnation of land—identity of issues, parties, and subject matter. An adjudication that plaintiff was not entitled to an injunction restraining the condemnation of land for highway purposes necessarily precludes the subsequent relitigation of the same issue, between the same parties, and concerning the same land.

Hoover v Iowa Com., 210-1; 230 NW 561

Trees—removal for drainage. In landowner's action to restrain county from cutting down seven trees in the construction of a highway, where evidence showed that trees were too far apart to constitute a windbreak, that trees were on the highway right of way, and that their destruction was necessary to provide a drainage ditch, lower court properly refused to enjoin destruction, under statute prohibiting such destruction unless "materially interfering with improvement of the road".

Harrison v Hamilton County, (NOR); 284 NW 456

(h) NUISANCES

Issue-changing amendment—right to reject. The court does not abuse its discretion in refusing a belated amendment which would convert an action for damages for a permanent

nuisance into an action to enjoin a nonpermanent nuisance and for damages.

Cary-Platt v Elec. Co., 207-1052; 224 NW 89

Nuisance per se. The operation of a rendering plant in a city or town for processing the carcasses of animals dying of disease will be peremptorily and permanently enjoined when it is demonstrated that the plant cannot be operated without being a public nuisance.

State v Drayer, 218-446; 255 NW 532

Playground—not nuisance. In an action to enjoin as a nuisance the maintenance of a public playground and athletic field, used both during the day and at night, and attended generally by the people of the community, resulting in incidental annoyance and inconsequential injury to plaintiff, an adjoining property owner, held, facts did not warrant issuance of an injunction to restrain such use as a nuisance.

Casteel v Afton, 227-61; 287 NW 245

Playgrounds—not per se nuisances. Playgrounds and athletic fields are of advantage to the health and well-being of a community and are not per se nuisances, tho they can be so conducted as to become nuisances.

Casteel v Afton, 227-61; 287 NW 245

Practicing medicine without license—injunction—constitutionality. The statute authorizing injunction to restrain the practice of medicine and surgery without a license is constitutional for the reason that such practice constitutes a nuisance under the general law of the state, and chancery has, from time immemorial, possessed jurisdiction to enjoin nuisances; and this is true irrespective of the question whether the district court may be constitutionally vested with an equitable jurisdiction not possessed by chancery courts when the state constitution was adopted.

State v Howard, 214-60; 241 NW 682

Private nuisance—funeral home. The operating of an undertaking business or so-called funeral home in a strictly residential section of a municipality under circumstances which bring to the families in the immediate neighborhood a constant reminder of death, a resulting feeling of mental depression, an appreciable lessening of their happiness and disease-resisting powers, and an appreciable depreciation of the value of their properties, constitutes a nuisance and is enjoinable as such.

Bevington v Otte, 223-509; 273 NW 98

Undertaking establishment. The operation, under formal municipal permit, of an undertaking and embalming establishment in a city, in a territory designated by a duly enacted zoning ordinance as a commercial district, will not be enjoined on the sole ground that being adjacent to a residence, said operation will have a depressing mental effect on the occupant and owner of said residence and on the members of his family.

Kirk v Mabis, 215-769; 246 NW 759; 87 ALR 1055

(I) PROMISSORY NOTES, ETC.

No annotations in this volume

(J) TAXATION

Alleged unconstitutional tax. Injunction will lie to test the constitutionality of a tax imposed tho accompanied by a penal provision.

Solberg v Davenport, 211-612; 232 NW 477

Assessments—irregularities. Injunction will not lie to restrain a mere irregularity in the levying of a drainage assessment.

Seabury v Adams, 208-1332; 225 NW 264

Assessment—wrongful classification. A taxpayer, who fails timely to interpose, before the local board of review, or before the state board of assessment and review, his objection that his property (in this case, the capital stock of a bank) was wrongfully classified as personal property and subjected to a consolidated levy instead of being classified as moneys and credits and subject to a six-mill levy, may not proceed in equity to enjoin the collection of the tax.

Security Bank v Mitts, 220-271; 261 NW 625

Special assessment tax sales. When the petition asked for an injunction restraining the county treasurer from selling at tax sale lands upon which Polk county holds tax deeds, it was error to grant an injunction restraining tax sales for special assessments regardless of who the owner of the tax deed might be, even tho other general relief was asked by the petition, the petitions of intervention, and the answer, as the court should not render a judgment which has no foundation in the pleading and is not justified by the evidence, issues, or theory upon which the case was tried.

Bennett v Greenwalt, 226-1113; 286 NW 722

Construction of permanent sidewalks. Injunction will not lie to enjoin the collection of a special assessment for a permanent sidewalk when the city or town council had acquired jurisdiction over such construction and assessment, even tho the procedure leading up to such jurisdiction was somewhat indefinite.

Perrott v Balkema, 211-764; 234 NW 240

Enjoining assessment. Failure in drainage proceedings to serve any valid notice on a property owner (1) of the proposed establishment of a drainage district, or (2) of the later proposed assessment, renders the entire proceedings void as to such property owner; and the collection of the assessment will be enjoined, even tho the property owner did voluntarily and generally appear at the hearing on the confirmation of the assessment

II SUBJECTS OF PROTECTION AND RELIEF—continued

(j) TAXATION—concluded

and filed objections thereto and did not appeal from the adverse ruling thereon.

Chicago, NW Ry. v Sedgwick, 203-726; 213 NW 435

Establishment of drainage district—incorrect name of mortgagee—nonjurisdictional defect. In action to cancel tax sale certificate for an unpaid drainage assessment, to enjoin issuance of treasurer's deed therefor, and to further enjoin the collection of remaining assessments on ground that drainage district was not legally established because of defective notice and failure to file proof of service, the drainage record book kept by auditor showing compliance with statutory requirements was admissible, and failure to give correct name of mortgagee in proceeding to establish the district was not a jurisdictional defect where proposed ditch did not extend through or abut upon land covered by the mortgage. (§1989-a3, S., '13.)

Whisenand v Van Clark, 227-800; 288 NW 915

National bank stock taxed in excess of other moneyed capital. The action of taxing officials in classifying a national bank's shares of stock as "moneyed capital" under the state laws, while placing competing capital of individuals in class of "moneys and credits", resulting in higher tax rates on banks, held, prohibited discrimination against national bank, and entitled bank to an injunction against the county treasurer restraining collection of discriminatory tax, notwithstanding bank's alleged failure to seek a hearing before state board of review.

Knowles v Bank, 58 F 2d, 232

Wrongful assessment—administrative remedy to be exhausted before appeal to court. All adequate administrative remedies in matters of taxation must be exhausted before resort can be had to court, so when administrative stage of action is completed, judicial power of court may begin, and the parties may resort to any tribunal having jurisdiction. Hence, where national banks bring an action to restrain collection of alleged illegal taxes on capital stock, basing alleged illegality on fact that other competitive "moneyed capital" was taxed intentionally and consistently at lower rate in violation of federal statutes, held, banks failed to exhaust remedy provided by statutes providing appeal from assessor to board of review.

Nelson v Bank, 42 F 2d, 30

Crawford Bk. v Crawford County, 66 F 2d, 971

(k) TRESPASS

Construction of dam. Injunction will lie to enjoin the construction of a dam and the consequent overflow of private property for the public use, until the damages are paid; and this is true even tho the taker is solvent.

Scott v Price Bros., 207-191; 217 NW 75

Levee construction. Evidence justified denying to landowner a decree for injunction against construction and maintenance by private persons of levee on adjoining property when landowners' claims were that levee would result in essential interference with flood waters or appreciably increase their volume or height along owner's property or that levee would prevent extraordinary flood water, which might flow over dike protecting land on other side, from running back to river when flood waters receded.

Kellogg v Hottman, 226-1256; 286 NW 415

Repeated trespasses on realty. Injunction will lie to restrain repeated trespasses and threatened injury to real property so as to avoid multiplicity of suits and prevent irreparable injury.

Casteel v Afton, 227-61; 287 NW 245

Repeated trespasses on realty—dissolution of writ. Injunction will lie to restrain a party from trespassing upon and wrongfully resuming possession of real estate from which he has been removed under and by virtue of an order of removal duly issued in forcible entry and detainer proceedings; but if appeal be perfected from said order of removal and stay order obtained, before the said order has been completely executed, the court may properly dissolve the temporary writ.

Usailis v Jasper, 222-1360; 271 NW 524

Threatened trespass. Injunction will lie to prevent a threatened trespass.

Rasmussen v Alberts, 215-644; 246 NW 620

Trespass on real estate. Allegations to the effect that defendants on a certain occasion tore down plaintiff's fence, trespassed upon plaintiff's land, and wrongfully removed a building belonging to plaintiff disclose no equitable jurisdiction for the issuance of a mandatory injunction for the restoration of the fence and building; and such action is properly transferred to the law calendar.

Griffiths v Allen, 212-831; 237 NW 219

Water easement. Where a contract easement exists to pipe water from the premises of the owner of land to the premises of the easement owner, it necessarily follows that the latter's right to go upon said premises of the former to make reasonable repairs to the pipes and related equipment will be protected from interference by injunction.

Hawkeye Cement v Williams, 213-482; 239 NW 120

(l) WASTE

No annotations in this volume

(m) CRIMINAL ACTS, CONSPIRACIES, AND PROSECUTIONS

Discussion. See 13 ILR 206—Control of crime by equity

Peacefully picketing not secondary boycott —no injunction. A threat to do something that a person has a right to do is not a threat in a legal sense. Held that union officials by lawfully placing a neon sign manufacturer on the unfair list, advertising to the public that **he was unfair to electrical** workers, and peacefully picketing his place of business, were not guilty of such conspiracy as to constitute a secondary boycott, and an injunction will not lie.

Smythe Co. v Local Union, 226-191; 284 NW 126

Sale of aspirin. A corporation may be restrained by injunction from selling or offering or exposing for sale aspirin, on proof that aspirin is a drug, and is not a proprietary medicine, and that the corporation is not conducting the business of selling said article under the supervision of a licensed pharmacist.

State v Jewett Co., 209-567; 228 NW 288

Search without warrant. One who is shown to be a violator of the law relative to the sale and possession of intoxicating liquors will be accorded no standing in a court of equity in an action by him to enjoin peace officers from picketing his place of business, interfering with his business, or searching his customers without a search warrant.

Dietz v Cavender, 201-989; 208 NW 354

Secondary boycott—essential elements. A secondary boycott may be defined as a combination to cause a loss to one person by coercing others against their will to withdraw from their beneficial business intercourse by threats that, unless they do so, the combination will cause similar loss to them; or by the use of such means as the infliction of bodily harm on them, or such intimidation as will put them in fear of bodily harm.

Smythe Co. v Local Union, 226-191; 284 NW 126

III ACTIONS

(a) PARTIES

Evidence—sufficiency. In an action for injunction, where plaintiffs advanced capital to organize a corporation for the purpose of putting invention on market—the inventor in turn assigning to them an absolute interest in patent, and where plaintiffs thereafter organize a separate corporation to engage in marketing the patented device both directly and by license, the evidence held sufficient to entitle plaintiffs to injunction restraining inventor from circulating to plaintiffs' prospective customers material to effect plaintiffs had no interest in patent, and restraining the threatening of such prospective customers with litigation in event they should buy from plaintiffs.

Burlington Corp. v Debrey, 226-1190; 286 NW 473

Nonjoinder. An injunction restraining tax sales of all property against which special assessment certificate holders had liens was erroneous insofar as it deprived certificate holders, who were not parties to the action and over whom the court had no jurisdiction, of their right to have the property sold to pay the special assessments.

Bennett v Greenwalt, 226-1113; 286 NW 722

Taxpayer must show adverse interest to enjoin city erecting light plant. One suing to enjoin town's contract for purchase of machinery for electric lighting plant must show interest adversely affected.

Christensen v Kimballton, (NOR); 231 NW 502

(b) PLEADINGS

Amended and supplemental pleadings—seeming illegality. In an action by private citizens to enjoin a municipality and its contractor from carrying out an alleged, illegal, written contract for the construction of a light and power plant, the defendants may be permitted by the court so to amend their answer as to plead, tho belatedly, that a provision in said contract relative to the manner of testing said plant when completed, and which provision was in material variance with the plans and specifications on which bids were received, was inadvertently inserted in said contract—that the actual agreed test was identical with that called for by said specifications, and that, since the commencement of the suit, the said defendants had entered into a supplemental contract in accordance with said plea.

Pennington v Sumner, 222-1005; 270 NW 629; 109 ALR 355

Farm bureau aid appropriations. A plaintiff who seeks to enjoin the appropriation of county funds in aid of a farm bureau organization on the ground that the bureau was not organized to cooperate with stated governmental agencies, must specially plead and prove said fact.

Blume v Crawford County, 217-545; 250 NW 733; 92 ALR 757

IV DECREE

Absence of prayer—effect. No decree of injunction should be rendered against an intervener when plaintiff answered the petition of intervention but prayed for no relief.

Red Top Co. v McGlashing, 204-791; 213 NW 791

Decree not justified by pleadings. When the petition asked for an injunction restraining the county treasurer from selling at tax sale lands upon which Polk county holds tax deeds, it was error to grant an injunction restraining

IV DECREE—concluded

tax sales for special assessments regardless of who the owner of the tax deed might be, even tho other general relief was asked by the petition, the petitions of intervention, and the answer, as the court should not render a judgment which has no foundation in the pleading and is not justified by the evidence, issues, or theory upon which the case was tried.

Bennett v Greenwalt, 226-1113; 286 NW 722

Dismissal of temporary injunction not adjudication. Dismissal of a temporary injunction even after answer is not an adjudication of the cause, as ordinarily a plaintiff asking a permanent injunction is entitled to a trial on the merits.

McMurray v Faust, 224-50; 276 NW 95

Evidence—sufficiency. In an action for injunction, where plaintiffs advanced capital to organize a corporation for the purpose of putting invention on market—the inventor in turn assigning to them an absolute interest in patent, and where plaintiffs thereafter organize a separate corporation to engage in marketing the patented device both directly and by license, the evidence held sufficient to entitle plaintiffs to injunction restraining inventor from circulating to plaintiffs' prospective customers material to effect plaintiffs had no interest in patent, and restraining the threatening of such prospective customers with litigation in event they should buy from plaintiffs.

Burlington Corp. v Debrey, 226-1190; 286 NW 473

Judgment—reservation of unpleaded issue. In an action to enjoin a public utility company from maintaining an electric light and power plant within a city, the reservation in the final decree of the question of the right of the company to maintain a similar plant running through the city and supplying points outside the city—a plant distinct from the company's city plant—is proper when the pleadings do not fairly embrace said latter plant.

Iowa Light Co. v Grand Junction, 217-291; 251 NW 609

12513 Writ as auxiliary remedy.

Law action with prayer for injunction. In an action at law for damages with auxiliary prayer for injunction to prevent a repetition of the injury, the injunction feature of the action is not transferable to the equity calendar for trial.

Pisny v Railway, 207-515; 221 NW 205; 222 NW 609

12514 Temporary or permanent.

Fatally indefinite decree. A decree which enjoins a party from doing any act which "would infringe upon the rights of the plaintiff" under a specified contract, is fatally indefinite and therefore unallowable.

Henry & Sons v Rhinesmith, 219-1088; 260 NW 9

Preliminary and interlocutory injunctions—inevitable dissolution. A temporary injunction in an untried action in one county should be dissolved when it is made to appear that since the commencement of the action the right to such injunction has been determined adversely to the plaintiff by the supreme court in an action instituted in another county involving, inter alia, the same subject matter.

Bratt v Life Co., 209-881; 226 NW 724

12515 Temporary—when allowed.

Discussion. See 23 ILR 2—Injunctions—sit-down strikes

"Balance-of-convenience" rule. A temporary order restraining the board of railroad commissioners from collecting a tax, pending the determination of the constitutionality of the statute under which the commissioners are acting, should not be dissolved in the absence of a showing by the commissioners that the bond exacted by the court as a condition of the issuance and continuance of the restraining order will not adequately protect the state.

Iowa Motor v Board, 202-85; 209 NW 511

"Balance-of-convenience" rule. The consummation of a perfectly legal reorganization of a corporation will not be held up by injunction pending the determination of the value of the interest of a dissenting stockholder when said stockholder can be amply protected by a deposit of money or bond by the corporation.

Ontjes v Bagley, 217-1200; 250 NW 17

Construction—necessity for determination. The court will not, on an order dissolving a temporary injunction pending the trial of the main action, pass upon the constitutionality of the statute under attack.

Iowa Assn. v Board, 202-85; 209 NW 511

Contempt — unallowable defense. In contempt proceedings for the violation of a temporary injunction, duly served, it is no defense that the injunction was improvidently or improperly granted.

Orr v Hamilton, 202-345; 209 NW 285

Dissolving temporary injunction not operative as demurrer—nonadjudication. General rule being that a preliminary injunction will be dissolved upon filing of an answer fully denying the material allegations of the petition, a motion to dissolve when filed thereafter and sustained will not operate as a demurrer to the petition nor adjudicate that the petition fails to state a cause of action.

Sioux City Patrol v Mathwig, 224-748; 277 NW 457

Injunction violation—passion and prejudice negatived. There was no merit in a contention that a decision finding the defendants guilty of violating an injunction against a labor union was based on passion and prejudice, when evidence showed that they aided and abetted in mass picketing which was unlawful and which was restrained by the injunction.

Carey v Dist. Court, 226-717; 285 NW 236

Labor union injunction. An injunction against officers of a trade union was not void on its face as a denial of the right of freedom of speech and assembly because it prohibited unlawful interference with a company's business, mass picketing, intimidation, and coercion, and going upon the company's premises without consent.

Carey v Dist. Court, 226-717; 285 NW 236

Nonallowable attorney fees. In a successful action to enforce plaintiff's right to redeem from execution sale, the fact that plaintiff secured a temporary injunction to protect his possession (and solely as a collateral remedy) furnishes no justification for the taxation against plaintiff of an attorney fee in favor of defendant, especially when the said injunction was ordered dissolved only in event plaintiff failed to exercise his right to redeem.

Werner v Hammill, 219-314; 257 NW 792

Peacefully picketing not secondary boycott—no injunction. A threat to do something that a person has the right to do is not a threat in a legal sense. Held that union officials by lawfully placing a neon sign manufacturer on the unfair list, advertising to the public that he was unfair to electrical workers and peacefully picketing his place of business, were not guilty of such conspiracy as to constitute a secondary boycott and an injunction will not lie.

Smythe Co. v Local Union, 226-191; 284 NW 126

Vaccination of school children. The appellate court will be slow to interfere with an order by the trial court refusing a temporary injunction against the enforcement by a school board of its order which temporarily excluded unvaccinated pupils from the public school; and especially when it affirmatively appears that the order of the board has expired ex vi termini.

Baehne v Sch. Dist., 201-625; 207 NW 755

12516 By whom granted.

Injunction against governor—writ denied. Writ of prohibition not granted to test the jurisdiction of the district court and validity of an order enjoining the governor from dispossessing the chairman of the greater Iowa commission of the books and records of the commission.

State v Dist. Court, (NOR); 275 NW 108

12520 Notice to defendant.

Knowledge negatives notice. The court had jurisdiction to adjudge the defendants guilty of contempt for violating an injunction, altho they contended that no notice of the injunction was served upon them, when evidence showed that they all must have known of the injunction and its contents.

Carey v Dist. Court, 226-717; 285 NW 236

12521 When notice necessary.

Knowledge negatives requirement of notice. The court had jurisdiction to adjudge the defendants guilty of contempt for violating an injunction, altho they contended that no notice of the injunction was served upon them, when evidence showed that they all must have known of the injunction and its contents.

Carey v Dist. Court, 226-717; 285 NW 236

12524 Motion to dissolve.

Motion before answer. A plaintiff in injunction proceedings who, without objection, goes to a hearing on defendant's motion to dissolve the writ may not on appeal and for the first time contend that such motion was improper in the absence of an answer.

Peoples Bk. v McCarthy 207-162; 222 NW 372

Dissolving temporary injunction not operative as demurrer—nonadjudication. General rule being that a preliminary injunction will be dissolved upon filing of an answer fully denying the material allegations of the petition, a motion to dissolve when filed thereafter and sustained will not operate as a demurrer to the petition nor adjudicate that the petition fails to state a cause of action.

Sioux City Patrol v Mathwig, 224-748; 277 NW 457

12526 Bond.

ANALYSIS

Suretyship generally. See under §11577

I AMOUNT OF BONDS

No annotations in this volume

II ACTION ON BOND

Liability—necessary showing. In an action on an injunction bond to recover damages, plaintiff must show that the injunction was wrongful in its inception or was wrongfully continued. The dissolution by the court of the temporary order constitutes, at least, pri-

II ACTION ON BOND—concluded

ma facie evidence that the injunction was wrongful.

Chrisman v Schmickle, 209-1311; 230 NW 550

Evidence. The pleadings in an action for injunction are admissible on the issue whether an injunction was the sole relief sought in the action, or whether the injunction was auxiliary to some other main issue.

Chrisman v Schmickle, 209-1311; 230 NW 550

Decree denying injunction decisive on bond liability. A bankruptcy trustee's injunction action against a bankrupt, which action effectuated a dispossession of certain land to which the bankrupt's wife held title, and such action, after appeal, being finally determined adversely to the trustee's claimed right to possession, under which possession he had sold the crops, becomes an adjudication decisive on the issues in a subsequent action on the injunction bond for damages for wrongful issuance of the writ of injunction.

Goltry v Relph, 224-692; 276 NW 614

III SURETIES

No annotations in this volume

IV DEFENSES

No annotations in this volume

V DAMAGES

Discussion. See 21 ILR 584—Recovery in general

Damages nonrecoverable. No damages are recoverable on an injunction bond when the injunction was purely auxiliary to the main action and enjoined defendant from doing an act which he never intended or desired to do, and when the defendant permitted the injunction to operate until automatically dissolved by a judgment in his favor on the merits of the main action.

Schmidt v Meredith, 209-621; 228 NW 568

Liability on injunction bond—construction of municipal light plant restrained. In an action by a city on injunction bonds put up by a light and power company to restrain construction of a lighting plant, the city was entitled to all damages that naturally and proximately resulted from wrongful injunctions, and the city was not necessarily limited to damages arising only while the injunctions were in force, if the damages flowing directly from the injunctions continued for a period of time beyond date of their dissolution.

Corning v Iowa-Nebr. Co., 225-1380; 282 NW 791

Nonallowable attorney fees. In a successful action to enforce plaintiff's right to redeem from execution sale, the fact that plaintiff secured a temporary injunction to protect his possession (and solely as a collateral remedy) furnishes no justification for the taxation against plaintiff of an attorney fee in favor of defendant, especially when the said injunction was ordered dissolved only in event plaintiff failed to exercise his right to redeem.

Werner v Hammill, 219-314; 257 NW 792

Permissible recovery. When an injunction is the only relief sought, and the temporary writ is dissolved on final hearing, defendant may recover on the bond the reasonable and necessary costs, expenses, and attorney fees expended in procuring such dissolution.

Chrisman v Schmickle, 209-1311; 230 NW 550

Subjects of damages—anticipated profits neither nominal nor speculative. In a city's action on a public utility's injunction bond indemnifying city's loss on account of delayed construction of a municipal light plant, even tho plant had not been in operation, loss of profits and loss of use of the plant not in being, are not too speculative nor nominal, and anticipated profits, if established with reasonable certainty, may be recovered as damages.

Corning v Iowa-Nebr. Co., 225-1380; 282 NW 791

12527 Restraint on proceedings or judgment—venue.

Enjoining proceeding in action. The district court of one county has no jurisdiction to enjoin a plaintiff in an action pending in another county from proceeding with his action and carrying the same to trial and judgment.

Bankers Tr. Co. v Scott, 215-1107; 246 NW 836

Enjoining proceedings on judgment—proper court. An action to enjoin proceedings on a judgment rendered in a municipal court cannot be maintained in the district court, even tho both courts are located in the same county.

Keeling v Priebe, 219-155; 257 NW 199

Inherent power of court to stay execution. The district court has inherent, discretionary power, in order to prevent injustice, to order a reasonable stay of execution, even without bond if it be made to appear that the judgment plaintiff will not be prejudiced by the order. But if said order is made because the chose or thing in action, which has been already levied on, has not been adjudicated, the order should be conditional on a reasonably prompt adjudication of said chose or thing in action.

Brenton Bros. v Dorr, 213-725; 239 NW 808

Municipal court — enjoining proceedings to enforce judgment. A municipal court of one county has no jurisdiction to enjoin proceedings to enforce a judgment entered by a municipal court of another county.

Educational Film v Hansen, 221-1153; 266 NW 487

Unallowable venue. An action will not lie in one county to enjoin proceedings on a judgment rendered in another court in another county, even tho plaintiff's action is based on the claim that the judgment is wholly void.

Ferris v Grimes, 204-587; 215 NW 646

12531 Application for dissolution.

Automatic dissolution. Under an order providing that defendant's motion to dissolve a temporary injunction "be sustained" if defendant, within a named time, paid plaintiff a named sum and also certain costs, the injunction is automatically dissolved both (1) by the act of defendant in paying, within said time, the said costs and tendering to plaintiff the named sum (tho plaintiff refused the tender), and (2) by the affirmance of the order on appeal by plaintiff. It follows that a further unnecessary order, subsequent to the affirmance finally dissolving the injunction, is not erroneous, even tho defendant had not kept good his tender.

Peoples Bank v McCarthy, 210-952; 231 NW 487

Dismissal because of lack of subject matter. An action is properly dismissed when by the lapse of time no issue remains for trial.

Peoples Bank v McCarthy, 210-952; 231 NW 487

Dissolution by dismissal of action. The dismissal of an action solely for injunctional relief necessarily dissolves the temporary injunction issued therein.

Peoples Bank v McCarthy, 210-952; 231 NW 487

12533 Dissolution.

Absence of equity. An injunction restraining the owner of land from interfering with the possession by a trustee in bankruptcy should be forthwith dissolved when it appears that said trustee has substantially no interest in the land, that his lien is valueless because of the foreclosure of a superior lien, and that he has no purpose to redeem.

Relph v Goltry, 213-1118; 240 NW 646

Dismissal of temporary injunction not adjudication. Dismissal of a temporary injunction even after answer is not an adjudication of the cause, as ordinarily a plaintiff asking a permanent injunction is entitled to a trial on the merits.

McMurray v Faust, 224-50; 276 NW 95

Dissolving temporary injunction not operative as demurrer. General rule being that a preliminary injunction will be dissolved upon filing of an answer fully denying the material allegations of the petition, a motion to dissolve when filed thereafter and sustained will not operate as a demurrer to the petition nor adjudicate that the petition fails to state a cause of action.

Sioux City Patrol v Mathwig, 224-748; 277 NW 457

12535 Proceedings for violation.

Review by certiorari. See under §12550

Distinction between "court" and "judge". Statutes, providing for the prosecution of injunction violators, which do not prohibit the "court" from trying the defendant forthwith should be construed as consistent with statutes providing punishment for contempt, which allow the court to try the defendant forthwith, when both statutes recognize the distinction between the terms "judge" and "court", so that when acting in the capacity of "court" rather than as "judge", the court could try the defendants for an injunction violation during the same term in which the precept to punish them for contempt was issued.

Carey v Dist. Court, 226-717; 285 NW 236

In re divorce proceedings. The violation of an order to the defendant in pending divorce proceedings not to interfere with the person of the plaintiff or with plaintiff's peaceable possession of her home is properly punished as a contempt.

Blunk v Walker, 206-1389; 222 NW 358

Violation by labor union officials. There was no denial of the right of freedom of speech in holding officers of a trade union in contempt of court for violating an injunction, when they counseled, aided, abetted, and assisted in the violation of the injunction.

Carey v Dist. Court, 226-717; 285 NW 236

12539 Contempt punished.

Applicable statute. The violation of an injunction against injuring or interfering with specified property is punishable only as provided by §12543, C., '35.

Eicher v Tinley, 221-293; 264 NW 591

CHAPTER 536

CONTEMPTS

12540 "Court" defined.

Discussion. See 21 ILR 595—Legislative power to regulate punishment of contempt

Distinction between "court" and "judge". Statutes, providing for the prosecution of injunction violators, which do not prohibit the "court" from trying the defendant forthwith should be construed as consistent with statutes providing punishment for contempt, which allow the court to try the defendant forthwith, when both statutes recognize the distinction between the terms "judge" and "court", so that when acting in the capacity of "court" rather than as "judge", the court could try the defendants for an injunction violation during the same term in which the precept to punish them for contempt was issued.

Carey v Dist. Court, 226-717; 285 NW 236

12541 Acts constituting contempt.

Refusal to disclose property. See under §11810, Vol I

Discussion. See 11 ILR 85—Resistance to process; 18 ILR 64—Alimony payments enforced; 20 ILR 121—Contempts

Disobedience of divorce decree—willfulness necessary for contempt. In an equity action involving alleged nonpayment of support under a divorce decree and seeking punishment for alleged disobedience of the decree, a contempt order will not issue unless the disobedience was willful and the proof thereof clear and satisfactory, and where a father is willing to pay a reasonable sum for his son's expenses at college, a refusal to cite for contempt is proper.

Johnstone v Johnstone, 226-503; 284 NW 379

Fatally insufficient evidence. When a lodge and the officers thereof are subject to contempt for failure to reinstate a member "upon the payment of all dues and fines", no basis for contempt proceedings is shown by testimony that a representative of the member attended a session of the lodge, made an inquiry as to said member, discovered that the members present were hostile, and thereupon sat down without producing or offering to produce the money for said dues and fines and without even giving notice that he was representing said member.

St. George's Soc. v Sawyer, 204-103; 214 NW 877

Injunction violation by labor union officials. There was no denial of the right of freedom of speech in holding officers of a trade union in contempt of court for violating an injunction, when they counseled, aided, abetted, and assisted in the violation of the injunction.

Carey v Dist. Court, 226-717; 285 NW 236

Injunction violation—passion and prejudice negatived. There was no merit in a contention that a decision finding the defendants guilty of violating an injunction against a labor union was based on passion and prejudice, when evidence showed that they aided and abetted in mass picketing which was unlawful and which was restrained by the injunction.

Carey v Dist. Court, 226-717; 285 NW 236

Searches and seizures—contempt for "dumping" liquor. In a certiorari proceeding a conviction for contempt in resisting the execution of a search warrant will not be reversed where the evidence indicated defendant knew purpose of search and disposed of evidence by dumping liquor before officers could seize it. Defendant's contention ineffectual that "dumping" occurred prior to execution of warrant.

Krueger v Municipal Court, 223-1363; 275 NW 122

12543 Punishment.

Exclusively applicable statute. The violation of an injunction against injuring or interfering with specified property is punishable only as provided by this section.

Eicher v Tinley, 221-293; 264 NW 591

Injunction violation—passion and prejudice negatived. There was no merit in a contention that a decision finding the defendants guilty of violating an injunction against a labor union was based on passion and prejudice, when evidence showed that they aided and abetted in mass picketing which was unlawful and which was restrained by the injunction.

Carey v Dist. Court, 226-717; 285 NW 236

Jury trial. A party charged with contempt is not entitled to a jury trial.

Hammer v Utterback, 202-50; 209 NW 522

Legislative limitation on punishment. While the general assembly has no power to wholly deprive a constitutionally created court of its inherent power to inflict punishment for acts which are in contempt of such court, yet it may constitutionally impose a reasonable limitation on such courts as to the punishment which may be imposed.

Eicher v Tinley, 221-293; 264 NW 591

Power to prescribe. The general assembly has constitutional power to prescribe the punishment which shall be imposed by the courts in proceedings to punish contempts.

State v Baker, 222-903; 270 NW 359

Violators of injunction—maximum penalty excessive. Sentences of six months in jail and a $500 fine each, the maximum permitted by statute, when imposed against labor union officials for violating an injunction against the union, were excessive in view of the circumstances.

Carey v Dist. Court, 226-717; 285 NW 236

12544 Imprisonment.

Bastardy — imprisonment for contempt as cruel and unusual punishment. Statutes providing for commitment to jail for contempt, upon default in payment of support money awarded in bastardy proceedings, without citation, charge, or hearing and without allowing defendant an opportunity to purge himself of any alleged contempt, contravene the constitutional prohibition against cruel and unusual punishment.

State v Devore, 225-815; 281 NW 740

Willful avoidance of decree of alimony. A willful refusal to pay an award of alimony may be punished as a contempt of court by imprisonment until the award is paid.

Roberts v Fuller, 210-956; 229 NW 163

12545 Affidavit necessary.

State as party—affidavits. Where a grave situation existed in the locality at the time, the state had the right to be made a party to proceedings involving an injunction violation by labor union officials, by filing a petition incorporating by reference the affidavits of the plaintiff's petition and the injunction upon which it was based, when the state did not seek different and distinct remedies from that asked by the plaintiff.

Carey v Dist. Court, 226-717; 285 NW 236

12546 Notice to show cause.

Distinction between "court" and "judge". Statutes, providing for the prosecution of injunction violators, which do not prohibit the "court" from trying the defendant forthwith should be construed as consistent with statutes providing punishment for contempt, which allow the court to try the defendant forthwith, when both statutes recognize the distinction between the terms "judge" and "court", so that when acting in the capacity of "court" rather than as "judge", the court could try the defendants for an injunction violation during the same term in which the precept to punish them for contempt was issued.

Carey v Dist. Court, 226-717; 285 NW 236

Knowledge negatives requirement of notice. The court had jurisdiction to adjudge the defendants guilty of contempt for violating an injunction, altho they contended that no notice of the injunction was served upon them, when evidence showed that they all must have known of the injunction and its contents.

Carey v Dist. Court, 226-717; 285 NW 236

Power to punish — due process. Contempt proceedings which are in accordance with that provided by this chapter are not violative of the due process clauses of the federal and state constitutions.

State v Baker, 222-903; 270 NW 359

Unallowable defense. In contempt proceedings for the violation of a temporary injunction duly served it is no defense that the injunction was improvidently or improperly granted.

Orr v Hamilton, 202-345; 209 NW 285

12547 Testimony reduced to writing.

Amendment without notice. A trial court has no jurisdiction, after term time and after a proceeding for contempt has been removed to the supreme court by certiorari, to enter, without notice to the defendant (petitioner in certiorari), a nunc pro tunc amendment to the record to the effect that the defendant entered a plea of guilty in said contempt proceeding.

Sergio v Utterback, 202-713; 210 NW 907

Failure to file and preserve evidence. Failure to file and preserve the evidence upon which a judgment of conviction of contempt is entered is fatal to the validity of such conviction.

Ciccio v Utterback, 205-482; 218 NW 253

Hearing—ruling on testimony. A referee appointed by the supreme court to hold hearing, and report to the court as to the facts in original contempt proceedings pending in said court, pursues the proper course by reporting his entire proceedings to the court without ruling on objections made to the testimony offered.

State v Baker, 222-903; 270 NW 359

Insertion of non-record matter. On certiorari to review the action of a trial court in proceedings for contempt, it is wholly unallowable to insert in the return matter which was not made of record by the court at the time of the entry of the order in question, and matters so inserted will be stricken on motion.

Crosby v Clock, 208-472; 225 NW 954

Mandatory requirements. There can be no legal judgment for contempt unless the record made by the court at the time of the judgment entry shows every fact which is necessary to the guilt of the party. Nothing must be left to inference. This is one instance where the law refuses to presume that the judgment was supported by sufficient evidence.

Crosby v Clock, 208-472; 225 NW 954

Preservation of evidence. Evidence in contempt proceedings is properly preserved when the duly certified shorthand notes and exhibits

are filed prior to the entry of the order adjudging the contempt, and where the transcript of said notes was duly extended and likewise filed, all within a reasonable time.

Hammer v Utterback, 202-50; 209 NW 522
Roberts v Fuller, 210-956; 229 NW 163

Record evidence mandatory. Judgment for contempt on evidence which has not been made of record is a nullity.

Sergio v Utterback, 202-713; 210 NW 907
Leonetti v Utterback, 202-923; 211 NW 403

Review of finding of contempt. The finding of a trial court that a party is guilty of a contempt, while entitled to great respect, is not conclusive on the supreme court when reviewing the finding on certiorari. A contempt must be clearly and satisfactorily established.

Mason v Dist. Court, 209-774; 229 NW 168

Scope of inquiry. In contempt proceedings for the violation of an injunction against the practice of medicine and surgery without a license, the testimony may very properly cover the entire time from the issuance of the writ to the date of hearing.

State v Baker, 222-903; 270 NW 359

12548 Personal knowledge of court—record required.

Facts personally known to judge but not made of record. In contempt proceedings, a fact personally known to the trial judge cannot be deemed a part of the record when "preserved" only in the form of a written "statement" made by the judge and filed in the proceedings long subsequent to the entry of the judgment for contempt.

Mason v Dist. Court, 209-774; 229 NW 168

12550 Revision by certiorari.

Belated presentation of objection. On certiorari to review a conviction for contempt in violating an intoxicating liquor injunction, the petitioner will not be permitted to present the objection that testimony taken in the trial court should not be considered because taken in his absence, and under a stipulation entered into by an unauthorized attorney, such objection not having been presented in the trial court.

Hammer v Utterback, 202-50; 209 NW 522

Mandatory record.

Sergio v Utterback, 202-713; 210 NW 907

Grounds for new trial—insufficient record. Record reviewed in an action wherein plaintiff appeared pro se in the trial court, and held insufficient to authorize the court (1) to set aside a former order denying a new trial, and (2) thereupon—11 months after the entry of judgment on a directed verdict—to grant a new trial.

Spoor v Price, 223-362; 272 NW 305

Injunction violation—no trial de novo. In certiorari to review a judgment finding the defendants guilty of violating an injunction, the case was not triable de novo in the supreme court.

Carey v Dist. Court, 226-717; 285 NW 236

Proceedings and determination—method of trial—extent of proof. Certiorari to review contempt proceedings is not triable de novo in the supreme court, and proof of guilt need not appear beyond a reasonable doubt.

Madalozzi v Anderson, 202-104; 209 NW 274

Review not by appeal—by certiorari. The supreme court is without jurisdiction to review a contempt proceeding by appeal, regardless of whether the order was for punishment or for discharge.

Metzger v Metzger, 224-546; 278 NW 187

Review—extent. On certiorari to review a judgment holding a party guilty of contempt, the findings by the respondent court are not conclusive on the reviewing court, tho due regard will be accorded such findings.

Roach v Oliver, 215-800; 244 NW 899

Review of finding. The finding of a trial court that a party is guilty of a contempt, while entitled to great respect, is not conclusive on the supreme court when reviewing the finding on certiorari. A contempt must be clearly and satisfactorily established.

Mason v Dist. Court, 209-774; 229 NW 168

Unallowable appeal. Upon the discharge of one accused of contempt in violating an injunction, an appeal may not be maintained under the title under which the injunction was obtained.

Cedar Falls Bank v Boslough, 218-502; 255 NW 665

CHAPTER 537

OFFICIAL BONDS, FINES, AND FORFEITURES

12552 Official bonds construed.

Acts constituting breach. A statutory bond conditioned to secure the prompt paying over to the proper authorities of public funds on deposit in a bank is breached on the failure to promptly make such payment, and not from the time when the authorities suffer an actual loss.

Leach v Bank, 205-987; 213 NW 528

Adjudication of liability. An unappealed order of court adjudicating the amount of the liability of a trustee to the beneficiary is

conclusive on the trustee and ipso facto on his surety.

Dodds v Cartwright, 209-835; 226 NW 918

Affirmance or disaffirmance. It is of no concern to a surety on the bond of a trustee whether the beneficiary affirms or disaffirms the fraudulent conduct of the trustee.

Dodds v Cartwright, 209-835; 226 NW 918

12553 Prior judgment no bar.

Liability on official bonds—sureties. The liability of the surety on the bond of a public officer—under §§1059, 1060, C., '31—is not limited solely to the failure of the official to make proper accounting for all public money and property officially coming into his possession, but embraces liability for the failure of said officer to "faithfully and impartially, without fear, favor, fraud, or oppression, discharge all duties * * * required of his office by law".

Brown v Cochran, 222-34; 268 NW 585

12554 Fines and forfeitures.

Atty. Gen. Opinions. See '32 AG Op 135; AG Op May 5, '39

CHAPTER 539

GUARDIANS FOR MINORS

12573 Natural guardian of the person.

ANALYSIS

Probate jurisdiction over guardianships. See under §10763
Testamentary guardianships. See under §12574

I NATURAL GUARDIANS OF MINORS

Custody of child—presumption. Presumptively, the welfare of a minor child will be best subserved in the care and control of its parents. Evidence held to confirm said presumption, even tho the child (immature) in its testimony expressed a preference in favor of the nonparent.

In re McFarland, 214-417; 239 NW 702

Custody—pre-eminent right of parent. The pre-eminent natural and statutory right of fit and proper parents to the custody of their child must prevail over those who hold no blood relation to the child, even tho the parents are in very humble financial circumstances, and even tho the parents may have temporarily yielded the custody of the child to another.

Adair v Clure, 218-482; 255 NW 658

Parent as guardian of child—rights—relinquishment. Parents are the natural guardians of their minor child, being equally entitled to its care and custody. Upon the death of one parent the survivor has an absolute right to the custody of the child unless such right has been relinquished by abandonment, contract, or otherwise, or unless the best interests and welfare of the child call for other care and custody.

Allender v Selders, 227-1324; 291 NW 176

Unauthorized satisfaction of bequest. An order of the probate court authorizing an executor to discharge a cash bequest to a minor by transferring to the father of the minor as natural guardian a note and mortgage, belonging to the estate, is wholly void when said order is entered without the appearance of any guardian, regular or ad litem, for the minor.

Irwin v Bank & Trust, 218-477; 255 NW 671

II RIGHT TO CUSTODY OF MINOR CHILDREN

Presumptive right of parent. A father is necessarily given the custody of his motherless child when he has neither abandoned the child, nor surrendered his right to the custody of the child, and when there is no showing that the welfare of the child requires its custody to be awarded to another.

Bonnarens v Klett, 213-1286; 241 NW 483

Presumptions—right of parent to custody of child. Presumptively, the welfare of a child will be best served in the care and control of its parents, and a showing of such relationship makes a strong prima facie case for parents claiming the care of their children. The presumption is rebuttable in cases of extreme neglect of natural and legal duty by the parents, the controlling consideration being the present and best future interests of the children, with due regard to the natural rights of the parents.

Allender v Selders, 227-1324; 291 NW 176

Custody determined early—changes minimized. It is desirable that the status and custody of a child be fixed as quickly as possible and that it be disturbed thereafter as little as possible. Where a child of tender

II RIGHT TO CUSTODY OF MINOR CHILDREN—concluded

years was being cared for by its aged maternal grandparents, and it appeared that before many years some change in its custody would be necessary, it was better for the present and future welfare of the child to give his custody to his father than to wait and make a change in the custody later.

Allender v Selders, 227-1324; 291 NW 176

Selecting parent—custody—when not disturbed. Where children are old enough to elect with which parent they will live, the refusal of the lower court to disturb their custody sustained on appeal.

Johnstone v Johnstone, 226-503; 284 NW 379

Return to father's home after death of mother. Where the father never abandoned his rights to a son whom the mother took from the home where he was well cared for and where he was never neglected nor mistreated, and where, at the death of the mother, the boy was left with the mother's sister and later surrendered to the mother's aged parents who had never before had the care of the child, the custody of the boy should be given to the father who had a home where he was well able to care for the boy, who could then be brought up with his sister already in the father's care.

Allender v Selders, 227-1324; 291 NW 176

Modification of order of custody—considerations. In an action for the modification of an order for the custody of a 10-year-old child, where the affection and care received in the homes of each of the divorced parents was satisfactory, the wishes of the child cannot have great weight, the controlling consideration being the welfare of the child, and, when there was no change in circumstances to require the action of the court, a previous adjudication that the child remain with his mother should not be modified.

Vierck v Everson, 228- ; 291 NW 865

III RECOVERY OF CUSTODY BY HABEAS CORPUS

Proceeding for child custody. Habeas corpus actions involving the custody of minor children treated as equitable proceeding.

Ellison v Platts, 226-1211; 286 NW 413

Custody of child obtained by parents—principles. The scope of habeas corpus extends to controversies concerning the custody of children, resting on the assumption that the state has the right, paramount to any parental or other claim, to dispose of children as their best interests require, being governed not so much by the considerations of strictly legal rights of the parents as by those of expediency and equity and, above all, the interests of the child.

Allender v Selders, 227-1324; 291 NW 176

Review de novo—habeas corpus proceedings—custody of child. An appeal in habeas corpus proceedings—a law action—involving the custody and best welfare of a child necessarily and unavoidably gravitates to a review de novo.

Adair v Clure, 218-482; 255 NW 658

Allender v Selders, 227-1324; 291 NW 176

IV RECOVERY FOR SERVICES OF MINOR CHILDREN

Personal services of ward to guardian offsetting charges. A guardian will not, without an authorizing order of court, be permitted to charge the ward's funds with the cost of board, clothing, education, and other necessities for the ward (who resided with the guardian) when the services rendered to the guardian by the ward equaled or exceeded in value the said charges.

Myers v Anderson, 208-191; 225 NW 258; 64 ALR 687

V EMANCIPATION OF MINOR CHILDREN

Emancipation by desertion—effect. A parent who deserts and abandons his minor child thereby emancipates him, and may not maintain an action based on a plea of loss of services consequent upon the wrongful killing of the child.

Lipovac v Railway, 202-517; 210 NW 573

VI AGREEMENTS AS TO CUSTODY OF MINOR CHILDREN

Adoption of ward by guardian. The statutory requirement that a guardian consent to the adoption of his ward is complied with when the guardian consents that he adopt the child himself.

Darrah v Burkholder, 211-1222; 233 NW 702

12574 Surviving parent.

ANALYSIS

I SURVIVING PARENT AND OTHER RELATIVES AS GUARDIANS

Presumptive right of parent. A father is necessarily given the custody of his motherless child when he has neither abandoned the child, nor surrendered his right to the custody of the child, and when there is no showing that the welfare of the child requires its custody to be awarded to another.

Bonnarens v Klett, 213-1286; 241 NW 483

Parent as guardian of child—rights—relinquishment. Parents are the natural guardians of their minor child, being equally entitled to its care and custody. Upon the death of one parent the survivor has an absolute right to the custody of the child unless such right has been relinquished by abandonment,

contract, or otherwise, or unless the best interests and welfare of the child call for other care and custody.

Allender v Selders, 227-1324; 291 NW 176

Custody of child—return to father's home after death of mother. Where the father never abandoned his rights to a son whom the mother took from the home where he was well cared for and where he was never neglected nor mistreated, and where, at the death of the mother, the boy was left with the mother's sister and later surrendered to the mother's aged parents who had never before had the care of the child, the custody of the boy should be given to the father who had a home where he was well able to care for the boy, who could then be brought up with his sister already in the father's care.

Allender v Selders, 227-1324; 291 NW 176

Invalid appointment as to parent. The right of a fit and proper father to the custody of his minor child whom he has never abandoned, and whose custody he has neither forfeited nor waived, is in no manner affected by orders of court (1) appointing, without notice to said parent, the maternal grandfather as guardian of said child, and (2) authorizing said guardian to proceed and adopt said child; especially is this true when the petition by the mother for the appointment of the grandfather was not filed until after the appointment was made.

In re McFarland, 214-417; 239 NW 702

Invalid appointment—procedure. Application or motion to set aside a guardianship appointment involving a minor, and invalid as to a parent because made without notice to him, is proper procedure.

In re McFarland, 214-417; 239 NW 702

II APPOINTMENT OF GUARDIANS

Presumption. Orders in probate appointing guardians are presumptively regular.

Marsh v Hanna, 219-682; 259 NW 225

Testamentary guardian of person. Principle recognized that a testamentary guardianship of the person is unknown to our law.

Turner v Ryan, 223-191; 272 NW 60; 110 ALR 554

12575 Guardian of property.

General duty and responsibility. A guardian is a trustee, responsible as such for faithful performance of duties of his office and responsible to ward for all property of ward coming into guardian's control. It is his duty to give personal care to management of ward's estate, and to exercise such diligence and prudence as a reasonably prudent person ordinarily employs in the conduct of his own affairs.

In re Moore, 227-735; 288 NW 880

Guardian's nonliability. It was guardian's duty to see that 95-year-old ward was properly taken care of, and guardian was not personally liable for money paid out of ward's estate in pursuance of court order to one who was obligated to ward under a promissory note not then due, since such action on part of guardian was reasonably prudent.

In re Moore, 227-735; 288 NW 880

12576 Minor may choose.

Abuse of discretion by court. In proceedings for the appointment of a guardian or trustee of the property of a minor who is over 14 years of age and under no legal disability, the court abuses its discretion when it refuses to appoint the concededly competent and qualified person formally requested by the ward for such appointment. So held where the court ignored the request solely because the person whose appointment was requested resided just outside the judge's judicial district and some short distance from the location of the trust property.

Hodgen's Executors v Sproul, 221-1104; 267 NW 692

Appointment by court. A testamentary request that the court appoint a guardian of the property devised to minors does not give the presiding judge a personal power to appoint, but contemplates an appointment by the court acting as a judicial tribunal.

Hodgen's Executors v Sproul, 221-1104; 267 NW 692

Selecting parent—custody—when not disturbed. Where children are old enough to elect with which parent they will live, the refusal of the lower court to disturb their custody sustained on appeal.

Johnstone v Johnstone, 226-503; 284 NW 379

12577 Bond and oath of guardian of property.

Suretyship generally. See under §11577

Action on bond — accrual. Action on the bond of a guardian is barred in ten years (1) from the death of the guardian, or (2) from the death of the ward, or (3) from the attainment by the ward of his majority.

Armon v Craig, 203-1338; 214 NW 556

Bonds—nonliability of surety. A guardianship is terminated by the death of the guardian, and if, on the occurrence of such death, the guardianship funds are intact, the surety on the statutory bond of the deceased guardian is not liable for a subsequent loss occasioned by the officious conduct of the natural guardian (the father of the ward) in handling said funds, even tho the surety took no steps to obtain the legal appointment of a guardian to succeed the deceased guardian.

Kies v Brown, 222-54; 268 NW 910

Conversion—effect. Conversion by a guardian of the guardianship funds does not start the running of the statute of limitation on the bond of the guardian.

Armon v Craig, 203-1338; 214 NW 556

Conversion—failure to file claim in probate. Failure of a ward to file a claim against the estate of an embezzling guardian works no release of the surety on the bond of the guardian.

Armon v Craig, 203-1338; 214 NW 556

Death of guardian—duty of personal representative. The surety on the bond of a guardian has no right, on the death of the guardian, to take possession of the ward's estate and administer it. Such property passes in trust to the guardian's personal representative who should report the situation to the probate court and await instructions.

Kies v Brown, 222-54; 268 NW 910

Foreign ancillary guardianship—delivery of property to foreign guardian. On an application by a foreign guardian of the property of a minor for an order directing a domestic guardian to deliver the funds in his hands to said foreign guardian, the plea that if said funds are so delivered the foreign guardian will squander them will be given no consideration if the foreign guardian files the bond required by the statute.

In re Hanson, 213-643; 239 NW 701

General duty and responsibility. A guardian is a trustee, responsible as such for faithful performance of duties of his office and responsible to ward for all property of ward coming into guardian's control. It is his duty to give personal care to management of ward's estate, and to exercise such diligence and prudence as a reasonably prudent person ordinarily employs in the conduct of his own affairs.

In re Moore, 227-735; 288 NW 880

"Lawful representatives." The bond of a guardian which purports to bind the sureties "and our lawful representatives" does not bind the heirs of the surety.

Conley v Jamison, 205-1326; 219 NW 485; 59 ALR 835

Liability for prior defalcation. The surety on a guardian's bond, conditioned as provided by statute, is liable for the defalcation of the guardian occurring prior to the execution of the bond whether the bond be a "substitute" bond or simply security in addition to a prior existing bond.

Brooke v Bank, 207-668; 223 NW 500

Liability for proceeds of real estate sale. The general bond of a guardian of property—the bond which all such guardians give when they qualify following appointment or which are later required and given for the same purpose—must be deemed to embrace liability for the proceeds of a promissory note which is in the hands of the guardian when he gives such bond and which represents the sale price of real estate sold under order of court, but without a sale bond being given by the guardian. (Holding under §§1183, 3197, C., '97, and §1177-a, S., 1913.)

Iowa Bank v Soppe, 215-1242; 247 NW 632

Receipt of funds. Where a party was guardian of minors and also trustee for said minors (bond in each case having been given), his written receipt showing the receipt of funds as guardian is not necessarily conclusive on the issue whether he received said funds as trustee.

In re Baldwin, 217-279; 251 NW 696

Release—strict compliance with statute. The release and discharge of the surety on a guardian's bond under any judicial procedure other than that prescribed by statute is a nullity, and in such case a new bond cannot be deemed a "substitute bond" but must be deemed additional security. So held where the surety filed no petition for a release.

Brooke v Bank, 207-668; 223 NW 500
Bookhart v Younglove, 207-800; 218 NW 533

Nonallowable set-off. In an action on the bond of a guardian to recover a lost bank deposit, the surety is not entitled to have his liability reduced by the amount of a dividend paid by the receiver of the bank on a deposit for the loss of which the surety was not liable.

Baitinger v Elmore, 208-1342; 227 NW 344

Successive bonds. Principle reaffirmed that successive, unreleased bonds of the same administrator for the same estate remain in force.

Varga v Guar. Co., 215-499; 245 NW 765

12579 Bond and oath of guardian of person.

Defect of parties in re objections. A guardian, after purchasing a residence property for his ward at a price authorized by the court, paid the vendor a trifling part of the contract price and obtained a deed from the vendor to the ward who thereafter for years remained in undisturbed possession of the property. The guardian in a later report credited himself with the full amount of the contract price. Later, the deception being discovered, the ward filed objections to the report. The guardian dying, his administrator appeared in re said objections.

Held, the court was in error in establishing a claim in favor of the ward and against the guardian's estate in the amount of the credit improperly taken by the guardian, on condition that the ward reconvey the property to the unpaid vendor—that the court was per se without jurisdiction to adjudicate said controversy in the absence of said unpaid vendor as a party to said proceedings.

In re Bennett, 221-518; 266 NW 6

12581 Duties.

ANALYSIS

I Powers of Guardians of the Property
II Liability, Accounting, and Settlement of Guardians

Additional annotations under §12772

I POWERS OF GUARDIANS OF THE PROPERTY

General duty and responsibility. A guardian is a trustee, responsible as such for faithful performance of duties of his office and responsible to ward for all property of ward coming into guardian's control. It is his duty to give personal care to management of ward's estate, and to exercise such diligence and prudence as a reasonably prudent person ordinarily employs in the conduct of his own affairs.

In re Moore, 227-735; 288 NW 880

Actions—form of. The fact that a guardian brings an action in behalf of the ward as "next friend" does not necessarily affect the validity of the proceedings.

Bennett v Ryan, 206-1263; 222 NW 16

Actions—proper plaintiff. The guardian is the proper plaintiff in an action to recover the property of the minor, even tho the matter is one in which the minor had assumed to act for himself.

McFerren v Bank, 214-198; 238 NW 914

Actions—prompt appointment of guardian during trial. No prejudicial error is committed when, after a trial has proceeded for some time, it develops that one of the defendants is a minor, a fact previously unknown to the court, whereupon the court promptly appoints the minor's attorney as his guardian ad litem, inasmuch as the minor's rights had been fully protected, since said attorney, being present all the time, was fully cognizant of the proceedings up to that point.

Brien v Davidson, 225-595; 281 NW 150

Findings by court—conclusiveness. A finding of fact by the court in guardianship proceedings, on supporting testimony, is conclusive on appeal, such proceedings not being reviewable de novo.

In re Roland, 212-907; 237 NW 349

Judgment against minor unallowable. A nonresident minor may, in a proper case, be made a party to litigation in this state, by service in this state on the foreign guardian, but such service will not confer jurisdiction on the court to enter a personal judgment against the minor.

Irwin v Bank & Trust, 218-474; 255 NW 670

Nonadversary proceedings. The good-faith compromise by a guardian with the approval of the court, of pending litigation to which the minor is a party, is not a proceeding adversary to the minor.

Kreamer v Wendel, 204-20; 214 NW 712

Nonrecoverable interest. A guardian in a successful action to cancel an exchange of property which the minor ward assumed to enter into may not recover of the other party to the exchange interest on money which was never in the hands of such other party, and from which he derived no interest, but which was held by a third party as custodian pending the litigation, especially when the deposit was made with the custodian without any arrangement as to interest.

Cloud v Burnett, 207-593; 223 NW 379

Unallowable attachment. An attachment cannot be legally issued in an action against a ward and his property guardian. Not being legally issuable, the writ cannot be legally levied on the property of the ward, and must be discharged on proper motion.

Reason: The ward's property is in custodia legis.

Shumaker v Bohrofen, 217-34; 250 NW 683; 92 ALR 914

Compromise settlement. An order in guardianship proceedings approving a settlement of a claim on behalf of the ward is conclusive until set aside by some direct and appropriate proceedings in the probate court.

Bennett v Ryan, 206-1263; 222 NW 16

Power to compromise litigation. The guardian of a minor has power, without notice to the minor, and without the appointment of a guardian ad litem, but with the approval of the probate court, in good faith to enter into a valid, irrevocable written compromise and settlement of a dispute arising out of the attempt by the minor to probate a will in which he was a devisee, even tho such compromise and settlement set aside to the minor property of a materially different quality and quantity than that devised by the will; and especially is this true when the guardian on his final report again presented said matter to the court, and when, on due notice to the minor and after the appointment of a guardian ad litem, the court approved said final report.

Kreamer v Wendel, 204-20; 214 NW 712

Settlement of claim—irregularities. The validity of a settlement of a claim on behalf of a ward is not affected by the fact that the settlement was signed shortly before the guardian was actually appointed or that there was some delay in filing the order of court approving the settlement.

Bennett v Ryan, 206-1263; 222 NW 16

Disaffirmance of contract. The guardian of an incompetent may disaffirm the contract of his ward without going into equity, and re-

I POWERS OF GUARDIANS OF THE PROPERTY—continued

cover the amount paid by the ward on the contract.

Ayres v Nopoulis, 204-881; 216 NW 258

Valid contract by ward. A mentally competent adult person who has, on her own voluntary application, been placed under guardianship solely because of her physical inability to freely move about and transact her business —tho no statute existed which authorized the appointment of a guardian under such application—is not deprived of power to enter into a valid oral contract for necessaries in the form of board and lodging and personal care for herself. And such contract, when executed, will be binding on her estate even tho never approved by the probate court having jurisdiction over the guardianship.

Dean v Atwood, 221-1388; 212 NW 371

Authority to borrow—scope. Court authority to a guardian to borrow money for the support and education of the ward is no authority to hypothecate the ward's property as security for the loan.

Fansher v Bank, 204-449; 215 NW 498

Disaffirmance of contracts. The guardian of an insane person may disaffirm the contracts of his ward. Evidence held not only sufficient to show mental incompetency of the maker and indorser of promissory notes, but also sufficient to show that the beneficiaries of such instruments knew of such incompetency, and, in addition, obtained the instruments by fraud.

Norelius v Home Bank, 200-613; 203 NW 809

Disbursements to parents for ward's support. Disbursements by a guardian to the parents of a ward for the support and maintenance of the ward, made under a preceding authorizing order of court on due showing of existing conditions, are perfectly legal.

In re Lemley, 219-765; 259 NW 481

Expenditure of principal of fund. The principal of the ward's fund may, of course, be expended for the care, support, and education of the ward when the accruing interest is not sufficient.

Guardianship v Benson, 213-492; 239 NW 79

Funds expended without order of court. Guardianship funds expended by a guardian in the purchase of property, without an authorizing order of court, may be recovered back from the seller who had knowledge of the trust nature of the funds when he received them.

Kowalke v Evernham, 210-1270; 232 NW 670

Giving ward money. The practice of a guardian in giving the ward modest sums of money for his care and support may not be wise and prudent, but the guardian will be given proper credit when the money was not squandered or needlessly spent.

Guardianship v Benson, 213-492; 239 NW 79

Irregular advance to ward. A guardian will be credited with an advance of money to one ward tho it was made in the form of a loan to another ward, which latter ward subsequently paid the full amount to the first ward.

Guardianship v Benson, 213-492; 239 NW 79

Deposits without order of court. A deposit in a bank by a guardian of guardianship funds as a loan without a directing or approving order of court is wrongful, and the bank at once becomes a trustee of the fund for the benefit of the ward.

Andrew v Bank, 207-394; 223 NW 249

Deposit without authority of court. The temporary deposit by a guardian of guardianship funds in a bank for safekeeping is not rendered wrongful because made without an authorizing order of the court or judge, such deposit not being within the scope of either §9285 or this section.

Andrew v Bank, 205-1248; 218 NW 24

Wrongful bank deposits. A deposit in a bank by a guardian of guardianship funds withdrawable only on 60 days notice, without an authorizing order of court, is legally wrongful.

Baitinger v Elmore, 208-1342; 227 NW 344

Guardian dealing with himself. A guardian will not (at least in the absence of an authorizing order of court) be permitted to expend guardianship funds in the purchase, from himself individually, of a note and mortgage. And it matters not how many times the court has approved interlocutory reports embracing the subject matter when the inherent nature of the transaction is concealed from the court.

In re Arrak, 218-117; 254 NW 307

Insanity—order for mental examination of ward. In an action by a guardian to enjoin the transfer of a note and mortgage, procured from the ward by alleged fraudulent means, a motion by defendant for an order for the personal appearance and mental examination of the ward is properly overruled.

Scott v Seabury, 216-1214; 250 NW 468

Guardian disposing of solvent estate—not intended by statute. The statutes providing for guardians of property of incompetents do not contemplate disposition of ward's assets, except in instances where ward's estate is insolvent, or probably will be insolvent. The statutes intend that the business of the ward shall be conducted by a guardian instead of by the ward himself.

In re Simpson, 225-1194; 282 NW 283; 119 ALR 1208

Duty to plead exemption. The guardian of a mentally incompetent person is under duty to plead the exemptions of the ward.

Appanoose Co. v Henke, 207-835; 223 NW 876

Funds to retry issue of sanity. Where a person is under guardianship and confined in a state hospital under an adjudication of insanity, an application in his behalf for an order directing the guardian to pay a substantial sum for the purpose of retrying the issue of insanity is properly denied on a showing by affidavit that two laymen consider the patient sane.

In re Ost, 211-1085; 235 NW 70

Investment — demand certificate of deposit. A guardian cannot be deemed to have made a loan or investment of guardianship funds by depositing them in a bank and taking in return therefor a certificate of deposit payable on demand.

Kies v Brown, 222-54; 268 NW 910

Investment of funds—when ward estopped to object. A mentally competent adult person, who, on his own application, causes a guardian of his property to be appointed (§12617, C., '35), will be estopped to object to fair and honest investment of guardianship funds in real estate, when said investment, tho made without first securing the approval of the court, was made with the knowledge, consent, and approval of the ward, and when the ward at once entered into possession of the property and thereon resided for some seven years without payment of rent of any kind. (Investment made prior to effective date of §12772, C., '31.)

In re Meinders, 222-236; 268 NW 537

Ratification of unauthorized acts. The district court may, by a subsequent order, ratify and approve a previously unauthorized act performed by a guardian in the management of his ward's estate. Ratification refused in the case of the unauthorized compromise of interest on a promissory note of which the guardian was one of several individual makers.

Guardianship v Benson, 213-492; 239 NW 79

Unauthorized investments — subsequent approval nugatory. An investment of guardianship funds, in order to protect the guardian from resulting loss, must be preceded by an order of the court or judge approving the proposed investment, and, since the enactment of §12772, C., '31, the approval by the court or judge of the investment after it has been made, is a nullity.

In re Nolan, 216-903; 249 NW 648

Unauthorized investment—ratification. The act of a newly appointed guardian in foreclosing, under order of court, the illegal and unauthorized investment of a prior guardian, cannot be deemed a ratification of said investment.

In re Nolan, 216-903; 249 NW 648

Unauthorized investment—reconveyance. A guardian, after fully accounting in cash for an unauthorized and illegal investment in real estate of guardianship funds, will be entitled to a reconveyance of the land to himself, individually.

In re Arrak, 218-117; 254 NW 307

Unauthorized, provident investment—subsequent approval by court. Principle reaffirmed that a provident investment of guardianship funds by a guardian without a pre-authorizing order of court, may, on proper application, be subsequently approved by the court with the same resulting force and effect as tho the court had, on due application entered a pre-authorizing order.

(Ruling was on transaction prior to enactment of the 43rd GA., Ch 259.)

Richardson v Lampe, 221-410; 265 NW 629

Unauthorized and imprudent investments. A guardian who, without authorization from the court, invests his ward's funds in real estate, does so at his peril, and irrespective of his good faith; nor may he compel the ward to accept such property even tho the ward did not promptly disavow the investment on attaining his majority.

Guardianship v Pharmer, 211-1285; 235 NW 478

Validating an unauthorized investment. A provident investment made by a guardian long prior to, and maintained long subsequent to, the enactment of §12772, C., '31, but made originally without an authorizing order of court, is validated by the subsequent action of the court in specifically approving the same, and in repeatedly approving the guardian's annual reports with reference to the receipt of income from said investment.

In re Lemley, 219-765; 259 NW 481

Life insurance premiums. A guardian will not be given credit for payments of life insurance premiums on policies which he caused to be issued to his ward (apparently with some profit to himself) unless, by proper evidence, the necessity or desirability of such policies is made to appear.

Guardianship v Benson, 213-492; 239 NW 79

Loan by guardian to himself—authorization. The probate court, when it finds that such a course will essentially promote the physical and mental welfare of a ward, may validly authorize a guardian, as such, to make a specified loan of guardianship funds to himself, individually, and, as guardian, to receive from himself, individually, the proper and legally required security for said loan.

In re Fish, 220-1328; 264 NW 542

I POWERS OF GUARDIANS OF THE PROPERTY—concluded

Nonapplication of payments against unmatured obligation. It was guardian's duty to see that 95-year-old ward was properly taken care of, and guardian was not personally liable for money paid out of ward's estate in pursuance of court order to one who was obligated to ward under a promissory note not then due, since such action on part of guardian was reasonably prudent.

In re Moore, 227-735; 288 NW 880

Partition — continuance and dismissal — legality. An order in partition proceedings brought by the guardian of an incompetent to the effect that the cause "be continued until certain conditions are complied with, which being fulfilled, the cause should be dismissed", and a later order dismissing said cause on a recital that said "conditions" had been fulfilled, cannot be said to be illegal and beyond the jurisdiction of the court, even tho such "conditions" were not recited in the record, it appearing that the court had personal knowledge of them.

Salomon v Newby, 210-1023; 228 NW 661

Personal contract reformed to show contract as representative of another. A written contract of sale of property purporting to obligate the purchaser personally will, on clear, satisfactory, and convincing evidence that the purchaser was acting as guardian only, be so reformed as to avoid the mutual mistake or oversight.

Kowalke v Evernham, 210-1270; 232 NW 670

Presumption as to expenditures. Presumptively a guardian in making expenditures for the ward will use nonexempt funds rather than exempt funds.

Appanoose Co. v Henke, 207-835; 223 NW 876

Proceedings by guardian—legality. The dismissal of an action in partition brought by the permanent guardian of an incompetent, in accordance with a compromise and settlement at which neither the guardian ad litem nor his attorney was present, may not be said to be illegal.

Salomon v Newby, 210-1023; 228 NW 661

Release of mortgage without court authorization. A guardian has no legal right, except under court authorization, to release, without payment, a court-authorized, real estate mortgage executed to, and held by, him as such guardian; and subsequent purchasers of the land are chargeable with knowledge of the statute invalidating such release. (§12773, C., '31.)

Randell v Fellers, 218-1005; 252 NW 787

Restoration of status quo. An incompetent, through his guardian, may, on proper grounds, maintain an action to set aside and annul a judgment in foreclosure without offering to restore the status quo, when the incompetent received no part of the money secured by the mortgage.

Engelbercht v Davison, 204-1394; 213 NW 225

Right of possession. A guardian appointed on application of the ward himself is entitled to the possession of property which the ward, prior to the guardianship, placed in the hands of a third party under a written contract solely for preservation and management and with no intent to pass title.

Schultz v Gay, 207-738; 223 NW 495

II LIABILITY, ACCOUNTING, AND SETTLEMENT OF GUARDIANS

General duty and responsibility. A guardian is a trustee, responsible as such for faithful performance of duties of his office and responsible to ward for all property of ward coming into guardian's control. It is his duty to give personal care to management of ward's estate, and to exercise such diligence and prudence as a reasonably prudent person ordinarily employs in the conduct of his own affairs.

In re Moore, 227-735; 288 NW 880

Care of property—standard required—accounting methods. A property guardian must exercise a degree of care commensurate with responsibilities of the position, and, while infallibility of judgment is not required, accurate accounts and self-explanatory vouchers should be kept.

McBurney v McBurney, (NOR); 210 NW 568

Demand for accounting by guardian of insane ward—burden of proof. In an action by the guardian of an insane ward to compel defendant to account for property paid or delivered by the ward to defendant, without consideration, and at various periods of time prior to the time the ward was adjudged insane, the guardian must establish the insanity of the ward at each particular transaction, or must establish such fact condition as compels an accounting. Evidence held insufficient to meet the burden of proof as to one transaction.

Davidson v Piper, 221-171; 265 NW 107

Death of guardian—duty of personal representative. The surety on the bond of a guardian has no right, on the death of the guardian, to take possession of the ward's estate and administer it. Such property passes in trust to the guardian's personal representative who should report the situation to the probate court and await instructions.

Kies v Brown, 222-54; 268 NW 910

Depositing funds—subsequent approval. The due approval by the probate court of a guardian's report wherein he recited that he had deposited the funds of the ward in a bank and had received a stated amount of interest

on such deposit, is in legal effect an authorization to the guardian to continue the deposit, with resulting consequence that the guardian is relieved of personal responsibility in case the bank subsequently becomes insolvent. All this is true irrespective of §9285.

Robinson v Irwin, 204-98; 214 NW 696

Deposit in bank—subsequent approval by court. The rule of law that the approval by the probate court or a judge thereof of a guardian's report showing the depository of the ward's funds is in legal effect an authorization to deposit said funds with said depository is a rule which necessitates a showing that said report was actually called to the attention of the court.

Snyder v Ind. Co., 214-1055; 243 NW 343

Corporate guardian—depositing funds with itself. A corporate guardian and its surety will not be permitted to escape liability for guardianship funds on the plea that the guardian on its own motion but in good faith deposited said funds with itself.

Snyder v Ind. Co., 214-1055; 243 NW 343

Deposit of funds—fraud. A guardian who, without authority from the court, keeps estate funds on deposit in a bank for an extended period of time, and after he knew the bank was probably insolvent, will be held personally responsible for the loss resulting from the insolvency of the bank, and a belated order of court authorizing such deposit will afford him no protection when he obtained the order by concealing the facts from the court.

Cronk v Surety Co., 208-267; 225 NW 454

Disobeying order of court. An administrator and the surety on his bond are liable for a shortage in estate funds occasioned by the failure of the administrator's own private bank in which the funds were deposited, the administrator having been ordered by the court prior to the insolvency of said bank to remove the funds to another depository, and, while able to comply with said order, had neglected so to do.

In re Kendrick, 214-873; 243 NW 168

Borrowing and hypothecating without authority. A ward's estate is liable for money borrowed by the guardian and actually used for the use and benefit of the ward's estate, even tho such borrowing was without authority of the court; but if the guardian has, without authority, hypothecated the ward's property as security for the loan, the hypothecation must be released, on proper application, to the guardian, especially when the hypothecation embraced the entire property of the ward.

Fansher v Bank, 204-449; 215 NW 498

Interest on uninvested funds. A guardian may be charged with a reasonable rate of interest on estate funds which he might have invested by the exercise of reasonable diligence.

Myers v Anderson, 208-191; 225 NW 258; 64 ALR 687

Investment in second mortgage. Where two separate guardianships exist with the same guardian—one over an adult, and one over a minor—authority granted by the court in the adult guardianship to execute a second mortgage on the lands of the adult, and to invest in said second mortgage the money held by the guardian under the guardianship of the minor, constitutes no protection to the guardian (in view of §12772, C., '24) if the ward in the minorship proceedings objects. (In this case, no entries whatever were made in the latter proceedings.)

In re Galloway, 217-284; 251 NW 619

Loaning to self — who may question. The invalidity which attends the act of a guardian in loaning guardianship funds to himself, individually, and in securing such loan by a first mortgage on real estate—all without any preauthorizing order of court—may not be pleaded by a second mortgagee of the land on the theory that such invalidity absolutely voided the said note and mortgage to the guardian, and thereby left the purported second mortgage as the first lien on the land. The sole right to question the legality of said acts of the guardian rests in the ward, or in his heirs, or in those properly representing said ward or heirs.

Richardson v Lampe, 221-410; 265 NW 629

Unauthorized deposit as loan. A guardian who, without an authorizing order of court, permits the funds of the ward to remain in a bank where they had originally been placed by the ward, and who, without such authorization, accepts as evidence of said funds a certificate of deposit payable at a fixed date in the future, thereby makes an unauthorized loan to the bank and must make good the loss in case of the insolvency of the bank.

In re Fahlin, 218-121; 254 NW 296

Unauthorized investments — rejection by ward. A ward, on the hearing on the final report of the guardian, may reject any or all loans or investments made by the guardian without the authority or approval of the court.

In re Jefferson, 219-429; 257 NW 783

Unauthorized interest-bearing, time certificates of deposit. A guardian who, without authority from the probate court, deposits guardianship funds in a bank, and in return therefor receives interest-bearing, time certificates of deposit, must personally account for the loss in case the bank becomes insolvent.

In re Fish, 220-1328; 264 NW 542

II LIABILITY, ACCOUNTING, AND SETTLEMENT OF GUARDIANS—concluded

Findings by court — conclusiveness. The hearing upon the report of a guardian is in probate, and the finding of facts of a probate judge in such case have force and effect of a jury verdict, and trial court in such case may properly exercise a degree of sound discretion in regard to the nature and extent of expenditures which may be properly approved.

McBurney v McBurney, (NOR); 210 NW 568

Foreign and ancillary guardianship—custody of property. A resident guardian of a nonresident ward, with whom no claims have been filed, should be ordered to turn over all funds and property of the ward in his possession, to the original foreign guardian, upon the payment of all taxes against the estate and upon the filing, by the foreign guardian, of a certified copy of his bond. (§12610, C., '31.)

In re Cihlar, 216-327; 249 NW 254

Nonapplication of payments against unmatured obligation. It was guardian's duty to see that 95-year-old ward was properly taken care of, and guardian was not personally liable for money paid out of ward's estate in pursuance of court order to one who was obligated to ward under a promissory note not then due, since such action on part of guardian was reasonably prudent.

In re Moore, 227-735; 288 NW 880

Ratification of unauthorized acts. The district court may, by a subsequent order, ratify and approve a previously unauthorized act performed by a guardian in the management of his ward's estate. Ratification refused in the case of the unauthorized compromise of interest on a promissory note of which the guardian was one of several individual makers.

In re Benson, 213-492; 239 NW 79

Review at law. Supported findings and orders of the probate court on the hearing on the final report of a guardian are conclusive on the appellate court, the proceedings being at law.

In re Jefferson, 219-429; 257 NW 783

Unauthorized release of mortgage. The act of a guardian in releasing, without an order of court, a mortgage which represented an investment of funds derived from a sale of the ward's real estate, constitutes a breach of the bond specially given by the guardian in order to effect said sale, it appearing that the guardian was, by said release, rendered incapable of personally accounting to the ward for the amount of said mortgage.

In re Brubaker, 214-413; 239 NW 536

Transfer of trust funds—recovery. Funds transferred from one trust fund by the trustee thereof to another trust fund of which he is also the trustee, in order to make good a wrongful shortage in the latter fund, may be recovered by the beneficiary of the wrongfully depleted fund.

In re Aasheim, 212-1300; 236 NW 49

12582 Suits by guardians.

When reply not necessary. In an action by a guardian of a minor on a certificate of deposit issued to the minor by the defendant bank, an answer alleging that the minor, in the reorganization of the bank, waived a named portion of the deposit is denied by operation of law. In other words, no reply is required.

McFerren v Bank, 214-198; 238 NW 914

12583 Nonabatement of actions.

Death of party without substitution. Where no personal representative was substituted for plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence, application made during same term to vacate the dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

12587 Sale or mortgage of property.

Nonapplicability of statute. The statutory provision that the real property of a minor may be mortgaged or sold "when not in violation of the terms of a will by which the minor holds it", has no application to a compromise by the guardian of a will contest under which compromise the minor receives encumbered real property in lieu of nonencumbered real property devised by the will.

Kreamer v Wendel, 204-20; 214 NW 712

Authority to borrow—scope. Court authority to a guardian to borrow money for the support and education of the ward is no authority to hypothecate the ward's property as security for the loan.

Fansher v Bank, 204-449; 215 NW 498

Trust property held by ward. A contract by the guardian of an incompetent, for the sale of land owned by the ward solely as trustee, tho approved by the court, cannot, in any sense, be deemed the contract of the ward; therefore, such contract cannot, in the event of the death of the ward, be deemed to create any indebtedness against the estate of the ward.

Copple v Morrison, 221-183; 264 NW 113

12592 Bond.

Liability in general. See under §12577

Successive bonds by administrator. Principle reaffirmed that successive, unreleased bonds of the same administrator for the same estate remain in force.

Varga v Guar. Co., 215-499; 245 NW 765

Unauthorized release of mortgage. The act of a guardian in releasing, without an order of court, a mortgage which represented an investment of funds derived from a sale of the ward's real estate, constitutes a breach of the bond specially given by the guardian in order to effect said sale, it appearing that the guardian was, by said release, rendered incapable of personally accounting to the ward for the amount of said mortgage.

In re Brubaker, 214-413; 239 NW 536

12595 Applicable procedure.

Bidder at sale of trust property—nonaggrieved party. In the sale of the personal property assets of an insolvent bank by the liquidating receiver, a bidder who is not a creditor of the bank, or interested in any manner in the trust property except as a proposed buyer, has no such standing or interest as authorizes him to appeal from an order of the court rejecting his bid for an item of said assets, and approving a lesser bid of another party for the same item. Nor will the court, under such circumstances, order a remand when the difference between the two bids is slight. (This is not suggesting (1) that the unsuccessful bidder may not very properly call the attention of the court to the disparity in bids, or (2) that the court has unbridled discretion to reject high bids and to approve low bids.)

Dean v Clapp, 221-1270; 268 NW 56

12596 Validity of sale—limitation to question.

Similar provision. See under §11951, Vol I

12597 Account.

General duty and responsibility. A guardian is a trustee, responsible as such for faithful performance of duties of his office and responsible to ward for all property of ward coming into guardian's control. It is his duty to give personal care to management of ward's estate, and to exercise such diligence and prudence as a reasonably prudent person ordinarily employs in the conduct of his own affairs.

In re Moore, 227-735; 288 NW 880

Absence of vouchers—effect. The absence from a guardian's report of vouchers for expenditures may be excused by other evidence by the guardian that the expenditures were actually made.

Guardianship v Benson, 213-492; 239 NW 79

Deposit in bank—subsequent approval by court. The due approval by the probate court of a guardian's report wherein he recited that he had deposited the funds of the ward in a bank and had received a stated amount of interest on such deposit is, in legal effect, an authorization to the guardian to continue the deposit, with resulting consequence that the guardian is relieved of personal responsibility in case the bank subsequently becomes insolvent; and this is true irrespective of the provisions of §9285, C., '24.

Robinson v Irwin, 204-98; 214 NW 696

Findings by court—conclusiveness. The hearing upon the report of a guardian is in probate, and the finding of facts of a probate judge in such case have force and effect of a jury verdict, and trial court in such case may properly exercise a degree of sound discretion in regard to the nature and extent of expenditures which may be properly approved.

McBurney v McBurney, (NOR); 210 NW 568

Findings of fact. The findings of the probate court, on supporting testimony, as to the amount of the excess charges made by a guardian for the support and education of the ward, are conclusive on the appellate court.

In re Nolan, 216-903; 249 NW 648

Liability of surety. A formal accounting by a guardian is not a necessary prerequisite to an action against the surety when (1) the breach of the bond and (2) the resulting loss can be readily and definitely determined in the action on the bond.

Baitinger v Elmore, 208-1342; 227 NW 344

Nonapplication of payments against unmatured obligation. It was guardian's duty to see that 95-year-old ward was properly taken care of, and guardian was not personally liable for money paid out of ward's estate in pursuance of court order to one who was obligated to ward under a promissory note not then due, since such action on part of guardian was reasonably prudent.

In re Moore, 227-735; 288 NW 880

Personal services offsetting charges. A guardian will not, without an authorizing order of court, be permitted to charge the ward's funds with the cost of board, clothing, and education and other necessities for the ward (who resided with the guardian) when the services rendered to the guardian by the ward equaled or exceeded in value the said charges.

Myers v Anderson, 208-191; 225 NW 258; 64 ALR 687

Ratification of settlement—failure to disaffirm. In guardianship proceeding, wherein father acting as guardian made a settlement with his children after son had reached his majority, but daughter lacked three months of being 21 years of age, and suit against the father for an accounting was not brought

until two and one-half years after the settlement, held, evidence sufficient to support finding of trial court in approving the guardian's report which, in effect, approved the settlement, the same having been ratified by failure to disaffirm within a reasonable period of time.

In re Fisher, 226-596; 284 NW 821

Review at law. Supported findings and orders of the probate court on the hearing on the final report of a guardian are conclusive on the appellate court, the proceedings being at law.

In re Jefferson, 219-429; 257 NW 783
In re Fish, 220-1328; 264 NW 542

12599 Compensation.

Accounting and settlement—personal services offsetting charges. A guardian will not, without an authorizing order of court, be permitted to charge the ward's funds with the cost of board, clothing, education, and other necessities for the ward (who resided with the guardian) when the services rendered to the guardian by the ward equaled or exceeded in value the said charges.

Myers v Anderson, 208-191; 225 NW 258; 64 ALR 687

Attorney fees in abortive action. Attorneys employed by a temporary guardian to prosecute the main action on the issue whether a permanent guardian shall be appointed, may not be paid from the ward's estate when the action for a permanent guardian fails; and it matters not that the court assumed to authorize the temporary guardian to make such employment.

In re Barner, 201-525; 207 NW 613

Attorney fees—temporary guardianship. An allowance of reasonable compensation to a temporary guardian and to his attorney in conserving and caring for the estate of the ward is proper, even tho no permanent guardian is appointed.

In re Barner, 201-525; 207 NW 613

Denial. The court may very properly refuse to grant any compensation to a guardian who has been guilty of neglect and malfeasance in the management of the ward's estate.

Myers v Anderson, 208-191; 225 NW 258; 64 ALR 687

Poor business management — effect. The poor business management of an estate may have a material bearing on the compensation to be allowed a guardian.

Guardianship v Benson, 213-492; 239 NW 79

12600 Disobedience of orders.

Equitable estoppel—report—failure to rely. A party will not be permitted to say that he relied, to his financial disadvantage, on the long delay of a guardian to file his final report, when it appears that he did not change his position because of said delay—did not, because of his own lack of due diligence, have knowledge of said delay until long after he had acted to his disadvantage.

Bates v Remley, 223-654; 273 NW 180

12603 Action on bond.

See also under §12577

Accounting and settlement—who may object. In the guardianship of military veterans, the federal veterans administration has legal right to appear and contest the legality of investment of guardianship funds.

In re Arrak, 218-117; 254 NW 307

12604 Removal—new bond.

Absence of formal notice—legality. An order discharging a guardian and appointing a new one without formal notice to the incompetent may not be said to be illegal when the latter appointment was made with the knowledge, consent, and acquiescence of the ward, who himself petitioned for the appointment in the original proceedings.

Salomon v Newby, 210-1023; 228 NW 661

CHAPTER 540

FOREIGN GUARDIANS

12606 Appointment.

Foreign courts — jurisdiction. Record reviewed, and held to show jurisdiction in the courts of a foreign state validly to appoint a guardian of the property and person of an adult former resident of this state who has been a mental defect (tho not an imbecile or idiot) from birth, and who has lived in said foreign state continuously for some 25 years with a protecting chaperon.

Turner v Ryan, 223-191; 272 NW 60; 110 ALR 554

Personal judgment unallowable. A nonresident minor may, in a proper case, be made a party to litigation in this state, by service in this state on the foreign guardian, but such service will not confer jurisdiction on the court to enter a personal judgment against the minor.

Irwin v Bank & Trust, 218-474; 255 NW 670

12610 Copy of bond.

Delivery of property to foreign guardian. On an application by a foreign guardian of the

property of a minor for an order directing a domestic guardian to deliver the funds in his hands to said foreign guardian, the plea that if said funds are so delivered the foreign guardian will squander them will be given no consideration if the foreign guardian files the bond required by the statute.

In re Hanson, 213-643; 239 NW 701

12611 Order for delivery.

Custody of property. A resident guardian of a nonresident ward, with whom no claims have been filed, should be ordered to turn over all funds and property of the ward in his possession, to the original foreign guardian, upon the payment of all taxes against the estate and upon the filing, by the foreign guardian, of a certified copy of his bond. (§12610, C., '31.)

In re Cihlar, 216-327; 249 NW 254

CHAPTER 541

GUARDIANS FOR DRUNKARDS, SPENDTHRIFTS, LUNATICS, AND PERSONS OF UNSOUND MIND

12614 Petition—appointment.

ANALYSIS

I NATURE AND RESULT OF GUARDIANSHIP

Advancing funds to retry issue of sanity—discretion of court. Where a person is under guardianship and confined in a state hospital under an adjudication of insanity, an application in his behalf for an order directing the guardian to pay a substantial sum for the purpose of retrying the issue of insanity is properly denied on a showing by affidavit that two laymen consider the patient sane.

In re Ost, 211-1085; 235 NW 70

Continuances. A motion for a continuance, even in proceedings for the appointment of a guardian, is addressed, peculiarly, to the sound legal discretion of the court, and the order overruling such motion is conclusive on the appellate court unless it clearly appears that the trial court has abused its discretion and thereby perpetrated an injustice.

Anspach v Littler, 217-787; 253 NW 120

Foreign courts — jurisdiction. Record reviewed, and held to show jurisdiction in the courts of a foreign state validly to appoint a guardian of the property and person of an adult former resident of this state who has been a mental defect (tho not an imbecile or idiot) from birth, and who has lived in said foreign state continuously for some 25 years with a protecting chaperon.

Turner v Ryan, 223-191; 272 NW 60; 110 ALR 554

Presumption. Orders in probate appointing guardians are presumptively regular.

Marsh v Hanna, 219-682; 259 NW 225

Testamentary capacity—drunkard guardianship. One under guardianship is not necessarily incompetent to make a will; for instance, as to a drunkard under guardianship, incapacity is not presumed. Evidence failed to establish that testator was intoxicated when he made his will, and his competency, being a fact question when decided in his favor by the court after waiver of a jury, will not be disturbed on appeal.

In re Willer, 225-606; 281 NW 155

II UNSOUNDNESS OF MIND

Guardianship — presumption. One who is under guardianship because of mental defect, is presumptively incapable of executing a valid will. Evidence pro and con held to sustain the presumption.

Brogan v Lynch, 204-260; 214 NW 514

Unnecessary amendment. In proceedings for the appointment of a guardian, the allegation of unsoundness of mind made when the petition is filed may be supported by testimony of unsoundness at the time of the trial, tho the proceedings be long protracted. It follows that the unnecessary allowance of an amendment alleging such subsequent unsoundness is quite harmless.

Anspach v Littler, 217-787; 253 NW 120

Jury question. A jury question is created on the issue of mental unsoundness in proceedings for the appointment of a guardian of property, by testimony that the person in question, by reason of the impairment of his mental faculties, has no clear understanding of what he has done, or the probable effect of what he has done on his estate, and that his property is being mismanaged and is in danger of being lost thereby.

Zander v Cahow, 200-1258; 206 NW 90

Nonjury question. In an action for the appointment of a guardian of the property of an alleged mental incompetent, the court may direct a verdict for the defendant if the evidence fails to show that the mental incompetency of defendant deprives him of the ability

II UNSOUNDNESS OF MIND—concluded

to care for his property and to understand the nature and effect of what he does.

Richardson v Richardson, 217-127; 250 NW 897

Termination (?) or continuance (?) of guardianship. In determining whether guardianship should be terminated, the accepted test of mental unsoundness is the ability and competency of a person to manage his property and business affairs in a rational manner, and the object of a statute making unsoundness of mind a basis for appointment of a guardian is the protection of the property of the affected person—cited cases being of little aid except to fix general principles.

In re Hawk, 227-232; 288 NW 114

Refusal to terminate. Where record disclosed that ward was unable to cope with those having designs on his property, that he was still lacking in business judgment, that he owned 80 acres of good land on which, with good crops, the mortgage could be retired in another year, and that unscrupulous persons would be ready and anxious to take advantage of his weakness, court's action in refusing to terminate guardianship was not error, it being clearly evident the ward was mentally deficient.

In re Hawk, 227-232; 288 NW 114

Unsoundness of mind — proof required. A guardian for the property of a person should be appointed whenever it is made to appear that such person has lost his reasoning powers to the extent that he cannot manage his property and business affairs in a rational manner.

Claussen v Claussen, 216-269; 249 NW 397

12616 Guardian of drunkard.

Inebriacy defined. Inebriacy is the state of drunkenness or habitual intoxication.

Maher v Brown, 225-341; 280 NW 553

12617 Party may apply for guardianship.

Appointment—absence of formal notice. An order discharging a guardian and appointing a new one without formal notice to the incompetent, may not be said to be illegal when the latter appointment was made with the knowledge, consent, and acquiescence of the ward, who himself petitioned for the appointment in the original proceedings.

Salomon v Newby, 210-1023; 228 NW 661

Right of possession. A guardian appointed on application of the ward himself is entitled to the possession of property which the ward, prior to the guardianship, placed in the hands of a third party under a written contract solely for preservation and management and with no intent to pass title.

Schultz v Gay, 207-738; 223 NW 495

Valid contract by ward. A mentally competent adult person who has, on her own voluntary application, been placed under guardianship solely because of her physical inability to move about freely and transact her business —tho no statute existed which authorized the appointment of a guardian under such application—is not deprived of power to enter into a valid oral contract for necessaries in the form of board and lodging and personal care for herself. And such contract, when executed, will be binding on her estate even tho never approved by the probate court having jurisdiction over the guardianship.

Dean v Atwood, 221-1388; 212 NW 371

When ward estopped to object to investment. A mentally competent adult person, who, on his own application, causes a guardian of his property to be appointed, will be estopped to object to fair and honest investment of guardianship funds in real estate, when said investment, tho made without first securing the approval of the court, was made with the knowledge, consent, and approval of the ward, and when the ward at once entered into possession of the property and thereon resided for some seven years without payment of rent of any kind. (Investment made prior to effective date of §12772, C., '31.)

In re Meinders, 222-236; 268 NW 537

12619 Petition—answer.

Irregular petition for appointment—collateral attack. Irregularities in the form of a petition for the appointment of a guardian, while perhaps subject to direct attack, were not sufficient to justify a collateral attack in an action to set aside a default judgment obtained by the guardian.

Jensen v Martinsen, 228- ; 291 NW 422

Irregularities in petition for appointment—right to bring action. A petition by the wife of an inmate of a state hospital for the insane, asserting that she was the wife of the inmate who had property, and asking that she be appointed guardian, altho insufficient to meet the statutory requirements for a petition for the appointment of a guardian, was sufficient for the appointment of a temporary guardian, and when notice was accepted by the superintendent of the institution and wife was appointed, she was at least a temporary guardian, and, as such, could maintain an action in behalf of the incompetent.

Jensen v Martinsen, 228- ; 291 NW 422

12620 Temporary guardian.

Validity. The appointment of a temporary guardian on proper and sufficient notice to the person sought to be placed under guardianship is valid, even tho the statute authorizing such appointment is silent as to notice.

Franklin v Bonner, 201-516; 207 NW 778
In re Barner, 201-525; 207 NW 613

Irregularities in petition for appointment—right to bring action. A petition by the wife of an inmate of a state hospital for the insane, asserting that she was the wife of the inmate who had property, and asking that she be appointed guardian, altho insufficient to meet the statutory requirements for a petition for the appointment of a guardian, was sufficient for the appointment of a temporary guardian, and when notice was accepted by the superintendent of the institution and wife was appointed, she was at least a temporary guardian, and, as such, could maintain an action in behalf of the incompetent.

Jensen v Martinsen, 228- ; 291 NW 422

Compensation—attorney fees. An allowance of reasonable compensation to a temporary guardian and to his attorney in conserving and caring for the estate of the ward is proper, even tho no permanent guardian is appointed.

In re Barner, 201-525; 207 NW 613

Compensation — attorney fees in abortive action. Attorneys employed by a temporary guardian to prosecute the main action on the issue whether a permanent guardian shall be appointed, may not be paid from the ward's estate when the action for a permanent guardian fails; and it matters not that the court assumed to authorize the temporary guardian to make such employment.

In re Barner, 201-525; 207 NW 613

12621 Trial.

Hypothetical question—fundamentally required instructions. Expert testimony tending to show that a party is of unsound mind, based solely on a hypothetical state of fact, is wholly without value unless the jury finds that the assumed state of fact is true, and fundamental error results in failure so to instruct.

Anspach v Littler, 215-873; 245 NW 304

12622 Presumption of fraud.

Contracts by insane person—validity—demand for accounting—burden of proof. In an action by the guardian of an insane ward to compel defendant to account for property paid or delivered by the ward to defendant, without consideration, and at various periods of time prior to the time the ward was adjudged insane, the guardian must establish the insanity of the ward at each particular transaction, or must establish such fact condition as compels an accounting. Evidence held insufficient to meet the burden of proof as to one transaction.

Davidson v Piper, 221-171; 265 NW 107

Valid contract by ward. A mentally competent adult person who has, on her own voluntary application, been placed under guardianship solely because of her physical inability to move about freely and transact her business —tho no statute existed which authorized the appointment of a guardian under such application—is not deprived of power to enter into a valid oral contract for necessaries in the form of board and lodging and personal care for herself. And such contract, when executed, will be binding on her estate even tho never approved by the probate court having jurisdiction over the guardianship.

Dean v Atwood, 221-1388; 212 NW 371

12623 Petition to terminate.

Burden of proof. A ward has the burden to show that he is no longer a proper subject of guardianship.

Perry v Roberts, 206-303; 220 NW 85

Refusal to discontinue. On appeal from a judgment refusing to discontinue a guardianship, the appellate court, while conceding a large discretion in the trial court, will most carefully scan the record in order that no possible injustice may be done the applicant.

Perry v Roberts, 206-303; 220 NW 85

Selfish interest of expectant heir. The fact that an expectant heir is in the background of a proceeding to continue a guardianship will prompt the court to great scrutiny of the testimony.

Coomes v Mayer, 201-405; 205 NW 645
See 198-1113; 197 NW 476

Termination of guardianship. Allegation, in petition to terminate guardianship, that 37 percent of the receipts of the guardianship had been paid to guardian and his attorney for fees and expenses, was properly stricken out on motion as not being material to the issue before the court.

In re Hawk, 227-232; 288 NW 114

Unsupported apprehension. The court will not continue a guardianship simply on the unsupported apprehension that the ward, who has attained a great age, may be despoiled of her property by her husband, when it appears that the ward is otherwise competent to direct her business affairs.

Coomes v Mayer, 201-405; 205 NW 645

12625 Trial.

Refusal to terminate. Where record disclosed that ward was unable to cope with those having designs on his property, that he was still lacking in business judgment, that he owned 80 acres of good land on which, with good crops, the mortgage could be retired in another year, and that unscrupulous persons would be ready and anxious to take advantage of his weakness, court's action in refusing to terminate guardianship was not error, it being clearly evident the ward was mentally deficient.

In re Hawk, 227-232; 288 NW 114

Termination of guardianship—court findings as jury verdict. When jury trial is waived in

action to terminate guardianship, facts found by court have same binding effect as verdict of jury.

In re Hawk, 227-232; 288 NW 114

Termination of guardianship—discretion of court. In action to terminate guardianship, large discretion is lodged in the trial court to determine whether the ward is a proper subject for the continuation of the property guardianship, and whether ward's best interests will be best served by such continuance.

In re Hawk, 227-232; 288 NW 114

12628 Sale or mortgage of real estate.

Probate record—constructive knowledge. One who takes a mortgage from a mortgagor who, under the recording acts, appears to be the sole owner of the fee is not charged with constructive knowledge of matter which appears in the "probate record" (§11842, C., '31) and which suggests or implies that some person other than the apparent fee owner has an interest in the property.

Booth v Cady, 219-439; 257 NW 802

12630 Insolvent estates.

Disposing of solvent estate—not intended by statute. The statutes providing for guardians for property of incompetents do not contemplate disposition of ward's assets, except in instances where ward's estate is insolvent, or probably will be insolvent. The statutes intend that the business of the ward shall be conducted by a guardian instead of by the ward himself.

In re Simpson, 225-1194; 282 NW 283; 119 ALR 1208

Judgment against insane person—priority in estate—lien. A judgment rendered against an insane person at a time when the guardianship was entirely insolvent, with no proceedings then pending nor contemplated relative to dissolution or distribution of assets of guardianship, becomes a lien upon his realty, and upon his death the district court could properly order administrator of his estate to pay the judgment prior to payment of claims against the estate.

In re Simpson, 225-1194; 282 NW 283; 119 ALR 1208

CHAPTER 542

GUARDIANS FOR ABSENTEES

12640 Qualifications—powers and duties.

General duty and responsibility. A guardian is a trustee, responsible as such for faithful performance of duties of his office and responsible to ward for all property of ward coming into guardian's control. It is his duty to give personal care to management of ward's estate, and to exercise such diligence and prudence as a reasonably prudent person ordinarily employs in the conduct of his own affairs.

In re Moore, 227-735; 288 NW 880

CHAPTER 542.1

GUARDIANSHIP OF VETERANS

12644.13 Compensation.

Right to allow. Section 454, title 38, U. S. Code, providing that federal funds granted to a world war veteran "shall not be subject to the claims of creditors", does not prohibit the courts of this state from allowing the guardian of such veteran and from such funds, compensation not only for ordinary services but for extraordinary services rendered the ward—the guardian not being a "creditor" within the meaning of said statute.

Hines v McKenzie, 216-1388; 250 NW 687

12644.14 Investment of funds.

Who may object. In the guardianship of military veterans, the federal veterans administration has legal right to appear and contest the legality of investment of guardianship funds.

In re Arrak, 218-117; 254 NW 307

Loan by guardian to himself—authorization. The probate court, when it finds that such a course will essentially promote the physical and mental welfare of a ward, may validly authorize a guardian, as such, to make a specified loan of guardianship funds to himself, individually, and, as guardian, to receive from himself, individually, the proper and legally required security for said loan.

In re Fish, 220-1328; 264 NW 542

12644.15 Use of funds.

General duty and responsibility. A guardian is a trustee, responsible as such for faithful performance of duties of his office and responsible to ward for all property of ward coming into guardian's control. It is his duty to give personal care to management of ward's estate, and to exercise such diligence and prudence as a reasonably prudent person or-

dinarily employs in the conduct of his own affairs.

In re Moore, 227-735; 288 NW 880

Nonapplication of payments against unmatured obligation. It was guardian's duty to see that 95-year-old ward was properly taken care of, and guardian was not personally liable for money paid out of ward's estate in pursuance of court order to one who was obligated to ward under a promissory note not then due, since such action on part of guardian was reasonably prudent.

In re Moore, 227-735; 288 NW 880

CHAPTER 543

CHANGING NAMES

Atty. Gen. Opinion. See '25-26 AG Op 303

CHAPTER 544.1

PATERNITY OF ILLEGITIMATE CHILDREN AND OBLIGATION OF PARENTS THERETO

12667.01 Obligation of parents.

Divorce — effect as to children. Principle reaffirmed that the duties and liabilities of the parents to a minor child do not terminate by a decree of divorce.

Hensen v Hensen, 212-1226; 238 NW 83

12667.02 Recovery by mother from father.

Separate maintenance. An action for separate maintenance presupposes the existence of the marriage relation and a wife who institutes such action while the marriage relation exists may not, after the entry of a valid decree of divorce, and after the remarriage of both parties, maintain the action, even to the extent of recovering (1) for her own past support up to the time of her remarriage, or (2) for the past and future support of her minor child.

Freet v Holdorf, 205-1081; 216 NW 619

12667.07 Proceedings to establish paternity.

Repeal of statute—effect. The repeal of the former statutes relative to establishing the paternity of an illegitimate child and charging the father with the support of such child did not in any manner affect an existing right to institute such proceeding, even tho no proceedings were pending at the time of the repeal.

State v Shepherd, 202-437; 210 NW 476

Unallowable proceedings. The paternity of a child is a subject matter not cognizable in an equitable action of divorce at the instance of the plaintiff, who is suing in her own personal behalf, it appearing that the parties were not, in fact, husband and wife.

Reppert v Reppert, 214-17; 241 NW 487

Birth during lawful wedlock—presumption —proof to overthrow. The presumption of legitimacy of a child born in lawful wedlock is so strong that it will yield only to clear, satisfactory, and practically conclusive proof that the husband was:

1. Impotent, or
2. Entirely absent so as to have no access to the mother, or
3. Entirely absent from the mother at the period during which the child must have been begotten, or
4. Present with the mother under circumstances negativing sexual intercourse with her.

Craven v Selway, 216-505; 246 NW 821

Nonallowable evidence. The illegitimacy of a child born in lawful wedlock, without proof that the husband was impotent or had no sexual access to the mother, cannot be established by the declarations of the mother, or of the putative father, or of said child, nor by proof of the mother's adultery.

This does not imply that after illegitimacy has been made to appear, by competent proof, the declarations of the putative father and of the mother are not admissible to identify the actual father.

Craven v Selway, 216-505; 246 NW 821

Paternity statutes — proceedings are civil, not criminal. The statutory proceeding to determine paternity and for support money is not a criminal proceeding but is tried as an ordinary action.

State v Devore, 225-815; 281 NW 740; 118 ALR 1104

12667.08 Who may institute proceedings.

Unallowable proceedings. The paternity of a child is a subject matter not cognizable in an equitable action of divorce at the instance of the plaintiff who is suing in her own personal behalf, it appearing that the parties were not, in fact, husband and wife.

Reppert v Reppert, 214-17; 241 NW 487

12667.18 Method of trial.

ANALYSIS

I IN GENERAL

Paternity statutes—proceedings are civil, not criminal. The statutory proceeding to determine paternity and for support money is not a criminal proceeding but is tried as an ordinary action.

State v Devore, 225-815; 281 NW 740; 118 ALR 1104

Former statute—jail sentence as imprisonment for debt—unconstitutional. Proceeding to establish paternity and to provide support money, being a civil proceeding, the statutory punishment by commitment to jail for nonpayment contravenes the constitutional prohibition against imprisonment for debt.

State v Devore, 225-815; 281 NW 740; 118 ALR 1104

II EVIDENCE

(a) IN GENERAL

Evidence of good character or reputation. Conceding, arguendo, that one accused of being the father of a child may sustain his denial by proof of good character or reputation, yet such evidence must be confined to the traits involved in the charge.

Moen v Fry, 215-344; 245 NW 297

Declarations admissible. Declarations of the deceased mother of a child born out of lawful wedlock, as to who was the father of said child, are admissible on the issue of paternity; also like declarations of other members of the family as a matter of family history. Evidence reviewed and held insufficient to establish plaintiff's paternity.

Hopp v Petkin, 222-609; 269 NW 758

Evidence—permissible range. Evidence in bastardy proceedings reviewed and held not to be beyond the permissible range of testimony in such cases.

State v Andrioli, 216-451; 249 NW 379

(b) CONDUCT OF PROSECUTRIX

Incompetent declarations by prosecutrix. On the issue as to the paternity of a child, statements by the prosecutrix, not in the presence of the defendant, to the effect that defendant was the father of her child, are wholly incompetent.

Moen v Fry, 215-344; 245 NW 297

Paternity—incompetent evidence. On an issue as to the paternity of a child, testimony by the family pastor that at the time the child was baptized prosecutrix charged another person with the paternity of said child does not justify, on cross-examination, testimony as to what said accused party said and did, and what talk the pastor had with members of the family, relative to said charge.

Moen v Fry, 215-344; 245 NW 297

Paternity—incompetent evidence. On an issue as to the paternity of a child, the material fact that prosecutrix had at a former time charged another party with said paternity, presents no justification for the reception in evidence of substantially the entire judicial proceeding growing out of said former accusation.

Moen v Fry, 215-344; 245 NW 297

(c) RESEMBLANCE OF CHILD

No annotations in this volume

(d) TIME OF INTERCOURSE AND BIRTH

Reopening cause to permit additional testimony of prosecutrix. The court may at the close of plaintiff's testimony, and in the exercise of a fair discretion, reopen the case and permit a witness to be recalled for further examination.

State v Andrioli, 216-451; 249 NW 379

(e) PRESUMPTIONS

Child begotten out of, but born in, wedlock. A child manifestly begotten out of wedlock but born during wedlock is presumed to be the child of such intermarried persons.

Ryke v Ream, 212-126; 234 NW 196

(f) INSTRUCTIONS

No annotations in this volume

12667.21 Death, absence, or insanity of mother—testimony receivable.

Declarations of mother admissible. Declarations of the deceased mother of a child born out of lawful wedlock, as to who was the father of said child, are admissible on the issue of paternity; also like declarations of other members of the family as a matter of family history. Evidence reviewed and held insufficient to establish plaintiff's paternity.

Hopp v Petkin, 222-609; 269 NW 758

12667.24 Judgment in general.

Former statute—imprisonment for contempt as cruel and unusual punishment. Statutes providing for commitment to jail for contempt, upon default in payment of support money awarded in bastardy proceedings, without citation, charge, or hearing and without allowing defendant an opportunity to purge himself of any alleged contempt, contravene the constitutional prohibition against cruel and unusual punishment.

State v Devore, 225-815; 281 NW 740; 118 ALR 1104

CHAPTER 545

JUDGMENT BY CONFESSION

12670 Statement.

Statement of confession defined—mandatory duties of clerk—recording not entry of judgment. A "statement of confession", or "cognovit" oftentimes referred to as a "power of attorney" or simply as a "power", is the written authority of the debtor and his direction to the clerk of the district court, or justice of the peace, to enter judgment against him as stated therein and the statutory provision that "the clerk shall thereupon make an entry of judgment" is definite and mandatory, so the mere recording by the clerk of the debtor's admission of indebtedness, confession of judgment, and authorization to the clerk to enter judgment was not the "entry of judgment by confession" required by statute. Execution issued thereon was properly annulled and decree quieting title to land in owners as against execution levy and making permanent a temporary injunction enjoining execution sale was proper.

Blott v Blott, 227-1108; 290 NW 74

12671 Judgment—execution.

Mandatory duties of clerk—recording not entry of judgment. A "statement of confession", or "cognovit" oftentimes referred to as a "power of attorney" or simply as a "power", is the written authority of the debtor and his direction to the clerk of the district court, or justice of the peace, to enter judgment against him as stated therein and the statutory provision that "the clerk shall thereupon make an entry of judgment" is definite and mandatory, so the mere recording by the clerk of the debtor's admission of indebtedness, confession of judgment, and authorization to the clerk to enter judgment was not the "entry of judgment by confession" required by statute. Execution issued thereon was properly annulled and decree quieting title to land in owners as against execution levy and making permanent a temporary injunction enjoining execution sale was proper.

Blott v Blott, 227-1108; 290 NW 74

CHAPTER 546

OFFER TO CONFESS JUDGMENT

12675 Offer to confess after action brought.

Erroneous docketing—effect. An applicant for condemnation of realty who erroneously causes its appeal from the award of the sheriff's jury to be docketed in the name of itself as plaintiff, and in the name of the landowner as defendant, and files petition, and thereby induces the landowner to file answer thereto, is in no position, after causing its own error to be corrected by a proper redocketing, either to demand the entry of judgment in accordance with its own offer to confess judgment, or to object to the action of the court in granting to the landowner (the proper plaintiff) a continuance over the term in which to file a proper petition.

Wilcox & Sons v Omaha, 220-1131; 264 NW 5

12676 Nonacceptance—costs.

Judgment on remand for amount confessed. A plaintiff-appellant who, on appeal, is unsuccessful in his effort to establish liability in excess of defendant's offer to confess judgment is entitled on remand to procedendo directing the trial court to enter judgment in his favor for the amount of said offer and for costs to date of said offer.

Fenley v Ins. Co., 215-1369; 245 NW 332; 247 NW 635

12680 Effect of nonaccepted offer.

Revealing offer of compromise. Statements by plaintiff's counsel in his opening statement to the jury to the effect that defendant had offered to compromise the claim sued on, together with testimony by plaintiff to the same effect, constitutes reversible error, even tho said testimony is stricken from the record and the jury is admonished not to consider it.

Hoover v Ins. Co., 218-559; 255 NW 705

CHAPTER 547

SUBMITTING CONTROVERSIES WITHOUT ACTION OR IN ACTION

12686 Agreed statement of facts.

Construction of undefined term. A stipulation that certain property was sold for the purpose of using the same as prizes in the operation of a punch board is a concession that the term "punch board" has a general recognized meaning which must control the construction of the stipulation.

Parker-Gordon v Benakis, 213-136; 238 NW 611

Submission with and without action. The filing of a petition and answer, without service of an original notice, and the submission of the matter to the court on an agreed statement of facts which stipulated for judgment for plaintiff in case the court found that a recovery should be allowed, and followed by a motion by defendant for a verdict in his favor, shows the institution and prosecution of an ordinary action, and not the submission of a controversy to the court without action as provided by this chapter.

Robinson v Bruce Co., 205-261; 215 NW 724; 61 ALR 851

Trial by court—submissions contrasted. The submission of a pending law action and of the pleadings and stipulations of fact filed therein, for trial by the court without a jury, cannot be deemed a submission under and subject to the provisions of this chapter relating to the submission of controversies without action.

Rogers v Davis, 223-373; 272 NW 539

12691 Submission of cause pending.

Stipulation of fact. A stipulation of facts upon which a cause is submitted is conclusive on both parties. In other words, no fact not embraced in the stipulation can be considered on appeal.

Andrew v Bank, 209-277; 227 NW 899

Stipulation of fact may act as amendment. A duly signed stipulation as to the ultimate facts in a case may become, in legal effect, an amendment to the petition in the case, for the purpose of a subsequently interposed motion to dismiss the petition.

Pierre v Pierre, 210-1304; 232 NW 633

Questions or issues specially withheld—effect. Parties, in agreeing to a compromise, may specifically withhold or exclude certain issues or questions from the adjudication. Needless to say that such issues are not adjudicated.

Jones v Sur. Co., 210-61; 230 NW 381

12693 Submission of question of law—agreement as to judgment.

Stipulation—enforceability. The court will enforce a duly filed stipulation by the parties to an action of forcible entry and detainer to the effect that if defendant fails to comply with specified conditions judgment shall be entered against defendant for the possession of said premises.

Peak v Mulvaney, 215-1400; 245 NW 748

12694 Costs.

Taxation—submission without action. When the issues in a controversy are made up by pleadings and the pleadings then abandoned and the matter submitted to the court on a stipulation of fact, the costs are properly taxed against the wholly unsuccessful party.

Chambers v Bk. & Tr., 218-63; 254 NW 309

CHAPTER 548

ARBITRATION

12695 What controversies.

Discussion. See 6 ILB 113—Arbitration

Contract for—effect. A party who has contracted that a matter in controversy shall be submitted to arbitration and permits such matter to go to such arbitration is bound by the decision.

Oskaloosa Bank v Bank, 205-1351; 219 NW 530; 60 ALR 1204

12696 Written agreement.

ANALYSIS

I STATUTORY SUBMISSION
II COMMON-LAW SUBMISSION

I STATUTORY SUBMISSION

Defective acknowledgment. An agreement for statutory arbitration is rendered fatally defective by the failure of the notary public to attach his notarial seal to the certificate of acknowledgment of one of the parties to the agreement.

Koht v Towne, 201-538; 207 NW 596

Ineffective curing of defects. A notary public may not, after his term of appointment has expired, voluntarily or under order of court validly attach a new certificate of acknowledgment to a statutory agreement for arbitration executed during his expired term, even tho, at the time of attaching such new

certificate, he was a notary public under a new appointment.

Koht v Towne, 201-538; 207 NW 596

Written compromise—effect. A definite written agreement in which one party agrees to pay the other a named sum in settlement of their actual differences furnishes ample basis for a future action within ten years after default, even tho, when it was entered into, the said differences had been submitted to statutory arbitrators, and even tho the agreement contemplated that the arbitrators would report to the court in accordance with the agreement —which was done but without filing in court.

In re Powers, 205-956; 218 NW 941

II COMMON-LAW SUBMISSION

Arbiter's power to change decision. The power of an arbiter is gone after his final decision, and he may not subsequently modify, revoke, or annul it, or make a new award upon the same issues.

Granette v Neumann, 208-24; 221 NW 197

Insurance—adjustment of loss—arbitration — inadequate award — fraud — effect. Equity will vacate a grossly inadequate award by arbitrators, especially when an element of fraud exists in the appointment and proceedings of the arbitrators.

Koopman v Ins. Assn., 209-958; 229 NW 221

Weights and measures—admeasurement to landlord—"bushel" construed. The admeasurement to a landlord by an agreed arbitrator of a certain number of bushels of corn as rent for a certain year will not be construed as calling for that number of bushels of "shelled" corn when the parties knew at all times that the admeasurement was on the basis of crib measurement, and when the landlord receives in shelled corn all that was set aside to him "on the cob," the rent must be deemed fully paid.

Salinger v Elev. Co., 210-668; 231 NW 366

12706 Rejection—rehearing.

Excessive decree. A motion to set aside an award as a statutory award does not empower the court to decree the legal effect and conclusiveness of the award as a common-law award.

Bureker v County, 201-251; 207 NW 115

12707 Force and effect of award.

Discussion. See 21 ILR 155—Judgment on award—vacation for fraud

12712 Arbitration by agreement.

Execution—effect. A party who has contracted that a matter in controversy shall be submitted to arbitration and permits such matter to go to such arbitration is bound by the decision.

Oskaloosa Bank v Bank, 205-1351; 219 NW 530; 60 ALR 1204

CHAPTER 549

RECEIVERS

12713 Appointment.

ANALYSIS

Bank receiverships. See under §9239
Receivers in mortgage foreclosures. See under §12372 (VII)

I APPOINTMENT IN GENERAL

Appointment — conclusiveness. An unappealed decree appointing a receiver of real estate and of the rents and profits thereof must, in a subsequent intervention in the cause, be deemed an adjudication against the owner, of all the issues involved in said appointment.

Canfield v Sec. Co., 216-747; 249 NW 646

Appointment—ancillary to primary relief. The generally accepted doctrine, in the absence of statutes to the contrary, is that a receiver cannot be appointed except to preserve property involved in litigation pending the final outcome thereof, and as a result thereof, a receiver can only be ancillary to some other or primary relief demanded.

Wagner v Securities Co., 226-568; 284 NW 461

Appointment—effect on agency. A contract of agency is terminated by the insolvency of the agent, and the placing of his business affairs in the hands of a receiver.

Andrew v Ins. Co., 211-282; 233 NW 473

Concurrent jurisdiction—receivership—possession of res. The court appointing a receiver and having possession of the res has exclusive jurisdiction to hear and determine all controversies affecting title, possession, and control of the property, which jurisdiction must be respected by all other courts, except that another court may entertain another cause concerning the same subject matter if it does not oust the appointing court from possession

I APPOINTMENT IN GENERAL—concluded

of the res, or appropriate disposal of the cause there entertained.

Bates v Evans, 226-438; 284 NW 385

Continuing business. On creditor's petition for appointment of receiver, the court, in the interest of the parties, may direct him to continue temporarily the corporation's business. Obligations incidental thereto are a necessary expense of receivership and payable from assets even before distribution of any funds to preferred creditors.

Miller Co. v Silvers Co., 227-1000; 289 NW 699

Current statutory law applicable. Receivership proceedings and the method of distribution thereunder are governed by the statute in force at the time of the appointment of the receiver.

Dickinson County v Leach, (NOR); 211 NW 542

Federal appointment—effect on state courts. The mere pendency of federal receivership proceedings over a party does not necessarily oust the jurisdiction of the state courts over the party and over his property.

Lippke v Milling Co., 215-134; 244 NW 845

Motion to dismiss appointment—waiver by filing answer. A motion by defendant to dismiss an application for the appointment of a receiver, and not ruled on, is waived by the subsequent filing by defendant of an answer and resistance to said application.

Interstate Assn. v Nichols, 213-12; 238 NW 435

Preliminary hearing — decision on merits. The court has no legal right, against the clearly expressed purpose of a plaintiff, to convert a preliminary hearing as to the appointment of a receiver pendente lite into a hearing on the full merits of the entire action, and to enter a dismissal accordingly.

McCarthy Co. v Coal Co., 204-207; 215 NW 250; 54 ALR 1116

Second appointment for same property. The fact that a party purchases property at a receiver's sale does not exhaust the power of the court to appoint a second receiver of the property so purchased in order to protect rights relative to said property which accrued after said sale and by reason of the wrongful acts of said purchaser.

State v Beaton, 205-1139; 217 NW 255

Refusing appointment of temporary receiver. Certiorari will not lie to review the discretion of the court in refusing the appointment of a temporary receiver to close up the affairs of a corporation whose charter has expired, especially when appeal would furnish an adequate remedy for a review of every question presented.

McCarthy v Dist. Ct., 201-912; 208 NW 505

Justifiable refusal. The appointment of a receiver to collect past and future maturing installments on a claim, secured as a lien on lands, is properly refused when the lien for matured installments has been foreclosed and the land sold, when no judgment for other installments has been obtained, and when there is no showing of waste.

Cadd v Snell, 219-728; 259 NW 590

Superintendent of banking as sole receiver. The statutory declaration (§9242, C., '27) that the superintendent of banking shall be the sole and only receiver or liquidating officer for state incorporated banks has no application (1) when the receiver is prayed for, not by said superintendent, but by private parties, and for a bank which has largely closed out its business as a bank and is preparing to dissolve, and (2) when the receiver is prayed for as an auxiliary remedy in an action for the adjudication of matters in which the superintendent of banking is interested adversely to plaintiff.

Harris Est. v Bank, 207-41; 217 NW 477

II GROUNDS FOR APPOINTMENT

Material considerations. On the issue whether a temporary receiver should be appointed in an action by minority stockholders to liquidate the affairs of a corporation whose charter had expired, the court, always proceeding cautiously, will, inter alia, give due consideration to the following matters: (1) The fact that ordinarily such liquidation is effected through the corporate organization; (2) the relative financial holdings of the contending parties; (3) the fact that the parties agree that the inherent nature of the business requires a temporary continuation of the business as a part of the liquidation; (4) whether, from the nature of the business, the court would be practically compelled to choose a receiver from the management which is under attack; (5) the integrity of the past and present corporate management; (6) whether liquidation has been unduly delayed, in view of general economic conditions; (7) the probability of loss or impairment of assets under the present corporate management; (8) the solvency or insolvency of the corporation.

McCarthy Co. v Coal Co., 204-207; 215 NW 250; 54 ALR 1116

General equitable relief prayed. In equity action seeking the appointment of a receiver, defendant's contention that a receiver could not be appointed because no main cause of action was stated was without merit, since plaintiff was in fact seeking to foreclose a lien on rents and had asked for general equitable relief, the rule being that "equity does not deal

in technicalities, but rather it seeks to ascertain the true intent of the pleading filed".

Wagner v Securities Co., 226-568; 284 NW 461

Insolvency not necessary. In an equity action for foreclosure of realty mortgage also asking appointment of receiver, where inadequacy of security is shown and mortgage provided for appointment of receiver, court is authorized to appoint a receiver without proof of insolvency.

Federal Bank v Ditto, 227-475; 288 NW 618

Right of minority stockholders. A receiver may, in an action by minority stockholders, very properly be appointed for a solvent corporation which is no longer a going concern and is in process of liquidation, on a showing that the management is inefficient, negligent, and fraudulent, to the manifest detriment of the plaintiffs.

Crow v Mtg. Co., 202-38; 209 NW 410

III PARTICULAR SUBJECT MATTERS

(a) IN GENERAL

Receiver pending action to quiet title.

Korf v Howerton, 201-428; 205 NW 323

Receivership—who may not object to. Alleged partners in an alleged private banking business may not object to the appointment of a permanent receiver for the business on the prayer of those who are admittedly partners when the order of appointment in no manner disturbs complainants in their property and specifically withholds adjudication of the issues whether complainants are partners.

Tillinghast v Courson, 215-957; 247 NW 252

Refusal of receivership—presumption. The refusal of a receivership for property in controversy in the probate court, even tho the petition for said appointment is strictly in compliance with the statute, is supported by affidavits, and is resisted only orally and informally, is presumptively correct. Appellant must negative the presumption.

Frazier v Wood, 214-237; 242 NW 78

Mechanic's lien foreclosure. The appointment in mechanic's lien foreclosure proceedings of a receiver of the rents, at the instance of a vendor and lien claimants, may be proper when the equitable owner of the property in question is insolvent, and when the property itself is inadequate security for the established claims.

D M Marble v McConn, 210-266; 227 NW 521

(b) RENTS AND PROFITS INVOLVED

Deficiency judgment in rem. A receiver may, on a proper showing, be appointed to collect pledged rents, and thereby discharge a deficiency judgment, whether the deficiency arises on a judgment in personam or in rem.

Interstate Assn. v Nichols, 213-12; 238 NW 435

Injury or loss as essential element. A receiver of the rents and profits of land, properly in the hands of an executor of an estate, is properly denied when there is no evidence that said rents and profits are in danger of being lost or injured if left in the hands of the executor.

Farber v Ritchie, 212-1396; 238 NW 436

Mortgage on rents—right to receiver to protect. A mortgagee of the rents and income of real estate is entitled to have a receiver appointed to protect his right to said rents and income when said right is jeopardized by the unauthorized acts of an impecunious mortgagor.

Equitable v McNamara, 220-297; 259 NW 231; 262 NW 466

Unauthorized appointment. Upon a sale of land on execution under an ordinary judgment at law, the court has no authority to appoint a receiver to collect the rents and profits of the land during the period of redemption.

Anthony v Heiny, 215-1347; 244 NW 902

IV EFFECT OF RECEIVERSHIP IN GENERAL

Failure to file claim—effect. The failure of a creditor to file his claim in receivership proceedings against his debtor does not bar the creditor from asserting his claim against the debtor after the termination of said proceedings.

Zimbelman v Boone Coal, 220-1310; 263 NW 335

Nonabatement of action by receivership. The appointment of a receiver for an insolvent corporation does not abate an action by the corporation as a judgment creditor to set aside conveyances as fraudulent; and if the receiver be not substituted as plaintiff the action may be continued by the corporation in its corporate name.

Grimes Bank v McHarg, 217-636; 251 NW 51

12714 Permissible proofs.

Insolvency not necessary. In an equity action for foreclosure of realty mortgage also asking appointment of receiver, where inadequacy of security is shown and mortgage provided for appointment of receiver, court is authorized to appoint a receiver without proof of insolvency.

Federal Bank v Ditto, 227-475; 288 NW 618

12715 Oath and bond of.

Suretyship generally. See under §11577

Breach of unauthorized contract. Sureties on a receiver's bond are not liable for a breach

by the receiver of a contract of lease which the court has never authorized or approved.

Matson v Surety Co., 204-632; 215 NW 630

Nonrelease of surety. The surety on the bond of a receiver appointed to take charge of grain and await the further orders of the court is not released because without notice to the surety and without his consent the court subsequently ordered the receiver to convert the grain into money, said bond specifically calling for a full accounting of all money received.

McClatchey v Marquis, 203-76; 212 NW 371

12716 Powers.

Discussion. See 20 ILR 113—Foreign assets; 22 ILR 60—Tort claims in receiverships

ANALYSIS

Bank receiverships. See under §9239
Receivers in mortgage foreclosures. See under §12372 (VII)

I POWERS IN GENERAL

Chattel mortgage — nonright to question. The receiver of an insolvent corporation has no such standing as will enable him to advantage himself of technical defects in a chattel mortgage executed by the corporation when solvent. So held where the description of the property was indefinite.

Silver v Farms, Inc., 209-856; 227 NW 97

Employees' contracts for arbitration—not binding unless approved by court. In a receivership proceeding neither an agreement with employees for arbitration of differences nor award thereunder is binding on receivers of street railway company without advance authorization from the court or subsequent approval.

Amalgamated Assn. v Railway, 14 F 2d, 836

Insolvent partnership—authority to authorize suit against partners. In an action for the dissolution of an insolvent partnership, a court of equity has power to authorize its receiver to bring suit against the partners to collect the funds necessary to pay the debts of the partnership in full.

Bierma v Ellis, 212-366; 236 NW 402

II ACTIONS

Abatement of authorized action. A court having ordered its receiver in partnership to begin action against the partners, in order to collect funds with which to pay creditors, has discretionary power, after such action has been commenced, and on a showing that the receiver has in his possession a very large amount of unliquidated partnership assets, to abate the action until such assets are liquidated.

Day v Power, 219-138; 257 NW 187

Certificates—absence of notice. The fact that a stockholder in an insolvent bank was not made a party to proceedings which resulted in the issuance of receiver's certificates becomes quite immaterial when, in an action by the receiver to enforce an assessment to pay said certificates, the stockholder is afforded full opportunity to question the legality of such certificates.

Andrew v Bank, 206-869; 221 NW 668

Certificates—subrogation. The holder of certificates of indebtedness issued and sold by the receiver of an insolvent bank in order to raise funds with which to pay the debts of the bank, will, in an action by the receiver to enforce an assessment on corporate stock in order to pay the certificates, be deemed to stand in the shoes of the original creditors of the bank.

Andrew v Bank, 206-869; 221 NW 668

Collections of assessments—petition—sufficiency. A foreign bank receiver, in an action in this state to collect "double" stock liability, need not allege that the defendant stockholder had notice of the hearing on the necessity for such assessment; nor need the petition set forth a copy of the order entered by the foreign court on such hearing.

Baird v Cole, 207-664; 223 NW 514

Compromise — approval by court — review. The action of the court in bank receivership proceedings in approving a compromise on a written guaranty by the directors of payment of certain assets of the bank will not be set aside in the absence of a showing that such approval is not in the interest of the depositors; and especially is this true when an element of uncertainty exists as to the extent of the legal recovery under the guaranty.

Andrew v Bank, 205-712; 218 NW 520

Creditor's bill—conditions. The obtaining of a judgment against a purported partner in an insolvent private bank is a condition precedent to the right of the receiver to maintain a general equitable action to set aside an alleged fraudulent conveyance by the partner.

Cooper v Erickson, 213-448; 239 NW 87

Foreign receivership—right to maintain action in this state. A foreign receiver of a foreign insolvent banking corporation may maintain an action in this state to collect a "double" liability assessment on the stock of a stock-

holder who is a resident of this state when the receiver is charged by statute with the duty to make such collection and to distribute the proceeds among creditors.

Baird v Cole, 207-664; 223 NW 514

Order ratifying oral contemporaneous contract—effect. In an action by a receiver to recover mining royalties accruing under a written contract, the defendant may show that the court has, on due notice and hearing, approved, confirmed, and ratified an oral contract which was contemporaneous with the written contract and which varied and altered the terms of said written contract.

Dinning v Krapfel, 211-888; 232 NW 490

Rents and profits not garnishable. A motion to dismiss a garnishment against a receiver should have been sustained on the ground that the receiver was not subject to garnishment for rents and profits when the record showed that the receiver acted under court order in renting property for the benefit of holders of notes against the company in receivership.

Sioux Falls Assn. v Henry Field Co., 226-874; 285 NW 155

Unpaid stock subscriptions — liability determined in receivership proceedings. An ancillary bill by a receiver of insolvent corporation to enforce collection upon unpaid stock subscriptions cannot be maintained in equity in the same court where receivership proceedings are pending, since the stockholders are not necessary parties to the receivership action as they are represented by the corporation, itself, which is a party to the action, and the liability of such stockholders can be determined in the receivership action after which the receiver may proceed by action at law against the various subscribers for the unpaid stock subscriptions.

Britton v Andrews, 8 F 2d, 950

Unpaid stock subscriptions—exclusive right of general receiver to maintain action. After the appointment of a general receiver for the purpose of winding up the affairs of a corporation, or after appointment of a trustee in bankruptcy, such officer has the sole and exclusive right to maintain suits for the collection of unpaid stock subscriptions. So, where a judgment creditor started an action for the collection of such unpaid stock subscriptions after having established his claim in receivership and also obtaining judgment thereon in the state court, a motion to dismiss such creditor's suit was properly sustained. The appointment of receiver affects ordinary procedural rights of creditors of corporation where the pursuit thereof interferes with rights of receiver.

Reagan v Midland Co., 8 F 2d, 954

III TITLE AND POSSESSION OF PROPERTY

Acts constituting conversion. One who is in possession of property as agent of a duly appointed receiver is not guilty of a conversion of the property by refusing to give it up without the consent of the receiver, even tho such agent is plaintiff in the action in which the receiver was appointed and even tho a full settlement of the action has been consummated but not yet called to the attention of the court.

McCarthy v Cutchall, 209-193; 225 NW 865

Agent of court only—trustee of funds. A receiver is not an agent of anyone except the court appointing him, but he holds any fund at least as quasi trustee for the benefit of whoever may eventually establish title thereto.

Andrew v Bk. & Tr., 225-929; 282 NW 299

Commercial paper held for collection. The receiver of an insolvent bank takes no title to commercial paper coming into his hands and received by the bank for collection only.

Leach v Bank, 201-349; 207 NW 332

Unexecuted rescission of fraudulent contract. A subscriber for corporate shares of stock who, while the corporation is a going concern, enters into a bona fide agreement with the corporation for the complete rescission of the stock subscription contract, will be entitled to judgment against a subsequently appointed receiver for the amount of the stock subscription notes executed by him and transferred by the corporation and not returned to him as provided in the contract of rescission.

Lex v Selway Corp., 203-792; 206 NW 586

Fraud in incorporation—effect on title of receiver. Even tho the court in proceedings for the dissolution of a so-called corporation found and decreed, in effect, that the concern was conceived, born, and nurtured in fraud, nevertheless, in receivership proceedings for the ordering of an assessment on those who had contracted for stock in the concern and had not paid therefor, the receiver will be deemed to have prima facie title to such contracts of subscriptions.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Garnishment — priority over receivership. The receiver of a defunct corporation takes the property of the corporation subject to the prior positive rights acquired by a creditor under a duly perfected garnishment of the admitted debtors of the corporation.

Watts v Surety Co., 216-150; 248 NW 347

Liens and equities unchanged. The title to property is not changed by the appointment of

III TITLE AND POSSESSION OF PROPERTY—concluded

a receiver, as he takes it subject to existing liens and equities, and his taking exclusive possession thereof does not interfere with or disturb any pre-existing liens, preferences, or priorities.

Andrew v Bk. & Tr., 225-929; 282 NW 299

Mortgages—rents—priority over receiver. The receiver of an insolvent bank must be deemed to hold the insolvent's mortgaged land (which it took "subject to said mortgage") subject to the right of the mortgagee, in order to satisfy a deficiency judgment, to perfect and enforce a pledge of the undisposed of rents as provided in the mortgage.

Reason: The receiver may no more deny the mortgagee's right to said rents than might the insolvent deny such right.

Lincoln JSL Bank v Barlow, 217-323; 251 NW 501

Right of review—receivers. The receiver of an insolvent bank has a right to appeal from an order which grants to a depositor an equitable preference over all other creditors in the payment of his claim.

Andrew v Bank, 205-1248; 218 NW 24

Unpaid stock subscription—nonliability. A subscriber for corporate stock who is not a promoter of the purported corporation is not liable on his fraud-induced, unpaid stock subscription contract in an action by the receiver of the corporation when the charter of the corporation has been judicially annulled, subsequent to the subscription contract, by the state, for fraud perpetrated on the state in obtaining the charter; in other words, the so-called English "Equitable Trust Fund Doctrine" does not apply to such a condition.

Fundamental reason: Such purported corporation, having been conceived, born, and nurtured in fraud, was never, in truth or fact, a corporation de jure or de facto, in a business sense.

State v Packing Co., 216-1344; 249 NW 761; 90 ALR 1339

IV MANAGEMENT AND DISPOSITION OF PROPERTY

Action to enforce partner's liability — waiver. The liquidating receiver of a private bank, when appointed with power to bring action against the partners on their individual liability, may, with the approval of the court, and notwithstanding the objections of a creditor, settle and compromise the liability of a partner when the creditor has appeared in the receivership proceedings and secured the allowance of his claim.

Reason: The creditor, by submitting himself to the jurisdiction of the receivership court, irrevocably elects his remedy.

Ellis v Bank, 218-750; 251 NW 744

Borrowing under order of court—expense of administration—priority. Money borrowed by a receiver under authority of an order of court must be repaid as an expense of administration, and the lender is entitled to a preference over other creditors.

Klages v Freier, 225-586; 281 NW 145

Continuing business—expenses incurred. On creditor's petition for appointment of receiver, the court, in the interest of the parties, may direct him to temporarily continue the corporation's business. Obligations incidental thereto are a necessary expense of receivership and payable from assets even before distribution of any funds to preferred creditors.

Miller Co. v Silvers Co., 227-1000; 289 NW 699

Death of bankrupt—widow's rights—allowance and dower. Where a husband secures a receiver for his property in a state court and, with his wife, makes a conveyance of property to such receiver, and thereafter is adjudged an involuntary bankrupt, but dies before the disposition of his property by the trustee, and application is made for widow's allowance in the bankruptcy proceeding, held, that the bankruptcy adjudication and vesting of realty was not such "other judicial sale" as will defeat her right of dower, and her relinquishment by deed to husband's receiver of her contingent rights in his property became void by bankruptcy proceedings. In construing statutes for allowance to widows and children, equity court should be careful to do them no injustice.

Johnson v Payne, 26 F 2d, 450

Dissolution and annulment of incorporation. Even tho a so-called incorporation is dissolved and its life wholly annulled, nevertheless, the receiver appointed for the purpose of winding up its affairs must be deemed to represent the corporation for said purpose.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Partnership—dissolution—receiver's general sale power. A receiver in a partnership dissolution, while having no inherent powers but only those conferred by the appointing decree and subsequent orders, may, nevertheless, under a decree definitely granting general power to sell property without prior application to the court, make a sale of stock at an adequate price involving no bad faith, which sale, being by an officer of the court requiring court approval, is, when set out in and approved as part of an annual report, a completed valid sale entitling purchaser to a stock transfer on the proper corporation records.

Van Alstine v Bank, 224-1311; 278 NW 604

Execution of trust — trustees (?) or receiver (?). A court of equity may not terminate or violate a trust agreement between the issuer of bonds and trustees to the effect that the former will transfer to the latter se-

curities for the benefit of bondholders, and that if the issuer defaults in the payment of interest on, or principal of, the bonds, the trustees, on notice from the unpaid bondholders, shall liquidate said securities and apply the proceeds to the payment of the bonds. It follows that, if the issuer of the bonds becomes insolvent, the trustees, in the absence of any counterwish of the bondholders, have a right superior to that of the receiver to liquidate the securities, the securities being less than the outstanding bonds; and this is true even tho the securities in question are not actually transferred to the trustees but only delivered to them.

In re Trusteeship, 214-884; 241 NW 308

Federal income tax on operating receiverships—nature of business. The federal statute requiring operating receiverships to pay income tax applies to a receiver, where a substantial part of business both before and after the appointment was the investment of corporation funds in securities and the collection of rents and profits, even tho the receiver was appointed to liquidate the business.

State v Cas. Co., 225-638; 281 NW 172

Improvident judicial sale—setting aside after confirmation—review. The court has jurisdiction to set aside a judicial sale after confirmation where improvidently and inadvertently made; but, in the absence of any showing to that effect, a review will be denied.

Parks v Carlisle Co., 224-193; 276 NW 591

Insolvent corporation assets—appraiser as buyer—setting aside sale. Generally, an appraiser individually may not purchase the property he appraised, but the fact that one of three court-appointed appraisers for a corporation in receivership, later with two other persons as trustees for bondholders, bought the appraised property at judicial sale, will not suffice to set aside such sale on motion, in the absence of showing that stockholders or creditors were prejudiced thereby, or that the buyer was interested in the property when he acted as a joint appraiser, or that the price was inadequate.

Parks v Carlisle Co., 224-193; 276 NW 591

Liability on bond—breach of unauthorized contract. Sureties on a receiver's bond are not liable for a breach by the receiver of a contract of lease which the court has never authorized or approved.

Matson v Surety Co., 204-632; 215 NW 630

Management of property—source of authority. A receiver's authority is measured by the order of appointment, the powers reasonably inferred therefrom, and subsequent directions of the court.

Sutton v Schnack, 224-251; 275 NW 870

Receiver's lease not conclusive of mutual rescission. In vendee's action to cancel a real estate contract and note, a mutual rescission is not established by showing that the receiver in a mortgage foreclosure proceeding against the real estate had leased the premises to vendee, when the lease, by its very terms, was not to become effective unless vendee paid all obligations to vendor.

Fitchner v Walling, 225-8; 279 NW 417

Right of creditors. Creditors of an insolvent whose affairs are under receivership have a right to appear in such proceedings and enter their objections to improper orders.

Schubert v Andrew, 205-353; 218 NW 78

Right of set-off. In receivership matters the rights of all parties as to set-off are to be determined as of the date of the appointment of the receiver.

Andrew v Trust Co., 217-657; 251 NW 48

Sale—bid—cancellation. A bid at a sale in partition is effectually canceled by the act of the bidder in accepting a return of his required cash deposit, even tho such deposit is returned under the order of the court.

Fraizer v Fraizer, 204-724; 215 NW 946

Stock—corporation having first option to buy—no restriction on judicial sale—mandamus to transfer. Sale of assets of insolvent national bank made in obedience to an order of court is not a voluntary but a judicial sale; therefore, a corporation whose stock was sold thereunder is not entitled to notice thereof, even tho its articles of incorporation required notice of proposed sale of stock, and mandamus will lie to compel the transfer of said stock on its records.

McDonald v Farley Co., 226-53; 283 NW 261

Waiver of valuable rights. A chancery receiver may not waive a valuable right without the authority of the court, nor may an agent of a statutory receiver (e. g., the superintendent of banking) waive such valuable right without the authority of such statutory receiver. So held under the bulk sales act.

Andrew v Rivers, 207-343; 223 NW 102

V ALLOWANCE AND PAYMENT OF CLAIMS

(a) IN GENERAL

Belated filing. It is within the discretion of the court to recognize a belatedly filed claim, no dividends having been paid.

Andrew v Bank, 203-546; 213 NW 245

Order permitting belated filing of claim. Appeal will not lie from an order which grants to a claimant in receivership proceedings the naked right to file and prove his claim after the time originally fixed for the filing of claims.

In re Hamburg, 203-1399; 214 NW 561

Compromise of claims. A receiver may not compromise claims except under prior author-

V ALLOWANCE AND PAYMENT OF CLAIMS—continued

(a) IN GENERAL—continued

ity of, or under subsequent ratification by, the court.

Sherman v Linderson, 204-532; 215 NW 501

Failure to file—effect. The failure of a creditor to file his claim, in receivership proceedings, against his debtor does not bar the creditor from asserting his claim against the debtor after the termination of said proceedings.

Zimbelman v Boone Coal, 220-1310; 263 NW 335

Failure to object to claim. A receiver may contest the allowance of a claim filed with him even tho he files no formal objections to the claim.

Leach v Bank, 207-471; 220 NW 10

Filing—unavoidable lack of details—effect. A claimant in receivership proceedings who formally brings his claim to the attention of the court and to the receiver within the time fixed by the court for the filing of claims, and in so doing sets forth the general facts as definitely as he is then able to discover them, may very properly be granted relief even tho the particular and detailed facts are discovered long afterwards.

In re Selway, 211-89; 232 NW 831

Liberality in pleadings. In the adjudication of claims pending in receivership proceedings, compliance with the strict rules of pleadings will not ordinarily be demanded.

Andrew v Bank, 207-948; 222 NW 8

Nonnecessity for formal objections. The receiver of an insolvent bank is under no legal obligation to file formal objections to a claim which asserts a right to an equitable preference in payment of a deposit. In other words, he may contest the claim without formal pleadings.

Andrew v Church, 216-1134; 249 NW 274

Notice. Claims which are filed in receivership proceedings may be validly allowed by the court without individual notice to all other creditors of the filing of such claims.

Schubert v Andrew, 205-353; 218 NW 78

Payment to third party. Where a corporation agrees to a rescission of a contract of sale of its corporate shares of stock, and agrees to obtain and pay the purchaser's promissory note which had been transferred, the receiver for the corporation may, very properly, be directed to pay dividends direct to the holder of the note, the said holder and maker of the note joining in such request.

In re Selway Co., 211-89; 232 NW 831

Proof of claim. Claims treated by all parties in the trial court as sufficiently established will be so treated on appeal, the sole contention in the trial court being as to the legal liability of defendant therefor.

State v Cas. Co., 213-200; 238 NW 726

Status of claims—subsequent appeal—law of case. A final holding on appeal that certain claims in a receivership are general claims fixes the status of such claims regardless of any subsequent order of the trial court.

State v Cas. Co., 216-1221; 250 NW 496

Nonallowable attorney fees. An attorney who, under employment by a debtor whose property is under receivership, successfully defends an attempt to throw the debtor into bankruptcy, may not have his attorney fees paid from the receivership funds, when the receiver and his attorney under order of court also appeared and successfully contested said bankruptcy proceeding.

Cook v McHenry, 208-442; 223 NW 377

Unallowable claims. Attorney fees, disbursements, and costs incurred by a policyholder on his own behalf with reference to a policy of insurance, after the insurer had passed into the hands of a receiver, are not allowable against the receiver.

State v Cas. Co., 213-197; 238 NW 731

Interest. Where allowed claims in a receivership are all general claims and of the same class, any balance of funds remaining after paying said claims in full and costs of administration will be applied as interest on a pro rata basis among said claimants.

State v Cas. Co., 216-1221; 250 NW 496

Balance of funds as interest. Where allowed claims in a receivership are all general claims and of the same class, any balance of funds remaining after paying said claims in full and costs of administration will be applied as interest on a pro rata basis among said claimants.

State v Cas. Co., 216-1221; 250 NW 496

Election of remedy. A creditor of an insolvent banking partnership who, under an authorizing order of court, files proof of his claim with a duly appointed and unquestioned receiver of the partnership will not be permitted thereafter to maintain an independent action against the partners until after the receivership has been closed, when the receiver, under an order of court, has already instituted an action against all the partners to collect the amount necessary to settle the indebtedness of said bank; especially is this true when a multiplicity of suits is avoided.

Bierma v Ellis, 212-366; 236 NW 402

Federal income tax—statute of limitations not started by insufficient tax return. The

mere filing of a federal income tax blank containing, not the required information, but only a notation across the face that the corporation was "hopelessly insolvent" and in the hands of a receiver, does not constitute a legal return as will start the statute of limitations operating against the income tax assessment.

State v Cas. Co., 225-638; 281 NW 172

Dissolution of corporation—federal income tax liability. The state, not owning the property, has no such interest in a corporation under receivership as to prevent the federal government from collecting income tax therefrom, even tho the receivership arose out of the state's action in its governmental capacity for a dissolution of the corporation.

State v Cas. Co., 225-638; 281 NW 172

Claims—lapsed time for hearing—reopening discretionary. Trial court administering receiverships has a discretion dependent upon equitable circumstances and not a mandatory duty to permit a claim to be presented and heard after the time fixed therefor.

Headford Co. v Associated Co., 224-1364; 278 NW 624

Claims—disallowance—penitentiary confinement insufficient equitable ground to reopen. Penitentiary confinement of the president of a corporation, the claimant in a receivership, without a showing that no other representative of the claimant had sufficient information to object to a receiver's report, is not, when asserted four years after an order approving the report disallowing the claim, such equitable circumstance as will make court's refusal to hear the claim an abuse of discretion.

Headford Co. v Associated Co., 224-1364; 278 NW 624

Claims—order approving disallowance construed. An order of court in an insolvent corporation receivership proceedings in the language, "The claims filed * * * be and the same are hereby allowed as classified by the receiver herein * * *", construed to mean an approval of the disallowance of a claim by the receiver.

Headford Co. v Associated Co., 224-1364; 278 NW 624

(b) PRIORITIES

Allowance and payment of claims—stockholder's advance of clay pit rent—extent of priority. After a clay products company has gone into receivership neither delinquent nor accruing rent on its clay pit advanced by a stockholder taking an assignment of the clay pit lease, is collectible in full from the receiver as expenses of administration nor as a rent obligation to which the stockholder became subrogated, when the sale price of the clay pit lease was less than the claim for rent advanced thereon, but an order allowing priority for the rent claim to the extent of the sale price of the clay pit lease and establishing the balance of the advanced rent as a general claim was correct.

Parks v Carlisle Co., 224-193; 277 NW 731

Augmentation of assets — nonpresumption. An equitable preference in payment of trust funds may not be decreed against the receiver of an insolvent trustee on a record which is absolutely silent as to the property taken over by the receiver and as to the value thereof.

Leach v Bank, 204-760; 216 NW 16

VI ACCOUNTING AND DISCHARGE

Discharge—settlement of action. The full and complete settlement by the parties to an action in which a receiver is appointed, does not, ipso facto, discharge the receiver and release the property which the receiver is holding.

McCarthy v Cutchall, 209-193; 225 NW 865

Dissipated trust funds. The receiver of an insolvent bank may not be charged with that part of a trust fund which has been wrongfully and unlawfully dissipated prior to the time when the balance of the fund came into his hands.

Leach v Bank, 206-675; 220 NW 113

Condition precedent. A party may not have an accounting unless he first pleads and proves that something is due him.

Oskaloosa Bank v Bank, 205-1351; 219 NW 530; 60 ALR 1204

Courts' obligations—diligence in paying required. Courts and their officers, e. g., receivers, should be especially diligent in meeting the obligations of their receivership contracts, however unfortunate they may turn out.

Klages v Freier, 225-586; 281 NW 145

Federal income tax from receiver—burden of sustaining deductions. In an action involving a claim for federal income tax from an insolvent corporation, the assessment by the internal revenue collector must be treated as prima facie evidence of the amount due, and the state statutes do not control the matter of deduction for attorney fees, referee fees, court costs, and other expenses, but the burden is on the receiver to establish these deductions.

State v Cas. Co., 225-638; 281 NW 172

Final report and discharge—absence of notice—effect. The approval of the final report of a receiver in foreclosure proceedings and the discharge of the receiver, when entered without prior notice to the mortgagee, may be set aside on a showing that the receiver made an unauthorized distribution of the funds in his hands; and a delay of some four years by the mortgagee will not necessarily bar relief, especially when no one has changed his position because of the delay.

Farmers Bk. v Pomeroy, 211-337; 233 NW 488

VI ACCOUNTING AND DISCHARGE—concluded

Receiver of insolvent co-executor trust company—control by probate. Where the district court of Scott county appoints a receiver to take charge of an insolvent trust company which was also a co-executor and co-trustee in an estate pending in the district court of Johnson county, and when such receiver is ordered by the Johnson district court to report and account, such receiver does not, by filing a pleading and supporting it by evidence denying the jurisdiction of the Johnson district court, thereby make a "general appearance" in the Johnson district court.

Bates v Evans, 226-438; 284 NW 385

Statutory bond to discharge receiver and pay claims—effect. Where, in order to secure an order for the discharge of a receiver, the defendant in the receivership proceedings executes and delivers to a claimant in said proceeding a bond conditioned to pay said claimant whatever judgment he may obtain on his claim, it follows that the claimant's lien on the assets in the hands of the receiver is thereby transferred to the bond, and recovery may be had on said bond for whatever judgment the claimant secures on his claim.

Shanahan v Truck Co., 209-1231; 229 NW 748

VII COMPENSATION

Expenditures—allowance. The expenditures of a receiver are properly allowed to him when they are authorized or ratified by the court, and especially when they are distinctly in the interest of the creditors.

Sunset Park Co. v Eddy, 205-432; 216 NW 93

VIII FOREIGN RECEIVERSHIP

Comity. A foreign receiver may maintain in this state an action to recover of a corporate stockholder a statutory liability on stock holdings.

Hirning v Hamlin, 200-1322; 206 NW 617
Gruetzmacher v Quevli, 208-537; 226 NW 5

Foreign corporations—dissolution and receivership—effect. A foreign decree of dissolution of a corporation, and an order appointing a receiver to wind up its affairs, do not abate an action aided by attachment in this state, because the claim of the receiver of a foreign corporation to its property in this state will not be recognized as against the valid claims of resident attaching creditors.

Watts v Surety Co., 216-150; 248 NW 347

Right to maintain action in this state. A foreign receiver of a foreign insolvent banking corporation may maintain an action in this state to collect a "double" liability assessment on the stock of a stockholder who is a resident of this state, when the receiver is charged by statute with the duty to make such collection and to distribute the proceeds among creditors.

Baird v Cole, 207-664; 223 NW 514

12717 Priority of liens.

Lienable judgment during receivership. A judgment rendered against a debtor at a time when he is under temporary receivership for purposes other than the winding up of the affairs of the debtor (even tho the receiver is not a party to the action) is valid and lienable on the lands of the debtor in preference to other creditors, even tho, subsequent to the rendition of such judgment, the said receivership is converted into a proceeding for the winding up of the affairs of the debtor.

Britten v Oil Co., 205-147; 217 NW 800

Application of partnership assets and assets of partners. Where partnership property and the individual property of all the partners are in the hands of the partnership receiver, a creditor whose claim is against the partnership because of a partnership transaction, and also against an individual partner because the partner has individually guaranteed the claim, may have the assets so marshaled that he will share in the partnership property along with the other partnership creditors, and then resort to the individual property of the guaranteeing partner to the exclusion of partnership creditors.

Ia.-D. M. Bk. v. Lewis, 215-654; 246 NW 597

Notice—coparties. In an action by a municipality against the receiver of an insolvent bank and its surety, to obtain a preference in the payment of the municipal deposit, an appeal from the decree granting the prayer on the plea of both plaintiff and the surety will be dismissed when no notice of appeal is had upon the surety.

Ind. Dist. v Bank, 204-1; 213 NW 397

Rents—priority over receiver. The receiver of an insolvent bank who forecloses a second mortgage belonging to the insolvent and receives a sheriff's deed, acquires by said deed simply the rights formerly possessed by the mortgagor-owner. It follows that the receiver holds said land subject to the right of the first mortgagee subsequently to perfect and enforce a pledge of the undisposed of rents, in order to satisfy a deficiency judgment, as provided in the first mortgage. (Schlesselman v Martin, 207 Iowa 907, overruled.)

Metropolitan v Sheldon, 215-955; 247 NW 291

Northwestern Ins. v Gross, 215-963; 247 NW 286

Metropolitan v Smith, 215-1052; 247 NW 503

Willey v Andrew, 215-1104; 247 NW 501

Connecticut Ins. v Stahle, 215-1188; 247 NW 648

Lincoln Bank v Barlow, 217-323; 251 NW 501

Rents—priority over receiver. The receiver of an insolvent bank must be deemed to hold the insolvent's mortgaged land (which it took "subject to said mortgage") subject to the right of the mortgagee, in order to satisfy a deficiency judgment, to perfect and enforce a pledge of the undisposed of rents as provided in the mortgage.

Reason: The receiver may no more deny the mortgagee's right to said rents than might the insolvent deny such right.

Lincoln JSL Bank v Barlow, 217-323; 251 NW 501

12718 Taxes as prior claim—nonnecessity to file.

Estates—gross premiums tax as preferred claim. In estate and receivership proceedings, taxes have preference over other claims. Held, foreign corporations gross premiums tax allowable in receivership as preferred claim without interest.

State v National Life, 223-1301; 275 NW 26

Property in custodia legis—tax claim. A statute levying a tax is sufficient basis to support a claim in receivership against the property in custodia legis.

State v National Life, 223-1301; 275 NW 26

Taxes. Rents on real estate, fully accrued prior to the commencement of a foreclosure and in the hands of a receiver under a prior foreclosure, need not be applied by the court to the payment of taxes on the premises.

Haning v Dunlop, 203-48; 212 NW 351

12719 Claims entitled to priority.

Equitable trusts in bank receiverships. See under §9239

Atty. Gen. Opinion. See '28 AG Op 160

Common-law rule repudiated. The common-law rule relative to the preferential standing of claims due the state and its governmental subdivisions is not in force in this state.

In re Gates, 200-1039; 205 NW 968

Contra; Davis v Bargloff, 200-1160; 206 NW 251

Estates—gross premiums tax as preferred claim. In estate and receivership proceedings taxes have preference over other claims. Held, foreign corporation's gross premiums tax allowable in receivership as preferred claim without interest.

State v National Life, 223-1301; 275 NW 26

Interest on preferred claims. The holder of a preferential claim for public funds, which has been allowed against the receiver of an insolvent bank is not entitled to interest on the claim, tho payment be long delayed on account of litigation.

Leach v Bank, 210-613; 231 NW 497; 69 ALR 1206

Liquidation of banks. Principle reaffirmed that §9239, C., '24 and related sections on the same subject provide an exclusive procedure for the liquidation of an insolvent state bank, without preference to any depositor.

Leach v Bank, 202-97; 209 NW 421

Priority of claim over taxes. A chattel mortgagee may not have his claim reduced by taxes which have never been a lien on the mortgaged chattels superior to that of the mortgage.

In re Cutler & Horgen, 213-983; 234 NW 238; 238 NW 80

Priority of public debts and taxes. This section does not embrace a tax levied on the shares of stock of a corporation and against the individual owners thereof in a year during which, and before the taxes become payable, the corporation passes into receivership, the corporation being statutorily liable, generally, for the payment on behalf of stockholders of taxes on shares of its stock.

Wilcoxen v Munn, 206-1194; 221 NW 823

"Receivership" defined. An assignment for the benefit of creditors may not be deemed a "receivership" for the purpose of determining claims entitled to preference in payment.

In re Gates, 200-1039; 205 NW 968

Repeal of preferential deposit law. Sureties on a bank depository bond conditioned to hold the state harmless on deposit of state funds in said bank, and given at a time when the state possessed a statutory preferential right, in case the bank was thrown into receivership, to be paid in full prior to the payment of general depositors, are not entitled, upon the payment of a loss, in case of such receivership, to be subrogated to such right on the part of the state, when, prior to such payment, the statute giving such right has been repealed. This is on the priniciple that a surety is entitled to subrogation only upon payment of the principal's debt, and only to the rights then possessed by the creditor.

Leach v Bank, 205-1154; 213 NW 517

Statutory recitals exclusive. A specific recital in an insolvency statute as to what claims shall be entitled to preference in payment is exclusive of all other claims.

In re Gates, 200-1039; 205 NW 968

Subrogation. Principle reaffirmed (1) that a surety on a public depository bond is not, on payment of the bond, entitled to be subrogated to the preferential rights of the municipality existing when the bond was given, when, at the time of such payment, the statute granting such payment had been repealed; and (2) that the repeal of such statute impaired no contract obligation and violated no vested right of such surety.

Andrew v Bank, 205-883; 213 NW 531

Tax paid by surety. A surety whose bond was held for a compromise of corporate federal income taxes holds no lien upon the corporate assets but has merely a right to be paid from assets held by receiver before payment to other claimants, and a receiver authorized to continue a business is not personally liable to such surety for diminishment of assets during receivership, tho such assets at the time of receiver's appointment would have been sufficient to pay the surety.

Miller Co. v Silvers Co., 227-1000; 289 NW 699

Vested right. A municipal corporation which, at the time an insolvent bank is placed under receivership, is entitled, under a statute as construed by the supreme court, to a priority in the payment of its municipal deposit, is not deprived of such priority by a subsequently enacted statute which denies such priority.

Murray v Bank, 202-281; 208 NW 212; 214 NW 975

Vested rights. The general assembly has constitutional power by legislative act to deprive a county of an existing right of preference in a deposit of money belonging to the county in an insolvent bank.

Kuhl v Bank, 203-71; 212 NW 337

Unallowable equitable action. An order of court which, in bank receivership proceedings, mistakenly grants, under a misapprehension of the law, an absolute preference in payment of the deposit of a municipality, may not, on the ground of such mistake, be set aside by an independent action in equity by other depositors and creditors of the insolvent bank, when such depositors and creditors neither (1) appealed from said order, nor (2) entered, in the receivership proceedings, any objection to such order.

Schubert v Andrew, 205-353; 218 NW 78

12719.1 Nonapplicability.

Appeal—receivership creditor. Depositors and creditors in a bank receivership have a right to appeal from an order of court which grants to a depositor an unallowable preference in the payment of his deposits.

Schubert v Andrew, 205-353; 218 NW 78

Nonpreference in payment of taxes. Taxes on corporate bank stock and against the individual owners thereof may not be collected from the receiver of a bank which is insolvent to the extent that it cannot pay its depositors.

Andrew v Munn, 205-723; 218 NW 526

12719.3 Discovery of assets.

Discovery proceedings—extent of jurisdiction. In a discovery proceeding against a person suspected of taking wrongful possession of decedent's property, where a dispute arises as to ownership of property, neither the trial nor appellate court has authority to order delivery of the property to the executor or administrator unless it appears beyond controversy that the person examined has wrongful possession of the property.

In re Hoffman, 227-973; 289 NW 720

Scope of inquisitorial proceeding. In strictly inquisitorial proceedings for the discovery of assets belonging to an estate, the court has no authority to order property turned over to the administrator when the title to such property is in dispute; especially is this true when the property apparently does not belong to the estate.

In re Brown, 212-1295; 235 NW 754
Findley v Jordan, 222-46; 268 NW 515

CHAPTER 550

ASSIGNMENT FOR BENEFIT OF CREDITORS

Bankruptcy generally. See Note 1 at end of chapter

Fraudulent conveyances. See under §11815

12720 Must be without preferences.

Discussion. See 20 ILR 113—Foreign assets

Assignment of testamentary interest—ratification by certain creditors. An assignment of the interest of beneficiary of a testamentary trust for the benefit of certain creditors, ratified by the creditors benefited, is not a general assignment and need not be for the benefit of all creditors.

Friedmeyer v Lynch, 226-251; 284 NW 160

Equity (?) or law (?). The court is inclined to treat an assignment for the benefit of creditors as a proceeding in equity; but howsoever this may be, a proceeding which involves the final report of the assignee and the accounting therein made, and which embraces equitable issues, will be heard on appeal as in equity when so treated by the litigants and trial court.

In re Stone, 220-1341; 264 NW 604

Requisites—recording not necessary. Where the interest of a beneficiary of a testamentary trust is assigned for the benefit of creditors, such assignment need not be recorded to be valid against existing creditors without notice.

Friedmeyer v Lynch, 226-251; 284 NW 160

Special assignment for particular creditors. An assignment by an insolvent debtor of all his property to a trustee for the purpose of

securing and paying in a named order the claims of certain named existing bona fide creditors and providing for the payment of any balance to the assignor-debtor does not constitute a general assignment for the benefit of creditors (and invalid because of the preference) when executed pursuant to an agreement with said creditors, or when ratified by said creditors prior to the acquisition of rights by others; and this is true even tho there probably will be no balance to pay to the assignor-debtor.

Eicher v Baird, 204-188; 215 NW 236

Subsequent modification—legality. After the execution of a composition agreement with the creditors of a bankrupt corporation, the further nonfraudulent execution by a stockholder of a guaranty under which certain creditors may ultimately receive more on their claims than other creditors have received is not illegal and unenforceable as between the parties thereto.

Shively v Mfg. Co., 205-1233; 219 NW 266

Validity—no showing of knowledge and fraud participation. A debtor may prefer creditors; and an assignment to preferred creditors is not invalid because hindering, delaying, or defeating other creditors when there is no evidence that the preferred creditors knew of and participated in a fraud in making the assignment.

Friedmeyer v Lynch, 226-251; 284 NW 160

12724 Effect of assignment.

Right of assignee. An assignee for the benefit of creditors stands in the shoes of the assignor in the enforcement of claims on behalf of the estate of the assignor.

Smallwood v O'Bryan, 208-785; 225 NW 848

12726 Inventory and appraisement—bond.

Loss notwithstanding reasonable care—liability of assignee. An assignee for the benefit of creditors, who deposits in a bank trust funds coming into his hands and loses them because the bank subsequently closes its doors in consequence of insolvency, while not protected from loss under an ex parte order of court authorizing such deposit (§9285, C., '35) yet he is protected from such loss if, in making such deposit, and in looking after and caring for said funds, he exercised that degree of care which a person of ordinary care and prudence would exercise under the same or similar circumstances.

In re Stone, 220-1341; 264 NW 604

12727 Notice of assignment—notice to creditors.

Assignment of testamentary interest—ratification by certain creditors—no general assignment. An assignment of the interest of beneficiary of a testamentary trust for the benefit of certain creditors, ratified by the creditors benefited, is not a general assignment and need not be for the benefit of all creditors.

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Requisites—recording not necessary. Where the interest of a beneficiary of a testamentary trust is assigned for the benefit of creditors, such assignment need not be recorded to be valid against existing creditors without notice.

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Validity—no showing of knowledge and fraud participation. A debtor may prefer creditors; and an assignment to preferred creditors is not invalid because hindering, delaying, or defeating other creditors when there is no evidence that the preferred creditors knew of and participated in a fraud in making the assignment.

Friedmeyer v Lynch, 226-251; 284 NW 160

12728 Claims filed.

Debts due federal government. An indebtedness due to the government of the United States (i. e., a claim for freight accruing during the management and control of the railroads by the federal government) is entitled to an unconditional preference in payment out of the estate of the insolvent debtor, irrespective of the law of any state or of the judgment of the courts thereof. Especially is this true in view of the personal liability of the assignee, under the federal statutes, for the payment of such claims when notified thereof. (§§6372, 6373, U. S. Comp. Stat.; 31 USC, §§191, 192.)

Davis v Bargloff, 200-1160; 206 NW 251

Interest on claims not necessarily allowable. An assignee for the benefit of creditors of an insolvent estate pays interest on claims at his peril. The court may wholly or partially disapprove of such payments; but where a fund belonging to a claimant has been drawing interest as a bank deposit claimant is entitled to the interest.

In re Cutler & Horgen, 213-983; 234 NW 238; 238 NW 80

Labor claims—extent of priority. Under a voluntary assignment for the benefit of creditors, all claims for personal service rendered to the assignor within 90 days next preceding the assignment are payable in full irrespective of the amount, (§12732, C., '31) and irrespective of the rights of a landlord who asserts his lien simply under his lease and not under a levy. This is true because the rights of parties to a voluntary assignment for the benefit of creditors are exclusively controlled by the chapter pertaining to such assignment, and, consequently, §11717, C., '31, limiting the priority of labor claims to $100 in case property is seized under proceeding not voluntary on the part of the creditor, does not apply.

In re Brady, 216-320; 249 NW 344

Priority of claim over rents. A chattel mortgagee may not have his claim reduced by a claim for unpaid rent accruing subsequent to the mortgage and on the premises whereon the mortgaged chattels were kept.

In re Cutler & Horgen, 213-983; 234 NW 238; 238 NW 80

Refusal of attorney fees. Attorney fees for services on behalf of an assignee for the benefit of creditors are properly rejected when such services were rendered without any expectation of receiving compensation therefor.

In re Cutler & Horgen, 204-739; 212 NW 573; 54 ALR 527

12729 Report required.

Appeal—equity (?) or law (?). The court is inclined to treat an assignment for the benefit of creditors as a proceeding in equity; but howsoever this may be, a proceeding which involves the final report of the assignee and the accounting therein made, and which embraces equitable issues, will be heard on appeal as in equity when so treated by the litigants and trial court.

In re Stone, 220-1341; 264 NW 604

12730 Claims contested.

Discussion. See 22 ILR 60—Tort actions in receiverships

Right of creditors to contest. Creditors whose claims have been allowed have a statutory right to appear and formally contest the allowance of a claim.

In re Lounsberry, 208-596; 226 NW 140

12731 Priority of taxes—nonnecessity to file claim.

Common-law rule repudiated. The common-law rule relative to the preferential standing of claims due the state and its governmental subdivisions is not in force in this state.

In re Gates, 200-1039; 205 NW 968

Debts due federal government. An indebtedness due to the government of the United States (i. e., a claim for freight accruing during the management and control of the railroads by the federal government) is entitled to an unconditional preference in payment out of the estate of the insolvent debtor, irrespective of the law of any state or of the judgment of the courts thereof. Especially is this true in view of the personal liability of the assignee, under the federal statutes, for the payment of such claims when notified thereof. (§§6372, 6373, U. S. Comp. Stat.; 31 USC, §§191, 192.)

Davis v Bargloff, 200-1160; 206 NW 251

Preferred claims. A specific recital in an insolvency statute as to what claims shall be entitled to preference in payment is exclusive of all other claims.

In re Gates, 200-1039; 205 NW 968

Priority of claim over taxes. A chattel mortgagee may not have his claim reduced by taxes which have never been a lien on the mortgaged chattels superior to that of the mortgage.

In re Cutler & Horgen, 213-983; 234 NW 238; 238 NW 80

Statutory declaration of lien—effect. A statutory declaration that taxes are a lien does not necessarily mean that they are a first lien.

In re Cutler, 213-983; 234 NW 238; 238 NW 80

Unallowable preference. An assignment for the benefit of creditors may not be deemed a "receivership" for the purpose of determining claims entitled to preference in payment.

In re Gates, 200-1039; 205 NW 968

12732 Labor claims preferred.

Atty. Gen. Opinion. See '30 AG Op 268

Extent of priority. Under a voluntary assignment for the benefit of creditors, all claims for personal service rendered to the assignor within 90 days next preceding the assignment are payable in full irrespective of the amount, and irrespective of the rights of a landlord who asserts his lien simply under his lease and not under a levy. This is true because the rights of parties to a voluntary assignment for the benefit of creditors are exclusively controlled by the chapter pertaining to such assignment, and, consequently, §11717, C., '31, limiting the priority of labor claims to $100 in case property is seized under proceeding not voluntary on the part of the creditor, does not apply.

In re Brady, 216-320; 249 NW 344

12736 Disposal of property—time limit.

Appellate decision—subsequent appeal—law of case. A direction on appeal as to the manner in which the final distribution of the proceeds of an insolvent estate should be made becomes the law of such case.

In re Cutler, 213-983; 234 NW 238; 238 NW 80

Note 1 Bankruptcy generally.

Discussion. See 22 ILR 60—Tort claims in receiverships

ANALYSIS

Equitable assignments. See under §10941 (IX)
Fraudulent conveyances. See under §11815

I CONSTITUTIONAL AND STATUTORY PROVISIONS

Discussion. See 9 ILB 72—Jurisdiction of federal courts in suits by trustees; 18 ILR 534—Amendments to act

Extension to principal available to surety. An order of a court of bankruptcy granting, to a maker of a negotiable promissory note, an extension of time in which to make payment, is not personal to said maker only, but inures, under 11 USC, §204, to the benefit of another maker of said note who in fact signed said note as surety only, but without so indicating on the face of the note; and said latter maker, when sued alone by the original payee, may, for the purpose of abating the action, establish his suretyship and consequent secondary liability.

Benson v Alleman, 220-731; 263 NW 305

No prejudice to creditors — nonfraudulent conveyance. A conveyance under which the grantor neither accomplishes anything for himself, nor prejudices his general creditors, cannot be deemed fraudulent or to constitute a preference under the federal bankruptcy act.

Hoyne v Loan Co., 219-278; 257 NW 799

II PROCEEDINGS IN GENERAL

Discussion. See 20 ILR 565—Trustees' actions—jurisdiction

Action against bankrupt—fraudulent conveyance. In an action by a bankruptcy trustee, where property was conveyed to a brother by a sister, who thereafter took bankruptcy and such property was considerably in excess of consideration therefor, the deeds were only constructively fraudulent as to grantee, and the setting aside of such deeds required that grantee be paid amount he gave as consideration for the conveyance.

McGarry v Mathis, 226-37; 282 NW 786

Attachment liens set aside—insolvency. In an equity action brought by trustee in bankruptcy to set aside and annul an attachment lien upon the bankrupt's property, the provisions of the bankruptcy act are such that it is essential that the person attacking the lien must show that debtor was insolvent when the lien was obtained.

Matthews v Engineering Co., 228- ; 292 NW 64

Equitable estoppel—non-change in position. The plea of a mortgagee that a mortgagor was estopped to deny the validity of his signature to the mortgage because, when the mortgagor was thrown into bankruptcy, the mortgage prevented the mortgagee from participating in dividends to unsecured creditors, must fall when there is no showing that there were any such dividends.

State Bank v Nolan, 201-722; 207 NW 745

Nonfraudulent intent. A fraudulent intent is not necessarily an element of a voidable four months preference under the federal bankruptcy act.

Patrick v White, 203-239; 212 NW 469

Fraudulent conveyance — trustee in bankruptcy—remedy. A trustee in bankruptcy cannot maintain an action at law against a grantee of the bankrupt to recover the value of property collusively and fraudulently transferred to said grantee in fraud of creditors. This is not saying that the trustee may not treat the property in the hands of the grantee as belonging to the bankrupt, or impress a trust on the proceeds of the property if grantee has disposed of it.

Lambert v Reisman Co., 207-711; 223 NW 541

"Surety" as creditor. The act of a surety for an insolvent in receiving, within four months of the filing of a petition in bankruptcy, property of the insolvent, and paying the agreed value thereof on the surety obligation, constitutes a voidable preference, within the meaning of the federal bankruptcy act.

Patrick v White, 203-239; 212 NW 469

Discharge of surety—subsequent compromise and satisfaction—effect. The surety on a bond staying the collection of judgments is wholly released by the subsequent acts of the trustee in bankruptcy for the judgment defendant and the receiver for the insolvent judgment plaintiff entering into a legally authorized compromise settlement and satisfaction of the judgment, in order to avoid threatened and doubtful litigation growing out of the execution of said stay bond, and the subsequent insolvency of all the parties thereto.

State v Cas. Co., 213-211; 238 NW 709

Preliminary and interlocutory injunctions—dissolution. An injunction restraining the owner of land from interfering with the possession by a trustee in bankruptcy should be forthwith dissolved when it appears that said trustee has substantially no interest in the land—that his lien is valueless because of the foreclosure of a superior lien, and that he has no purpose to redeem.

Relph v Goltry, 213-1118; 240 NW 646

III EFFECT OF BANKRUPTCY PROCEEDING

Action by trustee—fraudulent conveyance—sufficiency of evidence. Trustee in bankruptcy who introduces testimony given on examination in bankruptcy court is bound thereby, and evidence is insufficient to sustain trustee's claim that transfer of note by bankrupt to sister was in fraud of creditors.

Cooney v Graves, (NOR); 230 NW 407

Adjudication—secured claims against bankrupt property—remedies of lienor. The federal bankruptcy act does not deprive a lienor of any remedy with which he is vested by state law, and one holding a secured claim against

III EFFECT OF BANKRUPTCY PROCEEDING—continued

a bankrupt is not bound to file formal proof of claim in the bankruptcy court. He may rely on his security and enforce it otherwise.

Blotcky v Silberman, 225-519; 281 NW 496

Scope of adjudication—potentially litigated question. A duly rendered judgment of a court of bankruptcy that its trustee has no interest in nor title to an article of personal property because said article belongs to one who sold it to said bankrupt under a conditional sale contract which has been duly forfeited, constitutes in legal effect, inter alia, a final adjudication that said bankrupt had no redeemable interest in said article—conceding, arguendo, that he might, under some circumstances have had such right.

Smith v Russell, 223-123; 272 NW 121

Adjudication—nonpresumption of prior insolvency. An adjudication of bankruptcy carries no presumption that the bankrupt was insolvent on a date several months prior to the date of the adjudication.

Stark v White, 215-899; 245 NW 337

Assignment — unlawful preference — burden of proof. A trustee in bankruptcy, who seeks to set aside a transfer of property by the bankrupt on the ground that such transfer constitutes an unlawful preference, must fail when he does not show that the property transferred belonged to the bankrupt. So held where the property in question had been received by the bankrupt on consignment and was returned to the consignor.

Dwight v Horn, 215-31; 244 NW 702

Exempt property—procedure. The jurisdiction of the federal bankruptcy court over the exempt property of the bankrupt extends no further than to enter an order setting off such property to the bankrupt. Irrespective of the proceedings in such court, the right to the exempt property, as between the owner and a mortgagee thereof, must be determined in the state court.

Eckhardt v Hess, 200-1308; 206 NW 291

Extension to principal available to surety—abatement of action. An order of a court of bankruptcy granting to a maker of a negotiable promissory note an extension of time in which to make payment is not personal to said maker only, but inures, under Title 11, §204, USC, to the benefit of another maker of said note who in fact signed said note as surety only but without so indicating on the face of the note; and said latter maker, when sued alone by the original payee, may, for the purpose of abating the action, establish his suretyship and consequent secondary liability.

Benson v Alleman, 220-731; 263 NW 305

Foreclosure action in rem—state court—not stayed by bankruptcy proceedings. Where mortgagees on foreclosure did not ask personal judgment but only a judgment in rem, and trustee in bankruptcy for mortgagors had secured an order releasing and discharging the real estate as assets in bankruptcy matter, state court was justified in proceeding with foreclosure and in not staying proceedings until adjudication of mortgagors as bankrupts, bankruptcy act, §11 [11 USC, §29], contemplating only suits in personam and from which a discharge in bankruptcy would be a release.

Mayer v Imig, (NOR); 227 NW 328

Mortgages—rents and profits—priority. The right of a receiver in mortgage foreclosure proceedings to the rents and profits reserved in the mortgage is superior to the rights of a subsequently appointed trustee in bankruptcy of the then owner of the land.

Robertson v Roe, 203-654; 213 NW 422

Mortgages—staying deed under moratorium act—loss of right. A defendant in mortgage foreclosure may not, after execution sale, have an order under the emergency moratorium act (45 GA, Ch 179) staying the execution of sheriff's deed and extending the period for redemption, when, at the time of the application for the order, the defendant, on his own application, has been adjudged a bankrupt, and his equity of redemption in the land in question has been sold under an order issued out of the bankruptcy court.

Lincoln JSL Bank v Brown, 219-630; 258 NW 770

Redemption—orders in bankruptcy. An order in federal bankruptcy proceedings for the sale of the bankrupt's equity of redemption in land sold under foreclosure proceedings is immune from collateral attack on the ground that the land embraced the bankrupt's homestead.

Lincoln JSL Bank v Brown, 219-630; 258 NW 770

Release of mortgage under mistake of law. A mortgagee who, without being mistaken as to any matter of fact, or the victim of any fraud, accepts from the mortgagor a conveyance of the mortgaged land in full satisfaction of the mortgage debt, and thereupon releases and satisfies his mortgage of record—and so acts solely on the mistaken belief that a discharge of the mortgagor in bankruptcy ipso facto worked a cancellation of a junior judgment against the mortgagor and the lien of said judgment against the mortgaged land—may not, after discovering his mistake as to the legal effect of said discharge in bankruptcy, successfully ask a court of equity to re-establish his canceled mortgage.

Connecticut Ins. v Endorf, 220-1301; 263 NW 284

Right to sell in ordinary course of business. A conditional sale contract with proviso that the vendee may sell in the ordinary course of business remains and continues as a conditional sale contract as to all unsold goods. Especially is this true when the contract provides that the vendee shall hold the proceeds of goods sold for the benefit of the vendor.

International Co. v Poduska, 211-892; 232 NW 67; 71 ALR 973

Rights of bankrupt—four-month liens. A judgment lien is in no manner displaced or affected by bankruptcy proceedings instituted by the judgment defendant more than four months after the lien attached.

Kramer v Hofmann, 218-1269; 257 NW 361

Rights under moratorium act—loss of. A mortgagor who, subsequent to a sale under foreclosure, makes application for a discharge in bankruptcy and is adjudged a bankrupt, thereby deprives himself of all right to an extension of time in which to redeem from said foreclosure and sale, because, upon being adjudged a bankrupt, the title to his equity of redemption ipso facto passed to his trustee in bankruptcy.

Prudential v Lininger, 220-1212; 263 NW 534

Setting aside—limitation of actions—laches. A suit in equity by trustee in bankruptcy to set aside deed by bankrupt to husband on grounds of want of consideration, fraud, and failure to take possession of land, brought more than six years after recording of deed, is barred by laches under statute of limitations where only one creditor secured allowance of claim, which claim was based on note past due when deed was recorded.

Monroe v Ordway, 103 F 2d, 813

Title—contract of purchase—specific performance. The beneficial right of a bankrupt to have specific performance of a contract for the purchase of real estate passes to his trustee in bankruptcy.

Wilson v Holub, 202-549; 210 NW 593; 58 ALR 646

Tort action in state court—appeal—moot question. An appeal from a district court ruling which in effect permitted the prosecution in the state court of a tort action against a bankrupt contrary to an order of the bankruptcy court that such action must be prosecuted solely in the bankruptcy court, will be dismissed on a proper showing by appellee that, since said ruling by the state court, the federal court has so modified its former order as specifically to authorize appellee to prosecute said action in the state court, even tho such showing requires a showing dehors the original appellate record.

Van Heukelom v Black Hawk Corp., 222-1033; 270 NW 16

Unlawful preference—required proof. A bona fide transfer of property by a debtor to his creditor within four months of the adjudication of bankruptcy cannot be set aside as an unlawful preference in the absence of evidence that the creditor knew or ought to have known that the debtor was insolvent at the time of the transfer.

Dwight v Horn, 215-31; 244 NW 702

IV ADMINISTRATION AND DISTRIBUTION OF ESTATE

Discussion. See 20 ILR 113—Foreign assets; 21 ILR 145—Definition of secured creditor

Conditional sales contract—defective acknowledgment—trustee's rights. Where conditional sale contract provided that title to goods should remain in vendor until contract was performed, the property did not pass to trustee in bankruptcy of such vendee, notwithstanding that contract was not acknowledged in accordance with Iowa statute so as to entitle it to be recorded.

In re Pointer Brewing Co., 105 F 2d, 478

Conditional sales—right of forfeiture—effect. Tho the vendor in a conditional contract of sale has retained the right to forfeit the contract for nonpayment and to resume absolute ownership, yet, so long as he has not done so, his assignment of the contract invests the transferee with no greater right than the vendor had under the contract.

Soodhalter v Coal Co., 203-688; 213 NW 213

Conditional sales—unrecorded and imperfect contract valid against trustee in bankruptcy. A conditional sale contract which provides that the vendor shall retain his title to the goods and the right to the possession thereof until they are paid for, covering present and future purchases, is enforceable against the vendee and against anyone standing in the vendee's shoes—e. g., the vendee's assignee for the benefit of creditors or the vendee's trustee in bankruptcy; and this is true irrespective of the recording or filing of the contract and irrespective of the fact that the contract imperfectly describes the goods.

International Co. v Poduska, 211-892; 232 NW 67; 71 ALR 973

Debts due federal government—preference. Bank deposits made by federal trustees in bankruptcy and belonging to pending estates in bankruptcy are not, in case of the insolvency of the bank, within the scope of the federal statutes which require a preference in the payment of debts due to the United States, even tho such deposits are secured by bonds running to the United States.

Andrew v Bank, 208-1248; 224 NW 499

Exempt property liable for debts—determined by state courts. While the homestead is liable for debts antedating its purchase the bankruptcy court is without jurisdiction over

IV ADMINISTRATION AND DISTRIBUTION OF ESTATE—continued

bankrupt's exempt property, except to make an order setting it aside to bankrupt and the right of any particular creditor as against bankrupt's exempt property can only be determined by state courts.

Bracewell v Hughes, (NOR); 235 NW 37

Interest of remainderman passes to trustee. The interest of a bankrupt as a real estate remainderman, whether the interest be vested or contingent, passes to the trustee in bankruptcy.

Noonan v Bank, 211-401; 233 NW 487

Fraudulent conveyance—action by trustee to set aside—conditions precedent. A trustee in bankruptcy may not maintain an action to set aside a fraudulent conveyance by the bankrupt unless he pleads and proves that such setting aside is necessary in order to pay claims allowed in the bankruptcy proceedings.

Newman v Callahan, 212-1003; 237 NW 514

Action by trustee—conditions. A trustee in bankruptcy has no right to maintain an action to set aside as fraudulent a conveyance by the bankrupt unless he shows that claims have been filed and allowed against the bankrupt, and that he, as trustee, has not sufficient funds with which to pay said claims. Especially is this true when the equity in the property in question is practically nothing.

Shaw v Plaine, 218-622; 255 NW 686

Action by trustee—fraudulent conveyance—sufficiency of evidence. Trustee in bankruptcy who introduces testimony given on examination in bankruptcy court is bound thereby, and evidence is insufficient to sustain trustee's claim that transfer of note by bankrupt to sister was in fraud of creditors.

Cooney v Graves, (NOR); 230 NW 407

Fraudulent conveyance—confidential relations—right to prefer. A conveyance by a husband to his wife, executed and received for the sole purpose of paying an actual bona fide debt of the husband to the wife is beyond the reach of other creditors provided the property conveyed is not substantially in excess of the debt.

Johnson v Warrington, 213-1216; 240 NW 668

Fraudulent conveyances — termination of property interest regardless of creditors. No present title to land passes under a contract to the effect (1) that a daughter, so long as she outlived her father and paid certain annual rentals and other charges, should have the possession and profits of named lands, (2) that title should remain in the father, but at the death of the father she should receive an absolute deed to the land, which deed was put in escrow under the control of the father during his lifetime, (3) that if she defaulted in said payments the contract could be forfeited on notice, and (4) that all her interest terminated instantly on her death prior to that of the father. It follows that upon the insolvency of the daughter and her default on said payments, the father and daughter may voluntarily cancel said contract regardless of the creditors of the daughter.

Tilton v Klingaman, 214-67; 239 NW 83

Fraudulent transfers—evidence. Evidence held to establish a fraudulent transfer by a bankrupt.

Schnurr v Miller, 211-439; 233 NW 699

Remedies of creditors—establishment of lien. An actual, nonfraudulent, voluntary conveyance should not, in an action by a trustee in bankruptcy on behalf of creditors, be wholly set aside and the title vested in the trustee, but a lien on the land may be decreed in favor of antecedent creditors.

Crowley v Brower, 201-257; 207 NW 230

Remedies of creditors—personal liability of grantee. A wife who, knowing that her husband intended to hinder and delay his creditors, accepts a voluntary transfer of his bank deposit is, nevertheless, not personally liable to the husband's subsequently appointed trustee in bankruptcy for that part of the deposit which is expended prior to the bankruptcy proceedings in carrying on in good faith the ordinary business of the husband.

Barks v Kleyne, 201-308; 207 NW 329

Life estates—accounting by life tenant. A life tenant with testamentary power to encroach upon the principal, with remainder over, may be compelled to make full disclosure to a trustee in bankruptcy of a possible remainderman of the property received by her under the will (the probate records not revealing such fact), but may not be compelled to account to such trustee as to her use of the property, in the absence of any allegation and proof of waste, fraud, or improper use or disposal.

Nelson v Horsford, 201-918; 208 NW 341; 45 ALR 515

Persons entitled to assert invalidity. An actual, nonfraudulent, but voluntary conveyance may not be impeached by a trustee in bankruptcy on behalf of subsequent creditors.

Crowley v Brower, 201-257; 207 NW 230

Right of trustee—form of judgment. The decree in an action by a trustee in bankruptcy to set aside a conveyance by the bankrupt as fraudulent should be, not that the trustee is the owner in fee of the property, but that the trustee has a superior lien on the property to the amount of the lienable claims in his hands as such trustee.

Hoskins v Johnston, 205-1333; 219 NW 541

Transfers by bankrupt—right of trustee. A trustee in bankruptcy who, in the interest of

creditors, seeks to set aside a fraudulent conveyance by the bankrupt, is entitled to the same relief as the creditor would have been entitled to, had he (the creditor) prosecuted the action.

Crowley v Brower, 201-257; 207 NW 230

Railroad reorganization—bank's nonallowable set off against bonds. Bank holding railroad bonds in default held not entitled to set off deposit in railroad's checking account after payment by bank of railroad's check in sum exceeding amount on deposit at time railroad filed its petition for reorganization, since under "first in, first out" rule there was no credit subject to set-off. (Bankruptcy act, §77; 11 USC, §205.)

Iowa-Des Moines Bk. v Lowden, 84 F 2d, 856

Recovery on excess corporate indebtedness—proper party plaintiff. A trustee in bankruptcy of a corporate bankrupt cannot maintain an action against the directors and officers of the corporation to enforce the statutory individual liability attaching to such directors and officers consequent on their act in knowingly consenting to a corporate indebtedness in excess of that permitted by law. Such right of action never, in any sense, belongs to the corporation, but, on the contrary, is a right extended to the corporation creditors, and is enforceable solely by such creditors, if necessary, irrespective of the bankruptcy proceedings.

Hicklin v Cummings, 211-687; 234 NW 530; 72 ALR 822

Partnership relation nonexistent—operation of bank. Where probate court set aside to decedent's widow a private bank which was thereafter operated for many years by her son, who received none of the profits thereof, held, evidence did not establish partnership as between the son and his mother. Hence, son's trustee in bankruptcy could claim no interest in said bank.

Duckworth v Manning's Estate, (NOR); 252 NW 559

Sale—manner and terms. Principle recognized that a trustee in bankruptcy may, if to the advantage of unsecured creditors, sell incumbered real property free of liens.

First Tr. Bk. v Kleih, 201-1298; 205 NW 843

Statutory liens—discharge. A statutory attorney's lien which is adjudicated by a foreclosure decree unappealed from, to have become a lien on defendant's land as of a date several years prior to the filing by defendant of a petition in bankruptcy (to which the attorney was not a party) is not discharged by §67f of the bankruptcy act [11 USC, §107f], even tho the foreclosure decree was entered within the four months period immediately preceding the filing of said petition in bankruptcy.

Sweatt v Acres, 209-1288; 228 NW 74

Trustee—surety—recoupment. A bank which acts as a collection agency for a trustee in bankruptcy in gathering in the funds belonging to the bankrupt's estate, and in good faith accounts to the trustee for the collections, is not a "depository" of said funds, within the meaning of the federal statutes and rules of court governing depositors of bankrupt funds. So held where a surety who had paid the amount embezzled by the trustee sought recoupment from the said collecting bank on the theory that the bank had violated such federal statutes and rules.

So. Surety v Bank, 207-910; 223 NW 865

Unlawful preference — inadmissible evidence. The duly filed schedules of indebtedness of a bankrupt which fail to reveal when the items of indebtedness accrued are not admissible (to prove insolvency) against the grantee in an instrument sought to be set aside as an unlawful preference.

Stark v White, 215-899; 245 NW 337

Unlawful preference—insufficient evidence. A chattel mortgage, executed within four months prior to the institution of bankruptcy proceedings against the mortgagor, cannot be established as an unlawful preference by evidence that the mortgagee had failed in his urgent effort to collect the debt due him, or that he may have suspected that the mortgagor was in some degree financially embarrassed.

Stark v White, 215-899; 245 NW 337

Unlawful preference — limitation on evidence. Where a chattel mortgage was executed within four months preceding the filing of bankruptcy proceedings against the mortgagor, and where, later, the mortgaged property was sold by the mortgagor and a new mortgage was executed by the purchaser on the same property to the former mortgagee, and where the original mortgage was thereupon released, and where the two transactions were attacked by the trustee in bankruptcy as an unlawful preference, the evidence must be confined to the conditions existing on the date of the first transaction.

Stark v White, 215-899; 245 NW 337

V RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT

Discussion. See 16 ILR 526—Assignment of expectancy

Adjudication of homestead status. An unquestioned order in bankruptcy setting off to a bankrupt certain land as a homestead is, as to all parties to the proceedings, a final adjudication that said land was then a homestead.

Bracewell v Hughes, 214-241; 242 NW 66

Chattel mortgage enforcement after contest in bankruptcy. The holder of a chattel mortgage on exempt property who appears in bankruptcy proceedings against the mortgagor and

V RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT—continued

unsuccessfully contests the asserted right of the mortgagor to have said property set off to him (the mortgagor) as exempt, is not thereby estopped to later, and after the mortgagor has been discharged, enforce the lien of said mortgagor.

Schwanz v Co-op. Co., 204-1273; 214 NW 491; 55 ALR 644

Conclusiveness of judgment. A decree to the effect that a conveyance was fraudulent as to a judgment plaintiff is immune from subsequent attack on the ground that, when the decree was rendered, the judgment in question had been discharged in bankruptcy, such fact not having been pleaded in said action.

Reining v Nevison, 203-995; 213 NW 609

Discharge as affecting assignment of expectancy as security. When a debtor assigns his expectancy in an estate as security for the payment of the debt, a subsequent discharge of the debt in bankruptcy ipso facto discharges said assignment and all unadjudicated equitable rights thereunder, even tho the ancestor creates a legacy for the debtor and dies after the debtor is adjudged a bankrupt and before the debtor is decreed a final discharge.

Gannon v Graham, 211-516; 231 NW 675; 73 ALR 1050

Dischargeable debts—fraud. State courts will take judicial knowledge that, under the federal bankruptcy statutes, a debt arising from the fraud of the debtor is not dischargeable in bankruptcy.

Hills Bank v Cress, 205-306; 218 NW 74

Discharge—effect on existing liens. The discharge in bankruptcy of the mortgagor does not discharge the lien of such mortgage.

Schwanz v Co-op. Co., 204-1273; 214 NW 491; 55 ALR 644

Webber v King, 205-612; 218 NW 282

Effect on liens. The fact that a bankrupt has been discharged presents no legal obstacle to proceedings by the bankrupt's trustee to enforce lien against property which is legally a part of the bankrupt's estate but as to which the bankrupt wrongfully disclaims any interest.

Bogenrief v Law, 222-1303; 271 NW 229

Failure to plead discharge—effect. A discharge in bankruptcy of a claim subsequently sued on avails nothing unless the discharge is pleaded as a defense; and this is true tho the plaintiff has knowledge of the discharge.

Harding v Quilan, 209-1190; 229 NW 672

Improper scheduling of debt. A discharge in bankruptcy is a nullity as to a debt which is improperly scheduled in that the bankrupt, well knowing the correct post office address of his creditor, scheduled an incorrect address. But the bankrupt may avoid the effect of the error by showing that the creditor actually did have timely notice of the bankruptcy proceedings.

Lundy v Skinner, 220-831; 263 NW 520

Nondischargeable debt. A tenant who fraudulently causes the consumption and disposal of property belonging to his landlord as rent, thereby matures a cause of action against himself for the "malicious injury" to the said property—a claim not dischargeable in bankruptcy.

Russell v Peters, 219-708; 259 NW 197

Exempt property—debts enforceable against—unallowable procedure. After a court of bankruptcy has adjudged a debtor to be a bankrupt and after the court has set off a homestead to said debtor, a creditor holding a duly scheduled, unliquidated, and unsecured debt has no right to proceed in equity in the state court, and have his debt adjudicated and enforced as a lien on the said homestead because said debt antedates the acquisition of said homestead. And it is immaterial that the creditor, preceding his action in the state court, obtained an order staying the final discharge of the bankrupt.

Bracewell v Hughes, 214-241; 242 NW 66

Irretrievable nullification of lien. The filing by an insolvent judgment defendant of his petition in bankruptcy within four months following the entry of judgment, discharges the judgment (it not being based on fraud or willful injuries) and irretrievably nullifies an execution levy on property whether the property be exempt or nonexempt. In other words, the judgment plaintiff may not thereafter proceed in equity in the state court and have his discharged judgment enforced against property set aside to the judgment defendant as exempt, even tho, were it not for the bankruptcy proceedings, plaintiff would be able to show that said property was not exempt from levy under plaintiff's particular judgment.

McMains v Cunningham, 214-300; 233 NW 129

Preferential transfer—all-essential proof. A trustee in bankruptcy may not have a transfer of property, made within four months of an adjudication of bankruptcy, set aside on the ground that said transfer gave the transferee an unlawful preference, in the payment of debts, unless he proves, inter alia, the fundamental, all-essential fact that said transfer was made by the grantor-bankrupt in payment, in whole or in part, of the latter's debt to the transferee.

Bagley v Bates, 219-1348; 261 NW 523

Revival of discharged debt. Principle recognized that the moral obligation to pay a debt which has been discharged in bankruptcy will

support an oral promise to pay the discharged debt.

Fierce v Fleming, 205-1281; 217 NW 806

Setting off homestead—effect. An unappealed order in bankruptcy proceedings setting off a homestead to the bankrupt does not constitute an adjudication of the bankrupt's rights in the homestead, e. g., the existence of liens and the order and priority thereof.

Kramer v Hofmann, 218-1269; 257 NW 361

CHAPTER 551

SECURITIES AND INVESTMENTS OF TRUST FUNDS

12751 Security to be by bond.

Additional annotations under §1059

Statutory bonds—construction—law governing. A statutory bond executed in a foreign state and delivered in this state will be construed under the laws of this state.

Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495

Construction—"lawful representatives". The bond of a guardian which purports to bind the sureties "and our lawful representatives" does not bind the heirs of the surety.

Conley v Jamison, 205-1326; 219 NW 485; 59 ALR 835

Attempt to limit liability. A statutory surety may not limit his statutory liability.

Andrew v Bank, 205-878; 219 NW 34

Common-law bond. A statutory bond may not be treated as a common-law bond.

Zeidler Co. v Ryan & Fuller, 205-37; 215 NW 801

Statutory bonds—effect. A statutory bond may not be added to or subtracted from.

Dallas Co. v Bank, 205-672; 216 NW 119
State v Gregory, 205-707; 216 NW 17
Queal Lbr. v Anderson, 211-210; 229 NW 707

Execution and delivery in foreign state. A statutory bond which is executed and delivered in a foreign state for the performance of a contract in this state will be construed in accordance with the laws of this state when such was the intention of the parties, as shown (1) by the nature of the transaction, (2) by the subject matter, and (3) by the attending circumstances.

Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495

Statutory bond—estoppel to question validity.

Plymouth Co. v Schulz, 209-81; 227 NW 622

Inclusion and exclusion. Statutory requirements will be read into a statutory bond, and nonstatutory requirements will be read out of such bond.

Curtis v Michaelson, 206-111; 219 NW 49
Charles City v Rasmussen, 210-841; 232 NW 137; 72 ALR 638
Bateson v County, 213-718; 239 NW 803
In re Durey, 215-257; 245 NW 236
Iowa Bank v Soppe, 215-1242; 247 NW 632

Statutory bonds—surplusage. Nonstatutory conditions inserted in a statutory bond will be treated as surplusage.

Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495
See Francesconi v Sch. Dist., 204-307; 214 NW 882

Successive bonds by administrator. Principle reaffirmed that successive, unreleased bonds of the same administrator for the same estate remain in force.

Varga v Guar. Co., 215-499; 245 NW 765

Action—condition. A bond of indemnity to hold the obligee free of any loss which he may sustain is not broken, and no right of action accrues, until a loss has been suffered against which the covenant runs.

Duke v Tyler, 209-1345; 230 NW 319

Acts constituting breach. A statutory bond conditioned to secure the prompt paying over to the proper authorities of public funds on deposit in a bank is breached on the failure to promptly make such payment, and not from the time when the authorities suffer an actual loss.

Leach v Bank, 205-987; 213 NW 528

Assignee's liability—loss notwithstanding reasonable care. An assignee for the benefit of creditors, who deposits in a bank trust funds coming into his hands and loses them because the bank subsequently closes its doors in consequence of insolvency, while not protected from loss under an ex parte order of court authorizing such deposit (§9285, C., '35) yet he is protected from such loss if, in making such deposit, and in looking after and caring for said funds, he exercised that degree of care which a person of ordinary care and prudence would exercise under the same or similar circumstances.

In re Stone, 220-1341; 264 NW 604

Bank deposits bonded—time deposits excluded—nonliability. A surety on a bond covering bank deposits, but excluding "indebtedness not subject at all times to immediate withdrawal", held not liable for amount of depositor's savings account, where depositor also had checking account and bank's bylaws reserved right to notice of withdrawals of savings deposits as provided by state statute.

U.S. Guarantee Co. v Walsh Co., 67 F 2d, 679

Bank deposits without felonious intent. The act of the treasurer of a corporation in depositing the funds of his corporation in a bank (of which he is also an officer) in the manner in which deposits are ordinarily made, and the loss of such funds by the subsequent failure of the bank, do not constitute embezzlement. So held in an action on a surety bond which contracted against loss by embezzlement.

Williamstown Assn. v Surety Co., 205-830; 218 NW 474

Successive actions by several beneficiaries. A recovery on a statutory bond by one beneficiary constitutes no bar to an action by another beneficiary to the extent of the unexhausted penalty of the bond.

Carey Co. v Cas. Co., 201-1063; 206 NW 808; 47 ALR 495

Bonds in excess of statutory call. A statutory bond is a nullity insofar as it attempts to bind the surety to do more than the statute requires.

Ottumwa Boiler Works v O'Meara & Son, 206-577; 218 NW 920

Bond of contractor—no piecemeal recovery. Recovery on a contractor's bond may not be piecemeal, consequently that part of trial court's decree, holding its judgment is not a bar nor an adjudication of any future claim against the bond, will be stricken on appeal.

Osceola v Gjellefald Co., 225-215; 279 NW 590

Bovine tuberculosis examiner—non-required bond. In applying the bovine tuberculosis test, the examiner need not, nor may he be required to, post a bond to indemnify the owner against loss in case cattle are wrongfully destroyed, because the statute does not expressly or impliedly require such bond.

Peverill v Dept., 216-534; 245 NW 334

Conditional delivery — other signers — evidence of financial standing. On the issue whether a written guaranty was delivered on the condition that a named other party should sign it, no reversible error results from excluding evidence that such other party was a person of large financial responsibility.

Boyd v Miller, 210-829; 230 NW 851

Consideration—contract of reguaranty. A guarantor who, in a new written contract, reguarantees the payment of the amount past due on a former contract on which he is guarantor, and also guarantees the payment of future-accruing indebtedness, will not be heard to say that there was no consideration for the guaranty in the new contract of the old indebtedness, when by the new contract an extension of time of payment of the old indebtedness was secured.

Watkins v Peterson, 210-661; 231 NW 489

Contract limitations. Whether parties to a statutory bond will be permitted by contract to specify the time before which or after which an action can be maintained, quaere.

Page County v Fidelity Co., 205-798; 216 NW 957

Defective statutory bond as common-law bond. A fatally defective statutory bond may be enforced as a common-law bond.

Belmond Assn. v Luick, 217-805; 253 NW 521

Demand. In an action on the bond of a public officer to recover funds unaccounted for, no demand on the surety is necessary before commencing the action when proper demand has been made on the principal.

State v Carney, 208-133; 217 NW 472

Enforcement against heirs et al. The bond of a fiduciary, under the terms of which a surety purports to bind "his heirs, devisees, and personal representatives", is not revoked by the death of the surety, and binds the estate of the surety in the hands of his heirs, devisees, or personal representative.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Failure to file claim—when enforceable against heir. A claim arising under a bond wherein the surety binds "his heirs, devisees, and personal representatives", and arising after the death of said surety and the due settlement of his estate, is enforceable:

1. Against the property received by an heir, as such, from said ancestor-surety, and
2. Against the property passing from said ancestor and owned by said heir under conveyance for which he paid nothing, and
3. Against the heir, personally, for the value of the property so received if he has consumed it. And this is true even tho, necessarily, said claim was not filed against the estate of said surety.

Baker v Baker, 220-1216; 264 NW 116; 103 ALR 995

Fidelity bond—fraud in extension of credit by overdrafts—evidence. In action on fidelity bond of bank cashier the exclusion of evidence of bank's custom of deferring posting of checks creating an overdraft was not erroneous where the dishonest acts complained of were the extension of credit by means of overdrafts in violation of statute.

Fidelity Co. v Bates, 76 F 2d, 160

Forgery—statutory bond—sufficiency of evidence. Evidence reviewed and held that the signature to a depository bond was genuine.

School District v Bank, 218-91; 253 NW 920

Fraud of trustee—affirmance or disaffirmance. It is of no concern to a surety on the bond of a trustee whether the beneficiary affirms or disaffirms the fraudulent conduct of the trustee.

Dodds v Cartwright, 209-835; 226 NW 918

Highway—assessment—abortive appeal. An appeal from an order levying an assessment within a secondary road district is not perfected (1) by the timely giving of notice of appeal, and (2) by the timely filing of a purported appeal bond whch is not signed by the surety; nor is the defect cured by the filing, after the statutory time for appeal has expired, of an affidavit of qualification by a party who states "that I am surety in the above bond."

In re Road Dist., 213-988; 238 NW 66

Indemnity—right to maintain action without notice to indemnitor. An indemnitee may maintain an action on the contract of indemnity to recover the amount the indemnitee has been compelled to pay on account of a judgment rendered against him, even tho no notice was given the indemnitor of the pendency of the action which resulted in the judgment.

Surety Co. v Salinger, 213-188; 238 NW 715

Insurance contract—construction—effect of reinsurance. A contract performance bond which, in effect, binds the insured to reimburse the insurer and any reinsurer for any loss which the insurer or reinsurer may be compelled to pay, is not multiplied or divided by a subsequent reinsurance contract. In other words, the liability of the original insured remains a single liability, and the risk carried by both insurers remains as one risk.

Iowa Cas. Co. v Wagner Co., 203-179; 210 NW 775

Reinsurance—settlement with insured—effect. A reinsurer who agrees that the reinsured shall take charge of all matters arising under the bond, and effect all settlements, is bound by a settlement entered into between such reinsured and the original insured.

Iowa Cas. Co. v Wagner Co., 203-179; 210 NW 775

Intent of parties controls. A bond given to secure cemetery funds in the hands of a trustee will be construed in accordance with the undoubted intentions of the parties thereto. Held, bond not given to secure funds received during the one-year term of the bond only, but to secure the entire fund as it might exist at any time during said term.

Olin Assn. v Bank, 222-1053; 270 NW 455; 112 ALR 1205

Omission of penalty—effect. The omission from a duly approved school fund depository bond of the amount for which the surety is to be liable, is fatal to the validity of the bond, unless the defeasance clause of the bond imparts an obligation independent of the penalty clause. And this is true even tho the statute provides that the bond shall be in an amount double the amount deposited.

Ind. Sch. Dist. v Morris, 208-588; 226 NW 66

Oral modification. An agreement between the state treasurer and the accommodation sureties on a statutory bank deposit guaranty bond, to the effect that such bond shall be deemed automatically canceled when the deposit of state funds in the bank drops below the amount of existing non-accommodation surety bonds, is invalid, both as to the state and as to non-accommodation sureties who are seeking contribution.

Leach v Bank, 205-975; 213 NW 612

Probate findings. The supported finding of the court in probate on the issue whether funds received by a person were received by him as guardian or as trustee (bond in each case having been given) is conclusive on the appellate court.

In re Baldwin, 217-279; 251 NW 696

Administrators—liabilities on bonds—existing judgment against executor—surety's new trial improper. Under the general rule that a judgment against an administrator is conclusive against the surety on his bond, where a judgment against an administrator for misappropriation of funds stands unreversed, it is error to set aside judgment on a bond and give the surety a new trial, since such order would not, ipso facto, vitiate a former order fixing the administrator's liability.

In re Sterner, 224-605; 277 NW 366

Nonpermissible assumption of liability. A statutory bond for the performance of a public improvement contract is void insofar as it attempts to assume liability for the nonperformance of independent obligations which the statute does not contemplate, but which are voluntarily inserted in the contract; and this is true as to the surety, even tho the public authorities have on hand and undistributed a fund arising under the contract and sufficient to discharge such nonstatutory obligations.

Monona Co. v O'Connor, 205-1119; 215 NW 803

Reformation of instruments. A statutory bond may not be so reformed as to defeat its purpose.

Leach v Bank, 205-975; 213 NW 612

Reformation—evidence required. To justify the reformation of a written instrument, the evidence must be clear, satisfactory, and convincing and free from reasonable doubt. So held in an action to reform the term of a bond, the evidence being held insufficient. .

Olin Assn. v Bank, 222-1053; 270 NW 455; 112 ALR 1205

Right to secure deposits. The officers of a savings bank which is a duly selected and acting depository of county funds under a statutory depository bond may, in addition to the security afforded by said previously executed bond, validly transfer to the county, and the county through its fiscal officers may validly

accept, notes and mortgages of the bank as additional collateral security for said deposits.

Andrew v Bank, 203-1335; 214 NW 559

Road patrolmen. The statutory bond required of road patrolmen for the performance of their statutory duties in caring for the roads assigned to them does not embrace liability, to a traveler, in damages consequent on the negligent handling of road machinery.

Bateson v Marshall County, 213-718; 239 NW 803

Securities act—maximum liability. The surety on the bond of a dealer in securities under the Iowa securities act (Ch 393-C1, C., '31 [Ch 393.1, C., '39]) is not liable beyond the statutory amount of the bond—$5,000—irrespective of the number or amount of the claims sought to be enforced against it. Order impounding a bond as a trust fund for the pro rata benefit of numerous claimants affirmed.

Witter v Ins. Co., 215-1322; 247 NW 831; 89 ALR 1065

Surety—authority of agent—estoppel. A surety company will not, in an action on a bond issued in its name by its agent, be permitted to dispute the authority which it has specifically conferred on said agent in a written power of attorney filed with the clerk of the district court and relied on by said clerk in approving the bond, the obligee in the bond having no knowledge of any limitation on the authority of the agent.

State v Packing Co., 219-419; 258 NW 456

Actions—evidence—sufficiency. Evidence reviewed, in action on a fidelity surety bond, and held to show abstraction of the employer's funds by the employee and consequent loss by the employer, within the terms of the bond.

Webster Bk. v Ins. Co., 203-1264; 212 NW 545

Surety—taking assignment of claim. Where, because of the peculations of a county auditor, a depository bank pays a forged check on school funds, the county, on effecting settlement with the surety on the auditor's official bond, may assign to the said surety its cause of action against the bank, and the assignee may enforce the said assigned action as the county might have enforced it.

New Amsterdam Cas. v Bank, 214-541; 239 NW 4; 242 NW 538

Cosureties — rights. Accommodation and nonaccommodation sureties on bonds given to secure public funds on deposit in banks are cosureties, and each, in case of payment by him, is entitled to contribution from the others, and to be subrogated to the rights of the municipality.

Andrew v Bank, 205-878; 219 NW 34

Contribution against surety on separate bond. Where an executor has executed and filed two separate bonds for the faithful discharge of his duties, the surety who pays a devastavit in full may enforce contribution from the other surety; and it is immaterial that the surety enforcing contribution signed the bond for a consideration and that the other surety signed as an accommodation.

New Amst. Cas. v Bookhart, 212-994; 235 NW 74; 76 ALR 897

Discharge of surety—stay bond—subsequent compromise and satisfaction—effect. The surety on a bond staying the collection of judgments is wholly released by the subsequent acts of the trustee in bankruptcy for the judgment defendant, and the receiver for the insolvent judgment plaintiff entering into a legally authorized compromise settlement and satisfaction of the judgment in order to avoid threatened and doubtful litigation growing out of the execution of said stay bond and the subsequent insolvency of all the parties thereto.

State v Cas. Co., 213-211; 238 NW 709

Extension to principal available to surety. An order of a court of bankruptcy granting to a maker of a negotiable promissory note an extension of time in which to make payment is not personal to said maker only, but inures, under 11 USC, §204, to the benefit of another maker of said note, who in fact signed said note as surety only, but without so indicating on the face of the note; and said latter maker, when sued alone by the original payee, may, for the purpose of abating the action, establish his suretyship and consequent secondary liability.

Benson v Alleman, 220-731; 263 NW 305

Finding of fact in re suretyship. The finding of the court as to the amount of the liability of a surety on a bond, not based on a mathematical computation, but on a determination of disputed questions of fact, is conclusive on the appellate court.

Iowa Bank v Soppe, 215-1242; 247 NW 632

Public improvements — contract — assignment as releasing surety—inadequate proof. A surety on a bond for the construction of a city pavement who claims release from liability because the city consented to an assignment of the contract to a third party, must, at the least, establish such consent by evidence of some action on the part of the city council. Proof of consent by the city auditor, alone, to such assignment, is not sufficient. Especially is this true when the record otherwise shows that the original contractor was the only contractor recognized by the city.

Sioux City v Western Corp., 223-279; 271 NW 624; 109 ALR 608

Remedies of surety—agreement to indemnify—joint and several liability. A written agreement in an application for a surety bond by two duly appointed referees in partition to

the effect and in the language of "we hereby agree" to indemnify said surety for any damage suffered by him because of said bond, is jointly and severally binding on both principals even tho one of them received no part of the funds covered by the bond and was guilty of no personal failure to account.

Indemnity Ins. v Opdycke, 223-502; 273 NW 373

Voluntarily augmented funds. A court-appointed, testamentary trustee and the surety on his official, statutory bond are liable not only for the money which comes into his hands as specifically required by the will, but for additional amounts of the testamentary funds which come into the hands of the trustee, as such, consequent on the generous action of the devisees, generally, in voluntarily augmenting said trust funds from the testamentary funds.

Whisler v Estes, 216-491; 249 NW 264

Liability on trustee's bonds—receipt of funds. Where a party was guardian of minors and also trustee for said minors (bond in each case having been given), his written receipt showing the receipt of funds as guardian is not necessarily conclusive on the issue whether he received said funds as trustee.

In re Baldwin, 217-279; 251 NW 696

Unauthorized deposit of trust funds. A court-appointed trustee of cemetery funds and the sureties on his bond are liable for said funds deposited, without authority of court, in a bank of which both the trustee and the sureties were officers, and lost because of the insolvency of said bank.

Belmond Assn. v Luick, 217-805; 253 NW 521

Unallowable limitation on liability. A statutory bond which is given for the express purpose of securing public deposits in a bank may not be limited in liability to less than the liability called for by the statute; and any such attempt will be deemed nugatory, even tho such bond is approved by the public governing board.

Leach v Bank, 205-1154; 213 NW 517

Unauthorized substitution. Public officers who are authorized to deposit in banks public funds only on the due execution of an indemnifying bond have no authority to accept collateral security in lieu of a statutory bond; and if taken, the same may be released, and the sureties on the statutory bonds may not complain.

Leach v Bank, 205-975; 213 NW 612

12752 Payee.

Action by subcontractor on public bond. See Ch 452

Breach—right to maintain immediate action. An action on a contractor's bond to repair a street may be maintained without allegation and proof that the city has made the repairs.

Charles City v Rasmussen, 210-841; 232 NW 137; 72 ALR 638

Unallowable action by stranger. A bond which, in effect, is limited to the indemnification of the obligee only, for pecuniary loss sustained by the obligee through the dishonest acts of his officers or employees, is a contract of indemnity. In other words, such bond does not cover liability to a third party for loss sustained by said third party through the dishonesty of the officers or employees of the said obligee. (See §8581-c14, C., '31 [§8581.18, C., '39], for bonds covering liability.)

Allen v Bonding & Ins. Co., 218-294; 253 NW 498

12753 Defects rectified.

Omission of name of surety. The omission from the body of a bond of the name of the surety does not necessarily invalidate the bond.

Ind. Sch. Dist. v Morris, 208-588; 226 NW 66

12754 Qualifications of sureties.

Capacity of parties—evidence. Record reviewed, and held insufficient to show mental incapacity of a surety at the time of the execution of a bond.

Leach v Bank, 205-975; 213 NW 612

12755 Attorneys not receivable as surety.

Attorneys incompetent as sureties. See under §11251, Vol. I

12759.1 Appeal bonds—presumption.

Failure to formally approve. An appeal bond which has been presented to and retained by the clerk of the district court, and which has effected all the purposes for which it was manifestly presented, will not be held invalid because not formally accepted and approved.

State v Packing Co., 219-419; 258 NW 456

Drainage district assessment—appeal bond. Where, on appeal from action of county board of supervisors, with respect to classification and assessment of land in drainage district, the board urges that failure of the auditor to approve the appeal bond constituted a fatal defect and it is shown attorney for property owner delivered the notice of appeal and appeal bond to county auditor with instructions to file them, the delivery to and receipt by the auditor of the tendered appeal bond constituted a "filing" and generated statutory presumption that auditor approved the bond, sufficient to uphold appeal, in absence of evidence to overcome presumption.

Mills v Board, 227-1141; 290 NW 50

12763 Guaranty company as surety.

Guaranty and suretyship contracts generally. See under §11577

Atty. Gen. Opinion. See AG Op March 3, '39

Bond to pay taxes "incurred"—scope. A bond, (1) reciting that the principal therein had been licensed as a motor carrier under named statutes of the state, and (2) conditioned to pay "the taxes and penalties incurred" under said statutes—a positive liability—embraces liability to pay taxes and penalties incurred before, as well as after, the date of said bond.

State v USF&G Co., 221-880; 266 NW 501

Best evidence—unsigned copy of fidelity bond—inadmissible. In action by a surety company against defendant, who was covered by a fidelity bond and who agreed to indemnify plaintiff against loss sustained by reason of its executing fidelity bond in his behalf, it was error to admit in evidence instrument purporting to be a certified copy of the bond, but containing no signatures and which was admittedly no true and genuine copy of original bond.

Fidelity Deposit Co. v Ryan, 225-1260; 282 NW 721

12764 Payment of premiums.

Refusal to allow. The probate court is clearly within its discretion in refusing to allow against an estate and to the surety on an executor's bond (the executor being deceased and his estate insolvent) the amount of unpaid premiums on the bond, especially when such allowance would burden the estate with a double charge for premiums consequent on the mismanagement of the estate by the executor.

In re Mowrey, 218-992; 255 NW 511

12768 Release.

Release—strict compliance with statute required.

Brooke v Bank, 207-668; 223 NW 500

Bookhart v Younglove, 207-800; 218 NW 533

Unauthorized release of bond—effect. The liability of a surety on an appeal (supersedeas) bond, attaches the moment when the bond is accepted. It follows that an order of court assuming to set aside and to cancel the bond and to authorize the filing of a new and different bond, without notice to the appellee-obligee, is a nullity as to the first filed bond.

State v Packing Co., 219-419; 258 NW 456

Permitting reliance on unauthorized bond. The surety on an appeal (supersedeas) bond is estopped to question its liability on the bond when, knowing of the execution of the bond by its agent and the filing and acceptance thereof, it permits the appellee-obligee and the clerk accepting the bond, innocently to act and rely on said bond until the full purpose of the bond has been accomplished.

State v Packing Co., 219-419; 258 NW 456

Continuing liability of surety. The liability of a surety on a statutory depository bond conditioned "to hold the county treasurer harmless" because of authorized deposit of public funds in a bank continues for a reasonable time after the expiration of the authorized period as to the undrawn balance of all deposits made during said period.

Dallas County v Bank, 205-672; 216 NW 119

Discharge of surety—settlement with principal. Principle reaffirmed that a contract of settlement which releases a principal ipso facto releases the surety.

Iowa Cas. Co. v Wagner Co., 203-179; 210 NW 775

Ex parte revocation—effect. A peremptory, ex parte court order to the effect that the appointment of an administrator is revoked, and the simultaneous reappointment of the same administrator, and the execution of another bond, do not effect a legal revocation, and consequently do not operate as a discharge of the bond given pursuant to the original appointment.

In re Donlon, 203-1045; 213 NW 781

Liability for prior defalcation. The surety on a guardian's bond, conditioned as provided by statute, is liable for the defalcation of the guardian occurring prior to the execution of the bond whether the bond be a "substitute" bond or simply security in addition to a prior existing bond.

Brooke v Bank, 207-668; 223 NW 500

Nonrelease by change in order of court. The surety on the bond of a receiver appointed to take charge of grain and await the further orders of the court is not released because, without notice to the surety, and without his consent, the court subsequently ordered the receiver to convert the grain into money, said bond specifically calling for a full accounting of all money received.

McClatchey v Marquis, 203-76; 212 NW 374

12769 Suit on bond—service.

Action without notice to indemnitor. An indemnitee may maintain an action on the contract of indemnity to recover the amount the indemnitee has been compelled to pay on account of a judgment rendered against him, even tho no notice was given the indemnitor of the pendency of the action which resulted in the judgment.

So. Sur. v Salinger, 213-188; 238 NW 715

Right to maintain immediate action. An action on a contractor's bond to repair a street may be maintained without allegation and

proof that the city has made the repairs.

Charles City v Rasmussen, 210-841; 232 NW 137; 72 ALR 638

12771 Estoppel—stockholders liable.

Authority of agent—estoppel. A surety company will not, in an action on a bond issued in its name by its agent, be permitted to dispute the authority which it has specifically conferred on said agent in a written power of attorney filed with the clerk of the district court and relied on by said clerk in approving the bond, the obligee in the bond having no knowledge of any limitation on the authority of the agent.

State v Packing Co., 219-419; 258 NW 456

12772 Authorized securities.

Investments by guardians. See under §12581

Discussion. See 19 ILR 354—Trust investment statutes; 19 ILR 441—Exclusion of statute by instrument

Atty. Gen. Opinion. See '28 AG Op 176

Applicability of statute. This statute has no application to a compromise by the guardian of a will contest under which compromise the minor receives certain property in lieu of the property devised to him by the will.

Kreamer v Wendel, 204-20; 214 NW 712

Investments—whether will or statute controls. A statute which specifies the securities and the nature thereof in which trust funds may be invested does not control the investment of testamentary trust funds created under a will which—no rights of creditors being involved—clearly directs investments to be made in more lucrative securities.

In re Lawson, 215-752; 244 NW 739; 88 ALR 316

Commingling funds. Where trust funds are deposited in the individual account of the trustee, the cestui que trust has the right to elect to sue the trustee for the conversion, or he may pursue the trust funds and establish a preference thereto if they can be traced.

In re Riordan, 216-1138; 248 NW 21

Funds used by executor—interest chargeable. In probate proceedings on objections to executor's final report where it is shown that the estate funds were intermingled with executor's funds and used by him with no attempt being made to reinvest such funds, executor is held chargeable with interest at six percent a year with annual rests.

In re Sheeler, 226-650; 284 NW 799

Custody and care of ward's estate—interest on uninvested funds. A guardian may be charged with a reasonable rate of interest on estate funds which he might have invested by the exercise of reasonable diligence.

In re Anderson, 208-191; 225 NW 258; 64 ALR 687

Deposit in bank—subsequent approval by court. The due approval by the probate court of a guardian's report wherein he recited that he had deposited the funds of the ward in a bank and had received a stated amount of interest on such deposit is, in legal effect, an authorization to the guardian to continue the deposit, with resulting consequence that the guardian is relieved of personal responsibility in case the bank subsequently becomes insolvent; and this is true irrespective of the provisions of §9285, C., '24.

Robinson v Irwin, 204-98; 214 NW 696

Demand certificate of deposit not a loan. A guardian cannot be deemed to have made a loan or investment of guardianship funds by depositing them in a bank and taking in return therefor a certificate of deposit payable on demand.

Kies v Brown, 222-54; 268 NW 910

Legal deposit (?) or illegal investment (?). A deposit by a trustee of trust funds in a savings bank, at a stated rate of interest but with the legal right to withdraw said deposit at any time, does not constitute an "investment" within the meaning of this section.

In re Moylan, 219-624; 258 NW 766

Unauthorized deposit of trust funds. A court-appointed trustee of cemetery funds and the sureties on his bond are liable for said funds deposited, without authority of court, in a bank of which both the trustee and the sureties were officers, and lost because of the insolvency of said bank.

Belmond Assn. v Luick, 217-805; 253 NW 521

Unauthorized deposit as loan. A guardian who, without an authorizing order of court, permits the funds of the ward to remain in a bank where they had originally been placed by the ward, and who, without such authorization, accepts as evidence of said funds a certificate of deposit payable at a fixed date in the future, thereby makes an unauthorized loan to the bank and must make good the loss in case of the insolvency of the bank.

In re Fahlin, 218-121; 254 NW 296

Interest-bearing, time certificates of deposit. A guardian who, without authority from the probate court, deposits guardianship funds in a bank, and in return therefor receives interest-bearing, time certificates of deposit, must personally account for the loss in case the bank becomes insolvent.

In re Fish, 220-1328; 264 NW 542

Wrongful purchase of securities by executor or trustee. An objection to the final report of a trust company acting as trustee and executor was sufficient in alleging that securities were purchased without the approval of the court, altho the date of each purchase was not stated,

and it was not stated whether the purchases were made as executor or trustee.

In re Carson, 227-941; 289 NW 30

Investments without authorizing order—subsequent confirmation. Assuming, arguendo, that an authorizing order of court is absolutely necessary in order to render legal an investment of trust funds, yet a trustee, who, without such order, has made an investment in good faith, and without loss to the estate, may, subsequently, on a full showing of the controlling facts and at a time when the estate has suffered no loss, be granted a valid order confirming said investment.

In re Lawson, 215-752; 244 NW 739; 88 ALR 316

Invalid investments—who may question. The invalidity which attends the act of a guardian in loaning guardianship funds to himself, individually, and in securing such loan by a first mortgage on real estate—all without any pre-authorizing order of court—may not be pleaded by a second mortgagee of the land on the theory that such invalidity absolutely voided the said note and mortgage to the guardian, and thereby left the purported second mortgage as the first lien on the land. The sole right to question the legality of said acts of the guardian rests in the ward, or in his heirs, or in those properly representing said ward or heirs.

Richardson v Lampe, 221-410; 265 NW 629

When ward estopped to object to investment. A mentally competent adult person, who, on his own application, causes a guardian of his property to be appointed (§12617, C., '35), will be estopped to object to fair and honest investment of guardianship funds in real estate, when said investment, tho made without first securing the approval of the court, was made with the knowledge, consent, and approval of the ward, and when the ward at once entered into possession of the property and thereon resided for some seven years without payment of rent of any kind. (Investment made prior to effective date of this section.)

In re Meinders, 222-236; 268 NW 537

Investment in unallowable mortgage. Where two separate guardianships exist with the same guardian, one over an adult, and one over a minor, authority granted by the court in the adult guardianship to execute a second mortgage on the lands of the adult, and to invest in said second mortgage the money held by the guardian under the guardianship of the minor, constitutes no protection to the guardian (in view of this section, C., '24) if the ward in the minorship proceedings objects. (In this case, no entries whatever were made in the latter proceedings.)

In re Galloway, 217-284; 251 NW 619

Unauthorized investment—ratification. The act of a newly appointed guardian in foreclosing, under order of court, the illegal and unauthorized investment of a prior guardian, cannot be deemed a ratification of said investment.

In re Nolan, 216-903; 249 NW 648

Unauthorized investments. Trust funds invested by a trustee in questionable or worthless securities without an authorizing order of court must, on settlement, be accounted for in cash, such securities not being "securities approved" as provided by this section.

Whisler v Estes, 216-491; 249 NW 264

Unauthorized investments—subsequent approval nugatory. An investment of guardianship funds, in order to protect the guardian from resulting loss, must be preceded by an order of the court or judge approving the proposed investment, and, since the enactment of this section the approval by the court or judge of the investment after it has been made, is a nullity.

In re Nolan, 216-903; 249 NW 648

Unauthorized investments — rejection by ward. A ward, on the hearing on the final report of the guardian, may reject any or all loans or investments made by the guardian without the authority or approval of the court.

In re Jefferson, 219-429; 257 NW 783

Unauthorized, provident investment—subsequent approval. Principle reaffirmed that a provident investment of guardianship funds by a guardian without a pre-authorizing order of court, may, on proper application, be subsequently approved by the court with the same resulting force and effect as tho the court had, on due application, entered a pre-authorizing order.

(Ruling was on transaction prior to enactment of the 43rd GA, Ch 259.)

Richardson v Lampe, 221-410; 265 NW 629

Validating unauthorized investment. A provident investment made by a guardian long prior to, and maintained long subsequent to, the enactment of this section, but made originally without an authorizing order of court, is validated by the subsequent action of the court in specifically approving the same, and in repeatedly approving the guardian's annual reports with reference to the receipt of income from said investment.

In re Lemley, 219-765; 259 NW 481

Loan by guardian to himself—authorization. The probate court, when it finds that such a course will essentially promote the physical and mental welfare of a ward, may validly authorize a guardian, as such, to make a specified loan of guardianship funds to himself, individually, and, as guardian, to receive from himself, individually, the proper and legally required security for said loan.

In re Fish, 220-1328; 264 NW 542

Loans—required value of lands. Evidence reviewed and held to show substantial compliance with the law which requires lands to be of a value equal to twice the proposed loan of guardianship funds thereon.

In re Fish, 220-1328; 264 NW 542

Trustee buying property from himself. The act of a trustee in transferring his individually owned bonds and mortgages to himself as trustee and charging the trust funds with the amount thereof is wholly void even when authorized by an order of court. A fortiori is this true when the order was not obtained in good faith.

In re Riordan, 216-1138; 248 NW 21

12772.2 Existing investments.

Wrongful retention of securities by trustee or executor. An objection to the final report of a trust company acting as trustee and executor of an estate is sufficient in alleging generally that the trust company wrongfully retained securities which it should have disposed of altho it does not state on what dates the securities should have been sold and what their values were on those dates.

In re Carson, 227-941; 289 NW 30

12773 Security subject to court order.

Release of court-authorized investments. The statutory provision embraced in this section providing that court-authorized investments by guardians shall only be released by court authorization, is not limited to investments authorized by the court under §364, S., '13 [§12772, C., '39].

Randell v Fellers, 218-1005; 252 NW 787

Unauthorized release of mortgage. A guardian has no legal right, except under court authorization, to release, without payment, a court-authorized, real estate mortgage executed to, and held by, him as such guardian; and subsequent purchasers of the land are chargeable with knowledge of the statute invalidating such release.

Randell v Fellers, 218-1005; 252 NW 787

Unauthorized release of mortgage. The act of a guardian in releasing, without an order of court, a mortgage which represented an investment of funds derived from a sale of the ward's real estate constitutes a breach of the bond specially given by the guardian in order to effect said sale, it appearing that the guardian was, by said release, rendered incapable of personally accounting to the ward for the amount of said mortgage.

In re Brubaker, 214-413; 239 NW 536

12775 Annual accounting.

Guardianship — findings by court — conclusiveness. The hearing upon the report of a guardian is in probate, and the finding of facts of a probate judge in such case have force and effect of a jury verdict, and trial court in such case may properly exercise a degree of sound discretion in regard to the nature and extent of expenditures which may be properly approved.

McBurney v McBurney, (NOR); 210 NW 568

12776 Property or funds in litigation—deposit.

Property held by administrator. Where trust property in the possession of an administrator is identifiable and not affected by rights of innocent third parties, equity may impress a trust therein.

Carpenter v Lothringer, 224-439; 275 NW 98

12778 Inability to distribute trust funds—deposit.

Atty. Gen. Opinions. See '30 AG Op 355; '38 AG Op 411

12781.1 Final report of fiduciary—personal taxes.

Atty. Gen. Opinions. See AG Op July 17, '39; July 27, '39; Sept. 7, '39; Sept. 12, '39; AG Op Jan. 24, '40

12781.2 Compromise of personal taxes.

Atty. Gen. Opinion. See AG Op Jan. 24, '40

12783 Liability—reports required.

Atty. Gen. Opinion. See '30 AG Op 355

Not insurer of official funds. The clerk of the district court is not liable for loss of official funds coming into his hands and lost because of the failure of the bank in which they were deposited, when, at the time of deposit, he in good faith justifiably believed the bank to be solvent.

Prudential v Hart, 205-801; 218 NW 529

12784 Deposit with county treasurer.

Atty. Gen. Opinions. See '30 AG Op 355; '38 AG Op 411

12785 Duty of treasurer.

Atty. Gen. Opinion. See '38 AG Op 411

12786 Disbursement.

Atty. Gen. Opinion. See '38 AG Op 411

12786.1 Federal insured loans.

Atty. Gen. Opinion. See AG Op Feb. 28, '39

CHAPTER 552

PROCEDURE TO VACATE OR MODIFY JUDGMENTS

12787 Judgment vacated or modified—grounds.

Discussion. See 21 ILR 155—Judgment on arbitration award

ANALYSIS

Correction of evident mistake. See under §10803

I APPLICABILITY OF STATUTE

Motion to set aside. A motion to set aside a duly entered judgment in a criminal case is unknown to our practice.

State v Hawks, 213-698; 239 NW 553

Failure to do equity. Equity will not set aside a judgment for a debt which complainant admits he owes, and which he in no manner offers to discharge.

Coulter v Smith, 201-984; 206 NW 827

Consent decree. Equity will not set aside a consent judgment for attorney fees for both parties in divorce proceedings against the defeated party and his land when no fraud is shown and when the court had personal jurisdiction over both parties to the proceeding.

Coulter v Smith, 201-984; 206 NW 827

Equal protection—litigant's day in court. Every litigant is entitled to his day in court.

Lunt v Van Gorden, 225-1120; 281 NW 743

Non de novo hearing. A proceeding to vacate a default judgment and for new trial is not triable de novo on appeal.

R.I. Plow Co. v Brunkan, 215-1264; 248 NW 32

Bank examiner's final report vacated—procedure. An application by the superintendent of banking to set aside and vacate on the ground of fraud an order approving the final report and discharging the receiver and examiner of a closed bank is governed by Ch 552 of the code—the statutory procedure to vacate and modify judgments—which provides a complete legal remedy for setting aside a judgment or order after the term in which it is entered and within one year of the rendition of the judgment.

Bates v Loan & Tr. Co., 227-1347; 291 NW 184

Administrators—liabilities on bonds—existing judgment against executor—surety's new trial improper. Under the general rule that a judgment against an administrator is conclusive against the surety on his bond, where a judgment against an administrator for misappropriation of funds stands unreversed, it is error to set aside judgment on a bond and give the surety a new trial, since such order would not ipso facto vitiate a former order fixing the administrator's liability.

In re Sterner, 224-605; 277 NW 366

Claims in probate — unallowable setting aside. An allowance by the court of a claim in probate, after issue is joined thereon and after due hearing, becomes a final adjudication in the absence of fraud or collusion and may not thereafter be set aside without hearing or evidence.

In re Kinnan, 218-572; 255 NW 632

Claims—disallowance—penitentiary confinement insufficient equitable ground to reopen. Penitentiary confinement of the president of a corporation, the claimant in a receivership, without a showing that no other representative of the claimant had sufficient information to object to a receiver's report, is not, when asserted four years after an order approving the report disallowing the claim, such equitable circumstance as will make court's refusal to hear the claim an abuse of discretion.

Headford Co. v Associated Co., 224-1364; 278 NW 624

Wide discretion of court. The refusal to set aside a judgment will not be disturbed on appeal unless it is made to appear that the wide discretion of the trial court has been abused.

Swan v McGowan, 212-631; 231 NW 440

Failure to apply for correction in lower court. An order or judgment of the district court dismissing an action for want of prosecution (as provided by a court rule) will not be reviewed on appeal when the lower court has been given no opportunity either (1) on petition under this section or (2) on motion under §12827, C., '35, to correct the error, if any.

Hansen v McCoy, 221-523; 266 NW 1

Grounds for new trial—insufficient record. Record reviewed in an action wherein plaintiff appeared pro se in the trial court, and held insufficient to authorize the court (1) to set aside a former order denying a new trial, and (2) thereupon—11 months after the entry of judgment on a directed verdict—to grant a new trial.

Spoor v Price, 223-362; 272 NW 305

Mandatory duty of court to vacate. A judgment must be set aside on proper and timely application when an agreement or understanding existed between the respective counsel such that one of the counsel was justified in assuming, and in good faith did assume, that the cause would not be assigned for trial without notice to him, and when the judgment is the result of a violation of said agreement or understanding.

First N. Bank v Bank, 210-521; 231 NW 453; 69 ALR 1329

Newly discovered evidence. Cumulative newly discovered evidence is no adequate grounds for new trial, especially when it is quite speculative.

Rauch v Elec. Co., 206-1155; 221 NW 788

Newly discovered evidence. Newly discovered evidence which might sooner have been discovered by reasonable diligence is not ground for new trial.

Anderson v Railway, 216-230; 249 NW 256

Nonpermissible impeachment. The judgment of a court having jurisdiction of the parties and of the subject matter cannot be collaterally impeached.

King City v Surety Co., 212-1230; 238 NW 93

Reinstating dismissed action—showing of prima facie cause necessary. One seeking to reinstate an action which has been dismissed must do more than establish his ground for vacating the judgment; he must show that he has a valid cause of action or defense to the action in which the judgment was rendered. Held that the failure of plaintiffs to make a prima facie showing of a valid cause of action was fatal to their proceedings.

Thoreson v Central States Co., 225-1406; 283 NW 253

Clerk's dismissal for want of prosecution—reinstatement—statutory proceedings necessary. The power of the court to modify or set aside a judgment, when once entered, is purely statutory, and where clerk of court, under a general order of judges of judicial district, on April 20, 1935, entered an order dismissing action without prejudice for want of prosecution, and trial court's order of approval was entered on August 28, 1935, the trial court could set aside judgment of dismissal by statutory proceedings only, and by bringing defendants into court by same proceedings, respecting notice and service, as an ordinary action, hence, an order of reinstatement made September 8, 1938, was unauthorized where application for reinstatement was made on November 27, 1936, and a 5-day notice of hearing on application was given defendants by mail and defendants appeared specially in response to notice.

Hammon v Gilson, 227-1366; 291 NW 448

Vacating—nonpermissible issue. In an action to cancel a judgment by default on a promissory note, the defendant will not be permitted to present the issue that he was not personally liable on said note.

West v Heyman, 214-1173; 241 NW 451

Void judgment. A void judgment may be collaterally attacked.

Geneva v Thompson, 200-1173; 206 NW 132

Void judgment always subject to attack. A void judgment may be attacked in any proceeding in which it is sought to be enforced.

Gohring v Koonce, 224-1186; 278 NW 283

II JURISDICTION AND PROCEDURE IN GENERAL

Consolidation—pending actions only—when not permissible at plaintiff's instance. A motion by plaintiff, whereby his independent separate acton to set aside a dismissal and to reinstate the cause would be consolidated with the original action to recover accident insurance dismissed by such order, is properly overruled upon defendant's resistance thereto, since, under the statute, such motion can only be made at instance of defendant and then only as to pending actions.

McKee v Natl. Assn., 225-1200; 282 NW 291

Default judgment—custom of giving notice—setting aside for failure. Practice of attorneys of informing opposing counsel of intention to take default is not repugnant nor void under §11587, C., '35, providing for default judgment upon failure to file or amend pleadings within required time, and such practice may be considered under petition to set aside default judgment rendered without such notice.

Lunt v Van Gorden, 225-1120; 281 NW 743

Judgment by default—setting aside unaffected by failure to secure stay order. Fact that proceedings in district court could have been stayed pending appeal will not, on the ground that misfortune was avoidable, preclude setting aside a default judgment rendered pending appeal without customary notice between counsel.

Lunt v Van Gorden, 225-1120; 281 NW 743

Judgment by default—setting aside—"practice of court" includes practices of attorneys. Expression "practice of this court" fairly includes more than acts of presiding judge and means practices characteristic of the proceedings when attorneys appear for litigants therein, including practice of attorneys of informing opposing counsel of intention to take default, and evidence of such practice of attorneys was admissible under a petition to set aside a default judgment, altho petition alleged "practice of this court".

Lunt v Van Gorden, 225-1120; 281 NW 743

II JURISDICTION AND PROCEDURE IN GENERAL—continued

Appearance date agreed on—waiver of notice. Where the parties in a proceeding to vacate an order of court approving the final report of a bank receiver stipulate that the court may set a date for appearance later than the second day of the term, and that the bank examiner will file an appearance or pleading on or before that date, and that no other or further notice to him shall be necessary, the examiner may not assert the departure from the statutory requirements as to the appearance date as a ground for challenging the jurisdiction of the court by a special appearance.

Bates v Loan & Tr. Co., 227-1347; 291 NW 184

Foreclosure — decree — nonjurisdiction to amend. The district court has no jurisdiction, long after a duly rendered decree in mortgage foreclosure has become final, to amend said decree by striking therefrom a provision for redemption from execution sale, and by substituting therefor a provision directing the sheriff to issue deed forthwith upon making such sale. So held where the judgment plaintiff sought such amendment on the theory that the judgment defendant had lost his right to redeem because of a stay of execution obtained by him pending ineffectual bankruptcy proceedings.

Nibbelink v De Vries, 221-581; 265 NW 913

Independent action to reinstate not permissible. An independent separate action to set aside a dismissal and to reinstate a cause, on the ground of unavoidable casualty and misfortune, made within one year but after term at which dismissal was made, is not permissible.

McKee v Natl. Assn., 225-1200; 282 NW 291

Former decision as res adjudicata. Where a salesman obtained an Iowa judgment against an Indiana company and after judgment the company filed a combination pleading, consisting of a special apperance (the propriety of which is doubtful) and a petition to vacate the judgment for lack of jurisdiction, and a decision is rendered thereon adversely to the company, from which no appeal was taken, such judgment becomes a final judgment, and where company subsequently brings a separate action in equity to vacate such judgment for lack of jurisdiction, the trial court properly dismissed the equity petition and refused to enjoin its enforcement, since the former decision on the jurisdiction question was res adjudicata. The company cannot relitigate the same questions that were, or might have been, determined upon its former petition to vacate the judgment.

Martin Bros. v Fritz, 228- ; 292 NW 143

Vacating final report of receiver. After the approval of the final report of the receiver of a closed bank which discharged both the receiver and the examiner in charge, an application by the receiver for vacation of the order consented to the jurisdiction of the court only as to the receiver, but the court had jurisdiction to deal summarily with the examiner by prescribing the form of notice to be served on him and to set the time for his appearance so long as the statutory provisions for vacating and modifying judgments were complied with and the application filed within one year from the date of rendition of the order attacked.

Bates v Loan & Tr. Co., 227-1347; 291 NW 184

Judgment of dismissal — nonjurisdiction to set aside. The district court, having at one term entered a judgment of dismissal of an action for want of prosecution of the action as required by the rules of the court, has no jurisdiction at a subsequent term, tho the judgment entry remains unsigned, to set aside said judgment under §10801, C., '35, and reinstate the action. The governing procedure under such circumstances is provided by this section.

Workman v Dist. Court, 222-364; 269 NW 27

Modification — mistake. A consent decree which sets aside certain deeds, and which is participated in by all the legatees under a will for the sole and conceded purpose of facilitating the carrying out of the provisions of a will, is properly modified by striking therefrom a provision which mistakenly gives to some of the legatees a right or estate to which they were not entitled under the subsequent happenings of events clearly provided for in the will.

Reno v Avery, 203-645; 212 NW 564

Modification under legalizing act. A decree which adjudges the rights of the public under a statute as it exists at the date of the decree may, after the term and after the enactment of a curative and legalizing act, be so modified as to express the public rights under the statute as it exists under the curative act.

Wilcox v Miner, 201-476; 205 NW 847

Municipal court—filing motions after verdict —extending time. The municipal court has jurisdiction to enter an order extending the time to file a motion for a new trial and exceptions to instructions and judgment non obstante veredicto. Such order is reviewable by appeal, not by certiorari.

Eller v Mun. Ct., 225-501; 281 NW 441

Opening and setting aside—different allowable procedures. When final judgment is erroneously rendered in municipal court against a defendant (1) because of the mistaken assumption by the court that defendant was in default for want of an answer, and (2) because of the fraud of plaintiff, said defendant may (at least when he acts diligently under the circumstances) proceed by petition under this section et seq., C., '35, for the setting aside of said judgment, instead of proceeding by motion

under §10681, C., '35, for the same relief. It necessarily follows that if defendant so proceeds, he is not bound by the 90-day limitation imposed by said last named section.

La Forge v Cooter, 220-1258; 264 NW 268

Rulings in re change of records. A ruling of the trial court relative to changing its records will not be interfered with by the appellate court in the absence of a clear and satisfactory showing that the trial court was in error.

Gow v Dubuque County, 213-92; 238 NW 578

Setting aside dismissal. When an action to collect death benefits was dismissed for want of prosecution, the court was justified in setting aside the dismissal when the petition for reinstatement showed the fact of the accident resulting in death, and that witnesses had been located, and the order of the court complied with a statute in making an adjudication that the plaintiff had a valid cause of action.

Nickerson v Iowa Assn., 226-840; 285 NW 162

Void sale — relief — venue. A proceeding wherein relief is sought on the theory that the petitioner bought property at a void judicial sale and received nothing for his purchase price must be brought in the court and in the proceedings out of which the execution arose.

State v Beaton, 205-1139; 217 NW 255

III MISTAKE, NEGLECT, OR OMISSION OF CLERK

Unpardonable delay. A judgment may not be corrected for error of the clerk in computing the amount thereof, when the defendant, before the expiration of the year following the entry felt in his own mind that such error had been made, but, without explanation, delayed the filing of his application for correction until after the expiration of said year, and until after the land had been sold under the judgment; and especially when his application is accompanied by an inequitable demand.

Floyd Co. v Ramsey, 213-556; 239 NW 237

IV IRREGULARITIES IN OBTAINING JUDGMENT

Dismissal of cases for want of prosecution—validity of general order. The fact that an order of the judges of a judicial district, requiring the parties to cause each case to be finally determined within two years from date of filing petition, was a general order applicable to all cases or proceedings pending or to come before the courts of the district did not invalidate such order.

Hammon v Gilson, 227-1366; 291 NW 448

Irregularity in obtaining judgment. The fact that, in mortgage foreclosure, the court entered personal judgment against a subsequent grantee on a finding that he had assumed the mortgage debt, manifestly cannot be deemed an "irregularity" sufficient to demand the setting aside of the judgment even tho said assumption did not appear in the grantee's deed, and even tho such assumption was in issue between said grantee and his grantors.

Swan v McGowan, 212-631; 231 NW 440

Discretion of court. The action of the municipal court, on timely motion, in vacating a judgment for irregularity in obtaining the judgment will not be disturbed on appeal in the absence of a clear showing of abuse on the part of the court.

Mitchell v Brennan, 213-1375; 241 NW 408

Adoption — fabricated ground of abandonment—effect. A decree of adoption of a child, based solely on a finding that the child had been abandoned by its parent, and entered without notice to the parent of the hearing, tho her residence was known, will be set aside on a direct attack supported by affirmative and conclusive evidence that the child had never been so abandoned.

Pitzenberger v Schnack, 215-466; 245 NW 713

Unallowable equitable action. An order of court which, in bank receivership proceedings, mistakenly grants, under a misapprehension of the law, an absolute preference in payment of the deposit of a municipality, may not, on the ground of such mistake, be set aside by an independent action in equity by other depositors and creditors of the insolvent bank, when such depositors and creditors neither (1) appealed from said order, nor (2) entered, in the receivership proceedings, any objection to such order.

Schubert v Andrew, 205-353; 218 NW 78

V FRAUD IN OBTAINING JUDGMENT

Inherent power of court. The district court has inherent power to set aside a judgment during the term at which it was rendered on proof that the judgment was obtained by fraud, extrinsic and collateral to the judgment, even tho there was no default.

Cedar Rapids Co. v Bowen, 211-1207; 233 NW 495

Collateral attack—attorney omitting defense—belated attack ineffectual. A regularly entered decree against a person represented by reputable counsel will not seven years thereafter be set aside for alleged fraud of an attorney in failing to plead a bankruptcy discharge as a defense.

Ware v Eckman, 224-783; 277 NW 725

Deception constituting fraud—requisites to nullify judgment. Fraud as will invalidate a duly entered decree must be perpetrated by or in some manner connected with the opposing party or his attorney.

Ware v Eckman, 224-783; 277 NW 725

V FRAUD IN OBTAINING JUDGMENT—continued

Equivocal wording of original notice. An original notice will not justify a personal judgment on default when it is so drawn that a person would naturally and ordinarily conclude that the relief demanded was simply to establish the mortgage sued on as a lien paramount to the defendant's junior lien; much less would it justify such personal judgment if intentionally drawn to mislead.

Sutton v Rhodes, 205-227; 217 NW 626

Evidence — sufficiency. Evidence held insufficient to set aside a decree of divorce and to grant a new trial on the grounds of fraud and unavoidable casualty and misfortune.

McAtlin v McAtlin, 205-339; 217 NW 864

Falsity of testimony. Motion to vacate a judgment on the ground that the testimony on which the judgment was rendered was false is properly overruled.

Genco v Mfg. Co., 203-1390; 214 NW 545

Fraud—motion to set aside decree. A motion to set aside a decree of divorce for fraud, in that plaintiff had not acquired a bona fide residence required by statute, is a proper procedure, but the burden of proof necessarily rests on the maker of the motion.

Girdey v Girdey, 213-1; 238 NW 432

Fraud of judgment plaintiff. A judgment entered against a defendant after plaintiff, for a sinister purpose, had assured defendant that he would not be held on his indorsement of the note in question, and after plaintiff had induced defendant to forego reimbursing himself by a settlement with the maker of the note, will be deemed fraudulent and set aside accordingly.

Foote v Bank, 201-174; 206 NW 819

Fraudulent allowance. The fraudulent allowance of the claim that certain property belongs to claimant and not to the estate may be set aside on proper application at any time before the estate is finally settled, and especially so when the applicant was not a party to the original allowance.

In re Sarvey, 206-527; 219 NW 318

Fraudulently obtained order. A fraudulently obtained order of court may, of course, be set aside on proper application.

In re Riordan, 216-1138; 248 NW 21

Bank examiner's final report vacated—procedure. An application by the superintendent of banking to set aside and vacate on the ground of fraud an order approving the final report and discharging the receiver and examiner of a closed bank is governed by this chapter, which provides a complete legal remedy for setting aside a judgment or order after the term in which it is entered and within one year of the rendition of the judgment.

Bates v Loan & Tr. Co., 227-1347; 291 NW 184

Fraudulently obtained decree of divorce—swift annulment. In view of the confidential relationship existing between a husband and wife, a court of equity should be swift to set aside a decree of divorce obtained by the husband by fraudulent means, the application by the innocent party for such annulment being made promptly after learning of the deception.

Petersen v Petersen, 221-897; 267 NW 719

Extrinsic and collateral fraud—impeachment of witnesses. Evidence newly discovered after trial and verdict, and apparently demonstrating that the verdict was obtained by extrinsic and collateral fraud, is ground for new trial within the time limit and conditions provided by the statute; and it is no objection that said evidence also tends to impeach witnesses. So held where the newly discovered evidence tended strongly to show that the stamp "Paid", as it appeared on an obligation sued on, had been willfully fabricated.

Bates v Carter, 222-1263; 271 NW 307

Non-extrinsic fraud. Principle reaffirmed that the fraud which will justify the setting aside of a decree must be extrinsic and collateral to the matter determined by the decree—something other than false swearing in procuring the decree.

Girdey v Girdey, 213-1; 238 NW 432

Intrinsic and extrinsic fraud. A default judgment on a promissory note is justifiably set aside and a new trial ordered on proof that the execution of the note was induced by false representations as to the consideration therefor, and that said fraud was repeated shortly prior to the entry of said judgment and the maker thereby induced to believe, until after judgment was entered, that he had no defense to said note.

Rock Island Plow Co. v Brunkan, 215-1264; 248 NW 32

Inhering fraud. A final order of discharge of an administrator may not be set aside, opened up, or otherwise questioned on a showing of fraud which inheres in said order of discharge.

Murphy v Hahn, 208-698; 223 NW 756

Perjury. Perjury on a material issue in a cause will not be recognized in an equitable action as sufficient ground to vacate a judgment or decree and to grant a new trial after the expiration of one year from the entry thereof.

Abell v Partello, 202-1236; 211 NW 868

Perjury. Perjury as to any intrinsic matter in an action is not a ground for a new trial.

Hewitt v Blaise, 202-1114; 211 NW 481

Procedure. A party against whom judgment has been rendered must, in order to have the judgment set aside for fraud, proceed by ordinary proceedings entitled as in the original action.

Swartzendruber v Polke, 205-382; 218 NW 62

Vacation — unallowable grounds. A decree of divorce, rendered on full jurisdiction, will not be set aside and canceled on the ground that the applicant for the cancellation fraudulently colluded with the other party to the action to obtain the decree.

Reppert v Reppert, 214-17; 241 NW 487

VI MINORS AND INSANE PERSONS

Insane persons—actions—guardian ad litem. Every person is presumed sane until the contrary appears, and, unless an adult person appearing in court has been judicially declared insane, there is no requirement that a guardian ad litem be appointed to represent him, this being especially true where, not being confined, he appears by counsel and presents a defense, and a judgment against him will not be set aside.

Ware v Eckman, 224-783; 277 NW 725

Restoration of status quo. An incompetent, through his guardian, may, on proper grounds, maintain an action to set aside and annul a judgment in foreclosure without offering to restore the status quo when the incompetent received no part of the money secured by the mortgage.

Engelbercht v Davison, 204-1394; 213 NW 225

Unknown insanity—effect. A judgment in foreclosure which was obtained by the holder in due course of the notes secured and which has passed to foreclosure deed will not be set aside on the ground that the defendant was at all times mentally incompetent and that the notes and mortgage were forgeries, (1) when neither the plaintiff nor the court had knowledge of such grounds, (2) when the defendant was personally served in the foreclosure and appeared by counsel and filed answer, and (3) when the defendant had never been adjudged to be insane, nor was he an inmate of a state hospital for the insane.

Engelbercht v Davison, 204-1394; 213 NW 225

Annulment of marriage—insanity. Admission of improperly certified judicial records of Texas and Michigan bearing on issue of defendant's sanity in trial of default action to annul marriage is not ground for reversal of court's action in refusing to set aside the default annulment when lower court was not given opportunity to pass upon the competency of the records. The rule is that a party is not to be surprised on appeal by new objections and issues, nor as to defects within his power to remedy had he been advised in the proper time and manner.

Kurtz v Kurtz, 228- ; 290 NW 686

VII DEATH OF PARTIES

Death of party without substitution. Where no personal representative was substituted for plaintiff who died after institution of partition action, and heirs of decedent were not in court, plaintiff's attorney had no authority to dismiss cause, and court was without jurisdiction to enter decree on petition of intervention against interests once held by plaintiff. Hence, application made during same term to vacate the dismissal and decree should have been sustained.

Bingaman v Rosenbohm, 227-655; 288 NW 900

Judgment after death of defendant. Principle recognized that the court having taken a cause under advisement, and delayed decision until after the death of the defendant, may validly render judgment as of the date of the submission.

Chariton Bk. v Taylor, 213-1206; 240 NW 740

VIII CASUALTY, MISFORTUNE, AND NEGLIGENCE

Discretion of court. The appellate court will be quite reluctant to reverse an order setting aside a decree and granting a new trial on the somewhat questionably established ground of unavoidable casualty or misfortune, when the beneficiary of the order shows an apparently good defense. So held where the real issue was whether an original notice had been delivered to defendant's counsel.

Heater v Bagan, 206-1301; 221 NW 932

Court acting on own motion contrary to agreement of counsel. Consolidated actions, dismissed by the court on its own motion in the absence of counsel, for want of prosecution, are properly reinstated on a showing of "unavoidable casualty and misfortune" in that there was no negligence on the part of plaintiffs or their counsel and that they were relying on an agreement between counsel that certain motions would not be made nor issues made up until convenient to all counsel.

Thoreson v Central States Co., 225-1406; 283 NW 253

Defective pleading. A defendant may not ignore a suit against him and allow judgment to be entered, and then have the judgment set aside for want of jurisdiction because of merely defective pleading, as distinguished from absence of pleading and prayer.

Nelson v Higgins, 206-672; 218 NW 509

Evidence—sufficiency. Evidence held insufficient to set aside a decree of divorce and

VIII CASUALTY, MISFORTUNE, AND NEGLIGENCE—concluded

to grant a new trial on the grounds of fraud and unavoidable casualty and misfortune.

McAtlin v McAtlin, 205-339; 217 NW 864

Litigant's day in court. It is the policy of the law that every cause of action should be tried upon its merits and that every party to an action shall have his day in court.

Western Grocer Co. v Glenn, 226-1374; 286 NW 441

Reinstatement justified. When an action for death benefits was dismissed for failure to prosecute, reinstatement was not an abuse of discretion when it was shown that: there was a valid cause of action; witnesses were difficult to obtain; there was a change in the plaintiff's counsel; the court records erroneously showed an amended answer which might have misled the new counsel; there was no personal neglect on the part of the plaintiff; and a dismissal at that time, under the terms of the policy, prevented having any trial on the merits of the case.

Nickerson v Iowa Assn., 226-840; 285 NW 162

Dismissal of action—setting aside—time limit. The time limit for filing petition to vacate an order dismissing an action for want of prosecution, on the ground of unavoidable casualty or misfortune preventing a party from prosecuting the action, is not limited to a time on or before the second day of the term succeeding the entry of the order.

Seiders v Adel Co., 218-612; 255 NW 656

Vacating—decree in foreclosure after lapse of year—insufficient showing. A mortgagor is not entitled to have a decree in foreclosure set aside on the ground of misunderstanding and inefficiency of his attorney, when he applies more than a year after entry of the decree, and it appears that the proceedings were regular in every way, and it further appears that his attorney did everything possible in his behalf.

Snyder v Bank, 226-341; 284 NW 157

12788 Petition for new trial after term.

ANALYSIS

I PETITION
II NEWLY DISCOVERED EVIDENCE

I PETITION

Appeal as sole remedy. An order which sets aside a judgment some five years after its rendition, on the asserted ground that the cause had never been set for trial after issue had been joined, such order being made on motion, service, and appearance of all parties, is a finality in the absence of an appeal therefrom.

Dickson Fruit Co. v Dist. Court, 203-1028; 213 NW 803

Fraudulent decree. An unappealed decree of a court of competent jurisdiction of a sister state, granting separate maintenance to a wife on the ground of desertion, and dismissing the husband's cross-petition for divorce on the same ground, constitutes a final adjudication that the husband was not entitled to a divorce on any ground (the laws of the two states being the same), and is binding on the courts of this state; and a decree of divorce subsequently obtained in this state by the husband on service by publication and on the ground of desertion, and without revealing the foreign decree, will be deemed fraudulent and will be set aside on timely petition by the wife and a new trial granted on her prayer.

Bowen v Bowen, 219-550; 258 NW 882

II NEWLY DISCOVERED EVIDENCE

Motion delayed more than five days. A motion for new trial when not based on newly discovered evidence is properly overruled when made more than five days after the verdict.

In re Larimer, 225-1067; 283 NW 430

12789 Petition deemed denied—method of trial.

Affidavits—statutory denial. Affidavits relative to newly discovered evidence as grounds for new trial (on petition) are denied by operation of law.

Anderson v Railway, 216-230; 249 NW 256

12790 Time limit.

General equitable jurisdiction. After the expiration of the one year for vacating a judgment, as provided by statute, a court of equity will not decree a vacation, under its general equitable power, when it is made to appear that complainant has had, from the inception of the judgment, full knowledge of the grounds for the vacation.

Montagne v Cherokee County, 200-534; 205 NW 228

Equitable action after one year. What exact limitations a court of equity will impose on itself in exercising its power to vacate a judgment or decree and to grant a new trial because of evidence discovered after the expiration of the statutory one year for vacation and new trial, quaere; but such power will not be exercised either (1) when the new evidence was or ought to have been discovered during said statutory period, or (2) when such evidence falls far short of presenting strong equitable considerations, is largely incompetent, and, within the range of competency, is a double-edged sword which militates strongly against the equities of the applicant.

Abell v Partello, 202-1236; 211 NW 868

Unallowable equitable action. A party against whom judgment has been rendered may not, after the expiration of one year, maintain an equitable action to set aside the

judgment for fraud of which he had knowledge before the expiration of such year.

Swartzendruber v Polke, 205-382; 218 NW 62

Fatal delay. A judgment against an insane person may not be vacated, under the statute, because of erroneous proceedings or fraud not going to the jurisdiction of the court, when the proceedings to vacate are delayed beyond one year after the death of the insane person.

Montagne v Cherokee County, 200-534; 205 NW 228

Fatal delay. A defendant is very properly denied a new trial when she had knowledge of the entry of the default judgment almost simultaneously with its entry, and negligently delayed filing her petition for a new trial until after the lapse of nine months and the passing of three terms of court, and especially when her petition presents no fact coming to her knowledge since the entry of the judgment complained of.

Anderson v Anderson, 209-1143; 229 NW 694

Belated plea of fraud. A timely petition for the vacation of a judgment on the ground that the stipulation on which the judgment was rendered was wholly unauthorized, may not, after the lapse of one year after the rendition of the judgment, be so amended as to inject the issue of fraud as a basis for such vacation.

Haas v Nielsen, 200-1314; 206 NW 253

Laches—effect. A party may not, after the lapse of one year from the rendition of a judgment, maintain an equitable action to set aside the judgment for fraud, extrinsic and collateral to the proceedings, when he knew, or by reasonable diligence would have known, of such fraud during said one year.

Gehle v Hart, 209-736; 229 NW 149

Modification—timely action. An action to rectify a mistake in a decree against a minor is timely when the notice in the action to rectify is duly served within the year following the attainment of the majority of the minor, even tho the petition is not filed until after the lapse of said year, such action not being controlled by this section, C., '24.

Reno v Avery, 203-645; 212 NW 564

12791 Motion to correct mistake or irregularity.

Rules—general order—dismissal for want of prosecution. Under the recognized rule that courts have the inherent power to prescribe such rules of practice and rules to regulate their proceedings in order to expedite the trial of cases, to keep their dockets clear, and to facilitate the administration of justice, the judges of a judicial district could adopt and enforce a general order requiring parties to cause each case to be finally determined within two years from date of filing petition and providing upon failure to comply with such order the clerk should enter upon the record, "Dismissed without prejudice for want of prosecution".

Hammon v Gilson, 227-1366; 291 NW 448

Dismissal of cases for want of prosecution —validity of general order. The fact that an order of the judges of a judicial district, requiring the parties to cause each case to be finally determined within two years from date of filing petition, was a general order applicable to all cases or proceedings pending or to come before the courts of the district did not invalidate such order.

Hammon v Gilson, 227-1366; 291 NW 448

Clerk's entry of dismissal under general order—nonreviewable when court approves entry. Where a general order of the judges of a judicial district provided for the dismissal of all actions and proceedings undetermined after a period of two years, and directed the clerk of court to enter the dismissal without prejudice, and where such order was so entered in the district court record by the clerk, the supreme court is not required to pass upon the question of whether such entry by the clerk would be an effective dismissal, when at the same term of court the presiding judge made an entry in the same record "approving, affirming and ratifying" this and all other orders of dismissal under the general order.

Hammon v Gilson, 227-1366; 291 NW 448

Clerk's dismissal for want of prosecution— reinstatement — statutory proceedings necessary. The power of the court to modify or set aside a judgment, when once entered, is purely statutory, and where clerk of court, under a general order of judges of judicial district, on April 20, 1935, entered an order dismissing action without prejudice for want of prosecution, and trial court's order of approval was entered on August 28, 1935, the trial court could set aside judgment of dismissal by statutory proceedings only, and by bringing defendants into court by same proceedings, respecting notice and service, as an ordinary action, hence, an order of reinstatement made September 8, 1938, was unauthorized where application for reinstatement was made on November 27, 1936, and a five-day notice of hearing on application was given defendants by mail and defendants appeared specially in response to notice.

Hammon v Gilson, 227-1366; 291 NW 448

Inherent power of court. The district court is but exercising its inherent power when, on motion, it corrects by nunc pro tunc order, and regardless of the one-year limitation imposed by this section, the unquestionably established error of its own clerk in entering a judgment against a judgment defendant for a less amount than theretofore ordered by the court —it appearing that the judgment plaintiff had

not, by laches, forfeited the right to demand such correction against the judgment defendant.

Murnan v Schuldt, 221-242; 265 NW 369

Motion as proper remedy. A motion to set aside and vacate an order which is in excess of the jurisdiction of the court is proper.

Guisinger v Guisinger, 201-409; 205 NW 752

Insufficient motion. A final decree of divorce may not be vacated, even during the term at which entered, on a motion by defendant which alleges that no witness was sworn or testified in the cause and no corroborating testimony was offered, but which is silent as to any showing that plaintiff had no cause of action, or that defendant had a defense to plaintiff's action, or that there was fraud in obtaining the decree.

Radle v Radle, 204-82; 214 NW 602

Mistake of clerk—unpardonable delay. A judgment may not be corrected for error of the clerk in computing the amount thereof, when the defendant, before the expiration of the year following the entry, felt in his own mind that such error had been made, but, without explanation, delayed the filing of his application for correction until after the expiration of said year, and until after land had been sold under the judgment; and especially when his application is accompanied by an inequitable demand.

Floyd County v Ramsey, 213-556; 239 NW 237

Unallowable modification. The court, having overruled a motion (1) to strike an answer, and (2) for judgment nil dicit, has no right, later and after the term of court has expired, and while the cause is pending, to materially amend said ruling without pleadings, without hearing, and without notice to the defendant.

Taylor v Canning Corp., 218-1281; 257 NW 353

12792 Petition.

ANALYSIS

I Relief in General
II Petition
III Equitable Relief

I RELIEF IN GENERAL

Allowance of probate claim—unallowable setting aside. An allowance by the court of a claim in probate, after issue is joined thereon and after due hearing, becomes a final adjudication in the absence of fraud or collusion and may not thereafter be set aside without hearing or evidence.

In re Kinnan, 218-572; 255 NW 632

Time for filing petition. The time limit for filing petition to vacate an order dismissing an action for want of prosecution, on the ground of unavoidable casualty or misfortune preventing a party from prosecuting the action, is not limited to a time on or before the second day of the term succeeding the entry of the order.

Seiders v Clay Prod., 218-612; 255 NW 656

II PETITION

Setting aside dismissal. When an action to collect death benefits was dismissed for want of prosecution, the court was justified in setting aside the dismissal when the petition for reinstatement showed the fact of the accident resulting in death, and that witnesses had been located, and the order of the court complied with a statute in making an adjudication that the plaintiff had a valid cause of action.

Nickerson v Iowa Assn., 226-840; 285 NW 162

III EQUITABLE RELIEF

Granting unallowable relief. The court may not decree the cancellation of an unquestioned judgment, or decree a reconveyance of land when the validity of the original conveyance was not properly in issue.

Benson v Sawyer, 216-841; 249 NW 424

Former decision as res adjudicata. Where a salesman obtained an Iowa judgment against an Indiana company and after judgment the company filed a combination pleading, consisting of a special appearance (the propriety of which is doubtful) and a petition to vacate the judgment for lack of jurisdiction, and a decision is rendered thereon adversely to the company, from which no appeal was taken, such judgment becomes a final judgment, and where company subsequently brings a separate action in equity to vacate such judgment for lack of jurisdiction, the trial court properly dismissed the equity petition and refused to enjoin its enforcement, since the former decision on the jurisdiction question was res adjudicata. The company cannot relitigate the same questions that were, or might have been, determined upon its former petition to vacate the judgment.

Martin Bros. v Fritz, 228- ; 292 NW 143

12793 Time limit.

Service of notice. An action to modify a judgment for mistake therein is "commenced", under this section, C., '24, by the service of the notice of such action. (See §11012, C., '24.)

Reno v Avery, 203-645; 212 NW 564

Setting aside dismissal. The time limit for filing petition to vacate an order dismissing an action for want of prosecution, on the ground of unavoidable casualty or misfortune preventing a party from prosecuting the action, is not limited to a time on or before the second day of the term succeeding the entry of the order.

Seiders v Clay Prod., 218-612; 255 NW 656

Timely action. An action to rectify a mistake in a decree against a minor is timely when the notice in the action to rectify is duly served within the year following the attainment of the majority of the minor, even tho the petition is not filed until after the lapse of said year, such action not being controlled by §12790

Reno v Avery, 203-645; 212 NW 564

Unallowable equitable action. A party against whom judgment has been rendered may not, after the expiration of one year, maintain an equitable action to set aside the judgment for fraud of which he had knowledge before the expiration of such year.

Swartzendruber v Polke, 205-382; 218 NW 62

12794 Proceedings.

ANALYSIS

I PROCEDURE IN GENERAL
II NOTICE
III PARTIES
IV PLEADINGS AND ISSUES
V VENUE
VI METHOD OF TRIAL
VII APPEAL

I PROCEDURE IN GENERAL

Clerk's dismissal for want of prosecution—reinstatement — statutory proceedings necessary. The power of the court to modify or set aside a judgment, when once entered, is purely statutory, and where clerk of court, under a general order of judges of judicial district, on April 20, 1935, entered an order dismissing action without prejudice for want of prosecution, and trial court's order of approval was entered on August 28, 1935, the trial court could set aside judgment of dismissal by statutory proceedings only, and by bringing defendants into court by same proceedings, respecting notice and service, as an ordinary action, hence, an order of reinstatement made September 8, 1938, was unauthorized where application for reinstatement was made on November 27, 1936, and a five-day notice of hearing on application was given defendants by mail and defendants appeared specially in response to notice.

Hammon v Gilson, 227-1366; 291 NW 448

Bank examiner's final report vacated. An application by the superintendent of banking to set aside and vacate on the ground of fraud an order approving the final report and discharging the receiver and examiner of a closed bank is governed by this chapter, which provides a complete legal remedy for setting aside a judgment or order after the term in which it is entered and within one year of the rendition of the judgment.

Bates v Loan & Tr. Co., 227-1347; 291 NW 184

Mistake of clerk — unpardonable delay to make correction. A judgment may not be corrected for error of the clerk in computing the amount thereof, when the defendant, before the expiration of the year following the entry, felt in his own mind that such error had been made, but, without explanation, delayed the filing of his application for correction until after the expiration of said year, and until after land had been sold under the judgment; and especially when his application is accompanied by an inequitable demand.

Floyd County v Ramsey, 213-556; 239 NW 237

Modification of judgment—timely action. An action to rectify a mistake in a decree against a minor is timely when the notice in the action to rectify is duly served within the year following the attainment of the majority of the minor, even tho the petition is not filed until after the lapse of said year, such action not being controlled by §12790, C., '24.

Reno v Avery, 203-645; 212 NW 564

II NOTICE

Commencement of action. An action to modify a judgment for mistake therein is "commenced" by the service of the notice of such action. (See §11012, C., '24)

Reno v Avery, 203-645; 212 NW 564

Unallowable modification of ruling. The court, having overruled a motion (1) to strike an answer, and (2) for judgment nil dicit, has no right, later and after the term of court has expired, and while the cause is pending, to materially amend said ruling without pleadings, without hearing, and without notice to the defendant.

Taylor v Grimes Corp., 218-1281; 257 NW 353

III PARTIES

Modification of mistake in consent decree by legatees. A consent decree which sets aside certain deeds, and which is participated in by all the legatees under a will for the sole and conceded purpose of facilitating the carrying out of the provisions of a will, is properly modified by striking therefrom a provision which mistakenly gives to some of the legatees a right or estate to which they were not entitled under the subsequent happenings of events clearly provided for in the will.

Reno v Avery, 203-645; 212 NW 564

IV PLEADINGS AND ISSUES

Unallowable modification of ruling. The court, having overruled a motion (1) to strike an answer, and (2) for judgment nil dicit, has no right, later and after the term of court has expired, and while the cause is pending, to materially amend said ruling without pleadings, without hearing, and without notice to the defendant.

Taylor v Grimes Corp., 218-1281; 257 NW 353

V VENUE

Judgment—enjoining proceedings—unallowable venue. An action will not lie in one county to enjoin proceedings on a judgment rendered in another court in another county, even tho plaintiff's action is based on the claim that the judgment is wholly void.

Ferris v Grimes, 204-587; 215 NW 646

VI METHOD OF TRIAL

Nonallowable order as to merits. On the trial of a petition by a defendant for a new trial, the court should go no further than adequately to determine the matters of grounds for new trial and whether defendant has a prima facie good defense to the original action. The court may not, after granting a new trial, enter in connection therewith an order dismissing the original petition.

Heater v Bagan, 206-1301; 221 NW 932

VII APPEAL

Discretion and findings of court. An order setting aside the dismissal of an action for want of prosecution will be set aside by the appellate court only on a clear showing of abuse of discretion. In fact, supported legal findings as a basis for such an order are conclusive on the appellate court.

Seiders v Clay Prod., 218-612; 255 NW 656

Scope and extent—finding by court. A finding by the court, on conflicting and supporting testimony, in a proceeding to set aside a judgment on a bail bond, that the surety had, at his own expense, caused the principal in the bond to be delivered to the sheriff, is not reviewable on appeal.

State v Robinson, 205-1055; 218 NW 918

12796 Cause of action or defense—necessity.

Necessity for defense. Judgments, orders, or findings of the court will not be set aside in the absence of a showing of defense.

In re Donlon, 201-1021; 206 NW 674

Insufficiency of showing. An order removing an administrator will not be vacated (1) when there is no showing that the administrator has any defense to the order, (2) when the extent of his liability to the estate as found by the court is admitted to be correct, (3) when he has held the estate open beyond the time contemplated by law, and (4) when he is largely indebted to the estate and is financially embarrassed.

In re Donlon, 201-1021; 206 NW 674

Reinstating dismissed action—showing of prima facie cause necessary. One seeking to reinstate an action which has been dismissed must do more than establish his ground for vacating the judgment; he must show that he has a valid cause of action or defense to the action in which the judgment was rendered. Held that the failure of plaintiffs to make a prima facie showing of a valid cause of action was fatal to their proceedings.

Thoreson v Central States Co., 225-1406; 283 NW 253

Reinstatement justified. When an action for death benefits was dismissed for failure to prosecute, reinstatement was not an abuse of discretion when it was shown that: there was a valid cause of action; witnesses were difficult to obtain; there was a change in the plaintiff's counsel; the court records erroneously showed an amended answer which might have misled the new counsel; there was no personal neglect on the part of the plaintiff; and a dismissal at that time, under the terms of the policy, prevented having any trial on the merits of the case.

Nickerson v Iowa Assn., 226-840; 285 NW 162

Setting aside dismissal. When an action to collect death benefits was dismissed for want of prosecution, the court was justified in setting aside the dismissal when the petition for reinstatement showed the fact of the accident resulting in death, and that witnesses had been located, and the order of the court complied with a statute in making an adjudication that the plaintiff had a valid cause of action.

Nickerson v Iowa Assn., 226-840; 285 NW 162

12798 Grounds to vacate first tried.

Reinstating dismissed action—showing of prima facie cause necessary. One seeking to reinstate an action which has been dismissed must do more than establish his ground for vacating the judgment; he must show that he has a valid cause of action or defense to the action in which the judgment was rendered. Held that the failure of plaintiffs to make a prima facie showing of a valid cause of action was fatal to their proceedings.

Thoreson v Central States Co., 225-1406; 283 NW 253

12800 Judgment affirmed.

Discussion. See 18 ILR 372—Damages—frivolous appeal

TITLE XXXIV

SUPREME COURT

CHAPTER 553

ORGANIZATION OF SUPREME COURT

12803 Submission to entire court—rules.

Discussion. See 13 ILR 398—Rules of court in Iowa

Consolidation of similar cases. A motion to dismiss an appeal or to set aside the submission thereof will be overruled when made by plaintiffs in a different but similar action, on the ground that the two actions were consolidated, and that no notice of the appeal was served on said plaintiffs, the record revealing that the two actions were consolidated only to the extent of hearing both causes at the same time and on the same evidence.

Mershon v School Dist., 204-221; 215 NW 235

Rules—allowable and unallowable waiver. The supreme court may waive its own rules governing appellate procedure. It may not waive a mandatory statutory rule governing such procedure.

Coggon Bk. v Woods, 212-1388; 238 NW 448

Specified procedure — observance required. Statutory regulations and rules promulgated by the supreme court governing its procedure must be observed.

Harroun v Schultz, 226-610; 284 NW 450

12810 Divided court.

Affirmance by divided court. An affirmance, on appeal of an order setting aside the allowance of a claim in probate, constitutes a final adjudication even tho such affirmance resulted by operation of law from an equal division of the appellate court in the consideration of the appeal.

Doyle v Jennings, 210-853; 229 NW 853

Opinion by divided court. The fact that a final opinion by the supreme court is arrived at by a divided court, e. g., by a vote of five to four, does not, of itself, furnish any reason for repudiating it.

State v Grattan, 218-889; 256 NW 873

Substituted service on nonresident individual. Principle reaffirmed that an individual nonresident who maintains in this state an office or agency, even tho he has never personally been within this state, may be legally personally served in this state with original notice of suit as to matters growing out of such office or agency by service directed to him and made on his agent employed in said office or agency. (§11079, C., '31.)

Goodman v Doherty Co., 218-529; 255 NW 667

12813 Opinions to be filed.

Supreme court decisions in general. See under §§12871, 14010

Discussion. See 18 ILR 567—Arguments by counsel reported

Correcting erroneous decisions. Courts have a duty to correct their own decisions when found to be wrong.

Montanick v McMillin, 225-442; 280 NW 608

Costs judgment—voluntary payment. A voluntary payment of an entire judgment prior to appeal by the superintendent of banking, tho such judgment be only for costs entered against him by the court, and not merely taxed by the clerk, is such an acquiescence and submission to the judgment as precludes an appeal thereon. (Distinguishing Boone v Boone, 160 Iowa 284.)

Bates v Bank, 223-878; 274 NW 32

Decision—conclusiveness. A final opinion by the supreme court in an equitable action is conclusive as to all inhering subject matters except such as the court may and does specifically except therefrom.

Globe Ins. v Cas. Co., 205-1085; 217 NW 268; 56 ALR 463

Decisions as precedents. Prior decisions as binding precedents, affirming decisions resulting from divided court, and overruling of former opinions discussed.

Goodman v Doherty & Co., 218-529; 255 NW 667; affirmed 294 US 623; 55 SCR 553

Dictum—what is not. If a question is specifically presented to the supreme court on appeal, the opinion of the court on such question cannot be deemed dictum even tho it was not strictly necessary for the court to pass on the question.

Galvin v Bank, 217-494; 250 NW 729

Dictum—what is not—unquestioned pronouncement. Scant consideration will be given to the claim that a pronouncement of the court was pure dictum when it has stood unchallenged and been acted on for half a century.

Schoenwetter v Oxley, 213-528; 239 NW 118

Opinion by divided court. The fact that a final opinion by the supreme court is arrived at by a divided court, e. g., by a vote of five to four, does not, of itself, furnish any reason for repudiating it.

State v Grattan, 218-889; 256 NW 873

Prior action—appellant not party—res adjudicata—precedent. The judgment in a prior action decided by the supreme court involving the same guardianship is not res adjudicata as against appellant who was not a party to the former action; but what was there said, following the holding in Bookhart v Younglove, 207 Iowa 800, is binding upon this court as a precedent.

Federal Co. v France, 212-1403; 283 NW 460

Rights and remedies of surety—contribution—nonestoppel. A surety who unsuccessfully contends, when sued on bond, that he is not liable for any defalcation occurring prior to the bond—that said bond is a substitute for a prior bond of the same guardian—does not thereby estop himself from enforcing contribution from the sureties on said prior and contemporary bond.

Federal Co. v France, 212-1403; 238 NW 460

CHAPTER 555

PROCEDURE IN THE SUPREME COURT IN CIVIL ACTIONS

12822 Appellate jurisdiction.

ANALYSIS

Contempt orders—review on appeal. See under §12550
Denial of right to appeal, due process. See under Art I, §9 (VI)
Effect of appeal on jurisdiction of trial court. See under §12857
Judicial department, constitutional provisions. See under Const, Art V
Jurisdiction of supreme court. See Const, Art V, §4

I NATURE AND FORM OF REMEDY

Appeal dismissed—no bar to second appeal. Voluntary dismissal of an appeal does not preclude the right to again appeal within the statutory time.

Doonan v Winterset, 224-365; 275 NW 640

Correcting erroneous decisions. Courts have a duty to correct their own decisions when found to be wrong.

Montanick v McMillin, 225-442; 280 NW 608

Equitable and law issues in probate—appellate practice. In appeals involving claims in probate, frequent practice of supreme court has been to review equitable issues by trial de novo, while considering alleged errors assigned in the law action.

Ontjes v McNider, 224-115; 275 NW 328

Contract to repurchase stock—equitable issues not presented. On appeal from a ruling sustaining plaintiff's demurrer to answer of a foreign corporation, in suit for breach of contract to repurchase from plaintiff its own stock, setting up defense that such purchase would impair its capital, which was prohibited under the statute of the state of its domicile, the supreme court could not exercise its inherent equitable power or give consideration to estoppel, ratification, implied contract, or theory that contract was loan, when proper pleading or proof relating thereto was lacking.

Bishop v Middle States Co., 225-941; 282 NW 305

Due process of law—appeal—absence of. The right of appeal is not a constitutional right, and it is wholly within the power of the legislature to grant or deny it, in either civil or criminal cases. So held under the juvenile court act.

Wissenburg v Bradley, 209-813; 229 NW 205; 67 ALR 1075

Jurisdictional defects—nonwaiver. Defects and objections that go to the jurisdiction of the appellate court cannot be waived.

Sioux Falls Assn. v Field Co., 224-655; 277 NW 284

Probate—allowance of claim—review only by appeal. Errors in a probate proceeding for allowance of a claim as in law actions should be corrected by appeal, and no exceptions nor appeal therefrom being taken, a finding in such probate proceeding is a final adjudication.

In re Davie, 224-1177; 278 NW 616

Right of review—statutes govern appeal. The right of appeal, being purely statutory, is controlled by the statutes in effect at the time the judgment appealed from was rendered.

Ontjes v McNider, 224-115; 275 NW 328

Social welfare board—findings of fact—noninterference by court. The provisions as to powers and authority of the court on appeal, under the provisions of the social welfare law as to old-age assistance, are somewhat analogous to those of the workmen's compensation law, under which the holdings of our court have always been that, when supported by competent evidence, the findings of fact by the

commission will not be interfered with by the court.

Schneberger v Board, 228- ; 291 NW 859

Rulings on motions—correction—certiorari (?) or appeal (?). Certiorari will not lie to review rulings of the court on motions submitted to the court by the hostile litigants, the sole function of the writ being to annul illegal action and not to review mere errors. Appeal is the sole remedy for the correction of the latter.

Morrison v Patterson, 221-883; 267 NW 704

Taxation—collection—court lending aid. The supreme court will, within the limits of the power conferred by the legislature, lend its aid to the collection of the revenues upon which the state must depend.

Bittle v Cain, 224-1332; 278 NW 608

II JUDGMENTS IN GENERAL

Abstract—all-essential recitals. A naked statement, in an abstract on appeal, that the judgment appealed from was "rendered", is fatally insufficient in not revealing the all-essential fact that the judgment was duly entered of record.

Harmon v Hutchinson Co., 215-1238; 247 NW 623

Nonassignment of error—no consideration. Form of decree, complained of in appellant's brief, will not be considered when not assigned as error.

Bredt v Franklin County, 227-1230; 290 NW 669

Court findings on conflicting evidence—conclusiveness. Where different inferences reasonably may be drawn from undisputed facts and circumstances, the drawing of any one of such inferences by the court in a trial without a jury is a final finding which will not be disturbed on appeal.

Home Ins. v Ins. Co., 225-36; 279 NW 425

Decretal portion inconsistent with recital of facts. The decretal portion of a decree, when in conflict with recital of facts, takes precedence, and the decree is not void because of the inconsistency, and appeal lies only on the decretal portion of the decree that is final judgment.

Higley v Kinsman, (NOR); 216 NW 673

Dismissal—judgment appealed from, not entered—no appeal. The supreme court cannot consider an appeal where the record fails to show any judgment of record from which an appeal could be taken, when such appeal purports to be from a judgment.

Lotz v United Markets, 225-1397; 283 NW 99

Dismissal—insurer's attorney also defendant—sufficient judgment for appeal. In an action on an accident policy, the insured, an attorney, who makes the insurer's attorney a defendant along with the company, may not dismiss the company-attorney's appeal on the ground that there is no judgment against such company-attorney, when the judgment entry is against the company and "any person acting in its behalf".

Eller v Guthrie, 226-467; 284 NW 412

"Final decision." A statutory declaration that a decision by the court shall be "final" may carry the clear meaning that such decision is not an appealable decision.

State v Webster Co., 209-143; 227 NW 595

From final judgment—presumption. When the abstract recites, generally, the taking and perfecting of an appeal, and the jurisdiction of the appellate court is not attacked in written form as provided by §12885, the appeal will be presumed to be from the final judgment, even tho the abstract does not show the entry of a final judgment.

In re Kahl, 210-903; 232 NW 133

What constitutes judgment—entry in record book essential. Neither the mental conclusion of the judge presiding at a trial, nor the oral announcement of such conclusion, nor his written memorandum entered in his calendar, nor the abstract entered in the judgment docket, constitutes a judgment. A judgment cannot be said to be entered until it is spread by the clerk upon the record book.

Lotz v United Markets, 225-1397; 283 NW 99

Necessity for separate appeals. Where objections to an administrator's report are ruled on in part by two different judges and separate judgments are entered, an appeal from one of the judgments does not bring up for review the judgment from which no appeal has been taken.

In re Atkinson, 210-1245; 232 NW 640

Review—scope and extent. A party may not have a review of that part of a judgment which pertains to the costs when such part is not within the scope of his appeal.

Chicago, Burl. Ry. v Board, 206-488; 221 NW 223

Right to review—voluntary compliance with costs judgment. A voluntary payment of an entire judgment prior to appeal by the superintendent of banking, tho such judgment be only for costs entered against him by the court, and not merely taxed by the clerk, is such an acquiescence and submission to the judgment as precludes an appeal thereon. (Distinguishing Boone v Boone, 160 Iowa 284.)

Bates v Nichols, 223-878; 274 NW 32

Where reasonable minds disagree. In action for damages to plaintiff's automobile, judgment will be affirmed, on appeal, where reason-

able minds might reasonably disagree on the fact issues.

Schenk v Moore, 226-1313; 286 NW 445

III JURISDICTION IN GENERAL

Supreme court without original jurisdiction. The supreme court has no original jurisdiction.

Sch. Dist. v Samuelson, 220-170; 262 NW 169

Supreme court not trier of facts. The supreme court may not sit as a trier of facts and substitute its judgment as to the amount of damages to be awarded, for the judgment of the jury.

Stoner v Hy. Com., 227-115; 287 NW 269

Social welfare board—administrative duties—nonjudicial review. While the lines of demarcation between the three branches of government are sometimes difficult to determine and the duties sometimes overlap, the duties of the state board of social welfare in determining eligibility for old-age assistance are clearly administrative and, under the statute, in the absence of fraud or abuse of discretion, they are not and could not well be the subject of judicial inquiry.

Schneberger v Board, 228- ; 291 NW 859

Appeal from unrecorded order — no complaint by appellant. After the unsuccessful termination of his appeal, an appellant may not later challenge the jurisdiction of the supreme court to entertain the appeal because the order appealed from was not spread upon the district court records.

Lincoln Bk. v Brown, 224-1256; 278 NW 294

Appeal statutory—unaffected by consideration of expediency. The right to appeal in any particular case being entirely governed by statute is not affected by fact that determination of appeal would facilitate and expedite trial on the merits in the lower court.

Ontjes v McNider, 224-115; 275 NW 328

Appearance to fatally defective service. Appearance in an appellate tribunal for the purpose of objecting because the notice of appeal was not served as required by law does not confer jurisdiction on the tribunal to hear the appeal.

Casey (Town) v Hogue, 204-3; 214 NW 729

Assignment of errors necessary. In a law action tried to a jury, jurisdiction of supreme court on appeal is confined to that of a court for correction of errors and, to invoke its jurisdiction, a proper assignment of error is necessary.

Slippy Corp. v Grinnell, 226-1293; 286 NW 508

Consent to jurisdiction. Parties to litigation cannot, by agreement, confer jurisdiction upon the supreme court.

Hampton v Railway, 216-640; 249 NW 436

Continuing jurisdiction of lower court. An appeal simply from an order appointing a receiver in auxiliary proceedings to enforce a judgment leaves all other portions of said proceedings within the jurisdiction of the district court.

Wade v Swartzendruber, 206-637; 220 NW 67

Dismissal—improper procedure. The contention that the appellate court has no jurisdiction to entertain an appeal must be presented by motion to dismiss (§12886, C., '27), and not by a discussion in appellee's argument.

First T. & S. Co. v Gypsum Co., 211-1019; 233 NW 137; 73 ALR 1196

Jurisdiction on appeal—not conferred by consent—dismissal. Where an unauthorized appeal has been taken, it is the duty of the court upon ascertaining the situation to dismiss the appeal on its own motion. Jurisdiction of the court is statutory and cannot be conferred by consent of the litigants.

Eby v Phipps, 225-1328; 283 NW 423

Lack of jurisdiction—raised at any time—not conferred by consent. Objection based upon the want of jurisdiction of the court over the subject matter of the action may be raised at any time, and, when the law withholds from a court authority to determine a case, jurisdiction cannot be conferred, even by consent of parties.

Johnson v Purcell, 225-1265; 282 NW 741

Motion to dismiss appeal determined first. A motion to dismiss an appeal submitted with the case, being jurisdictional, will be determined before other matters.

Ontjes v McNider, 224-115; 275 NW 328

Requirements for valid decree. To be valid and binding, the acts of a court must be within the court's jurisdiction, i. e., it must have (1) jurisdiction of the subject, which is power to hear and determine cases in the general class of the question presented, and (2) jurisdiction of the person, which is power to subject the parties to the judgment.

Collins v Powell, 224-1015; 277 NW 477

Writ of prohibition—right of appeal. The jurisdiction of the supreme court to issue a writ of prohibition, commanding a district court to discontinue all assumption of jurisdiction over named actions pending in said latter court, is not necessarily defeated because the beneficiaries of said writ would have a right to appeal from an adverse judgment.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

Wrong form of action below. Supreme court cannot assume jurisdiction on appeal where the matter in issue is not such as was triable in the form of action brought in the trial court below.

Anderson v Meier, 227-38; 287 NW 250

IV APPEALABLE DECISIONS

Court order based on unconstitutional statute—voidability by appeal. When the district court made an order extending the period for redemption of land on which a mortgage had been foreclosed, and the supreme court later declared the statute under which the extension was granted to be unconstitutional, the order granting such extension was not void, but was voidable by reversal on appeal, and when no appeal was taken, the order could not be attacked.

New York Ins. v Breen, 227-738; 289 NW 16

Decisions reviewable—motion to strike—ruling inheres in judgment. An order striking portions of a pleading inheres in the judgment and is presentable on appeal therefrom.

Doonan v Winterset, 224-365; 275 NW 640

Dismissal of action. A final judgment dismissing plaintiff's petition is appealable.

First Sec. Co. v U. S. Gyp., 211-1019; 233 NW 137; 73 ALR 1196

Enforcing uncontroverted part of judgment —effect. A plaintiff who contends for a lien on both of two tracts of land, and is conceded by all parties a lien on one of said tracts, may enforce his lien on said one tract, and thereafter maintain an appeal from the judgment denying his lien on the remaining tract.

Luglan v Lenning, 214-439; 239 NW 692

Exclusion of question—necessity to show prejudice. No reviewable error results from excluding a question which does not, in and of itself, reveal that which the questioner is seeking to show, and the court is not, by proper offer, otherwise enlightened.

Schooley v Efnor, 202-141; 209 NW 408

Independent action reopening estate—judgment appealable. A judgment for plaintiff in a separate, independent action in equity, brought not against an administrator but against the surviving spouse and heir, seeking to set aside the order in probate approving the final report and closing the estate, is a final judgment such as will entitle the defendant to appeal.

Federal Bank v Bonnett, 226-112; 284 NW 97

Motion to set aside default—timeliness of appeal. Where court entered default judgment on November 15, 1937, and overruled a motion to set aside the default on February 24, 1938, an appeal taken June 20, 1938, from the order overruling the motion was timely, since the appeal was not taken on the default judgment, but on the ruling on the motion, which was appealable.

Rayburn v Maher, 227-274; 288 NW 136

V NONAPPEALABLE DECISIONS

Appellant not adversely affected by error—no review. If the appellant is not adversely affected by the lower court's decision, even if erroneous, nothing is left for review by the appellate court on that appeal.

In re Keeler, 225-1349; 282 NW 362

Consent decree of reformation—nonreviewable. In an action where a consent judgment and decree is entered granting reformation of mortgages respecting description of lands involved, and no exception to the decree is entered nor appeal taken, the propriety of the court's granting such relief is not properly before supreme court on appeal from judgment and decree foreclosing such mortgages.

State Bank v Mapel, 226-1328; 286 NW 517

General appearance after stipulation—question first raised on appeal—no review. A stipulation purported to have been entered into between parties, after which it is claimed defendants filed a general appearance, will not be considered on appeal when not set out in the abstract and not called to the attention of the trial court. Matters not presented to the lower court will not be reviewed.

Johnston v Bank, 226-496; 284 NW 393

Nonappeal from inferential rulings. When the court finds in favor of the defendant on a specifically named defense, the inference will be indulged that the court found against him on his cross-petition for relief which is affirmative, and in the nature of an independent cause of action. It follows that defendant is not entitled, on an appeal by plaintiff, to a review of the inferential rulings on said affirmative and independent matters.

Toedt v Bollhoefer, 206-39; 218 NW 56

Motions—ruling on motion as adjudication —unallowable review. An order overruling plaintiff's motion (1) to strike an answer, and (2) for judgment nil dicit (assuming the propriety of such procedure) constitutes an adjudication that plaintiff has no legal right to a judgment on the pleadings as they then stand; and plaintiff has no right later to present, to another judge of the same court, a motion for judgment on the same pleadings, and said latter judge has no right to review the rulings of the former judge by sustaining said latter motion.

Taylor v Canning Corp.,218-1281; 257 NW 353

Order setting aside default. An order setting aside a default is not appealable.

Kirk v Betz, 216-1020; 250 NW 182

Preservation of error necessary—motor vehicles—insurance comment on voir dire. In a motor vehicle damage action, error may not be predicated on references to insurance in jurors' examination when no record is preserved for appeal.

McCornack v Pickerell, 225-1076; 283 NW 899

Simple finding of fact. An appeal will not lie from a so-called judgment which in fact is

only a statement or recital of findings by the court.

Harmon v Ice Cream Co., 215-1238; 247 NW 623

VI WHO MAY APPEAL

Appeal in name of deceased party. Altho plaintiff died during pendency of action below, supreme court took jurisdiction of appeal taken in name of such decedent, because parties treated cause as one properly before the court and because it was a case where court's constitutional authority could be invoked.

Bingaman v Rosenbohm, 227-655; 288 NW 900

Dismissal—expiration of official term. An appeal in an action in which the county is the real party in interest will not be dismissed because the terms of office of the official party defendants have expired.

First Bank v Burke, 201-994; 196 NW 287

Order for more specific statement. A plaintiff may except to an order sustaining a motion for a more specific statement and obtain a review of such ruling by refusing to plead over and appealing from the final judgment dismissing his action. (See under §§12827, 12828.)

Depping v Hansmeier, 202-314; 208 NW 288

Receiver. The receiver of an insolvent bank has a right to appeal from an order which grants to a depositor an equitable preference over all other creditors in the payment of his claim.

Andrew v Bank, 205-1248; 218 NW 24

Receivership creditor. Depositors and creditors in a bank receivership have a right to appeal from an order of court which grants to a depositor an unallowable preference in the payment of his deposits.

Schubert v Andrews, 205-353; 218 NW 78

VII WHO MAY NOT APPEAL

Consent judgment. An election contestant may not appeal from the judgment of the contest board holding the election in question illegal and providing for the calling of a new election by said board, when he consented to the entry of such judgment; nor may an estoppel to question such appeal be based upon the fact that the official board of which appellees were members refused to recognize the validity of the new election called by the contest board.

Leslie v Barnes, 201-1159; 208 NW 725

Contempt in violation of injunction — discharge. Upon the discharge of one accused of contempt in violating an injunction, an appeal may not be maintained under the title under which the injunction was obtained.

Cedar Falls Bank v Boslough, 218-502; 255 NW 665

Nature of remedy—no constitutional right. Principle reaffirmed that a litigant has no constitutional right to an appeal.

Van der Burg v Bailey, 207-797; 223 NW 515

Petitioners for drainage district. Petitioners for the establishment of a drainage district may not maintain an appeal from an order setting aside the establishment by the board of supervisors of a drainage district when, up to the time of the entry of the said order of the district court, the board of supervisors and the drainage district were the sole defendants in the proceedings.

Chi., Burl. Ry. v Board, 206-488; 221 NW 223

12823 Appeals from orders.

ANALYSIS

I ORDERS IN GENERAL

Appeal from unrecorded order—no complaint by appellant. After the unsuccessful termination of his appeal, an appellant may not later challenge the jurisdiction of the supreme court to entertain the appeal because the order appealed from was not spread upon the district court records.

Lincoln Bank v Brown, 224-1256; 278 NW 294

Belated presentation of defense. In summary proceedings between an attorney and a client, the defense that a contract between the parties was champertous, or against public policy, must be presented in some manner in the trial court, even tho such summary proceedings are heard by the trial court without written pleadings.

Norman v Bennett, 216-181; 246 NW 378

Constitutionality of mortgage redemption statute—first raised on appeal. When the constitutionality of a statute permitting the extension of the time for redemption of land upon which a mortgage had been foreclosed was not put in issue at a hearing at which the district court granted an extension, the order granting the extension became the law of the case, and the question of constitutionality could not first be raised in the supreme court in another action after the redemption had been made.

New York Ins. v Breen, 227-738; 289 NW 16

Court order based on unconstitutional statute—voidability by appeal. When the district court made an order extending the period for

redemption of land on which a mortgage had been foreclosed, and the supreme court later declared the statute under which the extension was granted to be unconstitutional, the order granting such extension was not void, but was voidable by reversal on appeal, and when no appeal was taken, the order could not be attacked.

New York Ins. v Breen, 227-738; 289 NW 16

Failure of cross-petitioners to appeal between each other. Defendant cross-petitioners in an action to enforce a contract for the sale of land, among whom judgments have been rendered on assignments and assumption of the contract sought to be enforced, may not have such judgments reviewed by simply appealing from the judgment rendered in favor of plaintiff.

Vanderwilt v Broerman, 201-1107; 206 NW 959

Garnishment—uncontested order—appeal requirements not waived. The fact that a receiver in a foreclosure proceeding does not resist an order directing him to withhold sufficient funds to satisfy a judgment creditor will not amount to an adjudication of creditor's rights in the funds nor constitute a waiver of the statute regulating time to appeal from a release of a garnishment, nor confer jurisdiction on the appellate court to review the dismissal of the garnishment proceedings, since such jurisdiction cannot be conferred by consent of the parties.

Sioux Falls Assn. v Field Co., 224-655; 277 NW 284

General appearance after stipulation—question first raised on appeal—no review. A stipulation purported to have been entered into between parties, after which it is claimed defendants filed a general appearance, will not be considered on appeal when not set out in the abstract and not called to the attention of the trial court. Matters not presented to the lower court will not be reviewed.

Johnston v Bank, 226-496; 284 NW 393

Lien—unauthorized order. An order establishing the heirship of persons to an estate and, without notice, decreeing a lien in favor of the attorney on the cash shares of certain heirs for whom the attorney has never appeared, is a nullity, insofar as the order establishing the lien and the amount thereof is concerned.

In re Lear, 204-346; 213 NW 240

Refusal to grant old-age assistance—fraud—abuse of discretion—review. Review by the supreme court on the abstract and transcript of evidence of the action of the state board of social welfare in refusing to reinstate claimants to old-age assistance relief because of son's ability to support them held not to disclose either fraud or an abuse of discretion.

Schneberger v Board, 228- ; 291 NW 859

Nonpermissible enlargement. An appeal specifically from the refusal of the court to strike a petition cannot be deemed enlarged so as to stand as an appeal from the final judgment as well as from the refusal to strike, simply because appellee on appeal (1) amends the appellant's abstract and shows that subsequent to the taking of the appeal, appellant answered the petition and proceeded to trial, and (2) files an argument as to the merits of the final judgment.

Iowa N. Bank v Raffensperger, 208-1133; 224 NW 505

Order for appearance of execution defendant. An order in proceedings auxiliary to execution, for the appearance and examination of the execution defendant and his wife, is not appealable, even tho the wife is not an execution defendant.

Lehigh Co. v Gjellefald, 205-778; 218 NW 475

Order overruling objections to interrogatories—not appealable. An order overruling objections and exceptions to interrogatories attached to a plaintiff's petition in an action for accounting is not an order from which an appeal will lie.

Eby v Phipps, 225-1328; 283 NW 423

Order overruling motion for more specific statement. An appeal will lie directly from an order overruling a motion to require plaintiff, in an action to recover the contract price for medical services rendered by him, to state whether at the time of rendering the services he was duly licensed to practice medicine; otherwise as to requiring plaintiff to set forth the contents of the formula used by plaintiff tho said formula was a subject matter of the contract.

Hoxsey v Baker, 216-85; 246 NW 653

Order to be terminated if statute invalid—not automatic termination. A court order extending the time of redemption of land on which a mortgage had been foreclosed, providing that, if the statute under which the order was entered be held invalid, the order "shall be terminated", did not automatically revoke the order when the statute was declared unconstitutional, but could be terminated only by action of the court.

New York Ins. v Breen, 227-738; 289 NW 16

Rulings subsequent to final judgment. An appeal solely from a definite and specified final judgment precludes review on appeal of adverse rulings subsequent to the entry of said judgment, striking appellant's exceptions to instructions and motion for a new trial.

Schooley v Efnor, 202-141; 209 NW 408

Power of judge at chambers. An ex parte order of a judge at chambers to the effect that a party to an action may, on the trial, use a

I ORDERS IN GENERAL—concluded

transcript of the testimony taken in another and former action is a nullity.

Kostlan v Mowery, 208-623; 226 NW 32

Right of review—estoppel. An order which permits the filing of an issue-changing amendment will not be reviewed on appeal when it appears that appellant rejected an offered continuance.

Kellar v Lindley, 203-57; 212 NW 360

Sufficiency of recitals. A notice of appeal which describes the proceeding by proper title and the order appealed from by proper date of rendition is all-sufficient, and brings up for review each and every feature of the order. So held where the final determination of the court embraced two orders, one germane to the proceeding before the court and one wholly nongermane.

In re Mann, 208-1193; 225 NW 261

Waiver of error by pleading over. Plaintiff may not predicate error on orders for more specific statement with which orders he has complied by pleading over.

Pride v Kittrell, 218-1247; 257 NW 204

II ORDERS AFFECTING SUBSTANTIAL RIGHT

Belated filing of claim. Appeal will not lie from an order which grants to a claimant in receivership proceedings the naked right to file and prove his claim after the time originally fixed for the filing of claims.

In re Bank, 203-1399; 214 NW 561

Bidder at sale of trust property—nonaggrieved party. In the sale of the personal property assets of an insolvent bank by the liquidating receiver, a bidder who is not a creditor of the bank, or interested in any manner in the trust property except as a proposed buyer, has no such standing or interest as authorizes him to appeal from an order of the court rejecting his bid for an item of said assets, and approving a lesser bid of another party for the same item. Nor will the court, under such circumstances, order a remand when the difference between the two bids is slight. (This is not suggesting (1) that the unsuccessful bidder may not very properly call the attention of the court to the disparity in bids, or (2) that the court has unbridled discretion to reject high bids and to approve low bids.)

Dean v Clapp, 221-1270; 268 NW 56

Certiorari not available—appealable rulings on motions. The sole function of certiorari is to annul illegal action and not to review mere errors arising out of rulings on motions when by appeal there is a remedy for the correction of the latter.

Kommelter v Dist. Court, 225-273; 280 NW 511

Refusal to quash certiorari. An appeal will not lie from an order refusing to quash a writ of certiorari.

Riley v Board, 207-177; 222 NW 403

Order setting aside default. An order setting aside a default is nonappealable, a fact which the appellate court will enforce on its own motion.

Barber v Shattuck, 207-842; 223 NW 864
Baker v Ry. Exp. Co., 207-1350; 224 NW 513
Welty v Ins. Assn., 211-1135; 235 NW 80
Wagoner v Ring, 213-1123; 240 NW 634
Kirk v Betz, 216-1020; 250 NW 182

Motion to set aside default—timeliness of appeal. Where court entered default judgment on November 15, 1937, and overruled a motion to set aside the default on February 24, 1938, an appeal taken June 20, 1938, from the order overruling the motion was timely, since the appeal was not taken on the default judgment, but on the ruling on the motion, which was appealable.

Rayburn v Maher, 227-274; 288 NW 136

Improper to review setting aside of default—appeal proper. Appeal, not certiorari, is the proper method to proceed to attack an alleged erroneous order of the municipal court in sustaining a motion to set aside a default judgment, where the court had jurisdiction to enter the order.

Weston v Allen, 225-835; 282 NW 278

Order noted on calendar. A party may not appeal from an order in the form of a mere notation on the judge's calendar, which order is later incorporated into the final decree.

Brotherhood v Ressler, 216-983; 250 NW 169

Defendant—right to review tho not present at trial. Defendant in foreclosure proceedings may appeal from, and have a review of, an order (duly excepted to) appointing a receiver, when his answer joined issue on the plaintiff's allegation for such appointment, even tho he introduced no evidence and did not attend the trial when the receiver was appointed.

First N. Bk. v Witte, 216-17; 245 NW 762

Directing verdict—stricken pleading of settlement—nonreview. Since a settlement must be pleaded, the overruling of a motion for directed verdict alleging a settlement of the action is not reviewable when the pleading setting forth the settlement has been ordered stricken and such order stands unchallenged.

Pearson v Butts, 224-376; 276 NW 65

Order overruling motion for directed verdict. An order overruling a motion to direct a verdict is not appealable.

Benson v Weitz' Sons, 208-397; 224 NW 592

Posted signs of damage settlement offer—denying directed verdict based on stricken pleadings. Denying a directed verdict based

on a general standing offer of settlement, made by posted signs to all patrons of a beauty shop in the event of injury, pleaded in answer but stricken on motion by an order not alleged as error, cannot be reviewed on appeal.

Pearson v Butts, 224-376; 276 NW 65; 2 NCCA(NS) 613

Motion to dismiss—failure to stand on motion. An order overruling a motion to dismiss an equitable action is not appealable unless the movant elects to stand on his motion or suffers judgment to be rendered against him.

Frazier v Wood, 215-1202; 247 NW 618

Motion to dismiss. When a motion to dismiss an equitable action is sustained, the plaintiff may (1) stand on his pleadings and appeal, or (2) amend.

Swartzendruber v Polke, 205-382; 218 NW 62

Overruled motion to dismiss equitable action —conditions attending appeal. An appeal will not lie from an order overruling a motion to dismiss an equitable action on the ground of misjoinder of parties unless the record shows (1) an election to stand on the pleading, or (2) that judgment was entered against the movant.

Fed. Sur. v Morris Plan, 209-339; 228 NW 293

Dismissal of equitable action on motion. An appeal will not lie from a ruling which sustains defendant's motion to dismiss plaintiff's petition in equity as the order of dismissal does not, in such case, terminate the litigation and is not, therefore, a final judgment.

Hawthorne v Andrew, 208-1364; 227 NW 402

Motion in equity to dismiss. An appeal will not lie from an order in an equity cause sustaining a motion to dismiss made at the close of plaintiff's testimony.

Bridges v Sams, 202-310; 202 NW 558

Order to strike and dismiss. An order overruling a motion to strike a pleading, and to dismiss parties, because of the improper joinder of actions and of party defendants, is appealable.

Ontjes v McNider, 218-1356; 256 NW 277

Motion to dismiss garnishee. On an appeal from an order overruling a motion to dismiss a garnishee, the burden of sustaining the motion was on the garnishee.

Sioux Falls Assn. v Henry Field Co., 226-874; 285 NW 155

Order as to indictments returned. An order of the district court refusing a hearing of an application to compel the county attorney to file and enter upon the appearance docket indictments alleged to have been returned against the applicant, is appealable, and therefore certiorari will not lie.

Hoskins v Carter, 212-265; 232 NW 411

Ruling as to legal settlement of insane patient. No appeal lies from a decision of the trial court on a duly joined issue as to the legal settlement of an insane inmate of a state hospital for the insane.

State v Webster Co., 209-143; 227 NW 595

Overruled motion for mental examination. An order overruling defendant's motion that plaintiff-guardian be compelled to produce his ward and that she be examined as to her mental condition is not appealable.

Scott v Seabury, 216-1214; 250 NW 468

Order approving lease. An order approving a lease in accordance with a foreclosure decree appointing a receiver is not reviewable on a purported appeal from the order itself. The validity of such order necessarily depends on the validity of the decree from which it springs.

Union Ins. v Eggers, 212-1355; 237 NW 240

Misjoinder of parties. The action of the court in overruling a motion to set aside an ex parte order making movant a party to a pending action is appealable, the motion being based on the ground of misjoinder of parties.

Irwin v Bank & Trust, 218-961; 256 NW 681

Misjoinder — wrong calendar — waiver. A defendant in equity who files answer after the overruling of his motion (1) to strike alleged misjoined causes of action, and (2) to transfer from equity to law, may not maintain an appeal from the ruling on his said motion.

Thompson v Erbes, 221-1347; 268 NW 47

Order refusing separation of misjoined causes. The court, on proper motion, must correct an unallowable joinder of causes of action and an order refusing so to do is appealable.

Ellis v Bruce, 215-308; 245 NW 320

Motions—sustained if any ground is good. When a motion to strike an application by an executor to have a clerk's approval of claims against an estate set aside was based on several grounds and when the granting of the motion was assailed as to only one ground, on an appeal, the supreme court was precluded from reversing the case since, if the motion was good on any of its grounds, the ruling below was correct.

In re Baker, 226-1071; 285 NW 143

Motion for more specific statement. Orders which simply settle the issues in a case (e. g., an order overruling a motion for a more specific statement) are not ordinarily appealable.

So. Sur. v Salinger, 213-188; 238 NW 715

Motion for more specific statement. An order overruling a motion for a more specific statement of allegations of negligence is not appealable when the allegations so attacked

II ORDERS AFFECTING SUBSTANTIAL RIGHT—continued

are virtually nugatory—of such nature that evidence in purported support thereof will not be admissible on the trial.

Ferguson v Cannon, 214-798; 243 NW 175
See Dorman v Credit Co., 213-1016; 241 NW 436

Overruling motion for more specific statement. An order overruling a motion for a more specific statement is appealable when the ruling deprives the movant of a right which cannot be protected by appeal from the final judgment.

Fay v Dorow, 224-275; 276 NW 31

Order overruling motion for more specific statement. An appeal will lie directly from an order overruling a motion for a more specific statement of a cause of action, when the ruling deprives the movant of a right which cannot be protected by an appeal from the final judgment.

Dorman v Credit Co., 213-1016; 241 NW 436

Negligence—general allegation—reservation of ground of review—standing on motion to strike or make specific. To preserve an objection that an allegation of negligence was too general and indefinite to constitute basis of cause of action, a defendant should stand on its motion to strike and for more specific statement. Failing in this and filing its answer, it waived any error of court in overruling motion. A cause of action should be sufficiently precise to enable the defendant to prepare his defense.

O'Meara v Green Const. Co., 225-1365; 282 NW 735

Order refusing judgment on pleadings. An order refusing a judgment on the pleadings is not appealable.

Benson v Weitz' Sons, 208-397; 224 NW 592
Frazier v Wood, 215-1202; 247 NW 618

Order refusing judgment against vouchee. An order refusing a judgment against a vouchee (who was, in substance, a party) is appealable.

Hoskins v Hotel, 203-1152; 211 NW 423; 65 ALR 1125

Ordering production of books. An order for the production of books is not appealable.

Stagg v Bank, 203-84; 212 NW 342

Order in re public deposits. An appeal lies from an order of court which adjudges the amount of public funds on deposit in an insolvent bank for the purpose of payment out of the "state sinking fund for public deposits".

Winnebago Co. v Horton, 204-1186; 216 NW 769

Order overruling objections to referee's report. An order overruling objections to the report of a referee in partition seems to be appealable.

Peterson v Younker, 219-32; 257 NW 442

Peremptory order appointing referee in accounting. An order appointing a referee to take an accounting without first determining defendant's plea that he was under no legal duty to account, is appealable.

Benson v Weitz' Sons, 211-489; 231 NW 431

Simple finding of fact. An appeal will not lie from a so-called judgment which in fact is only a statement or recital of findings by the court.

Harmon v Hutchinson Co., 215-1238; 247 NW 623

Special appearance—standing on. In appealing from an adverse ruling on the issues raised by a special appearance, it is not necessary for appellant especially to elect to stand upon his special appearance, or to suffer judgment to be entered against him.

Irwin v Bank & Trust, 218-470; 254 NW 806

Order overruling special appearance. An order of the district court overruling a special appearance, and thereby sustaining the jurisdiction of the court, is appealable.

In re Sioux City Yards, 222-323; 268 NW 18

Motion to strike—ruling inheres in judgment. An order striking portions of a pleading inheres in the judgment and is presentable on appeal therefrom.

Doonan v Winterset, 224-365; 275 NW 640

Nonappealable motion to strike. In a partition action the overruling of a motion to strike various explanatory allegations of a petition, being interlocutory and not going to the merits, is not appealable.

Lunt v Van Gorden, 224-4; 275 NW 579

Overruled motion to strike. An order overruling a motion to strike alleged immaterial or redundant allegations, or to strike matters which do not involve the merits of the case, is not appealable.

Morrison v Clinic, 204-54; 214 NW 705
Benson v Weitz' Sons, 208-397; 224 NW 592

Overruled motion to strike—standing on. An order overruling a motion to strike which is not the equivalent of a demurrer imposes no necessity on the appealing party to affirmatively stand on his motion and allow judgment to be entered against him on the merits.

Ontjes v McNider, 218-1356; 256 NW 277

Striking cross-petition. An order in foreclosure proceedings striking a defendant's cross-petition from the files is not appealable when defendant's answer, which remained on file, properly pleaded and prayed for the sole and identical relief pleaded and prayed for in said cross-petition.

Brotherhood v Ressler, 216-983; 250 NW 169

Order striking portion of answer. An order striking part of an answer is not appealable when defendant fails to stand upon his pleadings or to allow final judgment to be entered against him. In other words, he may not maintain an appeal and at the same time maintain his right in the trial court to amend.

Joslin v Bank, 213-107; 238 NW 715

Order striking defense. In an action to recover for death of guest resulting from motorcycle collision with automobile, an order striking allegation of defendant-car owner that decedent assumed risk of motorcycle driver's negligence was appealable because the matter stricken was of such character as to involve the merits of the case.

Edwards v Kirk, 227-684; 288 NW 875

Order overruling motion to strike. An order overruling a motion to strike a pleading is appealable when the ruling goes to the very merits of the controversy.

State v Murray, 217-1091; 252 NW 556

Ruling on motion to strike. On appeal from an order overruling a motion to strike on ground that there was misjoinder of a principal corporation and its subsidiary, where question to be determined was whether the corporate entity of the subsidiary could be disregarded because it was so organized, controlled, and conducted as to make it a mere instrumentality of the principal corporation, which question being one of fact determinable only after a hearing of the evidence, the supreme court would not decide the matter on basis of the pleadings.

Wade v Broadcasting Co., 227-427; 288 NW 441

Denial of change of venue. While direct and immediate appeal will not lie from an order denying a change of venue, yet such order is reviewable on appeal from a subsequent order refusing to strike an improperly joined cause of action.

Smith v Morrison, 203-245; 212 NW 567

III INTERMEDIATE ORDERS INVOLVING MERITS

Denial of separate trial. An order refusing a separate trial to one of two joint defendants is appealable when it materially affects the "final decision".

Manley v Paysen, 215-146; 244 NW 863; 84 ALR 1330

Escheat proceeding — striking allegations asking for new administrator—no appeal—dismissal. Where the state of Iowa in an estate proceeding files an application for the escheat to the state of the property in the estate and includes in its application extensive allegations dealing with the selection of a new administrator, a motion to strike those portions of the pleading dealing with the new administrator, when sustained, does not present an interlocutory order from which an appeal will lie, and, if taken, the appeal will be dismissed on motion.

In re Bannon, 225-839; 282 NW 287

Nonreviewable fact question. On appeal from an order overruling a motion to strike on ground that there was misjoinder of a principal corporation and its subsidiary, where question to be determined was whether the corporate entity of the subsidiary could be disregarded because it was so organized, controlled, and conducted as to make it a mere instrumentality of the principal corporation, which question being one of fact determinable only after a hearing of the evidence, the supreme court would not decide the matter on basis of the pleadings.

Wade v Broadcasting Co., 227-427; 288 NW 441

Order striking defense. In an action to recover for death of guest resulting from motorcycle collision with automobile, an order striking allegation of defendant-car owner that decedent assumed risk of motorcycle driver's negligence was appealable because the matter stricken was of such character as to involve the merits of the case.

Edwards v Kirk, 227-684; 288 NW 875

Stay of proceedings—interlocutory orders. On appeals from intermediate or interlocutory orders in the trial court application should be made, in the first instance, to the district court for an order staying proceedings in the trial court pending the appeal.

Dorman v Credit Co., 213-1016; 241 NW 436

IV FINAL ORDERS IN SPECIAL ACTIONS

Appeal by assignee of beneficiary's interest. In probate proceeding on objection to executor's report, an appeal by an assignee of a beneficiary's interest in the estate will not be dismissed where he fails to serve notice of appeal upon beneficiary as a co-party when the beneficiary cannot be adversely affected by the supreme court's decision on the assignee's appeal.

In re Sheeler, 226-650; 284 NW 799

Appeal as sole remedy. An order which sets aside a judgment some five years after its rendition, on the asserted ground that the cause had never been set for trial after issue had been joined, such order being made on motion, service, and appearance of all parties, is a finality, in the absence of an appeal therefrom.

Dickson Co. v Dist. Court, 203-1028; 213 NW 803

Order sustaining default annulment. Admission of improperly certified judicial records of Texas and Michigan bearing on issue of

IV FINAL ORDERS IN SPECIAL ACTIONS —concluded

defendant's sanity in trial of default action to annul marriage is not ground for reversal of court's action in refusing to set aside the default annulment when lower court was not given opportunity to pass upon the competency of the records. The rule is that a party is not to be surprised on appeal by new objections and issues, nor as to defects within his power to remedy had he been advised in the proper time and manner.

Kurtz v Kurtz, 228- ; 290 NW 686

Dual remedies—appeal or mandatory order. Where, after reversal and remand in an equity cause, the trial court, on procedendo, enters a judgment which it has no discretion to enter, the defendant may apply directly to the appellate court for a mandatory order to the trial court to obey the procedendo, even tho defendant might accomplish the same result by appealing from the entry of said judgment.

Ronna v Bank, 215-806; 246 NW 798

Order denying motion. Principle reaffirmed that an order of court denying a motion is appealable when such denial involves the merits or materially affects the final decision of the action.

Poole v Poole, 221-1073; 265 NW 653

Right to perfect appeal. In probate proceedings an administrator is entitled to appeal from a probate decree qualifiedly approving a final report of the preceding executor, notwithstanding he served no notice of appeal upon the beneficiaries under the will as co-parties, where he represents the beneficiaries, and their relations are not antagonistic, and where, tho they are interested in the outcome, they are not strictly co-parties.

In re Sheeler, 226-650; 284 NW 799

V PROVISIONAL REMEDIES

Granting provisional remedy. A provisional remedy is one which is provided for present needs, or for the occasion; that is, one adapted to meet a particular exigency, e. g., the appointment of a receiver in mortgage foreclosure. It follows that an order granting such a remedy is appealable.

Davenport v Thompson, 206-746; 221 NW 347

VI INJUNCTIONS

Violation and punishment—discharge—unallowable appeal. Upon the discharge of one accused of contempt in violating an injunction, an appeal may not be maintained under the title under which the injunction was obtained.

Cedar Falls N. Bank v Boslough, 218-502; 255 NW 665

Temporary injunction—vaccination of school children. The appellate court will be slow to interfere with an order by the trial court refusing a temporary injunction against the enforcement by a school board of its order which temporarily excluded unvaccinated pupils from the public school; and especially will the appellate court decline to disturb such refusal when it affirmatively appears that the order of the board has expired ex vi termini.

Baehner v School Dist., 201-625; 207 NW 755

VII ATTACHMENTS

Garnishment—dissolution—time to perfect appeal. Under mandatory statute, a garnishing creditor whose levy is discharged by court order must, when such order is made, announce his intent to appeal therefrom followed by perfection of the appeal within two days, and his noncompliance therewith is fatal.

Sioux Falls Assn. v Field Co., 224-655; 277 NW 284

VIII NEW TRIAL

Court's inherent power to set aside verdict. Where a party has not received a fair and impartial trial, the trial court has inherent power to set aside the verdict.

Brunssen v Parker, 227-1364; 291 NW 535

Appeal by appellee. Whether on appeal from an order granting a new trial on an untenable ground, appellee may save the ruling by taking a cross-appeal, and show that the trial court erred in not sustaining the motion for a new trial on grounds assigned by him that were tenable, quaere.

Kessel v Hunt, 215-117; 244 NW 714

See State v School Dist., 188-959; 176 NW 976

Decisions reviewable—restricting appeal to matters in notice. A notice of appeal specifying only the overruling of a motion for a new trial restricts the appeal to such matters as were raised in the trial court on said motion.

Shultz v Shultz, 224-205; 275 NW 562

Questions reviewable. A party who appeals from an adverse ruling on his motion for a new trial may have a review of the grounds specifically assigned by him in his said motion even tho he does not appeal from the main or final judgment.

Spaulding v Miller, 216-948; 249 NW 642

Discretion of court — automobile collision. Granting a new trial in an intersection collision case being largely discretionary with the trial court will not be interfered with on appeal unless an abuse of discretion appears.

Eby v Sanford, 223-805; 273 NW 918

Abuse of discretion necessary for reversal. Where evidence is conflicting, the granting of a new trial because the verdict is contrary to the evidence will not be reversed unless an abuse of discretion by the trial court appears.

Brunssen v Parker, 227-1364; 291 NW 535

Verdict contrary to evidence—setting aside —nonabuse of discretion. In an action for personal injuries sustained by plaintiff in a head-on automobile collision occurring at night near a crest of a hill on a narrow paved country highway, where the vehicle in which plaintiff was riding was then on the left-hand side of the highway attempting to pass another car traveling in the same direction, the setting aside of the verdict for plaintiff on the ground that verdict was contrary to the evidence, and granting a new trial, was not an abuse of discretion.

Brunssen v Parker, 227-1364; 291 NW 535

Dual appeals in same case. Where, after rendition of a final judgment, and after a motion for a new trial is overruled, separate appeals are perfected on different dates (1) from the main judgment and (2) from the order as to new trial, the latter appeal will be deemed properly before the court, even tho the appeal from the main judgment is dismissed because of failure to file abstract within 120 days. Whether, under such circumstances, the appeal from the main judgment worked a waiver of an appeal from the order denying a new trial (if the point had been presented) quaere.

In re Fetterman, 207-252; 222 NW 872

Granting or refusing—reviewability. A ruling by the trial court granting a new trial will be reviewed on appeal, and, if erroneous, will be reversed, altho the supreme court will interfere more readily when the new trial is refused than when it is granted.

Hupp v Doolittle, 226-814; 285 NW 247

Inconsistent and improbable evidence. A new trial was properly granted by lower court when defendant secured a verdict on evidence that abounded with inconsistencies and improbabilities, and ruling cannot be disturbed on appeal unless new trial could not have been sustained on any of the grounds urged, or abuse of discretion by court.

Christensen v Howson, (NOR); 226 NW 34

Directed verdict refused—findings by jury reviewed. In determining whether or not the court erred in overruling a motion for a directed verdict at the close of the testimony and in overruling a motion for a new trial on the ground that the evidence did not sustain the verdict, the supreme court is not to determine the facts, but is limited to a consideration of what the jury is warranted in finding the facts to be.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Legal and discretionary questions distinguished. Principle recognized that if a motion for a new trial is disposed of on a distinct legal proposition as distinguished from a matter of discretion, the ruling is reviewable and reversible on appeal on the same basis as other rulings on distinct legal propositions are reviewable and reversible.

Manders v Dallam, 215-137; 244 NW 724

Necessity of contesting grounds. Where several grounds were stated in a motion for a new trial, there could be no reversal of the order granting such new trial when the appellant made no attempt to show that none of the grounds were good.

Olinger v Tiefenthaler, 226-847; 285 NW 137

New trial—sustaining generally. An order sustaining generally a motion for new trial will be upheld if any of the grounds therefor are good.

Eby v Sanford, 223-805; 273 NW 918

Order for new trial. An order granting a new trial in favor of a defendant served by publication only is appealable.

Clark v Robinson, 206-712; 221 NW 217

IX DEMURRERS

Habeas corpus—adverse ruling on demurrer —conditions for review. Where a defendant was sentenced and imprisoned upon failing to plead after his demurrer to the indictment was overruled, an appeal will be dismissed from an adverse ruling on demurrer in a habeas corpus action to test the validity of such imprisonment, when the defendant does not (1) elect to stand upon his pleadings, or (2) suffer judgment to be entered against him in the lower court.

Besch v Haynes, 224-166; 276 NW 13

Answer after appeal on ruling on demurrer. A defendant who assumes to appeal from an adverse ruling on his demurrer without standing on his demurrer, and without suffering a judgment to be entered against himself, has a right to file an answer after his appeal has been dismissed and before default is entered.

Gow v Dubuque County, 213-92; 238 NW 578

Conditions attending appeal. An appeal does not lie from a ruling which sustains a demurrer unless the defeated party does one of two things, to wit: (1) elects to stand on his pleadings, or (2) suffers final judgment to be entered against him.

Devoe v Dusey, 205-1262; 217 NW 625
Hawthorne v Andrew, 208-1364; 227 NW 402
Neese v Furry, 209-854; 227 NW 510
Porterfield v Lodge, 212-1181; 236 NW 381
Fehrman v Sioux City, 216-286; 249 NW 200

Conditions precedent to appeal. An appeal from a ruling sustaining a motion to strike a plea of the statute of limitation in probate proceedings will not lie when the complainant fails to stand on the plea and fails to permit judgment to go against him.

In re Delaney, 207-451; 223 NW 486

IX DEMURRERS—concluded

Final judgment or election to stand on pleadings. In an action to recover against the estate of a deceased executor for losses caused by improper handling of an estate, the plaintiffs had no right to appeal from a ruling sustaining a demurrer filed by the defendants when the plaintiffs did not elect to stand on the pleadings nor suffer final judgment to be entered against them.

Hayes v Selzer, 227-693; 289 NW 25

Interlocutory order striking defense. An order sustaining a motion to strike certain matter defensively set up in the answer (said motion being treated as a demurrer) is not appealable in the absence of an election by the defendant to stand on his pleadings and in the absence of the entry of final judgment in accordance with such election.

Smith v Railway, 211-223; 233 NW 57

Motion to dismiss—ruling as adjudication. The overruling of a motion to dismiss a petition in an equitable action does not amount to an adjudication unless the defendant stands on his motion and allows judgment to be entered against him.

Frazier v Wood, 219-36; 255 NW 647

Nonwaiver—right of appeal. If it affirmatively appears that the unsuccessful party does not waive the error in ruling on demurrer, he may properly urge, on appeal, objection to such order.

Blessing v Welding, 226-1178; 286 NW 436

Appeal — mandamus — demurrer treated as motion to dismiss. In mandamus action, where parties treat a demurrer as a motion to dismiss, it will be so viewed on appeal.

Bredt v Franklin County, 227-1230; 290 NW 669

Order sustaining equitable demurrer—failure to stand on pleading or suffer judgment—effect. An order sustaining defendant's motion to dismiss plaintiff's action on the ground that the petition fails to state a cause of action, will not be reviewed on appeal when the record fails to show that plaintiff either (1) elected to stand on his pleadings, or (2) permitted final judgment to be entered against him. The ruling not being reviewable, the appeal will be dismissed.

Grimm v Bank, 221-667; 266 NW 517

Overruled demurrer to answer. Where plaintiff after answer moved for judgment of dismissal and also for judgment on the pleadings, held that if it be permissible to treat the latter motion as a demurrer to the answer, yet an adverse ruling thereon was not appealable unless plaintiff elected to stand thereon.

Morrison v Clinic, 204-54; 214 NW 705

Standing on demurrer—formal election. A pleader who (1) excepts to a ruling on demurrer, (2) does not plead over, and (3) suffers a final adverse judgment to be rendered, thereby affirmatively shows that he stands on his demurrer, with consequent right to appeal.

Hanson v Carl, 201-521; 207 NW 579

Overruled motion to dismiss. A ruling which denies a motion to dismiss (in lieu of the former equitable demurrer) is not appealable unless the movant unequivocally elects to stand upon his motion, and submits to a final adverse judgment; and this is true tho appellant asserts on his attempted appeal that he has nothing further to plead.

Morrison v Clinic, 204-54; 214 NW 705
Benjamin v Jackson, 207-581; 223 NW 383

Overruled motion to strike—suffering final judgment. Where a motion to strike which is not the equivalent of a demurrer is overruled, the defeated party is under no duty to suffer final judgment as a condition precedent to an appeal—assuming a right of appeal exists.

Dorman v Credit Co., 213-1016; 241 NW 436

Pleading over—issue abandoned. When district court determines, on demurrer, that restrictions on alienation in a will to avoid debts are invalid, and parties plead over and do not appeal from said ruling, the issue is abandoned and cannot be made the subject of an appeal.

Rich v Allen, 226-1304; 286 NW 434

Repleading—when not waiver of exception. Pleading a restatement of original allegations of petition does not constitute a waiver of exception to ruling on demurrer, and objection may be urged upon such ruling when the party duly excepts and allows judgment to be entered.

Blessing v Welding, 226-1178; 286 NW 436

Statute violations—assumed for purpose of demurrer. In an action for injuries resulting from a motor vehicle collision at an intersection where defendant's truck is alleged to have been parked so as to obscure the view of a stop sign, and where the violations of both city ordinance and state law are pleaded, the supreme court will assume, for the purpose of demurrer, that truck was parked within prohibited distance and did obscure the sign.

Blessing v Welding, 226-1178; 286 NW 436

X HABEAS CORPUS

Habeas corpus—custody of child—review as in equity. An appeal from habeas corpus proceedings by a parent to obtain the custody of a child is reviewable as in equity.

Adair v Clure, 218-482; 255 NW 658
Allender v Selders, 227-1324; 291 NW 176

XI PROBATE

Final report by trustee after receivership. The filing of a final report by a trust company as trustee of an estate after the company had

gone into receivership and could no longer perform any duty as active trustee, was not an act in administering the trust, but was the performance of its duty to make such final report upon its removal as trustee.

In re Carson, 227-941; 289 NW 30

Filing claims against estate—ruling on equitable circumstances—not appealable. In probate on a hearing to determine whether or not peculiar circumstances exist to relieve claimant of the bar of the statute for failure to file claim within statutory period, an order finding the existence of such circumstances and entitling claimant to a trial on the merits of such claim is not appealable as a "final order" nor "an intermediate order involving the merits or materially affecting the final decision."

Ontjes v McNider, 224-115; 275 NW 328

Independent action reopening estate—judgment appealable. A judgment for plaintiff in a separate, independent action in equity brought, not against an administrator but against the surviving spouse and heir, seeking to set aside the order in probate approving the final report and closing the estate, is a final judgment such as will entitle the defendant to appeal.

Federal Bk. v Bonnett, 226-112; 284 NW 97

Lien—unauthorized order. An order establishing the heirship of persons to an estate and, without notice, decreeing a lien in favor of the attorney on the cash shares of certain heirs for whom the attorney has never appeared, is a nullity, insofar as the order establishing the lien and the amount thereof is concerned.

In re Lear, 204-346; 213 NW 240

Non de novo hearing. Claims against an estate are triable at law. Consequently, on appeal, an allowance by the probate court will not be disturbed if it is not excessive and has support in the evidence.

Anderson Est. v Stason, 216-1017; 250 NW 183

Sanity of applicant—motion. In an application to set aside an ex parte order in probate wherein the defendant, inter alia, pleads mental incompetency of the plaintiff, a motion by defendant to set the matter for hearing solely on the issue of plaintiff's sanity is properly overruled.

In re Brockmann, 207-707; 223 NW 473

12827 Motion to correct error.

ANALYSIS

I MOTION IN GENERAL

Failure to obtain ruling—effect. The filing of exceptions to instructions and a motion for a new trial, after the entry of judgment on the verdict, is rendered wholly abortive by the failure to call the exceptions or the motion to the attention of the court, and to obtain a ruling thereon.

Linn v Kendall, 213-33; 238 NW 547

Prerequisite for appeal. A ruling and exception thereto in the lower court, or a showing of a request for a ruling and a refusal, are necessary prerequisites to a review in the appellate court.

In re Scholbrock, 224-593; 277 NW 5

Sua sponte determination by court. The court having issued a writ of certiorari will, on final hearing, determine whether the writ is allowable even tho such question is not raised by the party litigants.

Dickson Fruit Co. v Dist. Court, 203-1028; 213 NW 803

Unchallenged order striking pleading. Since a settlement must be pleaded, the overruling of a motion for directed verdict alleging a settlement of the action is not reviewable when the pleading setting forth the settlement has been ordered stricken and such order stands unchallenged.

Pearson v Butts, 224-376; 276 NW 65

Stricken pleadings not alleged as error. Denying a directed verdict based on a general standing offer of settlement, made by posted signs to all patrons of a beauty shop in the event of injury, pleaded in answer but stricken on motion by an order not alleged as error, cannot be reviewed on appeal.

Pearson v Butts, 224-376; 276 NW 65; 2 NCCA(NS) 613

Equitable defenses not alleged or proved. On appeal from a ruling sustaining plaintiff's demurrer to answer of a foreign corporation, in suit for breach of contract to repurchase from plaintiff its own stock, setting up defense that such purchase would impair its capital, which was prohibited under the statute of the state of its domicile, the supreme court could not exercise its inherent equitable power or give consideration to estoppel, ratification, implied contract, or theory that contract was loan, when proper pleading or proof relating thereto was lacking.

Bishop v Middle States Co., 225-941; 282 NW 305

Invalid defense not attacked by motion. If matter pleaded as a defense is not challenged by motion or demurrer or otherwise, it will, if proven, defeat the plaintiff's action, tho had the question been properly raised the answer would have been held to present no defense.

Lenth v Schug, 226-1; 281 NW 510; 287 NW 596

I MOTION IN GENERAL—concluded

Motion to set aside default. Where court entered default judgment on November 15, 1937, and overruled a motion to set aside the default on February 24, 1938, an appeal taken June 20, 1938, from the order overruling the motion was timely, since the appeal was not taken on the default judgment, but on the ruling on the motion, which was appealable.

Rayburn v Maher, 227-274; 288 NW 136

Withholding objection—effect. An objection to the reception of hearsay evidence will be given scant consideration when made for the first time at the conclusion of the testimony and then in the form of a motion so couched as to be practically impossible of application by the court.

Walker v Mach. Corp., 213-1134; 240 NW 725

Judgment for incorrect amount. Failure of the court to enter judgment for the correct amount should be corrected by motion in the trial court.

Burlington Bk. v Ins. Co., 206-475; 218 NW 949

Unsigned decree. The nunc pro tunc correction of an unsigned decree in order to make it conform to the original order of the court, such correction being made on motion, service, and appearance of all parties, is a finality in the absence of an appeal therefrom.

Samek v Taylor, 203-1064; 213 NW 801

Failure to mark exhibit. Failure during trial to identify by proper exhibit mark a volume, portions of which were offered in evidence, may, pending appeal, be corrected on motion before the trial court.

Orr v Hart, 219-408; 258 NW 84

Dismissal for lack of prosecution. An order or judgment of the district court dismissing an action for want of prosecution (as provided by a court rule) will not be reviewed on appeal when the lower court has been given no opportunity either, (1) on petition under §12787, or (2) on motion under this section, C., '35, to correct the error, if any.

Hansen v McCoy, 221-523; 266 NW 1

Alleging note as receipt—sham defense—striking. Where a written instrument sued upon contains the legal elements of a negotiable promissory note, an allegation in an answer that such written instrument was a receipt shows on its face that such pleading is false and should be stricken on motion.

Hillje v Tri-City Co., 224-43; 275 NW 880

II QUESTIONS FIRST RAISED ON APPEAL

Questions first presented on appeal.

Spicer v Administrator, 201-99; 202 NW 604
Riggs v Gish, 201-148; 205 NW 833
Minn. StL Ry. v Pugh, 201-208; 205 NW 758
Leach v Bank, 201-346; 207 NW 331
Wilcox v Miner, 201-476; 205 NW 847
Fellers v Sanders, 202-503; 210 NW 530
University Bk. v Johnson, 202-654; 210 NW 785
First Bk. v Tobin, 204-456; 215 NW 767
Andrew v Bank, 204-870; 216 NW 553
Standard v Kinseth, 204-974; 215 NW 972
Whitney v Eichner, 204-1178; 216 NW 625
State v Harding, 205-853; 216 NW 756
State v Packing Co., 206-405; 220 NW 6
Cavanaugh v Farm Co., 206-893; 221 NW 512
Gavin v Linnane, 206-917; 221 NW 462
Harrington v Sur. Co., 206-925; 221 NW 577
McNary v McNary, 206-942; 221 NW 580
Chas. Weitz v Guar. Co., 206-1025; 219 NW 411
Peoples Bk. v McCarthy, 207-162; 222 NW 372
State v McGee, 207-334; 221 NW 556
Heflen v Brown, 208-325; 223 NW 763
Benson v Weitz' Sons, 208-397; 224 NW 592
Cox v Const. Co., 208-458; 223 NW 521
Page & Crane v Clear Lake, 208-735; 225 NW 841
State v Bamsey, 208-796; 223 NW 873
Pennington v Nelson, 208-1310; 227 NW 163
Passcuzzi v Pierce, 208-1389; 227 NW 409
Employ. Bur. v Com., 209-1046; 229 NW 677
Kruckman v Kruckman, 209-1218; 229 NW 700
Albright v Moeckley, 209-1304; 230 NW 351
Ober v Dodge, 210-643; 231 NW 444
James v Sch. Twp., 210-1059; 229 NW 750
Kowalke v Evernham, 210-1270; 232 NW 670
Dilley v Service Co., 210-1332; 227 NW 173
Hartman v Transp. Co., 211-64; 233 NW 23
State v Henderson, 212-144; 232 NW 172
Duncan v Rhomberg, 212-389; 236 NW 638
State v Woodmansee, 212-596; 233 NW 725
New Amst. Cas. v Bookhart, 212-994; 235 NW 74; 76 ALR 897
Walker v Mach. Corp., 213-1134; 240 NW 725
Kaufman v Borg, 214-293; 242 NW 104
Heacock v Baule, 216-311; 249 NW 437; 93 ALR 151
Smith, etc. v Hollingsworth, 218-920; 251 NW 749
Phinney v Montgomery, 218-1240; 257 NW 208
Clark v Berry Seed Co., 225-262; 280 NW 505
In re Larimer, 225-1067; 283 NW 430
Fed. Bank v Trust Co., 228- ; 290 NW 512

Presentation and reservation of grounds—showing essential. A party who raises no question at the trial, interposes no objection at the trial, and saves no exception at the trial, has no standing on appeal.

Leach v Bank, 201-1323; 207 NW 326

Permissible change of position. A party who occupies in the trial court a purely defensive position, and in support thereof relies on an inapplicable statute, is not thereby precluded, on appeal, from relying on an applicable statute.

Leach v Bank, 202-97; 209 NW 421

Nontransfer from equity to law. A litigant may not allow an action in the trial court to remain on the equity side of the calendar without objection and, on appeal, claim, for the first time, that the action should have been at law.

Burmeister v Hamann, 208-412; 226 NW 10

Sufficiency of original notice—waiver. Objections to the sufficiency of an original notice as to form may not be presented for the first time on appeal.

Higdon v Bank, 223-57; 272 NW 93

Misjoinder of defendants. The objection that an insurance carrier was not a proper party defendant along with the employer in proceedings under the workmen's compensation act will not be considered when presented for the first time on appeal to the supreme court.

Walker v Mach. Corp., 213-1134; 240 NW 725

State as proper party to cross-petition. In an action to dissolve a mining corporation, question whether state, not being stockholder or creditor of the mining corporation, was proper party to make defense to a cross-petition, which question not having been raised in the trial court, may not be raised for the first time and reviewed on appeal.

State v Exline Co., 224-466; 276 NW 41

Belated filings. A party, on appeal, may not predicate error on the belated filing of a pleading to which he interposes no exception.

Royal Ins. v Hughes, 205-563; 218 NW 251

Pleadings — trial theory. A petition, the sufficiency of which has been acquiesced in by both parties in the trial court, may not be questioned for the first time on appeal.

Harm v Hale, 206-920; 221 NW 582

Nonapplicability of rule—legally insufficient defenses. The rule that a pleading which is legally insufficient to constitute a defense may nevertheless constitute a defense when unquestioned and unattacked can have no application to a so-called pleading which consists of evidentiary statements of fact only.

Hornish v Overton, 206-780; 221 NW 483

Objections to pleadings. Where claimant in probate proceedings appears at all stages of proceedings, in resistance to motion of administrator to dismiss claim, and makes no objection to the pleadings in the court below, he cannot attack them for the first time on appeal.

Joy v Bank, 226-1251; 286 NW 443

Ground of liability. An alleged ground of liability properly presentable to the trial court, tho not presented, will not be reviewed on appeal.

Miller Co. v Silvers Co., 227-1000; 289 NW 699

Timeliness of motion to discharge attachment. The objection that a motion to discharge an attachment was not timely may not be raised for the first time on appeal.

Olds v Olds, 219-1395; 260 NW 1; 261 NW 488

Timeliness of motion attacking answer. Question that a motion attacking an answer was not timely, raised for the first time on appeal, will not be considered by the appellate court.

Hillje v Tri-City Co., 224-43; 275 NW 880

Objections to evidence. One may not predicate error on the reception of evidence to which he enters no objection when it is offered.

In re Merrill, 202-837; 211 NW 361
State v Buick Sedan, 209-791; 229 NW 173

Confidential communications—failure to object. One who, without objection, allows an attorney to testify to confidential communications may not thereafter base error on the reception of such testimony.

Hepker v Schmickle, 209-744; 229 NW 177

Insufficiency of evidence. An insurer may not, on appeal, for the first time raise the question that the evidence does not show that the personal property was lost on the real property described in the policy.

Hall v Ins. Co., 217-1005; 252 NW 763

Evidence determining section line. Evidence in the record without objection by which a fence on the section line is definitely determined as the boundary of a highway cannot be objected to for the first time on appeal.

Davelaar v Marion Co., 224-669; 277 NW 744

Remote speed — materiality. Defendant's claim that plaintiff's speed remote from the collision was material as showing that, at the time defendant looked back before making a left turn, plaintiff was too distant to be seen over a viaduct, may not, when such evidence is excluded, be urged first on appeal as ground for reversal when such purpose for introducing such evidence was not stated to the trial court.

Thomas v Charter, 224-1278; 278 NW 920

Belated attack on stipulation. The contention that a stipulation in the trial court as to the testimony of a party was collusive and fraudulent may not be presented for the first time on appeal.

Bolte v Schenk, 205-834; 210 NW 797

Belated presentation of proposition. Where there is a failure to make a timely submission of a proposition in the court below, it will not be considered on appeal.

Whisenand v Van Clark, 227-800; 288 NW 915

Belated presentation of proposition. A legal contention not presented to the trial court nor

II QUESTIONS FIRST RAISED ON APPEAL—continued

to the appellate court on original submission is not available to the appellant in a petition for rehearing.

First N. Bank v Board, 217-702; 247 NW 617; 250 NW 887

Failure to raise statute of limitations as defense in lower court—effect. A defense under statute of limitations not raised in lower court cannot be considered on appeal.

In re Christensen, 227-1028; 290 NW 34

Objection to improper argument. A party may not withhold his objection to an improper argument until after verdict.

In re Merrill, 202-837; 211 NW 361

Submission of issues. Error may not be predicated on the submission to the jury of a supported issue when complainant failed to request the withdrawal of said issue.

Rosenstein v Smith, 218-1381; 257 NW 397

Objections to instructions. Assignments of error relating to instructions not raised or passed upon by the lower court will not be considered on appeal.

Mitchell v Underwriters, 225-906; 281 NW 832

Simmering v Hutt, 226-648; 284 NW 459

Exceptions to rulings and instructions. Failure to except to rulings on the introduction of evidence and to the giving of instructions precludes review on appeal.

State v Jackson, 205-592; 218 NW 273

Insufficient exception to instructions. An exception to an instruction is quite insufficient when it fails to state the grounds thereof. Neither may instructions be excepted to for the first time on appeal.

In re Berry, 207-605; 223 NW 480

Findings of court under waiver of jury. The findings of the trial court in a law action under waiver of a jury, and on supporting but conflicting testimony, are conclusive on the appellate court.

First N. Bank v McCartan, 206-1036; 220 NW 364

Vacation orders in mandamus. The granting of a temporary order in mandamus in vacation will not be reviewed on appeal when complainant appears in the trial court on notice and proceeds to a hearing in vacation without objection.

Weyrauch v Johnson, 201-1197; 208 NW 706

Judgment in improper form. Objections to the form of a judgment entry in a law action, not presented to the trial court, will not be considered on appeal.

School District v Sass, 220-1; 261 NW 30

Record and proceedings not in record—non-introduced matters. A party to an appeal may not, by certificate, bring to the appellate court matters which he failed to introduce and make a part of the record in the trial court.

Robson v Kramer, 215-973; 245 NW 341

Fatally belated arguments. Argument on propositions first presented by appellant in his reply argument will be ignored.

Luckenbill v Bates, 220-871; 263 NW 811; 103 ALR 252

Nonpresented constitutional questions. Constitutional questions not presented in the trial court will not be considered on appeal.

State v Johnson, 204-150; 214 NW 594

Talarico v Davenport, 215-186; 244 NW 750

Andrew v Bank, 215-1150; 247 NW 797

Terrell v Ringgold Co. Tel. Co., 225-994; 282 NW 702

Constitutional questions raised. Constitutional questions cannot be raised for the first times on appeal and, in order to present a constitutional question, specific reference must be made to the clause of the constitution relied upon and the reasons for the application of such clause must be asserted.

Martin Bros. v Fritz, 228- ; 292 NW 143

Constitutionality of moratorium act. When a district court order, granting an extension of the time for redemption of land on which a mortgage had been foreclosed, contained a provision that if the statute under which the extension was granted were repealed or held invalid the order would be terminated, such provision did not warrant an appeal challenging the constitutionality of the statute when the question of constitutionality was not raised in the lower court.

New York Ins. v Breen, 227-738; 289 NW 16

Moratorium—solvency of mortgagor. A foreclosing plaintiff seeking to show good cause for the rejection of defendant's application for a continuance under the moratorium act, will not, on appeal and for the first time, be heard on the claim that the defendant is not in financial distress.

First Tr. JSL Bank v Riddle, 221-1313; 268 NW 45

Construction of statute. Where the holder of a cashier's check on an insolvent bank is given, by the receiver, the preferential classification of a "depositor", the appellate court will not accord an enlarged preference under §9239-c1, C., '31 [§9239.1, C., '39], when said statute manifestly presents a grave problem of construction and is in no manner argued.

Andrew v Bank, 214-590; 243 NW 152

Construction of statute—seeming exception to rule. When the sole question before the trial court was whether a certain section of the statute (consisting of many separately

numbered paragraphs) exempts certain property from taxation, the appellate court in its review will consider and construe all relevant paragraphs of the section even tho it appears probable that one of said paragraphs was not called to the attention of the trial court.

McColl v Dallas Co., 220-434; 262 NW 824

Foreign judicial records—improper certification first raised on appeal. Admission of improperly certified judicial records of Texas and Michigan bearing on issue of defendant's sanity in trial of default action to annul marriage is not ground for reversal of court's action in refusing to set aside the default annulment when lower court was not given opportunity to pass upon the competency of the records. The rule is that a party is not to be surprised on appeal by new objections and issues, nor as to defects within his power to remedy had he been advised in the proper time and manner.

Kurtz v Kurtz, 228- ; 290 NW 686

Objections to abstract of title. On appeal from a foreclosure of a land sale contract, objections that the abstract of title produced by the vendor does not show good title will be disregarded when such objections were not made in the trial court.

Bortz v Wright, 206-698; 214 NW 542

Invalidity of contract. Failure to present in the trial court the proposition that a contract for grading was invalid, because not let to the lowest bidder, cannot be presented for the first time on appeal.

Carlson v Marshalltown, 212-373; 236 NW 421

Utility plant—contract and specifications—variation. A contended variation between the contract for a municipal public utility plant and the specifications, in that the contract omitted the right to call bonds at a certain time, will not be considered on appeal. when such variation, if any, was not an issue in the lower court.

Lahn v Primghar, 225-686; 281 NW 214

Agency—revocation—nonpleaded issue. In an action for real estate commission, contentions as to revocation of the agency arising from disposal of the subject matter of the agency and mental incapacity and death of one of the joint principals before the sale by the agent, will not be considered on appeal when the pleadings show no issue thereon, but the action is on a contract allegedly personally made with the defendant.

Maher v Breen, 224-8; 276 NW 52

Rent advanced as cost of administration. A stockholder of a clay products company in receivership, having advanced the rent due from the company on its clay pit lease, may not recover this rent as a cost of administration, especially when he advances this theory for the first time on appeal.

Parks v Carlisle Co., 224-1024; 277 NW 731

III FOLLOWING TRIAL THEORY

Fatal and inconsistent delay. A party may not, on appeal, predicate error on a theory which is wholly at variance with the theory maintained by him throughout the trial in the lower court.

Eves v Littig Co., 202-1338; 212 NW 154
Rocho v Dairy, 204-391; 214 NW 685
Loran v Des Moines, 205-1349; 219 NW 418
Rauch v Elec. Co., 206-309; 218 NW 340
Heflen v Brown, 208-325; 223 NW 763
White v Melchert, 208-1404; 227 NW 347; 73 ALR 595
Zieman v Association, 209-1298; 228 NW 48

Unpleaded theory. Appellant's demand, on appeal, for judgment on an unpleaded theory will be ignored.

Markworth v Bank, 217-341; 251 NW 857
Forsberg v Const. Co., 218-818; 252 NW 258
Smith v Tullis, 219-712; 259 NW 202

Ice on sloping portion of sidewalk—recovery refused on evidence and trial theory. In an action by a pedestrian against a city to recover for personal injuries received from fall on sidewalk where it is shown that pedestrian slipped on smooth, slippery ice, unaffected by artificial causes, on sloping portion of a sidewalk which was lifted by the roots of a tree, the refusal to permit a recovery on either of the following grounds of alleged negligence, to wit: (1) in failing to remove ice, or (2) in failing to repair slope in sidewalk, without the concurrence of the other, was not error under the evidence and the trial theory of plaintiff; consequently, the court could not properly submit such propositions to the jury as independent grounds of negligence.

Leonard v Muscatine, 227-1381; 291 NW 446

Agreed theory. A litigant who, in the trial court, acquiesces in the court's paraphrase of numerous assignments of negligence will not be permitted, on appeal, to contradict his former acquiescence.

Rulison v X-ray Corp., 207-895; 223 NW 745

Trial stipulation. A trial stipulation in the trial court as to the precise question presented cannot be departed from on appeal.

Equitable v Des Moines, 207-879; 223 NW 744

Permissible change of position. A party who occupies in the trial court a purely defensive position, and in support thereof relies on an inapplicable statute, is not thereby precluded on appeal from relying on an applicable statute.

Leach v Bank, 202-97; 209 NW 421

Parties entitled to allege error—contradicting trial theory. After an action by the widow of a deceased partner to determine her dower interest in her husband's partnership interest

III FOLLOWING TRIAL THEORY—concluded

is fully tried on the mutual theory of determining the amount and adjudging such amount as a trust against the entire property of the partnership, it is too late for the surviving partners to insist that the widow should take her interest in kind.

Fleming v Fleming, 211-1251; 230 NW 359

Legally insufficient defense. A legally insufficient defense is good when unquestioned, but this does not mean that such defense may be established by incompetent testimony.

Fairley v Falcon, 204-290; 214 NW 538
Strand v Bleakley, 214-1116; 243 NW 306

Wrong forum—law and equity. A defendant who, in the trial court, in an action on an unliquidated claim remains on the equity side of the calendar, without request for transfer to the law calendar, estops himself from complaining on appeal that he was denied a jury trial.

Ober v Dodge, 210-643; 231 NW 444

Wrong forum—probate and equity. A party who has not, in the trial court, questioned the right of his antagonist to prosecute the proceeding in probate, will not be heard to say on appeal that the proceeding must be in equity.

In re Weidman, 209-603; 228 NW 571

Trial de novo if cause tried in trial court as in equity. A cause mutually treated as in equity in the trial court will be so treated on appeal.

In re Moore, 211-804; 232 NW 729

Voluntary issues — trial — effect. Principle reaffirmed that parties who voluntarily litigate issues which are not within the pleadings are bound thereby.

Woodall v Woodall, 204-423; 214 NW 483

Newly presented objections. A party may, on appeal, abandon the objections which he made in the trial court to an instruction but he may not substitute an entirely new objection.

Gorham v Richard, 223-364; 272 NW 512

Instructions on trial theory—nonduty of court on other theories and necessity of requests. In an action by pedestrian who fell on ice which had formed on a sloping portion of sidewalk, an instruction to jury requiring, as prerequisite to recovery, a finding of knowledge or constructive notice by city of icy condition of sidewalk, was not erroneous where plaintiff failed to request an instruction that such notice was unnecessary, where action was tried on theory expressed in the instruction. A trial court is not required to instruct on theory not in the case as tried, and appellant, who invited instruction given and failed to request different instruction, could not, on appeal, complain of such instruction.

Leonard v Muscatine, 227-1381; 291 NW 446

Proof of claim. Claims treated by all parties in the trial court as sufficiently established will be so treated on appeal, the sole contention in the trial court being as to the legal liability of defendant therefor.

State v Cas. Co., 213-200; 238 NW 726

Notwithstanding verdict — proper rejection. Plaintiff's motion for judgment, notwithstanding a verdict for defendant, because defendant's answer failed to plead want of consideration for the signing of the note sued on, is properly overruled when defendant's answer impliedly pleaded want of consideration, and when plaintiff so construed the answer throughout the trial.

Persia Bk. v Wilson, 214-993; 243 NW 581

Rehearing — unallowable change of theory. A rehearing will not be granted on a theory wholly different than that presented by petitioner on original submission as determinative.

Wehrman v Bank, 221-249; 259 NW 564; 266 NW 290

IV JURISDICTIONAL MATTERS

Certiorari—jurisdictional question. In certiorari to review trial court's ruling sustaining motion to set aside default, supreme court is not concerned with jurisdiction at time judgment is entered, but is concerned with the jurisdiction of court at time ruling is made on motion.

Western Grocer Co. v Glenn, 226-1374; 286 NW 441

Dismissal of appeal on technical grounds—non-effect as adjudication. The dismissal, by the supreme court, of an appeal, and the affirmance by said court of the judgment appealed from, on the technical ground that appellant had failed to make timely filing of an abstract of the record, cannot be deemed an adjudication of the jurisdictional legality of the judgment so affirmed. In other words, while the appeal has proven abortive, the said judgment is nevertheless subject to an action for its cancellation on the ground that the trial court was wholly without jurisdiction to enter it.

Dallas v Dallas, 222-42; 268 NW 516

Municipal court—collateral attack. Conceding, arguendo, that the municipal court was in error in overruling defendant's motion for change of venue to the county of his conceded residence; yet the court manifestly had jurisdiction to rule on the motion, and defendant having failed to seek correction of the error by appeal or other appropriate direct proceedings, the ruling becomes a finality, and the subject matter thereof cannot properly be injected into subsequent collateral proceedings

wherein the judgment entered on the merits is sought to be enforced. So held where the collateral proceeding was an action to recover on a stay bond.

Educational Film Exch. v Hansen, 221-1153; 266 NW 487

12828 Motion for new trial.

Nonnecessity for motion for new trial. When an appeal is from the final judgment, a motion for a new trial is not necessary in order to present to the supreme court on appeal erroneous rulings of the trial court on the reception or rejection of evidence.

In re Kahl, 210-903; 232 NW 133

Nonnecessity after refusal to direct verdict. Defendant who, at the close of all the testimony, suffers an adverse ruling on his motion for a directed verdict, and duly excepts to said ruling, is under no legal necessity to move for a new trial because of said ruling, as a condition precedent to a review thereof on appeal.

Taylor v Burgus, 221-1232; 262 NW 808

Objections to evidence—re-raising in new trial motion. Where the immateriality of evidence objected to is plainly discernible and no further particularity is required to apprise the trial court of grounds of objections, it is not necessary that these same identical matters be again presented to trial court by way of motion for new trial before they may be considered by supreme court.

Floy v Hibbard, 227-149; 287 NW 829

Ruling on special appearance. An appeal from a decree on the merits does not present for review a ruling of the trial court on a special appearance, it appearing that such ruling was based on matter wholly foreign to any matter in the pleadings on the merits.

Scott v Price Bros., 207-191; 217 NW 75

12829 Finding of facts—evidence certified.

Review—scope—absence of record. The holding of the trial court as to the legal effect of a written instrument is necessarily conclusive on the appellate court when such instrument has not been included in the appellate record.

O'Connor v Hassett, 207-155; 222 NW 530

12830 Title of cause.

Contempt. Upon the discharge of one accused of contempt in violating an injunction, an appeal may not be maintained under the title under which the injunction was obtained.

Cedar Falls Bank v Boslough, 218-502; 255 NW 665

Notice of appeal—fatal defect. An appeal will be dismissed when the notice of appeal described the appealing plaintiff as "D. W. Bates, Superintendent of Banking as receiver of" (insolvent bank); and it is made to appear that, as to the particular subject matter involved, no petition so describing said appealing plaintiff had ever been filed; that the petition actually filed and involving said particular subject matter was captioned "D. W. Bates, Superintendent of Banking, Plaintiff" and was docketed under the same caption and given the same docket number as that given to a former action wherein said official asked for his appointment as receiver of said bank, to wit: "D. W. Bates, Superintendent of Banking, Plaintiff".

Bates v Bank, 221-814; 267 NW 677

12831 Process.

Liberality in granting. The supreme court will, as a matter of course, issue a restraining order to maintain the status quo pending an appeal when such order is the only remedy available to the appellant.

Welton v Hy. Com., 208-1401; 227 NW 332

Dual remedies—appeal or mandatory order. Where, after reversal and remand in an equity cause, the trial court, on procedendo, enters a judgment which it has no discretion to enter, the defendant may apply directly to the appellate court for a mandatory order to the trial court to obey the procedendo, even tho defendant might accomplish the same result by appealing from the entry of said judgment.

Ronna v Bank, 215-806; 246 NW 798

Writs of prohibition. The supreme court has original jurisdiction, under the constitution, to issue common-law writs of prohibition; but, when the application is for a writ directed to a district court and commanding it to discontinue further jurisdiction over named actions pending in said lower court, the supreme court must act solely on the established facts as revealed in the proceedings in said district court, and, if material disputed issues of fact arise, the writ will be refused, as the supreme court has no power to take testimony on disputed questions of fact dehors said district court records.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

Writ of prohibition—right to issue. The jurisdiction of the supreme court to issue a writ of prohibition commanding a district court to discontinue all assumption of jurisdiction over named actions pending in said latter court does not depend on whether the district court has made rulings as to special appearances entered in said actions.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

Writ of prohibition—right of appeal—effect. The jurisdiction of the supreme court to issue a writ of prohibition, commanding a district court to discontinue all assumption of juris-

diction over named actions pending in said latter court, is not necessarily defeated because the beneficiaries of said writ would have a right to appeal from an adverse judgment.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

Writ of prohibition — state as plaintiff. An original action in the supreme court for a writ of prohibition directed to a district court and prohibiting further action by said latter court in private actions pending therein, may be brought in the name of the state ex rel its attorney general; especially is this true when said private actions arose out of proceedings instituted by the state through the governor thereof.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

Overpayment on legacy—refund. The appellate court may, it seems, authorize and direct an executor to proceed to recover an overpayment on a legacy.

In re Moe, 213-95; 237 NW 228; 238 NW 718

12832 Time for appealing.

ANALYSIS

I Time for Taking
II Questions Reviewable

I TIME FOR TAKING

Statute controlling. The time in which an appeal may be taken from a judgment is controlled by the statute existing at the time the judgment is rendered.

Hancock Bk. v McMahon, 201-657; 208 NW 74
Ontjes v McNider, 224-115; 275 NW 328

Legislative change—effect. The time allowed for an appeal cannot be reduced by legislative enactment after judgment.

Davis v Robinson, 200-840; 205 NW 520
Insell v McDaniels, 201-533; 207 NW 533

Sixty-day automatic extension. An appeal from the main judgment in an action must be taken within 60 days from the ruling on the motion for a new trial when such ruling occurs less than 60 days before the expiration of the ordinary four months period for such appeal.

Fox v McCurnin, 210-429; 228 NW 582

Directing verdict—appeal delayed beyond 60 days. An appeal from a directed verdict in favor of defendant cannot be considered by the supreme court where it appears that the appeal from the directed verdict was not perfected within 60 days after the entry of an order overruling a motion for new trial.

Lotz v United Markets, 225-1397; 283 NW 99

Order overruling motion for new trial. An appeal from an order which overrules a motion for a new trial is timely if taken within four months from the entry of such order.

Pride v Acc. Assn., 207-167; 216 NW 62; 62 ALR 31

Motion for new trial—what constitutes. A motion which requests the court to reconsider a certain order theretofore made, and to enter a different order, constitutes a motion for a new trial, within the meaning of statute pertaining to the time of taking appeals.

Home Bank v Klise, 205-1103; 216 NW 109

Appeal dismissed—no bar to second appeal. Voluntary dismissal of an appeal does not preclude the right to appeal again within the statutory time.

Doonan v Winterset, 224-365; 275 NW 640

Order of removal — when completely executed. An order of removal issued on a judgment rendered in forcible entry and detainer proceedings cannot be deemed fully executed so long as the officer has in his possession on the premises in question personal property of the defendant upon which the officer has levied in order to collect the costs. And this is true tho the defendant has personally been removed from the premises. So held on the question whether the perfecting of an appeal and the obtaining of a stay order by the defendant were timely.

Usailis v Jasper, 222-1360; 271 NW 524

II QUESTIONS REVIEWABLE

Belated appeal—matters reviewable. An appeal taken more than six (now four) months after the entry of judgment, but within said time after the overruling of a motion for a new trial, preserves for consideration on appeal all matters properly presented in the motion and not inhering in the judgment.

Frett v Holdorf, 201-748; 206 NW 609

Failure to raise statute of limitations as defense in lower court—effect. A defense under statute of limitations not raised in lower court cannot be considered on appeal.

In re Christensen, 227-1028; 290 NW 34

12833 Amount in controversy.

ANALYSIS

I Amount in Controversy
II The Certificate
III Interest in Real Estate

I AMOUNT IN CONTROVERSY

Several assessments aggregating over $100. When separate assessments on separate lots are each less than $100, but in the aggregate over $100, an appeal lies from an adverse judgment in the district court when the contro-

versy over the several assessments has been treated throughout as one proceeding.

Brush v Liscomb (Town), 202-1155; 211 NW 856

Including interest on judgment. In determining the amount in controversy under the statute limiting supreme court appeals to cases involving over $100, the allegations of the pleadings are controlling, and where the propriety of the judgment is the only issue, interest or costs will not be considered in determining the amount in controversy; but where defendant's motion attacked purported judgment of district court confirming justice's judgment in sum of $74, together with accrued interest of $35, amount of interest would be added to judgment in determining whether amount involved was sufficient to authorize appeal to supreme court.

Yost v Gadd, 227-621; 288 NW 667

Unallowable computation. Where the court on separate applications in the same case orders separate changes of venue, and separately adjudges in favor of each party an allowance for expense and attorney fees for attending in the wrong county, the orders are not appealable simply because the sum total of the separate allowances is over $100.

In re Mann, 211-85; 232 NW 839

Chattel mortgage under $100, judgment for $330. Where in an action to foreclose a conditional sale contract on an automobile, the court granted priority of a lien of less than $100, and gave a judgment for $330 to the seller, an appeal therein involved more than $100 and was not subject to dismissal, altho no certificate had been filed by the trial court.

Hughes v Wessell, 226-811; 285 NW 200

II THE CERTIFICATE

Counterclaim over $100—certificate unnecessary. An appeal in an unsuccessful action to recover less than $100 because successfully met by a counterclaim for more than $100, pleaded solely as payment, will be dismissed, in the absence of the required certificate "that the appeal should be allowed".

Davis v Robinson, 200-840; 205 NW 520

Chattel mortgage under $100, judgment for $330—certificate not required. Where in an action to foreclose a conditional sale contract on an automobile, the court granted priority of a lien of less than $100, and gave a judgment for $330 to the seller, an appeal therein involved more than $100 and was not subject to dismissal, altho no certificate had been filed by the trial court.

Hughes v Wessell, 226-811; 285 NW 200

III INTEREST IN REAL ESTATE

No annotations in this volume

12834 Appeal by coparties.

Failure to serve interested coparty. Failure of an appellant to serve a notice of appeal on a party whose rights under the decree appealed from would be detrimentally affected by a reversal is fatal to the appeal.

Coggon Bk. v Woods, 212-1388; 238 NW 448
First Bank v Yarcho, 217-95; 250 NW 903

Failure to serve — effect and burden. A party who assumes to appeal from a decree in equity without serving notice of appeal on a nonjoining coparty has the burden to show that said coparty will not be adversely affected in any manner by any decree of the appellate court. In a case wherein the rights of various parties were much intertwined, held said burden had not been satisfied, and consequently the appeal must, on motion, be dismissed.

Jenkins v Beeler, 213-501; 239 NW 474
First Bank v Yarcho, 217-95; 250 NW 903

Party without interest in appeal. A party who appeals on an issue which is purely personal to himself need not serve notice of appeal on a coparty who has no possible interest in such issue.

Conner v Henry, 201-253; 207 NW 119

Noninterested coparties. Notice need not be served on coparties when the record fails to show that they may be adversely affected by the appeal.

Jackson v Snyder, 202-262; 208 NW 321

Unnecessary service on coparty. Appealing coparties need not serve notice of appeal on a nonappealing coparty when a reversal on appeal would necessarily accord to the nonserved coparty the exact relief prayed for by him in the trial court.

Hodgen's Executors v Sproul, 221-1104; 267 NW 692

Legatees nonnecessary parties. In an appeal from a holding that a claim in probate was not payable from life insurance funds, notice of appeal is all-sufficient when served solely on the executor, the legatees not being parties to the controversy.

In re Caldwell, 204-606; 215 NW 615

Notice to heirs — when not necessary. In probate proceedings an administrator is entitled to appeal from a probate decree qualifiedly approving a final report of the preceding executor, notwithstanding he served no notice of appeal upon the beneficiaries under the will as coparties, where he represents the beneficiaries, and their relations are not antagonistic, and where, tho they are interested in the outcome, they are not strictly coparties.

In re Sheeler, 226-650; 284 NW 799

Intervenor — failure to serve. Where the petition and a petition of intervention, both

asking the same relief, were dismissed on their merits, the fact that intervenor fails to appeal or was not served with notice of appeal by plaintiff, is quite inconsequential as far as plaintiff's appeal is concerned.

Anderson v Dunnegan, 217-1210; 245 NW 326

Foreclosure proceedings—intervention. On an appeal by an intervenor in foreclosure proceedings from a decree awarding rent notes to plaintiff because intervenor was a fraudulent indorsee thereof, and taxing costs against intervenor and the landlord-indorser, the failure to serve notice of appeal on the nonappealing landlord-indorser and tenant-maker of the notes constitutes a fatal defect of parties because a reversal—a decree that intervenor was a bona fide indorsee—(1) would restore the liability of the landlord-indorser on his indorsement, (2) would leave the landlord-indorser liable for all the costs without right to contribution from intervenor, and (3) would subject the tenant to a double liability for the rent.

Read v Gregg, 215-792; 247 NW 199

Mortgagor as adverse and necessary party—dismissal. A titleholder who did not assume a prior mortgage on the property and who appeals from an order in foreclosure appointing a receiver must serve notice of appeal on the mortgagor, as an adverse and necessary party, inasmuch as a personal judgment was rendered against mortgagor in the foreclosure.

Hoffman v Bauhard, 226-133; 284 NW 131

Cross-petition in foreclosure. An appeal by a cross-petitioner in mortgage foreclosure because of the denial of his plea to have title quieted in himself and against the mortgagor-defendant, cannot be maintained unless notice of the appeal is duly served on said mortgagor-defendant; and it is quite immaterial that the record indicates that said mortgagor-defendant was manifestly friendly to the plea of said cross-petitioner.

Crawford Bk. v Butler, 201-1281; 208 NW 284

Failure of cross-petitioners to appeal between each other. Defendant cross-petitioners in an action to enforce a contract for the sale of land, among whom judgments have been rendered on assignments and assumption of the contract sought to be enforced, may not have such judgments reviewed by simply appealing from the judgment rendered in favor of plaintiff.

Vanderwilt v Broerman, 201-1107; 206 NW 959

Coparty in partition. Failure of an appellant in partition to serve a coparty with notice of the appeal is fatal to the appeal when a reversal of the decree appealed from would reduce the share of the nonserved coparty; and this result is not obviated by a showing that the whereabouts of the nonserved party is unknown, and by an uncertain showing as to his heirs if he be dead.

Barkley v Henke, 209-731; 229 NW 156

Partition. In an appeal from a decision in partition that one defendant should account for all moneys received from an estate, it was necessary that notice of appeal be served upon each of the other parties or their attorneys under statutes requiring service upon all plaintiffs as adverse parties and upon all co-defendants who did not join in the appeal and might be adversely interested, since, if the appellant were permitted to keep the money, the interests of the other parties would be decreased.

Herrold v Herrold, 226-805; 285 NW 274

Failure to notify surety. In an action by a municipality against the receiver of an insolvent bank and its surety to obtain a preference in the payment of the municipal deposit, an appeal from the decree granting the prayer on the plea of both plaintiff and the surety will be dismissed when no notice of appeal is had upon the surety.

Independ. Dist. v Bank, 204-1; 213 NW 397

Insurer's attorney also defendant. In an action on an accident policy, the insured, an attorney, who makes the insurer's attorney a defendant along with the company, may not dismiss the company-attorney's appeal on the ground that there is no judgment against such company-attorney, when the judgment entry is against the company and "any person acting in its behalf".

Eller v Guthrie, 226-467; 284 NW 412

Attorney signing notice and accepting service thereof. An attorney who signs a notice of appeal on behalf of an appealing defendant, for whom he appeared in the trial court, may validly accept service of said notice on behalf of a nonappealing, co-defendant for whom said attorney also appeared in the trial court.

Osceola v Gjellefald Co., 220-685; 263 NW 1

12835 Coparties not joining.

ANALYSIS

I COPARTIES
II PARTIES GENERALLY

I COPARTIES

Decree does not inure to nonappellant. Where an equitable decree adjudged (1) that one of two assignees of the same fund took priority over the other assignee, but (2) that certain mechanics and dealers had lienable claims on said fund prior to both of said assignees, and where on appeal solely by the defeated assignee it was adjudged not only (1) that the appellant-assignee took priority over the appellee-assignee, but (2) that said mechanics and dealers had no lienable claims on said fund, held, that the judgment on appeal that the mechanics and dealers had no

lienable claims on said fund did not inure to the benefit of the appellee-assignee. In other words, the appellee-assignee was still bound by the decree of the trial court because he did not appeal therefrom.

Ottumwa Boiler v O'Meara, 208-80; 224 NW 803

Record—nonappealing parties—striking argument. Arguments filed in supreme court by nonappealing parties as appellants may be stricken.

In re Schropfer, 225-576; 281 NW 139

II PARTIES GENERALLY

Failure to appeal—effect. A defendant who fails to appeal from any part of a decree (1) which established certain claims for labor (as contended for by plaintiff), but (2) which held that such claims were not liens on certain property (as contended for by defendant), may not question the decretal establishment of said claims on a successful appeal by the plaintiff from the latter part of the decree.

Soodhalter v Coal Co., 203-688; 213 NW 213

Appellee defaulting on appeal—rights. An appellee who has not appealed may not have a more favorable judgment on appeal than was accorded to him in the trial court, even tho the appeal record reveals error against him.

Waxmonsky v Hoskins, 216-476; 249 NW 195

Nonjoinder by successful claimants against estate. The appellate court, in adjusting and determining claims for preferential payment of trust funds in the settlement of the estate of an insolvent, has no power to make a determination which will prejudice the rights of other parties who have been granted preference in payment and who are not parties to the appeal.

Leach v Bank, 204-497; 212 NW 748; 215 NW 728

Nonassignment of errors by appellee—rights on appeal. A successful party as appellee may without assigning errors show, if he can, that he was so erred against as to neutralize entirely any errors against appellant.

Thompson v Butler, 223-1085; 274 NW 110

12836 Appeal from part of judgment or order—effect.

Continuing jurisdiction of lower court. An appeal simply from an order appointing a receiver in auxiliary proceedings to enforce a judgment leaves all other portions of said proceedings within the jurisdiction of the district court.

Wade v Swartzendruber, 206-637; 220 NW 67

Review limited to part appealed. A part of a decree on which no appeal is taken by the party adversely affected is not before the supreme court for review.

Scott v Waterloo, 223-1169; 274 NW 897

Limited appeal in equity limits de novo hearing. The de novo hearing on appeal in an equitable action is necessarily limited to the particular part of the decree from which the appeal is taken; and, under such an appeal, appellee cannot have a de novo hearing on some other part of the decree unless he perfects a cross-appeal.

Brutsche v Coon Rapids, 220-1295; 264 NW 696

Voluntary payment of costs precludes appeal. A voluntary payment of an entire judgment, prior to appeal by the superintendent of banking, tho such judgment be only for costs, entered against him by the court, and not merely taxed by the clerk, is such an acquiescence and submission to the judgment as precludes an appeal thereon. (Distinguishing Boone v Boone, 160-284.)

Bates v Nichols, 223-878; 274 NW 32

Decretal establishment of claims. A defendant who fails to appeal from any part of a decree which (1) established certain claims for labor (as contended for by plaintiff), but (2) held that such claims were not liens on certain property (as contended for by defendant), may not question the decretal establishment of said claims on a successful appeal by the plaintiff from the latter part of the decree.

Soodhalter v Coal Co., 203-688; 213 NW 213

12837 Notice of appeal—service.

ANALYSIS

I NOTICE IN GENERAL
II PARTIES ENTITLED TO NOTICE
III FORM AND REQUISITES OF NOTICE

I NOTICE IN GENERAL

Service perfects appeal. An appeal is deemed perfected when the notice of appeal is served, not when it is filed.

Coggon Bk. v Woods, 212-1388; 238 NW 448

Special appearance to defective notice. Appearance in an appellate tribunal for the purpose of objecting because the notice of appeal was not served as required by law does not confer jurisdiction on the tribunal to hear the appeal.

Casey (Town) v Hogue, 204-3; 214-NW 729

Nonwaiver of defects by appearance. A voluntary appearance by attorneys for appellee and the filing of a motion to dissolve a restraining order do not waive defective notice. Notice of appeal is jurisdictional and want of notice cannot be supplied by voluntary appearance.

Cheney v Board, (NOR); 222 NW 899

Failure to serve adversely interested party. An appeal will be dismissed on timely and proper application when an adversely inter-

I NOTICE IN GENERAL—concluded

ested party is not served with notice of the appeal, e. g., a party whose share under a testamentary instrument will be decreased should appellant prevail.

Piercy v Bronson, 206-589; 221 NW 193

Service on attorney. A notice of appeal addressed to the appellee only and served on his counsel is sufficient to give the appellate court jurisdiction.

Anderson v Dunnegan, 217-1210; 245 NW 326

Attorney signing notice and accepting service thereof. An attorney who signs a notice of appeal on behalf of an appealing defendant, for whom he appeared in the trial court, may validly accept service of said notice on behalf of a nonappealing, co-defendant for whom said attorney also appeared in the trial court.

Osceola v Gjellefald Co., 220-685; 263 NW 1

Nonserved unnecessary parties—burden of proof. The burden is on an appellant to show —should the question arise—that parties not served with notice of appeal are not necessary parties to the appeal—that they will not be prejudiced or adversely affected in any manner by any order or decree of the appellate court.

State v So. Surety, 223-558; 273 NW 129

Notice to heirs—when not necessary. In probate proceedings an administrator is entitled to appeal from a probate decree qualifiedly approving a final report of the preceding executor, notwithstanding he served no notice of appeal upon the beneficiaries under the will as coparties, where he represents the beneficiaries, and their relations are not antagonistic, and where, tho they are interested in the outcome, they are not strictly coparties.

In re Sheeler, 226-650; 284 NW 799

Time of serving notice of appeal. A supreme court rule providing for service of a copy of the abstract upon each appellee, and for filing copies of the abstract with the clerk, contemplates that the service must be made before the copies are filed showing that such service has been made, and requires such service to be made within 120 days after the appeal is perfected unless additional time is granted.

Herrold v Herrold, 226-805; 285 NW 274

II PARTIES ENTITLED TO NOTICE

Jurisdiction to consider appeal. Supreme court cannot consider an appeal in the absence of necessary parties.

Paulson v Paulson, 226-1290; 286 NW 431

Defendant not designated — fatal defect. Where title of notice of appeal does not designate name of defendant in action below, the supreme court has no jurisdiction.

Cheney v Board, (NOR); 222 NW 899

Substituted plaintiff. Failure to serve a notice of appeal on a substituted plaintiff in whose name judgment was entered is fatal to the appeal, even tho the attorneys who were served for the original plaintiff were attorneys for the substituted plaintiff.

Silberman v Ins. Co., 218-626; 255 NW 646

Intervenor—notice unnecessary. Where the petition, and a petition of intervention, both asking the same relief, were dismissed on their merits, the fact that intervenor fails to appeal, or was not served with notice of appeal by plaintiff, is quite inconsequential as far as plaintiff's appeal is concerned.

Anderson v Dunnegan, 217-1210; 245 NW 326

Defendants—notice by intervenor. Failure of an intervenor in mortgage foreclosure to serve defendants with notice of his appeal is fatal to the appeal if a decision on appeal in favor of intervenor would prejudice the nonserved parties.

First Tr. JSL Bk. v Yarcho, 217-95; 250 NW 903

Noninterested party. A notice of appeal need not be served on one who is in no manner a party to the proceedings in which the judgment or order appealed from is entered. So held where the court in its order assumed to grant relief to a party who was in no manner a party to the proceeding.

Gray v Mann, 208-1193; 225 NW 261

Noninterested parties—action on contract. An appellant who appeals from a decree which denies his prayer for a reformation of a contract and grants to the appellee a rescission of such contract need not serve notice on other parties who have no interest whatever in said issues of reformation or rescission.

Cahail v Langman, 204-1011; 216 NW 765

Partition—necessary parties. In a partition action, on appeal from a decree fixing parties' interest in a cemetery lot, the widow and children of one of the original grantees are "necessary parties" in whose absence the supreme court cannot consider such appeal.

Paulson v Paulson, 226-1290; 286 NW 431

Coparties in partition. Failure of an appellant in partition to serve a coparty with notice of the appeal is fatal to the appeal when a reversal of the decree appealed from would reduce the share of the unserved coparty; and this result is not obviated by a showing that the whereabouts of the unserved party is unknown, and by an uncertain showing as to his heirs, if he be dead.

Barkley v Henke, 209-731; 229 NW 156

Partition—plaintiff and co-defendants. In an appeal from a decision in partition that one defendant should account for all moneys received from an estate, it was necessary that notice of appeal be served upon each of the

other parties or their attorneys under statutes requiring service upon all plaintiffs as adverse parties and upon all co-defendants who did not join in the appeal and might be adversely interested, since, if the appellant were permitted to keep the money, the interests of the other parties would be decreased.

Herrold v Herrold, 226-805; 285 NW 274

Partition — co-fractional owners of land. When in partition the court has adjudicated the fractional ownership of land to be in the plaintiff and in certain named defendants, the plaintiff appealing from a subsequent order for a new trial in favor of a defendant served by publication only (and who had been denied all ownership on the original trial) need not serve notice of appeal on his co-fractional owners.

Clark v Robinson, 206-712; 221 NW 217

Mortgagor as adverse and necessary party. A titleholder who did not assume a prior mortgage on the property and who appeals from an order in foreclosure appointing a receiver must serve notice of appeal on the mortgagor, as an adverse and necessary party, inasmuch as a personal judgment was rendered against mortgagor in the foreclosure.

Hoffman v Bauhard, 226-133; 284 NW 131

Former owner—quiet title action—liens. In an action by the purchaser of land to quiet title against certain claims for mechanics' liens, the decree confirmed the claims as liens on the land, and ordered said land sold for the payment—at least pro tanto—of said liens, and, in addition, entered personal judgments against a former owner of the land for the amount of each of said claims. Plaintiff appealed from the decree insofar as it established said claims as liens.

Held, the appeal could not be maintained without service of notice of appeal on said former owner.

Gordon Co. v Ideal Co., 223-313; 271 NW 523

Creditors as "adverse parties". A liquidator (quasi-receiver) was appointed in a foreign state to liquidate an insolvent insurance company chartered in said state and doing business in Iowa.

The attorney general of Iowa at once, in his official capacity, instituted ancillary receivership in Iowa, and, in time, certain claims were duly allowed in said ancillary proceedings in favor of creditors of said insolvent.

The Iowa court later ruled, on intervention by the foreign liquidator (to which intervention the said creditors formally objected of record) that funds in the hands of the ancillary receiver should be retained by him and distributed under said ancillary receivership.

Held, an appeal by the foreign liquidator from said latter ruling imperatively necessitated service of notice of appeal on said creditors, even tho they had not appeared at the trial of the intervention—that service on the ancillary receiver was not sufficient as to said creditors.

State v So. Surety, 223-558; 273 NW 129

Adverse party. Under statute providing for service of notice of appeal, any party who would be prejudiced by a reversal is an "adverse party". So where plaintiff-administrator, as assignee, seeks certain insurance proceeds, but after an intervenor in the action claims the proceeds, plaintiff aids in the showing that intervenor rather than plaintiff should recover, and where defendant but not plaintiff appealed, a reversal could not adversely affect plaintiff who, therefore, was not an "adverse party" on whom notice of appeal must be served. The mere possibility of plaintiff being interested in the taxation of costs did not require dismissal because the appeal notice, which was served upon attorneys representing both plaintiff and intervenor, was not addressed to plaintiff.

Luce v Ins. Co., 227-532; 288 NW 681

Legatees—claim in probate. In an appeal from a holding that a claim in probate was not payable from life insurance funds, notice of appeal is all-sufficient when served solely on the executor, the legatees not being parties to the controversy.

In re Caldwell, 204-606; 215 NW 615

Legatees—order construing will. Residuary legatees are not necessary parties to an appeal from an order construing the will on the application of the executor.

Dillinger v Steele, 207-20; 222 NW 564

Beneficiary of estate as coparty. In probate proceeding on objection to executor's report, an appeal by an assignee of a beneficiary's interest in the estate will not be dismissed where he fails to serve notice of appeal upon beneficiary as a coparty when the beneficiary cannot be adversely affected by the supreme court's decision on the assignee's appeal.

In re Sheeler, 226-650; 284 NW 799

II PARTIES ENTITLED TO NOTICE—concluded

Objectors to final report. Notice of appeal from a judgment sustaining objections to an administrator's final report must be served on all heirs objecting to the report, and a failure will result in a dismissal of the appeal.

Kelley's Est. v Kelley, 226-156; 284 NW 133

Administrator as adverse party—failure to serve. When, in an action to set aside alleged fraudulently procured deeds to lands, a party plaintiff is such, both (1) as an individual and (2) as administrator of the estate of the defrauded grantor, then the failure of the defendant, in appealing from a decree granting the prayer of the petition, to serve notice of the appeal on said party plaintiff as administrator is fatal to the appeal, tho said plaintiff is properly served as an individual.

Shea v Shea, 220-1347; 264 NW 590

Executor as adverse party. On an appeal by a ward from an order appointing a named party as guardian of the property of said ward, the executor of an estate, out of which said guardianship proceeding arose, is an "adverse party", it appearing that he was a party to said guardianship proceeding in opposition to the wishes of said ward. And this is true tho said executor had been discharged at the time said appeal was perfected.

Hodgen's Executors v Sproul, 221-1104; 267 NW 692

Administratrix—nonnecessity to serve self as individual. When an administratrix appeals, in her official capacity, from rulings on her final report, the fact that the court taxed to her, individually, the court costs occasioned by the hearing on the report, creates no necessity for the appellant to cause said notice of appeal to be served upon herself as an individual, she not being, in fact or in law, a party, individually, to said final report and hearing thereon.

In re Paulson, 221-706; 266 NW 563

Guardian as nonadverse party. On an appeal by a ward from an order appointing a named person as the guardian of the property of said ward, notice of appeal need not be served on said appointee, he never having made, or attempted to make, himself a party to said guardianship proceedings.

Hodgen's Executors v Sproul, 221-1104; 267 NW 692

County. An appeal from an order striking certain portions of the petitions in an action nominally against the members of the board of supervisors, but in legal effect against the county, will be dismissed when no notice of the appeal is served on the county.

Valentine v Board, 206-840; 221 NW 517

City in quiet title action. In appeal from decree quieting title in city to streets and alleys, but continuing hearing as to park, it was necessary to serve notice of appeal on city's attorney, and notice of appeal served on attorneys for cross-petitioners joining in prayer of appellee's petition was not binding on the city and entitled city to a dismissal.

Iowa City v Balluff, (NOR); 225 NW 942

III FORM AND REQUISITES OF NOTICE

Improper caption. In an assignment for the benefit of creditors wherein certain creditors had successfully objected to the recognition of a claim, a notice of appeal which is in no manner directed to said objectors is fatally defective even tho served on said objectors. In such case it is not sufficient to direct the notice to the assignee as the representative of all the creditors.

In re Lounsberry, 208-596; 226 NW 140

Improper caption. An appeal will be dismissed when the notice of appeal described the appealing plaintiff as "W. D. Bates, Superintendent of Banking as receiver of" (insolvent bank); and it is made to appear that, as to the particular subject matter involved, no petition so describing said appealing plaintiff had ever been filed; that the petition actually filed and involving said particular subject matter was captioned "W. D. Bates, Superintendent of Banking, Plaintiff" and was docketed under the same caption and given the same docket number as that given to a former action wherein said official asked for his appointment as receiver of said bank, to wit: "W. D. Bates, Superintendent of Banking, Plaintiff".

Bates v Bank, 221-814; 267 NW 677

Not addressed to appellee. A notice of appeal by defendant must not only (1) be addressed to, but (2) be served on a duly substituted plaintiff (or his attorney) in order to confer jurisdiction on the appellate court. Service alone is wholly insufficient, even tho the name of the substituted plaintiff is carried in the title to the notice.

Snyder v Spirit Lake, 218-774; 254 NW 14

Unsigned notice. An unsigned notice of appeal is a nullity, even tho appellee and the clerk of the district court execute acknowledgment of service thereon, and even tho the reverse side of the notice carries the title of the case and an indorsement of the name of appellant's attorney.

Jensen v Adlum, 201-1042; 206 NW 129

Caption containing name of supreme court—nonprejudicial error. Error in heading notice of appeal "In the Supreme Court of Iowa" is not prejudicial, altho inaccurate, because at that stage of the proceeding jurisdiction is still in the district court.

Cheney v Board, (NOR); 222 NW 899

Sufficiency of recitals. A notice of appeal which describes the proceeding by proper title, and the order appealed from by proper date

of rendition, is all-sufficient and brings up for review all and every feature of the order. So held where the final determination of the court embraced two orders, one germane to the proceeding before the court, and one wholly nongermane.

Gray v Mann, 208-1193; 225 NW 261

Conclusiveness. Appellant's specification in his notice of appeal as to the particular part of the judgment appealed from is conclusive upon him.

Rule v Rule, 204-1122; 216 NW 629

Unappealed part of judgment. A party may not have a review of that part of a judgment which pertains to the costs when such part is not within the scope of his appeal.

C. B. & Q. Ry. v Board, 206-488; 221 NW 223

Identification of judgment appealed from. Notice of appeal must specifically identify judgment or decree appealed from.

Cheney v Board, (NOR); 222 NW 899

Notice of appeal—from verdict or judgment. A notice of appeal is valid if, after stating that it is an appeal from the verdict, it goes further and states that it is also an appeal from the judgment and all rulings of the court adverse to appellant.

Sullivan v Harris, 224-345; 276 NW 88

Fatally deficient record in lower court. An appeal cannot be entertained when the record affirmatively shows (1) that the appearance docket of the trial court carries no notation of the filing of a notice of appeal, and (2) that no notice of appeal can be found in the office of the clerk of said court.

Educational Exchanges v Thornburg, 217-178; 251 NW 66

Correction of record after appeal. If the date of perfecting an appeal as shown on the return of service is erroneous, the defect must be corrected by proper procedure in the trial court—not in the supreme court.

Coggon Bk. v Woods, 212-1388; 238 NW 448

Service on attorney. Service of a notice of appeal on any one of several attorneys who appeared for the adverse party in the trial court is all-sufficient.

Home Bank v Klise, 205-1103; 216 NW 109

Service on attorney for deceased party. A notice of appeal addressed to a deceased plaintiff is without legal effect; likewise, a notice addressed to the attorney for such deceased plaintiff cannot be deemed a notice to a substituted plaintiff to whom the notice is not addressed.

Snyder v Spirit Lake, 218-774; 254 NW 14

Service on attorneys for part of appellees. When timely notice of appeal was served on attorneys for part of the appellees, the service on such attorneys was effective only as to the appellees they represented, and not effective as to other appellees represented by attorneys who received late service.

Herrold v Herrold, 226-805; 285 NW 274

Timely service mandatory. The law requiring that service of notice of appeal and filing of the abstract be timely is mandatory, and unless complied with, the appeal will be dismissed.

Herrold v Herrold, 226-805; 285 NW 274

City—mayor served. A notice of appeal addressed to a municipal corporation by name as the sole adverse party is all-sufficient, and service of such notice on the mayor of the city is likewise all-sufficient, even tho the notice is in no manner addressed to the mayor.

Lundy v Ames, 201-186; 206 NW 954

Western Corp. v Marshalltown, 203-1324; 214 NW 687

Service—return—filing. An appeal to the supreme court is not perfected unless, after the notice of appeal is properly served, said notice with return of service indorsed thereon or attached thereto is filed, within the time allowed for taking an appeal, with the clerk of the court wherein the proceedings were had.

Hampton v Railway, 216-640; 249 NW 436

Filing of notice. The filing of a duly served notice of appeal with the clerk of the trial court is an essential step in perfecting an appeal.

Educational Exchanges v Thornburg, 217-178; 251 NW 66

Failure to file served notice. An appeal to the supreme court is not perfected unless, after the notice of appeal is properly served, said notice, with return of service indorsed thereon or attached thereto, is filed, within the time allowed for taking an appeal, with the clerk of the court wherein the proceedings were had.

Bates v Bank, 222-1323; 271 NW 638

12839 Appeal prior to judgment entry —effect.

Premature service. The fact that notice of appeal is served before the judgment is entered upon the record is of no consequence when such entry is made before the abstract is filed on appeal.

Fryman v McCaffrey, 208-531; 222 NW 19; 224 NW 95

Premature filing—dismissal. An appeal must be dismissed when the abstract of the record is filed in the supreme court before the judgment appealed from has been entered upon the court record of the trial court.

Spear v Spear, 200-1222; 206 NW 102

Filing abstract—extension of time. It is suggested that an application by an appellant for an extension of time in which to file his abstract owing to the delay of the clerk of the trial court in entering the judgment in question on the trial court records will be granted as a matter of course.

Spear v Spear, 200-1222; 206 NW 102

Necessary recitals. Failure of the abstract to show that the order or judgment appealed from has been entered of record is fatal to the appeal, provided appellee properly presents the defect.

Deal v Marten, 214-769; 240 NW 686

All-essential recitals. A naked statement, in an abstract on appeal, that the judgment appealed from was "rendered", is fatally insufficient in not revealing the all-essential fact that the judgment was duly entered of record.

Harmon v Hutchinson Co., 215-1238; 247 NW 623

Presumption. When the abstract recites generally the taking and perfecting of an appeal, and the jurisdiction of the appellate court is not attacked in written form as provided by §12885, the appeal will be presumed to be from the final judgment, even tho the abstract does not show the entry of a final judgment.

In re Kahl, 210-903; 232 NW 133

12840 Service and filing with trial clerk.

Proper service. This section, which distinctly provides that a notice of appeal shall be "served as an original notice", authorizes a service on the designated party by leaving a copy of said notice at the usual place of residence of said party with some member of his family over 14 years of age—when said party is not present in the county at the time of said service. So held as to the service of a notice of appeal under §7133.

In re Sioux City Yards, 222-323; 268 NW 18

Constable's return of notice — verification. Return of service of notice of appeal by a constable must be verified in order to be valid.

Strasburger v Witousek, (NOR); 211 NW 713

Failure to file served notice. An appeal to the supreme court is not perfected unless, after the notice of appeal is properly served, said notice, with return of service indorsed thereon or attached thereto, is filed, within the time allowed for taking an appeal, with the clerk of the court wherein the proceedings were had.

Bates v Bank, 222-1323; 271 NW 638

Fatally deficient record. An appeal cannot be entertained when the record affirmatively shows (1) that the appearance docket of the trial court carries no notation of the filing of a notice of appeal, and (2) that no notice of appeal can be found in the office of the clerk of said court.

Educational Exch. v Thornburg, 217-178; 251 NW 66

12844 Payment of fees.

Failure to pay docket fees. An abstract duly filed in the time and manner provided by law cannot be deemed unfiled because the cause was docketed without the payment of the required fees.

Anderson v Dunnegan, 217-1210; 245 NW 326

12845 Abstracts.

ANALYSIS

Abstracts in criminal cases. See under §14010, also Rule 18

I ABSTRACTS IN GENERAL

No abstract, no review. An order of the probate court, entered on testimony duly taken, sustaining objections to the final report of executors, cannot be reviewed on appeal in the absence of the presentation of said testimony in accordance with the statutes and rules of the appellate court.

In re Andrews, 221-818; 265 NW 187

Extensions of time to be shown. A motion for new trial and exceptions to instructions filed 16 days after verdict, where no extension is secured, are filed too late, and questions raised therein cannot be considered on appeal. In such case, when extension of time has been granted, such fact should be shown in abstract.

Roggensack v Ahlstrom, (NOR); 209 NW 429

Deficient record—presumption. On appeal from action to enjoin trespass and for damages, where record before the supreme court relating to certain issues, including question of damages, was so incomplete as to make determination very difficult, it was presumed that the trial court performed its duty and reached a proper conclusion.

Arnd v Harrington, 227-43; 287 NW 292

Conclusiveness of record. The record as reflected in the abstract and amendments thereto is conclusive on the appellate court. Recourse may not be had to the arguments for the facts unless said facts are in accordance with the abstract.

Asher v Const. Co., 216-977; 250 NW 179

Cross-appeal—duplication of appellant's abstract unnecessary. A cross-appellant need not duplicate appellant's abstract. An amendment to appellant's abstract, accompanied by a certificate by counsel to the effect that appellant's abstract and the cross-appellant's amendment contain all the record, is all-sufficient.

Bergman v Coal Co., 200-419; 203 NW 697

Agreed abstracts. Needless to say that a party on appeal must stand on an agreed abstract.

O'Donell v Davis, 201-214; 205 NW 347

Record necessary for de novo trial. In order that an equitable action may be tried de novo on appeal it is imperative that appellant place before the court the record made in the trial court, and do so in the manner required by the statutes and rules of the court.

Merritt v Ludwig-Wiese, 212-71; 235 NW 292

Unallowable addition to record. On appeal, even in an equity case, the record as made in the trial court cannot be added to by the filing of affidavits bearing on the fact situation.

McDaniel v McDaniel, 218-772; 253 NW 803

Necessary corrections in trial court. An attack on the record as duly certified to the supreme court on appeal cannot be originated in the supreme court.

Melman Co. v Melman, 216-45; 245 NW 743

Utility plant—contract and specifications—variation first alleged on appeal. A contended variation between the contract for a municipal public utility plant and the specifications, in that the contract omitted the right to call bonds at a certain time, will not be considered on appeal, when such variation, if any, was not an issue in the lower court.

Lahn v Primghar, 225-686; 281 NW 214

II FORM AND ARRANGEMENT

Substantial compliance with court rules necessary. The failure of an appellant to comply substantially with the rules of the supreme court relative to the preparation and indexing of an abstract affords ample grounds for the peremptory dismissal of the appeal.

Hakes v North, 202-324; 208 NW 305

Failure to comply with rules—dismissal. A proceeding in certiorari before supreme court will be dismissed where petitioner fails to comply with order or rules requiring printed abstracts.

Eller v Hunter, (NOR); 209 NW 281

Abstracts in question and answer form. Unless necessary for appellate review of a particular error, abstracts should not be prepared in question and answer form, but in prescribed narrative form.

Swensen v Ins. Co., 225-428; 280 NW 600

Failure to index — dismissal. Adequate grounds for dismissing an appeal are furnished by failure to alphabetically index the abstract, and especially the exhibits contained therein.

Shively v Mfg. Co., 205-1233; 219 NW 266

Filing of defective abstract—effect. The filing, within the extended time granted by the court, of an abstract which is defective in that the testimony is set out in transcript form, followed by the filing of an amendment to the abstract wherein the testimony is properly abstracted, will prevent a dismissal of the appeal, but the unnecessary printing will be taxed to the appellant in any event.

Knapp v Baldwin, 213-24; 238 NW 542

III MATTERS INCLUDED OR EXCLUDED

(a) IN GENERAL

Record—abstract—contents—Rule 17. Abstracts in the supreme court should contain "everything material" and "omit everything else".

Brien v Davidson, 225-595; 281 NW 150

Nonrecord matter strikeable on motion. It is wholly unallowable to insert in an abstract matter which was not before the court, or of record therein, when the proceedings complained of were had.

La Forge v Cooter, 220-1258; 264 NW 268

Matters subsequent to entry of order. It is futile to insert in an abstract matter which has occurred subsequent to the entry of the order from which the appeal is taken.

In re Sarvey, 206-527; 219 NW 318

Hopelessly deficient record. Errors predicated on the exclusion of evidence tending to prove nonperformance of the contract sued on cannot be considered on appeal when appellant has not included in the abstract any part of such proffered evidence or the objections or rulings thereon.

McManus v Kucharo, 219-865; 259 NW 926

Deficient record—presumption. On appeal from action to enjoin trespass and for damages, where record before the supreme court relating to certain issues, including question of damages, was so incomplete as to make determination very difficult, it was presumed that the trial court performed its duty and reached a proper conclusion.

Arnd v Harrington, 227-43; 287 NW 292

III MATTERS INCLUDED OR EXCLUDED—concluded

(a) IN GENERAL—concluded

Treating improperly stricken plea in equity as in record.

Lawrence v Melvin, 202-866; 211 NW 410

Proceedings not in record—misconduct of jurors. Argument based on the alleged misconduct of jurors, when such misconduct does not appear of record, will be wholly ignored.

McDonald v Webb, 222-1402; 271 NW 521

Contents of excluded writing. The court cannot review a ruling excluding a writing when the appellate record reveals nothing as to the contents of the writing.

Rodskier v Ins. Co., 216-121; 248 NW 295

Moratorium hearing—nonrecord matters not considered. The supreme court will not consider, in a resistance to a moratorium extension, claims that the act was unconstitutional and did not apply to a federal government agency, when the record of a former hearing, stipulated as constituting the evidence to be considered by the court, contains neither contention.

First Tr. JSL Bk. v Burke, 225-55; 280 NW 467

(b) IN PARTICULAR

Nonintroduced matters. A party to an appeal may not, by certificate, bring to the appellate court matters which he failed to introduce and make a part of the record in the trial court.

Robson v Kramer, 215-973; 245 NW 341

Incomplete transcript of evidence. An appeal in an equitable action will not necessarily be dismissed nor a de novo hearing be refused, because all the evidence is not embraced in the abstract.

State v Baker, 212-571; 235 NW 313

Absence of evidence in equity. An appeal in an action brought and tried in equity will not be dismissed because the appellant fails to include the evidence in his abstract when the record reveals everything necessary for the court to decide the narrow question of law presented by appellant.

Carlson v Layman, 214-114; 241 NW 457

Chicago JSL Bk. v Eggers, 214-710; 243 NW 193

Total absence of evidence. An appeal in an equitable action must be dismissed when the only questions raised depend on the facts, and such facts are not presented.

Union County v Bank, 202-652; 210 NW 769

Evidence—allowance of attorney fee. The abstract on appeal need not contain evidence of a matter solely determinable by the trial court, to wit, the amount allowed as an attorney's fee, and such omission is not a basis for a motion to dismiss the appeal.

Rodman v Ladwig, 223-884; 274 NW 1

Fraud in equity action. Manifestly the appellate court cannot, on appeal in an equity action, review an issue of fact as to fraud when the appellate record presented to the court contains no evidence relating to fraud.

Goff v Milliron, 221-998; 266 NW 526

Appealed judgment not entered of record. Failure of the abstract to show that the order or judgment appealed from has been entered of record is fatal to the appeal, provided appellee properly presents the defect.

Deal v Marten, 214-769; 240 NW 686

Failure to show rulings. An abstract which fails to show that the rulings of which appellant complains were actually made, is necessarily fatally defective.

Shackelford v District, 203-243; 212 NW 467

Failure to show instructions. Assignments of error pertaining to instructions cannot be reviewed on appeal when the instructions do not appear in the abstract.

Hallowell v Van Zetten, 213-748; 239 NW 593

Unsupported allegations. Needless to say that the appellate court, on appeal in certiorari to test the right of the executive council to remove plaintiff from office, will ignore plaintiff's wholly unsupported allegation of prejudice on the part of said council.

Clark v Herring, 221-1224; 260 NW 436

Instructions and exhibits. The appellate court cannot review an instruction to the jury when the correctness of such instrument depends on the contents of exhibits not embraced in the abstract.

Forrest v Sovereign Camp, 220-478; 261 NW 802

Incomplete instructions — nonreviewability. Instructions not set out in their entirety in the abstract will not be reviewed.

Wilkinson v Indianola, 224-1285; 278 NW 326

Cross-appeal not shown in abstract. Supreme court will not consider appellee's appeal from part of the lower court judgment when the abstract does not show any appeal or cross-appeal by appellee, and where appellee merely stated in its argument "from this part of the decree appellee has appealed".

Queal Lbr. v McNeal, 226-637; 284 NW 482

Reference to insurance. In a motor vehicle damage action, error may not be predicated on references to insurance in jurors' examination when no record is preserved for appeal.

McCornack v Pickerell, 225-1076; 283 NW 899

IV ABRIDGING MATTERS OF RECORD

Nonabridged abstract. An order of affirmance is justified when the so-called abstract consists of a substantial copy of the bill of exceptions, 50 percent of which is immaterial matter.

Pieczynski v Railway, 202-625; 210 NW 758

Unabbreviated abstract — penalty. A flagrant violation, in the preparation of an abstract, of the rule "to preserve everything material to the question to be decided, and to omit everything else", may be penalized by a taxation to appellant of all the cost of printing, even tho appellant is successful on appeal.

In re Higgins, 207-95; 222 NW 401

Certiorari—return—insertion of nonrecord matter. On certiorari to review the action of a trial court in proceedings for contempt, it is wholly unallowable to insert in the return matter which was not made of record by the court at the time of the entry of the order in question, and matters so inserted will be stricken on motion.

Crosby v Clock, 208-472; 225 NW 954

Record of contempt — mandatory requirements. There can be no legal judgment for contempt unless the record made by the court at the time of the judgment entry shows every fact which is necessary to the guilt of the party. Nothing must be left to inference. This is one instance where the law refuses to presume that the judgment was supported by sufficient evidence.

Crosby v Clock, 208-472; 225 NW 954

Deficient record — presumption. On appeal from action to enjoin trespass and for damages, where record before the supreme court relating to certain issues, including question of damages, was so incomplete as to make determination very difficult, it was presumed that the trial court performed its duty and reached a proper conclusion.

Arnd v Harrington, 227-43; 287 NW 292

V RECITALS

(a) IN GENERAL

Absence of record. The holding of the trial court as to the legal effect of a written instrument is necessarily conclusive on the appellate court when such instrument has not been included in the appellate record.

O'Connor v Hassett, 207-155; 222 NW 530

Fatally defective record. The appellate court cannot consider errors assigned on exhibits which are not embraced in the appellate record.

State v Wall, 218-171; 254 NW 71

Total absence of exceptions—necessary affirmance. If the record on appeal is barren of any exception to the directed verdict rulings complained of, the appellate court will affirm the judgment of the lower court.

Garner v Cherokee County, 223-712; 273 NW 842

(b) AS TO CONTENTS

All-essential recitals. A naked statement, in an abstract on appeal, that the judgment appealed from was "rendered", is fatally insufficient in not revealing the all-essential fact that the judgment was duly entered of record.

Harmon v Hutchinson Co., 215-1238; 247 NW 623

VI PRESUMPTIONS

Amendment presumptively correct. An amendment to appellant's abstract, which amendment shows no exception to a ruling of the court, will be presumed correct in the absence of a certification of the record.

State v Slycord, 210-1209; 232 NW 636

Undenied amendment presumed true. Appellee's amendment to appellant's abstract will be presumed to speak the truth in the absence of a denial thereof or a certification of the record.

Home Bank v Ratcliffe, 206-201; 220 NW 36

Abstract contains the record. An abstract which is not denied or corrected by subsequent abstract will be presumed to contain the record, even tho unaccompanied by any certificate to that effect.

Pullan v Struthers, 201-709; 207 NW 794
Perry Fry v Gould, 214-983; 241 NW 666

Denial of abstract—effect. A sweeping, all-inclusive and adequate denial by appellee of the correctness of appellant's abstract will be deemed true in the absence of a certification of the record.

People's Bk. v Smith, 212-124; 236 NW 30

Presumption attending unduly abbreviated abstract. When the complete record on which the trial court reached its conclusion on a fact proposition is not before the court on a de novo trial, and where the contrary does not appear, the presumption must be indulged that the trial court properly performed its duty and reached a proper conclusion.

Harrington v Foster, 220-1066; 264 NW 51

Deficient record—presumption. On appeal from action to enjoin trespass and for damages, where record before the supreme court relating to certain issues, including question of damages, was so incomplete as to make determination very difficult, it was presumed that the trial court performed its duty and reached a proper conclusion.

Arnd v Harrington, 227-43; 287 NW 292

Justification of court ruling. The presumption will be indulged that the testimony before the trial court justified its ruling when, on

VI PRESUMPTIONS—concluded

appeal, the abstract shows the existence of such testimony, but does not contain it.

In re Eschweiler, 202-259; 209 NW 273

Case reinstated after dismissal—court rules not in evidence—no review. Where an action is dismissed by the clerk under district court rules, but the judge thereof, without notice to the defendant, reinstates the case on motion and showing that the clerk acted erroneously, and where an application to vacate the order of reinstatement is denied, supreme court could not on appeal assume that judge lacked jurisdiction to reinstate without notice to defendant, without the district court rules of practice being in evidence and before the appellate court.

Eggleston v Eggleston, 225-920; 281 NW 844

Instructions presumed correct. Where the record on appeal does not contain all the instructions necessary to determine the questions raised, the supreme court must presume their correctness.

Reardon v Hermansen, 223-1207; 275 NW 6

Appeal from judgment (?) or from order overruling motion for new trial (?). When the abstract recites generally the taking and perfecting of an appeal, and the jurisdiction of the appellate court is not attacked in written form, as provided by §12885, C., '27, the appeal will be presumed to be from the final judgment, even tho the abstract does not show the entry of a final judgment.

Koepke v Rohwer, 210-903; 232 NW 133

Facts provable by witness—absence—prejudice not presumed. Where the record fails to show the facts to be proved by a witness and prejudice resulting therefrom, none will be presumed and no reviewable error is preserved.

Pearson v Butts, 224-376; 276 NW 65

Plaintiffs as proper parties. On appeal in an action involving the title to real estate, it will be assumed, in support of the judgment, that the plaintiffs were the proper parties in interest, tho the record is indefinite, when they were so treated without objection in the trial below.

Bullock v Smith, 201-247; 207 NW 241

VII AMENDMENTS AND CORRECTIONS IN GENERAL

Nonapplicability of rule. The rule that an abstract cannot be amended, after a rehearing has been granted, has no application to a case where the court wholly withdraws an opinion, sets aside the former submission, and orders the appeal resubmitted.

State v Henderson, 215-276; 243 NW 289

Proceedings after judgment — amendment stricken. On an appeal from a judgment in mortgage foreclosure, the fact that execution has been issued and the property so sold as to leave a deficiency judgment is not properly made a part of the appellate record by including the same in an amendment to the abstract, and such amendment will be stricken, on motion.

John Hancock Ins. v Linnan, 205-176; 218 NW 46

Facts provable since trial. No procedure exists under which an insurance company may show, on appeal from a judgment against it on a policy, that since the appeal was taken judgment on another policy issued by another company on the same loss has been affirmed by the supreme court and paid, and that, therefore, appellant should be granted a reversal so that the loss may be prorated on the basis of all valid and collectible insurance.

Sargent v Ins. Co., 218-430; 253 NW 613

Failure to number lines—when stricken. An "additional abstract" containing a single short exhibit will not be stricken on appeal for failure to comply with rule as to numbering lines since reason for rule is to enable court to readily find testimony, and when the additional abstract is not essential to the decision of the case.

Keokuk Bridge v Curtin-Howe Corp., 223-915; 274 NW 78

Unallowable to amend after rehearing granted.

Bockes v Cas. Co., 212-499; 232 NW 156; 237 NW 886

In re Simplot, 215-578; 246 NW 396

Amendment filed when leave of court granted. Where the supreme court grants leave to file an amendment, a motion to dismiss such amendment will be overruled.

Allbaugh v Ashby, 226-574; 284 NW 816

VIII AMENDMENT BY APPELLANT

Belated filing—motion to strike. Appellant's amendment to his own abstract will not necessarily be stricken because it was filed after the expiration of the 120 days for filing the original abstract.

Knudson v Railway, 209-429; 228 NW 470

Amendment presumptively correct. An amendment to appellant's abstract, which amendment shows no exception to a ruling by the court, will be presumed correct, in the absence of a certification of the record.

State v Slycord, 210-1209; 232 NW 636

Unallowable amendment. An amendment to a petition, filed after the cause has been fully tried and submitted to the court, and without leave of the court, and brought to the appellate court as an amendment to the abstract, will be stricken on motion.

Fleming v Fleming, 211-1251; 230 NW 359

Amended abstract stricken—filing without leave. Appellant's amended additional abstract of testimony, filed three days prior to the submission of the case, and without leave of court, may be stricken on motion.

Harrison v Hamilton County, (NOR); 284 NW 456

Amendment by cross-appellant. A cross-appellant need not duplicate appellant's abstract. An amendment to appellant's abstract, accompanied by a certificate by counsel to the effect that appellant's abstract and the cross-appellant's amendment contain all the record, is all-sufficient.

Bergman v Coal Co., 200-419; 203 NW 697

Failure to certify record. Appellee's abstract and denial of appellant's abstract will not be stricken from the record when appellant makes no effort to sustain his abstract by a certification of the record.

McKay v Barrick, 207-1091; 224 NW 84

IX AMENDMENT BY APPELLEE

Amendment—unallowable method. An assertion by an appellee (by way of a so-called amendment to appellant's abstract) that the appellant actively procured the very order appealed from, will be disregarded when appellee neither denies the correctness of appellant's abstract nor supports his assertion by any record or by any allowable correction of the abstract.

Depping v Hansmeier, 202-314; 208 NW 288

Belated filing. The failure of appellee to file and serve his amended abstract within the time provided by the rules of the appellate court will not justify the striking of said amended abstract when the amendment contains material matter not in the originally filed abstract, when appellant has not been injured by the delay, and when appellee makes a reasonable excuse for his delay.

Richardson v Rusk, 215-470; 245 NW 770

X DENIALS

General denial—effect. The filing by appellee of a general denial of the correctness of appellant's abstract casts no duty on appellant to file an additional abstract conforming to appellee's complaint. The filing of such general denial effects no purpose whatever, except that, legally, it works a concession that the abstract thus attacked is correct.

Melman Co. v Melman, 216-45; 245 NW 743

Denial—effect. Appellant's assertion in his abstract of a fact relative to the filing of a motion availeth nothing in the face of a direct denial by appellee unless the assertion is sustained by a transcript of the record.

Mid-West Bk. v Struble, 203-82; 212 NW 377

Amendment — motion to strike. Appellee's abstract and denial of appellant's abstract will not be stricken from the record when appellant makes no effort to sustain his abstract by a certification of the record.

McKay v Barrick, 207-1091; 224 NW 84

Absence of amendment. An appellee who furnishes no amendment in support of his general denial of the correctness of appellant's abstract presents nothing to the appellate court by making reference to the original transcript of evidence.

Finley v Thorne, 209-343; 226 NW 103

Amendment—denial of correctness—certification of record. It is futile for appellant to deny the correctness of appellee's amendment to abstract unless appellant secures a certification of the record to the extent necessary to settle the dispute.

Harness v Tehel, 221-403; 263 NW 843

Correctness of abstract denied. Appellant's motion in supreme court to strike appellee's amendment to appellant's abstract was improper, since appellee in his amendment had made a specific denial of the correctness of appellant's abstract, and the proper procedure was for appellant to have the record certified to the supreme court as provided by its rules.

Rance v Gaddis, 226-531; 284 NW 468

XI FILING

Appellee need not file in case of cross-appeal. An appellant is the party who first gives notice of appeal, and he alone is required to file an abstract of the record, even tho the appellee perfects a cross-appeal.

Dunlop v Wever, 209-590; 228 NW 562
Hipp v Hibbs, 215-253; 245 NW 247

Time for filing abstracts. A supreme court rule providing for service of a copy of the abstract upon each appellee, and for filing copies of the abstract with the clerk, contemplates that the service must be made before the copies are filed showing that such service has been made, and requires such service to be made within 120 days after the appeal is perfected unless additional time is granted.

Herrold v Herrold, 226-805; 285 NW 274

Failure to pay docket fees—effect. An abstract duly filed in the time and manner provided by law cannot be deemed unfiled because the cause was docketed without the payment of the required fees.

Anderson v Dunnegan, 217-1210; 245 NW 326

Failure to file—dismissal. Appellant's failure to file abstract is sufficient ground for dismissing appeal or regarding it as abandoned.

Leach v Bank, (NOR); 218 NW 907

Cross-appellant need not file. There is no occasion or requirement that a cross-appellant file a separate, duplicate abstract of the record.

Wheatley v Fairfield, 221-66; 264 NW 906

XI FILING—concluded

Amended abstract stricken—filing without leave. Appellant's amended additional abstract of testimony, filed three days prior to the submission of the case, and without leave of court, may be stricken on motion.

Harrison v Hamilton County, (NOR); 284 NW 456

12845.1 Presumption.

See under §12845 (VI)

12845.2 Denials—additional abstracts—transcripts.

Denials. See under §12845 (X)
See also under §12846

12846 Unnecessary abstract or denial.

Unnecessary and immaterial amendment. The costs attending unnecessary and immaterial amendments to an abstract will be taxed to the party presenting them.

Wilson v Stever, 202-1396; 212 NW 142

Motion to strike. The court will be slow to strike amendments to an abstract when the filing appears to be actuated by a good-faith desire to present with great thoroughness matters of unusual importance.

McCarthy Co. v Coal Co., 204-207; 215 NW 250; 54 ALR 1116

Unnecessary abstract stricken. Appellee's abstract will be stricken when appellant's abstract is amply sufficient to enable the appellate court to decide all questions presented.

Reppert v Reppert, 214-17; 241 NW 487

Additional abstract containing filings subsequent to appeal stricken. On appeal from an order overruling special appearance, appellant's motion to strike appellee's additional abstract, containing only an amendment to plaintiff-appellee's petition filed in lower court subsequent to the appeal, would be sustained by supreme court.

Welsh v Ruopp, 228- ; 289 NW 760

12847 Time of filing.

Rulings under prior (C., '24) provisions.

Hogan v Ross, 200-519; 205 NW 208
Mullenix v Bank, 201-137; 206 NW 670
Marshall Inv. v McCoy, 201-757; 207 NW 740

Timely filing of abstract mandatory—dismissal for noncompliance. The law requiring that service of notice of appeal and filing of the abstract be timely is mandatory, and unless complied with, the appeal will be dismissed.

Herrold v Herrold, 226-805; 285 NW 274

Clerk's transcript submission—criminal—abstract—time limit. To avoid a submission on the clerk's short transcript, a criminal appellant who elects to present his case on printed abstract, brief, and argument must serve his notice under Rule 32 and file his abstract within the statutory time of 120 days from the giving of notice of appeal. Setting aside a submission is a matter of grace, not of right.

State v Johns, 224-487; 275 NW 559

Belated filing of abstract—review an transcript and argument. Where dependant failed to comply with Rule 32 and §12847, C., '39, requiring that abstract be filed within 120 days after perfecting appeal, but did file brief and argument within time fixed by said rule, held that only brief and argument would be considered, and that under §14010, C., '39, it was imperative duty of supreme court to review the record presented by clerk's transcript even tho the defendant had no right to have the abstract considered.

State v Dunley, 227-1085; 290 NW 41

Time of serving notice of appeal. A supreme court rule providing for service of a copy of the abstract upon each appellee, and for filing copies of the abstract with the clerk, contemplates that the service must be made before the copies are filed showing that such service has been made, and requires such service to be made within 120 days after the appeal is perfected unless additional time is granted.

Herrold v Herrold, 226-805; 285 NW 274

Motion to dismiss appeal. A motion to dismiss an appeal, because the abstract was not served upon all the appellees within 120 days after perfecting the appeal, was filed on time when filed more than 10 days before the time the case was assigned for submission, and should be sustained.

Herrold v Herrold, 226-805; 285 NW 274

Belated filing of amendment — motion to strike. Appellant's amendment to his own abstract will not, necessarily, be stricken because it was filed after the expiration of the 120 days for filing the original abstract.

Knudson v Railway, 209-429; 228 NW 270

Delay in filing—effect. Delay in filing a printed abstract in certiorari in strict accord with the order made at the time the writ was granted is not necessarily irremediable.

Sell v Mershon, 202-627; 210 NW 758

Notice of appeal—service on attorneys for part of appellees. When timely notice of appeal was served on attorneys for part of the appellees, the service on such attorneys was effective only as to the appellees they represented, and not effective as to other appellees represented by attorneys who received late service.

Herrold v Herrold, 226-805; 285 NW 274

Filing when notes and transcript not with clerk. An abstract filed with the clerk of the supreme court within the time provided by

statute is a proper and valid abstract notwithstanding the fact that, at the time of said filing, the shorthand notes had not been returned to, nor had the transcript been filed with, the clerk of the trial court.

Melman Co. v Melman, 216-45; 245 NW 743

Failure to file abstract—dismissal. Appellant's failure to file abstract is sufficient ground for dismissing appeal or regarding it as abandoned.

Leach v Bank, (NOR); 218 NW 907

Failure to file brief and argument. When an appellant files an abstract but no brief and argument in support of his appeal, the judgment appealed from will be affirmed on the presumption that the said judgment is correct, and that appellant has abandoned his appeal.

Gordon-Van Tine v Sergeant, 215-106; 244 NW 712

Necessary extension of time. It is suggested that an application by an appellant for an extension of time in which to file his abstract owing to the delay of the clerk of the trial court in entering the judgment in question on the trial court records will be granted as a matter of course.

Spear v Spear, 200-1222; 206 NW 102

Filing of defective abstract—effect. The filing, within the extended time granted by the court, of an abstract which is defective in that the testimony is set out in transcript form, followed by the filing of an amendment to the abstract wherein the testimony is properly abstracted, will prevent a dismissal of the appeal, but the unnecessary printing will be taxed to the appellant in any event.

Knapp v Baldwin, 213-24; 238 NW 542

Belated filing—effect. The filing of an abstract within the time fixed by the statute or by the court is a condition precedent to the attaching of the jurisdiction of the appellate court to entertain the appeal.

Waterloo Bk. v Redfield, 213-871; 236 NW 61

Invalid extension of time. An order extending the time in which to file abstract on appeal, made after the statutory time of filing has expired, is a nullity.

Coggon Bk. v Woods, 212-1388; 238 NW 448

Unallowable extension of time. An extension of time in which to file abstract on appeal in a criminal case may not be granted after the statutory time of 120 days for such filing has wholly expired.

State v Van Andel, 222-932; 270 NW 420

12848 Dismissal or affirmance.

Exclusive procedure. The exclusive procedure for presenting the question of the jurisdiction of the appellate court to entertain an appeal is by serving, ten days before the date assigned for the submission of the cause, a writing showing specifically such want of jurisdiction. Oral suggestion of want of jurisdiction cannot be recognized; likewise, appellee has the arbitrary right to serve such writing within the time provided by statute, the former doctrine of estoppel by delay having been abrogated by the statute.

Waterloo Bk. v Redfield, 213-871; 236 NW 61

Waiver of belated filing. Appellee, in order to avail himself of the appellant's failure to file his abstract within time, must act promptly and before the appellant has incurred expense in reliance on his filing.

Hewitt v Blaise, 202-1109; 211 NW 479

Fatally belated filing. An appeal must be dismissed when the abstract is not filed with the clerk of the supreme court within the statutory 120 days after the appeal is perfected and no extension of time is obtained, and it is immaterial that the appellee acknowledges timely service of the abstract.

Botna Valley Bk. v Cary, 205-913; 218 NW 926

Mandatory dismissal or affirmance. A timely motion to dismiss an appeal or to affirm the judgment appealed from because of the proven fact that the appellant has failed to file his abstract within the time required by statute leaves the appellate court with no alternative but to sustain the motion.

Farmers Bk. v Miles, 206-766; 221 NW 449

Alternative relief. When an appellant fails to file his abstract within the required statutory time, appellee's prayer for relief should be in the alternative, to wit: that the appeal be dismissed or that the judgment or order appealed from be affirmed.

Farmers Bk. v Miles, 206-766; 221 NW 449

Conflicting affidavits—effect. A war of conflicting affidavits between counsel as to what oral understanding was had relative to the time of filing an abstract on appeal will not necessarily be determined by the supreme court.

Farmers Bk. v Miles, 206-766; 221 NW 449

Dual appeals in same case—effect. Where, after rendition of a final judgment, and after a motion for a new trial is overruled, separate appeals are perfected on different dates (1) from the main judgment and (2) from the order as to new trial, the latter appeal will be deemed properly before the court, even tho the appeal from the main judgment is dismissed because of failure to file abstract within 120 days. Whether under such circumstances the appeal from the main judgment worked a waiver of an appeal from the order denying a new trial (if the point had been presented), quaere.

In re Fetterman, 207-252; 222 NW 872

Fatally belated filing—estoppel. An appellee who stands by and permits the appellant to print and file the abstract at a wholly unallowable time is not thereby estopped to move for a dismissal of the appeal.

Coggon Bk. v Woods, 212-1388; 238 NW 448

Unallowable nunc pro tunc entry. The supreme court may not enter a nunc pro tunc order to the effect that an abstract was filed within the time provided by statute when in truth and in fact it was not so filed.

Farmers Bk. v Miles, 206-766; 221 NW 449

12849 Certification of record optional with party.

Record not certified — abstract considered correct. In supreme court appeal, where appellee made specific denial of correctness of appellant's abstract, and where entire questioned record is contained in appellee's amendment to appellant's abstract, the record as set out in appellee's amendment will be taken as correct upon failure of appellant to sustain his abstract by a certified record as provided by the rules of the court.

Rance v Gaddis, 226-531; 284 NW 468

General denial — effect. An appellee who furnishes no amendment in support of his general denial of the correctness of appellant's abstract, presents nothing to the appellate court by making reference to the original transcript of evidence.

Finley v Thorne, 209-343; 226 NW 103

12850 Certification on order of court.

Amendment—denial of correctness. It is futile for appellant to deny the correctness of appellee's amendment to abstract unless appellant secures a certification of the record to the extent necessary to settle the dispute.

Harness v Tehel, 221-403; 263 NW 843

12850.1 Shorthand reporter's transcript—filing.

Reporter's transcript—when filing necessary. Statute requiring the translation of the shorthand report of a trial to be filed with clerk of district court after service of abstract on opposite party must be strictly followed. Such requirement is not antagonistic to supreme court Rule 16.

Goltry v Relph, 224-692; 276 NW 614
First Tr. JSL Bank v Abkes, 224-877; 278 NW 183

Filing transcript mandatory. Where appellant failed to file transcript of the record with court clerk until more than six months after appellant's abstract was served on appellee, appeal was dismissed for noncompliance with statute which required filing "immediately after said abstract is served on the opposite party"—the statutory requirement being construed as mandatory.

Harroun v Schultz, 226-610; 284 NW 450

Dismissal—failure to file reporter's transcript. An appeal from an order overruling motion to set aside default annulment will be dismissed on motion when, almost three months after abstract was served, the shorthand reporter's transcript of the evidence had not been filed, the statute requiring that such transcript be filed immediately after service of the abstract.

Kurtz v Kurtz, 228- ; 290 NW 686

12851 Transcript of evidence—certification and return.

Function of transcript. The only function which a transcript serves in the supreme court on appeal is as an arbiter between conflicting abstracts. It follows that, in the absence of a proper denial of appellant's abstract, the transcript will not be referred to tho on file.

Melman Co. v Melman, 216-45; 245 NW 743

12852 What sent up.

Ex-judge's affidavit—no part of record. A judge's affidavit made after termination of his office and three months after perfection of the appeal, is no part of the record and cannot be considered against the appellant as a basis for an alleged waiver.

In re Metcalf, 227-985; 289 NW 739

12857 Perfecting record.

Correction of record after appeal. If the date of perfecting an appeal as shown on the return of service is erroneous, the defect must be corrected by proper procedure in the trial court—not in the supreme court.

Coggon Bk. v Woods, 212-1388; 238 NW 448
Melman Co. v Melman, 216-45; 245 NW 743

Unallowable amendment. A record cannot be amended by affidavits of counsel.

Parker-Gordon v Benakis, 213-136; 238 NW 611

Unallowable corrections.

Sargent v Ins. Co., 218-430; 253 NW 613
McDaniel v McDaniel, 218-772; 253 NW 803

Correction in trial court. Corrections of the trial court record must be made in the trial court, not in the appellate court.

Educational Exchanges v Thornburg, 217-178; 251 NW 66

Amendment without notice. A trial court has no jurisdiction, after term time and after a proceeding for contempt has been removed to the supreme court by certiorari, to enter, without notice to the defendant (petitioner in certiorari), a nunc pro tunc amendment to the

record to the effect that the defendant entered a plea of guilty in said contempt proceeding.

Sergio v Utterback, 202-713; 210 NW 907

Municipal court—jurisdiction to dismiss pending appeal. An appeal from the municipal court to the supreme court from an interlocutory order involving part of an answer (order striking pleaded set-offs from part of the divisions of the answer), without supersedeas bond in, or stay order by, the appellate court, does not deprive the municipal court of jurisdiction to dismiss the action, in accordance with its rules, for want of attention.

D. M. Ry. v Powers, 215-567; 246 NW 274

12858 Stay of proceedings—supersedeas bond.

ANALYSIS

I SUPERSEDEAS IN GENERAL

Failure to formally approve. An appeal bond which has been presented to and retained by the clerk of the district court, and which has effected all the purposes for which it was manifestly presented, will not be held invalid because not formally accepted and approved.

State v Packing Co., 219-419; 258 NW 456

Supersedeas not applicable to self-executing judgment. The execution of a supersedeas bond on an appeal from a judgment discharging an execution levy on corporate shares of stock would be wholly without legal effect.

Hewitt v Cas. Co., 212-316; 232 NW 835

Failure to file supersedeas—dismissal. An appeal will not be dismissed simply because appellee has, pending the appeal, enforced the judgment because of appellant's failure to file a supersedeas bond or obtain a restraining order on appellee.

Spring v Spring, 210-1124; 229 NW 147

Removal of executor—right to appoint successor. An order of the probate court appointing an executor in place of an executor ordered removed, is perfectly valid and such new appointee after qualifying is not an intermeddler even tho the order of removal is subsequently reversed on appeal, when the order of removal was in no manner stayed pending the appeal.

In re Mann, 217-1134; 251 NW 83

II RESTRAINING ORDERS BY COURT

Discretion of court. The matter of granting a stay pending appeal from an order overruling a motion to strike is one resting largely in the sound discretion of the trial court.

State v Murray, 219-108; 257 NW 553

Stay of proceedings—interlocutory orders. On appeals from intermediate or interlocutory orders in the trial court application should be made, in the first instance, to the district court for an order staying proceedings in the trial court pending the appeal.

Dorman v Credit Co., 213-1016; 241 NW 436

III EFFECT OF SUPERSEDEAS

Supersedeas—effect. A supersedeas bond on appeal does not work a vacation of the judgment which is superseded.

Higgins v Higgins, 204-1312; 216 NW 693

Effect of bond. The giving of a supersedeas bond on appeal does not affect the existence, force, effect, or validity of the judgment from which the appeal is taken.

Moreland v Lowry, 213-1096; 241 NW 31

Unallowable set-off. An unsuccessful defendant in an action for the recovery of real property who is afforded no opportunity therein to interpose a claim for permanent improvements (§§12235, 12249) must necessarily resort to the occupying claimants act (§10128 et seq.) for relief, and when he fails to resort to such remaining and exclusive remedy, and quits and surrenders the premises, he will not be permitted when subsequently sued on a supersedeas bond growing out of the litigation to interpose a claim for such improvements as a set-off.

Bigelow v Ins. Co., 206-884; 221 NW 661

Appointment of administrator — judgment creditor of heir. A judgment creditor of an heir of an intestate is a proper person to make application for the appointment of an administrator even tho the judgment is pending on appeal under a supersedeas bond, it appearing that the deceased left several heirs and a small quantity of real and personal property.

Moreland v Lowry, 213-1096; 241 NW 31

IV LIABILITY ON BOND

Action—parties plaintiff. The various obligees in a supersedeas bond given on appeal from a decree quieting title to different tracts of land in different parties are all proper and necessary parties in an action on the bond to recover rents during the period covered by the bond.

Bigelow v Ins. Co., 206-884; 221 NW 661

Judgment by appellate court. The supreme court has jurisdiction to enter judgment on a supersedeas bond.

State v Packing Co., 219-419; 258 NW 456

Acts releasing bond. The obligee in a joint appeal bond is not entitled to judgment on the bond when, pending the appeal, and without notice to or knowledge of the surety, he (1) releases some of the principals in the bond, (2) extends the time of payment of the

IV LIABILITY ON BOND—concluded

judgment, and (3) accepts in part the obligation of a new party as part payment of the judgment.

Warman v Ranch Co., 202-198; 207 NW 532

Unauthorized release. The liability of a surety on an appeal (supersedeas) bond, attaches the moment when the bond is accepted. It follows that an order of court assuming to set aside and to cancel the bond and to authorize the filing of a new and different bond, without notice to the appellee-obligee, is a nullity as to the first filed bond.

State v Packing Co., 219-419; 258 NW 456

Subrogation—loss of right. Where on appeal in an equitable action the money judgment of the trial court against the appealing judgment defendant is ordered "superseded and set aside", and a new money judgment is entered against appellant "in lieu, place, and stead of that entered in the district court", the surety on the supersedeas bond on payment of the new judgment is not subrogated to the lien which the judgment plaintiff had under the old or first entered judgment.

Eland v Carter, 212-777; 237 NW 520; 77 ALR 448

Liability of surety on retaxation of costs. The surety on a supersedeas bond by executing the bond makes himself a party to the record, and is bound by an unappealed order retaxing the costs entered by the court on motion of principal in the bond after the appeal had been dismissed by the appellate court and after said principal had paid a part of the costs.

Springer v Ins. Co., 216-1333; 249 NW 226

Reliance on unauthorized bond. The surety on an appeal (supersedeas) bond is estopped to question its liability on the bond when, knowing of the execution of the bond by its agent and the filing and acceptance thereof, it permits the appellee-obligee and the clerk accepting the bond, innocently to act and rely on said bond until the full purpose of the bond had been accomplished.

State v Packing Co., 219-419; 258 NW 456

Liability on bond—construction of municipal light plant restrained—damages. In an action by a city on injunction bonds put up by a light and power company to restrain construction of a lighting plant, the city was entitled to all damages that naturally and proximately resulted from wrongful injunctions, and the city was not necessarily limited to damages arising only while the injunctions were in force, if the damages flowing directly from the injunctions continued for a period of time beyond date of their dissolution.

Corning v Iowa-Nebr. Co., 225-1380; 282 NW 791

12860 Order to stay.

Default judgment—setting aside unaffected by failure to secure stay order. Fact that proceedings in district court could have been stayed pending appeal will not, on the ground that misfortune was avoidable, preclude setting aside a default judgment rendered pending appeal without customary notice between counsel.

Lunt v Van Gorden, 225-1120; 281 NW 743

12861 Effect of stay.

Appeal does not vacate or affect judgment. A judgment which releases and discharges an execution levy on corporate shares of stock is a self-executing judgment, and is in full force and effect from the date thereof to the time the judgment is reversed on appeal and the execution levy reinstated, and one who purchases said stock after the entry of said judgment and before the reversal thereof, (from the owners thereof as shown by the corporate stock books) will be protected in his ownership when he purchased in good faith, for value, and without knowledge of said litigation.

Hewitt v Cas. Co., 212-316; 232 NW 835

12869 Assignment of errors.

Curing error. See under §§11493 (VI), 11548 (V)
Harmless error. See under §11548 (IV)
Invited error. See under §11548 (VI)

Discussion. See 17 ILR—Rule 30; 21 ILR 693—Changes and construction of rules

Scope and effect. This section goes no further than to abolish the common-law pleading known as an assignment of error.

Brenton v Lewiston, 213-227; 236 NW 28

Power to require assignments. The supreme court has both constitutional and statutory right and power to require such adequate assignments of error in appeals in law actions as will concisely inform the appellate court and appellee of the definite action of the trial court sought to be reviewed.

Siesseger v Puth, 211-775; 234 NW 540

Brief points—necessary. Brief points are necessary on appeal for each presented proposition.

Ettinger v Malcolm, 208-311; 223 NW 247

Rule for preparation. Each assignment of error must be complete in itself—must definitely and briefly point out an action of the court and with equal definiteness and conciseness state wherein or for what reason said action of the court is erroneous. An assignment to the effect that the court erred in holding that an action was based on fraud is too general to present any question to the appellate court.

Morrow v Downing, 210-1195; 232 NW 483

Specific and concise language necessary. On appeal, where appellant fails to set out his complaint against the rulings of trial court and merely assigns the error, with brief of authorities on general principles of law, followed by argument enlarging upon matters in the brief, the supreme court will decline to attempt a decision. Rule 30 requires that appellant point out his complaint against a ruling specifically and in concise language.

Jones v Krambeck, 228- ; 290 NW 56

Reason or basis of point raised. An assignment of error must (1) state the point or proposition which the party seeks to present to the court and (2) the reason or basis therefor.

Ryan Bros. v Rate, 203-1253; 213 NW 218
Blakely v Cabelka, 207-959; 221 NW 451
Rawleigh Co. v Bane, 218-154; 254 NW 18
Dravis v Sawyer, 218-742; 254 NW 920
Gorham v Richard, 223-364; 272 NW 512

Essential requirement. In the preparation of an assignment of error, that part of the record upon which error is predicated should be incorporated into the assignment of error.

McCornack v Bank, 207-274; 222 NW 851

Omnibus assignment. Assignments of error which make no reference to any part of the record other than to the exceptions to the rulings of the court, with no specific complaint or reason assigned why the court was in error, must be deemed omnibus in form and fatally insufficient.

Luther v Inv. Co., 222-305; 268 NW 589
Wettengel v Ins. Co., 223-1; 272 NW 435
Rogers v Davis, 223-372; 272 NW 539
Shultz v Shultz, 224-205; 275 NW 562
Pickett v Wray, 225-288; 280 NW 519

Assignment of error—fatal generality. It is quite futile in framing an assignment of error on appeal to assert, generally, that "the court erred" in doing thus or so, especially when the action of the court was based on the sustaining of numerous-pointed motions.

Prudential v Burns, 223-714; 273 NW 845

Omnibus assignment—dismissal. Omnibus assignments of error coupled with a wholesale violation of other rules of the court force the court, on motion, to dismiss the appeal.

Dondore v Rohner, 224-1; 275 NW 886

Vague and general assignment of error—no review. A specification of error that the court erred in overruling a motion to set aside a verdict and order a new trial, is too vague and general to review when the motion contained some 20 grounds.

Hawkins v Burton, 225-707; 281 NW 342

Assignment of errors necessary. In a law action tried to a jury, jurisdiction of supreme court on appeal is confined to that of a court for correction of errors and, to invoke its jurisdiction, a proper assignment of error is necessary.

Slippy Corp. v Grinnell, 226-1293; 286 NW 508

Equitable actions. Errors need not be assigned in an equitable action presenting questions of fact.

First Tr. JSL Bank v McNeff, 220-1225; 264 NW 105

Equitable proceedings—trial de novo. An action which plaintiff denominates when commenced as "in equity", and which is fully tried "in equity" without objection or effort to transfer to law, will, on appeal by defendant, be treated as "in equity" and tried de novo, without assignment of error.

Bates v Seeds, 223-70; 272 NW 515

Law action tried by equity procedure—errors must be assigned. Where an essentially law action to recover a money judgment is brought and recognized as such by the parties and the court, it is not, without a record entry transferring it to equity, converted to an equity action because the parties with the consent of the court use an equity procedure, and appeal therefrom will be dismissed when no errors are assigned.

Petersen v Ins. Co., 225-293; 280 NW 521

Summary proceedings—appeal—no hearing de novo. A summary proceeding by a client against his attorney will be heard on appeal only on errors assigned—not de novo.

Norman v Bennett, 216-181; 246 NW 378

Unallowable amendment. An appellant may not, in his reply brief, amend the assignment of errors set forth in his original brief.

Blomgren v Ottumwa, 209-9; 227 NW 823

Unallowable amendment. Appellant may not amend his assignment of error after appellee has filed his brief and argument, especially when the points presented by the amendments were not argued in appellant's argument-in-chief.

Lorimer v Ice Cream Co., 216-384; 249 NW 220

Unallowable amendment. An appellant will not be permitted to amend his assignment of error after the cause has been fully argued.

Baker v Ins. Co., 222-184; 268 NW 556

Amended assignment on rehearing unallowable. An appellant must, on rehearing, stand or fall upon his original assignment of error.

Dailey v Oil Co., 213-244; 235 NW 756

Nonassignment of error—no consideration. Form of decree, complained of in appellant's brief, will not be considered when not assigned as error.

Bredt v Franklin County, 227-1230; 290 NW 669

Questions not raised in trial court. Assignments of error relating to instructions not raised or passed upon by the lower court will not be considered on appeal.

Simmering v Hutt, 226-648; 284 NW 459

Fatally indefinite assignments.

In re Mott, 200-948; 205 NW 770
Monona Co. v Gray, 200-1133; 206 NW 26
In re Butterbrodt, 201-871; 208 NW 297
Blakely v Cabelka, 203-5; 212 NW 348
Schmoller Piano v Smith, 204-661; 215 NW 628
State v Lambertti, 204-670; 215 NW 752
Central Trust v City, 204-678; 216 NW 41
State v Gibson, 204-1306; 214 NW 743
State v White, 205-373; 217 NW 871
Reichenbach v Bank, 205-1009; 218 NW 903
State v Cordaro, 206-347; 218 NW 477
Handlon v Henshaw, 206-771; 221 NW 489
Harrington v Sur. Co., 206-925; 221 NW 577
State v Briggs, 207-221; 233 NW 552
State v Dillard, 207-831; 221 NW 817
State v Terry, 207-916; 223 NW 870
Cary-Platt v Elec. Co., 207-1052; 224 NW 89
Lein v Morrell, 207-1271; 224 NW 576
Bodholdt v Townsend, 208-1350; 227 NW 404
State v Perkins, 208-1394; 227 NW 417
Blomgren v City, 209-9; 227 NW 823
Hedrick Bank v Hawthorne, 209-1013; 227 NW 403
Ashman v City, 209-1247; 229 NW 907
State v Martin, 210-376; 228 NW 1
Crouch v Remedy Co., 210-849; 231 NW 323
In re Kahl, 210-903; 232 NW 133
Morrow v Downing, 210-1195; 232 NW 483
Siesseger v Puth, 211-775; 234 NW 540
State v Bruns, 211-826; 232 NW 684
In re Work, 212-31; 233 NW 28
Oestereich v Leslie, 212-105; 234 NW 229
Peoples Bk. v Smith, 212-124; 236 NW 30
Duncan v Rhomberg, 212-389; 236 NW 638
Brenton v Lewiston, 213-227; 236 NW 28
Dailey v Oil Co., 213-244; 235 NW 756
State v Campbell, 213-677; 239 NW 715
Hallowell v Van Zetten, 213-748; 239 NW 593
Weymiller v Weymiller, 213-955; 240 NW 237
Lorimer v Ice Cream Co., 216-384; 249 NW 220

Fatal indefiniteness. An assignment of error to the effect that the court erred (1) in giving a certain instruction, or (2) in overruling motion for new trial, is so fatally indefinite as to present no question on appeal.

State v Campbell, 213-677; 239 NW 715

Fatal indefiniteness. It is quite futile for appellant in assigning errors to simply say that "the court erred" in doing thus and so. A specific reason must be given why the action complained of was erroneous.

Kramer v Hofmann, 218-1269; 257 NW 361
Richmond v Whitaker, 218-606; 255 NW 681

Estoppel to allege error. A litigant may not inject into the record a fact which may work to his disadvantage and then predicate error thereon.

Fisher v Tullar, 209-35; 227 NW 580

Inviting or causing error. A party who induces his antagonist to omit in the trial court proof of a certain fact may not, on appeal, predicate error on the absence of such proof.

State v Huntley, 210-732; 227 NW 337

Required on original error. Error, if any, of the court, during the trial, in striking evidence or tendered issues cannot be reached by an assignment of error to the effect that the court erred in failing to instruct on said stricken matters. The assignment must be on the original alleged erroneous striking of said matters.

Reidy v Railway, 220-1386; 258 NW 675

Error against appellee—when considered. An answer, in an action to recover personal judgment on a promissory note, to the effect that plaintiff had theretofore foreclosed a mortgage securing the note and had thereby elected his remedy and abandoned all claim to a personal judgment against defendant and was estopped to assert the contrary, is demurrable when there is no allegation (1) that personal judgment had been, or might have been, rendered in said foreclosure against defendant, or (2) that inconsistent remedies existed and that plaintiff had chosen one of them, or (3) that defendant had altered his position because of said foreclosure; but if error in sustaining the demurrer be conceded, yet the error is not such as an appellee may avail himself of, without appeal, in order to neutralize an error against appellant.

Northern Trust v Anderson, 222-590; 262 NW 529

Appellant not adversely affected by error—no review. If the appellant is not adversely affected by the lower court's decision, even if erroneous, nothing is left for review by the appellate court on that appeal.

In re Keeler, 225-1349; 282 NW 362

Party entitled to allege error—nonwaiver by examining witness. A litigant who is unsuccessful in his effort to exclude improper testimony does not waive the error by examining the witness as to his improper testimony.

Smith v Sioux City, 200-1100; 205 NW 956

Charitable construction. The appellate court, on appeals in grave criminal cases, is inclined to tolerate imperfect and unskillful assignments of error which would not be tolerated in civil cases.

State v Ingram, 219-501; 258 NW 186

Self-apparent error. A specie of legal charity may move the court to overlook noncompliance with Rule 30 when the appeal record is

very brief and the alleged error relied on self-apparent.

In re Finarty, 219-678; 259 NW 112

Insufficient assignment. Errors, unassigned in compliance with Rule 30 of the supreme court, will not be considered on appeal—a rule which has not been insisted on in a few cases wherein affirmances were entered.

Russell v Peters, 219-708; 259 NW 197

Assignment of error—good-faith compliance with rule. When there has been a good-faith attempt to comply with a supreme court rule regulating the manner of making assignments of error in the appellant's brief, and the essential elements involved in the appeal can readily be determined, the court will not refuse to consider the assignment even tho there has not been a technical compliance in every particular.

In re Baker, 226-1071; 285 NW 641

Absolute, mandatory requirement. The filing, by appellant, of a proper assignment of error, under Rule 30 of the supreme court, is absolute and mandatory, and the court is not disposed to waive it in any particular.

Andreas & Son v Hempy, 221-1184; 268 NW 13

Ignoring rule—consideration notwithstanding—justification. Justification for considering, on its merits, an appeal in certiorari proceedings, tho appellant has not assigned errors as provided by Rule 30, is found in the fact that the main, legal point in issue is of grave importance not only to the litigants, but to the people of the state in general, and is made perfectly clear to the appellate court by the brief points and arguments of both parties to the appeal. Especially is this true when no motion is filed to dismiss the appeal.

National Ben. Assn. v Murphy, 222-98; 269 NW 15

Failure to comply with rules. It is a violation of the supreme court rules to make assignments of error which simply state a proposition and cite one case without further comment.

In re Baker, 226-1071; 285 NW 143

Grounds for affirmance. Appellant's failure to make assignment of errors as required by Rule 30 is grounds for affirmance.

Yale Co. v Zink, (NOR); 212 NW 119

Sufficiency. Judgment for plaintiff will be reversed on defendant's appeal regardless of sufficiency of defendant's assignment of error, where plaintiff, having the burden to make out a case, fails to do so.

Sch. Dist. v Ida County, 226-1237; 286 NW 407

Briefs—reference to abstract necessary. Under Rule 30, statements of evidence in appellant's brief and argument and in the reply must be referred to the page and line of the abstract where found; however, in a short record, the court may be inclined not to enforce the rule.

Mosher v Snyder, 224-896; 276 NW 582

Assignment of error—Rule 30. Supreme court condemns departures from Rule 30 in preparation of arguments, but instant appeal not dismissed for such departure inasmuch as appellee not confused thereby.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Excluding testimony—fatal indefiniteness. An assignment of error based on the exclusion of the testimony of witnesses must be made more definite than simply to refer to the pages of the abstract.

Morrow v Downing, 210-1195; 232 NW 483

Failure to refer to lines of abstract—dismissal. Assignments of error not complying with rules of the supreme court may be dismissed on motion.

Swensen v Ins. Co., 225-428; 280 NW 600

Rule 30—failure to point out page and line of abstract. Where alleged errors relied upon for reversal are based upon what appellant claims was shown by the proof, but nowhere is any evidence connected with these alleged errors set out, nor any reference made to the page and line of the abstract where such evidence would be found, the supreme court, following Rule 30, will not consider such errors on appeal.

Lotz v United Markets, 225-1397; 283 NW 99

Assignment of error—Rule 30—reasonable construction. The purpose of supreme court rules is to facilitate review, so, when the appellee and the court have neither been confused nor inconvenienced by an allegedly omnibus assignment of errors, the court will not arbitrarily refuse to consider the appeal.

Home Ins. v Ins. Co., 225-36; 279 NW 425

Motion to dismiss. Appellant's resistance, to a motion to dismiss based on failure to comply with Rule 30, cannot be made by amendment to brief and argument by reassigning errors relied upon to conform to rule, which is the basis for motion to dismiss, nor can appellant's resistance be in the nature of a confession and avoidance, asking court's permission to file amendment to comply with Rule 30 seven days before submission of case.

Cowles v Joelson, 226-1202; 286 NW 419

Reference to records—insufficient. Where assignment of error fails to point out specifically and in concise language complaints against ruling of trial court, and where appellant fails to state grounds on which trial

court erred on sustaining defendant's demurrer, a motion to dismiss will be sustained.

Keefe v Price, (NOR); 282 NW 309

Assignment of error—sufficiency. Insufficient assignments of error will not be reviewed.

In re Collicott, 226-106; 283 NW 869

Assignment of errors—insufficiency. Assignment of error stating that "plaintiff should have been granted a new trial on ground of surprise occurring on the trial" does not comply with Rule 30.

Clare v Pearson, 227-928; 289 NW 737

Directed verdict—showing necessary. On appeal from trial court's action in sustaining generally a motion for directed verdict predicated on several grounds, it is incumbent upon appellants to establish that the motion was not good upon any ground thereof before error can be predicated upon the sustaining of such motion.

Slippy Corp. v Grinnell, 226-1293; 286 NW 508

Habeas corpus—sufficiency. Where only assignment of error was to the effect that trial court erred in sustaining a writ of habeas corpus because record showed that plaintiff was a fugitive from justice, but there being several other grounds in addition to finding on this fact question which might have justified court's order granting the writ, which order being general in nature, affirmance was necessary, even if plaintiff was a fugitive, because the sufficiency of such other grounds was not before the supreme court upon assignments of error, and therefore could not be determined, since in proceedings at law, such as habeas corpus, only matters presented for review in assignments of error are decided.

Ross v Alber, 227-408; 288 NW 406

Absence of exceptions. An assignment of error in a law action is futile when the record reveals no exception to the ruling to which objection is made.

D. M. Co. v Seevers, 201-642; 207 NW 743

Instructions—insufficient exceptions. An exception to instructions to the effect that "the court erred in giving Instructions 1 to 12, inclusive," is fatally indefinite.

State v Feldman, 201-1089; 202 NW 90

Neutralizing errors against appellant. An appellee, without presentation of error points, may show, if he can, that he was so erred against as to neutralize entirely any errors against appellant.

Ford v Dilley, 174-243; 156 NW 513
Taylor v School Dist., 181-544; 164 NW 878
State v School Dist., 188-959; 176 NW 976
Miller v Surety Co., 209-1221; 229 NW 909
Thompson v Butler, 223-1085; 274 NW 110

Grounds presentable by appellee. When the lower court in an equity cause sustains plaintiff's action on one presented ground, but overrules all other presented grounds, the appellee on appeal may very properly argue the correctness of the overruled grounds.

Reason: The appellate court must affirm the decree of the lower court if it is sustainable on any ground properly presented in the lower court, irrespective of the findings of the lower court.

Wyatt v Town, 217-929; 250 NW 141

Off-setting errors against appellee. An appellee in a law action who has wholly won a verdict in the trial court may not, on appellant's appeal, have a review of errors, committed by the trial court against himself, and have them weighed against the errors committed against appellant.

Finley v Thorne, 209-343; 226 NW 103

Errors against prevailing party. While a defendant, on an appeal from an order granting plaintiff a new trial, may not ordinarily show that he was sinned against by the adverse and erroneous rulings of the trial court, yet he may assign error on the refusal of the trial court at the close of all the evidence to sustain his motion for a directed verdict, because if he were legally entitled to a directed verdict such fact would ordinarily be fatal to plaintiff's motion for a new trial.

Bennett v Ryan, 206-1263; 222 NW 16

Total absence of—effect. No question is presented to the appellate court by a record which fails to reveal any assignment of error or any argument which complies with the rules of the court.

McQuillen v Meyers, 211-388; 233 NW 502

Total failure to assign errors. In case appellant wholly fails to assign any error, the judgment of the trial court will be summarily affirmed.

In re Lunow, 220-39; 261 NW 499

Fatally belated filing. An assignment of error filed after both the appellant and appellee have filed their brief and arguments will be stricken, and the action of the trial court affirmed.

In re Rhodes, 221-821; 267 NW 679

Belated assignment—effect. A judgment appealed from will not be affirmed on appeal because of the total absence in the appellant's argument of any assignment of error when the contentions of the parties are manifest, and so treated by the parties, and when a formal assignment of error is made in the reply, and no additional argument is requested.

Woodard v Ins. Co., 201-378; 207 NW 351

Failure to comply with rules cured by affirmance. Where a case is affirmed it is un-

necessary to consider objections made by the appellee to the appellant's failure to comply with supreme court rules in making assignments of error.

Dykes v Washington Co., 226-771; 285 NW 201

Failure to file brief and argument. Where the supreme court issues an order for a writ of certiorari and, pursuant to such order, respondent judge makes a return of the proceedings below, and thereafter nothing further is done and no abstract or argument filed, the petitioners are presumed to have abandoned their cause, and the writ will be annulled.

Phoenix Fin. v Jordan, 226-630; 284 NW 820

Assignment inconsistent with trial theory. An assignment of error which is inconsistent with the theory on which the cause was tried in the trial court will not be considered.

McLain v Risser, 207-490; 223 NW 162

Argument ignoring adjudication. A cause will be summarily affirmed on appeal when the record prima facie shows a conclusively established plea of former adjudication, and appellant sees fit in his argument to ignore such condition of the record.

Franquemont v Munn, 208-528; 224 NW 39

Failure to argue. Unargued assignments of error will be disregarded on appeal.

Minn. StL Ry. v Pugh, 201-208; 205 NW 758
State v Derry, 202-352; 209 NW 514
State v Harding, 204-1135; 216 NW 642
Rauch v Elec. Co., 206-309; 218 NW 340
State v Neifert, 206-384; 220 NW 32
Bigelow v Ins. Co., 206-884; 221 NW 661
State v Andrioli, 216-451; 249 NW 379

Contrast between appeal from judgment and from denial of new trial. An appeal from a final judgment arms appellant with the right to make a proper assignment of error on any part of the entire trial record, and to have a review thereof.

An appeal solely from an order overruling a motion for a new trial arms appellant with no right to assign error on any ground except the grounds specified in said motion, and then only if such grounds are sufficient to meet the requirements of appellate practice.

Halstead v Rohret, 212-837; 235 NW 293

Excessive verdict. An assignment to the effect that the amount of the verdict is excessive and contrary to the instructions is sufficient.

Ryan Bros. v Rate, 203-1253; 213 NW 218

Nonrecord matter—scope of review. Assignments of error pertaining to instructions cannot be reviewed on appeal when the instructions do not appear in the abstract.

Hallowell v Van Zetten, 213-748; 239 NW 593

Conforming pleadings to proof—amendment not permitted. An assignment of error which stated that "the court abused its discretion when it refused to permit plaintiff to amend its amended and substituted petition to conform to the proof" is insufficient when the written contract sought to be enforced was not established by the proof; and the court's refusal to permit amendment to pleadings was not an abuse of discretion.

Clare v Pearson, 227-928; 289 NW 737

Assignment of errors—mandatory requirement. In appeals from law actions, the supreme court constitutes a court for correction of errors, and without assignments of error, as required under Rule 30, the appeal presents nothing for review.

Clare v Pearson, 227-928; 289 NW 737

12870 Motion book.

Motion to dismiss appeal—determined first. A motion to dismiss an appeal submitted with the case, being jurisdictional, will be determined before other matters.

Ontjes v McNider, 224-115; 275 NW 328

Motion to dismiss—timeliness. A motion to dismiss served and filed in the supreme court 17 days before submission of cause was timely.

Cowles v Joelson, 226-1202; 286 NW 419

Timeliness of motion. In a probate proceeding on appeal, a motion to dismiss served six days before cause is set for hearing must be denied as not being timely.

In re Sheeler, 226-650; 284 NW 799

Motion to dismiss—improper. Appellant's resistance, to a motion to dismiss based on failure to comply with Rule 30, cannot be made by amendment to brief and argument by reassigning errors relied upon to conform to rule, which is the basis for motion to dismiss, nor can appellant's resistance be in the nature of a confession and avoidance, asking court's permission to file amendment to comply with Rule 30 seven days before submission of case.

Cowles v Joelson, 226-1202; 286 NW 419

Motion to dismiss well grounded. On appeal to the supreme court, appellant's failure to comply with supreme court rules by omitting from his brief and argument that portion of the record referring to errors relied upon with the court's ruling thereon, and failing to point out specifically and precisely his complaints thereof, are sufficient grounds for a motion to dismiss the appeal.

Cowles v Joelson, 226-1202; 286 NW 419

Motion to dismiss where judgment paid. A motion to dismiss an appeal is proper where there has been compliance with and submission

to the judgment from which the appeal was taken.

Bates v Nichols, 223-878; 274 NW 32

Allowance of attorney's fee—motion to dismiss. The abstract on appeal need not contain evidence of a matter solely determinable by the trial court, to wit, the amount allowed as an attorney's fee, and such omission is not a basis for a motion to dismiss the appeal.

Rodman v Ladwig, 223-884; 274 NW 1

Escheat proceeding — striking allegations asking for new administrator—no appeal—dismissal. Where the state of Iowa in an estate proceeding files an application for the escheat to the state of the property in the estate and includes in its application extensive allegations dealing with the selection of a new administrator, a motion to strike those portions of the pleading dealing with the new administrator, when sustained, does not present an interlocutory order from which an appeal will lie, and, if taken, the appeal will be dismissed on motion.

In re Bannon, 225-839; 282 NW 287

12871 Arguments—submission—decision.

Discussion. See 22 ILR 609—Trial technique

ANALYSIS

I ARGUMENT
II DECISION
(a) IN GENERAL
(b) LAW OF CASE
III AFFIRMANCE
IV MODIFICATION
V REVERSAL
VI REMAND, FINAL JUDGMENT, AND RETRIAL
(a) IN GENERAL
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Error without prejudice. See under §11548
Following trial theory. See under §12827 (III)
Moot cases. See under §12886
Questions and theories first raised on appeal. See under §12827
Review of verdict of jury. See under §11429

I ARGUMENT

Failure to file argument. An appellant by failing to file an argument abandons his appeal.

Aetna Bk. v Fremmer, 213-339; 239 NW 234
Gordon-Van Tine Co. v Sergeant, 215-106; 244 NW 712
Deaton v Hollingshead, 225-967; 282 NW 329
Sentner v Dist. Court, 226-335; 284 NW 166
Phoenix Fin. v Jordan, 226-630; 284 NW 820

Failure to file—estoppel to assert claim. In action by subcontractor against principal and drainage district jointly to establish claim as a lien on the district's fund, where drainage district filed no brief or argument, court need give no attention to its plea that subcontractor was estopped from asserting claim by his action in accepting auditor's warrant for a lesser amount than that to which he was entitled.

Graettinger Works v Gjellefald, (NOR); 214 NW 579

Abandonment—failure to argue alleged errors. Grounds of error alleged and relied upon for reversal, but not argued, will be deemed to be abandoned.

Lotz v United Food Markets, 225-1397; 283 NW 99

Unargued propositions abandoned. Failure to mention in argument certain grounds for recovery is an abandonment thereof.

Valley Bk. v Staves, 224-1197; 278 NW 346

Reservation of grounds—objectionable argument. Failure to have an objectionable argument made of record and to except thereto constitutes a waiver of the error, if any.

Schram v Johnson, 208-222; 225 NW 369

Brief points, authorities and arguments—requirements under Rule 24. Where appellant files an abstract of record and fails to serve copies of brief points, authorities and arguments on attorneys for appellee at least 40 days before the day assigned for hearing case, appellee's motion to submit the cause on the record as it was on the date the time expired for serving copies of brief points was sustained and the cause submitted without oral argument in its regular order, and case dismissed for failure to comply with Rule 24.

Rabenold v Morrison, 228- ; 290 NW 60

Dismissal—failure to file argument. Failure of appellant to file argument during rule time will not necessarily be visited by an order of affirmance or dismissal.

Finley v Thorne, 209-343; 226 NW 103

Review de novo—irrespective of failure to file brief. An action in equity to recover a judgment against the members of an alleged partnership and to impress a trust on certain funds is triable de novo on appeal, and the supreme court will examine the record despite parties' failure to furnish brief and argument.

Maybaum v Bank, (NOR); 282 NW 370

Grounds presentable by appellee. When the lower court in an equity cause sustains plaintiff's action on one presented ground, but overrules all other presented grounds, the appellee on appeal may very properly argue the correctness of the overruled grounds.

Reason: The appellate court must affirm the decree of the lower court if it is sustainable on any ground properly presented in the lower court, irrespective of the findings of the lower court.

Wyatt v Town, 217-929; 250 NW 141

Nonpermissible enlargement. An appeal specifically from the refusal of the court to strike

a petition cannot be deemed enlarged so as to stand as an appeal from the final judgment, as well as from the refusal to strike, simply because appellee, on appeal, (1) amends the appellant's abstract and shows that, subsequent to the taking of the appeal, appellant answered the petition and proceeded to trial, and (2) files an argument as to the merits of the final judgment.

Iowa Bank v Raffensperger, 208-1133; 224 NW 505

Fatally belated arguments. Argument on propositions first presented by appellant in his reply argument will be ignored.

Luckenbill v Bates, 220-871; 263 NW 811; 103 ALR 252

Scurrilous matter stricken. Counsel who sees fit to indulge in his brief and argument in slurs and scurrilous statements, which are wholly unsupported by the record, need not be surprised if said filings are, on motion, stricken from the record.

Capital Loan Co. v Keeling, 219-969; 259 NW 194

Nonappealing parties — striking argument. Arguments filed in supreme court by nonappealing parties as appellants may be stricken.

In re Schropfer, 225-576; 281 NW 139

Reply to reply—no legal standing. A reply to a reply brief and argument has no standing and will be stricken on motion. (See Cochran v School Dist., 207 Iowa 1385.)

In re Rinard, 224-100; 275 NW 485

Dismissal of writ. A writ of certiorari will be dismissed when there is a total failure to comply with an order that the cause be submitted in accordance with the rules for the submission of civil causes, even tho the parties to the writ have stipulated for a submission without abstract or argument.

Touche v Franklin, 201-480; 207 NW 337

Amendment filed when leave of court granted. Where the supreme court grants leave to file an amendment to brief and argument, a motion to dismiss such amendment will be overruled.

Allbaugh v Ashby, 226-574; 284 NW 816

II DECISION

(a) IN GENERAL

Discussion. See 13 ILR 188—Advisory opinions

Decision — conclusiveness. A final opinion of the supreme court in an equitable action is conclusive as to all inhering subject matters except such as the court may and does specifically except therefrom.

Globe Ins. v Cas. Co., 205-1085; 217 NW 268; 56 ALR 463

Conclusiveness—holding on appeal in receivership proceedings. A holding on appeal in foreclosure proceedings that a deficiency judgment debtor will be entitled to credit on the deficiency judgment in the full amount of funds realized in the receivership proceedings, is necessarily conclusive on all parties to the appeal.

Hansen v Bowers, 211-931; 234 NW 839

Allowance of claims — conclusiveness. On appeal from an order of assessment on stockholders who have not paid for their stock, the court will not, on the plea of the nonappealing receiver, determine whether the allowance of a claim against the corporation is conclusive on the said stockholders.

State v Packing Co., 210-754; 227 NW 627; 71 ALR 91

Absence of applicable evidence precludes review. The appellate court cannot review an instruction to the jury when the correctness of such instrument depends on the contents of exhibits not embraced in the abstract.

Forrest v Sovereign Camp, 220-478; 261 NW 802

Absence of applicable evidence. Manifestly the appellate court cannot, on appeal in an equity action, review an issue of fact as to fraud when the appellate record presented to the court contains no evidence relating to fraud.

Goff v Milliron, 221-998; 266 NW 526

Opinion by divided court. The fact that a final opinion by the supreme court is arrived at by a divided court, e. g., by a vote of five to four, does not, of itself, furnish any reason for repudiating it.

State v Grattan, 218-889; 256 NW 273

Orders different from that appealed from. On appeal from an order approving a referee's report in probate, the appellate court will not review an ex parte order of the probate court made two days after the making of the order appealed from, and pertaining to the amount of attorney fees allowed to the attorneys for the executor in said reference proceedings.

In re Cochran, 220-33; 261 NW 514

Instituting new action pending appeal—effect. An appeal by a surviving spouse, in workmen's compensation proceedings, from a judgment that she had no right as surviving spouse to be substituted as plaintiff in a proceeding for compensation commenced by her husband in his lifetime, cannot be deemed abandoned by the act of said appealing spouse in subsequently filing with the industrial commissioner her formal application for compensation as a dependent, when said latter filing was for the sole purpose of avoiding the running of the statute of limitation and preserving her rights as a dependent in the event she, on the merits, lost her pending appeal.

Dille v Plainview Co., 217-827; 250 NW 607

II DECISION—continued

(a) IN GENERAL—concluded

Unruled matters. The appellate court will not pass on matters on which the lower court did not rule.

In re Hellman, 221-552; 266 NW 36

Absence of interested parties—effect. The appellate court will not, on appeal, assume to determine the rights of contending parties to property when it affirmatively appears that all interested parties are not before the court.

Woodward v Woodward, 222-145; 268 NW 540

Appeal—abandonment—answering over. An appeal from the refusal of the court to strike a petition must be deemed abandoned when it is made to appear that, subsequent to the perfecting of the appeal, the appellant answered the petition and went to trial on the merits.

Iowa Bank v Raffensperger, 208-1133; 224 NW 505

Disbarment of attorney—grounds—abandoned conviction. A conviction of an attorney in police court for keeping a disorderly house, followed by an appeal which has remained dormant for six years, must be deemed abandoned as a ground for disbarment of the attorney.

State v Metcalfe, 204-123; 214 NW 874

Veracity of witnesses — deference to trial court findings. In reviewing on appeal an action involving an alleged fraudulent transaction, the appellate court must of necessity rely quite largely on the judgment of the trial court as to the veracity of witnesses, especially as to the value of real estate.

Bates v Zehnpfennig, 220-164; 262 NW 141

Appellant bound by election of remedies. A litigant who chooses to move for a new trial, and is granted such, and therefore allows the time for appeal from the judgment against him to elapse without action, and thereafter suffers an adverse order setting aside the order for a new trial, may not, in appealing from said latter order, so frame his appeal as to secure a review of any question except the question of the correctness of said latter order.

Selby v McDonald, 219-823; 259 NW 485

Decisions adverse to nonappealing appellee. Matters decided against the appellee by the trial court are not to be considered by the supreme court when the appellee does not appeal.

Dawson v McKinnon, 226-756; 285 NW 258

Trial court's judgment—nonconclusive on appeal. Discretion of trial court in deciding whether guardianship should be terminated is not conclusive upon supreme court.

In re Hawk, 227-232; 288 NW 114

(b) LAW OF CASE

Appeal. Decisions on appeal constitute the law of the case.

Ryan v Trenkle, 203-443; 212 NW 888

Subsequent trials. The law announced on one appeal unqualifiedly continues to be the law of the case for subsequent trials.

Goben v Pav. Co., 218-829; 252 NW 262
White v McVicker, 219-834; 259 NW 465
Spaulding v Miller, 220-1107; 264 NW 8

Subsequent appeal—same case. A holding on appeal that the evidence is sufficient to present a jury question on the issues joined, including the issue as to the proximate cause of an injury, remains the law for all time as to that case. It follows that if the case reaches the court on a second or subsequent appeal, said adjudicated questions will not be again reviewed.

Crouch v Remedy Co., 210-849; 231 NW 323

Dictum—what is not. If a question is specifically presented to the supreme court on appeal, the opinion of the court on such question cannot be deemed dictum even tho it was not strictly necessary for the court to pass on the question.

Galvin v Bank, 217-494; 250 NW 729

Equal protection—ruling of U. S. supreme court. The chain store tax act (46 GA, Ch. 75; C., '35, Ch. 329-G1) is in violation of the equal protection clause of the federal constitution insofar as it attempts to levy an annual tax solely on the basis of the gross receipts of said stores, such being the holding of the U. S. supreme court and such holding necessarily being conclusive on the courts of this state.

Tolerton & Co. v Board, 222-908; 270 NW 427

Unallowable change of theory. One who has pleaded and tried his cause in the trial court on one theory may not, on appeal, change to an entirely different theory.

Larson v City, 216-42; 247 NW 38

Irregular but manifestly correct adjudication. Where the record reveals that a judgment creditor legally acquired a landlord's lien through garnishment proceedings against a tenant, the appellate court will not be inclined to inquire into the strict regularity of the proceedings whereby such adjudication was had.

Kinart v Churchill, 210-72; 230 NW 349

Matters not disposed of in law action.

In re Talbott, 204-363; 213 NW 779

Nonparties to appeal. The appellate court in adjusting and determining claims for preferential payment of trust funds in the settlement of the estate of an insolvent has no power to make a determination which will prejudice the rights of other parties who have

been granted preference in payment and who are not parties to the appeal.

Leach v Bank, 204-497; 212 NW 748; 215 NW 728

Errors against nonappellant. An appellee who has not appealed may not have a more favorable judgment on appeal than was accorded to him in the trial court, even tho the appeal record reveals error against him.

Waxmonsky v Hoskins, 216-476; 249 NW 195

Injunction—substantial compliance. Decree of lower court on retrial reviewed by certiorari and held to be in substantial compliance with supreme court opinion requiring respondent, by mandatory injunction, to remove obstructions from bayou outlet.

Vaughan v Dist. Court, (NOR); 226 NW 49

Negligence. A holding on appeal that a jury question on the issue of negligence in operating an automobile was not generated by record evidence relative to the location and condition of wrecked automobiles, and as to marks and broken glass on the highway, is necessarily conclusive on the court on retrial on substantially the same evidence.

Reimer v Musel, 220-1095; 264 NW 47

Contributory negligence. A holding on appeal, that plaintiff in a personal injury action based on alleged negligence was himself guilty of contributory negligence, is the absolute law of the case on retrial on the same state of facts.

Spaulding v Miller, 220-1107; 264 NW 8

Contributory negligence. The law of a case on the subject of contributory negligence as declared on appeal cannot be avoided on a retrial by simply adding to the testimony of a witness, by implication, something that the witness did not say.

Russell v Gas & Elec. Co., 218-427; 255 NW 504

Proximate cause of injury. A retrial follows the appellate reversal of a cause on the ground of a failure to establish the proximate cause of an injury, unless the court can say, as a matter of law, that a retrial will necessarily be limited to the testimony produced on the former trial.

Eclipse Lbr. v Davis, 201-1283; 207 NW 238

Opinion evidence on retrial. On the retrial of a reversed and remanded cause, additional testimony in the form of expert opinion which is the merest conjecture—opinion which is not predicated upon any basis (1) of scientific knowledge, or (2) of general experience—is entirely too weak to lift the cause out of the evidential law of the case as first declared on appeal.

Hartford Ins. v Mellon, 206-182; 220 NW 331

Sufficiency of evidence. A holding on appeal of insufficiency of evidence to present a jury question on an issue necessarily controls a retrial on the same evidence.

Disalvo v Railway, 203-974; 213 NW 569
Pease v Bank, 210-331; 228 NW 83

Right to rents. A holding on appeal in mortgage foreclosure action that plaintiff is entitled to the rents and profits accruing during the period of redemption becomes the absolute law of the case in all future proceedings in the case.

Northwestern Life v Gross, 218-408; 255 NW 511

Agreement for rents pending appeal. Where, pending an appeal which involved the title to land, the rival claimants under a landlord's lien and under a chattel mortgage on the crop entered into an agreement for the harvesting and sale of the crop and the holding of the proceeds until the appeal was decided. Held that the contract evidently contemplated that the final holding on appeal would settle the right of one or the other of the parties to the controversy without further litigation.

Farber v Andrew, 208-964; 225 NW 850

Claims in receivership. A final holding on appeal that certain claims in a receivership are general claims fixes the status of such claims regardless of any subsequent order of the trial court.

State v Cas. Co., 216-1221; 250 NW 496

Will contest—evidence. A holding on appeal that the evidence was insufficient to submit the issue of undue influence in the execution of a will is necessarily conclusive on a retrial on substantially the same evidence.

Blakely v Cabelka, 207-959; 221 NW 451

Claim in probate. A holding on appeal that an order setting aside the allowance of a claim in probate is appealable becomes the law of the case, and precludes further review or rehearing on such question in said case.

Doyle v Jennings, 210-853; 229 NW 853

Distribution of estate proceeds. A direction on appeal as to the manner in which the final distribution of the proceeds of an insolvent estate should be made becomes the law of such case.

In re Cutler & Horgen, 213-983; 234 NW 238; 238 NW 80

Cost only involved. The supreme court will not determine an appeal where the only question involved is one of costs.

Welton v Hy. Com., 208-1401; 227 NW 332

Unappealed but erroneous order dismissing employee. In an action of certiorari against the state executive council, and the custodian of public buildings and grounds, to review the

legality of the discharge of an employee of the latter department, an unappealed order of court dismissing said custodian as an improper party defendant, tho unqualifiedly erroneous, becomes the law of said particular action, and precludes said plaintiff from thereafter proceeding against said custodian for the relief sought.

Pittington v Herring, 220-1375; 264 NW 712

III AFFIRMANCE

Failure to assign errors. In case appellant wholly fails to assign any error, the judgment of the trial court will be summarily affirmed.

In re Lunow, 220-39; 261 NW 499

Total absence of exceptions—necessary affirmance. If the record on appeal is barren of any exception to the directed verdict rulings complained of, the appellate court will affirm the judgment of the lower court.

Garner v Cherokee County, 223-712; 273 NW 842

Summary affirmance in lieu of demand for dismissal. Except on a quite unusual appellate record, the appellate court, in reversing an ordinary action at law for damages, will not enter an order dismissing plaintiff's action, but will remand the cause for full retrial; and when defendant-appellant insists on appeal that under no circumstances does he desire a new trial, the appellate court may, rather than depart from said long established practice, decline to rule on appellant's assignment of error, and may summarily affirm the judgment of the trial court.

Taylor v Burgus, 221-1232; 262 NW 808

Dismissal of appeal on technical grounds—non-effect as adjudication. The dismissal, by the supreme court, of an appeal, and the affirmance by said court of the judgment appealed from, on the technical ground that appellant had failed to make timely filing of an abstract of the record, cannot be deemed an adjudication of the jurisdictional legality of the judgment so affirmed. In other words, while the appeal has proven abortive, the said judgment is nevertheless subject to an action for its cancellation on the ground that the trial court was wholly without jurisdiction to enter it.

Dallas v Dallas, 222-42; 268 NW 516

Reversal as to one cause of action, affirmance as to other. When plaintiff sues on two independent causes of action, the appellate court may, on appeal, reverse as to one cause of action, and affirm as to the other.

Keller v Gartin, 220-78; 261 NW 776

Remittitur to cure error. The fact that plaintiff, a layman, in a personal injury action, is permitted to testify as to the reasonable value of the medical services rendered him by a physician may not be sufficient to justify a reversal; yet such fact may demand a remittitur as a condition to affirming the case.

Wood v Branning, 215-59; 244 NW 658

Dual judgments—remittitur. When two separate judgments are entered in the same action —one on the return of the verdict, and one on the ruling for new trial—the formal remitting of the prior judgment removes all error.

Lynch v Railway, 215-1119; 245 NW 219

Remittitur—effect on prior judgment entry. A duly entered judgment, followed by an unexcepted order for a new trial unless a remittitur be filed, automatically becomes a judgment in the lesser amount immediately upon the due filing of the remittitur.

Fox v McCurnin, 210-429; 228 NW 582

Time given for election. A party, who in the trial court is decreed a specific time from final adjudication either in the trial or the supreme court in which to make an election, has such time after affirmance of the decree in the supreme court.

Myrick v Bloomfield, 202-401; 210 NW 428

IV MODIFICATION

Modification by eliminating excess in judgment.

In re Carpenter, 210-553; 231 NW 376

Modification of excessive order.

Drennan v Ins. Co., 200-931; 205 NW 735

Modification by deducting excess verdict.

Cox v Fleisher Co., 208-458; 223 NW 521

Modification of uncertain judgment.

Murphy v Berry, 200-974; 205 NW 777

Platner v Hughes, 200-1363; 206 NW 268; 43 ALR 1141

Modification to avoid uncertainty.

Kollmann v Kollmann, 204-950; 216 NW 77

Modification to avoid double liability.

Webber v King, 205-612; 218 NW 282

Modification by correcting erroneous calculations.

Junger v Bank, 208-336; 223 NW 381

V REVERSAL

Ineffectual reversal. On an appeal from a decree quieting title, the appellant has no standing to ask a reversal when the record reveals the fact that the decree deprived the appellant of nothing, and that a reversal could award him nothing.

Duggleby v Railway, 214-776; 243 NW 372

Reversal with order to dismiss—when justifiable. The appellate court, on entering an order of reversal in a law action, may, in the exercise of its broad statutory discretion, terminate long protracted litigation, by ordering the trial court to dismiss plaintiff's action. So ordered where an action on a policy of insurance had been four times tried and had been three times reversed on defendant's appeal.

Stoner v Ins. Co., 220-984; 263 NW 46

Peremptory direction as to judgment. On reversal, a cause will be returned to the trial court with peremptory order to enter the proper judgment when supreme court decision results in all questions of law and fact being fully settled in favor of recovery by the plaintiff.

Duncan v Brotherhood, 225-539; 281 NW 121

Reversal as to one count—effect on other adjudicated counts. While a general reversal in a law action ordinarily gives the parties a retrial on all issues, yet where the plaintiff is successful as to one count and defeated as to all other counts, and does not appeal, a general reversal on defendant's appeal as to the one count on which plaintiff was successful does not give plaintiff a right to a retrial of any of the counts on which he was defeated. Plaintiff's defeats stand as a final adjudication even tho the formal judgment of dismissal of plaintiff's unsuccessful counts was not entered until after the issuance of procedendo on the reversal.

Pease v Bank, 210-331; 228 NW 83

Reversal in equity—fact theory controlling. On reversal in the supreme court of an equitable action to quiet title, the successful appellant will not be permitted to take decree other than in strict accord with the fact theory on which the action was commenced and prosecuted by appellant, and reversed by the appellate court. This may require the withholding of final decree until appellant returns property which he has received and in which he admittedly has no interest under the fact theory of his action.

McCloud v Bates, 222-1047; 270 NW 373

Error both prejudicial and harmless—procedure on appeal. It may happen that an error by the court in the rejection of evidence is presumptively prejudicial as to one subject matter, and quite harmless as to another subject matter; and if the record reveals the amount of the presumptive prejudice, the appellate court may give the prevailing party the option to omit the amount of presumptive prejudice or suffer a reversal.

Lantz v Goodwin, 210-605; 231 NW 331

Presumption—disregard of incompetent evidence. A competently supported judgment will not be reversed because of incompetent evidence.

Koht v Dean, 220-86; 261 NW 491

Withdrawal of opinion—jurisdiction. The supreme court has jurisdiction in a criminal case to withdraw a reversing opinion and to order a resubmission of the appeal, provided procedendo has not issued to the lower court, and provided, if procedendo has not issued, the lower court has not assumed jurisdiction of the case by redocketing it.

State v Henderson, 215-276; 243 NW 289

VI REMAND, FINAL JUDGMENT, AND RETRIAL

(a) IN GENERAL

Retrial on former record. Parties will not, after reversal, be deemed to have retried the cause solely on the former record, even tho the former record is reintroduced in toto, when it is manifest that such reintroduction was made on the one issue whether a motion to dismiss should be sustained or overruled.

Eclipse Co. v Davis, 201-1283; 207 NW 238

Conclusiveness—proceedings not in conformity with order on appeal. A proceeding in which the trial court makes a finding of fact only, but in which no judgment is entered, and which is not in conformity with an order of the supreme court, on appeal, may not be deemed an adjudication of a proceeding between the same parties which does result in a judgment in conformity with said appellate order.

State v Beaton, 205-1139; 217 NW 255

Provisional and conditional order of condemnation. When the court on appeal in an action to adjudicate rights to a fund growing out of a public improvement, is in a quandary as to how far an admitted claim can be enforced against a fund belonging to a nonparty to the action, it may enter a provisional and conditional order of condemnation.

Comm. Bk. v Broadhead, 212-688; 235 NW 299

Rendering judgment instead of new trial. Where appeal is not only from order denying new trial but from all other erroneous rulings and where evidence as to completed gift inter vivos would not change on retrial, the supreme court may render such judgment as inferior court should have done.

Wilson v Findley, 223-1281; 275 NW 47

Remand with order to dismiss. A holding on appeal that an instrument is not admissible to probate as a last will and testament necessitates a remand to the trial court with direction to dismiss the petition for probate.

In re McElderry, 217-268; 251 NW 610

Administrator's debt to decedent—exemptions—remand. In proceeding on objection to administrator's final report, burden of proof was on the administrator to show why he should not be held accountable for full value of property inventoried by him, which inventory included his own debt to decedent. He was liable on such debt to the extent of his ability to pay at any time during administration, and everything above his statutory exemptions should have been so utilized, and there being no evidence in the record from which the extent of his nonexempt property or income could be ascertained, such question would be remanded to lower court for determination.

In re Windhorst, 227-808; 288 NW 892

VI REMAND, FINAL JUDGMENT, AND RETRIAL—continued

(a) IN GENERAL—concluded

Presumption of regularity—review. Tho a presumption of regularity exists as to an unassailed allowance of attorney fees for extraordinary services, and tho ex parte orders fixing such fees without introduction of evidence are not uncommon, yet such orders are always open to review on final settlement.

In re Metcalf, 227-985; 289 NW 739

Injunction—substantial compliance. Decree of lower court on retrial reviewed by certiorari and held to be in substantial compliance with supreme court opinion requiring respondent, by mandatory injunction, to remove obstructions from bayou outlet.

Vaughan v Dist. Court, (NOR); 226 NW 49

(b) IN LAW

Reversal in law—remand—effect. Upon the reversal and remand of a once fully tried law action, the cause stands for retrial exactly as it would stand had there never been a trial.

Finley v Thorne, 209-343; 226 NW 103

Final judgment in law action.

Frank Cram v Trust Co., 205-408; 216 NW 71

Remand when basis of dismissal uncertain. When the appellate court is quite uncertain whether the trial court dismissed the cause on the erroneous basis of matter in bar or on the basis of insufficiency of evidence to sustain the action in any event, a remand for new trial must be entered.

Bonner v Reandrew, 203-1355; 214 NW 536

Retrial (?) or peremptory judgment (?). When an action at law is reversed because defendant had not sufficiently or properly proven his counterclaim, the cause, after procedendo, stands for retrial on said counterclaim, and the peremptory rendition of judgment by the trial court against defendant on said counterclaim is error.

Perry-Fry Co. v Gould, 217-958; 251 NW 142

Order for dismissal. A law action, reversed on appeal on a ground rendering recovery by plaintiff impossible, will be remanded with direction to the trial court to dismiss the action.

Pearson v Anthony, 218-697; 254 NW 10

Unadjudicated ground of negligence. Plaintiff, in an action based on negligence, who fails on appeal to sustain a verdict in his favor against an employer based solely on the doctrine of respondeat superior, may, on remand and retrial, avail himself of a ground of negligence which was alleged by him on the original trial, but which was unadjudicated, and which, if established, would render the defendant liable irrespective of the doctrine of respondeat superior.

Lahr v Railway, 218-1155; 252 NW 525

Remand—right to amend. A plaintiff manifestly does not set up a new and different cause of action when, after remand on appeal in a law action based on negligence, he, by allowable pleadings, rephrases and elaborates an unadjudicated ground of negligence which was embraced in his pleadings at the time of the original trial.

Lahr v Railway, 218-1155; 252 NW 525

(c) IN EQUITY

Avoidance of technical remand in equity.

Vanderwilt v Broerman, 201-1107; 206 NW 959

Remand in equity—permissible scope.

Globe Ins. v Cas. Co., 200-847; 205 NW 504

Remand in equity for defect in parties.

Whitmer v Board, 210-239; 230 NW 413

Remand in equity to try additional issue.

Pauly v Montgomery, 209-699; 228 NW 648

Remand in equity for trial of untried issue.

Goode v Ry. Exp., 205-297; 215 NW 621; 217 NW 876

Pace v Mason, 206-794; 221 NW 455

Remand in equity to take testimony.

Miller v Perkins, 204-782; 216 NW 27

Dismissal of equitable action on plaintiff's testimony—effect on appeal.

Matthews v Quaintance, 204-520; 215 NW 707

Coen & Conway v Bank, 205-483; 218 NW 325

Remand for additional testimony. Where, on appeal in an equitable action of mandamus to compel the levy of assessments to defray the cost of maintaining the common outlet of several drainage districts, it appears that the trial court erroneously denied relief as to one of two expenditures, and the record so blends and combines the allowable and unallowable expenditures that the appellate court is unable to determine the matter, a reversal and remand may be entered with order to the trial court to receive additional testimony and determine the amount of the allowable expenditure.

Board v Board, 214-655; 241 NW 14

Mandatory procedendo for dismissal. On the reversal and remand in toto, on the merits, of a judgment for plaintiff in an equitable action, a procedendo directing the trial court, generally, to take "further proceedings not inconsistent with the opinion of the supreme court", must be deemed, in the absence of additional pleadings or evidence in the trial court, a mandatory direction to the trial court to dismiss

the action. In the absence of such pleadings or evidence, the trial court has no jurisdiction to enter a judgment on a basis not presented by the pleadings or authorized by the opinion.

Ronna v Bank, 215-806; 246 NW 798

Remand for hearing on dismissed application. The dismissal of an application for an order staying the issuance of a deed under mortgage foreclosure (on the erroneous theory that the emergency act is unconstitutional) may necessitate a remand by the appellate court for an actual hearing on the application.

Connecticut Ins. v Clingan, 218-1213; 257 NW 213

12871.1 Arguments in re constitutional test.

Constitutional questions raised. Constitutional questions cannot be raised for the first time on appeal and, in order to present a constitutional question, specific reference must be made to the clause of the constitution relied upon and the reasons for the application of such clause must be asserted.

Martin Bros. v Fritz, 228- ; 292 NW 143

12872 Judgment against sureties on bond.

See also annotations under §12858

Jurisdiction of appellate court. The supreme court has jurisdiction, subsequent to the affirmance of an appeal, and on motion therefor, to enter judgment against the surety on the appeal (supersedeas) bond for the amount of the money judgment, interest, and costs against the appellant.

State v Packing Co., 219-419; 258 NW 456

Jurisdiction pending appeal to U. S. supreme court. The supreme court has no constitutional, statutory, implied, or inherent jurisdiction to enter an original judgment on a stay bond given by an appellee in compliance with an order of a judge of said court pending an application by appellee to the supreme court of the United States for a writ of certiorari to review a decision of the supreme court of this state to the effect that the district court of this state was in error in refusing to enter a certain judgment.

Hoskins v Hotel, 206-932; 221 NW 442

Release of principal—effect. The obligee in a joint appeal bond is not entitled to judgment on the bond when, pending the appeal, and without notice to or knowledge of the surety, he (1) releases some of the principals in the bond, (2) extends the time of payment of the judgment, and (3) accepts in part the obligation of a new party as part payment of the judgment.

Warman v Ranch Co., 202-198; 207 NW 532

12873 Damages for delay.

Frivolous appeal—penalty. Record held insufficient to justify the imposition of a penalty for prosecuting an alleged frivolous appeal, especially when the decisive features of the litigation were close and doubtful.

Russell v Gas & Elec. Co., 218-427; 255 NW 504

Appeal bond—performance of contract. In buyer's action against seller for nonperformance of oral contract to deliver corn, an appeal by seller from verdict awarding amount prayed held not to entitle buyer appellee upon affirmance to damages on appeal bond under this section.

Willers v Flanley Co., 224-409; 275 NW 474

12874 Costs taxed.

Additional taxation of costs. See under §12846

Holding under prior rule. The citation by an appellee of Iowa cases by a reference to nonofficial reports only, will be grounds for refusing him any taxation for the costs of his briefs.

Walter v City, 203-1068; 213 NW 935

Holding under prior rule. The cost of printing a brief on appeal may be very properly taxed to a party who fails to cite the opinions of this court by the proper volume and page of the Iowa Reports. (Rule 30, Par. 7.)

Sheridan v Limbrecht, 205-573; 218 NW 278

Apportionment—grounds therefor. The fact that an appellee has, subsequent to the taking of the appeal, cured an error in the record furnishes grounds for an apportionment of the costs on appeal.

Koontz v Clark Bros., 209-62; 227 NW 584

Unauthorized certification. Costs attending the filing on appeal of an unauthorized certification of what purports to be a portion of the record will be taxed to the party making the filing.

Andrew v Bank, 216-60; 245 NW 241

Unabbreviated abstract—penalty. A flagrant violation, in the preparation of an abstract, of the rule "to preserve everything material to the question to be decided, and to omit everything else", may be penalized by a taxation to appellant of all the cost of printing even tho appellant is successful on appeal.

Higgins v Higgins, 207-95; 222 NW 401

Costs taxed to administratrix as individual. When an administratrix appeals, in her official capacity, from rulings on her final report, the fact that the court taxed to her, individually, the court costs occasioned by the hearing on the report creates no necessity for the appellant to cause said notice of appeal to be served upon herself as an individual, she not being,

in fact or in law, a party, individually, to said final report and hearing thereon.

In re Paulson, 221-706; 266 NW 563

12875 Remand—process.

Procedendo — competency. The supreme court, by virtue of its constitutional powers to issue writs necessary to the exercise of its powers, has power to provide, without the aid of a statute, for the writ of procedendo, in order to furnish the trial court with competent evidence of its final decision and of its release of jurisdiction.

State v Banning, 205-826; 218 NW 572

Order to dismiss. A holding on appeal that an instrument is not admissible to probate as a last will and testament, necessitates a remand to the trial court with direction to dismiss the petition for probate.

In re McElderry, 217-268; 251 NW 610

Order for dismissal. A law action, reversed on appeal on a ground rendering recovery by plaintiff impossible, will be remanded with direction to the trial court to dismiss the action.

Pearson v Anthony, 218-697; 254 NW 10

Procedendo—retrial (?) or peremptory judgment (?). When an action at law is reversed because defendant had not sufficiently or properly proven his counterclaim, the cause, after procedendo, stands for retrial on said counterclaim, and the peremptory rendition of judgment by the trial court against defendant on said counterclaim is error.

Perry-Fry Co. v Gould, 217-958; 251 NW 142

Remand when basis of dismissal uncertain. When the appellate court is quite uncertain whether the trial court dismissed the cause on the erroneous basis of matter in bar or on the basis of insufficiency of evidence to sustain the action in any event, a remand for new trial must be entered.

Bonner v Reandrew, 203-1355; 214 NW 536

Mandatory procedendo for dismissal. On the reversal and remand in toto, on the merits, of a judgment for plaintiff in an equitable action, a procedendo directing the trial court, generally, to take "further proceedings not inconsistent with the opinion of the supreme court", must be deemed, in the absence of additional pleadings or evidence in the trial court, a mandatory direction to the trial court to dismiss the action. In the absence of such pleadings or evidence the trial court has no jurisdiction to enter a judgment on a basis not presented by the pleadings or authorized by the opinion.

Ronna v Bank, 215-806; 246 NW 798

Judgment on remand for amount confessed. A plaintiff-appellant who, on appeal, is unsuccessful in his effort to establish liability in excess of defendant's offer to confess judgment, is entitled on remand to procedendo directing the trial court to enter judgment in his favor for the amount of said offer and for costs to date of said offer.

Fenley v Ins. Co., 215-1369; 245 NW 332; 247 NW 635

Administrator's debt to decedent — exemptions—remand. In proceeding on objection to administrator's final report, burden of proof was on the administrator to show why he should not be held accountable for full value of property inventoried by him, which inventory included his own debt to decedent. He was liable on such debt to the extent of his ability to pay at any time during administration, and everything above his statutory exemptions should have been so utilized, and there being no evidence in the record from which the extent of his nonexempt property or income could be ascertained, such question would be remanded to lower court for determination.

In re Windhorst, 227-808; 288 NW 892

12876 Decision certified.

Cancellation of reversed decree. A decree of the trial court which has been wholly reversed on appeal should be formally set aside in the final decree entered on procedendo.

Fidelity Inv. v White, 212-782; 237 NW 518

Decree after remand from appeal—finality. The decree entered by the district court in conformity to an opinion of the supreme court is the final adjudication in the case.

Goltry v Relph, 224-692; 276 NW 614

Reversal in equity — judgment — fact theory controlling. On reversal in the supreme court of an equitable action to quiet title, the successful appellant will not be permitted to take decree other than in strict accord with the fact theory on which the action was commenced and prosecuted by appellant, and reversed by the appellate court. This may require the withholding of final decree until appellant returns property which he has received and in which he admittedly has no interest under the fact theory of his action.

McCloud v Bates, 222-1047; 270 NW 373

Order—effect on decree and mistaken stipulation. An order on appeal for a new trial on the ground of a conceded mutual mistake in entering into a written stipulation for judgment, necessarily works a setting aside not only of the judgment but of the stipulation, and, after procedendo, the trial court does not exceed its jurisdiction in entering a formal order to said effect.

Hall v Dist. Court, 206-179; 215 NW 606

12877 Restitution of property.

Moratorium denial due to misinterpretation of supreme court opinion. Where the trial

court under a misinterpretation of a supreme court opinion orders a mortgagor to account for rents and profits collected prior to foreclosure proceedings, or suffer a denial of a continuance sought under the moratorium act of the 45th GA, and the mortgagor fails to so account within the time limit set by the order, such erroneous order and subsequent judgment cannot be an adverse prior adjudication, nor terminate jurisdiction to determine the merits of the mortgagor's rights to a continuance under the later moratorium act of the 46th GA.

Equitable v McNamara, 224-859; 278 NW 910

12878 Title not affected.

Deed pending appeal — effect. The vendee in a referee's deed in partition who takes his deed pending an appeal from the order for the deed takes at his peril.

Fraizer v Fraizer, 204-724; 215 NW 946

12879 Mandates enforced.

Dual remedies—appeal or mandatory order. Where, after reversal and remand in an equity cause, the trial court, on procedendo, enters a judgment which it has no discretion to enter, the defendant may apply directly to the appellate court for a mandatory order to the trial court to obey the procedendo, even tho defendant might accomplish the same result by appealing from the entry of said judgment.

Ronna v Bank, 215-806; 246 NW 798

12880 Petition for rehearing.

Speedy trial not denied—delay by defendant occasioned by appellate review. In a larceny prosecution, a defendant may not complain that he has been denied a speedy trial, where a procedendo was recalled because of a rehearing in the supreme court, and, after the second procedendo was issued, the trial was delayed by defendant's writ of certiorari. Delays complained of occurred at the instance of the defendant himself.

State v Ferguson, 226-361; 283 NW 917

12881 Rehearing—notice.

Discussion. See 14 ILR 36—The rehearing evil

12883 Petition may constitute brief and argument.

Belated presentation of proposition. A legal contention not presented to the trial court nor to the appellate court on original submission is not available to the appellant in a petition for rehearing.

First N. Bk. v Board, 217-702; 247 NW 617; 250 NW 887

12884 Death of party—continuance.

Death of party—appeal not abated. Death of appellee during pendency of divorce appeal to the supreme court does not abate the action when property rights are involved.

Graham v Graham, 227-223; 288 NW 78

12885 Objection to jurisdiction.

Exclusive procedure—non-estoppel by delay. The exclusive procedure for presenting the question of the jurisdiction of the appellate court to entertain an appeal is provided by this section. Oral suggestion of want of jurisdiction cannot be recognized; likewise, appellee has the arbitrary right to serve such writing within the time provided by statute, the former doctrine of estoppel by delay having been abrogated by the statute.

Waterloo Bk. v Town, 213-871; 236 NW 61

Applicability of statute. This section has no application to an attempted appeal from an inherently unappealable order, e. g., an order setting aside a default judgment.

Barber v Shattuck, 207-842; 223 NW 864

Failure to question jurisdiction. The failure of an appellee to challenge the jurisdiction of the supreme court on an appropriate ground does not necessarily operate to confer jurisdiction.

Union Ins. v Eggers, 212-1355; 237 NW 240

Jurisdiction on appeal—not conferred by consent—dismissal. Where an unauthorized appeal has been taken, it is the duty of the court upon ascertaining the situation to dismiss the appeal on its own motion. Jurisdiction of the court is statutory and cannot be conferred by consent of the litigants.

Eby v Phipps, 225-1328; 283 NW 423

Jurisdictional questions determined first. A motion to dismiss an appeal submitted with the case, being jurisdictional, will be determined before other matters.

Ontjes v McNider, 224-115; 275 NW 328

Timely motion. A motion to dismiss an appeal for want of jurisdiction is timely even tho service of the motion was not made 10 days before the day assigned for the submission of the cause, when it appears that the cause was not submitted under said assignment but was continued and reassigned for submission at a later term, which afforded appellant much more than said 10 days notice.

Piercy v Bronson, 206-589; 221 NW 193

Motion to dismiss—timeliness. A motion to dismiss an appeal, because the abstract was not served upon all the appellees within 120 days after perfecting the appeal, was filed on time when filed more than 10 days before the time the case was assigned for submission, and should be sustained.

Herrold v Herrold, 226-805; 285 NW 274

Untimely motion. Motion to dismiss an appeal for want of jurisdiction because of de-

fective service must be filed 10 days prior to submission.

Aldrich v Van Hemert, 205-460; 218 NW 311

Appeal from unrecorded order. After the unsuccessful termination of his appeal, an appellant may not later challenge the jurisdiction of the supreme court to entertain the appeal because the order appealed from was not spread upon the district court records.

Lincoln Bk. v Brown, 224-1256; 278 NW 294

Appeal prior to judgment entry. Failure of the abstract to show that the order or judgment appealed from has been entered of record is fatal to the appeal, provided appellee properly presents the defect.

Deal v Marten, 214-769; 240 NW 686

Presumption. When the abstract recites, generally, the taking and perfecting of an appeal, and the jurisdiction of the appellate court is not attacked in written form, the appeal will be presumed to be from the final judgment, even tho the abstract does not show the entry of a final judgment.

In re Kahl, 210-903; 232 NW 133

Order overruling objections to interrogatories. An order overruling objections and exceptions to interrogatories attached to a plaintiff's petition in an action for accounting is not an order from which an appeal will lie.

Eby v Phipps, 225-1328; 283 NW 423

12886 Dismissal of appeal.

ANALYSIS

I WAIVER OF RIGHT OF APPEAL
- (a) IN GENERAL
- (b) BY JUDGMENT PLAINTIFF
- (c) BY JUDGMENT DEFENDANT

Who may appeal. See under §12822

I WAIVER OF RIGHT OF APPEAL

(a) IN GENERAL

Fatally belated motion. A fatally belated motion to dismiss an appeal will be overruled.

Andrew v Bank, 216-60; 245 NW 241

Nonappealable order—dismissal sua sponte. On an attempted appeal from an order which the appellate court has no jurisdiction to review (e. g., an order striking portions of an answer) the court will dismiss sua sponte, even tho the opposing party does not move to dismiss.

Joslin v Bank, 213-107; 238 NW 715

Mandatory procedure. The contention that the appellate court has no jurisdiction to entertain an appeal must be presented by motion to dismiss, not by a discussion in appellee's argument.

First Sec. Co. v U. S. Gyp., 211-1019; 233 NW 137; 73 ALR 1196

Moot case—road completed. An appeal will be dismissed when the subject matter of the action becomes nonexistent pending the appeal. So held where the action was to enjoin road authorities from establishing a road through an orchard, and where, pending the appeal, the road was actually laid out and paved through the orchard owing to appellant's failure to obtain a restraining order from the appellate court.

Welton v Hy. Com., 208-1401; 227 NW 332

Moot case—child admitted to school. An appeal from an order refusing to compel the public authorities to admit a child into the public schools (owing to certain health regulations) will be dismissed on a showing that the child has, prior to the taking of the appeal, been admitted to the school.

Saner v Board, 211-1201; 235 NW 291

Moot questions — attachment proceedings. Jurisdictional defects in attachment proceedings become moot and inconsequential when it appears that the proceedings were auxiliary to a real estate foreclosure, and that general personal judgment has been rendered in the foreclosure proceedings against the defendant in attachment.

Grimes v Kelloway, 204-1220; 216 NW 953

Moot case—service of new notice. An appeal from a ruling upholding the sufficiency of the recitals of a duly served original notice becomes moot upon a showing that since the ruling in question a new notice unquestionably complying with the statute has been served.

Ransom v Mellor, 216-197; 248 NW 361

Moot case—contract expired. The court on appeal will not concern itself with a contract which ex vi termini has ceased to have legal effect.

Capitol Hill Co. v Wells, 202-577; 210 NW 754

Moot case—redemption period expired. An appeal from an order denying a writ to place a receiver in possession of premises under mortgage foreclosure will be dismissed when it appears that sale has been had, that the redemption has expired, and that the defendant has surrendered possession of the premises to plaintiff.

Upton v Gephart, 205-235; 217 NW 630

Foreclosure—receiver—when question moot. An issue whether a mortgagee in real estate foreclosure is entitled, under a pledge of the rents, to a receiver to take possession of the mortgaged premises becomes moot when the period for redemption expires.

Metropolitan v Andrews, 215-1049; 247 NW 551

Moot case—lease expired. An appeal from a judgment in forcible entry and detainer proceedings will be dismissed when it is manifest

on the record that the lease under which appellant claims has expired and that he has no further interest in the premises, and that nothing is involved except a matter of costs.

Manning v Heath, 206-952; 221 NW 560

Moot questions—legality of court orders. An order of the supreme court on appeal that the trial court enter a decree of divorce in favor of plaintiff, and all proper orders relative to the custody of the children, renders moot the legality of all prior orders of the trial court in injunctional proceedings relative to the custody of such children.

McGrath v Dist. Court, 205-191; 217 NW 823

Moot question—right to hold office. An appeal in an action to determine whether a person is ineligible to the office of congressman will be deemed to present a moot question, and will be dismissed, when, pending the appeal, it is made to appear that the person in question has actually been sworn in as congressman, and is acting as such.

Richman v Letts, 202-973; 210 NW 93

Moot question—plea in abatement. Whether the sustaining of a plea in abatement based on the pendency of an appeal in another action, is or is not erroneous, becomes quite moot after said appeal has been fully adjudicated.

McCarthy v Bank, 210-626; 231 NW 488

Moot case—automatic dissolution of injunction. An appeal in an action for injunctional relief only, and from an order continuing the injunction to a named date, will be deemed to present a moot question when, on presentation of the appeal, it appears that the injunction has been automatically dissolved by the lapse of time.

Humble v Carter, 210-551; 231 NW 341

Moot questions—insurance policy expired. Questions with reference to the reformation of a policy of insurance will not be reviewed on appeal when it appears that the policy has expired by its own terms and without loss.

Travelers Ins. v Ins. Assn., 211-1051; 233 NW 153

Moot question—bar of statute of limitation. Injunction to restrain the issuance and payment of warrants for certain claims, because of the alleged unconstitutionality of the statute purporting to authorize such claims, presents a moot case when it appears that a portion of the claims have been actually paid and the remaining claims are barred by a statute of limitation.

Gallarno v Long, 214-805; 243 NW 719

Moot question—no funds to pay. Whether the rejection by the trial court of part of a claim was erroneous becomes moot when the fund out of which payment must be made is insufficient to pay the amount that was allowed.

So. Sur. v Jenner, 212-1027; 237 NW 500

Moot question—foreclosure deed on property. Whether land was fraudulently conveyed by the owner becomes moot when, before the determination of the question, mortgage foreclosure deed for the land is issued to a nonparty to the action.

Newman v Callahan, 212-1003; 237 NW 514

Moot case — unnecessary review. An appeal from an order sustaining a special appearance will be dismissed when it appears that since the entry of the order plaintiff has instituted a new action on the same subject matter and that defendant has entered a general appearance thereto.

Schnurr v Brazelton, 217-1125; 253 NW 152

Moot question—jurisdiction of court. An appeal from a district court ruling which in effect permitted the prosecution in the state court of a tort action against a bankrupt contrary to an order of the bankruptcy court that such action must be prosecuted solely in the bankruptcy court, will be dismissed on a proper showing by appellee that, since said ruling by the state court, the federal court has so modified its former order as specifically to authorize appellee to prosecute said action in the state court, even tho such showing requires a showing dehors the original appellate record.

Van Heukelom v Black Hawk Corp., 222-1033; 270 NW 16

Transfer of interest. An appeal may not be dismissed on the ground that the appellant has transferred to another the subject matter involved in the appeal.

Union Ins. v Eggers, 212-1355; 237 NW 240

Absence of subject matter. An appeal will be dismissed when it is made to appear (1) that the appeal involves the question whether a judgment lien on previously mortgaged premises is prior to a mechanic's lien on the same premises, and (2) that the land has gone to foreclosure and deed under the prior mortgage.

Eclipse Lbr. v Riley, 203-583; 213 NW 209

Absence of evidence in equity. An appeal in an action brought and tried in equity will not be dismissed because the appellant fails to include the evidence in his abstract when the record reveals everything necessary for the court to decide the narrow question of law presented by appellant.

Carlson v Layman, 214-114; 241 NW 457

Acceptance of uncontroverted part of litigated fund. An appellant who, after the taking of an appeal, claims and receives that part of the fund in litigation which admittedly belongs to him, does not thereby waive his appeal from that part of the judgment which deprives him of the controverted part.

Nickle v Mann, 211-906; 232 NW 722

I WAIVER OF RIGHT OF APPEAL—continued

(a) IN GENERAL—continued

Submission contrary to rules. A writ of certiorari will be dismissed when there is a total failure to comply with an order that the cause be submitted in accordance with the rules for the submission of civil causes, even tho the parties to the writ have stipulated for a submission without abstract or argument.

Touche v Franklin, 201-480; 207 NW 337

Failure to file reporter's transcript. An appeal from an order overruling motion to set aside default annulment will be dismissed on motion when, almost three months after abstract was served, the shorthand reporter's transcript of the evidence had not been filed, the statute requiring that such transcript be filed immediately after service of the abstract.

Kurtz v Kurtz, 228- ; 290 NW 686

Failure to file argument. Failure of appellant to file argument during rule time will not necessarily be visited by an order of affirmance or dismissal.

Finley v Thorne, 209-343; 226 NW 103

Failure to file brief and argument. When an appellant files an abstract but no brief and argument in support of his appeal, the judgment appealed from will be affirmed on the presumption that the said judgment is correct, and that appellant has abandoned his appeal.

Gordon-Van Tine v Sergeant, 215-106; 244 NW 712

Abstracts — failure to index. Adequate grounds for dismissing an appeal are furnished by a failure to index alphabetically the abstract, and especially the exhibits contained therein.

Shively v Mfg. Co., 205-1233; 219 NW 266

Abstract—incompleteness—effect. An appeal in an equitable action will not necessarily be dismissed nor a de novo hearing be refused because all the evidence is not embraced in the abstract. So held where only one of several defendants was affected by the appeal.

State v Baker, 212-571; 235 NW 313

Fatally belated filing of abstract. An appellee who stands by and permits the appellant to print and file the abstract at a wholly unallowable time is not thereby estopped to move for a dismissal of the appeal.

Coggon Bk. v Woods, 212-1388; 238 NW 448

Institution of new action. The rule that a party waives his appeal by instituting a new action in the lower court on the same matters involved in the appeal, is not applicable to a case where, after the taking of an appeal, the appellant attempts to revive a dismissed cross-petition which involves the matters embraced in the appeal.

Matthews v Quaintance, 200-736; 205 NW 361

Instituting non-inconsistent action. The commencement, by the proponents of a will, of an action in partition, after the return of a verdict holding the will invalid, is not a waiver of the right to appeal from the adverse verdict denying probate of the will, when the petition in partition definitely asserted the intent and right to appeal, and assumed to make the outcome of the partition proceedings dependent on the outcome of said appeal.

In re Narber, 211-713; 234 NW 185

Death of appellant. An appeal in a criminal cause will be dismissed by the court on its own motion when it appears that the appellant has died pending the appeal.

State v Catron, 207-318; 222 NW 843

Nonabatement by death. The death of a party to whom a decree of divorce has been awarded does not abate an appeal insofar as property rights and the custody of children are affected by the decree.

Oliver v Oliver, 216-57; 248 NW 233

Dismissal—motion by nonparty. A motion to dismiss an appeal or to set aside the submission thereof will be overruled when made by plaintiffs in a different but similar action, on the ground that the two actions were consolidated, and that no notice of the appeal was served on said plaintiffs, the record revealing that the two actions were consolidated only to the extent of hearing both causes at the same time and on the same evidence.

Mershon v Sch. Dist., 204-221; 215 NW 235

Abandonment—answering over. An appeal from the refusal of the court to strike a petition must be deemed abandoned when it is made to appear that, subsequent to the perfecting of the appeal, the appellant answered the petition and went to trial on the merits.

Iowa Bk. v Raffensperger, 208-1133; 224 NW 505

Evidence improperly admitted—nonreview. In appeal from court's refusal to set aside default decree annulling marriage, alleged errors in admitting evidence are not reviewable, even tho raised on motion to set aside the decree, when the appeal from the order denying the motion is dismissed.

Kurtz v Kurtz, 228- ; 290 NW 686

Justifiable omission to instruct. The action of the court in omitting a certain subject matter from the instructions must be deemed justifiable when, after consultation with the litigants, the court understood that such omission was requested, and when complainant entered no exception when the instructions

were given, and made no objections to such omission.

McLain v Risser, 207-490; 223 NW 162

Dual appeals in same case—effect. Where, after rendition of a final judgment, and after a motion for a new trial is overruled, separate appeals are perfected on different dates (1) from the main judgment and (2) from the order as to new trial, the latter appeal will be deemed properly before the court, even tho the appeal from the main judgment is dismissed because of failure to file abstract within 120 days. Whether, under such circumstances, the appeal from the main judgment worked a waiver of an appeal from the order denying a new trial (if the point had been presented), quaere.

In re Fetterman, 207-252; 222 NW 872

Conditions precedent to appeal. An appeal from a ruling sustaining a motion to strike a plea of the statute of limitation in probate proceedings will not lie when the complainant fails to stand on the plea and fails to permit judgment to go against him.

In re Delaney, 207-451; 223 NW 486

Fatal defect in parties. In an action by the purchaser of land to quiet title against certain claims for mechanics' liens, the decree confirmed the claims as liens on the land, and ordered said land sold for the payment—at least pro tanto—of said liens, and, in addition, entered personal judgments against a former owner of the land for the amount of each of said claims. Plaintiff appealed from the decree insofar as it established said claims as liens.

Held, the appeal could not be maintained without service of notice of appeal on said former owner.

Gordon Co. v Ideal Co., 223-313; 271 NW 523

Fatally deficient record. An appeal cannot be entertained when the record affirmatively shows (1) that the appearance docket of the trial court carries no notation of the filing of a notice of appeal, and (2) that no notice of appeal can be found in the office of the clerk of said court.

Educational Exchanges v Thornburg, 217-178; 251 NW 66

Coerced compliance with order appealed from —effect. Coerced compliance with an order appealed from cannot be deemed a waiver by appellant of his right of appeal.

In re Carson, 221-367; 265 NW 648

Dismissal on technical grounds—noneffect as adjudication. The dismissal by the supreme court of an appeal, and the affirmance by said court of the judgment appealed from, on the technical ground that appellant had failed to make timely filing of an abstract of the record, cannot be deemed an adjudication of the jurisdictional legality of the judgment so affirmed. In other words, while the appeal has proven abortive, the said judgment is nevertheless subject to an action for its cancellation on the ground that the trial court was wholly without jurisdiction to enter it.

Dallas v Dallas, 222-42; 268 NW 516

Improper notice of appeal. In appeal from decree quieting title in city to streets and alleys, but continuing hearing as to park, it was necessary to serve notice of appeal on city's attorney, and notice of appeal served on attorneys for cross-petitioners joining in prayer of appellee's petition was not binding on the city and entitled city to a dismissal.

Iowa City v Balluff, (NOR); 225 NW 942

Motion to dismiss appeal—determined first. A motion to dismiss an appeal submitted with the case, being jurisdictional, will be determined before other matters.

Ontjes v McNider, 224-115; 275 NW 328

Notice of appeal—mortgagor as adverse and necessary party—dismissal. A titleholder who did not assume a prior mortgage on the property and who appeals from an order in foreclosure appointing a receiver must serve notice of appeal on the mortgagor, as an adverse and necessary party, inasmuch as a personal judgment was rendered against mortgagor in the foreclosure.

Hoffman v Bauhard, 226-133; 284 NW 131

Notice of appeal—administrator failing to serve all objectors—dismissal. Notice of appeal from a judgment sustaining objections to an administrator's final report must be served on all heirs objecting to the report, and a failure will result in a dismissal of the appeal.

Kelley's Est. v Kelley, 226-156; 284 NW 133

Service of notice of appeal jurisdictional—extension forbidden—dismissal. The statutory period for service of notice of appeal cannot be extended by the court. Where appellant knew of the existence of parties who might be adversely affected by a reversal, knew their residence addresses, and could have served them with notice, but statutory time had elapsed, a dismissal must follow.

Kelley's Est. v Kelley, 226-156; 284 NW 133

Coparty—failure to serve—effect and burden. A party who assumes to appeal from a decree in equity without serving notice of appeal on a nonjoining coparty has the burden to show that said coparty will not be adversely affected in any manner by any decree of the appellate court. In a case wherein the rights of various parties were much intertwined, held said burden had not been satisfied, and consequently the appeal must, on motion, be dismissed.

Jenkins v Beeler, 213-501; 239 NW 474

Dismissal — noncompliance with Rule 30. Where appellant's brief and argument containing 117 pages, the first 60 pages of which

I WAIVER OF RIGHT OF APPEAL—continued

(a) IN GENERAL—concluded

were rambling statement of testimony and comment thereon, nowhere containing a statement of how the case was decided in the lower court, the nature of the lawsuit being ascertainable therefrom only with difficulty, and when the brief and argument nowhere contained any statement that might be called an assignment of error, the appeal will be dismissed on motion for failure to substantially comply with Rule 30, which requires a short and clear statement of the above matters.

Ind. Dist. v Hartwick, 226-491; 284 NW 453

Motion to dismiss appeal—time for making. A motion to dismiss an appeal, because the abstract was not served upon all the appellees within 120 days after perfecting the appeal, was filed on time when filed more than 10 days before the time the case was assigned for submission, and should be sustained.

Herrold v Herrold, 226-805; 285 NW 274

Partial dismissal—effect. Where appellants for a consideration procured dismissal of an appeal as to a part of appellees and thereby prejudiced rights of remaining appellees in real estate involved in litigation, supreme court sustained motion by such remaining appellees to dismiss the appeal as to them.

Lynch v Life Co., 227-730; 288 NW 902

Assignment of error—ignoring rule. Justification for considering, on its merits, an appeal in certiorari proceedings, tho appellant has not assigned errors as provided by Rule 30, is found in the fact that the main, legal point in issue is of grave importance not only to the litigants, but to the people of the state in general, and is made perfectly clear to the appellate court by the brief points and arguments of both parties to the appeal. Especially is this true when no motion is filed to dismiss the appeal.

National Assn. v Murphy, 222-98; 269 NW 15

(b) BY JUDGMENT PLAINTIFF

Accepting benefits of judgment. A party litigant who receives and accepts substantially all the money paid into court, on a judgment in his favor, may not thereafter appeal from that part of the decree which denies him interest on the sum so paid into court.

Kelly v Bk. 217-725; 248 NW 9; 250 NW 171

Enforcement of judgment by appellee. An appeal will not be dismissed simply because appellee has, pending the appeal, enforced the judgment because of appellant's failure to file a supersedeas bond or obtain a restraining order on appellee.

Spring v Spring, 210-1124; 229 NW 147

Compliance with order. An appeal from an order requiring plaintiff to bring in certain parties as additional defendants is not maintainable when the record shows that the appellant has complied with the order.

Bruner v Myers, 203-570; 213 NW 217

Moot case—contract performed. An appeal by plaintiff-appellant from an order dismissing his action for specific performance will be dismissed on motion when it is made to appear that, since the ruling in the trial court, the defendant-appellee has specifically performed, and that such performance has been accepted by appellant. The court will not retain the appeal for the purpose of determining costs.

Fish v City, 210-862; 232 NW 118

Enforcing uncontroverted part of judgment. A plaintiff who contends for a lien on both of two tracts of land, and is conceded by all parties a lien on one of said tracts, may enforce his lien on said one tract, and thereafter maintain an appeal from the judgment denying his lien on the remaining tract.

Luglan v Lenning, 214-439; 239 NW 692

Instituting new action pending appeal—effect. An appeal by a surviving spouse, in workmen's compensation proceedings, from a judgment that she had no right as surviving spouse to be substituted as plaintiff in a proceeding for compensation commenced by her husband in his lifetime, cannot be deemed abandoned by the act of said appealing spouse in subsequently filing with the industrial commissioner her formal application for compensation as a dependent, when said latter filing was for the sole purpose of avoiding the running of the statute of limitation and preserving her rights as a dependent in the event she, on the merits, lost her pending appeal.

Dille v Coal Co., 217-827; 250 NW 607

(c) BY JUDGMENT DEFENDANT

Involuntary performance of judgment. The involuntary performance of a decree because of the issuance of an execution does not deprive the judgment defendant of the right of appeal.

Horan v Horan, 203-495; 211 NW 249

Waiver of appeal. A defendant does not waive his appeal from an adverse ruling, on his motion to strike, by filing an answer subsequent to the appeal when he is coerced by the ruling of the court into making such answer.

Ontjes v McNider, 218-1356; 256 NW 277

Moot question—redemption period expired. An appeal by a surviving mortgagor from an order which grants to a probate claimant a right to redeem from a sale under foreclosure will be dismissed when it is made to appear that appellant has allowed his time for redemption to elapse without any attempt by him to redeem.

Central Bank v Lord, 204-439; 215 NW 716

When question becomes moot. An appeal from an order refusing a moratorium continuance of mortgage foreclosure suit will be dismissed when it appears that said suit has gone to final decree because the appellant neither caused said suit to be stayed or filed supersedeas bond, and that said final decree is not appealable because of the lapse of time.

Lincoln JSL Bank v Hansen, 221-21; 263 NW 821

Loss of right. One who bases his attempt to enjoin interference with a public or private easement in a strip of land solely on the ground of his ownership of the abutting land loses such right by an unconditional conveyance of the abutting land.

Rider v Narigon, 204-530; 215 NW 497

Forcible detainer of premises—appeal—nonright to maintain. Defendant in an action involving the sole question whether he was wrongfully detaining possession of premises after a refusal to pay rent, may not, after voluntarily surrendering possession in compliance with an order of removal, maintain an appeal from said order.

Sherman v Moore, 222-1359; 271 NW 606

12887 Proceedings on motion to dismiss.

Partial dismissal. Where appellants for a consideration procured dismissal of an appeal as to a part of appellees and thereby prejudiced rights of remaining appellees in real estate involved in litigation, supreme court sustained motion by such remaining appellees to dismiss the appeal as to them.

Lynch v Life Co., 227-730; 288 NW 902

TITLE XXXV

CRIMINAL LAW

CHAPTER 556

PUBLIC OFFENSES

Discussion. See 17 ILR No. 4 Supp.—Iowa crime statistics

12889 Classification.

Discussion. See 19 ILR 437—Statutory crimes—mind at fault; 22 ILR 659—Negative acts in criminal law

Atty. Gen. Opinion. See '36 AG Op 361

Statutes defining crime. Principle reaffirmed that statutes definitive of crime are strictly construed and all doubt resolved in favor of the accused.

State v Cooper, 221-658; 265 NW 915

12890 "Felony" defined.

Discussion. See 12 ILR 407—Public torts and mens rea

Atty. Gen. Opinions. See '34 AG Op 563; '36 AG Op 690

Enactment of statute—legislature's power—felony for third conviction—liquor violation. Legislature possesses full authority to enact statute making third and subsequent offense of violating liquor law a felony.

State v Erickson, 225-1261; 282 NW 728

12891 "Misdemeanor" defined.

Atty. Gen. Opinions. See '34 AG Op 563; '36 AG Op 361

Nonindictable misdemeanor. A nonindictable misdemeanor may be prosecuted under an information filed and sworn to by a private individual.

State v Porter, 206-1247; 220 NW 100

12893 Prohibited acts—misdemeanors.

Atty. Gen. Opinion. See '32 AG Op 27

12894 Punishment for misdemeanors.

Atty. Gen. Opinion. See '36 AG Op 361

CHAPTER 557

PRINCIPALS AND ACCESSORIES

12895 Distinction between principal and accessory.

ANALYSIS

I IN GENERAL
II INDICTMENT
III CONSPIRACY
IV "AID AND ABET"
V INSTRUCTIONS

Evidence in conspiracy prosecutions. See under §13162
Indictment for conspiracy. See under §§13737, 13755
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I IN GENERAL

Discussion. See 19 ILR 507—Doctrine of coercion

Accessories—how tried. Principle reaffirmed that an accessory before the fact is triable as a principal.

State v Pinkerton, 201-940; 208 NW 351

Accessories before fact. The distinction between an accessory before the fact and a principal does not exist in this state.

State v Carlson, 203-90; 212 NW 312

Knowledge as essential element. One cannot be an accessory unless he is knowingly such, and conflicting instructions as to such element constitute error.

State v McCarty, 210-173; 230 NW 379
State v Miner, 213-193; 238 NW 594

Accomplices—incest. A prosecutrix in a prosecution for incest is not an accomplice if she did not voluntarily submit to the acts of sexual intercourse.

State v Candler, 204-1355; 217 NW 233

Intoxicated driver—accomplice. The owner of an automobile who causes another person to operate the car while such other person is intoxicated because such other person is less drunk than the owner becomes an accomplice in the offense of operating an automobile while intoxicated.

State v Myers, 207-555; 223 NW 166

Bootlegging—purchaser not particeps criminis. Purchaser of liquor from bootlegger held not an accessory or accomplice.

State v McMahon, (NOR); 211 NW 409

Accessory—evidence. Evidence reviewed at length, and held to sustain a verdict of guilty against defendant as an accessory to the felonious breaking and entry of a building.

State v Ball, 220-595; 262 NW 115

Coercion of wife by husband. No presumption exists that a wife who commits a crime in the presence of her husband does so under the coercion of the husband.

State v Renslow, 211-642; 230 NW 316; 71 ALR 1111

Coercion—required nature and extent. The compulsion which will excuse a criminal act must be present, imminent, and impending, and of such a nature as to induce a well grounded apprehension of death or serious bodily harm if the act is not done.

State v Clay, 220-1191; 264 NW 77

Coercion—no presumption. In arson prosecution against husband and wife, it is no longer presumed that a wife, committing a crime in the presence of her husband, did so under his coercion.

State v Bazoukas, 226-1385; 286 NW 458

Crimes—effect of wife's presence or knowledge—nonpresumption. In prosecution for arson, in the absence of testimony tending to show participation or conspiracy on the part of the wife in a crime committed by her husband, her guilt will not be presumed, nor the fact that she may have knowledge of and even be present at the scene of the crime and fail to actively oppose the same, will not, in the absence of conspiracy or participation, render her likewise guilty.

State v Bazoukas, 226-1385; 286 NW 458

Accessory — fatally incompetent evidence. The theory of the state that its sole witness to a felonious homicide (tho confessedly a participant in the transaction which led to the death of deceased) was not in fact an accomplice, because said witness acted under duress of and in fear of the defendant who was on trial, may not be supported by testimony that said defendant made a felonious assault on said witness some four months after the commission of said homicide.

State v Clay, 220-1191; 264 NW 77

II INDICTMENT

Joint indictment—right to testify. An accomplice, jointly indicted with defendant, may testify against defendant.

State v Thompson, 222-642; 269 NW 774

III CONSPIRACY

Issues, proof, and variance — permissible theory of conspiracy, and aiding and abetting. Under an indictment for murder in which the defendant is charged with having actually fired the fatal shot, the state may avail itself, as a matter of evidence, of a conspiracy theory, and at the same time invoke the theory of

aider and abettor in the commission of the offense charged.

State v Bittner, 209-109; 227 NW 601

IV "AID AND ABET"

Aiding and abetting. Evidence held ample to justify the court in submitting to the jury the question whether the accused "aided and abetted" the illegal transportation of intoxicating liquors.

State v Canalle, 206-1169; 221 NW 847

Aiding and abetting. Evidence held ample to support a finding of aiding and abetting a homicide.

State v Griffin, 218-1301; 254 NW 841

Presumption of coercion—nonapplicability. The presumption that, when a wife, in the near presence of her husband, participates in the commission of a crime, she is acting under the coercion of her husband, cannot be employed by the state as affirmative proof or presumption of the husband's guilt.

State v Kuhlman, 206-622; 220 NW 118

Coercion—no presumption. In arson prosecution against husband and wife, it is no longer presumed that a wife, committing a crime in the presence of her husband, did so under his coercion.

State v Bazoukas, 226-1385; 286 NW 458

V INSTRUCTIONS

Accessories before the fact—instructions. Instructions as to when accessories are principals reviewed and held correct.

State v Slycord, 210-1209; 232 NW 636

Accessory before fact—basis for instruction. On a charge of murder by means of poison, evidence that one defendant manually procured the poison, and that he was aided and abetted therein by another defendant, furnishes adequate basis for an instruction relative to the full responsibility of the latter as an accessory before the fact.

State v Miner, 213-193; 238 NW 594

Failure to define. Failure to define the term "accomplice" is quite harmless when the jury is peremptorily told that the witness in question is an accomplice.

State v Gill, 202-242; 210 NW 120

Accessory before fact—knowledge as essential element. An instruction to the effect that one may be convicted on proof that he knowingly aided and abetted the commission of a crime is correct, but without the qualifying word "knowingly" or its equivalent it is prejudicially erroneous.

State v Miner, 213-193; 238 NW 794

Guilt of others—effect. Requested instructions to the effect that the jury cannot consider the guilt of parties other than the one on trial are properly refused when the one on trial is accused of having aided and abetted such other parties in committing the offense.

State v Hillman, 203-1008; 213 NW 603

Instructions correct but unelaborated. A correct instruction relative to "accessories" and "aiding and abetting" is not erroneous because the court failed elaborately to define said word and phrase.

State v Tibbits, 207-1033; 222 NW 423

Harmless instructions. An accused who is manifestly a principal, if guilty, is in no manner harmed by instructions to the effect that all accessories before the fact are principals.

State v Harding, 204-1135; 216 NW 642

Instructions. Instructions relative to an accessory knowingly aiding and abetting another in the commission of a crime, and the nature of such abetting, reviewed and held unobjectionable.

State v Griffin, 218-1301; 254 NW 841

Accomplice per se. Whether a witness, testifying for the state as to the commission of the offense on trial was an accomplice is not a jury question on a record which shows that the witness himself might be charged and convicted of said offense. On such a record the court must peremptorily instruct that the witness was an accomplice, and properly guide the jury as to the necessity for corroboration.

State v Clay, 220-1191; 264 NW 77

12896 Accessory after the fact.

Corroboration. An accessory after the fact is not an accomplice to the main crime and therefore not within the purview of §13901, C., '35, relating to corroboration.

State v Philpott, 222-1334; 271 NW 617

CHAPTER 559
HOMICIDE

12910 Murder.

ANALYSIS

Evidence in criminal cases generally. See under §13897 et seq.
Indictment generally. See under Chs 637, 638
Instructions, criminal cases generally. See under §13876
Instructions, first degree murder. See under §12911 (VIII)
Instructions, second degree murder. See under §12912 (IV)

I MURDER IN GENERAL

Discussion. See 19 ILR 445—Suicide

Optional venues. A prosecution for murder by means of an attempted abortion may be prosecuted in the county wherein the resulting death occurred even tho the unlawful operation was performed in another county of this state.

State v Sweeney, 203-1305; 214 NW 735

Insanity—fundamental rule. The dividing line between accountability and nonaccountability in the taking of human life is the power or ability to know and distinguish right from wrong.

State v Maharras, 208-127; 224 NW 537

Issue of insanity—fatally delayed presentation. In order to suspend the ordinary proceedings in a prosecution for murder, and to enter upon a trial as to the insanity of the accused, the question of insanity must be raised before the end of the trial. (Motion in this case filed after sentence of death had been passed and judgment thereon entered.)

State v Tracy, 219-1412; 261 NW 527

Sentence—absence of abuse of discretion. Record reviewed and held to present no abuse of discretion on the part of the trial court in passing death sentence on defendant's plea of guilty of murder in first degree.

State v Wheaton, 223-759; 273 NW 851

Deceased as peace officer. In a prosecution for murder it was proper to refuse to instruct the jury that the fact that the deceased was a merchant policeman had no bearing on the case.

State v Coleman, 226-968; 285 NW 269

II "MALICE AFORETHOUGHT"

(a) IN GENERAL

Justifiable submission to jury. Murder in both degrees is properly submitted to the jury on testimony which will justify a finding of malice, deliberation, and premeditation.

State v Reed, 205-858; 216 NW 759

(b) EXPRESS MALICE

Presumption (?) or assumption (?) of malice. The court may, under applicable evidence, instruct that the jury has a right, in the absence of evidence to the contrary, to presume the existence of malice from the use of a deadly weapon in a deadly manner; and in so instructing it is quite immaterial that the court employs the term "assume" instead of the term "presume".

State v Berlovich, 220-1288; 263 NW 853

Proof of intent. An instruction informing the jury how intent may be proved or arrived at was proper in a murder prosecution.

State v Coleman, 226-968; 285 NW 269

(c) IMPLIED MALICE

1 In General

Homicide—malice—nonconclusive presumption—instructions. Reversible error results from instructing that "malice" is conclusively presumed from a deliberate and intentional killing, when the record reveals a plea of justification and excuse, and supporting testimony relating thereto.

State v Sipes, 202-173; 209 NW 458; 47 ALR 407

2 Deadly Weapon

Presumption of malice—intent. The use of a deadly weapon in a deadly manner generates a presumption of malice, and, if death results, justifies the inference of intent to kill.

Klinkel v Saddler, 211-368; 233 NW 538

Malice—presumption from use of deadly weapon. In the absence of evidence to the contrary, the use of a deadly weapon in a deadly manner generates a presumption of malice, but not a presumption of willfulness or premeditation.

State v Woodmansee, 212-596; 233 NW 725

III INDICTMENT

Attempted abortion — sufficiency of allegation. Indictment for murder by means of an attempted abortion reviewed, and held to adequately, tho somewhat clumsily, allege the use by the accused of instruments as a means of effecting such abortion.

State v Sweeney, 203-1305; 214 NW 735

IV EVIDENCE

(a) IN GENERAL

Enlarged photograph of deceased. An enlarged photograph of the deceased in a prosecution for criminal homicide may be admissible.

State v Kneeskern, 203-929; 210 NW 465

Photographs—admissibility for limited purpose. In a prosecution for homicide the court committed no error in admitting in evidence photographs showing the condition of the body of the deceased at the time photographs were taken, said photographs so marked that laymen could properly interpret the meaning of markings thereon. Such evidence admissible even tho physician who performed post mortem and who identified abrasions and bruises so shown by these exhibits had not personally observed the condition of the body immediately prior to the taking of the photographs.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Expert witness—jury question. In prosecution for alleged homicide, evidence of expert witnesses' opinion of cause of death of deceased and kind of instrument used to inflict the wounds properly admitted and jury question on facts thereby generated.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Physician's cross-examination. In a murder prosecution, when a doctor on direct examination testified only as to what he found when he made physical examinations of the deceased, it was not error to deny cross-examination on the history of the patient.

State v Coleman, 226-968; 285 NW 269

Evidence that deceased was peace officer. Altho offered to show that the defendant knew the deceased to be a peace officer, it was error, in a murder prosecution, to admit evidence that about three weeks before the affray alleged to be the cause of the death, the deceased had seen the defendants fighting, and at that time a bystander was asked to take one defendant home because he was too drunk to drive.

State v Coleman, 226-968; 285 NW 269

Reception of exhibits—competency. The reception in evidence of an exhibit purporting to show the questions put to an accused in a homicide case very shortly after the occurrence in question and the answers of the accused to such questions, does not constitute reversible error when it appears that prior to the reception of the exhibit the witness had fully testified as of her own knowledge to all the facts shown by the exhibit.

State v Maharras, 208-127; 224 NW 537

Acts prior to time of homicide. On the trial of a charge of felonious homicide evidence of acts and the circumstances attending them, and of the participation of the accused therein —even tho said acts occurred prior to the actual homicide in question—may be admissible (because of their connection with the actual homicide in point of time, place and circumstances) for the purpose (1) of identifying the accused as the actual perpetrator of the homicide, and (2) of showing what the accused was then doing in the locality in question—that he had no legitimate mission therein. And this is true tho said evidence proves or tends to prove the commission by the accused of a crime independent of the crime for which he is on trial.

State v Johnson, 221-8; 264 NW 596

State's evidence not controlled by admission. The defendant cannot compel the state to accept his admission of a fact in lieu of evidence of such fact. In other words, the defendant cannot, by making certain admissions, control the state in its introduction of testimony.

State v Griffin, 218-1301; 254 NW 841

Bad feelings. On the trial of an indictment charging assault to murder wherein there is no issue as to self-defense, and consequently no issue as to which party was the aggressor, evidence tending to show the bad feeling existing between the defendant and the prosecuting witness is inadmissible.

State v Smith, 215-374; 245 NW 309

Limiting evidence on established fact. In the trial of a criminal cause, the court commits no reversible error by closing the floodgates of testimony in proof of a fact already abundantly established by other evidence. So held, in the prosecution of a wife for the murder of her husband, as to the contents of illicit correspondence (which had been destroyed) between the husband and another woman; also as to certain incidents taking place between the wife and her husband months before the fatal shooting, all as bearing on the already fully established relations existing between the accused and the deceased.

State v Johnston, 221-933; 267 NW 698

Hypothetical question — inadmissible when not based on evidence. In a prosecution for homicide where it was shown that the deceased was found with a fractured neck, with no marks on his neck or body nor any evidence of a quarrel or struggle, after he had been left alone for only about a minute and a half with the defendant who was a friend of about the same size and weight, it was reversible error to allow a physician to demonstrate a strangle hold, and to answer a hypothetical question, not based on evidence, that force could be applied from the rear so as to break a man's neck.

State v Hillman, 226-932; 285 NW 176

Motive—reconciliation—inapplicable instruction. In a prosecution for uxoricide, a re-

IV EVIDENCE—*continued*
(a) IN GENERAL—continued

quested instruction as to the effect of a reconciliation, as bearing on motive, is properly refused when there is no direct evidence of reconciliation, and when the difficulties between the parties appear to have continued down to the time of the death of the wife.

State v Flory, 203-918; 210 NW 961

Motive. Proof of motive is not necessary, to sustain a conviction for criminal homicide.

State v Kneeskern, 203-929; 210 NW 465

Evidence—motive. On a charge of murder, evidence tending to show that the accused and his associates were seeking to discover the hiding place of the contraband liquors of the deceased and his associates, and to this end were searching for the deceased, and maltreating and threatening to kill the associates of the deceased if they did not reveal said hiding place, is admissible for the purpose of showing a motive on the part of the accused.

State v Campbell, 213-677; 239 NW 715

Ill health of deceased. On a prosecution for murder by poison, the exclusion of evidence tending to show the diseased condition of the deceased five and more years prior to the alleged homicide is not erroneous, no offer being made to show that such diseased condition continued down to the time of the death of said deceased.

State v Flory, 203-918; 210 NW 961

Physical condition of defendant. In a murder prosecution, testimony that the defendant was not in good shape and was flighty, nervous, and weak at the time of an affray with the deceased should have been admitted.

State v Coleman, 226-968; 285 NW 269

Instructions—good reputation. The fact that an accused in a homicide case has the reputation of being a quiet, peaceable, law-abiding, and moral citizen, is a defensive circumstance bearing on the likelihood of such a person committing such a crime, but it is pre-eminently the right and duty of the jury to determine, in view of all the circumstances, what weight they will give to such circumstance.

State v Johnson, 215-483; 245 NW 728

Bad character or reputation—res gestae. In a homicide prosecution under a self-defense plea, the bad character or reputation of deceased may be proved as part of the res gestae.

State v Rhone, 223-1221; 275 NW 109

Bad character or reputation—when provable—manner. Under a self-defense plea in a homicide prosecution, bad character or reputation of a deceased may be proved by (1) defendant's personal knowledge of deceased's actual character, (2) information communicated to defendant, (3) defendant's actual knowledge of deceased's general reputation, and (4) fact of bad reputation plus long acquaintance between defendant and deceased, or residence in same community, as presumption of knowledge by defendant.

State v Rhone, 223-1221; 275 NW 109

Weight of reputation evidence. An instruction in a criminal trial with reference to the weight and effect of evidence of good reputation of the defendants was not reversible error when the defendants led the way in offering evidence of reputation rather than character.

State v Coleman, 226-968; 285 NW 269

Character and habits. In prosecution for murder, an objection was properly sustained to a question regarding deceased's conduct when deceased was requested to assist in repairing a road—the purpose of the question being to show that deceased had a violent disposition—since the question called for specific acts of deceased at a time remote from the date of crime, when it is not shown that the conduct referred to was known to defendant.

State v Norton, 227-13; 286 NW 476

Self-defense — character of accused. Not even a defendant in a charge of homicide is a competent witness to testify to the reputation of the deceased as to peaceableness or quarrelsomeness when he—the defendant—fails to show his qualification so to testify.

State v Reynolds, 201-10; 206 NW 635

Self-defense — uncommunicated threats by deceased. On the trial of a charge of murder, evidence that the deceased, some three months prior to the fatal encounter, proposed to a party that they rob the defendant, which proposal was never communicated to the defendant, is inadmissible on the question as to who was the aggressor in said encounter.

State v Matheson, 220-132; 261 NW 787

Defendant's oral admission that he knew deceased. In a murder prosecution, evidence of a conversation with the defendant while he was being taken to jail was admissible to show that the defendant recognized and was acquainted with the deceased, and the refusal to allow cross-examination on other parts of the conversation was not reversible error.

State v Coleman, 226-968; 285 NW 269

Admissions by accused. In prosecution for murder, defendant's voluntary written statement made by him which does not acknowledge guilt of crime charged, but which contains a statement of facts and circumstances from which guilt might be inferred, constitutes substantive evidence of facts stated, and may be admissible as an admission in support of the charge.

State v Norton, 227-13; 286 NW 476

Admissions and confessions. In prosecution for murder, defendant's voluntary written

statement, admitted in evidence and referred to as confession, which in fact did not acknowledge crime charged, merely containing a statement of facts and circumstances, an instruction that statement is not a confession, but an admission of the truth of the matters therein contained, is proper and not reversible error.

State v Norton, 227-13; 286 NW 476

Dying declarations — issue of competency. The time elapsing between the making of alleged dying declarations and the death of the declarant, may be very material on the issue whether the declarant was in extremis and had no hope of recovery at the time the declarations were made, and prejudicial error results from so instructing the jury as to deprive it of the right to consider said lapse of time on such issue.

State v Sweeney, 203-1305; 214 NW 735

Irrelevant and prejudicial matter. In a prosecution for murder by means of an abortion, the state, after the admission on motion of the accused of a letter from the party committing the abortion, should not be permitted to show that on the occasion of the writing of the letter the writer thereof had registered at the hotel under an assumed name.

State v Sweeney, 203-1305; 214 NW 735

Immaterial inquiry—poison content. Uncontradicted testimony as to the amount of poison contained in the particular embalming fluid injected into a body renders immaterial any inquiry into the amount of poison contained in other such fluids of the same manufacture.

State v Flory, 203-918; 210 NW 961

Insanity—irrelevant and immaterial evidence. On the issue of insanity in the trial of a criminal case, proof of a mental condition of the defendant which was neither progressive nor continuous is properly stricken from the record when there is no accompanying evidence that the defendant was in some degree subject to the influence of such condition at the time the crime was committed.

State v Brewer, 218-1287; 254 NW 834

Harmless error—repetition of testimony. On a trial for murder, the reception in evidence of a statement signed by defendant, and explanatory of the shooting in question, is quite unobjectionable and harmless when the statement is but a repetition of the testimony of the defendant on the trial.

State v Harness, 214-160; 241 NW 645

Curing error by striking incompetent testimony. Error, if any, in receiving in evidence a statement (part of a purported dying declaration) is cured by immediately striking the statement from the record with admonition to the jury to disregard it; especially when substantially the same statement is properly in the record as part of the res gestae.

State v Woodmansee, 212-596; 233 NW 725

Circumstantial evidence. Criminal homicide may be proved by circumstantial evidence. Evidence held to show that death was the result of criminal violence, rather than of fire accidentally communicated to the clothing of deceased.

State v Solomon, 203-954; 210 NW 448

Presumption of malice—intent. Principle reaffirmed that the use of a deadly weapon in a deadly manner generates a presumption of malice, and, if death results, justifies the inference of intent to kill.

Klinkel v Saddler, 211-368; 233 NW 538

Included offenses—absolutely discredited testimony. In a prosecution for murder by means of poison, the court is not required to submit assault with intent to kill or to inflict great bodily injury because of the presence in the record of evidence that the same poison was contained in the embalming fluid injected into the body of the deceased, and of evidence in the form of an official death certificate which gives the cause of death as disease, when the probative force of such evidence on the issue in question is wholly destroyed by unquestioned testimony that the poison found in the body, in addition to the quantity traceable to the embalming fluid, was over seven times sufficient to cause death, and by equally unquestioned testimony that the official certificate was incorrect in assigning disease as the cause of death.

State v Flory, 203-918; 210 NW 961

Other offenses shown on cross-examination. A defendant in a charge of first degree murder who testifies that there was no cooperation between him and a co-defendant, and that he did not intend to kill the deceased and did not know that his co-defendant intended to kill deceased, may be cross-examined as to the cooperation existing between himself and the co-defendant, even tho such examination reveals the commission of a robbery by said parties shortly prior to the homicide in question.

State v Griffin, 218-1301; 254 NW 841

Manner of inflicting wound. Instruction relative to the manner in which a wound was inflicted reviewed and held applicable to the record testimony.

State v Van Doran, 208-863; 226 NW 19

Hands and fists as deadly weapons. Since malice and criminal intent may be inferred from the intentional use of a deadly weapon in a deadly manner without legal justification, and premeditation need not exist for any particular length of time before the killing,

IV EVIDENCE—concluded
(a) IN GENERAL—concluded

and when hands and fists violently used to strangle and beat are dangerous weapons, there was sufficient evidence of premeditation to submit the question of first degree murder to the jury.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Murder. Evidence held ample to support a verdict of murder in the first degree.

State v Gaskill, 200-644; 204 NW 213

First degree—sufficiency. Evidence reviewed and held to justify the submission to the jury of the offense of first degree murder.

State v Matheson, 220-132; 261 NW 767

Jail delivery—cause of detention. On a prosecution for murder resulting from the attempt by prisoners in jail to escape, the state is privileged to show the reason for the defendant's detention in the jail.

State v Carlson, 203-90; 212 NW 312

Attempted suicide. The act of an accused in attempting to commit suicide after his arrest and incarceration for murder and after he has knowledge of the charge placed against him, constitutes a circumstance which is indicative of guilt, the force and effect of which the jury must determine.

State v Bittner, 209-109; 227 NW 601

Aiding and abetting. Evidence held ample to support a finding of aiding and abetting a homicide.

State v Griffin, 218-1301; 254 NW 841

Accessory—fatally incompetent evidence. The theory of the state that its sole witness to a felonious homicide (tho confessedly a participant in the transaction which led to the death of deceased) was not in fact an accomplice, because said witness acted under duress of and in fear of the defendant who was on trial, may not be supported by testimony that said defendant made a felonious assault on said witness some four months after the commission of said homicide.

State v Clay, 220-1191; 264 NW 77

(b) THREATS

Quarrelsome nature of deceased—right to show. Where deceased, tho forbidden, entered upon defendant's land, armed with deadly weapons and prior to the fatal shooting advanced upon the retreating defendant threatening to strike him with said weapons, the defendant in a prosecution for homicide under a plea of self-defense may show the rough, bullying, threatening nature and violent, dangerous character or reputation of the deceased prior to and up to the time of the killing.

State v Rhone, 223-1221; 275 NW 109

(c) INTOXICATION

Intoxication. The defense of drunkenness is available to an accused only when the degree of intoxication is so great as to deprive him of the power to form a specific intent.

State v Johnson, 211-874; 234 NW 263

Defenses—intoxication—burden of proof—instruction. While not interposed as an affirmative defense, evidence reviewed and held insufficient to prove that defendant was so intoxicated at the time of the commission of the homicide that he was unable to form criminal intent and instruction thereon held proper.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Intoxication of defendant. Evidence that the defendant had been drinking shortly before events occurred upon which a charge of murder was based against him was admissible.

State v Coleman, 226-968; 285 NW 269

Immaterial evidence — whether defendant drinks. In a murder prosecution, testimony by a witness that if he wanted a drink he took it was properly stricken as immaterial.

State v Coleman, 226-968; 285 NW 269

Defendants' previous drunken brawl. In a trial for murder, evidence that the defendants had been engaged in a drunken brawl about three weeks before the homicide should have been stricken on motion, and the error in refusing the motion was not cured by an instruction.

State v Coleman, 226-968; 285 NW 269

12911 First degree murder.

ANALYSIS

Evidence. See under §12910 (IV)
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I BY MEANS OF POISON

Murder by poison. The legislature may constitutionally declare that murder by poison shall constitute murder in the first degree.

State v Flory, 203-918; 210 NW 961

Remote ill health of deceased. On a prosecution for murder by poison, the exclusion of evidence tending to show the diseased condi-

tion of the deceased five and more years prior to the alleged homicide is not erroneous, no offer being made to show that such diseased condition continued down to the time of the death of said deceased.

State v Flory, 203-918; 210 NW 961

Included offenses. Principle reaffirmed that in a prosecution for murder by poison neither second degree murder nor manslaughter need be submitted.

State v Flory, 203-918; 210 NW 961

Included offenses—absolutely discredited testimony. In a prosecution for murder by means of poison, the court is not required to submit assault with intent to kill or to inflict great bodily injury because of the presence in the record of evidence that the same poison was contained in the embalming fluid injected into the body of the deceased, and of evidence in the form of an official death certificate which gives the cause of death as disease, when the probative force of such evidence on the issue in question is wholly destroyed by unquestioned testimony that the poison found in the body, in addition to the quantity traceable to the embalming fluid, was over seven times sufficient to cause death, and by equally unquestioned testimony that the official certificate was incorrect in assigning disease as the cause of death.

State v Flory, 203-918; 210 NW 961

Accessory before fact—basis for instruction. On a charge of murder by means of poison, evidence that one defendant manually procured the poison, and that he was aided and abetted therein by another defendant, furnishes adequate basis for an instruction relative to the full responsibility of the latter as an accessory before the fact.

State v Miner, 213-193; 238 NW 794

Murder by poison—plea of guilty. The entry of a plea of guilty to a charge of murder, alleged to have been perpetrated by means of poison, constitutes a plea of guilty to murder in the first degree and, therefore, no issue of degree is left for determination by the court. But, were it otherwise, there is no requirement, in such a case, that the court's findings be entered of record.

State v Harper, 220-515; 258 NW 886

II LYING IN WAIT

No annotations in this volume

III WILLFULNESS, DELIBERATION, AND PREMEDITATION

Premeditation and deliberation. Premeditation and deliberation need not exist for any particular length of time before the killing, and may be proved by circumstantial evidence.

State v Kneeskern, 203-929; 210 NW 465
State v Griffin, 218-1301; 254 NW 841

Evidence — sufficiency. Evidence reviewed under a first degree murder charge and held ample to support a finding of deliberation and premeditation.

State v Mitchem, 217-152; 251 NW 46
State v Brewer, 218-1287; 254 NW 834
State v Griffin, 218-1301; 254 NW 841

Information. Information charging that defendant murdered his wife by depositing dynamite or other explosive in a shotgun and inducing her to fire it is not demurrable as not charging defendant with first degree murder under the general statute, the demurrer alleging that if any crime was charged it was under a specific statute providing murder for causing death by high explosives.

State v Rhodes, 227-332; 282 NW 540; 288 NW 98

IV PERPETRATION OR ATTEMPT OF CERTAIN FELONIES

Commission of "burglary". The statute which declares murder to be in the first degree when committed in the perpetration or attempt to perpetrate a "burglary" refers solely to the burglary of a dwelling house (§12994, C., '24).

State v Pinkerton, 201-940; 208 NW 351

Jurisdiction to pass sentence. A trial information which charges three defendants jointly with making an assault with a deadly weapon while jointly attempting to commit a robbery, and that one of them fired the fatal shot with the specific intent to kill "of their malice aforethought", is not so fatally defective as to deprive the court, on a plea of guilty, of jurisdiction to pass sentence on all the defendants.

McBain v Hollowell, 202-391; 210 NW 461

Evidence—sufficiency. Evidence relative to a "hijacking" transaction reviewed and held to present a jury question as to every element of first degree murder.

State v Troy, 206-859; 220 NW 95

V TEST AS TO DEGREE

Use of deadly weapon. A specific intent to kill may justifiably be drawn from the deliberate use of a deadly weapon in a deadly manner.

State v Pinkerton, 201-940; 208 NW 351

First degree — evidence — sufficiency. Evidence reviewed and held to justify the submission to the jury of the offense of first degree murder.

State v Harness, 214-160; 241 NW 645
State v Matheson, 220-132; 261 NW 787

Presumption (?) or assumption (?) of malice. The court may, under applicable evidence, instruct that the jury has a right, in the absence of evidence to the contrary, to presume the existence of malice from the use of a deadly weapon in a deadly manner; and in so instructing it is quite immaterial that the court em-

V TEST AS TO DEGREE—concluded

ploys the term "assume" instead of the term "presume".

State v Berlovich, 220-1288; 263 NW 853

Felonious intent—presumption from use of deadly weapon. A self-confessed murderer, who long before had embarked upon a life of crime and carried a deadly weapon with the fixed purpose always in mind to use this weapon in a deadly manner on every occasion that might arise which threatened to thwart his criminal purposes, may not on a hearing to determine degree of punishment be heard to say that he had formed no felonious intent, when, with such weapon, he killed an officer, knowing said officer was attempting to arrest him for the commission of another crime.

State v Mercer, 223-1134; 274 NW 888

Hands and fists as deadly weapons. Since malice and criminal intent may be inferred from the intentional use of a deadly weapon in a deadly manner without legal justification, and premeditation need not exist for any particular length of time before the killing, and when hands and fists violently used to strangle and beat are dangerous weapons, there was sufficient evidence of premeditation to submit the question of first degree murder to the jury.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Conviction of second degree murder—as acquittal of first degree on retrial. When the jury in a murder trial found guilt in the second degree, on retrial the defendants could not be tried on a charge of first degree murder, but evidence of any other offense of which the defendants might have been guilty could be offered.

State v Coleman, 226-968; 285 NW 269

Jury not to act arbitrarily. An instruction in a murder case that a lower conviction or an acquittal should not rest on the notion that jury could arbitrarily do as it pleased was correct, but not commended, as it might have a coercive effect.

State v Coleman, 226-968; 285 NW 269

VI INDICTMENT

Failure to allege intent. An indictment, under the short form act, for murder in the first degree need not allege a specific intent to kill. It is sufficient if said charge is set forth in the language employed by the statute in defining said crime, to wit: "willfully, deliberately, premeditatedly, and with malice aforethought killed" a named person "by shooting him with a revolver".

State v Harness, 214-160; 241 NW 645

Allegation of intent—sufficiency. An allegation, in an indictment for murder, that the assault was made "with intent to kill" is all-sufficient; likewise instructions which follow such allegation. So held against the contention that the only proper allegation was "with specific intent to kill".

State v Berlovich, 220-1288; 263 NW 853

VII SECOND DEGREE CHARGE

Homicide — included offenses — murder by poison. Principle reaffirmed that in a prosecution for murder by poison neither second degree murder nor manslaughter need be submitted.

State v Flory, 203-918; 210 NW 961

Instructions—degree of murder—reasonable doubt. It was not error to instruct the jury in murder trial that if jury entertained a doubt as to the degree of the offense of which defendant was guilty, that is, of murder in the second degree or manslaughter, it should find him guilty only of the degree about which it entertained no reasonable doubt.

State v Shannon, 214-1093; 243 NW 507

VIII INSTRUCTIONS

Essential elements. Instructions should not lead a jury to understand that (1) premeditation, (2) deliberation, (3) malice aforethought, and (4) intent to kill need not exist prior to the striking of the fatal blow, but may exist at the very time of striking the fatal blow.

State v Sipes, 202-173; 209 NW 458; 47 ALR 407

Inapplicable instruction. In a prosecution for uxoricide, a requested instruction as to the effect of a reconciliation, as bearing on motive, is properly refused when there is no direct evidence of reconciliation and when the difficulties between the parties appear to have continued down to the time of the death of the wife.

State v Flory, 203-918; 210 NW 961

Accident — instructions. Instructions held to present adequately the defendant's theory of accidental killing.

State v Troy, 206-859; 220 NW 95

Dying declarations—instructions. Requested instructions in disparagement of dying declarations are properly refused, the court properly covering the subject by its own instructions.

State v Troy, 206-859; 220 NW 95

Attempt to commit suicide. An attempt to commit suicide is not an unlawful act. It is erroneous, therefore, to instruct that if a person with a deadly weapon attempts to take his own life he is doing an unlawful act, and if, in such attempt, he takes the life of an innocent party he is guilty of murder.

State v Campbell, 217-848; 251 NW 717; 92 ALR 1176

Accessory—aiding and abetting. Instructions relative to an accessory knowingly aiding and abetting another in the commission of a crime, and the nature of such abetting, reviewed and held unobjectionable.

State v Griffin, 218-1301; 254 NW 841

Inconsistent instructions under inconsistent pleas. An accused may not plead inconsistent defenses—i. e., (1) that he fired the fatal shot in self-defense, and (2) that the fatal shot was not fired by him, but by a third party—and then predicate error on the claim that the court, by instructing on both pleas, placed the accused in an inconsistent light.

State v Reynolds, 201-10; 206 NW 635

Correct but inexplicit. Correct but inexplicit instructions are all-sufficient in the absence of a request for elaboration.

State v Griffin, 218-1301; 254 NW 841

Failure to except—effect. Failure to take and preserve exceptions to instructions in criminal cases in the manner and form provided by statute precludes review on appeal, irrespective of §14010, C., '31.

State v Griffin, 218-1301; 254 NW 841

Deceased as peace officer. In a prosecution for murder it was proper to refuse to instruct the jury that the fact that the deceased was a merchant policeman had no bearing on the case.

State v Coleman, 226-968; 285 NW 269

Rights and duties of peace officers. In a murder trial where the defendant was charged with killing a peace officer, it was proper to instruct as to the rights and duties of peace officers and the way testimony on that subject should be considered by the jury.

State v Coleman, 226-968; 285 NW 269

Murder—nonassumption of killing. Instructions to the effect that the use of a rifle in a deadly manner without legal excuse or justification raises a presumption of malice may not be said to assume that the accused used a rifle with which to kill the deceased.

State v Gibson, 204-1306; 214 NW 743

Malice—nonconclusive presumption. Reversible error results from instructing that "malice" is conclusively presumed from a deliberate and intentional killing, when the record reveals a plea of justification and excuse, and supporting testimony relating thereto.

State v Sipes, 202-173; 209 NW 458; 47 ALR 407

Allegation of intent—sufficiency. An allegation, in an indictment for murder, that the assault was made "with intent to kill" is all-sufficient; likewise instructions which follow such allegation. So held against the contention that the only proper allegation was "with specific intent to kill".

State v Berlovich, 220-1288; 263 NW 853

Proof of intent. An instruction informing the jury how intent may be proved or arrived at was proper in a murder prosecution.

State v Coleman, 226-968; 285 NW 269

Instructions — intent — self-defense. In a prosecution for murder, an instruction on intent held not objectionable on omitting reference to defense of self-defense.

State v Norton, 227-13; 286 NW 476

Assuming guilt—nonprejudicial as entirety. An instruction defining the word "premeditated" and stating the defendant "considered the killing" and "killed him in pursuance of this specific intent", when read with the other instructions is not prejudicial as assuming the defendant committed the crime.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Hands and fists as deadly weapons. Since malice and criminal intent may be inferred from the intentional use of a deadly weapon in a deadly manner without legal justification, and premeditation need not exist for any particular length of time before the killing, and when hands and fists violently used to strangle and beat are dangerous weapons, there was sufficient evidence of premeditation to submit the question of first degree murder to the jury.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Intent inferable from use of weapon. An instruction under a charge of first degree murder, that, "if a person makes a wrongful assault upon another with a deadly weapon, and death ensues from the injury inflicted, the inference is warranted that he intended to commit murder in the absence of evidence that he intended a lesser injury," is correct, the elements of deliberation and premeditation being properly covered in other instructions.

State v Brewer, 218-1287; 254 NW 834

Limiting impeaching evidence. The failure of the court on its own motion in its instructions to specifically limit impeaching testimony to that particular purpose is not erroneous when the testimony in question is of such a nature that it could not be considered for any other purpose.

State v Brewer, 218-1287; 254 NW 834

Evidence—disposition of accused. Instructions relative to the consideration to be given, in a murder charge, to defendant's former disposition as a quiet and peaceable citizen, reviewed and held quite unobjectionable.

State v Harness, 214-160; 241 NW 645

VIII INSTRUCTIONS—concluded

Self-defense. Instructions in a murder case relative to (1) the right of a person to repel an assault upon another and (2) the nonright of a person to plead self-defense when he is the aggressor, reviewed and held correct, and that the accused waived his right to more explicit instructions by not asking therefor.

State v Matheson, 220-132; 261 NW 787

Self-defense. An instruction by the court on its own motion in a murder trial, giving the defendants all they were entitled to on the question of self-defense, was sufficient.

State v Coleman, 226-968; 285 NW 269

Deadly weapon. In prosecution for murder where defendant pleads self-defense in firing five shots from pistol, all of which entered deceased's body, any two of which may have caused death, no error is committed in refusing requested instruction, "defendant is not guilty if the fatal shot was fired while acting in self-defense, altho the defendant continued firing", where no evidence is submitted to show which shot caused death, and where the jury is properly instructed on self-defense, on question whether defendant was justified in firing all five shots which defendant testifies were " 'fired about all at once.' "

State v Norton, 227-13; 286 NW 476

Reasonable doubt. On a prosecution for murder by poison, the jury need not be told that they must, before they can convict, find beyond a reasonable doubt that the accused bought the poison at the time and place claimed by the state, the record revealing other testimony tending to show the administration of the poison by the accused.

State v Flory, 203-918; 210 NW 961

Degrees of murder. Instructions relative to the distinctions between murder in the first and second degree reviewed, and held not prejudicially erroneous.

State v Johnson, 211-874; 234 NW 263

Instructing jury not to act arbitrarily. An instruction in a murder case that a lower conviction or an acquittal should not rest on the notion that you can do as you please arbitrarily was correct, but not commended, as it might have a coercive effect.

State v Coleman, 226-968; 285 NW 269

12912 Second degree murder.

ANALYSIS

Evidence. See also under §12910 (IV)
Evidence in criminal cases generally. See under §13897 et seq.
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I WHAT CONSTITUTES

Miscarriage with fatal result. Principle reaffirmed that a person who, in an attempt to produce a miscarriage, inflicts injury upon a woman from which she dies, is guilty of murder in the second degree, unless the miscarriage was necessary to save the woman's life.

State v Rowley, 216-140; 248 NW 340

Murder resulting from abortion. The crime of attempting to produce an abortion is not included in an indictment for murder in the second degree, even tho the indictment is based on an attempted abortion resulting in death.

State v Rowley, 216-140; 248 NW 340

Attempt to commit suicide. An attempt to commit suicide is not an unlawful act. It is erroneous, therefore, to instruct that if a person with a deadly weapon attempts to take his own life he is doing an unlawful act, and if, in such attempt, he takes the life of an innocent party he is guilty of murder.

State v Campbell, 217-848; 251 NW 717; 92 ALR 1176

II INDICTMENT

Willfulness. Under an indictment for murder in the second degree resulting from an abortion, it is not necessary to prove that the death was willfully caused.

State v Rowley, 216-140; 248 NW 340

III EVIDENCE

Evidence—sufficiency. Record held to support a conviction of murder in the second degree.

State v Trybom, 200-1248; 206 NW 246
State v Burzette, 208-818; 222 NW 394
State v Rowley, 216-140; 248 NW 340

Deliberation and premeditation. Deliberation and premeditation as an element of murder in the second degree are necessarily provable by the facts and circumstances attending the homicide.

State v Woodmansee, 212-596; 233 NW 725

IV INSTRUCTIONS

Instructions as a whole. Instructions relative to the distinctions between murder in the first and second degree reviewed, and held not prejudicially erroneous.

State v Johnson, 211-874; 234 NW 263

Nonapplicability to evidence. A requested instruction as to the right of one accused of homicide to defend his guest is properly refused when there is no testimony upon which to base the instruction.

State v Reynolds, 201-10; 206 NW 635

Inconsistent instructions under inconsistent pleas. An accused may not plead inconsistent defenses—i. e., (1) that he fired the fatal shot in self-defense, and (2) that the fatal shot was not fired by him, but by a third party—and then predicate error on the claim that the court, by instructing on both pleas, placed the accused in an inconsistent light.

State v Reynolds, 201-10; 206 NW 635

Defining "accident". Ordinarily, there is no occasion for the court in presenting to the jury the issues in homicide to define the term "accident".

State v Friar, 204-414; 214 NW 596

Accidental killing. Instructions must be considered as a whole on the question whether the court properly presented defendant's claim of accidental homicide.

State v Friar, 204-414; 214 NW 596

In re accidental shooting. Requested instructions as to the effect of an accidental shooting are properly refused when otherwise properly covered by the instructions of the court.

State v Johnston, 221-933; 267 NW 698

Manner of inflicting wound. Instruction relative to the manner in which a wound was inflicted reviewed, and held applicable to the record testimony.

State v Van Doran, 208-863; 226 NW 19

Good character and peaceable disposition — burden of proof. The instructions must not place upon the defendant the burden of proof to establish his alleged peaceable disposition and good character.

State v Johnson, 211-874; 234 NW 263

Instructions not necessary without supporting evidence. Where not supported by evidence, it is not reversible error to fail to instruct regarding accused's right to occupy a public highway at the time of shooting, especially without a request therefor.

State v Johnson, 223-962; 274 NW 41

Knowledge of deceased's insanity as bearing on self-defense. Where a jury is instructed to the effect that "belief in" rather than the "fact of" necessity to kill is controlling, it is not reversible error to fail to instruct regarding accused's knowledge of deceased's insanity especially when such an instruction was not requested.

State v Johnson, 223-962; 274 NW 41

12913 Degree determined.

ANALYSIS

I By the Jury
II By the Court

I BY THE JURY

Justifiable submission to jury. Murder in both degrees is properly submitted to the jury on testimony which will justify a finding of malice, deliberation, and premeditation.

State v Reed, 205-858; 216 NW 759

Conviction of second degree murder—as acquittal of first degree on retrial. When the jury in a murder trial found guilt in the second degree, on retrial the defendant could not be tried on a charge of first degree murder, but evidence of any other offense of which the defendants might have been guilty could be offered.

State v Coleman, 226-968; 285 NW 269

Former jeopardy—no retrial for higher degree. On retrial, a defendant in a homicide case, convicted of manslaughter, cannot be tried for a higher degree of the crime than the jury formerly found him guilty.

State v Rhone, 223-1221; 275 NW 109

Instructions. In prosecution for murder an instruction, when read with other instructions, is not erroneous in that it impliedly directs jury to return a verdict of first degree murder, wherein the court states, "The fact that you have the power to return a verdict finding a lesser crime or an acquittal is, alone, no excuse for using such power. A lower conviction or an acquittal should not rest on the notion that you can do as you please, arbitrarily", especially where jury returns verdict of manslaughter.

State v Norton, 227-13; 286 NW 476

II BY THE COURT

Discretion of court. The discretion of the court, on a plea of guilty, to determine the degree or grade of a criminal homicide will not be disturbed except on a clear showing of abuse.

State v Grattan, 222-172; 268 NW 489

Imposition of death penalty—conclusiveness. The imposition by the trial court of a sentence of death on a plea of guilty of murder in the first degree will not be interfered with by the appellate court unless the record reveals a very clear abuse of discretion.

State v Tracy, 219-1412; 261 NW 527

Sentence of death—when final. The imposition of a sentence of death (1) on a plea of guilty of murder in the first degree, and (2) on confirmatory testimony duly taken subsequent to said plea, is a finality in the absence of a showing that the trial court clearly abused its legal discretion to impose either one of two allowable sentences, to wit: death or life imprisonment.

State v Breeding, 220-605; 262 NW 467

Felonious intent—presumption from use of deadly weapon. A self-confessed murderer, who long before had embarked upon a life of crime and carried a deadly weapon with the fixed purpose always in mind to use this weapon in a deadly manner on every occasion that

II BY THE COURT—concluded

might arise which threatened to thwart his criminal purposes, may not on a hearing to determine degree of punishment be heard to say that he had formed no felonious intent, when, with such weapon, he killed an officer, knowing said officer was attempting to arrest him for the commission of another crime.

State v Mercer, 223-1134; 274 NW 888

Plea of guilty—effect. The entry of a plea of guilty to a charge of murder, alleged to have been perpetrated by means of poison, constitutes a plea of guilty to murder in the first degree and, therefore, no issue of degree is left for determination by the court. But, were it otherwise, there is no requirement, in such a case, that the court's findings be entered of record.

State v Harper, 220-515; 258 NW 886

Insanity—ineffective expert testimony. The testimony of an expert to the effect that one who is unquestionably guilty of murder in the first degree is mentally responsible to receive a life sentence, but not mentally responsible to receive a death sentence, carries, at the best, very little element of persuasiveness.

State v Tracy, 219-1412; 261 NW 527

Findings by court—surplusage—effect. A judgment entry of murder in the first degree, on supported findings by the court, after a plea of guilty to an information charging, among other necessary averments, a "willful, deliberate, and premeditated" killing, without any averment that the killing was perpetrated in the commission of a "burglary", will not be disturbed because the findings unnecessarily recite that the parties were, at the time of the killing, burglarizing a mere office building—an offense technically unknown to our law.

State v Pinkerton, 201-940; 208 NW 351

Failure to determine degree of murder. A judgment of life imprisonment for murder rendered by the district court under a proper charge and on a plea of guilty of such crime, is not rendered void by the failure of the court, before imposing such judgment, to call witnesses and determine the degree of said crime, and enter said determination on the record. It follows that such failure, tho it be conceded to be error and reversible on appeal, furnishes no ground for release under a writ of habeas corpus.

McCormick v Hollowell, 215-638; 246 NW 612

12914 Fixing punishment in first degree murder.

Sentence of death—when final. The imposition of a sentence of death (1) on a plea of guilty of murder in the first degree, and (2) on confirmatory testimony duly taken subsequent to said plea, is a finality in the absence of a showing that the trial court clearly abused its legal discretion to impose either one of two allowable sentences, to wit: death or life imprisonment.

State v Breeding, 220-605; 262 NW 467

Procedure. Upon the entry of a plea of guilty of murder alleged to have been perpetrated by means of poison, the court is confronted by the single question whether the penalty should be death or life imprisonment—a question which it can determine in any manner which satisfies its sense of duty. It follows that if it sees fit to hold a hearing, error may not be predicated on the reception of unsworn, or hearsay, or incompetent testimony.

State v Harper, 220-515; 258 NW 886

Judgment entry. The formal entry of a plea of guilty to a charge of murder perpetrated by means of poison, followed by a sentence of life imprisonment, is all-sufficient, tho the better practice would be to first enter a formal judgment of conviction of the crime.

State v Harper, 220-515; 258 NW 886

Sentence—absence of abuse of discretion. Record reviewed and held to present no abuse of discretion on the part of the trial court in passing death sentence on defendant's plea of guilty of murder in first degree.

State v Wheaton, 223-759; 273 NW 851

Duty of jury to determine. The fact that a jury on the first trial fixed life imprisonment, instead of death, as the punishment has no such effect on a second trial as to prevent the court from again submitting to the jury the duty to determine whether the punishment shall be death or life imprisonment.

State v Kneeskern, 203-929; 210 NW 465

12915 Assault with intent to murder.

ANALYSIS

Evidence in criminal cases generally. See under §13897 et seq.
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I IN GENERAL

Shooting as accident—evidence. On the issue whether the shooting and wounding of a prosecuting witness were accidental, the state may show that the accused discharged his gun in different directions, at the time in question, and wounded different persons.

State v Bingaman, 210-160; 230 NW 394

Defense of property—permissible force. A jury must not be peremptorily told, as a matter of law, in a criminal case not involving

a homicide, that the defendant (a private citizen) would not be justified in employing a deadly weapon (1) to make an arrest for a felony committed in his presence and within the curtilage of his home, or (2) to prevent the forcible carrying away of his property by the thieves. The essential issue (which must be explained to the jury) is, not the nature of the weapon employed, but whether the defendant employed only that degree of force to accomplish such purposes which a reasonable person would deem reasonably necessary under the existing circumstances as they in good faith appeared to the defendant.

State v Metcalfe, 203-155; 206 NW 620; 212 NW 382

II INTOXICATION

No annotations in this volume

III INDICTMENT

No annotations in this volume

IV EVIDENCE

Evidence—sufficiency. Record held insufficient to support a verdict of guilty of assault with intent to commit murder.

State v Woolman, 218-967; 255 NW 524

Corpus delicti. Evidence held to present a jury question whether death resulted from an assault.

State v Clay, 222-1142; 271 NW 212

Shooting as accident—evidence. On the issue whether the shooting and wounding of a prosecuting witness was accidental, the state may show that the accused at the time in question discharged his gun in different directions and wounded different persons.

State v Bingaman, 210-160; 230 NW 394

V INSTRUCTIONS

Instructions. Instructions reviewed and held adequately to present all the elements of assault with intent to murder and included offenses.

State v Messer, 213-1264; 238 NW 462

VI SENTENCE

Final commitment—excessive sentence under indeterminate sentence law. A sentence under the indeterminate sentence law cannot be deemed excessive.

State v Bingaman, 210-160; 230 NW 394

12919 Manslaughter.

ANALYSIS

Assault with intent to commit manslaughter. See under §12933, Vol I
Evidence in criminal cases generally. See under §13897 et seq.
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I IN GENERAL

Nonapplicable statute. Section 5026-b1, C., '31 [§5037.10, C., '39], fixes civil liability in the operation of automobiles and has nothing to do with automobile operations resulting in manslaughter.

State v Richardson, 216-809; 249 NW 211

Voluntary intoxication. It is not the law that a defendant on trial for murder in the second degree must be acquitted of both murder in the second degree and manslaughter if at the time in question he was so intoxicated that he could not distinguish between right and wrong or know what he was doing.

State v Johnson, 215-483; 245 NW 728

Former jeopardy—no retrial for higher degree. On retrial, a defendant in a homicide case, convicted of manslaughter, cannot be tried for a higher degree of the crime than the jury formerly found him guilty.

State v Rhone, 223-1221; 275 NW 109

II VOLUNTARY MANSLAUGHTER

Homicide—trial—manslaughter—instruction—sufficiency. In prosecution for murder, the court's instruction, wherein manslaughter is defined as the unlawful killing of a human being without malice, expressed or implied, and without deliberation, as "upon a sudden quarrel or upon sudden adequate uncontrollable provocation", is not subject to objection that quoted words will tend to lead jury to believe that involved case is in fact manslaughter.

State v Norton, 227-13; 286 NW 476

III INVOLUNTARY MANSLAUGHTER

(a) WHAT CONSTITUTES

Recklessness definition — nonapplicability. The definition of "recklessness" as applied to civil cases under the motor vehicle guest statute [§5037.10, C., '39] has no application in a prosecution for manslaughter arising from an automobile accident.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Involuntary manslaughter—negligent exposure of poisoned beverage. The act of a person in so negligently exposing a beverage which contains a narcotic in a deadly quantity as to be consumed by another may constitute involuntary manslaughter, if the death of a human being results and the possession or use of such narcotic by the accused is unlawful. Evidence held insufficient to show that the accused placed the poison in the beverage in question or knew of its presence therein.

State v Korth, 204-1360; 217 NW 236

III INVOLUNTARY MANSLAUGHTER—concluded

(a) WHAT CONSTITUTES—concluded

Requisites — instructions. A manslaughter case was properly submitted to the jury by instructions defining involuntary manslaughter and requiring that, in order to convict the defendant, the state has the burden of proving beyond a reasonable doubt that the defendant committed one or more of certain unlawful acts in such a manner as to show wanton and reckless disregard and indifference to the safety of others who might reasonably be expected to be injured thereby, and that death was the natural and proximate result thereof.

State v Graff, 228- ; 282 NW 745; 290 NW 97

(b) NEGLIGENCE

Manslaughter by negligent act. The unintentional killing, by one act of negligence, of two or more persons cannot constitute more than one manslaughter. It follows that an acquittal under an indictment charging manslaughter in the killing of one deceased is a bar to a further prosecution for manslaughter for the killing of another deceased.

State v Wheelock, 216-1428; 250 NW 617

Instruction—contributory negligence of deceased. An instruction in a manslaughter prosecution that contributory negligence of deceased would not relieve the defendant of criminal responsibility if the death were caused by the defendant doing unlawful acts in a wanton and reckless disregard for the safety of others who might be expected to be injured thereby was sufficient to meet an objection that the jury was not sufficiently advised that, if the proximate cause of the death was the negligence of the deceased, the defendant was not guilty.

State v Graff, 228- ; 282 NW 745; 290 NW 97

IV INDICTMENT

Short form. An indictment for manslaughter in the language authorized by the short form act is sufficient against a demurrer which simply asserts the general and all-inclusive claim that the indictment "does not conform to the laws of the state".

State v Long, 215-494; 245 NW 726

Manslaughter by negligence. An indictment for manslaughter by negligence must specifically set out the facts constituting the negligence.

State v Sexsmith, 200-1244; 206 NW 100
State v Korth, 204-1360; 217 NW 236

Defects rendered immaterial by verdict. Defects in an indictment for murder become immaterial when manslaughter is properly charged and the accused is convicted of the latter offense.

State v Harness, 214-160; 241 NW 645

V EVIDENCE

Reckless driving — evidence — sufficiency. Testimony held to generate a jury question on the issue of manslaughter arising from reckless driving.

State v Thomlinson, 209-555; 228 NW 80
State v Richardson, 216-809; 249 NW 211

Automobile accident—criminal negligence—directed verdict. Conflicting evidence that witnesses had smelled liquor on the breath of the defendant who was charged with manslaughter as a result of an automobile collision, without evidence as to how the defendant was driving or who was at fault in the collision, was not sufficient to support a finding of guilt under instructions defining criminal negligence and intoxication and stating that if one becomes voluntarily under the influence of liquor so that he looses his self-restraint and becomes reckless and indifferent to the consequences of his act, this would be criminal negligence, making him liable for the death of another person. Under such evidence, the defendant was entitled to a directed verdict.

State v Weltha, 228- ; 292 NW 148

Use of intoxicants. Evidence that the defendant in a manslaughter case might have been to some extent under the influence of intoxicating liquor at the time of a fatal automobile accident warranted the court in giving a requested instruction that there was no evidence that the defendant was intoxicated, and in adding that the use of intoxicating liquor by the defendant might be considered in determining whether or not he had acted with reckless disregard for the safety of others.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Opinion evidence—speed of automobile. A witness who has operated an automobile for several years and whose business necessitates extensive travel by him over the country, mostly by automobile, is competent to give an opinion as to the speed at which an automobile was being operated on a certain occasion.

State v Thomlinson, 209-555; 228 NW 80

Speed at nonremote place. In a prosecution for manslaughter resulting from the reckless speed of an automobile, the state may show, by a duly qualified witness, the speed at which the automobile was being operated at a point 450 feet from the place where the deceased was hit by the automobile.

State v Thomlinson, 209-555; 228 NW 80
Waldman v Motor Co., 214-1139; 243 NW 555

Desire of defendant to kill self—inference of guilt. The jury in a manslaughter case arising from an automobile accident may consider evidence that, while standing by the body after the tragedy, the defendant asked a bystander

if he had a gun, saying, "I would like to finish everything right now".

State v Graff, 228- ; 282 NW 745; 290 NW 97

Marriage as inference of suppressing testimony. It is reversible error in a manslaughter case for the state to call accused's wife as a witness and, in the presence of the jury after discovering her relationship, to elicit testimony over accused's objection thereby creating the prejudicial inference that accused's marriage was purposefully to suppress testimony.

State v Chismore, 223-957; 274 NW 3

Quarrelsome nature of deceased—right to show. Where deceased, tho forbidden, entered upon defendant's land, armed with deadly weapons and prior to the fatal shooting advanced upon the retreating defendant threatening to strike him with said weapons, the defendant in a prosecution for homicide under a plea of self-defense may show the rough, bullying, threatening nature and violent dangerous character or reputation of the deceased prior to and up to the time of the killing.

State v Rhone, 223-1221; 275 NW 109

Blood test—authority to take. When a coroner from another county, without legal warrant and without express or implied assent, acted as a volunteer and went into an operating room and took from an unconscious patient a blood sample to be used in a possible future criminal prosecution, the court was in error in a later manslaughter prosecution against the patient, in receiving in evidence, over timely objections by the defendant, the blood sample and the testimony of experts based thereon.

State v Weltha, 228- ; 292 NW 148

VI INSTRUCTIONS

Sufficiency. In prosecution for murder, the court's instruction, wherein manslaughter is defined as the unlawful killing of a human being without malice, expressed or implied, and without deliberation, as "upon a sudden quarrel or upon sudden adequate uncontrollable provocation", is not subject to objection that quoted words will tend to lead jury to believe that involved case is in fact manslaughter.

State v Norton, 227-13; 286 NW 476

Involuntary manslaughter — requisites. A manslaughter case was properly submitted to the jury by instructions defining involuntary manslaughter and requiring that, in order to convict the defendant, the state has the burden of proving beyond a reasonable doubt that the defendant committed one or more of certain unlawful acts in such a manner as to show wanton and reckless disregard and indifference to the safety of others who might reasonably be expected to be injured thereby, and that death was the natural and proximate result thereof.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Harmless error. Error in instructions relative to manslaughter is inconsequential when the jury convicts the accused of first degree murder.

State v Troy, 206-859; 220 NW 95

Disposition of accused — instructions. Instructions relative to the consideration to be given, in a murder charge, to defendant's former disposition as a quiet and peaceable citizen, reviewed and held quite unobjectionable.

State v Harness, 214-160; 241 NW 645

Wanton and reckless conduct. Instructions to the effect that, in order to constitute manslaughter, the operation of an automobile must be in such a wanton and reckless manner as to show utter disregard for the "safety" of others, are not erroneous because the court did not employ the phrase "safety and lives of others".

State v Richardson, 216-809; 249 NW 211

Unavoidable accident — failure to submit issue. Instructions, under a charge of manslaughter, which distinctly place on the state the burden to show beyond a reasonable doubt that the defendant was operating his automobile in a careless, reckless, and negligent manner in willful or wanton disregard of the safety of others, clearly protect the defendant from a conviction if the death was the result of unavoidable accident.

State v Richardson, 216-809; 249 NW 211

Intoxication. Refusal of an instruction to the effect that intoxication alone would not justify a conviction for manslaughter, results in no error when the court otherwise instructed that intoxication was a circumstance which the jury might consider along with all other proven facts.

State v Richardson, 216-809; 249 NW 211

Automobile accident — criminal negligence. Conflicting evidence that witnesses had smelled liquor on the breath of the defendant who was charged with manslaughter as a result of an automobile collision, without evidence as to how the defendant was driving or who was at fault in the collision, was not sufficient to support a finding of guilt under instructions defining criminal negligence and intoxication and stating that if one becomes voluntarily under the influence of liquor so that he loses his self-restraint and becomes reckless and indifferent to the consequences of his act, this would be criminal negligence, making him liable for the death of another person. Under such evidence, the defendant was entitled to a directed verdict.

State v Weltha, 228- ; 292 NW 148

VI INSTRUCTIONS—concluded

Use of intoxicants. Evidence that the defendant in a manslaughter case might have been to some extent under the influence of intoxicating liquor at the time of a fatal automobile accident warranted the court in giving a requested instruction that there was no evidence that the defendant was intoxicated, and in adding that the use of intoxicating liquor by the defendant might be considered in determining whether or not he had acted in a reckless disregard for the safety of others.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Instructions in re accidental shooting—request. Requested instructions as to the effect of an accidental shooting are properly refused when otherwise properly covered by the instructions of the court.

State v Johnston, 221-933; 267 NW 698

Instructing jury not to act arbitrarily. An instruction in a murder case that a lower conviction or an acquittal should not rest on the notion that jury could arbitrarily do as it pleased was correct, but not commended, as it might have a coercive effect.

State v Coleman, 226-968; 285 NW 269

Contributory negligence of deceased. An instruction in manslaughter prosecution that contributory negligence of deceased would not relieve the defendant of criminal responsibility if the death were caused by the defendant doing unlawful acts in a wanton and reckless disregard for the safety of others who might be expected to be injured thereby was sufficient to meet an objection that the jury was not sufficiently advised that, if the proximate cause of the death was the negligence of the deceased, the defendant was not guilty.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Self-defense. In prosecution for murder, instruction on self-defense that if defendant had reason, as an ordinarily prudent and "courageous" man, to believe that he was in danger of being killed, then defendant will have the right to defend himself as may appear necessary to him as an ordinarily prudent and "courageous" man, the use of the word "courageous" is proper.

State v Norton, 227-13; 286 NW 476

CHAPTER 560

SELF-DEFENSE

12921 Lawful resistance in self-defense.

See annotations under §12922

12922 Cases in which permitted.

ANALYSIS

Evidence in criminal cases generally. See under §13897 et seq.
Force to overcome resistance to arrest. See under §13472, Vol I
Instructions in criminal cases generally. See under §13876

I SELF-DEFENSE

Discussion. See 5 ILB 206—Duty to retreat

(a) IN GENERAL

Admitted aggression—effect. Whether defendant employed excessive force in repelling an assault upon him is the sole question at issue in a civil action for damages when plaintiff admits that he was the aggressor in the affray with defendant. In other words, in such a case neither the issue (1) whether the plaintiff was the aggressor nor (2) whether the defendant had the right of self-defense, should be submitted to the jury.

Booton v Metcalfe, 201-311; 207 NW 386

Excusable or justifiable homicide. If one person kills another in self-defense it is "justifiable" or "excusable homicide."

State v Norton, 227-13; 286 NW 476

Standard of action. An "ordinarily prudent and cautious" man is the standard set by the law as a condition for exercising the right of self-defense, and not an "ordinarily prudent and courageous" man.

State v Sipes, 202-173; 209 NW 458; 47 ALR 407

Self-defense—nature of. Self-defense, unless negatived by the state beyond a reasonable doubt, is a complete defense to a charge of homicide; in other words, self-defense has no bearing whatever on the degrees of homicide.

State v Twine, 211-450; 233 NW 476

Elements of self-defense—directing verdict. In a prosecution for murder under a plea of self-defense, the accused must (1) not be the aggressor, (2) retreat as far as possible, (3) have an actual honest belief in imminent danger, and (4) have reasonable grounds for such belief, in view of which a motion for a directed verdict was properly denied under evidence enabling jury to reject a self-defense plea in arriving at a verdict of manslaughter.

State v Johnson, 223-962; 274 NW 41

Defense of intoxicating liquors. A person may validly resist an attempt to steal from him intoxicating liquors which are unlawfully in his possession, even tho the said liquor has no value in a commercial sense.

State v Shannon, 214-1093; 243 NW 507

(b) SIMPLE ASSAULT

Instructions—undue limitation. Instructions limiting the right of self-defense to one who believes himself in danger of (1) loss of life, or (2) great bodily injury, are erroneous when the offense of assault and battery is submitted as an included offense, and the defendant is convicted thereof.

State v Sanford, 218-951; 256 NW 650

(c) MURDEROUS ASSAULT

1 When Killing Assailant Justified

Forfeiture of right. One who, in the commission of a burglary, is armed with a deadly weapon with the manifest purpose of shooting his way to freedom if apprehended may not claim that he killed the owner of the property in self-defense because the owner resisted the taking of his property with a like deadly weapon, and did not attempt formally to arrest the accused.

State v Burzette, 208-818; 222 NW 394

Apprehension of death or great bodily injury. In prosecution for murder, to justify or excuse the killing of another in self-defense, the defendant must have a reasonable fear or apprehension that he is in danger of being killed or receiving great bodily injury and must have reasonable grounds for such apprehension.

State v Norton, 227-13; 286 NW 476

2 Apparent Danger

Honest belief. The danger necessitating self-defense need not in fact exist if an accused honestly believes he is in peril of great bodily harm.

State v Rhone, 223-1221; 275 NW 109

Reasonable grounds. In prosecution for murder, to justify or excuse the killing of another in self-defense, the defendant must have a reasonable fear or apprehension that he is in danger of being killed or receiving great bodily injury and must have reasonable grounds for such apprehension.

State v Norton, 227-13; 286 NW 476

3 Deadly Weapon

Felonious possession of weapon. A person wrongfully assaulted is not deprived, under proper circumstances, of defending himself with a dangerous weapon which he is unlawfully carrying concealed on his person.

State v Shannon, 214-1093; 243 NW 507

4 Duty to Retreat

Discussion. See 12 ILR 171—Duty to retreat

Non-duty to retreat. One who is subjected to a felonious assault not provoked by him is under no duty to retreat if the assault is committed on him while he is in his home, office, or place of business, or on property lawfully occupied by him.

State v Sipes, 202-173; 209 NW 458; 47 ALR 407

Non-duty to retreat. The duty to retreat as a part of the law of self-defense does not exist when retreat would be dangerous or impossible.

State v Shannon, 214-1093; 243 NW 507

(d) ARREST

Arrest without warrant — validity — jury question. Whether an arrest or attempted arrest by an officer without warrant was valid, may, under applicable evidence, be a question for the jury to decide. So held where the accused claimed the right of self-defense because of the claimed invalidity of the arrest.

State v Fador, 222-134; 268 NW 625

Acting as peace officer or as individual. Under the record in a death action for shooting an alleged assailant, a peace officer under a self-defense plea had no different or greater rights in the exercise of this defense as a peace officer than he had as an individual.

Boyle v Bornholtz, 224-90; 275 NW 479

(e) EVIDENCE

1 In General

Immaterial evidence in re self-defense. Evidence held immaterial to the issue of self-defense.

State v Rourick, 211-447; 233 NW 509

Self-defense—weight and sufficiency. A jury question on the issue of self-defense may exist even tho the accused is the only witness as to what occurred at the time of the fatal encounter.

State v Twine, 211-450; 233 NW 476

I SELF-DEFENSE—continued
(e) EVIDENCE—concluded
1 In General—concluded

Physical prowess of prosecuting witness. It is not error to reject the argumentative testimony of the accused, on the issue of self-defense, as to his view of the physical prowess of the prosecuting witness.

State v Messer, 213-1264; 238 NW 462

2 Disposition of Deceased

Character of accused. Not even a defendant in a charge of homicide is a competent witness to testify to the reputation of the deceased as to peaceableness or quarrelsomeness when he—the defendant—fails to show his qualification to so testify.

State v Reynolds, 201-10; 206 NW 635

Ill feeling and hostility. On the trial of an indictment charging assault to murder wherein there is no issue as to self-defense, and consequently no issue as to which party was the aggressor, evidence tending to show the bad feeling existing between the defendant and the prosecuting witness is inadmissible.

State v Smith, 215-374; 245 NW 309

Bad character or reputation of deceased—res gestae. In a homicide prosecution under a self-defense plea, the bad character or reputation of deceased may be proved as part of the res gestae.

State v Rhone, 223-1221; 275 NW 109

Bad character or reputation of deceased—when provable—manner. Under a self-defense plea in a homicide prosecution, bad character or reputation of a deceased may be proved by (1) defendant's personal knowledge of deceased's actual character, (2) information communicated to defendant, (3) defendant's actual knowledge of deceased's general reputation, and (4) fact of bad reputation plus long acquaintance between defendant and deceased, or residence in same community, as presumption of knowledge by defendant.

State v Rhone, 223-1221; 275 NW 109

Quarrelsome nature of deceased—right to show. Where deceased, tho forbidden, entered upon defendant's land armed with deadly weapons, and prior to the fatal shooting advanced upon the retreating defendant threatening to strike him with said weapons, the defendant in a prosecution for homicide under a plea of self-defense may show the rough, bullying, threatening nature and violent dangerous character or reputation of the deceased prior to and up to the time of the killing.

State v Rhone, 223-1221; 275 NW 109

Character and habits. In prosecution for murder, an objection was properly sustained to a question regarding deceased's conduct when deceased was requested to assist in repairing a road—the purpose of the question being to show that deceased had a violent disposition—since the question called for specific acts of deceased at a time remote from the date of crime, when it is not shown that the conduct referred to was known to defendant.

State v Norton, 227-13; 286 NW 476

3 Physical Weakness of Deceased

Knowledge of deceased's insanity as bearing on self-defense. Where a jury is instructed to the effect that "belief in" rather than the "fact of" necessity to kill is controlling, it is not reversible error to fail to instruct regarding accused's knowledge of deceased's insanity especially when such an instruction was not requested.

State v Johnson, 223-962; 274 NW 41

4 Facts as to Defendant

Accused as only witness. A jury question on the issue of self-defense may exist even tho the accused is the only witness as to what occurred at the time of the fatal encounter.

State v Twine, 211-450; 233 NW 476

5 Threats by Deceased

Uncommunicated threats by deceased. On the trial of a charge of murder, evidence that the deceased, some three months prior to the fatal encounter, proposed to a party that they rob the defendant, which proposal was never communicated to the defendant, is inadmissible on the question as to who was the aggressor in said encounter.

State v Matheson, 220-132; 261 NW 787

6 Burden of Proof

Civil action for damages. A peace officer, in attempting an arrest for a misdemeanor, has no legal right, unless he acts in legal self-defense, to kill the offender. It follows that if he does kill, and is sued for damages consequent on the death, he has the burden to prove self-defense; especially so (1) when death was effected by a deadly weapon used in a deadly manner, (2) when the defendant distinctly pleaded self-defense as a defense, and (3) when plaintiff neither by plea nor proof presented the question of self-defense.

Klinkel v Saddler, 211-368; 233 NW 538

Instructions—self-defense. In a prosecution for murder, use of word "justified" in instruction on self-defense approved.

State v Norton, 227-13; 286 NW 476

(f) INSTRUCTIONS

1 In General

Inconsistent instructions under inconsistent pleas. An accused may not plead inconsistent defenses—i. e., (1) that he fired the fatal shot in self-defense, and (2) that the fatal shot was not fired by him, but by a third party—and then predicate error on the claim that the court, by instructing on both pleas, placed the accused in an inconsistent light.

State v Reynolds, 201-10; 206 NW 635

Justifiable failure to define terms. The terms "assault", "assault and battery", and "trespass", as used in the statement of the law on the subject of justification, need not be specifically defined, especially in the absence of request.

State v Reed, 205-858; 216 NW 759

Self-defense — prejudicial confusion. Definite and pointed instructions in a prosecution for homicide, to the effect that the state must prove beyond a reasonable doubt that the defendant did not act in self-defense, and that no duty to establish self-defense was upon the defendant (given in a case wherein the record facts do not per se negative such defense) are rendered prejudicially confusing and misleading by injecting therein a recital of the essential and necessary elements constituting a good plea of self-defense, and strongly implying that each and every one of such elements must be affirmatively proven by the defendant; especially is this true when such elements are imperfectly expressed.

State v Davis, 209-524; 228 NW 37

Undue limitation. Instructions limiting the right of self-defense to one who believes himself in danger of (1) loss of life, or (2) great bodily injury, are erroneous when the offense of assault and battery is submitted as an included offense, and the defendant is convicted thereof.

State v Sanford, 218-951; 256 NW 650

Instructions in re self-defense. Instructions in a murder case, relative to (1) the right of a person to repel an assault upon another, and (2) the nonright of a person to plead self-defense when he is the aggressor, reviewed and held correct, and that the accused waived his right to more explicit instructions by not asking therefor.

State v Matheson, 220-132; 261 NW 787

Absolute necessity—instructions. In covering the subject of self-defense, the court does not necessarily commit reversible error by employing the term "necessary self-defense", or "absolute necessity for". Instructions reviewed and held, as a whole, to fully protect the accused.

State v Johnston, 221-933; 267 NW 698

Force in repelling assault. A defendant in repelling an assault upon his person has a right to use such force as appeared to him, as a reasonably prudent, courageous, and cautious man, to be necessary under the circumstances, and the trial court's words "reasonably appeared necessary to him as a cautious, courageous man", while inaccurate in an instruction, are not prejudicially erroneous, the trial court having correctly stated the rule in other paragraphs of the instruction of which complaint is made.

Boyle v Bornholtz, 224-90; 275 NW 479

Trial—instructions—right to defend self. When, from the instructions, the jury may easily understand that one who is assailed may defend himself, it is not reversible error to fail to give a separate instruction thereon, especially without a request therefor.

State v Johnson, 223-962; 274 NW 41

Applicability to defense of another. Where an instruction covering self-defense directs the jury to "rules hereafter given you" from which they could understand that defense of one's mother was governed by same rules, it was not reversible error to fail to give separate instructions on the defense of another.

State v Johnson, 223-962; 274 NW 41

Murder—self-defense. An instruction by the court on its own motion in a murder trial, giving the defendants all they were entitled to on the question of self-defense, was sufficient.

State v Coleman, 226-968; 285 NW 269

Instructions — intent — self-defense. In a prosecution for murder, an instruction on intent held not objectionable on omitting reference to defense of self-defense.

State v Norton, 227-13; 286 NW 476

2 Apparent Danger

Elements of self-defense—action for wrongful death. In a death action against a merchant policeman for shooting an alleged robber, the plea of self-defense, being an affirmative one, required defendant to prove (1) that the assailant was attempting to rob him; (2) that he was reasonably apprehensive of peril; (3) that he was acting as a reasonably cautious and courageous man; and (4) that he had reasonable grounds to believe it necessary to use the force he did use, and the court commits no error in so instructing.

Boyle v Bornholtz, 224-90; 275 NW 479

3 Death or Great Harm

Sufficiency. In prosecution for murder, instruction on self-defense that if defendant had reason, as an ordinarily prudent and "courageous" man, to believe that he was in danger of being killed, then defendant will have the right to defend himself as may appear necessary to him as an ordinarily prudent and "courageous" man, the use of the word "courageous" is proper.

State v Norton, 227-13; 286 NW 476

4 Necessity

Permissible degree of force. The degree of force which a defendant may employ in order to prevent injury to himself from an assault by one person is not necessarily the measure of defendant's permissible resistance when, at the same instant of time, he is menacingly threatened by several other persons in his

I SELF-DEFENSE—concluded
(f) INSTRUCTIONS—concluded

immediate presence. This important fact must not be overlooked by the instructions.

Booton v Metcalfe, 201-311; 207 NW 386

5 Deadly Weapon

Sufficiency. In prosecution for murder where defendant pleads self-defense in firing five shots from pistol, all of which entered deceased's body, any two of which may have caused death, no error is committed in refusing requested instruction, "'* * * defendant is not guilty if the fatal shot was fired while acting in self-defense, altho the defendant continued firing * * *'", where no evidence is submitted to show which shot caused death, and where the jury is properly instructed on self-defense, on question whether defendant was justified in firing all five shots which defendant testifies were "'fired about all at once.'"

State v Norton, 227-13; 286 NW 476

6 Retreat

Self-defense in one's home. Instruction relative to the right to exercise self-defense in one's own home without retreating, reviewed and held correct.

State v Harness, 214-160; 241 NW 645

7 Arrest

No annotations in this volume

8 The Aggressor

Provoking encounter. One who provokes an encounter may not plead self-defense in a resulting homicide.

State v Clay, 202-722; 210 NW 904

Civil liability. The aggressor in a physical encounter who is met by allowable self-defense necessarily has no cause of action against the party he assaults.

Lake v Moots, 215-126; 244 NW 693

9 When Instruction Required

Self-defense—absence of evidence. Instructions as to the law of self-defense are properly refused when the record reveals no evidence upon which to base such instructions.

State v Johnson, 211-874; 234 NW 263

10 Burden of Proof

Ignoring issue of self-defense—effect. Instructions are reversibly erroneous when they completely ignore the subject of burden of proof on the clearly presented issue of self-defense.

State v Rourick, 211-447; 233 NW 509

Elements of self-defense—action for wrongful death. In a death action against a merchant policeman for shooting an alleged robber, the plea of self-defense being an affirmative one required defendant to prove (1) that the assailant was attempting to rob him; (2) that he was reasonably apprehensive of peril; (3) that he was acting as a reasonably cautious and courageous man; and (4) that he had reasonable grounds to believe it necessary to use the force he did use, and the court commits no error in so instructing.

Boyle v Bornholtz, 224-90; 275 NW 479

II DEFENSE OF PROPERTY

Defense of property—permissible force. A jury must not be peremptorily told, as a matter of law, in a criminal case, not involving a homicide, that the defendant (a private citizen) would not be justified in employing a deadly weapon (1) to make an arrest for a felony committed in his presence and within the curtilage of his home, or (2) to prevent the forcible carrying away of his property by the thieves. The essential issue (which must be explained to the jury) is, not the nature of the weapon employed, but whether the defendant employed only that degree of force to accomplish such purposes which a reasonable person would deem reasonably necessary under the existing circumstances as they in good faith appeared to the defendant.

State v Metcalfe, 203-155; 212 NW 382

Unintended victim. A defendant who employs a justifiable degree of force to prevent thieves from carrying away his property is not criminally liable if his force, e. g., the discharge of a gun, takes effect on an unintended person.

State v Metcalfe, 203-155; 212 NW 382

12923 Persons aiding another.

Self-defense instructions — applicability to defense of another. Where an instruction covering self-defense directs the jury to "rules hereafter given you" from which they could understand that defense of one's mother was governed by same rules, it was not reversible error to fail to give separate instructions on the defense of another.

State v Johnson, 223-962; 274 NW 41

CHAPTER 503
ASSAULTS

12929 Assault and battery.

ANALYSIS

Evidence in criminal cases generally. See under §13897 et seq.
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I IN GENERAL

Exemplary damages—malice as basis. Exemplary damages are allowable for malicious assault and false imprisonment.

Schultz v Enlow, 201-1083; 205 NW 972

Actions—immaterial evidence. In an action for assault and false imprisonment committed by a mayor and a city marshal, evidence of violations by plaintiff of an ordinance is inadmissible when it appears that, on the occasion in question, no attempt was made to arrest plaintiff for such violations, and when the pleadings are silent as to justification and mitigation.

Schultz v Enlow, 201-1083; 205 NW 972

Rape—conviction of included offense. Under an indictment for rape, the court need not submit the offense of assault with intent to do great bodily injury even tho the record reveals evidence tending to establish said latter offense.

State v Brown, 216-538; 245 NW 306

Rape — included offenses — when submitted. In a rape prosecution included offenses of assault and battery and simple assault should not be submitted to the jury where there is no allegation nor proof that force or threat of force was used, nor any resistance offered.

State v Beltz, 225-155; 279 NW 386

Verdicts—nonexcessiveness—$1,180 for assault and battery—exemplary damages. In an assault and battery case verdict for $1,680, reduced by remittitur to $1,180, held not so excessive as to evince passion and prejudice, when verdict included exemplary damages.

Hauser v Boever, 225-1; 279 NW 137

II ATTEMPT TO COMMIT BATTERY

No annotations in this volume

III PUTTING IN FEAR

No annotations in this volume

IV BATTERY

No annotations in this volume

V DEFENSES

Former jeopardy — conviction for assault and battery—effect on higher offense. A conviction in municipal court for assault and battery constitutes no bar to a subsequent prosecution under an indictment charging assault and battery, with intent to commit great bodily injury, based on the same act.

State v Smith, 217-825; 253 NW 130

Ignoring issue of self-defense—effect. Instructions are reversibly erroneous when they completely ignore the subject of burden of proof on the clearly presented issue of self-defense.

State v Rourick, 211-447; 233 NW 509

VI INFORMATION

No annotations in this volume

VII EVIDENCE

Included offenses—rape—rule for submission. Notwithstanding any prior decisions by this court seemingly to the contrary, an indictment for rape, statutory or otherwise, necessarily includes (1) assault with intent to commit rape, (2) assault and battery, and (3) simple assault. Whether one or more of these necessarily included offenses should be submitted to the jury must be determined by the answer to the query: Suppose the offense in question were the only charge against the accused, does the evidence present a jury question on the issue of guilt? If yea, then submit; if nay, then do not submit.

Contradictory evidence held to show that the act in question was committed by force and against the will of the prosecutrix, and that, therefore, assault and battery should have been submitted to the jury.

State v Hoaglin, 207-744; 223 NW 548

Physical prowess of prosecuting witness. It is not error to reject the argumentative testimony of the accused, on the issue of self-defense, as to his view of the physical prowess of the prosecuting witness.

State v Messer, 213-1264; 238 NW 462

Robbery—included offenses. The court must, on the trial of a charge of robbery alleged to have been committed with force and violence, submit the included offense of assault and battery when the evidence is sufficient to support such verdict.

State v Buchan, 219-106; 257 NW 586

Identity of assailant. As against contention that the party assaulted could not definitely identify defendant as his assailant, evidence

held sufficient to sustain a conviction for assault committed by defendant striking another with his fist.

State v Chappel, 226-1392; 286 NW 432

VIII INSTRUCTIONS

Justifiable failure to define terms. The terms "assault", "assault and battery", and "trespass", as used in the statement of the law on the subject of justification, need not be specifically defined, especially in the absence of request.

State v Reed, 205-858; 216 NW 759

Self-defense—undue limitation. Instructions limiting the right of self-defense to one who believes himself in danger of (1) loss of life, or (2) great bodily injury, are erroneous when the offense of assault and battery is submitted as an included offense, and the defendant is convicted thereof.

State v Sanford, 218-951; 256 NW 650

Civil liability—instructions as whole—self-defense properly submitted. In an assault and battery case an instruction setting out elements of plaintiff's proof without referring to "self-defense" is not erroneous when "self-defense" is sufficiently explained to the jury in other instructions.

Hauser v Boever, 225-1; 279 NW 137

12930 Pointing gun at another.

Assault with weapon. See under §12929

12933 Assault with intent to commit a felony.

Assault with intent to commit rape. See under §12968

Corpus delicti—sufficiency. Evidence held to present a jury question whether death resulted from an assault.

State v Clay, 222-1142; 271 NW 212

Offense classifiable as "rape"—included offenses. The offense of having "unlawful carnal knowledge of an idiot or female naturally of such imbecility of mind or weakness of body as to prevent effectual resistance", is legally classifiable as "statutory rape", tho the statute does not specifically so designate the offense; it follows that the necessarily included offenses of assault with intent to commit rape, and assault and battery, and simple assault must be submitted to the jury if there be supporting testimony.

State v Swolley, 215-623; 244 NW 844

12934 Assault with intent to inflict bodily injury.

ANALYSIS

Evidence in criminal cases generally. See under §13897 et seq.
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I IN GENERAL

Elements. In prosecution for assault with intent to inflict great bodily injury, principles applicable to determination of offense stated: (1) the crime is not susceptible to exact definition; (2) it is not necessary that an injury be inflicted; (3) extent of injury is a factor in determining intent; (4) the foundation of the offense is the intent; (5) intent in most cases must be established circumstantially and by legitimate inferences from the evidence; (6) a person is held to intend the natural consequences of his act; (7) when an act is committed which is unlawful, unless justified, specific intent may be inferred or presumed from the unlawful act.

State v Crandall, 227-311; 288 NW 85

II ASSAULT

Manner of commission. An assault with intent to inflict great bodily injury may be consummated without the use of any weapon or the infliction of any bodily injury.

State v Grimm, 206-1178; 221 NW 804

Elements of assault. In prosecution for assault with intent to inflict great bodily injury principles applicable to determination of offense stated: (1) the crime is not susceptible to exact definition; (2) it is not necessary that an injury be inflicted; (3) extent of injury is a factor in determining intent; (4) the foundation of the offense is the intent; (5) intent in most cases must be established circumstantially and by legitimate inferences from the evidence; (6) a person is held to intend the natural consequences of his act; (7) when an act is committed which is unlawful, unless justified, specific intent may be inferred or presumed from the unlawful act.

State v Crandall, 227-311; 288 NW 85

III INTENT TO INJURE

Former jeopardy—conviction for assault and battery—effect on higher offense. A conviction in municipal court for assault and battery constitutes no bar to a subsequent prosecution under an indictment charging assault and battery, with intent to commit great bodily injury, based on the same act.

State v Smith, 217-825; 253 NW 130

Anticipation of results. Defendant's act, in driving his fist through glass in car door causing a splinter to pierce prosecuting witness' eye so that he lost the sight of it, was an unlawful act for which there was no justification, and intent being inferable from an

unlawful act, defendant was bound to anticipate that such an injury might reasonably be a probable consequence of his act.

State v Crandall, 227-311; 288 NW 85

IV INDICTMENT

Failure to allege facts—waiver. An objection that an indictment is lacking in the specific recitals of fact necessary to constitute the offense of assault with intent to inflict great bodily injury is waived when raised for the first time in a motion in arrest of judgment.

State v Costello, 200-313; 202 NW 212

V EVIDENCE

Alibi—jury question. Evidence held to present a question for the jury as to the identity of defendant as one who committed an assault, notwithstanding evidence tending to establish an alibi.

State v Fador, 222-134; 268 NW 625

VI INSTRUCTIONS

Bodily injury. In prosecution for assault with intent to inflict great bodily injury principles applicable to determination of offense stated: (1) the crime is not susceptible to exact definition; (2) it is not necessary that an injury be inflicted; (3) extent of injury is a factor in determining intent; (4) the foundation of the offense is the intent; (5) intent in most cases must be established circumstantially and by legitimate inferences from the evidence; (6) a person is held to intend the natural consequences of his act; (7) when an act is committed which is unlawful, unless justified, specific intent may be inferred or presumed from the unlawful act.

State v Crandall, 227-311; 288 NW 85

12935 Assault with intent to commit certain crimes.

Included offenses. An indictment for an assault with intent to commit an offense necessarily includes a simple assault, and, depending solely on the wording of the indictment, may include assault and battery.

State v Hoaglin, 207-744; 223 NW 548

CHAPTER 564

WEAPONS, FIREARMS, AND TOY PISTOLS

12936 Carrying concealed weapons.

Atty. Gen. Opinion. See '30 AG Op 309

Not prohibited on own land. By statute, carrying a pistol on one's own land is not prohibited.

State v Rhone, 223-1221; 275 NW 109

Self-defense—felonious possession of weapon. A person wrongfully assaulted is not deprived, under proper circumstances, of defending himself with a dangerous weapon which he is unlawfully carrying concealed on his person.

State v Shannon, 214-1093; 243 NW 507

Passenger carrying pistol in automobile—joint enterprise with driver. One carrying a pistol in a motor vehicle on a common mission with the driver is jointly operating the vehicle and is also an accomplice liable as the principal in violating the statute prohibiting the carrying of such weapon by the operator of a motor vehicle.

State v Thomason, 224-499; 276 NW 619

Operator of motor vehicle—definition not controlling. The definition of an "operator" of a motor vehicle applicable to and contained in the motor vehicle law (§4960-d1, C., '35 [§5000.01, C., '39]) is not controlling in construing a criminal statute found in another, distinct part of the code.

State v Thomason, 224-499; 276 NW 619

Pistols not offered in evidence taken to jury room. In prosecution for carrying concealed weapons, permitting jury to take pistols, not technically offered in evidence, to jury room held not prejudicial where pistols were before jury, frequently referred to in evidence, and sent to jury room with knowledge of defendant's counsel and without his objection.

State v Busing, (NOR); 251 NW 620

12938 Permit to carry concealed weapon.

Territorial validity. A duly-issued permit, issued by the sheriff of one county, to carry a revolver is valid throughout the state.

Fisher v Tullar, 209-35; 227 NW 580

12939 Application.

Tear gas gun—town not liable for negligent use. A city or town is not liable for the negligent acts of its peace officer employee merely because it furnished him with a tear gas gun.

Hagedorn v Schrum, 226-128; 283 NW 876

CHAPTER 564.1

MACHINE GUNS

Atty. Gen. Opinion. See '32 AG Op 43

CHAPTER 565

INJURIES BY EXPLOSIVES

12961 Death caused by high explosives.

Civil liability. He who knowingly uses or handles violent explosives must anticipate and guard against the happening of any and all things which reasonably prudent human foresight might foresee might happen with injurious consequences to another.

Eves v Littig Co., 202-1338; 212 NW 154; 28 NCCA 155

Information. Information charging that defendant murdered his wife by depositing dynamite or other explosive in a shotgun and inducing her to fire it is not demurrable as not charging defendant with first degree murder under the general statute, the demurrer alleging that if any crime was charged it was under a specific statute providing murder for causing death by high explosives.

State v Rhodes, 227-332; 282 NW 540; 288 NW 98

CHAPTER 566

RAPE

12966 Definition—punishment.

Atty. Gen. Opinions. See '32 AG Op 240; '36 AG Op 25

ANALYSIS

Assault with intent to commit rape. See under §12968
Corroboration in rape. See under §13900
Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I RAPE IN GENERAL

Discussion. See 11 ILR 272—New rape statute

Nature and elements — common-law and statutory rape. All violations of this section are legally classifiable as "rape".

State v Hoaglin, 207-744; 223 NW 548

Inflammatory questions and innuendoes. Reversible error results from the act of the county attorney in persistently asking and re-asking questions which bristle with prejudicial innuendoes against the accused, and which call for testimony of a highly inflammatory and incompetent nature; and the sustaining of objections to such questions is not a sufficient antidote for such poison.

State v Neifert, 206-384; 220 NW 32

II AGE OF CONSENT

No annotations in this volume

III INDICTMENT

Included offenses—assault and battery. An indictment which charges that the accused assaulted prosecutrix "with a felonious intent * * * to * * * ravish and carnally know and abuse * * * by force", does not charge the offense of assault and battery. It follows that said latter offense should not be submitted, even tho the evidence would support a finding of such offense.

State v Ellington, 200-636; 204 NW 307

Conviction of included offense—fundamental rule for submission. Principle reaffirmed that no included offense should be submitted on the trial of an indictment or trial information (1) unless the offense is expressly or impliedly charged in the indictment or information, and (2) unless the record reveals evidence tending to establish said offense.

State v Brown, 216-538; 245 NW 306

Indictment and information—time discrepancy immaterial. A rape conviction is valid altho for a date different than the date fixed in the indictment if within the statute of limitations and if no fatal variance occurs between the indictment and the proof.

State v Beltz, 225-155; 279 NW 386

Substantial language charging rape—validity. An indictment charging that defendant

"raped, carnally knew, and abused" a female sufficiently states an offense in terms of substantially the same meaning as the statute, so as to apprise the court and the accused that the offense of rape was intended to be charged.

State v Keturokis, 224-491; 276 NW 600

Amending indictment—validity. In a prosecution for rape, adding the words "a female, by force and against her will" as an amendment to an already valid indictment, which amendment affecting not substance but form only, and being merely surplusage, is not prejudicial and not error.

State v Keturokis, 224-491; 276 NW 600

Legislative definition—use of "rape" in title only. An indictment for rape by reference to the statute is not void on the ground that the statute does not use the word "rape", when the statute is merely a codification of a legislative act which amply indicated in the title that it was intended to define the common-law crime of rape.

State v Keturokis, 224-491; 276 NW 600

IV EVIDENCE

(a) IN GENERAL

Corpus delicti. The fact that the crime of rape has been committed may be established by the testimony of the prosecutrix alone.

State v Mueller, 202-1067; 208 NW 360

Conclusiveness of supported verdict. A conviction of rape on supporting testimony and on ample corroboration is conclusive on the court.

State v Steele, 209-550; 228 NW 75

Issues, proof, and variance—time of offense. The time of the commission of the offense of assault with intent to rape need not be proved in exact accord with the allegation of the indictment.

State v Ellington, 200-636; 204 NW 307

Separate and disconnected offenses. On the trial of an indictment for rape, evidence tending to show separate and distinct assaults to rape, upon females other than prosecutrix, and wholly disconnected with the transaction on trial, are inadmissible.

State v Huntley, 204-981; 216 NW 67

Evidence—sufficiency. Evidence on a prosecution for rape reviewed, and held not to present such showing of malice or desire for revenge or other indicia of falsehood upon the part of the prosecutrix as to justify the conclusion, as a matter of law that her testimony was false.

State v Pritchard, 204-417; 215 NW 256
State v Davenport, 208-831; 224 NW 557

Demonstrative evidence—identification. Exhibit held sufficiently identified, material, and relevant, and properly received in evidence.

State v Brown, 216-538; 245 NW 306

Motive of prosecutrix. Principle recognized that the motive of a witness may be shown as bearing on the question of credibility.

State v Ingram, 219-501; 258 NW 186

Angry feelings of prosecutrix. A prosecutrix in a charge of rape may be permitted to testify to her angry feelings toward the defendant.

State v Ingram, 219-501; 258 NW 186

Several offenses—election at close of direct evidence. In a statutory rape prosecution, where several acts of intercourse are shown, the state need not, before the close of the direct evidence, elect on which act it relies.

State v Beltz, 225-155; 279 NW 386

Other offenses — admissibility. Rule that other crimes may not be shown is not applicable in a statutory rape prosecution to other acts of sexual intercourse between the parties.

State v Beltz, 225-155; 279 NW 386

Ill feeling of third parties. Evidence of the acts of parties who are not witnesses, tending to show hostility against an accused in a prosecution for rape, is not admissible.

State v Speck, 202-732; 210 NW 913

Opinion evidence — impotency. An accused in a prosecution for rape may not establish his impotency by his wife's opinion as to the reason why she had not given birth to more than three children.

State v Steele, 209-550; 228 NW 75

Identification of accused. A prosecutrix in a charge of rape who had not known the accused prior to the commission of the offense, may very properly be permitted to testify that after the accused was arrested she identified him at the police station.

State v Mayer, 204-118; 214 NW 710

Eight-year-old witness. In prosecution for statutory rape where it is shown on preliminary examination of eight-year-old witness that she knew what "telling the truth" meant and knew what a lie was, that it was wrong to tell a lie, and that punishment was the penalty for not telling the truth, it was not error to permit such witness to testify, especially where no objection was made to witness' competency until the conclusion of her testimony, altho she did not understand the meaning of the word "oath", nor definition of word "witness".

State v Diggins, 227-632; 288 NW 640

Eight-year-old witness. In a prosecution for statutory rape where an eight-year-old

IV EVIDENCE—continued
(a) IN GENERAL—concluded

witness testified on direct examination in a clear, frank, direct, and intelligent manner as to what she had seen or heard on the occasion in controversy, a motion to strike such testimony was properly overruled, as the question of the credit and weight to be given her testimony was clearly for the jury. The testimony of a witness must be construed in its entirety.

State v Diggins, 227-632; 288 NW 640

Defendant as witness. In prosecution for statutory rape an instruction to the jury regarding defendant testifying in his own behalf as an interested witness from an interested standpoint, and that the jury should consider his testimony as such, is not objectionable on the ground that it singles out the testimony of the defendant from the testimony of other witnesses in a manner that makes it appear to the jury that his testimony is not worthy of belief, nor on the ground that it invades the province of the jury.

State v Diggins, 227-632; 288 NW 640

Misconduct of counsel—"sexual pervert". A cross-examination of defendant in a prosecution for rape whether he would object to his wife testifying against him, and the act of the county attorney referring to defendant as a "sexual pervert", while improper, does not necessarily constitute reversible error.

State v Ingram, 219-501; 258 NW 186

Divorced wife's testimony as to venereal disease—nonprejudicial. In a rape prosecution, an unsuccessful attempt to introduce objectionable testimony relative to defendant's affliction with venereal disease, during marriage, by asking divorced wife if she had observed his condition relative to venereal disease, and if she had testified in her divorce action that she had received venereal disease from him, held nonprejudicial error.

State v Donovan, (NOR); 263 NW 516

(b) AGAINST HER WILL

Opinion evidence—allowable conclusion. A witness on the trial of a charge of rape may very properly testify that the accused pushed prosecutrix under the fence and that "they scrapped" and "fought back and forth" and "that she tried to get away". Such testimony is not only an allowable conclusion but is also descriptive in character.

State v Mayer, 204-118; 214 NW 710

Resistance. The resistance of a prosecutrix in a charge of rape must be shown to have been to the full extent of her ability under the circumstances.

State v Brewster, 208-122; 222 NW 6
See State v Brown, 216-538; 245 NW 306

Included offenses—when submitted. In a rape prosecution included offenses of assault and battery and simple assault should not be submitted to the jury where there is no allegation nor proof that force or threat of force was used, nor any resistance offered.

State v Beltz, 225-155; 279 NW 386

(c) UNDER AGE OF CONSENT

Minor offenses. In the trial of a prosecution for rape on a child under the age of consent, the offenses of assault and battery and simple assault should not be submitted if the record is such that it would not support a verdict of guilt of such minor offenses had the prosecution charged such minor offenses only.

State v Ingram, 219-501; 258 NW 186

(d) PENETRATION

Ruptured hymen — physician's testimony proper. A physician may properly testify as to the physical condition of a prosecutrix in a charge of rape; that the hymen was ruptured; and that only a strain of some kind would have brought about such rupture.

State v Mayer, 204-118; 214 NW 710

(e) CONDUCT

Admissions—identification of offense. Admissions of guilt by an accused are not rendered inadmissible on the trial of an indictment because made when accused was arrested under an information which misstated the time of the commission of the offense as prior to the time alleged in the indictment, the record demonstrating that but one offense was being prosecuted.

State v Heath, 202-153; 209 NW 279

Flight subsequent to discharge. Evidence of flight and instructions as to the effect thereof may be proper even tho the flight took place after the accused had been once discharged under a prior preliminary information charging the same and identical offense and transaction.

State v Heath, 202-153; 209 NW 279

Seeking opportunity. Evidence, including certain writings of the defendant, and his conduct in general, exhaustively reviewed in a prosecution for rape on a child under 16 years of age, and held to reveal no sufficient corroboration of prosecutrix either on the theory (1) that he had been seeking an opportunity to commit said offense on prosecutrix, or (2) that he was the only person who could have committed the offense; or that a manifestation of guilty conscience furnished such corroboration.

State v Landes, 220-201; 262 NW 105

(f) COMPLAINT

No annotations in this volume

(g) CHARACTER OF PROSECUTRIX

Character of prosecutrix. Proof of particular acts or specific facts is not admissible, in

a prosecution for rape, to show the bad character of prosecutrix.

State v Speck, 202-732; 210 NW 913

Cross-examination—association with other men. Cross-examination in a prosecution for rape held not unduly restricted as to the association of prosecutrix with other men.

State v Steele, 209-550; 228 NW 75

Exclusion of nonexplanatory question—prejudice presumed. The erroneous refusal of the court, in a prosecution for assault to rape, to permit a witness, proffered by the defendant, to answer a question whether the witness knew the general reputation of the prosecutrix as to truth and veracity in the community where she lived, cannot be deemed harmless error on the ground that the question did not reveal whether the witness would answer "yes" or "no", when, in connection with the proffer of the witness, defendant offered to show that said prosecutrix was "wholly unreliable in her word and statements".

State v Teager, 222-391; 269 NW 348

(h) CONCEPTION

No annotations in this volume

(i) EXPERT TESTIMONY

Opinion evidence—recital of fact. A physician may properly testify as to the physical condition of a prosecutrix in a charge of rape; that the hymen was ruptured and that only a strain of some kind would have brought about such rupture.

State v Mayer, 204-118; 214 NW 710

Expert evidence. Expert testimony tending to show the possibility of sexual intercourse with a nine-year-old child may be proper.

State v Ingram, 219-501; 258 NW 186

V INSTRUCTIONS

Included offenses—rule for submission. Notwithstanding any prior decisions of this court seemingly to the contrary, an indictment for rape, statutory or otherwise, necessarily includes:

1. Assault with intent to commit rape, and
2. Assault and battery, and
3. Simple assault.

Whether one or more of these necessarily included offenses should be submitted to the jury must be determined by the answer to the query: Suppose the offense in question was the only charge against the accused, does the evidence present a jury question on the issue of guilt? If yea, then submit; if nay, then do not submit.

State v Hoaglin, 207-744; 223 NW 548
State v Blair, 209-229; 223 NW 554

Conviction of included offense. Under an indictment for rape, the court need not submit the offense of assault with intent to do great bodily injury even tho the record reveals evidence tending to establish said latter offense.

State v Brown, 216-538; 245 NW 306

Included offenses—failure to charge—effect. Failure to charge that a rape was committed with force or against the will of prosecutrix, removes the necessity under any circumstances to instruct as to assault or assault and battery.

State v Tennant, 204-130; 214 NW 708

Included offenses—failure to define offense. The failure to define the included offenses of assault and battery and simple assault, or to set forth the elements of either of said offenses, under an indictment for rape does not constitute prejudicial error when the jury finds the accused guilty of rape.

State v Grimm, 212-1193; 237 NW 451

Other offenses as showing consent. In a prosecution for rape on a child under the age of consent, the court should not instruct that evidence of other offenses between the same parties can be considered on the question of consent on the part of the prosecutrix.

State v Ingram, 219-501; 258 NW 186

Duty to convict of highest offense. An instruction to the effect that the jury should find the defendant guilty of the highest degree of crime included in the indictment, of which the jury finds him guilty beyond a reasonable doubt, reviewed, and held unobjectionable.

State v Ingram, 219-501; 258 NW 186

Estoppel to object. Defendant may not successfully claim that an instruction given at his request unduly magnified the importance of certain evidence.

State v Brown, 216-538; 245 NW 306

Failure to define offense. The failure specifically to define an offense, in the absence of a request, does not constitute error when the elements of the offense are accurately set forth in the instructions.

State v Grimm, 212-1193; 237 NW 451

Fatal assumption of fact. An assumption by the court in its instructions in a criminal case that the prosecutrix and the defendant were together on a certain occasion material to the case, when such association was sharply in issue, constitutes reversible error.

State v Hubbard, 218-239; 250 NW 891

Flight subsequent to discharge. Evidence of flight and instructions as to the effect thereof

V INSTRUCTIONS—concluded

may be proper even tho the flight took place after the accused had been once discharged under a prior preliminary information charging the same and identical offense and transaction.

State v Heath, 202-153; 209 NW 279

Instruction on flight. An instruction that if defendant had reason to believe he would be charged with rape, and that if he fled from state to avoid arrest, his flight could be considered prima facie indicative of guilt, held not error as against objection that by use of words "had reason to believe" jurors were told they might consider flight without finding that defendant had any actual knowledge or suspicion that he would be charged with rape.

State v Donovan, (NOR); 263 NW 516

General in lieu of specific instructions. A general and all-inclusive instruction as to the conduct of a prosecutrix in a charge of rape and the right and duty of the jury to give due consideration thereto as affecting her credibility, may justify the court in refusing requested instructions on specific instances of conduct.

State v Mueller, 202-1067; 208 NW 360

Inferential instruction insufficient. Where defendant was convicted of assault with intent to commit rape, failure to instruct jury as to necessity of corroboration of prosecuting witness' testimony—an essential element of conviction—was prejudicial error, and the jury was not sufficiently instructed as to this necessity by inference from another instruction on corroboration given in connection with the court's statement that crime charged in indictment was rape, which included the lesser offense of assault with intent to commit rape. Nor was the error rendered nonprejudicial by the fact that record contained evidence of corroboration, since it is not the court's function to pass upon weight and sufficiency of corroborating evidence, except to determine whether it is sufficient to go to the jury.

State v Ervin, 227-181; 287 NW 843

Intent—applicable instruction. It is not erroneous to instruct that the jury has the right to infer that the defendant intended to do that which he voluntarily and willfully did, the charge being rape on a female incapable of consent, and there being evidence that the offense was consummated.

State v McIntyre, 203-451; 212 NW 757

Unsupported issue. Requested instructions on a wholly unsupported issue are properly refused.

State v Mueller, 202-1067; 208 NW 360

VI SENTENCE

Discussion. See 10 ILB 140—Indeterminate sentence—rape

Sentence—judicial discretion. Judicial discretion is vested in the court as to the sentence to be imposed on a conviction for rape —an exception to the indeterminate sentence act.

State v Steele, 209-550; 228 NW 75

Excessive sentence. In the absence of extenuating circumstances, the appellate court cannot say that a sentence of 40 years, passed on a supported verdict of guilt in a prosecution for rape, is excessive.

State v Ingram, 219-501; 258 NW 186

Sentence less than maximum—excessiveness —parole board's jurisdiction. Where defendant was sentenced to not more than 15 years for statutory rape, the supreme court would not consider contention that sentence was excessive and should be reduced, since sentence was less than maximum and defendant was subject to jurisdiction of parole board.

State v Banks, 227-1208; 290 NW 534

Statutory rape—sentence—unaffected by lack of chasity. Statutory rape is unaffected by a 14-year-old prosecutrix's lack of chastity and a 10-year sentence imposed upon a 50-year-old defendant is neither excessive nor indicates an abuse of trial court's discretion as justifies interference on appeal.

State v Beltz, 225-155; 279 NW 386

Instructions relative to punishment. It is to be regretted that there are courts which continue to instruct juries as to the punishment provided by law for the commission of an offense.

State v Tennant, 204-130; 214 NW 708

12966.1 Jurisdiction of the board of parole.

Excessiveness of sentence — parole board's jurisdiction. Where defendant was sentenced to not more than 15 years for statutory rape, the supreme court would not consider contention that sentence was excessive and should be reduced, since sentence was less than maximum and defendant was subject to jurisdiction of parole board.

State v Banks, 227-1208; 290 NW 534

12967 Carnal knowledge of imbecile.

ANALYSIS

Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638
Resemblance of child. See under §§12663, 12970, Vol I

I IN GENERAL

Offense classifiable as "rape"—included offenses. The offense of having "unlawful car-

nal knowledge of an idiot or female naturally of such imbecility of mind or weakness of body as to prevent effectual resistance", is legally classifiable as "statutory rape", tho the statute does not specifically so designate the offense; it follows that the necessarily included offenses of assault with intent to commit rape, and assault and battery, and simple assault must be submitted to the jury if there be supporting testimony.

State v Swolley, 215-623; 244 NW 844

II INDICTMENT

Offenses included—submission to jury. An indictment charging rape upon an imbecile female also charges defendant with the included offense of assault with intent to commit rape, assault and battery, and simple assault, and these included offenses should have been submitted to the jury.

State v Swolley, 215-623; 244 NW 844

III EVIDENCE

Burden of proof. In a prosecution for unlawfully having carnal knowledge of an imbecile, the state must establish the imbecility of the prosecutrix beyond all reasonable doubt. Testimony held to present a jury question.

State v Patrick, 201-368; 207 NW 393

12968 Assault with intent to commit rape.

Atty. Gen. Opinion. See '36 AG Op 25

ANALYSIS

Assault with intent to commit a felony. See under §12933
Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I IN GENERAL

Offense classifiable as "rape"—included offenses. The offense of having "unlawful carnal knowledge of an idiot or female naturally of such imbecility of mind or weakness of body as to prevent effectual resistance (§12967, C., '31) is legally classifiable as "statutory rape", tho the statute does not specifically so designate the offense. It follows that the necessarily included offenses of assault with intent to commit rape, and assault and battery, and simple assault must be submitted to the jury if there be supporting testimony.

State v Swolley, 215-623; 244 NW 844

II INDICTMENT

Included offenses. An indictment for an assault with intent to commit an offense necessarily includes a simple assault, and, depending solely on the wording of the indictment, may include assault and battery.

State v Hoaglin, 207-744; 223 NW 548

Included offense. Under an indictment for rape, there may be a conviction for assault with intent to commit rape even tho the only evidence offered by the state is to the effect that a completed rape by actual penetration was accomplished.

State v Blair, 209-229; 223 NW 554

III EVIDENCE

Sufficiency. Evidence held sufficient to sustain a verdict of guilty of assault with intent to rape.

State v Ellington, 200-636; 204 NW 307

Evidence—sufficiency. Evidence of prosecutrix reviewed, and held not ipso facto incredible because of contradictions, inconsistencies, and admissions of unfavorable conduct on her part.

State v Mueller, 202-1067; 208 NW 360

Corroboration — sufficiency. Corroboration sufficient to sustain a verdict of guilty of assault to rape is found in testimony tending strongly to show that the accused was actually observed by witnesses other than prosecutrix in the attempt forcibly to have sexual intercourse with prosecutrix.

State v Mayer, 204-118; 214 NW 710

Corroboration — sufficiency. Corroboration sufficient to sustain a verdict of guilty of assault to rape may be found in testimony wherein defendant tacitly admitted his immoral relation with the prosecutrix and his departure from the state for the purpose of avoiding prosecution.

State v Tennant, 204-130; 214 NW 708

Corroboration — purpose — accused's admissions sufficient. Fact of the commission of a rape or an assault with intent to commit rape may be established by the sole evidence of the prosecutrix, and corroboration is necessary only to connect the accused with the crime, hence accused's voluntary admissions may furnish corroboration.

State v Beltz, 225-155; 279 NW 386

Included offenses—when submitted. In a rape prosecution included offenses of assault and battery and simple assault should not be submitted to the jury where there is no allegation nor proof that force or threat of force was used, nor any resistance offered.

State v Beltz, 225-155; 279 NW 386

IV INSTRUCTIONS

Circumstantial evidence—basis. In a charge of assault with intent to rape, alleged to have been committed in an automobile, evidence that

people saw the car, heard screams, and saw prosecutrix alight from the car in an excited and disheveled condition, furnishes sufficient basis for instructions relative to circumstantial evidence.

State v Mueller, 202-1067; 208 NW 360

Prejudicial recital of punishment. Prejudicial error results from a recital in the instructions of the punishment for rape (imprisonment for five years or for life with opportunity for parole under minimum sentence), and failing to recite the punishment for assault with intent to rape (imprisonment for an indeterminate term not exceeding 20 years with opportunity for parole), the defendant being convicted of the latter offense.

State v Mayer, 204-118; 214 NW 710
State v Tennant, 204-130; 214 NW 708

Instruction as to "intent to have or attempt to have sexual intercourse". Under an indictment charging assault with intent to commit rape, an instruction authorizing the jury to convict if the assault was made "with the intent to have or attempt to have sexual intercourse" with prosecutrix, is fundamentally erroneous because it submits an offense which does not exist.

State v Western, 210-745; 231 NW 657

Failure to define offense—effect. The failure to define the included offenses of assault and battery and simple assault, or to set forth the elements of either of said offenses, under an indictment for rape, does not constitute prejudicial error when the jury finds the accused guilty of rape.

State v Grimm, 212-1193; 237 NW 451

V SENTENCE

Statutory rape — sentence — unaffected by lack of chastity. Statutory rape is unaffected by a 14-year-old prosecutrix's lack of chastity, and a 10-year sentence imposed upon a 50-year-old defendant is neither excessive nor indicates an abuse of trial court's discretion as justifies interference on appeal.

State v Beltz, 225-155; 279 NW 386

CHAPTER 567

FORCIBLE MARRIAGE AND DEFILEMENT

12969 Compelling to marry or be defiled.

Conversations in the presence of prosecutrix. In a civil prosecution for forcible defilement, statements may become material when made in the presence of the injured female, and long after the commission of the alleged offense, and by a member of her family who was instrumental in later initiating the prosecution, to the effect that the accused was a good man, and that a person other than the accused was responsible for the woman's condition.

Wildeboer v Peterson, 201-1202; 203 NW 284

CHAPTER 568

SEDUCTION

12970 Definition—punishment.

ANALYSIS

Civil liability for seduction. See under §10985
Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638

I SEDUCTION IN GENERAL

No annotations in this volume

II SEDUCTIVE ARTS

Non-reliance on artifice. A record in a prosecution for seduction which, in view of the character, conduct, and knowledge of the prosecutrix, fails to show that she relied on the alleged artifice and deception, necessarily shows an unsupported verdict.

State v Moss, 202-164; 209 NW 276

III CHASTE CHARACTER

Indecent language and conduct. The accused under a charge of seduction may, on the issue of chastity, show that prosecutrix was given to the use of indecent language and to the telling of obscene stories.

State v Wilcoxen, 200-1250; 206 NW 260

IV INDICTMENT

No annotations in this volume

V EVIDENCE

Corroboration. See under §13900

Association with other men. In a prosecution for seduction, the accused may, on the issue of chastity and on the issue whether he

and prosecutrix were engaged, show that, during the time of claimed engagement, the prosecutrix was continually keeping company with other men.

State v Wilcoxen, 200-1250; 206 NW 260

Unsupported instructions. An instruction relative to the conditions under which the birth of a child would be corroborative of the prosecutrix under an indictment for seduction is necessarily erroneous when there is no testimony in the record from which the jury could find such conditions.

State v Reynard, 205-220; 217 NW 812

CHAPTER 569

ATTEMPT TO PRODUCE ABORTION

12973 Administration of drugs—use of instruments.

ANALYSIS

I IN GENERAL
II INDICTMENT
III EVIDENCE

Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638

I IN GENERAL

Homicide—optional venues. A prosecution for murder by means of an attempted abortion may be prosecuted in the county wherein the resulting death occurred, even tho the unlawful operation was performed in another county of this state.

State v Sweeney, 203-1305; 214 NW 735

Miscarriage with fatal result. Principle reaffirmed that a person who, in an attempt to produce a miscarriage, inflicts injury upon a woman from which she dies, is guilty of murder in the second degree, unless the miscarriage was necessary to save the woman's life.

State v Rowley, 216-140; 248 NW 340

II INDICTMENT

Use of instruments—sufficiency of allegation. Indictment for murder by means of an attempted abortion reviewed, and held to allege adequately, tho somewhat clumsily, the use by the accused of instruments as a means of effecting such abortion.

State v Sweeney, 203-1305; 214 NW 735

Absence of essential allegations—waiver. Objections that an indictment fails to allege the character of certain instruments or the manner of using them as a means of bringing about an abortion are waived by the failure to demur to the indictment.

State v Sweeney, 203-1305; 214 NW 735

Included offenses. The crime of attempting to produce an abortion is not included in an indictment for murder in the second degree, even tho the indictment is based on an attempted abortion resulting in death.

State v Rowley, 216-140; 248 NW 340

Murder resulting from abortion—willfulness. Under an indictment for murder in the second degree resulting from an abortion, it is not necessary to prove that the death was willfully caused.

State v Rowley, 216-140; 248 NW 340

III EVIDENCE

Opinion of expert. A physician who has professionally attended a woman upon whom an abortion has been attempted, and who later performed an autopsy upon her body, may state whether in his opinion the abortion was necessary to save the life of the woman; otherwise as to a physician who bases his opinion on matters not appearing in the record.

State v Sweeney, 203-1305; 214 NW 735

Irrelevant and prejudicial matter. In a prosecution for murder by means of an abortion, the state, after the admission, on motion of the accused, of a letter from the party committing the abortion, should not be permitted to show that, on the occasion of the writing of the letter, the writer thereof had registered at the hotel under an assumed name.

State v Sweeney, 203-1305; 214 NW 735

Opinion evidence—operation by means of catheter. Whether a catheter could, against the resistance of a woman, be inserted into her uterus by an unskilled layman, and thereby produce a miscarriage, or whether the operation could be performed on a woman by the use of a catheter without a speculum and light to guide the operator, are not the subjects of expert testimony.

State v Candler, 204-1355; 217 NW 233

Negativing necessity and good faith. In a prosecution for aiding and abetting an attempted miscarriage by a regular practicing physician, the state must establish beyond a reasonable doubt (1) that the operation in question was not necessary to save the life of the woman, and (2) that the physician did not in good faith believe such operation was necessary.

State v Dunklebarger, 206-971; 221 NW 592

Necessity to save life. The condition of a woman's health prior to a miscarriage, and

III EVIDENCE—concluded

the nonprofessional character of the person attempting the miscarriage, together with the admission of the latter that she was in the habit of bringing about miscarriages, may quite clearly show that the miscarriage in question was brought about without any necessity to save the woman's life.

State v Rowley, 216-140; 248 NW 340

Cause of death. Evidence held ample to justify a finding that the use of an instrument on a woman in an attempt to produce a miscarriage was the cause of her death.

State v Rowley, 216-140; 248 NW 340

Murder resulting from abortion—evidence—sufficiency. Record reviewed, and held to sustain a verdict of guilty under a prosecution for murder in the second degree resulting from an attempted abortion.

State v Rowley, 216-140; 248 NW 340

CHAPTER 570

ADULTERY

12974 Punishment—prosecution.

Discussion. See 10 ILB 327—Adultery and conspiracy to commit adultery

Atty. Gen. Opinion. See '36 AG Op 353

Non-prosecution of co-defendant. It is no defensive plea to a charge of adultery that the co-defendant of the accused has not been prosecuted.

State v Rounds, 202-534; 210 NW 542

Common-law marriage. A written agreement between a man and a woman "to live as husband and wife until such time that we are lawfully married" is insufficient to constitute a common-law marriage, because the writing not only furnishes a cover for illicit relation but fails to carry on its face the required element of a present intention to assume the legal relation.

State v Grimes, 215-1287; 247 NW 664

CHAPTER 572

INCEST

12978 Definition—punishment.

ANALYSIS

Evidence in criminal cases generally. See under §13897 et seq

Indictment generally. See under Chs 637, 638

I IN GENERAL

Accomplices. A prosecutrix in a prosecution for incest is not an accomplice if she did not voluntarily submit to the acts of sexual intercourse.

State v Candler, 204-1355; 217 NW 233

II RELATIONSHIP

"Sister" contemplates "half-sister". The statute (§10445, C., '27) which declares void a marriage between a man and his sister's daughter, embraces a marriage between a man and his half-sister's daughter. As a consequence carnal knowledge between a man and the daughter of his half-sister constitutes incest.

State v Lamb, 209-132; 227 NW 830

III INDICTMENT

Intercourse with stepdaughter—sufficient allegation. An allegation that a defendant had sexual intercourse with his wife's daughter charges incest.

Lockerby v Hollowell, 210-623; 231 NW 375

IV EVIDENCE

Election—incestuous disposition. When the state elects, in a prosecution for incest, to rely for conviction on a certain transaction, testimony which tends to show acts of sexual intercourse between the parties subsequent to said transaction is properly left in the record for its bearing on the claimed incestuous disposition of the accused.

State v Candler, 204-1355; 217 NW 233

Sufficiency of evidence. An element of improbability in the testimony of a prosecutrix in a prosecution for incest will not necessarily justify the court in ruling that the testimony is per se insufficient to support a verdict of guilty.

State v Candler, 204-1355; 217 NW 233

Accomplices — instructions. Principle reaffirmed that a prosecutrix in a prosecution for incest is not an accomplice if she did not voluntarily submit to the acts of sexual intercourse.

State v Candler, 204-1355; 217 NW 233

CHAPTER 573

SODOMY

12979 Definition.

Corroborating testimony. Corroboration of prosecuting witness may be shown by circumstantial evidence, and it is sufficient if corroborating witness' testimony is material and connects defendant with crime.

State v Donovan, (NOR); 229 NW 255

Penetration—jury question. Issues regarding penetration and sufficiency of testimony corroborating prosecuting witness in sodomy prosecution held properly submitted to jury.

State v Donovan, (NOR); 229 NW 255

Prosecuting witness as accomplice—jury question. Whether prosecuting witness in sodomy prosecution was accomplice held properly submitted to jury under proper instructions, where testimony was conflicting.

State v Donovan, (NOR); 229 NW 255

Defendant's testimony—weight—instruction. Instruction in prosecution for sodomy on weight to be given defendant's testimony held not erroneous.

State v Donovan, (NOR); 229 NW 255

Requested instructions. In sodomy prosecution, it is not error to refuse to give defendant's requested instructions which are unduly favorable and argumentative, especially when the charge already given contains the correct statements of law.

State v Donovan, (NOR); 229 NW 255

12980 Punishment.

Atty. Gen. Opinion. See '36 AG Op 456

CHAPTER 574

KIDNAPING

Atty. Gen. Opinion. See '34 AG Op 269

CHAPTER 575

ARSON

12991.1 Dwelling house and parcels thereof.

Atty. Gen. Opinion. See '32 AG Op 41

Circumstantial evidence. Circumstantial evidence may be ample to establish the corpus delicti in a charge of arson.

State v Henricksen, 214-1077; 243 NW 521

12991.2 Miscellaneous buildings.

Atty. Gen. Opinion. See '32 AG Op 41

Partial burning. In prosecution for arson, when proof shows partial burning of building, failure to submit offense of attempt to set fire is not error.

State v Bazoukas, 226-1385; 286 NW 458

"Juxtaposition" of circumstantial evidence not equivalent of direct evidence—instructions. Testimony in an arson prosecution, entirely unsubstantiated by direct evidence, will not justify an instruction defining "direct evidence", even on the theory that evidence showing a man, prior to the fire, was seen near the burned building, from which footprints led to defendant's home, constitutes circumstances in such "juxtaposition" as to be equivalent to direct evidence. Jury should be instructed case rests on circumstantial evidence.

State v Mikels, 224-1121; 278 NW 924

Instructions not substantiated by evidence—error. In arson trial, an instruction on the state's evidence that footprints "pointing toward and away from" burned store building was held erroneous, in absence of any evidence of footprints pointing toward building.

State v Neff, 228- ; 291 NW 415

Direct evidence instruction permitting collateral fact confusion with guilt. Evidence, altho being direct, may not be direct evidence of defendant's guilt; and instructing in such a manner that the jury may be confused into considering direct evidence of collateral facts as direct evidence of defendant's guilt is error.

State v Mikels, 224-1121; 278 NW 924

Erroneous instruction on fact not existing. It is error to assume or state in an instruction that certain facts exist which do not exist, and a presumption of prejudicial error arises therefrom. Therefore, in arson trial, circumstantial evidence was held insufficient to establish defendant's guilt so conclusively as to require a conviction notwithstanding an erroneous instruction on state's evidence of footprints "pointing toward and away from" burned store building when there was no evidence of footprints "pointing toward" such building.

State v Neff, 228- ; 291 NW 415

12991.4 Defrauding insurers.

Cross-examination—other fires. In prosecution for arson, where testimony relative to other fires is elicited on cross-examination without objection and defendant later moves to strike, whereupon the court admonishes jury not to consider the testimony and repeats this admonition in the instructions, the alleged overruling of objections relative to such other fires and refusing to strike the testimony presents no error.

State v Bazoukas, 226-1385; 286 NW 458

Evidence—sufficiency to support conviction. In prosecution for arson against husband and wife, evidence held sufficient to convict husband.

State v Bazoukas, 226-1385; 286 NW 458

12991.5 Attempts.

Failure to submit attempt. In prosecution for arson, when proof shows partial burning of building, failure to submit offense of attempt to set fire is not error.

State v Bazoukas, 226-1385; 286 NW 458

12991.6 Married women.

Wife as participant with husband. In prosecution for arson, evidence held insufficient to sustain conviction of wife as participant with husband.

State v Bazoukas, 226-1385; 286 NW 458

Wife not presumed coerced. In arson prosecution against husband and wife, it is no longer presumed that a wife, committing a crime in the presence of her husband, did so under his coercion.

State v Bazoukas, 226-1385; 286 NW 458

Wife's presence or knowledge—nonpresumption. In prosecution for arson, in the absence of testimony tending to show participation or conspiracy on the part of the wife in a crime committed by her husband, her guilt will not be presumed, nor the fact that she may have knowledge of and even be present at the scene of the crime and fail to actively oppose the same, will not, in the absence of conspiracy or participation, render her likewise guilty.

State v Bazoukas, 226-1385; 286 NW 458

CHAPTER 576

BURGLARY

12994 Definition—punishment.

ANALYSIS

Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638
Other breakings and enterings. See under §§13001–13004

I IN GENERAL

Duplicity—compound offense. Principle reaffirmed that burglary is not a compound offense which includes larceny. (§13738, C., '27.)

State v Leasman, 208-851; 226 NW 61
State v Henderson, (NOR); 239 NW 588

Burglary—scope of term. All forms of felonious statutory breakings of buildings constitute burglary in view of §13738-b1, C., '31 [§13738.1, C., '39].

State v Engler, 217-138; 251 NW 88

II BREAKING AND ENTRY

Trespass — acts constituting and liability therefor. The mere opening of an unlocked door and entering premises, without right or authority, constitutes a breaking and entering within the law of trespass.

Girard v Anderson, 219-142; 257 NW 400

Time as surplusage. The time of day of burglariously breaking and entering a warehouse is no element of the offense and if alleged may be treated as surplusage.

State v Murray, 222-925; 270 NW 355

III DWELLING HOUSE

Murder—commission of burglary. The statute which declares murder to be in the first degree when committed in the perpetration of, or attempt to perpetrate a burglary (§12911, C., '24), refers solely to the burglary of a dwelling house (§12994, C., '24).

State v Pinkerton, 201-940; 208 NW 351

IV OFFENSE INTENDED

Discussion. See 7 ILB 254—Intent in burglary

Intent—larceny—justifiable inference. Under a charge of burglary with intent to commit larceny, the intent to commit larceny may be inferred by the jury from an unexplained breaking and entering in the nighttime of the building in question.

State v Woodruff, 208-236; 225 NW 254

Evidence—extent of intended theft. In a prosecution for burglary, evidence on behalf of defendant as to the extent of an intended theft is quite immaterial.

State v Murray, 222-925; 270 NW 355

V INDICTMENT

Compound offense. Principle reaffirmed that burglary is not a compound offense which includes larceny.

State v Leasman, 208-851; 226 NW 61

Permissible duplicity. Statutory burglary, and larceny from a building in the nighttime, tho separate offenses, may be charged in different counts in the same indictment, provided the second count alleges that the offense therein charged was committed in connection with the commission of the offense charged in the first count.

State v Stennett, 220-388; 260 NW 732

Statutory burglary—short form—failure to charge intent. An indictment for statutory burglary ("breaking and entering" in the language of the statute) which is otherwise sufficient is not rendered insufficient by failing to charge an intent; especially is this true when the indictment carries the allegation, to wit: "contrary to and in violation of §13001, C., '31."

State v Stack, 221-727; 266 NW 523

VI EVIDENCE

(a) IN GENERAL

Intent—justifiable inference. Under a charge of burglary with intent to commit larceny, the intent to commit larceny may be inferred by the jury from an unexplained breaking and entering in the nighttime of the building in question.

State v Woodruff, 208-236; 225 NW 254

Lack or absence of evidence—effect. Instructions reviewed and held sufficiently to cover the effect of the lack or absence of evidence of guilt.

State v Stennett, 220-388; 260 NW 732

Corpus delicti—sufficiency. Evidence reviewed, at length, under a charge of burglary and held ample to sustain a conviction.

State v Stennett, 220-388; 260 NW 732

Instructions—included offenses. Included offenses need not be submitted (1) when there is no supporting evidence in the record of the commission of said included offense, and (2) when under the record, the accused is guilty as charged or not guilty.

State v Stennett, 220-388; 260 NW 732

(b) POSSESSION OF STOLEN PROPERTY

Recent possession of burglarized property. No error results from instructing that the unexplained recent possession of property stolen by means of a burglary is sufficient to sustain a conviction.

State v Jackson, 205-592; 218 NW 273

12995 Aggravated offense.

Atty. Gen. Opinion. See '38 AG Op 334

13000 Possession of burglar's tools—evidence.

Expert testimony. Expert testimony is admissible as to the burglarious nature of certain tools.

State v McHenry, 207-760; 223 NW 535

Innocent tools possessed burglariously. The facts and circumstances surrounding and attending the possession of tools, instruments, and other articles each of which is admittedly capable of lawful uses, may be such as to justify the jury in finding that the possession was burglarious.

State v Furlong, 216-428; 249 NW 132

Opinion evidence. In a prosecution for possessing burglar's tools with felonious intent, the state may show by expert testimony that certain instruments could be used in the commission of a burglary, but erroneously asking the witness whether such instruments would be so used is not necessarily prejudicial.

State v Furlong, 216-428; 249 NW 132

Rifle. A rifle may be a tool incident to the use of burglar's tools, and on a charge of possession it is immaterial that the weapon belonged to a person other than the accused.

State v McHenry, 207-760; 223 NW 535

Burglar's tools—evidence. Properly qualified police officers may testify that certain instruments are burglar's tools.

State v Engler, 217-138; 251 NW 88

Admissibility. Burglar's tools are admissible if described or set forth in the indictment.

State v McHenry, 207-760; 223 NW 535

Miscellaneous and immaterial articles. Articles seized at the time of the seizure of alleged burglar's tools, but casting no light on the character, use, or purpose of such alleged burglar's tools are wholly inadmissible.

State v McHenry, 207-760; 223 NW 535

"Short-form" indictment—venue. An indictment for possessing burglar's tools with intent to commit a burglary need not specifically allege the venue.

State v Engler, 217-138; 251 NW 88

"Short-form" indictment. An indictment, under the "short-form" statute, charging in the language of the statute the possession of burglar's tools with intent to commit a burglary, is not subject to demurrer. The proper procedure is to demand a bill of particulars.

State v Engler, 217-138; 251 NW 88

Admissibility of tools. Under a "short-form" indictment for possessing burglar's tools

with intent to commit a burglary, the tools need not be described as a condition precedent to their admissibility in evidence, the accused making no demand for a bill of particulars.

State v Engler, 217-138; 251 NW 88

Recent burglaries. On a charge of having possession of burglar's tools with intent to commit a burglary, evidence is admissible to show recent burglaries, and that the accused had the fruits of such burglaries in his possession.

State v McHenry, 207-760; 223 NW 535

Possession. On the issue of the possession of burglar's tools, it is not necessarily a defense that the tools in question were not found on the person of the accused, or in the particular room occupied by her as a bedroom, it appearing that such tools were found in the house occupied by the accused under a lease executed by her.

State v McHenry, 207-760; 223 NW 535

Unnecessary allegation. An allegation of possession with the specified statutory intent, need not allege where or at what place the accused intended to carry out his intent.

State v Bamsey, 208-802; 226 NW 57

Instructions. Instructions under a charge of possession of burglar's tools with intent to commit a burglary reviewed and held not subject to the vice of not limiting the jury to the evidence introduced during the trial.

State v Engler, 217-138; 251 NW 88

Guilt of joint defendants. Instructions under a joint indictment for possessing burglar's tools with intent to commit a burglary reviewed, and held not to justify a conviction of all defendants on proof of possession by one defendant.

State v Engler, 217-138; 251 NW 88

13001 Other breakings and enterings.

ANALYSIS

Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I IN GENERAL

Duplicity—compound offense. Principle reaffirmed that burglary is not a compound offense which includes larceny. (§13738, C., '27.)

State v Leasman, 208-851; 226 NW 61
State v Henderson, (NOR); 239 NW 588

Duplicity—necessary allegation to obviate. An indictment which charges in different counts (1) burglary of a granary and (2) larceny from a granary, even tho the location of the granary and the date of the commission of said offenses are the same in each count, is fatally defective—wholly bad—in the absence of an allegation that the larceny was committed in connection with the burglary.

State v Frey, 206-981; 221 NW 445
State v Leasman, 208-851; 226 NW 61

II OFFENSE INTENDED

No annotations in this volume

III STATUTORY BREAKING AND ENTERING

Schoolhouses. A schoolhouse is a "building" within the definition of statutory burglary.

State v Burzette, 208-818; 222 NW 394

Time as surplusage in burglary. The time of day of burglariously breaking and entering a warehouse is no element of the offense and if alleged may be treated as surplusage.

State v Murray, 222-925; 270 NW 355

IV INDICTMENT

Statutory burglary—short form—failure to charge intent. An indictment for statutory burglary ("breaking and entering" in the language of the statute) which is otherwise sufficient is not rendered insufficient by failing to charge an intent; especially is this true when the indictment carries the allegation, to wit: "contrary to and in violation of §13001, C., '31."

State v Stack, 221-727; 266 NW 523

Permissible duplicity. Statutory burglary, and larceny from a building in the nighttime, tho seperate offenses, may be charged in different counts in the same indictment, provided the second count alleges that the offense therein charged was committed in connection with the commission of the offense charged in the first count.

State v Stennett, 220-388; 260 NW 732

Non-fatal variance. An allegation in an indictment for burglary of ownership of the premises in a named party is sufficiently supported by evidence of possession by said party.

State v Archibald, 208-1139; 226 NW 186

Railroad car—sufficiency. An indictment which charges that a railway car (the subject of a burglary) was a place in which goods were kept for "use, deposit, and transportation" is a good indictment under this section, even tho the word "transportation" does not appear in said section.

State v Christofferson, 215-1282; 247 NW 819

V EVIDENCE

Possession of burglarized property — effect. The recent, unexplained possession of personal property which was, in the first instance, unquestionably obtained by some one in the commission of a burglary may justify the jury in finding that the possessor committed said burglary.

State v Harding, 204-1135; 216 NW 642

Alleged stolen articles—when immaterial. Evidence that automobile tires of a well known make and in general use throughout the country, were stolen from a garage at the time it was burglarized, and that when defendant was arrested he was using the same kind and size of tires on his automobile, is, in and of itself, wholly immaterial.

State v Sigman, 220-146; 261 NW 538

Imprint of heel of shoe—when immaterial. Evidence tending to show (1) that on the morning following the burglary of a garage a paper bearing the imprint of the heel of a well known and commonly-worn make of shoe, was found on the floor of the garage, and (2) that when the defendant was arrested he was wearing a pair of said make of shoes, is wholly immaterial and must not be allowed, over objections, to remain in the record unless supplemented by some evidence tending to prove (1) that the imprint was made at the time of the burglary, and (2) by the defendant's shoe.

State v Sigman, 220-146; 261 NW 538

Extent of intended theft. In a prosecution for burglary, evidence on behalf of defendant, as to the extent of an intended theft, is quite immaterial.

State v Murray, 222-925; 270 NW 355

Corroboration connecting defendant to crime. Corroboration of the testimony of an accomplice in breaking and entering is sufficient if it supports his testimony in some material fact tending to connect the defendant with the commission of the offense. Proof held sufficient.

State v Proost, 225-628; 281 NW 167

Corpus delicti—evidence—sufficiency. Evidence reviewed at length under a charge of burglary and held ample to sustain a conviction.

State v Stennett, 220-388; 260 NW 732
State v Ball, 220-595; 262 NW 115

VI INSTRUCTIONS

Recent possession — fatally erroneous instructions. Fatal error results from instructing that the law presumes a party guilty of breaking and entering if the property stolen by breaking and entering is recently thereafter found in the possession of said party; or by instructing that the recent possessor of stolen property must establish the honesty of his possession.

State v Taylor, 213-67; 238 NW 457

Stating punishment. The statement in an instruction as to the punishment provided by law for the commission of an offense is improper but not reversible error.

State v Loucks, 218-714; 253 NW 838

Intent — intoxication — instructions. Instructions on intoxication as bearing on the ability to form an intent are properly refused when there is no applicable evidence.

State v Murray, 222-925; 270 NW 355

13002 Entering bank with intent to rob.

Atty. Gen. Opinions. See '25-26 AG Op 376; '32 AG Op 240; '34 AG Op 614; '36 AG Op 25

Corporate capacity as surplusage. An indictment for entering a bank with intent to rob need not charge the corporate capacity of the said bank, and, if it is charged, it may be treated as surplusage.

State v Wagner, 202-739; 210 NW 901

Question of place being bank. In a criminal prosecution for entering a bank with intent to rob, evidence was sufficient to submit to the jury the question of whether or not the place involved was a bank.

State v Mikesh, 227-640; 288 NW 606

Voluntary confession. In a prosecution for the crime of entering a bank with intent to rob, a voluntary statement made by the defendant and introduced upon cross-examination of defendant for purpose of impeachment in absence of evidence to indicate statement was not voluntary, places the burden on the defendant to show statement incompetent, and the fact that statement was made without warning the accused that it might be used against him does not affect its admissibility in the absence of statute requiring that the accused be warned.

State v Mikesh, 227-640; 288 NW 606

Identification of defendant. In a criminal prosecution for entering a bank with intent to rob, the question of whether or not defendant was the person who entered the bank with intent to rob was, under the evidence, including the identification of both defendant and his car, sufficient to submit to the jury.

State v Mikesh, 227-640; 288 NW 606

Justifiable instruction. Evidence that an accused stated that he participated in the robbery charged, and that he was one of the three persons who entered the bank, and knew where some of the stolen bonds were, justifies the court in giving a properly balanced instruction on the subject of confession.

State v Davis, 212-131; 235 NW 759

Life imprisonment mandatory on conviction. On conviction of crime of entering a bank with intent to rob, the trial court has no discretion in fixing sentence—life imprisonment is mandatory.

State v Mikesh, 227-640; 288 NW 606

13004 Breaking and entering car.

Burglary—scope of term. All forms of felonious statutory breakings of buildings constitute burglary in view of §13738-b1, C., '31 [§13738.1, C., '39].

State v Engler, 217-138; 251 NW 88

Instructions in re breaking and entering. Under an indictment drawn under §13001, C., '31, instructions relative to intent and as to what acts would constitute a breaking and entering in case the jury found the car in question was "closed or sealed", cannot be deemed a submission of any element of fact under this section.

State v Christofferson, 215-1282; 247 NW 819

CHAPTER 577

LARCENY

13005 Definition.

Atty. Gen. Opinion. See AG Op Jan. 24, '39

ANALYSIS

Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876
Receiving stolen goods. See under §13042

I IN GENERAL

Duplicity—compound offense. Principle reaffirmed that burglary is not a compound offense which includes larceny. (§13738, C., '27.)

State v Leasman, 208-851; 226 NW 61
State v Henderson, (NOR); 239 NW 588

Larceny and false pretenses distinguished. A false representation may result in the crime of (a) cheating by false pretenses or (b) larceny. If the representation induces the owner of property to transfer both title and possession, the resulting crime is cheating by false pretenses. If the representation induces the owner of the property simply to part with the possession, and the receiver takes with the intent fraudulently to convert the property to his own use, the resulting crime is larceny.

State v Chamberlain, 215-273; 245 NW 277

Provision for added punishment. The crime of larceny is created by §13005, C., '35. No other or different offense is created by §13008 of said code, which authorizes an enlarged punishment when the larceny is committed "in a building".

State v Morrison, 221-3; 265 NW 355

Accomplice—thief and receiver of property. One who steals property is not an accomplice of one who thereafter feloniously receives the stolen property.

State v Smith, 219-168; 256 NW 651

Error against state. Defendant in a prosecution for larceny may not predicate error on an unanswered question material to the state's case.

State v Philpott, 222-1334; 271 NW 617

Speedy trial not denied—delay by defendant occasioned by appellate review. In a larceny prosecution a defendant may not complain that he has been denied a speedy trial where a procedendo was recalled because of a rehearing in the supreme court, and, after the second procedendo was issued, the trial was delayed by defendant's writ of certiorari. Delays complained of occurred at the instance of the defendant himself.

State v Ferguson, 226-361; 283 NW 917

Time of trial—delay by defendant—certiorari to require dismissal denied. One convicted of larceny, who, on appeal, is granted a reversal, and who, then, each time thereafter as his case is assigned for retrial, delays trial on the merits by dilatory moves such as request for rehearing and change of venue, may not complain that he has been denied a speedy trial as provided by law, and certiorari will not lie to require dismissal of the indictment.

Ferguson v Bechly, 224-1049; 277 NW 755

Disposition on appeal—remand for proper sentence. Record held sufficient to sustain a conviction of larceny, but insufficient to sustain a finding of value of the stolen property

in excess of $20. The cause is therefore reversed and remanded with direction to the trial court to re-sentence the accused.

State v Morrison, 221-3; 265 NW 355

II "STEALING"

Instructions in re intent approved. Instructions reviewed and held, when construed as a whole, properly to state the law of intent applicable to larceny.

State v Philpott, 222-1334; 271 NW 617

Intent—inadequate instructions. An accused may, on request, be entitled to a specific instruction on the issue whether the taking was (1) with the intent to steal the property, or (2) with the intent to return the property to the owner.

State v Marshall, 206-373; 220 NW 106

***Burglary — intent — justifiable inference of* larceny.** Under a charge of burglary with intent to commit larceny, the intent to commit larceny may be inferred by the jury from an unexplained breaking and entering in the nighttime of the building in question.

State v Woodruff, 208-236; 225 NW 254

Distinguished from embezzlement. An employee is guilty of larceny if, when he receives his master's property into his possession, he then intends to steal it. If such intent is subsequently formed, he is guilty of embezzlement.

State v Smith, 200-338; 202 NW 511

Non-consent to taking. Non-consent to the taking of property is inferable from the fact that the owner had delivered it to a common carrier who had placed it in a sealed car, and that the car had been broken open and the property removed.

State v Joy, 203-536; 211 NW 213

III "TAKING"

Consent to taking—collusion between employees. When goods are in the mere custody of a servant who is not actually or apparently authorized to pass the possession to another, his consent to the taking will not prevent the taking from being larceny, and especially when the custodian and taker collude in the taking.

State v Smith, 200-338; 202 NW 511

IV "CARRYING AWAY"

Asportation — separate offenses. A single larceny may be committed by more than one act of asportation.

State v Vandewater, 203-94; 212 NW 339

V "PROPERTY OF ANOTHER"

Discussion. See 25 ILR 351—Larceny of spouse's property

Larceny and false pretenses distinguished. A false representation may result in the crime of (a) cheating by false pretenses or (b) larceny. If the representation induces the owner of property to transfer both title and possession, the resulting crime is cheating by false pretenses. If the representation induces the owner of the property simply to part with the possession, and the receiver takes with the intent fraudulently to convert the property to his own use, the resulting crime is larceny.

State v Chamberlain, 215-273; 245 NW 277

VI "ANY MONEY, GOODS, OR CHATTELS", ETC.

No annotations in this volume

VII INDICTMENT

(a) IN GENERAL

Non-charged crime. It was reversible error to submit question of larceny to jury under indictment charging breaking and entering (§§13001, 13008, C., '27).

State v Henderson, (NOR); 238 NW 588

Duplicity—necessary allegation to obviate. An indictment which charges in different counts (1) burglary of a granary and (2) larceny from a granary, even tho the location of the granary and the date of the commission of said offenses are the same in each count, is fatally defective—wholly bad—in the absence of an allegation that the larceny was committed in connection with the burglary.

State v Frey, 206-981; 221 NW 445
State v Leasman, 208-851; 226 NW 61

(b) OWNERSHIP

Ownership — non-variance. No variance is presented by an allegation of the ownership of stolen property and mere proof that the said alleged owner had delivered the same to a common carrier and received a bill of lading showing shipment to another party.

State v Joy, 203-536; 211 NW 213

Ownership — right of possession as proof. An allegation, in an indictment for larceny, of ownership of the alleged stolen property, is supported by proof that said alleged owner had legal right to the possession of said property. So held as to coal which had been stolen from a public school corporation prior to its actual physical delivery to the district.

State v Philpott, 222-1334; 271 NW 617

VIII EVIDENCE

(a) IN GENERAL

Evidence — sufficiency. Record reviewed and held ample to sustain a verdict of guilt.

State v Henderson, 215-276; 243 NW 289
State v Cozad, 221-960; 267 NW 663

Evidence—ownership. Ownership of stolen property may be established by circumstantial evidence.

State v Johnson, 210-167; 230 NW 513

VIII EVIDENCE—continued
(a) IN GENERAL—concluded

Corpus delicti — sufficiency. Circumstantial evidence held to establish the corpus delicti in a prosecution for larceny.

State v Manly, 211-1043; 233 NW 110

Sufficiency of circumstantial evidence. Evidence reviewed, and, tho circumstantial, held to present a jury question on the issue of larceny of fowls.

State v Hester, 205-1047; 218 NW 616
State v Blake, 208-995; 221 NW 569

Extraneous motives. It is quite immaterial what motives moved an accused to commit a larceny which he unqualifiedly admits.

State v Leitzke, 206-365; 218 NW 936

Other offenses to show plan or scheme—limitation. In a prosecution for larceny, evidence of another prior and different larceny, even tho closely connected in point of time, is inadmissible on the theory of a plan or scheme to commit a series of larcenies, unless there is evidence in the record tending to establish such plan or scheme.

State v Renslow, 209-982; 229 NW 225

Admissions do not control state in making proof. An accused in a charge of larceny who, throughout the trial, openly admits the truth of every allegation of the indictment except the one relative to the value of the stolen property, may not object if the state is permitted to prove the truth of such admitted allegations notwithstanding the admissions.

State v Leitzke, 206-365; 218 NW 936

Value—competency of witness—fatal delay in objecting. Objections to the competency of a witness to testify to the value of stolen articles must be made when the witness is asked as to said values, not later when the articles are offered in evidence.

State v Endorf, 219-1321; 260 NW 678

Homing instinct of chickens. On the issue of the identification of stolen chickens, evidence is admissible that when the chickens in question were taken to the home of the alleged owner, they appeared familiar with their surroundings and with the former methods of handling and feeding them.

State v Wagner, 207-224; 222 NW 407; 61 ALR 882

Identification of stolen chickens. To identify alleged stolen property—eight white plymouth rock hens—with spray-soiled feathers and with a numbered aluminum band on the leg of each hen—as the property of the alleged owner, evidence is admissible that at about the time in question and in the near vicinity where the defendant was apprehended, the alleged owner had suffered the disappearance of hens of the same breed, color, spray-soiled feathers, and with banded legs, identical with those found in the possession of the alleged thief.

State v Cozad, 221-960; 267 NW 663

Hogs taken from railroad car. Evidence that hogs had been stolen from railroad car and had been driven in direction of defendant's home, and were later found there, tended to prove larceny, and did not support conviction for receiving stolen goods.

State v Butler, (NOR); 205 NW 842

(b) POSSESSION OF RECENTLY STOLEN PROPERTY

Recent possession. The recent possession of stolen property may be such as to justify a verdict of guilty.

State v Vandewater, 203-94; 212 NW 339
See Tullar v Ins. Co., 214-166; 239 NW 534

Possession of burglarized property — effect. The recent, unexplained possession of personal property which was, in the first instance, unquestionably obtained by someone in the commission of a burglary may justify the jury in finding that the possessor committed said burglary.

State v Harding, 204-1135; 216 NW 642

Recent possession—justifiable inference. Unexplained possession of recently stolen property may justify the conviction of the possessor of the larceny in question; and especially when said possession is reinforced by proof of other incriminating circumstances with which the accused is connected.

State v Sweetman, 220-847; 263 NW 518
State v Cozad, 221-960; 267 NW 663
State v Kenny, 222-279; 268 NW 505

Recent joint possession. The recent possession of stolen property which will justify an inference of guilt of larceny may consist of a joint possession with others.

State v Blake, 208-995; 221 NW 569

Question of recency. Whether the possession of stolen property was or was not recent becomes of no consequence when it appears that such possession was not claimed in the trial court to be recent, nor was the jury given the right to find that it was recent.

State v Bohall, 207-219; 222 NW 389

Accused in vicinity of secreted property. Evidence that property had been stolen and had been secreted in a certain locality, and that the accused, when arrested, was in the immediate vicinity of said secreted property, furnishes no basis for an instruction relative to the effect of possession of recently stolen property.

State v Albertson, 206-344; 220 NW 39

Recent possession—burden to explain. Instruction, relative to recent possession by accused of stolen property, reviewed, and held

not to place, on the accused, the burden of proof to explain said possession.

State v Ferguson, 222-1148; 270 NW 874

Misdated check—admissibility. A check alleged to have been given to the accused in payment of allegedly stolen property may, in view of attending circumstances, be clearly admissible, even tho it is dated prior to the larceny in question.

State v Manly, 211-1043; 233 NW 110

IX INSTRUCTIONS

(a) IN GENERAL

Larceny—instructions—direct and circumstantial evidence—effect of recent possession. In a prosecution for larceny of sheep, instructions as to direct and circumstantial evidence regarding (1) how facts to be proven, (2) circumstances to prove guilt beyond reasonable doubt, (3) all circumstances taken together to prove moral certainty that the defendant is guilty of the crime charged, (4) every other reasonable hypothesis must be excluded, and (5) unexplained recent possession of stolen property warrants conviction—reviewed and held not erroneous.

State v De Koning, 223-951; 274 NW 25

Circumstantial evidence. Failure to instruct as to circumstantial evidence is not reversible error in a case wherein the evidence is not wholly circumstantial and especially when no such instruction was requested.

State v Shearer, 206-397; 220 NW 13

Joint defendants. Instructions must separate and submit to the jury the question of the separate guilt of each of jointly indicted parties. So held where instructions permitted the jury to find both of two jointly indicted parties guilty if the jury found one of them guilty.

State v Heffelfinger, 212-1041; 237 NW 364

Instructions—failure to request. In prosecution for larceny of sheep, held instructions eminently fair and in absence of request for certain instructions, defendant may not, on appeal, be heard to complain.

State v De Koning, 223-951; 274 NW 25

Instructions in re intent approved. Instructions reviewed and held, when construed as a whole, properly to state the law of intent applicable to larceny.

State v Philpott, 222-1334; 271 NW 617

Intent—inadequate instructions. An accused may, on request, be entitled to a specific instruction on the issue whether the taking was (1) with the intent to steal the property, or (2) with the intent to return the property to the owner.

State v Marshall, 206-373; 220 NW 106

Value (?) or market value (?). Instructions calling upon the jury to find the "value" of the property stolen, if stolen, instead of the "market value", are not reversibly erroneous when the record reveals both the wholesale and retail value.

State v McCarty, 210-173; 230 NW 379

Stating punishment. The statement in an instruction as to the punishment provided by law for the commission of an offense is improper but not reversible error.

State v Loucks, 218-714; 253 NW 838

(b) POSSESSION OF RECENTLY STOLEN PROPERTY

Possession of stolen property. The jury must not be instructed that, as a matter of law, the unexplained possession of recently stolen property warrants conviction.

State v McCarty, 210-173; 230 NW 379

Recent possession — fatally erroneous instructions. Fatal error results from instructing that the recent possessor of stolen property must establish the honesty of his possession.

State v Taylor, 213-67; 238 NW 457

Shifting burden of proof. An instruction to the effect that the recent, unexplained possession of stolen property creates a presumption that the possessor committed the larceny, is fundamentally erroneous; likewise a further clause therein imposing on the accused the burden to show that his possession was honestly obtained.

State v Delanty, 211-50; 230 NW 436

Presumption of guilt—burden of proof. Employing in instruction in a larceny case the expression "presumption of guilt arising from the possession of recently stolen property", is fatally erroneous when used, directly or inferentially, in the sense that the state has sufficiently established its case against the accused, and that the burden of overcoming the so-called presumption is shifted to the accused.

State v Davis, 214-329; 242 NW 51

Presumption—satisfactory explanation. It is fundamentally erroneous to instruct the jury in a larceny case that the possession of property immediately after it has been stolen is presumptive evidence of guilt of the larceny. Equally erroneous is it to instruct the jury to convict if the jury finds that the accused had possession of the property recently after it was stolen "unless the evidence satisfactorily explains the possession to have been honest and rightful".

State v Smith, 207-1345; 224 NW 594
State v Taylor, 213-67; 238 NW 457

Recent possession—burden to explain. Instruction relative to recent possession by accused of stolen property reviewed, and held

IX INSTRUCTIONS—concluded
(b) POSSESSION OF RECENTLY STOLEN PROPERTY —concluded

not to place on the accused the burden of proof to explain said possession.

State v Ferguson, 222-1148; 270 NW 874

Inference from possession. There is no legal difference between instructing in a prosecution for larceny that the jury "has a right" to infer guilt from recent possession of the stolen property, and instructing that the jury "may" infer such guilt from such possession.

State v Blake, 208-995; 221 NW 569

Inference — precautionary instruction. A defendant may not predicate error on a precautionary instruction to the substantial effect that the jury must not infer guilt of larceny from the recent possession of the stolen property, if the jury is satisfied that the defendant's possession was innocent, or if it has a reasonable doubt whether the possession was innocent or guilty.

State v Blake, 208-995; 221 NW 569

Accused in vicinity of secreted goods. Evidence that property had been stolen and had been secreted in a certain locality, and that the accused when arrested was in the immediate vicinity of said secreted property furnishes no basis for an instruction relative to the effect of possession of recently stolen property.

State v Albertson, 206-344; 220 NW 39

13008 Larceny in nighttime.

Information—using equivalent terms. An information charging larceny "from" a building is equivalent to charging larceny "in" a building, within the meaning of this section.

State v Morrison, 221-3; 265 NW 355

Added punishment—effect. The crime of larceny is created by §13005, C., '35. No other or different offense is created by this section of said code, which authorizes an enlarged punishment when the larceny is committed "in a building".

State v Morrison, 221-3; 265 NW 355

Included offense under aggravated charge. Larceny is an included offense in the charge of larceny from a building in the nighttime, and is properly submitted when there is supporting evidence.

State v Endorf, 219-1321; 260 NW 678

Statutes distinguished—larceny of poultry. Indictment reviewed and held to charge "larceny of poultry in the nighttime from a private building" under this section rather than plain larceny of poultry under §13015, C., '31.

Clark v Ireland, 215-560; 246 NW 262

Ownership of property. An allegation of ownership, in an indictment for larceny from a building in the nighttime, is supported by evidence that the alleged owner was in possession of the property. But ownership is not controlling in such a case.

State v Henderson, 215-276; 243 NW 289

Non-charged crime. Judgment on verdict of guilty of larceny at night under indictment for breaking and entering held reversible error (§§13001, 13008, C., '27).

State v Henderson, (NOR); 239 NW 588

13010 Larceny from building on fire or from the person.

Larceny from person. Larceny is necessarily included in a charge of larceny from the person, and must be submitted if the evidence is such as would justify the jury in finding the lesser offense, instead of the offense charged.

State v Marshall, 206-373; 220 NW 106

13015 Larceny of domestic fowls and animals.

Holding under prior statute. Evidence of the market value of hogs in the locality where stolen is sufficient, especially when the contrary evidence is as to the value at a more remote locality and concerning a different class of hogs.

State v Leitzke, 206-365; 218 NW 936

Market value—competency of witness—prior statute. A witness who is familiar with the market reports of an article is prima facie competent to testify to the value of such article.

State v Gill, 202-242; 210 NW 120

Statutes distinguished—larceny of poultry. Indictment reviewed and held to charge "larceny of poultry in the nighttime from a private building" under §13008, C., '31, rather than plain larceny of poultry under this section.

Clark v Ireland, 215-560; 246 NW 262

Evidence—sufficiency. In a prosecution for larceny of sheep, held conviction justified by the evidence and no reversible error in action of trial court.

State v De Koning, 223-951; 274 NW 25

Evidence—sufficiency. Evidence (1) that defendant's truck was seen near farm on the night sheep were stolen, (2) that two men were seen in the truck, (3) that defendant never allowed anyone else to drive the truck except one other who was convicted of a similar offense, and (4) that he cashed the check given in payment for the sheep, is competent to prove larceny.

State v De Kraai, 224-464; 276 NW 11

Sufficiency of circumstantial evidence. Evidence reviewed, and, tho circumstantial, held

to present a jury question on the issue of larceny of fowls.

State v Hester, 205-1047; 218 NW 616

Homing instinct of chickens. On the issue of the identification of stolen chickens, evidence is admissible that when the chickens in question were taken to the home of the alleged owner, they appeared familiar with their surroundings and with the former methods of handling and feeding them.

State v Wagner, 207-224; 222 NW 407; 61 ALR 882

Domestic animals—homing instinct. It is common knowledge that cattle will return to a place to which they have long been accustomed, and it is characteristic of practically all domestic animals to seek the places where they have been sheltered and fed, and evidence of such behavior is admissible.

State v McAteer, 227-320; 288 NW 72

Identification of stolen chickens. To identify alleged stolen property—eight white plymouth rock hens—with spray-soiled feathers and with a numbered aluminum band on the leg of each hen—as the property of the alleged owner, evidence is admissible that at about the time in question and in the near vicinity where the defendant was apprehended, the alleged owner had suffered the disappearance of hens of the same breed, color, spray-soiled feathers, and with banded legs, identical with those found in the possession of the alleged thief.

State v Cozad, 221-960; 267 NW 663

Persistent questioning improper. In prosecution for stealing chickens, questions propounded to defendant insinuating that he was guilty of other offenses constituted grounds for reversal of conviction.

State v Archibald, (NOR); 221 NW 814

Cross-examination of co-indictee to show that he was a thief by profession. In the trial of one of two persons jointly indicted for larceny of chickens, the persistent cross-examination of the co-indictee, not on trial, but called as a witness by the one on trial, along the line of showing that the witness was in the business of stealing chickens, is prejudicially erroneous.

State v Huss, 210-1317; 232 NW 692

Instructions—direct and circumstantial evidence—effect of recent possession. In a prosecution for larceny of sheep, instructions as to direct and circumstantial evidence regarding (1) how facts to be proven, (2) circumstances to prove guilt beyond reasonable doubt, (3) all circumstances taken together to prove moral certainty that the defendant is guilty of the crime charged, (4) every other reasonable hypothesis must be excluded, and (5) unexplained recent possession of stolen property warrants conviction, reviewed and held not erroneous.

State v De Koning, 223-951; 274 NW 25

Instructions—failure to request—effect. In prosecution for larceny of sheep, held instructions eminently fair and in absence of request for certain instructions defendant may not, on appeal, be heard to complain.

State v De Koning, 223-951; 274 NW 25

Speedy trial not denied—delay by defendant occasioned by appellate review. In a prosecution for larceny of cattle a defendant may not complain that he has been denied a speedy trial, where a procedendo was recalled because of a rehearing in the supreme court, and, after the second procedendo was issued, the trial was delayed by defendant's writ of certiorari. Delays complained of occurred at the instance of the defendant himself.

State v Ferguson, 226-361; 283 NW 917

13017 Custody of property levied on or deposited by officer.

Atty. Gen. Opinion. See AG Op Feb. 28, '39

13018 Appropriating found property.

Noninconsistent statutes. The statutory provision that the finder of lost goods shall be paid a named compensation when he makes restitution to the owner (§12211, C., '31) is not inconsistent with the statutory provision that he who unlawfully converts found property to his own use is guilty of larceny.

Flood v Bank, 218-898; 253 NW 509; 95 ALR 1168

"Lost" goods defined. Money taken from the owner thereof by robbery, and the whereabouts of which money is thereafter unknown to said owner until it is returned to him by one who found it, where the robber had hidden it, constitutes "lost" money within the meaning of the statute which provides compensation to the finder of "lost" money and other property. (§12211, C., '31)

Flood v Bank, 218-898; 253 NW 509; 95 ALR 1168

CHAPTER 578

EMBEZZLEMENT

13027 Embezzlement by public officers.

ANALYSIS

I IN GENERAL
II "PUBLIC OFFICER"
III CONVERSION
IV INDICTMENT
V EVIDENCE

Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638

I IN GENERAL

Discussion. See 11 ILR 255—Subsequent accounting of funds converted by officer

Division of sections — effect. The mere act of dividing an existing section of law and printing its parts in the code as separate sections works no change in the meaning of the law. So held as to §4840, C., '97 [§§13027–13029, C., '39].

State v Gardiner, 205-30; 215 NW 758

Record reviewed from transcript. The record of conviction of a public officer for embezzlement reviewed from clerk's transcript (appellant not having filed his abstract, brief, and argument within the statutory time), and held that the trial court committed no reversible error.

State v Johns, 224-487; 275 NW 559

II "PUBLIC OFFICER"

Informal creation of office. The appointee to a public position who duly qualifies, gives bond, and acts in the collection of public funds, is a public officer within the meaning of the statute prohibiting embezzlement by public officers even tho said position and the duties thereunder were very informally created at an unrecorded, impromptu meeting of a majority of the members of the official governing body.

State v Conway, 219-1155; 260 NW 88

III CONVERSION

Using public funds for private use. The acts of a county treasurer in wrongfully and repeatedly taking and using, for his own private purposes, public funds in his possession, ipso facto constitutes "willful misconduct and maladministration in office", notwithstanding the fact (1) that, prior to the commencement of an action to remove him from office he returns, to the public treasury, the amount of his peculations, and (2) that his bondsmen are liable for his wrongdoing; a priori is this true when he also knowingly connives at and permits like conduct by his official employee.

State v Smith, 219-5; 257 NW 181

IV INDICTMENT

Indictment — sufficiency. Indictment reviewed, and held adequately to charge embezzlement by a public officer.

State v Gardiner, 205-30; 215 NW 758

V EVIDENCE

Former jeopardy—proof of several supporting transactions—election—effect. When, upon the trial of a public officer for embezzlement charged in one count and in a lump sum, the state supports the charge by evidence of several different transactions, any one of which was sufficient to support the charge, and, on order of the court, elects to rely on one certain transaction, the defendant, after being convicted and after being granted a new trial, may not successfully contend that he has been put in jeopardy on all the transactions except the transaction on which the state elected to rely on the first trial—it appearing that the nonelected transactions were allowed to remain in the record as evidentiary matter bearing on the issue of fraudulent intent.

State v Huff, 217-41; 250 NW 581

13029 Funds received by virtue of office.

Conversion—evidence. Failure of a public officer (1) to enter on the official books of his office fees collected by him, and (2) to pay over to the proper receiving officer fees collected is competent evidence bearing on the issue of conversion.

State v Berg, 200-627; 204 NW 441

"Offer to account"—effect. The statutory element in embezzlement by a public officer of "failure to account" (§13027, C., '24), is wholly negatived by a good-faith offer by the officer properly to pay over any funds which may be shown to be due from him, such offer being made prior to the prosecution in question.

State v Berg, 200-627; 204 NW 441

Elements—"failure to account"—evidence. The failure of a municipal court bailiff to pay over to the city treasurer on or before the 10th day of each of a series of months all public fees collected during the preceding month of such series (§10671, C., '24), does not constitute such "failure to account," under §13027, C., '24, as will support a conviction for the embezzlement of the aggregate amount not so paid over, because each conversion and failure to pay over and account constitutes an offense in and of itself.

State v Berg, 200-627; 204 NW 441

Demand—sufficiency. In an indictment for embezzlement by a township clerk, an allegation that a demand for the funds was made

by the succeeding clerk, naming him, is all-sufficient.

State v Gardiner, 205-30; 215 NW 758

Proper demand for accounting. Where the board of control of state institutions legally creates an official position, and charges the incumbent with the duty of collecting and accounting for certain state funds, a demand for an accounting, as a basis for a prosecution for embezzlement, is properly made by the treasurer of state, said latter official being the official ultimately entitled to the custody of said funds.

State v Conway, 219-1155; 260 NW 88

13030 Embezzlement by bailee.

Intent—inapplicable instruction. An instruction that "the law presumes a man to intend the reasonable and natural consequences of his act deliberately and intentionally done", given in a prosecution for embezzlement by a bailee, is not necessarily erroneous.

State v Folger, 204-1296; 210 NW 580

Nonconsent of owner. In a prosecution for the unlawful retention of a storage battery, under §13111-a4, C., '27 [§13111.4, C., '39], the nonconsent of the owner is of the very gist of the offense.

State v See, 205-601; 218 NW 249

Sale or bailment—jury question. Conflicting testimony relative to the question whether a bailee charged with embezzlement understood that the delivery of the property constituted a sale to him or a bailment necessarily presents a jury question.

State v Folger, 204-1296; 210 NW 580

Mortgage payment. One who receives money in payment of a note and mortgage when he neither owns nor has authority to receive the money due thereon, and converts said money to his own use is guilty of embezzlement as a bailee, irrespective of any question of agency.

State v Cavanaugh, 214-457; 236 NW 96

Former jeopardy. An acquittal on an indictment which charges the defendant as agent with the embezzlement of the proceeds of grain delivered to him (§13031, C., '24) is no bar to an indictment which charges the defendant as bailee with the embezzlement of the same grain.

State v Folger, 204-1296; 210 NW 580

13031 Embezzlement by agents.

ANALYSIS

Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638

I IN GENERAL

Tender of embezzled funds—effect. An accused charged as agent with embezzlement may not complain that a given instruction to the effect that he must be found not guilty if he tendered the money to his principal before a preliminary information was filed against him is erroneous because it excludes his right to tender the money before an indictment was returned. He is not entitled to the instruction received or contended for.

State v Gripp, 208-1143; 226 NW 16

II THE RELATION

Agency—failure to establish. The failure of the state to prove the agency alleged in an indictment for embezzlement necessarily entitles the defendant to a directed verdict of not guilty.

State v Reynolds, 208-1046; 226 NW 717

Agency—sufficiency of proof. In a prosecution for embezzlement by an agent, an allegation of the defendant's agency may be supported by proof that the money in question was delivered by the owner thereof to the defendant for the special purpose of delivering it to the borrower notwithstanding the fact that the defendant was the agent of the borrower to procure the loan.

State v Reynolds, 209-543; 228 NW 283

Embezzlements by agent and bailee. An acquittal on an indictment which charges the defendant, as agent, with the embezzlement of the proceeds of grain delivered to him (this section C., '24) is no bar to an indictment which charges the defendant as bailee with the embezzlement of the same grain. (§13030, C., '24.)

State v Folger, 204-1296; 210 NW 580

III "EMBEZZLES OR FRAUDULENTLY CONVERTS"

Bank deposits without felonious intent. The act of the treasurer of a corporation in depositing the funds of his corporation in a bank (of which he is also an officer) in the manner in which deposits are ordinarily made, and the loss of such funds by the subsequent failure of the bank, do not constitute embezzlement. So held in an action on a surety bond which contracted against loss by embezzlement.

Williamstown Assn. v Surety Co., 205-830; 218 NW 474

Proceeds of bonds—right to sell. An allegation of the embezzlement of bonds by an agent is not supported by proof of the embezzlement of the proceeds of the bonds, it appearing that the accused had the right un-

der the agency to convert the bonds into money.

State v Reynolds, 209-547; 228 NW 285

IV WITHOUT CONSENT OF EMPLOYER

No annotations in this volume

V INDICTMENT

Former jeopardy. An acquittal on an indictment which charges the defendant as agent with the embezzlement of the proceeds of grain delivered to him is no bar to an indictment which charges the defendant as bailee with the embezzlement of the same grain.

State v Folger, 204-1296; 210 NW 580

VI EVIDENCE

Evidence—sufficiency. Evidence held to present jury question on issue of embezzlement.

State v Gripp, 208-1143; 226 NW 16

13036 Embezzlement by executor, administrator, or guardian.

Atty. Gen. Opinions. See '28 AG Op 310; AG Op March 2, '39

13037 Embezzlement of mortgaged property.

Atty. Gen. Opinion. See '28 AG Op 350

Parol consent to sale of mortgaged chattels. Evidence is admissible that a chattel mortgagee orally consented to the sale of the chattels by the mortgagor, notwithstanding the fact that the criminal statute denominates such sales criminal unless the consent is in writing.

Hepker v Schmickle, 209-744; 229 NW 177

Communication not libelous per se. A written notification by a bank to the consignee of sheep to the effect that "the bank has a chattel mortgage on said shipment of sheep and the proceeds of said sale should be held intact subject to said claim" is not libelous per se as to the consignor.

Miller v Bank, 220-1266; 264 NW 272

13037.1 Prima facie evidence of disposal.

Concealment by vendee under conditional sale—demand necessary. The state, in a prosecution for larceny based solely on the charge that the vendee in a conditional bill of sale "willfully and with intent to defraud concealed the property," must, in order to create, under this section, prima facie evidence of such concealment, establish the making of a demand by the vendor on the vendee that the latter pay for the property or produce and return it, and that the latter failed to comply with said demand.

State v Delevie, 219-1317; 260 NW 737

CHAPTER 579

ROBBERY

13038 Definition—punishment.

ANALYSIS

Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I LARCENY FROM THE PERSON

Included offense. Larceny is necessarily included in a charge of larceny from the person, and must be submitted if the evidence is such as would justify the jury in finding the lesser offense, instead of the offense charged.

State v Marshall, 206-373; 220 NW 106

II FORCE OR FEAR

Included offenses. The court must, on the trial of a charge of robbery alleged to have been committed with force and violence, submit the included offense of assault and battery when the evidence is sufficient to support such verdict.

State v Buchan, 219-106; 257 NW 586

III INCLUDED OFFENSES

Assault and battery. The court must, on the trial of a charge of robbery alleged to have been committed with force and violence, submit the included offense of assault and battery when the evidence is sufficient to support such verdict.

State v Buchan, 219-106; 257 NW 586

Included offenses—possible wide range. An indictment for robbery with aggravation may be so drawn and the evidence on the trial may be such as to require the court to submit as included offenses the crimes of (1) assault with intent to rob, (2) assault with intent to do great bodily harm, (3) assault and battery, and (4) simple assault.

State v Warneke, 219-1239; 260 NW 667

Larceny—when not included offense. Failure of the court, on the trial of a charge of robbery, to submit the crime of larceny as an

included offense is proper when the record unquestionably demonstrates that if the accused was guilty of larceny it was because he took the property from the prosecuting witness by force and violence.

State v Warneke, 219-1239; 260 NW 667

IV INDICTMENT

No annotations in this volume

V EVIDENCE

Demonstrative evidence—admissibility. All the facts and circumstances connected with the actual perpetration of a robbery are admissible whether there be one participant or many. So held as to certain exhibits offered and received in evidence.

State v Leftwich, 216-1226; 250 NW 489

Evidence wrongfully obtained—admissibility. In prosecution for robbery, objection to testimony regarding search of defendant's room for gun on ground that search of premises was unlawful held properly overruled.

State v La Barre, (NOR); 210 NW 918

Property left at roadside. The court has discretion, on the trial of an indictment for robbery, to permit the introduction in evidence of exhibits which disappeared from the bank at the time of the robbery and which were found several weeks later by a roadside, many miles from the scene of the robbery, even tho there is no direct evidence that said exhibits were ever in the possession of the accused.

State v Abbott, 216-1340; 249 NW 167

VI INSTRUCTIONS

Confession — justifiable instruction. Evidence that an accused stated that he participated in the robbery charged, and that he was one of the three persons who entered the bank, and knew where some of the stolen bonds were, justifies the court in giving a properly balanced instruction on the subject of confession.

State v Davis, 212-131; 235 NW 759

Misconduct — curative instructions. Assertions of the county attorney in his opening statement to the jury relative to the refusal of defendant's associate in crime to appear as a witness, and as to defendant's inability to give bail, will not be deemed prejudicial misconduct sufficient to demand a new trial when defendant requested no special instructions or admonition to the jury concerning the matter, and when the instructions to the jury were fair.

State v Sampson, 220-142; 261 NW 769

13039 Robbery with aggravation.

Information—sufficiency. A county attorney information which charges that the defendant aided and abetted other named parties in a robbery, and that one of said other parties was armed with a loaded revolver with the intent to kill the person robbed if he resisted, and which is accompanied by minutes of evidence tending to prove said allegations, is fully sufficient to apprise the accused of the fact that he is charged with robbery with aggravation, and, on a plea of guilty, justifies a sentence accordingly.

Deemy v Dist. Court, 215-690; 246 NW 833

Duress as defense. A motion for a directed verdict of not guilty, based on the ground that the defendant was dominated by his associate in crime and compelled to be an actor in the crime of said associate, is properly overruled when the evidence of duress is very slight and when the defendant was active in the commission of the crime.

State v Xanders, 215-380; 245 NW 361

Incriminative admissions. On the trial of an indictment for robbery with aggravation, the state may introduce the voluntary admissions or declarations of the accused when arrested to the effect that he had often been charged with such offense and had defeated such charges, and that he had thrown away numerous guns because after any of his holdups he had thrown away his gun in order to free himself of evidence that might prove to be incriminating.

State v Grimm, 221-652; 266 NW 19

Jury question as to identity. The identity of a person who is prosecuted for robbery with aggravation as the one who actually committed it is a question of fact for the jury, on conflicting testimony.

State v Ayles, 205-1024; 219 NW 41

CHAPTER 580

RECEIVING STOLEN GOODS

13042 Punishment.

ANALYSIS

Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638

I IN GENERAL

Nature and elements. An instruction to the effect that, if one buys stolen property of a value exceeding $20, knowing that the said

I IN GENERAL—concluded

property has been stolen, he is guilty of a felony and punishable as provided by law, is correct and quite unobjectionable.

State v Friend, 210-980; 230 NW 425

Ownership — non-variance. No variance is presented by an allegation of the ownership of stolen property and mere proof that the said alleged owner had delivered the same to a common carrier and received a bill of lading showing shipment to another party.

State v Joy, 203-536; 211 NW 213

Knowledge—essential element. Knowledge that the property received had been stolen is necessarily an essential element of the crime of receiving stolen property, and a conviction will not be permitted to stand when the evidence of such element is insufficient.

State v Chanen, 209-784; 229 NW 143

Knowledge—instructions. In a prosecution for receiving stolen goods, it is sufficient for the state to establish that the facts and circumstances known to the accused were sufficient to satisfy him or cause him to believe that the goods had been stolen, and, after so instructing, subsequent references to "knowledge" will be deemed as referring to the instruction already given, and as so understood by the jury.

State v Friend, 210-980; 230 NW 425

Accomplice—thief and receiver of property. One who steals property is not an accomplice of one who thereafter feloniously receives the stolen property.

State v Smith, 219-168; 256 NW 651

Guilt of original larceny as defense. It is no defense to a prosecution for concealing stolen property in a named county that the accused was present at the perpetration of the larceny in another county.

State v Davis, 212-582; 234 NW 858

II STOLEN PROPERTY

Stolen bonds—when purchaser protected. The purchaser of stolen United States liberty bonds will be protected in his purchase when he purchases in good faith, for full value, in the ordinary course of business, and without actual notice or knowledge of any defect in the title of the seller, and without notice or knowledge of any fact which would put said purchaser on inquiry as to said seller's title.

State Bank v Bank, 223-596; 273 NW 160

Concealment—guilt of original larceny as defense. It is no defense to a prosecution for concealing stolen property in a named county that the accused was present at the perpetration of the larceny in another county.

State v Davis, 212-582; 234 NW 858

Cow—evidence of ownership in conflict. In prosecution for receiving and concealing a stolen cow, cause was properly submitted to jury when testimony of ownership was conflicting.

State v McAteer, 227-320; 288 NW 72

III INDICTMENT

Former jeopardy—acquittal of larceny—felonious receiving. An acquittal under an indictment charging larceny from a building in the nighttime constitutes no bar to a subsequent indictment charging the felonious receiving of the stolen property—said crimes being separate and distinct offenses.

State v Smith, 219-168; 256 NW 651

IV EVIDENCE

Evidence—sufficiency. Evidence held to sustain a conviction for receiving stolen property.

State v Feldman, 201-1089; 202 NW 90

Corpus delicti and venue—evidence. Evidence reviewed and held ample to establish the corpus delicti and venue in a prosecution for receiving stolen property.

State v Joy, 203-536; 211 NW 213

Larceny (?) or receiving stolen property (?). Evidence tending to show that an accused drove his conveyance to a certain place and there waited until his companion returned, a short time later, with stolen property, which was then loaded by both parties into the conveyance, is ample (guilty knowledge being shown) to justify a jury finding that the accused was guilty of receiving stolen property.

State v Joy, 203-536; 211 NW 213

Larceny (?) or receiving stolen property. Evidence that hogs had been stolen from railroad car and had been driven in direction of defendant's home, and were later found there, tended to prove larceny, and did not support conviction for receiving stolen goods.

State v Butler, (NOR); 205 NW 842

Domestic animals—homing instinct. It is common knowledge that cattle will return to a place to which they have long been accustomed, and it is characteristic of practically all domestic animals to seek the places where they have been sheltered and fed, and evidence of such behavior is admissible.

State v McAteer, 227-320; 288 NW 72

Receiving other stolen property. On a prosecution for receiving and concealing stolen property, evidence of the receiving and concealing by defendant, about the same time, of other stolen property is admissible on the issue of knowledge.

State v Renslow, 211-642; 230 NW 316; 71 ALR 1111

Other contemplated thefts on issue of knowledge. In a prosecution for concealing a stolen

cow, evidence is admissible on the issue of the knowledge of the accused, that on the evening preceding the larceny of the cow, the accused, together with other persons who were admittedly participants in the stealing of the cow, arranged to sell and deliver, that night, to a stock dealer, certain hogs, it being made to appear that none of the parties possessed any hogs.

State v Davis, 212-582; 234 NW 858

Conviction on testimony of felon. A defendant, in a prosecution for receiving stolen hogs, may be convicted on the testimony of one convicted of a felony, and, since the weight to be given such testimony is for the jury, when there is a conflict, a directed verdict for the defendant is properly refused. Held, evidence sufficient to convict.

State v Wehde, 226-47; 283 NW 104

CHAPTER 581

FALSE PRETENSES, FRAUDS, AND OTHER CHEATS

13045 False pretenses.

ANALYSIS

Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I IN GENERAL

Discussion. See 9 ILB 204—Larceny by trick and false pretenses

Check on insufficient deposit. The obtaining of money on a check by the drawer thereof when he knows he has no sufficient funds in the drawee bank for the payment of the check may not be prosecuted as a felony under the false pretense statute when the legislature has specifically declared such a transaction to be a mere misdemeanor. (§§13047–13049.)

State v Marshall, 202-954; 211 NW 252

False and genuine instruments differentiated. An indictment charging the obtaining of property by means of a false and spurious order charges an offense as defined in this section and not as defined in §13047, the latter section dealing solely with genuine instruments.

Humphrey v Hollowell, 203-221; 212 NW 570
Furey v Hollowell, 203-376; 212 NW 698

Felony (?) or misdemeanor (?). The district court has no jurisdiction of an indictment or trial information which charges, in effect, the fraudulent obtaining of money (1) on a check drawn by himself in an assumed name, and (2) on the mere representation that the check was of face value which was untrue, as such charge constitutes an unindictable misdemeanor under §13047. (Note change in statute.)

Conkling v Hollowell, 203-1374; 214 NW 717

Felony (?) or misdemeanor (?). The presentation of, and the obtaining of property on, a spurious check purporting to be signed by one other than the presentor, constitutes a felony under this section and not a misdemeanor under §13047, the other essential elements of the felony being duly alleged and established.

Benny v Hollowell, 203-1351; 214 NW 496
Winfield v Hollowell, 204-179; 214 NW 491

Felony (?) or misdemeanor (?). An indictment which alleges the obtaining of money by the accused on false representation as to the value of a check drawn by himself and on other specifically alleged material and false representations of fact, charges a felony under this section, and not a misdemeanor under §13047.

Murphy v Hollowell, 204-64; 214 NW 734

Differentiation showing misdemeanor. On a record showing (1) that one "Jack Lusk" as the payee of a check signed by "T. L. Wood" was indicted on the mere allegation that defendant had falsely represented the check to be of face value, and (2) that upon the arraignment of the defendant he was thereafter proceeded against and convicted as "Thomas Lusk Woods", it will be presumed that the check was signed by the defendant and that the indictment charges an offense under §13047.

Woods v Hollowell, 204-186; 214 NW 675

Larceny and false pretenses distinguished. A false representation may result in the crime of (a) cheating by false pretenses or (b) larceny. If the representation induces the owner of property to transfer both title and possession, the resulting crime is cheating by false pretenses. If the representation induces the owner of the property simply to part with the possession, and the receiver takes with the intent fraudulently to convert the property to his own use, the resulting crime is larceny.

State v Chamberlain, 215-273; 245 NW 277

II THE FALSE PRETENSE

False statement of indebtedness. A false statement of one's indebtedness, made with the intent to fraudulently procure a loan of

II THE FALSE PRETENSE—concluded

money, will support a charge of false pretenses.

State v Detloff, 201-159; 205 NW 534

Representations in different transactions. A false statement in one transaction as to one's financial condition, not made with an intent to defraud, may afford a basis for a charge of false pretenses when the statement is reiterated and reaffirmed in a subsequent transaction, and with the intent to defraud.

State v Detloff, 201-159; 205 NW 534

III PROPERTY OBTAINED

False pretenses—indictment—failure to describe money—waiver. Failure to specifically describe the money obtained by false pretenses (assuming such necessity) is waived by delaying objection until after the jury is sworn.

State v Detloff, 201-159; 205 NW 534

False pretenses—indictment—indefinite identification of property. An indictment which charges the obtaining by false pretenses of "a stock of merchandise consisting of groceries, dry goods, drugs, and fixtures," must describe or point out the property in such manner as to individualize it from all other property of like character: e. g., by charging its exact location. An allegation of ownership is not, in and of itself, sufficient.

State v Hixson, 202-431; 210 NW 423

Larceny and false pretenses distinguished. A false representation may result in the crime of (a) cheating by false pretenses or (b) larceny. If the representation induces the owner of property to transfer both title and possession, the resulting crime is cheating by false pretenses. If the representation induces the owner of the property simply to part with the possession, and the receiver takes with the intent fraudulently to convert the property to his own use, the resulting crime is larceny.

State v Chamberlain, 215-273; 245 NW 277

IV SIGNATURE OBTAINED

No annotations in this volume

V INDICTMENT

Venue. The crime of obtaining property by false pretenses may be committed partly in one county and partly in another and thereby justify the return of an indictment in either county.

State v George, 206-826; 221 NW 344

Venue. An indictment for obtaining money by false pretenses may lay the venue in the county in which the false representations were made and in which the check was obtained, even tho the money on the check was obtained in a foreign county of this state.

State v Detloff, 201-159; 205 NW 534

Failure to describe money. Money charged to have been obtained by false pretenses need not be particularly described in the indictment.

State v Detloff, 201-159; 205 NW 534

Receipt of property—variance. An indictment charging the obtaining of money by false pretenses is properly supported by evidence that the accused obtained a check for the amount of money in question and later personally obtained the money by cashing the check.

State v Detloff, 201-159; 205 NW 534

Indefinite identification of property. An indictment which charges the obtaining by false pretenses of "a stock of merchandise consisting of groceries, dry goods, drugs, and fixtures" must describe or point out the property in such manner as to individualize it from all other property of like character: e. g., by charging its exact location. An allegation of ownership is not, in and of itself, sufficient.

State v Hixson, 202-431; 210 NW 423

Setting out pretense. An indictment for false pretenses need not set forth a written pretense, tho used in evidence, when the charge in question is based on a subsequent transaction and on the oral representations then made, even tho the oral representations were a substantial repetition of the former written one.

State v Detloff, 201-159; 205 NW 534

Short form indictment — erroneous designation of section. A short form indictment for obtaining money by false pretenses, even tho it specifically purports to be found under this section, but which, by the bill of particulars, is manifestly based on false pretenses on obtaining a refund of tax paid on motor vehicle fuel as provided by §5093-a8, C., '31 [§5093.31, C., '39], is sufficient to support a conviction under the latter section and a sentence solely thereunder.

State v Wall, 218-171; 254 NW 71

VI EVIDENCE

(a) IN GENERAL

Circumstantial evidence. Falsity may be established by circumstantial evidence. Evidence held to present jury question.

State v Huckins, 212-283; 234 NW 554

Ownership of land. Evidence held wholly insufficient to sustain a verdict of guilt of obtaining money by false representations as to ownership of certain indefinitely described land.

State v George, 206-826; 221 NW 344

Written statements of accused. The falsity of pretenses charged in an indictment may be shown by the written statements of the accused, executed both before and after the transaction charged in the indictment.

State v Detloff, 201-159; 205 NW 534

Financial statement. On the issue of false pretenses as to the amount of the unsecured indebtedness of the accused, the reception in evidence of promissory notes of the accused which did not evidence unsecured indebtedness is harmless when the falsity of the pretenses alleged is shown by other uncontradicted evidence.

State v Detloff, 201-159; 205 NW 534

Unallowable cross-examination. The state on the trial of one accused of false pretenses, may not, on the cross-examination of the accused, develop the fact that the federal post office authorities have entered an order which denies to the accused the use of the mails.

State v Yarham, 206-833; 221 NW 493

(b) OTHER TRANSACTIONS

Subsequent transaction not establishing crime. On the trial of an indictment for false pretenses, it may be shown that the accused, in a transaction subsequent to the one charged, reiterated the pretenses charged in the indictment, even tho such subsequent transaction does not reveal the commission of any crime.

State v Detloff, 201-159; 205 NW 534

Similar and nonremote false pretenses. The state, in a prosecution for obtaining property by false pretenses, may show the making by the accused of other like or similar nonremote false pretenses, but need not show that property was actually obtained by means of such latter pretenses.

State v Huckins, 212-283; 234 NW 554

Unallowable cross-examination. The state on the trial of one accused of false pretenses may not, on the cross-examination of the accused, lay the foundation for introducing testimony of other prior and like offenses by the accused.

State v Yarham, 206-833; 221 NW 493

Unallowable "other offense". The state, upon the trial of an indictment for false pretenses, may not show a prior transaction of the accused which furnishes no suggestion of criminal intent.

State v Yarham, 206-833; 221 NW 493

(c) INTENT TO DEFRAUD

Knowledge, design, and intent. In a prosecution for false pretenses, the state may, in showing other and like offenses, also show, as bearing on the defendant's knowledge, design, and intent, that money to finance the proposed deal was to be obtained by the person to whom the false representations were made by having his widowed mother mortgage her home and that the accused fully indorsed such plan; on the other hand, evidence that such plan was carried out is quite irrelevant and prejudicial.

State v Huckins, 212-283; 234 NW 554

VII INSTRUCTIONS

Falsity of pretense. The state must definitely allege and prove, in a prosecution for obtaining property by false pretenses, that the accused knew that the pretenses were false. Instructions held not to state the rule adequately.

State v Hixson, 205-1321; 217 NW 814

Invading province of jury. An instruction invades the province of the jury (in a prosecution for false pretenses) when it asserts that the law imputes or implies a fraudulent purpose on the part of a person who, in order to induce reliance on his statement, unqualifiedly states that a certain fact exists of his own knowledge, when, in truth and fact, such fact does not exist.

State v Huckins, 212-283; 234 NW 554

13047 False drawing or uttering of checks.

Differentiation of statutes. See under §13045

Atty. Gen. Opinions. See '30 AG Op 59; '34 AG Op 103, 139

Venue — proof by circumstantial evidence. The venue of a criminal offense may be established by circumstantial evidence and the just and allowable inferences deducible therefrom.

State v McCutchan, 219-1029; 259 NW 23

Venue—loss to bank first receiving check. The state, in order to show loss to the bank first receiving a check drawn without funds or arrangement for payment, may show that, with the connivance of the cashier of said bank, the said check was utilized in part as a basis for the payment of a former check drawn by the same drawer for a lesser amount.

State v McCutchan, 219-1029; 259 NW 23

Loss at place of venue. On a prosecution for the fraudulent drawing and uttering of a check without funds or arrangement for payment, proof that the credit entered by the bank because of said check was utilized, in part, in paying an outstanding check issued by the accused for freight due in another state, is sufficient proof that the bank granting the credit suffered a loss at the place where the bank was located.

State v McCutchan, 219-1029; 259 NW 23

Other offenses. On a prosecution for the fraudulent drawing and uttering of a check without funds or arrangement for payment, evidence is admissible that the defendant, with the manifest connivance of the cashier of the defrauded bank, drew and had cashed, during several months immediately preceding the transaction on trial, a series of checks on said defrauded bank in which he had no funds.

State v McCutchan, 219-1029; 259 NW 23

Knowledge of agent. On a prosecution for the fraudulent issuance and utterance of a check without funds or arrangement for pay-

ment, the knowledge of the cashier of the defrauded bank will not be imputed to the bank when said cashier was, manifestly, in the entire transaction particeps criminis with the drawer of the check.

State v McCutchan, 219-1029; 259 NW 23

Notes designed to resemble checks and so treated. Instruments for the payment of obligations, which papers resembled checks and were treated as such, but upon which the maker had cleverly executed certain qualifying words whereby he hoped that they could be treated as promissory notes, held to be in fact ordinary checks when it was noted that the payee was required to indorse them before payment.

State v Doudna, 226-351; 284 NW 113

Fraudulent intent necessary. An essential element of the crime of uttering a false bank check is fraudulent intent, and consists of securing a thing of value by giving a check knowing at the time that it cannot be paid when presented; however, the false representations must be more than a promise of future performance.

State v Doudna, 226-351; 284 NW 113

False check—postdating. While a postdated check may be held to be merely a promise to pay in the future, yet when the maker represents that the reason he postdates a check for only one day is because the bank is closed for the day and the check cannot be cashed until the next day, he in effect represents to the payee that the check is good when made.

State v Doudna, 226-351; 284 NW 113

Bad check—issued in trade name with maker as agent. A livestock buyer who issues a bad check under a trade name, with himself as manager, cannot by this device escape criminal liability, since it is not essential in a prosecution that he obtained the property for himself; and there is no doctrine of agency in the criminal law which will permit an officer of a corporation to shield himself on the ground that his wrongful acts were for the corporation.

State v Doudna, 226-351; 284 NW 113

False uttering of check—presentment and protest not necessary. Allegations of error in the admission of certain certificates of protest attached to a check, the subject matter of a criminal prosecution, were without merit since it was not essential to the state's case to prove presentment and protest, the crime of false uttering of the check being proven otherwise.

State v Doudna, 226-351; 284 NW 113

Check on insufficient deposit. The obtaining of money on a check by the drawer thereof when he knows he has no sufficient funds in the drawee bank for the payment of the check may not be prosecuted as a felony under the false pretense statute (§13045, C., '24) when the legislature has specifically declared such a transaction to be a mere misdemeanor. (§§13047–13049, C., '24.)

State v Marshall, 202-954; 211 NW 252

Differentiation showing misdemeanor. On a record showing (1) that one "Jack Lusk," as the payee of a check signed by "T. L. Wood," was indicted on the mere allegation that defendant had falsely represented the check to be of face value, and (2) that, upon the arraignment of the defendant, he was thereafter proceeded against and convicted as "Thomas Lusk Woods," it will be presumed that the check was signed by the defendant, and that the indictment charges an offense under this section, C., '24.

Woods v Hollowell, 204-186; 214 NW 675

False and genuine instruments differentiated. An indictment charging the obtaining of property by means of a false and spurious order charges an offense as defined in §13045, and not as defined in this section, C., '24, the latter section dealing solely with genuine instruments.

Humphrey v Hollowell, 203-221; 212 NW 570

Differentiation of statutes. Principle reaffirmed that the strict false pretense statute (§13045, C., '24) deals with false tokens and the offenses connected therewith, while this section, C., '24, deals with true tokens and the offenses connected therewith.

Furey v Hollowell, 203-376; 212 NW 698

Felony (?) or misdemeanor (?). The presentation of, and the obtaining of property on, a spurious check purporting to be signed by one other than the presentor constitutes a felony, under §13045, C., '24, and not a misdemeanor, under this section, C., '24; the other essential elements of the felony being duly alleged and established.

Benny v Hollowell, 203-1351; 214 NW 496

Fraud — felony (?) or misdemeanor (?). The district court has no jurisdiction of an indictment or trial information which charges, in effect, the fraudulent obtaining of money (1) on a check drawn by himself in an assumed name, and (2) on the mere representation that the check was of face value (which was untrue); as such charge constitutes an unindictable misdemeanor, under this section, C., '24. (Note change in C., '27.)

Conkling v Hollowell, 203-1374; 214 NW 717

Amount of check determines grade of offense —jurisdiction. In a prosecution for false uttering of a bank check, it is the amount of the check that determines the grade of the offense and not the amount received, provided something of value is received for it. Where a check was $20 or more, but only $2 in cash was received, the district court was in error in di-

recting a verdict for defendant on the ground that the offense should be prosecuted in the justice of the peace court.

State v Dillard, 225-915; 281 NW 842

Sufficiency of evidence. Evidence received and held to present a jury question on the issue of guilt of drawing and uttering a check when the drawer knowingly had no funds or arrangement for its payment.

State v McCutchan, 219-1029; 259 NW 23

Lack of funds or arrangement — evidence. On a prosecution for the fraudulent drawing and uttering of a bank check without funds or arrangement for payment, evidence is admissible that the state banking department, a few months prior to the uttering of the check in question, and to the knowledge of the defendant, had, in writing, explicitly prohibited the directors and officers of the defrauded bank from extending any financial credit to the defendant, and that the said prohibition was thereafter repeatedly violated by connivance between the defendant and the cashier of said bank.

State v McCutchan, 219-1029; 259 NW 23

13051 Fraudulent conveyances.

Fraudulent conveyances—civil actions to set aside. See under §11815

State as creditor. A plea of guilty in a criminal prosecution does not create the relation of creditor and debtor between the state and the accused, and a transfer of property by the accused after such plea and before the entry of judgment for a fine is not necessarily fraudulent as to the state.

State v Malecky, 202-307; 210 NW 121; 48 ALR 603

13057 Dealing in certain instruments.

Atty. Gen. Opinion. See '36 AG Op 59

13069 Fraudulent advertisements.

Atty. Gen. Opinion. See '28 AG Op 224

13070 Publishers acting in good faith.

Atty. Gen. Opinion. See '28 AG Op 224

13071 False entries in corporation books.

Motion to dismiss—nonincriminating grand jury testimony — no resulting immunity. A person involuntarily appearing before the grand jury, tho not asked self-incriminating questions, who later is charged by county attorney's information with falsification of records, a subject connected with the grand jury investigation, may not, by certiorari, review the overruling of a motion to dismiss the information on the ground of immunity because of such grand jury appearance, when a remedy by appeal existed.

Kommelter v Dist. Court, 225-273; 280 NW 511

13072 Transacting business without license.

Atty. Gen. Opinion. See '25-26 AG Op 85

CHAPTER 582

MALICIOUS MISCHIEF AND WILLFUL TRESPASS

13080 Malicious injury to buildings and fixtures.

Malice. One who wantonly destroys property furnishes ample evidence of malice and it is quite immaterial that he does not know who is the owner of the property.

State v Shaffer, 202-958; 211 NW 230

13092.1 Alteration of manufacturer's serial number.

Atty. Gen. Opinion. See '34 AG Op 415

CHAPTER 582.1

ALTERATION, SALE, AND CHARGING OF STORAGE BATTERIES

13111.4 Unlawful retention.

Nonconsent of owner. In a prosecution for the unlawful retention of a storage battery, the nonconsent of the owner is of the very gist of the offense.

State v See, 205-601; 218 NW 249

CHAPTER 583

INJURIES TO INTERNAL IMPROVEMENTS AND COMMON CARRIERS

13131 Jumping off cars in motion.

Accident insurance—violation of law. Proof that an insured at the time of his death was riding in a railroad freight car reveals no violation of a statute against "climbing upon or holding to" a moving railroad freight car.

Ragan v Ins. Co., 209-1075; 229 NW 702

CHAPTER 585

FORGERY AND COUNTERFEITING

13139 Forgery.

ANALYSIS

Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638

I IN GENERAL

Fictitious payee. Principle recognized that the indorsement of a check payable to a fictitious payee, by one to whom the drawer did not intend payment to be made, is forgery.

McCornack v Bank, 203-833; 211 NW 542; 52 ALR 1297

General reference to check. Instructions which refer the jury to the "check in question" (under a charge of uttering a forgery) are not necessarily erroneous because the record reveals numerous other checks.

State v Miller, 217-1283; 252 NW 121

Sentence—dual statutes. If there be two statutes defining an offense in such language that the accused may be sentenced under either, and one of them is general in its terms, and the other limited and particular, and imposes a lesser penalty, the particular should be construed as an exception to the general, and the lesser penalty prescribed thereby imposed. (So held under §§13139 and 13144, C., '27.)

Drazich v Hollowell, 207-427; 223 NW 253

II "INTENT TO DEFRAUD"

Other offenses—uttering forged instrument. On the trial of an indictment for uttering a forged instrument, the state may, as bearing on the defendant's purpose, intent, and knowledge, show the uttering of other like forgeries, both before and after the offense charged, which are properly connected with the offense on trial, in point of time and circumstances.

State v Baugh, 200-1225; 206 NW 250

III "FALSELY MAKE, ALTER", ETC.

No annotations in this volume

IV PUBLIC RECORD, ETC.

Uttering and publishing—jury question. A jury question on the issue of uttering a forged receipt is generated by evidence that the accused, while a witness in a civil action against himself and another and on demand of the attorney of his co-defendant, produced said receipt and that the same was introduced in evidence, it appearing that the interest of said accused and his co-defendant under said receipt was identical.

State v Carter, 222-474; 269 NW 445

V INDICTMENT

Indictment under "short-form". A county attorney information which charges the forgery of a check, and which otherwise is sufficient under the "short-form" act, is not insufficient because it (1) does not describe the check in detail, (2) does not allege the actual or apparent legal efficacy of the check, and (3) does not set forth a copy of the check. Resort to a motion for a bill of particulars is defendant's remedy in such cases.

State v Solberg, 214-333; 242 NW 84

Joining forgery and uttering—effect. The joining, in separate counts, in one indictment of forgery and uttering of said forgery, when both offenses are committed by the same person, does not have the effect of combining the two offenses into one offense with consequent obligation on the state to establish both counts.

State v Miller, 217-1283; 252 NW 121

Amendment—wholly new and different offense. A county attorney information which charges forgery cannot be deemed an amendment of an abandoned information which charged the uttering of a forgery, even tho the former is denominated an "Amended and substituted information."

State v Solberg, 214-333; 242 NW 84

VI EVIDENCE

Evidence—sufficiency. Evidence held insufficient to establish defendant's connection with a forgery.

State v Glendening, 205-1043; 218 NW 939

Validity of mortgage. Evidence held insufficient to show forgery of a mortgage.

McDaniel v Life Co., 210-1279; 232 NW 649
McDaniel v Bank, 210-1287; 232 NW 653

Signature on statutory bond—sufficiency of evidence. Evidence reviewed and held that the signature to a depository bond was genuine.

School District v Bank, 218-91; 253 NW 920

Other offenses as bearing on intent. Upon the trial of an indictment for uttering a specifically described forged check, the state may show, on the issue of intent, that the accused has committed other like forgeries as a part of a general scheme to defraud the alleged maker of the check in question.

State v Cordaro, 206-347; 218 NW 477

VII VALIDITY OF INSTRUMENTS

Forgery after delivery—burden of proof. A pleader who wishes to avoid the legal effect of an instrument, because of a material and unauthorized alteration therein, must plead that the alteration was made after delivery.

Hartwick v Hartwick, 217-758; 252 NW 502

Statutory bond—forgery. Evidence reviewed and held that the signature to a depository bond was genuine.

School District v Bank, 218-91; 253 NW 920

Opinion evidence—signatures—jury question. The mere introduction in evidence of genuine signatures of a party in order to establish the plea that the purported signature of the party to a written release is a forgery does not generate a jury question on the issue of forgery, when other ample evidence persuasively shows that the signature to the release is genuine.

Vande Stouwe v Life Co., 218-1182; 254 NW 790

Rebutting presumption by possession—forgery. Transfers and assignments of property of a deceased, in the hands of certain heirs, raise a presumption that they were delivered. However, facts and circumstances may overcome this presumption, especially when it is shown that the signatures of the deceased to the instruments are forgeries.

Brien v Davidson, 225-595; 281 NW 150

13140 Uttering forged instrument.

ANALYSIS

Indictment generally. See under Chs 637, 638

I IN GENERAL

Similar offenses. On the trial of an indictment for uttering a forged instrument the state may, as bearing on the defendant's purpose, intent, and knowledge, show the uttering of other like forgeries, both before and after the offense charged, which are properly connected with the offense on trial, in point of time and circumstances.

State v Baugh, 200-1225; 206 NW 250
State v McWilliams, 201-8; 206 NW 114
State v Debner, 202-150; 209 NW 404

Evidence—sufficiency. Evidence held to sustain a verdict of guilty of uttering a forgery.

State v Cordaro, 206-347; 218 NW 477

Jury question. Testimony by the person whose name purports to be signed to a bill of exchange to the positive effect (1) that the signature is not his and was not authorized by him, (2) that the body of the bill was in defendant's handwriting, (3) that defendant falsely stated that the money obtained was desired by his employer as "change", and (4) that the defendant forthwith absconded, is ample, on a charge of uttering, to create a jury question on the issue of forgery and the defendant's knowledge of the forgery.

State v Miller, 217-1283; 252 NW 121

Evidence in former trial. A jury question on the issue of uttering a forged receipt is generated by evidence that the accused, while a witness in a civil action against himself and another and on demand of the attorney of his co-defendant, produced said receipt and that the same was introduced in evidence, it appearing that the interests of said accused and his co-defendant under said receipt were identical.

State v Carter, 222-474; 269 NW 445

Res judicata—acquittal of crime—nonconclusive as to payment in civil action. Where a contract for bailment of cattle provided for their purchase at a stipulated price and also provided for their surrender on demand if not paid for, and where defendant had been acquitted of a forgery charge based on a forged "Paid" stamp giving the appearance the contract price had been paid, his acquittal, when interposed in a replevin action for the cattle, was not res judicata on the issue of payment and did not bar the replevin action.

Bates v Carter, 225-893; 281 NW 727

II INDICTMENT

Other offenses as bearing on intent. Upon the trial of an indictment for uttering a specifically described forged check, the state may show, on the issue of intent, that the accused has committed other like forgeries as a part of a general scheme to defraud the alleged maker of the check in question.

State v Cordaro, 206-347; 218 NW 477

Joining forgery and uttering—effect. The joining, in separate counts, in one indictment of forgery and uttering of said forgery, when both offenses are committed by the same person, does not have the effect of combining the

II INDICTMENT—concluded

two offenses into one offense with consequent obligation on the state to establish both counts.

State v Miller, 217-1283; 252 NW 121

Form — statement of charge. Indictment charging offense substantially in language of statute and setting out copy of check alleged to have been forged and uttered held to charge offense of uttering forged instrument and not that of obtaining money or property by false pretenses.

Lewis v Hollowell, (NOR); 227 NW 140

13141 Public instruments.

Public security—dual general and particular statutes—proper procedure. When each of two statutes embraces the offense of uttering a forged or counterfeit public security, one general and the other particular, in that it is confined to said kind of securities, an indictment is properly returned under the latter statute. So held as to this section and §13144, C., '31.

State v Kirkpatrick, 220-974; 263 NW 52

13144 Uttering counterfeit securities.

Sentence—dual statutes. If there be two statutes defining an offense in such language that the accused may be sentenced under either, and one of them is general in its terms, and the other limited and particular, and imposes a lesser penalty, the particular should be construed as an exception to the general, and the lesser penalty prescribed thereby imposed. (So held under this section and §13139, C., '27.)

Drazich v Hollowell, 207-427; 223 NW 253

Public security—dual general and particular statutes—proper procedure. When each of two statutes embraces the offense of uttering a forged or counterfeit public security, one general and the other particular, in that it is confined to said kind of securities, an indictment is properly returned under the latter statute. So held as to §13141 and this section, C., '31.

State v Kirkpatrick, 220-974; 263 NW 52

CHAPTER 586

CONSPIRACY

13162 "Conspiracy" defined—common law.

Atty. Gen. Opinion. See '36 AG Op 591

ANALYSIS

Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I IN GENERAL

Civil liability—essential elements. A conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy, would give a right of action.

Hall v Swanson, 201-134; 206 NW 671
Dickson v Young, 202-378; 210 NW 452

Verdict — excessiveness. Record reviewed, and held that a verdict of $40,000 for libel and defamation of character was excessive and the result of passion and prejudice.

Mowry v Reinking, 203-628; 213 NW 274

Concerted action without conspiracy. Joint liability may exist without allegation or proof of conspiracy.

Baumchen v Donahoe, 215-512; 242 NW 533

Legal acts not conspiracy. A conspiracy cannot be predicated on the doing of legal acts in a legal manner.

Olmsted v Cas. Co., 218-997; 253 NW 804

Action based on fraud. In an action based on a conspiracy to defraud, the issue of conspiracy is not determinative, the important factor being that in order to be granted relief, it is necessary that the plaintiff establish the necessary elements of actionable fraud, the amount of recovery being dependent upon the extent of damage resulting from the fraudulent conduct.

Community Sav. Bank v Gaughen, 228- ; 289 NW 727

Damages—failure to establish. Proof that defendants have conspired to injure plaintiff's business or to employ unfair competition against plaintiff, becomes of no consequence in a law action when plaintiff fails to establish damages.

Roggensack v Monument Co., 211-1307; 233 NW 493

Peacefully picketing not secondary boycott. A threat to do something that a person has the right to do is not a threat in a legal sense. Held that union officials by lawfully placing a neon sign manufacturer on the unfair list, advertising to the public that he was unfair to electrical workers and peacefully picketing his place of business, were not guilty of such conspiracy as to constitute a secondary boycott and an injunction will not lie.

Smythe Co. v Union, 226-191; 284 NW 126

Secondary boycott—essential elements. A secondary boycott may be defined as a combination to cause a loss to one person by coercing others against their will to withdraw from their beneficial business intercourse, by threats that, unless they do so, the combination will cause similar loss to them, or by the use of such means as the infliction of bodily harm on them or such intimidation as will put them in fear of bodily harm.

Smythe Co. v Union, 226-191; 284 NW 126

Boycott — essential elements. Intimidation and coercion are essential elements of boycott. It must appear that the means used are threatening and intended to overcome the will of others and compel them to do or refrain from doing that which they would or would not otherwise have done.

Smythe Co. v Union, 226-191; 284 NW 126

II INDICTMENT

Description of offense. An indictment for conspiracy to commit a crime need not set forth the various elements of said crime. Indictment held properly to charge a conspiracy to engage in the unlawful transportation and sale of intoxicating liquors.

State v Terry, 207-916; 223 NW 870

Permissible theory of conspiracy and aiding and abetting. Under an indictment for murder in which the defendant is charged with having actually fired the fatal shot, the state may avail itself, as a matter of evidence, of a conspiracy theory, and at the same time invoke the theory of aider and abettor in the commission of the offense charged.

State v Bittner, 209-109; 227 NW 601

Indictment—"means" employed. An indictment which in effect charges that defendants conspired to injure the funds of a fraternal beneficiary society and of the certificate holders therein by doing the illegal act of loaning a named amount of said funds on real estate not worth double the amount loaned, as required by statute, and by converting a portion of said loan to their own use, sufficiently charges the "means" to be employed by said conspirators.

State v Blackledge, 216-199; 243 NW 534

Former jeopardy. A conviction on an indictment charging the obtaining, by an officer of a fraternal beneficiary society, of funds of the society, by means of false and fraudulent representations, is not a bar to an indictment for conspiracy based on the identical acts charged in the former indictment, the two charges not being sustainable by the same evidence.

State v Blackledge, 216-199; 243 NW 534

Indictment — duplicity. An indictment for conspiracy is not duplicitous because it sets forth numerous purposes or objects of the one conspiracy.

State v Moore, 217-872; 251 NW 737

III EVIDENCE

(a) IN GENERAL

Evidence—direct or circumstantial. Conspiracy may be established by either direct or circumstantial evidence.

State v Terry, 207-916; 223 NW 870

Circumstantial evidence. Circumstantial evidence in order to justify a conviction must not only show guilt beyond a reasonable doubt, but such evidence must be inconsistent with any other reasonable conclusion.

State v Lowenberg, 216-222; 243 NW 538

Establishing conspiracy. Conspiracy need not be shown by direct evidence, but may be shown by proof of concert of action and by the declarations, conduct, and acts of the parties. So held as to a conspiracy to effect a fraudulent sale of corporate shares of stock.

Reinertson v Struthers, 201-1186; 207 NW 247
State v Blackledge, 216-199; 243 NW 534
State v Lowenberg, 216-222; 243 NW 538

Evidence—order of introduction. The order of introducing testimony under a charge of conspiracy rests in the sound discretion of the court.

State v Terry, 207-916; 223 NW 870

Acts antedating conspiracy. In an action for damages for conspiracy to libel plaintiff and to defame his character, growing out of the world war activities, evidence is wholly inadmissible which tends to show that, long prior to the alleged conspiracy, the defendants and the community generally in which they lived, sought to perpetuate and did perpetuate the military habits, customs, and practices of the foreign people and government of which the defendants were formerly a part.

Mowry v Reinking, 203-628; 213 NW 274

Sale of stock. Evidence held ample to sustain a charge of conspiracy on the part of the officers of a corporation in the sale of the shares of stock.

Pullan v Struthers, 201-1179; 207 NW 235

Fraud not shown by evidence. Record reviewed and held insufficient to establish an alleged conspiracy to defraud plaintiff of his interest in property.

Bergman v Coal Co., 200-419; 203 NW 697

Malice—evidence to rebut. Competent testimony to rebut malice on the part of an alleged conspirator is manifestly admissible.

Mowry v Reinking, 203-628; 213 NW 274

Assault—evidence of conspiracy. Evidence held ample to establish a conspiracy to assault.

De Bruin v Studer, 206-129; 220 NW 116

III EVIDENCE—concluded

(b) ACTS, ETC., OF CO-CONSPIRATOR

Improper reception of testimony—curing error. The improper reception of testimony of the declaration of a co-conspirator after the conspiracy had been consummated is cured by oral and written instructions to the jury to disregard the same wholly, even tho the erroneously received testimony was read to the jury in order that the jury might definitely know just what was excluded from their consideration.

State v Lyons, 202-1195; 211 NW 702

Declarations of conspirators. Declarations of a co-conspirator which are made on the morning following the commission of the crime in question, and in the absence of the defendant on trial, are inadmissible against the latter.

State v Archibald, 204-406; 215 NW 258

Incompetent statements and declarations. Statements by one conspirator, not in the presence of the other conspirator, who is solely on trial, and which are not in furtherance of the conspiracy or a part of the res gestae thereof, are wholly inadmissible.

State v Huckins, 212-283; 234 NW 554

Incompetent declarations. The reception in evidence of the inflammatory acts and declarations of an alleged co-conspirator, not occurring in the presence or hearing of the accused who is solely on trial for the purpose of proving the conspiracy (there being no direct evidence), and the retention of such evidence before the jury for the major part of a long, sharply contested, and acrimonious trial before such evidence is withdrawn by the court, constitute such unfairness of trial that the error can only be cured by a new trial, notwithstanding the attempt of the trial court to supply an antidote through a cautionary instruction.

State v Hartman, 213-546; 239 NW 107

Declarations of co-conspirators. Acts and declarations of alleged conspirators which are not done or made in the presence or with the concurrence of the parties on trial for conspiracy are not admissible to establish the conspiracy, but are admissible in support of the state's case after the state has otherwise established a prima facie case.

State v Moore, 217-872; 251 NW 737

Declarations prior to conspiracy. Declarations of one joint defendant in a charge of conspiracy, tho made shortly before the time when it is alleged the conspiracy was entered into, are, if material on his state of mind, admissible against him, and his co-defendant on trial may not complain if the declarations are offered, received, and confined strictly to the maker thereof.

State v Moore, 217-872; 251 NW 737

Incompetent declarations. Declarations of alleged co-conspirators evincing hostility toward the plaintiff in an action for conspiracy to libel are wholly inadmissible when it cannot be said that they were made in furtherance of the alleged conspiracy. Especially are declarations evincing hostility to plaintiff inadmissible when made by persons who are not party defendants nor shown to be conspirators, and whose declarations spring solely from personal hostility wholly disconnected with the conspiracy in question.

Mowry v Reinking, 203-628; 213 NW 274

IV INSTRUCTIONS

Improper reception of testimony. The improper reception of testimony of the declaration of a co-conspirator after the conspiracy had been consummated, is cured by oral and written instructions to the jury to disregard the same wholly, even tho the erroneously received testimony was read to the jury, in order that the jury might definitely know just what was excluded from their consideration.

State v Lyons, 202-1195; 211 NW 702

Damages—actual and exemplary—mitigation. In an action for libel and defamation of character, the court should clearly differentiate between the purpose and effect of evidence (1) tending to show a good faith belief in the truth of the charges in question, and (2) tending to show the actual truth of such charges.

Mowry v Reinking, 203-628; 213 NW 274

Conspiracy—reception of incompetent testimony—incurable error. The reception in evidence of the inflammatory acts and declarations of an alleged co-conspirator, not occurring in the presence or hearing of the accused who is solely on trial for the purpose of proving the conspiracy (there being no direct evidence), and the retention of such evidence before the jury for the major part of a long, sharply contested, and acrimonious trial before such evidence is withdrawn by the court, constitutes such unfairness of trial that the error can only be cured by a new trial, notwithstanding the attempt of the trial court to supply an antidote through a cautionary instruction.

State v Hartman, 213-546; 239 NW 107

13163 Conspiracy to prosecute.

Malicious prosecution. See under §13728

CHAPTER 587

MALICIOUS THREATS

13164 Malicious threats to extort.

ANALYSIS

I IN GENERAL
II "MALICIOUSLY THREATEN"
III "WITH INTENT TO EXTORT," ETC.
IV INDICTMENT

Indictment generally. See under Chs 637, 638

I IN GENERAL

Dual offenses—failure to separate. Under a charge of "malicious threats to extort money", the accused cannot be properly convicted of "malicious threats to compel a person to do an act against his will", (said offenses being separate and distinct tho provided for in the same section) and instructions which infer the contrary are erroneous.

State v Essex, 217-157; 250 NW 895

Instructions — money paid because of fear. Instructions reviewed and held not to authorize the jury to convict, irrespective of any threats, if it found that the prosecuting witness paid money because of fear only.

State v Wilbourn, 219-120; 257 NW 571

II "MALICIOUSLY THREATEN"

Liability for mental pain. Willful threats made to a debtor for the purpose of producing in the mind of the debtor such mental pain, anguish, and harassment as will induce him to pay the debt, renders the offender liable in damages for the resulting pain and anguish, even tho there be no actual or threatened physical injury, provided the threats are not mere threats to resort to legal procedure.

Barnett v Service Co., 214-1303; 242 NW 25; 4 NCCA(NS) 223

III "WITH INTENT TO EXTORT," ETC.

Instructions — nonpermissible construction. The ordinary instruction defining "intent" cannot be deemed an authorization to the jury to infer that the defendant was responsible for the acts and statements of bystanders.

State v Wilbourn, 219-120; 257 NW 571

IV INDICTMENT

Failure to allege essential threat. A "short-form" indictment for malicious threat to extort is fatally defective when it fails to allege the statutory identifying threat made by the accused.

State v Goldenberg, 211-234; 233 NW 66

Failure to name injured party. A "short-form" of indictment for malicious threat to extort is fatally short in legal requirement when it fails to allege the name of the person threatened.

State v Goldenberg, 211-234; 233 NW 66

Indictment — sufficiency. An indictment for extortion may be sufficient tho the language relative to the threatened offense and the accompanying intent is bunglingly expressed.

State v Wilbourn, 219-120; 257 NW 571

CHAPTER 588

PERJURY

13165 Definition—punishment.

ANALYSIS

I OATH OR AFFIRMATION
II MATERIALITY OF MATTER
III INDICTMENT
IV EVIDENCE
V INSTRUCTIONS

Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I OATH OR AFFIRMATION

No annotations in this volume

II MATERIALITY OF MATTER

Record admissible to show materiality. In a prosecution for perjury, the record and instructions in the proceedings, in which the perjury is alleged to have been committed, may be admissible for the purpose of showing the materiality of the alleged false testimony.

State v Mutch, 218-1176; 255 NW 643

III INDICTMENT

Improper statement in indictment. Perjury may, manifestly, be predicated on the fact that the defendant had falsely sworn that a certain incriminating admission had not been made to him by another person. It is equally manifest that the indictment in such a case may predicate the perjury in such form as to render immaterial the entire assignment of perjury.

State v Morrison, 208-858; 226 NW 54

IV EVIDENCE

Contradictory testimony. Testimony on which a charge of perjury is based is not shown to be false beyond a reasonable doubt by proof that the accused, prior to the perjury alleged,

IV EVIDENCE—concluded

made a statement directly contradictory of said testimony.

State v Mutch, 218-1176; 255 NW 643

Libel action based on perjury—proof beyond reasonable doubt not required. In an action for libel based on a defamatory publication that the plaintiff could not tell the truth when on the witness stand, in which action defendant offered to show that plaintiff perjured himself in a previous foreclosure hearing as to the existence of a certain fence, the court errs in withdrawing this evidence from the jury on the ground of indefiniteness, since in this civil action the defendant was not required to prove perjury beyond a reasonable doubt.

McCuddin v Dickinson, 226-304; 283 NW 886

V INSTRUCTIONS

Instruction on material parts of indictment. In prosecution for subornation of perjury, where defendant assigns as error the court's omission to instruct the jury as to what were the material parts of the indictment—while it is true this is a duty of the court—a review of the instructions shows that defendant's argument is quite technical, and the instructions, as a whole, clearly and definitely point out to the jury what the material allegations of the indictment were and what was necessary for the jury to find before returning a verdict of guilty.

State v Hartwick, 228- ; 290 NW 523

Elements necessary for conviction—construction as a whole. In prosecution for subornation of perjury, where defendant complains of the instruction summarizing the elements necessary to conviction, while the instruction could not have been complete in and of itself and was not so intended, since the instruction called the jury's attention to other instructions defining perjury, subornation of perjury, and other essentials of the crime to be found by the jury, it was sufficient. Principle reaffirmed that instructions must be considered as a whole.

State v Hartwick, 228- ; 290 NW 523

Rule as to credibility of witness. In prosecution for subornation of perjury, where defendant complains of the court's instruction which stated in part, "it being presumed in law that a man whose general reputation for truth and veracity is bad would be less likely to tell the truth than one whose reputation is good", such instruction did not instruct the jury that defendant had been impeached, that he would not tell the truth, or that they could disregard his testimony (they were only informed of a rule applicable in everyday business transactions), it being more a statement of the reason for such a rule in impeachment than any direction to the jury, and was in no sense a presumption of guilt, but could only be applied to defendant as a witness. The weight of defendant's testimony was left entirely for the jury.

State v Hartwick, 228- ; 290 NW 523

Other perjuries—sufficiency of instruction. In prosecution for subornation of perjury, where the court instructed the jury that "Certain evidence has been admitted in this case tending to prove other claimed perjuries and of other acts of the defendant and of his sister," the use of the words "certain evidence" does not indicate the opinion of the court as to quantity and weight of the evidence, and the use of the word "certain", so commonly used by practically all courts and all persons, could not have been understood by the jury to have meant fixed and established. It must have been considered as merely stating there was evidence of the nature described, and the use of the words "other acts of the defendant and of his sister" were not indefinite. They were sufficient to call the attention of the jury to the other facts, and it was not necessary that the court set out and review the testimony referred to.

State v Hartwick, 228- ; 290 NW 523

Offenses partly in county. In prosecution for subornation of perjury, an instruction as to venue was proper when it stated that evidence introduced tended to show defendant had solicited a witness to give the claimed perjured testimony in a trial, and that such solicitations, or some of them, were made in Appanoose county, and if defendant continued in his attempt to procure the witness and called and had witness testify as a witness in Davis county, knowing or believing witness would give perjured testimony, and if witness did in fact commit perjury in Davis county, the defendant could be prosecuted and convicted in Davis county.

State v Hartwick, 228- ; 290 NW 523

13166 Subornation of perjury.

See under §13165

CHAPTER 589

COMPOUNDING FELONIES

13168 Compounding certain felonies.

Contract to compound crime—proof. The plea that an obligation is invalid because executed in consideration of the compounding of a crime necessitates proof of an agreement, express or implied, (1) to compound or conceal the offense, or (2) not to prosecute the same, or (3) not to give evidence thereof.

Cotten v Halverson, 201-636; 207 NW 795

CHAPTER 590

OBSTRUCTING JUSTICE

13170 Interference with administration of justice.

Bribery as indicating unfavorable admission. Attempt by a defendant to bribe a witness is indicative of an admission on his part that his cause or claim is unjust, dishonest, and unrighteous; and the court may so instruct the jury on supporting testimony.

Gregory v Sorenson, 214-1374; 242 NW 91

CHAPTER 591

PROSTITUTION

13174 Soliciting.

Atty. Gen. Opinion. See AG Op Jan. 27, '39

"Solicitation" defined. "Solicitation", within the meaning of the statute which prohibits solicitation for purpose of prostitution, requires no particular form of words. Acts and conduct may constitute such solicitation.

State v Render, 203-329; 210 NW 911

Defendant soliciting for personal gratification—not included. The statute providing a penalty for any person who solicits another to have carnal knowledge is intended to punish for the solicitation for purpose of prostitution and not to punish a defendant in soliciting by mail a female to have carnal knowledge with him for his personal gratification.

State v Oge, 227-1094; 290 NW 1

Demurrer—function—whether offense comes within statute. On appeal from judgment overruling a defendant's demurrer to indictment, the sole duty of the supreme court is to determine whether the offense with which the defendant is charged comes within the provisions of the statute under which he is charged, without regard to whether such or similar offenses may, or may not, come within any other criminal statute.

State v Oge, 227-1094; 290 NW 1

13175 Keeping house of ill fame.

Atty. Gen. Opinion. See '25 AG Op 319

ANAYLSIS

Evidence in criminal cases generally. See under §13897 et seq.
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I IN GENERAL

Continuance—neglect to procure counsel—no showing of prejudice. A person accused of operating a house of ill fame, whose counsel withdraws after trial wherein the jury disagreed, such person then having two months to secure new counsel, but neglecting so to do until three days before retrial, may not complain if a motion for continuance is overruled, there being no showing on appeal of injury from such ruling.

State v Hathaway, 224-478; 276 NW 207

II INDICTMENT

No annotations in this volume

III EVIDENCE

Reputation of keeper of bawdyhouse—when admissible. In a prosecution for keeping a house of ill fame, defendant's reputation for chastity may be shown when she resided on the premises and was also an inmate, under the rule that such reputation of the inmates of the house and those who resort thereto may be shown as bearing on the question as to whether or not the house was, in fact, one of ill fame.

State v Lewis, 226-98; 283 NW 424

Circumstantial evidence. The offense of keeping a house of ill fame may be established by circumstantial evidence.

State v Owen, 205-1052; 219 NW 23

House of ill fame—reputation. In establishing the general reputation of a place as being a house of ill fame, it is sufficient if from the entire series of questions and answers it is manifest that the reputation was confined to the time during which defendant occupied the house.

State v Owen, 205-1052; 219 NW 23

Licentious character of frequenters. The state may, but is not necessarily obliged to, establish the evil dispositions and tendencies of those who frequent an alleged house of ill fame.

State v Owen, 205-1052; 219 NW 23

Cross-examination — scope—categorical denial of guilt on direct examination. On direct examination, accused's categorical denial that she operated a house of ill fame, which being the very question that the jury is ultimately to decide, opens wide the gates for exploration

on cross-examination as to witness' conduct during the period covered by the question.

State v Hathaway, 224-478; 276 NW 207

IV INSTRUCTIONS

Female jurors—no presumption of prejudice. Contention that a fair trial was not obtained on account of female jurors, a majority of whom were on the jury, having an inborn prejudice against a woman accused of keeping a house of ill fame, denied because, in absence of a contrary showing, jurors, regardless of sex, are presumed to follow instructions and determine guilt upon the evidence.

State v Hathaway, 224-478; 276 NW 207

13176 Evidence—general reputation.

Reputation. In establishing the general reputation of a place as being a house of ill fame, it is sufficient, if from the entire series of questions and answers it is manifest that the reputation was confined to the time during which defendant occupied the house.

State v Owen, 205-1052; 219 NW 23

CHAPTER 592

OBSCENITY AND INDECENCY

13184 Lascivious acts with children.

Atty. Gen. Opinion. See '28 AG Op 315

Nonmitigating circumstance. One convicted of lascivious acts with an infant may not justly find mitigation in the waywardness of his victim.

State v Taylor, 202-189; 209 NW 287

Unallowable detail of hearsay and non res gestae statements. On the trial of an indictment charging the commission of lewd and lascivious acts with the body of a child, testimony of the parents of the child as to what they were told in detail by their children, singly and collectively, after they—the parents—returned home, relative to the acts of the defendant, and testimony of the prosecutrix as to what she detailed to her parents relative to the acts of the defendant are wholly incompetent for any purpose.

State v Rounds, 216-131; 248 NW 500

Other closely allied offense. On the trial of an indictment charging the commission of lewd and lascivious acts with the body of a child, evidence of the commission by the defendant of a similar offense with a child other than prosecutrix is admissible when the acts with the two children are so closely related in point of time and place, and so intimately associated with each other that they form one continuous transaction.

State v Rounds, 216-131; 248 NW 500

Included offenses. On the trial of an indictment charging the commission of lewd and lascivious acts with and upon the body of a child, the included offenses of assault and battery and simple assault should be submitted when there is supporting evidence and when there is no evidence of consent on the part of prosecutrix.

State v Rounds, 216-131; 248 NW 500

Unallowable instructions. On the trial of an indictment charging the commission of lewd and lascivious acts with the body of a child, it is wholly unallowable to instruct that the jury may convict if it finds that the defendant "hugged and kissed" prosecutrix or "placed his hand under her clothing".

State v Rounds, 216-131; 248 NW 500

Confession of crime—claim of intoxication. A purported confession as to lascivious acts with a child, the admissibility of which confession is objected to because of a claim of intoxication at the time the confession was made, raises a question properly submitted to the jury when it appears the defendant had not taken any liquor for 15 to 18 hours before the confession was made.

State v Hall, 225-1316; 283 NW 414

13190 Obscene literature—articles for immoral use.

Atty. Gen. Opinion. See '34 AG Op 690

13191 Circulating obscene matter.

Demurrer—druggist circulating birth control literature. An information charging the defendant, a druggist, with the crime of circulating advertisements of a device for the prevention of conception, charges facts which, if proven, would constitute a complete legal defense and a bar to prosecution, and is demurrable, druggists being specifically excepted from the provisions of the statute.

State v Chenoweth, 226-217; 284 NW 110

Title of act. The title, "An act to 'suppress' obscene literature", fails to intimate that a criminal penalty was provided for a violation.

State v Chenoweth, 226-217; 284 NW 110

Codification—code editor's catchwords—no part of law. Code section catchwords, "Circulating obscene matter", prepared by code editor, are no part of the law.

State v Chenoweth, 226-217; 284 NW 110

13195 Exceptions—doctors—druggists—artists.

Atty. Gen. Opinion. See '34 AG Op 690

Demurrer—druggist circulating birth control literature. An information charging the de-

fendant, a druggist, with the crime of circulating advertisements of a device for the prevention of conception, charges facts which, if proven, would constitute a complete legal defense and a bar to prosecution, and is demurrable, druggists being specifically excepted from the provisions of the statute.

State v Chenoweth, 226-217; 284 NW 110

CHAPTER 593

GAMBLING

13198 Keeping gambling houses.

Atty. Gen. Opinions. See '30 AG Op 230; '36 AG Op 441; '38 AG Op 298, 300

ANALYSIS

I WHAT CONSTITUTES
II INDICTMENT

I WHAT CONSTITUTES

Punch boards and slot machines as gambling devices. Legislature has specifically recognized punch boards and slot machines as gambling devices and they are subject to forfeiture when seized under a valid search warrant, unless the person named in the information or claiming an interest in the property shows cause why they should not be so forfeited.

State v Doe, 227-1215; 290 NW 518

Evidence insufficiency. Evidence of defendant's guilt of keeping a gambling house held insufficient for jury.

State v McNuelty, (NOR); 266 NW 291

Information—description of gambling devices—sufficiency. Description of gambling devices as "cards, dice, faro, roulette tables, and other devices" in information to obtain issuance of search warrant held sufficient.

State v Doe, 227-1215; 290 NW 518

II INDICTMENT

Plea in bar—holding of inferior court. It is no defense to an indictment for keeping a gambling house that, before the acts were done which it is claimed constituted such keeping, a municipal court had held that said acts did not constitute gambling.

State v Striggles, 202-1318; 210 NW 137; 49 ALR 1270

Search warrant—lack of seal—noninvalidation. The lack of a seal in a search warrant issued by a magistrate does not invalidate proceedings in search for gambling devices.

State v Doe, 227-1215; 290 NW 518

13202 Gaming and betting—penalty.

Atty. Gen. Opinions. See '28 AG Op 257; '36 AG Op 57, 441; '38 AG Op 298

Presumption. The presumption, under the bucket shop act, that grain, the subject matter of a purported contract of sale, was never intended to be delivered by the broker is not overcome by the simple expedient of having the broker testify that he intended to deliver the grain unless he had sooner sold it prior to the date of delivery.

Yoerg v Geneser, 219-132; 257 NW 541

13203 Wagers—forfeiture.

Atty. Gen. Opinions. See '28 AG Op 104, 257

Forfeiture of contraband articles. The procedure for the seizure and condemnation of alleged lottery tickets under this and following sections is a civil action.

State v Lottery, 214-158; 241 NW 421

Condemnation proceedings—lack of knowledge of unlawful use—effect. In proceedings to condemn slot machines as gambling devices, it is quite immaterial that the lessor of the machines did not know that the lessees were using the machines for gambling purposes.

State v Doe, 221-1; 263 NW 529

When legitimate device becomes gambling device. Tho a slot machine of a given type be not a gambling device per se, yet it becomes subject to seizure and condemnation as such when actually used and operated for gambling purposes.

State v Doe, 221-1; 263 NW 529

13210 Possession of gambling devices prohibited.

Atty. Gen. Opinions. See '38 AG Op 300; AG Op Jan. 10, '39

Probable cause for issuance of warrant—determination—sufficiency. The existence of "probable cause" for the issuance of a search warrant is to be determined by the magistrate issuing such warrant and does not have to be shown in the information itself but may be shown by affidavit attached thereto or by sworn testimony taken before the magistrate prior to the issuance of the warrant; hence, warrant to search for gambling devices was not issued without "probable cause" where state agent who signed and swore to information was also examined under oath.

State v Doe, 227-1215; 290 NW 518

Information—description of gambling devices—sufficiency. Description of gambling devices as "cards, dice, faro, roulette tables, and other devices" in information to obtain issuance of search warrant held sufficient.

State v Doe, 227-1215; 290 NW 518

Search warrant—lack of seal—noninvalidation. The lack of a seal in a search warrant

issued by a magistrate does not invalidate proceedings in search for gambling devices.

State v Doe, 227-1215; 290 NW 518

Gambling devices—John Doe warrant—validity. Unless a person is to be searched or is known to be in possession of the premises, a John Doe warrant sufficiently describing the premises is a valid basis to search for gambling devices.

State v Doe, 227-1215; 290 NW 518

Nickel-in-the-slot machine. A nickel-in-the-slot vending machine which, when operated, invariably produces a stated article of merchandise, and sometimes, in addition, divers numbers of metal checks which are each "good for five cents in trade", is a gambling device, even tho a mechanism on the machine always indicates just what will be received on each operation of the machine.

State v Ellis, 200-1228; 206 NW 105

Slot-vending machine. A slot-vending machine which, upon the insertion of a coin, invariably produces a package of merchandise, and occasionally by chance a valueless disk or token which may be played into the machine, not for merchandise, but for amusement purposes only, is a gambling device.

State v Marvin, 211-462; 233 NW 486

Property sold in furtherance of gambling. A vendor of property which is capable of a perfectly legitimate use may not recover therefor when he sells it for the very purpose of enabling the vendee to operate a gambling device, to wit, a punch board.

Parker-Gordon v Benakis, 213-136; 238 NW 611

Punch boards and slot machines as gambling devices. Legislature has specifically recognized punch boards and slot machines as gambling devices and they are subject to forfeiture when seized under a valid search warrant, unless the person named in the information or claiming an interest in the property shows cause why they should not be so forfeited.

State v Doe, 227-1215; 290 NW 518

Stipulations—construction of "punch board." A stipulation that certain property was sold for the purpose of using the same as prizes in the operation of a punch board, is a concession that the term "punch board" has a general recognized meaning which must control the construction of the stipulation.

Parker-Gordon Co. v Benakis, 213-136; 238 NW 611

When legitimate device becomes gambling device. Tho a slot machine of a given type be not a gambling device per se, yet it becomes subject to seizure and condemnation as such when actually used and operated for gambling purposes.

State v Doe, 221-1; 263 NW 529

Condemnation of gambling devices—judicial notice of information and warrant. In proceeding to condemn slot machines and punch boards as gambling devices, failure to introduce in evidence the information, search warrant, and the property seized was not error where the defendant in his answer admitted seizure of the property and since information and warrant were a part of the case and court would take judicial notice of the files therein.

State v Doe, 227-1215; 290 NW 518

Condemnation proceedings—lack of knowledge of unlawful use—effect. In proceedings to condemn slot machines as gambling devices, it is quite immaterial that the lessor of the machines did not know that the lessees were using the machines for gambling purposes.

State v Doe, 221-1; 263 NW 529

Evidence of keeping gambling house. Evidence of defendant's guilt of keeping a gambling house held insufficient for jury.

State v McNuelty, (NOR), 266 NW 291

13218 Lotteries and lottery tickets.

Atty. Gen. Opinions. See '28 AG Op 257; '34 AG Op 741; '36 AG Op 19, 544; '38 AG Op 527; AG Op Jan. 9, '39; Feb. 25, '39; May 15, '39

Regulation and prohibition—consideration for chance indispensable element. A scheme for the distribution, by lot or chance, of valuable prizes does not constitute a lottery when the recipient of the prize neither pays nor hazards anything of value for the chance to obtain said prize. And it is quite immaterial that the donor of such prizes expects such distribution of prizes will work a financial betterment of his business.

State v Hundling, 220-1369; 264 NW 608; 103 ALR 861

Bank night—value of consideration in contract. A bank night scheme is not a lottery merely because a legal consideration is given in return for the promise to give the prize. The value of the consideration given in a lottery is important, as a lottery depends on whether persons are induced to hazard something of value on a mere chance, but in a civil action to enforce the payment of a bank night prize the value of the consideration does not control, as any legal consideration is sufficient to support the promise.

St. Peter v Pioneer Theatre, 227-1391; 291 NW 164

Prize money deposit—"contestant" not "winner"—award necessary. Where, after starting a contest to place small "R's" within a large "R", the sponsor company became insolvent and its receiver, under agreement with defendant bank, set up a special bank account as prize contest payment money—which account

was later applied by the bank on a note of the insolvent sponsor company—an individual contestant, altho complying with all contest rules, may not, without being declared to be the winner according to the contest rules, recover against the bank the amount of the first prize from such special account.

Bielen v Bank, 224-19; 276 NW 25

13219 Minors in billiard rooms—duty of owner.

Atty. Gen. Opinions. See '28 AG Op 123, 356: '38 AG Op 176

CHAPTER 594

AFFRAYS AND PRIZE FIGHTING

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CHAPTER 596

DESECRATION OF SABBATH

13227 Breach of Sabbath—exceptions.

Atty. Gen. Opinions. See '28 AG Op 422; '38 AG Op 896

ANALYSIS

I IN GENERAL
II WHAT ACTS INCLUDED
III WHAT NOT INCLUDED
IV RATIFICATION
V EFFECT OF VIOLATION
VI INFORMATION

I IN GENERAL

Sales on Sunday—damages. Fact that beverage was sold on Sunday, in violation of this section, C., '35, does not deprive plaintiff of right to recover proven damages.

Anderson v Tyler, 223-1033; 274 NW 48

II WHAT ACTS INCLUDED

Appeal and error—review—scope and extent—nonpleaded matter. Failure to plead the invalidity of a contract because it was entered into on Sunday precludes review of the point on appeal.

Passcuzzi v Pierce, 208-1389; 227 NW 409

III WHAT NOT INCLUDED

Contracts—delivery on secular day. A written guaranty executed on Sunday but delivered on a secular day under express or implied authority of the guarantor, is perfectly valid.

Iowa D.M. Bk. v Lewis, 215-654; 246 NW 597

IV RATIFICATION

Subsequent ratification—effect. A plea that promissory notes were executed on Sunday is avoided by a plea, and proof thereof, that the maker of the notes subsequently ratified the execution of said notes.

Witmer v Fitzgerald, 209-997; 229 NW 239

V EFFECT OF VIOLATION

Execution on Sunday—collateral agreement. The fact that a promissory note was signed on Sunday has no legal bearing on an agreement growing out of and relating to said note, but wholly collateral thereto.

Hirtz v Koppes, 212-536; 234 NW 854

VI INFORMATION

No annotations in this volume

CHAPTER 598

DESERTION AND ABANDONMENT OF WIFE AND CHILDREN

13230 "Desertion" defined.

ANALYSIS

I IN GENERAL
II INDICTMENT
III EVIDENCE
IV INSTRUCTIONS

Evidence in criminal cases generally. See under §13897 et seq
Indictment generally. See under Chs 637, 638
Instructions in criminal cases generally. See under §13876

I IN GENERAL

Discussion. See 9 ILB 97—Desertion and abandonment

Support by divorced mother. The father of a child is not guilty of willfully failing to support the child if the divorced mother is, in the discharge of her legal duty, supporting it to such extent that it is not "destitute" in a legal sense.

State v Brodie, 206-1340; 222 NW 23

I IN GENERAL—concluded

Maintenance by mother. A child may not be said to be in a "destitute condition" as to the father of the child if the mother of the child in the discharge of her legal duty to maintain her child has rendered it nondestitute, even tho the father and mother are divorced.

State v Sayre, 206-1334; 222 NW 20

Destitution—what constitutes. A child may be in a "destitute" condition even tho charitable people have voluntarily taken it into their homes and gratuitously supported it.

State v Herring, 200-1105; 205 NW 861
State v Sayre, 206-1334; 222 NW 20

Willfulness negatived. A father may not be said to willfully fail to support his infant child in the custody of its mother when it is made to appear that he had extended to the mother the privilege of drawing checks on his bank account for the support of herself and child and that the mother had declined to do so.

State v Herring, 200-1105; 205 NW 861

Essential intent. There can be no abandonment by a parent of his child in the absence of an intent to abandon.

Pitzenberger v Schnack, 215-466; 245 NW 713

Fugitive from justice—nonpresence in demanding state. A party cannot be a fugitive from justice of a demanding state, and therefore cannot be legally extradited to said state, when, admittedly, he has never been, physically, within the demanding state since a long time prior to the commission of the offense charged in said state, to wit, nonsupport of his child; and, legally, it matters not that the accused personally caused the pregnant mother to go to, and enter, and remain in, the demanding state.

Drumm v Pederson, 219-642; 259 NW 208

II INDICTMENT

Essential elements. Under a charge of child desertion "willfulness" and "without cause" are two indispensable elements.

State v Nichols, 219-309; 257 NW 813

III EVIDENCE

Destitute condition. Evidence reviewed in a prosecution for child desertion and held to present a jury question on the issue whether the child was in a destitute condition.

State v Sayre, 206-1334; 222 NW 20

Evidence—sufficiency. Evidence held to present a jury question on the issue of willful refusal of a husband and father to support a wife and child who were dependent upon the charity of others.

State v Anderson, 209-510; 228 NW 353; 67 ALR 1366

Essential elements. Proof of failure to support will not, in and of itself, sustain a conviction for failure of a husband to support his wife. The state must carry the burden of establishing every element of the offense.

State v Gude, 201-4; 206 NW 584

Burden of proof. In a prosecution for failure of a husband to support his wife and child, it is not incumbent on the accused to show that he was "without fault", and reversible error results from so instructing.

State v Gude, 201-4; 206 NW 584

Physical inability to support. Record reviewed and held to present a jury question on the issue whether a parent was physically able to support his child.

State v Sayre, 206-1334; 222 NW 20

Desertion of child—proof of paternity—reasonable doubt rule applicable. In a prosecution for child desertion, a claim of nonaccess creating a conflict in the evidence as to the paternity of the child requires the state to prove paternity beyond a reasonable doubt and submission of the question to the jury.

State v Heath, 224-483; 276 NW 35

IV INSTRUCTIONS

Nonapplicability to evidence. An instruction to the effect that a husband would not be guilty of failure to support his wife if he procured a home at a named place and if the wife without good cause refused to live at said place is erroneous when the applicable evidence was solely to the effect that the husband offered to procure such home and that the wife refused such offer.

State v Wright, 200-772; 205 NW 325

Separate estate of wife — instructions. An instruction that a husband may be criminally liable for failure to support his wife even tho "she has an estate of her own" is prejudicially confusing when not coupled with any explanation as to what would constitute, under said statute, a "destitute condition" on the part of the wife.

State v Wright, 200-772; 205 NW 325

Unallowable assumption. Record reviewed and held reversible error for the court to instruct that, as a matter of law, an accused had failed to show any conduct on the part of his wife which would justify him in refusing to support her.

State v Gude, 201-4; 206 NW 584

13235 Prima facie evidence.

Burden of proof. In a prosecution for the willful failure by a parent to support his child, no burden at any time rests on the defendant to establish to any extent or degree that his failure to support was not willful, even tho the statute does declare that the failure to support is prima facie evidence of willfulness.

State v Brodie, 206-1340; 222 NW 23

CHAPTER 602

INFRINGEMENT OF CIVIL RIGHTS

13251 Civil rights defined.

Discussion. See 8 ILB 129, 211—Race discrimination in naturalization; 14 ILR 63—Iowa "Civil Rights Act"

13252.1 Religious test.

Atty. Gen. Opinion. See '36 AG Op 629

13252.2 Evidence.

Atty. Gen. Opinion. See '36 AG Op 629

CHAPTER 604

LIBEL

13256 "Libel" defined.

Libel and slander generally. See under §12412 et seq

Libel per se. A writing which charges that certain parties are hypocrites, cheats, defrauders, and falsifiers is libelous per se.

State v Heptonstall, 209-123; 227 NW 616

13258 Indictment for libel.

Civil liability. See under §§12412–12416

Disjunctive acts charged conjunctively. When several nonrepugnant acts are enumerated disjunctively as constituting an offense, they may be alleged conjunctively without rendering the indictment subject to the vice of duplicity, and only one of said acts need be established in order to sustain a conviction.

State v Heptonstall, 209-123; 227 NW 616

13260 Publication.

Publication—evidence. Evidence held to amply sustain a finding of publication of a libel.

State v Heptonstall, 209-123; 227 NW 616

13262 Jury determines law and fact.

Duty to instruct. It is the duty of the court to instruct the jury that a writing is libelous per se (if it be such) even tho the jury has the discretionary right to determine the law of the case and is so instructed.

State v Heptonstall, 209-123; 227 NW 616

CHAPTER 605

BRIBERY AND CORRUPTION IN ELECTIONS

13263 Bribing electors—fine.

Conduct of election—candidates' statements. Statements made by candidates for municipal office as to their intentions respecting the acquisition of a public utility will not vitiate the election deciding the question of municipal ownership without a showing that the election was affected thereby.

Abbott v Iowa City, 224-698; 277 NW 437
Keokuk Co. v Keokuk, 224-718; 277 NW 291

Election bribery by third person—disqualifying effect. A candidate having been elected to office is not disqualified merely because some third person may have given or offered a bribe to the voters for the purpose of securing the election of said candidate, unless the candidate actually participated in and approved thereof.

Van Der Zee v Means, 225-871; 281 NW 460; 121 ALR 558

Electric company offering rate reduction—not candidates' bribery—election valid. Evidence held insufficient to establish bribery and an illegal election in that candidates for municipal office acquiesced in or ratified an advertised plan by which the local electric company offered to reduce its rates and pay back to its subscribers an accumulating sum as a rebate, in the event the voters would elect council members opposed to municipal ownership.

Van Der Zee v Means, 225-871; 281 NW 460; 121 ALR 558

13284 Political advertisements.

Conduct of election—candidates' statements. Statements made by candidates for municipal office as to their intentions respecting the acquisition of a public utility will not vitiate the election deciding the question of municipal ownership without a showing that the election was affected thereby.

Abbott v Iowa City, 224-698; 277 NW 437
Keokuk Co. v Keokuk, 224-718; 277 NW 291

CHAPTER 606

BRIBERY AND CORRUPTION OF PUBLIC OFFICIALS

13297 Bribery of jurors or referees.

Testimony tending to show distinct crime—admissibility. Testimony tending to show that the defendant, at a former trial, attempted to bribe the jurors is admissible, notwithstanding the fact that it tends to show the commission of a distinct and separate offense.

State v Friend, 210-980; 230 NW 425

Cross-examination of defendant in criminal case—scope. A defendant who is a witness in his own behalf stands upon the same footing as any other witness in relation to his memory, history, motives, or matters affecting his credibility. He may be asked if he did not, on a former trial, attempt to bribe the jurors.

State v Friend, 210-980; 230 NW 425

13301 Accepting reward for public duty.

Atty. Gen. Opinions. See '28 AG Op 75; '30 AG Op 165; '38 AG Op 363; AG Op Feb. 27, '39

13302 Corruptly influencing officials.

Atty. Gen. Opinion. See '30 AG Op 165

CHAPTER 607

MISCONDUCT OR NEGLECT IN OFFICE

13305 Oppression in official capacity.

Atty. Gen. Opinions. See '25-26 AG Op 270; '30 AG Op 142

13308 Stirring up quarrels and suits.

Discussion. See 18 ILR 266—Agreement with third party

13316.1 Private use of public property.

Atty. Gen. Opinions. See '38 AG Op 837; AG Op March 8, '39

CHAPTER 608

GRATUITIES AND TIPS

13317 Accepting or giving.

Atty. Gen. Opinions. See '28 AG Op 399; '30 AG Op 232

13320 Immunity from prosecution.

Motion to dismiss information—nonincriminating grand jury testimony. A person involuntarily appearing before the grand jury, tho not asked self-incriminating questions, who later is charged by county attorney's information with falsification of records, a subject connected with the grand jury investigation, may not, by certiorari, review the overruling of a motion to dismiss the information on the ground of immunity because of such grand jury appearance, when a remedy by appeal existed.

Kommelter v Dist. Ct., 225-273; 280 NW 511

13324 State employees not to be interested in contracts.

Atty. Gen. Opinions. See '30 AG Op 207; '34 AG Op 443; '36 AG Op 660

13327 Interest in public contracts.

Atty. Gen. Opinions. See '28 AG Op 296, 372; '30 AG Op 340; '34 AG Op 221; '38 AG Op 23; AG Op April 3, '39; April 26, '39

CHAPTER 609

RESISTANCE TO EXECUTION OF PROCESS

13331 Resisting execution of process.

Searches and seizures—execution of warrant—contempt for "dumping" liquor—certiorari review. In a certiorari proceeding a conviction for contempt in resisting the execution of a search warrant will not be reversed where the evidence indicated defendant knew purpose of search and disposed of evidence by dumping liquor before officers could seize it. Defendant's contention ineffectual that "dumping" occurred prior to execution of warrant.

Krueger v Municipal Court, 223-1363; 275 NW 122

Rights and duties of peace officers. In a murder trial where the defendant was charged with killing a peace officer, it was proper to instruct as to the rights and duties of peace officers

and the way testimony on that subject should be considered by the jury.

State v Coleman, 226-968; 285 NW 269

Murder—deceased as peace officer. In a prosecution for murder it was proper to refuse to instruct the jury that the fact that the deceased was a merchant policeman had no bearing on the case.

State v Coleman, 226-968; 285 NW 269

13336 Calling out military force or posse.

Officers—civil liability. Civil liability of officers of the militia and their agents in putting down, under orders of the governor, an insurrection, discussed.

State v Dist. Court, 219-1165; 260 NW 73; 99 ALR 967

CHAPTER 612

ESCAPES

13355 Costs and fees.

Atty. Gen. Opinion. See AG Op July 19, '39

13358 Breaking jail—escape.

Atty. Gen. Opinion. See AG Op Jan. 10, '39

Cause of detention. On a prosecution for murder resulting from the attempt by prisoners in jail to escape, the state is privileged to show the reason for the defendant's detention in the jail.

State v Carlson, 203-90; 212 NW 312

CHAPTER 613

VAGRANCY

13371 "Vagrants" defined.

Inebriacy defined. Inebriacy is the state of drunkenness or habitual intoxication.

Maher v Brown, 225-341; 280 NW 553

13395 Compensation for keeping.

Atty. Gen. Opinions. See '30 AG Op 327; '38 AG Op 491

CHAPTER 614

HABITUAL CRIMINALS

13396 Third conviction of felony.

Aggravated punishment—constitutionality. A statute is not ex post facto because it attaches to a crime an increased punishment because of former convictions, even tho such former convictions were had prior to the enactment of the statute.

State v Norris, 203-327; 210 NW 922

Former conviction—sufficiency of charge. A charge of former conviction is all-sufficient when it distinctly alleges the time and place of such conviction and the record and page thereof where it may be found.

State v Lambertti, 204-670; 215 NW 752

Evidence of former convictions. Records of former convictions are not, in and of themselves, sufficient evidence that the defendant on trial and the defendant in the former convictions are one and the same person, even tho the names are the same.

State v Logli, 204-116; 214 NW 490

Identity of persons. The state, under an allegation of former conviction, must establish beyond a reasonable doubt and by evidence other than identity of names, that the defendant on trial and the defendant in a former proved conviction are one and the same person. Evidence held insufficient.

State v Parsons, 206-390; 220 NW 328
State v McCarty, 210-173; 230 NW 379
State v Anderson, 216-887; 247 NW 306

Judgment of former conviction. The record of a former conviction of an accused is admissible under an indictment which properly charges such conviction.

State v Lambertti, 204-670; 215 NW 752

Separate submission—issue of former conviction. On the trial of an indictment, the issue of former conviction should be separately submitted to the jury.

State v Parsons, 206-390; 220 NW 328

Objection first presented on appeal. An accused may not for the first time on appeal present the objection that the indictment pleads a former conviction which is legally unallowable.

State v McGee, 207-334; 221 NW 556

Unallowable former convictions. When an indictment charges a complete offense and is therefore not demurrable, but pleads unallowable former convictions, the objections to such convictions may be raised for the first time by objections to the proof of such convictions.

State v Madson, 207-552; 223 NW 153

Unauthorized allegation of former conviction. An unauthorized allegation in an indictment of a former conviction, and the reception in evidence of proof thereof, constitutes reversible error even tho on conviction the judgment imposed was within the limit provided for a first offense.

State v Bergman, 208-811; 225 NW 852

Submission of unsupported issue—harmless error. The submission to the jury of the unsupported issue of former conviction and the unauthorized finding by the jury that the accused had been so convicted is quite harmless when the sentence imposed was less than the maximum provided for the substantive and proven offense charged in the indictment.

State v Lambertti, 204-670; 215 NW 752

Conviction of primary offense. An accused may very properly be convicted of the primary offense alleged in an indictment, even tho the allegation of a former conviction is unproven.

State v Parsons, 206-390; 220 NW 328

Nonpermissible amendment. An indictment which charges a first offense may not be so amended as to charge a second offense.

State v Herbert, 210-730; 231 NW 318

13398 Evidence.

Judgment record as evidence. The permanent judgment record is admissible on the issue of former conviction.

State v McGee, 207-334; 221 NW 556

Identification of defendants. Proof that defendant, on trial under a certain name, admitted having been three times convicted in a named county of the felonious offense of breaking and entering, together with proof that the district court records of said county revealed said number of convictions (and no more) of a party by the same name, and for breaking and entering, present a jury question on the issue whether the defendant on trial and the defendant in said three convictions are one and the same person.

State v Clarke, 220-1188; 263 NW 837

Permissible proof. Proof of former convictions of violations of the intoxicating liquor statutes, when pleaded in aggravation of a present like charge, is properly proven by the production and proper identification of the original charge, written plea of guilty, and judgment entry of sentence, together with proof that the person therein prosecuted and the defendant presently on trial are one and the same person.

State v Roberts, 222-117; 268 NW 27

Successive offenses—proof by certified copies. Statutes which authorize proof of former convictions of crime to be made by duly authenticated copies of said judgments of convictions are constitutional.

State v Murray, 222-925; 270 NW 355

Possession of liquor—proof of prior convictions unnecessary under guilty plea. Where an indictment charged the defendant with committing the crime of unlawful possession of alcoholic liquor, and that he had been convicted on two previous occasions of liquor law violations, and when defendant pled guilty, trial court was under no duty to require proof of former convictions.

State v Erickson, 225-1261; 282 NW 728

13399 Duties of jury and judge.

Method of trial. When the statute requires an allegation of former conviction to be inserted in the indictment, the resulting issue and the issue whether the present and former accused are one and the same person, are properly submitted to the jury on supporting evidence even tho the statute makes the record or a due authentication thereof prima facie evidence that a conviction has been had.

State v McGee, 207-334; 221 NW 556

13400 "Habitual criminal" defined.

Pleadable convictions. This section embraces a conviction accompanied by an indeterminate sentence of not less than one nor more than three years.

Haley v Hollowell, 208-1205; 227 NW 165

13401 Evidence.

Proof of identity of persons. An allegation in an indictment that the defendant has previously been convicted of an offense, as a basis for added punishment, necessarily demands affirmative proof that the person named in the record of the former conviction is the identical person who is on trial on the present indictment. Identity of names is not sufficient proof of identity of persons.

State v Parsons, 206-390; 220 NW 328
State v McCarty, 210-173; 230 NW 379
State v Anderson, 216-887; 247 NW 306

Former conviction. The permanent judgment record is admissible on the issue of former conviction.

State v McGee, 207-334; 221 NW 556

Identification of defendants. Proof that defendant, on trial under a certain name, admitted having been three times convicted in a named county of the felonious offense of "breaking and entering", together with proof

that the district court records of said county revealed said number of convictions (and no more) of a party by the same name, and for "breaking and entering", present a jury question on the issue whether the defendant on trial and the defendant in said three convictions are one and the same person.

State v Clarke, 220-1188; 263 NW 837

Operation while intoxicated—second offense. On the issue of former conviction of driving an automobile while intoxicated, it is highly prejudicial to receive in evidence on the trial to the jury, the files of said former case. So held where said files consisted of (1) the information of the county attorney with minutes of testimony attached, (2) the indictment with the minutes of some thirteen witnesses attached, (3) the bench warrant, and (4) mittimus.

State v De Bont, 223-721; 273 NW 873

TITLE XXXVI

CRIMINAL PROCEDURE

CHAPTER 615

MAGISTRATES, PEACE OFFICERS, AND SPECIAL AGENTS

13403 "Magistrate" defined.

Atty. Gen. Opinions. See '34 AG Op 363; '36 AG Op 313

13404 Power of magistrates.

Atty. Gen. Opinions. See '34 AG Op 363; '36 AG Op 313

Holding under former statute. A judge of the district court, tho a magistrate, may not issue a search warrant for intoxicating liquors.

Latta v Utterback, 202-1116; 211 NW 503

13405 "Peace officers" defined.

Atty. Gen. Opinions. See '25-26 AG Op 179; '28 AG Op 440; '34 AG Op 311; '36 AG Op 339

Peace officer as agent of public. A law-enforcing officer, whose office is created by statute and whose duties are prescribed therein, is an agent of the public in general and not the agent of the municipality which employs him. Therefore, the municipality is not liable in damages for his unlawful or negligent acts, and a petition alleging cause of action thereon against the municipality is demurrable.

Hagedorn v Schrum, 226-128; 283 NW 876

13405.1 Duties.

Atty. Gen. Opinions. See '28 AG Op 368; '34 AG Op 311; '36 AG Op 275; AG Op Jan. 16, '39

ANALYSIS

I IN GENERAL

Malicious prosecution—ill feeling. Plaintiff in a prosecution for malicious prosecution may show that, many years prior to the prosecution in question, he had arrested the defendant, and that such arrest resulted in ill feeling on the part of defendant against plaintiff. But plaintiff should not make prominent the reason for such arrest.

Fisher v Tullar, 209-35; 227 NW 580

Murder of officer—instructions—rights and duties of peace officers. In a murder trial where the defendant was charged with killing a peace officer, it was proper to instruct as to the rights and duties of peace officers and the way testimony on that subject should be considered by the jury.

State v Coleman, 226-968; 285 NW 269

II PERFORMANCE OF DUTIES

Noncompensable injuries — dropping gun. The statutory provision (editorially classified as part of the workmen's compensation act, §1422, C., '31) which, inter alia, grants compensation to a city marshal when injured "while performing such official duties where there is peril or hazard peculiar to the work of his office", does not authorize compensation for an injury received by a marshal from the accidental discharge of his revolver as it dropped from his pocket while cleaning the floor of the city jail.

Roberts v Colfax, 219-1136; 260 NW 57; 37 NCCA 807

Blood test—authority to take. When a coroner from another county, without legal warrant and without express or implied assent, acted as a volunteer and went into an operating room and took from an unconscious patient a blood sample to be used in a possible future criminal prosecution, the court was in error in a latter manslaughter prosecution against the patient, in receiving in evidence over timely objections by the defendant, the blood sample and the testimony of experts based thereon.

State v Weltha, 228- ; 292 NW 148

III BREACH OF DUTIES

(a) IN GENERAL

Arrest without warrant—reasonable ground —excessive force. Testimony reviewed and held to present a jury question on the issues (1) whether a defendant-sheriff in an action for damages had reasonable cause to believe that plaintiff's automobile contained the persons who had just prior thereto committed a robbery, (2) whether the sheriff acted as a prudent and reasonable officer would act under similar circumstances, and (3) whether the sheriff employed more force than was apparently necessary to stop the car.

Lawyer v Stansell, 217-111; 250 NW 887

Arrest under warrant—rights and privileges of officer. An officer is privileged to make an arrest under a valid warrant in which the person is described therein by name only, when the person arrested bears that name or is commonly known by such name, and is the person intended, or where the officer in the exercise of due diligence in good faith reasonably believes him to be the person intended.

O'Neill v Keeling, 227-754; 288 NW 887

(b) FALSE ARREST AND FALSE IMPRISONMENT

Exemplary damages—malice as basis. Exemplary damages are allowable for malicious assault and false imprisonment.

Schultz v Enlow, 201-1083; 205 NW 972

Action for assault. In an action for assault and false imprisonment committed by a mayor and a city marshal, evidence of violations by plaintiff of an ordinance is inadmissible when it appears that, on the occasion in question, no attempt was made to arrest plaintiff for such violations, and when the pleadings are silent as to justification and mitigation.

Schultz v Enlow, 201-1083; 205 NW 972

Arrest without warrant—justification—burden of proof. A party who instigates an arrest without warrant and without later filing an information against the accused must, in an action for false imprisonment, assume the burden to legally justify his action.

Fox v McCurnin, 205-752; 218 NW 499

Civil liability—definite instruction as to elements. The jury should be definitely instructed that there cannot be false imprisonment unless the imprisonment is against the will of the person imprisoned.

Kelley v Gardner, 213-16; 238 NW 470

Civil liability—false imprisonment per se. An arrest without warrant and the imprisonment thereunder become per se unlawful by the failure of the peace officer (or private person) making the arrest to take, on his own motion, the arrested person, without unnecessary delay, before the nearest and most accessible magistrate in the county in which the arrest was made and there to state in affidavit form the grounds on which the arrest was made —and, incidentally, abide by the orders of said magistrate.

Norton v Mathers, 222-1170; 271 NW 321

Justification — jury question. In an action for wrongful arrest and false imprisonment where defendants, Polk county sheriff and deputies, acquired information that one "Gene or Eugene Drake, alias J. O. Drake", 40 to 45 years of age, weighing 150 pounds or more, with light hair and complexion, had committed a felony, and by telegraphic request to Omaha, Nebr., police caused arrest and imprisonment of plaintiff, Eugene Drake, 29 years old, weighing 240 pounds, with dark hair, the question as to whether defendants were justified in causing plaintiff's arrest was one for jury. Hence, court erred in sustaining motion for directed verdict.

Drake v Keeling, (NOR); 287 NW 596

Consent to extradition—no waiver of illegal arrest and detention. In an action for wrongful arrest and false imprisonment of plaintiff by Omaha, Nebr., police upon request of defendants, Polk county, Iowa, sheriff and deputies, where plaintiff waived extradition and was taken to Polk county, altho protesting he did not commit alleged offense, and where imprisonment continued in Iowa even after one of the defendant deputies stated that he was satisfied they had the wrong man, the waiver of extradition did not, as a matter of law, constitute a relinquishment of plaintiff's right to claim such arrest and detention to be unlawful.

Drake v Keeling, (NOR); 287 NW 596

Minutes of testimony—record basis for indictment. The minutes of testimony taken before grand jury and filed with indictment constitute the record basis for finding of the indictment, and this record may not be added to by calling on the grand jurors in the trial of a case to give additional testimony tending to impeach the indictment, such as that given in false arrest case where grand jurors testified in effect that plaintiff was in truth and in fact the person indicted. Any rule permitting grand jurors to impeach their own record would be contrary to public policy.

O'Neill v Keeling, 227-754; 288 NW 887

Arrest with warrant—issue as to person intended. In action for false arrest and imprisonment of plaintiff under an indictment and warrant for commission of an offense committed by another who falsely represented himself to be the plaintiff, issue as to what person was intended by the name used in the warrant could be shown by all the competent facts and circumstances surrounding the transaction out of which the indictment arose and warrant issued; and determination of such question was for jury.

O'Neill v Keeling, 227-754; 288 NW 887

Soldiers preference act—policeman assaulting prisoner—discharge justifiable. In an action in certiorari brought under soldiers preference law to review a ruling of civil service commission sustaining the discharge of a police officer for violation of civil service rules, providing for the dismissal of a policeman who clubs or mistreats a prisoner merely because such prisoner makes derogatory remarks concerning the officer, held, evidence sufficient to sustain findings of the commission.

Edwards v Civil Service, 227-74; 287 NW 285

Militia officers—civil liability. Civil liability of officers of the militia and their agents in putting down, under orders of the governor, an insurrection, discussed.

State v Dist. Court, 219-1165; 260 NW 73

13411 Power of governor and attorney general.

Atty. Gen. Opinion. See '38 AG Op 780

CHAPTER 616

BUREAU OF CRIMINAL IDENTIFICATION

13416 Criminal identification.

Atty. Gen. Opinion. See '30 AG Op 66

13417.1 Finger and palm prints—duty of sheriff and chief of police.

Finger prints—expert testimony as to ultimate fact. A witness who is expert in the science of dactylography may testify that in his opinion, judgment, or belief, different finger prints were made by one and the same finger, but he may not testify that they were made by one and the same finger.

State v Steffen, 210-196; 230 NW 536; 78 ALR 748

CHAPTER 617

SEARCH WARRANTS

13441.01 Definition.

Unlawfully obtained evidence, admissibility. See under §13897 (I)

Injunction to restrain search. One who is shown to be a violator of the law relative to the sale and possession of intoxicating liquors will be accorded no standing in a court of equity in an action by him to enjoin peace officers from picketing his place of business, interfering with his business, or searching his customers without a search warrant.

Dietz v Cavender, 201-989; 208 NW 354

Holding under former statute. A judge of the district court, tho a magistrate, may not issue a search warrant for intoxicating liquors.

Latta v Utterback, 202-1116; 211 NW 503

Void warrant — injunction. Injunction will lie to restrain the search of premises under a void warrant, but not otherwise.

D. M. Drug Co. v Doe, 202-1162; 211 NW 694

Search and seizure act—nonapplicability of federal decisions. Certain recitals in the preface of this act, revising and codifying the search and seizure statutes, did not contemplate uniformity with similar proceedings of the federal government so as to make decisions of the federal courts control the construction of this chapter in preference to decisions of the Iowa supreme court.

Krueger v Mun. Ct., 223-1363; 275 NW 122

13441.03 When authorized.

Discussion. See 14 ILR 315—Searches and seizures

Liquor nuisance — search warrant as evidence. Search warrant proceedings are admissible on a prosecution for nuisance, in order to lay the foundation for the reception in evidence of liquors seized under such proceedings. (§1966-a1, C., '27 [§1966.1, C., '39].)

State v McGee, 207-334; 221 NW 556

13441.04 Information.

See also annotations under Const., Art. I, §8

Warrant by district judge. A judge of the district court was not authorized under §1970 as it existed in C., '24, to issue a search warrant for intoxicating liquors.

Latta v Utterback, 202-1116; 211 NW 503

Information filed with magistrate—issuance of warrant—validity. Where search warrant was issued by magistrate after court clerk's office was closed and information was kept by magistrate and filed with clerk following morning, held, issuance of warrant was proper in view of statute permitting filing of information before magistrate.

State v Doe, 227-1215; 290 NW 518

Information—sufficiency. A sworn information which makes distinct allegations of facts

showing illegal possession of intoxicating liquors, may not be said to be an affidavit of belief only.

State v Friend, 206-615; 220 NW 59

Information—description of gambling devices—sufficiency. Description of gambling devices as "cards, dice, faro, roulette tables, and other devices" in information to obtain issuance of search warrant held sufficient.

State v Doe, 227-1215; 290 NW 518

Condemnation of gambling devices—judicial notice of information and warrant. In proceeding to condemn slot machines and punch boards as gambling devices, failure to introduce in evidence the information, search warrant and the property seized was not error where the defendant in his answer admitted seizure of the property and since information and warrant were a part of the case and court would take judicial notice of the files therein.

State v Doe, 227-1215; 290 NW 518

Presumption of legality. Search warrant proceedings, regular on their face, and shown to have been issued on a sworn information, and a separate oral examination of the informant, will, in the absence of any showing to the contrary, be presumed legal, even tho the facts or evidence showing probable cause do not actually appear in any of the proceedings leading up to the issuance of the warrant.

State v Bruns, 211-826; 232 NW 684

13441.05 Issuance of warrant.

Unlawfully obtained evidence, admissibility. See under §13897 (I)

Atty. Gen. Opinion. See AG Op Jan. 16, '39

Determining probable cause — affidavit together with testimony. An affidavit for a search warrant, to comply with the Iowa constitution, need not contain a recital of facts showing probable cause, as the magistrate may also examine witnesses in determining the existence of probable cause.

Krueger v Mun. Ct., 223-1363; 275 NW 122

Probable cause for issuance—determination —sufficiency. The existence of "probable cause" for the issuance of a search warrant is to be determined by the magistrate issuing such warrant and does not have to be shown in the information itself but may be shown by affidavit attached thereto or by sworn testimony taken before the magistrate prior to the issuance of the warrant; hence, warrant to search for gambling devices was not issued without "probable cause" where state agent who signed and swore to information was also examined under oath.

State v Doe, 227-1215; 290 NW 518

Recital of fact finding. A recital in a search warrant that "the court finds from the evidence that there is in fact sufficient ground and reason that a search warrant issue" conclusively shows that the warrant was not issued on mere belief.

State v Friend, 206-615; 220 NW 59

Presumption of legality. Search warrant proceedings, regular on their face, and shown to have been issued on a sworn information, and a separate oral examination of the informant, will, in the absence of any showing to the contrary, be presumed legal, even tho the facts or evidence showing probable cause do not actually appear in any of the proceedings leading up to the issuance of the warrant.

State v Bruns, 211-826; 232 NW 684

13441.06 Form of warrant.

Search warrant—lack of seal—noninvalidation. The lack of a seal in a search warrant issued by a magistrate does not invalidate proceedings in search for gambling devices.

State v Doe, 227-1215; 290 NW 518

Intoxicating liquors—John Doe warrant—when valid. Unless a person is to be searched or is known to be in possession of the premises, a John Doe warrant sufficiently describing the premises is valid as basis to search for intoxicating liquor.

Krueger v Mun. Ct., 223-1363; 275 NW 122

Gambling devices—John Doe warrant—validity. Unless a person is to be searched or is known to be in possession of the premises, a John Doe warrant sufficiently describing the premises is a valid basis to search for gambling devices.

State v Doe, 227-1215; 290 NW 518

Condemnation of gambling devices—judicial notice of information and warrant. In proceeding to condemn slot machines and punch boards as gambling devices, failure to introduce in evidence the information, search warrant and the property seized was not error where the defendant in his answer admitted seizure of the property and since information and warrant were a part of the case and court would take judicial notice of the files therein.

State v Doe, 227-1215; 290 NW 518

13441.13 Receipt for property.

Failure to receipt for property—effect. Failure of the officer executing a search warrant to receipt for the property seized has no bearing on the question whether the property is receivable in evidence in a prosecution against the party from whom taken.

State v Wenks, 200-669; 202 NW 753

13441.16 Notice of hearing.

Failure to present proposition for reversal—effect. The point or proposition that a magistrate had no legal right to proceed to the

condemnation of liquors seized on a search warrant because he delayed such proceeding until after the lapse of 48 hours after the return on the warrant will not be reviewed on appeal when such point or proposition is not, on appeal, set forth as a reason for reversal or mentioned in the briefs.

State v Bruns, 211-826; 232 NW 684

13441.20 Procedure.

Condemnation of gambling devices. In proceeding to condemn slot machines and punch boards as gambling devices, failure to introduce in evidence the information, search warrant and the property seized was not error where the defendant in his answer admitted seizure of the property and since information and warrant were a part of the case and court would take judicial notice of the files therein.

State v Doe, 227-1215; 290 NW 518

13441.21 Right to contest forfeiture.

Jurisdictional questions always presentable. The total want of jurisdiction to issue a search warrant may be raised at any stage of the proceeding.

Latta v Utterback, 202-1116; 211 NW 503

Punch boards and slot machines as gambling devices. Legislature has specifically recognized punch boards and slot machines as gambling devices and they are subject to forfeiture when seized under a valid search warrant, unless the person named in the information or claiming an interest in the property shows cause why they should not be so forfeited.

State v Doe, 227-1215; 290 NW 518

13441.22 Insufficient description—effect.

Information—description of gambling devices—sufficiency. Description of gambling devices as "cards, dice, faro, roulette tables, and other devices" in information to obtain issuance of search warrant held sufficient.

State v Doe, 227-1215; 290 NW 518

13441.42 Appeal by state.

Certiorari. A writ of certiorari will not be sustained when to do so would effect no change in the status of the subject matter in controversy. So held where the writ was brought to test the legality of an actual dismissal of search warrant proceedings wherein intoxicating liquors had been seized.

State v Beem, 201-373; 207 NW 361

CHAPTER 618

LIMITATION OF CRIMINAL ACTIONS

13443 Eighteen months limitation.

ANALYSIS

I THE TIME
II HOW QUESTION RAISED
III PROOF
IV INSTRUCTIONS

I THE TIME

Time of commission—instructions. Instructions are proper to the effect that the exact and precise time of the commission of an offense is immaterial provided the jury, by harmonizing the testimony, can find and does find that the offense was committed at some time within the statute of limitation; and this is true even tho the state in its indictment and its testimony rests the charge on a specifically named date, and even tho the testimony of the accused definitely tends to fix his presence on said date at a place other than at the scene of the alleged offense but in the same neighborhood.

State v Davenport, 208-831; 224 NW 557

Harmless error. In stating that which was necessary to convict, the court's omission to state that the offense must have been committed within 18 months prior to an indictment, was without prejudice to defendant where there was no evidence that the crime was committed at any other time than the eighth day of the month preceding the month of trial.

State v Steffens, 116-227; 89 NW 974

II HOW QUESTION RAISED

Discussion. See 21 ILR 639—Pleading guilty—nonwaiver

III PROOF

Rape—time discrepancy in indictment immaterial. A rape conviction is valid altho for a date different than the date fixed in the indictment if within the statute of limitations and if no fatal variance occurs between the indictment and the proof.

State v Beltz, 225-155; 279 NW 386

IV INSTRUCTIONS

Election by state. An instruction that the jury must, in order to convict, find that the act charged was committed within 18 months prior to the finding of the indictment is not in conflict with an election by the state to rely on a transaction which was designated other than by the date when it occurred.

State v Speck, 202-732; 210 NW 913

13444 Three-year limitation.

Atty. Gen. Opinions. See '28 AG Op 310; '32 AG Op 80; AG Op March 2, '39

Proof of time of offense—instruction. It is not erroneous for the court to instruct as to the necessity for proof of the commission of the offense within the statute of limitation, naming the full period, even tho the testimony of guilt is solely confined to a specific day within said period.

State v Canalle, 206-1169; 221 NW 847

Instructions in re time and venue. Failure of instructions to require the jury to make any finding as to time and venue is quite harmless when the time and place of the commission of the offense are not a matter of any controversy whatever.

State v Bird, 207-212; 220 NW 110

Instructions. An instruction which sets forth the material allegations of the indictment is not subject to the objection that the recital would apply to a transaction barred by the statute, when elsewhere the court specifically confines the jury to the transaction alleged in the indictment.

State v Friend, 210-980; 230 NW 425

Certiorari — revoking suspended sentence. Tho an invalid original entry of judgment in a criminal cause may be beyond review by certiorari because of the statute of limitation, yet certiorari will lie, if timely, to review a subsequent order of court revoking the suspended part of said former judgment and ordering the accused committed to jail.

Dayton v Bechly, 213-1305; 241 NW 416

Time of commission of offense. An instruction justifying a conviction for possessing intoxicating liquors at any time within three years prior to the return of the indictment is unobjectionable, when the indictment, proof, and trial were exclusively centered on one particular transaction occurring during said period.

State v Healy, 217-1155; 251 NW 649

Necessary identification of offense. Instructions that a defendant may be found guilty of maintaining a liquor nuisance if he committed the offense within three years prior to the return of the indictment will not be deemed to put the defendant on trial for an alleged liquor offense on which the defendant was acquitted within said three years when the specific nature of the latter offense is not made to appear.

State v Kelly, 217-1305; 253 NW 49

Limitation of prosecutions. In a prosecution for bootlegging it is proper to instruct the jury that the exact date of guilt is not material provided it is shown that the offense was committed at some time within three years just prior to the filing of the trial information, even tho the evidence is such that if the defendant be guilty he is guilty as of a definite date.

State v Howard, 223-767; 273 NW 849

13445 One-year limitation.

Harmless inaccuracy. An inaccuracy in the instructions as to the period of time during which the jury might find that the accused had committed the offense is quite harmless when all the evidence showed that, if the offense was committed, it was committed within one year prior to the filing of the information and on a specified day.

State v Brundage, 200-1394; 206 NW 607

CHAPTER 619

JURISDICTION OF PUBLIC OFFENSES

13448 Persons subject to laws of state.

Atty. Gen. Opinion. See AG Op Feb. 10, '39

Wrongfully brought within state. Persons wrongfully brought within the state are subject to the jurisdiction of the state.

State v Ross and Mann, 21-467
State v Day, 58-678; 12 NW 733

Custody of person essential. The district court has no jurisdiction over the person of an indicted party until it in some manner acquires, under the indictment, the actual custody of the person of the said party; and the court does not have such custody because of the fact that the state is holding the party in confinement in the penitentiary under a former conviction.

State v Judkins, 200-1234; 206 NW 119

Insufficient defect to exclude jurisdiction. A trial information which charges three defendants jointly with making an assault with a deadly weapon, while jointly attempting to commit a robbery, and that one of them fired the fatal shot with the specific intent to kill "of their malice aforethought", is not so fatally defective as to deprive the court, on a plea of guilty, of jurisdiction to pass sentence on all the defendants.

McBain v Hollowell, 202-391; 210 NW 461

13449 Jurisdiction of district court.

ANALYSIS

I LAYING VENUE
II PROOF OF VENUE
III MISSISSIPPI AND MISSOURI RIVERS

I LAYING VENUE

Failure to recognize venue—instructions. An instruction which may be deemed erroneous because it fails to recognize the venue in a

criminal action, is rendered unobjectionable by other instructions which clearly confine the jury to the venue alleged in the indictment.

State v Hughey, 208-842; 226 NW 371

Change of venue on application of state. The legislature may constitutionally grant to the state the right to a change of venue in a criminal prosecution.

State v Dist. Court, 213-822; 238 NW 290

Locality in indictment. An indictment against a defendant for keeping a house of prostitution is sufficient as to venue if it charges the offense as committed within the county.

State v Shaw, 35-575

Homicide—optional venues. A prosecution for murder by means of an attempted abortion may be prosecuted in the county wherein the resulting death occurred even tho the unlawful operation was performed in another county of this state.

State v Sweeney, 203-1305; 214 NW 735

Abortion. In a prosecution for abortion, the jurisdiction is with the county wherein the medicine intended to produce the miscarriage was administered, and not that where the miscarriage took place.

State v Hollenbeck, 36-112

Embezzlement—venue. The venue can be laid in a county where an agent failed to account.

State v Hengen, 106-711; 77 NW 453

Wife desertion. The venue in a prosecution for desertion of the wife by the husband may be laid in the county in this state in which the husband and wife had, at the husband's instigation, mutually agreed to live, and in which he refused to provide for her; and this is true even tho it be conceded that the husband retained his legal residence in a foreign state.

State v Jinkins, 189-1233; 179 NW 541

Larceny. The jurisdiction of the district court in a case of larceny is determined by the value of the property stolen as found in the indictment by the grand jury, and not by the value as ascertained by the verdict of the petit jury.

State v Stingley and McCormack, 10-488

Instructions in re venue. Failure of instructions to require the jury to make any finding as to time and venue is quite harmless when the time and place of the commission of the offense are not a matter of any controversy whatever.

State v Bird, 207-212; 220 NW 110

Degree of offense. The defendant may be convicted in the district court of an offense of which said court had no original jurisdiction, under an indictment for a higher offense of which that court has jurisdiction.

State v Shepard, 10-126

II PROOF OF VENUE

Venue. Venue need not be made to appear by positive testimony. A jury question is created when the venue is fairly inferable from the testimony.

State v Caskey, 200-1397; 206 NW 280
State v Ostby, 203-333; 210 NW 934; 212 NW 550

Venue—evidence. Venue is established by the testimony of a witness who describes the locus in quo and who testifies that such place is in a named county.

State v Brewster, 208-122; 222 NW 6

Reopening case. The court may reopen a case after the state has rested, and permit the state to offer further testimony on the issue of venue.

State v Anderson, 209-510; 228 NW 353; 67 ALR 1366

Venue—proof by circumstantial evidence. The venue of a criminal offense may be established by circumstantial evidence and the just and allowable inferences deducible therefrom.

State v McCutchan, 219-1029; 259 NW 23

Venue—necessity for proof. In a prosecution for crime, a conviction cannot be sustained in the absence of proof of the venue. Evidence held insufficient to establish venue even by justifiable inference.

State v Brooks, 222-651; 269 NW 875

Judicial notice. Where a crime is shown to have been committed in close proximity to a certain town the court will take judicial notice of the location of the town, and failure to otherwise prove the venue is not fatal.

State v Mitchell, 139-455; 116 NW 808

Judicial notice of county seats. Courts are authorized to take judicial notice of the location of a county seat, and that it is within the limits of the county where the court is being held.

State v Laffer, 38-422

Venue. The location of incorporated municipalities within a certain county is a matter of judicial notice.

State v Fishel, 140-460; 118 NW 763

Territorial jurisdiction. Pottawattamie county is divided for judicial purposes by the west line of range 40, and where it is shown that a crime was committed in said county at a place 15 miles east of Council Bluffs, the supreme court will take judicial notice of the fact that such place is within the jurisdiction of the western division of the county.

State v Arthur, 129-235; 105 NW 422

Instructions in re time and venue. Failure of instructions to require the jury to make any finding as to time and venue is quite

harmless when the time and place of the commission of the offense are not a matter of any controversy whatever.

State v Bird, 207-212; 220 NW 110

III MISSISSIPPI AND MISSOURI RIVERS

Mississippi river. District courts of counties bordering on the Mississippi river have jurisdiction over offenses on the river even tho past the middle stream.

State v Mullen, 35-199

See State v Moyers, 155-678; 136 NW 896

Jurisdiction—on boundary waters. The state of Iowa has jurisdiction to try and determine the offense known, under our game laws, as the unlawful use of decoys (in the form of live ducks), tho said offense be committed on a temporary sandbar located in the Missouri river and west of the middle of the main channel thereof.

State v Rorris, 222-1348; 271 NW 514

13451 Offenses partly in county.

Forgery. Where one signs another's name in one county, and fills in blanks in another county, he is guilty of forgery in the latter county, and venue will be properly laid there.

State v Spayde, 110-726; 80 NW 1058

False pretenses. An indictment for obtaining a signature to a deed by false representations, alleging that accused, being in Dallas county, represented that he was owner of certain property in Des Moines, and had authority to convey it for certain property in such county, and then and there offered to sell and procure a deed to such Des Moines property, properly lays the venue in Dallas county, the words "then and there" having reference to said county and not to the description of the property.

State v Tripp, 113-698; 84 NW 546

Offense committed in part in different counties. An indictment for obtaining money by false pretenses may lay the venue in the county in which the false representations were made, and in which the check was obtained, even tho the money on the check was obtained in a foreign county of this state.

State v Detloff, 201-159; 205 NW 534

Indictment—false pretenses. An indictment for false pretenses may lay the venue wholly in one county and be supported by evidence that it was in part committed in that county and in part in another county of this state.

State v Detloff, 201-159; 205 NW 534

False pretenses. The crime of obtaining property by false pretenses may be committed partly in one county and partly in another and thereby justify the return of an indictment in either county.

State v George, 206-826; 221 NW 344

Instruction as to venue. In prosecution for subornation of perjury, an instruction as to venue was proper when it stated that evidence introduced tended to show defendant had solicited a witness to give the claimed perjured testimony in a trial, and that such solicitations, or some of them, were made in Appanoose county, and if defendant continued in his attempt to procure the witness and called and had witness testify as a witness in Davis county, knowing or believing witness would give perjured testimony, and if witness did in fact commit perjury in Davis county, the defendant could be prosecuted and convicted in Davis county.

State v Hartwick, 228- ; 290 NW 523

13452 Offenses near boundary of two counties.

Atty. Gen. Opinion. See '28 AG Op 444

13453 Offenses on trains, boats, or aircraft.

Discussion. See 16 ILR 261—Former jeopardy

CHAPTER 620

PRELIMINARY INFORMATION AND WARRANTS OF ARREST

13459 Form.

Informations triable before a justice of the peace. See Ch 627

Preliminary complaint — total insufficiency. Unsigned and unverified paper received and held lacking in substantially every requirement of law and therefore insufficient to support a conviction.

State v Ford, 222-655; 269 NW 926

13460 Filing—issuing warrant.

Atty. Gen. Opinion. See AG Op March 30, '39

13461 Form of warrant.

Atty. Gen. Opinion. See '25-26 AG Op 205

Warrant sufficient. A warrant of arrest in a criminal case which follows substantially the form given in this section is legally sufficient.

Devine v State, 4-443

Wrong name. If the warrant was issued against the plaintiff in the wrong name, when his right name was unknown, such fact will not render his arrest illegal or void.

Allen v Leonard, 28-529

13462 Directed to peace officer—contents.

Searches and seizures—John Doe warrant—when valid. Unless a person is to be searched or is known to be in possession of the premises, a John Doe warrant sufficiently describing the premises is valid as basis to search for intoxicating liquor.

Krueger v Mun. Court, 223-1363; 275 NW 122

CHAPTER 621

ARREST: GENERAL PROVISIONS

13465 "Arrest" defined—time of making.

Discussion. See 25 ILR 201—Law of arrest

Distribution of reward. The individual members of a committee appointed by an unincorporated association of banks for the purpose of making distribution of a reward offered by the association for the apprehension of criminals are not responsible to third parties for an erroneous decision as to the manner in which such reward should be distributed.

Bird v Barrett, 207-1158; 224 NW 556

Offer of reward — insufficient revocation. Where an unincorporated bankers association offered, in the form of a printed poster, a reward for facts leading to the conviction of bank robbers, the act of the cashier of a member bank in removing said poster from his bank and destroying it, and in declining, for his bank, to pay further dues to the association, will not, in and of itself, constitute a revocation of the offered reward, the evident intent of the offerer being to continue the offer for a reasonable time, and the offer being acted on within such time.

Carr v Bankers Assn., 222-411; 269 NW 494; 107 ALR 1080

Offer of reward by nonlegal entity—liability of members. An incorporated bank which, in effect, represents that it is a member of an association which is offering a reward for information leading to the conviction of bank robbers, thereby obligates itself to pay the reward when, in truth, the association is but a voluntary, unincorporated association.

Carr v Bankers Assn., 222-411; 269 NW 494; 107 ALR 1080

13466 Acts necessary.

Discussion. See 24 ILR 154—Deadly force—fleeing arrestee

Atty. Gen. Opinion. See '34 AG Op 563

13468 Arrests by peace officers.

Atty. Gen. Opinion. See '34 AG Op 563

ANALYSIS

I IN GENERAL
II WITH WARRANT
III WITHOUT WARRANT

I IN GENERAL

Reasonable ground—excessive force. Testimony reviewed and held to present a jury question on the issues (1) whether a defendant-sheriff in an action for damages had reasonable cause to believe that plaintiff's automobile contained the persons who had just prior thereto committed a robbery, (2) whether the sheriff acted as a prudent and reasonable officer would act under similar circumstances, and (3) whether the sheriff employed more force than was apparently necessary to stop the car.

Lawyer v Stansell, 217-111; 250 NW 887

False arrest—questions for jury. Evidence reviewed in action for damages for false arrest and malicious prosecution (padlocked schoolhouse case), and held such as to preclude the

I IN GENERAL—concluded

court from determining the question of want of probable cause, malice, and good-faith reliance on the advice of counsel.

Gripp v Crittenden, 223-240; 271 NW 599

Justification—jury question. In an action for wrongful arrest and false imprisonment, where defendants, Polk county sheriff and deputies, acquired information that one "Gene or Eugene Drake, alias J. O. Drake", 40 to 45 years of age, weighing 150 pounds or more, with light hair and complexion, had committed a felony, and by telegraphic request to Omaha, Nebr., police caused arrest and imprisonment of plaintiff, Eugene Drake, 29 years old, weighing 240 pounds, with dark hair, the question as to whether defendants were justified in causing plaintiff's arrest was one for jury, hence court erred in sustaining motion for directed verdict.

Drake v Keeling, (NOR); 287 NW 596

Consent to extradition—no waiver of illegal arrest and detention. In an action for wrongful arrest and false imprisonment of plaintiff by Omaha, Nebr., police upon request of defendants, Polk county, Iowa sheriff and deputies, where plaintiff waived extradition and was taken to Polk county, altho protesting he did not commit alleged offense, and where imprisonment continued in Iowa even after one of the defendant deputies stated that he was satisfied they had the wrong man, the waiver of extradition did not, as a matter of law, constitute a relinquishment of plaintiff's right to claim such arrest and detention to be unlawful.

Drake v Keeling, (NOR); 287 NW 596

II WITH WARRANT

Arrest of witness in contempt. A witness who is in contempt may be arrested upon a warrant directing the arrest in vacation, but the court may also order his discharge by the officers intrusted with the writ, upon bail fixed by the court. These proceedings, however, are authorized only in a case of actual contempt, and when necessary to the proper administration of justice.

State v Archer, 48-310

Issue as to person intended. In action for false arrest and imprisonment of plaintiff under an indictment and warrant for commission of an offense committed by another who falsely represented himself to be the plaintiff, issue as to what person was intended by the name used in the warrant could be shown by all the competent facts and circumstances surrounding the transaction out of which the indictment arose and warrant issued, and determination of such question was for jury.

O'Neill v Keeling, 227-754; 288 NW 887

III WITHOUT WARRANT

Discussion. See 16 ILR 434—Arrest without warrant

Arrest without warrant — justification. A party who instigates an arrest without warrant and without later filing an information against the accused must, in an action for false imprisonment, assume the burden to legally justify his action.

Fox v McCurnin, 205-752; 218 NW 499

Arrest without warrant — validity — jury question. Whether an arrest or attempted arrest by an officer without warrant was valid, may, under applicable evidence, be a question for the jury to decide. So held where the accused claimed the right of self-defense because of the claimed invalidity of the arrest.

State v Fador, 222-134; 268 NW 625

13469 Arrests by private persons.

Atty. Gen. Opinions. See '25-26 AG Op 91; '38 AG Op 170

13471 Manner of making.

Atty. Gen. Opinion. See '34 AG Op 563

13472 Resistance to arrest—use of force.

Atty. Gen. Opinion. See '34 AG Op 563

Death—burden of proof to show self-defense. A peace officer, in attempting an arrest for a misdemeanor, has no legal right, unless he acts in legal self-defense, to kill the offender. It follows that, if he does kill, and is sued for damages consequent on the death, he has the burden to prove self-defense, especially so (1) when death was effected by a deadly weapon used in a deadly manner, (2) when the defendant distinctly pleaded self-defense as a defense, and (3) when plaintiff neither by plea nor proof presented the question of self-defense.

Klinkel v Saddler, 211-368; 233 NW 538

Use of force. In making an arrest the defendant had no right to use any other means or greater force than was reasonably necessary to accomplish that purpose. In his effort to make such arrest he had no right to make use of a deadly weapon in a deadly manner to accomplish such purpose.

State v Towne, 180-339; 160 NW 10

Self-defense—as peace officer or as individual. Under the record in a death action for shooting an alleged assailant, a peace officer under a self-defense plea had no different or greater rights in the exercise of this defense as a peace officer than he had as an individual.

Boyle v Bornholtz, 224-90; 275 NW 479

13478 Arrests by private person—disposition of prisoner.

Atty. Gen. Opinion. See '38 AG Op 170

13479 Conveying prisoner to jail—fees and expenses.

Atty. Gen. Opinions. See '38 AG Op 326; AG Op Feb. 21, '39

CHAPTER 622

ARREST BY WARRANT

13481 In case of arrest for felony.

Atty. Gen. Opinion. See '25-26 AG Op 205

13482 In case of arrest for misdemeanor.

Atty. Gen. Opinion. See AG Op Sept. 13, '39

CHAPTER 623

ARREST WITHOUT WARRANT

13488 Disposition of prisoner.

Atty. Gen. Opinion. See '38 AG Op 47

False imprisonment per se. An arrest without warrant and the imprisonment thereunder become per se unlawful by the failure of the peace officer (or private person) making the arrest to take, on his own motion, the arrested person, without unnecessary delay, before the nearest and most accessible magistrate in the county in which the arrest was made and to there state in affidavit form the grounds on which the arrest was made—and, incidentally, abide by the orders of said magistrate.

Norton v Mathers, 222-1170; 271 NW 321

Insane person. The law governing the right to arrest without warrant a person for crime has no application to the right to arrest without warrant a person on the charge of being insane.

Bisgaard v Duvall, 169-711; 151 NW 1051

CHAPTER 624

FUGITIVES FROM JUSTICE

13497 Agents in extradition cases.

Discussion. See 19 ILR 462—Extradition

Atty. Gen. Opinions. See '25-26 AG Op 285; '28 AG Op 285; '36 AG Op 361; '38 AG Op 87, 366

Consent to extradition—no waiver of illegal arrest and detention. In an action for wrongful arrest and false imprisonment of plaintiff by Omaha, Nebr., police upon request of defendants, Polk county, Iowa, sheriff and deputies, where plaintiff waived extradition and was taken to Polk county, altho protesting he did not commit alleged offense, and where imprisonment continued in Iowa even after one of the defendant deputies stated that he was satisfied they had the wrong man, the waiver of extradition did not as a matter of law constitute a relinquishment of plaintiff's right to claim such arrest and detention to be unlawful.

Drake v Keeling, (NOR); 287 NW 596

13498 Fees and expenses.

Atty. Gen. Opinions. See '28 AG Op 285; '38 AG Op 87

13499 Payment of claims.

Atty. Gen. Opinion. See '38 AG Op 87

13501 Sworn evidence and copy of indictment necessary.

Atty. Gen. Opinion. See '36 AG Op 261

Form of accusation. Where it is a proper method of charging crime in the state where committed, a complaint or information duly sworn to will constitute the basis of an extradition proceeding.

Morrison v Dwyer, 143-502; 121 NW 1064

Nonpresence in demanding state. A party cannot be a fugitive from justice of a demanding state, and therefore cannot be legally extradited to said state, when, admittedly, he has never been, physically, within the demanding state since a long time prior to the commission of the offense charged in said state, to wit, nonsupport of his child; and, legally, it matters not that the accused personally caused the pregnant mother to go to, and enter, and remain in, the demanding state.

Drumm v Pederson, 219-642; 259 NW 208

Finding by governor not conclusive. Principle reaffirmed that on habeas corpus to test the legality of the extradition proceedings, the determination of the governor that the party sought to be extradited is, in fact, a fugitive from justice, is not conclusive on the court.

Drumm v Pederson, 219-642; 259 NW 208

13502 Warrant of arrest.

Atty. Gen. Opinions. See '25-26 AG Op 284; '38 AG Op 366

13503 Filing complaint and issuance of warrant.

Atty. Gen. Opinion. See '38 AG Op 348

Variance—extradition and indictment. Where defendant was extradited from Canada for setting fire to and burning a certain brick "house" occupied and inhabited as a retail shoe store, and was indicted for burning a certain store "building" then and there occupied as a store, the objection that the crimes charged in the information and in the indictment were not the same, was without merit.

State v Spiegel, 111-701; 83 NW 722

13509 Liability of complainant—costs.

Atty. Gen. Opinion. See '38 AG Op 348

CHAPTER 626

PRELIMINARY EXAMINATIONS

13527 Procedure—waiver.

Extent of waiver. The waiver of preliminary examination before the committing magistrate will not deprive the defendant of the right, in a habeas corpus proceeding, to introduce testimony for the purpose of showing he is detained upon insufficient evidence to sustain the charge.

Cowell v Patterson, 49-514

13540 Minutes of examination.

Defendant discharged. Statute does not require the minutes of a preliminary examination to be filed with the clerk of the district court in a case where the defendant is discharged upon such examination.

State v Helvin, 65-289; 21 NW 645

Magistrate's return as part of record. The entire return by a magistrate to the district court of a preliminary hearing is a part of the record of a trial on an indictment growing out of such hearing.

State v Japone, 202-450; 209 NW 468

13544 Commitment—indorsement on minutes.

Duty of defendant to answer. A defendant in a criminal proceeding who, on preliminary hearing, is "held to answer", and gives bail in the ordinary form (§13612, C., '31), must answer by appearance at each and every material stage of a proceeding either under an indictment or under county attorney information, even tho no bench warrant is issued or new bond given, under the final charge.

State v Walker, 217-229; 251 NW 56

13546 Warrant of commitment.

Warrant. The warrant of commitment, issuing to the sheriff of the county in which the examination is held, will authorize detention and custody by the sheriff of the next most convenient county having a jail.

Cowell v Patterson, 49-514

13551 Return to district court.

Return as part of record. The entire return by a magistrate to the district court of a preliminary hearing is a part of the record of a trial on an indictment growing out of such hearing.

State v Japone, 202-450; 209 NW 468

13555 Liability of informant—costs.

Malicious prosecution. See under §13728 (II)

Atty. Gen. Opinion. See '38 AG Op 94

CHAPTER 627

TRIAL OF NONINDICTABLE OFFENSES

13557 Jurisdiction.

Atty. Gen. Opinions. See '25-26 AG Op 205; '38 AG Op 47

Requirements for valid decree. To be valid and binding the acts of a court must be within the court's jurisdiction, i. e., it must have (1) jurisdiction of the subject, which is power to hear and determine cases in the general class of the question presented, and (2) jurisdiction of the person, which is power to subject the parties to the judgment.

Collins v Powell, 224-1015; 277 NW 477

Indictment charging fine and costs. A prosecution may not be maintained under an indictment which simply charges an offense which is punishable by a maximum fine of $100 and costs, and by imprisonment until the fine and costs are paid.

State v Wyatt, 207-319; 222 NW 866

Presumption of jurisdiction. When exclusive jurisdiction of any subject is conferred by law upon an inferior court, and it has acquired jurisdiction of the subject matter in the manner prescribed by law, every presumption thereafter is in favor of the validity of the proceedings, and objection to irregularity in its action can be taken only on appeal or by certiorari.

State v Berry, 12-58

Assault and battery. The offense of assault and battery is triable summarily before a justice of the peace or other officer authorized by law on information under oath without indictment or the intervention of a grand jury, and not otherwise.

State v Lee, 37-402

Liquor condemnation. The action for the condemnation and destruction of intoxicating liquor kept for illegal sale is a criminal case, and is not affected by the constitutional provision limiting the jurisdiction of justices of the peace in civil cases.

State v Arlen, 71-216; 32 NW 267

Illegal fishing—several counts. Several counts charging the seining of fish may be embraced in a single information, and the fact that the aggregate fine which may be

imposed upon conviction will exceed $100, or imprisonment for more than 30 days, will not deprive the justice of jurisdiction.

State v Denhardt, 129-135; 105 NW 385

Assault with intent. An information charging an assault with intent charges an indictable offense, and one which a justice of the peace has no jurisdiction to try. Nor would an appeal from a judgment of conviction, rendered by a justice in such case, confer any jurisdiction upon the district court.

State v Carpenter, 23-506

Appeal excludes habeas corpus. Habeas corpus will not lie to test the sufficiency of the evidence to sustain a judgment of conviction by a justice of the peace under an information which actually charges an offense, the punishment for which does not exceed either a fine of $100 or imprisonment for 30 days.

Hallway v Byers, 205-936; 218 NW 905

False check—amount of check determines grade of offense—jurisdiction. In a prosecution for false uttering of a bank check, it is the amount of the check that determines the grade of the offense and not the amount received, provided something of value is received for it. Where a check was $20 or more, but only $2 in cash was received, the district court was in error in directing a verdict for defendant on the ground that the offense should be prosecuted in the justice of peace court.

State v Dillard, 225-915; 281 NW 842

13558 Information.

Information by private prosecutor. A nonindictable misdemeanor may be prosecuted under an information filed and sworn to by a private individual.

State v Porter, 206-1247; 220 NW 100

Malicious prosecution. It is a complete defense to an action for malicious prosecution that the prosecuting witness in good faith disclosed to the county attorney all the facts possessed by him, and was advised by such attorney that such facts were (1) sufficient to show the commission of an offense, and (2) sufficient to warrant the institution of criminal proceedings against the accused; and it matters not that the proceedings were commenced by preliminary information, instead of by original proceedings before the grand jury, as suggested by the attorney.

Granteer v Thompson, 203-127; 208 NW 497

Disclosure to county attorney. A private prosecutor is not liable in damages for malicious prosecution when, before signing the preliminary information, he, in good faith, makes a full and fair statement to the county attorney of all the facts and circumstances within his knowledge concerning the offense in question and is, in effect, assured by said public official that he would be warranted in commencing the prosecution; and this is true even tho the county attorney did express a preference on his part to place the prosecution before the grand jury without the filing of a preliminary information.

Granteer v Thompson, 207-1204; 224 NW 528

Speeding charge—unsworn information first challenged on appeal. Where a municipal court information charging speeding was not sworn to, defendant did not waive his right to challenge its sufficiency to sustain a conviction, nor lose his right to raise such objection on appeal in supreme court, by failure to question the sufficiency of information before the trial.

State v Weston, 225-1377; 282 NW 774

13559 Contents of information.

Atty. Gen. Opinion. See '25-26 AG Op 205

ANALYSIS

I IN GENERAL
II FACTS CONSTITUTING OFFENSE
III AMENDMENT OF INFORMATION

I IN GENERAL

Formal requisites—waiver. The objection that an information for a nonindictable misdemeanor is indefinite, vague, and uncertain in its statement of facts is waived by defendant's failure to challenge the information prior to the entry of his plea.

State v Porter, 206-1247; 220 NW 100

Slipshod preparation of information. Where a defendant was convicted of a motor vehicle traffic offense in a municipal court under an information filed by a police officer, in a slipshod manner, which information defendant contended gave court no jurisdiction, and when, on appeal, the supreme court was unable to decipher written entries in the information, the construction placed by attorneys as to what such entries were could not be accepted by such court.

State v Weston, 225-1377; 282 NW 774

II FACTS CONSTITUTING OFFENSE

Total insufficiency. Unsigned and unverified paper reviewed and held lacking in substantially every requirement of law and, therefore, insufficient to support a conviction.

State v Ford, 222-655; 269 NW 926

Unsworn information—no basis to support conviction. An unsworn municipal court information charging defendant with speeding will not support a conviction.

State v Weston, 225-1377; 282 NW 774

III AMENDMENT OF INFORMATION

Striking unnecessary allegation in re nuisance. A trial information by the county attorney for maintaining an intoxicating liquor nuisance in a named county "in the city of Ce-

III AMENDMENT OF INFORMATION—concluded

dar Rapids" may, after the jury is sworn, be amended by striking therefrom the clause "in the city of Cedar Rapids", it appearing that the said clause was a manifest error, and that the accused so knew, and requested no further time for trial.

State v Japone, 202-450; 209 NW 468

Waiver of formal amendment. The objection that no formal amendment to an indictment was filed after the sustaining of the motion to amend, will be deemed waived when the trial was conducted precisely as it would have been conducted had the formal amendment been filed, and when the objection was withheld until exceptions to the instructions were filed.

State v Japone, 202-450; 209 NW 468

13560 Form of information.

Information in name of state. Under special charter of Cedar Rapids providing that proceedings for the violation of ordinances may be by information in the name of the state, an information for the violation of an ordinance of said city, entitled in the name of the state instead of the city is good.

State v Wilson, 109-93; 80 NW 230

13562 Warrant of arrest.

Atty. Gen. Opinion. See AG Op March 30, '39

13566 Wrong name—waiver.

Identity of accused. See under §13864

13567 Pleadings of defendant.

Formal requisites — waiver. The objection that an information for a nonindictable misdemeanor is indefinite, vague, and uncertain in its statement of facts is waived by defendant's failure to challenge the information prior to the entry of his plea.

State v Porter, 206-1247; 220 NW 100

13569 Change of venue—grounds.

Atty. Gen. Opinion. See '36 AG Op 313

13570 Change allowed—transmission of papers.

Atty. Gen. Opinion. See '36 AG Op 313

Refusal of change of venue—certiorari. The refusal of a mayor to grant defendant a change of venue in a prosecution for assault and battery, on the ground "that the mayor was prejudiced against him", constitutes an illegality reviewable on certiorari, an appeal from the judgment of the mayor on the merits not being a plain, speedy, and adequate remedy.

Shearer v Sayre, 207-203; 222 NW 445

13580 Jury of six.

Number of jurors. The trial of a nonindictable misdemeanor may legally be had in municipal court before a jury of six persons.

State v Porter, 206-1247; 220 NW 100

Constitutional provision. The constitution guarantees a right of trial by a jury of 12 men, but under Art. I, §9, the general assembly may authorize a trial by a jury of less than 12 for offenses cognizable by inferior courts.

Bryan v State, 4-349

Number of jurors. The accused is entitled to a jury of 12 men, but may be tried by a jury of less number in an inferior court, while a trial by a jury of 12 may be secured by an appeal to a higher court.

State v Beneke, 9-203

13587 Judgment—rules.

Unlawful suspension. The court has no power in a criminal case to enter a suspension of sentence during good behavior and on payment of the costs.

State v Hamilton, 206-414; 220 NW 313

13588 Imprisonment for nonpayment of fine.

Atty. Gen. Opinion. See '30 AG Op 329

Length of time. The judgment of a justice of the peace committing a defendant to prison until the payment of a fine imposed is not void because it does not specify the extent of the imprisonment, the limit in such case being determined by statute.

Jackson v Boyd, 53-536; 5 NW 734

13590 Costs taxed to prosecutor.

Malicious prosecution. See under §13728

Where taxable to county. Where a criminal action was dismissed by a justice of the peace at the time set for trial, and the costs were taxed to the state to be paid by the county, it will be presumed, in the absence of an affirmative showing to the contrary, that the discretion of the justice in not taxing the costs against the prosecuting witness, was properly and legally exercised.

Palo Alto v Moncrief, 58-131; 12 NW 142

13593 Correction of record.

Correction of transcript. The district court, on appeal from a mayor's court, may, on affidavit proof, correct an erroneous recital in the transcript relative to the taking of an appeal.

Creston v Kessler, 202-372; 210 NW 464

Presumption of not guilty plea. When the record discloses that in the trial before the justice the defendant was present and asked for a jury, a plea of not guilty is presumed if

the justice failed to enter it upon his docket. In such cases the district court may order a plea of not guilty to be supplied as an apparent omission on the face of the record.

State v McCombs, 13-426

13596 Fine—payment to justice.

Atty. Gen. Opinion. See '28 AG Op 150

13599 Appeal—how taken.

ANALYSIS

I In General
II How Taken

I IN GENERAL

Includes trial before mayor. When a city charter vests the mayor with exclusive original jurisdiction for the violation of the ordinances of the city, and allows appeals from his decisions in the same cases, time, and manner as may at any time be allowed by law from those of other justices, held, that appeals were allowed from the judgment by the mayor in cases where his jurisdiction was exclusive.

Conboy v Iowa City, 2-90

II HOW TAKEN

Appeal excludes habeas corpus. Habeas corpus will not lie to test the sufficiency of the evidence to sustain a judgment of conviction by a justice of the peace under an information which actually charges an offense, the punishment for which does not exceed either a fine of $100 or imprisonment for 30 days.

Hallway v Byers, 205-936; 218 NW 905

13604 Trial on appeal—procedure.

ANALYSIS

I In General
II Several Counts

I IN GENERAL

Jury may be waived.

Lovilia (Town) v Cobb, 126-557; 102 NW 496

Supreme court. It is only such errors as affect the substantial rights of a party that can be regarded by the supreme court even in criminal cases.

Hintermeister v State, 1-101

II SEVERAL COUNTS

No annotations in this volume

13607 Appeal to supreme court—procedure.

Jurisdiction. The supreme court will not acquire jurisdiction of a cause arising in police court unless the same was in the first instance appealable to the district court, and the fact that defendant did not appeal from an order of the district court overruling his motion to dismiss would not preclude his raising the question of jurisdiction in the supreme court, as the question of jurisdiction may be raised at any stage of the proceedings.

State v Ford, 161-323; 142 NW 984

CHAPTER 628

BAIL

13609 Bailable offenses.

Misconduct in opening statement—failure to give bail. Assertions of the county attorney in his opening statement to the jury relative to the refusal of defendant's associate in crime to appear as a witness, and as to defendant's inability to give bail, will not be deemed prejudicial misconduct sufficient to demand a new trial when defendant requested no special instructions or admonition to the jury concerning the matter, and when the instructions to the jury were fair.

State v Sampson, 220-142; 261 NW 769

Purpose of bail. The purpose of bail is to assure the attendance and punishment of criminals rather than to obtain profit for the state by the forfeiture of the bond.

State v Thomason, 226-1057; 285 NW 636

13611 Bail on commitment to answer.

Power of county judge. The county judge has power, under the statute, to admit to bail any person held to answer by another magistrate for a bailable offense; and a bail bond accepted and approved by the county judge of another county from the one in which the accused was examined and committed is not void for want of authority in that office to accept and approve such bonds.

State v Klingman, 14-404

Duty of defendant to answer. A defendant in a criminal proceeding who, on preliminary hearing, is "held to answer", and gives bail in the ordinary form, must answer by appearance at each and every material stage of a proceeding either under an indictment or under county attorney information, even tho no bench warrant is issued, or new bond given, under the final charge.

State v Walker, 217-229; 251 NW 56

Nonappearance for trial in misdemeanor cases. Where, before forfeiting a bail bond, the court waits two days for the defendant to appear for trial under a misdemeanor charge,

with no request from the defendant's attorney that the trial proceed in the absence of the defendant, it is too late to insist successfully that the sureties on the bail bond were exonerated because the trial might have proceeded in the absence of the defendant.

State v Walker, 217-229; 251 NW 56

13615 Officers required to take bail.

Validity. A recognizance executed before the clerk of the court of one county for the appearance of the defendant before the court of another county wherein the indictment is pending, and where the bond is filed is not invalid. (Under this section such matters are merely directory and failure to conform does not vitiate the bond.)

State v Wells, 36-238

13617 Bail on appeal—conditions.

Discussion. See 12 ILR 418—Appeal bond surety's liability for fine

Costs. An appeal bond on appeal from a judgment of conviction for felony does not embrace liability for costs.

Van Buren Co. v Bradford, 202-440; 210 NW 443

Nonliability for costs. An appeal bond on appeal from a judgment of imprisonment and fine, conditioned to "in all respects abide the orders and judgment of the supreme court" does not, in case of affirmance, embrace liability for costs.

State v Gregory, 205-707; 216 NW 17

Liability for fine. An appeal bond on appeal from a judgment of imprisonment and fine, and conditioned to "in all respects abide the orders and judgment of the supreme court" carries, in case of affirmance, liability for the payment of the fine, even tho the defendant is surrendered for imprisonment.

State v Gregory, 205-707; 216 NW 17

Bond secures fine. When an accused in a criminal cause is fined and, independent of fine, is ordered imprisoned for a named period, an appeal bond conditioned to perform the judgment is not satisfied by the surrender of the accused by the surety.

State v Crosser, 202-725; 210 NW 957

Surrender of defendant. Sections 4593-4595, C., '73 [§§13641-13643, C., '39] providing for the surrender of defendant in exoneration of bail, relate only to bail given on appeal from a judgment of imprisonment, and not to bail upon an appeal from a judgment imposing a fine only; and in the latter case, the sureties upon the appeal bond cannot surrender the defendant in their own exoneration, but must pay according to the terms of their bond.

State v Stommel, 89-67; 56 NW 263

Surety on appeal bond. On the issue whether defendant had contracted to indemnify plaintiff against liability as surety on an appeal bond in a criminal case, and whether defendant had received funds from the accused with which to perform such indemnity contract, evidence is wholly inadmissible that defendant had received funds from the father or brother of the accused for a purpose wholly foreign to said indemnity contract.

State v Cordaro, 211-224; 233 NW 51

Late appearance—defendant in federal penitentiary. When a criminal defendant who had posted an appeal bond did not appear after affirmance of the conviction, because he was incarcerated in a federal penitentiary, but was shortly thereafter brought to the court through the efforts of the surety on his bond, and was then taken to the state reformatory, all at the cost of the surety, there was delivery of the defendant into court so that the state could not recover on the bond.

State v Thomason, 226-1057; 285 NW 636

CHAPTER 629

UNDERTAKINGS OF BAIL AS LIENS

Atty. Gen. Opinion. See AG Op May 22, '39

CHAPTER 630

CASH BAIL

13627 Deposit in lieu of bail.

Discussion. See 11 ILR 372—Right to attach cash deposit when made by person other than defendant

Certificate of deposit as "money". A bank certificate of deposit, duly indorsed to and deposited with the clerk of the district court, by a party as bail for one accused of crime will be deemed "money" within the meaning of the statute.

State v Hart, 209-119; 227 NW 650

13630 Disposition of deposited money.

Right to apply cash bail on judgment. Cash or its equivalent voluntarily deposited with the clerk as bail for one accused of crime may be applied in satisfaction of so much of the judgment against the accused as requires the payment of money, even tho the said deposit does not belong to the accused.

State v Hart, 209-119; 227 NW 650

Accused deemed owner of deposit. Cash deposited by a third person as bail pending an appeal by an accused who has been convicted will be conclusively deemed to belong to the accused, as far as the state is concerned, and is forfeitable accordingly.

State v Friend, 212-136; 236 NW 20

Freedom pending abortive appeal as consideration. Cash deposited as bail pending an appeal is forfeitable for the nonappearance of the accused even tho the appeal, because of improper notice was abortive and was dismissed, when the accused by reason of said bail secured his unrestricted freedom pending the attempted appeal.

State v Friend, 212-136; 236 NW 20

CHAPTER 631

FORFEITURE OF BAIL

13631 Entry.

ANALYSIS

I IN GENERAL

Criminal prosecution—duty of defendant to answer. A defendant in a criminal proceeding who, on preliminary hearing, is "held to answer", and gives bail in the ordinary form (§13612, C., '31), must answer by appearance at each and every material stage of a proceeding either under an indictment or under county attorney information, even tho no bench warrant is issued, or new bond given, under the final charge.

State v Walker, 217-229; 251 NW 56

II WHAT CONSTITUTES FORFEITURE

Bail—forfeiture—mandatory essentials. A bail bond cannot legally be forfeited until after the principal is called in open court and his nonappearance is made to appear.

State v Kronstadt, 204-1151; 216 NW 707

III WHAT IS NOT FORFEITURE

Late appearance—defendant in federal penitentiary. When a criminal defendant who had posted an appeal bond did not appear after affirmance of the conviction, because he was incarcerated in a federal penitentiary, but was shortly thereafter brought to the court through the efforts of the surety on his bond, and was then taken to the state reformatory, all at the cost of the surety, there was delivery of the defendant into court so that the state could not recover on the bond.

State v Thomason, 226-1057; 285 NW 636

IV ORDER OF FORFEITURE

"Call" as condition precedent. Principle reaffirmed that a legal "call" of the prisoner in open court is a condition precedent to a legal forfeiture of the bail bond.

State v Robinson, 205-1055; 218 NW 918

V ENTRY OF FORFEITURE

No annotations in this volume

13633 Judgment.

Judgment on bail bond—appeal. The refusal of the trial court to enter judgment on an appeal bond in a criminal case will not be interfered with on appeal unless an abuse of discretion is shown.

State v Thomason, 226-1057; 285 NW 636

13634 Forfeiture in justice of the peace court.

Jurisdiction of district court. The district court has jurisdiction in actions on appearance bonds taken by justices of the peace acting as examining magistrates.

State v Emerson, 16-206

13636 Judgment set aside.

Construction. The effect to be given under this section to the surrender of an accused after judgment against the sureties on an appearance bond has no application to the effect to be given, under §13617, to the surrender of an accused after an unsuccessful appeal to the supreme court.

State v Gregory, 205-707; 216 NW 17

Vacation made conditional. An order vacating a judgment on a bail bond may be made conditional on the payment by the surety of all costs attending the recapture and surrender of the absconding prisoner.

State v Robinson, 205-1055; 218 NW 918

Delivery in foreign county. A surety in an application to set aside a judgment on a bail bond who shows that he caused the absconding principal in the bond to be delivered to the sheriff of the county wherein the criminal proceedings were pending, but in a foreign county to which the sheriff might have refused to go, establishes a "delivery" to such sheriff.

State v Robinson, 205-1055; 218 NW 918

Arrest in another county. The arrest and detention in another county of a prisoner who

is under bond for appearance does not have the effect to release the sureties upon his bond.

State v Merrihew, 47-112

Justifiable refusal to set aside. An application to set aside a judgment on a forfeited bail bond is properly overruled when the nonappearance of the principal in the bail bond at the time of trial is wholly unexplained, and when said principal was never surrendered to the sheriff of the county in which the bail was given.

State v Arioso, 207-1109; 224 NW 56

Refusal of court to enter judgment on bond. When a statute provides that a judgment granted on the forfeiture of bail shall not be set aside by the court unless the defendant appears within 60 days and all costs are paid, then the court also has the power to refuse to enter judgment on an appeal bond on hearing at the trial after forfeiture.

State v Thomason, 226-1057; 285 NW 636

CHAPTER 633

SURRENDER OF DEFENDANT

13641 Manner of surrendering defendant.

Surrender not satisfaction of appeal bond. When an accused in a criminal cause is fined, and, independent of the fine, is ordered imprisoned for a named period, an appeal bond conditioned to perform the judgment is not satisfied by the surrender of the accused by the surety.

State v Crosser, 202-725; 210 NW 957

13643 Return of money deposited.

Right to apply cash bail on judgment. Cash or its equivalent voluntarily deposited with the clerk as bail for one accused of crime may be applied in satisfaction of so much of the judgment against the accused as requires the payment of money even tho the said deposit does not belong to the accused.

State v Hart, 209-119; 227 NW 650

CHAPTER 634

INFORMATION BY COUNTY ATTORNEY

13644 Offenses prosecuted on information—jurisdiction.

Discussion. See 13 ILR 264—Trial information in Iowa

Constitutional law. The fifth amendment to the federal constitution (requiring infamous crimes to be presented by indictment) is no limitation upon the power of the state to provide for prosecution of infamous crimes without an indictment by a grand jury.

State v Ostby, 203-333; 210 NW 934; 212 NW 550

Nonindictable offense. An indictment, or an information as a substitute for an indictment, which simply charges an offense which is punished by a maximum fine of $100 or 30 days imprisonment is a nullity.

State v Wyatt, 207-322; 222 NW 867

13645 Filing by county attorney.

Atty. Gen. Opinion. See AG Op June 9, '39

"Vacation" of court defined. The term "vacation" as employed in the county attorney information act (§13667, C., '31) means the interim which commences immediately after the expiration of a term of court and ends at the commencement of the next term of court. The court is not in vacation while it is in a recess.

Dayton v Bechly, 213-1305; 241 NW 416

Physician—institution of prosecution. Prosecutions for the enforcement of the laws regulatory of the practice of medicine and surgery may be instituted without any authority from the state department of health.

State v Hueser, 205-132; 215 NW 643

Erroneous proceedings on county attorney information. The act of the district court in formally approving a county attorney information, and forthwith entering judgment against the accused on a plea of guilty, is in effect a finding that the grand jury was not then actually in session, and tho it be conceded that such finding was erroneous, such error furnishes no allowable basis for a writ of habeas corpus six years later to test the legality of the judgment.

Marsh v Hollowell, 215-950; 247 NW 304
Bennett v Bradley, 216-1267; 249 NW 651

When grand jury not in session—determination of fact. The act of a judge of the district court in duly approving, and of the county attorney in duly filing, a trial information for felony, and the act of said judge (as a court), on the same day, in accepting and passing sentence on a plea of guilty, constitutes, in effect, a judicial determination that said information was duly filed—that the grand jury

was not "actually in session" when said information was filed.

Thrasher v Haynes, 221-1137; 264 NW 915

"Actually in session" defined. The statutory right of the county attorney to file a trial information "at any time when the grand jury is not actually in session" does not mean that he is prohibited from filing such information at any time of any day on which the grand jury was in session. So held where the information was filed on the day on which the grand jury was duly convened, but at a time on said day when said jury was not "actually" in session.

Thrasher v Haynes, 221-1137; 264 NW 915

13646 Indorsement.

Waiver of indorsement. The failure to indorse (1) "a true information", or (2) the names of the witnesses, on an information or to file any minutes of testimony, is waived by failure to move to set aside the information on such grounds.

State v Voss, 201-16; 206 NW 292

13647 Names of witnesses—minutes of evidence.

Witnesses not before grand jury. The statutory prohibition goes to the witness and not to the competency of his testimony. The defendant waives the objection by allowing him to be examined in part.

State v Hurd, 101-391; 70 NW 613

Discrepancy in name of witness. A discrepancy in the name of a witness as indorsed on the indictment or as written in a notice of additional testimony becomes quite inconsequential when the accused is in no manner misled.

State v Leitzke, 206-365; 218 NW 936

Minutes of testimony—sufficiency. The minutes of the evidence which are required to be attached to an information by the county attorney need not be signed or sworn to by the witness.

State v Hueser, 205-132; 215 NW 643
State v Van Klaveren, 208-867; 226 NW 81

Minutes of testimony as impeachment. Minutes of testimony attached to a trial information filed by a county attorney are not admissible to impeach a witness who neither prepared nor signed said minutes.

State v Davis, 212-582; 234 NW 858

Absence of indorsements—waiver. After conviction under a county attorney information, it is too late to raise the question that the names of the witnesses were not indorsed on the information, or that the minutes of testimony were not attached, or that the accused was not furnished a copy of the information.

Bennett v Bradley, 216-1267; 249 NW 651

Waiver of defects and objections—inadequacy of minutes—remedy. If an accused is dissatisfied with the lack of fullness of the statement of facts set forth in the minutes of testimony returned with an indictment, his remedy is to move for a bill of particulars.

State v McCutchan, 219-1029; 259 NW 23

13649 Verification by oath.

Unsworn information first challenged on appeal—no waiver. Where a municipal court information charging speeding was not sworn to, defendant did not waive his right to challenge its sufficiency to sustain a conviction, nor lose his right to raise such objection on appeal in supreme court, by failure to question the sufficiency of information before the trial.

State v Weston, 225-1377; 282 NW 774

13650 Approval by judge.

Filing before approval—effect. A county attorney information is not subject to a motion to set aside because the filing with the clerk momentarily preceded the formal indorsement of approval by the judge.

State v Harding, 204-1135; 216 NW 642

Irregular approval—effect. The irregular or equivocal approval of a trial information by the county attorney, arising out of the signing by the judge of a blank form of approval without erasing the provision for disapproval, does not deprive the court of jurisdiction over the information, especially when the indorsement by the judge otherwise reveals an approval.

State v Nova, 206-635; 220 NW 41

Failure of judge to approve—waiver. Failure of the judge to approve a trial information by the county attorney is waived when presented for the first time on appeal.

State v Nova, 206-635; 220 NW 41

13654 Amendments.

Amendment. An information may be amended upon application to any extent which the court may deem consistent and proper.

State v Doe, 50-541

Discretion of court. Where there is no uncertainty as to the nature of an offense charged in an information, it may, in the discretion of the court, be amended so as to charge the commission of the crime anywhere within the jurisdiction of the court, instead of within a particular subdivision.

State v Abrams, 131-479; 108 NW 1041

13655 Statutes applicable.

Atty. Gen. Opinion. See '32 AG Op 80

Indictment principles applicable. Principles announced in cases referring to indictments are applicable to cases based on county attorney's informations.

State v Albertson, 227-302; 288 NW 64

Duplicity—waiver. The claim that an indictment or trial information charges more than one offense will be disregarded when raised for the first time on appeal.

State v Voss, 201-16; 206 NW 292

Forgery. A county attorney information which charges the forgery of a check, and which otherwise is sufficient under the "short-form" act, is not insufficient because it (1) does not describe the check in detail, (2) does not allege the actual or apparent legal efficacy of the check, and (3) does not set forth a copy of the check. Resort to a motion for a bill of particulars is defendant's remedy in such cases.

State v Solberg, 214-333; 242 NW 84

13660 Time of making motion—rulings of court.

Absence of indorsements—waiver. After conviction under a county attorney information it is too late to raise the question that the names of the witnesses were not indorsed on the information, or that the minutes of testimony were not attached, or that the accused was not furnished a copy of the information.

Bennett v Bradley, 216-1267; 249 NW 651

13667 Place of arraignment.

"Vacation" of court defined. The term "vacation" as employed in the county attorney information act means the interim which commences immediately after the expiration of a term of court and ends at the commencement of the next term of court. The court is not in vacation while it is in a recess.

Dayton v Bechly, 213-1305; 241 NW 416

Illegal sentence under information. Sentence and final judgment under a county attorney information filed in one county cannot be legally rendered in another county of the same judicial district when a term of court is pending in the county in which the information is filed. And a term of court is pending even tho the court has temporarily recessed.

Dayton v Bechly, 213-1305; 241 NW 416

13669 Judgments on written pleas.

Written plea—when required. Written pleas of guilt are not required under the county attorney information act except when the plea is taken in vacation of the court.

Bennett v Bradley, 216-1267; 249 NW 651

Jurisdiction during vacation. A district judge has jurisdiction in vacation and while sitting in chambers in any county of his district, to receive a written plea of guilty under a trial information filed by the county attorney, and to enter sentence, even tho the offense is charged to have been committed in a county of his district other than the county in which he is sitting.

State v Voss, 201-16; 206 NW 292

13671 Place of rendition.

Rendition in vacation—validity. The court has no jurisdiction, on its own initiative, in a criminal case prosecuted by indictment, to order that prospective motions in arrest of judgment and for new trial, and exceptions to instructions be heard by the judge in vacation, and that final sentence be entered by the judge in vacation in case said motions and exceptions be overruled. It necessarily follows that the judge has no jurisdiction, even tho the accused be present, to rule on such matters in vacation, and no jurisdiction to pronounce final judgment in vacation, even tho it be conceded that the accused suffered no prejudice.

State v Rime, 209-864; 226 NW 925

Illegal sentence under information. Sentence and final judgment under a county attorney information filed in one county cannot be legally entered in another county of the same judicial district when a term of court is pending in the county in which the information is filed. And a term of court is pending even tho the court has temporarily recessed.

Dayton v Bechly, 213-1305; 241 NW 416

13673 Bail—construction.

Duty of defendant to answer. A defendant in a criminal proceeding who, on preliminary hearing, is "held to answer", and gives bail in the ordinary form (§13612, C., '31), must answer by appearance at each and every material stage of a proceeding either under an indictment or under county attorney information, even tho no bench warrant is issued, or new bond given, under the final charge.

State v Walker, 217-229; 251 NW 56

13674 Form of information.

Verification. The verification of a trial information by a county attorney as being true "as I verily believe", being in the language of the statute, is all-sufficient.

State v Japone, 202-450; 209 NW 468

Allegations of former convictions. In prosecution for illegal possession of intoxicating liquor, county attorney's action in seeking to place the federal convictions before the jury, such matter being entirely withdrawn from the consideration of the jury, was not prejudicial to defendant and did not entitle him to a reversal when there was ample competent evidence to sustain the jury's verdict.

State v Caringello, 227-305; 288 NW 80

Duplicity—demurrer. An information which charges that defendant willfully, premeditat-

edly, deliberately, with malice aforethought, and with specific intent to kill, murdered his wife, and also that he willfully deposited, in a shotgun, dynamite or other explosive material, and induced his wife to explode the gun, thereby killing her, is not duplicitous.

State v Rhodes, 227-332; 282 NW 540; 288 NW 98

CHAPTER 635

IMPANELING GRAND JURY

13678 Drawing grand jurors.

Selection of jurors. See Ch 482

Waiver of exemption. Persons over 65 may be exempt as under §10843 but such exemption is personal and may be waived.

State v Edgerton, 100-63; 69 NW 280

Irregularity. The provision requiring the names on the ballots prepared by the county auditor, from the lists of grand jurors returned by the judges of election, to be compared with said lists by the clerk and sheriff before the drawing of grand jurors commences, is directory only, and the comparison of names drawn, by the auditor and sheriff, with the lists as the ballots are taken from the box, is not such an irregularity as will affect the validity of the acts of the jury thus selected.

State v De Bord, 88-103; 55 NW 79

Drawn on precept. If a grand jury be once regularly drawn, and for any cause fails to appear at a subsequent term, a precept for a jury should, at that term, issue to the body of the county, and §240, C., '73 [§§10873, 10874, C., '39] providing that the jurors shall be drawn 20 days before the term, does not apply.

State v Beste, 91-565; 60 NW 112

Immaterial error. A slight deviation from the statute as to the number of names required for a grand jury list from which the panel is drawn is not a material error.

State v Clark, 141-297; 119 NW 719

13679 Additional drawings.

Talesmen. When all of the regular jurors are not in attendance, and the grand jury is completed by summoning talesmen, the talesmen serve for the term; and if the jury is discharged and recalled during the term, they must be summoned with the other jurors impaneled.

State v Reid, 20-413

13680 Challenge to panel—motion.

Fatally delayed motion. A motion to set aside an indictment on the ground that the accused has been unlawfully discriminated against in the selection of the grand jury is unallowable when interposed after the accused has entered a plea and has had one trial.

State v Twine, 211-450; 233 NW 476

13682 Grounds of challenge.

ANALYSIS

I In General
II Remedy

I IN GENERAL

Member of election board. Membership on an election board does not disqualify one from serving as a grand juror, and the mere fact that the name of one of the judges of election was returned by the board of which he was a member affords no proof that the same was done at his solicitation.

State v Clark, 141-297; 119 NW 719

II REMEDY

Appeal—objections—inadequate presentation in trial court. The proposition that the court declined to permit further examination of a juror after a challenge had been overruled is not presented to the trial court by the complainant's dictating into the record matter upon which the trial court cannot make a ruling.

State v Harding, 205-853; 216 NW 756

CHAPTER 636

DUTIES OF GRAND JURY

13702 Indictable offenses.

Physicians and surgeons—law enforcement. Prosecutions for the enforcement of the laws regulatory of the practice of medicine and surgery may be instituted without any authority from the state department of health.

State v Hueser, 205-132; 215 NW 643

Instigation of prosecution. Where county attorney made no independent investigation, made no recommendation to the grand jury, and, after making careful investigation of the evidence subsequent to the return of the indictment, dismissed the case, the defendant's appearance before the grand jury, when merely advised by the county attorney that he could do so if he cared to, raised a jury question of whether defendant instigated the prosecution.

Bair v Schultz, 227-193; 288 NW 119

13706 Right of county attorney to appear.

Presence of assistant county attorney. The presence of a duly appointed assistant county attorney in the grand jury room while the question of indictment was being considered did not render the indictment defective.

State v Coleman, 226-968; 285 NW 269

13711 Refusal of witness to testify.

Exemption from self-incrimination—nonwaiver. A witness who voluntarily appears before a grand jury, and, without duress or compulsion, testifies to matters which tend to render himself criminally liable for an offense as to which he is not given absolute immunity from prosecution (§11269, C., '35), does not thereby waive his natural, common-law, statutory, and constitutional right to refuse to testify to said matters on the subsequent trial of another party under an indictment returned in whole or in part on the original testimony of said witness.

Duckworth v Dist. Ct., 220-1350; 264 NW 715

13712 Minutes to be kept.

Inadequacy of minutes—remedy. If an accused is dissatisfied with lack of fullness of the statement of facts set forth in the minutes of testimony returned with an indictment, his remedy is to move for a bill of particulars.

State v McCutchan, 219-1029; 259 NW 23

13713 Minutes read—signing by witness.

Refreshing recollection. It is not improper for the county attorney, after a witness has testified to a certain extent, to hand to the witness the minutes of his testimony taken before the grand jury and to request the witness to refresh his memory in order to determine whether he had overlooked any matter; nor is it improper to permit the witness thereupon to testify to material matters which had been overlooked.

State v Friend, 206-615; 220 NW 59

Refreshing memory. A party producing a witness may very properly ask him a question designed to refresh his memory on a material subject matter.

State v Briggs, 207-221; 222 NW 552

13714 Evidence returned and filed.

Indictment as evidence. An indictment is wholly inadmissible to show the guilt of the defendant even tho offered, on cross-examination, in connection with an offer, by the accused, of the minutes of testimony returned with the indictment.

State v Huckins, 212-283; 234 NW 554

Exhibits—nonduty to return and file. Exhibits which are before the grand jury in its investigation of an offense by certain parties need not be returned and filed with an indictment of other and different parties for another and different offense, especially when said exhibits cannot be used as substantive evidence against complainants. And this is true tho all said charges had relation to a transaction in which all the parties were material actors.

State v Campbell, 213-677; 239 NW 715

Failure to file exhibits. The statute requiring the filing of exhibits in a criminal action in the office of clerk with minutes of testimony is not mandatory, but is directory only, and the failure to file such exhibits does not render such exhibits inadmissible where counsel for defendant is advised that exhibits are in the custody of the sheriff, subject to inspection, and where no application is made for such inspection and no apparent prejudice results from noncompliance with statute.

State v Bazoukas, 226-1385; 286 NW 458

Minutes of testimony—nonimpeachable. The minutes of testimony taken before grand jury and filed with indictment constitute the record basis for finding of the indictment, and this record may not be added to by calling on the grand jurors in the trial of a case to give additional testimony tending to impeach the indictment, such as that given in false arrest case where grand jurors testified in effect that plaintiff was in truth and in fact the person indicted. Any rule permitting grand jurors to impeach their own record would be contrary to public policy.

O'Neill v Keeling, 227-754; 288 NW 887

13725 Disclosure required.

Right to rebut impeaching testimony. Testimony by grand jurors which tends to show, by way of impeachment, that a witness for an accused made statements before the grand jury inconsistent with the statements of the witness at the trial arms the accused with right to show by the clerk of the grand jury that the grand jurors were mistaken—that the testimony of the witness in question was the same on both occasions.

State v Archibald, 204-406; 215 NW 258

Minutes of testimony—nonimpeachable. The minutes of testimony taken before grand jury and filed with indictment constitute the record basis for finding of the indictment, and this record may not be added to by calling on the grand jurors in the trial of a case to give additional testimony tending to impeach the indictment, such as that given in false arrest case where grand jurors testified in effect that plaintiff was in truth and in fact the person indicted. Any rule permitting grand jurors to impeach their own record would be contrary to public policy.

O'Neill v Keeling, 227-754; 288 NW 887

CHAPTER 637

FINDING AND PRESENTATION OF INDICTMENT

13728 Indictment at instance of private prosecutor.

Discussion. See 16 ILR 89—Malicious prosecution action

ANALYSIS

I IN GENERAL

Taxation of costs against prosecuting witness. In an action for malicious prosecution, the testimony of the magistrate to the effect that in dismissing the prosecution he taxed the costs to the prosecuting witness is harmless when the court instructs that neither want of probable cause nor malice could be inferred from such taxation.

Kness v Kommes, 207-137; 222 NW 436

II MALICIOUS PROSECUTION (CIVIL ACTIONS)

(a) IN GENERAL

Procuring signature to federal information. One who, in good faith, and at the request of a federal district attorney, procures another to sign a federal information, is not responsible in damages if the resulting prosecution fails.

Dickson v Young, 208-1; 221 NW 820

Prosecution under federal information. When a United States district attorney on his own motion institutes an investigation, and as the result thereof prepares an information charging a violation of a federal statute, the resulting prosecution must be deemed instituted by such district attorney, and not by a private citizen who, in good faith, and at the request of such district attorney, formally signs and swears to such information, even tho such citizen has never theretofore advised with the district attorney in reference to said prosecution.

Dickson v Young, 208-1; 221 NW 820

Motive—ill feeling. Plaintiff in a prosecution for malicious prosecution may show that, many years prior to the prosecution in question, he had arrested the defendant, and that such arrest resulted in ill feeling on the part of defendant against plaintiff. But plaintiff should not make prominent the reason for such arrest.

Fisher v Tullar, 209-35; 227 NW 580

Presence of family when arrest made. Evidence is receivable, in an action for malicious prosecution, to the effect that plaintiff's family was present when he was arrested.

Hepker v Schmickle, 209-744; 229 NW 177

Instructions—fatal contradiction. In an action for damages consequent on a malicious prosecution, instructions to the effect (1) that plaintiff must negative good faith on the part of defendant in instituting the prosecution and (2) that good faith on the part of defendant constituted no defense are prejudicially erroneous in that they are mutually conflicting.

Dobbins v Todd Co., 218-878; 256 NW 282

(b) ELEMENTS

Elements—burden of proof. In action for damages for malicious prosecution, plaintiff has burden to show (1) the prosecution; (2) instigation or procurement by defendant; (3) acquittal or discharge of plaintiff; (4) want of probable cause; (5) malice.

Bair v Schultz, 227-193; 288 NW 119

Malice and probable cause—advice of counsel as defense. It is a complete defense to an action for malicious prosecution that the prosecuting witness in good faith disclosed to the county attorney all the facts possessed by him, and was advised by such attorney that such facts were (1) sufficient to show the commission of an offense, and (2) sufficient to warrant the institution of criminal proceedings against the accused; and it matters not that the proceedings were commenced by preliminary information, instead of by original proceedings before the grand jury, as suggested by the attorney.

Granteer v Thompson, 203-127; 208 NW 497

Defense—disclosure to county attorney. A private prosecutor is not liable in damages for malicious prosecution when, before signing the preliminary information, he makes, in good faith, a full and fair statement to the county attorney of all the facts and circumstances within his knowledge concerning the offense in question, and is, in effect, assured by said public official that he would be warranted in commencing the prosecution; and this is true even tho the county attorney did express a preference on his part to place the prosecution before the grand jury without the filing of a preliminary information.

Granteer v Thompson, 207-1204; 224 NW 528

Want of probable cause—advice of counsel—failure to divulge material fact. The advice of counsel is a complete defense to an action for malicious prosecution only when obtained in good faith and when based upon a full and fair disclosure of all the material facts.

Hepker v Schmickle, 209-744; 229 NW 177

Want of probable cause—advice of counsel. Principle recognized that a defendant in an action for damages for malicious prosecution presents a complete defense when he proves

II MALICIOUS PROSECUTION (CIVIL ACTIONS)—concluded
(b) ELEMENTS—concluded

that, prior to commencing the prosecution, he made a good-faith, full, and fair recital of the facts to his attorney, and was advised to commence the prosecution.

Beard v Wilson, 211-914; 234 NW 802

Malice inferred from want of probable cause. In action for malicious prosecution malice may be inferred from want of probable cause for the prosecution.

Bair v Schultz, 227-193; 288 NW 119

Want of probable cause — evidence — sufficiency. Principle reaffirmed that the question of probable cause may be one of law, or it may be one of fact. Evidence held to present a question of fact.

Hepker v Schmickle, 209-744; 229 NW 177

Negative definition of want of probable cause. It is not necessarily erroneous to define want of probable cause in a negative form, instead of in an affirmative form.

Hepker v Schmickle, 209-744; 229 NW 177

Probable cause per se. Record reviewed and held insufficient to show per se that defendant had probable cause for instituting against plaintiff a prosecution for embezzlement.

Weisz v Moore, 222-492; 269 NW 443

Want of probable cause—landlord's writ—improper submission. In an action for malicious prosecution in suing out a writ of landlord's attachment for rent admittedly due (but which was cancelled by a pleaded and established counterclaim), manifest error results from submitting to the jury the question whether the landlord had probable grounds to believe the truth of the ground alleged as a basis for the writ.

Kelp v McManus, 218-226; 253 NW 813

Want of probable cause—unallowable presumption. Principle reaffirmed that while malice may be inferred from a total want of probable cause, yet a want of probable cause cannot be inferred from malice, however great.

Dugan v Midwest Co., 213-751; 239 NW 697

(c) ACTIONS

Unpleaded issue. The submission to the jury of an issue, and the placing of the burden on a party to prove the affirmative thereof, when the party was in no manner presenting such issue, constitute reversible error. So held where, in an action for malicious prosecution, the court submitted the unpleaded issue of actual guilt of the plaintiff of the offense in question.

Granteer v Thompson, 203-127; 208 NW 497

Malicious prosecution growing out of auto collision—counterclaim. Defendant in an action for damages consequent on a collision between automobiles may not plead as a counterclaim damages consequent on a malicious prosecution instituted by the plaintiff against defendant for reckless driving at the time of the collision.

Harriman v Roberts, 211-1372; 235 NW 751

Jury question. In an action for malicious prosecution, record reviewed and held to present jury questions on both the issues of (1) want of probable cause, and (2) malice.

Richmond v Whitaker, 218-606; 255 NW 681

Harmless error—withdrawn testimony. Testimony, in an action for malicious prosecution, relative to the return of an indictment against plaintiff but without proof that defendant was connected therewith, reveals no prejudicial error when the court ultimately withdrew said testimony in toto.

Richmond v Whitaker, 218-606; 255 NW 681

Questions for jury. Evidence reviewed in action for damages for false arrest and malicious prosecution (padlocked schoolhouse case), and held such as to preclude the court from determining the question of want of probable cause, malice, and good-faith reliance on the advice of counsel.

Gripp v Crittenden, 223-240; 271 NW 599

Defense—acting on advice of county attorney. In action for malicious prosecution, whether the defendant acted on advice of the county attorney is generally a question for the jury, and assuming he so acted, if he failed to make a full disclosure of the facts, he did not so conclusively establish this defense as to sustain a directed verdict.

Bair v Schultz, 227-193; 288 NW 119

13729 Names of witnesses indorsed.

ANALYSIS

Notice of additional witnesses. See under §13851

I IN GENERAL

Criminal law—rebuttal and direct testimony—admissibility—witness' name not on indictment. Arresting officer's testimony as a rebuttal witness for the state that defendant made the statements "I was afraid of that", and "Well, I finally caught up with the guy",

held proper even tho the name of the rebuttal witness was not indorsed on the indictment and no notice of additional testimony was given where such testimony, altho not strictly rebuttal, had a tendency to disprove defendant's testimony, it oftentimes occurring that rebuttal testimony might also have been used as direct testimony in the state's case.

State v Crandall, 227-311; 288 NW 85

II INDORSING NAMES OF WITNESSES

Failure to use all witnesses before grand jury. There is no obligation resting upon the state to use upon the trial all the witnesses examined before the grand jury, and evidence of a failure so to do is not admissible to show the animus of the prosecution.

State v Dillon, 74-653; 38 NW 525

Failure to produce. The state is not bound to call all whose names are indorsed on the indictment.

State v Helm, 92-540; 61 NW 246

III FAILURE TO INDORSE

(a) IN GENERAL

Rebuttal witnesses. The state may, in rebuttal, call witnesses whose names are not indorsed upon the back of the indictment.

State v Ruthven, 58-121; 12 NW 235

When unnecessary. The statutory requirement that an indictment carry the names of the witnesses on whose testimony it is found and be accompanied by a minute of their testimony, has no application to the names and testimony of witnesses used on the trial in rebuttal.

State v Cozad, 221-960; 267 NW 663

Rebuttal witnesses not before grand jury. It is quite immaterial that witnesses called by the state in rebuttal were not before the grand jury.

State v Olson, 200-660; 204 NW 278

Rebuttal—witness' name not on indictment. Arresting officer's testimony as a rebuttal witness for the state that defendant made the statements "I was afraid of that," and "Well, I finally caught up with the guy," held proper even tho the name of the rebuttal witness was not indorsed on the indictment and no notice of additional testimony was given where such testimony, altho not strictly rebuttal, had a tendency to disprove defendant's testimony, it oftentimes occurring that rebuttal testimony might also have been used as direct testimony in the state's case.

State v Crandall, 227-311; 288 NW 85

Rebuttal of alibi. A defendant who relies on an alibi has the burden to prove it, and evidence tending to contradict that introduced to establish the alibi is rebutting evidence, and it is not required that the names of the witnesses giving such evidence should be on the back of the indictment.

State v McClintic, 73-663; 35 NW 696

Witness not named on indictment. This is a personal right of defendant and he may waive such right and allow the witness to be examined.

State v Ward, 73-532; 35 NW 617

Non-grand-jury witness—curing error. Any error in receiving the testimony of a witness not before the grand jury is cured by subsequently excluding such testimony and admonishing the jury to disregard it.

State v Christensen, 205-849; 216 NW 710

(b) VARIANCE

Waiver by defendant.

State v Voss, 201-16; 206 NW 292

Discrepancy—effect. A discrepancy in the name of a witness as indorsed on the indictment or as written in a notice of additional testimony becomes quite inconsequential when the accused is in no manner misled.

State v Leitzke, 206-365; 218 NW 936

Sufficiency of indorsement. The indorsement on an indictment of the name of a witness is all-sufficient when the name given is that by which he is commonly known. So held where the actual name, Edison Caster, was indorsed as Ed Caster.

State v Mullenix, 212-1043; 237 NW 483

(c) EFFECT OF FAILURE

Minutes of testimony—conclusiveness. The defendant in an indictment will not be permitted to show that witnesses other than those whose names are indorsed on the indictment were before the grand jury and gave testimony relative to the charge against defendant, and that minutes of testimony of such other witnesses were not returned with the indictment.

State v Martin, 210-376; 228 NW 1

Absence of indorsement—waiver. After conviction under a county attorney information, it is too late to raise the question that the names of the witnesses were not indorsed on the information, or that the minutes of testimony were not attached, or that the accused was not furnished a copy of the information.

Bennett v Bradley, 216-1267; 249 NW 651

IV RETURNING MINUTES OF TESTIMONY

Minutes may be filed separately.

State v Hamilton, 42-655

V DOCUMENTARY EVIDENCE

Evidence other than minutes. Other evidence than the minutes on the trial is admissible

V DOCUMENTARY EVIDENCE—concluded

to determine whether or not a witness was in fact examined before the grand jury or committing magistrate, altho the minutes returned with the indictment are made, by the statute, conclusive as to what names are or should be indorsed on the back of the indictment.

State v Marshall, 105-38; 74 NW 763

Exhibits—failure to return. Relevant exhibits are admissible upon the trial of an indictment even tho they have not been before the grand jury, or, if before such jury, have not been returned.

State v Bailey, 202-146; 209 NW 403

VI PRESENTATION TO THE COURT

No annotations in this volume

VII INDORSEMENT BY CLERK

No annotations in this volume

VIII SUBSTITUTION OF LOST INDICTMENT

No annotations in this volume

CHAPTER 638

INDICTMENT

13732 Definition.

Violation of replaced statute. Under the interpretation given subsection 1 of §63, an indictment for driving while intoxicated was not demurrable on the ground that the statutory penalty had been repealed and replaced by another statute which went into effect before the indictment was returned.

State v McDowell, 228- ; 290 NW 65

Nonindictable offense — appeal. A prosecution may not be maintained under an indictment which simply charges a nonindictable offense, and such contention may be presented for the first time on appeal.

State v Wyatt, 207-319; 222 NW 866

Jurisdictional question. The point that the trial court had no jurisdiction over an indictment because the indictment simply charges a nonindictable offense may be raised for the first time on appeal.

State v Wyatt, 207-322; 222 NW 867

Nonindictable offense. An indictment, or an information as a substitute for an indictment, which simply charges an offense which is punished by a maximum fine of $100 or 30 days imprisonment is a nullity.

State v Wyatt, 207-322; 222 NW 867

Indictment as evidence. An indictment is wholly inadmissible to show the guilt of the defendant even tho offered, on cross-examination, in connection with an offer, by the accused, of the minutes of testimony returned with the indictment.

State v Huckins, 212-283; 234 NW 554

13732.01 Form of indictment.

Applicability of short form act. The sufficiency of the charging part of an indictment will be determined by the short form indictment act, tho said act was enacted after the return of the indictment but before the sufficiency thereof was formally questioned, said act not being an ex post facto act.

State v Johnson, 212-1197; 237 NW 522

Short form indictment act. A bill for "an act to amend, revise, and codify" enumerated sections of law, embracing the former law governing the requisites and sufficiency of indictments, furnishes a sufficient title to support what is now known as the short form indictment act.

State v Henderson, 215-276; 243 NW 289

13732.02 Contents of indictment.

Designating offense by name and section violated. An indictment is sufficient in the charging part thereof when it specifies the statutory name of the offense, and the section of the statute violated.

State v Johnson, 212-1197; 237 NW 522

Conspiracy—description of offense. An indictment for conspiracy to commit a crime need not set forth the various elements of said crime. Indictment held to charge properly a conspiracy to engage in the unlawful transportation and sale of intoxicating liquors.

State v Terry, 207-916; 223 NW 870

Embezzlement—sufficiency. Indictment reviewed and held adequately to charge embezzlement by a public officer.

State v Gardiner, 205-30; 215 NW 758

Forgery under short form. A county attorney information which charges the forgery of a check, and which otherwise is sufficient under the short form act, is not insufficient because it (1) does not describe the check in detail, (2) does not allege the actual or apparent legal efficacy of the check, and (3) does not set forth a copy of the check. Resort to a motion for a bill of particulars is defendant's remedy in such cases.

State v Solberg, 214-333; 242 NW 84

Manslaughter by negligence. An indictment for manslaughter by negligence must specifically set out the facts constituting the negligence.

State v Sexsmith, 200-1244; 206 NW 100
State v Korth, 204-1360; 217 NW 236

Robbery—with aggravation. A county attorney information which charges that the defendant aided and abetted other named parties in a robbery, and that one of said other parties was armed with a loaded revolver with the intent to kill the person robbed if he resisted, and which is accompanied by minutes of evidence tending to prove said allegations, is fully sufficient to apprise the accused of the fact that he is charged with robbery with aggravation, and, on a plea of guilty, justifies a sentence accordingly.

Deemy v Dist. Court, 215-690; 246 NW 833

Threats—extortion. An indictment for extortion may be sufficient tho the language relative to the threatened offense and the accompanying intent is bunglingly expressed.

State v Wilbourn, 219-120; 257 NW 571

Grounds of remedy—defectively charged offense. A prisoner will not, on habeas corpus, be released from imprisonment on the ground that the indictment or trial information defectively and unskillfully charges the offense for which he was convicted and imprisoned. The rule is otherwise if the defect is so total that the indictment or information is a nullity.

McBain v Hollowell, 202-391; 210 NW 461

Crime defined by reference to statute. An indictment need not set out the elements of a crime to be valid, if it refers to a section of the statutes creating the crime charged.

State v Keturokis, 224-491; 276 NW 600

Failure to name injured party. A short form of indictment for malicious threat to extort is fatally short in legal requirement when it fails to allege the name of the person threatened.

State v Goldenberg, 211-234; 233 NW 66

Fraudulent banking—general allegation of intent. An indictment for fraudulent banking need not specifically allege the name of the person whom the defendant intended to defraud by receiving the deposit in question; but, nevertheless, an allegation that defendant (a private banker), knowing of his insolvency, received a named deposit from a named person, with intent to defraud, is, in effect, an allegation to defraud the named person.

State v Boysen, 214-46; 238 NW 581

Rape—time discrepancy in indictment immaterial. A rape conviction is valid altho for a date different than the date fixed in the indictment if within the statute of limitations and if no fatal variance occurs between the indictment and the proof.

State v Beltz, 225-155; 279 NW 386

Sufficiency—substantial language charging rape—validity. An indictment, charging that defendant "raped, carnally knew, and abused" a female, sufficiently states an offense in terms of substantially the same meaning as the statute, so as to apprise the court and the accused that the offense of rape was intended to be charged.

State v Keturokis, 224-491; 276 NW 600

Rape—use of "rape" in title only—validity. An indictment for rape by reference to the statute is not void on the ground that the statute does not use the word "rape", when the statute is merely a codification of a legislative act which amply indicated in the title that it was intended to define the common-law crime of rape.

State v Keturokis, 224-491; 276 NW 600

Specifying acts constituting nuisance—effect. An indictment for nuisance which specifies the acts done by the accused limits the state to proof of the specific acts charged.

State v Schuling, 216-1425; 250 NW 588

Negativing exceptions—possession of drugs. An indictment for the unlawful possession of narcotic drugs need not, in view of §3156, C., '24 [§3169.18, C., '39], negative the exception of the statute (§3154, C., '24 [§3169.05, C., '39]) relative to possession under the prescription of named medical practitioners.

State v Bailey, 202-146; 209 NW 403

13732.03 Absence of particulars—effect.

Absence of particulars. An indictment under the short form statute charging, in the language of the statute, the possession of burglar's tools with intent to commit a burglary, is not subject to demurrer. The proper procedure is to demand a bill of particulars.

State v Engler, 217-138; 251 NW 88

13732.04 Bill of particulars.

Short form—constitutionality. The plea that the short form indictment act does not provide for apprising the defendant of the offense with which he is charged, and is therefore unconstitutional, is untenable in view of the right of the defendant under said act to a bill of particulars.

State v Henderson, 215-276; 243 NW 289

Informing accused of accusation. The constitutional right of an accused "to be informed of the accusation against him" (Const. Art. I, §10)—formerly accorded to him through a technically and elaborately drawn indictment—is now, under the short form indictment act, fully accorded to him through a bill of particulars, to which he is arbitrarily entitled.

State v Engler, 217-138; 251 NW 88

Bill of particulars—function. It is not the function of a bill of particulars to supply a material allegation omitted from the indictment, but the insertion of such allegation in a

bill of particulars is of no consequence when the indictment is all-sufficient in itself.

State v Boysen, 214-46; 238 NW 581

Sufficiency. A notice of additional testimony in the trial of an indictment, substantially complying with the statute, is not subject to a motion for a bill of particulars.

State v Loucks, 218-714; 253 NW 838

Inadequacy of minutes. If an accused is dissatisfied with the lack of fullness of the statement of facts set forth in the minutes of testimony returned with an indictment, his remedy is to move for a bill of particulars.

State v McCutchan, 219-1029; 259 NW 23

Admissibility of burglar tools. Under a short form indictment for possessing burglar's tools with intent to commit a burglary, the tools need not be described as a condition precedent to their admissibility in evidence, the accused making no demand for a bill of particulars.

State v Engler, 217-138; 251 NW 88

False pretense. A short form indictment for obtaining money by false pretenses, even tho it specifically purports to be found under §13045, C., '31, but which, by the bill of particulars, is manifestly based on false pretenses on obtaining a refund of tax paid on motor vehicle fuel as provided by §5093-a8, C., '31 [§5093.29, C., '39], is sufficient to support a conviction under the latter section and a sentence solely thereunder.

State v Wall, 218-171; 254 NW 71

13732.05 Setting aside indictment.

Sufficiency not triable by habeas corpus. The sufficiency or validity of an indictment or information, of which the court had jurisdiction, may not be tried in habeas corpus proceedings.

Wilson v Haynes, 218-1370; 256 NW 678

Accused in state hospital—term for trial after release. An indictment not brought to trial because of accused's confinement in a state hospital as an inebriate is not subject to dismissal because accused was not immediately tried upon his release, when such was impossible because the release came at a time when the term was well under way and the assigned cases completely filled the court's time for that term.

Maher v Brown, 225-341; 280 NW 553

13732.06 Identification of defendant.

Previous convictions—identification of defendants. Proof that defendant, on trial under a certain name, admitted having been three times convicted in a named county of the felonious offense of "breaking and entering", together with proof that the district court records of said county revealed said number of convictions (and no more) of a party by the same name, and for "breaking and entering", present a jury question on the issue whether the defendant on trial and the defendant in said three convictions are one and the same person.

State v Clarke, 220-1188; 263 NW 837

13732.07 Time of commission of offense.

Election between acts. The court need not require the state to elect, on an indictment charging illegal possession of intoxicating liquors, whether it will rely on possession in the defendant's shop or in his near-by chicken coop, the indictment not distinguishing between the different liquors in respect to the time or place of their possession.

State v Christensen, 205-849; 216 NW 710

Reception of evidence—election between acts. In a prosecution of municipal court bailiff for embezzlement in failing to account monthly for fees collected (§10671, C., '24),wherein appears evidence tending to show such failure for each of a series of months, the accused may compel the state to elect on which monthly transaction it will rely.

State v Berg, 200-627; 204 NW 441

Embezzlement by series of acts—applicability of statute. The provisions of the statute (§13032, C., '24) that, if money is embezzled by a series of acts during the same employment, the total amount so embezzled shall be considered as embezzled in one act, have no application to embezzlement by a public officer.

State v Berg, 200-627; 204 NW 441

Time of commission—instructions. Instructions are proper to the effect that the exact and precise time of the commission of an offense is immaterial provided the jury, by harmonizing the testimony, can find and does find that the offense was committed at some time within the statute of limitation; and this is true even tho the state in its indictment and its testimony rests the charge on a specifically named date, and even tho the testimony of the accused definitely tends to fix his presence on said date at a place other than at the scene of the alleged offense but in the same neighborhood.

State v Davenport, 208-831; 224 NW 557

Failure to allege time. An allegation in an indictment under the short form act that the accused committed the offense charged, without any allegation as to the time when or place where he committed it, carries the same legal force and effect as the formerly required allegation as to time and place.

State v Engler, 217-138; 251 NW 88

13732.08 Place of commission of offense.

Failure to allege place. An allegation in an indictment under the short form act that the accused committed the offense charged, without any allegation as to the time when or place where he committed it, carries the same legal force and effect as the formerly required allegation as to time and place.

State v Engler, 217-138; 251 NW 88

Venue. An indictment for possessing burglar's tools with intent to commit a burglary need not specifically allege the venue.

State v Engler, 217-138; 251 NW 88

13732.09 Means.

Threat to extort—failure to allege essential threat. A short form indictment for malicious threat to extort, under §13164, is fatally defective when it fails to allege the statutory identifying threat made by the accused.

State v Goldenberg, 211-234; 233 NW 66

13732.11 Ownership.

Larceny. An allegation of ownership in an indictment for larceny from a building in the nighttime is supported by evidence that the alleged owner was in possession of the property. But ownership is not controlling in such a case.

State v Henderson, 215-276; 243 NW 289

Burglary—ownership of premises. An allegation in an indictment for burglary of ownership of the premises in a named party is sufficiently supported by evidence of possession by said party.

State v Archibald, 208-1139; 226 NW 186

Right of possession as proof. An allegation, in an indictment for larceny, of ownership of the alleged stolen property, is supported by proof that said alleged owner had legal right to the possession of said property. So held as to coal which had been stolen from a public school corporation prior to its actual physical delivery to the district.

State v Philpott, 222-1334; 271 NW 617

13732.12 Intent.

Malice aforethought—joint defendants. A trial information which charges three defendants jointly with making an assault with a deadly weapon while jointly attempting to commit a robbery, and that one of them fired the fatal shot with the specific intent to kill "of their malice aforethought," is not so fatally defective as to deprive the court, on a plea of guilty, of jurisdiction to pass sentence on all the defendants.

McBain v Hollowell, 202-391; 210 NW 461

Murder — allegation of intent — sufficiency. An allegation in an indictment for murder that the assault was made "with intent to kill" is all-sufficient; likewise instructions which follow such allegation. So held against the contention that the only proper allegation was "with specific intent to kill".

State v Berlovich, 220-1288; 263 NW 853

Murder—failure to allege intent. An indictment, under the short form act, for murder in the first degree need not allege a specific intent to kill. It is sufficient if said charge is set forth in the language employed by the statute in defining said crime, to wit: "willfully, deliberately, premeditatedly, and with malice aforethought killed" a named person "by shooting him with a revolver".

State v Harness, 214-160; 241 NW 645

Short form burglary—failure to charge intent. An indictment for statutory burglary ("breaking and entering" in the language of the statute) which is otherwise sufficient is not rendered insufficient by failing to charge an intent; especially is this true when the indictment carries the allegation, to wit: "contrary to and in violation of §13001, C., '31."

State v Stack, 221-727; 266 NW 523

Fraudulent banking—general allegation of intent. An indictment for fraudulent banking need not specifically allege the name of the person whom the defendant intended to defraud by receiving the deposit in question; but, nevertheless, an allegation that defendant (a private banker), knowing of his insolvency, received a named deposit from a named person, with intent to defraud, is, in effect, an allegation to defraud the named person.

State v Boysen, 214-46; 238 NW 581

Instructions—intent to defraud. Instructions relative to intent to defraud and to the conditions under which it might be inferred, and to the presumption that a person intends the reasonable and natural consequences of acts deliberately and intentionally done by him, reviewed and held to reveal no error.

State v Boysen, 214-46; 238 NW 581

13732.15 Description of place or thing.

Corporate capacity of bank as surplusage. An indictment for entering a bank with intent to rob (§13002, C., '24) need not charge the corporate capacity of the said bank, and, if it is charged, it may be treated as surplusage.

State v Wagner, 202-739; 210 NW 901

13732.16 Identification of others than defendant.

Immaterial misdescription. In an indictment for the larceny of coal from a school district it is not a fatal defect that the district

is described as Grove Township School District instead of the Grove School District Township.

State v Philpott, 222-1334; 271 NW 617

Failure to name injured party. A short form indictment for malicious threat to extort is fatally short in legal requirement when it fails to allege the name of the person threatened.

State v Goldenberg, 211-234; 233 NW 66

13732.22 Negativing exception.

Requisites and sufficiency—negativing exceptions to securities act—nonnecessity. An indictment charging violation of securities act is not defective on ground that it fails to negative exceptions legalized by the act.

State v Dunley, 227-1085; 290 NW 41

Demurrer—druggist circulating birth control literature. An information charging the defendant, a druggist, with the crime of circulating advertisements of a device for the prevention of conception charges facts which, if proven, would constitute a complete legal defense and a bar to prosecution, and is demurrable, druggists being specifically excepted from the provisions of the statute.

State v Chenoweth, 226-217; 284 NW 110

Securities act—burden of proving exceptions—lack of basis for attack on validity. In prosecution for violation of securities act wherein defendant attacked validity of statute requiring that burden of proving exceptions to the act shall be on party seeking benefit thereof, and contended that such burden should be placed on state, held, defendant's contention was without merit in view of trial court's instructions which in fact did place such burden on the state.

State v Dunley, 227-1085; 290 NW 41

Securities act—lack of basis for attack on validity. As respects statute providing that exceptions to securities act need not be negatived in an indictment thereunder, a contention that such statute deprived defendant of information as to the nature of charge against him, and was therefore unconstitutional, could not be sustained on record showing that defendant was in fact provided with such information when summary of evidence to be introduced at trial was served on him.

State v Dunley, 227-1085; 290 NW 41

13732.26 Perjury.

Instruction on material parts of indictment. In prosecution for subornation of perjury, where defendant assigns as error the court's omitting to instruct the jury as to what were the material parts of the indictment—while it is true this is a duty of the court—a review of the instructions shows that defendant's argument is quite technical, and the instructions, as a whole, clearly and definitely point out to the jury what the material allegations of the indictment were and what was necessary for the jury to find before returning a verdict of guilty.

State v Hartwick, 228- ; 290 NW 523

13732.29 Surplusage.

Corporate capacity as surplusage. An indictment for entering a bank with intent to rob (§13002, C., '24) need not charge the corporate capacity of the said bank, and, if it is charged, it may be treated as surplusage.

State v Wagner, 202-739; 210 NW 901

13732.33 Permissible forms.

Discussion. See 12 ILR 209, 355—Abridged indictments and informations; 14 ILR 129—Short form of indictment; 14 ILR 385—Short Indictment Act

Short form indictment valid. A short form indictment is valid and the statute providing therefor is constitutional.

State v Keturokis, 224-491; 276 NW 600

Manslaughter. An indictment for manslaughter in the language authorized by the short form act is sufficient against a demurrer which simply asserts the general and all-inclusive claim that the indictment "does not conform to the laws of the state".

State v Long, 215-494; 245 NW 726

Burglary. An indictment which charges that a railway car (the subject of a burglary) was a place in which goods were kept for "use, deposit, and transportation" is a good indictment under §13001, C., '31, even tho the word "transportation" does not appear in said section.

State v Christofferson, 215-1282; 247 NW 819

Threat to extort—failure to allege essential threat. A short form indictment for malicious threat to extort, under §13164, is fatally defective when it fails to allege the statutory identifying threat made by the accused.

State v Goldenberg, 211-234; 233 NW 66

13737 Charging but one offense.

ANALYSIS

Overt act as necessary allegation. See under §13755

Verdicts for offenses of different degree. See under §13919

I DIFFERENT MODES AND MEANS

Bootlegging. Under this section an indictment charging the commission of the offense of bootlegging by any and all of the means denounced by §1927 is proper.

State v McMahon, (NOR); 211 NW 409

II ONE TRANSACTION

No annotations in this volume

III SEVERAL ACTS—ONE OFFENSE

Animals—health regulations—duplicity in indictment. The offense of permitting the carcass of a dead animal to lie about the premises of the owner or custodian undisposed of for more than 24 hours is complete when the law is violated as to any one animal. It follows that an indictment charges more than one offense when it charges a violation as to more than one animal, dying "at sundry and various times".

State v Redlinger, 207-1114; 224 NW 83

Receiving bank deposits while insolvent. In a prosecution for receiving bank deposits with knowledge of the bank's insolvency, separate and distinct deposits by separate and distinct individuals may not be charged, even in separate counts.

State v McCarty, 202-162; 209 NW 288

Requisites and sufficiency—disjunctive acts charged conjunctively—libel. When several nonrepugnant acts are enumerated disjunctively as constituting an offense, they may be alleged conjunctively without rendering the indictment subject to the vice of duplicity, and only one of said acts needs to be established in order to sustain a conviction. So held in a prosecution for libel.

State v Heptonstall, 209-123; 227 NW 616

IV VARIOUS ACTS—SAME OFFENSE

Disjunctive acts charged conjunctively—libel. When several nonrepugnant acts are enumerated disjunctively as constituting an offense, they may be alleged conjunctively without rendering the indictment subject to the vice of duplicity, and only one of said acts need be established in order to sustain a conviction. So held in a prosecution for libel.

State v Heptonstall, 209-123; 227 NW 616

V CONSPIRACY

Duplicity. An indictment for conspiracy is not duplicitous because it sets forth numerous purposes or objects of the one conspiracy.

State v Moore, 217-872; 251 NW 737

VI INCLUDED OFFENSES

Finding offense of different degree. See under §13919

Rape—rule for submission. Notwithstanding any prior decisions by this court seemingly to the contrary, an indictment for rape, statutory or otherwise, necessarily includes (1) assault with intent to commit rape, (2) assault and battery, and (3) simply assault. Whether one or more of these necessarily included offenses should be submitted to the jury must be determined by the answer to the query: Suppose the offense in question were the only charge against the accused, does the evidence present a jury question on the issue of guilt? If yea, then submit; if nay, then do not submit. Contradictory evidence held to show that the act in question was committed by force and against the will of the prosecutrix, and that, therefore, assault and battery should have been submitted to the jury.

State v Hoaglin, 207-744; 223 NW 548

Assault to commit offense. An indictment for an assault with intent to commit an offense necessarily includes a simple assault, and depending solely on the wording of the indictment, may include assault and battery.

State v Hoaglin, 207-744; 223 NW 548

VII DISTINCT OFFENSES

Duplicity in indictment. The offense of permitting the carcass of a dead animal to lie about the premises of the owner or custodian undisposed of for more than 24 hours is complete when the law is violated as to any one animal. It follows that an indictment charges more than one offense when it charges a violation as to more than one animal dying "at sundry and various times".

State v Redlinger, 207-1114; 224 NW 83

Larceny not part of burglary. Principle reaffirmed that burglary is not a compound offense which includes larceny.

State v Leasman, 208-851; 226 NW 61

Bootlegging—submission of nuisance—effect. On a simple charge of "bootlegging" as defined by §1927, C., '27, it is reversible error to submit (along with said charge) the offense of maintaining a nuisance, even tho there be no evidence of the maintenance of a nuisance, and even tho the two offenses have common elements, and closely approach identity.

State v Moore, 210-743; 229 NW 701

VIII SEPARATE COUNTS

Election between counts. A motion to compel the state to elect on which count it will proceed will not lie when the indictment charges in separate counts a burglary and a larceny committed in connection with the burglary.

State v Loucks, 218-714; 253 NW 838

Fraudulent banking. In a prosecution for receiving bank deposits with knowledge of the bank's insolvency, separate and distinct de-

VIII SEPARATE COUNTS—concluded

posits by separate and distinct individuals may not be charged, even in separate counts.

State v McCarty, 202-162; 209 NW 288

Burglary and larceny. An indictment which charges in different counts (1) burglary of a granary, and (2) larceny from a granary, even tho the location of the granary and the date of the commission of said offenses are the same in each count, is fatally defective—wholly bad—in the absence of an allegation that the larceny was committed in connection with the burglary.

State v Leasman, 208-851; 226 NW 61

Joining forgery and uttering. The joining, in separate counts, in one indictment of forgery and uttering of said forgery, when both offenses are committed by the same person, does not have the effect of combining the two offenses into one offense with consequent obligation on the state to establish both counts.

State v Miller, 217-1283; 252 NW 121

IX AVERMENTS TO SHOW INTENT, ETC.

No annotations in this volume

X DUPLICITY—WHEN QUESTION RAISED

Waiver. The claim that an indictment or trial information charges more than one offense will be disregarded when raised for the first time on appeal.

State v Voss, 201-16; 206 NW 292

Objection revealed by testimony. An indictment may (speaking by way of argument) be duplicitous, and yet not reveal such fact on the face of the indictment.

State v Reinhard, 202-168; 209 NW 419

Amendment as cure. Whether an indictment which is wholly bad because duplicitous can be made all-sufficient by an amendment as provided by statute, quaere.

State v Leasman, 208-851; 226 NW 61

Dismissal of count—effect. The vice of duplicity in an indictment cannot be cured by the dismissal of one of the counts.

State v Leasman, 208-851; 226 NW 61

XI REQUIRING PROSECUTION TO ELECT

No annotations in this volume

13738 Charging several offenses.

Atty. Gen. Opinion. See '36 AG Op 59

13738.1 Miscellaneous separate offenses.

Scope of term "burglary". All forms of felonious statutory breakings of buildings constitute "burglary" in view of this section.

State v Engler, 217-138; 251 NW 88

Joining germane matters. The constitutional requirement that a legislative act "shall embrace but one subject and matters properly connected therewith" is not violated by an act (1) authorizing different offenses to be charged in the same indictment, and (2) regulating peremptory challenges under such charge—the latter being germane to the former.

State v Miller, 217-1283; 252 NW 121

Joining forgery and uttering. The joining, in separate counts, in one indictment of forgery and uttering of said forgery, when both offenses are committed by the same person, does not have the effect of combining the two offenses into one offense with consequent obligation on the state to establish both counts.

State v Miller, 217-1283; 252 NW 121

Election between counts. A motion to compel the state to elect on which count it will proceed will not lie when the indictment charges in separate counts a burglary and a larceny committed in connection with the burglary.

State v Loucks, 218-714; 253 NW 838

Permissible duplicity. Statutory burglary, and larceny from a building in the nighttime, tho separate offenses, may be charged in different counts in the same indictment, provided the second count alleges that the offense therein charged was committed in connection with the commission of the offense charged in the first count.

State v Stennett, 220-388; 260 NW 732

13738.2 Judgment.

Under conviction under different counts. Under a verdict of guilt of all jointly indicted parties under both counts (statutory burglary, and larceny from building in nighttime) judgment is properly entered on each count against each defendant.

State v Stennett, 220-388; 260 NW 732

13740 Name of person injured. (Repealed.)

Non-variance. No variance is presented by an allegation of the ownership of stolen property and mere proof that the said alleged owner had delivered the same to a common carrier and received a bill of lading showing shipment to another party.

State v Joy, 203-536; 211 NW 213

Non-fatal variance. An allegation in an indictment for burglary, of ownership of the premises in a named party is sufficiently supported by evidence of possession by said party.

State v Archibald, 208-1139; 226 NW 186

13742 Words of statute. (Repealed.)

Negativing exceptions. An indictment for the unlawful possession of narcotic drugs need

not, in view of §3156, C., '24 [§3169.18, C., '39], negative the exception of the statute (§3154, C., '24 [§3169.05, C., '39]) relative to possession under the prescription of named medical practitioners.

State v Bailey, 202-146; 209 NW 403

13743 Rule of sufficiency. (Repealed.)

Additional annotations. See under §13740
Sufficiency as to particular offenses. See under section defining offense.
Venue. See under Ch 619

Defectively charged offense. A prisoner will not, on habeas corpus, be released from imprisonment on the ground that the indictment or trial information defectively and unskillfully charges the offense for which he was convicted and imprisoned. The rule is otherwise if the defect is so total that the indictment or information is a nullity.

McBain v Hollowell, 202-391; 210 NW 461

Indefinite identification of property. An indictment which charges the obtaining by false pretenses of "a stock of merchandise consisting of groceries, dry goods, drugs, and fixtures" must describe or point out the property in such manner as to individualize it from all other property of like character, e. g., by charging its exact location. An allegation of ownership is not, in and of itself, sufficient.

State v Hixson, 202-431; 210 NW 423

Attempted abortion—sufficiency of allegation. Indictment for murder by means of an attempted abortion reviewed, and held to adequately, tho somewhat clumsily, allege the use by the accused of instruments as a means of effecting such abortion.

State v Sweeney, 203-1305; 214 NW 735

Ignoring material allegations. The court may not, in the trial of a criminal case, ignore material allegations in the indictment or information and thereby place the accused on trial for a higher and more severely punished offense than is charged in the indictment or information.

State v Wyatt, 207-322; 222 NW 867

13744 Amendment.

[Note that some of the following were under the former statute which was much more limited in its scope than the present statute.]

Constitutionality. The statute authorizing an amendment to an indictment is not unconstitutional.

State v Schumacher, 162-231; 143 NW 1110

Failure to read. Failure to read to the jury an amendment to an indictment is waived by proceeding to trial.

State v Schumacher, 162-231; 143 NW 1110

Allowable amendment. An indictment may be amended by inserting a verb which had manifestly been inadvertently omitted.

State v Crisinger, 197-613; 195 NW 998

Allowable amendment. An indictment may, after the state has rested, be amended as to the date on which the offense is alleged to have been committed.

State v Brundage, 200-1394; 206 NW 607

Striking unnecessary allegation in re nuisance. A trial information by the county attorney for maintaining an intoxicating liquor nuisance in a named county "in the city of Cedar Rapids" may, after the jury is sworn, be amended by striking therefrom the clause "in the city of Cedar Rapids", it appearing that the said clause was a manifest error, and that the accused so knew, and requested no further time for trial.

State v Japone, 202-450; 209 NW 468

"Matter of form" illustrated. An indictment charging that a bank official "did accept a renewal of a deposit" while the bank was insolvent may be so amended as to charge that the defendant "did renew certificates of deposit", there being no question but that the original indictment and the amendment referred to the same certificates.

State v Childers, 202-1377; 212 NW 63

Name of person. An indictment which charges solicitation "to have carnal knowledge with one June Mills" may be amended during the trial by substituting the name of a different female in lieu of the one charged.

State v Render, 203-329; 210 NW 911

Unnecessary amendment. An accused may not object that the indictment was amended by inserting therein an entirely unnecessary allegation.

State v Dowling, 204-977; 216 NW 271

Striking surplusage—effect. An accused may not complain that an amendment to a valid indictment worked any injury to him when the sum total of the amendment was to eliminate surplusage, nor will he be heard to say that such elimination resulted in charging him with a different offense than first contemplated.

State v Gardiner, 205-30; 215 NW 758

Amendment under prior statute. An indictment was amendable under §13744, C., '24, in the description of an article or thing—e. g., a stock of goods.

State v Hixson, 205-1321; 217 NW 814

Allowable form. An application to amend an indictment by striking out certain words and by inserting certain words in lieu of the stricken words, is not objectionable because it also sets forth the form of the indictment as it will be if the amendment is permitted.

State v Bamsey, 208-802; 226 NW 57

Amendment as cure. Whether an indictment which is wholly bad because duplicitous

can be made all-sufficient by an amendment as provided by statute, quaere.

State v Leasman, 208-851; 226 NW 61

13745 Amendment before trial.

Waiver of formal amendment. The objection that no formal amendment to an indictment was filed after the sustaining of the motion to amend, will be deemed waived when the trial was conducted precisely as it would have been conducted, had the formal amendment been filed, and when the objection was withheld until exceptions to the instructions were filed.

State v Japone, 202-450; 209 NW 468

Procedure for amendment. An indictment cannot be legally amended before the commencement of the trial except through the instrumentality of a written application to amend, together with a copy of the proposed amendment, duly served on the defendant. The application and amendment may not in such case be dictated into the record, even tho the accused and his counsel are present in the court, proper objection being made.

State v Bamsey, 208-802; 226 NW 57

"Commencement" of trial defined. The trial on an indictment may not be said to have "commenced" at a time when the accused had not even been arraigned, even tho the accused and his counsel are present in court preparatory to proceeding with the trial.

State v Bamsey, 208-802; 226 NW 57

Failure to notify defendant. The refusal to strike an amendment to an indictment constitutes reversible error when the application to amend is made before the commencement of the trial and defendant is neither served with a copy of the proposed amendment nor given an opportunity to resist it.

State v Hyduck, 210-736; 231 NW 451

13747 Nonpermissible amendment.

Striking surplusage—effect. An accused may not complain that an amendment to a valid indictment worked any injury to him when the sum total of the amendment was to eliminate surplusage, nor will he be heard to say that such elimination resulted in charging him with a different offense than first contemplated.

State v Gardiner, 205-30; 215 NW 758

Nonpermissible amendment. An indictment which charges a first offense may not be so amended as to charge a second offense.

State v Herbert, 210-730; 231 NW 318

Wholly new and different offense. A county attorney information which charges forgery cannot be deemed an amendment of an abandoned information which charged the uttering of a forgery, even tho the former is denominated as an "amended and substituted information".

State v Solberg, 214-333; 242 NW 84

13754 Perjury. (Repealed.)

Materiality of testimony. Perjury may, manifestly, be predicated on the fact that the defendant had falsely sworn that a certain incriminating admission had not been made to him by another person. It is equally manifest that the indictment in such a case may predicate the perjury in such form as to render immaterial the entire assignment of perjury.

State v Morrison, 208-858; 226 NW 54

13755 Conspiracy—overt act. (Repealed.)

Overt act necessary. A conspiracy which is followed by no overt act furnishes no basis for a civil action.

Hall v Swanson, 201-134; 206 NW 671
Dickson v Young, 202-378; 210 NW 452

13757 Compounding offense.

Compromising certain offenses. See Ch 659, Vol I

CHAPTER 639

PROCESS AFTER INDICTMENT

13759 Bench warrant.

Jurisdiction — custody of person essential. The district court has no jurisdiction over the person of an indicted party until it in some manner acquires, under the indictment, the actual custody of the person of said party; and the court does not have such custody because of the fact that the state is holding a party in confinement in the penitentiary under a former conviction.

State v Judkins, 200-1234; 206 NW 119

CHAPTER 640

ARRAIGNMENT OF DEFENDANT

13773 Right to counsel.

Atty. Gen. Opinion. See AG Op Dec. 28, '39

13774 Fee for attorney defending.

Atty. Gen. Opinion. See AG Op Dec. 28, '39

Attorney appointed by juvenile court. The court by statute has power and authority to appoint attorneys to represent juvenile delinquents in municipal court, unable to employ counsel, and an obligation arises on the part of the county to pay a reasonable attorney fee, altho statute makes no provision therefor.

Ferguson v Pottawattamie, 224-516; 278 NW 223

Change of venue. The general provision of law that the county from which a criminal cause is sent on change of venue shall pay all costs consequent on such change includes attorney fees for defending the accused.

Cass Co. v Page Co., 203-572; 213 NW 426

Pauper defendant—counsel fees not determinable on appeal. The supreme court will not, on appeal, fix attorney fees for defending a pauper prisoner.

State v Froah, 220-840; 263 NW 525

13775 Affidavit required.

Failure to file. An attorney following, into the supreme court, a case in which he was selected to defend an accused, is not entitled to have that court fix the fee to which he is entitled, if that court can ever do so, where he did not file in the district court an affidavit to the effect that he "has not directly or indirectly received any compensation for such services from any source".

State v Behrens, 109-58; 79 NW 387

Irregular audit. The audit by a trial court of a claim for attorney fee for defending a prisoner on change of venue to a foreign county, on an affidavit which fails to show that the attorney has neither received nor contracted to receive compensation from any other source, is not void, and may not be collaterally attacked.

Cass Co. v Page Co., 203-572; 213 NW 426

13777 Arraignment—how made.

Jury question as to identity. The identity of one who is prosecuted for a crime as the one who actually committed it is a question of fact for the jury, on conflicting testimony.

State v Ayles, 205-1024; 219 NW 41

13778 Incorrect name—estoppel.

"Idem sonans" doctrine—applicability. The doctrine of idem sonans is recognized by Iowa courts and, while each case must be determined according to its own facts, the mere fact that names spelled differently from true name could be pronounced like the true name by a strained pronunciation would not make the doctrine applicable, but where the names, when general and ordinary rules of pronunciation are applied, are so identical in pronunciation and so alike that there is no possibility of mistake, the doctrine should be applied; or where two names, as commonly pronounced in the English language, are sounded alike, a variance in their spelling is immaterial; and even slight difference in their pronunciation is unimportant, if the attentive ear finds difficulty in distinguishing the two names when pronounced. Such names are "idem sonans" and, altho spelled differently, are to be regarded as the same.

Webb v Ferkins, 227-1157; 290 NW 112

CHAPTER 641

SETTING ASIDE INDICTMENT

13781 Grounds for setting aside indictment.

ANALYSIS

Selection of grand jury. See under Chs 482, 635

I IN GENERAL

Power of court sua sponte. A motion to set aside an indictment, filed on behalf of an accused who was not in the custody of the court, is nugatory; yet, when the motion presents a proper ground, the sustaining of the motion will be deemed proper, because the court had power to take such action on its own motion.

State v Judkins, 200-1234; 206 NW 119

Improper testimony by wife. A defendant in a criminal case who knows, before the commencement of the trial, that his wife has, before the grand jury, improperly given material

testimony against him, must, if he wishes to attack the indictment on such ground, move to quash the indictment. He may not utilize such objection as the basis of a motion for a directed verdict.

State v Smith, 215-374; 245 NW 309

II GROUNDS SPECIFIED ARE EXCLUSIVE

Motion to dismiss improper—remedy by moving to quash. A defendant in a criminal case who knows, before the commencement of the trial, that his wife has, before the grand jury, improperly given material testimony against him, must, if he wishes to attack the indictment on such ground, move to quash the indictment. He may not utilize such objection as the basis of a motion for a directed verdict.

State v Smith, 215-374; 245 NW 309

III INDORSEMENT OF "TRUE BILL"

No annotations in this volume

IV INDORSEMENT OF NAMES OF WITNESSES

Minutes of testimony—conclusiveness. The defendant in an indictment will not be permitted to show that witnesses other than those whose names are indorsed on the indictment, were before the grand jury and gave testimony relative to the charge against defendant, and that minutes of testimony of such other witnesses were not returned with the indictment.

State v Martin, 210-376; 228 NW 1

V MINUTES OF EVIDENCE RETURNED

Conclusiveness. The defendant in an indictment will not be permitted to show that witnesses other than those whose names are indorsed on the indictment were before the grand jury and gave testimony relative to the charge against defendant, and that minutes of testimony of such other witnesses were not returned with the indictment.

State v Martin, 210-376; 228 NW 1

VI PRESENTATION AND FILING

Requisites and sufficiency—waiver. An accused who goes to trial without questioning the sufficiency of an indictment, may not thereafter raise the question of sufficiency by objections to evidence.

State v Phillips, 212-1332; 236 NW 104

VII PRESENCE OF OUTSIDERS

Disqualification of attorney—improper appearance before grand jury. An assistant county attorney (in this instance a special prosecutor) by accepting from a private person compensation for services rendered and to be rendered before the grand jury, in its investigation of certain pending charges of criminality, thereby ipso facto disqualifies himself henceforth from being present before said jury during said investigation. And his further presence before said jury during said investigation, in disregard of said disqualification, mandatorily necessitates the quashing, on proper motion, of all indictments returned by said jury on said investigation.

Maley v Dist. Court, 221-732; 266 NW 815

Improper presence of county attorney. The presence of the county attorney before the grand jury during its investigation of certain charges of criminality, when he is confessedly disqualified from so appearing, necessitates the quashing of all indictments returned by said jury as a result of said investigation.

Maley v Dist. Court, 221-732; 266 NW 815

Presence of assistant county attorney. The presence of a duly appointed assistant county attorney in the grand jury room while the question of indictment was being considered did not render the indictment defective.

State v Coleman, 226-968; 285 NW 269

VIII IMPROPER SELECTION, ETC., OF JURY

Fatally delayed motion. A motion to set aside an indictment on the ground that the accused has been unlawfully discriminated against in the selection of the grand jury, is unallowable when interposed after the accused has entered a plea and has had one trial.

State v Twine, 211-450; 233 NW 476

Grounds of challenge. An indictment for adultery against a woman will not be set aside because her husband's brother was one of the jurors who found it.

State v Russell, 90-569; 58 NW 915

Illegal selection of grand jury—insufficient showing. The claim of an accused that he has been discriminated against and has been denied the equal protection of the law in that the jury commissioners have willfully excluded members of his race from the grand jury list, is properly overruled when the showing of fact is largely on information and belief and hearsay, and otherwise insufficient.

State v Twine, 211-450; 233 NW 476

Two jurors from same township.

State v Judkins, 200-1234; 206 NW 119

13781.1 Exception.

Two jurors from same township. An indictment must be set aside when returned by a grand jury two members of which were from the same township.

State v Judkins, 200-1234; 206 NW 119

13783 Objections to selection of grand jury.

Qualifications of grand jurors. An accused who is held to answer to the grand jury is absolutely bound by his waiver of all challenges to the grand jury or to individual members thereof.

State v Hickman, 195-765; 193 NW 21

13785 Motion overruled—defendant must answer.

Going to trial—effect on unruled motion. Defendant in a criminal proceeding waives a motion filed by him by going to trial without demanding a ruling on said motion.

State v Wilson, 222-572; 269 NW 205

13787 Resubmission—bail.

Dismissal of indictment. Where a defendant has moved to set aside the indictment, for the reason that the grand jury which returned it was not legally constituted, he cannot complain of an order setting it aside for the same reason, which was subsequently entered on the motion of the county attorney. Nor can he complain of an order directing that he be retained in custody and that his case be resubmitted to another grand jury.

State v Hassan, 149-518; 128 NW 960

CHAPTER 642

PLEADINGS OF DEFENDANT

13790 Grounds of demurrer.

ANALYSIS

I IN GENERAL
II WHAT ARE GROUNDS
III WHAT ARE NOT GROUNDS

I IN GENERAL

Nonpresentable issue on habeas corpus. Objections to the sufficiency of an indictment of which the court has jurisdiction may not be raised in subsequent habeas corpus proceedings.

Furey v Hollowell, 203-376; 212 NW 698

Order sustaining demurrer to indictment as "final judgment". Where court entered an order reciting that the court "finds that said demurrer should be sustained and indictment dismissed", altho such order is not in the form of a judgment, it was in legal effect a "final judgment" from which an appeal can be taken by the state under §13995, C., '39. Every final adjudication of the rights of the parties is a judgment.

State v Talerico, 227-1315; 290 NW 660

Ruling on demurrer—no review by certiorari. Where neither the writ of certiorari nor the petition therefor encompassed a review of lower court's alleged error in overruling demurrer to indictment, and where no authorities were cited sustaining the proposition that alleged error was reviewable by certiorari, court will refuse to review the ruling on the demurrer by this writ.

Harris v Dist. Court, 226-606; 284 NW 451

Overruling demurrer—appeal—technicalities disregarded—judgment on record entered. On an appeal from a judgment entered on a plea of guilty, which is made subject to the exception to the ruling overruling defendant's demurrer to indictment, the supreme court is, by statute, required to examine the record without regard to technical errors or defects which do not affect substantial rights of the parties, and render such judgment on the record as the law demands.

State v Oge, 227-1094; 290 NW 1

II WHAT ARE GROUNDS

Duplicity—sole remedy. Demurrer is the only remedy by which to present a charge of duplicity in an indictment.

State v Leasman, 208-851; 226 NW 61

Indictment good in part. A demurrer to an indictment in toto, because the principal offense is not sufficiently charged, is properly overruled when included offenses are sufficiently charged.

State v Harness, 214-160; 241 NW 645

III WHAT ARE NOT GROUNDS

"Short-form"—manslaughter. An indictment for manslaughter in the language authorized by the "short-form" act is sufficient against a demurrer which simply asserts the general and all-inclusive claim that the indictment "does not conform to the laws of the state".

State v Long, 215-494; 245 NW 726

Burglary — "short-form" indictment — sufficiency. An indictment, under the "short-form" statute, charging, in the language of the statute, the possession of burglar's tools with intent to commit a burglary, is not subject to demurrer. The proper procedure is to demand a bill of particulars.

State v Engler, 217-138; 251 NW 88

13791 Failure to demur—waiver.

Nonapplicability of statute. The duty to object to an indictment in matters of "substance and form" before the jury is sworn does

not apply when a demurrer will not lie because the objection — former acquittal — does not appear on the face of the indictment and is revealed only by the testimony introduced on the trial.

State v Reinhard, 202-168; 209 NW 419

Belated objection. Objection to an indictment that it did not specifically describe the car broken and entered, which was not raised until after the jury was sworn, came too late to be available.

State v Stutches, 163-4; 144 NW 597

Absence of essential allegations — waiver. Objection that an indictment fails to allege the character of certain instruments or the manner of using them as a means of bringing about an abortion are waived by the failure to demur to the indictment.

State v Sweeney, 203-1305; 214 NW 735

Duplicity. An indictment is demurrable when it improperly charges more than one offense and such duplicity is waived if not presented by demurrer before the jury is sworn.

State v Frey, 206-981; 221 NW 445

Failure to describe money. Failure to specifically describe the money obtained by false pretenses (assuming such necessity) is waived by delaying objection until after the jury is sworn.

State v Detloff, 201-159; 205 NW 534

Fatally delayed objection. The insufficiency of an indictment may not be presented for the first time in a motion for a directed verdict.

State v Hawks, 213-698; 239 NW 553

Formal requisites. The objection that an information for a nonindictable misdemeanor is indefinite, vague, and uncertain in its statement of facts is waived by defendant's failure to challenge the information prior to the entry of his plea.

State v Porter, 206-1247; 220 NW 100

Unallowable former convictions—proper presentation. When an indictment charges a complete offense and is therefore not demurrable, but pleads unallowable former convictions, the objections to such convictions may be raised for the first time by objections to the proof of such convictions.

State v Madson, 207-552; 223 NW 153

Insufficient defect to exclude jurisdiction. A trial information which charges three defendants jointly with making an assault with a deadly weapon while jointly attempting to commit a robbery, and that one of them fired the fatal shot with the specific intent to kill "of their malice aforethought", is not so fatally defective as to deprive the court, on a plea of guilty, of jurisdiction to pass sentence on all the defendants.

McBain v Hollowell, 202-391; 210 NW 461

Irregularity of indictment. Irregularity in finding an indictment cannot be objected to after verdict, when the party goes to trial without objection.

Munson v State, 4 Greene 483
Wau-kon-chaw-neek-kaw v US, Morris 437

Matters of substance. The fact that an indictment fails to charge an offense, because of the absence of an essential allegation, may not be presented by way of objection to evidence.

State v Ostby, 203-333; 210 NW 934; 212 NW 550
State v Phillips, 212-1332; 236 NW 104

Nonpresentable issue — insufficiency of indictment. Habeas corpus will not lie to question the sufficiency of an indictment or information of which the nisi prius court had jurisdiction.

Smith v Hollowell, 209-781; 229 NW 191

Plea in abatement. The former statute which provided for waivers of "pleas in abatement" in criminal cases (§5289, S., '13 [§13791, C., '39]) had no application to a plea that the court had no jurisdiction because of the fact that the indictment or trial information was a nullity.

McBain v Hollowell, 202-391; 210 NW 461

13796 Absolute discharge.

Order sustaining demurrer to indictment as "final judgment". Where court entered an order reciting that the court "finds that said demurrer should be sustained and indictment dismissed", altho such order is not in the form of a judgment, it was in legal effect a "final judgment" from which an appeal can be taken by the state under §13995, C., '39. Every final adjudication of the rights of the parties is a judgment.

State v Talerico, 227-1315; 290 NW 660

13797 Resubmission.

Effect of sustaining demurrer. The sustaining of a demurrer to an indictment on the ground that it does not substantially comply with the requirements of the code (insufficient charge of manslaughter) becomes an absolute bar to any further prosecution for the offense attempted to be charged, unless the court orders the cause "resubmitted to the same or to another grand jury." "Authorizing" the county attorney to file a trial information is not within the statute as thus written.

State v Sexsmith, 202-537; 210 NW 555

Mere authorization of resubmission. Discretionary power in a court to order a resubmission of a cause to a grand jury because of the defective nature of the charge does not embrace the power simply to authorize a resubmission.

State v Sexsmith, 202-537; 210 NW 555

Sustaining demurrer — procedure. Principle reaffirmed that upon the sustaining of a demurrer to an indictment, the court must either enter an out-and-out dismissal, or resubmit the cause to the grand jury.

State v Leasman, 208-851; 226 NW 61

13798 Pleading over—final judgment.

Adverse ruling on demurrer—conditions for review. Where a defendant was sentenced and imprisoned upon failing to plead after his demurrer to the indictment was overruled, an appeal will be dismissed from an adverse ruling on demurrer in a habeas corpus action to test the validity of such imprisonment, when the defendant does not (1) elect to stand upon his pleadings or (2) suffer judgment to be entered against him in the lower court.

Besch v Haynes, 224-166; 276 NW 13

Ruling on demurrer—no review by certiorari. Where neither the writ of certiorari nor the petition therefor encompassed a review of lower court's alleged error in overruling demurrer to indictment, and where no authorities were cited sustaining the proposition that alleged error was reviewable by certiorari, court will refuse to review the ruling on the demurrer by this writ.

Harris v Dist. Court, 226-606; 284 NW 451

13799 Pleas to the indictment.

ANALYSIS

I GENERALLY
II SPECIAL DEFENSES

Alibi as defense. See under §13897 (XVI)
Former jeopardy. See under §13807
Insanity as defense. See under §13897 (XV)
Justification for assaults. See under §12929
Self-defense. See under §12922
Unwritten law. See under §12919 (I)

I GENERALLY

Coercion—required nature and extent. The compulsion which will excuse a criminal act must be present, imminent, and impending, and of such a nature as to induce a well grounded apprehension of death or serious bodily harm if the act is not done.

State v Clay, 220-1191; 264 NW 77

Inconsistent defenses—estoppel.

State v Reynolds, 201-10; 206 NW 635

II SPECIAL DEFENSES

Former acquittal—timely objection. The duty to object to an indictment in matters of "substance and form" before the jury is sworn (§13791, C., '24) does not apply when a demurrer will not lie because the objection—former acquittal—does not appear on the face of the indictment, and is revealed only by the testimony introduced on the trial.

State v Reinhard, 202-168; 209 NW 419

Intoxication—burden of proof—instruction. While not interposed as an affirmative defense, evidence reviewed and held insufficient to prove that defendant was so intoxicated at the time of the commission of the homicide that he was unable to form criminal intent and instruction thereon held proper.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Driving while intoxicated — instructions — dazed condition caused by accident. In a prosecution for driving while intoxicated, the thoughts of requested instructions were sufficiently embodied in instructions which stated that in determining whether the defendant was intoxicated at the time of the collision, or whether his condition immediately after was the result of injury or shock, the jury should consider the injury, its nature, extent and effect, and all other evidence.

State v McDowell, 228- ; 290 NW 65

Manslaughter—voluntary intoxication — effect. It is not the law that a defendant on trial for murder in the second degree must be acquitted of both murder in the second degree and manslaughter if at the time in question he was so intoxicated that he could not distinguish between right and wrong or know what he was doing.

State v Johnson, 215-483; 245 NW 728

Non-jurisdiction because of defect. A plea to the jurisdiction of the court because the indictment or trial information is so totally defective that it is a nullity, is allowable.

McBain v Hollowell, 202-391; 210 NW 461

13800 Plea of guilty—form—entry.

Imposition of death penalty—conclusiveness. The imposition by the trial court of a sentence of death, on a plea of guilty of murder in the first degree, will not be interfered with by the appellate court unless the record reveals a very clear abuse of discretion.

State v Tracy, 219-1412; 261 NW 527

Plea of guilty in criminal prosecution. A plea of guilty in a criminal prosecution may be admissible as an admission when the judgment entered thereon would not be admissible.

In re Johnston, 220-328; 261 NW 908

Plea of guilty in murder charge. When a prisoner on an indictment for murder pleads guilty, the court must ascertain by examination of witnesses whether the crime be murder or manslaughter, and the examination of witnesses and the decision of the judge must appear of record.

McCauley v U. S., Morris 641

State as creditor. A plea of guilty in a criminal prosecution does not create the relation of creditor and debtor between the state

and the accused, and a transfer of property by the accused after such plea and before the entry of judgment for a fine is not necessarily fraudulent as to the state.

State v Malecky, 202-307; 210 NW 121; 48 ALR 603

Third conviction—proof of prior convictions unnecessary under guilty plea. Where an indictment charged the defendant with committing the crime of unlawful possession of alcoholic liquor, and that he had been convicted on two previous occasions of liquor law violations, and when defendant pleaded guilty, trial court was under no duty to require proof of former convictions.

State v Erickson, 225-1261; 282 NW 728

Written plea—when required. Written pleas of guilt are not required under the county attorney information act except when the plea is taken in vacation of the court.

Bennett v Bradley, 216-1267; 249 NW 651

13802 Failure to plead.

Motion to set aside denied. When a motion to set aside an indictment is denied, the defendant must immediately demur or plead thereto; and upon his refusal to do either a plea of not guilty must be entered by the court.

State v Morris, 36-272

13803 Withdrawal of plea of guilty.

Arbitrary right to withdraw. An accused under an indictment has an arbitrary right to withdraw a plea of guilty at any time before the oral sentence passed upon him has taken the form of a final judgment by entry in the record book of the court. This is true, irrespective of any other entries in the court records.

State v Wieland, 217-887; 251 NW 757

Fatally delayed motion. A motion in a criminal case for a new trial and for the permission to withdraw a plea of guilty must be made before judgment.

State v Van Klaveren, 208-867; 226 NW 81

Right to withdraw. A plea of guilty may not be withdrawn after judgment has been entered on the plea.

State v Tracy, 219-1412; 261 NW 527
State v Harper, 220-515; 258 NW 886

13804 Issues of fact—trial.

Defendant cannot waive jury trial. An accused indicted for the crime of gambling nuisance may not waive a jury and the judgment of conviction and penalty imposed must be and are held to be void.

State v Stricker, 196-290; 194 NW 60

Degree of guilt in murder prosecution. The defendants' motion for a directed verdict in a murder trial was properly overruled when based on the idea that the state had not proved the defendants guilty of a crime of any degree, as that was a question for the jury.

State v Coleman, 226-968; 285 NW 269

13805 Plea of not guilty—evidence admissible.

Defenses in general—entrapment. Principle recognized that if a criminal intent and design originate in the mind of an accused, it is no defense that he was entrapped by the artifices of public officers.

State v Heeron, 208-1151; 226 NW 30

Good character as defense. Defendant in a criminal prosecution may place in issue that trait of his character which is questioned by the charge made against him, and may sustain his good character as to said trait (1) by evidence of his good reputation as to said trait, or (2) by the direct testimony of witnesses who, by knowledge, qualify to speak as to such good character.

State v Ferguson, 222-1148; 270 NW 874

13806 Personal presence at trial.

Presence at arraignment. See under §13771, Vol I
Presence at judgment. See §13952, Vol I
Presence when verdict rendered. See under §13924

Presence of accused. An accused in a charge of felony must be present when the jury is given additional instructions.

State v Wilcoxen, 200-1250; 206 NW 260

Appearance by counsel. An indictment for resisting an officer serving legal process charges a misdemeanor. In such case the defendant may appear by counsel and demand a trial, and it was error for the court to refuse a trial and order a forfeiture of bond for nonappearance of the defendant.

State v Conneham, 57-351; 10 NW 677

Drawing jurors in absence of defendant. The fact that, in impaneling a jury in a criminal case, the names of jurors were drawn from the panel box at a time when the defendant was not present will not be deemed prejudicial error in the absence of a showing that such drawing deprived defendant of a fair and impartial jury.

State v Sweetman, 220-847; 263 NW 518

Nonappearance for trial. Where, before forfeiting a bail bond, the court waits two days for the defendant to appear for trial under a misdemeanor charge, with no request from the defendant's attorney that the trial proceed in the absence of the defendant, it is too late to successfully insist that the sureties on the bail bond were exonerated because the trial might have proceeded in the absence of the defendant.

State v Walker, 217-229; 251 NW 56

13807 Conviction or acquittal—when a bar.

ANALYSIS

Also see annotations under Const., Art I, §12
Dismissal by court. See under §14027
To indict for higher offense. See under §13866, Vol I

I IN GENERAL

Discussion. See 16 ILR 261—Offenses in several counties; 19 ILR 596—Need for statute

Final judgment. Statute does not exclude a conviction or acquittal without a verdict from having the same effect.

State v Fields, 106-406; 76 NW 802

General test. General principle recognized that an acquittal is a bar to a subsequent prosecution if proof of the subsequent allegations would have sustained a conviction under the indictment under which acquittal was had; otherwise not.

State v Folger, 204-1296; 210 NW 580

Holding of inferior court. It is no defense to an indictment for keeping a gambling house that, before the acts were done which it is claimed constituted such keeping, a municipal court had held that said acts did not constitute gambling.

State v Striggles, 202-1318; 210 NW 137; 49 ALR 1270

II DISMISSAL OF PROSECUTION

(a) ARBITRARY DISMISSAL

Acquittal as bar to civil action. The general rule is that a defendant's acquittal in a criminal prosecution is neither a bar to a civil action against him, nor evidence in such action of his innocence; but, when the subsequent action, altho civil in form, is quasi-criminal in nature, as to recovering penalties or declaring forfeitures, the second action may be barred by the former.

Bates v Carter, 225-893; 281 NW 727

Former jeopardy as rebuttal. When the state, in a prosecution for receiving deposits while the bank was insolvent, seeks to establish the insolvency by proof which tends to show that the accused had both embezzled funds of the bank and had made false reports concerning the assets of the bank, the accused may show, in rebuttal, that he has been indicted for both of said alleged offenses and acquitted.

State v Pierson, 204-837; 216 NW 43

Nolle prosequi—time to enter. A nolle prosequi may be entered (1) before the jury is impanelled, (2) while the case is before the jury, and (3) after the verdict.

State v Veterans, 223-1146; 274 NW 916; 112 ALR 383

State v Moose, 223-1146; 274 NW 918

(b) CAUSE FOR DISMISSAL

Former jeopardy—state's appeal from directed verdict—defendant unaffected by reversal. Where the state appeals from a ruling sustaining motion for directed verdict for defendant in a criminal case, defendant will not be affected by reversal on appeal.

State v Dillard, 225-915; 281 NW 842

III TESTS OF IDENTITY OF OFFENSES

Necessary identification of offense. Instructions that a defendant may be found guilty of maintaining a liquor nuisance if he committed the offense within three years prior to the return of the indictment will not be deemed to put the defendant on trial for an alleged liquor offense of which the defendant was acquitted within said three years when the specific nature of the latter offense is not made to appear.

State v Kelly, 217-1305; 253 NW 49

IV TWO CRIMES FROM SAME ACT

Same transaction. A trial resulting in an acquittal upon an indictment for uttering and publishing as true a certain false and forged note and chattel mortgage, is a bar to a subsequent prosecution on an indictment for obtaining property, in exchange for said note and mortgage, upon false pretenses, when the transaction relied on in both indictments is the same.

State v Stone, 75-215; 39 NW 275

Conviction for assault and battery. A conviction in municipal court for assault and battery constitutes no bar to a subsequent prosecution under an indictment charging assault and battery with intent to commit great bodily injury, based on the same act.

State v Smith, 217-825; 253 NW 130

Embezzlements by agent and bailee. An acquittal on an indictment which charges the defendant as agent with the embezzlement of the proceeds of grain delivered to him (§13031, C., '24) is no bar to an indictment which charges the defendant as bailee with the embezzlement of the same grain. (§13030, C., '24.)

State v Folger, 204-1296; 210 NW 580

Former jeopardy—false pretense and conspiracy. A conviction on an indictment charging the obtaining, by an officer of a fraternal beneficiary society, of funds of the society by means of false and fraudulent representations, is not a bar to an indictment for conspiracy based on the identical acts charged in the for-

IV TWO CRIMES FROM SAME ACT—concluded

mer indictment, the two charges not being sustainable by the same evidence.

State v Blackledge, 216-199; 243 NW 534

Intoxicating liquors. A criminal prosecution for a violation of the intoxicating liquor statutes is not a bar to contempt proceedings based on the same act.

Touche v Bonner, 201-466; 205 NW 751

Larceny of several objects. Conviction for simple larceny for theft of a watch from one of defendant's roommates was a bar to a subsequent prosecution for larceny from the dwelling, based on the theft of money from another roommate at the same time.

State v Sampson, 157-257; 138 NW 473

Retrial. While a conviction for manslaughter amounts to an acquittal of a higher degree of crime, yet a retrial after a reversal is upon the same indictment and it is proper for the county attorney to send the same to the jury, altho it charges murder, and to state that the accused is to be tried for manslaughter, to which charge he has pleaded not guilty, and that such is the issue then to be tried.

State v Walker, 133-489; 110 NW 925

V ONE CRIME FROM TWO ACTS

Manslaughter by negligent act. The unintentional killing, by one act of negligence, of two or more persons cannot constitute more than one manslaughter. It follows that an acquittal under an indictment charging manslaughter in the killing of one deceased is a bar to a further prosecution for manslaughter for the killing of another deceased.

State v Wheelock, 216-1428; 250 NW 617

Subsequent overlapping charge. When the state bases an indictment for nuisance on a series of acts occurring during a specified period of time, it thereby segregates such acts from all subsequent acts, and irrevocably identifies and stamps said acts as one complete offense; and if it suffers an acquittal, it may not thereafter maintain an indictment based (1) on said segregated acts and (2) on other acts subsequent thereto; and the exclusion of said segregated acts on the trial of the last indictment will not avoid the bar resulting from the first acquittal.

State v Reinhard, 202-168; 209 NW 419

VI SEPARATE OFFENSES

Acquittal of larceny. An acquittal under an indictment charging larceny from a building in the nighttime constitutes no bar to a subsequent indictment charging the felonious receiving of the stolen property, said crimes being separate and distinct offenses.

State v Smith, 219-168; 256 NW 651

Intoxicating liquors. An acquittal on an indictment which charges the maintenance of an intoxicating liquor nuisance does not constitute a bar to an indictment which charges the unlawful possession of such liquors, even tho the same liquors may appear as evidence in both cases.

State v Boever, 203-86; 210 NW 571

Wife desertion. The former conviction of a husband for willful neglect to provide for his destitute wife is not a bar to another prosecution for the same offense, after expiration of his former sentence.

State v Morgan, 155-482; 136 NW 521

VII PLEADING

Former acquittal—timely objection. The duty to object to an indictment in matters of "substance and form" before the jury is sworn (§13791, C., '24) does not apply when a demurrer will not lie because the objection—former acquittal—does not appear on the face of the indictment and is revealed only by the testimony introduced on the trial.

State v Reinhard, 202-168; 209 NW 419

VIII EVIDENCE

Embezzlement—several supporting transactions—election—effect. When, upon the trial of a public officer for embezzlement charged in one count and in a lump sum, the state supports the charge by evidence of several different transactions, any one of which was sufficient to support the charge, and, on order of court, elects to rely on one certain transaction, the defendant, after being convicted and after being granted a new trial, may not successfully contend that he has been put in jeopardy on all the transactions except the transaction on which the state elected to rely on the first trial, it appearing that the non-elected transactions were allowed to remain in the record as evidentiary matter bearing on the issue of fraudulent intent.

State v Huff, 217-41; 250 NW 581

Identification of defendants. Proof that defendant, on trial under a certain name, admitted having been three times convicted in a named county of the felonious offense of "breaking and entering", together with proof that the district court records of said county revealed said number of convictions (and no more) of a party by the same name, and for "breaking and entering", present a jury question on the issue whether the defendant on trial and the defendant in said three convictions are one and the same person.

State v Clarke, 220-1188; 263 NW 837

13808 Prosecutions barred.

Former jeopardy. See Const, Art I, §12; §13807

Former jeopardy—manslaughter by negligent act. The unintentional killing, by one

act of negligence, of two or more persons cannot constitute more than one manslaughter. It follows that an acquittal under an indictment charging manslaughter in the killing of one deceased is a bar to a further prosecution for manslaughter for the killing of another deceased.

State v Wheelock, 216-1428; 250 NW 617

Transporting intoxicating liquors. The conviction of an accused in the court of a justice of the peace of the nonindictable offense of transporting intoxicating liquors without properly labeling the same (§1936) is a bar to a subsequent prosecution based on the same transaction for the indictable offense of transporting intoxicating liquors (§1945-a1 et seq., C., '27 [§1945.1 et seq., C., '39]), the latter offense being necessarily embraced in the former.

State v Purdin, 206-1058; 221 NW 562

CHAPTER 643

CHANGE OF VENUE

13810 Right to change.

Discussion. See 17 ILR 399—Change of venue for state

Change of venue on application of state. The legislature may constitutionally grant to the state the right to a change of venue in a criminal prosecution.

State v Dist. Court, 213-822; 238 NW 290

13811 Petition by defendant.

Nondisqualifying interest of judge. A judge of the district court does not, by signing a petition to a city council for an election to vote on the proposition whether the city shall erect a specified public utility plant, thereby disqualify himself from fully presiding over litigation questioning the legal sufficiency of said petition.

Piuser v Sioux City, 220-308; 262 NW 551; 100 ALR 1298

13813 Petition by state.

Refusal of change of venue to state. Certiorari will lie, in the form of an original action in the supreme court, to review the alleged abuse of discretion, and consequent illegal action of the district court in refusing the state a change of venue in a criminal prosecution for a felony.

State v Dist. Court, 213-822; 238 NW 290

Unimpeached showing of prejudice. The refusal, in a criminal prosecution, to grant a change of venue to the state constitutes an abuse of discretion, and therefore an illegal action, when the state has made a prima facie showing of such prejudice and excitement in the county as will, judging it prospectively, prevent the state from receiving a fair and impartial trial, and when such showing stands substantially unimpeached by the resistance.

State v Dist. Court, 213-822; 238 NW 290

13816 Additional testimony.

Certiorari—evidence—admissibility. On certiorari by the state to review the alleged illegal action of the district court in refusing an application by the state for a change of venue as to numerous defendants, similarly charged, a transcript of the testimony taken upon the trial of one defendant who was acquitted is admissible for the purpose of showing the circumstances and nature of the acts charged.

State v Dist. Court, 213-822; 238 NW 290

13818 Discretion of court.

ANALYSIS

I In General
II Discretion of Court
III Particular Cases

I IN GENERAL

Insufficient record. A reversal cannot be had for alleged error in refusing a change of venue in a criminal case, when the record fails to show the grounds on which the change was asked.

State v Ball, 67-517; 25 NW 757

Refusal of change of venue to state. Certiorari will lie, in the form of an original action in the supreme court, to review the alleged abuse of discretion, and consequent illegal action of the district court in refusing the state a change of venue in a criminal prosecution for a felony.

State v Dist. Court, 213-822; 238 NW 290

II DISCRETION OF COURT

Discretion. The change of venue is left to the sound legal discretion of the district court, and the supreme court will interfere with its rulings on such applications only when it is made manifest that such discretion had been abused.

State v Baldy, 17-39
State v Spurbeck, 44-667
State v Boggs, 166-452; 147 NW 934
State v Sipes, 202-173; 209 NW 458; 47 ALR 407
State v Gibson, 204-1306; 214 NW 743
State v Smith, 219-168; 256 NW 651

III PARTICULAR CASES

Affidavits. Where a change of venue was asked on the ground of the prejudice of the

III PARTICULAR CASES—concluded

inhabitants, and supported by affidavits of 46 persons, and resisted by affidavits of 73 persons, held there was no abuse in court's discretion in overruling motion.

State v Stewart, 74-336; 37 NW 400

Newspaper accounts. A change need not be granted in a trial for rape, by reason of sensational newspaper articles in reference to the crime, which allege that the organization of a vigilance committee is seriously contemplated, and that it might take a hand in the proceedings if the preliminary trial is unduly prolonged, where no feeling against the defendant pervades the county, altho some exists in the vicinity where the crime was committed.

State v McDonough, 104-6; 73 NW 357

13824 Cost attending change.

Attorney fees. The general provision of law that the county from which a criminal cause is sent on change of venue shall pay all costs consequent on such change includes attorney fees for defending the accused.

Cass Co. v Page Co., 203-572; 213 NW 426

CHAPTER 644

TRIAL JURY

13826 Rules for drawing.

Discussion. See 16 ILR 20, 223—Proposed jury changes

Selection and return. The statutes governing the selection and return of jury lists by the judges of election are directory only, and substantial compliance therewith is sufficient unless it is made to appear that prejudice has resulted from a lack of strict compliance. Thus, a failure to return the number of names apportioned by the auditor to an election precinct, or of the judges of the election to certify the list selected, was not such a material departure from the statute as will authorize a defendant to complain that the statute was not followed; especially where all jurors upon the panel were qualified, and none resided in precincts where the judges of election failed to return the requisite number of names, or to certify to the lists, and there is no showing that such precincts contained the requisite number of qualified jurors.

State v Wilson, 166-309; 144 NW 47

Special jurors. In calling special jurors summoned on special venire, for the trial of a particular indictment, their names may be called in the order in which they are summoned by the sheriff, but the better practice is to place their names on ballots and draw them as regular jurors, and this is the proper practice when they are summoned for the entire term.

State v Green, 20-424

13827 Completion of panel.

Calling bystanders. Where 20 jurors were summoned for the term, and the court excused two, and nine of the remaining 18 were engaged on another case when this case was called, held that it was competent for the court to summon jurors from the bystanders for the trial of this case.

State v McCahill, 72-111; 30 NW 553

Excusing juror after opening case. After a jury had been impaneled and the case opened, the court excused a juror on account of his mother's illness. The parties declined to call one more juror, and the court discharged the panel and impaneled a new jury. Held, there were no grounds for the complaint.

State v Laughlin, 73-351; 35 NW 448

Jury panel exhausted. Out of a panel of 24 jurors, only 18 appeared, and the panel was exhausted before a jury for the trial of the indictment was procured. But before it was known that a jury could not be obtained from the regular panel in this case, a special venire was issued, "for the purpose of using the names of the jurors so drawn and summoned in the impaneling of a jury". When the regular panel was exhausted, the sheriff, under the direction of the court, called the names of the persons so drawn and summoned, in the order in which their names stood on the list, beginning with the first, until a jury was obtained; held that in all this there was no error.

State v Ryan, 70-154; 30 NW 397

13828 Challenges to the panel.

Drawing jurors in absence of defendant—effect. The fact that, in impaneling a jury in a criminal case, the names of jurors were drawn from the panel box at a time when the defendant was not present will not be deemed prejudicial error in the absence of a showing that such drawing deprived defendant of a fair and impartial jury.

State v Sweetman, 220-847; 263 NW 518

Evidence to sustain challenge. The refusal of the defendant to introduce evidence to sustain his challenge to the panel of the grand jury was sufficient to authorize the court to overrule the challenges.

State v Gillick, 10-98

Jury drawn from part of panel. An accused in a criminal cause who fails to show that he exercised any or all of his peremptory challenges, or that he did not obtain a fair and impartial jury, may not complain that he was

denied the right to have the jury drawn from the entire jury panel.

State v McHenry, 207-760; 223 NW 535

13830 Challenges for cause.

ANALYSIS

I IN GENERAL

Unqualified right. The right to challenge jurors is absolute and without qualification.

Smith v State, 4 Greene 189

Client of public prosecutor. A juror is not subject to challenge in a criminal cause because he is the client of the public prosecutor.

State v Wilcoxen, 200-1250; 206 NW 260

Competency—waiver. The fact that a juror was an election judge at the election at which the jury list was selected and certified is not a ground for challenge for cause even tho his name is certified as a juror in violation of the statute (§10869, C., '24). In any event, any tenable objection to the juror is waived by not discovering the incompetency until after verdict.

State v Burch, 202-348; 209 NW 474

Immaterial issues. In the examination of a juror on his voir dire, it is immaterial what other members of the panel may have done bearing on their qualifications.

State v Wheelock, 218-178; 254 NW 313

Peremptory challenges not exercised. The overruling of defendant's challenges to jurors for cause cannot be said to have prejudiced him, where none of the jurors so challenged sat on the trial, all having been rejected on peremptory challenges, and he accepted the jury which tried him, without exhausting all of his peremptory challenges.

State v Winter, 72-627; 34 NW 475

II WANT OF PRESCRIBED QUALIFICATIONS

Female jurors—house of ill fame case—no presumption of prejudice. Contention that a fair trial was not obtained on account of female jurors, a majority of whom were on the jury, having an inborn prejudice against a woman accused of keeping a house of ill fame, denied because, in absence of a contrary showing, jurors, regardless of sex, are presumed to follow instructions and determine guilt upon the evidence.

State v Hathaway, 224-478; 276 NW 207

Nonresidence. Where a juror leaves the state for his health for 18 months, taking his family and some of his household goods, and without any intent to take up a residence elsewhere, but with intent to return, and that he did not vote during his absence, he is competent as a juror after his return.

State v Burke, 107-659; 78 NW 677

III TRIED ANOTHER DEFENDANT FOR THE OFFENSE

No annotations in this volume

IV FORMED OR EXPRESSED AN OPINION

(a) IN GENERAL

Hostile attitude of juror. The fact that a prospective juror, prior to the time when he was called and examined on his voir dire, took part, in the court room, in a demonstration hostile to the accused, does not necessarily show that the juror is disqualified as having formed an unqualified opinion as to guilt.

State v Wheelock, 218-178; 254 NW 313

(b) THE OPINION

Qualified opinion. An opinion formed by a juror as to the guilt of the defendant is not a sufficient cause for challenge unless it is unqualified in its character.

State v Hinkle, 6-380
State v Gillick, 10-98

(c) "FORMED OR EXPRESSED"

Opinion—effect. The fact that a prospective juror states that he has already formed an opinion on the subject of the guilt or innocence of the accused, which would require evidence to remove, does not necessarily render him an incompetent juror.

State v Burzette, 208-818; 222 NW 394

Opinion formed—insufficiency. In voir dire examination, refusal to sustain challenge to a juror who testified that he had read of the case, heard it discussed, had formed "some" opinion from such hearsay information which would require evidence to remove, and who, when asked if he could lay aside his opinions and try the case solely and entirely on the evidence introduced in the trial of the case, answered "Yes, sir" and when the question was repeated twice, answered "I think so" was not error where he also repeatedly testified that he could and would lay aside his opinion and decide the case solely on the evidence and instructions, the fact that he had formed an opinion, in the light of the entire examination, not establishing that he had

IV FORMED OR EXPRESSED AN OPINION—concluded

formed such a fixed and unqualified opinion as to prevent him from rendering a true verdict on the evidence.

State v Rhodes, 227-332; 282 NW 540; 288 NW 98

(d) NATURE OF THE OPINION

Disqualifying opinion. A juror is wholly incompetent when he has formed such an opinion relative to the guilt of the accused as (1) will remain with him throughout the trial, (2) will require contrary evidence to remove, and (3) will prevent the juror from giving the accused the benefit of the presumption of innocence; and prejudice will be presumed on a showing that, proper challenge for cause being overruled, the accused exercised all his peremptory challenges, one of which was against the juror in question.

State v Reed, 201-1352; 208 NW 308

Nondisqualifying opinion. A juror is not disqualified by an opinion as to guilt or innocence, formed on newspaper or hearsay sources, when the juror can and will lay aside such opinion and decide the cause solely on the evidence submitted on the trial.

State v Gibson, 204-1306; 214 NW 743
State v Mayer, 204-118; 214 NW 710

Opinion from hearsay. When a prospective juror has formed an opinion from hearsay, the test of whether he may be challenged for cause is whether his state of mind is such that he believes the hearsay is true, has made up his mind and has a conviction that the defendant is guilty, as distinguished from the state of mind of a juror who does not know whether the rumors are true and who bases his opinion on the mere assumption that the hearsay is true.

State v Rhodes, 227-332; 282 NW 540; 288 NW 98

V OBJECTION STATED

No annotations in this volume

VI TIME FOR OBJECTION

Competency of juror. The mere fact that a defendant in a criminal case may have talked with one of the jurors who was confined in the jail with him would not render the juror incompetent, unless he received some information or impressions tending to bias his judgment and prejudice him against the accused; and if such was the fact and it was discovered during the trial, it was the duty of the defendant to make the objection then, rather than speculate on a favorable verdict and in the event of disappointment insist upon the juror's incompetency as a basis of a motion for new trial.

State v Baker, 157-126; 135 NW 1097

Waiver. Where no examination of a juror is had before his acceptance, and it is not shown that an alleged disqualification was not known to defendant at the time, the right to object is waived.

State v Burke, 107-659; 78 NW 677

Waiver. It is not error to overrule a challenge for cause where defendant waived a peremptory challenge, by the exercise of which the juror might have been excused.

State v McIntosh, 109-209; 80 NW 349
State v Tyler, 122-125; 97 NW 983

VII DISCRETION OF COURT

Answers on voir dire—discretion of court. A juror will not necessarily be held inflexibly to his answer as to what he will do under certain circumstances when such answer is given before he understood just what his duty is and will be.

State v Mullenix, 212-1043; 237 NW 483

Challenge improperly overruled—compelling use of strike. It is error for the court to compel the use of a strike to remove a juror by improperly overruling a challenge to the juror.

State v Coleman, 226-968; 285 NW 269

Court's discretion. In voir dire examination a challenge for cause should be decided at discretion of the court, not from isolated answers, but on the entire examination of the juror.

State v Rhodes, 227-332; 282 NW 540; 288 NW 98

Discretion of court. Altho the court has a large discretion in passing upon the qualification of jurors, still in a criminal prosecution where the complaining witness is an officer, care should be taken to secure an unprejudiced jury.

State v Butler, 155-204; 135 NW 628

Existence of opinion. The fact that a juror has formed an opinion as to the guilt or innocence of the accused, and will carry such opinion into the jury box, will not disqualify such juror if the court, in the exercise of a fair discretion, is satisfied that the juror can and will try and decide the issues solely on the evidence.

State v Harding, 205-853; 216 NW 756

Finding of court—effect. The determination of the trial court that a juror can and will lay aside an existing opinion as to the guilt or innocence of the accused and try the cause solely on the trial evidence will not ordinarily be overruled on appeal.

State v Reed, 205-858; 216 NW 759

VIII ERROR WITHOUT PREJUDICE

Drawing jurors in absence of defendant—effect. The fact that, in impaneling a jury in a criminal case, the names of jurors were

drawn from the panel box at a time when the defendant was not present will not be deemed prejudicial error in the absence of a showing that such drawing deprived defendant of a fair and impartial jury.

State v Sweetman, 220-847; 263 NW 518

Overruled challenge to juror. An order overruling a challenge to a juror on the ground that the juror had a disqualifying opinion on the question of guilt or innocence, will not be reviewed when the record supports the evident conclusion of the trial court that the juror would be fair and impartial.

State v Twine, 211-450; 233 NW 476

Peremptory challenges not exercised. The overruling of defendant's challenges to jurors for cause cannot be said to have prejudiced him, where none of the jurors so challenged sat on the trial, all having been rejected on peremptory challenges, and he accepted the jury which tried him, without exhausting all of his peremptory challenges.

State v Winter, 72-627; 34 NW 475

Rejection of competent juror—effect. The rejection by the court of a qualified juror does not constitute reversible error in the absence of a showing that, because of such rejection, the complainant did not have a fair trial.

Boston v Elec. Co., 206-753; 221 NW 508

Voir dire examination—permissible range. The act of the county attorney, in a prosecution for maintaining a liquor nuisance, in asking a proposed juror (whose business was transporting beer) whether he would vote to convict the accused if the accused was proven guilty beyond all reasonable doubt, will not, in and of itself, be deemed prejudicial error.

State v Harrington, 220-1116; 264 NW 24

13831 Examination of jurors.

Challenges—improper voir dire. Questions on the voir dire of prospective jurors designed to reveal their attitude toward crimes because of the severity or lack of severity of the punishment attending such crimes are improper even as a basis for peremptory challenge.

State v Xanders, 215-380; 245 NW 361

13835 Peremptory challenges.

Improper overruling challenge for cause. An accused may not be compelled to exhaust his peremptory challenges upon jurors who should have been excused for cause.

State v Reed, 201-1352; 208 NW 308

Improper voir dire. Questions on the voir dire of prospective jurors designed to reveal their attitude toward crimes because of the severity or lack of severity of the punishment attending such crimes are improper even as a basis for peremptory challenge.

State v Xanders, 215-380; 245 NW 361

Jury drawn from part of panel. An accused in a criminal cause who fails to show that he exercised any or all of his peremptory challenges, or that he did not obtain a fair and impartial jury, may not complain that he was denied the right to have the jury drawn from the entire jury panel.

State v McHenry, 207-760; 223 NW 535

Peremptory challenges not exercised. The overruling of defendant's challenges to jurors for cause cannot be said to have prejudiced him, where none of the jurors so challenged sat on the trial, all having been rejected on peremptory challenges, and he accepted the jury which tried him, without exhausting all of his peremptory challenges.

State v Winter, 72-627; 34 NW 475

13836 Peremptory challenges—number.

Challenge improperly overruled—compelling use of strike. It is error for the court to compel the use of a strike to remove a juror by improperly overruling a challenge to the juror.

State v Coleman, 226-968; 285 NW 269

13841 Jurors sworn.

Jury not sworn. The supreme court will not disturb a judgment on the ground that the jurors by whom the case was tried in the court below were not sworn, in the absence of any showing that they were not sworn, or complaint on that ground in the court below.

State v Schlagel, 19-169

CHAPTER 645

TRIAL

Discussion. See 11 ILR 297—Absurdities in criminal procedure

13842 Joint indictment—separate trials.

Right to waive. The statutory right of jointly indicted parties to have separate trials is not such a right that it cannot be voluntarily waived.

State v Moore, 217-872; 251 NW 737

Separate presentation of guilt. Instructions must separate and submit to the jury the question of the separate guilt of each of jointly indicted parties.

State v Heffelfinger, 212-1041; 237 NW 364

13843 Continuances.

ANALYSIS

I IN GENERAL
II FURTHER TIME
III ABSENCE OF WITNESSES

Continuances in civil cases. See under §§11443-11445

I IN GENERAL

Burden to show prejudice. The movant for a continuance in a criminal case must affirmatively show that he has been prejudiced by the overruling of the motion.

State v Twine, 211-450; 233 NW 476

Elimination of issue. The voluntary elimination of an issue in a case affords no ground for a continuance.

State v Carney, 208-133; 217 NW 472

Noninterference without abuse of discretion. The ruling on a motion for a continuance is committed to the sound discretion of the trial court and will not be interfered with unless there is a clear abuse of judicial discretion.

State v Hathaway, 224-478; 276 NW 207

Waiving right. Joint defendants may not complain that they were granted a continuance only after they had agreed to waive their right to separate trial when their agreement was strictly voluntary.

State v Moore, 217-872; 251 NW 737

II FURTHER TIME

Neglect to procure counsel—no showing of prejudice. A person accused of operating a house of ill fame, whose counsel withdraws after trial wherein the jury disagreed, such person then having two months to secure new counsel but neglects so to do until three days before retrial, may not complain if a motion for continuance is overruled, there being no showing on appeal of injury from such ruling.

State v Hathaway, 224-478; 276 NW 207

Undue haste in trial. The action of the trial court, and county attorney, in bringing a criminal prosecution on for trial promptly after the alleged commission of the offense (15 days in this case) cannot be deemed prejudicially erroneous in the absence of any showing that the defendant was thereby deprived of a fair trial.

State v Berlovich, 220-1288; 263 NW 853

III ABSENCE OF WITNESSES

Discretion of court. The refusal in a criminal case of a continuance based on the absence of witnesses is largely in the discretion of the trial court, especially so when the applicant has been guilty of a measure of negligence, and when the testimony of the absent witness would have been cumulative to testimony appearing in the record.

State v Peacock, 201-462; 205 NW 738

Disappearance of witness. After the court has extended to defendant ample opportunity to find and produce a duly subpoenaed witness who has unexpectedly disappeared without fault of the defendant, it is not reversible error to refuse a continuance of the cause when, if the witness were finally produced (which was questionable) his testimony would be confined almost entirely to matters collateral to the main issue.

State v Leftwich, 216-1226; 250 NW 489

Due diligence essential. Motions for continuance grounded on the plea of absence of evidence must be accompanied by a showing of due diligence to obtain such evidence.

State v Twine, 211-450; 233 NW 476

Harmless error. The overruling of defendant's motion for a continuance, to enable defendant to take the deposition of an absent witness, must, if erroneous, be deemed harmless when defendant did secure said deposition prior to the trial.

State v Papst, 221-770; 266 NW 498

Insufficient showing. A motion for a continuance because of the absence of witnesses, with an affidavit in support thereof, is properly overruled when they fail to set forth the facts to which such witnesses will testify.

State v Candler, 204-1355; 217 NW 233

13844 Time to prepare for trial.

Right may be waived. Defendant waives his right to the three days, after plea, in which to prepare for trial, by requesting that the case be assigned, subject to a motion for continuance to a particular time, and by insist-

ing upon a trial at a much earlier date than that at which the case is tried.

State v King, 97-440; 66 NW 735

Undue haste in trial. The action of the trial court, and county attorney, in bringing a criminal prosecution on for trial promptly after the alleged commission of the offense (15 days in this case) cannot be deemed prejudicially erroneous in the absence of any showing that the defendant was thereby deprived of a fair trial.

State v Berlovich, 220-1288; 263 NW 853

13845 Mode and manner of trial.

Argument not made of record. Error may not be based on alleged misconduct of counsel in argument unless the specific misconduct is made of record, and exceptions entered thereto.

State v Harrington, 220-1116; 264 NW 24

Objections first made on appeal. Objections to evidence must be made when it is offered, not for the first time on appeal.

State v Harrington, 220-1116; 264 NW 24

Failure of justice. The facts that an accused (1) was promptly tried after the commission of the offense, (2) was handcuffed during the trial, and (3) that at the time of the trial public feeling ran high against the accused, do not, in and of themselves, justify an inference that the accused did not have a fair trial.

State v Brewer, 218-1287; 254 NW 834

Failure to object. The admissibility of testimony will not be reviewed on appeal when no objection was interposed in the trial court.

State v Davis, 212-582; 234 NW 858

Former jeopardy as rebuttal. When the state, in a prosecution for receiving deposits while the bank was insolvent, seeks to establish the insolvency by proof which tends to show that the accused had both embezzled funds of the bank and had made false reports concerning the assets of the bank, the accused may show, in rebuttal, that he has been indicted for both of said alleged offenses and acquitted.

State v Pierson, 204-837; 216 NW 43

Jury drawn from part of panel. An accused in a criminal cause who fails to show that he exercised any or all of his peremptory challenges, or that he did not obtain a fair and impartial jury, may not complain that he was denied the right to have the jury drawn from the entire jury panel.

State v McHenry, 207-760; 223 NW 535

13846 Order of trial.

Discussion. See 22 ILR 609—Trial technique

ANALYSIS

Appeals to district court. See under §13599
Arguments. See under §13847
Conduct of counsel. See under §13944
Directed verdict. See under §13915 (IV)
Evidence. See under §§13897–13904
Exceptions. See under §§13933–13941
Instructions. See under §13876
Judgment. See under §§13950–13968
Jury. See under §§13826–13841
New trial. See under §§13942–13945
Pleadings of defendant. See under §§13789–13809
Verdict. See under §§13915–13932

I COURSE AND CONDUCT IN GENERAL

(a) IN GENERAL

State has burden of proving guilt. In a criminal case the burden of establishing guilt at every stage of the trial is upon the state.

State v Hillman, 226-932; 285 NW 176

(b) CONTROL BY COURT

Control by court. Defendant in a criminal case, by refusing to avail himself of the simple and expedient method of proof pointed out and proffered to him by the court, may be held to have waived his right to establish a fact which he deems material to his defense.

State v Philpott, 222-1334; 271 NW 617

(c) DISCRETION OF COURT

Conspiracy—evidence—order of introduction. Principle reaffirmed that the order of introducing testimony under a charge of conspiracy rests in the sound discretion of the court.

State v Terry, 207-916; 223 NW 870

Examination of witnesses. The form of questions propounded to a witness and rulings on objections to the examination are largely matters of discretion with the trial court, and will not be interfered with on appeal unless an abuse of such discretion is shown.

State v Finley, 147-563; 126 NW 699

I COURSE AND CONDUCT IN GENERAL —concluded

(c) DISCRETION OF COURT—concluded

Misconduct of jurors. The granting of a new trial because of misconduct of jurors is quite largely within the discretion of the court, especially when there is a dispute whether there was any misconduct.

State v Umphalbaugh, 209-561; 228 NW 266

New trial—misconduct of jurors—contradictory showing—effect. The discretion of the court in denying a new trial in a criminal case on a conflicting showing of misconduct of the jury will not ordinarily be disturbed on appeal.

State v Reynolds, 201-10; 206 NW 635

Proffer in presence of jury—discretion of court. The court has discretionary power to refuse to permit counsel to state, in the presence of the jury, the controversial facts which he expects to prove by a proffered witness.

State v Teager, 222-392; 269 NW 348

Testimony after rebuttal. When rebuttal is closed, it is within the discretion of the court to refuse time in which defendant may get witnesses who live in the city, in the absence of a showing for what the witnesses are wanted.

State v Osborne, 96-281; 65 NW 159

Trial—continuance. The refusal in a criminal case of a continuance based on the absence of witnesses is largely in the discretion of the trial court, especially so when the applicant has been guilty of a measure of negligence, and when the testimony of the absent witness would have been cumulative to testimony appearing in the record.

State v Peacock, 201-462; 205 NW 738

(d) REMARKS AND CONDUCT OF JUDGE

Examination of witness. It is not improper for the court, in the trial of a criminal cause, to put questions to a witness, (1) because of the hesitation of the witness, (2) in order to properly rule on a motion to strike the testimony, or (3) in order to secure pertinent answers.

State v Eggleston, 201-1; 206 NW 281

Examination by court. An impartial examination of a witness by the court is proper.

State v Weber, 204-137; 214 NW 531

Remarks of court to witness. It is within the province of the court, when it is justified in believing that a witness is not speaking frankly and fully of the matters inquired about, to remind the witness that he is under oath and must tell the whole truth.

State v Poder, 154-686; 135 NW 421

Witness questioned by judge. Where the state's witnesses show a disposition to evade giving direct answers, and to equivocate, and the questions of the state's attorney are not well calculated to develop material facts, it is not error for the trial court to question the witnesses and compel answers.

State v Spiers, 103-711; 73 NW 343

Witnesses—examination by court. It is not necessarily erroneous for the court, in a criminal case, to interrogate a witness.

State v Leftwich, 216-1226; 250 NW 489

(e) ASSISTANT PROSECUTORS

Appointment of assistant prosecutor. The appointment by the court of an assistant prosecutor after the jury had been impaneled was not error, where it was not shown that prejudice resulted to the defendant, in that he would have exercised his right of peremptory challenge differently had he known of the appointment.

State v Cobley, 128-114; 103 NW 99

(f) PRIVATE COUNSEL

Private counsel. Whether private counsel will be permitted to assist the county attorney in the trial of a criminal cause is a matter resting in the sound discretion of the court, with the exception always that private counsel interested in a civil action involving the same state of facts must not be permitted to so appear.

State v Lilteich, 195-1353; 191 NW 76

(g) WITNESSES

1 Recalling

Recalling witness. The right of recalling a witness is in the discretion of the court and such discretion will not be interfered with unless it has been greatly abused.

State v Shelledy, 8-477

2 Separation

Separation of witnesses. The separation of witnesses upon the trial is largely a matter of discretion and unless abused the appellate court will not interfere with the order.

State v Cristy, 154-514; 133 NW 1074

3 Exclusion

Exclusion of sheriff from courtroom. It is within the discretion of the court to receive the testimony of the sheriff and of a special officer assisting the county attorney even tho they had remained in the courtroom in violation of an order excluding witnesses.

State v Bittner, 209-109; 227 NW 601

Exclusion of witnesses—presumption. Complaint of an order of court excluding all witnesses from the courtroom during trial cannot be considered unless the record in some manner reveals prejudice to complainant.

State v Sampson, 220-142; 261 NW 769

II READING INDICTMENT AND PLEA

No annotations in this volume

III OPENING STATEMENTS

Misconduct—curative quality of instructions. Assertions of the county attorney in his opening statement to the jury relative to the refusal of defendant's associate in crime to appear as a witness, and as to defendant's inability to give bail, will not be deemed prejudicial misconduct sufficient to demand a new trial when defendant requested no special instructions or admonition to the jury concerning the matter, and when the instructions to the jury were fair.

State v Sampson, 220-142; 261 NW 769

Nonprejudicial opening statements. No reversible error results from overruling, in the trial of a charge of manslaughter, objections to the opening statements of the county attorney relative to the intoxication of the accused some 45 minutes after the fatal act, there being no showing of bad faith on the part of the county attorney and it appearing that offered testimony to prove such intoxication as thus stated was excluded.

State v Long, 215-494; 245 NW 726

Opening statement—unsustained objection. An unsustained objection by the state to an opening statement on behalf of an accused presents no reviewable matter.

State v Kendall, 200-483; 203 NW 806

Opening statement—reference to confession. No misconduct on the part of the county attorney is shown when he, in good faith and with reasonable ground for believing the evidence admissible, told the jury in his opening statement that the evidence would show that defendant made a written confession in the presence of the chief of police, which confession and attending conversation were later admitted as competent evidence.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

IV OFFER OF EVIDENCE

(a) IN GENERAL

Cross-examination—justifiable limitation. On the cross-examination of a witness who has identified an accused, the exclusion of questions which have no direct bearing, and but little incidental bearing, on the question of identity, is necessarily proper, especially when counsel has otherwise been given wide latitude in his examination.

State v Abbott, 216-1340; 249 NW 167

Hypothetical questions—inadmissible when not based on evidence. In a prosecution for homicide where it was shown that the deceased was found with a fractured neck, with no marks on his neck or body nor any evidence of a quarrel or struggle, after he had been left alone for only about a minute and a half with the defendant who was a friend of about the same size and weight, it was reversible error to allow a physician to demonstrate a strangle hold, and to answer a hypothetical question, not based on evidence, that force could be applied from the rear so as to break a man's neck.

State v Hillman, 226-932; 285 NW 176

Improper reception—effect. The improper reception in evidence of a written notice to an accused to produce a written instrument or to submit to secondary evidence of its contents, and the possession of such notice by the jury, do not necessarily work prejudicial error.

State v Gardiner, 205-30; 215 NW 758

Necessity to present and preserve error—absence of objection—effect. If there be no objection to an offer of testimony, there can be no review on appeal as to the reception of said testimony.

State v Slycord, 210-1209; 232 NW 636

Order of presenting. Order of introduction of testimony is largely in discretion of trial court and rulings thereon are reversible only on the clearest showing of prejudice.

State v Crandall, 227-311; 288 NW 85

Rebuttal—scope. Evidence introduced by the defendant in his behalf, in a criminal case, may, of course, be rebutted by the state.

State v Wheelock, 218-178; 254 NW 313

Refreshing recollection. It is not improper for the county attorney, after a witness has testified to a certain extent, to hand to the witness the minutes of his testimony taken before the grand jury and to request the witness to refresh his memory in order to determine whether he had overlooked any matter; nor is it improper to permit the witness thereupon to testify to material matters which had been overlooked.

State v Friend, 206-615; 220 NW 59

(b) ORDER OF PROOF

Introduction of evidence. The order of evidence is within the discretion of the court and there will be no reversal unless an abuse of such discretion is shown.

State v Gadbois, 89-25; 56 NW 272
See State v Sorenson, 157-534; 138 NW 411

Order of evidence. The order in which evidence shall be introduced rests, under the discretion of the court, within the discretion of the party introducing it.

State v Hudson, 50-157

Order of proof. Change in the order of proof is largely discretionary with the trial court, and prejudice will not always be presumed; and where it appears that evidence competent only in chief is admitted on rebuttal and the same corroborates rather than contradicts the defendant, there is no prejudicial error.

State v Seligman, 127-415; 103 NW 357

IV OFFER OF EVIDENCE—continued

(c) REBUTTAL EVIDENCE

See also Book of Anno., Vol I, §13851

Rebuttal testimony. The offering and receiving on rebuttal of testimony which is not strictly of that character do not necessarily work prejudicial error.

State v Gardiner, 205-30; 215 NW 758

Rebuttal testimony admissible tho admissible on direct. Testimony which in fact is rebuttal in character is not rendered inadmissible because the state might have used it as part of its direct testimony.

State v Slycord, 210-1209; 232 NW 636

Rebuttal testimony in re insanity. An accused who, through his counsel's opening statement, by the cross-examination of witnesses, and by his own testimony, sought to show that his mind was completely blank from a time prior to the homicide to a time subsequent thereto, thereby opens the door to the state to establish by rebuttal testimony the sanity of the defendant.

State v Woodmansee, 212-596; 233 NW 725

Evidence on rebuttal. A witness whose name is not indorsed on the indictment may testify on rebuttal in contradiction of the defendant's alibi even tho such testimony would have been proper while the state was making its case in chief.

State v McCumber, 202-1382; 212 NW 137

Indorsement of names of witnesses—when unnecessary. The statutory requirement that an indictment carry the names of the witnesses on whose testimony it is found and be accompanied by a minute of their testimony has no application to the names and testimony of witnesses used on the trial in rebuttal.

State v Cozad, 221-960; 267 NW 663

Proper rebuttal. Testimony offered by the state which actually rebuts in some degree the testimony of the accused is admissible even tho it might have been offered by the state in support of the indictment.

State v Graham, 203-532; 211 NW 244

Rebuttal to sustain confession. Presumptively, a confession by an accused in a criminal case is voluntary and if the accused attacks the presumption, the state necessarily must have the right to sustain the presumption by rebuttal testimony.

State v Kress, 204-828; 216 NW 31

Testimony after rebuttal. When rebuttal is closed, it is within the discretion of the court to refuse time in which defendant may get witnesses who live in the city, in the absence of a showing for what the witnesses are wanted.

State v Osborne, 96-281; 65 NW 159

Witnesses not before grand jury—permissible scope of testimony. No error results, in the trial of a criminal case, in receiving, without notice, evidence from witnesses not before the grand jury when said evidence was strictly rebuttal, or evidence which might have been introduced in the state's main case.

State v Smith, 215-374; 245 NW 309

(d) REOPENING CAUSE

Reopening case. It is not an abuse of discretion for the court to permit the state to introduce exhibits, which have been fully identified, after argument has begun, where there is no showing of prejudice; if the defendant is thereby taken by surprise he may apply for a continuance or offer further testimony if he so requests.

State v Leonard, 135-371; 112 NW 784

Reopening case. Reopening of a case for further testimony is largely a matter within the discretion of the trial court, and in the absence of an abuse of discretion a reversal will not be ordered for a refusal to do so.

State v Crayton, 138-502; 116 NW 597
State v Edwards, 205-587; 218 NW 266

Setting aside submission and receiving testimony. The submission of a criminal cause may be set aside, even after arguments are well under way, and the cause reopened for the reception of vitally material testimony.

State v Pritchard, 204-417; 215 NW 256

Venue—further evidence. The court may reopen a case after the state has rested, and permit the state to offer further testimony on the issue of venue.

State v Anderson, 209-510; 228 NW 353; 67 ALR 1366

(e) ADMISSIONS BY ACCUSED

Admission by accused. An accused in a charge of larceny who, throughout the trial, openly admits the truth of every allegation of the indictment except the one relative to the value of the stolen property may not object if the state is permitted to prove the truth of such admitted allegations notwithstanding the admissions.

State v Leitzke, 206-365; 218 NW 936

(f) OBJECTIONS

Habitual criminals—unallowable former convictions—proper presentation. When an indictment charges a complete offense, and is, therefore, not demurrable, but pleads unallowable former convictions, the objections to such convictions may be raised for the first time by objections to the proof of such convictions.

State v Madson, 207-552; 223 NW 153

Hearsay testimony — reception — inviting error. Defendant who, on cross-examination of the state's witness, first enters the forbidden field of hearsay testimony on a certain point,

is not in an advantageous position to object when the state, on redirect, follows into the same field of inquiry, especially when the testimony erroneously received is not inherently prejudicial and is practically that which was brought out by defendant on cross-examination.

State v Philpott, 222-1334; 271 NW 617

Striking immaterial testimony. Justification for striking testimony is found in the fact that said testimony stands wholly unconnected with any fact in issue in the prosecution which is on trial.

State v Johnson, 222-574; 269 NW 354

V MOTIONS

Operation of automobile. A motion to strike testimony of the operation of third party's automobile on afternoon preceding night of alleged assault when prosecuting witness testified that he did not know whether defendant had anything to do with the operation of the car, was not improperly overruled, defendant having made no objection to the testimony when given, and neither defendant nor the owner of the car having testified in regard to its operation.

State v Crandall, 227-311; 288 NW 85

13847 Arguments.

ANALYSIS

I ARGUMENTS
II RIGHT TO OPEN AND CLOSE

Misconduct in argument—new trial. See under §13944 (VI)

I ARGUMENTS

Agreement to limit time. Where state waived opening argument and by agreement of counsel the accused and state had 20 minutes to argue to jury, objection that county attorney did not confine himself to response to defendant's argument, and misstated facts to jury, could not be raised on appeal by accused who took no objection or exceptions at time of state's argument.

State v McGregor, (NOR); 266 NW 22

Bill of exceptions—improper argument. Improper argument by the county attorney, which argument has not been taken down by the reporter as part of the record, but as to which proper exception has been entered, may be made a part of the record by a bill of exceptions signed by the judge.

State v Voelpel, 213-702; 239 NW 677

Former conviction—unallowable comment. A statement in argument by the county attorney that a former conviction of the accused had been set aside upon technical grounds, constitutes reversible error. (§13945, C., '31.)

State v Voelpel, 213-702; 239 NW 677

Improper argument by defendant—reply by state. An accused may not complain that the county attorney replied to an improper argument by the accused as to the penalty attending a conviction.

State v Kendall, 200-483; 203 NW 806

Inference from inconsistent record. Where mother testified her son, the accused, had said "he was going to kill him" and the record was inconsistent as to whom was referred to, it was not a prejudicial misstatement of the record for counsel for the state to argue to the jury his inference that accused meant to kill his father.

State v Johnson, 223-962; 274 NW 41

Misconduct—failure to make of record. Improper argument by the county attorney cannot be shown by affidavits attached to motion for new trial.

State v Hixson, 208-1233; 227 NW 166

Noninflammatory argument. The fact that the county attorney in his argument characterized the defendant with quite blunt epithets is not necessarily reversible error.

State v Brewster, 208-122; 222 NW 6

Objections—sufficiency. An objection to a flagrantly improper argument by the county attorney may be all-sufficient even tho not couched in specific language; a priori, when the attorney and court cannot but know the very subject matter to which reference is made.

State v Voelpel, 213-702; 239 NW 677

Prosecutor's misconduct—court's discretion. In a prosecution for operating a motor vehicle while intoxicated, where misconduct was alleged because of prosecutor's argument to jury that defendant had admitted his intoxication, and, if other statements of prosecutor were not true, defendant's counsel would not jump up and squeal like a pig under a gate; and when timely admonitions to the jury are given, coupled with the discretion of the trial court in controlling arguments, no reversal should follow as supreme court will not interfere unless such misconduct results in prejudice and deprives a defendant of a fair trial.

State v Dale, 225-1254; 282 NW 715

II RIGHT TO OPEN AND CLOSE

No annotations in this volume

13850 Instructions.

Instructions in civil cases. See under §§11491-11495
Instructions in criminal cases. See under §13876

13851 Notice of additional testimony.

ANALYSIS

Additional annotations. See under §13729
Names of witnesses on indictment. See under §13729
Rebuttal testimony. See under §13846 (IV)

I IN GENERAL

Scope of additional testimony. Witnesses who testify for the state under a notice of additional testimony are not confined in their testimony to the matters and things specified in such notice.

State v Harding, 204-1135; 216 NW 642

II WITNESSES NOT BEFORE GRAND JURY

Witness not before grand jury — evidence taken on notice. The examination of a witness whose evidence is taken upon notice need not be strictly confined to those matters specified in the notice.

State v Jackson, 156-588; 137 NW 1034

Error without prejudice. Error in admitting the testimony of witnesses who were not before the grand jury, and whose names were not on the indictment, and of whose evidence legal notice had not been given, is without prejudice, where the defendant in his testimony does not deny, but admits, every material allegation testified to by such witnesses.

State v Burk, 88-661; 56 NW 180

Non-grand-jury witness—curing error. Any error in receiving the testimony of a witness not before the grand jury is cured by subsequently excluding such testimony and admonishing the jury to disregard it.

State v Christensen, 205-849; 216 NW 710

Permissible scope of testimony. No error results in the trial of a criminal case in receiving, without notice, evidence from witnesses not before the grand jury when said evidence was strictly rebuttal, or evidence which might have been introduced in the state's main case.

State v Smith, 215-374; 245 NW 309

Witness' name not on indictment. Arresting officer's testimony as a rebuttal witness for the state that defendant made the statements "I was afraid of that," and "Well, I finally caught up with the guy," held proper even tho the name of the rebuttal witness was not indorsed on the indictment and no notice of additional testimony was given where such testimony, altho not strictly rebuttal, had a tendency to disprove defendant's testimony, it often times occurring that rebuttal testimony might also have been used as direct testimony in the state's case.

State v Crandall, 227-311; 288 NW 85

III MINUTES OF EVIDENCE

Additional testimony. Witnesses for the state who were before the grand jury, were examined and minutes of their testimony attached to the indictment, may testify upon the trial to matters not inquired about by the grand jury without notice to defendant of such additional matter.

State v Boggs, 166-452; 147 NW 934

IV INDORSEMENT OF NAMES

Indorsement of names of witnesses—when unnecessary. The statutory requirement that an indictment carry the names of the witnesses on whose testimony it is found and be accompanied by a minute of their testimony, has no application to the names and testimony of witnesses used on the trial in rebuttal.

State v Cozad, 221-960; 267 NW 663

Discrepancy — effect. A discrepancy in the name of a witness as indorsed on the indictment or as written in a notice of additional testimony becomes quite inconsequential when the accused is in no manner misled.

State v Leitzke, 206-365; 218 NW 936

V NOTICE

(a) IN GENERAL

Defective return—effect. The defectiveness of a return of service of notice of additional witnesses on the trial of an indictment becomes quite immaterial when unquestioned proof of such service is otherwise made.

State v Mullenix, 212-1043; 237 NW 483

Sufficiency. A notice of additional testimony in the trial of an indictment, substantially complying with the statute, is not subject to a motion for a bill of particulars.

State v Loucks, 218-714; 253 NW 838

(b) ERRORS IN NOTICE

Review on appeal. Where a witness whose name is not indorsed on the indictment, is permitted to testify over objection, after the prosecution states that notice was given, and presents what it claims was a notice to the court, on appeal it will not be presumed that the notice was insufficient, or was not properly served, such notice not being included in the abstract.

State v Bone, 114-537; 87 NW 507

Signing notice. The defendant in a criminal cause who has accepted the service of a notice that a witness not named in the indictment will be introduced on the trial, and who has agreed

to treat such notice as personally served, cannot object that it was not signed by the district attorney.

State v Watrous, 13-489

(c) SERVICE

Acceptance of service by attorney valid. Service of notice and copy thereof of the intention of the state, on the trial of an indictment, to offer stated testimony additional to that receivable under the indictment as returned, may be validly accepted in writing for and on behalf of the defendant, by the defendant's acting attorney of record.

State v Froah, 220-840; 263 NW 525

Service of notice. Service of notice of additional testimony is all-sufficient when made on one of defendant's attorneys of record (defendant not being found in the county), even tho such notice is addressed to the defendant and to an attorney of record for him other than the attorney receiving the service.

State v Debner, 202-150; 209 NW 404

13856 View of premises by jury.

View of premises. See under §11496

Discretion of court. The trial court has a wide discretion in determining when a jury in a criminal cause may be permitted to view the scene of a crime.

State v Carr, 200-306; 204 NW 218

Misconduct of jurors. The fact that two of the jurors, during the trial, visited the scene of an alleged rape and there talked the matter over among themselves, is held not to have amounted to misconduct, where it was shown that they said nothing about their observations to their fellow jurors and both testified that the visit had nothing to do with their verdict.

State v Crouch, 130-478; 107 NW 173

Proper denial. The refusal of the court to permit the jury to view the scene of a bank robbery finds justification in the fact that substantially the sole issue before the jury was the identity of the accused.

State v Papst, 221-770; 266 NW 498

View of automobile. The court is within its discretion in refusing to send the jury to examine an automobile for the purpose of determining whether it was physically possible (as had been testified) for a person to stand on one side of the car and reach across and take a bottle from a pocket on the opposite side of the car.

State v Ling, 198-598; 199 NW 285

Action for death by shooting—court's discretion. In action to recover for death by shooting, refusal to permit jury to view premises where murder occurred, being largely discretionary with court, held not error; and fact that one juror did visit premises was not ground for reversal where it was shown that juror did not disclose information to other jurors nor allow it to affect his judgment.

Collings v Gibson, (NOR); 220 NW 338

13859 Sickness of juror.

Illness of juror. Evidence held to show that illness of a juror was not prejudicial to defendants.

Kirchner v Dorsey, 226-283; 284 NW 171

13860 Separation of jury.

See annotations under §§13878, 13944

13861 Officer sworn.

Unsworn bailiff. Where a jury is ordered kept together during the trial of a criminal case, the fact that the court bailiff who accompanied the jurors on the first adjournment of court was not specially sworn as required by this section, does not constitute reversible error when it appears the bailiff protected the jurors exactly as he would have protected them had he been so sworn and had respected his oath.

State v Miller, 217-1283; 252 NW 121

13864 Questions of law and fact.

Assumption of fact by instructions. See under §11493 (1)
Libel cases. See under §13262
Waiver of jury. See under §13804

Confession—justifiable instruction. Evidence that an accused stated that he participated in the robbery charged, and that he was one of the three persons who entered the bank, and knew where some of the stolen bonds were, justifies the court in giving a properly balanced instruction on the subject of confession.

State v Davis, 212-131; 235 NW 759

Demonstrative evidence—admissibility. All the facts and circumstances connected with the actual perpetration of a crime are admissible whether there be one participant or many. So held as to certain exhibits offered and received in evidence.

State v Leftwich, 216-1226; 250 NW 489

Jury question as to identity. The identity of one who is prosecuted for a crime as the one who actually committed it is a question of fact for the jury, on conflicting testimony.

State v Ayles, 205-1024; 219 NW 41

Mental disease — jury questions. Whether psychopathic personality of the excitable type is a mental disease is properly submitted to the jury on controversial testimony.

State v Buck, 205-1028; 219 NW 17

13866 Higher offense proved—procedure.

Conviction of lower degree than charged. See under §§13919, 13920

13874 No offense charged—resubmission.

Defective indictment. Upon the discharge of a jury, and the termination of a criminal trial by reason of a defective indictment, the court may in its discretion resubmit the case to the grand jury, when it will tend to prevent the failure of justice.

State v Kimble, 104-19; 73 NW 348

13876 Instructions.

ANALYSIS

As to instructions dealing with specific crimes. See annotations under sections relating to various crimes.
Defendant as witness. See under §13890
Defendant's failure to testify. See under §13891 (III)
Good character—instructions. See under §13897 (XIX)
Included offenses. See under §13919 (IV)
Instructions, civil law applicable. See under §§11491–11495
Limitation of criminal actions. See under §13443 (IV)
Reasonable doubt. See under §§13917 (V), 13918
Self-defense. See under §12922 (I)

I PROVINCE OF COURT AND JURY

Accomplice per se. Whether a witness testifying for the state as to the commission of the offense on trial was an accomplice is not a jury question on a record which shows that the witness himself might be charged and convicted of said offense. On such a record the court must peremptorily instruct that the witness was an accomplice, and properly guide the jury as to the necessity for corroboration.

State v Clay, 220-1191; 264 NW 77

Duty of court and jury. The court may very properly instruct the jury that its sole duty is to determine the issue of guilt, and that if it finds the accused guilty, the extent of punishment is not a matter for its consideration.

State v Bell, 206-816; 221 NW 521

Weight given defendant's testimony. In a criminal prosecution it is not error to give an instruction that, in considering the testimony of the defendant, the jury should consider that he is charged with a crime and, whether the testimony was given in good faith or for the purpose of avoiding conviction, the jury should give such testimony such weight as they believe it fairly entitled to, and no more.

State v McDowell, 228- ; 290 NW 65

Duty to convict of highest offense. An instruction to the effect that the jury should find the defendant guilty of the highest degree of crime included in the indictment, of which the jury finds him guilty beyond a reasonable doubt, reviewed, and held unobjectionable.

State v Ingram, 219-501; 258 NW 186

Expert witness—jury question. In prosecution for alleged homicide, evidence of expert witnesses' opinion of cause of death of deceased and kind of instrument used to inflict the wounds properly admitted, and jury question on facts thereby generated.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Fatal assumption of fact. An assumption by the court in its instructions in a criminal case that the prosecutrix and the defendant were together on a certain occasion material to the case, when such association was sharply in issue, constitutes reversible error.

State v Hubbard, 218-239; 250 NW 891; 253 NW 834

Jury's competency to understand. Where trial court promptly and fully admonished the jury not to consider withdrawn testimony, and later made the same admonition in written instructions, the appellate court is bound to assume that the jury fully understood and obeyed his admonitions.

State v Caringello, 227-305; 288 NW 80

Limitation of actions—general instruction. It is not erroneous for the court to instruct as to the necessity for proof of the commission of the offense within the statute of limitation, naming the full period, even tho the testimony of guilt is solely confined to a specific day within said period.

State v Canalle, 206-1169; 221 NW 847

Limitation of prosecution. An instruction which sets forth the material allegations of the indictment is not subject to the objection that the recital would apply to a transaction barred by the statute, when elsewhere the court specifically confines the jury to the transaction alleged in the indictment.

State v Friend, 210-980; 230 NW 425

Unpleaded defense. Reversible error results from submitting to the jury and requiring it to make a finding on a possible defense not presented by the defendant. So held as to the possession of an official certificate explanatory of the alteration of a motor vehicle engine number.

State v Dunn, 202-1188; 211 NW 850

Use of intoxicants. Evidence that the defendant in a manslaughter case might have been to some extent under the influence of intoxicating liquor at the time of a fatal automobile accident warranted the court in giving a requested instruction that there was no evidence that the defendant was intoxicated, and in adding that the use of intoxicating liquor by the defendant might be considered in de-

termining whether or not he had acted in a reckless disregard for the safety of others.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Voluntary or involuntary confession—jury question. Principle reaffirmed that a confession, to be admissible in evidence, must be free and voluntary and not induced by threat or violence or any direct or implied promise or inducement. Held, in trial of defendant for alleged homicide that the fact that defendant was not represented by counsel at the time he signed confession would not render it involuntary, and that the court correctly submitted the question of the voluntary character of confession to jury.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

II FORM, REQUISITES, AND SUFFICIENCY

Alibi. Instructions relative to the defense of alibi are always justified when the record reveals a manifest purpose on the part of the accused to rely on such defense.

State v Parsons, 206-390; 220 NW 328

Alibi when not in issue. Evidence which is merely incidental to the denial of an accused that he is guilty does not present the issue of alibi, and, in such case, reversible error results from the giving of the usual instruction as to the nature of such defense.

State v Wagner, 207-224; 222 NW 407; 61 ALR 882

Admissions. Instructions which aim to guide the jury in the consideration of statements which are claimed to have been made by the accused after his arrest, and which do not constitute "confessions", are not erroneous simply because the said instructions refer to them as "confessions of facts".

State v Bittner, 209-109; 227 NW 601

Admissions—balanced instruction. A well-balanced instruction relative to both the weakness and the strength of verbal admissions is unobjectionable on a supporting record.

State v Friend, 210-980; 230 NW 425

Admissions and declarations. The record may be such as to require cautionary instructions as to the legal effect to be given to admissions and declarations of the accused.

State v Johnson, 211-874; 234 NW 263
State v Johnson, 215-483; 245 NW 728

Admissions—refusal of disparaging instructions. Requested instructions in disparagement of admissions by an accused are properly refused when such admissions appear to have been deliberately and understandingly made.

State v Troy, 206-859; 220 NW 95

Assumption of fatal and erroneous fact. Prejudicial error results (1) from the mistaken assumption by the court that a named witness had remained in the courtroom during the taking of the testimony, in violation of the orders of the court to the contrary, and (2) from instructing that the jury might consider such conduct in determining the weight to be given to the testimony of said named witness.

State v McCook, 206-629; 221 NW 59

Inferential assumption of fact negatived. An inferential assumption of fact in instructions may manifestly be wholly negatived by other instructions.

State v Harding, 204-1135; 216 NW 642

Instructions—moral character—reasonable doubt. An instruction as to the weight to be given evidence of good moral character of the defendant was not incorrect in adding that if, under all the evidence, including that bearing on moral character, there was no reasonable doubt as to guilt, the jury should convict, however good the character may have been.

State v McDowell, 228- ; 290 NW 65

Burden of proof—defensive matter. Instructions to the effect that an accused has the burden to establish a purely defensive matter are not rendered prejudicially erroneous by the omission of the phrase "by a preponderance of the evidence".

State v Gardiner, 205-30; 215 NW 758

Co-defendants—sufficiency of forms of verdict. Instructions which clearly extend to the jury the privilege of finding either of two co-defendants guilty or of finding both guilty are all-sufficient, in the absence of any request from the defendants as to such subject matter.

State v Slycord, 210-1209; 232 NW 636

Colloquy with jury. A colloquy between the court and the foreman of the jury, in the presence of the jury, relative to the instructions already given, reviewed and held not to constitute oral instructions and, therefore, not improper.

State v Mullenix, 212-1043; 237 NW 483

Instructions considered as whole—each not complete in itself. Instructions are to be considered as a whole, and each need not be complete in and of itself. An instruction in a criminal case was not objectionable in that it did not contain a statement of reasonable doubt when reasonable doubt was covered in other instructions, nor was another instruction insufficient in failing to include the defendant's ground of defense which was covered in other instructions.

State v McDowell, 228- ; 290 NW 65

Elements necessary for conviction — construction as a whole. In prosecution for subornation of perjury, where defendant complains of the instruction summarizing the elements

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necessary to conviction, while the instruction could not have been complete in and of itself and was not so intended, since the instruction called the jury's attention to other instructions defining perjury, subornation of perjury, and other essentials of the crime to be found by the jury, it was sufficient. Principle reaffirmed that instructions must be considered as a whole.

State v Hartwick, 228- ; 290 NW 523

Construction as a whole. If instructions as a whole fairly present the law relative to a subject matter, e. g., alibi, they are not subject to the charge of being confusing and misleading.

State v Bird, 207-212; 220 NW 110

Instructions as a whole. Instructions which to a degree improperly limit the basis of defendant's insanity to "family troubles", in accordance with the oft repeated trial theory of defendant, are unobjectionable when the jury is specifically told to take into account all other facts and circumstances shown in evidence.

State v Buck, 205-1028; 219 NW 17

Construction as a whole. Instructions reviewed, and held adequately to tell the jury that it must base its verdict on the evidence.

State v McGee, 207-334; 221 NW 556

Sufficiency as a whole. A mere recital in an instruction of a statutory principle of law without embodying therein the essentials of the crime charged, constitutes no error when the said essentials are elsewhere stated.

State v Parsons, 209-540; 228 NW 307

Correct as a whole. Instructions are all-sufficient if they are correct as a whole.

State v Reynolds, 201-10; 206 NW 635

Conviction of guilty and acquittal of innocent. It is not improper to instruct, in substance, that, altho the good of society requires that crime be surely and promptly punished, it is equally important that the innocent be protected.

State v Derry, 202-352; 209 NW 514

Conviction of felony—legal effect. The law does not presume that a person who has been convicted of a felony is less worthy of belief than a person who has not been so convicted, and error results from so instructing.

State v Voelpel, 208-1049; 226 NW 770

Correct but nonelaborate. Correct but nonelaborate instructions are all-sufficient, in the absence of a request for further elaboration.

State v Peacock, 201-462; 205 NW 738
State v Sampson, 220-142; 261 NW 769

Corroboration—mandatory duty to instruct. The court must, on its own motion, instruct as to the necessity for corroboration of an accomplice.

State v Myers, 207-555; 223 NW 166; 29 NCCA 569

Correlated instructions — how construed. Correlated instructions must be read and construed together.

State v Berlovich, 220-1288; 263 NW 853

Credibility of accused. Instruction relative to the credibility of an accused as a witness reviewed, and held to reveal no error.

State v Parsons, 209-540; 228 NW 307

Credibility of accused. Instructions are proper which direct the jurors as to their right to consider the interest of the accused when they pass upon the credibility of his testimony, especially when the same rule is elsewhere applied to all the witnesses.

State v Conklin, 204-1131; 216 NW 704

Credibility of witness—rule as to presumption. In prosecution for subornation of perjury, where defendant complains of the court's instruction which stated in part, "it being presumed in law that a man whose general reputation for truth and veracity is bad would be less likely to tell the truth than one whose reputation is good", such instruction did not instruct the jury that defendant had been impeached, that he would not tell the truth, or that they could disregard his testimony (they were only informed of a rule applicable in everyday business transactions), it being more a statement of the reason for such a rule in impeachment than any direction to the jury, and was in no sense a presumption of guilt, but could only be applied to defendant as a witness. The weight of defendant's testimony was left entirely for the jury.

State v Hartwick, 228- ; 290 NW 523

Custom as defense — sale (?) or bailment (?). Instructions reviewed, and held to fully and adequately present to the jury in a prosecution for embezzlement by a bailee the effect of a usage or custom in the warehousing business to sell the bailment; also to present fully and adequately the question whether the transaction in question was a bailment or a sale.

State v Folger, 204-1296; 210 NW 580

Defining "accident". Ordinarily there is no occasion for the court, in presenting to the jury the issues in homicide, to define the term "accident".

State v Friar, 204-414; 214 NW 596

Defining "felony" not necessary. The trial court, in the absence of a request therefor, need not define a common, nontechnical word, such as the word "felony".

State v Proost, 225-628; 281 NW 167

Indictment—instruction on material parts—sufficiency. In prosecution for subornation of

perjury, where defendant assigns as error the court's omission to instruct the jury as to what were the material parts of the indictment—while it is true this is a duty of the court—a review of the instructions shows that defendant's argument is quite technical, and the instructions, as a whole, clearly and definitely point out to the jury what the material allegations of the indictment were and what was necessary for the jury to find before returning a verdict of guilty.

State v Hartwick, 228- ; 290 NW 523

Duty to cover essential elements. Principle reaffirmed that the court is under a duty, without request, to direct the jury adequately as to the essential elements of the offense charged.

State v Hixson, 205-1321; 217 NW 814

Duty to cover issues. In a prosecution charging the unlawful possession of intoxicating liquors, the court must, without request, instruct on the supported issue whether defendant was consciously in possession of the liquors found on his person.

State v Wheeler, 216-433; 249 NW 162

Dying declarations—justifiable refusal. Requested instructions in disparagement of dying declarations are properly refused, the court properly covering the subject by its own instructions.

State v Troy, 206-859; 220 NW 95

Dying declaration—nonassumption of fact. Instructions that dying declarations could not be considered unless the jury found that the decedent was suffering from a mortal wound "which had been inflicted upon him by the defendant", may not (when the instructions are read as a whole) be said to assume that the defendant had inflicted such wound on the deceased.

State v Gibson, 204-1306; 214 NW 743

Evidence — similar offenses — election — instructions in re intent. When the state, after introducing evidence tending to establish several distinct offenses of a noncontinuing nature involving a specific intent, elects to rely upon one distinct transaction, the court may very properly instruct the jury that the remaining transactions of the same kind may be considered on the issue of intent.

State v Derry, 202-352; 209 NW 514

Circumstantial evidence. Instructions to the effect that circumstantial evidence must, beyond a reasonable doubt, be consistent with guilt and, beyond such doubt, inconsistent with any other rational theory than that of guilt, are all-sufficient in the absence of a request for more elaboration, especially when the record reveals materially more than a "chain of circumstances" against the accused.

State v Kneeskern, 203-929; 210 NW 465

Circumstantial evidence. There is no occasion to instruct on circumstantial evidence when the evidence connecting the accused with the offense is direct.

State v Johnson, 215-483; 245 NW 728

Confusion—direct evidence of collateral facts and direct evidence of guilt. Evidence, altho being direct, may not be direct evidence of defendant's guilt, and instructing in such a manner that the jury may be confused into considering direct evidence of collateral facts as direct evidence of defendant's guilt is error.

State v Mikels, 224-1121; 278 NW 924

Erroneous admission in evidence—not cured by instructions. In a trial for murder, evidence that the defendants had been engaged in a drunken brawl about three weeks before the homicide should have been stricken on motion, and the error in refusing the motion was not cured by an instruction.

State v Coleman, 226-968; 285 NW 269

Ignoring lack of evidence. An instruction which ignores the effect of "want of evidence," but directs the jury to determine guilt solely on the evidence "admitted" is not erroneous when it is manifest the instruction was given solely with reference to the effect to be given certain exhibits received in evidence, and without reference to the instruction on reasonable doubt which is not questioned.

State v Madison, 215-182; 244 NW 868

Arson—"juxtaposition" of circumstantial evidence not equivalent of direct evidence. Testimony in an arson prosecution, entirely unsubstantiated by direct evidence, will not justify an instruction defining "direct evidence", even on the theory that evidence showing a man, prior to the fire, was seen near the burned building, from which footprints led to defendant's home, constitutes circumstances in such "juxtaposition" as to be equivalent to direct evidence. Jury should be instructed case rests on circumstantial evidence.

State v Mikels, 224-1121; 278 NW 924

Lack or absence of evidence—effect. Instructions reviewed and held to sufficiently cover the effect of the lack or absence of evidence of guilt.

State v Stennett, 220-388; 260 NW 732

Instructions not substantiated by evidence—error. In arson trial, an instruction on the state's evidence that footprints "pointing toward and away from" burned store building was held erroneous, in absence of any evidence of footprints pointing toward building.

State v Neff, 228- ; 291 NW 415

Erroneous instruction on fact not existing—failure of circumstantial evidence to overcome error. It is error to assume or state in an instruction that certain facts exist which do not exist, and a presumption of prejudicial error arises therefrom. Therefore, in arson trial, circumstantial evidence was held insuffi-

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cient to establish defendant's guilt so conclusively as to require a conviction notwithstanding an erroneous instruction on state's evidence of footprints "pointing toward and away from" burned store building when there was no evidence of footprints "pointing toward" such building.

State v Neff, 228- ; 291 NW 415

Limiting impeaching evidence. The failure of the court on its own motion in its instructions to limit, specifically, impeaching testimony to that particular purpose is not erroneous when the testimony in question is of such a nature that it could not be considered for any other purpose.

State v Brewer, 218-1287; 254 NW 834

Other offenses. The court in the trial of a criminal case is under no legal duty, in the absence of a request, to instruct the jury as to the particular purpose for which evidence of other offenses had been admitted.

State v McCutchan, 219-1029; 259 NW 23

Instruction on other claimed perjuries. In prosecution for subornation of perjury, where the court instructed the jury that "Certain evidence has been admitted in this case tending to prove other claimed perjuries and of other acts of the defendant and of his sister," the use of the words "certain evidence" does not indicate the opinion of the court as to quantity and weight of the evidence, and the use of the word "certain", so commonly used by practically all courts and all persons, could not have been understood by the jury to have meant fixed and established. It must have been considered as merely stating there was evidence of the nature described, and the use of the words "other acts of the defendant and of his sister" were not indefinite. They were sufficient to call the attention of the jury to the other facts, and it was not necessary that the court set out and review the testimony referred to.

State v Hartwick, 228- ; 290 NW 523

Presumption (?) or assumption (?) of malice. The court may, under applicable evidence, instruct that the jury has a right, in the absence of evidence to the contrary, to presume the existence of malice from the use of a deadly weapon in a deadly manner; and in so instructing it is quite immaterial that the court employs the term "assume" instead of the term "presume".

State v Berlovich, 220-1288; 263 NW 853

Failure to define offense. The failure specifically to define an offense, in the absence of a request, does not constitute error when the elements of the offense are accurately set forth in the instructions.

State v Grimm, 212-1193; 237 NW 451

Failure to deny or explain res gestae statements. The refusal of the court to instruct as to the effect of defendant's failure to deny or explain statements against him, made in his presence, is not erroneous when the statements are properly in the record solely because they were part of the res gestae.

State v Woodmansee, 212-596; 233 NW 725

Flight — denial of identity. Instructions in re flight and denial of identity by defendant reviewed and held amply to protect the defendant.

State v Johnson, 222-574; 269 NW 354

Evidence — flight subsequent to discharge. Evidence of flight and instructions as to the effect thereof may be proper even tho the flight took place after the accused had been once discharged under a prior preliminary information charging the same and identical offense and transaction.

State v Heath, 202-153; 209 NW 279

Flight. An instruction that if defendant had reason to believe he would be charged with rape, and that if he fled from state to avoid arrest, his flight could be considered prima facie indicative of guilt, held not error as against objection that by use of words "had reason to believe" jurors were told they might consider flight without finding that defendant had any actual knowledge or suspicion that he would be charged with rape.

State v Donovan, (NOR); 263 NW 516

General reference to check. Instructions which refer the jury to the "check in question" (under a charge of uttering a forgery) are not necessarily erroneous because the record reveals numerous other checks.

State v Miller, 217-1283; 252 NW 121

Impeachment—duty of court. While in criminal cases the court must fairly present the issues to the jury, yet, after this is done, a defendant should ask for further instructions, if desired, or not be heard to complain; so, where the jury would have understood from the instructions given the purpose of introducing a written instrument for impeachment only and the meaning of the word "impeachment", it was not reversible error to fail to give a separate instruction thereon, especially without a request therefor.

State v Johnson, 223-962; 274 NW 41

Improper argument — curing error. Statements by the county attorney in his argument to the jury to the effect that counsel for defendant knew that defendant was the same person who had formerly been convicted of a pleaded offense because counsel for defendant had then prosecuted defendant, do not constitute reversible error (1) when objection was withheld until after the arguments were closed, (2) when the court sustained the objection and

directed the jury not to consider said statements, and (3) when there was nothing before the appellate court showing precisely what statements were made and the circumstances attending them.

State v Anderson, 216-887; 247 NW 306

Inadequate enumerations of elements. Instructions which direct the jury to convict on proof of named elements of an offense are prejudicially erroneous when not all the elements of such offense are enumerated.

State v Sipes, 202-173; 209 NW 458; 47 ALR 407

Inadvertent use of words. The inadvertent use in instructions of a word which could not have misled the jury will be treated as harmless.

State v Hughey, 208-842; 226 NW 371

Intent. Instructions relative to intent to defraud and to the conditions under which it might be inferred, and to the presumption that a person intends the reasonable and natural consequences of acts deliberately and intentionally done by him, reviewed and held to reveal no error.

State v Boysen, 214-46; 238 NW 581

Threats—nonpermissible construction. The ordinary instruction defining "intent" cannot be deemed an authorization to the jury to infer that the defendant was responsible for the acts and statements of bystanders.

State v Wilbourn, 219-120; 257 NW 571

Inapplicable instruction. An instruction that "the law presumes a man to intend the reasonable and natural consequences of his act deliberately and intentionally done," given in a prosecution for embezzlement by a bailee, is not necessarily erroneous. Instructions reviewed as a whole, and held unobjectionable.

State v Folger, 204-1296; 210 NW 580

Interchange of conjunctions. An objection to the use in instructions of the conjunction "but," instead of "and," is quite hypercritical when the same objection could, with equal plausibility, be lodged against the instruction, had the term "and" been used.

State v Davis, 212-131; 235 NW 759

Intoxication—inherently erroneous instruction. An instruction to the effect that an accused must be acquitted if the jury finds that he was "intoxicated" when he committed the act in question is inherently erroneous.

State v Patton, 206-1347; 221 NW 952

Intoxication—nonexpert testimony. No instruction need be given in regard to nonexpert evidence in relation to intoxication.

State v Wheelock, 218-178; 254 NW 313

Driving while intoxicated—dazed condition caused by accident. In a prosecution for driving while intoxicated, the thoughts of requested instructions were sufficiently embodied in instructions which stated that in determining whether the defendant was intoxicated at the time of the collision, or whether his condition immediately after was the result of injury or shock, the jury should consider the injury, its nature, extent and effect, and all other evidence.

State v McDowell, 228- ; 290 NW 65

Bootlegging—submission of nuisance. On a simple charge of "bootlegging" as defined by §1927, it is reversible error to submit (along with said charge) the offense of maintaining a nuisance, even tho there be no evidence of the maintenance of a nuisance, and even tho the two offenses have common elements and closely approach identity.

State v Moore, 210-743; 229 NW 701

Intoxicating liquor—nuisance. An appellant may not complain of instructions which are in harmony with his contention that the accused was charged with maintaining an intoxicating liquor nuisance.

State v Bryant, 208-816; 225 NW 854

Defenses in homicide—intoxication—burden of proof. While not interposed as an affirmative defense, evidence reviewed and held insufficient to prove that defendant was so intoxicated at the time of the commission of the homicide that he was unable to form criminal intent, and instruction thereon held proper.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Essential instructions. Under an indictment for maintaining an intoxicating liquor nuisance, it is reversible error for the court in its instructions (1) to quote the statute which prohibits the mere "manufacture" of such liquors, (2) to tell the jury that the defendant was indicted thereunder, and (3) to fail to set out in some manner the elements of the statute prohibiting a nuisance.

State v Reid, 200-892; 205 NW 517

Intent to sell. Instructions reviewed at length and as a whole, and held fully to protect the accused against a conviction regardless of criminal intent.

State v Arluno, 222-1; 268 NW 179

Liquor nuisance—confusion of elements. An instruction which, in defining the term "nuisance" (of the maintenance of which defendant is charged), makes elaborate and somewhat unnecessary recital of the statutes relative to "bootlegging" is not necessarily subject to the vice of confusing the jury as to the elements of the offense charged—nuisance.

State v Harrington, 220-1116; 264 NW 24

Means and motive in effecting sale. It is proper to instruct that, if a sale of intoxicating

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liquors was in fact unlawful, then the means adopted by the buyer to effect the sale, and his motives, become quite immaterial.

State v Weber, 204-137; 214 NW 531

Preliminary explanation. In a prosecution for unlawful possession of intoxicating liquors, no prejudice results from setting forth in the instructions the various acts prohibited by the statute when the following instructions are specifically limited to the offense charged.

State v Matthes, 210-178; 230 NW 522

Right to possess liquor for own use—failure to instruct. The court, in a prosecution for maintaining a liquor nuisance, is fully justified in failing to instruct as to the right of defendant to possess in his own home and for his own use, the liquors which were seized in his home, when defendant in his testimony positively asserted that he did not have said seized liquors in his possession for his own use.

State v Harrington, 220-1116; 264 NW 24

Time of commission of offense. An instruction justifying a conviction for possessing intoxicating liquors at any time within three years prior to the return of the indictment is unobjectionable, when the indictment, proof, and trial were exclusively centered on one particular transaction occurring during said period.

State v Healy, 217-1155; 251 NW 649

Unsupported instruction. In a prosecution for illegal possession of intoxicating liquors, an instruction as to the statutory presumption attending an attempt, in the presence of peace officers, to destroy such liquors—as to which there was no supporting evidence—does not constitute reversible error, it appearing from the record that the defendant was, beyond question, guilty of the offense charged and, in addition, was an habitual violator of said liquor statutes.

State v Roberts, 222-117; 268 NW 27

Invading province of jury. Instruction held not to direct a verdict of guilt of one or the other of two offenses.

State v Shannon, 214-1093; 243 NW 507

Joint defendants. Instructions must separate and submit to the jury the question of the separate guilt of each of jointly indicted parties. So held where instructions permitted the jury to find both of two jointly indicted parties guilty if the jury found one of them guilty.

State v Heffelfinger, 212-1041; 237 NW 364

Oral direction to retire—nonnecessity for writing. An oral direction by the court to the jury, after long deliberation by the jury, to retire and resume their consideration of the case because the instructions already given fully and adequately cover the case, need not be in writing.

State v Johnston, 221-933; 267 NW 698

Instruction allowing recommendation of clemency—juror's affidavit explaining—effect—new trial. Where during its deliberations jury inquired of judge as to whether a verdict of guilty with recommendation of clemency would have any weight on sentence and judge instructed that any recommendations desired could be made on separate sheet of paper, signed and returned with verdict, held, instruction did not constitute error, and that jurors' affidavits stating that they were influenced by the instruction could not be considered by court in ruling on motion for new trial.

State v Cook, 227-1212; 290 NW 550

Oral instructions. If the court orally instructs the jury, and then later reduces the instructions to writing, such does not cure the defect of the oral instructions.

State v Harding, 81-599; 47 NW 877

Popular designation of offense. Designating an offense in instructions by its popular name is quite unobjectionable when the specific elements of the offense are correctly set forth.

State v Bevins, 210-1031; 230 NW 865

Punishment for offense. It is not reversible error for the court to instruct the jury that the punishment for grand larceny is greater than for petit larceny.

State v Leitzke, 206-365; 218 NW 936

Explaining punishment. The practice of instructing juries as to the punishment provided for an offense when the jury has nothing to do with such punishment is, while not reversible error, disapproved.

State v Marx, 200-884; 205 NW 518
State v Reid, 200-892; 205 NW 517
State v Tennant, 204-130; 214 NW 708
State v Loucks, 218-714; 253 NW 838

Prejudicial recital of punishment. Prejudicial error results from a recital in the instructions of the punishment for rape (imprisonment for five years or for life with opportunity for parole under minimum sentence, §12966, C., '27) and failing to recite the punishment for assault with intent to rape (imprisonment for an indeterminate term not exceeding 20 years, with opportunity for parole,

§12968, C., '24), the defendant being convicted of the latter offense.

State v Tennant, 204-130; 214 NW 708
State v Mayer, 204-118; 214 NW 710

Physical and mental condition—burden of proof. Instructions reviewed and held not subject to the vice of imposing on defendant, in a criminal case, any burden to establish his mental or physical condition.

State v Wheelock, 218-178; 254 NW 313

Ratification of wrongful act. Instructions reviewed, relative to the effect to be given to a ratification by a bailor of the wrongful act of the bailee in selling the bailment, and held to contain nothing of which the accused could complain.

State v Folger, 204-1296; 210 NW 580

Submission of unsupported offense. When an offense may be committed in different ways, and there is no evidence of one of the ways, error results from copying the entire statute into the instructions and directing the jury to convict "if the accused did any one of the things as in these instructions explained".

State v Smalley, 211-109; 233 NW 55

Summing up as to juror's duty. An instruction which impartially sums up the duty of the jurors both to the state and to the accused, is not objectionable.

State v Kneeskern, 203-929; 210 NW 465

Superfluous definition. A nonmisleading but superfluous definition of "burden of proof" cannot be prejudicial.

State v Matthes, 210-178; 230 NW 522

Time and venue. Failure of instructions to require the jury to make any finding as to time and venue is quite harmless when the time and place of the commission of the offense are not a matter of any controversy whatever.

State v Bird, 207-212; 220 NW 110

Offenses partly in county—venue. In prosecution for subornation of perjury, an instruction as to venue was proper when it stated that evidence introduced tended to show defendant had solicited a witness to give the claimed perjured testimony in a trial, and that such solicitations, or some of them, were made in Appanoose county, and if defendant continued in his attempt to procure the witness and called and had witness testify as a witness in Davis county, knowing or believing witness would give perjured testimony, and if witness did in fact commit perjury in Davis county, the defendant could be prosecuted and convicted in Davis county.

State v Hartwick, 228- ; 290 NW 523

Failure to recognize venue. An instruction which may be deemed erroneous because it fails to recognize the venue in a criminal action is rendered unobjectionable by other instructions which clearly confine the jury to the venue alleged in the indictment.

State v Hughey, 208-842; 226 NW 371

Undue exaggeration. Instructions relative to circumstantial evidence reviewed and held not subject to the criticism that they exaggerated the effect of such evidence.

State v Rounds, 202-534; 210 NW 542

Violation of constitutional right. The constitutional right of an accused in a criminal case to be confronted by the witnesses against him is violated in a criminal case wherein the value of various items of property is material, by an instruction to the effect that the jurors "have the right to use their own knowledge of values * * * in connection with the testimony as to values which have been given by the different witnesses".

State v Henderson, 217-402; 251 NW 640

III REQUESTS FOR INSTRUCTIONS

Accessories—guilt of others—effect. Requested instructions to the effect that the jury cannot consider the guilt of parties other than the one on trial are properly refused when the one on trial is accused of having aided and abetted such other parties in committing the offense.

State v Hillman, 203-1008; 213 NW 603

Additional instructions—necessity of request. In prosecution for arson, allegedly based on circumstantial evidence, in the absence of a request for additional or more explicit instructions by accused, trial court does not commit reversible error in failing fully to instruct the jury upon the subject of circumstantial evidence.

State v Bazoukas, 226-1385; 286 NW 458

Circumstantial evidence — nonapplicability. There is no occasion to instruct on circumstantial evidence when the evidence connecting the accused with the offense is direct.

State v Johnson, 215-483; 245 NW 728

Circumstantial evidence—proof open to two constructions. An instruction that, in order to convict on circumstantial evidence alone, the proof must not only be consistent with the defendant's guilt but also inconsistent with a theory of innocence, sufficiently covered the defendant's request for an instruction that if the evidence was open to two constructions, one consistent with guilt and the other with innocence, the defendant should be acquitted.

State v McDowell, 228- ; 290 NW 65

Construction of law. Requested instructions relative to the duty of courts and jurors to so construe the intoxicating liquor statutes as to prevent evasions are properly refused.

State v Dunham, 206-354; 220 NW 77

III REQUESTS FOR INSTRUCTIONS—continued

Correct and incorrect request—rejection in toto. A requested instruction which, in connection with correct statements of the law, directs the jury to acquit the defendant, if it finds defendant to be a quiet, peaceful and law abiding citizen, is properly rejected in toto.

State v Fador, 222-134; 268 NW 625

Covering requested instructions. A requested instruction relative to the right of the jury to reject the testimony of a prosecuting witness who was actuated by a sinister motive and as to the effect of contradictory statements, is properly covered by the usual instructions relative to the interest of the witness and to the right of the jury to reject the testimony of a witness who has willfully testified falsely to a material fact.

State v Weber, 204-137; 214 NW 531

Duty to cover issues. An accused waives nothing by failing to request the court adequately to cover all the material allegations in the indictment or information.

State v Wyatt, 207-322; 222 NW 867

Estoppel to object. Defendant may not successfully claim that an instruction given at his request unduly magnified the importance of certain evidence.

State v Brown, 216-538; 245 NW 306

Evidence of "other offenses". The court in the trial of a criminal case is under no legal duty, in the absence of a request, to instruct the jury as to the particular purpose for which evidence of other offenses had been admitted.

State v McCutchan, 219-1029; 259 NW 23

Failure to request—effect. In a prosecution for larceny of sheep, held, instructions eminently fair, and in absence of request for certain instructions defendant may not, on appeal, be heard to complain.

State v De Koning, 223-951; 274 NW 25

Failure to request elaboration—effect. Instructions will be deemed all-sufficient when they appear to cover a subject matter correctly and no elaboration is requested.

State v Kneeskern, 203-929; 210 NW 465
State v Christensen, 205-849; 216 NW 710
State v Bourgeois, 210-1129; 229 NW 231
State v Miller, 217-1283; 252 NW 121
State v Griffin, 218-1301; 254 NW 841
State v Carlson, 224-1262; 276 NW 770

Good character generating reasonable doubt. The previous good character of an accused (as to the trait involved) shown either (1) by the general reputation of the accused, or (2) by actual personal experience of witnesses with the accused, may, in connection with all the evidence in the case, generate a reasonable doubt of the guilt of the accused, and entitle him to an acquittal. And the jury must, on request, be so instructed.

State v Ferguson, 222-1148; 270 NW 874

Impeachment—duty of court—failure to request. While in criminal cases the court must fairly present the issues to the jury, yet, after this is done, a defendant should ask for further instructions, if desired, or not be heard to complain; so, where the jury would have understood from the instructions given, the purpose of introducing a written instrument for impeachment only and the meaning of the word "impeachment", it was not reversible error to fail to give a separate instruction thereon, especially without a request therefor.

State v Johnson, 223-962; 274 NW 41

Instructions in re accidental shooting. Requested instructions as to the effect of an accidental shooting are properly refused when otherwise properly covered by the instructions of the court.

State v Johnston, 221-933; 267 NW 698

Instructions not necessary without supporting evidence. Where not supported by evidence, it is not reversible error to fail to instruct regarding accused's right to occupy a public highway at the time of shooting, especially without a request therefor.

State v Johnson, 223-962; 274 NW 41

Nonapplicability to evidence. A requested instruction as to the right of one accused of homicide to defend his guest is properly refused when there is no testimony upon which to base the instruction.

State v Reynolds, 201-10; 206 NW 635

Presentation of particular theory. Comprehensive and correct instructions by the court render unnecessary, in the absence of a request, the submission of defendant's particular theory of the case.

State v Dillard, 205-430; 216 NW 610

Refusing instructions otherwise given. It is not erroneous to refuse requested instructions which, so far as material, are otherwise embodied in the instructions given by the court on its own motion.

State v Moore, 217-872; 251 NW 737

Requests unsupported by evidence. Requested instructions which are without support in the evidence are properly refused. So held as to a requested instruction which assumed that a certain gunshot wound was fatal and that others were nonfatal.

State v Johnston, 221-933; 267 NW 698

Right to defend self. When from the instructions the jury may easily understand that one who is assailed may defend himself, it is not reversible error to fail to give a separate in-

struction thereon, especially without a request therefor.

State v Johnson, 223-962; 274 NW 41

Sufficiency of forms of verdict. Instructions which clearly extend to the jury the privilege of finding either of two co-defendants guilty, or of finding both guilty, are all-sufficient in the absence of any request from the defendants as to such subject matter.

State v Slycord, 210-1209; 232 NW 636

Verdict—disregard of instructions. An instruction in a criminal cause that a witness for the state was an accomplice must be obeyed by the jury, even tho the court was in error in so instructing.

State v Lozier, 200-652; 204 NW 256

IV OBJECTIONS, REFUSAL, AND EXCEPTIONS

Belated exceptions disregarded. Exceptions to instructions in criminal cases must be made within the time provided by law or they will be disregarded.

State v Kirkpatrick, 220-974; 263 NW 52

Beer — nonintoxicating liquor — instruction refused. In prosecution for driving a motor vehicle while intoxicated, the refusal of accused's requested instruction that beer is not an intoxicating liquor held not error.

State v McGregor, (NOR); 266 NW 22

Correct and incorrect request—rejection in toto. A requested instruction which, in connection with correct statements of the law, directs the jury to acquit the defendant, if it finds defendant to be a quiet, peaceful, and law-abiding citizen, is properly rejected in toto.

State v Fador, 222-134; 268 NW 625

Failure to deny or explain res gestae statements. The refusal of the court to instruct as to the effect of defendant's failure to deny or explain statements against him, made in his presence, is not erroneous when the statements are properly in the record solely because they were part of the res gestae.

State v Woodmansee, 212-596; 233 NW 725

Failure to except. Failure to take and preserve exceptions to instructions in criminal cases in the manner and form provided by statute precludes review on appeal, irrespective of §14010, C., '31.

State v Griffin, 218-1301; 254 NW 841

Failure to instruct not cured by evidence. Where defendant was convicted of assault with intent to commit rape, failure to instruct jury as to necessity of corroboration of prosecuting witness' testimony—an essential element of conviction—was prejudicial error, and the jury was not sufficiently instructed as to this necessity by inference from another instruction on corroboration given in connection with the court's statement that crime charged in indictment was rape, which included the lesser offense of assault with intent to commit rape. Nor was the error rendered nonprejudicial by the fact that record contained evidence of corroboration, since it is not the court's function to pass upon weight and sufficiency of corroborating evidence, except to determine whether it is sufficient to go to the jury.

State v Ervin, 227-181; 287 NW 843

Failure to present and reserve error. Exceptions in a criminal case to instructions will not be reviewed when first presented on appeal. So held where it was objected on appeal that the instructions (1) were not sufficiently elaborate, (2) were inconsistent, (3) failed to explain the right of an owner to protect his property, and (4) failed to state the nonnecessity of malice aforethought in assault with intent to commit manslaughter.

State v Bingaman, 210-160; 230 NW 394

Former trial—attempt to bribe juror. An instruction to the effect that, if the jury believed that defendant had attempted to improperly influence the jury on a former trial, such conduct was a circumstance to be considered by the jury in determining the guilt of the defendant, is unobjectionable, even tho such instruction is based on a denial by defendant, on cross-examination, of such improper conduct, and on testimony by the state tending to show such misconduct, it appearing that the exceptions to the instruction did not embrace the point that the said testimony could only be used for impeaching purposes.

State v Friend, 210-980; 230 NW 425

General and indefinite exceptions. Nonspecific exceptions to instructions will be disregarded.

State v Derry, 202-352; 209 NW 514
State v Burch, 202-348; 209 NW 474

Intent—intoxication. Instructions on intoxication as bearing on the ability to form an intent are properly refused when there is no applicable evidence.

State v Murray, 222-925; 270 NW 355

In re circumstantial evidence—inapplicability in face of direct. Instructions to the effect that, in order to convict on circumstantial evidence, each fact in the chain of circumstances must be proven beyond a reasonable doubt; that all said facts must be connected with each other and with the main fact to be proven; and that said facts must produce a moral certainty of defendant's guilt, are properly refused on a record revealing both direct and circumstantial evidence of guilt.

State v Engler, 217-138; 251 NW 88
State v Ferguson, 222-1148; 270 NW 874

Reconciliation—inapplicable instruction. In a prosecution for uxoricide, a requested instruction as to the effect of a reconciliation, as bearing on motive, is properly refused when there is no direct evidence of reconciliation and when the difficulties between the parties appear to have continued down to the time of the death of the wife.

State v Flory, 203-918; 210 NW 961

Undue particularization or emphasis. Instructions should not attempt to marshal the evidence or to emphasize particular phases or circumstances, and thereby by silence minimize or obscure other phases or circumstances. Instructions working such results are properly refused, especially when the instructions fairly and comprehensively cover the subject matters in such requests.

State v Blair, 209-229; 223 NW 554

13878 Officers sworn.

ANALYSIS

I CUSTODY OF JURY
II SEPARATION OF JURY
III COMMUNICATION WITH JURY

Misconduct and new trial generally. criminal cases, §13944; civil cases, §11550

I CUSTODY OF JURY

Misconduct of bailiff — finding of court — conclusiveness. A finding by the court, on conflicting testimony, that a bailiff was not guilty of misconduct is conclusive on appeal.

State v Kurtz, 208-849; 225 NW 847

II SEPARATION OF JURY

Separation of, and communications with, jurors. The conduct of bailiffs in permitting jurors in a criminal trial to communicate with outsiders, personally and by telephone or in permitting slight separations of jurors, tho inexcusable, does not necessarily constitute reversible error.

State v Siegel, 221-429; 264 NW 613

III COMMUNICATION WITH JURY

Unaddressed question from jury room—ignored by court. Inquiries from the jury room, presented to the judge but not addressed to the court or to anyone in particular, are properly ignored.

State v Ferguson, 226-361; 283 NW 917

Unauthorized communication with jurors. Statements by a bailiff to jurors to the effect that they must remain in session until they had agreed on a verdict, coupled with the refusal by the bailiff either to conduct the jury to the court, or to deliver any message to the court, constitute such misconduct as to require the granting of a new trial, it appearing that said conduct had such controlling and coercive influence on certain jurors as caused them to change their views as to the merits of the case.

State v Terpstra, 206-408; 220 NW 357

CHAPTER 646

WITNESSES

13879 Subpoenas for witnesses.

Nonresident — immunity from process. A nonresident coming into the state as a party or witness and who is sued while attending the contest of her brother's will may appear specially to secure her common-law immunity from civil process of local courts which immunity exists and continues not only while in attendance, but for a reasonable time thereafter.

Moseley v Ricks, 223-1038; 274 NW 23

13880 Defense witnesses at expense of state.

Atty. Gen. Opinions. See '28 AG Op 142; '30 AG Op 177

13890 Defendant as witness.

Cross-examination of defendant generally. See under §13892
Criminating questions. See under §§11267, 11268

Compulsory examination of defendant's person. An examination of the defendant's person, while in jail, by a physician, cannot be said to have been compulsory, where the only evidence of compulsion was that the sheriff accompanied the physician, but it was not shown that he did or said anything in respect to the examination.

State v Struble, 71-11; 32 NW 1

Credibility of accused. Instructions are proper which direct the jurors as to their right to consider the interest of the accused when they pass on the credibility of his testimony, especially when the same rule is elsewhere applied to all the witnesses.

State v Conklin, 204-1131; 216 NW 704

Defendant as witness—correct instruction. In a criminal prosecution wherein the defendant alleges error on instruction relative to the defendant as a witness in his own behalf, and where the jury was instructed that it had the right to take into consideration the fact that defendant was on trial and was an interested witness, and that it was not required to receive blindly the testimony given by him, but could consider whether testimony was true and given

in good faith, or false, and for the purpose of avoiding conviction, and also being told that defendant's testimony was not to be discredited solely because he was interested, but that he had a right to testify in his own behalf, and his testimony should be fairly and impartially considered together with all the other facts and circumstances in the case, and weighed in the same manner and with the same fairness as that of other witnesses, and that it should give his testimony and the testimony of all other witnesses the weight to which it believed such testimony to be fairly entitled, held, a correct instruction.

State v Mikesh, 227-640; 288 NW 606

Defendant as witness—instruction. In prosecution for statutory rape an instruction to the jury regarding defendant testifying in his own behalf as an interested witness from an interested standpoint, and that the jury should consider his testimony as such, is not objectionable on the ground that it singles out the testimony of the defendant from the testimony of other witnesses in a manner that makes it appear to the jury that his testimony is not worthy of belief, nor on the ground that it invades the province of the jury.

State v Diggins, 227-632; 288 NW 640

Instructions—weight given defendant's testimony. In a criminal prosecution, it is not error to give an instruction that, in considering the testimony of the defendant, the jury should consider that he is charged with a crime and, whether the testimony was given in good faith or for the purpose of avoiding conviction, the jury should give such testimony such weight as they believe it fairly entitled to, and no more.

State v McDowell, 228- ; 290 NW 65

Failure of accused to testify—allowable reference. County attorney, during the trial of a criminal case, may properly refer to the fact that the accused has not testified in his own behalf, and constitutional due process is not thereby violated.

State v Ferguson, 226-361; 283 NW 917

Inference from accused's failure to testify. Any resulting inference or presumption of guilt arising from an accused's choice not to testify in his own behalf is not involved in the due process clause of the constitution.

State v Ferguson, 226-361; 283 NW 917

In re character witnesses. Correct instructions in a criminal prosecution relative to the weighing of defendant's testimony are not required to be accompanied by instructions relative to the testimony of defendant's good-character witnesses. If defendant desires the latter he should ask for them.

State v Schenk, 220-511; 262 NW 129

Instructions—credibility of accused as witness. The court may very properly specifically instruct the jury as to the rules for determining the weight and credibility of the testimony of an accused. Instructions held correct.

State v Kendall, 200-483; 203 NW 806

Mandatory instruction. The court must, on request, instruct the jury that an accused in a criminal case has a right not to be a witness in his own behalf, and that the exercise of such right shall not be considered by the jury for any purpose. Instruction held to meet the requirements of the rule.

State v Bell, 206-816; 221 NW 521

Proper cross-examination. A defendant in a criminal prosecution, as a witness in his own behalf, is subject to the same rules regulating cross-examination and impeachment as other witnesses.

State v Carter, 222-474; 269 NW 445

Self-incrimination. The statutory declaration (§1966-a1, C., '27 [§1966.1, C., '39]) that the finding of intoxicating liquors in the possession of a person under search warrant proceedings, when the liquors have been adjudged forfeited, shall be prima facie evidence that said person was maintaining a nuisance does not violate the right of said person not to be a witness against himself.

State v Bruns, 211-826; 232 NW 684

Threat to commit offense. A party held to keep the peace in a preliminary examination upon an information charging him with threatening to commit a public offense is not a competent witness in his own behalf.

State v Darrington, 47-518

Undue prominence to defendant's testimony. When a defendant is a witness in his own behalf, it is not improper for the court in its instructions to direct the jurors as to their right to consider the interest of the accused when they pass on the credibility of his testimony.

State v Healey, 217-1155; 251 NW 649

13891 Failure to testify—effect. (Repealed.)

ANALYSIS

I COMMENT ON FAILURE TO TESTIFY

Discussion. See 15 ILR 113—Rule abolished in Iowa

Argument in re undisputed facts. This inhibition is not violated by the act of the public prosecutor in asserting in argument that certain facts are undisputed, even tho the accused is the only person who could dispute them.

State v Solomon, 203-954; 210 NW 448

I COMMENT ON FAILURE TO TESTIFY —concluded

Allowable reference. It is not erroneous for the county attorney to refer, during the trial of a criminal case, to the fact that the accused has not testified in his own behalf.

State v Stennett, 220-388; 260 NW 732

Comment on failure to testify. The public prosecutor will not be deemed to have referred to defendant's failure to testify by assertions in argument to the effect that certain evidence is not denied or explained.

State v Harding, 205-853; 216 NW 756

Failure of accused to testify. County attorney, during the trial of a criminal case, may properly refer to the fact that the accused has not testified in his own behalf, and constitutional "due process" is not thereby violated.

State v Ferguson, 226-361; 283 NW 917

Comment by county attorney. The failure of the defendant in a criminal case to testify in his own behalf does not deprive him of the presumption of innocence, but the jury is entitled to consider it as an inference of guilt, and the county attorney may comment upon it.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Nullifying improper reference. Error in a reference by the state to the defendant's right to testify is obviated by the defendant's becoming a witness in his own behalf.

State v Fahey, 201-575; 207 NW 608

II CO-DEFENDANTS

Curative quality of instructions. Assertions of the county attorney in his opening statement to the jury relative to the refusal of defendant's associate in crime to appear as a witness, and as to defendant's inability to give bail, will not be deemed prejudicial misconduct sufficient to demand a new trial when defendant requested no special instructions or admonition to the jury concerning the matter, and when the instructions to the jury were fair.

State v Sampson, 220-142; 261 NW 769

Failure to call co-defendant. Failure of an accused to call in his behalf a co-defendant cannot properly be considered against him, and the court should so instruct in case the state makes improper use of such failure.

State v Hillman, 203-1008; 213 NW 603

Permissible reference. Principle recognized that the state may, in argument to the jury, very properly refer to the fact that a co-defendant who was not on trial had not been called as a witness.

State v Harding, 204-1135; 216 NW 642

III INSTRUCTIONS

Instructions. Defendant's failure to be a witness in his own behalf need not be covered by an instruction, in the absence of a request.

State v Reid, 200-892; 205 NW 517

Instructions. It is not error to instruct that the failure of the accused in a criminal prosecution to be a witness in his own behalf must not be considered against him.

State v Mueller, 202-1067; 208 NW 360

Mandatory instruction. The court must, on request, instruct the jury that an accused in a criminal case has a right not to be a witness in his own behalf, and that the exercise of such right shall not be considered by the jury for any purpose. Instruction held to meet the requirements of the rule.

State v Bell, 206-816; 221 NW 521

Weight given defendant's testimony. In a criminal prosecution, it is not error to give an instruction that, in considering the testimony of the defendant, the jury should consider that he is charged with a crime and, whether the testimony was given in good faith or for the purpose of avoiding conviction, the jury should give such testimony such weight as they believe it fairly entitled to, and no more.

State v McDowell, 228- ; 290 NW 65

13892 Cross-examination.

ANALYSIS

Direct examination—defendant as witness. See under §13890

I CROSS-EXAMINATION—CRIMINAL CASES GENERALLY

Conclusiveness of answers. The state is absolutely bound by the answers of the defendant on cross-examination in a criminal prosecution relative to the defendant's going under various assumed names, when the state makes no showing of connection between such inquiry and the commission of the crime charged.

State v McCumber, 202-1382; 212 NW 137

Cross-examination. Principle reaffirmed that the cross-examination of witnesses generally in any particular case is left to the sound discretion of the trial court, and his action will not be reviewed on appeal unless a clear abuse of discretion is shown.

State v Archibald, 208-1139; 226 NW 186

Discretionary limit to cross-examination. After a witness, on cross-examination, has testified (1) that he is a laborer, (2) that he has been convicted of a felony, and (3) that he is now residing in the county jail, the court may very properly curtail further cross-examination by excluding questions designed to show that the witness, instead of being a laborer, has been engaged, generally, in bootlegging, and in the commission of larcenies and burglaries.

State v Johnson, 215-483; 245 NW 728

II DEFENDANT—CROSS-EXAMINATION

(a) PERMISSIBLE SCOPE

Cross-examination. Principle reaffirmed that when a defendant in a criminal action is a witness in his own behalf, he stands upon the same footing as any other witness, insofar as his memory, history, motives, or matters affecting his credibility are concerned.

State v Holley, 203-192; 210 NW 749
State v Voelpel, 208-1049; 226 NW 770

Cross-examination — scope. An accused on trial for crime and a witness in his own behalf may, on cross-examination, be required to write certain matter in his own handwriting, the relevancy of such matter otherwise appearing in the record.

State v McHenry, 207-760; 223 NW 535

Cross-examination—scope. A defendant who is a witness in his own behalf stands upon the same footing as any other witness in relation to his memory, history, motives, or matters affecting his credibility. He may be asked if he did not, on a former trial, attempt to bribe the jurors.

State v Friend, 210-980; 230 NW 425

Estoppel to predicate error. An accused who introduces incompetent, immaterial, and irrelevant testimony may not predicate error on a cross-examination which is germane to such testimony.

State v Bowers, 208-1321; 227 NW 124

Evidence at preliminary examination. Defendant, on cross-examination, may be examined as to his apparently voluntary testimony given on a preliminary examination in which another was accused of the crime and not defendant.

State v Kneeskern, 203-929; 210 NW 465

Improper question—effect. The mere asking, on cross-examination of a defendant, of a wholly improper question does not necessarily result in reversible error.

State v Umphalbaugh, 209-561; 228 NW 266

Permissible cross-examination.

State v Shaw, 202-632; 210 NW 901

Permissible scope. An accused who attempts, in his direct testimony, to account for all his conduct and doings during a certain material period of time thereby opens the door to cross-examination on transactions occurring during said time and omitted in the direct examination, and it is no objection that the revelations take on a sinister aspect.

State v Davis, 212-582; 234 NW 858

Restriction. Cross-examination in a prosecution for rape held not unduly restricted as to the association of prosecutrix with other men.

State v Steele, 209-550; 228 NW 75

Same rules as for other witnesses. A defendant in a criminal prosecution, as a witness in his own behalf, is subject to the same rules regulating cross-examination and impeachment as other witnesses.

State v Carter, 222-474; 269 NW 445

Scope of cross-examination. The state is privileged, to the extent of a fair discretion, to cross-examine the defendant in a criminal cause as to his previous history, prior conduct, habits, and ways of living as affecting his credibility and for the purpose of impeaching him.

State v Bittner, 209-109; 227 NW 601

Scope—categorical denial of guilt on direct examination. On direct examination, accused's categorical denial that she operated a house of ill fame, which being the very question that the jury is ultimately to decide, opens wide the gates for exploration on cross-examination as to witness' conduct during the period covered by the question.

State v Hathaway, 224-478; 276 NW 207

Use of liquor. Even tho an accused on trial for driving an automobile while intoxicated is not asked on direct examination whether he had used intoxicating liquors on the day in question or was then sober or drunk, yet on cross-examination the state may make inquiry of defendant concerning his use of intoxicating liquors on the occasion in question, for the purpose of enabling the jury to properly weigh the defendant's testimony.

State v Wheelock, 218-178; 254 NW 313

(b) CREDIBILITY OR IMPEACHMENT

Association with accomplice. An accused who becomes a witness in his own behalf may be impeached by testimony tending to establish his personal association with an accomplice, the existence of such association being material, and having been denied by the accused.

State v Hart, 205-1374; 219 NW 405

Contemplated offense. The fact that a transaction tends to show that an accused was contemplating the commission of a crime is not a valid objection to its admissibility for impeaching purposes, when the transaction is

II DEFENDANT—CROSS-EXAMINATION —concluded

(b) CREDIBILITY OR IMPEACHMENT—concluded

inconsistent with and contradictory to the statements of the accused as to the facts attending the alleged offense for which he is on trial.

State v Davis, 212-582; 234 NW 858

Impeachment—collateral matters. An accused on trial for crime may, as a witness, be cross-examined as to his antecedents, but is not subject to impeachment on such matters, especially when such matters are collateral to the main issue.

State v McHenry, 207-760; 223 NW 535

Minutes before grand jury as impeaching material. The minutes of evidence given before the grand jury, or of that submitted upon preliminary examination, are not admissible upon the trial for the purpose of impeaching a witness.

State v Hayden, 45-11

(c) OTHER OFFENSES

Cross-examination. A defendant in a charge of first degree murder who testifies that there was no cooperation between him and a co-defendant, and that he did not intend to kill the deceased and did not know that his co-defendant intended to kill deceased, may be cross-examined as to the cooperation existing between himself and the co-defendant, even tho such examination reveals the commission of a robbery by said parties shortly prior to the homicide in question.

State v Griffin, 218-1301; 254 NW 841

Other offenses. When the use and possession of intoxicating liquors by an accused is the subject of proper cross-examination of the accused, it matters not that the examination tends to prove the accused guilty of a criminal offense other than that for which he is on trial, to wit: the unlawful possession of such liquors.

State v Wheelock, 218-178; 254 NW 313

Permissible cross-examination. An accused in a criminal prosecution who, for the manifest purpose of placing himself in the light of an honorable and trusted character, testifies to his former membership on the police force may, on cross-examination, be shown to have secured his said position by falsely representing that he had never been convicted of a felony.

State v Shaw, 202-632; 210 NW 901

Unallowable cross-examination. The state on the trial of one accused of false pretenses, may not, on the cross-examination of the accused, develop the fact that the federal post office authorities have entered an order which denies to the accused the use of the mails.

State v Yarham, 206-833; 221 NW 493

Unallowable cross-examination. The state on the trial of one accused of false pretenses may not, on the cross-examination of the accused, lay the foundation for introducing testimony of other prior and like offenses by the accused.

State v Yarham, 206-833; 221 NW 493

Unallowable scope. Reversible error results from repeatedly and insistently injecting into the cross-examination of a defendant on trial for crime, and into the cross-examination of his character witnesses, insinuations and innuendoes to the effect that the accused had been guilty of other crimes prior to the time in question.

State v Rounds, 216-131; 248 NW 500

(d) INSTRUCTIONS

Attempt to bribe juror. An instruction to the effect that, if the jury believed that defendant had attempted to improperly influence the jury on a former trial, such conduct was a circumstance to be considered by the jury in determining the guilt of the defendant, is unobjectionable, even tho such instruction is based on a denial by defendant, on cross-examination, of such improper conduct, and on testimony by the state tending to show such misconduct, it appearing that the exceptions to the instruction did not embrace the point that the said testimony could only be used for impeaching purposes.

State v Friend, 210-980; 230 NW 425

Credibility of accused. Instruction relative to the credibility of an accused as a witness reviewed, and held to reveal no error.

State v Parsons, 209-540; 228 NW 307

Interest of accused as witness. Principle reaffirmed that an accused as a witness in his own behalf is an interested witness and that the court may so instruct.

State v Bird, 207-212; 220 NW 110

III CO-DEFENDANT—CROSS-EXAMINATION

Cross-examination of co-indictee. In the trial of one of two persons jointly indicted for larceny of chickens, the persistent cross-examination of the co-indictee, not on trial but called as a witness by the one on trial, along the line of showing that the witness was in the business of stealing chickens, is prejudicially erroneous.

State v Huss, 210-1317; 232 NW 692

Other offenses shown. A defendant in a charge of first degree murder who testifies that there was no cooperation between him and a co-defendant, and that he did not intend to kill the deceased and did not know that his co-defendant intended to kill deceased, may be cross-examined as to the cooperation existing between himself and the co-defendant, even tho

such examination reveals the commission of a robbery by said parties shortly prior to the homicide in question.

State v Griffin, 218-1301; 254 NW 841

IV OTHER WITNESSES—CROSS-EXAMINATION

Credibility—permissible cross-examination. A witness who has testified to the reputed good character of a party may, within the limits of good faith on the part of the cross-examiner, be examined along the line whether said good-character witness had "heard of" certain nefarious transactions in which the said party had been engaged.

State v Carter, 222-474; 269 NW 445

Cross-examination to show bias. The state, through the cross-examination of a witness called by the defendant, may always show the personal bias of the witness for the defendant.

State v Leftwich, 216-1226; 250 NW 489

Discretionary limit to cross-examination. After a witness, on cross-examination, has testified (1) that he is a laborer, (2) that he has been convicted of a felony, and (3) that he is now residing in the county jail, the court may very properly curtail further cross-examination by excluding questions designed to show that the witness, instead of being a laborer, has been engaged, generally, in bootlegging, and in the commission of larcenies and burglaries.

State v Johnson, 215-483; 245 NW 728

Good-character witness. A good-character witness, who testifies that the general reputation of an accused (charged with operating an automobile while intoxicated) for moral character is good, may, on cross-examination, be asked whether he has heard within a stated recent time that the defendant, while operating a motor vehicle and while in an intoxicated condition, had been involved in certain specified accidents.

State v Wheelock, 218-178; 254 NW 313

Testimony as to intoxication—cross-examination as to effect of blow on head. In a prosecution for driving while intoxicated, where the defense was that after an automobile accident the defendant was in a dazed condition due to a blow on the head, the witnesses who testified as to intoxication could not be asked on cross-examination how much effect the blow might have had on the defendant's condition, as the answer would have been no more than a guess. This question was for the jury and there was no foundation laid to give the answer probative value.

State v McDowell, 228- ; 290 NW 65

Justifiable limitation. On the cross-examination of a witness who has identified an accused, the exclusion of questions which have no direct bearing, and but little incidental bearing, on the question of identity, is necessarily proper, especially when counsel has otherwise been given wide latitude in his examination.

State v Abbott, 216-1340; 249 NW 167

Limit on cross-examination. A witness who has testified to the good reputation for honesty of an accused in the community where the accused lives can be cross-examined solely and alone as to what the witness has heard in the community in the way of rumors or reports derogatory to the honesty of the accused. In other words, the state may not, on such examination, ask the witness if he does not know that the accused has been charged with or convicted of this or that offense.

State v Bell, 206-816; 221 NW 521

Nonresponsiveness of answer. The party examining a witness has, ordinarily, the sole right to object to answers on the ground that they are not responsive to the questions asked.

State v Murray, 222-925; 270 NW 355

Penal abode of witness. An accused may not base error on the fact that the state, in the examination of the witness, brings out the fact that the witness is then an inmate of a penal institution.

State v Leitzke, 206-365; 218 NW 936

Speculative question—exclusion. After a witness has frankly admitted that he was mistaken in a portion of his testimony, the court commits no error in excluding the general query whether the witness is not apt to be mistaken in other matters to which he has testified.

State v Johnson, 215-483; 245 NW 728

Value—competency of witness—fatal delay in objecting. Objections to the competency of a witness to testify to the value of stolen articles must be made when the witness is asked as to said values, not later when the articles are offered in evidence.

State v Endorf, 219-1321; 260 NW 678

V CROSS-EXAMINATION BY COURT

Examination by court. It is not necessarily erroneous for the court, in a criminal case, to interrogate a witness.

State v Leftwich, 216-1226; 250 NW 489

13893 Attendance of witnesses outside state.

Discussion. See 18 ILR 70—Compelling return of witness

13896 Fees advanced—protection from service of process.

Discussion. See 14 ILR 468—Nonresident witnesses—immunity

CHAPTER 647

EVIDENCE

13897 Rules of evidence.

ANALYSIS

As to evidence of specific crimes. See annotations under sections relating to various crimes.
Admissions distinguished from confessions. See under §13903
Confessions. See under §13903
Corroboration of accomplice. See under §13901
Defendant as witness. See under §§13890–13892
Reasonable doubt. See under §§13917 (V), 13918
Self-defense. See under §12922

I IN GENERAL

Discussion. See 8 ILB 263—Illegally procured evidence

Admission in chief of evidence excluded on cross-examination. In prosecution for bootlegging, the fact that evidence as to officers' search of defendant's car for liquor was excluded on defendant's cross-examination did not require its exclusion when offered in chief by state's witness.

State v Chase, (NOR); 221 NW 796

Appearance of deceased. A descriptive statement of the expression upon the face of the dead may be an allowable conclusion.

State v Kneeskern, 203-929; 210 NW 465

Bootlegging—evidence as to the delivery of bottles and money. Evidence tending to show the passing of bottles by the accused to others and the passing of money from such others to the accused is admissible on a charge of bootlegging, even tho such testimony is somewhat equivocal.

State v Smalley, 211-109; 233 NW 55

Brevity of minutes does not limit testimony. Mere brevity of the minutes of evidence taken before the grand jury will not prevent the witnesses from testifying as to the subject matter and facts embraced within them.

State v Van Vleet, 23-27

Crimes—presumption of coercion. The presumption that the participation of a wife, in the presence of her husband, in the commission of a crime is the result of the coercion of the husband applies only when the wife is in the near presence of her husband.

State v Kuhlman, 206-622; 220 NW 118

Coercion of wife by husband. No presumption exists that a wife who commits a crime in the presence of her husband does so under the coercion of the husband.

State v Renslow, 211-642; 230 NW 316; 71 ALR 1111

Coercion—required nature and extent. The compulsion which will excuse a criminal act must be present, imminent, and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done.

State v Clay, 220-1191; 264 NW 77

Competency. Evidence which tends to show the commission of the offense charged in the indictment, and to associate the defendant with it, is competent.

State v Bishel, 39-42

Rape—instruction on corroborating evidence—sufficiency. In a prosecution for statutory rape, the court instructed the jury that the state has the burden of proving that defendant was guilty beyond a reasonable doubt, and gave an instruction on corroborating testimony stating that the fact that the crime of rape or of assault with intent to commit rape has been committed by someone may be established by the testimony of the injured party alone if the jury is satisfied beyond a reasonable doubt that her testimony establishes such fact; but before the defendant can be convicted of the crime proven there must be other credible evidence than that of the injured party that singles out and points to the defendant as the guilty party and tends to connect him with the commission of the crime, to which the objection is raised to the use of the words "crime proven" as an assumption of the essential fact that the crime had been committed. The words "crime proven" obviously refer to the immediately preceding statement and the instruction when considered

in its entirety and in connection with other instructions is not subject to the criticism made.

State v Diggins, 227-632; 288 NW 640

Competency — permissible comparison. A witness may, in a proper case, be permitted to compare the size and shape of a package, the inside of which he could not see, with another article materially connected therewith.

State v Plew, 207-624; 223 NW 362

Contempt. The evidence in contempt proceedings must clearly and satisfactorily establish the guilt of the accused. Evidence reviewed, and held ample to meet the rule.

Tuttle v Peters, 206-435; 220 NW 22

"Conclusion" of ballistic expert. The province of a jury is not invaded by permitting a ballistic expert to testify that as a result of his detailed investigation he had "reached the conclusion" that a certain bullet had been fired through the barrel of a certain gun.

State v Campbell, 213-677; 239 NW 715

Before coroner's jury—best evidence rule. Oral proof of the testimony given by a witness at a coroner's inquest is not properly subject to the objection that it is not the best evidence.

State v Johnston, 221-933; 267 NW 698

Credit to be given testimony. The testimony of a witness whose reputation for truth is shown to be bad is not necessarily to be entirely disregarded, but should be considered under all the circumstances, and in connection with the other evidence, and given the weight to which the jury believe it entitled.

State v Miller & Kremling, 53-209; 4 NW 1083

Demonstrative evidence. It is discretionary with the court whether a witness shall or shall not produce demonstrative evidence.

State v Graham, 203-532; 211 NW 244

Demonstrative evidence—admissibility. All the facts and circumstances connected with the actual perpetration of a crime are admissible whether there be one participant or many. So held as to certain exhibits offered and received in evidence.

State v Leftwich, 216-1226; 250 NW 489

Demonstrative evidence—identification. Exhibit held sufficiently identified, material, and relevant, and properly received in evidence.

State v Brown, 216-538; 245 NW 306

Discretion of jury. Tho the jury are not bound to believe a witness and may disregard his testimony, they are not to disregard or disbelieve testimony without cause at their uncontrolled and unreasonable discretion; and they have no right to disregard the testimony of one who stands in every way unimpeached, and who shows that he has the means of information and speaks intelligently and consistently.

State v Guyer, 6-263

Evidence—immaterial but harmless. Error may not be predicated on immaterial but quite harmless testimony relative to the attitude of a deceased toward women.

State v Clay, 222-1142; 271 NW 212

Evidence tending to prove dismissed count. Evidence tending competently to prove any essential element of a count on which the state relies for a conviction is admissible even tho it may tend to prove elements of a count which the state has dismissed.

State v Miller, 217-1283; 252 NW 121

Examination—refreshing recollection. It is not improper for the county attorney, after a witness has testified to a certain extent, to hand to the witness the minutes of his testimony taken before the grand jury, and to request the witness to refresh his memory, in order to determine whether he had overlooked any matter; neither is it improper to permit the witness thereupon to testify to material matters which had been overlooked.

State v Friend, 206-615; 220 NW 59

Exclusion of evidence. Where evidence is excluded as inadmissible under any circumstances, tho offered out of its order, it need not be offered again to authorize an exception to the ruling.

State v Hunter, 118-686; 92 NW 872

Exclusion of sheriff from court room. It is within the discretion of the court to receive the testimony of the sheriff and of a special officer assisting the county attorney, even tho they had remained in the court room in violation of an order excluding witnesses.

State v Bittner, 209-109; 227 NW 601

Exhibit containing immaterial matter. The offer in evidence of the entire contents of a book of municipal traffic laws, containing manifestly much irrelevant and immaterial matter, is properly rejected.

State v Long, 215-494; 245 NW 726

Exhibits—excluding evidentiary statements. Properly identified bottles and their intoxicating contents are not rendered inadmissible because the labels thereon contain evidentiary statements when the jury is instructed to disregard such statements.

State v Christensen, 205-849; 216 NW 710

Exhibits—failure to return—effect. Relevant exhibits are admissible upon the trial of an indictment even tho they have not been before the grand jury, or if before such jury, have not been returned.

State v Bailey, 202-146; 209 NW 403

Failure to swear witness. A witness will be presumed, on appeal, to have been sworn before testifying, unless the contrary clearly appears from the record. Where it is known to the de-

I IN GENERAL—continued

fendant during the trial, that a witness for the state had not been sworn, and no objection to the testimony is made at the time, there is a waiver of the requirement.

State v Smith, 124-334; 100 NW 40

Finger prints—expert testimony as to ultimate fact. A witness who is expert in the science of dactylography may testify that in his opinion, judgment, or belief, different finger prints were made by one and the same finger, but he may not testify that they were made by one and the same finger.

State v Steffen, 210-196; 230 NW 536; 78 ALR 748

Form of oath—objection. Objection to the form of an oath must be made previous to its administration or it will be deemed waived.

State v Browning, 153-37; 133 NW 330

Hearsay. What an accused has been told about an offense for which he is on trial is immaterial and hearsay.

State v Papst, 221-770; 266 NW 498

Identity of part of exhibit—permissible conclusion. A witness may testify that an article found by him under named circumstances with which the accused is connected, is a detached or torn-off part of another exhibit with which the accused is likewise connected.

State v Japone, 202-450; 209 NW 468

Identification of ballistic photographs. Evidence held ample to identify certain ballistic photographs.

State v Campbell, 213-677; 239 NW 715

Imbecility of defendant. A non-expert can testify to the mental condition of the defendant only after detailing the facts on which he bases his opinion.

State v Pennyman, 68-216; 26 NW 82

Immaterial inquiry. Uncontradicted testimony as to the amount of poison contained in the particular embalming fluid injected into a body renders immaterial any inquiry into the amount of poison contained in other such fluids of the same manufacture.

State v Flory, 203-918; 210 NW 961

Inadmissible experiments. Evidence as to experiments is inadmissible when performed under unstated conditions, or under conditions materially different from those attending the particular fact in issue.

State v Fahey, 201-575; 207 NW 608
State v Kneeskern, 203-929; 210 NW 465

Incriminating another. Testimony which is intended to show, on behalf of the accused on trial, that a person other than said accused is, in fact, the guilty party, is wholly inadmissible when it furnishes the jury no basis for a finding of fact on such issue, but, on the contrary, simply furnishes the jury a basis for a mere conjecture or surmise.

State v Papst, 221-770; 266 NW 498

Identity of firearm.

State v Lyons, 202-1195; 211 NW 702

Indictment as evidence. An indictment is wholly inadmissible to show the guilt of the defendant even tho offered on cross-examination, in connection with an offer, by the accused, of the minutes of testimony returned with the indictment.

State v Huckins, 212-283; 234 NW 554

Intoxication. While the intoxication of a witness at the time of the transactions of which he testifies does not destroy his credibility, it undoubtedly impairs it; but if his testimony is corroborated, or his recollection of the transaction appears to be distinct and clear, he is entitled to belief.

State v Castello, 62-404; 17 NW 605

Intoxication—burden of proof. An accused who pleads intoxication as a defense has the burden to show that his intoxication was to such extent and in such a degree that he was incapable of forming a criminal intent.

State v Patton, 206-1347; 221 NW 952

Intoxication of defendant. Evidence that the defendant had been drinking shortly before events occurred upon which a charge of murder was based against him was admissible.

State v Coleman, 226-968; 285 NW 269

Purchaser of liquor not excused. Where the sale of intoxicating liquors is a crime under the prohibitory law, the purchaser is not a participant in the crime, and he cannot excuse himself from testifying as to such purchases made by him, on the ground that his testimony would tend to criminate himself.

Wakeman v Chambers, 69-169; 28 NW 498

Judicial notice—distance between cities, etc. The courts of this state may and do take judicial notice of the distance between cities in this state, and the direction of one from the other; also of the states which abut this state.

State v Johnson, 221-8; 264 NW 596

Leading questions. Where a defendant seeks to negative evidence of the state by testimony directly responsive thereto, counsel may direct the attention of the witness to the very statements proposed to be negatived, and the examination will not be considered as leading and suggestive.

State v Manigan, 164-434; 145 NW 869

Nonleading question—calling attention to topic. Where a question is framed so as only to call the witness' attention to the topic, it is not leading.

State v Hartwick, 228- ; 290 NW 523

Materiality—harmless error. No prejudicial error results from receiving in evidence a lease entered into by the accused in a name other than his own, the accused having already admitted such fact.

State v Gaskill, 200-644; 204 NW 213

Matter not testified to before grand jury. A witness who has been examined before the grand jury, and the minutes of his testimony have been preserved and filed, may be examined upon the trial as to all matters within his knowledge touching the defendant's guilt or innocence.

State v McCoy, 20-262
State v Perkins, 143-55; 120 NW 62

Medical experts. The opinion of medical men who are shown to be experts, as to the instrument produced, and the nature and consequences of wounds or the causes of disease, is competent evidence in a prosecution for homicide.

State v Morphy, 33-270

Minutes before grand jury as impeaching material. The minutes of evidence given before the grand jury, or of that submitted upon preliminary examination, are not admissible upon the trial for the purpose of impeaching a witness.

State v Hayden, 45-11

Minutes of testimony—nonimpeachable. The minutes of testimony taken before grand jury and filed with indictment constitute the record basis for finding of the indictment, and this record may not be added to by calling on the grand jurors in the trial of a case to give additional testimony tending to impeach the indictment, such as that given in false arrest case where grand jurors testified in effect that plaintiff was in truth and in fact the person indicted. Any rule permitting grand jurors to impeach their own record would be contrary to public policy.

O'Neill v Keeling, 227-754; 288 NW 887

Motive. Proof of motive is not necessary to sustain a conviction for criminal homicide.

State v Kneeskern, 203-929; 210 NW 465

Objection to competency. An objection to the competency of a witness not made at the time he is offered is waived.

State v O'Malley, 132-696; 109 NW 491

Offer of privileged witness. The fact that the state offers as a witness defendant's doctor, who treated him for the alleged injury but who is not permitted to testify over defendant's objection on the ground of privilege, is not sufficient to warrant a reversal.

State v Booth, 121-710; 97 NW 74

Operation of automobile. A motion to strike testimony of the operation of third party's automobile on afternoon preceding night of alleged assault when prosecuting witness testified that he did not know whether defendant had anything to do with the operation of the car, was not improperly overruled, defendant having made no objection to the testimony when given, and neither defendant nor the owner of the car having testified in regard to its operation.

State v Crandall, 227-311; 288 NW 85

Testimony as to intoxication—cross-examination as to effect of blow on head. In a prosecution for driving while intoxicated, where the defense was that after an automoblie accident the defendant was in a dazed condition due to a blow on the head, the witnesses who testified as to intoxication could not be asked on cross-examination how much effect the blow might have had on the defendant's condition, as the answer would have been no more than a guess. This question was for the jury and there was no foundation laid to give the answer probative value.

State v McDowell, 228- ; 290 NW 65

Opinion of witnesses. A witness who has not been shown to be an expert cannot be permitted to testify respecting the mental condition of one who pleads insanity as a defense.

State v Geddis, 42-264

Photographs inadmissible unless relevant. Photographs of a stranger to the prosecution are, manifestly, inadmissible in the absence of evidence showing relevancy.

State v Papst, 221-770; 266 NW 498

Presumptions act prospectively only. Principle recognized that a presumption does not travel backward. It looks forward only.

State v Liechti, 209-1119; 229 NW 743

Private interview with witness. The court has no power to order a witness to submit to a private interview with defendant's counsel.

State v Wallack, 193-941; 188 NW 131

Privilege of witness. The refusal of a witness in a criminal trial to answer a question, upon the ground that he may thereby criminate himself, cannot be shown as a circumstance against him in a subsequent trial for the same offense.

State v Bailey, 54-414; 6 NW 589

Proffer in presence of jury—discretion of court. The court has discretionary power to refuse to permit counsel to state, in the presence of the jury, the controversial facts which he expects to prove by a proffered witness.

State v Teager, 222-391; 269 NW 348

Referring to minutes to refresh memory. It is not error to allow a witness in a criminal trial to refresh his memory by a reference to the minutes of his testimony given before the grand jury.

State v Miller & Kremling, 53-154; 4 NW 900

I IN GENERAL—concluded

Refusal to reshape question. An accused may not predicate error on the exclusion of a question when the sustained objection, in and of itself, very clearly points the way to an avoidance of the objection by a reshaping of the question, and the accused fails so to do.

State v McCook, 206-629; 221 NW 59

Responsive answers. In the examination of witnesses a party is entitled to answers responsive to the inquiry, and such portions as are not may be stricken on motion.

State v Nathoo, 152-665; 133 NW 129

Retention of nonresponsive answer. The court does not necessarily have to strike the nonresponsive answer of a witness when the answer reveals competent testimony. So held relative to the issue whether a party was intoxicated.

State v Fahey, 201-575; 207 NW 608

Right to recall witness. Where, under order of court, witnesses were excluded from the courtroom, the fact that, after examination, a witness remained in the room did not justify denial of permission to recall him.

State v Kissock, 111-690; 83 NW 724

Secondary evidence — preliminary showing. Secondary evidence of the contents of destroyed letters, shown to have been written by the accused in a criminal cause, is admissible when the originals would be admissible.

State v White, 205-373; 217 NW 871

Self-incrimination. While a witness is not bound to criminate himself, yet if he shall voluntarily testify to any matter tending to criminate, he may be compelled to testify in respect to that matter concerning all that is material to the issue.

State v Fay, 43-651

Test of credibility. The moral (general) character of a witness—that is, his reputation for morality in the vicinity of his residence—may be shown as a test of his credibility and it was error to exclude an inquiry of that kind in this case.

State v Froelick, 70-213; 30 NW 487

Trial—nonspecific objections. Objections to testimony in criminal cases must be as specific as is required in civil cases, in order to receive review on appeal.

State v Vandewater, 203-94; 212 NW 339

Unlawfully obtained evidence admissible.

Contra State v Sheridan, 121-164; 96 NW 730
State v Tonn, 195-94; 191 NW 530
State v Gorman, 196-237; 194 NW 225
Foley v Utterback, 196-956; 195 NW 721
Joyner v Utterback, 196-1040; 195 NW 594
State v Rowley, 197-977; 195 NW 881
Lucia v Utterback, 197-1181; 198 NW 626
State v Bogossian, 198-972; 200 NW 586
State v Weaver, 198-1048; 200 NW 705
State v Parenti, 200-333; 202 NW 77
State v Lozier, 200-652; 204 NW 256
State v Wenks, 200-669; 202 NW 753
Hammer v Utterback, 202-50; 209 NW 522
State v Korth, 204-667; 215 NW 706
State v Lambertti, 204-670; 215 NW 752
State v Bamsey, 208-796; 223 NW 873
State v Rollinger, 208-1155; 225 NW 841
State v Bourgeois, 210-1129; 229 NW 231
State v Rowley, 216-140; 248 NW 340

Unallowable self-corroboration. A witness may not corroborate himself by testifying that on other occasions out of court he has told the same story which he has told in court. Neither may a party prove such extra recitals by other witnesses.

State v Bell, 206-816; 221 NW 521

Wife may be witness. When the husband and wife were indicted for keeping a house where intoxicating liquors are unlawfully sold, and were tried together, it was held that the wife might be a witness for her husband, with the restriction that her testimony should not be considered in her own behalf.

State v Donovan, 41-587

Wife witness for husband. The testimony of a wife in behalf of her husband in a criminal case is to be received, and her credibility is to be tested by the same rules which apply to all other witnesses, and it is error to instruct the jury that her testimony should be examined with peculiar care.

State v Bernard, 45-234

Witnesses — excluding answer — necessity of error to appeal. When a witness is prevented, on objection, from answering, counsel should, by some proper offer or record, show what he intends to establish. Conjecture as to what the answer might be will not justify a reversal.

State v Madden, 170-230; 148 NW 995

Witnesses—oath. No particular form of oath to be administered to a witness is prescribed, but if of such character as to be regarded by the witness as binding upon his conscience it is sufficient, altho he may regard some other form as more solemn.

State v Browning, 153-37; 133 NW 330

II CO-DEFENDANTS

Conspiracy. See under §13162

Declaration of joint defendant. Declarations of one joint defendant in a charge of conspiracy, tho made shortly before the time when it is alleged the conspiracy was entered into, are, if material on his state of mind, admissible against him, and his co-defendant on trial may not complain if the declarations are offered, received, and confined strictly to the maker thereof.

State v Moore, 217-872; 251 NW 737

III TESTIMONY OF ACCOMPLICE

Accomplices—corroboration—sufficiency. If the testimony of an accomplice is corroborated by other witnesses in any material point tending to connect the defendant with the commission of the offense, it is sufficient. So held as to testimony relative to rings taken from the body of the deceased.

State v Clay, 222-1142; 271 NW 212

Accomplice per se. Whether a witness, testifying for the state as to the commission of the offense on trial, was an accomplice is not a jury question on a record which shows that the witness himself might be charged and convicted of said offense. On such a record, the court must peremptorily instruct that the witness was an accomplice, and properly guide the jury as to the necessity for corroboration.

State v Clay, 220-1191; 264 NW 77

Corroboration. Whether certain testimony was or was not corroborative of an accomplice is quite inconsequential when the record shows that such testimony was received for and limited to a purpose entirely foreign to the subject of corroboration.

State v Bohall, 207-219; 222 NW 389

Extent of corroboration. An accomplice need not be corroborated in all matters to which he testifies.

State v Gaskill, 200-644; 204 NW 213

Fatally incompetent evidence. The theory of the state that its sole witness to a felonious homicide (tho confessedly a participant in the transaction which led to the death of deceased) was not in fact an accomplice, because said witness acted under duress of and in fear of the defendant who was on trial, may not be supported by testimony that said defendant made a felonious assault on said witness some four months after the commission of said homicide.

State v Clay, 220-1191; 264 NW 77

At former trial. The transcript of the testimony of an accomplice given at former trial of the defendant in a criminal prosecution, is admissible on a retrial when the accomplice is found by the court to be out of the state and therefore beyond the reach of a subpoena.

State v Clay, 222-1142; 271 NW 212

Objections negatived by record. Manifestly there is no merit in the objection that testimony of an accomplice is inadmissible and should be stricken from the record when the record reveals no evidence that the witness was an accomplice, and when the record reveals ample corroboration of the witness' testimony.

State v Rowley, 216-140; 248 NW 340

IV DECLARATIONS AND ADMISSIONS OF DEFENDANT

Admissions. Evidence is admissible that after a party was arrested he inquired of the officer as to the punishment provided in this state for the offense which he was apparently attempting to commit.

State v Engler, 217-138; 251 NW 88

Admissions. Admissions of guilt by an accused are not rendered inadmissible on the trial of an indictment because made when accused was arrested under an information which misstated the time of the commission of the offense as prior to the time alleged in the indictment, the record demonstrating that but one offense was being prosecuted.

State v Heath, 202-153; 209 NW 279

Balanced instruction. A well-balanced instruction relative to both the weakness and strength of verbal admissions, is unobjectionable on a supporting record.

State v Friend, 210-980; 230 NW 425

Cautionary instructions. The record may be such as to require cautionary instructions as to the legal effect to be given to admissions and declarations of the accused.

State v Johnson, 211-874; 234 NW 263

Desire of defendant to kill self—inference of guilt. The jury in a manslaughter case arising from an automobile accident may consider evidence that, while standing by the body after the tragedy, the defendant asked a bystander if he had a gun, saying, "I would like to finish everything right now".

State v Graff, 228- ; 282 NW 745; 290 NW 97

Confession—justifiable instruction. Evidence that an accused stated that he participated in the robbery charged and that he was one of the three persons who entered the bank and knew where some of the stolen bonds were, justifies the court in giving a properly balanced instruction on the subject of confession.

State v Davis, 212-131; 235 NW 759

Confession—state not bound by exculpatory statements. The state by introducing defendant's written confession does not thereby preclude itself from showing, by direct or circumstantial evidence, the untruthfulness of exculpatory statements contained in said confession.

State v Ball, 220-595; 262 NW 115

Confessions—testimony of witness—admissibility. Testimony of witness that a confession was the free and voluntary act of the defendant is not an opinion or conclusion of the witness and may be received in evidence when

IV DECLARATIONS AND ADMISSIONS OF DEFENDANT—concluded

the circumstances to said confession are also in evidence.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Voluntary confession. In a prosecution for the crime of entering a bank with intent to rob, a voluntary statement made by the defendant and introduced upon cross-examination of defendant for purpose of impeachment in absence of evidence to indicate statement was not voluntary, places the burden on the defendant to show statement incompetent; and the fact that statement was made without warning the accused that it might be used against him does not affect its admissibility in the absence of statute requiring that the accused be warned.

State v Mikesh, 227-640; 288 NW 606

Confessions — when jury question. If the record affirmatively shows that confessions were obtained because of promises of a light sentence, they must be summarily rejected; if the record shows a fair conflict on the issue whether the confessions were so obtained, then said issue is for the jury.

State v Johnson, 210-167; 230 NW 513

Direct and circumstantial—directing verdict. Circumstantial evidence, supplemented by oral and written confessions of guilt may be such as to have the weight of direct evidence, and the court was right in overruling defendant's motion for directed verdict when, under the record, the established facts and circumstances were not only consistent with defendant's guilt but were inconsistent with any other reasonable hypothesis.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Letters—relevancy. Letters are properly received in evidence when shown to have been written by the accused in a criminal charge and to have relation to the transaction on which said charge is based.

State v Hixson, 208-1233; 227 NW 166

Nonvoluntary admission. The reception of admissions of guilt which were possibly nonvoluntary will not be deemed prejudicial when a voluntary written confession of guilt containing the same admissions is subsequently received.

State v Hammond, 217-227; 251 NW 95

Party bound by evidence. The state, by introducing certain testimony given by the defendant upon a former trial, is not bound thereby to admit that such testimony was true.

State v Lucas, 57-501; 10 NW 868

Plea of guilty in criminal prosecution. A plea of guilty in a criminal prosecution may be admissible as an admission when the judgment entered thereon would not be admissible.

In re Johnston, 220-328; 261 NW 908

Presumption. Admissions of guilt by an accused are presumptively voluntary.

State v Joy, 203-536; 211 NW 213

Refusal of disparaging instructions. Requested instructions in disparagement of admissions by an accused are properly refused when such admissions appear to have been deliberately and understandingly made.

State v Troy, 206-859; 220 NW 95

Review—self-invited error. An accused may not base error on the fact that matter detrimental to himself was brought out by himself.

State v Leitzke, 206-365; 218 NW 936

State's evidence not controlled by admission. The defendant cannot compel the state to accept his admission of a fact in lieu of evidence of such fact. In other words, the defendant cannot, by making certain admissions, control the state in its introduction of testimony.

State v Griffin, 218-1301; 254 NW 841

Voluntary inculpatory statements—warning of use against accused unnecessary. Police officer need not warn a person in custody that incriminating statements may be used against him, for, if voluntarily made, they are admissible in evidence without warning.

State v Beltz, 225-155; 279 NW 386

V RES GESTAE

Admissibility. Acts or declarations are always admissible as part of the res gestae when they are practically inseparable from the principal fact or transaction in question.

State v Woodmansee, 212-596; 233 NW 725

Competency—proper exclusion. The exclusion of declarations of unidentified bystanders, made shortly after an accident, to the effect that "the boys ran between the cars", does not constitute reversible error when ample evidence bearing on the same point was received in evidence, and when the said declarations were, in view of the entire record, quite inconsequential.

Riddle v Frankl, 215-1083; 247 NW 493

Evidence. What a person said about being sick and dizzy within a very few minutes after he had unwittingly drunk a lethal dose of poison is part of the res gestae.

State v Korth, 204-1360; 217 NW 236

Hearsay (?) or res gestae (?). Hearsay which is no part of the res gestae is inadmissible.

State v Kneeskern, 203-929; 210 NW 465

Loaded revolver. The fact that a loaded revolver was found upon the seat of an automo-

bile carrying intoxicating liquors at the time the defendant was arrested while seated in the automobile is part of the res gestae and admissible as such.

State v Anderson, 216-887; 247 NW 306

Non-res-gestae statement — effect. The reception of evidence under the mistaken belief that it was part of the res gestae will be deemed nonprejudicial when the jury was already in possession of competent evidence which, if believed, established every fact which could be deduced from the supposed res gestae statement.

State v Ayles, 205-1024; 219 NW 41

Unallowable detail of hearsay and non-res-gestae statements. On the trial of an indictment charging the commission of lewd and lascivious acts with the body of a child, testimony of the parents of the child as to what they were told in detail by their children, singly and collectively, after they—the parents—returned home, relative to the acts of the defendant, and testimony of the prosecutrix as to what she detailed to her parents relative to the acts of the defendant are wholly incompetent for any purpose.

State v Rounds, 216-131; 248 NW 500

VI DECLARATIONS OF CO-DEFENDANTS

Conspiracy. See under §13162

VII DECLARATIONS OF CO-CONSPIRATORS

Declarations of co-conspirators. See under §13162 (III)

VIII DECLARATIONS OF OTHERS IN GENERAL

Declarations of wife in presence of husband. Declarations of a wife in the presence and hearing of her husband, and undenied by the husband at the time, as to what the husband had done on a certain occasion, are admissible against the husband in a subsequent criminal proceeding against him, wherein the truth of said declarations is material, even tho the wife, if called as a witness against her husband, would not be competent to testify to the statements embodied in the declarations.

State v Sharpshair, 215-399; 245 NW 350

Material declaration of third party in presence of defendant. A material declaration by a third party in the presence of the defendant is admissible.

State v Slycord, 210-1209; 232 NW 636

Unallowable detail of hearsay and non-res-gestae statements. On the trial of an indictment charging the commission of lewd and lascivious acts with the body of a child, testimony of the parents of the child as to what they were told in detail by their children, singly and collectively, after they—the parents—returned home, relative to the acts of the defendant, and testimony of the prosecutrix as to what she detailed to her parents relative to the acts of the defendant are wholly incompetent for any purpose.

State v Rounds, 216-131; 248 NW 500

IX DYING DECLARATIONS

Dying declarations. Dying declarations and the circumstances attending the same reviewed, and held to justify their reception in evidence.

State v Gibson, 204-1306; 214 NW 743
State v Rowley, 216-140; 248 NW 340

Essential limitations. Dying declarations must be limited to the res gestae of the crime and to the facts and circumstances immediately surrounding the same. Declarations reviewed and held to violate this rule.

State v Sweeney, 203-1305; 214 NW 735

Admissibility. Principle recognized that the conduct of a defendant when first accused of the crime in question is admissible.

State v Johnson, 221-8; 264 NW 596; 267 NW 91

Flight and denial of identity. Instructions in re flight and denial of identity by defendant reviewed and held amply to protect the defendant.

State v Johnson, 222-574; 269 NW 354

Homicide—issue of competency. The time elapsing between the making of alleged dying declarations and the death of the declarant may be very material on the issue whether the declarant was in extremis, and had no hope of recovery, at the time the declarations were made; and prejudicial error results from so instructing the jury as to deprive it of the right to consider said lapse of time on such issue.

State v Sweeney, 203-1305; 214 NW 735

Instructions — justifiable refusal. Requested instructions in disparagement of dying declarations are properly refused, the court properly covering the subject by its own instructions.

State v Troy, 206-859; 220 NW 95

Theory of admissibility—instructions. Instructions as to the theory justifying the reception of evidence of dying declarations reviewed, and held to fully protect the accused.

State v Johnston, 221-933; 267 NW 698

X CONDUCT OF DEFENDANT

Attitude, actions, and conduct of accused. The attitude of an accused and what he said and did while under investigation relative to the charge against him may be admissible.

State v Vandewater, 203-94; 212 NW 339

Association with accomplice. An accused who becomes a witness in his own behalf may

X CONDUCT OF DEFENDANT—concluded

be impeached by testimony tending to establish his personal association with an accomplice, the existence of such association being material, and having been denied by the accused.

State v Hart, 205-1374; 219 NW 405

Attempt to bribe juror. An instruction to the effect that, if the jury believed that defendant had attempted to improperly influence the jury on a former trial, such conduct was a circumstance to be considered by the jury in determining the guilt of the defendant, is unobjectionable, even tho such instruction is based on a denial by defendant on cross-examination of such improper conduct, and on testimony by the state tending to show such misconduct, it appearing that the exceptions to the instruction did not embrace the point that the said testimony could only be used for impeaching purposes.

State v Friend, 210-980; 230 NW 425

Flight. The usual instructions relative to the effect of flight by one accused of crime are justified by evidence tending to show, (1) that the flight immediately followed the commission of the offense, and (2) that the accused was conscious that he was under suspicion as the perpetrator of the offense.

State v Loucks, 218-714; 253 NW 838

Flight or attempted escape. Flight or an attempt to escape is an indication of guilt and the court may very properly so instruct.

State v Harding, 204-1135; 216 NW 642

Flight subsequent to discharge. Evidence of flight and instructions as to the effect thereof may be proper even tho the flight took place after the accused had been once discharged under a prior preliminary information charging the same and identical offense and transaction.

State v Heath, 202-153; 209 NW 279

Liquor—unlawful transportation — incriminating circumstance. On a charge of unlawful transportation of liquors, evidence is admissible that, shortly before the accused was arrested with intoxicating liquors in his vehicle, he was seen on a somewhat remote highway, and near a cache containing such liquors.

State v Campbell, 209-519; 228 NW 22

Shooting as accident—evidence. On the issue whether the shooting and wounding of a prosecuting witness was accidental, the state may show that the accused at the time in question discharged his gun in different directions and wounded different persons.

State v Bingaman, 210-160; 230 NW 394

Failure of defendant to testify—comment by county attorney. The failure of the defendant in a criminal case to testify in his own behalf does not deprive him of the presumption of innocence, but the jury is entitled to consider it as an inference of guilt, and the county attorney may comment upon it.

State v Graff, 228- ; 282 NW 745; 290 NW 97

Instructions—weight given defendant's testimony. In a criminal prosecution, it is not error to give an instruction that, in considering the testimony of the defendant, the jury should consider that he is charged with a crime and, whether the testimony was given in good faith or for the purpose of avoiding conviction, the jury should give such testimony such weight as they believe it fairly entitled to, and no more.

State v McDowell, 228- ; 290 NW 65

XI HOSTILE FEELINGS

Hostile attitude of juror. The fact that a prospective juror, prior to the time when he was called and examined on his voir dire, took part, in the courtroom, in a demonstration hostile to the accused, does not necessarily show that the juror is disqualified as having formed an unqualified opinion as to guilt.

State v Wheelock, 218-178; 254 NW 313

XII INTENT

Discussion. See 24 ILR 471—Other crimes to show intent

Intoxication—burden of proof. An accused who pleads intoxication as a defense has the burden to show that his intoxication was to such extent and in such a degree that he was incapable of forming a criminal intent.

State v Patton, 206-1347; 221 NW 952

Intoxication as defense—burden of proof—instruction. While not interposed as an affirmative defense, evidence reviewed and held insufficient to prove that defendant was so intoxicated at the time of the commission of the homicide that he was unable to form criminal intent and instruction thereon held proper.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Proof of intent. An instruction informing the jury how intent may be proved or arrived at was proper in a murder prosecution.

State v Coleman, 226-968; 285 NW 269

XIII OTHER OFFENSES

(a) IN GENERAL

Discussion. See 24 ILR 471—Intent shown by other crimes

When admissible. Evidence which has material bearing on the issues in a criminal prosecution is admissible notwithstanding the fact that such evidence may tend to show that the accused is guilty of another and additional offense.

State v Campbell, 209-519; 228 NW 22

Allegations of former convictions. In prosecution for illegal possession of intoxicating liquor, county attorney's action in seeking to place the federal convictions before the jury, such matter being entirely withdrawn from the consideration of the jury, was not prejudicial to defendant and did not entitle him to a reversal when there was ample competent evidence to sustain the jury's verdict.

State v Caringello, 227-305; 288 NW 80

Contemplated offense. The fact that a transaction tends to show that an accused was contemplating the commission of a crime, is not a valid objection to its admissibility for impeaching purposes, when the transaction is inconsistent with and contradictory to the statements of the accused as to the facts attending the alleged offense for which he is on trial.

State v Davis, 212-582; 234 NW 858

Estoppel to allege error. A defendant may not predicate error on the reception of evidence of extraneous crimes claimed to have been committed by him when he interposes no objection at the time the evidence is offered, and when he later avails himself of the evidence under the claim that it tends to show his claimed insanity.

State v Mullenix, 212-1043; 237 NW 483

Evidence of former convictions. Records of former convictions are not, in and of themselves, sufficient evidence that the defendant on trial and the defendant in the former convictions are one and the same person, even tho the names are the same.

State v Logli, 204-116; 214 NW 490

Evidence of other offenses. The court in the trial of a criminal case is under no legal duty, in the absence of a request, to instruct the jury as to the particular purpose for which evidence of other offenses had been admitted.

State v McCutchan, 219-1029; 259 NW 23

Driving while intoxicated—second offense—unallowable evidence. On the issue of former conviction of driving an automobile while intoxicated, it is highly prejudicial to receive in evidence on the trial to the jury, the files of said former case. So held where said files consisted of (1) the information of the county attorney with minutes of testimony attached, (2) the indictment with the minutes of some 13 witnesses attached, (3) the bench warrant, and (4) mittimus.

State v De Bont, 223-721; 273 NW 873

Inquisition. In proceedings to determine the sanity of an indicted person, evidence is admissible which tends to show the commission by said person of crimes committed during a series of prior years, especially when such evidence is largely in rebuttal of testimony tending to show insanity.

State v Murphy, 205-1130; 217 NW 225

Other crimes. Evidence which has no other effect than to show that defendant had been guilty of other crimes than that charged in the indictment, is not admissible on the part of the state; neither is evidence of defendant's bad character, where he has not himself placed his character in issue.

State v Rainsbarger, 71-746; 31 NW 865

(b) SPECIFIC OFFENSES

Fraudulent banking—other offenses. In a prosecution for receiving bank deposits when the bank is insolvent, testimony tending to show a criminal diversion by the defendant of the funds of the bank, subsequent to the occurrence of the specific charge on which the indictment is based, is wholly inadmissible as bearing on the question of the solvency or insolvency of the bank on the prior date alleged in the indictment.

State v Brown, 215-600; 246 NW 258

Lascivious acts. On the trial of an indictment charging the commission of lewd and lascivious acts with the body of a child, evidence of the commission by the defendant of a similar offense with a child other than prosecutrix is admissible when the acts with the two children are so closely related in point of time and place, and so intimately associated with each other that they form one continuous transaction.

State v Rounds, 216-131; 248 NW 500

Similar offenses—instructions in re intent. When the state, after introducing evidence tending to establish several distinct offenses of a noncontinuing nature involving a specific intent, elects to rely upon one distinct transaction, the court may very properly instruct the jury that the remaining transactions of the same kind may be considered on the issue of intent.

State v Derry, 202-352; 209 NW 514

Successive offenses—guilty plea—needless proof. After a plea of guilty to a third offense of unlawful possession of intoxicating liquor, to require proof of the prior convictions would be a useless act, not contemplated by the legislature.

State v Erickson, 225-1261; 282 NW 728

Successive offenses—proof by certified copies. Statutes which authorize proof of former convictions of crime to be made by duly authenticated copies of said judgments of convictions are constitutional.

State v Murray, 222-925; 270 NW 355

Testimony tending to show distinct crime—admissibility. Testimony tending to show that the defendant, at a former trial, attempted to bribe the jurors is admissible, notwithstanding the fact that it tends to show the commission of a distinct and separate offense.

State v Friend, 210-980; 230 NW 425

XIII OTHER OFFENSES—concluded
(b) SPECIFIC OFFENSES—concluded

Unauthorized allegation of former conviction—effect. An unauthorized allegation in an indictment of a former conviction and the reception in evidence of proof thereof constitute reversible error, even tho, on conviction, the judgment imposed was within the limit provided for a first offense.

State v Bergman, 208-811; 225 NW 852

XIV MALICE

Murder — presumption of malice — intent. Principle reaffirmed that the use of a deadly weapon in a deadly manner generates a presumption of malice, and if death results, justifies the inference of intent to kill.

Klinkel v Saddler, 211-368; 233 NW 538

XV INSANITY

Burden to establish. Principle reaffirmed that a defendant must establish his plea of insanity by a preponderance of the evidence.

State v Maharras, 208-127; 224 NW 537

"Comprehension and consequence" rule. It is very firmly established that the nature, character, and degree of insanity which exonerate a party from criminal responsibility embrace inability rationally to comprehend the nature and consequences of the act in question.

State v Buck, 205-1028; 219 NW 17

Inquisition. In proceedings to determine the sanity of an indicted person, evidence is admissible which tends to show the commission by said person of crimes committed during a series of prior years, especially when such evidence is largely in rebuttal of testimony tending to show insanity.

State v Murphy, 205-1130; 217 NW 225

Irrelevant and immaterial evidence. On the issue of insanity in the trial of a criminal case, proof of a mental condition of the defendant which was neither progressive nor continuous is properly stricken from the record when there is no accompanying evidence that the defendant was in some degree subject to the influence of such condition at the time the crime was committed.

State v Brewer, 218-1287; 254 NW 834

Mental disease—jury questions. Whether psychopathic personality of the excitable type is a mental disease is properly submitted to the jury on controversial testimony.

State v Buck, 205-1028; 219 NW 17

Nonexpert witness. A nonexpert witness who has never seen an accused in a homicide case prior to the transaction which resulted in the homicide, may not express an opinion as to the then insanity of the accused.

State v Maharras, 208-127; 224 NW 537

Presumption of sanity. The presumption of sanity is not per se overcome by the peculiar atrocity accompanying a homicide.

State v Buck, 205-1028; 219 NW 17

Unsupported issue of insanity. The issue of insanity quite manifestly finds no support in testimony to the effect that the defendant is of such mentality that when he wants a thing he is not actuated by moral obligations, and, tho conscious of the wrong, proceeds to go and get the desired thing regardless of the rights of others.

State v Mullenix, 212-1043; 237 NW 483

XVI ALIBI

Burden of proof. The plea of alibi must be established by the accused by a preponderance of the evidence before he will be entitled to an acquittal on such plea.

State v Debner, 205-25; 215 NW 721

Burden of proof—instructions. A defendant who interposes an alibi must establish the same by a preponderance of the evidence. Instructions reviewed and held correct.

State v Sampson, 220-142; 261 NW 769

Essential elements. The plea of alibi in its true sense necessitates a showing by the accused to the extent of a preponderance of the testimony that he was so far away from the scene of the crime in question that he could not have committed it.

State v Debner, 205-25; 215 NW 721

Instructions. Instructions relative to the defense of alibi are always justified when the record reveals a manifest purpose on the part of the accused to rely on such defense.

State v Parsons, 206-390; 220 NW 328

Instructions. An accused who by his evidence manifestly seeks to show that at the time and place of the commission of the offense charged he was elsewhere may not on appeal deny the effect of such evidence and assert the inapplicability of correct instructions relative to the defense of alibi.

State v Bird, 207-212; 220 NW 110

Instructions in re alibi. Principle reaffirmed that the defense of alibi is easily manufactured and that jurors should scan the proofs with care and caution.

State v Bird, 207-212; 220 NW 110

Instructions construed as a whole. If instructions as a whole fairly present the law relative to a subject matter, e. g., alibi, they are not subject to the charge of being confusing and misleading.

State v Bird, 207-212; 220 NW 110

Insufficient basis. No basis for the usual instruction as to the defense of alibi is furnished (1) by evidence tending to show that

the accused spent several specifically named days in a named city in arranging for and purchasing certain materials with which to commit the crime out of which the prosecution arose, and (2) by counter evidence that the accused was not and in reason could not have been in said city on said days.

State v Carter, 222-474; 269 NW 445

Insufficient basis. A simple statement by an accused in his testimony that, at the time of the commission of the offense, he was in a place other than the place where the offense was committed does not necessarily arise to the dignity of an alibi and require any instructions relative thereto.

State v Hammond, 217-227; 251 NW 95

Jury question. Evidence held to present a question for the jury as to the identity of defendant as one who committed an assault, notwithstanding evidence tending to establish an alibi.

State v Fador, 222-134; 268 NW 625

Nature and requirements. Principle reaffirmed that an alibi is an affirmative defense, easily concocted, and calling for a preponderance of proof by the defendant.

State v Johnson, 221-8; 264 NW 596

Sufficiency. Testimony on behalf of an accused and tending to show that when the alleged offense was committed he was at a place which was not so located as to render impossible his presence at the scene of the alleged offense, does not constitute proof of an alibi or justify instructions on the theory of an alibi. Such testimony must be deemed merely incidental to the plea of not guilty.

State v Davenport, 208-831; 224 NW 557

When not in issue. Evidence which is merely incidental to the denial of an accused that he is guilty does not present the issue of alibi, and in such case reversible error results from the giving of the usual instruction as to the nature of such defense.

State v Wagner, 207-224; 222 NW 407; 61 ALR 882

When not an issue. Error results from instructing on the subject of alibi when the accused admits that he was in close proximity to the place where and when the alleged offense was committed, even tho he does account for his presence a few minutes prior thereto.

State v Steffen, 210-196; 230 NW 536; 78 ALR 748

XVII CIRCUMSTANTIAL EVIDENCE

Alleged stolen articles — when immaterial. Evidence that automobile tires of a well-known make, and in general use throughout the country, were stolen from a garage at the time it was burglarized and that when defendant was arrested he was using the same kind and size of tires on his automobile, is, in and of itself, wholly immaterial.

State v Sigman, 220-146; 261 NW 538

Arson. Circumstantial evidence may be ample to establish the corpus delicti in a charge of arson.

State v Henricksen, 214-1077; 243 NW 521

Bootlegging. An indictment for bootlegging may be sustained by circumstantial evidence.

State v Plew, 207-624; 223 NW 362

Circumstantial evidence.

State v Kneeskern, 203-929; 210 NW 465
State v Solomon, 203-954; 210 NW 448

Direct and indirect. The law recognizes that circumstances may indirectly, as well as directly, connect an accused with the commission of a crime.

State v Manly, 211-1043; 233 NW 110

Evidence — sufficiency. Circumstantial evidence held to establish the corpus delicti in a prosecution for larceny.

State v Manly, 211-1043; 233 NW 110

False pretenses—jury question. Falsity may be established by circumstantial evidence. Evidence held to present jury question.

State v Huckins, 212-283; 234 NW 554

Imprint of heel of shoe—when immaterial. Evidence tending to show, (1) that on the morning following the burglary of a garage a paper, bearing the imprint of the heel of a well known, and commonly worn make of shoe, was found on the floor of the garage, and (2) that when the defendant was arrested he was wearing a pair of said make of shoes, is wholly immaterial and must not be allowed, over objections, to remain in the record unless supplemented by some evidence tending to prove, (1) that the imprint was made at the time of the burglary and (2) by the defendant's shoe.

State v Sigman, 220-146; 261 NW 538

Instructions—proof open to two constructions. An instruction that, in order to convict on circumstantial evidence alone, the proof must not only be consistent with the defendant's guilt but also inconsistent with a theory of innocence, sufficiently covered the defendant's request for an instruction that if the evidence was open to two constructions, one consistent with guilt and the other with innocence, the defendant should be acquitted.

State v McDowell, 228- ; 290 NW 65

Inapplicability. Instructions to the effect that, in order to convict on circumstantial evidence, each fact in the chain of circumstances must be proven beyond a reasonable doubt; that all said facts must be connected with each other and with the main fact to be proven; and that said facts must produce a moral certainty

XVII CIRCUMSTANTIAL EVIDENCE—concluded

of defendant's guilt, are properly refused on a record revealing both direct and circumstantial evidence of guilt.

State v Ferguson, 222-1148; 270 NW 874

Instructions. Failure to instruct as to circumstantial evidence is not reversible error in a case wherein the evidence is not wholly circumstantial and especially when no such instruction was requested.

State v Shearer, 206-397; 220 NW 13

Instructions in re circumstantial evidence. An instruction that the state's case is based solely on circumstantial evidence is properly refused when the evidence is both direct and circumstantial.

State v Engler, 217-138; 251 NW 88

Nonapplicability—direct evidence. There is no occasion to instruct on circumstantial evidence when the evidence connecting the accused with the offense is direct.

State v Johnson, 215-483; 245 NW 728

Stolen property—ownership. Ownership of stolen property may be established by circumstantial evidence.

State v Johnson, 210-167; 230 NW 513

Possession of still—identification of exhibits. On the issue whether defendant was in possession of a still which was buried on defendant's premises, a coat and letters and documents therein, addressed to the defendant, and buried with the still, are admissible, there being some evidence that the coat belonged to defendant.

State v Trumbauer, 207-772; 223 NW 491

Refusal to instruct. A refusal of the court to instruct that the state's case rests solely on circumstantial evidence, even tho such is the record, is erroneous but not necessarily reversible error.

State v Glendening, 205-1043; 218 NW 939

Relevancy as test. Circumstances, if relevant and material, may be admissible, tho of no great weight or evidentiary importance.

State v Ferguson, 222-1148; 270 NW 874

Weight and sufficiency. Circumstantial evidence, when exclusively relied on to prove that a defendant did a certain wrongful act, must be of such a nature, and the facts embraced therein be so related to each other, that the theory that defendant did the act is the only conclusion that can fairly or reasonably be arrived at.

Gregory v Sorenson, 214-1374; 242 NW 91
State v Lowenberg, 216-222; 243 NW 538

Weight and sufficiency. Principle reaffirmed that circumstantial evidence when exclusively relied on to support a verdict of guilt in a criminal cause must point to the guilt of the defendant beyond all reasonable doubt and be inconsistent with any reasonable theory of the defendant's innocence. So held as to a charge of operating an automobile while intoxicated.

State v Hooper, 222-481; 269 NW 431

XVIII CORPUS DELICTI

Corpus delicti. Corpus delicti may be established by circumstantial evidence. So held as to charge of larceny.

State v Kelley, 193-62; 186 NW 834

Photographs—admissibility for limited purpose. In a prosecution for homicide the court committed no error in admitting in evidence photographs showing the condition of the body of the deceased at the time photographs were taken, said photographs so marked that laymen could properly interpret the meaning of markings thereon. Such evidence admissible even tho physician who performed post mortem and who identified abrasions and bruises so shown by these exhibits had not personally observed the condition of the body immediately prior to the taking of the photographs.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Unlawful transportation of liquor—proof of corpus delicti. Proof relative to the alcoholic nature of certain liquors reviewed and held ample to show they could be used for beverage purposes.

State v Anderson, 216-887; 247 NW 306

XIX CHARACTER AND REPUTATION

(a) IN GENERAL

Discussion. See 19 ILR 341—Recent reputation of crime; 24 ILR 498—Character testimony

Cross-examination. A good character witness, who testifies that the general reputation of an accused (charged with operating an automobile while intoxicated) for moral character is good, may, on cross-examination, be asked whether he has heard within a stated recent time that the defendant, while operating a motor vehicle and while in an intoxicated condition, had been involved in certain specified accidents.

State v Wheelock, 218-178; 254 NW 313

Cross-examination as to remote matters. The cross-examination of a good-character witness may not be carried into matters which are from eight to twelve years remote from the time of trial.

State v Bell, 206-816; 221 NW 521

General reputation—sufficiency. The point that a question calls for testimony of the "reputation" of a witness, instead of testimony of the general reputation, is not raised by the objection of incompetency and immateriality.

State v Dillard, 205-430; 216 NW 610

Good character as defense. Defendant in a criminal prosecution may place in issue that trait of his character which is questioned by the charge made against him, and may sustain his good character as to said trait (1) by evidence of his good reputation as to said trait, or (2) by the direct testimony of witnesses who, by knowledge, qualify to speak as to such good character.

State v Ferguson, 222-1148; 270 NW 874

Good moral character—reasonable doubt created. Evidence of good moral character of the defendant in a criminal prosecution is not in itself sufficient to generate a reasonable doubt of guilt so as to justify a reversal of a conviction on the ground that the lower court should have directed a verdict in the defendant's behalf, when the jury was justified in believing the evidence against the defendant.

State v McDowell, 228- ; 290 NW 65

Good character of defendant. Where the defendant has introduced evidence of his good character, the state, in rebuttal, is confined to general evidence that his character is not good in the particular in question, and evidence of particular acts indicative of bad character must be excluded.

State v Sterrett, 71-386; 32 NW 387

Bad moral character of defendant. Where the defendant in a criminal prosecution takes the stand in his own behalf, his bad moral character may be shown in derogation of his credibility.

State v Kirkpatrick, 63-554; 19 NW 660

Impeachment—unnecessary limitation. Testimony of general bad moral character of an accused and of his bad reputation for truth and veracity need not be limited to the very time of the commission of the offense on trial.

State v Parsons, 206-390; 220 NW 328

Impeachment—improper but harmless cross-examination. The cross-examination of a good-character witness for a defendant in a criminal case should be limited to reports and rumors in the community to negative good reputation. But ordinarily prejudicial and reversible error will not be deemed to result from an improper cross-examination when it is not extreme, when the answers are favorable to defendant, and when the court promptly admonishes the jury to wholly disregard such examination.

State v Clay, 222-1142; 271 NW 212

Objection to qualification. Objection to the qualification of witnesses to testify to the reputation of a party to an action cannot be raised for the first time on appeal.

State v Hamilton, 151-533; 132 NW 44

(b) INSTRUCTIONS

Good character. Reversible error results from instructing that "evidence of good character is a circumstance which may be shown for the purpose of rebutting the presumption of guilt arising from circumstantial evidence".

State v Dunn, 202-1188; 211 NW 850

Good character—effect. Evidence of the defendant's former good character must be considered by the jury, along with all other facts and circumstances, in determining the question of guilt or innocence; and it is error for the court, after so instructing, to say that, if the jury finds him guilty beyond all reasonable doubt, then evidence of good character is no defense and should not be considered.

State v Hillman, 203-1008; 213 NW 603

Good character generating reasonable doubt. The previous good character of an accused (as to the trait involved) shown either (1) by the general reputation of the accused, or (2) by actual personal experience of witnesses with the accused, may, in connection with all the evidence in the case, generate a reasonable doubt of the guilt of the accused, and entitle him to an acquittal. And the jury must, on request, be so instructed.

State v Ferguson, 222-1148; 270 NW 874

Instructions — moral character — reasonable doubt. An instruction as to the weight to be given evidence of good moral character of the defendant was not incorrect in adding that if, under all the evidence, including that bearing on moral character, there was no reasonable doubt as to guilt, the jury should convict, however good the character may have been.

State v McDowell, 228- ; 290 NW 65

Good character and peaceable disposition. The instructions must not place upon the defendant the burden of proof to establish his alleged peaceable disposition and good character.

State v Johnson, 211-874; 234 NW 263

Instructions. Instructions guiding the jury in the consideration of good-character evidence reviewed and held correct.

State v Bell, 206-816; 221 NW 521
State v Blair, 209-229; 223 NW 554
State v Harness, 214-160; 241 NW 645

Instructions—sufficiency. Instruction in re good character reviewed and held, in effect, to correctly direct the acquittal of the accused if, from a consideration of all the evidence, including the evidence as to good reputation, the jury had any reasonable doubt of his guilt.

State v Fador, 222-134; 268 NW 625

Instructions in re character witnesses. Correct instructions, in a criminal prosecution relative to the weighing of defendant's testimony, are not required to be accompanied by instructions relative to the testimony of defendant's good-character witnesses. If defendant desired the latter he should ask for them.

State v Schenk, 220-511; 262 NW 129

XIX CHARACTER AND REPUTATION—concluded
(b) INSTRUCTIONS—concluded

Questionable instruction. Defendant is entitled, on request, to a specific instruction to the effect that evidence of his good character may be sufficient to generate a reasonable doubt of guilt. Instruction substituted by the court for one requested, reviewed and criticized.

State v Reynard, 205-220; 217 NW 812

Right to rebut. A defendant is not entitled to an instruction to the effect that the state has the right to rebut his testimony of good moral character.

State v Wheelock, 218-178; 254 NW 313

Weight of reputation evidence. An instruction in a criminal trial with reference to the weight and effect of evidence of good reputation of the defendants was not reversible error when the defendants led the way in offering evidence of reputation rather than character.

State v Coleman, 226-968; 285 NW 269

13900 Corroboration in rape, seduction, and other crimes.

ANALYSIS

I IN GENERAL
II RAPE
(a) IN GENERAL
(b) OPPORTUNITY
(c) COMPLAINT
(d) ADMISSIONS AND CONFESSIONS
(e) COURT AND JURY
III SEDUCTION

I IN GENERAL

Incest. A father may be convicted for the crime of incest committed upon his daughter by her uncorroborated testimony, where the act was accomplished by force.

State v Rennick, 127-294; 103 NW 159

II RAPE

(a) IN GENERAL

Rape. Evidence that defendant was seen driving away from the place where the alleged crime of rape was committed; that no one else was present who could have committed the crime; that there were automobile tracks leading toward a highway from the place where the prosecutrix said that defendant stopped his machine; and that defendant had the opportunity, which was of his own making, to commit the crime, was sufficient corroborating evidence to take the case to the jury.

State v Lindsay, 161-39; 140 NW 903

Uncertain identification of accused. The identification of an accused, under a charge of rape, at the time of the occurrence in question, tho somewhat uncertain and equivocal, may justify the jury in finding that the corroboration is sufficient.

State v Mueller, 202-1067; 208 NW 360

Sufficiency. Corroboration sufficient to sustain a verdict of guilty of assault to rape is found in testimony tending strongly to show that the accused was actually observed by witnesses other than prosecutrix in the attempt forcibly to have sexual intercourse with prosecutrix.

State v Mayer, 204-118; 214 NW 710
State v *Grimm*, 212-1193; 237 NW 451

Corroboration. Evidence, aside from that of prosecutrix, reviewed, and held sufficient to point out the defendant, in a charge of rape, as the guilty party.

State v Grimm, 212-1193; 237 NW 451

Sufficiency. Evidence in a prosecution for assault to rape, reviewed, and held sufficient to submit to the jury on the issue of corroboration.

State v Teager, 222-392; 269 NW 348
State v *Johnson*, 222-574; 269 NW 354

Impeachment of witness. Where upon a trial for rape the prosecuting witness was corroborated by the testimony of another, whom the defendant sought to impeach, held, that it was for the jury to determine, in view of all the facts, whether or not the witness had been impeached.

State v Mylor, 46-192

Insufficiency. Corroboration of a charge of rape may not rest on the facts that the accused expressed his affection for the prosecutrix shortly after the commission of the alleged offense; that he then attempted to meet the prosecutrix; that, when arrested, he asked the officer if there was some way to settle the matter and avoid going to jail; and that he might have had the opportunity to commit the offense.

State v Lamberti, 200-1241; 206 NW 128

Insufficiency. The demeanor of the defendant when identified by the prosecutrix after his arrest, in simply "dropping his head and remaining silent", is wholly insufficient to constitute the required corroboration.

State v Greiner, 203-248; 212 NW 465

Child a proper corroborating witness—weight for jury. Age alone of a ten-year-old corroborating witness will not vitiate her testimony, since credibility and weight are matters for the jury.

State v Beltz, 225-155; 279 NW 386

Eight-year-old witness. In prosecution for statutory rape where it is shown on preliminary examination of eight-year-old witness that she knew what "telling the truth" meant and knew what a lie was, that it was wrong to tell a lie, and that punishment was the penalty for

not telling the truth, it was not error to permit such witness to testify, especially where no objection was made to witness' competency until the conclusion of her testimony, altho she did not understand the meaning of the word "oath", nor definition of word "witness".

State v Diggins, 227-632; 288 NW 640

Eight-year-old witness—credibility. In a prosecution for statutory rape where an eight-year-old witness testified on direct examination in a clear, frank, direct, and intelligent manner as to what she had seen or heard on the occasion in controversy, a motion to strike such testimony was properly overruled, as the question of the credit and weight to be given her testimony was clearly for the jury. The testimony of a witness must be construed in its entirety.

State v Diggins, 227-632; 288 NW 640

Fatally erroneous instruction. Fatal error results from instructing that corroboration of prosecutrix in a charge of rape may be found from "the evidence in the case or the lack thereof."

State v Pritchard, 204-417; 215 NW 256

Proof beyond reasonable doubt. An instruction in a criminal case requiring proof beyond a reasonable doubt, of every material fact issue, must be deemed to apply to the proof of corroboration in those criminal cases wherein proof of corroboration is required.

State v Ingram, 219-501; 258 NW 186

Inferential instruction insufficient. Where defendant was convicted of assault with intent to commit rape, failure to instruct jury as to necessity of corroboration of prosecuting witness' testimony—an essential element of conviction—was prejudicial error, and the jury was not sufficiently instructed as to this necessity by inference from another instruction on corroboration given in connection with the court's statement that crime charged in indictment was rape, which included the lesser offense of assault with intent to commit rape. Nor was the error rendered nonprejudicial by the fact that record contained evidence of corroboration, since it is not the court's function to pass upon weight and sufficiency of corroborating evidence, except to determine whether it is sufficient to go to the jury.

State v Ervin, 227-181; 287 NW 843

(b) OPPORTUNITY

Insufficiency. Evidence to the effect that one convicted of assault with intent to commit rape requested, on the occasion in question, the privilege of taking the prosecuting witness and her adult female relative to their home is wholly insufficient to show that the accused deliberately created an opportunity for committing the crime charged, which would, in itself, constitute sufficient corroboration.

State v Hatcher, 201-936; 208 NW 307

Opportunity only insufficient. Corroboration is quite insufficient when, in its last analysis, the testimony simply demonstrates that the accused had the opportunity to commit the offense in his home which was his place of business.

State v Brundidge, 204-111; 214 NW 569
State v Ashurst, 210-719; 231 NW 319

Seeking opportunity — precluding guilt of others—guilty conscience. Evidence, including certain writings of the defendant, and his conduct in general, exhaustively reviewed in a prosecution for rape on a child under 16 years of age, and held to reveal no sufficient corroboration of prosecutrix either on the theory (1) that he had been seeking an opportunity to commit said offense on prosecutrix, or (2) that he was the only person who could have committed the offense; or that a manifestation of guilty conscience furnished such corroboration.

State v Landes, 220-201; 262 NW 105

Planned opportunity — evidence — sufficiency. In a prosecution for rape or assault to commit rape, the required legal corroboration of prosecutrix may appear in testimony to the effect that defendant designedly planned an opportunity to commit the crime on prosecutrix. Evidence reviewed and held wholly insufficient to establish such planning.

State v Whitney, 220-1203; 263 NW 803

(c) COMPLAINT

No annotations in this volume

(d) ADMISSIONS AND CONFESSIONS

Defendant's admission. The admissions of a defendant charged with rape that he had sexual intercourse with the prosecutrix were sufficient corroborating evidence.

State v Haugh, 156-639; 137 NW 917

Admissions of accused. Statutory corroboration in a prosecution for rape may be found in the general admission of the accused that he had had sexual intercourse with the prosecutrix even tho such admissions did not specifically refer to the transaction on which the state elects to rely.

State v Speck, 202-732; 210 NW 913

Tacit admission. Corroboration sufficient to sustain a verdict of guilty of assault to rape may be found in testimony wherein defendant tacitly admitted his immoral relation with the prosecutrix and his departure from the state for the purpose of avoiding prosecution.

State v Tennant, 204-130; 214 NW 708

Purpose — accused's admissions sufficient. Fact of the commission of a rape or an assault with intent to commit rape may be established by the sole evidence of the prosecutrix, and corroboration is necessary only to connect the accused with the crime, hence accused's voluntary admissions may furnish corroboration.

State v Beltz, 225-155; 279 NW 386

II RAPE—concluded

(d) ADMISSIONS AND CONFESSIONS—concluded

Corroboration by confession—sufficiency. In prosecution for statutory rape, testimony of prosecutrix alone is sufficient to prove the commission of the offense, yet she must be corroborated by other evidence which points out the defendant as the guilty party, but defendant's voluntary confession of intercourse with prosecutrix is sufficient corroboration.

State v Banks, 227-1208; 290 NW 534

(e) COURT AND JURY

Conclusiveness of supported verdict. A conviction of rape on supporting testimony and on ample corroboration is conclusive on the court.

State v Steele, 209-550; 228 NW 75

Impeachment of witness. Where upon a trial for rape the prosecuting witness was corroborated by the testimony of another, whom the defendant sought to impeach, held, that it was for the jury to determine, in view of all the facts, whether or not the witness had been impeached.

State v Mylor, 46-192

Credibility of testimony—jury question. In a prosecution for statutory rape where an eight-year-old witness testified on direct examination in a clear, frank, direct, and intelligent manner as to what she had seen or heard on the occasion in controversy, a motion to strike such testimony was properly overruled, as the question of the credit and weight to be given her testimony was clearly for the jury. The testimony of a witness must be construed in its entirety.

State v Diggins, 227-632; 288 NW 640

Evidence warranting submission to jury. In a prosecution for statutory rape it is essential that the testimony of a prosecuting witness be corroborated by other testimony tending to connect the defendant with the commission of the crime, but it is not necessary that all of the material evidence of the prosecuting witness be corroborated. The question of whether there was statutory corroboration is a question for the trial court, and there was sufficient evidence of corroboration by an eight-year-old witness as to what she saw and heard to warrant the submission of the question of corroboration to the jury.

State v Diggins, 227-632; 288 NW 640

Instruction on corroborating evidence—sufficiency. In a prosecution for statutory rape, the court instructed the jury that the state has the burden of proving that defendant was guilty beyond a reasonable doubt, and gave an instruction on corroborating testimony stating that the fact that the crime of rape or of assault with intent to commit rape had been committed by someone may be established by the testimony of the injured party alone if the jury is satisfied beyond a reasonable doubt that her testimony establishes such fact; but before the defendant can be convicted of the crime proven there must be other credible evidence than that of the injured party that singles out and points to the defendant as the guilty party and tends to connect him with the commission of the crime, to which the objection is raised to the use of the words "crime proven" as an assumption of the essential fact that the crime had been committed. The words "crime proven" obviously refer to the immediately preceding statement and the instruction when considered in its entirety and in connection with other instructions is not subject to the criticism made.

State v Diggins, 227-632; 288 NW 640

Failure to instruct not cured by evidence. Where defendant was convicted of assault with intent to commit rape, failure to instruct jury as to necessity of corroboration of prosecuting witness' testimony—an essential element of conviction—was prejudicial error, and the jury was not sufficiently instructed as to this necessity by inference from another instruction on corroboration given in connection with the court's statement that crime charged in indictment was rape, which included the lesser offense of assault with intent to commit rape. Nor was the error rendered nonprejudicial by the fact that record contained evidence of corroboration, since it is not the court's function to pass upon weight and sufficiency of corroborating evidence, except to determine whether it is sufficient to go to the jury.

State v Ervin, 227-181; 287 NW 843

III SEDUCTION

Absence of testimony to support. An instruction relative to the conditions under which the birth of a child would be corroborative of the prosecutrix under an indictment for seduction is necessarily erroneous when there is no testimony in the record from which the jury could find such conditions.

State v Reynard, 205-220; 217 NW 812

Acquaintanceship, opportunity, or birth of child as corroboration. In seduction prosecution it is a well established rule that evidence of mere acquaintanceship, opportunity, or birth of a child, does not, singly or collectively, meet the statutory requirement on corroboration.

State v Moss, 202-164; 209 NW 276

Unsigned letters. Where a jury is warranted in a finding that defendant wrote unsigned letters which corroborated the claim

of seduction made, this is sufficient statutory corroboration.

State v Bradbury, 92-512; 61 NW 192

13901 Corroboration of accomplice.

ANALYSIS

I IN GENERAL

Failure to define. Failure to define the term "accomplice" is quite harmless when the jury is peremptorily told that the witness in question is an accomplice.

State v Gill, 202-242; 210 NW 120

Objections negatived by record. Manifestly there is no merit in the objection that testimony of an accomplice is inadmissible and should be stricken from the record when the record reveals no evidence that the witness was an accomplice, and when the record reveals ample corroboration of the witness' testimony.

State v Rowley, 216-140; 248 NW 340

II WHO DEEMED ACCOMPLICE

Accomplice per se. Whether a witness, testifying for the state as to the commission of the offense on trial, was an accomplice is not a jury question on a record which shows that the witness himself might be charged and convicted of said offense. On such a record, the court must peremptorily instruct that the witness was an accomplice, and properly guide the jury as to the necessity for corroboration.

State v Clay, 220-1191; 264 NW 77

Intoxicated driver. The owner of an automobile who causes another person to operate the car while such other person is intoxicated because such other person is less drunk than the owner becomes an accomplice in the offense of operating an automobile while intoxicated.

State v Myers, 207-555; 223 NW 166

III WHO NOT DEEMED ACCOMPLICE

Bootlegging. A witness may not be deemed an accomplice in the crime of bootlegging from the mere fact that, while riding with the accused, he (the witness) directed the driver of the vehicle to stop at a point where the accused apparently obtained the liquor.

State v Brundage, 200-1394; 206 NW 607

Incest. Principle reaffirmed that a prosecutrix in a prosecution for incest is not an accomplice if she did not voluntarily submit to the acts of sexual intercourse.

State v Candler, 204-1355; 217 NW 233

Fatally incompetent evidence. The theory of the state that its sole witness to a felonious homicide (tho confessedly a participant in the transaction which led to the death of deceased) was not in fact an accomplice, because said witness acted under duress of and in fear of the defendant who was on trial, may not be supported by testimony that said defendant made a felonious assault on said witness some four months after the commission of said homicide.

State v Clay, 220-1191; 264 NW 77

Thief and receiver of property. One who steals property is not an accomplice of one who thereafter feloniously receives the stolen property.

State v Smith, 219-168; 256 NW 651
State v Wenks, 200-669; 202 NW 753

Abortion. The woman upon whom an abortion was attempted is not an accomplice to the crime, and corroboration of her testimony is not essential.

State v Stafford, 145-285; 123 NW 167

Accessory after fact — corroboration. An accessory after the fact is not an accomplice to the main crime and therefore not within the purview of this section.

State v Philpott, 222-1334; 271 NW 617

IV CORROBORATION

(a) NATURE OF EVIDENCE

Telegram to accomplice—permissible corroboration. The state may corroborate the testimony of its accomplice-witness, even tho such corroboration does not "tend to connect the defendant with the commission of the offense." So held where a telegram transmitting money to the accomplice was received in evidence in corroboration of the testimony of the accomplice that he had received money from the accused by means of such telegram.

State v Lozier, 200-652; 204 NW 256

Accused and accomplice at scene of crime. Corroboration of an accomplice may be found in independent evidence (1) that the accused and the accomplice were seen in the immediate vicinity of the place where the crime was consummated and (2) that the defendant's car was identified as the one employed in aid of the commission of the offense.

State v Loucks, 218-714; 253 NW 838

Corroboration as to exhibits. A material exhibit duly identified by an accomplice is admissible against an accused, even tho the evidence corroborative of the accomplice does not extend to said particular exhibit.

State v Lozier, 200-652; 204 NW 256

Reputation of corroborative witness. It does not necessarily follow that testimony corrob-

IV CORROBORATION—concluded
(a) NATURE OF EVIDENCE—concluded

orative of an accomplice is insufficient because the witness is of bad reputation.

State v Peacock, 201-462; 205 NW 738

Accomplices—corroboration evidencing separate offense. Testimony which fortifies the testimony of an accomplice is admissible on the issue of corroboration, even tho such testimony tends to show the commission of a crime by the defendant separate and distinct from the crime for which the defendant is on trial.

State v Burzette, 208-818; 222 NW 394

Circumstantial evidence. Corroboration of an accomplice may be found in the circumstances surrounding and attending the commission of an offense.

State v Gill, 202-242; 210 NW 120
State v Carlson, 203-90; 212 NW 312

By admissions. Admissions of an accused may, of course, be of such nature as to furnish the required corroboration of an accomplice.

State v Morrison, 221-3; 265 NW 355

Sufficiency—rings worn by deceased. If the testimony of an accomplice is corroborated by other witnesses in any material point tending to connect the defendant with the commission of the offense, it is sufficient. So held as to testimony relative to rings taken from the body of the deceased.

State v Clay, 222-1142; 271 NW 212

(b) EFFECT OF EVIDENCE

Corroboration sufficient.

State v Owen, 196-285; 194 NW 187

Evidence connecting defendant to crime. Corroboration of the testimony of an accomplice in breaking and entering is sufficient if it supports his testimony in some material fact tending to connect the defendant with the commission of the offense. Proof held sufficient.

State v Proost, 225-628; 281 NW 167

Part of testimony corroborated. If an accomplice is sufficiently corroborated as to any material part of his statements as a witness, then the jury is at liberty to believe any other part of his said statements, even tho there is no corroboration whatever as to such other part. Corroboration held ample in a prosecution for receiving stolen property.

State v Lozier, 200-652; 204 NW 256

Extent of corroboration. An accomplice need not be corroborated in all matters to which he testifies.

State v Gaskill, 200-644; 204 NW 213

Corroboration as to part of testimony. An accomplice need not be corroborated as to every fact testified to by him. Corroboration as to burglary held sufficient.

State v Hart, 205-1374; 219 NW 405

Sufficiency — murder. Corroboration of an accomplice, in a prosecution for murder, held ample.

State v Thompson, 222-642; 269 NW 774

Larceny. Evidence considered and held sufficient to corroborate an accomplice and support a verdict of guilty on a prosecution for larceny.

State v Blain, 118-466; 92 NW 650

Sufficiency. Evidence in a prosecution for robbery reviewed and held to furnish ample corroboration of the testimony of accomplices.

State v Williams, 218-780; 254 NW 42

Failure of accused to deny evidence. Whether a record contains sufficient evidence to support a conviction may be materially influenced by the failure of the accused, as a voluntary witness in his own behalf, to deny in part the incriminating evidence of an accomplice.

State v Lozier, 200-652; 204 NW 256

Testimony of accomplice unsupported. Corroborative testimony which depends for its materiality entirely upon the unsupported testimony of the accomplice is insufficient to meet the statutory requirement that such testimony must connect the defendant with the commission of the offense.

State v Pauley, 210-192; 230 NW 555

Absence of corroboration. Record reviewed and held to contain neither direct nor circumstantial evidence corroborative of an accomplice, and therefore insufficient to sustain a conviction.

State v Winters, 209-565; 228 NW 286

Testimony not for corroboration. Whether certain testimony was or was not corroborative of an accomplice is quite inconsequential when the record shows that such testimony was received for and limited to a purpose entirely foreign to the subject of corroboration.

State v Bohall, 207-219; 222 NW 389

(c) JUDGE AND JURY

Mandatory duty to instruct. The court must, on its own motion, instruct as to the necessity for corroboration of an accomplice.

State v Myers, 207-555; 223 NW 166; 29 NCCA 569

13902 Proof of overt acts.

Civil liability. A conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy, would give a right of action.

Hall v Swanson, 201-134; 206 NW 671
Dickson v Young, 202-378; 210 NW 452

13903 Confession of defendant.

ANALYSIS

I WHAT CONSTITUTES CONFESSION
II VOLUNTARY CONFESSIONS
III INVOLUNTARY CONFESSIONS
IV MENTAL CONDITION AT TIME OF CONFESSION
V CORROBORATION NECESSARY

I WHAT CONSTITUTES CONFESSION

Discussion. See 18 ILR 73—Admissibility

Admissions and confessions. In prosecution for murder, defendant's voluntary written statement, admitted in evidence and referred to as confession, which in fact did not acknowledge crime charged, merely containing a statement of facts and circumstances, an instruction that statement is not a confession, but an admission of the truth of the matters therein contained, is proper and not reversible error.

State v Norton, 227-13; 286 NW 476

Admissions by accused. In prosecution for murder, defendant's voluntary written statement made by him which does not acknowledge guilt of crime charged, but which contains a statement of facts and circumstances from which guilt might be inferred, constitutes substantive evidence of facts stated, and may be admissible as an admission in support of the charge.

State v Norton, 227-13; 286 NW 476

Confessions (?) or contradictory statements (?). Evidence that an accused made contradictory statements as to how and of whom he obtained certain property imposes no obligation on the court to instruct on the subject of confessions of guilt.

State v Dunn, 202-1188; 211 NW 850

Confession—state not bound by exculpatory statements. The state by introducing defendant's written confession does not thereby preclude itself from showing, by direct or circumstantial evidence, the untruthfulness of exculpatory statements contained in said confession.

State v Ball, 220-595; 262 NW 115

Preliminary examination in re confession. No error results from denying to an accused the right to examine, apart from the jury, the witnesses for the state as to the voluntary character of a confession when the entire record clearly presents a jury question on such issue.

State v Harding, 204-1135; 216 NW 642

Proof of corpus delicti. A naked confession made out of court will not sustain a conviction unless the corpus delicti is otherwise proven. So held as to a charge of maintaining an intoxicating liquor nuisance, there being no evidence that the accused had ever, directly or indirectly, been engaged in trafficking in such liquors.

State v Thomsen, 204-1160; 216 NW 616

Two on trial. Instructions as to confession held correct inasmuch as the jury could not have inferred that any confessions made by K. were in any manner to prejudice B.

State v Kreiger, 71-32; 32 NW 13

II VOLUNTARY CONFESSIONS

Confessions—burden of proof. Principle reaffirmed that, where a confession of guilt appears to be free and voluntary, the burden is on the accused to establish the contrary.

State v Dunn, 202-1188; 211 NW 850

Confessions — jury question. A conflict of testimony on the issue whether an alleged confession was voluntary necessarily generates a jury question.

State v Kress, 204-828; 216 NW 31
State v Jackson, 205-592; 218 NW 273

Confessions — jury question. Whether a confession should be wholly rejected because improperly obtained is properly submitted to the jury when the only testimony which tends to show that the confession was not voluntary comes from the accused.

State v Harding, 204-1135; 216 NW 642

When jury question. If the record affirmatively shows that confessions were obtained because of promises of a light sentence, they must be summarily rejected. If the record shows a fair conflict on the issue whether the confessions were so obtained, then said issue is for the jury.

State v Johnson, 210-167; 230 NW 513

Accused's burden to show inadmissibility. In a prosecution for the crime of entering a bank with intent to rob, a voluntary statement made by the defendant and introduced upon cross-examination of defendant for purpose of impeachment in absence of evidence to indicate statement was not voluntary, places the burden on the defendant to show statement incompetent, and the fact that statement was made without warning the accused that it might be used against him does not affect its admissibility in the absence of statute requiring that the accused be warned.

State v Mikesh, 227-640; 288 NW 606

Admissibility. Where there is no suggestion in the evidence that a defendant was induced to make a statement concerning his connection with the offense charged, his direct and positive confession is admissible in evidence, even tho he had no attorney present at the time.

State v Neubauer, 145-337; 124 NW 312

Admissions by accused. In prosecution for murder, defendant's voluntary written statement made by him which does not acknowledge

II VOLUNTARY CONFESSIONS—concluded

guilt of crime charged, but which contains a statement of facts and circumstances from which guilt might be inferred, constitutes substantive evidence of facts stated, and may be admissible as an admission in support of the charge.

State v Norton, 227-13; 286 NW 476

Admissions and confessions. In prosecution for murder, defendant's voluntary written statement, admitted in evidence and referred to as confession, which in fact did not acknowledge crime charged, merely containing a statement of facts and circumstances, an instruction that statement is not a confession, but an admission of the truth of the matters therein contained, is proper and not reversible error.

State v Norton, 227-13; 286 NW 476

Burden to disprove. The burden is on the defendant to prove the incompetency of a confession appearing on its face to be free and voluntary.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Rape—corroboration—sufficiency. Corroboration sufficient to sustain a verdict of guilty of assault to rape may be found in testimony wherein defendant tacitly admitted his immoral relations with prosecutrix and his departure from the state for the purpose of avoiding prosecution.

State v Tennant, 204-130; 214 NW 708

Direct and circumstantial—directing verdict. Circumstantial evidence, supplemented by oral and written confessions of guilt may be such as to have the weight of direct evidence, and the court was right in overruling defendant's motion for directed verdict when, under the record, the established facts and circumstances were not only consistent with defendant's guilt but were inconsistent with any other reasonable hypothesis.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Opening statement—reference to confession—effect. No misconduct on the part of the county attorney is shown when he, in good faith and with reasonable ground for believing the evidence admissible, told the jury in his opening statement that the evidence would show that defendant made a written confession in the presence of the chief of police, which confession and attending conversation were later admitted as competent evidence.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Repetition of testimony. On a trial for murder, the reception in evidence of a statement signed by defendant, and explanatory of the shooting in question, is quite unobjectionable and harmless when the statement is but a repetition of the testimony of the defendant on the trial.

State v Harness, 214-160; 241 NW 645

Testimony of voluntary confession—admissibility. Testimony of witness that a confession was the free and voluntary act of the defendant is not an opinion or conclusion of the witness and may be received in evidence when the circumstances to said confession are also in evidence.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Voluntary or involuntary confession—jury question. Principle reaffirmed that a confession to be admissible in evidence must be free and voluntary and not induced by threat or violence or any direct or implied promise or inducement. Held, in trial of defendant for alleged homicide, that the fact that defendant was not represented by counsel at the time he signed the confession would not render it involuntary, and that the court correctly submitted the question of the voluntary character of confession to jury.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Voluntary inculpatory statements—warning of use against accused unnecessary. Police officer need not warn a person in custody that incriminating statements may be used against him, for, if voluntarily made, they are admissible in evidence without warning.

State v Beltz, 225-155; 279 NW 386

III INVOLUNTARY CONFESSIONS

Evidence — confessions — burden of proof. Principle reaffirmed that, where a confession of guilt appears to be free and voluntary, the burden is on the accused to establish the contrary.

State v Dunn, 202-1188; 211 NW 850

Evidence — confessions — jury question. Whether a confession should be wholly rejected because improperly obtained is properly submitted to the jury when the only testimony which tends to show that the confession was not voluntary comes from the accused.

State v Harding, 204-1135; 216 NW 642

Instructions—voluntary or involuntary confession—jury question. Principle reaffirmed that a confession to be admissible in evidence must be free and voluntary and not induced by threat or violence or any direct or implied promise or inducement. Held in trial of defendant for alleged homicide, that the fact that defendant was not represented by counsel at the time he signed confession would not render it involuntary, and that the court correctly submitted the question of the voluntary character of confession to jury.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

IV MENTAL CONDITION AT TIME OF CONFESSION

Confession of crime—claim of intoxication—jury question. A purported confession as to lascivious acts with a child, the admissibility of which confession is objected to because of a claim of intoxication at the time the confession was made, raises a question properly submitted to the jury when it appears the defendant had not taken any liquor for 15 to 18 hours before the confession was made.

State v Hall, 225-1316; 283 NW 414

V CORROBORATION NECESSARY

Argument—incurable misconduct. Reversible error results from the assertion by the county attorney in argument before the jury in a criminal case that he (not a witness in the case) personally knows that the defendant had made a confession of the crime charged, especially when the record evidence tending to show guilt is weak.

State v Thomson, 219-312; 257 NW 805

Corroboration. Evidence of guilt only being an admission by the defendant, held that such evidence was not sufficient to sustain a verdict of guilty, unless corroborated.

State v Penny, 70-190; 30 NW 561

13904 Photographs—measurements—Bertillon system.

Photographs—admissibility for limited purpose. In a prosecution for homicide the court committed no error in admitting in evidence photographs showing the condition of the body of the deceased at the time photographs were taken, said photographs so marked that laymen could properly interpret the meaning of markings thereon. Such evidence admissible even tho physician who performed post mortem and who identified abrasions and bruises so shown by these exhibits had not personally observed the condition of the body immediately prior to the taking of the photographs.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

CHAPTER 648

INSANITY OF DEFENDANT DURING TRIAL

13905 Doubt as to sanity—procedure.

Jurisdiction of insanity commission and court. See under §3540

Discussion. See 14 ILR 401—Mental defectives—criminal law; 18 ILR 521—Presumption of insanity overcome

Evidence—burden of proof. The defendant has the burden of proving the defense of insanity to the reasonable satisfaction of the jury, by a preponderance of the evidence.

State v Robbins, 109-650; 80 NW 1061
State v Sigler, 114-408; 87 NW 283
State v Thiele, 119-659; 94 NW 256
State v Humbles, 126-462; 102 NW 409

Exclusive jurisdiction of district court. The district court acquires exclusive jurisdiction to determine the sanity of an indicted person when he is taken into custody under an indictment, and, during the pendency of such indictment, such jurisdiction continues, and attaches under a subsequently returned indictment under which the person is taken into custody. It follows that an adjudication of insanity of such person by the commission of insanity subsequent to the first indictment and prior to the last indictment is a nullity.

State v Murphy, 205-1130; 217 NW 225

Expert testimony as to insanity. Instructions to the effect that certain expert testimony might be found quite reliable and satisfactory, or the reverse, and entitled to little, if any, consideration, reviewed and held quite nonprejudicial.

State v Mullenix, 212-1043; 237 NW 483

Fatally delayed presentation. In order to suspend the ordinary proceedings in a prosecution for murder, and to enter upon a trial as to the insanity of the accused, the question of insanity must be raised before the end of the trial. (Motion in this case filed after sentence of death had been passed and judgment thereon entered.)

State v Tracy, 219-1412; 261 NW 527

Fundamental rule. Principle reaffirmed that the dividing line between accountability and nonaccountability in the taking of human life is the power or ability to know and distinguish right from wrong.

State v Maharras, 208-127; 224 NW 537

Ineffective expert testimony. The testimony of an expert to the effect that one who is unquestionably guilty of murder in the first degree is mentally responsible to receive a life sentence, but not mentally responsible to receive a death sentence, carries, at the best, very little element of persuasiveness.

State v Tracy, 219-1412; 261 NW 527

Knowledge of deceased's insanity as bearing on self-defense. Where a jury is instructed to the effect that "belief in" rather than the "fact of" necessity to kill is controlling, it is not reversible error to fail to instruct regarding accused's knowledge of deceased's insanity, especially when such an instruction was not requested.

State v Johnson, 223-962; 274 NW 41

Presumption of sanity. The law presumes the sanity of a person, and the burden of proof is upon him who seeks relief from a legal obligation on the ground of insanity.

State v Geddis, 42-264

Right to open and close. Where, in a prosecution for murder, the defense does not controvert the killing, but denies the necessary malicious intent on the ground of insanity of the defendant, the burden of proof being upon the state, the defendant is not entitled to the opening and closing argument.

State v Felter, 32-49
State v Robbins, 109-650; 80 NW 1061

13906 Method of trial.

Burden to establish. Principle reaffirmed that a defendant must establish his plea of insanity by a preponderance of the evidence.

State v Maharras, 208-127; 224 NW 537

Inquisition—evidence. In proceedings to determine the sanity of an indicted person, evidence is admissible which tends to show the commission by said person of crimes committed during a series of prior years, especially when such evidence is largely in rebuttal of testimony tending to show insanity.

State v Murphy, 205-1130; 217 NW 225

13907 Finding of insanity—discharge.

Adjudication of insanity. Whether a defendant in a criminal case who causes himself, when placed on trial, to be adjudged insane can appeal from such adjudication, quaere; but if he has such right, it is a quite barren one.

State v Demara, 210-726; 231 NW 337

13908 Restored to reason—returned to custody.

Atty. Gen. Opinion. See '25-26 AG Op 342

13909 Insanity after commitment to jail.

Layman's affidavit—insufficiency. In a criminal prosecution for entering a bank with intent to rob, the overruling of a motion for a new trial on the ground that defendant was mentally incompetent was not error where the issue was not raised on the trial, when the affidavit in support of such motion was merely a conclusion of a layman who was an acquaintance of the defendant several years before the trial, and when affidavit referred to one interview a week or ten days before the commission of the offense.

State v Mikesh, 227-640; 288 NW 606

CHAPTER 649

JURY AFTER SUBMISSION

13910 Papers taken by jury.

Additional annotations. See under §13944 (II)

Inconsequential evidence. The fact that certain identifying pasters were allowed to remain on liquor receptacles when they were taken by the jury on final submission is of no consequence when such pasters furnished the jurors no fact not already legally in their possession.

State v McGee, 207-334; 221 NW 556

13911 Report for information.

Unaddressed question from jury room—ignored by court. Inquiries from the jury room, presented to the judge but not addressed to the court or to anyone in particular, are properly ignored.

State v Ferguson, 226-361; 283 NW 917

13912 Discharge of jury—grounds.

Sealed verdict by agreement. Permitting the jury to return a sealed verdict and to separate and reassemble when the verdict is opened, is proper when the state and the defendant have agreed in writing to that effect; nor is it erroneous for the court to read such agreement to the jury.

State v Ferro, 211-910; 232 NW 127

13913 Retrial—when allowed.

Reversal or jury disagreement—retrial at same term unnecessary. Tho reversal of a judgment against a criminal defendant is an order for a new trial and a jury disagreement a cause for retrial, he need not be retried at the same term of court.

Ferguson v Bechly, 224-1049; 277 NW 755

CHAPTER 650

VERDICT

13915 General and special verdicts.

ANALYSIS

I IN GENERAL
II SPECIFIC OFFENSES
III EFFECT OF VERDICT
IV DIRECTED VERDICT

Directed verdicts, civil cases. See under §11508

I IN GENERAL

Conclusiveness. Verdicts in criminal cases when supported by substantial testimony will not be disturbed by the appellate court.

State v Harrington, 220-1116; 264 NW 24

Direct and circumstantial—record facts. Circumstantial evidence, supplemented by oral and written confessions of guilt may be such as to have the weight of direct evidence, and the court was right in overruling defendant's motion for directed verdict when, under the record, the established facts and circumstances were not only consistent with defendant's guilt but were inconsistent with any other reasonable hypothesis.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Evidence—sufficiency. An element of improbability in the testimony of a prosecutrix in a prosecution for incest will not necessarily justify the court in ruling that the testimony is per se insufficient to support a verdict of guilty.

State v Candler, 204-1355; 217 NW 233

Every material charge. A general verdict of guilty imports a conviction of the defendant in a criminal prosecution, on every material allegation or charge of the indictment. It is accordingly held, that an inquiry by the court of the jury, upon their returning a verdict of guilty, as to whether they found the defendant guilty of the particular offense charged in the indictment, was not erroneous.

State v Collins, 32-36

Former jeopardy—manslaughter by negligent act. The unintentional killing, by one act of negligence, of two or more persons cannot constitute more than one manslaughter. It follows that an acquittal under an indictment charging manslaughter in the killing of one deceased is a bar to a further prosecution for manslaughter for the killing of another deceased.

State v Wheelock, 216-1428; 250 NW 617

Jury request for court parole not misconduct. The fact that the jury accompanies its verdict of guilty with a recommendation that the court parole the accused cannot be deemed such misconduct as to require a new trial.

State v Sampson, 220-142; 261 NW 769

Motion for new trial—verdict—conclusiveness. Where verdict is not contrary to law nor against clear weight of evidence, the ruling of the lower court denying a motion for new trial on ground of insufficient evidence is correct and will not be disturbed on appeal.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Threats—evidence—sufficiency. Evidence reviewed and held to present a jury question of guilt under an indictment charging malicious threats.

State v Wilbourn, 219-120; 257 NW 571

Verbose verdict. Even tho a verdict is verbose and redundant, it is a good verdict if the jury's intention is clear regardless of the surplusage.

State v Douglass, 1 Greene 550

Unallowable impeachment. A verdict in a criminal case may not be impeached by affidavits as to matters which necessarily inhere in the verdict.

State v Kress, 204-828; 216 NW 31

II SPECIFIC OFFENSES

Instructions—good character. The fact that an accused in a homicide case has the reputation of being a quiet, peaceable, law-abiding and moral citizen, is a defensive circumstance bearing on the likelihood of such a person committing such a crime, but it is preeminently the right and duty of the jury to determine, in view of all the circumstances, what weight they will give to such circumstance.

State v Johnson, 215-483; 245 NW 728

Larceny—prosecution and punishment—instructions—value (?) or market value (?). Instructions calling upon the jury to find the "value", of the property stolen, if stolen, instead of the "market value", are not reversibly erroneous when the record reveals both the wholesale and the retail value.

State v McCarty, 210-173; 230 NW 379

Special interrogatories—proper refusal. The submission to the jury of special interrogatories in a prosecution for larceny is properly refused (1) when defendant's only plea is "not guilty", (2) when there is no claim that a witness is an accomplice, and (3) when there is no question of corroboration in the case.

State v Philpott, 222-1334; 271 NW 617

III EFFECT OF VERDICT

Indictment—defects rendered immaterial by verdict. Defects in an indictment for murder become immaterial when manslaughter is properly charged and the accused is convicted of the latter offense.

State v Harness, 214-160; 241 NW 645

IV DIRECTED VERDICT

Discussion. See 25 ILR 128—Directed verdict—guilty

Directed verdict refused. A motion for a directed verdict of not guilty, based on the ground that the defendant was dominated by his associate in crime and compelled to be an actor in the crime of said associate, is properly overruled when the evidence of duress is very slight and when the defendant was active in the commission of the crime.

State v Xanders, 215-380; 245 NW 361

Embezzlement—agency not established. The failure of the state to prove the agency alleged in an indictment for embezzlement necessarily

IV DIRECTED VERDICT—concluded

entitled the defendant to a directed verdict of not guilty.

State v Reynolds, 208-1046; 226 NW 717

Jury question—degree of guilt in murder prosecution. The defendants' motion for a directed verdict in a murder trial was properly overruled when based on the idea that the state had not proved the defendants guilty of a crime of any degree, as that was a question for the jury.

State v Coleman, 226-968; 285 NW 269

Jury question at close of trial. Conceding, arguendo, that the overruling of a motion for a directed verdict at the close of the state's testimony on direct is debatable, yet if at the close of all the testimony a jury question clearly exists on the issue of guilt, and the defendant is found guilty, the cause will not, on appeal, be remanded because of the former ruling.

State v McCutchan, 219-1029; 259 NW 23

Good moral character—reasonable doubt created. Evidence of good moral character of the defendant in a criminal prosecution is not in itself sufficient to generate a reasonable doubt of guilt so as to justify a reversal of a conviction on the ground that the lower court should have directed a verdict in the defendant's behalf, when the jury was justified in believing the evidence against the defendant.

State v McDowell, 228- ; 290 NW 65

Manslaughter — elements of self-defense — directed verdict. In a prosecution for murder under a plea of self-defense, the accused must (1) not be the aggressor, (2) retreat as far as possible, (3) have an actual honest belief in imminent danger, and (4) have reasonable grounds for such belief, in view of which a motion for a directed verdict was properly denied under evidence enabling jury to reject a self-defense plea in arriving at a verdict of manslaughter.

State v Johnson, 223-962; 274 NW 41

Motion to dismiss indictment — improper testimony by wife. A defendant in a criminal case who knows, before the commencement of the trial, that his wife has, before the grand jury, improperly given material testimony against him, must, if he wishes to attack the indictment on such ground, move to quash the indictment. He may not utilize such objection as the basis of a motion for a directed verdict.

State v Smith, 215-374; 245 NW 309

Prosecution—receiving stolen hogs—conviction on testimony of felon. A defendant, in a prosecution for receiving stolen hogs, may be convicted on the testimony of one convicted of a felony, and since the weight to be given such testimony is for the jury when there is a conflict, a directed verdict for the defendant is properly refused. Held, evidence sufficient to convict.

State v Wehde, 226-47; 283 NW 104

When remand for new trial not ordered. Irrespective of the sufficiency of the evidence at the time when the state rests, a remand, on appeal, will not be ordered when the evidence at the close of the entire case presents a jury question on the issue of guilt.

State v Sharpshair, 215-399; 245 NW 350

13916 Answers to interrogatories.

Special interrogatories — proper refusal. The submission to the jury of special interrogatories in a prosecution for larceny is properly refused (1) when defendant's only plea is "not guilty", (2) when there is no claim that a witness is an accomplice, and (3) when there is no question of corroboration in the case.

State v Philpott, 222-1334; 271 NW 617

Special interrogatory—nonmandatory duty to submit. When the sole question before the court and jury in a criminal case is the guilt of the accused under his general plea of "not guilty", the court is under no mandatory duty to submit special interrogatories.

State v Near, 214-1083; 243 NW 519

13917 Reasonable doubt.

ANALYSIS

Burden of proof, civil cases. See under §11487 (II)

Preponderance of evidence, civil cases. See under §11487 (III)

I IN GENERAL

Automobile—operating while intoxicated—insufficient evidence. Evidence which is not conclusive that an accused was intoxicated when arrested some three or four hours after he had operated an automobile, together with evidence that the accident which resulted from such operation might easily have happened to a sober man, is wholly insufficient to sustain a verdict of guilty of operating an automobile while intoxicated.

State v Liechti, 209-1119; 229 NW 743

Definition. A jury may very properly be told that a reasonable doubt does not mean a doubt "manufactured from sympathy for a defendant, nor a captious, strained, or unnatural doubt, nor one raised by some forced or unnatural meaning".

State v Wagner, 207-224; 222 NW 407; 61 ALR 882

Limiting jury to testimony. Juries should not be directed to determine a criminal prose-

cution solely on the instructions of the court and on the testimony "offered", or on the testimony actually "before them".

State v Patrick, 201-368; 207 NW 393

II AMOUNT OF EVIDENCE

Good moral character—reasonable doubt created. Evidence of good moral character of the defendant in a criminal prosecution is not in itself sufficient to generate a reasonable doubt of guilt so as to justify a reversal of a conviction on the ground that the lower court should have directed a verdict in the defendant's behalf, when the jury was justified in believing the evidence against the defendant.

State v McDowell, 228- ; 290 NW 65

Instructions — moral character — reasonable doubt. An instruction as to the weight to be given evidence of good moral character of the defendant was not incorrect in adding that if, under all the evidence, including that bearing on moral character, there was no reasonable doubt as to guilt, the jury should convict, however good the character may have been.

State v McDowell, 228- ; 290 NW 65

Evidence—sufficiency—nonreviewability. The weight and sufficiency of the evidence being for the jury, the supreme court, reviewing a case on the evidence, will not consider the question of reasonable doubt.

State v De Kraai, 224-464; 276 NW 11

Prosecution for perjury. Testimony on which a charge of perjury is based is not shown to be false beyond a reasonable doubt by proof that the accused, prior to the perjury alleged, made a statement directly contradictory of said testimony. Held, rule not applicable because of extrinsic corroborating evidence.

State v Mutch, 218-1176; 255 NW 643

Prosecution—receiving stolen hogs—conviction on testimony of felon. A defendant, in a prosecution for receiving stolen hogs, may be convicted on the testimony of one convicted of a felony, and since the weight to be given such testimony is for the jury when there is a conflict, a directed verdict for the defendant is properly refused. Held, evidence sufficient to convict.

State v Wehde, 226-47; 283 NW 104

III PROOF OF EACH "LINK"

Failure to support spouse—essential elements. Proof of failure to support will not, in and of itself, sustain a conviction for failure of a husband to support his wife. The state must carry the burden of establishing every element of the offense. (§13230, C., '24.)

State v Gude, 201-4; 206 NW 584

IV BURDEN OF PROOF

Corroboration beyond reasonable doubt. An instruction in a criminal case requiring proof beyond a reasonable doubt, of every material fact issue, must be deemed to apply to the proof of corroboration in those criminal cases wherein proof of corroboration is required.

State v Ingram, 219-501; 258 NW 186

Desertion of child—proof of paternity—reasonable doubt rule applicable. In a prosecution for child desertion, a claim of nonaccess creating a conflict in the evidence as to the paternity of the child requires the state to prove paternity beyond a reasonable doubt and submission of the question to the jury.

State v Heath, 224-483; 276 NW 35

Evidence—driving while intoxicated. In a prosecution for operating a motor vehicle while intoxicated, a conviction based solely on the self-contradictory statements of the state's witnesses, as to whether defendant was actually driving the vehicle, cannot be sustained.

State v Hamer, 223-1129; 274 NW 885

Evidence—driving while intoxicated. In a prosecution for driving while intoxicated the state must prove beyond a reasonable doubt that (1) defendant was operating the motor vehicle and (2) defendant was intoxicated.

State v Hamer, 223-1129; 274 NW 885

Evidence—weight and sufficiency—alibi. The plea of alibi must be established by the accused by a preponderance of the evidence before he will be entitled to an acquittal on such plea.

State v Debner, 205-25; 215 NW 721

Instructions—ignoring issue of self-defense—effect. Instructions are reversibly erroneous when they completely ignore the subject of burden of proof on the clearly presented issue of self-defense.

State v Rourick, 211-447; 233 NW 509

Instructions—good character and peaceable disposition. The instructions must not place upon the defendant the burden of proof to establish his alleged peaceable disposition and good character.

State v Johnson, 211-874; 234 NW 263

Instructions—physical and mental condition. Instructions reviewed and held not subject to the vice of imposing on defendant, in a criminal case, any burden to establish his mental or physical condition.

State v Wheelock, 218-178; 254 NW 313

Larceny — recent possession. Instructions, relative to recent possession by accused of stolen property, reviewed, and held not to place on the accused the burden of proof to explain said possession.

State v Ferguson, 222-1148; 270 NW 874

Recent possession of burglarized property—effect. No error results from instructing that

IV BURDEN OF PROOF—concluded

the unexplained recent possession of property stolen by means of a burglary is sufficient to sustain a conviction.

State v Jackson, 205-592; 218 NW 273

State has burden of proving guilt. In a criminal case the burden of establishing guilt at every stage of the trial is upon the state.

State v Hillman, 226-932; 285 NW 176

Securities act—burden of proving exceptions—lack of basis for attack on validity. In prosecution for violation of securities act wherein defendant attacked validity of statute requiring that burden of proving exceptions to the act shall be on party seeking benefit thereof, and contended that such burden should be placed on state, held, defendant's contention was without merit in view of trial court's instructions which in fact did place such burden on the state.

State v Dunley, 227-1085; 290 NW 41

V INSTRUCTIONS

Unfortunate attempt to define. It is unfortunate that some courts, in instructing juries as to the subject of a reasonable doubt, continue to employ the oft-condemned statement that "a doubt which entitles the defendant to acquittal must be reasonable and not unreasonable."

State v Sweeney, 203-1305; 214 NW 735

Instructions considered as whole—each not complete in itself. Instructions are to be considered as a whole, and each need not be complete in and of itself. An instruction in a criminal case was not objectionable in that it did not contain a statement of reasonable doubt when reasonable doubt was covered in other instructions, nor was another instruction insufficient in failing to include the defendant's ground of defense which was covered in other instructions.

State v McDowell, 228- ; 290 NW 65

Absence of evidence—instructions. Failure to instruct that a reasonable doubt may arise from the absence of evidence will not be deemed reversible error, especially when the definition of such doubt carries the clause "arising from the consideration of the whole case".

State v Gardiner, 205-30; 215 NW 758

Circumstantial evidence—inapplicability. Instructions to the effect that, in order to convict on circumstantial evidence, each fact in the chain of circumstances must be proven beyond a reasonable doubt; that all said facts must be connected with each other and with the main fact to be proven; and that said facts must produce a moral certainty of defendant's guilt, are properly refused on a record revealing both direct and circumstantial evidence of guilt.

State v Ferguson, 222-1148; 270 NW 874

Curing error. Failure of the court, in defining reasonable doubt, to refer to the absence or lack of evidence in the case is cured by other instructions to the effect that, in considering the issue of guilt or innocence, due consideration must be given to the want or lack of evidence, if any.

State v Pritchard, 204-417; 215 NW 256

Defensive matter. Instructions to the effect that an accused has the burden to establish a purely defensive matter are not rendered prejudicially erroneous by the omission of the phrase "by a preponderance of the evidence".

State v Gardiner, 205-30; 215 NW 758

Definition. It is not improper for the court, after having once accurately defined a reasonable doubt, to instruct the jury to the effect that a reasonable doubt does not mean one that is forced, strained, captious, or unnatural.

State v McGee, 207-334; 221 NW 556

Erroneous definition. It is unfortunate that there are courts which continue to instruct juries that a reasonable doubt is one arising out of the testimony adduced or introduced on the trial, thereby inferentially excluding the recognized rule of law that such doubt may very legitimately arise from the absence of testimony.

State v Tennant, 204-130; 214 NW 708

Duty to convict of highest offense. An instruction to the effect that the jury should find the defendant guilty of the highest degree of crime included in the indictment, of which the jury finds him guilty beyond a reasonable doubt, reviewed, and held unobjectionable.

State v Ingram, 219-501; 258 NW 186

Absence of evidence. A failure to instruct the jury that a reasonable doubt of guilt may arise from the absence of evidence constitutes reversible error.

State v Love, 210-741; 231 NW 392
State v Smalley, 211-109; 233 NW 55
State v Grattan, 218-889; 256 NW 273

Lack of evidence. Reversible error results from instructing that the jury must determine all matters "alone from the evidence before you", as such instruction distinctly denies to the jury the right to find a reasonable doubt because of the lack or want of evidence.

State v Comer, 198-740; 200 NW 185
State v Bogossian, 198-972; 200 NW 586
State v Burris, 198-1156; 198 NW 82
State v Speck, 202-732; 210 NW 913
State v Pritchard, 204-417; 215 NW 256
Dahna v Fun House, 204-922; 216 NW 262
State v Christensen, 205-849; 216 NW 710
State v Bamsey, 208-796; 223 NW 873
State v Hughey, 208-842; 226 NW 371.
State v Anderson, 209-510; 228 NW 353; 67 ALR 1366
State v Ferguson, 222-1148; 270 NW 874

Lack of evidence on material issue. A jury must not be instructed that a belief beyond a reasonable doubt may arise from a lack of evidence upon a material issue.

State v Matthes, 210-178; 230 NW 522

Ignoring lack of evidence. An instruction which ignores the effect of "want of evidence", but directs the jury to determine guilt solely on the evidence "admitted", is not erroneous when it is manifest the instruction was given solely with reference to the effect to be given certain exhibits received in evidence, and without reference to the instruction on reasonable doubt which is not questioned.

State v Madison, 215-182; 244 NW 868

Good character. Defendant is entitled, on request, to a specific instruction to the effect that evidence of his good character may be sufficient to generate a reasonable doubt of guilt.

State v Reynard, 205-220; 217 NW 812

Good character generating reasonable doubt. The previous good character of an accused (as to the trait involved) shown either (1) by the general reputation of the accused, or (2) by actual personal experience of witnesses with the accused, may, in connection with all the evidence in the case, generate a reasonable doubt of the guilt of the accused, and entitle him to an acquittal. And the jury must, on request, be so instructed.

State v Ferguson, 222-1148; 270 NW 874

In re good character — sufficiency. Instruction in re good character reviewed and held, in effect, to correctly direct the acquittal of the accused if, from a consideration of all the evidence including the evidence as to good reputation, the jury had any reasonable doubt of his guilt.

State v Fador, 222-134; 268 NW 625

Inapplicable instructions. On a prosecution for murder by poison, the jury need not be told that they must, before they can convict, find beyond a reasonable doubt that the accused bought the poison at the time and place claimed by the state, the record revealing other testimony tending to show the administration of the poison by the accused.

State v Flory, 203-918; 210 NW 961

Inferential duty to convict. Reversible error may result from instructing, in effect, that "a doubt, to justify an acquittal, must be reasonable".

State v Sipes, 202-173; 209 NW 458; 47 ALR 407

Instructions. An instruction is not objectionable because it directs the jury to convict if it is "satisfied" beyond a reasonable doubt of the defendant's guilt.

State v Healy, 217-1155; 251 NW 649

Instruction in re reasonable doubt need not be repeated. One definite instruction to the effect that the state must establish beyond all reasonable doubt every material element of an offense, is all-sufficient. Repetition is not required.

State v Ball, 220-595; 262 NW 115
State v Harrington, 220-1116; 264 NW 24

Necessary instructions. The jury must be specifically, or in effect, instructed, under every indictment, that guilt can only be predicated on a finding beyond all reasonable doubt.

State v Gude, 201-4; 206 NW 584

Repetitions. Manifestly, there is no occasion for the court to repeat throughout instructions in a criminal case the term "beyond a reasonable doubt".

State v Friend, 210-980; 230 NW 425
State v Davis, 212-131; 235 NW 759

13918 Reasonable doubt as to degree.

Conviction of lower degree. The principle that, if the jury has a reasonable doubt of the degree or grade of offense proved, it can convict of the lower degree or grade only, is not necessarily to be embraced in one paragraph of the charge, or even in a distinctive sentence. The very form of the instructions as a whole may amply express the thought to the jury.

State v Ellington, 200-636; 204 NW 307

Invading province of jury. Instruction held not to direct a verdict of guilt of one or the other of two offenses.

State v Shannon, 214-1093; 243 NW 507

Murder. Where a party is put upon his trial for murder in the first degree, all the degrees of criminal homicide should be explained and submitted to the jury.

State v Clemons, 51-274; 1 NW 546

Reasonable doubt. An instruction giving substantially this section, is not required on trial for larceny of hogs, where the uncontroverted evidence shows that the defendant, if guilty at all, was guilty of grand larceny.

State v Burton, 103-28; 72 NW 413

Larceny—value. Under an indictment for larceny the value of the property alleged to have been stolen must be established beyond a reasonable doubt, mere preponderance of evidence that it exceeds $20 not being sufficient to justify a conviction for the greater offense.

State v Wood, 46-116

13919 Finding offense of different degree.

ANALYSIS

I In General
II Lower Degrees or Included Offenses
III Effect of Conviction of Lower Offense

IV SUBMISSION AND INSTRUCTIONS
(a) IN GENERAL
(b) AS TO DEGREE CHARGED
(c) AS TO LOWER OFFENSE

I IN GENERAL

Manslaughter by negligent act. The unintentional killing, by one act of negligence, of two or more persons cannot constitute more than one manslaughter. It follows that an acquittal under an indictment charging manslaughter in the killing of one deceased is a bar to a further prosecution for manslaughter for the killing of another deceased.

State v Wheelock, 216-1428; 250 NW 617

Instructions — included offenses. Included offenses need not be submitted (1) when there is no supporting evidence in the record of the commission of said included offense, and (2) when under the record the accused is guilty as charged or not guilty.

State v Stennett, 220-388; 260 NW 732

II LOWER DEGREES OR INCLUDED OFFENSES

Assault to commit offense. An indictment for an assault with intent to commit an offense necessarily includes a simple assault, and depending solely on the wording of the indictment, may include assault and battery.

State v Hoaglin, 207-744; 223 NW 548

Justifiable refusal to submit. Included offenses need not be submitted (1) when there is no supporting evidence in the record of the commission of said included offense, and (2) when, under the record, the accused is guilty as charged or not guilty.

State v Stennett, 220-388; 260 NW 732

Assault to inflict great bodily injury—included offenses—duty to exclude. Under a charge of assault with intent to inflict great bodily injury, the court must not submit the included offenses of assault, and assault and battery, when the record shows that, prior to return of the indictment, the accused was formally charged with assault and battery, and that the said charge was dismissed by the state, under §14027, C., '24.

State v Dickson, 200-17; 202 NW 225

Included offenses—unnecessary submission. An accused who is convicted of assault with intent to inflict great bodily injury may not complain that assault and battery (not charged in the indictment) was submitted to the jury.

State v Costello, 200-313; 202 NW 212

Larceny—as included offense under aggravated charge. Larceny is an included offense in the charge of larceny from a building in the nighttime, and is properly submitted when there is supporting evidence.

State v Endorf, 219-1321; 260 NW 678

Larceny—when not included offense. Failure of the court, on the trial of a charge of robbery, to submit the crime of larceny as an included offense is proper when the record unquestionably demonstrates that if the accused was guilty of larceny it was because he took the property from the prosecuting witness by force and violence.

State v Warneke, 219-1239; 260 NW 667

Lascivious acts with child—instructions—included offenses. On the trial of an indictment charging the commission of lewd and lascivious acts with and upon the body of a child, the included offenses of assault and battery and simple assault should be submitted when there is supporting evidence and when there is no evidence of consent on the part of prosecutrix.

State v Rounds, 216-131; 248 NW 500

Murder by poison. Principle reaffirmed that in a prosecution for murder by poison neither second degree murder nor manslaughter need be submitted.

State v Flory, 203-918; 210 NW 961

Conviction of second degree murder—as acquittal of first degree on retrial. When the jury in a murder trial found guilt in the second degree, on retrial the defendants could not be tried on a charge of first degree murder, but evidence of any other offense of which the defendants might have been guilty could be offered.

State v Coleman, 226-968; 285 NW 269

Degree or grade of offense. First and second degree murder and manslaughter are properly submitted under a first degree charge when the record reveals support for either of said charges.

State v Buck, 205-1028; 219 NW 17

Justifiable limitation. First and second degree murder and manslaughter are properly submitted and all other offenses properly excluded when the accused, under the record, is guilty of homicide or not guilty at all.

State v Buck, 205-1028; 219 NW 17
State v Johnson, 221-8; 264 NW 596

Murder—discredited testimony. In a prosecution for murder by means of poison, the court is not required to submit assault with intent to kill or to inflict great bodily injury because of the presence in the record of evidence that the same poison was contained in the embalming fluid injected into the body of the deceased, and of evidence in the form of an official death certificate which gives the cause of death as disease, when the probative force of such evidence on the issue in question is wholly destroyed by unquestioned testimony that the poison found in the body, in addition to the quantity traceable to the embalming fluid, was over seven times sufficient to cause death, and by equally unquestioned testimony that the

official certificate was incorrect in assigning disease as the cause of death.

State v Flory, 203-918; 210 NW 961

Rape—conviction of included offense—great bodily injury. Under an indictment for rape, the court need not submit the offense of assault with intent to do great bodily injury even tho the record reveals evidence tending to establish said latter offense.

State v Brown, 216-538; 245 NW 306

Rape—included offenses—when submitted. In a rape prosecution included offenses of assault and battery and simple assault should not be submitted to the jury where there is no allegation nor proof that force or threat of force was used, nor any resistance offered.

State v Beltz, 225-155; 279 NW 386

Assault with intent to commit rape—absence of evidence. Assault with intent to rape and simple assault should not be submitted when the record in a prosecution for rape on a female under 16 years of age is barren of any evidence of force or violence.

State v Speck, 202-732; 210 NW 913

Rape—failure to charge—effect. Failure to charge that a rape was committed with force or against the will of prosecutrix removes the necessity under any circumstances to instruct as to assault or assault and battery.

State v Tennant, 204-130; 214 NW 708

Rape—imbecile—carnal knowledge. The offense of having "unlawful carnal knowledge of an idiot or female naturally of such imbecility of mind or weakness of body as to prevent effectual resistance" (§12967, C., '31) is legally classifiable as "statutory rape," tho the statute does not specifically so designate the offense. It follows that the necessarily included offenses of assault with intent to commit rape, and assault and battery, and simple assault must be submitted to the jury if there be supporting testimony.

State v Swolley, 215-623; 244 NW 844

Robbery—included offenses—possible wide range. An indictment for robbery with aggravation may be so drawn and the evidence on the trial may be such as to require the court to submit as included offenses the crime of (1) assault with intent to rob, (2) assault with intent to do great bodily harm, (3) assault and battery, and (4) simple assault.

State v Warneke, 219-1239; 260 NW 667

III EFFECT OF CONVICTION OF LOWER OFFENSE

No annotations in this volume

IV SUBMISSION AND INSTRUCTIONS

(a) IN GENERAL

Included offenses. An indictment being a pleading, no issue should be submitted, not specifically, or, from the nature of the offense charged, necessarily included therein.

State v Woodworth, 168-263; 150 NW 25

Included offenses — justifiable limitation. First and second degree murder and manslaughter are properly submitted and all other offenses properly excluded when the accused, under the record, is guilty of a felonious homicide or not guilty at all.

State v Buck, 205-1028; 219 NW 17
State v Johnson, 221-8; 264 NW 596

Ignoring material allegations—effect. The court may not, in the trial of a criminal case, ignore material allegations in the indictment or information and thereby place the accused on trial for a higher and more severely punished offense than is charged in the indictment or information.

State v Wyatt, 207-322; 222 NW 867

Submission unnecessary. Where the evidence clearly shows that the defendant is either guilty or not guilty of the crime charged or of any crime, omission to instruct on the offense of simple larceny was not erroneous.

State v Haywood, 155-466; 136 NW 514
See State v Adams, 155-660; 136 NW 1051

Self-defense—undue limitation. Instructions limiting the right of self-defense to one who believes himself in danger of (1) loss of life, or (2) great bodily injury, are erroneous when the offense of assault and battery is submitted as an included offense, and the defendant is convicted thereof.

State v Sanford, 218-951; 256 NW 650

Unsupported claim of manslaughter. The court need not and should not instruct on manslaughter when the record reveals no element of such offense.

State v Woodmansee, 212-596; 233 NW 725

(b) AS TO DEGREE CHARGED

Improper submission—inconsequential error. The improper submission to the jury of murder in the first degree becomes of no consequence when the accused is found guilty of murder in the second degree, and on appeal a new trial is ordered for other reasons.

State v Davis, 209-524; 228 NW 37

Manslaughter. Where under no view of the case could defendant have been convicted of a crime less than manslaughter, no instructions as to included offenses below that of manslaughter were required.

State v Hessenius, 165-415; 146 NW 58

Assault and battery. It was not prejudicial error to instruct the jury that assault and battery was a crime included in assault with intent to commit murder, where the defendant was charged not only with assault but with battery also.

State v Graham, 51-72; 50 NW 285

IV SUBMISSION AND INSTRUCTIONS—concluded

(b) AS TO DEGREE CHARGED—concluded

Instructing jury not to act arbitrarily. An instruction in a murder case that a lower conviction or an acquittal should not rest on the notion that you can do as you please arbitrarily was correct, but not commended, as it might have a coercive effect.

State v Coleman, 226-968; 285 NW 269

(c) AS TO LOWER OFFENSE

Reasonable doubt. On a trial for rape, where the court instructed the jury that they might find the defendant guilty not only of rape, but of any of the inferior offenses included under the indictment, if the evidence showed that he was guilty of either, held that it was prejudicial error not to instruct further that, if they had any reasonable doubt as to the degree of the offense of which he was guilty, they should convict only of the lesser degree.

State v Neis, 68-469; 27 NW 46

Larceny from person and larceny. Larceny is necessarily included in a charge of larceny from the person, and must be submitted if the evidence is such as would justify the jury in finding the lesser offense, instead of the larger offense.

State v Marshall, 206-373; 220 NW 106

Homicide—included offenses—proper omission. The court should not instruct as to included offenses below manslaughter when the evidence without dispute demonstrates that defendant is guilty of a criminal homicide or not guilty.

State v Johnston, 221-933; 267 NW 698

Offense classifiable as rape—included offenses. The offense of having "unlawful carnal knowledge of an idiot or female naturally of such imbecility of mind or weakness of body as to prevent effectual resistance" (§12967, C., '31) is legally classifiable as "statutory rape," tho the statute does not specifically so designate the offense. It follows that the necessarily included offenses of assault with intent to commit rape, and assault and battery, and simple assault must be submitted to the jury if there be supporting testimony.

State v Swolley, 215-623; 244 NW 844

Rape—rule for submission. Notwithstanding any prior decisions by this court seemingly to the contrary, an indictment for rape, statutory or otherwise, necessarily includes (1) assault with intent to commit rape, (2) assault and battery, and (3) simple assault. Whether one or more of these necessarily included offenses should be submitted to the jury must be determined by the answer to the query: Suppose the offense in question were the only charge against the accused, does the evidence present a jury question on the issue of guilt? If yea, then submit; if not, then do not submit.

State v Hoaglin, 207-744; 223 NW 548
State v Blair, 209-229; 223 NW 554

13920 Finding included offense.

Finding offense of different degree. See under §13919

Fundamental rule for submission. Principle reaffirmed that no included offense should be submitted on the trial of an indictment or trial information,

1. Unless the offense is expressly or impliedly charged in the indictment or information, and
2. Unless the record reveals evidence tending to establish said offense.

State v Brown, 216-538; 245 NW 306

Included offenses — estoppel to complain. Principle reaffirmed that an accused may not complain that the jury by its verdict was more lenient with him than the evidence warranted.

State v Blair, 209-229; 223 NW 554

Included offenses—failure to charge—effect. Failure to charge that a rape was committed with force or against the will of prosecutrix, removes the necessity under any circumstances to instruct as to assault or assault and battery.

State v Tennant, 204-130; 214 NW 708

Included offenses — proper omission. The court should not instruct as to included offenses below manslaughter when the evidence without dispute demonstrates that defendant is guilty of a criminal homicide or not guilty.

State v Johnston, 221-933; 267 NW 698

Justifiable refusal to submit. Included offenses need not be submitted (1) when there is no supporting evidence in the record of the commission of said included offense, and (2) when under the record, the accused is guilty as charged or not guilty.

State v Stennett, 220-388; 260 NW 732

Assault to commit offense. An indictment for an assault with intent to commit an offense necessarily includes a simple assault, and, depending solely on the wording of the indictment, may include assault and battery.

State v Hoaglin, 207-744; 223 NW 548

Larceny from person and larceny. Larceny is necessarily included in a charge of larceny from the person and must be submitted if the evidence is such as would justify the jury in finding the lesser offense instead of the larger offense.

State v Marshall, 206-373; 220 NW 106

Larceny as included offense under aggravated charge. Larceny is an included offense in the charge of larceny from a building in the night-

time, and is properly submitted when there is supporting evidence.

State v Endorf, 219-1321; 260 NW 678

Errors favorable to accused. In a prosecution for larceny from a building in the nighttime, failure to define the included offense of larceny from a building in the daytime, is inconsequential, the punishment for said latter offense being in excess of that of which the accused was convicted—larceny.

State v Endorf, 219-1321; 260 NW 678

Lewd and lascivious conduct. On the trial of an indictment charging the commission of lewd and lascivious acts with and upon the body of a child, the included offenses of assault and battery and simple assault should be submitted when there is supporting evidence and when there is no evidence of consent on the part of the prosecutrix.

State v Rounds, 216-131; 248 NW 500

Murder resulting from abortion. The crime of attempting to produce an abortion is not included in an indictment for murder in the second degree, even tho the indictment is based on an attempted abortion resulting in death.

State v Rowley, 216-140; 248 NW 340

Assault to murder. Under a charge of assault to murder, failure to instruct as to any included and supported offense below assault with intent to commit manslaughter does not constitute prejudicial error when the jury finds the defendant guilty as charged.

State v Smith, 215-374; 245 NW 309

Rape—rule for submission. Notwithstanding any prior decisions of this court seemingly to the contrary, an indictment for rape, statutory or otherwise, necessarily includes:

1. Assault with intent to commit rape, and
2. Assault and battery, and
3. Simple assault.

Whether one or more of these necessarily included offenses should be submitted to the jury must be determined by the answer to the query: Suppose the offense in question was the only charge against the accused, does the evidence present a jury question on the issue of guilt? If yea, then submit; if nay, then do not submit.

State v Hoaglin, 207-744; 223 NW 548
State v Blair, 209-229; 223 NW 554

Rape—included offense. Under an indictment for rape, there may be a conviction for assault with intent to commit rape, even tho the only evidence offered by the state is to the effect that a completed rape by actual penetration was accomplished.

State v Blair, 209-229; 223 NW 554

Rape—great bodily injury. Under an indictment for rape, the court need not submit the offense of assault with intent to do great bodily injury even tho the record reveals evidence tending to establish said latter offense.

State v Brown, 216-538; 245 NW 306

Offense classifiable as "rape"—included offenses. The offense of having "unlawful carnal knowledge of an idiot or female naturally of such imbecility of mind or weakness of body as to prevent effectual resistance", (§12967, C., '31) is legally classifiable as "statutory rape", tho the statute does not specifically so designate the offense; it follows that the necessarily included offenses of assault with intent to commit rape, and assault and battery, and simple assault must be submitted to the jury if there be supporting testimony.

State v Swolley, 215-623; 244 NW 844

Rape—failure to define offenses. The failure to define the included offenses of assault and battery and simple assault, or to set forth the elements of either of said offenses, under an indictment for rape, does not constitute prejudicial error when the jury finds the accused guilty of rape.

State v Grimm, 212-1193; 237 NW 451

Rape. In the trial of a prosecution for rape on a child under the age of consent, the offenses of assault and battery and simple assault should not be submitted if the record is such that it would not support a verdict of guilt of such minor offenses had the prosecution charged such minor offenses only.

State v Ingram, 219-501; 258 NW 186

Robbery—when larceny not included offense. Failure of the court, on the trial of a charge of robbery, to submit the crime of larceny as an included offense is proper when the record unquestionably demonstrates that if the accused was guilty of larceny it was because he took the property from the prosecuting witness by force and violence.

State v Warneke, 219-1239; 260 NW 667

Necessary submission. The court must, on the trial of a charge of robbery alleged to have been committed with force and violence, submit the included offense of assault and battery when the evidence is sufficient to support such verdict.

State v Buchan, 219-106; 257 NW 586
State v Warneke, 219-1239; 260 NW 667

13922 Verdict as to several defendants.

Sufficiency of forms of verdict. Instructions which clearly extend to the jury the privilege of finding either of two co-defendants guilty, or to find both guilty, are all-sufficient in the absence of any request from the defendants as to such subject-matter.

State v Slycord, 210-1209; 232 NW 636

Conviction under different counts. Under a verdict of guilt of all jointly indicted parties under both counts (statutory burglary, and lar-

ceny from building in nighttime) judgment is properly entered on each count against each defendant.

State v Stennett, 220-388; 260 NW 732

13924 Presence of defendant—when necessary.

Presumption of presence. Where the record shows that a defendant in a criminal action was present at the commencement and conclusion of his trial, in the absence of any affirmative showing to the contrary, it will be presumed that he was present during the trial and at the rendition of the verdict.

State v Wood, 17-18

13927 Informal verdict.

Recommendations for leniency. A verdict otherwise adequate is not rendered fatally defective by the act of the jury in inserting therein a recommendation for leniency.

State v Purcell, 195-272; 191 NW 849

13929 Jury polled.

Sealed verdict. Where jury of its own volition sealed the verdict, the right of the defendant to have the jury polled before their verdict is recorded is a substantial one of which he cannot be deprived without his consent.

State v Callahan, 55-364; 7 NW 603

13932 Acquittal on ground of insanity —commitment.

Erroneous but nonprejudicial instruction. Failure to require the jury, if it finds a not-guilty verdict because of insanity of the defendant, to state such fact in the verdict is not prejudicially erroneous when the jury is peremptorily instructed to acquit the defendant if it finds the defendant insane.

State v Mullenix, 212-1043; 237 NW 483

CHAPTER 651

EXCEPTIONS

13933 Bill of exceptions—purpose.

Argument—failure to except—effect. Failure to enter exceptions to alleged improper argument, when made, precludes review on appeal.

State v Philpott, 222-1334; 271 NW 617

13934 What constitutes record—exceptions unnecessary.

Corresponding provisions in civil cases. See §§11536–11548

13935 Grounds for exceptions.

Discussion. See 22 ILR 609—Trial technique

ANALYSIS

I IN GENERAL
II NATURE OF OBJECTION
III RESERVATION OF GROUNDS

I IN GENERAL

Failure to object — effect. The appellate court will not review assignments of error on the reception of testimony or on the giving of instructions to which complainant entered no objection.

State v Bourgeois, 210-1129; 229 NW 231

II NATURE OF OBJECTION

Argument—sufficiency of objection. An objection to a flagrantly improper argument by the county attorney may be all-sufficient even tho not couched in specific language; a priori, when the attorney and court cannot but know the very subject matter to which reference is made.

State v Voelpel, 213-702; 239 NW 677

Sufficiency. Exceptions to instructions must specifically and definitely point out the error complained of, and no others will be considered.

State v Grigsby, 204-1133; 216 NW 678

III RESERVATION OF GROUNDS

Estoppel to allege error. Counsel will not be permitted to equivocate relative to proper and material questions asked him by the court and thereupon base error on the ensuing colloquy.

State v Woodmansee, 212-596; 233 NW 725

Misconduct in argument—waiver. Misconduct in argument is waived by a failure to except thereto.

State v Myers, 207-555; 223 NW 166

Pistols not offered in evidence taken to jury room. In prosecution for carrying concealed weapons, permitting jury to take pistols, not technically offered in evidence, to jury room held not prejudicial, where pistols were before jury, frequently referred to in evidence, and sent to jury room with knowledge of defendant's counsel and without his objection.

State v Busing, (NOR); 251 NW 620

Question first presented on appeal. Failure in the trial court to question the form of the indictment precludes the presentation of such question on appeal.

State v Woodmansee, 212-596; 233 NW 725

Untimely objection to question. A party will not be permitted to deliberately withhold his objection to a question until he discovers that the answer is not to his liking.

State v Woodmansee, 212-596; 233 NW 725

13937 Bill by judge.

Improper argument. Improper argument by the county attorney, which argument has not been taken down by the reporter as part of the record, but as to which proper exception has been entered, may be made part of the record by a bill of exceptions signed by the judge.

State v Voelpel, 213-702; 239 NW 677

CHAPTER 652

NEW TRIAL

13942 Definition.

Writ of error coram nobis. The common-law writ of error coram nobis is not recognized in this state.

Boyd v Smyth, 200-687; 205 NW 522; 43 ALR 1381

State v Harper, 220-515; 258 NW 886

13943 Application—when made.

Fatally delayed motion. A motion in a criminal case for a new trial, and for permission to withdraw a plea of guilty must be made before judgment.

State v Van Klaveren, 208-867; 226 NW 81

Mandatory time for filing. Motions for new trial in criminal cases will be disregarded when filed after the time authorized by statute.

State v Kirkpatrick, 220-974; 263 NW 52

Time limit. Statutory requirements applied, that motions in arrest of judgment in criminal cases must be filed during the term, and motions for new trial before judgment.

State v Harper, 220-515; 258 NW 886

13944 Grounds.

ANALYSIS

Failure of accused to testify. See under §13891
Misconduct in civil cases. See under §11550
Misconduct in cross-examination. See under §13892
Misconduct of bailiff. See under §13878
New trial in civil cases. See under §11550
Use of affidavits in civil causes. See §11551

I IN GENERAL

After judgment. After judgment has been entered in a criminal case a petition for new trial will not be entertained.

State v Hayden, 131-1; 107 NW 929

Coercion of jury. That a rumor reached the jury at four o'clock on Saturday afternoon, after they had been out 25 hours, that the presiding judge was going away at noon on the following Monday, and that they would be held together until Monday, unless they agreed sooner, will not require a new trial, where it is not shown that they were influenced thereby.

State v Smith, 99-26; 68 NW 428

Conviction of second degree murder—as acquittal of first degree on retrial. When the jury in a murder trial found guilt in the second degree, on retrial the defendants could not be tried on a charge of first degree murder, but evidence of any other offense of which the defendants might have been guilty could be offered.

State v Coleman, 226-968; 285 NW 269

Excessive proof of fact. In a prosecution for driving an automobile while intoxicated, the fact that the gruesome details of a collision were oft detailed by a large number of witnesses furnishes no reason why the defendant should be given a new trial.

State v Wheelock, 218-178; 254 NW 313

Excessive sentence. The plea of excessive sentence in a criminal case is unavailable to one sentenced under the indeterminate sentence act.

State v Hixson, 208-1233; 227 NW 166
State v Bingaman, 210-160; 230 NW 394

I IN GENERAL—continued

Failure of accused to testify—allowable reference. County attorney, during the trial of a criminal case, may properly refer to the fact that the accused has not testified in his own behalf, and constitutional "due process" is not thereby violated.

State v Ferguson, 226-361; 283 NW 917

Failure of justice. The facts that an accused (1) was promptly tried after the commission of the offense, (2) was handcuffed during the trial, and (3) that at the time of the trial public feeling ran high against the accused, do not, in and of themselves, justify an inference that the accused did not have a fair trial.

State v Brewer, 218-1287; 254 NW 834

Failure to produce testimony. A defendant in a criminal prosecution may not have a new trial in order to produce material testimony which was at all times within his reach.

State v Carter, 192-196; 183 NW 318

Failure to subpoena defense witness. Failure of the sheriff to subpoena a witness for the defendant, whose testimony was not pointed out as material to the defense, and so far as it may have had a bearing on the conduct of an accomplice it could not have affected the result, was not ground for a new trial.

State v Brown, 130-57; 106 NW 379

Inadvertent reception of immaterial testimony. On a charge of illegally transporting intoxicating liquors, the reception of evidence as to the search of an automobile of which the accused was not in possession and as to the finding of such liquors therein does not constitute reversible error when the evidence was first received because of a misunderstanding of the court as to which automobile was being referred to, and when the court pointedly directed the jury not to consider it.

State v Canalle, 206-1169; 221 NW 847

Allegations stricken from motion—not supported by affidavit. There was no prejudicial error in striking on motion, from a motion for new trial in a criminal case, allegations that the jury had considered matters not in evidence, when the only affidavit in support of the allegations was by an attorney who said no more than that he believed the allegations to be true, and there was no request that the jurors be called for examination.

State v McDowell, 228- ; 290 NW 65

Improper exhibit withheld from record. The fact that the state, in identifying an accused, employs a photograph on the reverse side of which is printed the criminal record of the accused furnishes no basis for an assignment of error when the photograph was never in the hands of any juror, and was not received in evidence, and when the criminal record was not referred to in the presence of the jurors.

State v Kelly, 202-729; 210 NW 903

Inconsequential evidence. The fact that certain identifying pasters were allowed to remain on liquor receptacles when they were taken by the jury on final submission is of no consequence when such pasters furnished the jurors no fact not already legally in their possession.

State v McGee, 207-334; 221 NW 556

Jury question as to identity. The identity of one who is prosecuted for a crime as the one who actually committed it is a question of fact for the jury, on conflicting testimony.

State v Ayles, 205-1024; 219 NW 41

Lack of specification. Motions for new trial must be specific, in criminal as well as in civil cases, as to the grounds, or they will not be reviewable.

State v Vandewater, 203-94; 212 NW 339

Matters not in record. Without determining whether it is proper for the trial judge to advise himself as to matters not disclosed in the evidence as an aid in fixing punishment, it is at all events not grounds for a new trial but rather for an application to reduce the punishment.

State v Huff, 76-200; 40 NW 720

Mistake of witness. The fact that erroneous statements were made by a witness upon the trial because of his misunderstanding of a question put to him will not entitle the party affected thereby to a new trial in the absence of any showing of prejudice because of such evidence.

State v Viers, 82-397; 48 NW 732

Public prejudice. Public prejudice is not a ground for new trial where there were no demonstrations of such character as to intimidate the jury or to indicate that the verdict was anything other than the honest conclusion of the jury.

State v Gulliver, 163-123; 142 NW 948

Requiring undue deliberation of jury. The court, in the trial of a charge of murder, does not necessarily abuse its discretion by requiring the jury to continue its deliberations for a period of some 90 hours.

State v Siegel, 221-429; 264 NW 613

Undue haste in trial. The action of the trial court and county attorney in bringing a criminal prosecution on for trial promptly after the alleged commission of the offense (15 days in this case) cannot be deemed prejudicially erroneous in the absence of any showing that

the defendant was thereby deprived of a fair trial.

State v Berlovich, 220-1288; 263 NW 853

Witness' name not indorsed. No objections having been made to witness testifying in consequence of his name not having been indorsed on the back of the indictment, after his testimony had gone to the jury without objection, it is not on that account sufficient cause to authorize the court in granting a new trial.

Ray v State, 1 Greene 316

II EVIDENCE OUT OF COURT

Inconsequential remarks in jury room. No ground for new trial arises from a showing that some casual remarks were made in the jury room as to the pregnancy of the deceased and as to the accused's having thereby taken more than one life.

State v Kneeskern, 203-929; 210 NW 465

Jurors influenced by newspaper—matter inhering in verdict. In prosecution for rape, motion for new trial based on affidavit of two jurors that they found defendant guilty because they received newspaper stating that they would be locked up over Memorial Day constituted an attempt to impeach verdict upon a matter that inhered in it and presented nothing that the trial court could or should have considered.

State v Banks, 227-1208; 290 NW 534

III MISCONDUCT OF JURY

Additional annotations. See under §13860, Vol I

Discussion. See 11 ILR 268—Juror's affidavits as to misconduct

(a) SEPARATION WITHOUT LEAVE

Separation of, and communications with, jurors. The conduct of bailiffs in permitting jurors in a criminal trial to communicate with outsiders, personally and by telephone, or in permitting slight separations of jurors, tho inexcusable, does not necessarily constitute reversible error.

State v Siegel, 221-429; 264 NW 613

(b) OTHER MISCONDUCT

1 In General

Application of epithet. The application by a juror, in the jury room, to the defendant, of an inelegant epithet does not constitute reversible error.

State v Kurtz, 208-849; 225 NW 847

Discretion in case of dispute. The granting of a new trial because of misconduct of jurors is quite largely within the discretion of the court, especially when there is a dispute whether there was any misconduct.

State v Umphalbaugh, 209-561; 228 NW 266

Discretion of court. The discretion of the court in denying a new trial in a criminal case on a conflicting showing of misconduct of the jury will not ordinarily be disturbed on appeal.

State v Reynolds, 201-10; 206 NW 635

Examination of trial jurors. An unsupported request by an accused in a motion for a new trial that certain trial jurors be called for examination as to alleged misconduct on the part of the jury is properly overruled, especially when no affidavit of any juror had been filed.

State v Friend, 206-615; 220 NW 59

False answers. A new trial in a criminal case will not be granted on an unsatisfactory and uncertain showing that a juror on his voir dire made false answers as to his then opinion as to the guilt of the accused.

State v Kneeskern, 203-929; 210 NW 465

Immaterial fact statement. The making, by a juror during the deliberations of the jury, of a statement of fact which is immaterial to any issue before the jury, does not constitute reversible prejudice; likewise when the statement is in the nature of a conclusion by the juror.

State v Gripp, 208-1143; 226 NW 16

Improper statements during deliberation. In a prosecution for illegal possession of intoxicating liquors, statements by jurors to other jurors during the deliberation of the jury that defendant "does nothing but bootleg" and "is the king of bootleggers", constitute such misconduct as to require a new trial.

State v Clark, 210-724; 231 NW 450

Inconsequential remarks in jury room. No ground for new trial arises from a showing that some casual remarks were made in the jury room as to the pregnancy of the deceased and as to the accused's having thereby taken more than one life.

State v Kneeskern, 203-929; 210 NW 465

Indefinite statements dehors record. A new trial will not be granted on a showing of indefinite statements dehors the record, made by one juror to another, especially when made after the verdict had been agreed to.

State v Rounds, 202-534; 210 NW 542

Jury request for court parole. The fact that the jury accompanies its verdict of guilty with a recommendation that the court parole the accused cannot be deemed such misconduct as to require a new trial.

State v Sampson, 220-142; 261 NW 769

Juror riding with county attorney. Action of trial juror in riding with county attorney to and from place of trial, while not intentional misconduct and even tho no actual wrong resulted, casts suspicion on jury's verdict, is against public policy, and is grounds for a new trial.

State v Neville, 227-329; 288 NW 83

III MISCONDUCT OF JURY—continued
(b) OTHER MISCONDUCT—continued
1 In General—concluded

Jurors as witnesses—refusal to call. On a motion for a new trial in a criminal case, the court may very properly refuse to permit the oral examination of jurymen for the purpose of establishing misconduct which the defendant induced—for which he was responsible.

State v Mutch, 218-1176; 255 NW 643

Insufficiency of evidence. In prosecution for subornation of perjury, where defendant complains of the denial of his motion for new trial involving the misconduct of the jury, where evidence, by juror examined on the subject, of matters discussed by jury related to defendant's father's estate and a school controversy in which defendant had been engaged, both of which were referred to in cross-examination of certain character witnesses in the trial and which were admitted by the court, and where juror admitted she agreed to verdict and did not consider anything said by anyone which was not admitted in evidence, there was nothing to indicate any misconduct on the part of the jury, and the court's ruling was correct.

State v Hartwick, 228- ; 290 NW 523

Misconduct of jurors—proof required. Error cannot be predicated on the surmise that jurors or some of them may have read an improper newspaper article relative to the defendant in a criminal case.

State v Long, 215-494; 245 NW 726

Prejudicial effect. Misconduct of jurymen in a criminal case does not vitiate the verdict of guilt and necessitate a new trial, unless, from the entire showing of misconduct, the court finds that the jury was probably influenced or prejudiced by said misconduct in the rendition of said verdict. So held as to jury-room discussion relative to:

1. Charges or claims that the county attorney had not introduced all available testimony.
2. Charges that some of the jurors had been bribed.
3. Remarks, derogatory to the innocence of the accused, made by loiterers on the street, and in the presence of jurymen.

State v Siegel, 221-429; 264 NW 613

Presence of officers in jury room. Where, because of the small size of the room in which the jury was deliberating upon its verdict, and of the impurity of the air therein, the jury was permitted after midnight to remove to the courtroom, where during the greater part of the time of their further deliberation there were with them a deputy sheriff and a bailiff, but it appeared that during most of the time said officers were in one corner of the room and partly asleep, and neither of them had any conversation with the jurors, except to tell them to stay away from one of two tables that were in the room, held, that there was not such showing of prejudice as to entitle the defendant to a new trial.

State v Thompson, 87-670; 54 NW 1077

Refusal of personal examination. The court may very properly decline to call the jury, after verdict, for personal examination relative to their misconduct which has no support except in the hearsay affidavit of the counsel for defendant.

State v Woodmansee, 212-596; 233 NW 725

Statement of fact. No prejudicial error occurs from a statement by a juror during the deliberation of the jury that she knew that a certain date fell on a certain day of the week because she had personally looked it up on the calendar, when the record shows that whether the date fell on said day of the week was quite immaterial.

State v White, 205-373; 217 NW 871

2 Communications

Finding of court—conclusiveness. A finding by the court on conflicting testimony that a bailiff was not guilty of misconduct is conclusive on appeal.

State v Kurtz, 208-849; 225 NW 847

Separation of, and communications with, jurors. The conduct of bailiffs in permitting jurors in a criminal trial to communicate with outsiders, personally and by telephone or in permitting slight separations of jurors, tho inexcusable, does not necessarily constitute reversible error.

State v Siegel, 221-429; 264 NW 613

Jurors influenced by newspaper—matter inhering in verdict. In prosecution for rape, motion for new trial based on affidavit of two jurors that they found defendant guilty because they received newspaper stating that they would be locked up over Memorial Day constituted an attempt to impeach verdict upon a matter that inhered in it and presented nothing that the trial court could or should have considered.

State v Banks, 227-1208; 290 NW 534

3 Drinking Liquor

Drinking liquors. In a prosecution for maintaining a liquor nuisance, it is for the court to determine the extent to which the liquors introduced in evidence were drunk by the jurors and the effect of such drinking, and the finding of the court on such questions will not be disturbed if within the evidence bearing thereon.

State v Phillips, 212-1332; 236 NW 104

Drinking liquor after verdict. A conviction of unlawfully transporting intoxicating liquors within the state will not be disturbed on appeal on the ground of misconduct of certain jurors in drinking the contents of one of the bottles of beer transported by the defendant, after the

verdict was found, reduced to writing, and signed by the foreman.

State v Reilly, 108-735; 78 NW 680

Misconduct of juror. The mere fact that a material prosecuting witness treated two of the jurors to beer, in a saloon, before any deliberation on the verdict was commenced, is not sufficient to show that jurors were guilty of misconduct.

State v Minor, 106-642; 77 NW 330

Tasting or smelling liquors. In a prosecution for maintaining an intoxicating liquor nuisance it is not prejudicial error for the jurors to smell or taste the liquors introduced in evidence.

State v Phillips, 212-1332; 236 NW 104

4 Affidavits of Jurors

Affidavits. In overruling motion for new trial in manslaughter conviction where affidavits of county attorney and juror were presented that juror rode to and from place of trial with county attorney but that they did not discuss the case, it must be assumed that the trial court attached no credence to the allegation that the county attorney and juror had discussed the case or any part of it.

State v Neville, 227-329; 288 NW 83

Nonpermissible affidavits. Affidavits to the effect that a juror changed his vote from "not guilty" to "guilty" because of certain misconduct occurring during the deliberation of the jury will be given no consideration whatever.

State v Clark, 210-724; 231 NW 450

Nonpermissible affidavits. The affidavits of jurors that their verdict was or was not affected by certain verdict-inhering matters are not permissible. The effect of such matters must be determined by the court.

State v Siegel, 221-429; 264 NW 613

Instruction allowing recommendation of clemency—juror's affidavit explaining—effect—new trial. Where during its deliberations jury inquired of judge as to whether a verdict of guilty with recommendation of clemency would have any weight on sentence and judge instructed that any recommendations desired could be made on separate sheet of paper, signed and returned with verdict, held, instruction did not constitute error, and that jurors' affidavits stating that they were influenced by the instruction could not be considered by court in ruling on motion for new trial.

State v Cook, 227-1212; 290 NW 550

5 Affidavits of Others

Unallowable impeachment. A verdict in a criminal case may not be impeached by affidavits as to matters which necessarily inhere in the verdict.

State v Kress, 204-828; 216 NW 31

Allegations stricken from motion—not supported by affidavit. There was no prejudicial error in striking on motion, from a motion for new trial in a criminal case, allegations that the jury had considered matters not in evidence, when the only affidavit in support of the allegations was by an attorney who said no more than that he believed the allegations to be true, and there was no request that the jurors be called for examination.

State v McDowell, 228- ; 290 NW 65

IV INSTRUCTIONS

Instructions. See under §13876

V VERDICT CONTRARY TO EVIDENCE

Conflicting evidence. Where testimony is conflicting and both have substantial support in the evidence, it is the province of the jury to determine questions of fact and the court will not set aside their verdict unless it is clearly against the weight of the evidence and there is no substantial evidence to support it.

State v Crandall, 227-311; 288 NW 85

Motion for new trial — verdict — conclusiveness. Where verdict is not contrary to law nor against clear weight of evidence, the ruling of the lower court denying a motion for new trial on ground of insufficient evidence is correct and will not be disturbed on appeal.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Sufficiency of evidence of guilt. The appellate court will not substitute its judgment as to the weight of substantial and sufficient evidence of guilt.

State v Manly, 211-1043; 233 NW 110

Verdict set aside — criminal more readily than civil. Where the verdict is clearly against the weight of evidence, a new trial should be granted, and the appellate court will interfere more readily in a criminal case than in a civil one.

State v Carlson, 224-1262; 276 NW 770

VI OTHER CAUSES

(a) IN GENERAL

Change in attitude of jury. The fact that a majority of the jury in a criminal prosecution was, at one stage of its deliberations, in favor of an acquittal places no obligatory duty on the court to grant a new trial.

State v Taylor, 202-189; 209 NW 287

Hostile attitude of audience. Conclusion affidavits stressing the hostility of the audience present during the trial of an accused, which was manifested in alleged demonstrations against the accused, reviewed, and held insufficient to show that accused was not accorded a fair trial, especially in view of the overruling of the motion for new trial on that ground.

State v Mueller, 202-1067; 208 NW 360

VI OTHER CAUSES—continued
(a) IN GENERAL—concluded

Insufficient showing. Evidence held quite insufficient to show conduct on the part of a witness prejudicial to the defendant.

State v Long, 215-494; 245 NW 726

Misconduct—responsive argument by state. Nothing to the contrary appearing, the formal finding of record by the court that the closing argument of the state was justified by, and responsive to, the argument of counsel for the defendant is quite decisive and final.

State v Burzette, 208-818; 222 NW 394

Prosecutor's misconduct — admonition — court's discretion. In a prosecution for operating a motor vehicle while intoxicated, where misconduct was alleged because of prosecutor's argument to jury that defendant had admitted his intoxication, and, if other statements of prosecutor were not true, defendant's counsel would not jump up and squeal like a pig under a gate, and when timely admonitions to the jury are given, coupled with the discretion of the trial court in controlling arguments, no reversal should follow as supreme court will not interfere unless such misconduct results in prejudice and deprives a defendant of a fair trial.

State v Dale, 225-1254; 282 NW 715

Misnaming offense on trial. Misnaming, during argument, the offense on trial constitutes no ground for new trial when from the record it is manifest the jury was not misled.

State v Ferro, 211-910; 232 NW 127

Unsworn bailiff. Where a jury is ordered kept together during the trial of a criminal case, the fact that the court bailiff who accompanied the jurors on the first adjournment of court was not specially sworn as required (§13861, C., '31), does not constitute reversible error when it appears the bailiff protected the jurors exactly as he would have protected them had he been so sworn and had respected his oath.

State v Miller, 217-1283; 252 NW 121

What absent witness would testify. The statement of the county attorney, on a prosecution for murder, that an absent witness, if present, would probably testify that defendant struck deceased, was not an unfair comment.

State v Fuller, 125-212; 100 NW 1114

(b) NEWLY DISCOVERED EVIDENCE

Newly discovered evidence. The plea of newly discovered evidence will be disregarded when the slightest diligence prior to trial would have revealed the evidence in question. Likewise, when, prior to trial, the accused knew of such testimony, and might doubtless have had the full benefit thereof by offering it.

State v Rounds, 202-534; 210 NW 542
State v Friend, 210-980; 230 NW 425
State v Leftwich, 216-1226; 250 NW 489

Newly discovered evidence — discretion of court. The court may recognize newly discovered evidence as a ground for a new trial, but its discretion in the matter is very broad.

State v Endorf, 219-1321; 260 NW 678

Newly discovered evidence. Newly discovered evidence is not a statutory ground for a new trial in criminal cases.

State v Tracy, 219-1412; 261 NW 527
State v Siegel, 221-429; 264 NW 613

(c) INCOMPETENCE OF DEFENDANT'S ATTORNEY

Unskillfulness of counsel. Neglect and incompetency of counsel for an accused in the trial of a criminal case are not ordinarily grounds for a new trial.

State v Vandewater, 203-94; 212 NW 339

(d) MISCONDUCT OF DEFENDANT'S ATTORNEY

Motion for new trial and in arrest—misconduct—jurors as witnesses—refusal to call. On a motion for a new trial in a criminal case, the court may very properly refuse to permit the oral examination of jurymen for the purpose of establishing misconduct which the defendant induced—for which he was responsible.

State v Mutch, 218-1176; 255 NW 643

(e) MISCONDUCT OF PROSECUTING ATTORNEY

1 In General

Argument not made of record. Error may not be based on alleged misconduct of counsel in argument unless the specific misconduct is made of record, and exceptions entered thereto.

State v Harrington, 220-1116; 264 NW 24

Argument—failure to except. Failure to enter exceptions to alleged improper argument, when made, precludes review on appeal.

State v Philpott, 222-1334; 271 NW 617

Argument—agreement to limit time. Where state waived opening argument and by agreement of counsel the accused and state had 20 minutes to argue to jury, objection that county attorney did not confine himself to response to defendant's argument, and misstated facts to jury, could not be raised on appeal by accused who took no objection or exceptions at time of state's argument.

State v McGregor, (NOR); 266 NW 22

Failure to make record. Improper argument by the county attorney cannot be shown by affidavits attached to motion for new trial.

State v Hixson, 208-1233; 227 NW 166
State v Phillips, 212-1332; 236 NW 104

Good-faith motives. County attorney's prompt withdrawal of exhibits and all testimony in connection with two federal convictions for liquor offenses when such matters were withdrawn from the consideration of the jury was persuasive evidence of his good faith and honest conviction that he had the right to introduce such evidence.

State v Caringello, 227-305; 288 NW 80

Improper argument. The refusal by the trial court of a new trial in a criminal cause because of alleged misconduct of the county attorney in argument will not be reversed in the absence of any showing that said argument was not in response to argument made by the attorneys for the accused.

State v Johnson, 221-8; 264 NW 596

Indefinite record. New trial because of misconduct of the county attorney in argument cannot be granted on a materially indefinite record.

State v Clay, 202-722; 210 NW 904

Insufficient record. An assignment of misconduct of the county attorney in argument will not be considered, in the absence on appeal of such argument.

State v Peacock, 201-462; 205 NW 738

Misconduct in argument—waiver. Misconduct in argument is waived by a failure to except thereto.

State v Myers, 207-555; 223 NW 166
State v Henderson, 212-144; 232 NW 172

Misconduct of county attorney—record required.

State v Feldman, 201-1089; 202 NW 90

Misnaming offense on trial. Misnaming, during argument, the offense on trial constitutes no ground for new trial when from the record it is manifest that the jury was not misled.

State v Ferro, 211-910; 232 NW 127

Prosecutor's misconduct — admonition — court's discretion. In a prosecution for operating a motor vehicle while intoxicated, where misconduct was alleged because of prosecutor's argument to jury that defendant had admitted his intoxication, and, if other statements of prosecutor were not true, defendant's counsel would not jump up and squeal like a pig under a gate, and when timely admonitions to the jury are given, coupled with the discretion of the trial court in controlling arguments, no reversal should follow as supreme court will not interfere unless such misconduct results in prejudice and deprives a defendant of a fair trial.

State v Dale, 225-1254; 282 NW 715

Waiver of improper argument. Improper argument is deemed waived unless objection thereto is made in the trial court, ruled on, and an exception saved.

State v Halley, 203-192; 210 NW 749

Belated complaint. In prosecution for rape, complaint as to statements made in argument by county attorney, when raised for the first time in a motion for new trial, came too late to be considered on appeal.

State v Banks, 227-1208; 290 NW 534

2 Nonprejudicial Misconduct

Improper argument—curing error. Statements by the county attorney in his argument to the jury to the effect that counsel for defendant knew that defendant was the same person who had formerly been convicted of a pleaded offense because counsel for defendant had then prosecuted defendant, do not constitute reversible error (1) when objection was withheld until after the arguments were closed, (2) when the court sustained the objection and directed the jury not to consider said statements, and (3) when there was nothing before the appellate court showing precisely what statements were made and the circumstances attending them.

State v Anderson, 216-887; 247 NW 306

Improper characterization. A cross-examination of defendant in a prosecution for rape whether he would object to his wife testifying against him, and the act of the county attorney referring to defendant as a "sexual pervert", while improper, does not necessarily constitute reversible error.

State v Ingram, 219-501; 258 NW 186

Improper characterization of accused. The fact that the county attorney in his argument to the jury characterized the accused as "Public Enemy No. 1" will not, in and of itself, be deemed reversible error especially when the accused's objection to such argument was sustained by the court.

State v Berlovich, 220-1288; 263 NW 853

Improper question—effect. The mere asking on cross-examination of a defendant of a wholly improper question does not necessarily result in reversible error.

State v Umphalbaugh, 209-561; 228 NW 266

Asking improper questions. The conduct of the county attorney in asking improper questions, under the mistaken view that the answers thereto could be utilized for the purpose of impeachment, does not necessarily constitute prejudicial error.

State v Grimm, 212-1193; 237 NW 451

Incompetent and prejudicial testimony. The direct or inferential production of incompetent and prejudicial testimony relative to the defendant's business does not necessarily constitute reversible error when the court immediately excludes the objectionable matter and pointedly directs the jury to eliminate such matters from their minds.

State v Canalle, 206-1169; 221 NW 847

VI OTHER CAUSES—continued
(e) MISCONDUCT OF PROSECUTING ATTORNEY—continued
2 Nonprejudicial Misconduct—concluded

Noninflammatory argument. The fact that the county attorney in his argument characterized the defendant with quite blunt epithets is not necessarily reversible error.

State v Brewster, 208-122; 222 NW 6

Nonprejudicial opening statements. No reversible error results from overruling, in the trial of a charge of manslaughter, objections to the opening statements of the county attorney relative to the intoxication of the accused some 45 minutes after the fatal act, there being no showing of bad faith on the part of the county attorney and it appearing that offered testimony to prove such intoxication as thus stated was excluded.

State v Long, 215-494; 245 NW 726

Voir dire examination—permissible range. The act of the county attorney, in a prosecution for maintaining a liquor nuisance, in asking a proposed juror (whose business was transporting beer) whether he would vote to convict the accused if the accused was proven guilty beyond all reasonable doubt, will not, in and of itself, be deemed prejudicial error.

State v Harrington, 220-1116; 264 NW 24

Misconduct—curative quality of instructions. Assertions of the county attorney in his opening statement to the jury relative to the refusal of defendant's associate in crime to appear as a witness, and as to defendant's inability to give bail, will not be deemed prejudicial misconduct sufficient to demand a new trial when defendant requested no special instructions or admonition to the jury concerning the matter, and when the instructions to the jury were fair.

State v Sampson, 220-142; 261 NW 769

3 Prejudicial Misconduct

Cross-examination of co-indictee to show he was a thief by profession. In the trial of one of two persons jointly indicted for larceny of chickens, the persistent cross-examination of the co-indictee, not on trial but called as a witness by the one on trial, along the line of showing that the witness was in the business of stealing chickens, is prejudicially erroneous.

State v Huss, 210-1317; 232 NW 692

Failure to persistently object. The fact that objections to an argument are not specific or persistent will not be deemed a legal reason for denying a new trial when the argument in question was flagrantly and knowingly improper.

State v McIntyre, 203-451; 212 NW 757

Incurable misconduct. Reversible error results from the assertion by the county attorney in argument before the jury in a criminal case that he (not a witness in the case) personally knows that the defendant had made a confession of the crime charged, especially when the record evidence tending to show guilt is weak.

State v Thomson, 219-312; 257 NW 805

Improper cross-examination. Reversible error results from repeatedly and insistently injecting into the cross-examination of a defendant on trial for crime, and into the cross-examination of his character witnesses, insinuations and innuendoes to the effect that the accused had been guilty of other crimes prior to the time in question.

State v Rounds, 216-131; 248 NW 500

Inflammatory appeals in close case. Weaving into an address by the county attorney reference to sensational newspaper reports, unwarranted assertions of the defendant's guilt of other offenses, inferences that the state has been prevented from showing all the evidence against the accused, and the inconsequence of a verdict of guilty, because of the ease in securing paroles, may require the granting of a new trial, especially (1) when the record reveals such inconsistencies and improbabilities as would fully justify an acquittal, (2) when the case has been three times tried, and (3) when the verdict was clearly a compromise among the jurors.

State v McIntyre, 203-451; 212 NW 757

Inflammatory questions and innuendoes. Reversible error results from the act of the county attorney in persistently asking and reasking questions which bristle with prejudicial innuendoes against the accused, and which call for testimony of a highly inflammatory and incompetent nature; and the sustaining of objections to such questions is not a sufficient antidote for such poison.

State v Neifert, 206-384; 220 NW 32

Juror riding with county attorney. Action of trial juror in riding with county attorney to and from place of trial, while not intentional misconduct and even tho no actual wrong resulted, casts suspicion on jury's verdict, is against public policy, and is grounds for a new trial.

State v Neville, 227-329; 288 NW 83

Misconduct in argument. Argument reviewed and condemned as improper.

State v Burch, 195-427; 192 NW 287

Prejudicial cross-examination. Reversible error may result from the act of the county attorney, while cross-examining the good-character witnesses of the defendant, in persistently and insistently injecting into his questions and by-remarks (and in the face of repeated adverse rulings by the court) matter incompetent and irrelevant, highly derogatory to the character of the defendant, and naturally prejudicial to him.

State v Hixson, 202-431; 210 NW 423

Untoward episode requiring new trial. A new trial must be granted in a criminal case tried before a jury when the county attorney, during the cross-examination of the accused and of his witness, asserts, in an impassioned manner, that the testimony being given is false to his personal knowledge, and couples therewith, in the presence of the jury, a statement that he, himself, is under legal disability to testify, and when the county attorney does not thereafter testify in the case.

State v Gustoff, 213-817; 239 NW 572

4 Curing Error

Admission of evidence. The reception of admissions of guilt which were possibly nonvoluntary will not be deemed prejudicial when a voluntary, written confession of guilt containing the same admissions is subsequently received.

State v Hammond, 217-227; 251 NW 95

Conduct of counsel—curing error. Prejudice arising from misconduct of the county attorney in attempting to bring irrelevant and incompetent matter to the attention of the jury may, ordinarily, be cured or avoided by a very pointed admonition from the court to the jurors to wholly disregard such conduct.

State v Hixson, 208-1233; 227 NW 166
State v Dobry, 217-858; 250 NW 702

Failure of accused to testify—allowable reference. It is not erroneous for the county attorney to refer, during the trial of a criminal case, to the fact the accused has not testified in his own behalf.

State v Stennett, 220-388; 260 NW 732

5 Discretion of Court

Broad discretion of court. The refusal of a new trial in a criminal cause on the grounds of misconduct of the county attorney in examining witnesses, and in argument to the jury, will not be deemed erroneous, unless the record reveals a manifest abuse of the court's discretion.

State v Wheelock, 218-178; 254 NW 313
State v Smith, 219-168; 256 NW 651
State v Stennett, 220-388; 260 NW 732

Misconduct of county attorney—test. Test of whether county attorney's alleged misconduct will warrant a new trial is whether the alleged misconduct is so improper as to be prejudicial and deprive defendant of fair trial, and broad discretion is vested in the trial judge's rulings thereon.

State v Caringello, 227-305; 288 NW 80

(f) MISCONDUCT OF JUDGE

1 In General

Assumption of fact. It is not error for the court to refer to the testimony of a witness as a "fact" when such reference is manifestly for the purpose of correcting counsel in the assertion that the testimony was an "opinion" or "conclusion".

State v Bourgeois, 210-1129; 229 NW 231

Inferential assumption of falsity of testimony. Reversible error results from a statement by the court in the presence of the jury and to the counsel for an accused that "You can't manufacture a conversation with a third person and put it in as a defense."

State v Shearer, 206-397; 220 NW 13

Examination by court. It is not improper for the court, in the trial of a criminal cause, to put questions to a witness (1) because of the hesitation of the witness, (2) in order to properly rule on a motion to strike the testimony, or (3) in order to secure pertinent answers.

State v Eggleston, 201-1; 206 NW 281

Witnesses—examination by court. It is not necessarily erroneous for the court, in a criminal case, to interrogate a witness.

State v Leftwich, 216-1226; 250 NW 489

2 Absence of Judge

Absence of judge from courtroom. It is sufficient if the judge, during the arguments to the jury, was in a position where he could observe and hear all the proceedings in the courtroom, even tho he may not have been at all times actually inside the courtroom.

State v McGee, 207-334; 221 NW 556
State v Van Doran, 208-863; 226 NW 19
State v Twine, 211-450; 233 NW 476
State v Dobry, 217-858; 250 NW 702

Reversible error. The mere fact that the trial judge, during argument, retired to a room adjoining the courtroom, but was only a few feet from the jurors, and always remained within immediate call, reveals no reversible error.

State v McGee, 207-334; 221 NW 556

(g) JURORS NOT QUALIFIED

Drawing jurors in absence of defendant. The fact that, in impaneling a jury in a criminal case, the names of jurors were drawn from the panel box at a time when the defendant was not present will not be deemed prejudicial error in the absence of a showing that such drawing deprived defendant of a fair and impartial jury.

State v Sweetman, 220-847; 263 NW 518

13945 Effect of a new trial.

Unallowable comment. A statement in argument by the county attorney that a former conviction of the accused had been set aside upon technical grounds constitutes reversible error.

State v Voelpel, 213-702; 239 NW 677

CHAPTER 653

ARREST OF JUDGMENT

13946 "Motion in arrest" defined—grounds.

Argument—incurable misconduct. Reversible error results from the assertion by the county attorney in argument before the jury in a criminal case that he (not a witness in the case) personally knows that the defendant had made a confession of the crime charged, especially when the record evidence tending to show guilt is weak.

State v Thomson, 219-312; 257 NW 805

Motion in arrest unavailable. An accused may no longer avail himself of a motion in arrest of judgment on a ground which would be ground for demurrer.

State v Frey, 206-981; 221 NW 445

Motion to set aside. A motion to set aside a duly entered judgment in a criminal case is unknown to our practice.

State v Hawks, 213-698; 239 NW 553

Notwithstanding verdict—unrecognized practice. Motions for judgment notwithstanding the verdict are not recognized in our practice governing criminal cases.

State v Stennett, 220-388; 260 NW 732

Statutory ground exclusive. Motions for arrest of judgment must be based on the one ground specified by statute, viz: that on the whole record, no legal judgment can be pronounced.

State v Kirkpatrick, 220-974; 263 NW 52

Writ of error coram nobis. The common-law writ of error coram nobis is not recognized in this state.

Boyd v Smyth, 200-687; 205 NW 522; 43 ALR 1381

State v Harper, 220-515; 258 NW 886

13947 Time of making motion.

Time limit. Statutory requirements applied that motions in arrest of judgment in criminal cases must be filed during the term, and motions for new trial before judgment.

State v Harper, 220-515; 258 NW 886

CHAPTER 654

JUDGMENT

13951 Judgment of conviction—time for.

Consent to immediate sentence. Sentence may be imposed instanter on conviction when the accused consents to such action.

Bennett v Bradley, 216-1267; 249 NW 651

Fundamental limitation on sentence. A sentence must not exceed the punishment prescribed by law for the criminal elements charged in the indictment, notwithstanding the fact that other additional criminal elements may be unqualifiedly established by the evidence.

McWilliams v Walker, 209-769; 229 NW 183

Judgment entry—sufficiency. The formal entry of a plea of guilty to a charge of murder perpetrated by means of poison, followed by a sentence of life imprisonment, is all-sufficient, tho the better practice would be to first enter a formal judgment of conviction of the crime.

State v Harper, 220-515; 258 NW 886

Premature entry—effect. A sentence rendered less than three days after the return of a verdict will not be disturbed unless the accused shows that he has been prejudiced by such premature sentence.

State v Raney, 208-1238; 226 NW 916

Record entry omitted. A sentence imposed under a plea of guilty and a minute thereof entered on the judge's calendar is wholly without effect as a judgment until actually entered on the record book.

Jones v McClaughry, 169-281; 151 NW 210

Rendition in vacation—validity. The court has no jurisdiction, on its own initiative, in a criminal case prosecuted by indictment, to order that prospective motions in arrest of judgment and for a new trial, and exceptions to instructions be heard by the judge in vacation, and that final sentence be entered by the judge in vacation in case said motions and exceptions be overruled. It necessarily follows that the judge has no jurisdiction, even tho the accused be present, to rule on such matters in vacation, and no jurisdiction to pronounce final judgment in vacation, even tho it be conceded that the accused suffered no prejudice.

State v Rime, 209-864; 226 NW 925

State as creditor. A plea of guilty in a criminal prosecution does not create the relation of creditor and debtor between the state and the accused, and a transfer of property by the accused after such plea and before the entry of judgment for a fine is not necessarily fraudulent as to the state.

State v Malecky, 202-307; 210 NW 121; 48 ALR 603

Unlawful suspension. The court has no power in a criminal case to enter a suspension of sentence during good behavior and on payment of the costs.

State v Hamilton, 206-414; 220 NW 313

13955 Appearance for judgment—showing of cause.

Sentence—evidence in re mitigation. The court is under no obligation, at the time of passing sentence in a criminal cause, to receive evidence in mitigation of the offense, on the part of the accused.

State v Kendall, 200-483; 203 NW 806

13956 What may be shown for cause.

Mental incompetency — insufficiency. In a criminal prosecution for entering a bank with intent to rob, the overruling of a motion for a new trial on the ground that defendant was mentally incompetent was not error where the issue was not raised on the trial, when the affidavit in support of such motion was merely a conclusion of a layman who was an acquaintance of the defendant several years before the trial, and when affidavit referred to one interview a week or ten days before the commission of the offense.

State v Mikesh, 227-640; 288 NW 606

Plea of guilty—fatally delayed withdrawal. A plea of guilty may not be withdrawn after sentence has been passed and judgment entered thereon.

State v Tracy, 219-1412; 261 NW 527

13957 Insanity.

Ineffective expert testimony. The testimony of an expert to the effect that one who is unquestionably guilty of murder in the first degree is mentally responsible to receive a life sentence, but not mentally responsible to receive a death sentence, carries, at the best, very little element of persuasiveness.

State v Tracy, 219-1412; 261 NW 527

Issue of insanity—fatally delayed presentation. In order to suspend the ordinary proceedings in a prosecution for murder, and to enter upon a trial as to the insanity of the accused, the question of insanity must be raised before the end of the trial. (Motion in this case filed after sentence of death had been passed and judgment thereon entered.)

State v Tracy, 219-1412; 261 NW 527

13958.1 Motions—proceedings in vacation.

Rendition in vacation—validity. The court has no jurisdiction, on its own initiative, in a criminal case prosecuted by indictment, to order that prospective motions in arrest of judgment and for new trial, and exceptions to instructions be heard by the judge in vacation, and that final sentence be entered by the judge in vacation in case said motions and exceptions be overruled. It necessarily follows that the judge has no jurisdiction, even tho the accused be present, to rule on such matters in vacation, and no jurisdiction to pronounce final judgment in vacation, even tho it be conceded that the accused suffered no prejudice. (Decided prior to enactment of this section.)

State v Rime, 209-864; 226 NW 925

13958.2 Judgment entered.

Allowable correction. A judgment that a defendant be confined in the penitentiary for an indefinite period which is longer than permitted by law, may, without notice to the defendant or to his counsel and in their absence, be at once so corrected by the court that the period of imprisonment will conform to the period provided by law.

State v Grimm, 206-1178; 221 NW 804

Death of defendant. The death of a defendant in a criminal prosecution, even after trial, conviction, judgment, and appeal, but before the final determination of the latter proceeding, works a complete abatement of the proceeding ab initio.

State v Kriechbaum, 219-457; 258 NW 110; 96 ALR 1317

Entry—necessity. Principle reaffirmed that the oral rendition by the court of his decision, the entry of such decision on the court calendar, and the transcribing of such entry into the appearance docket and fee book, does not constitute a judgment.

State v Wieland, 217-887; 251 NW 757

Impairment of defendant's right of appeal. After imposing, in a criminal case, a fine and imprisonment less than the maximum allowable limit, the court does not impair the defendant's right to appeal by embodying in the judgment a provision for the suspension of a portion of the sentence provided the defendant does not appeal.

State v Kelly, 217-1305; 253 NW 49

Judgment entry — sufficiency. The formal entry of a plea of guilty to a charge of murder perpetrated by means of poison, followed by a sentence of life imprisonment, is all-sufficient, tho the better practice would be to first enter a formal judgment of conviction of the crime.

State v Harper, 220-515; 258 NW 886

Judgment notwithstanding verdict—unrecognized practice. Motions for judgment notwithstanding the verdict are not recognized in our practice governing criminal cases.

State v Stennett, 220-388; 260 NW 732

Motion to set aside. A motion to set aside a duly entered judgment in a criminal case is unknown to our practice.

State v Hawks, 213-698; 239 NW 553

Murder—plea of guilty—findings by court—surplusage—effect. A judgment entry of murder in the first degree, on supported findings by the court, after a plea of guilty to an information charging, among other necessary averments, a "willful, deliberate, and premeditated" killing, without any averment that the killing was perpetrated in the commission of a "burglary," will not be disturbed because the findings unnecessarily recite that the parties were, at the time of the killing, burglarizing a mere office building, an offense technically unknown to our law.

State v Pinkerton, 201-940; 208 NW 351

Rendition in vacation—validity. The court has no jurisdiction, on its own initiative, in a criminal case prosecuted by indictment, to order that prospective motions in arrest of judgment and for new trial, and exceptions to instructions be heard by the judge in vacation, and that final sentence be entered by the judge in vacation in case said motions and exceptions be overruled. It necessarily follows that the judge has no jurisdiction, even tho the accused be present, to rule on such matters in vacation, and no jurisdiction to pronounce final judgment in vacation, even tho it be conceded that the accused suffered no prejudice.

State v Rime, 209-864; 226 NW 925

Sentence—dual statutes. If there be two statutes under either one of which an accused may be sentenced, the court must sentence under the statute which authorizes the shortest maximum term of imprisonment. (So held under §§13139 and 13144.)

Drazich v Hollowell, 207-427; 223 NW 253

Striking invalid provision. A provision in a judgment sentence to the county jail to the effect that the sentence shall be served in the penitentiary is a nullity, even tho the defendant consents thereto; and the court may at the same term, and in the absence of the defendant, strike said provision from the judgment entry and change the commitment to a county other than the county of trial.

State v Herzoff, 200-889; 205 NW 500

13959 Cumulative sentences.

Atty. Gen. Opinions. See '28 AG Op 282, 396; '34 AG Op 728; '38 AG Op 281

Consecutive running. Different sentences need not run concurrently.

State v Van Klaveren, 208-867; 226 NW 81

Invalid and valid nonconcurrent sentences. Petitioner in habeas corpus may establish his right to a discharge from custody by showing (1) that he is being confined under two nonconcurrent sentences; (2) that the first sentence is void because rendered by a court which had no jurisdiction of the subject matter; and (3) that he has served a time equal to that imposed by the second sentence.

Bennett v Hollowell, 203-352; 212 NW 701

Nonconcurrent imprisonment. Where the court sentences an accused to imprisonment on three separate indictments, the sentences under two of said indictments may be so imposed as to commence on the expiration of the imprisonment imposed under the other or third indictment.

Clark v Ireland, 215-560; 246 NW 262

13960 Indeterminate sentences.

Atty. Gen. Opinions. See '25-26 AG Op 376; '32 AG Op 240; '34 AG Op 614, 739; '36 AG Op 25, 353; '38 AG Op 334; AG Op March 8, '39

Allowable correction. A judgment that a defendant be confined in the penitentiary for an indefinite period which is longer than permitted by law may, without notice to the defendant or to his counsel, and in their absence, be at once so corrected by the court that the period of imprisonment will conform to the period provided by law.

State v Grimm, 206-1178; 221 NW 804

Excessive sentence. The plea of excessive sentence is not available to one who is sentenced under the indeterminate sentence law.

State v Christofferson, 215-1282; 247 NW 819

Fixing maximum or minimum confinement—surplusage. That part of a sentence of confinement in the penitentiary or in the men's or women's reformatory for a felony other than treason, murder, or rape, which assumes to fix the maximum or minimum term of confinement is surplusage under the indeterminate sentence act, even tho the statute under which the conviction is had fixes both a maximum and minimum term of confinement.

Cave v Haynes, 221-1207; 268 NW 39

Sentence—form. A sentence to the effect that the accused "be imprisoned in the penitentiary according to law" is all-sufficient, under the indeterminate sentence law.

State v Korth, 204-667; 215 NW 706

Indeterminate sentences not made concurrent—habeas corpus not available. That defendant's imprisonment, if he is compelled to serve full time for each offense, would cover 82 years affords no legal ground for discharge from custody under indeterminate sentences in habeas corpus proceedings, even tho defendant was only 18 years of age and had not been represented by counsel at time pleas of guilty were entered.

Randall v Hollowell, (NOR); 227 NW 139

Punishment—indeterminate sentence as excessive. The appellate court may not say that an indeterminate sentence is excessive when a sentence to the penitentiary was proper under the record.

State v Giles, 200-1232; 206 NW 133; 42 ALR 1496; 29 NCCA 578

State v Overbay, 201-758; 206 NW 634

State v Bird, 207-212; 220 NW 110

State v Hixson, 208-1233; 227 NW 166
State v Bingaman, 210-160; 230 NW 394
State v Hammond, 217-227; 251 NW 95

Rape not included. Judicial discretion is vested in the court as to the sentence to be imposed on a conviction for rape, an exception to the indeterminate sentence act.

State v Steele, 209-550; 228 NW 75

Weight of evidence. All the evidence in the case must be presented on appeal, or the supreme court will not consider the question whether or not the verdict was against the weight of evidence.

State v Carr & Brown, 43-418

13961 Sentences for two or more offenses.

Atty. Gen. Opinions. See '28 AG Op 282; '34 AG Op 728

13962 Discretion as to sentence.

Atty. Gen. Opinion. See '36 AG Op 353

Excessive sentence — review. Possibly a criminal case might be attended by such rare and extraordinary circumstances as to justify the appellate court in holding, notwithstanding the indeterminate sentence act, that the trial court abused its discretion in ordering a commitment to the state reformatory instead of ordering a commitment to the county jail.

State v Cooley, 220-1384; 264 NW 714

13964 Imprisonment for fine.

ANALYSIS

I IN GENERAL
II COSTS
III PAYMENT
IV JUDGMENT

Costs, civil cases generally. See under Ch 497
Imprisonment for debt. See under Art. I, §19, Constitution

I IN GENERAL

Punishment—contempt of liquor injunction. This section, authorizing imprisonment until fine is satisfied, is applicable to judgment imposing a fine as punishment for contempt of liquor injunction under §2029.

Scavo v Utterback, (NOR); 205 NW 858

Surrender of accused—effect. When an accused in a criminal cause is fined, and, independent of the fine, is ordered imprisoned for a named period, an appeal bond conditioned to perform the judgment is not satisfied by the surrender of the accused by the surety.

State v Crosser, 202-725; 210 NW 957

Unauthorized judgment. Authority to imprison in the penitentiary does not embrace authority to imprison in the county jail.

State v Gillman, 202-428; 210 NW 435; 29 NCCA 581

When imprisonment works satisfaction of fine.

State v Oliver, 203-458; 212 NW 572

II COSTS

Appeal—bond—conditions. An appeal bond on appeal from a judgment of conviction for felony does not embrace liability for costs. (§13617, C., '24.)

Van Buren County v Bradford, 202-440; 210 NW 443

Motor vehicles—sentence—imprisonment for nonpayment of costs. One convicted for operating an automobile while intoxicated and sentenced to pay a fine and costs, may not be imprisoned for the nonpayment of the costs.

State v Gillman, 202-428; 210 NW 435

Sentence — imprisonment for costs. There can be no legal imprisonment for the nonpayment of costs in a prosecution for the illegal transportation of intoxicating liquors.

State v Van Klaveren, 208-867; 226 NW 81

III PAYMENT

Intoxicating liquors—injunction—violation. A judgment that an accused in a prosecution for contempt in violating an intoxicating liquor injunction "pay a fine of $300, or in lieu of payment * * * be committed to jail for three months", is satisfied in toto by serving the term of imprisonment.

State v Oliver, 203-458; 212 NW 572

IV JUDGMENT

Bail—surrender of accused—effect. When an accused in a criminal cause is fined, and, independent of the fine, is ordered imprisoned for a named period, an appeal bond conditioned to perform the judgment is not satisfied by the surrender of the accused by the surety.

State v Crosser, 202-725; 210 NW 957

13965 Commitment to jail of another county.

Atty. Gen. Opinion. See AG Op Feb. 20, '39

Authorized change in entry. A provision in a judgment sentence to the county jail to the effect that the sentence shall be served in the penitentiary is a nullity, even tho the defendant consents thereto; and the court may at the same term, and in the absence of the defendant, strike said provision from the judgment entry and change the commitment to a county other than the county of trial.

State v Herzoff, 200-889; 205 NW 500

Presumption. It will be presumed, in the absence of any counter-showing, that the court had a legal reason for changing the place of commitment from the county jail of the county of trial to the jail of a foreign county.

State v Herzoff, 200-889; 205 NW 500

13966 Allowance of bail upon appeal.

Additional annotations. See under §13617
Bail in murder cases. See under §13609, Vol I

Failure to fix appeal bond—effect. The failure of the court, in entering judgment, to fix the amount of the bond upon appeal affects neither the validity nor the finality of the judgment.

State v Olson, 200-660; 204 NW 278

13968 Costs—when payable by state.

Death of defendant—effect. The death of a defendant in a criminal prosecution, even after trial, conviction, judgment, and appeal, but before the final determination of the latter proceeding, works a complete abatement of the proceeding ab initio.

State v Kriechbaum, 219-457; 258 NW 110; 96 ALR 1317

CHAPTER 655

LIEN OF JUDGMENTS AND STAY OF EXECUTIONS

13969 Fines lien on real estate.

Death of defendant—effect. The death of a defendant in a criminal prosecution, even after trial, conviction, judgment, and appeal, but before the final determination of the latter proceeding, works a complete abatement of the proceeding ab initio.

State v Kriechbaum, 219-457; 258 NW 110; 96 ALR 1317

State as creditor. A plea of guilty in a criminal prosecution does not create the relation of creditor and debtor between the state and the accused, and a transfer of property by the accused after such plea and before the entry of judgment for a fine is not necessarily fraudulent as to the state.

State v Malecky, 202-307; 210 NW 121; 48 ALR 603

13970 Stay of execution.

Atty. Gen. Opinions. See '28 AG Op 204, 236

CHAPTER 656

EXECUTIONS

13971 Copy of judgment as execution.

Atty. Gen. Opinions. See '28 AG Op 236; '38 AG Op 281

Illegal commitment—effect. The service by the sheriff of an illegal commitment does not satisfy the judgment.

State v Herzoff, 200-889; 205 NW 500

CHAPTER 657

EXECUTION OF DEATH PENALTY

Atty. Gen. Opinions. See '25-26 AG Op 207; '36 AG Op 107

CHAPTER 658

APPEALS

13994 Office of appeal—who may appeal.

ANALYSIS

I IN GENERAL
II APPEAL BY STATE
III APPEAL FROM FINAL JUDGMENT
IV TIME OF APPEAL

I IN GENERAL

Adjudication of insanity. Whether a defendant in a criminal case who causes himself, when placed on trial, to be adjudged insane can appeal from such adjudication, quaere; but if he has such right, it is a quite barren one.

State v Demara, 210-726; 231 NW 337

Appeal and error—no judgment on assumptions. Assumptions as basis of judgment in criminal case cannot be accepted by the supreme court.

State v Weston, 225-1377; 282 NW 774

Death of defendant. The death of a defendant in a criminal prosecution, even after trial, conviction, judgment, and appeal, but before the final determination of the latter proceed-

ing, works a complete abatement of the proceeding ab initio.

State v Kriechbaum, 219-457; 258 NW 110; 96 ALR 1317

Impairment of defendant's right of appeal. After imposing, in a criminal case, a fine and imprisonment less than the maximum allowable limit, the court does not impair the defendant's right to appeal by embodying in the judgment a provision for the suspension of a portion of the sentence provided the defendant does not appeal.

State v Kelly, 217-1305; 253 NW 49

Intermediate orders. Appeal does not lie from an intermediate order.

State v Swearengen, 43-336

Motion for new trial—misconduct of jurors—prejudicial effect. Misconduct of jurymen in a criminal case does not vitiate the verdict of guilt and necessitate a new trial, unless, from the entire showing of misconduct, the court finds that the jury was probably influenced or prejudiced by said misconduct in the rendition of said verdict. So held as to jury-room discussion relative to:

1. Charges or claims that the county attorney had not introduced all available testimony.
2. Charges that some of the jurors had been bribed.
3. Remarks, derogatory to the innocence of the accused, made by loiterers on the street, and in the presence of jurymen.

State v Siegel, 221-429; 264 NW 613; 299 US 586

Nonpermissible appeal. A city, in a criminal prosecution for the violation of its own ordinance, may not appeal from a judgment of conviction in the district court.

Creston v Kessler, 202-372; 210 NW 464

Statutory punishment excessive—legislature not controlled by court. Tho punishment is believed excessive, the supreme court has no power to change punishment fixed by specific enactment of legislature for third and subsequent offense of violating liquor law.

State v Erickson, 225-1261; 282 NW 728

Writ of error coram nobis. The common-law writ of error coram nobis is not recognized in this state.

Boyd v Smyth, 200-687; 205 NW 522; 43 ALR 1381

State v Harper, 220-515; 258 NW 886

II APPEAL BY STATE

Appeals by state from directed verdict.

State v Bailey, 202-146; 209 NW 403

State v Meyer, 203-694; 213 NW 220

Former jeopardy—state's appeal from directed verdict—defendant unaffected by reversal. Where the state appeals from a ruling sustaining motion for directed verdict for defendant in a criminal case, defendant will not be affected by reversal on appeal.

State v Dillard, 225-915; 281 NW 842

Review—scope and extent—appeal by state—sufficiency of evidence. An appeal by the state from an order directing an acquittal in a criminal case will not be reviewed when nothing is involved but the question of the sufficiency of the evidence to sustain a conviction.

State v Little, 210-371; 228 NW 67

Review, scope of — appeal by state — sufficiency of evidence. An appeal by the state from an order directing an acquittal in a criminal case will not be reviewed insofar as the sufficiency of the evidence to sustain the order is concerned.

State v Niehaus, 209-533; 228 NW 308

III APPEAL FROM FINAL JUDGMENT

Demurrer overruled. The supreme court has no jurisdiction to determine an appeal from an order overruling a demurrer to an indictment.

State v Doty, 109-453; 80 NW 505

Demurrer sustained. A ruling sustaining a demurrer to an indictment on the ground that it contained matter which was a legal defense or bar to the prosecution and directing the discharge of the defendant and the release of his bondsmen is in legal effect a final judgment.

State v Fields, 106-406; 76 NW 802

Order sustaining demurrer to indictment as "final judgment". Where court entered an order reciting that the court "finds that said demurrer should be sustained and indictment dismissed", altho such order is not in the form of a judgment, it was in legal effect a "final judgment" from which an appeal can be taken by the state under §13995, C., '39. Every final adjudication of the rights of the parties is a judgment.

State v Talerico, 227-1315; 290 NW 660

IV TIME OF APPEAL

Abstract—filing—unallowable extension of time. An extension of time in which to file abstract on appeal in a criminal case may not be granted after the statutory time of 120 days for such filing has wholly expired.

State v Van Andel, 222-932; 270 NW 420

Circumventing statute—"record" defined—criminal cases. An appellant who allows the time for filing his abstract to expire may not circumvent the statute by filing what he denominates "motion to submit case on transcript of evidence and exhibits as a part of clerk's transcript", on the theory that §14010, C., '35, provides therefor. The word "record" in that section means only the record before the appellate court and not the entire evidence in the trial court.

State v Johns, 224-487; 275 NW 559

IV TIME OF APPEAL—concluded

Clerk's transcript submission—criminal—abstract—time limit. To avoid a submission on the clerk's short transcript, a criminal appellant who elects to present his case on printed abstract, brief, and argument must serve his notice under Rule 32 and file his abstract within the statutory time of 120 days from the giving of notice of appeal. Setting aside a submission is a matter of grace, not of right.

State v Johns, 224-487; 275 NW 559

13995 Time of taking—from final judgment only.

Appeal and error—right of appeal excludes certiorari. An order of the district court refusing to enter upon a hearing of an application to compel the county attorney to file and enter upon the appearance docket indictments alleged to have been returned against the applicant, is appealable, and therefore certiorari will not lie.

Hoskins v Carter, 212-265; 232 NW 411

Order sustaining demurrer to indictment as "final judgment". Where court entered an order reciting that the court "finds that said demurrer should be sustained and indictment dismissed", altho such order is not in the form of a judgment, it was in legal effect a "final judgment" from which an appeal can be taken by the state under this section. Every final adjudication of the rights of the parties is a judgment.

State v Talerico, 227-1315; 290 NW 660

13997 Taking and perfecting.

Service of notice. Service of notice of an appeal to the supreme court upon the clerk of the district court is necessary to give the supreme court jurisdiction of the cause, and in the absence of an affirmative showing of such service in the record, a case will be dismissed by the supreme court, notwithstanding an appearance of the parties to the merits without objection to the omission as to such service.

State v Rogers, 71-753; 32 NW 7
State v Clossner, 84-401; 51 NW 16

13998 Duty of clerk when appeal is taken.

Abstract and argument—failure to file in time. Where defendant's petition in the supreme court to set aside the submission of a criminal cause and to reinstate the cause and for extension of time to file abstract was sustained, and thereafter a supplemental order was entered extending the time to file abstract to November 25th, and continuing the cause to January 1940 term, defendant, by failure to file abstract by November 25th, lost the right to file an abstract, and by failure to file an argument 30 days before date when cause was submitted, lost the right to file an argument, and the supreme court's only duty was to examine the clerk's transcript of record pursuant to statute. Record re-examined and no error found justifying reversal.

State v Clark, 227-1082; 290 NW 46

14000 Transcript at expense of county.

Ability to pay. Where one criminal defendant had considerable property in another state, and his co-defendant stated that he did not intend to press his appeal, a transcript of the record at public expense was properly refused.

State v Dewey, 155-469; 136 NW 533

Justifiable refusal. Refusal of the court, on appeal, in a criminal cause, to order a transcript of the evidence for the defendant at the expense of the county, may find justification in the fact that the defendant has voluntarily rendered himself financially unable to pay for said transcript.

State v Horton, 223-132; 272 NW 527

Transcript at expense of county. The statutory requirement that in criminal cases an impecunious defendant may, on appeal, have a transcript of the record at the expense of the county has no application to an appeal by a defendant in an equitable action to revoke his professional license.

State v Knight, 204-819; 216 NW 104

14001 Appeal by state—effect.

State's appeal from directed verdict—defendant unaffected by reversal. Where the state appeals from a ruling sustaining motion for directed verdict for defendant in a criminal case, defendant will not be affected by reversal on appeal.

State v Dillard, 225-915; 281 NW 842

14002 Appeal by defendant—effect.

Freedom pending abortive appeal as consideration for bail. Cash deposited as bail pending an appeal is forfeitable for the nonappearance of the accused even tho the appeal, because of improper notice, was abortive and was dismissed, when the accused by reason of said bail secured his unrestricted freedom pending the attempted appeal.

State v Friend, 212-136; 236 NW 20

14003 Bail—proceedings when given.

Immateriality of receipt under issues. On the issue whether defendant had contracted to indemnify plaintiff against liability as surety on an appeal bond in a criminal case, and whether defendant had received funds from the accused with which to perform such indemnity contract, evidence is wholly inadmissible that defendant had received funds from the father or brother of the accused for a purpose wholly foreign to said indemnity contract.

State v Cordaro, 211-224; 233 NW 51

14004 Title of case—how docketed.

Abstract and argument—failure to file in time. Where defendant's petition in the supreme court to set aside the submission of a criminal cause and to reinstate the cause and for extension of time to file abstract was sustained, and thereafter a supplemental order was entered extending the time to file abstract to November 25th, and continuing the cause to January 1940 term, defendant, by failure to file abstract by November 25th, lost the right to file an abstract, and by failure to file an argument 30 days before date when cause was submitted, lost the right to file an argument, and the supreme court's only duty was to examine the clerk's transcript of record pursuant to statute. Record re-examined and no error found justifying reversal.

State v Clark, 227-1082; 290 NW 46

14007 Assignment of error.

Additional assignment on rehearing. An appellant must, on rehearing, stand on the errors specified by him on the original submission.

State v Lozier, 200-652; 204 NW 256

Appellant's duty to submit brief. In appeal from conviction for illegally transporting intoxicating liquor, where case was submitted only on transcript of record and printed abstract, amendment, and denial, defendant had further duty to submit brief and argument, since court sits to correct errors of law, and the precise complaint must be substantially pointed out by appellant.

State v Korbel, 226-676; 284 NW 458

Charitable construction. The appellate court, on appeals in grave criminal cases, is inclined to tolerate imperfect and unskillful assignments of error which would not be tolerated in civil cases.

State v Ingram, 219-501; 258 NW 186

Failure to present proposition for reversal —effect. The point or proposition that a magistrate had no legal right to proceed to the condemnation of liquors seized on a search warrant because he delayed such proceeding until after the lapse of 48 hours after the return on the warrant, will not be reviewed on appeal when such point or proposition is not, on appeal, set forth as a reason for reversal or mentioned in the briefs.

State v Bruns, 211-826; 232 NW 684

Fatal indefiniteness. An assignment of error to the effect that the court erred (1) in giving a certain instruction, or (2) in overruling motion for new trial, is so fatally indefinite as to present no question on appeal.

State v Campbell, 213-677; 239 NW 715

Fatal generality. An assignment of error which, in effect, invites the court to search for errors will be wholly disregarded.

State v Terry, 207-916; 223 NW 870

Fatal indefiniteness. An assignment of error which simply asserts that the court erred in giving an instruction is fatally indefinite.

State v White, 205-373; 217 NW 871
State v Cordaro, 206-347; 218 NW 477
State v Dillard, 207-831; 221 NW 817
State v Perkins, 208-1394; 227 NW 417

Fatal insufficiency. An assertion on appeal in a criminal prosecution that the court erred in refusing to give an instruction, which may be found on a certain page of the abstract, is fatally insufficient. The refused instruction should be literally set forth in connection with the assignment.

State v Murray, 222-925; 270 NW 355

Insufficiency overlooked. Insufficiency of an assignment of error will not necessarily be insisted on in a grave criminal charge on appeal when the court can discover the alleged error intended to be pointed out.

State v Clay, 222-1142; 271 NW 212

Particularity required. If procedure in a criminal case violates a constitutional provision, the complainant must specifically set forth wherein or in what manner said provision has been violated.

State v Hawks, 213-698; 239 NW 553

14009 Rules of procedure.

Abstracts. See under §14010

Amendment of abstract on rehearing—nonapplicability of rule. The rule that an abstract cannot be amended after a rehearing has been granted has no application to a case where the court wholly withdraws an opinion, sets aside the former submission, and orders the appeal resubmitted.

State v Henderson, 215-276; 243 NW 289

Assignment of errors—additional assignment on rehearing. An appellant must, on rehearing, stand on the errors specified by him on the original submission.

State v Lozier, 200-652; 204 NW 256

Clerk's transcript submission — abstract — time limit. To avoid a submission on the clerk's short transcript, a criminal appellant who elects to present his case on printed abstract, brief, and argument must serve his notice under Rule 32 and file his abstract within the statutory time of 120 days from the giving of notice of appeal. Setting aside a submission is a matter of grace, not of right.

State v Johns, 224-487; 275 NW 559

Death of appellant. An appeal in a criminal cause will be dismissed by the court on its own

motion when it appears that the appellant has died pending the appeal.

State v Catron, 207-318; 222 NW 843

Failure to file brief—abandonment presumed. Appellant has duty to file brief and argument pointing out errors at law relied on for reversal, and failure so to file will be presumed an abandonment of the appeal.

State v Korbel, 226-676; 284 NW 456

Nonrecord proceedings—improper showing. A certificate or written statement by the clerk of the district court is incompetent to show that the trial court remained in session more than three days after a verdict of guilty was rendered.

State v Raney, 208-1238; 226 NW 916

Unargued assignment of error. Unargued assignments of error will be deemed waived.

State v Derry, 202-352; 209 NW 514

14010 Decision of supreme court.

ANALYSIS

Abstracts in civil cases. See under §§12845–12847
Procedendo. See under §14016
Supreme court—arguments—decisions. See also §12871
Unsupported verdicts. See under §13944

I IN GENERAL

Appeal and error—no judgment on assumptions. Assumptions as basis of judgment in criminal case cannot be accepted by the supreme court.

State v Weston, 225-1377; 282 NW 774

Abstract and argument—failure to file in time—duty of court. Where defendant's petition in the supreme court to set aside the submission of a criminal cause and to reinstate the cause and for extension of time to file abstract was sustained, and thereafter a supplemental order was entered extending the time to file abstract to November 25th, and continuing the cause to January 1940 term, defendant, by failure to file abstract by November 25th, lost the right to file an abstract, and by failure to file an argument 30 days before date when cause was submitted, lost the right to file an argument, and the supreme court's only duty was to examine the clerk's transcript of record pursuant to statute. Record re-examined and no error found justifying reversal.

State v Clark, 227-1082; 290 NW 46

Belated filing of abstract—review on transcript and argument. Where defendant failed to comply with Rule 32 and §12847, C., '39, requiring that abstract be filed within 120 days after perfecting appeal, but did file brief and argument within time fixed by said rule, held that only brief and argument would be considered, and that under §14010, C., '39, it was imperative duty of supreme court to review the record presented by clerk's transcript even tho the defendant had no right to have the abstract considered.

State v Dunley, 227-1085; 290 NW 41

Desertion of child—proof of paternity—reasonable doubt rule applicable. In a prosecution for child desertion, a claim of nonaccess creating a conflict in the evidence as to the paternity of the child requires the state to prove paternity beyond a reasonable doubt and submission of the question to the jury.

State v Heath, 224-483; 276 NW 35

Duplicity. Duplicity in an indictment cannot be first urged on appeal.

State v Callahan, 96-304; 65 NW 150

Estoppel to ask review. After the court has received defendant's testimony on a tenable theory, defendant may not complain of the striking out of the testimony when defendant insists for its retention solely on an untenable theory.

State v Buck, 205-1028; 219 NW 17

Instructions—failure to except. Failure to take and preserve exceptions to instructions in criminal cases in the manner and form provided by statute precludes review on appeal, irrespective of this section, C., '31.

State v Griffin, 218-1301; 254 NW 841

Intoxication as defense—burden of proof—instruction. While not interposed as an affirmative defense, evidence reviewed and held insufficient to prove that defendant was so intoxicated at the time of the commission of the homicide that he was unable to form criminal intent, and instruction thereon held proper.

State v Heinz, 223-1241; 275 NW 10; 114 ALR 959

Questions of fact. The findings of fact by the jury in criminal cases, on fairly supporting testimony, are conclusive on appeal.

State v Kress, 204-828; 216 NW 31

Statute not construed to aid lawbreakers. Statute providing that the supreme court shall disregard technical immaterial errors is not to be construed to provide a means of allowing lawbreakers to escape.

State v Albertson, 227-302; 288 NW 64

Sufficiency of evidence of guilt. The appellate court will not substitute its judgment as to the weight of substantial and sufficient evidence of guilt.

State v Manly, 211-1043; 233 NW 110

Variance. An indictment charging the obtaining of money by false pretenses is properly supported by evidence that the accused obtained a check for the amount of money in question and later personally obtained the money by cashing the check.

State v Detloff, 201-159; 205 NW 534

Demurrer—function—whether offense comes within statute. On appeal from judgment overruling a defendant's demurrer to indictment, the sole duty of the supreme court is to determine whether the offense with which the defendant is charged comes within the provisions of the statute under which he is charged, without regard to whether such or similar offenses may, or may not, come within any other criminal statute.

State v Oge, 227-1094; 290 NW 1

Withdrawal of opinion — jurisdiction. The supreme court has jurisdiction, in a criminal case, to wholly withdraw a reversing opinion and to order a resubmission of the appeal, provided procedendo has not issued to the lower court, and provided, if procedendo has not issued, the lower court has not assumed jurisdiction of the case by redocketing it.

State v Henderson, 215-276; 243 NW 289

II ERROR WITHOUT PREJUDICE

Action favorable to accused. In a prosecution for fraudulent banking, the action of the court in withdrawing that part of the indictment which charges an "intent to receive a financial benefit" constitutes no error of which the accused may complain.

State v Boysen, 214-46; 238 NW 581

Admission of evidence. The reception of admissions of guilt which were possibly nonvoluntary will not be deemed prejudicial when a voluntary, written confession of guilt containing the same admissions is subsequently received.

State v Hammond, 217-227; 251 NW 95

Circumstantial evidence—refusal to instruct. A refusal of the court to instruct that the state's case rests solely on circumstantial evidence, even tho such is the record, is erroneous, but not necessarily reversible error.

State v Glendening, 205-1043; 218 NW 939

Continuance—harmless error. The overruling of defendant's motion for a continuance, to enable defendant to take the deposition of an absent witness, must, if erroneous, be deemed harmless when defendant did secure said deposition prior to the trial.

State v Papst, 221-770; 266 NW 498

Declarations of deceased—harmless error. Record reviewed relative to the admission of declarations of a deceased, alleged to have been part of the res gestae or dying declarations, and held to reveal no prejudicial error.

State v Johnston, 221-933; 267 NW 698

Curing harmless error. Error, if any, in receiving in evidence a statement (part of a purported dying declaration) is cured by immediately striking the statement from the record with admonition to the jury to disregard it; especially when substantially the same statement is properly in the record as part of the res gestae.

State v Woodmansee, 212-596; 233 NW 725

Defects rendered immaterial by verdict. Defects in an indictment for murder become immaterial when manslaughter is properly charged and the accused is convicted of the latter offense.

State v Harness, 214-160; 241 NW 645

Error against state. Defendant in a prosecution for larceny may not predicate error on an unanswered question material to the state's case.

State v Philpott, 222-1334; 271 NW 617

Errors favorable to accused. In a prosecution for larceny from a building in the nighttime, failure to define the included offense of larceny from a building in the daytime, is inconsequential, the punishment for said latter offense being in excess of that of which the accused was convicted—larceny.

State v Endorf, 219-1321; 260 NW 678

Defendant's appeal — technicalities disregarded—judgment rendered as law demands. On an appeal from a judgment entered on a plea of guilty, which is made subject to the exception to the ruling overruling defendant's demurrer to indictment, the supreme court is, by statute, required to examine the record without regard to technical errors or defects which do not affect substantial rights of the parties, and render such judgment on the record as the law demands.

State v Oge, 227-1094; 290 NW 1

Errors not affecting results. It is wrong for courts to reverse criminal cases for technical defects in instructions, or technical errors in the trial which do not affect the result.

State v Roberts, 222-117; 268 NW 27

Estoppel to allege error. A defendant may not predicate error on the reception of evidence of extraneous crimes claimed to have been committed by him when he interposes no objection at the time the evidence is offered, and when he later avails himself of the evidence under the claim that it tends to show his claimed insanity.

State v Mullenix, 212-1043; 237 NW 483

II ERROR WITHOUT PREJUDICE—continued

Exclusion of nonexplanatory question — prejudice presumed. The erroneous refusal of the court, in a prosecution for assault to rape, to permit a witness, proffered by the defendant, to answer a question whether the witness knew the general reputation of the prosecutrix as to truth and veracity in the community where she lived, cannot be deemed harmless error on the ground that the question did not reveal whether the witness would answer "yes" or "no", when, in connection with the proffer of the witness, defendant offered to show that said prosecutrix was "wholly unreliable in her word and statements".

State v Teager, 222-392; 269 NW 348

Failure to send exhibit to jury room—review. The fact that a duly introduced exhibit in a criminal case was not given to the jury when it first retired, but was sent to the jury some hours before the verdict was returned, reveals no prejudicial error, especially when the contents of the exhibit were fully revealed to the jury by both parties during the arguments.

State v Twine, 211-450; 233 NW 476

Pistols not offered in evidence taken to jury room. In prosecution for carrying concealed weapons, permitting jury to take pistols, not technically offered in evidence, to jury room held not prejudicial, where pistols were before jury, frequently referred to in evidence, and sent to jury room with knowledge of defendant's counsel and without his objection.

State v Busing, (NOR); 251 NW 620

Harmless error. The conclusion of a witness as to the size of a regulatory speed sign may be entirely harmless in view of other testimony as to the size of said sign.

State v Thomlinson, 209-555; 228 NW 80

Harmless error. The reception of evidence wholly harmless to the accused, constitutes no ground for reversal.

State v Fador, 222-134; 268 NW 625

Harmless error. An accused may not predicate error on the reception of evidence that his co-indictee (not on trial) "had been tried."

State v Graham, 203-532; 211 NW 244

Harmless error. On the issue of false pretenses as to the amount of the unsecured indebtedness of the accused, the reception in evidence of promissory notes of the accused which did not evidence unsecured indebtedness is harmless when the falsity of the pretenses alleged is shown by other uncontradicted evidence.

State v Detloff, 201-159; 205 NW 534

Harmless error. Error (if it be error) in permitting a witness to testify that he had learned a certain fact bearing solely on defendant's guilt becomes harmless when the evidence shows that defendant's admission of guilt embraced a recognition of the existence of such fact.

State v Cordaro, 206-347; 218 NW 477

Harmless error. Error may not be predicated on the reception of immaterial, nonprejudicial testimony.

State v Mullenix, 212-1043; 237 NW 483

Hearsay testimony — reception — inviting error. Defendant who, on cross-examination of the state's witness, first enters the forbidden field of hearsay testimony on a certain point, is not in an advantageous position to object when the state, on redirect, follows into the same field of inquiry, especially when the testimony erroneously received is not inherently prejudicial and is practically that which was brought out by defendant on cross-examination.

State v Philpott, 222-1334; 271 NW 617

Immaterial but harmless testimony. Error may not be predicated on immaterial but quite harmless testimony relative to the attitude of a deceased toward women.

State v Clay, 222-1142; 271 NW 212

Immaterial but incidental testimony. The reception of testimony as to what a witness observed upon approaching, and while at, a place where an accident had happened, even tho having no bearing on the issue on trial, does not necessarily constitute prejudicial error.

State v Thomlinson, 209-555; 228 NW 80

Improper submission—inconsequential error. The improper submission to the jury of murder in the first degree becomes of no consequence when the accused is found guilty of murder in the second degree, and on appeal a new trial is ordered for other reasons.

State v Davis, 209-524; 228 NW 37

Improper reception — effect. The improper reception in evidence of a written notice to an accused to produce a written instrument or to submit to secondary evidence of its contents, and the possession of such notice by the jury, do not necessarily work prejudicial error.

State v Gardiner, 205-30; 215 NW 758

Included offenses—failure to submit—when not error. Under a charge of assault to murder, failure to instruct as to any included and supported offense below assault with intent to commit manslaughter does not constitute prejudicial error when the jury finds the defendant guilty as charged.

State v Smith, 215-374; 245 NW 309

Instructions—harmless omission. Objection to an instruction permitting the jury to find a verdict of guilty of receiving stolen property if the accused received the property from "some person," instead of "some other person," is too hypercritical to warrant an inference of prejudice.

State v Joy, 203-536; 211 NW 213

Instructions in re time and venue. Failure of instructions to require the jury to make any finding as to time and venue is quite harmless when the time and place of the commission of the offense are not a matter of any controversy whatever.

State v Bird, 207-212; 220 NW 110

Misconduct of juror—statement of fact. No prejudicial error occurs from a statement by a juror during the deliberation of the jury that she knew that a certain date fell on a certain day of the week because she had personally looked it up on the calendar, when the record shows that whether the date fell on said day of the week was quite immaterial.

State v White, 205-373; 217 NW 871

Non-grand-jury witness—curing error. Any error in receiving the testimony of a witness not before the grand jury is cured by subsequently excluding such testimony and admonishing the jury to disregard it.

State v Christensen, 205-849; 216 NW 710

Non-res-gestae statement—effect. The reception of evidence under the mistaken belief that it was part of the res gestae will be deemed nonprejudicial when the jury was already in possession of competent evidence which, if believed, established every fact which could be deduced from the supposed res gestae statement.

State v Ayles, 205-1024; 219 NW 41

Nonreversible error — unsupported instruction. In a prosecution for illegal possession of intoxicating liquors, an instruction as to the statutory presumption attending an attempt, in the presence of peace officers, to destroy such liquors—as to which there was no supporting evidence—does not constitute reversible error, it appearing from the record that the defendant was, beyond question, guilty of the offense charged and, in addition, was an habitual violator of said liquor statutes.

State v Roberts, 222-117; 268 NW 27

Questions in general. The exclusion of a question whether the county attorney had, on a certain occasion, attempted to talk with a witness for an accused is quite harmless.

State v Steele, 209-550; 228 NW 75

Pistols not offered in evidence taken to jury room. In prosecution for carrying concealed weapons, permitting jury to take pistols, not technically offered in evidence, to jury room held not prejudicial, where pistols were before jury, frequently referred to in evidence, and sent to jury room with knowledge of defendant's counsel and without his objection.

State v Busing, (NOR); 251 NW 620

Rape—divorced wife's testimony as to venereal disease. In a rape prosecution, an unsuccessful attempt to introduce objectionable testimony relative to defendant's affliction with venereal disease, during marriage, by asking divorced wife if she had observed his condition relative to venereal disease, and if she had testified in her divorce action that she had received venereal disease from him, held nonprejudicial error.

State v Donovan, (NOR); 263 NW 516

Repetition of testimony. On a trial for murder, the reception in evidence of a statement signed by defendant, and explanatory of the shooting in question, is quite unobjectionable and harmless when the statement is but a repetition of the testimony of the defendant on the trial.

State v Harness, 214-160; 241 NW 645

Trial—harmless error—exclusion of inconsequential evidence. The exclusion of testimony tending to show that the private prosecutor of a charge of crime had deliberately destroyed or made away with certain evidence does not constitute error when it appears that said prosecutor admitted the existence of every fact which the excluded evidence would establish.

State v Smith, 207-1345; 224 NW 594

Wife as witness against husband. The act of the state in calling a woman as a witness against the defendant (who was accused of a felonious assault on a third party) does not constitute reversible error when a preliminary examination, on prompt objection, reveals the fact that the witness is the common-law wife of the defendant, and when the witness was thereupon promptly excluded.

State v Smith, 215-374; 245 NW 309

III REGULARITY BELOW PRESUMED

No judgment on assumptions. Assumptions as basis of judgment in criminal case cannot be accepted by the supreme court.

State v Weston, 225-1377; 282 NW 774

Instructions—presumption. Presumptively, as against appellee, an instruction has support in testimony not abstracted to the appellate court.

State v Metcalfe, 203-155; 212 NW 382

IV GROUNDS FOR REVERSAL

Charging offense under nonexistent statute. Conviction for possession of fish of illegal length, under information charging violation of §208 of the conservation laws of the 47th GA, cannot be sustained when no such section exists even tho defendant makes no objection at any stage of the proceedings.

State v Albertson, 227-302; 288 NW 64

Excluded testimony otherwise received. Parties charged with conspiracy may not predicate error on the exclusion of documentary evidence tending to show the lawfulness of their purposes when the essential facts revealed in the excluded evidence are otherwise shown in their testimony.

State v Moore, 217-872; 251 NW 737

IV GROUNDS FOR REVERSAL—concluded

Extortion—failure to keep separate. Under a charge of "malicious threats to extort money", the accused cannot be properly convicted of "malicious threats to compel a person to do an act against his will", (said offenses being separate and distinct tho provided for in the same section) and instructions which infer the contrary are erroneous.

State v Essex, 217-157; 250 NW 895

Failure to present proposition for reversal—effect. The point or proposition that a magistrate had no legal right to proceed to the condemnation of liquors seized on a search warrant because he delayed such proceeding until after the lapse of 48 hours after the return on the warrant will not be reviewed on appeal when such point or proposition is not, on appeal, set forth as a reason for reversal or mentioned in the briefs.

State v Bruns, 211-826; 232 NW 684

Hypothetical questions not based on evidence. In a prosecution for homicide where it was shown that the deceased was found with a fractured neck, with no marks on his neck or body nor any evidence of a quarrel or struggle, after he had been left alone for only about a minute and a half with the defendant who was a friend of about the same size and weight, it was reversible error to allow a physician to demonstrate a strangle hold, and to answer a hypothetical question, not based on evidence, that force could be applied from the rear so as to break a man's neck.

State v Hillman, 226-932; 285 NW 176

Immaterial cross-examination. Error may not be predicated on the cross-examination of an accused on an immaterial and apparently inconsequential matter.

State v Graham, 203-532; 211 NW 244

Reception of evidence—competency. The reception in evidence of an exhibit purporting to show the questions put to an accused in a homicide case very shortly after the occurrence in question and the answers of the accused to such questions does not constitute reversible error when it appears that, prior to the reception of the exhibit, the witness had fully testified, as of her own knowledge, to all the facts shown by the exhibit.

State v Maharras, 208-127; 224 NW 537

V RESERVATION OF GROUNDS

Discussion. See 22 ILR 609—Trial technique

Duplicity—waiver. The claim that an indictment or trial information charges more than one offense will be disregarded when raised for the first time on appeal.

State v Voss, 201-16; 206 NW 292

Trial—effect on unruled motion. Defendant in a criminal proceeding waives a motion filed by him by going to trial without demanding a ruling on said motion.

State v Wilson, 222-572; 269 NW 205

Failure to except to improper argument—effect. Failure to except to improper argument either at the time of the argument or in motion for new trial precludes review on appeal.

State v Henderson, 212-144; 232 NW 172

Failure to object. The admissibility of testimony will not be reviewed on appeal when no objection was interposed in the trial court.

State v Davis, 212-582; 234 NW 858

Form of indictment—failure to question. Failure in the trial court to question the form of the indictment precludes the presentation of such question on appeal.

State v Woodmansee, 212-596; 233 NW 725

Habitual criminals—unallowable former convictions—proper presentation. When an indictment charges a complete offense, and is, therefore, not demurrable, but pleads unallowable former convictions, the objections to such convictions may be raised for the first time by objections to the proof of such convictions.

State v Madson, 207-552; 223 NW 153

Inadequate presentation in trial court. The proposition that the court declined to permit further examination of a juror after a challenge had been overruled is not presented to the trial court by the complainant's dictating into the record matter upon which the trial court cannot make a ruling.

State v Harding, 205-853; 216 NW 756

Indictment for nonindictable offense. A prosecution may not be maintained under an indictment which simply charges a nonindictable offense, and such contention may be presented for the first time on appeal.

State v Wyatt, 207-319; 222 NW 866

Jurisdictional question. The point that the trial court had no jurisdiction over an indictment because the indictment simply charged a nonindictable offense may be raised for the first time on appeal.

State v Wyatt, 207-322; 222 NW 867

Objectionable answer—waiver. Failure to move to strike an objectionable answer to a proper question waives the vice contained in the answer.

State v Gillman, 202-428; 210 NW 435

Estoppel to allege error. A defendant may not predicate error on the reception of evidence of extraneous crimes claimed to have been committed by him when he interposes no objection at the time the evidence is offered, and when he later avails himself of the evidence under the claim that it tends to show his claimed insanity.

State v Mullenix, 212-1043; 237 NW 483

Objections first presented on appeal. Alleged error in receiving in evidence, before an accused became a witness, a statement voluntarily signed by an accused wherein he stated that he had theretofore served a term in the penitentiary, will not be reviewed when first presented on appeal; especially when the objectionable statement had been made by defendant's counsel to the jury during the opening statements, and later confirmed by the testimony of the defendant himself.

State v Woodmansee, 212-596; 233 NW 725

Objections to evidence. Objections to evidence must be made when it is offered, not for the first time on appeal.

State v Harrington, 220-1116; 264 NW 24

Review—scope and extent—waiver. An accused may not, for the first time on appeal, present the objection that the indictment pleads a former conviction which is legally unallowable.

State v McGee, 207-334; 221 NW 556

VI THE RECORD

Certification of transcript. The original transcript of the evidence made by the reporter cannot be considered on appeal unless it is identified as being the evidence in the case by a certificate of the clerk of the court below.

State v Tower, 96-101; 64 NW 764

Circumventing statute—"record" defined. An appellant who allows the time for filing his abstract to expire may not circumvent the statute by filing what he denominates, "Motion to submit case on transcript of evidence and exhibits as a part of clerk's transcript" on the theory that this section provides therefor. The word "record" in this section means only the record before the appellate court and not the entire evidence in the trial court.

State v Johns, 224-487; 275 NW 559

Evidence not identified. The only way oral evidence introduced on the trial of a cause can be preserved and identified, for the purpose of an appeal to the supreme court, is by a bill of exceptions, signed by the trial judge; and certain alleged evidence in the case cannot be considered, unless so identified.

State v Hemrick, 62-414; 17 NW 594

Fatally defective record. The appellate court cannot consider errors assigned on exhibits which are not embraced in the appellate record.

State v Wall, 218-171; 254 NW 71

Failure to file brief—abandonment presumed. Appellant has duty to file brief and argument pointing out errors at law relied on for reversal, and failure so to file will be presumed an abandonment of the appeal.

State v Korbel, 226-676; 284 NW 458

Misconduct in argument—necessary record. An assignment of misconduct of the county attorney in argument will not be considered, in the absence on appeal of such argument.

State v Peacock, 201-462; 205 NW 738

Misconduct of county attorney. Complaint of the conduct of the county attorney in the trial will be disregarded, in the absence of a definite record relating thereto.

State v Feldman, 201-1089; 202 NW 90

VII PRINTED ABSTRACTS

Absence of abstract—effect. The appellate court cannot consider appellant's statement of fact in a criminal case in the absence of a certified transcript of the evidence or of an abstract thereof.

State v Soeder, 216-815; 249 NW 412

Abstract and argument — filing — requirements. Where defendant's petition in the supreme court to set aside the submission of a criminal cause and to reinstate the cause and for extension of time to file abstract was sustained, and thereafter a supplemental order was entered extending the time to file abstract to November 25th, and continuing the cause to January 1940 term, defendant, by failure to file abstract by November 25th, lost the right to file an abstract, and by failure to file an argument 30 days before date when cause was submitted, lost the right to file an argument, and the supreme court's only duty was to examine the clerk's transcript of record pursuant to statute. Record re-examined and no error found justifying reversal.

State v Clark, 227-1082; 290 NW 46

Belated filing of abstract—review on transcript and argument. Where defendant failed to comply with Rule 32 and §12847, C., '39, requiring that abstract be filed within 120 days after perfecting appeal, but did file brief and argument within time fixed by said rule, held that only brief and argument would be considered, and that under §14010, C., '39, it was imperative duty of supreme court to review the record presented by clerk's transcript even tho the defendant had no right to have the abstract considered.

State v Dunley, 227-1085; 290 NW 41

Abstract of evidence. An abstract of the evidence presented on the first appeal will not be construed as the abstract on the second appeal, tho the evidence is the same.

State v Wolf, 118-564; 92 NW 673

Fatally defective record. The appellate court cannot consider errors assigned on exhibits which are not embraced in the appellate record.

State v Wall, 218-171; 254 NW 71

Review of instructions. Rulings upon instructions requested and refused, purporting to be predicated upon the evidence, will not be reviewed where the evidence is omitted from

VII PRINTED ABSTRACTS—concluded

the abstract, as their relevancy to the evidence is not made to appear.

State v Ayers, 163-631; 145 NW 276

Abstract—filing—unallowable extension of time. An extension of time in which to file abstract on appeal in a criminal case may not be granted after the statutory time of 120 days for such filing has wholly expired.

State v Van Andel, 222-932; 270 NW 420

VIII DECISION ON APPEAL

(a) IN GENERAL

Bill of exceptions. Failure to file a bill of exceptions leaves the supreme court no avenue of reversal on the evidence, but it must affirm.

State v Taylor, 53-759; 6 NW 39
State v Omeig, 54-761; 7 NW 124
State v Brewer, 70-384; 30 NW 646
State v Philpott, 222-1334; 271 NW 617

Conclusiveness of supported verdict. A conviction of rape on supporting testimony and on ample corroboration is conclusive on the court.

State v Steele, 209-550; 228 NW 75

Correction of sentence. Judgments for imprisonment for nonpayment of fine and cost must specify the definite term of imprisonment, but if this is omitted, such omission will be corrected on appeal.

State v McCoy, 196-278; 194 NW 265

Counsel fees not determinable on appeal. The supreme court will not, on appeal, fix attorney fees for defending a pauper prisoner.

State v Froah, 220-840; 263 NW 525

Disputed question of fact. The appellate court will not, in a criminal case, disturb a verdict based on a fair, disputed question of fact.

State v Derry, 202-352; 209 NW 514

Evidence — sufficiency — reasonable doubt. The weight and sufficiency of the evidence being for the jury, the supreme court, reviewing a case on the evidence, will not consider the question of reasonable doubt.

State v De Kraai, 224-464; 276 NW 11

Remand for proper sentence. Record held sufficient to sustain a conviction of larceny, but insufficient to sustain a finding of value of the stolen property in excess of $20. The cause is therefore reversed and remanded with direction to the trial court to re-sentence the accused.

State v Morrison, 221-3; 265 NW 355

When remand for new trial not ordered. Irrespective of the sufficiency of the evidence at the time when the state rests, a remand, on appeal, will not be ordered when the evidence at the close of the entire case presents a jury question on the issue of guilt.

State v Sharpshair, 215-399; 245 NW 350

(b) VERDICT CONTRARY TO EVIDENCE

Unlawful transportation—sufficiency of evidence. Examination of record on appeal from conviction for unlawful transportation of intoxicating liquor, as required by statute, disclosed sufficient evidence to sustain the conviction.

State v Korbel, 226-676; 284 NW 458

Unsustained verdict. Judgments of conviction in criminal cases will be set aside when they are clearly against the weight of the evidence and the instructions of the court.

State v Klein, 218-1060; 256 NW 741

(c) EXCESSIVE SENTENCE

1 In General

Nonsubstantial reasons. A sentence will not be disturbed in absence of a substantial reason therefor.

State v Bamsey, 208-796; 223 NW 873

Excessiveness — material considerations. Whether a sentence is excessive may depend to an extent on the recognized frequency of the offense in question and on the fact that the legislature has quite recently increased the punishment.

State v Hester, 205-1047; 218 NW 616

Indeterminate sentence as excessive. The appellate court may not say that an indeterminate sentence is excessive when a sentence to the penitentiary was proper under the record.

State v Giles, 200-1232; 206 NW 133; 42 ALR 1496; 29 NCCA 578
State v Overbay, 201-758; 206 NW 634
State v Hammond, 217-227; 251 NW 95

Indeterminate sentence. The plea of excessive sentence is not available to one who is sentenced under the indeterminate sentence law.

State v Christofferson, 215-1282; 247 NW 819

Law-imposed sentence. A sentence which the indeterminate sentence act ipso facto imposes as the result of a conviction may not be deemed excessive when formally imposed by the court.

State v Bird, 207-212; 220 NW 110

Reduction of sentence—record required. A sentence for violating the intoxicating liquor statutes will not, on appeal, be reduced, in the absence of a record which shows a substantial reason for such reduction.

State v Nolta, 205-595; 218 NW 144

Sentence—excessiveness. It is not for the judicial department to relieve an accused of a sentence because of the state of his health.

State v Van Klaveren, 208-867; 226 NW 81

Violators of injunction—maximum penalty excessive. Sentences of six months in jail and a $500 fine each, the maximum permitted

by statute, when imposed against labor union officials for violating an injunction against the union, were excessive in view of the circumstances.

Carey v Dist. Court, 226-717; 285 NW 236

2 Sentence Reduced

Operation while intoxicated. Sentence of one year in the penitentiary, for operating an automobile while intoxicated, reviewed, held excessive, and reduced to a fine of $1,000, and, in default of payment, to imprisonment in the county jail for 300 days.

State v Kendall, 200-483; 203 NW 806

3 Sentence Not Reduced

Sentence not reduced. In the absence of any mitigating circumstances, sentence imposed by the trial court for the unlawful sale of intoxicating liquors will not be disturbed on appeal.

State v Lammers, 199-820; 202 NW 504

14012 Decisions in appeals by state.

Appeal by state — sufficiency of evidence. An appeal by the state from an order directing an acquittal in a criminal case will not be reviewed when nothing is involved but the question of the sufficiency of the evidence to sustain a conviction.

State v Niehaus, 209-533; 228 NW 308
State v Little, 210-371; 228 NW 67
State v Friend, 213-544; 239 NW 132
State v Tibbetts, 213-552; 239 NW 133

State's appeal from directed verdict—defendant unaffected by reversal. Where the state appeals from a ruling sustaining motion for directed verdict for defendant in a criminal case, defendant will not be affected by reversal on appeal.

State v Dillard, 225-915; 281 NW 842

14013 Reversal—effect.

Atty. Gen. Opinion. See AG Op Feb. 24, '39

Remand with directions. When it appears that certain rulings of a material nature have been made by the judge in vacation without jurisdiction so to rule in vacation, the cause will be remanded with directions to the trial court to proceed in term time to a ruling on said matters.

State v Rime, 209-864; 226 NW 925

Reversal or jury disagreement—retrial at same term unnecessary. Tho reversal of a judgment against a criminal defendant is an order for a new trial and a jury disagreement a cause for retrial, he need not be retried at the same term of court.

Ferguson v Bechly, 224-1049; 277 NW 755

14015 Opinion of supreme court.

Withdrawal of opinion—jurisdiction. The supreme court has jurisdiction, in a criminal case, to wholly withdraw a reversing opinion and to order a resubmission of the appeal, provided procedendo has not issued to the lower court, and provided, if procedendo has not issued, the lower court has not assumed jurisdiction of the case by redocketing it.

State v Henderson, 215-276; 243 NW 289

14016 Decision recorded and transmitted.

Procedendo—competency as evidence. The supreme court, by virtue of its constitutional powers to issue writs necessary to the exercise of its powers, has power to provide, without the aid of a statute for the writ of procedendo, in order to furnish the trial court with competent evidence of its final decision and of its release of jurisdiction.

State v Banning, 205-826; 218 NW 572

Speedy trial not denied—delay by defendant occasioned by appellate review. In a larceny prosecution, a defendant may not complain that he has been denied a speedy trial, where a procedendo was recalled because of a rehearing in the supreme court, and, after the second procedendo was issued, the trial was delayed by defendant's writ of certiorari. Delays complained of occurred at the instance of the defendant himself.

State v Ferguson, 226-361; 283 NW 917

14018 Time of imprisonment deducted.

Atty. Gen. Opinions. See '28 AG Op 315; '38 AG Op 883

CHAPTER 660

DISMISSAL OF CRIMINAL ACTIONS

14024 Delay in trial.

Discussion. See 11 ILR 81—Speedy trial

Accused in state hospital—term for trial after release. An indictment not brought to trial because of accused's confinement in a state hospital as an inebriate is not subject to dismissal because accused was not immediately tried upon his release, when such was impossible because the release came at a time when the term was well under way and the assigned cases completely filled the court's time for that term.

Maher v Brown, 225-341; 280 NW 553

Continuance on defendant's application. Where indicted defendant sought and secured a continuance at first term after return of the indictment, and case was not tried until fifth term, defendant's motion to dismiss and spe-

cial appearance was properly overruled under statute which states that no continuance shall extend beyond the following three terms of court, as cases continued upon defendant's application are not subject to dismissal under these statutes.

Harris v Dist. Court, 226-606; 284 NW 451

Delay by defendant—certiorari to require dismissal denied. One convicted of larceny, who, on appeal is granted a reversal, and who, then, each time thereafter as his case is assigned for retrial, delays trial on the merits by dilatory moves such as request for rehearing and change of venue, may not complain that he has been denied a speedy trial as provided by law, and certiorari will not lie to require dismissal of the indictment.

Ferguson v Bechly, 224-1049; 277 NW 755

Dismissal for delay—statute not applicable after reversal on appeal. Nothing contained in this section requires that a criminal case must be tried at the next term or any term after a reversal in the supreme court.

Ferguson v Bechly, 224-1049; 277 NW 755

Implied consent to delayed trial. A defendant who makes no request for a trial may not claim that he was denied a speedy trial.

State v Ferro, 211-910; 232 NW 127

Inebriate in state hospital—delay in trial—no dismissal. Criminal courts have no right to force an inebriate inmate of a state hospital to stand trial on an indictment for driving while intoxicated, and such confinement is good cause for refusing to dismiss for delay in prosecution.

Maher v Brown, 225-341; 280 NW 553

Mandatory discharge for delay. The court, on proper motion therefor, is under mandatory duty to dismiss an indictment which, during the first term of court following its return, was, on motion for change of venue, transferred to another county, and was not there tried during the term pending when the transfer was ordered, nor during the following term—lasting two months—because of the very large assignment of equity cases and matters local to said county. And this is true tho the defendant during said delay made no demand for a trial.

Davison v Garfield, 221-424; 265 NW 645

Reversal or jury disagreement—retrial at same term unnecessary. Tho reversal of a judgment against a criminal defendant is an order for a new trial and a jury disagreement a cause for retrial, he need not be retried at the same term of court.

Ferguson v Bechly, 224-1049; 277 NW 755

Speedy trial not denied—delay by defendant occasioned by appellate review. In a larceny prosecution, a defendant may not complain that he has been denied a speedy trial, where a procedendo was recalled because of a rehearing in the supreme court, and, after the second procedendo was issued, the trial was delayed by defendant's writ of certiorari. Delays complained of occurred at the instance of the defendant himself.

State v Ferguson, 226-361; 283 NW 917

Undue haste in trial. The action of the trial court and county attorney in bringing a criminal prosecution on for trial promptly after the alleged commission of the offense (15 days in this case) cannot be deemed prejudicially erroneous in the absence of any showing that the defendant was thereby deprived of a fair trial.

State v Berlovich, 220-1288; 263 NW 853

When court loses jurisdiction. An indictment which has neither been continued on defendant's application, nor brought to trial at the first regular term of court following its return, is, on a motion to dismiss, subject to a showing explaining and excusing the delay in trial, but the continuance of such an indictment beyond the third term following the return of the indictment, ipso facto deprives the court, after the expiration of said third term, of all jurisdiction over said indictment except to formally dismiss it.

Davison v Garfield, 219-1258; 257 NW 432; 260 NW 667

14025 Discharge on undertaking.

When court loses jurisdiction. An indictment which has neither been continued on defendant's application, nor brought to trial at the first regular term of court following its return, is, on a motion to dismiss, subject to a showing explaining and excusing the delay in trial, but the continuance of such an indictment beyond the third term following the return of the indictment, ipso facto deprives the court, after the expiration of said third term, of all jurisdiction over said indictment except to formally dismiss it.

Davison v Garfield, 219-1258; 257 NW 432; 260 NW 667

14027 Dismissal by court—effect.

Authorized dismissals. See under §13807

Acquittal—effect on subsequent overlapping charge. When the state bases an indictment for nuisance on a series of acts occurring during a specified period of time, it thereby segregates such acts from all subsequent acts, and irrevocably identifies and stamps said acts as one complete offense; and if it suffers an acquittal, it may not thereafter maintain an indictment based (1) on said segregated acts and (2) on other acts subsequent thereto; and the exclusion of said segregated acts on the trial of the last indictment will not avoid the bar resulting from the first acquittal.

State v Reinhard, 202-168; 209 NW 419

Death of defendant. The death of a defendant in a criminal prosecution, even after trial, conviction, judgment and appeal, but before the final determination of the latter proceeding, works a complete abatement of the proceeding ab initio.

State v Kriechbaum, 219-457; 258 NW 110; 96 ALR 1317

Delay in trial—continuance on defendant's application. Where indicted defendant sought and secured a continuance at first term after return of the indictment, and case was not tried until fifth term, defendant's motion to dismiss and special appearance was properly overruled under statute which states that no continuance shall extend beyond the following three terms of court, as cases continued upon defendant's application are not subject to dismissal under these statutes.

Harris v District Court, 226-606; 284 NW 451

Nolle prosequi—time to enter. A nolle prosequi may be entered (1) before the jury is impanelled, (2) while the case is before the jury, and (3) after the verdict.

State v Veterans, 223-1146; 274 NW 916; 112 ALR 383

State v Moose, 223-1146; 274 NW 918

ANNOTATIONS TO SUPREME COURT RULES

Rule 14-a1

Failure to file abstract—dismissal. Appellant's failure to file abstract is sufficient ground for dismissing appeal or regarding it as abandoned.

Leach v Bank, (NOR); 218 NW 907

Notice of appeal—service on attorneys for part of appellees—effect. When timely notice of appeal was served on attorneys for part of the appellees, the service on such attorneys was effective only as to the appellees they represented, and not effective as to other appellees represented by attorneys who received late service.

Herrold v Herrold, 226-805; 285 NW 274

Time of serving notice of appeal. A supreme court rule providing for service of a copy of the abstract upon each appellee, and for filing copies of the abstract with the clerk, contemplates that the service must be made before the copies are filed showing that such service has been made, and requires such service to be made within 120 days after the appeal is perfected unless additional time is granted.

Herrold v Herrold, 226-805; 285 NW 274

Rule 15-a

Amended abstract stricken — filing without leave. Appellant's amended additional abstract of testimony, filed three days prior to the submission of the case, and without leave of court, may be stricken on motion.

Harrison v Hamilton County, (NOR); 284 NW 456

Motion to dismiss appeal—time for making. A motion to dismiss an appeal, because the abstract was not served upon all the appellees within 120 days after perfecting the appeal, was filed on time when filed more than 10 days before the time the case was assigned for submission, and should be sustained.

Herrold v Herrold, 226-805; 285 NW 274

Notice of appeal—service on attorneys for part of appellees—effect. When timely notice of appeal was served on attorneys for part of the appellees, the service on such attorneys was effective only as to the appellees they represented, and not effective as to other appellees represented by attorneys who received late service.

Herrold v Herrold, 226-805; 285 NW 274

Time of serving notice of appeal. A supreme court rule providing for service of a copy of the abstract upon each appellee, and for filing copies of the abstract with the clerk, contemplates that the service must be made before the copies are filed showing that such service has been made, and requires such service to be made within 120 days after the appeal is perfected unless additional time is granted.

Herrold v Herrold, 226-805; 285 NW 274

Timely service of abstract mandatory—dismissal for noncompliance. The law requiring that service of notice of appeal and filing of the abstract be timely is mandatory, and unless complied with, the appeal will be dismissed.

Herrold v Herrold, 226-805; 285 NW 274

Rule 16

Abstract—question and answer form only in certain cases. Unless necessary for appellate review of a particular error, abstracts should not be prepared in question and answer form, but in prescribed narrative form.

Swensen v Union Life, 225-428; 280 NW 600

Dismissal—brief and argument—noncompliance with Rule 30. Where appellant's brief and argument containing 117 pages, the first 60 pages of which were rambling statement of testimony and comment thereon, nowhere containing a statement of how the case was decided in the lower court, the nature of the lawsuit being ascertainable therefrom only with difficulty, and when the brief and argument nowhere contained any statement that might be called an assignment of error, the appeal will be dismissed on motion for failure to substantially comply with Rule 30, which requires a short and clear statement of the above matters.

Ind. Sch. District v Hartwick, 226-491; 284 NW 453

Omnibus assignment—dismissal. Omnibus assignments of error coupled with a wholesale violation of other rules of the court force the court, on motion, to dismiss the appeal.

Dondore v Rohner, 224-1; 275 NW 886

Record—copying transcript—noncompliance with rule. Appellant does not comply with the court rules by practically copying the transcript, thereby including in the abstract much more than is necessary for a full understanding

of the issues. In such case the appeal may be affirmed.

Dondore v Rohner, 224-1; 275 NW 886

Shorthand reporter's transcript—when filing necessary. Statute requiring the translation of the shorthand report of a trial to be filed with clerk of district court after service of abstract on opposite party must be strictly followed. Such requirement is not antagonistic to this rule.

Goltry v Relph, 224-692; 276 NW 614

First Tr. JSL Bank v Abkes, 224-877; 278 NW 183

Rule 17

Abstracts of record—amendment—motion to strike. Appellee's abstract and denial of appellant's abstract will not be stricken from the record when appellant makes no effort to sustain his abstract by a certification of the record.

McKay v Barrick, 207-1091; 224 NW 84

Abstract—amendment—denial of correctness—certification of record. It is futile for appellant to deny the correctness of appellee's amendment to abstract unless appellant secures a certification of the record to the extent necessary to settle the dispute.

Harness v Tehel, 221-403; 263 NW 843

Abstract—contents. Abstracts in the supreme court should contain "everything material" and "omit everything else".

Brien v Davidson, 225-595; 281 NW 150

Abstract—question and answer form only in certain cases. Unless necessary for appellate review of a particular error, abstracts should not be prepared in question and answer form, but in prescribed narrative form.

Swensen v Union Life, 225-428; 280 NW 600

Amended abstract stricken—filing without leave. Appellant's amended additional abstract of testimony, filed three days prior to the submission of the case, and without leave of court, may be stricken on motion.

Harrison v Hamilton County, (NOR); 284 NW 456

Correctness of abstract denied—record certified. Appellant's motion in supreme court to strike appellee's amendment to appellant's abstract was improper, since appellee in his amendment had made a specific denial of the correctness of appellant's abstract, and the proper procedure was for appellant to have the record certified to the supreme court as provided by its rules.

Rance v Gaddis, 226-531; 284 NW 468

Record not certified — abstract considered correct. In supreme court appeal, where appellee made specific denial of correctness of appellant's abstract, and where entire questioned record is contained in appellee's amendment to appellant's abstract, the record as set out in appellee's amendment will be taken as correct upon failure of appellant to sustain his abstract by a certified record as provided by the rules of the court.

Rance v Gaddis, 226-531; 284 NW 468

Rule 18

Assignment of errors—omnibus assignment—dismissal. Omnibus assignments of error coupled with a wholesale violation of other rules of the court force the court, on motion, to dismiss the appeal.

Dondore v Rohner, 224-1; 275 NW 886

Cross-appeal not shown in abstract—not considered. Supreme court will not consider appellee's appeal from part of the lower court judgment when the abstract does not show any appeal or cross-appeal by appellee, and where appellee merely stated in its argument "from this part of the decree appellee has appealed."

Queal Lbr. Co. v McNeal, 226-637; 284 NW 482

Deficient record—presumption indulged. On appeal from action to enjoin trespass and for damages, where record before the supreme court relating to certain issues, including question of damages, was so incomplete as to make determination very difficult, it was presumed that the trial court performed its duty and reached a proper conclusion.

Arnd v Harrington, 227-43; 287 NW 292

Failure to meet printed abstract requirements. A proceeding in certiorari before supreme court will be dismissed where petitioner fails to comply with order or rules requiring printed abstracts.

Eller v Hunter, (NOR); 209 NW 281

Imperfect preparation—effect. The failure of an appellant to comply substantially with the rules of the supreme court relative to the preparation and indexing of an abstract affords ample grounds for the peremptory dismissal of the appeal.

Hakes v North, 202-324; 208 NW 305

Incomplete record—instructions—presumed correct. Where the record on appeal does not contain all the instructions necessary to determine the questions raised, the supreme court must presume their correctness.

Reardon v Hermansen, 223-1207; 275 NW 6

Preservation of error necessary—insurance comment on voir dire. In a motor vehicle damage action, error may not be predicated on references to insurance in jurors' examination when no record is preserved for appeal.

McCornack v Pickerell, 225-1076; 283 NW 899

Setting out pleadings and arguments—noncompliance with rule. Unnecessarily setting out in the abstract pleadings containing arguments and conclusions is a violation of this rule.

Dondore v Rohner, 224-1; 275 NW 886

Unabbreviated abstract — penalty. A flagrant violation, in the preparation of an abstract, of the rule "to preserve everything material to the question to be decided, and to omit everything else," may be penalized by a taxation to appellant of all the cost of printing, even tho appellant is successful on appeal.

In re Higgins, 207-95; 222 NW 401

Rule 19

Belated motion to dismiss—ten-day notice. A motion to dismiss an appeal, the basis of which arose before the filing of abstract, is not timely and cannot be considered, when not served on the opposite party or attorney ten days before the morning on which causes for the district are set for hearing.

Prudential Ins. v Soloth, 225-172; 279 NW 399

Dismissal—timely motion. A motion to dismiss an appeal for want of jurisdiction is timely even tho service of the motion was not made ten days before the day assigned for the submission of the cause, when it appears that the cause was not submitted under said assignment, but was continued, and reassigned for submission at a later term, which afforded appellant much more than said ten days notice.

Piercy v Bronson, 206-589; 221 NW 193

Escheat proceeding — striking allegations. Where the state of Iowa in an estate proceeding files an application for the escheat to the state of the property in the estate and includes in its application extensive allegations dealing with the selection of a new administrator, a motion to strike those portions of the pleading dealing with the new administrator, when sustained, does not present an interlocutory order from which an appeal will lie, and, if taken, the appeal will be dismissed on motion.

In re Bannon, 225-839; 282 NW 287

Motion to dismiss—timeliness. A motion to dismiss served and filed in the supreme court 17 days before submission of cause was timely.

Cowles v Joelson, 226-1202; 286 NW 419

Motion to dismiss appeal—determined first. A motion to dismiss an appeal submitted with the case, being jurisdictional, will be determined before other matters.

Ontjes v McNider, 224-115; 275 NW 328

Motion to dismiss filed six days before hearing—not timely. In a probate proceeding on appeal, a motion to dismiss served six days before cause is set for hearing must be denied as not being timely.

In re Sheeler, 226-650; 284 NW 799

Rule 24

Record—nonappealing parties—striking argument. Arguments filed in supreme court by nonappealing parties as appellants may be stricken.

In re Schropfer, 225-576; 281 NW 139

Brief points, authorities, and arguments—requirements. Where appellant files an abstract of record and fails to serve copies of brief points, authorities, and arguments on attorneys for appellee at least 40 days before the day assigned for hearing case, appellee's motion to submit the cause on the record as it was on the date the time expired for serving copies of brief points was sustained and the cause submitted without oral argument in its regular order, and case dismissed for failure to comply with this rule.

Rabenold v Morrison, 228- ; 290 NW 60

Amendment filed when leave of court granted—effect. Where the supreme court grants leave to file an amendment to brief and argument, a motion to dismiss such amendment will be overruled.

Allbaugh v Ashby, 226-574; 284 NW 816

Reply to reply—no legal standing. A reply to a reply brief and argument has no standing and will be stricken on motion.

In re Rinard, 224-100; 275 NW 485

See Cochran v School Dist., 207-1385; 224 NW 809

Waiving first argument in equity—striking reply to reply. In an equity appeal, plaintiff appellee having the burden has the right to file the first argument, but waiving this, the arguments shall consist of the appellant's opening and appellee's reply. Appellant's reply to appellee's reply will be stricken on motion.

Utterback v Stewart, 224-1135; 277 NW 735

Rule 30

Discussion. See 9 ILB 115—Supreme court rules 53 and 55; 17 ILR 91—Assignments; 21 ILR 693—Construction

Abandonment—failure to argue alleged errors. Grounds of error alleged and relied upon for reversal, but not argued, will be deemed to be abandoned.

Lotz v United Markets, 225-1397; 283 NW 99

Abstract of record—imperative necessity. In order that an equitable action may be tried de novo on appeal, it is imperative that appellant place before the court the record made in the trial court, and do so in the manner required by the statutes and rules of the court.

Merritt v Ludwig-Wiese, 212-71; 235 NW 292

Assignment of error—absolute, mandatory requirement. The filing, by appellant, of a proper assignment of error, under this rule of the supreme court, is absolute and mandatory, and the court is not disposed to waive it in any particular.

Andreas & Son v Hempy, 221-1184; 268 NW 13

Assignment of error—departure condemned—effect. Supreme court condemns departures from this rule in preparation of arguments, but instant appeal not dismissed for such departure inasmuch as appellee not confused thereby.

Yance v Hoskins, 225-1108; 281 NW 489; 118 ALR 1186

Assignment of errors—fatal indefiniteness. An assignment of error which simply asserts that the court erred in overruling a 29-pointed motion is fatally lacking in definiteness. Likewise, statements or propositions of law, without any attempt to apply them to the rulings of the court.

Central Tr. Co. v City of Des Moines, 204-678; 216 NW 41

Assignment of error—ignoring rule. Justification for considering, on its merits, an appeal in certiorari proceedings, tho appellant has not assigned errors as provided by this rule, is found in the fact that the main, legal point in issue is of grave importance not only to the litigants, but to the people of the state in general, and is made perfectly clear to the appellate court by the brief points and arguments of both parties to the appeal. Especially is this true when no motion is filed to dismiss the appeal.

National Assn. v Murphy, 222-98; 269 NW 15

Assignment of errors — insufficiency. Assignment of error stating that "plaintiff should have been granted a new trial on ground of surprise occurring on the trial" does not comply with this rule.

Clare v Pearson, 227-928; 289 NW 737

Assignment of errors—mandatory requirement. In appeals from law actions, the supreme court constitutes a court for correction of errors, and without assignments of error, as required under this rule, the appeal presents nothing for review.

Clare v Pearson, 227-928; 289 NW 737

Nonassignment of error—no consideration. Form of decree, complained of in appellant's brief, will not be considered when not assigned as error.

Bredt v Franklin County, 227-1230; 290 NW 669

Omnibus assignment—dismissal. Omnibus assignments of error coupled with a wholesale violation of other rules of the court force the court, on motion, to dismiss the appeal.

Dondore v Rohner, 224-1; 275 NW 886

Omnibus assignment of error—no review. In an appeal in a law action on a promissory note, tried to the court, where all assigned errors violate this rule as being omnibus in form and supreme court, on its own initiative, could discover no errors, an affirmance and dismissal of the appeal on motion will result.

Pickett v Wray, 225-288; 280 NW 519

Omnibus assignment not permitted. Omnibus assignments of error do not comply with the rules of the supreme court.

Schultz v Schultz, 224-205; 275 NW 562

Assignment of error—reasonable construction. The purpose of supreme court rules is to facilitate review, so, when the appellee and the court have neither been confused nor inconvenienced by an allegedly omnibus assignment of errors, the court will not arbitrarily refuse to consider the appeal.

Home Ins. v Ins. Co., 225-36; 279 NW 425

"Shotgun" Assignments of error. "Shotgun" assignments of error present no question for consideration on appeal.

State v Lambertti, 204-670; 215 NW 752

Assignment of error—substantial compliance with rule. While the court does not approve anything less than a strict compliance with this rule, still if assignments of error are plainly pointed out to the court in some other manner so as to constitute a substantial compliance with the rule, then the court will consider the errors relied on for reversal.

Vance v Grohe, 223-1109; 274 NW 902; 116 ALR 332

Assignment of error—substantial compliance with rule. If assignments of error are plainly pointed out in a manner constituting substantial compliance with this rule, the supreme court will not refuse to consider them.

Smith v Utilities Co., 224-151; 275 NW 158

Assignment of error — sufficiency. Judgment for plaintiff will be reversed on defendant's appeal regardless of sufficiency of defendant's assignment of error, where plaintiff having the burden to make out a case, fails to do so.

Ida Grove Sch. Dist. v Ida County, 226-1237; 286 NW 407

Assignment required on original error. Error, if any, of the court, during the trial, in

striking evidence or tendered issues cannot be reached by an assignment of error to the effect that the court erred in failing to instruct on said stricken matters. The assignment must be on the original alleged erroneous striking of said matters.

Reidy v Railway, 220-1386; 258 NW 675

Briefs—good-faith compliance with rule. When there has been a good-faith attempt to comply with a supreme court rule regulating the manner of making assignments of error in the appellant's brief, and the essential elements involved in the appeal can readily be determined, the court will not refuse to consider the assignment even tho there has not been a technical compliance in every particular.

In re Baker, 226-1071; 285 NW 641

Brief points—necessary. Brief points are necessary on appeal for each presented proposition.

Ettinger v Malcolm, 208-311; 223 NW 247

Conforming pleadings to proof—amendment not permitted. An assignment of error which stated that "the court abused its discretion when it refused to permit plaintiff to amend its amended and substituted petition to conform to the proof" is insufficient when the written contract sought to be enforced was not established by the proof; and the court's refusal to permit amendment to pleadings was not an abuse of discretion.

Clare v Pearson, 227-928; 289 NW 737

Dismissal—brief and argument. Where appellant's brief and argument containing 117 pages, the first 60 pages of which were rambling statement of testimony and comment thereon, nowhere containing a statement of how the case was decided in the lower court, the nature of the lawsuit being ascertainable therefrom only with difficulty, and when the brief and argument nowhere contained any statement that might be called an assignment of error, the appeal will be dismissed on motion for failure to substantially comply with this rule, which requires a short and clear statement of the above matters.

Ind. Sch. District v Hartwick, 226-491; 284 NW 453

Failure to file brief and argument—abandonment. An appellant is presumed to have abandoned his appeal by his failure to file brief and argument.

Deaton v Hollingshead, 225-967; 282 NW 329

Briefs—statement of facts—noncompliance with rule. Appellant's brief and argument containing as a statement of facts 27 pages of exhortation and argument is not a compliance with this rule.

Dondore v Rohner, 224-1; 275 NW 886

Essential requisites. An assignment of error presents no question upon which the court can pass unless it specifically (1) points out an action of the court, and (2) states wherein and for what reason such action was erroneous.

Dravis v Sawyer, 218-742; 254 NW 920

Failure to comply with rules of practice—motion to dismiss well grounded. On appeal to the supreme court, appellant's failure to comply with supreme court rules by omitting from his brief and argument that portion of the record referring to errors relied upon with the court's ruling thereon, and failing to point out specifically and precisely his complaints thereof, are sufficient grounds for a motion to dismiss the appeal.

Cowles v Joelson, 226-1202; 286 NW 419

Failure to comply with rules. It is a violation of the supreme court rules to make assignments of error which simply state a proposition and cite one case without further comment.

In re Baker, 226-1071; 285 NW 143

Appellant's failure to comply with rules cured by affirmance. Where a case is affirmed it is unnecessary to consider objections made by the appellee to the appellant's failure to comply with supreme court rules in making assignments of error.

Dykes v Ins. Co., 226-771; 285 NW 201

Failure to comply with rules. Assigning errors together instead of in separate divisions, failing to set out the part of the record referring to the errors, and failing to point out the complaints against the rulings of the trial court are not a compliance with the rules of the supreme court.

Younkin v Bank, 226-343; 284 NW 151

Failure to refer to lines of abstract—dismissal. Assignments of error not complying with rules of the supreme court may be dismissed on motion.

Swensen v Union Life, 225-428; 280 NW 600

Failure to point out page and line of abstract. Where alleged errors relied upon for reversal are based upon what appellant claims was shown by the proof, but nowhere is any evidence connected with these alleged errors set out, nor any reference made to the page and line of the abstract where such evidence would be found, the supreme court, following this rule, will not consider such errors on appeal.

Lotz v United Markets, 225-1397; 283 NW 99

Failure to argue assignment of error—effect. An assignment of error not argued as required by this rule will not be considered on appeal.

Roggensack v Ahlstrom, (NOR); 209 NW 429

Failure to file abstract or argument. Petitioners for writ of certiorari are presumed to have abandoned their cause, when no abstract

or argument is filed either on their behalf or on behalf of respondents.

Sentner v Dist. Court, 226-335; 284 NW 166

Improper citation of cases—effect. The citation of Iowa cases by an appellee on appeal by a reference to nonofficial reports only will be grounds for refusing him any taxation for the costs of his briefs. (Rule 30 since amended.)

Walter v Ida Grove, 203-1068; 213 NW 935

Improper presentation. Principle reaffirmed that assignments of error not presented in accordance with appellate rule will not be considered on appeal.

Hallowell v Van Zetten, 213-748; 239 NW 593

Insufficient assignment—exceptions. Errors, unassigned in compliance with this rule of the supreme court, will not be considered on appeal—a rule which has not been insisted on in a few cases wherein affirmances were entered.

Russell v Peters, 219-708; 259 NW 197

Law action in supreme court—assignment of errors necessary. In a law action tried to a jury, jurisdiction of supreme court on appeal is confined to that of a court for correction of errors and, to invoke its jurisdiction, a proper assignment of error is necessary.

Slippy Corp. v Grinnell, 226-1293; 286 NW 508

Law action tried by equity procedure—errors must be assigned. Where an essentially law action to recover a money judgment is brought and recognized as such by the parties and the court, it is not, without a record entry transferring it to equity, converted to an equity action because the parties with the consent of the court use an equity procedure, and appeal therefrom will be dismissed when no errors are assigned.

Petersen v Ins. Co., 225-293; 280 NW 521

Motion to dismiss—resistance by amending appellant's brief and argument. Appellant's resistance to a motion to dismiss, based on failure to comply with this rule, cannot be made by amendment to brief and argument by reassigning errors relied upon to conform to rule, which is the basis for motion to dismiss, nor can appellant's resistance be in the nature of a confession and avoidance, asking court's permission to file amendment to comply with this rule seven days before submission of case.

Cowles v Joelson, 226-1202; 286 NW 419

Motion sustained generally—showing necessary on appeal. On appeal from trial court's action in sustaining generally a motion for directed verdict predicated on several grounds, it is incumbent upon appellants to establish that the motion was not good upon any ground thereof before error can be predicated upon the sustaining of such motion.

Slippy Corp. v Grinnell, 226-1293; 286 NW 508

Nonassignment of error—affirmance. Appellant's failure to make assignment of errors as required by this rule is grounds for affirmance.

Yale Co. v Zink, (NOR); 212 NW 119

Questions not raised in trial court—no review. Assignments of error relating to instructions not raised or passed upon by the lower court will not be considered on appeal.

Simmering v Hutt, 226-648; 284 NW 459

Record—nonappealing parties—striking argument. Arguments filed in supreme court by nonappealing parties as appellants may be stricken.

In re Schropfer, 225-576; 281 NW 139

Reference to records—insufficient. Where assignment of error fails to point out specifically and in concise language complaints against ruling of trial court, and where appellant fails to state grounds on which trial court erred on sustaining defendant's demurrer, a motion to dismiss will be sustained.

Keefe v Price, (NOR); 282 NW 309

Review de novo—irrespective of failure to file brief. An action in equity to recover a judgment against the members of an alleged partnership and to impress a trust on certain funds is triable de novo on appeal, and the supreme court will examine the record despite parties' failure to furnish brief and argument.

Maybaum v Bank, (NOR); 282 NW 370

Self-apparent error. A specie of legal charity may move the court to overlook noncompliance with this rule when the appeal record is very brief and the alleged error relied on self-apparent.

In re Finarty, 219-678; 259 NW 112

Statements of evidence—reference to abstract necessary. Under this rule, statements of evidence in appellant's brief and argument and in the reply must be referred to the page and line of the abstract where found; however, in a short record, the court may be inclined not to enforce the rule.

Mosher v Snyder, 224-896; 276 NW 582

Unargued propositions abandoned. Failure to mention in argument certain grounds for recovery is an abandonment thereof.

Valley Bank v Staves, 224-1197; 278 NW 346

Vague and general assignment of error—no review. A specification of error, that the court erred in overruling a motion to set aside a verdict and order a new trial, is too vague and general to review when the motion contained some 20 grounds.

Hawkins v Burton, 225-707; 281 NW 342

Rule 31

Cross-appeal not shown in abstract—not considered. Supreme court will not consider appellee's appeal from part of the lower court judgment when the abstract does not show any appeal or cross-appeal by appellee, and where appellee merely stated in its argument "from this part of the decree appellee has appealed".

Queal Lbr. Co. v McNeal, 226-637; 284 NW 482

Rule 32

Clerk's transcript submission — time limit. To avoid a submission on the clerk's short transcript, a criminal appellant who elects to present his case on printed abstract, brief, and argument must serve his notice under this rule and file his abstract within the statutory time of 120 days from the giving of notice of appeal. Setting aside a submission is a matter of grace, not of right.

State v Johns, 224-487; 275 NW 559

Belated filing of abstract—review on transcript and argument. Where defendant failed to comply with Rule 32 and §12847, C., '39, requiring that abstract be filed within 120 days after perfecting appeal, but did file brief and argument within time fixed by said rule, held that only brief and argument would be considered, and that under §14010, C., '39, it was imperative duty of supreme court to review the record presented by clerk's transcript even tho the defendant had no right to have the abstract considered.

State v Dunley, 227-1085; 290 NW 41

Abstract and argument—failure to file in time. Where defendant's petition in the supreme court to set aside the submission of a criminal cause and to reinstate the cause and for extension of time to file abstract was sustained, and thereafter a supplemental order was entered extending the time to file abstract to November 25th, and continuing the cause to January 1940 term, defendant, by failure to file abstraet by November 25th, lost the right to file an abstract, and by failure to file an argument 30 days before date when cause was submitted, lost the right to file an argument, and the supreme court's only duty was to examine the clerk's transcript of record pursuant to statute. Record re-examined and no error found justifying reversal.

State v Clark, 227-1082; 290 NW 46

Criminal appellant's duty to submit brief. In appeal from conviction for illegally transporting intoxicating liquor, where case was submitted only on transcript of record and printed abstract, amendment, and denial, defendant had further duty to submit brief and argument, since court sits to correct errors of law, and the precise complaint must be substantially pointed out by appellant.

State v Korbel, 226-676; 284 NW 458

Failure to file brief — abandonment presumed. Appellant has duty to file brief and argument pointing out errors at law relied on for reversal, and failure so to file will be presumed an abandonment of the appeal.

State v Korbel, 226-676; 284 NW 458

Circumventing statute—"record" defined—criminal cases. An appellant who allows the time for filing his abstract to expire may not circumvent the statute by filing what he denominates, "Motion to submit case on transcript of evidence and exhibits as a part of clerk's transcript" on the theory that §14010, C., '35, provides therefor. The word "record" in that section means only the record before the appellate court and not the entire evidence in the trial court.

State v Johns, 224-487; 275 NW 559

Abstract—filing—unallowable extension of time. An extension of time in which to file abstract on appeal in a criminal case may not be granted after the statutory time of 120 days for such filing has wholly expired.

State v Van Andel, 222-932; 270 NW 420

Rule 34

Additional abstract—failure to number lines—when stricken. An "additional abstract" containing a single short exhibit will not be stricken on appeal for failure to comply with rule as to numbering lines since reason for rule is to enable court to readily find testimony, and when the additional abstract is not essential to the decision of the case.

Keokuk Bridge v Curtin-Howe Corp., 223-915; 274 NW 78

Rule 37

Speedy trial not denied—delay by defendant occasioned by appellate review. In a larceny prosecution, a defendant may not complain that he has been denied a speedy trial, where a procedendo was recalled because of a rehearing in the supreme court, and, after the second procedendo was issued, the trial was delayed by defendant's writ of certiorari. Delays complained of occurred at the instance of the defendant himself.

State v Ferguson, 226-361; 283 NW 917

Rule 45

Notice of appeal—appellant not adverse party. When an administratrix appeals, in her official capacity, from rulings on her final report, the fact that the court taxed to her, individually, the court costs occasioned by the hearing on the report, creates no necessity for the appellant to cause said notice of appeal to be served upon herself as an individual, she not being, in fact or in law, a party, individually, to said final report and hearing thereon.

In re Paulson, 221-706; 266 NW 563

TABLE OF CORRESPONDING SECTIONS

From the 1935 Code to the 1939 Code

This abridged table of corresponding sections shows the sections in the 1935 Code which carried a combination number-letter citation and their respective equivalents in the 1939 Code carrying a decimal number. In this condensed form from the 1939 Code it is carried here for convenience in locating, in the 1939 Code, sections cited in opinions by a number-letter citation.

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718-b6	718.06
718-b7	718.07
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718-b16	718.16
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1921-f16	1921.016
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1921-f63	1921 063
1921-f64	1921.064
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1921-f71	1921.071
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1921-f78	1921 078
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1921-f87	1921.087
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1921-f91	1921.091
1921-f92	1921.092
1921-f94	1921 093
1921-f95	1921.094
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1921-f126	1921.129
1921-f127	1921.132
1921-f128	1921.133
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1945-a6	1945.7
1945-d1	1945.1
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1966-a1	1966.1
1966-a2	1966.2
1966-a3	1966.3
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2013-c2	2013.2
2013-c3	2013.3
2013-c4	2013.4
2013-c5	2013.5
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2437-g14	2437.36
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2437-g16	2437.38
2437-g17	2437.39
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2437-g21	2437.43
2437-g22	2437.44
2437-g23	2437.45
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2585-b19	2585 34
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2585-c2	2585 02
2585-c3	2585 03
2585 c4	2585 04
2585-c5	2585 05
2585-c7	2585 06
2585-c8	2585 07
2585 c9	2585 18
2585-c10	2585 20
2585-c11	2585 21
2585-c12	2585 22
2585-c13	2585 23
2585-c14	2585 30
2585-d1	2585 29
2585-f1	2585 24
2585-g1	2585 09
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2704-b3	2704 4
2704-c1	2704 2
2704-c2	2704 5
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2799-d2	2799 2
2799-d3	2799 3
2799-d4	2799 4
2799 d5	2799 5
2799-d6	2799 6
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2812-f2	2812 2
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2948-g2	2948 2
2948-g3	2948 3
2948 g4	2948 4
2948-g5	2948 5
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2953-b3	2953 3
2953-b4	2953 4
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2962 d4	2962 4
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3244-b2	3244 02
3244 b3	3244 03
3244-b4	3244 04
3244-b5	3244 05
3244-b6	3244 06
3244-d1	3244 08
3244-d2	3244 09
3244 f1	3244 07
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3274-e2	3274 2
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9283 b26	9283 74
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9283 c3	9283 03
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9305-a16	9305 16
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9305-a18	9305 18
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9305-a20	9305 20
9305-a21	9305 21
9305-a22	9305 22
9305 a23	9305 23
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9340 b2	9340 02
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9438-f7	9438 07
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TABLE OF CORRESPONDING SECTIONS

From the 1897 Code to the 1939 Code

Suggestions have been made to the editor that attorneys when finding a reference in an opinion or elsewhere to the early codes are often inconvenienced to locate the statute in the present code—this situation usually arising when the tables of corresponding sections are not available. Furthermore this situation seems to occur more frequently with regard to 1897 Code citations than the earlier codes. As an aid in this connection, the following table has been prepared for the purpose of assisting users of the Annotations in locating in the Code of 1939 the equivalent or related sections of the Code of 1897, the Supplement of 1913, and the Supplemental Supplement of 1915. The usefulness of the table will arise perhaps more frequently in using Volume I of the Annotations since references to the 1897 Code and Supplements occur therein more often than in this Volume II.

["S" before a number in the first column indicates Supplement of 1913; "SS" indicates Supplemental Supplement of 1915; other numbers indicate Code of 1897. Sections which appear for the last time in either the Supplement of 1902 or the Supplement of 1907 are indicated in the footnotes.

"See" before a number in the last column indicates that the section as it appeared in the Code of 1897, Supplement of 1913, or Supplemental Supplement of 1915 has been repealed but that there will be found in the section or sections cited something identical to or analogous to the repealed section.

"Omitted" indicates a section that was temporary, special or repealing in character.

"R" indicates a repeal.

References to session laws are of four types, for example: 45-113-6, or 45 Ex-25-6, or 45 ExGA, ch 25, or 45 ExGA, SF 163. A reference such as 45-113-6 means 45th General Assembly, chapter 113, section 6. A reference such as 45 Ex-25-6 means 45th Extra General Assembly, chapter 25, section 6. A reference such as 45 ExGA, ch 25 means 45th Extra General Assembly, chapter 25, and a reference such as 45 ExGA, SF 163 means 45th Extra General Assembly, Senate File 163—a specific section reference in these instances not being obtainable.]

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*Appeared for the last time in Supplement 1907.

ANNOTATION INDEX

Important: Read this explanatory note first

This index supplements the code index as an aid to the users of the Annotations in locating general subject matters. **This index does not relieve the searcher of looking in the code index for subjects there indexed.** Primarily, this index is to make available subjects, such as "Harmless Error" or "Last Clear Chance", not readily discoverable from the code index because such subjects are case law rather than statutory law, and consequently would not appear in the code. The existence of many such subjects has, perhaps, many times been overlooked because Volume I, lacking an index, failed to show their availability.

Since it was both logical and desirable to follow the scheme and general classifications of the Annotations in Volume I, it was necessary to ascertain the locations of such subjects under the various sections in Volume I in order that identical subjects would appear in identical places in both volumes—thus affording the proper annotation continuity. Duplications have been avoided and minimized, since this index, though not extensive, was also designed to facilitate the use of Volume I as well as this Volume, and all references should be followed back through Volume I. As to both Volume I and the supplements thereto, no record was available of the scheme of placement of the many case law subjects not readily discoverable through the code index. To properly annotate this volume and coordinate the annotations herein with Volume I, the editor compiled this index, chiefly for office use, and in printing it herewith is passing on to the users hereof the benefits to be gained therefrom. I believe it will be found both desirable and useful.

The roman numerals in parentheses following the section number references refer to a part of the classification under the section. The page numbers in parentheses following certain index references refer to the page on which the subject or its classification starts.